VOLUME IX OF XI

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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S.C. SUPREME COURT

Certiorari to Spartanburg County

Honorable J. Derham Cole, Circuit Court Judge

ANDRES ANTONIO TORRES,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2020-000842

APPENDIX

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And so as -- as the brain starts to organize those domains environment is everything, because environment helps structure those domains.

Q All right. Let's look at the significant factors of Mr. Torres' environment as you understand them to be and that relate to your opinions in the case.

A The first is significant head injuries in infancy and early in life.

And the reason why this is important is because it's a real transition in the -- in the last 30 years of what I was taught in my residency and what we believe today and what -- certainly what was true in 2008.

We used to believe that head injuries early in life in children were not -- unless they were huge head injuries were not that relevant, that children could kind of grow out of them, they could kind of grow through them and it would be okay.

We know better now. We know that the sequela, early head injuries, can be devastating. They can change one's behavior; they can impact one's ability to acquire new knowledge; they can impact one's ability to effectively weigh and deliberate, because they create a scar across the brain, wherever that injury is.

Q Scar tissue?

A Not so much as scar tissue, although that's true in

some places, but a -- a dysfunction, because once that organizing -- once that pruning as we talked about starts to work it may have to work around these areas that have been damaged. That's certainly true in Mr. Torres' case.

Q Okay, sir.

A An unstable and volatile home -- a volatile home life. We can't overemphasize the importance of stability early in life.

One of the things that Dr. Schwartz-Watz talked about in her testimony -- and I think it came up again this morning in terms of theory of mind -- you know, the theory of mind is really the ability to develop a certain self-awareness, to kind of know who you are, know who you are in the world.

And when you have an unstable and volatile home life where your parents aren't necessarily modeling for you, the behaviors that, you know, you need to be socially accepted, to be socially understood, that is problematic.

It's particularly problematic with special-needs children because you assume that a child has a brain that is able to take in that modeling. But if you -- if you both have a child that is not able to take in that modeling and there's -- or there's no modeling but there's a limited modeling, then that becomes problematic.

Now, of course in Mr. Torres' circumstance much of that

volatility in his home life was really a function of him being out of the home for such significant periods of time in other places.

Q Residential placements and hospitalizations?

A And hospitalizations, right.

Q And how about the relationship between his mother and father and other significant people in the household itself and the violence that occurred in there?

A We -- we already know that his mother suffered significant -- his mother suffered abuse during pregnancy. There is every indication that that abuse continued. And so this is what the child -- this is what the child is seeing. This is what the child is experiencing even at an early age.

The idea that children aren't learning preverbally before they can express how they feel is not accurate.

Q All right, sir. Can you distinguish that then from physical and psychological abuse? You're speaking of his environmental circumstances in the sense that his home setting and I think -- are you referencing in physical and psychological abuse what is directed to him personally?

A Yes, yes. And we know that, you know, not only did he have the fall when he was very, very young down the cement steps.

We also know that his father at least on one occasion punched him in his face, knocked out a tooth. For a child

that is very similar to what we describe as a contrecoup lesion, a contrecoup lesion because the brain is suspended in the skull. And to have a young child's brain go forward and backwards by being hit like that, you know, these are all potential factors that can contribute to brain injury.

But more important than that, to have this done by neither a cousin or some other kid or you're playing around -- to have this actually done by your father puts an emotional complexity on it that's hard to -- really kind of hard to really think about.

And we know as well that either in mocking games or directly his father would kind of stalk -- shouldn't say kind of. It's kind of hard for me to say this -- would, you know, hit him in the head, would stalk on his head, on the side of his head. You know, and this is as a child.

So, you know, we're seeing environmental factors not only limited in terms of what comes at you from a modeling point of view, but we're seeing these direct insults onto the brain that -- and that impair that brain while it's growing, while it's trying to grow.

Q All right, sir. You have I think in the next category a significant reference to issues in the record.

For instance, I think we talked about the M.R.I. reference to Dr. Schwartz-Watz's narrative. And we've heard about the Dr. Brawley testing.

Tell us how that helps you cross the bridge into -- into the more deliberate behavioral issues in this case.

A Well, you know, when you look at the -- we'll talk more about the M.R.I. But when you look at the E.E.G. findings and the subsequent treatment for the M.R.I. finding or for the E.E.G. findings, these are indications of a young boy with a brain that isn't working properly in multiple domains.

First of all, the E.E.G., the electroencephalogram, is a test for electrical activity in the brain.

There are multiple types of activity in the brain. There's neurochemical activity, and Dr. Lipman spoke to some degree about that. There is electrical activity.

There are multiple types of activity in the brain, and any one of these types of activity can go awry and cause problems because the brain is so complex.

So, at this point we really see structural problems in his brain based upon the 2008 M.R.I. But even as a child we see E.E.G. problems, electrical problems, in his brain.

Now, as it turns out the medicine that they chose to treat him with -- Tegretol -- is an antiseizure medication.

In 1983 Dr. Streticowsky [sic] at the University of Pittsburgh did this very elegant study looking at people that were bipolar that also had seizure disorders.

And what happened was he was -- he's a neurologist.

And he was actually treating these people for their seizure disorders. But what he saw was that their bipolar symptoms became better when he treated them with medicine for seizures. And that's how Tegretol became a treatment for bipolar disorder.

And today actually the antiseizure medicines like Tegretol, Carbamazepine -- those are looking for what we call abstock [sic] seizures. It's -- are the No. 1 treatments taking over from Lithium.

So, even at this age we're seeing a young man whose brain is not functioning properly, who also has some structural problems very young.

Q All right, sir. In addition in that paragraph you indicated the -- Dr. Brawley and Wood psyc testing. Are you familiar with the scores as relates to intellectual functioning, I.Q. aspects of that?

A Yes, I am.

Q Was that in any way significant to you? As we understand it, it was in some instances normal and some instances borderline, low borderline.

A Yes.

Q Was that of any particular interest to you?

A Yes.

Q And why?

A Well, for two reasons. No. 1 -- and we -- we -- this

is awfully confusing to people.

Intellectual functioning is not the same as brain functioning. They don't overlie each other. And certainly now with the test, the new test that Dr. Wood is describing, they're trying to have I.Q. tests captured more of brain function.

Intellectual tests -- I.Q. tests really -- they -- they touch on brain function, but they don't really capture how a brain works in the same way that neuropsychological testing does.

And, so, what you can have is someone who -- whose brain if he's very -- may work in these very exceptional ways, and yet their intellectual functioning is poor or their brain -- their intellectual functioning may work reasonably well but their brain functioning is poor.

A classic example is Kim Peek. Kim Peek is the man who the movie "Rain man" was made about. And if you remember, or if you remember it, the movie or Mr. Peek who died a couple of years ago, he was this idiot savant who could give you the certain historical facts from many, many years ago. He could do a number of really amazing things with his brain.

In fact, he had an I.Q. of 73. He wasn't able to button his shirt. He lived in Salt Lake City and was not able to find his way around the city. And his father who

was much older was very, very concerned about what would happen to Mr. Peek, because in spite of these amazing intellectual functions most of his brain did not work well. So that's really the discrepancy between I.Q. and brain function.

Q All right, sir. How about the absentee father?

A Any parent that's not there makes it a problem. It's somewhat compromised in this case in that -- and I'm not sure exactly how to say this -- but given the records that we have of what Mr. Torres' mother had to undergo and what Mr. Torres had to undergo while his father was there, it's complex to say what the impact was once his father was not there.

Q Okay. But that does relate to your next point, which, again, I think is some historical underpinning on the residence -- fluid residence circumstances of Mr. Tony Torres from hospitalizations and home placements, institutional, does it not?

A Exactly, right.

There's a body of literature around children -- a body of literature in the trauma literature around children that experience extensive hospitalizations, and it's not only psychiatric hospitalizations, but this is also medical hospitalizations, because we often think, okay, my child has a problem. I've got to take him to the hospital. But

they're getting the best of care. They're around people that love them -- the docs, the nurses take care of them. This is something that has to be.

And yet the problem is, as we point out here, there is separation anxiety. The child doesn't know that -- particularly the young children. They don't understand that this is necessarily for their own good. They don't necessarily know what's wrong.

And we see records in the -- in Mr. Torres' records of him having extraordinarily -- extraordinary difficulty separating from his mother. At times that he would have to come into the hospital, she would bring him to the hospital.

Those are the attachment problems that in the long run generalize to other people and make it difficult to establish meaningful relationships.

Q So in the case of separation anxiety it's not so much the length of the separation as the frequency.

A And quality.

Q And quality.

A Right.

Q And is it that we're familiar with you -- it doesn't make any difference if mom's in the next room. If you can't see her when you're young, don't know that she's anywhere.

A That's exactly right. Children -- and this goes back to the theory of mind. Children run to slaps as well as to

hugs.

Q Okay.

A All right. Children don't understand the difference. They just want that contact, and so they'll try to get that contact any way they can.

It's not an intentional thing. It's built into them to make that -- you know, make that relationship. And if they can't, it's very problematic. And that's particularly true in a special needs child.

Q And how is Tony in special needs in his early development?

A What we see with Mr. Torres are behaviors starting as young as 18 months that are disruptive behaviors. And those behaviors really are -- are more consistent with an impaired brain than a behavioral syndrome. And in some ways -- and I -- I'm not trying to be critical of the persons that saw him -- but it's often what you see when someone doesn't understand how neurological symptoms present.

They saw his symptoms as purely behavioral, which is only the final common pathway, and didn't have a chance to really understand that a child that is 18 months old that is acting the way that Mr. Torres is acting or a child that is three years old that is having the kinds of inhibition -- disinhibition problems, acting-out problems, that this is more neurological than it is psychiatric.

Q And would it be fair to say even broader than possibly neurological and embracing genetic?
A Absolutely.
Q And would it be fair to say then that really the -- the precipitating conditions or the biological that are resulting in what you're now talking about is behavioral?
A That's exactly right. And -- and this is what often occurs where you have these biologically derived symptoms.

They're read as psychiatric. They're -- it's attempt -- you attempt to treat them as psychiatric. The treatments fail.

You have multiple diagnoses; you have multiple medications because nothing's working, and it's because, unfortunately, you're in the wrong basket. You're in the psychiatric basket.

Q And did the records in his early childhood through seven years of age to the extent that all of the experts at the trial level relied upon them suggest that there were failures to really understand and diagnose what was happening in Tony's developmental history?
A This is a -- this is a classic case of a child that has cognitive problems, that express themselves in behavior, and therefore they are looked at as a psychiatric problem.

And there are clues throughout the medical records that speak to this being a neurological problem. But no one

apparently knew what those clues meant.

Q Or undertook to investigate them with what testing was available in 2008.

A Sure. When we look at 2008 we're not even looking at the -- you know, the 20th Century.

And we've got to keep -- it's important to understand that neuropsychological testing -- you know, one of the batteries that has been used for many, many years in neuropsychological testing was first developed in 1948.

So, neuropsychological testing isn't a brand new phenomenon that just came up in the last ten years. It's been available. It's been standardized; it's been normed.

The American Academy of Neurology says that neuropsychological testing is the gold standard in their 1996 consensus paper, said it's the gold standard on brain functioning.

Q And also that applies, does it not, to the more biological investigations particularly as it relates to a person's genetic condition, genome structure and that sort of thing?

A I'm sorry?

Q Testing for those things in 2008 were --

A Yes. They were all -- they were absolutely available.

Q And had this investigation been undertaken in 2008 or somewhat a little before that those things would have been

available.
A Certainly. There's nothing that has been done to date that was not available in 2008.
Q And the evaluation and investigation on what drugs he was processing or what drugs he may not be able to process is a matter of biology again?
A The -- the drugs in which he was processing -- that's a pretty good question. The -- the cytochrome pathways that Dr. Lipman talked about were not as clearly delineated during Mr. Torres' childhood, but by 2008 they were absolutely in place.
Q They were there to be it utilized.
A Oh, absolutely.
Q Okay, sir. Now, I've interrupted you from multiple placements outside the home. I think we really kind of did -- talked about --
A Yes.
Q -- Exhibit -- well, we -- being trial counsel, through Marti Loring presented. And it was in the transcript a pretty good summary of the multiple transitions and the hospitalizations and residential placements of Mr. Torres. You found those significant --
A Yes.
Q -- in the context of environmental review?
A Yes.

Q Okay. How about this last one?
A The development of significant drug and alcohol abuse.
Again, consistent with the self-medication of neurocognitive problems.
What you see with Mr. Torres was that he didn't particularly settle on one drug. You know, nowadays we talk about people that are methheads or people that use Oxycontin. And even though they may dabble in other drugs, they -- that's kind of their drug.
What we see with Mr. Torres was that he used multiple drugs. He used uppers; he used sedatives; he used alcohol. You know, and all of these drugs have an impact on brain function.
I might add however that they have a greater impact on brain function when the brain isn't functioning properly in the first place.
Q Okay.
A And so that -- that creates a vulnerability for abnormal brain function, because if someone has a brain that is already disinhibited and then they in fact, drink -- at least the first phase of alcohol is disinhibition -- then we're getting back to that synergistic relationship.
Q All right. And by disinhibition are you referencing that people are inhibited from certain behaviors by reason of social judgment and that sort of thing? And by

disinhibited you mean that they are no longer restricted in managing and supervising and controlling?

A Exactly right. And we see disinhibition in Dr. Wood's testing when she talked about the -- the Stroop and its difficulty on the Stroop, you know, as well as -- really perhaps even more so -- on the Iowa Gambling Test where he was disinhibited.

He -- he kind of knew that he was going to lose money in this particular debt, and yet that didn't stop him from making that -- that move. And that's the kind of thing that you see where, again, the gate doesn't quite hold, hold him in cognitively.

Q All right, sir. Have we covered environmental?

A Yes, we have.

Q And we're on symptoms then. And you have listed the -- these are the outgrowths for want of a better word or phrase where -- would these be outgrowths of the environmental and genetic familial circumstances that you've already talked about?

A Yes, Mr. Ehlies. And this is -- and this is why you look at symptoms rather than diagnoses, because symptoms cross the bridge between what's going on in the brain and behavior.

When you look at hyperactive, you know, you -- you create a great differential about hyperactivity -- does the

kid have A.D.H.D., you know, does the child have some other type of -- is it just an active child. And so you create these differentials with each one of these.

The child's impulsive. What does that mean? What's the differential? The child is aggressive. That tells you there's something about not understanding social context. Is it just that he's growing up in a home where aggression is modeled, or is there something about his cognitive functioning that leads him to not understand social context and social circumstances? Headbanging.

Q In the sense that you are using -- excuse me -- cognitive functioning in a little broader context than what I'm accustomed to, can you define for us how you are using the phrase cognitive functioning?

A Sure. Cognitive functioning to me is -- or excuse me. Cognitive functioning is a skill that is brain derived. So, it is a skill that certainly starts with some brain functioning, and then as the potential of being either amplified or modified by environmental factors. So, cognitive functioning is something that can happen in the brain.

If you have -- for example, if you see a child that's aggressive, you know, you can think of a number of things -- is this child intellectually disabled, does this child have poor frontal lobe functioning, does this child -- is this

child getting certain medications or -- or drugs that may be causing this aggression, does this child have an infected brain, do they have, you know, streptococcus or staphylococcus infection.

So, in this case we know that there are potentially other viral infections that Mr. -- at least we don't have records of this -- but there's potential of other viral infections that Mr. Torres may have had.

So, you're constantly creating this differential diagnosis and seeing what information fits -- fits there.

Q All right, sir. You've itemized some specific events that we heard about in the record -- the rattling in the crib and as a pretoddler almost at several months of age to the point that it came apart.

And I was very interested and curious to ask you about the last item that you mentioned here, to explain to us what it is that you are attempting to highlight in the developmental history of significance in this case.

A Sure. If I could move back one though.

Q Sure.

A And then if you don't mind.

Q Sure.

A When we -- when we talk about rattling a crib until it fell apart, that's more than a behavior. I mean, that's more than just -- right.

What we're talking about is a type of perseveration. You know, we talked about perseveration earlier. You know, we talked about kind of getting stuck and the ways in which he would get stuck.

And Dr. Wood talked about how on the list-learning task how Mr. Torres got stuck. He kept going -- he kept saying care, care, care, which both said he wasn't aware that he was doing that because that wasn't the instructions. But he continued to perseverate.

So, this -- this rattle-the-crib-until-it-fell-apart is more than a kid just being -- you know, I mean, it's really talking about a lack of awareness, you know, and a real perseveration, a person that gets stuck in a certain behavior and can't get out of it. I just wanted to say that.

Q So, am I safe in assuming that a person so situated is not remaining there necessarily in that condition as a matter of choice?

A That's correct.

Q Okay. And there's some biological feature engaged that is overriding the judgment.

A That's correct. And as a child you don't have -- we're talking about very young. So, you don't really have as much choice control and judgment control. So, we're seeing what is probably a pretty straightforward neurological

phenomenon.

Q Audi came out with a model and the throttle would get stuck in the down position and not recoil back up.

A Exactly right.

Q Is that what we're talking about where this throttle gets stuck?

A Yes, sir.

Q All right, sir.

A The reason undeveloped expressive language is important is because language is a -- obviously a brain function -- both language acquisition, getting language, language usage, how you use language.

And, you know, there are two broad categories of language. There's a receptive of -- receptive of what you hear -- do you understand what comes in, can you receive language and understand it, can you express language in a way that's fluent and adequate and, you know, and helpful. And this is a brain function. This is a left brain function. It is a specific area of the brain.

You often find in children that are premature, that are born prematurely, problems in expressive language development. Often they're able to catch up. That early problem with expressive language development, they're able to catch up. But it is a, again, a soft side. It's kind of something that makes you go, huh, okay. Another something

about the way his brain works.
Q All right, sir. We move on into then the impact of these particular symptoms. And as I understand it, is it fair to say that you don't consider these behaviors necessarily psychiatric but more organic and brain driven?
A Yes.
Q The phrase I think you defined for it was cognitive functioning.
A That's right. The -- what you get are behavioral or psychiatric manifestations of cognitive functioning.
Q All right, sir. Let's just go in then to that criteria.
A So, the impact, obviously, are neurodevelopmental. You have someone who's brain is not developing in the same way -- as Dr. Wood noted -- who's not developing in the same speed, who has problems in his brain, who has by -- because he has problems in his brain he has problems catching the things that allow us to grow developmentally.

He has problems responding in ways that allow -- that allow him to grow developmentally; he has problems interpreting things in the ways that allow him to grow developmentally. And that's exactly what we see. That impacts the social and interpersonal relationships.
Q All right.
A And it creates -- and this is where it often turns into

psychiatric symptoms. It creates emotional problems. These are kids that act out.

Q Okay.

A These are kids that get depressed. You know, these are kids that, you know, become -- and not in each and every case, but certainly with this kind of brain dysfunction they become aggressive. All right. But it also shows up in cognitive ways, and that's what we see in Mr. Torres, and often.

And the testing that was done kind of throws it off because, you know, he didn't do too poorly in school. I mean, they -- they thought at one time -- they said, well, you know, he can -- he can be on the honor roll if he just tried a little bit harder.

All right. So they -- they said this these things that really kind of mitigate the fact that his brain isn't working properly. But, in fact, the parts that didn't work just don't work. The parts that did allowed him to read okay, allowed him to do math pretty well, you know, allowed him to do some of that academic stuff. But those aren't the parts that control the day-to-day functioning, the disinhibition, the impulsivity, the misunderstanding of social context.

Q All right, sir. And is that embraced within the concept of self-regulation?

A Self-regulation is fairly specific here, and it does embrace the concept of self-regulation, but self-regulation is what all of those lead to, impairments of self-regulation.

Q Stuck with throttling full bore.

A Right.

Q All right, sir. You mentioned -- and I think you utilized in your assessment -- certain particulars that I want to get at.

He had a history at one time of running a fever that was very high.

A Right.

Q As I understand it, the records reflected something like 106 degrees.

A That's correct.

Q And was that significant in drawing your conclusions?

A That's a very difficult one because children tend to have high fevers.

So, I looked at that, and I noted that his fever was 106. Usually before the age of three or four -- I know this sounds pretty crazy -- parents, don't -- you know, don't gasp when I say this -- but children can have fevers that high. And the reason is because the regulatory systems that control temperatures in children are not fully developed yet.

So, a child can have a temperature that high and it not necessarily reflect impaired neurological functioning in the same way that a child can have what are called febrile seizures, not the kind of electrical activity that Mr. Torres has. But they can have a high temperature; they can have a seizure; and they can actually be okay.

So, I looked at that. And, again, I include that in my differential. I didn't think that it was particularly relevant.

Q Okay, sir. School history I think you've reviewed.

A Yes.

Q All right. And what was significant in that regard?

A Again, that he was able to do relatively well in school and kindergarten for his grade. He got B's and C's. You know, we see a decrease in that academic functioning, but I think this was a real problem that people couldn't quite figure out that, you know, Mr. Torres was able to do reasonably well in some academic classes. It was his behavior, that it was really this kind of impulsivity disinhibition that disrupted his academic problems.

Q All right. Taking you to the next slide.

A Sure. And I think we've talked about this.

Q Yes. We were starting actually on what I think is 22, and we've sort of covered the environmental.

A Oh, okay.

Q These are hot lutten [sic] items that were in the medical records that were referenced by you, I think.
A Right.
Q And of some significance to your -- your opinions in the case.
But I think you've covered just about every one in there except for the M.R.I. You were promising us a little more information on what was in the M.R.I. and discounted at the trial.
A Yes. The M.R.I. -- and I'd like to speak just quickly about the tension headaches.
Q All right.
A Mr. Torres described headaches all of his life. They are described in the record as tension headaches.
The types of headaches that Mr. Torres described are not tension headaches. He described them very clearly as being on the left side.
Tension headaches are caused by a diamond shaped muscle in the back of the -- in one's back called the platysmas. And that muscle shrinks. And when that muscle shrinks under tension it pulls your scalp and it causes tension headaches.
What he described is a very specific type of localized headache in the left part, left side back of his brain that at times can -- that can go to other parts of his head. That's -- and he's had it since childhood.

So, that is not a tension headache. And what -- and that relates to the -- to the angioma, the finding of the angioma.

Q All right. And is it significant where -- what -- and I think you need to tell us. What is the organic structure of this particular mass, or what are we talking about?

A Sure. Dr. Self described a -- an angioma. And what an angioma is is it's a collection, typically a collection, of fluid.

What he described was a hemangioma. And hem is blood. So this is a collection of fluid in the left occipital lobe of Mr. Torres. Hemangiomas are typically congenital, meaning they were there at birth. They are -- hemangiomas are lakes of fluid.

When you get brain developed, along with that comes blood vessel development. And the blood vessels are supposed to develop in a certain pattern so that they can feed blood to all of the parts of the brain.

And as they feed that blood to all parts of the brain that nourishes those parts of the brain and allows the brain to function normally.

So, it's like having a lake. When you have a hemangioma it's like having a lake of blood rather than rivers of blood. And that lake of blood in the brain does not feed the parts of the brain that it should be feeding

and, consequently, those parts of the brain don't work properly.

And what we see in the M.U.S.C. records are actually very interesting tests of that part of the brain that were done when Mr. Torres was around seven years old, as I recall it, specific tests for that, for problems in that part of the brain. And we'll talk more about that in the next line.

Q All right, sir.

A We talked about this. Okay. Angiomas are typically congenital. They're really not caused by injury in most cases.

They -- you can get bleeds when you've got brain injury that can have the same impact, but the difference about a hemangioma is that it is more commonly enclosed as opposed to if you have a traumatic brain injury the blood vessel has been broken, and so people bleed into the brain. This is not a bleed. A hemangioma is not a bleed into the brain. It's a sack in the brain.

Q Isolated and contained?

A Isolated and contained.

Now, we have to keep in mind that the brain is a closed system. And the skull encompasses the brain. So, there shouldn't be anything else in there. And when there's something else in there like a sack of blood that at this point probably by the time they -- they -- he was three or

four that blood had dried and hardened. You've got a big lump in your brain that shouldn't be there. What does that cause? It causes headaches.

Q Okay.

A Causes headaches.

Now, more important -- I shouldn't say more importantly -- but also those -- those parts of the brain that should be fed by that, those rivers of blood, are not being fed, and so they don't function properly.

And Shemainland [sic] recognized the importance of these problems in a paper in 1998. And that's exactly what we see in Mr. Torres, problems with the back of the brain, the cerebellum. If you look at Dr. Schwartz-Watz's report she describes this angioma in the left cerebellum.

The cerebellum is the part of the brain that controls several function -- functions. One of them that's more commonly known is motor function. The cerebellum is that part of the brain that controls motor function, and in that it controls how well a person can what we call tandem walking, how well they can hold their balance.

It controls how well they can walk as a child without falling from one way to another. It also controls their ability to do what we call fast alternating movements.

So, you might ask a person to (motions by witness) or (motions by witness) or to do some type of fast alternating

movement, and their ability to do that is dependent upon having an intact cerebellum.

Now, problems in the left cerebellum are different than problems in the right cerebellum. Problems in the left cerebellum also create problems in executive functioning because there are neuro -- there are connections between the frontal lobe and the cerebellum.

You know, earlier when Dr. Wood was -- was talking we talked about the fact that -- or she talked about the fact that the eyes are in front when you're trying to orient where you were. The eyes are in front. But the part of the brain that controls vision is in back.

The same thing is true with executive functioning. The frontal lobes control many aspects of executive functioning, but there are neuro connections that go all the way to the back of the cerebellum.

And when -- when the left side in a specific area is impaired you get what are called cerebello cognitive affective syndrome. You see impairments in one's ability to weigh and deliberate. Really the most common thing you see is disinhibition, impulsivity.

And so when I saw that he had this angioma in the left cerebellar part of the brain, it speaks to him having the emotional problems. But what I wanted to see was did he have the motor problems as well.

And I think if I can go the next slide.

Q Sure.

A There we are. Early in his life for some reason that I still can't quite -- I can't quite understand -- there was some doctor that did specific types of testing with Mr. Torres as a child.

They did tandem walking; they had -- they noticed he had problems with rapid alternative movements. They also noted he had problems with ataxia, but I think that was probably at age seven if I recall. And ataxia is balance, being able to kind of stand up.

You know, these are much like the field sobriety tests, right, because alcohol can affect the cerebellum. So, when they -- when they would have a person stand, put their legs together, put their hands by their side, close their eyes, because eyes orient you, and to see if you sway from one side to another, that's the kind of thing that the cerebellum would test.

And here we see as a child Mr. Torres had these kinds of problems. That tells you that that angioma is real and that, in fact, he had problems in that cerebellum.

Q And all of these things that you've been mentioning are in very early childhood, seven and earlier, is that correct?

A That's correct.

Q So those -- that -- that would be a time where a child

wouldn't have any secondary gain kind of initiatives to initiate behaviors that weren't driven by more material circumstances, is that correct?

A Yes, sir.

Q Okay.

A So, we've talked about this, the cerebellar cognitive affect syndrome, deficits in -- by cello neurological tests.

We want to do a neurologically -- deontological examination.

I might add that in my neurological examination he continued to have problems with rapid alternating movements. I couldn't do standardized -- I couldn't do tandem walking because he was in chains. But he reflected still some of these soft neurological signs.

He had problems with what we call a go/no go test. And a go/no go test is when you have a list of letters and you tell him -- you tell the person that every time they hear an A they should tap. And so then you start to read these lists of letters, and every time they hear an A they should tap.

He had problems with that bilaterally, with both hands with greater on the right. Why greater on the right? Because his brain impairment is on the left.

And so he had problems with -- again, a sign of disinhibition. He had problems with no/go no testing. We

see -- he had problems with rapid alternating movement.

He had another -- he had problems with what we call graphesthesia. Graphesthesia is being able to recognize something that is written on one's hand, and typically numbers and letters.

So, you have them close their eyes. You have -- you'll write an eight or a seven or a six. You'll ask them what it is.

It seems very simple, but it's a very complex neurological test, because they have to feel it. They have to recognize that it's a number. They have to identify the number, taking it from one side to the other across the corpus callosum. And they have to be able to express to you what it is. He had difficulty with this. Again, a sign of cerebellar impairment.

Q All right, sir.

A We've -- we've talked about that.

These are the kinds of problems you see, neuropsychiatric problems you see, in cerebellar disorders.

You see problems with attention; you see problems with distractibility; you see problems with hyperactivity; you see problems with compulsive and ritualistic behaviors.

You remember, again, we're talking about the banging on the -- pulling on the crib until it came apart, a ritualistic behavior.

We see problems with impulsiveness and disinhibition, unpredictability, often feelings that are inconsistent, what we call inconcluse feelings.

We see anxiety, agitation. Again, stereotypic behavior, self-stimulating behavior, the rocking. You could see a logical -- and, you know, you don't see each and every one of these. This is a kind of a list of potential symptoms that can occur. You see perseveration on the negative-symptom side.

So what you really see here are symptoms that if you didn't think of it you would assume that they were psychiatric. If you didn't know that there was something going on in his brain you would assume that these were really a psychiatric syndrome. Many of these fit bipolar disorder. Many of these fit -- you remember at 18 months where he was diagnosed with A.D.H.D.

Q Yes.

A Many of these fit -- inattentiveness, distractibility, hyperactivity. These are all symptoms of A.D.H.D.

But what we do know is that the neuropsychological testing, the best test of brain function, are consistent with the medical records that talked about impaired brain function, are consistent with the M.R.I. report in 2008.

Q How about the next slide on the neuropsychiatry, the cerebellum?

A We -- yes. I'm sorry. We talked about this. I'm jumping ahead. I apologize for that. Okay.
Q I noticed though that you had four, possibly five, slides attributed to research of Showman Hannah [sic].
A Yes.
Q And had drawn conclusions of significance from this pool of blood in the brain of Tony Torres, is that correct?
A Yes.
Q And am I to understand then by doing that you found much more significance to that anatomical consequence of his birth congenital development than did Dr. Schwartz-Watz at trial?
A That's correct.
Q Not to falter, I believe you did see a curiosity that prompted you to investigate what the M.R.I. finding was, and this is what you came up with.
A Well, I have clients that have this.
Q Okay.
A So I already had a body of knowledge about cerebellar disorder.
Q So it was significant to you based on your clinical experience.
A It was based on my clinical experience and based upon my, you know, understanding of how this can be detected. If it -- if it had been an angioma on the right-hand -- on the

right side it would not have made a difference.
Q And you did not see anything in the presentation of the trial materials that suggested there was a significance made of the fact that this artifact is in his brain.
A It's not an artifact.
Q This condition.
A This condition, yes.
Q In his brain.
A Right, because an artifact is something that does not have neuropsychological meaning.
Q All right, sir. And I brought you up now to Prader-Willi.
A Sure. You know, what we see -- and Dr. Rary I'm sure discussed this -- are symptoms of Prader-Willi -- the obesity that is really a function of the hyperphasia, the dysmorphic features, the cryptorchidism and the micro, small phallus, behavioral problems. There are some of these that are brain related, and I'd like to speak to that if I may.
Q All right.
A Okay. The hyperphasia, which is actually called the Klüver-Bucy syndrome -- K-L-U-V-E-R B-U-C-Y -- the hyperphasia, which really is the Klüver-Bucy syndrome, is a specific problem of the left temporal lobe.
Now, it's the hyperphasia that obviously leads to the obesity, now, because we're not describing someone that just

likes to eat. His mother describes someone that -- that she just could not keep away from food.

And what you see when you looked at the literature both in humans that have had part of their left temporal lobe, the front, the anterior, the front part of their left temporal lobe -- when that is taken off they develop this overwhelming appetite because the control center, the locus L-O-C-U-S ceruleus -- C-E-R-U-L-E-U-S -- the locus ceruleus is the control mechanism for the -- for appetite, and it's impaired, and when it's impaired you get hyperphasia, you get obesity.

Now, the reason that was important to me is because right in front of this area that controls hyperphasia is the area that controls expressive language, Broca's area -- B-R-O-C-A. Broca's area is right in front of that. It's completely different than the cerebellum.

So what we are now identifying are multiple areas in Mr. Torres' brain that don't work quite right. We know through neuropsychological testing that his frontal lobes don't work right correctly. We know from the medical records that his cerebellum doesn't work quite correctly. We know because of the anatomical locations of some of the symptoms of Prader-Willi that there are other parts of his brain that just don't work quite right.

Q All right, sir.

THE COURT: How much more direct do you have, Mr. Ehlies? We've been going on two hours here.

MR. EHLIES: I think -- I think a break would be appropriate, Judge, and I think we have four more slides.

THE WITNESS: Yes, sir.

THE COURT: Okay. We're going to take a break. We'll take 15 minutes.

You can step down. Don't discuss your testimony during the break.

THE WITNESS: Thank you, Your Honor.

THE COURT: Fifteen minutes.

(Whereupon, a recess was taken.)

THE COURT: All right. Mr. Ehlies.

MR. EHLIES: May it please the Court.

BY MR. EHLIES

Q Dr. Woods, I would ask that you take a look at the remaining slides here and see if there's anything in particular that you would like to bring to the Court's attention before we go to the final slides expressing your conclusions about this case. I think you had conclusions in clinical setting and forensic setting.

A Yes. Let me just quickly talk about the psychological diagnoses.

Q All right.

A You see here that he had a number of diagnoses --

atypical bipolar disorder and impulse control disorder, disruptive disorder, and not otherwise specified, oppositional defiant disorder, conduct disorder, intermittent explosive. I think we -- no. That's intermittent explosive disorder and A.D.H.D.

And when you look at each of these diagnoses what you see are commonality of symptoms -- impulsivity, distractibility, difficulty weighing and deliberating, difficulty understanding social circumstances and social contacts. And these are the symptoms that are absolutely consistent with the brain impairments that we've talked about.

So, rather than look at the diagnoses once you extract the symptoms you see that they are very consistent with his neurological function and they're consistent with his neurological functioning from the age of 18 months.

Q All right, sir. And that is a pretty early onset for this degree of severity in symptoms. Do you agree?

A And very early onset for it to be a psychiatric disorder.

Q Okay, sir.

A Right. And then the same -- in the same vein. What you see him -- he's treated with Mellaril, an antipsychotic; Tegretol, an antiseizure medicine; Ritalin used in distractibility in A.D.H.D.; Depakote, another antiseizure

medicine; Imipramine, another early, tertiary antidepressant; Vistaril, really a sedating agent, what we call a cholinergic agent; Lithium for specific -- Lithium only has one use, and that use for bipolar disorder; Klonopin, a benzodiazepine that's used in anxiety; Aldomet -- Aldomet is actually similar to what people take today for -- it's an -- it's really a blood pressure medicine, but it's used in performance anxiety.

Q Pianists.

A Huh?

Q Pianists.

A Yeah, exactly. Trytophan; Eskalith, which is another form, a longer-acting form, of Lithium.

So, you see this potpourri of medications that really speak to what are we treating and why isn't it working.

My clinical conclusions. First, that he has a cognitive disorder not otherwise specified. That would have been the diagnosis in 2008 under the DSM-IV-T-R. Under the DSM-V which came out April 18th of last year it would be a major cognitive disorder. This is documented by history of abnormal E.E.G., documented by a report of an abnormal M.R.I.

And we have neuropsychological testing from both 2008 and currently, but we also have symptoms that were in the medical records that reflect neuropsychological signs of

ataxia for alternating movements, things that are considered consistent with the second diagnosis, the cerebellar cognitive affective syndrome and the Prader-Willi syndrome.

Now, the important thing about these conclusions is that really only one of them is -- well, none of them are psychiatric diagnoses.

The cognitive disorder is filed in the DSM, but these are really -- these really reflect neurological impairment, neurocognitive impairment. And their manifestations as we saw on the diagnostic slide are symptoms that look psychiatric.

Q All right, sir.

A Diagnoses are not as relevant symptoms of what characterize Mr. Torres' neurocognitive, his history -- disinhibition, decreased functioning in new, novel and stressful circumstances, poor understanding of responsible, understanding of social contacts, impaired decision-making secondary to impaired executive functioning consistent with both frontal and occipital lobe impairment.

Q Which is documented by Dr. Wood.

A Exactly. Each of the symptoms that we see have been ongoing, neurologically based and lifelong starting at the age of 18 months, and each of these symptoms were present at the time of the offense.

Q Could I interrupt you one second? I'm sorry.

A Yes.
Q Starting at age 18 months you're referencing symptoms manifesting to the point that they needed to be treated and came to the attention of the medical providers at age 18 months.
A That's right. They were so significant.
Q Actually, the genetic component starts in the ovarian lottery, I think we heard.
A That's -- that's right. A very good term. Yes.
Q Thank you.
A They were present at the time of the offense, and they're extreme, and they really reflect extreme emotional distress.
Q All right, sir. In conclusion, I'd like you to run back for me to the referral question.
A Sure.
Q And in part two of the referral question you listed some elements, genotype elements, or a collection of the elements. And we'll read those conditions affecting his ability to control impulses, effectively weigh and deliberate decisions, learn from experience, understand and process information and understand social context and other context in everyday living.
A Yes.
Q Do those conditions also -- are they found in the

subset of intellectual disability, mental retardation?
A They can be, that's correct.
Q So they would be similar in the -- to those expressed in the Supreme Court in the Atkins vs. Virginia decision.
A Yes.
Q Thank you. Answer any questions counsel may have.
A Thank you.

CROSS-EXAMINATION

BY MR. ZELENKA

Q Dr. Woods, we've been in many cases before, haven't we?
A Yes, sir, we have.
Q And have you done an extraordinarily high number of capital cases in South Carolina compared to your normal practice?
A I think I've probably done maybe six or seven cases in North Carolina.
Q Okay.
A That's what I recall.
Q How many in South Carolina?
A I mean South Carolina. I apologize. I'd say under ten, but I was thinking it'd be six or seven.
Q Okay. Yet you said, if I understood correctly, you only testified normally in about eight percent of the cases that you've been involved in.
A That's correct.

Q But in South Carolina that's much, a much, higher percentage of capital cases.
A That's -- that's correct, although I would say that South Carolina is a -- a bulk of the cases that I've testified in.
Q Pardon me?
A I said South Carolina is a significant number of the cases I have testified in.
Q Okay. Well, so the eight percent of the types of cases that involved -- been involved in South Carolina required your testimony more? Or how do you explain that dichotomy?
A I think they have been more specific in terms of being about neuropsychiatry and neurocognitive. So, it really has to be more of referral questions that I've been asked.
Q And in this case, like the other cases, you were looking for an ecological validity to what had occurred and what had been found in a particular defendant's case, is that correct?
A Yes.
Q And as you testified, the more information you get the better for completing your assessment or answering your questions.
A That's correct.
Q Did I understand it correctly that you did not review materials concerning the facts of the crime itself?

A I reviewed the facts -- I reviewed materials concerning the facts of the crime, but not extensively.
Q Okay. And when you met with Mr. Torres did you discuss with him the facts of the crime?
A I discussed his mental state at the time of the crime in terms of he had been drinking, he had been up, not sleeping. He would not discuss with me the specifics of the crime.
Q Okay. So he didn't discuss what role, if any, he had in that particular case.
A That's correct.
Q Okay. Yet I thought one of the matters you had talked about as far as what your assessment was supposed to do was to determine what you would expect would happen on the street.
A Yes.
Q And was what happened to the family -- the Emery family in this case -- what you would expect to happen on the street with the assessment you did of Tony Torres?
A I think there is that potential --
Q Okay.
A -- given his brain impairments.
Q All right. And as I understood, a weight of your testimony was that Mr. Torres was not treated correctly as a child.

A Correct.
Q And as you read the mitigation presentation at the trial, that was a theme that the defense team was putting forward in their case, is that not correct, that he was not treated correctly as a child by his family, by the doctors who were assessing him and more could or should have been done?
A I certainly think there was things and more could or should have been done.
Q When you reviewed the mitigation presentation that was done in this case did you have both the direct examination and the cross-examination?
A Yes.
Q Dr. Schwartz-Watz and the others?
A Yes.
Q Okay. In your assessment one of your forensic conclusions was that he was -- each of the symptoms that you found -- impulsivity -- well, explain what symptoms you found again. I don't want to put words in your mouth.
A Sure. The impulsivity, the impaired understanding of social situations, the difficulty weighing and deliberating, learning from experience.
Q Okay. And those were present with Mr. Torres at the time of the crime.
A Yes.

Q And that -- it impaired his ability to conform his conduct to the requirements of the law.
A Yes.
Q And that's the extent of your opinion on conforming your conduct to the requirement of the law.
A That's correct.
Q Impaired at the time.
A That's correct.
Q Okay. Yet can an individual that doesn't suffer under the -- the neurological brain dysfunction that you have found -- could another individual still have all of those symptoms?
A Another individual could have those symptoms.
Q Okay. Even though they didn't suffer under brain impairment. There would be impulsive, distractive, unable to recognize the correct social situations, the symptoms you described.
A They could have those symptoms. The difficulty, Mr. Zelenka, is to have all of those symptoms at the same time or, you know, within -- would make it very, very difficult for them to have them and not have some type of brain impairment.
Q Okay. You opine that he suffered under -- I have it here in front of me -- cognitive disorder not otherwise specified as would be described in 2008.

A That's correct.
Q Is that correct? Cerebellum cognitive affective syndrome, which is something that's not in the DSM at the time. And where did that designation come from?
A It's a neurological syndrome rather than a psychiatric syndrome, and it was developed by a Dr. Shermainman [sic] and Dr. Sherman at Harvard. They really started this book around 1985, but their first paper was published in 1998.
Q Okay. And you supported and gave a conclusion that he suffered under Prader-Willi syndrome.
A Yes, but that's based upon my review of Dr. Rary's material.
Q Okay. But you have defined yourself as an expert in developmental disabilities, correct?
A I -- from a neuropsychiatric point of view, that's correct, but not from a genetic point of view.
Q Okay. And is Prader-Willi syndrome a situation you have had with any other clients in your life?
A I think I probably have had two or three Prader-Willi syndrome clients.
Q Okay. And do you know how those Prader-Willi syndrome clients -- how it was determined they suffered under that particular disorder?
A Well, the most common way is through clinical examination and determination.

You could also look at it through genetic testing. The genetic testing is not as reliable as a clinical evaluation.

Q So you disagree with the Prader-Willi Syndrome Association of the United States on the best way to make a determination of the existence of Prader-Willi syndrome?

A Well, if that's what they say I would respectfully disagree, because when you look at the genetics it's not -- it's not so well developed that you can make -- you can always make a definitive diagnosis just on the genetics.

Q So you disagree with their approach that the methylation testing and molecular testing that would be done and, in fact, was done on this case is the preferred method for making that determination and that it's 99 percent accurate in resolving that situation?

A I think it's -- I think the -- unless I'm missing, I think that you're correct in that it is 99 percent accurate. However, that does not mean that there can't be an expression of Prader-Willi outside of that genetic finding.

So, it's ninety -- when you find it you've got it; but when you don't find it, that doesn't mean you don't have it.

Q That there's a one percent?

A That's -- I'm sorry. That's not how I read that literature. The way I read that literature is that the 99 percent finding makes for a definitive diagnosis. But you can also make the diagnosis from a clinical perspective.

Q Does that -- you were concerned about the accuracy of that diagnosis when the genetic testing that is generally relied upon by developmental disability genetic experts in the area --

MR. EHLIES: We object to that. It's outside the expertise, and there's no factual basis that it is generally accepted by the developmental sector.

MR. ZELENKA: Well, if I can finish my question I think he will be able to answer it.

Q Does that give you any concern about your assessment with information that that testing did not support the conclusion itself?

A I think that I would have to answer that by saying I'm waiting for genetic testing to be more valid before I could ascribe such certainty.

You know, what we have with genetic testing now in many of these syndromes and developmentally disorder is we have reliability as opposed to validity.

Reliability means if you get genetic testing here and you get genetic testing there and you get genetic testing there, then they all look the same. But that doesn't mean that they all are valid.

And the genetic testing in Prader-Willi has not reached that level of validity that I would choose to make that without the clinical findings.

What I'm saying is if you had someone that had Prader-Willi and it was only by genetic testing with no clinical symptoms, I would still be concerned about whether they had it.

Q Okay. But Prader-Willi syndrome is addressing whether there's an error in chromosome 15.

A Yes.

Q And what other information could you have other than the molecular testing that there would be an error in chromosome 15?

A You would have the genetic expression of that error.

I mean, I'm not a geneticist, so I don't want you -- I don't want to get too -- too deep into this. But the issue is having an error in chromosome -- in that area doesn't necessarily manifest itself the same way every time. And that's the problem, and that's why you've got variations in all of the genetic syndromes.

So that's the problem with genetic testing, is that the manifestation, the expression, doesn't always correlate with the genetic finding.

Q Okay. You testified essentially the more facts, the better.

A Yes.

Q And you assessed the defendant in 2012 and 2013.

A That's correct.

Q Or 2013 and 2014.
A I think it was 2012 and 2013.
Q Okay. And you made an expression when discussing Prader-Willi about the defendant's obesity. Is that based upon his present weight, or how did you make that assessment?
A It was based upon his early weight as a child, not present.
Q All right. And were you aware that his weight at the time of the arrest is much different than it was today?
A I would not be surprised. I wasn't -- I'm not sure I was aware of that, but I would not be surprised considering his drug use.
Q Okay. And why would that be?
A Well, because not only the drugs that we normally think of -- methamphetamine, etc. -- but, you know, he was -- my understanding is that he was drinking pretty heavily, he was using Klonopin, which is a -- it was an antianxiety agent, which actually also affects weight. And he had been sleepless for significant periods of time.

So, he was living a pretty -- he was -- he just -- true, granted, he'd just gotten out of incarceration relatively recently. But he was living a pretty tough life.
Q Okay. And around the time of the crime what was the extent of the drug use that he was taking roughly days

before the killings?
A I don't recall.
Q Or the day of the killing.
A Right. I don't recall, sir. I do remember Klonopin and alcohol, but I don't recall the exact temporal relationship.
Q Okay. Do you recall reviewing the testimony of the psychopharmacologist, Dr. Alex Morton, during the trial about the amount of drugs he was advised the defendant was taking within a day and hours before the incident?
A I -- I'm sorry. I don't.
Q Okay. Do you recall in your review of Dr. Morton's testimony and your discussions with the defendant that there was what you recall as a striking difference between what was presented at trial and what was advised of you by the defendant?
A I don't recall what was presented at trial. If you would refresh my memory, I'd appreciate that.
Q Three to five grams of meth, 12-pack of alcohol, a liter of vodka, 19 to 20 milligrams of Klonopin.
A I remember the Klonopin; I remember the alcohol; I don't remember the -- the meth.
Q Was that consistent with what the defendant had told you on that day?
A I think the Klonopin was, but I don't -- I don't

remember the methamphetamine. I know it was an extraordinary amount of Klonopin.

Q Okay. And his drug use generally at that time -- smoking cigarettes, two packs, beer, marijuana from age 15, cocaine.

A Yes.

Q Crack cocaine, Ecstasy.

A Yes.

Q And his drug of choice being L.S.D.

A I remember him saying that, yes.

Q Would those drugs or any of those drugs have a long-term effect on the brain impulsivity, inability to perform executive functions?

A Well, it's interesting 19 -- the amount of Klonopin he had would put -- he says he -- he states that he had -- it was an extraordinary amount of Klonopin, and would, in fact, disinhibit rather than put someone to sleep.

Certainly, that those amount of drugs could create many of the symptoms that you -- you know, that we're describing in terms of difficulty weighing and deliberating.

The other problem however is that they would create another phenomenon, which is a delirium. You know, we're talking about a drug-induced delirium when you're talking about that level of drugs. And a drug-induced delirium impairs consciousness in ways that his cognition would not,

his impaired cognition would not.
Q Okay. Could it have any long-term effect on the functioning of the brain, that extensive drug use?
A Some of it could. We -- we know for a fact that the worst drug on the brain is alcohol. We always like to think of it as illegal drugs, but, in fact, alcohol has a far greater impact than either cocaine.
Methamphetamines can have -- methamphetamine can have significant impairments on the brain as well.
The difficulty with drugs like methamphetamine is that they have global impairments. They don't necessarily impair specific areas of the brain.
And -- and what we see in the review of the records is that there was specific areas of the brain that were identified as impaired in his childhood.
Q Okay. But the neuropsychological testing that was done was done -- well, at age 27 and age -- his present age, correct?
A Yes.
Q And that neuropsychological testing would reflect situations which could have been affected by the drug use also, is that not correct?
A Some. We'd have to -- we'd have to really walk through the drugs separately.
It's interesting, because one think -- would think that

cocaine is a drug that has a long-term impact on the brain. The literature hasn't really shown that to be true.

Methamphetamine however certainly has a long-term impact on the brain.

Marijuana is more difficult because even though there are multiple studies issued -- no, marijuana has not been standardized. So the literature on marijuana is really problematic because different research organizations and groups use different standards. They haven't been able to standard -- standardize the marijuana.

Certainly, as it related to the alcohol, the alcohol long term could have an impact on the brain.

However, what we see is that he's got this protective factor which is up until the time he got out of prison, he had two stints in jail at which time his drug use was probably much more limited than when he was out.

So it's not like we have this long-term period where he, you know, used drugs over the course of seven or eight or ten years, that that would im -- that would create the kind of impairments you're talking about.

Q What about L.S.D.? Does that have any long-term impairment on the brain?

A L.S.D. actually does not impair the brain as greatly as it damages the chromosomes.

Q Explain that.

A L.S.D. actually can -- and this is usually in the developmental years like 11 or 12.

It can have a greater impact on not chromosome deletion, because that's, you know, purely congenital, but it can actually down-reach chromosomes in ways that other drugs do not. It has a less of an impact on neurological functioning.

Q You reviewed Dr. Schwartz-Watz's report.

A Yes.

Q And the history and the assessment that she had done in this case, correct?

A Yes, I did.

Q And when she summarized Dr. Sults's [sic] report is it correctly noted that it revealed the lesion on the left cerebellum?

A Yes.

Q And he assessed or it was reported that he had assessed to her that it was not effected towards what was going on in this case but would reflect ataxia, correct?

A Yes.

Q And you pointed out that that part of the statement was correct.

A That's correct.

Q All right. So the information that you're questioning as I understand it that she did not assess or recognize was

that it could also possibly have caused some dysfunction in the executive functioning.

A That's exactly right. And if you -- if you didn't look at that history of ataxia and that current neuropsychological testing because it was -- his neuropsychological testing was relatively limited at that time, it may have been more difficult to put those two together, although all of the information was available.

Q Okay. No support of the ataxia in the record that you saw from one of the earlier hospitalizations.

A That's correct, as well as the hand movements. And there was one more -- Ataxia, hand alternating movements. And, boy, there was one more I'm blocking on.

Q Okay.

MR. ZELENKA: Court's indulgence.

(Pause.)

A Tandem walking. I'm sorry. Sometimes I get stuck. The other one was tandem walking.

Q In the assessment that was done did you ask the defendant about or did you assess individually the defendant's memory?

A I did do a screening test for memory. I don't typically do more than screening tests. I did what Dr. Wood did. I did digital, I mean, a digit span. I did a test of five words at immediate recall, five minutes and 15 minutes.

And he did okay.
Q He did okay.
A Yeah.
Q Explain okay. Did he have memory problems reflected to you?
A Well, you know, I really just tested what we call declarative memory. And in that sense the memory, his memory, was five based upon those screening instruments, the kind of instruments that Dr. Brawley did. They're very -- they're fairly superficial tests for brain functioning.
Q Okay. So why did you do that at that time?
A Because it's part of my battery.
Q Okay. And the battery that you did reflected to you he did not have any current short-term memory problems?
A No, no. They -- they really were much more reflective of these are just screening instruments.

So, what screening instruments really try to do is they try to pick up really bad problems. If you pick something up -- I use a Montreal Cognitive Assessment instrument.

And if you pick up something on a screening instrument you're really worried, but, you know, by and large most people get through them pretty successfully.
Q Okay. So what you determined was this wasn't a really bad memory problem that you were assessing.
A It wasn't -- it wasn't the worst. And that's why I

really reply upon neuropsychological testing to really test memory.

Q At the time you interviewed him did you have Dr. Wood's report, her testing that she had done?

A No.

Q Okay. So that didn't effect, or did the lack of it effect what you did or would have done with the defendant?

A Well, the -- the things that I picked up made me want to have neuropsychological testing done, because the neuropsychological screening that was done at the time of the trial was incomplete.

Q Okay. Incomplete in what way?

A Incomplete in both it was -- it was incomplete in that it did not test a number of domains. It didn't really do a good test of executive functioning. It really did not do a good test of memory. It was a screening instrument much like the screening instrument that I used.

Q Okay. Well, then why didn't you wait for that testing to be done before you met with the defendant?

A Because I always do my own, at least a screening battery. It's just part of my -- it's my clinical practice as well as my forensic practice.

Q And had you already asked for that additional neuropsychological testing to be done before you met with this defendant?

A I don't think I had asked, but regardless of my findings I would have asked.
Q Okay. When did you first expect that there may be a genetic issue in this case?
A Well, I think when I first read the medical records.
Q And the basis for that was because of the hospitalization at age three and age seven?
A That was one. I mean, when -- when -- well actually even before that.

Any time -- and this -- you know, this may be my own bias, so I -- any time that I see an infant having these types of behavioral problems my differential automatically includes neurological problems. That automatically includes genetic problems.

Q Okay. And you would agree that in the 1984 M.U.S.C. hospitalization they noted a potential for genetic problems.
A That's correct.
Q In April of 1984.
A That's correct.
Q And in their assessment they thought it was unlikely.
A That's correct.
Q In reviewing the materials in this case you saw a significant history of the defendant's violence towards others?
A Yes.

Q And you had an expectation based upon that history and your assessment that he would likely -- or continuation of the violence was likely?
A I did not make an assessment as to ongoing violence.
Q Okay. Because it wasn't part of your referral question?
A It was not a part of my referral question.
Q Is that why you did not do it?
A That was probably the specific reason why I did not do it.
Q Okay. Were you prevented -- presented with any other test data which was inconsistent with your opinion, your findings, your conclusions in the course of your work?
A I don't recall any other test data. I don't recall any testing in the -- during the trial. I don't recall any testing other than Dr. Brawley's, you know, limited neuropsychological testings. I don't recall any genetic testing; I don't recall any neuropsychological testing.

So, I don't -- I can't think of anything else, and except for that one record that said they didn't feel as though -- there's actually two syndromes as I recall. I don't recall anything else that was inconsistent.
Q Okay. Since the trial were you aware of any testing that was done that was consistent or inconsistent with the conclusions on genetic testing?

A Other than what we discussed earlier, I don't know of anything else.
Q The one Prader-Willi test?
A Yes.
Q You weren't provided other information concerning genetic testing that may not also have been inconsistent with those conclusions? You didn't --
A Well, I --
Q Answer that question.
A I know that Dr. Rary did other testing. I really was not familiar with it, so I didn't draw any conclusions about that.
Q Okay. And would that be on the 22q11 --
A Probably so.
Q -- adage?
A Yes.
MR. ZELENKA: Court's indulgence one moment.
(Pause.)
Q Just a clarification.
A Sure.
Q Did the defendant decline to talk with you about his meth use?
A I don't recall meth use, and I apologize. I don't have my records here. So, I don't know whether -- he was fairly open about his drug use. I just don't recall him talking

about methamphetamine.
Q Okay.
MR. ZELENKA: Thank you, Your Honor. I have no further questions.
A Thank you Mr. Zelenka.
REDIRECT EXAMINATION
BY MR. EHLIES
Q Dr. Woods, you were asked about the meth, methamphetamines, and other drugs -- Klonopin, alcohol.
A Yes.
Q L.S.D. After he had been released from the state functions and treatment.
A Yes, yes.
Q And that sort of thing. Were you aware of those facts before you drew the conclusions that you expressed to this Court about Tony Torres' condition?
A Yes. As I said, I don't recall him describing the methamphetamines, but other drugs I was made aware of.
Q So the opinions you hold did incorporate knowledge of those particular facts.
A Oh, absolutely.
Q And that when you've been asked about those, does that alter your opinions in any way you that you've expressed here today?
A No.

Q Thank you so much.

THE COURT: You may step down. Thank you.

THE WITNESS: Thank you, Your Honor.

MR. EHLIES: I presume he can be released.

THE COURT: He may be excused.

(Whereupon, the witness was excused.)

THE COURT: May I see the lawyers just a minute regarding scheduling?

(Bench conference held off the record.)

THE COURT: Court's in recess until 9:30 in the morning.

END OF PROCEEDINGS APRIL 24, 2014

(Proceedings April 25, 2014)

THE COURT: All right. Are we ready to proceed?

MR. EHLIES: Good morning, Judge. Thank you, sir. Mr. Reckenbeil.

THE COURT: Okay.

JOHN G. RECKENBEIL, having been first duly sworn, testified as follows:

DIRECT EXAMINATION BY MR. EHLIES

Q What about water? Would you care? I can get you a cup.

A I think I've got some back here.

THE COURT: There is a pitcher by the witness stand.

Q Is there a cup back there?

A Yes.

Q Great.

A Thank you.

Q And would you give us your full name for the record, please?

A John Reckenbeil, J-O-H-N, middle initial G, Reckenbeil, R-E-C-K-E-N-B-E-I-L.

Q Mr. Reckenbeil, I believe you're practicing law here in Spartanburg.

A Yes, sir.

Q And when were you admitted to the South Carolina Bar?

A November 13th of 2000.

Q And since that time you've been employed, engaged in the practice of law?
A Yes, sir.
Q And is that a full-time vocation for you?
A Yes, sir.
Q All right. And do you practice in a firm or how -- what is the style of your practice?
A Beginning in 2000 I started off with the Hodge Law Firm, Charlie Hodge here across the street. Then January 1st of 2006 I opened my own practice, Office of John Reckenbeil, and been doing that ever since.
Q And what was the character of your practice up until 2006 at the Hodge Law Firm?
A Predominantly, we started -- well, I started -- excuse me -- with auto accidents, worker's compensation, medical malpractice, then got into criminal defense I would say probably in 2001, and then probably 2002 developed into federal labor and employment law. But predominantly towards 2003 was federal labor and employment law and criminal defense.
Q And in 2006 when you opened your own practice what was the character of it at that point?
A Both federal labor and employment law and also criminal defense.
Q And what is it today?

A Mostly, I would say mostly, labor and employment law, constitutional law, civil defense, contract litigation, and then very few, very few criminal cases.

Q All right, sir. In May of 2007 -- May 11th to be exact -- were you -- had been dealing with a crime that occurred in Spartanburg County against an elderly couple by the name of Emery -- Ray and Ann Emery? Were you involved in that case?

A Yes, sir, I was.

Q And I believe Tony Torres was charged with the murders, is that correct?

A That's correct.

Q And he's present in the courtroom. And do you recognize Tony Torres?

A I do.

Q Tell me how you became involved in this case.

A At that point in time Judge Hayes was the chief administrative judge for general sessions.

There was -- obviously, this crime was extremely publicized. And I can't remember if I started the dialogue or Judge Hayes started the dialogue, but I know that him and I met. And I expressed a willingness to be a second chair in this case if needed.

Obviously, if there was others that were going to be appointed, that's fine. But I expressed an interest, and I

said I would, in fact, be second chair for this case.
Q All right, sir. And in regards to your reference to Judge Hayes, I'll need to clarify for the record, please, sir, which Judge Hayes that would be.
A Yes, sir. Judge Mark Hayes here in Spartanburg.
Q All right, sir. And at that point when you expressed the willingness to serve was the public defender appointed for the defendant Mr. Torres?
A I can't recall specifically, but then my next conversation, obviously, was with Clay. And I don't know if he was appointed right away, but I'm assuming so. But then I spoke with Clay, and we discussed it, and he seemed to be okay with that. And then I know we approached Judge Couch to solidify my appointment.
Q And do you remember whether at the time that you approached Judge Couch the solicitor had served the notice of an intent to seek death?
A Yes, sir. I do believe so.
Q Okay. And at that time had you ever served in any capacity on a capital litigation case?
A No, sir.
Q All right, sir. And had you at that time ever attended any specialized training dedicated solely to the issues of representing capitally charged defendants?
A No, sir.

Q We had testimony earlier from Ms. Hodges about attending at least one dedicated session regarding voir dire and qualifying, death qualifying, a jury. Did you attend that session as well?
A Wracking my brain and going back, I know I attended predominantly criminal defense C.L.E.s going forward from 2002 through about 2006-2007. So I can't specifically recall if there was a capital voir dire section of any of those C.L.E.s, but I don't specifically remember attending the one that Ms. Hodges attended.
Q And I can represent to you and hope that you agree that the generalized criminal defense C.L.E.s do not embrace specific capital issues like death qualification of a juror.
A Yes, sir.
Q So my question is whether you attended any specialized training programs dealing with capital litigation at any level, I mean not just voir dire but any level -- scientific evidence, mitigation evidence, a preservation of the record for review on appeal, any of those things.
A Specifically for the capital portion of it.
Q Sure.
A I would say no, sir.
Q Okay. Did you ask for that from Mr. Allen to be able to -- for funding to be able to attend any specialized training for purposes of honing your skills in the case of

Tony Torres?
A I don't believe I did.
Q We went through with Ms. Hodges -- and I won't belabor the point again -- certain early capital cases from the Supreme Court of the United States which we referred to as SCOTUS. And it starts primarily in their jurisprudence with Furman vs. Georgia, and then quickly after '72 and '76 Gregg vs. Georgia. Are you familiar with those cases?
A I'm sure I've heard of them, maybe glanced over them, but I can't specifically recall them right now --
Q Okay.
A -- what their holdings are.
Q All right. We got into several other cases -- Atkins -- and basically we were using those cases to identify norms for trial-counsel performance. And are you familiar with Strickland vs. Washington at all?
A Yes, sir.
Q And what do you understand about Strickland vs. Washington?
A Strickland vs. Washington I think is our South Carolina case -- may not even be out of South Carolina -- but it's a case usually for the standard of a P.C.R.

Normally there's dual elements where -- putting in just plain language is the trial counsel so ineffective as to fall below the standard of reasonableness and thus prejudice

the accused, the defendant.

Q Okay. Well, if we can pull up United States vs. Chapman we'll take a look at that for clarification because I need for you to answer the questions I'm going to be asking you.

A Yes, sir.

Q You need to have a clear understanding of what the standards are pertaining to capital post conviction relief proceedings.

MS. BROWN: Your Honor, I object. This line appears to be a bit argumentive or summation of a position, a legal argument as opposed to a question.

THE COURT: I sustain that objection.

Mr. Ehlies, I understand there are some legal matters you're going to have to address with this witness, but it's more based upon the facts.

You can argue law to me to argue that he fell below the standard of care -- excuse me -- he fell below the standard of reasonable and effective representation, but simply to go over the law with him appears to me to be something that's more directed to me rather than to him.

I mean, I understand he has to understand what his obligations and duties are in representing Mr. Torres, but I don't want to have him read capital litigation cases here on the record. If that's to benefit me, I can read them

myself --

MR. EHLIES: Yes, sir.

THE COURT: -- or I can listen to your argument as it relates to what he did or did not do in the representation of Mr. Torres.

MR. EHLIES: Yes, sir. The point of asking him to be familiar with the law is to confirm that he knew that standard at the time he undertook the representation and then made decisions that specifically undermined the standard of care as expressed in the norms in A.B.A.

THE COURT: All right. Well, then just ask him the question rather than us reading these cases.

Q Okay. All right. Are you aware through the SCOTUS jurisprudence on capital litigation that certain norms have been discussed and establish that control the performance of capital lawyers?

MS. BROWN: Your Honor, I object. Excuse me. But it seems to be a misstatement of law.

THE COURT: I'm not sure that's a statement. How do you believe it to be a misstatement?

MS. BROWN: Well, if I heard correctly -- and maybe I misheard -- but there seemed to be two standards. And I thought that we had gone in a little bit to A.B.A., but I have an argument that A.B.A. is not an accepted standard. We were going to look at the Strickland standard which

we've already gone over today. So to suggest that there is another standard that is accepted and required would be a misstatement of law under our argument that we would be making at the proper time.

MR. EHLIES: And I'll rephrase the question.

THE COURT: Okay.

Q We're talking about standards for performance as far as judging capital litigation attorneys, and that's articulated in Strickland. But in establishing what the norm is, which is the standard stated in Strickland, SCOTUS is endorsed, the A.B.A.s project for guidelines for performance to establish written norms.

MS. BROWN: I'm sorry, Your Honor.

MR. EHLIES: That's our position.

MS. BROWN: But that is actually the nut of the argument, the legal argument, that we have.

I would submit to you the A.B.A. guidelines are just that. They're guidelines. They're not standards. They've never been accepted by the United States Supreme Court.

There was a recent case -- Bobby vs. Van Hook, I believe -- that specifically said that the standards come from the private organization. They can be looked to, but they do not control an ineffective assistance of counsel situation.

And our state Supreme Court has also looked to those

guidelines. They've never accepted them as mandatory or per se ineffective assistance of counsel.

There's a most recent case from the Court of Appeals that confirms that, that our state Supreme Court has never said that they're mandatory.

So based on that, that's why we offer that as a misstatement of law. And we would object.

MR. EHLIES: We don't suggest at all that they're mandatory. They're norms. And, in fact, we agree that sometimes even more is required, and sometimes less based on the circumstances of the case. But in Ard and Council the Supreme Court of South Carolina adopted that, referenced it favorably and said you have to have a benchmark, they are norms, they are not mandatory but norms for judging whether the conduct met or fell below.

THE COURT: All right. Note your objection. It's overruled.

Q Mr. Reckenbeil, do you have working knowledge --

THE COURT: It's overruled for purposes of this presentation, but I'm going to listen to your argument.

MS. BROWN: Thank you, sir.

Q Do you have a working knowledge of this capital jurisprudence in South Carolina and the United States Supreme Court?

A For purposes of P.C.R., no, sir.

Q Okay. Do you have a working knowledge of that body of law for purposes of primary direct representation of a capitally charged defendant?
A I can't say that I specifically know it right now.
Q All right, sir.
A But I'm not saying I didn't review it back in 2007.
Q All right. Okay. Well, did you form part of the defense team in the case of Tony Torres?
A I'm sorry? Say that again.
Q You were part of the defense.
A Yes, sir, yes, sir.
Q In that context did you as team member review the expectations of each member's performance?
A Did I review the expectations of each member's performance?
Q The guidelines and what would be expected and what the level of performance was, those sorts of things.
A Did I sit down and look at what the advisory guidelines were? I can't say that I did, no.
Q Okay. Sir, well, as an example there's a guideline 10.9.1 regarding the duty to seek a negotiated resolution.
A Yes, sir.
Q And we'll talk that about that, and I know there some -- some action. Okay. Were you aware that is a guideline within the jurisprudence?

A If I could say that I could probably infer that it's in there by the basis of just practicing good law for your client, then I can't say I knew what 10.9 was, no, sir.
Q Were you familiar with that as an articulated norm?
A I can't say that I am, no.
Q And were you aware then also that as a standard of practice and good practice 10.11-K --

MS. BROWN: Objection, Your Honor. The witness has already said that he did not recall this. So it would be outside of his scope of personal knowledge.

MR. EHLIES: Let me hand them to him and ask him if he's seen or heard.

THE COURT: Okay.

Q I'm showing you the standard -- and it's 10.11-K -- and ask you to read that and then publish it.
A Yes, sir, okay.
Q All right. And does it articulate in that standard a suggestion to avoid the word duty, that the best practice is to get your jury charges and anything the judge is going to say to the jury ahead of time?
A Yes, sir, yes, sir. I would agree.
Q And that's my copy, sir.

And did you file any motions regarding the judge's jury charges in advance of the trial and qualification of the jury?

A I don't know if it was actually a motion we filed, but I know we reviewed in depth or I reviewed in depth the jury charge, yeah.
Q And I think that you and I have talked before --
A Yes, sir.
Q -- this hearing.
A Yes, sir.
Q And if I recall what you said, was that you went to Judge Couch's office.
A Yes, sir.
Q You sat down with his law clerk, and you reviewed on a computer screen what his guilt-phase charge would be.
A Yes, sir.
Q And you just scrolled down on the screen with the law clerk.
A Yes, sir.
Q And no one else was with you.
A If Ms. Gallivan I think was -- I think she was standing there, yes, sir.
Q Bad question. No other team member was with you.
A They were -- the way Judge Couch's chambers is set up, in the back is the law clerk, the secretary, then judge's chambers. They were there, and I was in with Ms. Gallivan if I recall.
Q Okay. And you didn't have a hard copy.

A I can't say. I don't remember if I did or not.
Q And didn't that occur after the close of the evidence and just before closing arguments?
A It could have been the timing of it. It could have been.
Q So you didn't have in advance any notice of what he was going to be saying during voir dire in writing.
A Okay. Well, in writing, yes. But I was going to answer your question before that, is did I have any advance notice of what he was going to have.

Judge Couch -- I've practiced in front of him several times and I'm very familiar with his jury charge. And so a majority of it I've seen before and I've heard before several times.

Q You have been present when he death qualified a jury?
A No, sir. But what we're talking about. I thought we were talking about the murder guilt-or-innocence jury charge.
Q No. I had asked you about having the voir dire.
A Oh, no, sir. Did not have that.
Q So y'all have never seen that.
A No, no, sir.
Q You had a general working knowledge of what his charges would be in other criminal cases for criminal sexual conduct as an example.

A Yes, sir. That's true.
Q But never on a capital case.
A That is correct.
Q Okay. And so you didn't have advance knowledge of what he was going to be saying, is that correct?
A That's true, yes, sir.
Q And then if I understood what you said in conversation with me is that that was limited -- your action in that regard was limited only to the guilt phase, is that correct?
A That's true, yes, sir.
Q You didn't ask for or did not review in any way the printed charge on sentencing.
A I can't say that I did or I didn't, but most likely it would have just been in a perusing setting if I did with Clay and Kathy.
Q And when would -- what would you have had to peruse?
A I'm sure it was just discussions. I don't know if there was a hard copy at all of it.
Q And that applies also to the jury verdict forms. Did you have that in advance, jury verdict forms in advance, of trial?
A No, sir, no, not in advance of trial.
Q So that object is to be familiar with what is going to be said from the judge to the jury in advance.
A Yes, sir. That's true.

Q And you did not have that.
A No, sir.
Q So if there was an obvious opening apparent defect in those charges you would not have known that to alert the judge ahead of time, correct?
A Yes. If we we're talking prior to trial, yes, sir, that would be true.
Q Now, you were present during the entire trial.
A Yes, sir.
Q And I don't mean to be facetious, but there are some times people leave during a capital trial.
A Understood, yes, sir. But I was there the entire time.
Q So if the record was going in the case you were physically present in the courtroom.
A Yes, sir.
Q And in that regard did you hear the opening charge to the jury from the judge regarding their duty or role in the sentencing proceeding?
A Yes, sir.
Q When you went and looked at the jury charge in the guilt phase did you see a charge regarding the definition of circumstantial evidence?
A Yes, sir.
Q And had Mr. Allen ever spoken to you about counsel's duties as regards being positioned in the case to take

advantage of changes in the law? Do you remember any discussions like that?

A I can't specifically recall that.

Q Sometimes we speak of it in terms of forward looking posturing of the case. Do you remember any discussions about that?

A Not in that exact terms, no, sir.

Q Were you familiar with the history of the circumstantial-evidence charge over the four or five years prior to the time this case was tried in 2008?

A History in the evolution of the charge?

Q Charge of circumstantial evidence.

A As the case law has came down?

Q Yes.

A I can't say that I scripted it out, but with the number of cases that I've tried I pretty much had jury trials every couple of weeks. So I was probably hearing that charge over and over again.

Q Okay. And then you'd be familiar with State vs. Edwards.

A I couldn't cite that right off the top of my head, but I'm sure State vs. Edwards is a circumstantial-evidence jury charge. Then I'm sure I have seen it before.

Q It was very favorable to the defendant and it had -- I don't want to bring it up on the screen and take the time to

do that. We've seen it here in this courtroom with Ms. Hodges. And it got reversed just prior to your trial by Grippon -- G-R-I-P-P-O-N -- State vs. Grippon. And a new circumstantial evidence charge came into play, and that was the third time circumstantial evidence had been modified, revised in the few years prior to your trial. Were you aware of that?

A I'm not sure. I don't specifically recall a discussion on that specific point.

Q And were you aware of the charge as it was expressed in Grippon deleted certain advantages to the defendant regarding the jury's duty in assessing circumstantial evidence?

A I'll take your word for it if that's what the holding is.

Q All right. We're not going to go into that on the screen.

THE COURT: Mr. Ehlies, now, don't misunderstand me. I don't mind you showing some things on the screen. If you want to show it to Mr. Reckenbeil to see if he is familiar with it, that's fine.

MR. EHLIES: All right.

THE COURT: I just don't want to have cases read to me. I can read them myself.

MR. EHLIES: All right, sir.

THE COURT: But if you need to show him something to see if he's familiar with it, in that aspect of it I don't mind you showing it to him.

MR. EHLIES: Judge, I would never presume to read to you, and I hope you didn't take it that way. I would be reading to the witness. I know you're very astute and a student of the law and will educate me. So if I left you with the impression that I'm reading to you, I apologize.

THE COURT: That reading gets you nowhere, Mr. Ehlies.

Q Well, let's take a look at State vs. Edwards real quick then and just illustrate. And while she is doing that to keep this ball rolling, we reviewed with Ms. Hodges her opening statement. Were you with her at the time she prepared that opening statement?

A We -- I can't say I'll be sitting right next to her, but I know we had many, many group meetings and team meetings. And the basis of the opening statement, I know, was reviewed several times.

Q How was it reviewed?

A Just team discussions about it of where -- where were we thinking to going with the case. Obviously, your beginning part of your trial of just giving an outline as to where you want the jury to focus their attention and I -- obviously, tying pieces of the puzzle together. So if I recall, I know we talked about it several times.

Q All right, sir. Did you listen to her present it?
A In the courtroom?
Q Did you listen to her present it in preparation for being in the courtroom?
A I don't know if -- I don't know if she did that or not. I can't say that I specifically recall her standing up in front of the table and we sat there and listened to it. I don't remember if she did or not.
Q All of the team members, including outside people you could grab in to listen to her give her opening statement. Do you remember whether that --
A I don't remember specifically that.
Q All right, sir. Well, would you be in disagreement with the proposition that her opening statement stresses two features, circumstantial evidence was all that was available in the case and all that would be heard and that the defendant was not guilty? And we've counted the times to be nine times in the opening statement he was not guilty. Do you disagree with that?
A I have no reason to disagree with that.
Q And the point of that statement is that circumstantial evidence was a fundamental tenant of the opening statement. Would you agree with that?
A I would agree.
Q Okay. This is the Edwards charge, and you will see

that very briefly the circumstance relied upon by the state be proven beyond a reasonable doubt and all the circumstances so proven be consistent with each other and taken together point conclusively to the guilt of the accused to the exclusion of every other reasonable hypothesis. It is not sufficient that they create a probability, though a strong one, and if assuming -- do you understand that language would slip right over the curtain? That is a very favorable charge and was the charge in this state at the time of Edwards.

We then had a change in that law by Grippon and the proposed -- just go to the right. Just go to the right there. There you go. And all of that language that we just read is gone, and now what we have is a jury charge that really kind of just lays on circumstantial evidence as proof of a chain of facts. You prove one and it lines up, but all the duty to connect and disprove -- that's gone. Do you see that?

A Yes, sir.

Q All right. Now, right after that the Supreme Court went back again a third time within less than ten years and issued its decision in Logan. And in that decision they went back closer.

MS. BROWN: Your Honor --

Q Are you aware of...

MR. EHLIES: I'll accept that -- I'll accept that.
Q Are you familiar with Logan?
A If you put it on the wall I'm sure I've seen the circumstantial-evidence charge.
Q Okay.
MS. BROWN: But, Your Honor, my objection is, again, a misstatement, perhaps a lack of clarification. There was an intervening case that's not being mentioned as well.
MR. EHLIES: Sure.
MS. BROWN: And that would be State vs. Cherry.
MR. EHLIES: I'm trying to get to the parts that count.
THE COURT: I understand. And, Ms. Brown, I feel fairly competent that you're going to be examining this witness too.
MS. BROWN: Yes, sir.
THE COURT: And that you can bring up any other cases or matters that you need to address with the witness.
MS. BROWN: Thank you, sir.
MR. EHLIES: All right, sir. Thank you, Judge.
Q In Logan -- why not go to the actual charge that was approved which is highlighted down there? How about if we just -- I think that's it. I can't see that. Yeah. This is the charge that came out just after the trial in your case. This charge came out because trial lawyers refused to

accept the charge of Grippon and went forward with a position and took an appeal.

MS. BROWN: Your Honor --

MR. EHLIES: This is an appeal.

MS. BROWN: Excuse me. But that's testimony from the attorney, or argument.

THE COURT: Mr. Ehlies, now, you can't give editorial comments. You've just got to ask some questions and let him read the law if you need for him to to refresh his memory. But your editorial comments are not going to be permitted unless you're going to testify.

MR. EHLIES: All right, sir. And I'll try to avoid it. Under 611 I was trying to form a leading question.

THE COURT: Okay. Go ahead.

MR. EHLIES: And the foundation for the question.

Q But have you had a chance to take a look at that?

A Yes, sir.

Q Do you know how it is in the practice of law that an existing circumstantial-evidence charge in a trial at one date is later changed in the cases of Cherry, and Grippon reversed by another decision? How did that happen based on your experience?

A Honestly, I don't have -- I don't have an opinion as to that. Chief Justice Toal I think said it best in that little phrase there, is that you have to have two different

sets of vehicles to basically determine direct evidence and circumstantial evidence.

Q Okay. Sir, I've not stated my question properly.

How is any change in the law made absent an appeal?

A Well, there's a couple of ways, but I'm going to get into constitutional law. But the legislature could change the law, and therefore then that would be after geo [sic] perspectively or retroactively. But of course it has to be an appeal for a Court to make a determination as to a -- of an issue, of an error in law.

Q All right. And so did you and your team members when you were relying so heavily on a circumstantial-evidence charge discuss taking the very position that was taken in Logan to preserve and promote a more favorable charge on circumstantial evidence?

A I can't -- I honestly can't specifically recall whether or not we were talking about the very essence of a holding of a case to make a trial strategy based upon circumstantial evidence.

Q Okay. Now, you had a job assignment, a particular assignment, in the team, did you?

A Yes, sir.

Q And what was that?

A Very early was discussed that I would focus my attention on the guilt or innocence phase.

Q And in the process of doing that did you then undertake to investigate the facts pertaining to guilt or innocence?
A Yes, sir.
Q For instance, did you talk to one Crystal Williamson?
A The daughter of the Emerys?
Q Yes.
A No, sir.
Q Did you commission any outreach to Crystal Williamson?
A If I'm -- I'm -- if I'm not mistaken, I know myself, Will and Pete Skidmore -- I think we talked about that. And I'm not sure if Will tried to call her or tried to stop by her place, but I don't think there was ever any discussions by the defense team with the Emerys' daughter.
Q Do you have any knowledge of what Ms. Williamson might have said pertaining to guilt or innocence of the case?
A The only thing I can go back to is what she testified at trial.
Q Okay. And did the team ever file a Brady motion?
A Yes, sir.
Q And in response to the Brady motion did you get any response at all from the solicitor's office as regards specific Brady requests as opposed to general discovery requests?
A I -- I can't really say one way or the other. I know that we received ample information.

Q Do you recall whether you ever received information from the solicitor's office that you needed to talk to Crystal Williamson?
A I think what her -- the information that I specifically recall about her is that she was setting a timeline more for the state than anything. Her leaving the house outside the back sliding glass door at a specific time I think was predominantly her importance to the state.
Q Yes, sir. And I appreciate that. But the question was whether you received notice from the solicitor's office that the defense team needed to talk to Crystal Williamson as potentially favorable evidence for the defense.
A I can't recall that, no, sir. I don't know.
Q And did you ever talk to Kevin Biggerstaff?
A I'm not sure if I did or Clay did, or made an attempt to talk with him. But I thought he was incarcerated if I'm not mistaken.
Q Well, that'd have made him available very easily. We often have trouble finding our witnesses. So did you go and speak to Kevin Biggerstaff?
A I can't recall if I did or not.
Q And how about Mr. Roger Kirby?
A I would have to look back at all of your notes and everything. I can't specifically recall if I talked with Mr. Kirby or not.

Q Well, I don't want the record which is -- needs to be full and complete -- to suggest that I caught you by surprise. Is it not true that I've made available our amended application specifying everything in detail?
A Yes, sir.
Q And is it not true that I've even briefed certain issues including a merits brief, trial brief?
A Yes, sir.
Q And did I not set out in detail and have it available to you and Mr. Allen?
A Yes, sir.
Q And did I not sit down with you several times to tell you where we were going and give you opportunity to talk to me?
A Absolutely.
Q And have you not had time to meet with the attorney general?
A I have.
Q I don't want any suggestion that I'm catching you by surprise, you've not had any opportunities to look at these things. Okay?
A Yes, sir. No. I agree.
Q Okay. All right. So you did not speak to Kevin Biggerstaff. You did not speak with Roger Kirby, is that true? But, more particularly, you never received notice

from the circuit solicitor's office that you should.
A Yeah, if -- if -- unless it's in there, then no. I don't specifically recall that, no, sir.
Q All right. Well, in the context though of people you did speak to did you then formulate some defense plan --
A Yes, sir.
Q -- to the guilt phase?
A Yes, sir.
Q And that was your primary role.
A Yes, sir.
Q And are you under the understanding that once you get an assignment you're relieved from everything else the team is doing?
A No, no, sir, no.
Q So what is your understanding as being a team member on a capital litigation case? What is your role?
A Obviously, the whole entire package. But with the limited amount of time we had it was very important that we focus on our individual cogs in the wheel and individual spokes in the wheel to be able to formulate some sort of defense. And so, no, did I just dismiss the fact that I wasn't involved in anything else? No. But I knew that I had to focus on my specific assignment.
Q All right. Why was the time limited?
A We were -- we were moving at a very rapid pace.

Q Well, why was it limited?
A I can speculate.
Q No. I want to know only if you know why it was limited.
A I can't tell you this is the answer.
Q All right, sir.
A But circumstantial evidence of tying certain things together would clearly give me a reasonable deduction as to why, in fact, this case was moving very quickly.
Q Well, let me suggest a possible thought for you, and leading question. Did you have a trial date?
A I don't remember if we had a trial date or not, but it was very quick to move up that ladder.
Q Well, and that's what I'm asking. What was it -- when was the trial date set?
A October 6th.
Q The trial date was set October 6th for trial when?
A No. I'm saying is that I know the trial date was October 6th of 2008 -- started.
Q Correct. And when was that trial date set?
A I couldn't tell you exactly identical the day that it was. I don't know.
Q Do you recall in the discussions that you had with Ms. Glass and myself characterizing Judge Couch as very favorable?

A Favorable, absolutely, yes, sir.
Q And he would give you anything you asked, I think is what you literally said.
A Completely agree with that, yes.
Q So why didn't -- did you ask for more time?
A I don't know if I did or Clay did, but I'm pretty certain that there was several times where we asked or Clay may have asked for additional time.
Q All right. Well, let's break that down.
Did you ask and file a motion with the Court to extend the time for preparation for trial?
A I don't believe I did specifically.
Q Did you join in preparing and articulating reasons on a presentation to the judge confidentially as far as the reasons were concerned to support a motion to get more time?
A Specifically, I can't recall, but I'm not certain if we did or not.
Q All right, sir. If the record doesn't reflect that, would that be safe harbor?
A That would be.
Q And it did, in fact, come to pinch your duties as guilt-phase coordinator, cog, as regards D.N.A. Do you remember that?
A Yes, sir.
Q And, in fact, it came in very late, didn't it?

A It did.
Q D.N.A. very close to trial from state law enforcement division laboratories.
A Yeah. I can't tell you exactly when the date was, but, yes, I would say late in the game.
Q And was, in fact, up until that point your view that the case was circumstantial?
A Yes.
Q And, in fact, the D.N.A. that came in was a comparison between a known sample, Schmerber sample taken from Mr. Torres, and an evidence sample taken from Mrs. Ann Emery. Do you remember that?
A Yes, sir.
Q And what was the comparison? Was it that the contributor was Tony Torres?
A Yes, sir.
Q Okay. That came in very late. Did that change your trial strategy about how to approach the jury in making a statement, opening statement?
A I -- I don't know if it changed it or not. I really don't know.
Q Well, you weren't assigned opening statement, and I understand that. Do you recall talking with Ms. Hodges about new evidence and having to make an adjustment and how you would approach the jury given that evidence?

A I'm sure we discussed it and I'm sure we made a strategy. We had to realize the fact that we had to be realistic with the evidence that came in and that he was there. So there was -- there's no getting around that.
Q And that based on the location of the evidence sample on Mrs. Ann Emery's body it was going to be -- how would you have characterized from a juror's perspective the thrust and nature of that evidence?
A Damning.
Q Would it be even worse than damning?
A Unequivocal.
Q Okay. So that would have been a major reason to readjust all of the thinking about how to handle that case with the jury.
A Yes, sir.
Q And, in fact, I believe you actually talked to the defendant -- then defendant, my client, your client, the applicant, Mr. Torres -- about that piece of evidence, right?
A I did.
Q Okay. And, in fact, that piece of evidence came into your possession after you had gone with Mr. Clay Allen to see the solicitor, I believe.
A I assume so, yes, sir.
Q Okay. Okay, sir. So let's go back then to Bruce

Mendall Miller. My understanding was then that you were in charge of developing this defense strategy and witnesses. And in that context you did, in fact, interview a couple of witnesses -- Tammy Hughey, is that correct?

A That's correct.

Q And who was the other one? Tammy Hughey. I'll turn to my partners.

(Pause.)

Q Mandy. You talked to those two people. You present them. And you made a showing --

A Yes, sir.

Q -- in response to -- do you remember how that whole hearing came to be necessary?

A Yes, sir.

Q And what -- how did it come to be necessary?

A Well, at the beginning of the trial we were dealing with a motion. I remember a motion was presented by the state -- a motion in limine -- to exclude obviously any sort of mention of third-party guilt in our opening statement. And so therefore I believe it was Solicitor Gowdy that made that motion to exclude that third-party-guilt evidence, and therefore we had to have a hearing to determine whether or not it met the requisites.

Q All right. So it wasn't just limited, was it, to the opening statement? It was limited to any evidence. I mean,

it was to exclude any evidence of third-party guilt going into this trial.

A Yes, sir.

Q Okay. So was it fair then for you to assume at that point that your defense of third-party guilt was being challenged by the solicitor's office?

A Yes, sir.

Q And that the theory of their case was expressed in their pleadings, statements and questions to be that the entire crime in every aspect from planning, execution, covering, gasoline was the brain child of Tony Torres.

A That's correct.

Q And, in fact, in their opening statement we'll look at later that's what they said.

A That's correct, yes, sir.

Q It's all Tony. Can we agree with that?

A I would agree with it, yes, sir.

Q And that's a serious point because that's putting everything in the case on Tony.

A Yes, sir. I agree.

Q So you developed an idea that maybe that isn't so.

A That's true.

Q And that was in your mind as third-party guilt.

A Yes, sir.

Q And you -- you had team members to help you with that

law and to help you with developing it and the strategy. And this is the third-party-guilt standard. It has to exclude Tony Torres from being guilty of the crime and point to the other people. And I think the person in this case -- was it Chuck Emery?

A Yes, sir, uh-huh.

Q And it may have been -- is that fair, or were there other suggestions that maybe even Chuck had people with him during the crime?

A I don't believe there was any other suggestions of others.

Q Well, there was a girlfriend Holly.

A Yes, sir.

Q And my recollection was -- correct me if I'm wrong -- they never saw Chuck without seeing Holly.

A I believe that's true, yes, sir.

Q Pretty much.

A Uh-huh.

Q All right, sir. So you were thinking in terms of this third-party guilt, and you made your showing. What was Judge Couch's -- what was Judge Couch's ruling?

A That we didn't meet the standard and that any sort of mention of third-party guilt would be excluded.

Q Let's take a look at what the state said in their opening statement through Ms. Crick at page 1602 of the

trial transcript. This is before any evidence was received to the petit jury.

She went up to the jury, and she basically articulated the theory of the state. And it was your understanding that the theory of the state was who's responsible for this crime. Solely Tony Torres. And that was articulated to the jury, correct?

A Yes, sir.

Q When that happened did you have a team meeting and conference and ask the judge for a minute, do you recall?

A I don't recall that.

Q Did you not find it misleading to suggest to this jury that the entire responsibility for that crime rested on Mr. Torres when, in fact, you knew there was evidence that suggested that maybe not?

A Well, yeah. There was other evidence to demonstrate that it could have been involvement with somebody else.

Q So now we're talking not third-party guilt. We're talking about the solicitor representing to a jury, articulating the theory of their case, when you knew that the jury could hear some evidence that maybe it isn't so, that maybe it isn't that theory.

A Yes, sir.

Q And that would be a different reason for offering that evidence to contradict the state's theory of their case, is

that right?
A Right. Where you're saying that they opened the door and therefore --
Q Correct.
A -- we couldn't bring in something else?
Q Correct. Does that in your experience ever happen when someone --
A That happens all of the time.
Q -- makes a statement --
A I like those.
Q And all of a sudden what was not admissible becomes admissible.
A Absolutely. I agree.
Q So where in the transcript did you and Mr. Clay Allen ever have conferences with the judge that were not -- in a capital murder case that were not on the record?
A Did we ever have conferences with Judge Couch that were not on the record between myself and Mr. Allen and Ms. Hodges? I am --
Q I'm talking about litigation issues that were not included in the record. The state would have been present through the solicitor's office. My point is had you made a motion would it be in the record.
A Oh, yes, sir, if we made a motion on -- in -- yeah, to the Court. Of course it'd be in the record.

Q All right. Well, then let me refine it a little more based on my experience. Sometimes conferences at the bench don't get on the record. Has that been your experience?
A Yes, sir.
Q So my point is did you ever get on the record with a request to Judge Couch to revisit his ruling because now you have a different reason for entering that evidence into the record?
A I can't recall that we did or not.
Q It's not in the record. So the question is did you do it.
A I don't remember.
Q Did you talk about it?
A I don't think so.
Q Did one of the three of you come up and say, you know what, the door has just been opened?
A I don't believe we did.
Q Okay. State vs. Charping. If however -- I'm sorry to bring this thing real close. You were asked about mitigating circumstances and charges. Okay. I'm going to jump way forward and skip over a couple of things.
In the statute 16-3-20(C)(b)(4) -- No. 4, there is -- there is -- there is the mitigation -- statutory mitigator. And this repeats that, and I'm out of order. If you can get that statute 16-3 -- there you go. And scroll on down to

paragraph (c). It's highlighted.

(Pause.)

Q Do you see on the bottom of that? I can't really see it. Mitigator. The mitigating circumstances. You were familiar with this statute, right?

A Yes, sir.

Q And it's a controlling procedural statute, and right -- not there -- oh, yeah, four. There you go.

All right. Legislature thought about this. Legislature thought about your circumstances and what you were doing in guilt phase. And did you ever attend any kind of conference with your team members with other litigators about how to handle capital cases?

A I'm -- I think I recall we had several, a couple, of phone conferences, I think, with some attorneys out of Columbia, but I can't say specifically if I remember.

Q All right. Are you familiar -- and by other means of front loading to the guilt phase things that are very important in your sentencing phase?

A Absolutely.

Q And, in fact, in the sentencing phase -- not your assignment or call -- what does that say? And I'm really not being facetious because I can't read it.

A "The defendant was an accomplice in the murder committed by another person and his participation was

relatively minor."
Q Now, I know that you were using that evidence as a guilt-phase third party. But does it not also support from a juror's perspective -- and you only need one -- the possibility that maybe this theory is entirely wrong and he is guilty and he is involved in that crime but left with the question of what his involvement was?
A Yes, sir.
Q Okay. And would that have been potentially mitigating?
A Yes, sir.
Q And did that evidence ever get beyond a proffer hearing? Do you recall ever again seeing any of that type of what you are calling third-party evidence?
A The shoe print.
Q No. The testimony that --
A Well, yeah.
Q The testimony that chuck was -- yeah.
A The testimony from -- yeah. The testimony from the -- the witnesses, no.
Q Right. As best we could find out when the proffer ended that whole thing ended. Is that your recollection?
A Yes. The testimony from the witnesses. Yes. I agree.
Q Okay. And --
A And I'm sorry. Let me just clarify that answer.
The testimony from the witnesses that testified in the

proffer -- the third-party guilt, yes, sir. They did not testify during any case in chief.

Q The jury never heard a word of it.

A Well, never heard a word of their testimony, yes, sir.

Q Right. And I don't believe they ever heard a word of third-party guilt by argument, not by testimony or anything else.

A Right. But, you know, not by coming out directly and saying it, but there is other ways to say it.

Q Okay. I'm going to State vs. Charping. But would it not have been -- trial court properly excluded evidence of Whitlock's convictions and sentence. We do not suggest that evidence of a codefendant's participation" -- have you ever heard of an unindicted codefendant?

A You wouldn't be a codefendant if you were not indicted.

Q You've never heard that phrase, unindicted codefendant equal of significance but not necessarily indicted at that time?

A Well, okay. I'll take your word for it.

Q Okay. "The participation may not -- may not be mitigated." However, what does that say? "Evidence of codefendant's participation may not be mitigating. However, although a defendant's participation might be relevant to the circumstances of the offense and therefore mitigating. The fact that a codefendant received a lesser sentence is

not."

Do you understand then that the evidence of third-party involvement changes third-party guilt into role in the offense?

A Yes, sir.

Q And when you do -- you do guilty pleas.

A Yes, sir.

Q Does the judge ever ask during the course of the colloquy in a guilty plea for information to describe the defendant's role in the offense -- what did you do?

A Yes, sir.

Q And is that not even required?

A Substantial factual basis for the plea, yes, sir.

Q And is it related to sentencing?

A I think, yes.

Q And wouldn't the jury want to know what the role was of the person they're considering putting in the electric -- execute -- returning a sentence of death?

A Yes.

Q Okay. Did you all discuss how to handle that issue?

A I'm sure we did. I can't say specifically of the exact conversation, but I'm sure we did.

Q When -- when you got to -- I'm going to shift down to the sentencing phase.

Do I understand your testimony that you were

responsible as a team member to participate in the sentencing phase?

A Yes, sir.

Q Okay. And did you reduce your degree of responsibility to the client because you had now entered the sentencing phase as opposed to the guilt phase?

A Did I reduce my --

Q Correct. Your acuity for issues of fact and law.

A No. I'm going to say I'm still there, still -- still fighting hard for him.

Q A hundred percent, correct?

A 110.

Q Okay. 110 percent in both phases even though your assignment cognitively may have been guilt.

A Yeah, right.

Q Did you see what was introduced in evidence as three and four? And this timeline is Defendant's -- that's your group -- three. And I'm showing you what was from the record at the trial defendant's group four, which articulates just very briefly through -- Marti Loring was the witness, author -- the background of your client starting the date of birth? Did you ever see that exhibit prior to trial?

A Yes, sir.

Q Were you aware in the very beginning of the case of

this significant psychiatric history?
A Yes.
Q And did you discuss that with the team members, the significance of how early this boy was in trouble?
A Yes.
Q And is it fair to say that the evidence is unusual?
A Unusual in what context?
Q No. 2. Eight months old, too aggressive and starting treatment with a physician for aggression.

A year old. Apple of his mother's eye at 81 -- 15 months. He's starting to tear toys apart -- 18 months, spells, outbursts. He goes into medical and goes on prescriptions.

First hospitalization in 1984 at Medical University of South Carolina. Admitted for violence.

Did y'all talk about how that history suggested something really wrong from a very early age?
A Yes, sir.
Q Okay. What did you do about that?
A Presentation in the sentencing phase was to show -- I think that's obviously what the whole key to the defense was.
Q Okay sir. The presentation was to show it. And what was it that you were attempting to show?
A That -- that we felt -- meaning we, society -- felt it.

Q Okay. I think that's an astute observation. At that age you're suggesting he really doesn't provide for himself. He's looking to others.
A Yes, sir.
Q And is it fair to say he's looking to others for medical assistance?
A Yes, sir.
Q And social assistance, social services type assistance.
A Yes.
Q And even it came down to group homes, correct?
A Yes, sir.
Q Okay. So your presentation was to show that --
A Yes, sir.
Q -- and possibly how we had failed him.
A Yes, sir.
Q Did you and your team articulate that to the jury that we had failed him?
A That's my term.
Q Okay.
A That's my -- what I have come to realization in my maturing --
Q Yes.
A -- from a young, arrogant person to a person that is, I think, a more realization that there's a greater responsibility that we have towards people.

Q Okay.
A Towards Tony. And that's my term, not anything with Clay or Kathy.
Q All right. And I think Clay Allen was in the courtroom then.
A Uh-huh.
Q Were you in the courtroom with Ms. Hodges' testimony?
A I wasn't.
Q So the idea was to show the history, is that correct?
A That's correct.
Q Not necessarily to articulate to the jury a very good thought, which is that we have failed him.
A Yes, sir.
Q Okay. Did you -- did anybody else in the team attempt to articulate that thought trend that the system had failed to provide services for this child?
A I don't -- I don't -- I don't recall.
Q Okay. What did you do as far as consulting with any expert about what this record was showing?
A Just the putting that together with how it would explain what happened. So taking that nurture of what Tony had, or what the lack there was of that, through medical facilities and through psychiatric facilities and trying to explain what was done to the Emerys.
Q Okay. So if I understand it correctly, the idea was to

develop the record to summarize that record for purposes of arguing to the jury what the sentence should be.

A Yes, sir.

Q So there was no, in your recollection, specific advanced-science-qualified expert to consult and direct that investigation.

A I can't recall specifically if there was or not.

Q They are never witnesses. Okay. They are only consultants. Do you recall anybody in that role?

A Consultants on the D.N.A. I do remember that. And I'm sure that there were consultants that maybe Clay spoke to that I maybe never did speak with, but I can't specifically offhand remember that.

Q Well, he'll be here to answer those questions, so we'll leave it to him. If you don't remember it --

A I don't remember, no, sir.

Q But you did mention D.N.A.

A Yes, sir.

Q Consulting on that. We have several issues with that.

A Yes, sir.

Q So were you directly involved in consulting with a D.N.A. expert?

A Yes, sir.

Q Okay. Who was it?

A I can't recall the name, but I'm sure if I heard the

voice or the name I could tell you yes or so.
Q And what did he tell you?
A That just going over educating us as to D.N.A. evidence and then just discussing the strengths and weaknesses of the state's position and some things they -- that might want to poke some holes in.
Q Okay. What were those, do you remember?
A No D.N.A. on the murder weapon.
Q Okay. All right. Did you discuss with him the technical testimony about testifying to the jury that the known sample and the evidence sample were consistent?
A Yes, sir.
Q Okay. What did he tell you about that?
A I can't specifically recall that.
Q Did they talk about how many alleles were identified, as to how many alleles there were, the numbers?
A Yes, sir.
Q Okay. And did he ever talk to you, and do you recall ever talking, about fingerprints in that context?
A Yeah. We talked. We talked about the fingerprints, yes.
Q And like the fingerprints, it doesn't make any difference of how many like marks there are from the latent and known. If there's one on the known that doesn't exist in a fully developed latent, it isn't him.

A Yes, sir.
Q And that's Brandon Mayfield against the F.B.I., and it closed their lab. Do you remember that case?
A Yes, sir.
Q Absolutely closed the F.B.I. in fingerprints. Did you know the same thing is applicable in D.N.A.?
A I'm sure you're telling me there is some. I'll take your word for it.
Q We will get into that with Mr. Clay Allen. But if you didn't have direct contact with the consult, then I'll leave it there.
A Yeah. I did on the phone, but we were obviously -- I guess I was learning a little bit about that, which I knew some about D.N.A. But my focus was more as to how do I -- how do I show somebody else there.
Q Okay. Okay. All right. Back to these exhibits, three and four, and what you did to develop those, I think you called a pharmacologist, Alex Morton.
A Yes, sir.
Q And you called Dr. Schwartz-Watz --
A Yes, sir.
Q -- to talk about the history of the diagnosis and the treatment, correct?
A Yes, sir.
Q Okay. But what we saw and wondered is where the files

were in your joint team files that evidenced that your consult developed the evidence that was in the record by answering the whys instead of the what-happens.

"And here I can show it to you. That was your presentation. Let me show it to you. There was no effort. We never found any evidence that anyone ever undertook a fresh view to discovering why."

MS. BROWN: Your Honor, I would object because that is testimony and should be stricken.

I don't believe that Mr. Ehlies can say I never found there is nothing in that record. That testimony must come from the stand, Your Honor.

MR. EHLIES: We're leading questions here, and I'll rephrase my question.

THE COURT: Okay.

Q Is there a file folder not in the files that relates to a consult directing investigations into the evidence? And I'm talking the medical evidence.

A Not that I can recall. And I would say no. There's -- if there's -- of it's not in the file, then it's not there.

Q Could it be -- could it be in your head? Is it one like the D.N.A. person that you were in contact with that directed that what needed to be done was to start answering why?

A Yes, sir.

Q Who?
A No. I'm just saying is that -- no, sir, there was just -- no.
Q I misread.
A No.
Q Okay. Would you agree with me -- excuse me -- correction. Withdraw that question.
Would it be an important piece in a mitigation case to tell the jury why?
A If we knew the answer.
Q That's the point. Did you undertake to find the answer to why?
A I'm going to answer this in a way that -- the reality is -- is that did we undertake and get an expert to tell us why. I don't believe so.
Q All right. And --
A But I -- but if I may -- but I don't know if anybody has the answer to this --
Q Okay.
A -- because it's a science based upon probabilities of what we think and what science can give us. But can we cut Tony's head open and put something on a projector screen and say this is why? No, we can't.
Q Would it be surprising to you to learn that we've done that?

A I hear all of these people testify. And I was in here and I heard some of these experts come in and testify. And it's theories, absolutely.
Q Well, is it your testimony that genetics is a theory?
A Genetics is not a theory.
Q Is it --
A Genetics is science that is going forward to say if you've got one thing it produces another.
Q And, in fact, is D.N.A. identifications part of genetics?
A Yes, sir.
Q And is it science?
A Yes, sir.
Q Dilbert. Subject to Dilbert and State vs. Jones?
A Yes, sir, yes, sir.
Q And if you have deletions and genetic structures and certain spots are missing and that is demonstrated conclusively, would that be demonstrating possible whys?
A Possible whys, yes, sir. But it's -- but we're -- I can't. I can't sit and not say that you have a mathematical formula of two plus two equals four. We know that.

You have a human being with free will, and you have so many X factors that make a determination of what somebody's going to do from left to right. This shows a probability of a prediction as to what's probably going to happen in the

future. But do we know absolutely? No.
Q Well, what was your job with the jury, to tell them what's going to happen in the future, that he's going to be violent and kill more people? Was that your job?
A No.
Q Was it your job to show -- and I can go through what I'm going to go through with Clay Allen point by point of what you did show -- and that's exactly what you show, that he beat the slop out of his dog in your mitigation case?
A I believe that's -- that's about true.
Q Wouldn't it have been better to have started telling the jury why the limitations genetically?
A Sure.
Q And we had expressed from that witness stand that he lost the ovarian lottery. And isn't the suggestion that it's not choice been better than it was all choice for your perspective in sentencing?
A Yes, sir. I would agree with that.
Q It was your job as a team to defend Mr. Torres from the advantage and strength of everything you could get to answer every question that may impact the decision as to the appropriate sentence -- death or life.
A Agree.
Q All right, sir. Real quick.
(Pause.)

MR. EHLIES: Judge, can I have just a second here?

THE COURT: Sure.

(Pause.)

Q All right. Did you -- do you -- have you ever heard in your limited capital experience that if you're looking at the jury you're losing the case? Have you ever heard that expression?

A No, sir.

Q And would you agree with me though if you've not heard that that if you can achieve a negotiated resolution of less than life that's a pretty good deal with the strength of the cases as it was in this case?

A Yes, sir.

Q And, in fact, did you discuss with your client the strength of the case after the D.N.A. came to you in particular?

A Yes, sir.

Q And isn't it true that he wanted you to fight for his life?

A Absolutely.

Q And I think you and Mr. Allen may have attempted that at least once. Do you recall?

A Yes, sir.

Q And I'm referencing 10.9.1 on the duty to seek a negotiated resolution.

A Yes, sir. I do remember that.
Q And in regards to that guideline which was specifically referenced in the Council case, E, a negotiated disposition would be in the best -- if a negotiated disposition would be in the best interest of the client initial refusals by the prosecutor to negotiate should not present." And that was paragraph E.

And so I think that I have some indication that at least once this is the norm standard -- standard of care -- at least once. Can you tell us about that trip and what that initiative was?
A We had a chambers meeting with Judge Couch. And you want me to talk specifically about the attempt to talk with Solicitor Gowdy about a plea?
Q A negotiated settlement in the case.
A Sure. We came out of chambers with Judge Couch -- myself, Clay, Solicitor Barnette, Solicitor Gowdy -- and Clay asked Trey outside, said any opportunity for us to resolve this in a plea -- paraphrasing of course. And it was very clear from then future Congressman Gowdy that there would be no plea and that there was just no opportunity to resolve it that way.
Q All right, sir. And did you hear that statement?
A Oh, yes, sir.
Q Were you physically present?

A Yes, sir.
Q And it was outside of Judge Couch's chambers, was it?
A Yes, sir.
Q How close was it to trial?
A I'm thinking that was in the -- it was one of the first group meetings I think we had if I am not mistaken. So it was early on, I think, that we were discussing this.
Q All right. So at that point you haven't really developed all of the evidence in the case for presentation at trial, is that correct?
A Yes, sir, that would be correct.
Q And you had a press-for-time, I think you mentioned. So did you move for a continuance once the D.N.A. evidence came in?
A I don't -- if it's not in the record, we didn't do it.
Q Yes, sir. I don't think you did.
A No, sir.
Q Did you ask and renew any efforts with Solicitor Gowdy to talk to him about the case?
A Yes, sir.
Q And when did you do that?
A Several, several times.
Q And can you articulate that, the circumstances of that?
A It was times where, you know, we just ran into each other at -- discussed with him, hey, you know, Trey, is

there an ability for us to get this thing resolved, like, come on, now, we don't need to keep going forward on this. We had private conversations about it.

Q And when you had that conversation had you the testimony or an interview of Crystal Williamson?

A Did I?

Q Yes, sir.

A No, sir. I said being that we didn't -- nobody talked with her but reviewed obviously her, I believe, statements and other things that she talked to the police about.

Q She was the surviving heir of Mrs. Ann Emery. Do you understand that?

A Yes, sir.

Q She was an only child.

A Yes, sir.

Q And we had an outreach to her independent in my office and also involving my office. Did you undertake anything like that?

A I don't believe so.

Q If you were to have discovered that Ms. Crystal Williamson, the daughter of the deceased Ann Emery, would have responded, as I'm going to read to you, to this question: "Have you been approached by defense counsel and asked whether a sentence of life in prison without parole would satisfy the needs of you as the immediate beneficiary,

closest relative to Ann, what would you have told them?

Answer: "If they had just asked me if life?

Question: "Yes.

Answer: "That's fine."

Would that have helped you in any way?

A No.

Q Okay. Do you think and have any reason to think that Trey Gowdy and the solicitor's office knew -- knew that that was her position?

A I don't. I can't speculate as to whether or not -- he knew or not, or they knew or not.

Q On page eight of the transcript: "Why was it that you were uncomfortable? Specifically, why were you uncomfortable with the death penalty?"

Answer: "I didn't believe he did it by himself."

Was that part of your defense?

A Yes, sir.

Q Would that have been helpful?

A Telling me something I already knew. Not really but --

Q Would it have given you a witness?

A I think the witnesses that we had were probably the best ones to show and demonstrate any sort of involvement from somebody else because she -- at 10:00 o'clock she said she walked out the sliding glass door and never saw him again and he went home.

Q Sometimes more is better, wouldn't you agree --
A Yeah, but --
Q -- especially if it's the deceased's daughter?
A Well, I would agree with you on that -- I would agree with you on that, but you're running the risk of bringing her onto the witness stand. And, you know, No. 1 is that testimony was very powerful, but No. 2 is that there was no way that she would have got those words out of her mouth.
Q Well, she did from the witness stand.
A Well, I understand that, but it's speculation saying that she thinks that somebody was involved. There's nothing else to support that.
Q Well, do you know that she testified that her mother had been complaining about fears for her welfare just prior to her --
A Yes, sir.
Q How do you know that if you didn't talk to her?
A Well, it's -- it's -- I recall there was something regarding that, was in some sort of note or some sort of police report if I'm not mistaken.
Q Well, her testimony was that no one ever asked her those sorts of questions.
A Right. But what I'm saying is that I don't -- I think there was something in a record about that that I read. But the questions were never asked. No. She was never

cross-examined. No, sir. And then she was never talked to before.
Q Correct.
A Yes, sir.
Q The point is that no one ever talked to her.
A Agree. I would agree with that.
Q The record speaks for itself in this proceeding as to what she would have said and, in fact, was asked would you have testified here at the jury trial as you have here today, and her answer was she would.
A But my question, I guess, not to be argumentative, but when did you talk to her?
Q We talked to her probably a year ago.
A Okay. You're looking at an individual that has a completely different view on life from 2008 to 2014. Time has a way to make people think differently.
Q I'll agree with that.
A So what she would have said in 2007, probably going to be a little bit different than what she would have said in 2013.
Q And do you know that in 2007 she was far more aggressive against Chuck Emery and in favor of Tony Torres, your client, than she was on the stand?
A It's possible.
Q No. She testified to that --

A Yes, sir. Okay.
Q -- under oath, and that she had gone to Trey Gowdy about getting the correct defendants, one being Chuck Emery.
A Yes, sir.
Q So I'll agree.
Let's move on to another issue.
Other than these passing remarks to the solicitor did you get together a mitigation package to share with the solicitor in an effort, an informal effort, to get a negotiated resolution?
A I can't specifically recall and say we did that.
Q Did you ever engage a consulting service for purposes of educating you on how best to achieve that negotiated resolution?
A I can't say, recall, that, no, sir.
Q Do you know that they exist, those services?
A Yes, sir.
Q Do you recall ever speaking with Mr. Allen about getting these consults on board to develop the questions of why and how to present the negotiated settlement and how best to formulate an opening statement given the circumstances of the case?
A I can't recall if we did or not.
Q When you did the voir dire -- or if you read the reports you saw that the police were looking for that

Mexican.
A Yes, sir.
Q Do you remember that?
A Yes, sir.
Q And, in fact, he has a name suggesting a minority group -- Torres.
A Yes, sir.
Q And some do mistake him for a Mexican, correct?
A Obviously, in the police report. You could say that's accurate.
Q Okay. And, in fact, Mrs. Ann Emery was -- do you know what racial background she was?
A Caucasian.
Q Yes. And so did you ever discuss in voir dire your duties to secure a race-neutral death-qualified petit jury?
A Do I recall a specific conversation about that? No. But the -- obviously, jury selection in accordance with constitutional boundaries -- Batson -- then, yes. But was it specifically brought up, the fact that Tony could be inferred as a minority and therefore we need to make sure that that is something that is preserved on the record? No. I don't believe we did.
Q And there were no questions designed in voir dire to inform the jury that Mr. Torres is, in fact, an ethnic minority, although it's Puerto Rico and not Mexico.

A Right.
Q Okay. And that the victim of the sexual assault was Caucasian.
A Yes, sir.
Q And did you inform the jurors of that and probe for assurance that you were getting a race neutral juror?
A Not that I can recall, no, sir.
Q And you didn't get consults about how to do that.
A No, sir.
Q The -- let's bring this up. 16-3 again -- 16-3-20. When you got the jury charge on the guilt phase did y'all ever have any conversations about this word recommendation?
A When we got -- okay. So the question then you're asking is we're going to the guilt phase.
Q We know we don't have the charge in advance.
A Right, yes, sir.
Q We know we don't have it in writing.
A Right.
Q We know you scrolled through the guilt phase.
A Yes, sir.
Q Did anyone scroll through the sentencing-phase charges?
A I'm thinking Clay and Kathy did. I'm thinking pretty much kinda like how I --
Q All right. If Kathy says otherwise would she be the more -- the closer person to the information?

A Most likely, yes, sir.
Q And most reliable source of whether that was done or not?
A Yes, sir. I would agree with that.
Q And as regards the verdict form?
A Yes, sir.
Q Did you ask for that in advance?
A I can't recall if I did or not.
Q Okay. Let's take a look at this one sentence here that's the next paragraph down. I don't think it's that one. I think it's the next paragraph, the first sentence in the next paragraph. I need that as big as you can get it.
There's -- I don't know if you've done any more capital litigation after this case.
A No.
Q That's a question. I'm sorry.
A No, sir. I have not.
Q Okay. This word recommendation appears in the jury charge in this case 61 times to be exact, plus the front end charge to the jury as they began contained no statement that the judge would impose the sentence and they were the sentencing authority in the courtroom. The source is in this sentence where a statutory aggravating circumstance is found and a recommendation of death is made. Do you see that?

A Yes, sir.
Q So all of the time in this case in this charge the judge is saying your role is to make a recommendation. Did you ever discuss challenging that on a constitutional basis?
A No, sir.
Q Did you ever discuss challenging that on an inappropriate use of a procedural statute as opposed to a substantive statute?
A No, sir.
Q And do you know what I mean by that distinction?
A Yes, sir.
Q Okay. And did you ever talk about challenging that as being unconstitutional as applied in this case?
A No, sir.
Q And did you ever ask in fourth or fifth or wherever I am that the judge charge the rest of the sentence if he was going to use that sentence? And can you read that for me? Because I can't read.
A The top line is where a statutory aggravating circumstance is found and a recommendation of death is made. "The trial judge shall sentence the defendant to death." The trial judge before imposing the death penalty shall find as an affirmative fact that.
Q Right. The point is what's happened is a selective extraction of a single word from a sentence that includes

notice to the jury that whatever you do I shall do.
A Yes, sir.
Q All right. Is -- does that -- is that a -- as you read that is that an ambiguity if you were a normal citizen on making a rec -- what would you understand that to be?
A It's a -- it completely contradicts itself.
Q Yes. And --
A Recommendation and shall, uh-uh. Two words that shouldn't be in the same sentence.
Q Absolutely. In the same sentence.
A Can't be, shouldn't be.
Q And-but the point is that nobody made any challenge of it.
A No, sir.
Q There was no strategic reason for not challenging that.
A No, no, sir.
Q Now, that error also appeared in the jury-verdict form, but you didn't see that or challenge that, is that correct?
A That's correct.
Q And it went on the written charge that the judge is required by this statute -- won't go there -- but he has to give a written charge.
A Yes, sir.
Q Okay. One of the names I forgot to ask is whether you interviewed Phyllis White as regards third-party guilt or

sentencing mitigation evidence.
A I can't recall specifically.
Q Phyllis White was -- just to help you maybe recollect -- she was Ann Emery's best friend, church member, and grew up from 10 years old -- 10 or 12 years old. Does that ring a bell?
A No, sir.
Q Do you recall ever seeing any investigative reports regarding Phyllis White? She testified at trial too, by the way.
A Yeah, if I -- I don't -- nothing jumps off the page.
Q She was an aggravation witness, a witness in the state's aggravation case.
A Okay. I'll take your word for it.
Q Did you have a standing policy as issued and directed by your lead counsel for investigating everybody that was disclosed as a witness for the state?
A I don't -- I'm not sure if we had a standing practice, but I know Pete Skidmore and his associate Will -- I'm sure tackled that -- that list.
Q Okay. Is there any way for you to put your hands to see who they interviewed?
A No, sir.
Q We -- we -- we did -- the fact is in this case without -- we talked about victim outreach but the -- the

daughter of Mrs. Ann Emery did, in fact, testify and didn't have that outreach program. But did you all talk about the other witnesses, the other family members on the victim's -- Ray -- particularly his brother? Do you remember he had a brother?

A Yeah, Ray.

Q Ray Emery had a brother.

A Right.

Q And did you all consider talking to him about what he had to say about this case?

A I can't recall if we did or not.

Q Do you understand that there's a separation of responsibilities and investigation between guilt-phase investigation and mitigation-development investigation?

A Yes, sir. I would agree.

Q And who was the mitigation-developed expert, investigator?

A I can't recall her name.

Q Is it that you can't recall her name or that you had no contact with her?

A I --

Q You --

A No. I had contact with her and met with her several times when we were -- we would have group team meetings that they would be in Spartanburg over at the public defender's

office, yes, sir.
Q Okay. All right. Now, as regards Mr. -- now, when you're in the courtroom in this case did you have any division of labor? I don't think we'll -- it'll be laborious. Did you have any division of labor about objections to things that were happening on the record and who would object and who wouldn't?
A I think we all had kind of a -- a blueprint of who was to cross-examine a witness, who was to direct a witness. And so I think that was -- the majority of the responsibility was to that counsel -- either be Kathy, myself or Clay as to whoever was engaging that witness, would be the one that would object. But I think we all were -- we all were keeping our ears open. And so anything somebody didn't catch, one of us might have stood up, I'm sure.
Q Okay. Or passed a note to whoever had the responsibility.
A Oh, sure.
Q Correct?
A Yes.
Q As the testimony was developing.
A Yes.
Q And I'm wanting now to focus on testimony as opposed to exhibits.

A Right. Yes, sir.
Q Okay. And so when you have an expert witness on the stand, okay, certain rules apply to what they are able to say and what they're not.
A Yes, sir.
Q Specifically, they're not able to speculate, is that true, under 703?
A Yeah, yes, sir.
Q And if a witness is speculating that -- expert witness is speculating that would maybe cause you to wonder. Is that a fair statement?
A Yes, sir.
Q And, in fact, is it not true that they have to express opinions to a reasonable degree of certainty within the science that they have qualified as an expert?
A Yes, sir.
Q So if the expert at page 1782 is saying things like in response to direct evidentiary questions and opinions he believed it may be so, if he was not mistaken, 1785, he would imagine, 1786, he could not say but maybe, probably so, could be approximated to -- are those words that would cause you to wonder if he's expressing an opinion to a reasonable degree of medical certainty?
A Yes. The way that you phrased the question, yes, it could lead to.

Q Well, the longest testimony without a question in the trial record goes on for pages of a narration by Dr. Wren. So there was a lot in there that was being said. But you were paying attention and present.
A Yes, sir.
Q There are no objections.
(Pause.)
Q In regards to that pathologist -- Dr. Wren -- was time of death relevant in your third-party guilt?
A Yes, sir.
Q And do you know what the coroner said about time of death?
A I'm not sure. I know I knew it at that time, but now I'm not sure what it was.
Q If I can get the patience of counsel, the coroner's report suggested 12:00 midnight to 9:30. I think something like that.
A A.m.?
Q A.m.
A Agree. I would say that would be accurate.
Q Is that very helpful to you in your dealings with third-party guilt -- Chuck Emery?
A I do think so.
Q Okay. And if it had been narrowed down more specifically to conform to the testimony of, say, Tammy

Hughey would that have been helpful?
A Yes, sir.
Q And did you go to Dr. Wren and ask him to narrow that time of death down if he could?
A No, I did not.
Q Did you talk to the coroner about how and why and where he got those times?
A No, sir.
Q Would it have been helpful if he had told that they were not based on any scientific method?
A It would also have been helpful if the time of death was 9:30 in the morning and Li'L Cricket and had Tony on the -- on the video tape. So being kind of it's a long time --
Q Yeah. It would have been helpful.
A It would have been helpful, yes, yeah.
Q And to the extent that it was admitted through testimony it would have been helpful if we could have cross-examined on that.
A Sure, yes, sir.
Q On the third-party guilt.
A Yes, sir.
Q When Solicitor Gowdy was -- and I have that -- was questioning the defendant's mother, Lisa Lamb, he went into a series of questions. And we'll get you the page numbers

here because you're going to need to recall this. But it was a series of questions you may recall as I articulate it to you about Ms. Lamb's testimony concerning her taking Tony to medical care facilities, particularly Medical University of South Carolina. And the question was how many other children were in that clinic at the time you were there and asked her to specify a number.

There was 23 other kids. And every time he went, she would articulate where she was going, he would ask, well, how many kids were there.

Do you remember that line of questioning? I'll show it to you and refresh your recollection.

(Pause.)

Q And while they're getting that up let me ask you if you know that the only thing relevant in a sentencing-phase trial, capital case -- excuse me. What do you understand to be the limitations on evidence in a sentencing in a capital case?

A The aggravation and mitigation.

Q Okay. But what -- how -- what evidence illustrates either aggravation or mitigation? I can help you with it.

A I --

Q I'm going to get an objection, but is the circumstances of the crime one of the three?

A Yes, sir.

Q And is the unique characteristics of the defendant another category?
A Yes, sir.
Q And after Tennessee -- Payne vs. Tennessee is loss to the family of the victim in his community what we call victim impact?
A Yes, sir.
Q And if the testimony is not relevant to one of those three, then the testimony is inadmissible. Those are the three issues. Would you agree with that?
A If that's what our courts have outlined, then I'll agree with you.
Q Well, I'm -- no. I'm asking you. You were representing him.
A Sure.
Q And would that have -- is that your understanding of the limitations of the evidence?
A Yes, sir.
Q This line of questioning...
(Pause.)
Q Let me move on while they're searching for Lisa Lamb's testimony in that regard.
When you were working on this team how would you characterize its effectiveness and cohesion between all of the team members?

A We had an open dialogue. We talked pretty much every day if I'm not mistaken.

It was -- obviously, the bulk of the work was done over at the public defender's office. Meetings were over there. Yeah. Communicated freely and openly.

Q All right. There are how many dogs in this pulling this sled? Three lawyers.

A Three lawyers, two investigators on the front end.

Q Guilt end.

A Yes, sir. You know, I don't know how many we had in the sentencing phase.

Q Well, does Carolyn Graham ring a bell with you now, the name Carolyn Graham as the mitigation specialist?

A Yes, yes.

Q Okay. And who else was on the team?

A I think it was Dr. Loring.

Q Okay. She was an expert witness.

A Okay. Right.

Q Sociology. I'm talking --

A Talking about the team?

Q -- more in the team of preparing this defense charge with specific obligation of defending Mr. Torres.

A You've named them.

Q Is that --

A Yes, sir.

Q And as far as that team was concerned, would you say that everybody was pulling in the same direction together throughout the course of the representation?
A Obviously, one objective of course, but I can't -- I don't -- I don't want to phrase it like that, no.
Q Okay. How would you phrase it?
A We all -- we all bring our own independent thoughts to the case; we all bring our own independent experiences to the case. And I think that my relationship -- I think with Tony was better than Clay-Kathy with Tony. And so I can't say that we were pulling in any different directions because we all had one objective, and that's to defend, save Tony.
Q All right. And was it your impression that the team worked well in that regard without the sentence?
A Obviously not.
Q Well, no. I'm not judging that from the outcome.
A Well.
Q I'm asking you whether the team was together pulling forward or whether that was a fractured team.
A It was a -- it was a team that we did the best I think we could under the circumstances.
MR. EHLIES: Judge, can I take a break for about ten minutes and let me find this document?
THE COURT: Yes, sir.
We'll take ten minutes.

You can step down. Don't discuss your testimony.

THE WITNESS: Yes, sir.

MR. ZELENKA: Judge, it's 11:30. Just bringing that up.

THE COURT: Yeah.

MR. EHLIES: Is this going to be noisy?

THE COURT: Oh, yes, it's going to be noisy for some period of time. I mean, it'll be lights, sirens, whole works.

MR. EHLIES: Well, our suggestion was maybe we should take a short, early lunch and come back when that's over and fill on for the rest of the day.

THE COURT: Well, it's not going to take that long for the lights and the sirens to go out. I thought you needed to excuse yourself.

MR. EHLIES: I do. I do indeed. And I need to find this document.

THE COURT: All right. We'll take ten minutes while you excuse yourself and they find that document.

MR. EHLIES: Thank you.

THE COURT: Because in ten minutes something's going to happen.

(Whereupon, a recess was taken.)

THE COURT: Mr. Ehlies, if you'd like to continue with your examination, we'll see how it goes.

MR. EHLIES: All right, sir.
BY MR. EHLIES
Q Mr. Reckenbeil, was there ever a time in your representation of Tony Torres where Mr. Torres expressed to you his desire that you serve as lead counsel?
A I -- I wouldn't -- I don't know if you'd use the word lead counsel, but there was a time where Tony and I talked in the jail room at the very, very end of the case when it was right before the closing summation in the sentencing phase that Tony asked if I would give the closing summation.
Q Okay. Is that the only time that you had a conversation of that tenor?
A There could have been others. I'm not sure. If not -- there may be. There may be one or two others.
Q Would that have been the closing guilt or the closing -- no.
A The sentencing phase.
Q The sentencing phase.
A Yeah. The last -- last day.
Q Now, there was questions that I was asking you about Mr. Gowdy's examination of Tony's mother, Lisa Lamb. And I'm looking now at the trial transcript, and I don't know exactly what page -- 2464. And we have a set of questions here, and he's speaking to Ms. Lamb. And he says he wanted to start a children's learning center. And he asked, "How

many other children with the children's learning center?"

Now, when I read that I said excuse me, circumstances of the crime, the characteristics of the defendant and suffering of the family.

Then he goes on to talk about how many other children -- children were there. And he presses for an answer -- 15, 20, 25, 30. Answer: Maybe 30. "How about York Place? How many other children were there? I couldn't tell you. I don't know. You're visiting there though, right? Yeah. Fifteen? Ten, 15, 20, maybe 20? Twenty. How about Pioneer Ridge?"

I'm not seeing any objections to this line of testimony and questioning about other people being present. And it goes on, again, Pioneer Ridge. I mean, throughout the entire program. Do you know how many other children? "Oh, my God, it's the whole school for the deaf and blind."

Was Tony deaf and blind?

A I'm sorry. If you may, I was trying to get the context of the question. The 14 if you don't mind.

Q Pioneer Ridge.

A Okay. I see what you're saying.

Q School of Deaf and Blind on line 23. Was Tony deaf or blind?

A No, sir.

Q And did that apply to him? Okay?

A No, no, sir, not that I --
Q The next page --
A No, sir.
Q -- talking about children that have been similarly situated to your son. How is that relevant to a sentencing, other people and other people's circumstances? And how would a witness know whether the individual was similarly situated other than that they were in the same complex? How would they know any of the details of that individual were like the details, unique characteristics, of your client?
A So the question is, is why is that relevant and why we didn't object?
Q I'm fixing on showing you how it turned out.
A Oh, I know what you're doing.
Q I'm wondering if y'all are talking to each other about where is this going.

Can you tell me looking at it now whether it is testimony, questions and answers pertaining to circumstances of this crime for which he had now been committed?
A No, no, sir. It's not.
Q Is it about the unique characteristics of this man Tony Torres?
A I know an argument could be made that there is some bearing for that because I -- I know where it's all leading to.

Q And we're going to show you.

All right. All right. Well, pick it up right there. If you know where it's leading, are you getting uncomfortable with the line of questioning?

A Well, yeah. I do think that, you know, retrospect, absolutely.

Q All right.

A It's a situation where he is -- he is trying to make it where Tony is the uniqueness, the exception, of what these other kids are.

Q Well, we don't know anything about the other kids really, do we?

A Well, they're in some sort of school that has been deemed an alternative school, I'm assuming.

Q Okay. Then he asked, "There are other children. There are other children who had the same -- yes -- issues and the same problem." How would Ms. Lamb have known that? How would Mr. Gowdy have known that?

A Just the generalization. Yes. You're right. You're -- yeah. It's just a generalization of the fact that the school and these other institutions are alternative schools.

Q Let's jump over to when he puts the hammer down on it to Ms. Schwartz-Watz and imports that testimony into questioning Dr. Schwartz-Watz.

Would you agree with me that I think the latest statistics I saw somewhere .4, 1.5 of the population suffers from bipolar disorder? That sounds about right?

Of that we'll just call it 2 million. Split the difference -- 2 million suffer from bipolar -- percentage. Two million.

What percentage of that 2 million had committed crimes that are similar to what he has done? How in the world would anyone be able to answer that question that didn't know all the other people who are -- had bipolar disease, whether they were treated properly or maybe medically improperly or whether they committed crime? Do you know how many unsolved murders there are in Spartanburg County right now?

A No, sir.

Q Would you agree with me that it'd be pretty difficult to answer that question with any degree of reliability?

A Yes, sir. I would agree.

Q It would be very small, I think, and -- and listen to where this goes. "I think out of all of the death penalty cases I've done, I think Mr. Torres is the only one I've ever diagnosed bipolar disorder."

Next page.

(Pause.)

Q Okay. Well, you skipped the closing.

She uses in her testimony that Tony Torres is a very small subset of violence. Do you remember that testimony?
A I'm -- I can't say I specifically recall those coming out of Dr. Schwartz-Watz's mouth, but looking at the screen up there that is kind of the context of the testimony.
Q Okay. Well, I will have the specific references in the memoranda that you had a chance to review on page numbers. And I'll go into that with Mr. Clay Allen.
A Okay.
Q Okay. But would you agree with me that this line of testimony about what other people's circumstances might be and whether they did or did not commit a crime that is or is not like the crime of Tony Torres is irrelevant --
A I would agree with that.
Q -- to sentencing this man?
A I would agree with that.
Q And if you were standing in front of a judge on a D.U.I. and the prosecutor started talking about their other D.U.I. that the judge had sentenced last week, would you offer any objection to how that would be relevant to this particular D.U.I.?
A Yes, sir, I would assume so in that sort of phrasing the way that you're stating it, yes, sir.
Q And that would be somebody that was convicted of D.U.I. We don't know that these people are convicted of anything.

Isn't that true?
A Yes, sir, that's true.
Q He's just lumped them all together based on the fact -- one common fact that they all are sick in one way or the other, and suggested that this man should be punished because everybody else that was sick never committed such a crime, when we don't have any idea what they did. And it's not relevant, correct?
A Yes, sir. That'd be the logical conclusion.
Q And no one objected to that on the record. And I presume there was strategic reason for that to happen, for you not to object.
A I can't specifically recall the mind-set of -- I don't think that there was any discussion on that.
MR. EHLIES: Excuse me just a second, Judge.
(Pause.)
MR. EHLIES: Thank you so much, Judge.
Q Thank you, Mr. Reckenbeil.
A Yes, sir.
THE COURT: Ms. Brown.
MS. BROWN: May it please the Court.
THE COURT: Yes, ma'am.

CROSS-EXAMINATION

BY MS. BROWN

Q Good morning, Mr. Reckenbeil.

A Good morning.

Q I made it just in time to say good morning. That's why I was checking the clock first. We are kind of close.

A Yes, ma'am.

Q Let me ask you a few questions just in general before we start with the specific facts of the case. And just bear with me. Some of these may seem a bit too general.

But you were aware when you were appointed in this case that this is a capital case, right?

A Yes. I was.

Q You were keenly aware of that when you were first appointed.

A Yes.

Q You were talking about that with Judge Hayes if I understood your testimony.

A Yes, ma'am. That's correct.

Q Okay. And you were aware as part of that that Mr. Torres, your client, could be sentenced to death, is that right?

A Yes, ma'am.

Q And, in fact, he was.

A Yes, ma'am.

Q Now, and you've mentioned that you had a good relationship with Mr. Torres during your representation.
A I think so, yes.
Q Okay. And could you speak bluntly to Mr. Torres, plainly to him about the case?
A I think so.
Q Okay.
A I do.
Q And you told him that he was facing the death sentence.
A Yes, ma'am.
Q Okay. All right. Did you perceive a level of trust coming from Mr. Torres toward you?
A I would say being that we are just obviously thrown into a fish bowl and not by basically choice, I would say yeah. It was. There was a level of trust. I liked him.

I had no reason to think otherwise except for the obviously -- the obvious. But when we had discussions, I think we had pretty good dialogue back and forth.
Q And you had mentioned earlier in your direct that Mr. Torres had actually asked you to give the argument in closing. And that would have been the penalty phase, right?
A Yes, ma'am.
Q All right. And why didn't you do that?
A At that point in time -- I'm going to answer it in two ways if I could.

Q Sure.
A At that point in time knowing that Clay was more prepared for that portion of the case I thought it would be better suited and we would serve Tony's best interest by the individual who is focused on that, and I truly thought that that would be in Tony's best interest and that the evidence would be discussed better by an individual that was poring through it a lot better than what I did on that specific area.
Q So I think you mentioned before you were giving 110 percent. And sometimes to do that you have to defer to experts, someone who has more knowledge in that area than you would.
A That's correct.
Q And in this case you perceived that it would be best because Mr. Allen had so much experience in this and also had talked to other experts, medical experts and social experts, that it would be better for Mr. Torres.
A Yes. I agree.
Q Okay. And as part of that it goes back to your team's discussions, doesn't it, that you wanted some separation between the phases and who was representing Mr. Torres initially in those phases, correct?
A Yes.
Q Okay. So you had discussions that there may an issue

with the jury listening to one attorney saying not guilty and another attorney saying here's another reason to look at for not sentencing.

A We -- absolutely. And I think that was a very real, and is a real, issue that I sold out to the jury, and I had to in my closing summation in the sense that saying truthfully the fact that his fingerprints were not on the murder weapon.

And so then you're going to come back and just -- you know, some bald headed from New Jersey just telling you two days ago that his hand's not on the murder weapon and then just saying, well, you know, we shouldn't put him to -- to death.

That was a very real discussion and a very clear strategy that it was distinguishable. And that's the way we proceeded.

Q And you maintained that strategy even with opposition to that strategy from your client.

A Yes.

Q Okay. And let's talk a little bit about the decision to go forward at trial to contest the guilt.

Mr. Torres wanted you to contest guilt, didn't he?

A If he didn't want me to do it, I was going to do it anyway. But, yes, he wanted me to contest it. And I felt that we had very good arguments that would carry over to the

second portion of the case.
Q Okay. But he was firm in his decision that he wanted a trial, correct?
A Yes, ma'am.
Q And he never backed up on that?
A Well, he never backed up on it. I don't know what you do when the solicitor is saying there is no offer.
You could do what my former law partner did -- Charlie Hodge -- who pled a guilty man to death. And it was overturned on a P.C.R. And so we couldn't just plead him and then just get the death penalty.
So there was no choice. We were going to fight this thing regardless. There was no opportunity for resolution. So the discussions were extremely limited as to, okay, well, how do we stop this. We couldn't. So, yes, we had to contest both phases to the best of our ability.
Q And when you spoke with your client who trusted you at this point, when you spoke with him did you tell him here's all the evidence and we're going to have to address the evidence?
A Yes, ma'am.
Q And in your perception -- layman's terms -- but in conversation with Mr. Torres did he understand that this was a very strong case?
A Not answering for Tony, but I think so, yeah. I think

so.
Q And you met with him several times.
A Yes, ma'am.
Q Can you even estimate how many times?
A I couldn't.
Q Did you ever refuse to meet with him?
A I don't -- I don't think so.
Q Okay.
A I'm not sure.
Q Okay. And were you aware that Mr. Torres had what we would call rather limited formal education?
A Yes, ma'am. I'd agree with that.
Q But in your conversations with Mr. Torres did he express understanding of the criminal justice system?
A I can't say specifically that he told me back of -- okay, well, I'm going to sit in this chair and I'm the defendant. I don't think we went through the -- the setup. But I do think that there was times where we discussed the procedure of what was going to happen.
Q And he had been involved in the criminal justice system before from a charge to disposition before he was your client.
A Yes.
Q And he had some knowledge from that background as well.
A I -- I don't know. I didn't represent him in those

cases. I wish I did.
Q Okay. And in your conversations with Mr. Torres did he ever express some misunderstanding that he really wasn't facing the death penalty in this charge?
A No, ma'am.
Q Now, in your discussions about the state's evidence in making the decision on how you were going to handle the trial and the penalty phase I'm sure you had discussions with your client about his perception of that evidence, right, not just telling him what it was but asking him what he thought about it?
A I can't say specifically his overall reaction to it but --
Q Let's look at it in smaller terms.
How did he want to explain his semen in Mrs. Emery?
A I'm not sure if somebody suggested it or it was brought up, but the fact that -- I can't say who it came from, but somebody suggested that Tony was just having random sex with Mrs. Emery.
Q Okay. Any evidence of that?
A Well, obviously with the body fluids in her at the time of the incident. But besides that, I don't think so.
Q Nothing else.
Okay. How did he want you to explain his shoe prints, those consistent prints, with the bloody prints at the crime

scene?
A I don't specifically remember Tony and I talking about that. If we did it would have been the fact that he was an acquaintance with Chuck. And I don't know if Chuck borrowed his shoes or something along those lines.
Q How did he want you to explain his possession of the Emerys' van at around 7:00 a.m. that morning?
A There wasn't an explanation.
Q And what did he tell you about having all of the Emerys' personal items in that van?
A Just wasn't an explanation really.
Q And what about the possession of Mrs. Ann Emery's cell phone?
A Again, I don't specifically recall any sort of -- specifically -- conversation or explanation on it.
Q Let's talk a little bit about that cell phone.
You remember Mrs. Emery's -- Mrs. Ann Emery's cell phone came up in regards to a stipulation that was actually made at trial.
A Yes, ma'am.
Q Do you recall that?
A I do.
MS. BROWN: Your Honor, may I approach?
THE COURT: You may.
Q I'd like for you to review this document, sir, and ask

if that -- if you recognize that document.
A I do.
Q Okay. And what is that document?
A A stipulation of where we stipulated that the -- that Tony made a telephone call at 5:14 a.m. that morning.
Q Okay. And you say you stipulated. The signatures on there reflect that Mr. Allen signed. And is that your signature that you also signed?
A Yes, ma'am.
Q And Kathleen Hodges signed.
A Yes, ma'am.
Q And Mr. Barry Barnette signed.
A Yes, ma'am.
Q And Mr. Torres signed.
A Yes, ma'am.
Q So you've discussed that stipulation with Mr. Torres.
A Yes.
Q And he told you, instructed you, to stipulate?
A Well, we just said that this -- you know, Tony -- quid pro quo -- we needed to keep out the sex line because they're going to prove the fact that you made the phone call. So I think it was just a quid pro quo situation where we had to lessen the impact of that sex line.
Q Okay. So he did admit to you possession of the cell phone at 5:14 a.m.

A Well, I can't tell you specifically what he said when he said it, but, yes, ma'am, obviously, not going to sign a document that contains a falsity, so, yes, ma'am.
Q And you went over this stipulation with Mr. Torres, explained it to him and what you were doing.
A Yes, ma'am.
Q And why you wanted to do it.
A Yes, ma'am.
Q And he agreed.
A Yes, ma'am.
Q And, again, any explanation why he had that phone at that point?
A No, ma'am.
Q Okay. You told him the danger of admitting that particularly inculpatory fact.
A I don't think there was just any way around it.
Q Okay.
A So I think we had to lessen the severity of that sex-phone line, that 1-900 number.
Q Okay. Now, as I understand your testimony on direct, you were in charge of the guilt phase, more or less. Although it was a team effort, you were primarily in charge of the guilt phase.
A I wouldn't categorize it like that, but that was my assignment, yes, ma'am.

Q Okay. Well, would you say that you took the lead on that?
A I would say that, yes, yes, yes.
Q Is that a better phrase?
A Yeah, fair statement.
Q And in doing that did you rely in part on what Mr. Torres was telling you about the crime itself?
A Yes, ma'am.
Q Okay. And did Mr. Torres ever tell you as his trusted attorney that someone else was involved in the crimes against the Emerys?
A I'm -- I can't say if I brought it up or he brought it up or somebody else brought it up, but I know we had discussions about others to include Chuck and some sort of reasonings behind it.
Q So, and I understand you had discussions, some speculation. But what I want to know specifically is did Mr. Torres who couldn't remember that he was in possession of Mrs. Emery's phone at 5:14 in the morning -- if he said someone else was with him.
A No, because I don't think -- Tony didn't remember a lot.
Q But he remembered 5:14, that phone.
A Well, I can't say that he specifically remembered it. It's just a matter of, like I say, quid pro quo in the sense

that need to keep out that sex line in the context that they were going to be able to prove that they had his -- or excuse me -- that he had her cell phone. So, you know, there is -- saying specifically recall, I do remember a lot of it that Tony didn't remember a lot of what was happening that evening.

Q Okay. And did he tell you that he drove the van some, as I believe the record reflects, 20-plus miles somewhere between 6:30 and 7:00 a.m., given that the crash occurred at 7:00 a.m.? Did he tell you that he drove that van over to Buffalo and --

A And I don't mean to be a smart aleck, but he didn't have to tell me. I don't even know if he even said that he was driving the van. The evidence -- it just was.

So that's conversations -- I respected Tony enough not to treat him like an idiot in the sense that I'm just not going to ask him something that just clearly is. And so we had discussions and just said, hey, the van -- yeah. Driving to Li'L Cricket. It just -- there wasn't -- we didn't have a lot of time to just B.S. And so we were getting to the heart of the matter of what we needed to do. So there was things that were just obvious, and that was one of them. He was driving.

Q And he didn't contest it, did he?

A No, no, not really.

Q He didn't tell you that anyone gave him keys to the house or the van, did he?
A Now, that's -- I can't recall if -- if Tony and I talked about the fact of something along those lines, but I -- I deferred to any sort of notes on that issue or any other. But I don't recall whether or not -- but there may be something along those lines and that -- Mr. Allen or Ms. Hodges may have had some recollection on that. But that does stick out in my mind a little bit.
Q Okay. And do you recall that he made several statements to the police officers right after he was taken out of his grandmother's home?
A I believe so.
Q And part of those statements indicated that he knew that it was a beating death. Do you remember that?
A Yes, ma'am.
Q And the state didn't use that. The state voluntarily withdrew that statement and it didn't come in. Do you recall that?
A Yes, ma'am.
Q Did he tell you how he knew that it was a beating death before that information was published?
A No, ma'am.
Q But you do recall that statement.
A Yes, ma'am, I do.

Q Did Mr. Torres ever tell you that he had engaged in conversations planning to rob the Emerys?
A I don't recall that.
Q At any time, at any point?
A No, ma'am. I don't recall.
Q Even jokingly to somebody?
A I don't believe so.
Q Now, you've represented multiple criminal defendants before. So have you ever had a client charged with a significant crime not admitting his involvement or try to downplay his involvement?
A So the question is that have I ever had a client try to downplay or not admit that they did it?
Q Uh-huh.
A Every single one of them.
Q Every single one of them.
A I'm sorry.
Q And so your strategy would not be based solely on what your client represents to you.
A No, ma'am, no.
Q Okay. And you investigated in this particular case too, didn't you?
A Yes.
Q Okay.
MS. BROWN: And before I forget, Your Honor, I'd like

to offer the stipulation as an exhibit.

MR. EHLIES: Without objection.

THE COURT: It's admitted.

(Stipulation No. 1 of trial marked State's Exhibit No. 5.)

MS. BROWN: May I approach again, Your Honor?

THE COURT: You may.

Q I'd like to show you two statements. They appear to be billing statements from Skidmore and Associates. And there are two -- 10/6 and 11/4 of 2008. And see if you can identify or you recognize those documents.

A I -- I do remember receiving the bills from Pete or Will, but I know that they would, obviously, go through the public defender's office and then indigent defense to be compensated.

Q Okay. And this would be the investigator that you mentioned in your direct examination, is that correct?

A Yes, ma'am, that's correct.

Q Okay. And do you recall how long Mr. Skidmore and Associates had to research or investigate in this particular case?

A Eight or nine months.

Q Okay.

A Maybe a touch longer.

Q Okay. And you would see that the first entry there

suggests September of 2007. Does that sound like when the investigation, fact investigation, would have started for you?
A That sounds about accurate.
Q Okay. And that would have continued until October of 2008. Does that sound accurate?
A Yes, ma'am.
Q Okay. So we're talking a little over a year in just the investigation, at least from the entries of the statement?
A Based upon what I've seen in front of me, yes, ma'am.
Q Okay. And you were talking a little bit about selecting Mr. Chuck Emery as a party of interest. And do you remember how that developed, what setting? Was it talking to Mr. Torres first? Was it reviewing the evidence? What did you have?
A I think it was reviewing the evidence, then discussions with several members that are sitting here in the gallery, and then talking with Tony of ultimately a witness testifying that they saw Chuck exiting the Emerys' house about 7:00 a.m. the morning of the murders.
Q Okay. And you mentioned talking with some of the family members. Would that have been Ms. Tammy Hughey?
A Yes, ma'am.
Q And that's Mr. Torres' aunt, neighbor to the Emerys.

A Yes, ma'am.
Q That's where Mr. Torres was living, neighbor to the Emerys.
A Yes, ma'am. That's correct.
Q And do you recall that Ms. Hughey gave two statements to the police officers on the day that the bodies were discovered?
A Yes, ma'am, I recall that.
Q And do you recall that she did not mention anything about Mr. Chuck Emery in the house or coming out of the house? In fact, she only said something around -- about 7:00 o'clock and sunglasses in her initial statement. Does that ring a bell?
A Something like that. Yes, ma'am, it does.
Q Okay. Well, my question is based on that -- and those were the statements that were made on May 11th of 2007 and introduced in this proceeding as well I believe as State's 1 and 2 -- you had that and you were reviewing that. And then we find -- which has also been submitted -- an affidavit executed in August of 2008. And in that affidavit Ms. Hughey reflects a suspicion about Chuck Emery and a fire pit and maybe being around the house closer to the time that the suspected murder -- the time they suspected for the murder. Do you recall that?
A I do recall that.

Q Why did you get an affidavit from a cooperating defense witness?
A The way that I think my discussions were is that she just didn't have the opportunity the first time or so to give a statement because a rush to judgment was being made.
And so I think that that affidavit was something that we needed to have firm when we were trying to discuss the opportunity of third-party guilt, and so an affidavit you get because you want to make sure the person's not going to flip on you. I didn't think she was going to do that, but I just wanted to have something that was solid, and so that was I think my choice of getting that affidavit.
Q Okay. And that particular bit of information that Mr. Emery may have been around a fire pit or at the house I believe sometime after 3:00 o'clock and before the sunglass incident, that wasn't anywhere else, was it?
A No, ma'am. I don't believe so.
Q And this was after some discussion along the way from your representation all the way up to trial to focus on Chuck Emery. Is that fair?
A True. That's fair. But I will say this. As I remember her coming to me and saying that there was a time or times that she tried to follow up with law enforcement and did not get the opportunity, I vaguely remember that but -- but, yes, you're accurate in what you're saying.

Q Okay. And, again, you didn't just stop with what either Ms. Hughey was telling you or Mr. Torres was telling you, but you had Mr. Skidmore out there. And would you agree with me there are several entries where Mr. Skidmore or an investigator with his firm attempted to locate neighbors?
A Yes. That's true.
Q And follow up on tips?
A Yes, ma'am.
Q And talk to Kelly Pedrick, a neighbor?
A Yes, ma'am.
Q And spoke to Toby, a neighbor. And located Mandy McKinish.
A Yes, ma'am.
Q And she was also a neighbor, correct?
A That's correct.
Q Do you remember that?
A Yes, ma'am.
Q Okay. And if you look down at the entry at September 24th of 2008 it appears to reflect that one investigator went to an emergency veterinarian clinic at a certain address and interviewed the staff. Do you recall that information from your representation?
A Looking at it, yeah, it jogs my memory a little bit.
Q Okay. And if you'll remember, Holly Melton and Chuck

Emery gave statements in this case.
A I believe so, yes, ma'am.
Q And you would have reviewed those statements.
A Yes, ma'am.
Q Okay. And they indicated at one point going to a veterinarian clinic at that address. So wouldn't this be trying to either confirm or debunk what Mr. Emery had said in his statement?
A Yes, ma'am. That was the purpose.
Q And if it had debunked it you would have used it, wouldn't you?
A Yes, ma'am.
Q Because you were focused on Mr. Chuck Emery.
A Or --
Q By some suggestion.
A Yes, ma'am. Anything that was, yes, reasonably plausible, yes, ma'am.
Q Okay.
MS. BROWN: Your Honor, I would like to move the Skidmore documents in as an exhibit.
MR. EHLIES: Your Honor, we don't know that there's proper foundation for that.
The witness hasn't identified it as his document, and it is addressing issues that he's not particularly familiar with, and it's offered to prove that it's accurate and that

those things were, in fact, done and when -- when they were done.

And I don't think there's a sufficient foundation for that document to come in on its own merits through this witness.

MS. BROWN: Your Honor, he has identified not only the document but the information in the document and having reviewed that information with Mr. Skidmore.

THE COURT: Well, I didn't understand that.

Is that -- he's testified.

Is that your testimony, that you viewed the document and reviewed it with Mr. Skidmore after its preparation by him?

THE WITNESS: The -- yes, sir, Your Honor. I did review the document. And did we go line item through line item? No, sir.

THE COURT: Well, you've reviewed that document with Mr. Skidmore after its preparation?

THE WITNESS: When it was presented to me, yes, sir, I believe I did.

THE COURT: Okay. And you've looked through it now.

THE WITNESS: Yes, sir. I've been skimming through it.

THE COURT: And does it -- is it -- based upon your recollection is it accurate?

THE WITNESS: Looking back through it, yes, sir.
THE COURT: In other words, you discussed those various things with Mr. Skidmore? I mean, whatever he investigated, whatever he found, y'all had those discussions?
THE WITNESS: Yes, sir.
THE COURT: Okay. Overrule your objection.
MS. BROWN: Thank you, Your Honor. Let me retrieve these and have that marked as one exhibit.
(Statement from Skidmore and Associates dated October 6, 2008, marked State's Exhibit No. 6.)
MS. BROWN: Beg the Court's indulgence.
(Pause.)
MS. BROWN: Thank you, Your Honor. I appreciate that.
BY MS. BROWN
Q Mr. Reckenbeil, let's go back to voir dire a little bit.
Now, you said this was a team effort. And was voir dire a team effort as well?
A Yes, ma'am, as I recall, yes.
Q Okay. And you discussed the selection of the jurors.
A Yes, we did.
Q Okay. And I believe that the transcript reflects that Mr. Allen spoke mainly for the defense as far as the selection --

A I recall --
Q -- in seating the jurors. Do you recall that?
A Yes, ma'am.
Q All right. And -- and this being a capital case, you received information, more information than you would normally receive in voir dire, correct?
A Yes, ma'am. There was a questionnaire I believe that we received.
Q Okay. And that questionnaire has information that may uncover bias.
A I would agree with that, yes, ma'am.
Q Okay. All right. And you work now presently with some discrimination cases, correct?
A Yes, ma'am.
Q Okay. So you're acutely sensitive, are you not, to bias, and especially racial bias or gender bias?
A Yes, ma'am. The McDonnell-Douglas test is that we must show that pretext is not the true reason for the termination or the action, but, in fact, a motivation factor is the discrimination.
Q And that's something that you would have been looking for in jury selection back in October of 2008?
A Yes, ma'am. I handled several labor employment cases before then.
Q And was there any racial aspect to the crime that you

were aware of that the jury would hear that sort of underscored that that you would be concerned about?

A Not that I could see, no, ma'am.

Q But general bias you would have looked for.

A Yes, ma'am.

Q And I want to ask you a little bit about the order of appointment.

You told us that you went to Judge Hayes. And do I understand your testimony to be that you essentially requested to be on the case?

A It -- somewhat, yes. I would say somewhat, yeah. There was discussion that Judge Hayes and I had. And, yes, it was, ultimately, I think mine, yeah. As a result of my decision, but, yes, I would say requested. That would be deemed that.

Q And do you recall actually having a formal order appointing counsel that Judge Hayes would have signed June -- in fact, June 20th of 2007?

A Yes, ma'am. I remember that.

Q And the crime was May 11th of 2007.

A Yes, ma'am.

Q So this was -- the appointment was pretty close after the crime itself.

A Yes, ma'am.

Q Okay. And just to give us some context, the trial was

October of 2008, right?
A Yes, ma'am.
Q Okay. Now, within the order of appointment the judge put in some information, and I'd like to read the information -- it's a very short entry in the order, 2-page order -- and ask you specifically if that was accurate for that time. And that would have been June of 2007. Okay.
A Yes, ma'am.
Q "As to co-counsel, John G. Reckenbeil, I find that he is a graduate of the University of Oklahoma City School of Law and was admitted to practice in the State of South Carolina in 2000. He has been in private practice in South Carolina for approximately seven years. He has defended over 100 felony cases in the last five years including a murder trial and several murder cases. Mr. Reckenbeil is familiar with the practice and procedure of the criminal courts of this state." Is that accurate?
A Yes, ma'am.
Q Was that accurate when it was written in June of 2007?
A Yes, ma'am.
Q So over a hundred felony cases and murder cases.
A Yes, several murder cases, yes, ma'am.
Q Okay. So but you don't do as much criminal work now, is that correct?
A Yeah.

Q Is that fair?
A That is very, very fair.
Q Okay. But at that time you were keenly aware of the criminal-law aspects of representation. And that would include circumstantial evidence?
A Yes, ma'am.
Q Now, let me ask you about notice in general with the third-party-guilt issue.
You were aware that the state was asking for a pretrial determination about your third-party-guilt evidence.
A Yes, ma'am. That's correct.
Q So that wasn't a surprise to you.
A No, ma'am.
Q And talking about the solicitor's office in general, you had worked with that particular solicitor's office a good bit judging from that case load, is that correct?
A Absolutely.
Q Okay. And had they been accommodating to you in this case as far as answering your requests and giving you access to information?
A Extremely, yes.
Q Extremely.
A I think I had a very, very good working relationship with all three and know Cindy probably the best but know Trey pretty well. I always had a very good working

relationship with all three of them.
Q And you had no discovery complaints to make, bring, against the solicitor's office.
A Not that I can recall.
Q Okay. So knowing in advance -- and they gave you that notice in advance -- would it be fair to say a heads up that this is coming?
A Yes, ma'am.
Q Okay. So you knew the challenge in advance and you knew that it was possible that all of this could be suppressed, the evidence that you wanted to present could be suppressed.
Did you tell your client that there was that possibility?
A Yes, ma'am.
Q So he knew that.
A Yes, ma'am.
Q And even after it was suppressed he still wanted to go to trial. He still wanted you to contest guilt.
A Absolutely, yes.
Q Not even after -- he never wavered in it. Not even after that. I'm sorry.
A No. There was no, clearly no -- there was no choice. And I think a good trial lawyer can anticipate what is coming from the other side. And so I work on both sides of

the aisle in a civil aspect of it, so I pretty much know what's coming before it even comes. And I had a very strong suspicion that they were going to move to try to kick that evidence out.

Q Okay. And you've had other cases, I'm sure, where you didn't put up a defense, correct? You didn't actually offer exhibits or evidence.

A Correct. That is true.

Q Okay. All right. But that doesn't affect the state's burden of proof, does it?

A Never.

Q The state still had that burden of proof, no matter what came in, and accepted it.

A That's true.

Q And you could still attack on cross-examination any perceived witness -- weakness -- excuse me -- in the -- the state's case.

A Yes, ma'am. That's correct.

Q And that's part of a defense. You don't have to necessarily present evidence, correct?

A That is true.

Q Okay. And so when you knew in advance that the evidence could be suppressed and you were talking about the opening did you consider that the evidence would be suppressed and you still have to give the same opening?

A Yes.
Q And it wouldn't have been inconsistent to still do a cross-examination and hold the state to its burden of proof, would it?
A No.
Q And I think you probably alluded to this, but if you wouldn't mind me asking the direct question, what was your assessment of the likelihood of success in the guilt phase?
A Now or then?
Q Well, let's start with then.
A You play mind tricks with yourself to do certain things one hundred percent, because I don't ever do anything halfway. One hundred percent was my thought on my client's innocence. That's the way that you do it.

The likelihood in reality, single digits, one or two percent on the guilt or innocence.

Q Now, you would agree with me, would you not, that in general terms you have to have some evidence in the record to support any requests to charge?
A That is true.
Q Okay. And it's the same with mitigation and a request to charge. You have to have some evidence to support it, correct?
A Correct. That's true.
Q Okay. And what evidence in the record would support

that there was anyone else who participated, named or unnamed who participated, in this crime?
A In the record would be the shoe print in the house that was unaccounted for.
Q Okay. And the shoe print if we can talk about that, there were actually two prints recovered from the house, correct?
A Yes, ma'am, yes, ma'am.
Q And the testimony at trial said that one print was consistent with law enforcement. Do you recall that?
A Yes, ma'am.
Q Okay. And the other print was consistent with the shoes that Mr. Torres handed over to officers just a few hours after wrecking that van.
A Yes, ma'am.
Q Correct?
A Yes, ma'am,
Q Okay. So what evidence was there that would definitively show another person in that house?
A Besides what you've just discussed the other -- definitively? I can tell you what I argued in closing summation, would be the fact that Tony's fingerprints or D.N.A. was not on the murder weapon. So, and if I'm not mistaken, it's also the magical evidence that Ms. Crick talked about I don't believe was on the gas can if I'm not

mistaken. But that was -- those, just pieces just to raise reasonable doubt.

Q Let me just ask you. Focus again on the hammer. There was discussion about the sample on the handle of the hammer. And you're saying his, Mr. Torres', profile was not matched to -- if I may use that term -- the handle. But he wasn't excluded, was he?

A Right. But in my --

Q Sure. You made the argument.

A Yes. I just think that --

Q But it wasn't excluded.

A It wasn't excluded, no, ma'am, but I think that there were to a heck of a lot more on there than -- but, of course, I know the argument was raised that he wore gloves, but none were found.

So that was -- those were the little pieces interjected into the record that was available, obviously, with what was excluded in the pretrial motion that were in the record as to the possibility of other involvement by others.

Q And there were a number of photographs in this case, correct?

A Yes, ma'am.

Q And there were photographs of the footprints that we've just been talking about, correct?

A That is correct.

Q Okay.
MS. BROWN: The Court's indulgence, please.
(Pause.)
MS. BROWN: Your Honor, may I approach?
THE COURT: You may.
(Pause.)
MS. BROWN: I'd like to approach.
THE COURT: I've already granted that request.
MS. BROWN: Excuse me. I did not hear you. I apologize for that.
Q I'd like to ask if you could review this. This is labeled State's Exhibits 328 and 327 from the clerk's office. Do you recall looking at those photographs?
A I do, yes, ma'am.
Q And the photographs -- what do the photographs reflect? What do you recall them reflecting and what does it look like to you now?
A Looks like the -- a shoe print, a bloody shoe print --
Q Okay.
A -- if I'm not mistaken. And then this looks like the bedding if I'm not mistaken as well. It's just a limited glance in 16 there. Bedding I think from the Emerys.
Q Okay. And I've just shown you these to ask you this question.
These photographs and many more like that -- because

you'll agree with me there were a lot of photographs from this case.

A Yes, ma'am. There were.

Q And it was a very bloody crime scene.

A Yes, ma'am.

Q These -- these prints, these footprints, were in blood in the house.

A That is correct.

Q Okay. And there were only two identified prints.

A Yes, ma'am.

Q From all of the prints in that house and all of the blood in that house.

A Yes, ma'am.

Q And one matched Mr. Torres' shoe print.

A Yes, ma'am.

Q And the other was consistent with law enforcement.

A Yes, ma'am.

MS. BROWN: And, Your Honor, I'd like to hand these up to you. And they are already in the record as State's Exhibit 327 and State's Exhibit 328 in the trial record.

MR. EHLIES: Without objection.

THE COURT: They are admitted. Are you going to make copies of these for this record?

MS. BROWN: Your Honor, that's -- this is a copy that the clerk's office was kind enough to make for us from the

original.

THE COURT: These are copies.

MS. BROWN: Yes, sir.

THE COURT: Okay. That's -- do you want them marked separately?

MS. BROWN: Yes, sir.

327 would be State's 7 and 328 would be State's 8.

(Photograph S-327 trial exhibit marked State's Exhibit No. 7; photograph S-328 trial exhibit marked State's Exhibit No. 8.)

Q Mr. Reckenbeil, you were talking a little bit in your direct about the D.N.A. evidence coming in late. But you already had the print evidence that we were just looking at.

A Yes, ma'am.

Q And you'd already had the van evidence and many more instances that tied Mr. Torres to the crime, right?

A Yes, ma'am.

Q So was the D.N.A. a surprise?

A No, ma'am.

Q And Mr. Torres never told you he was a minor participant. He never even told you he had anybody with him, did he?

A No, but I -- just the reasonable person, and in light of what you just showed me, would conclude that the blood splatter had to be tremendous with a hammer.

And Tony slept next to a guy for 30 minutes coming back from Union. And I remember asking that gentleman did you see blood all over Tony, did you see it everywhere, and he didn't see it.

And then Tony's D.N.A. not on the hammer, it just -- it still bucks me today --

Q Uh-huh.

A -- because Tony was -- if Tony was in such a rush to get out of there, he didn't go and change and then no. It just happened simultaneously. And so there would have been blood, more blood, everywhere. So it's something that bothers me.

Q Would it also bother you to think that he had presence of mind to flee --

A Yes. Absolutely.

Q -- but can't remember the crime?

A Yes, yes, yes.

Q And you were asked a little bit about opening statement from Ms. Crick.

Isn't it true that the state has the ability to offer their theory of the case?

A Absolutely. I think Cindy did a great job. I like and respect Cindy tremendously. I just -- I joke about the magical evidence. It's because she was very emphatic about that. And I used her opening in my closing to say take that

of what they said is true about the magical evidence, and the magical evidence is not on the murder weapon.

Q Uh-huh.

A And I know that broke through to the jury because they kind of went, oop, wow, yes. So that's -- my hope was to carry that over to the second phase.

Q Okay. And you talked a little bit about your relationship with the solicitor's office and with the solicitor and the deputy solicitor and Ms. Crick. And you've also told us that it wasn't a surprise about the third-party-guilt motion in pretrial.

Did you talk to the solicitor about what you were developing or attempting to develop in your investigation?

A I would never discuss with opposing counsel my inner secrets and trial strategy, but I do think that we had very -- it wasn't a surprise where we were going with this.

We didn't have anything that was so secretive of some sort of, you know, bomb we were going to drop on each other. Everything was pretty much there.

So, yeah, there was discussions, absolutely. But my private discussions with Trey that we had up in his office on that Saturday morning when I came -- we were both in golf attire -- was, Trey, look at this stuff, how is this -- how is this not giving us the ability to cut a plea.

Q So you were attempting.

A Yes.
Q You were attempting to give them what you could without violating any confidence. Give them what you could and say let's do something different.
A Yes. I used whatever relationship we had developed through my work experience, through our personal lives to try in any way, sharp or form to not have this trial go forward.
Q And I think at some point you said that this was your one and only capital case that you have been involved in, is that correct?
A Yes, ma'am.
Q Okay.
A Yes, ma'am.
Q But, obviously, you were not alone. You talked to us about Mr. Allen and Ms. Hodges and Pete Skidmore and various other experts. I think you told me your expert for the D.N.A. was Dr. Ostroski. Does that ring a bell?
A That does.
Q Is that correct?
A That does.
Q So you had a team together. You were working together. And you had resources available outside of your office and Mr. Allen's office, correct?
A That's correct.

Q All right. And you had other support from indigent defense perhaps or other attorneys.
A Yes, ma'am.
Q Do you recall specifically any other attorney, any other case, that you reviewed in preparation for this one?
A I do. I remember that it was simultaneously going on, was the -- and I'm sorry to use this phrase -- but the Clemson bikini case is the one that Jim Bannister was defending down where Dr. Loring who might have -- she might have been indisposed because Solicitor Ariail said he was going to throw her in jail for practicing without a license. And so we were having concerns about that. And so, yeah, those were the things we did review. And we reviewed information that Clay was receiving from individual -- I can't remember exactly the attorneys out of Columbia, but we did. We did get information.
Q How about the Inman case? Does that sound correct?
A That is correct.
Q Okay. And in that case, that was a plea if that's -- to your knowledge was that case a plea?
A He pled guilty, which Jim didn't want to do. I remember that specifically.
Q So when it comes down to pleading guilty a lot of this is driven by your client. In fact, you can't coerce your client to plead guilty, can you?

A You can't coerce your client to plead guilty, but I remember Jim standing up and just saying to the judge he shouldn't be pleading guilty to this.

Q And Dr. Loring -- you got Dr. Loring's name from that particular case.

A Clay, I believe, organized that.

Q So would it be more appropriate to address anything about experts to Mr. Allen?

A You can ask me anything and I'll try to give you the best answer I can, but I do believe that Clay was -- we are limited in our state with, obviously, who we have to use. And I know Clay was relying upon others that have done other capital cases who they used as experts.

Q And as far as resources available and help that would be available to you, was there any limitation on the preparation of this case other than Mr. Torres' direction to go to trial and his failure to indicate any other person that had any involvement?

A No. Judge Couch was very receptive any time we had a request for something.

Q Okay. Okay. You were asked a little bit to comment on testimony from Ms. Crystal Williamson. Do you remember Mrs. Ann Emery's daughter? And you were given a part of her testimony to consider in your direct.

I want you to give me your impression if you had that

part of the testimony saying that she had might be receptive to a life sentence, consideration of a life sentence, in context with her answer on cross-examination when asked if all of the evidence shows that Mr. Torres was the only participant in that crime, what do you think about the sentence, and she said it was deserving of death. If you had those two statements is that going to help you with plea negotiations?

A No.

Q Okay. And you said something I believe about running the risk on a witness and not knowing what would come out. And is that not a good example? You might find something good in one part of the examination and something very detrimental in another.

A Her testimony still sits with me today. It's something I probably will never forget in the same -- if you knew that that was the last time you were going to see your parents alive as you walked out of that sliding glass door, I can't even imagine. And so that testimony that she gave, how do you -- how do you -- how do you even put a person on the witness stand and try to get it from them? Not a chance in the world. So there was no -- there was no way. No way. It'd be malpractice to put her on the witness stand.

Q You were also asked on your direct about the scientific evidence. And you've been here for a portion of the P.C.R.

proceedings, and you have some understanding of the genetics evidence that was presented. Is that fair?

A That's fair.

Q Okay. And you're aware that any kind of evidence, scientific or otherwise, can be challenged, correct?

A Yes, ma'am.

Q And is that the point that you were making in your direct, is that sometimes you can have opposing experts?

A Yes, yes, it is, because some experts, you can pay them to say whatever you want them to say. I've seen that in medical malpractice cases.

Q Doctors disagree all of the time, don't they?

A Everybody disagrees all of the time. That's why they call it science, because it's not perfect.

Q And you were also asked a little bit about circumstantial-evidence charge. Do you recall I mentioned it earlier today? I hope I said that I'll come back to it.

A Yes, ma'am.

Q But at the time of the trial you were more focused on criminal law. So isn't it fair to say that you would have been more familiar with circumstantial-evidence charges at that time?

A Yes, ma'am.

Q Okay. Are you at all familiar with the 2013 case of State vs. Logan addressing circumstantial evidence?

A I'm -- I think the last case I had with Judge Kelly probably would have preceded that because I've not tried a criminal case in some time.
Q Okay. So you really can't comment on whether something was really overruled or not. You haven't researched it. So we just have to look at Westlaw and see what happens, correct?
A Yeah.
Q Okay. Now, if the record does not support opposing counsel's questions at all, then you would not have been able to comment on the correct record, is that correct? If I said that --
A So --
Q I don't know if I said that plainly enough.
A So your question is, is that if opposing counsel's --
Q Had misstated a fact from the record.
A Right.
Q And you presumed that to be correct, then your answer would not necessarily be correct, because the record would control, correct?
A Correct.
Q Okay. And I want to read you just a very short portion of the record. This is the judge's charge on page 2754, lines 11 and 12. And ask you to comment on that just briefly. And this is talking about the recommendation and

the sentencing language.

Now, you had said before in your direct that the statute has recommendation in it. Statute still has recommendation in it to your knowledge, right? That's just the statutory language.

A Yes, ma'am.

Q So let me read this portion. And, again, lines 11 through 12.

Your sentence: "Sentencing recommendation will be followed by this Court."

Is that clear language to you that the judge will impose what the jury returns?

A Yes, ma'am.

Q Okay. Now, you were also asked a bit about Dr. Wren's testimony. If you recall, page 1782 mentioned, 1785, 1789, I think. Had you looked at that when you were answering by any chance?

A Did I look at what?

Q The transcript.

A I can't say that I have. I may have looked at it awhile back.

Q Okay.

MS. BROWN: May I approach the witness, Your Honor?

THE COURT: Yes, ma'am.

Q I'd like for the witness to look at 781 -- 1781, 1782

and 1783 to a portion of 1784. And if you could just glance over it and not read it word for word, but I wanted to ask you.

There was a comment made in the testimony that the testimony went on and on and on and it was very long and it wasn't broken up and might have been confusing in some respect. Do you remember that discussion?

A Yes, I do.

Q And that portion of the testimony actually is where Dr. Wren is discussing the injuries, the horrific amount of injuries, to Mr. Emery, correct?

A Yes, ma'am.

Q Those Emerys were not in contest -- injuries were not in contest, correct?

A Yes, ma'am.

Q And it took that long because there were so many, correct?

A Yes, ma'am.

MS. BROWN: I'd retrieve my copy, Your Honor.

A And we wanted him off the witness stand as quick as possible and the pictures off the bulb. On the wall there were pictures that were just horrific. And the only way to move that quicker is to have some him speak faster and not object, because the jury is getting a -- a full plate -- full of the horrific -- can't say it any other way -- of the

injuries.

And so I know looking back that that is definitely -- I know it was my mindset, was wanting to get him off the witness stand as quick as possible and get those pictures off of the wall. And I say off the wall because in that courtroom where we were the projector was smack dab right in front of the jury.

Q Okay. You were also asked a little bit about a timeline suggested in the coroner's estimation in his report and his notes. And it was a rather long timeline, correct?

A Yes, ma'am.

Q But would it be fair to say that your investigation narrowed that timeline significantly?

A Yes, ma'am.

Q Okay. So you had that initial estimation. And for what that's worth, the initial estimation wasn't wrong, right? The timeline was within the estimation.

A Yeah. I think it was like a nine-or-nine-and-a-half-hour period of time, yes, ma'am.

Q And very focused on 4:15. That was the stipulation when Mr. Torres stipulated he had Ann Emery's phone and was using it? I'm sorry. 5:14.

A Five.

Q Did I misstate that?

A Yes. He had it. It's 5:14.

Q Excuse me. 5:14. And of course the crash at 7:00. So you had a narrow, a much more narrow, timeframe to work with, correct?
A Yeah. I would -- I liked it. Like I said, I direct -- I like it out to be 9:30 because then if it happened then he wasn't there.
Q Okay. Now, you were also asked a little bit about the state's cross-examination in the mitigation phase of Ms. Lisa Lamb --
A Yes, ma'am.
Q -- about the children and different -- how many children were in a home at a certain time.
A Yes, ma'am.
Q Now, powerful points are prejudicial, aren't they? Wouldn't you agree with that?
A Powerful points, the other side raising, are prejudicial.
Q Uh-huh.
A That is a very good way to put it. Prejudicial in the context of 403, no. Prejudicial in the sense of guilt of an individual, yes. It is what it is.
Q And when you're focusing on a sentence in capital, a capital trial, you are looking at whether these circumstances and the acts of this defendant and the circumstances of the defendant justify imposition of death.

A Yes, ma'am.
Q Correct?
A Yes, ma'am.
Q And isn't it relevant to know that there are perhaps similarly situated people who do not commit these crimes? That's, in essence, what it is, isn't it? You're making an individual determination.
A It's -- it's basically setting out the second prong of an ideal society in the sense that you have individuals that live within the boundaries of our rules. And then you have unique situations that live outside the boundaries of those civilized rules. And thus the imposition of death is the only way to cure that exception outside the boundaries. That is in an ideal society, yes, ma'am.
Q And you were also asked about the cross-examination of Dr. Schwartz-Watz.
A Yes.
Q And linking whether there is a correlation between bipolar disorder and murders essentially.

Now, looking at that from the reverse of what you were asked on direct it would not have helped your case, would it, to say that all people who have bipolar disorder are murderers?
A It would -- if you had that argument on its face, then it would lessen the sensitivity to it, so therefore maybe

death might not be imposed to every bipolar person, because if you did have everybody who's bipolar commit murders, well, then that's just a problem. We kind of need to deal with it.

Q And that's a generalization, isn't it?

A Yes. It's a generalization.

Q And that's way outside of what you're doing in the sentencing phase, isn't it?

A Correct.

Q And what we're narrowing it down to is that this man committed a murder. He was found guilty by a jury -- now, does that man deserve death, can this man rely on certain circumstance of his upbringing or a certain part of the crime to argue that he is entitled to life and not to be put to death for murders, right?

A That's the balancing test that a jury is asked to decide.

Q Mr. Reckenbeil, in your opinion knowing what you know about the representation and how the trial went, did you do your best in this case for Mr. Torres?

A I -- I wish I could -- I wish I could try the case now, because I know I'm a different -- I know so much in hindsight.

I tried my best at that time, but I am a different person now than I was then. And I really, really wish I had

the opportunity now to stand in front of a jury to argue for Tony as opposed to back then.

Q And would that have been -- in which phase? Which -- exactly what makes you think you would have done something different, and what would you have differently?

A Back then I don't think I would have done anything different, but now I would have. It's the maturity that I received over the course of time.

Eleven days after the case I walked into an empty home. My wife left and took everything and was gone. That was 11 days after the case. I have grown in tremendous maturity.

And I think about Tony every single day. And to give me this opportunity to stand in front of a jury and argue that in the failures of our society, I think I'd like that chance, but I'm not going to get that chance.

So I want to make sure that everything that I do going forward as being a lawyer is I'm going to help people in every way I can. And I'm going to hold people's feet to the fire too, including South Carolina, on a lot of things.

But at that point in time I was arrogant, I was -- I was a person that I just don't even know who I was back then as I am now in the context of the way that I have learned to treat others and to practice law and my true purpose as opposed to just being an arrogant lawyer.

And so at that point in time in 2007-2008, no, I would

have done -- I wouldn't have done anything differently, but now I know I would have.

Q And you would have accepted that opportunity to argue in the sentencing phase?

A If I could transport myself right here right now who I am to that courtroom to that day, yes, but --

Q And that's because of this information that you knew about Mr. Torres and his background.

A And how much I've learned in the last six years of my life.

Q And you would have made a plea based on this, because this is emotional in your perspective, and it would have connected with the jury in your perspective.

A Yes.

Q And the idea that he was acting under irresistible impulse to the extent that that could be acknowledged, but if he was doing that, that's not as powerful as this information here, is it, going back to hospitalization when he was some eight months old being called too aggressive, all of the inpatient treatment. In your estimation this is powerful, isn't it?

A Yes.

Q And it was before the jury.

A Yes.

Q I think you've talked about this as well to some

extent, but let me just focus in. You are bound by our ethical rules in representation, correct?
A Yes, ma'am.
Q If you had evidence you could offer, you would offer it, wouldn't you, to show a third party in this?
A I've -- I have said this many times, is that that certificate on the wall is more important than any client I will ever represent.
Q Because you can't help anybody else if that's gone.
A That is true, and so if there is a ruling by a court, I'm not one to ever tried try to side-door or back-door something that has been ruled upon. That's our rules. We live by them. So, yes, yes, ma'am, I would have.
Q And you know that there is opposition to the death penalty in and of itself, not case specific. Opposition to that penalty.
A Yes.
Q But no party should go outside the rules to oppose that in a court of law, should they? And you are bound by those ethical rules. You are bound by the rules of evidence. And you present the best case you can.
A If you go outside the bounds of the rules, then you're no better. There are times when you need to, but as our founding fathers did. But in this time in this courtroom we -- we have rules of procedure, and I am ethically bound

to follow them. And I do to the best of my ability.
Q Going back again to your relationship with the solicitor's office in this case and in speaking with them repeatedly and them giving you indication of what was coming up in pretrial and that sort of thing, you also recognize that the solicitor had to try his case too. Didn't he?
A Absolutely.
Q And this case -- I think you said that the injuries were horrific. The crime is horrific.
A Yes. Worst I've ever seen.
Q Do you recall Mr. Trey Gowdy's closing to some extent in the penalty phase?
A Two things in this trial will stand out -- Crystal Williams' testimony and Trey Gowdy's final summation. And I will never be able to duplicate that. Trey Gowdy is a very, very good trial lawyer. I would say that he is the best I've been up against.

And when he gave that final summation to that jury where he said if not for this, then for what, and if not him, then who -- I don't have any hair on my head. But the hairs in the back of my neck stood up. And that was the most powerful statement that could ever be made in any courtroom, because that's all that needed to be said, because it is the very foundation of who we are as a people and a society, is that do we tolerate this or not and do we

live by it or we don't. And that is what went through my mind when he said that, is that that was extremely powerful.

Q And this is after the jury has seen caved-in face from Mrs. Emery, her body left in an indignant position in her own bedroom, blood all over Mr. Emery, back of his head crushed. These are the type of horrific things the jury had just seen. Mr. Torres leaving semen in Mrs. Ann Emery's body.

A Yes.

Q And Mr. Gowdy just argued simply if not that, then what, and if not him, who. And that's based on what happened here.

MS. BROWN: Thank you. No further questions, Your Honor.

MR. EHLIES: Judge, I have significant questions -- questioning.

THE COURT: Okay. Well, how long do you think it's going to take? I would like to finish the witness today if we can.

MR. EHLIES: Well, I know that's the part that's on the record. As far as this case goes in history, is this is the last record opportunities. And I would have about 45 minutes with this witness -- 30 or 40 minutes.

THE COURT: Okay. Let's go finish it up.

REDIRECT EXAMINATION

BY MR. EHLIES

Q You have made a lot of personal statements. Do you need time off?

A No, sir, no. I'm fine. Thank you, sir.

Q And you made statements suggesting that you're somehow different today than you were then.

A Yes, sir. Absolutely.

Q And the thing that jumped immediately in my mind is were you competent to accept this appointment when you did given the state of mind that you had as you characterized it and your overwhelming affinity with the prosecution's statement -- if not now when -- and him -- because your view was it wasn't him with the hammer, right?

A Yes, sir.

Q So why did you accept the appointment?

A I'm competent in the -- the ways of the -- sorry -- of the -- competent in the context of what the law says, yes.

Am I a much better person and trial lawyer now? Absolutely. I honestly accepted the appointment because it would be a way to better my resumé but also the fact that who would come on a case like this.

Q But you're admitting now that based on your insight you would have done a different job than you did then. And I'm trying to understand that.

A Yes, sir.

Q Because we're not talking in Strickland about whether you did your best.
A Yes, sir.
Q Do you understand that?
A Yes, sir.
Q You were asked that.
A Oh, yeah.
Q Is that part of the Strickland standard as to whether counsel did their best?
A It's bright, because if you're just -- you know, if you're trying to play ice hockey and you can't ice skate, you're doing your best --
Q Right.
A -- but you can't really be a good part of the team and play hockey. I agree with that.
Q I'm with you. I don't understand that.
A But, yes, I -- I did my best. It's --
Q But my point is that's not the standard.
A You're absolutely right. It is not the standard. And my -- you're right.

My best is that the standard of -- so we're going to say, well, he tried his best, give him a -- give him the medal. No.

It's -- you -- you have a standard of whether or not in the light of everything across the board in reasonableness

of a capital-murder defense attorney is he acting or she acting within the reasonable standards of what a normal, reasonable capital attorney does.

Q And would it surprise you to find out -- or maybe since you only had one you mentioned -- Buck Inman -- that this case is comparably soft to some of the others as far as the crime itself and the horrendous features?

A I would -- yes and no. You know, I honestly don't -- I've stopped watching the news, so I don't really pay attention to other cases. But you could say, yes, that it's soft in some aspects, but it's more egregious in others.

Q You mentioned Buck Inman's case, and we need to straighten something out because it's crooked in the record.

Is it your understanding that you had to try this case and enter a plea of not guilty to this jury because Tony Torres insisted a right to a trial?

A No, no, no.

Q Okay. What was your -- what was driving in the fact that you were having to go to trial?

A That Judge Couch would have sentenced Tony to death.

Q No, no. Why would -- well, how did Judge Couch have authority to sentence Tony to death? What vehicle made that possible?

A I'm not sure of the answer you're looking for, but I know that there's statutory authority and there is authority

by our laws that gives Judge Couch the ability to sentence him to death if he would have pled guilty.

Q In capital litigation do you know what device makes a murder a capital murder?

A Aggravation.

Q The notice by the circuit solicitor's office served personally on a defendant that he is going to do what?

A Seek the death penalty under 17.

Q What other authority is there to turn a murder into a capital murder besides that?

A I'm not sure. I don't know the answer.

Q Would you be surprised none?

A Well, then that would be the right answer. Then don't treat me like an idiot. Come on, now. Just say it straight out. If there's not an answer -- come on, now. If there's no other thing, then don't say that surprisingly that's just all sides. I'm sorry. But this is -- if there is no other answer, then don't answer ask a question like that. I'm sorry.

THE WITNESS: I apologize, Your Honor.

Q That is the vehicle by which death becomes in play.

A Right. Agreed.

Q And so doesn't it make it really logical that drawing that vehicle, which is solely the solicitor's responsibility --

A Yes, sir.
Q -- is front and center on your initiative?
A Yes, sir.
Q Okay. Now, in Buck Inman, you claim to have had notice about Buck Inman. Do you know what happened in that case?
A No, sir.
Q Well, you went and listened, or how did you investigate that case?
A It was just on T.V. I saw something about it, and I know Jim Bannister.
Q Okay. And Mr. Inman wound up pleading guilty to the judge -- Miller.
A Yes, yes, sir.
Q And he got death. Do you know why?
A No, sir.
Q Well, the notice wasn't withdrawn. So the point is unless Trey Gowdy had withdrawn the notice in this case you cannot blame this man for insisting on a trial so he gets sentenced by a jury instead of the judge, is that correct?
A Yes, that's correct.
Q Okay.
A That's the whole point of why we went forward the way we did.
Q And the fact that you are put on notice by the client that he wants a trial in a capital murder case does not

relieve you of the ethics you were cross-examined about or examined about in how to conduct a trial. Isn't that true?

A Right.

Q That's U.S. vs. Chapman that we saw as far as Richmond is concerned here the other day. The decisions on how to do the trial belong to counsel. The decision to go to trial belongs to the client.

A Yes.

Q Okay. And you were operating with that understanding during the trial of this case.

A Yes.

Q And I don't have copies of these. We have looked in the course of your testimony in response to the state's -- the state's questions, and I'm going to show from your own records and ask you a few questions about it. And I'm sorry. I'm going to ask you if you recognize that.

A I do.

Q What is that?

A My handwriting on third-party guilt.

Q Okay.

MR. EHLIES: Let's mark these for identification purposes.

THE COURT: Show those to counsel.

MS. BROWN: Your Honor, we may have a motion. May we have a moment to check records?

THE COURT: Okay. I tell you what. We'll have to take lunch.

Mr. Reckenbeil, you'll have to come back.

THE WITNESS: Yes, sir, Your Honor.

THE COURT: We'll recess until 2:30. And y'all can deal with that during lunch, and then we'll talk about it when we come back.

Court is in recess until 2:30.

The witness can step down. Don't discuss your testimony during the break.

(Whereupon, a recess was taken.)

THE COURT: All right. We have an evidentiary issue to address?

MS. BROWN: Yes, sir.

When we broke for lunch Mr. Ehlies handed and provided to us two pages, two document pages.

We were reviewing it, Your Honor, because, frankly, we have never seen these pages. We didn't know where they came from. I wanted to make sure that they had not been produced before and that I could tell the Court that this is something that is new to us.

Now, because we took lunch at that time we have had the opportunity to review the documents, and we do not have a motion to suppress based on those documents.

THE COURT: Okay.

MS. BROWN: Nonproduction of documents.

But I would like to put on the record, Your Honor, that I did check with Mr. Allen. He has no recollection of these documents being in -- in his file. So we could not have gotten it from that source.

Of course we cannot speak to Mr. Reckenbeil at this time, so I haven't been able to check with him. But, as you know, there are two lines of discovery of information in capital cases.

One allows us because of the waiver statute to go to trial counsel. And he produces things to us in defense of the allegations of ineffective assistance.

And the second stream of information comes from the civil discovery rules, and these are applicable by statute automatically in capital cases.

So we haven't gotten anything from trial counsel. We didn't get anything from opposing counsel in the regular course of discovery.

So we're asking if anything else needs to be released to do so now so that we have the opportunity to do that. And it will prevent future delays if we need to go forward on cross or recross on this information.

Now, Mr. Ehlies I believe has told me that nothing else will be presented and no discovery is due. But I would imagine you would like to hear that from them. But

that's our response.

THE COURT: Well, I don't really need to hear it if you don't, you're satisfied with it. But I'll ask just so the record is all clear.

Do you have anything else you're going to introduce besides those two documents?

MR. EHLIES: Because these came up in reply, we had no notice prior to the testimony they were going to need them, and they're trial-counsel records, and the procedure is they'll get those when they consult with trial counsel for release.

I don't know if something downstream with Mr. Clay Allen will come up where a reply document will be necessary.

THE COURT: Well, I understand. Those documents came from Mr. Allen's files or Mr. Reckenbeil's file?

MR. EHLIES: We got all of the files through -- and we could -- could I clear it up and put -- question him a little bit?

THE COURT: Yeah. Go ahead.

BY MR. EHLIES

Q You're still under oath.

A Yes, sir.

Q Let me show you.

MR. EHLIES: Let me mark it.

Here's a copy for you, Judge. It two pages. Let me mark it for identification, a document here.

(Thirty-party-guilt list marked Applicant's Exhibit No. 25 for Identification.)

MR. EHLIES: All right. For identification purposes Applicant's No. 25.

Q Take a look at that and --

THE COURT: Is this one exhibit?

MR. EHLIES: It's a 2-page one exhibit now stapled together.

Q And I would ask you if you recognize that handwriting.

A Yes. There's only one person with slopier handwriting than me, and that would be my father. So this is my sloppy handwriting.

Q All right. And it's not your father's.

A No, sir.

Q That is your writing. Look at page two and tell me if that, in fact, is your writing.

A Yes, sir.

Q Now, my understanding is -- and let me put it in the form of a question before we have an objection.

MS. BROWN: Your Honor, I'm sorry, but do I understand that this is just for purposes of establishing the discovery issue? Because I would ask -- we want to be made on whether it is actually evidence that would go to a

third-party-guilt claim, specifically ineffective assistance of counsel regarding third-party guilt.

And I ask that because if it's relevant, I concede I didn't get it from counsel, but opposing counsel has a duty under the rules to disclose it.

And my argument would be that would be or should be disclosed because it's relevant to the allegation of ineffective assistance of counsel and failure to investigate and present evidence of third-party guilt.

So to the extent that we are in these proceedings just to determine the relevancy and whether it was disclosed and where it's from, I just want to make sure that's where we're going and I would not object inappropriately. So if you could give us some guidance I'd appreciate it.

THE COURT: Okay. I'll be happy to.

I thought you just said you did not object to it, because we took a lunch break and you've reviewed it and talked to Mr. Ehlies about it.

MS. BROWN: That particular document, you're absolutely right, sir. But I do still have a motion that anything else would come out, that it should be relevant to the claims. And the reason I'm making that information, Your Honor, is I --

THE COURT: Anything besides these documents, you're talking about?

MS. BROWN: Yes, sir, because we didn't get anything from opposing counsel like this on third-party guilt. Had I had that, then I could have asked trial counsel more specific questions. I haven't had that document, didn't -- it wasn't provided in discovery.

Now, I'm not objecting to that document right now, but I want to make sure that we're getting information that we're supposed to have so that we have a fruitful discussion with trial counsel and we're not stopping these proceedings unnecessarily.

THE COURT: Well, I don't have a problem with that. But have you not looked at trial counsel's file?

MS. BROWN: No, sir.

THE COURT: You haven't?

MS. BROWN: No, sir. We -- and we interviewed trial counsel and counsel -- and Mr. Allen especially has given us documents. As we talked about them, he releases that. And that is his own option under the statute under State vs. Binney. But the document -- but the file is not given to us. And, in fact, under opposing counsel's discovery responses --

THE COURT: You don't -- you don't take the position that you're entitled to it where ineffective assistance of counsel is claimed?

MS. BROWN: We asked it, but it's not released. And

according to State vs. Binney it's according to what the -- what trial counsel wishes to release to us in defense of the claims of ineffective assistance of counsel.

The scope of the release and the scope of waiver is determined by the allegations. But, again, that's one stream of information.

Civil discovery gives us a second stream of information. If we get something from opposing counsel that they have said and considered as relevant, then we can go back and ask trial counsel and get specific documents from their files as well.

THE COURT: Okay. Well, I understand all of that.

MS. BROWN: Yes, sir.

THE COURT: As I understand, Mr. Ehlies' position is he didn't have any intention of going into this until you brought something out that he needed to reply to. That's why he -- he obviously didn't bring it up on direct.

MS. BROWN: And that's the reason I was asking for a ruling, whether that was discoverable pursuant to their allegation of ineffective assistance of counsel. And then we could determine whether that was a discovery violation even though I'm not going to move to suppress.

MR. EHLIES: The question --

THE COURT: Well, I'll have to -- I guess I'll have to read it and hear the testimony before I'll know if it's a

violation of the discovery rule.

MS. BROWN: Thank you, sir.

BY MR. EHLIES

Q And I think you've identified this as your personal document.

A Yes, sir.

Q And it pertains to and is part of the files you all generated in representing Tony Torres.

A That's correct, sir.

Q And what did you do with your files regarding that? I mean, where -- where did they ultimately end up?

A Best of my recollection, I think we agreed that we were going to just keep one central location and I was -- best I can remember, I gave everything to Clay so they would have it all together in preparations for this and other appeal matters.

Q Okay, sir. And so I will represent to you that that's exactly what we understood. And we copied the entire defense counsel because we are sharing the same obligations and confidentiality, so we got a copy of the whole file.

A Yes, sir, yes, sir.

Q Okay. So when you were asked by Ms. Brown about evidence you would have had to show that someone else was in that house -- you remember she asked you what would you have --

A Right.
Q You mentioned no prints on the --
A Right.
Q -- alleged murder weapon, who was actually doing it. Well, that's what caused me to -- because I had seen this to help you in answering that question. So now I'm coming and asking you if Applicant's 27 helps you identify issues you would have had had you prevailed with Judge Couch.
A Yes, sir. I would agree with that.
THE COURT: Excuse me. This is 25, is it not?
MR. EHLIES: Oh, is it 25? I'm sorry. Whatever it's marked.
Q What is the number on there?
A Twenty-five.
Q All right, sir. So does that help you answer her question?
A Yes, it does, and it is evidence that -- facts that this is my contemporaneous writings. I have, I thought, other writings, but clearly these were the main points that I think I was trying to make in that third-party-guilt situation.
Q And she -- so there are seven different things in here that you were dealing with in getting ready to get evidence to the jury in response to her question that may have helped you.

A Yes, sir.
Q And on page two -- I think she asked you about timeline and things like that. And I see there that you were, in fact, noting to yourself in Document 25, Applicant's 25, issue, about timelines and actually things that you had determined that, who would provide it for you, is that correct?
A Yes, sir.
Q So those are things that you could have done and would have done and did consider.
A Yes, sir.
Q Okay. What -- do you remember that she asked about the stipulation on the cell phone?
A Yes, sir.
Q Now, so that the record is clear when it's read, which cell phone was it? Who owned the cell phone that was involved with the stipulation? And that is an exhibit now. It is -- oh, gosh. Okay. No. State's 5. State's No. 5 exhibit in this action.
Who owned the cell phone that's the subject of that?
A I believe it was Ann Emery.
Q The deceased victim Ann Emery's cell phone.
A Yes, sir.
Q What evidence put that cell phone into Tony Torres' hands?

A And I'm now trying to remember, but I thought it was the fact that they -- and I'm guessing if I would say that it was found in the van or on his persons --
Q I can't accept a guess on this one.
A No, sir. I'm not going to -- I don't want to guess on it, so I'm going to say that I can't specifically recall.
Q Okay. What evidence?
A Yes.
Q You can't recall what evidence put the cell phone into Tony Torres' hands.
A Correct. I can only -- I can only speculate as to why the stipulation was done in the sense that there was concrete evidence putting it into his hands, so therefore we had to keep out the sex line in exchange for that stipulation.
Q And did he express to you reluctance to sign that?
A Oh, yeah, I'm sure. Absolutely.
Q Okay. Well, do you have a current independent recollection that he did that?
A We were -- I think we went back and forth with it when we were all in the jail room together. And it was -- yeah. I just can recall us standing in pod five over there. And we were in that small room. And Tony's sitting on the other side, and we're standing up.
And I'm just like, you know, Tony, we've -- we've got

damming evidence throughout the course of this trial, we got to try to limit it down one. And the sex line is just something here in South Carolina that, you know, is a bad thing. And so I wanted to keep that out.

Q The sex line. To be clear, he was reluctant to acknowledge -- if I could be fair.

A Sure.

Q He ever had disposition and control of the phone.

A Sure.

Q But one of the phone calls logged on that phone was to a 900 number.

A That's correct.

Q And the witness that they were proposing to offer from the state's side was a custodian, is that correct --

A That's true.

Q -- who would testify that these records are accurate for this phone service.

A Yes, sir.

Q And one of the phone numbers I guess would -- did it identify that it was a sex -- how do you know it's a sex line?

A Pete Skidmore called it.

Q Okay. Is that the only way you would know, is to actually call it? Doesn't say that on the bill, does it?

A Pete Skidmore called it. Told me.

Q All right. One last thing.
Judge Couch's words were read to you from Ms. Brown about we will follow -- the Court will follow your recommendation. Do you remember that language?
A Yes, sir.
Q Do you remember where those words were spoken in the context of the whole sentencing proceeding?
A Specifically, no, sir, I can't tell you when it was.
Q Do you remember there were two charges, once at the initial phase when Judge Couch was starting the sentencing phase, and then all the witnesses came in a couple of days?
A Yes, sir.
Q Aggravators.
A Yes, sir.
Q And then he did a closing charge. And at the very end I'll represent to you in the transcript those things appeared.
A Yes, sir.
Q So if he did that at the end, how would you have known he was going to do if you were watching what he did in the -- how would you have ever known that three days later he'd come up and say that?
A You wouldn't.
Q You wouldn't have. Thank you so much.
THE COURT: All right. I do not find any discovery

violation present.

Have you got anything else you want to ask him?

RECROSS-EXAMINATION

BY MS. BROWN

Q Mr. Reckenbeil, do you recall statements from Ashley Harley that Mr. Torres had left threatening messages, voice-mail messages? Did that help put that telephone in his hand as well?

A Thank you. I'm sorry. Yes, yeah. There you go. That's -- thank you. It's been a long time. Yes. You're right. Ashley Harley was identifying Tony's voice as leaving voice mails that evening from that phone number, yeah, so.

MS. BROWN: No further questions.

Q Thank you very much.

MS. BROWN: Thank you, Your Honor.

MR. EHLIES: That's all.

THE COURT: You may step down. Thank you. You may also be excused.

THE WITNESS: Thank you very much.

(Whereupon, the witness was excused.)

MR. EHLIES: This will take just a minute, Judge, in transition for Mr. Clay Allen.

THE COURT: Okay.

(Pause.)

MR. EHLIES: Judge, for planning purposes for S.C.D.C. and others, we are doing our very best to wind this up today.

THE COURT: Okay. Well, just --

MR. EHLIES: Mr. Clay Allen will be, I believe, our closing witness. And we need to get that.

CLAY T. ALLEN, having been first duly sworn, testified as follows:

DIRECT EXAMINATION BY MR. EHLIES

Q Mr. Clay Allen.

A Yes, sir.

Q How are you doing, sir?

A Pretty well.

Q Great.

I believe you are the circuit defender for this county, is that correct?

A For this circuit, yes, sir.

Q And were you circuit defender -- well, were you in that position in May of 2007?

A No. I was the Chief Public Defender for Spartanburg County in May of 2007, but I became the 7th Circuit Public Defender effective July 1 of 2008. So at the time of the trial I was the 7th Circuit Public Defender.

Q All right, sir. And as public defender I'm sure you've seen capital cases in your career as chief public defender

and circuit public defender.
A I participated in one, but I've seen portions of some others.
Q Okay. I'm sorry. Maybe we ought to -- when you were assigned --
A Excuse me if I may clarify. Prior to this trial I participated in one.
Q Okay. And in what role? Do you remember the name of that case?
A That was the State vs. Eric Dale Morgan --
Q Okay.
A -- tried in this county.
Q And that would -- okay. And what was your role in representing Mr. Morgan?
A Mr. Morgan -- I was lead counsel.
Q And prior to that case what work qualified you as lead counsel in a capital case?
A Statutorily I was -- I had five years or more of felony trial experience. And I received a certification prior to that trial from the state Supreme Court, you know, to serve as lead counsel. Most of my career I have been a public defender.
Q Okay.
A Or a private -- or a part-time contract attorney like what -- they had that in Greenville. I did that for ten

years as well.
Q All right. In the context of representing a capital defendant were you familiar basically with the supreme -- SCOTUS -- Supreme Court of South -- Supreme Court of the United States jurisprudence on capital litigation?
A Generally, yes.
Q And were you also familiar with the basic court cases in South Carolina State Supreme Court? And in that regard did you have reason to undertake training for purposes of handling capital cases?
A You mean prior to this case --
Q Yes.
A -- or prior to my first case?
Q Prior to May of 2007 when you were assigned the Tony Torres case.
A Prior to May of 2007 I don't think I had any specific training on capital cases. After that I attended a seminar out of state that was sponsored I believe by NLADA -- National Legal Assistance and Defense Agency -- entitled "Making the Case for Life," devoted to, you know, trying to get a life verdict in capital cases. And I attended that, I believe, in September of 2007.
Q All right, sir.
A And I also attended a seminar prior to this trial in Columbia, South Carolina, on voir dire, a technique in voir

dire. That was I believe sponsored by office of indigent defense.

Q And is that the one that you took Ms. Hodges?

A Ms. Hodges and I attended that together, yes.

Q Am I correct it's Hodges with an "S"?

A I think it's Hodges with an "S". I'm pretty sure it is.

Q All right. And so you had those two.

Anything else?

A Prior to this case or prior to this trial, periodically at a public defender conference they will have these one-or-two-hour breakout sessions, and they might devote that to capital cases, I mean, a technique or, you know, a particular subject on capital cases. But those are the two main trainings I went to prior to this trial. I have been to others. After indigent defense brought in a capital litigation division they've been hosting more than 1-day seminars almost annually on defending capital cases. And I've attended most of those, I believe.

Q And --

A But that didn't -- but that wasn't before this case.

Q All right, sir. Would it be fair to say then that your post-Torres experience and training has been significant in handling capital litigation, especially compared to what you had before?

A Yes, sir.
Q And in the course of the training and experience that you have had since this case have you come to understand and to appreciate that capital cases, since death is given, are very complex?
A Yes.
Q And have you come to appreciate that each little segment of the case has its own core set of issues and questions to be asked and answered?
A Okay. I can accept that.
Q And sometimes we don't possess the knowledge as lawyers to do that. Is that a fair statement?
A I think so.
Q As an example, in this particular case there was some scientific evidence --
A Yes, sir.
Q -- that presented questions concerning whether an evidence sample, D.N.A., was consistent with a contributor known sample.
A That's correct.
Q And, in fact, you turned, did you not, to an expert to help and assist with that?
A I did.
Q And have you learned in the course of your experience and training since this case that the developing, presenting

and the investigating capital cases is very involved?
A I have.
Q Yes, sir. And the first thing you do of course is to simulate the team.
A Yes, sir.
Q And put in place. In this case did you ever get an adviser and consultant, dedicated scientific consultant, that is in the area of science, for your services who would not ever be a witness and who had -- you had a contract with -- you've learned through your training to get a contract with a consultant to direct you?
A Well, no, I did not get a scientific consultant in this case.

Mr. Skidmore had been an experienced investigator. We sort of expected him to clue us in as to, you know, what needed further looking at. So maybe I relied on the wrong person at that time. I don't know. But that's sort of what we were also looking at him to help us with as far as the scientific evidence in the guilt phase of the case, if you will.

Q Well, Mr. Skidmore is not a graduate of any medical schools or --
A Right.
Q And is that the fellow who is just an investigator?
A He's an investigator, yes, sir.

Q With no particularized training or expertise or certifications in genetics or --
A That's correct.
Q Actually, genetics in this case are very important. And development of psychology.
A That's correct.
Q Okay. Are you familiar with the American Bar Association's guidelines and norms for representing capital defendants?
A I can't quote them to you, but in that course I attended in September of '07 I became aware of them, and that's how I became aware of them.
Q And would you be aware that these annotated rules -- and if you need to get them, I've got the entire rules -- deal with every aspect of the case?
A Yes, sir.
Q And in detail, paragraph, to give you an outline of norms and expectations for your -- for your con -- for your services as an expert. You're aware of that.
A For my services as an expert?
Q Yes. In guiding lawyers and handling --
A Oh, okay. Yes, sir.
Q And, for instance, 8.1 being training and continuous training.
A Yes, sir.

Q Dedicated to handling scientific evidence.
A Okay.
Q And those are -- these rules are referenced in our state case law, now in the case of Ard vs. State of South Carolina and Donney Council's case. They referenced guidelines.
A Yes, sir.
Q And on 10.4 it defines your role in this case as lead counsel, and 10. -- 10.4(B) clearly articulates that the lead-counsel role is to be responsible for identifying, developing and presenting the issues in the case.
A Yes, sir.
Q Would you agree with that?
A Yes, sir.
Q So to the extent you may rely on Pete Skidmore or anyone else or even make an assignment to another lawyer to do a cog in the wheel, the responsibility for developing that case, presenting it is with lead counsel.
A Yes, sir.
Q And you don't rely on any of the experts or investigators or whatever, even co-counsels.
A Right.
Q Okay. There are a number of specific obligations in that statute, but I want to kind of jump to the quick on something here before we get too late in the day because it

will take some time.

Were you responsible primarily as your hands-on task in the case developing the evidence and presentation for mitigation aspect of the case?

A Yes, sir, because, again, I attended that seminar, and so I've -- thought I had a better idea of what needed to, you know, be developed -- you know, the life story, the life history and that type of thing. So that's why I took that on.

Q Okay. And we know from your files in the discovery that we have engaged in that you did a good job of outlining the history. And I'm referencing now what your expert Marti Loring produced in the records -- three and four.

A Yes, sir.

Q You can see those, right?

A Yes, sir, somewhat.

Q Three and four.

A Right.

Q And these are documents that were admitted in your case in mitigation that kind of gives the history and outline. And she had this genogram too, but because she's not here to testify it can't be used.

A Okay.

Q Okay. So you had a good working knowledge.

A Yes, sir.

Q There's something else you had a good working knowledge of, and that is what was going to happen here today, is that true? You knew that this is a P.C.R.
A Oh, yes, sir.
Q And that this is directed towards trial counsel performance in handling this case.
A Yes, sir.
Q That would be you and Mr. Reckenbeil and Ms. Hodges.
A Right.
Q Okay.
A Ms. Hodges.
Q And you had met with me at least three times.
A Yes, sir.
Q And we discussed the case, and I've given you the final application.
A I believe you did.
Q And I gave you the memoranda outlining our position and --
A Okay.
Q And I gave you the summary judgment motion on the recommendation charge.
A Right.
Q And I fully shared with you everything we had, is that correct? I mean, I shared with you the issues that we were going to be presenting.

A Right.
Q You had a chance to think about them.
A Yes, sir. I think so.
Q And you --
A I think so.
Q Yeah. And you've been physically present this morning for the entire examination of Mr. Reckenbeil.
A Yes, sir.
Q So none of this is going to be catching you by surprise, I hope. I've tried to treat you fairly.
A Yes, sir.
Q Okay. All right. We identified Mr. John Shackelford, not as necessarily an expert but as a historian.
A Right.
Q Okay. And do you remember him for Tony coming in to continue with the care --
A Right.
Q -- as a young person and aging out?
A Right. And he had some hands on or some personal experience with Tony too.
Q Yes. But then he aged out of the system and out in the street. And then shortly thereafter this crime occurs.
A Right.
Q Okay. And then we identified a pharmacologist by the name of Alex Morton.

A Right.
Q And I think Ms. Hodges handled that.
A She handled his direct.
Q Okay. And then we identified and saw Dr. Schwartz-Watz --
A Yes, sir.
Q -- as a psychiatrist. And then we saw and identified Marti Loring as a social historian to kind of paint the picture of what life was about, is that correct?
A Yes, sir.
Q Okay. Those four are clear to us. Were there are any others --
A Experts?
Q -- that may not be in the record?
A Do you mean experts or --
Q Yes.
A Yes.
Q Okay. Who were they?
A Well, in addition -- in addition to the D.N.A. persons that didn't have anything to do with the extenuation-mitigation case, we had Dr. Brawley recommended by Dr. Schwartz-Watz to look at him. I think she ended up giving Dr. Schwartz-Watz some information that she was able to incorporate in her report -- a Dr. Self who I believe did -- who did or read the M.R.I., I believe.

Q Yes, sir.
A And Dr. Schwartz-Watz also provided us a recommendation that he be evaluated by a psychiatrist, I believe it was, in the area of sex offenses or sexual treatment or something like that.

Dr. Schwartz-Watz's thinking was that because of the allegation of the rape charge that we were thinking or she was thinking and recommending that we have him evaluated to show that he's not some sex crazed individual that's just going out ranting or something to that effect.

Q All right, sir.
A And we did refer him to that doctor.
Q And what became of that?
A Tony was not apparently extremely cooperative with that doctor, and the doctor got some information but not enough that he could make any conclusions on. So we didn't use him.
Q Okay. All right. Are those -- is that the extent of the experts that you looked to?
A I believe so.
Q Okay.
A Well, we had a mitigation investigator, but, again, she's not an expert necessarily to testify.
Q Right. She is -- she is.
A But we -- mitigation -- excuse me -- investigator. But

we did have a mitigation investigator.
Q I think we call them mitigation specialists.
A Okay.
Q And they do serve a very special function.
A Oh, yes, sir. But she wasn't going to be a testifying witness.
Q No. She's a team member.
A Right.
Q And do you remember who it was?
A Carolyn Graham.
Q And she provided a lot of the footwork, fieldwork, investigative work of interviewing witnesses and neighbors and early childhood and school records and things like that.
A Right. Locating documents.
Q Those things were historic --
A Right.
Q -- and presented through Marti Loring.
A Yes, sir.
Q Okay. So in the course of getting Dr. Schwartz-Watz's information and the history from Dr. -- Mr. Shackelford and Alex Morton we saw a picture emerge, and the picture was what we think we interpreted from your presentation at trial.

Can you tell us what it was that your role -- what your role was in the development and presentation of that

mitigation case?
A I'm not sure if you're asking me for what -- what was it that I was trying to present --
Q Yes.
A -- or if you're asking me what my purpose was -- I mean, well -- when you say my role, I mean, I'm not quite sure. I mean, I thought we went over my role. So maybe I'm not sure if I'm understanding what you're asking me.
Q Did you develop a theory?
A As to why he committed these, yes; why we acted as he did, yes.
Q And I believe then the obligation is that the theory is 10.10.1 and states, "As the investigations mandated by 10.7, produce information, trial counsel should formulate a defense theory. Counsel should seek a theory that will be effective in connection with both guilt and penalty, and should seek to minimize any inconsistencies."
MS. BROWN: Excuse me, Your Honor. May I just renew my objection, or can I have it continued about the A.B.A. guidelines being considered mandatory?
THE COURT: Well, sure.
MS. BROWN: Thank you, sir.
THE COURT: I don't think Mr. Ehlies is asserting that they're mandatory however.
MS. BROWN: Thank you, sir.

THE COURT: They're guidelines. In fact, that's the name of them.

MS. BROWN: Yes, sir.

Q It's a resource. You have a library with resource materials, do you?

A I have a library with some resource materials.

Q You can go on line and research. And you look for help.

A Yes.

Q And these guidelines are help, specifically tailored to your function.

A Right.

Q Okay. So that was available to you as a -- as a condition and a suggestion that you consider theories that balance what's going to happen in guilt with what's going to happen in sentencing.

A Okay.

Q Okay. And have you been trained in any of the seminars that you attend on how to do that when they're out of balance? And by out of balance I mean where the guilt phase is going to be very difficult but the sentencing phase is going -- is going to be very necessary to -- to get a favorable sentence that something be done.

A Yes. I understand that now a lot more probably than I did then.

Q All right. Is that --
A The whole theory has got to be consistent, if you will, and -- right.
Q And -- and did you see and have you witnessed a demonstration of that, the fellow, in talking about this who puts the glass of water out, which is your whole trial, guilt and sentencing, and then puts a drop of food color into the glass? Do you know what happens when you do that?
A I know what happens when you do that. I don't recall that demonstration as far as -- as related to death penalty cases. But I see the point you're making.
Q The same jury that hears the guilt, would you agree with me, would be the -- after the 24-hour period --
A Oh, yes.
Q -- would be the same jury that does the sentencing?
A Yes, sir.
Q So would you agree, and do you understand, that having credibility with the jury about what to do is important?
A Yes, sir.
Q Okay. That being the case, what did you develop as your theory for the mitigation case, sentencing case?
A What we wanted to show was since a young child Tony's mother has been seeking help for him, that he has diagnosed mental conditions, has been sometimes described as bipolar disorder, also had been described as intermittent explosive

disorder, but that he has had a problem his whole life controlling himself.

What -- starting, you know, I mean, she took him down to and left him, had to leave him, at M.U.S.C. as an inpatient when he was initially -- when he was three years old. And that he had been in other placements throughout his life.

Ms. Lamb, his mother, had limited means, and so she didn't -- she couldn't afford basically all of the nice, expensive places and doctors and what not.

And so what we're trying to show is that she's been seeking help for Tony and that he had a problem that to some degree could have been treated medically from what I understood. That's the purpose of bringing in Dr. Alex Morton, is to indicate -- you know, to talk about addictive behaviors and how addiction worked on him, you know, why certain people turn to illegal drugs because they, you know, get an immediate relief, as opposed to taking psychotropic medication which takes a while for it to work, as well as having psychotropic medication has certain side effects that a lot of people do not like, and that's why they sometimes have a hard time staying with it or not wanting to stay with it.

So we were trying to develop all of this to show that Tony has a problem, has had a problem and was -- and acted

out in sometimes bad ways but that he could be controlled and that there are, you know, periods in his life when he did well under supervision and under -- in some institutions that he had been in.

I'm not talking about prisons. I'm talking about the -- some of the schools and some of the programs he had been in, that he had done relatively well with people who are trained to handle him. That's why we brought in Mr. Aiken who is another expert I forgot to mention earlier.

Q Jim Aiken.

A Jim Aiken to talk about prison adaptability and how he could be controlled in a prison setting without endangering others. So that was what we were trying to do, is to show the jury that he's had this problem his whole life, sought help for it, and that he can be safely placed in a place where he can live out his life without endangering others. That was what I was -- this is what we were trying to present to the jury.

Q All right. And in two regards in context to your answer to that question I would ask you whether or not as an individual when you saw this case and what was developing from your mitigation specialist by way of information were you, like Dr. Schwartz-Watz, struck with the degree of severity of his condition? Is that yes?

A Yes. It is a yes.

Q And struck by her accounts with how early it manifested itself at such an extreme level that he was being treated with very powerful drugs at 19 months.
A Yes, sir.
Q And then admitted into a psychiatric facility at the Medical University of South Carolina in 1984.
A Yes.
Q And we heard testimony that it just screams at you. Would you agree?
A That something is wrong with him, yes.
Q Yes. That something is wrong.
A Yes.
Q And we're going to see some testimony here very shortly on the big screen of Dr. Schwartz-Watz. I will represent to you -- you may recall -- that she said she had never seen anything as early as that in her career.
A Okay.
Q Do you recall that?
A I don't specifically recall that, but if it's in the record, I'm sure.
Q All right. She did also reference these records from 1984 but made a statement. And I think you provided both us and the state with a letter that she had written to Dr. Self when she wanted him to rule out certain things in his neurologic setting, Dr. Self being a neurologist --

A Right.
Q -- in Columbia.
A Yes, sir.
Q He was at Medical -- at the University of South Carolina Medical School, is that correct?
A Yes. At that time I think Dr. Schwartz-Watz was associated with the medical school at U.S.C. as well, and so a lot of the people she recommended were in the same area or associated with the medical school and maybe even in the same -- I won't say practice, but the same office area.
Q These are all '84. The -- we made the concerted effort in looking at your file to find those records.
A Okay.
Q Dr. Self -- Schwartz-Watz indicated she didn't have those records.

We've had testimony from the experts in this case, in the post conviction relief case, that these records from 1984 contain significant historical and diagnostic information, treatment information particularly as it related to the drug prescriptions.

I'm going to have one marked -- everybody's seen this before -- for purposes of identification at this time point.

(Medical records of the applicant marked Applicant's Exhibit No. 26 for Identification.)

Q This is Applicant's Exhibit 26. I want to take a look

at this. This exhibit is bates numbered by us Torres 000149 through sequentially 000264.

And I will tell you now for purposes of other exhibits when it has Torres as a bates number it's something that we generated and obtained separate from your file. It's something that we did by field work.

A Okay.

Q And my question to you is do you recognize that package. As an example on 000149, it says Medical University Hospital, 4/27/1984. It says Andres Antonio Torres, and it starts off -- has his mama down here, Lisa Bull at the time. It has the doctor. And than it starts off with narratives. And did you -- do you recognize this package of documents and information?

A I don't think I do. I was looking through my file recently, and I didn't see where we had records from the medical university's in 1984.

We'd obtained a number of records from the continuum of care, I believe.

Q Correct.

A And it has some discharge summaries from the medical university. I believe the earliest one I saw most recently was 1987.

Q Yes, sir. That's what we've been calling the 7-year-old admission.

A Right.
Q And we did -- we retrieved those and bates numbered those from your file.
A Okay.
Q Which is C.A.
A I was -- but I did not see the 1984 information in my file when I reviewed it.
Q Based on the letter that you provided to us, which is really not dated, doesn't have a date on it, and it doesn't really -- it doesn't include your signature. But you provided to both of us, the state and us, a document here I'm going to show.

MR. EHLIES: Let her mark this. And this is not stapled, so it may come apart.

(Psychiatric evaluation of applicant dated October 16, 2008, of Donna Swart-Watts, M.D. and attached documents marked Applicant's Exhibit No. 27 for Identification.)

Q And now I'm...

MR. EHLIES: I would move No. 26 into evidence in this particular case.

THE COURT: '84 records.

MS. BROWN: The medical records?

MR. EHLIES: Yes, 1984.

MS. BROWN: No objection, Your Honor.

THE COURT: They're admitted.

(Medical records of the applicant marked Applicant's Exhibit No. 26.)

Q And now I'm showing you what's Exhibit, Applicant's Exhibit, 27. And I think that's a document that you actually gave to everybody, so you must have that document. Do you recognize that document?

A I do.

Q It's problematic because it's not signed and it's not dated. But did it come to you from Dr. Schwartz-Watz?

A Okay. The first two pages are from Dr. Schwartz-Watz, and she provided that to me. The next several pages talk about the psychiatric evaluation, plus her report, Dr. Schwartz-Watz's report, I mean. And, yes, that came to me alone. And then she attached the M.R.I. screening form.

The following pages are of Tony Torres' living situation, his group home psychiatric hospitals. I think that was something that was -- actually, it's one of the two exhibits which was prepared by Dr. Loring, I believe.

So both -- so that part did not come from Dr. Schwartz-Watz, as the next page, which is the genogram. My letter to Mr. Savitz did not come from Dr. Schwartz-Watz. And then this Skidmore and Associates statement obviously came from Skidmore and Associates and not from Dr. Schwartz-Watz.

Q All right, sir.

A The last page was an e-mail that I printed out from Dr. Schwartz-Watz to me.
Q All right, sir. But you did provide those documents to the state.
A I think so.
Q And you provided them to us.
A Yes. Well, you -- you got the whole file, so, and you took the whole file and copied it. So, yes, you provided -- so I provided all of the documents that were in that file to you.
Q But you provided separately those specific documents to me.
A Oh, I get it.
Q Yes, sir. You did, did you not?
A Yes. You asked me that if I made copies for the state to make a copy for myself and a copy for you, and I gave you these when you started the P.C.R. hearing.
Q Okay, sir. And was the letter from Dr. Schwartz-Watz, which is page one and two of that exhibit, a letter that you had read during the time you were representing Mr. Torres?
A Yes.
Q And during the developmental aspect for the mitigation case. That is before the time you were in trial.
A Yes, sir.
Q And she referenced not having the early admission

documents.
A She did.
Q Those would be exhibits -- Exhibit No. 20 --
A Six.
Q Twenty-six.
MR. EHLIES: We move 27 into evidence.
MS. BROWN: No objection, Your Honor.
THE COURT: They're admitted.
(Psychiatric evaluation of applicant dated October 16, 2008, of Donna Swart-Watts, M.D. and attached documents marked Applicant's Exhibit No. 27.)
Q One of the things that was brought out in the testimony here was the significance of a genetic history.
A Okay.
Q That'd be Mr. Torres' mom and family and father and the lineage for mental illness and that sort of thing.
A Yes.
Q Particularly as it related to genetics.
I'm showing you now Applicant's No. -- Exhibit No. 28. And as I told you before, you'll notice on the bottom right-hand side our bates numbers that start with 000921 and run through 001081 and ask you if you had access to and provided the experts with those documents relating to the genetic history and family history of Andrew -- Andres Torres.

A I don't believe I had --
Q We could not find them in your file.
A I don't believe I had them.
Q So is it fair to say then that as regards the two exhibits that...

MR. EHLIES: I move that into evidence. Excuse me.

MS. BROWN: No objection, Your Honor.

THE COURT: It's admitted.

(Medical records of Lisa B. Torres marked Applicant's Exhibit No. 28.)

Q As it regards those exhibits now before you with the exception of the document of -- the letter which Schwartz-Watz -- that none of your experts that worked on your development had either the 1984 admission records for Mr. Tony Torres or his family history records as are reflected in the several hundred pages or so of his mother.
A That would be correct.
Q Okay. Do you know why you didn't have those records or obtain those records?
A No. I mean, I know Ms. Graham was trying to get all of the records that we could get.

I recall some sort of conversation about some of the early records, especially from M.U.S.C. I mean, I was under the impression possibly that they -- that she could not obtain them or that they could not be obtained, or I don't

know, I mean, but...
Q Did you maintain an inventory of jobs and things for team members to do?
A I did not.
Q Did you --
A I don't think, I mean, other than -- I mean, through some notes. But, no, I mean nothing in particular.
Q On your regular team meetings -- we've had some history about that. Were they regular like weekly every Friday at 4:00 o'clock?
A No, no.
Q Okay. How -- how were they -- meeting?
A They were basically on -- as you're getting closer to trial, yes, they were much more regular. But in the earlier stages we didn't have them very regularly at all.
Q Would you know by reason of your training and experience whether the detailed medical records of a very young child would be important as relates to the developmental history from the perspective of a geneticist and a developmental psychologist?
A Yes, sir. They -- they are.
Q And, in fact, for care, neuropsychological testing, even as an adult those records are important.
A Yes, sir.
Q So you knew that at the time you were trying this case?

A I should have known that.
Q Okay, sir. Let us then -- let me clear up one other thing because I'm weak minded.
(Psychiatric history and mental status examination dated October 23, 1994 of applicant marked Applicant's Exhibit No. 29 for Identification.)
Q Mr. Allen, I'm going to show you now a document that's been marked Applicant's Exhibit 29 which we have used with the state before. And this one does bear a C.A. bates number, which is Clay Allen, 05398 through -- it's actually two documents. It's 054 -- 5400 and then 5402 and 5398, 5399. Those documents came to us originally from your file.
A Okay.
Q And I represent that to you by the bates number.
Do you have an independent recollection of seeing this evaluation of Mr. Torres on December -- on October the 23rd, 1994, when he was 14 years old?
A I'm sure I did.
Q Would you have digested the material and the suggestions and thoughts of the physician as he expressed them in this admission note to Patrick Harris Hospital dictated in October of --
A I remember his was different because he was ruling out some things that had been previously diagnosed by other doctors earlier. And I believe since he was ruling out, for

example, the explosive conduct disorder -- and I remember that.

Q All right. And that, I think, is on page four.

A Yes, sir.

Q Did you call him?

A No, sir.

Q Did you ever commission anybody to contact Physician H. Wayne Tobin, M.D.?

A I did not specifically ask anybody to do that, no.

Q And did you ever consult with a medical expert about what rule-out means when a doctor puts an Axis I diagnosis to rule out conduct disorder, what you would mean by that?

A I don't recall. I -- I would have asked Dr. Schwartz-Watz.

Q Okay. She would -- did she respond? Did you ask her?

A I think I did through a telephone conversation, but I -- I don't have any notes to that effect.

Q Well, this is an admission note, and it says that at the very top of the page criteria for admission, date of admission.

A Right. Okay.

Q Would it jog your memory at all if I told you that what he's suggesting is, what his impressions are at admission need to be investigated to determine whether they should be ruled out?

A Okay.
Q To direct the investigation.
MR. EHLIES: Okay. Let me put it into evidence.
We move that particular exhibit into evidence.
THE COURT: Twenty-nine?
MS. BROWN: No objection, Your Honor.
THE COURT: It's admitted.
(Psychiatric history and mental status examination dated October 23, 1994, of applicant marked Applicant's Exhibit No. 29.)
Q All right. Let's go to page four and just take a look at that. Let's take a look at that page.
When you saw this and reviewed it, you think you talked to Dr. Schwartz-Watz. We're now looking at page four.
A Uh-huh.
Q And, in particular, what really constituted the springboard for the post conviction investigation was this document from your file, because of line three, Axis III. Can you read what that says?
A The last line -- line?
Q The right next to it sales rule out Klinfelters, rule out chromosomal abnormalities.
A Chromosomal abnormalities, hyper --
Q Gonadism?
A Okay.

Q Okay?
A Yes, sir.
Q When you read that did you think in terms of what is Klinefelters and what are chromosomal disorders?
A Chromosomal -- I mean, I know what a chromosome is, but specifically asked about it, no.
Q All right. And did you think in terms of the early onset screening, something wrong with this child, when you saw in this report Exhibit --
A Okay. No. 29.
Q -- No. --
A Twenty-nine.
Q -- 29, did you go back and think in terms of what everybody was talking about, the severity and, part two, the early onset in terms of chromosomes? Klinefelters, I'll represent to you, is a genetic disorder.
A Okay.
Q So seeing that, did you then undertake to contact Dr. Wayne Tobin and get his thoughts about what he was dealing with when he saw Tony at age 14?
A No, sir.
Q Okay. All right. You -- I want to jump way forward.
You had your file together. You had your experts telling their story. You were supervising them. And in particular what we took way from your testimony about Alex

Morton was addiction behavior. And of course when he aged out, he went on the street. Do you remember that?
A Yes, sir.
Q And do you recall that he ever got medical, formal medical, care after that, had any insurance or --
A I don't think he did.
Q All right. And wound up on the street, is that correct?
A That's pretty much it.
Q That's a question. Did he wind up on the street?
A Living from -- with various relatives at different times, but a lot of times on the street, yes.
Q And just wherever he could put his head down.
A To some degree, yes.
Q And he got involved in illicit drugs.
A Yes, sir.
Q And so is that the self-medication aspects that you were talking about?
A Yes, sir.
Q So you were trying to sell to the jury a mitigation case in that particular that was voluntary intoxication, in essence.
A I wouldn't say simply voluntary intoxication. I try not to use that word in court --
Q Right. I understand.

A -- because it's not a defense to a crime. But I was trying to use the fact that he was addicted, you know, and had addictive behaviors as -- in an attempt to show that he -- he had some sort of diminished capacity at the time of the commission of the crime, one of the statutory aggravators.

Q Okay. So you were looking at his then current behavior.

A Yes, sir.

Q And you were looking at his childhood record as a history.

A Yes, sir.

Q Okay. And that's important -- as a history.

A Yes, sir.

Q Okay. Let's take a look now at what we do in preparing a -- and you've been to seminars regarding preparation of mitigation cases.

A Yes, sir.

Q Had you been to any seminars specifically directed towards developing the mitigation case before trying this case, Torres case?

A To some degree making the case for life was -- but, I mean, I won't say specifically towards that, but there are other seminars. But not before this one. I mean, I did attend the "Making the Case for Life."

Q And in that context with that seminar did they tell you to sit down and present your case to other team members and/or focus groups and/or other people from outside that would be willing to listen to you articulate your case in mitigation?
A I don't recall that as being a -- I mean, it may have been a recommendation, you know, like try it out on like spouse or somebody, but, I mean, I don't know if I would say specifically they recommended trying out for focus groups or things to that effect.
Q Well, you know that now, don't you? You and I crossed paths that the one you mentioned --
A Yes.
Q -- in Litchfield Beach, I think.
A Right.
Q And have you not focused in on developing the theory of the mitigation case with the aid of focus groups and outside persons?
A Again, that's a strong recommendation, yes.
Q Yeah. And did you do that in this case?
A I did not do that in this case.
Q Do you sit down even together as a team and picture it out on a screen, piece of paper or anything like that?
A I don't know if we pictured it out. I mean, I know we had discussions on it, especially Kathy Hodges and I. And I

believe Mr. Reckenbeil was involved with some of those as well in some of our team meetings with Carolyn Graham. But, no, we didn't actually picture it out.

Q All right. And then you had the theory for the mitigation case sort of in your head.

A Yes, sir.

Q Okay. But you really didn't articulate it, put it down and emulge and share it with people and put it together.

A When we were talking about it and we were talking about how, you know, he had gotten his treatment for his whole life.

Q Okay.

A I mean, but as far as writing down a mitigation case, no.

Q All right. Well, what I want to show you here is when we did that what we got. And I'm going to tell you that I'm going to reference you to pages in the trial transcript that went to the jury. The jury was present and heard these sentences. You have had this in advance. I shared it with you.

A Right.

Q And I've shared it with the state and everybody's been -- and I understand that these are pages out of the whole presentation.

Okay. Would you agree with me that juries snapshot

themselves and remember some things as against others?
A They certainly don't remember everything.
Q And they -- and it surprises us sometimes what they do remember in context to what we thought they would remember.
A That's true. What they pick up on.
Q So then would it have been reasonable to assume that if you had done what I am going to do you would have been able to anticipate that a jury would see a mitigation case in the pieces you were presenting?
A Do you want me to agree with that before seeing what you're going to do?
Q Well, no. All right. I'll show you.

On page 2381 of the trial transcript we have references to severe -- severe emotional conditions. So we put down that your client was severely emotionally disturbed.

On 2381 we put down he had received treatment over and over and over again.

The third, he is admitted into a program as a resident at a school for deaf and blind when he was neither deaf nor blind and was ten years old. That's on 2383.

On 2384 we're telling the jury that he, your client, was lashing out and program directors attempted to deescalate his anger.

On 2385 -- am I misstating what's in there? His violence required specifically trained people to forcibly

restrain, deescalate him. Do you agree?
A Okay.
Q Number six, he has had multiple diagnoses including intermittent explosive disorder, depression, bipolar disorder.
I am at 2567. I'm sorry. A lot of different diagnoses over time, a lot of different psychiatric medications over time, including behavior disorders.
And look at this one on 14. "Some of the doctors that saw him just thought he was misbehaving." This is your mitigation case. Do you acknowledge that those are the words in there?
A I do.
Q This is your witness in your case.
A Yes, sir.
Q I'm on 2391. I'm sorry -- 2568. That would be the medication Ritalin. We're starting to talk about strong attention deficit disorders, Thorazine, Ritalin. Are those in there, in the transcript?
A Yes, sir.
Q On 2391. "To the best of my recall -- and, again, I feel like mom had a lot of fear, but from my recall of that time it would -- it would be consistent participation was not available."
Here they're describing your client's mother being

afraid of him and not participating by showing up for joint sessions.

A Right.

Q On page 2394, "He had had intermittent episodes of huge rage." That's on line 17. Just totally out of control. And I think in there says he throws desks and it requires several staff to restrain. Is that in there?

A Yes, sir.

Q Number nine is at 2395, page 2395. This is what -- how we're portraying this young man to the jury. "He often could not recall the incidents after they were over."

In essence, the applicant was very dangerous, required several well-trained staff to restrain him. I'm summarizing. Essentially, we had to tell him what would happen. This is your witness.

A Right. That he didn't know or didn't remember being in the rage. And they had to tell him later, which he didn't believe was dishonest. I mean, it was --

Q Right.

A -- that he honestly didn't know that he had just gotten that angry.

Q Get so far out he wouldn't remember?

A Right.

Q 2407.

A And didn't know what he was doing.

Q Correct. Beginning, "Physical violence."
A Yes, sir. That's in there.
Q And I summarize that he had developmental problems, solving skills and limited times to cope with situations without resorting to physical violence. Sometimes he had positive peer -- had he had positive peer relations at 2434. And in this segment his mother could not control him.

Look at 14 -- 13 and 14. "Get real excited about trying to get his clothes on. Couldn't. I couldn't put -- get his clothes on. He would let me put his clothes on -- wouldn't let me put his clothes on. And times that I had taken him to the doctor we had trouble in the doctor's office even when he was -- when he was that young. This is the 19-month-old. For the doctor to examine him, I had trouble, you know, trying to hold him. He would kick; he would wiggle; he would holler. He just like let go, let go, let go."

2434 -- 2435. I want to get to number 11. This is the infamous crib question. "Did you see episodes involving Tony in his crib?" Do you see that?
A Yes, sir.
Q He rocked the crib where he took it apart. And that's lines 10, 11 and 12.
A Yes, sir. I remember that.
Q Okay. And 2442 through 2443. And actually in the

interest of time -- excited when upset.

I'm going to publish here. And any time you think I'm wrong would you stop me? And I want to show you what we have in summary prepared -- in summary of this.

I put down 12. He had to be removed in the first grade because the school authorities believed that other children were at risk for injury in the third grade. That's on 2442.

2443, he was involuntarily admitted to Medical University of South Carolina at age seven. You had that record.

2445, 14, he was involuntarily admitted to the Patrick Harris Psychiatric Hospital four different times because he was violent, acting out, cursing. That's 2447 to 2450.

He was uncontrollable. It was the same thing, behavior, over and over, the verbal, the throwing things, not calming himself down. That's at 2450. He lived in and was subjected to a very unstable home environment. 2453, 57.

He was always on medications, 2461. He had brutalized the family pet dog. I want to go there.

2457. This is the direct examination of Tony's mother, Lisa Lamb. And she was talking to you. And did you all prepare her?

A I thought I had.

Q Okay. And sometimes things get away from us if we

don't prepare witnesses, correct?
A Right.
Q "In this occasion I had to take him back" -- this is she talking to you on the record in front of the jury -- "early and I went a wedding. I got back before the two hours was up. But when I came in I couldn't find my dog, and he was sitting in the living room watching T.V. And I found the dog, and the dog had been injured. So I got Tony in the truck. I borrowed my stepfather's truck. Tony held the dog while we went to the vet and we -- when we got there I had to leave the dog. Then we went to my grandmother's house. But, now, he did hold -- he did hold the dog while I carried him in to the vet."

I want to show you how that got played by the solicitor when he heard that.

Okay. And that is on 2471 and 72.

First off, there was no reason for that to come out, isn't that true?
A That's true.
Q And a really close screening in prep of the witness would include instructions to stick to the plan, correct?
A Right.
Q I mean, it's not we're telling them to lie. We're telling them this is what we want to get.

Okay. Because Tony hurt the dog. Well, that's one --

this is Solicitor Gowdy cross-examining Tony's mother. "Well, that's what I'm getting at. But how do you know he did it? You were at a wedding, right? Well, there was nobody there in the house but him and Tony -- the dog and Tony. Did he tell you he did it? I asked him where the dog was, and he said -- he said he's walking around here somewhere. What were the injuries to the dog? He was -- he had been kicked in his nose, his eye had been kicked. He had been kicked in his chest, in his groin area. He had blood coming from his rectum, from his penis, and from his nose."

Solicitor Gowdy: "So you actually took Tony back because you suspected he had done all of these things to the dog?"

Yes.

And then she takes the dog to the vet.

Okay. Nineteen. And you don't need to go there unless somebody asks to see it.

Was that in the record?

A That's in the record.

Q He was using three illicit drugs at the time of the crimes -- methamphetamine, alcohol and Klonopin. 2491.

He was nonresponsive to medications. 2494.

He was violent -- voluntarily intoxicated, developed a disease of addiction at 2495, 2496.

His addictions enhanced, produced impulsivity and restlessness. 2496, line 17 through 18.

He had eight residential placements as a result of violence by age 17. 2501.

He had a biological and mis -- manic depressive illness. 2501.

He was being treated for tantrums, headbanging, irritability, threatening behavior, crying, kicking, screaming, cursing, impulsivity, attacking relatives, caregivers and others. 2502.

He was prescribed Ritalin at age three, Tegretol at age four, Lithium at age eight, Klonopin at age eight, Depakote, age 14. And these did not work. 2503, and four. These are remarks that are in the record. If you dispute that, then we'll pull up the record -- that are going to the jury.

He was not treated adequately, not given enough medicine to respond. Bottom line is he's got an untreated psychiatric disorder or disorder symptoms. 257 -- 26.

I cited that because this is a genetic tipoff for an investigator. He has been noncompliant concerning medications while in custody, and that limits the ability to control his behavior. Page 2541.

He had abnormal E.E.G. studies at age two. 2565.

He had abnormal adrenal gland function as it related to all of them. 2566.

He was a lot different. He had a lot of different diagnoses, different medications, and some doctors thought he was simply misbehaving. We saw that. 2567.

He has a normal I.Q. He's been diagnosed with intermittent explosive disorder, compulsive control disorder, attention deficit disorder. 2567, 68.

He had a family history of mental illness. And those illnesses usually have a genetic component. 2571.

That was specifically mentioned in your case. I didn't see any development of geneticist. Did you ever retain a geneticist?

A We did not.

Q Okay. And this is going in in your case. And I presume that you prepared the witnesses in advance and were familiar with their reports and what they were going to say.

A Yes, sir.

Q Okay. He had mental health history that distinguishes him from others, and that is the age of onset of his mental health history, was very young.

I've -- I've not seen -- Donna Schwartz-Watz -- I've not seen anybody else with younger age of onset of mental illness and being prescribed psychiatric medications. I've not seen anyone that young. 2572.

He was not compliant with team physician requests to repeat E.E.G studies. 2578. This is what you're telling

the jury about now.

He has bipolar and he has anxiety and he has antisocial personality according to the defense expert witness at 2583 and 84 and 2581.

He knew what it was -- what he was doing at the times of the murder, and he was not psychotic. 2591.

He has always known right from wrong, can conform his conduct and appreciate the wrongfulness of his conduct. He chooses to do wrong. He chooses to do wrong at 2596 and 97.

He belongs in a subset of patients who are acutely more dangerous than others. 2605. That's your litigation case.

He is aggressive sometimes by choice. 2606.

He is deceitful, disregards feelings of others, will con others and is a malingerer, lacks empathy and is callousd, cynical and contemptuous of others. 2613 through 2615.

He has a family history for mental illness. 2623, 24.

He may not be making choices and he may not be able to control his behavior. 2597.

He may explode in an episode of violence if touched by law enforcement personnel. 2704 and 05.

Now, that was a summary of the mitigation case you presented to save the life of Tony Torres.

So what we did is we put that together and we made a summary of the mitigation case. And I want to show it to

you, so that you would see it before you delivered it, you would see basically what you're telling this jury.

Okay. My client's mitigation case establishes that he is violent from birth, his mother was afraid of him, medical and residential authorities could not control him starting at age three.

He was nonresponsive to treatment of medications. Nonetheless, he was in control of his behavior.

He appreciated the wrongfulness of his conduct.

He would choose to behave in a violent manner.

He brutalized the family pet dog by kicking him in the nose, eye and chest and groin area. The dog had blood coming from his rectum, from his penis, from his nose.

The applicant had many episodes of voluntary intoxication utilizing illicit street drugs.

He was a lying sociopath. He would con anyone who would listen, and that he would act out violently against corrections officers in a prison setting during the patdown, a routine and common occurrence in a prison setting.

Do you agree that the record that I read to you supports those particularized incidents of the mitigation case?

A I understand an argument can be made. I do disagree with that last portion about acting out violently. If you're talking about the video tape that was made, he didn't

act violently. In fact, I don't think he even touched the officer.

Q Okay.

A He just said he did not want to be patted down. He had just been convicted.

He was, you know -- I don't know why he did that. The officer was asking him, you know, just basically like talked to him several minutes until the officers decided to touch him and basically take him down, pepper spray him and take him down.

Q Yes.

A And then of course escorted him to the shower where he was, you know, showered, got the pepper spray out of his eye. And, you know, he was compliant there, compliant to get into the van.

I did not see where he acted violently to the officers. I don't recall even that he struggled with the officers prior to their pepper spraying him. So I disagree with that, that point.

Q I think that's fair.

A But --

Q I think that's fair.

A But that was obviously not the story I was trying to tell the jury. But, yeah, there were certain things in his past that I can see why you're saying some of those things.

But that's not the purpose of what we were doing or why we were trying to put that information out there.

Q All right, sir. Well, this is what we took away from the mitigation case.

When we got in because of Dr. Tobin and because of the screening genetics we started developing a little different medication -- mitigation case. And let me show what we came up with and what we've attempted to -- to establish here by testimony of experts. Okay. Excuse me.

(Pause.)

Q What we've been trying to do here is to show Mr. Torres has multiple genetic chromosomal defects from conception, that is like in the womb.

A Right.

Q And when things -- right from the lightening board. And it's genetically impaired. He suffers with both Prader-Willi Syndrome, 22q11 deletion syndrome. And you see what we're doing here with the jury in the mitigation case, how much control you have over the card you were dealt?

A Basically showing a physiological behind it, you know.

Q Very --

A Much like we were hoping to get in a neurological examination but did not have.

Q Right, these symptoms created serious physiological conditions. And we had a lot of testimony about what that

means. Not behavioral. Very physical, biological conditions that substantially compromised or eliminated his ability to understand and process information, to learn from experience, to engage in logical reasoning, to control impulses and to structure responses to external stimuli which aggravated his underlying biological conditions. He is brain damaged. That was the first set.

The second set of the mitigation case, Mr. Torres suffers from an additional genetic defect that renders him a poor metabolizer, Imipramine, meaning that he is incapable of metabolizing the one anti -- the one antidepressant drug that doctors tried to use to treat the mood disorders with which he was diagnosed from a very young age.

As a result, the attempted treatment for the mood disorder with an antidepressant that he was genetically incapable of processing led to a severe adverse reaction caused by toxicity and resulted in the abandonment of any effort to treat his mood disorder therapeutically at a young age, instead of the doctors prescribed powerful -- and diagnosis and dangerous antipsychotic drugs as a chemical restraint during the most critical developmental years of his life. We had a developmental psychologist that spring-boarded from this.

The last segment of the mitigation presentation that we have tried to present here is finally Mr. Torres was not

only treated incorrectly from a pharmacological perspective.

He was also treated incorrectly from a behavioral psychological perspective in that he was often separated from his mother at a very young age, who was encouraged by staff to abandon or manipulate him as a young child instead of addressing the emotional attachment issues from which he suffered effectively warehousing him until he aged out of the state's jurisdiction with no effort made to secure appropriate treatment for Mr. Torres after discharge as an adult.

Now, in comparing those two presentations outlining that's the function setting this up graphically with other people to look, okay, side by side, which of those two would you have rather in October of 2008, in the fall of 2008 -- which of those two if you could have taken them off the board would you have rather tried to sell to the jury to save the life of Mr. Tony Torres?

A Obviously the second one.

Q Okay. Would you agree with me that the only difference really -- and I respect you in your effort because I've been there many times -- the only difference was whether to accept the historical presentation or whether to get on with the records in your file with finding out not what happened but why it happened and to get involved with Dr. Tobin -- take his deposition, find out what he was thinking, share

his records with others, get a geneticist, get blood work, urine, hair samples, get all of that done -- and it wouldn't have been easy, but we've yet to get the picture together for presenting the right-hand side and abandoning the left-hand side. You did not do that in your team, did you, the genetic studies?

A We did not do a genetic study, no.

Q And you did not have a developmental psychologist from age of -- I think it picks up at after one and goes to seven generally.

A Right. I did not have one.

Q And, in fact, Dr. Schwartz-Watz told you she was not a developmental psychologist. She was a forensic psychiatrist.

A Right.

Q She told you that she was not a neuropsychiatrist. She was a forensic psychiatrist.

A That's right.

Q And she told you in the record that we can show you -- and I'll get a page number for you. Do you recall her saying in her testimony that she didn't deal with children below 14 in a forensic setting? In her trial testimony she said --

A Okay.

Q So it excluded from your expert's assessment of your

client's condition everything before age 14, in essence, because she wasn't trained and did not incorporate early childhood and genetic issues in her presentation or in her expertise. Is that true, a fair statement?

A I suppose. I mean, I thought she was testifying about his psychological problems as they existed then or, you know, at the time of the offense and what we were dealing with now, so.

Q And, in fact, she was the one that testified to antisocial personality disorder.

A Yeah. She did.

Q And if you didn't know in 2008 what puts the brakes on any expert, do you know now?

A Oh, I didn't -- you can't tell her not to make that finding.

Q No. What you do is you invite her to go somewhere else at the time of trial.

A Well.

Q Isn't that true?

A Okay. Yes. I put her up, yeah, right.

Q You just cannot go to voluntary addiction and you cannot go to any -- because what -- you remember what Mr. Gowdy did when she said that?

A Yeah.

Q Pulled up the DSM.

A Got it.
Q And that's where all that lying, cheating, conning -- and all that went straight to the jury.
A Right.
Q You can't win in that. Would you agree with me?
A Yes, sir.
Q That is -- and combining that with voluntary intoxication is a pretty difficult task to sell. Would you agree with me?
A Yes.
Q We did --
THE COURT: How much more direct do you have?
MR. EHLIES: I can take a break. Do you want -- I'm getting close. I cut out a lot, Judge, and I'm getting close.
THE COURT: I don't know how much a lot was, but what I want to know is how much more.
MR. EHLIES: About an hour, 45 minutes.
THE COURT: Oh, we're going to have to take a break for sure.
All right. We're going to take 15 minutes. We'll resume after the break.
(Whereupon, a recess was taken.)
(Summary of mitigation case presented at trial marked Applicant's Exhibit No. 30 for Identification.)

Q Mr. Allen --
A Yes, sir.
Q -- on April the 10th of 2014 I had filed with the clerk of court in this courthouse for everyone's advantage the application and memoranda in support of the application for post conviction relief.

In that memoranda are the bullet points starting on page 15 as part of the file record in this case -- 16 and 17.

In addition to this document having been filed and shared with you in advance and served on the attorney general, the actual transcripts, as I understand it, the trial transcripts in six volumes, are part of this record. Correct me if I'm wrong. So those references to the record are there.

MR. EHLIES: And so I'm going to move into the record in this case if necessary the actual memoranda. But I don't think that's necessary because it's filed with the clerk's office.

MS. BROWN: We agree it is filed and been served on us. Part of the record.

MR. EHLIES: Okay.

Q I'm going to show you what's now marked as Applicant's Exhibit 30, and this is the summary of the case that I pointed out to you bullet by bullet.

And I had asked you while we were going through it that if you wanted to challenge any of the references to the transcript to stop me. And I believe you were kind enough to acknowledge that you -- you consent -- you agreed that it was in the transcript.

And then I shared this document that's now marked as an exhibit with you. And you wanted to make one change, I think. And I had asked you to take a pencil, a pen. And I think you were talking about the next to the last line, "And that he would act out violently against corrections officers."

Strike through that because I think that was a fair statement by you that he was not evidencing your disagreement with what is in that -- is what the number on that -- 30?

A Thirty.

Q Okay.

A Do you want me to strike out in this Exhibit No. 30? I mean, I'm not --

Q I want you to strike you on the --

A Act out violently --

Q The violence against corrections officers, because you said as I understood your testimony --

THE COURT: He wants you -- excuse me. He wants you to strike out anything you don't agree with on there.

A Oh, well, I don't agree that I was selling this particular story. Now, you're talking about this is an interpretation of --

Q Correct. From the record.

A From the record. I'm just going to strike out that whole last -- that whole.

Q The pepper spray event.

A The pepper spray.

Q The patdown event.

A Right.

Q And do I understand that you're striking that out because your interpretation of the video, which is in the trial record -- all of the exhibits are in the trial, in this record.

MR. EHLIES: Are the exhibits also in this case record?

MS. BROWN: All of the trial court record is also incorporated by statute, would be our position.

Q Okay. So there's a video about that event.

A Right.

Q And that's what you're concerned about.

A Right. I mean, he -- he clearly was not consenting to a patdown in the video. I don't think he was acting out violently against them, but he was not consenting to the -- to the patdown.

Q And you're not suggesting he had the right to refuse a patdown.
A I guess you never in a jail or prison setting have a right to refuse, although, quite frankly, I thought it was unnecessary.
They brought him back from court. They changed him from his court clothes into jail-issued clothes before they put him back in pod -- I believe it was -- six where he had been throughout that trial.
I mean, they had to pat him down then, and then they were moving him over to five where they wanted to pat him down. I mean, I just don't -- didn't understand why they had to pat him down.
Q Okay.
A Quite frankly.
Q All right, sir.
A But I know that was part of their procedure.
Q Okay. But as we went through these things though you saw that the statements that are in this except as to the video, which I didn't have a transcript reference, are supported by the pages that I announced in the record in this case.
A One may make those conclusions, yes.
Q Okay. So can I see the 30 now?
A Yes. Struck out the words after and in the -- referred

to the last line. And struck out. And it has been stricken in blue pen.
Q Okay. I'm handing you back -- handing you back the Applicant's Exhibit No. 30. And as I understand it now -- I'm not asking you for clarification to agree that that's what you were intending to do.
A Yes, sir.
Q I'm asking you whether or not the pages I referenced included support for what is expressed in Exhibit 30.
A Yes.
Q Okay. And I asked you as you did it --
A What you read -- what you read from --
Q Yeah. Okay.
A -- would support or could support those.
Q Okay. And so now you've amended 30 to strike out the thing on the video.
A Right.
Q Okay. So the point of that really -- and I'm sure some are wondering -- is that the -- your -- did your training suggest to you that you really have to think of your case in terms of what the jury is going to see?
A Not necessarily in those words, I guess, but, yeah, that's just --
Q All right.
A I mean, yeah, that's sort of sense -- makes common

sense, yes.
Q Let me articulate it a little different then.
Who is the decision-maker for you in obtaining the sentence you want in a capital case?
A Well, the -- the jury in this particular case.
Q Correct. And so you're making a presentation to the jury decision-maker, is that correct?
A Right. That's correct.
Q And so my point is through the training that you've received you want to make sure that that presentation resonates with the jury as strongly as you can do that --
A Correct.
Q -- with your unique characteristics of your particularized client, your specific client.
A Yes, sir.
Q Okay. And had you done that would you have seen potential dangers with the presentation, as an example putting up a witness to say he's sociopathic?
A I didn't like that at all, yes.
Q And that he is in control of his choices.
A Well, I think, yeah. I think the point that was made, that she was trying to make, was that, you know, it -- we were not trying to say he's insane or guilty but mentally ill. But that's where all of this choice stuff takes part.
Q All right. Now, we have talked about several issues

before you got...

MR. EHLIES: By the way, Judge, we offer into evidence -- and I understand that we've agreed that the state is going to renew questions for H. Wayne Tobin, M.D. And I am -- and have in my hand and offer into evidence his deposition dated April the 2nd of 2014 at Carolina Outreach Psychiatric in Fayetteville, North Carolina, with leave for the state to send him interrogatories. Is that -- is that what you decided?

MS. BROWN: I believe we have agreed to do the interrogatories and attach it to the exhibit. So I would have no objection to it coming in as long as the attachment can be made and they're not kept separate so that the record is very clear.

THE COURT: It'll be supplemented and that'll be together.

MR. EHLIES: And I'll have interrogatories in response to yours. We'll send them down to Dr. Tobin.

MS. BROWN: I don't believe we talked about that, but, I mean, we will -- we'll exchange interrogatories and talk about that outside of the record if that's all right.

THE COURT: Well, we don't need to do that the rest of this afternoon. Let's go ahead.

MR. EHLIES: Okay. This will be 31, I think.

(Deposition of H. Wayne Tobin, M.D., marked Applicant's

Exhibit No. 31.)

Q Mr. Allen, to try to close that out, you understand that the significance of the Dr. Tobin records that are in exhibit -- in his deposition was that it represented a springboard for us.

My question to you is when you reviewed those records did you ever determine, consult with an expert or anyone else, that it could be, in fact, significant enough to give him a call.

A No. I did not consult with anyone or think -- and I was -- during the break I was looking for that admission records in my records, which I found. And preceding that were two pages of the final discharge summary from another doctor, Dr. Stephen Crowley --

Q Crowley.

A -- on this admission where they -- where he determined or the evaluation of the treating pediatrician felt that he did not have Klinfelter syndrome. And they came to a discharge diagnosis of intermittent explosive disorder, conduct disorder, and no diagnosis on the Axis II and III.

There is no indication that they did a chromosomal check or a check for chromosomal abnormalities, however.

This was a discharge summary from that admission that they go back to the explosive disorder diagnosis that had been previously done.

Q I understand that. And I might have to ask you to let me share with you unless my people can find that pretty quickly, because I don't recall exactly that that's...

(Pause.)

MR. EHLIES: Your Honor, I would represent to you that the deposition exhibit included from trial counsel's file, the whole package, the admission and the discharge summary.

A Okay.

Q Can I -- can I see your copy? I'm sorry. They may find this, because my recollection is that what happened -- and I'll tell you that when we contacted in deposition of Dr. Wayne Tobin -- establishes that he was thinking in terms of genetics and just mentioned one in particular.

A Right.

Q Condition as a suggestion of a genetic, slash, chromosomal.

MS. BROWN: Your Honor, I have to object as to the characterization and the testimony and hearsay.

THE COURT: Sustained.

MR. EHLIES: Yes, sir.

Q Okay, sir. I want you -- I'm looking now at page two. Do you know what we're looking at?

MS. BROWN: Well --

MR. EHLIES: We're looking at the discharge --

MS. BROWN: I don't think I have yours. Nothing we

have has the bates stamp. So I'm not sure if we've got yours.

MR. EHLIES: It's on the record, the whole admission record.

MS. BROWN: This is what -- this is what we have.

MR. EHLIES: Okay. If you'll look at the deposition --

MR. ZELENKA: We just don't have the bates stamps to show where it came from.

Q I think I can give this back to you.

A Okay.

Q And the deposition of Dr. Tobin speaks for itself. But if you'll look -- excuse me -- right on page two -- page two. It's probably one, two, three four -- sixth line -- seventh line down at the top paragraph.

All right. This is the discharge summary, and follow along. Correct me if I'm wrong. But it says, "There was a question" -- and he's referring to the admission -- "of Klinefelter syndrome that was mentioned by the admitting physician. Evaluation by the treating physician felt that the patient did not have Klinefelter syndrome, however if there is any further questions this can be evaluated as an outpatient and did not require the patient to remain in the hospital."

A Yes, sir.

Q So they didn't rule out or suggest they had done chromosomals, correct?
A No. They didn't say anything about that in the discharge.
Q So would -- are you saying that because you saw that particular aspect on the discharge that you were relieved of the suggestion that you might call Dr. Wayne Tobin to ask why he was thinking such things?
A No. I mean, that's a good suggestion. I guess what I was trying to explain was the fact that they had gone back to the diagnosis of the intermittent explosive disorder that -- which seemed to have been somewhat consistent with the other diagnoses in his history -- that's why I didn't think -- and I didn't even think of genetics.

Okay. I'm just going to tell you. I didn't think of genetics.

Q I think the --
A No one told me to do genetics or suggested that I really needed to do genetics.
Q Or a developmental psychologist who specializes in --
A That's right.
Q But the point that you make is very well taken because what you are saying in this record and repeating in your mind-set is a relation back to a history of diagnosis that is perpetuated all the way through his record without

anybody except Dr. Tobin talking genetics, chromosomal.
A Yes, sir.
Q And so they springboard back to what was known and stated in the earlier records --
A Okay.
Q -- and perpetuated that throughout his life. And nobody ever asked the question why.
A Yes, sir.
Q Okay. And did that cause you to abandon the investigation, development and presentation of mitigation evidence as it relates to the genetic and developmental history of this client?
A To abandon the preparation and presentation of the best mitigation case for --
Q The genetics and developmental.
A Okay. It did not cause me to abandon my duty to present the mitigation case, the best one I could, for him. Again, I guess I didn't pick up on the significance of the genetic recommendation that was being made. And Dr. Schwartz-Watz and others looking at this did not bring that to my attention either and say, hey, we need to do that. So I'm sorry.
Q Well, and --
A And I didn't pick up on it either.
Q And that's the point really because this is your ship,

right?
A Yes, sir.
Q We talked about that long ago.
A We did.
Q And as far as seeing these, I think you agreed earlier that this screams something wrong.
A Yes, sir.
Q Both in its intensity and in its age.
A Yes, sir.
Q So you really didn't need somebody to tell you there was something wrong. That was apparent.
A Something was wrong, yes.
Q Okay. On the developmental psychologist is it your testimony that no one ever recommended to you that the investigation of this case required inquiry into the very early ages of development of this child, who was then a child?
A We had talked about his development, but as far as anyone specifically saying we needed to get a developmental psychiatrist to explain some of this stuff, I don't recall that being mentioned.

I mean Dr. Schwartz-Watz acknowledged she's not a developmental, but if that's her way of saying we need to get a developmental psychologist -- psychiatrist or psychologist -- I didn't pick up on that as a requirement.

Q And the point of that is twofold. Number one is to understand the whys, but, number two, had you done that -- are you familiar with Atkins vs. the Commonwealth of virginia?

A Yes.

Q Called Atkins case.

A Yes, Atkins, yes, yes, sir.

Q And do you know what the phenotype -- the basic symptoms are of a mentally retarded person?

A I know a lot better --

Q Mentally disabled person.

A I know a lot better now than I did then. I was aware of the Atkins decision because that came out during or after --

Q Before.

A Excuse me. Before my first case, you know, the Morgan case. So I was aware of that, and I was aware it stood for the proposition that one who is mentally retarded cannot be executed or sentenced to the death penalty.

Now, in my most recent case I learned a lot more about mental retardation and that it's not simply the measurement of the I Q. that I knew when I represented Mr. Torres.

Q But you were familiar at the time you represented Mr. Torres in '08 from the Atkins decision that the Supreme Court, SCOTUS, discussed what they considered to be the

characteristics of a class of people whose moral culpability was significantly less than the groups without those in progress.

A Yes.

Q And that the evolving standards of community conscience would require that that category of individual be ineligible for death.

A Right.

Q Okay. So if you had done that are you aware of whether -- do you know anything about Prader-Willi and 22q11 deletions and all of that?

A No, sir.

Q So you -- you had no way then of knowing whether the phenotypes of this group of genetically impaired individuals matches that of a mental retarded -- intellectually disabled person.

A No, I do not.

Q You don't know that.

A I don't know that.

Q Had you known that would you have made a categorical presentation that -- that is that this individual -- your client, Mr. Torres, fit the same criteria and therefore should be considered ineligible as Atkins in his group were because they were exactly parallel? In fact, we had statistics that showed Prader-Willi was even more

commonplace than mental retardation.
A Okay. I see -- see that argument. Yes.
Q You didn't make that argument; you didn't discuss that argument.
A No.
Q And when you saw the recommendation statute where it lists recommendation out of the sentence and doesn't use the rest, did you consider with your group making any challenge to the constitutionality of the statute as applied to your client by lifting out only recommendation and not the rest of the sentence?
A You mean the recommendation which shall be followed by the Court? Is that the --
Q And we in the interest of time then, we didn't really show it, but the statute --
A Right. It was --
Q -- you might recall has a sentence that says if they return recommendation --
A Right.
Q -- the Court shall impose a sentence.
A That's right.
Q So --
A We did not discuss lifting out the word recommendation. We did not discuss whenever he used the words recommendation to follow it up with shall be followed by the Court, or

words to that effect. We did not discuss that.
Q And you did not object.
A We did not object.
Q And you did not ask for the charges in advance of the trial.
A No, I did not ask for the charges in advance of the trial.
Q And in fairness to you, we did not see a motion in that regard.
A That's correct.
Q And-but there were dialogues. So I'm asking you whether you made maybe a verbal request of Judge Couch for a copy of the charges that he would use during voir dire and any time during the trial including --
A No. I don't recall that, making a verbal request for those charges in advance of the trial. I don't recall seeing an e-mail when I was reviewing the e-mails in connection with this case where he did that.
I know he did it in the most recent case we did a few days before trial. He gave us in the Blackwell case his charges, both prior to -- you know, his introductory charges, as well as his -- his charge on the sentencing. But I don't recall that he did that in this case.
Q And did you ask to see the jury verdict forms before they were submitted?

A I did not.
Q And did you know now that I've brought that as exhibits and all that those forms also included a phrase, recommendation, without any statement that that would be followed by the Court?
A That is correct, but he did state in his final charge to the jury that that recommendation will be followed by the Court.
Q And where in the charge did that appear? In the context, here's the beginning and here's the end?
A I think toward the end or -- toward the end of what he was explaining if they make the recommendation, or whatever their recommendation is it will be followed by this Court. That was towards the end of his charge.
Q And I pointed out in the motion that you considered it was 61 times. Did you count them yourself, or did you just accept that?
A I'm going to accept yours. I didn't count them.
Q Okay. And when you heard him make the charge three days earlier when you started the mitigation case did it include recommendation --
A No, sir.
Q -- was their sole role?
A Oh, did he say recommendation?
Q Yes.

A Yes, he did.
Q We can go and pull it up unless you remember.
A No. I know he used -- I was looking at that the other night.
Q Yeah. And what he said was their sole role was to --
A To make a recommendation.
Q To the Court.
A To the Court.
Q As though the Court was retaining the discretion as to which sentence he should have, life or death.
A He didn't say that.
Q All right. Let's look at it.
A But, I mean, he didn't say the Court.
Q To make a recommendation to the Court.
A He said recommendation to the Court. He did not say that the Court will decide whether to give him --
Q No, no. You're correct.
A Okay.
Q But he said that they would make a recommendation. Their sole role was to make a recommendation to the Court --
A Right.
Q -- whether the defendant should be sentenced to death or sentenced to life.
A That's correct.
Q That's all that's here in this proceeding, whether he

should be sentenced to death or whether -- whether you should recommend that he be sentenced to death or recommend sentenced to life.

A Yes, sir.

Q So at that point did you have any way of knowing that somewhere days later he would say, "and the Court will follow your recommendation"?

A I felt sure that he would because there's a case on point that says that they can't diminish the role of the jury in that they have to let the jury know that that recommendation will be followed by the Court, so.

Q They have to clearly convey.

A Right.

Q In State vs. Plemmons -- do you know where that occurred, where the judge clearly conveyed that the sentencing was in their hands? Do you know?

A I do not.

Q If I represented to you that in the Plemmons case he did it in voir dire --

A Okay.

Q -- with the jury in advance of everything, "I'm telling you the sentencing will be in your hands" --

A Okay.

Q -- clearly conveying who is making the decision.

A All right.

Q But how did you know that he would ever say anything in the end to suggest that the sentencing would be followed after he made the statement at the beginning and then all of the evidence was received?
A I felt like he would, but obviously if he didn't by the end, then we were going to have to raise that as an objection or take that as an exception to the charge and ask that he charge that.
Q Why couldn't you have done that when he charged that at the beginning when they were conditioned to hear the evidence?
A I didn't think of it at the beginning. I thought it was going to be at the end.
Q And it would have been important to the jury to know. Otherwise, they began hearing -- would you agree with me -- the evidence in miti -- aggravation and mitigation that it was going to be their job to determine whether the sentence should be death?
A I could see that, yes.
Q You would agree with me on that.
(Pause.)
MR. EHLIES: Okay. I note that it's -- can I approach the bench a second?
(Bench conference held off the record.)
THE COURT: All right. We will conclude with the

examination for today.

Mr. Allen, keep in mind the fact that you can't discuss your testimony during the break.

We will resume Wednesday morning, the 30th of April, at 10:00 o'clock a.m.

Court is in recess until then.

END OF PROCEEDINGS APRIL 25, 2014

(Proceedings April 30, 2014)
THE COURT: Good morning.
MR. EHLIES: Good morning, Judge.
THE COURT: Are we ready to continue?
MR. EHLIES: We are indeed, sir.
THE COURT: All right. We've got Mr. Allen here.
Mr. Allen, if you will, come back around, please. And of course you're still under oath.
THE WITNESS: Yes, Your Honor.
BY MR. EHLIES
Q Good morning, Mr. Allen.
A Good morning.
Q You served as lead counsel in the case of the State vs. Tony Torres, and I think we've established that earlier, is that correct?
A Yes, sir.
Q And I need to back-pedal just a little bit from Friday and get up to speed here.
A Okay.
Q We talked about the recommendation sentence, the sentence that Judge Couch gave concerning the jury's role. And we've referred to that as the recommendation --
A Yes, sir.
Q -- charge. And I asked you, and I ask you again, whether there was any strategic reason not to have objected

to that charge.
A Not a strategic reason, no.
Q Was there any particular reason that you had for not objecting to it?
A What I think I was mentioning is that I knew he was going to ultimately instruct the jury that that recommendation will be followed by the Court. I was aware that that -- an instruction of that sort had to be made.
And, I mean, I understand since you brought it out to me that it was not made at the beginning of the trial or in his introductory remarks either prior to the beginning of the guilt phase or even the sentencing phase. But he ultimately made that remark.
Q Well, I think that we also established that you did not as lead counsel request or file any motion to see the jury charge in advance.
A That's true. Yes. We discussed that.
Q So your statement that you knew that he was going to make that charge is based on what?
A Based on my, I guess you might say my, understanding of the law at that time that I knew at some point he was going to have to make that charge or we were going to have to reask that he make that charge when he, you know, made the final charge to the jury prior to sentencing, and of course, as always, gives us the opportunity to request additional

charges or make other exceptions to the charge. So I felt that he was going to make it at the time.

Q Was there any strategic reason for not objecting to the number of times that he used recommendation?

A Not a strategic reason, no.

Q And was there any strategic reason for not asking and obtaining copies of the verdict forms prior to them being submitted to the jury?

A No, sir.

Q And was there any strategic reason for asking for a copy of his written charge that went to the jury?

A No, sir.

Q Ms. Hodges testified that she went to a training session with you on voir dire --

A Yes, sir.

Q -- before this case was tried, is that correct?

A That is correct.

Q And would you agree with me that picking the jury in a capital case is an important thing?

A Be very important.

Q And in that context did you consult with any expert on the case of Tony Torres in demographics or anything else as regards selecting the jury?

A No. I knew -- like a jury consultant?

Q Yes.

A No. We did not.
Q And were you aware that Mr. Torres was a member of an ethnic minority group?
A Obviously, by his name we know that he is Hispanic, at least partially. But also I knew that his mother and his maternal grandmother are Anglo or Caucasian.
I didn't know much about Tony's father other than, you know, what we had been told. It was difficult in locating his father and getting -- and his father was ultimately located by Ms. Graham and Dr. Loring, but he did not want to really answer questions or take any part in this case. But I know his father was Puerto Rican.
Q Yes. Correct. Puerto Rican. And Ms. Hughey, I think, was part of your case development, is that true?
A Yes, sir.
Q And I think she fell primarily under the third-party-guilt evidence, which was Mr. Reckenbeil, cog-in-the-wheel sort of to develop.
A Yes, sir.
Q And in that context there was some reference to looking for the Mexican. Do you remember hearing that?
A Not specifically, but I'm sure it's in there, yes.
Q Okay. All right. So did you in compliance with Gene Hamm vs. the State of South Carolina, U.S. Supreme Court decision, 1968, attempt to do voir dire to establish a

neutral jury?

A No. That was not the training I had received.

The training we had received was a -- a type of jury voir dire questioning solely on the jurors -- the venire people's views on the death penalty and on their -- how we viewed their likelihood to impose the death sentence and that was -- the idea was to go solely on how people view the death penalty regardless of their religion, their racial makeup and that type of thing.

Q So is it fair to say then that your strategy and the way you conducted voir dire was to focus exclusively on death-qualified jurors to the exclusion of racial ethnic neutrality?

A To get death-qualified jurors, yes. I mean, basically we were -- we had a system.

I don't want to give the whole thing necessarily away because we still use that. But basically we are questioning jurors primarily on their views of the death penalty.

I mean, there are some questions we ask if it's raised in questionnaires or if it's raised in other questioning about their knowledge of the case and how that may or may not effect them. But the whole idea was to go solely on the -- on their views of the death penalty and how we view their likelihood to impose a death sentence as opposed to really consider life in prison.

We score them, and we are basically pulling jurors based on our average or our views of the scores. Ms. Hodges scores; I score; Mr. Reckenbeil scored. We'd take the average of the scores and go solely on that.

Q All right. In fact, did Mr. Torres ever express to you a concern that you secure an ethnic-neutral jury panel?

A I do not recall specifically his expressing that concern to me or to us.

Q Did you ever sit down with him at any time and discuss the strategy for jury selection?

A I would imagine we would have explained to him that -- how we're proceeding as far as the type of questions we're going to be asking and where we're going from -- for it. But I can't quote you chapter versus what I would have told him.

Q You imagine. But do you have as you sit here an independent recollection of having done that?

A I can't say that, no.

Q And do you have an independent recollection as to whether you allowed him to participate in selecting and expressing his concerns to have an ethnic-neutral jury panel -- petit panel?

A Frequently during questioning we look at Tony, or he's passing us notes or something to that effect, I mean, but I can't say that we specifically were asking for his complete

input in the voir dire session of every juror, because, again, we were following the technique, if you will, or the system, if you will, of the voir dire that Kathy and I had attended the training.

Q When you attended that training were you informed that the fact experts were available at no charge to assist you in the process of drawing a jury?

A I don't recall that being a part of the training.

Q Did you ever investigate whether an expert would be available at any charge?

A Concerning the jury?

Q Yes, sir. Jury selection process.

A No.

Q Did you ever consider that with the team and make any strategic reason for why you wouldn't have an expert with you when you went to a jury selection?

A No. I mean, Kathy and I had attended the session. We felt as if we understood it, and we had the, if you will -- I won't say printed information -- but there was some printed information that was provided showing us the scale that we were to score people on. And I think we felt as if we could do it.

Q All right, sir. And had you done it before?

A No. This was the first one that I had attempted using that system.

Q Okay. And I think you indicated you had one other prior capital case.
A That's correct.
Q You were not lead counsel in that case.
A Actually, I was.
Q Were you?
A Yes, sir.
Q All right. Did you have an expert consulted in that case --
A No, sir.
Q -- for jury selection?
A No, sir.
Q Okay. Let's go on to another issue then.
We talked about with Ms. Hodges -- and not to belabor the point with the records -- but I think I shared with you her opening statement prior to testifying.
A Yes, sir.
Q I gave you the body --
A Right.
Q -- to read her statement.
A Uh-huh.
Q Are you familiar with her opening statement?
A I reread it, but yes.
Q Do you have an independent recollection of it happening?

A Well, I know it happened, yes. I mean, I can't -- prior to reading it I probably couldn't have.
Q All right. But you've had an opportunity to read it now.
A Yes, sir.
Q And from the trial transcript.
A Yes, sir.
Q Okay. And is it fair to say that having read that the opening statement stressed that the state's case was circumstantial?
A Yes, sir.
Q And in that context did you all team assess the opening statement in advance of it being given?
A The specific opening statement, no, we did not assess it in advance of being given.

I know Kathy and I had discussed it, and, you know, bouncing ideas off of each other. And it was decided in the opening statement that we thought we would go after the -- what we viewed as the state's weakest point or points, were in this particular case, which is essentially to present it as a circumstantial case or no specific witnesses who saw anyone killing Mr. and Mrs. Emery. So we felt as if it was essentially a circumstantial case accusing Tony of having done that.

Q Okay. And did you know at the time that you talked to

her about her opening statement prior to the time it was given that you were developing third-party-guilt witnesses?

A Oh, yes.

Q And did you expressly consider third-party guilt in creating the opening statement?

A I'm sure it was considered, but we also wanted to leave it in such a way -- or I'm sure we understood -- that, you know, big possibility that the judge was not going to allow us to go into third-party guilt, which meant that we're not going to be able to specifically talk about the specific of the person.

But of course whether or not we're allowed under third-party guilt to identify a particular other individual, we can always argue that our client did not do it, somebody else must have, obviously, if he was not the one who did it. That's always allowed even if the judge says we can't go into third-party guilt. And we were aware of that.

Q All right, sir. And in the context of it emphasizing the circumstantial-evidence rule did y'all consider the law of circumstantial evidence and its history in South Carolina?

A We were familiar with the charges if that's what you're getting at. I mean, I remember when I watched Mr. Reckenbeil's testimony and remembered your questions to some degree on that.

I was aware that there prior to the trial of Mr. Torres' case -- that there had been a very -- I'm going to say defense oriented or defense friendly circumstantial-evidence charge that had been overruled or, in my words, somewhat watered down as far as the charge goes. And I was aware that that, I believe, was the state of the law at that time.

Q All right, sir. So you were aware and had heard the examination of Mr. Reckenbeil.

A Yes, sir.

Q And in the references to the Edwards case, State vs. Edwards, and Grippon and then finally Logan --

A Right. And I would not have been able to tell you the names prior to hearing your saying it in court.

Q It was an important -- if I understand you correctly, the circumstantial evidence law of South Carolina would have been important to the opening statement stressing circumstantial evidence.

A Yes, sir.

Q But did you request the judge's charge in writing in advance of making the opening statement?

A No.

Q And did you propose an alternative circumstantial-evidence charge to Judge Couch at any time?

A No, we did not.

Q Did you position yourself for any kind of change that may have occurred in the charge on circumstantial evidence in the trial of Tony Torres' case?
A No, we did not.
Q Were any of those things done for strategic reasons in conference with the other team members?
A I can't say it was done for any strategic reasons, no. I mean, as far as trying to, if you will, to stress or stretch or change the law on circumstantial evidence, no, we did not. I did not consider that.
Q Is your training to position yourself to take advantage of issues that are presented at the appellate levels?
A The training is to preserve appellate issues or to preserve appellate error.

I'm not sure if we were trained specifically on how to get back to a more defense-friendly circumstantial-evidence charge. So I can't say that.
Q Well, would you do that by an appeal?
A Well, you do it by an appeal, yes, and it has to be an issue that's been preserved on the record, the only way to do that.
Q Excuse me. How would you have done that in the circumstantial-evidence rule on Tony Torres' case?
A Well, obviously the best way to do it is to propose a charge and then to get the judge's ruling on that proposal.

Q Okay. And, in fact, isn't that what happened in Logan as it came down, went even back again?
A I'm going to have to assume so since that was the appellate issue.
Q That was the issue.
A Right.
Q All right, sir. But none of that was done in Tony Torres' case.
A That's correct. None of that was done.
Q Okay. The second part of the opening statement emphasized not guilty. And we --
A Yes.
Q -- went through all of this with the other lawyers. I won't put that back up.
A Right.
Q It was nine different times.
A Okay.
Q And you've read it this morning.
A I did.
Q And is it fair to say and would you agree with me that the opening statement stressed not guilty to the jury?
A It -- yes. I mean, in a way it starts out trying to indicate that he's pled not guilty, not guilty, you know, is how we get a trial to some degree. But she did end up saying that he is not guilty.

Q And how many witnesses were presented in defense?
A We didn't present any witnesses in the defense on the guilt phase of the case.
Q And what was your estimation of the strength of the government's case at the time the opening statement was made, the strength of the government's guilt-phase case?
A It was very strong.
Q Okay. And how did you reconcile, or did you reconcile, in dialogue with your other team members the conflicts between presenting a statement that stressed not guilty with a mitigation case that stressed what we've been through with you --
A Yes, sir.
Q -- in mitigation, not to rehash all of that?
A Well, that is to some degree an inherent problem when you're having a trial where the plea is not guilty and where we're essentially going to have to at some point, I felt at that time, argue that he is, in fact, not guilty with having to appear 24 hours later before that same jury to start a mitigation phase knowing and understanding that the jury found him not -- or found him guilty beyond a reasonable doubt. To some degree I felt like we were -- you know, there is something called residual doubt, you know, where a jury may find someone guilty beyond a reasonable doubt, and still there may be some residual doubt which may take --

can't really say it, but, you know, it can play a part in the -- in a juror's decision on whether to impose a death sentence or life in prison.

I've heard sometimes residual doubt may weigh in favor of a life sentence for one or more particular jurors, which of course, as you know, get one or more particular jurors holding for life, then you end up getting a life sentence for the client. So that's one thought.

But, yeah, we knew it was a strong case for the government on the guilt phase, but yet we -- I think we just felt we were compelled to argue that he -- during the guilt phase that he was not guilty. And to some degree the client wanted it argued that way. He wanted us as we got closer and closer to trial, he wanted us to fight in the guilt phase.

Q Well, did he not want a trial because he wanted you to fight for his life?

A We wanted us to fight for his life.

Q Okay.

A He also wanted us to as we got closer to trial, he wanted us to fight even the guilt aspect of the case even though I tried to talk to him about that and tried to warn him of some of the dangers. But, you know, that was some of our discussions with him as well.

Q So he did ask you to fight for his life.

A Yes, sir.
Q Okay.
A He did not want the death sentence.
Q And you explained to him that he can't get a jury sentencing if he pled guilty to the charge.
A I know we went over that because that was an issue that had gone on a few months prior in the Inman case. So, yes. And we knew that had he -- even if he wanted to plead guilty, if he pled guilty he would be sentenced by the judge even after presentation of an aggravation case by the government and a mitigation case by us. It will still be that one person, a judge, to make that determination.

And we also explained to him that, you know, the ramifications of not getting a unanimous jury, a verdict on the sentencing phase, and what that meant, you know, hung jury on sentencing you get a life in prison.
Q On your testimony in that regard and residual doubt and all of that --
A Uh-huh.
Q -- are you saying that those are the consequences of a very, very strong government case in guilt -- residual doubt -- or are you saying that when the case is possibly defensible?
A Well, obviously, the stronger the government's case the less likely to be a whole lot of residual doubt. But if

there are some jurors that may be uncomfortable with the circumstantial nature enough or may be comfortable enough to float guilt but not necessarily totally comfortable with the circumstantial nature of the case, that could mitigate for that juror of course a life verdict.

Again, it's not necessarily something we can really argue because that decision's already been made, the guilt or the -- or the strength of the government's case.

Q In your training as regards residual doubt, that would have been the same segments of training as regards strong guilt-phase cases and presenting it in a softer manner to front-load your sentencing. Does that ring a bell?

A Yes, sir.

Q Okay. So that when you're confronted with the facts of this case, would you assess it as being very strong, which is consistent with other trial counsel team members?

A Yes, sir.

Q It would -- was there any strategic reason not to step down the opening statement knowing that there was going to be overwhelming evidence and that you were going to offer no evidence in your case on guilt?

A I'm not quite sure how to answer that question.

I mean, we felt that we had to stand up and make an opening statement indicating that he -- you know, the strength of trying to characterize the government's case as

being circumstantial and ultimately to make a closing statement in that phase asking for a verdict of not guilty.

I just -- we -- we -- I mean, I felt that we were required to do that or had to do that and not necessarily start off the guilt phase asking or acknowledging the government's case or acknowledging that the government has a strong case and they're going to find him guilty.

Q Do you know that the State of South Carolina has resident in Columbia a capital resource facility?

A I know at the time that we went to trial there was a capital litigation division which had recently been started by indigent defense.

Q I'm speaking of John Blume's capital-funded, federally-funded --

A Okay.

Q -- capital resource center. It's been in Columbia for many years.

A Right.

Q Teresa Norris. Is that name familiar to you?

A Oh, yes, yes.

Q Okay. And aren't you familiar with the fact that they offer all of these assistants and experts for situations involving a very strong guilt phase when you have to make a death-penalty-mitigation-phase statement? Are you aware that that's a resource available to you?

A I was aware that they had some resources available. I didn't know specifically what.
Q Did you ask or investigate whether there was someone who could help you craft an opening statement in a case that was very strong for the state when you were going to present nothing?
A No, we did not.
Q Did you make a strategic decision not to seek assistance, professional assistance, on how to accomplish that?
A I can't say that it was a strategic decision, but I can only say that I thought that we could handle it or do it.
Q All right. Let's go to another issue. We're finished with that.
A Okay.
Q I want to bring up on the voir dire, because I'm not sure that you had an opportunity to review from last week Marti Loring. You remember Marti Loring.
A Yes, sir.
Q And she was your social expert.
A Life historian.
Q Yeah. Life historian, social -- genian -- Graham and the rest.
And I think in front of you in the Court is Exhibit 3 and 4 from the trial. You may not be able to read it now,

but/and the state's going to introduce a copy of it.
A Okay.
Q But there are boards that are right here in front of you. Those were produced by your witnesses. Do you recognize those?
A Yes. Those boards were produced by Dr. Loring.
Q Okay. And did you talk to Dr. Loring before you commenced this case?
A Yes, sir.
Q And did you consult with her to get her views on how it was going, how her work was going?
A Yes.
Q And did you ask her how was the case developing?
A Right.
Q And did you ask her what her opinions were before you put her on the stand?
A Oh, yes, sir.
Q And did you work through that with all of your experts? Dr. Schwartz-Watz?
A Well, I had. Yes. I mean, I knew what their opinions were prior to putting them on the stand either through their reports or through talking to them or both.
Q And did you work the testimony out with them in advance, actually go through the testimony of what you were going to be asking so you could hear their answers?

A Yes. And in Dr. Lorin's case I believe she even prepared some questions that she thought that I should consider as well. So I had those.

Q All right. We found this in the transcript, and it's her testimony in response to one of the questions about her opinion. And her opinion is that having done a family history of Mr. Torres, "I think that he was not properly and consistently diagnosed with a proper diagnosis, thereby leading to his not being medicated properly, not getting the proper kind of therapy and treatment making even worse an already difficult situation."

Did you know that was her position before she said that?

A Yes. I think so.

Q Did you not think that maybe that would be a question that needed answering?

A I'm not sure. You mean like what the proper --

Q She was telling you that the record is that nobody understands this.

A Okay.

Q Isn't that true? Isn't that what that statement says?

A Yes.

Q Historically from his first admission all the way through it's been flip-flop, correct?

A Right.

Q Okay. And so did you make any strategic decisions with you and your team not to follow up on those statements, to start asking the question as to why the record was in that state?

A Well, I thought we were trying to get to that by getting psychiatrists -- Dr. Schwartz-Watz involved and following her recommendations as far as other people to see him -- the neurologist, the psychologist on the sexual aspects of the case and that kind of thing.

So I thought that's what we were trying to do but to get -- that's what I --

Q Well, in that regard Dr. Schwartz-Watz testified that she'd never seen anything like this.

A Yes, sir.

Q And you talked to her prior to her testifying.

A Yes, sir.

Q So you had lots of information that this boy was not understood.

A Yes, sir.

Q Not diagnosed properly or multiple diagnoses, correct?

A Correct.

Q Okay. And so was there a strategic reason not to get hands-on involved in what was screaming for genetics? Did you ever make a strategic decision not to engage a geneticist?

A There was no strategic reason not to engage a geneticist. I just didn't know to do that and hadn't thought.
Q Okay.
A I mean, when you told me that you had engaged a geneticist I had no clue that -- I mean, I just didn't think of that.
Q Yes, sir.
A I mean, quite frankly. And no one -- you know, the doctors, Dr. Schwartz-Watz or someone like that -- said, hey, we need to get him evaluated genetically. I mean, I just did not know to do that.
Q Okay. You understand, and would you agree with me, that it is your task as lead counsel to investigate, develop and present --
A Yes, sir, yes, sir.
Q -- medical evidence, and especially if it relates to mitigation?
A Yes, sir.
Q That is your --
A Right.
Q -- primary function.
A Okay.
Q Okay. I mean, that's a question. I'm sorry it's poorly worded. Is that your understanding of your role?

A Yes, sir. I understand that I'm responsible for that, yes, sir.
Q Okay. Okay. Did you ever consult -- there was no strategic reason for the geneticist. Same question. Is there any strategic reason for why you wouldn't have had that early age group assessed by a developmental-qualified psychologist?
A I can't say. Again, it was a strategic reason. I thought that I could get the information through Dr. Schwartz-Watz, and I didn't.
Q Did she not also tell you that her training is not below age 14?
A That's true.
Q Okay. And this history is like at 17 months -- 19 months, initially, I think we've seen.
A Right, very young.
Q Okay. And then the first admission into a medical facility, I think, was at age 3.7.
A Yes, sir.
Q So -- so would that not have been her telling you? She may not have expressly stated go get a developmental psychologist, but would you agree with me that it would -- in retrospect maybe have been a fair assessment?
A In retrospect, yes.
Q And is there anything that happened at the time that

would have prevented you from seeing that as a need in far as investigation, developmental and presentation?
A I can't think of anything.
Q Same stated questions on your third expert, which would have been the historian, Alex Morton, who was the pharmacologist.
A Yes.
Q And he opined what the record reflected, didn't he?
A Yes, sir.
Q He never undertook any kind of studies as far as we could tell.

Do you know of any that he ran on the metabolism or the abilities or the reactions, allergies that Mr. Torres had to any medications?
A I don't think so. I think that he did -- I mean, I know I accompanied him to the jail for his session, if you will, with Tony.

I don't think I attended the whole thing. I was able basically to get him into the jail and have him introduced to Tony and that sort of thing. So, but I did not direct, you might say, his assessment or anything like that.
Q We didn't see anything in the record. And the file is voluminous. We've looked. But I'm asking you whether there is anything that you know of in the record that suggests those inquiries were made, scientific inquiries as to

genetics, early childhood development or into pharmacological adaptability and Tony's ability to metabolize certain drugs.

A No. I did not.

Q Okay. We have been over with other witnesses a number of A.B.A. standards and guidelines. I know that you recognize those as guidelines helpful to you, is that correct?

A Yes, sir.

Q And you referred to those when you had questions about what the duties and obligations are, is that correct?

A I would think so, yes, sir.

Q And we've referenced 5.1(B)(2), 8.1(B)(3) and 10.7 and 10.10.1 and 10.9 actually on duty to get the advanced notice of what the charges are going to be.

Did you consult any of those for purposes of structuring your work?

A No.

Q Okay. So how did you team structure their work in developing -- investigating, developing and presenting your case?

A Well, we got the records that we were able to get and had, obviously, Dr. Schwartz-Watz look through them as well, provided copies to Dr. Loring. Ms. Graham read them as well.

I know we made other copies as needed to the other experts. I know we met as a -- I'm pretty sure as a team, including Mr. Reckenbeil, with Carolyn, Dr. Loring, as well and talked about what they show or what they suggest and what basically they saw as areas that we could present to the jury.

Q You did not use any punch-list guideline checklist for developing -- for investigating and developing and presenting the case.

A No, sir.

Q Did you know that you could ask for those experts and secure funding for experts to develop -- to investigate, develop and present mitigation evidence like D.N.A. in response to the evidence sample and also in the mitigation case?

A Well, I know I can ask for funding for experts. I mean, I know, obviously, how to do that because I did it for these experts.

I guess if the question is if I knew that those experts were available --

Q Yeah. The purpose of that question was to make sure -- and you've answered it -- that you knew you could do that.

A Yes, sir.

Q Second part of that question is, is was there any -- was there any problem with Judge Couch in getting funding?

A No.
Q Did he ever say no to anything?
A I don't recall that he did.
Q Okay, sir. And then third is was there any strategic reason that you settled on the group of experts that you had and no others to the exclusion of any other fields or areas of interest. And I think you had James Aiken in there too, didn't you?
A Right. I had James Aiken too --
Q For adaptability.
A -- for adaptability.
As far as other mitigation people, I didn't -- I guess I couldn't think of any other areas.
Q Okay. I don't want to limit it to mitigation because I know that there was an issue about the D.N.A. in language.
A And we got Dr. Ostroski for that.
Q To consult with.
A To consult with or possibly to testify to if he found that there was a problem with their conclusions or with the way or their methodology. That's why we had to seek and get the full-case file from the -- well, through the solicitor's office but from SLED to provide to Dr. Ostroski. Plus, he gave me the opinion that, you know, that they appeared to have followed the proper methodology and all of that.
He did help me in preparing, or actually he helped

prepare some questions for cross-examination, some areas that I didn't go into, which I followed a good bit of that in structuring my cross-examination of their expert. But -- but he felt that he couldn't really add anything as far as attacking their conclusions or their methodology through testimony. That's why we didn't call Dr. Ostroski. But I did get him.

Q Did you ask him to express an opinion based on the percentages, the numbers of four times the population of the universe, that sort of thing?

A I don't -- I don't think I did.

Q Did you object to it when that came in?

A No, I did not.

Q And did you ask him for guidance on the use of the word "match" by a geneticist, or not a geneticist. These are people from SLED or technicians.

A I know, and I think it was in this case as well, you know, constantly got -- I won't say irritated or frustrated with some of the experts talking about consistent with, you know, this finding is consistent with this or can't exclude or, you know, can't include, I mean, you know, how -- I mean, it's not really calling something a match or something like that. They're simply saying, well, it could be or it couldn't be. I mean, that just find of frustrated me at times.

Q Was your training in handling scientific evidence to object to the phraseology that it's a match as opposed to that the evidence sample is consistent with the contributor's profile?
A No. I can't say. I can't say I recall training saying to object to a match.
Q Okay. And did you have any strategic reason for not objecting?
A I can't say a strategic reason other than I thought it was proper testimony.
Q Okay. That you -- do you know -- do you have any current recollection that SLED did any testing as regards the genetics except to make an identification of the contributor to the known -- the known contributor to the evidence sample?
A I think that was basically the D.N.A. analysis, to essentially match or determine if they conclude or exclude various people. And that was all the genetics that SLED did as far as I know.
Q All right. And did they ever identify Chuck Emery as a contributor in the household samples?
A They did not because no known sample of Chuck Emery to my knowledge or to my recollection was taken.
Now, if it shows differently in the D.N.A. report, then I stand corrected. But I don't think they had a sample from

Chuck Emery.

I know that they had known samples from both Mr. and Mrs. Emery, the deceased, as well as Mr. Torres.

Q Were you aware that Chuck Emery was living in that house --

A Yes, sir.

Q -- with them in and about this time?

A Yes, sir.

Q And did you -- was there any reason that you did not pursue that for your own investigative purposes?

A No, except that frequently in criminal cases I don't necessarily try to help make the state's case better. I like to in many cases argue -- I won't say possibilities, but, you know, argue, you know, I from the strength of, you know, they have to prove beyond a reasonable doubt certain things and here's what they did not do. You know, we don't know this, we don't know that. If you follow what I'm saying, as I recall it -- and I reviewed the D.N.A. testimony the other day. And as I recall there were some findings, if you will, of some portions of the D.N.A. And, well, I think about four of the areas or four of the loci --

Q Yes.

A -- that came up with a number that did not match either or any of the three known samples. And I brought that out in cross-examination as well to show that there was

something else there that did not -- that was -- that did not belong to Mr. Torres and Mr. and Mrs. Emery.

Q But someone else there was the thrust of your third-party-guilt case.

A Right.

Q Was it not?

A Yes, sir, yes, sir.

Q Okay. There was no contemporaneous charge with the experts from the judge to the jury about their right to accept or reject the testimony of any expert, just as any other witness would be treated.

Was there any strategic reason not to ask for that at the time the experts were testifying?

A I -- I guess I really haven't thought about as to whether or not a strategic reason to ask the judge to give them that contemporaneous charge or not.

I mean, I've never necessarily asked them to give that charge. I just don't merely consider asking the judge to charge them in part.

Q All right, sir. I'm going to race through two issues. Slow me down if necessary.

There was -- was there any strategic reason or discussion about challenging the recommendation portion, the use of the word recommendation as it was applied in this case as part of Judge Couch's sentencing-phase charge?

A The word recommendation in the sentencing-phase charge?
Q Correct.
A Strategic reason for it.
Q Yes.
A No.
Q Was there any discussion about asking him to charge the rest of the sentence? Because recommendation appears in the same sentence with the judge shall impose that.

Was there any discussion about asking the judge to charge the whole sentence?

A No, there was no discussion of that.
Q Was there any strategic reason not to do that, not to ask Judge Couch?
A I can't say a strategic reason other than we were -- I know it's not a strategic reason, but we were expecting him or I was expecting him to ultimately charge the jury that that recommendation -- words to the effect of the recommendation will be followed by the Court, although I've acknowledged that I didn't have the written charge and didn't know when it was coming up.
Q But your job, was it not, was to do the very best you could to get at that point a life sentence for your client?
A Yes, sir.
Q And did you perceive 61 references to recommendation as alerting the jury that they were going to be actually

sentencing this man?
A Say that again.
Q Do you not see when you read the sentence? At the front end of the sentence it says -- we can pull it up if you need to -- that the jury -- if the jury returns a recommendation that the judge shall sentence?
A Yes.
Q Do you not see a con -- a tension in the statutory language of a recommendation with the judge shall sentence what is recommended?
A I guess I never really considered that tension prior to, you know, your discussions and your bringing it up as a way to keep the word recommendation out. And I guess I just got accustomed to the nomenclature, is what it boils down to, of calling whatever the jury does a recommendation but knowing that the judge will follow that recommendation, or whatever the recommendation is will be followed by the Court, so.
Q Is it fair to say that you fell into common practice because you do it and you're around it?
A That is a big problem in common practice.
Q How often did the jurors in the case of Tony Torres hear that charge?
A I think none of them had served on a death penalty case before, so that would have been the only time, yes.

Q So isn't it apparent that the Caldwell-Mississippi mandate that the jury -- nothing happened to suggest to a jury that the ultimate sentencing lies somewhere else would be offended by telling them you're only making a recommendation?
A Well, if it ended with -- I mean, and I understand your point that in the opening charge, you know, the sentencing phase, that he used the word recommendation, yes, and did not include that language. But we knew, or I thought I knew, the judge was going to tell them that he was going to follow that recommendation, because I understood that that was the status of the law. But I did not -- and I acknowledge that I did not -- ask him to make that statement every time he used the word recommendation but...
Q My -- my question is whether you saw the tension in telling the jury that they were making a recommendation to the Court with the fact that the sentence goes on to say the judge shall impose that recommendation.
A And I think I'm trying to say that I guess I did not see the tension as such because I was accustomed to the nomenclature.
Q Okay. Were you aware of Caldwell vs. Mississippi at the time you tried this case?
A I can't say I was specifically aware of that particular case as far as being able to recite it, but I knew I was

aware that the judge was not to diminish the jury's role in their sentencing, or no one was to diminish the jury's role in the sentencing.

Q Okay. Were you aware of the language in South Carolina jurisprudence that the judge is obligated -- State vs. Davis -- to convey, clearly convey, that the sentencing will be the role of the jury?

A I think I --

Q They will be sentencing the defendant.

A I think I was aware that that was the role of the judge, and yes.

Q Likewise, was there any strategic reason for not advancing if you didn't -- back up. Strike that. I'm sorry.

You had no way of knowing about the genetic deletions, Prader-Willi and that sort of thing, is that correct?

A I did not know about them, no.

Q Okay. Then there'd be no way then -- there wasn't even a hint for you. There was not even a hint for you.

A No.

Q Okay. During the -- I'm going to another issue. Close that up.

The Chuck Emery third-party guilt. You were familiar as lead counsel with that, although maybe not primarily responsible, is that correct?

A Right. But we were all talking about the third-party guilt and how we were going to try to do that.
Q Are you familiar about State vs. Miller where mode of opportunity and means -- circumstantial evidence, mode of opportunity and means is sufficient to convict someone of murder?
A I don't know if I recall specifically that language, but as far as -- you mean the state's case of putting up to avoid a directed verdict and get-it-to-a-jury issue? I would say yes.
Q Okay. Circumstantial evidence that covers all three of those bases in State vs. Miller was sufficient.
A Okay.
Q Is that your understanding of the law?
A I think so.
Q What did you introduce that established motive on Chuck Emery during the proffer, do you remember? Were you present? I'm sorry.
A Yes, sir, I was present for the proffer.
Q For the proffer?
A Yes, sir.
Q I think Mr. Reckenbeil was handling the proffer.
A He was handling the questioning and the objections, but, yes, I was present.
Q Do you remember whether the probate file was admitted?

A It was not. I don't think it was. I don't think it was admitted.
Q How about if we say let the record stand for itself?
A All right.
Q Would that be okay?
A That would be okay.
Q Okay. I will skip over then the series of questions related to the probate file if you don't remember that happening. So as -- do you remember whether or not the probate file --
A I do not remember today, no.
Q As regards the third-party-guilt issue, did you all interview Crystal Williamson?
A No.
Q How about Ms. Gladys White? I'm sorry. Phyllis White.
A I don't think we did. I don't have in front of me a list of people that Mr. Skidmore or Mr. -- or Will Graham talked to. But I know I did not talk to Ms. White.
Q Mr. Biggerstaff, Kevin Biggerstaff?
A Yes. I don't think --
Q Mr. Roger Kirby?
A I don't think so.
Q Okay. As regards Ms. Crystal Williamson Harling -- H-A-R-L-I-N-G -- at the time of this case --
A All right.

Q -- do you remember who she was?
A I believe she's a daughter of Ann Emery.
Q Yes. And I need to remark here. I'm sorry. I'm out of place. But the deceased, Ann Emery, do you know whether she -- what race she was back to --
A I think she's Angelo or Caucasian.
Q Okay. And who was Crystal Williamson -- Harling Williamson?
A Her daughter.
Q Correct, correct. Okay. Did you undertake -- do you know whether Ann Emery had any other children?
A I don't -- I don't really remember. I don't think she did though. But, I mean, that will just be a guess at this point.
Q You heard her testimony in the aggravation, in the guilt phase and in the aggravation case.
A Yes, sir.
Q Do you recall that she was the only child of Ann Emery?
A I don't recall that testimony today specifically.
Q Okay. We'll let the record speak for itself.
A I hope so. Yes, sir.
Q Do you recall whether or not she characterized her relationship with her mother as very close?
A Yes.
Q And do you recall whether she actually testified she

lived with her mother in the same house close to the Emery residence?

A I know that they -- I mean, they weren't neighbors, but, yeah, they were close by.

Q And would you have a recollection as to the power of the testimony of Ms. Crystal Harling Williamson as it relates to the strength of her relationship to her mother?

A It was -- yeah. I mean, the courtroom was very quiet when she finished. It was power -- I mean, I'm not sure. I mean, I can't think of a better -- of another word for powerful, but it was quite effective for the state.

Q In your training did you ever encounter victim outreach programs?

A I had heard about it. I believe I've heard about it a lot more since the Torres case. That's about all I can say about that in this.

Q Did you have a strategic reason or a team meeting to decide for or against an outreach to the victim's family?

A I can't recall specifically a team meeting or a discussion about victim outreach with the other team members.

I do remember -- and I believe it was at that making-the-case-for-life that I attended prior that there were a number of cautions made about victim outreach.

I remember them talking about, you know, you need to be

very careful -- victim outreach person -- although a member of the team is supposed to be free to tell anything that the victim outreach person knows to the -- I'm going to call them victims -- but to the survivers of the victims, which means that you've also -- if there's certain information that's to be kept completely confidential, just the ones working on the defense or the mitigation that we also had to basically exclude to some degree the victim outreach person as well.

Q So in 2007 you knew about the initiative of victim outreach.

A I knew there was something called victim outreach and in general what it was.

Q Did you investigate the benefits of victim outreach and the targets and purposes of victim outreach as regards defending someone charged with capital murder?

A No, sir.

Q In front of you is a document, and it is marked if you'll give us the number that it is marked.

A Thirty-two.

Q Thirty-two. Yes, sir. On the bottom right-hand side is a bates number.

A Okay.

Q And it came from your file -- C.A., Clay Allen.

A All right.

Q 03248. And I want you to look at the last sentence on this newspaper article.
A On the third page or --
Q That is Sunday, May 13th of 2007.
What was the date of this murder -- May 11th of 2007?
A I believe that's correct.
Q Okay. On the bottom of the first page --
A Yes, sir.
Q -- would you publish what it says there, please starting with 7th Circuit?
A "Seventh Circuit Solicitor Trey Gowdy said he wouldn't comment on whether to push for a capital punishment for Torres until he spoke with the family."
Do you want me to go further?
Q Yes. Go on.
A "There is a process I go through in all capital-eligible cases, and the first part is to sit down with the Emerys' family and explain the options, Gowdy said. I don't think it's appropriate for me to say anything about the possible range of punishments until I speak with them and they can ask whatever questions they want to."
Q All right, sir. Now, did you in light -- did you have this article at and about the time it was published?
A I'm sure I did, yes.
Q And so is it fair to say that the solicitor himself is

cuing you in as the defense attorney that significant component of his decision, whether or not to seek death against your client, is the family -- Crystal Williamson?

MS. BROWN: Objection, Your Honor. Speculation.

THE COURT: Sustained.

Q All right. What did you do with that information that you just published?

A With the article? I mean, the article is in the file.

Q Did you do anything with that article?

A I did not. I did not contact the victim's family.

Q Crystal Williamson.

A Right.

Q Or Harling Williamson.

A Right.

Q And did you contact the solicitor's office in your furtherance of your duty to negotiate to present Crystal Williamson?

A I did not ask them to present Ms. Williamson. I know I asked or talked to Trey on a couple of occasions about pleading out for life without the possibility of parole, and Mr. Gowdy was very quick to reject it, almost in my opinion dismissive of me.

Q Okay. And there's one more paragraph after that as far as the article that you had available to you that -- did you know -- had you ever been with Trey Gowdy in other capital

cases, around it, not necessarily handling, but seeing how he handled them?

A Yes. He prosecuted the Morgan case. That was the first capital case I had done.

He prosecuted two other death penalty cases that were tried the same year Morgan was tried, and I was in the public defender's office and a public defender or the public defender on one and another assistant public defender on another, represented those defendants.

Q And as regards those cases, this remark that's in the newspaper that he was going to speak to the family and he had a process, was that consistent with the other times that you were dealing with cases or a part of cases?

A I know Mr. Gowdy speaks with the family. I'm not sure if I believe necessarily everything that he said in the quote.

Q All right, sir. What is the next paragraph below the last one you had?

A The next paragraph did you say?

Q Yes, sir, on page two. It's the third paragraph on page two.

A "Investigators said they don't believe Chuck Emery was involved in the killings, but Williamson said the couple had been worried about Chuck Emery and the activities he was engaging in."

Q Did you follow up with that statement in any way in developing your third-party-guilt case?
A I mean, as far as speaking with Ms. Williamson, no. We did not speak with Ms. Williamson about his activities, I mean.
Q You know that we had Ms. Williamson on the witness stand here.
A I did not know that. I did not attend the whole hearing.
Q Do you know that she was on the witness stand? Do you know anything about the substance of her testimony?
A I think I've heard either from you or from the attorneys for the state that she had indicated that -- something to the effect that she would have asked for life if she knew that someone else was involved or if Mr. Torres could help someone else or something to that effect. But I'm not sure.
Q Would it have been surprising for you to learn that she was -- she -- had she been approached by the defense -- and quoting, this is from the transcript.

Q "And had you been approached by defense counsel and asked whether a sentence of life in prison without parole would satisfy the needs of you as the immediate beneficiary and closest relative to Ann, what would you have

told them?

"A If they had just asked me if life? Answer, yes.

"Q That's fine. Your answer would have been I would have said fine. Okay. So had they come to you with a request concerning sentence for Tony in exchange for a plea to life without parole you would have been acceptable?

"A Yes.

Q On cross-examination she was asked, and she responded, about the sentence of death.

And she responded, "If Tony did this by himself, he deserves to die. But I don't think he did."

Would that have helped you with the jury on a sentence of life with the victim's daughter saying that?

A With the jury I don't know if her desire for or against the death penalty would necessarily be admissible.

I know that they can't testify that they want him to die. I'm not --

Q Well, actually they can't testify as to what the sentence should be. They can testify as to whether they think he should die, and the reason.

A Okay.

MS. BROWN: Objection. I believe that's a

misstatement of the law as we see it, Your Honor.

MR. EHLIES: Nonetheless, I withdraw that.

THE COURT: All right. Rephrase the question.

MR. EHLIES: I'll rephrase the question.

Q Do you know what is allowed under the state law as regards the victim's-family statements?

A In front of the jury, I don't think they're allowed to give their -- state whether or not they want -- like I said, I didn't think that they were allowed to testify that they wanted any particular person to die or to be given the death penalty.

MR. EHLIES: And permission to publish the actual statement from Sapp citation in examining this witness. And this is 366 South Carolina 283.

MS. BROWN: I would object because it's going to be out of context unless someone reads that. And it's a legal argument in the middle of testimony, Your Honor. I don't mind addressing the legal argument at a later time.

THE COURT: Okay. Well, I think he's asking Mr. Allen what his understanding of the law was in order to make a presentation of the witness to the jury or whether or not to make a presentation.

So do you have a copy for Mr. Allen to read?

MR. EHLIES: We can put it on the big screen. This is Sapp. State vs. Sapp, S-A-P-P, Sapp, 2005.

Q What was the date of this trial -- 2008?
A Yes, sir.
MR. EHLIES: And it's on page seven.
Q I'll just read it to you. I don't have it in our --
A Okay.
Q We addressed the issue of whether the trial court erred in --
THE COURT: Excuse me just a minute while you're doing that.
What's the South Carolina site?
MR. EHLIES: Yes, sir. 366, South Carolina, 283.
THE COURT: Thank you.
MR. EHLIES: And it is on page seven.
THE COURT: All right.
MR. EHLIES: I'm going to print it out. More recently in State vs. Wise.
Judge, I can come back to this if it'd be better because he should have a copy.
THE COURT: Come back to it. I'm going to get him a copy.
MR. EHLIES: Okay. Let's come back to it.
Q Can we agree that what we've been through about her third-party guilt -- not the sentencing issue but the third-party guilt -- would have been helpful as part of your presentation on third-party guilt that she did not believe

he did it alone?
A Yes.
Q And --
A I'm not sure if her belief though is admissible. But, be that as it may, yes, it would have been helpful.
Q Well, as mitigation we're going to see that. Let's just go there.
A Yeah.
MR. EHLIES: Why didn't you bring up the 16-3-20?
Q One of the things that we've expressed and you and I have talked about -- and it's been in the briefs -- is how third-party guilt for your purposes really wasn't third-party guilt. It was role in the offense.
A Okay. Yes. We did discuss that.
Q We discussed all of that. And we saw here under the statute for statutory mitigating circumstances that if there's any evidence that would suggest that the role wasn't what the state was saying it was, then this paragraph four, the defendant was an accomplice, you could have set that up in your opening statement, couldn't you, in guilt under the rubric of felony murder or some kind of an accessory or accomplice to murder without being the hammer man?
A I believe, I'm pretty sure, that I had requested this particular mitigator in my written request for the statutory mitigation that Judge Couch had asked for a few days prior

to trial.
Q I can tell you it does not appear so.
A Well, I --
Q And he did not charge it.
A Well, he didn't charge it. There was some -- okay. I know that when we were also discussing the mitigators prior to his giving the final charge, I believe that I made some comment in the record that I -- that I would like to request it. But of course he had denied my request to put up what I'm calling the third-party guilt. And I'm pretty sure during the sentencing phase I renewed the request to put up that information as mitigation, which he also denied.
Q We will -- we will invite you to find that in your record.

Could it have occurred on some sort of side-bar conference or in the office and not on the record?
A No. I was reviewing the transcript last week and I thought, I'm pretty sure I thought, I saw that where we made that request again.

I don't pretend to tell you. I'd have to probably go to the beginning of every witness' -- defense witness' request, but I think that was my plan, was to reopen it to get that request and if I --
Q So if you did that would you have preserved it for appeal?

A I would have thought so.
Q Would you have alerted in transitioning the file to appellate counsel to raise that as an error in failing to charge paragraph four?
A I did send them a letter. I can't say that that was part of it, no.
Q Did you see it addressed in the decision or in the briefs?
A It was not -- it was not.
Q And can you direct us anywhere in the file from your recollection as to where -- okay. On page 2716 of the trial transcript, let's take a look at that. Do you have that in front of you? Okay. Let's take a look at what -- what we are aware of that we don't believe is consistent with what you're saying, although I can't read that far away.

All right. And identify that page, No. 2716.

"Any other statutory mitigators the defendant believes was supported by the evidence?"

MR. ALLEN: No, Your Honor, not -- not -- not that that was supported by evidence. Of course we made request of -- I think it was No. 3. But based on the rulings of the Court that -- excuse me. But No. 3 -- not No. 3.

THE COURT: The one that says the defendant was an accomplice in a murder committed by another person and his participation was relatively minor?

MR. ALLEN: Right."

You better go down to the next line. And see if you can.

"Right. But based on the Court's ruling, and our abiding by this Court's ruling, I will acknowledge -- well, I understand your previous exceptions and then you except to my leaving that one off the list. And the ruling will remain the same. Thank you."

And the ruling was what, on what?

A The ruling was on the third-party-guilt --

Q Correct.

A -- type evidence that we were -- we were not allowed to present it.

Q Okay. It was not on the role in the offense.

A Well, I specified. And I believe when the judge was quoting that language, I believe he was reading from my written request for statutory mitigators. And I -- I mean, I really thought that was in there. I really do think it was in the -- the one that I handed up or provided the Court

prior to trial on that statutory mitigator.

And what I was trying to say was I was asking for it to be charged, but I understood we can't go into that because we didn't get the evidence out based on his prior rulings, which we were abiding by.

So in that way I was trying to essentially raise it to show that had we been allowed to put that evidence up, then we could have gotten that statutory mitigator.

Q All right. Is that in this particular page that you're clarifying what the judge -- "No. Your ruling, Judge, was on third-party guilt, and what I'm seeking is role-in-the-offense for paragraph four"?

A I didn't use the phrase role-in-the-offense, no. I mean, what you see is what I said.

Q And so it's not preserved on role-in-the-offense, because it was never presented as role-in-the-offense. Isn't that true?

A Well, I mean, again, I told the judge that I was requesting, that I wanted to request, the accomplice. I'm going to call it the accomplice statutory mitigator, but that I couldn't because we didn't have the evidence out there.

Q Well, you didn't have third-party-guilt evidence, but you had plenty of role-in-the-offense evidence, didn't you, if someone else was there?

A If someone else was there. But the judge didn't allow us to present that testimony.
Q What goes in in the sentencing phase is not the same that goes in on the guilt phase, is it?
A No. But, again, I -- I'm pretty sure I specifically renewed my request to present that evidence during the sentencing phase.
Q That's where we're having our trouble.
A Okay.
Q And would you agree with me that trial -- that the appellate counsel was bound by what you did with the judge at the trial?
A Yes.
Q So if the appellate counsel reading this doesn't see that any other way than the guilt phase, role-in-the-offense, I mean -- I'm sorry -- guilt phase, third-party guilt, then he would not have been ineffective for failing to raise it as an appellate issue. Would you agree with me on that?
A Okay. I will agree with that.
Q Had you, on the other hand, stated it clearly as you're saying you did state it clearly it would have been ineffective assistance of appellate counsel not to raise the judge's refusal to let you go to the jury on role-in-the-offense.

MS. BROWN: I'm going to object, Your Honor. That calls for a conclusion that actually is in your province at this point.

MR. EHLIES: I'm challenging his performance based on his understanding of the law.

THE COURT: Overruled.

A I don't know if I call it ineffective assistance of counsel, but, I mean, but, yeah, I mean.

Q It would have to be one way or the other.

A Okay.

Q Is what I'm asking you.

A Right.

Q You agree with that.

A Sure. I mean, I thought I preserved it, or I thought I preserved it as a mitigation or extenuation type evidence.

And I'm pretty sure that I renewed my request to present that evidence in the mitigation phase. I'm pretty sure I even read it. I can't tell you where it is, so I can't tell you what line it is. I'd have to look for it. But I thought I did.

Now, I didn't say I'm offering this in role-in-the-offense. I mean, I didn't use the word role-in-the-offense. But I guess I expected everybody understood what I was trying to do.

Q Okay. All right. I'm back now to the issue about

Crystal Williamson being of some assistance with the jury as regards what sentence they may impose under Payne vs. Tennessee.

A All right.

Q All right. The loss to the family and the community of the victim.

A Right.

THE COURT: Mr. Ehlies, here's a copy of that case --

MR. EHLIES: Okay. Thank you.

THE COURT: -- if you want to give that to Mr. Allen.

MR. EHLIES: Thank you, Judge.

THE COURT: It's marked.

Q Okay, sir. And I'm looking. Let's see. It would be on your page 292, possibly 293. And it starts off with 888 for the page number of the Southeastern -- well, more recently in State vs. Wise. Do you see that?

A I do.

Q Read that just a second to yourself if you will.

(Pause.)

Q Okay.

A All right.

Q We address the issue more recently -- "In Wise we address the issue of whether the trial court erred in refusing to allow surviving victim to testify on cross-examination during the sentencing phase of the trial

that he did not personally believe Wise should receive the death penalty." Do you see? You're with me?

A I see that.

Q "We reiterate our holding in Johnson, stating, quote, a close relative of the defendant, such as a sister, may be asked whether she wants the defendant to die, which is, again, asking her to make a general plea for mercy and not explicitly directed towards eliciting her opinion of what verdict the jury should reach." Okay.

A Okay.

Q Now, my point is that if Crystal Williams [sic] was available and would have testified that she did not want Tony to die and the reason was she did not believe he was alone committing the offense, would that have been helpful to you with the jury?

A Well, again, I mean, yes. If that evidence could be put out it would be helpful with the jury. I'm just, again, not sure.

Q That answers my question. The rest could go to the judge.

A All right. Thank you.

Q The solicitor -- Crick -- in her closing remarks -- opening statement, guilt, said that the forensic evidence, all the forensic evidence, pointed to the guilt of Tony Torres, and Tony Torres only.

Did you have any discussions with co-counsel at that point as to whether or not you should offer and renew your request for third-party-guilt information to correct the theory of the state's case with the jury as stated by Ms. Crick?

A I don't believe we discussed it.

Q Was there any strategic reason not to renew your request on the idea that she had opened the door by stating that the entire crime was Tony, and only Tony?

A You're talking about in her opening in the guilt phase.

Q In the guilt phase, way up front.

A Yes. I know we renewed our request, but it was -- but we did not specify that argument.

Q When would you have renewed the request?

A To present the --

Q Third-party guilt.

A -- third-party guilt? I certainly think we did that before.

Q We?

A Before either resting.

Q We don't see anything in third-party guilt after the proffer --

A Okay.

Q -- which the context it was just before the start of the trial.

A Right. That was on --
Q It was after voir dire.
A It was after voir dire --
Q The jury is in the box.
A -- before the jury was sworn.
Q Not present but selected, correct?
A I can't remember if it was done before or after the selection of the jury, but I think we had not begun any of the testimony in front of the jury.
Q But that was the opening statement of the solicitor.
A Yes.
Q Crick.
A Yes, sir.
Q And there was no strategic reason not to renew the request to be allowed to get into third-party guilt.
A No, there's no strategic reason not to do that.
Q And there was no training or suggestion that you could have softened the guilt opening statement on the suggestion of felony murder or role in the offense.
A Well, obviously, I was aware of that mitigator as we talked about that he was accomplice, because I am pretty sure I requested that, so, yeah. And I certainly have the statute, so I was aware of that as a mitigator.
Q And would you agree with me that it would have been a softer guilt-phase statement than not guilty in light of

knowing what was coming and no witnesses for the defense?
A I can agree with that.
MR. EHLIES: I'm almost done, Judge.
Q There were -- to shorten this thing if you would accept my reference that we went through it with another another lawyer that was a team member -- but Solicitor Gowdy had asked Ms. Lamb frequently how many kids were in this program -- how many kids in this program -- how many kids in this program. Do you remember that happening?
A I remember it happening. I remember -- I think it was -- you asked the questions of Mr. Reckenbeil, and I was, again, in the courtroom. And I listened to that, yes.
Q And -- and then he really closed it out with your expert, Schwartz-Watz, with all of those people are out there and none of them are murderers.
A Right, right.
Q How would -- did you know whether any of them were murderers?
A Well, of course not.
Q And do you think he did?
A No.
Q Do you think Dr. Schwartz-Watz could have answered that question?
A No.
Q Okay. Did anybody object?

A No. We didn't object.
Q And did it pertain to the unique characteristics of the defendant, what other people were doing?
A Well, no.
Q Okay. Circumstances of the crime?
A Not really.
Q What other people are doing, again?
A Right.
Q And the third category would have been the loss to the family, the victim and his community.
A Right.
Q It didn't --
A It did not.
Q And you filed a Brady motion. In response to the Brady motion did the solicitor ever give you a heads-up that you needed to talk to Crystal Williamson?
A I'm pretty sure that the Brady motion is included in my request for discovery.
Q Yes. It is.
A As a Rule Five. So that was the -- to my recollection the only Brady motion filed. And, no, the solicitor did not give me any heads-up to -- that I needed to talk to Ms. Williamson.
Q Was you aware that 10.9.1 suggests to us that we don't quit just because the solicitor says no on the first go or

even the second go?
A As far as negotiating?
Q Negotiating settlement. It's an ongoing obligation.
A Yes. I understand it's an ongoing obligation and that we're not supposed to quit just because he says no. There does come a point.
Q We -- we heard from Phyllis White. But y'all never interviewed her as far as her relationship with Ann Emery and Ann Emery's concerns for her safety as she related it to Phyllis White. You don't -- you didn't -- none of your file material suggests that that was followed up or known by your group. Is that true?
A I think that's true.
Q When you were developing the strategies for the defense case in guilt and in sentencing did you incorporate and include Tony Torres in the process?
A Do you mean as far as telling him what we're doing?
Q As far as asking him maybe. Or is that what you did? Did you tell him what you were doing?
A We kept him advised of, you know, the experts we were getting, you know, wanting him to cooperate with the experts and that type of thing.
Q Okay. Did you tell him about your strategic decisions and trial tactics on opening statement and the rest of that, as well as voir dire and including --

A I don't -- I don't think we talked with him specifically about what we were going to say in the opening or closing statements.
Q So would it be fair to say then that he had no input with you in making those decisions -- your group?
A I don't know if I'd say no input. I mean, we didn't tell him what we were going to say, that's true. I don't recall him asking what we were going to say or anything to that effect either. I mean, I would have gladly answered his questions.
Q Was he noncooperative as regards your strategies?
A At times he was not forthcoming with all of the information.
Q But as regards your strategies and decisions.
A Strategies. He suggested a few areas that he thought we should go into, which I know on at least one of those areas I did not think was a good idea at all.
Q Okay.
MR. EHLIES: Judge, I need a couple of minutes to talk with co-counsel, and I think we're about at the end of the applicant's case with this witness if I could have a few minutes.
THE COURT: Okay.
MR. EHLIES: Would that be all right? Is it break time? I don't know.

THE COURT: How long is it going to take?

MR. EHLIES: Well, in all honesty, this may be the end of the applicant's showing. And in that context I want to make sure there isn't anything that I should do at this point as regards any evidence if I could have just five minutes.

THE COURT: Okay. Sure.

MR. EHLIES: Would that be all right?

THE COURT: Sure.

MR. EHLIES: Thank you.

THE COURT: We'll take five minutes.

You can step down.

(Whereupon, a recess was taken.)

MR. EHLIES: Thank you, Your Honor.

BY MR. EHLIES

Q I am referencing -- I don't know if you have this or not -- transcript in front of you -- but I'm looking at page 2376 which will come up on the board here.

A Okay.

Q And, Mr. Allen, you have been testifying about recollection of talking to Judge Couch. And we are showing you 2376, line 15, which is Judge Couch.

And the Court: "Okay, sir. Thank you very much. Having heard the solicitor's argument," it says, "all right, anything further from the defense that we need to go through

before we take our -- your -- take -- take up your case? Any other matters you wish to raise before the Court?"

And will you publish what you said there, please?

A "Your Honor, the only other matters, that, again, we renew our request to present the evidence of the third-party guilt in this phase based, again, on the same grounds as we previously stated. I know they've been ruled upon previously by the Court, but we renew that request."

Q All right. And the Court's response is, "I'll hear from the state on that particular renewal of the motion."

A Right.

Q And the next. "My ruling would say." All right. Next page.

"I'm not aware of any more evidence that existed pretrial when Your Honor made this ruling. The evidence of this defendant's guilt forensically and otherwise is simply overwhelming. Nothing on that conjecture to suggest someone else committed the crime or, frankly, that someone else was complicit in the crime."

Court: "Any additional evidence that the defense wishes to present in this regard?"

Mr. Allen: "No, Your Honor."

A Yes, sir.

Q Ruling would stay the same.

Was there anywhere at all that you suggested to the

judge that you're not talking about third-party guilt, that you are talking about role in the offense for sentencing purposes?

A No, no. I mean, that's pretty much the entirety of what was said.

Q Is that -- is that where you think, you recall, that you were reading?

A That's right. I was renewing my request to present.

Q And that's 2330, 2376 and 2377.

A Right, which would have been after they presented their case in aggravation and before we called our first witness --

Q Okay.

A -- in mitigation, yes.

Q Okay. All right. So isn't it fair to say that as far as Judge Couch is concerned what you were presenting was what you said you were presenting, third-party guilt?

A That could -- yes. That could be an interpretation. But I was also keeping in mind the statutory mitigator of, as you previously put up there, for the accomplice testimony. But I didn't, obviously, say those words or bring his attention to that particular mitigator.

Q Is it trial counsel's responsibility to clearly articulate his position to the judge on the record?

A Yes, sir.

Q You had a capital case just prior -- not just prior, but prior to this.
A Yes, sir.
Q And you tried that case to the jury.
A Yes, sir.
Q And it was to conclusion.
A Yes, sir.
Q You got a verdict.
A Yes, sir.
Q You got a verdict of death.
A Yes, sir.
Q And you argued in that case, did you not, the individual defendant was only 17 at the time of the offense?
A Yes, sir. That case was tried before Roper was decided, which was decided the following year.
Q And you phrased your defense forward looking and based on his young, youthful life at the time of the crime, which was not the law, correct?
A I'm sorry?
Q Was there a categorical ineligibility for death on people who committed their crimes while 17 or under at the time you tried that case?
A There was not a categorical.
Q Didn't happen until Roper.
A That's correct.

Q Okay. So the point is that you were forward looking and positioning your case then for the benefit of your client and were later vindicated. Did he get executed?
A No.
Q Why not?
A Roper came out, and he was ultimately sent back for resentencing.
Q So why didn't you employ that on the circumstantial evidence rule, that kind of aggressive forward-looking position? Do you have a strategic reason for why you weren't looking in that same light on circumstantial evidence?
A I don't have an explanation for why I didn't. I mean, I just didn't. I guess I have to say I didn't think of it --
Q Okay.
A -- in the concept or the context of circumstantial evidence.
Q Had you known at the time you tried this case that Tony Torres suffered with a number of genetic disorders and Prader-Willi and deletions --
A Uh-huh.
Q -- would you have likewise positioned him under the theory of Atkins vs. Virginia as categorically ineligible because he fit the same category as Atkins, mental

retardation?
A I don't know if in 2008 I was that inventive, quite frankly.
I notice -- I notice when you were asking me questions on Friday you suggested that. And I remember being struck by that suggestion like -- it's almost like a light bulb went on like, oh, yeah.
Q Well, you did it in pre-Roper.
A But we knew that the case was pending in the U.S. Supreme Court on that very issue.
Q Okay.
MR. EHLIES: Thank you, Judge.
THE COURT: All right. We'll continue with the cross-examination this afternoon at 2:15. We will be in recess until then.
(Whereupon, a recess was taken.)
THE COURT: All right. We will continue the cross-examination of the witness.
MS. BROWN: Thank you, Your Honor. May it please the Court.
CROSS-EXAMINATION
BY MS. BROWN
Q Good afternoon, Mr. Allen.
A Good afternoon.
Q I'd like to go over a few points from your direct

testimony. And I have placed some exhibits in front of you. I believe on your right would be applicant's exhibits and on your left would be respondent's or the state's' exhibits.

A Okay.

Q I want to ask you about Applicant's Exhibit No. 28, if you recall that. That was one that you were asked about last Friday. And those appear to be records from Ms. Lisa Torres, correct?

A Appear to be, yes.

Q Okay. And that would be Lisa Lamb, the applicant's mother, correct?

A That's correct.

Q And Ms. Lamb was cooperating with the defense, correct?

A Oh, yes.

Q And you spoke with her several times.

A I think so, yes.

Q Okay. Is it your testimony that you did not have these particular records or any type of summary of these records in your file?

A I can't recall having these particular records in the file. I think -- I don't know if there was a summary in there or not.

Q Okay. And you mentioned earlier in your testimony that Carolyn Graham was your mitigation investigator.

A Yes,

Q Is that correct?
A She was.
Q Okay. How did you select Ms. Graham?
A I -- I mean, I was introduced to her. She -- she introduced herself to me. She indicated some of the cases that she had worked on. She provided me a C.V., I believe, or, you know, something like a resumé.
Q And to your knowledge she had previously worked as a mitigation investigator on a capital case in South Carolina, right?
A Yes.
Q Okay. And was she recommended to you by other capital litigation practitioners?
A I don't recall talking to any other practitioner about her.
Q Okay. And can you state whether Ms. Graham would have had the records from Applicant's 28?
A I'm sure she provided me copies of all records that she had obtained, so.
Q Did she keep her own file?
A I believe she kept copies of everything that she acquired.
Q Okay. And the way that your team worked if I understood your testimony was that Ms. Graham would obtain records, and she would provide that to you and also to other

team members -- Dr. Schwartz-Watz, Dr. Loring, is that correct?

A Well, I believe with respect to Dr. Schwartz-Watz, I think I made copies of records from what I had that she had provided, as well as, you know, from the discovery that the solicitor provided.

I can't remember who specifically provided copies to Dr. Loring. I know she worked pretty closely with Dr. Loring as far as when they would go out and talk with some of the mitigation witnesses, family members and that type of thing. And so I can't recall now if I made the copies for Dr. Loring or if she did or if it was a combination.

Q Okay. But to focus in on the medical records, were there medical records from Mr. Torres or family members that would have fallen to Ms. Graham to obtain those records?

A I relied heavily on her to get those records, yes, ma'am.

Q Okay. And Ms. Graham had records from Mr. Torres' grandmother, I believe, that she's named Glenda. And you may want to look on some of the timelines and other things that we have been looking at, or the Gina Graham if that helps refresh your memory. I think the Gina Graham is to your left as well here, or my left. Excuse me.

A All right.

Q As I understand, I believe earlier in your testimony

today you had said that Ms. Loring had prepared Defendant's Exhibit No. 2 to use at trial.

A Yeah. Dr. Loring did that.

Q Is that correct?

A Yes, yes, ma'am.

Q Would you be able to see this if I put it over here, or would you like to -- get that a little closer? Personally, I would probably want it a little closer to read but/and you may recall some of the key here.

A Right. Okay.

Q And that would have entailed some medical records and medical history, correct?

A Yes.

Q Okay. And you were mainly in charge and focused on the mitigation phase, right?

A I was focusing a lot on mitigation. That's not to say I was totally not paying any attention to the guilt phase. But a lot on mitigation.

Q Sure. I want to focus a little bit on mitigation first if we can.

A Okay.

Q And going back to Dr. Loring who testified at trial -- you remember her testimony. And you had said earlier that you had prepped her with that testimony and you were very familiar with the way it was going to be presented.

If you recall, Dr. Loring testified that there were mental illness issues with Mr. Torres' grandmother. This would have been the shock treatment if you recall that. Also, that she had found a bipolar diagnosis for a great uncle, panic disorders for Lisa Lamb and Ms. Lamb's sisters, including Tammy Hughey, Donald and Paula; depression for Aunt Pam; and for Jessica Hughey anxiety and bipolar as well.

And Dr. Loring made a point in her testimony -- and I quote from the record, page 2656. "We do often find that bipolar runs in families." Do you recall that testimony?

A Somewhat, yes. I mean, I remember her talking about the family and psychological difficulties with the various family members.

Q And that bipolar diagnosis was coming through from the family members. And then Dr. Schwartz-Watz would later give her a diagnosis of bipolar, correct?

A Yes.

Q Okay. And Ms. Loring testified that after Mr. Torres was given a bipolar diagnosis and he had treatment he had his golden year. That was her term. Do you remember that testimony?

A Right. I think that was in one of the schools that he attended, did pretty well, as far as, you know, the behavior and that type of thing.

Q Yes, sir. And that the suggestion then was that after the proper diagnosis or a diagnosis that worked, the bipolar and the treatment, then he did well. That was your theme as such.
A Yes. My -- what I was trying to present to the jury was that he had mental illnesses or -- and that they could be treated and that he did well in some, basically, institutional settings, you know, be it a school away from home or something to that effect to show that he could do well in an institutional setting.
Q Okay. And I think you mentioned earlier in your testimony that you were given questions and suggestions from your experts.
A Yes, from some of them, yes.
Q Dr. Loring especially.
A Dr. Loring.
Q As well as this social history.
A Right.
Q Medical history.
A Right.
Q And Ms. Graham also helped with preparation, is that correct?
A She did to some degree. I don't think she specifically wrote questions, but that she helped in guidance.
Q Did either Ms. Graham or Dr. Loring tell you that more

information was needed?
A I don't recall that being told to me, that we needed more information.
Q Okay. And do you recall anyone telling you that information or records had been requested but not yet received?
A That's my recollection of it, or that they weren't available, something to that effect. By my understanding was that Ms. Graham got basically all of the records that she could locate.
Q Okay. And you would expect her to tell you if there were some records that were available and she just hadn't gotten to that point to get them?
A I would expect that, yes.
Q Okay. But that's -- you didn't hear anything along those lines.
A No.
Q Okay. I'd like to direct your attention to Applicant's Exhibit 26 now.
A Okay.
Q And those appear to be records for Mr. Torres from the Medical University in Charleston.
A Yes.
Q I think we've been referring to that as M.U.S.C.
A Yes.

Q And those particular records seem to reference a 1984 admission.
A Right.
Q Do you recall we were talking about that?
A Yes.
Q Can you tell me? Do you have any of those records from your review of that document, any of those records in your file?
A Definitely not the day-to-day records, and, no, nothing in 1984, admission.
Q Do you know --
A Even though we were aware of the 1984 admission.
Q Okay. So do you know if Ms. Graham had ever had these records or reviewed records?
A My understanding is that -- she, because she did not provide the records, these records, that she also didn't have them. My understanding was that she was providing me all of the records that she had acquired.

I don't have the specific notes as to why we couldn't get them. My understanding or my recollection today is that for some reason they were not available or that she attempted and couldn't get them.

Q Okay. And I want to pick up on something you just said about you had some notice of some records that may have been out there, maybe for this 1984 admission.

If you would look at Applicant's Exhibit No. 27 --
A Yes.
Q -- that's the collection of documents that you had provided to us. And you provided a copy of course to opposing counsel.
A Yes.
Q And within that is a report from Dr. Schwartz-Watz.
A Yes.
Q Do you recall reviewing that report?
A Yes.
Q Okay. And on the very first page there's a list of documents, and it does not appear to be an entry for 1984 M.U.S.C. records. Would you agree with me?
A That -- that would be correct.
Q Okay. And I apologize. The document does not have numbers, but if you would flip over to the fourth page and look at paragraph nine Dr. Schwartz-Watz references a note from June 27th, 1984, and also writes, "Reference records from Michelle Blanch at M.U.S.C. which stated he had been on medication since he was 19 months old."
A Yes.
Q So at that point Dr. Schwartz-Watz had some notice of the 1984 treatment, is that correct?
A Oh, yes.
Q So is it possible or do you have any recollection that

there are notes or shared information within other documents that you received referencing 1984?

A I think some of the other documents would frequently refer to the admission of 1984. That may very well have been in the discharge summary that we got through -- there's a discharge summary of the 1987 admission to M.U.S.C.'s hospital that was included in the continuum of care records that we did get on Tony. So there were some other documents that would refer -- there were documents that did refer to his admission since 1984 and before.

Q Okay. And Dr. Loring testified that he was admitted to M.U.S.C. both at four years old in 1984 and the later admission.

A Yes.

Q And when he was seven.

Now, these documents, are these exhibits from trial? We've referenced them a good bit during this trial, and we have reduced them to just regular paper size. They are to your left. They have been premarked as State's Exhibits 10 and 11. Do you happen to see those?

A State's Exhibits 10 and 11?

Q Yes, sir.

A Okay, oh, yes.

Q And those look to be reproductions of the exact exhibits you've been using during your testimony here, is

that correct?
A Yes. These are the reproductions of the larger placards that are entitled Tony Torres' timeline and the Tony Torres' living situations, group homes and psychiatric hospitals.
Q And one of those documents talking about the timeline actually references 1984 and M.U.S.C., is that correct?
A Yes.
MS. BROWN: Your Honor, we would move State's Exhibits 10 and 11 into evidence.
MR. EHLIES: Without objection.
THE COURT: They're admitted.
(Tony Torres' timeline marked State's Exhibit No. 10; Tony Torres' living situations marked State's Exhibit No. 11.)
Q Let's look back if you would to Applicant's 26. These were the records from Mr. Torres' M.U.S.C. visit.
A Yes.
Q At the bottom you'll see some bates numbers.
A Yes.
Q Can you turn to page 175 from the bate number?
A Okay.
Q And right there at the very end there is an entry that reads, "Lack of mental retardation or hypogonadism make Prader-Willi syndrome or Laurence-Moon fetal syndrome

unlikely. Do you see that?
A What page? I mean, I must be on the wrong page.
Q It's at the very bottom of page 175 over to -- I'm sorry. Bottom of 174 over to page 175, the last line.
A Yes. I see --
THE COURT: Applicant's Exhibit 26.
Q Do you see it? It's Applicant's 26.
A This is Applicant's Exhibit 26, Torres 000174, last line. Lack of mental retardation or hypogonadism make Prader-Willi syndrome or Laurence-Moon Biedl -- B-I-E-D-L -- I presume that's syndrome -- unlikely.
Q And just reading that entry you wouldn't have any notice that Prader-Willi syndrome was a possibility to explore if you looked at these documents from 1984, is that correct?
A Well, from -- right. If I had known about this but also -- I mean, yes. I mean, I would not have been.
Q Presumably, you would have read all of the records together if you had gotten that package.
A Sure.
Q Is that correct?
A Sure. And the doctors would have -- you know, Dr. Schwartz-Watz and others we provided them to would have seen them as well.
Q Okay. And I'm sorry to make you kind of juggle

exhibits. I was trying to put them over there. It'd be a little easier for you. But I'd like to go to Applicant's 29. These were the impressions from Dr. Tobin that you went over on Friday.

A Yes.

Q Okay. You had mentioned in your testimony Friday that you would have also read in addition to Applicant's 29 the night or day of discharge a final discharge summary, correct?

A Yes, sir.

Q And if you would look at what's been premarked to your left there as State's 9 was that the -- a copy of the document that you were referencing in your testimony?

A Yes, it is.

Q Okay. And you had actually pointed out to us that a genetic basis had been rejected in that document, the discharge summary, correct?

A I don't know.

MR. EHLIES: I object. The summations of the record doesn't support genetics ruled out. She might ask him if there's anything that says that.

MS. BROWN: It's not for the truth of the matter but mostly just print on the page, Your Honor.

THE COURT: All right. Just rephrase the question.

MS. BROWN: Sure.

Q Do you remember the portion that you shared with us about the evaluation by the treating pediatrician felt the patient did not have Klinefelter syndrome?
A Let me try to find the language again. It's only a 2-page report.
Q Yes, sir.
A It's in the continuation -- well, it's in the -- the very top paragraph of page two toward the bottom of that paragraph. "Evaluation by the treating physician felt that the patient did not have Klinefelter syndrome." I don't think there's anything in there specifically about genetics.
Q Okay. If I suggest to you that Klinefelters is perhaps a genetic syndrome, and someone coming to you with that document would you have said this is a genetic syndrome and it's been ruled out, would you have any reason to look at Klinefelters or any genetic syndrome suggested by that?
A Well, as far as Klinefelters, no. But I don't know. I'm not saying that the document ruled out any genetic problem.
Q Sure, sure.
A I mean, it specifically says Klinefelter syndrome. So I don't know.
Q Right.
A If I -- looking at this document, I don't know if I would have known to have gone further into genetics.

Obviously, I didn't, because I didn't even -- I had both documents, both State's Exhibit -- excuse me -- 9, the discharge summary, as well as Applicant's Exhibit 29, which was the -- basically the intake summary. And I did not know to pursue genetics in general on Mr. Torres.

Q Sure. And -- and my question would be if you were looking at all of these documents together, as you would when you're preparing the case, correct --

A Right.

Q -- and you had the documents from 1984 saying no Prader-Willi syndrome and you had the documents from '94 saying no Klinefelters, that's not really a red flag to look at genetics from those two entries. Are they?

A Not to me.

MS. BROWN: Your Honor, I'd like to move State's Exhibit 9 into evidence.

MR. EHLIES: No objection.

THE COURT: It's admitted.

(Final discharge summary marked State's Exhibit No. 9.)

Q Okay. I think you've been pretty clear in your direct and to some questions here on cross. You did not obtain a geneticist.

A I did not.

Q And you do not have a geneticist background, do you?

A I do not.

Q So would it be fair to say that you would have to rely on experts to tell you when a geneticist was needed?
A To some -- yes.
Q Okay. And did your experts, either your psychiatrist or your historian or your investigator or any of your experts, mention a geneticist?
A I don't believe they did.
Q Okay. And you consulted with other capital litigation practitioners in identifying and retaining these experts, people who are known to work in capital litigation in South Carolina?
A I don't -- no. I can't say that. I mean, if I had a question about, like, a type of doctor to get or something like that, you know, I'd either get the recommendation from somebody that I knew, or when I started assembling the team, you know, get recommendations from other team members as well such as Ms. Graham, Dr. Schwartz-Watz, that type of thing.
Q And I might have misunderstood your testimony, but I thought you told us earlier that you had selected Ms. Graham in part because she had experience working in capital cases in South Carolina.
A Yes. But I don't think I mentioned that I would have talked to anybody in specific, any attorney, about her.
Q Okay. Would you normally do that?

A Not necessarily.
Q Not necessarily.
Okay. But you were aware, I believe you said in your direct, of resources. You could go to the resource center. You could talk to indigent defense. There were people that you could talk to about experts if you needed one.
A I was aware there was a capital resource center. I didn't consult them.
I forgot when indigent defense started up the capital litigation division. I know Mr. McGuire and Mr. Young were working there when we were doing voir dire because I know that they attended, sat in the audience of the courtroom, I think on the first day of individual voir dire.
And/but my impression now is that that was a relatively new division for indigent defense. And I apologize. I don't know when they actually started up.
Q Okay. Well, do I understand it to be your testimony that your selection of experts would depend on the expertise, not necessarily a connection to capital litigation?
A Right.
Q And if you would, sir, please look at Applicant's Exhibit 30. That is the summary that was offered of the mitigation case presented at trial. That's the way it was, I believe, termed.

A Okay.
Q And that's not your document, correct?
A That is not my document.
Q Okay. Were you consulted about the document, the paragraph, any of the language? Did you review it before your testimony Friday?
A I think Mr. Ehlies indicated that he showed it to me during one of our meetings, but I did not necessarily take from that meeting if he showed it to me then, you know, that I was going to be adopting it or presenting it as my own. I mean, obviously so.
Q And you didn't adopt it, did you?
A No.
Q And, in fact, you edited a portion of that document taking out the reference to the video, correct?
A Yes. As it is shown on the record or shown in court, yes. But, again, that doesn't mean to say that I was adopting the remaining portions of it, although I understand it's an argument that could be made as to what our mitigation case could have shown.
Q Yes, sir.
Okay. And I don't want you to have to go through it line by line, but would you agree that that argument is actually one more based on state's evidence or state's reasonable inference than your presentation and your

argument?
A It is a prosecution type argument, yes.
Q Okay. In fact, a lot of the testimony that we went over before that exhibit was presented comes from Solicitor Gowdy's cross-examination in mitigation. Do you remember that?
A I didn't really look. I haven't looked at it to determine if it mostly came from direct or cross-examination, but yeah.
Q That's fair enough.
Okay. Well, do you remember during the mitigation phase when Solicitor Gowdy cross-examined Dr. Schwartz-Watz he asked about whether Mr. Torres could appreciate the wrongfulness of his conduct? That was an area that he went into in his cross-examination.
A Yes, yes.
Q Okay. And do you recall in your presentation you had nonresponsive to treatment and medication? But that was a theme that the system had failed Mr. Torres, is that correct?
A That's one of the themes, yes. Mr. Gowdy's questions about being responsible and all of that goes really to an insanity defense, which was not at all what we were attempting to present to the jury and I'm thinking --
Q And you actually made that point in one of your

statements.
A I think I said that in closing prior to sentencing, yes.
Q And the mistreatment of mother's dog. That too was brought out by Solicitor Gowdy in cross-examination, correct?
A Definitely exploited it. I do believe though Tony's mother mentioned it during a portion of the direct examination.
Q And you didn't tell her to tell the story about the dog, did you?
A Oh, no, no.
Q Now, you didn't suggest that that would be mitigating in any way.
A No, no.
Q But you did want Ms. Lamb to testify, didn't you?
A I wanted her to testify. I didn't want that answer that -- I didn't want that episode out. You're absolutely correct.
Q Okay. But you can't tell a witness to refuse to answer a question though, can you?
A No. You can't tell a witness to refuse to answer a question. And even though you may tell the witness, you know, when you're talking with the witness what kind of information you're -- you're seeking you sometimes -- and it

happens frequently in cases. Witnesses go into areas that you've previously told them that's not what you're seeking. But/and, you know, that happens at times and, you know, in even noncapital cases as well.

Q Yes, sir. Did you notice that Dr. Schwartz-Watz in referencing her report on unnumbered page six that Mr. Torres was accused of beating a dog, his mother's dog?

A She mentioned it in her report, I believe.

Q On page six. I just wondered if you recalled that.

A I think that was in the report, yes. Again, I can't tell the expert what to put in the reports.

Q And so it's not a matter of your witness presenting some false information at this point. There were some other indications of this.

A No. I mean, there were some records that we had that talked about that episode as well, I believe.

Q Okay. You were also asked some questions about the solicitor's cross-examination of Dr. Schwartz-Watz about other children, other individuals with mental illness.

A Right, right.

Q And you did not object at the time, I believe you told us, and the record will bear that out.

A Right.

Q Well, isn't it true that that could just be cross-examination to highlight the individuality of this

particular defendant?
A I don't -- I mean, in a very --
Q And that not all children --
A -- negative sort of way though, I mean.
Q Not all children with mental health issues are born killers, right? You have to look at the individual.
A Yeah. I mean, obviously that's not the conclusion that Mr. Gowdy was wanting the jury to draw, but I don't -- that would be hard to say, that it really highlights his individuality, because you're taking something that is similar and then, as Mr. Gowdy was trying to do, say, well, other people have this same problem and they don't end up doing what he did so that's --
Q Because it's not just his mental illness though, is it? It's also his drug use, illegal drug test at the time.
A It was a variety of factors, yes.
Q And we're not talking about something that happened in his past, as evidence of something that happened in his past. We're talking about what he did on the night he killed the Emerys.
A Right.
Q And with Dr. Schwartz-Watz's testimony you did elicit the fact that in her opinion Mr. Torres' ability to conform was substantially impaired, correct? And you received a mitigating circumstance based on that.

A I believe so.
Q And isn't it fair to say that some of the medical evidence that you have -- the records that you have before you -- is a bit of a 2-edged sword? It shows that Mr. Torres is aggressive by nature.
A It shows that he's been aggressive, yes.
Q And it also shows in some of the reports that he can control himself. Is that a fair statement?
A There have been some incidents where he's been either able to control himself or that, depending upon the person that was talking with him or was with him like Mr. Shackelford or what not, they can sort of try to talk him out of it. But we were also trying to show that he just could not in some ways control himself even though his mother had been seeking help for him ever since he was a very young child.
Q And you were showing that through a history of records --
A Yes.
Q -- going back when he was very young.
A Right.
Q And there were indications of explosiveness and aggressiveness.
A Yes.
Q But going back to Exhibit 29 that you have before you

at the bottom of page two and on to page three there's an entry called admission showed normal intelligence, store of knowledge, memory, but also underlying explosiveness. He controlled himself during the interview. There's always that back-and-forth within these records, is that correct?

A To some degree, yes.

Q Okay. And whether there's a psychiatric cause -- bipolar or genetic cause -- you're always going to have to address that there's some evidence he can control himself at certain times. Is that a fair statement?

A I guess that's -- yes. That would be an argument that we'd have to deal with.

Q And isn't it fair to say that your -- your theme and your arguments in the penalty phase sort of embraced that negative, acknowledged it was there and explained it?

A We tried to.

Q And you asked for compassion and mercy essentially.

A Yes.

Q Okay. And you presented seven witnesses in mitigation -- Dr. Shackelford, the director of continuum care; Ms. Lisa Lamb; Ms. Pamela Gordon; Dr. Alex Morton; Dr. Donna Schwartz-Watz; Dr. Loring; and Mr. James Aiken.

A Okay.

Q You can't recall that?

A I've got a list of them here too, so yes.

Q Okay. Now, you actually argued -- and I'm looking at the record, page 2744 to 2745 -- that you're not trying to show applicant did not know right from wrong but because of his bipolar disorder, his anxiety disorder, his ability to conform was substantially impaired.

You also said there were some choices he did not make such as his mental disorder, his mental illness, 11 psychiatric hospitalizations before he reached the age of 14. Does that sound like your argument? Do you recall that?

A Yes. And I also -- I mean, I recall that from some notes I had written about the argument, or yes.

I was trying to basically blunt Mr. Gowdy's attack, if you will, that, you know, that he made choices, that he understood right from wrong, which is typical of what prosecutors are going to do. When you're not claiming insanity they're going to go into the choices.

Q Uh-huh.

A And that he could distinguish right from wrong and make it sound to the jury as if there's something wrong about that.

I was trying to make the point that we're not defending it on the defense of insanity but rather that there are some problems with Mr. Torres. And so I was trying to weave in the choice word, you know, by going through the choices that

he did not make in certain things that I thought was mitigating -- you know, his bipolar and other mental difficulties.

Q Okay. And you recall Mr. Torres addressed the jury.

A Sorry?

Q Do you recall that Mr. Torres addressed the jury?

A Yes, I do.

Q Do you recall that he apologized, quote, to the son and to the daughter, end quote, of the Emerys?

A I -- I believe so.

Q Okay. And that would be Chuck Emery and Crystal Williamson.

A Yes.

Q So he apologized to Chuck when he got to speak to the jury.

A Okay. Yes.

Q I'm interested because it says in the transcript, Mr. Allen, that Mr. Torres tore up a piece of paper and spoke frankly with the jury asking for forgiveness, acknowledging the murders, essentially asking for mercy or for them to render a judgment based on that information that they'd heard.

A Yes.

Q Was that something that you were aware was going to happen?

A Tearing up the piece of paper?
Q Yes, sir.
A No. He wanted to address the jury, which was his right, which is his right. And we -- and when I say we, I'm talking of Ms. Hodges, Mr. Reckenbeil and I -- are trying to help him or trying to basically keep things basically short. You know, we were trying to figure out what it is he -- you know, by talking to Mr. Torres, what he wanted to say to the jury.

I remember too I think it was the night before we did the arguments that I had called either Bill or Boyd -- Bill McGuire or Boyd Young -- to talk about this and try to get some of their input about maybe was it a good tactic or bad tactic and that kind of thing. And essentially the advice we got was to basically keep it short.

I can't quote to you what we wrote for him, but we wrote it for him, for him to read. And Mr. Torres decided to -- I think I see phrases -- speak from the heart.

And we were all standing around him. We had sort of worked that out because we wanted it to appear less threatening to a jury, you know, to have him standing right in front of them at the railing.

And when he tore the paper I was just hoping I didn't flinch, quite frankly, because that was just quite surprising.

Q And you're very familiar with the evidence that came in about the crimes, that they were horrific crimes. Would you agree with me?
A It's a bad, a bad case.
Q Okay. And the evidence though you could argue differently. The evidence did support his sole participation, correct?
A Yeah. And that's going to be debated. And maybe I'm looking at it because I believed that he wasn't solely involved. Can it be argued that he was solely involved? I guess it could be but...
Q And the evidence could support it. I think in a specific way --
A Yes, and -- and let's just -- can we just say that it's -- maybe it's just argument? Because I have a hard time believing that he was the sole person that did it.
Q Okay. Let me ask you a little bit about that. What did he tell you about the crime?
A I've got some notes about it, but there were times that he didn't want to talk about certain aspects of it but...
Q Okay. Did he ever indicate to you that Chuck Emery was involved?
A I don't have any specific notes about that. Sometimes Mr. Torres was trying to be protective of some people.
Q Okay. Well, did he ever tell you anybody was involved?

A I don't think he did.
Q Okay. Did he ever indicate to you that somebody gave him Ann Emery's phone?
A There was some -- something. I don't think he ever explained that to me.
Q Okay. Or how he came to have possession and control of the van.
A I don't think he explained that.
Q Okay. And you may be looking at the stipulation. I see you going through a couple of documents.
A No. These were some notes that I had on a database that I printed out. And I don't even think I've given Mr. Ehlies these notes because I didn't print them out until Monday, the 21st. I sometimes forget about the notes I put on the database.
Q Okay. Well, do you recall there was a stipulation at trial?
A There was a stipulation of fact, yes.
Q With the telephone.
A About the telephone.
Q And Mr. Torres actually signed off on that --
A Yes.
Q -- along with the entire team.
A Right.
Q Why did he want to admit possession and use of the

telephone at 5:14 a.m.?
A I was here for Mr. Reckenbeil's testimony. And the main thing was -- was that we were trying to keep out the business about the sex line, and some give and take in that, with -- I just thought it would be more damaging to him not necessarily in the guilt phase but ultimately in the sentencing phase if it -- the information came out to the jury that after he was adjudicated guilty of raping someone if he was calling a sex line. I just thought that would be pretty, I mean, really, really bad as far as aggravation goes.

We were really doing, trying to do, what we could to keep that kind of information out. And we recommended to Mr. Torres that we enter into the stipulation so that we could to some degree control the information that was going to come out about the cell phone, the call that was made.
Q Let me understand. He's not saying to you at any particular time that you're discussing that stipulation, no, I didn't have it, somebody gave it to me, I didn't have it at the house, I didn't grab it from the personal possessions from the Emerys.
A I don't know if we went into how he -- he got it, but there was going to be, and there was, a statement. And there was some testimony, I believe, about the phone call that was made to the person at about that time.

And because we had the records, as did the state, we knew what phone number was called, so we knew what person was called if you want to talk about that particular phone call we're talking about. So that person was available or, you know, would say that he made that phone call. So I don't know if we were really giving up that much as far as that goes.

Q And you recall there were some videos with Mr. Torres using the phone?

A There was videos, yes. I know specifically the one at the hospital, and maybe the one at the store as well.

Q Okay. And from your review of everything there was no bar to the death penalty at the time of the case, correct? He wasn't under 18 when the crime happened and he was not mentally retarded.

A That's correct from what I understood.

Q Okay. Were you aware of any inability to communicate that he had -- he could not express himself well?

A No. I mean, not in that sense, I mean.

Q Okay. And when he talked to you, you understood what he wanted from you or what he was asking you. He could verbalize.

A Yes, he could verbalize.

Q He had no problem with that.

A Right.

Q He appeared to understand what you were saying to him as much as you could tell from your conversation.
A Yes.
Q Okay. And were you aware of any inability to take care of himself, something that would show a lack of function?
A I was not aware of anything like that.
Q Okay. And you were aware that he had I.Q. tests around a hundred range from earlier years and maybe 90 around the trial.
A There was some reported scores in some of the information that we had, yes, in those ranges, I believe.
Q And you were aware from your review of the discovery that there was a threat from Mr. Torres to kill the Emerys in some one and a half hours or longer before the murders.
A As reported by, I believe, Chuck Emery or Holly or somebody like that, yeah. I mean, as reported by somebody else. I don't necessarily subscribe to that, but/or I did not necessarily, you know, agree that that was an accurate statement. But I understand that there's somebody's going to say that's what he said.
Q Okay. And if it's in the statement by Ms. Tammy Hughey, you would agree that that would be in the statement that you would have received in discovery.
A Yes. We had that.
Q Okay. And you remember the statements that Mr. Torres

made to police officers. And he acknowledged a fight with Chuck that very night.

A I believe so, the statements to the officers and/or at least, yes, in an argument when he went to the graveyard, I believe.

Q And he'd also mentioned in that same statement that he knew that the Emerys had been beaten to death.

A No. Okay. That's where -- and I was looking over my cross-examination at that point.

My thinking was that he received a telephone call from someone -- I believe Chuck -- who mentioned the beating death. And that was what I was trying to get across to the Court, was that it was Chuck who first told him about a beating death.

I remember one of the investigators -- I believe Jason Bryant -- was talking about how Tony said a beating death. But I was trying to get him back to what was being -- what he understood that Tony said that somebody else told him, if you follow what I'm trying to say, to try to explain how he learned there was a beating death.

In other words, they wanted to present it as if Tony without knowing anything, you know, without it being out in the news, you know, talked about it being death. And I was trying to just -- to show them that he had received a phone call. And I believe it was from Chuck Emery, was the first

one to mention beating death. Do you follow what I'm trying to say?
Q There was a telephone call according to the records from I believe Tammy Hughey to tell him that something had happened.
A Right.
Q But you're saying that you had some indication there was a separate telephone call?
A I think it came up in the cross-examination of one of the officers.
Q Okay.
A I want to say Mr. Bryant.
Q So we will leave the record as it stands?
A Yes.
Q Would that be correct?
A That would be good.
Q All right. And I did want to go -- I'm not going to go through all of the evidence, because, as you've said, there's -- there was a lot of evidence there. But we have essentially the telephone call, 5:14, Mrs. Ann Emery's phone. We have somebody going through loading the van. Someone stopping to make the telephone calls on the phone, one to a sex line. We have using the stolen phone to make other death threats to other individuals. Crashing the van and making a cover story to escape. Does go to his

grandmother's. Tries to wash the clothes, the clothes that have the Emerys' blood on them.

So there's some evidence there to support planning, understanding, step by step going through a crime. Isn't that fair?

A I can see where it could be -- I mean, yes, that -- that is an argument that could be made from the prosecution standpoint, yes.

Q Thank you sir.

Now, you'd mentioned earlier in your direct today that your client instructed you to contest guilt, that he'd actually gotten stronger in that position as you went further.

A Yes.

Q Okay. And you advised against it.

A Right. I mean, I was trying to get him to understand that sometimes when you contest -- from what I was told, some of the training is that if you contest it very vigorously, then sometimes the juries hold it against you in the sentencing phase. And so we were all -- we had that basically as a balancing situation that we're in in any death penalty case.

Q And he clearly didn't take your advice on that, and you went forward. But I understand that you tried to still separate it a little bit.

A Yes.
Q You did not make the arguments in the first phase.
A Right.
Q You stayed back for mitigation.
A Right.
Q Mr. Reckenbeil told us that there was a time when Mr. Torres had asked for Mr. Reckenbeil to do the closing argument.
A I heard that testimony.
Q And you had some discussions about that. And I would assume based on the record that you said that was a bad idea. Is that a safe assumption?
A Yes. We had discussion about that.

Mr. Reckenbeil came to me the morning of the closing arguments. I believe he told me that Tony told him that he wanted him to make the final argument. And I can't remember because I know I had to ask Mr. Reckenbeil or Reckenbeil -- excuse me -- to step into the interview room with me across from the east courtroom. At that time there were three of them. There is only one there now.

So I'm not quite sure if -- now if Mr. Reckenbeil told me that in the presence of Tony or not. And I basically took him back there and asked him why he -- you know, what he told Tony, why did he think he should take -- make the final argument when that had not been the plan all along and

suggested to Mr. Reckenbeil that he should have told Tony that we needed to stick with the plan.

And then in a few minutes after Mr. Reckenbeil went back and talked to Tony I was told that they -- that Tony wanted to talk to me. We had a discussion, and we talked about who should make the argument. And I remember Tony asked me if I really wanted to make it, and I told him I did. And I think -- and at that time he agreed with -- with me to make the final argument.

But I remembered being very irritated that day that the team knew what the plan was -- well, the three lawyers knew what the plan was. And I was being hit somewhat blindsided with the idea that we are going to change it all of a sudden.

Q That was coming from, from your understanding, Mr. Torres requesting that.

A That's what I was told.

Q Okay. And it says on the record that you and Mr. Reckenbeil had consulted with Mr. Torres about releasing Jonathan Howard in the penalty phase. Do you recall that?

A Yes. We were trying to get Mr. Howard into court. My intention was primarily to get him to talk about basically the amount of drugs and what not Tony had taken that night, he had seen him that night and that he was really messed up, if you will, on -- on the drugs. And I was going for that

additional -- or for that mitigator.

And we were, as you can see in the record, were in the process of asking the judge, because we had subpoenaed Mr. Howard. So we were in the process of asking the judge to get the sheriff to pick him up. And then Tony was very intent on my dropping it, which is why we changed our mind.

Q And there's another place in the record. This is on record page 2182 where you stated at the close of the guilt phase that Mr. Torres agreed with the dismissal of a juror, I believe because of some sleeping or inactivity or something, inattentive -- inattentiveness at least.

A Right. There was an allegation that one of the jurors --

Q Okay.

A -- had fallen asleep during some of the presentation of the case and even was nodding off during arguments or something to that effect.

Q Okay. And on that actual same page you have that you discussed presenting the written charge to the jury with Mr. Torres and he agrees with the decision to have the written charge presented to the jury. Do you remember that?

A Not fully, but, I mean, I'm sure.

Q Well, is it fair to say just based on the record and what you've said today from your recollection that Mr. Torres was assisting you in some decisions?

A Well, sure. I mean, a lot of times where, you know, for example, while I don't specifically remember the written charge I'm sure Mr. -- or that Tony was relying heavily on our -- not -- you know, we were telling what, you know, the reasons for it and that kind of thing. And I'm sure he was relying heavily on your advice to -- to agree with it, because we were in agreement with it.

I'm not trying to say that he made it. I mean, could he have said no? Yes. He could have said no. But I'm going to accept the fact that he was relying heavily on our advice on those type of decisions.

Q You perceive that he was listening to you.

A Yes.

Q But there were things he disagreed with.

A At times, yes.

Q And he didn't cooperate at all times with your investigation, did he?

A Yes.

Q Okay. For instance, he didn't submit to a test with Dr. Gregg Wier, I believe it was.

A That's correct. I mean, he submitted to portions of it, but not to others.

Q Okay. And of course he made the decision not to testify, not to talk about the crime.

A That is correct.

Q Now, you were asked a little bit about plea negotiations. I think you told us that you did attempt to negotiate. So it's fair to say that you were aware in 2007 and 2008 that discussing a possible plea may be of benefit to your client.
A Of course.
Q And that wasn't something that you shelved immediately -- I'm not going to do it.
A No. We didn't say we were not going to do it.
Q Okay. Certainly didn't overlook the possibility of plea negotiations.
A No.
Q But you couldn't make him plead guilty when he wanted to go to trial. So there had to be a point in time, if I understand your testimony, that you wouldn't have gone back because he wouldn't have pled.
A Well, to some degree, yes, I mean, but/and, quite frankly, I -- I remember Mr. Reckenbeil talking about some discussions that we were having with Trey very shortly before trial. Quite frankly, I had forgotten about that.

But, you know, it's not that we -- we don't -- you know, if Mr. Torres says I want to go to trial that we just totally forget about negotiating. I'm not trying to say that.

I mean, we -- you know, I attempted on a couple of

occasions to talk to Trey about negotiating it out, and, you know, and he, quite frankly, wasn't interested in talking with me about it. I think I characterized it with Mr. Ehlies as he being dismissive of me, just basically Mr. Gowdy didn't want to talk about it.

And so at some point when you don't get any better reception than that, I mean, how much further do I have to go? I guess it's a rhetorical question, but, you know, at some point I -- I feel like I'm not doing anybody any good by continuing to talk to Trey about considering letting him plead out.

Q And I think we've -- we've talked about that a good bit, about there really wasn't a plea offer ever made.

A He did not make a plea offer.

Q If I --

A He did not make a plea offer. Mr. Gowdy did not.

Q But if we can step back a minute and look at it from Mr. Torres' point, did Mr. Torres ever offer anything, any bargaining chip, any admission about the crime or statement that somebody else was involved, anything that could -- that you could take to the solicitor and say he will give you this if you can help us here?

A That was not -- no. I mean, I didn't talk to Tony specifically about what we could offer in order to get a better plea.

I mean, had Mr. Gowdy indicated an interest in getting information from him in exchange for a plea, I certainly would have pursued that a lot more with Tony.

But/and this is true even in -- in other noncapital cases. I mean, you don't -- you don't really want to just lay everything out for the solicitor -- this is what we've got and this is what our guy says, please let him plead guilty for a certain sentence if they're not -- if they're not really interested in that information. You're just basically just giving them information that is not going to ultimately benefit us.

So I didn't feel the need if Mr. Gowdy was not interested in talking about a plea for us. And when I'm saying a plea, I'm talking about taking death off the table and pleading to life without parole. Then I didn't feel the need to press Tony to admit things or to give me information so I could give it to Mr. Gowdy, I mean, because I just felt like it was not going to benefit Tony, if you follow what I'm trying to say.

Q Yes, sir. I believe so.

A Plus, hurts the -- you know, it will hurt the attorney-client relationship even further.

Q Actually that kinda goes to where I want to -- I want to lead you in this conversation, and that is more of what Mr. Torres said, not what you would have done, not what you

would have taken to Mr. Gowdy.

But did Mr. Torres, your client, come to you and say, hey, let me meet offer this? Even if you would have told him, no, it's not a good idea to take information, did he ever come to you and say, here, let me do this, let's see if we can get the state interested in this bit of information, anything like that?

A No, no.

Q And you were asked about reaching out to the family. And -- and this would be the Emerys. And I think that you showed us us an article that you have. And I wonder if you would look at that article again and tell me the print date across the bottom of the article.

A The article that I have? Oh, the newspaper article.

Q Yes, sir.

A Looked like -- hold on a second. This is Applicant's Exhibit 32. It looks like the print date was 10/7/08.

Q 10/7/08.

A That would have been when I actually printed it off of the internet, but, you know, there's print versions of the Herald-Journal as well. So I may have printed it on that date. But I certainly was aware of it at or about -- well, about the time of its publication, which was in '07.

Q Well, my question is why would you have printed it. And that would have been right at trial, correct? Why would

you have printed it at that point?
A Basically, to make sure I had it or kept it in the file.
Q You had it for what?
A To make sure I kept it for the file.
Q Kept it for the file.
A I was aware -- aware of it, but I wanted to make sure --
Q I understand.
A -- it was in the file.
Q What about other articles that would have been printed at that time? Would you have kept any other articles?
A I kept some of the other articles, yes, in a folder in the file.
Q Do you recall there were certain reports of the family being very supportive of seeking death at that point?
A I don't recall one way or the other.
Q Well, if -- if, for instance, you had articles that said this person may not be supportive but this person would be supportive -- those are media articles, right?
A Right.
Q You still don't have the person there.
A That's correct.
Q And that, would you say, would be of limited use in trying to force a plea?

A The article itself, yes, but --
Q Okay. And we had talked about Crystal Williamson and her testimony in this particular proceeding.
A Yes.
Q And her belief that she would support death if Mr. Torres was the -- the sole involved person in the crime.
That doesn't sound particularly sympathetic to Mr. Torres if he's the only person on trial, does it?
A I wouldn't call it sympathy. I don't know if I'd call it sympathetic, but I'm not sure what I would call it. I mean, but in one sense if she would agree, if she would agree not to support the death penalty for him, then I guess that could be considered sympathetic. I mean, it's certainly not the worst, if you follow what I'm trying to say.
Q So if you could promise that you could identify another person and bring them in and you could prosecute them, then in return she might support a life sentence. That requires a few more steps than just bringing her in and talking to her, doesn't it?
A It does and also involves decisions that I would not make, such as a decision to prosecute.
Q And I think you already said in your testimony -- and correct me if I'm wrong -- that you wouldn't know any way to have this actually submitted in the penalty phase. I mean,

she's not a relative of Mr. Torres asking for mercy, correct?

A She's not a relative of Mr. Torres, no. Cannot submit the news article itself as evidence.

In a way -- about the only way to get that information or that desire of hers into evidence, have to ask her. And of course I didn't talk to her ahead of time. I did not want to bother the family, was my thinking at the time.

I'm certainly not going to ask her a question about whether or not she supported the death penalty for Tony for the first time in front of the jury. I mean, that's just not done at all.

So I thought it was -- I mean, as I indicated in my earlier testimony, I thought it was inadmissible as to what she thought about wanting to see the death penalty for Mr. Torres.

Q So, first, you'd have to ask the question. And then if there's an objection that question would have to survive the objection before you could ever get to the answer.

A Sure. Yes.

Q And you mentioned your D.N.A. expert as well, Dr. Ostroski, I believe it was.

A Yes.

Q Okay. And he essentially told you that the testing results that matched 16 genetic markers was consistent, that

the test results were consistent with Mr. Torres' profile, correct?

A I believe him. He was not -- he did not give me any information that would change or where he could basically indicate that they were inaccurate or that they -- you know, that -- let's see if I can phrase this correctly.

He was not challenging their methodology or their results is my recollection of my conversation with Mr. Ostroski or Dr. Ostroski. Excuse me.

Q And did you discuss statistics at all with Dr. Ostroski? Did he give you any advice on that?

A I don't recall doing that, no, no.

Q Okay. Do you have any kind of a report or any documentation that would confirm that you didn't discuss it or that you did discuss it? And you may just need to refresh your recollection. Anything along those lines?

A I've got a folder on Dr. Ostroski and a folder on the D.N.A., so I'd have to refer back to that, which I've got in the courtroom if you need me to do that but...

MS. BROWN: With the Court's indulgence could the witness --

THE COURT: Sure.

MS. BROWN: -- obtain those notes?

(Pause.)

A Okay. I've reviewed my notes of information that Dr.

Ostroski provided me by way of a memorandum, specifically his suggestions of cross-examination questions, a note that I made when I talked with Dr. Ostroski after he, you know, examined what they did. Basically, the lead line of that note says that he agrees with all of their calls.

I don't have any specific notes about the percentages that -- that was being talked about. I mean, apparently I didn't ask him what did that mean.

Q And he -- you said he offered you some advice on cross-examination.

A Yes. He did.

Q Okay. And you had underscored the differences between genetic marker sites that are a match and identification in cross-examination.

Would that have been something that Dr. Ostroski pointed out or is that something that you learned from other cases?

A That's basically the kind of stuff that he was pointing out for me, right, is to basically look at where they're a match, whether they're different, you know, where he -- I think he talked to me a little bit about, you know, the other D.N.A. that, as I indicated earlier, that were in just a few of the loci that did not match any of the knowns as well.

But, I mean, a lot of that was some of the suggestions

that he had made. We had talked about, you know, a variety of things and what happens when they replicate D.N.A. I've got something called allelic, A-L-L-E-L-I-C, dropout and that type of thing.

Q And you say that you went further and got the raw data from SLED for your expert to look at.

A Well, he told me I needed to get the full case jacket. I mean, I had the report. And he was the one that alerted me to the fact that we needed the full case jacket before he could really take a look at it.

Q And you acted on that and received it.

A Oh, yeah, yes.

Q And, basically, your expert agreed with the SLED analysis and results.

A That was essentially what he told me.

Q Okay. And did he offer you any advice otherwise on looking for another way to attack this very firm evidence?

A You mean -- well, I mean, you know, he had told me essentially what, you know, that D.N.A. doesn't tell you, how something got on it. And to some degree the D.N.A. doesn't really tell you what the specific substance is being tested.

You may get, say, a blood, you know, a swab of blood, but, you know, depending upon the handling of it, depending upon what's been going on, somebody, from what I understand,

even, you know, a drop of sweat, for example, fell into that sample and that was part of what the swab had picked up on, or a skin cell from some other source, you know, then you'll get a different reading in all of that.

It is very sensitive, you know, the technology is. And of course he reminded me specifically as I talked about the semen or the seminal fluids, and of course D.N.A. doesn't tell you how the fluids got there, whether it was consensual or not and that kind of stuff.

Of course I -- I wasn't going to -- I didn't think it would be appropriate in this case to have brought that up with the jury. So while he suggested it, I made a decision not to pursue that avenue.

Q Did you talk to Mr. Torres about that particular avenue?

A We did have a discussion about that.

Q And what did he tell you?

THE WITNESS: Do I need to reveal what Mr. Torres told me?

THE COURT: You need to respond to the question.

THE WITNESS: Okay.

A I have a note that at one point he indicated that it was consensual.

Q And did you have any evidence to support that?

A His testimony would have been the only evidence that I

would have had.
Q Okay. So the only evidence that -- or only identification of another person being there would come from Mr. Torres. The only evidence of possible consent would come from Mr. Torres. And Mr. Torres declined to take the stand, correct?
A That's correct.
Q Did you perceive any benefit in attempting to show that part of the crimes against the Emerys could have occurred in another room separate and apart from the bedroom?
A I don't see how.
Q There's an allegation in the application, and I thought I would ask you about it.
A No. I didn't see where that would give us a benefit.
Q It certainly didn't change possession of the telephone or the semen analysis or anything.
A Right.
Q Okay. In your opening statement in the penalty phase -- this is on page 2222 of the record -- you advised the jury, "What we're going to try to show is that Tony was not correctly diagnosed, try to show you the condition he was in on May 11th when he committed these horrible crimes." Do you remember that?
A Okay. Yes.
Q And that was taking responsibility of that.

A Right.
Q And that was separate and apart from the attorneys who had argued in the first phase.
A Yes.
Q You were keeping that separation.
A Right.
Q And at that point you were trying to convince the jury to listen to you. Would that be a fair statement?
A Yes.
Q To have faith in what you were going to say.
A Right.
Q Okay. And you weren't planning to say the verdict that you have just returned of guilty is not quite right. You weren't going to go for a full residual-doubt argument at that point, were you?
A No, we were not going to argue against the verdict, no. We -- you know, no.
Q Okay. But you had asked for the statutory mitigating circumstance of minor participation before you went into the hearing, is that correct?
A It was part of my list of mitigating circumstances --
Q Okay.
A -- that I had given to the judge when he asked for our list. But based on the way the testimony was not allowed into evidence, while I acknowledge on the -- that I

requested or that I was trying to request it, that I also acknowledge that we didn't have the evidence in front of the jury to pursue that.

Q Okay. And I guess these questions will kind of be focused on time with that, because you've asked for that mitigator before you had the ruling on the renewal of your motion to present evidence, is that correct?

A Yes. I mean, that was prepared before that and before we had the hearing.

Q And then the record page 2376 that you reviewed at the close of your testimony or near the end of your testimony in direct, you were saying, "I would like to have the opportunity to present the information, third-party guilt, in the sentencing phase," correct? You had asked for that. You renewed your request to submit the evidence.

A I was trying to, yes.

Q Okay. And would you agree with me that you have to have some evidence in the record to support the mitigating charge --

A Oh, yes.

Q -- that you've requested?

A Yes.

Q There was a suggestion earlier in the hearing to Mr. Reckenbeil, I believe, that a continuance may have been warranted. I want to ask you a little bit about that.

The murders, if you will recall, occurred May 11th of 2007.

A Okay.

Q And you were appointed in June of 2007 according to the order of appointment on file.

And according to State's 6 -- and this is Mr. Skidmore's bill -- you had an investigator working by September of 2007. And the trial, I think you will agree with me, was October of 2008.

With that kind of timeframe kind of setting the question for you, did you have a basis or a need for a continuance in October of 2008?

A I didn't think we necessarily needed one. I thought we were prepared.

I would like to correct something that we opened in our defender -- in our database.

We opened this file May 15 of 2007. I spoke with Mr. Torres initially on May 13th, which I noted in my database was a Sunday.

So I think the official appointment appointing me in a death penalty case came because of the death penalty notice that was either dated or served on June 12th of 2007. But I was actually on the case shortly after his arrest, is the point that I'm trying to make.

Q Thank you for that clarification. I appreciate that.

In preparing the mitigation case did you believe that when you were going into trial that you had time to fully prepare the mitigation case as you had determined it was going to be?

A I felt as if we did, yes.

Q Okay. And would you agree that in preparing for portions of the P.C.R. proceeding and talking to Mr. Torres' present counsel that there may be some genetic-diagnosis evidence available that you did not have?

A Yes.

Q Okay. But would you agree with me that the history would be the same? In other words, you were looking at Mr. Torres' medical history, his history of bouts of being institutionalized and medicated and that sort of thing.

A Yes. The history, the same.

Q Okay. Now, you would agree with me that in that history there was a bipolar diagnosis.

A There was.

Q And you would agree with me that your historian identified a line of bipolar diagnoses in Mr. Torres' family, is that correct?

A Yes.

Q Okay. Well, let's consider for just a moment that the Prader-Willi diagnosis that you may have heard about was subject to challenge. Let's consider that someone would

come in and contest the propriety of the diagnosis under certain conditions.

Now, you're given two choices, what you have with Dr. Schwartz-Watz and the genetic condition. You're still going to have to explain, no matter what the cause, whether it's psychiatric or genetic, you're still going to have to explain Mr. Torres' history, right?

A Well, yes. But if the genetic diagnosis helps explain that, then that's a good explanation.

Q And I think that's a good point. And in Dr. Schwartz-Watz's testimony she said there's often a genetic component. And Dr. Morton said there's often a genetic component, correct?

A Okay. I believe so.

Q So to some extent -- and I will grant you it was not a diagnosis -- but to some extent there was a reference to a genetic factor.

A Possibility of one, yes.

Q Possibility of one. Thank you, sir.

You were also asked about the circumstantial-evidence charge in this case.

A Yes.

Q And you were practicing criminal law exclusively around the time of the trial, correct?

A Yes.

Q And you had continuing education on the state of the law at that time.
A Right.
Q So is it fair to say that you would have been looking at that charge from State vs. Cherry, State vs. Grippon at the time of the 2008 trial?
A I think I was.
Q Okay. And going to voir dire, I believe you said that you had gone through jury qualification in another capital case before this one.
A I did.
Q And that was the Morgan case, right?
A That's correct.
Q And you've since Mr. Torres' trial gone through another, correct, just recently?
A Yes.
Q Okay. And isn't it the practice to receive expanded juror questionnaires when you go into jury selection in a capital case?
A We receive a questionnaire. I mean, that's not normally sent out in the typical state case, that's correct.
Q And you get a little bit more information on the individual jurors at that point.
A Yes.
Q Okay. And you had that in Mr. Torres' case.

A Yes. We had the questionnaires or the -- and the answers.
Q And I believe you said you did not retain nor consider retaining a jury consultant.
A That's correct.
Q Is it your practice to normally retain a jury consultant?
A I haven't retained a jury consultant in a death penalty case yet. I have not retained a jury consultant in a non-death-penalty case. So I guess the answer is no.
Q So no?
A I haven't, that's correct. My answer is to your ultimate question, is no. I haven't. It's not my practice to get a jury consultant.
Q But you are well-versed in choosing a jury. Would you not say that?
A I thought I was, yes.
Q Okay. And you made reference to a system that you did not share with us, but a system that you have for selecting jurors, particularly in capital cases.
A That's not just some -- a system that I have. It was a system I was trained in.
Q Trained in. Okay. And that's --
A I received some training, I should say.
Q And that is a recognized system, a good system within

your area of practice.
A I think so, yes.
Q Okay. And I think you mentioned in your cross-examination earlier that Mr. McGuire and Mr. Young observed some of the voir dire.
A The first day of individual voir dire.
Q And they discussed that a little bit with you before leaving, didn't they?
A They did.
Q Okay. Gave you a suggestion or two?
A They did.
Q Okay. But nothing about race or manner of questions that you had actually posed that they saw.
A No.
Q Now, do you normally look for racial bias when you're considering selection of a juror?
A No. I mean not under the system or the training that I've received on voir dire in capital cases.
I may have thought -- well, I didn't really think about it in the Morgan case because he's white. But, anyway, no. That was not part of the training I received.
Q And in a little broader sense, not just capital cases. But looking at any juror you wanted to take bias, correct? You want to be aware of something that they said or something that would cue you into some kind of bias, because

that would affect the defendant; that would affect your witnesses; that would affect delivery of arguments sometimes, correct?
A It does, yes.
Q Okay. And you've mentioned earlier that you understood that Mr. Torres comes from a mixed-race background, I believe. And his family with him at trial, the family appeared to be Caucasian at that point, right?
A Yes. His family at trial -- I was with them -- was part Caucasian, were Caucasian, are Caucasian.
Q Was there a racial element to the crime itself that you were concerned about?
A To the crime itself, no.
Q Okay. But was there any need in your opinion to underscore a mixed-race background?
A Not really. I mean, you know, there was some discussion I think about the life historian, about his father is from Puerto Rico and that sort of thing. And, obviously, Mr. Torres has a Hispanic name completely. I mean, so but still other than his name in a way, I did not view him as Hispanic, I mean, from my talking with him, from my talking with his family members and that type of thing.
Q Okay. If I can refer you one more time to Applicant's Exhibit 27, the collection of documents that you gave to us --

A Oh, okay.
Q -- there's a letter in -- in there from you to Mr. Joe Savitz at appellate defense.
A Yes.
Q Just let me know when you find that.
A I've got it.
Q Okay. Now, is it your practice in every case to write such a letter and identify certain areas for appellate counsel to look at?
A Not in every case. I don't send this letter out. But there are some cases where I do if I believe there are certain issues that I want them to take a look at. I'll send a letter addressed solely to indigent defense for that purpose.
Q Okay. And you don't even do that in every capital case? Do I understand that? Because you've had three now.
A Right, I mean.
Q Is that correct?
A I've had three now. I don't know if I sent a similar letter in the Morgan case. I don't believe -- I mean, other than filing the notice of intent to appeal and the letters that go with that in the Blackwell case, I don't know if I sent a similar letter.
Q Okay. That's fine. And that's still pending, so we don't want to get into that.

A Correct, correct.
Q But in the letter dated October the 29th that you have in front of you -- and that would have been right after trial, right, the October 29?
A Yes.
Q Okay. October 29th you identified three possible issues. You brought that to the attention of other counsel.
A Right, right.
Q Okay. And one was a voir dire issue, correct?
A Yes.
Q Okay. And you had wanted to ask about certain aggravating circumstances.
A Right.
Q And you felt that you needed to object to the limitation.
A Yes.
Q But nothing about a limitation on a proposed race question because you didn't have that, correct?
A That's correct.
Q That's a limited -- a limited issue. Okay. And the second issue was third-party-guilt evidence.
A Right.
Q And you noted that you, I believe, had attempted to present this. And you felt that not being able to present it prevented you from getting the mitigator that you wanted,

right?
A Yes. That's correct.
Q And you objected to the limitation both in the first phase and in the penalty phase.
A I felt I did.
Q And you noted in this particular letter that your theory was that the defendant did not commit the murders. But then you continued --
A Yes.
Q -- although he was in possession of the victim's property shortly after the murders and although his semen was located in the vagina of one of the victims.
A Yes.
Q And you could have added also threatened to kill them shortly before the murder and possession of the phone. But you did not.
A I did not.
Q I was wondering. Why did you select those particular points to put in your letter to appellate defense?
A Well, I think it was pretty clear that from the evidence that he was in the possession of some of their property shortly after the murders in the sense that he was seen by witnesses not -- you know, the witnesses from Union County, getting out of their vehicles, the property in it, and that the -- there was D.N.A. evidence concerning the

semen.

I'm not sure if I totally subscribe to the idea that he threatened the victims, at least in the sense of meaning to follow through and kill. I mean, you know, a lot of times people say things when they're angry but they don't intend to follow through on them. So that's the only reason I can think of as to why I did not state that in the letter.

But of course Mr. Savitz or whoever would work on the case without the benefit of the trial transcripts, they could see the evidence for themselves.

Q Okay. And did you have any other discussions with Mr. Savitz about the strength of the state's case or any issue in the case itself?

A At some point I had a -- I know I had a telephone conversation with them about -- I think it was a telephone conversation with them.

I remember his telling me that he doesn't -- oftentimes he does not raise voir dire issues because many times it's in the discretionary rulings of the Court. I don't recall what else we had discussed in the telephone conversation.

Q Okay. And the last issue referenced in that October 29th letter goes to the statement concerning the clothes being in the washing machine.

A Yes.

Q Okay. And those are the clothes that had spots, areas

of blood, and the blood was --
A Right.
Q -- the Emerys' blood on the different clothes.
A Right.
Q It's fair to say that there was overwhelming evidence of guilt in this particular case, isn't it? And you were even pointing that out in your letter to appellate defense, correct, when you're pointing out the D.N.A. and you're pointing out possession of the property?
A Well, I was not agreeing there was overwhelming evidence of guilt but that it was a strong case, but yeah.
Q A strong case supportive of guilt.
A Right.
MS. BROWN: Court's indulgence.
(Pause.)
Q Mr. Allen, thank you very much for your patience and your testimony. I appreciate that.
MS. BROWN: No further questions, Your Honor.
MR. EHLIES: I have a few, Judge, and I need about five minutes to run across the hall.
THE COURT: All right. We'll take 15 minutes and we'll resume.
You may step down.
(Whereupon, a recess was taken.)
THE COURT: All right. Mr. Ehlies.

MR. EHLIES: Thank you, Judge.

REDIRECT EXAMINATION

BY MR. EHLIES

Q Mr. Allen, there were questions asked to you about the state of the records that's reflected on the trial exhibits, three and four, and now state's exhibits in the smaller pages.

Is it your position that the history as reflected in those exhibits is an adequate substitute for the in-depth record? I'm sorry. I've forgotten the missing records, the numbers.

A The medical records?

Q Yeah, the medical records which are 28 --

A Twenty-six.

Q -- and 26 that detail the actual treatment notes and prescription or medications and dosages.

A No.

Q And reactions.

A No. I'm not trying to suggest that.

Q Okay. And those records were absent for one reason or another and never obtained.

A That's right -- that's right.

Q And in that regard there were a series of questions asked to you. And as I understood it, you said that Carolyn Graham was working for you.

A Yes.
Q Her records all rolled over into your file.
A Sure.
Q And to your knowledge you had the file.
A Right. What I was trying to get at is that she may have retained records that she -- you know, she may have retained a copy of the records that she obtained. But my understanding is she gave me everything that she obtained.
Q Correct. And that would be standard practice that you would end up --
A Yes.
Q -- with the entire file.
A Sure.
Q And they're not in your file.
A Right.
Q The number -- State's No. 9 -- that would be the red tag.
A Yes.
Q And I think then on -- you were asked to read part of that as I think it was on page two. And before then is the admission note of Dr. Tobin which is in the deposition wherein on page four he suggests that we look at genetics, Klinefelters/chromosomes.
A Yes.
Q And rule out -- on page four he says let's take a look

genetically and rule that out. Okay. Isn't that correct on page four?
A In -- right. He wrote that in 1994 in connection with --
Q Correct, correct. That's the admission note.
A Right.
Q So then in response to that the state had you reading part of what's marked as State's 9.
A Yes.
Q Okay. And then you stopped when it got as far as, "served their purpose." And I'm asking you --
MS. BROWN: Objection, Your Honor, to characterization.
MR. EHLIES: Okay. Excuse me.
THE COURT: Rephrase it.
Q Ask you to read on page two, first paragraph. And start reading with "there". And you're now reading what is State's Exhibit 9.
A Beginning with, "There was a question of Klinefelter syndrome that was mentioned by the admitting physician. Evaluation by the treating pediatrician felt that the patient did not have Klinefelter syndrome. However, if there's any further questions this can be evaluated as an outpatient and did not require the patient to remain in the hospital longer."

Q Correct. And did you see or find in your records any indication where genetic studies had actually been done to investigate whether or not there were chromosomal or genetic issues?
A I don't recall anything like that in any of the records we have.
Q And the same with the reference to the Prader-Willi on what is Applicant's 26 they had you reading, handwritten notes --
A Yes.
Q -- if you can get those. And correct me if I'm wrong. I don't think you got all the way down on that either.
A I was on page 174, I believe of State's -- excuse me -- Applicant's Exhibit 26.
Q Correct. And would you read what this person, unidentified person, says about Prader-Willi?
A This is on a note from a Dr. S. Jackson.
Q Okay.
A It also has another person's signature on it too. But, anyway, I'll just begin with the paragraph.
"Normal growth and height eliminates Cushing's disease and hypothyroidism, lack of mental retardation or hypogonadism." Make -- no. Excuse me. Maybe I should read it.
Q Okay.

A "Lack of mental retardation or hypogonadism make Prader-Willi syndrome or Laurence-Moon Biedl syndrome unlikely."
Q Okay. Now, did you ever see any place in the record where a genitalia study had been done on this individual?
A No. And of course, again, I don't know if this needs to be -- beating the dead horse, but I did not have --
Q Great.
A -- the records that are Applicant's Exhibit 26 that I just read from.
Q And you -- you never saw any photographs of the genitalia of Mr. Torres.
A No, no.
Q You were asked about your impressions when you went to the jury about the strength of the government's case --
A Yes.
Q -- and asked to admit that it was strong. Do you remember that line of questioning?
A Yes.
Q And you indicated -- and I think almost if you did not say outright that it may have been strong -- but you had reservations whether Tony Torres was by himself in committing this entire crime. Do you remember that?
A Yes. I acknowledge that it appeared to be a strong case for the government, but I had and have reservations

that Tony Torres was solely responsible.

I can't give you any more information than, you know, what we have. I don't think Tony was necessarily strong enough to do -- you know, to contain two people or do it all by himself.

Maybe some of this is suspension and not outright evidence, but I don't -- I didn't believe it, and I still have a hard time believing that he's solely responsible.

Q All right. And then when I told you and published the transcript of Christy Williamson in response to cross-examination that Tony did this by himself and deserves to die -- but I don't think he did -- are you sharing now the same impression that she had?

A Apparently.

Q And would that have been testimony in mitigation for the jury to hear? Regardless of its admissibility, would that have helped you with the jury to hear the victim of the deceased Ann Emery say that --

A Yes, it would have.

Q -- as a victim impact testimony about her feelings on the sentence and what it would mean to the family?

A It certainly couldn't hurt.

Q And that that's her state of commitment to it, was unresolved as to how this crime happened?

A Right.

Q And if she testified then that it would have complicated their recovery as victim impact testimony?
A Yes, perhaps.
Q On your Jonathan Howard, trying to get him up to say about the amount of drugs --
A Right.
Q -- Jessica Hughey testified to that. Did you attempt to get her on the stand to testify as to the amount of drugs?
A We did, and I've got a note about -- I think I got a phone call from Tammy Hughey, Jessica's mother. I think this was right about the beginning of the trial or maybe when we wanted to start putting her up. Let me take a look at it. But there's something about that Jessica had a complicated pregnancy and couldn't take the rigors of coming into court and testifying, yes.

This is a note I had in that, beginning that, database dated October 10th of 2008, in part that Jessica was -- excuse me. Tammy Hughey was upset.

Apparently Mr. Gowdy had subpoenaed them as well. She was angry because her daughter Jessica has a high-risk pregnancy and it's not good for her to be in court. And then Jessica was also subpoenaed. And I talked to her about the possibility we might need her to testify later in the week, and she said she would be available. But that's

pretty much it about Jessica.
Q The conversations that you were questioned about between you and Mr. Torres and Mr. Reckenbeil --
A Uh-huh.
Q -- concerning assignments and obligations between the attorneys, do you remember that line of questioning?
A Some, yes, sir.
Q We had seen United States vs. Chapman which underscores what decisions belong to the client and which decisions belong to the lawyers.
A Okay.
Q Would you agree with me that the client has the right to decide whether to plead guilty or to go to trial?
A Oh, yes.
Q Would you agree with me that in a capital case you cannot plead guilty if the notice to death is outstanding and be sentenced by a jury? He'd be sentenced by the judge.
A Okay. I think I've got the question. But if he pleads guilty where the notice of death has been issued by the solicitor in a capital case --
Q Correct.
A -- then if he does so without any agreement that they'll either pull the death notice or agree to seek life without parole, then he's looking at being sentenced by the judge to possibly death or life without the possibility of

parole, but -- but the phase that we typically call extenuation, mitigation, will be tried before the judge alone as the trier of fact, also the trier -- well, he's also the judge on the law as well in ruling on admissibility and that kind of stuff, but yes.

Q And you had that understanding at the time you tried this case.

A Oh, yes.

Q So if Tony wanted to be sentenced by the jury he had to go to trial on the guilt.

A Definitely.

Q The decisions on how to try the case however belong to trial counsel. Would you agree with me?

A Oh, yes, yes, as far as how to question the witnesses and --

Q Tactical.

A Right.

Q Strategic, how to frame the opening statement.

A Yes, sir.

Q And when you met and consulted with Tony Cor -- Tony Torres about his statement to the jury -- do you remember testifying?

A Yes. I did.

Q And actually drafting it out with him and for him.

A Yes.

Q Why didn't you do that on the opening statement?
A Why didn't I draft the opening statement?
Q In team effort with whoever was assigned to do the opening statement just like you did with Mr. Torres.
A Good point. Kathy Hodges was an experienced attorney, had done a number of trials. And we had talked about some of the aspects of the trial, but/and I felt that she could draft a proper opening statement.
Q In capital cases we have more than one head even if one head is a caboched, right?
A That's true.
Q And there's a reason for two lawyers.
A Yes, sir.
Q And in this case you had three lawyers.
A We did.
Q Thank you so much.
MR. EHLIES: That's all.
THE COURT: All right. You may step down.
Anything further?
MR. EHLIES: That is the applicant's case.
THE COURT: All right. Let me direct these comments and questions to Mr. Torres.
Mr. Torres, you have been present during the entire presentation of your application seeking post conviction relief.

Mr. Ehlies has indicated to the Court that he has nothing further to present.

Have you understood everything he's presented throughout the presentation of this proceeding?

THE APPLICANT: Yes, sir.

THE COURT: And do you have any other grounds that you would like to present in seeking post conviction relief?

THE APPLICANT: No, sir.

THE COURT: Would you like to testify in this proceeding to add any additional information?

THE APPLICANT: No, sir.

THE COURT: Do you have any other presentation that you would like for your lawyers to make regarding evidence or support for post conviction relief?

THE APPLICANT: No, sir.

THE COURT: And are you satisfied with their representation of you in this case?

THE APPLICANT: Yes, sir, I am.

THE COURT: All right. Thank you. Be seated.

Does the respondent have any presentation to make?

MS. BROWN: Your Honor, we actually have a request for a little bit of additional time before we would make a presentation for these very specific reasons: If you'll recall, applicant made a motion to amend on April the 7th immediately before we went into trial. That's still

pending, and that was the -- or one of the allegations raised was the Prader-Willi syndrome diagnosis. And that was the first notice we had.

We've done a response to that motion to amend, and we don't particularly object to them being able to raise that, but we have requested additional time to be able to have some investigation of this particular claim.

I would note that applicant has had really actually several years to develop this claim, and we have just now gotten notice of any kind of a Prader-Willi diagnosis, which I'm sure you've heard is a genetic condition and takes a little bit of understanding. And doing that understanding part of that for cross-examination, we attempted to get an expert to guide us.

The first expert that we went to was a Mr. Curtis Rogers with Greenwood Genetics Center. And we understood that he had been contacted by Mr. Torres' team but did not help them.

When he got on the telephone with him -- and this was Friday, April the 18th, it turns outs that he actually had done testing and had been retained in some way. We immediately stopped the conversation, advised opposing counsel of that. But that kind of set us back to square one.

Now, he had a consulting geneticist who helped us

prepare for cross-examination. Our cross-examination that you've heard thus far has been based on his opinion. But he's not available for testimony.

We've gone through and we've tried to get other people in this area. And I would note that Greenwood Genetics is sort of the leading genetic center in this area. D.D.S.N. actually refers to them.

This is a very specialized field. We've gone to different states. We've heard back from one state. A geneticist who is an expert in Prader-Willi has told us, advised us, that we are essentially correct in our understanding of the information that we've gotten from our consulting geneticist. But we haven't had time to actually obtain an expert in this area.

We would request -- we have -- without giving you the specifics of our arguments and facts, we can tell you that we have been advised that there may be a problem with the method of diagnosis and some other records and tests, or what have you in this. So we have been advised there is a problem. And we need the opportunity to have an expert to come in, and we can prep them.

Now, we do not mind. We would offer. We could do them by deposition or however that it would please the Court to go forward, but we believe out of fundamental fairness to allow us the opportunity to fully meet the

allegations that have been raised, and raised just April 7th, that we do need a little extra time.

What I would propose if Your Honor would -- would consider that is to allow us 30 days to contact experts and see where we were at that point and offer at that time maybe another time that we could convene for one day and hear testimony from the expert.

I'd also notice too that we have the interrogatories for Dr. Tobin prepared and ready to give to opposing counsel. That too is something that we need to be able to go in to talk to our expert and prepare them for presentation.

So we would ask the Court's indulgence, and we would ask for 30 days that we could investigate.

THE COURT: Okay. I have no objection to that. So in 30 days you're going to tell me what you -- whether or not you have additional testimony you'd like to -- or whether or not you have testimony that you'd like to present?

MS. BROWN: Yes, sir. And hopefully we will be able to present a name to opposing counsel so they would have the opportunity likewise to prepare for any cross-examination.

MR. EHLIES: Cross and reply; cross, and if necessary reply.

THE COURT: Okay. All right. Thirty days. Y'all let

me know. Then we'll make a determination as to rescheduling.

MR. EHLIES: Thank you, sir.

MS. BROWN: Thank you, Your Honor.

THE COURT: Okay.

END OF PROCEEDINGS APRIL 30, 2014

(Proceedings June 30, 2015)

(C.V. of Dr. John Edward Spence marked State's Exhibit No. 12 for Identification; Prader-Willi printout marked State's Exhibit No. 13 for Identification; 22q11 printout marked State's Exhibit No. 14 for Identification.)

THE COURT: All right. Are you all ready to proceed?

MS. TIMMONS: Yes, Your Honor.

THE COURT: Okay.

MS. TIMMONS: The state calls Dr. Ed Spence.

DR. JOHN EDWARD SPENCE, having been first duly sworn, testified as follows:

MS. TIMMONS: May it please the Court.

THE COURT: Yes, ma'am.

DIRECT EXAMINATION BY MS. TIMMONS

Q Good morning, Dr. Spence. Can you please give us your full name for the record?

A John Edward Spence.

MS. TIMMONS: May I approach?

THE COURT: You may.

Q Dr. Spence, do you recognize that document?

A Yes.

Q And what is it?

A This is my C.V.

Q Do you know when that C.V. was prepared?

A It may be over a year old.

Q Does it seem to be fairly up to date? Is there anything you want to add to it?
A Oh, yes. There's very little change since this, since this was -- was made.
Q Where are you currently employed?
A I'm currently employed at Carolinas Medical Center in Charlotte, North Carolina.
Q How long have you been there?
A For 24 years.
Q And what do you do there?
A I am a faculty physician in the department of pediatrics. Most of my work is in medical genetics.
Q Can you briefly go through your educational background and training for the Court?
A I did a bachelor of science degree at Randolph-Macon College in Ashland, Virginia. I went to medical school at the University of Virginia.

I did my residency training in pediatrics at the University of North Carolina at Chapel Hill. I did a genetics fellowship at Baylor College of Medicine in Houston. And that's where I finished. I got my fellowship in genetics.

Q And are you currently licensed to practice medicine?
A Yes.
Q Where?

A In North Carolina.
Q Can you describe your current practice focus?
A Much of my clinical work is in clinical genetics, and I see patients with clinical genetics problems of all varieties -- adults and children. And I also am involved in teaching residents in pediatrics. Most of my work with residents is either in my genetics-clinic area or in newborn nursery doing general pediatrics.
Q What percentage of your time do you devote to seeing patients?
A Seventy-five to 80 percent of my time.
Q And what's the other percentage of your time devoted to?
A I spend 20 or 25 percent of my time working with medical students on the -- I run the third-year medical school cir -- clerkship in pediatrics in Charlotte.
Q Do you have any board certifications?
A I'm board certified in pediatrics and in medical genetics.
Q And do you do any research in your position?
A Very little research. It's more registry where we collect patient history information in the course of their disorder.
Q Do you use genetic testing in your practice?
A I routinely use genetic testing, yes.

Q How often would you say you use it?
A Often. Almost every day I'm in the clinic I'm doing some type of genetic testing.
Q Have you been qualified as an expert witness before?
A Yes.
Q What sorts of cases have you been qualified in?
A Primarily, I was qualified as an expert witness for D.N.A. testing more -- 25 years ago when D.N.A. testing first became used in criminal cases in forensic activities.
MS. TIMMONS: Your Honor, we would move to qualify Dr. Spence as an expert in medical genetics.
MR. TESSIER: No objection, Judge.
THE COURT: He is so qualified.
MS. TIMMONS: And we'd also like to have State's Exhibit 12, which is his C.V., admitted into evidence.
MR. TESSIER: No objection.
THE COURT: It's admitted.
MS. TIMMONS: Thank you.
(C.V. of Dr. John Edward Spence marked State's Exhibit No. 12.)
Q Dr. Spence, what is the difference between an M.D. and a Ph.D. in the field of genetics?
A In the field of genetics an M.D. is a physician who has then gone on to get further specialty training in clinical genetics. It could be just general genetics where

they see a variety of genetic problems; it could be biochemical genetics. And some go on to get training in specialty areas like molecular genetics.

A Ph.D. gets training in genetics that may involve research aspects of genetics. It could be cytogenetics or molecular genetics. And primarily they run laboratories that do the testing for chromosome analysis and D.N.A. analysis.

Others may work in teaching and education activities for other aspects of genetic training, whether it's physicians or genetic counselors or graduate students in genetics research.

Q Can Ph.D.s diagnose patients?

A In this day and time I don't know that that is a common occurrence. It may have been an occurrence in -- in former years when there were fewer medical geneticists to see patients.

Q Why do patients come to you?

A They come to me because many cases they want a diagnosis. People are seeking a diagnosis because they have genetic -- they may have a genetic problem either because of congenital abnormalities, learning disorders or intellectual disability, certain features that may suggest a biochemical disorder or a genetic syndrome, and also in managing those syndromes. We see a lot of patients in

followup where we manage their specific condition such as Down syndrome.

Q And what is your general procedure when you have a patient come to you for the first time? How do you start the process?

A We review all of the history including their prenatal history, their birth history, their medical history, their developmental history, their family history, any backup history that may be relevant and do a full physical examination.

Q Okay. Other than the history that you mentioned and the physical examination, are there any other resources that you rely in coming to a diagnosis for a patient?

A Well, we often will genetic testing based on the findings of our evaluation, the history and physical features.

We may use books, literature, online resources to help narrow in if we are not concern what the diagnosis might be to look for patterns that may suggest a certain condition.

Q And once you diagnose or you rule out a particular condition, where do you go from there?

A If we diagnose a certain condition we will provide genetic counseling. We'll give the information about the genetic cause of their disorder. We will give them information regarding how the features fit with that and

what the longterm expectations or prognosis might be.
Q Do you --
A If we don't have an answer, then we will consider other options for more esoteric, less common disorders and may do further testing depending on the findings of the examination.
Q And once you've come to a consensus on a certain diagnosis do you follow them from there? Is it a one-time sort of visit that they have with you?
A For many patients we follow them, although we're not the primary providers of their healthcare. We will -- the primary care provider is pediatricians, family medicine doctors, internists -- will often rely on us to provide specialty aspects to their genetic condition and recommendations and management of certain aspects of their genetic condition.
Q So what would you say is the real benefit of knowing that a particular symptom has genetic origins?
A It gives you an understanding of what -- understanding of the problems that have been going up to that time and where they came from.

It gives you an understanding of what to expect for the future. Although that may still not be very specific, it will give you some idea of what you don't have to worry about. And it'll give the family information about what's

a chance of it happening again if they were to have more children.

It gives that individual an opportunity to learn do they have a recurrent risk of the same problem in their children.

Q Are there any treatments for genetic conditions?

A There are some treatments. Primarily, it's in specific metabolic conditions where we can replace the enzyme that is -- that they are missing. But there are very small numbers of those individuals. It's not the large proportion of the patients we see.

There are certain biochemical conditions where we can provide I.V. therapy, replace the enzyme into their bloodstream that they cannot make.

Q Dr. Spence, what materials did you review in preparing your opinion for this case?

A I reviewed the records that were delivered to me including photographs and a deposition and some other information that Dr. Rary had put together.

Q Let me interrupt you real quick.

Do you mean Dr. Rary's testimony?

A Correct.

Q Okay.

A The deposition, yes, testimony. I'm sorry.

Q That's okay.

A And I used -- once I had the information I reviewed lab reports. I reviewed some past history that was delivered to me, a very small portion of past history. And then I -- and that's primarily what I used.

Q Okay. We're going to -- I'm going to bring up some of those for you to look at --

A Okay.

Q -- in more depth as we go on through your testimony.

I want to begin with talking about Prader-Willi syndrome. What is Prader-Willi syndrome?

A Prader-Willi syndrome is a genetic condition. It's -- the majority of individuals with this condition have -- and this is a generalization -- have short stature. They often have intellectual disability. They may have delays in cognitive abilities, intellectual abilities with speaking and cognitive processing.

They often have some -- some mild dysmorphic features, unusual facial features such as maybe an almond shape to the eyes, maybe bi-frontal narrowing. They may -- those may not be obvious.

They often will have small hands and small feet. And as infants and young children they may have hypotonia that will improve as they get older in most cases.

Q What is hypotonia?

A That's low muscle tone. For example, a six-month-old

that is not yet holding their trunk up, not holding their head up well, it's a combination of both strength and resting muscle tone.

They will be later in motor milestones in many cases. But the hypotonia is sort of a resting muscle tone that is lower, and so they are what we consider, quote, floppy, end quote.

Q And these traits that you've just gone over, are those the things that make you suspect Prader-Willi in a patient?

A Yes. Those are the traits that we -- that trigger the evaluation and decide, help us decide, what testing to do.

Q And then how do you go about actually diagnosing a patient with Prader-Willi syndrome?

A Primarily, we do an imprinting or methylation study of the chromosome 15 region that's involved in Prader-Willi syndrome.

We can also do deletion testing for that region, but that is an incomplete test as only 70 or 75 percent of the individuals with that condition have a deletion of chromosome 15.

Q What are the current requirements of Prader-Willi syndrome?

A I don't quite understand what you mean.

Q Well, where -- as a physician where do you go to see a list of these, the criteria to diagnose for someone to have

Prader-Willi syndrome?

A Well, there's many publications that list the specific features. Some of them they'll list the frequency of occurrence.

A common resource that we use in the clinic is GeneReviews, which will list the current -- the common features, the uncommon features, the very unusual features and what other conditions may look like Prader-Willi syndrome.

MS. TIMMONS: May I approach, Your Honor?

Q Dr. Spence, this is State's Exhibit 13. Do you recognize that document?

A Yes.

Q What is it?

A This is the GeneReviews for Prader-Willi syndrome dated December 30th of 2014.

Q And did you use GeneReviews in coming to your opinion in this case?

A It was one of the resources I used, yes.

Q Do you have an opinion about whether or not Mr. Torres has Prader-Willi syndrome?

A Yes.

Q And what is your opinion?

A My opinion is he does not have Prader-Willi syndrome.

Q How did you come to that opinion?

A He does not have many of the typical features. There was pictures that I had that were supplied that had a -- a ruler on his hands. And I measured his hands using that ruler and then looked at the tables, that of normal hand sizes. And his hands were normal. They were not small. His height. I'm sorry.

Q Are these the photographs that you're talking about? That's Applicant's Exhibit 14.

A Yes. These are the some of the -- some of the photos, yes. This has the hand measurements.

Q Okay. Continue.

A There was -- that was one example, the measurements.

His eyes were not unusually spaced according to the measurements that were available to me.

As a child there was -- I looked at notes, records from the endocrinologist that were available to me when he was three years and younger. And he had endocrinology evaluations, and they mentioned specifically that he did not have low muscle tone. And so there was evidence of hypotonia.

And as an infant he had normal developmental progress, and those features all contributed.

The D.N.A. tests that he had done, the imprinting analysis was normal with no abnormality noted. And that would mean that there was no deletion on chromosome 15,

there was no uniparental disomy on chromosome 15, and there was no imprinting defect on chromosome 15, all of which could cause Prader-Willi syndrome.

Q I want to go back to the clinical presentation, the features that were or were not present. Do you believe that Mr. Torres could be diagnosed with Prader-Willi syndrome based on a clinical presentation alone?

A No.

Q And then you mentioned the methylation test.

MS. TIMMONS: May I approach?

Q This is Applicant's Exhibit 16. Is that a methylation test that you reviewed for Mr. Torres?

A Yes. This test was done March 11th of 2014 at LabCorp and was a -- the angelman, slash, P.W.S. methylation assay, which is the test we do for methylation imprinting analysis for this condition. And this testing was negative.

Q And what does that mean to you as a medical doctor?

A That means there's more than a 99 percent chance he does not have Prader-Willi syndrome by laboratory testing alone.

Q And is the methylation test one that you normally use whenever you're looking to see if a patient has Prader-Willi syndrome?

A In my practice it's the definitive test that determines whether a person has the condition or not.

Q And what does GeneReviews, which would be State's Exhibit 13, say about methylation testing for the diagnosis of Prader-Willi syndrome?
A It says it's greater than a 99 percent chance. Well, if -- if the test has a greater than 99 percent chance of picking up those who have Prader-Willi syndrome.
Q Does --
A If the testing is negative that will suggest he does not have the condition by that test.
Q Does GeneReviews suggest that you use this test or is it --
A It recommends that as a primary test for Prader-Willi syndrome.
Q Okay. And so if you received this test, these test results, Applicant's Exhibit 16, for a patient of yours, what would you conclude about whether or not they had Prader-Willi syndrome?
A I would conclude they do not have that condition.
Q Would you pursue the diagnosis any further?
A No.
Q And how common is Prader-Willi syndrome?
A I could refer to the GeneReviews. I believe it's one in 3,000, one in 5,000 individuals.
Q How often do you see Prader-Willi syndrome?
A Probably two or three times a year.

Q Have you ever diagnosed a patient with Prader-Willi syndrome with a negative methylation test?
A No.
Q I want to move on to 22q11 deletion syndrome. What is that?
A 22q deletion -- 22q11.2 deletion syndrome is a syndrome -- a syndrome that was originally described as both DiGeorge syndrome and velocardiofacial syndrome or Shrintzen syndrome. And individuals with that condition have similar heart defects. They may have dysmorphic facial features of various types.

They often may have hypocalcemia which may be transient as due to psdo -- I'm sorry -- to hypoparathyroidism. And they may have immune deficiencies because of thymic aplasia and T-cell deficiencies.
Q So whenever a patient comes into your office what clues you into the fact that they may have 22q11 deletion syndrome?
A One of the most common problems that is a specific entity is the heart defect. Seventy-five percent or so will have congenital heart defects. And the common heart defects would include tetralogy of Fallot, truncus arteriosus and interrupted aortic arch.

They may also have other various congenital heart defects.

We also look at other features -- intellectual disability, dysmorphic facial features, very specific facial features that may be suggestive such as a soft palate cleft or small cupped ears or a variety of other features. But the physical features are quite variable and may not be as obvious in this condition compared to some other syndromes such as Down syndrome.

Q Do you use GeneReviews for the diagnosis of 22q11 deletion syndrome as well?

A I will use it sometimes. It is such a common condition that I don't use it as often as I do other -- for other conditions.

I use it more for teaching in teaching the residents and students that work with us to look at the different variable features of this condition and all the different manifestations of this condition, which is a -- this condition has a lot of features and multiple systems involved for individuals who have this condition.

Q Dr. Spence, do you recognize that document, State's Exhibit 14?

A Yes. This is the GeneReviews for 22q11 deletion syndrome, and it was printed in December of 2014, December 30th, 2014.

Q And does it list the wide variety of traits that you see with 22q11 deletion syndrome?

A Yes. It -- the -- the -- for example, the -- the disease characteristics, the features, start on the middle of this first page and go on to the second page. And then it goes through a lot of -- many details of the diagnosis and the various features that can happen -- have -- and all of the manifestations and different systems.

MS. TIMMONS: Your Honor, I'm not sure I moved the other one into evidence, but we would move Respondent's Exhibits 13 and 14, which are the GeneReviews for Prader-Willi syndrome and 22q11 deletion syndrome, into evidence.

MR. TESSIER: No objection.

THE COURT: Now, I understood 14 was photos.

MS. TIMMONS: State's 14. I'm sorry. I think --

MR. EHLIES: Applicant's 14 are the photos.

MS. TIMMONS: Yes.

THE COURT: Oh, I'm sorry. Okay.

MS. TIMMONS: And those were entered at the hearing last year.

THE COURT: Those are admitted.

MS. TIMMONS: Thank you.

(Prader-Willi printout marked State's Exhibit No. 13; 22q11 printout marked State's Exhibit No. 14.)

Q Do you have an opinion, Dr. Spence, about whether Mr. Torres has 22q11 deletion syndrome?

A He does not have the typical features of the chromosome 22q11.2 deletion syndrome.

He -- he had testing done, and that showed a small deletion on a very fringe region of this -- of this syndrome region on the chromosome 22, but he does not have the typical syndrome.

Q And the testing that you're talking about, that's Applicant's Exhibit 17, the microarray test? Is that the testing you're talking about that shows he has a deletion?

A Yes. That's correct.

Q And is this a test that you normally use in exploring whether a patient has 22q11?

A That's one of the tests we might use. The other test we might use is a simple deletion test just of that region by florescence and situ Hybridization analysis or FISH analysis. But the chromosome microarray does a better job of picking up smaller or variable deletions of this region.

Q And if you could say again in this case, what did the microarray show for Mr. Torres?

A The microarray for him showed a number of small deletions and duplications, and on chromosome 22 it -- let me get to that page. It showed that he had a -- let me see -- 91Kb, kilobase, deletion of the region and overlapped one recognized syndromic gene and a couple of other -- other genes in the region. But it did not include

the full typical -- full deletion seen in 22q11.2 deletion syndrome.

Q So how does that 91Kb deletion compare to the normal deletion that you see in 22q11 deletion?

A The normal deletion is 2.5 megabytes or 2,500 kilobases or 3,000 kilobases in size. And his was only 91 kilobases in size and on a very fringe region. So it did not include the more critical region for DiGeorge syndrome and velocardiofacial syndrome for the 22q11 syndrome.

Q Okay. And so did the deletion -- is it part of the DiGeorge critical region that has been deleted?

A It's a part of the -- the whole region, but it did not include the more classic part of the region that -- that we think is involved in intellectual disabilities and general heart defects and the typical features.

Q So the entire DiGeorge critical region is not deleted, only a portion of it.

A That's correct.

Q Is that right?

A A very small portion of it.

Q And that portion that's been deleted, is that the proline dehydrogenase?

A That gene is included in that region.

Q That has been deleted.

A That's a 24Kb gene -- 24 kilobase in size. It's

included in that 91 kilobase deletion review.
Q So what is the effect of that deletion?
A Proline dehydrogenase is an enzyme. The gene codes for an enzyme, and the enzyme -- if you have a deficiency of the enzyme you may not metabolize proline as well as usual. And so you may have minor -- some elevation of proline in the bloodstream.
Q Did you review whether Mr. Torres has a minor elevation of proline?
A I saw a report of lab values for amino acids that included a minor elevation of proline.
Q And when you say a minor elevation, do you have a way to compare it to what the normal elevation would be?
A I can't remember exactly what the level was. I think it was in the 40s. And most people have elevations up -- the normal range is up into the low 30s.
Q Okay.
A And as a relative -- whatever the scale is, I can't remember. Those with more severe elevations are in the 60s and above.
Q How common is 22q11 deletion syndrome?
A It's probably one in every two or three thousand babies. In my clinical world it's the second most common diagnosis we make after Down syndrome.
Q Have you ever seen a patient with 22q11 deletion

syndrome with this small of a deletion?
A No.
Q Okay. And have you ever diagnosed a patient with 22q11 syndrome?
A Yes.
Q When they had the small deletion?
A With this small of deletion I wouldn't call it that.
Q What would you call it?
A Well, I would -- I would specify the deletion, but I would not say it's the classic 22q11.2 deletion syndrome. I would say it's a varied deletion on the edge or fringe of the critical region.
Q And how many patients would you say you see a year with 22q11 deletion syndrome?
A Probably -- well, I -- for new patients I might -- we might see six or eight a year. Maybe more than that. I can't remember off the top of my head. I see many of them in followup even into teen years and sometimes into adult years.
Q Have you had any of your patients with 22q11 deletion syndrome commit homicide?
MR. TESSIER: Object to the form. That's speculation.
THE COURT: Overruled.
A Do I answer it?
Q Yes.

A NO.

MS. TIMMONS: Beg the Court's indulgence.

(Pause.)

Q We have no further questions. Thank you. Please answer Mr. Tessier's questions.

MR. EHLIES: Could we have just a second to consult with our expert?

THE COURT: Yes, sir.

MR. TESSIER: Will it be okay to take about a five-minute break?

THE COURT: Sure. We'll take ten.

Dr. Spence, you can step down from the witness stand, but you can't discuss your testimony during the break.

(Whereupon, a recess was taken.)

THE COURT: All right. If you will, resume your seat on the stand, please, sir.

MR. TESSIER: Thank you, Your Honor. May it please the Court.

CROSS-EXAMINATION

BY MR. TESSIER

Q Good morning, Dr. Spence. I'm Troy Tessier. As you know, we had the opportunity to take your deposition earlier this year. I'm going to ask you a few questions now about the testimony you just gave.

Did you review anything, any new material, between the

time of giving your deposition and today?
A No.
Q So the opinions you gave today are based on the same information, materials, that you had available when you provided your deposition, is that fair?
A Yes.
Q The question near the end of your direct testimony I had to follow up on. You don't make an effort, do you, to track every patient that you've ever diagnosed with 22q11 deletion syndrome, do you?
A Not beyond the time I'd still -- if I'm still following them, I know their history. If I am no longer following them, I don't keep up with their history.
Q And you don't make an effort to follow them --
A No.
Q -- you know, for the rest of their lives, do you?
A No, I do not.
Q So you have no way of knowing one way or another definitively whether any patient of yours who was diagnosed with 22q11 deletion syndrome ever killed anyone, do you?
A No, I don't. I don't know that.
Q You assume you might have heard about it, but you can't know that for sure.
A If I heard about it in the news, I might recognize the name. But it's possible I may not.

Q When you see a patient, I believe you described the process that you go through in evaluating patients that you deal with. And you do among other things a -- an actual physical exam.
A That is correct. I do.
Q A clinical examination is what you want to do.
A Yes.
Q You also want to get their full medical history.
A Yes.
Q Is that right? And you want to get information about the genetic history of their family, is that fair?
A Yes.
Q Those are the things you typically want to do when you see a patient.
A Yes.
Q Before you reach a diagnosis.
A That's correct.
Q In the case of Mr. Torres you would agree that you did not conduct any clinical evaluation of Mr. Torres.
A That's correct.
Q And you did not review any medical records on Mr. Torres other than a small batch of records provided to you by the government.
A That's correct.
Q So you don't know the vast majority of Mr. Torres'

medical history, fair?
A That's correct.
Q And you don't know one way or another if Mr. Torres actually suffers from a congenital heart defect, do you?
A No, I do not know that.
Q You did not review any other historical records about Mr. Torres like academic records or social history records, did you?
A I did not.
Q And you don't have any information about the genetic history of Mr. Torres' family, do you?
A No, I don't have that information.
Q So what you have done in your testimony, I believe, is primarily focus on a couple of opinions that Dr. Rary gave in this case. And you disagree with Dr. Rary, is that fair?
A That's correct.
Q In other words, you --
A In those -- in those opinions.
Q That's correct. In other words, you disagree -- when Dr. Rary said it is his opinion -- Dr. Rary's -- that Mr. Torres suffers from Prader-Willi syndrome, you disagree with that opinion.
A That is correct. I disagree with that.
Q Okay. And the same thing. When Dr. Rary said in his

opinion Mr. Torres suffers from 22q11 deletion syndrome, you disagree with that conclusion, is that fair?
A I agree -- I disagree with that conclusion, that's correct.
Q You would also agree with me, would you not, that there is no standard of care with respect to the diagnosis of Prader-Willi syndrome or 22q11 deletion syndrome that you can point to that you would say Dr. Rary failed to meet, is that fair?
A I -- I'm not -- I don't have available the information he used beyond what was in his -- his testimony and his PowerPoint presentation and the laboratory results that I saw.
Q Right. And what I'm getting at, I guess, is broader. In the field of genetics is there a specific standard of care like a book or a document somewhere that sort of governs what geneticists, medical geneticists, do that tells us that you would be in violation of the standard of care if you diagnosed a person with Prader-Willi syndrome based solely on a clinical evaluation? You would agree?
A I don't know available to me at this moment any specific published information that says this is the standard of care beyond the GeneReviews, which is not the same thing as a policymaking committee.
However, there is a standard of -- a general standard

of care that is accepted as a matter of just -- as you say, the standard of care, that is the standard of care that most physicians follow. And that may not be an evidence-based guideline that is published.

There may be something that I didn't prepare for today that I don't know about, but there is a sort of a standard -- there is somewhat of a standard of care that most geneticists use that follow the guidelines that I mentioned.

Q And what I want to get at, I guess, is this. The bottom line is are you trying to say that it is your opinion that Dr. Rary violated some standard of care applicable to medical geneticists when he reached the conclusions he reached.

A No, I'm not saying that.

Q In fact, the bottom line is you and Dr. Rary have a difference of opinion about this subject.

A Yes, we do. That is correct.

Q When you look at the -- and let me just...

MR. TESSIER: If I may approach, Your Honor.

Q Dr. Spence, I'm going to show you Applicant's Exhibit 60 which you had a moment ago. I believe that's the -- that's the Prader-Willi genetic test, is it not?

A That is correct. That is the -- the methylation assay for Prader-Willi syndrome.

Q Okay. And on the assay result page where it shows negative at the top, it goes on to describe the percentages that this particular test tells you.

Prader-Willi syndrome results from a particular kind of micro deletion 70 percent of the time and from maternal U.P.D. -- whatever that stands for -- 25 percent of the time.

Would you agree with me that this test result doesn't account for 100 percent of Prader-Willi sufferers if we can call them that?

A I would agree with that.

Q So there are some individuals out there in the world who have Prader-Willi syndrome who will not come on positive on the test that you're looking at right there, is that fair?

A Well, you mentioned that it says that deletion, micro deletion, causes 70 percent. And it says maternal U.P.D. causes 25 percent.

And then it says and/or -- I'm sorry, or from an imprinting defect. And that's somewhat of a lesser known, less common, change, but it is included in this assay. And so that makes up a good portion of that remaining five percent.

There may be as much as one percent that have Prader-Willi syndrome by clinical assessment that may not

have a positive test.
Q Right. So in other words, you I guess -- whereas that test result might make one think it's a five percent difference, you're saying it's more like a one percent likelihood that someone has Prader-Willi syndrome who doesn't come up positive on that exam, on that test.
A Yeah. They don't quantify the amount that have imprinting defect. They include that because that is detectable by this test.
Q So the bottom line is there are -- there are, you would agree, at least some people who can be Prader-Willi -- have Prader-Willi syndrome but will not show up positive on this particular exam.
A That's the way it's been described. However, if you don't have a positive test for someone you don't know that they might have something else that looks like Prader-Willi syndrome. And there may be a different cause.
Q And the bottom -- what we're talking about in this particular case is whatever the label one geneticist might put on it, you will agree that Mr. Torres does, in fact, have some genetic abnormalities that are confirmable and have been confirmed by the D.N.A. testing that's been done.
A Which testing are you referring to?
Q So, for example, he suffers from hyperprolinemia.
A Correct.

Q And that's a genetic condition that Mr. Torres has.
A That's correct.
Q And that's been confirmed by a test result.
A That's right.
Q That's one example.
A I agree with that.
Q Another example is he has a deletion within the overall 22q11 region. Now, whether or not it can be attributed to the 22q11 deletion syndrome or not, you agree he does have a deletion within chromosome 22.
A Yes. He does.
Q And that's been confirmed by a test result.
A That's correct.
Q So that's a genetic abnormality in Mr. Torres.
A Yes. That is correct.
Q What you don't know, which you agree, is you don't know what behavioral consequences Mr. Torres' particular genetic abnormalities might have caused in him, is that fair?
A I don't know which behavioral abnormalities have been caused by any genetic change.
Q And you would agree that it's at least possible that some behavioral problems could result from genetic conditions, is that fair?
A That's fair.

Q But in this particular instance you have not tried to -- and I'm not faulting you for this, Dr. Spence. You have not made an attempt to try to determine if any genetic preconditions in Mr. Torres might have resulted in behavioral problems.
A That is correct. I have not done that.
Q You would agree that the abnormality we're talking about on chromosome 22 for Mr. Torres includes a part or even perhaps the entirety of his PRODH gene, is that fair?
A That is correct.
Q In other words, he might be missing the PRODH gene.
A That's correct.
Q And this genetic condition for Mr. Torres or for anyone else, frankly, if you have this genetic condition makes you have a difficult time metabolizing an enzyme called proline.
A Well, it's an amino acid called proline, you're correct.
Q Thank you for correcting me.
A But you still have another gene on the -- of the pair of genes, you still have the other copy.
Q Of the nondeleted?
A The nondeleted.
Q Okay. Would you agree that proline is toxic to the human body in high doses if you can't get rid of it, in

other words?
A In high doses, I -- I would suspect it could be.
Q It's not something you want to have a lot of in your body for long periods of time?
A No, no. You don't.
Q In your deposition -- I believe today I think you -- you would characterize Mr. Torres as having what you would say is mild hyperprolinemia.
A That is correct.
Q How do you determine whether someone has a mild hyperprolinemia or a more severe hyperprolinemia? Is there a standard or a range?
A I've -- it's been difficult to find that. Hyperprolinemia is not a common condition. It's not recognized as something that we commonly see, but we know that there are individuals who have differing degrees.

More severe forms of hyperprolinemia cause seizures, cause more severe neurological defects and problems that relate to the neurological system.

Most individuals with that level have -- with that level of severity have proline levels that are over 60. And his was not to that level. His is a more mild to moderate elevation but not a severe elevation based on the single assay that I saw.
Q Right. And so --

A Which could be affected by diet. It could be affected in a variety of things. And so it was a single-point assay that I saw. I'm not sure when it was obtained, but I saw that compared to other amino acids, yes.

MR. TESSIER: May I approach, Your Honor?

Q Let me show you the exhibit you're talking about, Dr. Spence. This is Applicant's Exhibit 18. Is that -- is that the amino acid test you're talking about?

A Yes.

Q And that shows -- that's a test that was done. If you look at the last page -- I think it's on the -- it's near the end of it. It's one of the later pages that shows you the date of that test.

A Says date collected January -- January of twenty -- 2014.

Q Okay. So sometime early 2014 there was a single test that was done and it's showing an elevated proline level, is that fair?

A The level is 40 and the range is 10 to 31.

Q So if the range is 10 to 31 -- normal range is 10 to 31 -- and if you looked at the low end of normal -- ten -- he's a whole bunch bigger than that. Not doing the math, but it's like 400 percent of the normal -- the low end of normal range, is that right?

A He's -- his level is four times --

Q Four times.
A -- the lowest end.
Q And if you look at the middle of the normal range he's two times greater.
A That's correct. I agree with that.
Q Okay. And you agree that if you do an amino acid test like this one on a person like Mr. Torres at different times you might get a different result.
A You might get a different result.
Q Depending on diet and various other factors going on in their life at the time.
A Yes.
Q Do you happen to know one way or another what type of diet Mr. Torres was on when this test was done?
A No.
Q Do you know or did you -- would it make any difference to you to know that he was incarcerated at the time and on a prison diet, which would a fairly regulated diet?
A I wouldn't know what to make of that.
Q Okay. In other words, what would help spike a proline level, would you agree, would be a high intake of protein?
A Yes.
Q And if you're a body builder, say, and taking a lot of protein supplements you might spike your proline level --
A Yes. You might.

Q -- based on what you're eating.
So the only evidence you have to determine or to come to a conclusion in your mind that Mr. Torres is hyperprolinemia is that one test result, is that fair?
A Yes.
Q The test itself on page six puts a parenthetical after Mr. Torres' proline level as four and calls it high. So if you look at the bates number on the bottom of the page --
A There it is. Okay.
Q -- the one says four. Do you see that at the very top, says proline and just indicates high?
A Yes.
Q Does that help you or change your opinion in any way as to whether or not Mr. Torres had mild hyperprolinemia at the time of that test?
A It just says it is high compared to normal.
Q Okay. Is there also a hyperprolinemia type 2 versus hyperprolinemia type 1, or do you know?
A I have read about that, and I can't remember the differences.
Q Okay. Will you also agree with me that this one amino acid -- acid test that was done for Mr. Torres in 2014 tells us nothing about what level of proline Mr. Torres had in his system at the time of the crime that he committed?
A That is correct. It doesn't tell us anything about

that.
Q The deletion that Mr. Torres has of his PRODH gene is not normal. Would you agree?
A That is -- that is correct. That is not normal.
Q And would you also agree that in the field of genetics abnormalities and deletions of the PRODH gene are associated with a higher risk of schizophrenia?
A That is correct.
Q And so would it be fair to say -- and I think you touched on this in your deposition -- but fair to say you cannot rule out the possibility that Mr. Torres has schizophrenia based on his PRODH gene abnormality.
A That's correct.
Q You have tried it.
A I can't rule that out.
Q Okay. And do you know based on your experience as a medical geneticist that there is a type of schizophrenia known as schizophrenia type 4?
A No.
Q So you're not familiar with the various up to 12 types of schizophrenia that are identified?
A No.
Q If you -- as a geneticist you could, given that you know Mr. Torres has a deletion on his PRODH gene, you could do additional sequencing to look at the nondeleted allele

for his PRODH gene to see if there are any mutations in that nondeleted allele, correct?

A That's correct.

Q And that's the testing that's readily available right now, isn't it?

A Yes.

Q And if you did that and discovered mutation in the nondeleted allele that would suggest to you as a geneticist an even greater likelihood of problems for Mr. Torres, would it not?

A It very likely would suggest, yeah. Greater likelihood is the best way to put it.

Q And --

A No guarantee, but a greater likelihood.

Q And the greater likelihood of problems would be behavioral type problems like schizophrenia, correct?

A No. There could be other problems like neurological problems and seizures and other neurological issues, not just behavioral problems.

Q Okay.

A So those that have -- have abnormalities of both genes, of a pair, have a higher chance of having higher levels of proline and having more complicated medical issues that occur such as the things I mentioned.

Q But in addition to the things you mentioned like, you

know, neurological problems, and one of the additional heightened risks for someone with a deleted PRODH gene and mutated nondeleted allele would be greater behavioral problems as well. You have a greater risk of --

A I don't know that it's a greater risk or not. I don't know how additive that is.

There's been so few individuals studied with this that the risk is there, yes. There is association, yes. Whether it's an additive change and more likely to have behavioral problems as opposed to more likely having other neurological or emotional problems, it may be hard to sort that out with the limited number of patients that have been described in the literature with these kind of problems.

Q In your opinion as a medical geneticist would you go out on a limb and be willing to say that in your opinion it would not likely make it a lower risk of schizophrenia or other behavioral problems?

A Yes. I would say that.

Q It's either going to be a greater risk or it'll continue to be at the already heightened risk level.

A Yes.

Q Okay.

A But risk does not -- does not equate absolute diagnosis.

Q Correct. And that's just something you didn't try to

explore with Mr. Torres.
A No. I did not. I don't claim to have expertise in behavioral disorders.
Q Do you know the circumstances of the crime Mr. Torres committed?
A No.
Q And you've not done -- you have already answered this, and I apologize -- but you've not done anything to provide an opinion as to what effects, if any -- physical, behavioral or psychological -- that Mr. Torres' specific genetic defects have actually had on him in his life. You've not tried to do that, have you?
A I'm not sure I understand your question.
Q Okay.
A It's a -- it's a very large --
Q Long question.
A Not long. It's just encompasses a lot -- a lot of possibilities.
Q Okay. Well, let me --
A You're asking me to make a judgment on a whole range of things.
Q Okay.
A What specifically are you asking me about?
Q Have you -- have you made any effort from a genetics' perspective to identify whether any of the genetic

abnormalities that Mr. Torres actually has that have been confirmed -- any effort to try to assess whether those genetic abnormalities have impacted his behavior?

A No. I have not.

Q You talked about in general terms the 22q -- what you referred to as the classic 22q11 deletion syndrome. And you said if I heard you right that Mr. Torres has a deletion in what you called a, quote, fringe area.

A That's correct. That's what I said.

Q So as a geneticist would you say it's fair to characterize the PRODH gene deletion as a fringe area or somehow unimportant to a human being?

A I didn't say that. I said it was a -- a small deletion. He does have a deletion. It is an area of the 22q11.2 critical region, but it is very small in that region. It's on the edge of the critical region, and it does not include the typical genes that are involved in those who have the more classic features of -- which are variable -- of the 22q11 deletion syndrome.

Q For example, I mean, in the -- in the broader area of the 22q11 deletion syndrome, the classic presentation that you might see, you would expect deletions in areas that would cause a person to have a cleft palate.

A That would be one of the possibilities.

Q And another area might be in the area which causes

congenital heart defect.
A That's -- the specific genes that are assigned to those different problems are not as clear-cut as it might seem.
Q Okay. But they're -- they don't appear to be in the PRODH region.
A No. They're not.
Q Okay. So, in other words, in Mr. Torres' case it may well be that he doesn't suffer deletion as a result of him having a cleft palate, which we can all tell he does not. But he has a deletion in an area that does present a heightened risk of schizophrenia and other behavior disorders.
A That's correct.
MR. TESSIER: One moment, Your Honor.
(Pause.)
Q Mr. -- Dr. Spence -- I'm sorry. Dr. Spence, you gave a deposition, and I'll give you the date. It was March 26th of 2005, is when you actually gave your deposition in this case. Do you remember that?
A That's correct.
Q And in your deposition you testified under oath, didn't you?
A Yes.
Q And you provided all of your opinions in this case

based on the questions that we asked you, did you not?
A That's correct.
Q And have you changed any of the opinions that you gave in your deposition between the time of that deposition and today?
A No.
Q And would you go back -- have you had a chance to go back and read your deposition transcript?
A Yes.
Q Would you change anything about the testimony you gave if you had the opportunity?
A No.
Q I'd like to show you.
MR. TESSIER: If I may approach, Your Honor.
Q This is the original of the transcript for the deposition. I'm not going to ask you to open it necessarily if you've already ready it. But you're certainly welcome to, or we can have the judge open the deposition. Here's a copy of it as well.
But all I wanted to ask you, Dr. Spence, is would you adopt your deposition testimony as part of your testimony in this proceeding.
A I'm not sure I know what you mean. Tell me. Could you ask that question again?
Q Yeah. In other words, would you adopt the testimony

that you gave that's written down in that deposition transcript as if you had given it here today?

A Yes.

Q So I don't ask you all of the same questions again.

A Yes.

Q Okay.

MR. TESSIER: Your Honor, with that, we would like to offer into evidence the deposition transcript of Dr. Spence as well as part of his testimony.

MS. TIMMONS: We have no objections.

There may have been -- do you have any typographic errors, corrections, for the transcript?

THE WITNESS: Yes. I never did submit those. Microarray is misspelled. It doesn't change the substance of anything. It's just simple typographical spelling issues.

Q And did you prepare a document that listed some of those you've got there?

A Yes.

Q Did you send it to the government?

A I never did send it to them.

Q Okay.

MR. TESSIER: Well, certainly, Your Honor, we're entirely okay with including and incorporating that as part of this exhibit.

A It doesn't change any of the substance of -- of what I said.

MR. TESSIER: And you have that here today.

THE WITNESS: Yes.

Q Oh, you have it here today.

A Yes, I have it here.

MR. TESSIER: Well, we'll go ahead and mark it now then if that's okay, Your Honor.

Q Do you have it in here?

A It's in that green folder.

Q If you don't mind --

A Do you want me to get up and get it?

(Pause.)

Q Is that it, Doctor?

A That's it right there, the last pages.

Q Dr. Spence, what we now have in front of you is Exhibit -- Applicant's Exhibit 33, which is the original of your deposition transcript with the exhibits attached. Do you agree with that?

A I agree with that.

Q And you adopt that as a part of your testimony here today, is that fair?

A Yes.

Q And then in addition Exhibit -- Applicant's Exhibit 34 would be -- at the very back are some handwritten

corrections that you made to some of the testimony that's transcribed in your transcript.

A That's correct.

Q And you would adopt those corrections as part of that transcript as well?

A Yes.

MR. TESSIER: Your Honor, we would offer both Exhibit 33 and 34 then into evidence.

MS. TIMMONS: No objection.

THE COURT: They're admitted.

(Deposition marked Applicant's Exhibit No. 33; letter dated April 7, 2015, marked Applicant's Exhibit No. 34.)

MR. TESSIER: With that, Your Honor, we have no further questions.

MS. TIMMONS: A few brief followups.

THE COURT: Yes, ma'am.

REDIRECT EXAMINATION

BY MS. TIMMONS

Q Dr. Spence, how long have you been practicing?

A Been practicing for nearly 30 years. But if you include my fellowship years over 30 years.

Q So was there a time in that 30, 30-plus, years where you would make a diagnosis of Prader-Willi syndrome on clinical presentation alone?

A Yes.

Q Did that ever change?
A When we started having testing that changed dramatically.
Q And when did testing become available?
A Genetic testing by chromosome analysis picked up as many as ten percent that had deletions starting in the late 80's or early 90's. And by the mid-90's we had the imprinting methylation assay. Maybe the late 90's.
Well, first we had the deletion testing by FISH testing in the mid-90's. In the later 90's -- around 2000 -- we had the imprinting assay. And that changed the diagnosis, the ability to diagnose it, much more dramatically.
So individuals we wouldn't have considered classic for Prader-Willi syndrome became diagnosed earlier and much more definitively.
Q Okay. And when you say imprinting assay, is that the medical --
A The methylation. I'm sorry. Methylation assay.
Q And so that's been around since early 2000?
A I can't remember the exact date, but that's around that time.
Q And you mentioned a little bit in your testimony about correlation to mental illness.
Can you explain a little bit the difference between

whether something is correlated or will necessarily follow from a genetic condition if that makes sense?

A Typically, they will look at individuals who have, in this case, a behavioral disorder and look at those who have the medical problem as we're talking about hyperprolinemia. And so if you have elevated proline levels, is that always going to cause behavioral disorders, and the fact is it does not always cause.

There are people that have elevated proline levels that do not have behavioral disorders. But there is a -- an association or an increased chance of that because the people that -- there's a disproportionate number that have behavioral disorders associated with elevated proline levels in their blood compared to the general population.

But if somebody comes in with an elevated proline level and they don't have a behavioral disorder it doesn't predict that they definitely will. It shows there's a chance they might, but it doesn't predict they definitely will.

Q And then for 22q11 deletion, is there any features that were apparent that would clue you in that Mr. Torres might have 22q11 deletion syndrome or -- well?

A There were none that I read about or saw in the photographs that suggested that possibility.

Q Okay.

A None that suggested 22q11 syndrome.

MS. TIMMONS: Beg the Court's indulgence.

(Pause.)

Q Dr. Spence, in your practice do you normally rely on the diagnosis of a Ph.D. for a genetic condition?

A You mean the clinical diagnosis or the laboratory-based diagnosis?

Q Either.

A I never see patients that a Ph.D. has evaluated clinically. That is -- there's no one in our -- in our system or operation or our region that has a Ph.D. that sees patients on a clinical basis except for a psychologist and behavioral therapist, but none that see them for clinical evaluations.

MS. TIMMONS: No further questions.

MR. TESSIER: No more questions, Your Honor.

THE COURT: All right. You may step down.

MS. TIMMONS: Your Honor, that's our presentation of evidence. We rest.

THE COURT: Anything else?

MR. EHLIES: The applicant has no reply.

THE COURT: Okay. Now, as I understand it, each of you wish to brief the matter. But you need the transcript in order to accomplish that.

MR. EHLIES: That is the applicant's position. And by

briefing I mean to include all the outstanding issues as well as the cases we presented.

MR. ZELENKA: We're in agreement with that, Your Honor.

THE COURT: You what?

MR. ZELENKA: We agree.

THE COURT: Okay. Well, the court reporter -- I know she's done some of the transcript, and probably most of it. She'll look and see how much is left to do.

Once you receive the transcript how much time do you anticipate needing to brief it?

MR. EHLIES: Forty-five days after receiving the transcript.

THE COURT: All right, sir.

MR. ZELENKA: Thirty days after we receive their brief.

THE COURT: All right.

MR. EHLIES: That's fine with me.

THE COURT: Okay.

MR. EHLIES: Forty-five and 30 and ten on the reply if necessary.

THE COURT: Sounds reasonable to me.

MR. EHLIES: And I mentioned the funding, issue about funding. Apply for the costs once I get that. I don't hear an objection.

MR. ZELENKA: Why would we object?

MR. EHLIES: Get funding to get a copy of the transcript.

THE COURT: Well, they haven't objected to any of your funding requests as of yet.

MR. EHLIES: Thank you so much. And I'm glad they haven't.

THE COURT: All right. Anything further?

MR. EHLIES: That's it, Judge.

THE COURT: All right. We'll be adjourned then.

END OF REQUESTED TRANSCRIPT OF RECORD

CERTIFICATE

I, the undersigned Linda D. Moffitt, Official Court Reporter for the Seventh Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete Transcript of Record of all the proceedings had and evidence introduced in the trial of the captioned cause, relative to appeal, in the Common Pleas Court for Spartanburg County, South Carolina, on the 14th, 15th, 16th, 21st, 22nd, 23rd, 24th, 25th, 30th days of April 2014, and the 30th day of June 2015.

I do further certify that I am neither of kin, counsel nor interest to any party hereto.

October 3, 2015

Linda D. Moffitt
Circuit Court Reporter

(06/19/07) :00112

E# 200705695 VOLUNTARY STATEMENT PAGE 1 OF 3

ATEMENT OF: Charles Donald Emery | AGE: 26 | DATE: 05/11/07

DRESS: [redacted] Montgomery Street Drayton, SC

PHONE #: [redacted]98 | DOB: [redacted] | SSN: [redacted]

I have asked Inv. Clevenger to write this for me. I found out something happened to my father Charles Ray Emery and my stepmom Ann Harling Emery by a telephone call from Tammy Hughey to my girlfriend (Holly Nicole Melton) around 08:55 a.m. at [redacted]61. Holly and I travelled to my dad's house and I saw yellow tape around the house. I knew then, something bad had happened. When I got to my dad's house, 2 Deputies stopped me and I was asked to wait in the back of a cop car so they could talk to me.

I go back to 8:30 p.m. on 5-10-07 I had been to Taco Bell to eat. My dad and stepmom we gone. I think my dad went to a Ruritan meeting and my stepmom went to eat with her daughter. I was trying to leave before Lowes closed and Jonathan Howard and Andreas Antonio Torres show up unannounced at my dad's house. They were riding in a Toyota Paseo that did not have tags and a wing that would not stay on the back because the bolts would not hold it on. They put the wing in the back of the car. I don't think the car had insurance either. They came over to ask if I had a paper tag to put on the car and some 6x9 speakers that they could put in the car they knew I had. Jonathan stepped in the bathroom, used the bathroom, and stepped to the kitchen sink to wash his hands. Tony was not with us at the time that Jonathan cut me out .3 grams of methamphetamine in exchange for the speakers in my camaro in the storage building out back of the house. We (Me and Jonathan) walked out the sliding glass door toward the garage. Tony then comes to the garage to help retrieve the speakers and I walked out the breezeway smoking cigarettes and checking to make sure my dad or stepmom did not come back while they were here. I called Tony's cell phone [redacted]816 from my phone [redacted]216 or on the portable phone that is my dad's number [redacted]98 to let them know that I was gonna 'tch to make sure they did not come home. Tony and Jonathan came out without answering his ll. They asked "is your dad here, you scared the hell out of us". I asked did you get the eakers and they said "we only got one out". I told them they were gonna have to go cause I was scared my dad would come home. They left the house and we stayed outside and talked a few minutes in the yard. Then they left. Holly left to get a shirt , Ann came home and I got in the shower. I stayed in the shower approx. 30 minutes and got out. Holly stopped by before I got out of the shower to tell me the dog got hit and we were arguing. Holly called my dad's house 2 times while I was in the shower to talk to me about the dog. I dressed after my shower, Holly is outside. My dad came home at the same time Jonathan and Tony pulled up and my dad said something to me about "why are the hoodlums in my yard' and I replied" I did not know they were here, I will ask them to move". As soon as I got outside I told them they had to move and they did. We moved up the street to where the burnt stump is. Jonathan messed around in the Toyota Paseo that he was driving trying to put the one speaker in and cleaned it out.

Tony then went to take a shower at Tammy Hughey's house just up from my dad's

I have read this statement consisting of 3 page(s), and I swear that the statement that I have just given is the truth, the whole truth, and nothing but the truth, so help me God. I also swear this statement was given freely and voluntarily and I have received a copy of my statement.

This statement was completed at 2:09 PM on the 11th day of May, 2007

WITNESS: Kristy Clevenger

Charles D Emery
Signature of person giving statement

ORN to before me this 11th

day of May 07

(Seal)

Notary Public of South Carolina

My Commission expires: 8-22-10

PENGAD 800-631-6989 APPLICANT'S EXHIBIT # 2

CA 00208

(06/19/97) : 00113

CASE # 200705695	VOLUNTARY STATEMENT	PAGE 2 OF 2
STATEMENT OF: Charles D Emery	AGE: 26	DATE: 5-11-07
ADDRESS:		
PHONE #: [redacted]98	DOB: [redacted]	SSN: [redacted]

house. Jonathan stayed in the car messing with wires. I smoked the meth that I got from Jonathan and Tony came out after his shower. I could not find my phone I asked Jonathan if he still had my phone after I let him borrow it and he said it is some where in the car. I looked for the phone and could not find it. We left to go to Holly's grand pa's house off Drayton Avenue. We stayed there around 2 hours, I changed the phone number to another cell phone cause I thought they had the phone and were going to use it. Holly and I left and came back to my dad's house. Jessie Hughey was on the porch and said Tony was looking for me because of a missing cigarette pack that had money and drugs in it and a phone charger that was missing as well. Jessie said Tony cursed her out and others as well. He was not at my dad's when I got there. We spoke on the phone and he started talking shit about the missing cigarette pack. I told him I did not take it and he hung up on me. We then exchanged phone calls that were confrontational. The second phone call, he said something that made me mad. He said he had slept with my girlfriend and me and me and my girl Holly got in a confrontation. Some one called the County Police on us and I stayed on the porch. Holly talked to the Deputies and they left. Holly then pulled off. My phone was dead so I plugged my phone in at the drop cord at the tent. Tony called her threatening to shoot me with a .380 pistol. Jennifer King was calling me and asked where Tony was and she rode by a couple of times while I was waiting. Tony shows up with Terd (Chris Morgan) in a white Mitsubishi maybe a Galant with white rims. Tony got out and Terd left. Tony was yelling for me and walking down the street. Tony yelled at Holly to stop the car and cursing me. Holly stopped her car and had one leg out the door. Tony slammed the car door on Holly's leg and I was pissed. I ran toward Tony and Holly got between us to keep us from fighting. I pulled a knife and he ...ed like he had a gun. I threw my knife down cause I wanted to fight man to man. He made ... of me cause I pulled my knife. He continued harassing me and it was loud. He was saying I know you got people waiting on me. He kept talking shit while he was walking down the street and he walked off and did not want to fight. He walked off I grabbed my shirt and boots and we left. Holly and I went to B/P and pumped gas. I spoke to Kevin Biggerstaff and we then went to Kevin's house. Holly and I took Kevin to a house near Springfield in the Inman area to pick up money. We stopped at a gas station at 176 and I-26. We went straight back to Kevin's house. We stayed there until day break. Holly and I went straight to Holly's grand pa's and then went to pick up the dog at the emergency vet on Asville Hwy. On the way, Holly and I stopped by to look for the cigarette pack that Tony accused me of taking. We did not find it. Tammy looked for a gun cause she has a kid in her house. On the way down the street I saw Mandy (lives in the house for sale just down the street) and we spoke. I walked across the street to the red house looking for Tony to see if he was

I have read this statement consisting of 3 page(s), and I swear that the statement that I have just given is the truth, the whole truth, and nothing but the truth, so help me God. I also swear this statement was given freely and voluntarily and I have received a copy of my statement.

This statement was completed at _____ on the 11th day of May 2007

WITNESS: Kristy Clevenger

Charles D Emery
Signature of person giving statement

...ORN to before me this 11th day of May 07

Teri Wall (Seal)
Notary Public of South Carolina

My Commission expires: 8-22-13

(06/19/07) : 00141

CASE # 200705695	VOLUNTARY STATEMENT	PAGE 3 OF 3
STATEMENT OF: Charles Donald Emory	AGE: 26	DATE: 05/11/07
ADDRESS: [redacted] Mongomery Street Drayton, Sc		
PHONE #: [redacted]	DOB: [redacted]	SSN: [redacted]

inside. I checked the entire house and did not find him. Holly and I left to get the dog from Ashville Hwy. I called Ben Henson to ask what recomendations for a vet hospital we could take the dog to. We stopped by Holly's gran pa's house and took care of the dog. We were there approx. 1 hour before Holly got the call about my dad.

The last time I saw my dad and step mom alive was before I left to go to Holly's grand pa's They were watching the baseball game on T.V. They are Atlanta fans. My dad was sitting in his recliner and my step mom was on the big couch lying down. My dad asked me what you doing and I replied " I need to get this number off the caller ID so I could take it off the phone I gave Jonathan and change it to another phone. That was the last time I was in my dad's house. I had nothing to do with my dad or step moms murder. I think Tony Torres may have killed my dad and step mom and Jonathan Howard may have been involved.

I injested some meth before I took my shower and I am now clear now about what I am doing. I do not feel under the influence of any drugs or alcohol at the time this statement was given.

x Charles D Emory

I have read this statement consisting of 3 page(s), and I swear that the statement that I have just given is the truth, the whole truth, and nothing but the truth, so help me God. I also swear this statement was given freely and voluntarily and I have received a copy of my statement.

This statement was completed at 2:09 PM on the 11th day of May , 2007

WITNESS: Kristy Cleveland

x Charles D Emory
Signature of person giving statement

SWORN to before me this 11th day of May 07

(Seal)
Notary Public of South Carolina
My Commission expires: 8-22-10

~~(05/10/07) : 00115~~

CASE# 200705695 **VOLUNTARY STATEMENT** PAGE 1 of

STATEMENT OF: Charles Donald Emory | AGE: 26 | DATE: 5-11-07

ADDRESS: [redacted] Falcon Ridge Boiling Springs

PHONE # NO PHONE | DOB [redacted] | SSN: [redacted]

I have asked Inv. Clevenger to write this statement for me. I found out something happened to my Father Charles Ray Emory and my step Mother Ann Harling Emory. Tammy Hughey called Holly on her parents house phone [redacted] 61 January talked to my girlfriend Holly on the phone and Holly gave it to me. I tried to calm her down. I put on a shirt and we left and came to my dads house at [redacted] Montgomery Street. When we got to my dads I panicked because I saw the yellow tape. I was stopped by 2 Deputies and told me to turn around and by

I go back to ~~8~~5pm I took a shower at my dads house on 5-10-07. Jonathan Howard and Andreas Antonio Torres arrived at my dads before I was in the shower. They were in a Toyota Pasco that did not have a tag. I don't think the car is hot but it does not have insurance. He came over to ask if I had a paper tag and

I have read this statement consisting of _____ pages(s), and I swear that the statement that I have just given is the truth, the whole truth, and nothing but the truth, so help me God. I also swear this statement was given freely and voluntarily and I have received a copy of my statement.

This statement was completed at _____ _____M. on the _____ day of _____ 20___.

WITNESS: _____

_____
Signature of person giving voluntary statement

SWORN to before me this _____

day of _____, 20___.

_____(Seal)
Notary Public of South Carolina

PENGAD 800-631-6989 APPLICANT'S EXHIBIT # 3

CA 00211