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MR. UNTI: Thank you, Your Honor.

THE COURT: Okay. I'm ready to go when you guys are. I've talked enough.

DIRECT EXAMINATION BY MS. LUMSDEN (continued):

Q. Dr. Herfkens, I have a few questions for you. When you first met Mr. Allen, what was your initial impression of him?

A. You know, for some reason I was thinking about this yesterday, maybe during the conversation about the tattoos, that I was alarmed. You know, Mr. Allen does not look like the kind of guy that I'd like to meet on the street, honestly. And so even in a correctional setting, you know, I was wary, and a little bit uncomfortable for a bit. But that wore off in a hurry because he's actually, you know, pleasant and very easy to work with, articulate, and, you know, over the hours that I spent with him, my initial impression just -- it washed away and was replaced by a much more positive impression, but certainly my initial impression was a little wary.

Q. There is a -- a term of art that I'm going bring up and ask you to describe what it means to a psychologist, and the term is spiritually bankrupt.

MR. VLAHOS: Objection, Your Honor. I believe that was a term from a previous hearing that this court's already resolved the issues on. That's my objection.

THE COURT: Well, I'll let Dr. Herfkens tell us what

1 it means to her. I mean, I think if we were going to go back
2 and go through that, we should have asked Dr. Warren what it
3 meant to him, but I'll let Dr. Herfkens tell us if she has an
4 opinion as to what it means to her.

5 Go ahead. Overruled.

6 A. So that is honestly not a term that I would use in my
7 practice, but I'm quite familiar with it in the substance abuse
8 literature. Because the foundation of the 12 Step Recovery
9 Program that most people use is that it's a program of spiritual
10 recovery. And so I believe that's probably where it came from
11 is out of a substance abuse program. I don't believe it is
12 descriptively or diagnostically something that a clinical
13 psychologist would typically use.

14 Q. Okay. You may have touched on this moment ago, but
15 did you find Mr. Allen to be rational and reasonable in your
16 dealings with him after the initial alarm wore off quickly?

17 A. Entirely.

18 Q. Did he seem in any way to have a violent personality?

19 A. Not at all.

20 Q. How quickly did your first impression of alarm wear
21 off?

22 A. Oh, so you're asking me to remember a conversation
23 that I had in 2007?

24 Q. If you don't remember, that's fine.

25 A. I mean, I have impressions, but I can't tell you

1 whether it took half of my first multiple-hour meeting or less
2 than that. But what I was struck by, and I think I might have
3 even made reference to something similar yesterday, was this
4 sort of striking contrast between the -- you know, my initial
5 like knee-jerk reaction to somebody with the type of tattoos and
6 the visible nature of the tattoos that Mr. Allen has was quite
7 negative, but the conversation that I had with him was, as I
8 said a second ago, articulate, polite, reserved, measured,
9 deeply thoughtful as the conversation went on. Deeply
10 thoughtful.

11 MS. LUMSDEN: Your Honor, in my obligation of candor
12 to this court, I'd like to raise an issue about a possible
13 further subject of examination.

14 As I mentioned in our opening statement, we contend that
15 mitigating circumstances can derive from anything that would
16 lessen the power of a particular issue and an impeachment of
17 Vanessa Smith is also related to mitigation in that sense. I
18 would like to continue direct examination using the Vanessa
19 Smith mental health records that Your Honor is familiar with.

20 THE COURT: Let me think about that for a minute.
21 That sounds like a -- that maybe easier than I think, but it
22 sounds like we're sort of getting ready to go into a thicket
23 here.

24 MS. LUMSDEN: Well, Your Honor, that's why I raised
25 it.

1 THE COURT: And I appreciate that. Thank you. I
2 know. I know. I know that's why you raised it and that's just
3 how I formulated it in my head.

4 MS. LUMSDEN: Yes, sir.

5 MR. VLAHOS: The State would object, Your Honor. Your
6 Honor, I can state my reasons --

7 THE COURT: Yes.

8 MR. VLAHOS: -- for the objection, if you'd like.

9 THE COURT: Go ahead.

10 MR. VLAHOS: The first reason is that they are the --
11 I'm presuming they are going to be the same records that they
12 were -- that was the focus of the August 25th, 2017 hearing
13 where Dr. Warren testified, and the State would object to that
14 because those issues have been resolved.

15 The second objection is Dr. Warren testified he never
16 evaluated Vanessa Smith at that hearing, and that without
17 evaluating her, he could not give an opinion as to whether she
18 suffered from any disorder or not. And if you got one
19 psychologist saying that, no psychologist should be able to give
20 an opinion as to any mental health disorder that she may suffer
21 from that can be relevant to her ability to tell or not tell the
22 truth.

23 So the State is going to object on that basis to any offer
24 being made. The reason you call an expert is to get their
25 opinion, their expert opinion, and a doctor cannot give an

1 expert opinion unless they've evaluated a person. That's the
2 State's objection to that.

3 THE COURT: Thank you. Yes, ma'am.

4 MS. LUMSDEN: Well, I would disagree that an expert
5 can't give an expert opinion because another expert didn't make
6 a diagnosis.

7 But also, one of the most dramatic parts of the story that
8 Ms. Smith told was that they were -- she and Mr. Allen were
9 hiding in the woods and Mr. Allen was throwing rocks at the
10 dying man, which if that doesn't support heinous, atrocious and
11 cruel -- I feel sure that that is the kind of thing that the
12 jury would have held onto and we would like to rebut that.

13 THE COURT: How would the health records rebut him
14 throwing rocks at the -- Ms. Smith's testimony of this gentleman
15 throwing -- Mr. Allen throwing rocks at Mr. Gailey's body?

16 MS. LUMSDEN: Well, the entire strategy of the trial
17 team was to impeach Ms. Smith. If we impeach her credibility,
18 then her story about throwing rocks at the dying man has
19 considerably less effect.

20 THE COURT: Well, it's not that -- you know, I don't
21 have any kind of violent disagreement with you. All I'm
22 thinking is, what was the purpose of the last hearing about
23 if we're going to ask Dr. Herfkens questions about the
24 testimony?

25 MS. LUMSDEN: May I address that?

1 THE COURT: Please. Yes, ma'am. I'm just trying
2 to -- yeah. I'll take all the help I can get from either --
3 from any of you. I'm just trying to sort it out in my head.

4 I'm listening, Ms. Lumsden.

5 MS. LUMSDEN: It's our contention -- well, the August
6 hearing was directed specifically toward the issue of whether
7 trial counsel should have had access to those files.

8 THE COURT: Right.

9 MS. LUMSDEN: Here we are saying that it is important
10 to support a mitigating factor or to rebut an aggravating factor
11 that the jury did actually find. I believe those two purposes
12 are different in this proceeding.

13 THE COURT: Okay.

14 Yes, sir.

15 MR. VLAHOS: Your Honor, the claims here are
16 ineffective assistance of trial counsel. They are seeking to
17 try to offer evidence now to try to rebut testimony that was
18 given then without linking it to ineffective assistance of trial
19 counsel. Those are the issues we're here to resolve today, not
20 whether Vanessa Smith was allegedly telling the truth or not on
21 the stand the way that the defendant sees it. Okay? The record
22 is the record. She testified as to the way she testified and
23 was corroborated in her testimony by Jeffrey Lynn Page, Cooter
24 Page, and the defendant bragging. Those issues have all been
25 resolved, your Honor.

1 Seeking to try to cross -- you know, try to impeach her
2 testimony now through an expert who has not evaluated her is
3 getting way beyond the realm of the possible within a courtroom,
4 and the State objects to such evidence being put on as it is
5 completely improper to put that evidence on, especially trying
6 to prove ineffective assistance of counsel. How are you going
7 to link it back to what counsel knew or didn't know? They
8 didn't even meet Dr. Herfkens yet. They haven't met her yet, as
9 far as I know, unless they met in post conviction.

10 MS. LUMSDEN: The ineffectiveness of trial counsel's
11 efforts, a significant part of that is our contention that they
12 were essentially made ineffective by their not having access.

13 But as I say, at this point we're looking at whether
14 Dr. Herfkens -- and Dr. Herfkens can say if they had hired a
15 mental health expert and had access to these files, then their
16 job -- then that would --

17 THE COURT: Okay. I'll tell you what I'll do, guys.
18 You know, my ruling is on record. The appellate court is going
19 to take a look at it, my guess is at some point. You know, it's
20 not right we may have to do all this again, but I'll sustain the
21 objection.

22 If you think this is important enough to preserve it in the
23 record, Ms. Lumsden, I'll let you make an offer of proof. I'm
24 the trier of fact. I'm going to excuse myself and let you make
25 your offer of proof, put it in the record and then one of you

1 guys can knock on the door when you've finished your offer of
2 proof and we'll start back up.

3 MS. LUMSDEN: Thank you, Your Honor. I appreciate
4 that.

5 THE COURT: Is that what you'd like to do?

6 MS. LUMSDEN: Yes, sir.

7 MR. VLAHOS: Thank you, Your Honor.

8 THE COURT: Let the record reflect that the objection
9 of the State is sustained. The court will now accept the
10 following testimony as an offer of proof.

11 The court further notes that, as the trier of fact, the
12 court will excuse itself during the offer of proof. And at the
13 conclusion of the offer of proof, Ms. Lumsden will inform the
14 sheriff that the offer of proof is complete and the sheriff will
15 retrieve the Judge sitting as the trier of fact. All right.

16 MS. LUMSDEN: Thank you, Your Honor.

17 (Judge Long excused himself from the courtroom at
18 10:00 a.m.)

19 MS. LUMSDEN: Mr. Vlahos, I do not have an extra copy
20 of Defendant's Exhibit 1.

21 MR. UNTI: I think I do.

22 MS. LUMSDEN: I have one that I can give to
23 Dr. Herfkens.

24 MR. UNTI: Here's Defendant's 1.

25 MR. VLAHOS: Is it something that I've already got?

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1 MR. UNTI: Yes, it's --

2 MS. LUMSDEN: Yes. It's the same records.

3 MR. VLAHOS: Oh, I did not bring those with me.

4 DIRECT EXAMINATION BY MS. LUMSDEN

5 (outside the presence of Judge Long):

6 Q. Dr. Herfkens, I'm going to hand you what's been
7 labeled Defendant's Exhibit 1 and ask you if you recognize this
8 material?

9 A. Yes, I do.

10 Q. Could you identify it, please?

11 A. These are records from the Julian F. Keith Alcohol and
12 Drug Abuse Treatment Center for Vanessa Warner Smith.

13 Q. Could you -- can you determine what institution these
14 documents relate to?

15 A. The Julian F. Keith Alcohol and Drug Abuse Treatment
16 Center.

17 Q. In Black Mountain, North Carolina?

18 A. Yes.

19 Q. What time period do the records cover?

20 A. These are dated October 1990- -- yeah, October 1993
21 from the 6th -- starting at the 6th -- no, that's the discharge
22 date. Let me see what the admission date was. Fall of 1993.
23 Admission date was September 9th, 1993.

24 Q. Through October 10th, 1993?

25 A. Yes. I'm looking at it as a summary, just the first

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1 page. I'm not looking at the end of it, so I would have to go
2 all the way through the records to find the exact discharge
3 date, but that sounds right.

4 Q. Do you find in those records references to any other
5 prior mental health or substance abuse records in other
6 treatment facilities?

7 A. Let me go through the first note here. This was her
8 first admission to this facility, and I believe that she had had
9 a prior admission in either the previous -- either one or two
10 years prior to this at a different place, Woodville in 1992.

11 Q. Are there any references to Piedmont Area Mental
12 Health of Albemarle?

13 A. There may be in this. If you could point me to a
14 page, it may help me refresh my memory.

15 Q. Well, I imagine we'll get to that.

16 Have you reviewed any records from Stanly County?

17 A. Yes. I've reviewed -- well, I'm not sure if I've
18 reviewed the Stanly County records. I think you're going to
19 have to hand those to me to refresh my memory. There were a lot
20 of new records in the last couple weeks. So these are new to me
21 in the last couple of weeks.

22 Q. Okay.

23 A. Here's a -- Piedmont Mental Health Center, here's a
24 reference to her being referred to Black Mountain from Piedmont
25 Mental Health Center.

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1 Q. Do you know if Ms. Smith had ever been the subject of
2 a commitment proceeding?

3 A. Yes. Thank you. That refreshed my memory. So my
4 recollection here is that Ms. Smith was seen at Piedmont Mental
5 Health and involuntarily committed -- or committed to the Black
6 Mountain facility for a substance abuse program.

7 Q. Do you recall whether she was, in fact, committed or
8 not?

9 A. I believe that she went on a voluntary commitment
10 after she was evaluated for risk at the Piedmont Mental Health
11 Center.

12 Q. Have you reviewed and relied on any other documents or
13 information in connection with your review of these records?

14 A. I mean, I've looked at some affidavits. Again, I need
15 some refreshing in terms of which ones I've looked at in the
16 last couple of weeks because of the volume of paper. But I have
17 the records I've looked at with me.

18 Q. Dr. Herfkens, I'm going to hand you a notebook with
19 numbered tabs in it and I will ask you if these refresh your
20 memory about the material that you looked at?

21 A. Yes. So I have looked at the involuntary -- the
22 Stanly County records on Vanessa Smith, an affidavit and
23 interview of Dolly Ponds, affidavit and report of Greg O.
24 McCrary, September 2nd, 1994, recantation of Vanessa Smith
25 during the church break-in trial, affidavit of Kelly Racobs,

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1 affidavit and report of Emily Will, pretrial order on mental
2 health records signed by Judge Comer.

3 Q. The portion of the records that are from the Julian F.
4 Keith and Alcohol and Drug Abuse Treatment Center, ARC, I'm
5 going refer to those as the ARC records so that we can keep the
6 exhibits distinguished from one another.

7 In starting with those, in general, what did you learn
8 about Ms. Smith from these records?

9 A. Well, I mean, the most obvious thing is that she had a
10 terrible substance abuse problem that had started early and was
11 severe.

12 Q. At what age do you recall her substance abuse problem
13 beginning?

14 A. So the record says that she began -- so she was 21 at
15 the time of this record and she began using cocaine at 14 -- at
16 age 14. She began using alcohol at 12. She began using
17 cannabis at 13. She began the use of sedatives benzodiazepines
18 and barbiturates at age 16. Cigarettes at 12. So quite early.

19 Q. Do you find any references in there that relate to
20 Ms. Smith's promiscuity?

21 A. Yes. There were references to her generally
22 promiscuous behavior in terms of having sex with multiple
23 partners, but also to basically prostitution. So exchanging sex
24 for a residence and for food, I think, if I remember correctly,
25 but then also there were references to prostitution for money.

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1 Q. Was Ms. Smith given any specific diagnoses?

2 A. She was. So she was given -- let me go back to the
3 page here. She was given an -- early on a diagnosis of cocaine
4 dependence, alcohol dependence, cannabis dependence, nicotine
5 dependence, polysubstance abuse, and then she had some physical
6 issues in terms of vaginitis and a heart murmur and dermatologic
7 problem.

8 Q. Do you know -- from those records, do you know the
9 circumstances of her leaving the ARC program?

10 A. The record makes reference to her leaving against
11 medical advice 24 hours early. She said because she had a ride
12 that was available that day.

13 Q. Okay. Could you define "polysubstance abuse" and how
14 you come to diagnose someone with that?

15 A. Polysubstance abuse references inappropriate use of
16 multiple substances, multiple intoxicating or mood altering
17 substances, so it could be any number of different things.

18 Q. Is there a risk of permanent effects on the brain
19 from -- resulting from this degree of drug use?

20 A. Oh, from the degree I see referenced in this record?
21 Absolutely.

22 Q. Can you explain a little bit what that would do to a
23 brain?

24 A. It -- it -- so the answer is going to vary a little
25 bit depending on the substance. You know, the first -- I think

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1 the first thing to consider is her age during the time that all
2 this was happening, so her brain was still developing. And
3 really any substance abuse in a developing brain is problematic.
4 But this severe, really profound type of substance abuse is --
5 is really devastating to developing brains and can lead to life
6 long cognitive changes.

7 Q. And what kind of cognitive changes?

8 A. Problem with executive function, problems with
9 attention and processing speed. Those would be the things I
10 would look for clinically first, but it's primarily problems
11 with executive function. I mean, simultaneously, if somebody
12 who was abusing substances at the level that's described in this
13 record would potentially be poorly nourished, not necessarily,
14 but potentially. And then other types of health problems can
15 certainly go along with that.

16 Q. Would that affect anyone's memory, do you think?

17 A. Well, the level of alcohol use for sure would have a
18 potentially deeply negative impact on memory function.

19 Q. The documents at Tab Number 2. They are records from
20 Stanly County Clerk of Court. I'm going refer to those as the
21 Stanly County records. When you reviewed these, in general,
22 what did you learn from these documents?

23 A. A couple of things. So it seemed like Ms. Smith was
24 trying to diminish the impact of the statements that had gotten
25 her to the point of this evaluation. So she was compared to the

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1 statements in the Black Mountain records, the ARC records, she
2 was providing a more limited description of her substance abuse.

3 The allegation, I think, or the concern that was
4 expressed -- one of the concerns that was expressed in this was
5 that she had gone through \$40,000 on drugs. And that because of
6 that, she was a risk to herself and so, you know, she was -- I
7 think in her communication with the physician there, talking
8 about all the different ways she had spent that money, not just
9 on drugs.

10 Q. Do the records suggest that she might be at risk of
11 harming herself or others?

12 A. That was the concern. That's why this evaluation was
13 taking place. The physician said that there was no evidence of
14 suicidal or homicidal intent, but that there was obvious
15 evidence of cocaine.

16 Ms. Lumsden, can I expand on my previous response?

17 Q. Yes.

18 A. So as I'm going through the Stanly record, I see a
19 reference and I think this is basically the presenting concern
20 that -- or an early concern in this evaluation process that
21 Ms. Smith had made reference to the fact that she felt -- she
22 said, I feel so badly, I might as well be dead. I might as well
23 just kill myself. I think that she then recanted that during
24 the evaluation and the final determination was that there was no
25 risk of dangerousness.

Denise St. Clair, RPR, CRR, CRC

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Dr. Herfkens - Direct by ms. Lumsden - Offer of proof outside the presence of the judge

1 Q. Yeah. Do these records show any other type of mental
2 illness?

3 A. The physician who saw her diagnosed her with major
4 depression. Let me go back through to make sure I'm remembering
5 correctly.

6 I believe that's all.

7 Q. Looking at page -- Page 13. Is this a
8 biopsychological diagnostic summary?

9 A. Let me see.

10 Q. There is a handwritten number down in the lower-right
11 corner.

12 A. Which document are you looking at? Because I think
13 I'm looking at...

14 Q. I'm sorry. I'm looking at Exhibit 1, the ARC record.

15 A. Yes.

16 Q. What of this diagnosis on this page strikes you as
17 significant to the issue of Ms. Smith's testimony?

18 A. On Page 13?

19 Q. Yes.

20 A. Well, in the first part of this diagnostic summary,
21 you know, there's reference to a previous legal charges, an
22 acknowledgment that Ms. Smith would not have come to treatment
23 unless her mother -- because her mother -- the only reason she
24 came to treatment was that her mother told her she wouldn't pay
25 her fine unless she did and Ms. Smith didn't want to go to jail.

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1 There's also reference to possible genetic predisposition to
2 chemical dependency.

3 Ms. Smith reported that she, you know, felt like she
4 didn't belong, that people made fun of her. She had a
5 dysfunctional relationship with her mother that she described as
6 emotionally abusive. And then description of the substance
7 abuse.

8 So there's -- you know, now, this is a little bit
9 besides just the -- the previously mentioned diagnoses of
10 substance abuse, there's now some additional information that
11 begins to flesh out from an adaptive or psychological
12 perspective what might be going on with her.

13 Q. And can you go through that, please, initially?

14 A. In terms of just what I've mentioned so far?

15 Q. Uh-huh.

16 A. Okay. So, you know, in terms of beginning to
17 understand somebody's psychological development, the impact of
18 their current behavior and their history on psychological
19 diagnoses, some of this is really critical. Just in that
20 barebones sketch, there's -- at least from my end, if I was
21 reading this to diagnose her, I would begin to be concerned that
22 her upbringing was abusive. I'd want to know more about that,
23 but that would be a red flag for me. Because kids who come from
24 abusive or chaotic environments often have persisting long-term
25 personality features or behavior problems that require attention

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1 and really complicate treatment for other types of disorders.

2 So that would be a definite red flag for me.

3 Q. Ms. Smith in the commitment papers -- I'm sorry.

4 A. The one you gave me?

5 Q. No. I'm looking for the Stanly County records.

6 A. You gave them to me.

7 Q. Okay. In the Stanly County records, which would be

8 Exhibit 2, I believe, there is an evaluation by Dr. Randy

9 Berry?

10 A. Yes.

11 Q. What was her diagnosis?

12 A. Cocaine dependence, marijuana abuse, major depression.

13 Q. Is there a reference to Ms. Smith's current mental
14 status? That's also on Page 83, I believe.

15 A. Um-hum.

16 Q. What does that say?

17 A. So the narrative here says -- states only uses cocaine
18 on weekends. Says \$40,000 has been spent on numerous items,
19 cars, clothes, tattoos, et cetera, not all on drugs. Denies
20 suicidal thoughts or intent. I don't want to die, in
21 parenthesis. States believes mom loves her and is trying to
22 help her, but that statements on petition are not true. And
23 then she says, again, in quotes, I want to live. No evidence of
24 suicidal or homicidal intent. Obvious evidence of cocaine.

25 Q. And is there a reference to her current mental status

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1 and her ability to make an informed decision to seek treatment
2 voluntarily?

3 A. So in the criteria for commitment where the doctor is
4 basically referring for outpatient treatment, it's my opinion
5 that the patient is mentally ill, that the respondent or patient
6 is capable of surviving safely in the community with available
7 supervision. Based upon the patient's treatment history, she's
8 in need of treatment in order to prevent further disability or
9 deterioration, which would predictably result in dangerousness
10 as defined by General Statute 122C-3, and that the current
11 mental status or nature of her illness limits her or negates her
12 ability to make an informed decision to seek treatment
13 voluntarily or comply with the recommended treatment.

14 Q. I'd like to refer you back to the ARC records,
15 Exhibit 1, Page 29.

16 A. Okay.

17 Q. How does Ms. Smith describe her normal day to her
18 doctor?

19 A. Client reports that on a normal day, she will -- and
20 this is in quotes -- wake up, get high, get drunk and pass out,
21 end quote. She has no structured daily routine while in active
22 addiction.

23 Q. Is that level of substance abuse of concern when you
24 evaluate someone's memory?

25 A. Absolutely. That's profound.

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1 Q. Are there references to her prior mental health
2 treatment?

3 A. Let me go back to...

4 Q. I'm looking at Pages 11 -- well, Page 11.

5 A. Yes.

6 Q. Okay. Are there references to her substance abuse and
7 interests?

8 A. Yes.

9 Q. Would you --

10 A. I'm sorry. Go ahead.

11 Q. Go ahead. I was just going to ask you to read it out
12 and comment on its significance to you.

13 A. She noted that she was at Woodville in 1992 for 26
14 days, presumably that's a substance abuse treatment center.

15 She -- so you'd asked about previous treatment, and
16 I'm not seeing -- other than one mentioned, I'm not seeing a
17 reference to previous treatment in here.

18 Q. Are there references to her becoming involved in
19 satanism and the occults?

20 A. Under the clinical course, she's talking about
21 feelings of intense self-hatred and low self-esteem; evidenced
22 by her statement, again, in quotes, I'm just no good, I can't do
23 anything right, not even satanism, end quote.

24 Q. I'll direct your attention to Page 30.

25 A. Okay.

Dr. Herfkens - Direct by ms. Lumsden - Offer of proof outside the presence of the judge

1 Q. How does Ms. Smith describe herself?

2 A. She says that she can stand up for herself. She's a
3 good listener and a good friend. Those are her strengths that
4 she identifies -- and her weaknesses were identified as, I'm too
5 nice and sorthearted until crossed.

6 Q. Does that suggest possible vindictive nature?

7 A. Well, I mean, I might think that was a little bit too
8 much of an extension or interpretation, but it would make me
9 wonder about that.

10 Q. In your review of these records, do you have an
11 impression as to whether Ms. Smith is manipulative of other
12 people?

13 A. Based on my read of the records, the totality of this
14 record and some other information that I've read in preparing
15 for this hearing, I would say that that is -- that's a strong
16 possibility.

17 Q. What generally has given you that impression from
18 these records?

19 A. Well, the clinical information, first of all, gives
20 rise to concerns on my part that she has a personality disorder
21 that is characterized by some manipulativeness and a tendency
22 towards being deceitful, other things as well that I could be
23 more descriptive of, but then there's also, you know, other
24 statements that I've read that talk about her, basically, either
25 lying to further her own interest or dealing with emotional hurt

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1 of some kind by trying to get even with other people.

2 So there's a variety of evidence in the records that
3 I've read that would strongly suggest that she's manipulative
4 and is, you know, trying to advance her own interests in ways
5 that are harmful to others.

6 Q. And what personality disorders would you consider
7 possible?

8 A. Well, there's not a -- so the thing that I would be
9 most concerned about is borderline personality disorder.
10 Although on the surface, that could also be related to
11 antisocial personality disorder, also to narcissistic
12 personality disorder. So all three of those ought to be on the
13 table.

14 Q. In directing your attention to the affidavit of Dolly
15 Pond, which would be Exhibit Number 3. Could you describe the
16 incident that Ms. Pond has made a sworn statement to?

17 A. Well, there were several incidents actually in this
18 affidavit. So Ms. Ponds reported that she was incarcerated with
19 Vanessa Smith, I believe in the same cell or very close by, for
20 120 days. And she referenced that Ms. Smith would talk to her
21 about the things that had happened in the past, talking about
22 crimes that she was involved in, talking about the murder case
23 for which she was in jail. She gave a description of -- of --
24 her description of the crime saying that she, her boyfriend and
25 another guy went -- do you want me to go through all of this or

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1 be less specific, I guess?

2 Q. A summary.

3 A. A summary, okay. So description of events on the
4 crime at question, mentioned that she never expressed any
5 remorse for the crimes, said bad things about her co-defendant
6 and his lack of resolve, talked about how she -- or at least
7 acted like she had it in for her former boyfriend.

8 She also -- Ms. Ponds, in some detail, described a
9 series of behaviors in the jail where Ms. Smith would engage in
10 sexual acts with trustees and then engaged in a -- repeatedly
11 engaged in a sexual act with one of the jailers and basically
12 gathered evidence, if you will, in one of -- in I guess the last
13 of these episodes and then turned it in and he apparently was --
14 had some consequences. I don't know if he was fired or charged,
15 but he disappeared. He was gone.

16 Q. And what happened to Ms. Smith?

17 A. She was released from jail then.

18 Q. Is there a reference to -- looking at that affidavit,
19 does that also support a conclusion that she was manipulative
20 and would use, in this case, sexual favors in exchange for
21 something to benefit her?

22 A. Absolutely.

23 Q. Is that consistent with other notes from the
24 records --

25 A. It is.

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1 Q. -- that you've reviewed?

2 A. It is.

3 Q. From the records that you've reviewed, would you -- in
4 borderline personality disorder, could you explain a little bit
5 more about what that disorder involves?

6 A. Sure. So, you know, traditionally, borderline
7 personality disorder is thought to develop from unstable
8 childhood environments and relationships. So kids -- you know,
9 when kids grow up in a situation -- in a difficult situation
10 like that, they learn to -- they don't learn to manage their own
11 emotions, to soothe their own emotions. And so then as adults,
12 they have big swings in emotions that they don't know how to
13 manage.

14 They tend to be impulsive and act on their emotions
15 rather than, you know, learning as most people do when they
16 mature that feelings are just feelings and you can manage them
17 and they change or you don't have to act on them. They are just
18 feelings. But people with borderline personality disorder don't
19 know that, so they act on their feelings. And as a part of
20 this, they -- because they are acting on their feelings, they
21 are trying to protect themselves by doing that and so their
22 behavior -- their external behaviors that are motivated at
23 diminishing their own pain by protecting themselves from
24 abandonment.

25 So about the worst thing that can happen to somebody

Denise St. Clair, RPR, CRR, CRC

Official Court Reporter

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1 who has borderline personality disorder emotionally anyway, is
2 to be abandoned by somebody they're attached to.

3 Q. Would that include a breakup with a romantic
4 relationship?

5 A. Yes.

6 Q. As in this case?

7 A. Indeed. You know, one of the ways that people with
8 borderline personality are described in terms of their
9 relationships is that they idealize people. They put them on a
10 pedestal while they're attached. And when something breaks that
11 attachment, then they are the worst people ever. So the swing
12 in idealization versus, you know, demeaning or otherwise
13 negative reactions or behavior toward other people.

14 So, I mean, basically, I think in the psychological
15 literature what you'll see is that people with borderline
16 personality disorder are portrayed as being unstable in terms of
17 the way they see themselves, but also in terms of the way they
18 see other people and that results in a lot of really chaotic
19 behavior, chaotic relationships, strong reactions, impulsive
20 reactions; you know, just lots of damage strewn in their wake in
21 the most extreme forms. Of course, you know, this also exists
22 on a spectrum and not all people with borderline personality
23 disorder has such extreme problems.

24 Q. Could you take a look at Exhibit Number 5?

25 A. Yes.

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1 Q. Could you identify that document? I believe you
2 reviewed this document?

3 A. Yes. Statement of Vanessa Warner, re: 2-28-94
4 statement to Barry Bunting.

5 Q. Could you read that and comment whether you find that
6 significant?

7 A. "The first sentence was written by Bunting. He told
8 me that was what I was going to say in the first sentence. It
9 was actually Jamie Brewer and Mitchell Mauldin who were doing
10 the break-ins. I told them Scott Allen and Jamie Fender because
11 I was scared of my ex-boyfriend Jamie Brewer, and also I loved
12 him. Mitchell Mauldin didn't need to buy anything because he
13 was stealing the stuff."

14 You want me to read the whole thing or...

15 Q. Yes.

16 A. Yes. Okay.

17 "Jamie and Mike would take the stuff to band practice.
18 Jamie Fender and Scott would bring some to the stuff up here (to
19 Scott's house) and keep it with them.

20 "David Lowder wrote Jamie Fender a check. I didn't
21 see it. I just heard them talking about it.

22 The house where Scott and Joyce lived was on Allen
23 Road, near Beason Farm Road. I saw stolen property there when
24 me and Larry were there. We were there alone when Jamie Fender
25 drove up in Chris Gailey's El Camino with stuff loaded in the

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1 back. I saw a little thin sound board. Scott was not there
2 that night. Jamie Fender said he was going to leave it there
3 because the law was getting hot.

4 "The statement about the last job being a couple of
5 weeks ago is not true. I did not tell Bunting that Scott was
6 bragging about breaking into a Marlboro Friends Church. Scott
7 never made any admission to me about breaking into any church.

8 "I informed my attorney, Richard Roose, and Scott's
9 attorney, Pete Oldham, about these discrepancies in the
10 statement given to Bunting on 9-2-94."

11 Q. What does that document reflect in terms of
12 Ms. Smith's mental state and functioning?

13 A. Well, I mean, it -- I don't understand all the back
14 story here for sure. But it sounds like what she's saying is, I
15 made statements that I purported to be true that would have an
16 impact on somebody else and now I'm going to tell you that I
17 lied.

18 Q. And who specifically did she seem to be referring to
19 as the person she originally accused?

20 A. She's saying that she accused Scott, Scott Allen.

21 Q. And she's saying that she recanted that accusation?

22 A. Yes.

23 Q. Does that seem consistent with the mental state you've
24 described, including borderline personality disorder?

25 A. Yes.

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1 Q. If you will look at Exhibit Number 6, please.

2 Affidavit of Kelly Racobs?

3 A. Yes.

4 Q. Could you review that and tell us what you find
5 significant?

6 A. Well, the first thing is that when Kelly Racobs met
7 Vanessa, Vanessa told her that her name was Mary and also warned
8 her to stay away from Scott. What Kelly Racobs said in a couple
9 of different ways in this affidavit is that during the time that
10 Scott and Vanessa were around her together, that Scott was to
11 himself and that Vanessa had aggressively warned off Kelly about
12 Scott. She also talked in public with people she barely knew
13 about having sex with six men and called it a gangbang and
14 talked about naming her son the middle -- giving her son the
15 middle name of a demon and that she was a follower of Satan.
16 She implied that Scott was going to do what she wanted him to do
17 because she held the purse strings. And then she indicated that
18 after Vanessa left, that Scott's behavior relaxed and changed.
19 She knew that when Vanessa called Scott after she left, that she
20 could hear Vanessa yelling at Scott through the phone.

21 She also noted that when Scott went back to North
22 Carolina that he accidentally took a night shirt of Kelly's or a
23 shirt of Kelly's and that Kelly was aware that Vanessa went
24 through his things, discovered the shirt and then stabbed and
25 cut it up.

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1 Q. What does that tell you about Ms. Smith's mental state
2 and her attitude toward Mr. Allen?

3 A. Well, in the first part of the description, it sounds
4 like she was treating Mr. Allen as her property, if you will,
5 and indicated that she could get whatever behavior she wanted
6 out of him because she had money. There's also evidence of rage
7 in here. If she's dismissed or feels abandon at all, it looks
8 like she became rageful.

9 Q. Is this consistent with the other statements that
10 you've reviewed in evaluating Ms. Smith's mental state?

11 A. Yes.

12 Q. You mentioned a moment ago the possibility that
13 Ms. Smith had antisocial personality disorder?

14 A. I did.

15 Q. Would you explain what that disorder is?

16 A. So people with antisocial personality disorder
17 evidence behavior problems since, you know, early adolescence,
18 sometimes earlier. They have a disregard for the truth or
19 social norms, have no remorse or -- for things that they've done
20 or empathy toward other people, violate the law, not always. I
21 mean, certainly not everybody with antisocial personality
22 disorder violates the law, but it's not uncommon when that
23 happens.

24 It's interesting too, just almost as an aside, that as
25 neuroscience research has advanced, it seems that the biological

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1 underpinnings of antisocial personality disorder and borderline
2 personality disorder may be the same, but they have different
3 gender expressions.

4 Q. And how is that?

5 A. So if you look at some of the most difficult aspects
6 of borderline personality disorder in terms of being -- willing
7 to manipulate others to meet their own emotional needs, versus
8 antisocial personality disorder which has very similar types of
9 behavioral or kind of self-preservation types of
10 characteristics, that it's much more likely for a man with that
11 personality construct to be diagnosed with antisocial
12 personality disorder to have the full flavor of that personality
13 disorder, whereas it's much more common for a woman to be
14 diagnosed with borderline personality disorder and have the full
15 flavor of that disorder. But they exist in the same group of
16 personality disorders and there's considerable overlap in terms
17 of the symptomatology. They may be basically representing the
18 same biological disorder.

19 Q. Just a moment.

20 Dr. Herfkens, do you recall looking at an affidavit by
21 a Mr. Troy Spencer?

22 A. I do recall reading an affidavit by Troy Spencer, but
23 I don't specifically right this second recall the content.

24 Q. Do you recall if it had anything to do with the -- the
25 situation described in --

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1 A. Oh, I do remember now. Sorry. If you just give me a
2 second for my middle-age brain to work. Things come back.

3 Q. So does that -- you have, I believe, an Exhibit 4, an
4 affidavit by Greg McCrary?

5 A. Yes.

6 Q. Could you refer to that, please?

7 A. Yes.

8 Q. And tell me -- in reviewing that, can you tell me what
9 you find significant in evaluating Ms. Smith's medical?

10 A. Yes. So in reviewing this where Mr. McCrary went
11 through information about the crime scene and then statements
12 about the crime from Ms. Smith and from other people, it was --
13 his conclusion was that the statements that she had made about
14 the crime were completely inconsistent with the actual crime
15 scene.

16 Q. What can you draw from that about Ms. Smith's mental
17 state?

18 A. Well, I don't know so much that I can draw any
19 conclusion about her mental state, but I would certainly be
20 concerned that she was telling a lie. I don't know what her
21 state of mind was at the time, but it sounds like she was giving
22 untrue information, information that could not possibly have
23 been true.

24 Q. Does that relate to other material that you've looked
25 at about Ms. Smith's truthfulness?

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1 A. It does.

2 Q. Would her tendency to describe facts and events that
3 are clearly not true, is that consistent with the other findings
4 in the medical records that you reviewed?

5 A. Yes.

6 Q. Considering all of these medical records that we
7 have -- well, let me ask you before that.

8 In your opinion, is it true that a person with
9 antisocial personality disorder, with borderline personality
10 disorder can appear to be very convincing even when they are
11 telling things that are clearly not true?

12 A. Oh, absolutely. This is a well-honed skill. For
13 people with that personality construction, this is a survival
14 skill. This isn't a party game. And so if it's a survival
15 skill, you know, you got to be pretty convincing to use it to
16 survive. This is a skill that's borne of some real difficulties
17 in the developmental years.

18 Q. Which would include specifically a very long history
19 of substance abuse?

20 A. Yes.

21 Q. Again, in your opinion, how severe was Ms. Smith's
22 substance abuse problem?

23 A. It was profound. I mean, this -- you know, I've read
24 more medical records than I could even wrap my head around,
25 honestly, over the course of my career, and this is among the

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1 worst descriptions of a substance abuse disorder that I've seen.

2 Q. How severe were her personality disorders, antisocial
3 personality disorders and borderline personality disorders?

4 A. Well, I'm not diagnosing her, okay, so -- but what I
5 would say is that the records that I read in combination with
6 the affidavits and the other statements that I read would
7 certainly give me reason to consider whether she, you know, may
8 have had some substantial personality pathology. The ability of
9 anybody like me though to fully define that would require more
10 information of some kind. It's not impossible to get from a
11 medical record, but it requires a lot more information.

12 Q. Doctor, I'm going to ask to you review some exhibits
13 in Document Number 7. They are two handwritten statements --

14 A. Okay.

15 Q. -- purporting to be written by Vanessa Smith. In your
16 review of those statements, could you tell us if Ms. Smith makes
17 any assertions related to her having accused Mr. Allen of
18 committing the crime?

19 A. Well, in the first, Ms. Smith is writing to ask for
20 her belongings, mostly CDs, clothes, and jewelry and -- because
21 those are her possessions and she wants them back.

22 In the second letter to Scott Allen, she is accusing
23 someone else, Joyce, of lying, changing her story. She's
24 accusing Scott of lying about her. But then asking questions
25 that, you know, seem like they might come from a place of some

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1 concern ordinarily, but it's hard to reconcile with the
2 accusations. She's talking about the difficulty she's having
3 dealing with the conditions in the jail. And she's also -- it
4 sounds like she's trying to tell Scott that they are trying to
5 scare her or scare him by -- or everybody else by saying that
6 she told lies. And then she gets abusive to Scott if he
7 believes their lies. So it sounds like she's trying to do some
8 impression management here, basically.

9 Q. And what do you mean by that?

10 A. So, again, it's hard to know the back story of this.
11 But my read of it is that she's been, you know, both talking to
12 other people, you know, making her own way through the legal
13 system doing what she needs to do for herself, talking to other
14 people outside about what's happening, is assuming also that
15 Scott knows all of this. And that she's trying to clarify her
16 intent or to -- or to protect the image that he may have of her,
17 the way he understands her by way of kind of managing what he --
18 like her -- I'm trying to -- I'm babbling here. It's a
19 complicated thing to get out. He's trying to protect his -- her
20 interest -- let me try that whole sentence again.

21 It looks to me from this letter like she is trying to
22 protect her image that Scott sees of her through this letter by
23 trying to go through the different threads of information that
24 he might have from other people.

25 Q. Thank you. In your opinion, are the records that you

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1 reviewed, exhibits that we've discussed here, relevant to a
2 determination of what facts might support mitigating factors?

3 A. Yes.

4 Q. And how?

5 A. So I guess the first thing I want to say about this is
6 that understanding the -- having a jury understand the
7 perspective, the context, the personality of Ms. Smith would
8 have been important in terms of their ability to figure out what
9 weight to put on testimony that was presented. And that seems
10 absolutely critical.

11 Q. Would you say that these materials could be used to
12 help impeach the credibility of Ms. Smith at trial?

13 A. I would guess so. Yeah.

14 Q. In what way?

15 A. Well, if you're presenting somebody as a witness who
16 has a history of lying, of being manipulative, of being
17 deceitful, of harming others with her actions and her words,
18 then I believe that would be important for a jury to hear.

19 Q. One more time looking at Exhibit Number 7. I'm
20 looking at the page that begins at the top, "If you want to know
21 who got you caught." Looking down --

22 A. Can you tell me again which page you are on?

23 Q. Nine lines -- Exhibit 7.

24 A. Exhibit 7. In the letter that we were talking about?

25 Q. Yes.

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1 A. Okay.

2 Q. I'm sorry, the letter that is signed White Choc,
3 C-h-o-c.

4 A. What page are you looking at?

5 Q. I'm looking at -- there's a Bates number at the bottom
6 of the Page 00595.

7 A. 00595. Okay. Yes.

8 Q. And then it is nine down. Toward the right side of
9 the page.

10 A. Yes.

11 Q. Where it begins, "We are innocent."

12 A. Let me just scan through it. Yes. Okay.

13 Q. Does that -- would you read that sentence, please?

14 A. "We are innocent and we will go free and then we will
15 both go back to our lives."

16 Q. Does that suggest that she is acknowledging that the
17 accusation against Scott is a lie?

18 A. Yeah. It tells me that she may be aware that he did
19 not do what he's accused of and that neither did she.

20 Q. If you will look at the top of that page, the first
21 sentence. "If you want to know who got you caught, you need to
22 look at the ugly face you were sleeping next to when I called
23 that night."

24 Does that suggest that she is trying to deflect blame
25 for having accused Scott?

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1 A. Yes, it does.

2 Q. And back down halfway down the page, just under, "We
3 are innocent," there's a sentence, "I hope you burn that ugly
4 lying bitch for everything she has."

5 A. Yes.

6 Q. Does that again suggest that she thinks someone else
7 accused Scott?

8 A. Yes.

9 Q. Who does it appear she is saying accused Scott?

10 A. Kelly Racobs.

11 Q. Is that a significant fact for you that she is trying
12 to blame someone else for what she did to Mr. Allen?

13 A. Yes, it is.

14 Q. Is that consistent with the picture that you draw from
15 the mental health records you've seen?

16 A. It is.

17 MS. LUMSDEN: Your Honor, I have no further questions.

18 THE WITNESS: May I -- may I ask something? Can we
19 have a recess without the judge here?

20 (Off-the-record discussion.)

21 THE COURT: Let the record reflect the presiding judge
22 has been called back into the courtroom for the purpose of
23 recessing for a recess.

24 The court will be recessed until quarter after,
25 please, and then we'll resume at a quarter after. Thank you.