

State of North Carolina,
Plaintiff,

v.

Scott David Allen,
Defendant.

)
) Montgomery County
) 99CRS3818
) 99CRS3820
)
)
)
)
)

Honorable Kevin M. Bridges, Judge Presiding

APPEARANCES

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I N D E XWITNESSES

MARK RABIL

Direct Examination by Ms. Warren

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Cross-Examination by Mr. Vlahos

638

DEFENDANT'S EXHIBITS

NO.	DESCRIPTION	ID'd	RECEIVED
40	(Previously identified)		p637 v4
41	(Previously identified)		p637 v4
42	(Previously identified)		p637 v4
43	(Previously identified)		p637 v4
44	(Previously identified)		p637 v4
45	Telephone log	p534 v4	p637 v4

(Superior Court of Montgomery County resumed session on Thursday, September 26, 2024, before the Honorable Kevin M. Bridges.)

THE COURT: Good morning, everyone.

Let the record reflect that the defendant is present in the courtroom with both of his attorneys.

Are there any matters to address before we resume?

MS. WARREN: No, Your Honor.

I'll just note that sitting with us is another member of --

THE COURT: I can't hear you. I'm sorry.

MS. WARREN: Your Honor, I'll just note that sitting with us is another member of the legal team, Ms. Stephanie Hunter.

THE COURT: Thank you.

MR. VLAHOS: Nothing, Your Honor.

THE COURT: All right. We'll have Mr. Rabil come back up.

Have him resworn, please.

MARK RABIL,

having been first duly sworn,

testified as follows:

THE WITNESS: I do.

THE COURT: Please make yourself comfortable. Keep your voice up.

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1 And the defendant may resume.

2 **BY MS. WARREN:**

3 Q. Good morning, Mr. Rabil.

4 A. Good morning.

5 Q. Yesterday, we started talking about the American

6 Bar Association, the ABA Guidelines.

7 I wanted to start by asking you this morning, what

8 do those guidelines say about investigating a case?

9 **MR. VLAHOS:** Objection to preserve.

10 **THE COURT:** Overruled.

11 A. Yes. So I also referred to those in my report.

12 Let's see. Exhibit 43.

13 Q. I think the 1989 guidelines begin on page 5 of

14 your report.

15 A. Right. So under -- page 5 at the bottom, 11.4.1,

16 investigations -- investigation, it basically says that

17 defense counsel should conduct independent investigations

18 about both the guilt-innocence phase and the penalty phase.

19 Both are equally important. And they should begin that

20 immediately.

21 "The investigation for the preparation of the

22 guilt-innocence phase of the trial should be conducted

23 regardless of any admission or statement by the client

24 concerning facts constituting guilt."

25 Q. Is that in 11.4.1(b)?

0 9 : 3 2 1 A. Right. That's what I was just reading.

0 9 : 3 2 2 Q. Okay. How do the guidelines instruct counsel to
0 9 : 3 2 3 prepare for trial?

0 9 : 3 2 4 A. Well, they -- they go through a lot of things from
0 9 : 3 2 5 the very -- you know, from the very beginning of the case,
0 9 : 3 3 6 such as making sure you go see the client, finding out what
0 9 : 3 3 7 the charging documents are.

0 9 : 3 3 8 And I'm just sort of looking at the outline here
0 9 : 3 3 9 starting on page 6 with -- under Sources of Information,
0 9 : 3 3 10 which is point (d) of that same guideline you're talking
0 9 : 3 3 11 about.

0 9 : 3 3 12 So, you know, looking at all the charging
0 9 : 3 3 13 documents, pretty much the things that are in the court
0 9 : 3 3 14 file, and looking at the law to see, you know, exactly what
0 9 : 3 3 15 all the crimes are. Because a lot of times, you know, in
0 9 : 3 3 16 murder cases, there's underlying felonies.

0 9 : 3 3 17 So, you know -- and this is kind of basic stuff
0 9 : 3 3 18 here. You know, what are the affirmative defenses? What
0 9 : 3 3 19 are the constitutional issues that might be involved? So
0 9 : 3 3 20 sort of an overall, you know, exactly -- from a legal
0 9 : 3 3 21 standpoint, what is the person looking at?

0 9 : 3 3 22 Q. Do the guidelines include detailed steps as to how
0 9 : 3 4 23 to look at an interview, the person accused, potential
0 9 : 3 4 24 witnesses, materials from the police and prosecution,
0 9 : 3 4 25 physical evidence and the scene?

0 9 : 3 4 1 A. Right. That's all in the -- under point (d).

0 9 : 3 4 2 Right. Those are -- points (2), (3), (4), (5), and (6) sort
0 9 : 3 4 3 of goes into all of that.

0 9 : 3 4 4 Q. And guideline 11.5.1 explains the filing of
0 9 : 3 4 5 pretrial motions.

0 9 : 3 4 6 A. Yes.

0 9 : 3 4 7 Q. Does it -- are there different considerations for
0 9 : 3 4 8 pretrial motions in capital cases than in noncapital cases?

0 9 : 3 4 9 A. Right. There's -- so you have not only the basic
0 9 : 3 4 10 motions that you would file -- discovery, motions to
0 9 : 3 4 11 suppress for any Fourth, Fifth Amendment violations,
0 9 : 3 4 12 statements, physical evidence, that sort of thing -- but
0 9 : 3 5 13 then there's a number of other motions that are filed in
0 9 : 3 5 14 capital cases.

0 9 : 3 5 15 I think we heard Mr. Oldham talk about something
0 9 : 3 5 16 like 40 motions that were filed. And these are somewhat
0 9 : 3 5 17 standard motions that -- when I was -- when I was new at
0 9 : 3 5 18 this, we were -- basically said, here, here are these
0 9 : 3 5 19 motions, you know, and we would modify them with -- as to
0 9 : 3 5 20 the facts of our particular case. And -- but there -- a lot
0 9 : 3 5 21 of them -- some are like preservation motions, but others
0 9 : 3 5 22 are pretty serious, depending on the specific facts of your
0 9 : 3 5 23 case. So it's a lot.

0 9 : 3 5 24 Especially, you know, we get into motions
0 9 : 3 5 25 regarding jury selection, a lot more careful there because

0 9 : 3 5 1 you have different measures for, like, for cause challenges
0 9 : 3 6 2 and then trying to make -- get more peremptory challenges.
0 9 : 3 6 3 You're looking at pretrial publicity, all that.

0 9 : 3 6 4 There's a lot more motions that would come into
0 9 : 3 6 5 play with the sentencing phase too. For example, specific
0 9 : 3 6 6 challenges to maybe what the aggravating factors are, things
0 9 : 3 6 7 like that.

0 9 : 3 6 8 So it's a -- there's a lot more motions.

0 9 : 3 6 9 Q. And in any criminal trial, as well as in civil
0 9 : 3 6 10 trials, if you wanted to file a motion regarding evidence
0 9 : 3 6 11 you wanted to keep in or out, could you do that through a
0 9 : 3 6 12 motion in limine?

0 9 : 3 6 13 A. Right. A motion in limine -- of course, the court
0 9 : 3 6 14 knows what a motion in limine is. They can be filed in any
0 9 : 3 6 15 case or a motion to suppress.

0 9 : 3 6 16 Q. Looking at guideline 11.7.1 of the 1989
0 9 : 3 6 17 guidelines, which is on page 9 of your report, what does
0 9 : 3 6 18 that say regarding a theory?

0 9 : 3 7 19 A. Yeah. What it reads is that counsel should
0 9 : 3 7 20 formulate a defense theory. And in doing so, counsel can --
0 9 : 3 7 21 should consider both the guilt-innocence phase and the
0 9 : 3 7 22 penalty phase and seek a theory that will be effective
0 9 : 3 7 23 through both phases.

0 9 : 3 7 24 So this is very different, say, from your basic
0 9 : 3 7 25 criminal defense case, because you're looking through to the

0 9 : 3 7 1 possibility and, you know, a lot of these cases even the
0 9 : 3 7 2 likelihood of a conviction. Not that -- I'm not saying we
0 9 : 3 7 3 shouldn't be fighting for, you know, a not guilty if that's
0 9 : 3 7 4 the instruction, the position of the client. But we don't
0 9 : 3 7 5 want to open the door on some issues, and we want to have
0 9 : 3 7 6 some sort of consistency between the guilt phase and the
0 9 : 3 7 7 innocence phase.

0 9 : 3 7 8 So, you know, like, a very consistent guilt phase
0 9 : 3 8 9 defense that could transpose into sentencing would be a
0 9 : 3 8 10 diminished capacity. Because you're not fighting the act
0 9 : 3 8 11 whether the person -- the defendant committed the act;
0 9 : 3 8 12 you're just talking about state of mind and bringing in a
0 9 : 3 8 13 lot of, you know, psychiatric/psychological information and
0 9 : 3 8 14 opinions. And that's going to be sort of consistent when
0 9 : 3 8 15 you get into the -- when you get into the penalty phase. So
0 9 : 3 8 16 that's what this means there. It's just -- you should have
0 9 : 3 8 17 an eye towards the penalty phase.

0 9 : 3 8 18 Although, you know, guilt-innocence -- in cases
0 9 : 3 8 19 where a person is, you know, contending innocence or not
0 9 : 3 8 20 guilty, then you really do have to, you know, do what you
0 9 : 3 8 21 would always do and, you know, fight hard on innocence.

0 9 : 3 8 22 Q. And in developing a strong theory about innocence
0 9 : 3 8 23 or doubt, how does that translate across the two phases of a
0 9 : 3 9 24 capital trial?

0 9 : 3 9 25 A. Well, it's -- in my experience from cases of my

0 9 : 3 9 1 own and others that I've seen, and from some of the studies,
0 9 : 3 9 2 we know that this term residual doubt is important to juries
0 9 : 3 9 3 when they get to the sentencing phase.

0 9 : 3 9 4 And it's -- the courts do not allow that as a
0 9 : 3 9 5 mitigating factor. And they don't instruct on it, but we
0 9 : 3 9 6 know that that's how juries operate, and that's how they
0 9 : 3 9 7 consider evidence.

0 9 : 3 9 8 And, you know, I mean, I've had cases where the
0 9 : 3 9 9 person was not given the death penalty because some jurors
0 9 : 3 9 10 still had doubt about guilt, and so they're -- you know,
0 9 : 3 9 11 they might agree to a guilty verdict in the first phase but
0 9 : 3 9 12 say I'll never -- I'll never go with death.

0 9 : 3 9 13 So you really are always having an eye on
0 9 : 4 0 14 individual jurors in these cases as to what they -- what
0 9 : 4 0 15 they might do to -- trying to, you know, preserve residual
0 9 : 4 0 16 doubt there.

0 9 : 4 0 17 Q. And in your report, you included the 2003
0 9 : 4 0 18 guidelines, which I believe came out in February of 2003.

0 9 : 4 0 19 A. Uh-huh. Yes.

0 9 : 4 0 20 Q. And do those emphasize many of the same points of
0 9 : 4 0 21 the existing guidelines from 1989?

0 9 : 4 0 22 A. Yeah. There -- they -- they're consistent, and I
0 9 : 4 0 23 think add some -- some more information about the things
0 9 : 4 0 24 that should be done and -- yeah.

0 9 : 4 0 25 Q. And in guideline 10.10.1, they again emphasize the

0 9 : 4 0 1 need for a defense theory; is that right?

0 9 : 4 0 2 A. Are you -- I'm sorry. Are you looking at the
0 9 : 4 0 3 2003?

0 9 : 4 0 4 Q. Yes. On page 12 of your report.

0 9 : 4 0 5 A. Right. The top of the page.

0 9 : 4 1 6 10.10.1 reads, "As the investigation mandated by
0 9 : 4 1 7 guideline 10.7 produce information, trial counsel should
0 9 : 4 1 8 formulate a defense theory," and it's basically very similar
0 9 : 4 1 9 to the one we just looked at.

0 9 : 4 1 10 "Counsel should seek a theory that will be
0 9 : 4 1 11 effective in connection with both guilt and penalty and
0 9 : 4 1 12 should seek to minimize any inconsistencies."

0 9 : 4 1 13 Q. All right. Mr. Rabil, you've seen dozens of
0 9 : 4 1 14 capital cases in your career and seen, in a peripheral
0 9 : 4 1 15 sense, many, many more.

0 9 : 4 1 16 Was the evidence in this case strong for the
0 9 : 4 1 17 state, in your opinion?

0 9 : 4 1 18 MR. VLAHOS: Objection.

0 9 : 4 1 19 THE COURT: Overruled.

0 9 : 4 1 20 You may opine on that issue.

0 9 : 4 1 21 A. In my opinion, this was not a strong case for the
0 9 : 4 1 22 defense. Obviously, the jury --

0 9 : 4 1 23 Q. So when you say "a strong case for the defense" --

0 9 : 4 1 24 A. I mean, for the prosecution. It was not a strong
0 9 : 4 2 25 case for the state.

1 And, I mean, obviously, the jury found Mr. Allen
2 guilty, and the instruction was beyond a reasonable doubt.

3 But when you compare this capital case to a lot of
4 others that I see, the -- there's some --

5 **MR. VLAHOS:** Objection on a proportionality
6 review.

7 **THE COURT:** Overruled.

8 Go ahead.

9 **A.** If you don't see physical evidence that connects
10 the defendant to the crime, there's not a clear all-out
11 confession, and usually -- it's unusual in my experience to
12 see prosecutors actually pursue the death penalty in a
13 situation where the guilt phase evidence is not as strong.
14 So that was -- this seems surprising to me in, you know,
15 in -- from what I've seen.

16 **Q.** In your experience, have you had cases where there
17 were issues with the prosecution's case that resulted in it
18 being tried non-capitally?

19 **A.** Yeah. I've had several of my own cases like that.
20 I think I had mentioned one in Rowan County. And it -- you
21 know, it started out several defendants, ended up -- some of
22 them ended up pleading after jury selection.

23 But -- by the way, John Megerian, I was just
24 thinking, I know he's -- he goes around all these counties.
25 He was co-counsel with one of the other defendants in that

0 9 : 4 3 1 case.

0 9 : 4 3 2 But we worked along the way, trying to investigate
0 9 : 4 3 3 the crime scene. It was in -- a case in Salisbury. And
0 9 : 4 3 4 just to really -- I would say -- I would say sloppy is what
0 9 : 4 3 5 I argued to the jury in that case, but also to the district
0 9 : 4 3 6 attorney through discovery and discussions with him.

0 9 : 4 3 7 And, for example, through discovery, there were
0 9 : 4 3 8 things produced like a crime scene initial diagram followed
0 9 : 4 3 9 up by one that was computer-generated that was very
0 9 : 4 4 10 different from the initial one. There was a -- bad security
0 9 : 4 4 11 of the crime scene. There was a security guard who was
0 9 : 4 4 12 involved in a shooting, and shell casings got moved around.
0 9 : 4 4 13 So all -- those types of things led Mr. Kennally to declare
0 9 : 4 4 14 the case noncapital.

0 9 : 4 4 15 Q. So in that case, you and Mr. Megerian researched
0 9 : 4 4 16 all these issues with the state's case and took them to the
0 9 : 4 4 17 prosecution prior to trial?

0 9 : 4 4 18 A. Right. Yeah. We had -- with the district
0 9 : 4 4 19 attorney in Salisbury at the time, Mr. Kennally, we had a
0 9 : 4 4 20 good communication, you know, there. We talked about a lot
0 9 : 4 4 21 of the issues. And he made a decision, really after about
0 9 : 4 4 22 a year, somewhere in there, certainly well before trial,
0 9 : 4 4 23 that it was going to be noncapital.

0 9 : 4 4 24 And then there have been other cases where -- in
0 9 : 4 4 25 Forsyth County --

0 9 : 4 5 1 MR. VLAHOS: Objection. We're getting into
0 9 : 4 5 2 irrelevance.

0 9 : 4 5 3 THE COURT: Sustained.

0 9 : 4 5 4 Q. Did you listen to Mr. Oldham's testimony about
0 9 : 4 5 5 consulting with Mr. Megerian?

0 9 : 4 5 6 A. Right.

0 9 : 4 5 7 Q. And did you also consult and work with some of the
0 9 : 4 5 8 attorneys that Mr. Oldham mentioned?

0 9 : 4 5 9 A. Yes. I knew Frank Wells and -- Mr. Megerian's
0 9 : 4 5 10 partner. Frank passed away a few years ago. But we
0 9 : 4 5 11 frequently worked -- consulting on cases, like they would be
0 9 : 4 5 12 appointed consultant in my cases, I would be appointed
0 9 : 4 5 13 consultant in their cases.

0 9 : 4 5 14 And I -- probably at least a half dozen times, our
0 9 : 4 5 15 defense team would come down to Megerian and Wells, and we'd
0 9 : 4 5 16 meet with them and talk about cases.

0 9 : 4 5 17 I also -- I'd forgotten about it until Mr. Oldham
0 9 : 4 5 18 testified about it the other day about that room that they
0 9 : 4 5 19 rented in that restaurant where these defense lawyers would,
0 9 : 4 6 20 you know, meet and talk about cases.

0 9 : 4 6 21 And there was a couple of times I went there, and
0 9 : 4 6 22 we were -- we were brainstorming some cases. So I do
0 9 : 4 6 23 remember that. I don't remember Mr. Oldham, though,
0 9 : 4 6 24 until -- I'd never consulted with him. But with Megerian
0 9 : 4 6 25 and Wells.

0 9 : 4 6 1 And I think that's interesting because it does
0 9 : 4 6 2 show that standards for capital defense are the same,
0 9 : 4 6 3 whether it's Forsyth County; Winston-Salem, which is larger;
0 9 : 4 6 4 or Guilford County; or, you know, Randolph; or even down in
0 9 : 4 6 5 here.

0 9 : 4 6 6 Q. You were working in the same community as
0 9 : 4 6 7 Mr. Oldham at the same time as this case?

0 9 : 4 6 8 A. Yes. Yes.

0 9 : 4 6 9 Q. I want to talk to you about your opinion regarding
0 9 : 4 6 10 the cross-examination of Vanessa Smith.

0 9 : 4 6 11 A. Right.

0 9 : 4 6 12 Q. Did you review trial counsels' files in this case?

0 9 : 4 6 13 A. Yes.

0 9 : 4 6 14 Q. Did they appear to have materials for Ms. Smith's
0 9 : 4 7 15 cross-examination prepared?

0 9 : 4 7 16 MR. VLAHOS: Objection.

0 9 : 4 7 17 THE COURT: Overruled.

0 9 : 4 7 18 A. Well, I did not see an outline for a
0 9 : 4 7 19 cross-examination, if that's what you're asking me.

0 9 : 4 7 20 Q. Yes.

0 9 : 4 7 21 A. Or, like, a particular trial folder that normally
0 9 : 4 7 22 we use for -- witness by witness, and you'd have, like, an
0 9 : 4 7 23 outline and the exhibits you want to use for that witness.
0 9 : 4 7 24 I didn't see that. There were a lot of documents and notes,
0 9 : 4 7 25 but not -- what I would call -- formal, or even informal,

0 9 : 4 7 1 trial preparation. Yeah.

0 9 : 4 7 2 Q. Was that surprising to you?

0 9 : 4 7 3 A. Yeah, it was. Because I was looking for that.

0 9 : 4 7 4 Q. And you've heard Mr. Oldham say that -- I believe
0 9 : 4 7 5 he testified that he sort of just worked from his memory.
0 9 : 4 7 6 Was that common at the time?

0 9 : 4 8 7 A. Not -- not in my experience, no.

0 9 : 4 8 8 I mean, usually -- usually, we're going to have --
0 9 : 4 8 9 you know, some people write out their questions. More --
0 9 : 4 8 10 most of the time, what you see when I worked with other
0 9 : 4 8 11 attorneys is going to be maybe bullet points and then
0 9 : 4 8 12 documents that you're going to use. And you already have,
0 9 : 4 8 13 you know, the original for the exhibit and a copy for the
0 9 : 4 8 14 prosecutor and a copy for the Court, and maybe -- depending
0 9 : 4 8 15 on the nature of the case, maybe enough copies for the jury.
0 9 : 4 8 16 Usually, that's what I see. I mean, I'm not saying his
0 9 : 4 8 17 going by memory is wrong. That's his style. I'm just
0 9 : 4 8 18 saying I haven't seen that before.

0 9 : 4 8 19 Q. So in your experience, attorneys generally at
0 9 : 4 8 20 least write out points for examination?

0 9 : 4 8 21 A. Right. Points. And -- and have their documents
0 9 : 4 8 22 together for cross-examination, yeah.

0 9 : 4 9 23 Q. Why is it important to use documents during a
0 9 : 4 9 24 cross-examination?

0 9 : 4 9 25 A. Well, there's -- there's a couple reasons for

0 9 : 4 9 1 that. Excuse me.

0 9 : 4 9 2 So as we -- as we learned in trial practice and as
0 9 : 4 9 3 I taught in trial practice, you have to remember that
0 9 : 4 9 4 juries -- people on the jury learn in different ways. Some
0 9 : 4 9 5 people listen, and they can hear things the first time
0 9 : 4 9 6 around; other people have to see things.

0 9 : 4 9 7 And so it's important to ask questions and then
0 9 : 4 9 8 follow up with either documents or photographs so that you
0 9 : 4 9 9 can -- you know, I mean, not to drag it out, but just so
0 9 : 4 9 10 that people can see things in different ways and hear it.
0 9 : 4 9 11 Use photographs in front of the jury, use diagrams, use
0 9 : 4 9 12 statements. So it's important to do that.

0 9 : 4 9 13 And now I forgot -- am I answering your question?

0 9 : 4 9 14 Q. Yes. I asked why it was important to use
0 9 : 5 0 15 documents.

0 9 : 5 0 16 How do you use documents to impeach a witness?

0 9 : 5 0 17 A. Right. So, you know, you -- you would have to
0 9 : 5 0 18 start out with some sort of foundational-type questions
0 9 : 5 0 19 about a person's knowledge and confront them with -- with a
0 9 : 5 0 20 prior inconsistent statement to sort of, quote, set it up
0 9 : 5 0 21 to, you know, approach them with a document and then, you
0 9 : 5 0 22 know, ask them, "Do you remember making a statement to the
0 9 : 5 0 23 police? Do you remember signing that statement? Do you
0 9 : 5 0 24 remember what the date was?"

0 9 : 5 0 25 And, you know, after some questions like that,

1 then you approach with the document and have it marked for
2 identification and begin to go through it.

3 And it's very useful in -- from what I've seen, to
4 lead the witness through the particular points that you
5 want. Because leading questions are appropriate on
6 cross-examination when you're -- even when you're pointing
7 things out in a document when you phrase it in terms of a
8 question.

9 Once in a while, you might have a person read from
10 the statement. But a lot of times, it's hard for people,
11 you know -- I mean, lawyers and professionals, people like
12 that, it's not quite as difficult; but most people, it's
13 hard. So...

14 Q. And before you show a witness a document, do you
15 need to get them to commit to what they're saying on the
16 stand in court on that day?

17 A. Usually, yeah, as the -- as the foundation.

18 Q. I think in your report, you called that nailing
19 them down?

20 A. Nailing them down. Yeah. I didn't mean to use
21 such an informal term, but there we go.

22 Q. You have them say, "My testimony today is X"?

23 A. Yes. And so on cross-examination, it would be
24 prefaced like, "Now, Ms. Smith, you just testified in front
25 of the jury that as you were leaving Uwharrie Forest that

0 9 : 5 2 1 morning, that you heard several shots from what you
0 9 : 5 2 2 described as a .45, right?" And then go from there.

0 9 : 5 2 3 "However, you never said this to anybody before,
0 9 : 5 2 4 right?"

0 9 : 5 2 5 And it almost doesn't matter what she says then.

0 9 : 5 2 6 And then I would approach her with the preliminary
0 9 : 5 2 7 hearing transcript and her two written statements, the
0 9 : 5 2 8 shorter typed version and the longer one that she signed at
0 9 : 5 2 9 the bottom of every page.

0 9 : 5 2 10 Q. And why is it important to actually show them the
0 9 : 5 2 11 documents? And I think in your report, you discussed
0 9 : 5 2 12 Ms. Smith's testimony and the brief cross-examination
0 9 : 5 2 13 regarding her earlier statements.

0 9 : 5 2 14 A. Well, it's -- it's a matter of both, you know,
0 9 : 5 2 15 sort of a teaching philosophy and how the jury's going to
0 9 : 5 2 16 learn, but also establishing credibility for the defense.

0 9 : 5 2 17 Because if you show -- if you have a document in
0 9 : 5 3 18 hand and it is in their words, then that -- and they have
0 9 : 5 3 19 not said this before or they have said something different,
0 9 : 5 3 20 it's a whole lot more effective.

0 9 : 5 3 21 And sometimes it may cause a witness to actually
0 9 : 5 3 22 agree with things that they might not have agreed with, once
0 9 : 5 3 23 the witness sees you have these documents.

0 9 : 5 3 24 But mostly, it's for the benefit of the jury.
0 9 : 5 3 25 More of, you know, a teaching, multiple times, not too many,

1 but, you know, enough times to where they get the point.

2 Q. So in Ms. Smith's testimony, when she ultimately
3 said she didn't know what was in her statements to
4 Mr. Poole, was it important to actually show her those
5 statements?

6 A. Oh, yeah. Very important to actually confront her
7 with those statements.

8 Q. And you would ask her to point out where she
9 showed -- where she told Mr. Poole about hearing those
10 shots?

11 A. Yeah. You could do it that way. Very -- 27,
12 28-page statement. You know, there's -- or maybe find a
13 section of the statement where it logically would have been.

14 But sometimes with statements, you would -- "I'm
15 going to show you this statement. Would you take a minute
16 and read through that and tell us whether or not you made
17 that statement to Mr. Poole when you interviewed him -- or
18 when he interviewed you on August the 10th."

19 Q. Okay. I want to talk about the inconsistencies
20 between Vanessa Smith's testimony and the crime scene.

21 If you'll turn to your report on page 16.

22 A. Okay.

23 Q. Can you tell me a little bit about what the
24 inconsistencies were between her testimony and the crime
25 scene?

0 9 : 5 5 1 A. Right. So this would be from the middle of
0 9 : 5 5 2 page 16, where I've summarized this.

0 9 : 5 5 3 And, basically, it's that the -- Ms. Smith's
0 9 : 5 5 4 testimony was just not physically -- I mean, this would be
0 9 : 5 5 5 the argument, and I think it's accurate, that her testimony
0 9 : 5 5 6 was not physically or medically possible.

0 9 : 5 5 7 For example, she described -- throughout this
0 9 : 5 5 8 night after Mr. Gailey was shot, she described Mr. Gailey
0 9 : 5 5 9 making some movements reacting to rocks being thrown at him
0 9 : 5 5 10 for hours after the shooting.

0 9 : 5 5 11 And based on the testimony from Dr. Butts,
0 9 : 5 5 12 Mr. Gailey, in his opinion, would have lost consciousness
0 9 : 5 5 13 within two or three minutes because of the nature of these
0 9 : 5 5 14 injuries. So that's just, you know, not -- not going to
0 9 : 5 6 15 happen.

0 9 : 5 6 16 So -- and the other thing was the firing of the
0 9 : 5 6 17 .45.

0 9 : 5 6 18 So -- let me backup. So when she -- like we were
0 9 : 5 6 19 just talking a second ago, when she testified that they were
0 9 : 5 6 20 leaving the forest, they were almost out, she heard shots
0 9 : 5 6 21 from a .45.

0 9 : 5 6 22 She used some words to the effect of -- I think it
0 9 : 5 6 23 was an assumption that it was Mr. Gailey. But she clearly
0 9 : 5 6 24 in there and in other places in her testimony and statements
0 9 : 5 6 25 testified she knew what a .45 sounded like, she knew what a

1 sawed-off shotgun was, and she was able to describe these
2 things.

3 So here we are in the early morning hours or late
4 night hours, two people leaving the forest, and you hear
5 these .45 shots, which are very distinctive. I mean, a .45
6 is very loud. The sound carries for a very long way.

7 And so, you know, her conclusion, even though
8 phrased as an assumption, was he was firing his .45. That's
9 what her state of mind was at that time.

10 Well, that is -- that was physically and medically
11 impossible. Because, physically, Mr. Gailey was deceased;
12 not only unconscious within a few minutes, but probably he
13 passed away, at most, I think Dr. Butts said, in an hour or
14 two.

15 And then with a semiautomatic handgun like a
16 .45, like this was, there would have been shell casings
17 ejected. So if there were several shots from this .45, then
18 there would have been .45 shell casings. And they were not
19 there.

20 So that's basically what I mean by the
21 inconsistencies in that paragraph.

22 Q. And you included some additional details in your
23 2024 supplement, which is Defense Exhibit 44. And I'm
24 looking at page 2 of that report regarding the crime scene.

25 Did you also reach some opinions about the bloody

1 knife found at the crime scene?

2 A. Can you tell me which -- you're saying page 2
3 of 44?

4 Q. Yes. I'm looking at the second paragraph up from
5 the bottom.

6 A. The one that starts "Mr. Anderson testified..."?

7 Q. "Mr. Atkinson" --

8 A. I mean, "Atkinson testified..."

9 Q. Yes.

10 A. Yeah. So I was pointing out there, in my review
11 of Mr. Atkinson's deposition earlier this year, that, among
12 other things, he did not cross-examine any law enforcement
13 personnel about the bloody knife that was found at the crime
14 scene.

15 So, to me, that was an extremely significant fact
16 because you had an open locked-blade knife not too far from
17 his body on top of the bag.

18 And when you look at the lab reports, you can see
19 that the state -- the SBI lab did a phenolphthalein -- and
20 don't ask me how to spell that -- a phenolphthalein test,
21 which is a positive or negative for blood.

22 And they did -- it looked like, when I looked at
23 the diagram, maybe five or six places, both on the handle
24 and on the blade of the knife, that showed positive for
25 blood.

1 Now, they not only did the phenolphthalein, but
2 they did the next test, that Takayama, which would be more
3 significant for human blood.

4 So that's -- there's somebody's blood on there.
5 The lab confirmed it was blood, but, for some reason, they
6 canceled the request to do DNA testing on that.

7 So just -- I don't know. That just seemed like a
8 bizarre thing because there was no description by Ms. Smith
9 in any of her statements or any of her testimony about
10 Mr. Gailey having this knife out.

11 And there was another witness, somebody who knew
12 Mr. Gailey well, either told the police or testified that
13 that was Mr. Gailey's knife. So there was information that
14 that was Mr. Gailey's knife, not -- not anything associated
15 with Scott Allen.

16 So it would have been not only important to -- for
17 Ms. Smith to have said what -- what is this knife doing out
18 with blood on it but, you know, what -- whose -- whose blood
19 is on there?

20 You know, so it's just very significant in terms
21 of actually how this situation went down.

22 Q. And that would have been a question that you would
23 have expected counsel to ask Ms. Smith as well; is that
24 right?

25 A. Right. Yeah. It would be something -- something

1 to the effect of, "Ms. Smith, you've told this jury what
2 happened, what you could see, what you could hear. And it
3 sounded like, Ms. Smith, that this all happened pretty
4 quickly; is that right? And that there was nothing going on
5 before the shots from the shotgun before you said Scott
6 either pushed you or pulled you down or whatever. And
7 Ms. Smith, did you see Mr. Gailey with a knife? Did you see
8 Mr. Allen with a knife? Do you have any explanation as to
9 why a knife was found a few feet away from Mr. Gailey's
10 body?"

11 You know, questions like that. You sort of break
12 it down one by one because it's a question asked in good
13 faith; it's from the crime scene. I think by the time she
14 testified, the crime scene people had probably already
15 testified, as I recall that that was there.

16 So, yeah, it would be very important to ask her
17 about it. Yeah.

18 **Q.** And I want to -- you mentioned that the -- the
19 request for further testing of the knife was canceled.

20 **MS. WARREN:** I'm going to approach.

21 I'm marking as Defense Exhibit 45 what was the
22 Exhibit 85 to the second supplemental MAR. It is an SBI
23 Molecular Genetic Section telephone log from July 30th of
24 1999, which you reviewed.

25 Your Honor, may I approach?

1 **THE COURT:** Yes, you may.

2 **MR. VLAHOS:** Your Honor, state would like to
3 object and like to be heard about that.

4 **THE COURT:** All right. I will hear you.

5 **MR. VLAHOS:** Your Honor, the exhibit is not only
6 unauthenticated, it's got hearsay within hearsay in it, so
7 not really reliable. It was from trial counsels' files, so
8 we understand that, but I just want to put that on the
9 record. No hearsay, and it should be admitted for the
10 truth.

11 **THE COURT:** All right. The objection is duly
12 noted and overruled.

13 **Q.** Mr. Rabil, in that note regarding a telephone call
14 on July 30 of 1999, towards the end of that handwritten
15 note, does it say something about testing of the knife?

16 **A.** Yeah. In the -- there's, like, three blocks on
17 this Exhibit 45. And towards the bottom of the first block,
18 it says, "No need for DNA at this time. I told him I would
19 collect blood and keep it in bag with knife."

20 **Q.** Okay.

21 **A.** That -- I'd forgotten it said I would collect
22 blood and keep it in bag with knife, which is kind of
23 problematic in and of itself.

24 **Q.** Is that also how you would properly keep those
25 pieces of evidence?

1 Q. You know, I'll actually have you look at Defense
2 Exhibit 1-1, which is the printed copy of Mr. Atkinson's
3 deposition testimony.

4 A. I also have a copy of his deposition up here.

5 Q. If you have one in your files -- unless the Court
6 objects to him looking at that copy of the transcript.

7 THE COURT: Does the state object?

8 MR. VLAHOS: The state does not object,
9 Your Honor.

10 THE COURT: The Court does not object.

11 A. It's the deposition of Carl Atkinson on
12 January 24th, 2024, right?

13 Q. January 25th.

14 A. I'm sorry. 25th.

15 Q. Yes.

16 Would you look on page 44 of that deposition,
17 please.

18 A. Right.

19 Okay.

20 Q. And in the middle of that page, on lines 12
21 through 16, when asked, did Mr. Atkinson provide any
22 strategic reasons for not cross-examining Vanessa Smith
23 about the crime scene evidence?

24 A. No.

25 Q. Could you turn to page 37, please.

1 Q. Could you please turn to page 43.

2 A. Okay.

3 Q. Would you look at -- and I know you've reviewed

4 this, but if you can read -- actually, it begins on page 42,

5 line 24, all the way through page 44, line 16.

6 A. Okay.

7 Q. If you'll read that to yourself.

8 A. Okay.

9 To myself?

10 Q. Yes.

11 A. All right.

12 Q. 42, line 24, through 44, line 16.

13 A. Right. I got down to line 16 and --

14 Q. On page 44?

15 A. Yeah. And I'm -- I just want to make sure I'm

16 remembering what he's referring to in the question on

17 line 14.

18 Says not -- any strategic decisions about

19 cross-examining Vanessa Smith about this evidence? And he

20 said, "I do not."

21 So this evidence here, we're talking about the

22 .45 --

23 Q. Casings?

24 A. -- rounds scattered around?

25 Q. Yes.

2 A. Yeah. It -- actually, I think a little bit before
3 I started reading, it was a reference to one spent .45
4 round, and the rest being scattered around. So that's what
5 he said; he didn't have a strategic reason for not asking
6 about it.

8 || A. Okay.

12 **MR. VLAHOS:** Objection to what Atkinson or Oldham
13 thought.

15 **Q.** If you'd continue reading on page 44.

19 MS. WARREN: If I may retrieve those from the
20 clerk?

22 || **MS. WARREN:** May I approach the witness?

24 **A.** Thank you.

25 Q. All right. I've just handed to you Defense

1 Exhibit 1-2, which is the printout of the defense exhibits
2 of Mr. Atkinson's deposition, which is also provided
3 electronically on the flash drive at Defense Exhibit 1.

4 A. Right.

5 Q. And on page 44 of Mr. Atkinson's deposition, was
6 he asked questions about Defense Exhibit Number 2, at
7 line 18?

8 A. Yes. And -- right.

9 Q. And if you'd look at Defense Exhibit 2, which is
10 the second page of that 1-2 exhibit --

11 A. Okay. There's 1- -- 1 dash threw me off. I was
12 trying to figure out what was Defendant's 2. So for the
13 deposition, it was 1-2.

14 Q. For the deposition, it was Defense Exhibit 2.

15 For the purposes of this hearing, the deposition
16 exhibits as a group are 1-2.

17 A. Okay. All right.

18 Q. So Defense Exhibit 1-2 at this hearing includes
19 Defense Exhibits 1 through 5 from Mr. Atkinson's trial
20 [sic].

21 A. I'm glad you know. Okay.

22 Q. I know. We're all dealing with a lot of numbers.

23 A. This looks like the exhibits I looked at when I
24 was reading his deposition. And on the second page of that,
25 at the top, it says Defendant's 2 -- Exhibit Defendant's 2.

1 Q. And circled item number 5 in the middle of that
2 page, does it say, "Items scattered around, how got there"?

3 A. Yes.

4 Q. And if you'd look at Defense Exhibit 4 in the
5 packet that you're currently holding. I'll have you turn to
6 Defense Exhibit 4.

7 If you continue reading on the transcript, which
8 is defense -- if you would keep reading on page 44, from
9 line 25, through page 45, line 17.

10 A. Okay.

11 Q. And is that Mr. Atkinson talking about his notes
12 in Defense Exhibit 4?

13 A. Yeah. That's what it says. And I'm trying to
14 find that reference on Exhibit 4.

15 Q. Exhibit 4 is two pages. And if you'll look in the
16 middle of the second page which has the Bates stamp 0887 at
17 the bottom.

18 A. I see it now. Thank you.

19 Q. Yes.

20 A. It's "Way items scattered around body."

21 Q. Yes.

22 Did Mr. Atkinson acknowledge that he had questions
23 about that at the time?

24 A. Yes. In answer to the question whether he had --
25 whether he was concerned about what all that meant, he said

1 yes.

2 Q. And as you continue down page 45, when he was
3 asked -- line 45 -- sorry -- page 45, line 18, throughout
4 page 46, line 3.

5 When Mr. Atkinson was asked if he had any
6 strategic reason for not asking law enforcement officers
7 about the crime scene evidence, did he provide one?

8 A. He said, "I cannot. I cannot think of a reason
9 why -- why we -- it was in our mind at the time, why we
10 didn't."

11 Q. Uh-huh.

12 And did he also acknowledge that all of the
13 questions about the crime scene were based on the discovery
14 that he received and was in his file?

15 That's at page 46, lines 4 through 8.

16 A. Yeah. He said, "That is correct."

17 Q. And he, in fact, identified his contemporaneous
18 pretrial notes at Exhibits 2 and 4 that had questions about
19 this evidence?

20 A. Right. That's what I'm looking at,
21 Defendant's 1-2 for this hearing.

22 Q. And you heard Mr. Oldham's testimony?

23 A. Right.

24 Q. And you also reviewed his deposition?

25 A. Yes.

1 Q. Has he provided any strategic reasons for failing
2 to cross-examine Vanessa Smith about the discrepancies
3 between the crime scene evidence and her testimony?

4 A. No.

5 Q. Did you hear him on cross-examination when the
6 state suggested that she had her head down, and that might
7 be a reason not to ask her?

8 A. Yeah. Yes.

9 Q. Is that a reason not to ask a witness about
10 information that they might have about an event that they
11 witnessed?

12 A. No. You would want to make it very clear for the
13 jury that -- what senses was this person using to see or
14 hear or know? You know, how do they derive their knowledge?

15 And so even though she said, as I recall,
16 something about her head being down, and even though it was
17 supposedly dark, you know, you want to make sure that you
18 know what the limitations were.

19 Did she open her eyes at all? Where was -- we
20 know that Mr. Gailey had a flashlight. Was that shining on?
21 So we'd want to go through a lot of these details, you know,
22 even -- like probably -- and I don't know the answer to
23 this, but if I were trying the case, I would -- what was the
24 other lighting? You know, was it cloudy out? Was there
25 moonlight? We know it's in the middle of the woods, but was

1 there any lighting coming from that cabin? I don't think
2 there was because I don't think it had -- well, I don't --
3 trying to remember from being out there. I don't know if it
4 had a generator or not.

5 But those are questions. All these things,
6 everything that she could hear. Even when things are thrown
7 around, they're going to make a sound.

8 She even talked about the sound he -- that
9 Mr. Gailey made, you know, when he was shot. So there are
10 different types of perceptions, you want to cover all those.

11 Q. And is it fair to say that you don't want to
12 assume the limits of a witness's knowledge until they tell
13 them to you?

14 A. Yeah. You never know, I mean, sometimes what a
15 person may start to remember when you do slowly ask
16 questions, especially on cross-examination.

17 Q. So in your review of all of the materials that
18 trial counsel provided, their depositions, their testimony,
19 did they provide any strategic reason for not
20 cross-examining Ms. Smith about the discrepancies between
21 her story and the physical evidence at the crime scene?

22 A. Not in the depositions. I don't -- not on direct
23 examination of Mr. Oldham. Seems like on cross-examination,
24 there were discussions about reasons for not asking things,
25 you know, maybe from her statement. But they were more like

1 contemporaneous discussions of things, not trying to think
2 back at the time.

3 So when we talk about strategic reasons, we're
4 looking at reasons that were in the minds of the attorneys
5 at the time they made the decisions to do or not do
6 something.

7 Q. And if Mr. Oldham accepts the state's proposed
8 hypothetical reasons, is that an acceptable strategic
9 reason?

10 MR. VLAHOS: Objection. Outside of his expertise.

11 THE COURT: Sustained.

12 Q. Can Mr. -- according to the case law about what is
13 a strategic reason, can Mr. Oldham hypothesize about what he
14 might have been thinking at the time?

15 A. No. Even in the *State v. Allen* opinion, the
16 Supreme Court in 2021 talked about that, and they cite
17 US Supreme Court cases on that.

18 It can't be a retrospective speculation as to what
19 the reasons might have been. When analyzing the strategic
20 reason, it must be something that they decided at the time
21 or didn't decide. And if they don't remember, then they
22 don't remember.

23 Q. Uh-huh.

24 And that strategic reason -- according to our case
25 law, including North Carolina Supreme Court case law in

1 *State v. Todd* -- has to be an authentic memory of trial
2 counsel and not a justification from any other source; is
3 that right?

4 A. That's right.

5 Q. I want to talk with you about the banking and the
6 ATM records.

7 A. So --

8 Q. So I'm looking, just for the Court's reference, at
9 page 16 of Defense Exhibit 42, which is the 2022 report.
10 And I'm also looking at pages -- at page 2 of Defense
11 Exhibit 43, which is Mr. Rabil's 2024 report.

12 Mr. Rabil, what was the significance of the
13 banking and ATM records?

14 A. Well, as we heard testimony this week, you know,
15 about that, the allegation was that Ms. Smith and Mr. Allen
16 had gotten ahold of the ATM card for Mr. Gailey.

17 Q. Could you speak up just a little, please.

18 A. The allegation was that Ms. Smith and Mr. Allen
19 had gotten ahold of the ATM card for Mr. Gailey. And
20 presumably, the date of debit was July the 9th, maybe early
21 morning hours of July the 10th. But regardless, there were
22 indications that his ATM card was used after that. So it
23 was pretty significant in the case as to who was using
24 his -- Mr. Gailey's ATM card.

25 Q. I want to show you -- you reviewed the

1 Wachovia Bank records of Mr. Gailey; is that correct?

2 A. It's been a while, but, yeah, I looked at all
3 those, you know, over the last couple years.

4 Q. I'd like to show the witness what's been
5 previously admitted as Defense Exhibit 32.

6 MS. WARREN: If I may retrieve that from the
7 clerk.

8 And that was in trial counsels' files at P002183
9 to 97.

10 THE COURT: You may.

11 MS. WARREN: Thank you.

12 Your Honor, may I approach the witness?

13 THE COURT: Well, it's close enough for us to take
14 a recess at this point, so I'll let you do that after the
15 break.

16 MS. WARREN: Okay.

17 THE COURT: The witness may step down.

18 Mr. Bailiff, we'll take a ten-minute recess.

19 (Recess.)

20 THE COURT: The defendant is present with his
21 lawyers.

22 The witness will please retake the stand. And
23 recall that you are still under oath.

24 MS. WARREN: Your Honor, may I approach the
25 witness with Defense Exhibit 32?

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1 **THE COURT:** Yes.

2 **Q.** Mr. Rabil, are those the Wachovia Bank records

3 that you've reviewed in preparing your report?

4 **A.** Yes.

5 **Q.** And if you'd look on page 17 of your report.

6 **A.** Yes.

7 **Q.** Actually, I'm sorry, I'm still at the bottom of

8 page 16.

9 **A.** Okay.

10 **Q.** Does that -- does that exhibit include records

11 that suggest a transaction at the -- in Albermarle on

12 July 12th, 1999?

13 **A.** Right.

14 **Q.** And is that on page 8 of the exhibit you're

15 holding with the stamp on the bottom 001016?

16 **A.** I'm not sure that I have the same --

17 The first page of Defendant's 32 has 001009.

18 **Q.** Yes. Can you go eight pages in, to 001016.

19 **A.** 016. Okay.

20 I'm there.

21 **Q.** And does that appear to be a transaction in

22 Albermarle?

23 **A.** Yes.

24 **Q.** And looking at that system date, is that

25 July 12th, 1999?

[illegible]

1 A. Yes, it is.

2 Q. And would you turn to the next page.

3 A. Right.

4 Q. Is that another transaction from Albermarle?

5 A. Yes.

6 Q. The system date is also July 12th, 1999?

7 A. That's correct.

8 Q. And the next page, does that show the same thing,

9 a July 12th, 1999, transaction in Albermarle?

0 A. It does.

1 Q. Would you turn to the next page, please, 1019 at

2 the bottom.

3 A. Okay.

4 Q. Is that the transaction at a Citgo in Shallotte on

5 July 13, 1999?

6 A. It is.

7 Q. And the next page, 1020 --

8 A. Okay.

9 Q. -- is that another transaction at a Citgo in

0 Shallotte on July 13, 1999?

1 A. Yes.

2 Q. The next page, 1021 --

3 A. Okay.

4 Q. -- is that a transaction in Rowland on July 14th,

5 1999?

2 Q. Were Ms. Smith -- according to Ms. Smith's story,
3 was she and Mr. Allen together on July 12th, 13th, and 14th
4 of 1999?

6 **THE COURT:** Overruled.

8 **Q.** And how do you know that?

9 A. From reading her -- I'm trying to remember if it
10 was her statements or her testimony. Oh, it's -- yeah, in
11 her testimony. You know.

12 **Q.** So she testified that they had already parted
13 ways?

14 A. Right. In my report, I've noted on page 16, in
15 the bottom paragraph, "Allen and Smith parted ways on
16 July 12th with Allen going to Denver, citing transcript
17 page 1565, and Smith to Albermarle, citing transcript
18 page 1754."

19 Q. And was that also substantiated by an apparent
20 receipt for some property for Scott Allen under the name
21 Byron Johnson?

22 **A.** Yes. There was some receipt that was talked about
23 here yesterday for this Byron Johnson, the name Mr. Allen
24 was using with a fake driver's license.

25 Q. Uh-huh.

1 You heard Pete Oldham's testimony. Did he provide
2 any strategic reasons for failing to cross-examine
3 Vanessa Smith about the ATM records?

4 A. No.

5 Q. And you reviewed Will Atkinson's deposition.

6 A. Right.

7 Q. Would you take a look at Mr. Atkinson's
8 deposition, Defense Exhibit 1-1.

9 If you'd go to page 32, please.

10 A. Oh, the deposition itself? Okay.

11 Q. Yes.

12 A. 32?

13 Q. Yes.

14 A. Okay.

15 Q. Would you read on page 32, line 17, to page 33,
16 line 22.

17 A. Okay.

18 Q. Did Mr. Atkinson agree that it was important to
19 ask Vanessa Smith about this evidence?

20 A. Right. He did. He -- on line 10, he answered the
21 question "Yes" as to it would have been important to show
22 why that wasn't true, that is about the -- these dates and
23 everything with the ATM cards.

24 I'm sorry. I'm getting too --

25 Q. If you can speak up, please.

1 A. Sure.

2 Q. And did he provide any strategic reason for
3 failing to cross-examine Vanessa Smith about the ATM
4 records?

5 A. No. I mean, on page 32, line 21, he said
6 something about I think the evidence was clear that she had
7 been doing it. But that's not really a strategic reason,
8 which he says he didn't.

9 He said, "I cannot answer as to why we did or did
10 not delve into those ATM cards further."

11 And then, "So as to whether you can remember a
12 strategic reason regarding the ATM cards, your answer is
13 no?"

14 He said, "That would be correct."

15 Q. And was there any evidence in front of the jury
16 that Vanessa Smith had been the one using the ATM card?

17 A. Other than her? No.

18 Q. And her testimony was that Scott had forced her to
19 use the ATM card?

20 A. That's right.

21 Q. The state suggested in cross-examination of
22 Mr. Oldham that maybe Vanessa Smith hadn't seen the banking
23 records, didn't know about them.

24 Would that matter?

25 A. No. There are -- there are ways to use records,

1 lots of documents, to -- you know, one way is to refresh
2 recollection. Another is to just confront the witness with
3 the record. I mean, you don't know how it's going to work
4 or which way of approach is going to work until you -- until
5 you try.

6 Q. And is it important for the jury, whether or not
7 you successfully admit a record, to see that you're holding
8 on to something when you ask a question?

9 A. Yes. I mean, it establishes your credibility.
10 And here, it was -- those records were admitted -- I can't
11 remember -- it might have been after she testified when they
12 were admitted. But they were going to be coming in any way.
13 They were provided through discovery. You could use them
14 regardless because you have a good faith basis. That would
15 be the test whether you bring in something on
16 cross-examination, asking questions.

17 Q. Is it common to use documents on cross-examination
18 that aren't formally admitted?

19 A. That's a lot of cross-examination.

20 And I might -- in further answer to that question,
21 I mean, it's -- for the defense, you're always, you know,
22 thinking, am I admitting -- is this crossing the line and
23 admitting evidence.

24 And the case law on that is, no, you can use
25 documents for impeachment of a witness on the -- on the

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1 points that are arising in the case, and that's not waiving
2 your right to closing argument.
3 Q. Okay. Was that something that Pete testified he
4 had been considering?
5 A. You mean closing argument?
6 Q. Yes.
7 A. I think he did, but I -- I can't say. I have to
8 look at my notes.
9 Q. The transcript will answer that question; is that
10 fair?
11 A. Sorry about that.
12 Q. I want to talk about Barry Bunting and the ATM
13 records.
14 So I'm looking at page 19 of your 2022 report,
15 pages 2 to 3 of your 2024 report.
16 A. Okay.
17 Q. Was Mr. Bunting responsible for the initial
18 investigation, including requesting some evidence relating
19 to the ATM transactions?
20 A. That's right.
21 Q. And did he testify on voir dire that he had not
22 requested all of the ATM records?
23 A. Right. During the trial, there was a voir dire
24 hearing. There was a lot of back and forth about these --
25 the ATM records and the ATM videos. And Mr. Bunting

1 testified about that, yeah.

2 Q. Did Pete -- sorry -- Mr. Oldham provide any reason
3 for not asking Barry Bunting in front of the jury about his
4 failure to request all of those records?

5 A. No.

6 Q. And did Mr. Atkinson provide any strategic reason
7 for not asking Barry Bunting in front of the jury about
8 failing to request all of these records?

9 A. No.

10 Q. And would you look on the page, you should have
11 opened in Mr. Atkinson's deposition, page 33.

12 A. Okay.

13 Q. Would you please read line 23 of page 33 --

14 A. Okay.

15 Q. -- through line 1 of page 35.

16 So the bottom of 33 through the top of 35.

17 A. Okay.

18 Okay.

19 Q. When asked, did Mr. Atkinson provide any strategic
20 reason for failing to cross-examine Barry Bunting about the
21 collection of all of the videos of ATM transactions in front
22 of the jury?

23 A. I'm sorry. Was he asked about it?

24 Q. When asked, did Mr. Atkinson provide any strategic
25 reason for failing to ask Barry Bunting about his

1 investigation of the ATM withdrawals in front of the jury?

2 A. He said he couldn't think of any reason.

3 Q. And did he provide -- by "he," I mean

4 Mr. Atkinson -- provide any strategic reason for failing to
5 cross Barry Bunting in front of the jury about the fact that
6 the video evidence he had collected did not show Scott Allen
7 or Vanessa Smith?

8 A. No.

9 I'm sorry. So, yeah. And so, therefore, there
10 was no evidence about that in front of the jury about
11 Mr. Bunting's testimony about the videos.

12 Q. I'm sorry, speak up, please.

13 A. There was no testimony in front of the jury -- I
14 think is what you're asking me -- about strategic reasons to
15 not ask in front of the jury. So that never came out.

16 Q. So on voir dire, outside the presence of the jury,
17 trial counsel learned that Barry Bunting had not even sought
18 to collect all of the possible ATM evidence?

19 A. That's right.

20 Q. And they never asked that question in front of the
21 jury?

22 A. That's right.

23 Q. And they've not provided any strategic reason for
24 not doing that?

25 A. That's right.

1 Q. And would that evidence have been important to
2 undermine Vanessa Smith's testimony?

3 A. Yeah. That would have been another very important
4 point. Because with cross-examination in a case where
5 there's one main witness that is the eyewitness to the
6 crime, you need to confront them not only with physical
7 evidence at the scene but also any documentary, you know,
8 records that would be timestamped with place and time to
9 show whether they're telling the truth or not.

10 Q. Would that evidence also have been important to
11 show the investigative failures in the case?

12 A. Right. The investigation -- a police or law
13 enforcement investigation and its quality or even
14 negligence -- however you want to frame it -- is always an
15 issue in a case. It's always fair game to question the
16 credibility of the investigation, as the Supreme Court
17 pointed out in *Kyles v. Whitley*.

18 Q. So sorry, would you say that case name again.

19 A. Kyles, K-Y-L-E-S.

20 Q. And Whitley is W-H-I-T-L-E-Y?

21 A. That's right.

22 Q. And why is it important to remind the jury --
23 sorry. Strike that. I'll rephrase.

24 How can deficiencies in an investigation be used
25 to undermine the state's case in front of a jury?

1 A. Well, deficiencies in the investigation impair
2 the -- sort of the fact-finder or truth-finding mission of a
3 trial. So if you don't have an adequate record of what is
4 found at a crime scene or what happens to suspects within a
5 relevant period of time, really before or after, then you
6 can't fully test their testimony. It's -- it impairs the
7 ability to cross-examine.

8 So just the whole crime scene investigation in
9 this case was not -- not well done. It was not clear. The
10 sketch was not done well. Things were not noted on there,
11 like the shotgun casings. There were --

12 Q. I want to stick with the ATM records for now.

13 A. Okay. Sorry. You know, the professor in me keeps
14 coming out. A little verbose.

15 I apologize, Your Honor.

16 Q. Did Will -- I'm sorry. I apologize. I have been
17 communicating, as the state has, with trial counsel for
18 years and so I don't mean to informally refer to them by
19 their first name. I will work to do better.

20 Did Mr. Oldham testify about some comments that
21 Barry Bunting made to him regarding Scott Allen?

22 A. Yes. That had to do with the prior church
23 break-ins case.

24 Q. And did -- according to Mr. Oldham, did
25 Barry Bunting suggest that had Scott Allen not gotten such a

1 good plea in the 1994 case, this murder may have never
2 happened?

3 MR. VLAHOS: Objection.

4 THE COURT: I'm sorry. What was the year you said
5 again?

6 MS. WARREN: The 1994 case.

7 THE COURT: Thank you.

8 Overruled.

9 Go ahead.

10 A. Was the question did -- did Barry Bunting make
11 some comment to Mr. Oldham -- I get into calling first names
12 too -- about the two cases?

13 Yeah, he blamed him, basically, for -- he blamed
14 Mr. Oldham for getting him such a good deal. I think Scott
15 had some sort of *Alford* plea and probably less time than --
16 obviously from Mr. Bunting's comment, less time than he
17 thought he should have gotten.

18 Q. And does that kind of comment suggest a possible
19 bias of Barry Bunting?

20 MR. VLAHOS: Objection.

21 THE COURT: Overruled.

22 A. Right. That would be -- it's always -- on
23 cross-examination, always proper to ask about bias. And,
24 you know, you get into -- maybe get your -- the police could
25 get their mind on a suspect because of something that

1 happened before. And maybe things went wrong, they
2 didn't -- police didn't get necessarily the right result
3 they wanted, so they're going to have more of a risk of
4 confirmation bias or tunnel vision about somebody.

5 So I think it's appropriate for that. It shows --
6 I mean, arguably shows bias, you know.

7 Q. And could it show that Mr. Bunting assumed who had
8 committed the shooting in this case?

9 A. Yeah.

10 Q. Would that have been powerful evidence in addition
11 to investigative failures?

12 A. Yeah. It all -- it all has to be looked at
13 cumulatively, right? Especially when you have the -- what,
14 in my opinion, were these investigative failures with the
15 banking records and the crime scene, right.

16 Q. And did Mr. Oldham provide any strategic reason
17 for not cross-examining Barry Bunting about his bias?

18 A. I don't believe he did. I'm trying to remember.

19 I could try to find it in my notes, but I -- I
20 know there was some discussion about it. I remember the
21 discussion, but I don't remember him providing any reason.

22 Q. Okay. Now, you just said that law enforcement can
23 make assumptions based on prior experience with someone
24 accused --

25 A. Right.

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1 Q. -- is that right?

2 In fact, was Barry Bunting involved in the 1994

3 case with Mr. Allen?

4 A. Oh, yeah. That's right. I mean, that's why this

5 comment was made. I mean, he's -- he's one of the main

6 officers in the case. He's quoted in the newspaper articles

7 about it and everything.

8 Q. Can you just speak a little louder, please.

9 A. Oh. I thought I was. Is that better right there?

10 Q. Yes.

11 I want to talk with you about Vanessa Smith's

12 statements and recantation in 1994.

13 A. Right.

14 Q. What -- what happened in the 1994 case? And I'll

15 direct you to your report --

16 Court's indulgence.

17 I'm looking on pages 2 and 3 of your 2024 report.

18 And based on your review of the documents in this

19 case, what happened in the 1994 case regarding Ms. Smith's

20 statements implicating Scott Allen?

21 A. Yeah. Excuse me. There were a number of people

22 charged in these church break-ins where people were stealing

23 speakers and microphones and things that apparently could be

24 sold to, like, bands, musicians, whatever. And a number of

25 people were charged, including Scott Allen and

1 Vanessa Smith.

2 Q. Did Vanessa Smith's first statement to law
3 enforcement, to Barry Bunting, implicate Scott Allen?

4 A. Right. It did.

5 Q. Her first statement, did it implicate Scott Allen?

6 A. Her first statement, as I recall, it did. And
7 then -- now I'm trying to remember. I know there was this
8 recantation. I'm not sure about the --

9 Q. If I can have -- it is a large exhibit.

10 A. I know I looked through that particular case.

11 Q. Hold on just a moment.

12 A. Sorry.

13 Q. Thank you.

14 MS. WARREN: May I please collect Defendant's 25
15 from the clerk?

16 THE COURT: You may.

17 MS. WARREN: May I approach the witness,
18 Your Honor?

19 THE COURT: Yes, you may.

20 MS. WARREN: May I approach the witness,
21 Your Honor?

22 THE COURT: Yes, you may.

23 Q. And I'll direct you to a page in just a moment.

24 A. Okay.

25 Q. Would you look -- it's towards the end of the

1 1 1 : 0 4 1 document. And I'm going to have you read what is

1 1 1 : 0 4 2 Bates-stamped at the bottom P003901.

1 1 1 : 0 4 3 A. Okay.

1 1 1 : 0 4 4 Q. And at the top of that document, does that have a
1 1 1 : 0 4 5 date?

1 1 1 : 0 4 6 A. Yes. 1/24/94.

1 1 1 : 0 4 7 Q. Okay. Would you -- does this appear to be a
1 1 1 : 0 4 8 statement of Vanessa Warner to Lieutenant Barry Bunting?

1 1 1 : 0 4 9 A. Right.

1 1 1 : 0 4 10 Q. And was Vanessa Warner later known as
1 1 1 : 0 4 11 Vanessa Smith?

1 1 1 : 0 5 12 A. That's right.

1 1 1 : 0 5 13 Q. Would you please read this statement on
1 1 1 : 0 5 14 January 24th of 1994 to yourself and tell me if it
1 1 1 : 0 5 15 implicates Scott Allen.

1 1 1 : 0 5 16 A. Okay.

1 1 1 : 0 6 17 Okay.

1 1 1 : 0 6 18 Q. Does that January 24th, 1994, statement implicate
1 1 1 : 0 6 19 Scott Allen?

1 1 1 : 0 6 20 A. No.

1 1 1 : 0 6 21 Q. Would you look at the next two pages of the
1 1 1 : 0 6 22 document, which are P003902 to 3903.

1 1 1 : 0 6 23 A. Okay.

1 1 1 : 0 6 24 Q. At the top of 3902, is there another date?

1 1 1 : 0 6 25 A. Yeah. February 25th, 1994. So, like, a month

1 later.

2 Q. Okay. Would you please --

3 Is this another statement by Ms. Smith?

4 A. It -- right. At the beginning, it says,
5 "Ms. Warner" -- who later is Ms. Smith -- "made the
6 following statement after being asked -- advised of her
7 rights."

8 Q. And on the second page, 3903, does it say she was
9 interviewed by Lieutenant Barry Bunting?

10 A. It does.

11 Q. And would you please read this February 25th,
12 1994, statement of Ms. Smith and tell me if it implicates
13 Scott Allen.

14 A. Okay.

15 I don't see Scott Allen's name in there.

16 Q. Okay. I'm next going to ask you to look at
17 pages -- the following pages, P003904, it's the subsequent
18 pages, all the way through 3907.

19 Before I have you read it, is that a Waiver of
20 Rights form on page 3904?

21 A. Right. Miranda rights. Uh-huh.

22 Q. And is this for Ms. Warner?

23 A. Yes.

24 Q. Vanessa Warner?

25 And what is the date on this?

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1 A. It is February 28th, 1994.

2 Q. All right. And would you please review this

3 statement made on February 28 of 1994.

4 A. Okay.

5 I read -- the first page, obviously, I mean,

6 answers the question that she implicates Scott Allen in this

7 statement of February 28, 1994.

8 Q. Okay. So that was a change from her prior

9 two statements?

10 A. That's correct.

11 Q. Did Mr. Oldham describe how Vanessa Smith came to

12 his office in this 1994 case?

13 A. Right. Even though it was unusual, as he

14 recalled, it would be unusual that she showed up without her

15 attorney. But it sounded like it was with Mr. Roose's

16 consent that she came to his office and talked to Mr. Oldham

17 and ended up signing a document in which she recanted that

18 statement about Scott Allen and the church break-ins.

19 Q. Would you look at -- it's going to be a little

20 further forward in the packet. The Bates stamp is P003896.

21 A. Okay. I'm there.

22 Q. And is there --

23 Take a look at this document.

24 Does this appear to be her recantation of her

25 February 28, 1994, statement to Barry Bunting?

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1 A. That's correct.

2 Q. And what does she say about what Barry Bunting

3 told her?

4 A. Well, she said -- referring back to the statement

5 I was just looking at a second ago, her 2/28/94 statement,

6 she said, "First sentence was written by Bunting. He told

7 me what I was going to say in the first sentence."

8 Q. Uh-huh.

9 And she says, "It wasn't Scott Allen"?

10 A. Right.

11 Q. "It was actually two other people."

12 A. Yeah. She -- yeah. She said she told Mr. Bunting

13 that or agreed with that, or however you want to phrase it,

14 because she was scared of her ex-boyfriend, Jamie Brewer.

15 Q. And Jamie Brewer was one of the people who,

16 according to Vanessa Smith, had actually been the ringleader

17 of the break-ins?

18 A. Right.

19 Q. Did she also say in the second-to-last paragraph

20 that she did not tell Barry Bunting that Scott had been

21 bragging about breaking into Marlboro Friends Church?

22 A. Yes.

23 Q. And Mr. Oldham remembered that church in

24 particular, right?

25 A. I think he said that was the sheriff's church.

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1 Q. Uh-huh.

2 And Vanessa Smith said in 1994 that Scott never

3 made any admission to her about breaking into any church; is

4 that right?

5 A. Correct.

6 Q. And is there a date on this document in the middle

7 of the page?

8 A. Right. September 2nd, 1994.

9 Q. Uh-huh.

10 Is it often that you have a recantation in a prior

11 case from a testifying co-defendant in a murder case several

12 years later?

13 A. No. I mean, I'm trying to -- maybe in my career,

14 but I don't think I've ever seen another one.

15 Q. Would that be something that would really stand

16 out in your mind as a defense attorney?

17 A. Yeah. Because this -- Vanessa Warner Smith is the

18 key witness in this case, or was the key witness in this

19 case. And if you, as the defense attorney, have evidence

20 that she has signed a statement admitting that she lied

21 about your client in a prior case, that's -- that's pretty

22 significant.

23 Q. And would it be significant that she was

24 influenced by one of the investigating officers in the

25 current 1999 case?

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1 A. Right. It's exactly the same officer.

2 Q. When Pete was initially asked by me on direct

3 examination if he had any strategic reason for not asking

4 Ms. Smith about this recantation, do you recall if he

5 provided a reason on direct examination?

6 A. In -- you mean this week?

7 Q. Yeah.

8 A. I cannot remember what he said.

9 Q. Okay. And you reviewed Mr. Oldham's deposition as

10 well.

11 A. Mr. Oldham's deposition, that's right, yeah.

12 Q. Yes.

13 In looking at your 2024 report on page 2, if

14 you'll look at the second paragraph, kind of in the middle

15 of the paragraph.

16 During that deposition, did Mr. Oldham provide any

17 strategic reason for not cross-examining Vanessa Smith about

18 her 1994 recantation?

19 A. Was I -- did I have that in the second paragraph

20 there?

21 Q. Yes. It's one, two -- line 5 of the second

22 paragraph.

23 A. Okay. Yeah. So he -- he testified that he could

24 not recall any strategic reason for not bringing that up.

25 And I think that's essentially what he said here in court.

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1 Q. On his direct examination?

2 A. Right.

3 Q. And did you hear during cross-examination that the

4 state asked about the risk of bringing in evidence regarding

5 Mr. Allen's prior convictions?

6 A. Yeah.

7 Q. And did -- did Mr. Oldham, in your recollection,

8 answer something along the lines of he didn't want to bring

9 that fact up?

10 A. Correct.

11 Q. You reviewed the trial transcript?

12 A. Yes.

13 Q. And prior to closing arguments in this case, the

14 jury heard Mr. Poole, Mr. Chris Poole read in the statements

15 of Vanessa Smith.

16 Do you remember that portion of the testimony?

17 A. Yes.

18 Q. And those statements included that Scott Allen was

19 on escape status for a prior conviction, didn't they?

20 A. That's right.

21 Q. So the jury knew that evidence?

22 A. That's right.

23 Q. And you also reviewed the closing arguments,

24 right?

25 A. Yes.

1 Q. And did the state argue in closing that Mr. Allen
2 was on escape status?

3 A. As I recall, they argued that was a motive.

4 Q. Uh-huh.

5 So the jury knew that Mr. Allen had a prior
6 conviction?

7 A. Right.

8 Q. In your experience, when a jury knows about a
9 prior conviction, can they sometimes -- can they speculate
10 about what that conviction might be?

11 MR. VLAHOS: Objection.

12 THE COURT: Overruled.

13 You may answer.

14 A. Yeah, that's the fear. I mean, if -- when you
15 have a situation like this where the fact is coming out that
16 a person is on escape or that there's evidence of a prior
17 conviction, you're better off not letting the imagination
18 run wild and just going ahead and bringing it up,
19 especially -- well, when you have a recantation like this
20 when you have the same thing happening again.

21 Q. And this recantation would have been relevant to
22 Vanessa Smith's credibility; is that right?

23 A. Right.

24 Q. It also would have been relevant to
25 Barry Bunting's bias?

1 A. That's right.

2 Q. And it might be relevant again to the
3 investigation of the case?

4 A. Correct.

5 Q. Now, you reviewed Will Atkinson's deposition as
6 well. And I'm going to direct you back to two exhibits, so
7 I'd like you to pull up in your hands both his transcript,
8 which is Defense Exhibit 1-1, and the defense exhibits,
9 which are 1-2, Defense Exhibit 1-2 for the purposes of this
10 hearing.

11 A. Okay. I have his deposition, and I have 1-2.

12 Q. Thank you.

13 Would you please turn to page 23 of 1-1.

14 A. Okay.

15 Q. And would you read page 23 -- actually, I'll have
16 you go all the way up to page 22.

17 Would you read line 12 on page 22 all the way
18 through line 18 of page 24.

19 A. Okay.

20 Okay.

21 Q. Is that Mr. Atkinson's testimony about the 1994
22 recantation?

23 A. Yes, it is.

24 Q. And does he identify his handwritten notes about
25 this?

1 A. Right. Defendant's 1, which is part of -- part of
2 Defendant's 1-1.

3 Q. Would you take a look at that.

4 He identified that as his handwriting?

5 A. Yes.

6 Q. And his pretrial notes?

7 A. Correct.

8 Q. And what does that handwritten note say, which is
9 on the first page of Defense Exhibit 1-2?

10 A. It says, "Recanted" -- I think his -- "recanted on
11 stand concerning church break-ins. How" -- I'm not sure
12 what the word is. How --

13 Q. Is that "How else"?

14 A. Oh. Maybe. How else -- how get in?

15 Q. And did -- did Mr. Atkinson agree that, at the
16 time of trial, he thought that the recantation was important
17 evidence?

18 A. Yes.

19 Q. Did he describe discussing it with other people?

20 A. Yes.

21 Q. And did he provide any strategic reason that he
22 had in 2003 for not cross-examining Vanessa Smith with her
23 prior recantation?

24 A. No. He said, "I cannot recall anything, any
25 reason now."

1 Q. There was evidence in trial counsel's file that
2 Vanessa Smith hadn't just changed her story in 1994, but
3 she'd also changed it in 1999; is that right?

4 A. Yeah.

5 Q. And what evidence was that?

6 A. What do you mean? Other than what we just talked
7 about?

8 Q. Yeah. There was a letter from Vanessa Smith in
9 trial counsel's file.

10 A. Another letter? Better refresh my recollection.

11 Q. All right. Will you go to -- in Mr. Atkinson's
12 deposition --

13 A. Yeah.

14 Q. -- I'm going to direct you to page 117.

15 A. Okay.

16 Q. And. Actually, before I do this, I believe this
17 is actually one of the state's exhibits from the deposition,
18 which for the clerk is going to be 1-3, Defense Exhibit 1-3
19 in this hearing.

20 MS. WARREN: And, Your Honor, may I approach the
21 clerk?

22 THE COURT: Yes.

23 MS. WARREN: May I approach the witness?

24 THE COURT: Yes, you may.

25 Q. Mr. Rabil, I've just handed you Defense

1 Exhibit 1-3, which, for the record, is the state's admitted
2 exhibits from Will Atkinson's January 25th, 2024,
3 deposition.

4 I've turned to the page which was the state's
5 Exhibit 5 in Mr. Atkinson's deposition.

6 And would you read the Bates number on the bottom
7 of that, please.

8 A. Yes. It's P000643.

9 And it goes to the next page.

10 Q. And --

11 A. Yeah, I remember this one. I thought you said
12 another 1994 letter, and I was, like -- I didn't remember
13 another one. I remember the White Chocolate letter, is what
14 you're talking about here.

15 Q. There you go.

16 Is this the White Chocolate letter?

17 A. It's the letter that we've referred to as the
18 White Chocolate letter because that's how it's signed.

19 Q. And did this letter on the second page include a
20 statement that said, "We are innocent"?

21 A. Yes.

22 Q. And did the letter include identifying features
23 suggesting that it was written by Vanessa Smith?

24 MR. VLAHOS: Objection. Calls for speculation.

25 THE COURT: Sustained.

1 1 1 : 2 4 1 Q. Would you look at deposition page 118.

1 1 1 : 2 5 2 A. For Mr. Atkinson?

1 1 1 : 2 5 3 Q. Yes.

1 1 1 : 2 5 4 A. Okay.

1 1 1 : 2 5 5 Q. And at lines 16 to 17 --

1 1 1 : 2 5 6 A. Right.

1 1 1 : 2 5 7 Q. -- did Mr. Atkinson describe that Vanessa's

1 1 1 : 2 5 8 nickname was White Chocolate?

1 1 1 : 2 5 9 A. He said, "There's no signature. That was her --

1 1 1 : 2 5 10 Vanessa's nickname, White Chocolate."

1 1 1 : 2 5 11 Q. Okay.

1 1 1 : 2 5 12 THE COURT: I'm sorry. That was page 118?

1 1 1 : 2 5 13 MS. WARREN: Yes. At lines 16 to 17, Your Honor.

1 1 1 : 2 5 14 THE COURT: Thank you.

1 1 1 : 2 5 15 Q. And does Mr. Atkinson describe at lines 21 through

1 1 1 : 2 5 16 24 the contents of that letter?

1 1 1 : 2 5 17 A. Yes.

1 1 1 : 2 6 18 Q. Would you turn to page 119 and look at line 20 --

1 1 1 : 2 6 19 A. Okay.

1 1 1 : 2 6 20 Q. -- through 120, line 4.

1 1 1 : 2 6 21 And did Mr. Atkinson say that he received this

1 1 1 : 2 6 22 letter before trial started?

1 1 1 : 2 6 23 A. He said, "I don't think that trial had started."

1 1 1 : 2 6 24 Q. Okay.

1 1 1 : 2 6 25 A. "But I don't think the trial had started."

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1 Q. Uh-huh.
2 If you'll go back to page 28 of the deposition
3 transcript --
4 A. Okay.
5 Q. -- looking at line 17, through page 29, line 5 --
6 actually, I'll go all the way down to line 17 on page 29.
7 If you would read --
8 A. How far down?
9 Q. -- to line 17 --
10 A. Okay.
11 Q. -- on page 29.
12 A. Okay.
13 Q. Mr. Atkinson was asked repeatedly about any
14 strategic reason for not cross-examining Ms. Smith with this
15 letter.
16 Did he provide one?
17 A. No. He said, "I do not remember any such reason."
18 Q. Okay. And in Mr. Oldham's testimony today, did he
19 provide any reason?
20 And I apologize, not today, but in this hearing.
21 A. No, I don't think so.
22 Q. Did both trial counsel say that it would have been
23 important to ask Vanessa Smith about all of the
24 inconsistencies in her testimony?
25 A. Yeah.

1 Q. And all of the reasons that she might be lying?

2 A. Right. Because they were -- like Mr. Oldham
3 testified here, they were trying to show her motive for
4 lying, so try to get everything about her inconsistencies of
5 why she was doing things.

6 Q. Mr. Rabil, in order to cross-examine Vanessa Smith
7 with that White Chocolate letter that's in Defense
8 Exhibit 1-3, which you were looking at, would trial counsel
9 have needed to authenticate that letter?

10 A. No. No. You would just -- on cross-examination,
11 you'd have this letter in your hand, and you'd say,
12 "Ms. Smith, do you sometimes go by the nickname
13 White Chocolate? And did you write a letter to Scott Allen
14 while you were in the jail here?" And then just take it
15 from there. "And in that letter, didn't you say this, this,
16 and this? And on the second page, did you not say, 'We are
17 innocent'?"

18 And you don't even need to get the letter in. You
19 just can ask the questions because it's a prior statement of
20 hers, and it goes to the core of the case because both are
21 charged with the murder.

22 Q. And if the witness denies knowledge of the letter,
23 you can --

24 MR. VLAHOS: Objection, Your Honor. Got to go
25 back as the description of it as a prior statement of hers,

1 any authentication on it. So I'd object to that
2 characterization of it. I'm sorry.

3 **THE COURT:** There was some evidence about Atkinson
4 conceding that Vanessa went by White Chocolate that they
5 just got in.

6 **MR. VLAHOS:** Yes, Your Honor. But there's nothing
7 saying that the person who wrote "White Chocolate" on that
8 page was Vanessa Smith. It's not signed, notarized by
9 Vanessa Smith. It's not acknowledging -- nobody testified
10 they took her interview and that's what she said. It's
11 somebody who wrote out something on a page that said
12 White Chocolate.

13 **THE COURT:** Do you want to be heard?

14 **MS. WARREN:** I think that Mr. Rabil is actually
15 testifying as to why that wouldn't matter.

16 **THE COURT:** So sustained.

17 Okay. Go ahead.

18 **Q.** So, Mr. Rabil, if the witness -- I'll start here.
19 Do witnesses sometimes fight with attorneys on
20 cross-examination?

21 **A.** Once in a while.

22 **Q.** Yes.

23 And is that something that you're trained to
24 handle?

25 **A.** Yeah. I mean, it's -- sometimes it's a good

1 thing, depending on, you know, strategy.

2 Q. And that, in fact, can undermine their
3 credibility; is that right?

4 A. Right.

5 Q. So if Vanessa Smith answered, "I didn't write that
6 letter," would that mean that would end all
7 cross-examination, you would be done?

8 A. No. I mean, because I would probably, I think, as
9 I just did, start out a little more generally. I didn't ask
10 her did she write this letter. I asked her did she write a
11 letter and did she go by the nickname White Chocolate; and
12 in the letter she wrote, did she say this.

13 So I wasn't really at that point laying a
14 foundation for any sort of admissibility; I was impeaching
15 her with a statement that she and Mr. Allen are innocent.

16 Q. And if --

17 A. It would be -- it wouldn't -- it's the same as if,
18 "Didn't you tell Joe somebody that the two of you are
19 innocent?" That is perfectly acceptable cross-examination.

20 Again, you have to have a good faith basis for
21 asking a question. And, you know, assuming that you had
22 such a statement. This is the same thing, only the belief
23 here is it's in -- it is her statement to Scott, so it's
24 even stronger.

25 Q. So based on Will Atkinson's testimony, trial

1 counsel would have a good faith basis?

2 A. Oh, yeah.

3 Q. It actually was in response to the state's
4 questioning that Mr. Atkinson said he knew White Chocolate
5 was her nickname, right?

6 A. Correct.

7 Q. And according to his notes, Mr. Atkinson believed
8 that this letter was from Vanessa?

9 A. Correct.

10 Q. Now, if a witness -- in your hypothetical about,
11 "Did you tell Joe that we are innocent," if a witness says
12 "No," would you ask a follow-up question?

13 A. I might, depending on the circumstances. "You
14 know Joe so-and-so, right? You've been friends for a long
15 time? He lives near you?"

16 I'd go through all the circumstances that I base
17 my belief on to try to show either maybe she just forgot
18 that she said she was innocent, you know, give her the
19 benefit of the doubt, but just take her through the
20 circumstances that would show her that I must have some
21 information that I, you know, have that shows that she made
22 this. I would go through it like that.

23 MS. WARREN: I've got just a couple more questions
24 on this before I think we could take our next break,
25 Your Honor.

1 Thank you for checking.

2 Q. If you -- would you end the line of
3 cross-examination like that typically with something along
4 the lines of, "So if Joe said you told him 'we are
5 innocent,' Joe would be lying, right"?

6 A. I might -- I might do it that way. Or I might
7 say, "And you told Joe the truth, didn't you? The two of
8 you are innocent."

9 Q. And even if the witness says "No," are you
10 demonstrating to the jury, you, as the attorney, your good
11 faith basis that there is evidence contradicting what the
12 witness is saying?

13 A. Exactly. I mean, when we teach cross-examination,
14 you know, the instructions are to use leading questions
15 generally to which you know the answer, or to which you
16 don't -- you don't really care what the answer is because
17 the information is out there. Again, if it's good-faith
18 information.

19 Q. And as to this letter, are there details in that
20 letter, the White Chocolate letter, about Vanessa's
21 relationship with Scott Allen and her current circumstances
22 that could be used to connect her to the letter?

23 MR. VLAHOS: Objection.

24 THE COURT: Overruled.

25 A. Yes. I mean, there's talk about a correspondence,

1 which I know Mr. Oldham was not approving of. You know,
2 anytime you have correspondence between your client and
3 somebody else, but, you know, "I wrote you back," it refers
4 to Joyce. Joyce is his mother, right?

5 Q. Joyce is Mr. Allen's wife.

6 A. Mr. Allen's future ex-wife. Okay.

7 And, you know, names of people they know. "I've
8 talked to Joyce quite a bit." You know, different things in
9 here that, you know, she would -- she would know that would
10 tie her to this. How much her bond was, what her situation
11 is, talking about a guilty plea.

12 I mean, there's just a lot that only -- or
13 probably not very many people in the world would match up
14 with the person who wrote this letter.

15 Q. So you would cross-examine her by asking her
16 knowledge of all of those facts that are in the letter,
17 right?

18 A. Yeah. If necessary, if she was -- if she was
19 denying that she made the statement, then you follow up with
20 a lot of those details, that's right.

21 Q. And in your experience, have you had a lot of
22 cases where a testifying co-defendant wrote a letter to your
23 client that said, "We are innocent"?

24 A. Not a lot. Maybe. Well, hardly any.

25 Q. Would that be something that would stand out in

1 your mind as strong material on cross-examination?

2 A. Yeah. This is basic fodder for cross-examination.

3 Q. Yeah.

4 Would you have a heyday with a letter like that?

5 A. I would.

6 Q. And just to be clear, as we conclude this topic,
7 neither trial counsel has provided a reason, a strategic
8 reason for not cross-examining Vanessa Smith about this
9 letter, have they?

10 MR. VLAHOS: Objection.

11 The record says what it is in the deposition.

12 THE COURT: Overruled.

13 You may answer.

14 A. Correct.

15 MS. WARREN: Your Honor, I think this would be a
16 good time for our break.

17 THE COURT: The witness may step down.

18 THE WITNESS: Thank you, Your Honor.

19 THE COURT: Mr. Bailiff, we'll take a ten-minute
20 recess.

21 (Recess.)

22 THE COURT: Let the record reflect that the
23 defendant is present in the courtroom.

24 And the witness is still under oath.

25 You may proceed.

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1 Q. Mr. Rabil, would you turn to page 17 of your 2022
2 report, which is Defense Exhibit 42.
3 A. Okay.
4 Q. My microphone is now on. Can you hear me?
5 A. Yes.
6 Q. Okay. And I know we talked a little bit about the
7 cross-examination regarding Ms. Smith's testimony at trial
8 about hearing what she believed was Chris Gailey firing
9 shots from his .45; is that right?
10 A. Yes.
11 Q. Okay. And if you'd look at -- I believe the state
12 asked -- Mr. Oldham went through some of the
13 cross-examination in which Mr. Oldham briefly asked
14 Ms. Smith about that; is that right?
15 A. Briefly.
16 Q. And did you actually consider that testimony in
17 your report in the bottom paragraph of page 17?
18 A. Yes. About the .45, the shots being fired?
19 Q. Uh-huh. Yes.
20 A. Right.
21 Q. And do you, in fact, reference the testimony that
22 the state showed Mr. Oldham in that paragraph, in the second
23 sentence of that paragraph?
24 A. Tell me what paragraph you're on. Page 17 --
25 Q. Of the last paragraph on page 17.

1 A. Second sentence, "Mr. Oldham did ask whether
2 Ms. Smith told Lieutenant Poole about Gailey firing his .45
3 as they were leaving, but he did not use those statements as
4 exhibits to confront her with this glaring omission of a
5 critical fact."

6 Q. Again, this is that standard use of documents that
7 we talked about at the start of your testimony this morning,
8 right?

9 A. Correct.

10 Q. And I believe you said he didn't use her
11 statements to Lieutenant Poole in August of 1999.

12 A. Right.

13 Q. And he also didn't use her preliminary hearing
14 testimony; is that right?

15 A. That's exactly right.

16 Q. If you'll turn to the next page.

17 On page 18, I'm looking at the top paragraph on
18 page 18.

19 Did Ms. Smith's preliminary hearing testimony say
20 that she went to Myrtle Beach with Mr. Allen?

21 A. Correct.

22 Q. And at trial, she testified that they went to
23 Shallotte?

24 A. That's right.

25 Q. And do you remember why Mr. Oldham said on

1 cross-examination by the state that he didn't ask her about
2 that?

3 A. Something, I think, about close to the
4 South Carolina line or something like that.

5 Q. Did he say he thought she might just be mistaken?

6 A. Yeah. And that -- to me -- I mean, I'm from here.
7 I'm familiar with Myrtle Beach. My sister has a beach house
8 at Sunset, which is a couple of miles from Shallotte. So I
9 know these -- I know these areas.

10 And because -- I mean -- and it sounds like the
11 attorneys knew those, too. Anybody could figure this out.

12 But you wouldn't even go to Myrtle Beach the way
13 you go to Shallotte. There would be other roads you would
14 take.

15 But the bottom line is you get a map out, measure
16 it. It's, like, 40 miles difference. Are they even in the
17 same part of a region? Sure.

18 But these are details that may at first blush
19 sound insignificant, but any detail like this, where you're
20 naming places, that's significant for a jury because you
21 just don't know what establishes reasonable doubt for
22 somebody on a jury.

23 What they are listening to -- different things
24 affect people in different ways, so this is a significant
25 one.

1 And given that this is a preliminary hearing just
2 a few months after the crime, a statement under oath,
3 Mr. Atkinson was there, he could cross-examine her. This
4 is -- it's even, in many ways, better than what Mr. Poole
5 had with the two -- is a very weird process of his --
6 anyway, this is under oath and it's transcribed.

7 And there was every opportunity to bring this out
8 about -- well, to bring lots of things out, you know, like
9 firing of the .45 and not mentioning it, it's just not in
10 there. Different details about what happened in the crime.
11 Like, you know, in one statement, she said Scott pulled her.
12 Another statement she said -- maybe in her testimony -- he
13 pushed her. And in the preliminary hearing transcript, they
14 rode back to the cabin.

15 I mean, court reporters usually get things right,
16 you know. And -- whereas police officers like Mr. Poole, I
17 wouldn't know --

18 They always get things right, I meant to say.
19 Sorry. Absolutely always get things right. But anyway.

20 You know, it's very different from Mr. Poole. I
21 mean, sure, Mr. Poole's is very important to impeach her
22 with. But even -- I don't know that I even saw the original
23 handwritten notes that he made that these were typed from.
24 So I was shocked about that because I kept looking for them.
25 And --

1 Q. And just to be clear, you're referring to
2 Mr. Poole's original handwritten notes of the statement he
3 says Vanessa Smith made to him?

4 A. Yeah. That's just a -- I have never quite seen it
5 like that.

6 Q. Can you describe what you've seen in the
7 statements in this case and what you would normally see in
8 another case?

9 A. Yeah. You've got two statements, two days in a
10 row. One's half as long as the other. They're talking
11 about the same thing. One -- the second one that's, like,
12 almost 30 pages long, is signed at the bottom by both the
13 witness and the police officer. The first one's not signed
14 by the witness. Both are, everybody agrees, written -- the
15 words are written by Mr. Poole and supposedly agreed to by
16 Ms. Smith.

17 But he testified there were these notes from which
18 he typed the statements. And as the defense lawyer, it is
19 a -- it is a basic thing at the conclusion of Ms. -- I mean,
20 even -- to me, it's *Brady*, the Supreme Court case of *Brady*,
21 Supreme Court case of *Bagley*. These are prior statements
22 that are different that should have been turned over.

23 But whether that's true or not, at the end of her
24 direct examination, the defense lawyers -- or at the end of
25 Mr. Poole's direct examination, I guess in this situation,

1 the defense lawyers should have said, "Your Honor, we
2 have -- we request, pursuant to the statute, that we be
3 given copies of these notes that Mr. Poole wrote down."

4 And my experience is, you know, in many cases,
5 there's -- there are differences that should have been
6 looked at.

7 Q. And if Vanessa Smith -- I want to just go back to
8 the preliminary hearing testimony about Myrtle Beach. If
9 she testified it was a mistake, is that still significant to
10 a jury?

11 A. No.

12 MR. VLAHOS: Objection to what would be
13 significant to a jury.

14 THE COURT: Sustained.

15 Q. In your experience, is that kind of testimony
16 still something that defense counsel can argue from?

17 A. Absolutely you can argue from that respect. I
18 guess kind of like -- I was maybe getting a little excited
19 talking about it there because, by nature, I'm a defense
20 lawyer, so, you know.

21 That is absolutely something that I would talk
22 about in my closing argument and cross-examine her about
23 that.

24 Q. And just like you can make an argument that if a
25 witness is lying about one thing, they're lying about

1 something else, you can argue if they're mistaken about one
2 thing, they're mistaken about something else?

3 A. Both are equally applicable. Mistake, lies,
4 doesn't matter if they got it wrong. Of course, a lie is a
5 little stronger, you know. But it's gotten -- even as of
6 this time of this trial, 2003, you know, the people -- it
7 was generally in the atmosphere, at least in the
8 United States, that eyewitnesses were making mistakes. This
9 was the point in time, at the time of this trial, there were
10 already, like, 140 DNA exonerations, most of them based on
11 faulty eyewitness identification.

12 This was -- this was out there, so it's certainly
13 something you're going to argue as a defense lawyer.

14 Q. And witnesses can be both mistaken and lying at
15 the same time, right?

16 A. Sure.

17 Q. I want to talk to you next about the newspaper
18 articles that were circulating in the area before Vanessa
19 turned herself in.

20 Would you turn to page 18 of your -- I think we
21 should still be there -- of your 2022 report.

22 A. Yes.

23 Q. What kind of details -- and I know you reviewed
24 them in your report, and you also heard testimony about them
25 this week.

1 What kind of details were included in the
2 newspaper articles in the month before Vanessa Smith turned
3 herself into law enforcement?

4 A. Well, when I wrote two years ago, I only had that
5 one newspaper article from July 21st, 1999, from the
6 Montgomery Herald.

7 And then in court this week, I heard testimony
8 from all those newspaper articles that the state cited in
9 its motion for change of venue.

10 And I was -- I was really surprised to see all the
11 details that were in there. I'm trying -- I apologize for
12 my memory, but... so I have my -- hopefully I can -- yeah.

13 So there was, like, you know, a number of
14 newspaper articles very early on that went into such things
15 as to where Mr. Gailey's body was found; where his wounds
16 were; that possibly the murder weapon was a shotgun; what
17 items were found at the scene, like a duffel bag, clothing,
18 handgun, \$1,944; details as to what other witnesses said,
19 like the people at the Whip-O-Will cabin.

20 And then another article -- that was July 25th.

21 July 22nd, again. Details about where the cabin
22 was, where the body was found, that it was 20 yards from
23 that cabin.

24 This is -- I mean, this is kind of extraordinary.

25 And then there's the July 21st one that I referred

1 to in my report had a lot -- some of those same details in
2 it.

3 Even early, early on in the Asheboro paper, the
4 July 14th, 1990, where the body was found, where the wounds
5 were located.

6 Q. Were there details about what even witnesses said,
7 like Robert Johnson and Danny Lanier?

8 A. Yeah. That was in the July 25th, 1999, article,
9 Defendant's Exhibit 27.

10 Yeah. So there was -- and there was -- there was
11 more.

12 But the level of detail was pretty surprising to
13 me. Because usually, it's going to be the state that comes
14 in to show these details were not in the media, you know,
15 sort of like Mr. Vlahos was doing. There were some details
16 that were not in there, but these are major details that
17 were in there.

18 Q. And would you say that most of the major details
19 of Vanessa Smith's statement regarding what happened in the
20 forest at the crime scene were things that were in the
21 newspaper?

22 MR. VLAHOS: Objection.

23 THE COURT: Overruled.

24 You may answer.

25 A. That's my recollection. A lot of the -- yeah.

1 Most of the major details.

2 Q. Uh-huh.

3 Why would it matter to ask Vanessa Smith about
4 these newspaper articles?

5 A. Well, when you look at her long statement, I don't
6 remember which one, the one that she signed, there's --

7 Q. Are you referring to her August statements to
8 Mr. Poole?

9 A. Yeah. I'm sorry.

10 Q. And those are -- if I may please have -- I'll hand
11 them to you, Mark.

12 A. Either way, I've got it. I've got some -- what I
13 was talking about marked with -- it's got all those yellow
14 stickies here, but I think I can --

15 Q. Those were admitted as Defense Exhibits 23 and 24
16 for the Court.

17 A. What I'm thinking about is, these newspaper
18 articles are important because of the facts they put out
19 there. But even when Ms. Smith was away, she -- you know,
20 she went out to Colorado to try to somehow get back with
21 Scott or something, and they had that confrontation near
22 Kelly Racobs. But there was -- here it is.

23 So I don't know what the exhibit number is. It's
24 SSR Exhibit 79, or SS --

25 Q. SSMAR Exhibit 79 is the August 11th, 1999,

1 statement of Vanessa Smith, and that was admitted previously
2 at this hearing as Defense Exhibit 24.

3 A. So I'm looking at page 22 towards the top where
4 Vanessa says she found out she was pregnant with Scott's
5 baby, and she called Joyce -- which is not Shirley, his
6 mother, it's the wife. She was in, apparently, constant
7 contact and told Joyce. And while she was talking to Joyce,
8 Scott beeped in and Joyce told her that Scott was on the
9 other line. And they kind of go back and forth there.

10 But then she references -- she -- that he was
11 going to come back to North Carolina to see her and turn
12 himself in and that his mother and father did not want him
13 to.

14 And then there's other references to, you know,
15 knowing what's going back -- knowing what's going on.

16 So I would cross-examine her about these newspaper
17 articles regardless of that.

18 But here's my good faith basis for thinking that,
19 even if she didn't read those articles, she knew what was in
20 the media. And, you know -- of course, the -- I would argue
21 that the newspaper articles are -- even if I -- if I tried
22 to admit them, they would show -- be used to show her state
23 of mind, knowledge, that sort of thing. Not that they were
24 offered for the truth of the matter asserted, but to show
25 where she got her information. And cross-examine her about

1 those newspaper articles just as I would have about these
2 other statements that we were talking about a little bit
3 ago.

4 You know, I mean, it goes something like, "So,
5 Ms. Smith" -- I mean, it would be a simple, "Ms. Smith, you
6 were aware that there were -- they were looking for you and
7 Mr. Allen, right? You were aware that there were 'Wanted'
8 posters for you, right? You were aware from Scott's parents
9 perhaps that there was -- that there were murder warrants
10 out for the two of you," because we know there was a law
11 enforcement connection with Scott's brother. So, you know,
12 going on and on like that.

13 Q. So if the witness fought you or denied knowledge,
14 you would have had her statement to impeach her with as to
15 knowledge that law enforcement was looking for her and Scott
16 at the time; is that correct?

17 A. Right. That's right.

18 Q. And that she was talking to a lot of other people
19 who also knew that law enforcement were looking for
20 Vanessa Smith and Scott Allen, right?

21 A. I mean, it was like she was in constant contact
22 with people. When you read through her statement, she knew
23 what was going on. She knew what she was doing.

24 Q. And why would it have been important for the jury
25 to understand all of this information that was publicly

1 available before Vanessa Smith turned herself in?

2 A. Because the basic defense here is Vanessa Smith is
3 making up a lot of this stuff, right? She's making up a lot
4 of this stuff at the crime scene.

5 Now -- then it becomes important to know what
6 exactly did she say to the police the very first time she
7 talked, and that would be Poole, is my understanding.

8 And Poole is, I guess, the same law enforcement
9 person that's giving the information to the media because
10 he's in charge of the case.

11 MR. VLAHOS: Objection.

12 THE COURT: Sustained.

13 A. Somebody from law enforcement is.

14 So if he's going to be, I'd say, fast and loose
15 with the facts of the case to the media, I would be
16 seriously cross-examining him about whether he's fast and
17 loose with imparting information about this case.

18 And I would -- so everything that's in the media
19 is going to be information that he's -- either -- some of
20 the stuff is just facts of the case: Where was he shot,
21 where did it happen, how far from. And these are details
22 she's also giving.

23 So the state would argue that she knows where all
24 these things are. I, or a defense attorney, would take all
25 of this information, and, you know, it'd just be basic to

1 argue that they could have planted that information in her.
2 Or not planted, but, you know, fed information.

3 But we don't know because the interviews were not
4 recorded, and we don't have the original notes. So, yeah.

5 Q. Through cross-examination of Vanessa Smith, you
6 could have established that she knew this information either
7 from -- the newspapers would be one source?

8 A. Uh-huh. Yes.

9 Q. Or from all the people that her statements made
10 clear she was talking to --

11 A. Correct.

12 Q. -- who might have read those newspapers?

13 A. Right.

14 Q. Or from the questioning of law enforcement
15 witnesses themselves?

16 A. Exactly.

17 Q. And you could have also cross-examined law
18 enforcement witnesses about these details and how they were
19 provided to the media; is that right?

20 A. There was a perfect setup with the very last
21 witness in the case, being Poole, when he read this
22 statement with certain redactions in it, but it took a long
23 time. I think they even had to take a recess. So he read
24 this long statement of Vanessa Smith. And no
25 cross-examination about any of the details or inconsis --

1 That would have -- that should have been the
2 closing argument outline, would be the cross-examination of
3 Poole after he read her statement. You use that to point
4 out all these inconsistencies. Not only in that statement
5 but her other statement, her preliminary hearing statement.
6 You go through everything right there. It would be -- your
7 closing argument would be made right there on that
8 cross-examination.

9 Q. So I want to be clear that all of the things that
10 you could use to cross-examine Vanessa Smith you would also
11 use to cross-examine law enforcement witnesses?

12 A. Absolutely. They work hand in hand. And one
13 of -- I guess I would call it indirect cross-examination of
14 Vanessa Smith would be what I've put in the report, the
15 questioning of Mr. Bunting and Ms. Wright. And now, as I
16 sat here this week listening to the evidence, I'm convinced
17 Mr. Poole as well.

18 Q. Did Mr. Oldham, whether in his deposition or in
19 his testimony here this week, provide any strategic reason
20 for not cross-examining Vanessa Smith about these newspaper
21 articles?

22 A. No.

23 Q. And on cross-examination, did he suggest -- did
24 the state suggest that she might have not known about the
25 newspaper articles?

1 A. Ask me that again.

2 Q. On Mr. Oldham's cross-examination, did he and the
3 state discuss the possibility that she might not have known
4 about the newspaper articles?

5 A. I think that's right.

6 Q. But for the reasons we've just discussed, that
7 would not be a reason not to cross-examine her about this
8 subject?

9 A. Oh, no. Because you have -- from all of her
10 statements and sources, that we have a good faith basis to
11 ask her about those articles. Whether, in fact, she had
12 read those articles or not, she should be confronted with
13 the fact of those articles and the information that's out
14 there in the public realm.

15 Q. Would you take a look, please -- would you pull
16 Defense Exhibit 1-1, which is Mr. Atkinson's deposition
17 transcript.

18 A. I'm making a mess up here. I'm sorry.

19 Q. I apologize. I've thrown so many documents at
20 you.

21 A. No, I brought a bunch too. So... There's a lot.
22 Okay. Mr. Atkinson's deposition.

23 Q. Yes. On page 48, would you take a look at 48,
24 line 6.

25 A. Okay.

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1 Q. Through -- all the way through 50, line 19. So
2 about three pages of testimony there.
3 A. Through 50, line 19?
4 Q. Yes.
5 A. Okay.
6 Q. And is this Mr. Atkinson's testimony about the
7 newspaper articles we've been discussing?
8 A. Right.
9 Q. Did Mr. Atkinson have any strategic reason for not
10 cross-examining Vanessa Smith about the newspaper articles?
11 A. What he said, "I cannot think of any reason today
12 and can't think of any reason that I would have thought of
13 back then."
14 Q. So he seems to even state pretty clearly he can't
15 think of any reason he could have possibly had at the time
16 in 2003?
17 A. Yeah. It's beyond that. I don't -- it's -- a lot
18 of, like, Mr. Oldham's statements were, "I don't recall."
19 This goes beyond that. He can't even think of any reason he
20 would have -- would have had to not cross-examine about
21 that.
22 Q. And on page 49, did he also testify that it would
23 be important to show the jury where Vanessa Smith got this
24 information?
25 A. I'm sorry. What page?

1 Q. On page 49 in the testimony you just read --

2 A. Oh, yeah.

3 Q. -- did Mr. Atkinson testify that cross-examination
4 about the possible source -- like the newspapers -- of
5 Vanessa Smith's knowledge of the case would have been
6 important?

7 A. Correct.

8 Q. Okay. I want to talk with you about the benefits
9 from the state that Vanessa Smith received.

10 A. The what from the state?

11 Q. The benefits from the state that Vanessa Smith
12 received in this case.

13 A. Right.

14 Q. And I'm still looking at page 18 of your 2022
15 report and pages 2 and 3 of your 2024 report.

16 MS. WARREN: I'm just going to retrieve some
17 exhibits. Court's indulgence.

18 May I please have Defense Exhibits 28 and 29?

19 Your Honor, may I approach?

20 THE COURT: Yes, you may.

21 Q. Mr. Rabil, I've handed you Defense Exhibits 28 and
22 29, which were previously admitted.

23 Is Exhibit 28 the plea agreement between
24 Vanessa Smith and the state?

25 A. Yes, it is.

1 Q. And is Exhibit 29 certified copies of a bond
2 motion and a bond order for Ms. Smith?

3 A. Yes, it is.

4 Q. Can courts take judicial notice of certified
5 copies of court documents at trial?

6 A. That's right.

7 Q. So the defense attorneys could have requested that
8 the Court take notice and admit these documents at trial; is
9 that right?

10 A. Right. You just -- yeah. As to 29, these are
11 court -- from the -- from Vanessa Smith's court file.

12 Q. Uh-huh.

13 A. Right. So you just get the clerk to certify
14 those, and they're self-authenticating.

15 Q. Looking -- and it seems like someone at least took
16 steps -- took steps to procure certified copies of these.

17 A. Right. And these were in -- yeah, this was in
18 Mr. Oldham's file, Exhibit 29.

19 Q. And these were never introduced at trial?

20 A. Is my understanding.

21 Q. And Exhibit 28, this bond motion, and the order on
22 the second page of it --

23 A. You mean 29?

24 Q. Yes. Thank you. I'm looking at 29, Bates stamp
25 P003277.

1 This is a bond order from July of 2001. So that's
2 more than two years before the trial, right?

3 A. Correct.

4 Q. And this is setting Ms. Smith's bond at \$5,000
5 secured; is that right?

6 A. Yep.

7 Q. Did Mr. Oldham testify that that was a very low
8 bond for a first-degree murder case?

9 A. I've never seen a bond that low in a first-degree
10 murder case. I mean, the lowest I've seen would be, like,
11 50,000. And then, you know -- an unsecured 50,000. But
12 it's still a lot more than that.

13 Q. And to be clear, we're taking into account
14 inflation. At the time, this was still a very low bond?

15 A. Oh, I'm thinking inflation. I'm thinking of a
16 case that I actually had in 2003.

17 Q. And does this bond order on that same page also
18 place Ms. Smith under electronic house arrest?

19 A. That's right.

20 Q. Do you have any cases where a co-defendant was
21 charged capitally with capital murder and another
22 co-defendant was placed on house arrest?

23 A. I don't -- I don't remember any.

24 Q. Okay.

25 A. Honestly, there's something reminding me of

1 something when I was in the Capital Defender's Office.

2 Mike Klinkosum had one with somebody under circumstances

3 like this. I don't -- but I don't remember it. They were

4 in their house.

5 Q. If you'd just move a little forward towards --

6 A. Sorry.

7 Q. Would you look at Exhibit 28.

8 A. Exhibit 28?

9 Q. Yes.

10 On the second page of that, at P002270, does it

11 say that her bond was reduced even further in 2002?

12 A. Okay. I got lost. Where am I looking?

13 Q. On the second page.

14 A. Second page. Okay.

15 Yes. The bond went down from 5,000 to -- 5,000
16 was secured, so she had to post it, and then 2500 unsecured.
17 So either she, well, you know, got out from under a bondsman
18 or got her money back, yeah.

19 Q. In her statements to Chris Poole, did
20 Vanessa Smith say why she had come forward?

21 A. Yeah.

22 Q. And if you look on your report at page 18 --

23 A. Yeah. It's in the -- there's those bullet points.
24 It's the third bullet point from the bottom where I wrote
25 that she, Vanessa Smith, told Lieutenant Poole on August 11,

1 1999, that she wanted to figure out what to do if she,
2 quote, were ever going to have a normal life, end quote,
3 and, quote, how she could pull it off, end quote.

4 Q. So from the very beginning, when she first turned
5 herself in, she made it clear that she wanted to do what she
6 needed to do to get out of this situation?

7 A. Exactly. This was her plan. This is like --
8 Mr. Oldham was talking about what is the motive to lie. The
9 answer is so that she could have a normal life and pull this
10 off to have a normal life.

11 Q. Uh-huh.

12 And turning back to 28 and her plea agreement, was
13 she going to serve any more time pursuant to her plea
14 agreement if she testified truthfully?

15 A. If she testified truthfully, no.

16 Q. So how much time did she serve in jail total for
17 the case where she was first charged with first-degree
18 murder? And it's at the bottom of that first page of
19 Exhibit 28.

20 A. It says here she served 23 months. I'm looking at
21 the date here.

22 Q. She served 23 months and 6 days before she was
23 released to house arrest in 2001; is that right?

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

25 Q. You heard Pete Oldham's testimony. And I believe

1 he said he felt he didn't need to cross-examine her about
2 the plea agreement and the bond reductions because the state
3 had already talked about it on their direct examination.

4 Is that a strategic reason consistent with the
5 standard of practice for capital defense attorneys at the
6 time of this trial?

7 **MR. VLAHOS:** Objection. Speculating what's a
8 strategic reason.

9 **THE COURT:** Overruled.

10 You may give an opinion on that question.

11 **A.** No. In my opinion, the defense attorney should
12 have used the plea agreement and questioned her almost line
13 by line about this with this in hand.

14 When I went back -- after Mr. Oldham testified
15 about that, I went back and looked at the transcript where
16 the district attorney, Ms. Allen, was asking questions.
17 And, of course, the transcript, you know, speaks for itself.
18 But there were not very many questions about the exact
19 details. I mean, it was generally summarized.

20 But when you use an exhibit like 28 to
21 cross-examine somebody about it, it's going to take longer,
22 the jury's -- and you're going to be able to, you know,
23 present it maybe a little more dramatically than just with a
24 soft paddle. Okay. So you're going to -- for telling the
25 truth, you get -- you're done, you know, did a couple years

1 and just kind of -- it slides past everybody, right.

2 This is something that is to be -- again, another
3 very basic thing to be emphasized and should have been used.

4 And the state had admitted it as an exhibit.

5 I probably need a fix -- at the bottom of page 18,
6 I said -- of my report, I said there was no strategic reason
7 to not ask Ms. Smith about the plea agreement. I stand by
8 that.

9 And then I said, or to introduce the plea
10 agreement into evidence. That has -- it was introduced in
11 evidence, as I said in the paragraph above that.

12 Q. And Ms. -- ADA Allen, Kristian Allen, was the
13 prosecutor for the state who asked a few questions of
14 Vanessa Smith about this plea agreement.

15 A. That's right.

16 Q. Did she ask any questions about the bond
17 reductions for the two years before trial?

18 A. Not that I recall.

19 Q. And so the jury didn't know about those additional
20 benefits beyond the plea agreement?

21 A. Correct.

22 Q. And the jury didn't hear any questioning about her
23 statement to Mr. Poole about why she was coming forward?

24 A. Maybe when he read the statement.

25 Q. No questioning from defense counsel?

1 2 : 2 7 1 A. That's right. That's right. There was no
1 2 : 2 7 2 cross-examination about that.

1 2 : 2 7 3 Q. You reviewed Will Atkinson's deposition?

1 2 : 2 7 4 A. Yeah.

1 2 : 2 7 5 Q. Did he provide any strategic reason for failing to
1 2 : 2 7 6 cross-examine Vanessa Smith about the plea agreement and the
1 2 : 2 7 7 benefits from the state?

1 2 : 2 7 8 A. I do not believe so.

1 2 : 2 7 9 Q. And --

1 2 : 2 7 10 A. It would -- whatever -- I think I put the page
1 2 : 2 7 11 numbers in the -- in my --

1 2 : 2 7 12 Q. In your report?

1 2 : 2 7 13 A. August 6, 2024, report.

1 2 : 2 7 14 Q. And would this line of questioning regarding her
1 2 : 2 7 15 benefits and cooperation with the state also have fit in
1 2 : 2 8 16 with her recantation and her willingness to tell law
1 2 : 2 8 17 enforcement what they wanted to hear?

1 2 : 2 8 18 MR. VLAHOS: Objection. Speculation.

1 2 : 2 8 19 THE COURT: Overruled.

1 2 : 2 8 20 A. Absolutely. It would fit right in with her
1 2 : 2 8 21 lifelong pattern of doing what she needed to do to get where
1 2 : 2 8 22 she wanted to go.

1 2 : 2 8 23 MS. WARREN: Your Honor, I have a couple more
1 2 : 2 8 24 shorter topics with this witness, but I do see that we're
1 2 : 2 8 25 approaching lunch. I hope to finish shortly after lunch. I

1 can keep going now if you want.

2 **THE COURT:** We'll stop now.

3 Thank you, sir. You may step down.

4 **THE WITNESS:** Yes, sir.

5 Your Honor, I'm going to take all my stuff.

6 **THE COURT:** Or you can leave them.

7 **THE WITNESS:** I'll leave those there.

8 **THE COURT:** Are those exhibits?

9 **THE WITNESS:** These are the exhibits.

10 **THE COURT:** Please leave the exhibits.

11 **THE WITNESS:** I was going to take my notes so it

12 doesn't get confusing.

13 **THE COURT:** Anything before we recess?

14 For either side?

15 **MR. VLAHOS:** No, Your Honor.

16 **THE COURT:** Recess us until 2:00 p.m., please.

17 (Recess.)

18 **THE COURT:** Good afternoon.

19 Let the record reflect that the defendant is

20 present in the courtroom.

21 Are there any matters to address before we resume?

22 For the defendant?

23 **MS. WARREN:** No, Your Honor.

24 **THE COURT:** For the state?

25 **MR. VLAHOS:** No, Your Honor.

Please recall you are still under oath.

THE COURT: You may proceed.

A. Yes.

A. Overwhelmingly, drug usage and jealousy.

A. That's right.

A. No.

THE COURT: Overruled.

A. Basically, in a case like this, it's just basic

State of North Carolina v. Scott David Allen

0 2 : 0 2 1 weaknesses of the state's case that you look at the physical
0 2 : 0 2 2 evidence, whether it's consistent or inconsistent with the
0 2 : 0 2 3 main eyewitness, which is Vanessa Smith. Not that there
0 2 : 0 2 4 wasn't, you know, some other evidence, but she is the main
0 2 : 0 2 5 eyewitness in the case.

0 2 : 0 2 6 And so when there are such glaring inconsistencies
0 2 : 0 2 7 combined with the failure of the police to really document
0 2 : 0 2 8 and explore things properly, then that would be -- that
0 2 : 0 2 9 would be the basic closing arguments. It's not a -- to me,
0 2 : 0 2 10 in my opinion, it's not debatable.

0 2 : 0 2 11 And here, as I -- I think there was only, like,
0 2 : 0 2 12 five pages of her cross-examination that even dealt with
0 2 : 0 2 13 anything about the physical evidence out of -- or maybe not
0 2 : 0 3 14 even five pages. Maybe --

0 2 : 0 3 15 Q. About three, I think.

0 2 : 0 3 16 A. Three and a half pages at the most out of 65 pages
0 2 : 0 3 17 of cross-examination of Ms. Smith by Mr. Oldham.

0 2 : 0 3 18 Q. And would anything that we've talked about this
0 2 : 0 3 19 morning that Mr. Oldham and Mr. Atkinson could have used to
0 2 : 0 3 20 cross-examine Ms. Smith undermine or conflict with their
0 2 : 0 3 21 questions about her drug use?

0 2 : 0 3 22 A. Oh, no. You would -- you know, that was certainly
0 2 : 0 3 23 reasonable to go into her drug use because that's, you know,
0 2 : 0 3 24 basic fact. That affects her memory, especially her memory
0 2 : 0 3 25 after the 9th, after July the 9th.

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1 Q. Uh-huh.

2 Did Mr. Oldham testify that he believed it was

3 important to cross-examine her with -- about all available

4 inconsistencies?

5 A. Yes.

6 Q. And would you take a look at Mr. Atkinson's

7 deposition, which is in front of you as Defense Exhibit 1-1.

8 A. I'm sorry. The exhibits?

9 Q. No. The actual transcript.

10 A. Okay.

11 Q. I'll direct you.

12 A. I'm sorry. I've got his deposition here.

13 Q. Yes. The transcript for Mr. Atkinson.

14 A. Yes. Yes. I'm sorry. Yeah.

15 Q. Would you go to page 18, please.

16 A. Okay.

17 Q. On page 18, would you read lines 14 through 18.

18 A. "The evidence that Scott was at the crime scene

19 was Vanessa Smith's testimony, right?"

20 "Answer: Yes. Primarily. Almost 100 percent,"

21 he said.

22 Q. Would you turn to the next page, please.

23 Would you take a look at lines 19 through 25. And

24 go ahead and read those out loud.

25 A. Okay. Starting on line 19:

0 2 : 0 5 1 "Question: Okay. Is it fair to say that
0 2 : 0 5 2 Vanessa Smith was the most important witness for the state?"

0 2 : 0 5 3 "Answer: Yes, most definitely."

0 2 : 0 5 4 "Question: And the state's case was based almost
0 2 : 0 5 5 entirely on her testimony, right?"

0 2 : 0 5 6 "Answer: That is correct."

0 2 : 0 5 7 Q. Would you turn to page 22, please.

0 2 : 0 5 8 A. Okay.

0 2 : 0 5 9 Q. Looking at page 22, lines 12 through 21, did
0 2 : 0 6 10 Mr. Atkinson testify that if a witness is lying about one
0 2 : 0 6 11 thing, it makes it more likely that they're lying about
0 2 : 0 6 12 something else?

0 2 : 0 6 13 A. Yes.

0 2 : 0 6 14 Q. There's no reason not to point out all the reasons
0 2 : 0 6 15 a witness is lying?

0 2 : 0 6 16 A. He said, "No, there's not."

0 2 : 0 6 17 Q. Did he also say, "Especially when a witness is as
0 2 : 0 6 18 important as Vanessa Smith"?

0 2 : 0 6 19 A. He said, "Correct."

0 2 : 0 6 20 Q. All right. Now, we focused a lot this morning on
0 2 : 0 6 21 the cross-examination of Vanessa Smith.

0 2 : 0 6 22 And I want to ask you about the cross-examination
0 2 : 0 7 23 of Barry Bunting, Catha Wright, and other law enforcement
0 2 : 0 7 24 officers. And so I'll be referencing pages 19 to 20 of your
0 2 : 0 7 25 2022 report, which is Defense Exhibit 43, and pages 2 and 3

1 of your 2024 report, which is Defense 44.

2 A. Okay. Let me get that.

3 Q. I'll let everyone pull those up.

4 A. Okay. So the 2022 report. What page?

5 Q. 19 to 20.

6 A. Okay.

7 Q. And your 2024 report, pages 2 and 3.

8 A. Got it.

9 Q. Did Mr. Oldham or Mr. Atkinson provide any
10 strategic reason for not examining law enforcement
11 witnesses, including Catha Wright, about the collection of
12 evidence at the crime scene?

13 A. No.

14 Q. Did either of them provide strategic reasons for
15 failing to cross-examine -- I'm sorry.

16 Did either of them provide strategic reasons for
17 failing to cross-examine Catha Wright or other law
18 enforcement witnesses about where specific items of evidence
19 were found at the crime scene?

20 A. No.

21 Q. And in both of their notes, handwritten notes,
22 both that you've seen from Will today and that you saw from
23 Pete in the previous days, did they include questions -- did
24 trial questions notes -- sorry -- did trial counsels' notes
25 include questions about where that evidence, specifically

1 the shotgun shells, were located at the crime scene?

2 A. Right. It was in the exhibit we were looking at
3 from Mr. Atkinson's file.

4 Q. And has either trial counsel provided a strategic
5 reason for failing to cross-examine law enforcement
6 witnesses about the collection and location of those shotgun
7 shells?

8 A. No.

9 Q. Or about the testing of those shotgun shells?

10 A. I'm trying to remember -- no. I was -- I think
11 Mr. Oldham -- trying to remember. I think he was talking
12 about a different item on cross-examination, so no.

13 Q. Would you look at page 39 of Mr. Atkinson's
14 deposition transcript, please.

15 A. Did you say 39?

16 Q. Yes.

17 A. Okay.

18 Q. Would you look at lines 15 to 25, please.

19 A. Okay.

20 Q. And when I asked him whether he had any strategic
21 reason in 2003 for not asking law enforcement witnesses why
22 they didn't immediately collect the spent shotgun shells at
23 the crime scene, did Mr. Atkinson have an answer?

24 A. He did not recall any reason.

25 Q. Would you turn to the next page, please.

1 Vanessa about that?

2 Q. Why they didn't ask law enforcement about the lack
3 of .45 spent casings consistent with Vanessa Smith's
4 testimony.

5 A. He said, no, he could not recall a strategic
6 reason.

7 Q. Would you turn to page 37.

8 A. Okay.

9 Q. And we've already gone over lines 17 through 22,
10 which is Mr. Atkinson's testimony that he did not have a
11 strategic reason for not asking Vanessa Smith about the
12 knife in 2003.

13 Would you please read lines 23 on page 37 through
14 line 3 on page 38.

15 A. Okay.

16 Q. And did Mr. Atkinson provide any strategic reason
17 for not asking law enforcement witnesses about the bloody
18 knife that was found at the crime scene?

19 A. He said, "I cannot recall why or why not, why or
20 why not that I didn't do that."

21 Q. And did Mr. Oldham provide a strategic reason for
22 not cross-examining law enforcement witnesses about the
23 knife at the crime scene?

24 A. I believe he said he didn't recall.

25 Q. Has either counsel testified about a strategic

0 2 : 1 4 1 reason for failing to cross-examine law enforcement
0 2 : 1 4 2 witnesses about the hair found in Christopher Gailey's hand?

0 2 : 1 4 3 A. This is what I was thinking about yesterday on
0 2 : 1 4 4 cross-examination. But I don't -- I'm remembering
0 2 : 1 5 5 cross-examination with Mr. Vlahos and Mr. Oldham, and they
0 2 : 1 5 6 were reading from some report about the hair, but I didn't
0 2 : 1 5 7 have the exhibit in front of me. I think that was a lab
0 2 : 1 5 8 report.

0 2 : 1 5 9 But I guess the question -- the only time they
0 2 : 1 5 10 asked in deposition or yesterday or this week was, you know,
0 2 : 1 5 11 no, no recollection of any strategic reason.

0 2 : 1 5 12 So I'm sorry about the confusion, I just
0 2 : 1 5 13 remembered something about the hair yesterday. Thank you.

0 2 : 1 5 14 Q. When you reviewed Will's transcript -- sorry --
0 2 : 1 5 15 Mr. Atkinson's deposition transcript, did he testify
0 2 : 1 5 16 repeatedly about how he noticed the crime scene evidence was
0 2 : 1 5 17 an important issue?

0 2 : 1 5 18 A. Yes.

0 2 : 1 5 19 Q. Would you look at page 7.

0 2 : 1 5 20 A. Of the deposition?

0 2 : 1 5 21 Q. Yes.

0 2 : 1 5 22 A. Okay.

0 2 : 1 6 23 Q. Would you look at the testimony on page 17,
0 2 : 1 6 24 beginning at line 24, through page 18, line 3.

0 2 : 1 6 25 A. I'm starting at what line?

1 "And I knew she was not a good witness. And one
2 thing that I did know that, of course, I knew that there was
3 some strange things about the way the evidence was
4 distributed out there at the death scene, and I just -- I
5 had questions about how that came about."

6 Q. Would you look at page 35, please.

7 A. Okay.

8 Q. And looking at page 35, beginning at line 2,
9 through page 36 at line 5.

10 A. To what on the next page?

11 Q. To line 5.

12 A. Okay.

13 Q. Is that additional testimony from Mr. Atkinson
14 about his concerns about the crime scene's physical evidence
15 being inconsistent with Vanessa Smith's testimony?

16 A. It does show his concerns, even though he seems to
17 have a mistaken memory about what was testified to.

18 Q. Does he say that the way the items were arranged
19 around that pile, if you will, was totally inconsistent
20 with -- I thought with what she was testifying to? Is that
21 at the bottom of page 35?

22 A. I just don't know what that means.

23 Q. Well, was he talking about the crime scene in this
24 testimony?

25 A. Yeah, he was talking about the crime scene and

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1 inconsistencies with Vanessa Smith.

2 Q. Uh-huh.

3 Would you take a look at page 45.

4 A. Okay.

5 Q. And at the top of page 45, Mr. Atkinson is

6 testifying about those notes that you looked at earlier, his

7 pretrial notes that said, "Way items scattered around the

8 body."

9 Do you remember that?

10 A. Yes.

11 Q. And he testified that he had noticed this issue

12 and was thinking about it, right?

13 A. Correct.

14 Q. And that he was concerned about what it all meant,

15 right?

16 A. He said yes.

17 Q. And in line 18 on page 45 through line 3 on

18 page 46, when he was asked whether he could think of any

19 strategic reason not to ask law enforcement officers about

20 the location of all of those items at the crime scene, did

21 he provide a strategic reason?

22 A. He said, "I cannot. I cannot think of a reason

23 why we -- it was in our mind at the time why we -- why we

24 didn't."

25 Q. And in addition to asking law enforcement

0 2 : 2 1 1 witnesses in front of the jury on cross-examination about
0 2 : 2 1 2 the crime scene, there are steps that trial counsel can take
0 2 : 2 1 3 before trial to find out about the crime scene evidence,
0 2 : 2 1 4 right?

0 2 : 2 1 5 A. Sure.

0 2 : 2 1 6 Q. They can investigate, right?

0 2 : 2 1 7 A. Right.

0 2 : 2 1 8 Q. And as we discussed this morning, they actually
0 2 : 2 1 9 have an obligation to conduct an independent investigation?

0 2 : 2 1 10 A. Correct.

0 2 : 2 1 11 Q. Did Mr. Oldham testify that he had no strategic
0 2 : 2 2 12 reason for not investigating the ATM records himself?

0 2 : 2 2 13 A. Investigating what?

0 2 : 2 2 14 Q. The ATM records himself.

0 2 : 2 2 15 A. I don't think he had a recollection, but I'm not
0 2 : 2 2 16 sure if something else came out on cross. I don't -- I
0 2 : 2 2 17 don't remember it.

0 2 : 2 2 18 Q. Would you look at page 47 of Mr. Atkinson's
0 2 : 2 2 19 transcript.

0 2 : 2 2 20 A. Okay.

0 2 : 2 2 21 Q. Would you take a look at lines 4 through 12.

0 2 : 2 2 22 A. Okay.

0 2 : 2 2 23 Q. Did Mr. Atkinson provide any strategic reason for
0 2 : 2 2 24 not sending their investigator to look for witnesses at the
0 2 : 2 3 25 locations of the ATM transactions?

0 2 : 2 3 1 A. He said, "I cannot."

0 2 : 2 3 2 Q. And did he have any strategic reason for not
0 2 : 2 3 3 otherwise independently investigating those ATM withdrawals?

0 2 : 2 3 4 A. Is that -- is that another answer here?

0 2 : 2 3 5 Q. Yes. It's on the middle of that page in that same
0 2 : 2 3 6 chunk.

0 2 : 2 3 7 A. Starting at line 13?

0 2 : 2 3 8 Q. Yes.

0 2 : 2 3 9 Does he have any strategic reason?

0 2 : 2 3 10 A. For not investigating the ATM withdrawals?

0 2 : 2 3 11 Q. Yes.

0 2 : 2 3 12 A. He said, "I cannot."

0 2 : 2 3 13 Q. He could not provide one; is that correct?

0 2 : 2 3 14 A. That's right.

0 2 : 2 3 15 Q. Did Mr. Oldham, in his testimony, provide any
0 2 : 2 4 16 strategic reason for not following up regarding the crime
0 2 : 2 4 17 scene tape that broke?

0 2 : 2 4 18 A. No.

0 2 : 2 4 19 Q. And he had notes in his file about it; is that
0 2 : 2 4 20 correct?

0 2 : 2 4 21 A. That's correct.

0 2 : 2 4 22 Q. I want to talk with you about the consultations
0 2 : 2 4 23 with the Center for Death Penalty Litigation --

0 2 : 2 4 24 A. Right.

0 2 : 2 4 25 Q. -- and case consultations more generally.

0 2 : 2 4 1 So I'm looking in your report -- on pages 3 to 4
0 2 : 2 4 2 of your 2024 report, which is Defense Exhibit 43.

0 2 : 2 4 3 A. Right.

0 2 : 2 4 4 THE COURT: I'm sorry. What was that date and
0 2 : 2 4 5 exhibit number again?

0 2 : 2 4 6 MS. WARREN: Yes. This is Exhibit Number 40 --
0 2 : 2 4 7 I'm sorry -- 44, Your Honor, the 2024 report, at pages 3 to
0 2 : 2 5 8 4.

0 2 : 2 5 9 Q. And I believe the state asked Mr. Oldham a lot of
0 2 : 2 5 10 questions about a consultation with the Center for Death
0 2 : 2 5 11 Penalty Litigation.

0 2 : 2 5 12 Do you remember that testimony?

0 2 : 2 5 13 A. I do.

0 2 : 2 5 14 Q. And the state also asked those questions in the
0 2 : 2 5 15 depositions of both trial counsel, right?

0 2 : 2 5 16 A. Right.

0 2 : 2 5 17 Q. And it was Mr. Atkinson who attended the Capital
0 2 : 2 5 18 College in this case; is that correct?

0 2 : 2 5 19 A. That's -- that's right.

0 2 : 2 5 20 I know Mr. Oldham went, but I think it was a
0 2 : 2 5 21 consultation, not a Capital College. That would be, like, a
0 2 : 2 5 22 three-hour thing as opposed to a multi-day thing.

0 2 : 2 5 23 Q. And can you tell me what the purpose of these
0 2 : 2 6 24 consultations was generally at the time. Are you familiar
0 2 : 2 6 25 with these consultations?

0 2 : 2 6 1 A. Right. So in the -- we started -- Center for
0 2 : 2 6 2 Death Penalty Litigation started doing those in the '90s,
0 2 : 2 6 3 and they got more intensive in the late '90s and into the
0 2 : 2 6 4 early 2000s.

0 2 : 2 6 5 And the idea was, we were having, in
0 2 : 2 6 6 North Carolina, a lot of death verdicts. And that's this
0 2 : 2 6 7 chart that I have at the end of this particular exhibit
0 2 : 2 6 8 we're looking at, my August 2024 report.

0 2 : 2 6 9 Now, so you can see that the '90s were pretty bad
0 2 : 2 6 10 with death verdicts. They did -- they started dropping off
0 2 : 2 6 11 in the early 2000s.

0 2 : 2 6 12 Some of that was due to a change in the law for
0 2 : 2 6 13 prosecutorial discretion. So before that, prosecutors, if
0 2 : 2 6 14 there were aggravating factors in a first-degree murder
0 2 : 2 7 15 case, had no discretion. They had to go -- they had to go
0 2 : 2 7 16 capital. They could take a plea for second, but --

0 2 : 2 7 17 So most of those in the '90s were due to -- were
0 2 : 2 7 18 due to that.

0 2 : 2 7 19 At the same time, though, there were a lot of
0 2 : 2 7 20 death verdicts. And the concern was that capital defense
0 2 : 2 7 21 lawyers were not paying enough attention to jury selection
0 2 : 2 7 22 in death penalty cases and to the mitigation phase of the
0 2 : 2 7 23 case.

0 2 : 2 7 24 So the primary concern at both consultations at
0 2 : 2 7 25 the Center for Death Penalty Litigation and the Capital

1 College was making sure you were getting ready for the
2 sentencing phase.

3 There was also a lot of emphasis on those with
4 trying to figure out ways to convince clients to take
5 reasonable pleas, which -- so that was a lot of emphasis.

6 So it was -- generally speaking, that was why
7 these were happening at that time.

8 Q. Was there a lot of emphasis on those parts of the
9 case, the mitigation and the pleas, both because of the
10 reality of death sentences and also because that's the part
11 of capital cases that is different from other criminal
12 cases?

13 A. That's right.

14 Q. So the training -- is it fair to say the training
15 often emphasized those portions because it assumed
16 competency in the guilt-innocence phase?

17 A. That's exactly right. That was -- ended up being
18 a lot of time talking to the attorneys about -- sometimes
19 they haven't gotten a mitigation investigator or gotten the
20 client's school records and work records, medical records,
21 all that sort of thing, and just making sure that they had
22 that and had, you know, their mitigation theme, so to speak,
23 and were thinking about all that.

24 Q. I believe Mr. Atkinson testified about attending a
25 Capital College where he consulted specifically about this

0 2 : 2 9 1 case.

0 2 : 2 9 2 Do you remember that?

0 2 : 2 9 3 A. Right.

0 2 : 2 9 4 Q. There were some brainstorming sessions during that
0 2 : 2 9 5 seminar?

0 2 : 2 9 6 A. Yes.

0 2 : 2 9 7 Q. During those kinds of consultation and
0 2 : 2 9 8 brainstorming, who is responsible for telling others in the
0 2 : 2 9 9 room about the case?

0 2 : 2 9 10 A. The defense team. So the two -- two attorneys or
0 2 : 2 9 11 one attorney, and sometimes even the mitigation person,
0 2 : 2 9 12 would come.

0 2 : 2 9 13 And the idea was that somebody from CFDPL or maybe
0 2 : 2 9 14 another experienced attorney would lead a discussion and
0 2 : 2 9 15 talk about overall what are the good facts here, what are
0 2 : 2 9 16 the bad facts here?

0 2 : 2 9 17 But it was, you know, certainly factual
0 2 : 2 9 18 discussions about the client, their background, and about
0 2 : 3 0 19 the case.

0 2 : 3 0 20 But it was -- you know, reliance on the attorneys,
0 2 : 3 0 21 the defense team, to -- to, you know, have the information
0 2 : 3 0 22 available and to talk about it.

0 2 : 3 0 23 Q. So the consultants from CFDPL and elsewhere did
0 2 : 3 0 24 not independently review the full discovery in the case; is
0 2 : 3 0 25 that right?

0 2 : 3 0 1 A. No. It was not an independent review. That would
0 2 : 3 0 2 be -- well, way too much and counterproductive.

0 2 : 3 0 3 Not to say that there weren't sometimes some
0 2 : 3 0 4 issues -- like we saw an example with the letter in this
0 2 : 3 0 5 case that they talked to the CFDPL about. And sometimes,
0 2 : 3 0 6 you know --

0 2 : 3 0 7 Q. Just to be clear. The letter, are you referencing
0 2 : 3 0 8 the Troy Spencer letter?

0 2 : 3 0 9 A. That's right. The one that was in the mailbox at
0 2 : 3 0 10 the courthouse for Mr. Atkinson here in Montgomery County.

0 2 : 3 0 11 Sometimes, they'd ask about specific issues like
0 2 : 3 1 12 that. But in terms of turning over the discovery or records
0 2 : 3 1 13 and things, that -- that just was not done. It was more
0 2 : 3 1 14 like asking general questions about it. Not an independent
0 2 : 3 1 15 review except on an issue-by-issue basis, and then you
0 2 : 3 1 16 might -- I don't --

0 2 : 3 1 17 Yeah. So we had from the Appellate Defender's
0 2 : 3 1 18 Office -- Staples Hughes would get involved if there was an
0 2 : 3 1 19 appellate-type issue of any nature. You know, it could
0 2 : 3 1 20 be -- he could work with the attorneys on that particular
0 2 : 3 1 21 issue.

0 2 : 3 1 22 But it wasn't -- we weren't dealing with basic
0 2 : 3 1 23 defense strategy in the case.

0 2 : 3 1 24 Q. Was the utility of these consultations -- just as
0 2 : 3 1 25 consultations today -- are limited by the quality of the

1 information being brought to the consultants?

2 A. Oh, yeah. And sometimes -- well, when
3 Mary Ann Tally was running CFDPL -- not running it, but when
4 she was the primary force there, there were many times she
5 would say, "You got to come back next week or a month or so"
6 if they weren't prepared, you know, to answer these
7 questions. Right.

8 Q. In other words, is it fair to say if garbage goes
9 in data-wise, garbage comes out consultation-wise?

10 A. That's exactly right.

11 And that was a huge benefit of the consultations,
12 because the attorneys could see where the holes were or what
13 the missing points were, what the missing records were.

14 It was really almost showing what they still had
15 to do and maybe what mitigation-type experts they needed to
16 help with things.

17 Q. Uh-huh.

18 Is it consistent with strategic -- I'm sorry.

19 Is it consistent with prevailing professional
20 norms to simply rely on a consultation with someone else
21 without independent strategic reasons for making a decision?

22 **MR. VLAHOS:** Objection.

23 **THE COURT:** Overruled.

24 You may answer.

25 A. No. It's not consistent. A consultation is just

0 2 : 3 3 1 that, another opinion. It's valued, sure. But, ultimately,
0 2 : 3 3 2 you know, as with all cases, some decisions have to be made
0 2 : 3 3 3 with the client.

0 2 : 3 3 4 You know, like we heard about the issue with
0 2 : 3 3 5 trying to convince Scott to allow his attorneys to present
0 2 : 3 3 6 mitigation evidence in the sentencing phase of his trial.

0 2 : 3 3 7 And so -- yeah. It's always going to be the
0 2 : 3 3 8 independence of the particular attorneys because they --
0 2 : 3 3 9 they know the nuances and the discovery and all that in the
0 2 : 3 3 10 case.

0 2 : 3 3 11 Q. So in defending yourself against an IAC claim, an
0 2 : 3 4 12 ineffective assistance of counsel claim, it's not a
0 2 : 3 4 13 strategic reason to simply say the Center for Death Penalty
0 2 : 3 4 14 Litigation told me to do this?

0 2 : 3 4 15 MR. VLAHOS: Objection.

0 2 : 3 4 16 THE COURT: Overruled.

0 2 : 3 4 17 A. No.

0 2 : 3 4 18 I don't think that would even -- well, Mary Ann
0 2 : 3 4 19 would strongly recommend things. And you might feel like
0 2 : 3 4 20 you're being told, but most of the time, it was, you know,
0 2 : 3 4 21 another opinion from somebody with experience. But Mary Ann
0 2 : 3 4 22 was only one of the people in the center, you know.

0 2 : 3 4 23 Q. And when claims of ineffective assistance of
0 2 : 3 4 24 counsel are raised, it's not the burden of the person
0 2 : 3 4 25 accused to show that their counsel was ineffective in every

1 single aspect of the case; is that right?

2 A. Of course not. Yeah.

3 I mean, there can be compliance with prevailing
4 norms on a lot of issues in a case, but then something basic
5 comes along and the norms are not complied with.

6 I mean, you can have attorneys with 30, 40 years
7 of experience, like me, who makes a basic mistake. It
8 doesn't matter what the reason is. It doesn't matter how
9 experienced you are. It doesn't matter how ethical you are.
10 It doesn't matter how much you care about your client. It
11 doesn't matter what a good person you are or whatever. You
12 know, there are things that should be done. There's basic
13 performance.

14 And that's why anybody who is on the capital list,
15 as we read about I think towards the beginning of my
16 testimony yesterday, there's -- you have to have a certain
17 amount of experience to be on the list -- or to stay on the
18 list.

19 I mean, in this case, these guys, Mr. Atkinson and
20 Mr. Oldham, got on like me. Can you breathe? Do you have a
21 license? Well, actually, that's probably more for me.

22 But then, you know, we had guidelines and
23 requirements. So the presumption was that you actually knew
24 from experience and lead counsel 10 jury trials, second
25 counsel five jury trials, you're presumed to know the very

1 basic things about the case.

2 Q. You testified yesterday that you've filed motions
3 for appropriate relief based on ineffective assistance of
4 counsel claims; is that right?

5 A. That's right.

6 Q. And when you file a motion for appropriate relief
7 based on an IAC claim, is the counsel who is filing that MAR
8 required to serve that MAR on the counsel that they are
9 alleging to be ineffective?

10 A. Yeah. It's in the statute. You have to -- at the
11 time you have -- at the time you serve it on the state, you
12 also serve it on the attorney or attorneys that were the
13 trial attorneys, the ones alleged to be ineffective.

14 Q. So Mr. Atkinson and Mr. Oldham were provided with
15 the first MAR and its allegations of IAC in 2006; is that
16 right?

17 A. Right.

18 Q. And they would have also been provided with the
19 supplemental MAR in 2013?

20 A. Correct.

21 Q. And they would have also been provided with the
22 second supplemental MAR in 2022; is that right?

23 A. Yes.

24 Q. And you heard Mr. Oldham's testimony and you
25 reviewed the materials regarding the process that we went

1 through in discovery in this case where trial counsel was
2 provided with all of their files to review; is that right?

3 A. Yes.

4 Q. And they reviewed them in order to defend
5 themselves against these claims; is that right?

6 A. Correct.

7 Q. And between 2006 and Mr. Oldham's testimony this
8 week, did he ever provide strategic reasons to explain the
9 claims alleged in this case?

10 A. No.

11 Q. And what about Mr. Atkinson? Same question.

12 From 2006 until his deposition, did he ever
13 provide any strategic reasons for his actions that were
14 alleged to be ineffective in this case?

15 A. No. Both of them either said "No," or they could
16 not recall any.

17 Q. You wrote in your report -- on page 4 of your 2024
18 report that Mr. Allen's trial attorneys bore ultimate
19 responsibility for investigating, gathering evidence, and
20 working with their client to put the state to its burden of
21 proof.

22 In your professional opinion, did they perform
23 consistently with that responsibility as to the claims that
24 are discussed in your reports?

25 MR. VLAHOS: Objection to preserve.

0 2 : 4 0 1 BY MR. VLAHOS:

0 2 : 4 0 2 Q. Mr. Rabil, did you interview either Mr. Oldham or
0 2 : 4 0 3 Mr. Atkinson?

0 2 : 4 0 4 A. No.

0 2 : 4 0 5 Q. You didn't sit down with them one on one, "Hey,
0 2 : 4 0 6 did you have a strategic decision for this or that"?

0 2 : 4 0 7 A. No.

0 2 : 4 0 8 Q. So you're going off what you reviewed; is that
0 2 : 4 0 9 correct?

0 2 : 4 0 10 A. Right. Yeah, those were questions that were asked
0 2 : 4 0 11 in the deposition and seemed like --

0 2 : 4 0 12 Q. You didn't sit down with them yourself?

0 2 : 4 0 13 A. No, I did not. Yeah, right.

0 2 : 4 0 14 Q. Specifically in this case, you do know that under
0 2 : 4 0 15 the *Strickland* standard, it directs that a Court must
0 2 : 4 0 16 indulge a strong presumption that counsel's conduct falls
0 2 : 4 0 17 within the wide range of reasonable professional assistance.

0 2 : 4 0 18 Isn't that what *Strickland* says?

0 2 : 4 0 19 A. Yes, sir.

0 2 : 4 0 20 Q. That's a presumption in favor of what this prior
0 2 : 4 0 21 trial counsel did; is that not correct?

0 2 : 4 0 22 A. Right. Which means that the post-conviction
0 2 : 4 0 23 attorneys have to come forward with evidence to rebut that
0 2 : 4 1 24 presumption.

0 2 : 4 1 25 Q. Right.

1 Not just come forward with evidence, but they've
2 got to overcome the presumption; is that correct?

3 A. That's what the case says, yes, sir.

4 Q. And *Strickland* also dictates a fair assessment of
5 attorney performance requires that every effort be made to
6 eliminate the distorting effects of hindsight to reconstruct
7 the circumstances of counsel's challenged conduct and to
8 evaluate the conduct from counsel's perspective at the time;
9 is that correct?

10 A. Yes, sir.

11 Q. So you've got to eliminate, reconstruct, and
12 evaluate; is that right?

13 A. Right.

14 Q. So this is not the time to be an armchair
15 quarterback, is it?

16 A. No.

17 Q. And, in fact, they tell Courts not to indulge in
18 such things; is that correct?

19 A. That's right. Yeah.

20 Q. And -- now, the question's not whether counsel's
21 performance deviated from best practices or most common
22 custom, is it?

23 A. Well, the case says did they deviate from the
24 prevailing norm, whatever you just read to me.

25 Q. Are you familiar with *Premo v. Moore*,

1 562 U.S. 115, at page 122, from 2011?

2 A. Maybe.

3 Q. It talks about --

4 A. That's why I have students.

5 Q. I figured you were a law professor, I'd try.

6 A. There's a couple cases I know, but...

7 Q. We're talking about deviating from best practices
8 or most common custom and then no competent attorney.

9 You know, basically, ineffective assistance of
10 counsel is on the same level basically with legal
11 malpractice, isn't it?

12 A. Yeah. It's -- it's pretty serious. It's a pretty
13 serious undertaking to go back and look at performance by
14 attorneys in a very serious case.

15 And so I took that very seriously as I
16 evaluated -- tried to reduce it to, like, the lowest common
17 denominator of what basically a criminal defense attorney
18 should be in a capital case like this.

19 And that's why a lot of the things I didn't -- I
20 didn't want to -- I did not have an opinion that they were
21 ineffective or deficient.

22 Q. You broke this up into a dichotomy, I think,
23 page 14 of your original 2022 report, Defendant's
24 Exhibit 43, page 14.

25 A. Yes, sir.

0 2 : 4 3 1 Q. What do you say there about the two types of
0 2 : 4 3 2 claims? How do you split them up?

0 2 : 4 3 3 A. Are you talking about, like, the boldface
0 2 : 4 3 4 paragraph in the middle there?

0 2 : 4 3 5 Q. You listed the claims. I'm not asking you to list
0 2 : 4 3 6 the claims.

0 2 : 4 3 7 There's a little disclaimer right under there
0 2 : 4 3 8 where you split them up into two groups.

0 2 : 4 3 9 A. Where it says, "To summarize, I agree with all or
0 2 : 4 3 10 portions..."

0 2 : 4 3 11 Q. Let me see.

0 2 : 4 3 12 A. I'm not sure I'm looking at the right --

0 2 : 4 4 13 Q. There's a line that's -- right before discussion
0 2 : 4 4 14 of opinions, there's a bolded and underlined that says, "I
0 2 : 4 4 15 have reviewed the other claims and at this time do not see
0 2 : 4 4 16 sufficient evidence in the prehearing record to form an
0 2 : 4 4 17 opinion as to trial counsels' deficient performance."

0 2 : 4 4 18 Is that correct?

0 2 : 4 4 19 A. Yes, sir.

0 2 : 4 4 20 Q. So you're basically splitting it up into two
0 2 : 4 4 21 groups. One group, you didn't find sufficient information
0 2 : 4 4 22 to make a determination. And the other group, where you
0 2 : 4 4 23 believe you did. Is that correct?

0 2 : 4 4 24 A. Oh, okay. Yes, sir.

0 2 : 4 4 25 Q. I'm going to ask you about both. Let's start with

1 the first set where you felt you did find --

2 A. Okay.

3 Q. -- enough information for deficient performance.

4 One of those things that you testified to earlier
5 was failing to cross-examine Vanessa Smith about the crime
6 scene; is that correct?

7 A. Yes.

8 Q. And one of those specific items you said that they
9 were ineffective for failing to cross-examine her about was
10 the knife, right? There was a knife found on a backpack and
11 blood on it, right? Or found on a bag, and there's --

12 A. Found on a bag, right.

13 Q. And you said it was ineffective not to
14 cross-examine Vanessa Smith about that; is that correct?

15 A. Right.

16 Q. And one of the reasons you said it was ineffective
17 not to cross-examine her about it was because there was some
18 information in one of the statements that the knife belonged
19 to Christopher Gailey.

20 A. Are you looking at -- are you --

21 Q. I'm not looking at your report. I was just
22 writing down what you said when you were testifying. That's
23 what I'm asking you.

24 You said a lot more when you were testifying. I
25 was trying to take some notes.

0 2 : 4 7 1 Gailey didn't have any wounds on him from a knife; isn't
0 2 : 4 7 2 that correct?

0 2 : 4 7 3 A. Well, the wounds were gunshot wounds, that's
0 2 : 4 7 4 right.

0 2 : 4 7 5 But you don't know what somebody might have done
0 2 : 4 7 6 with that knife, you know, in terms of the wound that he
0 2 : 4 7 7 had. I mean, maybe -- who knows, maybe they -- somebody
0 2 : 4 7 8 stuck the knife in or something like that.

0 2 : 4 7 9 Anything -- anything could have happened. I mean,
0 2 : 4 7 10 it's -- you know, you see enough murder cases, you know, a
0 2 : 4 7 11 lot of strange things can happen.

0 2 : 4 7 12 But the point is, you know, when you think about a
0 2 : 4 7 13 case like this, you have a first-degree murder -- I'm
0 2 : 4 7 14 getting -- I'm answering your question. I'm not trying to
0 2 : 4 7 15 not answer your question.

0 2 : 4 7 16 But this is a first-degree murder case,
0 2 : 4 7 17 premeditation and deliberation, right? And the jury's going
0 2 : 4 7 18 to be instructed on second-degree, or could be, probably
0 2 : 4 7 19 always, with a premeditation-deliberation in my experience.

0 2 : 4 8 20 So if something is derived from the use of that
0 2 : 4 8 21 knife that turned this into an altercation versus just a
0 2 : 4 8 22 shoot-from-behind cold-blooded murder, that is a very
0 2 : 4 8 23 different case and could have resulted in a lesser degree of
0 2 : 4 8 24 offense. You know, like going from first-degree to
0 2 : 4 8 25 second-degree.

0 2 : 4 8 1 And also looking into the second phase, in terms
0 2 : 4 8 2 of, you know, different aggravating factors, some of these
0 2 : 4 8 3 things could have -- could apply to that.

0 2 : 4 8 4 Q. While you're talking about what could have
0 2 : 4 8 5 happened, couldn't it have been Scott Allen's DNA that was
0 2 : 4 8 6 found on that knife? It was Scott Allen's blood?

0 2 : 4 8 7 A. It could have. It could have.

0 2 : 4 8 8 Q. What happens to defense counsel when they push
0 2 : 4 8 9 about that?

0 2 : 4 8 10 A. Push?

0 2 : 4 8 11 Q. What happens if they start asking questions and
0 2 : 4 8 12 they send it away for a DNA test, and it comes back and it's
0 2 : 4 9 13 Scott Allen's blood?

0 2 : 4 9 14 A. You're never gonna -- a defense attorney is never
0 2 : 4 9 15 going to ask that a potential weapon with blood on it be
0 2 : 4 9 16 sent off for DNA testing without the absolute consent of the
0 2 : 4 9 17 defendant.

0 2 : 4 9 18 Q. Whether you got -- you go get your defendant's
0 2 : 4 9 19 consent, are you going to ask for that as an attorney in the
0 2 : 4 9 20 case?

0 2 : 4 9 21 A. I have done that.

0 2 : 4 9 22 Q. Okay. What about in post-conviction? Have you
0 2 : 4 9 23 asked for post-conviction DNA?

0 2 : 4 9 24 A. Yes.

0 2 : 4 9 25 Q. But no post-conviction DNA testing was asked for

1 in this case on this knife or any of this other evidence,
2 was it?

3 A. Not that I'm aware of.

4 MR. VLAHOS: Your Honor, at this time, the state
5 would ask the Court to take judicial notice of its own file
6 that no motions for post-conviction DNA testing, for
7 fingerprint testing, or any other such has been filed.

8 THE COURT: The Court will take judicial notice of
9 what is within the file.

10 MR. VLAHOS: May I approach the witness,
11 Your Honor?

12 THE COURT: You may.

13 THE WITNESS: Can I further explain my answer?

14 THE COURT: Not at this point. You have to wait
15 for the next question.

16 Q. Mr. Rabil, I'm handing you what's been marked for
17 identification as Defendant's Exhibit 34.

18 A. Yes, sir.

19 Q. Is that correct?

20 A. 34.

21 Q. Yes, sir.

22 That's the statement that Lillie Efird gave to law
23 enforcement; is that correct?

24 A. That's -- yes, sir.

25 Q. What does it say at the top about the date she

1 gave that statement to law enforcement?

2 A. Says the -- Activity, July 21st, 1999. So that
3 appears to be the date. Well, actually, the first paragraph
4 says July 20th.

5 Q. And do you -- you reviewed this as part of the
6 case; is that correct?

7 A. At some point, yes, sir.

8 Q. If you'll please turn to pages Bates-stamped at
9 the bottom P01978, P01978.

10 A. Okay.

11 Q. And, Mr. Rabil, you reviewed this because it was
12 in Mr. Oldham's file; is that correct?

13 A. That's correct.

14 Q. Trial counsels' files.

15 The first paragraph on that page, there's a
16 line -- last sentence on the first page -- that's
17 underlined. Could you please read that into the record.

18 A. "She indicated that Allen also carried a knife in
19 his back pocket and indicated that it looked much like the
20 knife depicted in the crime scene photographs."

21 Q. "She" meaning Lillie Efird; is that correct?

22 A. I think that's -- yeah. It says, "Efird
23 stated..." And "She stated..."

24 It appears to be, yeah. Yeah. I wasn't sure she
25 was quoting Vanessa. Yeah, looks like Efird.

1 Q. In that statement, Efird -- you know she testified
2 at trial, right?

3 A. Yes, sir.

4 Q. In that statement, Efird is linking the knife to
5 Scott Allen; is that correct?

6 A. Yes.

7 Q. And also it's kind of underlined in there, kind of
8 like Mr. Oldham saw it and underlined it?

9 A. Right.

10 Q. Mr. Oldham would have a reason for not asking
11 about that knife, wouldn't he?

12 A. That would be -- you would take that into
13 consideration, I think also talk to the defendant.

14 Q. And if you decided not to ask that question about
15 that knife because it would link it to Scott Allen, isn't
16 that a reasonable decision for a professional attorney to
17 make?

18 A. Well, it -- it might be a reason not to ask
19 Ms. Efird about it.

20 But in terms of asking Ms. Smith about it as a
21 fact at the crime scene, I would not say that.

22 Q. Aren't you drawing attention to the knife if you
23 ask Ms. Smith about it or anybody about it in the case?

24 A. Yeah, you are drawing attention to it.

25 Q. Now, specifically with Ms. Smith, she never

1 testified she ever saw a knife out there, did she?

2 A. Correct.

3 Q. Okay. In fact, when she testified, basically her
4 testimony was they're walking through the woods, they walk
5 in single file. At some point, after drinking from the
6 well, they walk in single file.

7 A. Right.

8 Q. Defendant Allen pushes Christopher Gailey, turns
9 around -- or excuse me. Defendant Allen reaches back and
10 pushes Vanessa Smith back, turns around, and shoots
11 Christopher Gailey in the back with the sawed-off shotgun,
12 and Ms. Smith goes down to the ground and puts her hands
13 over her head on the ground; is that correct?

14 A. That's right.

15 Q. And then Mr. Allen, after he fires more than one
16 time, he grabs Ms. Smith and pulls her up to where the cabin
17 is; is that correct?

18 A. That's how she testified.

19 Q. Okay. And the cabin's some distance away; is that
20 right?

21 A. That's right.

22 Q. Didn't she also testify she never saw
23 Christopher Gailey after that?

24 A. I believe that's right.

25 Q. So what she sees as they're walking in line,

1 Scott Allen pushes her back, she goes down, hears shooting,
2 more than one shot, covers her head, and then he pulls her
3 up to the cabin. But she's never seen Gailey after the
4 first shot; is that correct?

5 A. Correct.

6 Q. So as far as what happens down there at the crime
7 scene, she did testify that Defendant Allen would crawl down
8 there and throw rocks at Gailey to see if he was alive; is
9 that correct?

10 A. She did.

11 Q. She testified she heard Gailey moaning; is that
12 right?

13 A. She did.

14 Q. And when they asked her what it sounded like, she
15 said the sound of being in pain; is that not right?

16 A. Something like that.

17 Q. Okay. And the defendant had just in front of her
18 shot a man -- who was his best friend -- in the back, a man
19 who used to give him food, give him money, give him drugs,
20 and she just saw him waste the guy like he was nothing; is
21 that correct?

22 A. She didn't use those words, but essentially,
23 that's a fair assessment.

24 Q. And while she's first hiding on the ground and
25 then up at the cabin wondering what he's doing down there

1 but hiding out, she has to think to herself, "I've given
2 Scott Allen money; I've traveled a lot of different places
3 with him, San Diego, Colorado, all that; helped him get a
4 fake ID when he was on the run. What if he decides to treat
5 me the way he just did his best friend?"

6 She has to be thinking something like that,
7 doesn't she?

8 A. I think she said that.

9 Q. It's reasonable to think that, isn't it?

10 A. I think any reasonable person would be pretty
11 scared if that's what happened.

12 Q. Okay. And she was also, according to her own
13 statement, taking drugs and drinking alcohol before they
14 went out there; isn't that correct?

15 A. I think -- I think alcohol, too, yeah.

16 Q. And so she had to be drinking. And people who
17 drink like that usually get drunk; isn't that right?

18 A. That's the reason.

19 Q. And she's probably high in addition to being
20 drunk?

21 A. Probably have some degree of impairment, yes, sir.

22 Q. Walking in the woods -- and it's dark in the woods
23 because it's after 9:00; is that not correct?

24 A. July, yes, sir.

25 Q. And --

0 2 : 5 6 1 A. I mean, yeah. 'Cause with all the trees, you're
0 2 : 5 6 2 not going to get much sun even. Yeah. That's right.

0 2 : 5 6 3 Q. It could have been light when they started; by the
0 2 : 5 6 4 time they get to where this happened, it's almost an hour's
0 2 : 5 6 5 walk.

0 2 : 5 6 6 A. It's about an hour's walk.

0 2 : 5 6 7 Q. And you walked it, you know. You went down there.

0 2 : 5 6 8 A. In the daytime.

0 2 : 5 6 9 Q. No. Yeah, I understand that.

0 2 : 5 6 10 But you --

0 2 : 5 6 11 A. Even though they tried to scare us away by saying
0 2 : 5 6 12 there's all these snakes out there, we went anyway.

0 2 : 5 6 13 Q. And so if you're not expecting it, you see
0 2 : 5 7 14 something like that happen, and you're high and drunk
0 2 : 5 7 15 anyway --

0 2 : 5 7 16 A. Yeah.

0 2 : 5 7 17 Q. -- kind of makes you freak out, doesn't it?

0 2 : 5 7 18 A. It does. But all the -- all the questions you're
0 2 : 5 7 19 asking me are assuming that she's telling the truth. And
0 2 : 5 7 20 what I'm saying about the knife is maybe she's not, and
0 2 : 5 7 21 maybe she's making all this up.

0 2 : 5 7 22 You know, and so poking around at -- I don't know
0 2 : 5 7 23 if poking is the right word -- you know, asking about
0 2 : 5 7 24 different things at the crime scene, shell casings,
0 2 : 5 7 25 there's -- thrown around here and there the holster, the

0 2 : 5 7 1 knife, all these weird things there, could indicate a
0 2 : 5 7 2 completely -- just as true alternative, just as not true --
0 2 : 5 7 3 but, you know, alternative explanation that showed she's not
0 2 : 5 7 4 credible.

0 2 : 5 7 5 So I'm questioning her -- I think this is where
0 2 : 5 7 6 you question her testimony, all the things you're asking
0 2 : 5 7 7 about; yes, she said all those things.

0 2 : 5 7 8 Q. I'm not saying don't question her testimony. I'm
0 2 : 5 7 9 saying you're -- let me rephrase.

0 2 : 5 7 10 The claim is ineffective assistance of counsel for
0 2 : 5 8 11 failing to cross-examine Vanessa Smith about things out at
0 2 : 5 8 12 the crime scene; isn't that the claim?

0 2 : 5 8 13 A. Not only the knife but the other things.

0 2 : 5 8 14 Q. All right. Well, if you ask her, "Wasn't there a
0 2 : 5 8 15 knife found out there at the crime scene?" isn't she going
0 2 : 5 8 16 to say, "I don't know. I was scared for my life up at the
0 2 : 5 8 17 cabin. I have no idea what was at the crime scene"?

0 2 : 5 8 18 A. Well, it's like we were talking about this
0 2 : 5 8 19 morning. In some respects, it doesn't matter what her
0 2 : 5 8 20 answer is. But drawing attention to it on cross-examination
0 2 : 5 8 21 is as big a point as seeing what her answer is.

0 2 : 5 8 22 Q. So, in your opinion, repeatedly asking somebody
0 2 : 5 8 23 questions that they can't possibly know the answers to and
0 2 : 5 8 24 giving them an opportunity to say how scared for their life
0 2 : 5 8 25 they were because of what they just saw, in your opinion,

1 that's what trial counsel should have done?

2 MS. WARREN: Objection.

3 THE COURT: Overruled.

4 You may answer.

5 A. I wouldn't say -- you used the word repeatedly. I
6 would say pointedly and maybe -- you know, you got to be
7 reasonable there. But -- I mean, an attorney has to be
8 reasonable there. I'm not criticizing you. You have to be
9 somewhat, you know, cognizant of how you're coming across
10 with the jury. And --

11 But, sure, asking questions about the crime scene
12 to expose problems with her memory is quite significant, I
13 would say.

14 Q. But if she doesn't know what was there, how does
15 that point out a problem with her memory?

16 A. You don't know what she doesn't know unless you
17 try to ask some questions about it.

18 Q. And you're advocating asking questions to which
19 you don't know the answer on cross-examination; is that what
20 you're telling us?

21 A. No. I know the answer is there's a knife out
22 there, and it doesn't matter what her answer is.

23 There is a -- there is the proposition of what --
24 the 10 commandments of cross-examination by Irving Younger
25 that we all saw in trial practice. Number one is never ask

0 2 : 5 9 1 a question you don't know the answer to. However, there are
0 2 : 5 9 2 exceptions to that. And if you don't care what the answer
0 3 : 0 0 3 is, then you ask it.

0 3 : 0 0 4 And here, what about the knife? What about the
0 3 : 0 0 5 shell casings? What about your inconsistent statement, you
0 3 : 0 0 6 know, from what she had said before? Those you are bringing
0 3 : 0 0 7 to the jury's attention through cross-examination, the
0 3 : 0 0 8 doubtful testimony of Vanessa Smith.

0 3 : 0 0 9 Q. Each time you ask about an item down there at the
0 3 : 0 0 10 scene, you ask about the knife, "I don't know. I was up at
0 3 : 0 0 11 the cabin." You ask about the shell casings, "I don't know.
0 3 : 0 0 12 I was up at the cabin." You ask about the holster, "I don't
0 3 : 0 0 13 know. I was up at the cabin."

0 3 : 0 0 14 How many times does that happen before -- I mean,
0 3 : 0 0 15 what does that really do for your client in a case?

0 3 : 0 0 16 A. Well, you're basically bringing out what the
0 3 : 0 0 17 evidence was at the crime scene -- and you're not -- so each
0 3 : 0 0 18 one of those things you just listed is a different object:
0 3 : 0 0 19 Shell casings, knife, holster, the rounds for the .45 that
0 3 : 0 0 20 were unspent that were strewn around. All those things are
0 3 : 0 0 21 important to bring out.

0 3 : 0 1 22 And, you know, as -- thinking forward, you know,
0 3 : 0 1 23 because you're thinking about what -- what came next. And
0 3 : 0 1 24 there's no point when Vanessa's up there that Scott got all
0 3 : 0 1 25 the way down -- he was all the way down where the body was.

0 3 : 0 1 1 So the cabin's, like, up here on the hill where this Kleenex
0 3 : 0 1 2 is and it's a slope down to where the body was. And they're
0 3 : 0 1 3 sitting on the front porch here, and about 70 yards down
0 3 : 0 1 4 here is Mr. Gailey. And Scott's, like, crawling down,
0 3 : 0 1 5 tossing rocks down. Right? But at no point does Vanessa
0 3 : 0 1 6 say that he went down there and was throwing things around
0 3 : 0 1 7 the scene where the body was.

0 3 : 0 1 8 So that's -- you know, you get into things like
0 3 : 0 1 9 that. It's not like just badgering with the same question
0 3 : 0 1 10 over and over. There's a progression that, you know, that
0 3 : 0 1 11 we just teach in the practice of law.

0 3 : 0 1 12 Q. How far a distance did you just testify to?

0 3 : 0 1 13 A. I don't know. 70 -- did I say 70 yards? I mean,
0 3 : 0 2 14 like, 70 feet, 60, 70 feet.

0 3 : 0 2 15 Q. Even 60, 70 feet, that's a fairly long distance to
0 3 : 0 2 16 see in the dark, right?

0 3 : 0 2 17 A. Well, depends on the lighting. It is a -- it's a
0 3 : 0 2 18 clear view from the cabin down to where the body was.

0 3 : 0 2 19 Q. And --

0 3 : 0 2 20 A. Yeah. To your point, it does, sure.

0 3 : 0 2 21 Q. Because Vanessa Smith didn't testify she saw him
0 3 : 0 2 22 go all the way down there doesn't mean he didn't make it all
0 3 : 0 2 23 the way down there; isn't that correct?

0 3 : 0 2 24 A. It could be. But there's no indication of that
0 3 : 0 2 25 from her prior statements. And so you would have her prior

0 3 : 0 2 1 statements where she said he crawled down there. And if she
0 3 : 0 2 2 at trial says he walked around down there, then you have a
0 3 : 0 2 3 prior inconsistent statement that you bring out, say, well,
0 3 : 0 2 4 she never said that before.

0 3 : 0 2 5 Q. All she could testify to is what she saw; isn't
0 3 : 0 2 6 that correct?

0 3 : 0 2 7 A. All she could testify to truthfully is what she
0 3 : 0 2 8 saw. If she's not being truthful, she can testify about
0 3 : 0 2 9 anything.

0 3 : 0 3 10 And cross-examination about the physical evidence
0 3 : 0 3 11 at the scene is the best measure of trying to see whether
0 3 : 0 3 12 she is being truthful because you have an object to compare
0 3 : 0 3 13 what's coming out of her mouth, right? I mean, no offense,
0 3 : 0 3 14 but I mean -- and I understand cross-examination, but the
0 3 : 0 3 15 point of your questions of me are presuming she's telling
0 3 : 0 3 16 the truth. Then, you know, question, question, question.
0 3 : 0 3 17 And I don't give her that presumption on cross-examination.

0 3 : 0 3 18 Does that -- I mean, I'm not trying to be
0 3 : 0 3 19 sarcastic here. I'm trying to give you my perspective.

0 3 : 0 3 20 Q. I understand your position.

0 3 : 0 3 21 But as we're going back and forth on this, can you
0 3 : 0 3 22 see reasonable professional minds disagreeing on such an
0 3 : 0 3 23 issue?

0 3 : 0 3 24 A. Not on a basic issue as crime scene evidence at
0 3 : 0 3 25 the scene of a murder where there's no fingerprints, no DNA,

1 no nothing connecting the person to the -- you know,
2 connecting the defendant to the crime scene and where it's a
3 one-witness case. I think that's what you have to work with
4 is the physical evidence --

5 **THE COURT:** I'm sorry. Go ahead. Finish.

6 **A.** That's what you have, physical evidence. That's
7 what you got to work with and go from there.

8 **THE COURT:** Mark your place. We're going to take
9 a brief recess.

10 Sir, you may step down. Thank you.

11 We will take a ten-minute recess.

12 (Recess.)

13 **THE COURT:** Counsel approach briefly, please.

14 (Bench conference, not reported.)

15 **THE COURT:** All right. Let the record reflect
16 that the defendant is present in the courtroom with his
17 lawyers.

18 I will just note, for the record, that due to
19 impending inclement weather, that being Hurricane Helene,
20 which is due to hit Montgomery County tonight, from what I
21 understand, the local schools have already been canceled for
22 Friday.

23 Therefore, based on that, the Court will not be in
24 session tomorrow, which is Friday, September 27th. We will
25 reconvene when we recess today at 5:00 and come back on

0 3 : 1 6 1 Monday at 9:30 a.m.

0 3 : 1 6 2 I understand counsel wanted to put some matters on
0 3 : 1 6 3 the record about that.

0 3 : 1 6 4 MS. WARREN: Yes, Your Honor.

0 3 : 1 6 5 Mr. McCrary has been here and is our crime scene
0 3 : 1 6 6 expert from out of state. We would like to get him on the
0 3 : 1 6 7 road home in advance of the hurricane as we look at the
0 3 : 1 6 8 pending weather.

0 3 : 1 6 9 This morning, Mr. McCrary drove to court along
0 3 : 1 7 10 with counsel, and his vehicle is about ten minutes away.
0 3 : 1 7 11 But we were in a shared vehicle to court. So Mr. Allen has
0 3 : 1 7 12 consented that we may continue for the next 20 to 30 minutes
0 3 : 1 7 13 while Mr. Chetson drives Mr. McCrary back to his car to
0 3 : 1 7 14 return him to Virginia, and court continues here.
0 3 : 1 7 15 Mr. McCrary will return on Monday morning at 9:30.

0 3 : 1 7 16 THE COURT: Just out of an abundance of caution,
0 3 : 1 7 17 sir, please stand.

0 3 : 1 7 18 Would you state your name for the record.

0 3 : 1 7 19 THE DEFENDANT: Scott David Allen.

0 3 : 1 7 20 THE COURT: Sir, you have the right to remain
0 3 : 1 7 21 silent. Anything you say may be used against you.

0 3 : 1 7 22 Your counsel -- co-counsel, Ms. Warren, just
0 3 : 1 7 23 stated that you do consent to your other attorney,
0 3 : 1 7 24 Mr. Chetson, leaving for just a few moments while we
0 3 : 1 7 25 continue in this evidentiary hearing; is that correct? You

1 do, in fact, consent to that?

2 **THE DEFENDANT:** Yes, Your Honor.

3 **THE COURT:** Thank you, sir. You may be seated.

4 Anything for the state?

5 **MR. VLAHOS:** No, Your Honor.

6 **THE COURT:** All right. Then we will proceed at
7 this point.

8 And the witness will please retake the stand. And
9 recall that you are still under oath.

10 I'll also note, for the record, that there's no --

11 **MR. VLAHOS:** Sorry, Your Honor. I think the
12 experts are --

13 **THE COURT:** I will also note, for the record, that
14 this was commissioned as a two-week session, so there are no
15 issues about that. All right.

16 Sir, recall you're still under oath.

17 The state may resume.

18 **MR. VLAHOS:** Thank you, Your Honor.

19 **Q.** So, Mr. Rabil, it was your opinion that no
20 competent attorney would have chosen not to cross-examine
21 Vanessa Smith about the evidence at the crime scene.

22 **A.** It's my opinion that a competent criminal defense
23 attorney would have cross-examined her about the knife and
24 the crime scene discrepancies that we've talked about.

25 **Q.** Thank you.

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1 Mr. Rabil, also Ms. Warren asked you about the ATM
2 records.
3 A. Right.
4 Q. And I believe you have them up there as
5 Defendant's Exhibit 32.
6 Could you please pull that out for me.
7 A. I'm sure they'll be at the bottom of the pile.
8 32. Yes, sir.
9 Q. Mr. Rabil, Ms. Warren asked you several questions
10 about these records.
11 Isn't it correct that these records were
12 introduced by the state into evidence at trial to
13 corroborate Vanessa Smith's testimony?
14 A. That's my recollection.
15 Q. Okay. And the claim is failing to cross-examine
16 Vanessa Smith about these bank records; is that correct?
17 A. Right. As well as Mr. Bunting.
18 Q. Now, as far as Vanessa Smith goes, they're not her
19 bank records, are they?
20 A. Not.
21 Q. They're Chris Gailey's bank records; is that
22 correct?
23 A. Correct.
24 Q. Do you have any information that she knows
25 anything about Chris Gailey's bank records or can get access

0 3 : 2 0 1 to them?

0 3 : 2 0 2 A. Not as to his records, just that she said that she
0 3 : 2 0 3 used his bankcard.

0 3 : 2 0 4 Q. So if you approach her at trial and say, "Here,
0 3 : 2 0 5 I'm handing you Chris Gailey's bank records. Could you
0 3 : 2 0 6 please review those and tell me what you think of them,"
0 3 : 2 0 7 would you do that?

0 3 : 2 0 8 A. Probably not.

0 3 : 2 0 9 Q. Okay. And so how would you go about
0 3 : 2 0 10 cross-examining her on them?

0 3 : 2 0 11 A. It would be more like this morning when I was
0 3 : 2 0 12 talking about newspaper records or prior statements. I
0 3 : 2 0 13 would confront her with -- with it. I'd say -- you know,
0 3 : 2 0 14 it'd be something -- it'd be more like, "So, Ms. Smith,
0 3 : 2 1 15 you've testified here today on direct examination that
0 3 : 2 1 16 you -- that Mr. Allen forced you to use Mr. Gailey's
0 3 : 2 1 17 bankcard on July 12th in Shallotte" -- or July 11, whatever
0 3 : 2 1 18 the day was -- "is that right?" And, you know, just nail
0 3 : 2 1 19 her down -- I guess is the word I use in my report -- as to
0 3 : 2 1 20 what exactly she, you know, said she did.

0 3 : 2 1 21 And I said -- and then I would probably slowly
0 3 : 2 1 22 work with her. "So if -- if that is correct, then you know
0 3 : 2 1 23 how things work there. There would be a record of that,
0 3 : 2 1 24 right?" And, again, almost doesn't matter what her answer
0 3 : 2 1 25 is. People know how banking records work.

0 3 : 2 1 1 And I probably would have also gone down the road
0 3 : 2 1 2 of asking her if she was aware that -- she -- there was
0 3 : 2 1 3 probably some sort of video or photograph taken of whoever
0 3 : 2 1 4 was using those.

0 3 : 2 1 5 Now, no way I would be able to -- well, they were
0 3 : 2 2 6 already introduced, so, you know, I could ask her then --
0 3 : 2 2 7 okay, back up. So -- so remembering that they were
0 3 : 2 2 8 introduced by the state as an exhibit, they're in front of
0 3 : 2 2 9 the jury.

0 3 : 2 2 10 And I could show her then the records and say,
0 3 : 2 2 11 "Now, Ms. Smith, do you see there's a record here of
0 3 : 2 2 12 somebody accessing Mr. Gailey's bank account on this
0 3 : 2 2 13 particular date?" And I can't remember if it has a time on
0 3 : 2 2 14 there.

0 3 : 2 2 15 Q. If they were introduced in the record after she
0 3 : 2 2 16 had finished testifying, which I think happened in this
0 3 : 2 2 17 case, what would you do?

0 3 : 2 2 18 A. Well, if they weren't until after -- and I don't
0 3 : 2 2 19 remember -- I think they were after, weren't they? Because
0 3 : 2 2 20 Mr. -- well, it was Bunting and then the people from the
0 3 : 2 2 21 bank. But I would -- we would have still had them through
0 3 : 2 2 22 discovery and asked her about them.

0 3 : 2 2 23 Q. Mr. Rabil, when you're saying nail down, that's
0 3 : 2 3 24 not a derogatory term. Lawyers across the state use that
0 3 : 2 3 25 all the time when we're describing how to do direct

0 3 : 2 3 1 examination properly; is that correct?

0 3 : 2 3 2 A. Yes.

0 3 : 2 3 3 Q. So -- and so let's nail this down. Let's nail the
0 3 : 2 3 4 dates down.

0 3 : 2 3 5 Friday was July the 9th of 1999, when they saw
0 3 : 2 3 6 Gailey, Allen, and Smith leave the Whip-O-Will Cove mobile
0 3 : 2 3 7 home; is that correct?

0 3 : 2 3 8 A. July 9th, year 1999.

0 3 : 2 3 9 Q. And then July 10th is the Saturday?

0 3 : 2 3 10 A. Correct.

0 3 : 2 3 11 Q. July 12 is Sunday. July 12th is the Monday.

0 3 : 2 3 12 That's the Monday where, according to
0 3 : 2 3 13 Lillie Efird, she gets a call at about 12:45 p.m. while
0 3 : 2 3 14 she's in court from her home phone or a page from her home
0 3 : 2 3 15 phone, so she calls her own home because she doesn't know
0 3 : 2 3 16 who's paging her. It ends up being Vanessa Smith on the
0 3 : 2 3 17 phone. And she leaves Court and goes back to see her at
0 3 : 2 3 18 5:30; is that right?

0 3 : 2 3 19 A. That's my recollection.

0 3 : 2 3 20 Q. So as far as Lillie Efird's timestamp, that's
0 3 : 2 4 21 going to be at 12:45 p.m. on July the 12th of 1999, the
0 3 : 2 4 22 earliest she's got her in Albermarle; is that correct?

0 3 : 2 4 23 A. Yes, sir.

0 3 : 2 4 24 Q. And you said you traveled a lot. How long -- have
0 3 : 2 4 25 you been to Albermarle too? Yes, you have. We had that

1 case up there together.

2 In Stanly County?

3 A. Yeah, that's right. That was Albermarle, yeah.

4 Q. You know Shallotte.

5 About how long from Albermarle to Shallotte? Do
6 you have an opinion?

7 A. I would say at least an hour and a half. I was
8 sort of surprised they would drive there and then go back to
9 Shallotte, but anyway.

10 Q. An hour and a half. So she would have left at --
11 12:45 -- 11:15 or so maybe left Shallotte at the latest?

12 A. To be there by that time? At the latest, yeah.

13 Q. Probably left earlier, right?

14 A. Seems like it.

15 Q. Let's turn to the bank records.

16 Because the last time anybody saw them was
17 July 9th of 1999 at the Whip-O-Will Cove?

18 A. The last time anybody saw --

19 Q. I'm sorry. Saw the three of them together.

20 A. Okay.

21 Q. Okay. They saw -- you know, we're not talking
22 about Jeff Brantley's party. Because isn't the testimony
23 that -- didn't Ms. Smith testify, hey, we went down to
24 Jeff Brantley in Shallotte, and then Mr. Allen decided the
25 cocaine wasn't good enough down there, so we went all the

1 way back up to Albermarle; is that correct?

2 A. That's correct.

3 Q. And we went all the way back down, stopped along
4 the way or somewhere in there; is that correct?

5 A. Yeah.

6 Q. Didn't she admit that somewhere in there, she'd
7 taken some Xanax to calm her nerves?

8 A. More than one, as I recall.

9 Q. Yes, sir.

10 And so not only does she have all the other drugs
11 and alcohol in her system, now she has Xanax in there too;
12 is that correct?

13 A. That's right.

14 Q. And that is -- that is not inconsistent with the
15 way she lived her life; is that correct?

16 A. That's my understanding.

17 Q. And during this time, she says she -- he told her
18 to use the card, she used the card.

19 Now, if you look at -- it's Defendant's Exhibit --
20 the bank records.

21 A. 32.

22 Q. Defendant's Exhibit 32, the first page, it looks
23 like somebody's been writing notes on there, one seven five
24 six, beside some of those transactions. I'm sorry, the
25 second page.

0 3 : 2 7 1 A. I guess my opinion would be that sounds
0 3 : 2 7 2 consistent, you know, if they're -- because there's no a.m.
0 3 : 2 7 3 or p.m., so I would assume they're on a 24-hour time clock
0 3 : 2 7 4 for those, so that would be 8 -- that would seem to indicate
0 3 : 2 7 5 8:40 p.m., yes, sir.

0 3 : 2 7 6 Q. You mean 8:40 a.m.?

0 3 : 2 7 7 A. I mean --

0 3 : 2 7 8 Q. Military time?

0 3 : 2 7 9 A. Yeah. Numbers and things, yes.

0 3 : 2 7 10 That's why I'm a lawyer, math.

0 3 : 2 7 11 Q. So 8:40 a.m. on July 11th of 1999, the Transaction
0 3 : 2 7 12 Amount is for \$200; is that correct?

0 3 : 2 7 13 MS. WARREN: Objection as to July 11th.

0 3 : 2 7 14 THE COURT: I'm sorry. Repeat that. Maybe I
0 3 : 2 7 15 didn't hear it right. Repeat that question.

0 3 : 2 7 16 Q. The Transaction Date, System Date -- System Date
0 3 : 2 8 17 is July 11th, 1999, at 8:40 a.m.; is that correct?

0 3 : 2 8 18 A. Well, it says -- yeah, it says System Date.

0 3 : 2 8 19 And --

0 3 : 2 8 20 Q. And you testified earlier that, you know, you know
0 3 : 2 8 21 how banks work. Everybody does. Even the jury knows how
0 3 : 2 8 22 banks work, right?

0 3 : 2 8 23 You've got a date when you do the transaction and
0 3 : 2 8 24 a date when it posts; isn't that correct?

0 3 : 2 8 25 A. Yes.

0 3 : 2 8 1 Q. So a reasonable interpretation of this is that she
0 3 : 2 8 2 did -- somebody, not she, sorry -- somebody did the
0 3 : 2 8 3 transaction on July 11th, 1999, at 8:40 a.m., and it posted
0 3 : 2 8 4 on Monday, July 12th; is that correct?

0 3 : 2 8 5 MS. WARREN: Objection.

0 3 : 2 8 6 THE COURT: Overruled.

0 3 : 2 8 7 You may answer.

0 3 : 2 8 8 A. I mean, that sounds reasonable. I don't know for
0 3 : 2 8 9 sure.

0 3 : 2 8 10 Q. That's something for the jury to decide, right?

0 3 : 2 8 11 A. Or the people from the bank. I mean, I wouldn't
0 3 : 2 8 12 go into court with this unless I had talked to somebody from
0 3 : 2 8 13 the bank to explain that to me, you know.

0 3 : 2 8 14 Q. And then how about the next page, 001014.

0 3 : 2 8 15 We got the same thing under Transaction
0 3 : 2 8 16 Information. We got a Post Date of July 12th, 1999; is that
0 3 : 2 9 17 correct?

0 3 : 2 9 18 A. You're on 1014 now?

0 3 : 2 9 19 Q. Yes, sir.

0 3 : 2 9 20 A. Yeah. Post Date of 7/12.

0 3 : 2 9 21 Q. An Effective Date of 7/12/99; is that correct?

0 3 : 2 9 22 A. Yeah.

0 3 : 2 9 23 Q. And a System Date, which is 7/11/1999; is that
0 3 : 2 9 24 correct?

0 3 : 2 9 25 A. Yeah. That's right.

0 3 : 2 9 1 Q. That's at 8:43, probably a.m.; is that correct?

0 3 : 2 9 2 A. Yeah. If that means a.m.

0 3 : 2 9 3 That's three minutes after the first one, right.

0 3 : 2 9 4 Q. And that's for \$100; is that correct?

0 3 : 2 9 5 A. That's what it says, "cash amount" down there.

0 3 : 2 9 6 Q. Then on the next page, 001015, we're going to look

0 3 : 2 9 7 at the same grouping.

0 3 : 2 9 8 Posting Date is July 12th of 1999; is that what

0 3 : 2 9 9 appears there?

0 3 : 2 9 10 A. Yes, sir.

0 3 : 2 9 11 Q. Effective Date is July 12th, 1999; is that

0 3 : 2 9 12 correct?

0 3 : 2 9 13 A. That's correct.

0 3 : 2 9 14 Q. System Date is July 11th, 1999; is that correct?

0 3 : 2 9 15 A. Yes, sir.

0 3 : 3 0 16 Q. It looks like it was done at 1522 hours, which

0 3 : 3 0 17 would be -- 13, 14, 15 -- 3:00 in the afternoon?

0 3 : 3 0 18 A. 3:22, if that's what -- yeah.

0 3 : 3 0 19 Q. And that one, nothing was withdrawn. Isn't

0 3 : 3 0 20 there -- somebody wrote down "balance inquiry"?

0 3 : 3 0 21 A. Yeah, somebody wrote that down. And there's

0 3 : 3 0 22 "current balance" over there on the right, says 357.

0 3 : 3 0 23 Q. Okay. The next one is zero?

0 3 : 3 0 24 A. Kind of weird because the day before -- I don't

0 3 : 3 0 25 know how it goes up.

0 3 : 3 1 1 A. Yes, sir.

0 3 : 3 1 2 Q. And according to basically the rough timeline we
0 3 : 3 1 3 made, Vanessa Smith would have enough time to check that
0 3 : 3 1 4 balance inquiry in Shallotte, drive all the way to
0 3 : 3 1 5 Albermarle, if that's the bank in Shallotte?

0 3 : 3 1 6 A. If she waited until the end of the week, she'd
0 3 : 3 1 7 have a thousand dollars in there.

0 3 : 3 1 8 I'm sorry. What was your question?

0 3 : 3 1 9 Q. No. It was -- we're not seeing what's coming in.
0 3 : 3 2 10 We're just seeing balance inquiries; isn't that right?

0 3 : 3 2 11 A. That's balance inquiry.

0 3 : 3 2 12 Q. And we're seeing what's coming out; is that
0 3 : 3 2 13 correct?

0 3 : 3 2 14 A. On the other ones.

0 3 : 3 2 15 Q. Okay.

0 3 : 3 2 16 A. On the other ones, they were -- yeah, we just
0 3 : 3 2 17 looked at two balance inquiries, and then we had transaction
0 3 : 3 2 18 amounts. And I guess -- I guess Transaction Amount is a
0 3 : 3 2 19 withdrawal. But then again, there's, like, cash amount,
0 3 : 3 2 20 there's nothing listed on those. I mean, I don't know.
0 3 : 3 2 21 Maybe somebody's depositing money in his account
0 3 : 3 2 22 unbeknownst. It's weird. I don't --

0 3 : 3 2 23 Q. If you're cross-examining Vanessa Smith about
0 3 : 3 2 24 that, those kind of questions come up when she's asking you
0 3 : 3 2 25 stuff, what would happen to your cross-examination of her?

0 3 : 3 2 1 A. I wouldn't do it without knowing what I'm looking
0 3 : 3 2 2 at. So I would have -- if the defense attorneys -- see, in
0 3 : 3 2 3 my opinion, they should have figured all this out before
0 3 : 3 3 4 they're sitting there with this in court.

0 3 : 3 3 5 And, you know, the other thing is, these are --
0 3 : 3 3 6 so, remember, Mr. Bunting, early officer in the case, he
0 3 : 3 3 7 requisitions these from Wachovia Bank records. He also
0 3 : 3 3 8 requisitions the video, whatever -- the video records, and
0 3 : 3 3 9 made some stills from it.

0 3 : 3 3 10 And strangely -- not strangely, but he testifies
0 3 : 3 3 11 that he looked -- he looked at these videos and did not see
0 3 : 3 3 12 Vanessa Smith or Scott Allen for the times that match up on
0 3 : 3 3 13 this. I think there was -- I remember going back and
0 3 : 3 3 14 forth -- when they were going back and forth with
0 3 : 3 3 15 Judge Cromer about a few minutes were off.

0 3 : 3 3 16 But, at any rate, the testimony on voir dire was
0 3 : 3 3 17 that they were not in this. So, you know, it all works
0 3 : 3 3 18 together. I don't know why they objected to the videos at
0 3 : 3 3 19 that point. I understand why they objected to the videos
0 3 : 3 3 20 before, and I'll tell you why because it kind of goes to how
0 3 : 3 3 21 I think about these things with reasonableness.

0 3 : 3 4 22 So remember, Mr. Pete Oldham testified that
0 3 : 3 4 23 Mr. Atkinson had looked at some videotape. I think you were
0 3 : 3 4 24 asking him about it, and it was not clear, or he couldn't
0 3 : 3 4 25 make -- I don't know what the words were, but it wasn't

1 clear.

2 So as -- as a pretrial matter, that's, like, not
3 helpful. Really not helpful to either side, right?

4 But once Mr. Bunting comes in and says he looked
5 at it and it's not either one of them, it becomes a helpful
6 thing. And it's like evidence of innocence because it
7 contradicts what the testimony is.

8 And so whatever these records are here, when you
9 use them in conjunction with the videos from these banks,
10 from this bank in Shallotte or these places, then it's,
11 like, good impeachment.

12 Q. And in the go-between between Judge Cromer and
13 defense counsel, didn't Mr. Atkinson indicate, "Well, I know
14 the state may not want to introduce them, but, Your Honor,
15 we may"?

16 A. Yeah, and then they objected.

17 Q. The defense or the state? Who objected?

18 A. Well, Mr. Yates was the DA, right? He was trying
19 to get it in. It was very strange. He was working on, you
20 know, laying the groundwork on voir dire for getting
21 Mr. Bunting to testify about this, and then -- then the
22 defense objected.

23 And when -- it was after he said it was not
24 Vanessa Smith or Scott Allen. And Mr. Yates was sort of
25 like, I thought we -- you know, I thought we were agreeing

1 on something, stipulating, whatever, and so never mind, we
2 won't introduce the video.

3 Q. And the positions kind of changed, didn't they?

4 A. Yeah. Oh, yeah, as to the video itself.

5 I guess it did, yeah. I didn't remember
6 Mr. Atkinson saying what you said, but sort of rings a bell.

7 Q. And were the still pictures made from the videos?

8 A. That's my understanding.

9 Q. And originally, the state was trying to get the
10 still photos on; is that correct?

11 A. Yeah.

12 Q. And the defense, especially Mr. Atkinson, he was
13 on his feet objecting, wasn't he?

14 A. I guess it was him. I was thinking it was. No, I
15 don't remember which one it was.

16 Yeah, the defense objected and so the DA decided
17 not to introduce it.

18 Q. Wasn't one --

19 A. The video or the stills.

20 Q. And wasn't one of the objections that they hadn't
21 seen them before; is that correct?

22 A. They were -- yeah, they were saying they were
23 surprised by this. And the judge was -- there was a lot of
24 back and forth throughout the trial, almost from the
25 beginning of the trial, over Judge Cromer trying to make

0 3 : 3 6 1 sure that at least one of the defense lawyers -- probably
0 3 : 3 6 2 Mr. Atkinson -- had the opportunity to sit down with
0 3 : 3 7 3 Mr. Bunting and look at these things.

0 3 : 3 7 4 Q. And did this happen? Because sometime during jury
0 3 : 3 7 5 selection, everybody found out that there were videotapes
0 3 : 3 7 6 left in Randolph County that hadn't made it to
0 3 : 3 7 7 Montgomery County.

0 3 : 3 7 8 A. Yeah. I think I remember Mr. Bunting saying the
0 3 : 3 7 9 week before trial or a week ago, yeah, just right on top of
0 3 : 3 7 10 trial or during trial he --

0 3 : 3 7 11 Q. Isn't that why Lieutenant Bunting -- a lot of the
0 3 : 3 7 12 times, they were voir diring him on this?

0 3 : 3 7 13 A. He had a lot of voir dires.

0 3 : 3 7 14 Q. And what came out, like you said, Mr. Atkinson
0 3 : 3 7 15 went and saw the videos?

0 3 : 3 7 16 A. That's -- yeah. And that's what Mr. Oldham
0 3 : 3 7 17 testified to in here.

0 3 : 3 7 18 Q. And the long and short of it was, in the end,
0 3 : 3 7 19 Judge Cromer looked at them, he made a comment on the record
0 3 : 3 7 20 that nobody's verified or -- the time statements or the
0 3 : 3 7 21 dates on any of these, hadn't heard any information on that;
0 3 : 3 7 22 and without that, they're useless pretty much. Wasn't that
0 3 : 3 8 23 his musing on the record?

0 3 : 3 8 24 A. Yeah, he was -- he was doing a lot of musing for a
0 3 : 3 8 25 judge throughout the trial. It was interesting. It was one

0 3 : 3 8 1 of his early capital cases anyway.

0 3 : 3 8 2 But, regardless, Bunting ended up saying he looked
0 3 : 3 8 3 at these, and Vanessa Smith and Scott Allen were not in
0 3 : 3 8 4 there. And that's helpful evidence for the defense, so I
0 3 : 3 8 5 don't know why they didn't try to bring that in.

0 3 : 3 8 6 Q. What happens when you try to ask those questions
0 3 : 3 8 7 and the state's objecting because there's been no
0 3 : 3 8 8 authentication of the date or timestamp?

0 3 : 3 8 9 A. Well, see, this is where it was -- seems to me --
0 3 : 3 8 10 big mistake to object to these videos after Mr. Bunting said
0 3 : 3 8 11 they were not in there. Why would you -- it's not like
0 3 : 3 8 12 saying there's DNA that exonerates you. But it's like
0 3 : 3 8 13 photographic evidence that Vanessa Smith is not telling the
0 3 : 3 8 14 truth about these transactions that Scott's making her do
0 3 : 3 9 15 these things. So it mystified me when this was happening.

0 3 : 3 9 16 Q. And that -- all that's on the record; isn't that
0 3 : 3 9 17 correct?

0 3 : 3 9 18 A. Yeah. Because I think even what -- I'm trying to
0 3 : 3 9 19 remember -- I don't know if Mr. Oldham added to that or not,
0 3 : 3 9 20 but there were recitations on the record about all this back
0 3 : 3 9 21 and forth and these banking things, yes, sir.

0 3 : 3 9 22 Q. When I said musing, I didn't mean any disrespect
0 3 : 3 9 23 to Judge Cromer.

0 3 : 3 9 24 But he was never asked to make a decision about
0 3 : 3 9 25 entering any of this -- either the videotapes or the still

1 photos from them -- into evidence; is that correct?

2 A. I think that's right. I think once there was this
3 objection, the district attorney withdrew trying to get the
4 videos in.

5 Q. So --

6 A. The stills.

7 Q. Defense counsel was successful in keeping the
8 district attorney trying to get in the evidence he wanted to
9 get in originally?

10 A. Strangely.

11 Q. And then -- and then everybody just kind of
12 dropped it?

13 A. Yes, sir. That's right.

14 Q. And no question, everybody knew what was going on.
15 By that time, they'd had so many hearings and talkings about
16 it and everything, it's clear that counsel made a decision,
17 isn't it?

18 A. That's a good question because it was such a
19 spur-of-the-moment objection. It's like they just didn't
20 have even time to decide. They just reacted without really
21 thinking it through. I mean, it's like -- and you have to
22 do this in court, you know. It's -- things happen and
23 you're, like, surprised in a good way. And you're, like,
24 okay, that happened. Here you have this video evidence that
25 comes in that says she's not at the bank when they say that

0 3 : 4 0 1 she is, and, you know, you should just, like, okay, no
0 3 : 4 0 2 objection.

0 3 : 4 0 3 I don't understand. It doesn't look like they
0 3 : 4 1 4 took a recess and conferred about it. It just happened.
0 3 : 4 1 5 The DA said, okay, I'm just not going to do it then. I
0 3 : 4 1 6 thought we had it worked out.

0 3 : 4 1 7 No disrespect to the district attorney, Mr. Yates,
0 3 : 4 1 8 but he really -- you can read his frustration. He was
0 3 : 4 1 9 mystified that they were, like, fighting over this, as am I
0 3 : 4 1 10 at this point.

0 3 : 4 1 11 Q. But it started in jury selection. It was way down
0 3 : 4 1 12 in the record before everything finally happened. And
0 3 : 4 1 13 Judge Cromer said on the record, "Look, without the stamps,
0 3 : 4 1 14 there's no authentication, it doesn't prove anything"; is
0 3 : 4 1 15 that right?

0 3 : 4 1 16 A. He was raising -- yeah, I don't remember exactly
0 3 : 4 1 17 what he said. He was raising questions about it. And he,
0 3 : 4 1 18 like -- as to the state, as to the state, and then he was,
0 3 : 4 1 19 like, if the defense wants to get them in, you've got the
0 3 : 4 1 20 same problem. But here, the state was willing to do it. If
0 3 : 4 1 21 there's no objection from the defense, the judge -- if he
0 3 : 4 1 22 has no objection to rule on, he could rule on his own
0 3 : 4 1 23 motion -- doesn't usually happen -- if they want to
0 3 : 4 1 24 introduce evidence.

0 3 : 4 1 25 Q. In fact, days of trial had passed between the

0 3 : 4 2 1 discovery of the videos, Will Atkinson going up there and
0 3 : 4 2 2 watching the videos, and then ultimately they have this part
0 3 : 4 2 3 where the judge says, "You can't prove anything," and they
0 3 : 4 2 4 both walk away; isn't that correct?

0 3 : 4 2 5 A. A lot of days passed. I'm thinking -- I don't
0 3 : 4 2 6 know if -- I think I'm right, that this whole thing with
0 3 : 4 2 7 Bunting saying they're not in there was the very last time
0 3 : 4 2 8 he was voir dired about it.

0 3 : 4 2 9 I don't know if I can put my finger on it right
0 3 : 4 2 10 away. That's a -- that was my recollection.

0 3 : 4 2 11 Q. Mr. Rabil, unless you've got something to add, I'm
0 3 : 4 2 12 going to move on.

0 3 : 4 2 13 A. I'm sorry. I was trying to see if -- I'm sorry.
0 3 : 4 2 14 I didn't mark that.

0 3 : 4 2 15 Q. Next I'd like to draw your attention to the whole
0 3 : 4 3 16 church break-ins case.

0 3 : 4 3 17 A. Okay.

0 3 : 4 3 18 Q. No question that Mr. Oldham knew those facts
0 3 : 4 3 19 inside and out because he had represented Allen in those
0 3 : 4 3 20 cases; is that correct?

0 3 : 4 3 21 A. Well, he certainly knew the facts and probably
0 3 : 4 3 22 knew them a lot better then because it was only a few years,
0 3 : 4 3 23 five or six years before.

0 3 : 4 3 24 Q. In fact, Mr. Oldham had -- in the course of
0 3 : 4 3 25 representing him, when Vanessa Smith showed up at his office

1 with the consent of her attorney, Mr. Roose, Richard Roose,
2 and Mr. Oldham took her statement in written form and then
3 had a typed statement typed out that she indicated was what
4 she said and then produced those in court, the trial judge
5 in the middle of trial made him make a sweetheart deal;
6 isn't that correct?

7 A. Yes, sir.

8 Q. And that is effective assistance, is it not?

9 A. Yeah.

10 I mean, it is not like Scott and his father talked
11 about it. So it was voluntary and all that.

12 So, yeah, you've got to add that in, you know,
13 client being voluntary -- but it sounds -- I think he
14 entered an *Alford* plea, so he had his input and --

15 Q. Defendant Allen took a plea, he pled guilty
16 pursuant to *State v. Alford*?

17 A. That's right.

18 Q. Now, when it comes time for the trial, this
19 evidence of church break-ins is kind of a double-edged
20 sword, isn't it?

21 A. You know, in -- yes. It can be a double-edged
22 sword for a number of reasons, yes.

23 Q. It basically places the lawyer in a dilemma,
24 doesn't it?

25 A. You have to make a decision, that's right. And

0 3 : 4 4 1 you really do have -- this is one of those where you'd have
0 3 : 4 4 2 to have consult with your client and weigh the risk and
0 3 : 4 4 3 benefits and all that.

0 3 : 4 4 4 And, you know, first of all, it's like a church,
0 3 : 4 5 5 or churches, right?

0 3 : 4 5 6 And -- but, you know, it's already known from
0 3 : 4 5 7 Vanessa's statements that have been read to the jury at this
0 3 : 4 5 8 point that Scott's on escape for something. And so the
0 3 : 4 5 9 calculus would include, okay, what's he on escape for? And
0 3 : 4 5 10 are we going to run the risk of bringing that in? And, you
0 3 : 4 5 11 know, if it only comes in that they were, you know, these
0 3 : 4 5 12 break-ins and what was taken, radio equipment stuff like
0 3 : 4 5 13 that, then that's not so bad.

0 3 : 4 5 14 Q. Well, it's a little bit more than that, isn't it?
0 3 : 4 5 15 They stole from several churches in this area.

0 3 : 4 5 16 A. Right.

0 3 : 4 5 17 Q. And the church people would come in and find on
0 3 : 4 5 18 the Sunday when they came in to worship that their stereo
0 3 : 4 5 19 equipment and musical equipment was gone; is that right?

0 3 : 4 5 20 A. That's right.

0 3 : 4 5 21 Q. That's almost like when you come in, the Grinch
0 3 : 4 5 22 has taken everything; is that correct?

0 3 : 4 5 23 A. It's bad.

0 3 : 4 6 24 Q. And on top --

0 3 : 4 6 25 A. I guess it's like the Grinch.

0 3 : 4 6 1 Q. On top of that, in some of this paperwork -- and I
0 3 : 4 6 2 don't even know, maybe the newspaper articles -- there's
0 3 : 4 6 3 some talk of maybe some satanic rituals being done at some
0 3 : 4 6 4 of these churches --

0 3 : 4 6 5 A. Yeah -- I'm sorry, I didn't mean to interrupt you.
0 3 : 4 6 6 Yeah. Obviously, there's some stuff that sounds
0 3 : 4 6 7 terrible, right? Like you just said, in the newspaper
0 3 : 4 6 8 article, and somewhere throughout, you know, that whole few
0 3 : 4 6 9 hundred pages. There's some bad stuff.

0 3 : 4 6 10 And you -- a defense attorney -- and I've had to
0 3 : 4 6 11 do this before -- would need to, you know, make the decision
0 3 : 4 6 12 with your client. Are you going to try to get this evidence
0 3 : 4 6 13 in? And if you do, you're going to make a motion in limine
0 3 : 4 6 14 to keep out what you were talking about there, this satanic
0 3 : 4 6 15 stuff, you know. Because if that comes in in a death
0 3 : 4 6 16 penalty case, that's not good.

0 3 : 4 7 17 So you would want to know in advance before you
0 3 : 4 7 18 brought that up, I think, whether you were going to get a
0 3 : 4 7 19 suppression of anything other than these were break-ins.

0 3 : 4 7 20 I mean, I would have a motion in limine to say he
0 3 : 4 7 21 was convicted of these break-ins, Vanessa was a witness to
0 3 : 4 7 22 it, she was a co-defendant, and limit the evidence to her
0 3 : 4 7 23 recantation. And the Court, under Rule 403, could limit
0 3 : 4 7 24 that evidence as being too prejudicial.

0 3 : 4 7 25 And I've done it in at least one other case where

1 there was satanic elements. Of course, in that case, my
2 client admitted that he was -- he had an interest in
3 satanism. And the judge -- because it was the type of
4 case -- it was -- had nothing to do with the case, he
5 suppressed it under Rule 403.

6 Gang stuff, that is frequently a thing that is a
7 subject of Rule 403 to suppress it, even though it might be
8 part of the prior crime.

9 Evidence can be relevant to the conduct that
10 you're talking about but still be limited. So that would be
11 the protocol, that, you know, basically you would -- knowing
12 what was in that file, and knowing what was in that article
13 you mentioned, you'd want to limit that.

14 Q. And that's only if counsel had decided to try to
15 use it; is that correct?

16 A. Well, I think there's -- I think basically there's
17 a presumption you want to use a prior recantation in a case
18 with the same person. If it had been a recantation of some
19 other defendant, a little more questionable. But exactly
20 the same person that you're representing now, and these two
21 people involved allegedly in the same crime? I think
22 there's a presumption you want to use it if you can and if
23 you can limit that bad stuff.

24 Q. You heard me ask Mr. Oldham yesterday if -- what
25 he and Mr. Atkinson decided, whether that was a strategic

1 decision in his book.

2 Did you hear me ask him that?

3 A. Yes.

4 Q. And did you hear him say, yes, it was?

5 A. Yes.

6 Q. Now, before we get into that, there was more than
7 one person in that case implicating Scott Allen in the
8 church breaking and enterings; isn't that correct?

9 A. Yes.

10 Q. So it was not just Vanessa Smith. There was
11 James Thomas Fender, Jamie Fender. Do you remember him? He
12 implicated Scott Allen, didn't he?

13 A. I think that's right.

14 Q. And then a Ronnie Dean Grissom, he implicated
15 Scott Allen?

16 A. I think several of them that were, they were
17 all --

18 Q. Dwight David Lowder Jr., he implicated Scott Allen
19 in the church breaking and enterings?

20 A. I don't remember all the names. I remember there
21 were several people, right.

22 Q. No question, way more evidence in there than just
23 Vanessa Smith; is that correct?

24 A. That's right. But does that -- it depends on, you
25 know, the limiting -- if you get a limiting order from the

0 3 : 5 0 1 Court about limiting some of the information that would be
0 3 : 5 0 2 so prejudicial.

0 3 : 5 0 3 Q. We've talked a little bit about it's a
0 3 : 5 0 4 double-edged sword; you got to weigh it.

0 3 : 5 0 5 And it's strategic choices, that's what the
0 3 : 5 0 6 United States Supreme Court calls it in *Strickland*, right?
0 3 : 5 0 7 We say strategic decisions; they say strategic choices.

0 3 : 5 0 8 And when they say strategic choices, do they not
0 3 : 5 0 9 say that strategic choices made after a thorough
0 3 : 5 0 10 investigation of the law and facts relevant to plausible
0 3 : 5 0 11 options are virtually unchallengeable; is that correct?

0 3 : 5 0 12 A. That's right. That's what that says.

0 3 : 5 0 13 MS. WARREN: Your Honor, may I just put on the
0 3 : 5 0 14 record that Mr. Chetson has returned to counsel table?

0 3 : 5 0 15 THE COURT: So noted.

0 3 : 5 0 16 Q. Mr. Rabil, that's what trial counsel did here;
0 3 : 5 0 17 they made a strategic choice. Is that correct?

0 3 : 5 0 18 A. Yes. So then you ask, was that an objectively
0 3 : 5 0 19 reasonable strategic choice?

0 3 : 5 0 20 Q. And, in your opinion --

0 3 : 5 1 21 A. No. Because I don't think they fully investigated
0 3 : 5 1 22 the possibilities of giving a limiting instruction through a
0 3 : 5 1 23 motion in limine about the other parts of the case.

0 3 : 5 1 24 Q. Could reasonable legal minds disagree on that?

0 3 : 5 1 25 A. Reasonable legal minds would not disagree over the

1 fact that a prior recantation with the same defendants in an
2 earlier case is a significant impeachment -- it is
3 significant impeachment evidence.

4 Where you go from there -- it's sort of like in
5 cases like *Rompilla*, a US Supreme Court case, where they
6 just didn't go after a record because they -- I can't
7 remember what their reason was. But they didn't go after
8 them, so they didn't investigate.

9 So a strategic decision must be made on a full
10 investigation, is what the Supreme Court says.

11 And here, I think part of that so-called
12 investigation would be discussing, exploring with your
13 client, filing a motion in limine to prevent the salacious
14 evidence from that same case.

15 Q. There are two parts to *Strickland*, right?

16 There's deficient performance and prejudice under
17 *Strickland*; isn't that right?

18 A. Prejudice, right. Reasonable probability of a
19 different result or the -- sufficient to undertake without
20 an efficient -- conduct sufficient to the underlying conduct
21 to alter the verdict.

22 Q. Is that standard a reasonable probability of a
23 different result?

24 A. Right. Which would mean in this case anything
25 from an acquittal to second-degree to something less than

1 death. A different result is multiple possibilities.

2 Q. But the wording "reasonable probability" means
3 more likely than not, right?

4 A. No, I don't think it does.

5 Q. It's a higher standard at least than a reasonable
6 possibility; isn't that correct?

7 A. Yeah, reasonable -- I think the Supreme Court
8 even -- because same -- it's the same language as in the
9 *Brady* cases. Reasonable probability, different result.

10 I think -- I'm thinking it's *Kyles v. Whitley* that
11 even says it's not more likely than not; it's a lower --
12 lower standard than that. You know, obviously more than a
13 mere possibility. But reasonable probability is lower than
14 more likely than not.

15 Q. Are you familiar with the United States Supreme
16 Court decision *Wong v. Belmontes*?

17 A. I do.

18 Q. 58 U.S. 15, on page 20, 2009 decision, a
19 per curiam decision that stands for the proposition that the
20 Court found that in evaluating prejudice under *Strickland*,
21 "It is necessary to consider all the relevant evidence that
22 the jury would have had before it" if counsel had pursued a
23 different path, not just the favorable evidence counsel
24 could have presented, but also the prejudicial evidence that
25 almost certainly would have come in with it; isn't that

0 3 : 5 4 1 correct?

0 3 : 5 4 2 A. That's right.

0 3 : 5 4 3 Q. And in this case, even if you get rid of the
0 3 : 5 4 4 satanic discussion because you filed a 404 -- 402-403
0 3 : 5 4 5 motions, even if you do that, it's still church breaking and
0 3 : 5 4 6 enterings, several, where their equipment is gone when they
0 3 : 5 4 7 come in on a Sunday morning; isn't that right?

0 3 : 5 4 8 A. Well, the crime is not breaking into a church.
0 3 : 5 4 9 That's the fact -- you know, the victim. The victims were
0 3 : 5 4 10 the churches. The crime is breaking and entering. So you
0 3 : 5 4 11 would ask for a limitation, a motion in limine for just what
0 3 : 5 4 12 the crime was.

0 3 : 5 4 13 Q. And if you break and enter somebody's house or
0 3 : 5 4 14 somebody's car, that's bad enough. But you break and enter
0 3 : 5 4 15 a church where people give their hard-earned money to come
0 3 : 5 4 16 there and worship, but you think so little of that that you
0 3 : 5 4 17 take their equipment so when they come in there, it's -- I
0 3 : 5 4 18 mean, quite --

0 3 : 5 4 19 A. Look, I hear what you're saying. And this
0 3 : 5 5 20 particular issue is closer, right, than the other things
0 3 : 5 5 21 that I'm -- than the crime scene evidence and the
0 3 : 5 5 22 cross-examination of Vanessa Smith.

0 3 : 5 5 23 I'm just -- my position is there was not a full
0 3 : 5 5 24 consideration and investigation before deciding not to try
0 3 : 5 5 25 to even introduce it.

0 3 : 5 5 1 Q. You do concede that, though, most certainly if
0 3 : 5 5 2 you -- if you introduce evidence of this recantation,
0 3 : 5 5 3 it's -- the evidence that it was breaking into several
0 3 : 5 5 4 churches and stealing their equipment is going to come into
0 3 : 5 5 5 evidence?

0 3 : 5 5 6 A. Well, yeah, and you would have to consider that.
0 3 : 5 5 7 And the good news is, it's -- you know -- it's still
0 3 : 5 5 8 breaking into a church. It's not like destruction of the
0 3 : 5 5 9 church. It's taking electronic equipment from a church
0 3 : 5 5 10 that -- you know, you'd want to limit the -- my -- I mean, I
0 3 : 5 5 11 think a reasonable motion in limine would ask that it not be
0 3 : 5 6 12 identified as a church. And if the Court rules against you
0 3 : 5 6 13 on that, then you still -- then you got another decision to
0 3 : 5 6 14 make there.

0 3 : 5 6 15 Q. So like we talked about before, your neck of the
0 3 : 5 6 16 woods is Winston-Salem, Forsyth County, around there.

0 3 : 5 6 17 Down here in Montgomery County and Randolph
0 3 : 5 6 18 County, where these two lawyers practiced, you'd probably
0 3 : 5 6 19 seek some lawyer's advice from down here before doing
0 3 : 5 6 20 something like that, wouldn't you?

0 3 : 5 6 21 A. You'd want to know what a jury might think of it,
0 3 : 5 6 22 yeah. I mean, you know, we run into the same thing in
0 3 : 5 6 23 Forsyth County, you know, because it's a -- it's a
0 3 : 5 6 24 church-going town.

0 3 : 5 6 25 Q. And if two local lawyers decide not to roll that

1 dice with a Montgomery County jury --

2 A. Well, again, it's like -- you got to go through
3 the motions and thought process of trying to set it up to
4 where the church part doesn't come in.

5 Like I say, closer than these other things I'm
6 talking about.

7 Q. Now, you were also talking about trial counsel
8 failing to cross-examine Barry Bunting, I think specifically
9 about the crime scene evidence; is that correct?

10 A. Yes, sir.

11 Q. And with regard to Lieutenant Bunting, you're
12 aware, aren't you, that although the crime occurred in
13 Randolph County, about a week later, they figured out that
14 it was really a Montgomery County case; is that correct?

15 A. They did, yeah.

16 Q. So Lieutenant Bunting did not get to do a full
17 investigation, did he?

18 A. Not -- he wasn't in charge of the full
19 investigation of the case, that's right.

20 Q. So he gets interrupted in the middle of his day
21 off from home and brought out to the scene by Wesley
22 Hopkins. And he's got to call it in, rope it off, stand out
23 there, and preside over it in whatever clothes he was in at
24 the time. And then he gets it for about a week, and it's
25 out of his hands; is that correct?

0 3 : 5 8 1 A. What you have just said is correct. I guess he
0 3 : 5 8 2 was not wearing his uniform. I don't know if he testified
0 3 : 5 8 3 what he was wearing, but yeah, I think that's correct.

0 3 : 5 8 4 At the same time, crime scene evidence is -- you
0 3 : 5 8 5 know, once the police -- law enforcement first gets there,
0 3 : 5 8 6 that's really significant because whatever happens in the
0 3 : 5 8 7 first few minutes, the first few hours, you know, evidence
0 3 : 5 8 8 is deteriorating, things can be moved, people coming in and
0 3 : 5 8 9 out of the crime scene. So he was in charge of perhaps --
0 3 : 5 8 10 perhaps at least one of the most critical aspects of the
0 3 : 5 8 11 case, which is the crime scene investigation.

0 3 : 5 8 12 Q. And didn't he just testify on direct that I went
0 3 : 5 8 13 out there, I secured -- when I got there, I secured the
0 3 : 5 8 14 area, called on my radio?

0 3 : 5 8 15 In fact, he ended up driving out there. And he
0 3 : 5 8 16 got to drive because he's got a key to that gate that leads
0 3 : 5 8 17 down there from the road, correct?

0 3 : 5 8 18 A. Yeah. He and the -- apparently the property
0 3 : 5 8 19 owners out there have a key to the gate.

0 3 : 5 9 20 Q. It's a special privilege they have because they
0 3 : 5 9 21 live in the Uwharrie Forest?

0 3 : 5 9 22 A. That's what I read.

0 3 : 5 9 23 Q. He was able to drive a truck near the location,
0 3 : 5 9 24 didn't have to walk like you did. And he went down there,
0 3 : 5 9 25 and he, while fresh and while he has a radio with him,

0 3 : 5 9 1 basically tries to secure the scene the best he can with his
0 3 : 5 9 2 vehicle and his eyes until the other law enforcement can
0 3 : 5 9 3 arrive; is that correct?

0 3 : 5 9 4 A. Yeah. But he called out theoretically the right
0 3 : 5 9 5 people, the crime scene people, and others to come out there
0 3 : 5 9 6 and make sure all this was done, but he's the ranking
0 3 : 5 9 7 officer.

0 3 : 5 9 8 Q. And then -- so they do come out there, and they
0 3 : 5 9 9 start doing their work; is that correct?

0 3 : 5 9 10 A. They do come out there and they start doing some
0 3 : 5 9 11 work.

0 3 : 5 9 12 Q. Catha Wright comes out there; is that correct?

0 3 : 5 9 13 A. She did.

0 3 : 5 9 14 Q. Eventually, a woman named Teresa Hogan came out
0 3 : 5 9 15 there?

0 3 : 5 9 16 A. That's my understanding.

0 3 : 5 9 17 Q. And Lieutenant -- it's Lanny McIver, but he's got
0 3 : 5 9 18 a longer name than that. I don't know his official name.

0 3 : 5 9 19 A. McIver, I remember that name.

0 3 : 5 9 20 Q. And there were a number of law enforcement
0 4 : 0 0 21 officers out there.

0 4 : 0 0 22 They had to bring the big lights to see; do you
0 4 : 0 0 23 remember them testifying to that?

0 4 : 0 0 24 A. Yeah.

0 4 : 0 0 25 Q. Kind of like stadium lighting on wheels they bring

0 4 : 0 0 1 out there in order to see in the dark night while they're
0 4 : 0 0 2 doing their work; is that correct?

0 4 : 0 0 3 A. Sounds right, yeah.

0 4 : 0 0 4 Q. Because there's no other sources of light
0 4 : 0 0 5 sufficient to do a crime scene search out there, is there?

0 4 : 0 0 6 A. Right.

0 4 : 0 0 7 Q. Kind of fits in with Vanessa Smith not being able
0 4 : 0 0 8 to see what's going on at the crime scene?

0 4 : 0 0 9 A. Well, it shows there was no power out there.

0 4 : 0 0 10 Q. And also with Sergeant Catha Wright, they only
0 4 : 0 0 11 cross-examined her about crime scene collection and
0 4 : 0 0 12 everything she collected and didn't collect; is that right?

0 4 : 0 0 13 A. Right.

0 4 : 0 0 14 Q. And, you know, when crime scene personnel go out
0 4 : 0 0 15 there and collect, they're doing what their supervisors tell
0 4 : 0 1 16 them to do. So their supervisor's watching what the other
0 4 : 0 1 17 people are doing; is that correct?

0 4 : 0 1 18 A. Well, crime scene people go through training, and
0 4 : 0 1 19 she testified about what training she had about crime
0 4 : 0 1 20 scene -- what to do at a crime scene. So they have
0 4 : 0 1 21 protocols, and they're trained.

0 4 : 0 1 22 You know, we have uniformed law enforcement
0 4 : 0 1 23 training in the State of North Carolina, for a long time.
0 4 : 0 1 24 And there's these, you know, certain -- I don't think they
0 4 : 0 1 25 call them guidelines, but there's policies, procedures that

0 4 : 0 1 1 are put out by the Justice Department of North Carolina, you
0 4 : 0 1 2 know, that they're trained on.

0 4 : 0 1 3 So they know, you know, you got to tape it off,
0 4 : 0 1 4 rope it off. Make a crime scene log, which they didn't do.
0 4 : 0 1 5 You got to document everything. There's got to be certain
0 4 : 0 1 6 triangulation so you can tell the distances. Take
0 4 : 0 1 7 photographs.

0 4 : 0 1 8 And I think, you know, I'd have to defer somewhat
0 4 : 0 1 9 to Mr. McCrary's report -- his second report from 2022,
0 4 : 0 2 10 where he goes through all of the different things about a
0 4 : 0 2 11 crime scene, how many photographs should be taken, and
0 4 : 0 2 12 showing, you know, measurements, all that. So there's
0 4 : 0 2 13 certain things they have to do.

0 4 : 0 2 14 I think the supervisor, like Bunting, would say,
0 4 : 0 2 15 here's the crime scene, you know, and they know what to do.
0 4 : 0 2 16 Now, obviously, he can intervene, but he's ultimately
0 4 : 0 2 17 responsible for it.

0 4 : 0 2 18 I'm sorry. Was that your question?

0 4 : 0 2 19 Q. Well, let me ask you this.

0 4 : 0 2 20 Perhaps -- well, one of the biggest themes in this
0 4 : 0 2 21 case that trial counsel used was there's no forensic
0 4 : 0 2 22 evidence linking Scott Allen to the scene. Is that correct?
0 4 : 0 2 23 Where Gailey's body was found?

0 4 : 0 2 24 A. That's a big point, yeah.

0 4 : 0 2 25 Q. You mentioned that yourself, too, right?

0 4 : 0 2 1 A. That's correct.

0 4 : 0 2 2 Q. So if there's no forensics linking him to the
0 4 : 0 2 3 scene, and you cross-examine the law enforcement -- which
0 4 : 0 2 4 Mr. Oldham did. He cross-examined Catha Wright, a fairly
0 4 : 0 3 5 lengthy cross-examination; is that not correct?

0 4 : 0 3 6 A. Of Ms. Wright? I don't remember how long the -- I
0 4 : 0 3 7 don't remember how long the cross-examination was.

0 4 : 0 3 8 Q. Do you remember he did cross-examine her, though?
0 4 : 0 3 9 He didn't go "No questions," right?

0 4 : 0 3 10 A. Yeah, he cross-examined her for 19 pages, I think.

0 4 : 0 3 11 Q. Okay. For 19 pages?

0 4 : 0 3 12 A. 1350 to 69.

0 4 : 0 3 13 Q. And, Mr. Rabil, when you're doing a
0 4 : 0 3 14 cross-examination like that --

0 4 : 0 3 15 Again, do you remember Mr. Oldham testifying on
0 4 : 0 3 16 the stand he didn't want to step on any landmines, I think
0 4 : 0 3 17 were his words?

0 4 : 0 3 18 A. Yeah, he used that a few times.

0 4 : 0 3 19 Q. And when you cross-examine on a crime scene and
0 4 : 0 3 20 the evidence shows that your client doesn't have forensic --
0 4 : 0 3 21 nothing forensic -- no forensic evidence links him to it, do
0 4 : 0 4 22 you really want to get down into the minutia of the crime
0 4 : 0 4 23 scene and how allegedly the bad job law enforcement did?

0 4 : 0 4 24 A. Well, in some cases, I would agree with you.

0 4 : 0 4 25 In this case, I would not because it's established

1 already that there's no physical evidence against
2 Scott Allen.

3 What we're focusing on -- the point of my opinions
4 is we're talking about the discrepancies with
5 Vanessa Smith's testimony, and you and I went over a lot of
6 that a little while ago. So that is more the focus.

7 Q. What's the purpose of pointing out that the --
8 that the shotgun shells weren't sent off for forensic
9 testing?

10 A. Well, the shotgun shells presumably, logically,
11 would be -- you know, the person who fired the shotgun, who
12 loaded the shotgun, their DNA would be on there.

13 Q. You could theoretically get their DNA off of there
14 and could theoretically get their fingerprints off of there
15 too; is that correct?

16 A. Well, I mean, actually -- I mean, you don't know
17 until you try. I mean, so -- I'm quibbling with the word
18 theoretically. Whether you actually get it or not, you
19 don't know until you try, and they didn't ask that it be
20 done.

21 Q. In this case, law enforcement didn't try; is that
22 correct?

23 A. Yeah.

24 Q. Okay. And you testified yourself no defense
25 attorney would send that stuff away for DNA or fingerprint

0 4 : 0 5 1 testing if law enforcement didn't; isn't that correct?

0 4 : 0 5 2 A. Did I say that? About the shell casings?

0 4 : 0 5 3 Q. About evidence.

0 4 : 0 5 4 A. Okay. We were talking about the knife with blood
0 4 : 0 5 5 on it. Yeah, okay. Same principles would apply. You'd
0 4 : 0 5 6 have to talk to your client, get his consent, all that,
0 4 : 0 5 7 yeah.

0 4 : 0 5 8 Q. And, you know --

0 4 : 0 5 9 A. But my point is, they didn't. And the burden's on
0 4 : 0 5 10 them to prove who -- you know, it's a couple things, just
0 4 : 0 5 11 like the number of shots.

0 4 : 0 5 12 And I understand, you know, Vanessa could be --
0 4 : 0 5 13 how many times a gun is fired is probably hard to actually
0 4 : 0 6 14 know in the heat of the situation like that, right?

0 4 : 0 6 15 But, at the same time, there were all these
0 4 : 0 6 16 shotgun shells. I think it was five. And he's only -- and
0 4 : 0 6 17 Mr. Gailey's only hit twice. So that's a very weird sort of
0 4 : 0 6 18 thing, you know.

0 4 : 0 6 19 It could raise the specter of, you know, an
0 4 : 0 6 20 argument, a fight, you know. Could have involved a knife.
0 4 : 0 6 21 Could have involved Mr. Gailey shooting his .45. So all
0 4 : 0 6 22 those things come into play.

0 4 : 0 6 23 Q. I'm just asking about the shotgun shells.

0 4 : 0 6 24 A. Okay.

0 4 : 0 6 25 Q. Mr. Oldham, he argued in closing argument about

0 4 : 0 6 1 the lack of physical evidence or lack of forensic evidence
0 4 : 0 6 2 at the scene tying Scott Allen.

0 4 : 0 6 3 He said, "Do they have his fingerprints on the
0 4 : 0 6 4 gun? No. Do they have his fingerprints on the .45 rounds
0 4 : 0 6 5 out there? No. Do they have his fingerprints on the
0 4 : 0 6 6 shotgun shells? We don't know, we'd have to assume."

0 4 : 0 6 7 Wasn't that his closing argument?

0 4 : 0 6 8 A. He did mention those things in his closing
0 4 : 0 7 9 argument. I guess he sort of soft-pedaled it. You know,
0 4 : 0 7 10 because most of his closing argument had to do with
0 4 : 0 7 11 Vanessa Smith, jealousy, and drugs.

0 4 : 0 7 12 Q. When you say soft pedaling, you saw Mr. Oldham
0 4 : 0 7 13 testify and you've gotten to see him on video testifying.

0 4 : 0 7 14 Did you watch the video of the -- of the
0 4 : 0 7 15 deposition?

0 4 : 0 7 16 A. Mr. --

0 4 : 0 7 17 Q. -- Oldham.

0 4 : 0 7 18 A. Oh, no. I just read the depositions.

0 4 : 0 7 19 Q. But you saw him for days here at this hearing; is
0 4 : 0 7 20 that correct?

0 4 : 0 7 21 A. I have a whole legal pad of notes.

0 4 : 0 7 22 Q. He's a mild-mannered demeanor'd man, is he not?

0 4 : 0 7 23 A. Very mild-mannered.

0 4 : 0 7 24 Q. Kind of the opposite of Will Atkinson.

0 4 : 0 7 25 Will Atkinson is a firebrand, correct?

0 4 : 0 7 1 A. I don't -- I did not have the ability -- I didn't
0 4 : 0 7 2 get to know him, yeah.

0 4 : 0 7 3 Q. Mr. Oldham, when he was doing his
0 4 : 0 7 4 cross-examinations, his style is not to confront you and try
0 4 : 0 7 5 to -- he would do a cross-examination like I do. His
0 4 : 0 7 6 cross-examination is leading somebody down the primrose path
0 4 : 0 7 7 until they get to the end, and then they don't know what
0 4 : 0 8 8 happened to them, and they have to give them the answer he
0 4 : 0 8 9 wants; isn't that correct?

0 4 : 0 8 10 A. Yeah. And I -- I don't quibble with style so much
0 4 : 0 8 11 as content and, you know, at least the attempt on
0 4 : 0 8 12 cross-examination to raise all those things.

0 4 : 0 8 13 Q. Well, in arguing that Vanessa Smith -- you said
0 4 : 0 8 14 they talked about her drug use, they talked about her
0 4 : 0 8 15 jealousy, you know, that gives her motive to testify falsely
0 4 : 0 8 16 against Scott Allen. They dug into the minutia of the crime
0 4 : 0 8 17 scene. They had plenty there and enough for Mr. Oldham to
0 4 : 0 8 18 argue no physical evidence linking his client to the case.

0 4 : 0 8 19 Now, isn't that a coherent argument for reasonable
0 4 : 0 8 20 doubt at the guilt phase?

0 4 : 0 8 21 A. Not -- not in this case. In my opinion, there
0 4 : 0 8 22 should have been a stronger attack from the beginning
0 4 : 0 8 23 through cross-examination of Vanessa Smith, Bunting, Wright,
0 4 : 0 9 24 and other officers at the scene about this conflicting
0 4 : 0 9 25 evidence.

0 4 : 0 9 1 Q. And I note you said that -- you got close to say
0 4 : 0 9 2 something like that about the benefits Ms. Smith received
0 4 : 0 9 3 from the state.

0 4 : 0 9 4 When Mr. Oldham testified on there that the state
0 4 : 0 9 5 had already read her deal into the record before the defense
0 4 : 0 9 6 got a chance to ask her anything, any questions, isn't that
0 4 : 0 9 7 a common prosecutor tactic to deflate the balloon before the
0 4 : 0 9 8 defense gets a chance?

0 4 : 0 9 9 A. Yeah, they did. It was deflating. I was
0 4 : 0 9 10 looking -- so -- but when I looked at the transcript, it was
0 4 : 0 9 11 very -- you know, maybe less than a page or so where
0 4 : 0 9 12 Ms. Allen was asking Ms. Smith about the plea agreement.
0 4 : 0 9 13 She didn't go into all the -- like, when --

0 4 : 0 9 14 You know, when we look at the actual deal, the
0 4 : 0 9 15 exhibit we have up here, defense should have gone through
0 4 : 1 0 16 almost every line of that. And they would have had the
0 4 : 1 0 17 benefit of the actual exhibit to do that with.

0 4 : 1 0 18 MS. WARREN: Your Honor, may we take --

0 4 : 1 0 19 THE COURT: Yes, we may.

0 4 : 1 0 20 MS. WARREN: I could do five minutes even.

0 4 : 1 0 21 THE COURT: You may step down, sir.

0 4 : 1 0 22 We'll take a five-minute recess.

23 (Recess.)

0 4 : 1 4 24 THE COURT: Let the record that the defendant is
0 4 : 1 4 25 present in the courtroom with both of his attorneys.

1 The witness will please retake the stand. And
2 recall that you are still under oath.

3 You may proceed.

4 Q. Mr. Rabil, we were talking about cross-examining
5 on deficiencies and law enforcement investigation.

6 When you question about such deficiencies, isn't
7 it true that, if you push that a little too far, don't you
8 open up the question in the jury's minds that, hey, maybe --
9 his DNA may be out there all over the place or his
10 fingerprints, just law enforcement didn't find them?

11 A. You know, it's always something that you confront.
12 It's always something you confront. Anytime you're dealing
13 with physical evidence in the case, certainly that's
14 something you factor in.

15 But here, there was none. You knew that going
16 into it. And you had this one eyewitness who is giving
17 testimony that's really contradicted by physical evidence
18 that I've already talked about.

19 Q. But they also knew they didn't send these shell
20 casings off, right?

21 A. Right.

22 Q. You've got to decide how you're going to handle
23 that evidence; isn't that correct?

24 A. Yeah.

25 Q. And like you said, you're always cognizant of that

1 sentencing phase in the capital case; isn't that correct?

2 A. That's right.

3 Q. And if you push something too far and start to
4 lose credibility with the jury, that's a consideration for
5 trial counsel in a capital case; is that not correct?

6 A. Yeah. But now we're -- but now we're getting into
7 a little more of a -- speculating as to what these two
8 attorneys were -- how they were strategizing. Because they
9 said they don't remember, so we don't know what their
10 strategic considerations were. They said they don't recall.
11 And what we do know from the exhibits is those notes that I
12 was looking at this morning with Ms. Warren was the physical
13 evidence was very important to them.

14 Q. So you admit the attorneys said they don't recall;
15 is that correct?

16 A. From most -- most of it, that's right. Which is
17 the same as -- well, we still don't have their reason --
18 their contemporaneous reason to measure.

19 Q. But it's not the same thing as "we didn't have a
20 strategic reason"; is that correct?

21 A. I guess it's not. Because, like, when you were
22 cross-examining in the depositions, you know, you were
23 asking -- that's the question you were asking. Just because
24 you don't recall doesn't mean you didn't have one.

25 But that doesn't give the Court the -- I don't

0 4 : 1 7 1 mean to be presuming what the Court would do, but it doesn't
0 4 : 1 7 2 give us or the Court the right, so to speak, to speculate as
0 4 : 1 8 3 to what those reasons were.

0 4 : 1 8 4 And all I can do is the best I can with the record
0 4 : 1 8 5 that I have: Their lack of recollection, the facts of the
0 4 : 1 8 6 case, the significance of the physical evidence as it
0 4 : 1 8 7 contradicted the most important witness in the case.

0 4 : 1 8 8 Q. And we're talking about a significant period of
0 4 : 1 8 9 time here. I mean, Mr. Oldham just testified, and it's
0 4 : 1 8 10 2024. This case was tried in 2003. Mr. Atkinson gave his
0 4 : 1 8 11 videotaped deposition in January of 2024, and the trial was
0 4 : 1 8 12 in 2003.

0 4 : 1 8 13 While it might be difficult for counsel to
0 4 : 1 8 14 remember what they did then in a big, complex case like
0 4 : 1 8 15 this, it doesn't mean that they didn't have strategic
0 4 : 1 8 16 reasons back then for doing certain things, does it?

0 4 : 1 8 17 A. No, it doesn't. It doesn't mean that they didn't;
0 4 : 1 8 18 we just don't know what they were.

0 4 : 1 8 19 And I would point out that the first motion for
0 4 : 1 8 20 appropriate relief was filed in -- was it 2007 or '8?

0 4 : 1 9 21 Something like that. And another one 2013. And then --

0 4 : 1 9 22 But, anyway, they were -- see, they were on
0 4 : 1 9 23 notice, so to speak, of questions about performance, and so
0 4 : 1 9 24 this is going to keep it in your mind.

0 4 : 1 9 25 I think most people, you know -- especially, you

1 know, you have a death verdict, you feel pretty bad, you
2 know, about it, and so it's going to be on your mind anyway.

3 Then you get a motion about ineffective assistance
4 or whatever the issues were that were raised, so it's going
5 to stay in your mind.

6 So I don't know that it's -- I understand passage
7 of time. And I'm not trying to criticize those guys, right?
8 I'm just saying -- you know, for their memories.

9 I am just saying they did have the opportunity to
10 think about these things years and years ago and maybe make
11 a note about it or at least have it in their mind as to why
12 they did these things. And here, we have pretrial notes
13 talking about the importance of physical evidence, and then
14 nothing is done about it, and they don't have an
15 explanation.

16 Q. We're in a motion for appropriate relief hearing
17 right now, are we not?

18 A. Yes.

19 Q. And in a motion for appropriate relief hearing,
20 it's governed by statute in North Carolina; is that correct?

21 A. The procedures, yes, sir.

22 Q. And by statute, the defendant is required to prove
23 every fact essential to support his motion; is that not
24 correct?

25 A. The burden is on the defendant to prove the facts

0 4 : 2 0 1 necessary for their claims.

0 4 : 2 0 2 Q. And the defendant's required to prove that by a
0 4 : 2 0 3 preponderance of the evidence; is that correct?

0 4 : 2 0 4 A. The fact, yes, sir.

0 4 : 2 0 5 Q. The state doesn't have to prove any facts right
0 4 : 2 0 6 now; is that correct?

0 4 : 2 0 7 A. Well, once the ineffective assistance is raised,
0 4 : 2 0 8 then what we normally see is the state -- it's sort of --
0 4 : 2 0 9 kind of a flip-flop situation. It's not the same burden of
0 4 : 2 0 10 proof. But the state does come in and try to see what the
0 4 : 2 1 11 recollections were or what the strategic decisions were.
0 4 : 2 1 12 It's almost like the state is defending their performance.
0 4 : 2 1 13 So it's not exactly like plaintiff and defendant, it's sort
0 4 : 2 1 14 of like plaintiff and defendant with some affirmative
0 4 : 2 1 15 defenses, that sort of thing.

0 4 : 2 1 16 Q. But the burden never shifts, does it?

0 4 : 2 1 17 The defendant has to carry the burden in this
0 4 : 2 1 18 entire hearing; is that not correct?

0 4 : 2 1 19 A. That's right.

0 4 : 2 1 20 Q. That's both the burden of proof and the burden of
0 4 : 2 1 21 persuasion; is that not correct?

0 4 : 2 1 22 A. That's right.

0 4 : 2 1 23 Q. And, in fact, when you add both of those up with
0 4 : 2 1 24 *Strickland's* deficient performance that "A Court must
0 4 : 2 1 25 indulge a strong presumption that counsel's conduct falls

1 within the wide range of reasonable professional
2 assistance," that's quite a hurdle for the defendant to
3 surmount on an ineffective assistance of counsel claim in an
4 MAR; is that not correct?

5 A. Yeah, that's why we don't -- like in my clinic; we
6 take it -- you know, we have to take a hard look at
7 situations before we would even pursue it. And I wouldn't,
8 you know, come in here and have an opinion that I didn't
9 believe. I didn't come with opinions supporting all these
10 other claims.

11 It's -- it's not an easy thing to do, to be
12 critical of attorneys who made some basic mistakes. But
13 it's -- you know, not that -- don't get me wrong. They did
14 a lot of things right in this case. But these major things
15 I think they did incorrectly, not according to standard, you
16 know, but -- it's -- it's one of those things that happens
17 sometimes, we make these basic mistakes in the heat of it.

18 Q. But the Court shouldn't presume --

19 If the attorney can't remember decades later
20 what -- why they made a particular decision, Court doesn't
21 presume there wasn't one, do they?

22 A. The Court -- I think the cases say the Court
23 cannot construct an ex post facto strategic reason for them.

24 Q. But when you're faced with facts that show --
25 obviously on the record because of the facts the attorney

1 had in front of them -- that there was a reason, I mean,
2 you're not supposed to ignore that, are you?

3 A. You mean if the attorney says that this was my
4 reason, that you're not supposed to ignore that?

5 Q. No. I mean, if the attorney says, "I can't
6 remember my reason," and then you show the attorney some
7 records and some information that shows that, hey, and then
8 the attorney admits on the stand, yeah, that was a strategic
9 decision. That happened several times with Mr. Oldham
10 yesterday.

11 And we weren't going back and giving a reason, you
12 know, post hoc. We were looking at the information he had
13 before him, and he was saying, yeah, based on this, it was a
14 strategic decision. That's different, right?

15 A. I think what it goes to is when *Strickland* talks
16 about a presumption, like I think you quoted it as a strong
17 presumption, I think once there is no tactical reason given,
18 then that presumption probably fades away, and then the
19 Court has to look at objectively what would the prevailing
20 norms require of an attorney in this situation.

21 Q. So, in your opinion, the presumption fades away?

22 A. Yeah. I think so. If there's no strategic reason
23 given, I don't think -- it's not like the presumption of
24 innocence, you know, for a criminal defendant that stays
25 there until the jury makes a decision. I don't think it's

1 written that way. I think -- you know, otherwise, there
2 wouldn't be these cases about you can't make up strategic
3 reasons or speculate about what they were. So I think it's
4 different.

5 Q. So according to you, attorneys have to state their
6 strategic reasons, or else the *Strickland* presumption melts
7 away; is that what you're saying?

8 A. Well, I think it depends on each -- it depends on
9 each case. I don't think the presumption is as strong if
10 there's no recollection or no tactical reason given.

11 Q. Now --

12 A. And I don't mean to be like -- I can't change the
13 law from the witness stand, right? So... And you're asking
14 me legal questions, right?

15 And so, you know, it goes to -- you know, there's
16 factual issues going on here. And whether there was a
17 breach of the standard is a factual -- or breach of the
18 prevailing norms or deficiency is a factual question. And
19 all the -- and these presumptions, these recollections, the
20 persuasive impact of the evidence, all that's, you know, in
21 the hopper for the judge to take into consideration. That's
22 what I'm saying. I'm not trying to change the law or
23 disagree with the Supreme Court.

24 Q. Can we shift to -- let's shift to practical,
25 factual questions.

0 4 : 2 5 1 A. Okay.

0 4 : 2 5 2 Q. Okay?

0 4 : 2 5 3 With regard to claim 2, you found enough evidence
0 4 : 2 5 4 to support claim 2 that trial counsel rendered ineffective
0 4 : 2 6 5 assistance at the guilt phase by failing to present evidence
0 4 : 2 6 6 and call certain witnesses; is that correct?

0 4 : 2 6 7 A. Yeah. As to the -- to the extent that I testified
0 4 : 2 6 8 today or put in my report. So there's other witnesses and
0 4 : 2 6 9 things in there that, if I didn't mention them in this
0 4 : 2 6 10 report or today, then I don't agree with them.

0 4 : 2 6 11 Q. Let's talk about Troy Spencer. Okay.
0 4 : 2 6 12 Troy Spencer is the one that wrote the letter that made it
0 4 : 2 6 13 into Mr. Atkinson's drawer at the courthouse.

0 4 : 2 6 14 Do you remember that?

0 4 : 2 6 15 A. Yeah, he wrote -- was it a two-page letter
0 4 : 2 6 16 where --

0 4 : 2 6 17 Q. More than two pages.

0 4 : 2 6 18 A. Okay. So he was the one that she went to live
0 4 : 2 6 19 with. He let her come live in his house and all that. And
0 4 : 2 6 20 he had some pretty bad stuff in that letter.

0 4 : 2 6 21 Q. Now, he, in his letter, says, you know, that
0 4 : 2 6 22 murder was premeditated and deliberated on both their parts;
0 4 : 2 6 23 is that correct?

0 4 : 2 6 24 A. Yeah, I'm not putting that letter in. I don't
0 4 : 2 6 25 want that guy.

0 4 : 2 6 1 Q. And they both planned it for days?

0 4 : 2 7 2 A. Yeah, we -- defense, we don't want -- we don't
0 4 : 2 7 3 want that guy near the courthouse.

0 4 : 2 7 4 Q. And, in fact, just to be sure, Mr. Oldham and
0 4 : 2 7 5 Mr. Atkinson went and consulted -- or Mr. Atkinson went to
0 4 : 2 7 6 CFDPL, consulted them, and they didn't see any good coming
0 4 : 2 7 7 of that either, did they?

0 4 : 2 7 8 A. Surprisingly, he had to ask somebody else. I
0 4 : 2 7 9 mean, that -- that's a pretty bad letter.

0 4 : 2 7 10 Q. So it wasn't ineffective assistance not to call
0 4 : 2 7 11 Troy Spencer in Scott Allen's defense?

0 4 : 2 7 12 A. No, I don't -- not in my opinion.

0 4 : 2 7 13 Q. How about Joyce Allen? That's Scott Allen's wife.
0 4 : 2 7 14 She basically gave statements giving a motive for the murder
0 4 : 2 7 15 in that -- because her sister Lois came to her and said,
0 4 : 2 7 16 "Oh, hey, Chris Gailey's going around telling stuff about
0 4 : 2 7 17 Scott and where he is."

0 4 : 2 7 18 She calls -- Joyce Allen calls Scott and tells
0 4 : 2 7 19 him, "Hey, Chris Gailey's giving you up, telling where you
0 4 : 2 7 20 are. He's, you know, ratting you out," or something
0 4 : 2 7 21 similar.

0 4 : 2 7 22 MS. WARREN: Your Honor, I'm going to object to
0 4 : 2 7 23 counsel testifying.

0 4 : 2 8 24 THE COURT: Overruled.

0 4 : 2 8 25 You may ask the question.

0 4 : 2 8 1 Go ahead.

0 4 : 2 8 2 Q. You heard the testimony yesterday and Mr. Oldham
0 4 : 2 8 3 answering those questions; isn't that correct?

0 4 : 2 8 4 A. Yeah. And I believe those were from an
0 4 : 2 8 5 interview -- was that the interview with the mitigation
0 4 : 2 8 6 person?

0 4 : 2 8 7 Q. Yes, sir.

0 4 : 2 8 8 A. Yeah. And so only the defense knew that. But
0 4 : 2 8 9 there's a risk that that's going to come out, you know, on
0 4 : 2 8 10 cross-examination.

0 4 : 2 8 11 Q. Yes, sir.

0 4 : 2 8 12 You're not going to call somebody as a witness
0 4 : 2 8 13 in -- as defense in a capital murder case that may end up
0 4 : 2 8 14 handing the state their motive, are you?

0 4 : 2 8 15 A. No.

0 4 : 2 8 16 Q. So Joyce Allen, it's not ineffective assistance
0 4 : 2 8 17 not to have called Joyce Allen?

0 4 : 2 8 18 A. I would agree with that.

0 4 : 2 8 19 Q. And then her sister, Lois Lawson, who's part of
0 4 : 2 8 20 the one causing the problems with -- she tells her, oh,
0 4 : 2 8 21 Jamie this... and Chris told... She's the one that told
0 4 : 2 8 22 Joyce.

0 4 : 2 8 23 And if that comes out, even from Lois Lawson's
0 4 : 2 8 24 perspective, that gives the state motive.

0 4 : 2 8 25 So according to what we just talked about,

1 Lois Lawson, it would not be ineffective not to call

2 Lois Lawson; is that correct?

3 A. I agree.

4 Q. Larry Smith, he's the guy that was married to
5 Vanessa Smith. And other than the church breaking and
6 enterings --

7 A. Oh, the one with the son.

8 Q. Yep.

9 A. That came out to California and all that, yeah.

10 Q. That was his only part that I remember in this
11 case, unless you remember something different after reading
12 all this. He was Vanessa Smith's husband, they had a kid,
13 and he was one of the ones in the church breaking and
14 enterings cases.

15 First, he wasn't at Whip-O-Will Cove, doesn't know
16 anything about that.

17 Second, he wasn't at the scene of where Gailey's
18 body was eventually found, where the shooting occurred.

19 Third, he wasn't at the party down in Shallotte
20 anywhere.

21 He doesn't know anything about any bank records or
22 ATM videos.

23 MS. WARREN: Your Honor, again, this is all
24 testimony that's not in evidence.

25 THE COURT: Overruled.

0 4 : 2 9 1 You may ask your question.

0 4 : 2 9 2 Q. Is that your recollection?

0 4 : 2 9 3 A. I don't remember all that.

0 4 : 2 9 4 Let me just say this. I reviewed the claim and
0 4 : 2 9 5 whatever supporting documents were for him and I didn't
0 4 : 3 0 6 agree with it.

0 4 : 3 0 7 Q. It's not ineffective assistance not to call
0 4 : 3 0 8 Larry Smith?

0 4 : 3 0 9 A. Right.

0 4 : 3 0 10 Q. And I'm breaking these down because you said you
0 4 : 3 0 11 did agree with claim 2, so I'm going back to the list of
0 4 : 3 0 12 everybody named in the pleadings so we can see what you
0 4 : 3 0 13 agree with and what you don't.

0 4 : 3 0 14 A. Yeah. I mean, it was -- the people I talk about
0 4 : 3 0 15 today, specific -- I'm sorry. Go ahead.

0 4 : 3 0 16 Q. How about Kelly Racobs, the girl from Colorado who
0 4 : 3 0 17 wasn't even here when any of this went down.

0 4 : 3 0 18 Do you believe it was ineffective assistance not
0 4 : 3 0 19 to call her at the guilt phase?

0 4 : 3 0 20 A. I think I determined no based on everything I had
0 4 : 3 0 21 seen.

0 4 : 3 0 22 Q. Was that a no?

0 4 : 3 0 23 A. No, I determined -- yeah, based on what I'd seen,
0 4 : 3 0 24 and I hadn't heard anything -- everything -- I was waiting
0 4 : 3 0 25 to see what came out here too. And, yeah, I haven't -- it

0 4 : 3 0 1 would not be ineffective to not call her at the guilt phase.

0 4 : 3 0 2 Q. How about Christina Fowler Chamberlain?

0 4 : 3 0 3 A. It would not be ineffective to not call her, given
0 4 : 3 1 4 that she was very confusing about times. Sometimes she said
0 4 : 3 1 5 July, and then somewhere else, she said a few months before,
0 4 : 3 1 6 so it was too impeachable on the alibi.

0 4 : 3 1 7 Q. And is that based on what counsel knew at the
0 4 : 3 1 8 time? Like, we're getting rid of the storytelling effects
0 4 : 3 1 9 of hindsight, reconstructing what trial counsel had, her
0 4 : 3 1 10 statements to them. They don't add up to an alibi. That's
0 4 : 3 1 11 clear; is that not correct?

0 4 : 3 1 12 A. They actually -- counsel actually talked to her
0 4 : 3 1 13 with the investigator, and she did not back up the alibi, so
0 4 : 3 1 14 reasonably efficient counsel would not bring her in.

0 4 : 3 1 15 Q. And it was only in post-conviction which she said,
0 4 : 3 1 16 oh, wait, I got something that might be an alibi; is that
0 4 : 3 1 17 correct?

0 4 : 3 1 18 A. Yeah. You got to look back to what they knew
0 4 : 3 1 19 before the trial.

0 4 : 3 1 20 Q. So it was not --

0 4 : 3 1 21 A. There might be a situation where you find out
0 4 : 3 1 22 something later that you should have found out, but that's
0 4 : 3 1 23 not one of them.

0 4 : 3 1 24 Q. So it was not ineffective not to call her?

0 4 : 3 1 25 A. I agree with your statement.

0 4 : 3 1 1 Q. Now, about Joe Laughlin, the person who supposedly
0 4 : 3 2 2 was outside Christina Chamberlin's and saw a guy who he
0 4 : 3 2 3 doesn't know with tattoos go into her house at a certain
0 4 : 3 2 4 time on a certain day?

0 4 : 3 2 5 A. Yeah. I don't remember all the details, but sort
0 4 : 3 2 6 of remember it. And I didn't think, based on what I saw,
0 4 : 3 2 7 that that was --

0 4 : 3 2 8 Q. So in your expert opinion, that's not ineffective
0 4 : 3 2 9 not to call him as a witness?

0 4 : 3 2 10 A. In my opinion, it would not be ineffective.

0 4 : 3 2 11 Q. You're the expert, aren't you?

0 4 : 3 2 12 A. For limited purposes, yeah. I don't feel like a
0 4 : 3 2 13 professor. I don't feel like an expert. I'm just telling
0 4 : 3 2 14 you what I think based on my experience.

0 4 : 3 2 15 Q. That's all any of us can do.

0 4 : 3 2 16 Lawyers take a look at a case, we try to dig down
0 4 : 3 2 17 to the facts that we think will help our client, and then we
0 4 : 3 2 18 just put those facts forward the best we can; isn't that
0 4 : 3 2 19 correct?

0 4 : 3 2 20 A. That's what I'm trying to do.

0 4 : 3 2 21 Q. And it's a lawyer's job to not just look at the
0 4 : 3 2 22 facts but to weave a theme and theory together from those
0 4 : 3 2 23 facts and present it to the jury in a persuasive fashion; is
0 4 : 3 3 24 that not correct?

0 4 : 3 3 25 A. Spoken like a true defense lawyer.

0 4 : 3 3 1 Q. You know, lawyers do that every day in court;
0 4 : 3 3 2 isn't that right?

0 4 : 3 3 3 A. Correct.

0 4 : 3 3 4 Q. That's what Mr. Oldham and Mr. Atkinson were
0 4 : 3 3 5 attempting to do in this case; is that not correct?

0 4 : 3 3 6 A. I have no doubt that's what they were attempting
0 4 : 3 3 7 to do.

0 4 : 3 3 8 Q. Now, Dolly Ponds, there is no -- and I asked
0 4 : 3 3 9 Mr. Oldham yesterday. They didn't know about Dolly Ponds.
0 4 : 3 3 10 She was unknown to them at the time of trial. This is the
0 4 : 3 3 11 cellmate of Vanessa Smith with some salacious information
0 4 : 3 3 12 that she's got.

0 4 : 3 3 13 Is it ineffective assistance not to call her if
0 4 : 3 3 14 they didn't even know about her?

0 4 : 3 3 15 A. If they didn't know about her or shouldn't have
0 4 : 3 3 16 known about her, I mean -- I don't -- honestly, I don't
0 4 : 3 3 17 remember all the facts. But back when I looked at all these
0 4 : 3 3 18 things, I didn't feel that was enough to include in my
0 4 : 3 3 19 report as ineffective.

0 4 : 3 3 20 Q. And so you believe it was not ineffective to not
0 4 : 3 4 21 call Dolly Ponds; is that right?

0 4 : 3 4 22 A. Based on everything I know, that's right.

0 4 : 3 4 23 Q. That leaves us with Shannon Diehl. Shannon Diehl
0 4 : 3 4 24 was there at the Whip-O-Will Cove house but then is out of
0 4 : 3 4 25 the picture for the rest of the case.

1 Did you believe it was ineffective assistance not
2 to call Shannon Diehl?

3 A. Again, I don't remember all of the details. But
4 based on everything that I read in the supporting
5 documentation and the claim, I didn't see sufficient
6 evidence to support an ineffective claim on that one.

7 Q. So it was not ineffective assistance not to call
8 Shannon Diehl?

9 A. It was not, based on everything I've seen, in my
10 opinion.

11 Q. All right. How about Tanzy Lanier? She was at
12 work when the three of them left; but then came back to the
13 house and saw when Vanessa Smith got back. And that was her
14 involvement in the case.

15 Was it ineffective assistance of counsel not to
16 call Tanzy Lanier?

17 A. Same answer as before. Based on everything I've
18 reviewed and heard, it was -- I did not see sufficient
19 evidence to support a claim of ineffective assistance for
20 not calling her.

21 Q. So it was not ineffective assistance not to call
22 Tanzy Lanier; is that correct?

23 A. That was my opinion.

24 Q. How about Robert Johnson? The state called him to
25 testify. And he's the one that set the time when they left,

0 4 : 3 5 1 and I think was there when Vanessa Smith got back. But that
0 4 : 3 5 2 was his involvement in the case. He wasn't at the scene
0 4 : 3 5 3 where Gailey was shot, and he wasn't down at the party.

0 4 : 3 5 4 Was it ineffective assistance not to call him
0 4 : 3 5 5 since the state had already called him?

0 4 : 3 5 6 A. Well, no, since the state had already called him.
0 4 : 3 5 7 And based -- and then based on everything I saw in the
0 4 : 3 5 8 supporting documentation for the claim, I didn't see
0 4 : 3 5 9 sufficient evidence to support that claim.

0 4 : 3 5 10 Q. So it was not ineffective assistance not to call
0 4 : 3 6 11 Robert Johnson, in your opinion; is that correct?

0 4 : 3 6 12 A. That's my opinion.

0 4 : 3 6 13 Q. And then that leaves us with a crime scene expert.

0 4 : 3 6 14 Do you believe that it was ineffective assistance
0 4 : 3 6 15 not to call a crime scene expert in this case?

0 4 : 3 6 16 A. So I did not include in my reports an opinion
0 4 : 3 6 17 saying that a crime scene expert should have been called as
0 4 : 3 6 18 a witness.

0 4 : 3 6 19 Obviously, from everything that I've said and in
0 4 : 3 6 20 my reports and things that I've said here today, a crime
0 4 : 3 6 21 scene expert -- someone knowledgeable in police procedures,
0 4 : 3 6 22 law enforcement procedures -- should have been used to
0 4 : 3 6 23 assist the defense in the case.

0 4 : 3 6 24 So I would -- my opinion is that I would -- I
0 4 : 3 6 25 don't have the opinion -- I do not believe that a crime

1 scene expert had to be called.

2 I think in conjunction with everything I've said
3 about cross-examination and preparation, someone familiar
4 with crime scene investigation, preservation of evidence,
5 and all that should have assisted the defense.

6 Which is -- you know, nine times out of ten, a lot
7 of our experts in cases are just that, to help the defense
8 understand the state's case and prepare effective
9 cross-examination questions at trial.

10 Q. Are you aware that Danny Carter is former law
11 enforcement? He was with the highway patrol.

12 A. I think I remember reading that. I don't -- I
13 don't know, as I sit here today, what his crime scene
14 expertise was.

15 Normally, highway patrol would be accident
16 recon -- you know, accident -- not reconstruction, unless
17 they're trained in it, but, you know, car wreck things.

18 Q. Let me try to get your opinion straight, then,
19 just for the record.

20 You believe it was not ineffective assistance of
21 counsel not to call a crime scene expert to testify?

22 A. In my opinion, it's not ineffective assistance of
23 counsel to not call a crime scene witness as an expert in
24 this case under these facts.

25 Rather, it was important to have the assistance of

0 4 : 3 8 1 an expert or someone knowledgeable in crime scene
0 4 : 3 8 2 investigation to help the attorneys understand the case and
0 4 : 3 8 3 prepare cross-examination or whatever else they needed to do
0 4 : 3 8 4 for defending Mr. Allen.

0 4 : 3 8 5 Q. All right. So they should have consulted with an
0 4 : 3 8 6 expert is what you're saying?

0 4 : 3 8 7 A. Well, probably had an expert, you know, as they
0 4 : 3 8 8 did with -- like as in post-conviction, like with
0 4 : 3 8 9 Mr. McCrary -- who you'll hear from next week -- somebody to
0 4 : 3 9 10 go to the scene, somebody to look at all the photographs and
0 4 : 3 9 11 all the documentation, and help the attorneys -- the trial
0 4 : 3 9 12 attorneys understand what was done wrong. I mean, that
0 4 : 3 9 13 was -- we did that in cases at this same period of time.

0 4 : 3 9 14 That appointment I mentioned in Rowan County,
0 4 : 3 9 15 where Megerian represented one of the defendants, we had --
0 4 : 3 9 16 I had a former law enforcement officer from -- he was
0 4 : 3 9 17 trained in Florida. But crime scene investigation is the
0 4 : 3 9 18 same pretty much everywhere. But he was from a little place
0 4 : 3 9 19 down there. And, you know, we used him to help us figure
0 4 : 3 9 20 out things and help impeach the state's case.

0 4 : 3 9 21 So, yeah, the assistance of a crime scene person
0 4 : 3 9 22 is what I'm saying would be the prevailing norm.

0 4 : 3 9 23 Q. Mr. Rabil, are you familiar with a case *Harrington*
0 4 : 3 9 24 *v. Richter* from the United States Supreme Court,
0 4 : 3 9 25 562 U.S. 86, a 2011 decision?

1 **A.** Again, maybe. It rings a bell, but I'm a few bars
2 to make that --

3 **MR. VLAHOS:** May I approach the witness,
4 Your Honor?

5 **THE COURT:** You may.

6 **MS. WARREN:** Your Honor, the witness has just said
7 he's not familiar with this case, and he's not a legal
8 expert on *Harrington v. Richter*. If Mr. Vlahos would like
9 to make a legal argument, I believe closing argument is the
10 appropriate time.

11 **THE COURT:** Do you have specific questions
12 relevant to this case after you show this exhibit to this --
13 this case to this witness?

14 **MR. VLAHOS:** Yes, sir, I do.

15 **THE COURT:** All right. That objection is
16 overruled.

17 **MR. VLAHOS:** If I may approach, Your Honor?

18 **THE COURT:** You may.

19 **Q.** Mr. Rabil, I'm handing you what I've marked for
20 identification as State's Exhibit Number 88, 88.

21 **MR. VLAHOS:** And, Your Honor, for the record, we
22 have jumped some numbers because we pre-marked some more
23 that we may be able to talk about to speed up the process.

24 **Q.** Mr. Rabil, I'm going to turn your attention in
25 this case to page 9. Up at the top, it's got page numbers.

0 4 : 4 1 1 Page 9 of 13.

0 4 : 4 1 2 Mr. Rabil, just to be completely candid, this is a
0 4 : 4 1 3 federal habeas corpus case so there's double deference on
0 4 : 4 1 4 *Strickland*.

0 4 : 4 1 5 A. Yeah, I've been through the double deference
0 4 : 4 1 6 federal habeas stuff. And it's just -- it's like walking
0 4 : 4 1 7 through one of those mirror things at the fair when
0 4 : 4 1 8 nothing -- nothing makes any sense in these cases where
0 4 : 4 1 9 there's federal habeas. But -- I'm sorry.

0 4 : 4 1 10 Q. Yes, sir. We're not going to talk about that part
0 4 : 4 1 11 of the case.

0 4 : 4 1 12 A. Thank God.

0 4 : 4 1 13 Q. I want to talk about the standards on page 9 of
0 4 : 4 2 14 13. It starts at number A, where the Court is focusing on
0 4 : 4 2 15 the issue of the defense counsel's performance. And under
0 4 : 4 2 16 there, under part A, the first paragraph says -- or does it
0 4 : 4 2 17 say:

0 4 : 4 2 18 "With respect to defense counsel's performance,
0 4 : 4 2 19 the Court of Appeals held that because Richter's attorney
0 4 : 4 2 20 had not consulted forensic blood experts or introduced
0 4 : 4 2 21 expert evidence, the California Supreme Court could not
0 4 : 4 2 22 reasonably have concluded counsel provided adequate
0 4 : 4 2 23 representation."

0 4 : 4 2 24 Is that what that says?

0 4 : 4 2 25 A. It does say that.

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1 Q. And it says, "This conclusion was erroneous."
2 Is that what that says?
3 A. It does.
4 Q. Okay. And I'm going to skip the next paragraph
5 because it goes into what the Court of Appeals did.
6 The important language starts where it says,
7 "Criminal cases..."
8 Can you see that?
9 A. Right.
10 Q. I'm going to read that paragraph. And it goes to
11 the next page. Is that what it says? Does the
12 United States Supreme Court say:
13 "Criminal cases will arise where the only
14 reasonable and available defense strategy requires
15 consultation with experts or introduction of expert
16 evidence, whether pretrial, at trial, or both."
17 Is that what it says?
18 A. It does say that.
19 Q. And does it go on to say, "There are, however,
20 countless ways to provide effective assistance in any given
21 case" -- sorry. Let me start over.
22 "There are, however, countless ways to provide
23 effective assistance in any given case. Even the best
24 criminal defense attorneys would not defend a particular
25 client the same way."

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1 Is that what it says?

2 A. It does say that.

3 Q. And does it next say, "Rare are the situations in

4 which the 'wide latitude counsel must have in making

5 tactical decisions' will be limited to any one technique or

6 approach"?

7 Is that what it says?

8 A. Right.

9 Q. "It can be assumed that in some cases, counsel

10 would be deemed ineffective for failing to consult or rely

11 on experts, but even that formulation is sufficiently

12 general that state courts would have wide latitude in

13 applying it."

14 Is that what it says?

15 A. Right.

16 Q. Then the next part:

17 "Here it would be well within the bounds of a

18 reasonable judicial determination for the state court to

19 conclude that defense counsel could follow a strategy that

20 did not require the use of experts regarding the pool" --

21 and it means a pool of blood -- "the pool in the doorway to

22 Johnson's bedroom."

23 Is that what it says?

24 A. It says that.

25 Q. Okay. And so there are some cases -- and under

0 4 : 4 4 1 the facts of this case, as a matter of fact, United States
0 4 : 4 4 2 Supreme Court may not know it was federal habeas. But
0 4 : 4 4 3 they're talking about there's some times when you need to
0 4 : 4 4 4 hire an expert, when it's obvious you need one, and then
0 4 : 4 4 5 there are other times when you can make a decision that you
0 4 : 4 4 6 don't need an expert.

0 4 : 4 4 7 Isn't that essentially what the United States
0 4 : 4 4 8 Supreme Court is saying?

0 4 : 4 4 9 A. Well, like, as you introduced it in the context of
0 4 : 4 4 10 this particular federal habeas proceeding, where everything
0 4 : 4 5 11 is weird because deference is given to whatever the lower
0 4 : 4 5 12 Court decided. And I don't know if this was -- excuse me --
0 4 : 4 5 13 if -- so this was 2011. So it would have been under --
0 4 : 4 5 14 assuming it was under AEDPA. And that's Antiterrorism and
0 4 : 4 5 15 Death Penalty Relief Act passed in the mid-1990s which
0 4 : 4 5 16 creates all these different presumptions.

0 4 : 4 5 17 Q. Professor Rabil, are you talking about the
0 4 : 4 5 18 Antiterrorism and Effective Death Penalty Act --

0 4 : 4 5 19 A. Right.

0 4 : 4 5 20 Q. -- promulgated in '96 that became effective in
0 4 : 4 5 21 '97?

0 4 : 4 5 22 A. I am.

0 4 : 4 5 23 Q. Sorry.

0 4 : 4 5 24 A. It's getting late in the day.

0 4 : 4 5 25 Yeah. And I've had to, you know, deal with these

1 in different habeas contexts and it's very difficult to know
2 what they mean.

3 I would back up and look to what our state courts
4 looked to. And we know that in North Carolina because of,
5 you know, Supreme -- because of Supreme Court cases
6 requiring indigent counsel under *Gideon* and all that line of
7 cases that came out after that, that we have effective
8 assistance of counsel.

9 And North Carolina has chosen to employ that
10 through 7A, now the creation of Indigent Defense Services.

11 And then in -- I believe it was 1985 or 1986,
12 *Ake v. Oklahoma*, which dealt with the psychiatrist. Upon
13 showing of a need for an expert based on the particular
14 facts of a case, the Court will provide that.

15 And Chapter 7A of the North Carolina General
16 Statute, I don't remember the exact provision, provides
17 for -- the term is supporting services.

18 So we in North Carolina have decided that part of
19 effective assistance of counsel is the right to obtain
20 supporting services in the right case. And I would say this
21 is -- this is the right case.

22 And I hear what this case is saying, but I
23 don't -- I don't -- without studying it, I don't know how
24 to -- you know, have an opinion on that. I just know what I
25 see at the ground level and what the statutes provide and

1 what North Carolina makes available to attorneys.

2 Q. And on this case, could reasonable -- "this case"
3 meaning the Scott David Allen case, could reasonable legal
4 minds disagree on whether you needed to consult a crime
5 scene expert or not?

6 A. See, that's different, so -- no, I think -- in my
7 opinion, you would -- it would be required to consult a
8 crime scene expert in order to prepare your case because
9 of -- because of the facts that we've -- you know, we've all
10 talked about.

11 I don't think that goes to the next step of saying
12 you're required to present expert evidence. But I do think
13 in order to prepare your case, you should obtain the
14 supporting services that you need. And that is -- at the
15 guilt phase, anyway, that's the big -- the big issue is the
16 physical evidence.

17 Q. And, Mr. Rabil, enough about that issue. I think
18 we've covered it.

19 Going back to claim 3, ineffective assistance at
20 the guilt phase by failing to adequately cross-examine
21 certain state's witnesses.

22 We've already been over Vanessa Smith. We've
23 already been over Lieutenant Barry Bunting. And we went
24 over somewhat Sergeant Catha Wright.

25 There are others listed in there, and they were

1 alphabetically listed in claims.

2 You indicated I believe in your sheet that you
3 could not find sufficient information to form an opinion, so
4 I'm going to go down those right now.

5 With regard to cross-examination of
6 Wesley Hopkins, is it your opinion that not cross-examining
7 Wesley Hopkins in a different manner was not ineffective
8 assistance of counsel?

9 A. I agree.

10 Q. And with --

11 A. I guess I'm making sure I'm answering that.
12 You're asking it in a negative way.

13 I do not have an opinion that it would be
14 ineffective to not cross-examine him in the way it's listed.

15 Q. If I can rephrase my question.

16 A. Might help me.

17 Q. You reviewed the direct and cross-examinations in
18 this case, so you got to review the job that the lawyer
19 cross-examining Wesley Hopkins did.

20 A. Right.

21 Q. And after reviewing that, it was your opinion that
22 the way that cross-examination was conducted was not
23 ineffective assistance of counsel?

24 A. I -- that's right. I do not have an opinion that
25 that was ineffective assistance of counsel based on

0 4 : 5 0 1 everything I've seen.

0 4 : 5 0 2 Q. And then with Robert Johnson, you got to read his
0 4 : 5 0 3 direct and cross.

0 4 : 5 0 4 Is it your opinion that the way counsel
0 4 : 5 0 5 cross-examined Robert Johnson was not ineffective?

0 4 : 5 0 6 A. That's right, based on everything I've reviewed.

0 4 : 5 0 7 Q. And with regard to Jeffery Page, that's
0 4 : 5 0 8 Cooter Page.

0 4 : 5 0 9 And is your opinion that after looking at the
0 4 : 5 0 10 direct and cross-examination, the way cross-examination was
0 4 : 5 0 11 performed by trial counsel was not ineffective?

0 4 : 5 0 12 A. That's right.

0 4 : 5 0 13 Q. And with regard to Dustin Maness, is your opinion
0 4 : 5 0 14 after reading the direct and cross-examination of
0 4 : 5 0 15 Dustin Maness that trial counsel was not ineffective in the
0 4 : 5 0 16 way they cross-examined Dustin Maness?

0 4 : 5 0 17 A. That's right.

0 4 : 5 0 18 Q. And Lillie Efird, is it your opinion that after
0 4 : 5 0 19 reviewing the direct and cross-examination of Lillie Efird,
0 4 : 5 0 20 trial counsel was not ineffective in cross-examining
0 4 : 5 0 21 Lillie Efird?

0 4 : 5 0 22 A. That's right.

0 4 : 5 0 23 Q. And then claim H is something that Judge Long had
0 4 : 5 1 24 decided, and the North Carolina Supreme Court affirmed, so
0 4 : 5 1 25 I'm not going to ask you any questions about that.

0 4 : 5 1 1 And then I, there was a portion of it that
0 4 : 5 1 2 Judge Long affirmed -- that was affirmed from -- Judge Long
0 4 : 5 1 3 denied, summarily was affirmed.

0 4 : 5 1 4 But then there's a portion where some of these
0 4 : 5 1 5 witnesses are named again, so I've got to go over them
0 4 : 5 1 6 again.

0 4 : 5 1 7 With Vanessa Smith, do you still have your opinion
0 4 : 5 1 8 that it was ineffective?

0 4 : 5 1 9 A. Yes.

0 4 : 5 1 10 Q. With Lieutenant Barry Bunting, do you still have
0 4 : 5 1 11 your opinion that it was ineffective?

0 4 : 5 1 12 A. Yes.

0 4 : 5 1 13 Q. With Robert Johnson, do you still have the opinion
0 4 : 5 1 14 that it was not ineffective assistance of counsel the way
0 4 : 5 1 15 trial counsel cross-examined him?

0 4 : 5 1 16 A. Yes.

0 4 : 5 1 17 Q. And with Dustin Maness, do you still have the same
0 4 : 5 1 18 opinion that it was not ineffective assistance of counsel
0 4 : 5 1 19 the way trial counsel cross-examined him?

0 4 : 5 1 20 A. Yes.

0 4 : 5 1 21 Q. And then J is Judge Long's denial of the subclaim
0 4 : 5 1 22 left undisturbed by the Supreme Court.

0 4 : 5 2 23 K, same thing.

0 4 : 5 2 24 And that leaves us with L, Catha Wright. You've
0 4 : 5 2 25 given your opinion on that?

0 4 : 5 2 1 A. Yes.

0 4 : 5 2 2 Q. Also, since you didn't have enough -- couldn't
0 4 : 5 2 3 find enough information as to -- how about claim 11, trial
0 4 : 5 2 4 counsel rendered ineffective assistance at the guilt phase
0 4 : 5 2 5 by failing to adequately investigate evidence pointing to
0 4 : 5 2 6 the guilt of a third party.

0 4 : 5 2 7 And my question about that is, you know the
0 4 : 5 2 8 standard for third-party guilt, it's got to not only show
0 4 : 5 2 9 that that other person did it, but that your client didn't.

0 4 : 5 2 10 A. Right. *State v. Cotton*.

0 4 : 5 2 11 Q. The first one, Vanessa Smith. What is your
0 4 : 5 2 12 opinion on that?

0 4 : 5 2 13 A. As to the third-party guilt of Vanessa Smith,
0 4 : 5 2 14 yeah, that -- that would -- my opinion is you would not
0 4 : 5 2 15 investigate the third-party guilt of Vanessa Smith in this
0 4 : 5 2 16 case because that is too closely related to her
0 4 : 5 3 17 co-defendant.

0 4 : 5 3 18 Q. Yeah. And it would have implicated Scott Allen,
0 4 : 5 3 19 too, right?

0 4 : 5 3 20 A. Yeah. I mean, it's --

0 4 : 5 3 21 Q. That's the whole Troy Spencer thing, isn't it?

0 4 : 5 3 22 A. I don't see any -- I mean, I didn't see any
0 4 : 5 3 23 evidence on anything that I looked at that would point to
0 4 : 5 3 24 Vanessa Smith killing Chris Gailey, you know, on her own
0 4 : 5 3 25 without somebody else involved. Yeah, so that's my opinion.

0 4 : 5 3 1 Q. Okay. So is your opinion that it was not
0 4 : 5 3 2 ineffective assistance of counsel not to pursue evidence of
0 4 : 5 3 3 third-party guilt against Vanessa Smith?

0 4 : 5 3 4 A. That's right.

0 4 : 5 3 5 Q. And what about Dustin Maness? Is it your
0 4 : 5 3 6 opinion -- this was a guy who got in an argument with
0 4 : 5 3 7 Chris Gailey about the bathtub, pulled a knife -- or
0 4 : 5 3 8 Chris Gailey pulled a knife on him, he took a warrant out on
0 4 : 5 3 9 him. And on the day of court, Gailey didn't show up because
0 4 : 5 3 10 he was dead.

0 4 : 5 3 11 A. Yeah, I think they investigated that.

0 4 : 5 3 12 Q. And with regard to that, is it your opinion that
0 4 : 5 3 13 it was not ineffective assistance of counsel not to pursue a
0 4 : 5 3 14 claim of third-party guilt against Dustin Maness?

0 4 : 5 4 15 A. That's right.

0 4 : 5 4 16 Q. And the last one was Jamie Fender. He's the guy
0 4 : 5 4 17 in the fatigues, Lois's husband who leaves with a rifle and
0 4 : 5 4 18 mad at Scott Allen and no gripe with Chris Gailey.

0 4 : 5 4 19 Is it your opinion that it was not ineffective
0 4 : 5 4 20 assistance of counsel not to pursue a third-party guilt
0 4 : 5 4 21 claim against Jamie Fender?

0 4 : 5 4 22 A. That's right.

0 4 : 5 4 23 Q. That takes us to claim 12, which is -- that's not
0 4 : 5 4 24 an ineffective assistance of counsel claim.

0 4 : 5 4 25 Claim 13. Did you form an opinion on did trial

1 counsel render ineffective assistance and violate
2 defendant's due process rights by failing to object to his
3 allegedly unconstitutional shackling?

4 A. So I just don't have an opinion one way or the
5 other on that because it's -- it's a factual determination.
6 If they -- if the attorneys saw shackling, then they had an
7 obligation to take action with the Court. And if -- if the
8 Court determines that they did see the shackling, then they
9 should have done something.

10 But the obligation would be to do -- to take
11 action. And I can't tell from this record. And, you know,
12 that's really -- the judge has to call that one. But their
13 obligation would be to take action as set forth in that
14 claim.

15 Q. Did you hear Mr. Oldham testify that he did not
16 see Defendant Allen in shackles?

17 A. I heard him testify to that in court. I think his
18 deposition, maybe his other documentation may have been a
19 little different, but...

20 Q. He said -- did he not say the same thing both
21 times, that he doesn't remember seeing him in any shackles?

22 MS. WARREN: I would object.

23 THE COURT: Hold on.

24 Basis?

25 MS. WARREN: I would object to the

1 characterization of Mr. Oldham's testimony as to whether he
2 said he did not see him in shackles or he did not remember.
3 I think the testimony speaks for itself.

4 **THE COURT:** Overruled.

5 You may redirect if you need to.

6 Go ahead.

7 **Q.** So do you recall Mr. Oldham testifying yesterday
8 about shackling and not seeing him in any restraints in the
9 courtroom?

10 **A.** What I remember him saying was he had -- in none
11 of his cases had -- had he seen that.

12 **Q.** And I asked him point-blank about
13 Scott David Allen. I think it was -- his wording was, "I
14 don't remember seeing him in any kind of restraints."

15 **A.** There was -- he never said he saw him with
16 restraints when he testified here.

17 **Q.** Okay. And I asked him even, "You were sitting
18 right there right next to him; is that correct?" And he
19 answered "Yes"; is that right?

20 **A.** Right.

21 **Q.** With Mr. Atkinson, there was one period of time
22 when -- you read it in his deposition. There was one period
23 of time where he thought that he had seen Scott Allen in
24 shackles --

25 **A.** Right. That's what I was thinking of.

0 4 : 5 6 1 Q. -- in the courtroom.

0 4 : 5 6 2 And Mr. Atkinson, in fact, told that to me when I
0 4 : 5 7 3 called him up to talk to him in preparation for 2022. And I
0 4 : 5 7 4 wrote it down and delivered it to -- typed it up, delivered
0 4 : 5 7 5 it to counsel and stopped talking to him on that occasion.

0 4 : 5 7 6 After reading the deposition, is it not true that
0 4 : 5 7 7 he then formed an opinion that he did not see Scott Allen in
0 4 : 5 7 8 shackles?

0 4 : 5 7 9 MS. WARREN: Objection as to the characterization
0 4 : 5 7 10 of what Mr. Atkinson testified to and lacking an opinion.

0 4 : 5 7 11 THE COURT: Overruled.

0 4 : 5 7 12 You may answer.

0 4 : 5 7 13 A. I remember that he changed and that he did not
0 4 : 5 7 14 support having -- remember having seen shackles.

0 4 : 5 7 15 Q. So the way he left it before he passed away is
0 4 : 5 7 16 that he did not see or did not remember seeing Scott Allen
0 4 : 5 7 17 in any shackles during any course of the trial or any
0 4 : 5 7 18 restraints; is that correct?

0 4 : 5 7 19 A. Words to that effect in his deposition, yeah.

0 4 : 5 7 20 Q. And you heard me ask Mr. Oldham and then on the
0 4 : 5 7 21 deposition asked Mr. Atkinson, any handcuffs, shackles, any
0 4 : 5 8 22 restraints of any kind; is that correct?

0 4 : 5 8 23 A. Right.

0 4 : 5 8 24 Q. And so neither one of them testified that they
0 4 : 5 8 25 remembered seeing him in any handcuffs, shackles, or

0 4 : 5 8 1 restraints of any kind; is that correct?

0 4 : 5 8 2 A. In terms of testimony, right.

0 4 : 5 8 3 Q. And based on that, have you formed an opinion as
0 4 : 5 8 4 to whether claim number 13 for rendering ineffective
0 4 : 5 8 5 assistance of counsel violating a due process right by
0 4 : 5 8 6 failing to object to his allegedly unconstitutional
0 4 : 5 8 7 shackling? In your opinion, did counsel render ineffective
0 4 : 5 8 8 assistance by not objecting to something they didn't see?

0 4 : 5 8 9 MS. WARREN: Objection. Asked and answered.

0 4 : 5 8 10 THE COURT: Overruled.

0 4 : 5 8 11 A. If -- so my opinion would be if they did not see
0 4 : 5 8 12 it, and if it was not going on, then they would not have an
0 4 : 5 8 13 obligation to take action about that.

0 4 : 5 8 14 But -- you know, I remember in the transcript
0 4 : 5 9 15 Judge Cromer saying something about -- concern about
0 4 : 5 9 16 shackling, and then this juror -- but that juror was not
0 4 : 5 9 17 allowed to -- well, she did testify. She didn't give her
0 4 : 5 9 18 opinion about the verdict, was not allowed to. But she did
0 4 : 5 9 19 talk about the sort of movement which sounds, you know --
0 4 : 5 9 20 and that one -- so factual, I have trouble forming an
0 4 : 5 9 21 opinion.

0 4 : 5 9 22 I think if one of them said, yeah, there was
0 4 : 5 9 23 shackling, we saw it, but we just chose not to do anything
0 4 : 5 9 24 about it, that would be, you know, ineffective.

0 4 : 5 9 25 Q. Therefore, on claim 14, where it's ineffective

0 4 : 5 9 1 assistance and violate defendant's statutory rights by
0 4 : 5 9 2 failing to request a hearing and finding of fact regarding
0 4 : 5 9 3 his alleged shackling, would your opinion be the same as it
0 4 : 5 9 4 was for claim 13?

0 5 : 0 0 5 A. It's -- yeah. I just don't have sufficient facts
0 5 : 0 0 6 to give me the basis for an opinion.

0 5 : 0 0 7 Q. And, again, it's not the state's burden to provide
0 5 : 0 0 8 you with any facts. An MAR evidentiary hearing is a
0 5 : 0 0 9 defendant's complete burden; is that not correct?

0 5 : 0 0 10 A. Yeah. I mean, it's -- I just don't feel like I
0 5 : 0 0 11 have sufficient facts to form an opinion.

0 5 : 0 0 12 Q. And then claim 15. To the extent defendant was in
0 5 : 0 0 13 an adequate position to raise shackling claims on appeal,
0 5 : 0 0 14 did appellate counsel render ineffective assistance by
0 5 : 0 0 15 failing to do.

0 5 : 0 0 16 So have you formed any opinion on that?

0 5 : 0 0 17 A. Well, that would be tied in with trial counsel.
0 5 : 0 0 18 And trial counsel or someone would have to give information
0 5 : 0 0 19 to appellate counsel. And there's no information in the
0 5 : 0 0 20 records I saw that that information was given to the
0 5 : 0 0 21 appellate lawyer. So there wouldn't be any obligation by
0 5 : 0 0 22 the appellate lawyer to raise that issue without that
0 5 : 0 1 23 information.

0 5 : 0 1 24 Q. Appellate lawyers, a lot of times, are somewhere
0 5 : 0 1 25 else and not necessarily here, is that correct, where the

0 5 : 0 1 1 trial's going on?

0 5 : 0 1 2 A. Yeah. Most of the -- I'm sure the appellate
0 5 : 0 1 3 lawyers were not trial lawyers. They haven't been in death
0 5 : 0 1 4 penalty cases. That hadn't been done for a long nine.

0 5 : 0 1 5 Q. The appellate attorney was Barbara Blackman.

0 5 : 0 1 6 Do you recall her? Do you know her?

0 5 : 0 1 7 A. Yeah, she's with the -- I don't know if she was
0 5 : 0 1 8 then, I think she's with the -- well, she was with the
0 5 : 0 1 9 Appellate Defender's Office. Yeah, they probably -- they
0 5 : 0 1 10 would normally have handled death penalty appeals.

0 5 : 0 1 11 Q. And that's the Appellate Defender's Office in
0 5 : 0 1 12 Raleigh; is that correct?

0 5 : 0 1 13 A. Yes.

0 5 : 0 1 14 Q. No reason for her to be down here in
0 5 : 0 1 15 Montgomery County when they're trying a murder case?

0 5 : 0 1 16 A. Strangely, once in a while, the appellate lawyers
0 5 : 0 1 17 come down to advise on things, but...

0 5 : 0 1 18 Q. You got no information that she was here during
0 5 : 0 1 19 the trial of this case?

0 5 : 0 1 20 A. I have no information about that.

0 5 : 0 1 21 Q. So it would be completely dependent on what trial
0 5 : 0 1 22 counsel told --

0 5 : 0 1 23 A. Trial counsel or somebody else in the case
0 5 : 0 1 24 associated with the defense told her.

0 5 : 0 1 25 Q. And both trial counsel testified they don't

0 5 : 0 2 1 remember seeing him in any restraints during trial before
0 5 : 0 2 2 the jury; is that correct?

0 5 : 0 2 3 A. That's right. And -- yeah. And we don't know --
0 5 : 0 2 4 well, I guess we don't even know what they told her about
0 5 : 0 2 5 that. But apparently, nothing in the records that we have
0 5 : 0 2 6 that she was given any indication of that; therefore, no
0 5 : 0 2 7 obligation to raise it as an issue.

0 5 : 0 2 8 Q. So to be clear, is it your opinion that there --
0 5 : 0 2 9 it was not ineffective assistance of appellate counsel not
0 5 : 0 2 10 to raise this claim based on what they were not told by
0 5 : 0 2 11 trial counsel?

0 5 : 0 2 12 MS. WARREN: Objection. I have no idea what that
0 5 : 0 2 13 question was.

0 5 : 0 2 14 THE COURT: Overruled.

0 5 : 0 2 15 If you understand it, you may answer it.

0 5 : 0 2 16 A. I hate to say that I can understand Mr. Vlahos,
0 5 : 0 2 17 but I think I did. Must be something wrong with you.

0 5 : 0 2 18 But my opinion is that if -- if Ms. Blackman, the
0 5 : 0 3 19 appellate lawyer, did not have information that there was
0 5 : 0 3 20 shackling, that there would be nothing in the records for
0 5 : 0 3 21 her to raise that issue.

0 5 : 0 3 22 Plus, as purely an appellate lawyer, there would
0 5 : 0 3 23 have to be something in the record, and then you would go to
0 5 : 0 3 24 a motion for appropriate relief.

0 5 : 0 3 25 Now, I don't remember if it was raised as a claim

0 5 : 0 3 1 or not. But with Judge Cromer making that comment on the
0 5 : 0 3 2 record about -- whatever his statement was about concern of
0 5 : 0 3 3 the jurors seeing the shackling, then maybe the appellate
0 5 : 0 3 4 defender had an obligation to inquire further and file a
0 5 : 0 3 5 motion for appropriate relief. But I --

0 5 : 0 3 6 Q. Was it your recollection that Judge Cromer did
0 5 : 0 3 7 that here in Montgomery County and said we're going to go to
0 5 : 0 3 8 Randolph County because that's one of my concerns is
0 5 : 0 3 9 security and because of the way they have to bring him into
0 5 : 0 3 10 the courthouse, that the jurors might see him?

0 5 : 0 3 11 A. Yeah. That's my recollection. But, you know,
0 5 : 0 4 12 if -- even if he -- if -- if the defendant was seen in
0 5 : 0 4 13 shackles in jury selection, it's the same thing.

0 5 : 0 4 14 Q. But even what Judge Cromer was talking about, he
0 5 : 0 4 15 wasn't talking about any danger of seeing him in shackles or
0 5 : 0 4 16 any kind of restraints inside the courtroom. He was talking
0 5 : 0 4 17 about when they were leading him from the van or whatever
0 5 : 0 4 18 car into the courthouse; is that correct?

0 5 : 0 4 19 A. I understand he was talking about a concern, not
0 5 : 0 4 20 something that he had seen or had been relayed to him.

0 5 : 0 4 21 Q. So do you have an opinion on that claim, claim 15,
0 5 : 0 4 22 that -- about appellate counsel? Were they ineffective or
0 5 : 0 4 23 not?

0 5 : 0 4 24 A. I don't know, because I don't -- I don't know what
0 5 : 0 4 25 the obligation is in terms of further motion for appropriate

0 5 : 0 4 1 relief upon getting any inkling of information about
0 5 : 0 4 2 shackling in a death penalty case.

0 5 : 0 4 3 Q. And you already told us your opinion on claim 16.
0 5 : 0 5 4 That leaves us with one last claim.

0 5 : 0 5 5 Claim 4. Did trial counsel -- well, I'm sorry.
0 5 : 0 5 6 I'm not going to ask cumulative error. That's probably a
0 5 : 0 5 7 legal standard. I'm not going to go into that one.

0 5 : 0 5 8 Claim 4, did trial counsel render ineffective
0 5 : 0 5 9 assistance by failing to obtain certain -- failing to object
0 5 : 0 5 10 to certain portions of the state's guilt phase closing
0 5 : 0 5 11 argument?

0 5 : 0 5 12 MS. WARREN: Objection. I believe that's claim 6.

0 5 : 0 5 13 THE COURT: Yes, I think so.

0 5 : 0 5 14 MR. VLAHOS: Claim 6. I'm sorry. Roman numerals
0 5 : 0 5 15 get me sometimes.

0 5 : 0 5 16 Q. On claim 6, did you read the direct appeal opinion
0 5 : 0 5 17 in this case?

0 5 : 0 5 18 A. Yes.

0 5 : 0 5 19 Q. And in the direct appeal opinion in this case --

0 5 : 0 5 20 THE COURT: I'm sorry, we've already gone past
0 5 : 0 5 21 5:00, and that is a multi-party claim, so we're going to
0 5 : 0 5 22 stop there.

0 5 : 0 5 23 I tried not to interrupt the flow of your
0 5 : 0 5 24 questioning as much as I could. This is a good place to
0 5 : 0 5 25 stop.

1 Thank you, sir. You may step down.

2 **THE WITNESS:** Thank you, sir.

3 **THE COURT:** Is that your water bottle?

4 Any other issues before we take a recess?

5 From either side?

6 **MR. VLAHOS:** No, Your Honor.

7 **MS. WARREN:** No, Your Honor. We'll see you on
8 Monday.

9 **THE COURT:** Then we will recess until Monday
10 morning at 9:30.

11 (Court recessed on Thursday, September 26,
12 2024, until Monday, September 30, 2024, at
13 9:30 a.m.)

14 (Volume 4 of 9.)

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