

State of North Carolina,)
)
) Plaintiff,) Montgomery County
) 99CRS3818
) 99CRS3820
)
 v.)
)
)
) Scott David Allen,
)
)
) Defendant.)

Judy Runes, CRR
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(Superior Court of Montgomery County
commenced session on Monday, September 23,
2024, before the Honorable Kevin M. Bridges.)

09 : 59 **THE COURT:** Good morning, everyone, and welcome to
09 : 59 this special session of Criminal Superior Court for
09 : 59 Montgomery County.

09 : 59 **MS. WARREN:** Good morning, Your Honor.

09 : 59 **THE COURT:** All right. We're here to address
09 : 59 State of North Carolina versus Scott David Allen, file
09 : 59 numbers 99 CRS 3818 and 3820.

10 : 00 And can we have Mr. Allen brought out, please?

10 : 00 (Defendant entered the courtroom.)

10 : 01 **THE COURT:** Would the attorneys for the defendant
10 : 01 please identify yourselves for the record.

10 : 01 **MS. WARREN:** Good morning, Your Honor.
10 : 01 Olivia Warren for Mr. Scott Allen.

10 : 01 **MR. CHETSON:** And Damon Chetson, C-H-E-T-S-O-N,
10 : 01 for Mr. Allen.

10 : 01 **THE COURT:** Thank you.

10 : 01 And would the attorney for the state please
10 : 01 identify yourself for the record.

10 : 01 **MR. VLAHOS:** Your Honor, I'm Nick Vlahos, Special
10 : 01 Deputy Attorney General, North Carolina Department of
10 : 01 Justice, for the state.

10 : 01 **THE COURT:** All right. As a preliminary matter,

1 the attorneys are aware that I ruled on some defense motions
2 recently, and I directed Attorney Vlahos to prepare the
3 proposed orders.

4 I understand that Mr. Vlahos emailed the draft of
5 the proposed orders to defense counsel and that defense
6 counsel agreed that the orders could be submitted to the
7 Court, but you reserve the right to put some matters on the
8 record. And I'll let you do that now if you would like.

9 **MR. CHETSON:** That's correct, Your Honor. Just
10 very briefly.

11 We filed three motions. The first motion that
12 I'll address is with respect to the clothing issue. And I
13 will let the Court know -- and I can mark this as
14 defendant's exhibit -- since we've already previously marked
15 other exhibits, I'm going to mark it as Exhibit 8.

16 May I approach?

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

18 Let the state see it.

19 **MR. CHETSON:** And, Your Honor, these are some
20 photographs of other, effectively, inmates at the time being
21 brought to post-conviction hearings, one in 2012, one just
22 earlier this year in Johnston County in 2024, that were
23 permitted to be dressed in civilian clothing.

24 We understand that there is no statutory right to
25 have somebody who has been convicted appear before a

1 court -- or before a court in civilian clothing; that
2 statutory right exists with respect to a jury.

3 Nonetheless, we believe there are significant due
4 process issues and dignity issues. And we respect the
5 dignity of this courtroom and the fact that we're here on a
6 very solemn purpose, which is to adjudicate an issue with
7 respect to Mr. Allen's claims regarding his violation of
8 Constitutional rights.

9 And we would urge the Court to have -- we will
10 take exception to the Court's order, understand that the
11 Court has ruled, but we believe, in a setting like this, it
12 would have been appropriate for him -- Mr. Allen to have
13 been permitted to wear civilian clothing.

14 We also think that that affords him not only
15 dignity, the Court dignity, but also his comfort.

16 And we know that the Court will not take into mind
17 the fact that he is a prisoner in evaluating these claims;
18 but nonetheless, it's important for the importance of the
19 proceeding that we're going through.

20 **THE COURT:** I will certainly not take into
21 consideration the fact that he is in custody.

22 **MR. CHETSON:** Yes, sir.

23 **THE COURT:** I'll also note for the record that the
24 defendant is wearing a gray pullover shirt and some white
25 pants. He's not dressed in an orange jumpsuit. He's not

1 dressed in a jumpsuit with black and white stripes. He
2 looks very similar to many people who appear in the audience
3 during criminal sessions of superior court.

4 I'll let the state be heard further if you'd like.

5 **MR. VLAHOS:** Nothing further than the response
6 we've already filed, Your Honor.

7 **THE COURT:** So noted.

8 Anything further for -- and I did not ask the
9 state.

10 Did you have any objection to Defendant's
11 Exhibit 8?

12 **MR. VLAHOS:** No objection, Your Honor.

13 **THE COURT:** Defendant's Exhibit 8 is received into
14 evidence for purposes of this hearing.

15 **MR. CHETSON:** Thank you, Your Honor.

16 **THE COURT:** Anything further?

17 **MR. CHETSON:** Yes, Your Honor.

18 With respect to the -- what I'll call the two
19 discovery motions.

20 One was a *Giglio* motion -- essentially,
21 effectively a *Giglio* motion. That is to say, for the state
22 to turn over the -- any impeaching information that it may
23 have in its personnel records or files.

24 We understand that those rulings relate to trial
25 rights. Nonetheless, both under our MAR statute, which has

1 fairly broad discovery provisions, and the fact that the
2 state -- and the fact the principles of due process do
3 persist here at this hearing, we believe it would have been
4 essential for us to be able to know if there was any
5 impeaching information contained in the state's files. And
6 the state is the sole custodian of those. And the state is
7 choosing to call these witnesses.

8 It is essential for our cross-examination to be
9 able to know if there are any things that we can use to --
10 to challenge the credibility of those individuals to ensure
11 that we come to a full understanding of the evidence
12 presented here.

13 So for due process grounds both for state and
14 federal purposes, that is, the Fifth, Sixth, Fourteenth
15 Amendments to the United States Constitution, and the
16 North Carolina Constitution, Article 1, Sections 19, 21, and
17 23, we would ask that one -- both those motions,
18 particularly with respect to the *Giglio* matter, that we --
19 that we are provided evidence from the state's files that
20 could be potentially used to impeach or challenge the bias
21 of any witnesses, law enforcement witnesses, or state's
22 witnesses that are called to testify.

23 **THE COURT:** Anything further for the state?

24 **MR. VLAHOS:** Your Honor, just to put on the
25 record, besides the response -- just to put on the record,

1 if I ran into any impeaching information while discussing --
2 or discussing about a former law enforcement officer that's
3 to testify as a witness at this hearing, I got another law
4 enforcement officer, we went out there -- a current law
5 enforcement officer, we went out there, took a statement.
6 That happened twice. And I turned them over to the defense.
7 So that's the only extra thing the state has to argue other
8 than its responses it's already filed.

9 **THE COURT:** Thank you.

10 Mr. Chetson, anything else?

11 **MR. CHETSON:** No, Your Honor. That's all.

12 **THE COURT:** Ms. Warren, anything for you?

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

14 **THE COURT:** I understood also that Attorney Vlahos
15 mailed the orders -- a hard copy of the orders along with a
16 return envelope to my office. I never received that. It
17 may be in the mail today for all I know.

18 But since I did not receive that, and I did not
19 want to delay the filing of these orders, I printed them
20 yesterday, after reviewing them, and signed them.

21 So at this point, I will have the clerk file stamp
22 the orders.

23 And I will ask Attorney Vlahos, how many copies do
24 you want, sir?

25 **MR. VLAHOS:** Your Honor, one for the state, one

1 for the defense.

2 THE COURT: So you just need two?

3 MR. VLAHOS: Yes, sir.

4 THE COURT: All right. Madam Clerk, at your
5 convenience, I would direct you to file stamp the three
6 orders that I have signed. And I will ask you to make --
7 after you file the orders, to make three copies and return
8 two to Mr. Vlahos and one to me.

9 THE CLERK: Yes, sir.

10 THE COURT: Thank you very much.

11 Are there any other preliminary matters at this
12 time?

13 MS. WARREN: Your Honor, before the parties make
14 what we hope will be brief opening statements, may we
15 approach on a scheduling matter very quickly?

16 THE COURT: Only a scheduling matter?

17 MS. WARREN: Yes, Your Honor.

18 THE COURT: Yes, you may.

19 MS. WARREN: Thank you.

20 (Bench conference, not reported.)

21 THE COURT: Are there any preliminary matters for
22 the state?

23 MR. VLAHOS: Your Honor, there is one matter.
24 It's -- the transcripts in this trial, being all the trial
25 transcripts, and there was two evidentiary hearings in this

1 case -- one was a limited evidentiary hearing and one was a
2 full evidentiary hearing -- PDF copies of all those
3 transcripts, I put them on a flash drive and I've given them
4 to the defense as well so that they can check it over.

5 We're going to ask that those be entered into
6 evidence at some point. And the issue we were discussing,
7 does the Court wish it to be the Court's exhibit, or would
8 you like us to introduce it during -- I intend to introduce
9 it. And I'll let Ms. Warren be heard on the defendant's
10 position about my trying to introduce it.

11 **MS. WARREN:** Your Honor, our position is that the
12 transcripts are a part of the record in this case, as are
13 all of the filings and pleadings since 1999.

14 But we do think, for the Court's convenience and
15 for the parties', that providing them on one flash drive for
16 everybody's convenience would be helpful, and we would
17 propose that those be marked as a Court's exhibit.

18 I believe both parties have exchanged witness
19 lists and proposed exhibits several weeks ago, and we've
20 been in close communications. I expect that both parties
21 will introduce portions of the transcript to discuss with
22 witnesses that we will mark as separate exhibits.

23 I think we both agree that the full transcripts
24 should be available to Your Honor and are -- should either
25 be admitted as exhibits or considered part of the record.

1 Again, we're happy to provide them in a convenient form.

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

3 THE COURT: I certainly would proceed under the

4 assumption that the transcripts are a part of the record.

5 And if you need to identify certain parts of it, I guess it

6 would be appropriate for ease and efficiency for you to

7 designate that as some exhibit and introduce that.

8 But, of course, I would review any portion of the

9 transcript that I feel necessary, whether it was brought to

10 my attention as an exhibit or not.

11 So anything else for --

12 MR. VLAHOS: No, Your Honor.

13 THE COURT: Okay. Then at this point, I will ask

14 if the attorneys for the defendant would like to make an

15 opening statement.

16 MR. CHETSON: We would, Your Honor.

17 THE COURT: You may proceed.

18 MR. CHETSON: Thank you, Your Honor. May it

19 please the Court.

20 In November 2003, Scott Allen's trial, the trial

21 court called the state's prosecution a joke. It was a joke

22 because it relied almost exclusively on the testimony of

23 Vanessa Smith, Scott's girlfriend. She was the essential

24 witness to say that Scott was the one who had killed

25 Chris Gailey. She was the key to the state's theory of the

1 case.

2 But Vanessa Smith should not have been believed.

3 And had Scott received the effective assistance of counsel,

4 she would not have been believed.

5 Vanessa Smith and Scott Allen were arrested in

6 July of 1999 in the murder of Chris Gailey in the national

7 forest.

8 Ms. Smith, who is since deceased, ultimately

9 alleged that Scott Allen killed Chris Gailey as she, Scott,

10 and Mr. Gailey walked single file down a narrowing path in

11 the forest.

12 She said that the three had gone out in search of

13 stolen weapons at a cabin in the forest in order to trade

14 those weapons for money or drugs.

15 She said that, as they walked, Scott ambushed

16 Mr. Gailey, first by pushing her back and then shooting

17 Mr. Gailey, who was walking in the lead of the column of

18 folks walking down this path, which she implied was narrow,

19 in the forest.

20 She alleged that she and Scott listened to

21 Mr. Gailey moan for hours in pain. Ultimately, she alleged,

22 that hours later, as she and Scott were leaving the area,

23 she heard Mr. Gailey firing his .45 caliber handgun until it

24 was empty.

25 The problem with Vanessa Smith's testimony is that

1 in all its particulars, it was wrong. And her story was
2 contradicted by the physical evidence collected from the
3 crime scene. She was biased; she was biased to lie against
4 Scott, and she provably lied against Scott in the past.

5 First, Mr. Gailey's body was found on a path that
6 was ten feet wide. It was not narrow at all. There was no
7 reason to believe Ms. Smith's story that the three had
8 walked in a single file line before the shooting.

9 Second, there was no shortage of funds. No need
10 to believe Ms. Smith when she said that the three had gone
11 out in search of stolen firearms to sell. \$1,900 was found
12 in cash on Mr. Gailey's body.

13 Mr. Gailey did not moan for hours. Dr. Butts, the
14 medical examiner, testified at trial that, given the wounds,
15 Mr. Gailey would have died very quickly, having bled out
16 from the wounds.

17 Other facts about the crime scene demonstrated
18 that there was no ambush. Mr. Gailey had removed his shirt
19 and placed a rock on top of it.

20 A knife with bloodstains was found laying on top
21 of a gym bag near the victim. Live .45 caliber rounds were
22 found. Mr. Gailey's .45 caliber gun was jammed.

23 Vanessa Smith's story, in all its -- or many --
24 most of its particulars, was fabricated. It did not comport
25 with the evidence.

1 Furthermore, in light of the fabrications, there
2 was no reason for jurors to have believed Vanessa Smith when
3 she and Scott Allen -- when she said that Scott Allen had
4 committed the murder.

5 But the jurors did not get to hear this. Trial
6 counsel failed to adequately cross-examine Ms. Smith about
7 the remarkably obvious discrepancies between her story and
8 the facts. They failed to give the jurors any reason to
9 doubt her when she ultimately said, as the key witness on
10 behalf of the state, that Scott had committed this murder.

11 Had the jurors known that, in almost all of the
12 particulars, she had fabricated the story or outright lied
13 with nearly every particular of the story, there is a fair
14 probability that they would not have believed Vanessa Smith
15 when she told them the bald-faced claim that Scott Allen was
16 responsible for the crime.

17 Furthermore, trial counsel failed to cross-examine
18 Vanessa Smith about the lies that she had previously told
19 about Scott Allen, and trial counsel failed to cross-examine
20 Vanessa Smith about a letter that trial counsel had in their
21 possession and which they believed to be from Vanessa Smith
22 in which she promised to help Scott exonerate himself.

23 This was not complicated stuff. This was basic
24 trial work that should have been performed by two
25 long-practicing lawyers.

1 This was about using the standard tools of a
2 criminal defense lawyer to show that the state's lead
3 witness -- in fact, its key witness as to the identity of
4 the killer -- had lied in the past, had reason to save her
5 own skin through a plea bargain she had worked out with the
6 state, and was lying to the jury about critical facts about
7 what had occurred.

8 Had jurors known about Ms. Smith's past lies, the
9 extent of her lies regarding the events surrounding
10 Mr. Gailey's death, the full extent of the deal that had
11 been worked out with her to save her own skin, and her
12 changing stories, there's a fair probability that Scott's
13 outcome would have been different.

14 In order to establish an effective assistance of
15 counsel, you need to establish the two prongs of the
16 *Strickland* test: Deficiency and prejudice.

17 We must show that trial counsels' performance was
18 deficient in that it fell below the objective standard of
19 reasonableness.

20 And, second, we must show that Scott suffered
21 prejudice in that there's a reasonable probability that, but
22 for counsels' errors, the result would have been different.

23 Note that in this context, the Court must grant
24 Scott a new trial if we have shown that there's a reasonable
25 probability that a single juror would have changed his or

1 her mind had trial counsel been proficient.

2 At this hearing, while the evidence will be
3 presented as to all claims remanded to this Court by the
4 North Carolina Supreme Court in 2021, we will focus on the
5 following claims:

6 Which is claim 2, that trial counsel failed to
7 investigate or call witnesses and present key evidence;

8 Claim 3A, that trial counsel committed ineffective
9 assistance in its cross-examination of Ms. Smith as I've
10 described;

11 Claim 3C, that trial counsel committed ineffective
12 assistance in its cross-examination of Lieutenant
13 Barry Bunting;

14 Claim 3I, that trial counsel committed ineffective
15 assistance in failing to utilize a crime scene expert;

16 Claim 3L, that trial counsel committed ineffective
17 assistance in its cross-examination of Catha Wright, the
18 crime scene technician;

19 Claim 10, that the collective deficient
20 performance by trial counsel amounted to cumulative
21 ineffective assistance of counsel;

22 And claim 16, that the failure to present a
23 coherent argument for reasonable doubt amounted to
24 ineffective assistance of counsel.

25 Each of these claims are ineffective assistance of

1 counsel claims. And to the extent that we prove that trial
2 counsel were deficient and that there's a reasonable
3 probability that such deficiency would have changed one
4 juror's mind, Scott must be given a new trial.

5 Finally, we have raised a due process claim that
6 Scott Allen was shackled. We know this because jurors saw
7 Scott Allen shackled.

8 Once we establish that Scott Allen was shackled,
9 it becomes the state's burden to establish that Scott's
10 unconstitutional shackling was harmless beyond a reasonable
11 doubt.

12 While the failure of trial counsel to
13 cross-examine Vanessa Smith was certainly the most glaring
14 example of ineffective assistance of counsel, it was not the
15 only example.

16 Over the course of this hearing, we will provide
17 compelling and substantial evidence that trial counsel
18 failed to provide effective assistance that was
19 constitutionally owed Scott Allen.

20 At the conclusion, Ms. Warren will stand before
21 this Court and ask it to grant Scott Allen a new trial with
22 the promise of effective representation he is
23 constitutionally due.

24 Thank you, Your Honor.

25 **THE COURT:** Mr. Chetson, before you're seated, I

1 want to make absolutely certain of the claims that you
2 intend to address in the motions for appropriate relief.

3 Could you run through those claims again that you
4 intend to address?

5 **MR. CHETSON:** Yes, Your Honor.

6 I wanted to stress, when I said that, that we
7 are -- all claims are properly before this Court; however,
8 we will be focusing on those claims that I listed, so...

9 **THE COURT:** I misheard you.

10 **MR. CHETSON:** No worries. And I thank you for
11 raising that issue. I was speaking a little bit quickly.

12 But all claims are before this Court that have
13 been remanded to this Court, but we are focusing on those
14 claims, and that's what you will hear, the bulk of the
15 information that we provide and we think will be compelling.

16 **THE COURT:** Thank you for that clarification.

17 **MR. CHETSON:** Thank you, Your Honor.

18 **THE COURT:** Will there will be an opening
19 statement for the state?

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

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

22 **MR. VLAHOS:** May it please the Court.

23 I think the Court's aware that this case has a
24 convoluted procedural history. If Your Honor would like me
25 to put any of that on the record in opening statement, I can

1 if you wish.

2 But I wanted to focus for a moment on the claims,
3 because when Mr. Chetson was going over the claims just now,
4 there was one that I noticed that I have something different
5 down for than what Mr. Chetson was talking about.

6 He was talking about claim 3I, where he said
7 failure to call a crime scene expert. And I was under the
8 impression that claim 2 is a claim where -- did trial
9 counsel render ineffective assistance at the guilt phase by
10 failing to present evidence and call certain witnesses.

11 So he should -- the crime scene expert should fall
12 under 2.

13 In fact, 3I, part of it has already been ruled
14 upon, or a portion of it, by Judge Long.

15 And, Your Honor, I've got a -- what I've got for
16 an opening statement is a digital aid to the claims that may
17 be beneficial to the Court. I've already shown the defense
18 a copy. I am giving them copies today.

19 If I may approach?

20 **THE COURT:** You may.

21 **MR. VLAHOS:** Your Honor, just to be clear about
22 this. These are just my writings of, I think, the simplest
23 language I could come up with for the claims. And I
24 attempted to list people that are mentioned in the MAR, in
25 the supplemental MAR, and in the second supplemental MAR the

1 best that I could.

2 For instance, claim 2 -- claim 2, which is up at
3 the top, it's the first one that's still available because
4 claim 1 is gone.

5 Claim 2 is: Did trial counsel render ineffective
6 assistance in the guilt phase by failing to present evidence
7 and call certain witnesses?

8 That appears to be a two-part. And the certain
9 witnesses that were named in the pleadings, I listed.

10 And then the failure to present evidence may be
11 another issue.

12 I think at some point, this Court's going to have
13 to determine issues like that. Are we talking about just
14 these witnesses? Are we talking about a bigger picture?
15 Because it's going to affect all the evidence that the state
16 is going to be attempting to present here because the state
17 is defending all these claims and intends to put on evidence
18 on all of them, just to point that out to Your Honor.

19 And then it might be a good idea -- I just did
20 this as a visual aid to try to help everybody and keep us on
21 point.

22 Now, the part of -- the state's opening statement
23 is this: Eliminate, reconstruct, evaluate.

24 *Strickland* -- that Ms. Chetson rightly quoted --
25 or rightly cited to -- dictates that a fair assessment of

1 attorney performance requires every effort be made to
2 eliminate the distorting effects of hindsight, to
3 reconstruct the circumstances on counsel's challenged
4 conduct, and to evaluate the conduct from counsel's
5 perspective at the time.

6 That's what the state's going to seek to do with
7 this evidence, Your Honor.

8 What matters is not what the allegations say in
9 the pleadings; what matters is what did the person say at
10 the time. What did the lawyer say at the time? What did a
11 potential witness say at the time that the lawyers talked to
12 that the state did not? What was the actual physical
13 evidence? What did it look like?

14 Those things matter in these cases, and that's
15 what the state's going to focus on in its case. And because
16 of that, there's a large volume of information the state's
17 going to try to present in evidence, so we just ask for the
18 Court's patience.

19 Thank you, Your Honor.

20 **THE COURT:** Evidence for the defendant?

21 **MS. WARREN:** Yes, Your Honor.

22 At the outset, there are seven exhibits to which
23 the state has stipulated admission.

24 The first is Carl -- William Carl Atkinson's
25 deposition, including the transcripts, the admitted exhibits

1 from his deposition, and a video. That is marked as Defense
2 Exhibit 1 and is on a flash drive, which I have for the
3 Court, and I have provided to the state.

4 MR. VLAHOS: May I be heard on that, Your Honor?

5 THE COURT: Did you have anything else to say
6 about that at this time?

7 MS. WARREN: No, sir.

8 THE COURT: Then I will hear from you.

9 MR. VLAHOS: The state agrees, with the caveat
10 that I think Ms. Warren may be putting on the record that
11 the exhibits, there were times when we objected to the
12 truth, and we weren't introducing the exhibits for the
13 truth, but because trial counsel reviewed them or wrote
14 them, we would maintain those objections now.

15 In other words, they're not automatically to be
16 believed for their truth. They were questioned about
17 counsel because counsel had them.

18 And I think you'll see we'll be making similar
19 objections to exhibits that the Court needs to review but
20 that the truth can't come in because of the exhibit.

21 THE COURT: The objection from the state as to the
22 truth of the matter asserted in this Defense Exhibit
23 Number 1, that is noted for the record. And Defense
24 Exhibit 1 is received over those objections.

25 MS. WARREN: Thank you.

1 And, Your Honor, for the record, I will note that
2 the parties stipulated in both of trial counsels'
3 depositions, and we have agreed for the purposes of this
4 hearing that the parties agree that the documents that were
5 provided by the defense team to the state as trial counsels'
6 files, which trial counsel reviewed and certified that they
7 had reviewed and were their files, are admissible at this
8 hearing as trial counsels' files.

9 Both parties may have objections to hearsay
10 statements and the authenticity of those documents, but we
11 agree that they are relevant and admissible for the effect
12 that they had on trial counsel.

13 Is that correct?

14 **MR. VLAHOS:** That's correct, Your Honor.

15 **THE COURT:** That stipulation is so noted.

16 **MS. WARREN:** Thank you.

17 I also have Defendant's Exhibits 2 through 7.
18 These are certified copies of death certificates for the
19 following:

20 Defense Exhibit 2 is a certificate of death for
21 Jeffrey Keith Brantley.

22 Defense Exhibit 3 is a certified copy of death for
23 Vanessa Smith Brown nee Warner.

24 Defense Exhibit 4 is a certificate of death for
25 Carl Wilburn Atkinson.

1 Defense Exhibit 5 is a certificate of death for
2 Elmer Capel Jr.

3 Defendant's Exhibit 6 is a certificate of death
4 for Shirlene Ewing.

5 And Defendant's Exhibit 7 is a certificate of
6 death for Jeffery Lence Page.

7 And these have been stipulated to as well.

8 **MR. VLAHOS:** That's correct, Your Honor.

9 **THE COURT:** Those exhibits are received into
10 evidence.

11 **MS. WARREN:** Your Honor, would you like me to
12 approach the clerk now?

13 **THE COURT:** I would like you to approach me.

14 **MS. WARREN:** Thank you, Your Honor.

15 **THE COURT:** Thank you.

16 **MS. WARREN:** Apologies.

17 **THE COURT:** I will hand them to her.

18 Thank you very much.

19 **MR. CHETSON:** Yes, Your Honor. And then, moving
20 on to our next set of exhibits, those would be defendant's
21 exhibits -- marked as Defendant's Exhibits 9 and 10.

22 Defendant's Exhibit 9 is the Elmer Capel
23 affidavit. And it is from March 4th, 2013. And it is SMAR
24 exhibit -- so supplemental MAR Exhibit 52.

25 And Exhibit 10 is the Shirlene Ewing affidavit

1 from March 3rd, 2013. And it is the supplemental MAR
2 Exhibit 55. And that's Defendant's Exhibit 10.

3 So we would move to admit both of these exhibits
4 into evidence at this hearing.

5 **THE COURT:** Any objections to Defendant's
6 Exhibits 9 and 10?

7 **MR. VLAHOS:** Yes, Your Honor. Several.

8 **THE COURT:** I will hear you.

9 **MR. VLAHOS:** Your Honor, the -- first of all, the
10 state would object to the authenticity of the exhibits, the
11 fact that they're hearsay because they're being offered for
12 the truth of the matters asserted therein, and objection at
13 this point to lay a proper foundation, it's not a -- these
14 are not self-proving documents.

15 In addition to that, Your Honor, on each exhibit,
16 it appears that the first one, Elmer Capel, although the
17 affiant appears to have signed on March the 4th of 2013, the
18 notary sworn and subscribed before me for March in the year
19 2010 in Montgomery County, North Carolina. So on its
20 face --

21 **THE COURT:** What's that full date?

22 **MR. VLAHOS:** The first --

23 **THE COURT:** -- of the notary?

24 **MR. VLAHOS:** -- of the notary is sworn and
25 subscribed before me this the 4th day of March in the year

1 2010.

2 So on the face of the affidavit alone, the notary
3 notarized three years before the person -- the affiant came
4 to swear to it.

5 And the same thing occurs, Your Honor, on the
6 affidavit of Shirlene Ewing. In Shirlene Ewing's case, the
7 person who wrote their name on this signed it purportedly on
8 3/3 of '13, which is March the 3rd of 2013; however, the
9 notary stamp -- or the notary printing says, "Sworn and
10 subscribed before me this the 3rd day of March in the year
11 2010 in Montgomery County." So there's another three-year
12 gap.

13 And on the face of these documents -- which I saw
14 as the defense is giving it to you. On the face of the
15 document right now, they're inadmissible. They're not valid
16 affidavits.

17 **THE COURT:** I will hear from defense counsel
18 further.

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

20 So with respect to the scrivener's error,
21 regarding the -- it's clear that what was intended there was
22 3 March, but it's a pre-printed --

23 If I can approach, Your Honor?

24 **THE COURT:** No, you cannot. I'll hear you.

25 **MR. CHETSON:** Fair enough, Your Honor. I'll

1 describe it to the Court, then.

2 With respect to both of the notaries' stamps and
3 notary certifications on both of these forms, those were
4 obviously pre-printed. Those are typewritten, pre-printed
5 paragraphs. And what are left to be filled in are the month
6 of the year and then the date of the year.

7 And so it is evidently a scrivener's error. And
8 so what had happened, apparently -- and this was with
9 Mr. Waller -- who I will just proffer to the Court -- was an
10 investigator I believe for Mr. Unti, these are pre-printed
11 and then out of a -- out of a Word document brought to the
12 witness, and then the witness was just asked -- or the
13 notary in this case was just asked to fill in the month.

14 So that is a mere scrivener's error. So I think
15 if the Court finds that there were sufficient indicia of
16 reliability with respect to these documents, the Court can
17 overlook that scrivener's error and admit these documents.

18 **THE COURT:** Any further argument from the state?

19 **MR. CHETSON:** I would like to address --

20 **THE COURT:** I'm sorry. Continue.

21 **MR. CHETSON:** I would like to address the actual
22 substantive claims about the hearsay objections.

23 **THE COURT:** Sure.

24 **MR. CHETSON:** And that is to say that this
25 squarely falls under the residual hearsay clause, 804(b)(5)

1 of our Evidence Code.

2 And in evaluating whether the hearsay exception
3 applies under eight -- or the residual exception applies,
4 there's a six-part test.

5 And that six-part test is described at some length
6 in *State v. Triplett*, 316 N.C. 1, 1986 case, adopting the
7 six-part test for Rule 804(b)(5), the residual --

8 **THE COURT:** Give me that citation again, please.

9 **MR. CHETSON:** Yes, sir, Your Honor. *State v.*
10 *Triplett*, 316 N.C. 1, number 1, page 1, 1986. And it lays
11 out a six-part test.

12 The state has been on notice about these
13 affidavits. And in fact, these affidavits were actually
14 considered by a prior court in this case in 2015, '16.

15 The state has been on notice about these
16 affidavits for going on a decade. And that's actually the
17 first prong of the six-part test.

18 That no other exception applies is the second
19 prong.

20 And it's clear that present-sense impression and
21 other exceptions in 804(b)(1) through (4) do not apply in
22 this circumstance, and so we look to the residual exception.

23 The third and most important part of the test --
24 and this is enunciated as an important test -- element of
25 the test that needs to be applied by the Court -- comes from

1 *State v. Smith*, which is 315 N.C. 76. And it requires a
2 determination about the inherent reliability of the
3 statement being proffered.

4 And there are a number of reasons to think that
5 the Court should believe that this statement -- these
6 statements are inherently reliable.

7 The first is that both affiants are telling the
8 Court -- or telling the notary that -- or saying to the
9 lawyer, "Here is my belief about what I saw with respect
10 to..." and these go to the shackling claim.

11 And so they are giving their own visual
12 remembrance of what they had seen when they served as either
13 a juror or, in Mr. Capel's example, he was an alternate.

14 Second is that both jurors don't have a -- to use
15 the phrase -- dog in the fight. They are not participants
16 in some sort of dispute for which they are -- have -- their
17 own personal interest is at stake. They are opining about
18 something that they participated in and then they left as
19 part of their lives and no longer have any role in saying
20 what is the truth or not. They're just giving their belief
21 about what they saw.

22 There's no indication that either one of them ever
23 recanted the statement. And the fact that they were giving
24 this statement as part of the affidavit process, that is,
25 the swearing to it, it is not just a document that we are

1 bringing in but is done with all the -- all of the qualities
2 that involve sitting down and having a notary public sit
3 before you. That should suggest to the Court that these are
4 reliable statements.

5 Further, I'll just add, in this case, Your Honor
6 can -- we're not presenting these to a jury. So you can --
7 you can say they're worth something, they're worth nothing.

8 So we are not in a situation where a jury or
9 untrained minds are being asked to look at these documents
10 and asked to consider these documents.

11 I think they come in, even if Your Honor doesn't
12 consider them affidavits. So even if you were to say they
13 don't fit the technical requirements of an affidavit because
14 the scrivener's error just renders them void in that sense,
15 they're still statements.

16 And you have to think about what was going through
17 the minds of the people who were giving those statements at
18 the time, which is they believed that they were affidavits,
19 and so their mind was focused on telling the truth because
20 they understood that this was an important document that may
21 go to a Court. It was not some idle speculation about
22 whether Mr. Allen was shackled or not.

23 I do appreciate Mr. Vlahos having noticed that the
24 2010 is not 2013. I will say that -- I have been involved
25 in this case for about a year, but this is the first time,

1 to my knowledge, the state -- having had these documents for
2 a better part of a decade to -- for the state to now say,
3 well, actually -- and I understand they should have been
4 properly written, but to say at this point they're not
5 affidavits.

6 So I would ask that you admit them. If Your Honor
7 believes that they're not worth very much, that is a
8 separate question, and that's what Your Honor is there to
9 do.

10 But Scott Allen should not be prejudiced because
11 of a mistake by a notary public or an investigator a decade
12 ago that counsel now can't do anything about because both of
13 these individuals have passed away. And yet they have, you
14 know, information -- they believed they had information that
15 rang crucial to a fundamental Constitutional right that
16 Scott had.

17 So I would ask that you admit them and allow us to
18 proceed.

19 **THE COURT:** I will ask, regarding the contents of
20 these exhibits, is this information available to the defense
21 from any other source which you could obtain through
22 reasonable efforts?

23 **MR. CHETSON:** No, Your Honor.

24 **THE COURT:** Thank you.

25 Anything else for the state?

1 **MR. VLAHOS:** Yes, Your Honor. I'd like to be
2 heard on the six-part test.

3 **THE COURT:** I will hear you.

4 **MR. VLAHOS:** Your Honor, the first part of the
5 six-part test that the trial court must engage in, first
6 you've got to find the declarant unavailable. But we're not
7 challenging that. Both jurors have passed away by the death
8 certificates.

9 After finding unavailability, the first of the
10 six-part inquiry is determining whether proper notice of
11 intent to introduce hearsay evidence under the catchall
12 provision was duly given.

13 While the state has had these affidavits for
14 decades, we don't dispute that, but no notice has been sent
15 by the defense to the state that they intended to use them
16 at this hearing, like a written notice.

17 **THE COURT:** I'll let you go again.

18 **MR. VLAHOS:** I just wanted to put that on the
19 record.

20 **THE COURT:** No notice of intent to use this
21 evidence in this fashion was ever given to the state?

22 **MR. VLAHOS:** Not a written notice that's filed
23 with the Court, Your Honor, which I think is what's required
24 with the rule. I fully expected them to use it, I'll put
25 that on the record, but no written notice, as is required by

1 the rule.

2 THE COURT: So noted.

3 MR. VLAHOS: Also, with respect to what
4 Mr. Chetson was saying about the state's had it for more
5 than a decade, I understand that, but that doesn't help the
6 fact when I'm preparing for this hearing and digging through
7 all these files that I've got that I figure something out
8 that I didn't know before. So -- or that I don't think I
9 knew before. I've had this case for a long time.

10 Second, the trial judge mis-determined whether the
11 statement is specifically covered by any of the hearsay
12 exceptions enumerated in the Rules of Evidence. The state
13 does not believe it is.

14 Third, a hearsay statement may be admissible under
15 residual exception if it possesses, quote, circumstantial
16 guarantees of trustworthiness, unquote, equivalent to those
17 required for admission under the enumerated exceptions.
18 This has been called the, quote, most significant
19 requirement, unquote, of admissibility under the catchall
20 provision.

21 As far as the circumstance -- or trustworthiness
22 of these, Your Honor, I heard something today that I didn't
23 know before: The defense investigator notarized this. So
24 you've got defense attorneys probably typing these up for
25 these witnesses -- or these witnesses, the defense

1 investigator notarizing it, notarizing it wrong, and then
2 all the other factors around how this was signed. How many
3 times did they call the person? Was the person just trying
4 to get rid of them and sign the document just to get rid of
5 an attorney or investigator that kept going after them? We
6 don't know all those facts.

7 Circumstantial guarantees of trustworthiness of
8 other statements do not surround this one. This is a
9 document that is created for litigation. It is created to
10 support a claim and created to introduce into evidence at a
11 claim, and the state should have a fair chance to be able to
12 meet this by cross-examining the witnesses who are,
13 unfortunately, no longer with us.

14 Fourth, the trial judge must determine whether the
15 statement is offered as evidence of a material fact which is
16 being construed as a mere restatement of the requirement of
17 relevancy. The state doesn't dispute that.

18 Fifth, the statement is admissible only if it is
19 more probative on the point for which it is offered than any
20 other evidence which the proponent can procure through
21 reasonable efforts, sometimes called necessity requirement.

22 Your Honor, there's another witness that's
23 subpoenaed who has provided an affidavit who is here who was
24 an alternate juror. So I don't think that -- I don't think
25 that applies.

1 And finally, the Court must consider whether the
2 general purposes of the Rules of Evidence and the interests
3 of justice will best be served by admission of the statement
4 into evidence.

5 So it all has to do with fairness, Your Honor,
6 that fundamental fairness. And the state doesn't think it's
7 fundamentally fair that they be allowed to introduce these
8 unauthenticated statement-made-out-of-court documents when
9 not even on the face of the document is an accurate
10 affidavit.

11 And I know he's calling it a scrivener's error.
12 But, Your Honor, courts, notaries, all those folks are
13 trained that when you've got a date that's wrong, you
14 scratch it out and you write the correct date in.

15 So the state would argue these should not be
16 admitted into evidence.

17 **THE COURT:** All right. Now I will allow you to
18 approach, Mr. Chetson, with these exhibits so that I may
19 review them.

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

21 (Approached bench.)

22 **THE COURT:** Was there something else?

23 **MR. CHETSON:** I did want to offer to the Court,
24 Your Honor, one of the reasons for -- I mean, the key reason
25 for an affidavit to be an affidavit is to -- for the Court

1 to be sure the person -- the person who signed it is
2 actually the person.

3 And so I did want to let the Court know -- and
4 these have been in the state's files since the trial, which
5 is -- there were jury questionnaires with the signatures of
6 these two affiants.

7 And if Your Honor had a concern that the
8 scrivener's error then makes you not believe that the person
9 who signed them signed them, we can approach and -- mark and
10 approach with the two juror questionnaires that come out of
11 the original court file that have the signatures of the
12 affiants so that who you can compare them against what you
13 see.

14 **THE COURT:** You should do that.

15 **MR. CHETSON:** Thank you, Your Honor.

16 And I'm going to --

17 **THE COURT:** Do you want to mark those 9A and 10A,
18 maybe?

19 **MR. CHETSON:** That's fine. Yes, Your Honor.

20 So --

21 **THE COURT:** Capel 9A, Ewing 10A.

22 **MR. CHETSON:** Yes, Your Honor.

23 And then I would like to make one short point
24 about -- rebuttal to Mr. Vlahos -- I'm sorry.

25 **THE COURT:** Let him see that.

1 **MR. CHETSON:** One short point, Your Honor, about
2 the notice issue.

3 The rule of evidence does provide that a written
4 notice -- that written -- a written statement or written
5 document does need to be provided to the state. That is the
6 actual affidavit that was provided that the state has had
7 for, again, going on a decade and that was also noticed in
8 our defendant's potential hearing exhibits.

9 And case law on this issue is pretty clear that we
10 only need to provide a day's notice. That is to say that
11 there's case law in North Carolina -- and I'm happy to
12 give -- happy to give a citation on it -- where the courts
13 have held that if we provide -- if a party provides a day's
14 notice, that is sufficient.

15 The point of that -- the point of that,
16 Your Honor -- and it goes to the core of the rule, which is
17 we have to provide the opposing party a fair opportunity to
18 respond to the substance of the argument.

19 And I fully anticipate -- he's an excellent
20 lawyer -- that he's going to respond to the substance of
21 these documents.

22 But -- but we provided this potential hearing
23 exhibit list a week ago. And so the state has had plenty of
24 notice with respect to these exhibits, whether you count it
25 by a decade or a week.

1 **THE COURT:** One moment. I'll let you speak again
2 if you'd like, but one moment.

3 Mr. Vlahos, anything else on that issue?

4 **MR. VLAHOS:** No, Your Honor. Nothing further.

5 **THE COURT:** One moment.

6 All right. Let's see. With respect to
7 Defendant's Exhibits 9 and 10, which are affidavits, the
8 declarants are, in fact, unavailable. That issue is not
9 contested.

10 With respect to notice, based on the arguments of
11 counsel, Court will find and conclude that notice is
12 adequate to provide the state with the opportunity to meet
13 the evidence such that it would promote the interests of
14 justice to allow admission of these exhibits, especially
15 since they have had the document for a substantial period of
16 time.

17 I understand that written notice was not provided,
18 but there was some notice that would put the state on an
19 equal footing were it actually received by the Court. So
20 notice is satisfied.

21 There are no other hearsay exceptions that would
22 cover Defense Exhibits 9 and 10.

23 This is relevant to the issues regarding the
24 defense motions for appropriate relief.

25 This tendered evidence is more probative to the

1 points for which it is offered than any other evidence that
2 is reasonably available.

3 I will also note that although the state contends
4 there is another source for some similar evidence, that
5 would not be the same as the evidence -- or close enough to
6 the evidence that is being offered because individuals
7 perceive and recount events differently, and I believe that
8 the remembrances of the affiants would be unique, and so
9 there are no other sources from which this particular
10 evidence could be obtained.

11 Court has taken a look at the jury questionnaires
12 which have been tendered by the -- or at least the relevant
13 portions of the jury questionnaires of these two affiants
14 contained in Defense Exhibits 9A and 10A.

15 The Court does not hold itself out to be a
16 handwriting expert or have any expert training in
17 determining signatures, but, as a layperson, I will state
18 that it does appear that the signatures contained in Defense
19 Exhibits 9 and 9A are, in fact, similar. Likewise, the
20 signatures affixed to Defense Exhibits 10 and 10A are, in
21 fact, similar.

22 Court will conclude that these exhibits do contain
23 guarantees of trustworthiness based on the similarity of the
24 signatures; the fact that the people did, in fact, appear
25 before a notary in order to adhere to the formalities of

1 making a sworn statement; and it does appear most likely
2 that this is, in fact, a scrivener's error.

3 So the Court will determine that these exhibits
4 are admissible, that the Court will determine the weight to
5 be given to these -- to this evidence, but they are, in
6 fact, admissible.

7 So the Court will receive Defense Exhibits 9 and
8 10 and concurrently 9A and 10A over objection.

9 Next?

10 **MS. WARREN:** Your Honor, the defense will be
11 calling our first witness, but I would ask for a five-minute
12 break if we may.

13 **THE COURT:** We will take a ten-minute recess.

14 **MS. WARREN:** And I believe counsel will discuss
15 with the bailiffs a request from our client during the
16 recess.

17 **THE COURT:** Is ten minutes sufficient for each
18 recess? Normally, I do 15.

19 **MS. WARREN:** I think ten is sufficient,
20 Your Honor.

21 **THE COURT:** Ten-minute recess. All right.

22 (Recess.)

23 **THE COURT:** Let the record reflect that the
24 defendant, Mr. Allen, is present in the courtroom with his
25 lawyers.

1 And the defendant may proceed.

2 MS. WARREN: Thank you, Your Honor.

3 I do want to note for the Court that I did hear
4 from some members of the public in the audience that they
5 are having difficulty hearing us and asked if our
6 microphones could be turned up louder.

7 THE COURT: Will you please turn up the
8 microphones, sir, if you can.

9 THE BAILIFF: AOC has to do that.

10 THE COURT: You know what I know. I made the
11 attempt.

12 MS. WARREN: I wanted to communicate the request.

13 THE COURT: Apparently, the county does not govern
14 that, but AOC does. So just speak up, and, hopefully, they
15 can hear a little better.

16 You may proceed.

17 MS. WARREN: Thank you, Your Honor.

18 The defense calls Tanya Tennille Hussey.

19 THE COURT: Have her come and be sworn, please.

20 If you'll place your left hand on the Bible --
21 watch your step. Left hand on the Bible, raise your right
22 and face Madam Clerk.

23 TANYA TENNILLE HUSSEY,

24 having been first duly sworn,

25 testified as follows:

1 THE WITNESS: Yes.

2 THE COURT: Please have a seat. Make yourself
3 comfortable. And speak into the microphone. Try to keep
4 your voice up.

5 You may proceed.

6 BY MS. WARREN:

7 Q. Good morning, Ms. Hussey.

8 A. Good morning.

9 Q. Would you please state your name and spell it for
10 the record.

11 A. It's Tanya Tennille Hussey. Do you want me to
12 spell it all?

13 Q. Yes, please.

14 A. T-A-N-Y-A; and Tennille is T-E-N-N-I-L-L-E; and
15 Hussey, H-U-S-S-E-Y.

16 Q. Ms. Hussey, where were you living in 2003?

17 A. In Star off of Mabe Road.

18 Q. Is that in Montgomery County?

19 A. Yes.

20 Q. Approximately how old were you in 2003?

21 A. 27.

22 Q. And were you called for jury duty in this case?

23 A. Yes.

24 Q. Had you ever been on a jury before?

25 A. No.

1 Q. Were you surprised when you were selected for the
2 jury in Scott Allen's case?

3 A. Yes.

4 Q. You were an alternate juror?

5 A. Yes.

6 Q. Did the trial take place here in
7 Montgomery County, in this courtroom?

8 A. No.

9 Q. Where did it take place?

10 A. In Randolph County.

11 Q. How did you get to the courthouse in Asheboro
12 every day?

13 A. They -- a sheriff's deputy transported us from
14 here to Randolph County.

15 Q. And by us, do you mean you and the members of the
16 jury?

17 A. Yes.

18 Q. Did you ever see Scott Allen outside of the
19 courtroom during this trial?

20 A. No.

21 Q. And you saw him in the courtroom?

22 A. Yes.

23 Q. What did you notice about Scott's appearance
24 during the trial?

25 A. I mean, nothing -- I mean, other than tattoos

1 or -- I mean, that was -- I remember his head was shaved.

2 Q. Did you notice whether Scott had any restraints
3 on, like handcuffs?

4 A. I can recall one time, I think he was maybe
5 writing to his lawyer or something, and he lifted up his
6 hands, and you can tell he had handcuffs on.

7 Q. And are you making a gesture of your wrists
8 together as if you have handcuffs on, for the record?

9 A. Yeah. I'm sorry.

10 Q. Do you remember that one of the witnesses at trial
11 was Scott's ex-girlfriend?

12 A. Yes.

13 Q. Do you remember that her name was Vanessa Smith?
14 Does that ring a bell?

15 A. I'm going to be honest. I don't remember names.
16 I can't even tell you what she looked like.

17 Q. Did you believe her testimony?

18 MR. VLAHOS: Objection.

19 THE COURT: Sustained.

20 MS. WARREN: Your Honor, if I may be heard on
21 that?

22 THE COURT: You may be.

23 MS. WARREN: Thank you.

24 Ms. Hussey is -- was not a deliberating juror, and
25 nothing about this testimony would impeach the verdict. I

1 believe it is admissible and relevant to issues, including
2 issues of prejudice.

3 **THE COURT:** I'll let the state respond.

4 **MR. VLAHOS:** Your Honor, it's irrelevant because
5 she wasn't a deliberating juror. And if she was a
6 deliberating juror, then it would be protected under the
7 rules against impeaching the verdict under those rules.
8 Under this specific situation, it's probably both.

9 I mean, she's -- they're presenting her to try to
10 impeach the verdict that this jury reached because she was
11 there listening to the same evidence.

12 So I'd argue under both the rule of
13 non-impeachment and under the fact that she did not
14 deliberate and, therefore, her opinion on whether the -- to
15 believe or not believe a witness or whether the state proved
16 its case or not is irrelevant.

17 **THE COURT:** Ms. Warren, any further argument on
18 this issue?

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

20 **THE COURT:** The objection is sustained.

21 **MS. WARREN:** No further questions.

22 **THE COURT:** Any cross-exam?

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

24 **BY MR. VLAHOS:**

25 **Q.** Ms. Hussey, you said this was your first time

1 being a juror; is that correct?

2 A. Correct.

3 Q. Okay. So not in any federal court, state court,
4 any court had you ever served as a juror before?

5 A. No.

6 Q. And you were an alternate juror; is that right?

7 A. Correct.

8 Q. So you took no part in either deliberation, not
9 the guilt-innocence phase or the sentencing phase, did you?

10 A. No.

11 Q. You didn't go back there --

12 THE COURT: I'm sorry. Could you speak louder,
13 please?

14 THE WITNESS: I'm sorry. No.

15 THE COURT: Thank you.

16 Q. So you didn't go back there and discuss the case
17 with the jurors when they went back and deliberated either
18 time; is that correct?

19 A. No. They -- in the -- in the end, when they were
20 going -- when they were making their decision, myself and
21 another alternate went to a separate room.

22 Q. Okay. And you talked to the defense in this case
23 sometime around 2021; is that correct?

24 A. I don't recall the dates.

25 Q. Okay. And did they -- did they find you or did

1 you go to them?

2 A. They found me.

3 Q. They found you. Okay. So...

4 And this is several years after the trial, it was
5 in 2003, and it was more than a decade after the trial; is
6 that right?

7 A. Right.

8 Q. Okay. And when they found you, what did they do?

9 A. They just asked me if I remembered the case. And,
10 I mean, who wouldn't? It was unforgettable, you know?

11 Q. Do you remember who talked to you from the
12 defense?

13 A. Yes.

14 Q. Who was it?

15 A. I don't even know her name, to be honest with you.

16 Q. Is it the attorney sitting here in court right
17 now?

18 A. Yes.

19 Q. Okay. And when you talked to her, did -- did she
20 take any notes when you were talking to her?

21 A. Yes.

22 Q. Okay. And was any -- did you then sign some kind
23 of affidavit?

24 A. I signed something, yeah.

25 Q. Okay. And how many times did you talk to

1 Ms. Warren about this?

2 A. Just that one time, until -- I spoke with her just
3 recently, she called -- or I got a summons.

4 Q. Okay. Did you ever give Ms. Warren any kind of
5 typed statement or anything? Did you ever type up a
6 statement yourself and give it to her?

7 A. No.

8 Q. Okay. So anything that was typed was not typed by
9 you; is that correct?

10 A. Correct.

11 Q. And when you said -- when Ms. Warren asked you
12 about restraints, you said one time he was trying to write
13 something and you saw what you thought were his hands in
14 handcuffs; is that correct?

15 A. Right. Because, I mean, it was 20-something years
16 ago.

17 Q. Okay. Do you recall, did you actually see
18 handcuffs?

19 A. I'm pretty sure I saw handcuffs.

20 Q. Pretty sure.

21 So --

22 A. See, I can't -- I can't -- at this point, I don't
23 feel like I could give you a correct statement because I
24 don't remember.

25 Q. Okay. So is it at this point you don't know

1 whether or not you saw handcuffs or not?

2 A. Honestly, I can't -- I couldn't say.

3 Q. Okay. And when you saw him when he was trying to
4 write, what was he doing particularly that made you look at
5 him?

6 A. He was whispering to his attorney. And it was odd
7 because I never saw him spoke [sic]. He never spoke or
8 anything.

9 Q. But you said you saw him trying to write
10 something?

11 A. Yeah.

12 Q. Did he have a pad sitting in front of him the
13 whole trial? Did he write on it on more than one occasion?

14 A. No. Just that one time is all I saw.

15 Q. Did you ever see his hands over counsel table like
16 I'm leaning right now with my hands out?

17 A. No, he kept 'em -- he kept 'em down as best I
18 could remember.

19 Q. Okay. And you heard evidence during -- you
20 remember the facts of the trial; is that correct?

21 A. Pretty much, yeah.

22 Q. So you remember hearing evidence that he was on
23 the run from the law even before they were looking for him
24 for the murder charge; is that right?

25 A. Right.

1 Q. Do you remember he escaped from work release at
2 Capel Mills and ran off with the girlfriend?

3 A. Yes.

4 Q. And left his wife there. Do you remember that
5 part?

6 A. I don't remember anything about a wife.

7 Q. Okay. And so you knew that he was an escapee from
8 prison before he was ever charged with murder; is that
9 correct?

10 A. Yes.

11 Q. And you knew he was charged with murder in this
12 case; is that not also correct?

13 A. Yes.

14 Q. And in the sentencing phase, did you hear his
15 relatives talking about going to go see him at the jail and
16 how much they missed him?

17 A. I remember his parents talking, his daughter
18 talking.

19 Q. About visiting him at the jail, writing to him at
20 the jail, those types of things?

21 A. Right.

22 Q. Okay. Was all that kind of stuff that you knew
23 about the facts of the case and it being so long since then,
24 are you sure that you saw this man fidgeting, looking like
25 he had handcuffs on?

1 A. I can't honestly say. I mean, you know, my mind
2 says, yes, I saw him with handcuffs. I remember how he was
3 writing. But as far as, you know, seeing it now, I mean, I
4 don't -- I can't honestly tell you.

5 Q. Could it be that since it's been so long, you
6 might be mixing some of this up in your mind, what they were
7 saying about him and what you saw?

8 A. It's been 20-something years ago.

9 Q. Is that possible, though, that you might be
10 mistaken?

11 A. I would have to say no on that. On the --

12 Q. Okay. Thank you.

13 A. Uh-huh.

14 MR. VLAHOS: No further questions at this time.

15 THE COURT: Any redirect?

16 MS. WARREN: Briefly, Your Honor.

17 BY MS. WARREN:

18 Q. Ms. Hussey, where were you seated during trial?

19 A. On the end.

20 Q. Were you in the jury box?

21 A. Yes.

22 Q. And you were seated right next to all of the
23 12 jurors who deliberated?

24 A. Yes.

25 MS. WARREN: Thank you.

1 **THE COURT:** Any recross?

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

3 **BY MR. VLAHOS:**

4 **Q.** Where do you say it was that you saw him with his
5 hands like that? Was it here in Montgomery County or over
6 in Randolph County?

7 **A.** I never saw him in Montgomery County. We were
8 always in Randolph County.

9 **Q.** Okay. So the only time you ever saw him was in
10 Randolph County; is that correct?

11 **A.** Correct.

12 **Q.** Okay. And you went through all the jury selection
13 process; is that correct?

14 **A.** Yes.

15 **Q.** Do you recall whether that happened here in
16 Montgomery County or over in Randolph County?

17 **A.** It happened here.

18 **Q.** It happened here. Okay.

19 But you didn't see him when y'all were selecting
20 the jury here?

21 **A.** I don't -- I don't remember seeing him.

22 **Q.** Okay. And do you remember what phase of the trial
23 you say you saw him with his hands when he was trying to
24 write the lawyer? Do you remember if it was the
25 guilt-innocence phase or sentencing phase? If you can

1 recall.

2 A. I can't remember.

3 Q. Okay. Thank you.

4 MR. VLAHOS: No further questions at this time,
5 Your Honor.

6 THE COURT: Anything else?

7 MS. WARREN: No, Your Honor.

8 THE COURT: Thank you very much, ma'am. You may
9 step down. Please watch your step.

10 THE WITNESS: Thank you.

11 MS. WARREN: Your Honor, Ms. Hussey can be
12 released from her subpoena.

13 THE COURT: Ms. Hussey, you are free to go about
14 your business, ma'am. Thank you very much.

15 Next witness?

16 MR. CHETSON: The petitioner calls Lee Bunting.

17 THE COURT: Lee Bunting, come and be sworn.

18 Place your left hand on the Bible, raise your
19 right.

20 LEE BUNTING,
21 having been first duly sworn,
22 testified as follows:

23 THE WITNESS: I do.

24 THE COURT: Please watch your step. Make yourself
25 comfortable. And keep your voice up.

2 || **MR. CHETSON:** Thank you, Your Honor.

4 **Q.** Mr. Bunting, could you introduce yourself to the
5 Court.

6 A. I'm sorry. I'm hard of hearing. I forgot my
7 hearing aids this morning, so you'll have to speak up.

8 || Q. No worries. I'll speak up.

9 Could you introduce yourself to the Court.

10 A. Yes. My name is Lee Bunting. My first name is
11 Roy, R-O-Y; middle name Lee, L-E-E; last name Bunting,
12 B-U-N-T-I-N-G.

13 Q. Okay. I'm going to take you back to November of
14 2003. Okay?

15 || A. Okay.

16 Q. How were you employed in November of 2003?

17 A. I was a lieutenant with the Montgomery County
18 Sheriff's Office.

19 Q. Okay. And so you held the rank of lieutenant?

20 **A.** Yes.

21 **Q.** And at some point during that -- during November
22 of 2003, did you help transport Scott Allen from
23 Montgomery County to Randolph County?

24 A. Yes, sir.

25 Q. Okay. And how many law enforcement officers or

1 deputies were with you as you transported him from
2 Montgomery County to Randolph County?

3 A. That I recall, I was by myself.

4 Q. Did you retrieve Scott from the jail in Troy?

5 A. I -- only thing I can remember is I remember
6 having him to transport. Whether I picked him up in the
7 jail or somebody brought him downstairs to me, I can't tell
8 you.

9 Q. When he was brought to you, how -- was he shackled
10 or handcuffed?

11 A. As our policy was at that time, he would have had
12 leg irons on, a waist chain, and handcuffs.

13 Q. And were the handcuffs connected to the waist
14 chain?

15 A. Again, I don't recall, but if -- what do I recall
16 is it was our policy because of the waist chains we had,
17 that they did connect in the front.

18 Q. And maybe it's obvious, but I'm going to ask, were
19 these all metal? That is, were they some kind of metal?

20 A. Yes.

21 Q. Did you transport him -- do you recall what kind
22 of vehicle you transported him in?

23 A. It was a marked patrol car.

24 Q. Okay. And you drove him from Troy to Asheboro?

25 A. Yes, sir.

1 Q. Okay. Upon arriving at the courthouse in Randolph
2 County, where did you park?

3 A. In the sallyport area at the courthouse. Coming
4 into the courthouse, it would have been on the left. They
5 had a sallyport area that went into a holding area to enter
6 the courthouse.

7 Q. Can you describe that sallyport area?

8 A. It was fenced in. And I remember they had a
9 speaker, as you drove up, to speak into to the tell 'em who
10 you were and what your business was.

11 Q. The fence, what kind of fence was it?

12 A. Chain-link fence is all I recall.

13 Q. Could people easily see through the chain-link
14 fence into the sallyport area?

15 A. I don't know.

16 Q. Well, my question, I guess, was, was there sort of
17 that black or dark reflective material that sometimes
18 prevents people from looking in? Do you recall?

19 A. I don't recall at that time.

20 Q. Was the sallyport area covered, or was it
21 uncovered?

22 A. Uncovered.

23 Q. And the area around the sallyport, immediately
24 outside of the sallyport, was that a parking lot, or what
25 was that --

1 in? How were you physically entered into the courthouse?

2 A. I can't -- only thing I can tell you is I got out
3 of my car, took him into the holding area. How I got in
4 there, I can't tell you. I don't remember.

5 Q. And when you talk about the holding area, is that
6 interior, inside the building?

7 A. Yes, sir.

8 Q. Okay. And that's covered, correct?

9 A. Yes.

10 Q. A covered room. Okay.

11 In that holding area, is Scott still shackled in
12 your custody?

13 A. Yes. Once I got into the holding area, they took
14 possession of him. And that I can recall -- and I don't
15 recall if they had taken his restraints off at that point
16 and placed theirs on and put him in a holding cell there.

17 Q. Okay. But the restraints -- when you -- first of
18 all, when you say they, who are you referring to?

19 A. The employees from Randolph County Sheriff's
20 Office.

21 Q. Okay. And when you say they took off his
22 shackles, that is once he got into the holding area of the
23 courthouse?

24 A. Yes, sir.

25 Q. And then at some point, were you provided the

1 metal shackles and leg irons?

2 A. That I recall, yes, sir. They gave them to me and
3 instructed me to take an elevator and put me on an elevator
4 and go upstairs.

5 Q. And then what did you do for the rest of the day?

6 A. I was in the -- I walked into the courtroom before
7 court started. Other than that, I usually just hung out in
8 the hallway behind the courtroom or the room across the hall
9 that was like an attorney room.

10 Q. Okay. Who -- who, to your knowledge, had access
11 to that hallway you just referred to?

12 A. I'm sorry?

13 Q. Who, to your knowledge, had access to that hallway
14 that you just referred to near the courtroom?

15 A. That particular hallway, attorneys, law
16 enforcement officers.

17 Q. And potentially jurors?

18 A. I don't know.

19 Q. Did you ever see Scott in the courtroom itself?

20 A. Not that I recall.

21 MR. CHETSON: No further questions, Your Honor.
22 Thank you, sir.

23 THE COURT: Cross-exam?

24 BY MR. VLAHOS:

25 Q. So you don't recall ever seeing defendant

1 Scott Allen in the courtroom during trial, do you?

2 A. No, sir.

3 Q. Okay. So you never saw him in restraints in front
4 of any jurors, did you?

5 A. No, sir.

6 Q. And the holding area, you said you handed him off
7 to other personnel there at the sheriff's office on the
8 downstairs holding cell where the sallyport is?

9 A. Yes, sir.

10 Q. Okay. Do you recall any of them, who you were
11 handing him off to, if you do?

12 A. The only person that I remember down there in that
13 area was -- and I don't know her first name. Her last name
14 was Reid. She was Sheriff Reid's wife. She was employed
15 there at the sheriff's office.

16 Q. Okay. You recall seeing her there specifically?

17 A. Yes. Because I actually talked to her.

18 Q. Okay. And after dropping him off there, you
19 weren't responsible for Defendant Allen at all after that?

20 A. No, sir. Randolph County had took control of
21 everything.

22 Q. Okay. And there are other folks that --

23 Now, there's a holding cell on the first floor,
24 isn't that correct, when you come in from the sallyport?

25 A. Yes, sir.

1 **Q.** And the superior courtrooms are up on the third
2 floor; isn't that correct?

3 **A.** I'm not sure what floor they were on. I just got
4 on the elevator and went up, got off.

5 **Q.** I gotcha.

6 And that was -- he wasn't with you --
7 Defendant Allen was not with you?

8 **A.** No. No.

9 **Q.** He didn't ride with you in the elevator, he didn't
10 walk down the halls with you in the courthouse at all --

11 **A.** I was not with him when he went up to the
12 courtroom, no.

13 **Q.** In other words, your point of contact ended right
14 there when you handed him at the sallyport?

15 **A.** At the sallyport.

16 **MR. VLAHOS:** Thank you.

17 No further questions, Your Honor.

18 **THE COURT:** Anything further?

19 **MR. CHETSON:** One moment, Your Honor.

20 No questions, Your Honor. Thank you.

21 **THE COURT:** Thank you very much, sir. You may
22 step down.

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

24 **MR. CHETSON:** May the witness be excused from his
25 subpoena?

1 O-L-D-H-A-M.

2 Q. And do you go by Pete?

3 A. Go by Pete.

4 Q. Mr. Oldham, when did you begin representing
5 defendants in criminal cases?

6 A. Probably 1977.

7 Q. And when were you admitted to the bar to practice
8 as an attorney?

9 A. In August of 1971.

10 Q. What did you do in your first six years of
11 practice?

12 A. When I came out of law school, I was employed by
13 the 19th solicitorial district. James Roberts was the
14 solicitor. And that was a four-county district. I worked
15 there for five years.

16 Q. And what kind of work did you do there?

17 A. Prosecute cases.

18 Q. Did you prosecute all levels of cases?

19 A. Yes. He had a policy where he wanted his
20 employees to be cross-trained. We worked three days -- I
21 mean, first two weeks in district court, the third week in
22 superior court. And it was a four-county district.

23 Q. And in 1977, did you start in private practice?

24 A. I did.

25 Q. You represented criminal defendants?

1 A. I had a general practice. Yes, I represented
2 criminal defendants.

3 Q. And what other kinds of cases did you do?

4 A. Besides criminal cases?

5 Q. Yes.

6 A. Domestic cases I did. I did property work, real
7 estate transactions. It was a general practice alone.

8 Q. When did you first represent a defendant in a
9 homicide case?

10 A. I think the first one I represented was a lady,
11 and I don't remember if she was -- I know her husband was
12 charged with murder. I think she was also. And that was
13 within a few months -- couple months after I assumed private
14 practice.

15 Q. So approximately 1977?

16 A. That would be correct.

17 Q. How many homicide cases did you try as a defense
18 attorney, approximately?

19 A. I would have no idea. At the time that I was in
20 private practice, and even when I was in the solicitorial
21 district, there wasn't no capital punishment in
22 North Carolina. The first capital cases I tried were in the
23 '90s.

24 Q. And were there no capital cases in the 1970s
25 because of the Supreme Court's pause on the death penalty?

1 A. That's correct.

2 Q. I know you said you can't say how many homicide
3 trials you had. Was it more than ten?

4 A. I'm sure.

5 Q. More than --

6 A. I practiced for 48 years, so I'm sure I
7 practiced -- I did several homicide cases.

8 Q. And you said you took on your first capital murder
9 case in the 1990s?

10 A. That's the first one I remembered, yes.

11 Q. How did you come to represent your client in that
12 first capital murder case?

13 A. I was appointed the second chair by the Court.

14 Q. How did the Court know to appoint you?

15 A. At that time, they had no prescribed rules as to
16 who was appointed. Over a period of time, rules evolved.
17 You had to have so many years of experience before you could
18 be appointed to the case. And there were maybe six of us in
19 Randolph County that did it.

20 Q. How many capital cases had you tried to verdict
21 before representing Scott Allen?

22 A. I did not keep track of the numbers. I'm sure
23 there were probably seven or eight at least.

24 Q. And were there other cases that were charged
25 capitally but did not proceed to trial?

1 A. Yes.

2 Q. Was there special training required to take on
3 capital cases?

4 A. At that time, I do not recall any special
5 training. Basically, the training we received was, once you
6 were appointed those cases, we attended capital punishment
7 seminars with the capital defense schools.

8 Q. And did you attend some of those seminars?

9 A. Several. Many, I should say.

10 Q. Did you think that capital cases were any
11 different in terms of what you needed to do as an attorney
12 than, say, a noncapital homicide?

13 A. Yes.

14 Q. How were they different?

15 A. Well, somebody's life was at stake. You spent a
16 considerable amount of time on it. And over a period of
17 time, the approach to capital cases, especially in the
18 sentencing phase, evolved.

19 Q. And how did it evolve?

20 A. Sometimes, the factors that we listed in the
21 sentencing phase were things that you had to convince
22 potential witnesses that this was something that needed to
23 be brought out in order to convince a jury to spare
24 somebody's life if they were convicted.

25 Q. And are you talking about mitigating factors?

1 A. Yes, I am.

2 Q. Were there any other ways that you felt capital
3 cases were different?

4 A. Well, generally, we -- about in every capital
5 case -- every capital case, I remember one of the initial
6 responses -- steps was to secure the employment of a
7 psychologist or psychiatrist in the case, to try to prepare
8 for the case, both in the guilt phase and certainly in the
9 sentencing phase.

10 Q. Were there any -- were there any other
11 differences?

12 A. Any other defenses?

13 Q. Any other differences in how you might approach a
14 capital case?

15 A. Well, I think simply because of the nature of the
16 cases, you generally spent more time on those cases. I, for
17 my personal self, tried to -- found that -- I liked to have
18 a particular investigator do my cases over a period of time.

19 Once he learned what to look for, you generally
20 like to use him again, as opposed to some investigator that
21 had not done capital cases.

22 I generally spent more time going out with the
23 investigator to prepare for the trial of the case.

24 A lot of times, I would -- you would go out with a
25 private investigator to interview witnesses. Because I

1 liked to actually see the witnesses before they testified in
2 court. There's a big difference in how a witness appears to
3 you as opposed to just reading the report from the private
4 investigator.

5 Q. Who was the investigator that you liked to work
6 with?

7 A. I worked primarily with an individual by the name
8 of Danny Carter.

9 Q. And did you work with him on Scott's case?

10 A. Yes.

11 Q. Has Mr. Carter passed away?

12 A. Yes, he did.

13 Q. In general, what did you do when you first got
14 assigned a criminal case?

15 A. A criminal case or a capital case?

16 Q. A criminal case.

17 A. A criminal case, I generally attempted to find out
18 something about the case. Occasionally, you would have the
19 opportunity to meet with the investigating officers in court
20 and do some informal discovery before you got the formal
21 discovery.

22 You would automatically file a request for
23 discovery to obtain reports from the state. And then I
24 would generally share that information with my private
25 investigator.

1 Q. And what would you do to investigate a case?

2 A. Well, in this particular case -- and this was sort
3 of customarily -- customary, I initially liked to make
4 contact with the person charged just to say, "I've been
5 appointed to represent you." I liked to make contact with
6 their family. I would generally go out to their family's
7 residence and talk to them with my private investigator.

8 I guess the first thing I did is I filed a request
9 to get funds to pay the private investigator because I
10 preferred to have that particular investigator as opposed to
11 another one in the county.

12 I then generally tried to get a psychologist --
13 funds for a psychologist to interview that particular
14 client. Because, again, I had had experiences with
15 different psychologists, and I generally leaned towards a
16 particular one as opposed to others.

17 Generally went down and -- as soon as I could,
18 talked to the defendant.

19 Q. Did you request discovery?

20 A. Oh, yes.

21 Q. And what did you do when you received discovery?

22 A. Well, when I received discovery, I would get the
23 reports. And generally, I would have Mr. Carter come into
24 my office, and he would set down, and I would say, "Here's
25 what I got. We need to check these reports out."

1 He would say, "Can you go with me?"

2 If we go after 5:00, I'd say yes. So we'd spend a
3 lot of time going out there.

4 And Mr. Carter, a lot of times, accompanied me to
5 see the family of the suspect, and he would sit there in the
6 initial interview. He would make notes while I talked to
7 them because I liked to concentrate on conversations with
8 them as far as -- as opposed to taking notes myself.

9 Q. Did you, in general, go to the crime scene where
10 the crime was alleged to have occurred?

11 A. Always.

12 Q. And did you go to the crime scene in this case?

13 A. Oh, yes.

14 Q. When?

15 A. Very shortly after I became involved in the case.
16 I was not involved in the case initially. I think it had
17 already gone through probable cause, and Mr. Atkinson had
18 been appointed. And I was asked by our resident judge, who
19 was a resident judge in this county and that county, if I
20 would be willing to go down to Montgomery County to
21 represent this -- Scott. And I think that was the second
22 time that it happened because I'd come down here to
23 represent a defendant previously.

24 Q. I'm going to have a couple more questions about
25 how you were appointed in this case. But before we go

1 there, I want to talk a little bit more about your practice
2 in general.

3 A. Sure.

4 Q. You said you'd generally go talk with your clients
5 after you were appointed --

6 A. Thank you.

7 Q. You would generally go talk with your clients
8 after you were appointed; is that right?

9 A. Not generally. Always.

10 Q. Tell me, for a criminal defense attorney, what is
11 the significance of the relationship with your client?

12 A. Well, you try to build a relationship in order to
13 get them to trust you.

14 A lot of times, people who are charged with
15 crimes, I found, were reluctant to open up to the counsel.
16 There was a lack of trust there. Sometimes, this was trust
17 built up on things that happened to them earlier in their
18 lives. But you had to build some type of relationship.

19 I didn't try to -- I didn't ask them direct
20 questions because I did not want to lock myself in as far as
21 a defense. I generally said, "I'm going to be representing
22 you. You got anything you want to talk to me about here?"

23 I would say, "Do you have any immediate relatives
24 that I can talk to about your case? Do you have any
25 witnesses that I can talk to about your case?"

1 Q. What do you mean about locking yourself into a
2 defense?

3 A. Well, I was always instructed that if you ask
4 somebody point-blank if they committed a particular crime,
5 that you were restricted in what you could ask them if you
6 had to use them as a witness during the trial of the case.
7 That is what I meant.

8 Q. Can you give me an example of that?

9 A. Well, I was instructed, basically, if you -- if
10 they admitted doing something to you, and then they told you
11 they were going to get up and tell a different story in
12 court than what they had told you previously, you could not
13 become a party to perjury.

14 Q. Who instructed you of that?

15 A. I can't remember. That was just something that I
16 remember was common at that time.

17 Q. Is it fair to say you had a lot of trials in your
18 career?

19 A. Yes. I don't -- I did not keep track of numbers
20 of cases or anything. A lot of trials.

21 Q. Generally, how did you prepare for trials?

22 A. Well, as I said, I would try to talk to any
23 witnesses, alibi witnesses, if any, that the client
24 instructed me to talk with; try to get a story from them,
25 evaluate how useful I thought they would be in the defense

1 of the case.

2 If it involved a psychologist, I would --
3 psychologist would come down from Greensboro to my office
4 and would sit there with myself and the detective.

5 I made copies of any discovery that I had made --
6 I received from the state, provided them to Mr. Carter. Got
7 his reports back, went over those reports with him, decided
8 if we needed to go back and discuss the case any further
9 with those witnesses.

10 Q. Did you draft examinations for witnesses in court?

11 A. I'm sorry?

12 Q. Did you draft examinations --

13 A. No, I did not. I did not draft examinations. I
14 did not draft closing arguments or opening statements. I
15 liked to be flexible in that regard.

16 I had observed, as a district attorney, people who
17 read statements to the jury, and I thought it sort of put
18 them to sleep, and they sort of ignored it.

19 I generally formed my statements around what the
20 district attorney said if I thought I could make
21 counterarguments at the opening statement.

22 And the closing statements, I did not like to read
23 closing statements to the jury. I grew up in dramatic arts
24 so I had to learn a lot of lines and plays. And I would
25 sort of look, think about what I'd heard in court at the end

1 of the day. And that argument would be modified throughout
2 the course of the trial depending what testimony had been
3 presented.

4 Q. Did you prepare any folders for each witness with
5 documents that you would use to impeach them?

6 A. I might have made some notes of some, but I don't
7 remember a particular folder for particular witnesses on
8 particular occasions. I generally made notes sometimes on
9 the reports that I had received from Mr. Carter or on
10 discovery that I had received from the state.

11 Q. And did you read that discovery several times in
12 the course of your preparation?

13 A. Oh, yes.

14 Q. So a lot of your trial preparation relied on your
15 memory; is that right?

16 A. It relied on what Mr. Carter provided me in his
17 reports, how that contrasted or compared to the reports I
18 received in discovery, and what I heard when the witness
19 testified from the stand during the trial.

20 Q. And the differences between Mr. Carter's reports
21 and the discovery, those were things that you kept in your
22 mind as you read those reports?

23 A. Yes. Generally, you know, if it was a large case,
24 I didn't make any appointments the week before or two weeks
25 before that, and went over the files and reread them again

1 to familiarize myself with them before the trial started.

2 Q. I want to talk about how you were appointed in
3 this case.

4 Approximately when were you appointed to represent
5 Scott?

6 A. I can't tell you the exact date. I can tell you
7 the circumstances. I was in superior court, and our chief
8 resident judge said he wanted to talk to me for a few
9 minutes.

10 So he said, "Would you be willing to go down -- I
11 understand you may have represented this defendant before.
12 Would you be willing to go down to Montgomery County and
13 help Mr. Atkinson in the trial of this case?"

14 Q. So --

15 A. I was one of maybe five lawyers that they would go
16 to from a list for capital appointments.

17 Q. Was Will Atkinson already appointed on the case?

18 A. Yes.

19 Q. Did you know Will?

20 A. Oh, yes, I knew of him. I knew his partner,
21 Mr. Hollins. I knew Will -- Will, I don't think, was
22 practicing when I was prosecuting cases in this county;
23 Mr. Hollins, his partner, was. Will I think came here
24 later. And I had run into him on occasions, you know.

25 Q. Did you ever work with Will again after this case?

1 A. I don't remember working with Will after this case
2 or before this case on any case.

3 Q. So, to your knowledge, this was the only case you
4 did together?

5 A. To my recollection, that's the only case other
6 than occasionally somebody from their office might call with
7 a traffic case and say, "Would you handle this for us?" And
8 that was usually talking with their staff more than anybody
9 else.

10 Q. You said the judge mentioned, when he asked you if
11 you would take the appointment, that you had already
12 represented Scott. Did you remember that?

13 A. Yes, I remembered that.

14 Q. And when you first went to see Scott, did he
15 remember you?

16 A. Yes, he did. He -- first time I met him on this
17 case, outside this door to my right, there was a holding
18 area at that time. I don't know if it's still there or not.
19 And that's -- he was in that holding area the first time I
20 met him.

21 Q. And he recognized you from your prior
22 representation?

23 A. Yes.

24 Q. Did he seem happy to see you?

25 A. Yes. He said, "I'm glad to see you."

1 Q. And had you had a good relationship with him in
2 your prior representation?

3 A. Yes. I had more of a relationship with his
4 father, who is now deceased, at that time. His father -- I
5 don't think he ever made bond in that particular case.
6 There were multiple defendants in the case. I remember the
7 case because it involved churches and break-ins at churches.
8 And his father worked at the prison camp in Randolph County,
9 and he made a point -- he came by my office on several
10 occasions to sit down and talk with me about the case.

11 Q. Did you have a good working relationship with
12 Scott in this case, in the 1999 case?

13 A. Yeah, it wasn't a hostile relationship. He was
14 always curious about what I had found out about his case.

15 Q. Was he respectful to you?

16 A. Yeah, he didn't -- he was never hostile towards
17 me. He just was curious about "What do you know? What have
18 you found out? What have you found out?"

19 Q. Uh-huh.

20 MS. WARREN: Your Honor, I'm about to get into a
21 longer section. May I take a five-minute break?

22 THE COURT: We'll take a ten-minute recess.

23 (Recess.)

24 THE COURT: Mr. Oldham, would you please come back
25 up to the witness stand, sir. And recall that you are still

1 under oath.

2 You may proceed.

3 Q. Mr. Oldham, tell me about the evidence in this
4 case.

5 A. Well, the evidence in this case, Mr. Allen was
6 basically -- he had been -- he was in the state of Colorado
7 when he was arrested. His, I guess you'd call, girlfriend,
8 Vanessa, had been arrested or turned herself into
9 Mecklenburg County law enforcement and started making
10 statements implicating Mr. Allen at that particular point.
11 And he became -- he was arrested subsequently out in the
12 state of Colorado and came back on extradition to this
13 particular state.

14 Q. Was there any physical evidence that connected
15 Scott to the crime scene?

16 A. There was -- as I recall, the weapon -- alleged
17 weapon was never discovered. There was a vehicle that was
18 allegedly taken by him and his girlfriend on the evening
19 that the crime was alleged to have been committed that
20 belonged to the victim. That vehicle wound up down in
21 Shallotte, where people down there -- who testified that --
22 who gave statements that they -- that Vanessa and Scott had
23 come down there. The vehicle was subsequently sold down
24 there, supposedly by Mr. Allen, to one of the individuals.
25 It came back to Stanly County, and a fence was contacted,

1 tried to get rid of the vehicle. The vehicle was
2 subsequently disassembled and sold by that particular fence.

3 Scott was picked up in the state of Colorado
4 subsequently, at the house of another young lady that he had
5 known -- had met from another contact down in the southern
6 part of this county on a previous trip out there.

7 He was taken into custody and questioned by the
8 Colorado authorities. There was a tape of that
9 interrogation.

10 He was subsequently brought back to this
11 particular county.

12 There was several people out at the cabin --
13 Whip-O-Will I believe was the name of it -- where supposedly
14 Scott and the victim and Vanessa had gone and spent several
15 nights with people who were in that particular residence.

16 One of the individuals out there recognized him
17 from, I think, a year book, a school book.

18 And they had supposedly remained there until the
19 evening of this particular incident, where they
20 supposedly -- there were people who testified at the cabin
21 that Scott and Vanessa and the victim had left there.

22 And subsequently, the body of the victim was found
23 at a cabin out in the -- near the Uwharrie Forest. I don't
24 remember -- it was a long way into that because I remember
25 visiting the scene and going with Investigator Carter out

1 there. And maybe an officer from Randolph County at that
2 particular time who had lived near where the cabin was
3 located took us out there.

4 I don't think it was him -- let me back up. It
5 wasn't him that took us out there. A young boy had gone to
6 his house out riding on a three-wheeler, motorbike, or
7 something, and contacted him when he found the body of the
8 victim out there.

9 Q. You said that Scott made statements to law
10 enforcement when he was arrested in Denver.

11 A. When he was arrested where? I'm sorry.

12 Q. In Denver, I believe.

13 A. He was questioned out there. And it was sort of a
14 verbal sparring match that went on between him and the
15 arresting officer.

16 The officer would say, "Well, we got such and
17 such."

18 And Scott would look at him, "You got what?" Or
19 something like that. I can't remember the exact words.

20 But it was sort of like a sparring match that went
21 on between them about what they had or what they didn't
22 have.

23 Q. Did Scott confess to law enforcement?

24 A. He didn't come out point-blank and say that, you
25 know. It just -- it was more like a sparring match between

1 the two of 'em.

2 Q. Did he make any inculpatory statements?

3 A. I would prefer him not to make -- talk to the
4 officer at all, would have been my advice. Just don't say
5 anything. Because I did not think it came across very good
6 in the taped interview that I saw. I did not think it would
7 go good in front of a jury.

8 Q. And why not?

9 A. Because it was sort of like... that can't be true
10 or something. It was sort of just -- his response, "You're
11 telling me such and such. I don't believe you" or such and
12 such.

13 You know, it just was not something I wanted to
14 see the client do. I always advise, if I got the client,
15 "Don't say anything. Just be quiet."

16 Q. I think you wouldn't be a criminal defense
17 attorney if you said something else.

18 On this video in this back and forth, what I'm
19 hearing from you, and correct me if I'm wrong, is an officer
20 would say, "We found this" and --

21 A. I'm sorry?

22 Q. An officer would say, "We found some evidence."

23 And Scott would say --

24 A. The officer was, what I call, poking him, saying
25 stuff to try to get him to say no.

1 You know, that indirectly I felt like might cause
2 a jury to question why my client was saying that.

3 Q. But Scott denied involvement in the interview?

4 A. Basically, he never admitted that he did anything.
5 Okay? He --

6 Q. And he --

7 A. He never -- yeah. Go ahead.

8 Q. Did he question the evidence that the officer was
9 describing?

10 A. He questioned what the officer was telling him as
11 to whether or not that was believable, true or not, okay, is
12 the way I would put it.

13 Q. And was there any evidence at the crime scene that
14 was connected to Scott through fingerprints, DNA, or items
15 that were known to have belonged to him?

16 A. I don't remember the weapon being found in this
17 particular case. I remember they sprayed the area to try to
18 determine if there was blood, blood had been present out
19 there.

20 Q. Do you remember any evidence from the crime scene
21 that connected Scott?

22 A. I don't remember that, no.

23 Q. Okay. So a lot of the state's case was based on
24 the testimony of Vanessa Smith?

25 A. It was based on her testimony. She was the only

1 witness to the alleged incident.

2 Other than that, there were people who talked
3 about the vehicle that belonged to the victim. Who -- how
4 they got that vehicle, where they had attained it. Where I
5 would say -- when I was a prosecutor, you always had
6 witnesses who you thought the jury would question their
7 credibility, and so you tried to bolster their testimony not
8 by other people who directly saw what had occurred but who
9 could support certain things about what the investigation
10 had shown and about what she said.

11 Q. And Vanessa Smith was the only witness who had
12 information about what allegedly happened in the woods?

13 A. She was the only witness who testified about the
14 alleged -- had direct knowledge of the homicide. There were
15 people who testified about the vehicle that belonged to the
16 victim, who was in that vehicle, the circumstances under
17 which they saw that vehicle, how that vehicle was sold down
18 in Shallotte, how it got transported back to areas up in
19 this area and subsequently sold to a fence in South Carolina
20 as I recall.

21 Q. From the defense perspective, was it important to
22 challenge Vanessa Smith's credibility?

23 A. Yeah, we looked for -- initially looked for an
24 alibi witness that Scott had provided a name for. And I
25 remember going out to a house -- I'm trying to remember if

1 it was in Davidson County, just outside of
2 Montgomery County. I know we went down -- went out there
3 and saw an elderly gentleman who was the grandfather of this
4 young lady. He -- we asked him to have her -- get in
5 contact with her because that was a name that Scott had
6 provided that possibly could provide an alibi for him.

7 We didn't hear any response from them.
8 Mr. Atkinson knew her. He subsequently was -- I remember I
9 made numerous attempts to try to get into contact with her.
10 I couldn't get a response. Mr. Atkinson said, "I know her.
11 She used to work out in the Montgomery County Country Club.
12 Let me see if I can get in contact with her."

13 And he made arrangements to meet with her out
14 at -- I wasn't present, he told me IHOP. But she never was
15 able to provide an alibi for the time period and date that
16 this particular homicide had occurred.

17 And I know he talked to her on several occasions.
18 I think there was a statement that might have been in one of
19 our files from her. I'm not sure at this particular point.
20 But it just never matched up to provide what I thought was
21 the alibi.

22 Q. Was it -- I want to go back to Vanessa Smith.

23 A. Yes.

24 Q. Was it important to point out the inconsistencies
25 in Vanessa Smith's story to the jury?

1 A. Yeah. I felt like -- at the point when the alibi
2 witness did not present themselves, I felt like it was -- to
3 try to build the defense on the witnesses of the state's
4 case, make the state prove their case.

5 Q. Do you mind speaking just a little closer to your
6 microphone, please?

7 A. I'm sorry. I'm leaning back in the chair at that
8 point.

9 Q. Thank you.

10 A. And so a lot of what I found out in the course of
11 the investigation was the victim we felt like was a pusher
12 of narcotic drugs. Initially, when talking to the people
13 who were out at Whip-O-Will and talking to people who -- one
14 lady was married to him, one was the sister-in-law. The
15 feedback I was getting was this is not somebody that he
16 would do anything to harm. This was his best friend. This
17 was the man who came and brought stuff to him when he was
18 trying to avoid capture.

19 Q. When you say "this was the man," are you talking
20 about the victim?

21 A. Yes, I'm talking about the victim.

22 Q. And his relationship with Scott Allen?

23 A. Yes.

24 Q. Okay.

25 A. And he was a man who had no real steady employment

1 that I saw. He just seemed to be an individual who had --
2 who might have dealt in drugs.

3 And so we thought we might find -- we never could
4 find anybody -- somebody that might say he had a
5 disagreement about some transaction that he had carried with
6 them and would do that. Because we kept hearing that Scott
7 would not do anything to this particular victim because he
8 was the one person he could count on to come out there and
9 take him wherever he needed to go at any particular time.

10 Q. So what I'm hearing from you is Scott Allen -- you
11 didn't find an alibi, you didn't find a motive, and it
12 became very important to you to cross-examine the state's
13 witnesses in this case; is that right?

14 A. Yeah, we tried to -- I tried to -- well, certain
15 things would pop up occasionally that I was not expecting.
16 From his sister-in-law, she made a statement to our
17 mitigation expert that I was not expecting, and I felt like
18 it was damaging to us.

19 So I was concerned about stepping on a landmine at
20 some point because some of the witnesses' testimony changed
21 at different times. There was a lot of narcotics involved
22 among people who were witnesses in the case.

23 Q. I just want to ask my question again.

24 A. Oh, okay. I'm sorry.

25 Q. Was it important to you to cross-examine the

1 state's --

2 A. Yes.

3 Q. -- witnesses thoroughly?

4 And it was especially important to challenge
5 Vanessa Smith's credibility in front of the jury?

6 A. Well, her and -- I was hoping to challenge any of
7 the others that might bolster her testimony in any way.

8 Q. Okay. And in challenging Vanessa Smith's
9 credibility, would it be important to try to cross-examine
10 her on every inconsistency?

11 A. To cross-examine her on what?

12 Q. On every inconsistency that you found.

13 MR. VLAHOS: Objection.

14 THE COURT: Overruled.

15 You may answer.

16 A. To try to find any inconsistencies and question
17 that, yes.

18 Q. Okay. And did you and Will tell the jury in
19 closing argument that you would point out all of these
20 contradictions and inconsistencies?

21 A. I don't remember making that particular statement.
22 I remember making the statement to the jury, "Ladies and
23 gentlemen of the jury, would you go -- would you do your
24 business transactions based on what -- based on Mrs. --
25 Vanessa's testimony?"

1 Q. All right.

2 MS. WARREN: Court's indulgence while I get a
3 document?

4 Q. I know you said what you remembered from closing
5 arguments. Would it refresh your recollection if I showed
6 you the transcript?

7 A. I'll be glad to look at it.

8 MS. WARREN: All right. Your Honor, I've marked
9 the closing arguments, which are the transcript pages 2243
10 to 2277, as Defendant's Exhibit 11.

11 May I approach the witness?

12 THE COURT: Yes, you may.

13 A. Do you want me to read a particular part?

14 Q. I'll direct you.

15 A. Okay.

16 Q. Mr. Oldham, on that first page, does it look like
17 these are arguments by Will Atkinson?

18 A. That's what it appears to be, yes. It says
19 "Mr. Atkinson" and talks about --

20 Q. And would you look at page 2247, just a couple
21 pages in.

22 A. Okay. I've got that page.

23 Q. Would you read sort of that large paragraph in the
24 middle.

25 A. "We contend Scott" --

1 Q. Oh, not -- just to yourself.

2 A. Oh.

3 (Pause in proceedings.)

4 Q. You can look up when you're done.

5 A. Okay. Thank you.

6 THE COURT: For my reference later, could you
7 delineate the line numbers that you are referring to,
8 please.

9 MS. WARREN: Certainly. I can pull it up right
10 now, Your Honor.

11 Your Honor, on page 2247, I'm looking at lines 13
12 to 22.

13 THE COURT: Thank you very much. I have copies of
14 the transcripts not with me, but it'll be easier for me to
15 follow along later if I have line numbers during the
16 hearing.

17 MS. WARREN: Certainly, Your Honor.

18 THE COURT: Okay.

19 MS. WARREN: Would you like a copy now? We do
20 have an extra copy.

21 THE COURT: Yes. If you have it, yes.
22 You may approach.

23 MR. CHETSON: Thank you.

24 THE COURT: Do you need to see it, Mr. Vlahos?

25 MR. VLAHOS: I've seen it, Your Honor.

1 **THE COURT:** And this is mine to write on and make
2 notes?

3 **MS. WARREN:** Yes, Your Honor.

4 **THE COURT:** Thank you. So noted.

5 **Q.** Mr. Oldham, looking at that, I asked you if you
6 and Will told the jury in closing arguments that you would
7 point out all of these contradictions, inconsistencies, and,
8 in a few instances, just plain impossibilities.

9 Is that what Will said?

10 **A.** That's what Will said, yes. This is his argument.

11 **Q.** Yes.

12 And that's on page 2247?

13 **A.** Starts at line 13.

14 **Q.** Uh-huh.

15 **A.** Right. Yeah. 12, maybe 13.

16 **Q.** How did you prepare for Vanessa Smith's
17 cross-examination?

18 **A.** I was trying to ascertain in my preparation
19 possibly what reason she would have for misrepresenting her
20 testimony.

21 Initially, in talking with the witnesses out at
22 Whip-O-Will and talking with Vanessa's -- Scott Allen's wife
23 and sister-in-law, I was repeatedly told that she was madly
24 in love with him, that she would do anything to put him away
25 because she was insanely jealous about any other woman that

1 was in his life, whether it was the woman out in Colorado or
2 not.

3 **THE COURT:** Just to be clear, sir, you were told
4 that she was madly in love with who?

5 **THE WITNESS:** With Scott Allen.

6 **THE COURT:** Thank you very much.

7 **THE WITNESS:** Sorry.

8 **A.** And initially, I had approached the case thinking
9 that that might be something that we could lead to -- it
10 sort of evolved into trying to locate -- hopefully pin her
11 down. Hopefully, this other individual who worked out at
12 the country club, a different female, would be able to
13 establish an alibi that would prevent that.

14 And then, finally, when those things sort of fell
15 through, concentration in preparation was over drug use in
16 this particular case and how the consumption of drugs would
17 affect people's memory and judgments about events that had
18 occurred.

19 **Q.** So your focus was on Vanessa Smith's consumption
20 of drugs?

21 **A.** Yes.

22 **Q.** Did you have overnight to prepare for the
23 cross-examination in this case of Vanessa Smith?

24 **A.** I don't remember whether it started during the day
25 or on a separate morning.

1 **MS. WARREN:** Your Honor, I'm marking Ms. Smith's
2 testimony as Defendant's Exhibit 12. This is several
3 excerpts of testimony. It is transcript pages 1507 to 1576,
4 1661 to 1734.

5 May I approach the witness?

6 And I also have a copy for the Court.

7 **THE COURT:** Since you are starting a different
8 line of questioning, I think we're close enough to the lunch
9 break to take that break. So when we resume, we won't have
10 to just stop. Because normally, I take the recess at around
11 12:30.

12 So, Mr. Oldham, sir, thank you very much. You may
13 step down. You can just leave that right there.

14 **THE WITNESS:** Okay.

15 **THE COURT:** You don't need to take anything but
16 your water. You can take that.

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

18 **THE COURT:** Watch your step.

19 Please recess us until 2:00 p.m.

20 (Recess.)

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

22 Let the record reflect the defendant is present in
23 the courtroom.

24 The witness will please retake the stand. And
25 recall, you're still under oath.

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1 You may proceed.

2 **Q.** Good afternoon, Mr. Oldham.

3 **A.** Good afternoon.

4 **Q.** We were talking about the cross-examination of

5 Vanessa Smith.

6 I'd like to show you some documents from your

7 files.

8 I've marked as Defendant's Exhibit 12 the document

9 Bates-stamped P002911, which was also an exhibit to the

10 supplement -- the second supplemental MAR, it was

11 Exhibit 84.

12 I've marked as Defendant's 13 the document

13 Bates-stamped P000855 to 856.

14 And as 14, the document Bates-stamped P001668.

15 Those have previously been provided to the state.

16 Your Honor, may I approach the witness?

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

18 **MS. WARREN:** And I have copies for the Court as

19 well.

20 **THE COURT:** Thank you.

21 **Q.** Mr. Oldham, if you'll look at the document marked

22 as Exhibit 12.

23 Do you recognize that document?

24 **A.** I have no -- I don't have any recollection, but

25 this appears to be a lab report submitted to

0 2 : 0 2 1 Corporal CJ Wright. And I'm familiar with her. She's a
0 2 : 0 2 2 crime scene investigator from Randolph County.

0 2 : 0 2 3 Q. And at the bottom of that document, do you see the
0 2 : 0 2 4 Bates stamp P002911?

0 2 : 0 2 5 A. I see that.

0 2 : 0 2 6 Q. Okay. And was this a part of your file that you
0 2 : 0 2 7 provided to prior counsel Mike Unti?

0 2 : 0 2 8 A. I would assume so because I just turned the whole
0 2 : 0 2 9 file over to him.

0 2 : 0 2 10 Q. And consistent with the prior stipulation of the
0 2 : 0 2 11 parties, this is one of the documents that we've stipulated
0 2 : 0 2 12 was in Mr. Oldham's file.

0 2 : 0 2 13 As you look at that document, does it indicate
0 2 : 0 2 14 that there was a knife collected at the crime scene?

0 2 : 0 2 15 A. It does.

0 2 : 0 2 16 Q. And does it also indicate that there was blood on
0 2 : 0 3 17 that knife?

0 2 : 0 3 18 A. It does.

0 2 : 0 3 19 Q. Would you look at the document that is marked
0 2 : 0 3 20 Defendant's Exhibit 13.

0 2 : 0 3 21 Do you recognize that document?

0 2 : 0 3 22 A. It's got a Bates stamp indicating it was from my
0 2 : 0 3 23 file.

0 2 : 0 3 24 Q. I'm sorry. I couldn't hear you.

0 2 : 0 3 25 A. It's got a P000855, indicating it was from my

0 2 : 0 3 1 file, yes.

0 2 : 0 3 2 Q. And do you recognize your handwriting in that
0 2 : 0 3 3 document?

0 2 : 0 3 4 A. It appears to be my handwriting, yes.

0 2 : 0 3 5 Q. Do those appear to be some notes you took on this
0 2 : 0 3 6 case?

0 2 : 0 3 7 A. It does.

0 2 : 0 3 8 Q. And what does it read at note number 4 on the page
0 2 : 0 4 9 marked P000855?

0 2 : 0 4 10 A. "Blood on knife found according to lab report."

0 2 : 0 4 11 Q. Uh-huh.

0 2 : 0 4 12 So if you'll take a look at the document marked
0 2 : 0 4 13 Defendant's Exhibit 14.

0 2 : 0 4 14 Do you also recognize this document as your
0 2 : 0 4 15 handwriting?

0 2 : 0 4 16 A. It appears to be my handwriting, yes.

0 2 : 0 4 17 Q. And at the bottom, the last note on this document
0 2 : 0 4 18 that's marked with a star at the end of the notes, what does
0 2 : 0 4 19 that read?

0 2 : 0 4 20 A. It says, "Knife transferred to latent evidence
0 2 : 0 4 21 section for further analysis." And then, "What happened?"

0 2 : 0 4 22 Q. Uh-huh.

0 2 : 0 4 23 Did you ever find out what happened to that knife?

0 2 : 0 5 24 A. I don't recall.

0 2 : 0 5 25 Q. Did you think that the blood on that knife found

1 at the crime scene was significant?

2 A. I can't tell you what I thought at that time. I
3 can simply say this is my handwriting.

4 Q. Did Vanessa Smith's story explain the knife's
5 presence at the crime scene at all?

6 A. I don't remember her testimony about the knife.

7 Q. Sorry, you said you don't remember her testifying
8 about the knife?

9 A. I don't remember if she testified -- I don't
10 remember what she said about the knife if anything.

11 Q. Uh-huh.

12 Do you recall if you cross-examined her at all
13 about the knife?

14 A. I do not at this point recall what I
15 cross-examined her about.

16 Q. Would it surprise you that Vanessa Smith did not
17 testify about the knife?

18 A. I just don't have any recollection about any
19 testimony about the knife.

20 MS. WARREN: Your Honor, I can either proffer from
21 the testimony or I can have him read it and review it. Do
22 you have a preference? As I believe the testimony itself is
23 in the record.

24 THE COURT: You can cross him on it.

25 MS. WARREN: I can cross him on it?

0 2 : 0 8 1 A. I cannot recall anything. I do know at some
0 2 : 0 8 2 point -- there was some -- I can't say it was a knife or
0 2 : 0 8 3 what it was -- I asked Officer McIver about whether the lab
0 2 : 0 8 4 reports come back. And it seemed like I received a negative
0 2 : 0 8 5 response; there was nothing further.

0 2 : 0 8 6 Q. So as you sit here today, can you recall any
0 2 : 0 9 7 strategic reason you had in 2003 for not cross-examining law
0 2 : 0 9 8 enforcement --

0 2 : 0 9 9 A. I cannot recall anything.

0 2 : 0 9 10 Q. I have to finish my question. I'm sorry.

0 2 : 0 9 11 A. I'm sorry.

0 2 : 0 9 12 Q. -- for not cross-examining law enforcement about
0 2 : 0 9 13 their further testing of the bloody knife that was found at
0 2 : 0 9 14 the crime scene?

0 2 : 0 9 15 A. No.

0 2 : 0 9 16 Q. Okay. Was Christopher Gailey fully clothed when
0 2 : 0 9 17 his body was found?

0 2 : 0 9 18 A. I believe he was. It's been a long time, but I
0 2 : 0 9 19 believe he was fully clothed.

0 2 : 0 9 20 Q. Did he -- was he not wearing a shirt?

0 2 : 0 9 21 A. I can't say one way or another. Seems like there
0 2 : 0 9 22 was some testimony about his shirt being found at the scene.

0 2 : 0 9 23 MS. WARREN: And I'm going to mark as Defendant's
0 2 : 1 1 24 Exhibit 15 a sketch and some documents.

0 2 : 1 1 25 For the record, this document was found in

0 2 : 1 1 1 Mr. Oldham's files at P001862 to 1864. It was also found in
0 2 : 1 1 2 Mr. Atkinson's files at Bates stamp 0928 to 0930, and it was
0 2 : 1 1 3 submitted to this Court as Exhibit 99 to the second
0 2 : 1 1 4 supplemental MAR.

0 2 : 1 1 5 MS. WARREN: May I approach, Your Honor?

0 2 : 1 1 6 THE COURT: Yes, you may.

0 2 : 1 1 7 Q. Mr. Oldham, do you recognize this document?

0 2 : 1 2 8 A. My best recollection is this must have been
0 2 : 1 2 9 something prepared by Catha Wright, but, again, that is my
0 2 : 1 2 10 best recollection.

0 2 : 1 2 11 Q. Do you see that on the second page of this
0 2 : 1 2 12 document, Item H is a black T-shirt?

0 2 : 1 2 13 A. On the back of the first page?

0 2 : 1 2 14 Q. Yes.

0 2 : 1 2 15 A. Okay. I was looking at the second page.

0 2 : 1 2 16 H, yes, there is.

0 2 : 1 2 17 Q. And if you'll turn back to the first page. Do you
0 2 : 1 2 18 see Item H, that T-shirt, is located away from the body?

0 2 : 1 3 19 A. I'm not seeing the H right now. I don't know.

0 2 : 1 3 20 Q. It's sort of at 7:00. Do you see it?

0 2 : 1 3 21 A. Is it in -- what appears to be, I guess, the path
0 2 : 1 3 22 and it says H?

0 2 : 1 3 23 Q. Uh-huh.

0 2 : 1 3 24 A. And a little scribble mark, I don't know what it
0 2 : 1 3 25 means, after that.

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1 A. Did you say I?

2 Q. Yes.

3 A. I is a black nylon holster, according to the code

4 on the back of the first page.

5 Q. Did Vanessa Smith's story include anything about

6 how that holster ended up so far away from

7 Christopher Gailey's body at the crime scene?

8 A. I don't remember.

9 Q. You don't remember?

10 A. No, ma'am.

11 Q. As you sit here today, can you recall any

12 strategic reason you had in 2003 for not cross-examining

13 Vanessa Smith about the holster at the crime scene?

14 A. I cannot recall any reason.

15 Q. Do you remember that there were spent shotgun

16 shells collected from the scene?

17 A. That seems correct, yes.

18 Q. Do you remember how many were collected from the

19 scene?

20 A. I do not at this time.

21 **MS. WARREN:** Thank you for the indulgence. I'm

22 trying to do this in batches.

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

24 **MS. WARREN:** I'm going to mark as Defense

25 Exhibit 16 the SBI -- an SBI lab report.

1 For the record, this item was located in
2 Mr. Oldham's files at P001304 and also at P001961, and it
3 was submitted to the Court as the second supplemental MAR
4 Exhibit 83.

5 I'm also going to mark Defendant's Exhibit 17,
6 which is the testimony -- trial testimony of Catha Wright.

7 Defendant's Exhibit 18, which is P002073 to 2080.
8 And 19 -- and that -- Your Honor, Defense 18 is the second
9 supplemental MAR Exhibit 97.

10 And 19, which is P002082 to 84. And that is the
11 second supplemental MAR Exhibit 87.

12 May I approach?

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

14 **Q.** If you'll start with what I've marked as Defense
15 Exhibit 16.

16 Is this an SBI lab report from Mr. Allen's case?

17 **A.** Yes.

18 **Q.** And does this include information about a
19 .45 caliber handgun, a magazine, a fired .45 caliber shell
20 casing, and 11 live rounds of .45 caliber ammunition?

21 **A.** That's correct.

22 **Q.** And those were sent for latent fingerprint
23 testing, according to this?

24 **A.** That was what was requested, yes.

25 **Q.** Okay. If you'll look at Defense Exhibit 17.

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1 A. What part?

2 Q. Would you turn to page 1344.

3 And would you please read lines 5 through 18 of

4 page 1344.

5 A. Lines 5 through 18?

6 Q. Yes.

7 A. Okay.

8 Q. Is that Officer Wright's testimony about the

9 five spent shotgun shells that were collected at the scene?

10 A. I must be looking at something different. This is

11 about the T-shirt.

12 Q. I'm looking on page 1344.

13 A. I'm sorry. I was on 45.

14 Q. And that's lines 5 to 18.

15 A. You said 1344?

16 Q. Yes.

17 A. I don't have a page 1344. It skips from 1343 to

18 1345.

19 **THE COURT:** To expedite this, you can take my

20 copy.

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

22 **MS. WARREN:** Is it on the back side?

23 **THE COURT:** It is on the back. 5 to 18. There it

24 is, sir.

25 **THE WITNESS:** I'm sorry. What line do you want me

0 2 : 2 6 1 to look at?

0 2 : 2 6 2 Q. 5 to 18 on page 1344.

0 2 : 2 6 3 A. Okay.

0 2 : 2 6 4 Q. And is that Officer Wright's testimony about the
0 2 : 2 6 5 five spent shotgun shells that were collected at the crime
0 2 : 2 6 6 scene?

0 2 : 2 6 7 A. Yes.

0 2 : 2 6 8 Q. Would you look at Exhibit 13, which should be in
0 2 : 2 7 9 your pile.

0 2 : 2 7 10 A. 13?

0 2 : 2 7 11 Q. Yes.

0 2 : 2 7 12 That should have Bates stamp 855 at the bottom.
0 2 : 2 7 13 It's your handwritten notes.

0 2 : 2 7 14 THE COURT: Looks like this, sir.

0 2 : 2 8 15 A. Okay. What part of 13?

0 2 : 2 8 16 Q. You have a note at the bottom of page 855. It's
0 2 : 2 8 17 circled number 8. What does that read?

0 2 : 2 8 18 A. "Five shotgun shells recovered by Teresa. All" --
0 2 : 2 8 19 and I can't read my own handwriting.

0 2 : 2 8 20 Q. Does it say "spent"?

0 2 : 2 8 21 A. I believe so. "All spent."

0 2 : 2 8 22 Then underneath, it's got, "Four Winchester, one
0 2 : 2 8 23 fired, 12-gauge -- one Federal 12-gauge."

0 2 : 2 9 24 MS. WARREN: I'm going to mark as Defendant's 20
0 2 : 2 9 25 what has been Bates-stamped at P000118 to 121.

0 2 : 2 9 1 **THE COURT:** It would be helpful if you would say
0 2 : 2 9 2 what the exhibit is instead of just the Bates number or any
0 2 : 2 9 3 other identifying number so we can follow along with our
0 2 : 3 0 4 exhibit list.

0 2 : 3 0 5 **MS. WARREN:** Uh-huh.

0 2 : 3 0 6 **THE COURT:** Thank you.

0 2 : 3 0 7 **MS. WARREN:** The exhibit list does generally
0 2 : 3 0 8 just -- I am reading the full note in the exhibit list that
0 2 : 3 0 9 I've provided to the court reporter.

0 2 : 3 0 10 Do you want me to characterize the document as
0 2 : 3 0 11 well?

0 2 : 3 0 12 **THE COURT:** I think that would be helpful, would
0 2 : 3 0 13 it not, Madam Clerk?

0 2 : 3 0 14 **THE CLERK:** Yes, sir.

0 2 : 3 0 15 **MS. WARREN:** I can also provide Madam Clerk with a
0 2 : 3 0 16 copy of our exhibit list --

0 2 : 3 0 17 **THE CLERK:** Yes, please.

0 2 : 3 0 18 **MS. WARREN:** -- for the exact titles of the
0 2 : 3 0 19 documents.

0 2 : 3 0 20 This appears to be notes by Pete Oldham. And I'm
0 2 : 3 0 21 going --

0 2 : 3 0 22 May I approach with this one, Your Honor?

0 2 : 3 0 23 **THE COURT:** Yes, you may.

0 2 : 3 0 24 **MS. WARREN:** Thank you.

0 2 : 3 0 25 Thank you for bearing with me.

1 **THE COURT:** Thank you.

2 **Q.** And, Mr. Oldham, would you look at what I've just
3 marked as Defense Exhibit 20.

4 **A.** Yes, ma'am.

5 **Q.** Do those appear to be your notes?

6 **A.** They do.

7 **Q.** Would you look at the last page of those notes,
8 please. It's the fourth page on the very back.

9 **A.** Okay.

10 **Q.** In the middle, it says, "Haven't seen..." And
11 then there are one, two, three items listed.

12 Does number 3 say, "Where were spent shells
13 found"?

14 **A.** Yes, it does.

15 **Q.** Okay. Do you remember, when you read
16 Officer Wright's testimony, she said she hadn't collected
17 those shells; that Teresa Hogan had?

18 **A.** That's what her report says. It was a different
19 officer.

20 **Q.** I'm sorry?

21 **A.** It was a different officer in their department.
22 She had a name, I don't remember the name.

23 **Q.** And do you remember if she collected them on the
24 same day that they discovered the body or at a later time?

25 **A.** I can't say for sure. It seems like there were

0 2 : 3 2 1 two different days they went to the scene, or the other
0 2 : 3 2 2 officer went on a subsequent occasion.

0 2 : 3 2 3 Q. And so these spent shells were not collected on
0 2 : 3 2 4 the first day by Officer Wright, as she testified?

0 2 : 3 2 5 A. I can't say for sure. I remember she testified
0 2 : 3 2 6 some other officer found something.

0 2 : 3 2 7 Q. And if you look at that crime scene sketch, which
0 2 : 3 2 8 is Exhibit 15 --

0 2 : 3 2 9 A. 15?

0 2 : 3 2 10 Q. Yes.

0 2 : 3 2 11 A. Yes, ma'am.

0 2 : 3 2 12 Q. And that you identified as the sketch by
0 2 : 3 2 13 Officer Wright?

0 2 : 3 2 14 A. That's my recollection.

0 2 : 3 2 15 Q. Does that show the location of the five spent
0 2 : 3 2 16 shotgun shells?

0 2 : 3 3 17 A. I don't see the reference to the spent shells on
0 2 : 3 3 18 this.

0 2 : 3 3 19 Q. And that would make sense because, as she
0 2 : 3 3 20 testified, she didn't collect them, right?

0 2 : 3 3 21 A. That's what I remember, yes.

0 2 : 3 3 22 Q. According to your notes, you thought it was
0 2 : 3 3 23 important to figure out where those spent shotgun shells had
0 2 : 3 3 24 been located.

0 2 : 3 3 25 A. I can't tell you what I was thinking at that

0 2 : 3 3 1 point. I think the notes that were there was when I made an
0 2 : 3 3 2 initial trip down to the -- this county to view the
0 2 : 3 3 3 evidence. And as I recall, they were remodeling the
0 2 : 3 3 4 sheriff's department. It was found in a building down the
0 2 : 3 3 5 street to my left. Because it says, "Trip to Troy with
0 2 : 3 3 6 private investigator."

0 2 : 3 3 7 Q. Was Mr. Gailey -- were the wounds consistent with
0 2 : 3 4 8 shotgun wounds?

0 2 : 3 4 9 A. I didn't -- oh, yes, shotgun wounds, yes.

0 2 : 3 4 10 Q. And do you recall how many times he was hit by a
0 2 : 3 4 11 shotgun?

0 2 : 3 4 12 A. I can't say positively. It seems like it was one
0 2 : 3 4 13 in the back and maybe one in the knee area.

0 2 : 3 4 14 Q. And if someone shoots a shotgun five times, they
0 2 : 3 4 15 would have to reload; is that right?

0 2 : 3 4 16 MS. VLAHOS: Objection.

0 2 : 3 4 17 THE COURT: Sustained.

0 2 : 3 4 18 Q. Do you know how many rounds a shotgun can hold?

0 2 : 3 4 19 MS. VLAHOS: Objection.

0 2 : 3 4 20 A. I don't. I'm not a firearm expert.

0 2 : 3 4 21 Q. Okay.

0 2 : 3 4 22 THE COURT: Overruled, based on that.

0 2 : 3 4 23 Q. Vanessa Smith's story only involved a shotgun
0 2 : 3 4 24 being fired twice, right?

0 2 : 3 4 25 MS. VLAHOS: Objection.

1 **THE COURT:** Overruled.

2 If you recall.

3 A. I don't recall. I know from my recollection he
4 was shot I thought twice, once in the knee area and once in
5 the back.

6 Q. As you sit here today, can you recall any
7 strategic reason you had in 2003 for not cross-examining
8 Vanessa Smith about the three other apparent shotgun rounds?

9 A. I cannot.

10 Q. Would you look at Defense Exhibits 18 and 19.

11 And each of these appear to be SBI laboratory
12 reports, so I think it's best to distinguish them based on
13 the numbering. 18 begins at 2073, and 19 begins at 2082.

14 And would you look at 2074.

15 A. Yes, ma'am.

16 Q. Does that lab report describe some items being
17 sent for latent print testing?

18 A. Yes.

19 Q. And looking at 2076, is that a handwritten note
20 requesting latent print testing?

21 A. Okay. You're asking me what this is?

22 Q. Yes.

23 Does that request latent print testing?

24 A. It's talking about blood samples and DNA analysis
25 and latent prints and hair examination.

0 2 : 3 7 1 Q. And none of the items requested in this report on
0 2 : 3 7 2 the pages that you've just looked at are the five spent
0 2 : 3 8 3 shotgun shells; is that right?

0 2 : 3 8 4 A. Doesn't mention shotgun shells.

0 2 : 3 8 5 Q. Okay. And I previously had you look at
0 2 : 3 8 6 Exhibit 16. I apologize for jumping around; but I
0 2 : 3 8 7 appreciate your patience.

0 2 : 3 8 8 A. I'm having trouble locating 16.

0 2 : 3 8 9 THE COURT: Looks like this, sir.

0 2 : 3 8 10 A. Okay.

0 2 : 3 8 11 Q. Does that --

0 2 : 3 8 12 THE COURT: You should have that.

0 2 : 3 8 13 A. I'm not seeing it.

0 2 : 3 9 14 I found it.

0 2 : 3 9 15 Q. Excellent.

0 2 : 3 9 16 And does -- we discussed that Exhibit 16 was
0 2 : 3 9 17 regarding some .45 rounds that were sent for latent print
0 2 : 3 9 18 testing.

0 2 : 3 9 19 A. A handgun, magazine, shell casings, ammunition,
0 2 : 3 9 20 and it was for latent print examination and comparison.

0 2 : 3 9 21 Q. And there's nothing on there regarding the
0 2 : 3 9 22 five spent shotgun shells that were collected at the scene?

0 2 : 3 9 23 A. I don't see any reference to shotgun shells on
0 2 : 3 9 24 this report.

0 2 : 3 9 25 Q. Would you look at Exhibit 19.

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1 A. Okay.

2 Q. And this is another SBI report.

3 A. Yes, it is.

4 Q. And looking at 2083, so the second page of that

5 document, is that sending a plastic bottle for latent print

6 testing?

7 A. Yes.

8 Q. Nothing in this report about the five spent

9 shotgun shells?

10 A. No.

11 Q. Do you know if the five spent shotgun shells were

12 ever sent for latent print testing?

13 A. I have no independent recollection.

14 Q. As you sit here today, can you recall any

15 strategic reason that you had in 2003 for not

16 cross-examining law enforcement witnesses about their

17 failure to submit the shotgun shells for latent print

18 examination?

19 A. I don't remember anything about that.

20 Q. Vanessa Smith testified at trial that as she and

21 Scott left the woods, she heard Chris Gailey empty his

22 handgun.

23 Do you remember that?

24 MS. VLAHOS: Objection to that characterization.

25 The transcript speaks for itself.

0 2 : 4 1 1 **THE COURT:** Sustained.

0 2 : 4 1 2 **Q.** Do you remember Vanessa Smith's trial testimony
0 2 : 4 1 3 about what she heard as she left the woods?

0 2 : 4 1 4 **A.** I thought she testified about a gun being
0 2 : 4 1 5 discharged, but I can't remember the details.

0 2 : 4 2 6 **MS. WARREN:** I'm marking as Defendant's Exhibit 21
0 2 : 4 2 7 Vanessa Smith's trial testimony.

0 2 : 4 2 8 **MS. VLAHOS:** Your Honor, I've got Vanessa Smith's
0 2 : 4 2 9 trial testimony as Defense Exhibit 12 already.

0 2 : 4 2 10 **MS. WARREN:** I did not end up marking and using it
0 2 : 4 2 11 at that time. 12 is --

0 2 : 4 2 12 **THE COURT:** So do I.

0 2 : 4 2 13 **THE CLERK:** I do, too.

0 2 : 4 2 14 **MS. WARREN:** What?

0 2 : 4 2 15 **THE CLERK:** We all have it as 12.

0 2 : 4 3 16 **MS. WARREN:** So I believe prior to lunch I was
0 2 : 4 3 17 going to mark it, but I didn't go forward with it. I now
0 2 : 4 3 18 have 12 as P002911, which should be on the stand with the
0 2 : 4 3 19 witness.

0 2 : 4 3 20 **THE COURT:** Which is the Wright lab report?

0 2 : 4 3 21 **MS. WARREN:** That is --

0 2 : 4 3 22 **THE COURT:** Is that right?

0 2 : 4 3 23 **MS. WARREN:** Yes. That's correct.

0 2 : 4 3 24 **THE COURT:** One moment.

0 2 : 4 3 25 Okay. You did hand up to me Defendant's 12, which

0 2 : 4 3 1 is the P002911, and I have that in my notes also. So you
0 2 : 4 3 2 actually did not hand up Vanessa Smith's testimony as your
0 2 : 4 3 3 12. You handed up the lab report involving CJ Wright.

0 2 : 4 3 4 So I'm going to direct the clerk to strike any
0 2 : 4 4 5 notation about Vanessa's trial testimony as defense
0 2 : 4 4 6 number 12. Defense number 12 is the lab report. So we'll
0 2 : 4 4 7 give this a new number.

0 2 : 4 4 8 Is there any problem with that, Madam Clerk --

0 2 : 4 4 9 **THE CLERK:** No, sir.

0 2 : 4 4 10 **THE COURT:** -- for your records?

0 2 : 4 4 11 **THE CLERK:** I'll take care of it.

0 2 : 4 4 12 **THE COURT:** So the new number for Vanessa's trial
0 2 : 4 4 13 testimony will be what, Ma'am?

0 2 : 4 4 14 **MS. WARREN:** 21, Your Honor.

0 2 : 4 4 15 **THE COURT:** 21 now. Thank you.

0 2 : 4 4 16 **MS. WARREN:** May I approach, Your Honor?

0 2 : 4 4 17 **THE COURT:** Yes, you may.

0 2 : 4 4 18 **MS. WARREN:** I'm also handing to the clerk an
0 2 : 4 4 19 exhibit list.

0 2 : 4 5 20 **Q.** Mr. Oldham, if you'll please turn to page 1543 and
0 2 : 4 5 21 read lines 1 through 8.

0 2 : 4 5 22 **A.** Okay.

0 2 : 4 5 23 **Q.** And is that Vanessa Smith's testimony, that she
0 2 : 4 5 24 heard what she was assuming was Chris empty his gun out?

0 2 : 4 6 25 **A.** It appears to be her direct testimony about that,

0 2 : 4 6 1 yes.

0 2 : 4 6 2 Q. And does she say that it was a .45?

0 2 : 4 6 3 A. Yes.

0 2 : 4 6 4 Q. Had she ever made that statement before?

0 2 : 4 6 5 A. Before the trial?

0 2 : 4 6 6 Q. Yes.

0 2 : 4 6 7 A. I don't recall.

0 2 : 4 9 8 MS. WARREN: I'm going to mark as Defendant's 22
0 2 : 4 9 9 the October 5th, 1999, transcript of the probable cause
0 2 : 4 9 10 hearing in this case. This document is also available at
0 2 : 4 9 11 P000781 to 834.

0 2 : 4 9 12 I'm going to mark as Defense Exhibit 23 the
0 2 : 4 9 13 August 10th, 1999, statement of Vanessa Smith. This is also
0 2 : 4 9 14 available in Mr. Oldham's files at P003500 to 10 and in
0 2 : 4 9 15 Mr. Atkinson's files at 0037 to 47. And I'm going to
0 2 : 5 0 16 mark -- and that was also Exhibit 78 to the second
0 2 : 5 0 17 supplemental MAR.

0 2 : 5 0 18 Finally, I'm going to mark as Defense Exhibit 24
0 2 : 5 0 19 the August 11th, 1999, statement of Vanessa Smith. This is
0 2 : 5 0 20 also available in Mr. Oldham's files at P002735 through 59,
0 2 : 5 0 21 in Mr. Atkinson's files at 0048 to 72. And this was
0 2 : 5 0 22 Exhibit 79 to the second supplemental MAR.

0 2 : 5 0 23 Your Honor, if I may approach?

0 2 : 5 0 24 THE COURT: You may.

0 2 : 5 1 25 Q. Mr. Oldham, I'm going to ask you to review

1 Ms. Smith's direct testimony.

2 MS. VLAHOS: Your Honor, at this time, since he's
3 going to read from it, the state would like to put an
4 objection on the record.

5 THE COURT: Are you asking him to read this out
6 loud or himself or what?

7 MS. WARREN: I'm going to ask him to read several
8 things to himself. And then, Your Honor, given the time, I
9 was going to ask for a short break once I direct him to the
10 portions to read.

11 THE COURT: Do you object to him reading it
12 himself?

13 MS. VLAHOS: Is this the transcript or the
14 statements of Vanessa Smith?

15 THE COURT: Go ahead.

16 MS. WARREN: Exhibit 22 is the transcript of the
17 probable cause hearing.

18 MS. VLAHOS: I have no objection to him reading
19 from that.

20 MS. WARREN: And I am going to ask him to read the
21 statements of Vanessa Smith as well, which are Exhibits 23
22 and 24.

23 MS. VLAHOS: State would be making objections to
24 those, Your Honor, if you want --

25 THE COURT: To him even reading those to himself?

0 2 : 5 2 1 MS. VLAHOS: Reading them out loud, Your Honor.

0 2 : 5 2 2 THE COURT: What are you --

0 2 : 5 2 3 MS. WARREN: I'm asking --

0 2 : 5 2 4 THE COURT: Let's address one thing at a time.

0 2 : 5 2 5 And you can object when she gets to the thing that you have
0 2 : 5 2 6 an issue with.

0 2 : 5 2 7 Q. All right. So, Mr. Oldham, I'll ask you to read
0 2 : 5 2 8 Ms. Smith's testimony, which begins on page 39 of the
0 2 : 5 2 9 probable cause hearing transcript, to yourself.

0 2 : 5 2 10 A. What page?

0 2 : 5 2 11 Q. 39.

0 2 : 5 2 12 THE COURT: Are we using Bates now or --

0 2 : 5 2 13 MS. WARREN: This is 39 of the transcript
0 2 : 5 2 14 numbering which is in the top right. I can give you the
0 2 : 5 2 15 Bates in just a moment.

0 2 : 5 2 16 THE COURT: Thank you. Okay.

0 2 : 5 2 17 MS. WARREN: 39 is Bates P000819.

0 2 : 5 3 18 THE COURT: Would you like the witness to read to
0 2 : 5 3 19 himself where specifically on that page?

0 2 : 5 3 20 MS. WARREN: From page 39, the beginning of
0 2 : 5 3 21 Ms. Smith's direct testimony, through page 52 of the
0 2 : 5 3 22 transcript, which is Bates-stamped P000832. The end of
0 2 : 5 3 23 Ms. Smith's testimony is on line 14 of that page.

0 2 : 5 9 24 A. Just go through the direct testimony?

0 2 : 5 9 25 Q. And the cross.

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1 **A.** And the cross?

2 **THE COURT:** I'm going to give folks a ten-minute

3 recess.

4 Thank you, sir. You can step down. You can leave

5 that and just step down.

6 **THE WITNESS:** Okay.

7 **THE COURT:** Thank you.

8 Just mark your place.

9 (Recess.)

10 **THE COURT:** The witness will please retake the

11 stand. Recall that you're still under oath.

12 And the defendant is present.

13 **A.** I finished the direct testimony. Is that where

14 you want me to stop?

15 **Q.** I wanted you to read the cross-examination as

16 well.

17 **A.** Okay.

18 **Q.** And do you see anything in her testimony at the

19 probable cause hearing on October 5th, 1999, about hearing

20 what she believed was Chris Gailey emptying out his .45 as

21 they left the woods in the morning?

22 **A.** I don't offhand. I just see the incident about

23 rocks thrown at him.

24 **Q.** She didn't testify at the probable cause hearing

25 about hearing Gailey empty his gun as they left the woods?

0 3 : 1 2 1 A. I don't see that in the transcript. I wasn't
0 3 : 1 2 2 there.

0 3 : 1 3 3 Q. As you sit here today, can you think of any
0 3 : 1 3 4 strategic reason you had in 2003 not to cross-examine
0 3 : 1 3 5 Vanessa Smith about what she allegedly heard regarding
0 3 : 1 3 6 Chris Gailey emptying his gun when she left the woods with
0 3 : 1 3 7 her probable cause hearing testimony?

0 3 : 1 3 8 A. I don't remember any reason.

0 3 : 1 3 9 Q. Okay.

0 3 : 1 3 10 MS. WARREN: Your Honor, at this time, I'm going
0 3 : 1 3 11 to ask Mr. Oldham to read Ms. Smith's statements on
0 3 : 1 3 12 August 10th of 1999, which is Defense 23, and on
0 3 : 1 3 13 August 11th, 1999, which is Defense 24.

0 3 : 1 3 14 These statements were read into trial -- into the
0 3 : 1 3 15 trial transcript by Officer Poole. But I believe the state
0 3 : 1 3 16 has an objection for the record.

0 3 : 1 3 17 THE COURT: All right. Let's see. One moment.
0 3 : 1 4 18 I'll make sure I label these.

0 3 : 1 4 19 When you hand up exhibits, they're not marked, so
0 3 : 1 4 20 I have to try to follow along to try to figure out --

0 3 : 1 4 21 MS. WARREN: Going forward, I'll mark them for
0 3 : 1 4 22 you.

0 3 : 1 4 23 THE COURT: -- goes with your Bates stamps.
0 3 : 1 4 24 One moment, please.

0 3 : 1 4 25 All right. I have an exhibit with a stamp at the

1 bottom 939. Which defense exhibit is that, please?

2 On the first page, that has 939 at the bottom.

3 MS. WARREN: The first page with 939 is 22.

4 THE COURT: That is 22. Thank you.

5 MS. WARREN: Sorry. 24, Your Honor.

6 THE COURT: That is 24. Okay.

7 MS. WARREN: Uh-huh.

8 THE COURT: So the exhibit that has 928 at the
9 bottom, that is 23, then?

10 MS. WARREN: That's correct.

11 THE COURT: Thank you.

12 MS. WARREN: And, for the record, that 23 is the
13 August 10th statement, and 24 is the August 11th statement.
14 I believe the numbering that Your Honor is referring to is
15 by either the sheriff's office or the district attorney's
16 office. But I previously read into the record the numbering
17 in trial counsels' files where these records can be found.

18 THE COURT: Thank you.

19 The state had objections.

20 MS. VLAHOS: Yes, Your Honor.

21 The state would object to these statements being
22 admitted for the truth of any matters asserted therein but
23 understand that trial counsel must be asked about their
24 existence.

25 Out-of-court statements like this one are used at

0 3 : 1 5 1 trial to impeach or corroborate the testimony of a witness,
0 3 : 1 5 2 and I believe that's what happened at this trial. After
0 3 : 1 5 3 cross-examination, the state offered them in as far as they
0 3 : 1 6 4 corroborated. But they're not a substitute for the
0 3 : 1 6 5 testimony of the witness at trial.

0 3 : 1 6 6 So her trial testimony is one thing, and testimony
0 3 : 1 6 7 at a probable cause hearing is the same. But these things
0 3 : 1 6 8 are a little bit different, and so we'd object to them
0 3 : 1 6 9 coming in for the truth of the matter asserted, but we
0 3 : 1 6 10 understand Mr. Oldham's got to be asked about them.

0 3 : 1 6 11 **THE COURT:** Your objection is noted.

0 3 : 1 6 12 And at this point, the state -- the defense may
0 3 : 1 6 13 proceed.

0 3 : 1 6 14 **MS. WARREN:** All right.

0 3 : 1 6 15 **Q.** Mr. Oldham, I'm going to ask you to read these
0 3 : 1 6 16 statements, looking for the same thing that I asked you to
0 3 : 1 6 17 look for in the probable cause hearing. When you're done
0 3 : 1 6 18 reading, I'm going to ask you if there's anything in these
0 3 : 1 6 19 statements about Vanessa Smith hearing Chris Gailey empty
0 3 : 1 6 20 out his .45 as they left the woods in the morning.

0 3 : 1 6 21 **A.** You want me to read both statements --

0 3 : 1 6 22 **Q.** Yes.

0 3 : 1 6 23 **A.** -- and see if there's any mention by her of the
0 3 : 1 6 24 gun being discharged in her statements?

0 3 : 1 6 25 **Q.** Yes. As they left the woods in the morning, as

0 3 : 1 7 1 she testified to.

2 (Pause in proceedings.)

0 3 : 5 2 3 Q. Are you done, Mr. Oldham?

0 3 : 5 2 4 A. Yes. What was your question again?

0 3 : 5 2 5 Q. I thought you might need that again. I'm
0 3 : 5 2 6 prepared.

0 3 : 5 2 7 A. Okay.

0 3 : 5 2 8 Q. I wanted to know if, in the two statements that
0 3 : 5 2 9 you just read at Defense Exhibits 23 and 24, if Ms. Smith
0 3 : 5 2 10 said anything about hearing Christopher Gailey empty out his
0 3 : 5 2 11 .45 caliber handgun as they left the woods in the morning.

0 3 : 5 2 12 A. I didn't see anything in there about that.

0 3 : 5 2 13 Q. Okay. As you sit here today, can you recall any
0 3 : 5 2 14 strategic reason you had in 2003 for not cross-examining
0 3 : 5 2 15 Vanessa Smith with these statements that do not include the
0 3 : 5 2 16 detail she added at trial about hearing Christopher Gailey
0 3 : 5 3 17 empty his handgun as they left the woods?

0 3 : 5 3 18 A. I don't recall anything.

0 3 : 5 3 19 Q. Sorry. I need you to say that when I'm done with
0 3 : 5 3 20 the full question. So anything -- I believe that finished
0 3 : 5 3 21 it, as they left the woods.

0 3 : 5 3 22 A. I don't recall anything.

0 3 : 5 3 23 Q. I couldn't hear you.

0 3 : 5 3 24 A. I do not remember anything else.

0 3 : 5 3 25 Q. Okay. There was -- do you remember that there was

0 3 : 5 3 1 only one spent shot -- .45 caliber round recovered from the
0 3 : 5 3 2 scene?

0 3 : 5 3 3 A. I think that's correct. I'm not sure.

0 3 : 5 3 4 Q. Would you look at Exhibit 16, which you should
0 3 : 5 3 5 have in your -- I apologize -- voluminous pile. I know this
0 3 : 5 3 6 is like a repeat of your deposition.

0 3 : 5 3 7 A. 16?

0 3 : 5 3 8 Q. Yes. It's going to be two pages, front and back.

0 3 : 5 4 9 A. It's the lab report?

0 3 : 5 4 10 Q. That's correct.

0 3 : 5 4 11 If you'd look at the second page of that.

0 3 : 5 4 12 A. Backside?

0 3 : 5 4 13 Q. Yes.

0 3 : 5 4 14 And do you see the notes regarding what was
0 3 : 5 4 15 collected at the scene by Officer Wright?

0 3 : 5 4 16 A. I see eight items mentioned.

0 3 : 5 4 17 Q. Yes.

0 3 : 5 4 18 And that includes a .45 caliber semiautomatic
0 3 : 5 4 19 pistol as Item 3?

0 3 : 5 4 20 A. Yes.

0 3 : 5 4 21 Q. A magazine with live rounds as Item 4?

0 3 : 5 4 22 A. Yes.

0 3 : 5 4 23 Q. Item 5 is a .45 caliber cartridge expended?

0 3 : 5 5 24 A. Yes.

0 3 : 5 5 25 Q. And Item 6 is live .45 caliber rounds, 11 count?

0 3 : 5 5 1 A. Yes.

0 3 : 5 5 2 Q. Okay. Does it appear that there only was one
0 3 : 5 5 3 expended .45?

0 3 : 5 5 4 A. That's all that's showing in this report that was
0 3 : 5 5 5 submitted, yes.

0 3 : 5 5 6 Q. As you sit here today, can you recall any
0 3 : 5 5 7 strategic reason you had in 2003 for not cross-examining
0 3 : 5 5 8 Vanessa Smith about the lack of the fourt -- of spent
0 3 : 5 5 9 .45 caliber casings recovered from the scene?

0 3 : 5 5 10 A. I don't remember any reason.

0 3 : 5 5 11 Q. I'm going to have you set aside that pile for a
0 3 : 5 5 12 little bit, and I'm going to give you a new round of three
0 3 : 5 5 13 exhibits that we will focus on for the next portion of
0 3 : 5 5 14 testimony.

0 3 : 5 5 15 MS. WARREN: I'm marking as Defense Exhibit 25
0 3 : 5 6 16 P003736 --

0 3 : 5 6 17 THE COURT: I'm sorry. Repeat that, please.

0 3 : 5 6 18 MS. WARREN: P003736 to 3917.

0 3 : 5 6 19 And for the clerk, that is on the fifth page of
0 3 : 5 6 20 exhibits towards the middle.

21 On that same page, I'm marking as Defense
0 3 : 5 6 22 Exhibit 26 the document with Bates stamps P003238 to 41.
0 3 : 5 6 23 And that is six rounds down on that same page on the exhibit
0 3 : 5 7 24 list.

0 3 : 5 7 25 And on the fourth page of the exhibit list, in the

1 middle, I'm going to mark Defense Exhibit 27, which is a
2 document Bates-stamped P003719 to 28. Part of this exhibit
3 was included in Exhibit 74 to the second supplemental MAR.

4 And, Your Honor, I will ensure that we confirm
5 with all parties, including the Court, at the end of the day
6 that we've all marked the appropriate exhibits.

7 **THE COURT:** Thank you.

8 **MS. WARREN:** May I approach with these?

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

10 **Q.** All right. Mr. Oldham, you testified earlier, I
11 think this morning, that when you first were appointed for
12 Scott, you remembered him from an earlier case in which you
13 had represented him; is that right?

14 **A.** That's correct.

15 **Q.** That was a string of breaking and enterings into
16 churches, you said?

17 **A.** That's correct.

18 **Q.** If you'll look at this document marked as Defense
19 Exhibit 25 -- I'm not asking you to read it, but just glance
20 through it -- does this look like your case file from
21 Scott's 1994 case?

22 And if it refreshes your memory, we did look at
23 this at your deposition as well.

24 **A.** Look at what?

25 **Q.** At this exhibit.

0 4 : 0 1 1 to law enforcement?

0 4 : 0 1 2 MS. VLAHOS: Your Honor, I'm going to object to
0 4 : 0 1 3 the exhibit, not to Mr. Oldham's recollections. The
0 4 : 0 1 4 objection is regarding the truth of any matters asserted in
0 4 : 0 1 5 the file, but understand counsel's got to ask him about it.

0 4 : 0 1 6 Also, it's a big file with a lot of hearsay from a
0 4 : 0 1 7 lot of different people, businesses, and organizations, so
0 4 : 0 1 8 the state would respectfully request the Court treat it
0 4 : 0 1 9 accordingly.

0 4 : 0 1 10 THE COURT: All right. The state's objection is
0 4 : 0 1 11 duly noted.

0 4 : 0 1 12 The defense may proceed.

0 4 : 0 1 13 Q. All right. Did Vanessa Smith make any statements
0 4 : 0 1 14 to law enforcement in this case?

0 4 : 0 1 15 A. I don't recall because I did not represent her.
0 4 : 0 1 16 She came to my office at the consent of Mr. Roose to give a
0 4 : 0 2 17 statement to me.

0 4 : 0 2 18 Q. Can I have you take a look at Bates stamps 3901 to
0 4 : 0 2 19 3903 within this large exhibit.

0 4 : 0 2 20 A. 3901?

0 4 : 0 2 21 Q. Yep.

0 4 : 0 2 22 A. Through 3903.

0 4 : 0 2 23 Q. That's correct.

0 4 : 0 2 24 They'll be towards the back.

0 4 : 0 3 25 A. I see 3901. That appears to be a statement. Says

0 4 : 0 3 1 it's a statement from Vanessa Warner to Lieutenant
0 4 : 0 3 2 Barry Bunting.

0 4 : 0 3 3 Q. Would you read that statement, which goes from
0 4 : 0 3 4 3901 to 3903.

0 4 : 0 7 5 A. You want me to read through page 39 -- 3813? I'm
0 4 : 0 7 6 sorry.

0 4 : 0 7 7 Q. I'm sorry. I can't hear you.

0 4 : 0 7 8 THE COURT: He's asking if you want him to read --
0 4 : 0 7 9 well, just tell him where you want him to read to.

0 4 : 0 7 10 Q. Through the end of 3903.

0 4 : 0 7 11 A. Okay. Yes, ma'am.

0 4 : 0 7 12 Q. Okay. Did anything in that statement implicate
0 4 : 0 7 13 Scott Allen in this case?

0 4 : 0 7 14 A. Scott was not mentioned in either the first or the
0 4 : 0 7 15 second statement she gave.

0 4 : 0 7 16 Q. And what is the date on this statement? I believe
0 4 : 0 7 17 it's sort of in the middle of page 3903.

0 4 : 0 7 18 A. The second statement?

0 4 : 0 7 19 Q. The first statement, the middle of --

0 4 : 0 7 20 A. The first statement?

0 4 : 0 8 21 THE COURT: 3903, in the middle.

0 4 : 0 8 22 THE WITNESS: In the middle?

0 4 : 0 8 23 THE COURT: Yes, sir.

0 4 : 0 8 24 A. Okay.

0 4 : 0 8 25 That says, "End of interview February 25" -- I

1 think that's --

2 Q. '94?

3 A. I think so. I'm not positive. It's not my
4 handwriting.

5 Q. And that will be the year of the case, right,
6 would be 1994?

7 A. Yes.

8 Q. Okay. Now, if -- I'm going to have you read her
9 next statement, which is on pages 3904 to 3907.

10 MS. WARREN: And, Your Honor, if I may take a
11 brief break while he reads, or I can do it afterwards.

12 THE COURT: We will take a ten-minute recess.

13 MS. WARREN: Thank you.

14 (Recess.)

15 THE COURT: Are you ready to proceed, ma'am?

16 MS. WARREN: Yes. Thank you, Your Honor.

17 Q. Mr. Oldham, were you able to review pages 3904 to
18 3907 of Defense Exhibit 25?

19 A. Yes.

20 Q. Is that Vanessa Smith's statement from three days
21 later, February 28, 1994?

22 A. That's what it purports to be.

23 Q. And does that statement implicate Scott Allen?

24 A. The second statement does.

25 Q. Yes.

0 4 : 1 5 1 Was there a time in this case where Vanessa Smith
0 4 : 1 5 2 came to your office?

0 4 : 1 5 3 A. She did. Are you talking about this case here?

0 4 : 1 6 4 Q. Yes.

0 4 : 1 6 5 A. Not the breaking and enterings.

0 4 : 1 6 6 Q. Correct. Thank you. I'll be clear for the
0 4 : 1 6 7 record. The 1994 case.

0 4 : 1 6 8 A. Yes.

0 4 : 1 6 9 Q. What happened when Ms. Smith came to your office
0 4 : 1 6 10 in the 1994 case?

0 4 : 1 6 11 A. She wanted to talk to me. I asked her about what
0 4 : 1 6 12 she told me she wanted to give me. She wanted to talk to me
0 4 : 1 6 13 about her implication of Scott Allen in the breaking and
0 4 : 1 6 14 enterings. I asked her if she had an attorney. She told me
0 4 : 1 6 15 she did. She told me who it was. I said, have you talked
0 4 : 1 6 16 to your attorney? Because you need to talk to him before
0 4 : 1 6 17 you talk to me. You don't have a privilege with me. She
0 4 : 1 6 18 indicated she had come there at his request to speak to me
0 4 : 1 6 19 about that at that time. As I recall, I prepared or typed
0 4 : 1 6 20 up something that should be in this file.

0 4 : 1 6 21 Q. Would you look at page 3913.

0 4 : 1 7 22 Is that your handwriting, Mr. Oldham?

0 4 : 1 7 23 A. That is.

0 4 : 1 7 24 Q. At the top, does it say, "Interview of Vanessa
0 4 : 1 7 25 Warner on September 2nd, '94, at my office"?

25 Q. Yes.

1 And the paragraph below that says, "She had no
2 knowledge of Scott breaking into churches."

3 A. I wrote, "She has no knowledge of Scott breaking
4 into churches. She does know he stole some items that were
5 hot."

6 Q. Is that "sold"?

7 A. Pardon?

8 Q. Is that "stole" or "sold"?

9 A. I've got S-O-L-D.

10 "He sold some items that were hot."

11 Q. Okay. Did Vanessa Smith more formally recant her
12 statement implicating Scott in 1994?

13 A. I thought there was a typed statement that I went
14 outside and had the secretary type up that time and had her
15 sign.

16 Q. If you'd look at page 3896, so move towards the
17 front of the document from where you are.

18 A. 3896 is back deep.

19 Q. 3896.

20 A. Okay.

21 That looks like the typed statement that I had
22 typed in my office while she was there in the office.

23 Q. Uh-huh.

24 And does this typed statement have details about
25 what portions of her statement were written by

0 4 : 2 1 1 Barry Bunting?

0 4 : 2 1 2 A. Appears to. It says, "The first statement were
0 4 : 2 1 3 written by -- first sentence was written by Bunting. He
0 4 : 2 1 4 told me what I was going to say in the first statement."

0 4 : 2 1 5 She goes on to say why she agreed with him at that
0 4 : 2 1 6 particular point in time.

0 4 : 2 1 7 Q. And she agreed because she was afraid of her
0 4 : 2 1 8 ex-boyfriend, Jamie Brewer?

0 4 : 2 1 9 A. That's what she told me, yes.

0 4 : 2 1 10 Q. Okay. She also says towards the bottom of this
0 4 : 2 1 11 statement that she did not tell Barry Bunting that Scott was
0 4 : 2 1 12 bragging about breaking into a church, and he never made any
0 4 : 2 1 13 admissions to her about breaking into a church; is that
0 4 : 2 2 14 right?

0 4 : 2 2 15 A. That's what I had typed up.

0 4 : 2 2 16 Q. She said she informed you and her attorney about
0 4 : 2 2 17 these discrepancies.

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

0 4 : 2 2 19 Q. This statement has a Defendant's Exhibit Voir Dire
0 4 : 2 2 20 Number 1.

0 4 : 2 2 21 Do you recall using this statement in Scott's 1994
0 4 : 2 2 22 trial?

0 4 : 2 2 23 A. I don't have any independent recollection of using
0 4 : 2 2 24 it at the trial. I remember there was a jury trial, and it
0 4 : 2 2 25 went on for about three days, and I remember what transpired

0 4 : 2 2 1 at that time.

0 4 : 2 2 2 Q. Do you know how else that exhibit sticker would
0 4 : 2 2 3 come to be on that document?

0 4 : 2 2 4 A. I don't know. It could have been marked for it.
0 4 : 2 2 5 I don't know if it ever reached the point that we had a
0 4 : 2 3 6 hearing. I can't recall at this particular time.

0 4 : 2 3 7 Q. Did you cross-examine Vanessa Smith in the 2003
0 4 : 2 3 8 trial for the 1999 case with her statement from the 1994
0 4 : 2 4 9 case?

0 4 : 2 4 10 A. I did not, no.

0 4 : 2 4 11 Q. I'm sorry?

0 4 : 2 4 12 A. I did not.

0 4 : 2 4 13 I did not cross-examine her about that earlier
0 4 : 2 4 14 incident, no.

0 4 : 2 4 15 Q. As you sit here today, can you recall any
0 4 : 2 4 16 strategic reason that you had in 2003 for not
0 4 : 2 4 17 cross-examining Vanessa Smith about her 1994 recantation?

0 4 : 2 4 18 MS. VLAHOS: Objection.

0 4 : 2 4 19 THE COURT: Overruled.

0 4 : 2 4 20 A. I don't recall.

0 4 : 2 4 21 Q. At Scott's 2003 trial, do you recall that
0 4 : 2 4 22 Chris Poole read Vanessa Smith's statements into the record?

0 4 : 2 5 23 A. I do not. Are you talking about her statement?

0 4 : 2 5 24 Q. Uh-huh.

0 4 : 2 5 25 A. As I recall, there were some statements she gave

1 to officers in Mecklenburg County. And I think he
2 subsequently -- I recall him -- receiving some discovery
3 that he interviewed her. And I think he and maybe someone
4 else actually took her in a vehicle to drive to different
5 locations that she mentioned in the statement.

6 Q. Do you remember that at the trial -- I think we
7 had a discussion about this -- Mr. Poole actually read those
8 statements which are marked as Defense 23 and 24 into the
9 record at the trial?

10 A. I just don't remember.

11 Q. Okay. If the transcript shows that, that would be
12 what happened?

13 A. If the transcript shows that, that's what it is; I
14 just don't have any independent recollection.

15 Q. And you just read those statements earlier this
16 afternoon. Those were her statements on August 10th and
17 11th of 1999?

18 A. I didn't look that closely. I didn't know --
19 there were two of them, correct?

20 Q. Yes.

21 A. I didn't know if the first one was from Charlotte
22 or Mr. Poole. I didn't pay attention.

23 Q. But you read Defense Exhibits 23 and 24?

24 A. Yes, I read them.

25 Q. And those included information about Scott Allen

0 4 : 2 6 1 being on escape status?

0 4 : 2 6 2 A. I think at least one of the statements it talked
0 4 : 2 6 3 about assistance that he received while he was on escape
0 4 : 2 6 4 prior to the alleged murder of Mr. Gailey.

0 4 : 2 7 5 Q. Uh-huh.

0 4 : 2 7 6 The jury at Scott's 2003 trial knew that at the
0 4 : 2 7 7 time of the 1999 case, Scott was on escape; is that right?

0 4 : 2 7 8 A. I would assume that they did. I just -- at this
0 4 : 2 7 9 point, yes.

0 4 : 2 7 10 Q. Did Ms. Hussey testify to that earlier today?

0 4 : 2 7 11 A. Did who?

0 4 : 2 7 12 Q. Did Ms. Hussey, the alternate juror, testify that
0 4 : 2 7 13 she was aware of that earlier today during the state's
0 4 : 2 7 14 cross-examination?

0 4 : 2 7 15 A. I think so.

0 4 : 2 7 16 Q. Okay. There was a significant amount of coverage
0 4 : 2 7 17 about the 1999 case in the local newspapers at the time,
0 4 : 2 7 18 right?

0 4 : 2 7 19 A. The murder case, yes.

0 4 : 2 7 20 Q. And enough that the state actually moved to change
0 4 : 2 7 21 the venue because of it; is that right?

0 4 : 2 7 22 A. The state made a motion to change the venue, yes.

0 4 : 2 7 23 Q. Okay. And would you look at what's been marked as
0 4 : 2 8 24 Defense Exhibit 26. This is P003238 to 41.

0 4 : 2 8 25 A. Okay.

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1 Q. And is that the state's motion to change venue?

2 A. This appears to have been the motion he filed,

3 yes.

4 Q. And if you'll look at the second and third pages

5 of that motion, you can just skim, and tell me, does that

6 include details of some of the newspaper articles?

7 A. It purports to quote from articles that were

8 allegedly published in local papers.

9 Q. Would you look at what's been marked as Defense

10 Exhibit 27. And that is Bates-stamped P003719 --

11 A. Yes.

12 Q. -- to 28.

13 Do those appear to be copies of newspaper

14 articles?

15 MS. VLAHOS: Your Honor, state would object to

16 those.

17 A. Yes.

18 THE COURT: Same reason?

19 MS. VLAHOS: Yes, Your Honor, for the hearsay, but

20 understanding it has to be asked about.

21 THE COURT: Okay. State's objecting to the truth

22 of the matter asserted. That is duly noted.

23 Defendant may proceed.

24 Q. Would you look at page 3721.

25 A. Okay.

0 4 : 2 9 1 Q. And is this apparently from the Courier-Tribune
0 4 : 3 0 2 out of Asheboro?

0 4 : 3 0 3 A. That's correct.

0 4 : 3 0 4 Q. Is the date on this Thursday, July 22nd, 1999?

0 4 : 3 0 5 A. That's what it indicates.

0 4 : 3 0 6 Q. In the middle column, does it note that Mr. Allen
0 4 : 3 0 7 was on escape from a 12-year sentence for a string of church
0 4 : 3 0 8 break-ins in Randolph County?

0 4 : 3 0 9 A. Page 3635 in the smaller section of the newspaper
0 4 : 3 0 10 story, second column?

0 4 : 3 0 11 Q. Yeah. That second column right in the middle.

0 4 : 3 0 12 THE COURT: I'm sorry. What page did you direct
0 4 : 3 0 13 him to?

0 4 : 3 0 14 MS. WARREN: It's 3721. I believe Mr. Oldham just
0 4 : 3 1 15 referenced it. It had been duly Bates-stamped as 3635.

0 4 : 3 1 16 THE COURT: I see it. Thank you.

0 4 : 3 1 17 MS. WARREN: There are a wealth of numbers in this
0 4 : 3 1 18 case.

0 4 : 3 1 19 A. What was your question?

0 4 : 3 1 20 Q. Does it note that Mr. Allen had escaped from a
0 4 : 3 1 21 12-year sentence for a string of church break-ins in
0 4 : 3 1 22 Randolph County?

0 4 : 3 1 23 That paragraph starts at the bottom of the first
0 4 : 3 1 24 column and goes to the top of the second.

0 4 : 3 1 25 A. Says, "According to Jordan, who was a

0 4 : 3 1 1 Randolph County deputy, authorities have been searching for
0 4 : 3 1 2 Allen since his escape."

0 4 : 3 1 3 Q. Thank you.

0 4 : 3 2 4 A. And at the top, it does talk about -- the first of
0 4 : 3 2 5 that paragraph, it talks about church break-ins.

0 4 : 3 2 6 Q. I want to move on from this set of exhibits, so
0 4 : 3 2 7 you can put these away, and I'll give you a new set.

0 4 : 3 2 8 MS. WARREN: Your Honor, this has been previously
0 4 : 3 2 9 admitted as Defense Exhibit 1 on a flash drive. And these
0 4 : 3 2 10 are materials from Will Atkinson's deposition. I'm
0 4 : 3 3 11 providing them to the Court as well as to the witness in
0 4 : 3 3 12 printed form.

0 4 : 3 3 13 And I've labeled the transcript as Defense
0 4 : 3 3 14 Exhibit 1-1.

0 4 : 3 3 15 I've labeled defense exhibits admitted at the
0 4 : 3 3 16 deposition as 1-2.

0 4 : 3 3 17 And the state's exhibits admitted at the
0 4 : 3 3 18 deposition as 1-3.

0 4 : 3 3 19 The only additional file that the flash drive
0 4 : 3 3 20 admitted as Exhibit 1 includes is the actual video recording
0 4 : 3 3 21 of the deposition.

0 4 : 3 3 22 THE COURT: Thank you.

0 4 : 3 3 23 MS. WARREN: May I approach?

0 4 : 3 3 24 MS. VLAHOS: Your Honor, the state would raise the
0 4 : 3 3 25 same objection it did earlier to the exhibits, not for their

1 truth, but understanding it has to be asked about, just to
2 preserve.

3 **THE COURT:** State's objection to the truth of the
4 matter asserted to these exhibits is duly noted.

5 The defendant may proceed.

6 **Q.** All right. Mr. Oldham, I want to -- I'm not going
7 to ask you to read these materials --

8 **A.** Thank you.

9 **Q.** -- but I am going to talk about two pages which we
10 have also talked about at your deposition.

11 If you'll turn to the third document in this
12 stack. And that should say Defense 1-3.

13 **A.** Yes. State versus Scott David Allen.

14 **Q.** Yes.

15 **A.** Atkinson's letter to post-conviction counsel.

16 **Q.** And I'm going to have you turn to Exhibit 5.

17 There's a long transcript, and these are not individually
18 paginated. So if you flip past the transcript, there's --
19 there's then a large volume of billing records. And in the
20 middle of the packet, you will come on State's Exhibit 5.

21 **A.** In this --

22 **Q.** Yes.

23 **A.** In Defendant's Exhibit 1-3?

24 **Q.** Yes.

25 **A.** What page is it?

0 4 : 3 5 1 Q. So they are not Bates'd because they're individual
0 4 : 3 5 2 exhibits. So if you look about halfway through the packet,
0 4 : 3 5 3 first you'll see a long transcript, then you'll see some
0 4 : 3 6 4 billing records. And towards the middle, you'll find
0 4 : 3 6 5 State's 5.

0 4 : 3 6 6 THE COURT: It's actually towards the very end.
0 4 : 3 6 7 If you look toward the very end and work backwards, you'll
0 4 : 3 6 8 see State's Exhibit 5 a lot quicker. It looks like this.
0 4 : 3 6 9 It's towards the back. I'll move this clip for you so you
0 4 : 3 7 10 can move the pages easier.

0 4 : 3 7 11 MS. WARREN: Thank you.

0 4 : 3 7 12 A. I see the page that's marked Exhibit State's 5.

0 4 : 3 7 13 Q. And at the bottom of that page, does it say
0 4 : 3 7 14 P000643?

0 4 : 3 7 15 A. That's what's stamped there, yes.

0 4 : 3 7 16 Q. Okay. And the next page, it looks like it
0 4 : 3 7 17 continues and is 44.

0 4 : 3 7 18 A. Yes.

0 4 : 3 7 19 Q. Do you recognize this document?

0 4 : 3 7 20 A. I think you'd asked me about this before. It's
0 4 : 3 7 21 signed White Chocolate. I think this is something
0 4 : 3 7 22 Mr. Atkinson came into possession of; I'm not sure where.

0 4 : 3 7 23 Q. Were you aware that White Chocolate was a nickname
0 4 : 3 7 24 for Vanessa Smith?

0 4 : 3 7 25 A. That's what I was told when we talked about it.

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1 Q. Mr. Atkinson told you that?

2 A. I don't recall. I remember you asking me if I

3 knew that, and I said I don't remember.

4 Q. Okay. As you look at this letter, does it appear

5 to be a letter from Vanessa Smith to Scott Allen while she's

6 in custody --

7 MS. VLAHOS: Objection to what it appears to be.

8 Q. -- pretrial?

9 THE COURT: Sustained to the form of the question.

10 Q. What do you believe this document is as you look

11 at it?

12 A. It's addressing -- it talks about speaking with

13 Joyce, who I assume was Scott's ex-wife.

14 Q. Uh-huh.

15 A. It appears to be -- it's signed White Chocolate

16 with a smiley face. It appears --

17 Q. Does this include -- sorry.

18 What does it appear to be?

19 A. From the tone of it, it talks about she hopes to

20 see him some day when they're both free. So I guess you

21 could guess that is who it's from, to him, a letter from

22 her.

23 MS. VLAHOS: Objection to what anybody could

24 guess.

25 THE COURT: Sustained to what he's guessing.

0 4 : 4 0 1 A. I don't know otherwise. I never heard her
0 4 : 4 0 2 referred to as White Chocolate, but I don't know.

0 4 : 4 0 3 Q. Do you remember discussing this letter with Will
0 4 : 4 0 4 before trial?

0 4 : 4 0 5 A. I remember discussing it with you at the
0 4 : 4 0 6 deposition or some statement.

0 4 : 4 0 7 Q. Does the letter say, "We are innocent. And we
0 4 : 4 0 8 will go free, and then we will both get back to our lives"?

0 4 : 4 0 9 A. Where are you referring to now?

0 4 : 4 0 10 Q. I'm looking on the second page, which has 644 at
0 4 : 4 0 11 the bottom. And from the top, it's down one, two, three,
0 4 : 4 0 12 four, five, six -- eight lines down.

0 4 : 4 1 13 A. Eight lines down, about midway through that line,
0 4 : 4 1 14 "We are innocent. We will go free, and then we will both
0 4 : 4 1 15 get back to our lives."

0 4 : 4 1 16 Q. Uh-huh.

0 4 : 4 1 17 I think -- when we discussed this at your
0 4 : 4 1 18 deposition, do you recall noting that, based on the
0 4 : 4 1 19 reference in this letter, it appeared to be a letter from
0 4 : 4 1 20 Vanessa Smith to Scott Allen?

0 4 : 4 1 21 MS. VLAHOS: Objection.

0 4 : 4 1 22 THE COURT: Sustained.

0 4 : 4 2 23 Q. As you sit here today, can you recall any
0 4 : 4 2 24 strategic reason you had in 2003 for not cross-examining
0 4 : 4 2 25 Vanessa Smith about whether she wrote this letter to

1 Scott Allen?

2 A. I don't remember the letter at that point, to be
3 honest with you, so I can't give you a reason why I did not
4 ask her that.

5 Q. Did you have any other cases where a testifying
6 co-defendant had written a letter saying that they -- "We
7 are innocent"?

8 THE COURT: You mean over the span of his career?

9 MS. WARREN: Yes.

10 A. Probably. I can't remember anything off the top
11 of my head at this particular point in time. I don't recall
12 any time that a person accused of a crime, like she was in
13 the breaking and enterings, came to my office to talk to me
14 instead of having her attorney -- have her attorney contact
15 me first.

16 MS. WARREN: I'm going to mark as Defense 28
17 P002269 to 73. This is on page 3 of the exhibit list. And
18 this was also attached to the second supplemental MAR as
19 Exhibit 80.

20 And I'm also going to mark P003276 to 77, which is
21 on the bottom of page 5 of the exhibit list, as 29.

22 Your Honor, may I approach?

23 THE COURT: You may.

24 Q. If you'll take a look at what's been marked as
25 Defense Exhibit 28.

1 Do you recognize that document?

2 A. Yes, I do.

3 Q. What is it?

4 A. This is a document that was furnished to me by
5 Mrs. Allen, who was the prosecutor in the case from Randolph
6 County. It was purported to be the agreement between her
7 office -- their office and Vanessa Smith.

8 Q. This document says that Vanessa Smith was out on
9 house arrest beginning in 2001, if you look at the bottom of
10 that first page.

11 A. Yes.

12 Q. And if you'll look at the second page, at the top,
13 what was her bond in 2001 when she was put on house arrest?

14 A. It was reduced to 5,000 secured, then it was
15 modified in August to 2500 unsecured.

16 Q. Okay. And that was -- a year later, it was
17 further modified to \$2,500 unsecured?

18 A. That's what it says.

19 Q. Okay.

20 A. Actually, a year and a month. A year and half a
21 month, I should say.

22 Q. Is \$5,000 a low bond for someone charged with
23 first-degree murder?

24 A. Yes.

25 Q. Is \$2,500 unsecured a low bond?

0 4 : 4 9 1 A. Uh-huh. It's very unusual. Yes.

0 4 : 4 9 2 Q. It's very unusual, you said?

0 4 : 4 9 3 A. Yes.

0 4 : 4 9 4 THE COURT: Mr. Oldham, try to let her finish
0 4 : 4 9 5 before you speak so that Madam Court Reporter can take
0 4 : 4 9 6 everything, please. Thank you.

0 4 : 4 9 7 Q. Did you ever have a client charged with
0 4 : 4 9 8 first-degree murder who was given a \$2,500 unsecured bond?

0 4 : 4 9 9 A. Not that I recall.

0 4 : 4 9 10 Q. As you sit here today, can you recall any
0 4 : 4 9 11 strategic reason you had in 2003 for not cross-examining
0 4 : 5 0 12 Vanessa Smith about her benefits going back to 2001 in this
0 4 : 5 0 13 case?

0 4 : 5 0 14 MS. VLAHOS: Objection.

0 4 : 5 0 15 THE COURT: Overruled.

0 4 : 5 0 16 You may answer.

0 4 : 5 0 17 A. My recollection is that Mrs. Allen read this
0 4 : 5 0 18 agreement in front of the jury and informed them of the
0 4 : 5 0 19 details of the agreement between her office and
0 4 : 5 0 20 Vanessa Smith.

0 4 : 5 0 21 Q. Is that the strategic reason why you did not
0 4 : 5 0 22 cross-examine --

0 4 : 5 0 23 A. I felt like the jury knew that at that particular
0 4 : 5 0 24 point in time, yes.

0 4 : 5 0 25 Q. If you'll look at Defense Exhibit 29.

1 **A.** Yes, ma'am.

2 **Q.** Are those certified copies of the bond motion and
3 order in this case?

4 || **A.** Is that a question?

5 || Q. Yes. Are those certified copies of the --

6 || A. It 's a --

7 || Q. -- bond motion and order --

8 **A.** It's a certified copy --

9 || Q. Can I finish the question?

10 || **THE COURT:** Try to remember.

11 || THE WITNESS: I'm sorry.

12 THE COURT: Thank you.

13 **Q.** Are those certified copies of the bond motion and
14 order for Vanessa Smith in this case?

15 A. I couldn't hear your last voice. Are they
16 certified copies of the --

17 Q. -- of the bond motion and order for Vanessa Smith
18 in this case?

19 **A.** Appears to be, yes.

20 Q. Did you obtain these certified copies?

21 || **A.** I don't recall.

22 I recall being furnished the previous document by
23 the district attorney's office when it occurred. Now, as to
24 whether or not they provided the motion and order in
25 addition to that notification, I don't remember.

0 4 : 5 2 1 Q. As you sit here today, can you recall any
0 4 : 5 2 2 strategic reason you had in 2003 for not cross-examining
0 4 : 5 2 3 Vanessa Smith about her bond reduction and orders entered
0 4 : 5 2 4 prior to her plea agreement?

0 4 : 5 2 5 A. None other than what I've previously stated.

0 4 : 5 2 6 Q. And that answer is?

0 4 : 5 2 7 A. The district attorney got up and read what it --
0 4 : 5 2 8 to the jury what had been promised allegedly to her. I had
0 4 : 5 2 9 nothing to dispute that in my possession.

0 4 : 5 2 10 MS. WARREN: Your Honor, I'm not sure how late you
0 4 : 5 3 11 want to go today. I have --

0 4 : 5 3 12 THE COURT: I'm about to stop now.

0 4 : 5 3 13 MS. WARREN: Great. I have a larger section
0 4 : 5 3 14 coming up. So...

0 4 : 5 3 15 THE COURT: This is a good stopping point?

0 4 : 5 3 16 MS. WARREN: Yes.

0 4 : 5 3 17 THE COURT: All right. Mr. Oldham, sir, you may
0 4 : 5 3 18 step down. We will have you back on the witness stand at
0 4 : 5 3 19 9:30 in the morning.

0 4 : 5 3 20 Is there anything else we should address at this
0 4 : 5 3 21 point before we take a recess?

0 4 : 5 3 22 From the defendant?

0 4 : 5 3 23 MS. WARREN: No, Your Honor.

0 4 : 5 3 24 THE COURT: From the state?

0 4 : 5 3 25 MS. VLAHOS: No, Your Honor.

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THE COURT: All right. Recess us until 9:30,
please.

(Court recessed on Monday, September 23,
2024, until Tuesday, September 24, 2023, at
9:30 a.m.)

(Volume 1 of 9.)