

State of North Carolina,
Plaintiff,

v.

Scott David Allen,
Defendant.

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

Judy Runes, CRR
Official Court Reporter
judith.r.runes@nccourts.org

I N D E X

Argument re Mr. Rabil's qualification as an expert 483

WITNESSES**CHAPIN PIERRE OLDHAM**

Cross-Examination by Mr. Vlahos 361
 Redirect Examination by Ms. Warren 447
 Recross-Examination by Mr. Vlahos 453

MARK RABIL

Direct Examination by Ms. Warren 460
 Voir Dire Examination by Mr. Vlahos 471
 Direct Examination by Ms. Warren 495
 Direct Examination by Ms. Warren

STATE'S EXHIBITS

NO.	DESCRIPTION	ID'd	RECEIVED
25	Bates stamps P002817 through 2826	p381 v3	
26	Summary from Detective Vigil	p401 v3	
27	Copies of VHS	p404 v3	p406 v3
28	Troy Spencer letter	p410 v3	p415 v3
29	Troy Spencer interview with Danny Carter	p410 v3	p415 v3
30	Christina Fowler Chamberlain February 2, 2002, interview with Will Atkinson	p410 v3	p415 v3
31	Christina Fowler Chamberlain April 2, 2001, interview with Danny Carter	p410 v3	p415 v3
32	Christina Fowler Chamberlain April 16, 2002 interview with Danny Carter	p410 v3	p415 v3
33	Danny and Tanzy Lanier January 29, 2001, statement to Danny Carter	p411 v3	p415 v3
34	Danny Lanier February 1, 2001, interview with Danny Carter	p411 v3	p415 v3

35	Dustin Maness January 9, 2001, interview with Danny Carter	p411	v3	p415	v3
36	Dustin Maness September 23, 2003, interview with Danny Carter	p411	v3	p415	v3
37	Jamie Fender December 20, 2000, interview with Danny Carter	p411	v3	p415	v3
38	Joyce Allen May 5, 2001, interview with Janet Herzog	p411	v3	p415	v3
39	Joyce Allen May 15, 2001, interview with Danny Carter	p412	v3	p415	v3
40	Joyce Allen October 20, 2003, interview with Lieutenant Jim Johnson	p412	v3	p415	v3
41	Joyce Allen December 11, 2000, interview with Danny Carter	p412	v3	p415	v3
42	Kelly Racobs phone interview	p412	v3	p415	v3
43	Larry Smith October 16, 2001, interview with Danny Carter	p412	v3	p415	v3
44	Lois Lawson Fender December 20, 200, interview with Danny Carter	p412	v3	p415	v3
45	Robert Johnson January 11, 2001, interview with Danny Carter	p413	v3	p415	v3
46	Robert Johnson January 30, 2001, interview with Danny Carter	p413	v3	p415	v3
47	Shannon Diehl February 5, 2001, interview with Danny Carter	p413	v3	p415	v3
48	Jamie Fender October 21, 2003, interview with ADA Kristian Allen	p413	v3	p415	v3

DEFENDANT'S EXHIBITS

NO.	DESCRIPTION	ID 'd	RECEIVED
39	2015 affidavit of Pierre Oldham	p451 v3	p455 v3
40	2023 order out of Harnett County denying state's motion to strike expert testimony	p491 v3	

41	Order from a 1999 case	p491	v3
42	Mark Rabil CV	p495	v3
43	Mark Rabil report dated September 9, 2022	p495	v3
44	Mark Rabil report dated August 6, 2024	p495	v3

(Superior Court of Montgomery County resumed session on Wednesday, September 25, 2024, before the Honorable Kevin M. Bridges.)

09 : 29

THE COURT: Good morning, everyone.

09 : 29

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

09 : 29

09 : 29

We'll have Mr. Oldham come up again and please be resworn.

09 : 29

09 : 29

MR. VLAHOS: Your Honor, may we put a matter on the record before we start?

09 : 29

09 : 30

THE COURT: Yes.

09 : 30

Sir, you can have a seat for now.

09 : 30

MR. VLAHOS: Your Honor, in working this investigation and contacting the officers back and forth with regard to their testimony, it came up during my conversation on the way driving up here one of these days, with Sergeant Catha Wright of the Randolph County Sheriff's Office, she was trying to refer to her narrative in a report that she made at the time when she was collecting the evidence at or near the time. And she was looking for something that I was asking her specifically about. And I asked her, she said she found it, and of her own volition went to the Randolph County Sheriff's Office, got the original file, looked through it. And then I asked her -- because she said something that I didn't recognize, and I

09 : 30

09 : 30

09 : 30

09 : 30

09 : 30

09 : 30

09 : 30

09 : 30

09 : 30

09 : 30

09 : 30

09 : 30

0 9 : 3 0 1 asked her if she would please make a copy of it for me. And
0 9 : 3 0 2 she did. And I received it yesterday. And I provided it to
0 9 : 3 1 3 the defense yesterday afternoon. And it appeared at the
0 9 : 3 1 4 time that I got it -- because I didn't recognize it, it
0 9 : 3 1 5 appeared that it was not in post-conviction discovery and it
0 9 : 3 1 6 appeared that it could not -- that it was not in the
0 9 : 3 1 7 discovery given at the time of trial.

0 9 : 3 1 8 However, thanks to defense counsel knowing their
0 9 : 3 1 9 file, we've got maybe a solution to that, and I'll let
0 9 : 3 1 10 Ms. Warren be heard on that part of it.

0 9 : 3 1 11 **THE COURT:** Ms. Warren?

0 9 : 3 1 12 **MS. WARREN:** Yes. Thank you.

0 9 : 3 1 13 I appreciate the state's candor in providing the
0 9 : 3 1 14 document promptly. I agree that, on the face, it had color
0 9 : 3 1 15 and looked a little bit different from what I had received.
0 9 : 3 1 16 I went home last evening and diligently reviewed discovery
0 9 : 3 1 17 that's been produced by the state and found that document.
0 9 : 3 1 18 And for --

0 9 : 3 1 19 **THE COURT:** This same document?

0 9 : 3 1 20 **MS. WARREN:** It is substantively identical. There
0 9 : 3 1 21 are slightly different markings that appear to simply be
0 9 : 3 2 22 from the Randolph County Sheriff's Office computer
0 9 : 3 2 23 printouts. But all of the substantive information is
0 9 : 3 2 24 contained within the document that I received.

0 9 : 3 2 25 For the record, my understanding -- and I received

0 9 : 3 2 1 in files from previous post-conviction counsel Mike Unti
0 9 : 3 2 2 this document in paper form. It was produced again by the
0 9 : 3 2 3 state following the remand on July 25th of 2022. And the
0 9 : 3 2 4 document can be located in PDF that is DA volume 8 of 8, and
0 9 : 3 2 5 it is Bates-stamped at 3900 -- 3934 to 3938.

0 9 : 3 2 6 So at this time, we do not have any objections as
0 9 : 3 2 7 to this document or motions regarding further discovery. We
0 9 : 3 3 8 believe that it is consistent with what we've been provided.

0 9 : 3 3 9 **THE COURT:** Okay. No motions from the defense on
0 9 : 3 3 10 this document and no objections to its use, correct?

0 9 : 3 3 11 **MS. WARREN:** We do object to it being admitted,
0 9 : 3 3 12 but I don't believe that the state is seeking to admit it at
0 9 : 3 3 13 this time.

0 9 : 3 3 14 **MR. VLAHOS:** That's correct, Your Honor. The
0 9 : 3 3 15 state's not going to seek to admit it at all.

0 9 : 3 3 16 **THE COURT:** So noted.

0 9 : 3 3 17 **MR. VLAHOS:** And, Your Honor, for the record, the
0 9 : 3 3 18 Bates stamp numbers are a range of five pages. The document
0 9 : 3 3 19 I gave over yesterday is a range of nine pages. But there's
0 9 : 3 3 20 a lot of blank space on the computer printout.

0 9 : 3 3 21 **MS. WARREN:** Yes. And, again, according to our
0 9 : 3 3 22 review, the substantive information is the same. We do not
0 9 : 3 3 23 have a further discovery motion at this time. Of course, if
0 9 : 3 3 24 we discover anything else, we reserve the right.

0 9 : 3 3 25 **THE COURT:** So noted.

0 9 : 3 3
0 9 : 3 3
0 9 : 3 3
0 9 : 3 3
0 9 : 3 3
0 9 : 3 3
0 9 : 3 4

0 9 : 3 4
0 9 : 3 4
0 9 : 3 4
0 9 : 3 4
0 9 : 3 4
0 9 : 3 4
0 9 : 3 4
0 9 : 3 4
0 9 : 3 4
0 9 : 3 4
0 9 : 3 5

1 MS. WARREN: Thank you.

2 THE COURT: Thank you.

3 MR. VLAHOS: Thank you, Your Honor.

4 THE COURT: Are both sides ready to proceed?

5 MR. VLAHOS: Yes, Your Honor.

6 THE COURT: The witness will please come up and be

7 resworn.

8 CHAPIN PIERRE OLDHAM,

9 having been first duly sworn,

10 testified as follows:

11 THE WITNESS: I do.

12 THE COURT: Please watch your step. Make yourself

13 comfortable. Would you like a cup of water?

14 THE WITNESS: Yes.

15 THE COURT: Can we get him some water, please?

16 Remember to try to keep your voice up.

17 THE WITNESS: Thank you.

18 THE COURT: Thank you.

19 The state may resume cross-examination.

20 MR. VLAHOS: Thank you, Your Honor.

21 BY MR. VLAHOS:

22 Q. Mr. Oldham, do you still have Defendant's Exhibit

23 Number 21 up there with you?

24 A. Yes.

25 Q. Mr. Oldham, in Defendant's Exhibit Number 21, I'll

ask you to turn to page 1534.

A. Yes, sir.

Q. And is that exhibit -- that's still Vanessa Smith's trial testimony; is that correct?

A. That's what the first page indicates, 1507.

Q. Mr. Oldham, on page 1534, starting from line 6 and going down to line 25. And I'm going to read some of this, Mr. Oldham. You tell me if it's correct.

A. Okay.

Q. Starting at line 6.

"Question: What was going on that day, that night?"

"Answer: We had -- me and Scott and Chris had planned to go out in the woods. Scott had been telling us for a couple of days that he had some guns out there that he'd stolen and that he had stashed out there."

"And when you used the word 'stashed,' what does that mean?"

"Answer: Hidden."

"Question: In the woods?"

"Answer: Yes."

"Question: Okay. And so what were the plans that you and Chris and Scott had?"

"Answer: To go out there and get the guns, bring them out of the woods, and then we were going to take them

0 9 : 3 7 1 to Albermarle so that the friends of mine that I know will
0 9 : 3 7 2 trade guns for cocaine and money. We were going to do
0 9 : 3 7 3 that."

0 9 : 3 7 4 "Question: Okay. And whose idea was it to go out
0 9 : 3 7 5 to the woods and get the guns?"

0 9 : 3 7 6 "Answer: It was Scott's."

0 9 : 3 7 7 Is that what it says there, Mr. Oldham?

0 9 : 3 7 8 A. That's what it says through line 23.

0 9 : 3 7 9 Q. And do you recall that's what she also testified
0 9 : 3 7 10 to at the probable cause hearing?

0 9 : 3 7 11 A. That sounds correct. Like I said, I did not do
0 9 : 3 7 12 that, but...

0 9 : 3 7 13 Q. You read the transcript?

0 9 : 3 7 14 A. I read the transcript, yes.

0 9 : 3 7 15 Q. And then again, Mr. Oldham, on page 1563 --

0 9 : 3 8 16 A. Okay.

0 9 : 3 8 17 Q. And on page 1563, I've got lines 3 through 24,
0 9 : 3 8 18 lines 3 through 24.

0 9 : 3 8 19 A. Yes, sir.

0 9 : 3 8 20 Q. I'm going to read them and see if this is what
0 9 : 3 8 21 they say, Mr. Oldham.

0 9 : 3 8 22 A. Okay.

0 9 : 3 8 23 Q. Line 3, "Question: And was it dark or light by
0 9 : 3 8 24 the time you got to the fire road" --

0 9 : 3 8 25 THE COURT: What page are you on?

0 9 : 3 8
0 9 : 3 8
0 9 : 3 8
0 9 : 3 8
0 9 : 3 8
0 9 : 3 8
0 9 : 3 8
0 9 : 3 9
0 9 : 3 9
0 9 : 3 9
0 9 : 3 9
0 9 : 3 9
0 9 : 3 9
0 9 : 3 9
0 9 : 3 9
0 9 : 3 9
0 9 : 3 9
0 9 : 3 9
0 9 : 3 9
0 9 : 3 9
0 9 : 3 9

1 MR. VLAHOS: 1536.
2 THE COURT: You said 63.
3 MR. VLAHOS: I'm sorry, Your Honor.
4 A. 1536?
5 Q. 1536.
6 A. Okay.
7 Okay.
8 Q. On page 1536, lines 3 through 24.
9 "Question: And was it dark or light by the time
10 you got to the fire road?"
11 "Answer: It was still light."
12 "Question: All right. What did y'all take with
13 you, if anything?"
14 "Answer: A cooler with some drinks in it, a small
15 cooler, and a duffel bag."
16 "Question: Who had the cooler?"
17 "Answer: I was carrying it."
18 "Question: Who had the duffel bag?"
19 "Answer: Chris did, was carrying it. And Scott
20 had a backpack."
21 "Question: Did Scott have anything else?"
22 "Answer: Yes."
23 "Question: What was that?"
24 "Answer: He had a black sawed-off shotgun."
25 "Question: Now, did you see it?"

0 9 : 3 9 1 "Answer: Yes."

0 9 : 4 0 2 "Question: And how did you know it was a
0 9 : 4 0 3 sawed-off shotgun?"

0 9 : 4 0 4 "Answer: Because it was very short."

0 9 : 4 0 5 "Question: Are you familiar with guns to any
0 9 : 4 0 6 extent?"

0 9 : 4 0 7 "Answer: Yes, to some extent."

0 9 : 4 0 8 "Question: Okay. Now, who was carrying that?"

0 9 : 4 0 9 "Answer: Scott was carrying the gun."

0 9 : 4 0 10 Is that what it says, Mr. Oldham?

0 9 : 4 0 11 A. It is.

0 9 : 4 0 12 Q. And drawing your attention, she testified that he
0 9 : 4 0 13 had a black sawed-off shotgun; is that correct?

0 9 : 4 0 14 A. That's what she testified in line 16.

0 9 : 4 0 15 Q. Okay. She never indicated that it had any other
0 9 : 4 0 16 color on it than black; is that correct?

0 9 : 4 0 17 A. That's all she indicates in that answer.

0 9 : 4 0 18 Q. And, Mr. Oldham, if you'll turn to page 1538,
0 9 : 4 1 19 1538.

0 9 : 4 1 20 A. Okay.

0 9 : 4 1 21 Q. Mr. Oldham, on page 1538, lines 1 through 15, I'm
0 9 : 4 1 22 going to read it, and you tell me if that's what it says,
0 9 : 4 1 23 line 1.

0 9 : 4 1 24 "Question: Now, you said y'all walked for an
0 9 : 4 1 25 hour. What was the weather like, if you remember?"

1 "Answer: It was hot."

2 "Question: Okay. What were you wearing?"

3 "Answer: I believe I was wearing jeans and a
4 T-shirt, and they were wearing Army fatigues."

5 "Question: So Chris and Scott were wearing Army
6 fatigues?"

7 "Answer: To the best of my recollection, yes."

8 "Question: Okay. Did they have on long pants?"

9 "Answer: Yes."

10 "Question: You walked for about an hour. Where
11 did the three of you eventually wind up?"

12 "Answer: At this house, like a little -- there's
13 a clearing, and then there's another, like, a driveway, and
14 then there's a house, and it has a well next to it."

15 Is that what that says?

16 A. It is.

17 Q. So Vanessa Smith testified that it was hot; is
18 that correct?

19 A. Yes.

20 Q. Okay. And does that make sense? Because it was
21 July the 9th of 1999 when they were out there, it gets hot
22 in the Uwharrie Forest during that time of year, doesn't it?

23 A. That would be consistent with what the weather
24 would be at that time of year.

25 Q. Thank you, Mr. Oldham.

1 Mr. Oldham, the next page I believe is 1539, 1539.

2 A. Okay.

3 Q. It's going to be lines 5 through 25, 5 through 25,
4 on that page. Excuse me. 3 -- I'm sorry. 3 through 25,
5 lines 3 through 25.

6 A. Okay.

7 Q. Line 3 is:

8 "Question: Okay. Did y'all stop, or did you keep
9 going at that point?"

10 "Answer: We stopped right there. Chris and Scott
11 drank out of the well, and Chris was -- I guess he thought
12 the guns were there. And Scott said, no, we have to go a
13 little bit further. And we walked into -- there's a little
14 path. Scott said there was another cabin at the end of that
15 path, and that's where the guns were."

16 "Question: So y'all kept walking?"

17 "Answer: Yes."

18 "Question: How were you feeling at that point?"

19 "Answer: Tired."

20 "Question: Okay. What happened after you resumed
21 walking past the cabin?"

22 "Answer: We went onto the little path. It was
23 very narrow, and we had to walk in single file. And all of
24 a sudden, Scott turned around and pushed me backwards, and
25 then turned back around and fired the gun at Chris's back."

0 9 : 4 4 1 "Question: Okay. And when he pushed you
0 9 : 4 4 2 backwards, what did you do?"

0 9 : 4 4 3 "Answer: When I heard the gunshot, he pushed me
0 9 : 4 4 4 backwards and then shot, and then turned -- and then he
0 9 : 4 4 5 turned back around and shot immediately. I got down on the
0 9 : 4 4 6 ground and covered my head up."

0 9 : 4 4 7 Is that what it says?

0 9 : 4 4 8 A. That's what it says.

0 9 : 4 4 9 Q. So according to this, Vanessa Smith is saying
0 9 : 4 4 10 Defendant Allen pushed her back before firing into Gailey's
0 9 : 4 5 11 back; is that correct?

0 9 : 4 5 12 A. That's correct.

0 9 : 4 5 13 Q. And where did she end up?

0 9 : 4 5 14 A. Where did she end up?

0 9 : 4 5 15 Q. Yes, sir, when he pushed her back.

0 9 : 4 5 16 At the very last line, does it say, "I got down on
0 9 : 4 5 17 the ground and covered my head up"?

0 9 : 4 5 18 A. Yes. At the very last line, says it.

0 9 : 4 5 19 Q. And, Mr. Oldham, in that position on the ground
0 9 : 4 5 20 covering her head up, would Ms. Smith be able to see a lot
0 9 : 4 5 21 of what's going on out there?

0 9 : 4 5 22 MS. WARREN: Objection.

0 9 : 4 5 23 THE COURT: Sustained.

0 9 : 4 5 24 Q. But that's the position she was in; is that
0 9 : 4 5 25 correct? That's what she testified?

0 9 : 4 5 1 A. That's the position she testified that she was in.

0 9 : 4 5 2 Q. And then, Mr. Oldham, on the next page, I'm going

0 9 : 4 5 3 to go through lines 1 through 24, lines 1 --

0 9 : 4 5 4 A. Is that 1540?

0 9 : 4 5 5 Q. Yes, sir, 1540. Starting at line 1.

0 9 : 4 5 6 "Question: Okay. Why did you do that?"

0 9 : 4 6 7 "Answer: I didn't know what was happening. And I

0 9 : 4 6 8 heard -- I knew he had fired the gun at Chris, and I kept

0 9 : 4 6 9 hearing him shooting over and over again, and I was afraid."

0 9 : 4 6 10 "Question: Did you hear him fire the gun more

0 9 : 4 6 11 than one time?"

0 9 : 4 6 12 "Answer: Yes."

0 9 : 4 6 13 "Question: And did you see Christopher get hit?"

0 9 : 4 6 14 "Answer: I did not actually see the bullets go

0 9 : 4 6 15 into Chris, but I heard the sounds that he made when he was

0 9 : 4 6 16 shot."

0 9 : 4 6 17 "Answer: So he made a sound when he was shot?" I

0 9 : 4 6 18 mean -- "Question: So he made a sound when he was shot?

0 9 : 4 6 19 "Answer: Yes."

0 9 : 4 6 20 "Question: Do you recall what kind of sound he

0 9 : 4 6 21 made?"

0 9 : 4 6 22 "Answer: It was just horrible. I don't -- it was

0 9 : 4 6 23 just -- just a -- the sound of being in pain."

0 9 : 4 6 24 "Question: All right. Did you see him after

0 9 : 4 6 25 that?"

0 9 : 4 6 1 "Answer: No."

0 9 : 4 6 2 "Question: Okay. What happened next?"

0 9 : 4 7 3 "Answer: Scott grabbed me by the back of my shirt
0 9 : 4 7 4 and said 'come on' and we ran back up to this cabin."

0 9 : 4 7 5 "Question: Okay. Approximately how far were you
0 9 : 4 7 6 from the cabin at that point?"

0 9 : 4 7 7 "Answer: 50 or 60 feet. I don't know."

0 9 : 4 7 8 Now, Mr. Oldham, in that part, did Vanessa Smith
0 9 : 4 7 9 say she -- defendant fired at Chris and then "I kept hearing
0 9 : 4 7 10 him shooting over and over again"?

0 9 : 4 7 11 A. That's what it indicates here.

0 9 : 4 7 12 Q. Did she put a number on it?

0 9 : 4 7 13 A. She did not put a number on it.

0 9 : 4 7 14 Q. Okay. She didn't say he fired twice, and that's
0 9 : 4 7 15 all?

0 9 : 4 7 16 A. No.

0 9 : 4 7 17 Q. She never mentioned how many times Scott Allen
0 9 : 4 7 18 fired; is that correct?

0 9 : 4 7 19 A. Not in this testimony, no.

0 9 : 4 7 20 Q. And as she's explaining that, did she ever say she
0 9 : 4 7 21 saw or heard Chris fire a gun?

0 9 : 4 7 22 A. No.

0 9 : 4 8 23 Q. And she stated, in fact, "I did not actually see
0 9 : 4 8 24 the bullets go into Chris," is that correct?

0 9 : 4 8 25 A. That's correct.

0 9 : 4 8 1 Q. Mr. Oldham, in her additional testimony, did
0 9 : 4 8 2 Ms. Smith testify that -- or to your recollection, did
0 9 : 4 8 3 Ms. Smith testify that after shooting Christopher Gailey and
0 9 : 4 8 4 after going to the cabin with Ms. Smith, Scott Allen would
0 9 : 4 8 5 either walk or crawl up to the area where Mr. Gailey was,
0 9 : 4 8 6 and Mr. -- Defendant Allen would throw rocks to see if he
0 9 : 4 8 7 was alive?

0 9 : 4 8 8 A. Pebbles or rocks, yes.

0 9 : 4 9 9 Q. And on page 1548, page 1548 -- excuse me, 1543,
0 9 : 4 9 10 page 1543.

0 9 : 4 9 11 A. Yes, sir.

0 9 : 4 9 12 Q. Okay. I'm going to read the part on 1543 from
0 9 : 4 9 13 line 9 all the way through to the next page, line 15 -- I
0 9 : 4 9 14 mean page 1544, line 3. That line of questioning, I'll read
0 9 : 4 9 15 it, and you tell me if that's what it says starting at
0 9 : 4 9 16 line 9.

0 9 : 4 9 17 "Question: You walked back to the vehicle?"

0 9 : 4 9 18 "Answer: Yes."

0 9 : 4 9 19 "Question: And what did you do when you got
0 9 : 4 9 20 there?"

0 9 : 4 9 21 "Answer: Scott told me to stand right there, and
0 9 : 4 9 22 he went into the woods and hid the gun."

0 9 : 5 0 23 "Question: Okay. Did he have the gun with him
0 9 : 5 0 24 when he left you?"

0 9 : 5 0 25 "Answer: Yes."

0 9 : 5 1 1 you to do?"

0 9 : 5 1 2 "Answer: Yes."

0 9 : 5 1 3 And, Mr. Oldham, the question I have for you is,
0 9 : 5 1 4 did Vanessa Smith not testify under oath that
0 9 : 5 1 5 Defendant Allen hid the gun he used to shoot Chris Gailey in
0 9 : 5 1 6 the back in the woods?

0 9 : 5 1 7 A. That's what her testimony indicated, that he left
0 9 : 5 1 8 her presence and went out into the woods.

0 9 : 5 1 9 Q. Okay. So at one point, she testified it was a
0 9 : 5 1 10 black sawed-off shotgun, and then she testified he took it
0 9 : 5 1 11 out into the woods and hid it; is that correct?

0 9 : 5 1 12 A. That's correct.

0 9 : 5 1 13 Q. And to your knowledge, was that weapon ever
0 9 : 5 1 14 recovered?

0 9 : 5 1 15 A. To my knowledge, it never was recovered.

0 9 : 5 1 16 Q. And there were a lot of other weapons recovered in
0 9 : 5 1 17 this case; is that correct?

0 9 : 5 1 18 A. Yes.

0 9 : 5 1 19 Q. There was a sawed-off shotgun that belonged to
0 9 : 5 1 20 Christopher Gailey; is that correct?

0 9 : 5 1 21 A. That's correct.

0 9 : 5 1 22 Q. And it had a brown stock; is that correct?

0 9 : 5 2 23 A. Best I remember.

0 9 : 5 2 24 Q. Okay. And there was another shotgun that belonged
0 9 : 5 2 25 to Robert Johnson; is that correct?

0 9 : 5 2 1 A. Yes.

0 9 : 5 2 2 Q. And I don't know what color it was, but it
0 9 : 5 2 3 belonged to Robert Johnson; is that right?

0 9 : 5 2 4 A. That was what I was informed.

0 9 : 5 2 5 Q. Okay. And, to your recollection, was there any
0 9 : 5 2 6 evidence presented that you remember that
0 9 : 5 2 7 Defendant Scott Allen shot Christopher Gailey in the back
0 9 : 5 2 8 with Christopher Gailey's shotgun?

0 9 : 5 2 9 A. Not that I remember.

0 9 : 5 2 10 Q. Okay. Thank you.

0 9 : 5 2 11 Now, Mr. Oldham, I'm going to turn your attention
0 9 : 5 2 12 to page 1561, 1561.

0 9 : 5 3 13 A. Yes, sir.

0 9 : 5 3 14 Q. Mr. Oldham, I'm going to start at line 13 on 1561,
0 9 : 5 3 15 and I'm going to read all the way to line 25 at the bottom
0 9 : 5 3 16 of 1561.

0 9 : 5 3 17 "Question: Okay. And right before we broke, I
0 9 : 5 3 18 believe you had indicated you were all in
0 9 : 5 3 19 Christopher Gailey's truck. And where did you go?"

0 9 : 5 3 20 "Answer. When? I mean " --

0 9 : 5 3 21 "Question: Right after it happened, you were in
0 9 : 5 3 22 the truck. Where did you say you went?"

0 9 : 5 3 23 "Answer: We went back to the -- right near the
0 9 : 5 3 24 house on Whip-O-Will Cove Road."

0 9 : 5 3 25 "Question: And after that, where did y'all go?"

1 "Answer: To Shallotte."

2 "Question: Okay. And why did you go to
3 Shallotte?"

4 "Answer: Because my friend Jeff Brantley was
5 living there, and that's just where we went."

6 A. Yes, sir. That's what it says.

7 Q. So right after the shooting, they went back to
8 Whip-O-Will Cove before eventually leaving for Shallotte; is
9 that correct?

10 A. According to her testimony, she retrieved the
11 wallet from the house at the suggestion of my client, and
12 then they went to Shallotte.

13 Q. Yes, sir.

14 Now, you said, according to her testimony,
15 Mr. Smith testified that she got the wallet while she went
16 back to -- she got Christopher Gailey's wallet; is that
17 right?

18 A. That's what I understood, yes.

19 Q. And Christopher Gailey's wallet had
20 Christopher Gailey's bankcard in it, according to her
21 testimony; is that correct?

22 A. Yes.

23 Q. On the next page, 1562, I'm going to read from
24 line 1 to line 25 on page 1562.

25 A. Okay.

0 9 : 5 4
0 9 : 5 4
0 9 : 5 4
0 9 : 5 4
0 9 : 5 4
0 9 : 5 5
0 9 : 5 5
0 9 : 5 5
0 9 : 5 5
0 9 : 5 5
0 9 : 5 5
0 9 : 5 5
0 9 : 5 5
0 9 : 5 5
0 9 : 5 5
0 9 : 5 5
0 9 : 5 5
0 9 : 5 5
0 9 : 5 5
0 9 : 5 5

1 Q. "Question: Okay. What state is Shallotte in?"
2 "Answer: I believe it's in North Carolina. It's
3 right next to the South Carolina line, but it can actually
4 be in South Carolina."
5 "Question: Okay. And you drove to Shallotte and
6 went to Jeff Brantley's; is that right?"
7 "Answer: Yes."
8 "Question: And what was going on with the
9 bankcard?"
10 "Answer: Well, nothing right then."
11 "Question: Okay. Did some activity occur with
12 the bankcard later?"
13 "Answer: Yes."
14 "Question: Tell us what that activity was."
15 "Answer: Scott wanted to get some cocaine, and
16 the kind that you could get down there was not what he
17 wanted."
18 "Question: Okay. What did y'all do?"
19 "Answer: We drove to Albermarle to get" --
20 "Question: So you were in Shallotte, you decided
21 you needed to drive back to Albermarle?"
22 "Answer: Yes. To obtain cocaine."
23 "Question: And what happened with the bankcard?"
24 "Answer: He had me to go and put it in the
25 machine and draw money out."

0 9 : 5 6 1 "Question: And where did you use the bankcard?"

0 9 : 5 6 2 "Answer: Used it either in Shallotte or at the
0 9 : 5 6 3 next little town. I don't recall if it was actually in
0 9 : 5 6 4 Shallotte, but it" --

0 9 : 5 6 5 Is that where it ends on line 25?

0 9 : 5 6 6 A. That's where it ends on line 25.

0 9 : 5 6 7 Q. Okay. And going over to the next page, 1563,
0 9 : 5 6 8 we're going to start with line 1 and go down to line 19.

0 9 : 5 6 9 And Ms. Smith, finishing that answer:

0 9 : 5 6 10 -- "was down there, you know?"

0 9 : 5 6 11 A. Hold on. Is that 1563?

0 9 : 5 6 12 Q. Yes, sir.

0 9 : 5 6 13 A. I turned the wrong way.

0 9 : 5 6 14 Q. I'm sorry.

0 9 : 5 6 15 A. I'm sorry.

0 9 : 5 6 16 Q. We were on 1562. Now we're on 1563.

0 9 : 5 6 17 A. I'm with you.

0 9 : 5 6 18 Q. Starting at line 1, and I'm going to go through
0 9 : 5 6 19 18.

0 9 : 5 6 20 On line 1:

0 9 : 5 6 21 -- "was down there, you know? And then we used it
0 9 : 5 6 22 again later on in Albermarle."

0 9 : 5 6 23 "Question: Okay. You used it in Shallotte and
0 9 : 5 6 24 you also used it in Albermarle?"

0 9 : 5 7 25 "Answer: Yes."

0 9 : 5 7 1 "Question: All right. Now, you returned to
0 9 : 5 7 2 Albermarle. And after that, did you go back to Shallotte?"

0 9 : 5 7 3 "Answer: That's where things started breaking
0 9 : 5 7 4 down for me. And I don't -- all I remember after that point
0 9 : 5 7 5 is that I went -- you know, woke up in Albermarle. I
0 9 : 5 7 6 believe we went back to Shallotte again, but I'm not sure.
0 9 : 5 7 7 I was very upset, and I had been given some Xanax, which is
0 9 : 5 7 8 a nerve pill, and I can't truthfully testify how long a
0 9 : 5 7 9 period between using the ATM card or how many times we went
0 9 : 5 7 10 back to Shallotte, I cannot truthfully testify to that."

0 9 : 5 7 11 "Question: Okay. When you went to
0 9 : 5 7 12 Jeff Brantley's, do you have any recollection of who else
0 9 : 5 7 13 was there?"

0 9 : 5 7 14 "Answer: It was Jeff Brantley and his wife and
0 9 : 5 7 15 Jeffery Page."

0 9 : 5 7 16 Is that what it says, Mr. Oldham?

0 9 : 5 7 17 A. That's what it says.

0 9 : 5 7 18 Q. So as far as the use of the bankcard, did
0 9 : 5 8 19 Ms. Smith testify that they went to Shallotte;
0 9 : 5 8 20 Defendant Allen could not get the kind of cocaine he wanted
0 9 : 5 8 21 in Shallotte, so they went back to Albermarle and then
0 9 : 5 8 22 eventually went back to Shallotte; is that correct?

0 9 : 5 8 23 A. That's correct.

0 9 : 5 8 24 Q. Did she put any time periods or any dates when
0 9 : 5 8 25 that happened?

0 9 : 5 9 1 Q. With the position that she was in on the ground,
0 9 : 5 9 2 is it your opinion that she would have seen what was going
0 9 : 5 9 3 on?

0 9 : 5 9 4 MS. WARREN: Objection.

0 9 : 5 9 5 THE COURT: Overruled.

0 9 : 5 9 6 You may give a lay opinion.

0 9 : 5 9 7 A. It would be my opinion that when she was pushed
1 0 : 0 0 8 down to the ground, that she just testified to what she
1 0 : 0 0 9 heard and could not observe what went on at that point in
1 0 : 0 0 10 time.

1 0 : 0 0 11 Q. And specifically with regard to the knife, not
1 0 : 0 0 12 cross-examining her about the knife, was that knife ever
1 0 : 0 0 13 connected or associated with your client, Mr. Allen?

1 0 : 0 0 14 A. Not to my knowledge.

1 0 : 0 0 15 Q. Okay. And what is your approach to
1 0 : 0 0 16 cross-examination in general?

1 0 : 0 0 17 A. To cross-examination in general?

1 0 : 0 0 18 Q. Yes, sir.

1 0 : 0 0 19 A. I look for things that I can hopefully obtain a
1 0 : 0 0 20 statement from the person being examined that might conflict
1 0 : 0 0 21 with what they had testified earlier in that examination or
1 0 : 0 0 22 if there were other people present that might conflict with
1 0 : 0 0 23 other witnesses' statements.

1 0 : 0 0 24 Q. And do you also look at the witness's prior
1 0 : 0 0 25 statements to see if they made inconsistent statements?

1 000600.

2 A. Okay.

3 Q. And in this investigation, was Mr. Peralta one of
4 those people that was out at Jeff Brantley's cookout?

5 A. That's my recollection, down in Shallotte.

6 Q. And is he somebody who saw the truck and saw
7 Scott Allen and Vanessa Smith down there at the cookout?

8 A. That's what he indicates on page 000600.

9 Q. Okay. And on the bottom of 00600, the very last
10 paragraph, does it state, "Robert stated this was on
11 July 11th, 1999, on Sunday. And Cooter Page came into the
12 room and told him that he had bought the GMC truck
13 (Chris Gailey's) from Scott Allen and that he needed to get
14 the truck home back to Stanly County."

15 Is that what it says?

16 A. That's what it says.

17 Q. And then if you'll turn now to page 000603.

18 A. Yes, sir.

19 Q. And at the very top of that page, I'm going to go
20 from the top of that page until just after the middle of it.
21 Does it state, "Robert stated that Scott Allen told them
22 that he killed this boy the other day, and Scott went into
23 details on it. Robert stated that Scott told them that it
24 was at night in the woods and that he shot the boy three or
25 four times with a shotgun, and that he laid out in the woods

1 and listened for the boy to die. Robert stated that Scott
2 told them when he shot the boy, he did it not to kill him
3 right away, and he waited four to five hours in the woods
4 for the boy to die. Robert stated that Scott told them the
5 boy kept choking on blood and moaning for help. Robert
6 stated that he stayed until the boy was dead. Robert stated
7 that Scott Allen told them it took a while for the boy to
8 die. Robert stated, 'What boy are you talking about?' And
9 Scott Allen told him the boy that owned that truck he sold
10 Cooter."

11 Is that what it says there?

12 A. That's what it says there.

13 Q. And so, Mr. Oldham, in your -- in the law
14 enforcement investigation, there was not only
15 Jeffery Lence Page -- or Cooter -- who testified that
16 Mr. Allen told him this, but at least in the investigation
17 of documents, there was also Robert Peralta, who kind of
18 corroborated what Mr. Page had said in his statements; is
19 that correct?

20 A. That's correct.

21 Q. And is that something you took into account in
22 preparing for this case?

23 A. Of course.

24 Q. And you felt -- did you find out that
25 Mr. Robert Peralta passed away before trial?

1 0 : 0 7
1 0 : 0 7
1 0 : 0 7
1 0 : 0 7
1 0 : 0 8
1 0 : 0 8
1 0 : 0 8
1 0 : 0 8
1 0 : 0 9
1 0 : 0 9
1 0 : 0 9
1 0 : 0 9
1 0 : 0 9
1 0 : 0 9
1 0 : 0 9
1 0 : 0 9
1 0 : 1 0
1 0 : 1 0
1 0 : 1 0
1 0 : 1 0
1 0 : 1 0
1 0 : 1 0

1 A. That's my recollection; he passed away.

2 Q. And the state never ended up trying to get his

3 statement or anything into evidence, did they?

4 A. Did not.

5 Q. Mr. Oldham, we were talking about

6 Christopher Gailey's bank records.

7 Do you have Defendant's Exhibit 32 up there? It's

8 going to be Defendant's Exhibit 32.

9 A. 32?

10 Q. Yes, sir.

11 A. Okay. Yes, sir.

12 Q. Mr. Oldham, Ms. Warren asked you about that

13 exhibit. She had you look on the Bates stamp at the bottom

14 right corner 001010; is that correct?

15 A. Yes. Back of the first page.

16 Q. Okay. And she asked you about several

17 transactions there that go from June 1st until July 20th; is

18 that correct?

19 A. Yes.

20 Q. Okay. Starting with the first one that says

21 July 12th, Mr. Oldham, does that appear -- the first actual

22 transaction, does that appear to be a \$41 transaction on

23 July the 12th?

24 A. It does.

25 Q. And further on down, does there appear to be a

\$100 transaction on July the 12th?

A. That's the next one.

Q. And the next transaction, does it appear to be a

\$200.00 one - -

A. That's correct.

Q. -- on July the 12th? Okay.

Okay. And if you can turn now -- well, let me ask you this.

Are you familiar in your own banking between the transaction date and then the posting date that the bank does?

A. I'm familiar there's a difference.

Q. Okay. So sometimes you can have a transaction one date, and it posts a day or two later; is that correct?

A. Yes.

Q. Okay. If you can please turn to the Bates stamp -- wait a minute. Wrong date.

If you can turn to the Bates stamp number 001013.

A. Yes, sir.

Q. Okay. And does that seem to show a transaction amount for \$200?

A. Transaction amount \$200, yes, sir.

Q. Okay. And at the top there, it says, "Post Date 7/12/99." Is that right?

A. That's what it says.

1 0 : 1 1 1 Q. "Effective Date 7/12/99." Is that correct?

1 0 : 1 1 2 A. Yes, sir.

1 0 : 1 1 3 Q. "System Date 7/11/99 84016 time."

1 0 : 1 1 4 A. Yes, sir.

1 0 : 1 1 5 Q. Okay. So, in other words, even though it posted
1 0 : 1 1 6 on the 12th, the transaction occurred on the 11th?

1 0 : 1 1 7 MS. WARREN: Objection.

1 0 : 1 1 8 THE COURT: Sustained.

1 0 : 1 1 9 Q. Okay. That's what the record states; is that
1 0 : 1 2 10 correct? Or that's -- excuse me.

1 0 : 1 2 11 That's what this bank record introduced into
1 0 : 1 2 12 evidence -- now, was this introduced into evidence by the
1 0 : 1 2 13 state?

1 0 : 1 2 14 A. I don't honestly recall if it was or not.

1 0 : 1 2 15 Q. Okay. And on the next one, it's going to be --

1 0 : 1 2 16 All right. Then we have another one on
1 0 : 1 2 17 page 001017; is that correct?

1 0 : 1 3 18 A. Yes, sir.

1 0 : 1 3 19 Q. And that transaction amount is for \$41; is that
1 0 : 1 3 20 correct?

1 0 : 1 3 21 A. That's what these papers indicate, yes, sir.

1 0 : 1 3 22 Q. And the Post Date for that is at 7/12/99?

1 0 : 1 3 23 A. Yes, sir.

1 0 : 1 3 24 Q. Is the Effective Date 7/12/99?

1 0 : 1 3 25 A. That's correct.

1 Q. And is the System Date 7/12/99?

2 A. That's correct.

3 Q. Thank you, Mr. Oldham.

4 Mr. Oldham, the next one's going to be Defendant's
5 Exhibit Number 35, Defendant's Exhibit Number 35 that they
6 had noted was a DEA -- excuse me.

7 A. Yes, sir.

8 Q. Now, before we get into this, do you recall from
9 the trial how Defendant Allen got a driver's license in the
10 name of Byron James Johnson?

11 A. Someone had known Byron Johnson and had contacted
12 I believe that individual and got a request to get this
13 identity. I think it was a driver's license from the state
14 of Washington. And that was, supposedly, according to
15 state's theory, an alias that he was using at that time.

16 Q. So there was a real Byron James Johnson; is that
17 correct?

18 A. That was what I was instructed and told, yes, sir.

19 Q. And the testimony at trial was that this
20 Byron James Johnson lent his paperwork to Mr. Allen, who
21 then went and got a -- basically a fraudulent driver's
22 license with Defendant Allen's picture on it, but with all
23 the credentials of Byron James Johnson; is that correct?

24 A. Yes, sir.

25 Q. Now, this particular Defendant's Exhibit 35, I

1 know the defense has it listed as a DEA receipt.

2 Can you look in the very bottom left corner there,
3 very bottom left, below the line, does it say "DEA form"?

4 A. Yes, sir.

5 Q. And below it, "(April 1983)"?

6 A. Yes, sir.

7 Q. Okay. So does this receipt for cash or other
8 items, does it state anywhere that it has anything to do
9 with the DEA other than the little print at the bottom?

10 A. That's the only reference I see.

11 Q. And is a law enforcement agency listed on that
12 form anywhere?

13 A. I do not see one.

14 Q. So from this form, we don't know if it's from a
15 police department in Washington state or police department
16 in Shallotte, do we?

17 A. I do not.

18 Q. And is this something you received in discovery,
19 or do you recall?

20 A. I don't know if it was listed on the list of items
21 obtained. There were two forms of discovery, one by
22 Arthur Donadio and a second one by Kristian Allen. And if
23 it was listed on that, I would have to rely on that to say
24 when I received it if it was in discovery or not.

25 Q. Now, at the bottom of this, there seems to be --

1 first, there's a signature on the left. And then printed on
2 the right, it looks like a Deputy Wally Long, perhaps, would
3 have written a name in there and signed it on the left; is
4 that correct?

5 A. That's correct.

6 Q. Are you familiar with any Deputy Wally Long?

7 A. No, I'm not familiar with Deputy Wally Long.

8 Q. And do you -- from looking at this document, do
9 you have any idea whether this was items taken from the real
10 Byron James Johnson or from Scott Allen fraudulently posing
11 as Byron James Johnson?

12 A. No, all I knew was what was on this document.

13 Q. Okay. And based on what you know from this
14 document that you can see, would you use it to try to
15 cross-examine a witness in a capital murder trial?

16 A. Not really. I don't think -- I'm not positive of
17 what -- about the circumstances of what it was.

18 Q. Yes, sir.

19 When I asked you earlier -- or yesterday, I think
20 you testified -- when I asked questions about whether or not
21 something proves or disproves something, I'm trying to
22 remember your phrasing, you were saying you were looking out
23 for landmines.

24 A. Yes. I used the terminology landmines, yes, sir.

25 Q. Now, they asked you about the church break-ins in

1 Defendant's Exhibit 25.

2 A. Yes, sir.

3 Q. I'm not going to ask you to pull that exhibit out
4 yet. I'm just going to ask you some questions.

5 First, regarding those church break-ins. You
6 represented Scott David Allen in that case; is that correct?

7 A. That's correct.

8 Q. And you not only represented him, did you recall
9 when he was first charged with this, that he was charged
10 with those church break-ins too?

11 A. I recall he was charged with them, yes, sir.

12 Q. Okay. And you recalled representing him on the
13 case?

14 A. Yes, I recall it.

15 Q. So you knew the whole time you were representing
16 Scott Allen that the church breaking and the entering cases
17 existed?

18 A. Yes. It actually went to trial.

19 Q. Yes, sir. I'm going to ask you, what happened in
20 those cases?

21 A. My recollection is it started in a trial.

22 Mr. Allen was present in court, of course. His father was
23 present in court observing the trial. It went on, as I
24 recall, for about three days. I'm thinking this was in
25 March or April. And --

1 Q. March or April of '98? '99? Do you know?

2 A. I can't tell you the exact date. I remember it
3 was approaching the time when the basketball tournament was
4 played in the Atlantic Coast Conference week.

5 Q. Yes, sir.

6 A. I remember that somewhere, seemed like it was the
7 third day of the trial, the presiding judge, who I had known
8 for years, Judge Jim Davis out of Concord, asked me to
9 approach the bench with the district attorney. And he said,
10 "On my own motion, I'm going to offer Mr. Oldham a plea in
11 this case."

12 Q. And is that something unusual?

13 A. I think I've only seen it happen maybe once or
14 twice before that I might have been involved in a case
15 involving Judge McConnell from Moore County.

16 Q. So what happened?

17 MS. WARREN: Can the witness speak up a little,
18 please?

19 THE WITNESS: I'll speak up to the microphone.

20 MS. WARREN: Thank you.

21 THE COURT: Thank you, sir.

22 Let us know if you can't hear.

23 A. He said, "Would you like an opportunity to discuss
24 it with your client?"

25 I said, "Yes, sir."

1 He said, "I'll take a recess."

2 He said, "Your client's father's out there. Would
3 you like him to be present?"

4 I said, "Yes, sir."

5 So he came up, and I explained to Scott and to his
6 father about the plea. And his father talked for a few
7 minutes after that. I don't remember any specific questions
8 they asked me. But at some point, Scott said, "I'm going to
9 take the plea offer."

10 Q. And did he, in fact, take the plea offer?

11 A. He did. And I can't tell you what the offer was
12 at this point.

13 Q. And so there was some conviction there?

14 A. Oh, yes. There was a plea entered, and the trial
15 was over at that particular point.

16 THE COURT: You keep trailing off. Keep your
17 voice up.

18 A. The trial was over at that point. I think it was
19 a Thursday at that point.

20 THE COURT: Thank you.

21 Q. Do you recall from Defendant's Exhibit 25 there
22 was some newspaper articles included in there?

23 A. About the breaking and enterings?

24 Q. Yes, sir.

25 A. I recall there was some newspaper articles

1 probably in my file about that. I recall one of the
2 churches was Marlboro Church. And it stood out in my mind
3 because there was some statements from the sheriff at that
4 time, Sheriff Hurley, and that was his church, and he made a
5 lot of statements about that.

6 Q. Was it your understanding from the discovery you
7 got in that case that churches were being broken into, the
8 stereo or musical equipment was being stolen and then sold
9 to bands -- or different bands in Charlotte?

10 A. That's my recollection. It was sold -- I believe
11 it was Mecklenburg County/Charlotte area at that time.

12 Q. And the way people were finding out was coming
13 into church on Sunday morning to find out their equipment
14 was gone; is that correct?

15 A. Yes. And it was --

16 (Court reporter clarification.)

17 THE COURT: Complicit about the underlying
18 circumstances.

19 A. A lot of details about the breakings and
20 enterings.

21 THE COURT: Remember, keep your voice up so
22 everybody can hear you. A little slower for the court
23 reporter.

24 Q. And do you recall, Mr. Oldham, at least in -- at
25 least in one of those newspaper articles, they named

1 Scott Allen as the, quote, ringleader, unquote?

2 A. Yes, his name was mentioned, yes, sir.

3 Q. And in representing -- the defendant has alleged
4 ineffective assistance for failing to cross-examine
5 Vanessa Smith about her recanting in that case.

6 A. Yes, sir.

7 Q. And had you asked her the questions about
8 recanting in that case, is that something you would have
9 wanted to do in this capital murder case?

10 A. No, not particularly I didn't.

11 Q. And why not?

12 A. I was concerned about what might come out about
13 the particular circumstances of that, and it connected Scott
14 to further things in his past that I thought would be
15 damaging to him.

16 Q. And this was information that, at least at the
17 time, you thought wouldn't come out unless you brought it
18 out?

19 A. That's correct.

20 Q. And this particular case, this murder case, one of
21 your concerns is that you're trying to save
22 Defendant Allen's life when you're there in trial; is that
23 correct?

24 A. That's generally your primary concern in these
25 types of cases.

1 Q. And when you're doing that, you don't particularly
2 want information coming out that he was a ringleader of a
3 bunch of church breakings and enterings, do you?

4 A. You don't want any information that's going to
5 color him in any worse light than what might be presented in
6 the case that's on trial itself.

7 Q. So you deciding not to cross-examine Ms. Smith on
8 this, even though you had it and knew about it from the
9 initiation -- in fact, she came to your office and gave the
10 recantation -- would you consider that to be a strategic
11 decision on your part?

12 A. I would.

13 Q. Mr. Oldham, I think the defense entered a letter
14 described as the White Chocolate letter or signed by
15 White Chocolate.

16 A. That's correct.

17 Q. Defendant's Exhibit 1-3, which was a deposition
18 exhibit, which was State's Deposition Exhibit 5.

19 Without looking at the letter, digging it up, do
20 you recall it?

21 A. I recall it, yes, sir. It was signed
22 White Chocolate, which I was unfamiliar with who that was at
23 that particular point. You had to sort of read between the
24 lines.

25 Q. And nobody else had signed it. No name was on it,

1 just signed White Chocolate?

2 A. That's correct.

3 Q. And was there any date on it that you recall?

4 A. I don't recall at this particular point.

5 Q. And this particular letter, do you recall seeing
6 it during the course of representing Scott Allen? Is this
7 something that you got from -- do you know what source?

8 A. I don't recall independently whether or not that
9 was something Mr. Atkinson had that he showed me. There was
10 at least one other letter that he'd received in his -- in
11 the filing cabinet that's maintained for different lawyers
12 in the clerk's office at that time.

13 Q. When you say filing cabinet, you mean some place
14 where they deliver you information like letters or notes or
15 something like that?

16 A. It was a cabinet, as I recall, that was down
17 there. I did not retrieve it; he did. But I was familiar
18 with the cabinet. Sort of like we had in Randolph. Also
19 where orders had been signed by judges, discovery might be
20 placed by the district attorney in those files. And that's
21 the circumstances under which I recall. There was a second
22 letter also that he showed me.

23 Q. Okay. And specifically with the White Chocolate
24 letter, is that what you're recalling was in that cabinet
25 maintained in the clerk's office, or was that the other

1 letter?

2 A. I remember the other letter was in there. I don't
3 remember in detail about the White Chocolate letter at this
4 point, you know.

5 Q. What did y'all do regarding -- or do you know when
6 abouts in the case you got it? Do you have any idea?

7 A. I have no idea. I would have to look back and see
8 if it's any -- if it's an item that's listed on the
9 discovery if it came from the state. If not, it would have
10 been given to me by Mr. Atkinson at the time that he
11 received it.

12 Q. Do you recall discussing it with Mr. Atkinson?

13 A. I don't recall the specifics of that particular
14 one. I recall more about the other letter that was found.

15 Q. And was the other letter the one from
16 Troy Spencer?

17 A. Yes, it was.

18 Q. And --

19 **THE COURT:** I'm going to interrupt you there.

20 Please mark your place. We're going to take a
21 brief recess.

22 The witness may step down. Thank you, sir.

23 **THE WITNESS:** Thank you, sir.

24 **THE COURT:** Mr. Bailiff, ten minutes.

25 (Recess.)

1 **THE COURT:** Let the record reflect the defendant
2 is present in the courtroom with his lawyers.

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

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

6 **THE COURT:** You may proceed.

7 **Q.** Mr. Oldham, we were talking about the
8 White Chocolate letter.

9 **A.** Yes, sir.

10 **Q.** Now, did you cross-examine Vanessa Smith with the
11 White Chocolate letter?

12 **A.** I don't recall.

13 **Q.** Okay. And is that something that you -- is that
14 something that you would use to cross-examine a witness like
15 that?

16 **A.** I wanted to know a little bit more about the
17 circumstances. My initial reaction, as I recall, to the
18 letter was -- I was always concerned when there's
19 communication in writing between my client and another
20 person.

21 And if this was the co-defendant at that time, I
22 was concerned because I thought those letters would be
23 accessed by law enforcement officers, what might be written
24 in those letters.

25 And I was always concerned about clients in jail

1 communicating about the case with other people, especially
2 people who are charged in that particular case because I
3 could foresee that might come back to haunt us at some
4 point.

5 Q. And there's no identifying information on the
6 letter itself saying who it comes from?

7 A. No. And I don't recall the circumstances. I
8 remember Mr. Atkinson, I think, had the letter, but I can't
9 say positively. He might have indicated to me he got it
10 from the client or he got it from the clerk's office. I
11 just don't know at this point.

12 Q. You don't know if Scott Allen provided this letter
13 or not?

14 A. That could have been a possibility. Because I
15 remember being concerned about -- I'm always concerned about
16 giving clients discovery that I get in cases where somebody
17 in jail might gain access to it and attempt to get a better
18 plea deal for themselves by offering testimony about the
19 case and using the information they provided to boast the
20 credibility of their statements.

21 Q. Okay. So even if Scott Allen gave you the letter,
22 you'd do something else with it before you ask any questions
23 about it; is that correct?

24 A. Yes, sir. Sort of like the other letter. We sort
25 of --

1 MS. WARREN: Would you repeat that?

2 A. It was like the second letter. We looked into
3 that, discussed that at that particular point in time.

4 Q. You mean the Troy Spencer letter?

5 A. Yes, the Troy Spencer letter. And Mr. Atkinson
6 discussed that with the attorneys in Durham, too.

7 Q. Do you recall discussing this White Chocolate
8 letter with the attorneys in Durham?

9 A. I don't recall discussing -- I don't recall as
10 much details about that letter as I do the other letter.

11 Q. Were y'all able to find out anything about this
12 letter, that you recall?

13 A. I don't recall a lot about this letter.

14 Q. Now, Mr. Oldham, you recall your client
15 Scott David Allen was interviewed by the police in Denver,
16 Denver Police Department; is that correct?

17 A. Yes, sir.

18 Q. And he was interviewed by an investigator. And
19 that interview, was the video was recorded?

20 A. It was recorded. And I remember -- I don't
21 remember the circumstances, but I remember seeing that
22 video.

23 MR. VLAHOS: May I approach the witness,
24 Your Honor?

25 THE COURT: Yes.

1 Q. Mr. Oldham, I'm handing you what I've marked for
2 identification as State's Exhibit Number 26.

3 Could you please take a look at that.

4 A. Yes, sir.

5 Q. Does this appear to be a summary from a Detective
6 Martin E. Vigil, V-I-G-I-L, of the Denver Police Department?

7 A. It appears to be, and that's what it indicates on
8 the document itself.

9 Q. And does it appear to be that officer's summary of
10 his interview with Scott David Allen on August 10th, 1999?

11 A. It does.

12 Q. And in that interview, on the second paragraph,
13 does it state that Vigil contacted Allen and conducted a
14 videotaped interview in the homicide unit?

15 A. It does.

16 Q. Does it say, "Vigil read Allen his Miranda rights,
17 to which he stated he understood and agreed to talk to
18 Vigil"?

19 A. It does.

20 Q. Okay. And does that comport with what you saw on
21 the videotape when you reviewed it?

22 A. Yes.

23 Q. And then further down, not the next paragraph but
24 the paragraph after that, so the one, two -- the fourth
25 paragraph down from the top, does that first line state,

1 "Allen stated that he was with the victim the night of the
2 incident near the location of the incident"?

3 A. That's what it states.

4 Q. Does it also state, "The victim told Allen that he
5 was attempting to complete a narcotics or ammunition
6 transaction in the woods"?

7 A. That's what it states.

8 Q. Does it also state, "He" -- meaning Allen --
9 "stated that the victim was wearing 'camo' pants and no
10 shirt"?

11 Is that what it says?

12 A. That's what it says.

13 Q. And the next line, "He stated" -- meaning Allen --
14 "that the victim was carrying an unknown bag when he
15 responded to the transaction."

16 A. Yes, sir.

17 Q. And the next line, "Allen stated that a party
18 named Vanessa was with him and the victim the night of the
19 incident."

20 A. Yes, sir, that's what it says.

21 Q. And the last line, "Allen denied any knowledge of
22 the incident except that there might be a motive which he
23 would not reveal."

24 A. That's what this statement says, summary
25 statement.

1 Q. And does that -- does that comport with your
2 recall of the video?

3 A. Yes.

4 Q. And, specifically, the state tried to introduce
5 that video at trial; is that correct?

6 A. That's my recollection.

7 Q. And y'all had filed a pretrial motion to suppress
8 it; is that correct?

9 A. That's correct.

10 Q. And the judge ended up suppressing the motion, but
11 not on constitutional grounds. He did it on a
12 404/403 balancing test; is that correct? 402/403 balancing
13 test.

14 A. Yes.

15 Q. And he found that any probative value was
16 substantially outweighed by dangers of unfair prejudice,
17 confusing the issues, misleading the jury; is that correct?

18 A. Yes, sir.

19 Q. So you and Mr. Atkinson were successful in getting
20 that suppressed?

21 A. Yes, sir.

22 Q. In the -- in the video, did Mr. Allen make several
23 statements that there were things he knew but either
24 couldn't or wouldn't tell law enforcement?

25 A. Yes.

1 Q. And not the tone of the conversation with law
2 enforcement but the fact that he's saying there's things he
3 knows but can't tell or won't tell, is that the way he was
4 operating with his counsel as well?

5 A. Yes.

6 Q. Okay.

7 MR. VLAHOS: Your Honor, at this time, I have
8 marked two flash drives, one with a red State's Exhibit 27,
9 one with a white State's 27.

10 My understanding, state's moving to introduce
11 them, the defense has no objection, with the provision that,
12 like everything in trial counsels' files, we're introducing
13 it because it was in trial counsels' files, not for the
14 truth of any matters asserted in any of the statements from
15 anybody in the video.

16 And, Your Honor, it's specifically -- I've got the
17 numbers of -- not the video, but where the videotape was
18 found in Mr. Oldham's file by the defense, and they
19 Bates-stamped it. There were Bates stamp numbers P000875
20 through 876. It's the VHS tape box, top of it, and the
21 label on the VHS tape, listing it as the videotaped
22 interview from the Denver Police Department.

23 MS. WARREN: Your Honor, for the record, I have
24 viewed the VHS itself as well as the digital conversion, and
25 they are the same.

1 **THE COURT:** Let's be clear. State's 27, which is
2 marked in red, is what specifically?

3 **MR. VLAHOS:** Is a copy of what is on the VHS tape,
4 the video interview of Defendant Scott David Allen.

5 **THE COURT:** What is State's 27 that's marked with
6 white?

7 **MR. VLAHOS:** The exact same thing, Your Honor.

8 **THE COURT:** No difference at all?

9 **MR. VLAHOS:** No, Your Honor, none.

10 **THE COURT:** Okay.

11 **MS. WARREN:** And I have reviewed and confirmed
12 that as well, Your Honor.

13 **THE COURT:** Thank you.

14 Then, at this point, there being no objection to
15 the State's 27 except for not being received for the truth
16 of the matter asserted, there are no other evidentiary
17 issues at this point?

18 **MS. WARREN:** Correct, Your Honor.

19 **THE COURT:** Are you moving to introduce those now,
20 or are you just --

21 **MR. VLAHOS:** I will, since they're stipulating,
22 for this, Your Honor. We're not technically putting on
23 evidence, but yes.

24 **THE COURT:** Do you have any objection to him doing
25 that now, or have him wait, since we're addressing it now?

1 MS. WARREN: Yes. I have no objection. I thought
2 that you were introducing all of these exhibits.

3 MR. VLAHOS: I will, but I didn't have the time to
4 mark them yet.

5 MS. WARREN: Got it.

6 THE COURT: Normally, he would not be allowed to
7 introduce anything at this point; that's why I was a little
8 taken aback that we were addressing this right now.

9 So you're fine with that, then?

10 MS. WARREN: That's correct, Your Honor.

11 THE COURT: All right. Then State's 27 with a red
12 sticker -- is that what it is?

13 MR. VLAHOS: That's correct, Your Honor.

14 THE COURT: -- and State's 27 with a white sticker
15 which purports to be flash drives of the VHS tape taped
16 video interview from the Denver Police Department.
17 State's 27 red, State's 27 white are both received into
18 evidence, not for the truth of the matter asserted. All
19 right.

20 MR. VLAHOS: Your Honor, may I approach the clerk
21 with the red State's Exhibit 27?

22 THE COURT: You may.

23 MR. VLAHOS: Your Honor, may I approach the Court
24 with the white State's Exhibit 27?

25 THE COURT: Yes, you may.

1 Q. Mr. Oldham, on another subject, you had gone to
2 view the physical evidence in this case at the -- I guess it
3 was a temporary office of the Montgomery County Sheriff's
4 Office; is that correct?

5 A. Yes, sir.

6 Q. And during one of those visits there, did you go
7 to view a videotape?

8 A. That's what the notes indicate, yes.

9 Q. Okay. And do you know whether or not it was, in
10 fact, a videotape of the crime scene or not?

11 A. I only know what I was told at that point.

12 Q. Okay. And you went to go see it; is that correct?

13 A. Yes, sir.

14 Q. And Deputy Scott MacFayden put the video VHS tape
15 into the VCR player while you were there; is that correct?

16 A. I believe that's what he did.

17 Q. And --

18 A. I just remember I was unable to see it because it
19 was broken. Whether it broke then or was already broken, I
20 cannot tell you independently from my recollection.

21 Q. It was either broken when he put it in or it broke
22 when he put it in, one of the two?

23 A. Yes, sir.

24 Q. But you were unable to view the videotape for that
25 reason?

1 A. Yes, sir.

2 Q. So you don't know for a fact whether or not it was
3 a videotape of the crime scene?

4 MS. WARREN: Objection.

5 THE COURT: Sustained, the form of the question.

6 Q. And in your review of the materials, did you see
7 any notations that a crime scene video was ever made of the
8 crime scene?

9 A. I don't recall.

10 Q. And when we're talking about crime scene, we're
11 talking about the area where Mr. Gailey's body was found?

12 A. That's what crime scene usually refers to, the
13 location, in a murder case, where the body was found.

14 MR. VLAHOS: May I have one moment, Your Honor,
15 with counsel?

16 THE COURT: Yes, you may.

17 (Pause in proceedings.)

18 MR. VLAHOS: May it please the Court?

19 THE COURT: Yes.

20 MR. VLAHOS: Your Honor, we've got a number of
21 exhibits, a fairly large number of exhibits that the parties
22 have talked about being able to stipulate to so I can speed
23 the process up. And there's only some of them, but not all
24 of them, that I have to ask Mr. Oldham about.

25 When the state exchanged exhibits, the state got

1 them out of the law enforcement files, not out of the
2 defense attorney files. So the defense has seen some minor
3 differences, so I want to have a chance to go downstairs and
4 see if I can't print these out from Mr. Oldham's file that I
5 have on disk on my computer. And that way, we might be able
6 to stipulate and get them in rather than going through a
7 much longer process to get them in.

8 **THE COURT:** That is acceptable.

9 **MR. VLAHOS:** It's probably going to take at least
10 30 minutes because there's a lot of them.

11 **THE COURT:** I will have the witness step down, and
12 we will be at ease while you do that.

13 **MR. VLAHOS:** Thank you, Your Honor.

14 **THE COURT:** The witness may leave the stand.

15 You may step down, sir. Watch your step.

16 Court will be at ease.

17 (Court at ease.)

18 **THE COURT:** Are you ready to proceed?

19 **MR. VLAHOS:** Yes, Your Honor.

20 **THE COURT:** All right. We will come to order.

21 **MS. WARREN:** Can I have just a second so that I
22 can --

23 **THE COURT:** You need a moment?

24 **MS. WARREN:** Sorry.

25 **THE COURT:** That's fine.

1 **MS. WARREN:** That way, I think we'll both be on
2 exactly the same page, Your Honor. Thank you.

3 (Pause in proceedings.)

4 **MR. VLAHOS:** May it please the Court?

5 **THE COURT:** Yes.

6 **MR. VLAHOS:** Your Honor, I believe counsels'
7 stipulating to the following exhibits as being from
8 Mr. Oldham's file, not for the truth of the matter asserted
9 therein.

10 First is going to be State's Exhibit 28. It's a
11 letter from Troy Spencer to counsel.

12 State's Exhibit 29, it's Troy Spencer interview
13 with Danny Carter.

14 **MS. WARREN:** Sorry, Nick. For the record, can we
15 please put the Bates stamp on with the exhibit numbers?

16 **MR. VLAHOS:** Back up to State's Exhibit 28, Bates
17 stamp numbers P000555 through 565.

18 And for State's Exhibit 29, P02990.

19 State's Exhibit 30 is going to be Christina Fowler
20 Chamberlain February 2nd of 2002 interview with
21 Will Atkinson, Bates-stamped P000600.

22 State's Exhibit 31 is going to be Christina Fowler
23 Chamberlain April 2nd of 2001 interview with Danny Carter,
24 P002971 through 2972.

25 State's Exhibit 32, Christina Fowler Chamberlain

1 April 16th, 2002, interview with Danny Carter, P002992.

2 State's Exhibit 33, Danny and Tanzy, T-A-N-Z-Y,
3 Lanier, January 29th, 2001, statement to Danny Carter,
4 P002949 through 2950.

5 MS. WARREN: That goes through 51.

6 THE COURT: This is one statement with both of the
7 witnesses?

8 MR. VLAHOS: Yes, Your Honor, it is.

9 THE COURT: Thank you.

10 MR. VLAHOS: And it goes to 2951, Your Honor.

11 THE COURT: Thank you.

12 MR. VLAHOS: State's Exhibit 34, Danny Lanier
13 February 1st, 2001, interview with Danny Carter, P002954.

14 State's Exhibit 35, Dustin Maness January 9th,
15 2001, interview with Danny Carter, P002946.

16 State's Exhibit 36, September 23rd, 2003,
17 Dustin Maness interview with Danny Carter, P002994.

18 State's Exhibit 37, Jamie Fender December 20th,
19 2000, interview with Danny Carter, P002944.

20 State's Exhibit 38, Joyce Allen May 5th, 2001,
21 interview with Janet Herzog, Bates stamp has no PO. It's
22 1400 through 1428.

23 MS. WARREN: And I'll note, for the record, that
24 this document is from Will Atkinson's file, not
25 Pete Oldham's file.

1 2 : 2 2
1 2 : 2 2
1 2 : 2 2
1 2 : 2 3
1 2 : 2 3
1 2 : 2 3
1 2 : 2 3
1 2 : 2 3
1 2 : 2 3
1 2 : 2 4
1 2 : 2 4
1 2 : 2 4
1 2 : 2 4
1 2 : 2 4
1 2 : 2 4
1 2 : 2 4
1 2 : 2 4
1 2 : 2 4
1 2 : 2 4
1 2 : 2 5

1 **THE COURT:** Thank you.

2 **MR. VLAHOS:** State's Exhibit 39, Joyce Allen

3 May 15th, 2001, interview with Danny Carter, P002978 through

4 2979.

5 State's Exhibit 40, Joyce Allen October 20th,

6 2003, interview with Lieutenant Jim Johnson, P001912 through

7 1913.

8 State's Exhibit 41, Joyce Allen December 11th,

9 2000, interview with Danny Carter, P002938 through 2939.

10 State's Exhibit 42, Kelly Racobs phone interview,

11 P000146 through 147.

12 **THE COURT:** Interviewed by?

13 **MR. VLAHOS:** I'm sorry, Your Honor?

14 **THE COURT:** Interviewed by?

15 **MR. VLAHOS:** It's -- it doesn't say who it's

16 interviewed by, Your Honor.

17 **THE COURT:** Okay.

18 **MR. VLAHOS:** It didn't have a date on it, just an

19 address.

20 **THE COURT:** Thank you.

21 **THE CLERK:** What was the last name?

22 **MR. VLAHOS:** Racobs, R-A-C-O-B-S.

23 State's Exhibit 43, Larry Smith October 16th,

24 2001, interview with Danny Carter, P002988.

25 State's Exhibit 44, Lois Lawson Fender

1 December 20th, 2000, interview with Danny Carter, P02941
2 through 2942.

3 State's Exhibit 45, Robert Johnson January 11th,
4 2001, interview with Danny Carter, P002716 through 2717.

5 State's Exhibit 46, Robert Johnson January 30th,
6 2001, interview with Danny Carter, P002715.

7 And State's Exhibit 47, Shannon Diehl, D-I-E-H-L,
8 February the 5th, 2001, interview with Danny Carter, P002956
9 through 2957.

10 **THE COURT:** Mr. Vlahos, I'm going to stop you
11 right there. Just mark your place.

12 I have a WebEx meeting scheduled over the lunch
13 recess regarding the new Odyssey system, so I need to attend
14 that remotely. So we'll take a recess until 2:00 p.m.

15 (Recess.)

16 **THE COURT:** Good afternoon, everyone.

17 Let the record reflect that the defendant is
18 present in the courtroom with his attorneys.

19 Mr. Vlahos, you may resume.

20 **MR. VLAHOS:** Thank you, Your Honor.

21 Before we get started, there is one more exhibit
22 to mark that we were able to do the same stipulation and
23 objection, truth of the matter asserted.

24 Your Honor, this is going to be State's
25 Exhibit 48, State's Exhibit 48, Jamie Fender, F-E-N-D-E-R,

0 2 : 0 1 1 October 21st, 2003, interview with ADA Kristian,
0 2 : 0 1 2 K-R-I-S-T-I-A-N, Allen. And for the record, Your Honor,
0 2 : 0 1 3 it's P001952.

0 2 : 0 2 4 Your Honor, with that, may I approach?

0 2 : 0 2 5 I've got a stack that I'm going to be asking
0 2 : 0 2 6 Mr. Oldham questions of -- these are the ones I just
0 2 : 0 2 7 submitted -- and a stack for the Court.

0 2 : 0 2 8 **THE COURT:** Let's have him come up so he can get
0 2 : 0 2 9 situated.

0 2 : 0 2 10 Come up, sir. Retake the stand. Recall that you
0 2 : 0 2 11 are still under oath.

0 2 : 0 2 12 While he's coming up, Mr. Vlahos, were you
0 2 : 0 2 13 prepared to move these into evidence now? Was that what was
0 2 : 0 2 14 contemplated?

0 2 : 0 2 15 **MR. VLAHOS:** Yes, Your Honor. I would be happy to
0 2 : 0 2 16 do that.

0 2 : 0 2 17 **THE COURT:** So that would be basically State's 28
0 2 : 0 2 18 through 48?

0 2 : 0 2 19 **MR. VLAHOS:** That's correct, Your Honor.

0 2 : 0 2 20 **THE COURT:** And based on the stipulation, those
0 2 : 0 2 21 are received into evidence, but not for the truth of the
0 2 : 0 2 22 matter asserted.

0 2 : 0 2 23 **MR. VLAHOS:** Thank you, Your Honor.

0 2 : 0 2 24 **THE COURT:** I will mark all those as being
0 2 : 0 2 25 received now at this point, Madam Clerk, not just identified

1 but actually received into evidence. Except for the
2 objection to the truth of the matter asserted by the
3 defendant, there are no other objections. So those are
4 received out of order based on the stipulation.

5 You may approach.

6 MS. WARREN: And, Your Honor, I just wanted to
7 confirm that we are only receiving 27 through 48 out of
8 order, not all of the state's marked exhibits.

9 THE COURT: I'm sorry? Repeat that, please.

10 MS. WARREN: 28 through 48, not all of the
11 state's --

12 THE COURT: That's what I said.

13 MS. WARREN: Okay. Thank you.

14 Q. Mr. Oldham, I'm not going to ask you about that
15 whole stack, just about maybe four people. Okay?

16 A. Okay.

17 Q. First of all, with regard to Troy Spencer --
18 you've got his stuff on the top -- that would be State's
19 Exhibit 28 and 29.

20 The first one being State's Exhibit 28, a letter
21 from Troy Spencer. Is that the one you spoke of as the one
22 being in I think Mr. Atkinson's box that he found at the
23 courthouse or drawer at the courthouse?

24 A. It has a note from him to me indicating that fact
25 on it.

0 2 : 0 4 1 Q. And that particular letter, do you remember
0 2 : 0 4 2 discussing that letter not only with Mr. Atkinson but also
0 2 : 0 4 3 with the lawyers at the -- or Mr. Atkinson discussed it with
0 2 : 0 4 4 the lawyers at the Center for Death Penalty Litigation?

0 2 : 0 4 5 A. That's correct.

0 2 : 0 4 6 Q. And that's when he wrote you that letter saying
0 2 : 0 4 7 "nothing good to come of this" or something similar?

0 2 : 0 4 8 A. Words to that effect, yes, sir.

0 2 : 0 4 9 Q. And with this particular letter, I'm going to ask
0 2 : 0 5 10 you to look at the letter. And there's some Bates stamp
0 2 : 0 5 11 numbers at the bottom starting at P000555.

0 2 : 0 5 12 A. Yes, sir.

0 2 : 0 5 13 Q. We're going to go to the second page, which is
0 2 : 0 5 14 P000556. And I'd like to take you all the way down to the
0 2 : 0 5 15 bottom of the page.

0 2 : 0 5 16 A. Yes, sir.

0 2 : 0 5 17 Q. On the right-hand side, we're going to come up
0 2 : 0 5 18 one, two, three, four lines, where it says, "She told me..."

0 2 : 0 5 19 A. This is 556?

0 2 : 0 5 20 Q. Yes, sir.

0 2 : 0 5 21 A. Come up four lines.

0 2 : 0 5 22 Q. Yes, sir. On the right-hand side, it ends with
0 2 : 0 5 23 "She told me..."

0 2 : 0 5 24 A. I was going up the left-hand side. I see what
0 2 : 0 5 25 you're saying.

0 2 : 0 5 1 Q. Yes, sir.

0 2 : 0 5 2 I'm going to read where it says, "She told me..."
0 2 : 0 5 3 and I'm going to go over to the next page, two lines. So
0 2 : 0 5 4 this is in the Troy Spencer letter.

0 2 : 0 5 5 "She told me that she wanted the big bag of
0 2 : 0 5 6 cocaine that Chris Gailey always displayed, and she wanted
0 2 : 0 6 7 the big roll of cash. She told me that it was her idea to
0 2 : 0 6 8 jump Chris and take it. It was all premeditated on both" --
0 2 : 0 6 9 underlined -- "their parts."

0 2 : 0 6 10 Is that what it says?

0 2 : 0 6 11 A. That's what it says.

0 2 : 0 6 12 Q. Okay. And when he's talking about "she," this is
0 2 : 0 6 13 a letter about --

0 2 : 0 6 14 A. Vanessa.

0 2 : 0 6 15 Q. -- Vanessa Smith; is that correct?

0 2 : 0 6 16 A. That's correct.

0 2 : 0 6 17 Q. And this man was a little bit perturbed and upset
0 2 : 0 6 18 with Vanessa Smith, was he not?

0 2 : 0 6 19 A. Yes.

0 2 : 0 6 20 Q. And that's because he got her out of jail, helped
0 2 : 0 6 21 get her out of jail on bond, and then she went to live with
0 2 : 0 6 22 him for a while and left him?

0 2 : 0 6 23 A. That's what happened, from what I understand.

0 2 : 0 6 24 THE COURT: One moment, please.

0 2 : 0 6 25 Yes, sir, Mr. Bailiff.

0 2 : 0 6 1 You situate that how you want to, so it doesn't
0 2 : 0 6 2 get knocked over.

0 2 : 0 6 3 THE WITNESS: I think it would be best -- let me
0 2 : 0 6 4 put it there. If it knocks over...

0 2 : 0 6 5 THE COURT: The witness has a cup of water now.

0 2 : 0 6 6 Thank You, Mr. Bailiff.

0 2 : 0 6 7 We are ready to resume.

0 2 : 0 6 8 Go ahead, sir.

0 2 : 0 6 9 MR. VLAHOS: Thank you, Your Honor.

0 2 : 0 6 10 Q. When he says, "it was all premeditated on both
0 2 : 0 7 11 their parts," is that a witness you would call at the guilt
0 2 : 0 7 12 phase of a capital murder trial?

0 2 : 0 7 13 A. My interpretation, it implicated both parties, her
0 2 : 0 7 14 and my client, and I would not call that individual.

0 2 : 0 7 15 Q. I'm going to take you over to the next page, which
0 2 : 0 7 16 is P000558.

0 2 : 0 7 17 A. 558?

0 2 : 0 7 18 Q. Yes, sir.

0 2 : 0 7 19 A. Okay.

0 2 : 0 7 20 Q. And we're going to go to the left-hand side of the
0 2 : 0 7 21 page, one, two, three, fourth line down where it starts
0 2 : 0 7 22 "Anyway..."

0 2 : 0 7 23 A. Yes, sir.

0 2 : 0 7 24 Q. Does it say, "Anyway, she told me that she used
0 2 : 0 7 25 witchcraft on Scott and went on and on at him until he

1 agreed to plan out a meeting with Chris to make an exchange
2 for some guns they stole for cocaine. But they both planned
3 it" -- underlined -- "it out for two days. She still
4 sits" --

5 A. "For days."

6 Q. "For days." I'm sorry.

7 "She still sits and laughs about how easy she
8 manipulated Scott and probably myself when I'm not around."

9 Is that what that letter says?

10 A. That's what it says.

11 Q. So is this something you'd offer in Scott Allen's
12 defense, that they both planned it out for days?

13 A. No, sir.

14 Q. Now, while you might be able to offer it as
15 inconsistent with Vanessa Smith's testimony, it would also
16 implicate your client and maybe line him up for the death
17 penalty?

18 A. Yes. It has ups and downs to it. And, in my
19 opinion, more downs than ups.

20 Q. And so when you and Mr. Atkinson decided not to
21 offer it, especially after you talked to CFDPL about it, was
22 that a strategic decision?

23 A. Yes.

24 I actually gave my opinion I did not think we
25 should use it. He consulted with the Center for Death

1 Penalty Litigation and indicated he got the same advice.

2 Q. Was that a double-check, just in case, to get
3 another second opinion or something?

4 A. Yes, sir.

5 Q. And I've got State's Exhibit 29. This is an
6 interview that Troy Spencer did with Danny Carter on or
7 about February 28 of 2002; is that correct?

8 A. That is correct.

9 Q. If we can look down at the second paragraph there.
10 Now, this one predates -- predates that letter,
11 doesn't it? The letter's dated March 31st of 2003, but this
12 is dated February 28th of 2002; is that correct?

13 A. That's correct.

14 Q. So a little over a year.

15 Now, Mr. Spencer was telling you then -- if you
16 look at the second paragraph, does it say, "Spencer states
17 when Vanessa got out on house arrest, she came to live with
18 him"?

19 A. Hold on. Okay. First paragraph.

20 Second paragraph. I'm sorry. Yes, sir.

21 Q. Second paragraph. "Spencer states when Vanessa
22 got out on house arrest, she came to live with him."

23 Is that what it says?

24 A. That's what it says.

25 Q. "Vanessa has not talked much about what happened

0 2 : 1 0 1 but has told him that Chris was Scott's friend who gave him
0 2 : 1 0 2 money, food, and helped him because he knew Scott was an
0 2 : 1 0 3 escapee. Vanessa told him the murder happened over cocaine.
0 2 : 1 0 4 Scott shot Chris in the back because Chris had a bag of coke
0 2 : 1 0 5 and money. Spencer states Vanessa said it was a surprise to
0 2 : 1 0 6 her when it happened. Vanessa told him that Scott had
0 2 : 1 0 7 threatened to kill her if she left him."

0 2 : 1 0 8 Is that what it says?

0 2 : 1 0 9 A. That's what it says.

0 2 : 1 0 10 Q. So his early statement to Danny Carter, it was a
0 2 : 1 0 11 surprise to Vanessa. But then when she left him, it was
0 2 : 1 0 12 "they all planned it out for days."

0 2 : 1 0 13 A. It changed.

0 2 : 1 0 14 Q. Yes, sir.

0 2 : 1 0 15 Now, based on the change in statements, is that
0 2 : 1 0 16 something -- in your experience -- if you did call him to
0 2 : 1 0 17 the stand to testify, at that time, the practice would be
0 2 : 1 0 18 for -- the state might ask the judge for any prior written
0 2 : 1 1 19 or recorded statements by this witness?

0 2 : 1 1 20 A. Yes, sir.

0 2 : 1 1 21 Q. And if the state did that, then you would be
0 2 : 1 1 22 required by law to hand over both the letter and the
0 2 : 1 1 23 statement; is that correct?

0 2 : 1 1 24 A. That would be a correct statement.

0 2 : 1 1 25 Q. And the state would be able to cross-examine him

1 with these prior statements; is that correct?

2 A. Yes, sir.

3 Q. Now, the next person I'd like to draw your
4 attention to is Christina Fowler Chamberlain. It's going to
5 start out with State's Exhibit 30. It's in the stack, which
6 should be the next one, State's Exhibit 30.

7 A. Yes, sir.

8 Q. And on State's Exhibit 30, does this appear to be
9 the statement from February 2nd of 2002, or a meeting that
10 Mr. Atkinson took and typed up his notes?

11 A. This appears to be a statement Mr. Atkinson typed
12 up after he met with this particular witness at the IHOP in
13 Asheboro.

14 Q. This is Mr. Atkinson's synopsis of what happened
15 at that meeting; is that correct?

16 A. That would be a correct statement.

17 Q. And does it say that they met at the IHOP
18 restaurant, Dixie Drive in Asheboro, 8:30 a.m. on
19 February 2nd, 2002?

20 A. It does.

21 Q. And then if we can go down one, two, three,
22 four -- the fifth paragraph, where it starts, "Tina advises
23 that..."

24 A. Yes.

25 Q. Says, "Tina advises that after high school, she

0 2 : 1 2 1 did not see him again until he came to her house one night
0 2 : 1 2 2 during the summer of 1999. She advises that someone dropped
0 2 : 1 2 3 him off and that someone came back later and picked him up.
0 2 : 1 2 4 She did write him when he was in the Troy unit."

0 2 : 1 2 5 Is that what that paragraph says?

0 2 : 1 2 6 A. That's what that paragraph says.

0 2 : 1 2 7 Q. And the very next paragraph states, "Tina
0 2 : 1 2 8 continues to insist that the date he came to her house was
0 2 : 1 2 9 not July 8th, 1999. She states that she heard about the
0 2 : 1 2 10 body being found and that a short time later, she heard that
0 2 : 1 3 11 Scott was a suspect. She insists that knowledge would have
0 2 : 1 3 12 made a big impression on her if he had been at her home on
0 2 : 1 3 13 that date or within that close proximity of time."

0 2 : 1 3 14 Is that what it says?

0 2 : 1 3 15 A. That's what the paragraph says.

0 2 : 1 3 16 Q. So at least in February of 2002, Christina Fowler
0 2 : 1 3 17 Chamberlain was telling the defense team that he came over
0 2 : 1 3 18 to my house in the summer of '99 but not on that date
0 2 : 1 3 19 anywhere where Chris Gailey was killed; is that correct?

0 2 : 1 3 20 A. Yes, sir.

0 2 : 1 3 21 Q. And if you can turn over to the next, State's
0 2 : 1 3 22 Exhibit Number 31. And this is a statement that
0 2 : 1 3 23 Danny Carter took with her on April 2nd, 2001; is that
0 2 : 1 3 24 correct? Or not -- excuse me. Not a statement -- it is a
0 2 : 1 3 25 statement because she evidently signed it because it's got

0 2 : 1 3 1 CDF on the bottom.

0 2 : 1 3 2 A. Yes. That was Mr. Carter's way of having the
0 2 : 1 3 3 witness sign the statement. He would put that type.

0 2 : 1 3 4 Q. He puts his name, Danny Carter, at the bottom.
0 2 : 1 3 5 That means it's his notes of the interview. If it has their
0 2 : 1 4 6 initials, that means they signed something?

0 2 : 1 4 7 A. Yes, that would be a correct statement.

0 2 : 1 4 8 Q. So this is on April the 2nd, 2001. If you can
0 2 : 1 4 9 please look -- not the first but the second paragraph --

0 2 : 1 4 10 A. Yes, sir.

0 2 : 1 4 11 Q. -- it starts out:

0 2 : 1 4 12 "In 1999, in the summer, I lived in a house beside
0 2 : 1 4 13 my grandparents on Highway 49. I remember Scott coming to
0 2 : 1 4 14 my house between 7:00 p.m. to 9:00 p.m. in the evening. I
0 2 : 1 4 15 know it was not dark. I let Scott in through the back door
0 2 : 1 4 16 to the kitchen."

0 2 : 1 4 17 Is that correct?

0 2 : 1 4 18 A. That's correct.

0 2 : 1 4 19 Q. But all it says is "in the summer." It doesn't
0 2 : 1 4 20 give a specific date; is that correct?

0 2 : 1 4 21 A. Does not.

0 2 : 1 4 22 Q. And then later on in the next paragraph, at the
0 2 : 1 4 23 end, does it say that she believes -- or she thinks maybe he
0 2 : 1 4 24 stayed about 30 minutes or so on that occasion in the summer
0 2 : 1 4 25 of 1999?

0 2 : 1 4 1 A. That's the last sentence in that.

0 2 : 1 4 2 Q. And if you go down -- if we can go down to the
0 2 : 1 4 3 bottom of the last paragraph, where it starts:

0 2 : 1 4 4 "I have not heard from Scott or seen him since
0 2 : 1 5 5 then. I believe it was around summertime. I remember
0 2 : 1 5 6 either hearing or seeing about the guy's body being found.
0 2 : 1 5 7 I know it was at least a month or two before when he came to
0 2 : 1 5 8 my house."

0 2 : 1 5 9 A. Yes, sir.

0 2 : 1 5 10 Q. And that "he," who is that "he"?

0 2 : 1 5 11 A. Scott.

0 2 : 1 5 12 Q. Okay. So at this time, it was at least a month or
0 2 : 1 5 13 two before Christopher Gailey's body was found that
0 2 : 1 5 14 Scott Allen came to her house; is that correct?

0 2 : 1 5 15 A. That's what she indicates.

0 2 : 1 5 16 Q. And that would not provide Scott Allen an alibi,
0 2 : 1 5 17 would it?

0 2 : 1 5 18 A. No.

0 2 : 1 5 19 Q. And this is the witness he named and a witness you
0 2 : 1 5 20 investigated as an alibi witness; is that correct?

0 2 : 1 5 21 A. This is the witness that we were informed could
0 2 : 1 5 22 possibly be an alibi witness for him.

0 2 : 1 5 23 Q. Were you informed that anybody else could be an
0 2 : 1 5 24 alibi witness for him except for Christina Fowler
0 2 : 1 5 25 Chamberlain?

0 2 : 1 5 1 A. This is the only name I received.

0 2 : 1 5 2 Q. Then, Mr. Oldham, I'm going to take you to the
0 2 : 1 5 3 next one, State's Exhibit 32.

0 2 : 1 6 4 A. Yes, sir.

0 2 : 1 6 5 Q. On State's Exhibit 32, that's a state -- that's an
0 2 : 1 6 6 interview that Danny Carter did with her on April 16, 2002;
0 2 : 1 6 7 is that correct?

0 2 : 1 6 8 A. That's correct.

0 2 : 1 6 9 Q. And the first paragraph there, he's got listed
0 2 : 1 6 10 "Differences from first statement." Is that his note at the
0 2 : 1 6 11 top?

0 2 : 1 6 12 A. That's what it indicates. And it's got a colon
0 2 : 1 6 13 after it. Looks like he starts listing items.

0 2 : 1 6 14 Q. And all cap letters, like a heading?

0 2 : 1 6 15 A. That's correct.

0 2 : 1 6 16 Q. The first paragraph states, "Tina states the time
0 2 : 1 6 17 Scott showed up at her house had to be before 4:00 p.m.
0 2 : 1 6 18 because she went to work then at Badin Tennis Club. When
0 2 : 1 6 19 she got back home, it was approximately 3:00 a.m., and Scott
0 2 : 1 6 20 was asleep on her couch. When she woke up, he was gone. He
0 2 : 1 6 21 may have stayed more."

0 2 : 1 6 22 Is that correct?

0 2 : 1 6 23 A. That's what it says, yes, sir.

0 2 : 1 6 24 Q. And -- but there's no particular date given there,
0 2 : 1 7 25 is there?

0 2 : 1 7 1 A. No, no particular date.

0 2 : 1 7 2 Q. And if you go down two paragraphs to the one, two,
0 2 : 1 7 3 three -- fourth-from-the-top paragraph.

0 2 : 1 7 4 A. Okay.

0 2 : 1 7 5 Q. "Tina state's there was another time, she thinks
0 2 : 1 7 6 in July, where she believes Scott was on her back porch and
0 2 : 1 7 7 Tonya Monk found him there. Tonya said the guy asked her
0 2 : 1 7 8 where she was."

0 2 : 1 7 9 Is that correct?

0 2 : 1 7 10 A. That's what it says, yes, sir.

0 2 : 1 7 11 Q. Okay. So do any of these statements that y'all
0 2 : 1 7 12 kept going out there and talking to her or trying to find
0 2 : 1 7 13 her, find her to talk to her, do any of the statements she
0 2 : 1 7 14 gave give Scott David Allen an alibi?

0 2 : 1 7 15 A. Did not.

0 2 : 1 7 16 Q. From all the information you were able to gather
0 2 : 1 7 17 pretrial on her, or any information she gave you, was there
0 2 : 1 7 18 any time she gave you anything that you believed could
0 2 : 1 7 19 amount to an alibi?

0 2 : 1 7 20 A. Not at any time.

0 2 : 1 7 21 Q. And was your decision not to call her, therefore,
0 2 : 1 7 22 a strategic decision?

0 2 : 1 8 23 A. Yes. I didn't think she would be helpful in
0 2 : 1 8 24 providing the alibi for the date in question.

0 2 : 1 8 25 Q. Thank you.

1 And the next person I'd like to take a look at is
2 Joyce Allen. She's David Allen's wife or was at the time.
3 And that's State's Exhibit 38.

4 A. Yes, sir.

5 Q. Okay. State's Exhibit 38 is fairly long. It's
6 about 28 pages of a typed interview that Joyce Allen did
7 with Janet Herzog.

8 She would be your mitigation investigator; is that
9 correct?

10 A. Yes, sir.

11 Q. Okay. And Ms. Herzog's job, what was it to do?

12 A. She was to try to find items that, if it came to
13 the point where we had a sentencing hearing, she would have
14 recommendations as to what witnesses -- certain witnesses
15 could say that might be beneficial in that regard in seeking
16 the jury to spare Scott's life if he was convicted.

17 Q. And if Ms. Herzog found something out that might
18 help you in the guilt-innocence phase, did you share that
19 with other members of the defense team?

20 A. Oh, yes, sir. I think -- probably this report was
21 given to both myself and Mr. Atkinson. And I know she was
22 present at least one -- I think the conference we had at
23 Mr. Atkinson's office down the street about half a block.

24 Q. And is this something you'd also share with
25 Danny Carter if you thought it was information that needed

1 to be followed up on?

2 A. Yes. Anytime -- if I got something from anybody
3 that I thought I needed to follow up on, I would contact
4 Mr. Carter to do that.

5 Q. Thank you.

6 And on the first page of this exhibit, it appears
7 to be the date of May 5th, 2001, when Ms. Herzog interviewed
8 Joyce Allen; is that correct?

9 A. That's correct.

10 Q. Now, there's Bates stamps at the bottom. I'm
11 going to take you to the Bates stamp that appears on 1404,
12 1404.

13 A. Yes, sir.

14 Q. And on the top there -- not the answer but the
15 first question -- does the question say:

16 "Was he more of a follower or a leader?"

17 "Answer: Definitely a leader. He don't follow
18 nobody. Scott's different from any human being I've ever
19 met."

20 "Question: So if there was a group of guys that
21 decided they wanted to go do something, and Scott felt like
22 he didn't really want to go, he would be strong enough to
23 say he didn't want to do that?"

24 "Answer: Absolutely. Scott -- like I said, he's
25 different than anybody else. I mean, I don't know how to

1 explain it. He don't -- his feelings aren't like everybody
2 else's. You know what I mean? He has a different outlook
3 on life."

4 Is that what it says?

5 A. That's what it says.

6 Q. So, basically, he's a leader, not a follower?

7 A. That's what she was indicating she'd been told by
8 Joyce.

9 Q. And then, Mr. Oldham, if you'd look on page 1408,
10 1408.

11 A. Yes, sir.

12 Q. Okay. Going down -- not the first question, but
13 the second question there where the interviewer asked:

14 "Question: Chris and Scott were arguing?"

15 Is that what it says?

16 A. Yes, sir.

17 Q. And the answer to that is, "Yeah. Something about
18 Jamie, which is Lois's husband, was wanting to kill Scott
19 because somebody broke into his house, and he automatically
20 thought it was Scott because Scott was in town. And so Lois
21 noticed that Chris had called Jamie, and she felt like Chris
22 was telling Jamie where Scott was because Scott and Chris
23 were together. Come to find out, Scott was the one that
24 made Chris call."

25 Is that what that says?

0 2 : 2 2 1 A. That's what it says.

0 2 : 2 2 2 Q. Okay.

0 2 : 2 2 3 "And we didn't know that. So Lois calls me in a
0 2 : 2 2 4 panic and said, 'Joyce, you got to call Scott and tell him
0 2 : 2 2 5 to get as far away from Chris as possible. You got to call
0 2 : 2 2 6 him and tell him Chris is telling everybody where he's at.'
0 2 : 2 2 7 So I called Scott, and I tell him. And I went, 'Scott, get
0 2 : 2 2 8 the hell out of here. You know, go away. Get away from
0 2 : 2 2 9 Chris. He's calling Jamie.'"

0 2 : 2 2 10 Is that what it says?

0 2 : 2 2 11 A. That's what it says.

0 2 : 2 2 12 Q. And then does it go on to say:

0 2 : 2 2 13 "Well, I guess Scott already knew because Scott
0 2 : 2 3 14 made him call. I don't know why, but they didn't get away
0 2 : 2 3 15 from each other, and I guess that Friday after the argument
0 2 : 2 3 16 was the last time I saw Chris. And then that Monday at
0 2 : 2 3 17 work, I received a call that they had found him. So
0 2 : 2 3 18 everybody says it had to have happened Saturday night, but I
0 2 : 2 3 19 don't believe it. I think it was a Friday night thing
0 2 : 2 3 20 because he was supposed to show up at a friend of mine's on
0 2 : 2 3 21 Saturday morning to pick up a dog that he wanted. It was a
0 2 : 2 3 22 wolf-dog."

0 2 : 2 3 23 Is that correct?

0 2 : 2 3 24 A. That's correct. That's what it says.

0 2 : 2 3 25 Q. So from that exchange -- what did you think when

1 you read that exchange?

2 A. I felt like that people -- individuals had been
3 instructed to call my client to tell him to be cautious
4 about Chris, that he was turning on him.

5 Q. Yes, sir.

6 And the Friday she's alluding to, from the
7 context, is it reasonable to read that, in the context of
8 fair reading, that it's Friday, July the 9th of 1999?

9 A. That's a possible reading, yes.

10 Q. And that's the same day that Chris Gailey,
11 Vanessa Smith, and Scott Allen left that Whip-O-Will Cove
12 home and left to go to Uwharrie Forest; is that correct?

13 A. Yes, sir.

14 Q. And then on page 1410, 1410.

15 A. Yes, sir.

16 Q. Not the first question, but way down almost middle
17 of the page, the second question where it says "Okay."

18 A. Yes, sir.

19 Q. Does it say, "Okay. So you called Scott to tell
20 that Jamie might be looking for him?"

21 Is that what it says?

22 A. Yes, sir.

23 Q. "Answer: Yeah. Well, I called Scott to tell him
24 to get away from Chris because I thought Chris was trying to
25 set him up, I think. You know? I didn't know. Lois called

1 me in a tizzy thinking -- and she got me all upset and so I
2 didn't know. I really didn't. I just knew I didn't want to
3 see Scott in trouble. I wanted him to leave before he got
4 hurt. And, obviously, he didn't. Obviously, maybe Chris
5 was there with him, I don't know, and maybe they rode off
6 then."

7 A. That's what it says.

8 Q. What did you think when you read that?

9 A. I was getting very concerned about what these
10 people might do if they might go and repeat these statements
11 to law enforcement and provide, in essence, maybe a possible
12 motive for what happened.

13 Q. Yes, sir.

14 And would you call a witness like this who could
15 provide a motive as a defense witness in a capital murder
16 case?

17 A. While motive is not a necessary element, it does,
18 in my opinion, have a strong influence on jurors.

19 Q. And is not calling a person -- now, the state --
20 it was kind of up for grabs. Y'all argued it in closing
21 argument. "Hey, is it this motive or that motive? You
22 didn't really show a motive."

23 Isn't that what your argument was?

24 A. Yes. It'd sort of cut this argument off if it
25 came in.

0 2 : 2 6 1 Q. It would undercut your closing arguments; is that
0 2 : 2 6 2 correct?

0 2 : 2 6 3 A. Yes, sir.

0 2 : 2 6 4 Q. And thereby weakening your case and strengthening
0 2 : 2 6 5 the case against Scott David Allen; is that correct?

0 2 : 2 6 6 A. Yes.

0 2 : 2 6 7 Q. So deciding not to call Joyce Allen, was that a
0 2 : 2 6 8 strategic decision?

0 2 : 2 6 9 A. That would be.

0 2 : 2 6 10 Q. The next person I draw your attention to is
0 2 : 2 6 11 Lois Lawson Fender. She's at State's Exhibit Number 44.

0 2 : 2 7 12 A. State's Exhibit 44. Yes, sir.

0 2 : 2 7 13 Q. And does that appear to be a two-page interview
0 2 : 2 7 14 with Danny Carter of Lois Fender on December 20 of 2000?

0 2 : 2 7 15 A. It does.

0 2 : 2 7 16 Q. Okay. And if we could go down one, two, three,
0 2 : 2 7 17 four -- to the fifth paragraph, where it starts out "Jamie
0 2 : 2 8 18 told..."

0 2 : 2 8 19 A. Yes, sir.

0 2 : 2 8 20 Q. "Jamie told me he knew Scott was at Robby's at the
0 2 : 2 8 21 lake. I told Joyce that Chris was selling Scott out. Lois
0 2 : 2 8 22 states Jamie left his gun with her when he left (changed
0 2 : 2 8 23 stories)."

0 2 : 2 8 24 Is that right?

0 2 : 2 8 25 A. Yes, sir.

0 2 : 2 8 1 Q. Then it says, "I was doing weekends in jail when
0 2 : 2 8 2 Chris was killed. I found out on Monday that Chris was
0 2 : 2 8 3 dead. I had talked to Chris on the Friday before I
0 2 : 2 8 4 reported. I did the time in Davidson County jail in 1998."

0 2 : 2 8 5 Is that what it says?

0 2 : 2 8 6 A. Yes, sir.

0 2 : 2 8 7 Q. So not just -- okay. She told Joyce that Chris
0 2 : 2 8 8 was selling Scott out; is that right?

0 2 : 2 8 9 A. That's what it says, yes.

0 2 : 2 8 10 Q. And then if we go to the next page, not the first
0 2 : 2 8 11 but the second paragraph, "Lois states..."

0 2 : 2 9 12 "Lois states Vanessa used her money over Scott's
0 2 : 2 9 13 head. Vanessa supposedly had \$400,000 from her dad's death.
0 2 : 2 9 14 That was the only reason Scott was with Vanessa. Vanessa
0 2 : 2 9 15 knew Scott was going to run from work release. Scott never
0 2 : 2 9 16 liked Vanessa."

0 2 : 2 9 17 Is that what that says?

0 2 : 2 9 18 A. Yes, sir.

0 2 : 2 9 19 Q. And would this particular statement, would that
0 2 : 2 9 20 countermand anything where Vanessa had control over Scott?

0 2 : 2 9 21 A. Yes. It sort of indicates that he was making
0 2 : 2 9 22 decisions according to her belief based on the money that
0 2 : 2 9 23 she had in her possession.

0 2 : 2 9 24 Q. And in your defense, were you trying to show that
0 2 : 2 9 25 Vanessa was controlling Scott Allen out there or anything

0 2 : 2 9 1 like that?

0 2 : 2 9 2 A. No.

0 2 : 2 9 3 Q. Okay. Why not?

0 2 : 3 0 4 A. I didn't want to go down the road of some of the
0 2 : 3 0 5 earlier statements about -- including the letter from the
0 2 : 3 0 6 man who got her out subsequently, that sort of implicated
0 2 : 3 0 7 both of them. And I was trying to stay away from that.

0 2 : 3 0 8 Q. Yes, sir.

0 2 : 3 0 9 And what path did you choose instead? How would
0 2 : 3 0 10 you define the defense you put on for Scott David Allen?

0 2 : 3 0 11 A. Well, my initial conception was to try to build a
0 2 : 3 0 12 psychological defense. And that failed. Had nothing to do
0 2 : 3 0 13 with this, it had to do with Dr. Gary Hoover.

0 2 : 3 0 14 And then I was trying to simply attack Vanessa's
0 2 : 3 0 15 credibility at this point so I could argue to the jury they
0 2 : 3 0 16 couldn't make assumptions about missing evidence from the
0 2 : 3 0 17 state's case.

0 2 : 3 0 18 I came increasingly concerned about what different
0 2 : 3 0 19 things were going to appear, what landmines were going to
0 2 : 3 0 20 blow up because these statements of Joyce and Lois sort of
0 2 : 3 0 21 changed over a period of time, what I'd been initially told,
0 2 : 3 0 22 and sort of provided what I felt like could be a motive that
0 2 : 3 1 23 would convince the jury of my client's guilt.

0 2 : 3 1 24 Q. And did you navigate that difficult road and try
0 2 : 3 1 25 to put on the best case you could with the information you

0 2 : 3 1 1 had?

0 2 : 3 1 2 A. Yeah. I tried to avoid where I thought something
0 2 : 3 1 3 might blow up. Initially I had thought Joyce might make a
0 2 : 3 1 4 witness at some point in the case. But as the case
0 2 : 3 1 5 proceeded and I talked to her, Danny Carter talked to her,
0 2 : 3 1 6 and the mitigation expert talked to her, things seemed to
0 2 : 3 1 7 change.

0 2 : 3 1 8 Q. And then we're going to go -- on that same page,
0 2 : 3 1 9 we're going to go -- count paragraphs from the top, one,
0 2 : 3 1 10 two, three, four, five. It says, "Scott was hiding from
0 2 : 3 1 11 Jamie..."

0 2 : 3 1 12 Do you see that paragraph?

0 2 : 3 1 13 A. Yes, sir.

0 2 : 3 1 14 Q. "Scott was hiding from Jamie, I believe, because
0 2 : 3 1 15 Scott knew Jamie had found out he stole his stuff."

0 2 : 3 1 16 A. Yes, sir.

0 2 : 3 1 17 Q. "Lois states Vanessa's not her friend. I found my
0 2 : 3 1 18 boyfriend Larry with Vanessa. I was mad at Vanessa and
0 2 : 3 2 19 still am."

0 2 : 3 2 20 Is that what it says?

0 2 : 3 2 21 A. That's what it says.

0 2 : 3 2 22 Q. This whole information about Scott hiding from
0 2 : 3 2 23 Jamie, are you familiar with that from Lois Lawson's
0 2 : 3 2 24 statements to various people?

0 2 : 3 2 25 A. From what was in the statements at that time, I

1 probably -- I read those obviously when Mr. Carter gave them
2 to me.

3 Q. Sure.

4 And I'm asking that because there's -- it's
5 alleged in the motion for appropriate relief, third-party
6 guilt evidence, ineffective assistance of counsel for not
7 presenting guilt of a third party [sic]. I want to draw
8 that to your attention.

9 Mr. Oldham, in representing criminal defendants
10 for the years that you did and prosecuting for the state in
11 your legal career, did you become familiar with the
12 requirements of presenting third-party guilt evidence before
13 you could put that on?

14 A. I guess so, yes, sir.

15 Q. And in order to meet -- in order to put on
16 evidence of third-party guilt, is it true that evidence that
17 another committed the crime for which the defendant is
18 charged generally is relevant and admissible as long as it
19 does more than create inference or conjecture in this
20 regard? Is that your experience?

21 A. Yes, sir.

22 Q. And it must point directly to the guilt of the
23 other party. Under Rule 401, such evidence must tend both
24 to implicate another and be inconsistent with the guilt of
25 the defendant.

1 Is that your understanding of third-party guilt
2 evidence?

3 A. Yes, sir.

4 Q. And the three people who were named in the MAR as
5 far as third-party guilt evidence and ineffective assistance
6 for not putting on evidence to that effect, first was
7 Vanessa Smith. And we've already covered some of the
8 statements that were being made about her.

9 Did you feel you had enough under the standard to
10 offer whatever evidence you had against Vanessa Smith to
11 show that she committed the murder, but Scott Allen didn't?

12 A. No. I felt like what I had was basically
13 something that implicated both of them, if you're talking
14 about statements provided by the man who had the
15 relationship with Vanessa.

16 Q. So is it safe to say all the information you
17 gathered, it could say that both of them did it or just he
18 did it, one of the two. It didn't say that she did it, and
19 he didn't do it; is that correct?

20 A. That's correct.

21 Q. And then with regard to Jamie Fender, he's named
22 as a third-party guilt defendant.

23 With Jamie Fender, that came from Lois Lawson,
24 et cetera; is that correct?

25 A. That's correct.

0 2 : 3 5 1 Q. And you actually sent Danny Carter to interview
0 2 : 3 5 2 Jamie Fender; is that correct?

0 2 : 3 5 3 A. Yes, sir.

0 2 : 3 5 4 Q. If you could look at State's Exhibit 37, please.
0 2 : 3 5 5 State's Exhibit 37.

0 2 : 3 5 6 A. 37?

0 2 : 3 5 7 Q. Yes, sir.

0 2 : 3 6 8 A. I thought that was going to be it.

0 2 : 3 6 9 Q. Mr. Oldham, it should be a one-page statement that
0 2 : 3 6 10 Danny -- interview that Danny Carter took of Jamie Fender.

0 2 : 3 6 11 A. Okay. Here it is.

0 2 : 3 7 12 Q. Mr. Oldham, on State's Exhibit 37, does that
0 2 : 3 7 13 appear to be an interview Danny Carter did with Jamie Fender
0 2 : 3 7 14 on December 20, 2000?

0 2 : 3 7 15 A. That's correct.

0 2 : 3 7 16 Q. And on the first paragraph there, does it state,
0 2 : 3 7 17 "Jamie states Scott had stolen things from him and that
0 2 : 3 7 18 Joyce got some of it back for him, so Jamie figured Scott
0 2 : 3 7 19 had the rest, and he was mad at Scott"?

0 2 : 3 7 20 Is that correct?

0 2 : 3 7 21 A. That's correct.

0 2 : 3 7 22 Q. And then the next paragraph, "I knew before where
0 2 : 3 7 23 Scott was staying. Lois did not know that I knew. I knew
0 2 : 3 7 24 roughly where the cabin at Uwharrie was located, have not
0 2 : 3 7 25 been there."

1 Is that what it states?

2 A. That's what it says.

3 Q. And then it states in the next paragraph, "I was
4 supposed to pick Chris up at Robby Johnson's house that
5 night to go to Charlotte. I went by, and Chris was not
6 there, so I went to Charlotte to a concert. Robby Grissom
7 went with me into Charlotte that night. Jamie states he was
8 at Robby's at approximately 9:00 p.m. There were three to
9 four guys at Robby's, and he did not know them."

10 Next paragraph, "Jamie states he got camouflages
11 on and got his rifle and went for Scott."

12 Is that correct?

13 A. That's correct.

14 Q. "He was going to kill Scott because he was mad.
15 (Why wear camouflage? Why say he left his gun?)"

16 Is that what it says?

17 A. That's what it says.

18 Q. Okay. So at some point, Chris got mad enough at
19 Scott David Allen to take his rifle; is that correct?

20 A. Yes, sir.

21 Q. Okay. And he was going to go for Scott. But do
22 you know anything that came of that?

23 A. I don't remember anything at this point.

24 Q. And any statement from any witness said he took a
25 rifle, not a shotgun; is that correct?

0 2 : 3 8 1 A. Yes, sir.

0 2 : 3 8 2 Q. And are you aware whether a rifle can fire shotgun
0 2 : 3 9 3 shells?

0 2 : 3 9 4 MS. WARREN: Objection.

0 2 : 3 9 5 THE COURT: Sustained.

0 2 : 3 9 6 Q. Now, this particular statement says that
0 2 : 3 9 7 Jamie Fender was supposed to go to a concert in Charlotte
0 2 : 3 9 8 and did, in fact, go to said concert; is that correct?

0 2 : 3 9 9 A. Yes, sir.

0 2 : 3 9 10 Q. And then I'm going to draw your attention to --
0 2 : 3 9 11 the last state's exhibit we entered was State's Exhibit
0 2 : 3 9 12 Number 48.

0 2 : 4 0 13 A. Yes, sir.

0 2 : 4 0 14 Q. And that appears to be an interview that
0 2 : 4 0 15 ADA Kristian Allen did with Jamie Fender on October 21st of
0 2 : 4 0 16 2003?

0 2 : 4 0 17 A. That's what this statement indicates at the
0 2 : 4 0 18 bottom. The last sentence, "Met with Kristian Allen on that
0 2 : 4 0 19 date."

0 2 : 4 0 20 Q. In the beginning, does it state, "Jamie Fender
0 2 : 4 0 21 says he remembers in 1999 he thought Scott had taken some of
0 2 : 4 0 22 his expensive music and he was mad. Lois got the albums
0 2 : 4 0 23 from Joyce Allen and put them back at the Fender house, but
0 2 : 4 0 24 they were out of alphabetical order"?

0 2 : 4 0 25 Is that what that says?

0 2 : 4 1 1 A. That's what it says.

0 2 : 4 1 2 Q. So eventually, he got his property back, but it
0 2 : 4 1 3 was out of alphabetical order?

0 2 : 4 1 4 A. Yes, sir.

0 2 : 4 1 5 Q. Next paragraph says, "He thinks it was Friday,
0 2 : 4 1 6 July 9th, 1999, right before he was going to see a local
0 2 : 4 1 7 band in a bar in Charlotte. He called cell phone (Chris's)
0 2 : 4 1 8 that night between 8:00 and 10:00."

0 2 : 4 1 9 Is that correct?

0 2 : 4 1 10 A. Yes, sir.

0 2 : 4 1 11 Q. "He's sure he left the house about 10:00. Fender
0 2 : 4 1 12 says he and Chris were supposed to go to a black acid disco
0 2 : 4 1 13 show in Charlotte, and Chris never showed up, so he went by
0 2 : 4 1 14 himself to concert. Then Monday or Tuesday, after the
0 2 : 4 1 15 concert, Jamie heard Chris was dead."

0 2 : 4 1 16 Is that correct?

0 2 : 4 1 17 A. Yes, sir.

0 2 : 4 1 18 Q. And then skip the next two paragraphs and go to
0 2 : 4 1 19 the next paragraph where it says, "Fender says he has
0 2 : 4 1 20 been..."

0 2 : 4 1 21 Do you see that?

0 2 : 4 1 22 A. Yes, sir.

0 2 : 4 1 23 Q. "Fender says he has been to see Scott three times
0 2 : 4 1 24 in prison. Last time was four to five months ago. Says he
0 2 : 4 2 25 felt like Scott wanted to 'put things right' with him. He

1 has written Scott. Scott asked him to visit. He agreed,
2 first visit. On the second visit, he decided he would just
3 go see Scott."

4 Is that correct?

5 A. That's correct.

6 Q. And this is October 21st. Is that sometime during
7 the trial, October 21st of 2003, or do you recall?

8 A. Sounds like it could have been. I don't recall
9 independently at this time.

10 Q. Yes, sir.

11 And then go two more paragraphs down, it says,
12 "fender says he had not really seen Scott since 1995. He
13 did not have contact with Scott in 1999. The first time he
14 visited Scott at Central Prison was the first time he had
15 seen him since they were involved in the church break-ins."

16 Is that correct?

17 A. That's correct.

18 Q. So Mr. Fender was another one in the church
19 break-ins; is that right?

20 A. It's my recollection he was.

21 Q. A lot of people in this group were in the church
22 break-ins, Vanessa Smith, more of them; is that correct?

23 A. Yes, sir. There was several people charged.

24 Q. So with the information you gathered about
25 Jamie Fender and the fact that he could have been at a

1 concert which could eventually be verified, did you believe
2 you had enough information to go forward under the standard
3 for third-party guilt against Jamie Fender?

4 A. I did not.

5 Q. And, therefore, did you make a strategic decision
6 not to present evidence of third-party guilt against
7 Jamie Fender?

8 A. Yes, sir.

9 Q. And how's about Dustin Maness?

10 A. Yes, sir. I remember Dustin Maness.

11 Q. Okay. Do you remember the situation where
12 Dustin Maness and Chris Gailey got in an argument and a
13 fight?

14 A. Seemed like they got in an argument centered
15 around a bathtub, if I remember correctly.

16 Q. Yes, sir.

17 And Chris Gailey supposedly pulled a knife on
18 Dustin Maness?

19 A. That's correct.

20 MS. WARREN: Objection.

21 THE COURT: Overruled.

22 Q. Is that your understanding?

23 A. That's my understanding, yes, sir.

24 Q. So Dustin Maness went and took out warrants
25 against Christopher Gailey; is that right?

0 2 : 4 4 1 A. That's correct.

0 2 : 4 4 2 Q. Christopher Gailey never showed up for the court
0 2 : 4 4 3 date because he was deceased; is that correct?

0 2 : 4 4 4 A. That's correct.

0 2 : 4 4 5 Q. Okay. But other than that, did you have any
0 2 : 4 4 6 information that Dustin Maness was involved in the -- in the
0 2 : 4 4 7 death of --

0 2 : 4 4 8 A. No, sir.

0 2 : 4 4 9 Q. -- Christopher Gailey?

0 2 : 4 4 10 A. No, sir.

0 2 : 4 4 11 Q. Okay. And based on that, did you -- based on the
0 2 : 4 4 12 information you got during your investigation with your
0 2 : 4 4 13 private investigator, your mitigation investigator, all the
0 2 : 4 4 14 discovery you got from the state, did you believe, based on
0 2 : 4 4 15 what you saw and what you knew, that you had enough evidence
0 2 : 4 4 16 to present a case of third-party guilt against
0 2 : 4 4 17 Dustin Maness?

0 2 : 4 4 18 A. I did not. Based -- I felt like it was not a
0 2 : 4 4 19 credible argument that I could make with the jury by
0 2 : 4 4 20 presenting those.

0 2 : 4 4 21 Q. And, therefore, did you make a strategic decision
0 2 : 4 4 22 not to present such evidence?

0 2 : 4 4 23 A. Yes, sir.

0 2 : 4 4 24 MR. VLAHOS: Your Honor, I have no further
0 2 : 4 5 25 questions at this time.

0 2 : 4 5 1 THE COURT: Redirect?

0 2 : 4 5 2 MS. WARREN: Yes, Your Honor.

0 2 : 4 5 3 BY MS. WARREN:

0 2 : 4 5 4 Q. Mr. Oldham --

0 2 : 4 5 5 A. Yes, ma'am.

0 2 : 4 5 6 Q. -- did the state ever offer a plea in this case?

0 2 : 4 5 7 A. State never offered a plea in this particular
0 2 : 4 5 8 case.

0 2 : 4 5 9 Q. Did you ever pursue a plea with the state?

0 2 : 4 5 10 A. I think Mr. -- I'm getting tired -- co-counsel
0 2 : 4 5 11 basically talked with the state about that because his
0 2 : 4 5 12 office is down here in Montgomery County. And, as I recall,
0 2 : 4 5 13 he advised me he'd made several attempts but was
0 2 : 4 5 14 unsuccessful in getting a plea offer.

0 2 : 4 5 15 Q. Did you ever prepare materials in support of a
0 2 : 4 5 16 plea offer to show the state?

0 2 : 4 5 17 A. I never prepared any material that I recall in
0 2 : 4 5 18 support of a plea offer, no, ma'am.

0 2 : 4 5 19 Q. I believe you testified that when a client won't
0 2 : 4 6 20 tell you what happened, you have to guess who to talk to; is
0 2 : 4 6 21 that right?

0 2 : 4 6 22 A. Well, when a client doesn't tell me what happened,
0 2 : 4 6 23 I'm sort of handcuffed as to know who to go talk to. So I
0 2 : 4 6 24 start looking around to see who might have been present with
0 2 : 4 6 25 my client, from what I understand from other parties, and

1 try to get Mr. Carter to substantiate whether their
2 statements were consistent they'd given law enforcement
3 officers with what he got from them.

4 Q. But Scott Allen gave you a lot of names to go talk
5 to in this case; isn't that right?

6 A. Scott Allen gave me a lot of names?

7 Q. Yes.

8 A. I do not recall him giving -- I recall him giving
9 the name of Christina Fowler as an alibi witness. I don't
10 recall any other names to check out that I was provided by
11 him. He may have talked to Mr. -- co-counsel, but I don't
12 remember any other names.

13 Q. You talked about -- Defense Exhibit 35 was that
14 receipt for some property signed by a Deputy Wally Long.

15 Do you remember that?

16 A. That's the statement that's --

17 Q. The Byron Johnson --

18 A. -- the person named Byron Johnson, yes, ma'am.

19 Q. That's correct.

20 Did you ever ask your investigator to go get any
21 more information about that receipt?

22 A. I don't remember talking to Mr. Carter about that.

23 Q. And you also said, regarding the letter signed by
24 White Chocolate, that you would have wanted to know more
25 information about that letter; is that right?

0 2 : 4 7 1 A. That's correct. I -- that letter was not signed.
0 2 : 4 7 2 You could read it and try to read between the lines and
0 2 : 4 7 3 possibly feel like that was his co-defendant communicating
0 2 : 4 7 4 with him while she was still in custody.

0 2 : 4 7 5 Q. Did you ever have your investigator do any further
0 2 : 4 8 6 investigation into that letter?

0 2 : 4 8 7 A. I don't believe he was able to ever talk to her.
0 2 : 4 8 8 She was represented by counsel.

0 2 : 4 8 9 Q. Did you ever reach out to her counsel?

0 2 : 4 8 10 A. I can't tell you that I had independent knowledge
0 2 : 4 8 11 of reaching out to him. He practiced law here in
0 2 : 4 8 12 Montgomery County. And as I recall, he was present at some
0 2 : 4 8 13 of the hearings and he was present during the trial itself.

0 2 : 4 8 14 Q. I know that some of the documents that you've seen
0 2 : 4 8 15 today and over the past three days, you seem to be
0 2 : 4 8 16 refreshing your recollection as to their contents. But I've
0 2 : 4 8 17 provided you with your full file?

0 2 : 4 9 18 A. Yes, ma'am. Initially, it was always my practice
0 2 : 4 9 19 once a case was completed to turn over my complete file to
0 2 : 4 9 20 the appellate counsel, which I did in this particular case.

0 2 : 4 9 21 I believe that counsel -- it wasn't you at that
0 2 : 4 9 22 time -- had come to my office and asked to see the file. I
0 2 : 4 9 23 said, "Here, I will just give you the file," because I
0 2 : 4 9 24 always felt like that was my obligation anytime I
0 2 : 4 9 25 represented somebody who was convicted.

1 Now, when you contacted me in -- I believe you
2 came to my residence, and we had an initial discussion about
3 some of the things. I obviously said it had been some
4 considerable period of time, and I asked you if you could
5 provide me copies of what was in my file before we talked on
6 subsequent occasions.

7 And I can't recall. There was at least one other
8 occasion we talked, maybe two, at my residence.

9 Q. And, typically, I did provide you with a full
10 physical copy of your file as well as an electronic PDF copy
11 of your file.

12 A. You mailed me, and I received that at the postal
13 service in Asheboro, yes, ma'am. And you asked me to read
14 that, and I read that. And that was probably -- my best
15 recollection -- sometime around January, February of last
16 year. I can't recall the specific date.

17 Q. And you went through all of these documents to
18 make a list of those that you felt were relevant to
19 defending the claims of ineffective assistance of counsel?

20 A. There came a time when you contacted me and said
21 that -- you might have provided me with a Court order that
22 indicated I and Mr. Atkinson was to provide any documents --
23 was to state what documents we felt were relevant in
24 defending against the claim of ineffective assistance of
25 counsel. And that was one of the exhibits.

1 I'm not sure. I don't think I was questioned
2 extensively about it today, but it was what I prepared and
3 listed those items on a multi-page response to that inquiry.

4 Q. You also completed an affidavit for prior
5 post-conviction counsel in 2015?

6 A. If you can show me. I can't tell you at this
7 point.

8 MS. WARREN: Your Honor, may I approach?

9 THE COURT: Yes.

10 MS. WARREN: Your Honor, I'm marking as
11 Defendant's Exhibit 39 a 2015 affidavit of Pierre Oldham.
12 And this was Exhibit 63 to Mr. Allen's supplemental MAR.

13 May I approach?

14 THE COURT: Yes, you may.

15 MS. WARREN: Thank you.

16 Q. Mr. Oldham, would you review that document,
17 please. And look up when you're done.

18 A. Yes, ma'am.

19 Yes, ma'am.

20 Q. Is this signed by you on the second page?

21 A. It is.

22 Q. And that was on January 14th of 2015?

23 A. Yes, ma'am.

24 Q. And in paragraph 4 of this affidavit, you said
25 that you had reviewed the motion for appropriate relief and

0 2 : 5 5 1 the supplemental motion for appropriate relief; is that
0 2 : 5 5 2 right?

0 2 : 5 5 3 A. "I have reviewed the motion for appropriate relief
0 2 : 5 5 4 and supplemental motion for appropriate relief filed by
0 2 : 5 5 5 Mr. Allen except for the exhibits included that remain..."

0 2 : 5 5 6 Q. And claim 10 of the supplemental motion for
0 2 : 5 5 7 appropriate relief is the claim regarding shackling.

0 2 : 5 5 8 In this affidavit or at any time, did you ever
0 2 : 5 5 9 tell prior post-conviction counsel Mr. Unti that you didn't
0 2 : 5 5 10 recall Mr. Allen being shackled?

0 2 : 5 6 11 A. So many people have asked me questions about that,
0 2 : 5 6 12 but I remember consistently saying I do not remember that,
0 2 : 5 6 13 if he was ever shackled during the trial, either in the
0 2 : 5 6 14 guilt-innocence phase or in the sentencing phase.

0 2 : 5 6 15 Q. You never told prior counsel Mike Unti Scott Allen
0 2 : 5 6 16 was not shackled, did you?

0 2 : 5 6 17 A. I thought I did. I don't see any reference to it
0 2 : 5 6 18 in here.

0 2 : 5 6 19 Q. Did you tell him you don't remember that he was
0 2 : 5 6 20 shackled or that he was not shackled?

0 2 : 5 6 21 A. I believe my statements have been I do not
0 2 : 5 6 22 remember him ever being shackled at either phase of the
0 2 : 5 6 23 trial.

0 2 : 5 6 24 Q. You also say in this affidavit in paragraph 7 that
0 2 : 5 6 25 you do not recall any strategic decisions to limit the

1 cross-examination of the state's witnesses, including
2 Vanessa Smith. Is that what it says?

3 A. That's what it says, yes, ma'am.

4 Q. And you said, "I do not recall having the
5 impeachment information set forth in Mr. Allen's claim 3 nor
6 the resources to interview and investigate every witness
7 called by the state."

8 Is that what it says?

9 A. That's what it said.

10 Q. And prior to answering questions from the state,
11 did you ever provide strategic reasons for your decisions in
12 this trial to post-conviction counsel?

13 A. Did I ever provide strategic reasons? I think you
14 had asked me some questions about different parts of the
15 case. I don't remember anybody else asking me specific
16 questions about that.

17 MS. WARREN: No further questions, Your Honor.

18 THE COURT: Is there any recross?

19 MR. VLAHOS: Yes, Your Honor, based on one thing.

20 BY MR. VLAHOS:

21 Q. Mr. Oldham, do the names Joe Laughlin or
22 Dolly Ponds mean anything to you?

23 MS. WARREN: Objection. That's beyond the scope
24 of the redirect.

25 THE COURT: I'll allow it for purposes of this

0 2 : 5 8 1 hearing.

0 2 : 5 8 2 You may proceed.

0 2 : 5 8 3 A. Ponds sounds familiar. They sound familiar, but I
0 2 : 5 8 4 cannot recall specifics about them at this time.

0 2 : 5 8 5 Q. Okay. With regard to Dolly Ponds, did you do any
0 2 : 5 8 6 investigation into any cellmates of Vanessa Smith from the
0 2 : 5 8 7 jail?

0 2 : 5 8 8 A. There was some information I had received, I
0 2 : 5 8 9 think -- and I'm not sure if this is what you're referring
0 2 : 5 8 10 to -- about a jailer being -- providing certain favors down
0 2 : 5 8 11 there, and he was subsequently discharged. And I think
0 2 : 5 8 12 Mr. Atkinson looked into that and possibly Mr. Carter also.

0 2 : 5 9 13 Q. Did Ms. Dolly Ponds ever come forward to you or
0 2 : 5 9 14 Mr. Atkinson, to your knowledge?

0 2 : 5 9 15 A. I don't recall talking to her personally myself,
0 2 : 5 9 16 no.

0 2 : 5 9 17 Q. And did Danny Carter ever have any opportunity to
0 2 : 5 9 18 interview Ms. Dolly Ponds?

0 2 : 5 9 19 A. It would have been in my file with the statements
0 2 : 5 9 20 is the best I can say at this particular point.

0 2 : 5 9 21 Q. Yes, sir.

0 2 : 5 9 22 And anybody -- did Mr. Joe Laughlin ever contact
0 2 : 5 9 23 you, to your recollection?

0 2 : 5 9 24 A. Not to my recollection.

0 2 : 5 9 25 Q. Okay. And did Ms. Christina Fowler Chamberlain

0 2 : 5 9 1 ever point to Joe Laughlin and say, "You've got to interview
0 2 : 5 9 2 him"?

0 2 : 5 9 3 A. No. I had trouble locating Mrs. Fowler myself.
0 2 : 5 9 4 We tried on multiple occasions, beginning with the residence
0 2 : 5 9 5 of her grandfather's house on 49. Subsequently advised
0 2 : 5 9 6 Mr. Atkinson's office that I made several attempts, and he
0 2 : 5 9 7 volunteered to go forward with it at that occasion because
0 2 : 5 9 8 he remembered her from working at the country club here in
0 3 : 0 0 9 Troy.

0 3 : 0 0 10 Q. So, therefore, Mr. Joe Laughlin and Dolly Ponds
0 3 : 0 0 11 were people who were unknown to you at the time you
0 3 : 0 0 12 represented Scott David Allen?

0 3 : 0 0 13 A. I just have no recollection at this point other
0 3 : 0 0 14 than what I've told you.

0 3 : 0 0 15 MR. VLAHOS: Thank you, Mr. Oldham.

0 3 : 0 0 16 No further questions, Your Honor.

0 3 : 0 0 17 THE COURT: Anything else?

0 3 : 0 0 18 MS. WARREN: I would move Exhibit 39 into
0 3 : 0 0 19 evidence.

0 3 : 0 0 20 THE COURT: Any objection?

0 3 : 0 0 21 MR. VLAHOS: No objection, Your Honor.

0 3 : 0 0 22 THE COURT: Defense Exhibit 39 is received into
0 3 : 0 0 23 evidence without objection.

0 3 : 0 0 24 Anything further?

0 3 : 0 0 25 MS. WARREN: We do have further witnesses, but --

1 Let me see the ones with the red when you gather
2 them all.

3 **THE BAILIFF:** Yes, sir.

4 **THE COURT:** All right. I was gathering and
5 organizing the state's exhibits that have already been
6 stipulated to, tendered, and received into evidence, which
7 are State's 28 through 48 that we were dealing with most
8 recently.

9 And while organizing them, I noted that, in this
10 stack of exhibits, there is no State's Exhibit 34 -- or
11 there's no exhibit identified with a sticker of State's
12 Exhibit 34, which should be a statement from Danny Lanier.
13 It goes from 33 to 35. But then I noticed that there were
14 two 36s, or there appears to be two 36s to me. And so 34
15 should be a statement from Danny Lanier. One of the 36s
16 appears to be the second statement of Danny Lanier Jr.

17 I'm going to ask counsel to approach and look at
18 this and perhaps make a correction on this exhibit sticker.
19 36 purports to be a statement by Dustin Maness, and we do
20 have that listed as State's Exhibit 36, but there appears to
21 be a second 36. I'll just let you look at both of them. Do
22 those look like 36s to y'all?

23 **MR. VLAHOS:** That's a 34. That's my 4. My 6s are
24 round. I can fix it.

25 **THE COURT:** That's a 4?

0 3 : 0 8 1 MR. VLAHOS: Yes, sir. That's a 6. That's my
0 3 : 0 8 2 penmanship.

0 3 : 0 8 3 THE COURT: I'm not used to your penmanship.

0 3 : 0 8 4 MR. VLAHOS: I can write it better.

0 3 : 0 8 5 THE COURT: Can you make that more of a 4?

0 3 : 0 8 6 MR. VLAHOS: Yes, sir, I can.

0 3 : 0 8 7 THE COURT: Thank you very much.

0 3 : 0 9 8 All right. At this time, the Court will hand to
0 3 : 0 9 9 the clerk -- or at least put over here for the clerk State's
0 3 : 0 9 10 Exhibits 28 through 48 which have been actually received
0 3 : 0 9 11 into evidence out of order with the consent of the
0 3 : 0 9 12 defendant.

0 3 : 0 9 13 These are other exhibits that are already in
0 3 : 0 9 14 evidence also, so I'm going to give you those, too. I'll
0 3 : 0 9 15 give you everything for now.

0 3 : 0 9 16 Now I will inquire of counsel. There are other
0 3 : 0 9 17 state's exhibits that were properly marked for
0 3 : 0 9 18 identification that have not yet been received. So it's my
0 3 : 0 9 19 intention at this time to give these back to the state
0 3 : 0 9 20 unless there's a reason for them to stay up here for the
0 3 : 1 0 21 next witness.

0 3 : 1 0 22 MR. VLAHOS: Your Honor, the state will gladly
0 3 : 1 0 23 take them back and keep this in a pile. If I have to ask
0 3 : 1 0 24 the next witness about them, I'll grab them from that very
0 3 : 1 0 25 pile and put them back.

0 3 : 1 0 1 **THE COURT:** I did not organize these. These are a
0 3 : 1 0 2 stack of state's exhibits that have been marked for
0 3 : 1 0 3 identification.

0 3 : 1 0 4 You may approach and receive these because they
0 3 : 1 0 5 are not yet in evidence.

0 3 : 1 0 6 **MR. VLAHOS:** Thank you, Your Honor.

0 3 : 1 0 7 **THE COURT:** All right. Next witness?

0 3 : 1 0 8 **MS. WARREN:** Your Honor, may we take a brief break
0 3 : 1 0 9 at this time?

0 3 : 1 0 10 **THE COURT:** Yes, we may. Ten minutes.

11 (Recess.)

0 3 : 2 0 12 **THE COURT:** Let the record reflect that the
0 3 : 2 0 13 defendant is present with both of his attorneys.

0 3 : 2 0 14 And you may proceed when ready.

0 3 : 2 0 15 **MS. WARREN:** Thank you, Your Honor.

0 3 : 2 0 16 Once more with the microphone.

0 3 : 2 0 17 The defense calls Mark Rabil.

0 3 : 2 0 18 **THE COURT:** If you would come and be sworn,
0 3 : 2 0 19 please.

20 **MARK RABIL,**
21 **having been first duly sworn,**
22 **testified as follows:**

0 3 : 2 1 23 **THE WITNESS:** I do.

0 3 : 2 1 24 **THE COURT:** Please take the stand. Please watch
0 3 : 2 1 25 your step.

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

2 **THE COURT:** Make yourself comfortable. Please
3 keep your voice up.

4 And you may proceed.

5 **BY MS. WARREN:**

6 **Q.** Good afternoon, Mr. Rabil.

7 **A.** Good afternoon.

8 **Q.** Would you please state your full name and spell it
9 for the record.

10 **A.** Mark, M-A-R-K, Rabil, R-A-B-I-L.

11 **Q.** Are you an attorney?

12 **A.** Yes.

13 **Q.** When were you licensed to practice in
14 North Carolina?

15 **A.** 1980.

16 **Q.** Where did you go to school? Starting with
17 college.

18 **A.** I went to Davidson College. Then I went to law
19 school at the University of North Carolina.

20 **Q.** What is your current role?

21 **A.** I am a clinical professor of law at the School of
22 Law at Wake Forest University.

23 **Q.** What other legal jobs have you held? Starting
24 with your first job out of law school.

25 **A.** I started with a small firm in Winston-Salem:

1 Jenkins, Lucas, Babb, and Rabil. The Rabil was my cousin.
2 We were there for five years.

3 Then I -- we moved -- my cousin and I moved to
4 another small firm for a couple years. Then I was with
5 another small firm with my wife, my wife and I. And then
6 another small firm, about four lawyers.

7 And that brings us up to somewhere in the early
8 '90s. And then other small firms, various names, Versaki,
9 Rabil and Probst. And there was Huff and Rabil in the late
10 '90s to early 2000s. And then I was a solo practitioner I
11 think 2001 and '2.

12 And then starting in May of 2003 until the end of
13 2012, I worked as an assistant capital defender in the
14 Forsyth regional office of the Capital Defender for the
15 statewide office.

16 And then I began full-time in -- let's see. I
17 think -- May of 2003 to the end of 2012, I was with the
18 Capital Defender's Office. And then I went to work with
19 Wake Forest in January of 2013 and have been there since
20 then.

21 Q. When you were in private practice for
22 approximately the first 22 years of your career, what kinds
23 of cases were you involved in?

24 A. Yeah. From the beginning, my cousin decided for
25 me that I was going to be in litigation, so I was like, "All

0 3 : 2 4 1 right, that's what I'll do." And I did both civil and
0 3 : 2 4 2 criminal and got on the court-appointed lists for criminal
0 3 : 2 4 3 and juvenile cases. That was a long time before we had a
0 3 : 2 4 4 public defender, so it was important to be on the
0 3 : 2 4 5 court-appointed list.

0 3 : 2 4 6 But I did -- probably half of my work for the
0 3 : 2 4 7 first -- during those 22, 23 years was criminal, about half
0 3 : 2 4 8 civil. It increased -- it was increasingly death penalty
0 3 : 2 4 9 defense about the time I became part of the Capital
0 3 : 2 4 10 Defender's Office. And then, of course, it was all totally
0 3 : 2 5 11 trial-level.

0 3 : 2 5 12 Q. Do you remember when you first represented a
0 3 : 2 5 13 client accused of murder?

0 3 : 2 5 14 A. Yes. It was September of 1984 when I was
0 3 : 2 5 15 appointed, along with another partner in the firm,
0 3 : 2 5 16 Mr. Jenkins, Gordon Jenkins, to represent Darryl Hunt. That
0 3 : 2 5 17 was one of the early death penalty cases in the state.
0 3 : 2 5 18 There had been a few others, but it had been, you know,
0 3 : 2 5 19 reactivated in the late '70s, and so that was one of the
0 3 : 2 5 20 first. So I was four years out, pretty young, too young
0 3 : 2 5 21 really, but that was when I had my first one.

0 3 : 2 5 22 Q. Uh-huh.

0 3 : 2 5 23 And approximately how many clients charged with
0 3 : 2 5 24 murder and capital murder have you represented, whether at
0 3 : 2 5 25 trial or just representing in general, in your career, if

0 3 : 2 5 1 you can approximate?

0 3 : 2 5 2 A. Yeah, I'd say approximately 50. I think I figured
0 3 : 2 6 3 it out at one point and put it in my report, but -- I don't
0 3 : 2 6 4 have the exact number, but probably around 50.

0 3 : 2 6 5 Q. I think in your report you noted over 50 criminal
0 3 : 2 6 6 cases to verdict. Would that be --

0 3 : 2 6 7 A. Criminal cases to verdict, yeah. But homicide,
0 3 : 2 6 8 probably 50, but not -- not -- not all trials, right.

0 3 : 2 6 9 Q. How many capital cases have you tried to verdict?

0 3 : 2 6 10 A. Six.

0 3 : 2 6 11 Q. And did you try any capital cases in the early
0 3 : 2 6 12 2000s, around the time period of Mr. Allen's case?

0 3 : 2 6 13 A. Yeah. Between 1999 and 2004, I had three capital
0 3 : 2 6 14 trials to verdict. In August or so of 2000, State v.
0 3 : 2 6 15 Timothy White. And then the fall of 2002, the State v.
0 3 : 2 7 16 Michael Bruton. And then in probably March or April of
0 3 : 2 7 17 2003, Ely Alvarez, State v. Ely Alvarez. All three of those
0 3 : 2 7 18 were in Forsyth County.

0 3 : 2 7 19 Then I had another -- it started out capital, was
0 3 : 2 7 20 reduced to noncapital. But there was a trial right around
0 3 : 2 7 21 the time of this case, I think January of 2004, so just
0 3 : 2 7 22 after this.

0 3 : 2 7 23 Q. And what counties have you represented criminal
0 3 : 2 7 24 defendants in North Carolina?

0 3 : 2 7 25 A. A lot. You know, mostly because of the -- when I

0 3 : 2 7 1 was in the Capital Defender's Office, it was a regional
0 3 : 2 7 2 office, but we had, you know, others. So, you know,
0 3 : 2 7 3 primarily Forsyth. A number in Surry, Stokes, Davidson,
0 3 : 2 7 4 Guilford, Yadkin, Davie, Davidson, Randolph, Stanly. I
0 3 : 2 8 5 think -- I think I had one in Montgomery. I don't know if I
0 3 : 2 8 6 listed that or not. Mecklenburg, Iredell, Catawba.
0 3 : 2 8 7 Maybe -- oh, yeah, Henderson, Hendersonville, I think it
0 3 : 2 8 8 might be Transylvania County, I can't remember if it's one
0 3 : 2 8 9 or two cases up there.

0 3 : 2 8 10 In terms of -- yeah, so mostly middle of the state
0 3 : 2 8 11 and some to the west. And Chatham -- I think we had
0 3 : 2 8 12 something in Chatham County at one point, too.

0 3 : 2 8 13 Q. Fair to say that almost all of those counties are
0 3 : 2 8 14 somewhat rural?

0 3 : 2 8 15 A. Yeah. That's right.

0 3 : 2 8 16 Q. And in your role as an assistant capital defender,
0 3 : 2 8 17 did you exclusively represent clients facing potentially
0 3 : 2 8 18 capital murder?

0 3 : 2 8 19 A. Yeah. That was the purpose of the office, to
0 3 : 2 9 20 represent people with first-degree murder cases. And they
0 3 : 2 9 21 would be prescreened by the Capital Defender, whoever was
0 3 : 2 9 22 the Capital Defender at the time, to look at the more
0 3 : 2 9 23 serious cases. Because the idea was that we were perhaps
0 3 : 2 9 24 more experienced, certainly dedicated, and could spend the
0 3 : 2 9 25 time on the capital cases.

0 3 : 2 9 1 Q. And since leaving the Capital Defender's Office,
0 3 : 2 9 2 have you continued to consult with attorneys representing
0 3 : 2 9 3 potentially capital cases across the state?

0 3 : 2 9 4 A. Yeah. There's a system through the office of the
0 3 : 2 9 5 Capital Defender in cases that appear to be on a capital
0 3 : 2 9 6 track to have a consultant, somebody who, like myself, have
0 3 : 2 9 7 done a lot of capital cases. And so I'm on that list. And
0 3 : 3 0 8 probably at any given time now, one or two -- probably one
0 3 : 3 0 9 or two cases.

0 3 : 3 0 10 And I think in terms of trial-level cases, I
0 3 : 3 0 11 stopped the trial-level cases, the death penalty, around, I
0 3 : 3 0 12 don't know, 2018 or '19 in Forsyth County. Yeah.

0 3 : 3 0 13 Q. What do you teach at the law school?

0 3 : 3 0 14 A. I've taught for a number of years criminal
0 3 : 3 0 15 procedure, investigations, and adjudications for a while.
0 3 : 3 0 16 Then it evolved into more investigations, trial practice,
0 3 : 3 0 17 which I don't teach right now.

0 3 : 3 0 18 Primarily what I teach right now is the innocence
0 3 : 3 0 19 and justice clinic, which is a clinical program, a small
0 3 : 3 0 20 number of students, usually 8 to 12 students in a given
0 3 : 3 1 21 semester. And different -- you know, different other types
0 3 : 3 1 22 of courses here and there.

0 3 : 3 1 23 Q. Uh-huh.

0 3 : 3 1 24 Are you familiar with the standards of practice
0 3 : 3 1 25 that existed at the time of Mr. Allen's trial in 2003 for

1 the defense of capital and potentially capital murder cases
2 in North Carolina?

3 A. Yes.

4 Q. And what are those standards?

5 MR. VLAHOS: Objection. I don't think he's been
6 qualified yet or tendered.

7 THE COURT: Counsel approach.

8 (Approached bench.)

9 THE COURT: All right. The objection's overruled.
10 You may proceed.

11 A. I think the question was, am I familiar with the
12 standards for defense counsel in death penalty cases as of
13 the time of this trial in 2003?

14 Q. Yes.

15 A. Yeah.

16 Q. And what are those standards?

17 A. Well, the basic standard, of course, is found in
18 *Strickland*, at least when evaluating ineffective assistance.
19 So...

20 But the -- that's not your question, though. Your
21 question is where are the affirmative standards found, and
22 that would be several sources.

23 There's ABA Guidelines for criminal defense.

24 There's ABA Guidelines for the defense of capital cases.

25 There's case law. And then there would be the standards of

1 practice that are the prevailing norms at the time in the
2 state in capital cases. That's pretty much -- there's
3 uniform standards in every state that has the death penalty.

4 Q. So I just want to make sure I understand all of
5 the categories.

6 There are ABA Guidelines --

7 And the ABA is the American Bar Association?

8 A. Yes.

9 Q. -- both for representation in criminal cases and
10 in capital cases specifically?

11 A. That's right.

12 Q. That's one area where the standards are developed?

13 A. Right.

14 Q. The standards are developed through case law?

15 A. Right.

16 Q. And in that case law, do courts look to the ABA
17 Guidelines?

18 A. Yes. The United States Supreme Court has
19 recognized the ABA Guidelines. Of course, they're
20 guidelines, but, in some cases, they have been more strictly
21 applied as a matter of law. In other cases, they emphasize
22 they're guidelines. You have Supreme Court cases going both
23 ways.

24 Q. And, finally, the third is the actual practice of
25 attorneys in the community; is that right?

0 3 : 3 4 1 A. That's right. And, of course, always prevailing
0 3 : 3 4 2 in there, you're going to have the Rules of Professional
0 3 : 3 4 3 Conduct that always are going to apply. And the -- well,
0 3 : 3 5 4 the cases would be interpreting the Constitution, because
0 3 : 3 5 5 the Constitution is basically, you know, pretty -- pretty
0 3 : 3 5 6 broad in the sense of right to the assistance of counsel.

0 3 : 3 5 7 Q. I want to ask you a few questions about the ABA
0 3 : 3 5 8 standards. And I'm going to ask specifically about the
0 3 : 3 5 9 standards for potentially capital cases.

0 3 : 3 5 10 When were the first ABA standards for potentially
0 3 : 3 5 11 capital cases promulgated?

0 3 : 3 5 12 A. Right. If I might, I've got my September 9th
0 3 : 3 5 13 report here just so I don't get these numbers wrong.

0 3 : 3 5 14 So there's the 1989 version of the ABA Guidelines
0 3 : 3 5 15 for the appointment and performance of counsel in death
0 3 : 3 5 16 penalty cases.

0 3 : 3 5 17 And then there were some more guidelines
0 3 : 3 5 18 promulgated in 2003, about nine or ten months before this
0 3 : 3 6 19 case was tried.

0 3 : 3 6 20 Q. And how were these guidelines created by the
0 3 : 3 6 21 American Bar Association?

0 3 : 3 6 22 A. So they -- the ABA has committees that are set up
0 3 : 3 6 23 to put together guidelines on all different sorts of
0 3 : 3 6 24 practice areas. And they will bring in specialists who have
0 3 : 3 6 25 worked in the -- in the areas. For example, they'll reach

1 out to different states.

2 And in -- from North Carolina, we had an attorney
3 named Henderson Hill from Charlotte who had done a lot of
4 death penalty cases, so he was very involved in the --
5 helping to write and design some of the guidelines that we
6 still have today.

7 Q. So the ABA Guidelines were informed by attorneys
8 practicing here in North Carolina?

9 A. Yes. Here and elsewhere, that's right.

10 Q. And the committee that formed them is a group of
11 peer attorneys who all practiced capitally?

12 A. That's right.

13 Q. And have you taught courses over the past
14 two and a half decades advising people of these standards?

15 A. Yes. Well, we've had some courses in law school
16 where we teach some death penalty law.

17 But in terms of being helpful to attorneys who
18 practice in the state in death penalty defense, I have
19 spoken a number of times at different seminars for death
20 penalty defense. Most recently, last November, I think.

21 And then, also, when we had so-called Capital
22 Colleges, I was -- I was a participant, and I took cases.
23 And we all heard one of the defense attorneys just talk
24 about that. So I attended some of those as a participant
25 attorney.

0 3 : 3 8 1 And then I was one of the -- I guess one of the
0 3 : 3 8 2 instructing attorneys, consulting attorneys in later years,
0 3 : 3 8 3 probably starting in around 2002 or '3 when -- yeah.

0 3 : 3 8 4 So there's annual -- there's an annual defense --
0 3 : 3 8 5 capital defense seminar, which usually takes place in May.
0 3 : 3 8 6 There's another one now that we've been doing it for seven
0 3 : 3 8 7 or eight years for newer capital defense lawyers.

0 3 : 3 8 8 And we have different two or three-day things.
0 3 : 3 8 9 Used to be Capital College, now they're a little more broken
0 3 : 3 8 10 down. There's -- the federal funding for that went away so
0 3 : 3 8 11 the things are a little bit different.

0 3 : 3 8 12 So, yeah, lots of things like that in terms of my
0 3 : 3 8 13 involvement with trying to help people understand what the
0 3 : 3 8 14 guidelines are and the obligations are in these cases.

0 3 : 3 9 15 Q. And just to be clear. You've been teaching at
0 3 : 3 9 16 these Capital Colleges and seminars since approximately
0 3 : 3 9 17 2002?

0 3 : 3 9 18 A. '2 or '3.

0 3 : 3 9 19 Q. Okay. And you also continue today to advise
0 3 : 3 9 20 attorneys who are practicing in capital cases through your
0 3 : 3 9 21 role as a consultant?

0 3 : 3 9 22 A. Right. Yes. Even currently.

0 3 : 3 9 23 Q. And your first capital case was in 1984.

0 3 : 3 9 24 Is it fair to say that you're familiar with the
0 3 : 3 9 25 practice in capital and potentially capital murder cases in

1 North Carolina from approximately 1985 to present?

2 A. Yes.

3 MS. WARREN: Your Honor, at this time, I would
4 tender Mr. Rabil as an expert in defense standards in
5 capital cases, and an expert in defense practices in
6 North Carolina from approximately 1985 to present.

7 THE COURT: Does the state have any questions on
8 the tender?

9 MR. VLAHOS: Yes, Your Honor.

10 THE COURT: You may proceed.

11 BY MR. VLAHOS:

12 Q. Would you like me to call you Mr. Rabil or
13 Professor Rabil? What do you prefer?

14 A. Don't call me Professor Rabil.

15 Q. Yes, sir, Mr. Rabil.

16 A. Since we knew each other before that.

17 Q. Mr. Rabil, you testified that you tried
18 six capital cases to verdict; is that correct?

19 A. Right.

20 Q. Okay. Did any of those result in life without
21 parole?

22 A. Four.

23 Q. Four out of six.

24 What happened to the other two?

25 A. Death.

0 3 : 4 0
0 3 : 4 0
0 3 : 4 0
0 3 : 4 0
0 3 : 4 0
0 3 : 4 0
0 3 : 4 1
0 3 : 4 1
0 3 : 4 1
0 3 : 4 1
0 3 : 4 1
0 3 : 4 1
0 3 : 4 1
0 3 : 4 1
0 3 : 4 1
0 3 : 4 1
0 3 : 4 1
0 3 : 4 1
0 3 : 4 1
0 3 : 4 1

1 Q. That's more than a 50 percent average, correct?

2 A. If you're looking at trials. I like -- hope --

3 prefer to think of it as total results. Most of the time

4 we'll end up with pleas, a few times with dismissals.

5 Q. But sometimes you have to go to trial; isn't that

6 correct?

7 A. I was trying to think about it. And I'm not -- in

8 those cases that we actually went to trial in, I don't think

9 the state ever offered anything, so I'm pretty sure we had

10 no choice but to go to trial.

11 Q. Have you tried any capital murder cases in

12 Montgomery County, North Carolina?

13 A. No.

14 Q. Okay. So no experience here in Montgomery County?

15 A. Trying capital cases, no.

16 Q. How about -- now, you listed off a number of

17 counties that you've tried capital cases in North Carolina;

18 is that correct?

19 A. Say that again?

20 Q. You've listed -- when you were in the Capital

21 Defender's Office --

22 A. Right.

23 Q. -- tried cases in -- capital cases in a number of

24 North Carolina counties?

25 A. Well, I had defendants in a number of -- had

0 3 : 4 1 1 defendants facing the death penalty or capital cases in a
0 3 : 4 1 2 number of counties.

0 3 : 4 1 3 The trials were -- I had one in Iredell that was a
0 3 : 4 1 4 capital trial, Ramseur. And I think all the others were in
0 3 : 4 1 5 Forsyth, the trials, I think.

0 3 : 4 1 6 Q. And is it your experience from traveling and
0 3 : 4 1 7 trying capital cases in more than one county that sometimes
0 3 : 4 1 8 juries in counties can have their own personalities?

0 3 : 4 2 9 A. Oh, yeah. You always have to be aware of the
0 3 : 4 2 10 locale and discuss, you know, what types of jurors you're
0 3 : 4 2 11 going to get with the local attorneys and make sure you're
0 3 : 4 2 12 aware of all of that for jury selection particularly, right.

0 3 : 4 2 13 Q. So one point you make in your practice is to seek
0 3 : 4 2 14 local attorneys when you get assigned maybe a capital case
0 3 : 4 2 15 in a county you haven't been in yet?

0 3 : 4 2 16 A. Yeah. Eventually, when -- you know, when it's
0 3 : 4 2 17 clear it's going to go to trial -- and sometimes even just
0 3 : 4 2 18 advice on dealing with the district attorney or maybe
0 3 : 4 2 19 certain types of local practices, especially back before we
0 3 : 4 2 20 had open discovery, you had to kind of find out whether you
0 3 : 4 2 21 got your discovery on pink paper or white paper, that sort
0 3 : 4 2 22 of thing.

0 3 : 4 2 23 Q. And 22 years was spent in private practice in very
0 3 : 4 2 24 small firms; is that correct?

0 3 : 4 2 25 A. Right.

0 3 : 4 2 1 Q. So I presume you're working a lot then -- you're
0 3 : 4 2 2 in a small firm or even a sole practitioner, you're working
0 3 : 4 3 3 a lot, your focus is not on studying other people's cases or
0 3 : 4 3 4 what's been going on, is it?

0 3 : 4 3 5 A. Well, actually, no. We would -- I would try -- I
0 3 : 4 3 6 would make it a point to, like, go to see other trials when
0 3 : 4 3 7 people are trying cases. Because you can learn, you know,
0 3 : 4 3 8 from the others that are trying the cases and talk to other
0 3 : 4 3 9 people.

0 3 : 4 3 10 So, yeah, it's certainly work-related. But we're
0 3 : 4 3 11 always trying to learn and going to the seminars and just
0 3 : 4 3 12 going -- watching things in other places, you know.

0 3 : 4 3 13 Q. And your degrees are a bachelor of arts in English
0 3 : 4 3 14 and a juris doctor degree; is that correct?

0 3 : 4 3 15 A. That's right.

0 3 : 4 3 16 Q. And many lawyers have those; is that correct?

0 3 : 4 3 17 A. Many what?

0 3 : 4 3 18 Q. Many lawyers have those degrees?

0 3 : 4 3 19 A. I think -- well, everybody has a JD. And I
0 3 : 4 3 20 think -- yeah, a lot -- a lot of English, yeah.

0 3 : 4 3 21 Q. Okay. So everybody's --

0 3 : 4 3 22 A. Hopefully everybody has a JD.

0 3 : 4 3 23 Q. My point is this. Do you have any other degrees
0 3 : 4 4 24 like an LLM or anything we don't know about or any doctorate
0 3 : 4 4 25 that we don't know about?

0 3 : 4 4 1 A. No. I'm not hiding any doctorates.

0 3 : 4 4 2 Q. Have you done any experimental testing about what
0 3 : 4 4 3 works with juries in particular cases in capital cases, as a
0 3 : 4 4 4 professor, or any other way?

0 3 : 4 4 5 A. Yes.

0 3 : 4 4 6 Q. What kinds of experiments have you done?

0 3 : 4 4 7 A. Well, I find that when a case is going to trial, a
0 3 : 4 4 8 capital case, that it's really helpful to do some focus
0 3 : 4 4 9 groups. And I'm trying to think -- I know we did -- I've
0 3 : 4 4 10 done two or three.

0 3 : 4 4 11 And so what we would do is try to find people that
0 3 : 4 4 12 were actually called for jury duty but were not selected.
0 3 : 4 4 13 And so the list used to be public, and so we would either
0 3 : 4 4 14 have a student or somebody call these people, and we would
0 3 : 4 5 15 invite them in to, you know, try to get, like, 12 people who
0 3 : 4 5 16 believed in the death penalty, you know, so death-qualified,
0 3 : 4 5 17 and present different aspects of the case to them. So that
0 3 : 4 5 18 way, we would study how -- how the juries make decisions at
0 3 : 4 5 19 different stages.

0 3 : 4 5 20 I've also -- even before I was, you know, teaching
0 3 : 4 5 21 at the law school, I found it very helpful to read studies
0 3 : 4 5 22 about how juries make decisions, how they operate at
0 3 : 4 5 23 post-jury -- post-verdict debriefings.

0 3 : 4 5 24 Like, there was a thing early on called Capital
0 3 : 4 5 25 Jury Project that we learned a lot from. And that was a

0 3 : 4 5 1 national sort of thing. And they would have people go
0 3 : 4 5 2 around, interview juries who had deliberated, found either
0 3 : 4 5 3 life or death. So there was a lot of good information from
0 3 : 4 5 4 that in the very early days.

0 3 : 4 5 5 And then different articles. Like, there's a guy
0 3 : 4 6 6 named Scott Sunby who has written a book, and he's done
0 3 : 4 6 7 studies. I think he studied 90 different juries where they
0 3 : 4 6 8 had rendered -- deliberated in capital cases and was trying
0 3 : 4 6 9 to figure out what are the factors that are important.

0 3 : 4 6 10 And -- because that's important for us as
0 3 : 4 6 11 practitioners in terms of trying to decide, you know, what
0 3 : 4 6 12 can work; what, generally speaking, the juries want to hear
0 3 : 4 6 13 about. And also it helps with jury selection in terms of
0 3 : 4 6 14 maybe what factors to ask about.

0 3 : 4 6 15 So I guess, yeah. So to answer -- the summary is,
0 3 : 4 6 16 yeah, I've done some focus groups. We've also done some
0 3 : 4 6 17 surveys with the assistance of students like in a certain
0 3 : 4 6 18 area, like on a venue question.

0 3 : 4 6 19 And then, you know, reading the articles and
0 3 : 4 6 20 reading the stuff from the Capital Jury Project.

0 3 : 4 6 21 And also, over the years that the capital -- or
0 3 : 4 6 22 death penalty defense seminars sponsored by the -- it's
0 3 : 4 7 23 North Carolina Advocates for Justice now, it used to be the
0 3 : 4 7 24 Academy of Trial -- Academy for Trial Lawyers. So we
0 3 : 4 7 25 would -- I would always go to those. And they would bring

1 in people who would talk about studies that were done to see
2 how juries make decisions.

3 Q. And did you hear testimony in this case from
4 Mr. Oldham that Mr. Atkinson did go to one of those Capital
5 Colleges with Scott Allen's case?

6 A. I did.

7 Q. Now, as far as the focus groups, were those on
8 cases you yourself were doing, or did you run them for other
9 people?

10 A. They were cases that I was one of the attorneys
11 in.

12 Q. Okay. So you did them in your own cases; is that
13 correct?

14 A. Yes. That's right.

15 Probably -- I'm pretty sure there were sometimes
16 when we advised other people about how we put those
17 together. Yeah.

18 Q. The studies you're talking about, those are
19 studies you read about; is that correct?

20 A. Studies that I read, not that I did.

21 Q. Have you ever done any studies on juries, what
22 they're going to do in capital cases, that have been
23 published in a journal that's reviewed, like a peer-review
24 journal?

25 A. No.

0 3 : 4 8 1 Q. And the surveys that you did, those are within the
0 3 : 4 8 2 law school, within Wake Forest University, or was it some
0 3 : 4 8 3 larger project?

0 3 : 4 8 4 A. No, what I meant was we would use clinic students
0 3 : 4 8 5 to help us survey people. I remember, like, for the Ramseur
0 3 : 4 8 6 case, we were trying to decide -- or trying to figure out
0 3 : 4 8 7 whether we needed to make a motion for change of venue. So
0 3 : 4 8 8 we got students to follow a -- we gave them a list, and it
0 3 : 4 8 9 was derived from voting records and things like, you know,
0 3 : 4 8 10 other lists that juries would come from, and we'd have them
0 3 : 4 8 11 call and ask a series of questions. So it was
0 3 : 4 8 12 case-specific/county-specific is what I mean by that.

0 3 : 4 8 13 Q. In other words, not outside your own cases or a
0 3 : 4 8 14 case you're working on or having your students work on?

0 3 : 4 9 15 A. That's right.

0 3 : 4 9 16 Q. I'm talking about, like, large observational
0 3 : 4 9 17 studies.

0 3 : 4 9 18 A. No.

0 3 : 4 9 19 Q. Have you conducted any large observational studies
0 3 : 4 9 20 all over North Carolina to see what works and what doesn't
0 3 : 4 9 21 work with juries?

0 3 : 4 9 22 A. I have not.

0 3 : 4 9 23 Q. Okay. Have you done any experiments throughout
0 3 : 4 9 24 North Carolina counties to see what might work in one county
0 3 : 4 9 25 but not in another in capital cases?

0 3 : 4 9 1 A. I have not.

0 3 : 4 9 2 Q. You also mentioned *Strickland v. Washington* when
0 3 : 4 9 3 you were talking about standards; is that correct?

0 3 : 4 9 4 A. Yeah. The basic Supreme Court case on ineffective
0 3 : 4 9 5 assistance, right.

0 3 : 4 9 6 Q. That's the seminal case on it, correct?

0 3 : 4 9 7 A. That's right.

0 3 : 4 9 8 Q. And it's been around a long time, since 1984?

0 3 : 4 9 9 A. Right.

0 3 : 4 9 10 Q. In *Strickland* itself -- I mean, you're a law
0 3 : 4 9 11 professor. I don't have to tell you.

0 3 : 4 9 12 In *Strickland*, the United States Supreme Court was
0 3 : 5 0 13 faced with do you want to activate specific guidelines for
0 3 : 5 0 14 counsel performance.

0 3 : 5 0 15 Do you recall that?

0 3 : 5 0 16 A. I think, yeah. I think so. I hadn't looked at it
0 3 : 5 0 17 in a little while.

0 3 : 5 0 18 Q. Is it something like -- in the majority opinion,
0 3 : 5 0 19 "When a convicted defendant complains of the ineffectiveness
0 3 : 5 0 20 of counsel's assistance, the defendant must show that
0 3 : 5 0 21 counsel's representation fell below an objective standard of
0 3 : 5 0 22 reasonableness"?

0 3 : 5 0 23 Do you recall that?

0 3 : 5 0 24 A. Oh, yeah.

0 3 : 5 0 25 Q. And then it says, "More specific guidelines are

1 not appropriate. The Sixth Amendment refers simply to
2 'counsel,' not specifying particular requirements of
3 effective assistance. It relies instead on the legal
4 profession's maintenance of standards sufficient to justify
5 the law's presumption that counsel will fulfill the role in
6 the adversary process that the Amendment envisions. The
7 proper measure of attorney performance remains simply
8 reasonableness under the prevailing professional norms."

9 Is that basically what it says?

10 A. It does.

11 Q. Okay. So it doesn't -- they didn't give power or
12 authorize the American Bar Association to make rules for
13 attorneys; did the United States Supreme Court do that?

14 A. No, they did not delegate that responsibility to
15 the ABA. I didn't mean to say that.

16 Q. No, thank you. "Delegate" was the word I was
17 thinking of. I'm sorry. I could not think of the word.

18 That's never been delegated by --

19 A. No.

20 Q. -- the United States Supreme Court, has it?

21 A. No. It's always up to the court to make that
22 determination.

23 And -- but in -- I believe it was *Wiggins* and
24 *Rompilla* particularly, the Supreme Court did give great -- I
25 don't know what the word is -- reliance, deference to the

0 3 : 5 1 1 ABA Guidelines.

0 3 : 5 1 2 And then some other cases, seems like I remember
0 3 : 5 1 3 one with Justice Scalia where he's saying those -- those are
0 3 : 5 1 4 just guidelines.

0 3 : 5 1 5 Q. It's kind of like, you know, Pirates of the
0 3 : 5 1 6 Caribbean, they're more kind of like guidelines?

0 3 : 5 1 7 A. I was not going to say that, but...

0 3 : 5 2 8 Q. Yeah.

0 3 : 5 2 9 A. I wasn't going to say that.

0 3 : 5 2 10 Q. While they may be helpful, they're not the
0 3 : 5 2 11 determining factor, in other words?

0 3 : 5 2 12 A. Well, see, I'm not -- I'm not disagreeing with
0 3 : 5 2 13 you, but let me say what's in my head when I'm answering
0 3 : 5 2 14 that question.

0 3 : 5 2 15 When you get into -- when you move from regular
0 3 : 5 2 16 criminal defense -- which, of course, all of the principles
0 3 : 5 2 17 of regular criminal defense still apply to capital cases.
0 3 : 5 2 18 But when you move into death penalty cases, it just -- it
0 3 : 5 2 19 takes on a whole different level.

0 3 : 5 2 20 And what I think people found and what I saw over
0 3 : 5 2 21 the years was there needed to be some more guidance about
0 3 : 5 2 22 what should be done in cases, because it just wasn't being
0 3 : 5 2 23 done.

0 3 : 5 2 24 And -- because, you know, everything changed with
0 3 : 5 2 25 the case -- United States Supreme Court case

0 3 : 5 2 1 re-inactivating -- reactivating the death penalty or
0 3 : 5 2 2 allowing states to, you know, come back in the late 1970s
0 3 : 5 2 3 with this guided discretion model of, is it a capital case?
0 3 : 5 3 4 Are there aggravating factors? Are there mitigating
0 3 : 5 3 5 factors? And so it was a whole new way of proceeding. And
0 3 : 5 3 6 it took a while for the proper techniques on how to
0 3 : 5 3 7 implement and teach juries how to, you know, make decisions
0 3 : 5 3 8 with aggravating-mitigating factors.

0 3 : 5 3 9 So it got a little more complicated, so the
0 3 : 5 3 10 guidelines were really helpful in that regard. Some get --
0 3 : 5 3 11 some do get really specific, not in the sense of how -- what
0 3 : 5 3 12 should you do with this affidavit in this case or what
0 3 : 5 3 13 should you do with this witness, but here are the types of
0 3 : 5 3 14 things that you should do, and here are the types of experts
0 3 : 5 3 15 you should have.

0 3 : 5 3 16 And, of course, there are some basic things
0 3 : 5 3 17 referred to, like go to the crime scene and investigate the
0 3 : 5 3 18 guilt-innocence, things like that.

0 3 : 5 3 19 So it got -- it did get to be a little bit more
0 3 : 5 3 20 specific when all these death penalty cases started being
0 3 : 5 3 21 tried.

0 3 : 5 3 22 Q. Okay. And so there are guidelines out there
0 3 : 5 4 23 trying to help, and they're published for lawyers to review;
0 3 : 5 4 24 is that correct?

0 3 : 5 4 25 A. That's right.

0 3 : 5 4 1 **MR. VLAHOS:** Your Honor, at this time, the state
0 3 : 5 4 2 would like to be heard.

0 3 : 5 4 3 **THE COURT:** Any other questions on qualifying this
0 3 : 5 4 4 witness?

0 3 : 5 4 5 **MS. WARREN:** No, Your Honor.

0 3 : 5 4 6 **THE COURT:** All right. I will hear from the
0 3 : 5 4 7 state.

0 3 : 5 4 8 Everybody turn off your phones, please.

0 3 : 5 4 9 **MR. VLAHOS:** Your Honor, I have two cases if I may
0 3 : 5 4 10 hand up. And I gave them to counsel before the break.

0 3 : 5 4 11 **THE COURT:** You may.

0 3 : 5 5 12 **MR. VLAHOS:** Thank you, Your Honor.

0 3 : 5 5 13 Your Honor, the first case is *Smith v. Childs*.
0 3 : 5 5 14 It's from the North Carolina Court of Appeals,
0 3 : 5 5 15 112 N.C. App. 672, a 1993 decision.

0 3 : 5 5 16 Your Honor, the reason I'm bringing Court of
0 3 : 5 5 17 Appeals cases in here, while they cite North Carolina
0 3 : 5 5 18 Supreme Court cases, there were no North Carolina
0 3 : 5 5 19 Supreme Court cases that said exactly what these cases said,
0 3 : 5 5 20 that's why I'm bringing Court of Appeals cases in.

0 3 : 5 5 21 *Smith v. Childs* is a legal malpractice case from
0 3 : 5 5 22 Mecklenburg County where the jury found the defendant's
0 3 : 5 5 23 attorney negligent and awarded damages to the
0 3 : 5 5 24 plaintiff/clients, and the attorney appealed the judgment.

0 3 : 5 5 25 And in this case, Your Honor, the big part of the

0 3 : 5 5 1 decision was issue 2, where the Court addressed defendant's
0 3 : 5 5 2 contention that the trial court erred, and it's got a Roman
0 3 : 5 6 3 numeral II. It's on page 3 of the handout I gave
0 3 : 5 6 4 Your Honor. On page 3, there's a Roman numeral II before
0 3 : 5 6 5 it.

0 3 : 5 6 6 "We next address defendant's contention that the
0 3 : 5 6 7 trial court erred by allowing plaintiffs' expert witness, a
0 3 : 5 6 8 Union County attorney, to testify as to legal conclusions.
0 3 : 5 6 9 According to defendant, the expert's testimony improperly
0 3 : 5 6 10 invaded the trial court's province to determine the legal
0 3 : 5 6 11 effect of the purchase money note and the guaranty executed
0 3 : 5 6 12 by Wood" -- who is one of the people/parties -- "as well as
0 3 : 5 6 13 the meaning of certain language in these documents."

0 3 : 5 6 14 And the essential rules out of this case,
0 3 : 5 6 15 Your Honor -- you're familiar with the North Carolina Rule
0 3 : 5 6 16 of Evidence Rule 702. They kind of go down and generalize
0 3 : 5 6 17 it.

0 3 : 5 6 18 And if it becomes an issue, Your Honor, I believe
0 3 : 5 6 19 this case -- because of the date it was tried and because of
0 3 : 5 6 20 when the MAR was filed -- is not a *Daubert* case, as we are
0 3 : 5 7 21 after the 2011 enactment of the new Rule 702. We still fall
0 3 : 5 7 22 under *Howerton v. Arai Helmet* Company -- *Howerton v. Arai*
0 3 : 5 7 23 *Helmet Limited*, by the North Carolina Supreme Court,
0 3 : 5 7 24 358 N.C. 440, a 2004 decision from the Supreme Court of
0 3 : 5 7 25 North Carolina.

0 3 : 5 7 1 That's -- it's slightly different standards. We
0 3 : 5 7 2 were not *a Daubert* state when this was filed. It has to be
0 3 : 5 7 3 on or after the effective date, which was October 2011,
0 3 : 5 7 4 according to this state bill, just to make sure we're on the
0 3 : 5 7 5 right standard, Your Honor.

0 3 : 5 7 6 So, luckily, I pulled this decision from 1993,
0 3 : 5 7 7 *Childs*, which is under the old standard, not the new
0 3 : 5 7 8 standard.

0 3 : 5 7 9 Your Honor, down under A, what basically the Court
0 3 : 5 7 10 says is, "As a general rule, expert testimony is admissible
0 3 : 5 7 11 when the expert's specialized expertise will assist the
0 3 : 5 7 12 trier of fact in understanding the evidence or in
0 3 : 5 8 13 determining a fact in issue. Pursuant to Rule 704, expert
0 3 : 5 8 14 testimony may even embrace an ultimate issue to be decided
0 3 : 5 8 15 by the trier of fact."

0 3 : 5 8 16 Now, "In determining whether a particular
0 3 : 5 8 17 expert... should be admitted, the inquiry should be not
0 3 : 5 8 18 whether it invades the province of the jury, but whether the
0 3 : 5 8 19 witness, because of his expertise, is in a better position
0 3 : 5 8 20 to have an opinion on the subject than is the trier of
0 3 : 5 8 21 fact."

0 3 : 5 8 22 So the first part of the state's argument,
0 3 : 5 8 23 Your Honor, Mr. Rabil has testified he's a lawyer. He's
0 3 : 5 8 24 been in practice a lot of years, and he's handled a lot of
0 3 : 5 8 25 capital cases, but he's a lawyer. He's not conducted

0 3 : 5 8 1 studies, either observational studies or big experiments
0 3 : 5 8 2 around the State of North Carolina to tell you what you
0 3 : 5 8 3 should do or shouldn't do in a capital case.

0 3 : 5 8 4 Also, he's tried no cases in Montgomery County,
0 3 : 5 8 5 and he hasn't specifically studied Montgomery County and how
0 3 : 5 8 6 their juries are. And he even admitted, as most all lawyers
0 3 : 5 8 7 will admit, when you go from one county to another county,
0 3 : 5 8 8 the jurys' personalities change. So it's helpful to have
0 3 : 5 9 9 local counsel helping you on a case. And in this case,
0 3 : 5 9 10 Mr. Atkinson was apparently from Montgomery County,
0 3 : 5 9 11 Mr. Oldham's from Randolph County, which is one county over.

0 3 : 5 9 12 What the state's basic argument here is,
0 3 : 5 9 13 Your Honor -- Your Honor has been on the bench many years,
0 3 : 5 9 14 Your Honor's had a long legal career, and Your Honor is in
0 3 : 5 9 15 just as good a position as Mr. Rabil to be able to have an
0 3 : 5 9 16 opinion in this case about whether there was ineffective
0 3 : 5 9 17 assistance of counsel or not. That's part one.

0 3 : 5 9 18 Part two, which is perhaps even more important --
0 3 : 5 9 19 because even if he does qualify as an expert, *Smith v.*
0 3 : 5 9 20 *Childs* goes on to say -- because this is a malpractice case
0 3 : 5 9 21 which is as close to the civil law as we can get to an
0 3 : 5 9 22 ineffective assistance of counsel case. It's basically
0 3 : 5 9 23 arguing no attorney would do this in the case. This is what
0 3 : 5 9 24 the important part of *Smith v. Childs*, "An expert is not
0 3 : 5 9 25 allowed" --

0 3 : 5 9 1 **THE COURT:** I'm sorry. Where are you?

0 4 : 0 0 2 **MR. VLAHOS:** I'm sorry. I'm on page 4. It's the
0 4 : 0 0 3 left side of the page. "Province of the jury," it starts.
0 4 : 0 0 4 It goes down one, two, three, four, five, there's some
0 4 : 0 0 5 language, "There are, nevertheless, limitations on the
0 4 : 0 0 6 admissibility of expert opinion testimony."

0 4 : 0 0 7 **THE COURT:** I see it.

0 4 : 0 0 8 **MR. VLAHOS:** And this is the important part.

0 4 : 0 0 9 "An expert is not allowed to testify that a
0 4 : 0 0 10 particular legal standard, or legal term of art, has been
0 4 : 0 0 11 met. Terms such as 'testamentary capacity' and
0 4 : 0 0 12 'premeditation and deliberation' are legal conclusions
0 4 : 0 0 13 premised upon particular underlying facts" when the expert
0 4 : 0 0 14 witness is an expert legal witness.

0 4 : 0 0 15 So here we have a person being tendered as an
0 4 : 0 0 16 expert legal witness in premeditation and deliberation, not
0 4 : 0 0 17 in a criminal sense, Your Honor, talking about a civil case.

0 4 : 0 0 18 But what we're talking about here, determination
0 4 : 0 0 19 such as deficient performance, with quotation marks around
0 4 : 0 0 20 it, is a legal term. Determinations like a reasonable
0 4 : 0 1 21 probability of a different result is a legal conclusion.
0 4 : 0 1 22 Both of those are legal conclusions that this Court must
0 4 : 0 1 23 reach.

0 4 : 0 1 24 And because of the specific law with regard to a
0 4 : 0 1 25 legal expert witness that this case shows and the following

1 case also fleshes out a little bit, Mr. Rabil, even with all
2 his experience, should not be allowed to testify that this
3 constitutes deficient performance or that this means there's
4 a reasonable probability of a different result, because
5 those are legal determinations, legal conclusions that this
6 Court must reach. While he can testify as to facts and what
7 he thinks about facts, he cannot make those legal
8 conclusions.

9 Your Honor, the second case is *Hummer v. Pulley*,
10 *Watson, King & Lischer*. This is another malpractice case
11 where the plaintiffs were a teacher and his wife. They sued
12 the defendants, an attorney, and their law firm in Durham,
13 alleging various causes of action, including legal
14 negligence.

15 And the summary of this case, Your Honor, it's the
16 old "the attorney didn't get around to it." The teacher got
17 a letter from the school board saying you have until such
18 and such a time to file a grievance or appeal or whatever it
19 was. And the attorney -- who they went to hire and did
20 hire -- didn't get around to filing the letter within the
21 deadlines, so they ended up suing the attorney for legal
22 negligence.

23 And specifically on page 3, it kind of says what
24 happened in the hearing. On page 3, on the left-hand side,
25 it goes all the way down -- not the first part, not the next

1 paragraph, but where it says, "The defendants sought..."

2 It says, "Defendants sought to introduce expert
3 testimony from several witnesses who had extensive
4 experience in the practice of education law that the
5 probable outcome of the dismissal proceedings would not have
6 been different had Lischer, in fact, mailed the request for
7 a hearing. The trial court refused to admit this evidence
8 on the ground it invaded the province of the jury as the
9 finder of fact."

10 So what happened was -- what was on appeal was the
11 trial court's refusal to allow these lawyers to testify as
12 experts.

13 And the legal conclusions that the Court of
14 Appeals reached are on page 4 of the decision, again, under
15 Roman numeral II. And it's a fairly small paragraph. It
16 sets it up.

17 It says, "Defendants next contend the trial court
18 committed error by not allowing defense expert testimony to
19 the effect that the school board would have dismissed
20 plaintiff even if defendants had requested a hearing before
21 the PRC. As discussed in part one, supra, it is no -- it is
22 not necessary to present evidence of what the particular
23 fact-finder would have done in the underlying case."

24 And here's the law.

25 "Moreover, expert testimony is inadmissible when

0 4 : 0 4 1 the expert is testifying to the legal effect of specific
0 4 : 0 4 2 facts."

0 4 : 0 4 3 And that cites the *Smith v. Childs* case that I
0 4 : 0 4 4 handed up, Your Honor.

0 4 : 0 4 5 The next sentence takes it a step further.

0 4 : 0 4 6 "Finally, expert testimony simply telling the jury
0 4 : 0 4 7 the result they should reach is also inadmissible."

0 4 : 0 4 8 And the state contends, Your Honor, that that's
0 4 : 0 4 9 what Mr. Rabil's testimony is going to tell you. He's going
0 4 : 0 4 10 to try to testify that this was deficient performance. He's
0 4 : 0 4 11 going to try to testify that there's a reasonable
0 4 : 0 4 12 probability of a different result.

0 4 : 0 4 13 And in doing so, what he's going to be doing is
0 4 : 0 4 14 testifying to legal conclusions and trying to tell
0 4 : 0 4 15 Your Honor the result you should reach rather than really
0 4 : 0 4 16 giving an expert opinion about something that Your Honor
0 4 : 0 4 17 wouldn't understand. Like, let's say it's an engineer that
0 4 : 0 4 18 has to explain something or a doctor that has to explain
0 4 : 0 5 19 what happens to the human body. We don't have the type of
0 4 : 0 5 20 training and experience that a doctor has. But in a
0 4 : 0 5 21 courtroom, everybody, including the judge, who's handling
0 4 : 0 5 22 the case and representing people in front of the Bar, is a
0 4 : 0 5 23 lawyer.

0 4 : 0 5 24 And while Mr. Rabil is an outstanding lawyer and a
0 4 : 0 5 25 professor, the state argues he doesn't rise to the level of

1 being able to be in a better position than Your Honor to
2 make the legal conclusions in this case.

3 **THE COURT:** Ms. Warren?

4 **MS. WARREN:** Yes, Your Honor.

5 First of all, today is the first that I heard the
6 state's objection to Mr. Rabil and his expert testimony.
7 They have been on notice and received an expert report over
8 two years ago, in 2022, as well as a supplemental expert
9 report several months ago. They've not filed any motion to
10 preclude his testimony or made any arguments prior to today.

11 Second, to my knowledge, Mr. Allen is the only
12 capital sentence that has ever come out of
13 Montgomery County.

14 Mr. Rabil testified that he's practiced in
15 Randolph and Stanly, which are neighboring counties, as well
16 as many other counties in this area of the state.

17 *Strickland* experts like Mr. Rabil have been a
18 standard part of MAR cases in this state for several
19 decades, I believe going back to the late '90s, Your Honor.

20 If I may approach with Defendant's Exhibits 40 and
21 41.

22 **THE COURT:** You may.

23 **MS. WARREN:** Thank you, Your Honor.

24 Defendant's Exhibit 40 is from a 2003 case. It is
25 a 2023 order out of Harnett County. This is an order

1 denying the state's motion to strike expert testimony by
2 Jonathan Broun.

3 And the Court in that case, in fact, relied on
4 *Smith v. Childs*, which the state is offering, to find that
5 expert testimony should be admitted when the expert witness,
6 because of his expertise, is in a better position to have an
7 opinion on the subject than the trier of fact.

8 That is in decretal paragraph 2 on page 4 of that
9 order, Your Honor.

10 The order continues on page 5 and found that
11 Jonathan Broun is an expert in capital criminal defense law,
12 that he has specialized knowledge about the applicable
13 standards of practice, that they should be considered by the
14 Court as prevailing professional norms of practice, and they
15 were important to provide context and understanding the
16 evidence and determining whether counsel's representation
17 fell below an objective standard of reasonableness.

18 They found that they were the product -- the
19 opinion was the product of reliable principles and methods,
20 and that they were applied reliably to the case.

21 Similarly, Defense Exhibit 41 is an order from a
22 1999 case. And this order was entered in 2009.

23 I tried to select two orders that demonstrate the
24 length of time for which this has been a prevailing norm in
25 these kinds of cases, although there are many other similar

0 4 : 0 8 1 orders.

0 4 : 0 8 2 In this order, at paragraph 48, on page 16, the
0 4 : 0 8 3 Court notes that Ornith Conner [phonetic] was qualified as
0 4 : 0 8 4 an expert witness in the areas of capital and criminal trial
0 4 : 0 8 5 defense and in the standard of practice for attorneys in
0 4 : 0 8 6 capital and criminal trials, again, with a resume very
0 4 : 0 8 7 similar.

0 4 : 0 8 8 Likewise, while I do not yet have an order, just
0 4 : 0 8 9 three weeks ago in Gaston County, in a 2003 case,
0 4 : 0 9 10 Judge Jesse Caldwell allowed -- over, to my understanding, a
0 4 : 0 9 11 very similar objection by the state -- the expert testimony
0 4 : 0 9 12 of Lisa Dubs as a *Strickland* expert in a capital defense
0 4 : 0 9 13 MAR.

0 4 : 0 9 14 I believe that this is a standard part of these
0 4 : 0 9 15 cases and that Mr. Rabil has specialized knowledge about the
0 4 : 0 9 16 standards, the objective standard of reasonableness, and the
0 4 : 0 9 17 prevailing professional norms at the time of this case, and
0 4 : 0 9 18 his testimony and report should be considered by Your Honor.

0 4 : 0 9 19 **THE COURT:** Something further, Mr. Vlahos?

0 4 : 0 9 20 **MR. VLAHOS:** Yes, Your Honor.

0 4 : 0 9 21 Just to state, as Your Honor knows, these are
0 4 : 0 9 22 superior court orders that are not binding on Your Honor.

0 4 : 0 9 23 **THE COURT:** They are not.

0 4 : 0 9 24 **MR. VLAHOS:** Court of Appeals is binding on
0 4 : 0 9 25 Your Honor. Thank you.

0 4 : 0 9
0 4 : 1 0
0 4 : 1 0
0 4 : 2 9
0 4 : 2 9
0 4 : 2 9
0 4 : 2 9
0 4 : 2 9
0 4 : 2 9
0 4 : 3 0
0 4 : 3 0
0 4 : 3 0
0 4 : 3 0
0 4 : 3 0
0 4 : 3 0
0 4 : 3 0
0 4 : 3 0
0 4 : 3 0
0 4 : 3 0
0 4 : 3 0
0 4 : 3 0
0 4 : 3 0

1 **THE COURT:** It is. Thank you.
2 We're going to take a 15-minute recess at this
3 time.
4 (Recess.)
5 **THE COURT:** All right. This case does predate the
6 adoption of the *Daubert* standard that was codified in the
7 2011 legislation which amended the statute; so, therefore, I
8 understand that, prior to this 2011 legislation, that
9 North Carolina did adopt the *Howerton v. Arai* standard for
10 expert testimony, as counsel for the state mentioned.
11 In this case, the Court will find that under Rule
12 of Evidence 702, this witness does possess the requisite
13 knowledge, skill, experience, training, and education, and
14 his testimony would assist the trier of fact in determining
15 an appropriate standard of conduct by an attorney in an
16 ineffective assistance of counsel case.
17 Therefore, he will be allowed to testify in the
18 form of an opinion as an expert witness in the fields in
19 which he was tendered by defense counsel.
20 So the witness will please retake the stand.
21 **MS. WARREN:** Thank you, Your Honor.
22 **THE COURT:** Recall that you are still under oath.
23 **THE WITNESS:** Yes, sir.
24 **MS. WARREN:** One brief housekeeping matter.
25 I noted at the break that my copy of Defense

1 Exhibit 41, which is the lengthier order in *State of North*
 2 *Carolina v. David Gainey*, had an extra back page, which I'm
 3 looking at yours, and it does not appear to have. If you'll
 4 just confirm that that's the last page of the order.

5 **THE COURT:** It goes to page 37 with a signature.

6 **MS. WARREN:** Yes. Yours did not include the
 7 additional page that my copy had. Thank you.

8 **THE COURT:** All right. The witness may appear and
 9 testify at this hearing as tendered.

10 You may proceed.

11 Of course, sir, if I didn't say so, you're still
 12 under oath.

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

14 **MS. WARREN:** Your Honor, I am marking as Defense
 15 Exhibit 2 [sic] the CV of Mark Rabil;

16 As Defense Exhibit 43 the September 9th, 2022,
 17 report of Mr. Rabil;

18 And as Exhibit 44 the August 6th, 2024, report of
 19 Mr. Rabil.

20 May I approach the witness?

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

22 **Q.** Mr. Rabil, would you look at Defense Exhibit 42.

23 **A.** Yes.

24 **Q.** Do you recognize that document?

25 **A.** Right. This was my CV as of two years ago.

0 4 : 3 3 1 Q. And was that when you submitted your first report
0 4 : 3 3 2 in this case?

0 4 : 3 3 3 A. That's right.

0 4 : 3 3 4 Q. Would you look at Exhibit 43, please.
0 4 : 3 4 5 What is that document?

0 4 : 3 4 6 A. Yes. Exhibit 43 is a copy of the report that I
0 4 : 3 4 7 prepared for you on September 9th, 2022, 21 pages long, plus
0 4 : 3 4 8 an attachment with a list of things that I reviewed.

0 4 : 3 4 9 Q. And Exhibit 44?

0 4 : 3 4 10 A. Yes. Exhibit 44 is an August 6th, 2024, report
0 4 : 3 4 11 that's -- I prepared for you, supplementing my prior report
0 4 : 3 4 12 with one attachment.

0 4 : 3 4 13 Q. What issues were you asked to examine in this
0 4 : 3 4 14 case?

0 4 : 3 4 15 A. Right. So I was asked to look at whether there
0 4 : 3 4 16 was deficient performance in this case, in this death
0 4 : 3 5 17 penalty case for Scott Allen, and come up with opinions on
0 4 : 3 5 18 whether I thought there was deficient performance, whether
0 4 : 3 5 19 the defense counsels' actions or representation in the case
0 4 : 3 5 20 fell below an objective standard of reasonableness, and then
0 4 : 3 5 21 to look at whether there's a reasonable probability of a
0 4 : 3 5 22 different result but for those actions.

0 4 : 3 5 23 Q. What materials did you review in forming your
0 4 : 3 5 24 opinion in this case?

0 4 : 3 5 25 A. For the -- two years ago, when I wrote the first

1 report, I looked at the -- read the 2003 trial transcript.
2 Although, I don't think I closely looked at the sentencing
3 as much as the rest of it because of the direction from the
4 Supreme Court for the guilt phase issues.

5 Then I looked at the first motion for appropriate
6 relief, the supplemental motion for appropriate relief, the
7 second supplement to the motion for appropriate relief,
8 portions of the MAR transcript for the two attorneys and a
9 Tina Fowler Chamberlain.

10 I looked at MAR or motion for appropriate relief
11 hearing exhibits.

12 I looked at Mr. Gregg McCrary's August 13, 2013,
13 report with his attachments.

14 I looked at the supplemental report of
15 Mr. McCrary, dated September 2nd, 2022, with attachments.

16 I read the opinions -- the North Carolina
17 Supreme Court opinions in this case, the first one from 2006
18 and the recent one from 2021.

19 I walked out with you and counsel and Mr. McCrary
20 to the scene of -- the crime scene on May 13, 2022.

21 We all then went to the sheriff's department here
22 and looked at crime scene photographs, laboratory reports --
23 well, let's see. We went -- I have that we looked at crime
24 scene and forensic discovery. I think some of that came
25 from the defense attorneys, from y'all, but we also went to

0 4 : 3 7 1 the sheriff's department, and I looked through a lot of
0 4 : 3 7 2 photographs and reports.

0 4 : 3 7 3 And then we came to the clerk's office here and
0 4 : 3 7 4 looked at actual physical evidence from -- the actual trial,
0 4 : 3 7 5 is what I'm trying to say, that's in -- the clerk has them
0 4 : 3 7 6 there in their file here.

0 4 : 3 7 7 And various materials from trial counsel that were
0 4 : 3 7 8 obtained from Mr. Oldham, Mr. Atkinson about the witness
0 4 : 3 8 9 Vanessa Smith, as well as other exhibits that were attached
0 4 : 3 8 10 to the three basic motions in the case.

0 4 : 3 8 11 Q. And after that report, did you review several
0 4 : 3 8 12 thousand more pages of documents for your 2024 report?

0 4 : 3 8 13 A. Right. This year, I looked through -- or might
0 4 : 3 8 14 have been over Christmas last year, and then later this
0 4 : 3 8 15 year, the -- Mr. Atkinson's files that was 2,144 pages;
0 4 : 3 8 16 Mr. Oldham's files -- the way it's phrased that I was
0 4 : 3 8 17 given -- Atkinson files produced to the state on 5/15/2023,
0 4 : 3 8 18 2,144 pages; Oldham files produced to the state May 15,
0 4 : 3 8 19 2023, which was 3,057 pages.

0 4 : 3 9 20 I looked at Mr. Oldham's March 6, 2023,
0 4 : 3 9 21 response -- it was framed a response to a Court order, but
0 4 : 3 9 22 it was basically his answers to certain questions about what
0 4 : 3 9 23 matters would be necessary to be disclosed for -- to defend
0 4 : 3 9 24 allegations of ineffective assistance of counsel.

0 4 : 3 9 25 I looked at Mr. Carl Atkinson's March 16, 2023,

1 response to the -- also the Court order directing him to
2 provide the same thing.

3 January 23rd, 2024, and January 20, 2024,
4 deposition of attorney Pete Oldham.

5 And the January 25th, 2024, deposition of attorney
6 Carl Atkins [sic].

7 And, of course, I've been here all week observing
8 the -- primarily the testimony of Mr. Oldham. I saw
9 everybody that testified so far.

10 And I think that's -- I think I've listed it all.

11 Q. After reviewing all of those materials, did you
12 form an opinion about the issues that you were asked to
13 review?

14 A. Yes, I did.

15 Q. What is that opinion?

16 MR. VLAHOS: Objection, Your Honor, for the same
17 reasons stated, just to preserve.

18 THE COURT: So noted.

19 Overruled.

20 A. Yeah. In my opinion, there was a breach of the
21 prevailing norms with regard to an overall theory of
22 reasonable doubt, especially with regard to the impeachment
23 of the witness, Vanessa Smith. And not only direct
24 impeachment or attack of her credibility directly through
25 cross-examination of her, but cross-examination of some of

1 the police officers or sheriff's department people in the
2 case, Lieutenant Bunting, Ms. Wright, and -- as I sit here
3 this week, I think there -- I realize there should have been
4 some more cross-examination of -- I think it was
5 Lieutenant Poole. But anyway, he was -- I can't remember
6 what his rank was, I'm sorry, when he took those statements
7 on August 10th and 11th of 1999. But I think that would
8 also be part of what -- one of the things I learned this
9 week in listening to Mr. Oldham's testimony.

10 Q. And just for the record, on page 14 of your 2022
11 report, would you --

12 THE COURT: What exhibit number are you referring
13 to?

14 MS. WARREN: This is Exhibit Number --

15 THE WITNESS: 43.

16 MS. WARREN: -- 43.

17 THE COURT: Thank you.

18 Q. On page 14, did you list the claims?

19 A. Right. So in the middle of the page there, I have
20 a summary of the claims that I agree with. So what I've
21 written is, "I agree with all or portions of the following
22 claims made by the defendant in his original motion for
23 appropriate relief as supplemented in the supplemental MAR
24 and the second supplemental MAR." And --

25 MR. VLAHOS: Your Honor, the state would object to

0 4 : 4 2 1 any of those that render a legal conclusion for the reasons
0 4 : 4 2 2 argued before. Don't wish to be heard.

0 4 : 4 2 3 THE COURT: The objection is noted and overruled.
0 4 : 4 2 4 He may testify in the form of an opinion.

0 4 : 4 2 5 You may proceed.

0 4 : 4 2 6 A. So -- thank you, Your Honor.

0 4 : 4 2 7 So, essentially, I agreed with the claims that
0 4 : 4 3 8 I've listed here. There's -- and as I read it, they're
0 4 : 4 3 9 Roman numerals for the claims beginning in the MAR, and they
0 4 : 4 3 10 continue into the second and supplemental MAR. And
0 4 : 4 3 11 sometimes, as they're supplemented, or in the second
0 4 : 4 3 12 supplemental, the Roman numerals are either added to it or
0 4 : 4 3 13 they are -- they go back and supplement some of the priors.

0 4 : 4 3 14 So there's all of -- the different claims come
0 4 : 4 3 15 within different Roman numerals, which is how I've listed
0 4 : 4 3 16 it.

0 4 : 4 3 17 And I listed claim Roman numeral 16 first, which
0 4 : 4 3 18 is from the second supplemental MAR, which was -- I agreed
0 4 : 4 3 19 with the claim in there, which is that Mr. Allen's counsel
0 4 : 4 3 20 were ineffective because they failed to present an available
0 4 : 4 3 21 and coherent argument for reasonable doubt.

0 4 : 4 3 22 I agreed with claim 2 regarding their failure to
0 4 : 4 4 23 investigate and call key witnesses who could have presented
0 4 : 4 4 24 an exculpatory witness to the jury or otherwise failed to
0 4 : 4 4 25 take appropriate steps to challenge false evidence.

0 4 : 4 4 1 Let me just note that I more specifically define
0 4 : 4 4 2 my opinions. These were just the titles of the claims,
0 4 : 4 4 3 which are your words or prior counsel's words.

0 4 : 4 4 4 So claim 3A, ineffective assistance of counsel
0 4 : 4 4 5 based on cross-examination of witness Vanessa Smith.

0 4 : 4 4 6 Claim 3C, ineffective assistance of counsel based
0 4 : 4 4 7 on cross-examination of witness Barry Bunting.

0 4 : 4 4 8 Claim 3I, ineffective assistance of counsel based
0 4 : 4 4 9 on cross-examination of the state's witnesses.

0 4 : 4 4 10 Claim 3L, ineffective assistance of counsel based
0 4 : 4 4 11 on cross-examination of Officer Catha Wright.

0 4 : 4 5 12 And claim 10, cumulative ineffective assistance of
0 4 : 4 5 13 counsel as described in the MAR, pages 118 and 19.

0 4 : 4 5 14 And as to the other claims, there's a lot in the
0 4 : 4 5 15 three different -- you know, the MAR and the two
0 4 : 4 5 16 supplements.

0 4 : 4 5 17 At the time I wrote this, I didn't see sufficient
0 4 : 4 5 18 evidence in the prehearing record to form an opinion as to
0 4 : 4 5 19 trial counsels' deficient performance, so I didn't render
0 4 : 4 5 20 any opinions on those.

0 4 : 4 5 21 Q. Have there been other instances where you have
0 4 : 4 5 22 been asked to review a case and concluded that there was
0 4 : 4 5 23 ineffective assistance of counsel?

0 4 : 4 5 24 A. Yes.

0 4 : 4 5 25 Q. Can you describe those instances?

0 4 : 4 5 1 A. Well, I've -- I've only testified myself one time,
0 4 : 4 5 2 a case in Wilkes County maybe 20 years ago. It was a murder
0 4 : 4 6 3 case. I think the last name of the defendant was Curry. I
0 4 : 4 6 4 don't -- I couldn't find it so I don't remember exactly what
0 4 : 4 6 5 it was that I said. But there was that.

0 4 : 4 6 6 And then I'm currently reviewing two or three
0 4 : 4 6 7 potential claims that other attorneys have asked me to look
0 4 : 4 6 8 at.

0 4 : 4 6 9 And then in our clinic at Wake Forest at the
0 4 : 4 6 10 innocence clinic, you know, there's -- we review cases. Of
0 4 : 4 6 11 course, people have to, first of all, say they're actually
0 4 : 4 6 12 factually innocent.

0 4 : 4 6 13 And then we have students investigate and gather
0 4 : 4 6 14 all of the relevant materials. We speak to clients. We
0 4 : 4 6 15 interview attorneys and all that.

0 4 : 4 6 16 And at some point, we have to decide, is there
0 4 : 4 6 17 some evidence to go forward with? And then we have to look
0 4 : 4 6 18 at the claims. And since there's not a per se innocence
0 4 : 4 6 19 claim, you know, in court in North Carolina, we would have
0 4 : 4 7 20 to look at newly discovered evidence, ineffective assistance
0 4 : 4 7 21 of counsel, *Brady* violations, and other -- others.

0 4 : 4 7 22 But those three are the big ones. And ineffective
0 4 : 4 7 23 assistance is something that we always look at. So we
0 4 : 4 7 24 have -- we have actually -- I guess I have formed an opinion
0 4 : 4 7 25 that there was ineffective assistance of counsel in a number

1 of those cases, so we looked at the record.

2 Recently we've -- since the inception of the
3 clinic, we've looked at over 2300 cases, and we have maybe
4 150 pending. So overwhelmingly, we reject cases. And we
5 believe that about 500 of those potentially involved
6 ineffective assistance and we decided not to pursue those
7 claims. Ineffective assistance would have been one of the
8 things.

9 We have currently, in litigation with
10 post-conviction motions, I think seven or eight cases in
11 which ineffective assistance is one of the claims that we've
12 made.

13 Q. So you have been asked to review and found that
14 there was not ineffective assistance of counsel in several
15 hundred cases?

16 A. Yeah. Most of the time, we find that there was
17 not.

18 I mean, I think probably those numbers would say
19 overwhelmingly most of the time we find that there's not,
20 yeah.

21 Q. And is that because the Supreme Court standard for
22 *Strickland* allows, in addition to applying the standard of
23 the prevailing norms of professional practice, allows
24 counsel broad latitude to make strategic decisions about
25 their cases?

0 4 : 4 8 1 A. Sure.

0 4 : 4 8 2 Q. I want to go claim by claim with your opinions.

0 4 : 4 8 3 But before we dive in, I do want to talk a little bit more
0 4 : 4 9 4 about the ABA Guidelines which you have included in your
0 4 : 4 9 5 report.

0 4 : 4 9 6 Why are the standards higher for capital cases?

0 4 : 4 9 7 A. The standards are higher for capital cases because
0 4 : 4 9 8 the stakes are higher. Mr. Oldham said it the other day,
0 4 : 4 9 9 actually, because it's the finality of the case if somebody
0 4 : 4 9 10 gets the death penalty. And so -- and it's also just more
0 4 : 4 9 11 complex litigation.

0 4 : 4 9 12 You know, so in a regular -- regular criminal
0 4 : 4 9 13 case, you're looking at guilt-innocence issues, you are also
0 4 : 4 9 14 investigating -- looking down the road towards -- if
0 4 : 4 9 15 somebody's convicted, you need to know what the mitigating
0 4 : 4 9 16 factors are, statutory mitigating, statutory aggravating
0 4 : 5 0 17 factors.

0 4 : 5 0 18 But it's much more complicated in death penalty
0 4 : 5 0 19 cases for several reasons, one of which -- which is, you
0 4 : 5 0 20 know, the law is that only people who will say to the Court
0 4 : 5 0 21 that they can consider giving the death penalty are allowed
0 4 : 5 0 22 to be on a jury because otherwise they can't follow the law.

0 4 : 5 0 23 And so there's -- it's like a prescreened -- well,
0 4 : 5 0 24 it's a screened group of people, you know, that in many
0 4 : 5 0 25 ways -- nowadays, it's even less than 50 percent of the

0 4 : 5 0 1 people that come in for jury duty. A lot of people are
0 4 : 5 0 2 excused for that. So it's already starting out with a
0 4 : 5 0 3 reduced population of potential jurors, which some studies
0 4 : 5 0 4 have shown can increase conviction proneness of a jury.

0 4 : 5 0 5 And then the other thing is -- because as you go
0 4 : 5 0 6 through with -- jury selection is a huge part. I mean, many
0 4 : 5 0 7 would say cases rise and fall on jury selection. And so
0 4 : 5 1 8 that's a huge part.

0 4 : 5 1 9 So a death penalty trial is a three-part
0 4 : 5 1 10 proceeding, sometimes four if there's an intellectual
0 4 : 5 1 11 disability. But jury selection can take a while. Then
0 4 : 5 1 12 there's the guilt phase. And then there's -- if he's
0 4 : 5 1 13 convicted -- if he or she is convicted of first-degree
0 4 : 5 1 14 murder, you go into the sentencing phase right away.

0 4 : 5 1 15 And one must always be cognizant -- as you go
0 4 : 5 1 16 through jury selection, opening statement, and all of the
0 4 : 5 1 17 guilt phase, you have to be cognizant of where could this
0 4 : 5 1 18 leave your client if you end up in the death penalty phase.

0 4 : 5 1 19 So it's -- you're having to think and think and
0 4 : 5 1 20 doublethink about a lot of things, you know. And so
0 4 : 5 1 21 that's -- that's what's different.

0 4 : 5 1 22 And then it's -- it's also -- it is -- there's a
0 4 : 5 2 23 higher degree of stress for those who participate.

0 4 : 5 2 24 And I have actually done a study of capital
0 4 : 5 2 25 defense lawyers that was more along the lines of what

1 Mr. Vlahos was asking me, you know, in terms of

2 peer-reviewed study, work with psychologists to study, you

3 know, the impact of trauma on capital defense attorneys.

4 And as you go farther into the work, usually over

5 15 years do this kind of work, there's a certain amount of

6 secondary trauma that, you know, can create stress and

7 affect judgment.

8 So we have to not only take care of ourselves but

9 take care of our clients.

10 There are many more experts that get involved in

11 capital cases.

12 So I would say, in my experience, a case that

13 either goes to trial or gets to the point of trial, maybe

14 isn't a plea, we're working with, you know, maybe sometimes

15 even a dozen experts, usually maybe eight or so.

16 Because you got -- you always have a mitigation

17 specialist. Usually a psychologist. Depending on the --

18 depending on the records and mental health of the person,

19 you might have a psychiatrist, neuropsychiatrist. Different

20 specialties you may need. You know, like one case, we had

21 an Alzheimer's situation, so we had experts with that.

22 My point is that there's -- there are more experts

23 that you might need. And it's just like a flowchart. If

24 you find this, then you've got to do that. If you don't

25 find this, then you don't. So there's a lot more

0 4 : 5 3 1 complexity.

0 4 : 5 3 2 And in many ways, the -- the evidence merges
0 4 : 5 3 3 between the first and second phases because, as we know,
0 4 : 5 3 4 the -- all of the evidence from the first phase of the trial
0 4 : 5 3 5 is considered evidence in the sentencing phase. The state
0 4 : 5 3 6 doesn't have to re-introduce all of that. And so lots of
0 4 : 5 4 7 considerations there.

0 4 : 5 4 8 And then -- then there's just your basic crime
0 4 : 5 4 9 scene investigation and the discovery. It used to be you'd
0 4 : 5 4 10 end up with more discovery in capital cases just because
0 4 : 5 4 11 people were trying to be more careful, but there was a lot
0 4 : 5 4 12 of problems.

0 4 : 5 4 13 This was a -- this case was a pre-open discovery
0 4 : 5 4 14 case. Open discovery wasn't created until October 1st of
0 4 : 5 4 15 2004.

0 4 : 5 4 16 MR. VLAHOS: Objection. Just a clarification of
0 4 : 5 4 17 what "this case" is. Mr. Allen's case?

0 4 : 5 4 18 THE COURT: Sustained.

0 4 : 5 4 19 A. So, yeah, I know I'm giving you a long answer.
0 4 : 5 4 20 I'm just trying to explain why death penalty cases are
0 4 : 5 4 21 different for lots of those reasons.

0 4 : 5 4 22 And on top of that, what we have found is a lot of
0 4 : 5 4 23 our clients have certain mental health issues with just
0 4 : 5 4 24 being in a situation where you're charged with murder. And,
0 4 : 5 5 25 you know, I mean, a lot of people -- a lot of people that

0 4 : 5 5 1 are charged actually did it, and they're guilty, and we're
0 4 : 5 5 2 trying to figure out why. And so there's lots of that.

0 4 : 5 5 3 And then, you know, for the -- a good percentage
0 4 : 5 5 4 that are claiming innocence, there's a lot more work on
0 4 : 5 5 5 the -- you know, on the front end of the guilt phase. All
0 4 : 5 5 6 of it -- the guilt phase work still has to be done
0 4 : 5 5 7 regardless of what the person says. But it's just a lot
0 4 : 5 5 8 more complexity, I would say.

0 4 : 5 5 9 Q. Do the ABA Guidelines themselves say that the
0 4 : 5 5 10 standard is higher for capital cases?

0 4 : 5 5 11 MR. VLAHOS: Objection to what the ABA Guidelines
0 4 : 5 5 12 say.

0 4 : 5 5 13 THE COURT: Is this a part of your education,
0 4 : 5 5 14 training, or experience, sir, that you base your opinions
0 4 : 5 5 15 on?

0 4 : 5 5 16 THE WITNESS: Right. Yes, sir.

0 4 : 5 5 17 THE COURT: Overruled.

0 4 : 5 5 18 A. And I have it in my report -- I think we're
0 4 : 5 5 19 looking at guideline 11.2 on page 5, Your Honor. Sort of
0 4 : 5 6 20 the third guideline, 11.2, minimum standards not sufficient.

0 4 : 5 6 21 And it reads in part A: Minimum standards that
0 4 : 5 6 22 have been promulgated concerning representation of
0 4 : 5 6 23 defendants in criminal cases generally, and the level of
0 4 : 5 6 24 adherence to such standards required for noncapital cases
0 4 : 5 6 25 should not be adopted as sufficient for death penalty cases.

0 4 : 5 6 1 And then in section B: Counsel in death penalty
0 4 : 5 6 2 cases should be required to perform at the level of an
0 4 : 5 6 3 attorney reasonably skilled in the specialized practice of
0 4 : 5 6 4 capital representation, zealously committed to the capital
0 4 : 5 6 5 case, who has had adequate time and resources for
0 4 : 5 6 6 preparation.

0 4 : 5 6 7 And these are the -- I was referring, as shown on
0 4 : 5 6 8 page 3, to the 1989 version of the ABA Guidelines for the
0 4 : 5 7 9 appointment and performance of counsel in death penalty
0 4 : 5 7 10 cases.

0 4 : 5 7 11 **THE COURT:** Ms. Warren, I'm going to stop. We're
0 4 : 5 7 12 close enough to the end of the day. Just mark your spot.

0 4 : 5 7 13 And thank you very much, sir. The witness may
0 4 : 5 7 14 step down.

0 4 : 5 7 15 Please recess us until 9:30.

16 (Court recessed on Wednesday, September 25,
17 2024, until Thursday, September 26, 2024, at
18 9:30 a.m.)

19 (Volume 3 of 9.)
20
21
22
23
24
25