

BOB DUDEK DIRECT BY MS. SHURLING

1 and ineffective assistance of appellate counsel.

2 THE COURT: Ms. Shurling.

3 MS. SHURLING: Thank you, Your Honor. For the  
4 record, I would note that Zoe Sanders is with me at counsel  
5 table. Ms. Sanders was the attorney originally appointed in  
6 this matter and I agreed to take over as counsel --

7 THE COURT: Did I sign the order?

8 MS. SHURLING: You did, indeed, Your Honor.

9 THE COURT: All right.

10 MS. SHURLING: But she is still participating and  
11 helping me with this matter today. I just wanted to  
12 identify her for the Court -- for the record, although I  
13 know the Court is well familiar with her.

14 I would note, Your Honor, that in going through  
15 the boxes of stuff I have on this case yesterday afternoon,  
16 I found another document captioned amendment and supplement  
17 to application for post-conviction relief, which was filed  
18 with the Richland County clerk of court's office on  
19 August 28th, 2012. It was, apparently, filed pro se. It's  
20 a four-page document, but it does not have a signature line  
21 on it, so I don't know -- I can question the applicant about  
22 it at the appropriate time. By and large, the issues that  
23 are covered in it are matters that I have raised in a  
24 somewhat different context in the amended application I did.  
25 A couple of exceptions to that are matters that I will

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1 address with the applicant at the time that he testifies.

2 Your Honor, I have a couple of witnesses that will  
3 be very brief. And it will be little a confusing to take  
4 their testimony out of order, but I would like to do so so  
5 that I can let them get back to their jobs.

6 So I'm going to first call Mr. Bob Dudek, please.

7 THE COURT: Mr. Dudek, please come around, sir.

8 THEREUPON,

9 BOB DUDEK,

10 after having been duly sworn, testified as follows:

11 THE COURT: Please take your seat. Tell us your  
12 full name and spell your last name for the record.

13 THE WITNESS: Robert N. Dudek, D-U-D-E-K.

14 MS. SHURLING: Your Honor, for the record, I'm  
15 advised that Your Honor has a copy of the appellate briefs  
16 that were filed in this matter as well as the memorandum  
17 opinion, the unpublished opinion of the court of appeals  
18 dated September 24, 2010, in your packet. Thank you.

19 THE COURT: Yes.

20 DIRECT EXAMINATION

21 BY MS. SHURLING::

22 Q. Mr. Dudek, can you just for the record tell us what  
23 your position is?

24 A. I'm the chief appellate defender for the appellate  
25 division of the office of indigent defense.

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1 Q. And at my request, did you pull your agency's file from  
2 the direct appeal in the matter of the State v. Clinton  
3 C. Folkes?

4 A. Yes, I did.

5 Q. The case was briefed by Celia Robinson, is that  
6 correct?

7 A. That's correct.

8 Q. And the decision of the court of appeals was issued on  
9 September 24th, 2010. At my request, did you look up  
10 in your agency's records and determine what was the  
11 last day that Celia Robinson was employed by the  
12 agency?

13 A. Yes. Ms. Robinson's last day -- Lisa Campbell, who's  
14 our human resource person e-mailed me this Tuesday,  
15 July 15th, that her last day was September 14th, 2010.

16 Q. And do you have a copy of that e-mail with you?

17 A. Yes, I do.

18 MS. SHURLING: Your Honor, I move to introduce  
19 this e-mail from Lisa Campbell from human resources document  
20 that Ms. Robinson's last day was September 14th, 2010.

21 THE COURT: I'm sure without any objection?

22 MS. HARRIGAN: No objection, Your Honor.

23 (WHEREUPON, Plaintiff's Exhibit No. 1  
24 was admitted into evidence.)

25 MS. SHURLING: May I approach, Your Honor?

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1 THE COURT: Yes, ma'am.

2 BY MS. SHURLING::

3 Q. Can you identify this letter?

4 A. It appears to be a letter to Mr. Folkes from our  
5 office.

6 Q. If you would, please, publish that correspondence for  
7 the record.

8 A. Dear Mr. Folkes, enclosed is a copy of the order of the  
9 court of appeals denying our petition for writ of  
10 certiorari and granting the petition to be relieved.  
11 This means you have exhausted your state court  
12 remedies. There's now a one-year statute of  
13 limitations for filing application for habeas corpus in  
14 federal court, however, please be aware that the time  
15 between your direct appeal becoming final and the date  
16 of your PCR application is filed will count against  
17 your federal habeas statute of limitations in the  
18 future.

19 This statute of limitations is strictly enforced.  
20 I have enclosed a copy of the pertinent section of that  
21 statute for you to review. I am enclosing your file  
22 with this letter. Please understand that it is your  
23 obligation alone to ensure that federal habeas  
24 application is timely filed if you want to continue  
25 challenging your conviction. Please feel free to

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1 contact me if you have any questions, but writing to me  
2 does not stay the applicability of statute of  
3 limitations. I do wish you the best in the future.  
4 Sincerely as M. C. Robinson, apparently, signed by  
5 Lauren E. Crews, who was her assistant would be what I  
6 would assume.

7 Q. Are you familiar with Celia Robinson's signature?

8 A. I haven't -- I haven't seen it in a while. I'm pretty  
9 confident that's not Ms. Robinson's signature.

10 Q. And generally --

11 A. In particular, because the LEC for Lauren E. Crews is  
12 circled.

13 Q. And you anticipate my next question. As a matter of  
14 policy, when someone signs correspondence for an  
15 attorney, they generally circle their initials?

16 A. I would think so.

17 Q. Okay.

18 MS. SHURLING: Your Honor, I would move to  
19 introduce this correspondence as Applicant's 2.

20 MS. HARRIGAN: No objection, Your Honor.

21 (Plaintiff's Exhibit No. 2 was admitted  
22 into evidence.)

23 BY MS. SHURLING::

24 Q. And you may have already said this, but the date on  
25 that letter is what?

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- 1 A. Date on that letter is September 28, 2010.
- 2 Q. And the date of the opinion was?
- 3 A. Was September 24th, 2010.
- 4 Q. Okay. So the opinion came out a good 10 days after
- 5 Ms. Robinson left your agency, and the letter was sent
- 6 out four days after that?
- 7 A. That is --
- 8 Q. Roughly?
- 9 A. Yeah, that is correct. And let me clarify one thing,
- 10 too, when you use the word policy. There is no policy
- 11 allowing, you know, an assistant to sign for an
- 12 attorney an opinion letter or anything like that. So
- 13 when you use the word policy, I just want to be sure
- 14 we're clear on that.
- 15 Q. And you make a good point and I didn't mean to be
- 16 implying the point that could have been construed from
- 17 my question. My point was that, generally, in business
- 18 correspondence, if someone signs a letter for someone,
- 19 if the person preparing the letter signs it, they,
- 20 generally, circle their initials to indicate that
- 21 they've done so. Isn't that accurate?
- 22 A. If you say so. I don't do that.
- 23 Q. Well, if you're -- if that's not what you're familiar
- 24 with, then I understand.
- 25 What does your file indicate in terms of what

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1 attorney was assigned to this appeal after Celia  
2 Robinson left the agency?

3 A. Well, it doesn't. And to the best of, you know, my  
4 recollection -- you know, at some point, certainly,  
5 when attorneys leave the office, you know, the cases  
6 are -- you know, cases are reassigned. Celia was the  
7 first attorney to leave after I became chief defender.

8 So, you know, again, the letter that, apparently,  
9 Ms. Crews, her assistant, signed, obviously, contains  
10 an error because it refers to denial of the petition  
11 for writ of certiorari and, in fact, this is a summary  
12 unpublished opinion of the court of appeals, which was  
13 affirmed, you know, since Mr. Folkes, fortunately,  
14 timely filed his petition -- I mean, his application  
15 for post-conviction or relief taken, you know, there's,  
16 at least, no harm in that file, fortunately, in that  
17 limited respect.

18 Q. Okay. Well, let's just back up for a minute. This  
19 was, in fact, a direct appeal?

20 A. That's correct.

21 Q. And it was a direct appeal at the court of appeal's  
22 level?

23 A. That's correct.

24 Q. And so when he lost in the court of appeals, he had the  
25 right to pursue an optional appeal to the supreme court

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1 of South Carolina?

2 A. I don't want to quibble with words, Ms. Shurling, but  
3 right -- as you know, in South Carolina, there is one  
4 appeal as a matter of right. From magistrate's court,  
5 it's to circuit court, from general sessions court,  
6 which this one is, there is an automatic appeal to the  
7 state court of appeals. There is no appeal as a matter  
8 of right, as you know, to the supreme court.  
9 Certainly, the attorney or office has the option of  
10 proceeding from the court of appeals with a writ of  
11 certiorari.

12 Q. Well, as you have said, not to quibble with words here,  
13 the point being, you lose in the court of appeals. If  
14 you elect to do so through your counsel --

15 A. Right.

16 Q. -- you may seek a review of the court of appeals's  
17 decision in the supreme court?

18 A. Absolutely correct.

19 Q. And this letter is erroneous for a couple of reasons.  
20 Let's go over them. One is it indicates that  
21 certiorari has been denied. And that's a step ahead of  
22 where he was, right?

23 A. That is -- that is correct. It states order of the  
24 court of appeals denying our petition for writ of  
25 certiorari and that's just erroneous. The advice, if

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1           that was a conclusion of the case, then should have  
2           been that you have -- there's another, basically, form  
3           letter which says you have one year to file an  
4           application for post-conviction relief. That one year  
5           statute of limitations is very strictly enforced. It's  
6           up to you to timely file it. And it contains some  
7           language in bold. This is simply the wrong form order  
8           that was sent to Mr. Folkes.

9    Q.    Okay. If someone's direct appeal is lost in the court  
10          of appeals --

11   A.    Uh-huh.

12   Q.    -- and it is the determination of the attorney in the  
13          case that they don't believe an appeal to the supreme  
14          court is warranted and the client is notified that the  
15          court of appeals has decided the case --

16   A.    Uh-huh.

17   Q.    -- do you advise the client that there is another step  
18          that could -- that could be taken, that being an appeal  
19          to the supreme court and do you tell them that they  
20          would have to do a petition for rehearing in the court  
21          of appeals in order to preserve that right?

22   A.    Well, I'm going to try an answer as briefly as I can.  
23          The court of appeals -- and this probably might have  
24          been after the time, you know, you left, you know,  
25          appellate defense, but court of appeals later, under

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1 Ken Rigstat (ph), they no longer accepted pro se  
2 petitions for rehearing. If we represented a client  
3 and we did not go for rehearing, that would be that  
4 would be the end of the process.

5 Now, two things have happened since this  
6 (indicating), since this case. One is, I instituted a  
7 procedure where there is a stamp on the opinion that  
8 the attorney initials and the assistant initials either  
9 rehearing or closed. That decision to go certiorari or  
10 not go certiorari -- and as you know, if you're going  
11 certiorari, you have to file a petition for rehearing  
12 first in the court of appeals and have it denied. That  
13 attorney and that assistant now initial that, both of  
14 them, and date it and then when the remittitur comes  
15 down, they file that.

16 Long story short, though, is that that decision to  
17 proceed with a rehearing and cert petition, you know,  
18 ultimately, is the attorney's decision to make.

19 Q. Okay. So who was making those decisions on Celia  
20 Robinson's cases after she left your office?

21 A. Well, that should have either been me or if the case  
22 was reassigned to an attorney -- to a new attorney.  
23 But I would say this case was 10 days after  
24 Ms. Robinson's last day, so I'm very confident there  
25 was no new attorney reassigned to it and it should have

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1           been run by me as far as a decision whether we would  
2           have proceeded with rehearing or -- you know, with  
3           rehearing, which is the prerequisite to go certiorari  
4           to the state supreme court.

5    Q.    Thank you.  And I know from firsthand experience how  
6           many cases come across your desk, but do you have any  
7           independent recollection of having reviewed the  
8           appellate court decision in this case and the briefs  
9           and making a decision?  Is there anything in your file  
10          that would indicate that you did?

11   A.    Excuse me, I have no independent recollection of making  
12          a decision to close this case and not go certiorari.  
13          I, frankly, do not have any recollection of, you know,  
14          seeing this letter.  And I'm pretty confident if I had,  
15          it would not have gone out.

16   Q.    When Ms. Robinson left appellate defense, did she leave  
17          any sort of list of cases that were pending that she  
18          thought had particularly good issues or cases that she  
19          thought had matters that would be worthy of pursuing  
20          further if they were not successful in the court of  
21          appeals?

22   A.    Frankly, Ms. Shurling, that was four years ago, I do  
23          not recall.  If she says she did, I'm sure she did.  I  
24          don't have any recollection.

25   Q.    Thank you.  And have you now reviewed the appellate

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1           brief and the opinion of the court of appeals in this  
2           case?

3    A.    Yes, I have.

4    Q.    And had you done so at the time this case was decided  
5           by the court of appeals, would you have done a petition  
6           for rehearing?

7    A.    Again, I don't want to quibble with words, but I'm  
8           saying I do not have an independent recollection.  It  
9           doesn't mean that I didn't do it.  I don't recall it.  
10          But my answer would be the opinion of the court of  
11          appeals cites State V. Tyler, which I guess you're  
12          going to -- what you want to get into here, which is on  
13          the jury charge, the absence of malice is not a  
14          requirement of ABHAN.  You know, I had the underlying  
15          case years before this, State V. Willie Pilgrim,  
16          dealing with that issue.

17                 The court then, in its very summary opinion,  
18                 Judges Few, Konduros and Lockemy then says if a charge  
19                 is sufficient if when considered as a whole covers the  
20                 law applicable to the case.  So I take -- my  
21                 interpretation of this opinion is they cite Tyler,  
22                 which is a correct state case, which Julie Timms in her  
23                 brief for the attorney general acknowledges is the  
24                 correct case on point that the absence of malice is not  
25                 a required element.

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1           The court then goes on to say when considered as a  
2 whole or if the jury charge covers substantive matter,  
3 that's good enough. Not to be flippant at all, but,  
4 certainly, arguments in the court of appeals have  
5 always said the unfortunate part of appellate  
6 interpretations of jury charge is, ultimately, really  
7 close enough, you know, for horseshoes, hand grenades  
8 and jury charges.

9           That said, on the very point that I think you're  
10 trying to get to is the jury charge -- my problem with  
11 the jury charge in this case was, I guess, Mr. Shealy  
12 or co-counsel had specifically asked that the judge  
13 charge absence of malice is not a required element of  
14 ABHAN and the judge refused to do that. My  
15 recollection is, I think, the jury returned with a  
16 question on the difference between assault and battery  
17 with intent to kill and assault and battery of a high  
18 and aggravated nature. And, you know, there's an old  
19 case, and I'm sure you might remember, State V.  
20 Blassingame, at the time the jury asked the specific  
21 question about a greater and a lesser included offense,  
22 they focus critical attention on that matter.

23           So, again, my interpretation of this paragraph is  
24 that they said the judge -- that that was a correct  
25 interpretation -- point of law, the absence of malice

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1 is not an element of ABHAN, but the court found that  
2 the charge as a whole covered that. I most  
3 respectfully disagree with the court of appeals on that  
4 point.

5 Q. And, in fact, in the State V. Glenda Tyler case, that  
6 defendant was charged with murder and manslaughter in a  
7 case where there was a question of proximate cause,  
8 correct?

9 A. I don't remember that, Ms. Shurling, frankly.

10 Q. I'll cover that point of law later then. And have you  
11 had an opportunity to actually review the jury  
12 instructions as given in this case?

13 A. I did not go back on the record, but I believe even  
14 Ms. Timms -- Ms. Timms quoted at length from the jury  
15 instruction as I recall when I was reading this the  
16 other day on Page 4 of her brief of respondent.

17 Q. So are you aware from reading that that the judge in  
18 this case told the jury that the offense of ABWIK  
19 required the presence of malice and if there was no  
20 malice, it would be ABHAN?

21 A. My memory is he never said what was requested, which is  
22 the absence of malice is not an element of ABHAN. He  
23 never told the jury that. If I'm incorrect, please,  
24 correct me quickly.

25 Q. Well, I will. Do you have a copy of the transcript?

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- 1 A. I have a copy of the record, so I can find it real  
2 quick if you want to give me the transcript.
- 3 Q. Just a second. Take a look at Page 389?
- 4 A. Okay.
- 5 Q. I apologize, I was looking at closing arguments. Just  
6 a second. Let's take a look at Page 413?
- 7 A. Transcript cite, right?
- 8 Q. Yes, the original transcript cite, not record on  
9 appeal.
- 10 A. I'm there.
- 11 Q. Lines 14 through 20?
- 12 A. Right.
- 13 Q. And would you agree that that portion of the charge  
14 defined assault and battery with intent to kill as  
15 specifically requiring malice aforethought?
- 16 A. Yes, it says in order to prove assault and battery with  
17 intent to kill, the State must prove beyond a  
18 reasonable doubt that the defendant committed an  
19 unlawful act of violence -- of a violent nature to the  
20 person of another with malice aforethought.
- 21 Q. And moving along to the next portion of the jury  
22 instruction on Page 417, Lines six through ten?
- 23 A. Assault and battery of a high and aggravated nature  
24 includes all of the elements of assault and battery  
25 with intent to kill except expressed malice.

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- 1 Q. Okay. And then the jury came -- well, let's first take  
2 a look at Page 422, Lines 17 through 23, wherein  
3 Mr. O'Neil objects to the specific portion of the  
4 instruction that said ABHAN encompasses all the  
5 elements of ABWIK except malice?
- 6 A. That's correct. And he's even -- in the next page  
7 there, 423 of the transcript, Page 396 of the record,  
8 he cites State V. Tyler.
- 9 Q. Now, after the jury comes back with a question  
10 concerning the distinctions between the ABWIK and  
11 ABHAN, the judge discussed on the record what he is  
12 going to tell the jury in response to the question at  
13 Page 424.
- 14 A. Uh-huh, yes.
- 15 Q. Lines 15 through 22?
- 16 A. Right.
- 17 Q. And in that portion, he proposes to say that one is an  
18 unlawful act of violent injury to the person of another  
19 accomplished by circumstances of aggravation, which is  
20 high and aggravated nature. And the other is an  
21 unlawful act of a violent nature to the person of  
22 another with malice aforethought?
- 23 A. That's correct.
- 24 Q. Okay. And the following page, the Court asks defense  
25 counsel if he has any objection to what he proposes to

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1 tell the jury and he indicates that he does not on Page  
2 425, Line 12, you see that?

3 A. Mr. O'Neil says, Your Honor, my only objection would be  
4 I just at this point would ask Your Honor to charge my  
5 ABHAN. And the Court responds, Well, I'm not going to  
6 change the charge.

7 Q. Okay. And moving along, the Court says, Do you have  
8 any objection to what I've just told you? And Mr.  
9 O'Neil says, No, Your Honor. You see that?

10 A. I do.

11 Q. Okay. Now, moving along, at the bottom of 425,  
12 starting at Line 23 over to the top of page 426 --

13 MS. HARRIGAN: Your Honor, if I could just object  
14 for the record. I think Mr. Dudek said that he hasn't had  
15 an opportunity to review this transcript, he has no  
16 independent knowledge of it. Ms. Shurling is picking out  
17 certain portions of the transcript and not the rest of it  
18 and making an argument here with Mr. Dudek and the State  
19 would object to that. She's on direct with this witness.

20 THE COURT: How about that, Ms. Shurling? The  
21 witness has not reviewed this document and knows nothing  
22 about it.

23 Is that correct, Mr. Dudek?

24 MS. SHURLING: Well, actually, Your Honor --

25 THE COURT: I'm asking Mr. Dudek the question.

## BOB DUDEK CROSS BY MS. HARRIGAN

1 Is that correct, Mr. Dudek?

2 THE WITNESS: Judge, I have not reviewed this  
3 record. I have read the briefs.

4 THE COURT: Okay. I think you said that earlier.

5 THE WITNESS: Yes, sir.

6 THE COURT: So your objection again is?

7 MS. HARRIGAN: That he has no independent  
8 knowledge of this, he hasn't read it. Ms. Shurling is  
9 highlighting specific portions and omitting others. He has  
10 no independent knowledge and has not read this document.

11 THE COURT: And, specifically, your objection is  
12 she's examining a witness with a document he's not familiar  
13 with --

14 MS. HARRIGAN: Yes.

15 THE COURT: -- has not seen? All right.

16 Ms. Shurling?

17 MS. SHURLING: I have no problem. Your Honor, I  
18 will take this issue up with the original appellate counsel,  
19 Ms. Robinson.

20 THE COURT: All right.

21 MS. SHURLING: Thank you. Beg the Court's  
22 indulgence. No further questions, Your Honor.

23 THE COURT: All right.

24 MS. HARRIGAN: Very briefly, Your Honor.

25 CROSS-EXAMINATION

## BOB DUDEK CROSS BY MS. HARRIGAN

1 BY MS. HARRIGAN::

2 Q. Mr. Dudek, how long have you been in appellate defense?

3 A. Twenty-four years and --

4 THE COURT: Did you say 44?

5 THE WITNESS: Twenty-four.

6 THE COURT: Okay.

7 THE WITNESS: Sorry.

8 Twenty-four years and five months.

9 BY MS. HARRIGAN::

10 Q. And is that your only appellate experience?

11 A. Yes.

12 Q. Okay. How long have you been chief deputy?

13 A. I became acting chief, I guess, in 2009, then permanent  
14 chief in 2010, so about five years, roughly.

15 Q. Roughly, how many appeals have you handled?

16 A. If we figured a hundred a year, I guess, would be a  
17 good conservative guess, I guess about 2400. Again,  
18 rough, rough guess.

19 Q. Do you petition for rehearing and eventual certiorari  
20 on every case you handle at the court of appeals?

21 A. No, I don't.

22 Q. How do you determine whether or not you're going to  
23 petition for rehearing?

24 A. Well, I don't petition for a rehearing, I think, as a  
25 rule unless I intend to file a petition for writ of

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1 certiorari because that -- you know, again, that's a  
2 prerequisite, you have to have rehearing denied to file  
3 for certiorari.

4 Q. Certainly. How often, though, of those 2400 or so or  
5 what percentage do you petition for rehearing knowing  
6 that you're going to eventually petition for cert?  
7 What percentage do you wish to take them up to the  
8 South Carolina supreme court, a rough estimate?

9 A. Yeah. A rough estimate in a non-Anders case, a merits  
10 case, I would say maybe 60 percent, maybe, a little  
11 more non-Anders cases.

12 Q. Approximately how many briefs coming through your  
13 office are Anders nonmerits briefs?

14 A. I, again, a -- and this is totally a scientific guess,  
15 I would say probably 30 percent are Anders briefs,  
16 maybe, or Johnson petitions, let me say that.

17 Q. When you say Johnson, that's a no merits appeal from a  
18 post-conviction relief action, correct?

19 A. That's correct.

20 Q. So when you discuss the 2400 and the 60 percent, is  
21 that including post-conviction relief appeals or direct  
22 appeals as in Mr. Folkes' case?

23 A. Well, again, 2400 is my talking about over 24 years  
24 say, you know, probably since -- for many years, I just  
25 did only death penalty and murders only, that percent,

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- 1 I did a much, much lesser percentage of PCR. But  
2 office-wide, if you want to guess, I would say probably  
3 30 percent of the briefs come out of our office, maybe  
4 higher, rough guess, are Anders or Johnson no merit  
5 cases. Obviously, to file an Anders brief, you're not  
6 going to petition for rehearing, you go certiorari.
- 7 Q. So your best estimate, just direct appeals, not  
8 including post-conviction relief appeal is that if a  
9 merits brief has been filed, you think 60 percent are  
10 up for certiorari to the supreme court, 60 percent of  
11 your briefs, you seek certiorari on?
- 12 A. I -- speaking for me --
- 13 Q. Yes.
- 14 A. Answering your question, as for me, a guess, I would  
15 say probably 60 percent of my merits case, possibly  
16 more, I continue on to the court of appeals. There's  
17 simply times when say something might be procedurally  
18 barred where I think there's no use in continuing and  
19 the client would be better off going PCR or, you know,  
20 you just think the court of appeals has got a right and  
21 there's no use.
- 22 Q. Of that approximate 60 percent, how often does the  
23 supreme court grant certiorari?
- 24 A. I, you know, I -- I don't -- you know, maybe, between  
25 10 and 15 percent of my cert petitions are granted.

## BOB DUDEK CROSS BY MS. HARRIGAN

1 Q. So --

2 A. A guess again.

3 Q. So the vast majority of certiorari is denied and the  
4 supreme court won't take the case, correct? If only 10  
5 to 15 percent are granted, 90 to 85 percent are --

6 A. Well, yeah, I would say -- again, I would say 15 to --  
7 maybe 15 to 20 percent -- maybe 10 to 15 from the court  
8 of appeals. Again, let's leave PCR's out of it. 10 to  
9 15 percent, maybe a little higher, they grant cert from  
10 the court of appeals. And that may well be higher.

11 Q. In your experience, 24 hours with appellate defense, is  
12 there more of a likelihood of certiorari being granted  
13 if it's a published opinion, not an unpublished  
14 opinion?

15 A. You know, logically, intuitively, you would think so,  
16 but they do grant cert on unpublished opinions and,  
17 frankly, more than I would -- you know, you would  
18 reasonably think. But, yes, I mean, I think, you know,  
19 if it's out there and it's published, if they don't  
20 like something in it, they can take -- you know, they  
21 can -- they're going to want to, in their view,  
22 straightened it out. You know, the supreme court by  
23 rule can even grant cert on its own. A little piece  
24 the trivia there.

25 Q. So based on your previous testimony, would you agree

## BOB DUDEK REDIRECT BY MS. SHURLING

- 1           that the court -- the supreme court is more likely to  
2           grant cert on published opinions than unpublished  
3           opinions?
- 4    A.    In my very humble opinion, I would think so.
- 5    Q.    And you said you have seen Mr. Folkes's opinion from  
6           the court of appeals, correct?
- 7    A.    Yes, I have. I have it right in front of me.
- 8    Q.    And that is an unpublished opinion, correct?
- 9    A.    It is unpublished.
- 10   Q.    And how long is the opinion in whole? I think you  
11          described it before on your direct.
- 12   A.    It's a paragraph.
- 13   Q.    And how many cases does it cite?
- 14   A.    Two, State V. Tyler and State V. Curd.
- 15   Q.    And I think we covered this before, but you're basing  
16          your opinions just on the court of appeals opinion and  
17          the two briefs that you read, correct?
- 18   A.    That's correct.
- 19   Q.    You haven't read the transcript in this case, have you?
- 20   A.    I have not read the transcript in this case.
- 21   Q.    And this was not your assigned case, correct?
- 22   A.    That's correct.
- 23   Q.    And Ms. Robinson left your office approximately 10 days  
24          before the opinion went out, correct?
- 25   A.    That's correct.

## BOB DUDEK REDIRECT BY MS. SHURLING

1 MS. HARRIGAN: Beg the Court's indulgence, Your  
2 Honor.

3 BY MS. HARRIGAN::

4 Q. And your testimony was that you can't recall whether or  
5 not you made the decision not to seek rehearing and  
6 certiorari on this case, you just have no independent  
7 recollection?

8 A. I have no independent recollection of reviewing this  
9 opinion and making a judgment call on whether to  
10 continue.

11 Q. And, again, that was almost four years ago, correct?

12 A. That's correct.

13 Q. And you handle, roughly, a hundred cases a year,  
14 correct?

15 A. That's correct.

16 MS. HARRIGAN: No further questions, Your Honor.

17 THE COURT: Anything on redirect, Ms. Shurling?

18 REDIRECT EXAMINATION

19 BY MS. SHURLING::

20 Q. Mr. Dudek, do you have any independent recollection of  
21 reviewing Ms. Robinson's cases after she left and  
22 making decisions across the board, all of her appeals  
23 --

24 A. I can't say all of them. I mean, I, certainly, would  
25 have been that -- you know, opinions coming out would

## BOB DUDEK REDIRECT BY MS. SHURLING

1 have been reviewed. I don't recall the -- I mean,  
2 certainly, since that time, the practice has been to,  
3 you know, immediately reassign cases of a departing  
4 attorney. That was not the case when Ms. Robinson was  
5 first attorney under my watch who departed.

6 Q. Sure. And in fairness to you, you just started as  
7 chief attorney about the same time, hadn't you?

8 A. Well, in fairness to me, I had not just started. I  
9 had, I think, started sometime in 2009. But, again,  
10 Ms. Robinson was the first attorney who left and, you  
11 know, as I've already testified, you know, this letter,  
12 (indicating), you know, is apparently -- and  
13 procedurally, procedurally what it states is incorrect  
14 because it states denial of certiorari where it was, in  
15 fact, the affirmance of a direct appeal.

16 Q. Well, just to recap real quickly, there's nothing in  
17 your file to indicate that you did review this case  
18 after the opinion came out?

19 A. No, there's nothing in here indicating I did. I don't  
20 have any independent recollection of it. And the  
21 procedures that have now been in place for some time on  
22 an attorney initialing with an assistant whether to  
23 close a case or go on would have been -- were not in  
24 place at that time.

25 For example, now, if an attorney decided not to

## BOB DUDEK REDIRECT BY MS. SHURLING

1 continue, it would just say enclosed is an unpublished  
2 opinion of the court of appeals affirming your  
3 conviction. We are closing your file with this case --  
4 with this letter. And it would have then given them  
5 advise on a one-year statute of limitations for filing  
6 a PCR, telling them they have to do that on their own  
7 and it's up to them to timely file it, and to give them  
8 advice that there's a one-year statute of limitation in  
9 federal habeas, but it's not really a one-year statute  
10 of limitation because time between direct appeal and  
11 filing for PCR go against them.

12 Q. Now, if this had been the proper letter following the  
13 loss of a direct appeal in the court of appeals --

14 A. Right.

15 Q. -- would that letter have indicated to the recipient,  
16 the client, that a decision had been made not to  
17 petition for a hearing and not to seek certiorari?

18 A. No, I mean, I, certainly -- I do not -- I do not do  
19 that. In other words, that, for one thing -- I mean,  
20 if there's ever a place that, you know, court  
21 procedures, believe me, and you know it yourself, is  
22 inside the South Carolina Department of Correction. So  
23 they know that.

24 We -- I do not -- you know, if I'm not going to go  
25 certiorari, I do not advise on that. Now, I don't --

## BOB DUDEK REDIRECT BY MS. SHURLING

1 really getting down in the weeds here, but I just say  
2 we're closing your file because, you know, the decision  
3 has been made that we're not going any further. I  
4 don't tell that to the client, but I, also -- we only  
5 have 15 days to petition for rehearing, so, frankly,  
6 that decision to say that we're closing your file is  
7 made -- you know, that I'm not going any further is I  
8 don't want to get a letter from the client 12 days or  
9 13 or 14 days later saying I want you to petition for  
10 rehearing and go certiorari because that is the  
11 attorney's decision, the appellate attorney's decision,  
12 if you understand what I'm saying.

13 Q. And in your office, it is the decision of the counsel  
14 of record on the appeal?

15 A. It is the decision of the counsel of record. You know,  
16 again, as in anything, issue selection, you know,  
17 anything, client's input is always welcomed, you know,  
18 it's encouraged, but a decision -- and, again, I don't  
19 mean this to sound harsh to Mr. Folkes or to anybody  
20 else, but, you know, the decision to continue on  
21 whether there's a chance or reasonable chance of  
22 certiorari being granted after the court of appeals  
23 is -- that decision rests with the attorney.

24 And, again, reiterating my direct appeal -- my  
25 direct testimony, you know, it was -- I do disagree

## BOB RECROSS BY MS. HARRIGAN

1 most respectfully with this opinion of the court of  
2 appeals and, you know, wish that, you know, it would  
3 have been taken up.

4 Q. Thank you.

5 A. And, if, you know, the supreme court, you know, would  
6 have reversed your burden, then, certainly, would be my  
7 humble opinion entitled to a new trial.

8 Q. Thank you. Real quickly, you've addressed Johnson and  
9 Anders brief situations, this letter that was sent to  
10 Mr. Folkes indicates that the -- not only that a  
11 petition for certiorari has been denied, but that a  
12 petition to be relieved has been granted?

13 A. Uh-huh.

14 Q. That reference would make this the letter that was  
15 typically sent out when someone had done a no merit  
16 pleading, wouldn't it?

17 A. It certainly would.

18 Q. Okay. So not only is it referencing the wrong type of  
19 appeal, but it's, also, indicating a petition to be  
20 relieved as counsel and Ms. Robinson had not asked to  
21 be relieved as counsel?

22 A. It is the wrong form letter as you are aware.

23 Q. And, lastly, you had indicated that there was a rule  
24 now that the court doesn't accept petitions for  
25 rehearing, pro se petitions for rehearing?

## BOB RECROSS BY MS. HARRIGAN

1 A. Again, Ken Rigstat -- when Mr. Rigstat was the clerk of  
2 the court of appeals, we had a procedure where we would  
3 say I'm not going any further and if you want to do it  
4 pro se -- I mean, if you want to file a pro se  
5 rehearing petition on your own, you can do that. But  
6 at some point, Mr -- and I don't remember the exact  
7 year, but the court of appeals stopped accepting those.  
8 And as you know, there's a case under Foster V. State  
9 that if you're represented by counsel, only counsel can  
10 deal with the court and you as the client can't deal  
11 with the court personally. You know, I wish there was,  
12 you know, still that procedure, but there isn't.

13 Q. Okay.

14 A. And I can't tell you the exact year that that occurred,  
15 but Mr. Rigstat's no longer the clerk as you know.

16 Q. And that addresses pro se petitions for rehearing.  
17 There would be nothing to stop someone if they could  
18 hire someone quickly enough to hire another lawyer to  
19 do a petition for rehearing and seek cert, would there?

20 A. No.

21 MS. SHURLING: Thank you very much. No further  
22 questions.

23 MS. HARRIGAN: Very briefly, Your Honor.

24 RECROSS-EXAMINATION

25

## BOB RECROSS BY MS. HARRIGAN

1 BY MS. HARRIGAN::

2 Q. Mr. Dudek, you said that in all due respect you  
3 disagree with the court of appeals' opinion here,  
4 correct?

5 A. I did preface it with all due respect and I meant it,  
6 yes, ma'am.

7 Q. How often do you disagree with the court of appeals?

8 THE COURT: All the time.

9 THE WITNESS: I'm sorry?

10 BY MS. HARRIGAN::

11 Q. How often do you disagree with the court of appeals?

12 A. Well, you know, as an advocate, we -- you think you're  
13 right most of the time and, oftentimes, they're right  
14 and I'm wrong. I mean, I don't know. I mean,  
15 certainly, when I disagree, respectfully disagree, I,  
16 you know, usually do a rehearing and go certiorari.

17 Q. On average, how many cases in a situation like Mr.  
18 Folkes' where, they've gone to trial, it's a direct  
19 appeal -- what percentage of cases are you successful  
20 at the court of appeals?

21 A. How often do I win at court of appeals?

22 Q. Yeah.

23 A. I -- I don't know.

24 Q. Can use give us an estimate? Is it a majority of your  
25 cases?

1 A. Oh, no, no --

2 MS. SHURLING: Your Honor, I'm going to have to  
3 object. I started to interrupt the last time we went down  
4 this road.

5 THE COURT: Basis?

6 MS. SHURLING: He's indicated he doesn't keep  
7 records, he doesn't know. He's guessing.

8 THE COURT: I think in response to some of your  
9 questions, he gave an estimate or guess, also, so I'm going  
10 to allow the question and overrule.

11 Do your best, Mr. Dudek, you know, you know, if  
12 you don't, you don't.

13 THE WITNESS: Okay. I mean, I don't know. You  
14 know, as a -- probably one of the hardest jobs in the world  
15 is being an appellate attorney in criminal defense. I don't  
16 know, probably 10 or less winning the court of appeals. You  
17 know, sometimes on, you know, certiorari, you know, our  
18 supreme court oftentimes does take a close look at things of  
19 the court of appeals. I don't -- I'm sorry, I'm not trying  
20 to evade your question.

21 BY MS. HARRIGAN::

22 Q. No, not at all. So a vast majority of the cases you  
23 bring to the court of appeals in a situation like this,  
24 you're unsuccessful and you disagree with the court of  
25 appeals, is that correct?

1 A. The attorney general's office wins the vast majority of  
2 criminal appeals. Fair enough?

3 MS. HARRIGAN: No further questions, Your Honor.

4 THE COURT: Anything further, Ms. Shurling?

5 MS. SHURLING: Nothing further.

6 Thank you, Mr. Dudek.

7 THE COURT: I'm sure you want to go back to Lady  
8 Street, is it?

9 THE WITNESS: Lady Street, yes, sir.

10 THE COURT: There's no objection to that?

11 MS. HARRIGAN: Certainly not. He's not under  
12 subpoena, but no objection.

13 MS. SHURLING: No, sir.

14 THE COURT: All right. Good to see you again.

15 THE WITNESS: Good to see you, Your Honor.

16 THE COURT: Call your next witness.

17 MS. SHURLING: Celia Robinson.

18 THEREUPON,

19 CELIA ROBINSON,

20 after having been duly sworn, testified as follows:

21 THE COURT: Please take your seat, Ms. Robinson.

22 Tell us your full name and spell your last name for the  
23 record.

24 THE WITNESS: Mary Celia Robinson,

25 R-O-B-I-N-S-O-N.

## CELIA ROBINSON DIRECT BY MS. SHURLING

1 THE COURT: All right.

2 DIRECT EXAMINATION

3 BY MS. SHURLING::

4 Q. Ms. Robinson, where are you practicing law now?

5 A. Mullis Law Firm.

6 Q. And you've been here for the testimony of Mr. Dudek?

7 A. Yes.

8 Q. And is it correct to say that you were no longer in  
9 appellate defense at the time period when this decision  
10 was issued by the court of appeals?

11 A. Yes.

12 Q. And is that signature on the correspondence introduced  
13 from appellate defense yours?

14 A. No, that's Lauren.

15 Q. And pardon me, that's whose?

16 A. Lauren.

17 Q. Lauren's. And tell us who Lauren is.

18 A. Lauren Crews was my assistant in appellate defense.

19 THE COURT: Ms. Robinson, I'm going to ask you to  
20 sit a little closer to the microphone and speak up just a  
21 little bit.

22 THE WITNESS: She was my paralegal at appellate  
23 defense.

24 BY MS. SHURLING::

25 Q. So she's not a lawyer?

## CELIA ROBINSON DIRECT BY MS. SHURLING

1 A. No.

2 Q. All right. And did anyone from appellate defense  
3 consult with you at the time Mr. Folkes' decision --

4 A. No --

5 Q. -- came out?

6 A. No.

7 Q. No one contacted you and asked you whether --

8 MS. HARRIGAN: Your Honor, I would object. This  
9 is Ms. Shurling's witness and she's leading.

10 THE COURT: Sustained. Rephrase the question.

11 BY MS. SHURLING:

12 Q. Did you have any input in the decision not to seek  
13 certiorari in this matter?

14 A. No.

15 Q. If you had still been in the appellate division of  
16 SCCID, would you or would you not have sought cert in  
17 this matter?

18 A. I, certainly, would have taken it up on rehearing and  
19 cert.

20 Q. And, of course, would you have filed a petition for  
21 rehearing?

22 A. Yes.

23 Q. Okay. What is your opinion concerning the strength of  
24 the appellate issue that you briefed in this case?

25 A. I thought it was a winner. I thought it was clear

## CELIA ROBINSON DIRECT BY MS. SHURLING

1 error. I thought it was reversible. The only chance  
2 would be if they said it wasn't -- it was harmless. It  
3 wasn't harmless. I mean, the jury had a question.  
4 This is -- this case should have been reversed on this  
5 issue in my humble opinion.

6 Q. Okay. Do you recall from the transcript the fact that  
7 defense counsel also raised objections about the  
8 instructions?

9 A. Yes.

10 Q. And were those objections raised at all the appropriate  
11 points?

12 A. I thought they were.

13 Q. Okay.

14 A. I thought that I raised the issue that the judge did  
15 not properly instruct the jury despite a request from  
16 the defense.

17 Q. Did you consider briefing as a separate issue?

18 MS. HARRIGAN: Your Honor, I would object.

19 Ms. Shurling is still leading. This is her witness.

20 THE COURT: What other issues, if any, did you  
21 consider briefing, that would be the question.

22 MS. SHURLING: Very well, Your Honor.

23 BY MS. SHURLING::

24 Q. What other issues, if any, did you consider briefing?

25 A. I -- I know what you're asking, you're asking did I

## CELIA ROBINSON DIRECT BY MS. SHURLING

1 consider having separate issue that the judge's charge  
2 was incorrect.

3 Q. Correct.

4 A. But I pushed it all together in one issue. The judge  
5 issued the wrong charge. He refused to give the  
6 defense charge, which is correct. So I only did one  
7 issue, I didn't do -- I didn't separate it out.

8 Q. What --

9 A. I thought I already won.

10 Q. What effect, if any, might the failure to brief that  
11 issue have had on the issue you did brief?

12 A. I didn't think it would have any effect. I thought I  
13 had won with that issue. I thought that issue was  
14 reversible error clearly.

15 THE COURT: I'm sorry, Ms. Robinson, I apologize.  
16 You need to speak louder.

17 THE WITNESS: I'm sorry.

18 THE COURT: And it's mainly my fault. I can't  
19 hear well.

20 THE WITNESS: I'm not used to this. I write, I  
21 don't talk.

22 BY MS. SHURLING::

23 Q. The judge declined to give the specific defense request  
24 to charge that the absence of malice was not a required  
25 element for ABHAN?

## CELIA ROBINSON DIRECT BY MS. SHURLING

1 A. Right.

2 Q. Correct? And, in fact --

3 THE COURT: Is this ABHAN or assault and battery  
4 with intent to kill.

5 MS. SHURLING: Assault and battery of a high and  
6 aggravated nature.

7 THE COURT: Okay. All right.

8 BY MS. SHURLING::

9 Q. Can you identify those?

10 A. These are requests to charge submitted by the defense.

11 THE COURT: Ms. Shurling --

12 MS. HARRIGAN: I've never seen those.

13 THE COURT: -- show it to her first so we'll all  
14 be on the same page. That's all right.

15 Now, can you identify that, Ms. Robinson?

16 THE WITNESS: Yes.

17 THE COURT: All right.

18 THE WITNESS: These are requests to charge  
19 submitted by the defense in Clinton Folkes.

20 THE COURT: All right.

21 BY MS. SHURLING::

22 Q. And the requests to charge submitted by defense counsel  
23 were made a Court's Exhibit in this case?

24 A. Right.

25 Q. Okay. In addition to not giving the request to charge,

## CELIA ROBINSON DIRECT BY MS. SHURLING

1 was there a specific problem with the charge that was  
2 given?

3 A. My memory -- after I reviewed it after this issue came  
4 up is that the judge instructed the jury -- I can't  
5 remember precisely how he instructed them, but he  
6 certainly backed up the solicitor that if it's -- if  
7 you find malice -- malice goes with ABWIK. Yeah, he  
8 gave the wrong -- he didn't tell them that you can  
9 convict him of ABHAN even if you find that he was  
10 acting maliciously. And that's what we needed him to  
11 tell them.

12 Q. And do you have a copy of the transcript?

13 A. No.

14 Q. If I could get you to look at the portion of the charge  
15 found at Lines six through ten on Page 417?

16 A. Yes. Do you want me to read it?

17 Q. You can either read it or just summarize for us what it  
18 says.

19 A. Well, he told them that assault and battery of a high  
20 and aggravated nature includes all of the elements of  
21 ABWIK, except expressed malice. That's the point.

22 Q. Okay. And prior to that, on Page 413, Lines 15 through  
23 20, how did the court define assault and battery with  
24 intent to kill?

25 A. In order to prove assault and battery with intent to

## CELIA ROBINSON DIRECT BY MS. SHURLING

1 kill, the State must prove beyond a reasonable doubt --

2 THE COURT: Stop. Let me make sure what page this  
3 is on. What page is this on the transcript again?

4 THE WITNESS: It's 413.

5 THE COURT: 413?

6 THE WITNESS: 413 of the transcript.

7 THE COURT: Line 14?

8 THE WITNESS: 15 -- well, 15.

9 THE COURT: All right. Go ahead.

10 THE WITNESS: The Defendant has been charged with  
11 assault and battery with intent to kill. In order to prove  
12 assault and battery with intent to kill, the State must  
13 prove beyond a reasonable doubt that the Defendant committed  
14 an unlawful act of a violent nature of the person of another  
15 with malice aforethought.

16 BY MS. SHURLING::

17 Q. Now, I apologize for doing that backwards, but after  
18 giving this charge, they came -- the court came back  
19 and said ABHAN's all the same things as ABWIK except  
20 for malice?

21 A. Right.

22 Q. Okay. Now, do you recall the portion of the transcript  
23 where the jury came back with a question?

24 A. Generally, yes.

25 Q. What was nature of that question?

## CELIA ROBINSON DIRECT BY MS. SHURLING

1 THE COURT: Let's do this for my benefit, turn to  
2 the page in the transcript regarding the question and let's  
3 look -- so I can take a look at it.

4 MS. SHURLING: Thank you.

5 THE COURT: Because she may recall, but it doesn't  
6 help me very much.

7 MS. SHURLING: Page 424.

8 THE COURT: All right. Hold on. Do you have a  
9 transcript up there?

10 Give her a transcript so the witness can follow  
11 along with the question.

12 I'm sorry, what page again?

13 MS. SHURLING: 424.

14 THE COURT: 424, all right.

15 BY MS. SHURLING.:

16 Q. And if we could take a look, please, at Lines 11  
17 through 14.

18 A. The jury asked, What is the difference between intent  
19 to kill and assault and battery of a high and  
20 aggravated nature? And the judge said, So I'm going to  
21 bring them back in --

22 Q. I'll stop you there.

23 A. Yeah.

24 Q. I've gone over that part earlier. I'm going to jump  
25 over to the recharge that was given to the jury

## CELIA ROBINSON DIRECT BY MS. SHURLING

1 starting on 426, Line 13.

2 THE COURT: Does this go over to 428, Ms.  
3 Shurling?

4 MS. SHURLING: I'm sorry, Your Honor, I've lost my  
5 spot.

6 THE COURT: It looks like it start 426, Line 13,  
7 and it may go to 428 or -- take your time and let's narrow  
8 it down a little bit.

9 BY MS. SHURLING::

10 Q. Go to Page 430, please.

11 A. Okay.

12 Q. And take a look at Lines 11 through 14?

13 A. Right. Assault and battery of a high and aggravated  
14 nature includes all the elements of assault and battery  
15 with intent to kill except malice aforethought. In  
16 addition --

17 Q. Okay. So both in the initial jury charge and when the  
18 jury was recharged, the court defined assault and  
19 battery of a high and aggravated nature in terms of the  
20 absence of malice?

21 A. Right.

22 Q. And if you would look at Page 431, Lines 4 through 7.

23 A. Right.

24 Q. What does that portion of the transcript indicate?

25 A. The trial counsel objected to the ABHAN charge given on

## CELIA ROBINSON DIRECT BY MS. SHURLING

- 1 the recharge and noted it for the record.
- 2 Q. Okay.
- 3 A. We'll see what they do on appeal.
- 4 Q. So defense counsel -- first off, in terms of the issue  
5 of preservation, the request to charge that was denied,  
6 that issue was preserved and you briefed it?
- 7 A. Right.
- 8 Q. Would you agree that the objection to the charge as it  
9 was given was also raised and argued and ruled upon?
- 10 A. Correct.
- 11 Q. And would, therefore, have been preserved for appellate  
12 review?
- 13 A. Yes.
- 14 Q. Okay. How long were you an appellate lawyer -- well, I  
15 know you still are, but doing criminal appeals, how  
16 long?
- 17 A. I'd say probably 10 years, maybe 13.
- 18 Q. Are you familiar with the Supreme Court's decisions in  
19 White V. State and Davis V. State?
- 20 A. Yes.
- 21 Q. And what are those cases addressing?
- 22 A. Charging the jury.
- 23 Q. No, the right to a belated appeal?
- 24 A. Oh, I thought were you talking about --
- 25 Q. Yeah. Is it -- is there case law addressing a

## CELIA ROBINSON DIRECT BY MS. SHURLING

1 defendant getting a belated appeal if he procedurally  
2 is deprived of that right at the time he should have  
3 gotten it?

4 A. You mean PCR?

5 Q. Yes.

6 A. Right.

7 Q. If it is established that someone didn't knowingly  
8 voluntarily waive their right to a direct appeal,  
9 there's a vehicle for getting a belated --

10 A. Right, right.

11 Q. And that's the old case of White V. State?

12 A. Right.

13 Q. Is that correct?

14 A. Right.

15 Q. Are you aware in the case law, although the prodigy  
16 that follows White V. State of any requirement that the  
17 applicant be able to prove he would have won that  
18 appeal?

19 A. Well, he has to show that it would have been a  
20 meritorious issue. What do you mean? I'm not  
21 understanding you.

22 Q. To get a belated appeal?

23 A. No, he just has to prove he didn't --

24 MS. HARRIGAN: Your Honor, the State would object  
25 based on relevance --

## CELIA ROBINSON DIRECT BY MS. SHURLING

1 THE COURT: Hold on. Go ahead.

2 MS. HARRIGAN: The State would object based on  
3 relevance. Mr. Folkes had an appeal here and Ms. Shurling  
4 is discussing the right to a belated appeal and he already  
5 had one.

6 MS. SHURLING: Well, Your Honor --

7 THE COURT: Let me help both of you out. The law  
8 is what the law is.

9 MS. SHURLING: I understand, Your Honor. The  
10 State opened the door. The State was trying to argue -- I'm  
11 arguing that he did not -- based on the decision of an  
12 attorney on his case, that no lawyer representing him made  
13 the decision not to seek certiorari. In response to that,  
14 the State -- I didn't object --

15 THE COURT: I'm not arguing with that, Ms.  
16 Shurling -- I mean, she's not arguing about that, it's just  
17 the way you're posing the question to the witness. What I'm  
18 saying is whether she knows the correct answer or not, the  
19 law is what the law is. Can we agree to that?

20 MS. SHURLING: I understand, Your Honor.

21 THE COURT: Okay.

22 MS. SHURLING: I'm broaching this question only  
23 because the State has attempted --

24 THE COURT: Go ahead and ask the question, Ms.  
25 Shurling, and I'll see what the answer is.

## CELIA ROBINSON CROSS BY MS. HARRIGAN

1 BY MS. SHURLING::

2 Q. In a White V. State inquiry, the operative question is  
3 what?

4 A. Whether he knowingly and voluntarily waived his right  
5 to appeal.

6 Q. And in order to get the belated appeal, you don't have  
7 to prove that you would have won it, do you?

8 A. No, no.

9 Q. Okay. So what percentage of cases was won or lost or  
10 how good a chance you would have had of winning it  
11 doesn't determine whether or not you were wronged by  
12 not getting it?

13 A. Right.

14 MS. SHURLING: Thank you. No further questions.

15 THE COURT: The point is does he have a right to  
16 it, is that correct?

17 MS. SHURLING: Yes.

18 THE COURT: All right. You may cross.

19 MS. HARRIGAN: Thank you, Your Honor.

20 CROSS-EXAMINATION

21 BY MS. HARRIGAN::

22 Q. I'm going to start a little bit in reverse and start  
23 with the questions at the end that were just asked.  
24 White V. State, the belated appeals often referred to,  
25 that deals with when an applicant in a PCR didn't have

## CELIA ROBINSON CROSS BY MS. HARRIGAN

1 a direct appeal, correct, they were denied the right to  
2 an initial direct appeal to the court of appeals,  
3 correct?

4 A. Okay.

5 Q. Do you know that case?

6 A. It's been a long time. I remember White V. State. It  
7 was always --

8 Q. Do you recall whether or not that deals with your right  
9 to a first appeal from the circuit court to the court  
10 of appeals?

11 A. Yes, I think so.

12 Q. And are -- did you handle post-conviction relief  
13 actions when you were at the office of the appellate  
14 defense?

15 A. Yes.

16 Q. Are you aware of the standard to win a claim of  
17 ineffective assistance of appellate counsel? Are you  
18 aware of what that standard is?

19 A. Yes. I'm probably not this minute, when I argued it, I  
20 did.

21 Q. How long were you at appellate defense, Ms. Robinson?

22 A. I think three years.

23 Q. And you left the office on September 14, 2010?

24 A. Yes.

25 Q. You don't know what happened to your cases when you

## CELIA ROBINSON CROSS BY MS. HARRIGAN

1 left, do you?

2 A. No.

3 Q. You don't know if your cases were reviewed, do you?

4 A. I certainly thought they were going to be.

5 Q. But you don't know whether anyone reviewed any of your  
6 cases when you left the office of appellate defense?

7 A. Well, apparently, not.

8 Q. But you agree --

9 A. This letter is signed by Lauren --

10 THE COURT: Stop. Listen, it's very simple. It's  
11 cross-examination. You've got to say yes or no, then you  
12 can explain.

13 THE WITNESS: Okay.

14 THE COURT: Ask the question one more time.

15 BY MS. HARRIGAN::

16 Q. You don't know if your file were reviewed? Not just  
17 this case, but any of your files after you left the  
18 office, right?

19 A. I don't know. I thought they would be, but the fact  
20 that this letter is signed by Lauren -- when I signed  
21 something for another attorney in appellate defense,  
22 you got another attorney to sign for you. You didn't  
23 get somebody's assistant to sign for you. I'm really  
24 kind of stunned.

25 Q. But you've never seen that letter before, correct?

## CELIA ROBINSON CROSS BY MS. HARRIGAN

1 A. Correct.

2 Q. And that's not your signature on that letter, correct?

3 A. Right.

4 Q. So you don't, actually, know if Mr. Dudek or another  
5 attorney at appellate defense reviewed your files when  
6 you left?

7 A. As I said, I don't know.

8 Q. And you don't know whether or not they decided whether  
9 or not to petition for rehearing on any particular  
10 case, correct?

11 A. No.

12 Q. Including this case here, correct?

13 A. Apparently, not.

14 MS. HARRIGAN: Moment's indulgence, Your Honor.

15 BY MS. HARRIGAN::

16 Q. You testified before that you thought this case was a  
17 very strong one to take up to the court of appeals,  
18 correct?

19 A. Yes.

20 Q. And that was because they didn't rule based on harmless  
21 error, correct?

22 A. I don't -- what do you mean?

23 Q. What was your reasoning for saying why you thought this  
24 was a strong --

25 THE COURT: I thought you said it was not

## CELIA ROBINSON REDIRECT BY MS. SHURLING

1 harmless?

2 BY MS. HARRIGAN::

3 Q. It was not harmless error?

4 A. Right. Well, the trial judge refused to charge the  
5 jury a correct statement of the law and it wasn't  
6 harmless. To me, that equals you get a new trial.

7 Q. In your three years at appellate defense, how many  
8 cases do you think you handled on average?

9 A. I don't know.

10 Q. How --

11 THE COURT: Sorry, Ms. Robinson, please --

12 THE WITNESS: I'm sorry.

13 THE COURT: It's not your problem, but if I can't  
14 hear you, it's not very helpful to me.

15 THE WITNESS: I understand.

16 I don't know.

17 BY MS. HARRIGAN::

18 Q. Do you recall how many cases you petitioned for a  
19 rehearing in the hopes of petitioning for eventual  
20 certiorari were?

21 A. I have no idea what the percentage is.

22 Q. You've done it before though, correct?

23 A. Oh, certainly. If I thought I had a good argument and  
24 I didn't win, I petitioned for rehearing and then cert.

25 Q. How often did you win your cases in the court of

## CELIA ROBINSON REDIRECT BY MS. SHURLING

1 appeals?

2 A. Very infrequently. I mean, I have no idea.

3 Q. Would you agree with Mr. Dudek's testimony that the  
4 vast majority of them are won by the State?

5 A. Yes.

6 Q. And you set forth in those briefs the most meritorious  
7 arguments that you thought were winners, correct?

8 A. Yes.

9 Q. And often the court of appeals did not agree, correct?

10 A. Yes.

11 Q. And was the cert still denied on those cases when you  
12 petitioned up?

13 A. Often.

14 MS. HARRIGAN: No further questions, Your Honor.

15 THE COURT: Ms. Shurling?

16 REDIRECT EXAMINATION

17 BY MS. SHURLING::

18 Q. Ms. Robinson, does the supreme court ever reverse the  
19 court of appeals?

20 A. Yes.

21 Q. Would you agree that it's, at least, a fairly common  
22 occurrence?

23 A. Yes, it is common.

24 Q. Rough end estimate, about how many times a year do you  
25 see criminal matters that are reversed, the court of

## CELIA ROBINSON REDIRECT BY MS. SHURLING

1 appeals is reversed --

2 A. Fairly --

3 Q. -- by the supreme court?

4 A. Fairly frequently. It seems like there's one in every  
5 advance sheet, but maybe not.

6 Q. Okay. So the fact that the court of appeals didn't  
7 agree with you certainly didn't mean the supreme court  
8 might not?

9 A. No.

10 Q. And just to be clear, you felt this was a meritorious  
11 issue?

12 A. Yes.

13 Q. You would have sought -- you would have petitioned for  
14 a hearing first?

15 A. Yes.

16 Q. And you would have sought cert?

17 A. And we don't know what would have happened on  
18 rehearing. The court of appeals issued a no merit  
19 decision in this case. There was, obviously, at least,  
20 arguable merit. So on rehearing, which is -- I mean,  
21 they almost never do it, but maybe if this had gotten  
22 taken up on rehearing somebody at the court of appeals  
23 would have gone oh, okay, maybe. Because issuing a no  
24 merit decision on this and citing Tyler back to you, I  
25 don't understand their decision, so.

## DAVID BATTISTE DIRECT BY MS. SHURLING

1 Q. Okay. And, again, to your knowledge, there's no  
2 indication that any lawyer made the decision about not  
3 going forward with this case?

4 A. No, I would say no lawyer did this because it is signed  
5 by Lauren Crews and she's my paralegal. And as I said,  
6 and, you know, Bob's right, it wasn't a standard  
7 practice, but if you're signing for another attorney,  
8 you sign their name and you put your initials. This is  
9 Lauren Crews. She's not an attorney, she's a  
10 paralegal.

11 Q. Were you notified when -- when you left appellate  
12 defense, not with specific reference to this case, but  
13 all of your cases, did they notify you when your cases  
14 were decided after you left?

15 A. No.

16 Q. So unless you happened to --

17 THE COURT: Well, the other question is did you  
18 check on any of your cases after you left?

19 THE WITNESS: No, I didn't.

20 BY MS. SHURLING::

21 Q. Well, this was an unpublished opinion, correct?

22 A. Right.

23 Q. So if you were in the habit of reading published  
24 opinions, you wouldn't have seen it even then?

25 A. That could have happened. I don't remember seeing it