

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM CHEROKEE COUNTY
Court of Common Pleas

J. Michael Baxley, Circuit Court Judge

Case No. 2012-212107

JONATHAN KYLE BINNEY, SK 6009 Petitioner/Respondent,

v.

STATE OF SOUTH CAROLINA Respondent/Petitioner.

APPENDIX
VOLUME IX OF XII

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1 BOTH THE AFFIDAVIT AND THE DEPOSITION AS COURT'S EXHIBIT 1,
2 BUT THE COURT IS GOING TO DISALLOW BOTH. I DO THAT BECAUSE
3 THESE DOCUMENTS ARE JUST INHERENTLY, ON THEIR FACE,
4 INHERENTLY UNRELIABLE.

5 THE BEST EVIDENCE OF THIS WOULD BE TO BRING THIS
6 WITNESS IN HERE, AND I REALIZE YOU TELL ME HE'S UNAVAILABLE,
7 BUT I HAVE AN AFFIDAVIT THAT APPARENTLY IS CONTRADICTED IN
8 THE DEPOSITION, AND IT HAS HEARSAY REFERENCES. AND ALL
9 THESE THINGS JUST GIVE GREAT CONCERN TO THE COURT. AND ALSO
10 I AM NOT CONVINCED THAT THIS IS AN ISSUE THAT IS APPROPRIATE
11 EVIDENCE IN THIS POST CONVICTION RELIEF PROCEEDING.

12 SO FOR ALL THESE REASONS BOTH THE AFFIDAVIT AND THE
13 DEPOSITION WILL NOT BE ALLOWED INTO EVIDENCE. WE WILL MARK
14 THEM NOW AS COURT'S EXHIBIT 1.

15 MR. SALTER: MAY I APPROACH, YOUR HONOR?

16 THE COURT: YOU MAY. PLEASE GIVE THOSE TO OUR COURT
17 REPORTER, IF YOU WILL. AND JUST OUT OF FAIRNESS SO OUR
18 RECORD WILL FURTHER SHOW, THE COURT HAS NOT REVIEWED THE
19 AFFIDAVIT, THE MERITS OF IT, THE CONTENTS OF IT. NOR HAVE I
20 REVIEWED THE DEPOSITION.

21 MR. SALTER: YOUR HONOR, JUST FOR THE RECORD SO IT'S
22 VERY CLEAR TO ANYONE REVIEWING THIS, WHAT WE HAVE IS AN
23 ELECTRONIC COPY EMAILED TO US. WE DO NOT YET HAVE THE
24 ORIGINAL DEPOSITION.

25 THE COURT: OKAY. VERY GOOD. WE'LL GO OFF THE RECORD

1 NOW SO THESE CAN BE MARKED.

2 MR. BLUME: WE'LL BE GLAD TO SUBSTITUTE THE ACTUAL
3 SEALED COPY OF THE DEPOSITION OF JUROR VIQUEZ WHEN WE
4 RECEIVE IT.

5 (WHEREUPON COURT'S EXHIBIT 1 WAS MARKED)

6 THE COURT: ALL RIGHT. LET'S GO BACK AND REVISIT ONE
7 ISSUE. AND THEN I THINK WE MAY BREAK FOR OUR LUNCH HOUR
8 BECAUSE IT'S NOW A QUARTER TIL ONE. COUNSEL, WERE YOU ABLE
9 TO FIND A SUPPLEMENTAL DOCUMENT WITH DR. ADLER'S NAME IN IT?

10 MS. PAAVOLA: NO, SIR. I WASN'T ABLE TO LOCATE IT.
11 ACTUALLY I HAVEN'T BEEN ABLE TO LOCATE THE SUPPLEMENTAL
12 RESPONSE, BUT I SPOKE TO MY ASSISTANCE WHO WAS ABLE TO LOOK
13 AT IT. AND I DO APOLOGIZE. DR. ADLER'S NAME IS NOT LISTED
14 ON THAT DOCUMENT.

15 THE COURT: ALL RIGHT. VERY GOOD. THEN THE COURT, OUT
16 OF FAIRNESS TO THE STATE, WOULD EXCLUDE DR. ADLER AS A
17 WITNESS BECAUSE THERE'S -- WELL, FIRST OF ALL, WAS HE GOING
18 TO BE CALLED AS A WITNESS?

19 MR. BLUME: NO.

20 THE COURT: ALL RIGHT. FORGIVE ME.

21 MR. SALTER: NO, SIR. WE WERE TRYING TO FIND OUT WHAT
22 HIS OPINION -- BECAUSE HIS OPINION'S RELIED UPON BY THEIR
23 EXPERTS IN REACHING THEIR OPINION, AN OPINION WHICH DID NOT
24 AT THE TIME IT WAS -- OTHER EXPERTS OPINIONS WERE GIVEN,
25 THAT OPINION DIDN'T EXIST.

1 THE COURT: AND WHAT RELIEF DO YOU REQUEST THEN, MR.
2 SALTER?

3 MR. SALTER: MOVE TO BAR THEIR TESTIMONY.

4 THE COURT: OF THE EXPERT WHO RELIES UPON DR. ADLER?

5 MR. SALTER: YES, SIR. WE'VE NEVER SEEN THIS. WE'VE
6 NEVER HEARD -- WE'VE NEVER HEARD ANYTHING ABOUT IT, DIDN'T
7 KNOW ABOUT IT.

8 THE COURT: ALL RIGHT. ONE LAST RESPONSE, MR. BLUME.

9 MR. BLUME: WELL, I MEAN, THAT'S RIDICULOUS. DR. ADLER
10 IS A -- HE CONSULTED WITH DR. NOVICK-BROWN. HE TALKED TO
11 HER ABOUT HIM. HE ISSUED A REPORT. HE RENDERED AN OPINION.
12 HE DIDN'T HAVE TO PRODUCE A REPORT AT ALL. THEY COULD HAVE
13 JUST TALKED. AND SHE COULD HAVE COME INTO COURT AND SAID,
14 YOU KNOW, I ALSO TALKED TO DR. ADLER WHO ALSO SAW -- WHO
15 ALSO SAW MR. BINNEY. I MEAN, EXCLUDING THE TESTIMONY ON THE
16 BASIS OF, WELL, THIS WITNESS WAS SLOW IN GETTING HIS REPORT
17 IS ---

18 THE COURT: WHO IS ---

19 MR. BLUME: HE'S NOT EVEN A WITNESS HIMSELF.

20 THE COURT: ALL RIGHT. WHO IS THE EXPERT ABOUT WHOM
21 WE'RE SPEAKING WHO RELIED ON DR. ADLER'S REPORT?

22 MR. BLUME: DR. NATALIE NOVICK-BROWN.

23 THE COURT: ALL RIGHT. DO YOU HAVE A COPY OF DR.
24 ADLER'S REPORT?

25 MR. BLUME: I HAVE THE FINAL REPORT THAT CAME IN LAST

1 NIGHT. I EMAILED IT -- I DON'T ACTUALLY HAVE IT IN MY
2 HANDS. THEY WERE MAKING COPIES OF IT AND BRINGING IT UP
3 'CAUSE IT CAME IN LAST NIGHT. I EMAILED IT TO MR. SALTER
4 THIS MORNING.

5 THE COURT: AND YOU SAY YOU DON'T HAVE IT?

6 MR. SALTER: NO, SIR. I ---

7 THE COURT: ALL RIGHT.

8 MR. SALTER: IF HE EMAILED IT TO ME THIS MORNING, I'VE
9 BEEN -- SINCE I LEFT MY HOUSE ON THE WAY TO GAFFNEY, I'VE
10 BEEN HERE IN GAFFNEY.

11 THE COURT: ALL RIGHT. WELL, I'M GOING TO ASK THAT
12 OVER LUNCH YOU REVIEW THE REPORT. WE'LL TAKE UP THIS ISSUE.
13 AGAIN, YOU GENTLEMEN AND LADIES HAVE LIVED WITH THIS FOR
14 MONTHS. IF THE INDIVIDUAL'S GOING TO BE A WITNESS HIMSELF,
15 THEN I WOULD EXCLUDE HIM. BUT IT IS A DIFFERENT MATTER IF
16 IT'S SOMEONE WHO RENDERED A REPORT WHICH AN EXPERT RELIED.

17 SO, PLEASE, OVER LUNCH IF YOU WOULD FIND A WAY TO PRINT
18 THAT, GIVE IT TO MR. SALTER AND MR. MABRY. WE'LL TAKE IT UP
19 WHEN WE RECONVENE AT 2:00. COURT WILL BE IN RECESS NOW. IS
20 THERE ANYTHING WE NEED TO TAKE UP BEFORE WE END FOR LUNCH ON
21 THESE ---

22 MR. MABRY: WE'D LIKE ---

23 THE COURT: --- PROCEEDINGS?

24 MR. MABRY: I'M SORRY, YOUR HONOR.

25 THE COURT: GO AHEAD.

1 MR. MABRY: WE'D LIKE TO GET DR. BACHMAN'S AFFIDAVIT
2 THAT THE COURT ORDERED PRODUCED.

3 THE COURT: ALL RIGHT. WE'LL DO THAT OVER THE LUNCH
4 HOUR. I'LL ASK THAT THAT BE DONE OVER THE LUNCH HOUR ALSO.
5 ANYTHING NOW FROM APPLICANT BEFORE WE BREAK FOR THE LUNCH
6 HOUR?

7 MR. BLUME: NO, SIR.

8 THE COURT: ALL RIGHT THEN. WE'LL BE IN RECESS UNTIL
9 2:00.

10 (WHEREUPON COURT WAS IN RECESS AT 12:50 PM)

11 THE COURT: PLEASE BE SEATED, LADIES AND GENTLEMEN.
12 ALL RIGHT. MR. BINNEY, WELCOME TO THE COURTROOM. I'M JUDGE
13 BAXLEY. WE'VE MET PREVIOUSLY. AND YOU ARE HERE BECAUSE WE
14 ARE BEGINNING YOUR POST CONVICTION RELIEF TRIAL TODAY.

15 EARLIER THIS MORNING, BECAUSE OF THE DELAY IN YOUR
16 TRANSPORT, WE TOOK UP SOME PRELIMINARY MATTERS. WE'VE NOT
17 TAKEN ANY TESTIMONY. WE'VE NOT ACTUALLY BEGUN THE
18 TESTIMONIAL TRIAL PORTION OF THE CASE. WE HAVE TWO OR THREE
19 OTHER PRELIMINARY ISSUES THAT WE NEED TO RESOLVE. AND THEN
20 WE'LL GO FORWARD FROM THERE. ARE YOU READY TO GO FORWARD,
21 SIR?

22 MR. BINNEY: YES.

23 THE COURT: ALL RIGHT. VERY GOOD. WHEN WE LEFT WE HAD
24 JUST CONCLUDED DISCUSSING SOME REPORTS THAT I'D ASKED TO BE
25 GIVEN TO THE AG. DO YOU HAVE THOSE, MR. SALTER?

1 MR. SALTER: YES, SIR, YOUR HONOR.

2 THE COURT: ALL RIGHT. HAVE YOU HAD TIME TO REVIEW
3 THEM?

4 MR. SALTER: YES, SIR, YOUR HONOR.

5 THE COURT: ALL RIGHT. VERY GOOD. ARE THERE ANY OTHER
6 MOTIONS OR PRELIMINARY MATTERS THAT WE NEED TO RESOLVE
7 BEFORE WE GO INTO THE TRIAL OF THE CASE? FROM THE AG?

8 MR. SALTER: NONE FROM THE ATTORNEY GENERAL.

9 THE COURT: ALL RIGHT. AND NOW FROM THE APPLICANT?

10 MR. BLUME: NO -- ON ONE THING, I BELIEVE DURING ONE OF
11 OUR TELEPHONIC CONFERENCES WE -- YOU RESOLVED A MOTION WHICH
12 YOU WERE GOING TO PUT ON THE RECORD. AND I BELIEVE THAT WAS
13 OUR REQUEST THAT WE BE PERMITTED TO VIEW THE CRIME SCENE.
14 AND YOU DENIED THAT. AND I BELIEVE WE WERE GOING TO PUT
15 THAT ON THE RECORD AT THIS HEARING.

16 THE COURT: ALL RIGHT. OUR RECORD SHOULD REFLECT THAT
17 OF COURSE THE COURT HAS THE PRIVILEGE TO TRAVEL AROUND THE
18 STATE HOLDING COURT IN DIFFERENT PLACES. MR. BLUME AND CO-
19 COUNSEL ARE OUT OF STATE A GOOD BIT. MR. SALTER HAS
20 RESPONSIBILITIES IN NUMEROUS PLACES.

21 FOR THESE REASONS WE HAVE HAD SOME -- TWO OR THREE
22 TELEPHONE CONFERENCES WITHOUT THE BENEFIT OF A RECORD
23 BECAUSE IT WAS JUST NOT LOGISTICALLY POSSIBLE TO HAVE A
24 RECORD. AND EACH TIME WE'VE DONE THAT THE COURT HAS MADE A
25 MEMORANDUM FOR THE PURPOSES OF THE COURT'S RECOLLECTION TO

1 DISCUSS THE VARIOUS ISSUES.

2 ONE OF THESE WAS MR. BLUME'S REQUEST THAT HE BE ALLOWED
3 TO ENTER THE MURDER SCENE. THIS WAS OPPOSED BY THE VICTIM,
4 VICTIMS WHO WROTE A LETTER THROUGH MR. SALTER, ALSO
5 DELIVERED TO THE COURT IN VEHEMENT OPPOSITION TO THAT.

6 THE COURT ON MAY 3RD, 2007 BEGINNING AT 2:15 UNDERTOOK
7 A TELEPHONE CONFERENCE BETWEEN COUNSEL ON THIS AS WELL AS ON
8 FOUR OTHER ISSUES. THE ATTORNEY GENERAL OPPOSED THE REQUEST
9 BECAUSE OF THE FACT THAT THIS EVENT OCCURRED SEVEN YEARS AGO
10 AND IT WAS IN THE ATTORNEY GENERAL'S OPINION UNLIKELY THAT
11 ANYTHING AT THE SCENE NOW WOULD BE HELPFUL FOR SOMETHING
12 THAT OCCURRED SEVEN YEARS AGO.

13 THE COURT IS AWARE OF THE PROTECTION FROM HARASSMENT
14 AND INTIMIDATION WHICH IS STATED IN THE VICTIM'S BILL OF
15 RIGHTS AND WAS AWARE THAT THE VICTIMS IN THIS CASE PERCEIVED
16 THAT THIS WAS INTIMIDATION AND HARASSMENT AND, IN FACT, USED
17 THOSE WORDS IN THE LETTER OPPOSING THE REQUEST TO ENTER THE
18 MURDER SCENE. FOR THESE REASONS THE COURT DENIED THE
19 REQUEST.

20 I SHOULD SAY THAT THE LETTER I'M REFERRING TO WAS DATED
21 APRIL 6TH, 2007 FROM MR. ALLAN SOUTHERN. HE'D TALKED ABOUT
22 THE FACT THAT THIS HAD BEEN A VERY DIFFICULT THING FOR HIM
23 AND HIS FAMILY AND HE PERCEIVED THIS TO BE FURTHER
24 HARASSMENT BY MR. BINNEY. AND I QUOTE FROM THE LETTER, IT
25 SAYS, I DO NOT APPRECIATE JONATHAN BINNEY'S CONTINUED

1 HARASSMENT OF ME AND MY FAMILY. AND THESE WERE THE REASONS
2 THE COURT MADE THE DECISIONS THAT IT DID.

3 MR. BLUME, IF YOU WISH TO STATE ON THE RECORD WHY YOU
4 REQUESTED THAT OR ANY FURTHER INFORMATION ABOUT THE REQUEST,
5 I'LL BE GLAD FOR YOU TO DO SO, SIR.

6 MR. BLUME: JUST THAT WE BELIEVE THAT THERE STILL ARE
7 SOME ONGOING ISSUES ABOUT EXACTLY WHAT HAPPENED, EXACTLY WHO
8 DID WHAT AND HOW THIS WAS RESOLVED. AND WE THOUGHT THAT IN
9 ORDER TO FULLY PURSUE THIS MATTER IT WOULD BE HELPFUL -- THE
10 CRIME SCENE PHOTOGRAPHS IN MY MIND ARE NOT PARTICULARLY GOOD
11 IN THIS PARTICULAR CASE. AND WE WANTED TO SEE THE SCENE IN
12 ORDER TO BASICALLY ELIMINATE OUR AWARENESS OF WHAT MAY HAVE
13 HAPPENED.

14 THE COURT: ALL RIGHT. THANK YOU. MR. SALTER OR MR.
15 MABRY, DO YOU WISH TO REPLY?

16 MR. SALTER: NOTHING FURTHER, YOUR HONOR. I THINK YOUR
17 HONOR HAS ADDRESSED OUR OBJECTION. AS I STATED ON THE
18 TELEPHONE, WE TAKE THE POSITION THERE WOULD BE NOTHING
19 RELEVANT THAT COULD BE VIEWED AT THE SCENE IN LIGHT OF THE
20 SUBSEQUENT MODIFICATION OF THE VICTIM'S RESIDENCE AND ALSO
21 IN MY PLEADING POINTED OUT THE VICTIM'S BILL OF RIGHTS.

22 THE COURT: ALL RIGHT. VERY GOOD. MS. JOHNSON, I
23 RECALL THAT ONE OF THE OTHER ISSUES THAT WE DISCUSSED ON THE
24 DAY OF THAT TELEPHONE CONFERENCE WAS THAT YOU MAY HAVE A
25 CONFLICT THIS WEEK BECAUSE OF PERHAPS THE ADOPTION OF SOME

1 CHILDREN INTO YOUR FAMILY. AND I HOPE THIS HAS NOT BEEN A
2 CONFLICT FOR YOU, MA'AM.

3 MS. JOHNSON: NO, YOUR HONOR. UNFORTUNATELY THEY'RE
4 NOT HERE YET.

5 THE COURT: ALL RIGHT. WELL, GOOD LUCK WITH THAT
6 PROCESS. AND, OF COURSE, THE RECORD REFLECTS THAT YOU ARE
7 PRESENT AND WITH US. ALL RIGHT. ANYTHING FURTHER NOW THEN
8 BEFORE WE BEGIN THE ACTUAL TRIAL OF THE CASE? FROM THE AG?

9 MR. SALTER: NOTHING FROM RESPONDENTS, YOUR HONOR.

10 THE COURT: AND FROM APPLICANT?

11 MR. BLUME: NO. I WOULD LIKE TO MAKE ONE INQUIRY.
12 BECAUSE OF THE LATENESS OF THE START WE'RE TRYING TO DECIDE
13 WHETHER TO HAVE ONE WITNESS HERE THIS AFTERNOON OR EVENING.
14 DOES THE COURT HAVE ANY IDEA OF HOW LONG WE'RE GOING TO GO
15 TODAY?

16 THE COURT: WELL, IT'S BEEN A LONG DAY ALREADY BECAUSE
17 OF TRAVELING SCHEDULES. AND I WOULD SUSPECT WE WOULD STOP
18 ABOUT FIVE. DOES THAT PRESENT A DIFFICULTY FOR YOU?

19 MS. JOHNSON: WELL, MAYBE I SHOULD SPEAK TO YOUR HONOR.
20 WE DO HAVE A WITNESS WHO WE THINK MIGHT BE HERE BY MAYBE
21 4:15.

22 THE COURT: ALL RIGHT.

23 MS. JOHNSON: I'M THINKING HIS TESTIMONY WON'T BE
24 LONGER THAN ABOUT HALF AN HOUR, BUT THAT IS DIFFICULT TO
25 PREDICT. AND ---

1 THE COURT: WELL, THAT'S FINE.

2 MS. JOHNSON: --- HE IS TWO AND A HALF HOURS AWAY. SO
3 I COULD ALSO TELL HIM TO COME TOMORROW MORNING.

4 THE COURT: WELL, I WOULD RATHER TAKE THAT WITNESS THAN
5 BREAK THE COURT DOWN AT FOUR OR 4:15.

6 MS. JOHNSON: OKAY.

7 THE COURT: SO IF YOU WANT TO BRING THE WITNESS, THAT
8 WOULD BE FINE.

9 MS. JOHNSON: THAT'S WHAT I'VE TOLD HIM TO DO. THANK
10 YOU.

11 THE COURT: ALL RIGHT. THANK YOU. ALL RIGHT.
12 COUNSEL, I'LL GIVE EITHER SIDE OR BOTH SIDES AN OPPORTUNITY
13 TO MAKE AN OPENING STATEMENT IF YOU WISH. MR. BINNEY, AS
14 THE APPLICANT, YOUR PARTY, YOU, SIR, BEAR THE BURDEN OF
15 PROOF. AND, THEREFORE, I WILL GIVE YOUR SIDE THE FIRST
16 OPPORTUNITY TO SPEAK. MR. BLUME, YOU WISH TO MAKE AN
17 OPENING STATEMENT?

18 MR. BLUME: AS WE INDICATED IN CHAMBERS SOMETIMES IT'S
19 THE, OF COURSE, AS I UNDERSTAND IT, YOUR HONOR, IT PROBABLY
20 MIGHT BE BENEFICIAL TO YOU IF WE GAVE AN OPENING STATEMENT.

21 THE COURT: I DO BELIEVE IT WOULD.

22 MR. BLUME: OKAY. WELL, THEN IF IT WOULD BE OF
23 ASSISTANCE TO THE COURT I WILL BE HAPPY TO BRIEFLY RUN
24 THROUGH WHAT WE BELIEVE THE EVIDENCE WILL SHOW AT THIS
25 HEARING AND HOW IT MAY OR MAY NOT BE RELEVANT TO THE

1 PARTICULAR ALLEGATIONS IN THE AMENDED APPLICATION FOR POST
2 CONVICTION RELIEF.

3 THERE ARE A VARIETY OF CLAIMS WHICH ARE RAISED. THE
4 COURT PREVIOUSLY TALKED ABOUT CLAIMS OF INEFFECTIVE
5 ASSISTANCE OF COUNSEL. AND THERE ARE A NUMBER OF CLAIMS OF
6 INEFFECTIVE ASSISTANCE OF COUNSEL IN THIS CASE. AS THE
7 COURT KNOWS, TO SATISFY OUR BURDEN OF THAT WE HAVE TO
8 DEMONSTRATE THAT COUNSEL'S PERFORMANCE WAS UNREASONABLE OR
9 OUTSIDE THE RANGE OF COMPETENT ASSISTANCE AND THAT IT WAS
10 ALSO PREJUDICIAL, THAT THERE'S A REASONABLE PROBABILITY THAT
11 BUT FOR COUNSEL'S ACTS OR OMISSIONS THE RESULT OF THE
12 PROCEEDING WOULD HAVE BEEN DIFFERENT.

13 AND THAT'S THE STANDARD ANNOUNCED BY THE SUPREME COURT.
14 AND STRICKLAND'S BEEN AFFIRMED, AND WILLIAMS VERSUS TAYLOR,
15 WIGGINS VERSUS SMITH AND ROMPILLA VERSUS BEARD, MOST
16 RECENTLY BY THE UNITED STATES SUPREME COURT. AND OBVIOUSLY
17 BECAUSE IT'S THE LAW OF THE LAND THE SOUTH CAROLINA SUPREME
18 COURT APPLIES ESSENTIALLY THE SAME STANDARD.

19 IN TRYING TO ELUCIDATE THE FIRST PRONG OF THIS, WHETHER
20 COUNSEL'S PERFORMANCE IS UNREASONABLE, THE CURRENT REALLY
21 TOUCHSTONE RELIED UPON PRIMARILY BY THE UNITED STATES
22 SUPREME COURT ARE THE ABA GUIDELINES. AND THE ABA
23 GUIDELINES SET FORTH A NUMBER OF -- A NUMBER OF OBLIGATIONS
24 THAT COUNSEL HAS IN A CAPITAL CASE. AND I WON'T GO THROUGH
25 EACH ALLEGATION OF INEFFECTIVE ASSISTANCE IN THIS CASE OF

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1 TRIAL COUNSEL, BUT I'LL TRY AND MAYBE JUST PAINT WITH A
2 LITTLE BIT BROADER BRUSH IN THIS OPENING STATEMENT.

3 NOW ESSENTIALLY AS WE DISCERNED IT FROM READING -- FROM
4 REVIEWING TRIAL COUNSEL'S FILES AND REVIEWING THE RECORD OF
5 THE CASE TRIAL COUNSEL IN THIS PARTICULAR CASE CHOSE
6 ESSENTIALLY -- THIS MAY BE A LITTLE BIT OF A GENERALIZATION,
7 BUT A THREE PRONG DEFENSE TO THESE CHARGES. FIRST, THEY
8 ATTEMPTED TO PROVE THAT MR. BINNEY ENTERED THE HOUSE OF THE
9 SOUTHERNS NOT WITH THE INTENT TO COMMIT A CRIME, BUT WITH
10 THE INTENT TO COMMIT SUICIDE.

11 AND THE REASONING ON THAT AS I UNDERSTAND IT OR JUST
12 SORT OF PIECING IT TOGETHER WAS IF HE DIDN'T -- SINCE
13 BURGLARY WAS THE ONLY AGGRAVATING CIRCUMSTANCE, WHICH WAS
14 ULTIMATELY FOUND, IF HE DIDN'T ENTER WITH THE INTENT TO
15 COMMIT A CRIME, THEN HE DIDN'T COMMIT A BURGLARY, IF HE
16 DIDN'T COMMIT A BURGLARY, THEREFORE, HE WAS NOT ELIGIBLE TO
17 BE SENTENCED TO DEATH BECAUSE THERE WASN'T AN AGGRAVATING
18 CIRCUMSTANCE. AND SO THAT WAS PART OF THE STRATEGY, I
19 BELIEVE.

20 SECONDLY, IT APPEARS AS IF THE SECOND PRONG WAS TO
21 SUGGEST INDIRECTLY THAT THE VICTIM'S HUSBAND, ALLAN
22 SOUTHERN, HAD SOME DIRECT OR INDIRECT ROLE IN THE DEATH OF
23 HIS WIFE. AND THAT WAS BASED UPON A NUMBER OF STATEMENTS
24 WHICH WERE CONTAINED IN THE LAW ENFORCEMENT FILES FROM
25 EITHER RELATIVES OF MS. SOUTHERN OR HER FRIENDS THAT THERE

1 WAS A GREAT DEAL OF MARITAL DISCORD THAT THE VICTIM IN THIS
2 CASE, MS. SOUTHERN, WAS PLANNING ON LEAVING MR. SOUTHERN,
3 THAT THEY HAD HAD NUMEROUS FIGHTS ABOUT -- ALTERCATIONS
4 ABOUT THE MONEY, THE DISTRIBUTION -- OF WHAT THE
5 DISTRIBUTION OF THE MONEY WOULD BE IN THE EVENT OF A
6 DIVORCE.

7 AND THEN MORE SALIENT SHE APPARENTLY MADE STATEMENTS ON
8 THE DAY OF HER DEATH WHEN SHE ARRIVED AT WORK SAYING, I'M
9 GOING TO DIE TODAY. AND LOW AND BEHOLD SHE ENDED UP DEAD ON
10 THAT DAY. AND SHE -- SHE WAS IN FEAR, HER FRIENDS WERE
11 ESSENTIALLY TRYING TO MAKE ARRANGEMENTS FOR HER TO LEAVE THE
12 MARITAL HOME. SO THEY MADE SOME INQUIRIES ALTHOUGH LIMITED,
13 I WOULD SAY, ALONG THOSE LINES IN THAT REGARD.

14 AND THEN, I THINK, IN ADDITION TO THAT AT THE
15 MITIGATION PHASE -- THE SENTENCING PHASE OF THE CASE THEY
16 CHOSE PRIMARILY TO RELY UPON THE TESTIMONY OF DONNA
17 SCHWARTZ-WATTS, WHO WAS THE PSYCHIATRIST IN COLUMBIA
18 REGARDING CERTAIN SEXUAL DISORDERS THAT MR. BINNEY HAD, IN
19 HER OPINION HE HAD.

20 THEY ALSO HAD INFORMATION FROM MR. BINNEY'S MOTHER,
21 ADOPTED MOTHER, SANDRA BINNEY, WHO'S HERE TODAY ALONG WITH
22 MR. BINNEY'S ADOPTED FATHER, THAT MR. BINNEY'S BIOLOGICAL
23 MOTHER HAD -- WAS AN ALCOHOLIC AND HAD CONSUMED ALCOHOL
24 DURING HER PREGNANCY WITH MR. BINNEY. SHE GAVE HIM UP FOR
25 ADOPTION, AND MR. BINNEY WAS ADOPTED AT FOUR OR FIVE DAYS

1 OLD. AND THEY BELIEVE THAT HE HAD FETAL ALCOHOL SYNDROME
2 AND WANTED THAT ASPECT OF THE CASE PURSUED.

3 SO ESSENTIALLY WHAT WE'RE GOING TO TRY AND ESTABLISH
4 TODAY IN SOME OF THE TESTIMONY WHICH WILL BE TAKEN AT A
5 LATER POINT IS THAT WHILE THE OVERALL APPROACH THEY TOOK MAY
6 NOT HAVE BEEN UNREASONABLE ON ITS FACE, THAT THE
7 INVESTIGATION AND THE DEVELOPMENT OF THE EVIDENCE SUPPORTING
8 THOSE THEORIES WAS UNREASONABLE AND DEFICIENT.

9 THAT, FOR EXAMPLE, THE FETAL ALCOHOL FRONT, THEY DID
10 NOT TAKE WHAT WE WILL CONTEND IS OBVIOUS, IN RETAINING
11 SOMEONE WHO COULD ASSIST THEM IN THE CASE WHO THAT WAS THEIR
12 AREA OF EXPERTISE AND WHO COULD ADVISE THEM ABOUT, WELL,
13 WHAT DOES IT REALLY MEAN TO HAVE FETAL ALCOHOL SYNDROME?
14 AND WHAT AFFECT MIGHT THAT HAVE HAD ON MR. BINNEY'S LIFE
15 COURSE? WHAT RELEVANCE MIGHT THAT HAVE ON HIS LIFE'S COURSE
16 AND WHAT CONNECTION MIGHT THAT HAVE TO THE PARTICULAR CRIME
17 FOR WHICH HE WAS ON TRIAL? AND ALSO THE CRIME WHICH WAS
18 INTRODUCED AT SENTENCING, THE CRIMINAL SEXUAL CONDUCT
19 INVOLVING HIS DAUGHTER, AND HOW THAT MIGHT HAVE IMPACTED ON
20 THAT BECAUSE, YOU KNOW, WE BELIEVE THAT WAS A LARGE PART OF
21 -- AT LEAST A SUBSTANTIAL PART OF THE STATE'S CASE FOR DEATH
22 IN THIS PARTICULAR MATTER.

23 IN ADDITION TO THAT WE BELIEVE THAT COUNSEL
24 INADEQUATELY FAILED ON THE SUICIDE PRONG IN FAILING TO
25 REALLY (A) SEEK SOMEONE OUT WHOSE AREA OF EXPERTISE WAS

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1 SUICIDE AND WHETHER THIS WAS, IN FACT, AN ATTEMPT TO COMMIT
2 SUICIDE OR NOT. AND ALSO THE EVIDENCE WHICH THEY DID
3 PRESENT ON THIS, AND THEY DID PRESENT SOME AT SENTENCING,
4 ALTHOUGH IT WAS NOT FROM SOMEBODY WHO THIS WAS THEIR AREA OF
5 EXPERTISE, DIDN'T PRESENT THAT EVIDENCE AT A TIME WHEN IT
6 MAY HAVE MATTERED, WHICH IS AT THE GUILT OR INNOCENCE PHASE
7 OF THE TRIAL WHEN THE JURY WAS TRYING TO DECIDE WHETHER MR.
8 BINNEY WAS GUILTY OR INNOCENT OF THE CRIME OF BURGLARY.

9 AND THIRD, WE WILL -- WE HOPE TO BE ABLE TO PROVE IN
10 THAT REGARD TO ESTABLISH THAT WHILE AGAIN IT WASN'T
11 NECESSARILY UNREASONABLE THEN, IN FACT, TO SUGGEST THAT THE
12 VICTIM'S HUSBAND MAY HAVE HAD SOME DIRECT OR INDIRECT
13 INVOLVEMENT IN THIS OFFENSE, THAT THEY FAILED TO CALL
14 SEVERAL OF THE WITNESSES WHO HAD WHAT WE BELIEVE IS THE MOST
15 SALIENT INFORMATION ON THAT POINT. AND SO WE WILL CALL ONE
16 OR TWO OF THOSE PEOPLE IN THIS PROCEEDING.

17 IN ADDITION TO THAT THERE ARE SEVERAL LARGER THEMES
18 GOING THROUGH THAT, THAT THE INVESTIGATION AND MITIGATION
19 GENERALLY WAS INADEQUATE. THEY DID NOT HAVE A SOCIAL
20 HISTORY INVESTIGATOR OR ANYONE TO HELP THEM GATHER LIFE
21 HISTORY RECORDS AND DOCUMENTS.

22 I ALSO DON'T BELIEVE THEY HAD A GUILT PHASE
23 INVESTIGATOR IN THE CASE. BUT THAT I'M NOT A HUNDRED
24 PERCENT POSITIVE AND WON'T KNOW UNTIL COUNSEL TESTIFIES IN
25 THIS MATTER. AND SO THAT THE -- THAT THERE WERE A NUMBER OF

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1 IMPORTANT LIFE HISTORY BACKGROUND MATERIALS, INFORMATION,
2 DOCUMENTS, SCHOOL RECORDS WHICH WERE RELEVANT TO MR.
3 BINNEY'S STATE OF MIND GENERALLY AND HIS -- HOW HIS OVERALL
4 FUNCTIONING WAS IMPAIRED BOTH AT THE TIME OF THE CRIMINAL
5 SEXUAL CONDUCT WITH HIS DAUGHTER AND SPECIFICALLY ON
6 RELATIONSHIPS TO THIS PARTICULAR CRIME AT ISSUE. SO I THINK
7 THAT'S KIND OF THE BIG PICTURE OF WHERE THE INEFFECTIVE
8 ASSISTANCE OF TRIAL COUNSEL CLAIM WILL GO.

9 THERE ARE SOME OTHER SORT OF MORE SPECIFIC ALLEGATIONS
10 THAT HAD TO DO WITH ALLOWING MR. BINNEY TO BE TRIED IN
11 PRISON CLOTHES AND OTHER ISSUES, BUT THAT'S, I THINK I'VE
12 SORT OF STATED THE BIG GROUNDS ON INEFFECTIVE ASSISTANCE OF
13 TRIAL COUNSEL.

14 AND THEN THE APPELLATE COUNSEL CLAIMS THAT WE HAVE A
15 NUMBER OF DIFFERENT ARGUMENTS WHICH WE BELIEVE APPELLATE
16 COUNSEL SHOULD HAVE RAISED, SOME HAVING TO DO WITH ALLOWING
17 THE PROSECUTION TO AMEND THE INDICTMENT AFTER THE CLOSE OF
18 EVIDENCE AND AFTER THE JURY WAS CHARGED.

19 SOME OF FAILING TO RAISE -- ONE THING COUNSEL DID DO AT
20 TRIAL FAIRLY VIGOROUSLY WAS ATTACK MR. BINNEY'S STATEMENTS
21 THAT HE MADE TO LAW ENFORCEMENT ABOUT TEN DAYS, I BELIEVE,
22 AFTER HIS ARREST. SUBSEQUENTLY THESE ARGUABLY -- THE
23 PROSECUTION'S THEORY WAS THAT HE INITIATED THE CONTACT AFTER
24 PREVIOUSLY INVOKING HIS RIGHTS. AND WE BELIEVE THAT SHOULD
25 HAVE BEEN RAISED ON APPEAL ON 6TH AMENDMENT GROUNDS AS WELL

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1 AS A 5TH AMENDMENT GROUND. AND ---

2 THE COURT: COUNSEL, GIVE ME THAT SECOND ARGUMENT AGAIN
3 WITH WHAT IT WAS YOU BELIEVE ON 5TH AND 6TH AMENDMENT
4 GROUNDS ---

5 MR. BLUME: WELL, IT WAS ONLY RAISED AS A MIRANDA
6 ISSUE. AND MR. BINNEY, WE BELIEVE, HAD, IN FACT, JUDGE COLE
7 FOUND THAT HE HAD A 6TH AMENDMENT RIGHT TO COUNSEL AS WELL
8 AS A 5TH AMENDMENT MIRANDA RIGHT BECAUSE COUNSEL HAD ALREADY
9 BEEN APPOINTED, DON THOMPSON REPRESENTED HIM, AND THERE ARE
10 CERTAINLY INSTANCES IN WHICH THE 6TH AMENDMENT RIGHT TO
11 COUNSEL SWEEPS SLIGHTLY BROADER THAN THE 5TH AMENDMENT.
12 RIGHT. AND WE BELIEVE THAT WAS GERMANE AND RELEVANT TO HOW
13 THIS SHOULD HAVE BEEN PRESENTED ON APPEAL IN MR. BINNEY'S
14 CASE.

15 COUNSEL ALSO FAILED TO RAISE ANOTHER ISSUE, WHICH WAS
16 RAISED BY TRIAL COUNSEL ON APPEAL, WHICH HAD TO DO WITH --
17 THEY MOVED UNDER THE SUPREME COURT'S DECISION IN ATKINS
18 VERSUS VIRGINIA OR AT LEAST THE LOGIC OF ATKINS VERSUS
19 VIRGINIA, WHICH BARS THE DEATH PENALTY FOR PEOPLE WITH
20 MENTAL RETARDATION. THAT SETS THE UNDISPUTED EVIDENCE IN
21 MR. BINNEY'S TRIAL WAS THAT HE SUFFERED FROM A MENTAL
22 ILLNESS THAT HE, THEREFORE, SHOULD ALSO BE EXEMPT FROM
23 CAPITAL PUNISHMENT. AND THAT ISSUE, WHILE RAISED AT TRIAL,
24 THEN OBVIOUSLY DENIED BY JUDGE COLE, WAS NOT PURSUED ON
25 APPEAL. SO IN ADDITION TO THAT, THAT, I THINK, IS SORT OF A

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1 BROAD OVERVIEW ABOUT THE INEFFECTIVE ASSISTANCE OF COUNSEL
2 CLAIMS.

3 IN ADDITION TO THAT WE HAVE SEVERAL CLAIMS WHICH HAVE
4 TO DO WITH WHETHER MR. BINNEY'S CONVICTION AND/OR DEATH
5 SENTENCE WERE OBTAINED IN VIOLATION OF THE CONSTITUTION
6 ITSELF OR DIRECT CHALLENGES.

7 AND SOME OF THESE, I WON'T DISCUSS ALL OF THEM, BUT TWO
8 OF THEM HAD TO DO WITH THE TESTIMONY OF SEVERAL JAILHOUSE
9 SNITCHES OR INFORMANTS WHICH CAME IN THIS CASE. THERE WERE
10 TWO OF THEM, ONE OF THEM BY THE NAME OF JERRY JOHNSON, ONE
11 OF THEM BY THE NAME OF DANNY RAY EDWARDS, WHO TESTIFIED FOR
12 THE PROSECUTION IN THIS CASE.

13 WE INTEND TO PRESENT EVIDENCE THAT MR. EDWARDS'
14 TESTIMONY AT LEAST IN ONE RESPECT WAS MATERIALLY FALSE. HE
15 TESTIFIED ON CROSS EXAMINATION WHAT HE WAS BEING -- AS YOU
16 CAN IMAGINE, TRIAL COUNSEL ATTEMPTED TO ATTACK THE VERACITY
17 OF MR. EDWARDS HIMSELF AS WELL AS HIS SORT OF CREDIBILITY AS
18 A JAILHOUSE INFORMANT. MR. EDWARDS WAS ASKED IF HE HAD EVER
19 IN HIS LIFE THROUGHOUT HIS LENGTHY HISTORY COOPERATED WITH
20 LAW ENFORCEMENT. AND HE ADAMANTLY SAID, NO.

21 OUR INVESTIGATION, IN FACT, WE HAVE THE TRANSCRIPT FROM
22 A FEDERAL SENTENCING PROCEEDING, WHICH WE WILL INTRODUCE
23 HERE, WHICH HAS BEEN PRODUCED TO THE ATTORNEY GENERAL AS
24 WELL AS FROM AN ONGOING FEDERAL CRIMINAL MATTER WAS THAT HE
25 COOPERATED EXTENSIVELY. AND THIS WAS PRIOR TO MR. BINNEY'S

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1 TRIAL THAT HE, IN FACT, COOPERATED EXTENSIVELY. AND THAT
2 WAS A SIGNIFICANT REASON FOR THE REDUCTION IN HIS TIME.

3 AND WE ALSO BELIEVE OR HOPE THAT ONE OR MORE LAW
4 ENFORCEMENT OFFICERS FROM THE PD REGION OF THE STATE COULD
5 TESTIFY THAT MR. EDWARDS HAS A LONG HISTORY OF COOPERATION
6 AND ESSENTIALLY TELLING ON OTHERS IN ORDER TO GET OUT OF
7 TROUBLE HIMSELF.

8 THE COURT: AND MR. EDWARDS' FIRST NAME IS?

9 MR. BLUME: DANNY -- I BELIEVE IT'S DANNY RAY.

10 THE COURT: THANK YOU.

11 MR. BLUME: AND IT MIGHT BE JUNIOR. I'M NOT POSITIVE.
12 OR DANNY RAY EDWARDS.

13 AND THEN IN ADDITION TO THAT THE OTHER JAILHOUSE
14 INFORMANT, THE INFORMATION ON THAT THAT WE HAVE IS, I WOULD
15 SAY INCOMPLETE, BUT NEVERTHELESS PRESENTED, IS THAT HE
16 TESTIFIED. HIS NAME WAS MR. JOHNSON.

17 HE TESTIFIED THAT HE WAS RECEIVING NOTHING IN EXCHANGE
18 FOR HIS TESTIMONY. HE WAS CHARGED WITH POSSESSION OF
19 METHAMPHETAMINE. AND SHORTLY AFTER THE TRIAL OF THIS MATTER
20 THOSE CHARGES AGAINST HIM WERE DISMISSED. AND HE TESTIFIED
21 ABOUT THAT IN HIS DEPOSITION AND MAINTAINED THAT IT WAS
22 BECAUSE THE EVIDENCE WAS LOST. SO THAT ESSENTIALLY IS THAT.

23 THEN THERE ARE SOME OTHER SORT OF ISSUES WHICH HAVE TO
24 DO WITH THAT THE TRIAL COURT WOULDN'T ALLOW FUNDING FOR A
25 JURY SELECTION EXPERT. WE CONTEND THAT BY WAY OF THE

1 SUPREME COURT'S DECISION IN AKE VERSUS OKLAHOMA.

2 AND WE ALSO BELIEVE THAT SOME PARTS OF THE
3 PROSECUTION'S CLOSING ARGUMENT IN THIS CASE WOULD HAVE BEEN
4 IMPROPER AS A MATTER OF STATE AND FEDERAL LAW. SO THERE'S
5 -- THAT'S A DIRECT CLAIM AS WELL AS AN INEFFECTIVE
6 ASSISTANCE OF COUNSEL CLAIM FOR FAILING TO LODGE A TIMELY
7 OBJECTION.

8 AND THEN WE ALSO HAD THE ISSUE ABOUT JUROR VIQUEZ, BUT
9 THE COURT SORT OF RULED ON THAT, AT LEAST FOR THIS
10 PROCEEDING.

11 SO THERE ARE SOME, YOU KNOW, OTHER, I WOULD SAY -- I
12 DON'T MEAN TO CALL THEM LESSER ISSUES, BUT SOME OTHER MORE
13 SPECIFIC CLAIMS, BUT IN LARGE PART THAT, I THINK, IS THE BIG
14 PICTURE OF THE APPLICANT'S CASE.

15 THE COURT: ALL RIGHT. THANK YOU. AND FROM THE STATE?

16 MR. SALTER: THANK YOU, YOUR HONOR. I AGREE WITH MR.
17 BLUME'S INITIAL POINT THAT THE APPROPRIATE STANDARD
18 OBVIOUSLY TO APPLY IN THIS CASE IS STRICKLAND VERSUS
19 WASHINGTON AND WIGGINS VERSUS SMITH. THE FAMILIAR TWO PRONG
20 TEST OF STRICKLAND BEING THAT HE MUST FIRST SHOW DEFICIENT
21 PERFORMANCE. AND EVEN IF HE SHOWS DEFICIENT PERFORMANCE HE
22 MUST THEREAFTER SHOW PREJUDICE. BUT FOR THE ERRORS BY
23 COUNSEL THERE'S REASONABLE PROBABILITY OF DIFFERENT RESULTS.

24 WITH RESPECT TO HIS SUGGESTION, HOWEVER, THAT THE ABA
25 GUIDELINES SET FOR THE STANDARDS TO APPLY THE SUPREME COURT

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1 OF THE UNITED STATES HAS LOOKED THROUGH THOSE STANDARDS IN
2 WIGGINS AND LOOKED AT THEM IN OTHER CASES, BUT THEY'VE NOT
3 -- THEY'VE DECLINED -- SPECIFICALLY DECLINED TO ADOPT THEM
4 AS THE STANDARDS TO WHICH COUNSEL MUST ADHERE IN A CASE.
5 THEY SPECIFICALLY DECLINE TO DO SO BECAUSE THEY INDICATED
6 THAT THAT WOULD INTERFERE WITH THE DISCRETION THAT'S
7 HISTORICALLY ALLOWED TO COUNSEL TO EXERCISE STRATEGY.
8 OTHERWISE, WE DON'T HAVE A LAWYER, YOU HAVE A FORMULA.

9 WITH RESPECT TO THE VARIOUS ALLEGATIONS, I WOULD SUBMIT
10 THAT THE EVIDENCE WILL SHOW THAT WE HAD TWO VERY
11 DISTINGUISHED ATTORNEYS WHO HAVE EXTENSIVE HISTORY IN TRYING
12 MAJOR FELONY CASES INCLUDING MURDER CASES. AND THEY'VE BOTH
13 BEEN INVOLVED IN DEATH PENALTY CASES BEFORE. ALBEIT, I
14 BELIEVE MR. PRUETT'S INVOLVEMENT CAPITAL -- ARE ALL IN
15 CAPITAL CASES.

16 THEY MADE A REASONABLE INVESTIGATION. THE TWO OF THEM
17 ULTIMATELY CONCLUDED THAT THEY DID NOT NEED THE SERVICES OF
18 AN INVESTIGATOR WITH RESPECT TO THE GUILT OR INNOCENCE PHASE
19 OF THE TRIAL. AND THEY DID THE LEG WORK THEMSELVES.

20 THEY ALSO MADE A DETERMINATION AFTER DISCUSSING THE
21 MATTER NOT TO HIRE A SOCIAL WORKER OR OTHER PERSON TO
22 PRESENT MITIGATING EVIDENCE, THAT THEY FELT THEY COULD
23 ADEQUATELY DO THAT THROUGH THE PRESENTATION OF TESTIMONY BY
24 REVEREND BINNEY. HE TESTIFIED AT TRIAL.

25 WITH RESPECT TO THE FAILURE TO EMPLOY AN EXPERT IN

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1 FETAL ALCOHOL SYNDROME, IT WAS OUR POSITION THAT DR.
2 SCHWARTZ-WATTS, WHO'S A NOTED FORENSIC PSYCHIATRIST, WAS
3 THOROUGHLY QUALIFIED TO TESTIFY AS TO A DIAGNOSIS OF FETAL
4 ALCOHOL SYNDROME, AND DID SO. SHE ULTIMATELY DID SO AT
5 TRIAL.

6 THEY ALSO UTILIZED THE SERVICES OF DR. BACHMAN. I
7 BELIEVE THAT COUNSEL'S RECOLLECTION OF THE CONVERSATIONS OF
8 DR. BACHMAN AND THOSE -- DR. BACHMAN'S AFFIDAVIT ARE GOING
9 TO DIFFER. COUNSEL WILL INDICATE THAT THEY SPECIFICALLY
10 TALKED TO HIM ABOUT WHETHER OR NOT THERE WAS ANY EVIDENCE ON
11 AN MRI.

12 AND I BELIEVE IT WAS A SPEC SCAN OR A PET SCAN, WHETHER
13 OR NOT THERE WAS ANY EVIDENCE TO SUPPORT A DIAGNOSIS OF
14 FETAL ALCOHOL SYNDROME. THEY ASKED HIM -- THEY ALSO ASKED
15 WHETHER OR NOT THERE WERE ANY OTHER EXPERTS THEY NEEDED TO
16 CONTACT AND TO HAVE THIS AREA EXPLORED MORE FULLY. AND THEY
17 WERE NOT GIVEN ANY INDICATION, EXCUSE ME, THAT FURTHER
18 EXPLORATION OR OTHER EXPERTS WERE NEEDED.

19 THE EVIDENCE OF SUICIDE DIDN'T JUST COME OUT IN THE
20 PENALTY PHASE, IT CAME OUT IN THE GUILT PHASE. IN FACT, THE
21 STATE INTRODUCED EVIDENCE OF A SUICIDE NOTE THAT WAS FOUND
22 AT THE CRIME SCENE.

23 WITH RESPECT TO THE FAILURE TO PRESENT EVIDENCE OF
24 ALLAN SOUTHERN'S POSSIBLE INVOLVEMENT IN THE CRIME, IT WOULD
25 BE OUR POSITION THAT THERE IS NO CREDIBLE EVIDENCE THAT

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1 WOULD SUFFICE TO MEET THE STANDARD THAT OUR STATE SUPREME
2 COURT HAS SET FORTH IN STATE VERSUS GREGORY AND WHICH IS
3 STILL THE LAW EVEN AFTER THE UNITED STATES SUPREME COURT'S
4 RECENT DECISION IN HOLMES VERSUS SOUTH CAROLINA. THE
5 EVIDENCE HAS TO BE INCONSISTENT WITH THE DEFENDANT'S OWN
6 GUILT.

7 FURTHERMORE, I DO BELIEVE THAT WHEN COUNSEL TESTIFIED,
8 AS THEY WILL -- THAT ONE OF THEM WILL TESTIFY CONCERNING AN
9 INTERVIEW THAT HE HAD WITH HIS CLIENT DURING THE COURSE OF
10 THE TRIAL IN BETWEEN THE GUILT PHASE AND THE SENTENCING
11 PHASE. WHAT HAPPENED IS THAT ORIGINALLY THE STATE SERVED
12 HIS NOTICE OF AGGRAVATING CIRCUMSTANCE THE AGGRAVATOR OF
13 MURDER FOR HIRE. THE STATE TAKES THAT OFF THE TABLE.

14 COUNSEL THEN SITS DOWN WITH HIS CLIENT SAYS, OKAY, IF
15 YOU TELL ME THAT YOU KNEW EITHER JUDY OR ALLAN SOUTHERN,
16 THEN THE BURGLARY IS OUT, THERE IS NO AGGRAVATING
17 CIRCUMSTANCE, THE DEATH PENALTY IS GONE. MR. BINNEY
18 INDICATED THAT HE DIDN'T KNOW EITHER ONE OF THEM. HE
19 ADMITTED -- HE ADMITTED HIS INVOLVEMENT IN THE CRIME AND HE
20 ADMITTED THAT HE DID NOT KNOW EITHER OF THEM, THAT IT HAD
21 NOTHING TO DO WITH THE COMMISSION.

22 WITH RESPECT TO THE TRIAL OF MR. BINNEY IN HIS PRISON
23 CLOTHES, I BELIEVE THAT TRIAL COUNSEL WILL TESTIFY THAT THEY
24 MADE A STRATEGIC DECISION TO HAVE HIM TRIED IN JAIL CLOTHES
25 BECAUSE THEY DID NOT WISH TO HAVE HIM PERCEIVED BY THE JURY

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1 AS A POTENTIAL THREAT. THEY DIDN'T WANT THE JURY THINKING
2 THAT HE'S GOING TO WALK OUT OF THE COURTROOM AT THE END OF
3 THE DAY. HE NEVER WAS SEEN IN SHACKLES, WHICH IS WHAT DECK
4 VERSUS MISSOURI PROHIBITS.

5 WITH RESPECT TO APPELLATE COUNSEL, I BELIEVE YOUR HONOR
6 WILL HEAR TESTIMONY THAT APPELLATE COUNSEL MADE A STRATEGIC
7 DECISION TO RAISE, THE ONE ISSUE WHICH HE DID RAISE, HE
8 STRATEGICALLY DECIDED NOT TO RAISE ISSUES CONCERNING THE
9 ADMISSIBILITY OF EITHER THE PHOTOGRAPH OF THE VICTIM FROM
10 THE CRIMINAL SEXUAL CONDUCT CASE, MR. BINNEY'S THREE MONTH
11 OLD DAUGHTER, OR CHILD PORNOGRAPHY THAT WAS SEIZED FROM THE
12 RESIDENCE.

13 HE FELT THAT TO RAISE THE ISSUE WOULD BE TOO
14 INFLAMMATORY TO HIS CLIENT AND THAT THERE'S NOT A TRACK
15 RECORD OF THE PENALTY PHASE OF CAPITAL CASE BEING REVERSED
16 FOR THE ADMISSIBILITY OF PHOTOGRAPHS IN THE PAST FIFTEEN
17 YEARS OR SO.

18 WITH RESPECT TO THE VARIOUS DIRECT CHALLENGES ADDRESSED
19 BY MR. BLUME, IT'S OUR POSITION THAT THOSE ARE NOT
20 APPROPRIATE -- THOSE ARE NOT APPROPRIATE ALLEGATIONS IN POST
21 CONVICTION RELIEF. THESE ARE ALL ISSUES THAT COULD HAVE
22 BEEN, IF AT ALL, RAISED ON DIRECT APPEAL, AT TRIAL ON DIRECT
23 APPEAL. THEY MAY NOT UNDER 17 27 20 AND DRAYTON VERSUS
24 EVATT, A 1993 OPINION BY THE STATE SUPREME COURT, THEY MAY
25 NOT BE ADDRESSED NOW.

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1 WITH RESPECT TO THE TRANSCRIPT, SUPPOSEDLY OF --
2 THEY'RE NOT SUPPOSEDLY HAVE BEEN SEEN. I'VE NOT SEEN --
3 I'VE NOT BEEN SHOWN ANY TRANSCRIPT OF ANY EVIDENCE. MR.
4 MABRY INFORMS ME THAT HE HAS NOT SEEN ANY SUCH TRANSCRIPT.
5 PERHAPS WITH THE SUPPLEMENTAL DISCLOSURES IN DISCOVERY, I
6 DON'T KNOW, BUT WE HAVE NOT SEEN IT.

7 WITH RESPECT TO ACTUALLY ADDRESSING THOSE ALLEGATIONS,
8 I DON'T BELIEVE THAT YOU'LL BE ABLE TO SHOW ANY -- THEY'LL
9 BE ABLE TO SHOW ANY MISCONDUCT ON THE PART OF THE STATE WITH
10 RESPECT TO EITHER MR. EDWARDS OR MR. JOHNSON.

11 AND I'M NOT AWARE OF ANY OPINION OF THE UNITED STATES
12 SUPREME COURT THAT HAS HELD THAT UNDER ATKINS THE MENTALLY
13 ILL -- THE EXECUTION OF THE MENTALLY ILL VIOLATES THAT.
14 THANK YOU VERY MUCH, YOUR HONOR.

15 THE COURT: THANK YOU, MR. SALTER. ALL RIGHT. THE
16 COURT NOTES THAT THERE ARE MEMBERS OF MR. BINNEY'S FAMILY
17 THAT ARE PRESENT NOW. AND WE HAD EARLIER INTRODUCED THOSE
18 FOR OUR RECORD WHO ARE PRESENT FROM THE VICTIM'S FAMILY.
19 AND IF THE MEMBERS OF MR. BINNEY'S FAMILY WISH TO INTRODUCE
20 THEMSELVES AT THIS TIME, PLEASE GIVE US YOUR NAMES.

21 MR. BINNEY: JIM BINNEY, THE FATHER, AND SANDRA BINNEY,
22 THE MOTHER. AND ALLISON HAYGOOD IS JONATHAN'S COUSIN.

23 THE COURT: ALL RIGHT. THANK YOU. AND WELCOME TO THE
24 COURTROOM, LADIES AND GENTLEMEN. AND, MR. BLUME, PLEASE
25 CALL YOUR FIRST WITNESS.

LEROY RIDDICK, M. D. - DIRECT EXAMINATION BY MR. BLUME

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1 COMPLETE, PLEASE ASK OUR WITNESS TO STATE HIS FULL NAME,

2 SPELLING HIS LAST, IF YOU WOULD. THANK YOU.

3 MR. BLUME: OKAY.

4 Q. MR. RIDDICK, ---

5 A. MY NAME IS LEROY RIDDICK. THAT'S R-I-D-D-I-C-K.

6 THE COURT: THANK YOU.

7 Q. AND SO FOR TWENTY-SEVEN YEARS YOU SERVED AS THE MEDICAL
8 EXAMINER?

9 A. THAT'S CORRECT.

10 Q. AND CAN YOU -- WELL, WHERE DID YOU GO TO MED SCHOOL?

11 A. I GRADUATED FROM NEW JERSEY COLLEGE OF MEDICINE IN
12 1969.

13 Q. AND AFTER THAT DID YOU DO SPECIALIZED TRAINING IN
14 PATHOLOGY?

15 A. RIGHT. AFTER THAT I DID A RESIDENCY IN PATHOLOGY AS I
16 STUDIED DISEASE AND INJURY IN A LABORATORY, LEARNED HOW TO
17 DO AUTOPSIES AT THE NEW YORK HOSPITAL, CORNELL UNIVERSITY
18 MEDICAL CENTER IN MANHATTAN. TOOK AN EXAM THAT QUALIFIED ME
19 AS A SPECIALIST IN PATHOLOGY IN 1974. PASSED IT AND WENT TO
20 WORK AS A DEPUTY MEDICAL EXAMINER IN WASHINGTON, DC WHERE I
21 WORKED AS A DEPUTY MEDICAL EXAMINER FOR FIVE YEARS.

22 1976 TOOK AN EXAM TO QUALIFY ME AS A SPECIALIST IN
23 FORENSIC PATHOLOGY AND PASSED THAT EXAM. DECIDED IN 1979 TO
24 COME BACK SOUTH AND ACCEPTED EMPLOYMENT WITH THE ALABAMA
25 DEPARTMENT OF FORENSIC SCIENCES. 1979 WENT TO WORK THERE

1 AND STILL THERE.

2 I TOOK -- WAS RE-QUALIFIED AS A SPECIALIST IN 1998,
3 MEMBER OF THE NATIONAL ASSOCIATION OF MEDICAL EXAMINERS,
4 AMERICAN ACADEMY OF FORENSIC SCIENCES, AND TESTIFIED IN
5 MULTIPLE COURTS OF LAW.

6 Q. WELL, APPROXIMATELY HOW MANY AUTOPSIES DO YOU THINK
7 YOU'VE DONE IN YOUR CAREER?

8 A. WELL OVER SEVEN THOUSAND.

9 Q. AND HOW MANY, I WOULD SAY, THAT YOU'VE ALSO PROBABLY
10 REVIEWED A NUMBER OF AUTOPSY REPORTS IN CASES WHICH YOU DID
11 NOT DO THE AUTOPSY?

12 A. YES.

13 Q. AND APPROXIMATELY HOW MANY?

14 A. OH, SEVERAL HUNDRED.

15 Q. AND HOW MANY TIMES DO YOU BELIEVE THAT YOU'VE BEEN
16 QUALIFIED AS AN EXPERT IN FORENSIC PATHOLOGY?

17 A. AT LEAST FIVE HUNDRED.

18 Q. HAVE YOU EVER BEEN QUALIFIED AS AN EXPERT IN FORENSIC
19 PATHOLOGY IN THE STATE OF SOUTH CAROLINA?

20 A. YES.

21 Q. AND ---

22 MR. BLUME: WELL, YOUR HONOR, AT THIS TIME I WOULD MOVE
23 TO OFFER DR. RIDDICK AS AN EXPERT IN FORENSIC PATHOLOGY.

24 THE COURT: ANY OBJECTION?

25 MR. SALTER: WITHOUT OBJECTION, YOUR HONOR.

1 THE COURT: ALL RIGHT. WITHOUT OBJECTION IT'S SO

2 NOTED.

3 Q. WELL, DR. RIDDICK, FIRST OF ALL, WHAT IS THE DIFFERENCE
4 BETWEEN FORENSIC PATHOLOGY AND PATHOLOGY?

5 A. WELL, PATHOLOGY IS JUST THE STUDY OF DISEASE AND INJURY
6 IN THE LABORATORY. PRIMARILY THE TWO CLASSIFICATIONS ARE
7 ANATOMIC PATHOLOGY, WHICH PEOPLE STUDY STRUCTURAL CHANGES IN
8 ORGANS AND TISSUES. IF SOMEBODY HAS A LUMP ON THEIR SKIN
9 AND IT'S REMOVED, THEN THE PATHOLOGIST LOOKS AT THE LUMP
10 UNDER A MICROSCOPE TO SEE WHETHER IT'S CANCER OR NOT CANCER.

11 THE OTHER TYPE IS CLINICAL PATHOLOGY, WHICH IS
12 PRIMARILY THE STUDY OF BODY FLUIDS, BLOOD, URINE, SPINAL
13 FLUID LOOKING FOR MARKERS OF DISEASE WHERE THERE'S AN
14 ELEVATED GLUCOSE OR WHAT HAVE YOU.

15 FORENSIC PATHOLOGY IS A SUBSET OF ANATOMIC PATHOLOGY
16 WHERE YOU STUDY DISEASE AND INJURY PRIMARILY BY DOING
17 AUTOPSIES TO DETERMINE THE CAUSE AND MANNER OF DEATH AND TO
18 LOOK AT ALL THE FINDINGS IN TERMS OF EVIDENCE OF -- IT'S
19 PERTAINING TO THE LAW.

20 Q. AND IN THIS PARTICULAR CASE CAN YOU TELL THE COURT WHAT
21 MATERIALS DID YOU REVIEW?

22 A. I REVIEWED THE AUTOPSY REPORT ON MS. SOUTHERN, WHICH
23 WAS PREPARED BY DR. ROSS AND SIGNED BY DR. SEXTON. I
24 REVIEWED THE EMERGENCY ROOM RECORD FROM MARY BLACK HOSPITAL
25 ALONG WITH THE SURGICAL RECORD. I REVIEWED THE TESTIMONY OF

1 MR. SOUTHERN, MR. CHAPMAN, MR. HINSON, DR. TATE, THE
2 SURGEON, AND DR. ROSS.

3 Q. AND DID YOU REVIEW THE AUTOPSY PHOTOS?

4 A. I REVIEWED -- ONLY RECEIVED ONE AUTOPSY PHOTOGRAPH. I
5 ALSO REVIEWED SOME OF THE SCENE PHOTOGRAPHS.

6 Q. AND WHY DID YOU -- WHAT'S YOUR UNDERSTANDING OF WHY YOU
7 ONLY GOT ONE AUTOPSY PHOTOGRAPH?

8 A. FROM WHAT I UNDERSTOOD OR UNDERSTAND WAS THAT THE OTHER
9 PHOTOGRAPHS WERE NOT AVAILABLE FOR WHATEVER REASONS. I
10 DON'T KNOW WHAT THOSE REASONS ARE.

11 Q. OKAY. DO YOU BELIEVE THAT YOU HAVE SUFFICIENT
12 INFORMATION AND BEEN PROVIDED SUFFICIENT INFORMATION BASED
13 ON WHAT YOU REVIEWED TO OFFER THE OPINIONS THAT YOU'RE GOING
14 TO TESTIFY TO TODAY?

15 A. YES.

16 Q. AND ARE THE OPINIONS THAT YOU ARE GOING TO OFFER TO A
17 REASONABLE DEGREE OF MEDICAL CERTAINTY?

18 A. YES.

19 Q. SO, DR. RIDDICK, FIRST WE'D LIKE TO ASK YOU ABOUT ONE
20 POINT. AND THEN I BELIEVE WE HAVE SEVERAL OTHER POINTS.
21 BUT FIRST I WOULD LIKE YOU TO ADDRESS THE FACT THAT -- WHAT
22 TYPE OF GUN MIGHT HAVE CAUSED THE INJURY IN THIS CASE.

23 WELL, LET ME BE MORE SPECIFIC. DR. ROSS TESTIFIED.
24 SHE WAS THE PATHOLOGIST THAT TESTIFIED AND WAS CALLED BY THE
25 PROSECUTION AT TRIAL. AND SHE TESTIFIED THAT THIS WOUND WAS

1 NOT CONSISTENT WITH A SMALL CALIBER HANDGUN, BUT IT WAS MORE
2 CONSISTENT WITH A MEDIUM CALIBER WEAPON. IN YOUR OPINION IS
3 THAT CORRECT?

4 A. NO.

5 Q. AND CAN YOU SAY WHY?

6 A. WELL, FIRST OF ALL, IN THE AUTOPSY PROTOCOL DR. ROSS
7 SIGNED THE CAUSE OF DEATH AS A PERFORATING SMALL CALIBER
8 GUNSHOT WOUND OF THE ABDOMEN. SO AT THE VERY BEGINNING SHE
9 THOUGHT IT WAS A SMALL CALIBER. AND IT WAS ONLY LATER ON
10 THAT SHE CHANGED HER OPINION AND SAID IT WAS A MEDIUM
11 CALIBER. AND JUST THINKING ABOUT IT WHEN WE'RE TALKING
12 ABOUT A .22 CALIBER IS .22 OF AN INCH. AND WE GET UP TO A
13 .30 CALIBER IS .30 OF AN INCH. SO WE'RE ONLY TALKING ABOUT
14 A LITTLE OVER A TENTH OF AN INCH, WHICH IS IN TERMS OF THE
15 DIAMETER OF THE BULLET. THAT'S NUMBER ONE.

16 NUMBER TWO, MS. SOUTHERN WAS THIRTY-NINE YEARS OLD.
17 THERE WAS NO WEIGHT IN THE AUTOPSY, BUT SHE WAS STILL OF
18 CHILDBEARING AGE AND THE ABDOMINAL WALL IN MOST CHILDBEARING
19 WOMEN IS DISTENSIBLE, IT'S ELASTIC, IT CAN BEAR PREGNANCY.
20 AND SO IF YOU PUNCTURE IT THE SKIN IS GOING TO CLOSE BACK
21 DOWN. SO IF THE ENTRANCE WOUND IS -- IT'S NOT GOING TO TELL
22 YOU THE DIAMETER OF IT. SHE CAN HAVE A .38 THAT GOES
23 THROUGH IT OR YOU CAN HAVE A .22 THAT GOES THROUGH IT AND
24 YOU'RE STILL GOING TO HAVE A VERY SMALL HOLE THROUGHOUT IT.

25 THE BULLET PASSED THROUGH SEVERAL ORGANS, BUT NONE OF

1 THE ORGANS WERE SOLID MUSCLE SO THAT YOU COULD GET A BETTER
2 IDEA MAYBE OF THE DIAMETER OF THE BULLET THROUGH THAT. AND
3 THEN IT EXITED. AND THE EXIT WOUND WAS ESSENTIALLY ROUND SO
4 THAT IT WAS HARD TO SEE IF IT -- IT TUMBLED AND MADE IT AN
5 OBLONG EXIT, YOU MIGHT HAVE BEEN ABLE TO DETERMINE A LITTLE
6 BIT MORE OF THE SIZE OF THE BULLET. BUT IT'S ALMOST
7 IMPOSSIBLE FROM JUST -- IN A PERFORATING WOUND UNLESS YOU
8 HAVE A HIGH VELOCITY RIFLE OR A SHOTGUN TO DETERMINE IN AND
9 OF ITSELF WHAT THE CALIBER OF THE WEAPON IS OR THE CALIBER
10 OF THE BULLET.

11 Q. WELL, AS I UNDERSTAND IT YOU CAN TELL SOME THINGS THAT
12 IT WASN'T.

13 A. RIGHT. YOU CAN TELL THAT IT WASN'T A HIGH CALIBER
14 RIFLE. IT WAS NOT A .45 CALIBER, WHICH WOULD HAVE MADE A
15 BIGGER HOLE, IT MADE MORE -- FAR MORE DAMAGE INTERNALLY.
16 IT'S NOT ONLY THE SIZE OF THE DEFECT ON THE ABDOMEN, BUT THE
17 AMOUNT OF DAMAGE INTERNALLY.

18 Q. BUT IT'S YOUR OPINION YOU CAN'T TELL WHAT IT WAS, FOR
19 EXAMPLE, BETWEEN A .22 AND A 9 MILLIMETER, SOMETHING OF THAT
20 ---

21 A. OR A .38, YOU CAN'T TELL THE DIFFERENCE.

22 Q. NOW LET ME MOVE ON TO THIS. WHAT WAS THE CAUSE OF
23 DEATH IN THIS CASE?

24 A. THE CAUSE OF DEATH IS WRITTEN OVER ON THE DEATH
25 CERTIFICATE ON HERE, LET ME JUST MAKE SURE, IT'S HYPOBULIMIC

1 SHOCK DUE TO PERFORATION OF THE PANCREAS, DUODENUM IN THE
2 RIGHT LEFT KIDNEY DUE TO THE GUNSHOT WOUND OF THE ABDOMEN.

3 Q. DID THE BULLET WOUND IN THIS CASE DAMAGE ANY MAJOR
4 INTERNAL ORGAN?

5 A. IF YOU'RE REFERRING BY VITAL ORGANS OF THE HEART, LUNG
6 OR BRAIN, NO, IT DID NOT.

7 Q. AND DID IT ALSO HIT ANY MAJOR ARTERIES?

8 A. NOT FROM THE DESCRIPTION EITHER GIVEN BY THE SURGEON OR
9 BY DR. ROSS WAS THERE -- THERE WAS NO MAJOR ARTERY THAT WAS
10 INJURED. THE ONLY VESSEL THAT WAS INJURED THAT WAS
11 DESCRIBED WAS A SUPERIOR MESENTERIC VEIN, WHICH IS LOW FLOW,
12 LOW PRESSURE VESSEL RATHER THAN A HIGH PRESSURE ARTERY.

13 Q. GIVEN THE NATURE OF THE INJURY WAS -- COULD MS.
14 SOUTHERN HAVE SURVIVED THIS ATTACK?

15 A. IN MY OPINION WITH VERY RAPID MEDICAL INTERVENTION SHE
16 COULD HAVE SURVIVED A PERFORATING WOUND WITH THE PANCREAS
17 AND OF THE DUODENUM IN THE KIDNEY.

18 Q. SO TIMING WAS IMPORTANT HERE, ---

19 A. TIMING ---

20 Q. --- GETTING MEDICAL CARE AS ---

21 A. TIMING ---

22 Q. --- AS POSSIBLE?

23 A. TIMING WAS OF ESSENCE.

24 Q. IN REVIEWING THE RECORDS WAS THERE ANYTHING THAT STOOD
25 OUT IN THAT REGARD OF RELEVANCE TO YOU?

1 A. WELL, THERE ARE A COUPLE OF THINGS THAT STOOD OUT TO
2 ME. NUMBER ONE, THERE WAS NO DESCRIPTION ON ANY MAJOR
3 ARTERY. THE TESTIMONY WAS -- SAID THE AORTA WAS BACK THERE,
4 WHICH IT IS, BUT THERE ARE THREE RATHER -- THE CELIAC ARTERY
5 THAT COMES OFF THE AORTA SUPPLIES THE STOMACH AND ALSO
6 AROUND THE HEAD OF THE PANCREAS. AND THEN THE SUPERIOR
7 MESENTERIC ARTERY. AND IT WASN'T DESCRIBED AS EITHER -- ANY
8 OF THESE BEING LACERATED. THAT WAS ONE THING.

9 THE OTHER ONE WAS A PERIOD OF TIME, FROM WHAT I READ,
10 THE INDICATION WAS THAT THE WOUND OCCURRED AROUND 4:00 IN
11 THE AFTERNOON. SHE GOT TO THE HOSPITAL AT 4:34 IN THE
12 AFTERNOON. AND FOR SOME REASON, AND THIS I CAN'T EXPLAIN,
13 IT WAS NOT UNTIL 5:25 THAT SHE GOT DEFINITIVE CARE AND
14 SURGERY.

15 AND IT'S THAT LATTER HOUR ALMOST THAT THE SURGEONS, THE
16 TRAUMA SURGEONS TALK ABOUT THE GOLDEN HOUR, THAT IF THEY CAN
17 GET SOMEBODY PRIMARILY FROM A BLEEDING WOUND WITHIN AN HOUR
18 THAT THEY HAVE A CHANCE OF SURVIVAL. BUT IT WAS NOT ONLY
19 THE TIME-FRAME FROM WHERE HER HUSBAND PICKED HER UP IN THE
20 PASTURE UNTIL SHE GOT TO THE HOSPITAL, BUT ALSO IT WAS
21 ALMOST AN HOUR'S DELAY IN THE EMERGENCY ROOM, WHICH I CANNOT
22 EXPLAIN AND WAS STRUCK WITH.

23 AND THEN THE OTHER ASPECT OF THIS IS SHE ARRESTED ONCE
24 IN THE EMERGENCY ROOM. THEY WERE ABLE TO BRING HER BACK AND
25 GET A BLOOD PRESSURE AND GET A HEARTBEAT. AND SHE ARRESTED

1 FOUR TIMES WHILE IN SURGERY. AND THREE OF THE TIMES THEY
2 WERE ABLE -- WORKING HARD TO GET HER BACK. AND IT WAS ONLY
3 ON THE FOURTH ARREST THAT THEY COULDN'T GET HER BACK. BUT
4 THEY HAD FINISHED THE SURGERY. THEY'D EVEN SEWED HER -- THE
5 ABDOMINAL INCISION UP. SO OBVIOUSLY SHE HAD A VERY STRONG
6 HEART AND EVERYTHING TO KEEP HER GOING DURING ALL OF THAT.
7 Q. SO IN ESSENCE THEN IT WAS, IN YOUR OPINION, WHAT WAS
8 NEEDED WAS TO QUICKLY TAKE HER INTO SURGERY AND STOP THE
9 BLEEDING?

10 A. WHAT SHE NEEDED WAS TO HAVE THE BLEEDING STOPPED AS
11 SOON AS POSSIBLE.

12 Q. AND THE ONLY WAY TO DO THAT IS TO TAKE ---

13 A. TAKE HER TO ---

14 Q. --- HER TO THE O. R.?

15 A. --- SURGERY IMMEDIATELY.

16 Q. THANK YOU.

17 THE COURT: CROSS EXAMINATION.

18 CROSS EXAMINATION BY MR. SALTER:

19 Q. GOOD AFTERNOON, DOCTOR. MY NAME IS ED SALTER. YOU
20 COMMUNICATED THAT YOU'VE TESTIFIED IN SOUTH CAROLINA BEFORE?

21 A. YES, SIR.

22 Q. DO YOU MIND TELLING ME WHAT CASE OR CASES?

23 A. THE CASE WAS THE STATE -- CAROLINA VERSUS BURKHART, I
24 BELIEVE WAS THE NAME.

25 Q. BURKHART? OKAY. NOW ONE OF THE ITEMS THAT YOU

- 1 REVIEWED IN PREPARATION FOR YOUR OPINION, I BELIEVE YOU
2 INDICATED YOU LOOKED AT ONE AUTOPSY PHOTOGRAPH, CORRECT?
3 A. THAT PICTURE WAS ALL THAT WAS PRESENTED TO ME.
4 Q. ALL RIGHT, SIR. BECAUSE THE OTHERS WERE NOT AVAILABLE,
5 CORRECT?
6 A. THAT'S CORRECT.
7 Q. YOU LOOKED AT DR. ROSS' REPORT?
8 A. YES.
9 Q. DID YOU TALK TO HER?
10 A. PARDON ME?
11 Q. DID YOU SPEAK TO HER?
12 A. NO.
13 Q. DIDN'T CONTACT HER? HOW ABOUT DR. TATE, YOU READ HIS
14 REPORT, CORRECT?
15 A. DR. TATE?
16 Q. YES, SIR.
17 A. RIGHT. NO, I DID NOT TALK TO HIM.
18 Q. OKAY. DID YOU REVIEW THEIR TESTIMONY?
19 A. YES.
20 Q. OKAY. AS I UNDERSTAND IT YOU'RE -- IT'S YOUR OPINION
21 THAT YOU COULD NOT DETERMINE THE CALIBER OF WEAPON USED --
22 CALIBER OF BULLET USED TO INFLICT THE WOUND THAT MS.
23 SOUTHERN RECEIVED, CORRECT?
24 A. WELL, I COULD RULE OUT SOME THINGS, BUT I COULDN'T
25 DETERMINE WHETHER IT WAS A SMALL CALIBER OR MEDIUM CALIBER.

1 Q. BECAUSE OF THE ELASTICITY OF THE ABDOMEN?

2 A. THAT'S RIGHT, THE ELASTICITY OF THE ABDOMEN AND ALSO
3 THE INTERNAL ORGANS.

4 Q. ALL RIGHT, SIR. AND SPEAKING OF THE INTERNAL ORGANS,
5 DURING THE COURSE OF SURGERY WEREN'T A NUMBER OF ORGANS
6 REMOVED?

7 A. YES.

8 Q. WHAT WERE -- WHAT ALL WAS REMOVED?

9 A. THE DUODENUM, THE HEAD OF THE PANCREAS, A PORTION OF
10 THE STOMACH.

11 Q. ALL RIGHT, SIR. AND THIS IS ALL THE SURGERY THAT
12 OCCURRED APPROXIMATELY AN HOUR AFTER SHE ARRIVED AT THE
13 HOSPITAL?

14 A. IT WAS SOMETIME DURING THE SURGERY. THE SURGERY LASTED
15 OVER FIVE HOURS.

16 Q. WERE YOU PROVIDED ANY INFORMATION AS TO HOW MUCH BLOOD
17 THE VICTIM HAD LOST PRIOR TO HER ARRIVAL OR PRESENTATION AT
18 THE EMERGENCY ROOM?

19 A. WELL, IT'S HARD TO SAY EXACTLY HOW MUCH SHE HAD -- SHE
20 HAD LOST. OBVIOUSLY SHE HAD LOST SEVERAL UNITS OF BLOOD
21 DURING THE PERIOD OF TIME. AND I BELIEVE THAT DR. ROSS
22 CALCULATED IT OUT. IT WAS SOMETHING LIKE SEVEN UNITS, I
23 BELIEVE.

24 Q. ALL RIGHT. HOW MUCH -- HOW MUCH BLOOD DOES THE HUMAN
25 BODY HAVE IN IT OR HOW MUCH BLOOD WOULD SOMEONE HER HEIGHT,

1 WEIGHT?

2 A. WELL, THAT WAS ONE OF THE PROBLEMS THAT -- THERE WAS NO
3 WEIGHT RECORDED ON THE -- ON THE AUTOPSY. AND SO TO
4 CALCULATE IT OUT -- ROUGHLY SHE -- CALCULATED THAT THERE WAS
5 PROBABLY TEN TO FOURTEEN LITERS OF BLOOD IN HER. I THINK IT
6 WAS A LITTLE BIT LESS.

7 Q. ALL RIGHT. WELL, HOW ABOUT HER MEDICAL RECORDS? WAS
8 THERE ANY OF THAT INFORMATION IN HER MEDICAL RECORDS?

9 A. I RECALL THAT IN THE SURGICAL NOTE, I BELIEVE THEY GAVE
10 HER -- AND I CAN'T REMEMBER RIGHT -- THEY GAVE HER TEN OR
11 TWELVE UNITS OF BLOOD.

12 Q. IT SOUNDS LIKE AN AWFUL LOT.

13 A. PARDON ME?

14 Q. IT SOUNDS LIKE AN AWFUL LOT TO SOMEONE ---

15 A. OH, YES, IT WAS.

16 Q. OKAY. ISN'T THAT ACTUALLY WHAT THE PROBLEM WAS, THEY
17 WERE TRYING TO GET ENOUGH BLOOD INTO HER SO THAT SHE COULD
18 -- SO THAT THEY COULD OPERATE ON HER?

19 A. WELL, THEY DIDN'T GIVE HER BUT TWO UNITS PRIOR TO THE
20 OPERATION. I THINK THEY ALSO WERE GIVING -- BUT I THINK
21 THAT THE KEY THING WAS TO STOP THE BLEEDING.

22 Q. OKAY. THEY WERE HAVING PROBLEMS WITH THAT. WOULD IT
23 BE NECESSARY FOR THEM TO STOP THE BLEEDING BEFORE THEY COULD
24 PERFORM THE OPERATION?

25 A. YOU'D BETTER ASK THE SURGEON THAT.

1 Q. ALL RIGHT, SIR. NOW YOU INDICATED THAT WITH VERY RAPID
2 RESPONSE TIME SHE COULD HAVE SURVIVED?

3 A. IN MY OPINION WITH A RAPID RESPONSE TIME SHE COULD HAVE
4 SURVIVED. SHE HAD A BETTER CHANCE OF SURVIVING.

5 Q. WHEN YOU SAY RAPID RESPONSE TIME, WHAT ARE WE TALKING
6 ABOUT?

7 A. WE'RE TALKING ABOUT WITHIN AN HOUR THAT SHE GET THE
8 DEFINITIVE SURGERY. PROBABLY LESS THAN THAT, THIRTY MINUTES
9 OR SO.

10 Q. SO THEY COULDN'T HAVE SAVED HER, COULD THEY?

11 A. WELL, IF SHE'D GOTTEN TO THE HOSPITAL AND THEY'D TAKEN
12 HER IMMEDIATELY TO SURGERY THEY COULD HAVE HAD A REAL CHANCE
13 OF SAVING HER.

14 Q. A REAL CHANCE?

15 A. YES.

16 Q. WHEN YOU SAY REAL CHANCE WHAT IS THAT REAL CHANCE?

17 A. I CAN'T GIVE YOU A FIGURE.

18 Q. OKAY. SO YOU REVIEWED DR. TATE'S TRIAL TESTIMONY?

19 A. THAT'S CORRECT.

20 Q. NOW HE TESTIFIED, DID HE NOT, THAT EVEN IF SHE HAD BEEN
21 SHOT IN THE EMERGENCY ROOM HE DIDN'T THINK ---

22 A. HE SAID, I'M NOT SURE OF THAT. HE DIDN'T SAY
23 ABSOLUTELY THAT SHE WAS GOING TO DIE, THAT I'M NOT SURE OF
24 THAT.

25 MR. SALTER: I BEG THE COURT'S INDULGENCE FOR A SECOND.

1 THE COURT: YES, SIR.

2 MR. SALTER: YOUR HONOR, MAY I APPROACH THE WITNESS?

3 THE COURT: YOU MAY.

4 MR. SALTER: THANK YOU.

5 Q. JUST SO I CAN REFRESH YOUR RECOLLECTION A LITTLE BIT.
6 IF YOU'D READ ALONG FROM PAGE 26. READ LINE, I BELIEVE IT'S
7 22 THROUGH THE FOLLOWING PAGE WHERE THE ANSWER CONCLUDES.

8 A. DR. TATE, DO YOU HAVE AN OPINION AS A MEDICAL DOCTOR
9 EXPERT AND BOARD CERTIFIED IN SURGERY ABOUT WHETHER OR NOT
10 IT WOULD HAVE MADE A DIFFERENCE IF JUDY SOUTHERN HAD CALLED
11 AN AMBULANCE INSTEAD OF CALLING HER HUSBAND? I BELIEVE SHE
12 WAS -- BUT I'M NOT SURE THAT -- I BELIEVE SHE WAS ILL ENOUGH
13 WHERE I'M NOT SURE THAT WOULD HAVE HELPED. HE JUST SAID I'M
14 NOT SURE THAT THAT WOULD HAVE HELPED.

15 Q. THAT'S CALLING AN AMBULANCE THOUGH INSTEAD OF CALLING
16 HER HUSBAND, CORRECT?

17 A. THAT'S CORRECT.

18 Q. OKAY. NOW I'LL SHOW YOU -- IT'S 2664 LINE 12 THROUGH
19 18.

20 MR. SALTER: THE SAME WITNESS' TESTIMONY, YOUR HONOR.

21 A. DOCTOR, IF SHE'D BEEN SHOT IN THE WAITING ROOM OF MARY
22 BLACK HOSPITAL CAN YOU TELL US IF YOU COULD HAVE SAVED HER?
23 IT'S NOT A SURE THING THAT YOU WOULD BE ABLE TO SAVE ANYBODY
24 EVEN AT THAT POINT. I MEAN, THERE'S A LOT OF INJURY, A LOT
25 OF BLEEDING AND A LOT TO GO THROUGH TO TRY TO BE SAVED EVEN

1 AT THAT POINT. BUT AGAIN, IT'S NOT A SURE THING.

2 Q. ALL RIGHT. SO IF DR. TATE -- HE DIDN'T KNOW WHETHER OR
3 NOT HE COULD HAVE SAVED HER IF SHE'D BEEN SHOT THERE IN THE
4 HOSPITAL, CORRECT?

5 A. WELL, HE WASN'T CERTAIN ABOUT IT.

6 MR. SALTER: NOTHING FURTHER, YOUR HONOR.

7 THE COURT: IS THERE REDIRECT?

8 MR. BLUME: JUST BRIEFLY TO CLARIFY.

9 REDIRECT EXAMINATION BY MR. BLUME:

10 Q. YOU'RE NOT HERE SAYING TODAY IT WAS A SURE THING
11 EITHER?

12 A. PARDON ME?

13 Q. YOU'RE NOT SAYING IT'S A SURE THING ONE WAY OR ANOTHER
14 EITHER?

15 A. NO, THAT'S RIGHT.

16 Q. I UNDERSTAND THE ESSENCE OF YOUR TESTIMONY IS THAT THE
17 INCREASED -- THE TIME IS OF THE ESSENCE IN GETTING HER TO
18 THE HOSPITAL AND INTO THE EMERGENCY ROOM -- TO THE OPERATING
19 ROOM AS QUICKLY AS POSSIBLE WOULD HAVE INCREASED HER CHANCES
20 OF SURVIVAL?

21 A. THAT'S CORRECT.

22 Q. THANK YOU.

23 THE COURT: ANY OBJECTION NOW TO THE RELEASE OF THIS
24 WITNESS FROM EITHER SIDE?

25 MR. SALTER: NONE FROM THE STATE, YOUR HONOR.

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1 MR. BLUME: NONE, YOUR HONOR.

2 THE COURT: ALL RIGHT, SIR. YOU'RE NOT REQUIRED TO
3 LEAVE, BUT YOU'RE FREE TO GO IF YOU WISH.

4 DR. RIDDICK: THANK YOU.

5 THE COURT: THANK YOU. PLEASE CALL YOUR NEXT WITNESS.

6 MS. JOHNSON: ARLENE ANDREWS.

7 THE COURT: PLEASE COME FORWARD AND TAKE THE OATH OF A
8 WITNESS.

9 ARLENE ANDREWS, BEING
10 DULY SWORN TESTIFIED AS FOLLOWS:

11 THE COURT: AND, MA'AM, PLEASE STATE YOUR FULL NAME AND
12 SPELL YOUR LAST FOR US, IF YOU WILL.

13 MS. ANDREWS: ARLENE BOWERS ANDREWS, A-N-D-R-E-W-S.

14 THE COURT: THANK YOU. GO AHEAD, COUNSEL.

15 DIRECT EXAMINATION BY MS. JOHNSON:

16 Q. DR. ANDREWS, WHERE ARE YOU EMPLOYED?

17 A. AT THE UNIVERSITY OF SOUTH CAROLINA. I'M A PROFESSOR
18 IN THE COLLEGE OF SOCIAL WORK.

19 Q. AND WOULD YOU TELL US BRIEFLY ABOUT YOUR EDUCATIONAL
20 BACKGROUND AND YOUR WORK EXPERIENCE?

21 A. I HAVE A BACHELOR'S DEGREE FROM DUKE UNIVERSITY, A
22 MASTER OF SOCIAL WORK DEGREE FROM THE UNIVERSITY OF SOUTH
23 CAROLINA, A PHD IN CLINICAL COMMUNITY PSYCHOLOGY FROM THE
24 UNIVERSITY OF SOUTH CAROLINA. I'M A LICENSED INDEPENDENT
25 SOCIAL WORKER IN BOTH ADVANCED PRACTICE AND CLINICAL

1 PRACTICE.

2 I FORMERLY DIRECTED A CLINIC FOR THE ASSESSMENT OF
3 CHILDREN WHO HAD FACED CHILD ABUSE AND NEGLECT. I'M A
4 FORMER DIRECTOR OF THE INSTITUTE FOR FAMILIES IN SOCIETY,
5 WHICH IS A RESEARCH CENTER AT THE UNIVERSITY OF SOUTH
6 CAROLINA.

7 I WAS THE FOUNDING EXECUTIVE DIRECTOR OF THE COUNCIL ON
8 CHILD ABUSE AND NEGLECT OF SOUTH -- OF THE MIDLANDS AREA OF
9 SOUTH CAROLINA, WHICH IS NOW KNOWN AS PREVENT CHILD ABUSE
10 SOUTH CAROLINA. I WAS ALSO THE FOUNDING EXECUTIVE DIRECTOR
11 OF SISTER CARE, WHICH IS A PROGRAM FOR VICTIMS OF DOMESTIC
12 VIOLENCE AND THEIR CHILDREN.

13 AND I'VE MANAGED A NUMBER OF RESEARCH PROJECTS AND HAVE
14 BEEN A FACILITATOR FOR A NUMBER OF STATE POLICY PROGRAMS
15 INCLUDING HELPING TO FACILITATE THE DEVELOPMENT OF A STATE
16 PLAN FOR CHILDREN'S MENTAL HEALTH, WORKING ON A STATEWIDE
17 FATHERHOOD INITIATIVE, WORKING ON THE FIRST STEPS OF SCHOOL
18 READINESS, EARLY CHILDHOOD INITIATIVE AND A NUMBER OF OTHER
19 THINGS LIKE THAT.

20 Q. AND CAN YOU TELL US ABOUT THE ARTICLES AND BOOKS YOU'VE
21 WRITTEN?

22 A. I'VE WRITTEN OVER FORTY ARTICLES AND BOOKS PERTAINING
23 TO ISSUES RELATED TO FAMILY DYNAMICS, VICTIMIZATION AND THE
24 DEVELOPMENT OF PREVENTIVE FAMILY SUPPORT SYSTEMS. I
25 SPECIFICALLY HAVE AUTHORED A BOOK CALLED VICTIMIZATION AND

1 SURVIVOR SERVICES, WHICH WAS PUBLISHED BY AN INTERNATIONAL
2 PUBLISHING HOUSE.

3 I CO-EDITED A BOOK ON ADEQUATE STANDARDS OF LIVING FOR
4 CHILDREN USING THE U. N. CONVENTION ON THE RIGHTS OF A
5 CHILD. I RECENTLY AUTHORED A BOOK CALLED SOCIAL HISTORY
6 ASSESSMENT ABOUT HOW TO CONDUCT AND ASSESS LIFE HISTORY, AN
7 ASSESSMENT OF PERSONAL LIFE HISTORIES IN THE SOCIAL
8 ENVIRONMENT.

9 I ALSO AM ONE OF THE AUTHORS OF A BOOK ABOUT HOW
10 FAMILIES WHOSE -- WHO HAVE LOVED ONES WHO FACE THE DEATH
11 PENALTY AND THE IMPACT ON THEIR FAMILIES. AND I'M ALSO THE
12 PRIMARY AUTHOR OF A BOOK ABOUT A FAITH BASED YOUTH
13 DEVELOPMENT PROGRAM.

14 Q. AND DO YOU ALSO HAVE A PERSONAL EXPERIENCE OF CHILDREN?

15 A. I DO. I HAVE A TWENTY-EIGHT YEAR OLD SON AND A TWENTY-
16 THREE YEAR OLD DAUGHTER. AND I AM THE GODMOTHER OF TWO
17 ADOPTED CHILDREN AND AUNT OF AN ADOPTED CHILD.

18 Q. MS. ANDREWS, LET ME SHOW YOU WHAT I THINK IS YOUR CV.
19 CAN YOU IDENTIFY THAT?

20 A. IT IS.

21 MS. JOHNSON: I'D LIKE TO OFFER THIS AS AN APPLICANT'S
22 EXHIBIT. WOULD YOU LIKE TO SEE IT?

23 THE COURT: ANY OBJECTION?

24 MR. MABRY: NO, YOUR HONOR.

25 MR. SALTER: NO, YOUR HONOR. NO OBJECTION.

1 THE COURT: VERY GOOD. LET'S MARK THAT THEN. WOULD
2 THAT BE APPLICANT'S 1, MADAME COURT REPORTER?

3 MADAME COURT REPORTER: YES, SIR.

4 MS. JOHNSON: YES, YOUR HONOR.

5 THE COURT: ALL RIGHT. LET'S TAKE A MOMENT WHILE
6 THAT'S MARKED, PLEASE.

7 (WHEREUPON APPLICANT'S EXHIBIT 1 WAS MARKED AND ENTERED
8 INTO EVIDENCE)

9 THE COURT: ALL RIGHT. APPLICANT'S 1 IN EVIDENCE
10 WITHOUT OBJECTION.

11 Q. MS. ANDREWS, IN THE COURSE OF YOUR TRAINING AND YOUR
12 EXPERIENCE HAVE YOU HAD AN OCCASION TO USE OR DEVELOP FAMILY
13 AND SOCIAL HISTORY ASSESSMENTS?

14 A. YES.

15 Q. AND COULD YOU TELL US BRIEFLY WHAT A FAMILY AND SOCIAL
16 HISTORY ASSESSMENT IS?

17 A. WELL, IT'S A FAIRLY STANDARD TOOL USED BY SOCIAL
18 WORKERS. AND IT TYPICALLY WOULD INVOLVE THREE PARTS. THE
19 FIRST PART IS AN ASSESSMENT OF FACTS IN A LIFE HISTORY OR
20 SOCIAL HISTORY THAT LOOKS AT THE INDIVIDUAL, THE FAMILY, THE
21 SOCIAL NETWORKS OR THE PEER NETWORKS AS WELL AS THE
22 COMMUNITY CONTEXT AND BASICALLY TRIES TO DO A DESCRIPTION,
23 OFTEN A CHRONOLOGY OF WHAT THAT LIFE HISTORY IS.

24 THE SECOND PART OF IT IS AN INTERPRETATION OF SOME OF
25 THE MAJOR THEMES IN THAT LIFE HISTORY USING THEORIES, HUMAN

1 BEHAVIOR IN THE SOCIAL ENVIRONMENT. THE FOCUS IS ON THE
2 SOCIAL RELATIONSHIPS, THAT IS THE INTERACTIONS AMONG THE
3 PEOPLE IN THAT SOCIAL ENVIRONMENT. AND THE THIRD PART VERY
4 OFTEN IS A DEVELOPMENT OF A TREATMENT PLAN BASED ON THE
5 FINDINGS.

6 Q. AND SO WHAT ARE SOME EXAMPLES OF THE PLACES WHERE
7 FAMILY AND SOCIAL HISTORY ASSESSMENTS ARE DONE?

8 A. THEY'RE USED IN MOST SETTINGS WHERE SOCIAL WORKERS ARE
9 EMPLOYED. I FIRST LEARNED TO DO SOCIAL HISTORY ASSESSMENTS
10 AS AN INTERN IN A COMMUNITY MENTAL HEALTH CENTER WORKING
11 WITH CHILDREN AND ADOLESCENTS.

12 I THEN DID A NUMBER OF THEM FOR YEARS FOR FAMILIES WHO
13 HAVE CHILDREN WITH DEVELOPMENTAL DISABILITIES. BUT THEY'RE
14 ALSO USED IN -- VERY OFTEN IN ADOPTIONS AND FOSTER CARE
15 ASSESSMENTS. THEY'RE USED IN DIVORCE CASES WHEN THERE'S A
16 CUSTODY DISPUTE IN PARTICULAR. THEY MIGHT BE USED IN ELDER
17 CARE IF YOU'RE TRYING TO MAKE A PLAN FOR AN OLDER PARENT.
18 SO THEY'RE USED IN A VARIETY OF THINGS.

19 Q. AND HAVE YOU ALSO DONE THEM IN THE CONTEXT OF CRIMINAL
20 CASES?

21 A. YES, I HAVE.

22 Q. IN A CRIMINAL CASE DO YOU ORDINARILY MAKE A
23 RECOMMENDATION ABOUT WHAT SHOULD BE DONE WITH THE PERSON
24 INVOLVED?

25 A. NO, I DO NOT.

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1 Q. SO HOW MANY -- APPROXIMATELY HOW MANY FAMILY HISTORY
2 ASSESSMENTS DO YOU THINK YOU HAVE CONDUCTED OVER YOUR
3 CAREER?

4 A. THAT'S HARD TO SAY. SEVERAL HUNDRED. I'VE PROBABLY
5 SUPERVISED MORE THAN I'VE DIRECTLY CONDUCTED MYSELF BECAUSE
6 I'VE BEEN INVOLVED IN ADMINISTRATIVE POSITIONS.

7 Q. SO SEVERAL HUNDRED YOU'VE CONDUCTED AND MORE THAN THAT?

8 A. I HAVE PERSONALLY PROBABLY CONDUCTED AT LEAST TWO
9 HUNDRED AND THEN MANY MORE THAN THAT.

10 Q. AND ARE THERE ACCEPTED PROCEDURES, ONES THAT YOU WERE
11 TRAINED IN AND, I GUESS, NOW TRAIN OTHER PEOPLE IN THAT YOU
12 USE WHEN YOU CONDUCT A FAMILY SOCIAL HISTORY ASSESSMENT?

13 A. THERE ARE. THE FIRST IS TO GATHER ACCURATE AND
14 RELIABLE INFORMATION. AND GENERALLY TO DO THAT WE WILL
15 EXAMINE RECORDS, ANY RECORDS ABOUT THE LIFE AS WELL AS
16 INTERVIEW KEY INFORMANTS WHO MIGHT KNOW SOMETHING ABOUT THE
17 LIFE.

18 Q. SO IS THERE A WAY -- DO YOU HAVE ACCEPTED METHODS THAT
19 YOU USE TO DETERMINE WHETHER SOMETHING THAT SOMEONE TELLS
20 YOU IS TRUE?

21 A. WE DO. WE TRY TO -- THAT'S A VERY IMPORTANT THING
22 BECAUSE PEOPLE THAT -- YOU WANT EVERYTHING TO BE AS FACTUAL
23 AS POSSIBLE. BUT PEOPLE ALSO WILL DO THEIR OWN
24 INTERPRETATIONS OF WHAT THEY HAVE SEEN AND EXPERIENCED. AND
25 SO WE'RE TRAINING IN HOW TO DO THAT. BUT WE PARTICULARLY

1 CHECK FOR ACCURACY BY TRYING TO -- IN MY CASE I TRY TO GET
2 AT LEAST TWO SOURCES ON EVERY FACT THAT I HAVE.

3 I ALSO WILL LOOK AT HOW CLOSE THE PERSON IS TO THE
4 ACTUAL EVENT THAT HAPPENED AND -- IN TERMS OF THEIR DIRECT
5 EXPOSURE TO IT. I CONSIDER ANY BIAS THE PERSON MIGHT HAVE
6 AND WHAT THEY MIGHT HAVE TO GAIN OR LOSE IN TERMS OF HOW
7 THEY TELL THE STORY OR THE EVENT THAT THEY'RE RELATING.

8 AND THEN PARTICULARLY FOR RELIABILITY WE LOOK AT
9 CONSISTENCY, CONSISTENCY ACROSS DIFFERENT PEOPLE TELLING
10 ABOUT THE LIFE, CONSISTENCY FROM THE SAME PERSON ACROSS
11 DIFFERENT TIMES THAT THE EXPERIENCE MAY BE DESCRIBED.

12 Q. YOU MENTIONED TWO THINGS THAT I'D LIKE TO ASK YOU ABOUT
13 IN A LITTLE MORE DETAIL. WHEN YOU SAY YOU WANT TWO SOURCES
14 FOR EVERY FACT THAT YOU'RE GOING TO REPORT ON, DO YOU MEAN
15 EVERY DETAILED EVENT OR EVERY DETAIL OF WHAT YOU MIGHT
16 RECOUNT?

17 A. NO. WE'RE PARTICULARLY INTERESTED IN MAJOR THEMES THAT
18 SEEM TO AFFECT THE SOCIAL BEHAVIOR OF THE PERSON WHO'S BEING
19 EXAMINED. AND SO WHAT WE'RE LOOKING FOR IS ENOUGH
20 INFORMATION TO DRAW A CONCLUSION. IF I'M GOING TO RELY ON
21 IT I'M GOING TO HAVE SOME CONFIDENCE THAT THAT IS SOMETHING
22 THAT REALLY HAPPENED.

23 Q. AND YOU ALSO MENTIONED THAT YOU LOOK FOR MOTIVATIONS TO
24 TELL SOMETHING OTHER THAN THE TRUTH. CAN YOU SAY A LITTLE
25 BIT ABOUT THAT IN THE CONTEXT OF A CRIMINAL CASE?

1 A. WELL, I HAVE FOUND THAT IN DISCUSSING THEIR OWN LIFE
2 HISTORY PEOPLE ARE USUALLY FORTHCOMING AND IT'S PRETTY EASY
3 TO GET SEVERAL SOURCES TO CONFIRM THE KIND OF INFORMATION
4 THAT TELL YOU ABOUT THE LIFE HISTORY. WHEN DISCUSSING AN
5 ACTUAL CRIME ITSELF THE -- A PERSON MAY BE MISLEADING OR IN
6 SOME WAYS HAVE AN INCENTIVE NOT TO TELL YOU THE FULL TRUTH.
7 AND YOU GENERALLY LOOK FOR THE FACTS OF THOSE SITUATIONS
8 ELSEWHERE.

9 Q. CAN YOU THINK OF A TIME WHEN YOU RELIED SOLELY ON
10 SOMETHING THE DEFENDANT TOLD YOU AS THE ONLY SOURCE OF
11 INFORMATION FOR A FACT OR CONCLUSION YOU CAME TO?

12 A. I HAVE NOT.

13 Q. DR. ANDREWS, HOW MANY TIMES HAVE YOU TESTIFIED IN A
14 CRIMINAL CASE?

15 A. YOU MEAN ON -- ACTUALLY IN COURT TESTIMONY OR SUBMITTED
16 ---

17 Q. IN COURT TESTIMONY.

18 A. IN COURT TESTIMONY. PROBABLY SEVEN OR EIGHT.

19 Q. AND ARE THERE ADDITIONAL TIMES WHEN YOU'VE SUBMITTED
20 SOME SORT OF AFFIDAVIT OR SOME OTHER ---

21 A. RIGHT. THERE HAVE BEEN TIMES WHEN I'VE SUBMITTED A
22 REPORT OR AFFIDAVIT.

23 Q. AND HAS THIS EVER HAPPENED IN SOUTH CAROLINA?

24 A. YES.

25 MS. JOHNSON: YOUR HONOR, I OFFER DR. ANDREWS AS AN

1 EXPERT IN FAMILY SYSTEMS THEORY AND IN CONDUCTING A FAMILY
2 AND SOCIAL HISTORY ASSESSMENT.

3 THE COURT: WHAT SAYS THE STATE?

4 MR. SALTER: JUST A BRIEF VOIR DIRE IF I MIGHT, YOUR
5 HONOR.

6 THE COURT: PLEASE. IF YOU HAVE QUESTIONS OF THE
7 WITNESS CONCERNING EXPERTISE, GO AHEAD.

8 MR. SALTER: YES, SIR.

9 VOIR DIRE BY MR. SALTER:

10 Q. IS IT DR. ANDREWS?

11 A. YES, IT IS.

12 Q. OKAY, DOCTOR, I'VE NOTICED IN LOOKING AT APPLICANT'S
13 EXHIBIT 1, YOUR CV, THAT YOUR DOCTORATE DEGREE IS IN, I
14 BELIEVE IT'S CLINICAL COMMUNITY PSYCHOLOGY, IS THAT CORRECT?

15 A. THAT'S CORRECT.

16 Q. WHAT IS -- WHAT DOES THAT AREA OF STUDY ENTAIL?

17 A. IT INVOLVES THE EXAMINATION OF OR THE DEVELOPMENT OF
18 SKILLS THAT ARE BOTH RESEARCH BASED IN EXAMINING INDIVIDUALS
19 FROM A -- THE POINT OF THE WAY THEY THINK, THE WAY THEY FEEL
20 AND THEIR BEHAVIORS IN PARTICULAR, SORT OF THE WHOLE
21 PSYCHOLOGY OF WHO THEY ARE.

22 MY SPECIALTY IS IN COMMUNITY PSYCHOLOGY BECAUSE I'M
23 PARTICULARLY INTERESTED IN PREVENTION OF SOCIAL PROBLEMS.
24 AND SO IN COMMUNITY PSYCHOLOGY WE PARTICULARLY LOOK AT
25 COMMUNITY SYSTEMS AND SUPPORTS THAT HELP PEOPLE COPE WITH

- 1 LIFE STRESSORS THAT THEY MAY CONFRONT.
- 2 Q. IN OTHER WORDS, MAKES SURE THAT THE COMMUNITY PROVIDES
- 3 ENOUGH RESOURCES FOR PEOPLE?
- 4 A. SO WHAT?
- 5 Q. THAT THE COMMUNITY PROVIDES ENOUGH RESOURCES FOR
- 6 INDIVIDUALS?
- 7 A. IN SOME WAYS THE COMMUNITY WOULD PROVIDE THEM, BUT IT
- 8 ALSO HAS TO DO WITH FAMILY SYSTEMS AND HOW PEOPLE INTERACT
- 9 WITH THEIR COMMUNITIES TO HELP PREVENT PROBLEMS.
- 10 Q. NOW HOW DOES THE DOCTORAL DEGREE THAT YOU HAVE ASSIST
- 11 YOU IN YOUR ABILITY TO DIAGNOSE INDIVIDUALS?
- 12 A. IT HELPS ME TO UNDERSTAND THEIR SOCIAL ENVIRONMENTS IN
- 13 PARTICULAR. BUT I RELY VERY HEAVILY ON MY TRAINING AS A
- 14 MASTERS -- IN MY MASTER'S IN SOCIAL WORK DEGREE TO DO THE
- 15 SOCIAL HISTORY ASSESSMENTS THAT I DO.
- 16 Q. ALL RIGHT. AND WITH RESPECT TO YOUR FAMILY AND HISTORY
- 17 ASSESSMENTS I BELIEVE YOU TESTIFIED JUST A MOMENT AGO THAT
- 18 YOU'VE DONE APPROXIMATELY TWO HUNDRED PERSONALLY?
- 19 A. UM-HUM (AFFIRMATIVE). THAT'S CORRECT.
- 20 Q. AND THAT YOU SUPERVISED OTHERS, RIGHT?
- 21 A. RIGHT. YES. I'VE BEEN A SOCIAL WORKER FOR ---
- 22 Q. WOULD YOU SAY THAT YOU, ---
- 23 A. --- THIRTY ---
- 24 Q. --- MORE OR LESS THAT YOU ---
- 25 THE COURT: COUNSEL.

1 Q. --- GOT TO THE POINT ---

2 THE COURT: COUNSEL.

3 Q. --- WHERE YOU'RE ---

4 THE COURT: PLEASE MAKE SURE YOU LET THE WITNESS FINISH
5 HER ANSWER BEFORE YOU ---

6 MR. SALTER: I APOLOGIZE, YOUR HONOR.

7 THE COURT: --- BREAK IN FOR OUR COURT REPORTER'S SAKE.

8 MR. SALTER: I APOLOGIZE, YOUR HONOR.

9 THE COURT: ALL RIGHT, GO AHEAD. MA'AM, DID YOU HAVE
10 SOMETHING FURTHER YOU WISHED TO SAY?

11 A. I WAS JUST ADDING TO IT THAT I HAD BEEN A SOCIAL WORKER
12 FOR THIRTY-THREE YEARS. SO THERE ARE A LOT OF THEM.

13 Q. I GUESS MY QUESTION OF YOU WAS HAVE YOU KIND OF GOTTEN
14 TO THE POINT WHERE YOU DO MORE SUPERVISORY WORK IN THAT AREA
15 THAN ACTUAL HANDS ON?

16 A. I HAVE DONE. I'M NOT SUPERVISING RIGHT NOW BECAUSE I'M
17 MOSTLY TEACHING.

18 Q. OKAY.

19 MR. SALTER: YOUR HONOR, WE DON'T OBJECT TO HER BEING
20 QUALIFIED AS A SOCIAL WORKER. WE DON'T -- BUT WHERE I DO
21 HAVE AN OBJECTION IS THAT UNDER RULE 703 SHE SHOULD NOT BE
22 ALLOWED TO BE A HEARSAY -- UNFORTUNATELY I LEFT A COPY OF
23 THE OPINION AT HOME. BUT THERE'S AN OPINION BY THE COURT OF
24 APPEALS CALLED JONES VERSUS DOE. AND IT'S 640 SE 2ND 514.

25 IT'S OFFERED BY JUDGE GOOLSBY WHERE HE SAYS THAT RULE

1 703, QUOTE, PERMITS AN EXPERT TO GIVE AN OPINION THAT RELIES
2 ON FACTUAL DATA THAT ARE NOT ADMITTED UNDER THE RULE, BUT
3 ADMISSIBLE INTO EVIDENCE. THE RULE, HOWEVER, DOES NOT ALLOW
4 THE UNQUALIFIED ADMISSION OF HEARSAY EVIDENCE MERELY BECAUSE
5 AN EXPERT HAS USED IT IN FORMULATING AN OPINION.

6 BUT I GUESS WHAT I DON'T WANT TO HAVE HAPPEN FOR THE
7 WITNESS TO BE ALLOWED TO TESTIFY AS TO HEARSAY MATTERS THAT
8 WERE RELATED TO HER AND OBVIOUSLY PEOPLE THAT I'LL NEVER BE
9 ABLE TO CROSS EXAMINE.

10 THE COURT: ALL RIGHT. COUNSEL, WE'LL WAIT AND SEE IF
11 THAT'S WHAT HAPPENS. AND I'D ASK YOU TO OBJECT
12 CONTEMPORANEOUSLY BECAUSE IT'S DIFFICULT TO RULE ON THAT IN
13 ADVANCE WITHOUT ACTUALLY HAVING IT OCCUR. SO LET'S WITHHOLD
14 THAT OBJECTION IF YOU WOULD, PLEASE, UNTIL YOU BELIEVE THERE
15 IS -- THAT HAS OCCURRED.

16 MR. SALTER: YES, SIR, YOUR HONOR.

17 THE COURT: ALL RIGHT. THEN THE REQUEST WAS FOR A
18 QUALIFICATION IN WHAT AREA, MS. JOHNSON?

19 MS. JOHNSON: AS AN EXPERT IN FAMILY SYSTEMS THEORY AND
20 CONDUCTING A FAMILY AND SOCIAL HISTORY ASSESSMENT.

21 THE COURT: I'M SORRY. TELL ME THAT ONE MORE TIME. I
22 DIDN'T HEAR ---

23 MS. JOHNSON: I HOPE I'VE SAID IT RIGHT. AS AN EXPERT
24 IN FAMILY SYSTEMS THEORY AND IN CONDUCTING FAMILY AND SOCIAL
25 HISTORY ASSESSMENT.

1 THE COURT: ALL RIGHT. NO OBJECTION?

2 MR. SALTER: NO, OBJECTION, YOUR HONOR.

3 THE COURT: THEN WITHOUT OBJECTION, SO QUALIFIED. GO
4 AHEAD, COUNSEL.

5 DIRECT EXAMINATION BY MS. JOHNSON CONTINUED:

6 Q. NOW YOU'VE TOLD US THAT YOU CAN DO THESE ASSESSMENTS
7 FOR A VARIETY OF PURPOSES. DOES WHAT YOU FOCUS ON DEPEND ON
8 THE PURPOSE THAT YOU ARE BEING ASKED TO DO AN ASSESSMENT?

9 A. YES.

10 Q. AND SO IN A CRIMINAL CASE OR A CAPITAL CASE WHAT WOULD
11 YOU TEND TO FOCUS ON?

12 A. GENERALLY I FOCUS ON THE LIFE HISTORY UP TO THE POINT
13 OF THE CRIME, JUST BEFORE THE CRIME.

14 Q. SO MR. SALTER REFERRED TO YOU MAKING A DIAGNOSIS. YOU
15 DON'T ACTUALLY MAKE A DIAGNOSIS ---

16 A. NO, I DON'T.

17 Q. YOU DON'T MAKE A DIAGNOSIS AND YOU DON'T ACTUALLY
18 INVESTIGATE THE EVENTS OF THE CRIME ITSELF?

19 A. THAT'S CORRECT.

20 Q. BECAUSE THAT'S NOT YOUR AREA OF EXPERTISE?

21 A. THAT'S NOT.

22 Q. AND SO IN THIS CASE, WITHOUT LISTING EVERY SINGLE ONE
23 OF THEM, WHAT SORTS OF INFORMATION DID YOU USE TO LOOK AT
24 MR. BINNEY'S LIFE UP TO THE TIME OF THE CRIME?

25 A. WELL, PROBABLY I SUSPECT THE GENERAL CATEGORIES ARE --

1 I LOOKED AT WITH REGARD TO JONATHAN BINNEY, ADOPTION
2 RECORDS, SCHOOL RECORDS, PSYCHOLOGICAL ASSESSMENT RECORDS,
3 MEDICAL AND PSYCHIATRIC RECORDS, JUVENILE AND CRIMINAL
4 JUSTICE SYSTEM RECORDS, CHILD PROTECTIVE SERVICES RECORDS,
5 DRIVER RECORD, EMPLOYMENT RECORDS, PHOTOGRAPHS AND OTHER
6 THINGS, THINGS THAT WERE IN HIS FAMILY, HIS -- THE BINNEY
7 FAMILY RECORDS.

8 I ALSO LOOKED AT RECORDS PERTAINING TO GAYLE DOVE, THE
9 BIRTH MOTHER. I CONDUCTED INTERVIEWS. AND I READ SOME
10 AFFIDAVITS.

11 Q. AND DO YOU HAVE A DETAILED LIST THERE?

12 THE COURT: MA'AM, DO YOU MIND MOVING A LITTLE CLOSER
13 TO THE MICROPHONE SO WE CAN ALL HEAR YOU BETTER? THANK YOU.

14 A. I'LL BE GLAD TO.

15 MS. JOHNSON: AND, YOUR HONOR, I'D LIKE TO OFFER THIS
16 LIST INTO EVIDENCE. SHE CERTAINLY CAN READ EVERY ITEM ON IT
17 INSTEAD, BUT FOR THE SAKE OF SPEED, I'D LIKE TO OFFER IT
18 INTO EVIDENCE.

19 THE COURT: ANY OBJECTION?

20 (PAUSE)

21 MR. SALTER: YOUR HONOR, IN LOOKING THROUGH THIS LIST I
22 SEE A NUMBER OF ITEMS THAT I'VE NEVER -- THAT ARE LISTED
23 THAT I'VE -- WE'VE NEVER SEEN BEFORE. WE REPORTEDLY WERE
24 PROVIDED IN DISCOVERY ACCESS TO SOME -- TO EVERYTHING. BUT
25 I DO NOT KNOW -- WE'VE NEVER SEEN ANYTHING REGARDING THE

1 JUVENILE RECORDS FROM WISCONSIN, ALBANY COUNTY JAIL. I
2 MEAN, THIS IS JUST GOING THROUGH THE FIRST COUPLE OF PAGES
3 OF HER LIST.

4 THE COURT: ALL RIGHT.

5 MS. JOHNSON: YOUR HONOR, I WOULD SAY WITH RESPECT TO
6 CRIMINAL RECORDS THAT THOSE RECORDS CERTAINLY ARE EASILY
7 ACCESSIBLE BY THE STATE AS THEY ARE BY THE APPLICANT, MORE
8 EASILY ACCESSIBLE. - BUT I BELIEVE WE HAVE ALSO PROVIDED THEM
9 WITH THOSE RECORDS.

10 THE COURT: ALL RIGHT. COUNSEL, LET'S GO BACK. YOU'RE
11 RAISING A DISCOVERY ISSUE. AND MY QUESTION TO YOU WAS
12 WHETHER YOU OBJECT TO THAT BEING MARKED AS AN EXHIBIT. DO
13 YOU?

14 MR. SALTER: NO, SIR.

15 THE COURT: ALL RIGHT. LET'S TAKE A MOMENT AND MARK
16 THAT AS APPLICANT'S EXHIBIT 2, WITHOUT OBJECTION.

17 (WHEREUPON APPLICANT'S EXHIBIT 2 WAS MARKED AND ENTERED
18 INTO EVIDENCE)

19 THE COURT: AND, COUNSEL, IF YOU HEAR SOMETHING THAT IS
20 ASKED OR AN ANSWER THAT YOU BELIEVE HAS SOME DISCOVERY ISSUE
21 THAT YOU WISH TO RAISE, PLEASE OBJECT CONTEMPORANEOUSLY. GO
22 AHEAD, MS. JOHNSON.

23 Q. SO THESE RECORDS THAT YOU RECEIVED, ARE THESE THE KIND
24 OF RECORDS THAT A PERSON WITH YOUR PROFESSIONAL EXPERIENCE
25 WOULD RELY UPON IN DRAWING CONCLUSIONS BOTH AS TO WHAT

1 HAPPENED IN THE FAMILY HISTORY AND WHAT WAS SIGNIFICANT IN
2 THAT HISTORY?

3 A. YES.

4 Q. WERE THERE ANY ITEMS IN THAT LIST THAT WERE NOT THE
5 KIND OF INFORMATION THAT YOU WOULD ORDINARILY RELY UPON?

6 A. I DID LOOK AT SOME OF THE ARREST RECORDS AND THE --
7 PERTAINING TO THE CRIME ITSELF EVEN THOUGH IT'S -- I DIDN'T
8 RELY ON IT FOR MY OPINION. I JUST NEEDED TO KNOW WHAT THE
9 CRIME WAS.

10 Q. SO YOU ARE FAMILIAR WITH THE CRIME, BUT YOU'RE NOT ---

11 A. THAT'S CORRECT.

12 Q. --- YOU DID NOT READ THE ENTIRE TRIAL TRANSCRIPT?

13 A. RIGHT.

14 Q. AND THAT WOULD NOT BE THE KIND OF RECORD YOU WOULD
15 ORDINARILY ---

16 A. RIGHT. AND IN THIS PARTICULAR CASE I READ THE
17 TRANSCRIPT OF THE SENTENCING PHASE OF THE FIRST TRIAL.

18 Q. AND ARE YOU -- WERE YOU ALSO FAMILIAR WITH THE PREVIOUS
19 CRIME WITH WHICH MR. BINNEY WAS CHARGED AGAINST HIS
20 DAUGHTER?

21 A. YES.

22 Q. WERE THERE ANY RECORDS THAT YOU REQUESTED THAT YOU DID
23 NOT RECEIVE?

24 A. THERE WERE. THERE WERE ATTEMPTS MADE TO FIND THESE
25 RECORDS, BUT I HAD ASKED TO SEE MEDICAL RECORDS REGARDING

1 GAYLE DOVE'S PREGNANCY AND MEDICAL RECORDS REGARDING
2 JONATHAN BINNEY'S BIRTH, BUT THEY WERE NOT -- I UNDERSTAND
3 THEY WERE SEARCHED, THERE WAS A SEARCH MADE FOR THEM, BUT
4 THEY WERE NOT FOUND.

5 Q. AND DOES THE LACK OF THOSE RECORDS CAUSE YOU TO DOUBT
6 ANY OF YOUR CONCLUSIONS?

7 A. NO.

8 Q. IN PREPARING A FAMILY HISTORY IS IT CONVENTIONAL TO USE
9 A GENOGRAM?

10 A. IT IS.

11 Q. AND CAN YOU EXPLAIN WHAT A GENOGRAM IS?

12 A. A GENOGRAM IS BASICALLY A FAMILY TREE. IT TELLS YOU
13 WHO THE MAJOR INDIVIDUALS IN THE FAMILY -- IN THE FAMILY
14 SYSTEM IS AND ARE. AND IT CAN ALLOW YOU TO DEMONSTRATE WHAT
15 SOME OF THE KEY RELATIONSHIPS IN THAT HISTORY ARE.

16 Q. AND IS THIS GENOGRAM ONE THAT YOU PREPARED?

17 A. YES, I DID.

18 MS. JOHNSON: YOUR HONOR, I'M NOT OFFERING THIS IN
19 EVIDENCE. SHE'S JUST GOING TO USE IT FOR DEMONSTRATIVE
20 PURPOSES.

21 Q. WOULD YOU LIKE TO -- I'M TRYING TO THINK WHAT'S BEST SO
22 SHE CAN POINT TO IT, SHE CAN SEE IT.

23 A. I HAVE A PAPER COPY TOO. DO YOU ---

24 Q. IF YOU'D LIKE US TO OFFER IT.

25 A. WOULD YOU LIKE TO SEE THE PAPER COPY?

1 THE COURT: WELL, YES. THANK YOU.

2 A. IT'S THE EXACT THING THAT'S UP HERE.

3 THE COURT: VERY GOOD.

4 Q. DO YOU WANT IT CLOSER?

5 A. THAT'S FINE.

6 Q. OKAY. SO MAYBE YOU COULD WALK US THROUGH ---

7 A. OKAY.

8 Q. --- THE GENOGRAM.

9 A. WELL, GENERALLY ON A GENOGRAM THE SQUARES ARE MALES AND
10 THE CIRCLES ARE FEMALES. A SOLID LINE INDICATES A LEGAL OR
11 A BLOOD RELATIONSHIP. IT MAY BE EASIER IF I TALK FROM THIS
12 ONE SO I CAN TALK TO YOU.

13 AND IN THIS PARTICULAR CASE YOU'LL SEE JONATHAN BINNEY
14 IS THERE TO THE LEFT. JONATHAN KYLE BINNEY WHO WAS BORN IN
15 1974 ON MAY 9TH. HE'S THAT SQUARE THERE. HE ACTUALLY HAS
16 TWO FAMILIES. THERE'S A BIRTH FAMILY, WHO HE DIDN'T KNOW
17 UNTIL IN THE YEAR BEFORE THIS CRIME HAPPENED. AND THERE'S
18 HIS ADOPTIVE FAMILY.

19 I WANT TO TALK ABOUT HIS BIRTH FAMILY FIRST. YOU'LL
20 SEE THAT THERE IS A DOTTED LINE TO HIS MOTHER AND -- HIS
21 BIRTH MOTHER AND HIS BIRTH FATHER. THAT INDICATES THAT THAT
22 RELATIONSHIP, THOUGH BIOLOGICAL RELATIONSHIP, WAS TERMINATED
23 AT BIRTH WHEN HIS MOTHER GAVE UP HER RIGHTS AND PLACED THE
24 CHILD FOR ADOPTION.

25 HIS MOTHER WAS GAYLE DOVE, WHO WAS FIFTEEN YEARS OLD AT

1 THE TIME SHE BECAME PREGNANT. SHE GAVE BIRTH AT AGE
2 SIXTEEN. AND SHE -- THE BIRTH FATHER WAS AN OLDER MAN, WHO
3 IN RECORDS LEFT BY HER, IT SAID THAT HE WAS A POLICE
4 OFFICER, AND THE FAMILY THAT WAS CARING FOR HER AT THE TIME
5 SAID THAT IT WAS A MAN WHO WAS KNOWN TO ---

6 MR. SALTER: OBJECTION, YOUR HONOR. HEARSAY.

7 THE COURT: JUST A MOMENT, MA'AM. RESPONSE?

8 MS. JOHNSON: YOUR HONOR, THIS IS CONVENTIONAL IN EVERY
9 FAMILY HISTORY THAT I HAVE EVER PUT UP. AND I THINK THERE'S
10 NOT ONLY SUPPORT FOR THAT IN PRIOR CASES, BUT IN FRONT OF
11 LOWER COURTS IN SOUTH CAROLINA, TRIAL COURTS AND POST
12 CONVICTION RELIEF COURTS. BUT THE UNITED STATES SUPREME
13 COURT IN WIGGINS AND WILLIAMS AND ROMPILLA DISCUSS THE
14 NECESSITY FOR CONDUCTING A FAMILY SOCIAL HISTORY. ALL OF
15 THOSE CASES DISCUSSED EVIDENCE THAT MIGHT IN OTHER CONTEXT
16 BE REGARDED AS HEARSAY BUT ARE PART OF THE TESTIMONY OF
17 SOMEONE WHO'S CONDUCTED A FAMILY SOCIAL HISTORY.

18 THE COURT: RESPONSE?

19 MR. SALTER: YES, SIR, YOUR HONOR. WIGGINS AND THESE
20 OTHER CASES DON'T SAY THAT YOU HAVE TO ALLOW HEARSAY
21 EVIDENCE IN IT. AND IT'S NOT NECESSARY THAT YOU GO DELVE
22 INTO THIS HEARSAY, WHAT SOMEBODY SUPPOSEDLY SAID IN ORDER --
23 IN ORDER TO REACH YOUR OPINION.

24 AGAIN, SHE CAN TESTIFY AS TO HER OPINION. SHE CAN RELY
25 UPON INFORMATION THAT'S PROVIDED TO HER THAT IS, IN FACT,

1 HEARSAY, BUT SHE CAN'T TESTIFY TO THE HEARSAY.

2 THE COURT: WHY DO YOU OFFER THIS EVIDENCE, COUNSEL?

3 MS. JOHNSON: WELL, YOUR HONOR, I THINK IN ORDER TO
4 HAVE AN ADEQUATE PICTURE OF HIS UPBRINGING AND HIS
5 BACKGROUND THAT'S PART OF HOW SHE COMES TO HER CONCLUSIONS.
6 AND I THINK -- I AM NOT AWARE OF ANY SOUTH CAROLINA CASE IN
7 WHICH THIS HAS NOT BEEN PERMITTED.

8 BUT I ALSO THINK THAT IF -- FOR THE SAKE OF EXPEDIENCY
9 IF YOU HAVE DOUBTS ABOUT THE ADMISSIBILITY OF THIS IT WOULD
10 MAKE MUCH MORE SENSE TO TAKE THE TESTIMONY AND THEN TO
11 DECIDE THAT YOU WANT TO STRIKE IT IF SUBSEQUENT RESEARCH
12 SUGGESTS TO YOU THAT IT'S NOT ADMISSIBLE. BUT I'LL JUST
13 REPORT THAT I THINK THIS IS EXTRAORDINARILY COMMON BECAUSE
14 IT IS IN THE NATURE OF THE SUPPORT FOR HER OPINION.

15 THE COURT: JUST ONE MOMENT, PLEASE.

16 (PAUSE)

17 THE COURT: COUNSEL, I'M GOING TO OVERRULE YOUR
18 OBJECTION.

19 MR. SALTER: THANK YOU, YOUR HONOR.

20 THE COURT: I BELIEVE THAT THIS IS INFORMATION THAT
21 WOULD NORMALLY BE RELIED UPON IN THE FIELD. AND FOR THESE
22 REASONS THE COURT'S GOING TO OVERRULE YOUR OBJECTION. AND
23 YOU MAY ANSWER, MA'AM. GO AHEAD.

24 A. ALL RIGHT. THE BIRTH FATHER WAS A POLICE OFFICER WHO
25 WAS KNOWN TO HAVE GIVEN ALCOHOL AND DRUGS TO OTHER TEENAGE

1 GIRLS IN EXCHANGE FOR SEX. SEVERAL GIRLS IN THE COMMUNITY
2 BECAME PREGNANT AT ABOUT THAT TIME. HIS MOTHER WAS THE
3 CHILD OF MARILYN DOVE AND RAYMOND DOVE.

4 AND I'VE MARKED IN PURPLE, YOU'LL SEE THERE, FAMILY
5 MEMBERS WHO HAD A HISTORY OF ALCOHOL ABUSE. RAYMOND DOVE
6 HAD A SERIOUS PROBLEM WITH ALCOHOL ABUSE UNTIL HE WENT INTO
7 RECOVERY AND HAS BEEN IN RECOVERY FOR A NUMBER OF YEARS.
8 AND HIS FATHER AND HIS UNCLE DIED OF CIRRHOSIS OF THE LIVER
9 RELATED TO ALCOHOL PROBLEMS.

10 RAYMOND DOVE, AS YOU'LL SEE THERE THAT THERE'S A DOUBLE
11 SLASH, IT INDICATES LEGALLY BROKEN RELATIONSHIP. HAS BEEN
12 MARRIED, I PUT SEVEN WIVES ON THERE. HIS SON SAID EIGHT.
13 HE SAID NINE. A LOT OF TIMES HE'S BEEN MARRIED.

14 MARILYN WAS HIS FIRST WIFE. AND HE HAD THREE CHILDREN
15 WITH HER. BOTH HER SONS AND HER DAUGHTER HAD SERIOUS
16 ALCOHOL PROBLEMS. SHE DID NOT HAVE AN ALCOHOL PROBLEM, BUT
17 SHE DID HAVE A SERIOUS MENTAL HEALTH DISORDER.

18 THE -- AND THEN JONATHAN'S BIRTH MOTHER WAS MARRIED
19 FOUR TIMES INCLUDING HER LAST HUSBAND, DON MURRAY. SO
20 YOU'LL SEE THEY'RE ALL ON THERE BY NAME.

21 ON THE OTHER SIDE YOU'LL SEE HIS ADOPTIVE FAMILY. AND
22 THERE YOU'LL SEE SORT OF A MORE CLASSIC FAMILY TREE. THE --
23 THERE IS NO REPORTED HISTORY OF MENTAL DISORDER, SUBSTANCE
24 ABUSE IN THAT EXTENDED FAMILY, IMMEDIATE FAMILY. AND THE --
25 YOU'LL SEE THERE ARE SOME WHERE I JUST DON'T HAVE

1 INFORMATION AND I MARKED THEM WITH UNKNOWN, WHETHER THEY HAD
2 A HISTORY OR NOT.

3 BUT ON THE BINNEY SIDE OF THE FAMILY, JONATHAN WAS
4 ADOPTED AT BIRTH WITHIN A FEW DAYS OF HIS BIRTH BY JAMES
5 BINNEY AND SANDRA CANAVAN AND KNEW HIS GRANDPARENTS AND HIS
6 AUNTS AND UNCLES THROUGH THOSE RELATIONSHIPS.

7 JONATHAN IS HIMSELF MARRIED TO MELANIE ISAAC, WHO HAD
8 BEEN MARRIED BEFORE. SHE WAS DIVORCED FROM HER PRIOR
9 HUSBAND. AND THEY HAVE TWO CHILDREN, ISAAC AND [REDACTED]

10 THE OTHER THING THAT WAS NOTEWORTHY IN THIS FAMILY WAS
11 THE HISTORY OF ATTEMPTED SUICIDE.. AND AS I'LL TALK ABOUT IN
12 A LITTLE WHILE, JONATHAN HAD DONE THAT. GAYLE DOVE, HIS
13 MOTHER, DID COMMIT SUICIDE IN THE YEAR 2002. AND SHE HAD IN
14 ADDITION TO VERY SERIOUS ALCOHOL ABUSE HAD SEVERAL OTHER
15 MENTAL DISORDERS. AND HER MOTHER WAS KNOWN TO HAVE
16 ATTEMPTED SUICIDE.

17 Q. SO THIS IS THE PICTURE OF THIS FAMILY. AND YOU
18 MENTIONED BOTH THE HISTORY OF MENTAL DISORDER, WHICH YOU'VE
19 COVERED, AND SOME SUICIDE AND SUBSTANCE ABUSE. THOSE WERE
20 IN THE FAMILY TREE, THE ONLY THINGS THAT YOU DEEMED
21 NOTEWORTHY, IS THAT RIGHT?

22 A. THAT WERE PARTICULARLY NOTABLE GIVEN THE OTHER FACTS OF
23 THIS CASE, YES.

24 Q. SO BEFORE YOU DEVELOP FINDINGS I ASSUME YOU HAVE TO GO
25 THROUGH SOMEONE'S HISTORY?

1 A. THAT'S RIGHT.

2 Q. AND YOU PROBABLY HAVE A HUGE NUMBER OF FACTS, BUT CAN
3 YOU GIVE US A RELATIVELY BRIEF CHRONOLOGY OF JONATHAN
4 BINNEY'S LIFE?

5 A. I'LL TRY TO DO THAT. AND I'LL -- TO START JONATHAN'S
6 LIFE WE REALLY HAVE TO START WITH THE LIFE OF HIS BIRTH
7 MOTHER, WHO WAS BORN IN 1957. AND BY THE TIME SHE WAS ABOUT
8 FIVE HER PARENTS HAD ALREADY DIVORCED. SHE WAS LIVING IN
9 KANSAS WITH HER MOTHER AND TWO OLDER BROTHERS. HER FATHER
10 WAS LIVING IN MICHIGAN.

11 AND MARILYN -- THE FAMILY WAS A LOW INCOME FAMILY WITH
12 CHILDREN WHO WERE ON SCHOOL LUNCH, FREE LUNCH. SHE WAS
13 HAVING A HARD TIME MAKING ENDS MEET AS A SINGLE MOTHER. SHE
14 MET RUTH MORRIS, WHOM I INTERVIEWED, AT -- THROUGH CUB
15 SCOUTS. THEIR BOYS WERE IN CUB SCOUTS WHEN THEY WERE LIVING
16 IN EL DORADO, KANSAS.

17 AND AT THAT TIME GAYLE AND HER -- GAYLE, WHO WAS A
18 TEENAGER, AND HER MOTHER WERE NOT GETTING ALONG VERY WELL AT
19 ALL. AND GAYLE SEEMED TO BE SOMEWHAT STARVED FOR ATTENTION
20 AND SEEMED TO PARTICULARLY APPRECIATE THE CONTACT THAT SHE
21 HAD WITH RUTH'S NOW DECEASED HUSBAND, LOUIS. AND SO WHEN
22 MARILYN MOVED TO NASHVILLE, TENNESSEE SHE ALLOWED GAYLE TO
23 STAY WITH RUTH AND LOUIS MORRIS, WHO BECAME HER LEGAL
24 GUARDIANS. SHE WAS FOURTEEN YEARS OLD AT THE TIME. BUT
25 MARILYN THOUGHT THAT IT WOULD HELP FOR GAYLE TO HAVE A

1 FATHER FIGURE.

2 BY THAT TIME WHEN GAYLE WAS FOURTEEN SHE WAS ALREADY
3 DRINKING. AND JOHN MORRIS IN PARTICULAR, THE SON OF RUTH
4 AND LOUIS MORRIS, OBSERVED THAT, AND GAYLE HERSELF REPORTED
5 IT NUMEROUS TIMES IN HER VARIOUS TREATMENTS FOR PSYCHIATRIC
6 PROBLEMS THAT SHE HAD OVER THE YEARS.

7 THE -- AND SHE AT AGE FIFTEEN, AS I'VE ALREADY NOTED,
8 SHE BECAME PREGNANT. SHE -- DURING THE PREGNANCY SHE WAS
9 VERY UPSET TO BE PREGNANT. SHE WAS STILL LIVING WITH THE
10 MORRIS'S AT THAT TIME.

11 AND THEY MADE ARRANGEMENTS TO SEND HER BACK TO HER
12 MOTHER. AND SHE WAS VERY DISTRAUGHT ABOUT BEING PREGNANT
13 AND TOOK A HEAVY DOSE OF ALCOHOL AND DRUGS ON MORE THAN ONE
14 OCCASION. ONCE HAD TO BE HOSPITALIZED WHILE SHE WAS
15 PREGNANT.

16 HER MOTHER THEN SENT HER TO A HOME FOR UNWED MOTHERS.
17 AND THAT'S THE PLACE WHERE SHE ACTUALLY GAVE BIRTH AT THAT
18 HOME. IT WAS IN HATTIESBURG, MISSISSIPPI. IT WAS A
19 CHRISTIAN HOME FOR GIRLS. AND THE BINNEYS HAD MADE
20 APPLICATION TO ADOPT A CHILD AT THAT POINT. AND SO THAT'S
21 HOW THEY MET, THROUGH THAT HOME.

22 NOW AFTER GAYLE GAVE BIRTH SHE RETURNED TO LIVE WITH
23 RUTH AND LOUIS. AND RUTH REALIZED RIGHT AWAY THAT GAYLE HAD
24 A DRINKING PROBLEM BECAUSE WITHIN TWO WEEKS SHE REQUIRED HER
25 TO STAY HOME AND NOT GO OUT ONE NIGHT AND GAYLE PRETENDED

1 THAT SHE HAD A COLD AND ENDED UP DRINKING TWO WHOLE BOTTLES
2 OF NYQUIL, WHICH ARE HEAVILY -- HAVE A HEAVY ALCOHOL
3 CONTENT. AND THAT'S WHEN RUTH REALIZED THAT SHE HAD A VERY
4 SERIOUS DRINKING PROBLEM.

5 RUTH AND LOUIS ADVISED HER AS SHE WAS GETTING OLDER TO
6 JOIN THE AIR FORCE. AND SHE DID MAKE AN APPLICATION TO DO
7 THAT. AND AT AGE SEVENTEEN SHE JOINED THE AIR FORCE. AND
8 HER PERFORMANCE WAS FAIRLY GOOD IN THE AIR FORCE FOR ABOUT
9 TWELVE YEARS, ALTHOUGH SHE WAS DRINKING MOST OF THE TIME SHE
10 WAS IN THE AIR FORCE. AND EVENTUALLY SHE GOT A DUI, WENT
11 INTO ALCOHOL TREATMENT WHILE SHE WAS STILL IN THE AIR FORCE,
12 BUT IT DIDN'T WORK.

13 AND THEN SHORTLY BEFORE SHE WAS DISCHARGED HONORABLY
14 FROM THE AIR FORCE SHE WAS SEXUALLY ASSAULTED WHILE SHE WAS
15 UNDER THE INFLUENCE OF ALCOHOL. AND AFTER SHE REPORTED THE
16 SEXUAL ASSAULT THE PERSON WHO WAS ALLEGED TO HAVE COMMITTED
17 THE SEXUAL ASSAULT COMMITTED SUICIDE, WHICH CAUSED A
18 PRECIPITATED, VERY TRAUMATIC REACTION IN HER. SHE DID
19 BECOME DISCHARGED FROM THE AIR FORCE AT THAT POINT.

20 SHE WORKED FOR A NUMBER OF YEARS IN MISSISSIPPI DEALING
21 CARDS AT CASINOS, BUT SHE EVENTUALLY WENT ON DISABILITY WITH
22 THE VA. AND ALL OF HER RECORDS INDICATE THAT THE
23 DISABILITIES WERE RELATED TO HER DRINKING, TO PSYCHIATRIC
24 PROBLEMS THAT SHE WAS EXPERIENCING. THE DRINKING LED TO
25 OTHER DRUG ABUSE AS WELL. AT DIFFERENT TIMES SHE WAS

1 DIAGNOSED WITH PTSD AND DEPRESSION.

2 AND IN THE YEAR BEFORE SHE MET JONATHAN, AND I'LL GET
3 TO THAT IN A LITTLE BIT, ---

4 Q. MET HIM AGAIN?

5 A. MET HIM AGAIN. RIGHT. SHE WAS BEING TREATED FOR
6 BIPOLAR DISORDER, POST TRAUMATIC STRESS DISORDER, SEVERE
7 MIGRAINES AND ADDICTION TO PAIN MEDICATION. SHE MARRIED
8 THREE TIMES BEFORE MEETING JONATHAN AND ONCE AFTER MEETING
9 HIM. AND HER VA TREATMENT RECORDS ARE THIRTEEN HUNDRED
10 PAGES LONG. SO SHE WAS IN TREATMENT A LOT. AND AGAIN, MOST
11 OF THAT TREATMENT WAS RELATED TO HER ALCOHOL ABUSE.

12 Q. SO THAT'S THE BIRTH SIDE OF HIS FAMILY. AND CAN YOU
13 TELL US NOW ABOUT HIS CHILDHOOD AND HIS ADOPTIVE FAMILY?

14 A. WELL, JONATHAN NEVER KNEW HIS BIRTH MOTHER DURING
15 CHILDHOOD. AND SANDRA AND JIM BINNEY HAD NO INFORMATION
16 ABOUT GAYLE'S HISTORY OR JONATHAN'S MEDICAL HISTORY WHEN
17 THEY ADOPTED HIM. BUT THEY DID PICK HIM UP AT AGE FOUR
18 DAYS. AND HE SEEMED FINE AND HEALTHY.

19 THEY TOOK HIM TO INDIANA FOR A FEW WEEKS, WHICH IS
20 WHERE THEY HAD BEEN LIVING. AND THEN THEY -- HIS FATHER'S
21 IN THE MINISTRY. AND RIGHT AWAY THEY WENT ON A SPECIAL TRIP
22 THAT INVOLVED HIS MINISTERIAL WORK IN WHICH THEY TRAVELED
23 OVER FIVE THOUSAND MILES THROUGH SEVENTEEN STATES IN HIS
24 FIRST TWO MONTHS OF LIFE.

25 AND THEY SETTLED IN FOXBORO, MASSACHUSETTS WHERE THEY

1 STARTED A CHURCH. AND THEY LIVED THERE UNTIL JONATHAN WAS
2 ABOUT THREE WHEN THEY MOVED FOR REVEREND BINNEY TO TAKE
3 ANOTHER POSITION IN HOLLAND, MICHIGAN.

4 Q. SO CAN YOU TALK ABOUT THE MILESTONES OF HIS EARLY
5 DEVELOPMENT AND ANY SIGNIFICANT EVENTS IN HIS EARLY
6 CHILDHOOD?

7 A. UM-HUM (AFFIRMATIVE). WELL, JONATHAN HAD A VERY LOVING
8 FAMILY AND NURTURING MIDDLE CLASS ENVIRONMENT IN WHICH HE
9 WAS RAISED. HE LED A FAIRLY SHELTERED LIFE IN HIS PRESCHOOL
10 YEARS. HE WAS -- HIS MOTHER STAYED AT HOME WITH HIM. HIS
11 LIFE CENTERED AROUND THE HOME AND THE CHURCH. HIS FATHER
12 WORKED AT THE CHURCH. HE RECEIVED A GREAT DEAL OF ATTENTION
13 FROM HIS PARENTS.

14 AND HE SPENT HOLIDAYS WITH EXTENDED FAMILY MEMBERS, WHO
15 ALSO SHOWED HIM A LOT OF POSITIVE AFFECTION. HE SHOWED
16 AFFECTION IN RETURN. IN FACT, HE WAS VERY OPEN ABOUT
17 HUGGING. HE COULD SOMETIMES EVEN BE SOMEWHAT CLINGY.

18 HE HAD TOYS. HE HAD PARENTAL GUIDANCE. HE HAD
19 DISCIPLINE WITH SPANKING THAT WAS ACCOMPANIED BY POSITIVE
20 INSTRUCTION AND COMFORT AND LOTS OF LOVING GESTURES BY HIS
21 PARENTS.

22 HIS HEALTH RECORDS INDICATE THAT HE ACHIEVED TYPICAL
23 MILESTONES. HE STARTED TALKING JUST AFTER AGE ONE. HE WAS
24 TOILET TRAINED JUST AFTER AGE TWO. HE HAD NO UNUSUAL
25 ILLNESSES. HE HAD HIS IMMUNIZATIONS INCLUDING DPT. HE

1 SHOWED EARLY MUSICAL TALENT. HE WAS ONLY FIVE YEARS OLD
2 WHEN HE SANG A SOLO AT CHURCH. AND HE WAS BAPTIZED WHEN HE
3 WAS FIVE YEARS OLD.

4 Q. NOW WERE THERE ANY INDICATORS OF -- ALL THIS SOUNDS
5 PRETTY NORMAL. WERE THERE ANY INDICATORS OF ATYPICAL OR
6 UNUSUAL DEVELOPMENT IN THOSE PRESCHOOL YEARS?

7 A. THERE WERE. ONE WAS HIS PHYSICAL STATURE. HE WAS
8 EXTREMELY SMALL. HE WAS IN THE LOWEST TEN PERCENTILE FOR
9 HIS AGE AND HEIGHT AND WEIGHT. AND HE WAS A PICKY EATER.
10 AND HE DIDN'T EAT MUCH.

11 THE OTHER WAS THAT EVEN THOUGH HE LIVED IN A REAL
12 STRUCTURED, DISCIPLINED AND NURTURING ENVIRONMENT HE STARTED
13 SHOWING BEHAVIOR PROBLEMS BY AGE THREE ESPECIALLY WHEN HE
14 WASN'T IN A PREDICTABLE ENVIRONMENT OF HIS OWN HOME. FOR
15 EXAMPLES, THE BINNEYS LEFT HIM IN THE INFANT NURSERY AT
16 CHURCH BECAUSE OF HIS SMALL SIZE EVEN THOUGH -- WHEN HE WAS
17 THREE YEARS OLD. AND THEY HAD TO ASK THAT HE BE REMOVED
18 FROM THAT BECAUSE THEY COULDN'T STOP HIM FROM PUSHING DOWN
19 THE OTHER CHILDREN. HE WAS THEIR SIZE, BUT HE WAS PUSHING
20 THEM.

21 WHEN HE WAS FOUR HE ONCE BROKE ALL HIS COUSIN'S CRAYONS
22 AND HE SPRAY PAINTED HIS GRANDFATHER'S GARAGE. AND HIS
23 PARENTS RESPONDED WITH DISCIPLINE. THEY SPANKED HIM AND
24 THEY TRIED TO TEACH HIM THE RIGHT THING TO DO, BUT HE SEEMED
25 TO HAVE A REALLY HARD TIME LEARNING HOW TO BEHAVE EVEN

1 THOUGH HE WAS GETTING VERY CONSISTENT AND NURTURING
2 DISCIPLINE.

3 Q. THAT TAKES US UP TO SCHOOL AGE. SO CAN YOU TELL ME
4 ABOUT THE ELEMENTARY SCHOOL YEARS?

5 A. WELL, HE WAS IN KINDERGARTEN THROUGH THE FIFTH GRADE IN
6 HOLLAND, MICHIGAN. HE ATTENDED A SCHOOL THAT WAS OPERATED
7 BY THE CHURCH WHERE HIS FATHER WAS THE PASTOR. SO THE
8 PRINCIPAL REPORTED TO HIS FATHER. AND BASICALLY JONATHAN'S
9 FATHER WAS IN A POSITION OF RESPONSIBILITY OVER THE CHURCH,
10 THE SCHOOL AND THE HOME. SO HIS FATHER WAS IN A PRETTY
11 POWERFUL POSITION.

12 JONATHAN CONTINUED TO BE VERY SMALL FOR HIS AGE. HE
13 ALWAYS STAYED AT THE TENTH PERCENTILE OR SO. HE WAS
14 DESCRIBED AS SHORT AND SKINNY AT THE TIME.

15 THE SCHOOL HE WENT TO, THE INSTRUCTION WAS VERY
16 INDIVIDUALIZED AND BASED ON A STANDARDIZED CURRICULUM THAT'S
17 USED IN SMALL CHRISTIAN SCHOOLS. AND JONATHAN HAD A HARD
18 TIME LEARNING.

19 BUT THE TEACHERS WORKED WITH HIM BECAUSE THEY WORKED --
20 BECAUSE IT WAS THIS INDIVIDUALLY PACED THING. AND THEY
21 WOULD TRY TO ADAPT FOR HIM. FOR EXAMPLE, THEY'D GIVE HIM
22 ORAL TESTS BECAUSE THEY KNEW HE HAD A HARD TIME LEARNING
23 VISUALLY. BUT HE WOULD GET FRUSTRATED. AND HIS MOTHER WILL
24 TALK ABOUT ONCE IN ABOUT THE SECOND OR THIRD GRADE WHEN HE
25 CRIED EVERY DAY FOR TWO WEEKS BECAUSE HE WAS HAVING SUCH A

1 HARD TIME LEARNING AT SCHOOL.

2 THE TEACHERS TRIED HARD. IN GIVING THAT JONATHAN'S
3 FATHER WAS THE LEADER OF THE SCHOOL THEY SEEMED HESITANT TO
4 SAY WHAT A HARD TIME THEY WERE HAVING TEACHING THE
5 PREACHER'S SON.

6 THERE WERE IN SOME GRADES -- THERE WERE TIMES WHEN
7 JONATHAN MISSED A LOT OF DAYS OF SCHOOL BECAUSE HIS FATHER
8 WOULD SOMETIMES TRAVEL WITH HIS MINISTRY AND SANDRA AND
9 JONATHAN WOULD GO WITH HIM.

10 BUT THOSE EARLY YEARS JONATHAN'S PERFORMANCE WAS
11 ADEQUATE, BUT IT -- YOU COULD SEE IT DECLINE. AS I LOOKED
12 AT HIS GRADES OVER HIS FIRST FIVE YEARS, AND THEY STARTED
13 OUT AS AS AND BS, BUT THEY GOT LOWER AND LOWER EVEN THOUGH
14 HE WAS GETTING THIS PRETTY INTENSE INDIVIDUALIZED
15 INSTRUCTION. THE MORE COMPLICATED THE WORK GOT THE LOWER
16 HIS GRADES GOT.

17 HE ALSO HAD SOME PROBLEMS, PART OF IT BECAUSE OF HIS
18 SIZE IN THE SCHOOL, SOME OF THE CHILDREN BULLIED HIM. SOME
19 OF THE BOYS ONCE STUCK HIS HEAD IN THE TOILET WHILE THEY
20 FLUSHED THE TOILET. AND IT UPSET HIM PRETTY BADLY.

21 AND HE DIDN'T HAVE ANY MAIN FRIENDS. HE ALSO GOT IN
22 TROUBLE A LOT AT SCHOOL. IN THE FIRST GRADE HE WAS SPANKED
23 A LOT. AND THE -- HE WAS ALWAYS BEHIND IN CLASS AND FELT
24 BADLY ABOUT THAT PARTICULARLY AS HE GOT OLDER AND BECAME
25 MORE AWARE OF IT.

1 BUT EVEN THOUGH HE WAS HAVING TROUBLE AT SCHOOL HE WAS
2 VERY AFFECTIONATE AT HOME. HE WAS VERY AFFECTIONATE WITH
3 HIS EXTENDED FAMILY. HE WAS MUSICALLY GIFTED. HE TOOK
4 SUZUKI VIOLIN AND LEARNED VERY QUICKLY. AFTER ONLY A FEW
5 LESSONS HE COULD HARMONIZE. HE LEARNED THE KEYBOARD BY EAR
6 WITH NO LESSONS. AND HE -- ALTHOUGH ONCE HE QUIT PERFORMING
7 MUSICALLY VERY SUDDENLY BECAUSE SOME BOYS MADE FUN OF HIM
8 AND CALLED HIM SISSY FOR PLAYING THE VIOLIN. HE LATER
9 PICKED IT UP AGAIN, BUT THAT WAS HARD FOR HIM.

10 ONE OF THE MOST UNUSUAL THINGS THAT HAPPENED TO HIM IN
11 THOSE EARLY YEARS WAS SOMETIME BETWEEN THE AGES OF SEVEN AND
12 NINE HE WAS SEXUALLY MOLESTED BY A BIGGER BOY AT THE SCHOOL,
13 A BOY THAT WAS FOUR YEARS OLDER THAN HE IS. THE BOY'S NAME
14 WAS GREG THASHER. HE'S -- THRASHER. HE'S NOW SERVING A
15 PRISON SENTENCE OR WAS, BASED ON THE RECORDS I SAW, FOR
16 SEXUAL ASSAULT AGAINST CHILDREN. AND HE WAS A STUDENT IN
17 JONATHAN'S SCHOOL AT THAT TIME.

18 AT THE TIME HE WAS MOLESTED JONATHAN DIDN'T TELL HIS
19 PARENTS ABOUT IT. THE -- BUT LATER HE HEARD THEM TALKING
20 ABOUT GREG BEING IN TROUBLE. AND WHEN HE HEARD THEM TALKING
21 ABOUT IT HE DID DISCLOSE IT. AND WHEN HE DISCLOSED THE
22 SEXUAL ABUSE THEY WERE SHOCKED AND TOLD HIM NOT TO TELL
23 ANYBODY ELSE ABOUT IT AND THEY KNEW THAT THE SCHOOL WAS
24 GOING TO HANDLE DEALING WITH GREG. THEY DID NOT SEEK
25 COUNSELING RELATED TO THAT SEXUAL ABUSE.

1 JONATHAN ALSO HAD A HARD TIME BEING STILL. HE WAS VERY
2 ACTIVE. HE HAD A HARD TIME PAYING ATTENTION TO THINGS. AND
3 EVEN THINGS -- LIKE WHEN HE WAS NINE HE WAS IN HIS AUNT
4 JOY'S WEDDING. AND A NINE YEAR OLD TYPICALLY MIGHT BE ABLE
5 TO HANDLE GETTING THE RING DOWN THE AISLE. A YOUNGER CHILD
6 MAY HAVE TROUBLE. BUT HE HAD TROUBLE KEEPING UP WITH THE
7 RING. AND HE ACTUALLY DROPPED IT IN A WAY THAT IT FELL DOWN
8 BETWEEN SOME STAIRS, AND ONE OF THE WEDDING RINGS GOT
9 MISPLACED. SO IT WAS NOT UNUSUAL FOR HIM TO DO THAT SORT OF
10 THING, TO JUST KIND OF HAVE A HARD TIME KEEPING TRACK OF
11 THINGS.

12 Q. SO NOW WE'RE UP TO MIDDLE SCHOOL.

13 THE COURT: COUNSEL, LET ME STOP YOU THERE. WE'RE
14 GOING TO TAKE OUR AFTERNOON BREAK AT THIS TIME 'CAUSE WE'RE
15 WORKING WITHOUT A JURY. SO WE'LL STOP IN THE MIDDLE OF A
16 WITNESS. DR. ANDREWS, IF YOU DON'T MIND, DURING THE BREAK
17 YOU'RE FREE TO STEP DOWN, BUT PLEASE DON'T TALK WITH EITHER
18 COUNSEL SINCE YOU'RE A WITNESS UNDER TESTIMONY. WE'LL TAKE
19 APPROXIMATELY A TEN MINUTE BREAK, LADIES AND GENTLEMEN.

20 (WHEREUPON COURT WAS IN RECESS AT 3:44 PM)

21 THE COURT: THANK YOU. PLEASE BE AT EASE, LADIES AND
22 GENTLEMEN. THANK YOU. PLEASE BE SEATED. ALL RIGHT,
23 COUNSEL, YOU MAY RESUME.

24 DIRECT EXAMINATION BY MS. JOHNSON CONTINUED:

25 Q. NOW WE'RE UP TO HIS MIDDLE SCHOOL YEARS. AND MAYBE YOU

1 COULD TELL US SIGNIFICANT THINGS THAT HAPPENED DURING THOSE
2 SCHOOL YEARS.

3 A. WELL, THINGS CHANGED SOMEWHAT BY THE TIME OF MIDDLE
4 SCHOOL. THE -- HE FINISHED SIXTH GRADE WITH PASSING GRADES,
5 BUT WHEN HE STARTED SEVENTH GRADE IN MICHIGAN HIS
6 PERFORMANCE WAS QUITE POOR. HE WAS MAKING Ds AND Fs AT THAT
7 POINT. AND IN THE MIDDLE OF THAT YEAR HIS FAMILY MOVED TO
8 NORTH CAROLINA WHERE THEY WERE AGAIN AT A CHURCH WHERE THERE
9 WAS A SCHOOL THAT WAS PART OF THE CHURCH AND REVEREND BINNEY
10 WAS THE PASTOR OF THE CHURCH.

11 AND THEY DECIDED THAT BECAUSE HE HAD BEEN DOING SO
12 POORLY IN SEVENTH GRADE THAT HE WOULD START -- HE WOULD DO
13 SIXTH GRADE AGAIN AT THIS NORTH CAROLINA SCHOOL. AND SO HE
14 DROPPED BACK A GRADE. AND FOR THE FIRST TIME HE WAS IN
15 CLASSES THAT WERE NOT USING INDIVIDUALIZED INSTRUCTION AND
16 FOUND THAT EVEN MORE DIFFICULT BECAUSE HE HAD TO OFTEN
17 ANSWER QUESTIONS IN FRONT OF OTHER STUDENTS IN THE CLASS.
18 AND THAT WAS DIFFICULT FOR HIM, BASICALLY PUT PRESSURE ON
19 HIM.

20 WHEN I LOOKED AT HIS STANDARDIZED TEST SCORES, WHICH
21 ARE SCORES THAT BASICALLY COMPARE A STUDENT'S PERFORMANCE
22 WITH PERFORMANCE OF CHILDREN AROUND THE NATION, AT THE END
23 OF THE SIXTH GRADE, THE SECOND SIXTH GRADE SCHOOL YEAR, THE
24 ONE IN NORTH CAROLINA, HE WAS CLEARLY BEHIND.

25 YOU WOULD EXPECT A CHILD WHO HAD DONE ADEQUATELY TO

1 PERFORM AT AT LEAST ABOUT A 6.9 LEVEL MEANING THAT THEY'RE
2 READY TO GO TO SEVEN OH, WHICH IS THE SEVENTH GRADE. BUT IN
3 HIS CASE HE HAD ONLY A 3.8. THAT IS ALMOST FOURTH GRADE,
4 JUST HIGHER THIRD GRADE LEVEL IN MATHEMATICS, A 4.9 ON
5 LANGUAGE AND A 5.1 EVEN THOUGH HE HAD JUST FINISHED THE
6 SIXTH GRADE FOR THE SECOND TIME. SO CLEARLY HE WAS HAVING
7 PROBLEMS PERFORMING IN SCHOOL AND DEALING WITH COMPLEX
8 INFORMATION.

9 HE STARTED SEVENTH GRADE IN NORTH CAROLINA. AND HE WAS
10 STILL -- HIS GRADES WERE VERY POOR STILL. AND HIS
11 STANDARDIZED TEST SCORE TO THE CALIFORNIA ACHIEVEMENT TEST,
12 HE SCORED IN THE FORTIETH PERCENTILE, WHICH IS VERY UNUSUAL
13 FROM A CHILD WHO'S FROM SUCH AN EDUCATIONALLY ADEQUATE
14 BACKGROUND. HE WAS NOT IN DEPRIVED SCHOOLS. HE HAD VERY
15 GOOD -- EXCEPTIONALLY LITERATE PARENTS. SO YOU OFTEN DON'T
16 SEE A CHILD WITH THAT KIND OF PERFORMANCE UNLESS THERE ARE
17 SOME KIND OF PROBLEMS.

18 HIS PARENTS WERE AWARE OF THAT AND TOOK HIM TO BE
19 EVALUATED AT THE EDUCATION AND REMEDIATION CLINIC IN
20 FAYETTEVILLE, NORTH CAROLINA WHERE THEY LIVED AND HAD HIS
21 INTELLIGENCE TEST WHERE HE DID SCORE IN THE AVERAGE RANGE OF
22 INTELLIGENCE. BUT HE HAD SOME TESTS THAT SHOWED EXTREME
23 VARIABILITY. AND THIS WAS QUITE SIGNIFICANT. THERE WERE
24 PARTICULARLY SEVERE DEFICIENCIES IN MATH AND PROBLEM
25 SOLVING. HE WAS ONLY AT THE FIFTH PERCENTILE IN MATH AND

1 ONLY AT THE SECOND PERCENTILE OR THE FIFTH LOWEST AND THE
2 SECOND -- SECOND PERCENTAGE IN PROBLEM SOLVING.

3 WHAT WAS DONE THROUGH THE CLINIC THEN WAS INSTRUCTIONAL
4 SUPPLEMENTATION. THERE WASN'T AN ASSESSMENT DONE AT THAT
5 POINT THAT'S TREATED AS A LEARNING DISABILITY OF ANY KIND.
6 IT WAS JUST SEEING A SORT OF A DEFICIENCY THAT HE NEEDS TO
7 CATCH UP IN SOME WAY. AND SO THERE WAS AN ATTEMPT TO GIVE
8 HIM SUPPLEMENTAL EDUCATION BUT NOT TO TEACH HIM ANY
9 DIFFERENTLY THAN THE WAY HE HAD BEEN BEING TAUGHT. SO HE
10 DIDN'T MAKE ANY PARTICULAR GAINS ON THAT.

11 SOCIALLY HE DIDN'T HAVE ANY REGULAR FRIENDS. HE --
12 MOST OF HIS SOCIAL TIME WAS WITH HIS PARENTS AND THEIR ADULT
13 FRIENDS RELATED TO THE MINISTRY. HIS PARENTS WERE REAL
14 STRICT ABOUT CERTAIN THINGS. BECAUSE OF THEIR BELIEFS THEY
15 RESTRICTED THE TYPE OF MUSIC THAT HE COULD LISTEN TO. AND
16 FOR EXAMPLE, HE WAS NOT ALLOWED TO LISTEN TO ROCK OR POP
17 MUSIC.

18 SO ONCE HE WAS INVITED TO A BIRTHDAY PARTY AT A ROLLER
19 SKATING RINK AND HE COULD ONLY GO FOR AS LONG AS THE MUSIC
20 PLAYED THERE WAS OLDIES, BUT NOT FOR THE ROCK AND THE POP
21 MUSIC. AND HE FELT -- THIS MADE HIM FEEL DIFFERENT FROM
22 OTHER CHILDREN BECAUSE OF THIS.

23 PROBABLY THE MOST UNUSUAL THING THAT BEGAN TO EMERGE
24 WHILE THEY WERE IN NORTH CAROLINA IS HE DEVELOPED AN
25 INTEREST IN WOMEN'S CLOTHING. AS SOON AFTER THE BINNEYS

1 MOVED TO NORTH CAROLINA THEY WERE LIVING IN AN APARTMENT
2 WITH AN OLDER COUPLE. AND JONATHAN FOUND GIRL'S CLOTHING IN
3 A CLOSET. AND IN PRIVATE HE'D PUT THE CLOTHING ON AND LOOK
4 AT HIMSELF IN THE MIRROR AND STARTED AT THAT TIME WONDERING
5 IF HE MIGHT OUGHT TO BE A GIRL.

6 HE DIDN'T TALK TO HIS PARENTS MUCH AT THAT POINT ABOUT
7 WHAT WAS ON HIS MIND. HE WAS IN THOSE EARLY TEEN YEARS AND
8 DIDN'T THINK THAT THEY WOULD UNDERSTAND IF HE TALKED TO THEM
9 ABOUT THINGS LIKE THAT.

10 NOW ABOUT THIS TIME WAS ALSO THE FIRST TIME HE GOT IN
11 TROUBLE. JONATHAN WAS SENT TO HIS ROOM FOR SOMETHING HE DID
12 AND HIS FATHER WAS COMING TO HIS ROOM TO DISCIPLINE HIM.
13 AND WHEN HE GOT THERE JONATHAN WAS GONE. HE HAD CLIMBED OUT
14 OF HIS WINDOW. HE WENT INTO THE GARAGE OF SOMEONE IN THE
15 NEIGHBORHOOD, TOOK A BICYCLE. AND HE WAS PICKED UP BY THE
16 POLICE. THERE WERE NO CHARGES FILED THAT I SAW.

17 AND THEY ONLY STAYED IN NORTH CAROLINA ABOUT A YEAR AND
18 A HALF. AND THEN THEY MOVED TO OHIO AND STARTED A NEW --
19 REVEREND BINNEY STARTED A NEW MINISTRY WITH A FOCUS OF
20 HOSTING RETREATS FOR COUPLES, MARRIED COUPLES WHO ARE IN THE
21 MINISTRY AND TO -- BASICALLY PEOPLE WOULD COME TO THEIR HOME
22 AND THEY WOULD SPONSOR THESE RETREATS. AND JONATHAN FELT
23 FAIRLY ISOLATED IN THIS RURAL AREA, BUT HE DID REGISTER FOR
24 SCHOOL THERE.

25 THEY WERE STILL CONTINUING TO SEE EXTENDED FAMILY

1 MEMBERS ON HOLIDAYS. AND HE SEEMED VERY POSITIVE AND
2 INTERACTIVE WITH HIS RELATIVES AT THOSE TIMES. HE DID SOME
3 VERY KIND THINGS. HE HAS A YOUNG COUSIN, ALLISON. HE BUILT
4 A DOLLHOUSE FOR HER. HE WAS CAPABLE OF DOING THOSE KINDS OF
5 GENEROUS THINGS.

6 HE OFTEN TRAVELED WITH HIS PARENTS AS PART OF THE
7 MINISTRY. AND THEY WOULD GO TO PLACES TO DO WORKSHOPS. AND
8 HE GENERALLY BEHAVED WELL WHILE HE WAS WITH -- WHERE THEY
9 WERE WITH PARENTS, FRIENDS AND ASSOCIATES. THE -- BUT AT
10 SCHOOL HE WASN'T DOING WELL AT ALL.

11 HE WAS FIFTEEN YEARS OLD AT THIS POINT AND GOING TO
12 SCHOOL IN ZANESVILLE, OHIO. AND HE WAS GETTING A NUMBER OF
13 DEMERITS FOR BEHAVIOR PROBLEMS. AND AT THE END OF THE
14 EIGHTH GRADE HE HAD THREE Fs AND TWO Ds. SO HE WAS PRETTY
15 MUCH FAILING AT THAT POINT.

16 HE ALSO AT THAT POINT OR AROUND THAT TIME STARTED
17 TAKING UNDERWEAR FROM THE GUESTS, THE LADY GUESTS WHO WOULD
18 COME TO THE RETREAT CENTER, WHICH THEY CALLED THE MANOR. HE
19 WOULD WEAR THE UNDERWEAR UNDER HIS REGULAR CLOTHING. AND
20 HIS PARENTS AT SOME POINT LATER FOUND OUT THAT HE HAD BEEN
21 TAKING THIS CLOTHING.

22 HE ALSO BECAME SEXUALLY ACTIVE AT THIS POINT. HIS
23 PARENTS ONCE GOT A CALL FROM AN IRATE FATHER. JONATHAN AND
24 HIS DAUGHTER HAD MET AT A CHURCH CAMP AND HAD GONE TO THE
25 HOME OF THE DAUGHTER AND HAD SEX IN THEIR HOME. AND THE

1 FATHER WAS UNDERSTANDABLY UPSET.

2 SO BY THE TIME HE WAS FINISHING MIDDLE SCHOOL HE WAS
3 FAILING IN SCHOOL AND DEVELOPING SOME UNUSUAL PERSONAL
4 PROBLEMS IN TERMS OF THE SEXUAL BEHAVIOR AND THE CLOTHING
5 BEHAVIOR, ALSO SOME SOCIAL PROBLEMS IN TERMS OF GETTING IN
6 TROUBLE.

7 Q. AND SO CAN YOU SUMMARIZE WHAT HAPPENS BETWEEN KIND OF
8 THE END OF MIDDLE SCHOOL AND BECOMING AN ADULT?

9 A. WELL, HIS PARENTS AT THIS POINT WERE TRYING EVERYTHING
10 THEY COULD. THEY WERE CONTINUING TO DISCIPLINE HIM. THEY
11 WERE CONTINUING TO DO WHAT THEY COULD. SO THEY REALIZED
12 THAT PERHAPS BOARDING SCHOOL WOULD HELP. AND THEY -- SO
13 THAT IN THE FALL OF 1990 WHEN HE WAS SIXTEEN THEY ENROLLED
14 HIM IN THE VICTORY GROUP HOME FOR BOYS IN AMBERG, WISCONSIN.

15 BUT WITHIN A MONTH AFTER BEING AWAY FROM HOME HE
16 COMMITTED A CRIME. HE AND ANOTHER BOY TOOK CHECKS BELONGING
17 TO A SCHOOL OFFICIAL AND TRIED TO FORGE HIS NAME AND CASHED
18 THEM AND STOLE A CAR. HE WAS CAUGHT AND HE WAS TAKEN BACK
19 TO THE SCHOOL. AND HE DID STAY AT THE SCHOOL UNTIL
20 DECEMBER. HIS GRADES WERE FS AND DS THOUGH. AND SO HE WENT
21 BACK TO OHIO TO LIVE WITH HIS PARENTS AND WENT BACK TO
22 SCHOOL THERE.

23 THE NEXT FALL THEY DECIDED TO TRY ANOTHER BOARDING
24 SCHOOL. THIS ONE WAS IN NEW HAMPSHIRE. AND WITHIN TWO
25 WEEKS OF BEING THERE JONATHAN AND ANOTHER BOY WENT OVER THE

1 BORDER INTO NEW YORK, BROKE INTO A CAR, STOLE AND USED A
2 CREDIT CARD AND BROKE INTO A STORE. THIS TIME HE WAS
3 CHARGED WITH FORGERY AND BURGLARY AND WENT TO JAIL IN ALBANY
4 COUNTY IN NEW YORK. HE WAS IN CUSTODY FOR SEVERAL MONTHS
5 FOR THAT.

6 AND WHILE THERE THERE WERE SOME -- AT ONE POINT HE TOLD
7 THE JAIL STAFF THAT HE WAS HEARING VOICES THAT WERE TELLING
8 HIM TO KILL HIMSELF. THE STAFF NOTES NOTICE THAT HE WAS
9 CRYING, TALKING ABOUT SUICIDE, HE WAS DEPRESSED, HE SHOWED
10 ANXIETY AND FEAR AND THAT HE -- THERE WAS A CHANGE IN HIS
11 BEHAVIOR. HE WAS SENT TO THE MENTAL HEALTH UNIT FOR THAT.

12 BY JANUARY OF 1992 JONATHAN WAS BACK IN OHIO WITH HIS
13 PARENTS. AND HE WAS ALMOST SEVENTEEN. AND HIS PARENTS
14 ARRANGED FOR HIM TO BE EVALUATED AGAIN AT A PLACE CALLED THE
15 LEARNING CENTER.

16 AND THIS TIME THEY FOUND NEURODEVELOPMENTAL ISSUES
17 INCLUDING A MARKED CONCERN RELATED TO RECEPTIVE LANGUAGE AND
18 SELECTIVE ATTENTION AND NOTED THAT A POSSIBLE CONCERN WERE
19 GROSS MOTOR FUNCTION AND VISUAL PROCESSING. HE WAS JUST IN
20 THE EIGHTH PERCENTILE ON HIS WEIGHT ALTHOUGH HE WAS UP IN
21 THE THIRTY PERCENTILE ON HIS HEIGHT. HE WAS GETTING TALLER.
22 AND AT THAT TIME HE WAS PRESCRIBED RITALIN TO HELP CONTROL
23 HIS BEHAVIOR, BUT THERE WAS NO FOLLOW-UP PLAN FOR FURTHER
24 WORK RELATED TO THE NEURODEVELOPMENTAL ISSUES.

25 IT WAS AROUND THIS TIME TOO THAT THE BINNEYS

1 REALIZED THAT JONATHAN'S PROBLEMS WERE QUITE SERIOUS. AND
2 THEY DECIDED TO TRY TO FIND INFORMATION ABOUT HIS BIRTH
3 FAMILY. THEY HEARD FROM THE PASTOR IN FLORIDA WHO HAD
4 HELPED CONNECT THEM TO THE HOME WHERE GAYLE DOVE GAVE BIRTH.
5 AND FROM HIM THEY FOUND OUT WHAT HER NAME WAS, BUT HE WAS
6 UNSUCCESSFUL AT THAT TIME IN FINDING HER. THEY STILL HAD NO
7 INFORMATION AT THIS POINT ABOUT JONATHAN'S PRE-BIRTH
8 HISTORY.

9 IN MAY JONATHAN AGAIN STOLE A CAR. AND BY COURT ORDER
10 HE WAS ADMITTED TO THE RIVEREDGE PSYCHIATRIC HOSPITAL IN
11 FOREST PARK, ILLINOIS. AND THERE FOR THE FIRST TIME HE HAD
12 A COMPLETE DIAGNOSTIC WORK-UP. AND THERE'S A VERY LONG
13 REPORT THERE.

14 BUT THE FINAL DIAGNOSIS THAT THEY MADE THERE WAS THAT
15 HE HAS -- HAD AT THAT TIME, HE WAS EIGHTEEN YEARS OLD,
16 ATYPICAL DEPRESSION, DYSTHYMIC DISORDER, WHICH IS A
17 DEPRESSIVE, CHRONIC DEPRESSIVE DISORDER, ATTENTION DEFICIT
18 WITH HYPER ACTIVITY DISORDER, A CONDUCT DISORDER THAT WAS
19 SOCIALIZED AND NON-AGGRESSIVE, OTHER FAMILY SPECIFIED
20 CIRCUMSTANCES, AND HE HAD ON AXIS II SPECIFIC COGNITIVE
21 PROCESSING PROBLEMS.

22 THERE WAS THIS PARTICULAR REPORT BY LAURIE FRANK, WHICH
23 NOTES THAT HE HAD SIGNIFICANT AUDITORY PROCESSING IMPAIRMENT
24 AND SEMANTIC TEMPORAL CONFUSION, SEQUENCING PROBLEMS
25 IMPACTING ATTENTION AND FOLLOW THROUGH OF DIRECTIONS, THAT

1 HE HAD SIGNIFICANTLY IMPAIRED ABILITY TO PROCESS VERBAL
2 STIMULUS IN THE PRESENCE OF A BACKGROUND OR ENVIRONMENTAL
3 NOISES WHEN THERE'S OVERLOADING CHARACTERISTICS, THAT HE HAD
4 HIGH WORD FINDING PROBLEMS, THAT IS HE COULDN'T DO TASKS
5 INVOLVED IN FINDING WORDS, HE HAD LOW FRUSTRATION TOLERANCE
6 AND POOR SELF CONCEPT ESPECIALLY TOWARDS AUDITORY PROCESSING
7 PROBLEMS, AND HE HAD IMPAIRED PLANNING AND ORGANIZATIONAL
8 SKILLS WHICH IMPACT TIME MANAGEMENT.

9 THIS WAS THE FIRST TIME THAT JONATHAN'S RATHER SERIOUS
10 COGNITIVE IMPAIRMENTS WERE DOCUMENTED. BUT EVEN THEN HE
11 RECEIVED NO SPECIFIC TREATMENT FOR THEM AND NO RECOMMENDED
12 TREATMENT PLANNING FOR THEM. AND THE PARENTS WERE GIVEN NO
13 SPECIFIC ADVICE PARTICULARLY RELATED TO HIS COGNITIVE
14 PROCESSING DEFICITS.

15 AND ODDLY THE TREATMENT THAT JONATHAN RECEIVED AFTER
16 THIS DIAGNOSTIC WORK-UP FOCUSED ON SUBSTANCE ABUSE EVEN
17 THOUGH THAT WAS NOT ONE OF HIS DIAGNOSES. THAT SEEMED TO BE
18 SORT OF THE STANDARD TREATMENT IN THE PLACEMENT WHERE HE
19 WAS. HE WAS THERE FOR ABOUT A MONTH.

20 IN LATE JUNE THE VERY EVENING AFTER HIS RELEASE FROM
21 THAT PSYCHIATRIC FACILITY HE WAS WITH HIS PARENTS AND HE RAN
22 AWAY. HE WAS IN ILLINOIS. HE CAUGHT RIDES WITH TRUCKERS TO
23 HIS HOME IN ILLINOIS. HE STOLE A NEIGHBOR'S CAR AND HAD --
24 HE THOUGHT HE WAS GOING TO SEE A GIRL THAT HE HAD MET AT
25 THIS PROGRAM THAT WAS CALLED RAPHA PROGRAM.

1 WHEN POLICE CAME TO HIS HOME, THE MANOR, TO APPREHEND
2 HIM FOR THE CAR THEFT JONATHAN ATTEMPTED SUICIDE BY
3 INGESTING APPROXIMATELY A HUNDRED AND TEN ASPIRIN. HE WAS
4 TREATED AT THE LOCAL HOSPITAL AND RELEASED TO POLICE
5 CUSTODY. .

6 HE THEN SPENT SEVERAL MONTHS IN THE OHIO DEPARTMENT OF
7 YOUTH SERVICES. WHILE THERE HE HAD A TREATMENT PLAN THAT
8 AIMED TO HELP ASSUME RESPONSIBILITY, IMPROVE HIS SCHOOL
9 WORK, STOP STEALING AND CEASE HIS SUICIDAL BEHAVIOR. HE
10 WROTE A LETTER TO HIS PARENTS WHILE HE WAS THERE TALKING
11 ABOUT THE EXTREME FEAR HE MET AND HE FELT BECAUSE OF THE
12 OTHER RESIDENTS IN THE PROGRAM AND TELLING THEM THAT HE HAD
13 THOUGHT ABOUT SUICIDE. HE ALSO ASKED THE STAFF FOR MENTAL
14 HELP. HE ASKED -- HE SAID, I COULD USE SOME MENTAL HELP.

15 HE ALSO -- PART OF THE PLAN THERE WAS TO TRY TO HELP
16 HIM REFRAIN FROM ISOLATING HIMSELF WHEN HE FELT DOWN, WHICH
17 WAS KNOWN TO BE A PART OF HIS PROBLEM.

18 HIS PARENTS AT THAT TIME WROTE A LETTER TO THE JUDGE
19 SAYING THAT THEY HAD BEEN UNAWARE OF HIS SPECIAL NEEDS FOR.
20 MOST OF HIS LIFE UNTIL AT AGE SEVENTEEN HE WAS DIAGNOSED
21 WITH A. D. D. HE DID EARN HIS G. E. D. WHILE HE WAS THERE.
22 HE WAS THEN EIGHTEEN YEARS OLD.

23 Q. OKAY. HE'S NOW EIGHTEEN?

24 A. UM-HUM (AFFIRMATIVE).

25 Q. DO YOU CONSIDER THAT THE END OF HIS CHILDHOOD?

1 A. CHRONOLOGICAL AGE AND LEGALLY EIGHTEEN IS NORMALLY
2 CONSIDERED THE END OF -- THE ONSET OF ADULTHOOD.
3 DEVELOPMENTALLY HE WAS BEHAVING VERY CHILDLIKE. BUT, YES,
4 HE HAD REACHED THE AGE OF LEGAL MAJORITY.

5 Q. SO YOU WOULDN'T YET START TO DESCRIBE WHAT HAPPENS NEXT
6 AS HE'S YET AN ADULT OR YOU WOULD?

7 A. WELL, IT'S SORT OF A CONTINUATION OF ADOLESCENCE BASED
8 ON THE WAY THAT HE'S LIVING.

9 Q. OKAY. SO MAYBE YOU CAN BRIEFLY DESCRIBE WHAT HAPPENS
10 IN THOSE COUPLE OF YEARS IN BETWEEN.

11 A. WELL, HE RETURNED HOME TO HIS PARENTS AFTER BEING
12 RELEASED FROM THE DEPARTMENT OF YOUTH SERVICES. AND HE WAS
13 NINETEEN. AND HIS PARENTS HAD FAMILY FRIENDS IN COLUMBUS
14 WHO HELPED HIM GET A JOB AS A SECURITY GUARD. BUT WITHIN
15 LESS THAN THREE MONTHS JONATHAN HAD AGAIN STOLEN A CAR, A
16 CAR PHONE AND SOME ELECTRONICS. AND HE LOST HIS JOB DUE TO
17 HIS ARREST IN SEPTEMBER OF THAT YEAR. HE WAS AGAIN
18 INCARCERATED.

19 HE WAS AGAIN EVALUATED WHILE INCARCERATED. THERE WAS A
20 COMPETENCY EVALUATION DONE AND FOUND JONATHAN TO BE
21 COMPETENT AND CRIMINALLY RESPONSIBLE. AND THE PSYCHOLOGIST
22 WHO DID THIS EVALUATION DESCRIBED JONATHAN AS A PSEUDOMATURE
23 NINETEEN YEAR OLD AND FOUND THAT MOST MENTAL PROCESSES
24 REPORTED WERE WITHIN NORMAL LIMITS, BUT THERE WAS --
25 ABSTRACT REASONING WAS IMPAIRED AND INSIGHT WAS QUITE

1 LIMITED.

2 HE ALSO AT THAT POINT WAS TALKING ABOUT HAVING A PLAN
3 TO JOIN THE NAVY. WHILE HE WAS INCARCERATED THAT TIME HE
4 DID HAVE AN EXPERIENCE AND WAS HOSPITALIZED FOR THREE DAYS
5 AT BETHESDA HOSPITAL BECAUSE OF HAVING A POSSIBLE SEIZURE.
6 HE HAD SOME SORT OF A SHAKING, JERKING SPELL THAT WAS
7 OBSERVED BY OTHER INMATES. HE COULDN'T CONTROL THE SHAKING
8 AND FELL DOWN.

9 HE WAS IN OHIO PRISON STILL UNTIL HE WAS -- JUST AFTER
10 HE TURNED TWENTY HE WAS RELEASED ON PROBATION. AND JUST
11 BEFORE HE WAS RELEASED IN MARCH OF THAT YEAR HE WAS
12 EVALUATED AGAIN FOR SUICIDALITY BECAUSE HE HAD WRITTEN A
13 LETTER THAT HE WOULD PROBABLY COMMIT SUICIDE. HE USED THE
14 TIP OF A PENCIL TO EXPRESS BLOOD FROM HIS ARM AND DROPPED
15 THAT BLOOD ON THE LETTER.

16 HE REPORTED HE PREFERRED BEING ALONE. HE TRIED NOT TO
17 BE WITH THE PRISON POPULATION AND TRIED TO STAY IN WHAT WAS
18 KNOWN AS THE HULL WHILE HE WAS IN THAT FACILITY. HE WAS
19 RELEASED THOUGH.

20 AND HE AGAIN WENT HOME TO HIS PARENTS. AND WITH HIS
21 PARENTS' ENCOURAGEMENT THEY ENCOURAGED HIM TO APPLY TO
22 HYLES-ANDERSON COLLEGE. AT THAT POINT HE DID APPLY TO
23 COLLEGE, AND HE WAS ACCEPTED.

24 HE WAS STILL HAVING THOUGHTS ABOUT WOMEN'S CLOTHING.
25 HE ALSO WROTE A LETTER TO SOMEONE HE MET NAMED RICK ASKING

1 HIM TO PAY FOR A SEX CHANGE OPERATION FOR HIM, FOR JONATHAN.
2 HE SAID THAT HE WANTED TO BE A WOMAN. AND IN IT HE SAID, I
3 NEED THIS OPERATION, I WANT TO FEEL NORMAL. AND HE GAVE HIS
4 ADDRESS AS BEING AT HYLES-ANDERSON COLLEGE.

5 BY THIS TIME JONATHAN WAS ALSO REGULARLY VIEWING AND
6 READING PORNOGRAPHY. HE -- AND HE PREFERRED READING THE
7 STORIES ABOUT -- PREFERRED THE STORIES TO ACTUALLY VIEWING
8 PICTURES ALTHOUGH HE VIEWED LOTS OF PICTURES.

9 HE ALSO -- IT SEEMS TO ME AS PART OF HIS COLLEGE
10 APPLICATION HE HAD A PHYSICAL DONE AND -- AT THE ZANESVILLE
11 HEALTH DEPARTMENT. AND AS PART OF THAT ASSESSMENT THERE WAS
12 A SOCIAL WORK ASSESSMENT.

13 AND THE SOCIAL WORKER NOTED IN THAT ASSESSMENT THAT HE
14 -- JONATHAN HAS A MALE FRIEND WHO CAN ARRANGE A JOB FOR HIM
15 IN LAS VEGAS. HE STATES HE DID NOT RECEIVE ANY COUNSELING
16 WHILE IN PRISON. HE STATES HE IS FEELING OVERWHELMED WITH
17 SO MANY CHOICES TO MAKE. HE WAS FORTHRIGHT ABOUT HIS RECENT
18 CRIMINAL RECORD. IT WAS ON THE SOCIAL WORK REPORT. AND HE
19 REFUSED COUNSELING AND SAID THAT HIS FATHER IS A CHRISTIAN
20 PSYCHOLOGIST. HE DID SAY THAT HE WANTED MEDICATION TO
21 CONTROL HIS IMPULSIVE BEHAVIOR.

22 JONATHAN DIDN'T MAKE IT IN COLLEGE. WITHIN THREE
23 MONTHS HE WAS EXPELLED. AND SO HIS PARENTS HAD A FRIEND IN
24 SOUTH CAROLINA WHO OFFERED TO HELP BY GIVING JONATHAN A JOB.
25 JONATHAN HAD HIS PROBATION TRANSFERRED AND MOVED TO SOUTH

1 CAROLINA WHERE HE LIVED WITH THE FAMILY FRIENDS AND WORKED
2 AT A CAR DEALERSHIP.

3 AND THAT ACTUALLY WENT PRETTY WELL FOR A WHILE. HE WAS
4 SORT OF AN ASSISTANT AT THIS DEALERSHIP ALTHOUGH AT TIMES HE
5 DID INAPPROPRIATE THINGS ON THE JOB. FOR EXAMPLE, ONCE HE
6 HAD A KEY TO THE FACILITY AND ONCE WHEN IT WAS CLOSED HE
7 WENT AND TOOK A POLICE CAR THAT WAS BEING SERVICED AND DROVE
8 IT AND PRETENDED TO BE A POLICE OFFICER, WHICH WAS AN
9 INAPPROPRIATE THING TO DO. THERE WERE NO CHARGES FILED FOR
10 THAT.

11 AROUND THIS TIME JONATHAN STARTED TO DEVELOP AN
12 ATTRACTION TO CHILD PORNOGRAPHY AND WAS DOWNLOADING PICTURES
13 AND DOCUMENTS FROM THE INTERNET AND WAS COLLECTING WHAT
14 BECAME THOUSANDS OF IMAGES THAT HE USED FOR MASTURBATION
15 SOMETIMES FOR UP TO FOUR TIMES A DAY.

16 JONATHAN MANAGED TO STAY OUT OF LEGAL TROUBLE FOR
17 ALMOST TWO YEARS. AFTER ABOUT A YEAR AT THE CAR DEALERSHIP
18 HE MET MELANIE, HIS WIFE. HE MET HER IN A -- THROUGH THE
19 INTERNET. THEY MET IN PERSON AND SOON AFTER THAT HE MOVED
20 IN WITH -- HE MOVED IN WITH HER. SHE'S FOURTEEN YEARS OLDER
21 THAN HE IS. AND SOON AFTER THAT HE LEFT HIS JOB BECAUSE HE
22 HAD AN ACCIDENT IN A COMPANY CAR, BUT MELANIE WORKED
23 REGULARLY.

24 IN SEPTEMBER OF 1996 JONATHAN, WHO WAS TWENTY-TWO AND
25 MELANIE, WHO WAS THIRTY-FOUR, MARRIED. THAT FALL HE TOOK

1 AND PASSED A FIRE FIGHTER COURSE AT THE SOUTH CAROLINA FIRE
2 ACADEMY. AND IN DECEMBER OF THAT YEAR HE STARTED A JOB AT
3 BEST BUY IN SPARTANBURG AS AN IN-STORE COMPUTER TECH BECAUSE
4 HE COULD ASSEMBLE COMPUTERS AND DO THINGS WITH COMPUTERS.

5 IN THE SPRING OF 1997 MELANIE BECAME PREGNANT EVEN
6 THOUGH THEY THOUGHT SHE COULDN'T HAVE CHILDREN AND THEY WERE
7 BOTH VERY EXCITED AND ELATED TO KNOW THAT THEY WERE GOING TO
8 HAVE A BABY.

9 IN JULY, WHILE SHE WAS PREGNANT, JONATHAN GOT INTO
10 LEGAL TROUBLE AGAIN, THIS TIME BECAUSE HE SHOT HIS
11 NEIGHBOR'S CHICKENS WHEN THEY MESSED UP HIS GARDEN. HE ALSO
12 QUIT HIS JOB AROUND THAT TIME BECAUSE HE WAS HAVING
13 TRANSPORTATION PROBLEMS AND HE DECIDED TO BECOME AN
14 INDEPENDENT COMPUTER CONTRACTOR. THE -- SO AT THIS POINT HE
15 HADN'T -- HE'D ONLY KEPT A JOB FOR ANY PERIOD OF TIME WHEN
16 HE WAS AT THE AUTO DEALERSHIP.

17 ON DECEMBER 23RD JUST BEFORE CHRISTMAS IN 1997 JONATHAN
18 WAS TWENTY-THREE AND HIS SON, ISAAC, WAS BORN. THE WHOLE
19 FAMILY WAS VERY EXCITED AND VERY HAPPY. THE -- JONATHAN
20 THOUGH DIDN'T HAVE A DRIVER'S LICENSE, SO MELANIE HAD TO
21 DRIVE THEM HOME FROM THE HOSPITAL. AND IN JANUARY RIGHT
22 AFTER THAT BIRTH HE WAS ISSUED A MOTORCYCLE ONLY DRIVER'S
23 LICENSE.

24 IN APRIL OF THAT YEAR JONATHAN WAS HIRED AT A COMPANY
25 CALLED B & R COMMUNICATIONS AS A COMPUTER TECHNICIAN WITH A

1 VERY GOOD SALARY, TWENTY-EIGHT THOUSAND DOLLARS A YEAR, BUT
2 WITHIN TWO MONTHS HE RECEIVED A POOR JOB EVALUATION AND WAS
3 GIVEN THE OPTION OF IMPROVING WITHIN THIRTY DAYS OR
4 RESIGNING.

5 HE WAS SPECIFICALLY CRITICIZED FOR FAILING TO TAKE
6 INITIATIVE AND FAILING TO USE PROBLEM SOLVING SKILLS. HIS
7 SUPERVISOR SPECIFICALLY NOTED; YOU HAVE NOT SHOWN ME THAT
8 YOU CAN BE TRUSTED TO HANDLE MORE THAN ONE TASK AT A TIME.
9 SO HE HAD TO LEAVE THAT JOB.

10 HE THEN TOOK A TEMPORARY JOB WITH A COMPANY IN
11 CHARLOTTE AS A COMPUTER TECH. HE WAS DISPATCHED TO VARIOUS
12 PLACES TO WORK ON COMPUTERS WITH THAT JOB. IN NOVEMBER OF
13 1998 HE AGAIN WAS IN TROUBLE WITH THE LAW BECAUSE HE STOLE A
14 VALUABLE LAPTOP COMPUTER FROM THE DESK OF AN OFFICE WHERE HE
15 WAS WORKING. THIS WAS IN NORTH CAROLINA WHERE THE OFFENSE
16 HAPPENED. HE SPENT THREE DAYS IN JAIL AND LATER PLED GUILTY
17 AND WAS SENTENCED TO PROBATION AND A FINE. JONATHAN WANTED
18 A LARGER COMPUTER IN PART BECAUSE HE WAS COLLECTING SO MUCH
19 PORNOGRAPHY AT THAT POINT IN TIME AND BECAME VERY OBSESSED
20 WITH IT.

21 HE WAS -- AND THE -- HE AND MELANIE WERE ARGUING MORE
22 THEN BECAUSE -- PARTLY BECAUSE HE SPENT SO MUCH TIME ON THE
23 COMPUTER. HE WAS ON IT HOURS AND HOURS A DAY. AND IN THE
24 SPRING OF 1999 MELANIE AGAIN BECAME PREGNANT. THEY WERE
25 HAPPY ABOUT THAT, BUT THEY HAD BEEN ARGUING A LOT.

1 AND FOR A WEEK THEY SEPARATED. HE MOVED OUT. HE DID
2 THAT FAIRLY SUDDENLY. SHE DIDN'T REALIZE HE WAS GOING TO DO
3 IT. BUT HE WAS ONLY GONE FOR A WEEK. HE WENT AND LIVED
4 WITH A WOMAN HE'D MET ON THE INTERNET. BUT HE MISSED
5 MELANIE AND ISAAC. AND HE DECIDED HE WANTED TO GO BACK, AND
6 SO HE DID.

7 Q. SO WE'RE NOW UP TO ABOUT A YEAR FROM THE CRIME AGAINST
8 ██████████ IS THAT RIGHT?

9 A. RIGHT. WELL, THAT SUMMER BEFORE. YEAH, MELANIE'S
10 PREGNANT WITH ██████████

11 Q. SO I WONDER IF YOU COULD SUMMARIZE THE THEMES IN
12 JONATHAN'S LIFE HISTORY. YOU'VE TOLD US A LOT OF FACTS
13 ABOUT WHAT HAPPENED. CAN YOU TO A REASONABLE DEGREE OF
14 PROFESSIONAL CERTAINTY TELL US WHAT THEMES YOU THINK WERE
15 SIGNIFICANT IN ---

16 A. --- IN JONATHAN'S DEVELOPMENT? WELL, ONE OF THE THINGS
17 I FOUND THAT WAS PARTICULARLY SIGNIFICANT IN JONATHAN'S
18 DEVELOPMENT ARE THE NUMEROUS POSITIVE FACTORS THAT EXISTED
19 IN HIS SOCIAL ENVIRONMENT. THERE WAS A STRONG AND STABLE
20 TWO WAY ATTACHMENT AND AFFECTION BETWEEN HIM AND HIS
21 ADOPTIVE PARENTS. HE RECEIVED EXCELLENT PHYSICAL NURTURE.
22 THERE WAS NO CHILD ABUSE OR NEGLECT WITHIN THE FAMILY.
23 THERE WAS CONSISTENT DISCIPLINE WITH FORGIVENESS AND MORAL
24 GUIDANCE.

25 HE HAD PARENTS WHO WERE COMMITTED TO ONE ANOTHER AND IN

1 A STABLE MARRIAGE. AND THERE WAS A STABLE FAMILY NETWORK
2 THAT WAS HIS FAMILY NETWORK. HE HAD GOOD EDUCATIONAL
3 ENVIRONMENTS. THEY WERE EXCEPTIONALLY POSITIVE FACTORS IN
4 HIS SOCIAL ENVIRONMENT.

5 HE ALSO DEVELOPED A NUMBER OF ABILITIES. HE DEVELOPED
6 ATTACHED RELATIONSHIPS AS A SON, AS A HUSBAND, AS A FATHER
7 AND AS AN EXTENDED FAMILY MEMBER. HE WAS A COUSIN, A
8 GRANDCHILD AND A NEPHEW.

9 HE DEVELOPED THE ABILITY TO EXPRESS HIMSELF MUSICALLY.
10 HE DEVELOPED AN ABILITY TO WORK WITH COMPUTERS, AND AN
11 ABILITY TO CARRY ON CONVERSATIONS. HE COULD SOCIALLY ENGAGE
12 WITH PEOPLE AND EXPRESS AFFECTION.

13 Q. SO YOU ALSO FOUND SOME NEGATIVE FACTORS?

14 A. THOSE POSITIVE FACTORS WERE SERIOUSLY OVERWHELMED BY
15 THESE NEGATIVE FACTORS. AND ESSENTIALLY A PERSON'S SOCIAL
16 FUNCTIONING IS A PRODUCT OF THAT PERSON WITHIN THAT SOCIAL
17 ENVIRONMENT.

18 AND THE SOCIAL ENVIRONMENT INCLUDES A RANGE OF SETTINGS
19 AS I'VE DESCRIBED BEFORE, THE HOME, SCHOOL, CHURCH, WORK AND
20 COMMUNITY. EACH ENVIRONMENT HAS RESOURCES AND LIMITATIONS.
21 BUT THE PERSON ALSO BRINGS HIS OR HER OWN ATTRIBUTES INTO
22 THAT ENVIRONMENT, THEIR OWN WAYS OF THINKING, THEIR OWN WAYS
23 OF FEELING, THEIR OWN WAYS OF BEHAVING. AND HOW WELL THE
24 PERSON ADAPTS IN AN ENVIRONMENT IS A PRODUCT OF THE
25 INTERACTION BETWEEN THESE PERSONAL ATTRIBUTES AND THE

1 CHARACTERISTICS OF THAT SOCIAL ENVIRONMENT.

2 AND FROM AN EARLY AGE I FOUND THAT JONATHAN SHOWED
3 SOCIAL IMPAIRMENT IN HIS SOCIAL ENVIRONMENTS. AND I'VE
4 CLUSTERED THE THEMES OF THE IMPAIRMENTS INTO FOUR TYPES.
5 ONE IS INCOMPETENT PROBLEM SOLVING. ANOTHER IS A THEME OF
6 INADEQUACY. A THIRD IS A THEME OF DEPENDENCY. AND A FOURTH
7 IS A THEME OF SOCIAL WITHDRAWAL.

8 Q. AND SO COULD YOU START WITH BRIEFLY DESCRIBING THE
9 INCOMPETENT PROBLEM SOLVING AND HOW IT'S MANIFESTED IN
10 JONATHAN'S DEVELOPMENT?

11 A. WELL, THE INCOMPETENT PROBLEM SOLVING BEHAVIORALLY,
12 JONATHAN HAD TROUBLE CONFORMING TO SOCIAL RULES AS A CHILD
13 AND LATER TO LAWS. EVEN THOUGH HE WAS DISCIPLINED HE DID
14 NOT CONSISTENTLY CONFORM HIS BEHAVIOR AND WAS PARTICULARLY
15 PRONE TO IMPULSIVE, INAPPROPRIATE BEHAVIORS.

16 HE WAS PARTICULARLY PRONE TO STEAL. AND WHAT HE STOLE
17 WERE THINGS THAT HE SEEMED TO WANT FOR THE MOMENT. IT'S NOT
18 LIKE HE WAS STEALING AS A MATTER OF CREATING A BUSINESS THAT
19 SOMETHING HE WAS GOING TO RESELL AND TRY TO MAKE MONEY FOR
20 IT. IT WAS JUST IMPULSIVE KINDS OF ACTIONS IN TERMS OF WHAT
21 HE TOOK.

22 FROM BEHAVIORALLY ALSO, HE TRIED AT SCHOOL, BUT HE
23 FAILED AT SCHOOL. HE WOULD TRY AT WORK, BUT HE KEPT FAILING
24 AT JOBS. AND MOST OFTEN HE'D FAIL AT JOBS BECAUSE HE DIDN'T
25 KEEP THE SCHEDULE OR HE COULDN'T FOLLOW DIRECTIONS.

1 HE HAD A VERY HARD TIME DOING LONG TERM PLANNING, LIKE
2 HIS PLAN TO JOIN THE NAVY OR AT ONE POINT THOUGHT HE WAS
3 GOING TO START A COMPUTER COMPANY, BUT HE COULDN'T FOLLOW
4 THROUGH WITH THOSE KINDS OF PLANS. PEOPLE WHO KNOW HIM SAY
5 YOU CANNOT ASK HIM TO DO MORE THAN ONE THING AT A TIME.

6 AND WHEN OVERWHELMED WITH PROBLEMS HE EMOTIONALLY WOULD
7 OFTEN EXPRESS HOPELESSNESS AND HELPLESSNESS, THAT HE
8 COULDN'T FIGURE OUT WHAT TO DO. THERE WERE A NUMBER OF
9 TIMES WHEN HE TALKED ABOUT AND A COUPLE OF TIMES WHEN HE
10 ATTEMPTED SUICIDE BEFORE THIS PERIOD.

11 EMOTIONALLY HE WAS KNOWN TO BE MOODY. HE COULD GET
12 ANGRY WHEN THINGS DIDN'T GO RIGHT FOR HIM, BUT HE HAD FEW
13 SKILLS AT POSITIVE ANGER MANAGEMENT. HE DIDN'T BLOW UP, BUT
14 HE WOULD JUST HOLD IN HIS ANGER AND DIDN'T SEEM TO KNOW HOW
15 TO EXPRESS IT.

16 COGNITIVELY HIS APPROACHES TO PROBLEM SOLVING WERE
17 IMMATURE. ONE OF THE THINGS I NOTICED WAS WHEN HE WAS
18 WRITING HIS APPLICATION TO COLLEGE ONE OF THE STATEMENTS WAS
19 WHAT IS YOUR GOAL FOR WHEN YOU GRADUATE? AND HE SAID, I'VE
20 NOT THOUGHT MUCH ABOUT WHAT I WILL DO WHEN I GRADUATE, WHICH
21 WAS TRUTHFUL. HE PROBABLY HADN'T THOUGHT MUCH ABOUT IT, BUT
22 HE DIDN'T SEEM TO CONSIDER THAT WHEN YOU WRITE A JOB -- A
23 COLLEGE APPLICATION YOU SHOULD TRY TO WRITE IT IN A WAY THAT
24 WOULD MAKE IT LIKELY THAT YOU WOULD GET ACCEPTED. SO IT WAS
25 THAT KIND OF LACK OF FORETHOUGHT SHOWING DIFFICULTY

1 ANTICIPATING CONSEQUENCES.

2 HE HAS LEARNED TO MASK SOME OF THIS INCOMPETENT PROBLEM
3 SOLVING BY FOCUSING ON WHAT HE'S GOOD AT. HE'S -- HOW GOOD
4 HE'S -- HOW HE'S GOOD AT COMPUTERS, BUT HE REALLY DOES HAVE
5 A HARD TIME FOLLOWING THROUGH SO THAT EVEN IF HE HAS SKILLS
6 AND THE ABILITY TO MASTER CERTAIN THINGS HE -- THERE SEEMS
7 TO BE JUST A REAL DIFFICULTY WITH THIS ISSUE OF ACTING ON IT
8 AND FOLLOWING THROUGH.

9 Q. AND I UNDERSTAND YOU'RE GOING TO TALK A LITTLE MORE
10 BRIEFLY ABOUT THESE OTHER THREE THEMES. THE NEXT ONE YOU
11 WERE GOING TO TALK ABOUT IS INADEQUACY?

12 A. RIGHT. HE ACTED INADEQUATE PARTICULARLY RELATIVE TO
13 WHAT IS SOCIALLY EXPECTED OF HIM AS A MALE IN SOCIETY.
14 BEHAVIORALLY HE HAS AVOIDED TRADITIONAL MASCULINE ROLES THAT
15 HIS FATHER, JIM -- REVEREND BINNEY, MODELED FOR HIM,
16 REVEREND BINNEY AS A LEADER. AND JONATHAN PREFERS THE ROLE
17 OF A CHILD. HE EVEN TALKS ABOUT HIS WIFE, MELANIE, AS
18 SOMEONE WHO WOULD TAKE CARE OF HIM AS A MOTHER WOULD.

19 EMOTIONALLY HE SEEMED TO FEEL INSIGNIFICANT. HE WAS AN
20 ONLY CHILD IN A FAMILY ENVIRONMENT WITH PARENTS WHO WERE
21 VERY SOCIALLY INTERACTIVE WITH OTHERS, BUT HE OFTEN FELT
22 DIFFERENT AND FELT VULNERABLE BECAUSE OF HIS SMALL SIZE AND
23 PARTICULARLY VULNERABLE TO BEING BULLIED.

24 HE WONDERED IF HE'S REALLY A MAN. AND EVEN NOW HE
25 STILL TALKS A LOT ABOUT WANTING A SEX CHANGE OPERATION. HE

1 SEEMS TO THINK OF HIMSELF WITH SELF LOATHING. HE KNOWS HE'S
2 DONE WRONG THINGS AND HE'S SHAMEFUL ABOUT WHAT HE'S DONE AND
3 HE'S CONFUSED ABOUT WHY HE'S DONE THOSE THINGS. THE -- HE
4 SEEMS TO THINK HE MAY NEVER BE GOOD ENOUGH, BUT HE ALWAYS
5 TRIES TO LOOK GOOD IN FRONT OF OTHERS. HE'S, AGAIN, LEARNED
6 TO MASK THAT.

7 AND ONE OF THE WAYS HE'S LEARNED TO COMPENSATE FOR
8 THESE FEELINGS OF INADEQUACY IS TO REALLY FOCUS ON THINKING
9 OF HIMSELF AS VERY SEXUALLY CAPABLE AND BECOMING -- AND HIS
10 OBSESSION WITH PORNOGRAPHY AND HIS OBSESSION WITH
11 FANTASIZING ABOUT SEX WITH CHILDREN IS A WAY THAT PEOPLE
12 COMPENSATE FOR THIS INADEQUACY.

13 Q. SO ANOTHER THEME IS DEPENDENCY?

14 A. HE'S AN EXTREMELY DEPENDENT PERSON. AND HE'S
15 PARTICULARLY DEPENDENT ON WOMEN IN MOTHERING ROLES. SANDRA
16 AND MELANIE, HE WAS HOPING HIS MOTHER, GAYLE, WOULD BE --
17 CARE FOR HIM. AND HE -- AS SOON AS HE MOVED AWAY FROM HIS
18 PARENTS AND WENT TO BOARDING SCHOOL HE STARTED TO GET INTO
19 REALLY SERIOUS TROUBLE. HE'S NEVER DEMONSTRATED THE ABILITY
20 TO LIVE INDEPENDENTLY.

21 THE -- HE'S OFTEN TRIED TO PLEASE OTHERS. HE WILL
22 OFTEN FOLLOW THE SUGGESTIONS OF OTHERS. HE'S SAID TO BE
23 GULLIBLE IN TERMS OF THE WAY HIS FAMILY DESCRIBES HIM AND
24 OTHERS, PEOPLE I'VE TALKED WITH. HE HAS OFTEN IN THE RECORD
25 HAS ASKED FOR PROTECTION FROM PEOPLE IN AUTHORITY. THE --

1 AND BASICALLY IS DEPENDENT ON PEOPLE AROUND HIM TO GIVE HIM
2 GUIDANCE FOR MAKING DECISIONS.

3 Q. AND THEN THE FOURTH THEME IS SOCIAL WITHDRAWAL. AND
4 WHAT DID YOU OBSERVE ABOUT THAT?

5 A. WELL, HE'S NEVER BEEN PHYSICALLY ALONE, BUT HE'S OFTEN
6 LIVED A RATHER ISOLATED LIFE. HE HAD NO REGULAR FRIENDS.
7 HE WAS RAISED IN A FAIRLY RESTRICTIVE ENVIRONMENT. AND WHEN
8 HE ENCOUNTERED THE REAL WORLD HE HAD MAJOR TROUBLE
9 ADJUSTING.

10 THE -- HE WITHDREW INTO KIND OF A PRIVATE WORLD. AND
11 HE HASN'T REALLY ASKED FOR HELP OUTSIDE THE FAMILY EXCEPT
12 WHEN HE'S BEEN INCARCERATED. BUT HE FEELS VERY CONTROLLED
13 BY OTHERS. AND LIVING IN THIS PRIVATE WORLD IS HOW HE'S --
14 HE'S DEVELOPED THIS SEXUAL OBSESSION WITH HIMSELF, HIS OWN
15 SEXUALITY, WITH SEXUAL IMAGES.

16 HE WAS PREMATURELY SEXUALIZED BY AN OLDER BOY AND KEPT
17 THAT PRIVATE FOR A LONG TIME AND THEN WAS TOLD NOT TO TALK
18 ABOUT IT. AND THE -- THAT COMBINED WITH WHAT IS CLEARLY AN
19 EMOTIONAL DEPRESSION THAT HE HAD, AND WHEN YOU'RE
20 EMOTIONALLY DEPRESSED IT'S VERY HARD TO RELATE SOCIALLY EVEN
21 THOUGH THE EXPECTATION IS IN HIS FAMILY NETWORK THAT YOU
22 SHOULD BE SOCIABLE AND YOU SHOULD BE INTERACTIVE WITH
23 OTHERS.

24 AND SO HE TRIES VERY HARD TO MASK HIS DEPRESSION AND
25 THESE FEELINGS OF INADEQUACY THAT HE HAS. BUT HE'S ACTUALLY

1 FAIRLY MUCH OF A LONER AND WAS LIVING A VERY INTERNAL LIFE
2 ON THE INTERNET, SPENT A LOT OF TIME TO THE POINT THAT HE
3 WAS HAVING MARITAL PROBLEMS RELATED TO THAT.

4 Q. SO THAT'S -- THOSE ARE THE SIGNIFICANT THEMES. I
5 WONDER, IF YOU COULD TURN NOW TO DESCRIBING HIS FUNCTIONING
6 AS AN ADULT?

7 A. THE -- WELL HE -- WHAT I OBSERVED IN THAT -- SOME OF
8 THESE HAVE TAKEN US INTO THE ADULT YEARS. THESE THEMES WERE
9 STILL THERE, PARTICULARLY IN THIS LAST YEAR BEFORE THIS
10 CRIME OCCURRED. HE HAD STRONG FAMILY VALUES. HE'S IN A
11 STABLE MARRIAGE, ALTHOUGH THEY WERE HAVING DIFFICULTIES.
12 AND HE HAD BEEN A GOOD FATHER TO ISAAC.

13 HE HAD A HISTORY OF PROPERTY CRIMES, BUT NO HISTORY OF
14 INTERPERSONAL VIOLENCE WITHIN THE HOME OR IN THE COMMUNITY
15 UNTIL THE YEAR BEFORE THIS HAPPENED. BUT THIS PATTERN OF
16 THE SOCIAL PROBLEMS, THE INCOMPETENCY, INADEQUACY, THE
17 DEPENDENCY, THE WITHDRAWAL WAS FIXED. AND HE WAS STILL
18 DOING IMPULSIVE THINGS.

19 Q. SO THE FINAL AREA THAT I THINK YOU DESCRIBED IS THE
20 LAST YEAR LEADING -- OR SO LEADING UP TO THE CRIME. AS I
21 UNDERSTAND IT YOU LOOK AT THE INTERACTION BETWEEN
22 IMPAIRMENTS AND THEN LIFE EVENTS IN THAT TIME PERIOD, IS
23 THAT ---

24 A. THAT'S RIGHT.

25 Q. --- SORT OF THE PROCESS YOU GO THROUGH?

1 A. YEAH. AND THERE WERE -- IN THAT FINAL YEAR THERE WERE
2 SEVERAL EXTREME CHANGES IN HIS SOCIAL ENVIRONMENT AND A
3 SERIOUS DETERIORATION IN HIS OWN SOCIAL BEHAVIOR.

4 IN THE SPRING, AS I MENTIONED BEFORE, THERE WAS A
5 MARITAL SEPARATION. IN PART, MELANIE AND JONATHAN WERE
6 ARGUING BECAUSE OF HIS TIME ON THE INTERNET. HE TRIED TO
7 START ANOTHER JOB, THIS ONE AT NESTLE, BUT HE GOT POOR
8 PERFORMANCE RATINGS ALMOST RIGHT AWAY.

9 THEY DECIDED NOT TO HAVE ANYMORE CHILDREN. SO HE HAD A
10 VASECTOMY JUST A FEW DAYS BEFORE HIS DAUGHTER, [REDACTED] WAS
11 BORN ON AUGUST 9TH. THEY WERE THRILLED TO HAVE A GIRL, BUT
12 [REDACTED] IMMEDIATELY HAD HEALTH PROBLEMS. SHE WAS IN
13 RESPIRATORY DISTRESS. AND SHE HAD TO BE AIRLIFTED TO THE
14 CHILDREN'S HOSPITAL IN COLUMBIA.

15 SO THE WHOLE FAMILY, JONATHAN, AND MELANIE AND ISAAC
16 WENT DOWN THERE. THEY STAYED WITH FRIENDS THEY'D MET ON THE
17 INTERNET WHILE [REDACTED] WAS THERE FOR THREE DAYS. SO THAT
18 WAS A FAIRLY TRAUMATIC BIRTH RELATED EXPERIENCE.

19 IN THE MIDDLE OF OCTOBER JONATHAN WAS WATCHING
20 TELEVISION AND SAW AN AD ABOUT HOW TO FIND A BIRTH PARENT.
21 AND HE CALLED THE NUMBER. AND WITHIN TWO WEEKS THEY HAD
22 FOUND GAYLE DOVE, HIS BIRTH MOTHER. AND SOON AFTER THAT IN
23 EARLY NOVEMBER HE AND GAYLE MET FOR THE FIRST TIME. SHE
24 CAME FOR ABOUT A WEEK AND STAYED AT THE HOME OF JONATHAN AND
25 MELANIE.

1 IT WAS A VERY POSITIVE VISIT ALTHOUGH THEY NOTICED AT
2 THAT POINT IN TIME THAT SHE TOOK A LOT OF MEDICATION.
3 JONATHAN WAS STILL SPENDING -- WAS NOT WORKING VERY MUCH,
4 WAS STILL SPENDING A LOT OF TIME ON THE INTERNET WITH HIS
5 PORNOGRAPHY. HE WAS FASCINATED WITH THE FEMALE BODY. AND
6 HE WAS THINKING ABOUT HAVING SEX WITH HIS BIRTH MOTHER AND
7 ALSO THINKING ABOUT HAVING SEX WITH HIS INFANT DAUGHTER.

8 Q. AND SO THIS IS THE POINT AT WHICH HE SEXUALLY ASSAULTS
9 ██████████ IS THAT RIGHT?

10 A. HE DOES. THE SEXUAL ASSAULT HAPPENED ON DECEMBER 7TH.
11 THE -- SHE WAS -- HE WAS CARING FOR HER WHILE MELANIE
12 WORKED.

13 THE COURT: WHAT YEAR IS THAT?

14 A. THIS WAS 1999.

15 Q. DECEMBER.

16 A. DECEMBER 7TH, 1999.

17 THE COURT: THANK YOU.

18 A. THE -- HE WAS TWENTY-FIVE YEARS OLD, I BELIEVE. AND
19 THE -- HE WAS CARING FOR THE CHILDREN WHILE MELANIE WORKED,
20 FOR ISAAC, THEIR SON, AND THE BABY. AND HE HAD FOR DAYS
21 BEEN FANTASIZING ABOUT INCEST. HE READ A STORY ONLINE ABOUT
22 A MOTHER'S SEX WITH HER INFANT SON AND WONDERED IF A BABY
23 CAN BE SEXUALLY AROUSED.

24 AT THAT TIME HE USED AN EGG SHAPED VIBRATOR AND
25 PENETRATED ██████████ WHO WAS INJURED BY TEARING. HE TREATED

1 THE BLEEDING AND CALLED MELANIE. AND THEY TOOK HER TO THE
2 EMERGENCY ROOM WHERE THE CHILD PROTECTION WERE CALLED AND
3 CAME RIGHT AWAY.

4 HE GAVE A SERIES OF STATEMENTS ABOUT THE ASSAULT FIRST
5 STATING THAT IT WAS AN ACCIDENT, THAT HE HAD HAD HER IN THE
6 SHOWER AND HIS FINGER WAS ACCIDENTALLY INSERTED. AND THEN
7 HE EVENTUALLY CONFESSED TO THE USE OF THE VIBRATOR. AND HE
8 WAS ARRESTED AND INCARCERATED.

9 THE CHILDREN WERE TAKEN INTO PROTECTIVE CUSTODY FOR
10 ALMOST TWO WEEKS. AND THEN DECEMBER 17TH BEFORE ISAAC'S
11 BIRTHDAY THE FAMILY COURT JUDGE AWARDED CUSTODY TO THEIR
12 MOTHER, MELANIE, UNDER THE CONDITION THAT THERE BE NO
13 CONTACT WITH JONATHAN OR WITH HER OWN FATHER, GLENN ISAAC,
14 WHO WAS KNOWN TO HAVE SEXUALLY ABUSED HER.

15 Q. SO NOW AS WE TURN TO 2000 HE'S IN JAIL.

16 A. HE'S IN JAIL.

17 Q. WHAT HAPPENS IN JAIL?

18 A. AT ONE POINT HE WAS ON SUICIDE WATCH WHILE HE WAS AT
19 THE JAIL. AND THE FAMILY COURT TOOK FURTHER ACTION IN
20 JANUARY, ORDERED HIM TO HAVE NO CONTACT WITH HIS CHILDREN,
21 ENTERED HIS NAME ONTO THE CENTRAL REGISTRY FOR CHILD ABUSE
22 AND NEGLECT AND ORDERED HIM TO HAVE A PSYCHOLOGICAL
23 EVALUATION AND TO PARTICIPATE IN SEXUAL PERPETRATOR'S
24 THERAPY.

25 THE FAMILY AT THAT POINT WANTED VERY MUCH FOR JONATHAN

1 -- JONATHAN AND THE FAMILY WANTED TO GET HELP. THEY KEPT
2 SAYING THEY WANTED MENTAL HEALTH HELP AND WERE HOPING TO GET
3 HIM STABILIZED WITH A JOB. HE DID GET A JOB AT WAL-MART.

4 AND GAYLE, HIS BIRTH MOTHER, DECIDED TO MOVE TO SOUTH
5 CAROLINA. AND GIVEN THAT HE COULDN'T LIVE WITH HIS WIFE,
6 HIS OWN -- HIS PARENTS, JIM AND SANDRA, WERE LIVING IN
7 ILLINOIS AT THE TIME. AND SO GAYLE DID MOVE TO SOUTH
8 CAROLINA WITH HER FATHER AND HER BOYFRIEND, DON. AND THEY
9 BOUGHT A HOUSE. AND JONATHAN LIVED THERE WITH GAYLE, DONALD
10 MURRAY AND RAYMOND DOVE, HIS BIRTH -- THE GRANDFATHER BY
11 BIRTH. BUT HE AND DONALD MURRAY DID NOT GET ALONG AT ALL.

12 ON THE 6TH OF FEBRUARY JONATHAN AT THAT POINT BECAUSE
13 OF VARIOUS DRIVING VIOLATIONS MOSTLY RELATED TO SPEEDING
14 MANY OF WHICH WERE LESS THAN TEN MILES AN HOUR, BUT HE HAD
15 ACCUMULATED POINTS, HE DIDN'T HAVE A REGULAR DRIVER'S
16 LICENSE. HE HAD A MOTORCYCLE ONLY LICENSE. AND HE HAD A
17 MOTORCYCLE -- A MOPED ACCIDENT AND WAS TREATED FOR THAT.

18 HE ALSO WAS STILL ON PROBATION IN NORTH CAROLINA FOR
19 STEALING THE COMPUTER. AND HE WAS CHARGED WITH VIOLATING
20 THE CONDITIONS OF HIS PROBATION BECAUSE OF HIS FAILURE TO
21 PAY THE RESTITUTION HE HAD BEEN ORDERED TO PAY IN NORTH
22 CAROLINA.

23 HE STARTED A JOB AT WAL-MART, BUT HE WORKED FULL-TIME
24 FOR ONLY TWO WEEKS AND THEN PART-TIME DURING SOME OTHER
25 WEEKS, BUT DIDN'T LAST ON THAT JOB VERY LONG.

1 HE, IN THE MIDDLE OF MARCH, HAD FOUR OF HIS WISDOM
2 TEETH REMOVED. AND GAYLE AND HER -- AND HE SAW CINDY
3 STIGNOFF, THE SEXUAL PERPETRATOR'S THERAPIST, ONCE, BUT SHE
4 HAS NO RECORDS.

5 THE -- IN LATE MARCH ON THE 30TH OF MARCH GAYLE
6 OVERDOSED ACCIDENTALLY. GAYLE DOVE WAS ADDICTED TO A
7 VARIETY OF MEDICATIONS AND OVERDOSED AT THE HOME SHE WAS
8 LIVING AT WITH JONATHAN. AND SHE WAS AT SPARTANBURG
9 HOSPITAL FOR ABOUT A WEEK.

10 AFTER HER RELEASE FROM THAT SHE WENT TO MISSISSIPPI
11 WITH HER BOYFRIEND, DON MURRAY. AND WHEN THEY RETURNED FROM
12 MISSISSIPPI THEY WERE MARRIED. THIS WAS HER FOURTH
13 MARRIAGE. AND DON AND GAYLE TOLD JONATHAN THAT HE HAD TO
14 MOVE OUT. THEY ALSO TOLD RAYMOND DOVE, THE GRANDFATHER,
15 THAT HE HAD TO MOVE OUT. AND JONATHAN'S PARENTS, THE
16 BINNEYS, ARRANGED TO PAY FOR A MOTEL ROOM FOR -- SO THAT HE
17 WOULD HAVE A PLACE TO STAY.

18 THE -- MELANIE -- AT ONE POINT JONATHAN WASN'T WORKING.
19 HE DECIDED THAT HE NEEDED TO GET AWAY FOR A WHILE. HE TOOK
20 THE MOPED TO CHARLESTON WHERE HE WENT TO SEE SOME -- TWO
21 WOMEN THAT HE HAD MET THROUGH INTERNET CONTACT AND HAD
22 UNPROTECTED SEX WITH THEM. MELANIE DID REPORT TO THE
23 BONDSMAN THAT HE HAD LEFT THE AREA. AND SO HE WASN'T
24 STABILIZING AT ALL, THAT THAT HAD BEEN WHAT THEY HAD HOPED
25 MIGHT HAPPEN AFTER THE ASSAULT ON [REDACTED]

1 Q. NOW WE'RE ABOUT A MONTH FROM THE MURDER OF JUDY
2 SOUTHERN, IS THAT RIGHT?

3 A. THAT'S CORRECT.

4 Q. MAYBE YOU COULD SUMMARIZE THE STRESSORS THEN AND THEN
5 BRIEFLY DESCRIBE WHAT HAPPENS IN THE NEXT MONTH.

6 A. WELL, HE WAS LIVING WITH THE SHAME OF HOW HE'D HURT HIS
7 OWN DAUGHTER. HE COULDN'T NO LONGER SEE HIS SON OR
8 DAUGHTER. HE WAS CUT OFF FROM THEM. HE WAS CUT OFF --
9 ALTHOUGH HE OCCASIONALLY SAW AND TALKED TO HIS WIFE, HE WAS
10 -- COULD NOT LIVE WITH HER.

11 HE WAS CUT OFF FROM THE BIRTH MOTHER THAT HE HAD HOPED
12 TO BE ABLE TO FORM A RELATIONSHIP WITH. HE WAS JOBLESS. HE
13 WAS HOMELESS. THE -- HE REALIZED THAT HIS BIRTH MOTHER WAS
14 ADDICTED AND HAD SERIOUS PROBLEMS. HE HAD NO LEGAL
15 TRANSPORTATION. HE WAS IN SERIOUS LEGAL TROUBLE WITH THESE
16 SEXUAL CHARGES PENDING. AND HIS PARENTS WERE IN ILLINOIS.
17 AND HE WAS ALONE.

18 Q. AND SO THEN WHAT HAPPENS IN MAY, MAY OF 2000?

19 A. HE ATTEMPTED SUICIDE BY TAKING TYLENOL AND WAS TREATED
20 AT THE SPARTANBURG REGIONAL HEALTH CARE CENTER AND WAS
21 TRANSFERRED FROM THERE TO PATRICK HARRIS PSYCHIATRIC
22 HOSPITAL.

23 AT THAT ADMISSION HIS PUPILS WERE DILATED. HE REPORTED
24 HOPELESSNESS, DEPRESSED, OFTEN OVERSLEEPS, MARRIAGE PROBLEMS
25 BECAUSE OF HIS TIME ON THE INTERNET, ANXIETY SINCE HE'S ON

1 BOND, THE ISSUE OF THE VIBRATOR WITH HIS FOUR MONTH OLD
2 DAUGHTER.

3 HE BLURTED OUT THE SIZE OF HIS PENIS AND THE ABILITY TO
4 GO ON A LONG TIME. HE WAS STILL SEXUALLY FIXATING, HAD LOW
5 SELF ESTEEM, WHICH HE BRAGGED TO SELF-DEFEND OR TO DEFEND.
6 THIS WAS HIS AGITATED STATE.

7 ON MAY 9TH, THAT WAS HIS TWENTY-SIXTH BIRTHDAY, HE WAS
8 IN PATRICK HARRIS PSYCHIATRIC HOSPITAL. AND THE RECORDS
9 NOTE THAT HE SAID HE HAD ACCESS TO A GUN, AND THOUGHT OF
10 SHOOTING HIMSELF. HIS SUICIDE IDEATION WAS REPETITIVE,
11 PLANNED, AND SERIOUS LETHAL. HE WAS DELUSIONAL, IRRITABLE,
12 IMPULSIVE AND OBSESSIVE.

13 AND THERE WAS MORE THAN ONE PERSON THAT TALKED TO HIM.
14 ANOTHER NOTES THAT HE HAD SUICIDAL IDEATION WITH A PLAN TO
15 USE A GUN AND NOTED THAT HE WAS FACING THESE CRIMINAL SEXUAL
16 ASSAULT CHARGES.

17 HE WAS PRESCRIBED AN ANTI-DEPRESSANT. AND THE RECORD
18 NOTES THAT HE SAID THAT THE REASON WAS -- HE WAS THERE WAS
19 TO HELP ME GET THERAPY AND I'M HERE FOR HELP.

20 MELANIE ALSO WAS TALKING TO THE DSS WORKER, WHO WAS
21 MONITORING THE CASE AND SAID THAT JONATHAN WAS REALLY
22 STRUGGLING WITH THINGS. BUT JUST A FEW DAYS AFTER HE WAS
23 ADMITTED HE WAS RELEASED FROM PATRICK HARRIS. AND THE
24 DISCHARGE NOTE SAYS HE CERTAINLY CONSTITUTES NO DANGER TO
25 HIMSELF OR OTHERS AS A RESULT OF MENTAL ILLNESS, HIS MOOD

1 WAS STABLE. HE WAS PRESCRIBED AN ANTI-DEPRESSANT AND GIVEN
2 A DISCHARGE DIAGNOSIS OF ADJUSTMENT REACTION WITH MIXED
3 FEATURES AND A PERSONALITY DISORDER NOT OTHERWISE SPECIFIED,
4 WHICH WOULD BE A NON-SPECIFIC PERSONALITY DISORDER.

5 HE RETURNED TO LIVING SOMETIMES IN A MOTEL ROOM PAID
6 FOR BY HIS PARENTS AND SOMETIMES IN -- IN THE BASEMENT OF
7 MELANIE'S HOUSE.

8 ON THE 22ND OF MAY MELANIE CONTACTED JIM BANNISTER, WHO
9 IS A CRIMINAL DEFENSE ATTORNEY ON BEHALF OF JONATHAN AND
10 SIGNED A FEE AGREEMENT. THEY GOT A REFERRAL TO MR.
11 BANNISTER FROM THE BONDSMAN. I COULDN'T FIND ANY RECORD OF
12 ANY CRIMINAL DEFENSE ATTORNEY THAT HAD BEEN ADVISING
13 JONATHAN UP TO THAT TIME.

14 MR. BANNISTER DID NOTE IT WAS UNUSUAL FOR THE MOTHER OF
15 THE SEXUALLY ABUSED CHILD TO WANT TO HELP THE ACCUSED. BUT
16 SHE SEEMED TO WANT TO GET HELP FOR JONATHAN AND SAID THAT
17 SHE BELIEVED JONATHAN IS SICK AND NEEDS HELP.

18 WITHIN ABOUT A WEEK OF MELANIE CONTACTING MR. BANNISTER
19 HE HAD A THREE-WAY PHONE CALL WITH JONATHAN AT HIS HOTEL
20 ROOM AND MELANIE AT HER HOME. AT LEAST HE BELIEVES
21 JONATHAN'S AT HIS HOTEL ROOM. THIS WAS THE FIRST TIME
22 JONATHAN HAD TALKED TO A LAWYER ABOUT HIS CHARGES. JONATHAN
23 TOLD HIM THEN, I NEED HELP. I DON'T WANT TO DO THESE
24 THINGS.

25 HE OBSERVED THAT JONATHAN WAS LIKE A YOUNG SEVENTEEN

1 YEAR OLD WHEN HE TALKED TO HIM. HE TRUSTED EVERYONE. HE
2 TRUSTED THE POLICE THAT WHEN THEY TOLD THEM THAT IF HE
3 CONFESSED HE WOULD GET HELP INSTEAD OF JAIL TIME. THE
4 OFFICERS HAD TOLD JONATHAN THAT HE WAS A LITTLE GUY AND HE
5 WOULD GET RAPED IN JAIL, AND THAT HE WOULD RATHER BE DEAD
6 THAN IN JAIL, AND THAT IF HE CONFESSED HE WOULD NOT ---

7 MR. SALTER: YOUR HONOR, ---

8 A. --- GO TO JAIL.

9 MR. SALTER: --- I'M GOING TO FINALLY OBJECT AGAIN. I
10 REALIZE YOUR HONOR OVERRULED MY EARLIER OBJECTION. BUT IT
11 APPEARS THAT WE NOT ONLY HAVE HEARSAY, BUT HEARSAY WITHIN
12 HEARSAY.

13 THE COURT: SUSTAINED.

14 MR. SALTER: THANK YOU.

15 MS. JOHNSON: YOUR HONOR, I WOULD NOTE THAT SHE DOES
16 HAVE TWO SOURCES FOR THIS CONVERSATION, ACTUALLY, I BELIEVE
17 SHE HAS THREE, MELANIE, JONATHAN AND MR. BANNISTER. SO THIS
18 IS WITHIN THE RANGE OF INFORMATION THAT SHE ORDINARILY
19 RELIES UPON.

20 THE COURT: COUNSEL, THIS GETS INTO QUESTIONS ABOUT
21 CONSTITUTIONAL RIGHTS. IT IS, AS MR. SALTER SAID, HEARSAY
22 WITHIN HEARSAY. I'M GOING TO SUSTAIN THAT OBJECTION.

23 Q. CAN YOU TELL THE JUDGE WHAT MR. BANNISTER TOLD -- WHAT
24 MR. BANNISTER TOLD YOU THAT HE TOLD JONATHAN ABOUT WHAT
25 WOULD HAPPEN TO HIM?

1 A. AT THAT POINT ---

2 MR. SALTER: I'M STILL GOING TO OBJECT, YOUR HONOR, TO
3 THE HEARSAY BY MR. BANNISTER. IF MR. BANNISTER IS GOING TO
4 TESTIFY, IT'S FINE, I CAN CROSS EXAMINE HIM.

5 MS. JOHNSON: YOUR HONOR, THAT'S NOT ---

6 THE COURT: WOULDN'T THE BETTER RESULT BE TO TELL ME
7 WHAT REACTION MR. BINNEY HAD? WOULD THAT ---

8 MS. JOHNSON: YOUR HONOR, ---

9 THE COURT: --- NOT ACCOMPLISH YOUR PURPOSE?

10 MS. JOHNSON: --- I THINK -- NO, YOUR HONOR. I THINK
11 THE PURPOSE IS THAT THIS IS AN ADDITIONAL STRESSOR, WHICH
12 WAS THAT UNTIL THIS TIME HE BELIEVED THAT HE WAS GOING TO
13 GET TREATMENT AND NOT GO TO JAIL. AND MR. BANNISTER IS THE
14 FIRST PERSON WHO SAYS TO HIM WHAT IS REALLY A WEEK BEFORE
15 THE CRIME, NO, YOU'RE GOING TO JAIL AND IT'S A MATTER OF HOW
16 LONG.

17 SO I THINK IT'S NOT -- SHE'S NOT ACTUALLY GOING TO
18 DESCRIBE HIS REACTION. AND I THINK, AS I SAID, THAT THERE
19 ARE THREE SOURCES FOR THIS. AND THIS UNLIKE THE STATEMENT
20 WITH RESPECT TO WHAT THE POLICE OFFICER SAID, IT'S CLEARLY
21 NOT HEARSAY WITHIN HEARSAY. IT IS MR. BANNISTER REPORTING
22 TO HER WHAT IT WAS THAT HE SAID. AND THERE'S REALLY NO
23 TRUTH TO THE MATTER OTHER THAN THAT HE SAID IT.

24 THE COURT: ALL RIGHT. COUNSEL, I'M GOING TO OVERRULE
25 THAT PORTION OF YOUR OBJECTION AND WILL ALLOW THAT. GO

1 AHEAD. GO AHEAD, MA'AM. YOU MAY TELL US WHAT ---

2 A. WHAT HE TOLD ME ---

3 THE COURT: --- WHAT THE ATTORNEY REPORTED TO YOU THAT
4 HE SAID.

5 A. MR. BANNISTER TOLD HIM THAT HE DISABUSED -- HE SAID TO
6 JONATHAN, I DISABUSED HIM OF THE IDEA THAT HE WOULD WALK
7 AWAY WITHOUT JAIL TIME. I SAID, YOU'RE GOING TO JAIL, IT IS
8 JUST A MATTER OF HOW MUCH TIME.

9 AND JONATHAN AT THAT POINT DIDN'T SEEM TO REALIZE THAT
10 WAS GOING TO BE HAPPENING. MELANIE DIDN'T REALIZE THAT WAS
11 GOING TO HAPPEN. THEY WERE HOPING HE WAS GOING TO GET SOME
12 KIND OF HELP. AND HE BECAME MORE AFRAID, MORE ANGRY AT THAT
13 POINT IN TIME.

14 Q. AND SO THIS IS THE POINT IN WHICH THEN THE CHAIN OF
15 EVENTS THAT STARTS -- LEADS UP TO THE CRIME, IS THAT RIGHT?

16 A. THAT'S CORRECT.

17 Q. WHEN HE PURCHASED ---

18 MR. SALTER: OBJECTION.

19 Q. --- PURCHASED THE HANDGUN?

20 MR. SALTER: OBJECTION.

21 MS. JOHNSON: I WAS ACTUALLY GOING TO SAY -- THAT'S WHY
22 SHE'S GOING TO STOP HERE. BUT IF YOU'D LIKE ME NOT TO HAVE
23 HER SAY THAT, I WILL NOT.

24 THE COURT: COUNSEL.

25 MR. SALTER: YOU'RE LEADING.

1 THE COURT: THAT IS A LEADING QUESTION. I'LL SUSTAIN
2 THAT. DO YOU HAVE FURTHER QUESTIONS ---
3 Q. WHAT HAPPENED ---
4 THE COURT: --- OF THE WITNESS, MA'AM?
5 Q. --- ON ---
6 THE COURT: EXCUSE ME. DO YOU HAVE FURTHER QUESTIONS
7 OF THE WITNESS?
8 MS. JOHNSON: YES.
9 THE COURT: ALL RIGHT. GO AHEAD.
10 Q. WHAT HAPPENED THEN ON JUNE 6TH?
11 A. JONATHAN PURCHASED A HANDGUN FROM A FRIEND AND WENT TO
12 HIS ROOM AT THE VILLAGER MOTEL.
13 Q. AND WAS THAT THE END OF THE EVENTS THAT YOU ---
14 A. THAT WAS THE POINT AT WHICH HE WAS THINKING ABOUT
15 SUICIDE, HE WAS CONFUSED, HE WAS ALONE, HE WAS CHAOTIC.
16 I'VE DESCRIBED ALL THE STRESSORS IN HIS LIFE. HE WAS PRETTY
17 WELL DETERIORATED AT THAT POINT IN TIME.
18 Q. SO MAYBE YOU COULD SUMMARIZE HOW JONATHAN BINNEY'S
19 SOCIAL FUNCTIONING WAS IMPAIRED AT THAT TIME RIGHT BEFORE
20 THE CRIME.
21 A. WELL, IT'S REALLY A SUMMARY OF HIS WHOLE LIFE AND HOW
22 IT KIND OF CAME TOGETHER AT THAT POINT. BUT HIS SOCIAL
23 HISTORY REVEALS EVIDENCE OF THE PRENATAL ALCOHOL EXPOSURE
24 THAT WENT UNDETECTED AND UNTREATED.
25 HE HAD IMPAIRED ABILITY TO CONFORM TO SOCIAL NORMS

1 RELATED TO AN UNTREATED, VERY SERIOUS LEARNING DISABILITY.
2 THERE WAS NO -- NEVER ANY APPROPRIATE INTERVENTION FOR WHAT
3 WAS CLEARLY A NEURODEVELOPMENTAL PROBLEM AND COGNITIVE
4 IMPAIRMENT. HE WAS KNOWN TO HAVE ATTENTION DEFICIT
5 PROBLEMS, BUT HE WASN'T BEING PARTICULARLY TREATED FOR IT AT
6 THAT POINT IN TIME.

7 HE HAD IMPAIRED SOCIAL AND EMOTIONAL FUNCTIONING
8 RELATED TO UNTREATED MENTAL DISORDERS, PARTICULARLY
9 DEPRESSION AND OBSESSION WITH PORNOGRAPHY, THE DISORDERS
10 RELATED TO THAT AS A MEANS TO COMPENSATE FOR HIS FEELINGS OF
11 POWERLESSNESS.

12 HE HAD IMPAIRED SOCIAL FUNCTIONING RELATED TO PATTERNS
13 OF INEFFECTIVE COPING AND MALADAPTATION THAT I SUMMARIZED AS
14 INCOMPETENT PROBLEM SOLVING, FEELINGS OF INADEQUACY,
15 DEPENDENCY AND SOCIAL WITHDRAWAL. AND HE HAD INADEQUATE
16 ADAPTIVE COPING SKILLS TO HELP HIM FACE MULTIPLE LIFE
17 STRESSORS IN THE YEAR BEFORE THIS CRIME LEADING TO THIS
18 ESCALATED DETERIORATION IN SOCIAL FUNCTIONING.

19 Q. AND DO YOU HOLD THIS OPINION ABOUT HOW HIS FUNCTIONING
20 WAS IMPAIRED TO A REASONABLE DEGREE OF PROFESSIONAL
21 CERTAINTY?

22 A. YES.

23 Q. NOW I WANT TO CHANGE GEARS AND ASK YOU WHETHER YOUR
24 EXPERTISE IN FAMILY SYSTEMS AND TRAUMA WOULD PERMIT YOU TO
25 FORM AN OPINION ABOUT THE IMPACT OF AN EXECUTION ON MR.

1 BINNEY'S CHILDREN?

2 A. YES.

3 MR. SALTER: OBJECTION AS TO RELEVANCY, YOUR HONOR.

4 THE COURT: WHAT IS YOUR RELEVANCE, COUNSEL?

5 MS. JOHNSON: YOUR HONOR, I UNDERSTAND THAT EXECUTION
6 IMPACT ON BOTH VICTIM FAMILY MEMBERS AND ON DEFENDANT FAMILY
7 MEMBERS IS ADMISSIBLE IN THIS STATE.

8 THE COURT: THIS IS PCR. COUNSEL, I'VE GOT -- I'LL
9 TAKE CARE OF THIS.

10 MR. SALTER: THANK YOU, YOUR HONOR.

11 THE COURT: THANK YOU. THIS IS A POST CONVICTION
12 RELIEF CLAIMANT. HOW IS THAT RELEVANT?

13 MS. JOHNSON: WELL, YOUR HONOR, THIS IS TESTIMONY THAT
14 COULD HAVE BEEN OFFERED BY DEFENSE COUNSEL AND WAS NOT
15 EXPLORED BY DEFENSE COUNSEL.

16 THE COURT: WHAT SAY YOU?

17 MR. SALTER: IT'S INADMISSIBLE. UNDER STATE VERSUS
18 MATHEWS, UNDER TORRENCE, IT'S INADMISSIBLE TO PUT UP SOMEONE
19 TO SAY -- FIRST OFF, WHAT, YOU KNOW, I WANT, YOU KNOW, I
20 WANT -- THIS IS THE SORT OF PUNISHMENT I WANT, IT'S
21 INADMISSIBLE TO TALK ABOUT HOW IT'S GOING TO IMPACT UPON
22 THEIR ---

23 THE COURT: VERY GOOD. THANK YOU. INADMISSIBLE AT
24 TRIAL. WHAT DO YOU SAY TO THAT, COUNSEL?

25 MS. JOHNSON: IT'S CERTAINLY INADMISSIBLE TO SAY I WANT

1 THE DEFENDANT TO LIVE, ALTHOUGH CERTAINLY MANY RELATIVES
2 HAVE SAID SO AND JUDGES HAVE PERMITTED THAT, BUT THAT'S NOT
3 WHAT SHE'S GOING TO TESTIFY TO. IT'S PARTICULARLY
4 APPROPRIATE IN THIS CASE WHERE THE STATE URGED THE JURY TO
5 IMPOSE DEATH IN PART TO BENEFIT [REDACTED] WHO WAS THE VICTIM
6 OF A CRIME. THAT WAS A BIG PART OF THEIR CLOSING ARGUMENT,
7 THE IMPACT ON HER OF THIS HORRIBLE CRIME. IT'S RELEVANT --
8 IT WOULD HAVE BEEN RELEVANT FOR THE JURY TO KNOW THAT
9 EXECUTING HER FATHER WOULD NOT HAVE BEEN BENEFICIAL TO
10 [REDACTED]

11 THE COURT: ALL RIGHT. ANY RESPONSE?

12 MR. SALTER: FIRST OFF, WE'RE TALKING ABOUT -- WE'RE
13 TALKING ABOUT SOMEONE THAT I'M NOT EVEN SURE HAD THE
14 CAPACITY HERSELF TO TESTIFY, WHICH -- ASIDE FROM THE
15 ADMISSIBILITY PROBLEMS, WHICH I'VE ALREADY ADDRESSED.

16 WE'RE TALKING ABOUT SOMEONE WHO'S AN INFANT WHEN THE
17 CRIMINAL SEXUAL CONDUCT WAS -- OCCURRED. SHE WAS ONLY A
18 COUPLE OF YEARS OLD AT THE TIME OF TRIAL. SHE CAN'T BE HERE
19 TODAY. MS. BINNEY'S TESTIMONY IS GOING TO BE TAKEN BY WAY
20 OF DEPOSITION.

21 THE COURT: ALL RIGHT. JUST A MOMENT, PLEASE.

22 (PAUSE)

23 THE COURT: COUNSEL, I BELIEVE THAT RANGES AFIELD FROM
24 POST CONVICTION RELIEF ISSUES. I'M GOING TO SUSTAIN IT ON
25 THE GROUND OF RELEVANCE. PLEASE MOVE TO THE NEXT AREA ---

1 MS. JOHNSON: YOUR HONOR, COULD I MAKE A QUICK PROFFER
2 OF WHAT SHE WOULD SAY?

3 THE COURT: COUNSEL, YOU ALREADY DID TELL US WHAT SHE
4 WOULD SAY IN YOUR RESPONSE TO MR. SALTER'S LAST COMMENTS.

5 MS. JOHNSON: YOUR HONOR, I DON'T REALLY FEEL THAT
6 IT'S, I MEAN, IT IS THAT IT WOULD BE NEGATIVE, BUT I THINK
7 THAT THERE ARE A NUMBER OF WAYS IN WHICH SHE -- HER
8 EXPERTISE DOES DESCRIBE HOW IT WOULD BE NEGATIVE. AND I
9 HAVEN'T DESCRIBED THAT. IF YOU DON'T WANT ME TO DO THAT, I
10 WON'T. BUT I DO HAVE THAT TO PROFFER.

11 THE COURT: JUST A MOMENT.

12 (PAUSE)

13 THE COURT: WHAT POSES A DIFFICULTY IS IS SITTING HERE
14 AS THE TRIER OF FACT, I DON'T WANT TO HAVE A SPILL-OVER
15 EFFECT FOR WHAT I HEAR THAT MAY HAVE BEEN DEEMED
16 INADMISSIBLE. PLEASE REMEMBER, THIS DECISION'S GOING TO BE
17 MADE SOME WEEKS, IF NOT MONTHS, HENCE. IT WILL BE DIFFICULT
18 FOR ME TO SEPARATE WHAT'S ACCURATELY WITHIN THE RECORD AND
19 WHAT IS NOT. DO YOU HAVE IT IN WRITTEN FORM THAT IT COULD
20 BE SUBMITTED TO THE COURT REPORTER?

21 MS. JOHNSON: YOUR HONOR, IT ISN'T IN PROFFER FORM, BUT
22 I'D BE HAPPY TO SUBMIT IT IN PROFFER FORM, IN A WRITTEN
23 STATEMENT.

24 THE COURT: WELL, LET'S -- JUST TO ---

25 MS. JOHNSON: I COULD HAVE HER SIGN IT, IF IT'S

1 ACTUALLY MORE APPROPRIATE TO HAVE HER DO THAT.

2 THE COURT: ALL RIGHT. TO PRESERVE MY ROLE AS THE
3 TRIER OF FACT AND TO AVOID CONFUSION OF WHAT THE COURT
4 BELIEVES IS INADMISSIBLE, LET'S DO IT THAT WAY, AND WE'LL
5 GIVE YOU THAT OPPORTUNITY.

6 MS. JOHNSON: YES, YOUR HONOR. THANK YOU.

7 THE COURT: ALL RIGHT. THANK YOU. FURTHER QUESTIONS?

8 MS. JOHNSON: NO, YOUR HONOR. THANK YOU.

9 THE COURT: ALL RIGHT. THANK YOU. AND IS THERE CROSS
10 EXAMINATION?

11 MR. SALTER: YES, SIR, YOUR HONOR.

12 THE COURT: ALL RIGHT.

13 MR. SALTER: I DON'T KNOW HOW LATE YOUR HONOR WISHES TO
14 GO.

15 THE COURT: WELL, LET'S REVISIT AN ISSUE WE DISCUSSED
16 EARLIER. AND I THINK WE MAY HAVE HAD A LITTLE BIT OF
17 CONFUSION ABOUT OUR TIMES. MY UNDERSTANDING WAS THAT YOU
18 FELT WE'D BE READY TO TAKE OUR FINAL WITNESS ABOUT 4:15.

19 MS. JOHNSON: YOUR HONOR, I HAVE CALLED THAT WITNESS
20 BECAUSE -- AND TOLD HIM THAT WE WOULD NOT BE NEEDING HIM
21 TODAY BECAUSE I UNDERSTOOD YOU TO SAY YOU WANTED TO FINISH
22 ABOUT FIVE.

23 THE COURT: ALL RIGHT. THAT'S GOOD. THANK YOU. GO
24 AHEAD, MR. SALTER. WE'LL JUST -- WE'LL STAY A LITTLE BIT
25 BEYOND FIVE. I KNOW THERE'S -- FOR THE CONVENIENCE OF OUR

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1 WITNESS HERE AND FOR OTHERS, WE'LL TRY TO CONCLUDE IF WE CAN
2 OUR WITNESS TODAY. GO AHEAD.

3 MR. SALTER: THANK YOU, YOUR HONOR.

4 CROSS EXAMINATION BY MR. SALTER:

5 Q. DR. ANDREWS, WHEN DID YOU FIRST BECOME INVOLVED IN THE
6 CASE?

7 A. PROBABLY THREE OR FOUR MONTHS AGO. I DON'T HAVE THAT
8 DATE WITH ME.

9 Q. OKAY. AND DO YOU RECALL HOW MANY TIMES YOU MAY HAVE
10 MET WITH MR. BINNEY?

11 A. TWICE.

12 Q. DO YOU KNOW THOSE DATES?

13 A. I DO. IF YOU'LL GIVE ME A MINUTE.

14 Q. WOULD THOSE HAVE BEEN MARCH 30, 2007?

15 A. YES.

16 Q. AND FEBRUARY 7, 2007?

17 A. NO, MAY 7TH.

18 Q. I'M SORRY, MAY. I APOLOGIZE.

19 A. YES.

20 Q. NOW YOU DID NOT PERSONALLY GATHER ALL THE INFORMATION
21 WHICH YOU RELATED HERE THIS AFTERNOON, DID YOU?

22 A. I DIDN'T PERSONALLY GATHER THE RECORDS, NO. I RELIED
23 ON RECORDS THAT WERE GIVEN TO ME TO REVIEW.

24 Q. THOSE RECORDS WERE GIVEN TO YOU BY A MITIGATION
25 SPECIALIST, CORRECT?

1 A. THAT'S CORRECT.

2 Q. AND THAT MITIGATION SPECIALIST WOULD BE MR. BLUME'S
3 SISTER?

4 A. I BELIEVE SO. WELL, NOT ALL OF THEM. SOME OF THEM
5 CAME FROM OTHER PEOPLE WHO WORK IN MR. BLUME'S OFFICE.

6 Q. AND THE PERSON WE'RE TALKING ABOUT IS PAMELA LEONARD?

7 A. YES.

8 Q. PAMELA BLUME LEONARD?

9 A. UM-HUM (AFFIRMATIVE).

10 Q. NOW DO YOU HAVE YOUR NOTES AND MS. LEONARD'S NOTES
11 CONCERNING HER INVESTIGATION?

12 A. I DON'T RELY ON MS. LEONARD'S NOTES. I GATHER ---

13 Q. YOU DON'T HAVE -- YOU DON'T HAVE ANY NOTES AT ALL?

14 A. I -- I HAVE READ HER NOTES, BUT I DON'T RELY ON THEM.
15 I DO MY OWN INTERVIEWS. I HAVE MY INTERVIEW NOTES.

16 Q. WHERE ARE HER NOTES? DO YOU HAVE THEM?

17 A. I DON'T HAVE THEM WITH ME HERE. THEY'RE AT HOME.

18 MR. SALTER: I'D ASK THEY BE PRODUCED, YOUR HONOR.

19 A. LIKE I SAID, I DON'T RELY ON THEM. I USE THEM AS A
20 SOURCE OF INFORMATION SO THAT I WILL KNOW WHERE TO GET MY
21 DIRECT INFORMATION.

22 THE COURT: COUNSEL, IF YOU -- DO YOU WISH FOR A
23 RESPONSE FROM THE COURT ON THAT?

24 MR. SALTER: YES, SIR, YOUR HONOR.

25 THE COURT: WELL, THE WITNESS HAS NOT BROUGHT THEM INTO

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1 COURT. I WILL DECLINE. SHE'S NOT RELIED UPON THEM. SHE'S
2 NOT USED THEM HERE IN HER TESTIMONY. AND I WOULD DECLINE TO
3 REQUIRE HER TO PRODUCE HER NOTES.

4 Q. AND HOW ABOUT YOUR OWN NOTES? DO YOU HAVE NOTES?

5 A. I DO HAVE MY NOTES.

6 Q. OKAY. CAN I SEE THOSE?

7 A. YES, YOU MAY.

8 Q. THANK YOU. ARE THESE ALL YOUR NOTES?

9 A. THESE ARE MY NOTES AND SOME AFFIDAVITS THAT I'VE READ,
10 BUT I'VE ALSO DONE INTERVIEWS.

11 MADAME COURT REPORTER: EXCUSE ME, YOUR HONOR. I CAN'T
12 HEAR ---

13 A. I'M SORRY. THESE ARE MY NOTES.

14 MR. SALTER: I APOLOGIZE.

15 A. AND SOME AFFIDAVITS THAT ARE IN THERE AS WELL.

16 Q. OKAY. THANK YOU.

17 THE COURT: WHILE YOU'RE LOOKING AT THOSE, LET ME ASK A
18 QUESTION OF THE WITNESS. MA'AM, YOU LIVE IN CHARLESTON, I
19 BELIEVE YOU SAID, IS THAT CORRECT?

20 A. NO, SIR, COLUMBIA.

21 THE COURT: COLUMBIA?

22 A. UM-HUM (AFFIRMATIVE).

23 THE COURT: WILL YOU BE HERE TOMORROW REGARDLESS OF
24 WHETHER YOUR TESTIFYING OR NOT?

25 A. NO, I WASN'T PLANNING TO.

1 THE COURT: ALL RIGHT. YOU'LL ONLY BE HERE FOR THE
2 EXTENT OF YOUR TESTIMONY IS WHEN YOU INTEND TO LEAVE?

3 A. THAT'S WHAT THE PLAN IS, YES.

4 THE COURT: ALL RIGHT. VERY GOOD.

5 Q. ALL RIGHT. ARE YOU A MEMBER OF THE NATIONAL
6 ASSOCIATION OF SOCIAL WORKERS?

7 A. YES.

8 Q. OKAY. THE NATIONAL ASSOCIATION OF SOCIAL WORKERS HAS A
9 POLICY AGAINST THE DEATH PENALTY, CORRECT?

10 A. I BELIEVE SO, YES.

11 Q. IT'S A LONGSTANDING POLICY, CORRECT?

12 A. UM-HUM (AFFIRMATIVE).

13 Q. YOU PERSONALLY ARE OPPOSED -- AGAINST -- YOU'RE
14 PERSONALLY OPPOSED TO THE DEATH PENALTY, RIGHT?

15 A. YES.

16 Q. ALL RIGHT. YOU'VE TESTIFIED IN A NUMBER OF CAPITAL
17 CASES, HAVE YOU NOT, AS A SOCIAL WORKER OR YOU HAVE SIMILAR
18 TESTIMONY AS TO WHAT YOU'VE GIVEN HERE THIS AFTERNOON?

19 A. YES.

20 Q. IT'S ALWAYS ON BEHALF OF THE DEFENDANT, CORRECT?

21 A. YES.

22 Q. NOW THE WAY I UNDERSTAND WHAT WAS DONE IN TERMS OF THE
23 GATHERING OF THE RECORDS IN THIS CASE IS THAT MS. LEONARD
24 WENT OUT AND GATHERED A BUNCH OF INFORMATION AND THEN
25 SUBMITTED THAT INFORMATION TO YOU AND THAT YOU THEREAFTER

1 WENT AND MET WITH MR. BINNEY, IS THAT CORRECT?

2 A. I RELY ON MITIGATION INVESTIGATORS IN THE SAME WAY THAT
3 YOU MIGHT RELY ON AN INVESTIGATOR TO DO THE PRIMARY
4 EXPLORATION OF WHAT INFORMATION MIGHT BE OUT THERE AND TO
5 HELP ME TARGET BECAUSE MY TIME IS MUCH MORE LIMITED IN TERMS
6 OF THE AMOUNT OF TIME THAT I WOULD INVEST IN A CASE. SO I
7 RELY ON THE INVESTIGATOR AND THE ATTORNEY TO ADVISE ME
8 REGARDING WHAT MIGHT BE OUT THERE. I THEN GATHER MY OWN
9 DIRECT EVIDENCE AND FORM MY OWN CONCLUSIONS.

10 Q. IS EVERYTHING THAT SHE GATHERED HERE IN YOUR NOTES?

11 A. NO.

12 Q. NO. SO WE DON'T KNOW WHAT SHE MAY HAVE GATHERED THAT
13 WAS AT ODDS WITH YOUR OPINION HERE THIS AFTERNOON, DO WE?

14 A. IT WOULDN'T BE THAT IT WAS AT ODDS. IT WAS USUALLY
15 BECAUSE IT WAS SOMEONE THAT DIDN'T KNOW ANYTHING THAT WAS OF
16 RELEVANCE OR THAT I DEEMED NOT TO BE RELEVANT, SO I CHOSE
17 NOT TO TALK TO THAT PERSON.

18 Q. WHEN YOU SAY YOU DEEMED IT NOT TO BE RELEVANT, WHY DID
19 YOU DEEM IT NOT TO BE RELEVANT?

20 A. FOR EXAMPLE, ONE OF GAYLE DOVE'S HUSBANDS DIDN'T KNOW
21 SHE HAD GIVEN BIRTH TO A CHILD. SO I THOUGHT THAT WAS NOT
22 RELEVANT IF HE DIDN'T EVEN KNOW THAT JONATHAN EXISTED.

23 Q. NOW WHO ALL DID YOU PERSONALLY INTERVIEW?

24 A. IT'S ON THE LIST THAT I SUBMITTED, THE LIST OF RECORDS.
25 AND I'M -- SO I DON'T -- YOU'VE JUST TAKEN MY FILES. SO I

1 DON'T HAVE IT THERE. BUT IT'S ALSO BEEN SUBMITTED ON THAT
2 LIST THAT'S UP HERE.

3 Q. I'LL GIVE THIS BACK TO YOU. THANK YOU.

4 A. I INTERVIEWED JONATHAN BINNEY ON TWO OCCASIONS, JIM AND
5 SANDRA BINNEY ON ONE OCCASION AND SANDRA BINNEY BY PHONE ON
6 ANOTHER OCCASION, MELANIE BINNEY ONCE IN PERSON, ONCE BY
7 PHONE, RUTH MORRIS BY PHONE, JOHN MORRIS BY PHONE, ALLISON
8 HAYGOOD BY PHONE.

9 Q. EXCUSE ME. WHO'S ALLISON HAYGOOD?

10 A. SHE'S HIS COUSIN.

11 Q. SHE'S HIS COUSIN. OKAY. SO YOU INTERVIEWED HER BY
12 PHONE.

13 A. THAT'S CORRECT.

14 Q. PLEASE CONTINUE. I'M SORRY.

15 A. LOU ANN DOVE, WHO IS HIS AUNT, I MEAN, THAT'S NOT HER
16 LAST NAME. I'M SORRY. IT'S BRANHAM, I BELIEVE. I'M SORRY.
17 I'VE GOT A MISTAKE THERE. IT'S JOY BRANHAM. NO, IT IS LOU
18 ANN DOVE. THAT'S MICHAEL DOVE'S WIFE. THAT WOULD BE HIS
19 BIRTH MOTHER'S SISTER-IN-LAW. JOY AND GENE BRANHAM BY
20 PHONE, MICHAEL DOVE, WHO IS HIS UNCLE BY BIRTH, BY PHONE,
21 JIM BANNISTER BY PHONE. I ALSO TALKED TO RAYMOND DOVE BY
22 PHONE AND NATALIE NOVICK-BROWN BY PHONE.

23 Q. ALL RIGHT. YOU'VE BEEN A PRESENTER BEFORE AT SEMINARS,
24 HAVE YOU NOT, BOTH FOR ATTORNEYS AND FOR SOCIAL WORKERS
25 RELATING TO CAPITAL CASES, CORRECT?

1 A. YES.

2 Q. AND YOU'VE DISCUSSED IN THOSE SEMINARS HOW TO PRESENT
3 MITIGATING EVIDENCE, CORRECT?

4 A. GENERALLY WHAT I DO IS TALK ABOUT TRAUMA OR HOW TO
5 ACCURATELY GATHER INFORMATION.

6 Q. THE PURPOSE OF GATHERING THAT INFORMATION IS TO PROVIDE
7 MITIGATING EVIDENCE, CORRECT?

8 A. CORRECT.

9 Q. EVIDENCE THAT WILL HUMANIZE THE DEFENDANT?

10 A. FOR THE MOST PART OR REALLY TELL THE LIFE STORY, THE
11 WHOLE LIFE.

12 Q. BUT INFORMATION THAT HE MURDERED SOMEONE, THAT DOESN'T
13 HUMANIZE HIM IN ANY WAY, DOES IT? IT DOESN'T MITIGATE IT IN
14 ANY WAY, DOES IT?

15 A. NO.

16 Q. NO. IT DOESN'T -- IT'S NOT MITIGATING TO SAY THAT HE'S
17 A SEXUAL SADIST, IS IT?

18 A. NO. BUT THAT IS PART OF WHAT WE WOULD INCLUDE IN A
19 PRESENTATION IF SEXUAL SADISM IS A PART OF WHAT'S FOUND TO
20 BE A PART OF THE PROBLEM.

21 Q. AND THAT IS -- THAT'S PRESENT IN THIS CASE, IS IT NOT?

22 A. YES.

23 Q. AS IS PEDOPHILIA?

24 A. YES.

25 Q. AND I BELIEVE YOU TESTIFIED EARLIER YOU WERE TOLD THAT

1 HE HAD USED A VIBRATOR ON HIS INFANT DAUGHTER?

2 A. YES.

3 Q. YOU WEREN'T TOLD THAT HE'D ACTUALLY PENETRATED HER WITH
4 HIS OWN PENIS?

5 A. I SAW INFORMATION AFTER THIS CRIME FOR WHICH HE'S BEEN
6 CHARGED IN WHICH HE SAID THAT HE DID THAT. BUT I DID NOT
7 READ THE TRANSCRIPTS, IF THERE ARE SUCH, OF THE CRIMINAL
8 SEXUAL ASSAULT TRIAL. I SAW CHARGES RELATED TO THAT. I
9 READ WHAT HAPPENED IN THE YEAR THAT WAS RELEVANT TO THE
10 SOCIAL HISTORY THAT I WAS DOING AND WHAT FACTS WERE KNOWN UP
11 UNTIL THE TIME OF THIS CRIME.

12 Q. RETURNING TO YOUR TWO MEETINGS WITH MR. BINNEY, WAS HE
13 AWARE OF THE PURPOSE OF YOUR MEETINGS?

14 A. YES.

15 Q. HE UNDERSTOOD WHY YOU WERE THERE AND THAT YOU WERE
16 TRYING TO HELP HIM, CORRECT?

17 A. I THINK TO THE EXTENT THAT HE COULD UNDERSTAND IT, YES.

18 Q. TO THE EXTENT HE COULD UNDERSTAND IT.

19 A. (AFFIRMATIVE NOD).

20 Q. HE COULDN'T UNDERSTAND WHAT YOU WERE SAYING TO HIM?

21 A. YES. OH, HE COULD UNDERSTAND. HE UNDERSTOOD. HE WAS
22 VERY COMPLIANT AND COOPERATIVE.

23 Q. NOW THE VARIOUS FAMILY MEMBERS YOU SPOKE TO OR OTHER
24 INDIVIDUALS, THEY ALSO UNDERSTOOD THE REASON WHY YOU WERE
25 CONTACTING THEM, CORRECT?

- 1 A. THAT'S CORRECT.
- 2 Q. DID THEY APPEAR -- STRIKE THAT, PLEASE. AND ALL YOUR
3 WORK WAS DONE AFTER THE NOVEMBER 2002 TRIAL, CORRECT?
- 4 A. YES.
- 5 Q. JUST IN IT FOR THE PAST FEW MONTHS. NOW YOU DIDN'T
6 PERSONALLY INTERVIEW EITHER OF MS. DOVE'S BROTHERS?
- 7 A. YES, I DID. I INTERVIEWED MICHAEL DOVE BY PHONE.
- 8 Q. OKAY. HOW ABOUT HER HALF BROTHER?
- 9 A. I DID NOT INTERVIEW HIM.
- 10 Q. YOU TESTIFIED EARLIER THAT YOU NEVER FOUND THE MEDICAL
11 RECORDS FOR MS. DOVE -- BIRTH RECORDS FOR THE APPLICANT IN
12 THIS CASE, CORRECT?
- 13 A. RIGHT.
- 14 Q. SO THERE'S NO CONTEMPORANEOUS RECORD FROM THE TIME OF
15 HIS BIRTH INDICATING THAT SHE CONSUMED ALCOHOL DURING THE
16 PREGNANCY, IS THERE?
- 17 A. NO, BUT YOU WOULDN'T EXPECT TO FIND THAT IN THE BIRTH
18 RECORD PER SAY GIVEN THAT SHE WAS LIVING IN A HOME FOR GIRLS
19 BEFORE THE BIRTH. THE CONSUMPTION OF ALCOHOL WAS IN THE
20 EARLIEST MONTHS OF PREGNANCY.
- 21 Q. AND THIS -- THIS INFORMATION COMES FROM WHERE?
- 22 A. I GOT THAT FROM MORE THAN ONE -- THE STATEMENTS THAT
23 SHE MADE IN HER VA RECORDS DURING HER OWN TREATMENTS,
24 STATEMENTS THAT JOHN MORRIS, WHO WAS IN THE FAMILY THAT SHE
25 LIVED WITH, HE HAD SEEN HER DRUNK BEFORE HE KNEW SHE WAS

1 PREGNANT. I GOT INFORMATION FROM HER FATHER THAT BEFORE SHE
2 DIED SHE TOLD HIM THAT SHE HAD DRANK TO THE POINT OF -- AND
3 TAKEN DRUGS TO THE POINT OF OVERDOSE. AND SHE ALSO TOLD MS.
4 SANDRA BINNEY THAT SHE HAD OVERDOSED WHILE SHE WAS PREGNANT
5 WITH JONATHAN.

6 Q. OKAY. WHERE IN THE VA RECORDS SPECIFICALLY ARE WE
7 TALKING ABOUT? WHERE IN THOSE THIRTEEN HUNDRED PAGES OF
8 RECORDS ARE WE TALKING ABOUT?

9 A. IF YOU'LL GIVE ME A MINUTE, I'LL TRY TO FIND MY NOTES
10 ---

11 Q. PLEASE.

12 A. --- ON THAT.

13 Q. DO YOU HAVE THE RECORD ITSELF?

14 A. I DO IN THE CAR. I'M SORRY. IT WAS IN THE VA RECORDS
15 THAT I GOT THAT SHE WAS DRINKING AT AGE FOURTEEN. SHE WAS
16 PREGNANT AT AGE FIFTEEN. SO THAT'S WHERE I GOT IT. AND SHE
17 HAD THAT IN HERE MORE THAN ONCE.

18 Q. WITH RESPECT TO THE RECORDS FROM THE VA HOSPITAL,
19 THEY'RE KIND OF -- YOU COMMUNICATED EARLIER THERE WERE
20 THIRTEEN HUNDRED PAGES?

21 A. UM-HUM (AFFIRMATIVE).

22 Q. AND MOST OF THOSE DEAL WITH HER SEEKING TREATMENT FOR
23 EITHER POST TRAUMATIC STRESS DISORDER OR MIGRAINE HEADACHES,
24 CORRECT?

25 A. AND SHE -- ALCOHOL ABUSE. SHE WENT INTO RECOVERY. SHE

- 1 WAS IN AA FOR A GOOD PART OF THAT TIME.
- 2 Q. BUT ALL OF THIS OCCURRED SUBSEQUENT TO MR. BINNEY'S
- 3 BIRTH, CORRECT?
- 4 A. THAT'S CORRECT. I HAVE THE RECORD WHERE SHE SAID THE
- 5 OVERDOSE. DO YOU WANT THE DATE?
- 6 Q. YES, MA'AM.
- 7 A. THERE WAS A SERIES OF RECORDS IN 1994 WHEN SHE WAS
- 8 BEING TREATED, 10/4/94 TO 11/1/94. SHE MADE A SUICIDE
- 9 ATTEMPT AT AGE SIXTEEN BY AN OVERDOSE OF PILLS AFTER
- 10 LEARNING THAT SHE WAS PREGNANT.
- 11 Q. BUT DIDN'T THAT -- DOESN'T THAT RECORD NOT REFLECT THAT
- 12 SHE WAS TREATED AND RELEASED?
- 13 A. YES.
- 14 Q. IT DOESN'T INDICATE THAT SHE WAS EVEN -- THAT SHE WAS
- 15 SUBMITTED OVERNIGHT, DOES IT?
- 16 A. NO, BUT THAT WAS -- NO, IT DOESN'T.
- 17 Q. DOESN'T SAY WHAT SHE TOOK AN OVERDOSE OF, DOES IT?
- 18 A. NO, IT DOESN'T.
- 19 Q. DOESN'T INDICATE HOW MANY PILLS THAT SHE MAY HAVE
- 20 TAKEN?
- 21 A. NO.
- 22 Q. AND THERE'S NO INDICATION IN THERE THAT SHE WAS USING
- 23 ALCOHOL AT THAT TIME, WAS THERE?
- 24 A. NOT ON THAT PARTICULAR STATEMENT, NO.
- 25 Q. NO. ALL RIGHT. THERE'S NO INDICATION THAT SHE'S USING

1 ALCOHOL IN THAT PARTICULAR STATEMENT DURING THE PREGNANCY,
2 IS THERE?

3 A. (NEGATIVE NOD).

4 Q. ALL RIGHT. NOW WHAT OTHER -- WHAT OTHER RECORD DO YOU
5 HAVE THAT INDICATES THAT SHE WAS USING ALCOHOL DURING HER
6 PREGNANCY?

7 A. I HAVE MY INTERVIEW WITH RAYMOND DOVE. AND I HAVE
8 STATEMENTS MS. SANDRA BINNEY MADE, WHICH SHE CAN TELL YOU
9 HERSELF THAT MS. DOVE MADE TO HER.

10 Q. YOU HAVE MS. BINNEY, THE ADOPTIVE MOTHER, HER
11 STATEMENT, CORRECT?

12 A. UM-HUM (AFFIRMATIVE).

13 Q. AND YOU HAVE ANOTHER STATEMENT BY MS. DOVE'S BROTHER,
14 CORRECT?

15 A. MS. -- NO.

16 Q. I APOLOGIZE. I DIDN'T -- THERE IS NO ---

17 A. JOHN MORRIS, THE PERSON SHE LIVED WITH. HE DOESN'T --
18 HE KNOWS THAT HE SAW HER DRUNK BEFORE HE KNEW SHE WAS
19 PREGNANT. I CAN'T SAY THAT HE KNEW THAT SHE WAS PREGNANT AT
20 THE VERY TIME THAT HE SAW HER DRUNK. BUT PRE-PREGNANCY HE
21 KNEW OR EITHER BEFORE OR DURING THE PREGNANCY HE KNEW SHE
22 WAS DRINKING TO THE POINT OF BEING DRUNK.

23 MR. SALTER: THE COURT'S INDULGENCE FOR ONE SECOND.

24 (PAUSE)

25 Q. NOW YOU READ SENTENCING PHASE PRESENTATION BY THE

1 DEFENSE, DID YOU NOT?

2 A. I DID.

3 Q. OKAY. REVEREND BINNEY TESTIFIED THAT THE BIRTH MOTHER
4 DRANK DURING THE PREGNANCY, DIDN'T HE?

5 A. I, YOU KNOW, I READ IT ALL, BUT I COULDN'T -- I'D HAVE
6 TO LOOK AT IT AGAIN TO VERIFY THAT.

7 Q. YOU DON'T DISPUTE THAT THOUGH, DO YOU?

8 A. NO.

9 Q. WITH REGARD TO THE RECORDS PERTAINING TO HER DRINKING I
10 SHOW YOU SEVERAL PAGES OF -- I BELIEVE IT'S THREE PAGES -- A
11 THREE PAGE DOCUMENT THAT WAS PROVIDED TO US BY MR. BINNEY'S
12 ATTORNEYS. IT'S DATED JUNE 28TH, 1995. AND THE TITLE OF
13 THE DOCUMENT IS POST TRAUMATIC STRESS DISORDER EXAM. DOES
14 THAT LOOK FAMILIAR?

15 A. GIVE ME A MINUTE. I'VE READ SO MANY. YES, I'VE READ
16 THIS.

17 MR. SALTER: YOUR HONOR, WE'D MOVE THAT INTO EVIDENCE
18 AS RESPONDENT'S EXHIBIT 1.

19 THE COURT: WHAT SAYS APPLICANT?

20 MS. JOHNSON: I SAW IT FOR THIRTY SECONDS. AND I'D
21 LIKE TO HAVE A ...

22 THE COURT: ALL RIGHT. WE'LL GIVE YOU A MOMENT TO LOOK
23 AT IT.

24 A. ACTUALLY, I THINK I'VE SEEN THIS. I'M NOT SURE. I
25 WOULD HAVE TO LOOK AT IT IN THE CONTEXT OF ALL THE RECORDS

1 I'VE READ 'CAUSE THERE WERE, LIKE I SAID, THERE WERE
2 THIRTEEN HUNDRED PAGES I THINK THAT I'VE READ THROUGH. SO
3 I'D HAVE TO LOOK AT THIS IN THE CONTEXT OF THAT. IT LOOKS
4 FAMILIAR, BUT I'M NOT SURE.

5 THE COURT: ALL RIGHT. LET'S TAKE A MOMENT AND LET
6 COUNSEL LOOK AT IT.

7 (PAUSE)

8 MS. JOHNSON: I HAVE NO OBJECTION.

9 THE COURT: ALL RIGHT. LET'S TAKE A MOMENT WHILE
10 THAT'S MARKED AS RESPONDENT'S 1.

11 (WHEREUPON RESPONDENT'S EXHIBIT 1 WAS MARKED AND
12 ENTERED INTO EVIDENCE)

13 Q. DR. ANDREWS, ---

14 THE COURT: JUST BEFORE YOU DO THAT, LET'S JUST HAVE A
15 -- COUNSEL, MS. JOHNSON, STEP UP AND LET'S HAVE A BENCH
16 CONFERENCE IF WE MAY WITH MR. SALTER AND MS. JOHNSON.

17 A. MAY I LOOK AT THAT?

18 THE COURT: GO AHEAD. YOU CAN BE LOOKING AT THAT IF
19 YOU WILL. CAN Y'ALL COME UP? PLEASE DO.

20 (WHEREUPON A BENCH CONFERENCE WAS HELD OFF THE RECORD)

21 (WHEREUPON COURT WAS IN RECESS AT 5:14 PM)

22 THE COURT: PLEASE ASK YOUR NEXT QUESTION.

23 MR. SALTER: ALL RIGHT. THANK YOU.

24 Q. DR. ANDREWS, THE DOCUMENT I JUST HANDED YOU,
25 RESPONDENT'S EXHIBIT 1, THAT'S THE DOCUMENT THAT'S SIMILAR

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- 1 TO MANY OTHER DOCUMENTS IN THE VA RECORDS, IS IT NOT?
- 2 A. THAT'S CORRECT.
- 3 Q. IT INDICATES ---
- 4 A. AND I HAVE ---
- 5 Q. --- SHE STARTED DRINKING AT FOURTEEN?
- 6 A. I'M SORRY?
- 7 Q. SHE STARTED DRINKING AT FOURTEEN IS WHAT THAT DOCUMENT
- 8 INDICATES?
- 9 A. IT'S SEVERAL TIMES IN THE VA RECORDS. I DON'T -- I
- 10 DIDN'T SEE IT ON THIS ONE, BUT IT'S IN THE VA RECORDS.
- 11 Q. WELL, THOSE RECORDS INDICATE THAT SHE STARTED DRINKING
- 12 AT FOURTEEN AND THAT HER DRINKING PROGRESSED AS SHE GOT
- 13 OLDER, CORRECT?
- 14 A. THAT'S CORRECT.
- 15 Q. BUT THOSE RECORDS, AGAIN, DON'T INDICATE THAT SHE DRANK
- 16 DURING HER PREGNANCY?
- 17 A. SHE WAS PREGNANT WHEN SHE WAS FIFTEEN.
- 18 Q. BUT THEY DON'T ---
- 19 A. AND SIXTEEN.
- 20 Q. --- BUT THE RECORDS DO NOT REFLECT THAT SHE WAS
- 21 DRINKING DURING THE TIME OF HER PREGNANCY?
- 22 A. I COULDN'T ANSWER -- THIS RECORD DOES NOT. BUT I'D
- 23 HAVE TO REVIEW ALL OF THE RECORDS TO MAKE SURE OF THAT
- 24 'CAUSE I KNOW THAT SHE TOOK, I MEAN, THE RECORDS DO SAY THAT
- 25 SHE TOOK THE DRUGS. I'D HAVE TO DOUBLE CHECK TO MAKE SURE

1 THEY DON'T MENTION THE ALCOHOL.

2 MR. SALTER: WELL, YOUR HONOR, IN LIGHT OF THAT
3 RESPONSE I WOULD MOVE TO INTRODUCE A SOCIAL WORKS -- SERVICE
4 REPORTS AND SUMMARIES THAT WERE PREVIOUSLY SHOWN TO OPPOSING
5 COUNSEL AS RESPONDENT'S EXHIBIT 2.

6 (WHEREUPON RESPONDENT'S EXHIBIT 2 WAS MARKED FOR
7 IDENTIFICATION)

8 Q. DR. ANDREWS, I'D SHOW YOU NOW WHAT'S BEEN MARKED AS
9 RESPONDENT'S EXHIBIT 2 ---

10 THE COURT: AND, COUNSEL, JUST SO -- IS THERE AN
11 OBJECTION TO RESPONDENT'S 2?

12 MS. JOHNSON: NO, YOUR HONOR.

13 THE COURT: WITHOUT OBJECTION RESPONDENT'S 2 IN
14 EVIDENCE.

15 (WHEREUPON RESPONDENT'S EXHIBIT 2 WAS ENTERED INTO
16 EVIDENCE)

17 Q. AND I WOULD ASK YOU TO TURN TO PAGE FOUR AND UNDER THE
18 ROMAN NUMERAL II, IF YOU WOULD REVIEW THAT INFORMATION.

19 A. OKAY.

20 Q. NOW THAT DOCUMENT IS CONSISTENT WITH WHAT WE WERE JUST
21 TALKING ABOUT, IS IT NOT?

22 A. THAT'S CORRECT. YES.

23 Q. WITH RESPECT TO THE HOME FOR UNWED MOTHERS IN
24 HATTIESBURG, DOES NOT THE INFORMATION DEVELOPED BY YOU OR
25 MS. LEONARD INDICATE THAT THIS WAS A PLACE THAT MS. DOVE DID

1 NOT LIKE?

2 A. ACTUALLY I HAD MIXED INFORMATION ABOUT THAT BECAUSE AT
3 ONE POINT IN THE VA RECORDS SHE INDICATED THAT SHE HAD A
4 POSITIVE RELATIONSHIP WITH A PERSON THERE. WE HAVE
5 INFORMATION THAT SHE SANG IN THE CHOIR THERE. SO I KNOW
6 THAT THE HOME WAS LATER OR THE PERSON RUNNING THE HOME AND
7 THE HOME WAS LATER CHARGED WITH SERIOUS PROBLEMS, BUT I
8 DIDN'T HAVE DIRECT INFORMATION ABOUT THE TIME WHEN SHE WAS
9 THERE. SO I CAN'T DRAW THAT CONCLUSION. IT WAS MIXED
10 INFORMATION.

11 Q. YOU WERE GIVEN SOME INFORMATION THOUGH THAT SHE WROTE
12 WHAT SOME OF HER FRIENDS PERCEIVED TO BE CODED MESSAGES?

13 A. THAT'S CORRECT. APPARENTLY MS. MORRIS SAID THAT HER
14 COMMUNICATION FROM THE GIRL'S HOME WAS WRITTEN IN SCRIPTURAL
15 LANGUAGE AND THAT SHE'D FELT LIKE GAYLE WAS ASKING FOR HELP.
16 IT DIDN'T SOUND LIKE GAYLE. IT DIDN'T SOUND LIKE BASICALLY,
17 IN MY LANGUAGE, A SPONTANEOUS LETTER FROM GAYLE. AND THEY
18 WERE CONCERNED ABOUT HOW RESTRICTIVE THAT HOME MIGHT BE ON
19 HER. AND APPARENTLY THERE WAS CENSORING OF COMMUNICATION
20 THAT WENT OUT FROM THE HOME.

21 Q. BUT THERE'S NO INDICATION THAT SHE WOULD HAVE DRUGS, OR
22 ALCOHOL OR ANYTHING LIKE THAT WHILE SHE WAS IN THIS HOME?

23 A. NO.

24 Q. IN FACT, TO THE CONTRARY, IT WAS EXTREMELY STRICT,
25 CORRECT?

1 A. CORRECT. THAT DOESN'T MEAN IT WASN'T THERE, BUT I
2 DON'T HAVE ANY REASON TO DRAW A CONCLUSION THAT IT WAS. BUT
3 AGAIN, SHE DID NOT GO TO THAT HOME UNTIL SHE WAS SEVERAL
4 MONTHS PREGNANT.

5 Q. OKAY. YOU READ DR. SCHWARTZ-WATTS' TESTIMONY?

6 A. I DID. YES, I DID. IN THE MITIGATION PHASE, YES. I
7 MEAN THE SENTENCING PHASE.

8 Q. NOW SHE TESTIFIED, DID SHE NOT, THAT THE BIRTH MOTHER,
9 MS. DOVE, DRANK DURING THE PREGNANCY?

10 A. THAT SHE HAD INFORMATION THAT SHE DID, YES.

11 Q. OKAY. SHE ALSO TESTIFIED, I BELIEVE, TO THE EARLIER
12 DIAGNOSIS OF HD, I'M SORRY, ADHD?

13 A. YES.

14 Q. CORRECT? SHE ALSO TESTIFIED ABOUT IMPULSIVITY?

15 A. YES.

16 Q. AND STEALING?

17 A. YES.

18 Q. JOB INSTABILITY?

19 A. I BELIEVE SO. YOU KNOW, I'D HAVE TO RE-READ THE
20 DETAILS OF IT, BUT SHE SEEMED TO HAVE SOME OF THAT
21 INFORMATION.

22 Q. AND THERE'S NO EVIDENCE OF ANY PRENATAL BIRTH
23 DEFICIENCY, IS THERE, IN WHICH YOU'RE AWARE OF?

24 A. I DON'T HAVE THE INFORMATION. I DON'T KNOW THAT
25 THERE'S NOT OR THAT THERE IS. I DO KNOW THAT HE WAS VERY

- 1 TINY.
- 2 Q. BUT YOU DON'T HAVE ANY -- THERE'S NOTHING IN THE
- 3 RECORDS THAT INDICATE -- APPROXIMATELY SIX POUNDS OR MORE?
- 4 A. WHEN HE WAS BORN, RIGHT.
- 5 Q. YES.
- 6 A. UM-HUM (AFFIRMATIVE).
- 7 Q. THAT'S NORMAL SIZE.
- 8 A. THAT'S NOT UNUSUAL. YES.
- 9 Q. OKAY. AND THERE'S NO RECORD INDICATING ANY KIND OF
- 10 PRENATAL DIFFICULTY OR ANYTHING 'CAUSE YOU WERE NOT ABLE TO
- 11 GET THOSE -- ANY KIND OF RECORD ---
- 12 A. RIGHT. THE RECORD SIMPLY DOESN'T EXIST, THAT'S RIGHT,
- 13 OR ISN'T AVAILABLE TO US.
- 14 Q. WITH RESPECT TO MR. BINNEY'S EMPLOYMENT AT THE CAR
- 15 DEALERSHIP, YOU INDICATED, I THINK, THAT HE DID SOME
- 16 INAPPROPRIATE BEHAVIOR, ENGAGED IN SOME INAPPROPRIATE
- 17 BEHAVIOR WHILE THERE AND WAS DISMISSED, CORRECT?
- 18 A. THAT'S NOT WHY HE WAS DISMISSED. I UNDERSTAND HE WAS
- 19 DISMISSED BECAUSE HE HAD AN ACCIDENT IN ONE OF THE COMPANY
- 20 CARS.
- 21 Q. ISN'T IT TRUE THAT WHAT HE WAS DOING WAS HE WAS GOING
- 22 UP THERE AT NIGHT AND STEALING A CAR AND GOING JOY-RIDING IN
- 23 IT?
- 24 A. I DON'T HAVE THAT INFORMATION. I WASN'T ABLE TO
- 25 INTERVIEW THE PERSON BECAUSE HE'S DECEASED.

1 Q. YOU DID TALK TO SOMEONE ABOUT HIM SUPPOSEDLY "PLAYING
2 THE ROLE OF A POLICE OFFICER?"

3 A. UM-HUM (AFFIRMATIVE).

4 Q. HE WASN'T JUST PLAYING THE ROLE OF A POLICE OFFICER, HE
5 WAS IMPERSONATING ONE, WAS HE NOT?

6 A. HE WAS -- I'M NOT SURE WHAT THE DIFFERENCE BETWEEN
7 PLAYING AND IMPERSONATING IS, BUT HE WAS PRETENDING TO BE A
8 POLICE OFFICER.

9 Q. HE STOPPED SOMEONE AS IF HE WERE A POLICE OFFICER,
10 CORRECT?

11 A. I DON'T, I MEAN, I THINK SO.

12 Q. YOU INDICATED THAT HE PREFERS THE ROLE OF A CHILD?

13 A. HE -- I WAS -- I GAVE THAT COMMENT IN THE CONTEXT OF
14 INSTEAD OF ASSUMING WHAT MIGHT BE CONSIDERED A TYPICAL MALE
15 GENDER ROLE IN OUR CULTURE. HE IS AFFECTIONATE, FOR
16 INSTANCE, AS A FATHER. HE WAS AFFECTIONATE WITH ISAAC, BUT
17 HE HAD A HARD TIME ASSUMING THE ROLE OF KEEPING A JOB,
18 BEHAVING IN WAYS THAT A RESPONSIBLE ADULT MALE WOULD BEHAVE.

19 Q. ALL RIGHT. YOU INDICATED THAT OF HIS -- SOMEHOW -- IT
20 WAS A NEGATIVE THAT HE INDICATED ON THE COLLEGE APPLICATION
21 THAT HE DIDN'T KNOW WHAT HE WANTED TO DO WITH HIS LIFE, IS
22 THAT CORRECT?

23 A. IT WAS THE WAY HE PHRASED IT THAT HE HADN'T THOUGHT
24 ABOUT WHAT HE WOULD LIKE TO DO WHEN HE GRADUATES.

25 Q. DON'T MANY PEOPLE WHO ENTER COLLEGE ---

- 1 A. THEY MIGHT NOT ---
- 2 Q. --- NOT KNOW WHAT THEY WANT TO DO?
- 3 A. --- KNOW WHAT THEIR MAJOR IS, BUT THEY OFTEN WILL --
- 4 WHEN YOU WRITE A JOB APPLICATION YOU OFTEN ARE TRYING TO BE
- 5 IMPRESSIVE. SO EVEN IF YOU'RE NOT SURE YOU'LL SAY I'M NOT
- 6 SURE, BUT I'M THINKING ABOUT THIS, THIS AND THAT AND WILL
- 7 OFFER SOME EXPECTATION OF WHAT A COLLEGE EDUCATION MIGHT DO
- 8 FOR YOU.
- 9 Q. THROUGHOUT THE COURSE OF HIS ADOLESCENCE I BELIEVE YOU
- 10 INDICATED HE HAD A FEW FRIENDS?
- 11 A. RIGHT, A FEW REGULAR FRIENDS.
- 12 Q. FEW REGULAR FRIENDS? COULD THAT IN PART NOT BE BECAUSE
- 13 HIS PARENTS WERE VERY STRICT?
- 14 A. IN PART, BUT IT WAS ALSO IN PART BECAUSE OF HIS
- 15 BEHAVIOR PROBLEMS.
- 16 Q. NOW WASN'T THERE EVIDENCE THAT YOU REVIEWED THAT
- 17 INDICATED A SUICIDE ATTEMPT, I BELIEVE, AT AGE FOURTEEN?
- 18 A. I'D HAVE TO CHECK THE DATE ON THAT. LET ME LOOK AT MY
- 19 NOTES. I HAVE ONE AT AGE SEVENTEEN, THAT HE TALKED ABOUT
- 20 IT. I DON'T THINK I HAVE ONE AT AGE FOURTEEN. DID I SAY
- 21 FOURTEEN?
- 22 Q. PERHAPS I GOT THE AGE WRONG. BUT ISN'T IT -- BUT THERE
- 23 WAS A SUICIDE ATTEMPT WHERE A FRIEND OF HIS FOUND HIM,
- 24 CORRECT? AND HE GOT ASSISTANCE FOR HIM?
- 25 A. I'M NOT AWARE OF THAT.

1 Q. YOU'RE NOT AWARE OF -- YOU'RE NOT AWARE OF THAT RECORD?

2 (PAUSE)

3 Q. WHEN WE WERE DISCUSSING THE STEALING I BELIEVE YOU
4 INDICATED HE'D OFTEN STEAL THINGS IMPULSIVELY WITHOUT ANY
5 THOUGHT -- ANY REAL THOUGHTS AS TO WHY HE SHOULD STEAL THE
6 ITEM, CORRECT? IS THAT WHAT I UNDERSTOOD YOU ---

7 A. WELL, HE TYPICALLY STOLE THEM BECAUSE HE THOUGHT HE
8 WANTED TO USE THEM FOR SOMETHING RIGHT THEN AND THERE. IT
9 WAS AN IMPULSIVE KIND OF THING AND HE WOULD STEAL THEM.

10 I WAS USING THAT AS SORT OF A COMPARISON FOR MANY
11 PEOPLE ENGAGED IN STEALING BECAUSE THEY'RE GOING TO, FOR
12 INSTANCE, ROB SOMEONE'S HOUSE AND THEN SELL IT IN ORDER TO
13 GET MONEY FOR DRUGS OR SOMETHING LIKE THAT. THAT WAS NOT
14 HIS -- HE DID THINGS ON THE SPUR OF THE MOMENT, STOLE CARS,
15 STOLE ELECTRONICS, THINGS THAT HE WANTED TO USE JUST FOR
16 HIMSELF, FOR THE MOMENT.

17 Q. YOU TALKED ABOUT MR. BINNEY'S PROBLEMS WITH HIS GENDER
18 IDENTITY.

19 A. YES.

20 Q. AND BEING TRANSVESTITE, CORRECT?

21 A. WELL, HE HASN'T -- I DON'T KNOW THAT I WOULD CALL HIM A
22 TRANSVESTITE. HE HAS AN INTEREST IN WOMEN'S CLOTHING.

23 Q. AND HE STOLE WOMEN'S CLOTHES, CORRECT?

24 A. RIGHT.

25 Q. OKAY. NOW BACKTRACKING TO A MOMENT AGO WITH RESPECT TO

1 DR. WATTS' INFORMATION CONCERNING THE DRINKING, THAT
2 INFORMATION SHE HAD WAS MS. BINNEY, CORRECT?

3 A. I DON'T ---

4 Q. SANDRA BINNEY?

5 A. I DON'T KNOW WHAT HER SOURCE WAS ON THAT.

6 MR. SALTER: NOTHING FURTHER, YOUR HONOR.

7 THE COURT: THANK YOU. AND IS THERE REDIRECT?

8 MS. JOHNSON: YES.

9 REDIRECT EXAMINATION BY MS. JOHNSON:

10 Q. SO YOU ARE OPPOSED TO THE DEATH PENALTY. DOES THAT
11 ALTER YOUR ANALYSIS OF MITIGATING FACTORS?

12 A. NO.

13 Q. DO YOU -- HAVE YOU REPORTED SOME NEGATIVE INFORMATION
14 ABOUT MR. BINNEY THAT'S NOT IN THE PUBLIC RECORD?

15 A. I DON'T KNOW. I HAVEN'T SORT OF BALANCED WHAT WAS IN
16 THE PUBLIC RECORD AND WHAT I FOUND IN MY INTERVIEWS. BUT I
17 TRY TO BE BALANCED AND REPORT THAT WHICH WAS NEGATIVE AS
18 WELL AS THAT WHICH WAS POSITIVE.

19 Q. MR. SALTER ASKED YOU WHETHER YOU HAD THIS INFORMATION
20 AT THE TIME OF THE 2002 TRIAL AND YOU SAID YOU DID NOT HAVE
21 IT. COULD YOU HAVE COLLECTED SUCH INFORMATION IN 2002?

22 A. YES.

23 Q. AND WERE YOU, IN FACT, PERFORMING SIMILAR ASSESSMENTS
24 IN 2002?

25 A. YES.

1 Q. IF YOU WOULD, EXAMINE THESE AND TELL ME WHETHER YOU
2 RECOGNIZE THEM AS FROM THE VA RECORDS?

3 A. YES.

4 Q. AND DOES THE FIRST ONE REFLECT A REPORT BY MS. DOVE
5 THAT SHE TRIED TO OVERDOSE USING GIN AND ANOTHER DRUG?

6 A. GIVE ME A MINUTE. IT'S HANDWRITTEN, SO ... YES.
7 1973, TOOK VALIUM AND ONE BOTTLE OF GIN.

8 Q. SO THE VA RECORDS REFLECT ---

9 MS. JOHNSON: ACTUALLY I'D LIKE TO MARK ALL OF THESE
10 FOR IDENTIFICATION.

11 A. DO I NEED TO SEE IF ---

12 Q. YES, IF YOU'D LOOK JUST BRIEFLY.

13 A. OKAY.

14 Q. AND DO THESE RECORDS ALSO REFLECT DRINKING -- A VA
15 REPORT OF DRINKING AT THE AGE OF FOURTEEN OR FIFTEEN?

16 A. YES. SHE STARTED DRINKING AT AGE FOURTEEN.

17 Q. AND NOW MR. SALTER SAID TO YOU YOU DO NOT HAVE
18 INFORMATION THAT SAYS IN THESE RECORDS THAT SHE WAS DRINKING
19 WHILE SHE WAS PREGNANT, IS THAT CORRECT?

20 A. HE SAID THAT, YES.

21 Q. AND THERE ISN'T SOMETHING IN THE RECORD THAT SAYS,
22 WHILE I WAS PREGNANT I WAS DRINKING?

23 A. THAT'S CORRECT.

24 MS. JOHNSON: ACTUALLY, I'D LIKE TO MARK THESE AS
25 APPLICANT'S 3, I BELIEVE.

1 A. ALTHOUGH 1973 WOULD BE ---

2 MS. JOHNSON: I THINK -- I THINK YOU NEED TO WAIT FOR
3 THE ---

4 THE COURT: TAKE JUST ONE MOMENT. THANK YOU. WE'LL
5 LET HER MARK THOSE.

6 (WHEREUPON APPLICANT'S EXHIBIT 3 WAS MARKED FOR
7 IDENTIFICATION)

8 THE COURT: AND IS THERE AN OBJECTION TO APPLICANT'S 3?

9 MR. SALTER: NO, SIR, YOUR HONOR.

10 THE COURT: WITHOUT OBJECTION, APPLICANT'S 3 IN
11 EVIDENCE.

12 (WHEREUPON APPLICANT'S EXHIBIT 3 WAS ENTERED INTO
13 EVIDENCE)

14 Q. SO YOU'VE DISCUSSED THAT YOU HAVE A NUMBER OF SOURCES
15 FOR HER DRINKING AT THAT TIME PERIOD, THE VA RECORDS, A
16 NUMBER OF THOSE ENTRIES. AND CAN YOU REVIEW WHAT THE OTHER
17 SOURCES ARE?

18 A. THE OTHER SOURCES ABOUT HER DRINKING ARE THE
19 CONVERSATION I HAD WITH HER FATHER. AND OBVIOUSLY I WASN'T
20 ABLE TO INTERVIEW HER SINCE SHE WAS DECEASED. BUT HE, HER
21 -- SHE TOLD HIM THAT SHE HAD DRANK WHILE SHE WAS PREGNANT.
22 MS. SANDRA BINNEY TOLD ME THAT. AND THE -- JOHN MORRIS JUST
23 KNEW THAT SHE WAS DRINKING BEFORE HE KNEW SHE WAS PREGNANT.
24 AND ---

25 Q. AND DOES JOHN MORRIS KNOW MR. BINNEY? HAS HE MET HIM?

1 A. NO.

2 Q. AND YOU DID NOT BECOME AWARE OF ANY REASON THAT HE
3 WOULD HAVE TO LIE ABOUT THIS?

4 A. NO.

5 Q. AND THESE RECORDS WERE ALL MADE LONG BEFORE MR. BINNEY
6 WAS CHARGED WITH ANY CRIME?

7 A. YES.

8 Q. AND SO WHEN YOU -- YOU INFERRED FROM ALL OF THESE, AS
9 YOU SAID YOU DID, THAT HE WAS INFLUENCED BY PRENATAL
10 EXPOSURE TO ALCOHOL. DO YOU FEEL UNCOMFORTABLE WITH THE
11 FACT THAT THERE IS NOTHING THAT SAYS IN A RECORD THAT SHE
12 DRANK WHILE SHE WAS PREGNANT?

13 A. NO, I DON'T. I FEEL FAIRLY CERTAIN THAT SHE DRANK
14 WHILE SHE WAS PREGNANT.

15 Q. THANK YOU.

16 THE COURT: ALL RIGHT. ANY OBJECTION TO THE RELEASE
17 NOW OF THE WITNESS?

18 MR. SALTER: YOUR HONOR, IF I MIGHT JUST HAVE TWO
19 QUESTIONS?

20 THE COURT: WELL, ON WHAT ISSUE, COUNSEL? I GENERALLY
21 DON'T ALLOW RECROSS.

22 MR. SALTER: JUST IN -- ONE IS TO INTRODUCE A RECORD
23 AND A RESPONSE TO THE RECORD THAT WAS JUST INTRODUCED INTO
24 EVIDENCE, EXHIBIT 3.

25 MS. JOHNSON: I HAVE NO OBJECTION TO THE INTRODUCTION

1 OF THE RECORD.

2 THE COURT: ALL RIGHT. LET'S TAKE -- WE'LL ALLOW THAT.
3 LET'S TAKE A MOMENT AND MARK IT.

4 MR. SALTER: THANK YOU, YOUR HONOR. I APOLOGIZE, YOUR
5 HONOR.

6 THE COURT: THAT'S FINE.

7 MR. SALTER: I DIDN'T REALIZE I WOULDN'T BE GIVEN THAT
8 OPPORTUNITY OR I WOULD HAVE CERTAINLY DONE THIS EARLIER.

9 THE COURT: ALL RIGHT.

10 (WHEREUPON RESPONDENT'S EXHIBIT 3 WAS MARKED FOR
11 IDENTIFICATION)

12 THE COURT: ALL RIGHT. AND WHAT NUMBER IS THAT, 3?

13 MADAME COURT REPORTER: YES, SIR.

14 THE COURT: ALL RIGHT. RESPONDENT'S 3 IN EVIDENCE
15 WITHOUT OBJECTION.

16 (WHEREUPON RESPONDENT'S EXHIBIT 3 WAS ENTERED INTO
17 EVIDENCE)

18 RECROSS EXAMINATION BY MR. SALTER:

19 Q. DR. ANDREWS, I'LL SHOW YOU RESPONDENT'S EXHIBIT 3 AND
20 DIRECT YOU TO THE PARAGRAPH MARKED ON THE FIRST PAGE, DANGER
21 TO SELF AND OTHERS, THE VERY LAST SENTENCE OF THAT
22 PARAGRAPH.

23 A. SHE'S CURRENTLY ON ZOLOFT? IS THAT THE ONE ---

24 Q. NO, MA'AM. THE VERY LAST SENTENCE OF THE PARAGRAPH
25 UNDER THREAT TO SELF AND OTHERS.

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1 A. SHE WAS TAKEN TO A HOSPITAL AND RELEASED THE SAME DAY.

2 Q. THANK YOU.

3 MR. SALTER: NOTHING FURTHER, YOUR HONOR.

4 THE COURT: ALL RIGHT. ANY REDIRECT ON THAT ONE ISSUE?

5 MS. JOHNSON: NO, YOUR HONOR.

6 THE COURT: ANY OBJECTION TO THE RELEASE OF THE
7 WITNESS?

8 MR. SALTER: NO, YOUR HONOR.

9 MS. JOHNSON: NO.

10 THE COURT: ALL RIGHT. HEARING NONE, THEN, MA'AM, YOU
11 ARE FREE TO STEP DOWN AND FREE TO LEAVE IF YOU WISH.

12 A. THANK YOU.

13 THE COURT: THANK YOU. ALL RIGHT. COUNSEL, WE ARE
14 GOING TO ADJOURN NOW FOR THE DAY. LET ME MAKE THIS
15 SUGGESTION TO SPEED THIS PROCESS. TOMORROW MORNING I'D LIKE
16 FOR YOU TO ARRIVE BEFORE COURT TIME. AND IF YOU HAVE
17 EXHIBITS YOU'RE GOING TO OFFER, LET'S GO AHEAD AND MARK
18 THEM. AND THAT WAY WE'LL SAVE A LOT OF TIME WHILE WE WAIT,
19 BREAK DOWN, STOP AND DECIDE WHETHER SOMETHING'S GOING TO BE
20 IN EVIDENCE.

21 SO IF YOU HAVE DOCUMENTS YOU WISH TO MARK, WHAT I'D ASK
22 YOU TO DO, IF YOU ALL WILL BE HERE BY NINE TO DO THAT. OUR
23 COURT REPORTER, I'LL ASK HER TO BE HERE SHORTLY AFTER NINE.
24 I'LL COME IN AT -- I'LL BE HERE BY THEN, BUT I PLAN TO START
25 TOMORROW MORNING AT 9:30 BACK IN THE TESTIMONY OF THE TRIAL.

1 ALL RIGHT.

2 WILL THERE BE ANY ISSUES THAT WE'LL NEED TO TAKE UP FOR
3 DISCOVERY, IN LIMINE PURPOSE OR ANYTHING ELSE BEFORE WE GO
4 DIRECTLY TO TESTIMONY TOMORROW FROM THE APPLICANT?

5 MR. BLUME: NOT THAT I'M AWARE OF, YOUR HONOR.

6 THE COURT: FROM THE STATE?

7 MR. SALTER: NONE IN WHICH WE'RE AWARE OF AT THIS TIME.

8 THE COURT: VERY GOOD. ANYTHING BEFORE WE CLOSE THE
9 RECORD FOR THE DAY?

10 MR. BLUME: JUST IN CASE -- JUST FOR SCHEDULING
11 PURPOSES, I BELIEVE THAT WE ARE STILL ON TRACK TO FINISH
12 TOMORROW.

13 THE COURT: GOOD. VERY GOOD. AND I'M NOT TRYING TO
14 RUSH OR STAMPEDE ANYONE, JUST SIMPLY TRYING TO REMAIN ON
15 COURSE. THIS IS A SHORT WEEK. AND I WANT TO MAKE SURE
16 WE'RE ABLE TO COMPLETE IN A TIMELY FASHION. ALL RIGHT.

17 MR. SALTER, ANYTHING FOR THE RECORD, OR MR. MABRY,
18 BEFORE WE CLOSE FOR THE DAY?

19 MR. SALTER: NO, SIR, YOUR HONOR.

20 THE COURT: ALL RIGHT, THEN. LADIES AND GENTLEMEN,
21 THIS COURT IS ADJOURNED UNTIL 9:30 TOMORROW MORNING.

22 (WHEREUPON COURT WAS IN RECESS AT 5:38 PM)

23 WEDNESDAY, MAY 30, 2007:

24 (WHEREUPON RESPONDENT'S EXHIBITS 4 - 9 WERE MARKED FOR
25 IDENTIFICATION)

1 (WHEREUPON APPLICANT'S EXHIBITS 4 - 9 WERE MARKED FOR
2 IDENTIFICATION)

3 THE COURT: ALL RIGHT. LADIES AND GENTLEMEN, PLEASE BE
4 SEATED. ALL RIGHT. WELCOME BACK TO THE COURTROOM EVERYONE.
5 LET ME BEGIN THIS MORNING WITH A FEW MATTERS OF
6 HOUSEKEEPING.

7 FIRST, AND I DON'T LIKE TO INTERRUPT THE PROCEEDINGS
8 WHEN WE'RE IN THE MIDDLE OF SOMETHING. IT'S DISCONCERTING
9 TO THE WITNESS, IT BREAKS THE CONTINUITY OF THE PROCEEDINGS,
10 BUT YESTERDAY WE HAD SOME CELL PHONES THAT WENT OFF IN THE
11 COURTROOM.

12 I WANT TO ASK EVERYONE TO MAKE SURE THAT YOUR CELL
13 PHONES ARE OFF. IF WE TAKE A BREAK AND PEOPLE TURN THEIR
14 CELL PHONES ON, PLEASE MAKE SURE THEY'RE TURNED OFF. IF
15 SOMEONE ELSE'S CELL PHONE GOES OFF OR IF IT BEEPS OR BUZZES
16 OR MAKES THE LEAST NOISE THAT WE HEAR, WE'RE GOING TO SEIZE
17 THAT CELL PHONE FOR THE REMAINDER OF THIS TRIAL AND MAY
18 IMPOSE OTHER PENALTIES IN ADDITION. THANK YOU FOR COMPLYING
19 WITH THE SUPREME COURT'S RULES.

20 NOW SECONDLY, I WANT TO MAKE SURE THAT COUNSEL TODAY IN
21 QUESTIONING WITNESSES, PLEASE TRY NOT TO OR TO AVOID TALKING
22 OVER THE WITNESS. AND PLEASE SPEAK CLEARLY SO OUR COURT
23 REPORTER IS ABLE TO MAKE SURE THAT THE RECORD TAKEN DOWN IS
24 AN ACCURATE RECORD OF THESE PROCEEDINGS.

25 AND THEN FINALLY, BUT MOST IMPORTANTLY, YESTERDAY MR.

1 BINNEY, I AM ADVISED THAT YOU MADE AN OBSCENE GESTURE IN
2 THIS COURTROOM BY WHAT I CALL AND WHAT THE RECORD SHOULD
3 REFLECT IS SHOOTING A BIRD AT ONE OF OUR SECURITY OFFICERS.
4 AND THAT'S OFFICER GRUBB.

5 OFFICER GRUBB DID NOT REPORT THIS TO THE COURT. THIS
6 WAS SEEN BY A THIRD PERSON WHO OBSERVED IT, REPORTED IT TO
7 ME AFTER THE PROCEEDINGS. IT WAS ALSO SEEN BY ONE OF YOUR
8 ATTORNEYS, MS. PAAVOLA, WHO MADE NO REMARK ABOUT IT AND WHO
9 DID NOT INFORM THE COURT ABOUT IT. BUT I'M GOING TO TELL
10 YOU, SIR, IF YOU DO SOMETHING OF THAT NATURE AGAIN, YOU'RE
11 GOING TO BE REMOVED FROM THIS COURTROOM FOR THE REST OF THIS
12 PROCEEDING AND YOU WILL NOT BE HERE FOR THIS PROCEEDING. DO
13 YOU UNDERSTAND THAT?

14 MR. BINNEY: YES.

15 THE COURT: DO YOU HAVE ANY QUESTION ABOUT THAT?

16 MR. BINNEY: NO.

17 THE COURT: ALL RIGHT. NOW IS THERE ANYTHING FOR OUR
18 RECORD BEFORE WE GO FURTHER?

19 MR. SALTER: YES, SIR, YOUR HONOR, JUST BRIEFLY. IN A
20 CONVERSATION LAST NIGHT WITH MY SUPERVISOR IN COLUMBIA I
21 UNDERSTAND THAT WE WERE -- WE WERE ABLE TO ACTUALLY FIND
22 SUPPLEMENTAL DISCOVERY RESPONSES THAT WERE DATED THE 22ND OF
23 MAY, BUT THEY WERE NOT RECEIVED INTO OUR OFFICE UNTIL
24 YESTERDAY EVENING.

25 THESE INCLUDED THE TRANSCRIPT THAT HAD BEEN REFERRED TO

1 YESTERDAY, A FEDERAL TRANSCRIPT OF A GUILTY PLEA, ALSO
2 INCLUDED -- INCLUDED SOME OTHER MATTERS. BUT IT DID NOT
3 INCLUDE ANY REFERENCE TO DR. ADLER, WHOM WE MENTIONED
4 EARLIER.

5 THE COURT: ALL RIGHT. THANK YOU. ANYTHING FOR OUR
6 RECORD FROM APPLICANT BEFORE WE GO FORWARD?

7 MR. BLUME: NO, SIR, YOUR HONOR.

8 THE COURT: MR. BLUME, YOU READY TO CALL YOUR NEXT
9 WITNESS? OR MS. JOHNSON? PLEASE CALL YOUR NEXT WITNESS.

10 MS. JOHNSON: JAMES AIKEN.

11 JAMES AIKEN, BEING DULY
12 SWORN TESTIFIED AS FOLLOWS:

13 MR. AIKEN: GOOD MORNING, SIR.

14 THE COURT: GOOD MORNING. AND PLEASE BEGIN BY STATING
15 YOUR FULL NAME AND SPELLING YOUR LAST FOR US, SIR.

16 MR. AIKEN: YES, SIR. MY NAME IS JAMES EVANS AIKEN,
17 A-I-K-E-N.

18 THE COURT: COUNSEL.

19 DIRECT EXAMINATION BY MS. JOHNSON:

20 Q. GOOD MORNING, MR. AIKEN.

21 A. GOOD MORNING.

22 Q. WHERE ARE YOU PRESENTLY EMPLOYED?

23 A. I'M PRESENTLY EMPLOYED AS PRESIDENT OF JAMES C. AIKEN
24 AND ASSOCIATES, INC.

25 Q. AND WHAT DOES THAT COMPANY DO?

1 A. IT IS A PRISON CONSULTING FIRM.

2 Q. AND CAN YOU EXPLAIN WHAT THAT MEANS?

3 A. YES. WHAT WE DO IS PROVIDE EXPERT TESTIMONY. WE HAVE
4 PROVIDED EXPERT ASSISTANCE TO CORRECTIONAL AGENCIES AS WELL
5 AS EMPLOYEES OF CORRECTIONAL AGENCIES ON THE FEDERAL, STATE
6 AND LOCAL LEVEL AS WELL AS INTERNATIONALLY.

7 Q. AND WHERE HAVE YOU GIVEN THAT ASSISTANCE TO, WHAT
8 LOCATIONS?

9 A. JUST ABOUT EVERY STATE IN THE UNITED STATES AS WELL AS
10 CANADA, FLORIDA, I MEAN, CANADA, COSTA RICA AND CARIBBEAN IN
11 THE DUTCH KINGDOM.

12 Q. AND COULD YOU DESCRIBE YOUR EDUCATION FOR THE COURT?

13 A. YES. I HAVE AN UNDERGRADUATE DEGREE FROM BENEDICT
14 COLLEGE, COLUMBIA, SOUTH CAROLINA, BACHELOR'S OF ARTS
15 DEGREE. AND I HAVE A MASTER'S DEGREE OF CRIMINAL JUSTICE AT
16 THE UNIVERSITY OF SOUTH CAROLINA.

17 Q. AND NOW ABOUT YOUR PROFESSIONAL EXPERIENCE.

18 A. WELL, MY PROFESSIONAL EXPERIENCE STARTED IN 1971 IN THE
19 CAPACITY OF A COUNSELOR AT A SUBSTANCE ABUSE PROGRAM AT THE
20 MANNING CORRECTIONAL INSTITUTION, WHICH IS LOCATED IN
21 COLUMBIA, SOUTH CAROLINA. AND IT'S A PART OF THE STATE
22 DEPARTMENT OF CORRECTIONS FOR THAT JURISDICTION.

23 FROM MANNING CORRECTIONAL INSTITUTION WAS ABOUT A THREE
24 HUNDRED AND FIFTY BED FACILITY AT THAT PARTICULAR TIME. IT
25 HOUSED MEDIUM SECURITY INMATE POPULATION. THAT'S POPULATION

1 THAT HAD TO BE ENCLOSED IN A SECURE PARAMETER, HOWEVER, THEY
2 HAD SOMEWHAT OF FREEDOM COMPARED TO MAXIMUM SECURITY TO GO
3 FROM ONE POINT OF THE PRISON TO THE OTHER. THAT DOES NOT
4 MEAN THAT THEY COULD MOVE ANYWHERE THEY WANTED AT ANY TIME.
5 THEY HAD CONTROLLED MOVEMENT, BUT IT WAS NOT AS CONTROLLED
6 AS IT WOULD BE IN A MAXIMUM SECURITY ENVIRONMENT.

7 FROM THERE I WAS PROMOTED TO THE RANK OF AN
8 ADMINISTRATIVE ASSISTANT TO THE WARDEN OF THAT FACILITY. IN
9 THAT PERIOD OF TIME I THINK I WAS THE FIRST ADMINISTRATIVE
10 ASSISTANT.

11 AND BASICALLY YOU GOT TO DO WHAT NO ONE ELSE WANTED TO
12 DO OR YOU FILLED IN. SO I LEARNED HOW TO RUN THE KEYS, I
13 BROKE UP FIGHTS AND I CONDUCTED CRIMINAL INVESTIGATIONS AS
14 WELL AS ADMINISTRATIVE INQUIRIES.

15 I HELPED CLASSIFY INMATE POPULATION AS WELL AS TO
16 ENSURE THE SAFETY AND WELL-BEING OF THE FACILITY. I WAS IN
17 CHARGE OF WORKING ON WEEKENDS IN A ROTATION, IN BEING THE
18 CHIEF EXECUTIVE OFFICER DURING THAT PARTICULAR TIMES. AND
19 WHEN NOTHING ELSE, I WROTE LETTERS FOR THE WARDEN.

20 AFTER THAT I WAS PROMOTED TO THE RANK OF DEPUTY WARDEN
21 OF THAT SAME FACILITY. I WAS SECOND IN COMMAND IN
22 INTERPRETING AS WELL AS THE DEVELOPMENTAL POLICY AS IT
23 PERTAINS TO THE OPERATION OF THE PRISON. I WAS IN CHARGE OF
24 SECURITY STAFF AS WELL AS ADMINISTRATIVE AND PROGRAMMATIC
25 STAFF. I WAS IN CHARGE OF CONTRABAND CONTROL, GANG

1 MANAGEMENT, DISRUPTIVE INMATE POPULATION, ESCAPE PREVENTION,
2 ESCAPE APPREHENSION, RIOT CONTROL, AS WELL AS ALL OF THE
3 INTRICACIES INVOLVED IN OPERATING A SECURED INSTITUTION.

4 FROM THERE I WAS PROMOTED TO DEPUTY WARDEN AT CCI, THE
5 STATE PENITENTIARY OR THE CENTRAL CORRECTIONAL INSTITUTION.
6 THIS FACILITY WAS ALSO A PART OF THE SOUTH CAROLINA
7 DEPARTMENT OF CORRECTIONS. IT WAS THE LARGEST INSTITUTION
8 WITHIN THE SYSTEM AT THAT PARTICULAR TIME. AND IT HOUSED
9 THE MOST DANGEROUS ---

10 MR. SALTER: YOUR HONOR, AT THIS POINT I -- I REALIZE
11 FOR THE MOST PART WE'RE GOING THROUGH MR. AIKEN'S WORK
12 HISTORY, HOWEVER, I THINK THAT I NEED TO MOVE IN LIMINE TO
13 RESTRICT TESTIMONY PURSUANT TO STATE VERSUS BURKHART AND
14 STATE VERSUS BOWMAN. BURKHART IS B-U-R-K-H-A-R-T AND BOWMAN
15 IS B-O-W-M-A-N.

16 WHEREIN THE STATE'S REPORT IT'S INDICATED THAT ANY
17 EVIDENCE CONCERNING THE ADAPTABILITY OF THE PRISON SHOULD BE
18 LIMITED TO INFORMATION SPECIFICALLY INVOLVING THE DEFENDANT.
19 AND WHAT OTHER FACILITIES ARE OR ARE NOT IS NOT LIMITED
20 WITHIN THOSE PARAMETERS.

21 THE COURT: ALL RIGHT. COUNSEL, ARE YOU QUALIFYING
22 YOUR WITNESS AS AN EXPERT NOW?

23 MS. JOHNSON: YOUR HONOR, I'M JUST QUALIFYING THE
24 WITNESS AT THIS TIME.

25 THE COURT: ALL RIGHT. IS THERE AN OBJECTION TO THE

1 WITNESS' EXPERTISE?

2 MR. SALTER: NO, SIR, YOUR HONOR. NONE.

3 THE COURT: ALL RIGHT. VERY GOOD. GO AHEAD, COUNSEL.

4 Q. WOULD YOU RESUME WHERE YOU WERE AT CCI?

5 A. YES. AT THAT FACILITY ARE HOUSED THE MOST DANGEROUS
6 PREDATOR INMATE POPULATION WITHIN THE -- WITHIN THE SOUTH
7 CAROLINA DEPARTMENT OF CORRECTIONS AS WELL AS THE CRIMINAL
8 JUSTICE SYSTEM ITSELF. IT HOUSED DEATH ROW INMATE
9 POPULATION AS WELL AS THOSE INMATES THAT WERE EVEN HOUSED IN
10 THE COUNTY LEVEL THAT HAD BECOME SO DISRUPTIVE THAT THE
11 COUNTIES COULD NOT MANAGE THESE BEHAVIORS. AND THEY
12 EVENTUALLY ENDED UP AT THE STATE PENITENTIARY.

13 FROM THERE I WAS PROMOTED TO THE RANK OF WARDEN OF THE
14 WOMEN'S CORRECTIONAL FACILITY IN THE SOUTH CAROLINA
15 DEPARTMENT OF CORRECTIONS ALSO LOCATED IN COLUMBIA, SOUTH
16 CAROLINA.

17 I BEGAN TO DEVELOP WHAT I CALL MY NITCH AT THAT
18 PARTICULAR TIME. I WAS SENT INTO PRISONS WHERE
19 ADMINISTRATORS WANTED TO GET PRISONS TO OPERATE AT A HIGHER
20 OPERABLE LEVEL OF PRODUCTIVITY AS WELL AS SECURITY. AND
21 THAT WAS A PART OF MY JOB THERE AT THE WOMEN'S CORRECTIONAL
22 CENTER.

23 I WAS THE CHIEF POLICY MAKER INTERPRETER AS WELL AS THE
24 INDIVIDUAL IN CHARGE OF ALL ASPECTS OF INMATE'S CARE, PROPER
25 PROTECTION AS WELL AS THE MANAGEMENT OF PROGRAMMATIC

1 INTERVENTIONS, SECURITY AS WELL AS ADMINISTRATION.

2 Q. AND HOW DID YOU MAKE THOSE DECISIONS RELATING TO THE
3 SECURITY? WHAT DID YOU LOOK AT AT THAT TIME?

4 A. WELL, BASICALLY I FOLLOWED PROTOCOLS THAT WERE
5 DEVELOPED AND THE POLICIES AND PROCEDURES AND TASKS FOR
6 PEOPLE, STAFF AS WELL AS INMATES, TO FOLLOW, ESTABLISHED
7 CRITERIA FOR INMATE SECURITY AND THE DESIGNATION OF THAT
8 PARTICULAR SECURITY, ENSURED ACCOUNTABILITY AND MONITORED
9 TRANSACTIONS AS PERTAINS TO SECURITY.

10 AND THOSE EXAMPLES COULD BE ANYTHING FROM MAKING SURE
11 THAT LOCKS ARE WORKING PROPERLY ALL THE WAY THROUGH TO
12 EVALUATING WHAT TYPE OF SECURITY MEASURES THAT WAS NECESSARY
13 FOR AN INMATE THAT HAD SPECIAL SECURITY NEEDS.

14 Q. SO YOU'RE AT THIS TIME THE WARDEN OF THE WOMEN'S
15 PRISON, THEN YOU GO BACK TO ...

16 A. THAT IS CORRECT. I GO BACK TO THE STATE PENITENTIARY
17 AS THE CHIEF ADMINISTRATOR OF THAT FACILITY IN CHARGE OF
18 EVALUATING WHAT'S GOING ON AT THAT FACILITY TO IMPROVE THE
19 SECURITY, TO ENSURE THAT THAT SECURITY AS WELL AS
20 PROGRAMMATIC INTERVENTIONS WERE ADHERED TO ON A CONTINUAL
21 BASIS AND DEVELOP ORGANIZATIONAL STRUCTURE TO ENSURE
22 ACCOUNTABILITY AS PERTAINS TO THAT.

23 ALSO IN THE CAPACITY OF WARDEN AT THE STATE
24 PENITENTIARY OR CCI I WAS RESPONSIBLE BY STATUTE TO CARRY
25 OUT EXECUTIONS. AND IN THAT CAPACITY I EXECUTED TWO INMATES

1 MYSELF.

2 Q. AND WHAT DID YOU DO NEXT?

3 A. I MOVED UP TO THE RANK OF DEPUTY ADMINISTRATOR. IN
4 THAT CAPACITY I WAS THE CHIEF ADMINISTRATOR OVER SIXTEEN
5 WARDENS AND THE PRISONS UNDER THEM TO ENSURE THAT POLICY,
6 PROCEDURES AS WELL AS THE PROTOCOLS THAT ARE RESPONSIBLE FOR
7 A SAFE, SECURE ENVIRONMENT WERE ADHERED TO. AND I WAS ALSO
8 INVOLVED WITH POLICY DEVELOPMENT, IMPLEMENTATION AS WELL AS
9 MONITORING.

10 AND IF I STEP BACK A LITTLE BIT, ALL OF MY CAREER HAS
11 BEEN INVOLVED WITH THE CLASSIFICATION OF INMATE POPULATION.
12 IN ALL OF THE POSITIONS THAT I'VE HELD AS WELL AS IN THE
13 CONSULTANCY, MY FOCUS, ONE OF THE MAJOR FOCUSES THAT I HAD
14 WAS CLASSIFICATION OF INMATES.

15 AND WHAT DOES THAT MEAN IN LAYMAN'S TERMS? IT MEANS
16 PUTTING THE RIGHT INMATE IN THE PROPER LEVEL OF SECURITY,
17 THE PROPER LEVEL OF INTERVENTIONS OF PROGRAMMATIC AS WELL AS
18 ADMINISTRATION TO ENSURE THAT THE PUBLIC IS PROTECTED. AND
19 THAT PUBLIC IS CONSISTING OF GENERAL COMMUNITY, STAFF AS
20 WELL AS INMATE POPULATION.

21 Q. AND SO HAS YOUR EXPERIENCE BEEN LIMITED TO SOUTH
22 CAROLINA?

23 A. NO, MA'AM. FROM THERE I WAS APPOINTED THE COMMISSIONER
24 OF CORRECTION FOR THE INDIANA DEPARTMENT OF CORRECTIONS. IN
25 SOUTH CAROLINA WE SAY DEPARTMENT OF CORRECTIONS. IN INDIANA

1 IT'S DEPARTMENT OF CORRECTION, NO "S".

2 I WAS IN CHARGE OF FIFTY -- FORTY-SIX, I THINK IT WAS,
3 FACILITIES RANGING FROM SUPER MAXIMUM SECURITY PRISONS ALL
4 THE WAY DOWN TO WORK RELEASE CENTERS AS WELL AS JUVENILE
5 POPULATION AS WELL AS MALE ADULTS AND FEMALE ADULTS,
6 JUVENILE FEMALES AND JUVENILE MALES.

7 I WAS ON THE GOVERNOR'S CABINET, CHIEF POLICY DIRECTOR
8 FOR ALL ASPECTS OF THE PRISON SYSTEM TO INCLUDE, LIKE I
9 SAID, JUVENILE ADULTS AS WELL AS PAROLE SERVICES OF THAT --
10 OF THAT PARTICULAR AGENCY.

11 AND THEN FROM THERE I BECAME DIRECTOR OF CORRECTIONS
12 FOR UNITED STATES VIRGIN ISLANDS. I WANTED TO GET
13 INTERNATIONAL EXPERIENCE AS IT PERTAINS TO DEALING WITH
14 PRISONER POPULATION AND THE MANAGEMENT OF PRISONER
15 POPULATION. THIS SYSTEM MANAGED FEDERAL INMATES, ADULT
16 INMATES, TERRITORIAL INMATES AS WELL AS JUVENILE AND JAIL
17 OPERATIONS.

18 ALSO I MUST SAY WE WERE INVOLVED WITH INTERNATIONAL
19 DRUG CARTELS TRYING TO BRING DRUGS THROUGH THE VIRGIN
20 ISLANDS TO GET INTO THE UNITED STATES. AND I ALSO HAD SOME
21 INDICATION AND SOME EXPERIENCE AS IT RELATES TO
22 INTERNATIONAL TERRORISM AS A TYPE OF POPULATION THAT WE HAD
23 TO DEAL WITH. SO WE DEALT WITH EVERYBODY FROM THE DRUNK TO
24 THE INDIVIDUAL THAT WAS INVOLVED WITH SOME VERY HIGH LEVEL
25 SOPHISTICATED CRIMINAL INVOLVEMENT AND BEHAVIORAL PATTERNS.

1: Q. AND WHEN DID YOU START DOING CONSULTING WORK?

2 A. WELL, I REALLY STARTED DOING THE CONSULTING WORK, I
3 GUESS, IN 1986. I WAS STILL THE WARDEN OF CCI. AND I WAS
4 APPROACHED BY THE UNITED STATES DEPARTMENT OF JUSTICE AND
5 NATIONAL INSTITUTE OF CORRECTIONS AND THE NATIONAL ACADEMY
6 OF CORRECTIONS.

7 AND I'M REFERRING BACK TO AN EARLIER QUESTION THAT YOU
8 HAD. IN THAT CAPACITY I WAS ASKED TO PROVIDE EXPERT
9 SERVICES AND TECHNICAL ASSISTANCE TO ANY JURISDICTIONS.
10 JUST ABOUT EVERY JURISDICTION IN THE UNITED STATES WERE
11 INVOLVED WITH ME OR I WAS INVOLVED WITH THEM OR MEMBERS OF
12 THEIR STAFF AS IT RELATES TO GANG MANAGEMENT, MANAGING THE
13 HARD TO MANAGE VIOLENT INMATE, CLASSIFICATION OF INMATE
14 POPULATION, CRITICAL EVENT ABATEMENT. THAT'S TO AVOID
15 ESCAPE, HOSTAGE SITUATIONS, MURDERS, AND GANGS AND THOSE
16 KINDS OF THINGS BECAUSE OF MY EXPERTISE OF DEVELOPING
17 SYSTEMS THAT WERE IN -- WERE NOT OPERATING AT A LEVEL OF
18 EFFICIENCY THAT WE WANTED -- TO OPERATE, TO BRING THESE
19 SYSTEMS UP.

20 I TAUGHT WARDENS HOW TO BE WARDENS. I TAUGHT EXISTING
21 WARDENS HOW TO BE BETTER WARDENS. I ALSO TAUGHT WARDENS HOW
22 TO BE WARDENS OF SUPER MAXIMUM SECURITY PRISONS.

23 AND WE DID THAT INTERESTINGLY AT AN INSTITUTION KNOWN
24 AS ADX. ADX IS THE MOST SECURE PRISON ON THE FACE OF THIS
25 EARTH IN MY OPINION. IT'S LOCATED IN COLORADO. AND THAT'S

1 WHERE HIGH LEVEL INDIVIDUALS THAT HAVE DONE SOME VERY
2 TERRIBLE THINGS IN THIS NATION ARE HOUSED ON THE FEDERAL
3 SYSTEM. AND THAT'S WHERE WE TAUGHT WARDENS OF STATE SYSTEMS
4 HOW TO BE WARDENS OF SUPER MAXIMUM SECURITY FACILITIES.

5 WE WERE ALSO INVOLVED WITH THE LEADERSHIP DEVELOPMENT
6 AS WELL AS EVALUATING THE OPERATIONS OF INSTITUTIONS TO
7 ENSURE THAT WE CAN IMPROVE THEIR SYSTEMS. AND IT'S CALLED
8 MANAGING PRISON SECURITY.

9 YOU KNOW, HOW DO YOU BRING ALL OF THESE SYSTEMS
10 TOGETHER IN A SEAMLESS FASHION TO ENSURE THAT THE SYSTEM IS
11 OPERATING? CLASSIFICATION. AGAIN, I DON'T WANT TO SOUND
12 TOO REDUNDANT. IT'S THE BACKBONE FOR ALL OF THESE
13 ACTIVITIES IN EVALUATING THE SECURITY AND CUSTODY NEEDS OF
14 INMATE POPULATION.

15 Q. WHAT IS THE RELATIONSHIP BETWEEN CLASSIFICATION AND
16 PRISON ADAPTABILITY?

17 A. CLASSIFICATION IS THE GATHERING OF THAT INFORMATION SO
18 THAT POLICY MAKERS AND PEOPLE IN THE POSITIONS THAT I'VE
19 HELD CAN MAKE ADEQUATE DECISIONS AS IT RELATES TO THE
20 PROTECTION OF OTHER INMATES, STAFF AS WELL AS THE GENERAL
21 COMMUNITY.

22 WE LOOK AT MANY ASPECTS OF THE PERSON'S BEHAVIOR, NOT
23 ONLY IN THE COMMUNITY, IN THE INSTITUTION AS WELL AS MAKE AN
24 ASSESSMENT OF WHETHER THAT PRISON OR THAT PARTICULAR
25 FACILITY CAN MANAGE THAT BEHAVIOR AND POTENTIAL BEHAVIOR.

1 WE HAVE TO LOOK AT NOT ONLY ACTUAL BEHAVIOR, BUT POTENTIAL
2 BEHAVIOR.

3 MS. JOHNSON: YOUR HONOR, I OFFER MR. AIKEN AS AN
4 EXPERT IN PRISON ADAPTABILITY AND PRISON SECURITY.

5 THE COURT: PRISON ADAPTABILITY AND WHAT?

6 MS. JOHNSON: PRISON SECURITY.

7 THE COURT: WHAT SAYS THE STATE?

8 MR. SALTER: AGAIN, THERE'S NO OBJECTION TO HIS
9 QUALIFICATIONS. BUT I GATHERED FROM LISTENING TO HIS
10 TESTIMONY THUS FAR THAT WE'RE HEADED DOWN THE ROAD THAT THE
11 SUPREME COURT HAS VERY RECENTLY ADMONISHES NOT TO GO.

12 THE COURT: ALL RIGHT. LET'S WAIT TIL WE GET THERE TIL
13 WE HAVE YOUR OBJECTION, AND I'LL RULE ON IT AT THAT TIME.
14 PLEASE MAKE IT CONTEMPORANEOUSLY WHEN THE FIRST QUESTION YOU
15 BELIEVE CROSSES THE LINE, IN YOUR OPINION. WE'LL DECIDE
16 THAT AT THAT TIME.

17 THERE BEING NO OBJECTION THE COURT FINDS THAT THE
18 WITNESS IS QUALIFIED IN THE AREA OF PRISON ADAPTABILITY AS
19 AN EXPERT AS WELL AS PRISON SECURITY. YOU MAY PROCEED.

20 MR. AIKEN: THANK YOU, SIR. THANK YOU.

21 THE COURT: YOU'RE WELCOME.

22 Q. AND WHEN YOU CLASSIFY AN INMATE, MR. AIKEN, WHAT DO YOU
23 LOOK AT?

24 A. I LOOK AT A FEW BASIC AREAS AS I STATED PREVIOUSLY, AND
25 I'LL GO INTO A LITTLE MORE DETAIL. I LOOK AT THE PARTICULAR

1 INMATE SPECIFICALLY AND THE COMMUNITY BEHAVIOR THAT GOT THAT
2 INDIVIDUAL INCARCERATED AS WELL AS HOW LONG THAT PERSON WILL
3 BE INCARCERATED.

4 SECONDLY, I LOOK AT THE INSTITUTIONAL BEHAVIOR, THE
5 ACTUAL BEHAVIOR OF THAT INDIVIDUAL AS IT PERTAINS TO THE
6 CUSTODY AND MANAGEMENT NEEDS OF THAT PERSON WITHIN THE
7 PRISON SYSTEM.

8 THIRD, I LOOK AT THE CAPACITY AND THE ABILITY OF THE
9 PRISON AND THE STAFF TO MANAGE THAT BEHAVIOR AS WELL AS THE
10 POTENTIAL BEHAVIOR MORE SPECIFICALLY AS IT PERTAINS TO
11 INSTITUTIONAL BEHAVIOR. WE CLASSIFY THEM BASED ON THEIR
12 ADJUSTMENT TO THE INSTITUTION, OF COURSE, THEIR SENTENCE AS
13 WELL AS THE TYPE OF CRIME THEY COMMITTED IN THE COMMUNITY.

14 ALSO WE LOOK AT OTHER FACTORS TO INCLUDE THEIR
15 PSYCHOLOGICAL ASPECTS, PHYSICAL ASPECTS, GANG INVOLVEMENT,
16 SECURITY THREAT GROUP INVOLVEMENT. WE LOOK AT A NUMBER OF
17 ISSUES AS PERTAINS TO EDUCATION AS WELL AS THE PERSON'S
18 RELATIONSHIP WITH OTHER INMATE POPULATION. ALL THOSE THINGS
19 ARE CONSIDERED AND RECONSIDERED ON A CONTINUAL BASIS TO
20 ENSURE THAT WE HAVE A PROPER LEVEL. NOW AS PERTAINS TO THE
21 LEVEL OF A PARTICULAR SENTENCE AS WELL AS THE CRIME, WE HOLD
22 THAT TO BE CONSTANT.

23 Q. SO YOU'RE ALWAYS CONSIDERING THAT?

24 A. BEG YOUR PARDON?

25 Q. YOU ALWAYS KEEP THAT IN MIND?

1 A. THAT'S ALWAYS CONSTANT, YES.

2 Q. YOU MENTIONED A SECURITY GROUP THREAT. COULD YOU
3 EXPLAIN WHAT THAT IS?

4 A. BEG YOUR PARDON?

5 Q. DID I GET THIS RIGHT? A SECURITY GROUP THREAT?

6 A. STG, SECURITY THREAT GROUP.

7 Q. SORRY.

8 A. NO PROBLEM. I HAVE TO AVOID ACRONYMS A LOT. WHAT THAT
9 IS, THESE ARE PEOPLE THAT ARE NOT JUST INVOLVED WITH
10 IMMATURE BEHAVIOR WITH A PRISON. THEY'RE NOT INVOLVED
11 REALLY WITH DISRUPTIVE BEHAVIOR. THEY'RE INVOLVED WITH ON
12 OCCASIONS THE USE OF PREDATORIAL BEHAVIOR IN ORDER TO -- TO
13 ESTABLISH CONTROL AND THE INFLUENCE OVER INMATES AS WELL AS
14 STAFF.

15 THESE PEOPLE ARE INVOLVED WITH OVERTHROWING THE
16 GOVERNMENT, SO TO SPEAK. THEY WANT TO CONTROL WHAT'S GOING
17 ON WITHIN A PRISON SYSTEM, CONTROLLING AS TO AREAS OF THE
18 PRISON, COULD BE THAT MINUTE, OR IT COULD BE MORE IN DEPTH
19 TO INCLUDE RUNNING CONTRABAND AS WELL AS INFLECTING RANDOM
20 AS WELL AS SYSTEMATIC VIOLENCE AGAINST OTHER INMATES AS WELL
21 AS STAFF NOT ONLY IN THE PRISON, BUT ALSO IN THE COMMUNITY.

22 Q. AND DID YOU REVIEW RECORDS FOR YOUR TESTIMONY TODAY
23 RELATING TO JONATHAN BINNEY?

24 A. YES.

25 Q. AND CAN YOU TELL ME WHAT ---

1 MR. SALTER: YOUR HONOR, FROM THIS POINT ON I'M GOING
2 TO OBJECT. THIS IS PRECISELY THE KIND OF -- THE INFORMATION
3 THAT THE COURT HAS DEEMED TO BE IRRELEVANT.

4 THE COURT: ALL RIGHT.

5 MR. SALTER: AND THE SUPREME COURT HAS INDICATED THAT
6 WE MUST CONFINE ADAPTABILITY TESTIMONY TO EVIDENCE
7 CONCERNING THE DEFENDANT'S ACTUAL INCARCERATION. HIS ACTUAL
8 BEHAVIOR BEHIND BARS IS SPECULATIVE. IT'S BASED ON IF HE'S
9 CLASSIFIED AT THIS LEVEL PLACED IN THIS TYPE OF FACILITY
10 THEN THIS TYPE OF FACILITY SHOULD BE ABLE TO HOUSE HIM.

11 MS. JOHNSON: YOUR HONOR, THAT'S NOT THE TESTIMONY I'M
12 ELICITING. I'M ASKING HIM AT THE MOMENT WHAT RECORDS HE
13 REVIEWED RELATING TO MR. BINNEY.

14 THE COURT: ALL RIGHT. TELL ME WHY THAT'S NOT AN
15 APPROPRIATE QUESTION, ASKING SPECIFICALLY ABOUT MR. BINNEY.

16 MR. SALTER: JUST AS TO THE RECORDS PERTAINING TO MR.
17 BINNEY, YOUR HONOR, IT ISN'T MY CONCERN THAT HE TESTIFIES
18 WHAT RECORDS HE'S REVIEWED AS MUCH AS IT IS HE THEN TURNS
19 AROUND AND SAYS, WELL, HAVING REVIEWED THESE RECORDS HE THEN
20 SPECULATES AS TO WHAT KIND OF CLASSIFICATION HE OUGHT TO
21 RECEIVE AND WHERE HE, YOU KNOW, WHAT TYPE OF FACILITY HE
22 WOULD BE IN AND IF THIS FACILITY SHOULD BE ABLE TO HOUSE HIM
23 SAFELY. THAT'S WHAT I UNDERSTAND ---

24 THE COURT: HOW DO YOU KNOW THAT'S WHERE THIS WITNESS
25 IS GOING?

1 MR. SALTER: ALL RIGHT. VERY WELL, YOUR HONOR.

2 THE COURT: ALL RIGHT. I'M NOT ARGUING WITH YOU, BUT
3 I'M JUST -- I FEEL LIKE YOU'RE ---

4 MR. SALTER: BASED ON MR. AIKEN'S PRIOR TESTIMONY IN
5 OTHER CASES ---

6 THE COURT: ALL RIGHT. AND I'M NOT AWARE OF THAT. BUT
7 LET'S -- LET ME JUST ASK YOU TO WITHHOLD YOUR OBJECTION
8 UNTIL IT'S RIPE.

9 MR. SALTER: YES, SIR.

10 THE COURT: AND AT THAT POINT I'LL MAKE A DECISION
11 BASED UPON THE ARGUMENTS THAT COUNSEL PRESENTS, ALL RIGHT?

12 MR. SALTER: YES, YOUR HONOR.

13 THE COURT: BECAUSE I FIND THE LAST QUESTION ABOUT MR.
14 BINNEY SPECIFICALLY IS AN APPROPRIATE QUESTION. SO PLEASE
15 REPHRASE YOUR QUESTION AND MR. AIKEN, PLEASE ANSWER.

16 A. YES, SIR.

17 Q. WOULD YOU TELL US THE RECORDS THAT YOU DID REVIEW?

18 A. YES. I RECEIVED TWO DOCUMENTS OR TWO, SHOULD I SAY,
19 FOLDERS TO INCLUDE HIS SOCIAL HISTORY, INDICTMENTS AND
20 WARRANTS, HIS ALBANY COUNTY JAIL RECORDS IN NEW YORK, HIS
21 OHIO DEPARTMENT OF CORRECTIONS RECORDS, HIS SOUTH CAROLINA
22 DEPARTMENT OF CORRECTIONS PRIOR TO THE DEATH SENTENCE AS
23 WELL AS SOUTH CAROLINA DEPARTMENT OF CORRECTIONS MEDICAL
24 RECORDS. I'VE ALSO RECEIVED ADDITIONAL SOUTH CAROLINA
25 DEPARTMENT OF CORRECTIONS RECORDS.

1 Q. AND WERE THERE ANY OTHER RECORDS THAT YOU REQUESTED?

2 A. NO, THERE ARE NO OTHER RECORDS. THERE IS SOME
3 INFORMATION CONTAINED IN THOSE RECORDS PERTAINING TO THE
4 SPECIFIC CRIMES THAT HE WAS INVOLVED WITH.

5 Q. AND ARE THESE THE TYPE OF RECORDS THAT AN EXPERT IN
6 YOUR FIELD WOULD RELY UPON TO DETERMINE HOW AN INMATE WOULD
7 ADAPT TO PRISON AND HOW TO CLASSIFY HIM?

8 A. YES. I'VE CLASSIFIED THOUSANDS AND THOUSANDS OF
9 INMATES. AND THIS IS IN ACCORDANCE TO THOSE GUIDELINES,
10 YES.

11 Q. AND AFTER REVIEWING THESE RECORDS DID YOU CONSIDER
12 WHETHER YOU THOUGHT THAT MR. BINNEY WOULD BE A THREAT TO THE
13 SECURITY?

14 A. WELL, IN REVIEWING ALL OF THESE RECORDS THAT'S THE
15 TOTAL FOCUS THAT I HAVE IS THE SECURITY IN RELATIONSHIP TO
16 THE DEFENDANT TO THE ENVIRONMENT IN WHICH HE'S GOING TO BE
17 INVOLVED IN SPECIFICALLY.

18 Q. AND CAN YOU TELL ME FROM YOUR EXPERIENCE HOW YOU WOULD
19 CLASSIFY MR. BINNEY?

20 A. I WOULD CLASSIFY HIM IN MAXIMUM SECURITY ---

21 MR. SALTER: YOUR HONOR, I OBJECT. NOW THIS IS
22 PRECISELY WHAT I WAS ---

23 THE COURT: ALL RIGHT. NOW LET'S JUST TAKE A MOMENT
24 AND LET'S TALK ABOUT THIS. TELL ME WHAT CASE OF LAW YOU
25 RELY UPON.

1 **MR. SALTER:** STATE VERSUS BOWMAN, WHICH IS 623 SE 2ND
2 378. THE DISCUSSION'S ACTUALLY ON PAGE 385, 2006 OPINION OF
3 THE SOUTH CAROLINA SUPREME COURT. THE STATE VERSUS
4 BURKETTE, BURKHART, EXCUSE ME. THAT'S 640 SE 2ND 450. THE
5 DISCUSSION'S ON PAGE 453.

6 THE SUPREME COURT HAS ADMONISHED BOTH THE PROSECUTION
7 AND THE DEFENSE BAR THAT ANY EVIDENCE CONCERNING
8 ADAPTABILITY MUST BE TAILORED TO THE DEFENDANT. HIS OWN
9 ADAPTABILITY AS EVIDENCED BY WHAT HE HAS AND HASN'T DONE
10 NOT SPECULATIVE TO TESTIMONY CONCERNING PRISON -- PRISON
11 LIFE GENERALLY, WHICH IS WHERE WE'RE HEADED; IF YOU CLASSIFY
12 SOMEBODY MAXIMUM SECURITY, MAXIMUM SECURITY SHOULD BE ABLE
13 TO HOLD THEM WITHOUT A PROBLEM. THAT'S WHAT THEY -- THAT'S
14 WHAT THEY ULTIMATELY WANTED TO GET OUT BASED ON WHAT HE'S
15 TESTIFIED TO IN OTHER CASES.

16 **MS. JOHNSON:** YOUR HONOR.

17 **MR. SALTER:** I THINK THAT'S INADMISSIBLE. THIS REPORT
18 HAS INDICATED AS MUCH, WHETHER OR NOT YOU'RE RIGHT
19 ULTIMATELY, WHETHER OR NOT -- AND THE US SUPREME COURT WOULD
20 DISAGREE. THEY HAVE, IN FACT, RULED THAT IN BOTH OF THOSE
21 CASES. AND THE LATTER CASE ACTUALLY REVERSED A DEATH
22 SENTENCE BASED ON THE STATE'S INTRODUCTION OF EVIDENCE
23 CONCERNING THE LESSER RESTRICTIONS UPON AN INMATE WHO'S
24 CONFINED TO GENERAL POPULATION AS OPPOSED TO ONE OF DEATH
25 ROW.

1 THE COURT: AND RESPONSE, MS. JOHNSON?

2 MS. JOHNSON: WELL, YOUR HONOR, THOSE TWO CASES
3 ACTUALLY ARE CASES WHERE THE STATE IS PROFFERING, ATTEMPTED
4 TO PROFFER EVIDENCE ABOUT ALL THE BENEFITS THAT THE
5 DEFENDANT GOT WITH A LIFE SENTENCE AND HOW CUSHY LIFE IN
6 PRISON WAS. I'M CERTAINLY NOT GOING TO DISPUTE THAT THAT'S
7 INAPPROPRIATE TESTIMONY, BUT ACTUALLY I HAVEN'T EVEN GOTTEN
8 TO QUESTIONS OF WHAT LIFE IS LIKE IN A MAXIMUM SECURITY
9 PRISON. I'M NOT GOING TO TALK ABOUT -- ASK HIM ABOUT
10 PRIVATIONS THAT PEOPLE SUFFER. SO IF THERE IS A PARALLEL
11 TESTIMONY, I'M NOT GOING TO ELICIT THAT. I DON'T PLAN TO
12 ELICIT THAT.

13 I'M FOCUSING MY TESTIMONY -- HIS TESTIMONY SOLELY ON
14 THE QUESTIONS OF WHETHER -- WHETHER MR. BINNEY POSES A RISK
15 TO THE -- OF ESCAPE, OF RISK TO STAFF OR RISK TO OTHER
16 INMATES. AND THAT'S WHAT PRISON ADAPTABILITY IS. IF
17 THERE'S -- IF THAT'S NOT ADMISSIBLE TESTIMONY, THERE IS
18 NOTHING LEFT OF PRISON ADAPTABILITY.

19 THE COURT: ALL RIGHT. AND IN RESPONSE?

20 MR. SALTER: JUST QUITE BRIEFLY. HE'S ALREADY BEEN
21 CLASSIFIED. THAT'S THE PROBLEM I HAVE. MR. BINNEY HAS BEEN
22 CLASSIFIED. HE'S ON DEATH ROW. HE'S NOT IN, YOU KNOW, SOME
23 OTHER LEVEL OF CLASSIFICATION IN SOME OTHER FACILITY.
24 THERE'S NO -- AND THERE'S NO EVIDENCE APART FROM HIS
25 INCARCERATION, I BELIEVE AT LIEBER, PRIOR TO THE IMPOSITION

1 OF THE DEATH SENTENCE, THERE IS NO EVIDENCE OF HIS
2 ADAPTABILITY WITHIN THE CORRECTIONS AT ANY OTHER FACILITY.

3 THE COURT: ALL RIGHT. COUNSEL, LET ME SEE -- MAY I
4 SEE YOUR CASES YOU REFERRED TO, PLEASE? BURKHART. THANK
5 YOU.

6 MR. SALTER: YES, SIR, YOUR HONOR.

7 THE COURT: AND YOU CITED ME A MOMENT AGO TO A SPECIFIC
8 DISCUSSION. WAS THAT BOWMAN OR WAS THAT BURKHART?

9 MR. SALTER: IT'S ACTUALLY IN BOTH OF THEM, YOUR HONOR.
10 IF I CAN FIND IT. IN BURKHART IT'S ON PAGE 453.

11 THE COURT: ALL RIGHT. AND THE PAGES HERE ARE ...

12 MR. SALTER: I APOLOGIZE. THAT'S ---

13 THE COURT: ALL RIGHT. I HAVE IT. 453. AND WHERE ON
14 PAGE 453? IS IT SUB-SECTION 8?

15 MR. SALTER: IT'S UNDER THE SUB-HEADING -- IT'S ON
16 ACTUALLY THE THIRD PAGE OF THAT DOCUMENT. IT'S UNDER THE
17 SUB-HEADING OF ADMISSION OF EVIDENCE IN THE SENTENCING
18 PHASE.

19 THE COURT: ALL RIGHT, COUNSEL. LET ME QUOTE FOR THE
20 RECORD, READING FROM STATE VERSUS BURKHART, WHICH IS CITED
21 AS 640 SE 2ND 450. I'M READING FROM PAGE 453. THE SUPREME
22 COURT SAYS IN AN OPINION OFFERED BY JUSTICE MOORE; WE ARE
23 AWARE OF THE TENSION BETWEEN EVIDENCE REGARDING THE
24 DEFENDANT'S ADAPTABILITY TO PRISON LIFE, WHICH IS CLEARLY
25 ADMISSIBLE, AND THIS RESTRICTION ON ADMISSION OF EVIDENCE

1 REGARDING PRISON LIFE IN GENERAL. WE NOTE, HOWEVER, THAT
2 EVIDENCE OF THE DEFENDANT'S CHARACTERISTICS MAY INCLUDE
3 PRISON CONDITIONS IF NARROWLY TAILORED TO DEMONSTRATE THE
4 DEFENDANT'S PERSONAL BEHAVIOR IN THOSE CONDITIONS.

5 NOW WITH THAT UNDERSTANDING, TELL ME AGAIN WHAT YOU
6 BELIEVE IS WRONG WITH THE TESTIMONY THAT'S BEING OFFERED.

7 MR. SALTER: YOUR HONOR, IT'S MY INTERPRETATION OF THAT
8 -- OF THAT LANGUAGE THAT THE EVIDENCE CONCERNING
9 ADAPTABILITY WOULD BE HOW HE HAS, IN FACT, -- WHETHER OR NOT
10 HE HAS, IN FACT, ADAPTED OR HAS NOT ADAPTED, NOT WHETHER OR
11 NOT HE COULD POTENTIALLY BE ADAPTABLE IN SOME OTHER SETTING
12 IN SOME OTHER CONTEXT BASED ON ANOTHER CLASSIFICATION.

13 THE COURT: WELL, COUNSEL, MY RECOLLECTION OF THIS
14 WITNESS' TESTIMONY IS THAT HE'S REVIEWED INCARCERATION
15 RECORDS FROM SCDC AS WELL AS THE OHIO DEPARTMENT OF
16 CORRECTIONS.

17 MR. SALTER: YES, SIR.

18 THE COURT: WHICH MEANS THAT THE DEFENDANT OR THE
19 APPLICANT, THEN DEFENDANT, MR. BINNEY, HAS A TRACK RECORD IN
20 CORRECTIONS. TELL ME HOW THIS EVIDENCE MAY NOT -- AND I
21 DON'T KNOW WHAT THE ANSWER IS. IN FACT, WE JUST BARELY GOT
22 THE QUESTION OUT. TELL ME HOW THIS MAY NOT FOLLOW IT IN
23 THOSE PARAMETERS.

24 MR. SALTER: I BELIEVE THE LINE OF QUESTIONING IS
25 HEADED TO HOW WE WOULD CLASSIFY, HOW WE WOULD CLASSIFY HIM,

1 MAXIMUM SECURITY, MAXIMUM SECURITY FACILITY AND HE SHOULD BE
2 ADAPTABLE IN A MAXIMUM SECURITY FACILITY. WELL, THE PROBLEM
3 IS HE'S ALREADY -- HE'S ALREADY IN THE CORRECTIONS, HE'S IN
4 -- HE'S IN -- HE'S ALREADY BEEN CLASSIFIED. AND IT'S NOT IN
5 A DIFFERENT -- IT'S NOT IN THE CONTEXT OF A DIFFERENT
6 FACILITY. THIS IS -- THIS IS NOT THE KIND OF TAILORING THAT
7 THEY'RE TALKING ABOUT, I BELIEVE, IN BURKHART AND BOWMAN.

8 THE COURT: ALL RIGHT. NOW YOU WISH TO RESPOND TO
9 THAT, MS. JOHNSON?

10 MS. JOHNSON: YES, YOUR HONOR. I THINK THE LANGUAGE
11 THAT YOU QUOTED IS EXACTLY THE RIGHT LANGUAGE. THERE IS
12 SOME TENSION BETWEEN SAYING -- A BROAD TESTIMONY ABOUT
13 PRISON CONDITIONS AND -- BUT THERE IS CONSTITUTIONALLY A
14 RIGHT TO PRESENT EVIDENCE OF PRISON ADAPTABILITY. AND WHAT
15 I BELIEVE THAT SENTENCE YOU JUST READ SAID WAS THAT WHEN THE
16 PRISON CONDITIONS THAT ARE BEING DISCUSSED RELATE TO
17 ADAPTABILITY, THAT IS WHEN THEY ARE RELATED TO SECURITY,
18 THOSE ARE ADMISSIBLE FOR A WITNESS TO TALK ABOUT.

19 BUT WHEN THERE MIGHT BE OTHER FACTS SUCH AS HOW MANY
20 PRIVILEGES THEY LOSE, HOW DIFFICULT IT IS, THAT KIND OF
21 PRISON CONDITION TESTIMONY WHETHER OFFERED BY THE STATE OR
22 BY THE DEFENDANT IS NOT ADMISSIBLE.

23 A TESTIMONY THAT RELATES TO HIS ADAPTABILITY TO
24 CONFINEMENT, WHICH, OF COURSE, IS A QUESTION THAT THE JURY
25 WOULD BE ABLE TO CONSIDER AS A PART OF ITS DETERMINATION

1 WHETHER THE DEATH SENTENCE IS APPROPRIATE, THAT TESTIMONY IS
2 ADMISSIBLE TESTIMONY.

3 THE COURT: ALL RIGHT.. AND, COUNSEL, LET'S GO BACK.
4 AND, OF COURSE, WE -- THIS POST CONVICTION RELIEF PROCEEDING
5 IS -- THE APPLICANT IS ATTEMPTING TO ELICIT EVIDENCE THAT
6 COULD HAVE GONE, WOULD HAVE GONE, OR IN THEIR POSITION,
7 SHOULD HAVE GONE TO THE JURY AT THE TIME OF THE SENTENCE, I
8 MEAN, EXCUSE ME, AT THE TIME OF THE TRIAL, WHICH IS BEFORE
9 THE SENTENCE AND BEFORE THE CLASSIFICATION AS A DEATH
10 SENTENCE INMATE. WHAT DO YOU SAY TO THAT?

11 MR. SALTER: I'M GOING TO -- I, AGAIN, YOUR HONOR, I
12 THINK I'VE BELABORED MY POINT ALREADY.

13 THE COURT: WELL, I'M NOT ARGUING WITH YOU. I'M JUST
14 SIMPLY TRYING TO DEFINE AND REFINE WITHIN MY MIND YOUR
15 POSITION. NOW IS IT YOUR POSITION THAT -- WELL, RATHER THAN
16 ASK IT THAT WAY, I'M GOING TO SIMPLY DO THIS. I'M GOING TO
17 OVERRULE YOUR OBJECTION AT THIS JUNCTURE. I'M GOING TO ASK
18 YOU TO RENEW IT IF YOU BELIEVE THAT IT GOES FURTHER AFIELD.
19 BUT I BELIEVE THAT THIS LINE OF QUESTIONING, AT LEAST WHAT
20 I'VE HEARD THUS FAR, IS APPROPRIATE UNDER BOWMAN AND UNDER
21 BURKHART.

22 AGAIN, THIS IS A NARROWLY TAILORED AREA. I WOULD ASK
23 YOU NOT TO GO BEYOND THAT AREA, MS. JOHNSON. AND I WOULD
24 ASK YOU TO OBJECT AGAIN CONTEMPORANEOUSLY TO PRESERVE THE
25 RECORD, MR. SALTER, IF YOU WOULD. YOU MAY PROCEED. HOW

1 ABOUT RE-ASKING YOUR QUESTION AGAIN.

2 Q. SO IF YOU WERE GOING TO -- IF WE WERE GOING TO LOOK AT
3 HOW MR. BINNEY WOULD BE CLASSIFIED, SIMPLY CLASSIFIED INTO
4 WHAT KIND OF PRISON HE WOULD GO INTO, WHAT KIND OF PRISON
5 WOULD HE BE ENTERED INTO IN SOUTH CAROLINA OR IS THERE ANY
6 FLEXIBILITY THERE?

7 A. THERE IS NO FLEXIBILITY IN RELATIONSHIP TO THE TYPE OF
8 CRIME THAT HE WOULD BE CONVICTED OF AS WELL AS THE TYPE OF
9 SENTENCE AS WELL AS THE OTHER FACTORS THAT I HAVE PROVIDED
10 THIS MORNING THAT WILL DRIVE HIM TO A VERY HIGH SECURITY
11 LEVEL SUCH AS MAXIMUM SECURITY. AND THAT BEING DEFINED AS
12 IN LAYMAN'S TERMS IS THAT THERE WILL BE A GUN BETWEEN HIM
13 AND THE PUBLIC AS LONG AS HE LIVES. AND THERE WILL BE
14 TWENTY-FOUR HOUR, SEVEN DAY A WEEK EVALUATION AS WELL AS
15 SUPERVISION OF HIS ACTIVITIES AS WELL AS BEHAVIOR AND
16 POTENTIAL BEHAVIOR WITHIN THIS HIGH SECURITY SETTING.

17 Q. NOW YOU DID ALLUDE TO WITH THE SENTENCE THAT HE HAS.
18 IF HE WERE ALTERNATIVELY SENTENCED TO LIFE WITHOUT PAROLE
19 WITH THE SAME OFFENSE IS THERE ANY FLEXIBILITY ABOUT WHAT
20 PRISON HE WOULD GO TO THEN?

21 A. WHEN I SAY SENTENCE, WHETHER HE'S SENTENCED TO DEATH OR
22 WHETHER HE'S SENTENCED TO LIFE WITHOUT PAROLE, HE STILL WILL
23 BE IN MAXIMUM SECURITY OR A HIGH SECURITY SETTING. AND THAT
24 BEING DEFINED OPERATIONALLY, IN A LAYMAN'S TERMS, THAT THERE
25 WILL BE A GUN BETWEEN HIM AS WELL -- AND THE COMMUNITY. NOW

1 THAT THERE ARE OTHER MECHANISMS AND ALTERNATIVES AVAILABLE
2 TO THE DEPARTMENT THAT WILL -- CAN FURTHER CONSTRICT HIS
3 BEHAVIOR IF IT DICTATES.

4 Q. I WAS JUST ABOUT TO ASK YOU THAT. SO OTHER THAN THE
5 GUN BETWEEN HIM AND THE FENCE AND THE MONITORING THAT YOU
6 REFERRED TO CAN YOU DESCRIBE SOME OF THE OTHER SECURITY
7 MEASURES THAT ARE AVAILABLE IN MAXIMUM SECURITY INSTITUTIONS
8 IN SOUTH CAROLINA?

9 A. THE FIRST THING IS THAT WHEN WE SAY MAXIMUM CONTROL,
10 CONTROL MOVEMENTS. PEOPLE SOMETIMES MAKE A MISTAKE OF
11 UNDERSTANDING THAT JUST BECAUSE YOU'RE IN A PRISON YOU LAY
12 UP IN A BED ONE DAY AND YOU DECIDE TO WALK TO THE OTHER END
13 OF THE PRISON AND CHAT WITH FRIENDS, THAT CANNOT HAPPEN TO
14 HIM. HE IS UNDER CONSTANT CONTROL AND CONSTANT SUPERVISION.
15 AND HE DOESN'T MOVE UNTIL SOMEONE LETS HIM MOVE AND SOMEONE
16 EVALUATES WHY HE NEEDS TO MOVE SUCH AS TO GO TO EAT OR EVEN
17 IN CHURCH SERVICES, IF NECESSARY, OR GO TO WORK.

18 AND THAT BEHAVIOR IS CONTINUOUSLY EVALUATED ON A
19 CONTINUAL BASIS BY TRAINED PEOPLE. AND WHEN I MEAN
20 EVALUATED, I MEAN WHO'S HE TALKING TO, HOW IS HE TALKING TO
21 OTHER PEOPLE, WHAT ARE HIS NON-VERBAL GESTURES, WHAT ARE HIS
22 VERBAL GESTURES. AND EVERYTHING IS DOCUMENTED. WE HAVE A
23 THING IN PRISON, IF IT'S NOT WRITTEN, IT DIDN'T HAPPEN.
24 EVERYTHING IS WRITTEN DOWN. AND THEN ON THE SAME TOKEN I'VE
25 HEARD MANY TIMES, IF YOU CAN'T SAY ANYTHING BAD ABOUT

1 SOMEONE, YOU DON'T SAY IT AT ALL. SO THAT'S THE KIND OF
2 CONTEXT THAT WE'RE TALKING ABOUT.

3 SURE, YOU HAVE FORMAL CLASSIFICATION EVALUATIONS OF
4 HIM. BUT WHAT I'M SAYING IS WHETHER HE'S A GOOD INMATE THAT
5 IS ADHERING TO ALL THE RULES AND REGULATIONS OR HE'S A BAD,
6 DISRUPTIVE OR PREDATOR INMATE WITH THIS TYPE OF SENTENCE AND
7 THIS TYPE OF CRIME THAT'S INVOLVED THAT'S SINCE SENTENCED BY
8 THE COURT, HE WILL STAY IN A HIGH SECURITY SETTING.

9 Q. AND IN A HIGH SECURITY SETTING SHORT OF MONITORING HIM
10 OR SHOOTING HIM ARE THERE OTHER SECURITY MEASURES THAT ARE
11 AVAILABLE?

12 A. YES. WE HAVE WHAT'S CALLED NON-LETHAL FORCE. THAT'S
13 CHEMICAL MUNITIONS, ELECTRICAL SHOCK, IF NECESSARY, HAND
14 RESTRAINTS, BODY RESTRAINTS. WE CAN TIE THEM TO THE BED, IF
15 NECESSARY. WE HAVE WHAT IS CALLED A RESTRAINT CHAIR THAT WE
16 CAN PHYSICALLY PUT THAT INDIVIDUAL IN A RESTRAINT CHAIR
17 WHERE HE CANNOT MOVE. WE CAN PUT A MASK OVER HIS FACE SO HE
18 CAN'T SPIT ON OTHER PEOPLE. WE CAN TIE HIM DOWN INTO A FOUR
19 POINT OR A SIX POINT RESTRAINT IN THE BED WHERE HE CAN HAVE
20 NO MOVEMENT.

21 HE CAN -- IF HE'S IN HIS CELL AND DECIDES NOT TO COMPLY
22 WITH LAWFUL ORDERS OF STAFF WE CAN APPLY WHAT IS KNOWN AS A
23 FORCED CELL MOVEMENT WITH HIGHLY TRAINED PEOPLE THAT CAN
24 COME IN AND TIE HIM AND RESTRAIN HIM WITHIN A CLOSE
25 CONFINEMENT AND REMOVE HIM TO THE PLACE THAT THEY WANT HIM

1 TO GO.

2 FOR EXAMPLE, WHY WOULD YOU WANT TO GET HIM OUT OF THE
3 CELL? WELL, THE DOCTOR WANTS TO EVALUATE HIM. AND HE NEEDS
4 TO -- THE DOCTOR NEEDS TO CONDUCT A PHYSICAL EVALUATION.
5 WELL, HE'S GOT TO COME OUT OF THAT CELL. THE FORCED CELL
6 MOVEMENT TEAM APPLIES GAS, IF NECESSARY, GOES IN, RESTRAINS
7 HIM.

8 AND THEN WE START TALKING ABOUT THE LETHAL FORCE THAT
9 CAN BE USED, THAT IS HIGH POWERED RIFLES, SPECIALLY TRAINED
10 PEOPLE THAT CAN KILL HIM, IF NECESSARY. AND I'VE ORDERED
11 PEOPLE KILLED. SO THAT'S -- THAT CAN OCCUR WITHIN A PRISON
12 SYSTEM.

13 AND THEN YOU HAVE A OTHER, WHICH IS DISCIPLINARY SYSTEM,
14 WHERE YOU CAN IMPOSE SANCTIONS AGAINST HIM FOR HIS
15 VIOLATIONS OF RULES AND REGULATIONS. AND THEN THERE'S
16 ANOTHER ONE. WE CAN RECLASSIFY THIS INDIVIDUAL. JUST
17 BECAUSE HE'S IN A VERY HIGH SECURITY STATUS DOESN'T MEAN
18 THAT WE CAN'T RECLASSIFY HIM UP TO EVEN MORE RESTRAINED
19 ENVIRONMENT, IF NECESSARY.

20 THE COURT: ALL RIGHT. COUNSEL, I'M GOING TO ASK YOU
21 NOW TO TAILOR YOUR QUESTIONS TO MR. BINNEY'S CHARACTERISTICS
22 AND HOW THEY WOULD RESPOND TO THESE BECAUSE WE ARE GETTING
23 INTO GENERAL PRISON CONDITIONS. AND THAT IS VIOLATIVE OF
24 THE COURT'S PRIOR RULING. SO PLEASE ASK SPECIFICALLY NOW
25 ABOUT MR. BINNEY.

1 MS. JOHNSON: THAT IS OVER MY OBJECTION, YOUR HONOR.

2 THE COURT: EXCUSE ME?

3 MS. JOHNSON: THAT'S OVER MY OBJECTION, YOUR HONOR. I
4 DID HAVE SOME ---

5 THE COURT: OBJECTION NOTED. THANK YOU.

6 Q. YOU SAID THAT YOU RECEIVED THE KIND OF RECORDS
7 REGARDING JONATHAN BINNEY THAT YOU WOULD USE TO CLASSIFY AND
8 ASSESS AN INMATE. WHAT IS YOUR ASSESSMENT OF HIM?

9 A. MY ASSESSMENT OF HIM, NUMBER ONE, IS THAT HE CAN BE
10 CONTROLLED AND MANAGED IN A PRISON ENVIRONMENT FOR THE
11 REMAINDER OF HIS LIFE WITHOUT CAUSING AN UNDUE RISK OF HARM
12 TO STAFF, INMATES AS WELL AS THE GENERAL COMMUNITY.

13 Q. AND CAN YOU TELL ME THE BASIS FOR THAT CONCLUSION?

14 A. LOOKING AT YEARS AND YEARS OF HIS CONFINEMENT LIKE IN
15 THE OHIO SYSTEM AND IN THE NEW YORK SYSTEM, THAT'S ALBANY,
16 AS WELL AS IN THE SOUTH CAROLINA DEPARTMENT OF CORRECTIONS
17 YOU WILL FIND THAT THE CORRECTIONAL AGENCIES HAS BEEN ABLE
18 TO MANAGE HIS BEHAVIOR, TO ANTICIPATE HIS BEHAVIOR.

19 AND ALSO IN EVALUATING HIM SPECIFICALLY I LOOK AT A AGE
20 FACTOR. WHAT I HAVE LEARNED AS WELL AS OTHER RESEARCH HAS
21 BROUGHT FORTH IN MY CLASSIFICATION OF HIM, ONCE HE'S PAST
22 THAT THIRTY-THREE, THIRTY-FOUR YEARS OF AGE HE BEGINS TO
23 BECOME MORE VULNERABLE TO VICTIMIZATION IN A PRISON SYSTEM.
24 THEY NOT ONLY GET BURNED OUT, THEY GET BURNED UP SO TO
25 SPEAK. AND YOU WILL FIND THAT HE'S NOT THE PERSON HE WAS

1 WHEN HE WAS SEVENTEEN YEARS OLD.

2 YOU'LL FIND THAT HE'S GETTING OLDER, HE'S GETTING
3 WEAKER. AND THE OTHER INMATE POPULATION SEES THAT. EVEN
4 THOUGH HE LOOKS YOUTHFUL, THE POINT STILL REMAINS IS THAT
5 THE AGE FACTOR WITHIN A PRISON SYSTEM WILL BEGIN TO BECOME
6 MORE PRONOUNCED, WHICH MEANS THAT HE BECOMES EVEN MORE
7 MANAGEABLE EVEN THOUGH HE HAS BEEN MANAGED ADEQUATELY WITHIN
8 THESE ENVIRONMENTS.

9 Q. NOW WHEN YOU SAY HE HAS BEEN MANAGED ADEQUATELY ARE
10 THERE NEGATIVE FACTS THAT EITHER ARE OR ARE NOT PRESENT IN
11 AN INMATE'S BACKGROUND THAT WOULD BE RELEVANT TO YOU HERE?

12 A. I THINK I UNDERSTAND YOUR QUESTIONS. YOU KNOW, I'M
13 LOOKING AT WHAT'S IN HIS RECORD, BUT I'M ALSO LOOKING AT
14 WHAT'S NOT IN HIS RECORD. I'M LOOKING IN HIS RECORD FOR
15 SPECIFIC THINGS TO INCLUDE GENERAL THINGS TOO.

16 WHAT I DON'T FIND WHEN I LOOK THROUGH HIS RECORD IS
17 HE'S TAKEN HOSTAGES. I DON'T FIND THAT HE'S INVOLVED IN
18 DISRUPTIVE STG GROUPS AND IN GANGS. I DON'T SEE WHERE HE
19 HAS EMPLOYED SYSTEMATIC AND RANDOM VIOLENCE AGAINST OTHER
20 INMATES. I DON'T SEE WHERE HE'S INVOLVED IN SYSTEMATIC AND
21 RANDOM VIOLENCE AGAINST STAFF. I DON'T SEE ANY ESCAPE
22 POTENTIAL ACTIVITY. I DON'T SEE ANY OF THOSE ISSUES WHERE
23 HE'S DEMONSTRATED THOSE PARTICULAR BEHAVIORS WHILE IN A
24 CONFINEMENT SETTING.

25 I ALSO UNDERSTAND AND SEE VERY CLEARLY THAT HE HAS NOT

1 BEEN INVOLVED WITH THOSE CRIMES THAT I'M LOOKING AT IN THE
2 COMMUNITY AS WELL AS THOSE BEHAVIORS IN A PRISON THAT WILL
3 PUT HIM IN THE CATEGORY OF -- I WOULDN'T SAY UNMANAGEABLE
4 PRISONS, CAN MANAGE JUST ABOUT ANY BEHAVIOR, BUT HE'S NOT
5 ANYWHERE NEAR THE HIGH POTENTIAL OF DISRUPTION AS WELL AS
6 PREDATOR ACTS WITHIN A PRISON SETTING.

7 Q. HOW WOULD YOU CHARACTERIZE THE AMOUNT OF DISCIPLINARY
8 VIOLATIONS HE HAS COMMITTED COMPARED TO OTHER INMATES HAS
9 FOR A SIMILAR LENGTH OF TIME?

10 A. WELL, I LOOK AT THAT. AND THAT'S WHAT I WAS TRYING TO
11 SHARE, WHAT'S NOT IN HIS PARTICULAR RECORD. IN LOOKING AT
12 HIGH SECURITY INMATE POPULATIONS I FIND THAT HE IS NOT THE
13 INMATE THAT COMES IN THE PRISON SYSTEM AND CONTINUES
14 PREDATOR BEHAVIORS AND VIOLENT BEHAVIORS AND DISRUPTIVE
15 BEHAVIORS WITHIN A PRISON SETTING.

16 NOW, YES, HE'S COMMITTED IMMATURE BEHAVIOR PATTERNS.
17 BUT IN THE SCOPE OF THOUSANDS AND THOUSANDS, HIS INVOLVEMENT
18 WITH THAT TYPE OF BEHAVIOR IS FAIRLY MINUSCULE.

19 Q. DO YOU RECALL SEEING IN HIS FILE THE NUMBER OF
20 COMPLAINTS?

21 A. GRIEVANCES, SO TO SPEAK?

22 Q. GRIEVANCES.

23 A. YES, MA'AM.

24 Q. AND DOES THAT DISTURB YOUR CONCLUSION?

25 A. NONE WHATSOEVER. IT DOES THE OPPOSITE. BEING IN

1 PRISONS YOU GET SUBED AS AN OFFICIAL. YOU GET GRIEVANCES
2 CONTINUOUSLY. I WELCOME THAT. I WELCOME THAT BECAUSE
3 YOU'RE TELLING ME THAT YOU ARE GOING TO COMPLY, LIKE I SEE
4 WITHIN HIS PARTICULAR RECORD, YOU ARE GOING TO COMPLY WITH
5 THINGS THAT YOU DISAGREE WITH BY FOLLOWING A PROCESS, A
6 PROCESS OF WRITING PAPERS VERSUS THROWING URINE, VERSUS
7 THROWING FECES, VERSUS TRYING TO STAB OFFICERS AND DOING
8 THOSE THINGS.

9 I DON'T SEE THAT IN HIS PARTICULAR RECORD. I SEE HIM
10 COMPLYING WITH THINGS THAT HE DISAGREES WITH WITH FOLLOWING
11 A PROTOCOL THAT IS APPROPRIATE.

12 Q. YOU LOOKED AT RECORDS THAT WERE UP TO HIS TRIAL AND
13 SENTENCE. AND THEN YOU ALSO LOOKED AT RECORDS THAT DESCRIBE
14 HIS BEHAVIOR SINCE HE'S BEEN INCARCERATED AT LIEBER. WOULD
15 YOUR CONCLUSIONS BE ANY DIFFERENT IF YOU LIMITED YOUR
16 COMMENTS TO WHAT HE HAD DONE BEFORE HE WAS SENTENCED TO
17 DEATH?

18 A. NO, MA'AM. HE HAS AN ESTABLISHED TRACK RECORD. IF
19 HE'S CONVICTED OF THIS CRIME THAT HE HAS BEEN ACCUSED OF AND
20 RECEIVES A LIFE WITHOUT PAROLE SENTENCE, THIS INDIVIDUAL
21 WILL AUTOMATICALLY BE IN THE HIGH SECURITY SETTING.

22 NUMBER TWO, I'M LOOKING AT THE OHIO SYSTEM, I'M LOOKING
23 AT THE NEW YORK, I'M LOOKING AT THE SOCIAL HISTORIES AND
24 THOSE KIND OF THINGS, AND I DON'T FIND ANY OF THOSE
25 DISRUPTIVE, PREDATOR BEHAVIOR PATTERNS IN A PRISON SETTING.

1 Q. NOW AT LIEBER DO YOU RECALL AN INCIDENT IN WHICH HE WAS
2 UNCOOPERATIVE AND SPOKE VERY DISRESPECTFUL TO A FEMALE
3 GUARD?

4 A. WELL, IT'S A CORRECTIONAL OFFICER, YES, MA'AM. IF I'M
5 NOT MISTAKEN IT WAS SOMETHING ABOUT THE SHOWER AND HE CALLED
6 HER, EXCUSE THE COURT, BITCH.

7 Q. AND DOES THAT INCIDENT DISTURB YOU AS FAR AS
8 ADAPTABILITY TO CONFINEMENT OR SECURITY ISSUES?

9 A. WELL, OF COURSE, EVERYTHING IS DISTURBING, BUT YOU HAVE
10 TO PUT IT IN THE RIGHT CONTEXT. YOU KNOW, AS A PRISON
11 WARDEN CLASSIFYING THOUSANDS AND THOUSANDS OF INMATES AND
12 REVIEWING, I WOULD SAY, TENS OF THOUSANDS INCIDENT REPORTS
13 YOU HAVE TO MAKE DETERMINATIONS AND YOU HAVE TO PUT WEIGHTED
14 VALUE ON EACH.

15 AND IF INMATE POPULATION WAS JUST TALKING BACK AND
16 CURSING AT STAFF, WHICH IS INAPPROPRIATE, BUT IT'S IN A
17 DIFFERENT ENVIRONMENT. AND WHAT I MEAN BY THAT, IF YOU DID
18 THAT AT THE LOCAL MALL IN FRONT OF PEOPLE, THAT IS
19 DISRUPTIVE. WITHIN A PRISON SYSTEM, THAT IS LESS THAN
20 TOTALLY DISRUPTIVE. IT'S IMMATURE BEHAVIOR. AND WE ASSESS
21 IT AT THAT. DO WE CONDONE IT? NO. DO WE SANCTION IT?
22 YES. DO WE DOCUMENT IT? YES. BUT THE POINT IS IS THAT WE
23 HAVE TO PUT IT IN THE RIGHT CONTEXT. AND THIS IS AT THE
24 BOTTOM LINE, SO TO SPEAK, OF THE SUPERIORITY.

25 Q. AND DO YOU ALSO RECALL A REPORT OF HIM TESTING POSITIVE

1 FOR MARIJUANA ON ONE OCCASION?

2 A. YES.

3 Q. AND WHAT DO YOU THINK ABOUT THAT AS FAR AS SECURITY
4 RISK AND ADAPTABILITY?

5 A. WELL, YOU HAVE TO MULTIPLY THAT OVER THE YEARS. HE GOT
6 LUCKY. AND THE SYSTEMS WORK. AND WHAT I MEAN BY THE
7 SYSTEMS WORK IS THAT THEY WERE ABLE TO DETECT, THEY WERE
8 ABLE TO ENSURE THAT THEY KNEW WHAT WAS GOING ON. AND THEY
9 HAVE BEEN ABLE TO CONTROL THE BEHAVIOR.

10 Q. TO A REASONABLE DEGREE OF PROFESSIONAL CERTAINTY DID
11 YOU COME TO ANY CONCLUSION ABOUT THE DEGREE OF RISK OF
12 ESCAPE MR. BINNEY WOULD POSE?

13 A. WELL, THE DEGREE OF RISK OF ESCAPE, THAT'S A TWO
14 PRONGED ISSUE. HE HAS NO HISTORY OF COMMITTING OR
15 ATTEMPTING TO COMMIT ESCAPE OR ATTEMPTED ESCAPE WHILE IN
16 CONFINEMENT. AND THAT IS THE INDICATOR THAT PREVIOUS
17 BEHAVIOR IS A BETTER PREDICTOR OF FUTURE BEHAVIOR WITHIN A
18 PRISON SYSTEM.

19 BUT ON THE SECOND PRONG, HE IS SENTENCED TO THE REST OF
20 HIS LIFE AT LEAST. AND AS A RESULT THEREOF, I DON'T CARE
21 WHETHER HE'S TRYING TO ESCAPE OR NOT TRYING TO ESCAPE, WE'RE
22 GOING TO TREAT HIM AS IF HE'S TRYING TO ESCAPE. SO HE'S
23 GOING TO BE IN THAT HIGH SECURITY STATUS. HE'S GOING TO BE
24 CONSTANTLY MONITORED AS IF HE'S ATTEMPTING TO ESCAPE EVEN
25 THOUGH THERE IS NO EVIDENCE OR INDICATION THAT HE HAS BEEN

1 INVOLVED OR WILL BE INVOLVED WITH THIS BEHAVIOR.

2 Q. AND SO THE LEVEL OF PROBABILITY OF ESCAPE YOU WOULD
3 ASSESS AS WHAT?

4 A. CLOSEST TO ZERO AS POSSIBLE BASED ON WHAT I KNOW AND
5 THE SYSTEMS THAT ARE AVAILABLE TO MANAGE THAT BEHAVIOR.

6 Q. AND DID YOU COME INTO ANY CONCLUSIONS ABOUT THE DEGREE
7 OF RISK OF HARM TO OTHER INMATES MR. BINNEY WOULD POSE?

8 A. MINUSCULE TO SAY THE LEAST.

9 Q. AND LIKEWISE, DID YOU COME TO ANY CONCLUSIONS AGAIN TO
10 A REASONABLE DEGREE OF PROFESSIONAL CERTAINTY ABOUT THE RISK
11 OF HARM TO STAFF THAT MR. BINNEY WOULD POSE?

12 A. MINUSCULE TO SAY THE LEAST.

13 Q. MR. AIKEN, ARE YOU OPPOSED TO THE DEATH PENALTY?

14 A. I HAVE NO OPINION.

15 Q. THANK YOU.

16 THE COURT: CROSS EXAMINATION.

17 MR. SALTER: YES, SIR, YOUR HONOR.

18 CROSS EXAMINATION BY MR. SALTER:

19 Q. MR. AIKEN, GOOD TO SEE YOU AGAIN.

20 A. GOOD TO SEE YOU, SIR.

21 Q. ONE OF THE GROUPS OF RECORDS YOU REVIEWED WERE THE
22 RECORDS FROM OHIO?

23 A. YES, SOUTH EASTERN, I THINK, THE INSTITUTION.

24 Q. THAT WAS FOR A JUVENILE CONVICTION OR A YOA OR ...

25 A. I DON'T KNOW THE AGE CATEGORY.

1 Q. BUT THE NEW YORK -- THE CONVICTION IN ALBANY, I
2 BELIEVE, THAT WAS WHEN HE WAS APPROXIMATELY EIGHTEEN YEARS
3 OLD, WAS IT NOT?

4 A. I WOULD -- HE WAS IN HIS LATE TEENS OR EARLY TWENTIES,
5 IF I'M NOT MISTAKEN, SIR.

6 Q. AND THE OHIO CONVICTIONS WERE BEFORE THAT TIME?

7 A. YES. THIS WAS DURING HIS EARLIER YEARS. THAT'S
8 CORRECT.

9 Q. ALL RIGHT. AS I UNDERSTAND IT, JUVENILE ADJUDICATION
10 AND THE PURPOSE IS REHABILITATION AND REINTEGRATION TO
11 SOCIETY, IS THAT CORRECT?

12 A. YES. YOU WILL FIND THAT MOST OF THE PEOPLE IN AN ADULT
13 AS WELL AS JUVENILE FACILITIES RETURN TO THE GENERAL
14 COMMUNITY.

15 Q. ALL RIGHT. THAT DIDN'T WORK THOUGH?

16 A. BEG YOUR PARDON?

17 Q. THAT DIDN'T WORK IN THIS CASE, DID IT?

18 A. NO, SIR, THAT'S NOT EVEN AN ISSUE WITH ME ANYMORE. I
19 LOOKED AT THESE RECORDS NOT FOR THAT PURPOSE, BUT FOR
20 INCAPACITATION.

21 Q. I UNDERSTAND ONE OF THE THINGS YOU LOOKED AT WAS THE
22 VERBAL AND NON-VERBAL GESTURES AND WHATNOT?

23 A. ANYTHING I CAN GET MY EYES AND HANDS ON, SIR.

24 Q. OKAY. NOW ONE OF THE -- ONE OF THE THINGS I'M SURE YOU
25 HEARD THIS MORNING BEFORE WE EVER BEGAN YOUR TESTIMONY WAS

1 THAT MR. BINNEY YESTERDAY APPARENTLY MADE AN OBSCENE GESTURE
2 TO ONE OF THE SECURITY PERSONNEL.

3 A. YES, SIR.

4 Q. THAT'S NOT APPROPRIATE BEHAVIOR, IS IT?

5 A. IN MY OPINION AS A PRISON WARDEN, THAT'S IMMATURE
6 BEHAVIOR.

7 Q. THAT'S IMMATURE BEHAVIOR. IT'S ALSO BEHAVIOR THAT GETS
8 AN INMATE SANCTIONS, DOES IT NOT?

9 A. EVERYTHING THAT'S EITHER IMMATURE, DISRUPTIVE, PREDATOR
10 BEHAVIORS WILL BE SANCTIONED AND NOTED. EVEN IF YOU'RE
11 FOUND NOT GUILTY IT'S STILL NOTED.

12 Q. ALL RIGHT, SIR.

13 MR. SALTER: YOUR HONOR, I HAVE A SERIES OF EXHIBITS
14 THAT HAVE PREVIOUSLY BEEN MARKED. AND I BELIEVE THEY'RE
15 GOING TO BE ADMITTED WITHOUT OBJECTION.

16 MS. JOHNSON: WITHOUT OBJECTION, YOUR HONOR.

17 THE COURT: ALL RIGHT.

18 Q. NOW FIRST I'D LIKE TO SHOW YOU, MR. AIKEN, IS A INMATE
19 DISCIPLINARY SYSTEM SUMMARY REPORT.

20 THE COURT: COUNSEL, TELL US WHAT THE NUMBERS ARE, THE
21 EXHIBITS IN YOUR HAND.

22 MR. SALTER: YES, SIR, YOUR HONOR. THIS IS
23 RESPONDENT'S EXHIBIT 5. THIS IS RESPONDENT'S EXHIBIT 5.
24 THE OTHERS ARE 6 - 9.

25 THE COURT: VERY GOOD. 5 - 9 INTO EVIDENCE WITHOUT

- 1 OBJECTION FOR RESPONDENT.
- 2 (WHEREUPON RESPONDENT'S EXHIBITS 5 - 9 WERE ENTERED
- 3 INTO EVIDENCE)
- 4 Q. I'LL JUST LEAVE THESE UP HERE, MR. AIKEN; ---
- 5 A. OKAY.
- 6 Q. --- FOR YOUR CONVENIENCE.
- 7 A. VERY WELL, SIR. THANK YOU.
- 8 Q. THE VERY FIRST DOCUMENT I HANDED TO YOU, RESPONDENT'S
- 9 EXHIBIT 5, THAT'S A RECEIPT, IS IT NOT?
- 10 A. IT SAYS INMATE DISCIPLINARY SYSTEM SUMMARY RECEIPT.
- 11 Q. THAT'S BECAUSE ONE OF THE FIRST THINGS THAT HAPPENS
- 12 WHEN YOU'RE INCARCERATED WITHIN THE DEPARTMENT OF
- 13 CORRECTIONS IS THAT THEY GIVE YOU A COPY OF THE DISCIPLINARY
- 14 SYSTEM SUMMARY, CORRECT?
- 15 A. THAT IS CORRECT, SIR.
- 16 Q. THIS CONTAINS RULES AND REGULATIONS HE'S GOT TO FOLLOW
- 17 WHEN HE'S AT SCDC?
- 18 A. THAT'S CORRECT, SIR.
- 19 Q. AND THIS IS DONE FOR SEVERAL REASONS, RIGHT?
- 20 A. SEVERAL REASONS, YES.
- 21 Q. ONE OF THE REASONS IS TO ENSURE THAT HE UNDERSTANDS
- 22 WHAT IS EXPECTED OF HIM IN TERMS OF HIS CONDUCT?
- 23 A. IT SETS VERY CLEARLY THE PARAMETERS IN WHICH HIS
- 24 BEHAVIOR IS GOING TO BE ASSESSED AND THE EXPECTATIONS WE
- 25 HAVE OF HIM.

1 Q. AND ANOTHER REASON IT'S DONE IS TO MAINTAIN ORDER AND
2 CONTROL WITH THE INMATE POPULATION, CORRECT?

3 A. I WOULDN'T GO THAT FAR. IT'S TO PUT HIM ON NOTICE THAT
4 THIS IS HOW YOU ARE GOING TO BE MONITORED WITHIN THIS
5 CONFINEMENT WHETHER YOU WANT TO COMPLY WITH IT OR NOT.

6 Q. AND THAT'S THE REASON FOR THE -- FOR THE SYSTEM ITSELF
7 THOUGH IS TO MAINTAIN ORDER.

8 A. SURE, THERE ARE MULTIPLE SYSTEMS. BUT I'M JUST SAYING
9 -- WE WERE JUST TALKING ABOUT THE DISCIPLINARY SYSTEMS
10 SUMMARY RECEIPT. IT'S TO PUT HIM ON NOTICE THAT THIS IS HOW
11 THE GAME'S GOING TO BE PLAYED.

12 Q. AND PART OF THAT REASON IS FOR THE SECURITY OF EVERYONE
13 IN THE INSTITUTION, WHETHER IT BE A CORRECTIONAL OFFICER OR
14 AN INMATE, CORRECT?

15 A. THE OVERALL PURPOSE OF THAT IS WHAT YOU SAID, SIR.
16 YES, I AGREE.

17 Q. OKAY. MR. BINNEY SIGNED THAT RECEIPT, DID HE NOT?

18 A. I CAN ONLY ASSUME AFTER LOOKING AT THOUSANDS OF THESE
19 THAT IT'S CUSTOMARY FOR THE INMATE TO PRINT HIS NAME AS WELL
20 AS SIGN IT.

21 Q. OKAY.

22 A. AND IT'S DATED FEBRUARY THE 28TH, 2002.

23 Q. ALL RIGHT. THAT DOCUMENT REFLECTS THAT MR. BINNEY WAS
24 INSTRUCTED TO READ THE INMATE DISCIPLINARY SUMMARY AND
25 THOROUGHLY FAMILIARIZE HIMSELF WITH ITS CONTENTS?

1 A. YES, SIR.

2 Q. IT FURTHER REFLECTS THAT HE UNDERSTANDS HE'S TO KEEP
3 THE DISCIPLINARY SUMMARY IN HIS POSSESSION FOR FUTURE
4 REFERENCE?

5 A. YES, SIR.

6 Q. NOW WE'VE TALKED ABOUT MAXIMUM SECURITY FACILITIES.
7 LET'S TALK ABOUT DEATH ROW ITSELF, WHERE HE'S CURRENTLY
8 HOUSED. CAN YOU DESCRIBE THAT FOR THE COURT?

9 A. WELL, BASICALLY IT'S A FACILITY THAT'S INTENDED TO
10 SEPARATE AND PLACE INMATE POPULATION SEPARATE FROM GENERAL
11 POPULATION BECAUSE OF THEIR SENTENCE. THEY'VE BEEN ORDERED
12 TO BE SENTENCED TO DEATH. AND THEY STAY THERE WHETHER THEIR
13 BEHAVIOR IS -- AS LONG AS THEIR BEHAVIOR IS IN ACCORDANCE TO
14 THE RULES AND REGULATIONS. NOW IF THEIR BEHAVIOR HAS --
15 BECOMES MORE DISRUPTIVE, THERE IS A REASON FOR MORE
16 SECURITY, THEN THIS INDIVIDUAL CAN ALSO BE PLACED IN A
17 HIGHER SECURITY SETTING.

18 Q. ALL RIGHT, SIR. NOW AFTER HE'S BEEN CONFINED IN THAT
19 ENVIRONMENT HE'S STILL GOTTEN INTO SOME TROUBLE, HAS HE NOT?

20 A. MY UNDERSTANDING HE HAS SEVERAL VIOLATIONS, YES, SIR.

21 Q. ALL RIGHT. SPECIFICALLY ON JANUARY 8 OF 2004.

22 A. WHAT EXHIBIT IS THIS, SIR, MAY I ASK?

23 Q. I BELIEVE IT'S -- THE INCIDENT REPORT WOULD BE NUMBER
24 9.

25 A. YES, SIR. I HAVE IT BEFORE ME.

1 Q. OKAY. HE WAS CHARGED WITH EITHER THE USE OR POSSESSION
2 OF NARCOTICS, MARIJUANA OR UNAUTHORIZED DRUGS, CORRECT?

3 A. THIS WAS A VIOLATION FROM THE STANDPOINT THAT HE HAD A
4 POSITIVE URINE, IF I'M NOT MISTAKEN. AND IT INDICATED
5 MARIJUANA, I THINK.

6 Q. ALL RIGHT. AND YOU'D AGREE THAT'S A FAIRLY SERIOUS
7 BREACH OF PROTOCOL WITHIN SCDC, IS IT NOT?

8 A. EVERYTHING I CONSIDER SERIOUS. THE ISSUE IS IS IT MORE
9 SERIOUS OR LESS SERIOUS IN COMPARISON TO OTHER BEHAVIORS AND
10 POTENTIAL BEHAVIORS?

11 Q. ALL RIGHT. WELL, YOU -- YOU INDICATED EARLIER THAT YOU
12 HAD FOR AT LEAST SOME PORTION OF YOUR CAREER BEEN IN CHARGE
13 OF, I BELIEVE IT WAS, SUBSTANCE OR CONTROL, I'M SORRY,
14 CONTRABAND CONTROL. EXCUSE ME. I APOLOGIZE. WAS IT
15 CONTRABAND CONTROL? IS THAT CORRECT?

16 A. YES, SIR.

17 Q. CONTRABAND IS A PROBLEM, ISN'T IT?

18 A. CONTRABAND IS A CONTINUAL CHRONIC ISSUE WITHIN A
19 CORRECTIONAL SETTING. AND THAT'S THE REASON WHY WE HAVE
20 URINALYSIS AS WELL AS OTHER PROCEDURES TO NOT ONLY TRY TO
21 PREVENT BUT TO ALSO DETECT AND SANCTION INDIVIDUALS THAT
22 INVOLVE THEMSELVES IN THIS BEHAVIOR.

23 Q. AND PART OF THE -- THE REASON IT'S SUCH A PROBLEM IS IF
24 HE TESTS POSITIVE FOR MARIJUANA AT A DRUG SCREEN THAT MEANS
25 SOMEBODY'S SMUGGLING MARIJUANA INTO THE PRISON, DOESN'T IT?

1 A. NO, IT DOESN'T.

2 Q. DOESN'T MEAN THAT SOMEONE BROUGHT MARIJUANA INTO THE
3 PRISON?

4 A. NO, SIR.

5 Q. DOES IT MEAN THAT SOMEBODY PERHAPS WAS GROWING
6 MARIJUANA SOMEWHERE IN THE PRISON?

7 A. NO, SIR.

8 Q. NOW HOW DOES -- HOW DOES SOMEONE TEST POSITIVE FOR
9 MARIJUANA IF THEY DON'T HAVE ACCESS TO MARIJUANA?

10 A. NO, THE ISSUE IS SOMEONE. IT COULD BE SOMETHING OR IT
11 COULD BE A ANIMAL. I CAN GIVE YOU EVEN AN EXAMPLE OF IT.
12 I'VE GOT INFORMATION ON ONE OF THE SECURITY PRISONS THAT I
13 WAS EVALUATING THAT THIS INDIVIDUAL TRAINED A CAT. AND THE
14 CAT -- THEY'D PUT THE MARIJUANA ON THE CAT AND THE CAT GOT
15 INTO THE PRISON AND HE GOES TO THE SAME PLACE EVERY DAY TO
16 GET FED. AND THEY GOT THE STUFF IN THAT WAY.

17 Q. SO SOMEONE WOULD HAVE TO UTILIZE A CAT OR SOME OTHER
18 ANIMAL PERHAPS ---

19 A. I'M JUST GIVING YOU SOME EXAMPLES OF WHAT WE HAVE TO
20 DEAL WITH ON A CONTINUAL BASIS, NOT A SITUATION WHERE
21 SOMEONE MADE A DISCRETIONARY DECISION OR IMMATURE DECISION
22 TO BRING MARIJUANA INTO A PRISON. THE THING IS THERE ARE
23 MANY WAYS. AND WITH THAT, WITH NEW TECHNOLOGY AND NEW
24 APPROACHES THAT'S THE PART THAT I'M TEACHING AND THE PART
25 THAT I'VE BEEN INVOLVED IN CAN BETTER PREVENT AS WELL AS

1 DETECT THE INVOLVEMENT OF PERSONS WITH THIS ILLICIT
2 ACTIVITY.

3 Q. IF YOU LOOK AT RESPONDENT'S EXHIBIT 7, WHICH IS UP
4 THERE IN FRONT OF YOU.

5 A. BEAR WITH ME A MOMENT, SIR. I SEE 6.

6 Q. YES, SIR.

7 A. I SEE 8. OKAY. I HAVE 7. IT'S RIGHT HERE BEFORE ME.

8 Q. THAT'S THE SCDC LETTER OF VISITATION SUSPENSION.

9 A. YES, SIR.

10 Q. AND THAT REFLECTS THAT HE LOST A HUNDRED AND TWENTY
11 DAYS OF VISITATION ---

12 A. YES, SIR.

13 Q. --- PRIVILEGES?

14 A. UM-HUM (AFFIRMATIVE).

15 Q. ALL RIGHT. SO IT'S PRETTY SAFE TO SAY THAT LIEBER
16 VIEWED HIS ACTIONS AS VERY SERIOUS?

17 A. LIKE I SAID, YES. ALL OF THIS IS VERY SERIOUS. AND
18 THE ELIMINATION OF VISITATION IN THIS PARTICULAR CHARGE IS
19 CUSTOMARY.

20 Q. ALL RIGHT, SIR. NOW A LITTLE OVER TWO YEARS AGO, I
21 BELIEVE IT'S APRIL 5, 2005, THAT WAS THE INCIDENT WHERE IT'S
22 REFLECTED IN RESPONDENT'S EXHIBIT 6.

23 A. BEAR WITH ME A MOMENT, SIR.

24 Q. YES, SIR.

25 A. OKAY. I'M LOOKING AT 6 NOW.

- 1 Q. ALL RIGHT, SIR. THAT IS THE INCIDENT IN WHICH HE
2 CURSED A CORRECTIONAL OFFICER ---
- 3 A. YES. THIS IS THE INCIDENT -- I'M SORRY. I DIDN'T MEAN
4 TO TALK OVER YOU, SIR.
- 5 Q. NO, I APOLOGIZE, SIR. PLEASE.
- 6 A. GO AHEAD.
- 7 Q. OKAY. THIS IS THE INCIDENT WHERE HE CURSED NATALIE
8 SCOTT, CORRECTIONAL OFFICER?
- 9 A. I SEE THE NAME SCOTT, YES, SIR.
- 10 Q. AND THIS ALL STARTED BECAUSE SHE REFUSED TO LET HIM
11 TAKE A SHOWER WHEN HE WANTED TO TAKE A SHOWER?
- 12 A. YES, SIR, BASICALLY.
- 13 Q. SO YOU'RE ASSIGNED TIMES AS AN INMATE WHEN YOU CAN TAKE
14 A SHOWER, IS THAT CORRECT?
- 15 A. YOU'RE ASSIGNED TIMES TO DO JUST ABOUT ANYTHING WITHIN
16 A PRISON ENVIRONMENT EXCEPT BREATHE.
- 17 Q. AND IT'S IMPORTANT THAT THE INMATES OBEY THOSE TIME
18 SCHEDULES, CORRECT?
- 19 A. THEY WILL OBEY THEM.
- 20 Q. AND APPARENTLY HE DIDN'T LIKE THAT, DID HE?
- 21 A. EVIDENTLY.
- 22 Q. AND HE, I BELIEVE, THE DOCUMENTS REFLECTS, I BELIEVE,
23 ON THE SECOND PAGE THAT HE SUBMITTED TO COUNSELING AS PART
24 OF THE SANCTION?
- 25 A. YES. HE WAS -- I REMEMBER -- I DON'T SEE IT DIRECTLY

1 HERE, BUT I DO UNDERSTAND THAT IT WAS HANDLED

2 ADMINISTRATIVELY WITH COUNSELING AND A VERBAL REPRIMAND.

3 Q. OKAY. DO THE RECORDS THAT YOU WERE PROVIDED INCLUDE
4 THE, I BELIEVE IT'S RESPONDENT'S EXHIBIT 8? IT'S MARCH 17,
5 2003 REQUEST TO STAFF MEMBER.

6 A. OKAY. ARE YOU REFERRING TO EXHIBIT 8?

7 Q. YES, SIR. I BELIEVE THAT'S THE NUMBER.

8 A. YES. I SEE EXHIBIT 8.

9 Q. ALL RIGHT. IS THAT THE MARCH 17?

10 A. IT SAYS MARCH 17, 2003 REQUEST TO STAFF MEMBER.

11 Q. ALL RIGHT. THAT WAS BY A -- THREAT BY HIM, WAS IT NOT,
12 TO WARDEN BURTT, B-U-R-T-T, AND A LIEUTENANT MILLER, THAT HE
13 WAS GOING TO SUE THEM UNDER 1983?

14 A. WELL SEE, I'M NOT TRYING TO PLAY ON WORDS, SIR. WHEN
15 YOU'RE A WARDEN OF A SUPER MAXIMUM SECURITY PRISON AND AN
16 INMATE TELL YOU THEY GOING TO SUE YOU, THAT'S NOT A THREAT.

17 Q. IT HAPPENS A LOT. IT'S KIND OF ...

18 A. WELL, NO. A THREAT IS MUCH DIFFERENT. I MEAN, THEY
19 PLANNING TO TAKE YOU OUT. AND USUALLY THEY DON'T THREATEN
20 TO DO IT, THEY DO IT FIRST. AND I DON'T FIND ANY OF THAT
21 HERE.

22 Q. ALL RIGHT.

23 A. SUE ME.

24 Q. YOU'VE BEEN SUED A NUMBER OF TIMES IN YOUR CAREER, HAVE
25 YOU NOT?

1 A. I MIGHT HAVE A STATE CHAMPIONSHIP.

2 Q. YOU AND I'VE TALKED A LITTLE BIT ABOUT THAT EARLIER,
3 DID WE NOT?

4 A. YES, SIR, WE DID.

5 Q. IT KIND OF COMES WITH THE TERRITORY?

6 A. WELL, YES. I MEAN, LIKE I STATED BEFORE TO COUNSEL, I
7 DON'T MIND INMATES SUING ME. I DON'T MIND THEM FILING
8 GRIEVANCES BECAUSE I THINK THAT'S APPROPRIATE BEHAVIOR. AND
9 REALLY IT HELPS. THE INSTITUTION BECOMES MORE ACCOUNTABLE.
10 IT'S WHEN THEY START ATTACKING STAFF WITH RANDOM AND
11 SYSTEMATIC VIOLENCE AND TRYING TO RUN THE PRISONS, THAT'S
12 WHEN I HAVE A PROBLEM 'CAUSE THAT'S WHAT YOU PAY ME TO DO.

13 Q. IT'S STILL AN AGGRAVATING NUISANCE THOUGH?

14 A. NO. IF YOU -- I DON'T. I REALLY DON'T. I HAVE
15 THANKED INMATES ON SOME OCCASIONS FOR SUING ME. AND THE
16 REASON WHY IS BECAUSE THEY'RE NO LONGER THROWING URINE AND
17 FECES ON MY STAFF.

18 Q. THAT'S THE KIND OF PROBLEM -- A MORE EXTREME FORM OF
19 MISBEHAVIOR BY INMATES, SORT OF PHYSICAL VIOLENCE TOWARDS
20 OTHER PEOPLE?

21 A. I WISH I COULD SAY THAT, SIR.

22 Q. WHAT OTHER TYPES OF BEHAVIOR ARE WE TALKING ABOUT?

23 A. I'M TALKING ABOUT THEM -- AND I DON'T WANT TO BE TOO
24 GRAPHIC, BUT THEY HAVE DEVELOPED WAYS TO INFLICT SYSTEMATIC
25 AND RANDOM VIOLENCE AGAINST STAFF ON A CONTINUAL BASIS AS

1 WELL AS OTHER INMATES. AND I'M TALKING ABOUT VERY HIGH
2 SECURITY INMATES, OF COURSE.

3 Q. ALL RIGHT.

4 A. AND CONTINUOUSLY, CHRONICALLY PREDATOR AND VIOLENT
5 INMATE POPULATIONS WHILE THEY'RE IN CONFINEMENT.

6 Q. ALL RIGHT. NOW THE RECORDS THAT YOU HAVE, THE ONES
7 THAT I SHOWED YOU AND THE ONES THAT YOU REVIEWED, THEY ONLY
8 REFLECT THOSE INSTANCES WHERE MR. BINNEY WAS CAUGHT DOING
9 SOMETHING, CORRECT?

10 A. WELL, YES, SIR. I MEAN, WHEN YOU SAY, WHEN HE GOT
11 CAUGHT. AND YOU HAVE TO PUT IT IN THE PROPER CONTEXT.
12 THERE ARE SOME THINGS THAT I GOT AWAY WITH IN SEVENTH GRADE
13 BECAUSE THE TEACHER DIDN'T SEE. OKAY.

14 Q. WHEN YOU'RE IN THE SEVENTH -- WHEN YOU'RE IN THE
15 SEVENTH GRADE YOU'RE NOT IN THE CONFINES OF ---

16 A. YOU ANSWERED ---

17 Q. --- PRISON.

18 A. --- THE QUESTION FOR ME. YOU'RE NOT IN A HIGH SECURITY
19 PRISON WITH PEOPLE HANDCUFFING YOU WHEN YOU'RE COMING OUT OF
20 THE CELL, WITH PEOPLE WATCHING YOU TWENTY-FOUR HOURS A DAY,
21 PEOPLE HAVE CAMERAS, PEOPLE HAVE WAYS OF TESTING YOUR URINE
22 AND A LOT OF OTHER THINGS THAT WE HAVE THAT I DON'T SHARE
23 WITH THE GENERAL PUBLIC IN ORDER TO PREVENT, DETECT, CONTAIN
24 AND MONITOR BEHAVIOR.

25 Q. ALL RIGHT. BUT THOSE RECORDS DON'T REFLECT ANYTHING HE

1 MAY HAVE DONE AND NOT BEEN OBSERVED BY A C. O. OR SOME OTHER
2 STAFF MEMBER, CORRECT?

3 A. OF COURSE THAT POSSIBILITY IS THERE, BUT THE
4 PROBABILITY OF HIM DOING THAT ON A CONTINUAL BASIS WITHOUT
5 DETECTION IS GREATLY REDUCED.

6 Q. ALL RIGHT. WELL, WERE YOU PROVIDED WITH INFORMATION
7 THAT HE STOLE A VCR WHILE AWAITING TRIAL ON THE MURDER
8 CHARGE AND WHILE AT LIEBER CORRECTIONAL INSTITUTION?

9 A. WELL, I DON'T HAVE DIRECT INFORMATION ON THAT, BUT
10 AGAIN, I'M PUTTING IT IN THE CONTEXT OF WHAT TYPE OF
11 BEHAVIOR PATTERN IS THIS. I DON'T THINK THAT HE COULD HAVE
12 BEEN INVOLVED IN A HOSTAGE SITUATION UNDETECTED. I DON'T
13 SEE WHERE HE COULD HAVE ESCAPED UNDETECTED AND STAYED ON
14 ESCAPE STATUS UNTIL NOW UNDETECTED.

15 I'M LOOKING AT THE TOTAL ASPECT OF THIS INDIVIDUAL AND
16 CAN HE BE CONTROLLED AND MANAGED. AND I'M SAYING BASED ON
17 THIS AS WELL AS BEING INCARCERATED IN VARIOUS INSTITUTIONS
18 AND VARIOUS SYSTEMS THAT HE'S NOT -- THIS WILL BE DETECTED.
19 LET'S PUT IT THAT WAY.

20 Q. ALL RIGHT. IF THERE'S INFORMATION THAT HE STOLE A VCR
21 BECAUSE HE WANTED THE PARTS FOR A TATTOO GUN, THAT WAS NOT
22 BROUGHT TO YOUR ATTENTION?

23 A. I DON'T RECALL THAT.

24 Q. ALL RIGHT, SIR. THAT WOULD BE A FAIRLY SIGNIFICANT
25 BREACH OF SECURITY, WOULD IT NOT?

1 A. IN RELATIONSHIP -- AGAIN, EVERYTHING TO WHETHER YOU
2 SPEAK TO THE WARDEN IN THE MORNING ALL THE WAY THROUGH TO
3 YOU'VE TAKEN HOSTAGES IS SERIOUS. WHAT YOU HAVE TO DO, AND
4 I'M THAT DECISION-MAKER, AND I HAVE TO SIGN MY NAME TO IT AS
5 WHAT DEGREE OF SERIOUSNESS IT IS.

6 Q. ALL RIGHT. WERE YOU PROVIDED WITH INFORMATION THAT
7 WHILE AWAITING THE TRIAL IN THIS CASE THAT HE WAS MAKING HIS
8 OWN LIQUOR?

9 A. I SEE NO BUCK CHARGES, AS WE CALL IT, IN HIS RECORD.
10 AND IF IT IS, I'LL BE GLAD TO REVIEW IT.

11 Q. ALL RIGHT. SO THAT WOULD BE A FAIRLY SIGNIFICANT
12 PROBLEM ALSO, WOULD IT NOT?

13 A. IT FITS IN THE SAME CATEGORY, SIR, AS WHAT DEGREE OF
14 SERIOUSNESS IT IS.

15 Q. ALL RIGHT. IT'S NOT -- IT'S NOT -- IT'S NOT THE SAME
16 AS ACTUALLY THREATENING SOMEONE'S LIFE, BUT IT IS A VERY
17 SIGNIFICANT PROBLEM?

18 A. EVERYTHING IS -- IS SIGNIFICANT, BUT YOU HAVE TO PUT IT
19 IN PROPER CONTEXT. YOU BROUGHT UP, OKAY, MAKING HOOCH OR
20 MAKING BUCK. AND YOU SAID THAT'S VERY SERIOUS. YES, IT'S
21 SERIOUS. BUT IT ALSO TELLS ME AS A PRISON WARDEN THAT
22 THEY'RE NOT GETTING DOPE IN THE INSTITUTION, SO THEY'VE GOT
23 TO MAKE HOOCH.

24 Q. WE ALREADY KNOW HE'S GOTTEN DOPE IN THE INSTITUTION.

25 A. WELL, I'M JUST SAYING, IF HE'S MAKING BUCK, HE'S NOT

1 GETTING DRUGS IN. AND, YOU KNOW, THOSE ARE THE THINGS YOU
2 HAVE TO WEIGH. NOW I'M NOT SAYING THAT CONCLUSIVELY. I'M
3 SAYING THOSE ARE SOME OF THE THINGS THAT I HAVE TO CONSIDER
4 AS A PRISON WARDEN.

5 Q. ALL RIGHT, SIR. NOW YOU MENTIONED PREDATOR INMATES.
6 THEY'RE A PROBLEM, ARE THEY NOT?

7 A. THAT'S TO SAY THE LEAST, YES.

8 Q. WOULD YOU VIEW A SEXUAL SADIST AS A PREDATOR INMATE?

9 A. A SEXUAL SADIST?

10 Q. YES, SIR.

11 A. WELL, HERE WE GO WITH ANOTHER PERFECT EXAMPLE OF IT.

12 THIS INDIVIDUAL HAS COMMITTED SEXUAL BATTERY AGAINST A
13 CHILD, HIS CHILD. IN THE COMMUNITY, THAT'S A PREDATOR. IN
14 A PRISON, I'VE GOT TO TRY TO KEEP HIM ALIVE.

15 Q. WHY IS THAT?

16 A. 'CAUSE INMATES HATE PEOPLE LIKE THAT. YOU LOOK AT THE
17 MOST -- AND I HAD TO STUDY AND I HAD TO EVALUATE NOT ONLY
18 TERRORISTS, BUT INDIVIDUALS THAT ARE INVOLVED WITH
19 SYSTEMATIC AND RANDOM VIOLENCE, BOTH BLACK, WHITE, LATIN,
20 EVERYONE AND ALL THE PRISON PREDATOR GANGS. ONE THING THAT
21 WOULD EXCLUDE YOU FROM BEING A PART OF THEM IS BEING
22 INVOLVED IN THIS TYPE OF BEHAVIOR. SO, YOU KNOW, HE
23 SWITCHES TO THE OTHER END OF THE SPECTRUM IN A PRISON. I
24 MEAN, HE'S GOT A TARGET ON HIM. AND I THINK THE SYSTEM HAS
25 DONE VERY WELL IN MANAGING HIM AND HIS SAFETY. BUT, NO,

1 HE'S NOT A PREDATOR IN PRISON, HE'S A VICTIM.

2 Q. A VICTIM. SO MR. BINNEY WOULD BE A VICTIM IN PRISON?

3 A. A POTENTIAL VICTIM

4 Q. IF HE'S A SEXUAL SADIST?

5 A. A SEXUAL SADIST IN THE COMMUNITY WILL MAKE HIM AT A
6 HIGH VALUED TARGET OF BEING A VICTIM IN A PRISON SYSTEM AND
7 A HIGH LEVEL OF VULNERABILITY. YES, SIR.

8 Q. LET ME ASK YOU A COUPLE OF QUESTIONS ABOUT YOUR EARLIER
9 TESTIMONY THAT IN A MAXIMUM SECURITY FACILITY AN INMATE
10 WOULD HAVE A FENCE AND A GUN BETWEEN HIM AND SOCIETY,
11 CORRECT?

12 A. I SAID A GUN, YES.

13 Q. NOT ALWAYS A FENCE THOUGH, CORRECT?

14 A. WELL, IN EVERY CIRCUMSTANCE THIS INDIVIDUAL WILL BE IN
15 MAXIMUM CUSTODY WHETHER HE'S IN A COURTROOM, I DON'T SEE A
16 FENCE AROUND THE COURT, FOR EXAMPLE, BUT THE POINT IS IS
17 THAT HE HAS ADEQUATE SECURITY.

18 I'VE HAD AN OPPORTUNITY TO OBSERVE THE SECURITY IN THIS
19 COURTROOM, FOR EXAMPLE. AND I THINK IT'S ADEQUATE. AND IF
20 IT WASN'T I WOULDN'T BRING IT OUT IN OPEN COURT. BUT THE
21 POINT STILL REMAINS IS THAT, YES, HE MAY HAVE TO COME TO
22 COURT. BUT NORMAL AS WELL AS EXTRAORDINARY SECURITY
23 MEASURES CAN BE INVOKED IN ORDER TO SECURE HIM.

24 Q. ALL RIGHT. BUT SOMETIMES WITHIN THE PRISON SYSTEM EVEN
25 THOUGH PEOPLE ARE CONVICTED OF MURDER ARE ALLOWED TO HAVE

1 JOBS OUTSIDE THE PRISONS, CORRECT?

2 A. NO, SIR, NOT LIFE WITHOUT PAROLE. I'VE ASKED THIS
3 QUESTION ON -- SEVERAL YEARS AGO, AND IT STILL REMAINS.
4 I'VE LOOKED AT OTHER SYSTEMS ALSO, INMATES SENTENCED TO LIFE
5 WITHOUT PAROLE. AND THAT INDIVIDUAL IS IN PRISON FOR THE
6 REST OF HIS LIFE. AND AS A RESULT THEREOF THAT INDIVIDUAL
7 WILL BE IN THIS HIGH SECURITY STATUS. THE ANSWER IS NO.

8 Q. BUT HE'S ALREADY SECURE WHERE HE IS RIGHT NOW, IS HE
9 NOT?

10 A. BEG YOUR PARDON?

11 Q. HE'S ALREADY SECURE WHERE HE IS RIGHT NOW IN THE
12 CONFINES OF DEATH ROW?

13 A. SURE. AND LIKE I EXPLAINED TO THE COURT, AND IF HIS
14 BEHAVIOR DICTATES WE CAN PUT HIM IN HIGHER SECURITY.

15 Q. OKAY. AND WE DON'T KNOW WHAT FACILITY HE WOULD
16 ACTUALLY BE IN SHOULD HE RECEIVE A LIFE WITHOUT PAROLE
17 SENTENCE?

18 A. I CAN'T GIVE YOU THE CELL ASSIGNMENT NOR THE FACILITY.
19 I'M JUST TALKING ABOUT THE TYPE OF FACILITY.

20 MR. SALTER: NOTHING FURTHER.

21 A. THANK YOU, SIR.

22 THE COURT: AND IS THERE REDIRECT?

23 MS. JOHNSON: NO, YOUR HONOR.

24 THE COURT: ALL RIGHT. ANY OBJECTION TO THE RELEASE OF
25 THE WITNESS?

1 MR. SALTER: NONE WHATSOEVER. THANK YOU, SIR.

2 THE COURT: ALL RIGHT. HEARING NONE, YOU'RE FREE --
3 YOU DON'T HAVE TO GO, BUT YOU'RE FREE TO GO IF YOU WISH.

4 A. THANK YOU.

5 THE COURT: HAVE A GOOD DAY.

6 A. HAVE A GOOD DAY, SIR. AND THANK YOU VERY MUCH.

7 THE COURT: PLEASE CALL YOUR NEXT WITNESS.

8 MR. BLUME: WE CALL NATALIE NOVICK-BROWN.

9 THE COURT: COUNSEL, LET ME ASK YOU, HOW LONG DO YOU
10 THINK YOUR WITNESS, YOUR NEXT WITNESS WILL BE?

11 MR. BLUME: I THINK SHE WILL BE PRETTY LONG ---

12 THE COURT: LET'S TAKE A BREAK THEN. LADIES AND
13 GENTLEMEN, LET'S JUST STAND DOWN AND TAKE A MORNING BREAK.
14 WE'LL BE IN RECESS UNTIL APPROXIMATELY 11:00 OR SHORTLY
15 THEREAFTER. COURT IS IN RECESS UNTIL THEN.

16 (WHEREUPON COURT WAS IN RECESS AT 10:48 AM)

17 THE COURT: ALL RIGHT. PLEASE BE AT EASE. PLEASE BE
18 SEATED, LADIES AND GENTLEMEN. THANK YOU. AND, MR. BLUME,
19 YOU READY TO CALL YOUR NEXT WITNESS?

20 MR. BLUME: WE CALL NATALIE NOVICK-BROWN.

21 THE COURT: AND PLEASE COME FORWARD AND TAKE THE OATH
22 OF A WITNESS.

23 NATALIE NOVICK-BROWN,

24 BEING DULY SWORN TESTIFIED AS FOLLOWS:

25 DIRECT EXAMINATION BY MR. BLUME:

1 Q. DR. NOVICK-BROWN, WOULD YOU PLEASE STATE AND SPELL YOUR
2 NAME FOR THE RECORD, PLEASE?

3 A. YES. NATALIE NOVICK-BROWN, N-O-V-I-C-K B-R-O-W-N.

4 Q. MS. BROWN, HOW ARE YOU CURRENTLY EMPLOYED?

5 A. I'M SELF-EMPLOYED AS A CLINICAL AND FORENSIC
6 PSYCHOLOGIST.

7 Q. AND WHERE DO YOU CURRENTLY RESIDE?

8 A. I RESIDE IN SEATTLE, WASHINGTON.

9 Q. DO YOU HAVE AN AREA OF SPECIALIZATION?

10 A. YES. I HAVE TWO AREAS OF SPECIALIZATION. ONE IS IN
11 FETAL ALCOHOL SPECTRUM DISORDERS. AND THE OTHER IS IN
12 SEXUAL PREDATOR EVALUATION, SEXUAL OFFENSE EVALUATION.

13 Q. AND ARE YOU CERTIFIED IN THAT AREA?

14 A. YES. I AM A CERTIFIED -- I'M CERTIFIED IN THE STATE OF
15 WASHINGTON AS A SEX OFFENDER TREATMENT PROVIDER DOING BOTH
16 EVALUATION AND TREATMENT.

17 Q. AND DO YOU HAVE ANY AFFILIATION WITH THE UNIVERSITY OF
18 WASHINGTON?

19 A. YES. I'M A CLINICAL ASSISTANT PROFESSOR ON STAFF IN
20 THE DEPARTMENT OF PSYCHIATRY AND BEHAVIORAL SCIENCES.

21 Q. AND WHAT DO YOU DO IN THAT CAPACITY?

22 A. I CONSULT WITH THE FETAL ALCOHOL AND DRUG UNIT AT THE
23 UNIVERSITY. AND I'M INVOLVED IN A GRANT PROJECT RIGHT NOW.
24 I DO FASD, FETAL ALCOHOL SPECTRUM DISORDER ASSESSMENTS FOR
25 KING COUNTY MENTAL HEALTH COURT AND DRUG COURT.

1 Q. AND DO YOU HAVE ANY -- DO YOU DIAGNOSE INDIVIDUALS FROM
2 THE DIVISION OF DEVELOPMENTAL DISABILITIES IN THE STATE OF
3 WASHINGTON?

4 A. YES. I'M ALSO CERTIFIED BY THE DIVISION OF
5 DEVELOPMENTAL DISABILITIES TO DO EVALUATIONS ON INDIVIDUALS
6 REFERRED TO ME.

7 Q. AND DO YOU ALSO PROVIDE THERAPY TO PEOPLE WITH FETAL
8 ALCOHOL SYNDROME OR FETAL ALCOHOL SPECTRUM DISORDERS?

9 A. YES. I'VE BEEN PROVIDING THERAPY FOR APPROXIMATELY
10 TWELVE YEARS NOW. AND THAT'S BOTH TO CHILDREN AND TO ADULTS
11 WITH FETAL ALCOHOL SPECTRUM DISORDERS.

12 Q. AND WHAT KIND OF EDUCATIONAL BACKGROUND DO YOU HAVE?

13 A. I HAVE A PHD IN CLINICAL PSYCHOLOGY FROM THE UNIVERSITY
14 OF WASHINGTON. AND I SPECIALIZED IN FORENSIC PSYCHOLOGY AND
15 HAVE POST DOCTORAL TRAINING WITH DR. ANN STREISSGUTH IN
16 FETAL ALCOHOL SPECTRUM DISORDERS AT THE UNIVERSITY OF
17 WASHINGTON.

18 Q. OKAY. AND BECAUSE I THINK IT'S RELEVANT TO THESE
19 PROCEEDINGS, WHO IS DR. ANN STREISSGUTH?

20 A. SHE'S ONE OF THE FOREMOST RESEARCHERS, PIONEER
21 RESEARCHERS ESSENTIALLY IN FETAL ALCOHOL SYNDROME BEGINNING
22 IN THE 70s, 1970s UP TO ACTUALLY THIS YEAR, SHE RETIRED.
23 BUT SHE'S STILL ON STAFF AT THE FETAL ALCOHOL AND DRUG UNIT,
24 BUT HAS RETIRED FROM ACTIVE RESEARCH.

25 Q. SO YOU SUBMIT YOUR POST OPERATIVE TRAINING WORKING WITH

1 DR. STREISSGUTH?

2 A. YES, I DID.

3 Q. IN ADDITION TO YOUR EDUCATION AND TRAINING HAVE YOU
4 PUBLISHED ANY ARTICLES OR CHAPTERS OR BOOKS?

5 A. YES. I PUBLISHED SEVERAL ARTICLES WHEN I WAS GETTING
6 MY PHD IN CLINICAL PSYCHOLOGY AND WORKING WITH DR.
7 STREISSGUTH. AND MY MOST RECENT PUBLICATION IS A BOOK
8 CHAPTER IN A BOOK EDITED BY KAREN O'MALLEY. AND MY CHAPTER
9 WAS ON THE VERSIONS OF FETAL ALCOHOL SPECTRUM DISORDERS AND
10 ATTENTION DEFICIT HYPERACTIVITY DISORDER. THERE'S A HIGH
11 DIFFERENTIATION BETWEEN THE TWO.

12 Q. AND APPROXIMATELY HOW MANY PEOPLE WITH FETAL ALCOHOL
13 SPECTRUM DISORDERS DO YOU THINK YOU'VE EVALUATED OR TREATED
14 OVER THE YEARS?

15 A. IT'S AT LEAST THREE HUNDRED, MAYBE AS HIGH AS THREE
16 HUNDRED AND FIFTY AT THIS POINT, PEOPLE IDENTIFIED AS HAVING
17 FETAL ALCOHOL SPECTRUM DISORDER.

18 Q. AND HAVE YOU EVER HAD THE -- HAVE YOU EVER BEEN CALLED
19 AS A WITNESS IN A CIVIL OR CRIMINAL CASE?

20 A. MANY TIMES, YES.

21 Q. AND IN THAT CAPACITY BEEN QUALIFIED AS AN EXPERT
22 WITNESS?

23 A. YES, IN MANY JURISDICTIONS AND MULTIPLE STATES.

24 Q. AND THOSE HAVE BEEN IN BOTH CIVIL CASES AND CRIMINAL
25 CASES?

1 A. YES.

2 Q. AND WAS THE ISSUE IN THOSE CASES OR AT LEAST SOME OF
3 THOSE CASES HAVE TO DO WITH WHETHER THE PERSON HAD FETAL
4 ALCOHOL SPECTRUM DISORDER AND ITS IMPLICATIONS FOR A
5 PARTICULAR LEGAL MATTER?

6 A. YES, THAT'S CORRECT.

7 Q. AND HAVE YOU BEEN -- YOU WERE QUALIFIED AS AN EXPERT IN
8 THOSE CASES?

9 A. YES, I WAS.

10 Q. AND YOU'VE BEEN QUALIFIED AS AN EXPERT IN FETAL ALCOHOL
11 SPECTRUM DISORDER?

12 A. THAT'S CORRECT, YES.

13 MR. BLUME: YOUR HONOR, AT THIS TIME I WOULD OFFER DR.
14 NOVICK-BROWN AS AN EXPERT IN FETAL ALCOHOL SPECTRUM
15 DISORDERS.

16 MR. MABRY: JUST A FEW QUESTIONS, YOUR HONOR, IF I
17 COULD, ---

18 THE COURT: ALL RIGHT. YOU MAY.

19 MR. MABRY: --- VERY BRIEF.

20 VOIR DIRE BY MR. MABRY:

21 Q. MS. NOVICK-BROWN, WHAT STATES HAVE YOU BEEN QUALIFIED
22 IN?

23 A. PREDOMINATELY IN WASHINGTON STATE AND THE STATE OF
24 FLORIDA, BUT ALSO NEW JERSEY, NEW YORK AND MISSOURI.

25 Q. OKAY. AND IN WHAT COUNTIES OR WHAT -- CAN YOU TELL ME

1 WHAT CITIES YOU QUALIFIED IN WHERE YOU TESTIFIED?

2 A. KING COUNTY, SEATTLE, EVERETT WASHINGTON, SNOHOMISH
3 COUNTY, PIERCE COUNTY, TACOMA, AND THEN A VARIETY OF
4 COUNTIES THROUGHOUT THE STATE OF FLORIDA, ACTUALLY
5 TOMORROWAKI (PHONETICS) IN JACKSONVILLE, FLORIDA, I'VE
6 TESTIFIED. AND IN NEW YORK IT WAS NEW YORK CITY. I DON'T
7 KNOW EXACTLY WHAT THE JURISDICTION WAS. THOSE ARE JUST A
8 FEW OF THE PLACES.

9 Q. WHAT COUNTIES IN FLORIDA HAVE YOU TESTIFIED?

10 A. IN ORANGE COUNTY, IN BROWARD COUNTY, IN MIAMI, DADE
11 COUNTY, IN VOLUSIA, IN BREVARD, IN DUVAL, THE SARASOTA AREA,
12 TO NAME BUT A FEW.

13 Q. OKAY. ARE YOU A MEDICAL DOCTOR?

14 A. NO. I'M A PSYCHOLOGIST.

15 Q. PSYCHOLOGIST. OKAY. AND THE DOCTOR IN FRONT OF YOUR
16 NAME IS BASED ON YOU HAVE A PHD IN PSYCHOLOGY?

17 A. CORRECT.

18 Q. BUT YOU CAN'T PRESCRIBE MEDICINE TO ANY OF THESE
19 PATIENTS, IS THAT CORRECT?

20 A. THAT'S CORRECT.

21 MR. MABRY: NO FURTHER QUESTIONS.

22 THE COURT: ANY OBJECTION TO THE QUALIFICATIONS?

23 MR. MABRY: I'D FIRST LIKE TO HEAR WHAT SHE'S BEING
24 QUALIFIED AS. AN EXPERT IN WHAT?

25 THE COURT: I BELIEVE HE SAID FETAL ALCOHOL SPECTRUM

1 SYNDROME.

2 MR. MABRY: AS A PSYCHOLOGIST I HAVE NO OBJECTIONS.

3 THE COURT: ALL RIGHT. AND SO NOTED. WITHOUT
4 OBJECTION YOU MAY PROCEED.

5 DIRECT EXAMINATION BY MR. BLUME CONTINUED:

6 Q. DR. NOVICK-BROWN, DO YOU RECALL WHEN YOU WERE RETAINED
7 IN THIS CASE?

8 A. I BELIEVE IT WAS THE END OF THIS PAST YEAR, 2006.

9 Q. AND CAN YOU PLEASE TELL THE COURT WHAT YOU WERE ASKED
10 TO DO?

11 A. TO REVIEW RECORDS AND OTHER INFORMATION AND TO
12 DETERMINE WHETHER OR NOT JONATHAN BINNEY MET CRITERIA FOR A
13 FETAL ALCOHOL SPECTRUM DISORDER CONDITION.

14 Q. AND WERE YOU ASKED TO DO ANYTHING ELSE OTHER THAN THAT?

15 A. THE SUMMARY OF WHAT I WAS ASKED TO DO. SPECIFICALLY
16 THERE WERE SOME SPECIFIC QUESTIONS ABOUT HIS BEHAVIOR AND
17 WHETHER OR NOT THE BEHAVIOR PARTICULARLY IN THE CAPITAL CASE
18 RESEMBLED BEHAVIOR THAT MIGHT BE SEEN IN AN INDIVIDUAL
19 DIAGNOSED WITH FASD.

20 Q. SO THAT WAS WHAT YOU WERE ASKED TO DO. CAN YOU TELL US
21 -- SO HOW DO YOU GO ABOUT DOING IT? AS AN EXPERT IN FETAL
22 ALCOHOL SPECTRUM DISORDERS, WHAT DO YOU DO?

23 A. THE REVIEW PROCESS IS EXTENSIVE AND COMPREHENSIVE. IT
24 INVOLVES REVIEWING RECORDS AND INFORMATION FROM A VARIETY OF
25 SOURCES TO LOOK FOR CONVERGENCE ON A FINDING ON A -- ON A

1 CONCLUSION. IT ALSO CAN INVOLVE INTERVIEWS BOTH WITH
2 COLLATERALS AND WITH THE INDIVIDUAL SUBJECT IN QUESTION.

3 THE DIAGNOSTIC PROCESS ITSELF IS TYPICALLY DONE AS A
4 TEAM PROCESS. I'M ONE OF THE PLAYERS ON THAT TEAM. OTHER
5 PLAYERS ON THAT TEAM WOULD INCLUDE A MEDICAL DOCTOR, PERHAPS
6 A DYSMORPHOLOGIST, A NEUROPSYCHOLOGIST TO DO
7 NEUROPSYCHOLOGICAL TESTING AND OTHERS AS WELL.

8 Q. SO IN THIS CASE DID YOU -- WERE YOU PROVIDED THE
9 DOCUMENTS TO REVIEW?

10 A. EXTENSIVE DOCUMENTS, YES.

11 Q. OKAY. AND CAN YOU BRIEFLY RELATE TO THE COURT WHAT
12 THOSE DOCUMENTS WERE?

13 A. YES. I REVIEWED BIRTH AND MEDICAL RECORDS OF MR.
14 BINNEY. I ALSO REVIEWED THE MEDICAL RECORDS, VA RECORDS FOR
15 THE BIRTH MOTHER, WHOM I REFERRED TO AS HIS -- WELL, I THINK
16 SHE'S HAD SEVERAL DIFFERENT NAMES. THE NAME ON THE RECORDS
17 WAS GAYLE. I'M BLOCKING HER LAST NAME.

18 MR. MABRY: DOVE.

19 A. DOVE, CORRECT. THANK YOU. I ALSO REVIEWED SCHOOL
20 RECORDS, FROM MY UNDERSTANDING, ALL OF THE SCHOOL RECORDS
21 THAT WERE AVAILABLE. AND THESE INCLUDED MOSTLY RELIGIOUS
22 SCHOOLS, BAPTIST SCHOOLS AND SO FORTH, CHRISTIAN --
23 CHRISTIAN ACADEMIES.

24 I REVIEWED DEPARTMENT OF CORRECTIONS RECORDS, WHICH
25 WERE ALSO EXTENSIVE. I REVIEWED TRIAL TESTIMONY AND

1 AFFIDAVITS FROM INDIVIDUALS WHO KNEW THE BINNEYS WHO WERE
2 FAMILY FRIENDS OF THE BINNEYS AND KNEW JONATHAN BINNEY. I
3 REVIEWED A SOCIAL HISTORY CHRONOLOGY. AND THAT WAS PREPARED
4 BY ARLENE ANDREWS. THAT WAS A DRAFT CHRONOLOGY THAT I
5 REVIEWED.

6 I REVIEWED PICTURES OF MR. BINNEY WHEN HE WAS IN
7 CHILDHOOD FROM INFANCY UP TO -- IT LOOKED ABOUT -- SOME OF
8 THE LATER PICTURES WERE TWELVE TO FOURTEEN YEARS OF AGE. I
9 ALSO REVIEWED A NUMBER OF REPORTS PREPARED BY THEIR EXPERTS
10 IN THE MATTER.

11 I REVIEWED IN PARTICULAR AN MRI ANALYSIS BY DR. FRED
12 BOOKSTEIN AND ALSO A DRAFT REPORT BY DR. RICHARD ADLER.
13 THOSE WERE THE DOCUMENTS THAT I REVIEWED, A SUMMARY OF THE
14 DOCUMENTS. I ALSO DID OTHER -- PERFORMED OTHER PROCEDURES
15 IN ---

16 Q. IN ADDITION TO THE DOCUMENTS AND REPORTS YOU REVIEWED
17 DID YOU TALK WITH ANYBODY?

18 A. YES. I SPENT OVER FIVE HOURS INTERVIEWING JONATHAN
19 BINNEY IN PRISON. THAT WAS ABOUT THREE WEEKS AGO. I ALSO
20 SPOKE AT LENGTH ON THE TELEPHONE TO HIS ADOPTIVE MOTHER,
21 SANDRA BINNEY. I SPOKE TO HIS WIFE, MELANIE BINNEY. AND I
22 SPOKE TO JOHN MORRIS, WHO WAS A FAMILY FRIEND AND MR. BINNEY
23 LIVED WITH HIM FOR A PERIOD OF TIME. AND I SHOULD ADD, I
24 SPOKE TO DR. MICHAEL LYONS, A CONSULTANT AND GENETICIST AND
25 A DYSMORPHOLOGIST AND ALSO DR. RICHARD ADLER.

1 Q. THOSE ARE THE PEOPLE YOU PERSONALLY SPOKE WITH?

2 A. YES.

3 Q. OKAY. AND AS A RESULT -- WELL, THE MATERIALS THAT YOU
4 REVIEWED IN THIS CASE, ARE THOSE THE TYPE OF MATERIALS THAT
5 ARE NORMALLY RELIED UPON BY AN EXPERT IN YOUR FIELD?

6 A. YES, THEY ARE.

7 Q. SO IN OTHER WORDS, IN DOING ANY TYPE OF FETAL ALCOHOL
8 SPECTRUM DISORDER EVALUATION THAT'S THE KIND OF MATERIAL YOU
9 WOULD EXPECT TO REVIEW AND REVIEWED?

10 A. WELL, YES. IN PARTICULAR FOR ANY ADULT THAT I MIGHT BE
11 ASSESSING IT'S CRITICALLY IMPORTANT TO HAVE PRIMARY SOURCE
12 RECORDS. SO THE SCHOOL RECORDS AND MEDICAL RECORDS THAT I
13 SPOKE OF WERE ESSENTIAL IN THAT PROCESS.

14 Q. AND IN THIS CASE DID YOU PREPARE A REPORT?

15 A. YES, I DID.

16 Q. AND SO LET ME SHOW YOU WHAT'S BEEN PREMARKED AS
17 PLAINTIFF'S EXHIBIT 5 AND ASK YOU IF YOU'RE FAMILIAR WITH
18 THAT DOCUMENT?

19 A. YES. THIS IS THE REPORT I PREPARED.

20 MR. BLUME: YOUR HONOR, AT THIS POINT WE WOULD OFFER
21 THAT AS PLAINTIFF'S EXHIBIT 5.

22 MR. MABRY: YOUR HONOR, WE OBJECT TO THE ENTRY OF THE
23 REPORT. SHE'S HERE TO TESTIFY. SHE CAN TESTIFY TO HER
24 FINDINGS. THE REPORT IS FILLED WITH HEARSAY. I HAVEN'T
25 EVEN BEEN ABLE TO CROSS EXAMINE HER ABOUT THE REPORT YET.

1 SO WE OBJECT TO THE ADMISSION OF THE REPORT. IT'S GOT A LOT
2 OF EXTRANEIOUS INFORMATION IN IT. IT RUNS ON FOR ABOUT FIFTY
3 SOMETHING PAGES, I BELIEVE, FIFTY-FOUR TO BE EXACT.

4 THE COURT: YOU WISH TO REPLY?

5 MR. BLUME: SHE IS HERE, AND SHE CAN BE CROSS EXAMINED.
6 THEY'VE BEEN PROVIDED WITH THE REPORT. I BELIEVE THAT IT IS
7 -- WOULD BE RELEVANT AND GERMANE AS PART OF THE PROCEEDINGS.
8 AND THAT'S WHY WE'RE OFFERING IT AS EVIDENCE OF WHAT SHE
9 ACTUALLY DID AND REDUCED TO WRITING IN THIS CASE.

10 THE COURT: COUNSEL, TELL ME WHAT YOU BELIEVE WITHIN IT
11 IS HEARSAY THAT'S INAPPROPRIATE, NOT THE SPECIFICS, BUT JUST
12 THE AREAS.

13 MR. MABRY: JUDGE, I CAN TELL YOU -- ALL I CAN TELL YOU
14 IS THAT IT'S FILLED WITH, GROSSLY FILLED WITH HEARSAY FROM
15 NUMEROUS PEOPLE. IT'S DOUBLE HEARSAY. A LOT OF THIS --
16 IT'S AN AFFIDAVIT -- STYLED AS AN AFFIDAVIT, NUMBER ONE. SO
17 I DON'T KNOW HOW THIS WAS PREPARED. TYPICALLY THEY'RE
18 PREPARED BY THE ATTORNEYS AND SIGNED BY THE WITNESS AS WE
19 FOUND OUT IN JUROR VIQUEZ'S AFFIDAVIT.

20 NUMBER TWO, IT'S FILLED WITH DOUBLE HEARSAY FROM THE
21 LADY THAT TESTIFIED YESTERDAY, THE SOCIAL WORKER. A LOT OF
22 IT'S JUST HIS LIFE HISTORY AND HER CONFORMING HER FINDING TO
23 HIS LIFE HISTORY.

24 THE COURT: ALL RIGHT. COUNSEL, I'M GOING TO DEFER MY
25 DECISION ON IT. I'M GOING TO LET YOU ASK QUESTIONS ABOUT

1 THE REPORT, IF YOU WISH, WHEN YOU HAVE CROSS EXAMINATION,
2 MR. MABRY. AND GO AHEAD, MR. BLUME.

3 Q. DR. NOVICK-BROWN, WHAT I WANT TO FIRST DO IS ASK YOU A
4 SIMPLE, OR NOT A SIMPLE, A QUESTION ABOUT DID YOU REACH AN
5 OPINION ABOUT WHETHER MR. BINNEY HAS FETAL ALCOHOL SPECTRUM
6 DISORDER. AND THEN I'M GOING TO ASK YOU ABOUT HOW YOU
7 REACHED THAT CONCLUSION. SO FIRST, DID YOU COME TO ANY
8 OPINION ABOUT WHETHER MR. BINNEY HAS FETAL ALCOHOL SPECTRUM
9 DISORDER?

10 A. YES, I DID.

11 Q. AND CAN YOU PROVIDE THE COURT WHAT YOUR OPINION IS?

12 A. YES. HE MEETS CRITERIA FOR FULL FETAL ALCOHOL SPECTRUM
13 DISORDER.

14 Q. AND IS THAT OPINION TO A REASONABLE DEGREE OF CERTAINTY
15 IN YOUR PROFESSION?

16 A. YES, IT IS.

17 Q. AND -- OKAY. SO NOW WE'VE LAID THAT GROUNDWORK. SO
18 LET'S NOW TALK ABOUT, OKAY, HOW DID YOU COME TO THAT
19 CONCLUSION?

20 A. I HAVE BASED THAT CONCLUSION ON THE REVIEW OF THE
21 INFORMATION THAT I'VE COVERED AND THE EVIDENCE IN THAT
22 INFORMATION WITH RESPECT TO SPECIFIC CRITERIA FOR FETAL
23 ALCOHOL SYNDROME IN PARTICULAR MR. BINNEY DOES POSSESS AND
24 DOES DISPLAY.

25 Q. WELL, YOU TALKED A LITTLE BIT ABOUT A MULTI-

1 DISCIPLINARY TEAM. AND HAVE YOU BEEN A PART OF OTHER MULTI-
2 DISCIPLINARY TEAMS IN THE PAST?

3 A. YES.

4 Q. IS THAT THE WAY IT'S FREQUENTLY DONE?

5 A. IN TERMS OF THIS PARTICULAR DISORDER, YES. AND IN
6 TERMS OF SEVERAL OTHER DISORDERS WHERE THERE ARE -- WHERE
7 THERE IS A SYNDROME OF SYMPTOMS OFTEN DISCIPLINARY TEAMS ARE
8 USED BECAUSE DIFFERENT MEMBERS OF THE TEAM WILL ASSESS
9 DIFFERENT ASPECTS OF THE SYNDROME.

10 Q. WELL, AND SO IN THIS CASE YOU TALKED ABOUT AND REVIEWED
11 THE REPORT OF DR. BOOKSTEIN, IS THAT CORRECT?

12 A. YES.

13 Q. AND JUST BRIEFLY, DO YOU KNOW DR. BOOKSTEIN?

14 A. YES. HE'S ALSO AT THE FETAL ALCOHOL AND DRUG UNIT IN
15 SEATTLE AT THE UNIVERSITY OF WASHINGTON.

16 Q. OKAY. AND IS THIS THE REPORT THAT YOU REVIEWED?

17 A. YES, IT IS.

18 Q. AND YOU ALSO INDICATED, I BELIEVE, BUT CORRECT ME IF
19 I'M WRONG, THAT YOU ALSO HAD THE BENEFIT OF A
20 NEUROPSYCHOLOGICAL TESTING REPORT BY DR. JAMES EVANS?

21 A. YES, THAT'S CORRECT.

22 Q. AND IN YOUR PROFESSION, YOUR FIELD, IS THAT THE KIND OF
23 INFORMATION YOU WOULD NORMALLY RELY UPON IN REACHING YOUR
24 CONCLUSIONS?

25 A. YES, IT IS.

1 Q. SO LET ME SHOW YOU WHAT'S BEEN PREMARKED AS PLAINTIFF'S
2 EXHIBIT 8 AND ASK YOU IS THAT THE NEUROPSYCHOLOGICAL REPORT
3 OF DR. JAMES EVANS?

4 A. YES, IT IS.

5 Q. NOW YOU ALSO INDICATED, I BELIEVE, THAT YOU CONSULTED
6 WITH DR. RICHARD ADLER.

7 A. YES.

8 Q. AND WHO IS DR. ADLER?

9 A. HE'S A PSYCHIATRIST WHO CONSULTS WITH THE FETAL ALCOHOL
10 AND DRUG UNIT IN SEATTLE, WASHINGTON. HE HAS A PRIVATE
11 PRACTICE. HE ALSO CONSULTS WITH A NUMBER OF OTHER GROUPS AS
12 WELL.

13 Q. AND YOU -- IS IT COMMON FOR YOU IN THESE CASES WHEN
14 YOU'RE DOING FETAL ALCOHOL SPECTRUM DISORDER EVALUATIONS TO
15 CONSULT WITH A PSYCHIATRIST IN THE CASE?

16 A. YES. A PSYCHIATRIST IS TYPICALLY INCLUDED ON THE
17 DIAGNOSTIC TEAM FOR THESE CASES.

18 Q. AND SO LET ME ASK YOU, YOU BOTH TALKED WITH HIM AND YOU
19 REVIEWED A REPORT FROM DR. ADLER, ---

20 A. THAT'S CORRECT.

21 Q. --- IS THAT CORRECT? IS THIS THE REPORT FROM DR.
22 ADLER?

23 A. YES, IT IS.

24 MR. BLUME: YOUR HONOR, AT THIS POINT WE WOULD OFFER
25 THOSE AS I BELIEVE THE EVIDENCE ESTABLISHES THIS IS THE TYPE

1 OF INFORMATION WHICH IS NORMALLY RELIED UPON BY AN EXPERT IN
2 HER FIELD. AND WE'RE OFFERING THOSE AS EVIDENCE OF WHAT WAS
3 DONE IN REACHING HER CONCLUSIONS IN THIS CASE THAT MR.
4 BINNEY HAS FETAL ALCOHOL SPECTRUM DISORDER. I DON'T KNOW
5 THAT WE ACTUALLY TRUTHFULLY NEED TO ADMIT THEM IN ORDER THAT
6 THAT IS ESTABLISHED THAT IT CLEARLY FORMS THE BASIS OF HER
7 OPINION, BUT IN ORDER FOR THE RECORD I THINK IT'S CLEAR ON
8 WHAT SHE RELIED UPON AND WHAT SHE DID WE'RE OFFERING THOSE.

9 MR. MABRY: WE OBJECT, YOUR HONOR, ON THE GROUNDS OF
10 HEARSAY. ALSO DR. BOOKSTEIN IS GOING TO TESTIFY IN THIS
11 CASE. HE CAN TESTIFY TO HIS OWN FINDINGS. DR. ADLER'S
12 REPORT WAS NOT TURNED OVER TO US AS THE COURT IS ALREADY
13 AWARE.

14 THE COURT: ALL RIGHT. I'M GOING TO SUSTAIN THOSE
15 OBJECTIONS. THE BEST EVIDENCE OF THOSE REPORTS WOULD BE TO
16 HAVE THE INDIVIDUALS WHO PREPARED THEM TO TESTIFY. AND THIS
17 MAY OCCUR IN SOME OF THOSE CASES, BUT I'M GOING TO SUSTAIN
18 THE OBJECTION. IF YOU WISH TO NOTE FOR THE RECORD THE
19 NUMBERS AGAIN THAT THE COURT IS SUSTAINING THE OBJECTION TO,
20 PLEASE DO SO.

21 MR. BLUME: OKAY. THESE ARE PLAINTIFF'S EXHIBIT 6,
22 PLAINTIFF'S EXHIBIT 8 AND PLAINTIFF'S EXHIBIT 9. BUT I WILL
23 JUST NOTE THAT THAT IS -- WELL, LIKE I SAID, IN A WAY MAYBE
24 THE ADMISSION OF THE REPORTS DOESN'T NECESSARILY MATTER.
25 THAT IS A COMMON PROCEDURE IN ANY EVALUATION. FOR EXAMPLE,

1 WHEN ANYBODY FROM THE DEPARTMENT OF MENTAL HEALTH COMES AND
2 TESTIFIES THEY ALWAYS HAVE UNDERLYING REPORTS AND
3 DOCUMENTATION WHICH THEY'VE REVIEWED BY OTHER PEOPLE AND
4 SOMEBODY IS THE ULTIMATE SPOKESPERSON FOR THE PART OF THE
5 TEAM AND EVERY INDIVIDUAL IS NOT CALLED. I MEAN, IT -- I
6 MEAN, IT'S JUST SORT OF THE STANDARD PROCEDURE.

7 THE COURT: ALL RIGHT. SO NOTED. BUT AGAIN, THE COURT
8 IS HERE TO HEAR THE WITNESS' OPINIONS AND FINDINGS BASED
9 UPON WHAT ALL SHE'S REVIEWED AND TO LET THE UNDERLYING
10 REPORTS INTO EVIDENCE, I BELIEVE, IS NOT APPROPRIATE BASED
11 ON OUR EVIDENTIARY RULES. AND I'M GOING TO SUSTAIN THE
12 OBJECTION.

13 PLEASE MOVE FORWARD, MR. BLUME. IF YOU WANT TO -- IF
14 YOU WISH TO MARK THOSE AS COURT'S EXHIBITS, WE'LL CERTAINLY
15 DO THAT FOR APPELLATE REVIEW PURPOSES.

16 MR. BLUME: WELL, THEY'VE ALREADY BEEN -- DO THEY NEED
17 TO BE REMARKED? I MEAN, I THINK THE RECORD WILL BE CLEAR
18 WHAT THEY ARE AND HOW THEY WERE IDENTIFIED AND WHAT THE
19 COURT'S RULING IS.

20 THE COURT: WELL, AT A BREAK WE'LL JUST PUT THEM INTO A
21 SINGLE COURT'S EXHIBIT SO THERE WON'T BE ANY CONFUSION ABOUT
22 WHAT'S IN EVIDENCE AND WHAT'S NOT.

23 MR. BLUME: THANK YOU.

24 Q. OKAY. DR. NOVICK-BROWN, FIRST OF ALL, YOU'VE SAID THAT
25 YOU BELIEVE HE HAS IT. AND YOU'VE TALKED A LITTLE BIT ABOUT

1 -- WE WERE TALKING ABOUT HOW THIS IS DONE TYPICALLY IN YOUR
2 EXPERIENCE AS PART OF A MULTI-DISCIPLINARY TEAM AND ALSO
3 BASED UPON REVIEW OF INFORMATION OF RECORDS, COLLATERAL
4 INFORMATION, INTERVIEWS, ALL THE TYPES OF THINGS THAT YOU'VE
5 DONE IN THIS CASE. SO WITH THAT BACKGROUND NOW CAN YOU TELL
6 THE JUDGE WHY IT IS YOUR OPINION THAT MR. BINNEY HAS FETAL
7 ALCOHOL SPECTRUM DISORDER, FETAL ALCOHOL SYNDROM?

8 A. OKAY. BECAUSE HE MEETS CRITERIA IN EVERY DIAGNOSTIC
9 CATEGORY FOR THE DISORDER. AND THERE ARE FOUR SPECIFIC
10 DIAGNOSTIC CRITERIA AS ESTABLISHED BY THE INSTITUTE OF
11 MEDICINE IN 1996.

12 Q. WHAT IS THE INSTITUTE OF MEDICINE?

13 A. THAT'S A GOVERNMENTAL BRANCH THAT IS RESPONSIBLE FOR
14 RESEARCH PRIMARILY. AND IN 19 -- IN THE 1990s THEY
15 SPONSORED GRANTS AND RESEARCH TO INVESTIGATE FETAL ALCOHOL
16 SYNDROME, FETAL ALCOHOL EFFECTS ALSO AS IT WAS KNOWN THEN
17 AND TO COME UP WITH DIAGNOSTIC CRITERIA THAT COULD BE USED
18 THROUGHOUT THE UNITED STATES AND PERHAPS BEYOND IN TERMS OF
19 DIAGNOSING THIS CONDITION. UP UNTIL THAT TIME THERE WERE
20 SPECIFIC DIAGNOSTIC CRITERIA, BUT THEY HADN'T BEEN CODIFIED.
21 SO THE IOM CODIFIED THE CRITERIA IN 1996.

22 Q. OKAY. SO THESE CRITERIA HAVE BEEN ESTABLISHED SINCE
23 1996?

24 A. ACTUALLY THEY WERE ESTABLISHED IN THE 1970s WITH THE
25 EARLIEST RESEARCH IN FETAL ALCOHOL SYNDROME AND REPLICATED

1 IN STUDY AFTER STUDY UP THROUGH THE 1990s WHEN THE IOM TOOK
2 A LOOK AT THE RESEARCH.

3 Q. SO YOU SAID THERE WERE FOUR CRITERIA. WHAT ARE THE
4 FOUR CRITERIA?

5 A. THERE ARE THREE CRITERIA RELATING TO THE INDIVIDUAL
6 HIMSELF OR HERSELF. THIS WOULD BE FACIAL DYSMORPHOLOGY OR
7 ABNORMALITIES OF THE FACE, GROWTH DEFICIT IN HEIGHT OR
8 WEIGHT OR BOTH. AND THE THIRD CRITERION IS CENTRAL NERVOUS
9 SYSTEM ABNORMALITIES. AND THERE ARE SEVERAL OF THOSE OR A
10 NUMBER OF THOSE RATHER. AND THE FOURTH CRITERION RELATES TO
11 THE BIRTH MOTHER, EVIDENCE OF DRINKING DURING PREGNANCY
12 BEFORE, DURING AND AFTER PREGNANCY.

13 Q. OKAY. WELL, LET'S NOW GO THROUGH EACH OF THOSE
14 CRITERIA AND WHY YOU BELIEVE THAT MR. BINNEY MEETS THIS --
15 WELL, IF YOU DON'T MIND.

16 A. OH, YOU WANT ME TO JUST START?

17 Q. WELL, WHICH ONE WOULD YOU LIKE TO TALK ABOUT?

18 A. WELL, LET'S BEGIN WITH THE BIRTH MOTHER AND HER
19 DRINKING HISTORY. THERE'S EVIDENCE IN THE RECORD, FROM THE
20 MEDICAL RECORDS PREDOMINATELY, THAT GAYLE DOVE HAD A SERIOUS
21 ALCOHOL PROBLEM, THAT SHE BEGAN DRINKING AT THE AGE OF
22 FOURTEEN AND THAT HER DRINKING INCREASED QUITE RAPIDLY AND
23 WAS VERY HEAVY BY THE TIME SHE ENTERED THE AIR FORCE AT THE
24 AGE OF SEVENTEEN.

25 SO BETWEEN THE AGES OF FOURTEEN AND SEVENTEEN IT

1 INCREASED SIGNIFICANTLY. BEYOND THAT TIME THERE'S EVIDENCE
2 OF -- IN THE RECORD, IN THE -- HER HEALTH RECORDS FROM THE
3 VA OF MULTIPLE PROBLEMS DUE TO ALCOHOLISM UP UNTIL THE TIME
4 THAT SHE COMMITTED SUICIDE.

5 I ALSO SPOKE TO JOHN MORRIS WHO ACTUALLY DIRECTLY
6 OBSERVED HER DRINKING AT A TIME THAT COINCIDED WITH HER
7 PREGNANCY. SO THERE IS FIRSTHAND OBSERVATION. SHE HAS
8 REPORTED TO SANDRA BINNEY THAT SHE DRANK DURING HER
9 PREGNANCY. AND I RECEIVED THAT INFORMATION WHEN I DID A
10 COLLATERAL INTERVIEW WITH SANDRA BINNEY. THOSE ARE JUST A
11 FEW OF THE EXAMPLES. SO THERE'S AMPLE EVIDENCE FROM
12 MULTIPLE SOURCES OF DRINKING AND THE ALCOHOL ABUSE DURING
13 HER PREGNANCY.

14 SHE ALSO ABUSED PRESCRIPTION DRUGS DURING HER
15 PREGNANCY. THERE WAS AN ATTEMPTED OVERDOSE AT ONE POINT
16 DURING HER PREGNANCY THAT WOULD HAVE COMBINED WITH THE
17 ALCOHOL USE.

18 Q. IN THE RANGE OF CASES YOU'VE BEEN INVOLVED WITH WOULD
19 YOU SAY THAT THE EVIDENCE OF MATERNAL INGESTION OF ALCOHOL
20 IN THIS CASE IS STRONG OR WEAK?

21 A. THIS IS ONE OF THE STRONGEST CASES I'VE SEEN ACTUALLY.
22 UNFORTUNATELY IN MANY CASES WE GET VERY LITTLE INFORMATION
23 ABOUT THE BIRTH MOTHER'S DRINKING HISTORY, PARTICULARLY IN
24 ADOPTION CASES. AND THERE AREN'T AMPLE MEDICAL RECORDS AS
25 THERE ARE IN GAYLE DOVE'S CASE PROBABLY BECAUSE SHE WAS A

1 MEMBER OF THE AIR FORCE AND THE VA RECORDS ARE EXTENSIVE.

2 SO ON THE -- COMPARING THIS CASE TO OTHER CASES I WOULD SAY

3 THIS IS ONE OF THE STRONGEST CASES I'VE EVER SEEN.

4 Q. NOW -- SO THAT'S ON THE MATERNAL INGESTION OF ALCOHOL.

5 I GUESS THAT'S MATERNAL INGESTION BY HER?

6 A. YES.

7 Q. THAT'S THE LANGUAGE THAT YOU -- THAT EXPERTS USE?

8 A. YES. PRENATAL ALCOHOL EXPOSURE OR MATERNAL INGESTION

9 OF ALCOHOL, WHICHEVER YOU PREFER.

10 Q. SO WHAT'S THE SECOND CRITERIA?

11 A. WELL, THEY'RE NOT NUMBERED. BUT ANOTHER CRITERION

12 WOULD BE -- IT'S CALLED FACIAL DYSMORPHOLOGY. AND THESE ARE

13 ABNORMALITIES OF THE FACE CODIFIED BY THE IOM INTO THREE

14 PARTICULAR ABNORMALITIES OF THE FACE. SMALL PALPEBRAL

15 FISSURES, WHICH ARE ACTUALLY THE EYE SLIT OPENINGS. A FLAT

16 PHILTRUM, WHICH IS THE GROOVE -- TYPICALLY WE HAVE A GROOVE

17 FROM OUR NOSE TO OUR UPPER LIP. AND IN THOSE WITH FETAL

18 ALCOHOL SPECTRUM DISORDERS IT TENDS TO BE FLATTENED IN SOME

19 CASES. AND THEN ALSO VERY SMALL UPPER LIP OR VERMILLIAN

20 BORDER, IT'S CALLED. SO THE UPPER LIP LOOKS QUITE SMALL IN

21 COMPARISON TO THE LOWER LIP.

22 THOSE ARE THE THREE PRIMARY FACIAL CHARACTERISTICS.

23 THERE ARE A NUMBER OF OTHERS. BUT THOSE ARE THE ONES

24 CODIFIED BY THE INSTITUTE OF MEDICINE.

25 Q. NOW AS I UNDERSTAND IT THOSE FEATURES DISAPPEAR OR

1 DISSIPATE OVER TIME.

2 A. YES. WELL, FIRST OF ALL, ONLY A FEW PEOPLE WITH AN
3 FASD DISORDER CONDITION SHOW THOSE FEATURES. THE BIRTH
4 MOTHER HAS TO DRINK AT A VERY SMALL WINDOW OF TIME IN HER
5 PREGNANCY WHEN THE FACIAL FEATURES ARE BEING FORMED, AND
6 THAT'S ABOUT THE SIXTH TO THE EIGHTH WEEK IN PREGNANCY FOR
7 THERE TO BE ANY KIND OF EFFECT ON THE FACE. AND IF SHE
8 DRINKS BEFORE AND AFTER, BUT NOT DURING THAT WINDOW OF TIME,
9 YOU'RE NOT GOING TO SEE THE FACIAL FEATURES.

10 Q. SO JUST TO MAKE IT CLEAR, EVEN IF SOMEONE -- SOMEONE'S
11 MOTHER DRANK, THEY DON'T HAVE THE FACIAL FEATURES, THEY'D
12 STILL HAVE FETAL ALCOHOL SPECTRUM DISORDER?

13 A. ABSOLUTELY. AND REALLY THE PRIMARY EFFECT OF PRENATAL
14 ALCOHOL EXPOSURE IS NOT TO THE FACE, IT'S ACTUALLY TO THE
15 BRAIN, TO THE CENTRAL NERVOUS SYSTEM DEVELOPMENT. AND THAT
16 OCCURS AT ANY POINT IN GESTATION THROUGHOUT THE NINE MONTHS.
17 THE FACE ONLY HAS A TWO WEEK WINDOW AS I INDICATED.

18 Q. BUT IN MR. BINNEY'S CASE YOU BELIEVE THAT HE HAS A
19 FACIAL DYSMORPHOLOGY?

20 A. IT'S -- I SAW THAT WHEN I REVIEWED THE CHILDHOOD
21 PHOTOGRAPHS, BUT IT WAS CONFIRMED WHEN I SPOKE TO DR.
22 MICHAEL LYONS, WHO'S A DYSMORPHOLOGIST, AND THAT'S HIS
23 SPECIALTY.

24 Q. AND I BELIEVE IS IT TRUE THAT THERE WAS ALSO SOME
25 TESTIMONY FROM DR. SCHWARTZ-WATTS ABOUT THIS PREVIOUSLY?

1 A. YES, BACK IN THE -- YES. I RECALL READING HER
2 TESTIMONY WHERE SHE INDICATED THAT SHE NOTICED WIDE SET
3 EYES, WHICH ARE ANOTHER -- REALLY ANOTHER WAY OF SAYING THAT
4 THE EYELID OPENINGS MAY BE SMALL AND ALSO LOW SET EARS.
5 THOSE ARE TWO OTHER CHARACTERISTICS. I NOTICED EYELID --
6 SOME EYELIDTOSIS, DROOPING OF THE EYELIDS, AND SOME ARCHING
7 OF THE EYEBROWS AS WELL.

8 Q. BUT YOU'VE CONFIRMED THIS WITH THIS DYSMORPHOLOGIST?

9 A. YES.

10 Q. NOW -- SO THAT'S TWO. WHAT'S THE NEXT CRITERIA?

11 A. GROWTH DEFICITS. EITHER IN HEIGHT OR WEIGHT OR BOTH
12 AND NOT NECESSARILY AT BIRTH, BUT OVER TIME THROUGHOUT THE
13 CHILD -- ACTUALLY THE IOM CRITERIA SAY AT ANY POINT IN THE
14 LIFE SPAN OF THE INDIVIDUAL. BUT WHAT WE TYPICALLY SEE IS
15 DECREASING WEIGHT IN COMPARISON TO HEIGHT AS THE CHILD AGES
16 AS THE INDIVIDUAL GOES THROUGH CHILDHOOD. IN MR. BINNEY'S
17 CASE THERE WERE AMPLE RECORDS, BOTH MEDICAL RECORDS AS WELL
18 AS SOME SCHOOL RECORDS, I BELIEVE, THAT SHOW HIS HEIGHT AND
19 WEIGHT AND THE -- HIS SMALL STATURE. AND THERE WAS A
20 MEDICAL RECORD IN PARTICULAR THAT INDICATED HIS WEIGHT WAS
21 AT OR BELOW THE TENTH PERCENTILE, WHICH IS CRITERIA THAT IOM
22 ESTABLISHED.

23 Q. SO IN YOUR OPINION BASED UPON THE MATERIALS YOU
24 REVIEWED INCLUDING HIS PEDIATRIC AND OTHER RECORDS HE MEETS
25 THAT CRITERIA?

1 A. YES. AND I ALSO RECEIVED CONFIRMATION OF THAT IN
2 CONSULTATION WITH DR. RICHARD ADLER.

3 Q. NOW ---

4 A. WHO IS AN MD, EXCUSE ME.

5 Q. PARDON ME?

6 A. WHO IS AN MD.

7 Q. WHAT'S THE FOURTH CRITERIA?

8 A. THE FOURTH IS THE MOST SERIOUS, IN FACT, OF PRENATAL
9 ALCOHOL EXPOSURE, AND THAT'S DAMAGE TO THE CENTRAL NERVOUS
10 SYSTEM. AND EVIDENCE OF THAT DAMAGE CAN OCCUR IN ANYONE OR
11 ALL OF THREE AREAS, THE STRUCTURAL -- YOU CAN ACTUALLY SEE
12 STRUCTURAL DAMAGE THROUGH IMAGING TECHNIQUES LIKE MRI,
13 NEUROLOGICAL EVIDENCE OF DAMAGE, TREMORS, SEIZURES, THAT
14 KIND OF THING, COULD ALSO BE SOFT SIGNS PICKED UP IN A
15 NEUROPSYCHOLOGICAL REPORT, AND THEN FINALLY, FUNCTIONAL
16 DEFICITS, WHICH SPAN A WIDE VARIETY OF DEFICITS OR SKILL
17 PROBLEM AREAS.

18 Q. WELL SO, WITHIN THOSE FOUR -- THE FOUR ASPECTS OF THE
19 FOURTH CRITERIA CAN YOU TELL ME WHAT IS IT ABOUT THE
20 MATERIALS YOU REVIEWED IN MR. BINNEY'S CASE WHICH LEADS YOU
21 TO CONCLUDE THAT HE HAS FETAL ALCOHOL SYNDROME?

22 A. HE MEETS CRITERIA IN EACH AND EVERY ONE OF THOSE
23 CLASSIFICATIONS, WHICH I DON'T TYPICALLY SEE. SO AGAIN, IN
24 COMPARING THIS TO OTHER CASES THIS IS QUITE STRONG IN TERMS
25 OF AN INDIVIDUAL WHO MEETS ALL OF THE CRITERIA FOR FETAL

1 ALCOHOL SYNDROME, WHICH IS ONE OF THE FASD CONDITIONS.

2 Q. OKAY. SO TELL ME WHAT THEY ARE, IF YOU DON'T MIND.

3 A. YOU WANT ME TO GO BACK OVER THE FOUR ---

4 Q. NO, I KNOW WHAT THE CRITERION ARE. OKAY. YOU STARTED
5 OUT WITH IS THERE SOME TYPE OF STRUCTURAL DAMAGE TO THE
6 BRAIN AS EVIDENCED ON AN MRI.

7 A. OKAY. IN TERMS OF STRUCTURAL DAMAGE ASSESSMENT OF THE
8 CORPUS COLOSUM BY DR. FRED BOOKSTEIN INDICATES SIGNIFICANT,
9 EXTREME DAMAGE TO MR. BINNEY'S CORPUS COLLOSUM IN TWO
10 DIFFERENT AREAS, THE ISMUS AND THE ANTERIOR REGION.

11 AND THAT PARTICULAR STRUCTURE IN THE BRAIN SITS IN THE
12 DEEP BRAIN SECTION BETWEEN THE TWO LOBES OF THE BRAIN, THE
13 FRONTAL LOBES OF THE BRAIN. AND IT'S RESPONSIBLE FOR
14 COMMUNICATION, SENDING COMMUNICATIONS BACK AND FORTH BETWEEN
15 THE TWO HALVES OF THE BRAIN. AND IF THAT DOESN'T FUNCTION
16 PROPERLY, THEN ---

17 MR. MABRY: YOUR HONOR, I'M GOING TO OBJECT AT THIS
18 POINT. SHE HAS TESTIFIED SHE IS NOT A MEDICAL DOCTOR. AND
19 THAT'S WHY I STIPULATED SHE IS A PSYCHOLOGIST. SHE'S NOT A
20 MEDICAL DOCTOR. DR. BOOKSTEIN SHOULD BE ABLE TO TESTIFY TO
21 THIS.

22 THE COURT: RESPONSE?

23 MR. BLUME: I BELIEVE SHE HAS SUFFICIENT TRAINING AS
24 SOMEONE WHO HAS STUDIED IN THE FIELD OF FETAL ALCOHOL
25 SPECTRUM DISORDERS WHO HAS LEARNED THROUGH HER RESEARCH AND

1 EXPERIENCE ABOUT THE EFFECTS OF ALCOHOL IN THE CORPUS
2 COLOSUM. AND PSYCHOLOGISTS, FOR EXAMPLE,
3 NEUROPSYCHOLOGISTS, ANOTHER PSYCHOLOGIST, TESTIFY FREQUENTLY
4 ABOUT BRAIN STRUCTURE AND THE EFFECTS OF -- WHAT THE ASPECTS
5 OF THE BRAIN DO. THAT'S WITHIN THEIR AREA OF EXPERTISE.

6 THE COURT: COUNSEL, ---

7 MR. BLUME: AND ESPECIALLY -- I'M SORRY.

8 THE COURT: THE COURT'S GOING TO GIVE THE WITNESS SOME
9 LATITUDE. YOUR OBJECTION IS NOTED, BUT OVERRULED. YOU MAY
10 PROCEED.

11 MR. MABRY: THANK YOU, YOUR HONOR.

12 THE COURT: THANK YOU.

13 Q. YOU WERE TALKING ABOUT THE CORPUS COLOSUM AND I WANT
14 YOU TO DO THAT. BUT FIRST, BEFORE THAT, LET ME ASK YOU
15 THIS. DOES THE RESEARCH SUGGEST THAT ALCOHOL HAS A SPECIAL
16 EFFECT ON THE CORPUS COLOSUM?

17 A. YES, IT DOES. BEGINNING IN THE MID 90s THERE IS
18 RESEARCH BY A NUMBER OF INDIVIDUALS, MOSTLY ON THE WEST
19 COAST, WITH FINDING THAT PARTICULAR RESULT. THE CORPUS
20 COLOSUM HAS BEEN STUDIED PROBABLY MORE THAN ANY OTHER BRAIN
21 STRUCTURE IN TERMS OF FASD.

22 Q. IN SOME CHILDREN THE CORPUS COLOSUM WITH FETAL ALCOHOL
23 SYNDROM HAVE WHAT THEY CALL CORPUS COLOSUM A-GENESIS.

24 A. YES.

25 Q. AND CAN YOU JUST TELL THE COURT WHAT THAT IS?

1 A. THAT'S THE ABSENCE OF THAT BRAIN STRUCTURE, THAT
2 COMPLETE ABSENCE OF THE CORPUS COLOSUM.

3 Q. AND OTHER INDIVIDUALS, I BELIEVE, BASED ON THE RESEARCH
4 HAVE ABNORMALLY SHAPED CORPUS COLOSUM.

5 MR. MABRY: OBJECTION, LEADING.

6 THE COURT: SUSTAINED. PLEASE REPHRASE.

7 Q. IN ADDITION TO A-GENESIS IS THERE ANY OTHER EFFECT ON A
8 CORPUS COLOSUM WHICH THE RESEARCH HAS ESTABLISHED IS PRESENT
9 IN PEOPLE WHOSE MOTHERS DRANK ALCOHOL DURING PREGNANCY?

10 A. YES. THE RESEARCH HAS ESTABLISHED DEFORMATION OR
11 MALFORMATION OF THE CORPUS COLOSUM. THERE SEEMS TO BE A
12 GENDER DIFFERENCE IN MALES. THE MALFORMATION SEEMS TO
13 TARGET THE ISMUS AS WELL AS BOTH ENDS, THE ANTERIOR IN
14 PARTICULAR. AND ALSO IN FEMALES IT TENDS TO TARGET THE ARCH
15 OF THE -- IT'S A RATHER U-SHAPED STRUCTURE.

16 Q. AND SO YOU WERE TESTIFYING THAT THERE -- BASED ON DR.
17 BOOKSTEIN'S REPORT YOU REVIEWED IN THIS CASE?

18 A. YES.

19 Q. AND HAVE YOU -- IS IT YOUR -- AS AN EXPERT IN YOUR
20 FIELD WOULD IT BE COMMON FOR YOU TO REVIEW A REPORT LIKE
21 THIS?

22 A. YES, IT WOULD.

23 Q. AND YOU'VE REVIEWED SIMILAR REPORTS IN OTHER CASES?

24 A. YES.

25 Q. SO AS AN EXPERT IN FETAL ALCOHOL SPECTRUM DISORDERS

1 WHAT WAS SIGNIFICANT TO YOU ABOUT THE CORPUS COLOSUM DAMAGE
2 NOTED BY DR. ---

3 A. IT MATCHED THE FUNCTIONAL DEFICITS THAT I SAW IN MY
4 ANALYSIS OF THE RECORDS AND THE OTHER INFORMATION IN THIS
5 CASE, THE OTHER EVIDENCE IN TERMS OF DAMAGE IN PARTICULAR TO
6 THE ANTERIOR PORTION AS WELL AS THE ISMUS. THE INTERIOR
7 PORTION OF THE -- OF THIS STRUCTURE IS CONNECTED TO OR
8 COMMUNICATES WITH THE PREFRONTAL CORTEX, WHICH IS
9 RESPONSIBLE FOR EXECUTIVE FUNCTIONS. AND IN MR. BINNEY'S
10 CASE HIS EXECUTIVE FUNCTIONING WAS SIGNIFICANTLY IMPAIRED,
11 WHICH MATCHES THE -- THE STRUCTURAL DAMAGE THAT WAS SHOWN ON
12 THE MRI.

13 Q. OKAY. WE'LL COME BACK TO THAT IN A MINUTE. BUT YOU
14 ALSO TALKED ABOUT THE NEUROPSYCHOLOGICAL TESTING YOU
15 REVIEWED.

16 A. YES.

17 Q. AND AS AN EXPERT IN FETAL ALCOHOL SPECTRUM DISORDERS
18 WHAT WAS SIGNIFICANT TO YOU ABOUT THAT?

19 A. WELL, THERE WERE A NUMBER OF DEFICITS SHOWN IN THAT
20 NEUROPSYCHOLOGICAL TESTING. DR. EVANS FOUND ATTENTION
21 DEFICITS, MEMORY DEFICITS, PROBLEMS WITH INTEGRATING VERBAL
22 AND NON-VERBAL INFORMATION AND A DISSOCIATION ESSENTIALLY
23 BETWEEN THOUGHT AND BEHAVIOR, SO A DISCONNECT BETWEEN
24 THOUGHT AND BEHAVIOR.

25 Q. NOW, DR. NOVICK-BROWN, DR. EVANS WAS NOT THE FIRST

1 PERSON WHO'S EVER GIVEN ANY PSYCHOLOGICAL TESTING TO MR.

2 BINNEY, IS HE?

3 A. NO, HE'S NOT.

4 Q. AND SO OTHER EVALUATORS, PEOPLE IN THE SCHOOL SYSTEM
5 HAVE GIVEN TESTS TO MR. BINNEY IN THE PAST?

6 A. THAT'S CORRECT.

7 Q. BASED UPON YOUR REVIEW OF THE MATERIAL WAS WHAT DR.
8 EVANS FOUND CONSISTENT WITH HIS LIFE-LONG PATTERN?

9 A. PERFECTLY CONSISTENT WITHOUT ANY -- ANY DEVIATION
10 ESSENTIALLY.

11 Q. OKAY. SO NOW YOU ALSO WERE TALKING ABOUT SOME OTHER
12 PHYSICAL NEUROLOGICAL ABNORMALITIES. WAS THERE ANYTHING
13 ELSE LIKE THAT WHICH WAS AT LEAST CORROBORATIVE IN YOUR
14 OPINION?

15 A. THERE WERE SOME NEUROLOGICAL FINDINGS IN TERMS OF SOME
16 OF THE RECORDS. THERE WAS A RECORD IN PARTICULAR THAT
17 TALKED ABOUT STARING EPISODES, WHICH MEANT MAY HAVE -- THERE
18 WAS NO DIAGNOSIS FOR THIS, BUT IT MAY HAVE BEEN RELATED TO
19 SOME NEUROLOGICAL PROBLEM. TREMORS WERE NOTED AS WELL. AND
20 THERE WERE SOME NEUROLOGICAL SOFT SIGNS NOTED IN THE
21 NEUROPSYCHOLOGICAL TESTING THAT DR. EVANS -- DR. EVANS DID.

22 Q. AND DO SOMETIMES PEOPLE WITH FETAL ALCOHOL SYNDROME
23 HAVE OTHER SORT OF MINOR PHYSICAL ABNORMALITIES OR UNUSUAL
24 FEATURES?

25 A. ACTUALLY IT'S COMMON. ALCOHOL DOESN'T JUST TARGET THE

1 BRAIN, THE CENTRAL NERVOUS SYSTEM. IT ALSO CAN AFFECT ANY
2 PART OF THE BODY. SO THERE ARE MANY BIRTH -- THERE ARE
3 PROBABLY A HUNDRED TO TWO HUNDRED DIFFERENT KINDS OF BIRTH
4 DEFECTS THAT HAVE BEEN IDENTIFIED TO DATE ASSOCIATED WITH
5 PRENATAL ALCOHOL EXPOSURE.

6 Q. AND DO YOU REMEMBER IF ANY WERE PRESENT IN MR. BINNEY'S
7 CASE?

8 A. I SAW ONE RECORD, FOR EXAMPLE, WHERE HE HAS AN EXTRA
9 NIPPLE, A THIRD NIPPLE, WHICH HAS BEEN ASSOCIATED WITH FASD
10 CONDITIONS. A HIGH ARCHED PALATE IS ANOTHER DEFECT THAT'S
11 BEEN ASSOCIATED WITH FASD. THOSE ARE TWO THAT I RECALL OFF
12 THE TOP OF MY HEAD.

13 THE COURT: COUNSEL, I MEAN, MA'AM, DID YOU SAY THAT
14 MR. BINNEY HAS THOSE OR THOSE ARE JUST TWO ASSOCIATED SIGNS?

15 A. MR. BINNEY HAS THOSE, YOUR HONOR.

16 THE COURT: THANK YOU.

17 Q. OKAY. WELL SO, DR. NOVICK-BROWN, AND THE FOURTH
18 CRITERION WE TALKED ABOUT, THE STRUCTURAL DAMAGE TO THE
19 BRAIN, WE TALKED ABOUT THE NEUROPSYCHOLOGICAL TESTING,
20 EVIDENCE OF DEFICITS. WE'VE TALKED ABOUT THESE PHYSICAL
21 ABNORMALITIES. AND THEN WHAT -- THE FOURTH ONE YOU
22 MENTIONED WAS EXECUTIVE DEFICITS.

23 A. WELL, THAT FALLS UNDER THE FUNCTIONAL DEFICIT CATEGORY.
24 THE BROADER CATEGORY IS FUNCTIONAL DEFICITS. EXECUTIVE
25 FUNCTIONING IS ONE OF SEVERAL FUNCTIONAL DEFICITS THAT ARE

1 CRITERIA FOR AN FASD CONDITION ACCORDING TO THE IOM.

2 Q. OKAY. SO BEFORE THEN I THINK THAT IT WOULD MAKE SENSE
3 TO TALK ABOUT WHAT EXECUTIVE FUNCTIONING IS.

4 A. EXECUTIVE FUNCTIONING INCLUDES A NUMBER OF ESSENTIAL
5 PRIMARY SKILLS THAT MAKE IT POSSIBLE FOR AN INDIVIDUAL TO
6 FUNCTION IN A PRO-SOCIAL APPROPRIATE MANNER. EXECUTIVE
7 FUNCTIONS ALLOW AN INDIVIDUAL TO, FOR EXAMPLE, PLAN A
8 BEHAVIOR, CONSIDER CONSEQUENCES, RECALL FROM PREVIOUS
9 EXPERIENCE WHETHER OR NOT THE OBJECTIVE IS APPROPRIATE,
10 SEQUENCE ACTIVITY TO GET TO THE OBJECTIVE, STOP HIMSELF IN
11 THE MIDDLE OF ACTING IF HE REALIZES THAT HIS BEHAVIOR'S
12 GOING TO HAVE A NEGATIVE OUTCOME AND THEN ULTIMATELY ACHIEVE
13 THAT OBJECTIVE.

14 SO IT'S A SEQUENTIAL PROCESS. IT ALSO INVOLVES MEMORY.
15 IT INVOLVES ATTENTION. IT INVOLVES IMPULSE CONTROL. THAT'S
16 PROBABLY ONE OF THE MOST SIGNIFICANT EXECUTIVE FUNCTIONS.
17 THE ABILITY TO INHIBIT ONE'S IMPULSES WHEN ONE NOTICES THAT
18 THEY'RE NOT APPROPRIATE OR THEY'RE HAVING A NEGATIVE
19 OUTCOME.

20 SOCIAL SKILL AWARENESS, SOCIAL SKILLS AND SOCIAL
21 AWARENESS, THAT'S ANOTHER MAJOR CATEGORY OF EXECUTIVE
22 FUNCTIONING, THE ABILITY TO PERCEIVE ONESELF AND OTHERS IN
23 CONTEXT. PERCEIVE BOUNDARIES, TO READ SOCIAL CUES
24 APPROPRIATELY AND RESPOND APPROPRIATE, TO KNOW WHAT'S
25 CORRECT IN THE WAY OF RESPONSE. THOSE ARE A FEW. THERE ARE

1 MORE.

2 Q. OKAY. WELL, SO YOU'VE TESTIFIED THAT YOU BELIEVE THAT
3 MR. BINNEY HAS DEFICITS IN THE -- HAS FUNCTIONAL DEFICITS.

4 A. YES. HE HAS FUNCTIONAL DEFICITS IN EVERY ONE OF THE --
5 THERE ARE ACTUALLY FIVE SPECIFIC CATEGORIES. AND I -- OR A
6 SIXTH CATEGORY CALLED OTHER. AND HE'S GOT SOME DEFICITS IN
7 THAT AREA AS WELL.

8 Q. OKAY. WELL HOW ABOUT IF YOU DON'T MIND GOING THROUGH
9 AND TELLING THE COURT ABOUT MR. BINNEY'S DEFICITS IN THESE
10 AREAS.

11 A. WELL, THE FIRST TERMS OF HOW THE IOM LISTS THEM, THE
12 FIRST AREA OF FUNCTIONAL DEFICIT IS COGNITIVE DEFICITS. AND
13 THAT INCLUDES LEARNING DISABILITIES. IT INCLUDES
14 INTERESTINGLY A SPECIFIC MATH DEFICIT. SO THE INDIVIDUAL
15 WILL HAVE A SPECIFIC LEARNING DISABILITY IN MATH AND MAY
16 TEND TO DO WORSE IN MATH THAN OTHER SUBJECTS.

17 AND THEN ALSO ACADEMIC ACHIEVEMENT PROBLEMS. THOSE ARE
18 THE CATEGORIES WITHIN THE COGNITIVE FUNCTIONING.
19 DEVELOPMENTAL DELAY ALSO FALLS IN THERE. MR. BINNEY,
20 ACCORDING TO THE RECORDS, MR. BINNEY MEETS CRITERIA FOR
21 DEFICITS IN ALL OF THOSE CATEGORIES.

22 Q. WELL, DO THE RECORDS THAT YOU REVIEWED INDICATE THAT HE
23 HAD SPECIFIC PROBLEMS IN MATH?

24 A. YES. THERE WERE A NUMBER OF RECORDS, THESE ARE PRIMARY
25 SOURCE SCHOOL RECORDS IN PARTICULAR, AND ALSO ACHIEVEMENT

1 TEST RECORDS THAT INDICATE THAT HE -- HE DID WELL INITIALLY
2 IN SCHOOL. AND THIS IS TYPICALLY WHAT WE SEE IN FASD,
3 CHILDREN WILL DO WELL DURING THE FIRST FEW GRADES WHEN MATH
4 IS PRETTY EASY AND THE OTHER COURSES ARE PRETTY EASY AND
5 PRETTY ROUTINE, AND THEN THEY START TO HAVE PROBLEMS AS THEY
6 PROGRESS IN SCHOOL, FOURTH, FIFTH, SIXTH, SEVENTH GRADE.
7 AND JUNIOR HIGH, WE TEND TO SEE A LOT OF PROBLEMS.

8 MR. BINNEY HAD A HISTORY CONSISTENT WITH THAT GRADUAL
9 ONSET OF PROBLEMS IN TERMS OF HIS ACADEMIC ACHIEVEMENT AS HE
10 INCREASED, AS HE WENT THROUGH SCHOOL. HE FAILED THE SIXTH
11 OR HE WAS PLACED BACK IN SIXTH GRADE TWICE, AND HE REPEATED
12 SIXTH GRADE. AND HE FAILED THE SEVENTH GRADE AND HAD TO
13 REPEAT THAT AGAIN. SO MULTIPLE PROBLEMS BY THE TIME HE WAS
14 -- HE WAS IN SIXTH GRADE.

15 IN TERMS OF MATH, HIS MATH SCORES STARTED GETTING WORSE
16 AS HE GOT FURTHER ALONG IN ELEMENTARY SCHOOL. AND BY THE
17 TIME HE WAS IN JUNIOR HIGH, MATH WAS CLEARLY HIS MOST
18 SIGNIFICANT PROBLEM.

19 Q. SO IS THIS PATTERN IN HIS SCHOOL RECORDS AND LEARNING
20 EDUCATION, WAS THAT CONSISTENT OR INCONSISTENT WITH FETAL
21 ALCOHOL SPECTRUM DISORDER?

22 A. ACTUALLY IT'S PICTURE PERFECT. IT'S EXACTLY WHAT WE'D
23 TYPICALLY SEE IN SOMEONE WHO HAS FETAL ALCOHOL SPECTRUM
24 DISORDERS.

25 Q. SO WERE THERE OTHER EVIDENCE OF COGNITIVE DEFICITS IN

1 THIS CASE?

2 A. IN TERMS OF DEVELOPMENTAL DELAY, YES. THERE WAS
3 EVIDENCE IN THE RECORD WITH REGARD TO SIGNIFICANT EMOTIONAL
4 DELAYS IN TERMS OF HIS ABILITY TO INTERACT WITH PEERS AND SO
5 FORTH. SO DEVELOPMENTAL DELAYS BEYOND JUST THE COGNITIVE
6 AREA.

7 BY THE WAY, HE DID NOT HAVE AN IQ DEFICIT. AND THIS IS
8 ANOTHER THING WE LOOK FOR. IT'S COMMONLY MISUNDERSTOOD THAT
9 FAS OR FASD IS ASSOCIATED WITH MENTAL RETARDATION, BUT
10 THAT'S NOT THE CASE. ONLY A SMALL MINORITY OF PEOPLE
11 ACTUALLY HAVE MENTAL RETARDATION AS ONE OF THE COGNITIVE
12 DEFICITS. IN FACT, IT'S RATHER THE DISCREPANCY BETWEEN THE
13 IQ AND THE ACTUAL FUNCTIONAL BEHAVIOR OR PERFORMANCE AND
14 ACHIEVEMENT OF THE INDIVIDUAL THAT INDICATES AN FASD
15 CONDITION. THAT'S A BETTER INDICATOR THAN IQ ALONE.

16 Q. WELL, BASED ON YOUR EXPERIENCE DO PEOPLE WITH A FETAL
17 ALCOHOL SPECTRUM DISORDER WITH HIGHER IQs HAVE BETTER OR
18 WORSE OUTCOMES IN LIFE?

19 A. BASED ON MY EXPERIENCE IN EVALUATING THEM AND ALSO
20 TREATING A NUMBER OF PEOPLE WITH AVERAGE TO HIGH AVERAGE
21 IQs, THEY TEND TO DO A LOT WORSE. THERE'S BEEN NO RESEARCH
22 ON THAT PARTICULAR ISSUE, WHY THAT IS.

23 MY EXPERIENCE INDICATES THAT IT'S -- IT HAS A LOT TO DO
24 WITH EXPECTATIONS. THE INDIVIDUAL IS -- LEARNS TO PERCEIVE
25 HIMSELF AS HAVING AN AVERAGE OR ABOVE AVERAGE IQ AND,

1 THEREFORE, HIS EXPECTATION AND PERHAPS HIS FAMILY'S

2 EXPECTATION IS THAT HE'LL DO WELL.

3 AND WHEN HE CAN'T, WHEN HE CAN'T FUNCTION APPROPRIATELY

4 OR ACHIEVE ACADEMICALLY OR BEHAVE APPROPRIATELY WITH PEERS

5 AND SO FORTH, THE INDIVIDUAL STARTS LOOKING FOR ANSWERS TO

6 THAT QUESTION AND STARTS GETTING MORE AND MORE FRUSTRATED

7 AND ENGAGING IN MORE AND MORE IMPULSIVE BEHAVIORS. AND

8 THAT'S PART OF THE RESULT OF THAT.

9 Q. IS PART OF THESE FUNCTIONAL DEFICITS, IS IT RELEVANT

10 THAT MR. BINNEY WAS PREVIOUSLY DIAGNOSED WITH ADD?

11 A. HIGHLY RELEVANT BECAUSE THERE IS EXTREMELY STRONG

12 CORRELATION BETWEEN ADD AND ADHD AND FETAL ALCOHOL SPECTRUM

13 DISORDERS. THAT WAS THE BOOK CHAPTER I JUST FINISHED

14 WRITING THAT WAS JUST PUBLISHED. THE CONCORDANCE THERE IS

15 AT LEAST EIGHTY PERCENT, EIGHTY TO NINETY PERCENT IS THE

16 ESTIMATE OF INDIVIDUALS WITH FASD ARE ALSO DIAGNOSED WITH

17 ADD OR ADHD.

18 Q. AND WHAT ABOUT -- IS SOCIAL SKILLS DEFICITS PART OF

19 THIS CATEGORY?

20 A. YES. THAT'S ONE OF THE OTHER MAJOR CATEGORIES UNDER

21 THE FUNCTIONAL DEFICIT DIAGNOSTIC CLASSIFICATION. AND

22 SOCIAL SKILL DEFICITS START MANIFESTING -- SOCIAL SKILL

23 DEFICITS ARISE FROM THE INDIVIDUAL'S -- THE CHILD'S

24 INABILITY TO SEE HIMSELF, TO PERCEIVE HIMSELF AS AN ACTOR IN

25 THE ENVIRONMENT AND TO PERCEIVE OTHER PEOPLE AS ACTORS

1 SEPARATE FROM THEMSELVES. SO THERE'S AN EARLY DEFICIT IN
2 TERMS OF BOUNDARIES.

3 AND THAT'S NOT -- I'M NOT TALKING ABOUT TOUCHING. I'M
4 TALKING ABOUT JUST PERCEPTION OF DIFFERENCES. AND THAT
5 COMBINES WITH DIFFICULTY IN READING SOCIAL CUES IN
6 INTERPRETING BEHAVIOR ON THE PART OF OTHER PEOPLE AND
7 INTERACTING -- AND KNOWING FROM THOSE CUES HOW TO ACT
8 HIMSELF AND HOW TO INTERACT EASILY AND COMFORTABLY WITH
9 OTHERS.

10 SO IT'S A COMBINATION OF PROBLEMS THAT LEADS TO SOCIAL
11 SKILL DEFICITS. AND THEY TEND TO GET WORSE OVER TIME IF
12 THERE IS NOT INTERVENTION EARLY ON FOR INDIVIDUALS WITH THIS
13 CONDITION.

14 Q. WELL, WAS THERE EVIDENCE OF THAT IN MR. BINNEY'S CASE?

15 A. IN TERMS OF EVIDENCE THERE WAS AMPLE. IN THE RECORDS,
16 PARTICULARLY IN SOME OF THE RECORDS THAT I REVIEWED
17 REGARDING THE REPORTS THAT HAD BEEN DONE AND THE SCHOOL
18 RECORDS REGARDING HIS INTERACTION WITH PEERS THERE WAS
19 EVIDENCE OF A SIGNIFICANT SOCIAL SKILL DEFICIT.

20 HIS ADOPTIVE MOTHER REPORTED SOCIAL SKILL DEFICITS,
21 LACK OF FRIENDSHIPS DURING THE TIME HE WAS GROWING UP. MR.
22 BINNEY, HIMSELF, REPORTED ABSENCE OF CLOSE FRIENDS. THAT
23 KIND OF THING IS ONE OF THE THINGS WE LOOK FOR. OFTEN
24 PEOPLE WITH FASD ARE DESCRIBED AS LONERS BECAUSE THEY JUST
25 DON'T KNOW HOW TO MAKE FRIENDS. AND IN MR. BINNEY'S CASE I

1 SAW THAT CHARACTERISTIC, THAT DESCRIPTION APPLIED TO HIM BY
2 A VARIETY OF PEOPLE IN A VARIETY OF CONTEXTS.

3 Q. IMPULSIVITY, IS THAT PART OF THIS?

4 A. THAT'S AN EXECUTIVE FUNCTION. AND THAT IS PROBABLY ONE
5 OF THE MOST SERIOUSLY AFFECTED EXECUTIVE FUNCTIONS IN FOLKS
6 WITH FASD CONDITIONS. THE ABILITY TO CONTROL IMPULSES, TO
7 CONTROL URGES IS WHAT TYPICALLY GETS THESE FOLKS IN TROUBLE.
8 AND ABOUT TWO THIRDS OF THESE PEOPLE END UP ARRESTED AND/OR
9 IN JAIL OR PRISON, WE KNOW FROM THE STUDIES. SO IT'S
10 IMPULSE CONTROL AND BEING ABLE TO WITHSTAND THOSE URGES THAT
11 IS DEFECTIVE OR DEFICIENT.

12 Q. AND WAS THERE EVIDENCE IN THE RECORD OF IMPULSIVITY AND
13 IMPULSIVE BEHAVIOR ON MR. BINNEY'S PART?

14 A. CHRONIC AND CONSTANT BEGINNING WHEN HE WAS YOUNG AND
15 REPORTS FROM HIS ADOPTIVE MOTHER, FOR EXAMPLE, AND
16 CONTINUING THROUGHOUT THE RECORD, A LOT OF HIS CRIMINAL
17 CONDUCT IN HIS MID TO LATE TEENS AND TWENTIES, THE
18 KLEPTOMANIA, THE OUTRIGHT THEFT, STEALING ARTICLES THAT HAD
19 SOME VALUE. A LOT OF THAT BEHAVIOR IS -- IT WAS VERY
20 TYPICAL IN TERMS OF IMPULSE CONTROL PROBLEMS THAT I SEE IN
21 FASD.

22 Q. ALSO, WHAT ABOUT IS THERE AN ISSUE ABOUT DIFFICULTY
23 UNDERSTANDING BECAUSE OF THAT?

24 A. YES.. AND THAT'S REALLY THE ABILITY -- IT INVOLVES A
25 COMPLEX SERIES OF STEPS IN ORDER TO HAVE ORGANIZED THOUGHT,

1 IN ORDER TO BE ABLE TO GENERALIZE FROM PREVIOUS EXPERIENCE
2 TO NEW, UNFAMILIAR EXPERIENCES. THAT'S A COMPLEX BEHAVIOR.
3 THAT'S A COMPLEX EXECUTIVE FUNCTION THAT ENTAILS A LOT OF
4 SKILLS. AND IT'S SOMETHING THAT'S ALSO ALMOST UNIVERSALLY
5 -- ACTUALLY I'VE NOT EVEN SEEN A CASE, EVER SEEN A CASE
6 WHERE THAT SET OF SKILLS WAS UNAFFECTED IN FOLKS WITH FASD.

7 Q. AND WERE THERE EXAMPLES OF THAT IN MR. BINNEY'S CASE?

8 A. NUMEROUS, YES. THE -- JUST TO NAME ONE, THE INABILITY
9 TO HOLD DOWN A JOB. THE INABILITY TO PLAN A CAREER AND TO
10 FOCUS IN SCHOOL, TO ARRIVE AT A PARTICULAR GOAL AND TO
11 ACCOMPLISH THAT GOAL. THAT TAKES A VARIETY OF STEPS AND A
12 VARIETY OF SKILLS HE WAS UNABLE TO DO.

13 Q. HE STOLE A LOT OF CARS.

14 A. YES.

15 Q. DOES THAT HAVE ANY RELEVANCE IN ANY OF THESE
16 CATEGORIES?

17 A. WHAT WE OFTEN SEE IN INDIVIDUALS WITH FASD WHO ARE
18 INVOLVED IN THE CRIMINAL SYSTEM IS REPETITIVE CRIMINAL
19 BEHAVIOR, REPETITIVE BEHAVIORS. AND IT'S ALSO CALLED
20 PERSEVERATION.

21 AN INDIVIDUAL WILL START BEHAVING IN A PARTICULAR WAY
22 IN TERMS OF A PARTICULAR CRIME AND REPEAT THAT BEHAVIOR OVER
23 AND OVER AGAIN DESPITE SANCTIONS, DESPITE CONSEQUENCES THAT
24 WOULD TEACH MOST PEOPLE, UNIMPAIRED INDIVIDUALS NOT TO
25 REPEAT THAT BEHAVIOR TO AVOID THE SANCTION. BUT IN THE CASE

1 OF FASD IT'S THAT INABILITY TO GENERALIZE, TO FORESEE
2 CONSEQUENCES THAT CAUSES A DEFICIT, AND THEY CONTINUALLY
3 REPEAT THE BEHAVIOR OVER AND OVER.

4 Q. WHAT ABOUT IMPAIRED JUDGMENT?

5 A. THAT'S A HIGHER ORDER EXECUTIVE FUNCTION THAT INVOLVES
6 SOME SUBPRIMARY SKILLS THAT I'VE BEEN TALKING ABOUT.
7 JUDGMENT IS ESSENTIALLY THE ABILITY TO MAKE GOOD DECISIONS,
8 THE ABILITY TO WEIGH POTENTIAL COURSES OF ACTION, POTENTIAL
9 OUTCOMES AND MAKE A GOOD CHOICE ABOUT SOMETHING THAT WILL
10 POTENTIALLY HAVE A POSITIVE OUTCOME. THAT'S IMPAIRED
11 CONSISTENTLY IN THE PEOPLE THAT I EVALUATE.

12 AND IN MR. BINNEY'S CASE I SAW NUMEROUS EXAMPLES OF
13 POOR JUDGMENT, HIS CRIMINAL BEHAVIOR, FOR EXAMPLE. HIS
14 ADOPTIVE MOTHER GAVE ME AN EXAMPLE OF, I THINK, THE FIRST
15 TIME HE STOLE A CAR. HE JUMPED IN THE CAR AND DROVE IT OFF.
16 HE'D NEVER DRIVEN BEFORE. HE DIDN'T KNOW HOW TO DRIVE. AND
17 HE HAD TO CALL THEM AND ASK HOW TO GET BACK HOME BECAUSE HE
18 WAS STRANDED ON THE SIDE OF THE HIGHWAY. SO IT'S THAT KIND
19 OF BEHAVIOR THAT I'M TALKING ABOUT THAT INVOLVES JUDGMENT
20 AND A NUMBER OF SKILLS THAT GO INTO MAKING -- TO HAVING GOOD
21 JUDGMENT.

22 Q. IS THERE ANYTHING IN THIS FOURTH CATEGORY OF FUNCTIONAL
23 DEFICITS THAT I HAVEN'T GONE -- ASKED YOU ABOUT?

24 A. MOTOR DEFICITS. HE HAD SOME FINE AND GROSS MOTOR SKILL
25 DEFICITS. WE TALKED ABOUT ATTENTION, BUT NOT A WHOLE LOT.

1 HE HAD ATTENTION DEFICIT, SIGNIFICANT ATTENTION DEFICITS.
2 AND THAT ALSO INVOLVES PERCEPTION AND THE ABILITY TO
3 PERCEIVE SOCIAL CUES. THEY'RE RELATED. AND I THINK WE GOT
4 THE REST OF THEM. SO WE CAPTURED THE REST.

5 Q. SO IN YOUR OPINION MR. BINNEY HAS DEFICITS IN EVERY
6 CATEGORY?

7 A. YES, HE DOES.

8 Q. AND IT'S ALSO YOUR OPINION THAT MR. BINNEY HAS FETAL
9 ALCOHOL SYNDROME?

10 A. YES.

11 Q. WHAT I'D LIKE TO DO BRIEFLY IS JUST -- WE TALKED A
12 LITTLE BIT ABOUT WHY MR. BINNEY HAS IT. BUT ONE OF THE
13 THINGS -- AND WE'VE SORT OF DONE A LITTLE BIT ABOUT
14 CHARACTERISTICS. BUT IT MIGHT HELP -- WE REALLY HAVEN'T
15 TALKED THAT MUCH ABOUT -- WELL, WHAT IS IT? AND WHY IT
16 MATTERS, WHY IT'S SIGNIFICANT.

17 A. IT'S A SYNDROME THAT IS OFTEN A HIDDEN DISABILITY, A
18 HIDDEN CONDITION BECAUSE MOST OF THESE FOLKS DON'T HAVE THE
19 FACIAL FEATURES. AND THE REASON WHY IT'S IMPORTANT IS
20 BECAUSE IT AFFECTS THE CENTRAL NERVOUS SYSTEM DURING THE
21 GESTATION PHASE AND IT HAS LIFE-LONG CONSEQUENCES, AND IT
22 HAS REAL LIFE CONSEQUENCES. IT AFFECTS BEHAVIOR IN
23 VIRTUALLY EVERY IMPORTANT DOMAIN OF FUNCTIONING. AND IT
24 CAUSES THE INDIVIDUAL TO HAVE SIGNIFICANT DIFFICULTY IN
25 CONTROLLING HIS BEHAVIOR AND BEHAVING IN A PRO-SOCIAL

1 MANNER.

2 SO IN TERMS OF THE CURRENT CONTEXT IT HAS A SIGNIFICANT
3 BEARING ON HIS BEHAVIOR IN QUESTION IN TERMS OF THE CAPITAL
4 CRIME THAT HE COMMITTED AND ALSO EVERY OTHER ASPECT OF HIS
5 BEHAVIOR.

6 Q. WELL, BEFORE WE GET TO THAT LET ME ASK, CAN IT BE
7 CURED?

8 A. NO. IT'S STRUCTURAL -- IT'S BASED ON STRUCTURAL BRAIN
9 DAMAGE BOTH IN STRUCTURES THAT WE CAN SEE THROUGH IMAGING
10 TECHNIQUES AND AT THE MOLECULAR LEVEL. SO IT NOT ONLY
11 AFFECTS STRUCTURAL ---

12 MR. MABRY: I'M GOING TO OBJECT AGAIN, YOUR HONOR.
13 SHE'S TALKING ABOUT MOLECULAR LEVEL. SHE'S NOT A MEDICAL
14 DOCTOR. AND SHE DOESN'T, TO MY KNOWLEDGE, SHE DOESN'T LOOK
15 THROUGH A MICROSCOPE OR ANY KIND OF IMAGING ---

16 THE COURT: SUSTAINED. THE COURT WILL DISREGARD THE
17 COMMENT ABOUT THE MOLECULAR LEVEL AND UNDERSTANDS THAT
18 THERE'S A STRUCTURAL BRAIN DISORDER THAT WAS THE FIRST PART
19 OF THE WITNESS' ANSWER. AND THE COURT ACCEPTS THAT. PLEASE
20 MOVE FORWARD TO YOUR NEXT QUESTION.

21 Q. SO YOU TESTIFIED THAT IT CAN'T BE CURED. BUT HAS THERE
22 ALSO BEEN RESEARCH IN THE FIELD WHICH INDICATES THAT EVEN
23 CHILDREN FROM -- THAT HAVE POSITIVE SOCIAL BACKGROUNDS WILL
24 BE SEVERELY, ADVERSELY AFFECTED BY THIS CONDITION?

25 A. YES. AND THIS WAS -- THIS IS BASED ON DR.

1 STREISSGUTH'S WORK IN THE MID 1990s. AND I ACTUALLY DID MY
2 POST-DOCTORAL STUDY WITH HER AT THE TIME SHE WAS FINISHING
3 THAT RESEARCH. IT WAS CALLED THE SECONDARY DISABILITIES
4 STUDY.

5 AND IN THAT RESEARCH SHE FOUND THAT FOLKS WITH FASD IN
6 THEIR ADOLESCENCE AND ADULT YEARS WILL MANIFEST A NUMBER OF
7 SECONDARY DISABILITIES INCLUDING CRIMINAL BEHAVIOR,
8 SUBSTANCE ABUSE, MENTAL HEALTH PROBLEMS,
9 INSTITUTIONALIZATION, JOB HOLDING PROBLEMS IF THEY ARE NOT
10 -- IF THEY DO NOT RECEIVE A DIAGNOSIS EARLY IN LIFE. AND
11 THE CUT OFF POINTS SEEM TO BE BY AGE SIX.

12 SO IF THEY'RE NOT DIAGNOSED BY AGE SIX AND RECEIVE
13 APPROPRIATE INTERVENTION INCLUDING DEVELOPMENTAL
14 DISABILITIES RESOURCES AND SUPPORT THEN THE RISK OF
15 DEVELOPING THOSE SECONDARY DISABILITIES GOES WAY UP. IT'S
16 EXTREMELY HIGH.

17 Q. NOW REGARDLESS OF SORT OF THIS SUPPORT OR ---

18 A. REGARDLESS. THE FAMILY SUPPORT, OF COURSE, IS
19 IMPORTANT AND POSITIVE FAMILY SUPPORT IS IMPORTANT, BUT IT'S
20 REALLY THE DIAGNOSIS AT THAT EARLY AGE AND THE INTERVENTION
21 WITH APPROPRIATE SERVICES TO HELP THE INDIVIDUAL DEVELOP
22 WAYS TO COPE WITH THE DEFICITS ESSENTIALLY THAT IS CRITICAL.
23 THAT WAS THE SINGULAR MOST IMPORTANT FINDING IN THAT
24 RESEARCH.

25 Q. YOU MENTIONED THE SECONDARY DISABILITIES. AND YOU SAID

1 STEALING. IS SEXUALLY INAPPROPRIATE BEHAVIOR ONE OF THOSE?

2 A. YES, IT IS.

3 Q. IS THAT COMMONLY SEEN?

4 A. YES. SURPRISINGLY IN ABOUT ALMOST FIFTY PERCENT OF
5 INDIVIDUAL -- OF INDIVIDUALS DIAGNOSED WITH ANY FASD
6 CONDITION, SEXUALLY INAPPROPRIATE BEHAVIOR IS OBSERVED. AND
7 THAT CAN RANGE FROM INAPPROPRIATE REMARKS, A BRIEF
8 INAPPROPRIATE TOUCH, UP TO AND INCLUDING SEXUAL ASSAULT
9 BEHAVIOR.

10 Q. NOW, DR. NOVICK-BROWN, WE'VE TALKED ABOUT WHETHER MR.
11 BINNEY HAS FETAL ALCOHOL SPECTRUM DISORDER. WE'VE TALKED
12 ABOUT WHAT IT IS. SO WHAT I'D NOW LIKE TO DO, ALTHOUGH YOU
13 TOUCHED ON THIS, IS TO TRY NOW TO HAVE A LITTLE MORE FOCUSED
14 DISCUSSION ABOUT WHAT RELEVANCE, IF ANY, MR. BINNEY'S FETAL
15 ALCOHOL SYNDROME HAS TO SORT OF HOW HE'S TURNED OUT IN LIFE
16 AND THE CRIME FOR WHICH HE WAS CONVICTED FOR.

17 A. HE IS AN INDIVIDUAL -- ANYONE WITH ---

18 MR. MABRY: YOUR HONOR, I'M GOING TO OBJECT. I OBJECT
19 TO THE FORM OF THE QUESTION.

20 THE COURT: LET ME HEAR THE QUESTION AGAIN, COUNSEL.

21 Q. CAN YOU -- WE'VE TALKED ABOUT WHETHER MR. BINNEY HAS
22 FETAL ALCOHOL SPECTRUM DISORDER. AND WE'VE TALKED ABOUT
23 WHAT IT IS. MY QUESTION AT THIS POINT IS SO, I GUESS, WHAT
24 DIFFERENCE DOES IT MAKE? WHAT DIFFERENCE HAS IT MADE IN HIS
25 LIFE THAT HE HAS THIS CONDITION?

1 THE COURT: ALL RIGHT. JUST A MOMENT. IS THERE AN
2 OBJECTION NOW?

3 MR. MABRY: NO.

4 THE COURT: ALL RIGHT. YOU MAY ANSWER, MA'AM. THANK
5 YOU.

6 A. IT'S MADE A SIGNIFICANT DIFFERENCE IN HIS LIFE. IT'S
7 AFFECTED HIS LIFE IN VIRTUALLY EVERY ASPECT OF HIS
8 FUNCTIONING FROM EARLY CHILDHOOD UP TO THE PRESENT TIME. IT
9 HAS IMPACTED HIS ABILITY TO CONTROL HIS BEHAVIOR, TO MAKE
10 GOOD DECISIONS ABOUT HIS BEHAVIOR, TO ENGAGE IN PRO-SOCIAL
11 AS OPPOSED TO NON PRO-SOCIAL BEHAVIOR OVER THE COURSE OF HIS
12 LIFE.

13 IT'S AFFECTED HIS ABILITY TO ACHIEVE. IT'S AFFECTED
14 HIS ABILITY TO FUNCTION AS AN ADULT IN VARIOUS DOMAINS OF
15 ADULT FUNCTIONING. IT'S AFFECTED HIS ADAPTIVE SKILLS, HIS
16 DAY TO DAY SKILLS. SO VIRTUALLY EVERY ASPECT OF HIS
17 FUNCTIONING HAS BEEN AFFECTED BY THIS CONDITION. AND IT'S
18 CERTAINLY, IN MY OPINION, AFFECTED HIS -- THE CRIME FOR
19 WHICH HE'S HERE TODAY.

20 Q. OKAY. SO LET'S TALK ABOUT THAT FOR A MINUTE. IN YOUR
21 OPINION HAVE YOU EVER GIVEN TESTIMONY AT THE SENTENCING
22 PHASE OF A CAPITAL TRIAL?

23 A. YES.

24 Q. SO YOU UNDERSTAND THE CONCEPT OF MITIGATION ---

25 A. YES, I DO.

1 Q. WHAT IS IT IN YOUR OPINION ABOUT THE FACT THAT MR.
2 BINNEY HAS THE FETAL ALCOHOL SPECTRUM DISORDER WHICH IS
3 RELEVANT TO HIS CULPABILITY FOR THE OFFENSE FOR WHICH HE WAS
4 CONVICTED?

5 A. BY VIRTUE OF THE FASD COMMISSION HE HAS DEFICIENT
6 REASONING ABILITY, DEFICIENT JUDGMENT AND DEFICIENT IMPULSE
7 CONTROL. AND THOSE ASPECTS WENT INTO THE -- WERE INVOLVED
8 IN THE BEHAVIOR IN THE CASE IN QUESTION, IN THE CRIME IN
9 QUESTION.

10 Q. DR. NOVICK-BROWN, AT THE TIME OF THIS TRIAL IN 2002 WAS
11 THE RESEARCH WHICH YOU'VE DISCUSSED TODAY AND THE CRITERIA
12 FOR DETERMINING WHETHER SOMEONE HAS FSD AND THE KNOWLEDGE
13 ABOUT ITS IMPLICATIONS ESSENTIALLY THE SAME AS IT IS NOW?

14 A. YES, THERE'S NO DIFFERENCE. AND I CAN'T EVEN THINK OF
15 ANYTHING THAT'S NEW AS OF THIS -- THAT DATE IN TERMS OF MY
16 TESTIMONY TODAY.

17 Q. AND IN 2002 WERE THERE PEOPLE WITH EXPERTISE IN FETAL
18 ALCOHOL SYNDROME AND FETAL ALCOHOL SPECTRUM DISORDERS?

19 A. MANY, YES.

20 Q. AND THERE WERE. AND SO YOU WERE DOING IT AT THAT TIME?

21 A. YES.

22 Q. AND WERE THERE OTHER PEOPLE, FOR EXAMPLE, AT THE
23 UNIVERSITY OF WASHINGTON WHERE THIS RESEARCH WAS GOING ON
24 WHO WOULD HAVE BEEN AVAILABLE HAD SOMEBODY CONTACTED THEM?

25 A. YES. THERE ARE SEVERAL REGIONAL CENTERS IN THE UNITED

1 STATES. SO ANYONE FROM ANY OF THOSE CENTERS COULD HAVE.

2 MR. BLUME: THE COURT'S INDULGENCE FOR A MOMENT?

3 THE COURT: YES, SIR.

4 (PAUSE)

5 Q. DR. NOVICK-BROWN, IF YOU'D PLEASE ANSWER ANY QUESTIONS
6 THAT SOMEONE FROM THE ATTORNEY GENERAL'S OFFICE WOULD HAVE,
7 WE'D GREATLY APPRECIATE IT. THANK YOU.

8 THE COURT: CROSS EXAMINATION.

9 MR. MABRY: YES, SIR.

10 CROSS EXAMINATION BY MR. MABRY:

11 Q. DR. NOVICK-BROWN, IN 2002 WHEN THIS CASE WAS TRIED DID
12 DR. SCHWARTZ-WATTS TESTIFY THAT MR. BINNEY HAD FETAL ALCOHOL
13 SYNDROME?

14 A. I BELIEVE SHE INDICATED THAT HE POSSIBLY DID. I DON'T
15 RECALL SPECIFICALLY THE WORDS SHE USED, BUT, YES, SHE
16 BROUGHT THAT UP.

17 Q. ALL RIGHT. DID YOU REVIEW HER TESTIMONY PRIOR TO
18 RENDERING YOUR OPINION IN THIS CASE?

19 A. I BELIEVE I DID, YES.

20 Q. OKAY. WELL, COULD YOU EXPLAIN TO ME WHY YOUR REPORT,
21 YOUR AFFIDAVIT SAYS THAT YOU DID NOT REVIEW HER TESTIMONY,
22 YOU ONLY REVIEWED THE TESTIMONY OF DR. TATE AND THE
23 PATHOLOGIST?

24 A. I BELIEVE I SAID I REVIEWED TRIAL TESTIMONY. AND I WAS
25 INCLUDING HER TESTIMONY IN THAT.

1 Q. I BELIEVE YOUR AFFIDAVIT SAYS THAT YOU REVIEWED
2 SUMMARIES OF SOME OF THE WITNESSES' TESTIMONY AND THEN YOU
3 REVIEWED THE ACTUAL TESTIMONY OF DR. TATE AND THE
4 PATHOLOGIST, IS THAT NOT CORRECT?

5 A. ARE YOU REFERRING ME TO THIS PAGE BECAUSE I DON'T SEE
6 ---

7 Q. NO. WELL, IT'S YOUR -- IT'S YOUR AFFIDAVIT, CORRECT?
8 WHY DON'T YOU POINT US TO WHERE YOU TELL THE COURT WHAT
9 ITEMS YOU REVIEWED?

10 A. IN SECTION THREE I COVER THE ITEMS I REVIEWED.

11 Q. OKAY. LET'S TALK ABOUT THOSE. WHAT ITEMS DID YOU
12 REVIEW?

13 A. ELEMENTARY SCHOOL RECORDS. AND I LIST THE FACILITIES,
14 THE JUVENILE RECORDS FROM DEPARTMENT OF CORRECTION, OHIO,
15 HOSPITAL RECORDS, OTHER MEDICAL RECORDS FROM OTHER MEDICAL
16 FACILITIES, GAYLE DOVE'S VA FILE, HER MEDICAL RECORDS, ADULT
17 DOC RECORDS, SOME CORRESPONDENCE MR. BINNEY WROTE, SUICIDE
18 NOTE, POLICE STATEMENTS, THE SYNOPSIS OF THE TRIAL
19 TESTIMONY.

20 Q. OKAY. STOP RIGHT THERE. WHO GAVE YOU THAT SYNOPSIS OF
21 THE TRIAL TESTIMONY?

22 A. DEFENSE COUNSEL.

23 Q. OKAY. THAT WOULD BE MR. BLUME?

24 A. YES.

25 Q. WHO HIRED YOU AS AN EXPERT IN THIS CASE?

1 A. THAT'S CORRECT.

2 Q. HOW MUCH HAVE YOU BEEN PAID AND HOW MUCH ARE YOU GOING
3 TO BE PAID FOR YOUR TESTIMONY?

4 A. WELL, MY HOURLY RATE IS TWO FIFTY.

5 Q. TWO HUNDRED AND FIFTY DOLLARS AN HOUR?

6 A. YES.

7 Q. OKAY.

8 A. AND I BELIEVE THAT THE EVALUATION -- I DON'T KNOW HOW
9 MUCH THIS PORTION WILL COST, BUT THE EVALUATION OF MY
10 PORTION OF MY BILL WAS FOURTEEN THOUSAND FOR ALL THE
11 DOCUMENT REVIEW AND THE EVALUATIONS. I WROTE ---

12 Q. FOURTEEN THOUSAND ---

13 A. I WROTE OFF AND DID NOT CHARGE FOR WELL OVER THIRTY
14 HOURS OF REPORT WRITING. SO THE REPORT WAS ESSENTIALLY NOT
15 CHARGED.

16 Q. SO FOURTEEN THOUSAND DOLLARS AND THEN MORE FOR YOUR
17 TESTIMONY HERE TODAY?

18 A. YES. A DAY OF TESTIMONY ESSENTIALLY.

19 Q. ALL RIGHT. AND YOU READ A SYNOPSIS THAT HE PROVIDED TO
20 YOU?

21 A. YES. AND I ALSO HAD INFORMATION FROM DR. -- THE TRIAL
22 TESTIMONY OF DR. SCHWARTZ-WATTS, WHICH I INADVERTENTLY
23 OMITTED FROM THIS LIST OF MATERIALS.

24 Q. WELL, THAT'S THE POINT I'M GETTING TO. YOUR AFFIDAVIT
25 DOESN'T SAY YOU REVIEWED HER TESTIMONY, DOES IT?

1 A. NO. BUT I -- I DID TALK -- I DID MENTION THE REPORT
2 THAT SHE DID, BUT I DID NOT MENTION HER SPECIFICALLY IN
3 TERMS OF THE TESTIMONY.

4 Q. ALL RIGHT. SO YOU READ HER REPORT THAT SHE FILED IN
5 THIS CASE, BUT YOU NEVER READ HER TRIAL TESTIMONY IN THE
6 PENALTY PHASE OF THIS TRIAL, DID YOU?

7 A. I BELIEVE I DID.

8 Q. WELL, THEN WHY IS IT NOT IN YOUR REPORT?

9 A. I INADVERTENTLY LEFT IT OUT.

10 Q. LET'S TALK ABOUT THAT TESTIMONY. DO YOU KNOW DR.
11 SCHWARTZ-WATTS?

12 A. NO, I DON'T.

13 Q. IS SHE A NATIONALLY RECOGNIZED EXPERT IN THE TREATMENT
14 OF SEXUAL ILLNESSES OR PERVERSION?

15 A. I'VE NEVER HEARD OF HER. AND I'VE BEEN IN THAT FIELD
16 FOR MANY YEARS. I SHOULD SAY I'VE NEVER HEARD OF HER UNTIL
17 THIS CASE.

18 Q. ALL RIGHT. IF WE'LL LOOK AT PAGE 3281. AND THIS IS
19 DR. SCHWARTZ-WATTS TESTIFYING. I BELIEVE SHE TESTIFIED, AND
20 WE KNOW FROM MS. BINNEY'S MOTHER, HIS ADOPTIVE MOTHER, AND
21 THEN MR. BINNEY HIMSELF THAT MS. MURRAY, AND THAT'D BE HIS
22 ADOPTIVE MOTHER, I MEAN, HIS BIOLOGICAL MOTHER, HAD A
23 HISTORY THAT WHILE SHE WAS PREGNANT WITH JONATHAN BINNEY
24 THAT SHE USED DRUGS, THAT SHE DRANK VERY HEAVILY IN AN
25 ATTEMPT TO ABORT THE PREGNANCY. IS THAT HER TRIAL TESTIMONY

1 BEFORE THE JURY?

2 A. YES, IT IS.

3 Q. DOES SHE GO ON -- IF YOU'LL GO ON DOWN TO LINE 17, DOES
4 IT ALSO DISCUSS THE FACT THAT HIS MOTHER HAD MENTAL ILLNESS?
5 THE QUESTION WAS, SO GIVEN HER HISTORY OF DEPRESSION WHICH
6 CULMINATED IN HER SUICIDE DO YOU FIND ANYTHING TO CORRELATE
7 TO JONATHAN BINNEY'S BEHAVIOR ON THE ISSUE OF, WE'LL COME TO
8 SOME OTHER THINGS, BUT RIGHT NOW JUST THAT ISSUE? AND SHE
9 SAID, YES. WE KNOW NOW JUST BECAUSE SOMEBODY'S PARENT HAS A
10 HISTORY OF DEPRESSION OR SUICIDE THAT DOESN'T MEAN THAT
11 AUTOMATICALLY A CHILD WILL HAVE THAT HAPPEN, BUT THAT MEANS
12 THEY'RE AT AN INCREASED RISK AND THEY'RE AT A MUCH HIGHER
13 CHANCE COMPARED TO SOMEBODY ELSE IN THE GENERAL POPULATION
14 THAT DOESN'T HAVE A MOM OR DAD THAT HAD THAT KIND OF
15 HISTORY. WAS THAT HER TESTIMONY?

16 A. YES.

17 Q. THE NEXT QUESTION WAS, YOU TESTIFIED THERE WAS EVIDENCE
18 OF SOCIAL HISTORY THAT SHE WAS CONSUMING QUANTITIES, LARGE
19 QUANTITIES OF ALCOHOL DURING HER PREGNANCY WITH JONATHAN.
20 NOW WHAT WAS HER ANSWER?

21 A. HER ANSWER WAS, YES.

22 Q. NEXT QUESTION WAS, OBVIOUSLY IT'S BAD -- OBVIOUSLY I
23 KNOW IT'S BAD TO DRINK WHEN YOU ARE PREGNANT, BUT WHY IS
24 THAT? AND WHAT WAS HER ANSWER?

25 A. DO YOU WANT ME TO READ IT?

1 Q. YES, PLEASE.

2 A. WELL, THERE'S LOTS OF REASONS, BUT THERE ARE STUDIES
3 THAT SHOW, OF COURSE, ANY DRUGS ARE BAD DURING PREGNANCY AND
4 SOMETIMES EVEN NOT ILLEGAL CHEMICALS, THINGS LIKE CAFFEINE
5 OR CERTAIN KINDS OF MEDICATIONS. YOU WANT ME TO KEEP GOING?
6 IT'S LONG.

7 Q. PLEASE.

8 A. IN THE FIRST PART OF THE PREGNANCY, WHICH IS CALLED THE
9 FIRST TRIMESTER, THAT'S WHEN SOMEBODY'S BODY IS FORMING,
10 THEIR BRAIN IS FORMING. ALL THEIR, YOU KNOW, THEIR HEART
11 SYSTEM, THEIR LUNG SYSTEM, THEIR DIGESTIVE SYSTEM. SO
12 THAT'S REAL CRUCIAL -- THAT'S A REAL CRUCIAL TIME IN THE
13 DEVELOPMENT OF THE LITTLE -- IT'S CALLED THE FETUS WHEN IT'S
14 INSIDE THE WOMB. AND THAT'S WHEN THE FETUS IS DEVELOPING.
15 SO ANY KINDS OF SUBSTANCES DURING THAT PERIOD OF DEVELOPMENT
16 CAN BE PRETTY DAMAGING.

17 IT CAN CAUSE -- THEY CAN CAUSE BRAIN DAMAGE, PROBLEMS
18 WITH LIMBS, ALL SORTS OF DIFFERENT THINGS. AND THEN THERE
19 IS ALSO STUDIES THAT SHOW WHEN ALCOHOL IS USED LATER ON IN
20 PREGNANCY THAT IT CAN AFFECT LATER ON A CHILD'S ABILITY TO
21 PAY ATTENTION ON -- PAY ATTENTION TO THINGS. THEY CAN HAVE
22 WHAT'S CALLED NEURODEVELOPMENT DISORDERS, PROBLEMS WITH
23 CONCENTRATION, MEMORY AND THOSE SORTS OF THINGS. SO IT'S
24 ASSOCIATED WITH DIFFERENT THINGS. IT CAN BE ASSOCIATED WITH
25 ACTUAL PHYSICAL PROBLEMS IN THE DEVELOPMENT OF A CHILD AND

1 THEN PROBLEMS WITH THE WAY THE CHILD THINKS.

2 Q. IS THERE -- THE NEXT QUESTION WAS IS THERE A HEADING OR
3 A GROUPING THAT WHAT YOU WERE TALKING ABOUT IS KIND OF
4 CLASSIFIED AND UNDER THIS POINT AT LEAST ON AN INFORMAL
5 BASIS? AND WHAT WAS HER ANSWER?

6 A. YES.

7 Q. WHAT IS THAT? THEN WHAT WAS HER ANSWER?

8 A. IN MEDICINE THERE IS A -- PEOPLE HAVE NOTICED AND I
9 HAVE DONE SOME RESEARCH ON THIS THAT SINCE THE 1960s THAT
10 THERE WERE CHILDREN THAT WE KNEW THEIR MOTHERS DRANK DURING
11 PREGNANCY AND THEY HAVE CERTAIN FEATURES THAT APPEAR TO BE
12 IN COMMON.

13 FIRST IT WAS LABELED FETAL ALCOHOL SYNDROME. I DON'T
14 KNOW IF YOU HAVE HEARD THAT OR NOT. BUT THEY KNEW THAT
15 THERE WERE CERTAIN THINGS IN COMMON WITH CHILDREN THAT HAD
16 MOTHERS THAT DRANK CERTAIN AMOUNTS OR DRANK IN CERTAIN
17 STAGES OF THEIR PREGNANCY.

18 AND WHAT THEY NOTICED FIRST IS THAT SOMETIMES THEY HAD
19 KIND OF DIFFERENT -- DIFFERENT FACIAL FEATURES COMPARED TO
20 OTHER KIDS. THEIR EYES WERE A LITTLE BIT DIFFERENT. AND
21 THEN THIS AREA OF YOUR MOUTH, WHICH IS CALLED THE PHILTRUM,
22 YOU KNOW, NORMALLY YOUR LIP WILL CURVE UP, THEY HAD
23 STRAIGHTER AREA OVER THEIR LIP. ALSO NOTICED THAT -- SO
24 THAT'S ONE SET OF FEATURES, THAT HE HAD HAD SOME DIFFERENT
25 FACIAL FEATURES ABOUT THEM.

1 THEIR HEADS WERE A LITTLE BIT SMALLER. SOMETIMES SOME
2 NOTICED THAT THEIR EARS WERE A LITTLE BIT DIFFERENT. THE
3 SECOND THING THAT THEY NOTICED IN THESE CHILDREN EARLY ON
4 WAS THAT THEY HAD WHAT'S CALLED FAILURE TO THRIVE. IT WAS
5 VERY HARD FOR THESE CHILDREN WHEN THEY WERE LITTLE BABIES TO
6 GAIN WEIGHT AND TO GROW AT THE SAME RATES AS OTHER CHILDREN.

7 THE THIRD PART OF THE SYNDROME THAT'S BEEN TALKED ABOUT
8 A LOT, AS THE CHILDREN GOT A LITTLE BIT OLDER SOMETIMES THEY
9 HAD PROBLEMS IN SCHOOL PAYING ATTENTION OR BEING DISTRACTED
10 VERY EASILY. AND THEY COULD HAVE SOME PROBLEMS WITH THEIR
11 MEMORY AND THAT SORT OF THING. THAT'S CALLED THE
12 NEURODEVELOPMENTAL PART OF THAT SYNDROME. THE PROBLEM IS IS
13 THERE'S LOTS OF THINGS WITH THE FETAL ALCOHOL SYNDROME THAT
14 MAKES IT HARD TO STUDY MEDICALLY.

15 Q. PLEASE CONTINUE.

16 A. KEEP GOING?

17 Q. PLEASE.

18 A. FIRST OF ALL, WHEN THE CHILDREN THAT HAVE THOSE
19 DIFFERENT KINDS OF FACIAL FEATURES, THEY KIND OF GO AWAY AS
20 THE KIDS GET OLDER. SO YOU CAN SEE A CHILD AROUND AGES FOUR
21 OR FIVE THAT MAY HAVE A VERY DIFFERENT FACIAL STRUCTURE THAN
22 THEY DO BY THE TIME A DOCTOR SEES THEM WHEN THEY'RE FIFTEEN
23 OR SIXTEEN OR WHEN THEY'RE ALSO INTO ADULTHOOD. SO THAT'S
24 ONE PROBLEM WITH THE DISORDER WITH THE SYNDROME BECAUSE SOME
25 OF THE FEATURES CAN GO AWAY.

1 AND THE OTHER PROBLEM IS THAT THERE'S NO REAL CRITERIA.
2 YOU CAN'T PULL OUT A MEDICAL MANUAL THAT SAYS, ALL RIGHT,
3 YOU NEED THESE FIVE SYMPTOMS TO BE ABLE TO DIAGNOSE SOMEBODY
4 WITH THIS DISORDER. GO RIGHT NOW -- SO RIGHT NOW MEDICINE
5 IS AT THE POINT WHERE THEY'RE DEVELOPING A CLASSIFICATION
6 SYSTEM. THEY ARE TRYING TO COME UP WITH A WAY TO MAKE SURE
7 THAT WHEN WE SAY FETAL ALCOHOL SYNDROME EVERYBODY'S TALKING
8 ABOUT THE SAME SET OF DISORDERS.

9 SO IT'S SOMEWHAT -- IT'S NOT VERY CLEAR IN TERMS OF
10 WHAT EXACTLY DO YOU LOOK FOR. BUT THE MEDICAL LITERATURE
11 SUGGESTS THE FOUR THINGS, THAT THERE IS USUALLY -- THERE CAN
12 BE FACIAL ANOMALIES. AND THAT'S NOT ALWAYS NECESSARILY.
13 YOU DON'T HAVE TO HAVE THAT. BUT YOU WILL NOTICE THAT
14 THERE'S A FAILURE TO THRIVE IN THESE CHILDREN. THEY HAVE
15 DIFFICULTY GAINING WEIGHT AND THAT SORT OF THING AND THAT
16 THEY CAN HAVE SOME PROBLEMS WITH THEIR DEVELOPMENT. IT'S
17 USUALLY EVIDENT BY THE TIME THEY'RE IN SCHOOL SETTINGS.

18 Q. ALL RIGHT.

19 THE COURT: COUNSEL, CITE US AGAIN WHERE IN THE RECORD
20 ON APPEAL OR WHAT PAGES ARE YOU ON?

21 MR. MABRY: I'M ON PAGE 3286 AT THIS POINT, YOUR HONOR.

22 THE COURT: THANK YOU.

23 Q. AND THE NEXT QUESTION WAS YOU MADE A POINT OR A
24 REFERENCE EARLIER THAT YOU HAD THE DSM MANUAL WHICH HAS
25 CLASSIFICATIONS FOR VARIOUS DISORDERS, MENTAL ILLNESSES.

1 FETAL ALCOHOL SYNDROM, FETAL ALCOHOL EFFECT, IS THAT STILL A
2 DEVELOPING AREA OF PSYCHIATRIC STUDY SUCH THAT AT THIS
3 POINT, LIKE YOU SAID, WE CAN'T MAKE THAT DEFINITE DIAGNOSIS
4 CLASSIFICATION? AND WHAT WAS THE ANSWER?

5 A. YES. AND ACTUALLY IT'S MORE OF A MEDICAL PHENOMENON
6 THAT IT'S PROBABLY GOING TO BE A PSYCHIATRIC PHENOMENON.
7 IT'S A MEDICAL -- JUST LIKE THERE IS LOTS OF DIFFERENT
8 SYNDROMES. YOU KNOW YOU CAN HAVE DOWNS SYNDROME. THERE ARE
9 LOTS OF SYNDROMES THAT CHILDREN ARE AFFECTED BY THAT CAN BE
10 WHEN THEY WERE -- WHEN THEY'RE DEVELOPING. SO IT MAY NOT
11 EVEN END UP IN A PSYCHIATRIC MANUAL. I THINK AT THIS POINT
12 IT'S MORE OF A MEDICAL ISSUE IN MAKING THOSE DIAGNOSES.

13 Q. OKAY. AND THEN THE NEXT QUESTION WAS, WELL, SPEAKING
14 FROM A PSYCHIATRIC STANDPOINT IF IT WAS DETERMINED THAT
15 SOMEBODY HAD FETAL ALCOHOL SYNDROME OR FETAL ALCOHOL EFFECT
16 WHAT MIGHT YOU EXPECT TO SEE BEHAVIOR ON? YOU MENTIONED
17 DEVELOPMENTAL GROWTH MIGHT BE IMPAIRED, DIFFICULTY
18 MAINTAINING ATTENTION, MEMORY. IS THERE ANYTHING ELSE
19 BEHAVIORALLY SPEAKING? AND WHAT WAS HER ANSWER?

20 A. AGAIN, YOU WANT ME TO READ THAT WHOLE ---

21 Q. PLEASE.

22 A. --- PARAGRAPH? NO, IT'S USUALLY MORE. WHAT HAPPENS IS
23 AND ESPECIALLY IN THE WORK AT THE DEPARTMENT OF JUVENILE
24 JUSTICE WE SEE CHILDREN ALL THE TIME THAT HAVE ATTENTION
25 DEFICIT HYPER ACTIVITY DISORDER. YOU HAVE ALL PROBABLY

1 HEARD OF THAT.

2 THAT'S WHERE KIDS HAVE PROBLEMS PAYING ATTENTION. THEY
3 HAVE DIFFICULTY FOCUSING THEIR ATTENTION ON THEIR SCHOOLWORK
4 OR MAYBE WHEN THEIR PARENTS ARE ASKING THEM TO DO CHORES OR
5 THAT SORT OF THING, THEY BECOME VERY DISTRACTABLE.

6 AND WHAT I MEAN BY THAT, IF A KID IS DOING HIS HOMEWORK
7 AND SOMEBODY DROPS A PENCIL, THEIR HEADS ARE ALWAYS LOOKING
8 UP IN THE CLASSROOM. THEY CAN HEAR ALL THE NOISES. THE AIR
9 CONDITIONER COMES ON AND THEY CAN'T STAY FOCUSED ON THEIR
10 SCHOOLWORK. THEY'RE KIND OF HEARING ALL OF THE NOISES GOING
11 ON AROUND IN A ROOM.

12 AND THEY CAN ALSO BE HYPERACTIVE AND SOMEWHAT
13 IMPULSIVE, RUNNING AROUND, YOU KNOW, RAISING THEIR HANDS UP,
14 BLURTING OUT ANSWERS AND THAT SORT OF THING.

15 Q. PLEASE CONTINUE.

16 A. THOSE IN CHILDREN THAT HAVE BEEN -- THAT HAVE HAD SOME
17 FETAL ALCOHOL EXPOSURE, THEY TYPICALLY PRESENT WITH SYMPTOMS
18 LIKE THAT. BUT THEY HAVE A LITTLE BIT OF TROUBLE IN SCHOOL
19 PAYING ATTENTION. THEY MIGHT DO THINGS, BLURT OUT THINGS,
20 DO THINGS BEFORE THEY THINK ABOUT THEM. SO IT'S REALLY
21 PRETTY TYPICAL -- SO IT'S MORE SYMPTOMS THAT YOU'RE GOING TO
22 SEE USUALLY DEVELOPING IN THE SCHOOL AREAS WHERE PEOPLE ARE
23 HAVING TROUBLE WITH THEIR WORK AND THAT SORT OF THING.

24 Q. ALL RIGHT. AND THE NEXT QUESTION WAS, WHAT ABOUT
25 IMPULSIVITY OR IMPULSIVE BEHAVIOR? AND HER ANSWER WAS WHAT?

1 A. SURE, YOU CAN SEE THAT, BUT AGAIN, MORE IN CHILDREN
2 IT'S GOING TO BE THINGS LIKE BLURTING OUT ANSWERS, NOT
3 WAITING YOUR TURN AND JUST DOING THINGS, DOING THINGS
4 WITHOUT THINKING ABOUT THEM. AND THAT OVER TIME -- NOW THAT
5 CAN TURN. YOU CAN SEE SOME BEHAVIORAL THINGS FROM THAT, BUT
6 KIDS MIGHT GET INTO TROUBLE LATER ON IF THEY'RE NOT TREATED.
7 WITH RESPECT ---

8 Q. THE NEXT QUESTION IS, WITH RESPECT TO WHAT YOU KNOW
9 ABOUT JONATHAN BINNEY FROM LOOKING AT HIS RECORDS, SCHOOL
10 RECORDS, ALL THE INFORMATION DO YOU HAVE AN OPINION AS TO
11 WHETHER OR NOT HE MAY OR MAY NOT SUFFER FROM FETAL ALCOHOL
12 SYNDROME OR FETAL ALCOHOL EFFECT? AND WHAT WAS HER ANSWER?

13 A. IT'S MY OPINION BASED ON, AGAIN, THE LIMITATIONS OF
14 WHAT MEDICALLY WE KNOW AT THIS POINT THAT THERE WAS
15 DEFINITELY -- HE HAS THE FOUR COMPONENTS THAT ARE DESCRIBED
16 IN THE MEDICAL LITERATURE. HE HAD A HISTORY OF EXPOSURE TO
17 ALCOHOL WHILE HIS MOTHER WAS PREGNANT WITH HIM.

18 HE HAD, IN MY OPINION, AND I HAVE GOT PICTURES, HE HAD
19 SOME OF THE FACIAL ANOMOLIES THAT YOU SEE WITH THE SYNDROME
20 AND THEN CLEARLY WE HAVE SEPARATE MEDICAL DOCUMENTATION THAT
21 HE HAS BEEN DIAGNOSED WITH ATTENTION DEFICIT DISORDER.

22 HE ACTUALLY HAD WHAT'S CALLED A NEUROPSYCHOLOGICAL
23 TESTING. HE TOOK PAPER AND PENCIL TESTING THAT SHOWS HOW
24 YOUR BRAIN FUNCTIONS. AND IT WAS VERY CLEAR THAT HE HAD
25 MANY DIFFICULTIES IN LEARNING, MANY DIFFICULTIES IN PAYING

1 ATTENTION AND CLEARLY HAD WHAT'S CALLED THE COGNITIVE
2 PROBLEMS THAT YOU SEE WITH THAT SYNDROME.

3 Q. ALL RIGHT. SO I'LL ASK YOU AGAIN, DID DR. SCHWARTZ-
4 WATTS DIAGNOSE MR. BINNEY WITH HAVING FETAL ALCOHOL
5 SYNDROME?

6 A. HE DIDN'T -- SHE DIDN'T ANSWER THAT QUESTION DIRECTLY,
7 BUT, YES, SHE SAID THAT HE -- HE DID EXHIBIT THE FOUR
8 CHARACTERISTICS OF THE DIAGNOSIS.

9 Q. ALL RIGHT. AND DID SHE NOT TESTIFY TO THAT BEFORE THE
10 JURY IN THE PENALTY PHASE OF HIS TRIAL?

11 A. APPARENTLY, YES.

12 Q. WELL, YOU HAVE THE TRANSCRIPT AND YOU READ IT ---

13 A. YES.

14 Q. YES OR NO?

15 A. YES, SHE DID.

16 Q. THANK YOU. NOW YOU HAD TALKED ABOUT MS. GAYLE DOVE'S
17 RECORDS. AND I'VE GOT THE RECORDS THAT WERE SUPPLIED TO ME
18 BY DEFENSE COUNSEL. WOULD YOU AGREE WITH ME THAT'S ABOUT A
19 MAYBE SEVEN OR EIGHT INCH STACK OF RECORDS FROM THE VA?

20 A. THAT LOOKS LIKE MY STACK, YES.

21 Q. AND ISN'T IT TRUE, DR. NOVICK-BROWN, THAT MOST OF THESE
22 RECORDS DEAL WITH HER TREATMENT FOR POST TRAUMATIC STRESS
23 DISORDER AND DEPRESSION?

24 A. YES, THAT'S TRUE.

25 Q. AND THE POST TRAUMATIC STRESS DISORDER AND DEPRESSION

1 WAS A RESULT OF HER BEING RAPED WHEN SHE WAS ABOUT TWENTY-
2 FOUR OR TWENTY-FIVE YEARS OLD?

3 A. THAT'S CONTAINED IN THOSE RECORDS AS WELL, YES, THAT
4 CONCLUSION.

5 Q. WELL, THAT'S WHERE THE POST TRAUMATIC STRESS CAME FROM,
6 SHE WAS RAPED BY HER SERGEANT, AND THEN HE COMMITTED SUICIDE
7 WHEN SHE REPORTED IT, ISN'T THAT CORRECT?

8 A. YES. AS I SAID, THAT'S CONTAINED IN THOSE RECORDS.
9 SO, YES.

10 Q. ALL RIGHT. AND THERE ARE OTHER RECORDS IN HERE
11 BELONGING TO MS. GAYLE DOVE WHERE SHE IS TREATED FOR
12 MIGRAINE HEADACHES.

13 A. YES, THAT'S CORRECT.

14 Q. SHE'S TREATED FOR SLIPPING AND FALLING AND HURTING HER
15 BACK, IS THAT CORRECT?

16 A. YES, THAT'S TRUE.

17 Q. IN FACT, THERE'S ONLY ABOUT THREE OR FOUR SHEETS OF
18 PAPER THAT I BELIEVE HAVE BEEN ADMITTED BY BOTH THE STATE
19 AND THE DEFENSE THAT DEAL WITH HER DRINKING AS A MINOR, IS
20 THAT CORRECT?

21 A. THAT'S CORRECT TOO.

22 Q. IN FACT, IN THOSE RECORDS THAT HAVE BEEN ADMITTED AT NO
23 TIME DID SHE EVER TELL ANYONE THAT WHILE SHE WAS PREGNANT
24 WITH JONATHAN SHE DRANK ALCOHOL.

25 A. I DID NOT FIND ANY EVIDENCE OF THAT IN THOSE RECORDS.

1 YOU'RE CORRECT.

2 Q. ALL RIGHT. IN FACT, THE BEST EVIDENCE THAT YOU HAVE
3 THAT SHE DRANK WHILE SHE WAS PREGNANT IS THE REPORT THAT SHE
4 TOLD MS. BINNEY THAT SHE DRANK HEAVILY AND SHE TRIED TO
5 ABORT JONATHAN BY DRINKING HEAVILY, ISN'T THAT CORRECT?

6 A. NO. ACTUALLY I CONSIDERED THE BEST REPORT DIRECT
7 OBSERVATION INFORMATION I RECEIVED FROM JOHN MORRIS.

8 Q. FROM WHO?

9 A. JOHN MORRIS.

10 Q. OKAY. AND MR. MORRIS REPORTED THIS TO YOU AFTER MR.
11 BINNEY WAS ON DEATH ROW?

12 A. YES. MR. MORRIS REPORTED THIS TO ME YESTERDAY,
13 ACTUALLY.

14 Q. YESTERDAY?

15 A. YES.

16 Q. 2007, RIGHT?

17 A. THAT'S CORRECT.

18 Q. MAY THE 29TH?

19 A. THAT'S CORRECT.

20 Q. ALL RIGHT.

21 A. BUT I SHOULD ALSO ADD, I REVIEWED HIS -- HE DID AN
22 AFFIDAVIT.

23 Q. UM-HUM (AFFIRMATIVE).

24 A. AND SO I WANTED TO SPEAK TO HIM DIRECTLY ABOUT THE
25 CONTENTS OF HIS AFFIDAVIT.

1 Q. OKAY. DOES THAT AFFIDAVIT SAY IN IT ANYWHERE THAT HE
2 SAW HER DRINKING WHEN SHE WAS PREGNANT?

3 A. NO.

4 Q. OKAY. HE FILLS OUT AN AFFIDAVIT FOR THE DEFENSE
5 ATTORNEYS, IS THAT CORRECT?

6 A. THAT'S CORRECT.

7 Q. ALL RIGHT. AND IT'S ABOUT TWO, THREE PAGES LONG?

8 A. YES, I BELIEVE SO.

9 Q. AND NOWHERE IN THAT SWORN AFFIDAVIT DOES HE MENTION
10 THAT MS. BINNEY, EXCUSE ME, MS. DOVE DRANK WHILE SHE WAS
11 PREGNANT IN HIS PRESENCE?

12 A. NO. THERE'S NO INDICATION IN THE AFFIDAVIT THAT HE WAS
13 ASKED THE KIND OF QUESTIONS THAT I ASKED HIM WHEN I SPOKE TO
14 HIM.

15 Q. SO THE FIRST TIME HE MENTIONS IT IS YESTERDAY WHEN YOU
16 TALKED TO HIM?

17 A. YES. BUT I'VE HAD TRAINING AND I'VE DONE A NUMBER OF
18 INVESTIGATIONS OF PRENATAL DRINKING, EXPOSURE TO DRINKING.
19 AND SO THE QUESTIONING I DO IS VERY IN DEPTH, VERY PRECISE
20 AND COMES AT THE ISSUE FROM A VARIETY OF WAYS.

21 Q. OKAY. WAS IT LIKE THIS? YOU SAW -- YOU KNOW, I'VE GOT
22 TO TESTIFY TOMORROW IN A PCR. AND ISN'T IT TRUE THAT YOU
23 SAW MS. DOVE DRINKING ALCOHOL WHEN SHE WAS PREGNANT WITH
24 JONATHAN?

25 A. I WOULD NEVER ASK A COLLATERAL -- THAT KIND OF

1 QUESTION.

2 Q. OKAY. WELL, APPARENTLY DEFENSE ATTORNEYS DIDN'T EITHER
3 BECAUSE IT WASN'T IN HIS AFFIDAVIT, WAS IT?

4 A. NO. I ASK QUESTIONS ABOUT WHAT HE OBSERVED, WHEN HE
5 OBSERVED IT, HOW OFTEN THE DRINKING OCCURRED, WHO SHE WAS
6 WITH WHEN SHE DRANK, HOW -- WHETHER SHE WAS DRINKING UP
7 UNTIL THE TIME SHE LEFT FOR THE UNWED MOTHER'S HOME.

8 QUESTIONS LIKE THAT THAT TRY TO GET A GOOD SENSE OF THE
9 TIMING OF THE ALCOHOL CONSUMPTION.

10 Q. WELL, WHEN HE MADE THIS STATEMENT TO YOU YESTERDAY HE
11 WAS AWARE THAT YOU WERE GOING TO COME HERE AND TESTIFY ON
12 MR. BINNEY'S BEHALF, WASN'T HE?

13 A. ACTUALLY I DON'T KNOW IF HE WAS AWARE OF THAT.

14 Q. WELL, DO YOU THINK WHEN HE FILLED OUT THIS AFFIDAVIT
15 FOR MR. BLUME THAT HE WAS AWARE THAT IT WAS GOING TO BE USED
16 IN SOME KIND OF SENTENCING PROCEEDING OR DEATH PENALTY
17 PROCEEDING?

18 A. HE PROBABLY WAS.

19 Q. SO HE KNEW WHEN YOU CALLED HIM WHAT YOU WERE LOOKING
20 FOR, DIDN'T HE?

21 A. I CAN'T SAY THAT FOR SURE. I IDENTIFIED MYSELF AND
22 SAID THAT I WAS ASSESSING MR. BINNEY. AND THAT'S ALL THE
23 INFORMATION I PROVIDED TO HIM.

24 Q. WELL AGAIN, ISN'T IT A FACT GIVEN THAT -- GIVEN
25 EVERYTHING ABOUT WHEN YOU GOT THAT REPORT FROM THIS WITNESS

1 AND HOW YOU GOT THAT REPORT, ISN'T THE BEST EVIDENCE THAT
2 MS. DOVE DRANK WHILE SHE WAS PREGNANT THE REPORT THAT MR.
3 BINNEY -- MS. BINNEY GAVE AT THE TIME HE WAS ON TRIAL OR
4 BEFORE HIS TRIAL ON THIS DEATH -- THESE DEATH PENALTY
5 CHARGES?

6 A. EXCLUDING MR. MORRIS' STATEMENT, YES, I WOULD AGREE
7 WITH THAT.

8 Q. ALL RIGHT. AND ISN'T IT A FACT THAT THAT INFORMATION
9 WAS BEFORE THE JURY IN HIS DEATH PENALTY TRIAL?

10 A. YES, I BELIEVE IT WAS.

11 Q. OKAY. WOULD YOU LIKE FOR ME TO SHOW YOU DR. SCHWARTZ-
12 WATTS' TESTIMONY AGAIN?

13 A. NO. I'LL TAKE YOUR WORD FOR IT.

14 Q. OKAY. SO THE JURY KNEW ABOUT THAT?

15 A. YES.

16 Q. KNEW THAT SHE DRANK, AT LEAST ACCORDING TO WHAT MS.
17 BINNEY SAID MS. DOVE TOLD HER?

18 A. YES, THAT'S CORRECT.

19 Q. WHILE SHE WAS PREGNANT?

20 A. YES.

21 Q. I WAS LOOKING ALSO AT YOUR AFFIDAVIT AND YOU WERE
22 TALKING ABOUT SPECIFIC COGNITIVE PROBLEMS, I BELIEVE. I'M
23 TRYING TO FIND THE EXACT PLACE THAT IT WAS. WHERE YOU
24 TALKED ABOUT THE STARING AND THE TWITCHING THAT HE HAD. DO
25 YOU REMEMBER WHERE THAT IS?

1 A. THAT WOULD BE UNDER THE NEUROLOGICAL ---

2 Q. NEUROLOGICAL ABNORMALITIES.

3 A. YES.

4 Q. AND THERE'S NOT -- I'M LOOKING AT YOUR AFFIDAVIT. I
5 SEE PAGE 18 OF 49. AND YOU POINTED TO THE FACT THAT HIS
6 ADOPTIVE MOTHER, MS. BINNEY, SAID THAT HE HAD STARING
7 EPISODES. AND YOU'RE POINTING TO THESE AS EVIDENCE OF
8 NEUROLOGICAL ABNORMALITIES. WHEN HE WAS SEVENTEEN HIS
9 MOTHER REPORTED STARING EPISODES WHEN IT WAS DIFFICULT TO
10 GET HIS ATTENTION OVER THE PREVIOUS THREE YEARS. IS THAT
11 CORRECT?

12 A. YES. THIS WAS -- THAT CAME FROM A 1992 EVALUATION
13 REPORT FROM THE LEARNING CENTER.

14 Q. OKAY. ARE YOU TESTIFYING THAT ANY SEVENTEEN YEAR OLD
15 THAT HAS STARING EPISODES AND HIS MOTHER HAS TO WORK TO GET
16 HIS ATTENTION HAS FETAL ALCOHOL SYNDROME?

17 A. STARING EPISODES IS WHAT MAKES IT A LITTLE BIT
18 DIFFERENT. THAT IN CONJUNCTION WITH THE RITUALISTIC
19 TWITCHING ON THE -- ON THE NEXT PAGE OF THAT REPORT COMBINED
20 COULD BE SYMPTOMS OF NEUROLOGICAL DAMAGE.

21 Q. OKAY.

22 A. IT'S NOT DEFINITIVE EVIDENCE OF NEUROLOGICAL DAMAGE,
23 BUT IT'S -- COULD BE SYMPTOMATIC.

24 Q. MY QUESTION AGAIN WAS ARE YOU TESTIFYING THAT ANY
25 SEVENTEEN YEAR OLD THAT STARES OFF INTO SPACE AND HIS MOTHER

- 1 CAN'T GET HIS ATTENTION HAS FETAL ALCOHOL SYNDROME?
- 2 A. NO, OF COURSE NOT.
- 3 Q. AND THE NEXT THING YOU POINTED TO WAS RITUALISTIC
- 4 TWITCHING OF HIS NECK AT FIFTEEN. WHERE DID YOU GET THAT
- 5 FROM?
- 6 A. THAT'S ALSO FROM THE LEARNING CENTER EVALUATION REPORT.
- 7 Q. ALL RIGHT. TELL THE JUDGE WHAT HAPPENED TO THAT
- 8 TWITCHING.
- 9 A. I DON'T UNDERSTAND YOUR QUESTION.
- 10 Q. WELL, DO NOT THE RECORDS REFLECT THAT AFTER HE WENT TO
- 11 THE CHIROPRACTOR HIS NECK DIDN'T TWITCH ANYMORE?
- 12 A. THAT'S CORRECT.
- 13 Q. ALL RIGHT. CAN YOU TELL ME GOING TO THE CHIROPRACTOR
- 14 CAN CURE YOU OF SYMPTOMS OF FETAL ALCOHOL SYNDROME?
- 15 A. I AM NOT A CHIROPRACTOR AND I'M NOT -- I AM NOT A
- 16 NEUROLOGIST. AND SO I DON'T KNOW IF MANIPULATION OF
- 17 SOMETHING IN THE NECK MIGHT HAVE AN EFFECT ON THAT
- 18 PARTICULAR CONDITION. SO I CAN'T RESPOND TO THAT.
- 19 Q. WELL, THE TRUTH IS A TWITCHING OF THE NECK THAT'S CURED
- 20 BY A CHIROPRACTOR WASN'T A SYMPTOM OF FETAL ALCOHOL SYNDROME
- 21 AT ALL, WAS IT?
- 22 A. WELL, IT MAY NOT HAVE BEEN.
- 23 Q. OKAY. BUT YOU CITED IT IN YOUR AFFIDAVIT?
- 24 A. I DID AS A POSSIBLE SYMPTOM, THAT'S CORRECT.
- 25 Q. WELL, I'M LOOKING AT YOUR AFFIDAVIT. IT SAYS

1 NEUROLOGICAL ABNORMALITIES. YOU GOT A COPY OF IT?

2 A. YES, IT IS AN ABNORMALITY. AND IT WAS PRESENT. AND IT
3 WAS IN THE RECORDS.

4 Q. ALL RIGHT. SEIZURES -- YOU TALK ABOUT SEIZURES, ---

5 A. COULD YOU REFER ME TO YOUR ---

6 Q. --- POST-NATAL INSULT -- I'M SORRY.

7 A. TELL ME WHAT PAGE YOU'RE ON, PLEASE.

8 Q. 18.

9 A. 18?

10 Q. BOTTOM OF 18.

11 A. OKAY.

12 Q. SEIZURES NOT DUE TO A POST-NATAL INSULT OR FEVER OR
13 OTHER SOFT NEUROLOGICAL SIGNS OUTSIDE NORMAL LIMITS, EG,
14 COORDINATION PROBLEMS AND DIFFICULTY WITH MOTOR CONTROL,
15 VISUAL MOTOR DIFFICULTIES, NYSTAGMUS, IN TERMS OF
16 DIFFERENTIAL DIAGNOSIS ALONG WITH STRUCTURAL DAMAGE ABNORMAL
17 NEUROLOGICAL FINDINGS CAN BE MOST PREDICTIVE OF UNDERLYING
18 CNS -- THAT CNS STANDS FOR WHAT?

19 A. CENTRAL NERVOUS SYSTEM.

20 Q. OKAY. ABNORMALITY DUE TO PRENATAL ALCOHOL EXPOSURE
21 RATHER THAN ENVIRONMENTAL TRAUMAS. NEUROLOGICAL
22 ABNORMALITIES IN JONATHAN BINNEY ARE DOCUMENTED BY THE
23 FOLLOWING. IT DOESN'T SAY ANYTHING ABOUT POSSIBLE
24 ABNORMALITIES. YOUR AFFIDAVIT SAYS ABNORMALITIES.

25 A. YES. WHAT I DID NOT SAY IN HERE AND WHAT I WAS NOT

1 PURPORTING WAS THAT THESE ABNORMALITIES ARE DEFINITIVE
2 EVIDENCE OF FASD. THESE ARE NEUROLOGICAL ABNORMALITIES.
3 TWITCHING OF THE NECK IS A NEUROLOGICAL ABNORMALITY.
4 WHETHER OR NOT IT WAS EVER ELIMINATED BY A CHIROPRACTOR
5 WORKING ON IT, IT'S STILL LISTED AS AN ABNORMALITY BECAUSE
6 THAT WAS WHAT WAS IN THE RECORD.

7 Q. YOU DON'T THINK IT'S IMPORTANT FOR THE JUDGE TO KNOW
8 THAT THAT TWITCHING STOPPED AFTER HE WENT TO THE
9 CHIROPRACTOR?

10 A. WHAT I'M LISTING HERE IS -- IT'S EVERYTHING IN THE
11 RECORD THAT INDICATES SOME KIND OF ABNORMALITY. A LOT OF
12 THE ISSUES HERE HAD ONGOING CONSEQUENCES OR SOME KIND OF
13 INTERVENTION AND SO FORTH. AND I DID NOT GO INTO EACH AND
14 EVERY ONE OF THESE ABNORMALITIES AND LIST WHAT THE
15 INTERVENTION OR THE OUTCOME WAS.

16 Q. OKAY. BUT YOU CITED IT IN YOUR REPORT AS AN
17 ABNORMALITY TO SUPPORT YOUR FINDING THAT HE HAD FETAL
18 ALCOHOL SYNDROME, DIDN'T YOU?

19 A. NO. WHAT I DID WAS I LISTED ALL THE NEUROLOGICAL
20 ABNORMALITIES THAT I FOUND IN THE RECORDS. AND THAT'S WHAT
21 THIS -- THIS CLEARLY POINTS OUT. NEUROLOGICAL ABNORMALITIES
22 IN JONATHAN BINNEY ARE DOCUMENTED BY THE FOLLOWING FINDINGS.

23 Q. BUT YOU DIDN'T PUT IN THERE THAT THAT ABNORMALITY
24 STOPPED AFTER HE WENT TO THE CHIROPRACTOR, DID YOU?

25 A. NO. AS I SAID, I DID NOT DO THAT WITH ANY OF THESE

1 ABNORMALITIES.

2 Q. WHAT -- IS THERE -- WHAT ELSE DID YOU NOT PUT IN HERE?

3 A. THERE'S NOTHING ELSE THAT I CAN THINK OF THAT ACTUALLY
4 STOPPED BY VIRTUE OF ANY KIND OF MEDICAL INTERVENTION.

5 THERE'S NO -- THERE'S CERTAINLY NO FUNCTIONAL DEFICIT THAT
6 WENT AWAY WITH ANY KIND OF INTERVENTION. THIS IS REALLY THE
7 ONLY, NOW THAT YOU BRING IT UP, THIS IS THE ONLY ABNORMALITY
8 THAT I CAN THINK OF THAT HAD SOME KIND OF INTERVENTION THAT
9 SEEMED TO BE EFFECTIVE.

10 Q. YOU TALKED ABOUT THE CORPUS CALLOSUM, THE PART OF THE
11 BRAIN THAT SEPARATES THE TWO LOBES.

12 A. YES.

13 Q. WHAT ARE SOME OF THE OTHER CAUSES OF THINNING OF THE
14 CORPUS CALLOSUM?

15 A. THERE IS ---

16 Q. BESIDES FETAL ALCOHOL SYNDROME?

17 A. ACCORDING TO THE RESEARCH THERE IS NO KNOWN CAUSE OF
18 THINNING OF THE CORPUS CALLOSUM EXCEPT FROM FETAL --
19 PRENATAL FETAL ALCOHOL EXPOSURE.

20 Q. DO PEOPLE WITH HYPERACTIVITY DISORDER HAVE A THINNER
21 CORPUS CALLOSUM THAN NORMAL PEOPLE?

22 A. I HAVE NOT SEEN ANY EVIDENCE IN THE LITERATURE TO
23 SUPPORT THAT CONCLUSION.

24 Q. DO PEOPLE WHO ARE PSYCHOPATHIC HAVE THINNER CORPUS
25 CALLOSUM?

1 A. NO. I'VE NEVER SEEN ANY EVIDENCE IN THE LITERATURE
2 WITH REGARD TO THAT EITHER. AND THAT'S ONE AREA OF
3 EXPERTISE IN TERMS OF MY SEXUALLY VIOLENT PREDATOR WORK.

4 Q. CAN GENETICS CAUSE A THINNER CORPUS CALLOSUM?

5 A. YES, IT -- I BELIEVE THAT IT CAN. BUT AGAIN, I'M NOT A
6 GENETICIST. SO I CAN'T RESPOND.

7 Q. ALL RIGHT. WELL, JUST A SECOND AGO I ASKED YOU WHAT
8 WERE SOME OF THE CAUSES OF A THINNER CORPUS CALLOSUM BESIDES
9 FETAL ALCOHOL SYNDROME AND YOU SAID THERE WERE NONE. AND
10 THEN YOU JUST TESTIFIED THAT GENETICS CAN CAUSE IT.

11 A. I'M ---

12 Q. WHICH IS IT?

13 A. WELL, I WAS -- I THOUGHT THAT YOU MEANT A CONDITION,
14 SOME KIND OF A BIRTH DEFECT OR CONDITION. IN TERMS OF
15 GENETICS, YES, THERE IS RESEARCH THAT SHOWS THAT
16 APPROXIMATELY POINT THREE (.3) PERCENT OF THE POPULATION HAS
17 SOME KIND OF AFFECT ON THE CORPUS CALLOSUM, SOME KIND OF
18 ABNORMALITY TO THE CORPUS CALLOSUM.

19 Q. GENETIC.

20 A. POINT THREE (.3) PERCENT, THAT'S CORRECT.

21 Q. GENETIC.

22 A. GENETIC. AND IN INDIVIDUALS WITH FETAL ALCOHOL
23 SYNDROME, APPROXIMATELY SEVEN PERCENT SHOW ABNORMALITIES TO
24 THE CORPUS CALLOSUM.

25 Q. ALL RIGHT. WELL, WE'LL ASK DR. BOOKSTEIN ABOUT THAT.

1 BUT ARE YOU TESTIFYING THERE ARE NO OTHER CAUSES OF THINNING
2 OF THE CORPUS CALLOSUM?

3 A. NO, I DID NOT MEAN TO IMPLY THAT. THERE ARE ---

4 Q. YOU JUST DON'T KNOW.

5 A. THERE ARE OTHER CAUSES, ACCORDING TO DR. BOOKSTEIN,
6 THERE ARE OTHER CAUSES. AND HE'S THE EXPERT ON THAT. SO HE
7 ---

8 Q. OKAY. WELL, ---

9 A. --- CAN RESPOND TO THAT.

10 Q. --- TELL US WHAT YOU KNOW FROM DR. BOOKSTEIN, WHAT ARE
11 THE OTHER CAUSES OF THINNING OF THE CORPUS CALLOSUM?

12 A. WELL, WHEN HE -- WHEN HE TALKS ABOUT THAT ISSUE HE SAYS
13 THAT THERE IS NO KNOWN -- NO KNOWN CONDITION OR BIRTH DEFECT
14 THAT HAS ANY KIND OF INCIDENTS IN THE POPULATION THAT CAUSES
15 THE THINNING OF OR ANY KIND OF DAMAGE TO THE CORPUS CALLOSUM
16 OTHER THAN PRENATAL ALCOHOL EXPOSURE. SO WHEN HE SAYS IT
17 THAT WAY IT'S MY UNDERSTANDING THAT THERE ARE SOME VERY RARE
18 CONDITIONS THAT MIGHT AFFECT THE CORPUS CALLOSUM, BUT HE
19 DOES NOT LIST THEM. AND I DO NOT KNOW WHAT THEY ARE.

20 Q. WELL, YOU KNOW FROM HIM OR FROM SOME OTHER SOURCES THAT
21 THERE ARE OTHER FACTORS OR THINGS THAT CAN CAUSE SOMEBODY TO
22 BE BORN WITH A THINNER CORPUS CALLOSUM, IS THAT NOT CORRECT?

23 A. YES, BUT THE POINT IS, ONCE YOU HAVE IT IT -- WHAT IT
24 DOES, HOW IT AFFECTS THE EXECUTIVE FUNCTIONS IS THE ISSUE.

25 Q. ALL RIGHT.

1 A. REGARDLESS OF WHAT CAUSED IT.

2 Q. WHOSE -- WHAT PSYCHOLOGICAL EVALUATIONS OF MR. BINNEY
3 DID YOU REVIEW IN THIS CASE?

4 A. DR. SCHWARTZ-WATTS, DAVID BUCKMAN, A NEUROLOGIST AND
5 PSYCHIATRIST.

6 Q. DAVID BACHMAN?

7 A. BACHMAN.

8 Q. OKAY.

9 A. PAMELA CRAWFORD, JAMES EVANS, FRED BOOKSTEIN AND
10 RICHARD ADLER. THERE WERE EARLIER REPORTS IN THE MEDICAL
11 RECORDS AS WELL, THE LEARNING CENTER, FOR EXAMPLE.
12 RIVEREDGE HOSPITAL HAD A NUMBER OF EVALUATION REPORTS.

13 (WHEREUPON RESPONDENT'S EXHIBIT 10 WAS MARKED FOR
14 IDENTIFICATION)

15 Q. LET ME SHOW YOU WHAT'S BEEN MARKED DEFENDANT'S EXHIBIT
16 NUMBER 10. THIS IS A LETTER TO DAVID L. BACHMAN FROM TRENT
17 PRUETT, DEFENSE COUNSEL IN THIS CASE. I'D ASK YOU TO LOOK
18 AT THAT. HAVE YOU SEE THAT LETTER BEFORE?

19 A. YES, I BELIEVE I SAW THIS.

20 Q. OKAY. AND WHAT DOES THAT LETTER TALK ABOUT? WHAT'S
21 MR. PRUETT DOING -- WHAT'S HE AT LEAST -- WHAT'S HE TELLING
22 DR. BACHMAN HE'S GOING TO DO?

23 A. GET CHILDHOOD PHOTOGRAPHS, EARLY CHILDHOOD PHOTOGRAPHS
24 ESSENTIALLY FROM THE ADOPTIVE PARENTS.

25 Q. OKAY. IN FACT, IT SAYS HE'S -- HE'S SENDING IT TO HIM,

1 RIGHT?

2 A. YES.

3 Q. NOW WHY WOULD MR. PRUETT SEND DR. BACHMAN EARLY
4 CHILDHOOD PHOTOGRAPHS?

5 A. I DON'T KNOW.

6 Q. WELL, MS. NOVICK-BROWN, YOU HAVE TESTIFIED YOU'RE AN
7 EXPERT IN THE TREATMENT OF FETAL ALCOHOL SYNDROME. AND NOW
8 YOU'RE TELLING THIS COURT THAT YOU DON'T KNOW WHY MR. PRUETT
9 WOULD BE SENDING A NEUROLOGIST EARLY CHILDHOOD PHOTOGRAPHS
10 OF THE DEFENDANT?

11 A. WELL, I'M NOT A NEUROLOGIST. AND SO I DON'T KNOW WHAT
12 THEIR STANDARD ASSESSMENT PROCESS INVOLVES. AND ---

13 Q. WELL, IN THE STANDARD PROCESS ---

14 MR. BLUME: WELL, I DO OBJECT TO THIS.

15 THE COURT: SUSTAINED.

16 MR. BLUME: SHE DOESN'T HAVE THE ---

17 THE COURT: COUNSEL, SUSTAINED. PLEASE LET YOUR
18 WITNESS FINISH HER QUESTION.

19 MR. MABRY: OH, I'M SORRY.

20 THE COURT: I'M GOING TO SUSTAIN AS TO THE FORM OF THE
21 RESPONSE. GO AHEAD, MA'AM. YOU HAD SOMETHING ELSE YOU WERE
22 SAYING.

23 A. I BELIEVE I HAD FINISHED.

24 THE COURT: VERY GOOD.

25 A. I WAS WAITING FOR YOU ---

1 Q. I APOLOGIZE IF I INTERRUPTED YOU. ISN'T ONE OF THE
2 STANDARD DIAGNOSTIC PROCESSES FOR FETAL ALCOHOL SYNDROME FOR
3 THE FAMILY OR THE ATTORNEY OR WHOEVER TO SEND CHILDHOOD
4 PHOTOGRAPHS, EARLY CHILDHOOD PHOTOGRAPHS FOR YOU TO LOOK AT?

5 A. YES. IN THE DIAGNOSIS OF A FETAL ALCOHOL SYNDROME,
6 YES.

7 Q. OKAY. AND WHY IS THAT? WHAT'S THE PURPOSE OF HIM
8 SENDING THOSE PHOTOGRAPHS?

9 A. TO LOOK FOR FACIAL DYSMORPHOLOGY AND ALSO GROWTH
10 DEFICIT IN CHILDHOOD. TO LOOK FOR -- DID YOU HEAR ME?

11 Q. YES. I'M SORRY. AND MR. PRUETT IN AUGUST OF 2002 IS
12 WRITING TO DR. BACHMAN, A NEUROLOGIST, REGARDING SENDING
13 EARLY CHILDHOOD PHOTOGRAPHS TO HIM TO LOOK AT, IS THAT
14 CORRECT?

15 A. YES, THAT'S CORRECT.

16 Q. APPARENTLY HE WAS HAVING HIM LOOK AT HIM FOR FETAL
17 ALCOHOL SYNDROME?

18 A. AGAIN, I DON'T KNOW THAT. I DON'T KNOW WHAT THE NATURE
19 OF THIS -- THIS LETTER INVOLVES. AND I ALSO, NOT BEING A
20 NEUROLOGIST, I DON'T KNOW IF THERE IS SOME REASON FOR A
21 NEUROLOGIST TO LOOK AT CHILDHOOD PHOTOGRAPHS.

22 Q. OKAY. WHAT ELSE BESIDES LOOKING AT THOSE PHOTOGRAPHS
23 DID DR. BACHMAN DO IN THIS CASE?

24 A. HE DID SOME TESTING.

25 Q. OKAY. HE ALSO DID AN MRI AND A PET SCAN FOR MR.

1 PRUETT, DIDN'T HE?

2 A. WELL, HE REVIEWED AN MRI AND A PET -- AN EEG SCAN
3 ACTUALLY, QUANTITATIVE EEG.

4 Q. PRIOR TO THE TRIAL OF THE CASE IN 2002?

5 A. YES, I BELIEVE IT WAS.?

6 Q. IN, IN FACT, IN HIS REPORT TO MR. PRUETT, WHICH YOU
7 HAVE SEEN, A THREE PAGE REPORT, ---

8 A. YES.

9 Q. --- DOES HE NOT STATE THAT HE FOUND ABSOLUTELY NO
10 ABNORMALITIES IN MR. BINNEY?

11 A. WELL, NO, THAT'S NOT QUITE ACCURATE. HE DID FIND SOME
12 ABNORMALITIES IN MR. BINNEY.

13 Q. OKAY. TELL THE COURT WHAT THE ABNORMALITIES WERE.

14 A. HE FOUND -- MAY I REFER TO THE REPORT?

15 Q. SURE.

16 A. I DON'T HAVE THE LAST TWO PAGES. I'VE GOT MY -- MY
17 TRIAL NOTEBOOK IS BASED ON ---

18 Q. WELL, I'LL TRY TO CUT TO THE CHASE.

19 A. OKAY.

20 Q. HE FOUND SOME EEG ABNORMALITY, BUT IT HAD NO
21 SIGNIFICANCE THAT HE COULD DETERMINE, IS THAT CORRECT?

22 A. HE FOUND EEG ABNORMALITIES, ---

23 Q. BUT NO CLINICAL SIGNIFICANCE TO IT?

24 A. NO. BUT WHAT IS SIGNIFICANT ABOUT, IN MY EXPERIENCE,
25 WITH EEG ABNORMALITIES, THE CAUSE IS USUALLY NOT KNOWN. SO

1 ABNORMALITIES WERE FOUND. THAT IN EFFECT BY ITSELF IS
2 SIGNIFICANT, THE FACT THAT THERE ARE EEG ABNORMALITIES.

3 Q. WELL, WHAT I'M ASKING YOU IS HIS REPORT TO MR. PRUETT
4 WAS, NUMBER ONE, THE CAT SCAN WAS NORMAL.

5 A. MRI.

6 Q. WELL, I'M SORRY. MRI WAS NORMAL. THE PET SCAN WAS
7 NORMAL ACCORDING TO HIS REPORT THAT HE SENT MR. PRUETT, IS
8 THAT CORRECT?

9 A. OKAY. I DON'T RECALL THERE BEING A PET SCAN. THERE
10 WAS AN EEG, A QUANTITATIVE EEG AND AN MRI.

11 Q. YOU DON'T ---

12 A. AND ACCORDING TO HIS REVIEW THOSE BOTH -- BOTH OF THOSE
13 TESTS, THE EEG HAD SOME ABNORMALITIES. THE MRI APPEARED TO
14 BE NORMAL UPON HIS EXAMINATION. BUT MRI SCANS ARE -- IN
15 TERMS OF EYEBALLING THE MRI, IT'S A LITTLE BIT DIFFERENT
16 THAN WHAT DR. BOOKSTEIN DOES. SO -- SO THERE'S ---

17 Q. WHAT DOES HE DO?

18 A. HE DOES ACTUAL MEASUREMENTS OF THE CORPUS CALLOSUM,
19 WHICH IS A DEEP BRAIN STRUCTURE.

20 Q. HE ACTUALLY HAS A COMPUTER MEASURE IT, DOESN'T HE?

21 A. YES.

22 Q. SO HE'S RELYING ON THE COMPUTER TO DO THE MEASURING?

23 A. YES, BASED ON HIS PROGRAM, HIS SOFTWARE PROGRAM.

24 Q. BASED ON A PROGRAM HE WROTE?

25 A. YES.

1 Q. . ALL RIGHT. ARE YOU AWARE THAT DR. McNAUGHT WAS
2 CONSULTED BY MR. PRUETT AND MR. SLADE AND HE DIAGNOSED THE
3 DEFENDANT WITH -- AS BEING A PSYCHOPATH?

4 A. I BELIEVE I SAW SOME INFORMATION TO THAT EFFECT, YES.
5 I DON'T RECALL SPECIFICALLY WHERE I READ THAT.

6 Q. OBVIOUSLY THEY COULDN'T CALL HIM AS A WITNESS IN FRONT
7 OF THE JURY, COULD THEY?

8 A. WELL, I DON'T KNOW WHAT THEY COULD OR COULD NOT HAVE
9 DONE, BUT ...

10 Q. AND DR. SCHWARTZ-WATTS DIAGNOSED HIM ---

11 MR. BLUME: YOUR HONOR, COULD WE APPROACH FOR A SECOND?

12 THE COURT: YOU MAY.

13 (WHEREUPON A BENCH CONFERENCE WAS HELD OFF THE RECORD)

14 THE COURT: ALL RIGHT. RATHER THAN HAVE AN OBJECTION
15 HERE AT THE BENCH, COUNSEL, JUST STATE YOUR OBJECTION OR
16 YOUR POINT ON THE RECORD, PLEASE.

17 MR. BLUME: YES. AS YOUR HONOR KNOWS THAT THERE IS AN
18 ONGOING DISPUTE, AN APPEAL ABOUT WHETHER THE ENTIRE FILE OF
19 THIS MATTER SHOULD HAVE BEEN DISCLOSED TO THE ATTORNEY
20 GENERAL'S OFFICE. IT IS OUR POSITION THAT DR. McNAUGHT'S
21 REPORT WOULD HAVE BEEN ONE OF THOSE THINGS WHICH WOULD STILL
22 BE COVERED BY THE PRIVILEGE.

23 I UNDERSTAND THAT THE COURT HAS RULED AGAINST US ON
24 THAT. AND I UNDERSTAND THIS ISSUE IS ON APPEAL. BUT I JUST
25 WANT, FOR PURPOSES OF THE RECORD, TO INDICATE THAT THIS

1 WOULD BE ONE AMONG OTHERS OF THE ITEMS THAT WE WOULD THINK
2 THE PRIVILEGE WOULD STILL APPLY TO.

3 THE COURT: ALL RIGHT. VERY GOOD. SO NOTED THEN FOR
4 THE RECORD. COUNSEL, TELL ME HOW LONG YOU BELIEVE YOUR
5 REMAINING CROSS IS GOING TO BE.

6 MR. MABRY: PROBABLY FIFTEEN, TWENTY MORE MINUTES, YOUR
7 HONOR.

8 THE COURT: ALL RIGHT. WE'LL BREAK FOR LUNCH AT THIS
9 TIME. WHAT WE'LL DO IS -- MA'AM, I'M GOING TO ASK YOU,
10 DURING THE LUNCH BREAK PLEASE NOT TO DISCUSS THIS CASE WITH
11 YOUR COUNSEL -- ON THIS SIDE OF THE CASE OR THAT SIDE OF THE
12 CASE AS YOU ARE A WITNESS UNDER TESTIMONY, ALL RIGHT?

13 A. YES, YOUR HONOR.

14 THE COURT: VERY GOOD. LADIES AND GENTLEMEN, WE WILL
15 ADJOURN UNTIL 2:00 FOR LUNCH. AND COURT WILL BE IN RECESS
16 UNTIL THAT TIME.

17 (WHEREUPON COURT WAS IN RECESS AT 12:46 PM)

18 (WHEREUPON COURT'S EXHIBIT 2 WAS MARKED)

19 THE COURT: AND, MA'AM, PLEASE RETURN TO THE WITNESS
20 CHAIR, IF YOU WILL. ALL RIGHT. WELCOME BACK. YOU WILL
21 RECALL, WE WERE IN CROSS EXAMINATION OF DR. NOVICK-BROWN.
22 AND, MA'AM, ARE YOU READY TO CONTINUE?

23 DR. NOVICK-BROWN: YES, I AM.

24 THE COURT: ALL RIGHT. GO AHEAD, MR. MABRY.

25 MR. MABRY: YES, SIR, YOUR HONOR. THANK YOU.

1 THE COURT: THANK YOU.

2 CROSS EXAMINATION CONTINUED BY MR. MABRY:

3 Q. DR. NOVICK-BROWN, I BELIEVE WE WERE TALKING ABOUT --
4 WHEN WE LEFT WE WERE TALKING ABOUT DR. MORGAN'S EVALUATION,
5 I'M SORRY, NOT DR. MORGAN, DR. SCHWARTZ-WATTS' EVALUATION OF
6 MR. BINNEY. AND YOU TESTIFIED THAT YOU HAD REVIEWED THAT AS
7 WELL, AM I CORRECT?

8 A. YES, THAT'S CORRECT.

9 Q. AND ISN'T IT A FACT THAT SHE DIAGNOSED HIM NOT ONLY
10 WITH FETAL ALCOHOL SYNDROME, BUT SHE DIAGNOSED HIM WITH
11 PEDOPHILIA?

12 A. I DO RECALL SHE DIAGNOSED HIM WITH PEDOPHILIA, YES.

13 Q. SHE DIAGNOSED HIM AS A SEXUAL SADIST.

14 A. I RECALL THAT AS WELL.

15 Q. SHE DIAGNOSED HIM AS HAVING -- AS A GENDER IDENTITY
16 DISORDER.

17 A. YES.

18 Q. AND SOME TYPE OF CROSS DRESSING.

19 A. TRANSVESTIC FETISHISM.

20 Q. FETISHISM, OKAY. AND DID YOU, IN FACT, REVIEW DR.
21 McNAUGHT'S REPORT?

22 A. I -- I DO NOT RECALL IF I DID. I REMEMBER READING
23 INFORMATION ABOUT WHAT HE SAID, BUT I DON'T RECALL
24 SPECIFICALLY WHERE I GOT THAT INFORMATION.

25 Q. ALL RIGHT. HE DIAGNOSED HIM AS HAVING PSYCHOPATHY.

1 A. PSYCHOPATHY, CORRECT.

2 Q. AND WHAT IS THAT?

3 A. PSYCHOPATHY ACTUALLY ISN'T A DIAGNOSIS. IT'S A -- IT'S

4 A DESCRIPTION OF EXTREME ANTI-SOCIAL BEHAVIOR. IT SHARES --

5 IT SHARES A LOT OF THE SAME SYMPTOMS OR BEHAVIORS AS ANTI-

6 SOCIAL PERSONALITY DISORDER. BUT IT REALLY IS A MEASURE OF

7 THREE DIFFERENT DOMAINS OF FUNCTIONING. SO IT GOES BEYOND

8 ANTI-SOCIAL PERSONALITY DISORDER. IT MEASURES AFFECTIVE

9 EMOTIONAL INTERPERSONAL AS WELL AS BEHAVIORAL FUNCTIONING.

10 Q. OKAY. BUT THAT'S WHAT HE DIAGNOSED MR. BINNEY WITH?

11 A. YES.

12 Q. AND DURING THE TRIAL OF THE CASE DR. McNAUGHT WAS NOT

13 CALLED, AS WE'VE ALREADY DISCUSSED. DR. SCHWARTZ-WATTS WAS

14 CALLED AS A WITNESS IN THE PENALTY PHASE.

15 A. YES.

16 Q. AND NOT ONLY DID SHE TESTIFY TO MR. BINNEY HAVING FETAL

17 ALCOHOL SYNDROME, SHE ALSO TESTIFIED TO THESE OTHER

18 DISORDERS THAT WE HAVE DESCRIBED.

19 A. THAT'S CORRECT.

20 Q. INCLUDING BORDERLINE PERSONALITY DISORDER.

21 A. YES, I RECALL THAT AS WELL.

22 Q. SO ALL THAT INFORMATION WAS BEFORE THE JURY AS WELL?

23 A. YES.

24 Q. AND SHE DESCRIBED ALL OF THOSE THINGS INCLUDING THE

25 PEDOPHILIA, INCLUDING THE SEXUAL SADISM AS MENTAL ILLNESSES

1 THAT HE HAD, THAT THEY WERE SICKNESSES, I MEAN, IN
2 MITIGATION.

3 A. MENTAL DISORDERS, CORRECT.

4 Q. THE -- GOING BACK A MINUTE TO THE -- TALKING ABOUT THE
5 MRI SCAN OF MR. BINNEY'S BRAIN. WE TALKED ABOUT -- YOU SAID
6 DR. BOOKSTEIN PROVIDED YOU A REPORT THAT YOU RELIED UPON?

7 A. YES. HE DIDN'T ACTUALLY PROVIDE IT. THE DEFENSE
8 COUNSEL PROVIDED IT.

9 Q. OKAY. SO THEY PROVIDED IT TO YOU. WHAT -- THE
10 COMPUTER PROGRAM THAT HE USES TO ESTIMATE THE SIZE OR GIVE A
11 PROBABILITY -- IT'S ACTUALLY A PROBABILITY, AM I CORRECT?

12 A. IT'S A LIKELIHOOD ESTIMATE, LIKELIHOOD RATIO --
13 STATISTIC THAT HE USES.

14 Q. STATISTICAL PROBABILITY. DO YOU KNOW WHEN HE WROTE
15 THAT PROGRAM?

16 A. I DON'T KNOW WHEN HE WROTE IT. I DO KNOW THAT HE
17 STARTED PUBLISHING RESULTS IN 2002, I BELIEVE.

18 Q. OKAY.

19 A. BUT I BELIEVE HE WROTE IT QUITE SOME TIME BEFORE THAT.
20 I'M NOT SURE THOUGH.

21 Q. BUT IT WAS PUBLISHED IN 2002? DO YOU KNOW WHEN IN
22 2002?

23 A. NO, I DON'T RECALL.

24 Q. SO YOU DON'T KNOW IF IT WAS BEFORE THIS TRIAL OR AFTER
25 THIS TRIAL OR DURING THIS TRIAL?

1 A. NO, I HAVE NO IDEA.

2 Q. TELL THE COURT WHAT HAPPENED IN 2004 AS FAR AS FETAL
3 ALCOHOL SYNDROME. THERE WAS SOMETHING SIGNIFICANT THAT
4 OCCURRED.

5 A. YES. THE CENTER FOR DISEASE CONTROL, CDC, PROMULGATED
6 A VERY SPECIFIC SET OF DIAGNOSTIC CRITERIA BUILDING ON THE
7 IOM CRITERIA IN 1996 AND MADE ESSENTIALLY A COMPILATION OF
8 THE CRITERIA USING SPECIFIC MEASUREMENTS FOR THE DIAGNOSIS.
9 SO A DIAGNOSIS DIDN'T CHANGE IT JUST GOT MORE SPECIFIC IN
10 TERMS OF MEASUREMENT. AND THE CDC PUBLISHED A BROCHURE,
11 PAMPHLET, DIAGNOSTIC TOOL FOR THE ASSESSMENT OF FAS ---

12 Q. WHY ---

13 A. --- IGNORING THE OTHER FASD CONDITIONS.

14 Q. I'M SORRY. WHY WAS THAT IMPORTANT THAT THEY PUBLISHED
15 THAT IN 2004?

16 A. WHY WAS THAT IMPORTANT? YOU MEAN WHY WAS THE DATE
17 IMPORTANT?

18 Q. NO. WHY WAS IT IMPORTANT THAT THE CDC DID IT?

19 A. BECAUSE THERE WAS -- FOR EXAMPLE, IN TERMS OF THE
20 FACIAL DYSMORPHOLOGY THERE WAS NOT A SPECIFIC STANDARD FOR
21 THE AMOUNT OF ABNORMALITY IN THE FACE FOR GROWTH, THERE
22 WASN'T A SPECIFIC STANDARD. GROWTH DEFICITS WAS USED IN
23 SOME CASES TEN PERCENT -- AT THE TENTH PERCENTILE, IN OTHER
24 CASES LOWER THAN THAT, AND IN OTHER CASES A LITTLE BIT
25 HIGHER THAN THAT. SO THEY STANDARDIZED THE MEASUREMENT FOR

1 THE CRITERIA.

2 Q.. I UNDERSTAND. STANDARDIZED THE MEASUREMENT FOR THE
3 CRITERIA IN THE YEAR 2004, IS THAT CORRECT?

4 A. FOR THE FAS DIAGNOSIS ALONE. THEY HAVE NOT ADDRESSED
5 THE OTHER DIAGNOSES THAT FALL UNDER THE FASD UMBRELLA.

6 Q. FALL UNDER WHAT?

7 A. FASD IS A -- IS AN UMBRELLA TERM THAT INCLUDES FETAL
8 ALCOHOL SPECTRUM OR FETAL ALCOHOL SYNDROME AND ALSO OTHER
9 PRENATAL EXPOSURE DISORDERS SUCH AS ALCOHOL RELATED
10 NEURODEVELOPMENTAL DISORDER.

11 Q. WELL, YOU TESTIFIED THAT IN YOUR OPINION MR. BINNEY HAS
12 FETAL ALCOHOL SYNDROME.

13 A. HE MEETS CRITERIA FOR THAT SYNDROME, YES, HE DOES.

14 Q. ALL RIGHT. AND THOSE CRITERIA WERE STANDARDIZED BY THE
15 CDS IN 2004.

16 A. THEY WERE ---

17 Q. IS THAT CORRECT?

18 A. WELL, NO, I WOULDN'T PUT IT THAT WAY. THEY WERE
19 STANDARDIZED BY INSTITUTE OF MEDICINE IN 1996. THAT WAS
20 CONSIDERED THE DEFINITIVE STANDARDIZED DIAGNOSTIC TOOL AT
21 THAT POINT IN TIME. ALL CDC DID WAS MAKE THE STANDARDIZED
22 ASSESSMENT EVEN MORE SPECIFIC IN TERMS OF ACTUAL
23 MEASUREMENT. SO THEY ADDED THE MEASUREMENT ASPECT TO IT.

24 Q. I THOUGHT JUST A MINUTE AGO I ASKED YOU THAT SAME
25 QUESTION AND YOU SAID THE IMPORTANCE OF WHAT HAPPENED IN

1 2004 IS THE CDC STANDARDIZED THE CRITERIA FOR FETAL ALCOHOL
2 SYNDROME.

3 A. NO, THAT'S -- I SAID THEY STANDARDIZED THE MEASUREMENT
4 OF SPECIFIC CRITERIA. THEY DIDN'T STANDARDIZE THE
5 DIAGNOSIS. THAT HAD ALREADY BEEN STANDARDIZED ESSENTIALLY.

6 Q. ALL RIGHT. SO BEFORE 2004 THERE WAS NO STANDARDIZED
7 CRITERIA FOR FETAL ALCOHOL SYNDROME?

8 A. . NO. THAT'S NOT WHAT I -- I HOPEFULLY DID NOT SAY THAT.
9 WHAT I -- WHAT I SAID WAS 1996 STANDARDIZED CRITERIA CAME
10 OUT IN THE FORM OF THE IOM CRITERIA. IN 2004 CDC WENT
11 FURTHER AND STANDARDIZED THE MEASUREMENT OF SPECIFIC
12 CRITERIA. SO THEY TOOK THOSE FOUR CRITERIA AND THEY
13 ACTUALLY ADDED SPECIFIC MEASUREMENTS AND GRADATIONS OF
14 SEVERITY ESSENTIALLY.

15 Q. OKAY. AND 2004 WAS TWO YEARS AFTER THE TRIAL OF THIS
16 CASE, IS THAT CORRECT?

17 A. YES, BUT IT'S NOT RELEVANT IN TERMS OF THE DIAGNOSIS.
18 BUT, YES, THAT'S TRUE.

19 Q. WELL, IF SOMEBODY WAS DIAGNOSING MR. BINNEY IN 2002
20 THEY WOULD NOT HAVE HAD THE CDC'S STANDARDIZED MEASUREMENT
21 OF CRITERIA, WOULD THEY?

22 A. NO, BUT THAT DID NOT STOP THOUSANDS AND THOUSANDS OF
23 DIAGNOSES PRIOR TO 2004. SO THAT'S ESSENTIALLY SAYING THAT
24 NONE OF THOSE DIAGNOSES WERE VALID. AND THAT, OF COURSE, IS
25 NOT ACCEPTED IN THE FIELD. THERE WERE MANY THOUSANDS OF

1 DIAGNOSES OF FASD CONDITIONS PRIOR TO 2004.

2 Q. IN FACT, DR. SCHWARTZ-WATTS DIAGNOSED MR. BINNEY WITH
3 THAT AND TESTIFIED TO THAT IN HIS TRIAL IN 2002 BEFORE THE
4 CDC ANNOUNCED THEIR STANDARDIZED MEASUREMENT OF CRITERIA,
5 ISN'T THAT CORRECT?

6 A. IT DEPENDS ON -- YES. IT DEPENDS ON HOW YOU VIEW HER
7 WORDING THOUGH. SHE DIDN'T SAY I GAVE HIM THIS DIAGNOSIS.
8 WHAT SHE SAYS IS HE MEETS THE CRITERIA IN EACH OF THE FOUR
9 CATEGORIES. NOW YOU CAN ASSUME THAT SHE WAS DIAGNOSING HIM,
10 BUT SHE DIDN'T ACTUALLY SAY THAT.

11 Q. WELL, JUST A SECOND AGO I ASKED YOU THE SAME QUESTION
12 ABOUT MR. BINNEY, AND YOU SAID HE MET THE FOUR CRITERIA OF
13 FETAL ALCOHOL SYNDROME. ISN'T THAT WHAT YOU SAID?

14 A. YES.

15 Q. DID THAT MEAN YOU'RE DIAGNOSING HIM AND SAYING HE HAS
16 FETAL ALCOHOL SYNDROME?

17 A. I MEANT THAT HE MEETS THE CRITERIA. IF YOU'RE ASKING
18 ME DO I DIAGNOSE HIM, DOES HE HAVE THAT DIAGNOSIS? I CAN
19 ALSO ANSWER YES TO THAT.

20 Q. OKAY. WELL, THAT'S THE SAME THING DR. SCHWARTZ-WATTS
21 SAID IN HER TESTIMONY, THAT HE MET THE CRITERIA FOR FETAL
22 ALCOHOL SYNDROME. AND SHE WENT -- ISN'T THAT CORRECT?

23 A. YES, SHE -- YES, SHE DID.

24 Q. AND SHE WENT FURTHER THAN THAT AND SHE TALKED ABOUT ALL
25 THE PROBLEMS THAT HE HAD. SHE SAID HE HAD THE FACIAL ...

- 1 A. DYSMORPHOLOGY.
- 2 Q. DYSMORPHOLOGY, HE HAD THE IMPULSIVE -- IMPULSE
- 3 PROBLEMS, CORRECT?
- 4 A. CORRECT.
- 5 Q. HE HAD THE ADD, ATTENTION DEFICIT DISORDER, THAT'S
- 6 COMMON WITH FETAL ALCOHOL ---
- 7 A. SHE MENTIONED ---
- 8 Q. --- SYNDROME.
- 9 A. --- THAT, CORRECT.
- 10 Q. AND THERE WERE OTHER THINGS SHE MENTIONED THAT HE HAD
- 11 WITH FETAL ALCOHOL SYNDROME.
- 12 A. YES, THAT'S TRUE. SHE -- SHE DESCRIBED THE TIP OF THE
- 13 ICEBERG. THAT'S TRUE.
- 14 Q. AND DID YOU NOT TESTIFY BEFORE LUNCH WHEN I ASKED YOU
- 15 THE QUESTION THAT SHE DID DIAGNOSE HIM WITH FETAL ALCOHOL
- 16 SYNDROME AND TESTIFIED TO THAT BEFORE THE JURY?
- 17 A. SHE -- YES. AND I DON'T KNOW HOW THE JURY INTERPRETED
- 18 HER ASSESSMENT. THE WAY SHE DESCRIBED IT WAS HE MEETS
- 19 CRITERIA FOR THESE FOUR CATEGORIES UNDER THE DIAGNOSIS. I
- 20 -- WHEN I READ THE TESTIMONY THAT'S EXACTLY WHAT SHE SAID.
- 21 SHE WASN'T ASKED DIRECTLY, IS THAT YOUR DIAGNOSIS? ARE YOU
- 22 DIAGNOSING HIM? AND I'M RESPONDING TO YOUR SPECIFIC
- 23 QUESTION, DID SHE DIAGNOSE HIM?
- 24 Q. MY QUESTION IS DID I ASK YOU THAT BEFORE LUNCH AND DID
- 25 YOU NOT TESTIFY THAT SHE DIAGNOSED HIM WITH FETAL ALCOHOL

1 SYNDROME? I'M ASKING WHAT YOUR TESTIMONY WAS BEFORE LUNCH.

2 A. NO. MY TESTIMONY BEFORE LUNCH WAS EXACTLY, I THINK, MY
3 TESTIMONY AT THE CURRENT TIME, THAT SHE SAID HE MET CRITERIA
4 UNDER THOSE FOUR CLASSIFICATIONS, BUT I DID NOT FIND WHERE
5 SHE WAS ASKED THE SPECIFIC QUESTION ABOUT THE DIAGNOSIS.

6 NOW AS FAR AS, I MEAN, THE BOTTOM LINE IS I'M SURE
7 PEOPLE INTERPRETED THAT AS A DIAGNOSIS, BUT SHE DIDN'T
8 ACTUALLY COME RIGHT OUT AND SAY, I DIAGNOSE HIM WITH FETAL
9 ALCOHOL SYNDROME OR FETAL ALCOHOL SPECTRUM DISORDER OR
10 ANYTHING OF THAT NATURE.

11 Q. WHAT DID YOU DO DURING LUNCH?

12 A. I WENT OUT TO LUNCH WITH MR. BLUME'S WIFE.

13 Q. MR. BLUME'S WIFE. AND TELL ME WHAT YOU DISCUSSED WITH
14 MR. BLUME'S -- MR. BLUME'S WIFE.

15 A. ITHACA, NEW YORK AND SOUTH CAROLINA, OUR CHILDREN,
16 MOSTLY MY WORK, EVALUATING SEXUALLY VIOLENT PREDATORS.

17 Q. ANYTHING ELSE? ANYTHING ELSE THAT WOULD CAUSE YOU TO
18 CHANGE YOUR TESTIMONY FROM BEFORE LUNCH TO AFTER LUNCH?

19 A. NO, I DON'T -- I DON'T -- I'M NOT CHANGING MY
20 TESTIMONY. BEFORE LUNCH I AM CERTAIN THAT I SAID THAT SHE,
21 DR. SCHWARTZ-WATTS IN HER TESTIMONY SAID THAT HE MET
22 CRITERIA UNDER THE FOUR DIAGNOSTIC CATEGORIES.

23 SHE WAS NOT ASKED SPECIFICALLY DO YOU -- IS THIS YOUR
24 DIAGNOSIS? DO YOU DIAGNOSE HIM WITH FAS OR ANY OTHER
25 CONDITION BECAUSE FASD IS AN UMBRELLA TERM. AND WHEN SHE

1 TESTIFIED SHE DIDN'T SAY HE MEETS CRITERIA FOR FAS, FETAL
2 ALCOHOL SYNDROME OR FETAL ALCOHOL AFFECT OR PARTIAL FAS OR
3 ARND. THERE ARE A NUMBER OF SPECIFIC CONDITIONS UNDER THE
4 FASD UMBRELLA. FASD IS NOT IN ITSELF A DIAGNOSIS.

5 Q. DID YOU READ OVER HER TESTIMONY DURING LUNCH?

6 A. NO.

7 Q. DID YOU THINK ABOUT YOUR TESTIMONY AND HOW YOU WANTED
8 TO CHANGE IT BETWEEN BEFORE LUNCH AND AFTER LUNCH THIS
9 AFTERNOON?

10 A. NOT FOR EVEN A MOMENT.

11 Q. IN REVIEWING HER TESTIMONY DO YOU THINK DR. SCHWARTZ-
12 WATTS WAS TELLING THE JURY THAT HE DIDN'T HAVE FETAL ALCOHOL
13 SYNDROME?

14 A. I'M NOT SURE WHAT SHE WAS TELLING THE JURY. SHE SAID
15 HE MET CRITERIA FOR A FETAL ALCOHOL SPECTRUM DISORDER, BUT
16 THAT'S AN UMBRELLA TERM. IT COULD HAVE MEANT ANY NUMBER OF
17 THINGS. AND I DON'T KNOW SPECIFICALLY WHAT SHE WAS
18 REFERRING TO OR WHAT, IF ANY, DIAGNOSIS IN PARTICULAR SHE
19 WAS REFERRING TO, IF ANY.

20 MR. BLUME: YOUR HONOR, I OBJECT TO THIS. I THINK THE
21 BEST EVIDENCE OF WHAT DR. SCHWARTZ-WATTS SAID IS WHAT SHE
22 SAID. I THINK THIS WITNESS' INTERPRETATION OR BELIEF ABOUT
23 HOW THE JURY MIGHT HAVE INTERPRETED WHAT IT SAID IS
24 IRRELEVANT. THE TESTIMONY SPEAKS FOR ITSELF.

25 THE COURT: ALL RIGHT, COUNSEL, WE ARE RANGING FAR

1 AFIELD HERE FROM WHERE WE BEGAN. TELL ME WHERE YOU INTEND
2 TO GO WITH THIS QUESTIONING.

3 MR. MABRY: I DON'T INTEND TO GO ANY FURTHER, YOUR
4 HONOR. I THINK THE RECORD WILL SPEAK AND HER TESTIMONY FROM
5 BEFORE LUNCH WILL SPEAK FOR ITSELF ---

6 THE COURT: IT WILL.

7 MR. MABRY: --- AS WELL.

8 THE COURT: ALL RIGHT. VERY GOOD. ANYTHING FURTHER?

9 MR. MABRY: YES, SIR. I'D LIKE TO CONTINUE.

10 THE COURT: ALL RIGHT. GO AHEAD. PLEASE MOVE TO THE
11 NEXT AREA.

12 Q. DOCTOR, YOU REVIEWED, ACCORDING TO YOUR AFFIDAVIT, YOU
13 REVIEWED THE TESTIMONY OF DR. TATE AND DR. ROSS. DO YOU
14 HAVE YOUR AFFIDAVIT?

15 A. YES, I DO.

16 Q. IF YOU WILL TURN TO THAT PORTION OF YOUR AFFIDAVIT
17 WHERE YOU ...

18 A. COULD YOU REFER ME TO THE PAGE, PLEASE?

19 Q. IT'S WHERE YOU TALK ABOUT WHAT ITEMS YOU REVIEWED. I'M
20 LOOKING AT PAGE 3. YOU SAY, I REVIEWED A SYNOPSIS OF
21 COMPLETE TRIAL TESTIMONY. YOU SAID THAT CAME FROM MR.
22 BLUME. AND THEN YOU TESTIFIED, I REVIEWED THE SPECIFIC
23 TESTIMONY OF DR. TATE AND JANICE ROSS.

24 A. YES.

25 Q. YOU SEE THAT?

1 A. YES, I SEE THAT.

2 Q. WHO WAS DR. TATE?

3 A. I DON'T RECALL. I ALSO DON'T -- I RETREATED SO MANY
4 RECORDS. I ALSO DON'T RECALL SPECIFICALLY WHAT WAS IN THEIR
5 TESTIMONY.

6 MR. MABRY: MAY I APPROACH THE WITNESS, YOUR HONOR?

7 THE COURT: YOU MAY.

8 Q. I'M GOING TO SHOW YOU A TRANSCRIPT.

9 MR. MABRY: I'M ON PAGE 2659, YOUR HONOR. TWO THOUSAND
10 SIX HUNDRED AND FIFTY-NINE.

11 A. YES, I RECALL THIS.

12 Q. ALL RIGHT. I'M GOING TO START AT LINE 10. AND DR.
13 TATE WAS ASKED, WHAT WAS THE INITIAL ASSESSMENT OF MS.
14 SOUTHERN WHEN SHE ARRIVED? DO YOU REMEMBER REVIEWING HIS
15 TESTIMONY NOW?

16 A. YES, I DO.

17 Q. OKAY. AND WHAT WAS HIS RESPONSE?

18 A. SHE WAS IN CARDIAC ARREST. THERE WAS NO BLOOD
19 PRESSURE. PUPILS WERE FIXED AND DILATED INDICATING NO
20 NEUROLOGICAL ACTIVITY. AND THERE WAS NO BLOOD PRESSURE OR
21 PULSE.

22 Q. ALL RIGHT. AND THE NEXT QUESTION WAS, AND SHE HAD NO
23 BLOOD PRESSURE, NO PULSE, NO NEUROLOGICAL ACTIVITY? AND YOU
24 COULD TELL THAT HOW? AND WHAT WAS HER ANSWER?

25 A. WELL, WHEN THE -- WITH THE PUPILS FIXED AND DILATED.

1 MR. BLUME: YOUR HONOR, I -- I OBJECT TO THIS. I DON'T
2 SEE THE POSSIBLE RELEVANCE OF WHAT THE TRANSCRIPT SAID, WHAT
3 DR. TATE SAID IS WHAT IT SAYS. AND IT DOESN'T -- THAT
4 TESTIMONY DOESN'T BEAR ON HER OPINION ABOUT MR. BINNEY AND
5 FETAL ALCOHOL SYNDROME. IT WAS JUST RELEVANT TO HER INQUIRY
6 ABOUT WHAT MR. BINNEY WAS CONVICTED OF DOING. THE SPECIFICS
7 OF IT ARE COMPLETELY IRRELEVANT. THIS IS A WASTE OF TIME.

8 THE COURT: ALL RIGHT. COUNSEL, WE READ SUBSTANTIALLY
9 FROM DR. SCHWARTZ-WATTS EARLIER. I HAVE THE BENEFIT OF
10 THESE -- OF THE RECORD. IN FACT, I WAS JUST LOOKING FOR THE
11 PARTICULAR PAGE YOU JUST CITED. TELL ME WHAT YOUR PURPOSE
12 IS IN THIS EXERCISE.

13 MR. MABRY: IT'S TWO PURPOSES, YOUR HONOR. THE MOVANT
14 HAD A PATHOLOGIST COME IN AND TESTIFY THAT THERE WAS A FORTY
15 MINUTE TIME PERIOD WHERE -- UNEXPLAINED TIME PERIOD OF WHAT
16 HAPPENED TO MS. SOUTHERN AT THE HOSPITAL.

17 THE COURT: THAT'S RIGHT.

18 MR. MABRY: THIS WITNESS SAID SHE REVIEWED THOSE
19 RECORDS.

20 THE COURT: RIGHT.

21 MR. MABRY: AND I WANT TO HAVE HER REVIEW THOSE RECORDS
22 ON THE RECORD NOW IN THIS PROCEEDING, NUMBER ONE, TO EXPLAIN
23 THAT FORTY MINUTE TIME PERIOD THAT THEY RAISED IN THIS CASE.
24 SECOND OF ALL, SHE WAS GIVEN THESE RECORDS TO REVIEW BY MR.
25 BLUME. AND I'M GOING TO FOLLOW UP WITH THE PURPOSE OF HER

1 REVIEWING THOSE RECORDS.

2 THE COURT: BUT COUNSEL, THIS WITNESS, OF COURSE, IS
3 NOT A MEDICAL DOCTOR. WHAT -- HOW CAN SHE ELUCIDATE WHAT'S
4 HAPPENED OTHER THAN TO READ INTO THE RECORD SOME PORTION OF
5 THE TRANSCRIPT AND THEN WHAT QUALIFICATION WOULD SHE HAVE TO
6 COMMENT ON IT? I CAN'T IMAGINE THERE WOULD BE ANY.

7 MR. MABRY: ALL I'M ASKING HER TO DO IS READ A SHORT
8 PORTION INTO THE RECORD BECAUSE SHE DID REVIEW THEM AND ASK
9 HER IF THAT IS THE RECORD. BUT THEN I'M GOING TO ASK HER
10 WHAT WAS THE PURPOSE -- WHAT WAS HER PURPOSE IN REVIEWING
11 DR. TATE'S RECORDS TO BEGIN WITH.

12 THE COURT: ALL RIGHT. MR. BLUME?

13 MR. BLUME: I THINK, I MEAN, JUST GO, HEY, JUST READ
14 THIS SELECTIVE PAGE? IT HAS NOTHING TO DO AND IT'S
15 IRRELEVANT.

16 THE COURT: I'M GOING TO SUSTAIN THE OBJECTION. YOU
17 MAY ASK HER WHY SHE REVIEWED THE PARTICULAR PHYSICIAN'S
18 RECORDS IF YOU WISH.

19 MR. MABRY: YES, SIR.

20 Q. DR. CRAWFORD, THE -- NOT DR. CRAWFORD, BROWN, CAN YOU
21 TELL ME WHY YOU AS A PSYCHOLOGIST BEING ASKED TO ANALYZE THE
22 DEFENDANT, MR. BINNEY, WOULD BE ASKED TO READ THE RECORDS OF
23 THE SURGEON THAT OPERATED ON THE VICTIM, JUDY SOUTHERN?

24 A. WELL, I ASKED FOR THE RECORDS RELEVANT TO THE CAPITAL
25 CRIME. AND I WANTED TO KNOW IF THERE WAS -- WHAT I WAS

1 LOOKING FOR WAS ANY BEHAVIOR THAT WOULD DISPUTE OR BE
2 INCONSISTENT WITH FETAL ALCOHOL SPECTRUM DISORDER BEHAVIOR.
3 SO I LOOK FOR THAT IN A VARIETY OF RECORDS. AND IN
4 PARTICULAR IN THE CASE OF THIS CAPITAL OFFENSE I WANTED TO
5 SEE IF HIS BEHAVIOR DIDN'T RESEMBLE FASD TYPE BEHAVIOR. SO
6 I WAS LOOKING FOR THAT ESSENTIALLY. AND I JUST HAPPENED TO
7 GET THESE RECORDS, I THINK, AS PART OF THE PACKAGE OF ALL OF
8 THE TRIAL MATERIAL.

9 Q. AND YOU ALSO REVIEWED THE PATHOLOGIST'S REPORT?

10 A. I BELIEVE THAT WAS ONE OF THE RECORDS THAT I RECEIVED.
11 I HAD A GROUP OF RECORDS REGARDING THE TRIAL.

12 Q. WELL, I'M -- AGAIN, I'M LOOKING AT YOUR AFFIDAVIT WHERE
13 YOU SAID YOU REVIEWED THE TESTIMONY OF DR. TATE AND YOU ALSO
14 REVIEWED THE TESTIMONY OF DR. ROSS, THE PATHOLOGIST.

15 A. WELL, I DIDN'T RECALL THAT DR. ROSS WAS THE
16 PATHOLOGIST. WHEN YOU PUT IT THAT WAY -- THE QUESTION TO ME
17 WAS, DID YOU REVIEW THE PATHOLOGIST'S REPORT? I DON'T
18 REMEMBER WHO WAS THE PATHOLOGIST. THAT'S ---

19 Q. OKAY. WELL, DR. ROSS WAS THE PATHOLOGIST. DID YOU
20 REVIEW HER TESTIMONY?

21 A. YES, I DID.

22 Q. OKAY. WHAT WAS THE PURPOSE OF REVIEWING HER TESTIMONY?

23 A. I SKIMMED IT. I DID NOT REVIEW IT IN DEPTH. IT HAD
24 NOTHING RELEVANT TO SAY TO ME WITH REGARD TO MR. BINNEY. SO
25 I LOOKED AT IT, SKIMMED IT, DIDN'T REVIEW IT IN DEPTH.

1 Q. ALL RIGHT. ACCORDING TO YOUR AFFIDAVIT YOU DID REVIEW
2 STATEMENTS OF THE DEFENDANT, MR. BINNEY, IS THAT CORRECT?

3 A. YES, BECAUSE THAT'S ----

4 Q. STATEMENTS ---

5 A. I'M SORRY.

6 Q. STATEMENTS HE MADE TO THE POLICE.

7 A. YES, THAT'S RELEVANT TO HIS FUNCTIONING.

8 Q. MR. BINNEY ADMITTED TO THE POLICE, DID HE NOT, THAT HE
9 PURCHASED A PISTOL ABOUT TWO DAYS BEFORE MS. SOUTHERN'S
10 MURDER?

11 A. YES, I RECALL THAT.

12 Q. IS THAT CORRECT?

13 A. I RECALL THAT, YES.

14 Q. DID FETAL ALCOHOL SYNDROME CAUSE HIM TO PURCHASE A
15 PISTOL?

16 A. I THINK THAT IT HAD -- IT HAD DIRECT BEARING ON HIS
17 POOR JUDGMENT AND A NUMBER OF OTHER ASPECTS OF HIS
18 FUNCTIONING. SO, YES.

19 Q. WHY DID HE PURCHASE THE PISTOL?

20 A. NO ONE KNOWS. AND I WOULD -- I WOULD SAY THAT IT WOULD
21 BE CONSISTENT TO CONCLUDE IT WAS IMPULSE PURCHASED BASED ON
22 SUICIDAL GESTURES IN THE PAST THAT HE'D MADE, BUT NO ONE
23 KNOWS FOR SURE.

24 Q. WELL, DID YOU REVIEW THE TESTIMONY OF, I BELIEVE, A MR.
25 EDWARDS, THE PERSON THAT SOLD HIM THE GUN?

1 A. I DON'T RECALL SPECIFICALLY WHETHER I REVIEWED THAT. I
2 DON'T BELIEVE I DID ACTUALLY.

3 Q. . YOU DIDN'T REVIEW A STATEMENT OF THIS GENTLEMAN THAT
4 SOLD HIM THE GUN OR HIS TESTIMONY?

5 A. I REVIEWED A SYNOPSIS OF ALL THE TRIAL TESTIMONY. AND
6 I DON'T RECALL WHETHER THAT WAS A SPECIFIC RECORD I GOT OR
7 NOT. I DON'T -- I DON'T RECALL. I'M SORRY.

8 Q. WELL, WHERE IS THE SYNOPSIS THAT YOU REVIEWED?

9 A. WHERE IS IT?

10 Q. UM-HUM (AFFIRMATIVE).

11 A. IT WAS PREPARED BY THE DEFENSE COUNSEL. I DON'T -- I
12 DON'T HAVE IT WITH ME. I DIDN'T BRING IT WITH ME.

13 Q. WELL, DO YOU REMEMBER ANYTHING ABOUT WHAT THE PERSON
14 THAT SOLD HIM THE GUN SAID?

15 A. NO, I DO NOT.

16 Q. DID HE HAVE ANY PROBLEM COMPLETING THE TRANSACTION FOR
17 THE PURCHASE OF THE PISTOL?

18 A. I DON'T RECALL. SORRY.

19 Q. DID HE HAVE ANY PROBLEM DRIVING TO THE BANK WHERE HE
20 PURCHASED THE PISTOL FROM THE SECURITY GUARD?

21 A. I DON'T REMEMBER.

22 Q. ANY COGNITIVE PROBLEMS?

23 A. I DON'T RECALL.

24 Q. ANY COMPLEX EXECUTIVE PROBLEMS THAT HE HAD IN
25 PURCHASING THE PISTOL?

1 A. I DON'T RECALL THAT THERE WERE ANY PROBLEMS IN TERMS OF
2 THE PURCHASE ITSELF.

3 Q. OKAY. AND THEN HE ALSO TOLD THE POLICE THAT HE LEFT
4 HIS MOTEL AND DROVE HIS MOPED FROM THE COLLEGE MOTOR INN IN
5 SPARTANBURG ALL THE WAY TO THE OTHER SIDE OF COWPENS WHERE
6 THE VICTIM'S HOUSE WAS, ISN'T THAT CORRECT?

7 A. YES, THAT'S CORRECT.

8 Q. DID HE HAVE ANY PROBLEMS DRIVING HIS MOPED FROM THE
9 COLLEGE MOTOR INN ALL THE WAY ACROSS HALF OF SPARTANBURG
10 COUNTY TO THE OTHER SIDE OF COWPENS?

11 A. I DON'T RECALL READING ABOUT ANY PROBLEMS THAT HE HAD
12 PERFORMING THAT FUNCTION.

13 Q. DID HE GET PULLED OVER BY ANY POLICE OFFICERS?

14 A. I DON'T RECALL READING ANYTHING ABOUT SOMETHING LIKE
15 THAT.

16 Q. DID HE HAVE ANY PROBLEM HIDING THE MOPED SEVERAL MILES
17 FROM THE VICTIM'S HOME?

18 A. NO. THE INFORMATION INDICATED HE DID THAT
19 SUCCESSFULLY. NO ONE FOUND IT.

20 Q. WERE THERE ANY COMPLEX EXECUTIVE FUNCTIONS THAT SEEMED
21 TO BE LACKING WHEN HE WAS DRIVING TO COWPENS AND HIDING THE
22 MOPED?

23 A. NOT FOR THOSE SPECIFIC FUNCTIONS, BUT IN TERMS OF THE
24 JUDGMENT, THE DECISION-MAKING, THE ABILITY TO CONTEMPLATE
25 THE CONSEQUENCES OF HIS ACTIONS, SIGNIFICANT PROBLEMS IN ALL

1 THOSE AREAS.

2 Q. AFTER HE HID THE MOPED, IN FACT, HE TOLD THE POLICE
3 THAT HE WENT -- HIKED THROUGH THE WOODS TO THE VICTIM'S HOME
4 AND SPENT THE NIGHT IN THE WOODS WATCHING HER HOUSE, ISN'T
5 THAT CORRECT?

6 A. THAT'S CORRECT.

7 Q. DID HE HAVE ANY PROBLEMS WITH HIS EXECUTIVE FUNCTIONING
8 HIKING FROM WHERE HE HID THE MOPED TO WHERE HE HID AND
9 WATCHED HER HOUSE?

10 A. HIS ACTUAL FUNCTIONING -- ANYONE'S ACTUAL FUNCTIONING
11 ON A MOMENT-BY-MOMENT BASIS MAY NOT BE AFFECTED PER SAY BY
12 THE FASD, BUT THE REASONING BEHIND IT, THE JUDGMENT, THE
13 DECISIONS MADE, THE IMPULSE CONTROL, THE WHOLE AREA AROUND
14 THE PROCESS OF DETERMINING WHAT HE'S GOING TO DO AND
15 CARRYING IT OUT, THAT'S WHAT'S IMPAIRED. IT'S NOT THE
16 ACTUAL SPECIFIC BEHAVIOR OF GETTING ON A MOPED AND DRIVING A
17 MOPED. HE'S CAPABLE OF DOING THAT.

18 Q. WAS IT IMPULSE THAT CAUSED HIM TO DRIVE FROM DOWNTOWN
19 SPARTANBURG ALL THE WAY TO THE OTHER SIDE OF COWPENS?

20 A. NO. HE HAD -- HE HAD A DISORGANIZED PLAN. HE HAD A
21 PLAN THAT HE COULD NOT SPECIFICALLY FORMULATE TO ANYONE. HE
22 HAD THREE POSSIBILITIES, THE WAY I READ THE RECORDS, THREE
23 POSSIBLE PLANS. SO THERE WAS NOT A SPECIFIC FOCUSED PLAN OF
24 ACTION IN HIS MIND.

25 Q. OKAY. THREE POSSIBLE PLANS. LIKE A MOVIE WITH THREE

1 ENDINGS, BUT HE DIDN'T KNOW WHICH ENDING WAS GOING TO ---

2 A. EXACTLY.

3 Q. --- GOING TO HAPPEN? OKAY. HE WAS ABLE TO CONTEMPLATE
4 ALL OF THAT IN HIS HEAD?

5 A. YES, HE WAS.

6 Q. AND WAS IT IMPULSIVITY THAT CAUSED HIM TO HIDE THE
7 MOPED?

8 A. NO. THAT WAS PART -- THAT MAY HAVE BEEN SOMETHING THAT
9 -- THAT HE HAD PLANNED IN ADVANCE OR IT MAY HAVE COME TO HIM
10 AT THE MOMENT. I DON'T KNOW. I DIDN'T SEE IN THE RECORDS
11 WHERE THAT WAS ELUCIDATED.

12 Q. WAS IT IMPULSIVITY THAT CAUSED HIM TO HIKE THROUGH THE
13 WOODS TO THE TREE LINE WITH GLOVES AND A FLASHLIGHT?

14 A. WAS IT IMPULSIVITY?

15 Q. UM-HUM (AFFIRMATIVE).

16 A. I THINK IT WAS IMPULSIVITY THAT MADE HIM DECIDE TO TAKE
17 THAT COURSE OF ACTION IN GENERAL, YES. BUT IN TERMS OF THE
18 SPECIFIC -- THIS SPECIFIC DISCREET BEHAVIORS, NO, THERE WAS
19 PROBABLY SOME PLANNING GOING ON THERE ABOUT WHAT HE WOULD
20 DO.

21 Q. WAS IT IMPULSIVITY THAT CAUSED HIM TO PICK OUT JUDY
22 SOUTHERN'S HOUSE?

23 A. NO. I THINK -- I RECALL READING THAT HE SELECTED IT
24 BECAUSE IT WAS MORE AFFLUENT LOOKING THAN THE OTHER HOUSES
25 ON THE BLOCK.

- 1 Q. OKAY.
- 2 A. SOMEWHAT REMOTE. SO ----
- 3 Q. HE ----
- 4 A. --- SOME AWARENESS.
- 5 Q. HE HAD NO PROBLEM CONTEMPLATING THAT. HE WANTED TO
- 6 STRIKE A HOUSE THAT WAS AFFLUENT.
- 7 A. THAT'S CORRECT. AND KEEP IN MIND, THIS IS NOT A BLACK
- 8 OR A WHITE KIND OF CONDITION. INDIVIDUALS WITH FASD ARE
- 9 CAPABLE OF MAKING PLANS. BUT WHAT THEY ARE NOT CAPABLE OF
- 10 DOING IS CHANGING THOSE PLANS AND MAKING GOOD DECISIONS WHEN
- 11 SOMETHING UNEXPECTED OCCURS.
- 12 Q. OKAY. IN FACT, HE TOLD THE POLICE THAT HE WENT FROM
- 13 THE WOOD LINE TO THE BARN AND WATCHED THE VICTIM LEAVE HER
- 14 HOME AND THEN WATCHED THE HUSBAND AND HER SON LEAVE THE
- 15 HOME, ISN'T THAT CORRECT?
- 16 A. YES, THAT IS CORRECT.
- 17 Q. DID IMPULSIVITY CAUSE HIM TO MOVE FROM THE TREE LINE TO
- 18 THE BARN?
- 19 A. NO. I DON'T THINK THAT WAS AN IMPULSIVE BEHAVIOR PER
- 20 SAY.
- 21 Q. AND THEN HE TOLD THE POLICE THAT HE WENT AROUND THE
- 22 HOUSE LOOKING FOR AN OPEN WINDOW, AN OPEN DOOR TO GET IN THE
- 23 HOUSE. AND HE WAS FINALLY ABLE TO GET IN SOMEWHERE ON THE
- 24 BACK OF THE HOUSE, IS THAT CORRECT?
- 25 A. THERE WAS AN OPEN DOOR AT THE BACK OF THE HOUSE,

1 CORRECT.

2 Q. AND YET HE HAD TO PHYSICALLY OPEN THE DOOR TO GET IN,

3 CORRECT?

4 A. OF COURSE, YES.

5 Q. DID IMPULSIVITY CAUSE HIM TO DO THAT, TO GO FROM THE
6 BARN, WAIT TIL THE VICTIMS LEAVE, GO FROM THE BARN TO THE
7 HOUSE, LOOK AROUND TIL YOU FIND AN OPEN DOOR AND THEN GO IN?

8 A. NO. IMPULSIVITY AFFECTED HIS SPECIFIC BEHAVIORS ONCE
9 HE WAS INSIDE THE HOUSE. IMPULSIVITY LIKELY AFFECTED HIS
10 BEHAVIOR WHEN HE SELECTED THIS PLAN TO BEGIN WITH. POOR
11 REASONING, POOR JUDGMENT WERE ALSO FACTORS. SO WE'RE NOT
12 JUST TALKING ABOUT IMPULSIVITY. WE'RE TALKING ABOUT HIS
13 REASONING ABILITY AND HIS JUDGMENT, HIS ABILITY TO FORESEE
14 CONSEQUENCES.

15 Q. OKAY. YOU SAID WHAT HAPPENED INSIDE THE HOUSE WAS WHAT
16 -- CAUSED BY IMPULSIVITY?

17 A. I BELIEVE SO, YES.

18 Q. OKAY. WELL, DIDN'T HE TELL POLICE THAT WHILE HE WAS IN
19 THE HOUSE HE CUT ALL THE PHONE LINES IN THE HOUSE?

20 A. CORRECT.

21 Q. DID IMPULSIVITY CAUSE HIM TO CUT ALL THE PHONE LINES SO
22 THE VICTIM COULDN'T CALL FOR HELP WHEN SHE CAME HOME?

23 A. I DON'T KNOW WHAT CAUSED THAT.

24 Q. OKAY. AND HE ALSO WENT THROUGH HER CLOTHES, DUMPED
25 THEM ON THE FLOOR.

1 A. I THINK YOU COULD CHARACTERIZE THAT AS AN IMPULSIVE
2 BEHAVIOR.

3 Q. HE TOOK ALL THE KNIVES OUT OF THE KITCHEN DRAWER AND
4 HID THEM IN THE CLOSET WHERE SHE COULDN'T HAVE A WEAPON WHEN
5 SHE CAME HOME.

6 A. PROBABLY NOT IMPULSIVE.

7 Q. PROBABLY NOT IMPULSIVE, RIGHT? WELL THOUGHT OUT,
8 CORRECT?

9 A. I WOULDN'T CONSIDER IT WELL THOUGHT OUT. I WOULD NOT
10 ATTRIBUTE WELL THOUGHT OUT TO ANY OF THAT -- THAT PLAN. AND
11 I USE THAT TERM LOOSELY.

12 Q. WELL, WOULD YOU AGREE WITH ME IT'S WELL THOUGHT OUT IF
13 YOU WANT TO EITHER RAPE OR MURDER SOMEONE WHEN THEY COME
14 HOME AND YOU'RE AT THEIR HOUSE, THAT YOU HIDE THE WEAPONS
15 THAT THEY COULD GET TO AND YOU CUT THE PHONE LINES?

16 A. I WOULD SAY WITH INDIVIDUALS WHO ARE CAPABLE OF
17 THINKING THINGS THOROUGHLY THROUGH TO THE END OUTCOME WITH
18 POSSIBLE CONSEQUENCES AND POSSIBLE DIFFERENT OUTCOMES THAT
19 YOU -- THAT THEY MIGHT BE CONSIDERED TO HAVE A WELL THOUGHT
20 OUT PLAN, BUT IN HIS CASE I DON'T THINK HE FORESAW
21 CONSEQUENCES. I DON'T THINK HE FORESAW MUCH OF ANYTHING
22 EXCEPT THIS BROAD GENERAL IDEA ABOUT THREE POSSIBLE
23 OUTCOMES. THAT'S VERY DISORGANIZED BEHAVIOR.

24 Q. OKAY. WELL, LET'S TALK ABOUT THE THREE POSSIBLE
25 OUTCOMES THAT HE TOLD THE POLICE ABOUT. HE SAID, NUMBER

1 ONE, HE WAS GOING TO GO IN THERE AND RAPE MS. SOUTHERN AND
2 COMMIT SUICIDE. THAT WAS ONE.

3 A. THAT WAS ONE.

4 Q. MURDER MS. SOUTHERN AND COMMIT SUICIDE. THAT WAS TWO.

5 A. TWO, RIGHT.

6 Q. OR MURDER THE WHOLE FAMILY AND THEN COMMIT SUICIDE.

7 A. CORRECT.

8 Q. SO IN ALL THREE OF THOSE HE PLANNED TO COMMIT SUICIDE.

9 A. THAT'S CORRECT.

10 Q. IF HE COMMITS SUICIDE THERE ARE NO CONSEQUENCES FOR HIS
11 ACTIONS, ARE THERE, NOT LEGALLY?

12 A. WELL, IN HIS CASE IT'S HARD TO THINK -- IT'S HARD TO
13 ENVISION A RATIONAL PLAN OR RATIONAL KIND OF REASONING
14 PROCESS FOR HIM AROUND THIS -- THIS BEHAVIOR BECAUSE HIS
15 REASONING IS NOT RATIONAL. SO IN THE PAST HE HAD HAD --
16 HE'D MADE NUMEROUS SUICIDAL GESTURES AND THEY WEREN'T
17 SUCCESSFUL.

18 SO -- SO I'M NOT SURE EXACTLY WHAT WAS GOING ON IN HIS
19 MIND. BUT IT IS UNUSUAL IN MY EXPERIENCE EVALUATING A
20 NUMBER OF CASES LIKE THIS WHERE SOMEONE WOULD HAVE SEVERAL
21 DIFFERENT POSSIBLE OUTCOMES LIKE THAT. THAT'S IRRATIONAL
22 BEHAVIOR. TYPICALLY IN CRIMINAL CONDUCT I SEE A SPECIFIC
23 GOAL, A SPECIFIC OBJECTIVE, BUT NOT ONE OF THREE POSSIBLE
24 SCENARIOS.

25 Q. ALL RIGHT. WELL, YOU'VE READ THE SO-CALLED SUICIDE

1 NOTE, YOU READ THAT, REVIEWED THAT, RIGHT?

2 A. YES, I DID.

3 Q. IN FACT, IN THAT SUICIDE NOTE HE TELLS HIS WIFE -- HE
4 TALKS ABOUT THE RAPE OF HIS THREE MONTH OLD DAUGHTER.

5 A. YES.

6 Q. AND HOW HE WAS TRYING TO DO THE RIGHT THING BY TELLING
7 THE TRUTH ABOUT WHAT HE DID TO HIS DAUGHTER.

8 A. YES.

9 Q. BUT HE'S GOING TO GO OFF TO PRISON. AND EVERYBODY
10 THINKS HE'S A BAD PERSON. BUT IN THAT SUICIDE NOTE HE SAYS,
11 I'M GOING TO SHOW Y'ALL HOW REALLY BAD I AM. I'M GOING TO
12 DO SOMETHING REALLY AWFUL. ISN'T THAT WHAT HE SAYS IN THE
13 SUICIDE NOTE?

14 A. I AGREE. YES, HE DID.

15 Q. SO HE HAD THOUGHT THROUGH THE FACT THAT HE'S GOING TO
16 PRISON, HE'S GOING TO PRISON AS A CHILD MOLESTER AND
17 EVERYBODY THINKS HE'S SO BAD THAT HE'S REALLY GOING TO SHOW
18 THEM HOW REALLY BAD HE IS.

19 A. I THINK THE SUICIDE NOTE WAS WRITTEN WHILE HE WAS
20 THERE. AND IN MY OPINION THAT WAS ANOTHER IMPULSIVE
21 GESTURE, IMPULSIVE ACT ON HIS PART.

22 Q. IN THE SUICIDE NOTE DID HE TELL HIS WIFE WHERE HE HAD
23 LEFT THE MOPED?

24 A. YES, HE DID.

25 Q. AND DID HE ALSO SAY HE'D LEFT ALL HIS WORLDLY GOODS TO

1 HIS WIFE? HE BASICALLY WROTE A MINI WILL TO HIS WIFE,

2 DIDN'T HE?

3 A. YES, HE DID.

4 Q. NOW MR. BINNEY STAYED INSIDE THE HOUSE ALL DAY,

5 BASICALLY DRINKING BEER AND SMOKING CIGARETTES WAITING ON

6 MS. SOUTHERN TO GET HOME, ISN'T THAT CORRECT?

7 A. THAT'S CORRECT.

8 Q. AND YOU'VE REVIEWED ALL THOSE RECORDS. HIS DNA IS

9 FOUND ON THE CIGARETTES IN THE BEDROOM, ON A SEXUAL DEVICE

10 THAT BELONGED TO MS. SOUTHERN.

11 A. YES.

12 Q. MR. BINNEY USED THE BATHROOM IN TWO DIFFERENT SHOWERS.

13 A. HE DEFECCATED IN TWO BATHTUBS, CORRECT.

14 Q. PLAYED VIDEO GAMES.

15 A. YES.

16 Q. AND BASICALLY SAT THERE AND WAITED ON MS. SOUTHERN TO

17 GET HOME.

18 A. THAT'S AN ASSUMPTION THAT I DON'T THINK ANYBODY REALLY

19 KNOWS, WHAT WAS IN HIS MIND.

20 Q. OKAY. WELL, ---

21 A. IT APPEARS THAT WAY, BUT WE DON'T KNOW FOR SURE.

22 Q. DID HE NOT TELL THE POLICE OR IN A LETTER HE WROTE TO

23 MR. SOUTHERN APOLOGIZING FOR THE CRIME, DID HE NOT SAY THAT

24 WHILE HE WAS IN THE HOUSE HE HAD DECIDED TO GO AHEAD AND

25 RAPE MS. SOUTHERN?

1 A. YES, I RECALL THAT.

2 Q. ALL RIGHT. AND HE WAS ACTUALLY IN THE BATHROOM IN THE
3 HALLWAY USING THE BATHROOM IN THE SINK TO AVOID MAKING NOISE
4 WHEN SHE CAME HOME.

5 A. YES. THAT'S NOT -- I DON'T RECALL HIM SAYING THAT
6 ABOUT DEFECATING IN THE BATHTUB THOUGH, WHICH IS ---

7 Q. NO, I MEAN URINATING ---

8 A. URINATING.

9 Q. --- IN THE SINK.

10 A. YES.

11 Q. SO HE WOULDN'T MAKE ANY NOISE.

12 A. YES, THAT'S CORRECT.

13 Q. AND AT THAT MOMENT WHEN HE TURNED AROUND MS. SOUTHERN
14 WAS THERE IN THE HOUSE.

15 A. YES.

16 Q. AND HE TOLD THE POLICE AND HE TOLD MR. SOUTHERN AT THAT
17 POINT HE POINTED THE GUN AT MS. SOUTHERN, JUDY SOUTHERN, AND
18 HE CLOSED HIS EYES AND HE PULLED THE TRIGGER.

19 A. THAT'S CORRECT.

20 Q. AND AS SOON AS HE SHOT HER SHE SAID, OH, MY GOD.

21 A. YES.

22 Q. AND YOU KNOW FROM READING THE FILE AS WELL THAT THE
23 BULLET ENTERED HER ON THIS SIDE OF HER BODY AND WENT THROUGH
24 -- WENT THROUGH A WALL AND INTO A BED IN THE ADJACENT
25 BEDROOM.

- 1 A. YES, I KNOW THAT.
- 2 Q. AND THEN SHE STARTED RUNNING OUT OF THE HOUSE. AND HE
- 3 PURSUED HER, DID HE NOT?
- 4 A. YES.
- 5 Q. AND HE SHOT AT HER AGAIN IN THE LIVINGROOM AS SHE WAS
- 6 RUNNING AWAY.
- 7 A. THAT'S CORRECT.
- 8 Q. SO HE SHOT NOT ONLY ONCE IN THE BATHROOM, BUT HE AT
- 9 LEAST TOOK FOUR OR FIVE MORE STEPS AND THEN SHOT AT HER
- 10 AGAIN, BUT MISSED.
- 11 A. YES.
- 12 Q. AND THEN HE CHASED HER OUT OF THE HOUSE AND SAID HE
- 13 FIRED EVEN MORE SHOTS AS SHE RAN AWAY TO KEEP HER RUNNING.
- 14 A. THAT'S CORRECT. I RECALL THAT.
- 15 Q. AND AT NO TIME DID HE -- OBVIOUSLY HE DIDN'T COMMIT
- 16 SUICIDE WHEN HE WAS IN THE HOUSE, DID HE?
- 17 A. NO, HE DID NOT.
- 18 Q. IN FACT, MR. BINNEY HID FROM THE POLICE UNTIL THE NEXT
- 19 DAY. ACTUALLY HID OUT IN THE WOODS, DIDN'T HE?
- 20 A. YES, FOR PART OF THAT TIME. YES.
- 21 Q. AND HE HID THE GUN. HE TOOK THE GUN AND BURIED IT
- 22 UNDER GROUND.
- 23 A. YES, I RECALL THAT.
- 24 Q. AND DID HE HAVE ANY PROBLEM WITH HIS COMPLEX
- 25 FUNCTIONING WHEN HE WAS BURYING THE GUN IN THE GROUND?

1 A. NO. IN TERMS OF SPECIFIC BEHAVIORS HE DID NOT HAVE A
2 PROBLEM. AND HAVING FASD DOES NOT MEAN YOU CAN -- THAT
3 YOU'RE PRECLUDED FROM PLANNING SOMETHING. WHAT IT MEANS IS
4 YOUR REASONING AND JUDGMENT BEHIND THAT PLANNING ARE
5 SIGNIFICANTLY IMPAIRED.

6 AND, YES, THERE'S AN IMPULSE CONTROL PROBLEM, BUT IT
7 DOESN'T MANIFEST IN EVERY SINGLE THING THAT SOMEONE WITH
8 FASD DOES. IMPULSE CONTROL PROBLEMS ARE MAKING DECISIONS
9 WITHOUT SEEING THE CONSEQUENCES, WITHOUT CONSIDERING THE
10 CONSEQUENCES OR MAKING DECISIONS WITHOUT WEIGHING ALL THE
11 ALTERNATIVES, THAT'S WHERE IMPULSE CONTROL COMES IN.

12 IT ALSO COMES IN IN REACTING TO SOMETHING THAT HAPPENS
13 IN THE ENVIRONMENT THAT YOU DON'T EXPECT. IT'S AN
14 INSTANTANEOUS REACTION. BUT IMPULSE CONTROL ALSO REFERS TO
15 MAKING DECISIONS PREMATURELY WITHOUT FULL CONSIDERATION.

16 Q. WELL, ISN'T IT TRUE HE TOLD POLICE WHEN HE SAW THAT MS.
17 SOUTHERN WAS IN THE HOUSE THAT HE POINTED THE GUN AT HER,
18 CLOSED HIS EYES AND PULLED THE TRIGGER?

19 A. YES, HE DID.

20 Q. AND HE KNEW THAT GUN. HE HAD CLEANED THAT GUN BEFORE.
21 HE ALSO TOLD THEM THAT, DIDN'T HE?

22 A. OH, I DON'T RECALL IF HE'D SAID HE'D CLEANED IT, BUT
23 HE'D HAD THE GUN FOR TWO DAYS.

24 Q. OKAY. HE'D SHOT CHICKENS WITH IT, HADN'T HE? DIDN'T
25 HE GET IN TROUBLE FOR SHOOTING ---

1 A. YES, BUT I DON'T --- .

2 Q. --- THE NEIGHBOR'S CHICKENS?

3 A. I DON'T THINK IT WAS THAT GUN BECAUSE THE CHICKEN
4 INCIDENT HAPPENED WELL BEFORE THAT.

5 Q. OKAY. AND YOU DON'T REMEMBER THAT HE BORROWED THE GUN
6 FROM THE SAME GUY HE BOUGHT IT FROM AND SHOT THE CHICKENS?

7 A. NO, I DIDN'T RECALL THAT.

8 Q. OKAY.

9 A. BUT THE CHICKEN INCIDENT WAS WAY BEFORE THAT.

10 Q. HE KNEW HOW TO WORK THE GUN. HE KNEW HOW IT FIRED.

11 A. I'M SURE HE DID, YEAH.

12 Q. AND HE'D CLEANED THE GUN BEFORE.

13 A. AGAIN, I DON'T RECALL ANYTHING ABOUT CLEANING, BUT I
14 ASSUME THAT HE DID.

15 Q. WELL, IF HE DID CLEAN THE GUN DID HE HAVE ANY PROBLEMS
16 WITH HIS COMPLEX MOTOR SKILLS OR EXECUTIVE FUNCTIONING WHEN
17 HE WAS CLEANING OR LOADING THE GUN?

18 A. NO. AGAIN, AS I SAID, SPECIFIC -- PEOPLE WITH FASD ARE
19 NOT TOTALLY INCAPACITATED. THEY CAN FUNCTION. THEY CAN GO
20 FROM POINT A TO POINT B. BUT IT'S THEIR DECISION-MAKING AND
21 THEIR REASONING AND THEIR JUDGMENT AS WELL AS THEIR IMPULSE
22 CONTROL THAT ARE IMPAIRED.

23 SO HIS -- HIS COGNITION, HIS THOUGHT PROCESS ABOUT WHAT
24 WOULD BE A GOOD PLAN, WHAT WOULD ACCOMPLISH HIS OBJECTIVE.
25 AND HIS OBJECTIVE WAS TO FEEL BETTER. HE WANTED TO STOP THE

1 EMOTIONAL STUFF THAT HE WAS GOING THROUGH.

2 THE COURT: COUNSEL, LET ME GET YOU TO APPROACH JUST A
3 MOMENT.

4 MR. MABRY: YES, SIR.

5 (WHEREUPON A BENCH CONFERENCE WAS HELD OFF THE RECORD)

6 THE COURT: PLEASE PROCEED.

7 MR. MABRY: YES, SIR.

8 CROSS EXAMINATION BY MR. MABRY. CONTINUED.

9 Q. AS FAR AS THE FETAL ALCOHOL SYNDROME YOU HAD TALKED
10 ABOUT SOME STUDIES AT SEATTLE THAT YOUR TEAM HAS DONE THAT
11 INCLUDES DR. BOOKSTEIN.

12 A. WELL, I WOULDN'T LABEL IT MY TEAM, BUT RESEARCHERS AT
13 THE UNIVERSITY OF WASHINGTON HAVE DONE RESEARCH FOR TWENTY,
14 THIRTY YEARS. MORE THAN THIRTY YEARS ACTUALLY AT THIS POINT
15 IN TIME. AND THAT RESEARCH WAS WELL UNDER WAY BEFORE I EVER
16 ENTERED THE SCENE IN THE MID 90s.

17 Q. IN FACT, THERE WERE SOME -- SOME OF THESE STUDIES WERE
18 NOT PUBLISHED UNTIL 2002, 2003, 2004?

19 A. WELL, STUDIES ARE STILL BEING PUBLISHED TODAY. SO THEY
20 WERE PUBLISHED FROM -- IN THE UNITED STATES FROM 1973, THAT
21 WAS THE FIRST STUDY, UP UNTIL THE CURRENT TIME. SO ACROSS
22 THAT TIME SPAN.

23 Q. ALL RIGHT. DID -- ISN'T IT TRUE THAT MR. BINNEY TOLD
24 MR. SOUTHERN, HE WROTE A LETTER TO MR. SOUTHERN ABOUT THE
25 CRIME, HE TOLD MR. SOUTHERN THAT HE HAD DECIDED THAT DAY

1 NOT TO CONTROL HIS ACTIONS?

2 A. YES, I RECALL HE SAID THAT.

3 Q. THOSE WERE HIS EXACT WORDS.

4 A. YES.

5 Q. AND IN THESE STUDIES THAT YOU HAVE DONE IN SEATTLE
6 THERE ARE PEOPLE WITH FS -- FAS OR FASD WHO DON'T COMMIT
7 CRIMES?

8 A. THE MINORITY.

9 Q. I THOUGHT YOU SAID ABOUT FIFTY PERCENT OF THE FASD
10 POPULATION WERE INCARCERATED.

11 A. NO. YES, INCARCERATED. BUT A NUMBER OF PEOPLE ARE IN
12 THE COMMUNITY -- COMMUNITY PROTECTION PROGRAMS OR ARE
13 INSTITUTIONALIZED, DEVELOPMENTALLY DELAYED INDIVIDUALS
14 WHO'VE COMMITTED CRIMES WHO ARE IN STRUCTURED RESIDENTIAL
15 LIVING SITUATIONS, THAT KIND OF THING.

16 Q. WELL, THEY DON'T ALL COMMIT CRIMES, DO THEY?

17 A. NO, BUT A GOOD NUMBER OF THEM DO.

18 Q. ALL RIGHT. WELL, HOW DO YOU EXPLAIN THE ONES THAT
19 DON'T COMMIT CRIMES?

20 A. DIAGNOSIS BEFORE AGE SIX IN MANY OF THE CASES. THAT'S
21 WHAT'S BEEN FOUND IN THE RESEARCH TO BE THE SINGLE MOST
22 IMPORTANT PREVENTIVE FACTOR.

23 Q. WELL, ISN'T IT A FACT THOUGH THAT YOU HAVE -- AT
24 SEATTLE YOU AND THE OTHER PROFESSORS, YOU MAY NOT BE CALLING
25 Y'ALL A TEAM, BUT YOUR GROUP, Y'ALL HAVE STUDIED PEOPLE WITH

1 FETAL ALCOHOL SYNDROME OR EFFECT THAT WERE NOT CAUGHT BEFORE
2 THE AGE SIX AND THEY HAVE NOT BEEN IN TROUBLE WITH THE LAW.

3 A. THEY'RE A VERY SMALL MINORITY. MOST OF THE PEOPLE WHO
4 ARE -- WHO ARE NOT DIAGNOSED UNTIL ADOLESCENCE OR ADULT
5 YEARS COME TO THE -- COME TO OUR ATTENTION BECAUSE THEY ARE
6 EITHER INCARCERATED OR THEY'RE FACING SOME KIND OF A
7 CRIMINAL PROCESS.

8 Q. OKAY. SO THE PEOPLE -- SO I UNDERSTAND IT, THE PEOPLE
9 THAT YOU STUDY AT THE UNIVERSITY OF WASHINGTON ARE THE
10 PEOPLE THAT COME TO YOU WITH PROBLEMS?

11 A. YES. AND THE STUDIES, MANY -- MOST OF THE STUDIES THAT
12 WERE DONE UP THROUGH THE 90s INVOLVE, ACTUALLY UP TO THE
13 CURRENT TIME, INVOLVE CHILDREN AND ADOLESCENCE, BUT THE
14 FOCUS WAS ON CHILDREN.

15 Q. ALL RIGHT. I WANT TO MAKE SURE WE'RE CLEAR. THE
16 STUDIES FROM THE UNIVERSITY OF WASHINGTON INVOLVING DR.
17 BOOKSTEIN AND YOU ARE ABOUT PEOPLE THAT HAVE COME TO YOU
18 WITH PROBLEMS? THEY'VE BROKE THE LAW, THEY'RE IN PROTECTIVE
19 PROGRAMS, THEY'RE IN JAIL, SOMETHING?

20 A. NO. I'M SORRY IF I MISLED YOU THERE. MY -- MY CONTACT
21 WITH THOSE INDIVIDUALS COMES AS A RESULT OF SOME KIND OF A
22 CRIMINAL PROCESS OR CIVIL COMMITMENT PROCESS.

23 Q. ALL RIGHT.

24 A. BUT THE OTHER RESEARCHERS AT THE UNIVERSITY DON'T SEE
25 PATIENTS OR INDIVIDUALS STEMMING FROM THAT KIND OF A

1 REFERRAL PROCESS. THEY SEE PEOPLE AS PART OF A DIAGNOSTIC
2 ASSESSMENT TEAM. IT HAS NOTHING TO DO WITH CRIMINAL
3 BEHAVIOR OR THE LEGAL SYSTEM.

4 Q. OKAY. WELL, I'M ASKING ABOUT THOSE PEOPLE AS WELL. TO
5 YOUR KNOWLEDGE NINETY-NINE PERCENT OF PEOPLE WITH FETAL
6 ALCOHOL SYNDROME DON'T GO TO PRISON, DO THEY? OR A HUNDRED
7 PERCENT DON'T GO TO PRISON ~~SEE~~

8 A. NO. ACTUALLY THE STUDIES INDICATE THAT ABOUT CLOSE --
9 SOMEWHERE BETWEEN FORTY AND FIFTY PERCENT END UP
10 INCARCERATED.

11 Q. OKAY. HOW DO YOU EXPLAIN THE OTHER FIFTY PERCENT THAT
12 DON'T END UP INCARCERATED? WHY DID THEY NOT COMMIT A CRIME?

13 A. THOSE ARE THE INDIVIDUALS WHO HAVE HAD THE EARLY
14 INTERVENTION BECAUSE OF AN EARLY DIAGNOSIS. THE
15 INTERVENTION IS WHAT TAKES AWAY THE RISK FACTOR FOR A LATER
16 SECONDARY DISABILITY OF ACTING OUT IN AN ILLEGAL MANNER.

17 Q. ALL RIGHT. SO I UNDERSTAND YOUR TESTIMONY 'CAUSE WE'RE
18 GOING TO ASK DR. BOOKSTEIN THE SAME QUESTION AND MAYBE SOME
19 OTHER PEOPLE, THE OTHER FIFTY PERCENT THAT AREN'T
20 INCARCERATED -- YOU STILL WITH ME?

21 A. UM-HUM (AFFIRMATIVE).

22 Q. THE OTHER FIFTY PERCENT THAT AREN'T INCARCERATED ARE
23 ALL SUBJECTS THAT WERE DIAGNOSED BEFORE THE AGE OF SIX?

24 A. WELL, YOU CAN'T MAKE A BLANKET BLACK OR WHITE
25 STATEMENT. THEY WEREN'T ALL, BUT MANY OF THEM WERE. MANY

1 OF THEM, IN FACT, WERE FIRST DIAGNOSED AS PART OF THE LONG
2 RANGE STUDY THAT STARTED IN THE 70s AND CONTINUED INTO THE
3 80s AND 90s THAT DR. STREISSGUTH STARTED. SO THOSE CHILDREN
4 WERE SEEN AT A VERY EARLY AGE AND THEY GOT THEIR DIAGNOSES
5 AT A VERY EARLY AGE. THE SECOND DISABILITY STUDY WAS BASED
6 ON A SMALL SECTION OF THAT LARGE SAMPLE. SO THOSE PEOPLE
7 WERE ALL DIAGNOSED IN CHILDHOOD.

8 Q. WHAT ABOUT THE PEOPLE THAT WEREN'T -- THAT HAVE FETAL
9 ALCOHOL THAT WEREN'T DIAGNOSED BEFORE SIX AND THEY'RE NOT IN
10 PRISON, WHY AREN'T THEY BREAKING THE LAW?

11 A. THE MAIN RESEARCH STUDIES THAT CAME FROM THE SECONDARY
12 DISABILITY STUDY ARE -- THAT'S THE -- THAT'S THE BULK OF THE
13 RESEARCH, THE IMPORTANT RESEARCH IN THE FIELD ABOUT
14 SECONDARY DISABILITIES. THOSE SUBJECTS IN THOSE STUDIES
15 WERE ALL FROM -- THERE MAY HAVE -- MAY BE SOME EXCEPTIONS.
16 I DON'T WANT TO MAKE THIS BLACK OR WHITE.

17 BUT MOST OF THEM WERE FROM THE STUDIES THAT HAD
18 HAPPENED AT THE -- EARLIER AT THE UNIVERSITY OF WASHINGTON.
19 SO THOSE INDIVIDUALS WERE DIAGNOSED IN CHILDHOOD. SO THERE
20 MIGHT BE EXCEPTIONS, BUT I WOULD SAY THE VAST MAJORITY OF
21 THOSE PEOPLE WHO DON'T HAVE THOSE OUTCOMES WERE DIAGNOSED IN
22 CHILDHOOD.

23 Q. WHAT I'M ASKING AGAIN IS PEOPLE THAT WEREN'T -- THAT
24 HAVE FETAL ALCOHOL THAT WEREN'T DIAGNOSED BEFORE THE AGE OF
25 SIX AND AREN'T INCARCERATED, HOW DO YOU EXPLAIN THAT THEY

1 HAVEN'T BEEN ARRESTED AND COMMITTED SOME CRIMINAL ACT?

2 A. BECAUSE OF INTERVENTIONS, BECAUSE OF DEVELOPMENTAL
3 DISABILITIES. ANOTHER PROTECTIVE FACTOR IS A CHILD WHO GETS
4 SERVICED BY THE DIVISION OF DEVELOPMENTAL DISABILITIES AND
5 DOESN'T NECESSARILY GET DIAGNOSED WITH FASD, BUT GETS THE
6 SERVICES THAT HE WOULD GET HAD HE BEEN DIAGNOSED OR HAD SHE
7 BEEN DIAGNOSED WITH FASD. SO INTERVENTION BY THE DIVISION
8 OF DEVELOPMENTAL DISABILITIES IN ANY STATE IN THE UNITED
9 STATES WOULD GIVE THE CHILD THE APPROPRIATE INTERVENTION TO
10 REDUCE THE SECONDARY DISABILITIES.

11 Q. ISN'T IT A FACT THAT, AS YOU SAID, YOU TREAT THE ONES
12 THAT HAVE CRIMINAL PROBLEMS, AND THE OTHER PEOPLE THAT YOU
13 WORK WITH TREAT THE CHILDREN THAT HAVE BEEN DIAGNOSED WITH
14 FETAL ALCOHOL SYNDROME BEFORE SIX OR AFTER SIX, AND THERE'S
15 A LOT OF PEOPLE OUT THERE IN THE UNITED STATES AND IN THE
16 WORLD THAT HAVE FETAL ALCOHOL SYNDROME THAT DO NOT HAVE
17 CRIMINAL BEHAVIOR AND DO NOT BREAK THE LAW? YOU JUST DON'T
18 SEE IT.

19 A. THERE'S NO BASIS IN THE SCIENCE FOR REACHING THAT
20 CONCLUSION.

21 Q. THERE'S NO BASIS IN YOUR SCIENCE FOR REACHING THE OTHER
22 CONCLUSION ---

23 A. YES, THERE IS.

24 Q. --- OTHER THAN WHO YOU SEE, RIGHT?

25 A. THE SECONDARY -- NO, I DIDN'T -- I DIDN'T DO THE

1 SECONDARY DISABILITY STUDY. THAT WAS DONE BY OTHER
2 RESEARCHERS WHO FOUND THOSE RESULTS.

3 Q. AND YOU DIDN'T DO -- YOU DIDN'T DO THAT?

4 A. NO. I WAS THERE AT THE TIME, BUT THEY WERE ALREADY IN
5 THE PROCESS OF PUBLISHING IT.

6 Q. YOU HAD, I BELIEVE, ALSO TESTIFIED THAT PEOPLE WITH
7 FETAL ALCOHOL SYNDROME HAVE FIFTY OR SIXTY PERCENT CHANCE OF
8 HAVING SOME SEXUALLY DEVIANT BEHAVIOR?

9 A. IT'S CLOSE TO FIFTY PERCENT.

10 Q. FIFTY PERCENT ---

11 A. AND SEXUALLY DEVIANT BEHAVIOR IS NOT THE RIGHT WAY TO
12 PHRASE IT. IT WOULD BE SEXUALLY INAPPROPRIATE BEHAVIOR IS
13 THE WAY IT'S LABELED.

14 Q. OKAY. WELL, WHAT ABOUT THE OTHER FIFTY PERCENT? WHY
15 DO THEY NOT HAVE A SEXUAL BEHAVIOR PROBLEM OR INAPPROPRIATE
16 ...

17 A. INAPPROPRIATE SEXUAL BEHAVIOR OF SOME KIND?

18 Q. RIGHT.

19 A. BECAUSE OF SOME APPROPRIATE INTERVENTION EARLIER IN
20 THEIR LIFE IN TERMS OF THE SECONDARY DISABILITY STUDY WHICH
21 IS WHAT -- THAT GIVES US OUR KNOWLEDGE OF WHAT HAPPENS AS
22 THESE INDIVIDUALS REACH ADOLESCENCE AND THEIR ADULT YEARS.

23 Q. SO I UNDERSTAND YOUR TESTIMONY TODAY, NONE OF THESE --
24 YOU HAVE FIFTY PERCENT OF THE SUBJECTS WITH FETAL ALCOHOL
25 HAVE SEXUAL DEVIANT BEHAVIOR AND FIFTY PERCENT DON'T?

1 A. CORRECT.

2 Q. ALL RIGHT. AND YOUR TESTIMONY IS THAT NONE OF THOSE
3 PEOPLE CHOSE, MADE A DECISION NOT TO PURSUE THAT BEHAVIOR?
4 EVEN THOUGH THEY MAY HAVE -- MAY HAVE ENTERTAINED THE
5 THOUGHT, THEY JUST CHOSE NOT TO ACT THAT WAY?

6 A. I HAVE NO IDEA. I HAVE NO WAY OF KNOWING THAT. I'M
7 NOT SURE THAT I UNDERSTAND YOUR QUESTION. I DON'T KNOW ANY
8 OF THOSE INDIVIDUALS. SO I CAN'T TELL YOU WHAT THEIR
9 MOTIVATION WAS OR WHAT THEIR DECISION-MAKING PROCESS WAS OR
10 WHAT THEIR LEVEL OF INTERVENTION WAS OR WHETHER THEY WERE
11 DIAGNOSED. I DON'T KNOW IN TERMS OF DIAGNOSIS OTHER THAN
12 THE GROSS RESULTS OF THE STUDIES, WHICH ---

13 THE COURT: COUNSEL, EXCUSE ME, AS THE TRIER OF FACT
14 THE COURT HAS AN UNDERSTANDING OF YOUR STATISTICAL POINT.
15 ARE THERE FURTHER QUESTIONS?

16 MR. MABRY: YES, SIR.

17 THE COURT: ALL RIGHT.

18 MR. MABRY: JUST ONE MOMENT.

19 Q. DID -- AFTER MR. BINNEY -- WELL HE WAS ACTUALLY
20 ARRESTED IN HIS WIFE'S BASEMENT, IS THAT CORRECT?

21 A. YES.

22 Q. AND WHEN HE WAS ARRESTED HE WAS ARRESTED WITH A POLICE
23 SCANNER?

24 A. YES, I SAW THAT.

25 Q. DID HE EVER TELL YOU WHY HE HAD THE SCANNER?

1 A. I DIDN'T ASK HIM. IN THE FIVE HOURS I SPENT WITH HIM I
2 DIDN'T ASK HIM THAT PARTICULAR QUESTION.

3 Q. AND, IN FACT, HE WENT TO THE HOSPITAL THE DAY AFTER HE
4 WAS ARRESTED FROM THIS MURDER CHARGE.

5 A. YES, I RECALL THAT.

6 Q. AND HE TOLD THE PEOPLE AT THE HOSPITAL THAT HE HAD PUT
7 THESE NICOTINE PATCHES ON HIS BODY SO HE COULD HAVE MORE
8 ADRENALINE TO RUN FROM THE POLICE, IS THAT CORRECT?

9 A. YES, I RECALL SEEING THAT.

10 MR. MABRY: NOTHING FURTHER.

11 THE COURT: IS THERE REDIRECT?

12 MR. BLUME: YES, YOUR HONOR.

13 REDIRECT EXAMINATION BY MR. BLUME:

14 Q. DR. NOVICK-BROWN, I WILL MAKE EVERY ATTEMPT TO BE AS
15 BRIEF AS POSSIBLE. I WANT TO GO BACK A LITTLE BIT. YOU DID
16 REVIEW MR. BINNEY'S BIOLOGICAL MOTHER'S MEDICAL RECORDS?

17 A. YES.

18 Q. AND YOU WERE ASKED QUESTIONS ON CROSS EXAMINATION ABOUT
19 WHETHER A LOT OF THAT -- THOSE RECORDS HAD TO DO WITH PTSD
20 AND OTHER MENTAL IMPAIRMENTS. DO YOU RECALL THAT LINE OF
21 QUESTIONING?

22 A. YES, I DO.

23 Q. WAS THERE ALSO INFORMATION IN THOSE RECORDS WHICH
24 INDICATED A LONGSTANDING AND CHRONIC SUBSTANCE ABUSE
25 PROBLEM?

1 A. YES, THERE WAS A LOT OF INFORMATION IN THOSE RECORDS
2 REGARDING THAT.

3 Q. AND DID THOSE RECORDS ALSO INDICATE -- WELL, BASED ON
4 YOUR KNOWLEDGE WERE THOSE RECORDS -- WERE THE STATEMENTS
5 THAT MS. BINNEY MADE TO THOSE HEALTH CARE PROVIDERS PROVIDED
6 BEFORE OR AFTER SHE EVER MET MR. BINNEY?

7 A. BEFORE IN MOST CASES. TOWARDS THE VERY END SHE HAD MET
8 HIM.

9 Q. AND CERTAINLY THOSE STATEMENTS WERE MADE BEFORE MR.
10 BINNEY WAS EVER CHARGED WITH THIS OFFENSE BASED ON YOUR
11 REVIEW OF THE RECORDS?

12 A. YES.

13 Q. AND IN THOSE RECORDS AT WHAT AGE DOES SHE INDICATE THAT
14 SHE BEGAN DRINKING?

15 A. FOURTEEN.

16 Q. AT WHAT AGE DID SHE BECOME PREGNANT?

17 A. SIXTEEN AND A HALF. AROUND SIXTEEN.

18 Q. DID THOSE RECORDS ALSO INDICATE THE ABUSE OF ALCOHOL
19 DURING HER PREGNANCY?

20 A. YES, SHE REPORTED THAT.

21 Q. NOW YOU WERE QUESTIONED ABOUT YOUR DISCUSSION WITH JOHN
22 MORRIS. DO YOU RECALL THAT?

23 A. YES.

24 Q. I WOULD LIKE TO ASK YOU THIS, DID YOU IN ANY WAY,
25 SHAPE, FASHION OR FORM SUGGEST TO MR. MORRIS HOW HE SHOULD

1 ANSWER YOUR QUESTIONS?

2 A. NO.

3 Q. IN YOUR OPINION IN YOUR PROFESSION WOULD IT BE
4 COMPLETELY UNETHICAL FOR YOU TO SUGGEST THE ANSWER TO A
5 PERSON IN ATTEMPTING TO GATHER THAT INFORMATION?

6 A. ABSOLUTELY.

7 Q. YOU WERE ASKED ABOUT DR. SCHWARTZ-WATTS' TESTIMONY.
8 I'M NOT GOING TO EVEN GO BACK THROUGH THAT BECAUSE I THINK
9 THAT TESTIMONY SPEAKS FOR ITSELF. BUT I WOULD LIKE TO ASK
10 YOU SEVERAL QUESTIONS ABOUT WHETHER YOU AGREE WITH CERTAIN
11 POINTS, NOT WITH WHETHER SHE SAID IT, BUT WHETHER YOU AS AN
12 EXPERT AGREE. SHE TESTIFIED IN HER TESTIMONY THAT THERE WAS
13 NO CRITERIA IN EXISTENCE FOR FETAL ALCOHOL SYNDROME IN 2002.
14 IN YOUR OPINION IS THAT CORRECT?

15 MR. MABRY: I OBJECT TO THE CHARACTERIZATION OF HER
16 TESTIMONY. I THINK IT DOES SPEAK FOR ITSELF. I'M NOT SURE
17 THAT'S WHAT SHE SAID EXACTLY.

18 THE COURT: COUNSEL, DO YOU HAVE A SPECIFIC PAGE AND
19 LINE NUMBER?

20 MR. BLUME: IT'S ON 3321 ON CROSS EXAMINATION. YOU
21 SAID THERE WERE REALLY NO CRITERIA TO DIAGNOSE THAT
22 DISORDER. ANSWER: AT THIS POINT THAT'S CORRECT.

23 THE COURT: ALL RIGHT. I'LL OVERRULE THE OBJECTION.
24 AND GO AHEAD, MA'AM, IF YOU HAVE AN ANSWER.

25 A. IN MY OPINION SHE WAS IN ERROR WHEN SHE MADE THAT

1 STATEMENT.

2 Q. THERE WERE CRITERIA?

3 A. YES.

4 Q. AND ARE THOSE THE CRITERIA YOU MENTIONED ON YOUR DIRECT
5 EXAMINATION?

6 A. YES, THEY ARE.

7 Q. NOW YOU WERE ALSO ASKED ON CROSS EXAMINATION ABOUT SOME
8 NEUROLOGICAL ABNORMALITIES. THEY MENTIONED ONE. WAS THERE
9 EVIDENCE OF OTHER NEUROLOGICAL ABNORMALITIES YOU REVIEWED?

10 A. YES. I SAW IN THE NEUROPSYCHOLOGICAL REPORT BY DR.
11 EVANS, SOME MENTION. I CAN'T RECALL SPECIFICALLY WHAT HE
12 SAID, BUT THERE WERE SOME NEUROLOGICAL ABNORMALITIES.

13 Q. AND DO YOU RECALL THERE WAS A HOSPITALIZATION FOR A
14 POSSIBLE SEIZURE AT SOME POINT?

15 A. YES, I DO RECALL THAT.

16 Q. AND AN ABNORMAL EEG?

17 A. THE ABNORMAL EEG, YES.

18 Q. AND THAT'S ALL THE EVIDENCE OF THE NEUROLOGICAL
19 ABNORMALITY?

20 A. ABSOLUTELY.

21 Q. AND I TAKE IT, IF I UNDERSTAND YOUR TESTIMONY
22 CORRECTLY, IN LISTING THESE THINGS THE IMPORTANCE TO YOU AS
23 A PROFESSIONAL, IN THIS AREA, IT'S NOT NECESSARILY GETTING
24 ONE SPECIFIC ITEM, BUT THE GLOBAL PICTURE?

25 A. THAT'S RIGHT. AND I -- AND WHAT I DO IS I NOT ONLY

1 LOOK FOR INFORMATION REGARDING A HYPOTHESIS ABOUT A
2 DISORDER, BUT I ALSO LOOK FOR HYPOTHESES FOR COMPETING
3 DISORDERS. FOR EXAMPLE, IN THIS CASE I LOOKED TO SEE IF
4 THERE WAS EVIDENCE TO SUPPORT ANTI-SOCIAL PERSONALITY
5 DISORDER AMONG MANY AND WHICH EXPLANATION, WHAT HYPOTHESIS
6 BEST EXPLAINED THE DATA. SO IT'S NOT LIKE I'M JUST LOOKING
7 FOR CONFIRMATION OF FASD. I WAS LOOKING AT ALL OF THE
8 SYMPTOMS AND TRYING TO DETERMINE WHAT BEST EXPLAINED HIS
9 BEHAVIOR.

10 Q. NOW ON CROSS EXAMINATION YOU WERE ALSO ASKED ABOUT DR.
11 SCHWARTZ-WATTS' TESTIMONY THAT MR. BINNEY HAS SADISM.

12 A. YES, I RECALL THAT.

13 Q. AND I UNDERSTAND FROM YOUR QUALIFICATIONS SEXUAL
14 DISORDERS IS ALSO ONE OF YOUR AREAS OF EXPERTISE.

15 A. YES.

16 Q. IN YOUR OPINION IS MR. BINNEY A SADIST?

17 A. NO. IN MY OPINION HE DOES NOT MEET CRITERIA FOR SEXUAL
18 SADISM.

19 Q. AND WHY IS THAT?

20 A. BECAUSE HE DOESN'T SHOW THE INTENSE RECURRENT SEXUAL
21 URGES INVOLVING A DESIRE TO HUMILIATE OR PUNISH A VICTIM
22 DURING SEXUAL ACTIVITY. THERE'S NO EVIDENCE THAT HE GETS
23 SEXUALLY AROUSED TO THAT KIND OF BEHAVIOR. AND THERE'S NO
24 EVIDENCE THAT IT CONTINUED BEYOND A PERIOD OF SIX MONTHS,
25 WHICH IS ONE OF THE CRITERIA IN THE PARAPHELIA SECTION IN

1 THE DIAGNOSTIC MANUAL.

2 Q. NOW YOU WERE ASKED A NUMBER OF QUESTIONS BASED ON MR.

3 BINNEY'S STATEMENTS.

4 A. YES.

5 Q. DID YOU REVIEW AN AUDIOTAPE OF THOSE STATEMENTS?

6 A. NO, I DID NOT.

7 Q. OR VIDEOTAPE OF THOSE STATEMENTS?

8 A. NO, I DID NOT.

9 Q. AND IS THAT BECAUSE THERE ISN'T ONE?

10 A. I DON'T RECALL IF THERE IS ONE OR NOT. I DIDN'T REVIEW

11 IT.

12 Q. WELL, LET ME ASK YOU THIS, PEOPLE WITH FETAL ALCOHOL

13 SPECTRUM DISORDERS OR SYNDROME, ARE THEY HIGHLY SUGGESTIBLE?

14 A. VERY ---

15 MR. MABRY: OBJECTION.

16 THE COURT: AND TO WHAT?

17 MR. MABRY: IT'S RECROSS REPLY. AND I DON'T THINK

18 THAT'S RELATED TO WHAT I CROSS EXAMINED HER ABOUT. HE'S NOW

19 ASKING -- HE'S GOING TO GO INTO WHETHER SHE THINKS THESE

20 STATEMENTS ARE ALLOWABLE OR NOT.

21 THE COURT: IT WAS A LEADING QUESTION, WHICH I THOUGHT

22 WOULD BE THE OBJECTION. I'M GOING TO SUSTAIN IT AS TO

23 LEADING. BUT, COUNSEL, APPROPRIATE REDIRECT IS ONLY ON

24 MATTERS BROUGHT UP IN CROSS. HOW WAS THAT BROUGHT UP IN

25 CROSS?

1 MR. BLUME: I THINK THAT THE POINT DURING CROSS
2 EXAMINATION, MR. MABRY ASKED HER A NUMBER OF QUESTIONS BASED
3 ON HIS STATEMENTS TO THE POLICE WHICH WERE RECORDED BY THE
4 POLICE WHICH ARE NOT -- THEY'RE NOT AUDIOTAPED, THEY'RE NOT
5 VIDEORECORDED. THEY ARE FOR THE MOST PART WRITTEN DOWN BY
6 THE POLICE.

7 THERE WAS TESTIMONY AT THE TRIAL IN THE JACKSON/DENNO
8 HEARING ABOUT MR. BINNEY'S SUICIDAL MOTIVATIONS AT THE TIME,
9 ABOUT HOW LAW ENFORCEMENT TOOK THESE STATEMENTS FROM HIM AT
10 A TIME WHEN HE WANTED THE DEATH PENALTY. HE TESTIFIED ABOUT
11 THE FACT THAT THEY WERE SHOWING HIM THE BOOK, THE LEGAL BOOK
12 ABOUT THE CRITERIA FOR CAPITAL PUNISHMENT.

13 AND I THINK GIVEN HIS STATE OF MIND AT THE TIME, GIVEN
14 HIS LONGSTANDING FETAL ALCOHOL SYNDROME AND GIVEN THE
15 CONTEXT OF THE INTERROGATION THERE IS REASON TO DOUBT THE --
16 THE NECESSARILY -- THE RELIABILITY AND ACCURACY OF THOSE
17 STATEMENTS. AND I THINK THAT'S LEGITIMATE REDIRECT.

18 THE COURT: YOU WISH TO REPLY TO THAT, MR. MABRY?

19 MR. MABRY: YES, SIR, YOUR HONOR. MY QUESTIONS WERE
20 SPECIFICALLY TAILORED TO DID HE MAKE THESE STATEMENTS TO THE
21 POLICE AND DO YOU THINK BASED ON THOSE STATEMENTS WHETHER HE
22 HAD ANY PROBLEM WITH HIS EXECUTIVE FUNCTIONING OR WERE THEY
23 TRIGGERED BY -- THESE ACTIONS THAT HE DESCRIBED TO THE
24 POLICE, AND THEY WERE IN HIS OWN HANDWRITING, THE OFFICERS
25 TESTIFIED THAT THEY WERE IN MR. BINNEY'S HANDWRITING, NOT

1 THEIRS, SHE TESTIFIED WHETHER THAT WAS IMPULSIVE BEHAVIOR OR
2 NOT AND WHETHER THAT WAS -- I CAN'T REMEMBER THE OTHER --
3 EXECUTIVE FUNCTIONING OR NOT.

4 BUT I DID NOT GO INTO WHETHER HE -- WHAT HE'S TRYING TO
5 DO NOW IS TOTALLY NEW MATTER, WHETHER SHE BELIEVES THESE
6 STATEMENTS TO BE TRUE OR NOT OR ANYTHING TO THAT EFFECT.
7 THAT'S WHERE HE'S TRYING TO GO.

8 THE COURT: ALL RIGHT. COUNSEL, I BELIEVE THAT IS AN
9 APPROPRIATE RESPONSE TO NEW MATTER BROUGHT UP ON CROSS, AND
10 I WILL ALLOW IT. BUT, COUNSEL, I'M GOING TO DIRECT YOU NOT
11 TO LEAD YOUR WITNESS 'CAUSE YOU DID -- YOUR FIRST QUESTION
12 WAS, WELL, IS IT ---

13 MR. BLUME: I APOLOGIZE.

14 THE COURT: --- IS HE SUGGESTIBLE? AND THAT'S LEADING.
15 GO AHEAD.

16 Q. IS THERE RESEARCH IN YOUR FIELD THAT INDICATES THAT
17 PEOPLE WITH FETAL ALCOHOL SYNDROME ARE SUGGESTIBLE?

18 THE COURT: ALL RIGHT. I'M ---

19 MR. MABRY: SAME OBJECTION.

20 THE COURT: --- GOING TO SUSTAIN IT. THAT IS LEADING.
21 AN APPROPRIATE QUESTION WOULD BE, WHAT ATTRIBUTES DO THESE
22 INDIVIDUALS HAVE OR WHAT MIGHT THEY HAVE AS OPPOSED TO USING
23 THE WORD SUGGESTABILITY.

24 Q. WELL, ARE THERE ANY CONCERNS THAT YOU AS A EXPERT IN
25 FETAL ALCOHOL SPECTRUM DISORDERS WOULD HAVE IN REVIEWING A

1 STATEMENT MADE BY A DEFENDANT?

2 A. YES. IN TERMS OF BOTH GULLIBILITY AND -- AS FAR AS
3 POLICE STATEMENTS ARE CONCERNED, GULLIBILITY AND
4 SUGGESTIBILITY. I'VE SPOKEN ON THAT AT INTERNATIONAL
5 CONFERENCES AND ALSO THERE'S BEEN SOME RESEARCH ON THAT
6 TOPIC.

7 Q. NOW THERE WAS TESTIMONY -- THERE WAS CROSS EXAMINATION
8 ABOUT MR. BINNEY'S ACTIONS. AND YOU'VE READ THESE
9 STATEMENTS IN THAT REGARD. AND THERE WAS TESTIMONY THAT HE,
10 I BELIEVE, DEFECCATED IN THE HOUSE. AND I KNOW IT'S A
11 STRANGE QUESTION, BUT FROM SOMEBODY WHO WORKS IN THE AREA OF
12 FETAL ALCOHOL SPECTRUM WAS THAT SURPRISING TO YOU?

13 A. NO, IT'S NOT. AND IN MY EVALUATION AND TREATMENT WORK
14 WITH FASD AFFECTED FOLKS I SEE THIS KIND OF BEHAVIOR
15 OCCASIONALLY. IT SURPRISED ME THE FIRST TIME I SAW IT, BUT
16 SINCE THEN I'VE SEEN IT OCCASIONALLY. IN ONE EXAMPLE THE
17 YOUNGSTER DEFECCATED OUT ON THE ROOF OF HER HOUSE ROUTINELY.
18 SO DEFECCATING IN UNUSUAL PLACES SEEMS TO BE A FACTOR IN SOME
19 OF THESE CASES.

20 Q. GOING BACK TO THE AREA OF SUGGESTIBILITY DO YOU RECALL
21 BASED ON THE RECORDS WHO IT WAS THAT SUGGESTED TO MR. BINNEY
22 THAT HE SHOULD WRITE THE LETTER TO MR. SOUTHERN?

23 A. I DON'T RECALL.

24 Q. NOW THERE WAS ALSO A QUESTION ASKED TO YOU ABOUT THAT
25 MR. BINNEY WAITED IN THE HOUSE FOR MS. SOUTHERN TO COME

1 HOME. DO YOU RECALL BASED ON YOUR REVIEW OF THE RECORDS
2 WHETHER HE REALLY HAD ANY IDEA WHO COULD COME HOME?

3 A. I DON'T RECALL READING ANYTHING THAT INDICATED HE KNEW
4 WHO WAS GOING TO COME HOME AT WHAT TIME.

5 Q. AND IN YOUR OPINION BASED ON REVIEWING THIS CRIME OF
6 ENTERING THE HOUSE OF SOMEONE YOU DON'T KNOW, STAYING ALL
7 DAY, DRINKING, EATING FOOD, PLAYING NINTENDO GAMES, USING
8 THE BATHROOMS AND ALL THAT, IS THAT -- IS THAT -- WOULD YOU
9 CALL THAT A WELL ORGANIZED EXECUTIVE FUNCTION PLAN?

10 MR. MABRY: OBJECTION, LEADING.

11 Q. HOW WOULD YOU -- BASED UPON -- AS AN EXPERT IN FETAL
12 ALCOHOL SYNDROME, BASED UPON WHAT YOU HAVE REVIEWED ABOUT
13 THIS CRIME IN THIS CASE DO YOU -- HOW DOES IT STACK UP
14 AGAINST WHAT YOUR OPINION IS OF SOMEBODY LIKE MR. BINNEY
15 WITH FETAL ALCOHOL SYNDROME?

16 A. IT'S CONSISTENT WITH THE KIND OF BEHAVIOR I'VE SEEN
17 WITH OTHER FASD AFFECTED INDIVIDUALS. IT'S DISORGANIZED,
18 UNFOCUSED CRIMINAL BEHAVIOR. AND I SEE THAT IN A NUMBER OF
19 CASES INVOLVING FASD.

20 THE COURT: ALL RIGHT. ANY OBJECTION TO THE RELEASE OF
21 THE WITNESS FROM ---

22 MR. BLUME: NO, SIR.

23 MR. MABRY: YOU'RE NOT GOING TO ALLOW ANY RECROSS, YOUR
24 HONOR?

25 THE COURT: COUNSEL, I BELIEVE WE'VE THOROUGHLY

1 CONCLUDED WITH THE WITNESS.

2 MR. MABRY: YES, SIR.

3 THE COURT: DO YOU HAVE A NEW MATTER THAT WAS BROUGHT
4 UP IN REDIRECT? ACTUALLY, I ---

5 MR. MABRY: I DO HAVE ONE QUESTION.

6 THE COURT: WELL, WHAT'S THE NEW MATTER? IT'S ONLY IF
7 THERE'S A NEW MATTER.

8 MR. MABRY: WELL, IT'S SOMETHING THAT HE BROUGHT UP.
9 AND I THINK IT'S A MISCHARACTERIZATION OF THE TESTIMONY.

10 THE COURT: ALL RIGHT. COUNSEL, I'M GOING TO DISALLOW
11 ANY FURTHER QUESTIONING.

12 MR. MABRY: ALL RIGHT.

13 THE COURT: MA'AM, YOU'RE FREE TO STEP DOWN. YOU'RE
14 FREE TO LEAVE IF YOU WISH.

15 DR. NOVICK-BROWN: THANK YOU, YOUR HONOR.

16 THE COURT: HAVE A GOOD DAY. COUNSEL, HOW LONG DO YOU
17 ANTICIPATE YOUR NEXT WITNESS TO BE?

18 MR. BLUME: I BELIEVE THE NEXT SEVERAL WITNESSES ARE
19 RELATIVELY BRIEF.

20 THE COURT: ALL RIGHT.

21 MR. BLUME: I MEAN, I'M TALKING FIVE, TEN MINUTES MOST
22 ON DIRECT.

23 THE COURT: ALL RIGHT. WELL, LET'S GO AHEAD AND TAKE
24 ONE OR TWO AND THEN WE'LL TAKE OUR AFTERNOON BREAK. PLEASE
25 CALL YOUR NEXT WITNESS.

TONYA BROWN - DIRECT EXAMINATION BY MR. BLUME:

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1 MR. BLUME: YES. WE'D CALL TONYA BROWN.

2 THE COURT: PLEASE COME FORWARD AND TAKE THE OATH OF A
3 WITNESS.

4 MR. SALTER: JUDGE, WE'D MOVE IN LIMINE TO BAR THIS
5 TESTIMONY. MS. BROWN HAS NOTHING BUT HEARSAY TO OFFER.

6 THE COURT: MS. BROWN, COME ON UP AND HAVE A SEAT. AND
7 LET'S PUT MS. BROWN UNDER OATH AND THEN WE'LL MAKE A
8 DECISION. WE'LL HEAR THE ARGUMENTS AND THEN DECIDE.

9 TONYA BROWN, BEING DULY
10 SWORN TESTIFIED AS FOLLOWS:

11 THE COURT: ALL RIGHT. OF COURSE, MR. SALTER,
12 OBVIOUSLY, I DON'T KNOW WHAT THE WITNESS IS GETTING READY TO
13 TESTIFY TO. AND I HAVE NO KNOWLEDGE ---

14 MR. SALTER: YES, YOUR HONOR.

15 THE COURT: --- OF WHAT QUESTIONS WILL BE ASKED. SO I
16 HAVE NO IDEA WHETHER WE'RE GETTING READY TO HAVE A HEARSAY
17 WITNESS. I BELIEVE THE BEST EVIDENCE IS WOULD BE FOR ME TO
18 HEAR THE QUESTION FIRST AND YOU OBJECT CONTEMPORANEOUSLY IF
19 THERE'S SOMETHING THAT'S ASKED THAT REQUESTS HEARSAY.

20 MR. SALTER: YES, SIR, YOUR HONOR.

21 THE COURT: ALL RIGHT. VERY GOOD. AND, COUNSEL, YOU
22 MAY PROCEED.

23 DIRECT EXAMINATION BY MR. BLUME:

24 Q. MS. BROWN, GOOD AFTERNOON. MS. BROWN, DID YOU KNOW
25 JUDY SOUTHERN?

- 1 A. I DID.
- 2 Q. HOW DID YOU KNOW HER?
- 3 A. WE WORKED TOGETHER.
- 4 Q. AND WHERE DID YOU WORK TOGETHER?
- 5 A. WITH THE POSTAL SERVICE.
- 6 Q. BESIDES WORKING TOGETHER DID YOU DO ANYTHING ELSE
- 7 TOGETHER?
- 8 A. WE DID. ON OCCASION WE RODE HORSES TOGETHER.
- 9 Q. AND ---
- 10 THE COURT: PLEASE SPEAK UP JUST A -- MA'AM, COME TO
- 11 THAT MICROPHONE JUST A LITTLE BIT BETTER OR MOVE THIS WAY SO
- 12 WE CAN ---
- 13 A. OKAY.
- 14 THE COURT: ALL RIGHT. THANK YOU.
- 15 Q. FOR A TIME DID YOU KEEP YOUR HORSE AT HER HOUSE?
- 16 A. I DID.
- 17 Q. WOULD YOU CONSIDER YOURSELF A CLOSE FRIEND?
- 18 A. FOR THE BRIEF TIME THAT I KNEW HER.
- 19 Q. NOW, MS. BROWN, LET ME ASK YOU, DID YOU SEE JUDY
- 20 SOUTHERN THE DAY THAT SHE DIED?
- 21 A. I DID.
- 22 Q. AND WHERE DID YOU SEE HER?
- 23 A. AT WORK.
- 24 Q. CAN YOU TELL ME IF ANYTHING UNUSUAL HAPPENED THAT DAY?
- 25 MR. SALTER: YOUR HONOR, AT THIS POINT I'M GOING TO

1 OBJECT. I BELIEVE WHAT SHE'S GOING TO RELAY IS
2 CONVERSATIONS THAT SHE MAY HAVE HAD WITH THE VICTIM.

3 THE COURT: ALL RIGHT. ASSUMING THAT MR. SALTER IS
4 CORRECT, TELL ME WHAT -- HOW THAT WOULD BE APPROPRIATE
5 EVIDENCE, MR. BLUME.

6 MR. BLUME: I'M GOING -- AM GOING TO ASK HER WHETHER
7 MS. SOUTHERN MADE ANY STATEMENT TO HER. A STATEMENT, IN MY
8 OPINION, IS CLEARLY ADMISSIBLE AS AN EXCEPTION TO THE
9 HEARSAY RULE. IT'S A PRESENT SENSE IMPRESSION ---

10 THE COURT: ALL RIGHT.

11 MR. BLUME: --- OF WHAT SHE IS GOING TO SAY. AND I
12 THINK IT'S AN EXCEPTION. IT COULD BE AN EXCITED UTTERANCE,
13 BUT I THINK IT MORE CLEARLY FALLS UNDER THE EXCEPTION FOR
14 PRESENT SENSE IMPRESSION.

15 THE COURT: AND WHAT OTHER -- TELL US WHAT OTHER
16 EXCEPTIONS YOU BELIEVE IT MAY -- MAY APPLY.

17 MR. BLUME: I BELIEVE PROBABLY -- WELL, I BELIEVE
18 PRIMARILY IT'S A PRESENT SENSE IMPRESSION AND IT'S AN
19 EXCITED UTTERANCE. BUT I THINK TO ME IT REALLY COMES UNDER
20 THE PRESENT SENSE IMPRESSION.

21 THE COURT: ALL RIGHT. AND IS IT YOUR, OF COURSE, I
22 RECALL IN OPENING STATEMENT IT WAS SAID THAT APPARENTLY MS.
23 SOUTHERN MADE THE COMMENT THAT SHE WAS -- THAT SHE WAS GOING
24 TO DIE THAT DAY. I ASSUME THIS IS THE TESTIMONY THAT WE'RE
25 TALKING ABOUT. AM I CORRECT, MR. SALTER?

1 MR. SALTER: I BELIEVE SO, YOUR HONOR.

2 THE COURT: ALL RIGHT. NOW IS THERE SOME EVENT THAT
3 OCCURRED IMMEDIATELY PRIOR TO THIS THAT CAUSED THIS
4 UTTERANCE OR THIS COMMENT IN YOUR BELIEF, MR. BLUME?

5 MR. BLUME: I BELIEVE WHAT MS. BROWN WOULD SAY IS THAT
6 HER APPEARANCE WAS DIFFERENT, SHE APPEARED TO BE AFRAID, SHE
7 DIDN'T LOOK OR ACT LIKE SHE NORMALLY DID AND THAT SOMETHING
8 HAD HAPPENED THAT MORNING AT HER HOUSE WHICH LED HER TO SAY
9 THAT.

10 SO THIS WAS A DIFFERENT -- SO HER -- THE FACT THAT HER
11 APPEARANCE SEEMED DIFFERENT, SHE APPEARED TO BE AFRAID, SHE
12 WAS DIFFERENT THAN SHE USUALLY WAS AND MADE THIS STATEMENT,
13 I THINK THAT QUALIFIES IT WAS A PRESENT SENSE IMPRESSION.

14 THE COURT: ALL RIGHT. WHAT DO YOU SAY TO THE HEARSAY
15 RULE?

16 MR. SALTER: YOUR HONOR, I DON'T BELIEVE THAT THEY -- I
17 DON'T BELIEVE THAT THEY CAN NARROW IT DOWN IN TERMS OF HOW
18 LONG AFTER WHATEVER WAS FOUND AT THE HOUSE HAD BEEN FOUND
19 THAT THIS CONVERSATION TOOK PLACE. IT'S JUST -- THE ONLY
20 INFORMATION THIS WITNESS HAS IS PURELY WHAT THE VICTIM TOLD
21 HER.

22 THE COURT: ALL RIGHT.

23 MR. SALTER: AND THAT'S IT. SHE DOESN'T HAVE ANY --
24 FROM WHAT I UNDERSTAND, THERE'S NOTHING TO INDICATE WHEN THE
25 VICTIM FOUND -- WHEN SHE FOUND WHAT CAUSED THE REACTION.

1 THE COURT: ALL RIGHT. LADIES AND GENTLEMEN, FOR THE
2 BENEFIT OF THOSE WHO ARE HERE WHO HAVE AN EXTREME INTEREST
3 IN THIS CASE AND HEAR US SPEAKING IN LEGALESE, GENERALLY THE
4 HEARSAY RULE PREVENTS A WITNESS FROM COMING UP TO THE STAND
5 AND SAYING WHAT SOMEBODY ELSE TOLD THEM.

6 AND THE REASON FOR THE HEARSAY RULE IS SIMPLY ONE OF
7 RELIABILITY BECAUSE SOMEBODY -- MR. SALTER, I'M GOING TO
8 JUST LET YOU TAKE A SEAT A MOMENT SO EVERYONE CAN SEE.

9 BECAUSE THEORETICALLY, IF YOU'LL THINK ABOUT IT,
10 SOMEBODY COULD TAKE THE STAND AND SAY THAT ANYONE SAID
11 ANYTHING PARTICULARLY IF THOSE WITNESSES WHO PURPORTED TO
12 HAVE SAID THAT ARE NOT AVAILABLE TO EITHER ADMIT OR DENY
13 WHAT WAS SAID. THIS IS THE REASON FOR THE HEARSAY RULE.

14 THE HEARSAY RULE HAS CERTAIN EXCEPTIONS. ALL OF THESE
15 ARE CODIFIED IN RULE 803 IN THE RULES OF EVIDENCE. CERTAIN
16 EXCEPTIONS ARE WHETHER THERE IS A COMMENT OR A STATEMENT
17 THAT DESCRIBES OR EXPLAINS AN EVENT WHILE IT IS BEING
18 PERCEIVED OR IMMEDIATELY THEREAFTER, WHICH IS CALLED A
19 PRESENT SENSE IMPRESSION.

20 THERE ALSO IS EXCITED UTTERANCE, WHICH IS A RES GESTAE
21 STATEMENT MEANING THAT SOMEONE WHO SAYS SOMETHING WHILE
22 THEY'RE UNDER THE STRESS OF OBSERVING AN EVENT. THEN
23 THERE'S ALSO THE THEN EXISTING MENTAL EMOTIONAL PHYSICAL
24 CONDITION OF THE PERSON, WHICH IS EXCEPTION NUMBER THREE.
25 MR. BLUME, I DON'T BELIEVE YOU RAISED THAT ONE.

1 MR. BLUME: I'M SORRY, YOUR HONOR. I DID MEAN TO RAISE
2 THAT, THAT EXCEPTION AS WELL.

3 THE COURT: ALL RIGHT. BASED UPON MY UNDERSTANDING OF
4 WHAT I -- OF THE FACTS THAT I'M HEARING IT APPEARS TO ME
5 THAT RULE 803 (3), WHICH IS A THEN EXISTING MENTAL
6 IMPRESSION, EMOTIONAL, PHYSICAL CONDITION MAY BE AN
7 APPROPRIATE EXCEPTION HERE. I'LL HEAR FROM YOU ON THAT, MR.
8 SALTER, WHY YOU BELIEVE IT IS NOT.

9 MR. SALTER: WELL, YOUR HONOR, EVEN IF YOUR HONOR FINDS
10 THAT IT IS WE STILL HAVE THE PROBLEM WITH THIRD PARTY GUILT.
11 AND THAT'S WHAT THEY'RE TRYING -- THAT'S WHERE THEY'RE
12 HEADING WITH ALL THIS EVIDENCE. THIS IS SUPPOSEDLY
13 CIRCUMSTANTIAL EVIDENCE OF THIRD PARTY GUILT. IT'S
14 INADMISSIBLE.

15 THIRD PARTY GUILT, EVEN AFTER HOLMES VERSUS SOUTH
16 CAROLINA, THE EVIDENCE MUST BE INCONSISTENT WITH THE
17 DEFENDANT'S GUILT OR MITIGATE SOMEHOW HIS SENTENCE. THIS IS
18 JUST CONJECTURE. IT'S THIRD PARTY GUILT.

19 THE COURT: ALL RIGHT. WHAT DO YOU SAY ABOUT THAT, MR.
20 BLUME?

21 MR. BLUME: WELL, I WOULD SAY TWO THINGS. NUMBER ONE,
22 THIS IS EVIDENCE OF TESTIMONY WE BELIEVE THAT COULD AND
23 SHOULD HAVE BEEN OFFERED AT MR. BINNEY'S TRIAL.

24 THE COURT: ALL RIGHT. WELL, NOW LET ME STOP YOU THERE
25 AND SAY WHAT MR. SALTER'S REALLY SAYING IS THAT THIS THIRD

1 PARTY GUILT DOESN'T RISE TO THE LEVEL OF ADMISSIBILITY AT
2 THE TRIAL AND THUS WOULD NOT BE APPROPRIATE HERE AT PCR.

3 MR. BLUME: WELL, THAT'S -- THE NEXT STEP OF THAT IS,
4 NUMBER ONE, JUDGE COLE DID ALLOW COUNSEL TO PURSUE EVIDENCE
5 IN THAT REGARD AT TRIAL. HE DID ALLOW COUNSEL BOTH ON CROSS
6 EXAMINATION OF MR. SOUTHERN IN THIS CASE AND THAT -- FOR
7 THOSE ARGUMENTS OF COUNSEL TO BE MADE.

8 AND SO THIS IS CLEARLY EVIDENCE WHICH WOULD HAVE ADDED
9 TO THAT EFFORT IN THAT REGARD. AND I THINK ---

10 THE COURT: MR. BLUME, LET ME STOP YOU. WHERE IN THE
11 RECORD MIGHT I FIND THAT REFERENCE TO JUDGE COLE ALLOWING
12 THIRD PARTY GUILT EVIDENCE?

13 MR. BLUME: WELL, I THINK IT'S IN THE TRANSCRIPT IN THE
14 CROSS EXAMINATION OF MR. SOUTHERN ITSELF. YOU CAN SEE IT.
15 THERE WAS AN OBJECTION TO SOME OF IT -- IT WASN'T -- THEY
16 DIDN'T ARTICULATE IT. THEY DIDN'T SAY WE'RE OBJECTING ON
17 THIRD PARTY GUILT BASIS.

18 THERE WAS AN OBJECTION TO SOME OF THE QUESTIONS TO MR.
19 SOUTHERN. THOSE OBJECTIONS WERE OVERRULED AND COUNSEL WERE
20 ALLOWED TO PURSUE OTHER ISSUES ABOUT, FOR EXAMPLE, DISCORD
21 IN THE MARITAL RELATIONSHIP, A PREVIOUS SUICIDE ATTEMPT BY
22 MR. SOUTHERN ABOUT, YOU KNOW, THE QUESTIONS ABOUT WHETHER --
23 HOW LONG IT TOOK TO GET TO THE HOSPITAL, QUESTIONS ABOUT WHY
24 HE -- 911 WASN'T CALLED, QUESTIONS ABOUT -- IN THAT REGARD.
25 THAT'S WHAT ALL OF THAT WENT TO.

1 AND I THINK -- AND THERE WAS NO -- THERE WAS NO -- NONE
2 OF THAT WAS EXCLUDED. I CAN'T THINK OF A SINGLE PIECE OF
3 EVIDENCE IN THAT REGARD WHICH WAS KEPT OUT AT TRIAL. I
4 THINK THIS WAS JUST ANOTHER PART OF THAT PUZZLE. ANOTHER
5 PIECE, I'M SORRY.

6 **THE COURT:** ALL RIGHT.

7 **MR. SALTER:** YOUR HONOR, THEY WERE NOT ALLOWED TO
8 PRESENT AND DID NOT PRESENT ANY WITNESS SUCH AS THIS WITNESS
9 TO TESTIFY TO HEARSAY MATTERS FROM -- FROM THE VICTIM THAT
10 DON'T HAVE ANY DIRECT NEXUS TYING ANYBODY SPECIFICALLY TO
11 THE MURDER.

12 **MR. BLUME:** TO SAY THAT THEY WERE NOT ALLOWED TO IS
13 INACCURATE. THEY MADE NO ATTEMPT TO. THERE WAS NO
14 EXCLUSION OF ANY EVIDENCE IN THIS REGARD.

15 **THE COURT:** WHICH IS WHY I ASKED WHETHER THERE WAS A
16 SPECIFIC POINT IN THE TRANSCRIPT AS TO WHETHER THIS ISSUE
17 WAS DISCUSSED BY JUDGE COLE AND COUNSEL. YOU'RE TELLING ME
18 THAT IT WAS NOT.

19 **MR. BLUME:** THERE WAS, AS I RECALL, A SINGLE OBJECTION
20 MADE ABOUT MR. -- I BELIEVE IT WAS MR. SOUTHERN'S SUICIDE
21 ATTEMPT SOME WEEKS PRIOR TO THIS OCCASION WHICH WAS MADE
22 DURING HIS CROSS EXAMINATION. THAT TESTIMONY WAS ALLOWED
23 AND ALL THE OTHER QUESTIONS WERE ALLOWED.

24 **THE COURT:** ALL RIGHT. THEN, COUNSEL, IN ORDER FOR ME
25 TO DETERMINE WHETHER OR NOT IT WOULD ULTIMATELY HAVE BEEN

1 ADMISSIBLE AT TRIAL, IF ATTEMPTED, I HAVE TO HEAR WHAT IT
2 IS. AND I'M GOING TO OVERRULE YOUR OBJECTION TO THE EXTENT
3 -- AND I WISH FOR THE RECORD TO REFLECT THAT BY THIS RULING
4 NOW I'M NOT SAYING THAT IT COMES IN AND SHOULD BE A PART OF
5 THIS PROCEEDING. I'M SIMPLY SAYING I HAVE TO HEAR IT IN
6 ORDER TO DETERMINE WHETHER YOUR OBJECTION THAT IT WOULD NOT
7 HAVE BEEN ALLOWED AT TRIAL IS A CORRECT POSITION. AND THE
8 ONLY WAY TO DO THAT IS TO HEAR IT.

9 MR. SALTER: YES, SIR, YOUR HONOR. AND JUST SO THE
10 RECORD WILL BE CLEAR AND SO YOUR HONOR UNDERSTANDS THERE WAS
11 NO EFFORT TO CALL THIS WITNESS OR ANY SIMILAR WITNESS
12 BECAUSE MR. BINNEY ADMITTED TO COUNSEL THAT HE, IN FACT,
13 COMMITTED THE CRIME AND THAT HE DID NOT HAVE ANY INVOLVEMENT
14 WITH MR. SOUTHERN.

15 THE COURT: ALL RIGHT. AGAIN, I AM NOT GOING TO STRIP
16 MR. BINNEY OF HIS ABILITY OR COUNSEL'S ABILITY TO PUT THIS
17 EVIDENCE IN AT THIS POINT OR AT LEAST TO PUT IT OUT THERE SO
18 WE CAN MAKE A DETERMINATION OF IT. SO FOR THOSE REASONS I
19 OVERRULE YOUR OBJECTION.

20 AGAIN, FOR THOSE WHO ARE HERE, THE QUESTION ABOUT THIRD
21 PARTY GUILT IS YOU CANNOT COME INTO TRIAL AND JUST SIMPLY
22 POINT THE FINGER AT SOME PERSON X AND SAY THIS PERSON DID
23 WHAT I'M ACCUSED OF DOING. THERE ARE CERTAIN RULES
24 REQUIRED. YOU HAVE TO SHOW THAT THE -- THERE'S CERTAIN
25 EVIDENTIARY PREREQUISITES REQUIRED BEFORE YOU CAN ALLEGE

1 THAT SOME OTHER PERSON IS GUILTY OF THE CRIME OF WHICH A
2 PARTICULAR PERSON IS ACCUSED. THAT'S WHAT THIS DISCUSSION
3 IS ABOUT.

4 AND, MA'AM, I'M GOING TO OVERRULE THE OBJECTION. I'M
5 GOING TO LET MR. BLUME GO AHEAD AND ASK YOU THE QUESTION.
6 AND THEN YOU MAY RESPOND TO IT. GO AHEAD, SIR.

7 Q. MS. BROWN, DID ANYTHING UNUSUAL HAPPEN THAT MORNING?

8 A. AS SOON AS I GOT TO WORK -- THE WAY OUR OFFICE IS SET
9 UP YOU WALK IN AND YOU HAVE ROWS OF PLACES WHERE EVERYBODY
10 PUTS THEIR MAIL UP. WHEN I WALKED IN THAT MORNING I HAD
11 WALKED PAST WHERE JUDY'S CASE WAS, WHAT WE CALL WHERE WE PUT
12 THE MAIL UP, AND SHE WAS STANDING THERE. AND SHE HAD A
13 BUNDLE OF MAIL IN HER HAND. AND SHE HAD A PIECE OVER IN
14 THIS HAND.

15 AND SHE WAS JUST LOOKING, JUST STANDING THERE JUST LIKE
16 LOOKING LIKE SHE WAS LOST IN THIS CASE. AND SO I KNEW THE
17 CASE AND I WALKED OVER AND I SAID SOMETHING TO HER. AND
18 WHEN SHE TURNED AROUND AND LOOKED AT ME SHE WAS JUST REAL
19 PALE, ALMOST WHITE AS A GHOST. AND I SAID, AND I SAID TO
20 HER, WHAT'S WRONG OR IS THERE SOMETHING WRONG, SOMETHING
21 LIKE THAT. AND SHE SAID, TODAY'S THE DAY. AND I SAID,
22 TODAY'S THE DAY WHAT? AND SHE SAID, TODAY'S THE DAY I'M
23 GOING TO DIE.

24 SO I TRIED TO TALK TO HER AND ASK HER WHAT DID SHE
25 MEAN, YOU KNOW, WHAT WAS SHE TALKING ABOUT. AND THEN THAT'S

1 WHEN SHE SAID TO ME ABOUT THE LIST THAT HER AND ALLAN HAD
2 DISCUSSED THAT MORNING.

3 Q. AND WHAT DID SHE TELL YOU?

4 A. SHE JUST TOLD ME THAT IT WAS A LIST OF THINGS THAT HE
5 DIDN'T LIKE ABOUT HER, THAT HE WAS UNHAPPY WITH HER ABOUT.
6 AND I IMMEDIATELY ASKED HER TO LET ME CALL SOMEBODY AT SAFE
7 HOMES AND LET HER TALK TO THEM. AND SHE WOULDN'T. SHE SAID
8 SHE DIDN'T WANT TO TALK TO SOMEBODY ELSE.

9 AND I EXPLAINED TO HER THAT I KNEW SOMEBODY THAT WORKED
10 AT SAFE HOMES AND THAT I WOULD CALL AND SEE IF SHE COULD
11 TALK TO THAT GIRL, THAT PARTICULAR GIRL. SO SHE AGREED.
12 SHE AGREED TO DO THAT.

13 SO SHE SAID SOMETHING ELSE TO ME ABOUT JACOB. SHE WAS
14 WORRIED ABOUT JACOB. SO I TOLD HER TO GO CALL THE DAYCARE
15 AND CHECK ON JACOB. HE WAS THERE AND HE WAS FINE.

16 AND I WENT AND CALLED THE SAFE HOMES. THE GIRL THAT I
17 KNEW THAT WORKED THERE WASN'T THERE THAT DAY. AND I ALREADY
18 KNEW THAT JUDY WASN'T GOING TO TALK TO SOMEBODY ELSE BECAUSE
19 OF THE WAY SHE WAS ACTING. SO I ASKED THE GIRL AT SAFE
20 HOMES COULD I GIVE HER JUDY'S NAME, COULD I GIVE JUDY HER
21 NAME AND TELL HER THAT I KNEW HER AND THAT SHE COULD TALK TO
22 HER. AND SHE SAID, YES.

23 SO I WROTE THE NUMBER DOWN. I TOOK IT BACK TO JUDY.
24 AND I SAID, HERE'S THE NUMBER, PLEASE CALL HER. THEN I WENT
25 AROUND TO MY CASE 'CAUSE I WAS TRAINING SOMEBODY THAT DAY

1 AND STARTED, YOU KNOW, PUTTING MAIL UP AND GOING ON ABOUT MY
2 BUSINESS.

3 LATER ON THAT MORNING I WENT TO CHECK ON HER AND SHE
4 WAS -- SHE WAS PUTTING HER MAIL UP LATER ON AS THE MORNING
5 WENT ON. AND I ASKED HER DID SHE CALL. AND SHE SAID, NO.
6 SO I TOLD HER TO GO AND TALK TO OUR SUPERVISOR, WHO WAS MARK
7 EDWARDS. I SAID, YOU NEED TO TALK TO HIM. SO SHE TOLD ME
8 SHE WOULD.

9 AND I THINK THAT WAS ABOUT THE TIME THAT SHE STARTED
10 TALKING TO ME ABOUT SOME BOOK, THAT THERE WAS A BOOK THAT
11 ALLAN HAD BEEN READING OR SOMEBODY HAD BEEN READING. AND
12 SHE SAID ALLAN KNEW ABOUT IT, THAT THIS BOOK TALKED ABOUT IF
13 YOU -- IF YOU WERE TO KILL SOMEBODY THAT YOU LOVED, SOME
14 FAMILY MEMBER OR SOMEBODY THAT WAS CLOSE TO YOU, THAT YOU
15 COULD COMMIT THESE OTHER ACTS AND YOU WOULD GET FORGIVEN FOR
16 KILLING THE PERSON THAT YOU LOVED.

17 AND SO I WAS ASKING HER ABOUT THE BOOK. AND SHE WAS
18 REAL VAGUE ABOUT IT. AND I WAS TRAINING. SO I HAD TO KEEP
19 GOING BACK AND FORTH, YOU KNOW, TRYING TO CHECK ON THEM.
20 AND THEN I JUST INSISTED ON HER TALKING TO MARK.

21 AND WHEN I GOT THROUGH PUTTING MY MAIL UP I WENT AROUND
22 TO CHECK ON HER THE LAST TIME. SHE HAD PUT HER MAIL UP, HAD
23 PULLED IT DOWN AND WAS JUST STANDING THERE. AND I SAID, ARE
24 YOU GOING TO TALK TO MARK? SHE SAID, YEAH, SHE WAS WAITING
25 ON EVERYBODY TO LEAVE.

1 SO I ASKED HER DID SHE CALL THE LADY AT SAFE HOMES.
2 SHE HADN'T. I ASKED HER TO DO IT, YOU KNOW, I ASKED HER
3 AGAIN TO CALL HER. AND I LEFT. AND THE LAST THING THAT I
4 KNEW THAT SHE WAS SUPPOSED TO BE STANDING UP, YOU KNOW,
5 WAITING TO TALK TO MARK EDWARDS, OUR SUPERVISOR.

6 Q. DID YOU EVER LATER THAT DAY CALL MS. SOUTHERN?

7 A. I DID.

8 Q. DO YOU RECALL APPROXIMATELY WHAT TIME THAT WAS?

9 A. IT WAS SOMETIME AFTER LUNCH. I HAD CALLED BECAUSE MY
10 BOYFRIEND HAD FOUND SOME HAY. JUDY WAS WANTING SOME HAY.
11 AND HE HAD FOUND SOME HAY. AND HE WANTED ME TO CALL HER TO
12 FIND OUT IF SHE STILL WANTED IT. SO I HAD CALLED. AND SHE
13 SAID, YES, SHE WANTED IT. SO THAT WAS THE EXTENT OF THAT
14 CONVERSATION. AND I CALLED HIM BACK AND TOLD HIM THAT, YES,
15 SHE WANTED IT.

16 WELL THEN LATER IN THE DAY SOMEWHERE -- I WAS BACK OFF
17 -- COMING OFF ON THE ROUTE WHICH WOULD BE SOMEWHERE AROUND
18 FOUR OR A LITTLE AFTER FOUR. HE CALLED AND TOLD ME TO CALL
19 HER TO SEE IF HE COULD BRING -- HE WOULD BRING IT TO HER
20 THAT DAY, THAT THEY NEEDED TO GET IT OUT OF THE FIELD 'CAUSE
21 THAT'S WHERE WE ALL -- WE GOT HAY, WAS WE PICKED IT UP OUT
22 OF SOMEBODY ELSE'S FIELD. SO I CALLED. I DIDN'T GET
23 NOBODY. SO I HAD LEFT A MESSAGE.

24 AND SO LATER ON THE WAY WHEN -- AS WE GOT CLOSER TO THE
25 POST OFFICE I HAD CALLED. AND I CALLED JUDY'S PHONE. JUDY

1 HAD TWO CELL PHONES. AND I HAD CALLED THE ONE PHONE THAT I
2 USUALLY CALLED HER ON. AND WHEN I DID, THAT'S WHEN ALLAN
3 ANSWERED THE PHONE.

4 Q. DO YOU KNOW WHY SHE HAD TWO CELL PHONES?

5 MR. SALTER: OBJECTION, YOUR HONOR. AGAIN, THIS IS
6 MORE HEARSAY.

7 THE COURT: SUSTAINED.

8 Q. SO YOU CALLED HER ON ONE OF TWO CELL PHONE NUMBERS THAT
9 YOU HAD FOR HER?

10 A. RIGHT.

11 Q. WAS THERE A PARTICULAR REASON YOU CHOSE THAT NUMBER?

12 A. THAT WAS JUST THE NUMBER I USUALLY CALLED HER ON.

13 Q. AND WHAT HAPPENED WHEN YOU MADE THAT CALL?

14 A. WHEN I MADE THE SECOND CALL ALLAN ANSWERED THE PHONE.

15 Q. AND SO HE ANSWERED HER CELL PHONE?

16 A. RIGHT.

17 Q. WAS THAT UNUSUAL?

18 A. YES. I THOUGHT IT WAS.

19 Q. AND COULD YOU HEAR ANYONE ELSE IN THE BACKGROUND?

20 A. I ASKED ALLAN TO LET ME SPEAK TO JUDY. AND HE WAS
21 YELLING SAYING, WHO IS THIS? WHO IS THIS? AND I SAID, JUST
22 LET ME SPEAK TO HER. BECAUSE I DIDN'T KNOW THAT HE KNEW
23 ABOUT THE OTHER PHONE.

24 AND SO WHEN HE ANSWERED IT, YOU KNOW, THAT STUNNED ME.
25 AND HE ASKED ME A COUPLE OF TIMES, WHO IS THIS? WHO IS

1 THIS? AND I SAID, YOU JUST LET ME SPEAK TO JUDY. AND IN
2 THE BACKGROUND I HEARD SOMEBODY SAY, GIVE ME THE PHONE. AND
3 THEN THE PHONE WENT DEAD. AND I THINK IT WAS BECAUSE OF
4 WHERE I WAS AT ON THE ROAD, THAT I WENT THROUGH A DEAD, YOU
5 KNOW, A DEAD SPOT.

6 Q. AND THAT WAS THE LAST CALL?

7 A. YES.

8 Q. PLEASE ANSWER ANY QUESTIONS THEY MAY HAVE.

9 THE COURT: COUNSEL, WITHOUT WAIVING -- WELL, DO YOU
10 WISH TO CROSS EXAMINE?

11 MR. SALTER: YES, SIR, YOUR HONOR. JUST BRIEFLY.

12 THE COURT: GO AHEAD.

13 MR. SALTER: JUST VERY BRIEFLY.

14 CROSS EXAMINATION BY MR. SALTER:

15 Q. MS. BROWN, YOU DON'T LIKE ALLAN SOUTHERN, DO YOU?

16 A. I DON'T REALLY KNOW ALLAN SOUTHERN.

17 Q. YOU DON'T LIKE HIM, DO YOU?

18 A. I DON'T KNOW HIM THAT GOOD.

19 Q. YOU DON'T KNOW HIM THAT GOOD? BUT YOU DON'T LIKE HIM,
20 DO YOU?

21 A. I HAVE NOTHING AGAINST HIM.

22 Q. YOU DON'T HAVE ANYTHING AGAINST HIM AT ALL?

23 A. I DON'T KNOW HIM.

24 Q. NOTHING WHATSOEVER?

25 A. I'VE ONLY MET HIM A COUPLE OF TIMES.

- 1 Q. AND YET YOU WERE TRYING TO PERSUADE MS. SOUTHERN TO
2 LEAVE HIM?
- 3 A. I DIDN'T SAY THAT. I TRIED TO GET HER TO GET HELP.
4 Q. TO GET HELP.
5 A. FROM SAFE HOMES.
- 6 Q. ALL RIGHT. YOU DON'T LIKE MICHELLE WILLINGHAM, DO YOU?
7 A. FROM THE SOLICITOR'S OFFICE?
- 8 Q. YES.
9 A. SHE'S NOT -- I DON'T KNOW HER PERSONALLY. I KNOW I
10 HAVE SOME PROBLEMS WITH THEIR OFFICE.
- 11 Q. YOU'VE HAD SOME PROBLEMS WITH THE SEVENTH CIRCUIT
12 SOLICITOR'S OFFICE, HAVEN'T YOU?
- 13 A. UM-HUM (AFFIRMATIVE).
14 Q. IN CONNECTION WITH A CRIMINAL OFFENSE AGAINST YOUR
15 DAUGHTER, IS THAT CORRECT?
- 16 A. YES, SIR.
17 Q. WHAT HAPPENED?
- 18 A. MY DAUGHTER WAS MOLESTED BY MY LANDLORD. AND WHEN I
19 CALLED THE SOLICITOR'S OFFICE TO FIND OUT WHY THE PERSON
20 THAT MOLESTED MY CHILD WAS STILL OPERATING THE BUSINESS,
21 THEY -- THEY COULDN'T DO ANYTHING ABOUT IT.
- 22 Q. ALL RIGHT. AND YOU DON'T LIKE THE GAFFNEY POLICE
23 DEPARTMENT, DO YOU?
- 24 A. I DON'T HAVE ANYTHING AGAINST ALL THEM. I JUST DON'T
25 THINK THAT THEY TREATING MY CHILD FAIRLY.

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- 1 Q. ALL RIGHT. NOW GOING BACK TO YOUR TESTIMONY. I
2 BELIEVE YOU SAID SHORTLY AFTER 4:00 YOU CALLED TWICE.
3 A. THE FIRST TIME I CALLED I LEFT A MESSAGE.
4 Q. RIGHT. THE SECOND TIME YOU CALLED YOU GOT ALLAN
5 SOUTHERN.
6 A. RIGHT.
7 Q. YOU DON'T KNOW WHAT HE WAS DOING AT THE TIME YOU
8 CALLED, DO YOU?
9 A. NO, SIR.
10 Q. YOU HAVE NO IDEA WHAT WAS GOING ON?
11 A. NO, SIR.
12 Q. ALL RIGHT.
13 A. AS FAR AS I KNEW THEY WERE ON THEIR WAY TO MARRIAGE
14 COUNSELING.
15 Q. AND THAT WOULD HAVE BEEN SOME INFORMATION PROVIDED TO
16 YOU BY JUDY SOUTHERN?
17 A. NO, EVERYBODY AT WORK KNEW IT.
18 Q. EVERYBODY AT WORK KNEW IT?
19 A. (AFFIRMATIVE NOD).
20 Q. AND THAT'S BECAUSE SHE TALKED ABOUT IT?
21 A. WELL, HER FRIENDS, YOU KNOW, ALL THE PEOPLE WE WORKED
22 WITH THAT, YOU KNOW, YOU WORK WITH PEOPLE, YOU TALK TO THEM
23 ABOUT THINGS.
24 Q. ALL RIGHT. AND IT'S FAIR TO SAY Y'ALL HAD A FAIRLY
25 DETAILED DISCUSSION THAT MORNING, CORRECT?

- 1 A. SHE AND I DID.
- 2 Q. AND YOU WERE ASKING A LOT OF QUESTIONS ABOUT WHAT WAS
3 GOING ON, RIGHT?
- 4 A. WELL, I WAS CONCERNED.
- 5 Q. YOU WERE CONCERNED? SO YOU ASKED HER QUESTIONS?
- 6 A. I WAS ASKING HER DID SHE NEED TO GET SOME HELP.
- 7 Q. AND THIS WASN'T LIKE -- YOUR CONVERSATIONS WITH HER
8 WEREN'T ALL AT ONE SPECIFIC TIME, WERE THEY?
- 9 A. NO. IT WAS BECAUSE I HAD TO KEEP GOING BACK AND FORTH
10 CHECKING ON THE PERSON I WAS TRAINING.
- 11 Q. AND YOU WOULD COME BACK EVERY SO OFTEN AND ASK HER MORE
12 QUESTIONS ABOUT IT?
- 13 A. UM-HUM (AFFIRMATIVE).
- 14 Q. ALL RIGHT. AND PRIOR TO THE -- PRIOR TO JUNE 7TH, 2000
15 DID MS. SOUTHERN TALK ABOUT HER BOYFRIEND, ROY GLASS?
- 16 A. I KNOW ROY GLASS.
- 17 Q. DID SHE TALK ABOUT HIM?
- 18 A. WELL, I WAS WITH THEM ON OCCASIONS HORSE BACK RIDING AT
19 CAMP CROFT ---
- 20 Q. ALL RIGHT.
- 21 A. --- AND AT THEIR HOUSE.
- 22 Q. YOU SAW THEM TOGETHER?
- 23 A. WE WERE ALL TOGETHER.
- 24 Q. OKAY. Y'ALL DISCUSSED HIM AS WELL, DID YOU NOT?
- 25 A. SOMETIMES.

1 Q. OKAY. FAIR TO SAY Y'ALL DID A LOT OF TALKING DOWN
2 THERE AT THE POST OFFICE, RIGHT?

3 A. WELL, A LOT OF OUR CONVERSATIONS, JUDY AND I WOULD GET
4 OFF IN THE AFTERNOONS AND GO TO THEIR HOUSE. THAT WAS WHY I
5 MOVED MY HORSE OVER THERE. AND WE WOULD RIDE. SO I'D GO
6 RIDE OVER THERE BEFORE MY KIDS GOT OUT OF SCHOOL.

7 MR. SALTER: COURT'S INDULGENCE FOR ONE SECOND.

8 Q. SO BASED ON YOUR CONVERSATIONS YOU WERE AWARE THAT JUDY
9 WAS HAVING AN AFFAIR WITH ROY GLASS, WEREN'T YOU?

10 A. RIGHT BEFORE ALL THIS HAPPENED, YES, SIR.

11 Q. AND YOU WERE ENCOURAGING THAT AFFAIR, WERE YOU NOT?

12 A. ENCOURAGING IT?

13 Q. YES.

14 A. NO. ONE -- ONE TIME ---

15 Q. YOU WERE RIDING HORSES -- EXCUSE ME. GO AHEAD. I'M
16 SORRY.

17 A. NO. WE WERE RIDING HORSES TOGETHER. WHEN I FOUND OUT
18 ABOUT JUDY AND ROY I THOUGHT THEY WERE FRIENDS TO START WITH
19 'CAUSE I DON'T WANT TO BUTT IN SOMEBODY ELSE'S BUSINESS.

20 AND AT THE TIME I HAD MET ALLAN, ONLY ONE TIME, THAT WAS AT
21 THEIR HOUSE, I DIDN'T -- I THOUGHT ROY WAS JUST THERE
22 TEACHING JUDY HOW TO RIDE. THAT WAS THE IMPRESSION THAT I
23 GOT. IN FACT, THAT'S HOW I WAS INVITED TO HER HOUSE.

24 Q. ALL RIGHT. AND DID MS. SOUTHERN -- MS. SOUTHERN HAVE
25 ANY CONVERSATIONS WITH YOU ABOUT ANYONE ELSE SHE MAY HAVE

1 BEEN SEEING?

2 A. NO.

3 Q. NEVER?

4 A. NO. THERE WAS GOSSIP WHERE I WORKED, BUT I TRY NOT TO
5 LISTEN TO GOSSIP.

6 Q. BUT ISN'T THAT WHAT YOU JUST HAVE BEEN RELAYING TO US
7 THIS AFTERNOON?

8 A. THAT WAS A ONE ON ONE CONVERSATION THAT I HAD WITH HER.

9 MR. SALTER: NOTHING FURTHER, YOUR HONOR.

10 THE COURT: IS THERE REDIRECT?

11 MR. BLUME: JUST REAL BRIEFLY.

12 REDIRECT EXAMINATION BY MR. BLUME:

13 Q. YOU WERE ASKED A FEW QUESTIONS ON CROSS EXAMINATION
14 ABOUT YOUR RELATIONSHIP WITH THE SEVENTH CIRCUIT SOLICITOR'S
15 OFFICE DUE TO THE VERY UNFORTUNATE -- THAT HAPPENED WITH
16 YOUR DAUGHTER. THAT HAPPENED LONG AFTER THESE EVENTS YOU
17 TESTIFIED ABOUT TODAY?

18 A. YES, SIR. THAT JUST HAPPENED. IN 2006 IS WHEN I
19 LEARNED OF IT. AND THAT'S BEEN MY DEALINGS WITH THE
20 SOLICITOR'S OFFICE ---

21 Q. AND ---

22 A. --- SINCE FEBRUARY.

23 Q. I'M SORRY. WE'RE NOT THE ONLY PEOPLE YOU'VE TOLD THIS
24 STORY TO, IS THAT CORRECT?

25 A. NO. PEOPLE I WORK WITH KNEW ABOUT IT.

1 Q. AND YOU TOLD THIS TO THE POLICE AFTER THIS HAPPENED?

2 A. OH, I SURE DID.

3 Q. AND YOU ALSO -- AND YOU GAVE A STATEMENT ABOUT THIS?

4 A. I DID.

5 Q. THANK YOU.

6 MR. BLUME: NOTHING FURTHER.

7 THE COURT: ALL RIGHT. ANY OBJECTION TO THE RELEASE OF
8 THE WITNESS?

9 MR. BLUME: NO, SIR.

10 THE COURT: ALL RIGHT, MA'AM, YOU'RE ---

11 MR. SALTER: NO, YOUR HONOR.

12 THE COURT: YOU'RE FREE TO LEAVE. YOU'RE NOT REQUIRED
13 TO LEAVE, BUT YOU'RE FREE TO STEP DOWN. AND YOU MAY LEAVE
14 IF YOU WISH.

15 MS. BROWN: THANK YOU.

16 THE COURT: ALL RIGHT. LADIES AND GENTLEMEN, LET'S
17 TAKE OUR AFTERNOON BREAK AT THIS TIME. WE'LL BE IN RECESS
18 NOW FOR APPROXIMATELY FIFTEEN MINUTES. AND COURT WILL
19 RECONVENE AT THAT TIME. COURT'S IN RECESS.

20 (WHEREUPON COURT WAS IN RECESS AT 3:39 PM)

21 THE COURT: PLEASE EVERYONE, BE SEATED. JUST BE AT
22 EASE. ALL RIGHT. ARE WE READY? THE COURT HAD -- I HAD
23 TAKEN MY COMPUTER IN THE BACK TO REVIEW THE CASE OF
24 BOBBY LEE HOLMES VERSUS SOUTH CAROLINA, WHICH, OF COURSE, IS
25 THE CASE THAT COUNSEL HAS FAMILIARITY WITH. MR. BLUME WENT

1 TO THE UNITED STATES SUPREME COURT ON THAT CASE, I SEE.

2 AND LET ME JUST ASK, TELL ME WHAT DIFFERENCE DOES IT
3 MAKE HERE THAT IN THIS CASE MR. BINNEY INITIALLY HAD
4 CONFESSED TO THE CRIME OR AT LEAST HAD GIVEN A STATEMENT
5 IMPLICATING HIMSELF IN THE CRIME AS OPPOSED TO THE SITUATION
6 IN HOLMES WHERE THERE WAS APPARENTLY NEVER AN ADMISSION, IF
7 YOU WISH TO CALL IT THAT, OF GUILT OR INVOLVEMENT ON THE
8 PART OF THE DEFENDANT. DOES THAT MAKE A DIFFERENCE HERE IN
9 THIS MATTER? MR. BLUME, WHAT'S YOUR POSITION ON THAT?

10 MR. BLUME: WELL, FIRST LET ME SAY I'M NOT A HUNDRED
11 PERCENT POSITIVE WE'RE THROUGH WITH ALL THIS EVIDENCE.
12 WE'RE PROBABLY THROUGH FOR THE DAY.

13 THE COURT: ALL RIGHT.

14 MR. BLUME: BUT STILL THAT DOESN'T MEAN YOUR QUESTION
15 IS IRRELEVANT. SO IF YOU ---

16 THE COURT: WELL, THE REASON I ASK IT IS BECAUSE WHEN
17 WE LEFT I ACTUALLY LEFT ON THE TABLE THE DECISION OF WHETHER
18 I WOULD DETERMINE HAVING FIRST HAD TO HEAR IT IN ORDER TO
19 SEE WHETHER OR NOT IT WOULD BE ADMISSIBLE HERE ON THE ISSUE
20 OF THIRD PARTY GUILT.

21 I RULED THAT IT WAS ADMISSIBLE ON HEARSAY. IT OVERCAME
22 THE HEARSAY OBJECTION, BUT NOT YET THE THIRD PARTY GUILT
23 OBJECTION.

24 MR. BLUME: OKAY. AND I JUST WAS TRYING TO MAKE CLEAR
25 THAT I -- CLEAR THE APPLICANT IS NOT GOING TO FINISH TODAY.

1 THE COURT: I UNDERSTAND.

2 MR. BLUME: AND SO I MAY HAVE ONE MORE, ONE OR TWO MORE
3 ADDITIONAL WITNESSES ON THIS. BUT THAT'S STILL -- I'M STILL
4 HAPPY TO ADDRESS YOUR QUESTION NOW IF YOU WANT ME TO, TO
5 ATTEMPT TO.

6 THE COURT: WHY NOT JUST BRIEFLY TELL ME. I DON'T WANT
7 TO DELAY THE PROCEEDING, BUT THAT WILL HELP AND ASSIST ME IN
8 MY DECISION. DOES THAT MAKE A DIFFERENCE?

9 MR. BLUME: NO. I DON'T THINK IT REALLY MAKES A
10 DIFFERENCE. I MEAN, THE QUESTION IS THAT YOU CAN'T LOOK, I
11 MEAN, THE IMPORT OF HOLMES IN MY VIEW, MY READING OF THE
12 CASE IS THAT YOU HAVE TO LOOK AT THE SORT OF, YOU KNOW, THE
13 TOTALITY OF THE EVIDENCE, NO SINGLE FACTOR IS DISPOSITIVE.
14 THE STATE'S CASE FOR GUILT, FOR EXAMPLE, MR. BINNEY'S
15 STATEMENTS, DOESN'T CARRY, YOU KNOW, DOESN'T CARRY THE DAY
16 IN AND OF ITSELF. AND THOSE STATEMENTS HAVE TO BE
17 CONSIDERED IN LIGHT OF THE TOTALITY OF THE OTHER EVIDENCE
18 AND IN LIGHT OF THE TOTALITY WHAT THE OTHER THEORIES, WHICH
19 WERE AVAILABLE TO COUNSEL OR AVAILABLE AT THIS POINT WERE.
20 AND I THINK DURING THE CROSS EXAMINATION TOMORROW OF
21 TRIAL COUNSEL IT WILL BECOME, I BELIEVE, DURING THE
22 EXAMINATION OR CROSS EXAMINATION OF COUNSEL, IT WILL BECOME
23 CLEAR THAT A THEORY THAT THEY WERE PURSUING. FOR THIS DIDN'T
24 DIRECTLY HAVE TO DO WITH A MURDER FOR HIRE SCHEME OR DIDN'T
25 HAVE TO DO WITH WHETHER THE VICTIM'S HUSBAND DIRECTLY KILLED

1 HER ALTHOUGH THAT WAS A POSSIBILITY WHICH WAS LEFT OPEN, BUT
2 WAS A POSSIBILITY GIVEN THE MARITAL DISCORD, GIVEN THE
3 IMPENDING END OF THE UNION IN THIS CASE AND THE RESULTING
4 FINANCIAL PRESSURES THAT THERE MAY HAVE BEEN -- THEY WERE
5 CONTEMPLATING -- I THINK THE IMPORT OF THEIR QUESTIONS WENT
6 TO MORE OF AN INTERVENING CAUSE ASPECT OF IT.

7 MR. BINNEY MAY HAVE SHOT HER, BUT THEN HE WAS LESS THAN
8 DILIGENT IN PURSUING MEDICAL ATTENTION ON THE THEORY THAT,
9 WELL, THIS WAS SORT OF A NICE, NOT NICE, BUT A -- I DON'T
10 MEAN TO TALK ABOUT IT THAT WAY, BUT, YOU KNOW, A POSSIBLE
11 SOLUTION TO THIS PROBLEM. AND THAT, I THINK, WAS THE GIST
12 WHERE THEY WERE GOING WITH THIS. AND I THINK MS. BROWN'S
13 TESTIMONY IS RELEVANT TO THAT.

14 AND I THINK IT'S ALSO RELEVANT -- IT IS IN REGARD --
15 AND A CASE, YOU KNOW, IT MAY BE THAT IT'S OF COINCIDENCE,
16 BUT A WORLD OF COINCIDENCE WHEN SOMEONE GOES TO WORK ONE DAY
17 AND SAYS THEY'RE GOING TO DIE AND THEY DIE THAT DAY, I THINK
18 THAT IS A RELEVANT FACT THAT THE JURY SHOULD HAVE BEEN
19 PERMITTED, COULD HAVE BEEN PERMITTED, SHOULD HAVE BEEN
20 PERMITTED TO CONSIDER.

21 THE COURT: ALL RIGHT. THANK YOU, MR. BLUME. MR.
22 SALTER, YOU WANT TO WEIGH IN?

23 MR. SALTER: YOUR HONOR, I'M NOT SURE THAT THE FACT
24 THAT THERE'S A STATEMENT DOESN'T WEIGH INTO THE CALCULUS,
25 BUT LET'S ASSUME FOR A MINUTE THAT IT DOES. THE EVIDENCE IN

1 QUESTION IS NOT INCONSISTENT WITH MR. BINNEY'S GUILT.
2 THERE'S ABSOLUTELY NO EVIDENCE WHATSOEVER TYING ALLAN
3 SOUTHERN TO THE OFFENSE OTHER THAN SPECULATION AND HEARSAY
4 AND GOSSIP. AND THAT'S THE PROBLEM I HAVE WITH THE WITNESS'
5 TESTIMONY.

6 THE BEST THAT SHE CAN DO IS GIVE EVIDENCE CONCERNING
7 THE VICTIM'S STATE OF MIND THAT MORNING BASED ON SOMETHING
8 THAT OCCURRED THAT MORNING WHEREAS THE CRIME ITSELF OCCURRED
9 AT 4:00 IN THE AFTERNOON.

10 THERE'S NO EVIDENCE THAT MR. SOUTHERN DELAYED TAKING
11 HIS WIFE TO THE HOSPITAL AFTER HE FOUND HER. THE PROBLEM
12 WAS, ONCE HE GOT TO THE HOME, WAS FINDING HER IN THE FIRST
13 PLACE. HE HAD TO GO SEARCH FOR HER. AND THEN HE HAD TO
14 CARRY HER BACK TO HIS VEHICLE AND THEN TRANSPORT HER TO THE
15 NEAREST HOSPITAL, WHICH HE DID.

16 THIS DOES NOT -- THIS IS JUST SPECULATION AS TO WHETHER
17 OR NOT HE MAY HAVE HAD SOME INVOLVEMENT BASED UPON SOMETHING
18 THAT OCCURRED THAT MORNING IS COMPLETELY UNRELATED TO THE
19 CRIME ITSELF.

20 AGAIN, IT'S A SITUATION WHERE COUNSEL WAS PRECLUDED
21 FROM EVEN SUGGESTING TO THEIR -- TO THE WITNESS BECAUSE
22 THEIR CLIENT HAD ADMITTED HIS GUILT TO THEM. AND THEY WERE
23 PUT -- AND WE WILL TALK A LITTLE -- GO INTO THAT OBVIOUSLY
24 TOMORROW.

25 BUT IN TERMS OF ADMISSIBILITY, AGAIN, THIS IS LIKE

1 STATE OF MIND CONCERNING SOME OTHER EVENT THAT OCCURRED --
2 IT'S JUST HAPPENSTANCE THAT IT OCCURRED THE SAME DAY.

3 THE COURT: ALL RIGHT. ALL RIGHT, THANK YOU. THE
4 COURT RETAINS THIS GENERAL ISSUE UNDER ADVISEMENT ABOUT THE
5 ULTIMATE ADMISSIBILITY OF WHAT MS. BROWN JUST TESTIFIED TO
6 IN THIS PROCEEDING AND WILL CONTINUE TO CONSIDER THAT.
7 PLEASE CALL YOUR NEXT WITNESS, MR. BLUME.

8 MR. BLUME: YES. LIEUTENANT JOHN PURVIS.

9 THE COURT: PLEASE COME FORWARD AND TAKE THE OATH OF A
10 WITNESS.

11 JOHN PURVIS, BEING DULY
12 SWORN TESTIFIED AS FOLLOWS:

13 THE COURT: AND, MR. PURVIS, PLEASE STATE YOUR FULL
14 NAME AND SPELL YOUR LAST NAME FOR US, IF YOU WILL, PLEASE,
15 SIR.

16 MR. PURVIS: JOHN PRESTON PURVIS, P-U-R-V-I-S.

17 THE COURT: ALL RIGHT. COUNSEL, BEFORE WE GO FURTHER,
18 I'M FROM DARLINGTON COUNTY. MR. PURVIS IS FROM DARLINGTON
19 COUNTY. HE IS THE LIEUTENANT WITH THE SHERIFF'S DEPARTMENT
20 AND HAS BEEN FOR MANY YEARS. I'VE WORKED WITH HIM AS I HOLD
21 COURT IN DARLINGTON COUNTY AS I HAVE ON DOZENS UPON DOZENS
22 OF OCCASIONS.

23 AND I JUST WANT BOTH SIDES TO KNOW THAT I KNOW THE
24 WITNESS PROFESSIONALLY AND THAT I KNOW HIM PERSONALLY IN
25 BEING -- LIVING IN DARLINGTON COUNTY, WHICH IS LIKE CHEROKEE

1 COUNTY. IT'S NOT A LARGE COUNTY. AND PEOPLE FROM THE SAME
2 LOCATION KNOW PEOPLE.

3 I DON'T HAVE ANY IDEA WHAT THE WITNESS' TESTIMONY WILL
4 BE, NOT AWARE THAT HE WAS INVOLVED IN THIS PROCEEDING AT
5 ALL. BUT I WISH TO STATE FOR THE RECORD THE FACT THAT I
6 KNOW THE WITNESS. NOW IS THERE ANY OBJECTION TO EITHER SIDE
7 FOR THIS COURT CONTINUING TO PRESIDE OVER THIS MATTER OR TO
8 PRESIDE WHILE THE WITNESS TESTIFIES? WHAT SAYS THE STATE?

9 MR. MABRY: NO OBJECTION, YOUR HONOR.

10 THE COURT: ALL RIGHT. AND WHAT SAYS THE APPLICANT?

11 MR. BLUME: NONE, YOUR HONOR.

12 THE COURT: ALL RIGHT. VERY GOOD. THANK YOU. AND
13 WITH THAT BEING SAID, MR. BLUME, PLEASE PROCEED.

14 DIRECT EXAMINATION BY MR. BLUME:

15 Q. MR. PURVIS, GOOD AFTERNOON.

16 A. GOOD AFTERNOON, SIR.

17 Q. WE APPRECIATE YOU BEING PATIENT. IT TOOK US A WHILE TO
18 GET TO YOU. CAN YOU TELL ME, WHERE DO YOU WORK?

19 A. DARLINGTON COUNTY SHERIFF'S OFFICE.

20 Q. AND WHAT'S YOUR TITLE THERE?

21 A. I'M A TRAINING OFFICER IN CHARGE OF CIVIL PROCESS.

22 Q. OKAY. AND HOW LONG HAVE YOU WORKED AT THE SHERIFF'S
23 DEPARTMENT?

24 A. TWENTY-NINE YEARS.

25 Q. AND WHAT DIFFERENT CAPACITIES HAVE YOU WORKED IN?

- 1 A. I'M SORRY?
- 2 Q. WHAT DIFFERENT JOBS HAVE YOU HELD DURING THE TWENTY-
- 3 NINE YEARS THERE?
- 4 A. WITH THE DEPARTMENT?
- 5 Q. WITHIN THE SHERIFF'S DEPARTMENT.
- 6 A. SERGEANT AND LIEUTENANT OVER THE PATROL DIVISION. I'M
- 7 OVER CIVIL PROCESS TRAINING NOW. BEEN DOING THE TRAINING
- 8 FOR ABOUT TWELVE YEARS.
- 9 Q. AND SO YOU'VE HELD A LOT OF DIFFERENT POSITIONS WITH
- 10 THE SHERIFF'S DEPARTMENT?
- 11 A. THAT'S CORRECT.
- 12 Q. NOW IN YOUR CAPACITY AS AN EMPLOYEE IN THE DARLINGTON
- 13 COUNTY SHERIFF'S DEPARTMENT IS ONE OF THE THINGS Y'ALL DO IS
- 14 INVESTIGATE CRIMES?
- 15 A. YES, SIR.
- 16 Q. AND I GUESS A GOOD PART OF THE TIME YOU CATCH THEM,
- 17 HOPEFULLY?
- 18 A. SOMETIMES, YES.
- 19 Q. WELL IN THAT CAPACITY HAVE YOU EVER COME ACROSS AN
- 20 INDIVIDUAL BY THE NAME OF DANNY RAY EDWARDS?
- 21 A. YES, SIR, I HAVE.
- 22 Q. ARE YOU FAMILIAR WITH MR. EDWARDS?
- 23 A. YES, SIR.
- 24 Q. AND BASED ON YOUR EXPERIENCE IN THE DARLINGTON COUNTY
- 25 SHERIFF'S DEPARTMENT DOES MR. EDWARDS HAVE A HISTORY OF

1 COOPERATING WITH LAW ENFORCEMENT?

2 A. WHEN DANNY IS THE DEFENDANT, ONCE YOU CATCH HIM RED-
3 HANDED, HE DOES AN EXCELLENT JOB. HE WILL COOPERATE. AND
4 DANNY HAD A HABIT ONCE HE WAS CAUGHT HE'D ROLL OVER ON
5 ANYBODY ELSE THAT HE WAS DEALING WITH AT THAT POINT IN TIME.

6 Q. AND WHY WOULD HE DO THAT?

7 A. TO TRY TO LIGHTEN HIS SENTENCE.

8 Q. WAS HE SUCCESSFUL IN DOING THAT?

9 A. YES, SIR.

10 Q. HAS HE, IN YOUR EXPERIENCE, DONE THAT ON NUMEROUS
11 OCCASIONS?

12 A. YES, SIR.

13 Q. HE'S BEEN ABLE TO REDUCE HIS SENTENCE BY COOPERATING
14 WITH LAW ENFORCEMENT ---

15 A. THAT'S CORRECT.

16 Q. --- AGAINST OTHER PEOPLE? THANK YOU.

17 THE COURT: IS THERE CROSS EXAMINATION?

18 MR. MABRY: YES, SIR, VERY BRIEFLY.

19 THE COURT: ALL RIGHT. GO AHEAD.

20 CROSS EXAMINATION BY MR. MABRY:

21 Q. SIR, ISN'T IT ALSO TRUE THAT MR. EDWARDS, WHEN HE'S
22 CAUGHT, HE COOPERATED WITH LAW ENFORCEMENT AS FAR AS
23 LOCATING STOLEN PROPERTY THAT HE HAD STOLEN?

24 A. YES, SIR.

25 Q. IN FACT, IN HIS FEDERAL CASE HE WAS INVOLVED WITH WITH

1 THE US ATTORNEY'S OFFICE THERE WAS SOME LARGE BULLDOZERS AND
2 EQUIPMENT THAT WERE STOLEN, AND THE FIRST THING THAT HE DID
3 OR FIRST THING HE DID WAS HE CONFESSED TO Y'ALL THAT HE TOOK
4 THE STUFF AND TOOK YOU AND SHOWED YOU WHERE IT WAS?

5 A. THAT'S CORRECT.

6 Q. ALL RIGHT. AND IN PART OF CONFESSING TO ALL OF THE
7 STUFF HE STOLE HE NAMED ALL OF THE PEOPLE INVOLVED IN THAT
8 RING OF PEOPLE THAT WERE STEALING PROPERTY?

9 A. THAT'S CORRECT.

10 Q. AND HE WAS AT THE TOP OF THE RING, AM I CORRECT?

11 A. YES, SIR.

12 Q. ALL RIGHT. DO YOU HAVE ANY KNOWLEDGE WHATSOEVER ABOUT
13 HIS TESTIMONY IN THIS CASE?

14 A. NO, SIR.

15 Q. WERE YOU AWARE THAT HE PROVIDED THE SOLICITOR'S OFFICES
16 WITH LETTERS THAT WERE WRITTEN BY MR. BINNEY, ---

17 A. NO, SIR.

18 Q. --- THE DEFENDANT?

19 A. NO, SIR, I HAVE NO KNOWLEDGE.

20 Q. ALL RIGHT. WERE YOU AWARE THAT THE LETTERS THAT HE
21 PROVIDED WERE AUTHENTICATED BY A HANDWRITING EXPERT AS
22 COMING FROM MR. BINNEY?

23 A. NO, SIR.

24 Q. DO YOU KNOW WHETHER OR NOT THE SOLICITOR HERE OR ANY
25 LAW ENFORCEMENT OFFICER PROMISED HIM ANYTHING TO TESTIFY IN

1 THAT CASE?

2 A. I DO NOT, NO, SIR.

3 Q. OKAY. THAT'S ALL I HAVE, SIR. THANK YOU.

4 THE COURT: REDIRECT?

5 MR. BLUME: ONE ON REDIRECT.

6 REDIRECT EXAMINATION BY MR. BLUME:

7 Q. WERE YOU AWARE THAT MR. EDWARDS ALSO TESTIFIED IN THIS
8 CASE THAT HE HAD NEVER, UNDER ANY CIRCUMSTANCES, COOPERATED
9 WITH LAW ENFORCEMENT IN ANY CASE?

10 A. NO, SIR.

11 Q. BASED ON YOUR EXPERIENCE WITH MR. EDWARDS WOULD THAT
12 STATEMENT BE TRUE?

13 A. IT WOULD BE FALSE.

14 Q. THANK YOU.

15 THE COURT: ALL RIGHT. ANY OBJECTION TO THE RELEASE OF
16 THE WITNESS?

17 MR. BLUME: NONE, YOUR HONOR.

18 MR. MABRY: NONE.

19 THE COURT: VERY GOOD. LIEUTENANT, YOU'RE FREE TO GO
20 IF YOU WISH. HAVE A SAFE TRIP BACK.

21 MR. PURVIS: THANK YOU, JUDGE.

22 MR. MABRY: YOUR HONOR, FOR THE RECORD, I WOULD OBJECT
23 TO THE LAST QUESTION OF THE CHARACTERIZATION OF THE
24 TESTIMONY. I THINK IT'LL SPEAK FOR ITSELF WHAT MR. EDWARDS
25 TESTIFIED TO IN THE TRIAL ITSELF.

1 THE COURT: ALL RIGHT. VERY GOOD. OBJECTION NOTED.
2 PLEASE CALL YOUR NEXT WITNESS. ACTUALLY, COUNSEL, LET'S
3 TALK A LITTLE BIT ABOUT SCHEDULING.

4 MR. BLUME: OKAY.

5 THE COURT: HOW MANY WITNESSES DO YOU HAVE REMAINING?

6 MR. BLUME: WELL, YOUR HONOR, WE HAVE, I THINK, TWO WE
7 WERE GOING TO CALL TODAY. THE ONE ISSUE THAT WE DO HAVE IS
8 THAT THE STATE HAS CALLED MR. SAVITZ FROM THE OFFICE OF
9 APPELLATE DEFENSE IN PART BECAUSE WE DIDN'T ANTICIPATE THAT
10 -- IN DISCUSSIONS, IT'S NOT THEIR FAULT, I DON'T THINK IT'S
11 OUR FAULT EITHER, DISCUSSIONS ABOUT THE TESTIMONY WE DIDN'T
12 INTEND OR UNDERSTAND -- BELIEVED THAT DR. NOVICK-BROWN'S
13 TESTIMONY WAS GOING TO GO QUITE SO LONG.

14 THE COURT: ALL RIGHT.

15 MR. BLUME: SO MR. SAVITZ IS HERE FROM COLUMBIA. WE
16 ARE -- IF THE COURT WAS WILLING TO STOP ABOUT THE SAME TIME
17 AS YESTERDAY, WHAT WE WOULD PROBABLY DO IS CALL ONE MORE
18 RELATIVELY SHORT WITNESS AND THEN ALLOW THE STATE TO CALL
19 MR. SAVITZ OUT OF TURN SO HE COULD RETURN TO COLUMBIA.

20 THE COURT: ALL RIGHT.

21 MR. BLUME: BUT THAT, I THINK, IS DEPENDANT ON ...

22 THE COURT: AND AFTER WE DO THAT HOW MANY MORE
23 WITNESSES GOING INTO TOMORROW DO YOU THINK YOU WILL HAVE?

24 MR. BLUME: AND I THINK WE WOULD HAVE ONE, NO MORE THAN
25 TWO OR THREE RELATIVELY BRIEF -- I THINK PROBABLY TOTALLY

1 LESS THAN AN HOUR OF TESTIMONY IN THE MORNING.

2 THE COURT: ALL RIGHT. ANY OBJECTION THEN TO YOU
3 CALLING YOUR WITNESS OUT OF ORDER, MR. SALTER?

4 MR. SALTER: NO, SIR, YOUR HONOR. WHAT HAPPENED WAS WE
5 TRIED TO GET WORD TO MR. SAVITZ THAT WE WOULD CALL HIM AT
6 LUNCHTIME IF WE WERE GOING TO REACH HIM TODAY, AND MR.
7 SAVITZ APPARENTLY MISUNDERSTOOD AND SHOWED UP AT LUNCHTIME.

8 THE COURT: WELL, NO PROBLEM. MR. SAVITZ HAS MANY
9 RESPONSIBILITIES. AND IF WE CAN ACCOMMODATE HIM, REGARDLESS
10 OF HOW IT IS THAT HE MAY HAVE COME TO BE HERE, THAT WILL
11 BENEFIT EVERYONE. SO LET'S GO AHEAD, AND PLEASE CALL YOUR
12 NEXT SHORT WITNESS. AND THEN WE'LL TAKE THE STATE'S WITNESS
13 OUT OF LINE.

14 MR. BLUME: WE'LL CALL ALLISON HAYGOOD.

15 THE COURT: PLEASE COME FORWARD AND TAKE THE OATH OF A
16 WITNESS.

17 ALLISON HAYGOOD, BEING
18 DULY SWORN TESTIFIED AS FOLLOWS:

19 THE COURT: AND, MA'AM, GIVE US YOUR FULL NAME, PLEASE.

20 MS. HAYGOOD: MY NAME IS ALLISON HAYGOOD,
21 H-A-Y-G-O-O-D.

22 THE COURT: AND HOW DO YOU SPELL ALLISON, MA'AM?

23 MS. HAYGOOD: A-L-L-I-S-O-N.

24 THE COURT: THANK YOU.

25 DIRECT EXAMINATION BY MR. BLUME:

ALLISON HAYGOOD - DIRECT EXAMINATION BY MR. BLUME

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- 1 Q. MS. HAYGOOD, GOOD AFTERNOON.
- 2 A. GOOD AFTERNOON.
- 3 Q. CAN YOU TELL ME, DO YOU KNOW MR. BINNEY, ---
- 4 A. YES.
- 5 Q. --- JONATHAN BINNEY?
- 6 A. YES, I DO. HE'S MY COUSIN.
- 7 Q. HE'S YOUR COUSIN. AND HOW IS HE YOUR COUSIN?
- 8 A. HIS MOM AND MY MOM ARE SISTERS.
- 9 Q. OKAY. AND SO HOW MANY COUSINS ARE THERE ON THAT SIDE
- 10 OF THE FAMILY?
- 11 A. THERE'S A TOTAL OF FOUR.
- 12 Q. AND RIGHT NOW WHERE ARE YOU LIVING?
- 13 A. I LIVE IN SAVANNAH, GEORGIA.
- 14 Q. AND HOW LONG HAVE YOU LIVED DOWN THERE?
- 15 A. IT'LL BE THREE YEARS THIS NOVEMBER.
- 16 Q. AND WHAT DO YOU DO?
- 17 A. I ACTUALLY JUST GOT A NEW JOB AT ENTERPRISE. I WORK IN
- 18 THEIR SALES AND MARKETING DEPARTMENT.
- 19 Q. AND PRIOR TO MOVING TO SAVANNAH WHAT WERE YOU DOING?
- 20 A. I WAS ATTENDING CLEAR WATER CHRISTIAN COLLEGE IN CLEAR
- 21 WATER, FLORIDA.
- 22 Q. AND DID YOU FINISH?
- 23 A. YES, SIR, I DID.
- 24 Q. AND SO WHERE DID YOU GROW UP?
- 25 A. I GREW UP IN A SMALL TOWN CALLED MERRILLVILLE, INDIANA.

1 AND I LIVED THERE FOR EIGHTEEN YEARS BEFORE I MOVED TO CLEAR
2 WATER, FLORIDA TO ATTEND COLLEGE.

3 Q. OKAY. NOW YOU SAID MR. BINNEY WAS YOUR COUSIN.
4 GROWING UP DID YOU SEE HIM A LOT?

5 A. YES. HIS MOM AND MY MOM WERE THE CLOSEST SISTERS OUT
6 OF THE FAMILY. SO WE SPENT A LOT OF THE MAJOR HOLIDAYS,
7 THANKSGIVING, CHRISTMAS, SPRING BREAKS, SUMMER VACATIONS,
8 THINGS LIKE THAT WE WOULD SPEND WITH HIS FAMILY.

9 Q. AND OF ALL YOUR COUSINS WAS THERE ONE OF THEM YOU WERE
10 CLOSER TO THAN ANOTHER ONE?

11 A. YES. JONATHAN WAS THE CLOSEST COUSIN.

12 Q. AND WHY WAS THAT?

13 A. MAINLY BECAUSE WE SAW EACH OTHER A LOT. LIKE I SAID,
14 WITH HIS MOM AND MY MOM BEING THE CLOSEST SISTERS WE ALWAYS
15 TOOK FAMILY VACATIONS. I ALWAYS SAW HIM, YOU KNOW,
16 ESPECIALLY WHEN THEY LIVED IN MICHIGAN, WE WERE JUST A FEW
17 HOURS AWAY. SO IT WAS JUST BECAUSE WE TOOK A LOT OF FAMILY
18 VACATIONS TOGETHER.

19 Q. WELL, NOW HOW MUCH OLDER IS JONATHAN THAN YOU?

20 A. HE IS NINE AND A HALF YEARS OLDER THAN ME.

21 Q. AND HOW HAS THAT AFFECTED YOUR RELATIONSHIP WITH HIM?

22 A. ACTUALLY, I MEAN, MAYBE WHEN WE WERE YOUNGER IT
23 AFFECTED IT A LITTLE BIT JUST BECAUSE HE WAS A LOT OLDER,
24 BUT, I MEAN, OVERALL I DON'T REALLY THINK IT AFFECTED IT AT
25 ALL. IT'S JUST MAYBE HE WAS ALLOWED TO DO THINGS LIKE, YOU

1 KNOW, DRIVE AND THINGS LIKE THAT WHEN I WASN'T.

2 Q. WELL, WHEN YOU WERE AROUND MR. BINNEY AS A CHILD WHAT
3 KIND OF THINGS DID Y'ALL DO TOGETHER?

4 A. THE MAIN THINGS WE WOULD DO IS PLAY VIDEO GAMES,
5 COMPUTER GAMES, I MEAN, TYPICAL, YOU KNOW, CHILDHOOD GAMES.
6 YOU KNOW, WE PLAYED BOARD GAMES OR HE HAD A DOG, ANNIE,
7 WHICH I LOVED TO DEATH. AND WE'D ALWAYS TAKE HER, YOU KNOW,
8 ON WALKS OR TEACH HER NEW TRICKS, YOU KNOW, AND JUST THINGS
9 LIKE THAT.

10 Q. BUT HE WAS TEN YEARS OLDER THAN YOU?

11 A. YES.

12 Q. DID THAT EVER STRIKE YOU AS UNUSUAL?

13 A. NO, BECAUSE HE ALWAYS SEEMED TO PLAY ON MY LEVEL WITH
14 ME.

15 Q. CAN YOU THINK OF ANY NICE THINGS MR. BINNEY DID FOR YOU
16 OR JONATHAN DID FOR YOU?

17 A. YES. WHENEVER I WENT TO SEE HIM IN COLUMBUS, OHIO HE
18 HAD THE NEW NINTENDO WITH EVERY GAME POSSIBLE. AND EVERY
19 TIME I'D GET THERE I'D BE LIKE, OH, I WANT TO PLAY, I WANT
20 TO PLAY. AND ONE CHRISTMAS I WAS THERE AND RAN IN THE DOOR.
21 I WAS LIKE, JONATHAN, WHERE'S YOUR NINTENDO? YOU KNOW, I
22 WANT TO PLAY. AND HE WAS LIKE, OH, DON'T WORRY ABOUT IT.
23 AND I WAS LIKE, NO, I WANT TO PLAY. AND HE WAS LIKE, JUST,
24 YOU KNOW, DON'T WORRY ABOUT, CALM DOWN OR WHATEVER. WELL,
25 COME TO FIND OUT HE HAD WRAPPED IT UP AND HE WAS GIVING IT

1 TO ME AS A GIFT FOR CHRISTMAS.

2 Q. ANYTHING ELSE YOU COULD THINK OF HE DID?

3 A. YES. WHEN HE WAS YOUNGER HE BUILT ME A COUPLE OF DOLL
4 HOUSES, WHICH I STILL HAVE. HE BUILT ME A THREE STORY ONE,
5 PUT CARPET ALL THAT TYPE OF STUFF INTO IT. AND THEN I HAVE
6 A SMALLER LIKE COTTAGE TYPE ONE.

7 Q. CAN YOU THINK OF ANY UNUSUAL THINGS THAT HE EVER DID?

8 A. I WOULD SAY THE MOST UNUSUAL THING HE DID WAS ONE TIME
9 WE WERE AT MY GRANDPARENTS, IT MUST HAVE BEEN FOR A HOLIDAY
10 OR SOMETHING, AND ONE NIGHT HE JUST DECIDED TO TAKE OFF.
11 WHEN WE WOKE UP THE BACK DOOR WAS OPEN AND JONATHAN WAS
12 GONE. AND HE HAD NO EXPLANATION.

13 Q. AND WHERE DID IT TURN OUT HE'D BEEN?

14 A. APPARENTLY HE HITCH-HIKED HOME TO MEET SOME GIRL.
15 THAT'S ALL I ---

16 Q. SO HE RAN AWAY?

17 A. YEAH, BASICALLY JUST RAN AWAY.

18 Q. NOW SO YOU SAID YOU'VE SEEN HIM ALL THOSE YEARS. IS HE
19 SOMEBODY YOU CARE ABOUT?

20 A. A LOT.

21 Q. DO YOU STILL KEEP IN CONTACT?

22 A. YES. I GO VISIT HIM ABOUT ONCE A MONTH.

23 Q. WHAT DID YOU DO WHEN YOU FOUND OUT MR. BINNEY, JONATHAN
24 BINNEY, HAD BEEN ARRESTED FOR THIS?

25 A. WE RECEIVED A CALL THE DAY AFTER HE WAS INCARCERATED

1 FOR THIS CURRENT CRIME. AND THAT DAY I GOT ON A PLANE, I
2 FLEW TO COLUMBUS, OHIO. ME AND MY AUNT PACKED UP THE CAR,
3 AND WE DROVE DOWN THAT DAY TO SOUTH CAROLINA TO STAY WITH
4 MELANIE, HIS WIFE.

5 Q. PRIOR TO THIS HAD YOU EVER KNOWN MR. BINNEY TO BE IN
6 TROUBLE BEFORE?

7 A. YES. GROWING UP IT WAS ACTUALLY QUITE COMMON, BUT HE
8 WAS CONSTANTLY IN AND OUT OF HOMES. OUR FAMILY WOULD GO
9 VISIT HIM. I KNOW ONE TIME WE WENT TO SPEND A WEEK WITH MY
10 AUNT AND UNCLE ONE SUMMER, AND WE WENT AND SAW HIM. AND HE
11 WAS IN THE OHIO DEPARTMENT OF CORRECTIONS. WE WENT TO SEE
12 HIM THERE. ALSO WHEN HE WAS IN THE HOME IN ILLINOIS, WE
13 WENT AND SAW HIM THERE TOO.

14 Q. AND DO YOU STILL KEEP IN CONTACT WITH HIM?

15 A. OH, YES.

16 Q. YOU WRITE LETTERS TO HIM?

17 A. YES. I WRITE LETTERS AND CARDS FOR EVERY HOLIDAY YOU
18 CAN IMAGINE, JUST RANDOM FUNNY ONES THAT I SEE AT THE STORE.

19 Q. AND YOU STILL GO SEE HIM?

20 A. YES.

21 Q. NOW AT THE TIME OF MR. BINNEY'S TRIAL WHERE WERE YOU
22 LIVING?

23 A. I WAS LIVING IN CLEAR WATER, FLORIDA.

24 Q. AND DID -- WERE YOU EVER CONTACTED BY ---

25 A. NO, SIR, NO ONE EVER CONTACTED ME.

1 Q. IF YOU HAD BEEN ASKED BY MR. BINNEY'S TRIAL COUNSEL TO
2 TESTIFY AND OFFER BASIC TESTIMONY SIMILAR TO HERE TODAY
3 WOULD YOU HAVE BEEN WILLING TO DO THAT?

4 A. YES, SIR. I WOULD HAVE BEEN THERE IN A HEARTBEAT.

5 Q. NO FURTHER QUESTIONS.

6 THE COURT: CROSS EXAMINATION.

7 MR. SALTER: NOTHING, YOUR HONOR.

8 THE COURT: ALL RIGHT. ANY OBJECTION TO THE RELEASE OF
9 THE WITNESS?

10 (NO RESPONSE)

11 THE COURT: OF COURSE, YOU'RE HERE AND YOU'RE NOT
12 REQUIRED TO LEAVE, BUT YOU'RE FREE TO LEAVE IF YOU WISH.
13 AND YOU MAY STEP DOWN.

14 MS. HAYGOOD: THANK YOU.

15 THE COURT: THANK YOU. ALL RIGHT. THEN BY AGREEMENT
16 OF COUNSEL, MR. SALTER, YOU WISH TO CALL YOUR FIRST WITNESS,
17 PLEASE, SIR?

18 MR. SALTER: YES, SIR. WE'D CALL JOSEPH SAVITZ, III.

19 THE COURT: ALL RIGHT. PLEASE COME FORWARD AND TAKE
20 THE OATH OF A WITNESS.

21 JOSEPH SAVITZ, BEING DULY
22 SWORN TESTIFIED AS FOLLOWS:

23 THE COURT: AND, MR. SAVITZ, PLEASE STATE YOUR FULL
24 NAME AND SPELL YOUR LAST FOR OUR RECORD.

25 MR. SAVITZ: OKAY. MY NAME IS JOSEPH SAVITZ,

1 S-A-V-I-T-Z.

2 DIRECT EXAMINATION BY MR. SALTER:

3 Q. MR. SAVITZ, WHERE AND HOW ARE YOU CURRENTLY EMPLOYED?

4 A. I'M THE CHIEF ATTORNEY AT THE DIVISION OF APPELLATE
5 DEFENSE IN COLUMBIA.

6 Q. ALL RIGHT. AND HOW LONG HAVE YOU BEEN AT APPELLATE
7 DEFENSE?

8 A. FOR TWENTY-TWO YEARS.

9 Q. ALL RIGHT. DO YOU RECALL PRECISELY WHEN YOU -- WHEN
10 YOU STARTED?

11 A. I STARTED JANUARY THE 2ND OF 1985.

12 Q. ALL RIGHT. NOW YOU REPRESENTED MR. BINNEY FOLLOWING
13 HIS CONVICTION FOR MURDER AND BURGLARY OF HIS DEATH
14 SENTENCE, CORRECT?

15 A. THAT'S RIGHT.

16 Q. WHEN DID YOU FIRST BEGIN YOUR REPRESENTATION OF HIM?
17 DO YOU RECALL THAT?

18 A. YOU KNOW, I HAVEN'T REVIEWED ANY OF THE MATERIALS FOR
19 THIS CASE. SO, I MEAN, I DON'T REMEMBER THE EXACT DATE. IT
20 WAS, YOU KNOW, IT WAS A COUPLE OF MONTHS AFTER THE TRIAL, I
21 GUESS, WE GOT THE TRANSCRIPT. PROBABLY MORE THAN A COUPLE
22 OF MONTHS. BUT AS SOON AS WE GOT THE TRANSCRIPT IN THE CASE
23 IT WOULD HAVE BEEN ASSIGNED TO ME.

24 Q. THIS WOULD HAVE BEEN BACK IN 2002 UNTIL -- YOU WOULD
25 HAVE CONTINUED REPRESENTATION UNTIL AFTER YOU -- UNTIL AFTER

1 THE STATE SUPREME COURT FILED AN OPINION?

2 A. AND WE SOUGHT CERT IN THE US SUPREME COURT AS WELL.

3 Q. OKAY. AND YOU WOULD HAVE CONTINUED TO REPRESENT HIM AT
4 THAT?

5 A. THAT'S RIGHT.

6 Q. ALL RIGHT. DO YOU RECALL DURING THAT TIME PERIOD
7 BEFORE YOU REPRESENTED MR. BINNEY ROUGHLY HOW MANY DEATH
8 PENALTY CASES YOU HAD ---

9 A. YOU KNOW, ANOTHER GUY, BOB DUGAN, AND I DO PRETTY MUCH
10 ALL OF THE CAPITAL APPEALS IN THE STATE. IT'S -- I DID A
11 BUNCH BEFORE THEN, I'VE DONE A BUNCH SINCE THEN. I USUALLY
12 HAVE ABOUT, YOU KNOW, FOUR OR FIVE GOING AT ANY ONE TIME.
13 BUT I DON'T REMEMBER HOW MANY I DONE BEFORE THAT. A GOOD
14 MANY.

15 Q. ALL RIGHT. DO YOU RECALL WHEN YOU FIRST HANDLED YOUR
16 VERY FIRST DEATH PENALTY APPEAL?

17 A. THAT WOULD HAVE BEEN PROBABLY IN 1985. .

18 Q. ALL RIGHT, SIR. WHICH ONE WOULD THAT HAVE BEEN?

19 A. JESSIE KEITH BROWN.

20 Q. WOULD THAT HAVE BEEN A SEVENTH CIRCUIT CASE?

21 A. IT COULD BE.

22 Q. OUT OF SPARTANBURG COUNTY?

23 A. THAT'S RIGHT.

24 Q. AND I BELIEVE YOU HAD ALSO REPRESENTED THE DEFENDANT
25 KEVIN HAWKINS, DID YOU NOT?

JOSEPH SAVTZ - DIRECT EXAMINATION BY MR. SALTER

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- 1 A. THAT'S RIGHT.
- 2 Q. HOW ABOUT DEMETRIUS GATHERS, IS THAT ---
- 3 A. YEP.
- 4 Q. OKAY. THAT WAS ALSO A CAPITAL CASE?
- 5 A. THAT'S RIGHT.
- 6 Q. HOW ABOUT WILLIAM KEITH VICTOR?
- 7 A. YES.
- 8 Q. DID YOU REPRESENT RICKY TIM CALDWELL?
- 9 A. YES, I DID.
- 10 Q. HOW ABOUT MITCHELL SIMS?
- 11 A. YES, I DID.
- 12 Q. OKAY. LARRY EUGENE HALL?
- 13 A. YES.
- 14 Q. I THINK ROBERT SUTHERLAND?
- 15 A. YES, I DID.
- 16 Q. ALL RIGHT. AND YOU'VE ALSO REPRESENTED TIMOTHY ROGERS,
- 17 I BELIEVE, TWICE, DID YOU NOT?
- 18 A. THAT SOUNDS RIGHT, YEAH.
- 19 Q. WERE THERE OTHERS THAT I'VE NEGLECTED TO MENTION?
- 20 A. YEAH, BUT I CAN'T THINK OF THEM OFF THE TOP OF MY HEAD.
- 21 Q. OKAY.
- 22 A. THERE ARE MORE THAN THAT.
- 23 Q. NOW THE RECORD BEFORE HIS HONOR INCLUDED THE FINAL
- 24 BRIEF THAT YOU FILED ON MAY 28TH, 2004. DO YOU REMEMBER THE
- 25 ISSUE YOU RAISED?

1 A. THERE WAS AN ISSUE ABOUT THE CONFESSION OR THE POLICE
2 OFFICER SENT HIM A NOTE SAYING IF YOU WANT TO TALK TO ME
3 WAIVE YOUR RIGHT TO COUNSEL OR YOU HAVE TO WAIVE YOUR RIGHT
4 TO COUNSEL OR SOMETHING LIKE THAT. AND THAT WAS -- THAT'S
5 THE ISSUE I REMEMBER. I DON'T REMEMBER IF THERE WERE ANY
6 OTHERS OR -- BUT THAT -- I DO REMEMBER THAT ISSUE.

7 Q. AND YOU RAISED THAT AS A 5TH AMENDMENT CLAIM?

8 A. I BELIEVE SO, YEAH.

9 Q. ALL RIGHT. DO YOU RECALL WHY YOU RAISED THAT ISSUE?

10 A. I THOUGHT IT WAS A GOOD ISSUE. I THOUGHT IT WAS A
11 WINNING ISSUE.

12 Q. ALL RIGHT. DO YOU RECALL WHETHER OR NOT YOU CONSIDERED
13 RAISING ANY OTHER ISSUES ON APPEAL?

14 A. YEAH, YOU CONSIDER RAISING ALL ISSUES THAT YOU SEE.
15 AND I DON'T REMEMBER, YOU KNOW, I DON'T REMEMBER THIS CASE,
16 ANY ISSUES THAT I'VE BEEN TOLD, SOME ISSUES THAT OCCURRED IN
17 THE CASE. I'M SURE I CONSIDERED THEM AT THE TIME. I DIDN'T
18 RAISE THEM.

19 Q. AND WHEN YOU SAY YOU CONSIDERED THEM AT THE TIME, BUT
20 DIDN'T RAISE THEM.

21 A. RIGHT.

22 Q. COULD YOU HAVE NOT RAISED THEM BECAUSE YOU DIDN'T THINK
23 THEY WERE VIABLE ISSUES OR ----

24 A. YEAH, THAT WOULD BE THE REASON. I MEAN, I WOULDN'T
25 ABANDON AN ISSUE I THOUGHT WAS A WINNER.

1 Q. ALL RIGHT. WILL YOU PLEASE EXPLAIN TO THE COURT, I
2 MEAN, I'VE GONE THROUGH THIS WITH YOU BEFORE.

3 A. RIGHT.

4 Q. WILL YOU PLEASE EXPLAIN TO THE COURT HOW YOU GO ABOUT
5 PREPARING YOUR BRIEFS ON APPEAL?

6 A. WELL, WHAT WE DO IS WE GET THE TRANSCRIPT OF THE TRIAL
7 AND READ IT AND THEN DO SOME, YOU KNOW, PICK OUT THE ISSUES
8 WE WANT TO RAISE AND DO THE RESEARCH, THEN WRITE THE BRIEF.
9 AND ALL OF THESE CASES ARE ARGUED IN THE SUPREME COURT. SO
10 WE WENT AND ARGUED THE CASE. I THINK YOU CAN WATCH THE
11 ARGUMENT ON LINE.

12 AND I THOUGHT THE ARGUMENT WENT WELL. I THOUGHT WE HAD
13 A GOOD CHANCE OF WINNING. WE LOST. AND I SOUGHT CERT IN
14 THE US SUPREME COURT. AND WE LOST THAT AS WELL.

15 Q. ALL RIGHT.

16 THE COURT: COUNSEL, LET ME ASK A QUESTION.

17 MR. SALTER: SURE.

18 THE COURT: DO YOU RECALL WHAT THE BREAKDOWN OF THE
19 JUSTICES WAS? WAS IT UNANIMOUS?

20 A. I DON'T -- I DON'T REMEMBER.

21 THE COURT: ALL RIGHT. THANK YOU.

22 Q. ONE OF THE ALLEGATIONS IN THE AMENDED APPLICATION,
23 WHICH WE RECEIVED LAST WEEK IS THAT YOU DID NOT RAISE THE
24 TRIAL JUDGE'S RULING OF COUNSEL'S MOTION TO SUPPRESS A
25 PHOTOGRAPH OF THE VICTIM FROM THE CRIMINAL SEXUAL CONDUCT

1 CASE, ---

2 A. RIGHT.

3 Q. --- THAT BEING THE THREE MONTH OLD DAUGHTER ---

4 A. RIGHT.

5 Q. --- OF MR. BINNEY. DO YOU RECALL THE PHOTOGRAPH IN
6 QUESTION THAT WE'RE TALKING ABOUT?

7 A. I DON'T THINK I EVEN LOOKED AT THE PHOTOGRAPH IN
8 QUESTION. I'VE RAISED ISSUES DEALING WITH PHOTOGRAPHS
9 BEFORE, THAT THEY WERE INFLAMMATORY AND PREJUDICIAL.

10 THE LAST TIME THAT I RAISED A PHOTOGRAPH ISSUE WOULD
11 HAVE BEEN IN JOE GARDNER'S CASE. THE VICTIM IN THAT CASE
12 WAS SHOT, I THINK, FIVE TIMES IN THE FACE. SHE WAS A MESS.
13 THE PICTURE WAS BAD.

14 AND I HAVEN'T HAD A WHOLE LOT OF LUCK RAISING
15 PHOTOGRAPHIC ISSUES WITH THE SUPREME COURT. AND I DOUBT
16 THAT -- I DON'T THINK I'VE RAISED ONE SINCE THEN. THEY
17 DON'T REALLY -- THEY REALLY HAVEN'T RECENTLY BEEN INCLINED
18 TO REVERSE ON PHOTOGRAPHS.

19 AND YOU ALWAYS RISK THE CHANCE OF INFLAMING THE COURT
20 WHEN THE PHOTOGRAPHS APPEAR IN FRONT OF THEM IF YOU RAISE
21 THEM AS AN ISSUE. BUT I DON'T REMEMBER LOOKING AT THESE
22 PHOTOGRAPHS. I DON'T REMEMBER THINKING ABOUT THE ISSUE OR
23 ANYTHING.

24 Q. DO YOU RECALL WHAT THE REASONING WAS BEHIND NOT RAISING
25 COUNSEL'S MOTION TO EXCLUDE SOME CHILD PORNOGRAPHY THAT WAS

1 SEIZED?

2 A. NO.

3 Q. YOU DON'T?

4 A. I REMEMBER THAT AS AN ISSUE, BUT I DON'T REMEMBER, YOU
5 KNOW, WHAT, I MEAN, ALL OF THESE ARE -- THIS IS GOING A
6 WHILE BACK. AND I'VE HANDLED BUNCHES OF CASES, NOT JUST
7 CAPITAL CASES, BUT BUNCHES OF APPEALS SINCE THEN. SO I
8 REMEMBER THAT BEING AN ISSUE. I REMEMBER THE JUDGE SHRANK
9 THEM DOWN INTO TINY LITTLE PICTURES SO THEY DIDN'T HAVE ALL
10 OF THEM IN FRONT OF THEM. BUT WHY I DIDN'T RAISE THAT, I
11 MEAN, OBVIOUSLY I DIDN'T THINK IT WAS A GOOD ISSUE OR A
12 MERITORIOUS ISSUE AT THE TIME.

13 MR. SALTER: I BEG THE COURT'S INDULGENCE.

14 Q. DO YOU RECALL WHY YOU DID NOT RAISE A QUESTION
15 CONCERNING THE ADMISSIBILITY, I'M SORRY, QUESTION CONCERNING
16 THE AMENDMENT OF THE INDICTMENT AFTER THE VERDICT WAS
17 RETURNED?

18 A. I DON'T -- I DON'T EVEN REMEMBER THAT ISSUE AT ALL. SO
19 I -- I, YOU KNOW, I'VE TALKED ABOUT IT TODAY. I DON'T
20 REMEMBER THAT BEING AN ISSUE. I DON'T REMEMBER, YOU KNOW,
21 IF YOU'RE ASKING ME NOW WOULD I RAISE IT IN RETROSPECT, I
22 PROBABLY WOULDN'T RAISE IT AGAIN.

23 Q. AND WHY IS THAT?

24 A. I JUST DIDN'T THINK IT WAS THAT GOOD OF AN ISSUE. BUT,
25 YOU KNOW, I MEAN, IT'S LIKE MY TESTIMONY AS YOU KNOW IN

1 THESE THINGS IS ALWAYS THE SAME. IT REALLY DOESN'T MATTER,
2 YOU KNOW, WHAT I THINK ABOUT THE ISSUE. IF I MISSED A
3 MERITORIOUS ISSUE, THEN THAT'S INEFFECTIVE ASSISTANCE OF
4 COUNSEL. AND, I MEAN, THAT'S MY POSITION GENERALLY ABOUT
5 THESE THINGS.

6 Q. ALL RIGHT. AND YOU'RE AWARE OF THE STATE SUPREME
7 COURT'S DECISION IN STATE VERSUS GENTRY?

8 A. NO.

9 Q. YOU'RE NOT AWARE ---

10 A. WHICH ONE ARE YOU -- WHICH ONE ARE YOU TALKING ABOUT?

11 Q. GENTRY.

12 A. OH, GENTRY, YES. YES. I'M SORRY, I DIDN'T ---

13 Q. WILL YOU PLEASE ---

14 A. --- UNDERSTAND YOU.

15 Q. --- EXPLAIN TO THE COURT WHAT THE COURT HELD IN GENTRY?

16 A. THE GENTRY CASE HOLDS THAT THE INDICTMENT IS NOT A
17 SUBJECT MATTER JURISDICTION DOCUMENT, IT IS A NOTICE
18 DOCUMENT AND THAT THE ONLY FUNCTION IT PROVIDES IS TO
19 PROVIDE NOTICE TO A DEFENDANT OF WHAT HE'S CHARGED WITH, NOT
20 TO INFER SUBJECT MATTER JURISDICTION ON THE COURT.

21 Q. ALL RIGHT. NOW WITH RESPECT TO THE QUESTION OF WHETHER
22 OR NOT YOU WOULD HAVE RAISED THE ADMISSIBILITY OF THE
23 PHOTOGRAPHS, ---

24 A. RIGHT.

25 Q. --- WE'RE TALKING ABOUT EVIDENCE THAT CAME OUT IN THE

1 PENALTY PHASE OF THE TRIAL, CORRECT?

2 A. THAT'S RIGHT.

3 Q. AND WHAT IS YOUR UNDERSTANDING OF THE PURPOSE OF THE
4 PENALTY PHASE?

5 A. WELL, THE PENALTY PHASE, THE PARAMETERS OF THE PENALTY
6 PHASE ARE MUCH BROADER THAN THE GUILT/INNOCENCE PHASE. YOU
7 CAN INTRODUCE PHOTOGRAPHS IN THE PENALTY PHASE THAT WOULDN'T
8 POSSIBLY BE ALLOWED AT THE GUILT/INNOCENCE PHASE. AND, LIKE
9 I SAY, I'VE RAISED, YOU KNOW, PHOTOGRAPHIC ISSUES BEFORE AND
10 JUST HAVE NOT HAD A LOT OF LUCK WITH THEM NO MATTER HOW BAD
11 THE PHOTOGRAPHS ARE IF THEY COME IN AT THE SENTENCING PHASE.

12 AND SO IT'S JUST -- I DON'T KNOW IF YOU CALL IT TO SAY
13 STRATEGY 'CAUSE I DIDN'T LOOK AT THE PICTURES IN THIS CASE,
14 BUT AS A PRACTICE I DON'T NORMALLY RAISE PHOTOGRAPHIC ISSUES
15 AND HAVEN'T DONE SO SINCE THE GARDNER CASE.

16 Q. ALL RIGHT. WITH RESPECT TO COUNSEL'S MOTION PERTAINING
17 TO THE PORNOGRAPHY, THAT WAS BASED UPON A MOTION TO
18 SUPPRESS.

19 A. RIGHT.

20 Q. AS A RESULT OF THE SEARCH?

21 A. IT MAY HAVE BEEN. I DON'T REMEMBER.

22 MR. SALTER: YOUR HONOR, MAY I APPROACH THE WITNESS?

23 THE COURT: YOU MAY.

24 Q. I DIRECT YOUR ATTENTION TO PAGE 2887 AT THE BEGINNING
25 OF LINE 9 AND GOING THROUGH LINE 19. JUST READ THAT TO

1 YOURSELF, SIR.

2 A. OKAY. RIGHT.

3 Q. DOES THAT REFRESH YOUR RECOLLECTION AS TO THE
4 CIRCUMSTANCES SURROUNDING THE SEARCH?

5 A. RIGHT.

6 Q. WHAT HAPPENED?

7 A. WELL, IT LOOKS LIKE THEY JUST GOT A SEARCH WARRANT AND
8 SEIZED, YOU KNOW, THE COMPUTER WITH THE PICTURES ON IT.

9 Q. AND DOES NOT THE PASSAGE I JUST DIRECTED YOUR ATTENTION
10 TO ALSO INDICATE THAT MS. BINNEY GAVE HER CONSENT TO THE
11 SEARCH?

12 A. THAT'S WHAT IT LOOKS LIKE.

13 Q. ALL RIGHT. I DON'T BELIEVE I HAVE ANYTHING FURTHER,
14 YOUR HONOR.

15 THE COURT: AND CROSS EXAMINATION.

16 CROSS EXAMINATION BY MS. JOHNSON:

17 Q. MR. SAVITZ, YOU WOULD AGREE THAT EVEN A VERY
18 EXPERIENCED COUNSEL COULD BE INEFFECTIVE ON SOME CASES?

19 A. OH, YEAH. I MEAN, I'VE BEEN INEFFECTIVE BEFORE. AND,
20 YOU KNOW, IT'S -- LIKE I SAY, IT'S ME AND ANOTHER GUY DOING
21 ALL OF THE CAPITAL APPEALS IN THE STATE. SO, YOU KNOW,
22 THERE'S A HIGHER CHANCE THAT ONE OF US IS GOING TO BE
23 INEFFECTIVE THAN THERE IS JUST UNEXPERIENCED COUNSEL
24 HANDLING ---

25 Q. AND WHEN YOU SAY YOU'VE BEEN INEFFECTIVE BEFORE YOU'RE

1 NOT JUST TALKING ABOUT YOUR OWN PERSONAL ASSESSMENT?

2 A. NO, NO, I'VE BEEN FOUND INEFFECTIVE IN A CAPITAL CASE
3 BEFORE.

4 Q. AND YOU THINK THAT WOULD NOT BE UNUSUAL EVEN ---

5 A. NO.

6 Q. --- FOR COMPETENT COUNSEL ---

7 A. NO.

8 Q. --- TO BE INCOMPETENT AND INEFFECTIVE ---

9 A. NO, NO. NO, THAT HAPPENS. YOU DO A LOT OF THESE
10 CASES, YOU'RE GOING TO BE INEFFECTIVE AT SOME POINT. IT
11 HAPPENS.

12 Q. NOW SOME LAWYERS MIGHT SAY I'D GIVE UP A WINNING ISSUE
13 TO PUT ANOTHER ISSUE FORWARD. WOULD YOU EVER MAKE A
14 STRATEGIC DECISION TO GIVE UP AN ISSUE THAT YOU FELT WAS A
15 WINNING ISSUE?

16 A. THE, I MEAN, IF YOU -- IF YOU ENDED UP WINNING, I GUESS
17 IT WOULD MAKE IT MOOT WHETHER OR NOT YOU HAD ABANDONED A
18 WINNING ISSUE. BUT THERE IS NEVER A REASON TO ABANDON A
19 WINNING ISSUE IN FAVOR OF A BUNCH OF ISSUES THAT LOSE. SO,
20 NO, A STRATEGIC DECISION TO LOSE THE APPEAL IS NOT A VALID
21 STRATEGIC DECISION.

22 Q. AND EVEN IF YOU THOUGHT YOU HAD TWO WINNING ISSUES, ---

23 A. RIGHT.

24 Q. --- YOU DO NOT RECALL ANY OCCASION ON WHICH YOU GAVE UP
25 A WINNING ISSUE IN FAVOR OF ANOTHER ISSUE?

1 A. I'VE NEVER NOT RAISED AN ISSUE THAT I THOUGHT WOULD BE
2 A WINNER.

3 Q. AND WITH RESPECT TO THESE PHOTOS YOU SAID THAT YOU HAD
4 NOT RAISED A PHOTO ISSUE SINCE GARDNER?

5 A. RIGHT.

6 Q. BUT YOU DON'T BELIEVE YOU ACTUALLY LOOKED AT THE PHOTOS
7 IN THIS CASE?

8 A. I'M SURE, BUT, I MEAN, AS YOU'VE DESCRIBED THEM TO ME
9 I'M SURE I WOULD HAVE REMEMBERED HAVING SEEN THEM. AND I
10 DON'T BELIEVE THAT I SAW THEM. AND, YOU KNOW, PART OF, LIKE
11 I SAY, PART OF THE REASON IS TO SEE THEM, YOU HAVE TO GET
12 THEM USUALLY SHIPPED TO THE COURT. AND, YOU KNOW, THERE'S
13 ALWAYS A CHANCE THAT THE COURT'S GOING TO BE SITTING THERE
14 DECIDING THE CASE, YOU KNOW, WITH THE PHOTOS IN FRONT OF
15 THEM. SO AS A PRACTICE -- I DON'T KNOW IF YOU CAN SAY I
16 LOOKED AT THEM AND DECIDED AS A STRATEGY NOT TO RAISE IT.
17 BUT AS A PRACTICE I DON'T NORMALLY RAISE PHOTOGRAPHIC ISSUES
18 ON APPEALS.

19 Q. BUT YOU DIDN'T MAKE ANY PARTICULAR DECISION IN THIS
20 CASE ---

21 A. NOT IN THIS CASE, NO. NO INDIVIDUALIZED ---

22 Q. AND YOU DON'T RECALL MAKING A DECISION NOT TO RAISE THE
23 ISSUE OF THE OTHER PHOTOS, THE PHOTOS THAT WERE TAKEN ---

24 A. FROM THE COMPUTER? NO. I REMEMBER THAT HAPPENING. I
25 REMEMBER THEM COMING IN. I REMEMBER THERE BEING AN

1 OBJECTION OF SOME SORT. BUT I DIDN'T, YOU KNOW, I JUST -- I
2 DIDN'T RAISE IT. I DIDN'T THINK IT WAS A GOOD ISSUE.

3 Q. AND DO YOU REMEMBER MAKING ANY DECISION ABOUT AMENDING
4 THE INDICTMENT?

5 A. I ---

6 Q. THE ISSUE ABOUT AMENDING ---

7 A. NO. I DIDN'T REMEMBER THAT AS EVEN BEING AN ISSUE IN
8 THE CASE UNTIL YOU REMINDED ME EARLIER. I STILL DON'T KNOW
9 THAT THAT'S THAT GOOD AN ISSUE THAT I WOULD, YOU KNOW, I
10 LOST. IF I HAD IT TO DO OVER AGAIN WOULD I RAISE SOME OF
11 THESE ISSUES? YES, PROBABLY. THIS ONE, I DON'T KNOW. I
12 DON'T THINK SO.

13 Q. NOW TRIAL COUNSEL RAISED A QUESTION ABOUT THE
14 ADMISSIBILITY OF THE CONFESSIONS ON BOTH THE 5TH AND THE 6TH
15 ---

16 A. RIGHT.

17 Q. --- AMENDMENT GROUNDS. DO YOU RECALL THAT?

18 A. I DIDN'T UNTIL I WAS REMINDED OF IT, BUT I DO NOW.

19 Q. AND DO YOU RECALL THAT AT THE TIME THAT THESE
20 SUBSEQUENT STATEMENTS WERE MADE THAT DON THOMPSON WAS
21 REPRESENTING -- HAD BEEN APPOINTED TO REPRESENT MR. BINNEY
22 ON CAPITAL CHARGES?

23 A. IT'S -- I CAN'T REMEMBER -- I REMEMBER THAT HE SHOWED
24 UP DURING THE INTERROGATION AND WAS THROWN OUT, BUT WHAT THE
25 SEQUENCE OF HOW EVERYTHING HAPPENED, NO, I DON'T REMEMBER

1 IT.

2 Q. AND IF THE TRIAL COURT FOUND THAT HE WAS INDEED -- HAD
3 BEEN APPOINTED TO REPRESENT HIM AT THAT TIME THAT WOULD BE
4 CONSISTENT WITH YOUR RECOLLECTION, YOU JUST DON'T ---

5 A. THAT'S RIGHT. I'M NOT -- I'M NOT DISPUTING THAT THAT'S
6 WHAT HAPPENED.

7 Q. IF YOU WERE THINKING ABOUT RAISING A 5TH AMENDMENT AND
8 A 6TH AMENDMENT ISSUE THERE WOULD BE DIFFERENT STANDARDS FOR
9 WHAT IT TAKES TO WIN EACH OF THOSE CLAIMS?

10 A. THAT'S RIGHT.

11 Q. AND DO YOU SEE ANY CONFLICT BETWEEN RAISING BOTH A 5TH
12 AND A 6TH AMENDMENT ---

13 A. NO. THERE'S A -- I DON'T REMEMBER RESEARCHING THE 6TH
14 AMENDMENT ISSUE HERE AND DECIDING NOT TO RAISE IT. I DON'T
15 SEE ANY REASON -- THERE'S NO REASON THAT I COULDN'T HAVE
16 RAISED BOTH OF THEM. I DON'T REMEMBER IF I RESEARCHED THE
17 LAW AND FOUND OUT THAT IT DIDN'T SUPPORT ME OR WHAT. I JUST
18 -- BUT, I MEAN, NO, I COULD HAVE RAISED BOTH OF THEM.

19 Q. YOU DON'T SEE ANY CONFLICT ---

20 A. OH, NO.

21 Q. --- BETWEEN RAISING ---

22 A. NO.

23 Q. --- RAISING THOSE TWO ---

24 A. NO, NOT AT ALL.

25 Q. --- ISSUES? TRIAL COUNSEL ALSO RAISED -- MADE A MOTION

1 THAT THE DEATH PENALTY NOT BE APPLICABLE TO MR. BINNEY
2 BECAUSE HE WAS MENTALLY ILL, ---
3 A. RIGHT.
4 Q. --- CITING ATKINS VERSUS VIRGINIA.
5 A. RIGHT.
6 Q. YOU'RE FAMILIAR WITH THAT ---
7 A. YES.
8 Q. AND ATKINS HOLDS THAT PERSONS WITH MENTAL RETARDATION
9 ---
10 A. YES.
11 Q. --- CANNOT BE SUBJECT ---
12 A. THAT'S RIGHT.
13 Q. --- TO THE DEATH PENALTY. DO YOU RECALL MAKING A
14 STRATEGIC DECISION NOT TO RAISE THAT ISSUE?
15 A. YOU KNOW, A LOT OF THESE ARE LIKE WHEN YOU SAY
16 STRATEGIC DECISIONS, DO I RECALL MAKING A CONSCIOUS DECISION
17 NOT TO PURSUE THIS ISSUE? NO, I DON'T REMEMBER MAKING A
18 CONSCIOUS DECISION NOT TO PURSUE THIS ISSUE. AND, YOU KNOW,
19 I DON'T KNOW, AGAIN, IF I HAD IT TO DO OVER AGAIN IF I'D
20 RAISE THIS OR NOT. I DON'T KNOW.
21 Q. WELL, THINKING ABOUT IT TODAY DO YOU -- CAN YOU THINK
22 OF ANY REASON THAT IT WOULD DISADVANTAGE MR. BINNEY FOR YOU
23 TO RAISE THAT ISSUE?
24 A. YOU KNOW, I HAVE A DIFFERENT -- MY IDEA IS MORE TOWARD
25 WINNING THE CASE IN THE SUPREME COURT. AND I GUESS FROM

1 BEING IN THE, YOU KNOW, THE FOURTH CIRCUIT AND OUR CIRCUIT
2 HAS NOT BEEN THAT KIND TO CAPITAL DEFENDANTS, MY INCLINATION
3 IS NOT -- A LOT OF PEOPLE THINK THAT YOU OUGHT TO JUST RAISE
4 EVERYTHING AND LET THEM FIGURE OUT WHAT THE, YOU KNOW, WHAT
5 TO DO. AND IF I HAD A SMALLER CASE LOAD, YOU KNOW, I MIGHT
6 BE MORE INCLINED TO DO THAT AS WELL. BUT, YOU KNOW, WITH
7 THE EXTENT -- I JUST -- I PICK THE ISSUES THAT I THINK WILL
8 WIN AND RAISE THOSE. AND ---

9 Q. BUT THERE'S NO DISADVANTAGE THAT YOU COULD SEE WITH
10 RESPECT TO YOUR OTHER ISSUES IN RAISING THIS ISSUE?

11 A. POSSIBLY SO. I CAN'T, I MEAN, IN THIS PARTICULAR CASE.
12 BUT, I MEAN, IN SOME CASES RAISING A BUNCH OF ISSUES, YOU
13 RISK THE -- I'VE RAISED -- I'VE HANDLED LOTS OF DEATH
14 PENALTY CASES THAT I -- WELL, NOT A LOT, SEVERAL, THAT I
15 HAVE WON THAT I RAISED JUST ONE ISSUE. AND THAT -- YOU JUST
16 PUT THAT ONE ISSUE IN FRONT OF THEM WHEREAS IF I'D RAISED
17 TWENTY ISSUES YOU RISK -- AND I'VE HAD THAT HAPPEN TOO. YOU
18 LOSE THE GOOD ISSUE BY RAISING A BUNCH. YOU KNOW, SO
19 THERE'S ALWAYS THAT. I'M NOT SAYING THAT'S THIS CASE, BUT
20 THAT IS A CONSIDERATION.

21 Q. BUT YOU DON'T RECALL THIS BEING A CASE IN WHICH THERE
22 WERE TWENTY ISSUES THAT YOU WERE ---

23 A. I DON'T REMEMBER THIS BEING A CASE THAT THERE WERE A
24 LOT OF REALLY GOOD ISSUES IN IT. NO, I DON'T.

25 Q. THANK YOU.

1 THE COURT: AND REDIRECT.

2 MR. SALTER: YES, YOUR HONOR, BRIEFLY.

3 REDIRECT EXAMINATION BY MR. SALTER:

4 Q. YOU WERE ASKED ABOUT THE FAILURE TO RAISE A 6TH
5 AMENDMENT CHALLENGE.

6 A. RIGHT.

7 Q. ALL RIGHT. WHAT WAS YOUR UNDERSTANDING OF THE FACTS
8 SURROUNDING THE OR WHAT THE SUPREME COURT VIEWED AS THE
9 FACTS SURROUNDING MR. BINNEY'S STATEMENT?

10 A. I'M SORRY. I DON'T UNDERSTAND ---

11 Q. DID THEY ---

12 A. --- THE QUESTION.

13 Q. ALL RIGHT. I APOLOGIZE. DID NOT THE STATE SUPREME
14 COURT FIND THAT MR. BINNEY HAD INITIATED CONTACT?

15 A. THAT'S CORRECT.

16 Q. SO EVEN IF HIS 6TH AMENDMENT RIGHT TO COUNSEL HAD
17 ATTACHED THEY FOUND THAT HE WAS THE ONE THAT INITIATED THE
18 CONTACT?

19 A. YOU KNOW, I HAVEN'T LOOKED AT THE 6TH AMENDMENT IN SO
20 LONG, I DON'T KNOW, I MEAN, THAT MAY BE TRUE. THAT'S
21 ENTIRELY POSSIBLE.

22 Q. ALL RIGHT. AND YOUR -- YOU DO RECALL IN THE RECORD
23 THAT WHEN THE APPOINTED COUNSEL, MR. THOMPSON, CAME IN THE
24 ROOM MR. BINNEY SENT HIM OUT, CORRECT?

25 A. YES.

1 Q. AND HE ACTUALLY USED SOME VULGARITY WHEN HE DID SO?

2 A. YES.

3 Q. ALL RIGHT. WITH RESPECT TO THE FAILURE TO RAISE A
4 VIOLATION OF ATKINS, EXECUTION OF THE MENTALLY ILL, ---

5 A. RIGHT.

6 Q. --- ARE YOU AWARE OF ANY CASE WHERE EITHER THE STATE
7 SUPREME COURT OR ANY FEDERAL COURT IN THIS JURISDICTION OR
8 THE UNITED STATES SUPREME COURT HAS HELD THAT THAT'S
9 VIOLATIVE OF THE 8TH AMENDMENT?

10 A. NOT RIGHT OFF THE TOP OF MY HEAD.

11 Q. OKAY. YOU WERE JUST TALKING A MOMENT AGO ABOUT YOU'VE
12 HAD A CASE WHERE YOU THOUGHT A GOOD ISSUE KIND OF GOT LOST
13 BECAUSE IT GOT SANDWICHED AROUND A BUNCH OF BAD ISSUES.

14 A. THE PATTERSON CASE, YES.

15 Q. THE PATTERSON CASE?

16 A. YEAH.

17 Q. AND THAT'S -- ISN'T THAT A CASE WHERE -- HOW MANY
18 ISSUES WERE RAISED ~~ARE~~

19 A. I WROTE PROBABLY THREE OF THE HOWEVER MANY THERE WERE.
20 AND ONE OF THEM I THOUGHT WAS REALLY GOOD. AND I CAN'T
21 REMEMBER WHAT IT WAS, BUT IT ENDED UP APPEARING AT ABOUT
22 PAGE 180 OR SOMETHING OF THE BRIEF. AND I DON'T EVEN KNOW
23 THAT IT WAS ADDRESSED IN THE OPINION. I FILED A PETITION ON
24 THE HEARING GOING, WAIT A MINUTE. AND I DON'T THINK THEY
25 EVEN ADDRESSED IT THEN.

1 Q. AND DO YOU RECALL WHETHER OR NOT THE SUPREME COURT OR
2 MEMBERS OF THE SUPREME COURT WERE CALLING UPON YOU TO
3 EXPLAIN WHY YOU HAD SUCH A LENGTHY BRIEF?

4 A. WELL, THAT WAS, I MEAN, THAT WAS A DIFFERENT SITUATION.
5 I MEAN, THAT -- THE BRIEF, I THOUGHT, WAS EXCESSIVELY LONG
6 MYSELF. AND I WAS -- I HAD CO-COUNSEL. IT WASN'T JUST ME
7 ON THAT CASE. SO I THOUGHT THE BRIEF WAS -- COULD HAVE BEEN
8 SHORTENED SUBSTANTIALLY. I'M ALWAYS FOR FILING THE SHORTER
9 BRIEF, BUT, I MEAN, THAT'S -- WORKS TOWARD MY NATURAL
10 TENDENCIES ANYWAY. SO ...

11 Q. ALL RIGHT.

12 MR. SALTER: NOTHING FURTHER, YOUR HONOR.

13 THE COURT: ALL RIGHT.

14 MS. JOHNSON: TWO BRIEF ---

15 THE COURT: IS THERE A NEW ISSUE, COUNSEL, BROUGHT UP
16 ON REDIRECT?

17 MS. JOHNSON: ONLY RESPONDING TO THE LENGTH OF THE
18 BRIEF ISSUE THAT HE ---

19 THE COURT: ALL RIGHT. THAT'S A NEW ISSUE. GO AHEAD.

20 RECROSS EXAMINATION BY MS. JOHNSON:

21 Q. COUNSEL, DO YOU RECALL THIS BRIEF PRESSING LIMITS OF
22 WHAT YOU THOUGHT WAS A LENGTHY BRIEF?

23 A. I NEVER FILE A LONG BRIEF, I MEAN, IN THIS CASE OR IN
24 ANY OTHER CASE. TO ME -- TO ME, BEING SUCCINCT WITH OUR
25 COURT IS A GOOD IDEA. BUT, I MEAN, I WAS NOT APPROACHING

1 THE LIMITS OF, YOU KNOW, HOW LONG A BRIEF COULD BE. THAT'S
2 NOT WHY I LEFT ISSUES OUT, BECAUSE THE BRIEF WAS TOO LONG,
3 ---

4 Q. THANK YOU.

5 A. --- IF THAT'S WHAT YOU'RE ASKING.

6 THE COURT: ALL RIGHT. ANY -- THIS IS YOUR WITNESS.
7 YOU WANT TO FOLLOW ON THAT POINT?

8 MR. SALTER: NO, SIR, YOUR HONOR.

9 THE COURT: ALL RIGHT. ANY OBJECTION TO RELEASING THE
10 WITNESS?

11 MR. SALTER: NONE WHATSOEVER, YOUR HONOR.

12 MS. JOHNSON: NO, YOUR HONOR.

13 THE COURT: VERY GOOD. HAVE A GOOD DAY.

14 MR. SAVITZ: THANK YOU.

15 THE COURT: YOU'RE FREE TO GO. ALL RIGHT. BACK TO THE
16 APPLICANT'S CASE NOW. DO YOU HAVE ADDITIONAL WITNESSES, MR.
17 BLUME, TODAY?

18 MR. BLUME: WE HAVE ONE WITNESS WHO WE CAN CALL. SHE
19 WOULD BE PROBABLY HALF AN HOUR OR A LITTLE MORE ON DIRECT.
20 SO WE COULD PRESS ON OR DO IT FIRST THING IN THE MORNING.
21 IT'S REALLY UP TO YOUR HONOR.

22 THE COURT: ALL RIGHT. LET'S HAVE A LITTLE SCHEDULING
23 CONFERENCE. COUNSEL, COME UP, IF YOU WILL, EVERYONE, IF YOU
24 WISH, PLEASE.

25 (WHEREUPON A BENCH CONFERENCE WAS HELD OFF THE RECORD)

1 THE COURT: ALL RIGHT, LADIES AND GENTLEMEN. COUNSEL
2 TELLS ME, AS YOU HEARD, THE NEXT WITNESS WILL BE
3 APPROXIMATELY THIRTY MINUTES LENGTH IN DIRECT EXAMINATION.
4 AND RATHER THAN SPLIT IN THE MIDDLE AND COME BACK AND HAVE
5 CROSS TOMORROW, WE'RE JUST GOING TO STOP FOR THE DAY. IS
6 THERE ANYTHING THAT WE NEED TO PLACE ON THE RECORD, FROM THE
7 STATE, WITH REGARD TO THESE -- TODAY'S PROCEEDINGS OR
8 ANYTHING BEFORE WE CLOSE THE RECORD FOR TODAY FROM THE
9 STATE?

10 MR. SALTER: NOT THAT I'M AWARE OF, YOUR HONOR.

11 THE COURT: ALL RIGHT. AND FROM APPLICANT?

12 MR. BLUME: NO, SIR, YOUR HONOR.

13 THE COURT: ALL RIGHT. THEN, LADIES AND GENTLEMEN, WE
14 WILL ADJOURN. AND WE WILL ADJOURN UNTIL 9:30 TOMORROW
15 MORNING. COURT WILL BE IN RECESS UNTIL 9:30 TOMORROW
16 MORNING.

17 (WHEREUPON COURT WAS IN RECESS AT 4:43 PM)

18 (END OF VOLUME ONE OF TWO)

STATE OF SOUTH CAROLINA
COUNTY OF CHEROKEE

IN THE COURT OF COMMON PLEAS

JONATHAN KYLE BINNEY,)
)
 APPLICANT,)
)
 -VS-)
)
 STATE OF SOUTH CAROLINA,)
)
 RESPONDENT.)
 _____)

2006-CP-11-223

TRANSCRIPT OF RECORD
(VOLUME TWO OF TWO)

MAY 29 - JUNE 1, 2007
GAFFNEY, SOUTH CAROLINA

BEFORE:

THE HONORABLE J. MICHAEL BAXLEY

APPEARANCES:

ATTORNEYS FOR APPLICANT:

JOHN H. BLUME, ESQUIRE
SHERI L. JOHNSON, ESQUIRE
EMILY C. PAAVOLA, ESQUIRE

ATTORNEYS FOR RESPONDENT:

WILLIAM E. SALTER, III, ASSISTANT ATTORNEY GENERAL
ANTHONY MABRY, ASSISTANT ATTORNEY GENERAL

SUSAN W. HUDGINS
CIRCUIT COURT REPORTER

1 THURSDAY, MAY 31, 2007 (VOLUME TWO):

2 (WHEREUPON APPLICANT'S EXHIBITS 10 AND 11 WERE MARKED
3 FOR IDENTIFICATION)

4 THE COURT: GOOD MORNING EVERYONE. PLEASE BE SEATED.
5 ALL RIGHT. LADIES AND GENTLEMEN, WELCOME BACK TO THE
6 COURTROOM. YOU WILL RECALL AT THE END OF THE DAY YESTERDAY
7 WE REMAINED IN THE APPLICANT'S CASE. AND, MR. BLUME, PLEASE
8 CALL YOUR NEXT WITNESS.

9 MS. JOHNSON: SANDRA BINNEY.

10 THE COURT: ALL RIGHT. PLEASE COME FORWARD AND TAKE
11 THE OATH OF A WITNESS.

12 SANDRA BINNEY, BEING DULY
13 SWORN TESTIFIED AS FOLLOWS:

14 THE COURT: COUNSEL.

15 DIRECT EXAMINATION BY MS. PAAVOLA:

16 Q. GOOD MORNING, MS. BINNEY. COULD YOU STATE AND SPELL
17 YOUR NAME FOR THE RECORD, PLEASE?

18 A. SANDRA BINNEY, B-I-N-N-E-Y.

19 Q. AND, MS. BINNEY, ARE YOU MARRIED?

20 A. I AM. FORTY YEARS.

21 Q. AND CAN YOU TELL US WHO YOUR HUSBAND IS?

22 A. JIM BINNEY.

23 Q. AND WHERE DO YOU AND JIM RESIDE RIGHT NOW?

24 A. WE LIVE IN GREENVILLE, SOUTH CAROLINA.

1 THE COURT: AND, I'M SORRY, I DIDN'T HEAR THAT. WHERE

2 DO YOU LIVE?

3 A. I LIVE IN GREENVILLE, SOUTH CAROLINA.

4 Q. AND WHAT DO YOU DO THERE?

5 A. WE WORK WITH MINISTRY COUPLES IN CRISIS. AND THEY COME

6 FROM ALL OVER THE WORLD. AND JIM COUNSELS THEM AT THEIR

7 WORST MOMENT.

8 Q. AND DO YOU AND JIM HAVE ANY CHILDREN?

9 A. I'M SORRY?

10 Q. DO YOU HAVE ANY CHILDREN?

11 A. WE HAVE ONE ADOPTED SON, JONATHAN.

12 Q. CAN YOU TELL US WHEN YOU ADOPTED JONATHAN? IN WHAT

13 YEAR?

14 A. WE ADOPTED HIM IN 1974.

15 Q. AND HOW DID YOU COME TO ADOPT HIM?

16 A. WE WERE MARRIED EIGHT YEARS AND WERE NOT ABLE TO HAVE

17 CHILDREN. AND SO WE WORKED THROUGH OUR PASTOR. AND HE

18 RECOMMENDED A HOME -- A HOME IN HATTYSBURG, MISSISSIPPI.

19 Q. DO YOU REMEMBER WHAT THAT HOME WAS CALLED?

20 A. BETHESDA HOME FOR GIRLS.

21 Q. AND DID YOU AND JIM GO THERE?

22 A. WE DID.

23 Q. DID YOU -- HOW OLD WAS JONATHAN AT THE TIME THAT YOU

24 ADOPTED HIM?

25 A. WHEN WE PICKED HIM UP AT THE HOSPITAL HE WAS FOUR DAYS

- 1 OLD.
- 2 Q. AT THAT TIME DID YOU MEET HIS BIRTH MOTHER?
- 3 A. NO, WE DID NOT.
- 4 Q. DID YOU KNOW ANYTHING ABOUT HIS BIRTH MOTHER?
- 5 A. WE KNEW NOTHING.
- 6 Q. CAN YOU TELL US WHAT JONATHAN WAS LIKE AS A CHILD?
- 7 A. HE -- HE WAS A CUTE LITTLE BABY AND JUST SEEMED LIKE A
- 8 NORMAL CHILD. HE WAS -- TRIED TO PLEASE US. AND AS A YOUNG
- 9 CHILD HE WAS JUST A FUN LITTLE BABY. AND UP UNTIL ABOUT
- 10 FIVE, SIX, EIGHT HE STARTED HAVING PROBLEMS LEARNING AND
- 11 THAT TYPE OF THING.
- 12 Q. AND DID HE HAVE ANY SPECIAL SKILLS OR TALENTS WHEN HE
- 13 WAS A KID?
- 14 A. MUSICALLY HE WAS VERY TALENTED. WE DID A LOT OF
- 15 SINGING AND INSTRUMENTS. HE TOOK VIOLIN, SUZUKI VIOLIN, AND
- 16 HE TOOK PIANO. AND HE EXCELLED. HE HAD -- HE WAS -- WE
- 17 ENROLLED HIM WITH A TEACHER THAT FULLY TAUGHT GIFTED
- 18 CHILDREN. AND SHE SAID -- WE THOUGHT WE WOULD TRY TO SEE IF
- 19 HE COULD TAKE FROM HER. AND SHE SAID THAT HE WOULD HAVE TO
- 20 COME DOWN AND AUDITION. AND WHEN SHE CALLED BACK SHE SAID
- 21 THAT HE WAS EXTREMELY TALENTED, HE HAD PERFECT PITCH AND SHE
- 22 WOULD LOVE TO WORK WITH HIM. AND SHE DID TEACH HIM. AND HE.
- 23 WENT ON AND WON AWARDS AND EXCELLED IN HIS MUSIC.
- 24 Q. AND THAT WAS A PIANO TEACHER, IS THAT RIGHT?
- 25 A. THAT WAS A PIANO TEACHER AFTER HE HAD SEVEN YEARS OF

- 1 SUZUKI VIOLIN.
- 2 Q. . AND YOU SAID EARLIER HE HAD -- HE STARTED TO HAVE SOME
3 PROBLEMS WITH LEARNING. CAN YOU TELL US WHAT SPECIFIC
4 PROBLEMS HE HAD WITH SCHOOL?
- 5 A. HE STRUGGLED IN MATH. HE STRUGGLED WITH WORD PROBLEMS.
6 BASICALLY HE JUST HAD A HARD TIME TAKING TESTS AND JUST
7 STRUGGLED, CONTINUALLY STRUGGLED.
- 8 Q. DO YOU REMEMBER ABOUT WHEN THAT WAS THAT HE STARTED TO
9 HAVE DIFFICULTIES WITH SCHOOL?
- 10 A. PROBABLY ABOUT SEVEN.
- 11 Q. SEVEN YEARS ---
- 12 A. SEVEN.
- 13 Q. --- OLD?
- 14 A. UM-HUM (AFFIRMATIVE).
- 15 Q. DID HE HAVE A LOT OF FRIENDS AT SCHOOL? DID HE HAVE A
16 LOT OF FRIENDS AT SCHOOL?
- 17 A. JONATHAN DREW PEOPLE. HE HAD A GOOD PERSONALITY AND HE
18 WAS A LOT OF FUN. HE DREW A LOT OF FRIENDS AND HE HAD LOTS
19 OF FRIENDS, BUT HE COULDN'T KEEP THEM.
- 20 Q. AND WHY DO YOU THINK THAT WAS?
- 21 A. I DON'T KNOW. SOMETIMES HE WOULD DO THINGS THAT
22 IRRITATE THEM, AND THEN THEY WOULD JUST STAY AWAY FROM HIM.
- 23 Q. WHAT ABOUT -- DID -- WHAT ABOUT BEHAVIORAL PROBLEMS?
24 DID HE HAVE BEHAVIORAL PROBLEMS AT HOME OR AT SCHOOL?
- 25 A. YES. HE SEEMED TO GET INTO TROUBLE AT SCHOOL. WHEN HE

1 WAS AT HOME I ALWAYS TRIED TO WORK WITH HIM AND FIGURE OUT
2 WHY HE DID SOMETHING AND TRIED TO SHOW HIM WHERE HE HAD
3 FAILED OR HOW WE COULD HELP HIM. AND WE WERE ALWAYS TRYING
4 TO WORK WITH HIM.

5 A. AND WHAT SPECIFICALLY WHEN YOU NEEDED TO DISCIPLINE HIM
6 DID YOU DO?

7 A. WHEN HE WAS LITTLE WE WOULD SPANK HIM. WHEN HE WAS
8 OLDER WE'D START TO TAKE AWAY PRIVILEGES AND REASON WITH
9 HIM, BUT IT DIDN'T WORK, THE REASONING.

10 Q. AND WHEN YOU TRIED TO REASON WITH HIM HOW DID HE
11 RESPOND EXACTLY? WHY DO YOU THINK REASONING WITH HIM DIDN'T
12 WORK OUT?

13 A. WELL, NOW WE KNOW THAT HE DIDN'T HAVE THE ABILITY TO
14 REASON.

15 Q. DID -- WHEN YOU EXPLAINED TO JONATHAN THAT SOMETHING
16 WASN'T APPROPRIATE BEHAVIOR DID HE SEEM TO UNDERSTAND THAT?

17 A. AFTER WE TALKED ABOUT IT HE WOULD BE SORRY FOR WHAT HE
18 DONE AND HE DIDN'T UNDERSTAND WHY HE DID IT.

19 Q. DID HE SEEM TO LEARN FROM HIS MISTAKES AND NOT REPEAT
20 THEM?

21 A. HE DID NOT. HE CONTINUED WITH THE SAME MISTAKES OVER
22 AND OVER.

23 Q. WOULD YOU CONSIDER ANY OF JONATHAN'S BEHAVIOR AS A
24 CHILD TO BE IMPULSIVE?

25 MR. SALTER: OBJECTION, YOUR HONOR. I'VE LET THE

1 LEADING GO ON, BUT I WILL NOW OBJECT.

2 THE COURT: SUSTAINED AS TO LEADING.

3 Q. CAN YOU THINK OF ANY PARTICULAR THINGS THAT JONATHAN
4 DID AS A CHILD THAT YOU FOUND UNUSUAL?

5 A. WELL, HE DIDN'T THINK BEFORE HE DID THINGS. HE WOULD
6 -- HE WOULD JUST DISAPPEAR SOMETIMES. AND, FOR INSTANCE,
7 ONE TIME WE COULDN'T FIND HIM AND WE WERE IN SOMEONE ELSE'S
8 HOME VISITING. AND WE LOOKED AND LOOKED.

9 AND PRETTY SOON A CAR DROVE UP AND IT WAS A DOCTOR'S
10 WIFE. AND SHE HAD JONATHAN IN THE BACKSEAT, AND HE WAS
11 BLEEDING. AND WHAT HE HAD DONE WAS TAKEN A SKATEBOARD FROM
12 -- HE'D JUST SAW THE SKATEBOARD. AND WE WERE AT A FRIEND'S
13 HOME. AND HE WENT OUT TO THE TOP OF THE HILL AND GOT ON IT.
14 HE'D NEVER BEEN ON A SKATEBOARD IN HIS LIFE.

15 AND HE GOT AT THE TOP OF A HUGE HILL AND WENT ALL THE
16 WAY DOWN AND, OF COURSE, DIDN'T MAKE IT AND CRAWLED UP TO
17 SOMEONE'S HOME AFTER HE CRASHED. AND IT HAPPENED TO BE A
18 DOCTOR'S HOME. AND THE WIFE OF THE DOCTOR GOT HIM IN THE
19 CAR, BROUGHT HIM BACK. AND THAT WAS AN EXAMPLE OF THINGS
20 THAT HE DID.

21 Q. DID HE EVER SEEM TO GROW OUT OF THAT KIND OF BEHAVIOR?

22 A. NO.

23 Q. DID ---

24 A. HE GOT MARRIED AND DIDN'T TELL US.

25 Q. WHEN WAS THAT?

1 A. WHAT? I'M NOT SURE OF THE YEAR, BUT HE'S BEEN MARRIED
2 SEVERAL YEARS. BUT HE GOT MARRIED AND DIDN'T TELL US. WE
3 FELT THAT WAS EXTREMELY IMPULSIVE.

4 Q. AND HOW DID YOU FIND OUT ABOUT THAT, THE FACT ---

5 A. HE CALLED US AFTER HE WAS MARRIED. WELL, WE ACTUALLY
6 WENT DOWN TO VISIT IN GREENVILLE. AND MY HUSBAND WAS
7 SPEAKING AT BOB JONES UNIVERSITY. AND THEY HAD PUT US IN A
8 GUEST APARTMENT. AND SO WHEN WE ARRIVED WE CALLED JONATHAN
9 UP AND SAID, WE'RE HERE AND WE'D LIKE TO SEE YOU. AND HE
10 SAID, WELL, WOULD YOU LIKE TO MEET YOUR NEW DAUGHTER-IN-LAW?

11 Q. DID YOU FIND THAT SURPRISING?

12 A. WELL, AT THAT POINT, NOT REALLY.

13 Q. DID YOU AND JIM EVER TRY TO SEEK HELP FOR JONATHAN FOR
14 THESE PROBLEMS THAT HE HAD AS A CHILD?

15 A. CONTINUALLY. WE PUT HIM IN A BOY'S HOME, VICTORY BOY'S
16 HOME. WAS THERE SIX MONTHS. THEY TOOK HIM ON TRIPS TO
17 MEXICO CALLED A MISSION TRIP. THEY DID REPELLING, HORSEBACK
18 RIDING, EVERYTHING THEY COULD DO TO HELP YOUNG BOYS.

19 THEN HE WENT TO DUBLIN CHRISTIAN ACADEMY IN NEW
20 HAMPSHIRE. THAT'S A SPECIALTY SCHOOL. IT'S A GREAT, GREAT
21 CHRISTIAN ACADEMY.

22 AND THEN HE WENT TO RAPHA, WHICH IS TWELVE HUNDRED
23 DOLLARS A DAY. HE WAS THERE ALMOST THIRTY DAYS. AND THEN
24 DR. WILLIAMS IN GREENVILLE HELPED US WITH TRYING TO DIAGNOSE
25 AND HELP AND SEE WHAT WAS WRONG.

1 Q. WERE THERE ANY OTHER PLACES THAT YOU SENT HIM AS A
2 CHILD THAT YOU CAN THINK OF?

3 A. OTHER PLACES THAT WE TOOK HIM?

4 Q. YES.

5 A. HE WENT TO LEARNING CENTERS AND HAD TUTORING.

6 Q. DID YOU EVER FEEL LIKE ANY OF THOSE PLACES WERE ABLE TO
7 HELP HIM EFFECTIVELY?

8 A. NOT REALLY. EVERYTHING CONTINUED THE SAME.

9 Q. DID ANY OF THOSE PLACES EVER DIAGNOSE HIM WITH FETAL
10 ALCOHOL SYNDROME?

11 A. NO.

12 Q. WHY DO YOU THINK THAT NEVER CAME UP?

13 MR. SALTER: OBJECTION, YOUR HONOR. THIS WOULD BE
14 PURELY SPECULATIVE ---

15 THE COURT: THAT IS SPECULATIVE. AND, COUNSEL, THAT
16 WAS A LEADING QUESTION ALSO. BUT GO AHEAD. PLEASE MOVE TO
17 YOUR NEXT QUESTION. OBJECTION IS SUSTAINED.

18 Q. DID YOU EXPLAIN TO JONATHAN AS A CHILD THAT HE WAS
19 ADOPTED?

20 A. YES, WE DID. WE WERE TOLD BY THE JUDGE THAT HE FELT IT
21 WAS THE BEST THING TO DO BECAUSE HIS FRIEND ON THE NIGHT OF
22 HIS MARRIAGE, HIS MOTHER TOLD HIM THAT HE WAS ADOPTED AND IT
23 DEVASTATED HIM. AND SO HE SAID THAT HE FELT IT WAS BEST TO
24 TELL THEM EARLY.

25 Q. AND DID JONATHAN EXPRESS INTEREST IN FINDING HIS BIRTH

1 MOTHER? :

2 A. ONCE WHEN HE WAS YOUNGER AND THEN LATER WHEN HE WAS IN
3 HIS TEENS. I PERSONALLY WANTED TO FIND HIS BACKGROUND WHEN
4 WE WERE HAVING ALL THESE STRUGGLES AND WE THOUGHT MAYBE IT
5 WOULD BE BEST TO LOOK BACK INTO THE HISTORY OF HIS BIRTH
6 FAMILY.

7 SO I TRIED TO CONTACT AND FIND OUT WHO HIS BIRTH MOTHER
8 WAS. AND AT THAT TIME WE FOUND THE PLACE WHERE HE WAS
9 ADOPTED FROM. AND THEY GAVE US HER NAME AND SENT US A
10 PICTURE OF HER.

11 Q. AND DID YOU EVER MEET JONATHAN'S BIRTH MOTHER?

12 A. YES, WE DID.

13 Q. AND WHAT WAS HER NAME?

14 A. GAYLE DOVE.

15 Q. AND HOW DID YOU COME ABOUT MEETING HER?

16 A. WHEN JIM WAS SPEAKING AT THE UNIVERSITY AT BOB JONES
17 SHE HAPPENED TO BE DOWN THERE VISITING. AND SO WE ALL MET
18 TOGETHER. AND SHE CAME OVER AND MET US AND WE TALKED FOR A
19 WHILE. AND THEN WE ALL WENT OUT TO EAT TOGETHER.

20 Q. HOW WAS IT THAT SHE WAS DOWN HERE VISITING?

21 A. SHE CAME DOWN TO VISIT AND SEE HER GRANDCHILDREN AND TO
22 MEET THE FAMILY.

23 Q. DID YOU AND JIM INITIALLY FIND HER?

24 A. JONATHAN FOUND HER THROUGH THE US SEARCH.

25 Q. AND WHAT IS THAT?

1 A. THAT'S A SEARCH COMPANY THAT HELPS YOU FIND YOUR
2 ADOPTED FAMILIES.

3 Q. AFTER YOUR INITIAL MEETING THAT YOU JUST DESCRIBED HOW
4 MUCH INTERACTION DID YOU HAVE WITH GAYLE AFTER THAT?

5 A. I HAD SOME. IT WASN'T A LOT. WE TRAVEL ALL OVER. AND
6 SO WE WERE GONE QUITE A BIT. AND WHEN WE WERE HERE GAYLE
7 WAS -- SHE SLEPT A LOT DURING THE DAY AND SHE WASN'T HERE A
8 WHOLE LOT EITHER. SHE WENT ON CRUISES AND THINGS WITH --
9 AND SHE GOT MARRIED. AND SO WE -- I PROBABLY SAW HER TEN
10 TIMES.

11 Q. AFTER JONATHAN WAS ARRESTED FOR THIS CRIME DID YOU MEET
12 WITH HIS TRIAL COUNSEL, MR. PRUETT AND MR. SLADE?

13 A. YES.

14 Q. WHEN YOU MET WITH THEM DID YOU TELL TRIAL COUNSEL THAT
15 YOU HAD INFORMATION THAT JONATHAN'S BIRTH MOTHER DRANK
16 DURING PREGNANCY?

17 A. I DID. I HAD DONE A LOT OF RESEARCH AND HAD A STACK OF
18 PAPERS LIKE THAT AND HANDED IT TO THEM. AND THEY SAID,
19 THANKS FOR THE RESEARCH.

20 Q. DID YOU ATTEND JONATHAN'S TRIAL FOR THIS CRIME? DID
21 YOU ATTEND THE TRIAL?

22 A. YES, I DID.

23 Q. WERE YOU ASKED TO TESTIFY DURING THAT TRIAL?

24 A. NO.

25 Q. IF YOU HAD BEEN ASKED TO TESTIFY WOULD YOU HAVE BEEN

1 WILLING TO DO THAT?

2 A. ABSOLUTELY.

3 MS. PAAVOLA: YOUR HONOR, AT THIS POINT I DID INTEND TO
4 ASK MS. BINNEY SOME QUESTIONS ABOUT THE IMPACT OF AN
5 EXECUTION ON HER FAMILY, BUT GIVEN THE COURT'S EARLIER
6 RULING ON THIS ISSUE I'D ASK INSTEAD TO JUST SUBMIT A
7 WRITTEN PROFFER OF HER TESTIMONY.

8 THE COURT: WHAT'S YOUR POSITION ON THAT, MR. SALTER?

9 MR. SALTER: AGAIN, WE OBVIOUSLY TAKE THE POSITION WE
10 DID WITH RESPECT TO THE EVIDENCE THAT THEY SOUGHT TO
11 INTRODUCE THROUGH THE SOCIAL WORKER. IT'S INADMISSIBLE,
12 IT'S IMPROPER.

13 THE COURT: ALL RIGHT. FOR THE SAME REASON, COUNSEL, I
14 WOULD SUSTAIN THE OBJECTION AGAIN. AND IF YOU WISH TO
15 SUBMIT A WRITTEN PROFFER THIS WOULD BE THE SECOND WRITTEN
16 PROFFER THAT I WOULD ALLOW ON THAT, THEN YOU MAY DO SO.

17 MS. PAAVOLA: OKAY.

18 THE COURT: VERY GOOD. THANK YOU.

19 MS. PAAVOLA: ONE SECOND.

20 THE COURT: ANYTHING FURTHER? VERY GOOD. AND, MA'AM,
21 I WANT TO MAKE SURE I UNDERSTAND, DID YOU SAY THAT YOU
22 ADOPTED JONATHAN AT AGE FOUR YEARS?

23 A. FOUR DAYS.

24 THE COURT: FOUR DAYS. ALL RIGHT. THANK YOU.

25 Q. JUST A COUPLE MORE QUESTIONS, MS. BINNEY. OBVIOUSLY

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1 YOU LOVE YOUR SON, CORRECT?

2 A. WE LOVE HIM MORE AFTER WE REALIZED WHAT STRUGGLES HE
3 HAD TO GO THROUGH. YES, WE LOVE HIM VERY MUCH.

4 Q. AND YOU -- DO YOU VISIT HIM NOW?

5 A. WE VISIT HIM REGULARLY.

6 Q. DO YOU WRITE TO HIM?

7 A. YES, WE DO WRITE TO HIM.

8 Q. HOW OFTEN WOULD YOU SAY THAT YOU VISIT HIM?

9 A. AT LEAST ONCE A MONTH.

10 Q. IF -- YOU SAID EARLIER YOU WOULD HAVE BEEN WILLING TO
11 TESTIFY AT THE TRIAL. WOULD YOU HAVE BEEN WILLING TO ASK
12 THE JURY TO SPARE YOUR SON'S LIFE?

13 A. OF COURSE.

14 Q. I HAVE NO FURTHER QUESTIONS.

15 THE COURT: AND CROSS EXAMINATION.

16 MR. SALTER: THANK YOU, YOUR HONOR.

17 CROSS EXAMINATION BY MR. SALTER:

18 Q. SO IT'S YOUR TESTIMONY THIS MORNING THAT YOU WOULD HAVE
19 BEEN WILLING TO TESTIFY IN THE PENALTY PHASE OF YOUR SON'S
20 TRIAL?

21 A. YES.

22 Q. BUT THE LAWYERS NEVER ASKED YOU TO DO SO?

23 A. DO I HAVE A SPECULATION -- WHAT?

24 Q. DID THE LAWYERS EVER ASK YOU TO DO SO?

25 A. NO.

- 1 Q. OKAY. BUT YOUR HUSBAND DID TESTIFY, CORRECT?
- 2 A. YES.
- 3 Q. AND MOST OF WHAT YOU TESTIFIED TO THIS MORNING WAS
- 4 COVERED BY HIM, WAS IT NOT?
- 5 A. I'M NOT SURE WHAT ALL HE SAID AT THAT TIME.
- 6 Q. YOU JUST DON'T RECALL WHAT HE TESTIFIED TO?
- 7 A. HE WASN'T ASKED QUESTIONS. HE JUST GAVE A TESTIMONY.
- 8 AND I DON'T KNOW THAT HE COVERED EVERYTHING THAT WE'VE
- 9 COVERED THIS MORNING.
- 10 Q. YOU INDICATED THAT YOU PROVIDED SOME RESEARCH TO MR.
- 11 BINNEY'S TRIAL ATTORNEYS. THAT RESEARCH DID NOT INCLUDE ANY
- 12 MEDICAL RECORDS, DID IT?
- 13 A. JONATHAN'S MEDICAL RECORDS?
- 14 Q. NO. I'M SORRY, MA'AM. ANY MEDICAL RECORDS OF HIS
- 15 BIRTH MOTHER, MS. DOVE.
- 16 A. I DIDN'T HAVE ANY AT THAT TIME.
- 17 Q. ALL RIGHT. WHAT YOU HAD WAS THE RESEARCH THAT YOU
- 18 GATHERED OFF OF THE INTERNET?
- 19 A. RESEARCH FROM BOOKS, INTERNET, PEOPLE THAT GAVE ME
- 20 INFORMATION OF BOOKS.
- 21 Q. AND YOU EITHER SPOKE BY TELEPHONE OR MET WITH THE TRIAL
- 22 ATTORNEYS ON MORE THAN ONE OCCASION, DIDN'T YOU?
- 23 A. I MET WITH THEM ABOUT PROBABLY THREE TIMES.
- 24 Q. ALL RIGHT. AND IN THOSE MEETINGS YOU DISCUSSED FETAL
- 25 ALCOHOL SYNDROME WITH THEM

1 A. I DID.

2 Q. ALL RIGHT. SO THEY HAD THE BENEFIT OF YOUR INPUT,
3 CORRECT?

4 A. I WOULD SAY THEY DID.

5 Q. ALL RIGHT. ONE OF THE THINGS I WOULD LIKE TO ASK YOU
6 ABOUT IS IS IT FAIR TO SAY THAT YOU AND YOUR HUSBAND WASN'T
7 SATISFIED WITH THE WAY THAT YOUR SON'S TRIAL ATTORNEYS WERE
8 HANDLING THE CASE?

9 A. I WOULD SAY WE WERE VERY UNCOMFORTABLE ABOUT THAT, YES.

10 Q. AND DIDN'T Y'ALL GO CONTACT OTHER LAWYERS AND HAVE
11 THOSE LAWYERS INTERFERE WITH THEIR REPRESENTATION?

12 A. YES. WE WERE REFERRED BY A FRIEND OF OURS, SENATOR
13 THOMAS, TO GET THE BEST HELP THAT WE COULD AND TO CHECK
14 AROUND. AND SO WE DID.

15 Q. DID YOU CONTACT A GENTLEMAN BY THE NAME OF WARREN
16 BRIGGS?

17 A. YES.

18 Q. AND MR. -- Y'ALL RETAINED MR. BRIGGS, DID YOU NOT?

19 A. YES, WE DID.

20 Q. ALL RIGHT. AND DO YOU RECALL WHY YOU RETAINED MR.
21 BRIGGS?

22 A. BECAUSE WE WERE ADVISED TO DO THAT.

23 Q. OKAY. FOR WHAT PURPOSE?

24 A. TO HELP WITH GETTING THE BETTER -- I GUESS WE FELT AT
25 THAT TIME AND, I BELIEVE, JONATHAN MADE THE REQUEST TO GET

- 1 DIFFERENT LAWYERS.
- 2 Q. ALL RIGHT. TO HELP. HOW WERE YOU GOING TO HELP?
- 3 A. TO GET BETTER HELP.
- 4 Q. TO GET BETTER HELP?
- 5 A. YES.
- 6 Q. TO GET BETTER HELP HOW?
- 7 A. SOMEONE THAT SEEMED MORE INTERESTED IN HELPING US WITH
- 8 THE CASE.
- 9 Q. THE LAWYERS JUST DIDN'T SEEM INTERESTED IN HELPING YOU
- 10 -- HELPING YOUR SON OR HELPING YOU?
- 11 A. BOTH.
- 12 Q. BOTH. OKAY. HOW SO?
- 13 A. BY THE LACK OF COMMUNICATION. AND AFTER BEING WITH
- 14 THIS GROUP OF PEOPLE I CAN SEE A MAJOR DIFFERENCE. WE GOT
- 15 PHONE CALLS AND PEOPLE CONTINUALLY TRYING TO HELP US.
- 16 Q. OKAY. SO THEY DIDN'T CALL YOU ENOUGH?
- 17 A. I DON'T THINK SO.
- 18 Q. AND THEY DIDN'T -- THEY DIDN'T TRY TO HELP YOU ENOUGH?
- 19 A. THREE TIMES FOR SUCH A MAJOR ISSUE DID NOT SEEM LIKE A
- 20 LOT TO US.
- 21 Q. OKAY. SO YOU HIRED MR. BRIGGS. AND DIDN'T MR. BRIGGS
- 22 SUGGEST TO YOU THAT HE HAD SOME POLITICAL METHOD WHEREBY HE
- 23 COULD DISPOSE OF THE DEATH PENALTY IN THIS CASE?
- 24 A. NOT THAT I KNOW OF. I REALLY DID NOT SPEAK TO HIM
- 25 ABOUT THAT.

1 Q. WHO DID? YOUR HUSBAND?

2 A. I DON'T KNOW IF HE DID OR NOT.

3 Q. ALL RIGHT.

4 MR. SALTER: NOTHING FURTHER, YOUR HONOR.

5 THE COURT: IS THERE REDIRECT?

6 MS. PAAVOLA: NO, SIR.

7 THE COURT: ALL RIGHT. MA'AM, YOU MAY STEP DOWN.

8 PLEASE CALL YOUR NEXT WITNESS.

9 MR. BLUME: YOUR HONOR, AT THIS TIME WHAT, I THINK, --

10 WELL, I'D HAVE A NUMBER OF SORT OF RECORD MATTERS, WHICH I

11 THINK THAT WE'LL TRY AND TAKE UP. FIRST, WE WOULD OFFER

12 WHAT'S BEEN MARKED AS PLAINTIFF'S EXHIBIT 7 ---

13 MR. SALTER: YOUR HONOR, JUST FOR THE RECORD,

14 PLAINTIFF'S EXHIBIT 7 WAS THE TRANSCRIPT OF THE GUILTY PLEA.

15 THE COURT: ALL RIGHT.

16 MR. SALTER: AND IT'S OUR POSITION THAT IT'S

17 INADMISSIBLE BECAUSE WHAT IT IS, IT'S EXTRINSIC EVIDENCE TO

18 IMPEACH A WITNESS ON ---

19 THE COURT: ALL RIGHT. MR. SALTER, LET ME HEAR FROM

20 MR. BLUME FIRST WHY HE WANTS TO PUT IT IN. THEN WE'LL COME

21 BACK TO YOU FOR OPPOSITION.

22 MR. BLUME: THIS IS A TRANSCRIPT OF A PLEA INVOLVING

23 DANNY RAY EDWARDS, WHO WAS ONE OF THE JAILHOUSE INFORMANTS

24 WHO TESTIFIED AT MR. BINNEY'S TRIAL. THIS PLEA WAS TAKEN

25 MAY 18TH OF 2000 PRIOR TO THE TRIAL OF THIS CASE.

1 A TRANSCRIPT OF THE PLEA AND PLEA AGREEMENT INDICATES
2 THAT MR. EDWARDS SUBSTANTIALLY COOPERATED BY BASICALLY
3 INFORMING ON OTHER PEOPLE IN THE COURSE OF THIS
4 INVESTIGATION PROVIDING INFORMATION TO LAW ENFORCEMENT IN
5 THE COURSE OF THIS INVESTIGATION.

6 AS A RESULT OF HIS COOPERATION HE RECEIVED A DOWNWARD
7 DEPARTURE FOR HIS COOPERATION. AND WE BELIEVE THAT THIS IS
8 RELEVANT IN THAT IT DEMONSTRATES IN ADDITION TO MR. PURVIS'
9 TESTIMONY YESTERDAY THAT MR. EDWARDS' TESTIMONY AT MR.
10 BINNEY'S TRIAL THAT HE HAD NEVER COOPERATED, IT WAS FALSE.

11 **THE COURT:** ALL RIGHT. AND NOW IN OPPOSITION, MR.
12 SALTER?

13 **MR. SALTER:** IT'S OUR POSITION THAT THIS EXHIBIT IS AN
14 ATTEMPT TO IMPEACH MR. EDWARDS, WHICH IS EXTRINSIC EVIDENCE
15 ON THE COLLATERAL MATTER. AND THAT'S IMPROPER.

16 **THE COURT:** AND REPLY?

17 **MR. BLUME:** I DON'T THINK IT'S EXTRINSIC EVIDENCE ON A
18 COLLATERAL MATTER. IT'S NOT TO SHOW A PRIOR BAD ACT. IT'S
19 TO SHOW THAT HIS TESTIMONY AT THE TRIAL WHEN HE SAID -- AND
20 I DON'T -- NEED ME TO CHARACTERIZE, BUT I THINK IT WOULD BE
21 ADAMANT. AND THE COURT CAN OBVIOUSLY READ IT AND SEE WHAT
22 HE SAYS WHEN HE INDICATED THAT HE HAD NEVER COOPERATED
23 BEFORE WAS FALSE.

24 I BELIEVE THAT HAD CERTAINLY COUNSEL KNOWN ABOUT THAT
25 MATTER THEY COULD HAVE USED IT TO IMPEACH MR. EDWARDS AT THE

1 TIME OF THIS TRIAL. AND I BELIEVE THAT IT'S RELEVANT AND
2 GERMANE TO WHETHER THAT TESTIMONY WAS TRUE.

3 THE COURT: AND DO YOU HAVE A PARTICULAR RULE OR
4 PRECEDENT THAT YOU CITE FOR ADMISSIBILITY, MR. BLUME?

5 MR. BLUME: I BELIEVE IT'S A -- YOU HAVE A
6 CONSTITUTIONAL RIGHT TO IMPEACH A WITNESS FOR EITHER, YOU
7 KNOW, BIAS, OR MOTIVATION OR UNTRUE TESTIMONY. IT'S NOT A
8 COLLATERAL ISSUE LIKE SOME OTHER PRIOR BAD ACT EVIDENCE THAT
9 YOU CAN'T USE EXTRINSIC EVIDENCE.

10 IT WOULD BE JUST LIKE AT A TRIAL IF YOU HAD -- THEY HAD
11 THIS PLEA TRANSCRIPT, HE SAID HE HADN'T COOPERATED. I THINK
12 THEY COULD HAVE SAID, ISN'T IT TRUE THAT YOU PLED GUILTY TO
13 THIS IN SUBSTANTIAL COOPERATION? IF HE DENIED IT, THE
14 TRANSCRIPT COULD HAVE BEEN USED TO IMPEACH HIM.

15 THE COURT: ALL RIGHT. JUST A MOMENT. LET ME REVIEW
16 THE RULES OF EVIDENCE. I'VE NOT YET LOOKED AT THE OFFERED
17 EXHIBIT.

18 (PAUSE)

19 THE COURT: WHAT IS MR. EDWARDS' STATUS? DID I HEAR
20 TESTIMONY THAT HE'S CURRENTLY INCARCERATED?

21 MR. BLUME: NO.

22 THE COURT: WELL, DO YOU KNOW WHERE HE IS OR WHAT HIS
23 STATUS IS OR WHAT HIS AVAILABILITY IS?

24 MR. BLUME: HE IS -- HE RESIDES IN FLORENCE COUNTY.
25 BUT I DON'T THINK, I MEAN, THE POINT, I THINK, IS NOT -- HE

1 DOESN'T HAVE TO BE CALLED AT THIS POINT TO REINVENT THE
2 TESTIMONY. HE GAVE THE TESTIMONY.

3 THE COURT: I UNDERSTAND.

4 MR. BLUME: IT'S ALREADY BEEN GIVEN UNDER OATH.

5 THE COURT: ALL RIGHT. ANYTHING IN CONCLUSION, MR.
6 SALTER?

7 MR. SALTER: YES, SIR, JUST BRIEFLY. WE SUBMIT IT'S
8 COLLATERAL. TO BE NON-COLLATERAL IT WOULD BE ABOUT WHETHER
9 OR NOT HIS TESTIMONY CONCERNING THE STATEMENT HE ACQUIRED
10 FROM MR. BINNEY WAS TRUTHFUL. THIS IS A DIFFERENT MATTER.
11 COULD HE HAVE BEEN ASKED, DID YOU PLEAD GUILTY IN MAY OF
12 2000 AND DID YOU NOT COOPERATE AND THAT KIND OF THING?
13 CERTAINLY. HE COULD HAVE BEEN ASKED THAT QUESTION.

14 AS I UNDERSTAND, I BELIEVE IT'S 613(B), IT GOVERNS THE
15 IMPEACHMENT WITH EXTRINSIC EVIDENCE OF A PRIOR INCONSISTENT
16 STATEMENT. HE WOULD HAVE HAD TO HAVE BEEN GIVEN THE
17 OPPORTUNITY TO ADMIT OR DENY THE EXISTENCE OF THE PRIOR
18 INCONSISTENCY.

19 THE COURT: ALL RIGHT. JUST ONE MOMENT, PLEASE.

20 (PAUSE)

21 THE COURT: ALL RIGHT. COUNSEL, IT SEEMS TO ME THAT
22 THE ISSUE HERE IS WHAT WAS AVAILABLE AT THE TIME OF THIS
23 TRIAL. THIS WAS A 2000 EVENT AND IT IS RELIABLE IN THAT
24 IT'S TAKEN UNDER OATH. IT IS A COURT PROCEEDING. I'M NOT
25 CERTAIN THAT MR. EDWARDS' AVAILABILITY OR UNAVAILABILITY

1 AFFECTS THE ADMISSIBILITY OF THE DOCUMENT.

2 BUT FOR COMPLETENESS OF THE RECORD AND NOT BEING AWARE
3 OF A RULE THAT PROHIBITS IT, THE COURT'S GOING TO ALLOW THE
4 APPLICANT'S NUMBER 7 IN EVIDENCE OVER OBJECTION OF THE
5 STATE. NOW LET'S TAKE A MOMENT WHILE OUR COURT REPORTER
6 MARKS THAT OR INDICATES ON HER RECORDS THAT IT IS IN
7 EVIDENCE.

8 (WHEREUPON APPLICANT'S EXHIBIT 7 WAS ENTERED INTO
9 EVIDENCE)

10 THE COURT: ALL RIGHT. VERY GOOD. SO DONE. ANYTHING
11 FURTHER NOW, MR. BLUME?

12 MR. BLUME: YES, YOUR HONOR. AT THIS POINT WE WOULD
13 ALSO OFFER ---

14 THE COURT: MR. BLUME, LET ME SAY ONE OTHER THING.
15 THERE'S A QUESTION ABOUT WHETHER IT'S EXTRINSIC EVIDENCE. I
16 DON'T SEE IT AS EXTRINSIC. I BELIEVE THAT IT BEARS DIRECTLY
17 ON POINT, THAT IS AND HAS BEEN CONTESTED ALREADY. WE HAD
18 ONE WITNESS COME IN, MR. PURVIS, TO SPEAK TO THE POINT. AND
19 THUS I DON'T FIND THIS TO BE A COLLATERAL, EXTRINSIC OR
20 OUTSIDE ISSUE. I'M SORRY, MR. BLUME. NOW GO AHEAD.

21 MR. BLUME: YOUR HONOR, AT THIS POINT WE WOULD OFFER
22 PLAINTIFF'S EXHIBIT 10. THIS IS AN INDICTMENT FOR JERRY
23 WAYNE JOHNSON, JR., WHO WAS A PRIOR -- WHO WAS ALSO A
24 JAILHOUSE INFORMANT WHO TESTIFIED AGAINST MR. BINNEY.

25 AT HIS TRIAL HE TESTIFIED THAT HE WAS NOT -- BASICALLY

1 HE WAS BEING OFFERED NOTHING, THAT HE HAD PENDING CHARGES
2 AGAINST HIM AND THAT THERE WAS NO ARRANGEMENT OF ANY KIND.
3 AND THE INDICTMENT REFLECTS THAT THREE MONTHS AFTER MR.
4 BINNEY'S TRIAL THE CHARGES AGAINST HIM WERE NOL PROSSED.

5 THE COURT: ALL RIGHT. MR. MABRY?

6 MR. MABRY: MY OBJECTION IS SIMPLY RELEVANCE, YOUR
7 HONOR. THEY HAD NOTHING TO TIE THE NOL PROS OF THE CASE
8 AGAINST MR. JOHNSON TO HIS TESTIMONY. AND UNTIL THEY DO
9 HAVE SOME KIND OF EVIDENCE OF THAT, WHAT HAPPENED ON HIS
10 CHARGE IS IRRELEVANT.

11 THE COURT: MAY I SEE THAT?

12 (PAUSE)

13 THE COURT: MR. MABRY, I BELIEVE IT'S RELEVANT. IT IS
14 AN ISSUE THAT HAS BEEN RAISED. DO YOU HAVE SOME RULE OF
15 EVIDENCE OR ADMISSIBILITY UPON WHICH YOU CONTEST IT OR IS IT
16 SOLELY ON THE GROUNDS OF RELEVANCE? WHAT YOU'RE REALLY
17 SAYING IS NOT NECESSARILY RELEVANCE, BUT THAT THERE'S JUST
18 NO EXPLANATION FOR THE NOL PROS, I BELIEVE, IS WHAT YOUR
19 OBJECTION ACTUALLY IS.

20 MR. MABRY: WELL, NO, SIR. AND I DON'T HAVE ANY
21 PROBLEM WITH THE AUTHENTICATION OF THE DOCUMENT.

22 THE COURT: ALL RIGHT.

23 MR. MABRY: IT IS WHAT IT IS. MY POINT IS THE FACT
24 THAT THIS WITNESS TESTIFIED AND THREE MONTHS AFTER THE TRIAL
25 THE CHARGES AGAINST HIM ARE NOL PROSSED DOESN'T PROVE

1 ANYTHING. IT'S NOT RELEVANT UNTIL -- UNLESS HE MAKES SOME
2 CONNECTION EITHER THROUGH MR. JOHNSON, WHO HE HAS DEPOSED
3 AND HAS DENIED THAT THERE WAS ANY DEAL, OR THROUGH SOMEBODY
4 WITH THE SOLICITOR'S OFFICE TO SAY THERE WAS A SECRET DEAL.
5 JUST THE FACT THAT THREE MONTHS LATER IT WAS DISMISSED
6 DOESN'T PROVE ANYTHING.

7 THE COURT: WELL, AND, OF COURSE, HERE THE COURT SITS
8 AS THE TRIER OF FACT AND FULLY UNDERSTANDS YOUR POINT. BUT
9 IF MR. BLUME HAS EVIDENCE HE WISHES TO PUT UP, WELL, THE
10 FIRST PIECE OF THAT EVIDENCE WOULD BE AN OFFICIAL DOCUMENT.
11 AND I NOTE THIS IS MARKED AS A TRUE COPY AND HAS THE CLERK'S
12 SEAL ON IT OF A PUBLIC RECORD. AND THIS MAY JUST BE ONE
13 PIECE OF HIS EVIDENCE.

14 NOW WHETHER OR NOT HE ULTIMATELY MAKES THAT CONNECTION
15 THROUGH PROOF THAT HE'S REQUIRED TO PUT FORTH, WELL, THAT
16 REMAINS TO BE SEEN. BUT THE COURT WILL OVERRULE THE
17 OBJECTION AND ALLOW PLAINTIFF'S 10 IN EVIDENCE PURSUANT TO
18 RULE 803 SUBSECTION 8 OF THE RULES OF EVIDENCE.

19 (WHEREUPON APPLICANT'S EXHIBIT 10 WAS ENTERED INTO
20 EVIDENCE)

21 MR. BLUME: YOUR HONOR, AT THIS POINT WE WOULD OFFER
22 PLAINTIFF'S EXHIBIT 11, WHICH IS THE PROBATE --
23 AUTHENTICATED PROBATE COURT RECORDS OF THE ESTATE OF JUDY
24 SOUTHERN. AND THE RELEVANCE OF THIS, YOU KNOW, WE BELIEVE
25 IS THAT IT INDICATES THAT IN THAT PROCEEDING MR. SOUTHERN

1 WAS REPRESENTED BY AN ATTORNEY BY THE NAME OF MICHAEL
2 HAMRICK. THIS WAS PRIOR TO THE TRIAL OF THIS CASE. MR.
3 HAMRICK ALSO REPRESENTED MR. JOHNSON, THE INFORMANT AGAINST
4 WHOM THE CHARGES WERE DROPPED ALL AT THE SAME TIME.

5 THE COURT: VERY GOOD. AND RESPONSE?

6 MR. MABRY: YOUR HONOR, WE OBJECT TO THAT ON THE
7 GROUNDS OF RELEVANCE. WHAT DIFFERENCE DOES IT MAKE THAT MR.
8 HAMRICK REPRESENTED MR. SOUTHERN? THIS IS A SMALL COUNTY,
9 SMALL TOWN COUNTY SEAT IN A SMALL COUNTY. THE FACT THAT MR.
10 HAMRICK REPRESENTED MR. SOUTHERN IN A PROBATE MATTER HAS NO
11 RELEVANCE TO WHETHER MR. JOHNSON WAS REPRESENTED BY MR.
12 HAMRICK IN A CRIMINAL MATTER THAT WAS DISMISSED BY THE
13 SOLICITOR'S OFFICE, AS I CAN TELL FROM THE DOCUMENTS, THAT
14 MR. HAMRICK HAD NOTHING TO DO WITH.

15 THE COURT: ALL RIGHT. VERY GOOD. YOU WANT TO REPLY
16 TO THAT?

17 MR. BLUME: I BELIEVE THAT IT IS AT LEAST
18 CIRCUMSTANTIAL EVIDENCE FROM WHICH A CONCLUSION COULD BE
19 DRAWN THAT THIS WAS -- THE SAME LAWYER WAS REPRESENTING
20 THESE PEOPLE AT THE SAME TIME, THE VICTIM IN THE CASE AND
21 THE WITNESS IN THE CASE, AND AFTER -- SUBSEQUENT TO THE
22 VICTIM, I MEAN, THE WITNESS' TESTIMONY THE CHARGES WERE
23 DROPPED.

24 THE COURT: ALL RIGHT..

25 MR. BLUME: THEY WERE NOL PROSSED.

1 **THE COURT:** I'M GOING TO SUSTAIN THE OBJECTION TO THAT
2 DOCUMENT BECAUSE I BELIEVE THAT IT IS TOO TENUOUS AND YOU
3 ASK THE COURT TO MAKE A TREMENDOUS LEAP OF FAITH THAT
4 THERE'S SOME VIOLATION OF -- I DON'T KNOW WHETHER IT'S
5 ATTORNEY/CLIENT PRIVILEGE OR MULTIPLE REPRESENTATION. AND I
6 SIMPLY HAVE NO EVIDENCE FROM WHICH TO MAKE THAT LEAP. FOR
7 THOSE REASONS THE COURT WILL SUSTAIN THE OBJECTION TO THAT
8 EXHIBIT.

9 **MR. BLUME:** JUST FOR PURPOSES OF THE RECORD, I KNOW
10 IT'S PROBABLY NOT NEEDED TO BE DONE, BUT JUST NOTE OUR
11 OBJECTION ON THAT MATTER.

12 **THE COURT:** SO NOTED. IF YOU WISH TO MARK IT AS A
13 COURT'S EXHIBIT, I HAVE NO ---

14 **MR. BLUME:** IT HAS BEEN MARKED ALREADY. WE WOULD -- I
15 GUESS WE CAN DO THAT AT A LATER TIME.

16 **THE COURT:** ALL RIGHT. WELL, LET'S JUST TAKE A MOMENT
17 AND MAKE SURE WE ALL UNDERSTAND. WHEN I LEAVE HERE I'M
18 PROBABLY GOING TO TAKE WITH ME THE DOCUMENTS THAT ARE
19 PARTIES' EXHIBITS, BUT THE COURT'S EXHIBITS, I'M GOING TO
20 LEAVE HERE IN THE RECORD BECAUSE THEY'RE MATTERS THAT I
21 DETERMINED I SHOULD NOT LOOK AT. AND SO I WON'T TAKE THEM
22 WITH ME. SO LET'S JUST TAKE A MOMENT AND DO THAT RIGHT NOW.
23 THAT WAY WE WON'T HAVE ANY CONFUSION. WE'RE GOING TO GO OFF
24 THE RECORD FOR A MOMENT.

25 (WHEREUPON APPLICANT'S EXHIBIT 11 WAS MARKED AS COURT'S

1 EXHIBIT 3)

2 THE COURT: ALL RIGHT. NOW WE'VE MARKED THAT AS
3 COURT'S EXHIBIT 3. ANYTHING FURTHER, MR. BLUME?

4 MR. BLUME: YES, TWO OTHER MATTERS. ONE, I DON'T KNOW
5 WHETHER WE CAN HANDLE BY STIPULATION OR WHETHER YOU WANT ME
6 TO CALL A PARALEGAL, MY PARALEGAL, BUT WHEN DR. RIDDICK
7 TESTIFIED, I'M NOT A HUNDRED PERCENT SURE IT WAS CLEAR, AND
8 I WOULD LIKE FOR AT LEAST THE RECORD TO BE CLEAR ON THIS,
9 THAT THE AUTOPSY PHOTOGRAPHS, AND THERE WAS ONE THAT HE WAS
10 ABLE TO REVIEW. AND THE REASON HE WASN'T ABLE TO REVIEW
11 ANYMORE IS THAT DR. ROSS, WHO IS THE PATHOLOGIST WHO
12 CONDUCTED THE AUTOPSY MAINTAINED THAT FOR REASONS SHE COULD
13 NOT -- SHE COULDN'T EXPLAIN, SHE DIDN'T UNDERSTAND -- THEY
14 COULDN'T FIND IT. THEY NO LONGER HAVE IT.

15 SO I JUST WANTED THE RECORD TO BE -- I'M HAPPY TO CALL
16 MS. RIDER, THE PARALEGAL, WHO HAS THE CORRESPONDENCE AND WHO
17 SPOKE WITH MS. ROSS TO ESTABLISH THAT FACT. BUT I JUST
18 WANTED THE RECORD TO BE CLEAR IF YOU'RE SEEING SOME
19 AMBIGUITY ABOUT IT NOT THAT ANY PHOTOGRAPHS WERE WITHHELD,
20 BUT HE LOOKED AT EVERY PHOTOGRAPH WHICH WAS AVAILABLE FROM
21 ANY SOURCE.

22 THE COURT: IS THERE ANY OBJECTION TO THAT STIPULATION,
23 MR. SALTER?

24 MR. SALTER: JUDGE, IT'S HEARSAY. THEY HAD AN
25 OPPORTUNITY THROUGH THEIR WITNESS TO ELICIT -- AND I BELIEVE

1 HE DIDN'T KNOW THE ANSWER. THEY COULD CALL THE GOOD DOCTOR
2 ROSS, ANYTHING THAT MS. RIDER HANDED OFF WOULD BE HEARSAY,
3 CLEARLY HEARSAY.

4 THE COURT: WELL, TELL ME THIS. AND PERHAPS I DON'T
5 UNDERSTAND THE NUANCES HERE. WHAT'S THE IMPORTANCE OF THAT
6 FACT? TELL ME WHY THAT, FIRST OF ALL, IT'S SUFFICIENTLY
7 IMPORTANT THAT YOU PROTESTED OR DON'T BELIEVE IT SHOULD COME
8 IN. THEN I'M GOING TO ASK MR. BLUME WHY HE THINKS IT'S
9 IMPORTANT TO THE CASE.

10 MR. SALTER: WELL, YOUR HONOR, I DON'T KNOW THAT THAT'S
11 CORRECT.

12 THE COURT: ALL RIGHT. I SEE.

13 MR. SALTER: THAT'S THE BOTTOM LINE. I'M NOT -- I'M
14 NOT ACCUSING MR. BLUME OF ANYTHING IMPROPER. I'M NOT
15 SUGGESTING ANYTHING BAD, BUT I DON'T KNOW THAT THAT'S
16 CORRECT. I'VE NOT SPOKEN TO HER.

17 THE COURT: VERY GOOD. AND, MR. BLUME, I GUESS I ASK
18 THAT YOU SPOON FEED ME. WHAT'S THE IMPORTANCE OF THAT?

19 MR. BLUME: THE ONLY IMPORTANCE OF THAT IS THAT I AM
20 TRYING TO AVOID -- HAVING READ A NUMBER OF ORDERS IN THESE
21 CASES I WOULD -- I'M WORRIED ABOUT SOMEONE DRAWING AN
22 INFERENCE AND SAYING THAT DR. RIDDICK'S TESTIMONY SHOULD BE
23 DISCREDITED BECAUSE HE REFUSED TO LOOK AT OR DID NOT LOOK AT
24 AUTOPSY PHOTOGRAPHS WHICH WERE AVAILABLE TO HIM.

25 AND I THINK THAT WOULD BE UNFAIR GIVEN THAT WE'VE MADE

1 EVERY GOOD FAITH EFFORT TO GET, AGAIN, THESE PHOTOGRAPHS
2 WHICH WERE IN THEIR POSSESSION. SHE THOUGHT THAT MAYBE THEY
3 WERE IN THE COURT'S FILE. I PERSONALLY CAME AND INSPECTED
4 THE COURT'S FILE. THEY'RE NOT IN THAT. OR SHE THOUGHT THE
5 SOLICITOR'S OFFICE MIGHT HAVE THEM. MR. GOWDY MADE
6 AVAILABLE WHAT I UNDERSTAND TO BE THE ENTIRE FILE TO ME.
7 AND THE PHOTOGRAPHS WERE NOT IN MR. GOWDY'S FILE.

8 SO I JUST WANT THE RECORD TO BE CLEAR AND COMPLETE THAT
9 MR. RIDDICK -- IT'S NOT AS IF ANY INFORMATION WAS HIDDEN
10 FROM HIM OR HE REFUSED TO LOOK AT IT. HE LOOKED AT WHAT WAS
11 AVAILABLE.

12 THE COURT: ALL RIGHT. WELL, CLEARLY FROM THE OTHER
13 SIDE I DON'T HEAR A STIPULATION OR AN AGREEMENT. I HESITATE
14 TO ACCEPT SOMETHING AS A FACT THAT'S OBVIOUSLY DISPUTED AND
15 JUST ARGUED TO ME BY COUNSEL. IF YOU HAVE A WITNESS YOU
16 NEED TO CALL ON THAT POINT, I WOULD SUGGEST THAT YOU DO
17 THAT.

18 MR. BLUME: WELL, THEN ---

19 THE COURT: BUT BEFORE YOU DO THAT LET'S JUST MOVE ON
20 TO WHATEVER OUR NEXT ISSUE IS.

21 MR. SALTER: YOUR HONOR, IF I MIGHT JUST VERY BRIEFLY?

22 THE COURT: YES, SIR.

23 MR. SALTER: I BELIEVE THAT MR. -- THAT DR. RIDDICK
24 RATHER TESTIFIED BOTH ON DIRECT AND ON CROSS EXAMINATION
25 THAT THESE OTHER PHOTOGRAPHS WERE NOT AVAILABLE FOR SOME

1 UNKNOWN REASON TO HIM.

2 THE COURT: HE DID.

3 MR. SALTER: SO, I MEAN, THERE'S NO WAY THAT I WOULD
4 SUGGEST THAT HE REFUSED TO LOOK AT SOMETHING THAT WAS
5 AVAILABLE AND FAILED TO DO SO.

6 THE COURT: ALL RIGHT. I WILL TELL YOU, MR. BLUME, I
7 DON'T HAVE THAT SENSE FROM THE EVIDENCE EITHER THAT THERE'S
8 SOME PART KNOWN THAT'S INTENTIONALLY LEFT OUT, BUT AGAIN,
9 THIS IS YOUR CASE AND THESE ARE YOUR STRATEGIES. I'LL LEAVE
10 IT TO YOU TO PUT UP THE CASE AS YOU WISH. AND I'LL LEAVE IT
11 TO YOU TO CALL YOUR WITNESS ON THAT ISSUE IF YOU WISH. BUT
12 LET'S MOVE FORWARD TO THE OTHER MATTER YOU WANTED TO ARGUE.

13 MR. BLUME: THE FINAL MATTER IN THIS REGARD WOULD BE
14 THAT WE SUBPOENAED AN INDIVIDUAL BY THE NAME OF MARK
15 EDWARDS. MR. EDWARDS WOULD HAVE GIVEN TESTIMONY ESSENTIALLY
16 CORROBORATIVE OF WHAT MS. BROWN SAID YESTERDAY. HE WAS A --
17 HE WORKED AT THE POST OFFICE, NOT AT THE TIME.

18 AND JUST TO BE CANDID ABOUT IT, IT WOULD NOT HAVE
19 CORROBORATED THE STATEMENT. HE DID NOT HEAR THE ACTUAL
20 STATEMENT. HE WOULD HAVE CORROBORATED THE CLEAR DIFFERENCE
21 IN APPEARANCE OF MS. SOUTHERN ON THAT DAY AND THAT SHE CAME
22 IN AND TALKED TO HIM AND APPEARED TO BE DISTRAUGHT AND
23 EXPLAINED DIFFICULTIES -- ONGOING DIFFICULTIES IN THE
24 MARRIAGE.

25 MR. EDWARDS HAD BEEN SUBPOENAED LAST WEEK. I HAD

1 TALKED TO HIM. HE'D INDICATED THERE WAS NO -- HE DIDN'T
2 HAVE ANY PROBLEM COMING, HE WAS HAPPY TO COME AND TESTIFY,
3 THAT HE HAD BEEN SUBPOENAED YESTERDAY.

4 MAY 30TH WE RECEIVED VIA FACSIMILE FROM THE UNITED
5 STATES POSTAL SERVICE A LETTER FROM YVONDA LEWIS, A
6 PARALEGAL SPECIALIST WITH THE POSTAL SERVICE, INDICATING
7 THAT THERE IS A FEDERAL REGULATION, 39 CFR 265.12 WHICH
8 PLACES SPECIAL LIMITS ON THE ABILITY TO SUBPOENA A POSTAL
9 WORKER, WHICH I CAN SAY THAT I HAD NO IDEA THAT SUCH A
10 REGULATION EXISTED.

11 THE REGULATION REQUIRES ESSENTIALLY TEN DAYS NOTICE,
12 TEN WORKING DAYS NOTICE THAT HAS TO BE IN WRITING. AND IT
13 HAS TO BE -- TESTIMONY REQUESTED HAS TO BE TAKEN -- SUMMARY
14 REQUESTED TESTIMONY.

15 MY BELIEF AND OPINION IS THAT THIS REGULATION IS NOT
16 RELEVANT, THAT THIS SHOULDN'T PRECLUDE HIM FROM TESTIFYING
17 BECAUSE THE INFORMATION DOESN'T HAVE TO DO WITH ANYTHING
18 REALLY IN HIS OFFICIAL CAPACITY, YOU KNOW, AS A POSTAL
19 WORKER. ATTEMPTS TO REASON WITH THE POSTAL SERVICE AND
20 THEIR LEGAL DEPARTMENT ABOUT THAT MATTER AND SECURE THE
21 ATTENDANCE OF MR. EDWARDS WERE UNSUCCESSFUL.

22 SO WHAT I AM, I GUESS, REQUESTING IS THE OPPORTUNITY TO
23 TAKE THIS BRIEF, LIMITED TESTIMONY AT THE SAME TIME AS THE
24 OTHER TESTIMONY IS TAKEN BY DEPOSITION.

25 THE COURT: WHAT SAYS THE STATE?

1 **MR. SALTER:** WELL, YOUR HONOR, OBVIOUSLY WE OPPOSE ANY
2 TESTIMONY FROM HIM AT ALL ON THE SAME GROUNDS THAT WE ARGUED
3 YESTERDAY WITH RESPECT TO TONYA BROWN. IT'S HEARSAY.
4 NOTHING SHORT OF IT. IT'S ALSO -- DOESN'T RISE TO THE LEVEL
5 OF ADMISSIBLE EVIDENCE. HOW HER STATE OF MIND WAS THAT
6 MORNING BECAUSE OF ANY ONGOING PROBLEMS SHE MAY HAVE HAD IN
7 HER MARRIAGE JUST ISN'T RELEVANT TO ANYTHING THAT OCCURRED
8 SUBSEQUENTLY THAT AFTERNOON, AROUND 4:00 IN THE AFTERNOON.

9 **THE COURT:** ALL RIGHT. THUS FAR WE HAVE AGREED, I
10 BELIEVE, TO TAKE THREE WITNESSES' TESTIMONY OUT OF TIME.
11 ONE WAS AN EXPERT THAT WAS UNAVAILABLE. THE SECOND WAS A
12 FAMILY MEMBER THAT HAD SOME PERSONAL REASONS THAT WERE, I
13 THINK, AGREED BY COUNSEL AND THE COURT VALIDATED NOT TO
14 APPEAR. AND THE THIRD INDIVIDUAL, I BELIEVE, WAS SOMEONE
15 THAT WE AGREED TO ON THE FIRST DAY OF TRIAL, BUT I'M NOT
16 CERTAIN WHAT THAT ---

17 **MR. BLUME:** DR. BOOKSTEIN.

18 **THE COURT:** ALL RIGHT. TWO EXPERTS AND A LAY WITNESS.
19 COUNSEL, I'M GOING TO RESPECTFULLY DENY YOUR REQUEST SIMPLY
20 BECAUSE I DON'T FIND A COMPELLING REASON TO LEAVE THE RECORD
21 OPEN FOR THAT. THE OTHER THREE WITNESSES THAT WE'VE ALLOWED
22 DID HAVE COMPELLING WITNESSES, I MEAN, COMPELLING REASONS
23 FOR BEING A WITNESS TAKEN OUT OF TIME. AND I RESPECTFULLY
24 DENY YOUR REQUEST TO ---

25 **MR. BLUME:** I'M ---

1 THE COURT: --- TAKE THIS BY DEPOSITION.

2 MR. BLUME: EXCUSE ME. SORRY, YOUR HONOR.

3 THE COURT: YES, SIR.

4 MR. BLUME: I DIDN'T MEAN TO INTERRUPT. FOR PURPOSES
5 OF THE RECORD THEN SHOULD I MAKE AN ADDITIONAL WRITTEN
6 PROFFER AS TO WHAT THIS PERSON WOULD HAVE SAID OR IS, I
7 MEAN, I HAVE ESSENTIALLY HAVE MADE AN ORAL PROFFER OF WHAT I
8 BELIEVE THIS WITNESS' TESTIMONY WOULD BE.

9 THE COURT: THE COURT ACCEPTS YOUR ORAL PROFFER OF WHAT
10 YOU BELIEVE THE WITNESS' TESTIMONY WOULD BE. AND THAT IS
11 SUFFICIENT.

12 MR. BLUME: WELL, THEN I BELIEVE THAT IS -- THAT'S THE
13 APPLICANT'S CASE IN CHIEF. I GUESS I'D HAVE TO DECIDE
14 BRIEFLY WHETHER TO PUT MS. RIDER UP OR HAVE MS. PAAVOLA PUT
15 ME UP TO TESTIFY ABOUT OUR EFFORTS TO GET THESE RECORDS. I
16 DON'T WANT TO DO THAT AND WASTE THE COURT'S TIME IF THE
17 OVERALL VIEW HERE IS ---

18 THE COURT: YOU TALKING ABOUT THE PHOTOGRAPH?

19 MR. BLUME: YES.

20 THE COURT: I REALLY SEE THAT AS A NON-ISSUE AND A
21 COLLATERAL MATTER AT BEST. THAT'S MY VIEW OF IT. BUT
22 AGAIN, I WOULD NOT WANT TO TELL YOU WHAT I THINK YOUR
23 STRATEGY AND TACTIC SHOULD BE. THAT'S YOUR DECISION.

24 MR. BLUME: WELL, IT'S NOT REALLY A STRATEGY OR TACTIC.
25 AND BASED UPON MR. SALTER'S REPRESENTATIONS AND WHAT THE

1 COURT SAID I BELIEVE THAT THAT WOULD PROBABLY BE UNNECESSARY
2 FOR ME TO CALL HER AND SOMEONE TO CALL ME.

3 THE COURT: ALL RIGHT. THEN APPLICANT RESTS?

4 MR. BLUME: I WOULD LIKE TO, YOUR HONOR, MAKE SURE JUST
5 TO FINAL THINGS. THESE ARE THE TWO WRITTEN PROFFERS THAT WE
6 HAD DISCUSSED.

7 THE COURT: VERY GOOD. WE WILL NEED TO MARK THOSE AS A
8 COURT'S EXHIBIT, PLEASE. AND WE'LL TAKE A MOMENT TO DO
9 THAT.

10 (WHEREUPON COURT'S EXHIBIT 4 WAS MARKED)

11 THE COURT: ALL RIGHT. COUNSEL, HAVE YOU LOOKED AT OUR
12 COURT REPORTER'S LIST OF EXHIBITS TO MAKE SURE THAT WHAT SHE
13 SHOWS IN EVIDENCE IS WHAT YOU HAVE IN YOUR RECORDS AS BEING
14 IN EVIDENCE?

15 MR. BLUME: NO, SIR, YOUR HONOR. I'LL DO THAT.

16 THE COURT: LET'S DO THAT.

17 (PAUSE)

18 (WHEREUPON ALL ATTORNEYS AGREED UPON EXHIBITS IN
19 EVIDENCE)

20 THE COURT: ALL RIGHT. ANYTHING FURTHER NOW FROM
21 APPLICANT?

22 MR. BLUME: NO, SIR, YOUR HONOR.

23 THE COURT: ANY MOTIONS OR MATTERS TO BE TAKEN UP BY
24 THE COURT AT THIS POINT, MR. SALTER?

25 MR. SALTER: VERY BRIEFLY, YOUR HONOR, JUST A

1 FORMALITY. ALL THE EXHIBITS ARE CURRENTLY SITTING IN THE
2 COURTROOM AND HAVE BEEN SINCE WE BEGAN. BUT I WOULD MOVE TO
3 INCORPORATE ALL THE EXHIBITS FROM THE ORIGINAL TRIAL, BOTH
4 THE GUILT PHASE AND PENALTY PHASE.

5 THE COURT: AND WHAT DO YOU SAY TO THAT, MR. BLUME?

6 MR. BLUME: I THOUGHT THEY HAD BEEN MOVED IN AT THE
7 BEGINNING OF THE PROCEEDING.

8 THE COURT: ALL RIGHT. VERY GOOD. THEN ASSUMING THAT
9 THEY EITHER WERE OR WERE NOT, I HEAR AGREEMENT THAT THEY
10 SHOULD BE IN, AM I CORRECT?

11 MR. BLUME: YES, SIR.

12 MR. SALTER: I JUST WANTED TO DOUBLE CHECK. THEY MAY
13 HAVE BEEN ---

14 THE COURT: ALL RIGHT. WITHOUT OBJECTION, SO ORDERED.

15 (WHEREUPON ALL OF THE EXHIBITS FROM THE ORIGINAL TRIAL
16 WERE ENTERED INTO EVIDENCE)

17 THE COURT: ANYTHING FURTHER, MR. SALTER, AT THIS
18 JUNCTURE?

19 MR. SALTER: NO FURTHER PRELIMINARY MATTERS, YOUR
20 HONOR.

21 THE COURT: ALL RIGHT. YOU READY TO CALL YOUR FIRST
22 WITNESS?

23 MR. MABRY: YOUR HONOR, THE STATE CALLS SOLICITOR TREY
24 GOWDY.

25 THE COURT: PLEASE COME FORWARD AND TAKE THE OATH OF A

1 WITNESS.

2 HAROLD W. GOWDY, BEING

3 DULY SWORN TESTIFIED AS FOLLOWS:

4 THE COURT: MR. SOLICITOR, GOOD MORNING.

5 MR. GOWDY: GOOD MORNING, YOUR HONOR.

6 DIRECT EXAMINATION BY MR. MABRY:

7 Q. FOR THE RECORD, WOULD YOU TELL US YOUR NAME, PLEASE?

8 A. MY NAME IS HAROLD WATSON GOWDY, III. I GO BY TREY.

9 Q. MR. GOWDY, WHAT DO YOU DO FOR A LIVING?

10 A. I AM THE SOLICITOR OF THE SEVENTH JUDICIAL CIRCUIT,
11 WHICH INCLUDE SPARTANBURG AND CHEROKEE COUNTIES.

12 Q. ALL RIGHT. DID YOU PROSECUTE THIS CASE, THE STATE
13 VERSUS JONATHAN BINNEY?

14 A. I DID ALONG WITH DEPUTY SOLICITOR DONNIE WILLINGHAM.

15 Q. ALL RIGHT. I WANT TO JUST BRIEFLY TALK TO YOU ABOUT
16 TWO INDIVIDUALS THAT HAVE BEEN BROUGHT UP BY MR. BINNEY'S
17 COUNSEL, DANNY EDWARDS AND, I BELIEVE, THE OTHER FELLOW'S
18 NAME WAS JERRY JOHNSON, JR. DO YOU REMEMBER THOSE TWO ---

19 A. I REMEMBER MR. EDWARDS BETTER THAN I DO MR. JOHNSON. I
20 BELIEVE MR. WILLINGHAM HANDLED MR. JOHNSON AS A WITNESS. I
21 HANDLED MR. EDWARDS. I MAY HAVE BEEN PRESENT FOR BOTH OF
22 THEIR TRIAL PREPS AS IT WERE. BUT MR. JOHNSON, I FRANKLY
23 DID NOT REMEMBER US CALLING AS A WITNESS UNTIL I SAT OUT
24 HERE EARLIER THIS WEEK.

25 Q. OKAY. AND WHAT WAS MR. EDWARDS CALLED TO TESTIFY TO IN

1 THE CASE AND WHAT WAS HIS IMPORTANCE TO THE CASE TO YOU?

2 A. PRINCIPALLY HIS IMPORTANCE TO ME WAS TO AUTHENTICATE
3 AND ULTIMATELY HOPEFULLY ADMIT A MAP THAT THE DEFENDANT,
4 JONATHAN BINNEY, HAD, AT LEAST IN OUR OPINION AND FROM OUR
5 PERSPECTIVE, DRAFTED A MAP AND ALSO A STATEMENT RELEVANT TO
6 HIS CSC CONVICTION INVOLVING HIS DAUGHTER, WHICH I ALSO
7 PROSECUTED EARLIER IN SPARTANBURG COUNTY.

8 MR. EDWARDS WAS THE CONDUIT OR THE FOUNDATION THAT WE
9 FELT LIKE WE HAD TO LAY TO BE ABLE TO GET TO GAYLE HEATH OR
10 WHOEVER THE SLED HANDWRITING EXPERT WAS SO WE COULD
11 AUTHENTICATE THE MAP AND THE STATEMENT.

12 Q. OKAY. JUST BRIEFLY IF YOU COULD INFORM THE COURT WHAT
13 MR. EDWARDS AND MR. JOHNSON SAY OCCURRED REGARDING -- FIRST
14 OF ALL, THEY WERE THE JAILHOUSE SNITCHES BASICALLY?

15 A. YOU KNOW, THAT'S A PHRASE I HEAR A LOT. AND I DON'T,
16 YOU KNOW, PEOPLE ARE MOTIVATED BY DIFFERENT THINGS TO COME
17 FORWARD. IF I REMEMBER CORRECTLY, I CALLED MR. EDWARDS, YOU
18 KNOW, AS A FORMER PROSECUTOR YOURSELF, YOU'RE INUNDATED WITH
19 LETTERS FROM PEOPLE WHO WANT TO HELP. I DON'T REMEMBER IT
20 BEING THAT WAY.

21 I CAN'T TELL YOU HOW I CAME TO KNOW THAT THERE WAS A
22 MAP OR A LETTER IN EXISTENCE, BUT I DO REMEMBER AT SOME
23 POINT US FINDING MR. EDWARDS. HE WAS TOWARDS THE END OF HIS
24 FEDERAL PRISON SENTENCE. WE ACTUALLY HAD HIM DRIVEN FROM
25 MARYLAND DOWN TO SOUTH CAROLINA. AND THE FIRST TIME I MET

1 WITH HIM WAS, I BELIEVE, WHILE WE WERE QUALIFYING THE JURY
2 THE WEEK OF TRIAL.

3 Q. OKAY. AND SO THIS WAS INFORMATION THAT KIND OF CAME TO
4 YOU LATE IN THE INVESTIGATION OF THE CASE?

5 A. AS I REMEMBER -- AS I REMEMBER. AND I COULD BE WRONG.
6 I COULD HAVE KNOWN ABOUT IT EARLIER ON. I DON'T THINK WE
7 DID. MR. BINNEY GAVE SEVERAL STATEMENTS TO LAW ENFORCEMENT
8 THAT IMPLICATED HIMSELF. SO I DON'T KNOW THAT WE WOULD HAVE
9 NEEDED TO RELY UPON TWO JAILHOUSE COOPERATING WITNESSES TO
10 SUBSTANTIATE HIS ROLE.

11 WE WERE CONCERNED ABOUT THE ISSUE OF THIRD PARTY GUILT
12 BECAUSE WE THOUGHT THAT WAS GOING TO BE THE DEFENSE. AND TO
13 THE EXTENT THAT WE COULD CALL ANY WITNESSES THAT WOULD --
14 THAT WOULD TEND TO SUGGEST THAT THE NOTION THAT ALLAN
15 SOUTHERN WAS INVOLVED WAS A NEW NOTION AND ONE THAT JONATHAN
16 BINNEY HAD NEVER MENTIONED BEFORE AND ALSO WITH RESPECT TO
17 THEIR DEFENSE OF SUICIDE.

18 WE DID THINK IT WAS IMPORTANT TO CALL PEOPLE THAT HAD
19 TALKED TO JONATHAN BINNEY RIGHT AFTER THE EVENTS AND HE
20 NEVER ONCE MENTIONED ANY EFFORT TO COMMIT SUICIDE. SO THOSE
21 TWO WITNESSES TO ME WERE MORE TO ANTICIPATE AND HOPEFULLY
22 REBUT A DEFENSE THAN THEY WERE TO ADVANCE OUR OWN CASE.

23 Q. OKAY. AND AS YOU SAID, YOU HAD STATEMENTS THAT HE GAVE
24 TO THE POLICE -- MR. BINNEY GAVE TO THE POLICE IMMEDIATELY
25 OR SHORTLY AFTER THE MURDER, IS THAT CORRECT?

1 A. WE HAD EVERYTHING FROM THE CONTEMPORANEOUS EXCLAMATION
2 TO A SLED AGENT AT THE TIME OF ARREST, WHAT WE, YOU KNOW,
3 WHAT THE DEFENSE CALLED A SUICIDE NOTE WHICH WAS LEFT AT THE
4 CRIME SCENE. HE WAS INTERVIEWED, I BELIEVE, BY DETECTIVE
5 BOLTS AND A SLED AGENT McCRAW, GAVE HIS STATEMENT. THERE
6 WERE -- THIS WAS NOT A WHO DONE IT FROM OUR PERSPECTIVE.

7 AS YOU COULD TELL BY THE FACT THAT WE LISTED IT AS AN
8 AGGRAVATED MURDER FOR HIRE, WE DID NOT KNOW WHAT THE DEFENSE
9 WAS GOING TO BE. AND A LOT OF WHAT WE DID AT TRIAL WAS TO
10 ANTICIPATE OR TRY TO ANTICIPATE WHERE THEY WERE GOING TO GO
11 WITH THEIR DEFENSE CASE.

12 Q. I UNDERSTAND. AND THE MURDER WEAPON IN THIS CASE, I
13 BELIEVE, WAS THE 9 MILLIMETER PISTOL. HOW DID THE POLICE
14 COME TO FIND THAT PISTOL?

15 MR. BLUME: YOUR HONOR, I OBJECT TO THIS. THE
16 TESTIMONY IS THE TESTIMONY ABOUT WHAT HAPPENED. AND I DON'T
17 THINK THAT SOLICITOR GOWDY'S COMMENTS NOW TO ANY POINTS
18 ABOUT HOW, YOU KNOW, WHAT HE THOUGHT THE EVIDENCE WAS ARE
19 REALLY RELEVANT TO ANY ISSUE IN THIS CASE.

20 THE COURT: ALL RIGHT. I'M GOING TO OVERRULE. I DO
21 BELIEVE IT IS RELEVANT AND PROBATIVE ON SEVERAL OF THE
22 ISSUES RAISED IN APPLICANT'S CASE. AND YOU MAY PROCEED.
23 REASK YOUR QUESTION, IF YOU WILL, COUNSEL.

24 MR. MABRY: YES, SIR.

25 Q. THE MURDER WEAPON THAT WAS INVOLVED IN THE CASE, WERE

1 THE POLICE ABLE TO RECOVER IT?

2 A. I THINK THEY WERE. IF I REMEMBER CORRECTLY -- AND
3 AGAIN, AT MY AGE THREE YEARS IS A LONG TIME TO REMEMBER
4 BACK. AND I -- WE'VE HAD THREE CAPITAL CASES SINCE THEN.
5 AND SO I DON'T -- IF I REMEMBER CORRECTLY MR. BINNEY WENT TO
6 A BARN OR SOME OTHER AREA AND THEN WAS ULTIMATELY IN THE
7 BASEMENT OF HIS HOME.

8 THERE HAD TO HAVE BEEN A MURDER WEAPON ULTIMATELY
9 RECOVERED OR WE WOULD NOT HAVE BEEN ABLE TO MATCH UP
10 BALLISTICS WITH THE SHELL CASINGS. I CAN'T TELL YOU WHERE
11 THAT WEAPON WAS FOUND. I CAN'T REMEMBER.

12 Q. BUT LET ME ASK YOU THIS. DO YOU REMEMBER THAT THE
13 SHELL CASINGS FOUND INSIDE THE HOME AND THE FIRED BULLETS
14 FOUND INSIDE THE HOME WERE MATCHED TO A SPECIFIC WEAPON?

15 A. YES.

16 Q. AND DO YOU REMEMBER MR. BINNEY WAS INTERVIEWED A SECOND
17 TIME BY AGENT McCRAW AND A PROFILE ---

18 MR. BLUME: THIS IS ESSENTIALLY LEADING TESTIMONY, YOUR
19 HONOR.

20 THE COURT: COUNSEL, THAT IS LEADING. SUSTAINED.

21 Q. DO YOU REMEMBER ANYTHING ABOUT A SECOND INTERVIEW?

22 A. I REMEMBER THAT SLED AGENT MICHAEL PRODAN AND McCRAW
23 DID INTERVIEW MR. BINNEY AGAIN. THERE WAS SOME DISAGREEMENT
24 OVER WHETHER OR NOT MR. BINNEY HAD INITIATED CONTACT WITH
25 LAW ENFORCEMENT. I REMEMBER THAT WAS A LEGAL ISSUE THAT WE

1 -- THAT WE HAD TO RESOLVE. I CAN'T TELL YOU TODAY WHAT WAS
2 DIFFERENT IN THE FIRST INTERVIEW HE GAVE OR HIS -- THE
3 LETTER HE LEFT AT THE CRIME SCENE AND THE INTERVIEW WITH
4 PRODAN.

5 I CAN TELL YOU THAT I -- I DON'T REMEMBER ANYTHING IN
6 THE DAYS OR WEEKS AFTER THE -- AFTER MS. SOUTHERN'S MURDER
7 THAT TENDED TO INDICATE THIRD PARTY GUILT OR THAT SOMEBODY
8 ELSE WAS INVOLVED. IT WAS AFTER THAT THAT WE BEGAN TO TRY
9 TO ANTICIPATE DEFENSES.

10 Q. ALL RIGHT. AND DO YOU REMEMBER ANYTHING ABOUT AFTER
11 THE INTERVIEW IN WHICH MR. BINNEY WAS INTERVIEWED BY AGENT
12 PRODAN AND AGENT McCRAW, IF THEY WENT ANYWHERE WITH THE
13 DEFENDANT?

14 A. MR. MABRY, I DO NOT REMEMBER. I KNOW ---

15 Q. THAT'S FINE.

16 A. --- AT SOME POINT SOME EVIDENCE WAS RECOVERED. I
17 REMEMBER THERE WERE GLOVES. I REMEMBER THERE WAS A SCOOTER.
18 THERE MAY HAVE EVEN BEEN A POLICE SCANNER. BUT I CAN'T TELL
19 YOU THE CHRONOLOGY OF WHEN THAT HAPPENED.

20 Q. I GOT YOU. I GOT YOU. MR. EDWARDS AND -- WELL, FIRST
21 OF ALL, LET'S JUST TALK ABOUT MR. EDWARDS. WERE ANY
22 PROMISES MADE TO MR. EDWARDS BY YOU IN ORDER TO GET HIM TO
23 TESTIFY ABOUT THIS MAP AND THIS NOTE THAT MR. BINNEY HANDED
24 TO HIM?

25 A. NO. MR. EDWARDS WAS TOWARDS THE -- WOULD HAVE HAD TO

1 HAVE BEEN TOWARDS THE TAIL END OF WHATEVER FEDERAL SENTENCE
2 HE GOT. EITHER HE DIDN'T GET MUCH OF A FEDERAL SENTENCE AND
3 WAS SENTENCED TO A HALF-WAY HOUSE OR ELSE HE WAS TOWARDS THE
4 TAIL END OF HIS FEDERAL SENTENCE. WHICH HE TOLD US HE WAS
5 IN A HALF-WAY HOUSE.

6 WHATEVER I WOULD HAVE SAID TO MR. EDWARDS I WOULD HAVE
7 TOLD TO MR. PRUETT AND THEN MR. SLADE. I DON'T BELIEVE THAT
8 WE SAID ANYTHING TO HIM OTHER THAN IF ASKED BY DEFENDANTS,
9 AND I HAVE IN THE PAST, WRITTEN A LETTER TO WHATEVER
10 PROSECUTOR HANDLED THEIR CASE ON THE FEDERAL LEVEL ADVISING
11 THEM THAT THIS PERSON DID SUCH AND SUCH, IF ASKED.

12 I DON'T REMEMBER BEING ASKED, AND I DON'T REMEMBER
13 WRITING THAT LETTER, ALTHOUGH I HAVE IN THE PAST. BUT I
14 CAN'T SWEAR TO YOU THAT A FEDERAL DEFENSE, A PUBLIC DEFENDER
15 LIKE AN ALAN BURNSIDE OR SOMEBODY LIKE THAT WOULD NOT HAVE
16 ASKED ME TO DO SO. I CAN'T TELL YOU THAT DIDN'T HAPPEN, BUT
17 I DON'T RECALL IT.

18 Q. RIGHT. AND DO YOU REMEMBER WHEN YOU WERE TALKING TO
19 MR. EDWARDS PREPARING FOR THE TRIAL OR DURING THE TRIAL THAT
20 YOU WERE AWARE OF ANY CASE HE HAD COOPERATED IN IN FEDERAL
21 OR ANY CASE HE'D GIVEN A STATEMENT ADMITTING HE STOLE ANY
22 PROPERTY OR FOUND ANY STOLEN PROPERTY?

23 A. NO, SIR. BUT FROM AN -- FROM PREPARING SOMEBODY FOR
24 IMPEACHMENT, THAT WOULD NOT BE SOMETHING THAT I WOULD BE
25 WORRIED ABOUT. I WOULD BE WORRIED ABOUT A PENDING PLEA

1 AGREEMENT, A 1.1 PROVISION AND -- OR A SUBSTANTIAL
2 COOPERATION PROVISION, I WOULD BE WORRIED ABOUT THAT OR AT
3 LEAST WORRIED. I'D BE WANTING TO PREPARE THEM FOR CROSS
4 EXAMINATION. THAT WOULD -- THAT IS NOT A QUESTION THAT I
5 WOULD ASK, HAVE YOU EVER COOPERATED IN THE PAST? I DON'T
6 RECALL EVER ASKING THAT.

7 AND FRANKLY, IT'S A LITTLE BIT OF A DOUBLE EDGED SWORD.
8 I REALLY HAVE NEVER SEEN ANYBODY IMPEACHED A LOT ON THAT
9 ISSUE BECAUSE IT'S A DOUBLE EDGED SWORD. IF YOU COOPERATE,
10 ARE YOU DOING IT FOR YOUR OWN BENEFIT? BUT IF YOU COOPERATE
11 A LOT, THEN SOME LAW ENFORCEMENT AGENCY OBVIOUSLY BELIEVES
12 YOU'RE A CREDIBLE PERSON OR THEY WOULDN'T BE USING YOU A
13 LOT. SO I THOUGHT MR. SLADE WAS VERY ADEPT IN HOW HE
14 BROUGHT IT OUT IN OUR CASE, BUT I'VE NEVER SEEN THAT AS A
15 SIGNIFICANT PORTION OF ANYBODY'S IMPEACHMENT.

16 Q. OKAY. AND DID MR. EDWARDS HAVE A SIGNIFICANT CRIMINAL
17 RECORD?

18 A. I REMEMBER LIKE IT WAS YESTERDAY, MR. SLADE LAYING OUT
19 HIS CRIMINAL RECORD. AND IT SEEMED TO STRETCH THE LENGTH OF
20 THE COURTROOM OR MAYBE THAT WAS JUST THE WAY IT APPEARED TO
21 ME AT THE TIME. BUT I REMEMBER HIM STANDING RIGHT IN FRONT
22 OF MS. McBEE WHILE MR. EDWARDS WAS TESTIFYING, AND I'M SURE
23 IT FELL, I'M SURE HE DIDN'T THROW IT, BUT IT STRETCHED OUT
24 QUITE A LONG WAYS.

25 AND I -- I THINK THE FIRST QUESTION I ASKED MR. EDWARDS

1 WAS TELL THE JURY ABOUT EVERY SINGLE CONVICTION YOU'VE EVER
2 HAD BECAUSE HE DID HAVE A RECORD. WAS IT A LOT OF OFFENSES
3 ROLLED INTO ONE CONSPIRACY? I DON'T -- I CAN'T RECALL THAT.
4 I SAW A QUESTION WHERE HE'D HAD A THIRTY YEAR LONG CRIMINAL
5 HISTORY. I WOULD HAVE NOTHING TO DISPUTE THAT.

6 Q. OKAY. AND, OF COURSE, HE WAS CROSS EXAMINED ABOUT HIS
7 CRIMINAL RECORD BY MR. SLADE.

8 A. AT LENGTH, TWICE.

9 Q. OKAY. THE MAP AND THE NOTE AFTER MR. EDWARDS TESTIFIED
10 AND MR. JOHNSON TESTIFIED, WERE YOU ABLE TO AUTHENTICATE THE
11 NOTE AS COMING FROM MR. BINNEY?

12 A. YES.

13 Q. HOW WERE YOU ABLE TO DO THAT?

14 A. SLED HANDWRITING.

15 Q. AND WAS THE MAP AUTHENTICATED AS WELL?

16 A. I THINK THERE WAS SOME WRITING ON THE MAP, BUT I DON'T
17 REMEMBER -- THERE WAS A SIDEBAR WHERE I THINK I TRIED TO
18 MOVE IT IN INITIALLY AND MAYBE MR. PRUETT OR MR. SLADE
19 OBJECTED AND WE HAD A BENCH CONFERENCE. AND I THINK THEY
20 WITHDREW THEIR OBJECTION. BUT I WAITED TO MOVE IT IN
21 THROUGH ANOTHER WITNESS. I DON'T REMEMBER AUTHENTICATION
22 BEING AN ISSUE WITH RESPECT TO THE MAP OR THE STATEMENT HE
23 GAVE RELATIVE TO THE CSC. WAS THERE ENOUGH WRITING ON THERE
24 FOR GAYLE HEATH TO BE ABLE TO DRAW A CONCLUSION? THERE MUST
25 HAVE BEEN. THAT'S MY RECOLLECTION.

1 Q. ALL RIGHT. WHAT WAS YOUR -- YOUR ASSESSMENT AFTER MR.
2 EDWARDS TESTIFIED OF HIS CREDIBILITY ON ---

3 MR. BLUME: I BELIEVE -- I OBJECT TO THAT. I DON'T
4 THINK IT MATTERS WHAT HE THOUGHT HIS CREDIBILITY WAS. THE
5 QUESTION IS HOW THE JURY ASSESSED HIS CREDIBILITY AND
6 WHETHER THEY WOULD HAVE HAD ALL THE INFORMATION NECESSARY TO
7 ASSESS THAT CREDIBILITY. I THINK THIS IS PENDING ON THAT.
8 I'M SURE HE HAS ONE, BUT I THINK IT'S IRRELEVANT TO ANYTHING
9 IN THESE PROCEEDINGS.

10 THE COURT: WELL, OVERRULED BECAUSE PART OF THE ISSUES
11 RAISED HERE ARE TRIAL COUNSEL'S ACTIONS WITH RESPECT TO
12 THAT. AND FOR THOSE REASONS THE COURT WILL ALLOW MR.
13 GOWDY'S OPINION ON THAT ISSUE. GO AHEAD AND RESTATE YOUR
14 QUESTION, COUNSEL.

15 Q. AS FAR AS MR. EDWARDS' TESTIMONY IN THE CASE THAT HE
16 HAD NEVER COOPERATED, HE ADMITTED HE COOPERATED AGAINST
17 HIMSELF OR NAMED HIMSELF, BUT HE HADN'T COOPERATED AGAINST
18 OTHER PEOPLE. AFTER MR. SLADE CROSS EXAMINED HIM WHAT WAS
19 YOUR ESTIMATION OF HIS CREDIBILITY ON THAT ISSUE?

20 A. I WAS GLAD THAT WE HAD A WITNESS THAT WOULD COME AFTER
21 MR. EDWARDS FROM SLED THAT WOULD CORROBORATE HIS TESTIMONY.
22 I REMEMBER -- I REMEMBER MR. SLADE'S CROSS EXAMINATION OF
23 DANNY EDWARDS BETTER THAN I DO ANY OTHER CROSS EXAMINATION
24 IN -- IN THE TRIAL. AND I REMEMBER BEING VERY GLAD THAT WE
25 HAD SOMETHING OTHER THAN DANNY EDWARDS' TESTIMONY, THE

HAROLD GOWDY - CROSS EXAMINATION BY MR. BLUME

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1 TESTIMONY OF A SLED AGENT IN PARTICULAR TO CORROBORATE THE
2 MAP AND THE STATEMENT.

3 YOU KNOW, THEY'RE -- CALL THEM JAILHOUSE SNITCHES OR
4 WHATEVER YOU WANT TO CALL THEM, BUT THERE'S ALWAYS A RISK.
5 I THOUGHT HE CAME ACROSS OKAY, BUT I ALSO THOUGHT THE CROSS
6 EXAMINATION KIND OF NEUTRALIZED HIM. SO WHAT WE'RE LEFT
7 WITH IS A MAP AND A STATEMENT THAT A SLED AGENT SAYS
8 JONATHAN BINNEY ALTERED.

9 Q. NOTHING FURTHER.

10 THE COURT: ANY CROSS EXAMINATION?

11 MR. BLUME: YES.

12 CROSS EXAMINATION BY MR. BLUME:

13 Q. GOOD MORNING, MR. GOWDY.

14 A. GOOD MORNING, MR. BLUME.

15 Q. NOW ON THE QUESTION OF MR. EDWARDS AND WHAT HE
16 TESTIFIED TO WOULD YOU AGREE WITH ME THAT THE BEST EVIDENCE
17 OF WHAT HE TESTIFIED TO IS CONTAINED IN THE TRANSCRIPT OF
18 THE TESTIMONY?

19 A. YES.

20 Q. AND THAT TESTIMONY IS GOING TO REFLECT ACCURATELY
21 WHETHER ALL HE DID WAS ATTEMPT TO AUTHENTICATE A NOTE OR
22 WHETHER HE ALSO RELAYED ORAL STATEMENTS BEYOND THOSE NOTES
23 SUPPOSEDLY MADE BY MR. BINNEY?

24 A. I WOULD AGREE WITH THAT, MR. BLUME. I DON'T BELIEVE OR
25 I HOPE I DIDN'T TESTIFY THAT THAT WAS ALL HE DID. I HOPE

1 WHAT I TESTIFIED TO WAS THAT THE PRIME PURPOSE IN CALLING
2 HIM WAS TO -- WAS TO AUTHENTICATE THE NOTE. IF I SUGGESTED
3 OTHERWISE, I DIDN'T MEAN TO. OBVIOUSLY HE TESTIFIED ABOUT
4 OTHER THINGS, BUT TO THE EXTENT OF WHAT OUR PURPOSE IN
5 CALLING HIM WAS, HE WAS TO AUTHENTICATE THOSE.

6 Q. AND AT THE TIME YOU CALLED HIM, I BELIEVE YOUR
7 TESTIMONY IS YOU DID NOT HAVE ANY KNOWLEDGE AS TO WHETHER HE
8 HAD COOPERATED WITH LAW ENFORCEMENT IN PRIOR INVESTIGATIONS?

9 A. IF I DID I WOULD HAVE PASSED IT ON TO MITCH AND TRENT.
10 I DON'T REMEMBER THAT I DID. OBVIOUSLY BEING A FORMER
11 FEDERAL PROSECUTOR IT WOULD HAVE CAUGHT MY ATTENTION THAT HE
12 WAS SERVING FEDERAL TIME. I HAVE TALKED TO SCORES OF
13 FEDERAL PROSECUTORS AND FEDERAL PUBLIC DEFENDERS IN MY
14 FOURTEEN YEARS ABOUT CLIENTS WHO COOPERATE. I DON'T RECALL
15 ANY CONVERSATIONS WITH ANYBODY ON BEHALF OF DANNY EDWARDS
16 PRIOR TO HIS TESTIMONY IN THIS CASE. I DON'T EVEN REMEMBER
17 TALKING TO HIM UNTIL THE MONDAY OF JURY QUALIFICATION.

18 Q. AND YOU DON'T HAVE ANY RECOLLECTION TODAY OF DOING ANY
19 TYPE OF INVESTIGATION TO DETERMINE WHETHER HE PREVIOUSLY
20 COOPERATED?

21 A. THAT WOULD NOT HAVE BEEN SOMETHING THAT I WOULD HAVE
22 DONE.

23 Q. NOW ANOTHER -- WELL FIRST, LET ME GO BACK TO ANOTHER
24 QUESTION. YOU INDICATED THAT YOU WERE TRYING TO ANTICIPATE
25 WHETHER THE DEFENSE WAS GOING TO RAISE AN ISSUE OF THIRD

1 PARTY GUILT.

2 A. YES.

3 Q. AND IS IT ALSO IN PART BECAUSE YOU HAD INFORMATION IN
4 YOUR FILE OBTAINED EARLY IN THE INVESTIGATION WHICH
5 SUGGESTED THAT MR. SOUTHERN MAY HAVE HAD SOME INVOLVEMENT IN
6 THIS?

7 A. WHAT DO YOU MEAN BY INFORMATION?

8 Q. WELL, YOU HAD STATEMENTS FROM A TONYA BROWN, STATEMENTS
9 FROM A SUSIE KIRBY, STATEMENTS FROM A STEPHANIE HEFLIN, A
10 STATEMENT MADE TO THE FBI BY MS. SOUTHERN'S SISTER, TRUDY,
11 HER TWIN SISTER, TRUDY, ALL OF WHICH INDICATED IN THEIR MIND
12 COLLECTIVELY SOME POSSIBLE INVOLVEMENT OF MR. SOUTHERN IN
13 THIS CASE.

14 A. YES, THERE WAS SPECULATION THAT MR. SOUTHERN'S MOTIVE
15 FOR WANTING MS. SOUTHERN KILLED WOULD HAVE BEEN STRONGER
16 THAN ANYONE ELSE'S. THERE IS A TREMENDOUS DIFFERENCE
17 BETWEEN SPECULATION, KNOWLEDGE AND PROOF. THERE WAS NEVER,
18 EVER ANY PROOF THAT JONATHAN BINNEY AND ALLAN SOUTHERN HAD
19 ANY CONNECTION WHATSOEVER.

20 WE WERE, OBVIOUSLY, I THINK AS RELATIVELY COMPETENT
21 PROSECUTORS WANTED TO PREPARE FOR THAT DEFENSE IF IT CAME.
22 THAT'S WHY WE HAD AN AGGRAVATOR, MURDER FOR HIRE, BUT WE
23 DROPPED IT. AND THERE, YOU KNOW, I CAN'T -- I CAN'T CHANGE
24 WHAT PEOPLE THINK IN TERMS OF MARRIAGES OR SPECULATION OR
25 OPINIONS.

1 THERE WAS EVEN A 302 FROM AN FBI AGENT IN THE FILE, BUT
2 THERE WAS NEVER ANY PROOF. AND THAT'S WHAT I HAVE TO DEAL
3 WITH IS PROOF THAT ALLAN SOUTHERN AND JONATHAN BINNEY EVEN
4 KNEW ONE ANOTHER.

5 Q. BUT WOULD YOU, I DON'T KNOW WHETHER IT'S IMPORTANT
6 WHETHER YOU AGREE WITH ME OR NOT, BUT THE EVIDENCE ISSUE, IT
7 WOULDN'T NECESSARILY HAVE TO BE A CONNECTION BETWEEN THE
8 TWO.

9 A. FOR MR. SOUTHERN TO HAVE COMMITTED MURDER HIMSELF OR
10 HIRED JONATHAN BINNEY?

11 Q. TO HAVE HAD SOME INVOLVEMENT IN THIS OR TO HAVE TAKEN
12 ADVANTAGE OF A SITUATION AFTER IT HAPPENED AS WAS SUGGESTED?
13 ALL -- I'M NOT ASKING YOU TO EVALUATE THE POSSIBILITY OF IT.
14 YOU AND I CAN COME TO DIFFERENT OPINIONS ABOUT THAT. ALL
15 I'M SAYING IS THAT THE EVIDENCE IN YOUR POSSESSION, IT
16 WOULDN'T NECESSARILY HAVE HAD TO BEEN A MURDER FOR HIRE
17 THEORY?

18 A. I'M GOING TO POLITELY DISAGREE WITH YOU ON THAT. I
19 DON'T SEE HOW YOU COULD HAVE PRESENTED THAT WITH A STRAIGHT
20 FACE WITHOUT SOME CONNECTION BETWEEN ALLAN SOUTHERN AND
21 JONATHAN BINNEY. YOU MAY KNOW BETTER THAN ME.

22 Q. OR NOT. BUT NEVERTHELESS, YOU WILL AGREE THAT THERE --
23 YOU DID HAVE STATEMENTS FROM VARIOUS PEOPLE IN YOUR FILE
24 AND, IN FACT, THAT THE DEFENSE WERE NOTIFIED IN THIS CASE BY
25 PEOPLE IN YOUR OFFICE THAT INITIALLY IN THIS CASE MR.

1 SOUTHERN WAS A SUSPECT?

2 A. I DON'T KNOW THAT I'VE EVER SEEN THE DEATH OF A WIFE
3 WHERE THE HUSBAND WAS NOT EITHER RULED IN OR RULED OUT
4 PRETTY EARLY ON AS A SUSPECT. AND THIS WOULD BE NO
5 DIFFERENT. AND THE FACT THAT THEIR MARRIAGE WAS NOT IDYLIC
6 I'M CERTAIN CONTRIBUTED TO PEOPLE SPECULATING ON IT.

7 BUT, MR. BLUME, THE ONLY THING I CAN TELL YOU IS THAT
8 THERE'S A BIG DIFFERENCE BETWEEN WHAT I THINK, WHAT I KNOW
9 AND WHAT I CAN PROVE. AND I DIDN'T SEE ANY KNOW OR PROOF IN
10 THE THEORY OF ALLAN SOUTHERN'S INVOLVEMENT.

11 Q. BUT YOU OBVIOUSLY HAVE SAID HERE TODAY THAT YOU THOUGHT
12 THERE WAS ENOUGH THERE THAT YOU WERE PREPARED TO TRY YOUR
13 CASE AND YOU DID TRY YOUR CASE IN ANTICIPATION OF TRYING TO
14 HEAD OFF A POSSIBLE DEFENSE IN THAT REGARD.

15 A. BECAUSE I DON'T -- I CAN LOOK AT THE FILE FOR TIME AND
16 MEMORIAL AND I STILL DON'T KNOW WHAT JONATHAN BINNEY'S GOING
17 TO TESTIFY TO. SO TO THE EXTENT THAT MR. PRUETT OR MR.
18 SLADE WOULD HAVE PUT JONATHAN BINNEY UP TO SAY, I REALLY
19 NEED TO TELL Y'ALL THE TRUTH THIS TIME, ALLAN SOUTHERN DID
20 HIRE ME, SURE, WE HAD TO BE PREPARED FOR THAT. THAT'S THE
21 CONTINGENCY THAT PROSECUTORS CAN NEVER PREPARE FOR, IS
22 WHAT'S GOING TO COME OUT OF A DEFENDANT'S MOUTH AT TRIAL.
23 SO, YEAH, WE HAD TO PREPARE FOR THAT.

24 AND, YOU KNOW, MR. SLADE AND MR. PRUETT ARE AS SKILLED
25 ATTORNEYS AS I HAVE EVER BEEN UP AGAINST. SO WAS I GOING TO

1 BE PREPARED FOR EVERY POSSIBLE THEORETICAL CONTINGENCY?

2 YES.

3 Q. AND THIS WAS ONE OF THEM?

4 A. IT WAS ONE OF THEM. IT WAS NOT PURSUED. AND FRANKLY,
5 TO THEIR CREDIT, THEY PURSUED A DEFENSE THAT WE HAD NOT
6 PREPARED FOR, WHICH IS THAT SUICIDE IS NOT A CRIME, I THINK
7 THE SUPREME COURT MIGHT HAVE DISAGREED WITH THEM LATER ON,
8 BUT THAT WAS THEIR DEFENSE. AND THAT WAS, AGAIN, A VERY
9 CREATIVE DEFENSE.

10 Q. NOW ANOTHER INDIVIDUAL THAT TESTIFIED IN THIS CASE,
11 THERE WAS ANOTHER JAILHOUSE WITNESS, IS THAT -- I WON'T CALL
12 THEM SNITCH, I WON'T CALL THEM INFORMANT, I'LL JUST SAY HE
13 WAS A WITNESS IN THE JAILHOUSE.

14 A. HE WAS A WITNESS THAT I THINK HAD SERVED SOME TIME WITH
15 EITHER MR. EDWARDS OR MR. BINNEY OR BOTH.

16 Q. AND THAT WAS JERRY JOHNSON.

17 A. YES.

18 Q. AND DID YOUR OFFICE HANDLE THE PROSECUTION OF HIS CASE?

19 A. MY OFFICE DID, AND IN PARTICULAR DEPUTY SOLICITOR
20 DONNIE WILLINGHAM, WHO WOULD HAVE BEEN HEADING UP THE
21 CHEROKEE COUNTY OFFICE AT THAT TIME.

22 Q. AND ARE YOU AWARE OF THE FACT THAT WITH SEVERAL MONTHS
23 AFTER HE TESTIFIED IN THIS CASE THE CHARGES AGAINST HIM WERE
24 *NOL PROSSED*?

25 A. I AM. AND I'M AWARE OF THE EXPLANATION THAT MR.

1 WILLINGHAM HAS FOR THAT.

2 Q. AND CAN YOU TELL ME WHY THE CHARGES WERE *NOL PROSSED*?

3 A. HE -- I THINK HE CITED THE REASON AS PER OFFICER
4 REQUEST. THE REALITY IS THE DRUGS WERE DESTROYED BY LAW
5 ENFORCEMENT INADVERTENTLY AND RATHER THAN WANTING TO
6 EMBARRASS THE POLICE OFFICER FOR LOSING THE DRUGS, I THINK
7 HE WROTE ON THE WARRANT PER OFFICER REQUEST. HE'S IN A
8 MURDER TRIAL. I EXPECT THAT HE WILL BE HERE TODAY TO
9 TESTIFY. THE DRUGS WERE LOST. I READILY ADMIT HOW THAT MAY
10 LOOK TO SOMEBODY, BUT I CAN TELL YOU THAT'S NOT THE ONLY
11 TIME DRUGS HAVE BEEN LOST IN CHEROKEE OR SPARTANBURG
12 COUNTIES.

13 Q. IS IT THE ONLY TIME THAT YOU'RE AWARE OF THAT A
14 WITNESS, THE PERSON WITH PENDING CHARGES HAS TESTIFIED FOR
15 YOUR OFFICE IN A CASE AND THEN AFTER THAT DRUGS WERE LOST
16 AND CHARGES WERE DROPPED? DO YOU KNOW OF ANY OTHER CASE IN
17 WHICH THAT'S HAPPENED?

18 A. I HAVEN'T RESEARCHED IT, BUT, NO, I WOULDN'T KNOW ANY
19 OFF THE TOP OF MY HEAD. AND FRANKLY, IN FAIRNESS TO MY
20 OFFICE, I DON'T KNOW WHEN THE DRUGS WERE LOST JUXTAPOSE WITH
21 WHEN HIS TESTIMONY WAS. IF THE -- IF THE DRUGS WERE LOST
22 PRIOR TO HIS TESTIMONY THAT WOULD -- MAY SUGGEST ONE THING
23 THAT THE DRUGS WERE LOST, THE WEEK OF THE TRIAL, THAT MIGHT
24 SUGGEST SOMETHING ELSE. WE DON'T STORE EVIDENCE.

25 SO, YOU KNOW, YOU'D HAVE TO ASK THE LAW ENFORCEMENT

1 AGENT WHEN THE DRUGS WERE LOST. HAS IT HAPPENED BEFORE?

2 YES. HAS IT HAPPENED IN A CAPITAL MURDER CASE? NEVER
3 LOOKED INTO IT.

4 Q. OR WHETHER IT'S HAPPENED IN ANY OTHER CASE IN WHICH
5 SOMEONE TESTIFIED, YOU'RE NOT AWARE OF ANY CASE OF THAT
6 NATURE?

7 A. NO, THAT'S NOT TO SAY IT HASN'T HAPPENED, BUT, NO, I
8 HAVEN'T LOOKED INTO THAT. I'M NOT AWARE OF IT, BUT I DON'T
9 WANT TO SAY IT'S NOT.

10 Q. THANK YOU.

11 THE COURT: REDIRECT?

12 MR. MABRY: NO, SIR. MAY HE BE EXCUSED?

13 THE COURT: ANY OBJECTION TO THE RELEASE?

14 MR. BLUME: NO OBJECTION.

15 THE COURT: ALL RIGHT, SIR. YOU'RE FREE TO GO.

16 MR. GOWDY: THANK YOU, YOUR HONOR.

17 MR. MABRY: YOUR HONOR, AT THIS TIME WE'D -- AS PART OF
18 OUR CASE WE WOULD PLAY THE 911 TAPE FROM THE TRIAL. IT'S
19 CITED IN THE TRANSCRIPT, BUT THERE'S NO DOCUMENTATION OF IT.
20 SO WE BELIEVE YOU NEED TO HEAR THE ACTUAL TAPE ITSELF.

21 THE COURT: VERY GOOD. ANY OBJECTION TO THAT, COUNSEL?

22 (WHEREUPON MR. BLUME WAS CONFERRING WITH MR. SALTER)

23 MR. BLUME: THE TRANSCRIPT OF THIS IS IN THE RECORD.

24 THE COURT: WELL, JUST A MOMENT BEFORE YOU PLAY IT.

25 LET ME ASK YOU, COUNSEL, AND I'LL ASK YOU AGAIN, IS THERE AN

1 OBJECTION?

2 MR. BLUME: I DON'T REALLY SEE THE POINT. THE
3 TRANSCRIPT OF THIS IS IN THE RECORD AND IS PART OF THE
4 EXHIBIT. I CERTAINLY -- I DON'T SEE THE POINT. THE COURT
5 CAN LISTEN TO IT AT ANY TIME. IT'S PART OF THE RECORD.

6 THE COURT: WELL, LET ME JUST -- MY EXPERIENCE WITH 911
7 TAPES HAS BEEN -- TO READ THE WORDS MAY NOT BE REALLY
8 DISPOSITIVE OF WHAT'S HAPPENING ---

9 MR. BLUME: OKAY.

10 THE COURT: --- ON THE TAPE. AND THE COURT'S
11 PREFERENCE WOULD BE TO HEAR IT. SO ---

12 MR. BLUME: NO OBJECTION.

13 THE COURT: VERY GOOD.

14 MR. MABRY: SORRY, YOUR HONOR. JUST A SECOND.

15 THE COURT: IT'S ALL RIGHT. TAKE YOUR TIME.

16 MR. MABRY: I'M TRYING TO GET ---

17 THE COURT: IF YOU WANT US TO STAND DOWN AND TAKE OUR
18 MORNING BREAK, WE CAN DO IT.

19 MR. MABRY: NO, SIR. I CAN GET IT, I BELIEVE.

20 THE COURT: ALL RIGHT.

21 MR. MABRY: IT'S GETTING THE PAUSE BUTTON TO STOP
22 PAUSING. AND IT'S MY FAULT. ALL RIGHT.

23 (WHEREUPON THE 911 TAPE WAS PLAYED FOR THE COURT)

24 MR. MABRY: LET ME REWIND IT.

25 THE COURT: ALL RIGHT. AND AGAIN, SO OUR COURTROOM

1 PARTICIPANTS CAN HEAR, PULL THE MICROPHONE TO IT IF YOU CAN.

2 MR. MABRY: THAT'S NOT WORKING. THAT'S AS GOOD AS I
3 CAN GET IT, JUDGE.

4 THE COURT: ALL RIGHT. VERY GOOD.

5 (WHEREUPON THE 911 TAPE WAS PLAYED FOR THE COURT)

6 THE COURT: ALL RIGHT. LADIES AND GENTLEMEN, WE'RE
7 GOING TO TAKE A BREAK AT THIS TIME. COURT WILL BE IN RECESS
8 FOR OUR MORNING BREAK APPROXIMATELY FIFTEEN MINUTES.

9 (WHEREUPON COURT WAS IN RECESS AT 10:53 AM)

10 THE COURT: PLEASE BE AT EASE. THANK YOU. ALL RIGHT.
11 COUNSEL, YOU READY TO CALL YOUR NEXT WITNESS?

12 MR. MABRY: YES, SIR. JUST ONE -- FIRST, ONE MATTER WE
13 WANT TO MAKE THE COURT AWARE OF.

14 THE COURT: ALL RIGHT.

15 MR. MABRY: WE INTEND TO CALL DR. SCHWARTZ-WATTS. WE
16 INTEND TO CALL HER TODAY. I WAS INFORMED THIS MORNING BY MY
17 OFFICE THAT SHE WAS SICK, AND SHE CONFIRMED IT BY PHONE.
18 SHE'S GOT STREP THROAT AND A FEVER OF A HUNDRED AND ONE.
19 SHE ALSO -- SHE'S GOING TO TRY TO GO TO HER SON'S GRADUATION
20 AT 6:00 TONIGHT. SHE HAD ASKED IF THERE'S ANY WAY WE COULD
21 TAKE HER IN THE MORNING OR EITHER DEPOSE HER AT A LATER
22 TIME. BUT SHE DOES -- SHE DOES HAVE A DOCTOR'S NOTE OR
23 WHATEVER THAT SHE HAS STREP THROAT.

24 THE COURT: WELL, THE COURT KNOWS AND HAS HAD DR.
25 SCHWARTZ-WATTS APPEAR MANY TIMES, AND SHE'S AN HONEST AND

1 CREDIBLE PERSON. AND IF SHE SAYS SHE'S SICK, I FEEL CERTAIN
2 THAT SHE IS. I SUSPECTED THAT. BUT IN ANY EVENT, WHAT'S
3 THE APPLICANT'S POSITION ON THE MATTER?

4 MR. BLUME: I BELIEVE IF SHE'S SICK, SHE'S SICK. AND I
5 BELIEVE IF HER CHILD'S GRADUATING, HER CHILD'S GRADUATING
6 AND SHE SHOULDN'T BE REQUIRED TO LEAVE HER SICK BED OR MISS
7 THE GRADUATION. AS TO WHETHER WE DO IT TOMORROW OR BY
8 DEPOSITION, I'LL LEAVE THAT TO THE COURT. I WAS HOPING TO
9 CONCLUDE TODAY, BUT LIFE IS AS IT IS.

10 THE COURT: COUNSEL, WHEN DO YOU THINK YOUR CASE WILL
11 FINISH TODAY WITHOUT DR. SCHWARTZ-WATTS?

12 MR. MABRY: I THINK IT WILL FINISH -- WELL, IT JUST
13 DEPENDS ON HOW LONG THEY CROSS EXAMINE THE WITNESSES. BUT
14 WE PLANNED TO CALL TRIAL COUNSEL AND MR. WILLINGHAM. MR.
15 WILLINGHAM WILL BE VERY SHORT. SO WE LEAVE IT UP TO YOU,
16 JUDGE, WHETHER YOU WANT TO COME BACK IN THE MORNING TO TAKE
17 HER TESTIMONY OR YOU WANT US JUST TO DO IT BY DEPOSITION.

18 THE COURT: ALL RIGHT. MAY I THINK ABOUT THAT?

19 MR. MABRY: SURE.

20 THE COURT: LET'S THINK ABOUT THAT.

21 MR. MABRY: YES, SIR.

22 THE COURT: AND ACTUALLY BEFORE YOU CALL YOUR NEXT
23 WITNESS ARE THERE ANY OTHER ISSUES THAT WE NEED TO DISCUSS
24 ON THE RECORD AT THIS TIME FROM APPLICANT?

25 MR. BLUME: NO, SIR, YOUR HONOR.

1 THE COURT: ALL RIGHT. WELL, LET ME -- I HAVE ONE I
2 WANT TO DISCUSS. I NOTED -- I DO NOT RECALL WHEN WE BEGAN
3 ANYONE STATING TO ME THAT YOU WANTED THE TRIAL EXHIBITS FROM
4 THE PREVIOUS TRIAL TO BE PART OF THE EXHIBITS HERE. THAT'S
5 FINE, THAT THEY WILL BE EXHIBITS.

6 BUT IT GIVES ME -- IT GAVE ME SOME PAUSE BECAUSE I HAD
7 NOTED OVER TO MY LEFT ON WHAT, I BELIEVE IS THE PETIT JURY
8 BAR AND TABLE, A LARGE NUMBER OF EXHIBITS JUST SORT OF
9 RANDOMLY PLACED THERE. NOW WHENEVER WE HAVE EXHIBITS IN A
10 TRIAL OUR COURT REPORTER TAKES POSSESSION OF THEM, AND THEY
11 DON'T GO IN, THEY DON'T COME OUT. THEY JUST STAY IN HER
12 POSSESSION. AND WE'VE TAKEN NO POSSESSION OF THESE
13 DOCUMENTS AND THESE VARIOUS EXHIBITS. THEY'RE JUST SITTING
14 OVER THERE AND HAD BEEN FOR THE ENTIRE WEEK.

15 OF COURSE THE COURTROOM IS LOCKED. I ASSUME NO ONE'S
16 TAMPERED WITH THE EVIDENCE. AND I'M NOT ACCUSING ANYONE
17 HERE IN THIS CASE OF SOMEHOW DOING THAT. I JUST MAKE A
18 COMMENT FOR THE RECORD THAT THESE EXHIBITS HAVE JUST BEEN
19 SITTING OVER HERE THROUGHOUT THE WEEK.

20 IT WOULD BE MY INTENTION THAT I WOULD GET AT OUR NEXT
21 BREAK OUR COURT REPORTER AT LEAST TO TAKE SOME POSSESSION OF
22 THEM SO THAT THEY WILL BE IN HER CARE. WE WILL NOT REMARK
23 THEM AS EXHIBITS SPECIFIC TO THIS TRIAL. WE WILL LEAVE
24 THEIR MARKINGS ON THEM FOR THE PROCEEDING IN WHICH THEY WERE
25 MARKED AND WORK WITH THEM IN THAT FASHION.

1 SO ANYONE WISHING TO REVIEW AN EXHIBIT LIST OF THE
2 PRIOR EXHIBITS WILL NOT COME TO THIS RECORD, BUT WILL GO TO
3 THE PREVIOUS RECORD TO DETERMINE THE NUMBER AND THE IDENTITY
4 OF THAT PARTICULAR EXHIBIT. NOW IS THERE ANY OBJECTION TO
5 THAT FROM EITHER SIDE OF THIS CASE?

6 **MR. MABRY:** NO, SIR, YOUR HONOR. THAT'S WHAT WE WANT
7 IN THE CASE, WHEN THE COURT IS REVIEWING THIS CASE TO MAKE A
8 DECISION YOU CAN LOOK AT ANY EXHIBIT YOU WANT TO AT ANY
9 TIME. THAT'S -- AND IT'S IN THE RECORD. SO ...

10 **THE COURT:** ALL RIGHT. RESPONSE TO THAT FROM THE
11 APPLICANT?

12 **MR. BLUME:** THE PROCEDURE OUTLINED BY THE COURT IS
13 FINE.

14 **THE COURT:** ALL RIGHT. OF COURSE, OUR COURT REPORTER
15 IS INTEGRALLY INVOLVED IN THAT. IS THERE ANYTHING FURTHER
16 WE NEED TO RESOLVE, MADAME COURT REPORTER, FOR THIS RECORD
17 ABOUT THESE EXHIBITS IN YOUR BELIEF?

18 **MADAME COURT REPORTER:** NO, SIR.

19 **THE COURT:** ALL RIGHT. SHE'S INDICATING NO. AND,
20 THEREFORE, WE'RE READY TO PROCEED. PLEASE CALL YOUR NEXT
21 WITNESS.

22 **MR. MABRY:** YES, SIR. JUST BRIEFLY, YOUR HONOR. THE
23 TAPE RECORDING THAT WAS PLAYED FOR THE COURT WAS STATE'S
24 EXHIBIT 72, I BELIEVE, FROM THE -- THERE'S ACTUALLY TWO 72s.
25 THIS MAY BE 71. I THINK WE HAVE A COPY AND THE ORIGINAL IS

1 DO?

2 A. WELL, WHEN I FINISHED LAW SCHOOL I WENT TO WORK FOR
3 MIKE DANIEL, WHO WAS AT THAT TIME RUNNING FOR LIEUTENANT
4 GOVERNOR. I FINISHED LAW SCHOOL IN MAY. HE WAS RUNNING IN
5 THE PRIMARY. I WENT TO WORK FOR HIM AS HIS DRIVER. I
6 WORKED FOR HIM UNTIL NOVEMBER OF '82. AND -- AND THEN
7 WORKED FOR HIM THROUGH -- I CAN'T REMEMBER, UNTIL I WENT TO
8 WORK IN THE SOLICITOR'S OFFICE. WORKING FOR HIS CAMPAIGN,
9 WE WERE TRYING TO PAY OFF HIS DEBT, THAT KIND OF THING. IN
10 19 -- IN AUGUST OF 1983 I WENT TO WORK IN THE SOLICITOR'S
11 OFFICE IN SPARTANBURG. AND THEN I WORKED THERE UNTIL ---

12 Q. WHO WAS THE SOLICITOR THEN?

13 A. CLAUDE TAYLOR.

14 Q. HOW LONG DID YOU WORK FOR SOLICITOR TAYLOR?

15 A. HE DIDN'T RUN FOR REELECTION. SO I WORKED FOR HIM --
16 HOLMAN GOSSETT WON THAT ELECTION IN NOVEMBER OF '84. SO I
17 WENT TO WORK -- I WORKED FOR CLAUDE UNTIL -- FROM '83 UNTIL,
18 I GUESS, JANUARY OF '85 WHEN HOLMAN TOOK OFFICE.

19 Q. ALL RIGHT. HOW MANY YEARS DID YOU WORK FOR SOLICITOR
20 GOSSETT?

21 A. FROM '85 UNTIL THE FALL OF 1990 WHEN I WENT INTO
22 PRIVATE PRACTICE. I SHARED SPACE WITH CLAUDE TAYLOR, WHO I
23 HAD WORKED FOR IN THE SOLICITOR'S OFFICE AND DURHAM COLE,
24 WHO I HAD WORKED WITH IN THE SOLICITOR'S OFFICE.

25 Q. OKAY. AND DURHAM COLE IS NOW CIRCUIT JUDGE?

- 1 A. THAT'S CORRECT.
- 2 Q. AND MR. TAYLOR HAS PASSED AND GONE, IS THAT CORRECT?
- 3 A. DIED IN NOVEMBER OF '91.
- 4 Q. ALL RIGHT. WHILE YOU WERE IN THE SOLICITOR'S OFFICE
- 5 WHAT KIND OF CASES DID YOU PROSECUTE? DID YOU SPECIALIZE OR
- 6 WAS THERE ...
- 7 A. NO. TRIED CASES FROM UNLAWFUL USE OF THE TELEPHONE TO
- 8 MURDER CASES.
- 9 Q. AND HOW LONG -- HOW MANY YEARS WERE YOU AN ASSISTANT
- 10 SOLICITOR?
- 11 A. I DON'T -- YOU MEAN WHEN DID I GO TO WORK OR WHEN WAS I
- 12 PROMOTED TO DEPUTY SOLICITOR?
- 13 Q. RIGHT.
- 14 A. I DON'T REMEMBER. I REMEMBER WHOSE PLACE I TOOK, BUT I
- 15 DON'T REMEMBER WHEN HE LEFT. STEVE WILSON WAS THE DEPUTY
- 16 SOLICITOR AND I WAS THE DEPUTY SOLICITOR AFTER HIM. I THINK
- 17 IT WAS IN '86 IN THE FALL, LATE '86 SOMETIME. I'M NOT --
- 18 I'M NOT EXACTLY CERTAIN.
- 19 Q. AT THAT TIME WERE THERE MORE -- WAS THERE MORE THAN ONE
- 20 DEPUTY SOLICITOR OR WAS THERE ONLY ONE?
- 21 A. NO, THERE WAS JUST ONE.
- 22 Q. AND HOW MANY YEARS DID YOU SERVE AS DEPUTY SOLICITOR IN
- 23 SPARTANBURG COUNTY?
- 24 A. FROM '86 UNTIL I WENT IN PRIVATE PRACTICE.
- 25 Q. AND DURING THE TIME YOU WERE DEPUTY SOLICITOR DID YOU

- 1 TRY ANY DEATH PENALTY CASES?
- 2 A. JESSIE KEITH BROWN.
- 3 Q. HOW MANY TIMES?
- 4 A. TWICE.
- 5 Q. TWICE? WERE YOU INVOLVED IN RIDDLE?
- 6 A. I DID A SENTENCING -- WORKED WITH HOLMAN ON A ..
- 7 SENTENCING CASE.
- 8 Q. WOULD THAT HAVE BEEN -- WOULD THAT HAVE BEEN RIDDLE
- 9 TOO?
- 10 A. YEAH.
- 11 Q. OKAY... SO IT WAS A RESENTENCING -- JUST A SENTENCING
- 12 HEARING?
- 13 A. CORRECT.
- 14 Q. BEFORE A JURY?
- 15 A. CORRECT.
- 16 Q. SO THERE WAS A TOTAL OF THREE DEATH PENALTY CASES THAT
- 17 YOU ---
- 18 A. WELL, THERE WAS -- WE STARTED TRYING ANOTHER ONE. I
- 19 THINK HIS NAME -- I THINK THE DEFENDANT'S NAME WAS THOMASON.
- 20 AND WE DIDN'T -- WE PICKED THE JURY FOR ABOUT THREE DAYS AND
- 21 PLED HIM TO A THIRTY YEAR LIFE.
- 22 Q. OKAY.
- 23 A. SO WE WERE, I DON'T KNOW, HALF WAY THROUGH JURY
- 24 SELECTION MAYBE. I APOLOGIZE. I CAN'T REMEMBER EXACTLY.
- 25 Q. ALL RIGHT. AND DO YOU HAVE ANY IDEA HOW MANY FELONY

1 CASES YOU WOULD HAVE TRIED WHILE YOU WERE ASSISTANT
2 SOLICITOR, DEPUTY SOLICITOR?

3 A. I'M SORRY? HOW MANY FELONY CASES?

4 Q. RIGHT.

5 A. I HAVE NO IDEA. I REALLY DON'T.

6 Q. WOULD IT HAVE BEEN A FEW, A LOT? SOME KIND OF
7 ESTIMATE.

8 A. A COUPLE -- WELL, I'M SURE I'VE TRIED MORE THAN A
9 HUNDRED CASES. I'VE PROBABLY TRIED CLOSER TO TWO HUNDRED
10 CASES. I'VE PROBABLY TRIED TWENTY-FIVE MURDER CASES, AND
11 NOT REALLY, YOU KNOW, I MEAN, PEOPLE WERE CHARGED WITH
12 MURDER. I MEAN, ESSENTIALLY A LOT OF THEM WERE MANSLAUGHTER
13 CASES. BUT, YOU KNOW, I'VE PROBABLY TRIED THAT MANY
14 MURDER/MANSLAUGHTER CASES.

15 Q. ALL RIGHT.

16 A. OR TWENTY, MAYBE. I'M NOT SURE. BUT IS THAT ANSWERING
17 YOUR QUESTION?

18 Q. YES, SIR. THAT'S ANSWERING THE QUESTION. WHEN YOU
19 WENT INTO PRIVATE PRACTICE WHAT WAS YOUR PRACTICE? WHAT
20 KIND OF PRACTICE DID YOU HAVE? CRIMINAL? CIVIL? WHAT?

21 A. IN THE BEGINNING I JUST DID CRIMINAL DEFENSE WORK
22 BECAUSE THAT WAS ALL I KNEW HOW TO DO. AS -- WELL, I TAKE
23 THAT BACK. DERHAM COLE AND CLAUDE TAYLOR BOTH HAD GENERAL
24 PRACTICES.

25 AND WHEN I FIRST WENT IN PRIVATE PRACTICE I WAS MOSTLY

1 DOING CRIMINAL DEFENSE WORK BECAUSE THAT'S WHAT I KNEW HOW
2 TO DO, THAT'S WHAT I WANTED TO DO. THEY BOTH DID DOMESTIC
3 WORK, DIVORCE WORK, AND THEY DID SOME -- A LIMITED AMOUNT OF
4 PLAINTIFF'S WORK.

5 AND SHORTLY AFTER I WENT IN PRACTICE WITH THEM CLAUDE
6 DIED AND DERHAM, JUDGE COLE, WENT ON THE BENCH. SO I HAD A
7 BUNCH OF STUFF THEY LEFT, DOMESTIC WORK PRIMARILY. SO I DID
8 DOMESTIC WORK UNTIL I -- THREE OR FOUR YEARS. NOW MY
9 PRACTICE -- I HAVE ALWAYS DONE CRIMINAL DEFENSE WORK. AND
10 NOW PROBABLY HALF OF WHAT I DO IS CRIMINAL DEFENSE WORK.
11 AND HALF OF IT IS PLAINTIFF'S WORK.

12 Q. AND, I BELIEVE, AT SOME POINT IN TIME YOU'VE ALSO
13 HANDLED A CASELOAD FOR BILL WINTER?

14 A. WHEN I FIRST WENT IN PRIVATE PRACTICE OR NOT LONG AFTER
15 I WENT IN PRIVATE PRACTICE BILL WINTER HAD TO GO TO THE
16 FIRST GULF WAR, HAD TO GO TO DESERT SHIELD. HE WAS IN JAG.
17 AND JUDGE CLARY WAS HIS PARTNER AND DIDN'T WANT TO FOOL WITH
18 THE CRIMINAL CASES. SO HE HIRED ME TO COME HANDLE BILL'S --
19 BILL WINTER'S -- HIS PARTNER'S CRIMINAL DEFENSE CASELOAD.

20 Q. OKAY. AND DID YOU TRY SOME OF THOSE CASES HERE IN
21 CHEROKEE COUNTY?

22 A. I DID. WELL, ALL OF BILL'S CASES WERE IN CHEROKEE
23 COUNTY. I TRIED TWO OR THREE OF THEM. I DON'T REMEMBER
24 WHICH ONES.

25 Q. DURING THE TIME THAT YOU WERE IN THE SOLICITOR'S OFFICE

1 AND YOUR PRIVATE PRACTICE DO YOU BELIEVE YOU CAME TO SOME
2 UNDERSTANDING OF HOW JURORS IN CHEROKEE COUNTY ANALYZED OR
3 VIEWED CASES?

4 A. YES.

5 Q. AND WAS IT DIFFERENT FROM HOW JURORS IN OTHER COUNTIES
6 VIEWED CASES, IN YOUR OPINION?

7 A. WELL, I THINK JURORS IN A SMALL TOWN WHERE A LOT OF
8 FOLKS KNOW EACH OTHER NECESSARILY DIFFER FROM JURORS IN A
9 LARGER COMMUNITY LIKE SPARTANBURG, LIKE GREENVILLE, LIKE THE
10 KIND OF JURY YOU GET IN A FEDERAL CASE, IN DISTRICT COURT IN
11 THE UPSTATE JUST BECAUSE A LOT OF THEM SEEM TO KNOW EACH
12 OTHER. AND THERE'S GENERALLY SOME DISCUSSION OF CASES IN
13 THE STREET LONG BEFORE YOU GET TO COURT.

14 Q. AND DO YOU HAVE ANY EXPERIENCE OF HANDLING CASES IN
15 FEDERAL COURT?

16 A. I'VE HANDLED PROBABLY HALF A DOZEN FEDERAL CRIMINAL
17 CASES. EACH OF THOSE HAS ENDED IN A PLEA. I'VE NOT TRIED A
18 FEDERAL CRIMINAL CASE.

19 Q. WHEN DID YOU BECOME CERTIFIED -- A CERTIFIED DEATH
20 PENALTY ATTORNEY?

21 A. SOMETIME SHORTLY AFTER I WAS APPOINTED TO REPRESENT
22 JONATHAN BINNEY.

23 Q. DO YOU REMEMBER WHEN YOU WERE APPOINTED TO REPRESENT
24 MR. BINNEY? APPROXIMATELY?

25 A. WELL, I THINK THAT TRENT PRUETT CALLED ME IN OCTOBER OF

1 2001 AND ASKED ME IF I WOULD HELP HIM REPRESENT JONATHAN
2 BINNEY IN THIS CASE.

3 Q. ALL RIGHT.

4 A. I DON'T REMEMBER WHEN I WAS APPOINTED.

5 Q. HOW DID YOU KNOW MR. PRUETT?

6 A. HE AND I HAD WORKED TOGETHER IN THE SOLICITOR'S OFFICE.
7 AND I HAD, EXCUSE ME, AFTER I WENT IN PRIVATE PRACTICE I HAD
8 SOME CASES AGAINST HIM WHEN HE WAS THE DEPUTY SOLICITOR. HE
9 AND I -- I TRIED CASES AGAINST HIM.

10 Q. ALL RIGHT. WHAT IS YOUR ESTIMATION OF MR. PRUETT'S
11 SKILLS AS A CRIMINAL LAWYER?

12 A. HE'S AN EXCELLENT LAWYER.

13 Q. CAN YOU THINK OF ANYONE YOU KNOW THAT IS A BETTER
14 CRIMINAL LAWYER THAN MR. PRUETT?

15 A. I'VE NEVER SEEN ANYBODY DO A BETTER JOB THAN I'VE SEEN
16 HIM DO IN CASES. YOU CERTAINLY HEAR ABOUT GREAT LAWYERS,
17 AND I'M SURE THERE ARE SOME, VERY FINE LAWYERS. TRENT'S THE
18 BEST LAWYER I'VE EVER SEEN TRY A CASE.

19 Q. WHEN -- WHO WAS THE JUDGE THAT APPOINTED YOU ON THIS
20 CASE?

21 A. JUDGE COLE.

22 Q. AND DO YOU REMEMBER WHAT THE FIRST THING YOU AND MR.
23 PRUETT DID WITH REGARD TO THIS CASE AFTER YOU WERE
24 APPOINTED?

25 A. TRENT ALREADY HAD SOME KNOWLEDGE OF THE CASE. I DON'T

1 REMEMBER IF HE ALREADY HAD SOME OF THE FILE. I JUST -- I
2 DON'T REMEMBER. WE -- HE CALLED ME AND WE TALKED ABOUT IT.
3 HE MADE SOME ARRANGEMENTS TO GET SOME PART OF THE FILE. WE
4 TALKED ABOUT GOING TO SEE JONATHAN. HE JUST GAVE ME A BRIEF
5 OVERVIEW OF THE BASIC FACTS, MS. SOUTHERN WAS SHOT. I CAN'T
6 REMEMBER AT THE TIME IF JONATHAN WAS AWAITING TRIAL FOR THE
7 CSC OR HE HAD BEEN CONVICTED, BUT HE GAVE ME THE OVERVIEW.

8 Q. I'M SORRY?

9 A. HE GAVE -- TRENT GAVE ME AN OVERVIEW OF THE FACTS OF
10 THE CASE.

11 Q. OKAY. DID YOU AND MR. PRUETT REPRESENT HIM ON THE CSC
12 CHARGE ON HIS CHILD?

13 A. JIM BANNISTER REPRESENTED HIM.

14 Q. ALL RIGHT. SO HE HAD A PRIVATE ATTORNEY?

15 A. YES, SIR.

16 Q. DID THE CSC CASE CONCERN YOU AND MR. PRUETT?

17 A. IT WAS A HUGE CONCERN, YEAH.

18 Q. AND EXPLAIN TO THE COURT WHY IT WAS A HUGE CONCERN.

19 A. WELL, OBVIOUSLY IF THEY MADE IT -- IF THE CASE GOT INTO
20 THE PENALTY PHASE THEY WILL -- THE PROSECUTION WAS GOING TO
21 BE ABLE TO INTRODUCE EVIDENCE THAT JONATHAN RAPED HIS BABY.
22 AND THAT'S A HUGE PROBLEM IN A DEATH PENALTY CASE IN MY
23 OPINION.

24 Q. WHY IS THAT A HUGE PROBLEM IN YOUR OPINION?

25 A. WELL, I JUST THINK IT'S SOMETHING THAT MOST PEOPLE

1 CONSIDER TO BE AN EXTREMELY DEPRAVED ACT. YOU HAVE A THREE
2 MONTH OLD CHILD WHO IS IN THE CARE OF THE PERSON, ONE OF THE
3 TWO PEOPLE ON EARTH WHO'S SUPPOSED TO BE THE FOREMOST
4 CARETAKER OF THIS HELPLESS BEING, AND WE HAD A SITUATION
5 WHERE ONE OF THOSE PEOPLE HAD, AT THAT TIME THE STORY WAS,
6 USED A SEXUAL DEVICE TO RAPE THIS CHILD SO VIGOROUSLY OR
7 ENTHUSIASTICALLY THAT HER GENITALIA WAS TORN. AND IF WE GOT
8 TO THE PENALTY PHASE THE JURY WAS CERTAINLY GOING TO HEAR A
9 GOOD BIT ABOUT THAT. AND THAT WAS JUST A VERY SERIOUS
10 PROBLEM IN MY JUDGMENT AND IN TRENT'S JUDGMENT.

11 Q. OKAY. DID Y'ALL INFORM MR. BINNEY OF THAT SERIOUS
12 PROBLEM AT SOME POINT IN TIME?

13 A. OH, YEAH. WE DISCUSSED IT A NUMBER OF TIMES. I'M
14 SORRY, I WAS THINKING YOU WERE ASKING ME WHEN WE ---

15 Q. I WAS JUST ASKING ---

16 A. I DON'T REMEMBER SPECIFICALLY WHEN WE STARTED
17 DISCUSSING THAT PART OF THE CASE, BUT YEAH, WE CERTAINLY
18 DISCUSSED IT WITH HIM MANY TIMES.

19 Q. AND WAS MR. BINNEY ULTIMATELY CONVICTED IN SPARTANBURG
20 COUNTY OF THAT OFFENSE?

21 A. YES.

22 Q. AND TO YOUR KNOWLEDGE WERE, IN THAT CASE, WERE THERE
23 STATEMENTS THAT HE GAVE REGARDING -- BASICALLY ENDING UP
24 ADMITTING THAT HE COMMITTED THE CRIME?

25 A. YES.

1 Q. AND DID THAT CONCERN YOU AS WELL?

2 A. YES.

3 Q. AND WHY WAS THAT?

4 A. WELL, THERE WAS SEVERAL -- SEVERAL CONCERNS ABOUT IT.
5 THE FIRST ONE IS THAT HE GAVE -- HE GAVE A NUMBER OF
6 STATEMENTS ABOUT IT. I MEAN, CLEARLY THERE'S GOING TO BE A
7 WHOLE LOT OF EVIDENCE THAT HE ACTUALLY -- THAT HE DID THAT.
8 I MEAN, THERE'S NOT GOING TO BE ANY DOUBT THAT HE DID IT.

9 THE FIRST COUPLE OF STATEMENTS WERE STATEMENTS THAT
10 WERE EXCULPATORY OR HE TRIED TO MAKE IT EXCULPATORY OR GAVE
11 REASONS FOR THE, EXCUSE ME, THE CHILD WAS TAKEN -- LET ME
12 BACK UP A STEP. THE CHILD WAS TAKEN TO THE HOSPITAL BY
13 JONATHAN FOR THE TEAR TO HER GENITAL AREA. AND HE WAS
14 QUESTIONED ABOUT THAT OR HE DISCUSSED IT WITH THE HEALTHCARE
15 PROVIDERS AND THEN DISCUSSED IT WITH THE POLICE.

16 AND THE FIRST EXPLANATION OR TWO OR THREE, I DON'T
17 RECALL HOW MANY RIGHT OFF THE TOP OF MY HEAD, BUT THE FIRST
18 COUPLE OF EXPLANATIONS WERE OF AN ACCIDENT. AND AS THE
19 POLICE CONTINUED TO INVESTIGATE THE CASE, THEN THE
20 STATEMENTS THAT HE MADE BECAME MORE INCRIMINATORY.

21 AND, YOU KNOW, WHEN YOU'RE LOOKING AT THAT SERIES OF
22 STATEMENTS BY YOUR CLIENT THAT A PROSECUTOR IS GOING TO USE
23 THOSE DIFFERING VERSIONS AND PRIMARILY THE MORE EXCULPATORY
24 STORIES AS AN UNWILLINGNESS TO CONFRONT THE CRIME THAT
25 YOU'VE COMMITTED AND YOUR UNWILLINGNESS TO ADMIT IT AND TRY

1 TO PLAY THAT OFF OR TRY TO DRAW FROM THAT INFERENCES OF LACK
2 OF REMORSE OR LACK OF A SENSE OF GUILT OR WRONG-DOING.

3 Q. MR. BINNEY'S WIFE, MELANIE BINNEY, DID SHE HAVE ANY
4 ROLE IN ANYTHING THAT OCCURRED AT THE HOSPITAL THAT CAUSED
5 PROBLEMS FOR YOU LATER?

6 A. WELL, I -- WE LOOKED REAL HARD AT USING MELANIE BINNEY
7 AS A WITNESS IN THE PENALTY PHASE.

8 Q. WHY IS THAT?

9 A. WELL, MY THINKING WAS THAT ONE OF THE THINGS THAT IT
10 WAS IMPORTANT FOR THE JURY TO SEE WAS A HUMAN BEING IN
11 JONATHAN BINNEY, A PERSON WHO WAS CAPABLE OF, EXCUSE ME, OF
12 REMORSE, A PERSON WHO WAS CAPABLE IN SOME PART OF HIS LIFE
13 OF LOVE AND BEING LOVED.

14 AND MELANIE BINNEY, IN MY JUDGMENT AND THE TIMES THAT I
15 TALKED TO HER, WAS A LIKEABLE PERSON. AND SHE HAD STUCK
16 WITH HIM THROUGH SOME PRETTY TOUGH TIMES. AND I'M NOT
17 REFERRING TO THE CRIMINAL CASES, EITHER THE CSC OR THE
18 MURDER CASE. HE HAD HAD AN ON AND OFF SORT OF WORKING
19 CAREER. AND SHE HAD STUCK WITH HIM THROUGH THE CSC CASE,
20 STUCK WITH HIM THROUGH THE UPS AND DOWNS OF HIS EMPLOYMENT,
21 STUCK WITH HIM THROUGH THE MURDER CASE. SHE WAS A LIKEABLE
22 PERSON IN MY JUDGMENT. AND I WAS HOPING THAT SHE COULD TALK
23 TO THE JURY A LITTLE BIT ABOUT THEIR FAMILY LIFE. WE HAD,
24 AT SOME POINT, HAD SOME PICTURES OF THEM WITH THE CHILDREN.

25 ONE OF THE THINGS THAT WAS A DOWNSIDE TO HER TESTIMONY

1 WAS THAT WHEN SHE WENT TO THE HOSPITAL ON THIS CSC, THE RAPE
2 OF THE BABY, ONE OF THE, I BELIEVE ONE OF THE POLICEMAN,
3 MIGHT HAVE BEEN A HEALTHCARE PROVIDER, I APOLOGIZE, I CAN'T
4 REMEMBER PRECISELY, BUT SOMEBODY WHO WAS PREPARED TO TESTIFY
5 THAT MELANIE HAD SAID SOMETHING TO THE EFFECT OF, CAN'T WE
6 KEEP THIS IN THE FAMILY? CAN'T WE -- DO WE HAVE TO MAKE A
7 POLICE MATTER OF THIS?

8 AND THAT WAS A POTENTIAL DOWNSIDE TO HER TESTIFYING IN
9 MY JUDGMENT JUST BECAUSE THERE ARE NATURALLY, I THINK, GOING
10 TO BE SOME QUESTIONS ABOUT WHY DOES SOME -- WHY DOES A
11 WOMAN, WHY DOES A WIFE, WHY DOES A MOTHER STAY WITH SOMEONE
12 WHO HAS RAPED HER DAUGHTER? AND MY VIEW OF IT WAS THAT SHE
13 COULD PRESENT HERSELF IN A WAY THAT IT WAS -- THAT THERE WAS
14 SOMETHING LOVEABLE ABOUT HIM.

15 AND, YOU KNOW, IF SHE WAS JUST TRYING TO MAKE A FAMILY
16 MATTER OF IT IT MADE IT LOOK MORE LIKE SHE, YOU KNOW, WAS
17 TRYING TO SWEEP UNDER THE RUG SOMETHING WRONG HE HAD DONE.
18 AND I JUST DIDN'T THINK IT, YOU KNOW, I MEAN, I JUST THOUGHT
19 IT WAS A NEGATIVE -- IT WAS JUST A PROBLEM WITH HER
20 TESTIMONY IN MY JUDGMENT THAT WOULD DEGRADE HER IN THE EYES
21 OF A JURY. BUT I STILL, YOU KNOW, I HAD -- STILL HAD SOME
22 HOPE THAT SHE COULD BE A GOOD WITNESS FOR US.

23 Q. OKAY. WELL, WERE YOU ULTIMATELY ABLE TO CALL HER AS A
24 WITNESS?

25 A. NO.

1 Q. CAN YOU EXPLAIN TO THE COURT WHY YOU WEREN'T ABLE TO
2 CALL HER?

3 A. WE HAD -- DONNA SCHWARTZ-WATTS EXAMINED JONATHAN FOR
4 SEVERAL -- FOR THE ISSUES THAT WE WERE GOING TO DEAL WITH IN
5 THE MITIGATION PHASE, EXCUSE ME, IN THE PENALTY PHASE. SHE
6 HAD SOME DISCUSSIONS WITH JONATHAN.

7 AND IN THE COURSE OF -- IN THE COURSE OF SOME
8 DISCUSSIONS WITH -- OR HER DISCUSSION WITH HIM THERE WAS
9 SOME DISCUSSION OF THE SEX PRACTICES OF MELANIE AND JONATHAN
10 BINNEY. AND THERE WAS SOME -- I THINK SHE TOLD TRENT AND
11 TRENT TOLD ME IN TURN THAT JONATHAN HAD TOLD HER, TOLD DR.
12 SCWARTZ-WATTS, THAT THEY HAD A PRACTICE OF URINATING ON ONE
13 ANOTHER OR THAT SHE HAD DONE THAT TO HIM OR HE HAD DONE THAT
14 TO HER.

15 AND I JUST THOUGHT THAT ULTIMATELY THAT THERE WAS TOO
16 MUCH DOWNSIDE RISK TO MELANIE TESTIFYING. I JUST THOUGHT
17 THAT WOULD, YOU KNOW, I DIDN'T KNOW FOR SURE THAT SOMETHING
18 LIKE THAT WAS GOING TO COME OUT. BUT I JUST THOUGHT, I
19 MEAN, CERTAINLY THE SOLICITOR'S OFFICE COULD ASK QUESTIONS
20 LIKE THAT IN GOOD FAITH. I MEAN, THEY HAVE -- POTENTIALLY
21 HAVE A BASIS FOR IT.

22 THE EFFORT OR THE APPARENT EFFORT ON HER PART AT THE
23 HOSPITAL WHEN THEY -- WHEN THEY TOOK [REDACTED] THE DAUGHTER,
24 [REDACTED] WAS THE DAUGHTER, TOOK THE DAUGHTER TO THE HOSPITAL
25 AND HER COMMENTS THERE ABOUT CAN'T WE KEEP THIS IN THE

1 FAMILY OR DOES THIS HAVE TO BE A POLICE MATTER AND YOU
2 COMBINE THAT WITH SOME TESTIMONY ABOUT WHAT I THINK WOULD BE
3 VIEWED BY THE JURY AS SOME FAIRLY PERVERSE SEX PRACTICES, I
4 JUST THOUGHT THAT SHE WOULD -- THAT THERE WAS TOO MUCH
5 DOWNSIDE RISK TO HER TESTIMONY.

6 Q. DO YOU REMEMBER ANYTHING HAPPENING WITH HER THE MORNING
7 OF THE PENALTY PHASE?

8 A. WELL, WE DISCUSSED HER TESTIMONY. I DISCUSSED IT WITH
9 HER PRIMARILY UP UNTIL THE VERY LAST. THE DECISION TO USE
10 HER OR NOT USE HER WAS SOMETHING THAT WE THOUGHT OVER HARD
11 FOR UP UNTIL THE TIME WE WOULD HAVE HAD TO CALL HER UNTIL
12 THE DAY SHE WOULD HAVE TESTIFIED.

13 YOU KNOW, SHE AND I DISCUSSED WHETHER OR NOT SHE COULD
14 TESTIFY OR WHETHER OR NOT IT WOULD BE A GOOD IDEA FOR HER TO
15 TESTIFY. I THINK -- I THINK TOWARD THE END OF THOSE
16 DISCUSSIONS I THINK SHE HAD SOME RELUCTANCE TO TESTIFY. I
17 DON'T, I MEAN, I THINK SHE PROBABLY WOULD HAVE DONE IT IF
18 I'D ASKED HER OR INSISTED.

19 Q. BUT YOU -- ARE YOU SAYING THAT SHE INDICATED SOME
20 RELUCTANCE TO -- ABOUT TAKING THE STAND? DO YOU REMEMBER?

21 A. WELL, SHE WASN'T, YOU KNOW, IN PREPARING A WITNESS YOU
22 HAVE TO TELL THEM WHAT YOU EXPECT THEM TO BE ASKED. AND I
23 DON'T THINK SHE WAS -- I DON'T THINK SHE WAS LOOKING FORWARD
24 TO THAT. AND I THINK PROBABLY IN A COURSE OF OUR
25 DISCUSSION, I'M TALKING ABOUT THE LAST MINUTE DISCUSSIONS

1 THAT I HAD WITH MELANIE ABOUT HER TESTIMONY, I THINK SHE
2 PROBABLY EXPRESSED SOME RELUCTANCE TO TESTIFY.

3 Q. ALL RIGHT. AND DID Y'ALL MAKE A DECISION NOT TO CALL
4 HER?

5 A. I MADE A DECISION NOT TO CALL HER.

6 Q. AND THAT WAS BASED ON EVERYTHING YOU TOLD US HERE
7 TODAY?

8 A. IT WAS BASED ON PRIMARILY THE TWO PROBLEMS THAT I'VE
9 DISCUSSED HERE A MOMENT AGO.

10 Q. OKAY. LET'S TALK A MINUTE ABOUT -- WE TALKED ABOUT THE
11 CSC. LET'S TALK ABOUT THIS CASE. WHAT WAS YOUR ESTIMATION,
12 YOUR INITIAL ESTIMATION OF THE GUILT, ON THE GUILT ISSUE
13 AGAINST JONATHAN?

14 A. WELL, I, YOU KNOW, MY -- GOING INTO IT WHEN I FIRST
15 STARTED WORKING WITH TRENT ON THIS CASE MY VIEW OF IT WAS
16 THAT -- THE CONVENTIONAL VIEW OF A DEATH PENALTY CASE, OF A
17 DEATH PENALTY DEFENSE IS THAT YOU -- YOU'RE NOT -- YOU
18 USUALLY DON'T HAVE MUCH OF A DEFENSE TO CONTEST IN A GUILT
19 PHASE. AND THERE'S SOME DANGER IN PUTTING YOURSELF IN A
20 POSITION IN THE GUILT PHASE OF DEFENDING IT ON A NOT GUILTY
21 BASIS BECAUSE -- BECAUSE YOU CAN PUT YOURSELF -- YOU CAN
22 LOSE A LOT OF CREDIBILITY WITH THE JURY, CREDIBILITY YOU'RE
23 GOING TO NEED IN THE PENALTY PHASE.

24 AS WE INVESTIGATED HIS CASE MORE -- TRENT WORKS OVER
25 HERE. I DON'T WORK OVER HERE. HIS OFFICE IS HERE. AND HE

1 KNOWS A LOT OF FOLKS IN THIS TOWN. AND HE KNEW THAT THERE
2 WAS A WHOLE LOT OF SPECULATION IN THE STREET THAT ALLAN
3 SOUTHERN HAD SOMETHING TO DO WITH THIS.

4 AND SO THE FIRST THING THAT WE LOOKED AT WAS WHETHER OR
5 NOT THERE WAS SOME ROLE THAT HE HAD TO PLAY. AND, IN FACT,
6 I THINK THE FIRST TIME WE TALKED TO JONATHAN WHEN WE WENT TO
7 SEE HIM AT PRISON WHERE HE WAS, WE DISCUSSED THAT ISSUE WITH
8 HIM FAIRLY EXTENSIVELY.

9 AND WE TRIED TO OUTLINE FOR HIM THE PROBLEMS THAT IT
10 WOULD CAUSE THE PROSECUTION IF MR. SOUTHERN HAD A ROLE IN
11 IT, IF HE'D LET HIM IN THE HOUSE. THEY WERE GOING TO HAVE
12 PROBLEMS WITH THE BURGLARY. THERE WAS SOME CONSENSUAL ENTRY
13 INTO THE HOUSE.

14 AND WE -- I THINK WE ASKED JONATHAN POINT BLANK IF
15 THERE WAS ANYTHING TO THE ISSUE OR TO THE POSSIBILITY THAT
16 MR. SOUTHERN HAD SOMETHING TO DO WITH IT, THAT ALLAN HAD
17 SOMETHING TO DO WITH IT. AND HIS RESPONSE WAS, I'LL GET
18 BACK TO YOU ON THAT.

19 WE CONTINUED TO PURSUE LOOKING AT WHETHER OR NOT MR.
20 SOUTHERN HAD SOMETHING TO DO WITH IT. BUT WE ALSO BEGAN
21 LOOKING HARD AT THE BURGLARY ISSUE JUST BASED ON OUR VIEW
22 THAT THERE MIGHT BE SOME WAY TO DEAL WITH THE BURGLARY ON
23 THE INTENT ISSUE, THAT WE MAY BE ABLE TO RAISE SOME
24 REASONABLE DOUBT ON THE INTENT. AND SO WE BEGAN WORKING ON
25 THAT AS WELL.

1 Q. OKAY. EXPLAIN WHAT YOU'RE TALKING ABOUT, THE INTENT ON
2 THE BURGLARY.

3 A. WELL, HE WENT IN THE HOUSE AT PROBABLY 10:00. HE
4 STAYED THERE IN THE HOUSE UNTIL, AND I APOLOGIZE, I CAN'T
5 REMEMBER PRECISELY THE TIMES, BUT MID-AFTERNOON, LET'S SAY
6 3:30. HE STAYED THERE FROM 10:00 TO 3:30. THERE WERE --
7 THERE WERE THINGS THAT -- THERE WAS EVIDENCE OF THINGS HE
8 HAD DONE IN THE HOUSE, USED SOME -- FIRST OF ALL HYGIENE
9 ITEMS, DONE SOME OTHER THINGS. HE TOLD THE POLICE HE HAD
10 DONE A COUPLE OF OTHER THINGS. THERE WAS EVIDENCE HE HAD
11 SMOKED CIGARETTES, HE'D BEEN IN THERE A WHILE.

12 THERE WEREN'T -- THERE WASN'T ANY EVIDENCE OF THE KIND
13 OF THEFT THAT YOU TYPICALLY SEE IN A BURGLARY. THE
14 TELEVISION WAS STILL IN PLACE. THE COMPUTER -- THERE WAS A
15 COMPUTER THERE THAT WAS STILL IN PLACE. SO THERE WAS, YOU
16 KNOW, THERE WAS SOME ISSUES THERE THAT WE THOUGHT WE MIGHT
17 COULD MAKE SOMETHING OUT OF, THAT WE MIGHT COULD RAISE A
18 REASONABLE DOUBT WITH.

19 THE INITIAL PROBLEM WAS, ONE OF THE INITIAL PROBLEMS,
20 THE BIGGEST PROBLEM IN MY JUDGMENT WAS THAT WE -- WE HAD TO
21 DECIDE HOW TO HANDLE THE CSC, THE RAPE OF THE BABY.
22 GENERALLY I THINK THAT YOU NEED TO START OFF A CASE FROM THE
23 -- TELLING A JURY YOUR PROBLEMS, YOUR BIGGEST PROBLEMS. AND
24 THIS WAS GOING TO BE A HUGE PROBLEM.

25 AND I THINK YOU HAVE TO -- YOU HAVE TO LET THEM KNOW

1 EARLY ON FROM THE BEGINNING WHAT YOUR PROBLEMS ARE 'CAUSE
2 YOU HAVE TO HAVE A FRAMEWORK FOR THESE PROBLEMS TO FIT INTO
3 A WAY THAT YOU EXPLAIN THE CASE. I MEAN, YOUR BIG PROBLEMS
4 IN YOUR CASE HAVE TO FIT INTO A FRAMEWORK WHERE THESE
5 PROBLEMS ARE NEUTRALIZED OR MINIMIZED OR SOMETHING.

6 Q. OKAY.

7 A. AND TRENT AND I HAD SEVERAL DISCUSSIONS ABOUT WHETHER
8 OR NOT WE OUGHT TO START OFF LETTING THEM KNOW ABOUT THE
9 CSC. AND WE FINALLY DECIDED THAT IF WE WERE GOING TO HAVE
10 ANY HOPE AT ALL ON THE BURGLARY CASE ON THE GUILT PHASE THAT
11 WE HAD TO DO WHAT WE COULD TO KEEP THE CSC FROM BEING
12 DISCUSSED OR TALKED ABOUT IN THE TRIAL OF THE -- OF THE
13 GUILT PHASE.

14 Q. OKAY. AND WAS THAT A PROBLEM? WAS THERE SOMETHING
15 ABOUT THE EVIDENCE IN THE GUILT PHASE THAT MIGHT BRING THE
16 CSC INTO PLAY?

17 A. WELL, THERE WAS -- THERE WERE A COUPLE OF THINGS THAT
18 WE TRIED TO DO IN THE GUILT PHASE. AND ONE OF THEM WAS THAT
19 WE WANTED TO -- WE WANTED TO LEAVE THE DOOR OPEN TO --
20 INVOLVING ALLAN SOUTHERN IN THIS CASE BECAUSE WE DIDN'T KNOW
21 ULTIMATELY WHAT JONATHAN WAS GOING TO TELL US.

22 HE -- AND, OF COURSE, WE HAVEN'T GONE THROUGH THE
23 DISCUSSIONS THAT WE -- PRIMARILY TRENT, BUT AT SOME POINT
24 BOTH OF US HAD WITH JONATHAN BINNEY ABOUT THIS. BUT WE
25 DISCUSSED OR TALKED WITH HIM MANY TIMES ABOUT WHETHER OR NOT

1 ALLAN SOUTHERN WAS INVOLVED. AND HE DENIED IT.

2 WE JUST DIDN'T KNOW IF AT THE LAST MINUTE HE WAS GOING
3 TO COME UP AND SAY HE WAS BECAUSE, AGAIN, IF ALLAN SOUTHERN
4 HAD LET HIM IN THAT HOUSE, HAD -- IF THERE WAS ANY KIND OF
5 CONSENSUAL ENTRY, THERE WAS ALL KIND OF -- THAT WAS VERY
6 HELPFUL TO US AND ALL KINDS OF PROBLEMS FOR THE PROSECUTOR'S
7 OFFICE.

8 WE WANTED TO -- WE WANTED TO -- WE WANTED TO RAISE THAT
9 ISSUE SO THAT IF AT THE LAST MINUTE JONATHAN BROUGHT IT UP
10 WE WOULDN'T HAVE TO BACKTRACK ON A CASE WE WERE DEFENDING OR
11 THE WAY WE WERE DEFENDING THE GUILT PHASE.

12 Q. OKAY.

13 A. THERE WAS ALSO THE ISSUE OF WE WANTED TO -- WE THOUGHT
14 WE HAD SOME GOOD EVIDENCE THAT -- THAT WE COULD RAISE A
15 REASONABLE DOUBT ABOUT WHY HE WENT INTO THE HOUSE. THERE
16 WAS A SUICIDE NOTE LEFT AT THE SCENE THAT I THINK CAN VERY
17 FAIRLY BE INTERPRETED AS A SUICIDE NOTE. BUT WE DIDN'T WANT
18 TO GET TOO MUCH INTO -- WE WANTED TO USE THE SUICIDE NOTE AS
19 A SUICIDE NOTE TO RAISE THE ISSUE OF WHAT HIS INTENT WAS.

20 WE DEFINITELY DIDN'T WANT TO GET INTO THE CHARACTER OF
21 JONATHAN BINNEY IN THAT -- IN THE GUILT PHASE BECAUSE THAT
22 WOULD RAISE ALL KIND OF ISSUES, NOT JUST WITH THE CSC, BUT
23 DR. SCHWARTZ-WATTS HAD TOLD US THERE WAS SOME OTHER SERIOUS,
24 IN MY JUDGMENT, SERIOUS MENTAL PROBLEMS THAT HE HAD. SHE
25 THOUGHT THAT HE WAS A SADIST.

1 AND I JUST THOUGHT THAT IF THE JURY KNEW OR THERE WAS A
2 LOT OF EVIDENCE ABOUT THE CSC OR ABOUT SADISM OR HIS
3 PROPENSITY OF SADISM OR SOME OF THE OTHER THINGS THAT SHE
4 DESCRIBED IN HER EXAMINATION OF HIM THAT WE WOULDN'T -- THE
5 JURY WOULDN'T SPEND MUCH TIME WORRYING ABOUT WHAT HIS INTENT
6 WAS WHEN HE WENT IN THE HOUSE.

7 Q. OKAY. I'M GOING TO SHOW YOU WHAT'S BEEN MARKED STATE'S
8 EXHIBIT NUMBER 34 AND I BELIEVE DEFENDANT'S EXHIBIT NUMBER 2
9 FROM THE JACKSON V. DENNO HEARING. AND I ASK YOU IS THAT
10 THE SUICIDE NOTE YOU WERE TALKING ABOUT?

11 A. YES, SIR.

12 Q. OKAY. AND DOES THAT SUICIDE NOTE MENTION, MAKE MENTION
13 OF [REDACTED] THE THREE YEAR OLD, THE THREE MONTH OLD DAUGHTER
14 THAT WAS RAPED?

15 A. YES.

16 Q. SO THAT THERE WAS A -- YOU HAD A SUICIDE NOTE, BUT YOU
17 HAD A NOTE THAT ALSO AT LEAST INDIRECTLY TALKED ABOUT THE
18 CSC CASE?

19 A. I KNEW FROM THE MOMENT I TRIED TO DO WHAT WAS RIGHT AND
20 BE HONEST ABOUT [REDACTED] I WAS SCREWED.

21 Q. OKAY. AND IT TALKS ABOUT OTHER THINGS IN THAT NOTE AS
22 WELL, CORRECT?

23 A. YES, SIR.

24 Q. OKAY. WERE YOU ULTIMATELY ABLE SUCCESSFULLY -- WERE
25 YOU ULTIMATELY ABLE, YOU AND MR. PRUETT, TO KEEP OUT ANY

1 EVIDENCE OF THE CSC AND THE -- HIS CHARACTER IN THE GUILT
2 PHASE?

3 A. YES, SIR.

4 Q. DO YOU REMEMBER HOW YOU WERE ABLE TO DO THAT?

5 A. WELL, WE DIDN'T OPEN ANY DOORS TO IT.

6 Q. OKAY. CAREFUL NOT TO OPEN ANY DOORS, CAREFUL NOT TO
7 ASK THE WRONG QUESTIONS, IS THAT WHAT YOU'RE SAYING OR ...

8 A. WELL, I MEAN, AS I SAID, WHEN WE WERE DISCUSSING HOW TO
9 -- HOW TO TRY THE GUILT PHASE ONE OF THE PRIMARY CONCERNS
10 WAS TO KEEP OUT EVIDENCE ABOUT THE CSC ABOUT -- AND ABOUT
11 HIS CHARACTER.

12 Q. OKAY.

13 A. AND ONE OF THE WAYS THAT WE WERE TRYING TO MAKE SURE
14 THAT WE DID THAT WAS NOT TO OPEN ANY DOORS THAT WOULD
15 ALLOWED HIM TO DISCUSS, ALLOW THE PROSECUTION TO BRING IN
16 EVIDENCE OF HIS CHARACTER.

17 Q. OKAY.

18 A. OR THE REASON HE WANTED TO COMMIT SUICIDE.

19 Q. ALL RIGHT.

20 A. OR ONE OF THE LIKELY STRESSORS THAT WOULD LEAD SOMEBODY
21 TO CONTEMPLATE SUICIDE.

22 Q. DID MR. BINNEY GIVE A SERIES OF STATEMENTS TO THE
23 POLICE IN THIS CASE?

24 A. HE DID.

25 Q. DO YOU REMEMBER WHAT THE FIRST STATEMENT WAS THAT HE

1 GAVE, WRITTEN OR ORAL?

2 A. THE FIRST STATEMENT WAS A STATEMENT TO A STREET DEPUTY
3 WHOSE NAME I CAN'T REMEMBER. BUT WHEN HE WAS ARRESTED AT
4 THEIR HOUSE HE WAS SITTING OUT ON THE -- THEY TOOK HIM OUT
5 TO THE EDGE OF THE YARD, I THINK. AND HE SAID SOMETHING TO
6 THE EFFECT OF, SHE'S DEAD, ISN'T SHE? AND THE DEPUTY
7 REPLIED, WHO? AND HE SAID, THE WOMAN I SHOT, OR WORDS TO
8 THAT EFFECT, THE LADY I SHOT, SOMETHING LIKE THAT.

9 Q. OKAY. DID THAT STATEMENT CAUSE PROBLEMS FOR YOUR
10 DEFENSE IN THE GUILT PHASE?

11 A. WELL, ALL, I MEAN, EACH OF THE STATEMENTS -- THEY WERE
12 ULTIMATELY -- IT WAS THAT -- THAT ORAL STATEMENT AT THE
13 SCENE OF THE ARREST. THERE WAS A STATEMENT TO SPIKE McCRAW.
14 THERE WAS A STATEMENT TO AGENT PRODAN AND SPIKE McCRAW. HE
15 TOOK THEM TO THE MURDER WEAPON THAT WAS HIDDEN OUT IN THE
16 WOODS NEAR THE SOUTHERN HOUSE, NEAR THE SOUTHERN PROPERTY.
17 ALL OF THOSE ARE -- ARE PROBLEMS.

18 Q. DID YOU FEEL LIKE YOU WERE -- AT ANY TIME DID YOU FEEL
19 LIKE YOU WERE GOING TO BE ABLE TO CONVINCING THE JURY THAT
20 JONATHAN BINNEY DID NOT GO IN THAT HOUSE AND DID NOT SHOOT
21 JUDY SOUTHERN?

22 A. NO. I THINK THERE WAS OVERWHELMING EVIDENCE THAT
23 JONATHAN BINNEY HAD BEEN IN THE HOUSE. THAT WAS NOT GOING
24 TO BE AN ISSUE THAT I THINK WE WERE GOING TO BE ABLE TO MAKE
25 ANY HEADWAY ON. I DON'T THINK THERE WAS GOING TO EVER BE

1 ANY CHANCE THAT WE WERE GOING -- I DIDN'T SEE ANY WORKING
2 ROOM ON THE ISSUE OF WHETHER OR NOT HE ACTUALLY SHOT HER.

3 Q. ALL RIGHT. DID -- WAS THERE ANY -- DID BALLISTICS
4 MATCH UP THE SHELL CASINGS AND THE BULLETS THAT WERE FOUND
5 INSIDE THE HOUSE WITH THE GUN THAT MR. BINNEY TOOK THE
6 POLICE TO?

7 A. YES.

8 Q. AND WERE -- WAS THERE A WITNESS CALLED IN THE TRIAL TO
9 ESTABLISH WHERE MR. BINNEY GOT THE GUN FROM?

10 A. YEAH. THE BOY THAT HE BOUGHT IT FROM WAS A FORMER CO-
11 WORKER OF SOME SORT. AND HE TESTIFIED. BUT I THINK -- I
12 THOUGHT HE TESTIFIED IN THE PENALTY PHASE, BUT I MAY BE
13 MISTAKEN.

14 Q. OKAY. BUT HE TESTIFIED IN THE TRIAL?

15 A. HE TESTIFIED IN THE TRIAL. THAT'S CORRECT.

16 Q. DID YOU AND MR. PRUETT CHALLENGE THE ADMISSIBILITY OF
17 THE STATEMENT THAT MR. BINNEY MADE TO THE STREET DEPUTY?

18 A. WE CHALLENGED ALL OF THE STATEMENTS THAT HE MADE.

19 Q. I'LL SHOW YOU WHAT'S BEEN MARKED STATE'S EXHIBIT 3 AND
20 ASK YOU IF YOU CAN IDENTIFY THAT AND HAVE YOU SEEN THAT
21 BEFORE?

22 A. YES, SIR.

23 Q. AND WHAT IS THAT?

24 A. THIS IS THE STATEMENT THAT SPIKE McCRAW GOT FROM HIM.

25 Q. GOT FROM MR. BINNEY?

1 A. YES, SIR. I'M SORRY. THIS IS THE STATEMENT THAT SPIKE
2 McCRAW GOT FROM JONATHAN BY SENDING A DEPUTY TO GO ASK HIM
3 IF OR TELL HIM THAT THEY WOULD LIKE TO TALK TO HIM OR HE
4 COULD CALL THEM IF HE WANTED TO TALK TO THEM, CONTACT THEM
5 IF HE WANTED TO TALK TO THEM.

6 Q. JUST BRIEFLY TO SAVE TIME, DOES MR. BINNEY ADMIT IN
7 THIS STATEMENT TO GOING IN THE HOUSE?

8 A. YES, SIR.

9 Q. AND SHOOTING MS. SOUTHERN?

10 A. YES, SIR.

11 Q. I'M GOING TO SHOW YOU WHAT'S BEEN MARKED AS STATE'S
12 EXHIBIT NUMBER 6. IF YOU WOULD, TELL THE COURT WHAT THAT
13 IS.

14 A. THAT'S THE LETTER HE WROTE IN THE SECOND INTERVIEW WITH
15 SPIKE McCRAW AND AGENT PRODAN. IT'S A LETTER TO ALLAN
16 SOUTHERN DESCRIBING WHAT HE DID AND HE IS EXPRESSING HIS
17 SORROW FOR WHAT HE'D DONE.

18 Q. OKAY. DOES HE TELL MR. SOUTHERN WHAT HE PLANNED ON
19 DOING AND WHAT COULD HAVE HAPPENED IF MR. SOUTHERN AND HIS
20 SON HAD COME HOME?

21 A. YES, SIR. HE SAYS THAT HE WOULD HAVE -- THEY WOULD --
22 I THINK THE WAY HE PUT IT IN THE LETTER TO ALLAN WAS THAT
23 THERE WERE THREE POSSIBLE OUTCOMES. THAT HE COULD HAVE --
24 WELL, IT'S HERE. I MEAN, HE COULD HAVE COMMITTED MASS
25 MURDER OR HE WOULD HAVE MURDERED ALL THREE OF THEM MEANING

1 ALLAN, THEIR SON AND JUDY. AND -- OR ME KILLING AND RAPING
2 JUDY -- OR ME COMMITTING SUICIDE. I'M SORRY, I
3 MISSTATED ---

4 Q. OKAY.

5 A. --- THE THREE. I BELIEVE THERE'S SOME REFERENCE IN
6 THERE TO MASS MURDER. BUT ANYWAY, ---

7 Q. ALL RIGHT.

8 A. --- I'M SORRY. THAT'S WHAT IT SAYS.

9 Q. NOW WHY IS THE SUICIDE IMPORTANT? WHY WAS THAT
10 IMPORTANT TO YOU AND MR. PRUETT? WHY IS IT IMPORTANT THAT
11 HE WAS GOING THERE TO COMMIT SUICIDE?

12 A. WELL, YOU GOT TO HAVE INTENT TO COMMIT A CRIME WHEN YOU
13 GO IN, WHEN YOU GO IN THE HOUSE IN ORDER TO BE CHARGED WITH
14 BURGLARY OR BE CONVICTED OF BURGLARY. THE PROBLEM THAT WE
15 -- THE PROBLEM THAT WE HAD WAS THAT, I MEAN, THERE'S GOT TO
16 BE SOME REASON HE GOES IN THE HOUSE.

17 AND THERE WAS A WHOLE LOT OF EVIDENCE THAT HE HAD A
18 SINISTER PURPOSE IN GOING IN THE HOUSE. HE DESCRIBES TAKING
19 GLOVES. HE DESCRIBES GETTING A FLASHLIGHT. HE DESCRIBES
20 GETTING A GUN. AND -- IN SOME OF THESE STATEMENTS TO THE
21 POLICE OFFICERS. AND SO, YOU KNOW, THERE'S CERTAINLY A LOT
22 OF EVIDENCE THAT THERE WAS A SINISTER PURPOSE GOING IN.

23 HE DID SOME THINGS IN THE HOUSE THAT AS I SAID EARLIER
24 IN MY TESTIMONY JUST DIDN'T FIT WITH A CONVENTIONAL
25 BURGLARY. I MEAN, HE LAID AROUND IN THE HOUSE FOR FIVE AND

1 A HALF HOURS OR THEREABOUT. AND I THOUGHT IF WE COULD FIND
2 SOME NON-CRIMINAL PURPOSE TO GO IN THE HOUSE AND LAY AROUND
3 OR WHATEVER WE MIGHT COULD GET OUT FROM UNDER THE BURGLARY,
4 WHICH IS THE KEY TO THEM GETTING INTO THE PENALTY PHASE.

5 AND WE THOUGHT ABOUT IT AND WORKED ON IT. AND I
6 THOUGHT THAT THERE WAS AN ARGUMENT TO BE MADE THAT SUICIDE
7 IS NOT A CRIME. AND I DID A MEMO ON IT. IT TRADITIONALLY
8 HAS BEEN A CRIME, AND I CAN GO CITE SOME JURIS PRUDENCE,
9 BECAUSE IN MY JUDGMENT THAT I THINK THE JUDGMENT OF SOCIETY
10 HAS SHIFTED AND THE VIEW OF PEOPLE WHO ACTUALLY COMMIT IT, I
11 DON'T THINK IT'S PUNISHED ANY LONGER. AND IN MY JUDGMENT IN
12 ORDER FOR SOMETHING TO FIT THE DEFINITION OF A CRIME THERE'S
13 GOT TO BE A PUNISHMENT AFFIXED TO IT.

14 AND SO WE TRIED TO DEVELOP THAT AS A REASON FOR
15 JONATHAN, A NON-CRIMINAL REASON, THAT FIT WITH THE FACTS
16 THAT WE KNEW WERE GOING TO BE THERE OR THAT WE COULDN'T GET
17 AROUND FOR GOING IN THE HOUSE. DOES THAT ANSWER YOUR
18 QUESTION?

19 Q. YEAH, I THINK SO. AND WERE YOU ULTIMATELY ABLE TO GET
20 A CHARGE FROM THE JUDGE IN THE GUILT PHASE THAT IF MR.
21 BINNEY ENTERED TO COMMIT SUICIDE ---

22 A. WELL, WE DIDN'T GET THE CHARGE WE WANTED, BUT WE GOT --
23 WE GOT A CHARGE ON IT. I MEAN, HE DID CHARGE THEM THAT
24 SUICIDE WAS NOT A CRIME.

25 Q. AND IN ORDER TO COMMIT MURDER HE HAS TO ENTER TO COMMIT

1 A CRIME?

2 A. RIGHT, THAT WAS PART OF THE CHARGE. YEAH, THAT'S
3 CORRECT.

4 Q. ALL RIGHT. DO YOU REMEMBER HOW LONG THE JURY
5 DELIBERATED IN THE GUILT PHASE OF THE TRIAL?

6 A. WELL, THEY WENT OUT BEFORE DINNER, I THINK SOMETIME
7 AFTER ELEVEN. AND THEY CAME BACK ABOUT 6:30 OR 7:00. THEY
8 HEARD A READ BACK FROM, I THINK, THE BALLISTICS EXPERT.
9 THAT TOOK ABOUT TWENTY OR THIRTY MINUTES.

10 Q. AT ANY ---

11 A. BUT THEY WERE OUT THROUGH THE AFTERNOON.

12 Q. I UNDERSTAND.

13 A. THROUGHOUT THE AFTERNOON.

14 Q. YOU THINK THEY CAME BACK AROUND 6:30, 7:00 THAT NIGHT?

15 A. THAT'S MY RECOLLECTION.

16 Q. AT ANY -- IN ANY OF THE STATEMENTS THAT MR. BINNEY GAVE
17 TO THE POLICE ABOUT SHOOTING MS. SOUTHERN, THE STATEMENTS
18 THAT YOU AND MR. PRUETT OBJECTED TO IN THE JACKSON V. DENNO
19 HEARING, DID HE EVER MENTION MR. SOUTHERN BEING INVOLVED IN
20 THIS CRIME?

21 A. NO.

22 Q. DID THAT CAUSE A PROBLEM FOR YOU ON THE ISSUE OF THIRD
23 PARTY GUILT?

24 A. WELL, THAT'S A PROBLEM. THE MAJOR PROBLEM IS HE WAS
25 DENYING TO US THAT ALLAN SOUTHERN HAD ANYTHING TO DO WITH

1 IT. AND WE WENT THROUGH, I MEAN, WE HAD A NUMBER OF
2 DISCUSSIONS WITH HIM ABOUT THE SIGNIFICANCE OF THAT. AND HE
3 JUST REFUSED TO SAY THAT SOUTHERN HAD ANYTHING TO DO WITH
4 IT.

5 Q. ALL RIGHT. DO YOU ---

6 A. OR THERE WAS ANY CONNECTION BETWEEN HIM AND SOUTHERN.
7 I MEAN, WE TRIED TO EXPLORE IT FROM THAT DIRECTION. YOU
8 KNOW, DID YOU KNOW HIM FROM THE INTERNET? DID YOU KNOW HIM
9 FROM, I DON'T KNOW, THE BOWLING ALLEY? I CAN'T REMEMBER THE
10 WAYS WE TRIED TO GET TO ANY RELATIONSHIP, BUT HE DENIED ANY
11 RELATIONSHIP.

12 Q. OKAY. DO YOU REMEMBER IF HE EVER AT ANY TIME MADE A
13 STATEMENT THAT HE KNEW MS. SOUTHERN, WAS INVOLVED WITH HER
14 SOMEHOW, GAVE YOU A DIFFERENT VERSION OF THE FACTS?

15 A. WELL, HE GAVE DON THOMPSON A VERSION OF THE FACTS.

16 Q. NOW WHO IS DON THOMPSON?

17 A. DON THOMPSON WAS THE LAWYER WHO REPRESENTED HIM IN THE
18 VERY BEGINNING. DON THOMPSON IS THE PUBLIC -- WAS THE
19 PUBLIC DEFENDER IN CHEROKEE COUNTY AT THE TIME. AND HE
20 HEARD ABOUT ALL THIS FROM THE MEDIA AND INITIATED SOME
21 CONTACT WITH JONATHAN IN THE VERY BEGINNING AND REPRESENTED
22 JONATHAN FROM THE BEGINNING.

23 AND THERE WAS -- THERE WAS A -- THERE WAS A VERSION OF
24 THE INCIDENT THAT HE GAVE DON AT SOME POINT. AND I DON'T
25 RECALL WHAT IT WAS, BUT IT WAS SIGNIFICANTLY DIFFERENT FROM

1 THE STATEMENTS MADE TO THE POLICE.

2 Q. OKAY. AND DID HE EVER TELL YOU AND MR. PRUETT THAT THE
3 VERSION HE GAVE DON THOMPSON WAS NOT TRUE?

4 A. HE DIDN'T TELL ME THAT, BUT I -- HE TOLD TRENT THAT.

5 Q. HE DID? .

6 A. I THINK HE DID, YES.

7 Q. ALL RIGHT. WE'LL ASK HIM ABOUT THAT. EVEN THOUGH HE
8 -- EVEN THOUGH MR. BINNEY SAID THERE WAS NO CONNECTION WITH
9 MR. SOUTHERN AND THE STATEMENTS NEVER MENTIONED MR.
10 SOUTHERN, HOW DID YOU TRY TO LEAVE THE DOOR OPEN TO THAT?

11 A. WELL, ---

12 Q. THIRD PARTY GUILT ISSUE?

13 A. WELL, IN CROSS EXAMINING THE WITNESSES AND MR. SOUTHERN
14 WE RAISED THE ISSUE OF MR. SOUTHERN'S TAPING OF THE -- OF
15 HIS WIFE, OF THE VICTIM. HE HAD ---

16 Q. TAPED HER PHONE CALLS?

17 A. YES, I'M SORRY. TAPED THE PHONE CALLS OF HIS WIFE IN
18 THE PERIOD OF TIME -- SOMETIME BEFORE THE -- FOR A PERIOD OF
19 TIME BEFORE THE SHOOTING. HE HAD -- THEY WERE GOING TO
20 MARITAL COUNSELING. THERE WAS SOME NOTES LEFT IN THE HOUSE
21 ABOUT A POTENTIAL PROPERTY SPLIT.

22 Q. OKAY.

23 A. SO WHAT WE WERE TRYING TO DO WAS EXPLOIT THE BAD
24 RELATIONSHIP BETWEEN THE VICTIM AND HER HUSBAND SO THAT IF
25 AT SOME POINT JONATHAN TOLD US THAT THERE WAS A RELATIONSHIP

1 THERE AND THAT, YOU KNOW, THERE WAS SOME NEGATIVE EVIDENCE
2 TOWARDS MR. SOUTHERN IN THE RECORD.

3 Q. CORRECT.

4 A. THAT WOULD PROVIDE SOME MOTIVE FOR THEM TO GET TOGETHER
5 AND HAVING -- GET TOGETHER FOR WHATEVER RESULTED IN THE
6 SHOOTING.

7 Q. OKAY. AND I BELIEVE YOU WENT INTO -- WERE YOU THE ONE
8 THAT CROSS EXAMINED MR. SOUTHERN?

9 A. NO.

10 Q. MR. PRUETT?

11 A. TRENT DID.

12 Q. OKAY. Y'ALL WENT INTO THE FACT THAT HE CARRIED HER TO
13 THE HOSPITAL IN HIS CAR RATHER THAN CALLING AN AMBULANCE?

14 A. OH, YEAH. CROSS EXAMINED HIM ABOUT WHY HE NEVER CALLED
15 911, WHY HE WENT PAST -- THERE'S A -- IF YOU GO FROM HIS
16 HOUSE TO MARY BLACK HOSPITAL YOU PASS, ON 29, YOU PASS RIGHT
17 BY AN EMS SUBSTATION.

18 Q. OKAY.

19 A. MY RECOLLECTION IS TRENT ASKED HIM ABOUT THAT. I MEAN,
20 WE RODE THE ROUTE FROM ---

21 Q. RIGHT.

22 A. --- AT MR. SOUTHERN'S THAT HE TOOK FROM THEIR HOUSE TO
23 MARY BLACK. AND HE QUESTIONED HIM ABOUT THAT. THERE WAS
24 SOME OTHER SUSPICIOUS CIRCUMSTANCES ABOUT HOW THE -- HOW IT
25 PLAYED OUT THAT HE ARRIVED AT THE HOUSE. I THINK HE --

1 DESPITE THE FACT THAT SHE TOLD HIM SHE WAS -- MAYBE SHE WAS
2 IN THE PASTURE OR MAYBE ROY CHAPMAN TOLD HIM SHE WAS IN THE
3 PASTURE. HE WENT TO THE HOUSE FIRST, THOSE KIND OF THINGS.
4 Q. RIGHT.

5 A. TRENT CROSS EXAMINED HIM ABOUT A GOOD MANY OF THOSE
6 THINGS. WE WANTED TO CROSS EXAMINE HIM ABOUT AS MUCH OF IT
7 AS WE COULD WITHOUT, I MEAN, THERE'S A LIMIT TO HOW HARD YOU
8 CAN CROSS EXAMINE THE VICTIM'S HUSBAND IF YOU, YOU KNOW, IF
9 YOU DON'T HAVE SOME SMOKING GUN TO SHOW DEFINITELY HE'S
10 INVOLVED WITH IT.

11 AND WE DIDN'T WANT TO GET -- GENERATE TOO MUCH SYMPATHY
12 FOR HIM, BUT AT THE SAME TIME WE WANTED TO LEAVE, I MEAN, WE
13 DIDN'T WANT TO BE TOO HARD ON HIM, BUT AT THE SAME TIME WE
14 WANTED TO LEAVE THE DOOR OPEN WITH HIM LOOKING LIKE HE'S GOT
15 A MOTIVE OR SOME LACK OF ENTHUSIASM ABOUT GETTING HER TO THE
16 HOSPITAL IF IT TURNED OUT THAT JONATHAN WAS GOING TO SAY
17 THAT SOUTHERN WAS INVOLVED, MR. SOUTHERN WAS INVOLVED.

18 Q. OKAY. I BELIEVE Y'ALL ALSO BROUGHT OUT THAT THE BULLET
19 THAT PASSED THROUGH MS. SOUTHERN WAS A THROUGH AND THROUGH
20 GUNSHOT WOUND AND THERE WAS NO BLOOD OR ---

21 A. NO BLOOD, YES, SIR.

22 Q. --- NO TISSUE ON IT OR ANYTHING LIKE THAT.

23 A. THAT'S CORRECT.

24 Q. AND YOU CROSS EXAMINED MR. SOUTHERN ABOUT THE FACT THAT
25 HE ALSO OWNED A HANDGUN?

1 A. SMALL CALIBER HANDGUN.

2 Q. A SMALL CALIBER HANDGUN?

3 A. CORRECT.

4 Q. ALL THAT WAS BEFORE THE JURY?

5 A. I BELIEVE IT WAS, YES.

6 Q. WELL, AT NO TIME -- WELL, TELL ME, DID MR. BINNEY EVER

7 TELL YOU AT ANY TIME THAT MR. SOUTHERN HAD ANYTHING TO DO

8 WITH THIS?

9 A. NO. TRENT HAD MOST OF THOSE -- MR. PRUETT HAD MOST OF

10 THOSE DISCUSSIONS WITH HIM. BUT THERE WAS NO EVIDENCE, I

11 MEAN, NOT FROM HIM THAT ---

12 Q. NOT AS YOU CAN RECALL.

13 A. --- THAT HE HAD HAD ANY CONTACT WITH MR. SOUTHERN

14 BEFORE THIS CASE.

15 Q. OKAY. AND IF YOU WOULD, TELL ME ABOUT -- THERE WAS AN

16 ISSUE WITH THE PATHOLOGIST, DR. ROSS, AND HER TESTIMONY AT

17 THE TRIAL. YOU HAD TALKED TO HER, I BELIEVE, LEADING UP --

18 YOU HAD TALKED TO HER FOR SOME ---

19 A. YEAH, I TALKED TO HER, I DON'T KNOW, SIX WEEKS, A MONTH

20 BEFORE THE TRIAL. AND SHE TOLD ME THAT ESSENTIALLY FROM HER

21 EXAMINATION THAT IT LOOKED LIKE MS. SOUTHERN HAD BEEN SHOT

22 POINT BLANK, VERY CLOSE TO THE GUN -- THE GUN HAD BEEN HELD

23 VERY CLOSE TO HER BODY.

24 ONE OF THE -- ONE OF THE MINOR ATTACKS THAT WE WANTED

25 TO TRY TO MAKE ON THE STATE'S CASE WAS RATHER THAN LYING IN

1 WAIT IN THE SOUTHERN'S HOME HE WAS MORE OR LESS, EXCUSE ME,
2 JONATHAN WAS MORE OR LESS LYING AROUND, SMOKING CIGARETTES
3 DRINKING BEER, SHE CAME IN AND SURPRISED HIM. IT WASN'T A
4 SITUATION WHERE HE WAS JUST WAITING AND WAITING AND WAITING
5 TO MURDER SOMEBODY. AND A CONTACT WOUND DOESN'T HELP YOU
6 WITH THAT. I MEAN, IT'S JUST TOO MUCH -- YOU'VE GOT TO GET
7 TOO CLOSE TO SOMEBODY, THERE'S TOO MUCH, IN MY JUDGMENT, TOO
8 MUCH INTENT THERE.

9 AND WE JUST, YOU KNOW, WE WERE TRYING TO -- I
10 APOLOGIZE. WHAT SHE -- WHAT SHE SAID INITIALLY WAS THAT SHE
11 THOUGHT IT WAS A SMALL CALIBER GUN.

12 Q. OKAY. WAS THAT IN HER REPORT?

13 A. YES, THAT WAS IN HER REPORT. I APOLOGIZE. AND I WAS
14 REMEMBERING WRONG. AND MR. SOUTHERN HAD A SMALL CALIBER
15 GUN. AND WE WANTED, AGAIN, TO TRY TO LEAVE THE DOOR OPEN TO
16 EXPLAIN THE MOTIVE BEHIND ALLAN SOUTHERN BEING INVOLVED IF
17 JONATHAN CHANGED HIS MIND AND SAID HE WAS. THE SMALL
18 CALIBER GUN FIT WITH MR. SOUTHERN OWNING THAT.

19 THERE WAS AN ISSUE ABOUT HER, AGAIN, WE WANTED TO MAKE
20 IT, I WON'T SAY MAKE IT LOOK, BUT WE WANTED TO -- WE WANTED
21 TO RAISE SOME DOUBT ABOUT WHETHER OR NOT HE LAID IN WAIT FOR
22 HER AS OPPOSED TO BEING SURPRISED BY HER ARRIVAL AND JUST
23 SHOOTING OUT OF FEAR OR SURPRISE.

24 Q. OKAY.

25 A. AND THAT WAS -- AGAIN, THAT WAS PART OF THE REASON THAT

1 I CONTACTED HER. AND WHEN APPARENTLY THE SOLICITOR'S OFFICE
2 TALKED WITH HER IN BETWEEN THE TIME I TALKED WITH HER AND
3 THE TIME SHE TESTIFIED AND SHE DECIDED THAT IT WAS ACTUALLY
4 A MEDIUM CALIBER GUN RATHER THAN A SMALL CALIBER GUN.

5 Q. OKAY. AND WAS IT -- DID YOU BRING OUT ON YOUR CROSS
6 EXAMINATION THAT SHE HAD CHANGED HER TESTIMONY FROM THE TIME
7 THAT SHE TALKED TO YOU AND ---

8 A. YES.

9 Q. --- THE TIME OF THE TRIAL?

10 A. YES, I DID.

11 Q. IN FACT, IT CHANGED FROM THE TIME SHE TALKED TO THE
12 SOLICITOR'S OFFICE AND THE TIME OF THE TRIAL.

13 A. YES.

14 Q. OKAY.

15 A. I CROSS EXAMINED HER ABOUT THAT CHANGE SHE MADE.

16 Q. DID SHE ADMIT THAT SHE HAD CHANGED HER TESTIMONY?

17 A. YES.

18 Q.. AND DID SHE ADMIT THAT HER REPORT STATED SOMETHING
19 DIFFERENT THAN WHAT SHE WAS TESTIFYING TO?

20 A. YES.

21 Q. LET ME TAKE YOU BACK INTO THE PREPARATION OF THE CASE.
22 DID Y'ALL DIVIDE THE CASE UP IN ANY FASHION, YOU AND MR.
23 PRUETT? WAS IT LIKE YOU WERE GOING TO DO THE GUILT PHASE
24 AND THE PENALTY OR THE REVERSE OR ---

25 A. NO. I MEAN, WE DIVIDED UP ISSUES. I MEAN, THERE WERE

1 ISSUES THAT I WORKED MORE ON THAN HE DID AND VICE VERSA.
2 BUT I DON'T REMEMBER HOW WE DIVIDED THEM. I DON'T THINK
3 THERE WAS ANY METHOD. I MEAN, WE JUST -- HE TOOK SOME, I
4 TOOK SOME.

5 Q. DO YOU REMEMBER WHO HANDLED THE SUPPRESSION ISSUES ON
6 THE STATEMENT, WHO HANDLED THE JACKSON V. DENNO?

7 A. I DID MOST OF THAT.

8 Q. WERE ALL STATEMENTS THAT HE GAVE CHALLENGED AS FAR AS
9 YOU CAN REMEMBER?

10 A. YES.

11 Q. AND DO YOU REMEMBER WHETHER OR NOT ALL OF THE
12 STATEMENTS WERE ADMITTED OR SOME?

13 A. THEY WERE ALL ADMITTED. THERE WAS BASICALLY FOUR.
14 THERE WAS THE -- THERE WAS THE ORAL STATEMENT TO THE FIELD
15 DEPUTY. THERE WAS THE FIRST STATEMENT TO SPIKE McCRAW, THE
16 SLED AGENT, THAT HE OBTAINED BY SENDING A JAILER TO TALK TO
17 HIM. THERE WAS THE SECOND STATEMENT THAT JONATHAN MADE TO
18 AGENT PRODAN AND AGENT SPIKE McCRAW. AND THEN I COUNT THE
19 LETTER TO ALLAN AS A -- AS A STATEMENT JUST BECAUSE IT'S A
20 WRITTEN ADMISSION ESSENTIALLY OF THE CRIME.

21 Q. OKAY. AND AGENT PRODAN, WHO WAS HE AND WHERE IS HE
22 FROM?

23 A. HE'S A -- I APOLOGIZE. I DON'T RECALL WHAT HE CALLS
24 HIMSELF. HE'S SOME TYPE OF PROFILER FOR SLED.

25 Q. AND DO YOU REMEMBER WHAT HIS TESTIMONY WAS REGARDING

1 WHY -- WHAT MR. BINNEY TOLD HIM ABOUT WHY HE WENT IN THE
2 HOUSE, WHAT WERE THE REASONS FOR GOING IN THERE?

3 A. WELL, THERE WAS -- HE GAVE ME -- MR. PRODAN TESTIFIED
4 THAT JONATHAN DISCUSSED SEVERAL REASONS FOR GOING IN THE
5 HOUSE. THAT MAY HAVE BEEN WHERE I REMEMBER THE MASS MURDER
6 FROM. BUT I -- I DON'T RECALL SPECIFICALLY WHICH REASONS
7 WERE GIVEN IN THE STATEMENT TO PRODAN AS OPPOSED TO ---

8 Q. OKAY.

9 A. --- THE LETTER TO ALLAN AS OPPOSED TO THE OTHER WRITTEN
10 STATEMENT.

11 Q. LET ME ASK YOU ---

12 A. I CAN'T REMEMBER THEM ---

13 Q. --- THIS QUESTION.

14 A. --- ALL.

15 Q. DO YOU REMEMBER SOMEONE TESTIFYING THAT MR. BINNEY GAVE
16 A STATEMENT THAT THE REASON HE WENT IN THE HOUSE WAS TO
17 COMMIT A MURDER SO HE WOULD GO TO JAIL AS A MURDERER AND NOT
18 A CHILD MOLESTER?

19 A. WELL, YES. SPIKE TESTIFIED TO THAT. SPIKE McCRAW
20 TESTIFIED TO THAT. THAT WASN'T IN THE STATEMENT THAT
21 JONATHAN GAVE SPIKE McCRAW WHEN HE ...

22 Q. WASN'T IN THE WRITTEN STATEMENT?

23 A. PRODAN. NO, IT WASN'T. THAT'S CORRECT.

24 Q. BUT SOMEBODY TESTIFIED TO THAT THAT HE SAID THAT,
25 CORRECT?

1 A. AGENT McCRAW DID.

2 Q. OKAY. SO THAT INFORMATION WENT BEFORE THE JURY?

3 A. MY RECOLLECTION, YES, THAT WAS WHAT IT WAS.

4 Q. IN THE PENALTY PHASE OF THE TRIAL DO YOU REMEMBER WHAT
5 THE STATE TRIED TO ADMIT AS FAR AS THE CSC, THE CRIMINAL
6 SEXUAL CONDUCT?

7 A. WELL, THEY -- THEY BROUGHT IN THE AGENT'S -- THE
8 POLICEMAN WHO HAD TAKEN THE STATEMENTS FROM JONATHAN, THE
9 VARIOUS STATEMENTS FROM JONATHAN. THEY BROUGHT IN THE
10 DOCTOR WHO DID THE SURGERY ON [REDACTED] TO REPAIR THE INJURY
11 TO HER GENITALIA. AND THEY INTRODUCED SOME PICTURES OF THE
12 WOUND.

13 Q. OKAY. DO YOU -- DO YOU REMEMBER WHETHER YOU AND MR.
14 PRUETT OBJECTED TO THIS INFORMATION ---

15 A. YES, WE DID.

16 Q. --- COMING IN? WHAT WAS YOUR POSITION ON WHAT SHOULD
17 COME IN IN THE PENALTY PHASE AS FAR AS THE CSC?

18 A. WELL, MY POSITION WAS THAT IT WAS -- THAT IT WAS
19 INFLAMMATORY, PARTICULARLY THE PICTURES. THERE'S NOBODY WHO
20 -- THERE'S NOBODY WHO SITS ON A JURY WHO CAN'T IMAGINE WHAT
21 A GROWN MAN HAVING SEX WITH A THREE MONTH OLD CHILD IS LIKE.
22 NOBODY NEEDS A PICTURE OF THAT.

23 THERE'S JUST -- THERE'S JUST SO LITTLE, IF ANY, FACTUAL
24 INFORMATION THAT CAN BE CONVEYED BY THE UNENDING REPLAY OF
25 THE CSC EVIDENCE. NOBODY WHO'S QUALIFIED TO SIT ON THE JURY

1 IS GOING TO MISUNDERSTAND WHAT THAT KIND OF ACT IS.

2 IT'S NOT LIKE A ROADHOUSE KILLING WHERE OR SHOOTING
3 WHERE, YOU KNOW, YOU COULD JUST AS LIKELY BE PROSECUTING THE
4 VICTIM AS THE DEFENDANT. IT'S -- IT WAS ONLY -- IT COULD
5 ONLY BE ONE THING. AND IT WAS -- SO WE OBJECTED TO IT.
6 THAT'S -- THAT WAS MY BASIS.

7 I MEAN, WE WENT INTO IT IN A LOT GREATER DETAIL, A LOT
8 GREATER LENGTH THAN THAT, BUT THAT'S THE HEART OF IT. I
9 MEAN, NOBODY NEEDS -- THE WHOLE POINT IS TO SHOW HIS
10 CHARACTER. AND NOBODY NEEDS TO BE -- HAVE IT RUBBED IN
11 THEIR FACE WHAT IT LOOKS LIKE. EVERYBODY KNOWS WHAT IT
12 LOOKS LIKE.

13 Q. BUT DOES THE PICTURE ACCURATELY REFLECT WHAT HE DID TO
14 HIS CHILD?

15 A. WELL, THAT -- I'M NOT ARGUING THAT POINT. I'M JUST
16 SAYING THAT POINT'S IRRELEVANT GIVEN THE PURPOSE OF THE
17 PENALTY PHASE.

18 Q. DOES THAT PICTURE ACCURATELY SHOW WHAT HIS CHARACTER
19 REALLY IS?

20 A. NO. IT HAS NOTHING TO DO WITH WHAT HIS CHARACTER --
21 WHAT HIS CHARACTER IS IS HE'S, UNDER THEIR THEORY, IS -- HIS
22 CHARACTER IS THAT HE'S A PERSON CAPABLE OF COMMITTING RAPE
23 ON A THREE MONTH OLD CHILD. NOBODY -- WELL, LET ME PHRASE
24 IT ANOTHER WAY. MY ONLY POINT IS THAT ANYBODY WHO HAS
25 ENOUGH SENSE AND LIFE EXPERIENCE TO SIT ON A JURY CAN

1 CONCEIVE IN THEIR MIND WHAT THAT PICTURE LOOKS LIKE.
2 THERE'S NOTHING ABOUT THE -- THE SAVAGERY OF THAT ACT IS
3 APPARENT IN THE SIMPLE FACT OF THE DESCRIPTION OF IT.
4 RUBBING PEOPLE'S NOSE IN IT BY SHOWING THEM A PICTURE OF IT
5 IS JUST NO DIFFERENT THAN IF THEY'D HAD A VIDEOTAPE OF IT
6 AND SHOWING THAT. IT DOESN'T -- WHAT DOES IT TELL YOU ABOUT
7 HIS CHARACTER?

8 Q. BUT DOESN'T IT SHOW THE INJURY TO THE CHILD, TO
9 [REDACTED] THE VICTIM?

10 A. WELL, IT DOES -- IT DOES THAT. I'M NOT ARGUING THAT
11 IT'S NOT AN ACCURATE PICTURE. I'M JUST ARGUING THAT THERE
12 WAS NO PURPOSE OTHER THAN INFLAMING THE JURY FOR ADMITTING
13 IT.

14 Q. AND THAT WAS YOUR POSITION AND MR. PRUETT'S, AND ---
15 A. YES.

16 Q. --- THE JUDGE DID NOT AGREE WITH YOU? DID HE KEEP SOME
17 OF THE PICTURES OUT THAT THEY OFFERED?

18 A. HE KEPT -- THEY HAD, I DON'T KNOW, SIXTY, EIGHTY, A
19 HUNDRED PAGES OF NOTEBOOK SIZED PAPER OF DOWNLOADS OF
20 PORNOGRAPHY. IT WAS -- I THINK WHAT IT WAS PRIMARILY WAS
21 VIDEOS. AND THEY DOWNLOADED IT FRAME BY FRAME. SO IT MAKES
22 A NUMBER OF PICTURES.

23 AND A GOOD MANY OF THOSE PICTURES WERE CHILD -- WHAT
24 COULD BE CLASSIFIED AS CHILD PORNOGRAPHY, VERY YOUNG MEN
25 HAVING SEX WITH VERY YOUNG MEN. AND WE OBJECTED TO THAT.

1 AND JUDGE COLE ALLOWED THEM, ONE, TO PUT IN ONE PAGE
2 AND, TWO, TO TELL THE JURY THAT THERE WAS MORE PAGES, THAT
3 THERE WAS SOMETHING LIKE TWENTY THOUSAND IMAGES, I THINK,
4 WAS THE NUMBER THEY USED. SO HE DENIED THEM THE RIGHT TO
5 PUT THE OTHER SEVENTY-NINE PAGES OF IT IN FRONT OF THE JURY.

6 Q. OKAY. AND THAT WAS AS A RESULT OF THE OBJECTION THAT
7 YOU AND MR. PRUETT MADE?

8 A. THAT'S CORRECT.

9 Q. AND ANY OTHER PHOTOGRAPHS THAT WERE KEPT OUT OF THE
10 PENALTY PHASE WERE AS A RESULT OF THE OBJECTIONS THAT YOU
11 AND MR. PRUETT MADE?

12 A. THAT'S RIGHT. I STAND CORRECTED. I THINK THERE WAS ---
13 I THINK THERE WERE THREE BIG PICTURES OF THE WOUND ---

14 Q. THE CHILD'S WOUND?

15 A. --- TO THE CHILD. EXACTLY. AND HE ALLOWED TWO IN AND
16 KEPT ONE OUT. AND I THINK -- I THINK THE ONE THAT WAS KEPT
17 OUT WAS A POST SURGERY PICTURE ---

18 Q. OKAY.

19 A. --- THAT JUDGE COLE SAID HAD NOTHING TO DO WITH THE
20 INFLICTION OF THE WOUND OR SOMETHING LIKE THAT. I DON'T
21 REMEMBER PRECISELY WHAT HIS RULING WAS.

22 Q. OKAY. LET'S GO BACK INTO THE PREPARATION OF THE CASE
23 AGAIN. WHO WAS IN CHARGE OF THE MENTAL HEALTH DEFENSES OR
24 ANYTHING IN THAT AREA? WAS IT SOMETHING BOTH OF YOU DID OR
25 WAS IT SOMETHING ONE OF YOU DID OR HOW WAS THAT DIVIDED UP?

1 A. WELL, TRENT WOUND UP DOING MOST OF IT. IN THE
2 BEGINNING I DID SOME OF IT. I HAD USED A PSYCHOLOGIST IN
3 CHARLOTTE IN ANOTHER CASE OR TWO. I DON'T REMEMBER HOW MANY
4 TIMES I HAD USED HIM. AND HIS NAME WAS McNAUGHT. I BELIEVE
5 ---

6 MR. BLUME: YOUR HONOR, JUST SO THE RECORD'S CLEAR ON
7 THIS, THIS IS THE SAME SORT OF OBJECTION THAT I MADE ON THE
8 ISSUE OF THE FILE THAT CAME IN YESTERDAY IN REGARD TO THIS
9 INDIVIDUAL.

10 THE COURT: VERY GOOD. NOTED. GO AHEAD, MR. SLADE.

11 A. I TALKED WITH DR. McNAUGHT. AND DR. McNAUGHT EXAMINED
12 JONATHAN.

13 Q. DO YOU KNOW WHERE HE EXAMINED HIM? DO YOU REMEMBER?

14 A. I BELIEVE -- I CAN'T REMEMBER WHICH INSTITUTION
15 JONATHAN WAS IN, BUT I BELIEVE DR. McNAUGHT WENT TO WHEREVER
16 JONATHAN WAS, IF I REMEMBER CORRECT.

17 Q. OKAY. AND DID HE ---

18 A. AND I THINK -- I BELIEVE HE WAS AT LIEBER IN THE MONTHS
19 PRIOR TO THE TRIAL. I CAN'T REMEMBER WHEN HE CAME UP HERE,
20 MEANING JONATHAN. I CAN'T REMEMBER WHEN JONATHAN WAS
21 TRANSFERRED FROM LIEBER TO HERE. BUT WHEREVER JONATHAN WAS
22 DR. McNAUGHT WENT TO HIM.

23 Q. AND DR. McNAUGHT IS THE PSYCHIATRIST, PSYCHOLOGIST ---

24 A. HE'S A PSYCHOLOGIST.

25 Q. PSYCHOLOGIST.

1 A. HE -- I THINK THE WAY I LEARNED OF HIM OR THE WAY I
2 USED HIM WAS I THINK HE TESTIFIED FOR ME IN A SEXUAL
3 PREDATOR CIVIL COMMITMENT PROCEEDING.

4 Q. ALL RIGHT.

5 A. AND HE DOES -- HIS FOCUS OF -- THE FOCUS OF HIS
6 PRACTICE IS ON, I'M NOT SURE OF THE TERM HE USED, BUT I
7 THINK OF IT AS DIFFERENT SEXUAL DYSFUNCTIONS ---

8 Q. WHAT ---

9 A. --- THAT LEAD TO CRIMINAL ACTS.

10 Q. CRIMINAL ACTS? AND WHAT WAS THE RESULT OF HIS
11 EVALUATION OF MR. BINNEY?

12 A. WELL, IT WASN'T FAVORABLE. IT WASN'T SOMETHING I
13 THOUGHT WE COULD USE.

14 Q. AND WHAT DID HE DIAGNOSE HIM AS BEING?

15 A. I BELIEVE THE TERM HE USED WAS SOCIOPATH.

16 Q. OKAY. AND I GUESS YOU HAD SOME LENGTHY DISCUSSION WITH
17 DR. McNAUGHT ABOUT THAT?

18 A. WELL, ---

19 Q. OR WHAT HIS FINDINGS WERE?

20 A. WELL, I HAD -- I HAD MORE THAN ONE DISCUSSION WITH DR.
21 McNAUGHT. I THOUGHT THAT, YOU KNOW, I LOOKED AT THE NOTION
22 THAT AT SOME POINT PSYCHOPATHS AND SOCIOPATHS RUN OUT OF --
23 WELL, THEY QUIT BEING SOCIOPATHS AND PSYCHOPATHS. I DON'T
24 KNOW THE TERM FOR IT. BUT WHEN THEY GET INTO THEIR FORTIES
25 OR FIFTIES THEY QUIT DOING THOSE KIND OF THINGS.

1 AND, YOU KNOW, I LOOKED AT THAT AND THOUGHT ABOUT THAT
2 FOR A WHILE AS MAYBE AN ARGUMENT FOR LIFE WITHOUT PAROLE,
3 BUT I ABANDONED THAT AT SOME POINT. SO I THINK THAT WAS
4 ABOUT ALL I DID WITH DIRECT WORK ON THE MENTAL HEALTH ISSUES
5 IN THE CASE.

6 Q. ALL RIGHT.

7 A. TRENT WAS THE PERSON WHO HAD ALL THE CONVERSATIONS WITH
8 DR. SCHWARTZ-WATTS. THE DOCTOR WHO TESTIFIED ON NICOTINE
9 POISONING AND NICOTINE PATCHES AND ---

10 Q. WHAT'S THAT ABOUT? JUST SO THE JUDGE KNOWS WHAT WE'RE
11 TALKING ABOUT, WHY DID NICOTINE BECOME AN ISSUE IN THE CASE?

12 A. WELL, WE SAY AND I THINK -- WELL, THERE WAS EVIDENCE
13 THAT HE HAD SOME NICOTINE PATCHES ON WHEN HE WAS ARRESTED.
14 AND PART OF OUR ARGUMENT THAT HE WAS INTENT ON SUICIDE AND
15 IT WAS THAT HE PUT NICOTINE PATCHES ON, PUT A LOT OF
16 NICOTINE PATCHES ON IN THE HOPE OF OVERDOSING ON NICOTINE.

17 Q. AND THE DOCTOR WAS CALLED TO SUBSTANTIATE THAT IN THE
18 PENALTY PHASE?

19 A. I BELIEVE HIS NAME WAS MARTIN. YES, HE TESTIFIED TO
20 VARIOUS ASPECTS OF NICOTINE POISONING AND HOW IT WORKS, HOW
21 IT WORKS FROM NICOTINE PATCHES, ET CETERA. AND HE TESTIFIED
22 IN THE PENALTY PHASE.

23 Q. DID HE ALSO ---

24 A. AND TRENT -- I'M SORRY.

25 Q. DID HE ALSO TESTIFY TO ITS EFFECTS ON SOMEBODY'S MIND?

1 A. YES.

2 Q. WHAT -- AFTER ALL THE EVIDENCE WAS IN IN THE PENALTY
3 PHASE, YOU KNOW, THE GUILT PHASE, THE PENALTY PHASE IS OVER,
4 DID YOU MAKE A CLOSING ARGUMENT TO THE JURY?

5 A. YES.

6 Q. AND HOW DID YOU -- WHAT WAS YOUR ARGUMENT TO THE JURY?
7 DO YOU REMEMBER WHAT YOUR -- DID YOU HAVE A THEME TO IT, A
8 THEORY TO IT?

9 A. WELL, ...

10 Q. HOW DID YOU HANDLE THE CSC AND HOW DID YOU HANDLE THE
11 MURDER?

12 A. WELL, THERE WERE A COUPLE OF THINGS THAT WE TRIED TO
13 ARGUE TO -- TO NEUTRALIZE THE CSC. AND ONE ---

14 MR. BLUME: YOUR HONOR, MAY I -- I JUST THINK THE BEST
15 EVIDENCE OF WHAT HE ARGUED IS WHAT HE ARGUED.

16 THE COURT: ALL RIGHT. THE OBJECTION IS OVERRULED
17 BECAUSE COUNSEL'S STRATEGIES AND TACTICS AND REFLECTIONS ON
18 THOSE ARE APPROPRIATE EVIDENCE HERE AT A POST CONVICTION
19 RELIEF PROCEEDING. WHILE WE HAVE A BREAK THOUGH IN THE
20 ANSWER, COUNSEL, JUST COME UP AND LET'S TALK ABOUT
21 SCHEDULING FOR A MINUTE, PLEASE.

22 (WHEREUPON A BENCH CONFERENCE WAS HELD OFF THE RECORD)

23 THE COURT: ALL RIGHT. WE WILL PROCEED WITH DIRECT
24 EXAMINATION.

25 Q. OKAY. I THINK WE WERE TALKING ABOUT HOW YOU HANDLED

1 THE CLOSING ARGUMENT, MR. SLADE, AND WHAT YOUR THEORY ---

2 A. ONE OF THE -- ONE OF THE THINGS WE WERE TRYING TO ARGUE
3 TO NEUTRALIZE THE RAPE OF THE CHILD WAS TO ARGUE THAT HE WAS
4 ALREADY DOING TIME FOR -- HE WAS ALREADY -- SOCIETY HAD
5 ALREADY EXACTED JUSTICE FOR HIM FOR THAT ACT.

6 I ALSO TRIED TO ARGUE TO THEM THAT THEY NEEDED TO LOOK
7 DOWN THE ROAD AT THE ULTIMATE EFFECT OF WHAT THEY WERE DOING
8 AND THAT, YOU KNOW, IT ONLY, YOU KNOW, I THINK -- I THINK
9 THEY'RE CERTAINLY WILLING TO UNDERSTAND AND WOULD BE
10 RECEPTIVE TO THE IDEA THAT THEY'RE MAKING A GOD-LIKE
11 DECISION AND THE CONSEQUENCES ARE GOING TO LAST FOREVER.

12 AND SO I TRIED TO LOOK AT, YOU KNOW, HOW IS [REDACTED]
13 THE DAUGHTER, HIS DAUGHTER, GOING TO BE LOOKING AT THIS FIVE
14 YEARS, TEN YEARS DOWN THE ROAD. THAT WAS ONE OF THE
15 STRATEGIES. YOU KNOW, THERE'S NOT A WHOLE LOT YOU CAN DO
16 WITH THE MURDER. THE OVERWHELMING PROBLEM YOU HAVE IN THIS
17 CASE IS THE RAPE OF THE BABY.

18 Q. OKAY. THE -- IN YOUR ARGUMENT TO THE JURY DID YOU TRY
19 TO TURN THE CSC BACK ON THE SOLICITORS, THAT MAYBE THEY WERE
20 -- THEY WERE USING IT AS YOU TALKED ABOUT ---

21 A. ONE OF THE THINGS ---

22 THE COURT: COUNSEL, WITHOUT OBJECTION TO THAT, I'M
23 GOING TO DIRECT YOU NOT TO LEAD YOUR WITNESS. THAT'S A
24 DISTINCT LEADING QUESTION. SO ---

25 MR. MABRY: OKAY. WELL, LET ME ---

1 THE COURT: --- REPHRASE.

2 Q. WAS THERE ANYTHING ELSE ABOUT THE CRIMINAL SEXUAL
3 CONDUCT, ANY WAY YOU USED IT IN YOUR CLOSING ARGUMENT?

4 A. WELL, THROUGHOUT THE CASE ONE OF THE THINGS WE TRIED TO
5 ARGUE WAS THAT THEY -- THAT THEY WERE TRYING TO ESSENTIALLY
6 SELECT OR SHAPE FACTS TO FIT THEIR THEORIES. WE ARGUED THAT
7 TO SOME EXTENT IN THE GUILT PHASE.

8 AND I TRIED TO ARGUE TO THE JURY THAT THE WHOLE REASON
9 THAT THEY WERE PURSUING THIS WAS BECAUSE OR THAT THE JUDGE,
10 EXCUSE ME, THE PROSECUTOR WAS TRYING TO PLAY ON THEIR
11 EMOTIONS IN THIS CASE WHERE HE WAS ALREADY DOING ALL THE
12 TIME THAT SOCIETY IMPOSED ON SOMEBODY FOR COMMITTING A CSC
13 AGAINST A CHILD. HE WAS ALREADY DOING THAT. AND THE WHOLE
14 PURPOSE OF SHOWING THEM THOSE PICTURES AND DWELLING ON THE
15 CSC TO SUCH AN EXTENT WAS TO ANGER THEM, TO DO WHAT HE WAS
16 TRYING TO TALK THEM INTO DOING.

17 Q. OKAY. YOU OR MR. PRUETT MADE A DECISION FOR MR. BINNEY
18 TO WEAR HIS JAIL UNIFORM DURING THE TRIAL?

19 A. YES, SIR.

20 Q. RATHER THAN HAVING A SUIT AND TIE?

21 A. YES.

22 MR. BLUME: THAT'S ANOTHER LEADING QUESTION.

23 THE COURT: THAT WAS, COUNSEL. THE APPROPRIATE
24 QUESTION WOULD BE WHY DID MR. -- I'LL ASK THE QUESTION. WHY
25 DID MR. BINNEY WEAR HIS JAIL CLOTHES IN THE TRIAL?

1 A. WELL, YOUR HONOR, THE REASON THAT WE DID THAT WAS WE
2 KNEW GOING IN THAT ONCE WE MADE THE DECISION THAT WE WERE
3 GOING TO DO ALL THAT WE COULD TO KEEP OUT ANY EVIDENCE OF
4 THE RAPE OF THE BABY IN THE GUILT PHASE THAT WHEN THE JURY
5 HAD IT -- HAD THAT EVIDENCE PARADED IN FRONT OF THEM THAT --
6 WELL, WE KNEW CERTAINLY WE WERE GOING TO LOSE SOME
7 CREDIBILITY. I THINK IT JUST INEVITABLY APPEARS THAT YOU
8 HAVE CONCEALED SOMETHING IMPORTANT FROM PEOPLE THAT YOU ARE
9 ASKING TO TRUST YOU TO GUIDE THEM IN A DECISION.

10 ONE OF THE THINGS THAT, AS I SAID, THAT WE WANTED TO
11 ARGUE, ONE OF THE THINGS THAT WE HAD WAS THAT HE IS ALREADY
12 DOING ALL THE TIME THAT SOCIETY EXACTS FROM SOMEBODY FOR
13 DOING THIS. AND SO WE WANTED, I WANTED, A VISUAL THAT THEY
14 WOULD HAVE FROM THE FIRST TIME THAT THEY SAW HIM, HE WAS
15 INCARCERATED.

16 AND I THINK THAT AN ORANGE JUMPSUIT IS A PRETTY GOOD
17 SYMBOL TO EVERYBODY, THEY UNDERSTAND WHAT THAT MEANS. SO
18 FROM THE TIME THAT THEY LAID EYES ON HIM IN THE BEGINNING
19 THEY COULD SEE THAT HE WAS INCARCERATED AND THAT I THOUGHT
20 THAT FIT INTO OUR ARGUMENT WHEN WE FINALLY HAD TO DEAL WITH
21 IT THAT HE IS DOING TIME FOR THAT. IT WAS, I THOUGHT, ONE
22 OF THE THINGS THAT WE HAD GOING FOR US.

23 ONE OF THE FEW THINGS WE HAD GOING FOR US IN THIS CASE
24 WAS THAT HE WAS -- HE WAS A VERY YOUTHFUL LOOKING GUY. HE
25 LOOKED LIKE HE WAS IN HIS TEENS. WE MADE SOME EFFORT TO

1 SEE, I CAN'T REMEMBER HOW SUCCESSFUL WE WERE, BUT WE TALKED
2 TO HIM ABOUT GETTING THE BIGGEST JUMPSUIT HE COULD FIND.

3 JURORS SPEND A LOT OF TIME LOOKING AT -- LOOKING AROUND
4 A COURTHOUSE, LOOKING AROUND A COURTROOM, BUT THEY SPEND A
5 LOT OF TIME, IN MY JUDGMENT, LOOKING AT THE DEFENDANT. AND
6 I THOUGHT IT WOULD BE A GOOD VISUAL FOR THEM TO SEE SOMEBODY
7 WE'RE ASKING THEM TO PUT IN JAIL FOR LIFE LOOKING VERY
8 YOUNG, VERY YOUTHFUL IN A PRISON JUMPSUIT EXPECTING AT SOME
9 POINT THEY'RE GOING TO SPECULATE ABOUT WHAT'S GOING TO
10 HAPPEN TO THAT YOUNG BOY IN A LIFE IN PRISON.

11 Q. WHAT KIND OF CHARGE DID YOU GET FROM THE JUDGE AS FAR
12 AS WHAT A LIFE SENTENCE MEANT?

13 A. THAT LIFE MEANT LIFE WITHOUT PAROLE, HE'D NEVER GET
14 OUT.

15 Q. AND ---

16 A. I MEAN, THAT'S NOT THE PHRASING THE JUDGE USED, BUT
17 THAT'S ESSENTIALLY WHAT HE SAID. I'M SORRY, ---

18 Q. WHY WAS THAT -- WHY WERE YOU ENTITLED TO THAT CHARGE?

19 A. WELL, BECAUSE THE LAW SAYS WE ARE. I'M NOT FOLLOWING
20 YOUR QUESTION, I GUESS.

21 Q. HE'D ALREADY BEEN CONVICTED OF CSC, AM I CORRECT?

22 A. RIGHT.

23 Q. ALL RIGHT. AND THEN A LIFE SENTENCE ON THE MURDER
24 WOULD BE A REAL LIFE SENTENCE.

25 A. RIGHT.

1 Q. THAT WAS MY QUESTION. WHY DID YOU NOT CALL MS. BINNEY
2 IN THE PENALTY PHASE OF THE TRIAL?

3 A. OH, YOU MEAN JONATHAN'S MOTHER?

4 Q. JONATHAN, I'M SORRY, NOT MELANIE, HIS WIFE. YOU
5 ALREADY TOLD US ABOUT THAT. BUT SANDRA BINNEY?

6 A. WELL, I JUST -- I JUST THOUGHT THAT SHE WOULDN'T BE A
7 VERY GOOD WITNESS.

8 Q. AND WHY WAS THAT?

9 A. WELL, SHE WAS, IN MY JUDGMENT, EXTREMELY FOCUSED ON ONE
10 ISSUE, FETAL ALCOHOL SYNDROME. SHE GAVE ME AND GAVE MR.
11 PRUETT A NUMBER OF DOWNLOADS, I GUESS, FROM WEBSITES WHERE
12 SHE HAD DONE SOME RESEARCH HERSELF ON FETAL ALCOHOL
13 SYNDROME. AND SHE WAS CONVINCED THAT JONATHAN HAD IT.

14 MY PROBLEM WITH IT WAS THAT I THOUGHT THAT THAT FOCUS
15 JUST MADE HER APPEAR THAT SHE WAS TRYING TO DISTANCE HERSELF
16 FROM HIS PROBLEMS, THAT IT LOOKED, YOU KNOW, THERE WASN'T
17 ANYTHING WE DID WRONG IN RAISING HIM, HE, YOU KNOW, HE CAME
18 TO US DEFORMED OR HE CAME TO US VERY FLAWED.

19 AND I DON'T KNOW, I JUST THOUGHT THAT WAS A BARRIER TO
20 CONNECT HIM WITH THE JURY. I THOUGHT THAT REVEREND BINNEY
21 WAS A GOOD PERSON TO MAKE THAT KIND OF CONTACT THAT WE
22 NEEDED -- MAKE THAT KIND OF CONNECTION WE NEEDED MAKING WITH
23 THE JURY.

24 Q. AND WHY IS THAT? WHAT WAS IT ABOUT REVEREND BINNEY?

25 A. WELL, I MEAN, HE COULD TALK ABOUT ALL OF JONATHAN'S

1 TROUBLES, HIS UPBRINGING. HE WAS -- IS A MINISTER. HE WAS
2 A MINISTER THEN. HE HAD A COUNSELING MINISTRY. I THOUGHT,
3 I MEAN, HE HAD A CONNECTION WITH BOB JONES UNIVERSITY.

4 THOSE ARE THE THINGS THAT I THOUGHT WOULD GIVE HIM
5 STANDING WITH THE JURY. HE HAD A GOOD WAY OF, IN MY
6 JUDGMENT, OF SPEAKING, PRESENTING HIMSELF. AND I JUST
7 THOUGHT HE COULD DO A GOOD JOB OF EXPLAINING JONATHAN'S
8 STORY TO THE JURY.

9 Q. HOW DO YOU FEEL HE DID IN THAT REGARD?

10 A. I THINK HE DID A PRETTY GOOD JOB.

11 Q. AND SINCE WE'RE ON THAT ISSUE, HOW DID YOU -- HOW DID
12 YOU AND MR. PRUETT DECIDE TO RELAY TO THE JURY MR. BINNEY'S
13 LIFE HISTORY? DID YOU HAVE A SOCIAL WORKER OR NOT AND WHY
14 DID YOU HAVE ONE OR DIDN'T HAVE ONE?

15 A. WELL, WE -- WE WANTED REVEREND BINNEY TO HAVE A GOOD
16 SPEAKING ROLE IN THE CASE. WE THOUGHT, AS I SAID A MOMENT
17 AGO, I THOUGHT HE COULD MAKE A CONNECTION WITH THE JURY
18 BECAUSE OF HIS BACKGROUND, BECAUSE OF HIS -- WHAT HE DID AND
19 BECAUSE HE HAD A GOOD WAY OF PRESENTING HIMSELF. AND I
20 THOUGHT THAT WE COULD PRESENT SOME OF JONATHAN'S PROBLEMS
21 THROUGH OR SOME OF JONATHAN'S HISTORY THROUGH HIM.

22 Q. AND WAS THAT A STRATEGIC DECISION THAT YOU MADE TO DO
23 IT THROUGH MR. BINNEY RATHER THAN A SOCIAL WORKER?

24 A. YES.

25 Q. IS THERE SOME REASON THAT YOU DIDN'T WANT TO CALL A.

1 SOCIAL WORKER?

2 A. I DON'T -- I DON'T RECALL ---

3 Q. I THOUGHT THAT'S ---

4 A. --- ANYTHING OTHER THAN WHAT I'VE JUST DESCRIBED TO
5 YOU.

6 Q. IF MR. BINNEY HAD NOT -- IF HE HAD NOT BEEN USED TO
7 RELAY TO THE JURY JONATHAN'S LIFE HISTORY WHAT COULD YOU
8 HAVE CALLED HIM FOR AS A WITNESS?

9 A. WELL, YOU CAN, I MEAN, HE COULD TESTIFY TO -- CERTAINLY
10 HE'S ENTITLED TO ASK FOR MERCY. HE COULD TALK ABOUT HIS
11 LIFE. I MEAN, WE JUST THOUGHT HE WOULD BE A GOOD PERSON TO
12 USE TO TELL THAT TO THE JURY. DONNA SCHWARTZ-WATTS DID PART
13 OF IT AS WELL, SOME OF HIS MENTAL HEALTH BACKGROUND.

14 Q. I WANTED TO ASK YOU ABOUT THAT QUESTION. YOU SAID MS.
15 BINNEY FOCUSED ON FETAL ALCOHOL SYNDROME. WAS FETAL ALCOHOL
16 SYNDROME SOMETHING THAT YOU AND MR. PRUETT PURSUED?

17 A. YEAH.

18 Q. AND HOW WAS THAT PURSUED?

19 A. WELL, TRENT HANDLED MOST OF THAT. BUT IT WAS DONE
20 THROUGH DR. SCHWARTZ-WATTS' EXAMINATION OF JONATHAN.
21 THROUGH -- THERE WAS A DOCTOR, I BELIEVE, IN CHARLESTON, BUT
22 I CAN'T REMEMBER EXACTLY WHERE DR. BACHMAN, WHO DID VARIOUS
23 IMAGING TESTS, AND TRENT DISCUSSED THAT WITH OR DISCUSSED
24 FETAL ALCOHOL WITH BOTH OF THEM, DR. SCHWARTZ-WATTS.

25 DR. SCHWARTZ-WATTS, TO MY UNDERSTANDING, IS THAT DR.

1 SCHWARTZ-WATTS DEALS WITH A GOOD NUMBER OF FETAL ALCOHOL
2 CASES IN THE OTHER WORK THAT SHE DOES, I THINK WITH JUVENILE
3 JUSTICE MAYBE. I DON'T REMEMBER THE AGENCY. BUT SHE TOLD
4 US THAT SHE DID A GOOD BIT OF WORK WITH FETAL ALCOHOL.

5 Q. OKAY. AND DID YOU AND MR. PRUETT RELY ON HER AND MR.
6 BACHMAN REGARDING THE FETAL ALCOHOL?

7 A. YES.

8 Q. DO YOU KNOW IF THEY SENT ANY INFORMATION TO ANY OTHER
9 DOCTORS?

10 A. I'M SORRY, I DON'T RECALL.

11 Q. DO YOU REMEMBER AN INCIDENT THAT OCCURRED IN THE
12 SPRING, I BELIEVE, OF 2002, YOU AND MR. PRUETT WERE
13 PREPARING WITH A LAWYER NAMED BRIGGS?

14 A. YES.

15 Q. IF YOU WOULD, TELL THE COURT WHAT HAPPENED WITH MR.
16 BRIGGS, WHAT IMPACT IT HAD ON YOUR REPRESENTATION OF
17 JONATHAN BINNEY.

18 A. WELL, WE -- I DON'T REMEMBER WHO -- WHICH OF US MR.
19 BRIGGS CONTACTED FIRST, BUT HE'S A -- MR. BRIGGS IS A LAWYER
20 IN LEXINGTON. AND HE WAS HIRED BY MR. AND MS. BINNEY,
21 JONATHAN'S PARENTS, TO DO SOMETHING IN HIS CASE. I AM NOT
22 QUITE CERTAIN WHAT IT WAS. BUT THE PRACTICAL EFFECT OF IT
23 WAS THAT HE QUESTIONED A LOT OF THE THINGS WE WERE DOING.

24 AND THERE WAS SOME CONVERSATION BACK AND FORTH OVER THE
25 PHONE. I TALKED WITH HIM PROBABLY MORE THAN ONCE. TRENT

1 TALKED WITH HIM. THERE WERE FAXES, THERE WERE LETTERS. AND
2 THEY WOULD -- HE WAS TELLING US THAT THEY WERE TALKING TO
3 DEATH PENALTY LAWYERS AND THAT WE WEREN'T PREPARING A
4 DEFENSE PROPERLY, WE WEREN'T COMPETENT TO HANDLE A DEATH
5 PENALTY CASE. AND I CAN'T REMEMBER WHAT ELSE HE SAID.

6 AND I DON'T REMEMBER, I MEAN, THERE'S LETTERS IN THE
7 FILE FROM HIM. AND I DON'T REMEMBER PRECISELY WHAT HE
8 WANTED. HE DIDN'T WANT TO GET IN THE CASE AND REPRESENT
9 JONATHAN, I DON'T THINK. BUT HE WANTED US OUT OF THE CASE,
10 I THINK.

11 SO TO TRY TO RESOLVE IT WE HAD, I CAN'T REMEMBER IF I
12 SUGGESTED IT OR HE SUGGESTED IT, WE HAD A HEARING SOMETIME
13 IN THE EARLY SUMMER OF THE YEAR WE TRIED THE CASE OF 2002
14 WHERE HE -- WE HAD AN EX PARTE HEARING. WE DIDN'T -- JUDGE
15 COLE AGREED NOT TO LET THE SOLICITOR IN BECAUSE WE MAY HAVE
16 TO DISCUSS PRIVILEGED ISSUES.

17 AND MY RECOLLECTION IS MR. BRIGGS ESSENTIALLY MADE HIS
18 ARGUMENT FOR WHY WE OUGHT TO BE OFF THE CASE. AND I CAN'T
19 REMEMBER IF JUDGE COLE QUESTIONED JONATHAN ABOUT ALL THAT AT
20 THE TIME OR NOT. I JUST DON'T REMEMBER.

21 THE ULTIMATE RULING WAS THAT HE KEPT US IN THE CASE. I
22 DON'T -- IF WE HEARD FROM MR. BRIGGS AFTER THAT, I DON'T
23 RECALL.

24 Q. DID THAT -- THE INVOLVEMENT OF MR. BRIGGS CAUSE ANY
25 PROBLEMS WITH YOUR COMMUNICATION WITH JONATHAN BINNEY DURING

1 THAT TIME PERIOD?

2 A. WELL, TRENT PRIMARILY WAS THE PERSON IN CONTACT WITH
3 JONATHAN. AND I THINK THAT JONATHAN, MY RECOLLECTION OF IT
4 WAS THAT JONATHAN QUIT TALKING TO HIM DURING THAT TIME. AND
5 I THINK WE'RE TALKING ABOUT A SIX WEEK PERIOD OR SO. I JUST
6 DON'T HAVE A GOOD RECOLLECTION OF THAT TIME-FRAME.

7 BUT I THINK THERE WAS SOME BREAKDOWN IN COMMUNICATION
8 BETWEEN US AND OUR CLIENT DURING THE PERIOD OF TIME THAT
9 JONATHAN, EXCUSE ME, THAT MR. BRIGGS WAS INVOLVED OR DOING
10 WHATEVER HE WAS DOING.

11 Q. ALL RIGHT. DID -- AFTER THE TRIAL OF THE CASE WAS OVER
12 MR. BINNEY -- TAKE THAT BACK. DO YOU REMEMBER HOW MANY
13 HOURS -- DO YOU HAVE ANY IDEA HOW MANY HOURS YOU WERE
14 SPENDING ON THIS CASE?

15 A. NO, I DON'T. I CAN'T REMEMBER WHAT I PUT ON THE TIME
16 SHEET, BUT I'M SURE I DIDN'T RECORD ALL OF IT. I JUST DON'T
17 KNOW. A COUPLE, SEVERAL HUNDRED. I REPORTED SEVERAL
18 HUNDRED. I DON'T REMEMBER PRECISELY THE NUMBER. BUT IT
19 WAS, YOU KNOW, I SPENT A GOOD BIT MORE TIME ON IT THAN I WAS
20 ABLE TO RECORD. SOMETIMES YOU JUST FORGET TO WRITE IT DOWN.
21 I DON'T -- I DO CRIMINAL DEFENSE WORK, PLAINTIFF'S WORK. I
22 DON'T TYPICALLY A LOT OF TIMES KEEP UP WITH IT.

23 Q. THE -- AFTER THE INCIDENT WITH MR. BRIGGS WERE YOU ABLE
24 TO PREPARE THE CASE FOR TRIAL?

25 A. YES.

SAM SLADE - CROSS EXAMINATION BY MR. BLUME:

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1 Q. AFTER THAT ISSUE WAS RESOLVED?

2 A. YES.

3 Q. DO YOU BELIEVE YOU DID EVERYTHING POSSIBLE IN YOUR
4 DEFENSE OF MR. BINNEY IN THIS CASE?

5 A. YEAH. I MEAN, YOU KNOW, YOU LOOK BACK AND YOU SEE
6 THINGS YOU WISHED YOU'D DONE DIFFERENTLY SOMETIMES, BUT I
7 THINK WE DID ALL WE COULD DO.

8 MR. MABRY: THAT'S ALL WE HAVE, YOUR HONOR. THANK YOU,
9 MR. SLADE.

10 THE COURT: ALL RIGHT. RATHER THAN HAVE CROSS
11 EXAMINATION WE'LL BREAK AT THIS TIME FOR LUNCH. MR. SLADE,
12 I'M GOING TO ASK YOU BECAUSE YOU'RE A WITNESS UNDER
13 TESTIMONY NOT TO TALK TO LAWYERS FOR THE STATE OR FOR THE
14 APPLICANT DURING THE LUNCH HOUR.

15 MR. SLADE: YES, SIR.

16 THE COURT: AND WE WILL COME BACK AND RECONVENE AT
17 2:00, LADIES AND GENTLEMEN. COURT WILL BE IN RECESS NOW
18 UNTIL 2:00.

19 (WHEREUPON COURT WAS IN RECESS AT 12:47 PM)

20 THE COURT: THANK YOU, LADIES AND GENTLEMEN. AND
21 PLEASE BE SEATED, EVERYONE. ALL RIGHT. WELCOME BACK TO THE
22 COURTROOM. YOU WILL RECALL, WE HAD ENDED DIRECT EXAMINATION
23 OF MR. SLADE. WE NOW HAVE CROSS EXAMINATION. AND, MR.
24 BLUME, YOU MAY PROCEED.

25 CROSS EXAMINATION BY MR. BLUME:

1 Q. GOOD AFTERNOON, MR. SLADE. THIS WAS THE FIRST CASE,
2 CAPITAL CASE YOU HAD EVER BEEN INVOLVED IN AS A DEFENSE
3 LAWYER?

4 A. THAT'S CORRECT. WELL, I TAKE THAT BACK. WHEN I --
5 AFTER I FINISHED LAW SCHOOL I HAD WORKED -- I HAD CLERKED IN
6 THE PUBLIC DEFENDER'S OFFICE IN LEXINGTON. AND AT SOME
7 POINT -- I THINK IN MY DIRECT TESTIMONY I HAD TOLD Y'ALL
8 THAT AFTER I FINISHED LAW SCHOOL I WORKED FOR MIKE DANIEL.

9 I STOPPED WORKING FOR HIM FOR A PERIOD OF TIME TO HELP
10 A FELLOW I HAD WORKED FOR IN THE PUBLIC DEFENDER'S OFFICE,
11 DANNY BENNETT, RETRY A DEATH PENALTY CASE, MICHAEL GODWIN
12 SLOAN. AND I DON'T REMEMBER HOW LONG -- I DON'T KNOW HOW --
13 I CAN'T REMEMBER SPECIFICALLY HOW LONG I TOOK TO DO THAT. I
14 DIDN'T QUESTION ANY WITNESSES. AND I CAN'T REMEMBER IF THAT
15 WAS -- I JUST DON'T REMEMBER EXACTLY WHEN IN THAT PERIOD OF
16 TIME AFTER I FINISHED LAW SCHOOL AND BEFORE I STARTED AT THE
17 SOLICITOR'S OFFICE THAT WAS. BUT I HELPED DANNY AND RAUCH
18 WISE PREPARE THAT CASE.

19 Q. SO THAT WOULD HAVE BEEN -- YOU HAD SOME THAT -- I DON'T
20 WANT TO UNFAIRLY CHARACTERIZE IT. YOU HAD SOME MINIMAL ROLE
21 IN A CAPITAL CASE SOME TIME IN THE EARLY 80s?

22 A. THAT'S A FAIR CHARACTERIZATION. THAT'S CORRECT.

23 Q. AND SO FROM THE EARLY 80s UNTIL 2001, I BELIEVE, WHEN
24 YOU WERE APPOINTED IN THIS, FOR PART OF THAT TIME YOU WERE
25 IN THE SOLICITOR'S OFFICE?

1 A. THAT'S CORRECT.

2 Q. FOR PART OF THAT TIME YOU WERE IN PRIVATE PRACTICE?

3 A. CORRECT.

4 Q. BUT IN YOUR PRIVATE PRACTICE, POST SOLICITOR'S OFFICE,
5 THIS WAS THE FIRST CAPITAL CASE WHICH YOU'D BEEN INVOLVED AS
6 A DEFENSE LAWYER?

7 A. THAT'S CORRECT.

8 Q. DO YOU RECALL, DID YOU TAKE A LOOK AT THE ABA, THE
9 AMERICAN BAR ASSOCIATION GUIDELINES FOR DEFENSE COUNSEL'S
10 DUTIES AND OBLIGATIONS IN A CAPITAL CASE? DO YOU RECALL IF
11 YOU LOOKED AT THOSE?

12 A. NO, SIR.

13 Q. OKAY. AND YOU WERE APPOINTED, AS I BELIEVE, IN OCTOBER
14 OF 2001. DOES THAT SOUND CORRECT?

15 A. THAT SOUNDS RIGHT.

16 Q. NOW AS I UNDERSTAND IT FROM YOUR DIRECT TESTIMONY, AND
17 PLEASE CORRECT ME IF I GET ANYTHING WRONG, WHAT YOU SAID ON
18 DIRECT, BUT THAT AS FAR AS THE GUILT OR INNOCENCE PHASE OF
19 THE TRIAL YOU HAD TWO PRIMARY STRATEGIES. THE FIRST WAS TO
20 CHALLENGE THE BURGLARY, IS THAT CORRECT? ONE OF WHICH WAS
21 TO CHALLENGE THE BURGLARY.

22 A. ONE OF THE STRATEGIES WAS TO -- RIGHT, TRY TO GET OUT
23 FROM UNDER THE BURGLARY.

24 Q. BECAUSE IN YOUR MIND IF HE WAS NOT GUILTY OF BURGLARY
25 THEN THE CRIME WAS PROBABLY NOT A DEATH ELIGIBLE OFFENSE

1 BECAUSE THERE WAS NOT AN AGGRAVATING OR WOULD NOT BE AN
2 AGGRAVATING CIRCUMSTANCE?

3 A. THEY WERE GOING TO HAVE A HARD TIME GETTING AN
4 AGGRAVATING CIRCUMSTANCE. THAT'S CORRECT.

5 Q. AND THE SECOND PRIMARY STRATEGY AT THE GUILT OR
6 INNOCENCE PHASE WAS TO RAISE QUESTIONS ABOUT THE INVOLVEMENT
7 OF THE VICTIM'S HUSBAND, ALLAN SOUTHERN, IN THE CASE?

8 A. THAT WAS -- THAT WAS ONE OF THEM. THAT'S CORRECT. AND
9 THERE WAS -- NOT ONLY TO RAISE QUESTIONS, BUT AS I TRIED TO
10 POINT OUT ON DIRECT TESTIMONY, LEAVE THE DOOR OPEN IN CASE
11 JONATHAN SAID THAT MR. SOUTHERN WAS INVOLVED. WE WOULDN'T
12 HAVE TO -- WE WOULDN'T HAVE TO CHANGE THE STRATEGY THAT WE
13 HAD LAID OUT OR THE WAY THAT THE EVIDENCE HAD COME IN.

14 Q. BUT PART OF THAT STRATEGY OF LEAVING THE DOOR OPEN WAS
15 TO RAISE QUESTIONS, THE ISSUES ---

16 A. THAT'S CORRECT.

17 Q. --- ABOUT MR. SOUTHERN'S ---

18 A. YOU'RE RIGHT. THAT'S CORRECT.

19 Q. AND YOU DID THAT BASED ON EVIDENCE WHICH WAS CONTAINED
20 -- WHICH YOU HAD IN YOUR FILE AND WHAT YOU HAD UNCOVERED
21 DURING THE COURSE OF YOUR REPRESENTATION?

22 A. YES.

23 Q. AND THAT EVIDENCE INCLUDED INDICATIONS THAT THERE WERE
24 PROBLEMS IN THE MARRIAGE, IS THAT CORRECT?

25 A. YES.

1 Q. THAT THERE WERE AFFAIRS OR MULTIPLE AFFAIRS GOING ON
2 BETWEEN THE PARTIES?

3 A. CLEARLY ONE AFFAIR, STORIES ABOUT OTHERS.

4 Q. AND EVIDENCE IN THE FILE THAT MS. SOUTHERN WAS PLANNING
5 ON LEAVING MR. SOUTHERN?

6 A. YES.

7 Q. AND, THAT, OBVIOUSLY IN YOUR MIND, WOULD AT LEAST
8 CREATE SOME POSSIBLE MOTIVE HERE BECAUSE THE INEVITABLE
9 FINANCIAL DIVISION OF ASSETS WHICH OCCURS DURING A
10 DISSOLUTION OF A MARRIAGE?

11 A. THAT'S A POSSIBLE MOTIVE, YES.

12 Q. AND THERE WERE ALSO -- YOU HAD STATEMENTS WHICH HAD
13 BEEN PROVIDED TO YOU BY THE SOLICITOR'S OFFICE, BY A NUMBER
14 OF DIFFERENT PEOPLE IN THE COMMUNITY, EITHER CO-WORKERS OR
15 RELATIVES OF MS. SOUTHERN WHO BELIEVED THAT THERE WAS SOME
16 INVOLVEMENT ON MR. SOUTHERN'S BEHALF?

17 A. THAT'S CORRECT.

18 Q. AND THERE WAS ALSO A STATEMENT WHICH INDICATED WHEN MS.
19 SOUTHERN WENT TO WORK THAT DAY SHE HAD MADE A STATEMENT TO
20 HER CO-WORKERS, TODAY'S THE DAY I'M GOING TO DIE, I'M GOING
21 TO DIE?

22 A. I DON'T REMEMBER -- I DON'T REMEMBER IT THAT WAY. BUT
23 SHE -- I WAS THINKING IT WAS SOME REFERENCE TO ALLAN IN THAT
24 STATEMENT. BUT I DON'T -- I DON'T REMEMBER EXACTLY. BUT,
25 YES, SHE HAD SOME CONCERN ABOUT THAT AND EXPRESSED IT TO A

1 CO-WORKER.

2 Q. AND REGARDLESS OF WHETHER MR. BINNEY COMMITTED THE
3 CRIME OR NOT OR JUST THINKING ABOUT IT, THAT'S OBVIOUSLY A
4 STRANGE COINCIDENCE?

5 A. YES.

6 Q. THAT SOMEONE GOES TO WORK AND REMARKS THEY'RE IN FEAR
7 OF THEIR LIFE OR THAT THEY MIGHT DIE THAT DAY AND THEY, IN
8 FACT, END UP DEAD THAT DAY?

9 A. THAT'S CORRECT.

10 Q. AND THAT WAS IN PART, I GUESS, THE FUEL FOR THE FIRE
11 AND THE TALK IN THE COMMUNITY AS WELL AS THESE OTHER
12 STATEMENTS THAT MR. SOUTHERN MAY HAVE HAD SOME INVOLVEMENT
13 IN THIS CASE?

14 MR. MABRY: OBJECTION TO THE FORM OF THE QUESTION.
15 HE'S ASKING FOR A CONCLUSION OF MR. SLADE AS TO WHAT THE --
16 WHY THE COMMUNITY THOUGHT THE WAY IT DID.

17 THE COURT: COUNSEL, YOU WISH TO REPHRASE?

18 MR. BLUME: WELL, HE HAD JUST TESTIFIED AT THE
19 BEGINNING THAT THIS WAS A SMALL COMMUNITY, THERE WAS A LOT
20 OF TALK ABOUT IT ---

21 THE COURT: WELL, BUT HIS ACTUAL TESTIMONY WAS THAT
22 HIS CO-COUNSEL BEING PART OF THE COMMUNITY WAS AWARE OF THE
23 TALK WITHIN THE COMMUNITY. SO I'M GOING TO SUSTAIN THE
24 OBJECTION ON THAT BASIS.

25 Q. AND THEN YOU POINTED OUT THAT DURING YOUR CROSS

1 EXAMINATION OF MR. SOUTHERN YOU ALSO TRIED TO RAISE FACTS
2 WHICH IN YOUR MIND WERE EVEN MORE SUSPICIOUS BEHAVIOR OR
3 BEHAVIOR WHICH COULD HAVE ARGUABLY LED A JURY TO BELIEVE HE
4 HAD SOME INVOLVEMENT IN THIS OFFENSE?

5 A. WELL, TRENT CROSS EXAMINED HIM. YOU'RE RIGHT AS TO THE
6 POINT OF THE CROSS EXAMINATION.

7 Q. AND THE CROSS EXAMINATION QUESTIONS WHICH WERE
8 DEVELOPED INCLUDED THE FACT THAT THERE WAS NOT A CALL TO
9 911?

10 A. YES.

11 Q. AS YOU MENTIONED THAT THERE WAS NO -- THEY WENT BY A
12 SUBSTATION AND DIDN'T STOP AT THAT?

13 A. THAT'S CORRECT.

14 Q. THAT MR. SOUTHERN WENT TO THE HOUSE INSTEAD OF THE
15 PASTURE UPON ARRIVING?

16 A. YES, SIR.

17 Q. AND THEN I BELIEVE AS YOU ALSO POINTED OUT IN YOUR
18 CLOSING ARGUMENT -- YOU MENTIONED THAT ONE OF THE POINTS
19 THAT YOU TRIED TO MAKE DURING CLOSING ARGUMENT WAS THE STATE
20 WAS TRYING TO PROVE THEIR TESTIMONY SOMEWHAT?

21 A. THAT'S CORRECT.

22 Q. AND ONE OF THE WAYS YOU TRIED TO POINT OUT THAT THEY
23 DID THAT WAS THAT MR. SOUTHERN TESTIFIED THAT HE FOUND OUT
24 SEVERAL DAYS LATER THAT THE PHONE LINES HAD BEEN CUT. DO
25 YOU RECALL THAT?

- 1 A. OKAY. ARE YOU ASKING ME IF I PUT THAT IN MY CLOSING OR
2 -- I APOLOGIZE.
- 3 Q. WELL, DO YOU RECALL TESTIMONY THAT THERE WAS A MESSAGE
4 LEFT ON THE HOME MACHINE ----
- 5 A. CORRECT. YES. YES.
- 6 Q. AND ONE OF THE POINTS YOU TRIED TO MAKE OR YOU DID MAKE
7 DURING YOUR CLOSING ARGUMENT ALONG THESE SAME LINES WAS THAT
8 MR. SOUTHERN'S TESTIMONY, THAT HE CALLED THE POLICE SEVERAL
9 DAYS LATER AND SAID THE PHONE LINES WERE CUT COULD NOT HAVE
10 BEEN TRUE ----
- 11 A. RIGHT, BECAUSE ----
- 12 Q. ---- BECAUSE THERE WAS A MESSAGE LEFT ON THE MACHINE?
- 13 A. CORRECT. YES.
- 14 Q. AND ANOTHER POINT THAT YOU MADE DURING THE POINT WAS
15 THAT THE PATHOLOGIST INITIALLY TOLD YOU THIS WAS A SMALL
16 CALIBER WEAPON?
- 17 A. CORRECT, AND THEN CHANGED HER STORY.
- 18 Q. PARDON ME?
- 19 A. AND THEN CHANGED HER STORY.
- 20 Q. AND THEN CHANGED HER STORY. AND ANOTHER POINT THAT YOU
21 BROUGHT OUT DURING THIS WAS THAT MR. SOUTHERN ALSO HAD A
22 SMALL CALIBER WEAPON, A .22?
- 23 A. I THINK THAT WAS BROUGHT OUT IN HIS CROSS EXAMINATION.
- 24 Q. AS WELL AS A 9 MILLIMETER?
- 25 A. RIGHT.