
No. 2018 - 6701

IN THE
SUPREME COURT OF THE UNITED STATES

ROGER EPPERSON
Petitioner

v.

COMMONWEALTH OF KENTUCKY
Respondent

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF KENTUCKY

APPENDIX TO
REPLY TO BRIEF IN OPPOSITION
PETITION FOR A WRIT OF CERTIORARI

CAPITAL CASE

DAVID M. BARRON
(Counsel of Record)
Assistant Public Advocate
Capital Post Conviction Unit
Kentucky Department of Public Advocacy
5 Mill Creek Park, Section 101
Frankfort, Kentucky 40601
502-564-3948
david.barron@ky.gov

BRIAN M. POMERANTZ
Law Offices of Brian M. Pomerantz
P.O. Box 853
Carrboro, NC 27510
323-630-0049
habeas@protonmail.com

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COMMONWEALTH OF KENTUCKY
WARREN CIRCUIT COURT
NO. 97-CR-00016

_____)	
ROGER DALE EPPERSON,)	
	)	Bowling Green, Kentucky
Movant	)	April 30, 2015
)	
vs.)	
)	
COMMONWEALTH OF KENTUCKY,	)	EVIDENTIARY HEARING
)	
Respondent)	
_____)	

TRANSCRIPT OF VIDEOTAPED PROCEEDINGS
BEFORE THE HONORABLE STEVE WILSON,
JUDGE, WARREN CIRCUIT COURT

APPEARANCES:

FOR MOVANT EPPERSON: DAVID M. BARRON
 KATHERINE A. BLAIR
 Assistant Public Advocates
 Capital Post-Conviction Unit
 KY Dept. of Public Advocacy
 Frankfort, Kentucky 40601

FOR RESPONDENT
COMMONWEALTH OF KENTUCKY: JULIE SCOTT JERNIGAN
 DAVID ABNER
 Assistant Attorneys General
 Office of the Attorney General
 Frankfort, Kentucky 40601

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1 THE COURT: David, do you want to wait for your client?

2 DAVID BARRON: Thanks, yes. I just noticed he wasn't here.

3 THE COURT: Well, he's having lunch. What he's doing, he's late getting
4 his lunch.

5 DAVID BARRON: I would like to wait. Your Honor, Mr. Jackson and Mr.
6 Jewell are out there, and I think it would be good to instruct that they probably
7 shouldn't be, I don't know if they are just chit-chatting or talking about the case.
8 They probably shouldn't be talking about their testimony if they are.

9 THE COURT: Well, who are you going to call next?

10 DAVID BARRON: Mike Jackson.

11 THE COURT: Why don't you call Mr. Jackson to come on in here. If he's
12 ready.

13 BAILIFF: He's ready.

14 THE COURT: Bring him on in.

15 DAVID BARRON: Thank you.

16 THE COURT: Mr. Jackson, if you will come forward to be sworn by the
17 clerk please.

18 (Sworn in)

19 THE COURT: Alright, Mr. Epperson is back in the courtroom. Mr.
20 Jackson has been sworn. You may ask David.

21 DIRECT EXAMINATION OF MICHAEL JACKSON

22 BY DAVID BARRON:

1 Q: Mr. Jackson, can you state your name for the record?

2 A: Mike Jackson.

3 Q: When were you admitted to practice law?

4 A: 1994.

5 Q: How are you currently employed?

6 A: I am employed at Boehl, Stopher, and Graves in Louisville.

7 Q: Did there come a point when you became counsel for Roger Epperson
8 in the case regarding the murders of Ed and Bessie Morris?

9 A: Yes.

10 Q: Do you recall when you began representing Roger?

11 A: No, I don't. Frank Jewell was lead counsel. He asked me to assist him
12 in the defense of Roger.

13 Q: And you did go ahead and represent him in the trial in 2003?

14 A: Yes.

15 Q: Now, the record reflects that Mr. Jewell undertook representation in
16 the fall of the year 2000. Do you know if you got involved shortly, sometime shortly
17 after that?

18 A: I have no idea.

19 Q: Well, it was definitely in advance of the trial?

20 A: Yes

21 Q: So, In this time frame when you were representing Roger, can you tell
22 us, do you have any idea, any approximation, how many cases you were handling?

1 A: No idea.

2 Q: Would you want to. Any possibility you would quantify? Are we
3 talking hundreds, or less than that, or still no idea?

4 A: You are asking me back in 2000, how many cases I was handling at
5 that time?

6 Q: Yes. At any given time approximately (garbled) between 2000 and
7 2003?

8 A: I had left the public defenders office, I was in my own practice, I could
9 not tell you how many cases I was handling.

10 Q: When were you employed as a public defender?

11 A: 1994 through '98, maybe. '99.

12 Q: Where, located were you with the public defender?

13 A: Uh. Jefferson County.

14 Q: Did you handle any death penalty cases while as a public defender at
15 the Jefferson County office?

16 A: I had many murder cases. I want to say I had death penalty cases. I
17 don't recall.

18 Q: Do you know if you had any death, any involvement in any death
19 penalty cases that went to trial prior to this one?

20 A: Prior to Roger's, yes.

21 Q: I'm sorry, yes you did?

22 A: Yes I did.

1 Q: How many?

2 A: I probably had six death penalty cases that had either settled during
3 the jury selection phase or (inaudible).

4 Q: Any that went to trial, went to verdict, before the jury?

5 A: Yes.

6 Q: Any that went to the actual sentencing phase?

7 A: Yes.

8 Q: How many of those?

9 A: Three.

10 Q: Do you recall names of who those clients were?

11 JERNIGAN: Objection. Irrelevant.

12 COURT: If you remember go ahead and answer.

13 JACKSON: Uh, Gazaway, McCreery, in Jefferson County, David Talbot I
14 don't think that went to a sentencing phase, I think we actually settled that before
15 that point, Pettway, Bernard Brown, not sure if that was death penalty or just a
16 murder, Earl Clayton, but that was it.

17 COURT: Mr. Jackson would you mind pulling that microphone closer to
18 you?

19 JACKSON: I will, I apologize.

20 COURT: No, no, That's good. I'm just (garbled).

21 RESUME DIRECT EXAMINATION OF MICHAEL JACKSON

22 BY MR. BARRON

1

2 Q: And then, if I recall your testimony correctly, you said it was around
3 1999 that you left the public defender's office?

4 A: Yes.

5 Q: And then where did you go at that point?

6 A: I started my own practice. Some of those murder cases and death
7 penalty cases were in my own practice.

8 Q: And how long did you have your own practice for?

9 A: I started with Boehl, Stopher, and Graves in 2005, 2006, somewhere.

10 Q: Now, when you were at the firm that you just mentioned, what
11 percentage of your cases were criminal cases?

12 JERNIGAN: I would object again, Judge. I don't see the relevance of this line
13 of questioning.

14 COURT: As to what he did after

15 JERNIGAN: Yes.

16 COURT: I'll sustain that.

17 BARRON: Your Honor, may I be heard on that, very briefly?

18 COURT: About what he did after, before he represented Mr. Epperson?

19 BARRON: No.

20 Crosstalk

21 BARRON: It was not after he represented. He joined this firm beforehand,
22 and it is where he was employed when he was representing Mr. Epperson. So the

1 type of work he was doing and the caseload is relevant to the timeframe,
2 particularly when we already had Mr. Lewis testify

3 COURT: I don't disagree with that. I thought we were talking about
4 something that happened after

5 JERNIGAN: The witness testified that he went to Boehl, Stopher, and Graves
6 in 2005.

7 COURT: That's what I thought he said, as well, and the Epperson case
8 was tried in '03.

9 BARRON: Then I misheard. Where did you work 2000 – 2003? Where were
10 you employed?

11 RESUME DIRECT EXAMINATION OF MICHAEL JACKSON

12 BY MR. BARRON

13 A: I had my own criminal practice.

14 Q: So you were out on your own the entire time you were representing Mr.
15 Epperson?

16 A: Yes.

17 Q: During that period of time, what percentage of your caseload was
18 criminal?

19 A: 99.

20 Q: And when you were out in your own practice, did you work with other
21 attorneys, associated with, or were you 100% on your own?

1 A: Steve Schoering, Rob Chandler, Allison Knight, Mr. Jewell,
2 (inaudible).

3 Q: Were you handling any other death penalty cases at the time you
4 represented Roger Epperson?

5 A: Not at the same time I was handling Roger's case, no.

6 Q: Now, you had mentioned a couple of other capital case that you had
7 handled, prior to representing Mr. Epperson. Many of which didn't go to trial. Can
8 you tell us did you use a mitigation specialist to do any investigation in those cases?

9 A: No.

10 Q: Have you ever used a mitigation specialist in a capital case to do a life
11 history investigation?

12 A: I have not.

13 Q: So, how then, in those cases, have you gone about conducting those
14 investigations?

15 JERNIGAN: Objection. Relevance.

16 COURT: I'll allow that. Go ahead.

17 A: I was not involved with the sentencing portion of those cases.

18 Q: So, then, I understand from what you are saying is that there was a
19 separate attorney who dealt with the sentencing phase and the guilt phase in your
20 cases that you handled beforehand?

21 A: There was group of people, we split up the work. I don't recall offhand
22 the percentage of the work I did on the sentencing phases.

1 Q: Did you split up the work in that same type of manner in Mr.
2 Epperson's case?

3 A: I did what Frank told me to do in this case. He was lead and basically
4 I did what I was instructed to do?

5 Q: Ok.

6 COURT: What Mr. Jackson was that? I don't think I heard the last part
7 of your question.

8 JACKSON: Whatever Frank wanted me to do as far as breaking down the
9 percentages of work on Roger's case.

10 COURT: Did you mainly handle the guilt phase?

11 JACKSON: I want to say I may have crossed some of the witnesses. I don't
12 believe I did opening or closing. Once again, I'm thinking back a long time, Judge.

13 COURT: I understand. But you don't think you had very much to do with
14 the penalty phase?

15 JACKSON: I think I did. Probably more than Frank did. I know I met with
16 Roger more than Frank did during the course of our representation.

17 COURT: I just didn't hear the last part of your answer.

18 RESUME DIRECT EXAMINATION OF MICHAEL JACKSON

19 BY MR. BARRON

20 Q: From what I understand, with you working at Frank's direction, there
21 was some kind of clear line breaking up what each person was responsible for.

22 A: I assume there was. Once again, this was 12 years ago, so . . .

1 Q: Now Mr. Jewell is going to come in and testify later today, he already
2 has testified previously in this case, that you would have been the one to handle
3 discussions with the family members, do the mitigation investigation. But, what
4 I'm hearing right now, it doesn't sound like you are disputing anything?

5 (Simultaneous)

6 A: Disputing what?

7 JERNIGAN: Objection.

8 JERNIGAN: That is not what the witness said, he said he didn't remember.

9 COURT: That's what I heard him say, specifically as to what his, what he
10 did for this particular case. I'll let you be more specific David, if you want to be.

11 BARRON: I'll be getting some more specifics, then I will come back to that.

12 COURT: Ok.

13 RESUME DIRECT EXAMINATION OF MICHAEL JACKSON

14 BY MR. BARRON

15 Q: For now though, let's turn to the ABA Guidelines for a moment. In
16 thinking back to 2003, can you tell us if you were familiar with the ABA Guidelines
17 for the Appointment and Performance of Defense Counsel in Death Penalty Cases?

18 A: I may have been. I am not familiar with them now. That was 12 years
19 ago, and I don't do. I don't do any criminal work now.

20 Q: I couldn't hear the first part of your answer.

21 A: I may have been at the time. I don't recall.

1 Q: Ok. While representing Roger Epperson in this case, did you consult
2 with any capital attorneys that had more experience than you did?

3 A: I am sure I did. I don't recall offhand who.

4 Q: Do you remember speaking to us in 2008 when another individual was
5 with me named Mr. Ilker Onen?

6 A: I'm sure I did. I don't recall anyone else being in the room but I don't
7 doubt that there was.

8 Q: Do you think that if there was an affidavit from Mr. Onen regarding
9 statements you made when you met with us in '08, do you think that looking at that
10 affidavit might refresh your recollection on any of the things we are talking about
11 today?

12 A: I would be happy to look at anything that may refresh my recollection.

13 JERNIGAN: I would object to the witness reviewing an affidavit not prepared
14 by himself.

15 COURT: I'll allow him, just for the point. The way the question was
16 asked, I think, was proper. Let him look and see if it refreshes his recollection.

17 RESUME DIRECT EXAMINATION OF MICHAEL JACKSON

18 BY MR. BARRON

19 Q: Mr. Jackson, there are 6 binders up there. If you could just turn to the
20 one that is labelled Binder 6.

21 A: Ok.

22 Q: And if you could open that and turn to exhibit number 109.

1 A: Ok.

2 Q: And if you could turn to the affidavit of Ilker Onen, if you could look at
3 paragraph 3, just read that over for a moment, tell me if that refreshes your
4 recollection or impacts anything with regards to what you just testified to about
5 consulting with more experienced attorneys in this case.

6 A: I do not recall making this statement. I don't think it is accurate. I
7 know I didn't talk to anyone at the Department of Public Advocacy. Um, I'm sure I
8 talked to Steve Schoering and some of the other attorneys in the office.

9 Q: Ok. And you just took me to where I was going to go next, in regards to
10 the Department of Public Advocacy and the attorneys there. You said you didn't
11 speak to them. Were you aware that Mr. Epperson had a case pending in post-
12 conviction out of Letcher County, and was represented in that regard by attorneys
13 at the Department of Public Advocacy?

14 A: I was aware that he had been convicted of another crime, yes.

15 Q: Were you aware that post-conviction proceedings were ongoing at that
16 point?

17 A: I'm sure I was.

18 Q: And then were you also aware that some of the being presented in that
19 case was regarding mitigating evidence that trial counsel didn't present?

20 A: I am not familiar with the specifics of the post-conviction proceedings
21 that were going on.

1 Q: But again, to be clear, you have just testified that you didn't speak to
2 any attorneys at the Department of Public Advocacy regarding, regarding preparing
3 Mr. Epperson's case?

4 A: Once again, dating back 12 years; 13, 14 were are talking pretrial, I
5 may have, I don't recall offhand, I'm not sure what Frank talked to them about. I'm
6 sure he did. I do not recall offhand talking to them about it.

7 Q: OK. And we will get to some specific documents, whether you recall
8 various documents and things in a few moments. Let's turn for a moment to jury
9 selection and voir dire. Are you familiar with life and death qualification processes?

10 A: Yes.

11 Q: In your opinion is it important to find out if a particular juror will
12 automatically impose the death penalty?

13 A: I'm sure that would be important, yes.

14 Q: And find out if a juror would be unwilling to give meaningful
15 consideration and full effect to mitigating circumstances?

16 A: I'm sure that would be important.

17 Q: Would you also agree it is important to find out if the jurors would give
18 full consideration and meaningful effect, not just to mitigation in general, but to
19 specific types of mitigation you are thinking of presenting in the sentencing?

20 A: I haven't given it much thought. I'm sure it would be important.

21 Q: I'm sorry Mr. Jackson.

1 A: I haven't given it any thought. I'm sure it would be important to find
2 out as much information as you can about potential jurors in a death penalty case.

3 Q: Important to voir dire with regards to the death penalty mitigation
4 each individual juror?

5 A: Is that a question?

6 Q: Yes it is.

7 A: Yes.

8 Q: So, can you tell us right now, do you think, is there any reason why
9 defense counsel pick a jury and not ask them the question at all regarding the death
10 penalty and mitigation?

11 A: I have no idea.

12 Q: If you had learned that a juror would not. In general, if you had
13 learned that a juror would not rely on events that occurred after the crime at all as
14 mitigation, is that the type of juror that you would likely seek to excuse for cause?

15 A: I don't understand the question

16 JERNIGAN: I have to object to that question.

17 COURT: I think that I need to hear it again. What was the question,
18 David.

19 BARRON: If you have a juror who stated that they would not give any
20 consideration or weight to events that occurred after the timeframe of the crime as
21 mitigation, would he seek to excuse that juror for cause?

1 COURT: I'll let him answer the question. First let me do this. Do you
2 remember that response being made in this trial?

3 JACKSON: Judge I don't remember anything about . . .

4 COURT: That's what I. We are just making a record. Now, if you can
5 answer the question, I'll let you.

6 JACKSON: I can't answer it based on just one single response. I mean you
7 would have to take it in its entirety. Not knowing what any of the other responses
8 would be later on, I'm not sure what we would have done.

9 RESUME DIRECT EXAMINATION OF MICHAEL JACKSON

10 BY MR. BARRON

11 Q: Ok, you stated earlier in your testimony that you had met with Mr.
12 Epperson more than Frank Jewell.

13 A: I suspect that that would be, from what I can recall. I don't know off
14 hand the number of times that Frank met with him, or the number of times that I
15 met with him.

16 Q: Do you have any idea how often you met with him?

17 A: No.

18 Q: Not any number you can place or a range over that time period at all?

19 A: I cannot place a number. Other than I believe that I probably met with
20 him more than Frank.

21 Q: Do you have any recollection of meeting with Roger the days leading
22 up to the trial?

1 A: I have no recollections of the specifics of any meetings with Roger. I
2 just know that I probably met with him more than Frank.

3 Q: Did you discuss with Roger the possibility of entering a plea for less
4 than the death penalty?

5 A: I don't recall the specifics of any offer discussion, what was offered,
6 what we talked about. This was 12 years ago. I just don't remember.

7 Q: Prior to Mr. Jewell and yourself representing Roger Epperson, Roger
8 was represented in preparation for the retrial of this case by Mike Williams. You
9 had some of Mike Williams files, and obviously knew he had previously represented
10 Mr. Epperson. Did you ever contact Mike Williams in regards to this case?

11 A: I don't recall ever talking to Mike Williams

12 Q: Do you recall if you reviewed the transcript of Roger Epperson's trial in
13 the Letcher County case?

14 A: I reviewed boxes and boxes of materials. The specifics of what I
15 reviewed I don't know, but I would imagine I did review his transcript, I believe.

16 Q: Were you aware that the prosecution intended to use the Letcher
17 County conviction as an aggravating circumstance in this case?

18 A: I'm not familiar with what was being used. I don't recall.

19 Q: You said, you don't recall what you reviewed in regards to the other
20 records, so I think that answers. I just want to be clear, do you have any
21 recollection of whether you reviewed the Kentucky Supreme Court opinion
22 remanding the Letcher County case for an evidentiary hearing?

1 A: I don't have specifics of (noise) of what I reviewed.

2 Q: OK. Do you recall then, moving away from Roger Epperson's file itself,
3 do you recall if you reviewed any of the records regarding his co-defendant, Benny
4 Hodge's, retrial.

5 A: I reviewed a lot of documents. I am not sure if I reviewed them. I don't
6 doubt that I did, I just don't remember.

7 Q: Ok. Now if you could turn to binder number 3, please. And if you
8 could turn to exhibit number 55. And that is a letter from Julia Pearson,
9 identifying documents that she attached to the letter. And that has already been
10 introduced into evidence here. Do you. Did you see that before you represented Mr.
11 Epperson?

12 A: Did I see this letter?

13 Q: Yes.

14 A: It's dated October 11, 2001, to Frank?

15 Q: Correct

16 A: I don't know if I did or not. Once again, I don't remember the specifics
17 of what I reviewed.

18 Q: What about if you turn to 56. Do you, well first of all, do you
19 remember a Doctor Peter Young?

20 A: I don't recall.

21 Q: Can you take a look at 56 and tell us if you recall seeing that
22 evaluation before?

1 A: I may have, I don't recall.

2 Q: Now, I'm sure you probably agree with the prosecution, but correct me
3 if I'm wrong, that your memory of events from 2003 was better when we spoke to
4 you in 2008 than it would be today?

5 A: I'm sure it was.

6 Q: Do you think looking at that affidavit from Mr. Onen might refresh
7 your recollection as to whether you did or did not see various documents prior to
8 trial?

9 A: I will look at whatever document you would like me to.

10 Q: If you could you go back then to binder 6, and look at exhibit 109,
11 please.

12 A: Yes.

13 Q: And if you could look at paragraph 11.

14 A: This affidavit was written in first person, as if I am saying it. I don't
15 remember giving any kind of written statement, nor do I remember any kind of
16 taped statement. Um, I mean paragraph 11 says that I did not recall seeing Doctor
17 Young's report. I don't recall specifically saying whether I did or didn't. Um this
18 doesn't refresh my recollection. I'm sure my memory was a lot better in 2008 than
19 at this time.

20 Q: What about then if we turn back to, and look for a moment at
21 paragraph 5. With regards to the transcripts and records of Mr. Hodge, the co-
22 defendant's, retrial?

1 A: I don't recall saying either one of those. But if I said it in 2008, my
2 memory was probably better then than it is now.

3 Q: Ok. Now, Doctor Young's report, which is already in evidence, and if
4 you need a few moments to review that right now, interrupt me and let me know.
5 But, it did contain information regarding things in the nature of head injuries,
6 concluded that Mr. Epperson had suffered some neuropsych, some
7 neuropsychological deficits and brain damage, that what Dr. Young had
8 characterized as physical and emotional abuse. Are things that you, in your
9 experience in capital cases would think would be important for the purpose of
10 mitigation?

11 A: I think the more information you have, the better.

12 Q: I'm sorry.

13 A: The more information you have, the better.

14 Q: And, therefore am I correct to conclude that, if you found out about
15 that information it would be something you would have liked to have investigated
16 and followed up on?

17 A: I'm sure if I was aware of that information it would be considered in
18 any kind of penalty phase we had.

19 Q: Can you tell us if you were aware if Mr. Epperson suffered from any
20 brain damage?

21 A: In my conversations with Roger, I never suspected any kind of brain
22 damage.

1 Q: So you are basing your determination on that on your communication
2 with Mr. Epperson, correct?

3 JERNIGAN: Objection, Judge

4 COURT: No, I think, he ah, that's the way I heard his testimony. You
5 never conclude he had any kind of mental issue from your conversations with him?

6 JACKSON: That's correct.

7 COURT: So, I'll let you answer. You can re ask the question.

8 RESUME DIRECT EXAMINATION OF MICHAEL JACKSON

9 BY MR. BARRON

10 Q: Just, just answer that.

11 A: Once again, I don't remember what I reviewed. Just going on my
12 recollection of my conversations with him.

13 Q: Do you have any medical training, yourself?

14 A: I don't.

15 Q: Psychological training?

16 A: I don't.

17 Q: Neuropsychological training?

18 A: No.

19 Q: Did you ever consider looking into, or having somebody evaluate or
20 opine whether Mr. Epperson suffered from any neuropsych deficits or brain
21 damage?

22 A: I don't recall what we considered.

1 Q: Were you aware that Mr. Epperson suffered from any level of physical
2 abuse?

3 A: I don't recall what I was aware of as relates to his level of physical
4 abuse.

5 Q: Emotional abuse?

6 A: Same answer.

7 Q: Poor academic record?

8 A: I am sure I reviewed it, I don't recall again what it was.

9 Q: Let's turn to. What was your defense at trial?

10 A: I don't recall the specific defense at trial.

11 Q: I'm sorry, you say you don't recall?

12 A: I don't recall a specific thing, a specific defense at trial. I believe our
13 defense was that Roger was not involved in the slaying.

14 COURT: That he was not involved?

15 JACKSON: That he was not involved in the actual slaying of the Morris.

16 RESUME DIRECT EXAMINATION OF MICHAEL JACKSON

17 BY MR. BARRON

18 Q: You believe? Are you saying you're sure or you are not sure?

19 A: I don't recall the specific defense, a specific way. I believe that was the
20 defense.

21 Q: Do you remember testifying in this case in a previous hearing in 2010?

22 A: I have testified several times in this case.

1 Q: Can you now turn in binder number 6 to exhibit number 108, please.

2 A: Yeah.

3 Q: And, let's turn to what is identified in there as page number 8.

4 A: Yeah.

5 Q: And if you could, look at lines 7 and 8, and let me know if that
6 refreshes your recollection as to what your trial defense actually was in this case.

7 JERNIGAN: Objection. Asking him to look at specific lines from the previous
8 testimony again is taking things completely out of context.

9 COURT: I'll let him look first at that document and see if it refreshes his
10 recollection. If it does not I will give him time to review the entire document.

11 RESUME DIRECT EXAMINATION OF MICHAEL JACKSON

12 BY MR. BARRON

13 A: I think my response at the time was that he did not go in the house
14 and was not involved. I think what my response to this was at the moment.

15 Q: So, at least at the time in 2008 then, I assume you are saying with
16 your testimony, you were certain your defense was, that Roger Epperson was not
17 involved in the murders?

18 A: In 2010, or 2008?

19 Q: When you testified in 2010, I'm sorry.

20 A: I don't know if I said with any certainty in 2010. I think I was talking
21 about recollection of events that occurred, at that point, 7 years earlier.

22 Q: Ok.

1 A: As we sit here today, I don't remember the specifics of our defense
2 other than what I just told you.

3 Q: Alright. Well then tell me if this is an incorrect statement of what you
4 testified to in 2010. Back to page 8, line 7, quote, obviously, our trial strategy was
5 that he was not involved at all.

6 A: That. You are reading correctly.

7 Q: And then again, on cross-examination, I'm sorry, on re-direct
8 examination, on page 11, from the same testimony, you were, in what I want to say
9 was affirmative and certain by saying, quote, clearly that was our trial strategy that
10 he was not involved.

11 A: You read that correctly.

12 Q: And then once again, in the same thing, going back to page 6, starting
13 with line 5 to 8. Question, now what would you say, what type of trial strategy
14 defense did you present? Answer, obviously that Mr. Epperson was not involved
15 with what he was accused of doing.

16 A: You read that correctly.

17 Q: Thank you. Now, keeping in mind that trial strategy, did you ever
18 speak with Roger's father, Ed Epperson, prior to trial in this case?

19 A: I don't recall.

20 Q: In light of the defense strategy that we just went over from your 2010
21 testimony, would you agree that evidence of other suspects would support your
22 defense that Mr. Epperson was not involved in the murders?

1 A: I don't know that you can make that statement. I knew that there was
2 some talk of other suspects.

3 Q: Do you believe that if there is evidence of alternative suspects in police
4 reports that that would be something that trial counsel should investigate?

5 JERNIGAN: Objection.

6 COURT: I'll let him answer the question.

7 RESUME DIRECT EXAMINATION OF MICHAEL JACKSON

8 BY MR. BARRON

9 A: I remember seeing that the police investigated other suspects.

10 Q: Did you investigate any of them yourself?

11 A: I don't recall what investigation I personally did as it relates to other
12 suspects.

13 Q: Do you think, based on your experience here, in your representation of
14 Mr. Epperson, when a police report states that 3 individuals, other than Roger
15 Epperson and his codefendants, were going to go to the victim's home to get money
16 would be important information to look into?

17 JERNIGAN: Objection.

18 COURT: What is the nature of your objection?

19 JERNIGAN: Speculation. Do you think you. He said he didn't remember
20 anything specific about what he did regarding alternative suspects.

21 COURT: I think he is being more specific. I'll allow him to ask that type
22 of question. What do you recall Mr. Jackson?

1 JACKSON: I don't recall. I remember seeing that on the police report, I
2 don't recall what I did as a basis to investigate.

3 RESUME DIRECT EXAMINATION OF MICHAEL JACKSON

4 BY MR. BARRON

5 Q: And now I'm also asking, whether in your opinion, this is something that
6 you would think would be important to be investigating when you are presenting a
7 defense that the client did not commit the offense?

8 A: I, I don't know. I suppose it would depend on the account that was
9 given.

10 Q: I would like to read off a list of names of various individuals and just
11 tell me if you recall the names at all, and if you do, if any investigation was done of
12 these individuals who are listed in documents as potential alternative suspects in
13 the case, including in police reports.

14 JERNIGAN: Objection. He answered this question, he does not remember.

15 A: And I can tell you I don't remember the specifics of any individual that
16 I investigated.

17 COURT: I'll allow him to ask the question, and see if something jogs your
18 memory or not.

19 RESUME DIRECT EXAMINATION OF MICHAEL JACKSON

20 BY MR. BARRON

21 Q: Wayne McDowell?

1 A: I remember the name. I don't remember if I spoke to him.

2 Q: Odie Crowe?

3 A: I remember the name, don't remember if I spoke to them.

4 Q: Paul Combs?

5 A: I remember the name, don't remember if I spoke to them.

6 Q: Danny Clemons?

7 A: I don't remember.

8 Q: Donnie Clemmons

9 A: Once again, I don't remember.

10 Q: Ronnie Vaughn

11 A: What was the name?

12 Q: Ronnie Vaughn?

13 A: I don't recall

14 Q: Junior Osborne

15 A: I remember the name, don't remember if I spoke to them.

16 Q: Shelby Spencer

17 A: Don't recall

18 Q: Ricky Vicker?

19 A: Don't remember

20 Q: Paul Combs?

21 A: I remember the name, don't remember if I spoke to them.

22 Q: Greg Mays?

1 A: Don't remember

2 Q: Ricky Horton?

3 A: Don't remember

4 Q: Hellen Gray

5 A: Don't remember

6 Q: A few of these you remember the name. Do you have any idea how it is
7 that the name is in your memory?

8 A: Um, Just dating back 12 years, that name just seems to stick out more
9 than the others. There are a number of names and individuals listed during the
10 course of the investigation. As we sit here 12 years later, I don't remember the
11 specifics.

12 Q: Now I realize you've been testifying about a lack of memory, I want to
13 mention some other specific facts from some police reports to see if it jogs any of
14 your memory. One of the police reports that is in evidence here talked about
15 information they had received the Monday after the murders had occurred naming
16 2 people that were not Roger Epperson, or his co-defendants. They went into a
17 person's house, and said they robbed 2 people and tied them up with stockings,
18 which is exactly what happened to the victims here. Did any of that ring a bell in
19 your mind?

20 A: Don't remember.

21 Q: Do you recall any other alternative suspects?

22 A: Don't recall.

1 Q: Can you now turn to what would be exhibit number 21, which should
2 be the second item in volume 2.

3 A: This is all loose stuff here. I don't know what was originally 21.

4 Q: Your Honor, it appears that the exhibits came out of the binders,
5 would it be permissible to approach the witness so I can clarify that?

6 COURT: Sure.

7 BARRON: Your Honor, for the record, a couple of them have been
8 separated, after the testimony we can take a look and make sure the rest of them
9 and make sure that they are back in the right order.

10 COURT: Sure. I think that Mr. Lewis, um, yeah, I think he's the one that
11 opened it up.

12 RESUME DIRECT EXAMINATION OF MICHAEL JACKSON

13 BY MR. BARRON

14 Q: Mr. Jackson.

15 A: Yes.

16 Q: Exhibit 21, is a list of alternative suspects, and it's a document filed by
17 Mike Williams in the case prior to your involvement.

18 A: Yes.

19 Q: Do you recall seeing that document?

20 A: I don't recall.

21 Q: Do you remember Donald Bartley?

22 A: Yes.

1 Q: Can you tell us who he was?

2 A: Uh, he was an individual that was allegedly involved in the
3 commission of this crime.

4 Q: Do you recall if he testified at trial?

5 A: I don't remember.

6 Q: Do you recall if he took a deal and testified. That he took a deal to less
7 than death in return for anything

8 A: He did take a deal, yes.

9 Q: Were you aware of that prior to trial?

10 A: Was I aware that he took a deal?

11 Q: Yes.

12 A: I believe I was.

13 Q: Were you aware whether he testified in Mr. Epperson's original trial in
14 this case?

15 A: I don't recall (inaudible).

16 Q: Do you recall any investigation that you did with regards to Mr.
17 Bartley and his deal with the prosecution in Kentucky?

18 A: I do not recall.

19 Q: Do you recall seeing the names of any individuals, or investigating any
20 individuals, to whom Bartley may have personally confessed to doing something in
21 this case, or committing the murders different than what he testified to?

22 A: Don't recall

1 Q: Do you recall the name Mark Thompson?

2 A: Don't recall.

3 Q: Tammy Gentry?

4 A: Familiar, don't recall. Once again, I don't recall who I spoke to about
5 the investigation

6 Q: And again for the record, these are individuals who Donald Bartley
7 had allegedly confessed to and whose impressions were markedly different than the
8 testimony

9 JERNIGAN: Objection.

10 COURT: I know that how it is being categorized. Just ask him whatever
11 questions you have left.

12 RESUME DIRECT EXAMINATION OF MICHAEL JACKSON

13 BY MR. BARRON

14 Q: Can you turn to exhibit 14, which should be in volume 1 for this.

15 A: Yes.

16 Q: And, if you could turn to page 1683 in that exhibit.

17 A: Which exhibit were we in?

18 Q: 14. Can you take a look at the bottom of the page where the witness
19 testified that, referring to Donald Bartley, it says he told me Benny and Roger
20 wasn't involved and he done what he had done to help his mother she needed money
21 and he was

22 JERNIGAN: Objection.

1 BARRON: was strung out on coke real bad, end quote. I haven't asked a
2 question.

3 COURT: Well then. Finish that question.

4 RESUME DIRECT EXAMINATION OF MICHAEL JACKSON

5 BY MR. BARRON

6 Q: You testified that you don't remember, any of this. I want to first of all
7 be clear that that doesn't refresh your recollection. My ultimate question though is,
8 is that something that you believe would have been beneficial to your defense that
9 Mr. Epperson didn't commit the crime, and to cross examining and impeaching
10 Donald Bartley?

11 A: Reiterating what I testified to earlier, the more information you have,
12 the better. You did read this correctly. I don't recall this. I'm sure that, I looked
13 over many documents. This may have been one of them.

14 Q: And, turning to exhibit 15 for a moment, which is also regarding Miss
15 Tammy Gentry, and is a pleading that was filed by Mr. Williams before you got
16 involved with the case, seeking to depose Miss Gentry based on the fact of Bartley's
17 confession and statement. Do you recall seeing that before?

18 A: Don't recall.

19 Q: Would that be the same for exhibit 16, which would be Elizabeth
20 Shaw's testimony in the trial of Benny Hodge?

21 A: Same response.

22 Q: The name Paul Browning, does that ring a bell?

1 A: Familiar, but I don't remember the specifics.

2 Q: Okay, then if you could turn to exhibit 12. Tell me if you recall ever
3 seeing that one before?

4 A: Same response as before. I don't remember the specifics of any
5 document that I reviewed in preparation for Roger's case.

6 Q: I was going to ask you some questions about Donald Bartley, but I
7 want to make sure I remember correctly that, sitting here, so you are telling us
8 right now you don't recall what if any investigation had been undertaken regarding
9 Donald Bartley, at all?

10 A: As we sit here today, I don't recall specifics.

11 Q: Did you consider presenting any evidence that Roger Epperson is
12 remorseful?

13 A: Don't recall.

14 Q: Do you know if victim evi -- Do you know if victim impact evidence was
15 admissible in 1987?

16 A: Don't recall.

17 Q: Victim's son was allowed to sit at counsel table during the sentencing
18 phase of the trial. Did you ever consider raising an objection to that?

19 A: Don't recall.

20 Q: Did you speak to Roger about testifying at the sentencing phase?

21 A: I don't recall.

1 Q: Do you recall any discussions at all, with regards to Roger, regarding
2 mitigation in general?

3 A: Don't recall.

4 Q: Regarding any specific mitigation?

5 A: Do not recall.

6 Q: Again, you don't recall consulting with any experts at all?

7 A: I don't remember.

8 Q: Did you gather any records in this case, yourself?

9 A: As I've said numerous times, I don't recall the specifics of gathering
10 any kind of records, or who I talked to, or what was reviewed, there were records
11 gathered, I do not recall the specifics of what was gathered.

12 Q: James Noble, does that name ring a bell?

13 A: Don't recall.

14 Q: Lightning Riddle?

15 A: Don't recall.

16 Q: Calvin Hurt?

17 A: Don't recall.

18 Q: When you started testifying today, you mentioned how you had
19 handled other capital cases. And, that I assume. Let me ask this. Evidence of head
20 injuries or brain damage is something you generally think is important or not in a
21 death penalty case?

1 A: I would think the more information you have that can be used as
2 mitigation the better it ought to be.

3 Q: So, if you have seen information of that nature, and how you are
4 saying that it is more important, is that the type of information that would likely
5 remain in your memory?

6 A: No.

7 JERNIGAN: Objection. I'll withdraw that, the witness has already answered.

8 Q: Were you aware that Roger Epperson was born blue and was deprived
9 of oxygen at birth?

10 A: Don't recall.

11 Q: Physically abused as a child?

12 A: Don't recall.

13 Q: Consumed large amounts of alcohol and drugs?

14 A: I don't recall specifics of his drug use.

15 Q: Can you turn to exhibit number 59, please. That would be binder
16 number 3.

17 A: Yes.

18 Q: Can you take a look at that exhibit and tell me if you've seen it before?

19 A: Don't recall.

20 Q: 58?

21 A: Don't recall.

22 Q: 67? I'm sorry, that would be volume 4.

1 A: Once again, this is ripped out a little bit, I'll see if I can
2 Q: Sorry about that.
3 A: That's alright.
4 Q: 67 would be a, an interview memo from Anna Chris Brown regarding
5 an interview with Betty Cummings.
6 A: Looks like there is a portion of that in the binder. Again, I do not
7 recall.
8 Q: Would that be the same, as far as your recollection on 68?
9 A: Don't recall.
10 Q: Now these documents, Betty Cummings being a teacher, does that
11 name at all ring a bell to you?
12 A: What was the name?
13 Q: Betty Cummings?
14 A: Sounds familiar, but I don't recall specifics.
15 Q: Jack Epperson? Does that sound familiar?
16 A: Familiar, but don't recall as to specifics.
17 Q: Do you recall if you ever spoke to him in preparation for the trial?
18 A: Don't recall specifically if I spoke to him.
19 Q: Do you recall the name Ann Thomas, at all?
20 A: Don't recall.
21 Q: Did you speak to any cousins of Mr. Epperson's?
22 A: Don't recall specifically who I spoke to.

1 Q: That means that would include father, mother, and aunt, too?
2 A: Don't recall the specifics of who I spoke to.
3 Q: Just to be clear, for the record then, could you also take a look at
4 exhibits 60 and 63 and tell me if that is anything you recall, or refreshes your
5 recollection?
6 A: Do not recall 63. I don't see 60. Would that be in the same binder?
7 Q: 60 would be the last thing in volume 3.
8 A: Don't recall. Was there another?
9 Q: I'm sorry?
10 A: Was there another?
11 Q: I don't believe so. You went through 60, you went through 63, already.
12 A: Yes
13 Q: We talked about 67 before that. We talked about 55 through 59. Was
14 there anything that prevented you from doing any mitigation investigation in this
15 case?

16 JERNIGAN: Objection.

17 COURT: Overruled. If you can answer, go ahead.

18 JACKSON: I don't recall anything that prevented us from doing any
19 mitigation investigation.

20 RESUME DIRECT EXAMINATION OF MICHAEL JACKSON

21 BY MR. BARRON

1 Q: Anything that prevented you from presenting, after investigation, to
2 the jury, any mitigation?

3 A: I don't think there was anything preventing us from presenting.

4 VOICE: One moment.

5 BARRON: I'm sorry.

6 A: I'm not. I'm not sure what, what, Roger wanted presented. I seem to
7 think there was some discussion, but as we sit here today I don't remember the
8 specifics of anyone preventing the presenting.

9 Q: Thank you. Um, Your Honor, before we pass to the Commonwealth
10 can we just approach the bench for a moment?

11 COURT: Sure.

12 BENCH CONFERENCE

13 BARRON: Essentially almost the entirety of Mr. Jackson's testimony today
14 was a complete lack of memory which is inconsistent with what he presented in
15 2008, so before passing for cross, I just wanted to put everybody on notice. That
16 essentially, it legally renders him essentially the equivalent of being unavailable,
17 and therefore we plan to put Ilker Onen on to testify to the information he conveyed
18 in 2008.

19 COURT: I'll just have to wait and see [Inaudible] what questions you ask
20 before I rule on it.

21 BARRON: That was it.

22 COURT: Do you pass?

1 BARRON: I'm going to pass to cross-examination.

2 INAUDIBLE VOICES SPEAKING AWAY FROM THE MICROPHONE

3 JERNIGAN: Cross will take about 2 seconds.

4 COURT: Mr. Jackson, we are about done.

5 JACKSON: Thank you.

6 COURT: Alright. Mr. Barron has passed, and Julie.

7 JERNIGAN: Yes Judge. Thank you.

8 CROSS EXAMINATION OF MICHAEL JACKSON

9 BY MS. JERNIGAN:

10 Q. I have one question for you, Mr. Jackson. When you say you don't
11 recall these things, you're not, are you saying that you didn't do them, or that you
12 don't remember?

13 A: No, I'm clearly saying that. I never said I didn't do anything, I just, as
14 we sit here 12 years later, I just don't remember the specifics of what, what was
15 reviewed, who I spoke with, the investigation that was done. I'm not saying it
16 wasn't done, I just don't remember specifically what.

17 JERNIGAN: That's all I have, thank you.

18 BARRON: Your Honor, I have one question. [Inaudible]

19 REDIRECT EXAMINATION OF MICHAEL JACKSON

20 BY MR. BARRON:

1 Q: The Commonwealth just asked. You just said that you don't. You're
2 not saying things weren't done, does that also mean that you're also saying you're
3 not sure they were actually done, either?

4 A: I'm saying. You went through a long list of documents, went through a
5 long list of people. I cannot tell you definitively that I spoke to each and every one
6 of those individuals. I can't tell you that I didn't speak to those individuals. I just
7 don't remember 13 years ago what specific work was done as it relates to the
8 preparation of the defense.

9 Q: And that goes not just to witnesses that you spoke to, but to
10 information you were aware of or not aware of?

11 A: Sure.

12 BARRON: Nothing further at this time.

13 JERNIGAN: Nothing further.

14 COURT: May he be released?

15 BARRON: Your Honor, I think with the next witness we are calling, I don't
16 think it is likely we I will be recalling him afterwards, but it is going to be about
17 certain communications. Just note that, I don't have a problem with him being
18 released, I don't know if in light of that the Commonwealth has a problem.

19 JERNIGAN: I don't need Mr. Jackson for anything, but he's Mr. Barron's
20 witness.

21 COURT: If you don't need him, if you don't want him, I'll release him. Ok.

22 BARRON: Thank you, Your Honor.

1 COURT: You may be [Inaudible]--

2 JACKSON: Thank you, Judge.

3 COURT: Thank you. Alright, you wanna take five minutes now?

4 JERNIGAN: That would be fine.

5 COURT: Okay, we'll take five.

6 RECESS

7 COURT: David, who you, you want to call next?

8 BARRON: Ilker Onen. Ilker Onen.

9 COURT: Onen.

10 INAUDIBLE VOICES SPEAKING AWAY FROM THE MICROPHONE

11 COURT: He'll have to spell it when he gets here.

12 CLERK: Raise your right hand.

13 ONEN: Yes.

14 CLERK: Do you swear and af—affirm the testimony you are about to give

15 will be the truth, the whole truth, and nothing but the truth?

16 ONEN: I do.

17 CLERK: Thank you.

18 COURT: Alright, Mr. Onen. If you would bring that microphone up to you

19 so we can all hear you please.

1 ONEN: Sure.

2 COURT: Alright, and could you, ah, ah, state and spell your name please.

3 ONEN: My name is Ilker Onen. First name spelled I-L-K-E-R, last name
4 Onen, O-N-E-N.

5 DIRECT EXAMINATION OF ILKER ONEN

6 BY MR. BARRON

7 Q: Mr. Onen, you've already testified multiple times in this proceeding so
8 I'm gonna skip all background info and just get directly to the purpose in which you're
9 on the stand right now about. Do you recall, as part of your involvement working with
10 myself and the post-conviction team on behalf of Mr. Epperson in 2008 being present
11 for an interview of Michael Jackson?

12 A: Yes.

13 Q: And you recall Mr. Jackson being one of Roger Epperson's trial
14 attorneys?

15 A: Yes.

16 Q: Do you recall, after that meeting, that notes were turned into an
17 affidavit that you signed as a result to it?

18 A: Yes.

1 Q: Now, I'm going to ask you specific questions about what Mr. Jackson
2 stated and that was then memorialized in that affidavit. If at any point you believe
3 you need to review that affidavit to refresh your memory on any of that, just please
4 let me know.

5 A: Okay.

6 Q: Do you recall if Mr. Jackson made any statements to us about whether
7 he spoke to Mike Williams about the case or any of the work, on any of the work Mr.
8 Williams had already done before Mr. Jackson got involved?

9 A: Ah, may I consult the affidavit?

10 Q: If you think that will refresh your recollection, certainly.

11 A: Yes.

12 Q: If you could turn to Binder # 6 and when you're there Exhibit # 109. And
13 more specifically, when you get to that affidavit direct your attention to paragraph
14 two.

15 A: And can you rephrase the question please?

16 Q: Certainly. Do you recall if Mr. Jackson had stated anything with regard
17 to whether he had any communications before trial with Michael Williams regarding
18 Mr. Williams' prior representation of Roger Epperson?

19 A: Ah, Mr. Jackson stated that he had no contact with Mr. Williams.

1 Q: Now, did he tell us anything about whether he had reviewed the
2 transcripts of the Letcher County trial of Mr. Epperson from 1986? And, and if you
3 don't recall and need to go back to your affidavit, let me know that that needs to be
4 done.

5 A: Okay. I ma-I need, I may, I need it to recall right now.

6 Q: Can you then turn to paragraph four, the last sentence of the paragraph.

7 A: Yes, Um, Mr. Jackson indicated that he did not review the transcripts
8 from the trial in Letcher County.

9 Q: And what about the actual court file, the record of proceedings that were
10 filed in the Letcher County case?

11 A: Uh, uh, he didn't review those either.

12 Q: Can you say anything about whether he had serious discussions with
13 Roger about the possibility of entering a plea to anything less than the death penalty?

14 A: Ah, he stated that he met with Roger but did not, uh, specifically have
15 serious discussions about, um, entering the guilty plea.

16 Q: What about whether he, any investigation was undertaken of
17 alternative suspects?

18 A: To the best of my recollection, he did not investigate alternative
19 suspects.

1 Q: What about whether he investigated Donald Bartley's alleged
2 confessions?

3 A: He did not investigate Donald Bartley's alleged confessions.

4 Q: Now, Mark Thompson testified that at a pre-trial hearing in the case,
5 before Jewel and Jackson got involved, with regard to confessions that Bartley made,
6 did Mr. Jackson say anything about whether he was aware of that?

7 A: He said he was unaware.

8 Q: Did he make any statement about whether it would have been beneficial
9 to his defense if he had been aware of it?

10 A: To the best of my recollection, he said it would have been beneficial if he
11 had been aware of it.

12 Q: Did he say anything about whether he investigated Bartley's confession
13 to Tammy Gentry?

14 A: He said that he did not investigate.

15 Q: Did he say that he was aware of it?

16 A: He said that he was unaware of it.

17 Q: Turning to the sentencing phase, do you recall that we discussed with
18 Mr. Jackson at that interview the sentencing phase investigation in, or the lack
19 thereof, in Mr. Epperon's case?

1 A: Ah, can you repeat the question?

2 Q: Do you recall this, that we discussed with Mr. Jackson, we met with him
3 in 2008, whether or not he conducted any sentencing phase mitigation investigation
4 in Roger's case?

5 A: From what I recall, he was tasked with conducting the sentencing phase
6 aspects of the legal defense, but I don't believe he conducted any investigation on his
7 own.

8 COURT: Uh, could you re--

9 BARRON: When you say don't--

10 COURT: I'm sorry, could you repeat that again. I, I don't know if I heard
11 all of it. What was your answer to that last question?

12 ONEN: Yes, Your Honor.

13 COURT: About the sentencing phase?

14 ONEN: Um, that, um, Mr. Jackson was involved with the sentencing
15 phase aspects of the legal representation—

16 COURT: Uh-hm.

17 ONEN: --but that he didn't investigate, ah,--

18 COURT: Oh.

1 ONEN: --mitigation witnesses.

2 RESUME DIRECT EXAMINATION OF ILKER ONEN

3 BY MR. BARRON

4 Q: You said to the best of your recollection, would reviewing your affidavit
5 on that make you any more certain one way or the other?

6 A: I'm not sure if I --

7 Q: I'm, I'm just trying to understand when you said to the best of your
8 recollection, are you su - - are you sure about that or are you having any doubts in
9 your memory that you needed to refresh your recollection?

10 A: Uh, due to the passage of time, yes, I would benefit from--

11 Q: Then if you could then turn to, in your affidavit, paragraph 10 please.
12 Let me know when you've had a moment to look that over.

13 A: Okay, I've gone through.

14 Q: What did he say with regard to whether he conducted any mitigation
15 investigation in the case?

16 A: That he did not conduct any mitigation investigation in the case.

17 Q: Did he say anything with regard to whether he gathered school, prison,
18 military, medical records or any other social history records on Roger?

1 A: He said he did not.

2 Q: What about whether he spoke to Roger about mitigation?

3 A: He did not.

4 Q: Well, what about whether he spoke to Roger's friends, family, or former
5 teachers about mitigation?

6 A: He did not.

7 Q: Roger's mother did testify a little bit at the trial. Did Mr. Jackson say
8 anything about whether he spoke to Roger's mother about mitigation prior to her
9 testimony?

10 A: Uh, he said he did not.

11 Q: When he was shown Dr. Young's neuropsych evaluation that we brought
12 with us, to our meeting with Mr. Jackson in 2008, what did Dr., what did, I'm sorry,
13 Mr. Jackson say with regard to whether he recalled seeing the report?

14 A: Uh, he did not recall seeing the report.

15 Q: Did he make any statements regarding the importance of that
16 information, within the report, when he had a chance to look at it in our presence?

17 A: Uh, he said that he would have considered using it in the, uh, sentencing
18 phase of the trial.

1 Q: And do you recall what phase he used describing the value of that
2 information?

3 A: I don't, I don't remember specifically—

4 Q: If you could turn to paragraph 11 and look at the third sentence, begins
5 with I do believe.

6 A: Yes, I see it.

7 Q: What does that say?

8 A: I do believe, thought that the more mitigation, the better and that
9 evidence of physical abuse, head injury, and brain damage is strong mitigation that
10 should be investigated whenever there is reason to believe it may exist.

11 Q: And what did he say he would've done if he had been aware of the
12 information in that report at the time of trial instead of when it was shown to him in
13 2008?

14 A: That he would have looked into it before deciding on which mitigation
15 strategy to pursue.

16 Q: Did he say anything with regard to whether he considered at all
17 presenting any evidence regarding medical issues Roger had during childhood,
18 physical or verbal abuse or head injuries at the sentencing phase?

19 A: Can you repeat the question?

1 Q: At trial, they presented a def, he and Mr. Jewell presented the defense
2 that Roger did not have any involvement with the crime but also argued that Roger
3 drove the getaway car. When we were discussing that with Mr. Jackson and pointed
4 that out to him in 2008, did he tell us anything about whether he thought those two
5 defense turned out to actually be inconsistent or not?

6 A: I'll need to consult the affidavit.

7 Q: If you could look at paragraph 16 please.

8 A: Uh, Mr. Jackson felt like the, uh, the facts were, uh, the strategy was,
9 uh, inconsistent with the, uh, facts of the crime.

10 COURT: Say that again. There were, his theory was inconsistent with the
11 facts at the trial?

12 ONEN: Correct.

13 COURT: Okay.

14 RESUME DIRECT EXAMINATION OF ILKER ONEN

15 BY MR. BARRON

16 Q: What about whether he said the two different theories of that Roger had
17 nothing to do with the crime and that Roger drove the getaway car, whether those
18 two defenses that trial counsel presented were actually inconsistent with themselves?

19 A: Can you repeat that statement please?

1 Q: Getaway car being driven by Roger, Roger had nothing to do with the
2 crime whatsoever and therefore couldn't have driven the getaway car. Did Mr.
3 Jackson say anything to us about whether, in his opinion, there was two separate
4 defenses, both of which the defense presented, are mutually inconsistent?

5 A: Uh, he did say that that was inconsistent.

6 Q: Now, do you recall him stating that he remembered that Sherry Hodge
7 testified at the sentencing phase for what he believed to be the sole purpose of saying,
8 showing Roger had no remorse? Do you recall that? Do you want to look at paragraph
9 17?

10 A: Can you repeat the question please?

11 Q: Do you recall Mr. Jackson mentioning that he did recall Sherry Hodge
12 testifying for what he believed to be the sole purpose of trying to show that Roger
13 Epperson had no remorse for the crimes? If you look at the first sentence of paragraph
14 17.

15 A: Yes, um. I read through it.

16 Q: Did he say anything about whether he saw any reason why one would
17 rebut the evidence of lack of remorse?

18 A: Uh, yeah. He said he, uh, didn't see a reason why the rebut.

19 Q: Did he say anything about whether they considered allocution? You
20 wanna look at the next paragraph in your affidavit.

1 A: Um, he said that he didn't remember considering allocution as a way for
2 Roger to speak about, without being subject to cross-examination by the prosecution.

3 Q: Did he say whether he remembered whether there were anything that
4 he thought was improper in the prosecution's closing argument?

5 A: Um. He said he remembered, uh, the prosecution's closing argument
6 containing numerous improper comments, uh, but he didn't object to any of them and
7 he couldn't think of a reason why he would.

8 Q: You said couldn't think of a reason why, I'm sorry, I didn't hear the last
9 part.

10 A: Or, or fa, failing, he couldn't think of a reason for failing to do so.

11 Q: We had mentioned if, tell me if you recall this, to Mr. Jackson that
12 Donald Bartley had actually received only a 45 year sentence for his involvement, or
13 alleged involvement in the murders in this case. Do you recall if Mr. Jackson knew
14 that or was surprised to hear about that?

15 A: Oh. He was surprised to hear that information.

16 Q: Did he recall what the testimony at trial was as to the sentence Bartley
17 had received in return for testifying against Roger?

18 A: Um, he would have used that information to impeach, uh, Mr. Bartley.

1 Q: Let me back up for a second, though because the question that I first
2 asked, was getting, was gonna get to that, but the question that I first asked was a
3 little different. Did Mr. Jackson, at that point, remember what the testimony was at
4 trial as to what sentence Donald Bartley received?

5 A: Uh, can you repeat the question?

6 Q: Did Mr. Jackson recall what testimony, as the testimony at the trial,
7 what that said the sentence was? If you wanna look more toward the second sentence
8 of paragraph 20.

9 A: Um, he said that he was surprised to hear the information.

10 Q: And then the third sentence.

11 A: Uh, Bartley testified at trial that he received a sentence of life without
12 parole for 25 years.

13 Q: Recognizing that those are different, did Mr. Jackson make any
14 statement with regards to whether he would've, if he had learned that the sentence
15 he got was different than what Bartley testified to? Did Mr. Jackson say anything
16 about whether or not he would've used that information to impeach Mr. Bartley at
17 trial?

18 A: He would've used the information to impeach him.

19 Q: Now Mr. Onen, the information we've asked you about today to the best
20 of your recollection is that all accurate information?

1 A: Yes.

2 Q: Information that were memorialized from notes into an affidavit shortly
3 after the interview with Mr. Jackson in 2008?

4 A: Yes.

5 Q: One moment, please. Nothing further at this time, Your Honor.

6 CROSS EXAMINATION OF ILKER ONEN

7 BY MS. JERNIGAN

8 Q: Few questions. Mr. Onen, do you have an independent recollection of
9 this meeting with Mr. Jackson?

10 A: I do.

11 Q: Okay. Where did it occur?

12 A: I, I'm not sure if I understand the question.

13 Q: Where did you have the meeting?

14 A: We had the meeting at the offices of, uh, Mr. Jackson.

15 Q: You went to his offices in Louisville?

16 A: Correct.

17 Q: Okay. Where was his office located at that point?

1 A: Um, I don't recall the street.

2 Q: Was it in a building?

3 A: A building, yes.

4 Q: Okay, an office building, I mean, tell me about the surroundings where
5 this meeting occurred?

6 A: Uh, from my recollection it was in downtown Louisville, um, within a
7 building, I would say at least, at least eight stories high.

8 Q: Did you record the conversation?

9 A: No.

10 Q: What time of day did the conversation occur?

11 A: Uh, I can't recall.

12 Q: Who asked the questions?

13 A: Mr. Barron asked the questions.

14 Q: What time of year?

15 A: It was, um, I believe in the winter.

16 Q: What's the, when did you have this conversation?

17 A: I believe it was late 2008.

1 Q: Late in 2008. And when did you prepare your affidavit?

2 A: I likely prepared it, um, a few months afterwards. Three—

3 Q: A few months afterwards?

4 A: Correct.

5 Q: And it was based upon your notes?

6 A: Yes.

7 Q: Did anyone assist you in the preparation of your affidavit?

8 A: I don't recall.

9 Q: You don't remember if you talked to anybody about the conversation
10 before you prepared your affidavit?

11 A: Um. It's likely but not with 100 percent accuracy.

12 Q: Did you physically prepare it yourself or did someone else type it for you?

13 A: I typed it.

14 Q: Who notarized it?

15 A: I believe our administrative assistant did.

16 Q: What else did Mr. Jackson say?

17 A: I don't recall.

1 Q: Is any of the testimony that you've given today from your own
2 independent recollection or did it all come from reviewing the affidavit?

3 A: Most of it came from reviewing the affidavit.

4 Q: What specifically do you remember that he said that day, seven years
5 ago?

6 A: That he was involved with the sentencing phase aspect of legal
7 representation of Roger Epperson.

8 Q: Okay. And again, this affidavit was made from your notes?

9 A: Correct.

10 JERNIGAN: David, are those notes in [inaudible]?

11 BARRON: No.

12 JERNIGAN: I would asked that Mr. Onen turn over the notes that he used in
13 making the affidavit.

14 BARRON: Your Honor, may I be heard on that?

15 COURT: Yes.

16 BARRON: Practice, policy and standard norms, just as when the police take
17 notes and turn it into a report is when the affidavit is made that their handwritten
18 notes that have memorialized immediately are reduced to the affidavit and then are
19 no further notes, just as there are with any other witness.

1 COURT: Let me just ask. Do you, you sir, have the notes?

2 ONEN: If I have notes then they're the property of, uh, the Department
3 of Public Advocacy. I, I don't have a personal copy of my notes.

4 COURT: So those would be in the possession of, uh, DPA?

5 ONEN: Correct, Your Honor.

6 COURT: Let me think about that. Okay. Let me, I, I, I need to think about
7 that. Alright. Any other questions of this witness.

8 JERNIGAN: I don't have anything else, Judge.

9 BARRON: Brief, brief redirect.

10 REDIRECT EXAMINATION OF ILKER ONEN

11 BY MR. BARRON

12 Q: Mr. Onen, Commonwealth asked you about when this interview took
13 place. Can you just turn to the beginning of your affidavit and tell us actually what
14 the date was of it?

15 A: The date of the interview is February 14, 2008.

16 Q: And does the affidavit even specify what time the interview took place?

17 A: The affidavit indicates the time was 2:00 p.m.

1 Q: And that was in February. Could you just clarify when you swore and
2 signed this affidavit by looking at the bottom of page three?

3 A: It was sworn to and subscribed on the second day of March, 2008.

4 Q: Which means would be barely more, means you wrote it before,
5 obviously before it was notarized and signed, but it means that between when the
6 interview took place and when the affidavit was notarized was barely more than two
7 weeks?

8 A: Correct.

9 Q: Do you recall if this interview took place at Mr. Jackson's law office or
10 somewhere else?

11 A: It was at his law office.

12 Q: Do you recall whether we had to talk to Mr. Jackson beforehand and
13 schedule a time where he was amenable and willing to meet with us?

14 A: We called in advance and scheduled an appointment with him.

15 Q: And then was the interview conducted at his office because that was
16 where he requested it to be?

17 A: That's correct.

18 Q: If you know, would you describe him as being willing or uninterested in
19 speaking to us?

1 A: He was willing.

2 Q: If you recall, did he have any difficulty re, recalling any of the
3 information that we discussed with him at that time?

4 A: No.

5 Q: Would you say he was or was not affirmative or certain in the answers
6 that he gave us?

7 A: He was affirmative.

8 Q: One moment. Nothing further at this time, Your Honor.

9 JERNIGAN: No redirect. No re-cross rather.

10 COURT: You may step down.

11 ONEN: Thank you, Your Honor.

12 COURT: Alright David, who do you wish to call next?

13 BARRON: Next witness, ah, I'm sorry, Your Honor, beforehand, um, we can't
14 excuse Mr. Onen. We may need him to testify again after Mr. Jackson.

15 COURT: Okay. Marshall, just tell him. And then bring Mr. Jackson on in
16 too, please.

17 BARRON: You mean Mr. Jewell?

18 COURT: Mean, I'm sorry, who did you ask?

1 BARRON: It's gonna be Frank Jewell. Could, now this could take a while if
2 the--

3 COURT: Sure.

4 BARRON: -- the Court wants a quick recess before or not.

5 COURT: Why don't we just keep, why don't we just put him on and I'll, I'll
6 stop us in a few minutes.

7 MARSHALL: Who do you want, Judge?

8 BARRON: Frank Jewell.

9 COURT: Frank Jewell.

10 MARSHALL: He'll be right here, Judge.

11 COURT: Okay.

12 BARRON: [Inaudible] the restroom. You mind if I stepped out and use it real
13 quick while we're waiting?

14 COURT: Yeah. Go ahead.

15 BARRON: Thanks. Sorry about that.

16 COURT: That's alright. I'm gonna go ahead and swear in Mr. Jewell.

17 BARRON: Nah, never mind.

1 COURT: Mr. Jewell, if you would just come forward please and be sworn
2 by the clerk.

3 CLERK: [Inaudible] you right hand please. Do you swear or affirm the
4 testimony you are about to give will be the truth, the whole truth, and nothing but
5 the truth?

6 JEWELL: [Inaudible]

7 CLERK: Thank you. You may [inaudible].

8 COURT: Mr. Jewell, if you could scoot just as close to that microphone as
9 possible it would aid me a great deal in hearing your testimony.

10 JEWELL: Thank you.

11 DIRECT EXAMINATION OF FRANK JEWELL

12 BY MR. BARRON

13 Q: Good Aft--afternoon, Mr. Jewell. How are you today?

14 A: Fine.

15 Q: Gonna try and make this as quick as possible, to try and get you outta
16 here and back home today. Can you tell us, if you recall, what year you began
17 representing Mr. Epperson?

18 A: I do not recall what year we took the case. Uh, I believe it was tried, the
19 best of my memory, in 2003, we had it for some time before that.

1 Q: Do you recall when you first met with Roger Epperson?

2 A: I would, ah, believe that I first met with Roger Epperson at one of the
3 pre-trial hearings on this case. Uh, Mr. Jackson was on the case with me. He made
4 the trips to Eddyville to see Mr.,uh, Epperson. I believe my first time was at a court
5 related situation.

6 Q: And do you have any idea how many times then you met with him after
7 that?

8 A: I met with him very few times. Mr. Jackson, ah, made the trips to
9 Eddyville, and, uh, made the most contact with Epperson.

10 Q: If you know, do you have any idea how often, with you guys working as
11 a team, Mr. Jackson met with Roger Epperson?

12 A: I do not know. I could not guess. I know he made, you know, trips to
13 Eddyville, multiple trips to see him.

14 Q: Do you recall whether you investigated any potential alternative
15 suspects in this case?

16 A: In terms of investigation, I don't really recall. We went through material
17 that was submitted to us from the first trial, this was a retrial, uh, went through any
18 reports that were done at that point. I don't recall anything else.

1 Q: You recall whether you spoke to anybody that was representing Mr.
2 Epperson in his other case, the Let - - Letcher County case to be specific, regarding
3 anything they were doing or uncovered on that case?

4 A: Yes, I do believe I spoke to, ah, some of the attorneys that were
5 representing him from DPA. I do not know who nor do I recall the conversations.
6 But I do recall speaking to them, especially when we were in the negotiation phases,
7 uh, and had an offer on this case.

8 Q: Do you recall anything more specific of what you might have talked to
9 them about?

10 A: I recall talking to some of the attorneys about the offer that was made
11 on this case, the fact they weren't getting an offer at that point, and I also, ah, recall
12 asking, uh, when, I think that was the case that got reversed on some mitigation
13 situation, and I recall talking to them about that. That's generally all I recall.

14 Q: Recall if you ever spoke to Mike Williams?

15 A: I believe I did.

16 Q: Do you have any recollection of what about?

17 A: Mike had had some problems with DPA which is one reason we took the
18 case. There were allegations made by Mike against other attorneys with DPA, I think,
19 counter allegations, it got quite nasty. DPA was wanting someone else to come in and

1 take the case. I know that there were rumors of bar complaints being filed and
2 every—

3 Q: Well, let me, let me refine then, be a little more specific for you. Do you,
4 did you talk to Mike Williams about any investigation he may or may not have done
5 in the case?

6 A: I don't recall.

7 Q: What about any witnesses he had spoken to?

8 A: I got files from Mike but I cannot recall what they contained.

9 Q: What about Ep, does that mean you can't recall anything with regard to
10 any mitigation information he had uncovered?

11 A: Not that I recall. I know that, uh, we spoke, uh, to the family on
12 mitigation and I just, I don't recall what was in the files that Mike sent me. He sent
13 me several files. DPA sent me a room full of boxes of files.

14 Q: He said spoke to the family? [Inaudible]--

15 A: Yes. Mr. Jackson spoke to the family and was arranging, uh, their
16 possible testimony at penalty phase.

17 Q: So that was Mr. Jackson, not yourself?

18 A: Correct.

19 Q: Do you know how far in advance of trial that would have been?

1 A: I do not know.

2 Q: Do you know what he actually specifically spoke to them with regard to?

3 A: I remember—I remember a few things, not everything, I remember we
4 had to get hospital records from, ah, now I don't remember where it was from,
5 concerning an accident that Roger had and we were trying to see if there were head
6 injuries there, uh—

7 Q: Let, let me just stop you for one moment, and come back to that. I just
8 want to clarify. When you say accident are you referring to like an auto accident or
9 some other type of accident?

10 A: I think it was an auto accident. I think.

11 Q: Okay. And I'm sorry go, go ahead with the other aspects you were
12 talking about with records and information that Mr. Jackson had talked to family
13 members and others about.

14 A: That's about all I can remember, okay.

15 Q: Do you remember specifically which family members he would have
16 spoken to?

17 A: I do not know. I remember, I remember speaking to the mother. I
18 remember speaking to the mother at the time of trial as well, as well as a sister, and
19 I believe, if I'm not mistaken, maybe a father or an uncle, a male member of the family
20 as well.

1 Q: Would that be it? Just those family members?

2 A: That's what I recall. There may have been more, that's, that's what I
3 recall.

4 Q: Now you said, just now, that you spoke to Roger's mother before trial.
5 Do you recall what you spoke to him, to her about?

6 A: No, I do not.

7 Q: Now do you recall reviewing the 11.42 motion that had filed in the
8 Letcher County case?

9 A: Excuse me.

10 Q: The 11.42 motion in the Letcher County case?

11 A: Now what about it?

12 Q: Did you recall, did you review that before the trial in this case?

13 A: I think I did but I do not recall specifically.

14 Q: What about the appellate brief in the Letcher County case in the
15 Kentucky Supreme Court? Did you review that?

16 A: I don't know if I did. I know I reviewed—I, I don't know if I did on that.
17 I can't recall at all.

1 Q: What about the opinion remanding for an evidentiary hearing in 2001
2 in the Letcher County case?

3 A: You, you're talking about the other case?

4 Q: Yes.

5 A: Not the one we tried.

6 Q: Um-hm.

7 A: Again, I can't remember. I believe I did but I cannot remember.

8 Q: Can you, for a moment just turn to some binders there for you. Uh, if
9 you could turn right now to Binder # 3, please. And when you're there could you turn
10 to Exhibit 55.

11 A: Yes.

12 Q: Could you tell us if you recall seeing that before trial?

13 COURT: David, could you identify that for me please what you're seeing.

14 BARRON: Yes, that's Exhibit 55 is a letter from Julia Pearson to Mr.
15 Jewell—

16 COURT: Thank you.

17 BARRON: --from 2001.

18 COURT: Thank you.

1 BARRON: You're welcome, Your Honor.

2 RESUME DIRECT EXAMINATION OF FRANK JEWELL

3 BY MR. BARRON

4 A: I don't have independent recollection of this letter. Obviously, I got it
5 and reviewed it, but I don't have any independent recollection of it.

6 Q: Okay. Do you recall if you ever then contacted or spoke to Ms. Pearson
7 with regard to that letter?

8 A: I remember speaking to Ms. Pearson on more than one occasion. I do
9 not know whether we discussed the specifics of this letter.

10 Q: Okay. And then let's talk about a couple more memos here and let's look
11 at 57 first which is from 1991, and it's a memo regarding an interview with Roger's
12 mother and father and let us know if you recall reviewing that memo before trial.

13 A: I, I do not remember this. I don't know if, ah, I may have read it but I do
14 not have any independent recollection of it.

15 Q: Can you look at 58, which is another memo regarding a later interview
16 with Roger and his mother and tell us th-- if it's the same? I mean if your answer
17 would be the same.

18 A: Again, I have no independent recollection of, uh, having read this memo.
19 I may have but I do not remember specifically.

1 Q: Did he say anything with regard to whether he considered the possibility
2 of presenting any evidence regarding head injuries, physical abuse, verbal abuse,
3 medical health issues Roger had during childhood?

4 A: Ah, he did not consider any of those you mentioned.

5 Q: And having been informed of that information, the first time that we
6 met with him in 2008, did he say anything about what he would have if he had been
7 made aware of that info at the time before trial?

8 A: That he would've considered using it during the trial.

9 Q: And what about whether he would have conducted any further
10 investigation about that info?

11 A: That he would've conducted further investigation.

12 Q: Did he make any statements about whether a mitigation specialist was
13 used in this case?

14 A: Uh, he would call it that no mitigation specialist was used in the case.

15 Q: Did he make any statements about whether he consulted or even
16 considered consulting with any experts with regard to the sentencing phase and by
17 expert, I mean medical or mental health individuals, professionals?

18 A: He did not consider, ah, the advice of an expert for use in the case.

1 Q: And could you tell us the same regarding 59 and afterward we'll take a
2 quick look at 60 too?

3 A: I do not remember, uh, this one at all. No.

4 Q: Okay, and then let's turn to Volume 4 for a second and look at, I'm sorry,
5 did you look at 60 too?

6 JERNIGAN: I'm sorry, David. Are you saying 62 or 60 also?

7 BARRON: Thank you. Number 60.

8 RESUME DIRECT EXAMINATION OF FRANK JEWEL

9 BY MR. BARRON

10 A: I, I do not recall this one.

11 Q: Now, let's turn to Volume 4 and look at 63 for a moment and see if you
12 have any recollection there.

13 A: Right now I not, tab sixty-what?

14 Q: 63. It's in Volume 4.

15 A: I'm in Volume 4 and I'm seeing tab 62 and then it seems to go to 67,
16 [inaudible]—

17 Q: It should be a transcript of an interview between Randy Wheeler, from
18 Randy Wheeler and Kathleen Schmidt with Ann Thomas.

1 A: Uh, here we go.

2 Q: Did you see it, Mr. Jewell?

3 A: Conversation between Ann Thomas, Kathleen Kallaher, and Randy
4 Wheeler?

5 Q: Yes, Mr. Jewell.

6 A: I, I do not recall.

7 Q: Now, let's also look at 67 and then 68 in the same binder and tell me if
8 you recall either of those.

9 A: 67, I do not recall seeing. And did you say 68?

10 Q: Yes, please.

11 A: It seems a little bit more familiar but I cannot recall seeing it. No.

12 Q: Did you speak to Anna Cris Brown prior to the trial in this case?

13 A: No, I do not recall if I did or not.

14 Q: Do you know who she is?

15 A: Yes.

16 Q: Who is she?

17 A: She was, at one time, uh, worked with mitigation with the DPA.

1 Q: Do you know if she had done any work with regard to Mr. Epperson's
2 case prior to your involvement in it?

3 A: I thought she had but I cannot be for sure. I cannot remember.

4 Q: Did you use the services of a mitigation specialist in this case?

5 A: We did not, we did not retain a mitigation specialist that I remember,
6 no.

7 Q: Did you ever seek funds for a mitigation specialist from the DPA or
8 otherwise?

9 A: I don't believe we did.

10 Q: Did you invest, investigate anybody to whom co-defendant Donald
11 Bartley had allegedly stated that he committed the crimes and Mr. Epperson was not
12 involved?

13 A: There was one person that I recall that testified, uh, at the trial that he
14 had made statements like that. I think that was a former girlfriend, or--it was a
15 female witness.

16 Q: What about anybody, other than that that had made statements prior
17 to the trial?

18 A: Not that I recall.

1 Q: Did you seek any mental health experts for the, specifically with regard
2 to the sentencing phase in this case?

3 A: No, we did not. We, I remember reviewing at least one and possibly more
4 mental health evaluations and based on those evaluations I did not seek to introduce
5 mental health into the penalty phase or seek any other evaluations at that point.

6 Q: Did you seek any evaluations or any efforts to determine whether Mr.
7 Epperson had suffered any brain damage in his life?

8 A: Unless they had been, uh, done otherwise, I don't remember.

9 Q: What about to look into whether he had suffered any head injuries?

10 A: Again, I recall that we looked at the accident. I recall that I had
11 reviewed the evaluation or evaluations done when we had received the case, but other
12 than that I don't have any specific memory of reviewing anything else.

13 Q: Did you look into the fact that Mr. Epperson had been deprived of oxygen
14 and was, at birth and was born blue?

15 JERNIGAN: Objection.

16 COURT: If you are aware of that. Were you aware of that, sir?

17 JEWELL: No. Not that I recall, Your Honor.

18 RESUME DIRECT EXAMINATION OF FRANK JEWELL

19 BY MR. BARRON

1 Q: Were you aware of any evidence the Roger Epperson might have been
2 physically abused as a child?

3 A: I do not recall if at the time of this trial we had heard those allegations
4 or if those were allegations that we heard after this trial when some of the hearings
5 or interviews that have been conducted with this proceeding. So I do not recall.

6 Q: What about whether Roger's father had hit him in the head with a
7 hammer?

8 A: I know that you had men, ah, mentioned that. I don't know if we knew
9 it at the trial. Not that I recall.

10 Q: Roger's father had hit Roger in the head with a brick?

11 A: Again—

12 Q: That he threw at him?

13 A: Again, I do, I do not recall. I remember hearing that. I don't remember
14 if it was from you after the trial or if we had heard some of that before the trial. I do
15 not recall.

16 Q: That Roger had obtained 14 F's in school, an entire semester of F's, and
17 had been held back before?

18 A: As to the specifics of the numbers of F's, I do not recall. I do recall, I
19 believe that we had some school records. They were not outstanding or sterling in

1 the academic field, did show some academic deficiencies from what I remember. But
2 that, that is all I remember.

3 Q: That Roger suffered numerous close friends, saw numerous close friends
4 die suddenly in traumatic circumstances?

5 A: I remember allegations of that. Again, I don't remember when or from
6 whom, but I do remember hearing those allegations.

7 Q: Did you consider looking into the impact they had on Roger's life and
8 development?

9 A: I can't recall with specificity if we discussed, if knew it at that time,
10 discussed, whether or not that would be something to develop at penalty phase that
11 he had a lot of friends that had violent deaths or not. I, I just don't remember.

12 Q: Do you recall if you even considered consulting with any psychologists
13 with expertise in trauma to determine what impact that may have had on Mr.
14 Epperson?

15 A: No. After we reviewed the records which were furnished to us by DPA, I
16 do not believe that we consulted with anybody else.

17 Q: And you mentioned that you may but not sure if you were aware of some
18 of the alleged abuse, emotional and physical abuse, before we talked to you or after?

1 A: This is my third time testifying. I've talked to both sides. Numerous
2 people have questioned me about this, and right now, some of this, I don't recall if I
3 know it from the interviews or if I know it from the trial.

4 Q: Okay. You contact Dr. Peter Young?

5 A: Not that I recall.

6 Q: So then you wouldn't recall whether you had any communications with
7 him about the evaluation he had conduct, he had, Mike Williams had him conduct of
8 Mr. Epperson?

9 A: I do not recall.

10 Q: Let me ask you, since you've been practicing for many years, evidence of
11 head injuries, brain damage, physical abuse, emotional abuse, in your opinion is that
12 important information to investigate, develop, and attempt to present in a death
13 penalty case?

14 A: It would depend on the facts and circumstances of the case itself and the
15 facts and circumstances of the defendant. I cannot answer that yes or no.

16 Q: Is it something that you would investigate if you knew of information
17 regarding it and then make a decision based on the investigation?

18 A: It is something that you would look into if you had valid reason to.

1 Q: And by valid reason, do you mean some indication that those events
2 might have occurred or are you referring to something else?

3 A: It would again depend on the facts and circumstances of the case.

4 Q: Okay. One moment, please.

5 BARRON: Your Honor, at this time, subject to redirect, I have no further
6 questions but would request that we take a couple minutes recess before cross
7 examination.

8 JERNIGAN: No objection.

9 COURT: Alright, we'll do that. Uh, let's take about five or ten. Sir, you may,
10 uh, step down.

11 JEWELL: Thank you, Your Honor.

12 NO CROSS-EXAMINATION

COMMONWEALTH OF KENTUCKY
WARREN CIRCUIT COURT
NO. 97-CR-16

_____)	
ROGER DALE EPPERSON,)	
	)	Louisville, Kentucky
Movant	)	September 28, 2012
)	
vs.)	
)	
COMMONWEALTH OF KENTUCKY,	)	EVIDENTIARY HEARING
)	
Respondent.)	
_____)	

TRANSCRIPT OF VIDEOTAPED PROCEEDINGS
BEFORE THE HONORABLE MARTIN MCDONALD,
SPECIAL SENIOR JUDGE, WARREN CIRCUIT COURT

APPEARANCES:

FOR MOVANT EPPERSON:

DAVID M. BARRON
Assistant Public Advocate
Capital Post-Conviction Unit
Ky Dept. of Public Advocacy
Frankfort, Kentucky 40601

FOR RESPONDENT
COMMONWEALTH OF KENTUCKY:

JULIE SCOTT JERNIGAN
DAVID B. ABNER
Assistant Attorney Generals
Office of the Attorney General
Frankfort, Kentucky 40601

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1 THE COURT: You see, turn around, do you see him?

2 That's him - - -

3 MR. BARRON: I do see Mr. Jewell here - - -

4 THE COURT: He's here.

5 MR. BARRON: I know Mr. Jewell, I've met him before,
6 yes.

7 THE COURT: Mr. Jewell do you want to step up here
8 and tell me what you've got to say about this whole thing?
9 And, I want to get you out of here and move you on. You
10 were trial counsel, were you not?

11 MR. JEWELL: Yes, I was Your Honor.

12 THE COURT: Raise your right hand. Do you swear
13 what you are going to tell us is the truth, the whole
14 truth, nothing but the truth, so help you God?

15 MR. JEWELL: I do Your Honor.

16 TESTIMONY OF FRANK JEWELL

17 EXAMINATION BY THE COURT

18 Q. Alright. Again, you have been inconvenienced multiple
19 times over this case. I know that 18 you have actually
20 gone to Bowling Green and testified in a 19 previous - - -

21 A. Yes Your Honor.

22 Q. 11.42 matter, am I correct?

23 A. Yes, your Honor.

24 Q. Now, can you just give us an overview, just a brief

1 overview with your involvement with the case
2 and what you did?

3 A. Yes, your Honor, I was contacted by the Department of
4 Public Advocacy. Betty Niemi contacted me and asked me if I
5 would be willing, along with Michael Jackson, to represent
6 Mr. Epperson. This was a retrial of the case that had been
7 reversed by the Kentucky Supreme Court. This was a retrial
8 out of the case I believe of Jackson County. After, much
9 discussion, I agreed to take the case. I was told that
10 basically they could not find counsel for Epperson. One of
11 their DPA lawyers was threatening to sue another DPA lawyer
12 over this case and was threatening to sue the DPA office
13 and it was a mess. They had (inaudible) opinions and
14 everything between these two lawyers going on, so I agreed
15 to represent him along with Michael Jackson. We represented
16 him up through the trial of this matter. And we tried the
17 case, I believe it was in 1993 for about three weeks in
18 Bowling Green.

19 Q. 1993?

20 A. I believe it was Judge. I have a copy of the
21 judgment, if I can refer to it and give the exact date on
22 that?

23 Q. Yes sir, please. Who was the trial Judge at that
24 time?

1 A. Judge Lewis out of Warren Circuit Court. He'd been on
2 a change of venue. This was originally out of Jackson
3 County. At one point, it went to Laurel County for some
4 proceedings and we ended up in Warren County. It was in
5 Warren County when I got the case. The judgment after
6 trial was entered July 23rd, 2003.

7 Q. Okay.

8 A. And, at that point after trial, we withdrew from the
9 case. DPA handled the appeal and all proceedings after
10 trial.

11 Q. Now, you're no stranger to what issues 11 have been
12 raised here in the 11.42, are you not?

13 A. I'm familiar with 11.42 proceedings, yes.

14 Q. Seems to me now, that you're the one who did the work.
15 Now, you're on the receiving end on this thing and I want
16 to let you, give you an opportunity to clear, address
17 whatever you want to address. Just the nature of 11.42's
18 are distasteful to the court. The lawyers who do the work
19 at trial are now criticized by backseat drivers who weren't
20 there that didn't do a thing to try the case and now are
21 criticizing trial counsel and I 22 want to give you an
22 opportunity to put on the record, so the Supreme Court can
23 hear your voice in response to anything that you think that
24 you should.

1 A. This was a very difficult case. It was a very
2 complicated case. We were dealing with approximately
3 twenty-five banker's boxes of material sent by DPA and by
4 Michael Williams who had been counsel for Epperson prior
5 to us, who was the attorney involved in all the hoopla with
6 DPA about whether other attorneys have been unethical, etc.
7 We had reams of papers to go through. This case had been
8 tried once before on a joint trial with Hodge. We went
9 through that trial. Hodge, the co-defendant, I believe had
10 also been tried on his retrial prior to our trial. So, we
11 went through that transcript. Roger was in Eddyville. He
12 had also received the death penalty on a separate case that
13 we did not represent him on, the DPA was still handling.
14 Mike Jackson did the client contact. He went to Eddyville
15 and talked to Roger, talked to the family - seeing what we
16 could put together for the case. We tried it in Bowling
17 Green. It was continued quite a bit. One time it was
18 continued for a rather lengthy period of time because Roger
19 was having serious medical problems at Eddyville. It was
20 thought he might have stomach cancer at one point, so the
21 case was kind of put on hold while that was determined. We
22 tried it in Bowling Green for about three weeks. At
23 Bowling Green, Roger informed us that he did not want to
24 put on a penalty phase, that he did not like the penalty

1 phase and what put on before, he did not want to call any
2 witnesses in the penalty phase. We disagreed with that.
3 Mike had talked extensively with the family and had people
4 willing to testify. We talked to Roger about that. He
5 said he wanted no witnesses. Finally, he agreed to let us
6 call one of the officers from Eddyville, and he had a
7 sister that basically insisted on testifying and word sent
8 through us to Roger. She wanted to testify anyway and I
9 know we called her, but he was not willing to put on any
10 penalty phase. There were exhibits that were introduced in
11 the Hodge trial that we were planning to seek to introduce
12 in this trial. Roger did not want them introduced. Also,
13 prior to trial, there was an offer made to Roger of a
14 settlement to this case that was recommended to him. At
15 that point, the DPA lawyers who was representing him on the
16 other case were trying to get their 11.42 going on that
17 case and were not getting an offer. Everybody wanted of
18 course to try and wrap both cases up. That was impossible
19 at the time, but we did have an offer on the table up to
20 the trial date on this case. Roger did not take that offer
21 for various reasons, so we went to trial on it. And
22 basically - - -

23 Q. (inaudible) individual - - -

24 A. We did individual voir dire. That took about a week

1 or a little longer. I know we had one interruption in
2 that. This is the same year that Chris Polk died, and I
3 had to come back for his funeral one day. I think that was
4 during voir dire, but we took about a week voir dire and
5 then we did the trial down there - - -

6 Q. Just for clarity, Chris Polk was a lawyer?

7 A. He was an attorney here in Louisville that I had
8 served at the Public Defender's Office with.

9 Q. Yes.

10 A. He died of a heart attack while this case was going
11 on. I don't remember a lot about the case. It's been so
12 long ago. But, I know that we tried it. One thing that I
13 know was present in this trial that was not in 16 the first
14 trial was the wife of the co-defendant Benny Hodge, his
15 former wife did testify. We were able to get out of her
16 that Bartley, the third co-defendant had allegedly told her
17 that it was he and Hodge that went in the house. So, that
18 came out at trial and you know, I'm willing to answer any
19 questions about it. We tried the case. We prepared it.
20 We went through the transcripts of 23 the ones before. We
21 ended up mediating all sorts of problems between attorneys
22 at DPA to get the files, and it was a very lengthy and very
23 messy case.

1 THE COURT: Alright. Do you have any questions of
2 this witness?

3 MR. BARRON: Yes, your Honor. I have multiple
4 different areas I would like to cover, and I'm going to
5 first start with talking about jurors.

6

7 DIRECT EXAMINATION

8 BY: MR. BARRON:

9 Q. And, what I'd like to do is just ask you if certain
10 information was known to you, if you would have challenged
11 those jurors for cause - - -

12 A. I knew what the jurors said during voir dire. We
13 based our decision on what the jurors said during voir
14 dire.

15 Q. I understand that Mr. Jewell. I'm talking about
16 things that we learned afterwards that you did not know and
17 I just want get out for the record - I think I know what
18 the answers would be, but I just want to have developed
19 in the record from your mouth instead of mine - on whether
20 if you knew this info, you would have moved to excuse
21 jurors who had certain thoughts for cause.

22 MS. JERNIGAN: I'm going to object to the question on
23 the grounds that it calls for speculation. Asking Mr.
24 Jewell to go back more than ten years in his mind and pick

1 out individual jurors. I think that's inappropriate.

2 THE COURT: You're going to have to focus a little
3 bit more, Mr. Barron. That's a-objection sustained.

4 MR. BARRON: I wasn't referring to a particular
5 juror. I was referring to general thoughts and I'm going
6 to get very specific. I wanted Mr. Jewell to understand
7 where I was headed. But, for instance, you presented
8 mitigating evidence at the sentencing phase that Roger
9 behaved well and had good prison conduct. If you had a
10 juror who you knew would never give any full effect to that
11 as a bases to impose less than death. Would you excuse
12 that type of juror for cause?

13 MS. JERNIGAN: Again, I'm going to object for
14 speculation, it's overly broad.

15 THE COURT: Objection sustained.

16 MR. BARRON: Your Honor, then I would want to put
17 it on by avowal. Actually, the Commonwealth has even
18 argued that these types of questions needed to be asked in
19 prior types of pleadings in this case and argued that
20 certain things shouldn't go forward because we don't know
21 if defense counsel would move for cause. So, they're also
22 arguing opposite of what they did earlier.

23 THE COURT: Objection was sustained. What else you
24 got for him?

1 MR. BARRON: Is that on an avowal possible or not?

2 THE COURT: You're not going to take time right now
3 to do an avowal. You can put that on later.

4 Q. Mr. Jewell, do you recall what your trial strategy was
5 in this case?

6 A. Our trial strategy was basically that Roger Epperson
7 did not kill these two individuals. Our trial strategy was
8 to cast doubt on the evidence presented by the Commonwealth
9 and to show that there was doubt that he actually killed
10 these individuals. We had the one statement of the witness
11 that one of the co-defendants had in fact said it was him
12 and the other co-defendant going in.

13 Q. So, was it also, to make sure I understand, part of
14 your strategy to show that Roger Epperson had nothing to do
15 with this crime at all?

16 A. No. our strategy was to show that he did not kill
17 these two people.

18 Q. Mr. Jewell, do you recall testifying in October 2010
19 in another evidentiary hearing in this case?

20 A. Yes, sir.

21 Q. Do you recall at all giving any testimony at that
22 hearing that your strategy was both to show that he did not
23 kill Mr - kill the victims and that he had nothing to do
24 with the crime?

1 A. Roger had maintained that he had nothing to do with
2 the crime. Our argument was that he was completely
3 innocent of the crime. Now, if the jury chose to believe
4 he had a lesser role, we felt we could use that as a
5 nonstatutory mitigator, but our defense was a denial of the
6 allegations that he was involved in this.

7 Q. So, Mr. Jewell, did you ever investigate any
8 alternative suspects?

9 A. I do not recall investigating alternative suspects
10 myself, other than the fact that there was a statement that
Bartley and Hodge had in fact entered the residence.

11 Q. Do you recall seeing any police reports that were
12 handed over in discovery that mentioned names of other
13 suspects?

14 A. There may have been. I don't recall.

15 Q. Are you aware that Donald Bartley allegedly confessed
16 to the following individuals, Tammy Gentry, a Mark Thompson
17 and Elizabeth Shaw?

18 A. I do not recall.

19 Q. Okay. Were you aware at the time of trial. strike
20 that for a second. Bartley testified at trial that he
21 received a life sentence for his involvement in this case.
22 So, were you aware at the time of the trial that, that was
23 not correct?

1 MR. JERNIGAN: I'm going to object. If Mr. Barron is
2 going to put information like that in the record, he needs
3 to have documents to back out.

4 MR. BARRON: Those documents are here actually with
5 the official judgment within the case and it's actually
6 part of the record in this case already. But, I do have
7 those documents with me that will establish that and I can
8 introduce them - - -

9 MR. JEWELL: I recall what the (inaudible) Bartley
10 got at trial. We did attempt to cross-examine him.
11 However, Bartley was such that cross-examination was not
12 very successful because Bartley claimed not to remember
13 anything and didn't answer a lot of questions. In fact, we
14 moved that he not even be allowed to testify, for a
15 mistrial after his testimony. So, I do not remember
16 exactly what he received or what he didn't receive. I
17 questioned him concerning his claim that he was entitled
18 to a better deal than he got. I know he had filed
19 something regarding that and I remember that, but that's
20 all I remember about it.

21 Q. Okay, Mr. Jewell. Let's talk a little bit about the
22 sentencing phase, investigation/mitigation area. Was I
23 correct to understand that your co-counsel Mike Jackson
24 handled most of the mitigation aspect of the case

1 investigation point of view?

2 A. Michael was the person who talked to the family and to
3 Epperson. I recall that he had talked to several family
4 members - who had several family members that we thought
5 would testify at the penalty phase. Some family members
6 were willing to testify, at least one in particular that we
7 thought should not. I know that in talking to Epperson,
8 Michael did find out about information that he gave
9 concerning some wreck he had that I believe was either in
10 Lexington or Scott County at some point. We got medical
11 records on that to see if there were any head injuries or
12 anything we could use in regards to that and there wasn't.

13 Q. You just stated that Mr. Jackson was the one that had
14 most of the communications with Roger Epperson. Does that
15 also mean that he would have been the one that would have
16 discussed with Roger about the plea offers in this case?

17 A. I think I discussed also with Roger, plea offers over
18 the telephone. I know Mike discussed plea offers. I
19 believe we both discussed plea offers. At the time of
20 trial, we both discussed plea offers with him because the
21 offer was still open at the trial at Bowling Green.

22 Q. Okay. Remember a Dr. Peter Young?

23 A. I do not recall that name.

24 Q. Do you recall seeing a neuropsych that would have be

1 performed by predecessor - - - would have been conducted at
2 the request of predecessor counsel in this case?

3 A. I went through thousands of documents. I remember
4 seeing some document or documents related to a mental type
5 of evaluation. The one I specifically remember mentioned,
6 some antisocial traits, which basically once they mention
7 that, I really am not interested in introducing that report
8 or testimony.

9 Q. Do you recall speaking to myself and an investigator
10 in my office in 2008 on December 3rd?

11 A. I don't recall the time, but I remember speaking to
12 you in my office, yes.

13 Q. Do you recall telling us that you had never seen a
14 neuropsych report that we provided to you from Dr. Young?

15 A. You showed me several reports that day, some of which
16 were done before trial, some of which were actually done
17 after our representation. Uh, to the best of my knowledge,
18 I told you what reports I thought I'd seen and hadn't seen.

19 Q. So, if I say, and we had somebody that would come in
20 and testify today, that you did not see that neuropsych
21 evaluation that was performed in 1996. You're not telling
22 me right now that you are disputing that are you?

23 A. No, I don't know if I saw it or not.

24 Q. Okay, now you didn't gather Roger Epperson's medical,

1 school and military records did you?

2 A. There were some records that we reviewed. They had
3 been gathered by prior counsel and used in the prior
4 penalty phase. I can't recall what those records were.

5 Q. And again, if somebody came in and testified that you
6 told us in 2008 that you didn't review any of those, would
7 you dispute that?

8 A. I'm saying now, I don't remember seeing them. I don't
9 know if I did or not. I don't remember them in specific.

10 Q. Okay. What about the post-conviction pleadings in
11 Epperson's other case out of Letcher County that you
12 briefly referenced at the beginning of your testimony?

13 A. What about them?

14 Q. Did you review those?

15 A. I am, I believe we reviewed some of those. What we
16 had, we reviewed. I don't know, which we reviewed or not.
17 I can't remember.

18 Q. What about speaking to a person named Chris Brown?

19 A. I don't know if I talked to Chris on this case or not.
20 I know that she had worked on at least one, some aspects of
21 one case. I do not recall if I spoke to her or read
22 reports she had done.

23 Q. Now, to try to speed things along and simplify it a
24 bit, I'd like to run through a list of things that you've

1 previously told us that you were unaware of at the time of
2 Roger's trial and that you had said you would have liked to
3 have known and investigated. And, I'd like you to just
4 confirm that information for us; that Roger was deprived of
5 oxygen at birth?

6 A. I don't even - I do not remember that. If he had
7 talked to me about it before, you know. It is, I do not
8 recall that at all.

9 Q. That there was documentation that the oxygen
10 deprivation likely caused Roger Epperson to suffer organic
11 brain damage?

12 A. I do not recall that at all.

13 MS. JERNIGAN: I'm going to object.

14 THE COURT: Hold on, hold on, hold on. The
15 objection is what?

16 MS. JERNIGAN: Mr. Jewell has already testified that
17 Mr. Epperson forbid them from putting on mitigation
18 evidence at sentencing with the exception of a few
19 witnesses. I'm not sure it's appropriate to ask him at
20 this point whether he would have investigated something
21 that his client told him that he couldn't investigate.

22 MR. BARRON: Your Honor, to briefly respond. I will
23 introduce testimony later on that will call into question
24 those statements and also under U.S. Supreme Court Case

1 Law, including *Wiggins V. Smith* in 2003, *Rompilla v. Beard*
2 from 2005, U.S. Supreme Court Case Law predating this
3 trial, and the prevailing professional norms, counsel has
4 an obligation to conduct the investigation regardless of
5 what the client says to counsel and he can't adequately
6 advise the counsel and the find - advise the client - and
7 then find out from the client whether he will or will not
8 permit that evidence to be presented until the
9 investigation takes place. In fact, that exact issue was
10 before the U.S. Supreme in the *Rompilla* case and addressed
11 and held exactly as I just testified. So, the
12 investigation that has to be undertaken beforehand and what
13 counsel knew is a legal prerequisite to any decision by the
14 client or advice to the client or whether to permit any
15 testimony to take place.

16 MS. JERNIGAN: And I would argue that the client knows
17 better than anybody what evidence is available, what his
18 background is, what his life is, what head injuries he's
19 had, whether or not he was born deprived of oxygen, and if
20 the client says you cannot investigate this, you cannot put
21 it on. Counsel is bound by that. But continuing to
22 question him about what his client told him he couldn't do
23 is not necessary.

24 MR. BARRON: There was no testimony - - -

1 THE COURT: Alright.

2 MR. BARRON: - - that the client specifically said
3 he couldn't do those things.

4 THE COURT: If you will pay attention, you will
5 hear me saying the objection is sustained. Move on.

6 MR. BARRON: Your Honor, I'd also like to ultimately
7 put that information in my awowal too.

8 THE COURT: Well - - -

9 Q. Moving to the next area that I would like to ask you
10 about, are you familiar with the names Calvin Hurt,
11 James Noble, or Lightening Riddle?

12 A. I do not recall those names.

13 Q. Okay. Are you familiar with the term allocution?

14 A. In what regards?

15 Q. Of an individual, like a defendant being able to give
16 an allocution before the jury or sentencing body before a
17 judgment or sentence is passed by that (inaudible).

18 A. Yes.

19 Q. Did you discuss that at all with Roger?

21. A. We asked Roger if he wanted to testify at the trial,
22 if he wanted to testify at sentencing or if he had anything
23 he wanted to say at the time of judgment.

24 Q. But, allocution is not testifying under oath. It's a

1 separate thing where the defendant is allowed to briefly
2 address the jury before they deliberate.

3 A. We did not specifically ask about an allocution at
4 trial. We asked if he wanted to testify. He said he had
5 nothing to say. We asked if he wanted to testify at
6 sentencing. He said no. We asked him at the time of
7 judgment if he wanted to address the Court and say anything
8 and he said no.

9 Q. Are you aware if victim impact evidence was admissible
10 at the time of the trial in this case?

11 A. I believe it was to some degree, but I can't go into
12 exactly what. You know, if what evidence was sought to be
13 introduced - if we felt it was objectionable - we objected
14 to it.

15 Q. Are you aware that victim impact evidence was
16 inadmissible at the time of the original trial in 1987?

17 A. As I told you, if something was brought into evidence
and we thought it was objectionable, we objected to it?

18 Q. Okay. Then tell me, and this IS based on what you
19 previously said before, is it still correct that you were
20 unaware that victim impact evidence was inadmissible at the
21 time of the trial in this case and didn't object to - - -

22 A. I do not remember ever telling you that.

1 MS. JERNIGAN: And I'm going to object, the question
2 has been asked and answered.

3 THE COURT: Sustained.

4 MR. BARRON: Your Honor, at this time, I would
5 request that the court again revisit the ability to ask
6 about what he didn't investigate because - - -

7 THE COURT: What I'm getting ready to revisit is
8 the order allowing this hearing in the first instance.
9 We're getting a little bit ridiculous here. You got the
10 real lawyer that tried the case here in front of you. I
11 suggest you make the best opportunity of this while you
12 have him in front of you, because I'm getting ready to cut
13 him off and excuse him from these proceedings.

14 MR. BARRON: Your Honor, the other trial attorney
15 will also testify and, as for Mr. Jewell, the only other
16 areas of inquiry that I would plan to make are the matters
17 that this court has precluded that I believe is contrary to
18 binding U.S. Supreme Court law and I believe the law
19 entitles me to put it on the record by avowal. Other than
20 the avowal, I don't have further questions right now for
21 this witness.

22 THE COURT: Okay, Thank you. Mr. Jewell, do you
23 anything - - - does the prosecution have anything that
24 they want to run passed this witness?

1 MS. JERNIGAN: I actually do have a couple of
2 questions, but I will be very brief.

3 THE COURT: Go ahead.

4 CROSS-EXAMINATION:

5 BY MS. JERNIGAN:

6 Q. You, I'm running through the actual claims that are
7 made in the 11.42 so that you can address each one of them
8 that's been raised. You did address with your client his
9 right to plead guilty and the offer presented to him,
10 correct?

11 A. On several occasions.

12 Q. You investigated alternate suspects that you
13 considered viable, correct?

14 A. As far as investigation, we went through what was
15 given to us from DPA. We went through the reports, the
16 police reports that we had.

17 Q. And if you had, in doing that, seen a suspect that you
18 considered a potential alternate perpetrator that would
19 have been used as a viable defense, you would have
20 investigated that, correct?

21. A. Yes.

22. Q. And if you had found that, you would have presented it
23 to the jury correct?

24 A. If we'd found what we would have felt to be credible

1 evidence that somebody else had done this and were aware of
2 it, we would have considered presenting that to the jury.

3 Q. Thank you. You uh, did you cross-examine Mr. Bartley
4 or did Mr. Jackson?

5 A. I think I did.

6 Q. And you impeached him with the information that you
7 had, is that correct?

8 A. I believe so, I mean I would have to look at the
9 transcript, I can't remember. Now, his - Bartley's
10 testimony was very strange because he basically clammed up.
11 The court allowed them to use his prior testimony, which we
12 objected to at that time. So, it was very difficult to get
13 anything out of Bartley at that time, but we attempted to
14 impeach him with anything that we had.

15 Q. Alright. That was actually my next question. There
16 is an allegation that you did not object to his testimony
17 being admitted and you testified that you did indeed
18 object.

19 A. I believe we did. Okay. I would have to look at the
20 record, but -

21 Q. And you testified that Sherry Hodge, Sherry Hamilton
22 Hodge did testify that Bartley had confessed to her?

23 A. MR. JEWELL: Yes, I believe, we had statement that
24 she had stated that Bartley had told her that he and Hodge

1 went in, and we did bring that statement up and question
2 her and I believe we questioned Bartley about it. But, I
3 remember that being brought up at trial.

4 Q. Was there any information in the cross of Ms.
5 Hamilton-Hodge that you would have liked to have been
6 admitted that you could not? There is an allegation that
7 the cross was ineffective?

8 A. I do not remember anything.

9 Q. Same question with regard to Mr. Bartley. Were there
10 questions that you wanted answered that you were not
11 permitted to get answered?

12 A. I do not recall. I know we had a problem with him in
13 his answers and we had a problem with using the prior
14 transcript.

15 Q. I'm going to address the mitigation issue again very
16 briefly. With regard to the report of Dr. Young, you
17 indicated that you recalled a report that mentioned
18 antisocial personality traits or antisocial traits?

19 A. Yes, and I don't know what report that was or who, I
20 can't remember who did it or what report.

21 Q. But you would have chosen not to have introduced that
22 report for strategic reasons, correct?

23 A. If any psychological report talks about a person being
24 antisocial, I normally do not want to introduce that

1 report.

2 Q. With regard to the mitigation generally, you testified
3 that Roger would not allow you to conduct an investigation
4 or he would not allow you to present the evidence at
5 (inaudible)?

6 A. Roger stated he did not want any witnesses called at
7 the penalty phase of the trial.

8 Q. And yet you called both of his parents and I believe
9 his sister-in-law?

10 A. I don't remember who all we called. All I remember is
11 a sister. It might have been a sister-in-law. The lady
12 said that he talked to her son over the phone when she
13 thought her son was getting in trouble. I remember calling
14 that witness. I remember calling one of the officers from
15 Eddyville. I don't recall who else we called or didn't
16 call.

17 Q. Would I be correct in saying that that was all he
18 would allow you to do?

19 A. Yes, I mean we basically told him that we have these
20 witnesses, we want to put them on. He said he didn't want
21 any witnesses. Finally, we got him to allow us to put on
22 certain witnesses. Like I say, the only two I remember is
23 the man from Eddyville and the sister or sister-in-law. I
24 just don't remember if we had others or not that testified.

1 Q. Would I be correct in saying then that you did conduct
2 a mitigation investigation, you or Mr. Jackson?

3 A. Yes.

4 Q. An extensive one?

5 A. We conducted what we felt was an adequate and
6 extensive investigation.

7 Q. Would you have used false mitigation evidence if you
8 had known it to be false?

9 A. No.

10 Q. And, I'm going to ask again just to clarify because
11 there are several claims about insufficient or incomplete
12 mitigation. You presented all the evidence your client
13 would allow you to present?

14 A. Yes.

15 Q. Did you or Mr. Jackson, to your knowledge, discuss
16 with Roger his right to testify?

17 A. Yes.

18 Q. And did you believe that when he waived his right to
19 testify that he did so knowingly, intelligently, and
20 voluntarily?

21 A. Yes.

22 Q. Did you object to any comments of the prosecutor that
you believed were inappropriate?

23 A. We, you know again, I'd have to go back through the

1 trial transcript, we made what objections we felt were
2 appropriate.

3 Q. Video tape and photographs of the crime scene were
4 admitted during the, I believe both phases of the trial.
5 Did you object to the admission of those?

6 A. I would have to look at the transcript and see.

7 Q. If you felt that they were inappropriate, would you
8 have objected?

9 A. Yes.

10 Q. Did you object to the victim's son sitting at the
11 trial at counsel table?

12 A. I don't recall.

13 Q. Okay. And you did object, I'm sorry, did you object
14 to instructions on mitigation?

15 A. On mitigation?

16 Q. If you believed that the trial court had presented
17 incorrect instructions, would you have objected to those?

18 A. Yes.

19 Q. If you had not objected to those, would you have done
20 so as a matter of strategy?

21 A. I would have to look at the specifics, but as I
22 stated, without going through the transcript again to see
23 which objections were made and not, I can only say that
24 things we felt at that point were objectionable, we

1 objected to.

2 Q. Do you believe that Roger Epperson received a full and
3 fair trial?

4 A. Yes.

5 Q. Do you believe that now?

6 A. Yes.

7 Q. Even with 10+ years retrospect?

8 A. Yes.

9 Q. And you believed that at the time?

10 A. Yes.

11 Q. You don't believe that any of his constitutional
12 rights were violated?

13 MR. BARRON: Objection.

14 A. Only, you know what we objected to at the time of
15 trial. If we said we object because we feel this violates
16 this right, yes we believe that objection to be proper.

17 MR. BARRON: Your Honor, there is an objection that
18 has been lodged.

19 THE COURT: What's your objection?

20 MR. BARRON: On constitutional rights, he is
21 offering a legal opinion rather than a lay factual
22 statement, and second, he does not know all the issues that
23 are being presented or the facts - some of which have
24 nothing to do with trial counsel's investigation or

1 presentation of the case - so, he doesn't have a basis to
2 make a statement on whether or not there was a fair trial
3 or not.

4 MS. JERNIGAN: I think trial counsel is the most
5 appropriate person to render that opinion of both his
6 representation and the trial itself.

7 THE COURT: He's the only one in this courtroom
8 that had any dealings with that trial. The only person
9 here. So, he's a valuable source of information.

10 Objection is overruled.

11 Q. Is there anything else you would like to say to the
12 court with regard to the 11.42, generally or specifically?

13 A. No. Just that we worked with what we were given, and
14 we tried to do the best we could in a difficult situation.
15 It was just a bizarre situation that was going on with Mr.
16 Barron's office at that point and with attorneys in his
17 office accusing each other of all sorts of things and we
18 had to get information from DPA, information from this
19 attorney. So, it was just very strange. But, we did the
20 best we could. We got everything we thought was
21 appropriate and did what we could. We did receive the
22 offer on the case. We talked about that several times with
23 Mr. Epperson. Our advice was to accept the offer and he
24 chose to go to trial.

1 Q. What was the offer if you recall?

2 A. I believe it was life without parole, and the reason
3 we advised him to accept it was he already had another
4 death sentence at that point that was an 11.42 had been
5 filed on at that point, but it was still pending. And this
6 one, we felt that given the state of the case, given what
7 had happened before and what had happened anytime these
8 facts were in from of a jury, we felt that life without
9 benefit of parole would have been the best deal on this
10 case.

11 MS. JERNIGAN: No further questions. Thank you Mr.
12 Jewell.

13 THE COURT: Alright.

14 MR. BARRON: Your Honor, very briefly based on what
15 was asked.

16 RE-DIRECT EXAMINATION:

17 BY MR. BARRON:

18 Q. The Commonwealth asked you and you responded, if I
19 recall correctly, that you conducted a mitigation
20 investigation in this case. Could you please tell us what
21 that investigation entailed?

22 A. The investigation entailed discussions with the family
23 - which were basically held by Mr. Jackson - discussions
24 with Roger Epperson by him, investigation of, like I say, I

1 do remember the one instance of the car wreck,
2 investigation which included going back through the
3 mitigation that had been presented, reviewing that and
4 seeing if that was appropriate. We also reviewed
5 mitigation files that had been compiled in relation to the
6 first trial and apparently had been compiled throughout the
7 representation of the case. Also, discussed possible
8 mitigation with prior trial counsel.

9 Q. So, you - and you reiterated on cross-examination that
10 you - discussed all the mitigation that you uncovered with
11 Roger, in, while he was making a decision on what to allow
12 you to present?

13 A. Roger, Mr. Jackson discussed - most of the discussions
14 with Roger. At the trial, I do remember telling Roger
15 evidence that we had, evidence that we wanted to put on.
16 He said he wanted - he did not want a penalty phase at all.
17 We had to talk him into calling the few witnesses that we
18 did. He did not want any penalty phase. There were
19 exhibits that had been introduced in the last trial that we
20 were prepared to introduce in this trial. He did not want
21 them in.

22 Q. Okay, but this - since you did say you discussed the
23 mitigation that was conducted with Roger, it does bring it
24 to head, the issue of whether you knew certain information

1 so we know whether you discussed it with Roger. So, I
2 still need to go back and find out if you knew about
3 certain things and then if you talked to Roger about those
4 things. And, that would include, things like Roger being
5 hit in the head with a brick by his father. Did you - - -

6 A. I do not recall that specifically.

7 Q. Okay, what about Roger's very poor academic
8 performance that included at least 14 F's?

9 MS. JERNIGAN: I'm going to object. Mr. Barron's
10 characterizing of Mr. Epperson's academic record is
11 inappropriate unless he is an educator.

12 MR. BARRON: Your Honor, the 14 F's are in the
13 report cards that are going to be introduced into evidence.
14 The 14 F card speaks for itself. I'm just asking if he was
15 aware of that.

16 THE COURT: Yes or no?

17 A. I do not specifically recall seeing report cards. I
18 do recall that he had very poor academic records.

19 Q. That Roger suffered from frontal lobe brain damage?

20 MS. JERNIGAN: Objection. That has never been
21 conclusively shown anywhere at any time.

22 MR. BARRON: Your Honor, Dr. Young testified, and
23 the Commonwealth's agreed to his testimony being introduced
24 in lieu of live testimony. He testified on at least five

1 occasions that Roger Epperson does suffer from frontal lobe
2 brain damage. That was never rebutted and to THE court,
3 the extent the court is not fully aware of it itself, I'd
4 request that the court allow the question to be answered
5 and then rule on the matter after it reviews Dr. Young's
6 testimony that will be introduced.

7 MS. JERNIGAN: I think that's a mischaracterization of
8 Dr. Young's testimony, but if the court wants to allow the
9 question, and then we can always strike it later.

10 A. As I've said before, I do not recall specifically
11 whose reports I saw. I do not recall all the details of
12 the reports. I recall the reports I did see, mentioned
13 antisocial disorder and that really indicated to me that it
14 may not be something that we want to get into.

15 Q. So, if I understand then, you can't come in here today
16 and testify that things that I just went over or any of
17 these other types of mitigation things were things that
18 were discussed and explained to Roger Epperson?

19 A. I do not recall the specifics of what I've said I
20 don't recall. What we knew, we discussed with him. I do
21 not recall whether we saw 14 report cards or not. I do not
22 recall specifically Roger, gee, you have a poor academic
23 history and we want to tell the jury that. No I don't
24 remember that specifically.

1 Q. So then, you couldn't come in here and also then say
2 that if Mr. Epperson knew this and knew the value of it,
3 that he still would have prohibited you from presenting it?

4 A. I don't know what Mr. Epperson would have done. I was
5 surprised when he said he didn't want a penalty phase. He
6 was adamant he did not want it. He referred to it as
7 bullshit and said he wasn't going to put on that bullshit
8 that his last attorneys put on.

9 THE COURT: Alright, I'm going to take a 3-minute break
10 here.

11 [BRIEF RECESS TAKEN]

1 [BACK ON THE RECORD]

2 THE COURT: Alright

3 REDIRECT EXAMINATION (CONTS.)

4 BY MR. BARRON:

5 Q. Just a couple of quick things here. Mr. Jewell, I
6 just want to clarify for the record that Roger's mother,
7 father, and another relative did testify briefly at the
8 sentencing phase, not about any of the things that I have
9 asked you about. So, he did allow some evidence to be
10 presented.

11 MS. JERNIGAN: Objection, asked and answered,
12 repeatedly.

13 THE COURT: Sustained.

14 Q. Mr. Jewell, you testified on cross-examination that
15 you talked to Roger about testifying or his right to
16 testify. You did so at the guilt phase, about testifying
17 at the guilt phase, but am I correct that you did not do so
18 with regard to testifying at the sentencing phase?

19 Ms. JERNIGAN: Objection.

20 A. I believe we did.

21 MS. JERNIGAN: That's fine.

22 THE COURT: Alright, go ahead.

23 MR. BARRON: Your honor, I have no further questions
24 of Mr. Jewell at this time.

1 THE COURT: Alright.

2 MS. JERNIGAN: Nor do I.

3 THE COURT: Mr. Jewell, thank you, you are excused.
4 Thank you for coming over here. We appreciate it.

5 MR. JEWELL: One question for the court. My
6 subpoena mentioned today and next week. Am I excused for
7 next week.

8 THE COURT: You will not be required to attend any
9 further proceedings in this case.

10 MR. JEWELL: Thank you.

11 THE COURT: Alright, I am still considering setting
12 aside the order which required this evidentiary hearing,
13 because based upon what I have heard now, at this point,
14 this isn't going to turn up anything. We have had the one
15 lawyer testify, who was actually on the job site doing the
16 job. He sounds like he did it in a very proficient and
17 professional manner. The DPA is making a mountain out of a
18 molehill here.

19 MR. BARRON: Your honor, just real briefly on that.
20 I do have the other trial attorney, who is now here that I
21 expected to call to testify and I think will contradict
22 some of what Mr. Jewell said. I also have here - - -

23 THE COURT: You are an optimist.

COMMONWEALTH OF KENTUCKY
WARREN CIRCUIT COURT
NO. 97-CR-16

ROGER DALE EPPERSON,)	
)	
Movant	)	Louisville, Kentucky
	)	September 27, 2010
vs.)	
)	
COMMONWEALTH OF KENTUCKY,	)	EVIDENTIARY HEARING
)	
Respondent)	

TRANSCRIPT OF VIDEOTAPED PROCEEDINGS
BEFORE THE HONORABLE THOMAS CASTLEN,
SPECIAL SENIOR JUDGE, WARREN CIRCUIT COURT

APPEARANCES:

FOR MOVANT EPPERSON:

DAVID M. BARRON
Assistant Public Advocate
Capital Post-Conviction Unit
Ky Dept. of Public Advocacy
Frankfort, Kentucky 40601

FOR RESPONDENT

COMMONWEALTH OF KENTUCKY:

JULIE SCOTT JERNIGAN
DAVID B. ABNER
Assistant Attorney Generals
Office of the Attorney General
Frankfort, Kentucky 40601

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1 THE COURT: Mr. Jewell, good morning.

2 MR. JEWELL: Good Morning.

3 THE COURT: Would you raise your right hand, please? Do
4 you solemnly swear or affirm the testimony you are about to give
5 to be the truth, the whole truth, and nothing but the truth?

6 MR. JEWELL: I do.

7 THE COURT: Alright. Be seated, please. Thank you.

8 Mr.--

9 MR. BARRON: I will be handling it, your honor.

10 THE COURT: Barron.

11

12 DIRECT EXAMINATION OF FRANK JEWELL

13 BY MR. BARRON:

14 Q. Good morning, Mr. Jewell. Can you state your first and
15 last name for the record, spelling both of them?

16 A. Franklin, F-R-A-N-K-L-I-N, Jewell, J-E-W-E-L-L.

17 Q. What is your current profession? What is your current
18 profession?

19 A. I'm an attorney.

20 Q. How long have you practiced law?

21 A. I have practiced since 1977.

22 Q. How much of that period time focused on criminal defense
23 work?

1 A. About all of it. For about two years, I was with a firm
2 that did mostly civil. I still did some criminal, but the rest
3 of it has been totally criminal.

4 Q. Did there come a time when you began representing Roger
5 Epperson in a murder trial for the murders of Ed and Bessie
6 Morris?

7 A. Yes.

8 Q. Do you recall when that was?

9 A. I do not. I think it was somewhere maybe around 2000,
10 perhaps 1999. I do not recall when I first got on the case.

11 Q. Did you represent him at the trial in this case?

12 A. Yes, I did.

13 Q. Do you recall when that took place?

14 A. I believe it was 2003.

15 Q. Mr. Jewell, do you recall receiving any DNA results when
16 you represented Mr. Epperson?

17 A. No, I do not.

18 Q. Do you recall if there were any DNA results in the file
19 when you took over the case?

20 A. I do not recall seeing any?

21 Q. Now, just to make sure everything is clear with the record,
22 if you could take a moment to look to the binder that is in
23 front of you and if you could turn to exhibit one, which appears

1 right after the tab one. Could you tell us what that document
2 is titled at the top of the page?

3 A. It is titled forensic case report with a date of January 8,
4 1999.

5 Q. Now, those have already been admitted into evidence today,
6 those two pages as the DNA results that are at issue today. Can
7 you take a moment, look at that, and just verify for us whether
8 you have ever seen that before?

9 A. I have not seen this.

10 MR. BARRON: One moment please. We'll pass the witness
11 this time to the Commonwealth.

12

13 CROSS EXAMINATION

14 BY MS. JERNIGAN:

15 Q. Okay. Let's talk for a moment or two about your strategy
16 at the trial in this case. You had indicated to me when we have
17 spoken about his matter previously that your strategy was that
18 Mr. Epperson was not an active participant, is that correct?

19 A. Correct. Mr. Epperson denied involvement in this crime.

20 Q. You sought to convince the jury that he was not in the
21 house, correct?

22 A. Yes.

23 Q. That he was not the actual trigger man here?

24 A. Yes.

1 Q. You, yourself in the course of your representation didn't
2 seek to have- let me back up a step, you were aware that hairs
3 had been collected from the bodies of Mr. Morris and Mrs.
4 Morris, correct.

5 A. I remember discussions about a hair from Mrs. Morris. I
6 really don't recall much about a hair from Mr. Morris.

7 Q. You, yourself in the course of your representation did not
8 seek DNA testing of that hair, is that correct?

9 A. No, we did not.

10 Q. And what was the reason that you decided not to do that?

11 A. The State Crime Lab did not match the hair to Epperson,
12 could not say that it came from him, and we were going with
13 that.

14 Q. You're aware that Mr. Epperson had been excluded as the
15 source of the hair?

16 A. No.

17 Q. I'm sorry.

18 A. No. The State Crime Lab from my memory had tested the hair
19 and had not been able to say that it was or was not anybody's,
20 okay.

21 Q. Okay. I understand. And you didn't proceed with DNA
22 testing to exclude Mr. Epperson as the source of the hair?

23 A. No, we did not.

1 Q. And again, can you tell me what the purpose of that was?

2 Why you didn't seek to have DNA testing done on that hair?

3 A. Because at that point the Commonwealth did not have
4 scientific evidence linking Roger Epperson to the crime scene.

5 Q. And seeking that test might have provided that evidence?

6 A. We do not- at that point and time, we didn't know what a
7 DNA test would show.

8 Q. Do you remember telling me when we talked that you decided
9 not to seek DNA testing because it wasn't worth the risks?

10 A. Correct. That's what I'm saying.

11 MR. BARRON: Your honor, I'm going to object at this
12 point. This entire line of questioning is going well beyond the
13 scope of the direct examination.

14 THE COURT: Overruled.

15 A. That's what I'm saying. We had at this point a situation
16 where we could argue to the jury that there was no scientific
17 evidence connecting Roger Epperson to the crime. We were
18 satisfied arguing that.

19 Q. Knowing what you now know, that there was a DNA test done
20 on this hair and that it excluded Mr. Epperson as the source of
21 that hair, would that have changed that part of your
22 presentation to the jury?

23 A. If we had been made aware of these tests, I'm sure we would
24 have attempted to introduce these tests into evidence.

1 Q. But, if your and I'm sorry, I may not be articulating my
2 questions very well, your strategy to the jury was that there
3 was no forensic evidence linking him to the crime.

4 A. Correct.

5 Q. The existence of this DNA test does not change that, does
6 it?

7 A. The existence of this DNA test does not provide any
8 scientific evidence linking him to the crime, no.

9 MS. JERNIGAN: Okay. I believe that's all the questions
10 that I have at this point, Judge.

11 MR. BARRON: Redirect, your honor?

12 THE COURT: Yes, of course.

13

14 REDIRECT EXAMINATION

15 BY MR. BARRON:

16 Q. Mr. Jewell, was it also part of your defense at trial to
17 show that Roger Epperson was not at all involved in the murders.

18 A. Our defense at trial was to deny involvement in the
19 criminal activity that was charged.

20 Q. So, it would be fair to say that it's not just that he
21 wasn't inside the house, but he was a factually, completely
22 innocent individual.

23 A. Yes. Our defense was that he was not involved at all and
24 that if he was, he was not the one who perpetuated the murders.

1 Q. Now, the DNA test with the exhibit 1 that we have been
2 referencing. Would you agree with us that those results do
3 exclude Mr. Epperson as a source of the hair on Bessie Morris?

4 A. It excludes him as a source of that hair, yes.

5 Q. Would you have presented to the jury and argue that it
6 excluded him if you had that?

7 A. If we had known of this test, I'm sure we would have
8 attempted to introduce it.

9 Q. And therefore, you believe it would have supported the
10 defense that you decided to pursue at trial?

11 A. I really didn't follow the question?

12 Q. I'm sorry; I will try to rephrase that. If I understand
13 what you are saying then, you believe that these DNA results
14 were not just helpful in general, but would have supported your
15 case, is that- would that be correct?

16 A. They could have.

17 MR. BARRON: No further questions.

18

19 RE CROSS EXAMINATION

20 BY MS. JERNIGAN:

21 Q. Okay. Let me ask that question perhaps in a different way.
22 You previously testified that the existence of this test would
23 not have altered your strategy, correct?

24 A. No, it would not have altered our strategy, no.

1 Q. Is that because the existence of this test does not
2 exonerate Mr. Epperson?

3 A. The existence of the test- the results are the results.
4 The results show that this hair, one hair or two hairs that were
5 found did not belong to Roger Epperson. That does not show any
6 less, it does not show any more. It doesn't show that he wasn't
7 involved at all. It doesn't- it shows what it is. Those were
8 not hairs belonging to him.

9 Q. So to repeat what you just said, you agree that this- the
10 existence of this test, the test results don't show that Mr.
11 Epperson wasn't there?

12 A. Correct. It's not- I wouldn't say it's conclusive one way
13 or the other that he was or he was not there. No, it does not
14 exclude him from- it's not like- perhaps I can explain it this
15 way. In certain cases DNA can be the be all and end all, such
16 as in a rape case where there is bodily fluids left on or in the
17 victim that has to come from the perpetrator. In that case your
18 DNA basically excludes the person if it is not his DNA. This
19 test does not go that far. I don't think it actually excludes
20 any of the individuals that were tested from having participated
21 in the crime. No, I don't think it's totally exclusionary.

22 MS. JERNIGAN: Nothing further.

23 MR. BARRON: No further questions.

1 THE COURT: Thank you, Mr. Jewell. You may step down.

2 Is he free to go?

3 MR. BARRON: Yes. Can we take a five minute recess?

4 THE COURT: Sure. I've been asked to admonish all of
5 the witnesses to please not discuss the case with anyone who has
6 not yet testified and been excused.

7 MR. JEWELL: Thank you, your honor.

8 THE COURT: Thank you very much, Mr. Jewell.

COMMONWEALTH OF KENTUCKY
WARREN CIRCUIT COURT
NO. 97-CR-16

_____)	
ROGER DALE EPPERSON,)	
	)	Louisville, Kentucky
Movant	)	September 26, 2010
)	
vs.)	
)	
COMMONWEALTH OF KENTUCKY,	)	EVIDENTIARY HEARING
)	
Respondent)	
_____)	

TRANSCRIPT OF VIDEOTAPED PROCEEDINGS
BEFORE THE HONORABLE THOMAS CASTLEN,
SPECIAL SENIOR JUDGE, WARREN CIRCUIT COURT

APPEARANCES:

FOR MOVANT EPPERSON:

DAVID M. BARRON
Assistant Public Advocate
Capital Post-Conviction Unit
Ky Dept. of Public Advocacy
Frankfort, Kentucky 40601

FOR RESPONDENT
COMMONWEALTH OF KENTUCKY:

JULIE SCOTT JERNIGAN
DAVID B. ABNER
Assistant Attorney Generals
Office of the Attorney General
Frankfort, Kentucky 40601

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1 A. I am an attorney.

2 Q. How long have you practiced?

3 A. Since 1994.

4 Q. Did your practice include sometimes handling criminal
5 cases?

6 A. It did.

7 Q. Including death penalty cases?

8 A. Yes.

9 Q. Did there come a time when you represented Roger Epperson
10 for murder charges involving the murder of Ed and Bessie Morris?

11 A. Yes.

12 Q. Do you recall when you began representing Mr. Epperson?

13 A. I know it was over ten years ago. I don't recall the exact
14 date Frank Jewell asked me to sit second-chair with him in the
15 defense with Mr. Epperson.

16 Q. And that means you were the attorney that actually tried
17 this case?

18 A. Yes.

19 Q. Do you recall any DNA results in this case?

20 A. I never saw any DNA results in this case?

21 Q. Are you aware of any DNA testing, motions that were filed
22 in the case?

1 A. I know from talking to you and looking at the case
2 afterwards that there were motions filed regarding new DNA
3 testing.

4 Q. Okay. What about before you spoke with me, when you were
5 handling the trial?

6 A. I believe at some point there was a motion filed. I know I
7 did not file the motion. I am not sure if Frank filed it or
8 whether Mr. Epperson's previous counsel had filed that motion,
9 but I understand there was a motion filed as it relates to the
10 DNA.

11 Q. Well, Mr. Jackson, there is a binder that is next to you
12 that you should be able to see right there at the witness stand
13 and that is exhibits that have already been pre-marked and some
14 introduced into evidence today. If you could turn for a moment
15 to exhibit 3.

16 A. Yes.

17 Q. Can you tell us what that is titled?

18 A. A motion for DNA PCR testing of forensic samples.

19 Q. Can you take a moment and tell me if you recall seeing that
20 motion in the record that was filed before you got involved in
21 the case, but when you were preparing for the case, do you
22 recall seeing it?

1 A. As I sit here today, I cannot tell you one way or the other
2 whether I recall seeing it. I've got no reason to believe that
3 I did not see it and review it if it was part of the record.

4 Q. Then, real briefly, can you tell us if that would be the
5 same for exhibits 4 through 7, please?

6 A. Yes, it would be the same for these. I have no independent
7 recollection of reviewing them, but I am sure if they were part
8 of the record that it was reviewed by me.

9 Q. Okay. Now, can you take a look at exhibit eight and turn
10 to page two, and specifically to the second paragraph that says
11 when the testing is completed and the report made available of
12 the results, Miero Diagnostics and or the Kentucky State Police
13 Lab shall see the delivery of the report of said results. The
14 parties shall so inform the court. Are you there Mr. Williams?
15 I'm sorry, Mr. Jackson?

16 A. Yes, I see that.

17 Q. Okay. Now, you testified—

18 THE COURT: Tell me, where are you?

19 DAVID BARRON: I'm on page two of Exhibit number eight.

20 The order for the taking of samples for DNA testing.

21 THE COURT: Okay.

22 Q. Now, Mr. Jackson, you testified a moment ago that you were
23 unaware of the DNA results in this case when you tried the case?

24 A. That's right.

1 Q. Would you agree with us that the portion that I just read
2 from that order required the State Lab or the testing lab to
3 provide the results to you?

4 A. It looks like that is an order signed by Judge Lewis that
5 says the results should be produced to us.

6 Q. And this order, as the record shows was, entered November 5
7 of 1998?

8 A. That's right.

9 Q. Did you at any point, since that order was entered, before
10 the trial concluded take any actions to find out about those
11 results if they existed?

12 A. I did not.

13 Q. So, you didn't contact Mr. Taylor directly yourself?

14 A. I do not recall contacting anyone about DNA results.

15 Q. Okay. And then Mr. Jackson, if we could go back to exhibit
16 number one for a moment please, which is titled Forensic Case
17 Report.

18 A. Yes, I'm there.

19 Q. And, that's already been entered into exhibit- into
20 evidence as the DNA results that you testified you didn't
21 receive. Could you just take a look at that for a moment and
22 verify that those are the results you are referring to, that you
23 did not see?

1 A. And once again, I don't know if I can verify that I did not
2 receive something, but I've never seen this before.

3 THE COURT: But what?

4 MR. JACKSON: I have never seen this document before.

5 Q. Now, what would you say, what type of trial strategy
6 defense did you present?

7 A. Obviously that Mr. Epperson was not involved with what he
8 was accused of doing.

9 Q. Now, in formulating that defense, would you have reviewed,
10 looked at, thought about these DNA results if they were in your
11 possession?

12 A. I think obviously if there were DNA results which show that
13 Mr. Epperson was not linked to any kind of evidence found inside
14 the scene of the crime, that certainly would be important in not
15 only formulating the defense, but in his defense at the trial
16 itself.

17 Q. So, do I understand correctly that you are also now saying
18 that if you had these DNA results, you would have used them as
19 part of your defense at trial?

20 A. Once again, I'm sure it would have been taken into
21 consideration and used for whatever purpose we felt fit at the
22 time. I'm sure that it would have been helpful information for
23 us in formulating the defense of Mr. Epperson. To what extent,
24 I mean, obviously, I can't tell you here what we would have used

1 it for, but obviously, I think it would be important for us to
2 have this knowledge when we were formulating his defense.

3 Q. Now, one further line of inquiry, Mr. Jackson. Do you
4 recall if the Commonwealth had an open file discovery policy in
5 this case or represented that everything they had had been
6 disclosed here?

7 A. As I recall. Certainly, I know that they are obligated to
8 turn over any kind of exculpatory evidence. As I understand,
9 they had turned over everything that they had in the case.

10 Q. So, would it have been your understanding that if they had
11 these DNA results that they would have been turned over to you?

12 A. Yes, I believe they would have been.

13 Q. And would you have relied on their representation that
14 everything had been disclosed to believe that there were no DNA
15 results out there?

16 A. I think we did rely on that.

17 Q. Thank you. Just one moment.

18 THE COURT: Ms. Jernigan or Mr. Abner

19 DAVID BARRON: We have no further questions right now.

20

21

CROSS EXAMINATION

22 BY MS. JERNIGAN:

23 Q. Can we discuss your trial strategy a little bit more, Mr.
24 Jackson?

1 A. Yes.

2 Q. You said that Mr. Epperson- your strategy was that he was
3 not involved. By that do you mean that he wasn't in the house,
4 or that he was completely innocent of any wrong doing?

5 A. I think certainly, he was not in the house and I think
6 that's the trial strategy that was put forward as it relates to
7 any involvement that he had. Obviously, our trial strategy was
8 that he was not involved at all.

9 Q. Wasn't actually the trigger person is what I'm hearing you
10 say, is that- didn't fire the weapons that killed the Morris's,
11 that was your strategy?

12 A. I think clearly that was part of the strategy that we had
13 that he was not involved and did not fire any kind of weapons.

14 Q. Just a moment if I may Judge? Were you and Mr. Jewell in
15 daily, or were you in regular contact regarding this case, or
16 would he have taken actions that you were not aware of, and
17 perhaps you took actions that he was not aware of.

18 A. I'm not sure about not aware of. I'm sure that he did
19 things, as I sit here today, I am not aware of.

20 Q. Of course. Given the passage of time, nothing more?

21 A. That's right.

22 Q. Which of you would have been in closest contact with Mr.
23 Epperson?

1 A. I would say I probably visited with Roger more. I'm not
2 sure what kind of contact Frank had by way of phone or any other
3 communication.

4 Q. Did Mr. Epperson advise you at any time that anyone from
5 the crime lab had come and taken blood from him?

6 MR. BARRON: Objection.

7 THE COURT: Restate the question.

8 Q. Did Mr. Epperson advise you that someone from the crime lab
9 had taken blood from him?

10 THE COURT: What is the objection?

11 MR. BARRON: Well, first of all it's getting into
12 somewhat of a privileged communication between the client and
13 his attorney at the time that remains privileged and second, I
14 do not see how the relevancy of the fact that which the record
15 clearly reflects that blood was drawn from Mr. Epperson
16 establishes that DNA results are returned. So, I don't see
17 where they are going anywhere other than down some fishing
18 expedition that goes directly into privileged communications
19 between a client and his attorney.

20 THE COURT: Well, this is an 11.42 action, right?

21 MR. BARRON: It's a very limited waiver of the privilege
22 only to the extent necessary to address the particular matter at
23 issue here, which is whether Mr. Jackson knew of the DNA result.

1 He has testified unequivocally that he had no knowledge of the
2 results.

3 THE COURT: Ms. Jernigan?

4 MS. JERNIGAN: You're asking for a rebuttal or--

5 THE COURT: Yeah. What do you say?

6 MS. JERNIGAN: If Mr. Epperson had told his attorneys that
7 somebody had come and taken blood from him. That should have
8 been some indication to them that some kind of testing had been
9 undertaken.

10 THE COURT: I'm going to overrule the objection.

11 A. I don't recall.

12 Q. You don't recall having the conversation, or you don't
13 recall what his answer would have been?

14 A. I don't recall, either whether we had that conversation,
15 and if we did, I'm not sure what his response was.

16 Q. Okay. Did you have a- did you have the kind of
17 relationship with him, and I'm going to keep this very narrow,
18 did you have the kind of relationship with him where you could
19 have had those sorts of discussions, or was your representation
20 of them fairly hostile?

21 MR. BARRON: Your honor. I would object to that as both
22 speculation and I don't think the court should even-
23 understandable.

1 THE COURT: Well, I think it's understandable, but I'm
2 going to sustain the objection.

3 MS. JERNIGAN: I understand.

4 Q. Just for the record, you and Mr. Jewell did not seek DNA
5 testing in your own preparations for the case, is that correct?

6 A. I know I did not.

7 MS. JERNIGAN: Okay. Nothing further.

8 MR. BARRON: Your honor, a brief redirect?

9 THE COURT: Okay.

10 REDIRECT EXAMINATION

11 BY DAVID BARRON:

12 Q. Mr. Jackson, would you also agree that part of your trial
13 strategy was to show that not just Mr. Epperson wasn't in the
14 house, but that he was not involved in this crime at all?

15 A. Clearly that was our trial strategy that he was not
16 involved.

17 Q. So, just to make sure we fully are all on the same page and
18 understand, you're saying basically, that would be a defense
19 that somebody else committed these crimes and Epperson wasn't
20 there and had absolutely nothing to do with it?

21 A. That's right.

22 Q. Now, are you aware of police reports in this case that show
23 that there were other suspects before Mr. Epperson?

24 MS. JERNIGAN: Objection, relevance.

1 THE COURT: I'm going to overrule.

2 A. I think that I recall that, and I'm not sure whether that's
3 something that I have read or something that I was reviewing at
4 the time. I believe that there were other suspects that were
5 mentioned.

6 Q. Since you just testified that one of your defenses was that
7 Epperson had nothing to do with the case and you have already
8 testified that these DNA results would have been beneficial, in
9 addition to that, with the knowledge that you just stated about
10 the alternative suspects, would those DNA results been something
11 that you would have considered using to point the finger at
12 trial at these alternative suspects?

13 MS. JERNIGAN: Objection.

14 THE COURT: Yeah. I'm going to sustain. There's no-
15 nothing suggesting that any alternative suspects were identified
16 at this point.

17 MR. BARRON: Well, your honor, the police records here--

18 THE COURT: They may, but this witness hasn't
19 acknowledged that.

20 Q. Mr. Jackson, do you recall reviewing any of those police
21 reports?

22 A. I'm sure I did if they were in the file. I reviewed all
23 the reports.

24 Q. Can you please turn to exhibit 16?

1 A. Yes.

2 Q. And I would like you to turn- well first of all, can you
3 try to identify what that is for us?

4 A. It looks like it is a transcript of an interview with Marty
5 Morris.

6 THE COURT: Wait a minute. Exhibit 15.

7 MR. BARRON: Sixteen, your honor, 1-6. I'm sorry.

8 A. Conducted on July 4, 1985 by Detective Ronnie Gay.

9 Q. Okay. And if you could just take a moment and review that,
10 most specifically, the fourth page into it?

11 THE COURT: Specifically what?

12 MR. BARRON: If you could take a look and review the
13 fourth page of exhibit 16, actually at the bottom it says
14 7850680-61.

15 MS. JERNIGAN: Judge, we are going to continue to object to
16 this.

17 THE COURT: On what basis?

18 MS. JERNIGAN: That the presence or absence of other
19 suspects is not relevant to the questions before this court and
20 that the area we are going into at this point is purely
21 speculative.

22 MR. BARRON: Your honor, if I may respond to that
23 briefly? In an ineffective assistance of counsel claim, one of
24 the factors and rulings that this court will have to make is

1 whether there is a prejudice from any deficient performance, if
2 the court finds deficient performance. In making that, this
3 court has to determine whether there is a reasonable probability
4 of a different outcome. Defined as sufficient to undermine
5 confidence in the outcome and whether it might well have
6 influenced the appraisal of the jury, its decision. In
7 determining that, knowing what evidence was available that could
8 have been presented and how trial counsel could or would have
9 used that is imperative to determining whether there is a
10 reasonable probability of a different outcome.

11 MS. JERNIGAN: Among other things, we don't even know at
12 this point if these witnesses would have been alive at the time
13 that Mr. Jackson, or I'm sorry- these alleged alternate suspects
14 would have been alive at the time that Mr. Jackson would have
15 represented them. I think where Mr. Barron is going with this
16 is that if they had known about the DNA results and if they had
17 known about the alternate suspects, then they would have sought
18 testing on the alternate suspects. Some of these people weren't
19 even alive to be tested at the time, so I mean this is so far
20 down the path of speculation that it's almost fairytale.

21 MR. BARRON: Your honor, I'd briefly clarify that yes,
22 there may have been additional testing, but there also would
23 have been we have the fact that we have these identified people
24 within here that are talking about how they knew how they could

1 get money. That money would have been gotten by going to Ed
2 Morris's residence. They might have to kill somebody to get
3 that money. That they would tie them up with stockings, and
4 rope, and wire. Those events are what happened to,
5 unfortunately, Ed and Bessie Morris, and it's strikingly
6 suspicious that somebody other than Epperson and his co-
7 defendants would be talking about robbing, killing the same
8 people, in the same means. So, when you take that, and then you
9 add to it DNA results that exclude Mr. Epperson and his co-
10 defendants, you have a substantial amount of evidence that could
11 have been presented to the jury right there for reasonable
12 doubt.

13 THE COURT: I'm going to let you ask the witness, but it
14 is speculative I think, but go ahead.

15 Q. Thank you. Now, Mr. Jackson, have you had a chance to read
16 page four?

17 A. I have.

18 Q. Okay. And before asking the question on that, can you go
19 back to page one of that and go to what would be one, two,
20 three, four, fifth line down where it says gay:? And can you
21 tell us, is that referring to an individual named Wayne McDowell
22 and Odie Crow?

23 A. That's what it says.

1 Q. And going then to page four, can you look at and read to us
2 what it says as in the second set where it says Morris begins,
3 he didn't, you know?

4 A. He didn't you know- he didn't say for sure that he was
5 going to go rob Ed, you know. He just said that I know where I
6 can get some money. After a while, he said, I may have to kill
7 the motherfucker, Odie Crow, he had a big gun under his belt. I
8 don't know what kind it was, but he said that, well, killing the
9 motherfucker ain't no problem. He said, you know where the
10 money is, I can do the killing and Wayne told him, he said, no
11 we don't want to kill nobody, we just want to get some money, he
12 said, because I've got a little trouble. He had had somebody in
13 Gray Hawk the day before that to work on his car, because I know
14 he said the transmission was messed up and when he got out of
15 the penitentiary, he said, he had to have somebody to work on
16 it.

17 Q. Okay. And would you agree that this is in reference to the
18 statements concerning here, Mr. Wayne McDowell and Odie Crow?

19 A. Yes.

20 Q. Thank you. Now, turning to exhibit 17.

21 THE COURT: Exhibit what?

22 MR. BARRON: Seventeen.

23 Q. And if you could look at the first page there?

24 A. Yes.

1 Q. And go to basically, the third paragraph that begins at
2 0830 hours?

3 A. Yes.

4 Q. I'm sorry. And then if you go two further that looks at
5 1000 hours, can you read that please?

6 A. 1000 hours, 6-24-1985, I received information from Sherriff
7 Fred Hayes that Wayne McDowell, Odie Crow, and an unidentified
8 subject were at the residence of Marty Morris on the weekend
9 before the murders. Marty Morris told Sherriff Hayes that they
10 were going to the residence of Ed Morris to get some money.
11 They were driving McDowell's blue Cheverolet Chevelle.

12 Q. Thank you. Now if you could go to the third page in the
13 same exhibit?

14 A. Yes.

15 Q. And if you go to the last paragraph that begins with 2045
16 hours?

17 A. Would you like me to read it?

18 Q. Yes, please.

19 A. 2045 hours, 6-29-85, I was contacted by a confidential
20 informant that stated a white female came into Houses Market on
21 Bond looking for a house to rent. She overheard people talking
22 about the Morris murders. She stated she lived on Arthur Ridge
23 Road out of East Bernstadt in Laurel County. She advised two
24 boys came to her house on Monday, June 17th and had silk

1 stockings in their pockets. They said that had robbed two
2 people and had tied them up in stockings and some wire and left
3 them. She stated one of the boys' name was Junior.

4 Q. Now, Mr. Jackson, if you could go to the third from the
5 last page of this same exhibit, please?

6 A. Yes.

7 Q. And if you could look to the second paragraph from the
8 bottom that begins with 1235 hours and read that?

9 A. Yes. 1235 hours, 7-11-85, I was contacted by Mr. and Mrs.
10 Don Hayes in McKee. They stated that on July 10, 1985 at
11 approximately 1730 hours, Willard Charles Morris came to their
12 grocery in Gray Hawk. Morris stated, Ricky Horton and some
13 people by the name of Bray in Clay County killed Bessie and Ed
14 Morris. He further stated he was going to get the gun used in
15 the murders. He stated six persons were involved and that one
16 of the six had been cut with a knife. Morris is the brother-in-
17 law to Ricky Horton. Mr. and Ms. Hayes stated Morris was crying
18 when he made the statement. Morris lives in the Island City
19 area of Owsley County.

20 Q. Mr. Jackson, those statements you just read out of exhibit
21 17 from the police reports, would it be your opinion that that
22 evidence would be information that would suggest or support the
23 theory that another person had committed the murders?

24 MS. JERNIGAN: Objection, relevance.

1 THE COURT: Well-

2 MS. JERNIGAN: Not at all relevant to the question of DNA
3 testing.

4 MR. BARRON: Your honor, with a little leeway, the
5 relevance will be shown because the follow-up question will be
6 after the next exhibit whether--

7 THE COURT: Go ahead.

8 MR. BARRON: Okay, thank you.

9 Q. If you could turn to exhibit 18, please.

10 A. Yes.

11 Q. Could you tell us if that looks like another police report?

12 A. It does.

13 Q. Okay. Can you start with the part, if you go to the
14 paragraph that begins with July 2, 1985?

15 A. Yes.

16 Q. Now, if you could start reading from the sentence that
17 begins on the morning of June 17, 1985 or June 18, 1985, please,
18 to the end of the paragraph?

19 A. On the morning of June 17, 85 or June 18, 85, Junior
20 Osborne and Ronnie Vaughn woke her up at her house in East
21 Bernstadt, Kentucky at 0500 hours. They had been stuck in her
22 field for about two hours. They had run their car upon a stump.
23 She advised they were both pretty drunk and were in Ronnie's
24 Vaughn's old two-door white Buick with black top and two black

1 stripes on the hood. They came in the house and Junior Osborne
2 pulled a stocking out of his pocket and stated that they had
3 robbed a couple of people. Their clothes were wet, but had no
4 blood on them. They had an old shotgun that Junior Osborne
5 stated he had stolen from his father. She advised that she did
6 not see any money nor any handguns at all. Hellen Gray advised
7 that this was- Hellen Gray advised this was all that was seen
8 or said by such subjects. She advised that her mother Nadine
9 Duncan told her the next couple of days the boys had some money,
10 but she did not know how much. Hellen Gray advised that she did
11 not see them with anything else.

12 Q. Okay. And now if you could turn to exhibit 20 and tell us,
13 does that look like a fingerprint examination report from the
14 Kentucky State Police?

15 A. Twenty looks like Monica Foster.

16 Q. I'm sorry, 19. My fault.

17 A. Yes, it does.

18 Q. Can you tell us if that fingerprint report mentions as
19 potential suspects the Odie or Odis Pennington and Wayne
20 McDowell, Paul Combs in the light that we were just discussing?

21 A. It does.

22 Q. Now, Mr. Jackson, being one of the attorneys that handled
23 this case at trial, with this evidence of alternative suspects
24 that, or as of a similar nature to the exact facts that occurred

1 here, with that information and with the DNA results, would
2 those DNA results have assisted your defense in making the
3 defense that Epperson had nothing to do with this crime?

4 A. Certainly any evidence—

5 MS. JERNIGAN: That seems awfully speculative, lots of ifs,
6 and woulds, and maybes.

7 THE COURT: Well, I'm going to let him answer.

8 A. Certainly any evidence that someone else committed these
9 crimes coupled with the fact that DNA evidence did not link Mr.
10 Epperson to the crime would be important evidence to have.

11 Q. Thank you. Now, I would like you to turn to exhibit 13 for
12 a moment. Now, that is an exhibit of the testimony of Ed Taylor
13 from the first trial. If I recall— do you recall if Mr. Taylor
14 testified at the retrial?

15 A. I don't recall.

16 Q. Okay. Well, the record will reflect that his testimony
17 from the first trial was read into the record because he was not
18 available. But, if you could turn to the bottom of page 1343
19 where it begins redirect examination of Mr. Craft and then goes
20 on to 1344. If you could take a look at that for a moment,
21 please?

22 A. Yes.

23 Q. Okay. Does that testimony from Mr. Taylor say that he
24 discovered no evidence involving any other individual?

1 MS. JERNIGAN: Objection, Judge. The witness testified
2 that he doesn't recall Mr. Taylor testifying. Asking the
3 witness what Mr. Taylor said at the first trial doesn't seem to
4 have any relevance and couldn't possibly--

5 THE COURT: That's true.

6 MR. BARRON: Well, your honor, we will be, as we
7 discussed earlier, bringing in that portion of the tape that
8 shows this was exactly read into the record. So, in lieu of
9 having to call Mr. Jackson after that is done later, we request
10 a little leeway that that be revisited if necessary.

11 THE COURT: Well, the record states for itself what was
12 asked and answered.

13 MR. BARRON: Okay. It would, but this was leading to the
14 follow-up question of whether he was going to- would have asked
15 something else with the DNA results based on this answer.

16 THE COURT: Well you can ask him that, but what-

17 MR. BARRON: So, I was trying to lay the foundation, your
18 honor.

19 THE COURT: It speaks for itself.

20 Q. Mr. Jackson, being that this says that no individual other-
21 that they found no evidence of any other individual, with the
22 DNA results that you are now aware of, would you have followed
23 that up and asked if Mr. Epperson had been excluded as the
24 source of the hair?

1 A. I'm sure I would have.

2 MR. BARRON: Thank you. No further questions.

3 MS. JERNIGAN: Just a couple--

4 THE COURT: Which is what the DNA evidence itself says?

5 MR. BARRON: Yes, but the jury--

6 THE COURT: So, if the DNA evidence was introduced,
7 that's what it would have said, was that Mr. Epperson was
8 excluded as a source of that hair.

9 MR. BARRON: Absolutely, but we believe we needed to
10 establish that Mr. Jackson would have presented that evidence to
11 the jury since the jury didn't know about the DNA results.

12 THE COURT: Alright.

13

14 RECROSS EXAMINATION

15 BY MS. JERNIGAN:

16 Q. Just a couple of short questions. With regard to all these
17 alternate suspects, you knew about them prior to the trial, is
18 that correct?

19 A. Yes.

20 Q. Knew about all of their names, all of their involvements,
21 you saw these police reports before the trial?

22 A. I'm sure that if it was in the record that I reviewed the
23 reports.

1 Q. And you are aware that none of these suspects were ever
2 arrested for any involvement relating to this crime?

3 A. As I understand, they were not arrested.

4 Q. Okay. And you actually questioned the investigating
5 officer, you or Mr. Jewell, questioned the investigating officer
6 about these alternate suspects at the trial?

7 A. I'm sure we did.

8 MS. JERNIGAN: Okay. Nothing further.

9 THE COURT: So, I'm assuming you satisfied yourself that
10 none of these suspects were involved in the murder? Otherwise,
11 you would have pursued that at trial, is that correct?

12 MR. JACKSON: I'm satisfied that the police did not arrest
13 them for any involvement with the murder. And I'm sure that at
14 the time, that we did question the officers and try to, at least
15 from our own strategic standpoint create the possibility that
16 they were involved, but they were not arrested or charged with
17 any of these.

18 THE COURT: So, is your answer that yes, you were
19 satisfied that these people were not involved in the murder from
20 your investigation?

21 MR. JACKSON: I can't say that I was satisfied that they
22 weren't involved.

23 THE COURT: If you believe that they were involved,
24 wouldn't you have pursued that at trial and given the jury some-

1 introduced some evidence that they were- it was one of these
2 suspects who was the guilty party? Give them something to hang
3 their hat on in that respect?

4 MR. JACKSON: I think we did attempt to do that through
5 questioning the officers and law enforcement that was involved.
6 Certainly, if there was any kind of DNA evidence, which would
7 have linked any of these people to the scene, it would have been
8 a lot more powerful, but I think we attempted to do that through
9 our questioning of--

10 THE COURT: Which one of these suspects did you attempt
11 to, or did you accuse I guess of being involved in this murder?

12 MR. JACKSON: I'm not sure if we specifically pointed the
13 finger at anyone in particular.

14 THE COURT: Alright. Anything further?

15
,
16

RE-REDIRECT EXAMINATION

17 BY MR. BARRON:

18 Q. With what you just testified about pointing- attempts to
19 point the fingers toward these other individuals, do you believe
20 these DNA results would have helped you in your efforts to point
21 those fingers?

22 A. I think anytime there is DNA results that exculpate or do
23 not link Mr. Epperson to the scene, it's a lot easier to point
24 the finger at someone else. Either if they were tested and

1 linked to those individuals, or if the police didn't test them
2 at all. I think it's a lot easier to, when you are talking
3 about the standard of proof in a criminal case. I think it's
4 easier to do that.

5 Q. And then would you have also said that the DNA results
6 would have been beneficial to impeaching the testimony of Donald
7 Bartley or Sherry Hodge?

8 A. I'm sure that if the DNA results said that Mr. Epperson was
9 not there and Mr. Bartley and Ms. Hodge said that he was inside
10 the residence, that the jury would have had the opportunity to
11 review their credibility with that that scientific--

12 THE COURT: Can I ask you, how do you jump from this
13 hair not being- not having come from one of the suspects, and
14 you said the DNA evidence says that he was not there, how do you
15 make that jump?

16 MR. JACKSON: I think the absence of any kind of DNA
17 evidence linking Mr. Epperson to the scene combined with the
18 fact that there was evidence found of someone else, certainly
19 the impression can be argued that he was not in the house when
20 these crimes occurred. I am not sure if there is any kind of
21 evidence which can say without a doubt that Mr. Epperson was not
22 in the house. I think the fact that others DNA evidence was
23 found at the scene, coupled with the fact that there was no DNA

1 found of Mr. Epperson, it would be a lot easier argument to
2 make.

3 THE COURT: Ms. Jernigan?

4 RE-RE-CROSS EXAMINATION

5 BY MS. JERNIGAN:

6 Q. I know this would be re, re, recross, may I ask a few more
7 questions? Do you have- Okay, the hair in question did not
8 come from Roger Epperson, that's what the DNA results show,
9 correct?

10 A. As I understand.

11 Q. Does that in anyway mean that he was not in the house?

12 A. It doesn't mean that he was not in the house.

13 Q. So, he could very well still have been in the house and
14 participated in the murder of these two people?

15 A. He could have been in the house and participated in the
16 murder of these two people.

17 Q. And that would have also been presented to the jury,
18 correct?

19 A. I'm sure that that would be the theory of the Commonwealth
20 that he was involved and--

21 Q. So, the presence or absence of the testing results with
22 regard to this single hair does not mean he did not kill these
23 people?

1 A. I'm not saying that it means he did not kill these people.

2 What I'm saying--

3 Q. It doesn't even mean that somebody else did?

4 A. It means that there was other DNA evidence found at the
5 scene of this crime that did not match Mr. Epperson's.

6 Q. And you have no idea who that hair could have belonged to?

7 MR. BARRON: Objection.

8 THE COURT: Overruled.

9 Q. You can't say it didn't belong to their children?

10 A. I don't know.

11 Q. You can't say it didn't belong to one of the investigating
12 officers?

13 A. I'm not sure who it was tested against, so--

14 Q. You can't say it didn't belong to the crime scene analyst?

15 MR. BARRON: Objection, your honor and if we could please
16 be heard on that matter that relates to a prior ruling by this
17 court.

18 THE COURT: What's your objection?

19 MR. BARRON: We had moved at one point to have DNA
20 testing conducted on the hair and run through the state
21 databases to run it through for these known suspects and also
22 for any cold hits. The Commonwealth opposed that, the court
23 granted the motion and there were issues with the State Crime
24 Lab being able to do so. The court ruled-- placed that in

1 abeyance, ruling that whether that would come back to anybody
2 else would be irrelevant to this issue because of prejudice
3 could be established anyways. Now the Commonwealth is trying to
4 backdoor and trying to have it both ways by making an argument
5 about the fact that we don't know if these results match
6 somebody else when our hands are tied preventing it from being
7 able to test to see if we have a cold hit. So, they're having
8 it both ways.

9 THE COURT: So, are you telling me that you wanted to
10 have this hair tested against these suspects and the court
11 denied your motion?

12 MR. BARRON: No, we asked to have it run through the
13 state and federal databases to see if it matched any individuals
14 that we believe were suspects or otherwise. This court granted
15 that motion. Then issues arose with the state lab being able to
16 do that and run it through the databases and the Commonwealth
17 came back with affidavits on that. We had argument on that and
18 Judge Boteler placed that matter in abeyance, issued an order
19 that ruled that it was not necessary to resolve that for this
20 (inaudible) matter here on this hearing today because it was not
21 relevant to the prejudice inquiry because we did not need to
22 determine whether it matched or excluded other individuals
23 beyond Mr. Epperson and his co-defendants. So, it would be
24 egregiously unfair now for the Commonwealth to be able to come

1 in and try to argue we should lose this case because it could
2 belong to a state crime lab or whatever when that testing was
3 ordered and then placed in abeyance because of the
4 Commonwealth's argument.

5 THE COURT: It's a rhetorical question anyhow, isn't it?
6 I mean, it's something that can be argued. We don't know who
7 the hair belonged to. It's as simple as that, right?

8 MR. BARRON: Well, we don't know, but we think that they
9 shouldn't be able to make an argument based on that, based on
10 the prior rulings.

11 THE COURT: Alright. I don't think it's objectionable.
12 Are you telling me that you can still to this day get DNA
13 testing on that hair compared to the other suspects?

14 MS. JERNIGAN: Can I speak to that, judge?

15 THE COURT: Yes, go ahead Ms. Jernigan.

16 MS. JERINIGAN: That's one of the questions that ultimately
17 resulted in this matter being held in abeyance. They did move
18 that the hairs be retested. One of the issues was, the first
19 thing the State Crime Lab has to do before they can actually,
20 you know put it into the system is that they have to exclude the
21 victims as a source of the hair and that's not possible. That's
22 one of the reasons they couldn't do the testing. Another of the
23 reasons was that--

1 THE COURT: They have to exclude the victim as the
2 source of the hair?

3 MS. JERNIGAN: Yes. The victim's hair was excluded through
4 microscopic analysis, but it was never excluded through DNA
5 analysis.

6 THE COURT: Oh, okay.

7 MS. JERNIGAN: That's one of the things that their
8 protocols said they have to do before they can proceed.

9 THE COURT: Okay.

10 MS. JERNIGAN: There were issues about that the profile
11 that exist is entirely too broad to be input into the system.
12 There were a number of issues with the testing, but the court
13 order doesn't go as far as Mr. Barron seems to think it does.

14 MR. BARRON: Your honor, the court order, which is in my
15 hand right now actually said, based on the ruling, that the
16 Commonwealth does not waive a challenge to microscopic hair
17 analysis generally, but they do waive the right to rely on or
18 use the existence of DNA testing generally with the lack of DNA
19 testing on the hair in Epperson's case as a basis to attack the
20 microscopic hair analysis conclusion that the hair does not
21 belong to either of the victims.

22 MS. JERNIGAN: Either of the victims. We haven't asked if
23 the hair could belong to the victims.

1 MR. BARRON: You just said that one of the issues was
2 testing to exclude the victims through DNA testing. That's not
3 on the table here and this court needs to keep in mind that we
4 are focusing on a time at trial. The Commonwealth was not going
5 to be taking this hair and doing DNA testing to see if it
6 belonged to the victims.

7 THE COURT: Alright. The motion-- the objection is
8 overruled. It seems to be a fair inquiry since you opened the
9 door and asked this witness about other possible suspects as
10 being the possible perpetrators of this crime and it seems to me
11 to be fair cross-examination, so go right ahead.

12 Q. I'm just going to wrap up because frankly I don't remember
13 who I asked if you knew. Basically, you have no idea who this
14 hair belonged to. It could have belonged to anybody who was
15 legitimately on the scene at the time of the crime?

16 A. It could have been anybody.

17 Q. And in 1985 you may or may not know the answers to this,
18 they wouldn't have taken the steps to secure a forensic scene
19 that they would now, is that correct?

20 A. I would expect that they would back in 1985.

21 THE COURT: Couldn't that hair have belonged to someone
22 who was not at the scene of the crime?

23 MR. JACKSON: I'm sure it could have been.
24

1 RE-RE-REDIRECT EXAMINATION

2 BY MR. BARRON:

3 Q. Mr. Jackson, real briefly. Being that we know that there
4 was a struggle at the beginning here and the hair was found in
5 the nightgown of Bessie Morris who was found next to the bed
6 where she was killed at, do you believe that this DNA result
7 would have been evidence that could have posed or could have
8 been used to show the reasonable doubt?

9 MS. JERNIGAN: Objection, speculation.

10 THE COURT: That's a fact question for the jury.
11 Whether or not he might want to- I think he testified already
12 that he'd use it, but whether or not it would have amounted to
13 reasonable doubt is a fact question for the finder of fact. So,
14 I'm going to sustain the objection.

15 MR. DRUMMOND: Your honor, I think he can testify whether
16 or not it would improve his argument that there was reasonable
17 doubt beyond what he was able to do at the trial actually.

18 THE COURT: Well, restate your question. I think he's
19 already answered, he would like to have- he would have used it.

20 Q. Mr. Barron: Just to be clear for the record. Do you
21 believe this hair would have further supported the case you
22 presented for reasonable doubt to the jury?

23 A. Yes.

24 MR. BARRON: Thank you.

1 THE COURT: Alright. Anything further? Alright, thank
2 you very much Mr. Jackson, you can step down.