

No. \_\_\_\_\_

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OCTOBER TERM, 2018

IN THE SUPREME COURT OF THE UNITED STATES

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MICHAEL JOSEPH MULDER, Petitioner,

v.

WILLIAM GITTERE, Warden, Respondent.

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*On Petition for Writ of Certiorari to the  
Supreme Court of the State of Nevada*

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**PETITION FOR WRIT OF CERTIORARI**

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**CAPITAL CASE**

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## QUESTION PRESENTED

In 2001, Petitioner Michael Joseph Mulder suffered a stroke that left him with diagnosed dementia, memory loss, paralysis on the right side of his body, and receptive, expressive, and anomic aphasia—meaning that Mr. Mulder is unable to meaningfully comprehend information that is spoken or written to him and unable to formulate thoughts and meaningfully express himself. As a result of the stroke, Mr. Mulder has an IQ score of 69 and does not remember most of his life, including the crime for which he was convicted. Medical experts have described Mr. Mulder as functioning both emotionally and intellectually at a second grade level.

During a 2011 competency hearing, a federal district judge found Mr. Mulder incompetent and unable to communicate rationally, concluding that Mr. Mulder's stroke negatively impacted his cognition, memory, and ability to communicate. The district court additionally concluded that these impairments were permanent.

As it stands today, Mr. Mulder's physical and mental conditions continue to decline. He suffers from the same mental impairments and has no memory of his crime. It is virtually certain he will never recover, but instead will sit on death row unless a court intervenes. In light of Mr. Mulder's diagnosed dementia, his inability to remember his crime, and his continuous physical decline, the question presented is:

Whether the Eighth Amendment categorically excludes from the death penalty an individual who, because of a stroke that caused dementia, is functionally intellectually disabled and does not remember the crime he committed.

## **LIST OF PARTIES**

Petitioner Michael Joseph Mulder is an inmate at Ely State Prison.

Respondent William Gittere is Warden of the Ely State Prison. Respondent Aaron Ford is the Attorney General of the State of Nevada.

## PETITION FOR WRIT OF CERTIORARI

Petitioner Michael Joseph Mulder requests this Court grant his petition for writ of certiorari and vacate his death sentence because he is functionally intellectually disabled and does not remember his crime. In light of Mr. Mulder's memory loss, mental disability, and significant physical decline, his death sentence fails to comport with the Eighth Amendment's commitment to protecting the dignity of all people.

This Court has already granted certiorari to consider how this country will elect to treat people suffering from dementia, without a memory of their crime, facing imminent execution. During this past term in *Madison v. Alabama*, No. 17-7505, this Court heard argument about Vernon Madison, his vascular dementia, and his substantial memory loss. Although Mr. Madison's case is currently being considered in the context of an imminent execution date, Mr. Mulder is requesting this Court take the Eighth Amendment analysis one step further. This Court should grant Mr. Mulder's petition to consider whether the Eighth Amendment categorically prohibits an individual who, because of a neurocognitive disorder like dementia, has been rendered functionally intellectually disabled and does not remember the crime for which he has been sentenced to death.

Subjecting an individual, who has already been found incompetent and functionally intellectually disabled, to a death sentence and then forcing him to suffer on death row until he gets an execution date is inconsistent with the evolving standards of decency inherent in this Court's Eighth Amendment jurisprudence.

## OPINIONS BELOW

The decision of the Nevada Supreme Court, affirming denial of Mr. Mulder's second state post-conviction petition for writ of habeas corpus, is found at *Mulder v. State*, 422 P.3d 1231 (Nev. 2018). 4App.0752–68. The Nevada Supreme Court's order denying the petition for rehearing is unreported and appears at 4App.0769–70.

## JURISDICTION

The Nevada Supreme Court's order of affirmance was issued on July 26, 2018, and a timely petition for rehearing was denied on September 21, 2018. On December 11, 2018, Justice Kagan extended the time to file a petition for writ of certiorari until and including January 20, 2019. This Court has statutory jurisdiction under 28 U.S.C. § 1257(a).

## CONSTITUTIONAL PROVISIONS

The Eighth Amendment to the United States Constitution provides: “Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”

## STATEMENT OF THE CASE

Petitioner Michael Joseph Mulder was convicted of first degree murder, robbery of a victim over 65, and burglary while in possession of a firearm. He was sentenced to death on March 4, 1998. *Mulder v. State*, 992 P.2d 845 (Nev. 2000).

On March 15, 2001, Mr. Mulder suffered a stroke that left him with dementia, memory loss, and receptive, expressive, and anomic aphasia. 4App.0716–

48. As a result, Mr. Mulder has an extremely difficult time understanding what is being said to him, he is unable to translate his thoughts to speech in a clear or consistent manner, and he cannot remember large portions of his life. 2App0395–96. He has a measured IQ score of 69 and functions both emotionally and intellectually at a second grade level. 1App.0013–14; 2App.0401. Because of the stroke, Mr. Mulder also suffers from substantial physical disabilities. The entire right side of Mr. Mulder’s body is completely paralyzed, and he has a very severe contracture of the right arm, both of which significantly impair his ability to move and get around while he waits on death row to be executed. 2App.0226.

In light of Mr. Mulder’s clear mental difficulties, he underwent several psychiatric evaluations during the early stages of his post-conviction proceedings. Psychologist Carol Milner evaluated Mr. Mulder and determined that he had a full scale IQ of 69 and had significant difficulty with “memory and comprehension.” 1App.0013–14. She noted that, at the time of her evaluation, Mr. Mulder could not recall the instant offense, his trial, or how many siblings he has. 1App.0019.

Dr. Jethro Toomer, an expert in forensic psychology, also conducted a psychological examination of Mr. Mulder, which included a test to assess Mr. Mulder’s intellectual functioning. Dr. Toomer testified that the results of this testing indicated that Mr. Mulder had an IQ score of 70. 2App.0322. Dr. Toomer opined that Mr. Mulder’s prognosis was “guarded to poor” meaning that, although there may be small levels of improvement following the stroke, it is unlikely Mr. Mulder will progress beyond his then-current level of achievement. *Id.* at 0330.

Psychiatrist Julie Kessel concluded that Mr. Mulder “has profound deficits in his ability to understand what is being said beyond a simple concept, or to express it beyond a simple concept.” 2App.0396. Dr. Kessel diagnosed Mr. Mulder with dementia, noting that after suffering from the stroke, Mr. Mulder is “on the border of mild mental retardation” and “functioning both emotionally and intellectually at a second grade level.” *Id.* at 0401. She concluded that because of the stroke, Mr. Mulder’s ability to store, form, and retrieve memory, language, and speech were all severely impaired. *Id.* at 0474. Dr. Kessel further indicated that while it is possible to gain some cognitive improvement with intensive rehabilitation post-stroke, “[a]fter the brain has settled . . . it’s nearly impossible to make substantial improvements.” *Id.* at 0432. Dr. Kessel opined that at the time she assessed Mr. Mulder, there was “virtually no opportunity for further improvement,” that Mr. Mulder’s dementia was not reversible, and that his condition could only get worse as he ages. *Id.* at 0433–34.

Dr. Melissa Piasecki, a forensic psychiatrist, diagnosed Mr. Mulder as suffering from a cognitive disorder, secondary to a brain injury. 3App.0531. She additionally confirmed that Mr. Mulder suffered from dementia and that he has deficits in both his short and long-term memory. *Id.* at 0582, 0584.

In light of the significant evidence of Mr. Mulder’s cognitive limitations, the federal district court determined that Mr. Mulder was permanently incompetent due to the stroke he suffered in 2001, and therefore, there was “very little, if any” chance he would ever regain competence. 4App.0716–48, 4App.0749–51.

## REASONS FOR GRANTING THE PETITION

- A. **Certiorari review is warranted because the Eighth Amendment’s ban on cruel and unusual punishment should categorically exclude Mr. Mulder, an individual who suffers from dementia that renders him functionally intellectually disabled, and who does not remember the crime for which he is being punished, from execution.**

The Eighth Amendment mandates that the application of the death penalty must “comport[] with the basic concept of human dignity . . . .” *Gregg v. Georgia*, 428 U.S. 153, 183 (1976); *Trop v. Dulles*, 356 U.S. 86, 100 (1958) (plurality opinion) (“The basic concept underlying the Eighth Amendment is nothing less than the dignity of man.”); *Roper v. Simmons*, 543 U.S. 551, 560 (2005) (“By protecting even those convicted of heinous crimes, the Eighth Amendment reaffirms the duty of the government to respect the dignity of all persons.”). To enforce the Constitution’s protection of human dignity, this Court considers the “evolving standards of decency that mark the progress of a maturing society.” *Trop*, 356 U.S. at 101. As this Court has noted, “the Eighth Amendment’s protection of dignity reflects the Nation we have been, the Nation we are, and the Nation we aspire to be. This is to affirm that the Nation’s constant, unyielding purpose must be to transmit the Constitution so that its precepts and guarantees retain their meaning and force.” *Hall v. Florida*, 572 U.S. 701, 708 (2014).

In furthering this goal, this Court has prohibited the execution of individuals whose crimes do not meet the penological justification of a punishment of death and whose diminished culpability, because of age or intellectual disability, renders a sentence of death cruel and unusual. *See, e.g., Kennedy v. Louisiana*, 554 U.S. 407,



437 (2008) (“As it relates to crimes against individuals, though, the death penalty should not be expanded to instances where the victim’s life was not taken.”); *Enmund v. Florida*, 458 U.S. 782, 797 (1982) (holding a death sentence violated the Eighth Amendment where the defendant “aid[ed] and abet[ted] a felony in the course of which a murder is committed by others but who does not himself kill, attempt to kill, or intend that a killing take place or that lethal force will be employed.”); *Roper v. Simmons*, 543 U.S. 551, 571 (2005) (“Retribution is not proportional if the law’s most severe penalty is imposed on one whose culpability or blameworthiness is diminished, to a substantial degree, by reason of youth and immaturity.”); *Hall*, 572 U.S. at 708 (“No legitimate penological purpose is served by executing a person with intellectual disability.”), citing *Atkins v. Virginia*, 536 U.S. 304, 317 (2002).

This Court has recognized that for capital punishment to be constitutional, it must be justifiable under at least one of the following three rationales: rehabilitation, deterrence, or retribution. *Kennedy*, 554 U.S. at 420. “Rehabilitation, it is evident, is not an applicable rationale for the death penalty.” *Hall*, 572 U.S. at 708–09. Thus, in order for a death sentence to be constitutional, it must serve either a deterrent or retributive purpose. Absent any retributive or deterrent justification for subjecting someone to the death penalty, society “risks its own sudden descent into brutality, transgressing the constitutional commitment to decency and restraint.” *Kennedy*, 554 U.S. at 420.

This past year, this Court granted certiorari review in a case that identified a class of individuals in which imposing the death penalty would serve no retributive or deterrent purpose. Vernon Madison is a death-row prisoner who suffers from dementia and who has no recollection of the crime for which he was sentenced to death. Under these facts, this Court will consider whether a diagnosis of dementia in conjunction with an inability to remember one's crime renders an individual incompetent, and thus, exempt from execution. Based on this Court's precedents, it appears that subjecting individuals who, like Mr. Madison and Mr. Mulder, suffer from dementia and have no memory of the underlying offense fails to meet the justifications required under the Eighth Amendment.

In *Panetti v. Quarterman*, 551 U.S. 930 (2007), the Court explained that retribution is not achieved where "a prisoner's recognition of the severity of the offense" does not match "the objective of community vindication." 551 U.S. at 958. A person who, because of dementia cannot remember his crime, cannot in any way recognize the severity of the offense for which he was convicted. Thus, no retributive value is served by executing someone who suffers from dementia and who cannot remember his crime. Similarly, executing an individual with no memory of the underlying offense fails to provide any deterrent purpose because, as this Court recognized in *Ford v. Wainwright*, 477 U.S. 399 (1986), the execution of an incompetent person "presents no example to others and thus has no deterrence value." *Id.* at 407. Accordingly, subjecting an individual who suffers from dementia

and has no memory of the underlying offense fails to meet the justifications required under the Eighth Amendment.

Here, because Mr. Mulder suffers from dementia and consequently has no recollection of the crime underlying his death sentence, his case presents an almost identical factual situation to that of Mr. Madison's. The main distinction between the two individuals is that Mr. Mulder, unlike Mr. Madison, is still litigating his post-conviction claims and thus, does not have an execution date. Nevertheless, for purposes of the Eighth Amendment's protection against cruel and unusual punishment, there is no distinction between the two individuals. Just like Mr. Madison, Mr. Mulder's mental limitations—specifically his dementia and his inability to remember his crime—render him ineligible to be executed because an execution under these circumstances fails to serve a retributive or deterrent purpose.

In light of Mr. Mulder's mental limitations, which are factually identical to Mr. Madison's, Mr. Mulder asks this Court to take the Eighth Amendment analysis one step further than what this Court is currently considering in *Vernon v. Madison*. Just as there are no penological justifications for executing someone who suffers from dementia and who does not remember his crime, there are no penological justifications for permitting someone with the same mental condition to languish on death row for years, waiting for an execution date to be imposed. The Eighth Amendment, and its corresponding reasons for banning the execution of someone who suffers from dementia and does not remember his crime, will apply to

Mr. Mulder now as well as years later when he finally receives his execution date. Forcing Mr. Mulder to suffer under the conditions of death row when medical evidence already indicates he will be ineligible to be executed is cruel and inhumane and does not adhere to the standards protected by the Eighth Amendment.

Furthermore, requiring individuals like Mr. Mulder to wait until an execution date is set to raise a competency claim following the conclusion of post-conviction proceedings undermines the reliability of the competency determination. In Nevada, if a judgment of death has not been executed but remains in force, a petitioner has only fifteen to thirty days after the warrant is issued before the date of the sentence of death must be executed. *See Nev. Rev. Stat. § 176.495 (2017)*. This short timeframe makes it difficult for Mr. Mulder to obtain a reliable determination of the facts to support a competency claim. Accordingly, this Court should grant certiorari review and hold that someone who suffers from dementia, cannot remember his crime, and has no chance of ever improving, is ineligible for execution regardless of whether an execution date has been set.

**B. Certiorari review is warranted because Mr. Mulder is functionally intellectually disabled and, therefore, should be categorically excluded from execution under *Hall v. Florida*.**

Mr. Mulder should be categorically excluded from the death penalty because he is functionally intellectually disabled.<sup>1</sup> As a result of his stroke and subsequent

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<sup>1</sup> To the extent the Nevada Supreme Court considered this claim, which was raised in Mr. Mulder's second state-post conviction petition, procedurally defaulted, there is good cause to overcome the default. Mr. Mulder argued that the Supreme Court's

memory loss, Mr. Mulder has an IQ of 69 and the adaptive functioning level of a second grader. *See* 2App.0401; 1App,0013–14. Despite these characteristics, Mr. Mulder does not fit into the strictly defined categories of someone who is intellectually disabled because his impairments did not arise prior to the age of onset cut-off outlined in *Atkins*. *See Hall*, 572 U.S. at 710 (noting “the medical community defines intellectual disability according to three criteria: significantly subaverage intellectual functioning, deficits in adaptive functioning (the inability to learn basic skills and adjust behavior to changing circumstances), and onset of these deficits during the developmental period,” citing *Atkins*, 536 U.S. at 308, n.3).

This bright-line age requirement, however, should not preclude Mr. Mulder from the protections of the Eighth Amendment. According to the Diagnostic and Statistical Manual of Mental Disorders, to be diagnosed with dementia, a person’s “cognitive deficits must be sufficiently severe to cause impairment in occupational or social functioning . . . .” Diagnostic and Statistical Manual of Mental Disorders IV-TR 148 (2000). These are precisely the same functional deficits that caused this

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consensus analysis in *Hall* was new, and therefore, constituted intervening authority to overcome any procedural bars. The Nevada Supreme Court determined the claim was procedurally barred because it did not find *Hall* added anything new to the intellectual disability analysis, and therefore, did not constitute intervening authority. Because the Nevada Supreme Court’s finding is intertwined with the merits of the federal issue raised here, and not based on any independent state law grounds, this Court has jurisdiction to review this claim. *See Rippo v. Baker*, 137 S. Ct. 905, 907 (2017) (per curiam) (“Because the court below did not invoke any state-law grounds ‘independent of the merits of [Rippo’s] federal constitutional challenge,’ we have jurisdiction to review its resolution of federal law.”)

Court to conclude that persons with intellectual disability are categorically excluded from the death penalty. *Atkins*, 536 U.S. at 318.

According to this Court in *Atkins*, the reason executing someone who is intellectually disabled violates the Eighth Amendment is because the punishment serves no retributive or deterrent purpose. *Hall*, 572 U.S. at 708 (“No legitimate penological purpose is served by executing a person with intellectual disability.” citing *Atkins*, 536 U.S. at 317). Thus, by extension, inflicting the death penalty against someone who suffers from dementia and, therefore has the same level of cognitive impairments as someone who is intellectually disabled, similarly fails to serve any penological purpose.

Furthermore, this Court in *Hall v. Florida* determined that when evaluating whether someone suffers from an intellectual disability, courts should not be constrained by bright-line rules in the face of substantial evidence documenting that individual’s mental limitations. *Hall*, 572 U.S. at 723. In fact, *Hall* specifically proscribed reliance on “rigid rules” that do not take into account the severity of the impairments from which the defendant suffers, and which could, therefore, warrant categorical exclusion from the death penalty. *Id.* In coming to this conclusion, this Court found that Florida’s law strictly defining an intellectual disability as requiring an IQ score of 70 or less was too rigid of a requirement that not only contravened the medical community’s approach for evaluating an intellectual disability, but also infringed upon “our Nation’s commitment to dignity and its duty to teach human decency as the mark of a civilized world.” *Id.* at 724.

Similar to the professional responses to the rigid application of the IQ score in *Hall*, there is wide agreement among the medical community that executing someone who suffers from dementia or some other traumatic brain injury because he or she does not meet the age of onset requirement to warrant an exemption is an irrational distinction. In fact, professional organizations like the American Bar Association, Mental Health America, the American Psychological Association, the American Psychiatric Association, and Amnesty International have all adopted policy statements and recommendations against the execution of persons with dementia who are functionally intellectually disabled, but do not meet the age of onset requirement.<sup>2</sup> These groups have uniformly recognized that persons such as Mr. Mulder should be excluded from the reach of the death penalty because there is no significant difference between those who are intellectually disabled and those

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<sup>2</sup> See ABA Recommendation 122A, adopted August 8, 2006, [www.abanet.org/disability/docs/DP122A.pdf](http://www.abanet.org/disability/docs/DP122A.pdf); Mental Health America Position Statement 54, adopted June 11, 2006, [www.mentalhealthamerica.net/go/position-statements/54](http://www.mentalhealthamerica.net/go/position-statements/54); American Psychological Association, Resolution on the Death Penalty in the United States adopted February 2006, [www.apa.org/about/division/cmpubint2.html#9](http://www.apa.org/about/division/cmpubint2.html#9); American Psychiatric Association, Death Sentences for Persons with Dementia or Traumatic Brain Injury, Position Statement, adopted December 2005, [www.psych.org/Departments/EDU/Library.APAOfficialDocumentsandRelated/PositionStatements/200508.aspx](http://www.psych.org/Departments/EDU/Library.APAOfficialDocumentsandRelated/PositionStatements/200508.aspx); Amnesty International, *United States of America: The Execution of Mentally Ill Offenders*, at 19-20 & Appendix 2, adopted January 31, 2006, [www.amnesty.org/en/library/asset/LAMR51/003/2006/en/73cOb3fe-d46f-11dd-8743-d305bea2b2c7/amr510032006en.pdf](http://www.amnesty.org/en/library/asset/LAMR51/003/2006/en/73cOb3fe-d46f-11dd-8743-d305bea2b2c7/amr510032006en.pdf).

who suffer from dementia or a traumatic brain injury, outside of the age of onset requirement.<sup>3</sup>

In addition to agreement among the mental health profession, there is also evidence of a national consensus among state government against executing individuals who are functionally intellectually disabled. For example, at least two states have passed legislation that allows for categorical exemption from the death penalty without reference to age of onset. *See* N. Mex. Stat. 1978, § 43-1-3(H); *State v. Trujillo*, 160 P.3d 577, 582 (N. M. App. 2009) (New Mexico); Neb. Rev. Stat. § 28-105.01(3) (Nebraska). Additionally, over the past thirty years, persons who were functionally intellectually disabled have been spared execution.<sup>4</sup> Moreover, even after *Atkins*, persons who were not otherwise exempted from the death penalty

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<sup>3</sup> The definition of dementia states that the “cognitive deficits must be sufficiently severe to cause impairment in occupational or social functioning . . . .” Diagnostic and Statistical Manual of Mental Disorders IV-TR 148 (2000). These are precisely the same functional deficits that caused the Supreme Court to conclude that persons with intellectual disability are categorically excluded from the death penalty. *Atkins*, 536 U.S. at 318.

<sup>4</sup>In 1988, David Cameron Keith was granted clemency by the governor of Montana on the grounds that he was partially paralyzed and nearly blind as a result of gunshot wounds he suffered during his apprehension. *Parole Board Urges Clemency for Pilot’s Killer*, *The Spokesman Review*, December 23, 1988, at B1. In 1993, Governor Mel Carahan granted clemency to Bobbie Shaw who had borderline intellectual functioning. *Retarded Convict’s Sentence is Commuted*, *New York Times*, June 4, 1993. In 2002, clemency was granted to Alexander Williams, who was mentally ill. Henry Weinstein, *Mentally Ill Killer Gains Clemency*, *Los Angeles Times*, February 26, 2002. In 2002, Governor Guinn and the Nevada Board of Pardons granted clemency to Thomas Nevius on the grounds that Nevius was intellectually disabled. *See* <http://www.deathpenaltyinfo.org/clemency>. In 2003, Louisiana Governor Foster granted clemency to Herbert Welcome based on Welcome’s mental retardation. *See id.*



have received executive clemency when they suffered from severe mental disabilities.<sup>5</sup> These examples show that there are many states that recognize the inhumanity in executing individuals who suffer from severe neurocognitive disorders, but because of the limitations in *Atkins* do not qualify for a categorical exemption.

Accordingly, there is a clear trend to exclude persons from the death penalty such as Mr. Mulder who suffer from severe mental disabilities like dementia. There does not, however, appear to be a contrary trend to include stroke victims with dementia within the reach of state or federal death penalty statutes. In light of this apparent national consensus, this Court should grant certiorari review to definitively answer whether individuals, who are functionally intellectually disabled because of dementia and who do not remember the crime for which they were convicted, should be categorically excluded from the death penalty.

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<sup>5</sup> For example, the capital sentence of Percy Walton was upheld by the courts due to his failure to prove the age of onset requirement, *Walton v. Johnson*, 440 F.3d 160, 177–78 (4th Cir. 2006); however, his death sentence was commuted by the governor based on his intellectual impairment. See Jerry Markon, *Virginia Governor Commutes Death Sentence*, The Washington Post, June 10, 2008, <http://www.washingtonpost.com/wp-dyn/content/article/2008/06/09/AR2008060901984.html>. The capital sentence of Heck Van Tran was originally upheld due to his failure to prove the age of onset requirement, see *Van Tran v. State*, 2006 WL 3327828, at \*25–26 (Tenn. Crim. App. 2006); however, the Sixth Circuit Court of Appeals recently rejected the state court’s determination on that issue. See *Van Tran v. Colson*, 764 F.3d 594, 613–19 (6th Cir. 2014). In *Eley v. Bagley*, 604 F.3d 958, 963–64 (6th Cir. 2010), the petitioner’s intellectual disability claim was denied by the courts, however, the governor subsequently granted clemency to the petitioner based on his mental disabilities. Reginald Fields, *Ohio Gov. John Kasich commutes inmate’s death sentence to life in prison*, The Plain Dealer, July 10, 2010.

## CONCLUSION

For the foregoing reasons, Mr. Mulder respectfully requests that this Court grant his petition for writ of certiorari to resolve the important question of whether the Eighth Amendment prohibits the execution of an individual who because of a stroke that caused dementia, is functionally intellectually disabled and does not remember the crime he committed.

DATED this 18th day of January, 2019.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I hereby declare that on 18th day of January, 2019, I served this Petition for Writ of Certiorari, including the appendix, on the State of Nevada by depositing an envelope containing the petition in the United States mail, with first-class postage prepaid, addressed as follows:

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**PETITIONER'S APPENDIX**

Volume I to IV  
(APP. 001- APP. 770)

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## VOLUME 1

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Appendix A	Transcript of Hearing, <i>State of Nevada v. Mulder</i> , District Court, Clark County, Nevada Case No. C138790 (May 13, 2005) .....APP0001-00192

## VOLUME II

Appendix B	Transcript of Hearing Volume I, <i>Mulder v. E.K. McDaniel, et al.</i> , District Court, Nevada Case No. 3:09-cv-00610 (August 2, 2011) .....APP0193-0367
Appendix C	Transcript of Hearing Volume II, <i>Mulder v. E.K. McDaniel, et al.</i> , District Court, Nevada Case No. 3:09-cv-00610 (August 2, 2011) .....APP0368-0493

## VOLUME III

Appendix D	Transcript of Hearing Volume III, <i>Mulder v. E.K. McDaniel, et al.</i> , District Court, Clark County, Nevada Case No. 3:09-cv-00610 (August 4, 2011) .....APP0494-0715
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## VOLUME IV

Appendix E	Order, <i>Mulder v. Baker, et al.</i> , District Court, Nevada Case No. 3:09-cv-00610 (September 26, 2011) .....APP0716-0748
Appendix F	Order, <i>Mulder v. Baker, et al.</i> , District Court, Nevada Case No. 3:09-cv-00610 (May 1, 2013) .....APP0749-0751
Appendix G	Order of Affirmance, <i>Mulder v. State of Nevada</i> , Supreme Court, Nevada Case No. 69490 (July 26, 2018) .....APP0752-0768
Appendix H	Order Denying Rehearing, <i>Mulder v. Baker, et al.</i> , Supreme Court, Nevada Case No. 69490 (September 21, 2018) .....APP0769-0770

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## VOLUME IV

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# APPENDIX A

# APPENDIX A



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CASE NO.

DISTRICT COURT

COUNTY OF CLARK, STATE OF NEVADA

STATE OF NEVADA,

Plaintiff,

vs.

MICHAEL J. MULDER,

Defendant.

CASE NO. C138790

ORIGINAL

REPORTER'S TRANSCRIPT

OF

EVIDENTIARY HEARING

BEFORE THE HONORABLE MICHELLE LEAVITT  
DISTRICT COURT JUDGE

TUESDAY, MARCH 10, 2005

APPEARANCES:

For the State:

STEVE OWENS, ESQ.  
Deputy District Attorney

For the Defendant:

CHRISTOPHER ORAM, ESQ.

Reported by: Sherry L. Graham, CCR #378

COUNTY CLERK

MAY 13 2005

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1 LAS VEGAS, NEVADA, MARCH 10, 2005, 11:00 A.M.

2 \* \* \* \* \*

3 THE COURT: I have two hearings set.  
4 State of Nevada versus Mulder. Mr. Mulder is present.  
5 He is in custody. This is case number C138790. It's  
6 represented to me you think you are going to take hours  
7 on this?

8 MR. ORAM: We have three doctors. Two  
9 for State, one for mine.

10 THE COURT: Because I didn't realize that  
11 you wanted hours. I don't even recall if we even  
12 discussed that you wanted hours.

13 MR. ORAM: We didn't.

14 MR. OWENS: I don't know if it will take  
15 hours. There are three doctors. It's a fairly narrow  
16 issue we are looking at. I don't have a lot of  
17 questions.

18 THE COURT: I thought it was a pretty  
19 narrow issue too that's why I couldn't understand -- I  
20 mean, it's just the issue of is he incompetent to  
21 assist you in post-conviction proceeding.

22 MR. ORAM: Correct.

23 THE COURT: That seems pretty straight  
24 forward. I'm not quite sure why it would take hours to  
25 do that.

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1 MR. ORAM: I'm hoping not. I have to  
2 meet with other prosecution at 2:00 o'clock.

3 THE COURT: I want to set Mr. Brooks free  
4 because he has things to do, but where is Mr. Sgro?

5 MR. BROOKS: I will be five minutes from  
6 the courthouse. I have my cell phone with me. I can  
7 be back here in five means when I receive a call.

8 THE COURT: But does anyone know where  
9 Mr. Sgro is?

10 MR. OWENS: I saw him. He checked in  
11 with me.

12 THE WITNESS: He has another matter up in  
13 one of the other courts. He said he would trying to be  
14 back at quarter after.

15 MR. CHRIS OWENS: We checked with  
16 Department 14. He has not been there. He left. He  
17 told Steve he was going to breakfast or something.  
18 No.

19 THE COURT: Because I really think  
20 Mr. White's matter is just -- Mr. Brooks is the only  
21 one who is going to -- that is a pretty narrow issue as  
22 well. I can't make any determination until I see from  
23 Mr. Sgro. Mr. Brooks, go ahead and go.

24 MR. ORAM: Maybe go with ours. Then  
25 when Mr. Sgro shows up, they can do their hearing

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1 in the middle of ours so they are not waiting  
2 around.

3 THE COURT: We can do it. They are both  
4 down from Nevada Department of Corrections. I can try  
5 to accommodate both.

6 I did have an opportunity to review  
7 your pleading, but I did want to suggest to you that I  
8 really don't want to hear from Judge Cherry and the  
9 other person.

10 MR. ORAM: I don't have them. I have  
11 talked with Mr. Owens. All we have is the two State's  
12 doctors and Dr. Kinsora.

13 THE COURT: Perfect. Why don't you go  
14 ahead and call your first witness.

15 MR. OWENS: State calls Carol Milner.

16

17 DR. CAROL SUE MILNER,  
18 having been first duly sworn, was  
19 examined and testified as follows:

20

21 THE CLERK: You may have a seat. We need  
22 you to state your name and spell your last name for the  
23 record.

24 THE WITNESS: My name is Carol Sue  
25 Milner, M-i-l-n-e-r.

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## DIRECT EXAMINATION

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BY MR. OWENS:

Q. Dr. Milner, how are you employed?

A. I'm employed currently with Nevada Department of Corrections at Ely State Prison.

Q. What is your job title there?

A. Job title is psychologist three.

Q. You have a degree in psychology?

A. Yes, sir.

Q. Can you run through your education and experience background, give us an idea of what it is that you do.

A. I have two Bachelor's degrees, two Master's degree and a Ph.D. in counselling psychology. Completed internships. Worked for --

THE COURT: You have a Ph.D. in what?

THE WITNESS: Counsel psychology.

Committed internships in post-doctorial experiences and so on. Worked for the Department of Veterans Affairs for 20 years. Then I worked also as a commander in United States Navy as a psychologist. Currently with the Department of Corrections.

THE COURT: What do you do there?

THE WITNESS: Psychologist there. I primarily do evaluations and assessments of individuals

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1 who have been there throughout my career and  
2 supervision of other psychologists.

3 BY MR. OWENS:

4 Q. Pursuant to a court order, did you have  
5 an opportunity to evaluate Michael Mulder?

6 A. I evaluated him in two different  
7 situations.

8 Q. Do you see him present here today?

9 A. Yes, sir.

10 Q. Would you please point to him and  
11 describe something he is wearing so we all know who you  
12 are talking about.

13 A. Mr. Mulder is wearing a blue denim shirt.

14 MR. OWENS: May the record reflect  
15 identification of the defendant?

16 THE COURT: So reflected.

17 BY MR. OWENS:

18 Q. You said on two different occasions you  
19 did evaluations?

20 A. Yes, sir.

21 Q. One was August 21 of 2004; is that  
22 correct?

23 A. Yes.

24 Q. The other one was November 21st of 2003.  
25 I guess that was the first one?

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1 A. Uh-huh.

2 Q. What was the purpose of those  
3 evaluations?

4 A. Initially we were asked by the State to  
5 do an evaluation of Mr. Mulder's current level of  
6 functioning.

7 Q. For the record, you have brought with you  
8 a file here today that you are referring to and used to  
9 respond to my last question; is that right?

10 A. Yes.

11 Q. What is that file that you have got?

12 A. This particular file is Mr. Mulder's file  
13 that was put together by the medical record technician  
14 at the Ely State Prison.

15 Q. Is that the sort of record that you would  
16 need to rely upon in order to testify here today?

17 A. Yes.

18 Q. How does it help to recall or refresh  
19 your memory or provide you information?

20 A. It provides me information with my  
21 particular psychological evaluation. It has progress  
22 notes in it and my testing or assessments that I did.

23 MR. OWENS: If I may approach the  
24 witness?

25 THE COURT: You may.

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1 MR. OWENS: There is an affidavit on the  
2 front of this. I have given Mr. Oram a copy of this  
3 exact file here, although we both have prison records,  
4 the prison medical record file was from a year or two  
5 ago. This would be a more updated one. I will have it  
6 marked as State's Exhibit One. This is not the  
7 original; this is a copy, correct?

8 THE WITNESS: Yes, that's a copy.

9 MR. OWENS: It's all tabbed for us, but  
10 it's a copy, and so I will mark it as Exhibit One and  
11 move for its admission pursuant to the affidavit of the  
12 custodian of records that appears on the front cover.

13 THE COURT: Any objection?

14 MR. ORAM: No, your Honor.

15 THE COURT: Okay. It's admitted.

16 MR. OWENS: After you mark it, I want to  
17 see it.

18 MR. ORAM: Are you going to give it back  
19 to the witness?

20 MR. OWENS: Well, I will go on with my  
21 questioning. If she needs to refer to it, she will let  
22 me know.

23 BY MR. OWENS:

24 Q. Mr. Mulder had a stroke at some point up  
25 at the prison; is that correct?

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1 A. Yes.

2 Q. That's kind of what caused this issue to  
3 come up and caused you to have to do an evaluation, is  
4 that your understanding?

5 A. That's my understanding.

6 Q. Can you tell me on these two dates when  
7 you evaluated him, what exactly did you do in terms of  
8 testing?

9 A. Initially, on the initial one, which was  
10 done in 2003, it was an interview with questions from  
11 the Wechsler Intelligence Scale and memory and so forth  
12 just to see initially how he would do and respond to  
13 that.

14 Q. How long was this after his stroke  
15 occurred that you did this first?

16 A. I believe the stroke occurred in 2001. I  
17 believe that was 3-15-2001. My assessment was in  
18 November of 2003.

19 Q. Like maybe year and a half later?

20 A. Close.

21 Q. What did you conclude as a result of that  
22 testing?

23 A. Initially, my conclusions, and again, not  
24 reading it directly from the report, was that  
25 Mr. Mulder had some difficulty with some of the

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1 aspects. He did have memory to some degree with regard  
2 to his schooling, his family, his significant other at  
3 the time of the incident offense; discussed some of  
4 those particulars, and then proceeded to have some more  
5 difficulty with as, I stated, with memory and  
6 comprehension and some of the small questions that I  
7 asked him at that time. It was not a full evaluation.

8 Q. What exactly is a stroke?

9 A. What is a stroke? My understanding,  
10 again, I'm not a physician, but my understanding is  
11 that it could be a blockage or it could be a hemorrhage  
12 that occurs within one of the vessels of the brain that  
13 subsequently leads to problems or deaths, cell death of  
14 brain tissue.

15 Q. How might this affect -- or in  
16 Mr. Mulder's, case how did it affect him?

17 A. Depending on where the location of that  
18 stroke is, it could affect the person in terms of  
19 express aphasia, receptive aphasia to some degree,  
20 memory, it can affect sight. It can affect  
21 interpretation of all the sensory materials that we  
22 receive.

23 Q. What is expressive and receptive aphasia?

24 A. In Mr. Mulder's case, expressive aphasia  
25 is the inability to communicate well in terms of

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1 discussing sentences, maybe having what you might call  
2 word valid, misusing words, having difficulty,  
3 expressing yourself freely with a clear thought and  
4 sentences and so on.

5 Receptive is what you might consider  
6 the opposite, where you are not receiving information  
7 correctly or understanding and interpreting things that  
8 well.

9 Q. In your opinion, Mr. Mulder was suffering  
10 from both of those?

11 A. To some degree, yes, he is.

12 Q. As part of your evaluations in both 2003  
13 and 2004, you actually sit down and talk with him  
14 one-on-one?

15 A. Yes. On the second evaluation, I did an  
16 actual test or an assessment of his abilities.

17 Q. How did he do on that?

18 A. On that assessment, we have a Wechsler  
19 Adult Intelligence Scale Revised, and he received  
20 scores, verbal, I may want to refer to that, but a  
21 verbal I.Q. of, I believe, it was 71 and a performance  
22 I.Q. of 70. Full-scale of 69. I believe those are  
23 correct.

24 Q. Did you have difficulty conversing with  
25 him during these evaluations? How did that go about?

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1           A.       No, I did not. He was very able to  
2 discuss -- in the first evaluation, again, situation  
3 that occurred to him where he went to school, that he  
4 completed elementary school and high school, and that  
5 he had some information regarding his family and when  
6 he started his drug use and so on.

7                       Then on the second evaluation, he  
8 was, again, appeared to do his best or try to be most  
9 cooperative in giving at least information regarding  
10 the questions that I asked him on the assessment. He  
11 was able to communicate. I was able to understand what  
12 he had to say to me and able to formulate even the  
13 answers to the test questions. I was able to  
14 understand what he had to say.

15           Q.       Was he able to voice his understanding  
16 with regard to why he was being evaluated by you?

17           A.       Yes. The first time and the second, he  
18 both understood and stated that he understood right  
19 from wrong. He stated that when an individual does a  
20 heinous crime, such as murder, that they should be  
21 punished. He understood that. He also understood what  
22 his words -- understood that a punishment of a crime  
23 like that might be execution and so on. But he  
24 appeared to understand that. He also understood, from  
25 my estimation, why he was being assessed at the time

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1 and evaluated.

2 Q. Did he express to you an understanding of  
3 the procedural posture of his case, meaning that he  
4 knew that he had been convicted and had an attorney and  
5 was going through an appeal process?

6 A. He indicated that he had an attorney  
7 and that he was going through an appeal process. I  
8 can't state to what degree he understood all of the  
9 specifics of that, but that he did make that statement  
10 to me.

11 Q. I want to show you what has been marked  
12 as State's Proposed Exhibits Two and Three. I believe  
13 these are just copies of the formal written evaluations  
14 from the two days that you have testified that you  
15 examined the Mr. Mulder; is that correct?

16 A. Yes.

17 Q. Those are true and accurate copies of  
18 your evaluations?

19 A. Yes.

20 Q. In fact, both are signed by you?

21 A. Yes.

22 MR. OWENS: I move for admission of  
23 State's Two and Three.

24 MR. ORAM: No objection.

25 THE COURT: They are both admitted.

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1 BY MR. OWENS:

2 Q. In your professional opinion, is  
3 Mr. Mulder able to assist and communicate with his  
4 counsel in pursuing a post-conviction appeal process of  
5 this case?

6 A. In my opinion, for the post-conviction  
7 appeal process, I believe that he can communicate with  
8 his attorney and assist. I believe that if he can work  
9 with me for approximately two hours and with another  
10 psychologist for five hours, that he would be able to  
11 assist any of us as a lay individual could assist our  
12 attorneys in a court case.

13 MR. OWENS: Thank you. I will pass the  
14 witness.

15 THE COURT: Cross-examination?

16 MR. ORAM: Yes, your Honor.

17

18 CROSS-EXAMINATION

19 BY MR. ORAM:

20 Q. Good afternoon, Doctor. Did you review  
21 Mr. Mulder's UMC records before you evaluated him?

22 A. I don't believe that -- UMC? Can you  
23 explain?

24 Q. University Medical Center, the records  
25 where he was flown to UMC and the reports?

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1 A. I did not have access, sir.

2 Q. Have you since? You have before you  
3 testified today, have you reviewed them?

4 A. Sir, the only access that I have had to  
5 material was the information that I received regarding  
6 Dr. Kinsora's report that I received just yesterday.

7 Q. So the answer is no, you haven't reviewed  
8 them?

9 A. Correct.

10 Q. You indicated that in your opinion he is  
11 competent to assist counsel?

12 A. Yes, sir.

13 Q. You did an I.Q. test of him, correct?

14 A. Yes.

15 Q. You found him to be a full score 69?

16 A. Yes.

17 Q. His verbal was a 70?

18 A. Yes.

19 Q. Which puts him in the bottom 6.4 rank?

20 A. On verbal?

21 Q. Correct.

22 A. Yes.

23 Q. His overall score puts him in the bottom  
24 2.3?

25 A. Yes, sir.

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1 Q. On your November 21, 2003 report, you  
2 indicated he was unable to recount the incident that  
3 led to his arrest for the murder or the specifics of  
4 the trial?

5 A. That is correct.

6 Q. So he told you that he didn't know about  
7 the trial, correct?

8 A. He told me he didn't know about the  
9 original trial that he went through, the murder trial.

10 Q. Only been one trial?

11 A. Right.

12 Q. Would you accept -- strike that. You  
13 told us that he tried his best when he was talking to  
14 you?

15 A. Yes.

16 Q. You put in your report that he doesn't  
17 have a memory of his arrest or the specific of his  
18 trial, correct?

19 A. A. As he indicated to me that is  
20 correct.

21 Q. Yet he would be able to assist me in  
22 talking about the trial even though he has no memory of  
23 the trial, right?

24 A. He was basically talking to me about his  
25 appeal and what he is trying to do on appeal, and that

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1 was his recollection. But you are correct in saying  
2 what you just did, that he indicated to me that he does  
3 not recollect the original trial.

4 Q. Would you agree with me that it would be  
5 difficult for him to assist an attorney on issues from  
6 that trial if he doesn't have memory of the trial?

7 A. When he went through the trial, he was  
8 within average intelligence. That case has already  
9 been tried, and that information I am assuming, would  
10 be available to you and he, so you could get that  
11 information, and at this point, you might, as an  
12 attorney, look at his current wishes for appeal and  
13 that's his level of assistance.

14 THE COURT: Okay. Well, I need to know  
15 does this gentleman have any memory of his trial?

16 THE WITNESS: He did not indicate that to  
17 me.

18 THE COURT: So no?

19 THE WITNESS: I would -- no.

20 BY MR. ORAM:

21 Q. But I want to make sure of something. In  
22 your November 21, 2003 interview, was there someone  
23 else present, another doctor?

24 A. Dr. Bishop was present.

25 Q. Was doctor -- so Dr. Terrell Bishop was

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1 present?

2 A. Yes.

3 Q. So I want to make sure before Dr. Bishop  
4 testifies that we are clear on something. Dr. Bishop  
5 was present on your November 21, 2003 hearing with this  
6 man, correct?

7 A. Yes.

8 THE COURT: You mean evaluation.

9 MR. ORAM: Evaluation.

10 BY MR. ORAM:

11 Q. I want to go through on your paragraph,  
12 the second large paragraph where you are talking to  
13 Mr. Mulder and he says that he does not recall the  
14 number of siblings he has?

15 A. Yes.

16 Q. Then next paragraphs or next line says he  
17 recalled that at age 16 he began using drugs, and his  
18 choice of drug was heroin?

19 A. Yes.

20 Q. That he stated that he completed an  
21 Associate of Arts Degree, was studying, had been  
22 studying at college?

23 A. He studied, yes. He remembered the  
24 Associates Degree at college, yes.

25 Q. He had three total years of college

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1 education, was studying psychology?

2 A. This is what he told me.

3 Q. He had never been married, but he had a  
4 girlfriend and had one son?

5 A. Yes.

6 Q. He believed the son was conceived around  
7 the time of his arrest?

8 A. Yes.

9 Q. It's fair to say that he told you in the  
10 presence of Dr. Bishop that he had memory of things  
11 that occurred before the stroke? Fair to say?

12 A. Yes, that's correct.

13 THE COURT: It sounds like before the  
14 murders.

15 MR. ORAM: Yes.

16 THE WITNESS: Current to the time of his  
17 arrest apparently.

18 BY MR. ORAM:

19 Q. So if a doctor was to come in here and  
20 say that during that evaluation of November 21, 2003,  
21 Mr. Mulder denied having any knowledge before the  
22 stroke of anything, a doctor said that, that wouldn't  
23 be true, would it?

24 A. Could you repeat that, sir.

25 Q. Sure. You asked him, Mr. Mulder, about

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1 his prior history. He remembered some things?

2 A. Uh-huh.

3 Q. We have gone over those, correct?

4 A. Uh-huh.

5 Q. Is that yes?

6 A. Yes.

7 Q. If a doctor was present at that meeting  
8 that you had with Mr. Mulder and wrote in a report that  
9 Mr. Mulder had said he had no memory before the stroke  
10 that would be accurate?

11 MR. OWENS: Objection as to foundation.  
12 He is referring to specific statements in a report that  
13 was written --

14 THE COURT: A year later. You can lay  
15 the foundation, make an argument because it doesn't  
16 really matter what this witness thinks that other  
17 doctor will testify to.

18 MR. ORAM: Okay.

19 BY MR. ORAM:

20 Q. Was Dr. Bishop able to hear what you were  
21 talking about with Mr. Mulder?

22 A. I assume so.

23 Q. He walked with a mild gait when he came  
24 into where you met with him, Mr. Mulder?

25 A. He had some gait problems that I noticed

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1 when he was walking up the stairs and so on.

2 Q. Your August 21, 2000 report, you  
3 indicated on the very bottom of page one, his  
4 difficulty in these areas indicate a loss of general  
5 information or memory for such from a former level of  
6 high school graduate as well as inability at present to  
7 utilize higher levels of abstraction and association.  
8 Is that what you wrote?

9 A. Yes.

10 Q. Is that accurate?

11 A. Yes.

12 Q. On the second page in the bottom of the  
13 first paragraph you say again, he had difficulty in  
14 both evaluations and judgment and abstraction and  
15 common problems with solve ability?

16 A. Certainly.

17 Q. On the last paragraph you conclude, he is  
18 limited in general knowledge, comprehension and  
19 judgment?

20 A. Yes.

21 Q. He has problems with expressive aphasia?

22 A. Yes.

23 Q. Word finding ability?

24 A. Yes.

25 Q. This would be consistent with both

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1 strokes he suffered from as well as repeated substance  
2 abuse initiated in his teen years?

3 A. Yes.

4 Q. Would it be fair to say, and I believe  
5 you conclude you had when the Judge asked you, that  
6 one, he doesn't appear to have any memory of the trial,  
7 correct?

8 A. According to what he says.

9 Q. But he did try to answer your questions  
10 to the best of his ability? That is what you wrote,  
11 correct?

12 A. In one instance, yes he did, the first  
13 time in. The second time, he did not.

14 Q. Where do you put that in your second  
15 report, that he was not cooperative with you?

16 A. Do not put that in my report. I'm  
17 stating that now. The first time he was able to meet  
18 with me at length, if you will, some of the particulars  
19 about his background, and the second time he was not.

20 Q. Where does it indicate --

21 THE COURT: But just tell me what dates  
22 those were, so the first time you --

23 THE WITNESS: First date was in November.

24 THE COURT: November of what?

25 THE WITNESS: November of 2003.

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1 THE COURT: Second evaluation?

2 THE WITNESS: In August.

3 THE COURT: August 2003?

4 THE WITNESS: August of 2004.

5 BY MR. ORAM:

6 Q. I want to read from the second one,  
7 August 21, 2004, if you go to your first paragraph, he  
8 was smiling, cordial and pleasant. He was able to  
9 fully cooperate with the assessment and appear to  
10 understand the reason behind the assessment?

11 A. Yes.

12 Q. You actually said he was cooperative?

13 A. Absolutely.

14 Q. Never once say in your report that he  
15 didn't appear to be cooperative. You never say that,  
16 do you?

17 A. I'm not saying that he was cooperative or  
18 not. What I'm saying is one time he remembered things  
19 to say. The second time, he did not.

20 Q. Where do you put that in your second  
21 report?

22 A. I did not. I am telling you this now.

23 Q. You mean you filled out a report pursuant  
24 to a court order, and you didn't put in here that he  
25 was not?

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1                   MR. OWENS: Witness can refresh her  
2 memory with the report.

3 BY MR. ORAM:

4                   Q.     Do you have the report up there?

5                   A.     Yes, sir.

6                   MR. OWENS: Second physical paragraph.

7                   THE WITNESS: Yes, sir.

8                   MR. OWENS: Sentence beginning  
9 behavior --

10                   THE COURT: Behaviors expressed from  
11 inmate with regard to nature of his crime, in turn in  
12 memory weren't suggesting less than full effort to  
13 cooperate in the current examination.

14 BY MR. ORAM:

15                   Q.     What is the next sentence?

16                   A.     With the expressive aphasia may work to  
17 suppress scores obtained under current assessment.

18                   Q.     Because that was determined as a result  
19 of the stroke, that his test scores may not accurately  
20 reflect his I.Q. because he has difficulty  
21 understanding the questions?

22                   A.     I'm trying to say two things. One, that  
23 the lack of full effort and the expressive aphasia may  
24 both work towards the depression of the current score  
25 that I received.

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1 Q. He got an overall I.Q. 69, correct?

2 A. Yes, sir.

3 Q. That is not at the bottom level? It's  
4 not a 55, right?

5 A. No, sir.

6 Q. Did you review Dr. Kinsora's report?

7 A. I only was able to review his report  
8 yesterday.

9 Q. Did you see the I.Q. test that he gave  
10 and got the same scores as the I.Q. test that you got?

11 A. Yes, I saw that there, but to 69 --

12 Q. Both of you came up with a full score 69?

13 A. Yes.

14 MR. ORAM: That concludes  
15 cross-examination.

16 THE COURT: Any redirect, Mr. Owens?

17 MR. OWENS: Just a couple questions.

18

19 REDIRECT EXAMINATION

20 BY MR. OWENS:

21 Q. You were asked about memory, you  
22 explained it, and you said that's what he told me?

23 A. Yes.

24 Q. He had no memory -- in your field, in  
25 your experience, are you capable of stating as fact

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1 here whether or not Mr. Mulder has a memory for certain  
2 of what he says he doesn't have one for now?

3 A. I could state that he has memory and that  
4 he has remote and immediate recall.

5 Q. But specifically about the crime that he  
6 says he doesn't remember, is there any way to test that  
7 or we just have to take his word for it?

8 A. You can take the information from some of  
9 the testing to see what his memory is, and assuming he  
10 has memory, because he was able to remember something  
11 about his son being conceived at the time of the arrest  
12 and so on and so forth.

13 I also understand that he has  
14 ordered books, for instance, through our prison system  
15 that are quite elevated in terms of understanding. He  
16 has ordered, since his stroke from 2002 to present,  
17 books such as Steven King, Dean Koontz. Why would a  
18 person who has memory problems and understanding and  
19 receptive problems and so on continue to order these  
20 types of books to read and so on and so forth? But in  
21 terms of memory, yes, we can assess memory.

22 The other comment I want to state at  
23 this point is that one he denied or did not have memory  
24 for the particulars in the trial; however, he also  
25 denied that he committed this particular instant

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1 offense in Arizona. Whether it's a memory problem or  
2 if it's a different type of situation, such as I don't  
3 want to be caught, so to speak, you know, I don't know  
4 how to necessarily assess that.

5 MR. OWENS: Nothing further.

6 MR. ORAM: Very briefly.

7

8 RE CROSS EXAMINATION

9 BY MR. ORAM:

10 Q. You said that he denied the offense that  
11 happened in Arizona?

12 A. That's what I read in the his file, that  
13 he denied it at the time of his arrest in Arizona, that  
14 he denied the instant offense.

15 Q. Whether the stroke is left sided or right  
16 sided part of the brain, is memory loss common if you  
17 know?

18 A. It can be certainly.

19 Q. How many stroke victims have you treated?

20 THE COURT: You know what? I don't think  
21 she has treated any, and I think it was pretty clear  
22 that she was not an expert on strokes.

23 MR. ORAM: You are not?

24 THE COURT: I don't think she is  
25 competent to answer that question.

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1 THE WITNESS: I would agree with that.

2 BY MR. ORAM:

3 Q. You don't have any knowledge whether if  
4 he is faking memory loss or if he actually has it is  
5 what you are saying?

6 A. Correct.

7 MR. ORAM: Nothing further.

8 THE COURT: Thank you very much for your  
9 testimony here today. You may step down. You are  
10 excused from your subpoena.

11 MR. OWENS: State would call Terrell  
12 Bishop.

13 THE COURT: Mr. Sgro, we let Mr. Brooks  
14 go, but we found him when he come back. If they are  
15 not done, we will take a break because I think that  
16 your case is going to be quicker than this one. But  
17 we couldn't find you. You were nowhere to be  
18 found.

19 MR. SGRO: I checked in with the bailiff.

20 THE COURT: He couldn't find you either.

21 THE BAILIFF: We did.

22 MR. SGRO: I'm here. I was with -- they  
23 brought us both down.

24 THE COURT: Were you in  
25 Judge McGroarty's?

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1 DR. TERRELL PHILMORE BISHOP, JUNIOR,  
2 having been first duly sworn, was  
3 examined and testified as follows:  
4

5 THE CLERK: You may have a seat. You  
6 need to state your name and spell your last name for  
7 the record.

8 THE WITNESS: Terrell Philmore Bishop,  
9 Junior, B-i-s-h-o-p.  
10

11 DIRECT EXAMINATION

12 BY MR. OWENS:

13 Q. Dr. Bishop, you are employed with the Ely  
14 State Prison; is that correct?

15 A. Yes, sir.

16 Q. What is your position that you hold  
17 there?

18 A. Senior psychiatrist.

19 Q. Could you run through for me your  
20 education and experience in that field?

21 A. Yes, sir. I graduated from medical  
22 school at University of Arkansas, Little Rock. Did  
23 psychiatrist residence at Duke University and Durham,  
24 North Carolina. Then neurology residency at Old Miss  
25 in Jackson, Mississippi. I was in private practice

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1 doing neurology and psychiatry for many years until  
2 roughly 2002 when I went to work at the prison, at  
3 Ely State Prison.

4 Q. Did you have occasion to evaluate  
5 Michael Mulder while you were there at the prison?

6 A. Yes, sir.

7 Q. In fact, you saw him on at least two  
8 different occasions, is that correct, November 21st of  
9 '03 and August 21st of '04?

10 A. That sounds correct. I'm not sure about  
11 the second date, but --

12 Q. It might have been the 22nd of '04. Do  
13 you see Mr. Mulder here in court right now?

14 A. Yes, sir.

15 Q. Please point to him and describe  
16 something he is wearing so we all know who are talking  
17 about.

18 A. He has got tattoos on both arms and  
19 sitting next to your opposing counsel.

20 MR. OWENS: Record reflect identification  
21 of the defendant?

22 THE COURT: So reflected.

23 BY MR. OWENS:

24 Q. What did you do in terms of evaluating  
25 him?

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1           A.       Interviewed him, which is what  
2       psychiatrists do.

3           Q.       You generated a report, two-page report  
4       dated August 22nd of 2004; is that correct?

5           A.       Yes, sir.

6           Q.       Showing you what has been marked as  
7       State's Proposed Number Four, is that a true and  
8       accurate copy of your report?

9           A.       Yes, sir.

10           MR. OWENS:   Move for admission of State's  
11       Proposed Exhibit Four.

12           MR. ORAM:   No objection.

13           THE COURT:   It's admitted.   Can I see it,  
14       Mr. Owens.

15           MR. OWENS:   Yes.

16       BY MR. OWENS:

17           Q.       What type of interview did you conduct  
18       with the defendant and what sorts of thing were you  
19       looking for?

20           A.       We just sat down on both occasions and I  
21       asked him about his mental status, just did a mental  
22       status exam, and he was alert and so forth and so on.  
23       I asked him about his memory of the incidents, and he  
24       reported he had no memory of them.

25           Q.       With your background in neurology, does

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1 that give you specialized training and knowledge about  
2 memory and how the brain works?

3 A. Yes, sir.

4 Q. Could you describe that for me?

5 A. Memory, you have remote memory and you  
6 have need memory and you have recent memory. Remote  
7 memory consists of protein molecules that are dispersed  
8 in different sites throughout the what is called the  
9 associative cortex or associative areas of the brain.  
10 It's dispersed. It's not in one focal area, so that if  
11 one states that they have no memory whatsoever from one  
12 day and going back in history, about the only way that  
13 that could be is if they are in a vegetative state or  
14 dead. It doesn't work that way, not from a thalamic  
15 stroke.

16 Q. Applying that to Mr. Mulder, what, if  
17 anything, did you concluded?

18 A. His history was not consistent with the  
19 way science works.

20 Q. What was his history? What was he saying  
21 to you?

22 A. He told me that from the time of the  
23 stroke and preceding, he had no memory whatsoever. Yet  
24 during the interview, he can remember being in  
25 California, and various other items of memory, and it

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1 was just inconsistent with what he has stated was his  
2 position within his memory.

3 Q. Inconsistent meaning he tells you he has  
4 no memory of anything, and then later in the interview  
5 he is able to remember things?

6 A. Yes, sir.

7 Q. What about this allegation that he has no  
8 memory for a block of time, which is his time spent  
9 here in Nevada, including the time that he committed  
10 the crime? Is that something that you would expect  
11 from a memory disorder or problems of some kind?

12 A. That's not consistent with his history of  
13 the stroke on the left cerebral.

14 Q. Why not?

15 A. It's dispersed throughout the brain. You  
16 would have to treat these defecits through most of the  
17 brain to have no memory in that time frame.

18 Q. Someone who has legitimate memory  
19 problems, how would they react different than  
20 Mr. Mulder?

21 A. You normally you would have more  
22 disruption of your immediate or recent memory. For  
23 example, you would forget what digits were said after a  
24 few seconds or what was said yesterday.

25 The remote memory once it is in the

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1 brain, it's very hard to get rid of all that memory  
2 unless you have disease which affects the entire brain.  
3 Like an Alzheimer's in the stages or a drowning or  
4 something along that line. A focal stroke on one  
5 side of the brain does not selectively stop memory from  
6 time A to time B because that area of the brain is not  
7 the only repository for the memories.

8 Q. Were you having difficulty communicating  
9 with the defendant when you sat down with him for this  
10 interview?

11 A. No, sir. He does have some aphasia which  
12 is consistent with his history, but he seems to  
13 comprehend well and respond well, and you have to give  
14 him time. He has to recircuit his -- in other words, I  
15 think he, like most stroke victims, he has to  
16 circumvent the area of the lesion so that he is slower  
17 in things, but he knows what you are talking about and  
18 can convey what he wishes to say. He does have an  
19 expressive aphasia, and he has some trouble with word  
20 finding, and he is not going to have the vocabulary of  
21 a William F. Buckley, no.

22 Q. But you were able to converse with him  
23 about his background, about his memory, his ability to  
24 recall, you were able to carry on a conversation with  
25 him?

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1 A. To my satisfaction, yes, sir.

2 Q. How long did you meet with him for?

3 A. Probably 30, 45 minutes each time. Maybe  
4 45 minutes the first time. Maybe 20, 30 minutes the  
5 second time. That is just a guesstimate.

6 Q. Did you ask the defendant about whether  
7 or not he understands that murder is wrong and you  
8 should be punished by society?

9 A. Yes, sir.

10 Q. What did he say about that?

11 A. He has the same understanding as society,  
12 that it's wrong to do murder, and it's just to be  
13 punished.

14 Q. What about execution, the death penalty?

15 A. I have to refer to my notes. I don't  
16 remember exactly if I asked him about the death  
17 penalty. I may have. I don't remember what his  
18 response was per se.

19 MR. ORAM: I don't mind if he leads for  
20 that point, your Honor.

21 BY MR. OWENS:

22 Q. Did he say that he agrees execution is  
23 valid punishment for murder?

24 A. That sounds like what I dictated, yes.  
25 Yes.

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1 Q. What about his status with the judicial  
2 system, that he has been convicted of a murder, and he  
3 is under a sentence of death? Did you discuss that  
4 with him?

5 A. Yes, sir. He understands that fully, but  
6 he stuck to his history that he had no memory of the  
7 crime, but he reported clearly that he understood that  
8 he had been convicted and that he received that  
9 sentence, yes, sir.

10 Q. There is no evidence of any psychosis or  
11 mental illness with the defendant; is that right?

12 A. No, sir.

13 Q. No evidence of hallucination, delusions  
14 or suicide idealization?

15 A. No, sir.

16 Q. Do you have a professional opinion about  
17 whether his memory is factitious, he claims lack of  
18 memory?

19 A. That's the correct word, and I would have  
20 to say that it's clearly factitious.

21 Q. Do you have an opinion as to whether or  
22 not he is competent to assist his current attorney in  
23 the post conviction proceedings and challenge his  
24 conviction and death sentence?

25 A. My opinion is definitiely that he is

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1 capable of assisting professionals, doctors, lawyers.

2 Q. He assisted you in this evaluation; is  
3 that right?

4 A. Yes, sir.

5 MR. OWENS: I will pass the witness.

6 MR. ORAM: Good afternoon, Doctor.

7 THE COURT: This might be a good times,  
8 Mr. Owens. I know everyone is keeping a leash in the  
9 courtroom, but is everybody ready on White?

10 MR. CHRIS OWENS: We were. Let me look.  
11 Is everybody ready? Mr. Sgro gets tied down next time  
12 he comes back in.

13 THE COURT: Until he gets here, we'll  
14 break here, but I don't want to waste time.

15 MR. ORAM: I will start?

16 THE COURT: Uh-huh.

17

18 CROSS-EXAMINATION

19 BY MR. ORAM:

20 Q. Doctor, you performed no test yourself,  
21 correct?

22 A. I don't do psychological testing. I'm  
23 not a psychologist.

24 Q. You put in your report he claims a total  
25 loss of all memory for events prior to CVA, but

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1 professes good memory for incidents since the CVA?

2 A. That's what he said, yes, sir.

3 Q. No. That's what you said in your report.

4 A. That's what he said, sir. That's what I  
5 put in the report.

6 Q. He told you that he had no memory before  
7 the CVA, which I presume is the stroke?

8 A. Yes, sir.

9 Q. He told you, I don't remember a single  
10 thing?

11 A. That's what he told me, yes, sir.

12 Q. You put it in your report. You evaluated  
13 him.

14 THE COURT: Are you ready to proceed? We  
15 are just going to take a short break, Doctor. You can  
16 go out in the hallway, but just don't go too far.

17 (Unrelated matters heard.)

18 MR. SGRO: Maybe finish with this, you  
19 want to continue this to a future date?

20 THE COURT: I don't know. He is up in  
21 Ely, correct, sir?

22 CORRECTIONS OFFICER: He was transported  
23 yesterday.

24 THE COURT: I was trying get it done so  
25 you can take him back, but is there a possibility we

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1 can continue it until tomorrow morning? Because first  
2 of all, I thought this White issue was going to be a  
3 lot be quicker than it was. See, that's what I get for  
4 relying upon the attorneys to tell me how quick it's  
5 going to be. I apologize for that.

6 CORRECTIONS OFFICER: Can I make a quick  
7 call and see if we can cover the time and come back  
8 first thing in the morning?

9 THE COURT: That would probably work. I  
10 can get Mr. Oram off to his 2:00 o'clock. Probably  
11 about around 10:00 o'clock. Whenever you can bring him  
12 back. I have the whole day tomorrow. Do you two  
13 gentlemen have the whole day tomorrow?

14 MR. ORAM: No. I have a prelim and a  
15 murder on for potential plea tomorrow at 9:00. Then I  
16 believe I have with Mr. Owens, the other Mr. Owens, at  
17 1:30.

18 THE COURT: What time frame?

19 MR. OWENS: I have got a capital writ  
20 argument tomorrow in 14 at 9:00 o'clock.

21 THE COURT: Around 10:00 or 11:00, can  
22 both of you be here?

23 MR. CHRIS OWENS: I will be in 14. Their  
24 doctors flew in from Ely.

25 MR. OWENS: Both doctors flew in. They

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1 go home today.

2 MR. ORAM: See if we can if go quickly.

3 THE COURT: I have to stop at  
4 2:00 o'clock though.

5 MR. ORAM: I understand.

6 THE COURT: We have been going. My staff  
7 has not broke yet. I really hesitate --

8 CORRECTIONS OFFICER: What time?  
9 10:00 o'clock?

10 MR. OWENS: I have got a writ argument in  
11 14. I'm happy to work around it.

12 THE COURT: I can continue it until  
13 whenever. If you want to go, see if we can do as much  
14 as we can until 2:00 o'clock.

15 MR. OWENS: I'm sure I can finish my  
16 doctors and let them go back home.

17 CORRECTIONS OFFICER: We can bring him  
18 back Monday, Tuesday, whenever you are ready.

19 MR. ORAM: Maybe that would be the best  
20 thing. My doctor is a local doctor. I can ask him  
21 could he please come back at another time.

22 THE COURT: Get Dr. Bishop back up here.

23 MR. ORAM: I was done.

24 THE COURT: I think we can get him done.

25 MR. ORAM: I do too.

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1 THE COURT: We will let you know, but I  
2 can't tell you right now. These guys' schedules are  
3 messed up.

4 CORRECTIONS OFFICER: It's not going to  
5 be tomorrow.

6 THE COURT: That's fine. Bring  
7 Dr. Bishop back in. Mr. Mulder, you can come back up  
8 here. You can continue.

9 MR. ORAM: Thank you.

10 BY MR. ORAM:

11 Q. Doctor, when we left off, we were talking  
12 about your report. Do you remember that?

13 A. Yes, sir.

14 Q. Did you have a chance at the break to  
15 talk to the other doctor who just got done testifying  
16 about your statement, he claims a total lose of all  
17 memory for events prior to CVA, but professes good  
18 memory for events since CVA. Did you talk to her about  
19 that outside?

20 A. No.

21 Q. Did she mention things about that?

22 A. No.

23 Q. It was placed in your report that  
24 Mr. Mulder had told you that he had no memory prior to  
25 the stroke, correct?

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1 A. Correct.

2 Q. You mentioned specifically that you  
3 interviewed him on November 21, 2003, correct?

4 A. I believe that's correct.

5 Q. In fact, we heard from the other doctor,  
6 Dr. Milner, that you were present when she interviewed  
7 him on November 21, 2003?

8 A. We both interviewed him at the same time.  
9 It was like I said, maybe 40, 45 or maybe 60 minutes.  
10 It was something in that time frame.

11 THE COURT: I just want -- because I have  
12 read this report a few times. So maybe if this will  
13 help you cut to the chase. I know that the doctor says  
14 he claims that a total loss of all memory for events  
15 prior to the CVA, but in the last paragraph he says,  
16 although he claims it, he seems to have memories of  
17 living in Riverside, earthquakes, thunderstorms, and he  
18 remembers growing up, which I think would clearly all  
19 be before.

20 MR. ORAM: Were are you reading?

21 THE COURT: The last paragraph of his  
22 Exhibit Four. He admits -- it's page one. He admits  
23 and endorses that murder is wrong, he should be  
24 punished by society. About the fifth sentence, he  
25 claims to have no memory of the murder since it

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1 occurred before his CVA simultaneously he remembered  
2 living in Riverside, California and some of the  
3 earthquakes there in that area. He remembers his name  
4 and growing up while claiming no memory of the CVA. I  
5 can tell you, as in the report, as he claimed to have  
6 no memories before the CVA, although apparently talked  
7 about stuff that would have clearly been before the  
8 CVA.

9 BY MR. ORAM:

10 Q. The other doctor indicated that I wanted  
11 to ask you is do you remember him talking about his  
12 drug useage when he was 16 and what his choice was?

13 A. I don't remember us talking about that.  
14 I knew from the chart that he used drugs, but I don't  
15 think I got into that.

16 Q. Do you remember him discussing how he had  
17 an Associate's Degree and was studying at college and  
18 had approximately three years of college?

19 A. I believe he did mention he had gone to  
20 school, yes, sir.

21 Q. That he has a girlfriend and a son?

22 A. That's vaguely familiar, yes, sir.

23 Q. He did mention to you things prior to his  
24 stroke? He mentioned them to you, didn't he?

25 A. That's what my report says, yes, sir.

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1           Q.       Your report says he mentioned the thing  
2 the Judge just went over, but the things I went over  
3 you didn't mention?

4           A.       I don't understand your question.

5           Q.       You're saying that he is telling you, I  
6 have no memory before the stroke, yet he talks, about  
7 all these things that occurred before the stroke,  
8 correct?

9           A.       That's the contradiction that I noted  
10 that he was making. He has contradicted himself,  
11 couldn't definitely state that he couldn't remember  
12 anything, but then he would mention things that did  
13 show memory. You are stating the exact contradiction  
14 that I put in the report.

15          Q.       Okay. Would it be a fair statement to  
16 say if somebody was effecting this faking memory loss,  
17 they denied that they had any memory and wouldn't  
18 mention things before, would they?

19          A.       If you were clever, that would be --  
20 well, of course if you were a clever liar, that would  
21 be the way to do it, yes, sir.

22          Q.       If you had something wrong with your  
23 brain and let's say have an I.Q. of 69, maybe you  
24 wouldn't get those things right, is that fair to say?

25          A.       Many criminals do this.

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1 Q. That's not my point.

2 A. It has nothing to do with an I.Q. of  
3 69.

4 Q. You didn't perform any tests as we went  
5 over, correct?

6 A. I don't do psychological testing.

7 Q. You met with him for an hour, and you  
8 made your conclusions, correct?

9 A. Yes, sir.

10 Q. You didn't review the UMC medical records  
11 of the stroke?

12 A. Those weren't part of the prison charts,  
13 no, sir, nor are they needed.

14 THE COURT: How come? Because I have  
15 seen them. I don't understand why nobody had access to  
16 them, but yet I have reviewed them.

17 MR. ORAM: My doctor reviewed them.

18 THE COURT: Who gave them to me?

19 MR. ORAM: It would have been from  
20 Justice Douglas. He had them before this.

21 THE COURT: Okay. So we just got them  
22 directly from UMC obviously.

23 MR. ORAM: I don't want to say that and  
24 be wrong. I remember that it was provided to  
25 Justice Douglas.

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1 BY MR. ORAM:

2 Q. Basically, your opinion is based upon  
3 approximately an hour or so of communicating  
4 with Mr. Mulder, correct?

5 A. That's correct.

6 Q. Nothing more; nothing less?

7 A. Well, nothing more; nothing less. That  
8 is my professional job for 28 years. That's what I do,  
9 yes, sir.

10 Q. In that time, he did mention things that  
11 happened before the stroke?

12 A. Well, yes.

13 Q. You are not professing to be any kind of  
14 expert on strokes; is that fair?

15 A. I am an expert on strokes. I have  
16 practiced neurology for 28 years. I think that makes  
17 me knowledgeable of strokes, yes, sir.

18 Q. Do strokes --

19 THE COURT: Let me just ask him really  
20 quick. I know what neurology is. A neurologist is the  
21 person that would treat somebody that has a stroke that  
22 affects their brain?

23 THE WITNESS: Absolutely. That's what  
24 neurologists do. One of the biggest part of the  
25 practice.

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1 BY MR. ORAM:

2 Q. Does a stroke cause memory loss?

3 A. It can cause memory loss, yes.

4 Q. Did Mr. Mulder receive any type of  
5 rehabilitation for his speech therapy or for speech  
6 therapy or for memory or for anything at the death row,  
7 on death row?

8 A. He is not getting any speech therapy that  
9 I'm aware of, but speech therapy doesn't improve  
10 memory.

11 Q. My question is did he get any therapy for  
12 any of those things?

13 A. He functions as a normal inmate at the  
14 facility, and therefore, there is no need to give him  
15 anything.

16 THE DEFENDANT: That's a lie.

17 THE COURT: Mr. Mulder.

18 MR. OWENS: Objection.

19 THE COURT: Mr. Mulder. You can't speak  
20 unless you are asked to speak by me. Do you understand  
21 that?

22 THE DEFENDANT: Yes.

23 THE COURT: Okay. If you have any  
24 outbursts, we just end the hearing and send you back.

25 THE DEFENDANT: All right. Thank you.

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1 MR. OWENS: Did we get that in the record  
2 record?

3 COURT REPORTER: Yes.

4 BY MR. ORAM:

5 Q. Did he receive any therapy that you know  
6 of?

7 A. Not from ESP that I'm aware of, no, sir.

8 THE COURT: What kind of therapy?

9 MR. ORAM: Speech therapy, any type of  
10 rehabilitation for the stroke and the answer is no.

11 THE WITNESS: Not at ESP to my knowledge,  
12 no, sir.

13 BY MR. ORAM:

14 Q. Are you familiar, as you are an expert on  
15 strokes, with the American Stroke Association and their  
16 guidelines?

17 A. I have not been involved with that  
18 association, but I have been a member of the American  
19 Academy of Neurology since 1983.

20 Q. Do you think it's unusual that somebody  
21 would have a stroke, which you don't know how severe it  
22 was because you haven't read the record, but somebody  
23 would have a stroke and become better without any  
24 rehabilitation?

25 A. That's the typical course after a stroke.

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1 When you have a stroke, you typically get better in the  
2 first month, and then for the ensuing months, some  
3 improvement, but then it usually becomes static.  
4 Usually improve cognitively on your own without  
5 therapy, without speech therapy, without -- mentally  
6 you rewire and do better when the edema reduces.  
7 Before, it's usually in the first four to eight weeks.

8 Q. Fair to say when the American Stroke  
9 Association says therapy, rehabilitation, really what  
10 you are saying is they don't really need it because  
11 they are going to get better?

12 A. That's what you are saying. We are  
13 talking about memory. They are talking about physical  
14 therapy for their gait and things like that and  
15 walking. We are talking memory I thought is what you  
16 were talking about, sir.

17 Q. Are you saying memory gets better on his  
18 own?

19 A. Yes, sir, it usually does.

20 Q. It usually does?

21 A. It usually gets better unless it's a  
22 totally devastating stroke.

23 Q. You don't know that because you haven't  
24 read the medical records?

25 A. I do know by seeing him he is not

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1 devastated because he functions and talks quite nicely.

2 He is not devastated, no, sir.

3 Q. He functions and talks quite nicely?

4 A. Yes, sir. When he is relaxed, he does  
5 quite nicely.

6 Q. So is that consistent with an I.Q. score  
7 of 69?

8 A. In what way do you mean?

9 Q. That he received from your colleague who  
10 testified a level full score of 69 where he was down in  
11 the bottom, I believe, 2.6 percent in verbal  
12 communication. When you say nicely, is that  
13 consistent?

14 A. People with an I.Q. of 70 usually  
15 converse quite nicely.

16 Q. It's your testimony that he could  
17 converse, he was able to converse with you -- strike  
18 that. Was he able to converse with you about complex  
19 subjects?

20 A. We didn't get into physics or anything  
21 like that, but common, every day things like we are  
22 talking about today, yes, he can convey his idea. He  
23 does have some expressive aphasia. He has some trouble  
24 with stuttering and slow speech, but he can convey his  
25 ideas quite adequately.

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1 Q. When he couldn't remember the number of  
2 siblings he has, was that a concern to you?

3 A. No. Because he has so inconsistencies  
4 that are not scientifically founded.

5 Q. You did that without conducting any  
6 tests?

7 A. That's my job. That's what neurologists  
8 and psychiatrists do, sir.

9 Q. Do most --

10 A. That's why we go to all those years of  
11 training, to know how to do that, yes, sir.

12 Q. Without tests?

13 A. That's correct. That's what neurologists  
14 and psychiatrists do, yes, sir.

15 Q. You do that without referring -- listen  
16 to my questions.

17 THE COURT: You have got to stop talking  
18 at the same time. You are both doing it. One at a  
19 time, please.

20 BY MR. ORAM:

21 Q. You can do that without looking at the  
22 patient medical history on the stroke, correct?

23 A. In this case, yes, because he was  
24 statically the same, which was not progressing as it  
25 had been years earlier. Yes, sir. You obviously don't

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1 understand neurology.

2 Q. Had you read Dr. Kinsora's report prior  
3 to you conducting this?

4 A. I only received it I think at  
5 5:00 o'clock two days ago, and I didn't read it until  
6 yesterday.

7 Q. Have you read it?

8 A. I scanned over it.

9 Q. Did you find anything wrong? Do you have  
10 disputes with it?

11 A. It's quite curious, yes.

12 Q. How is it curious?

13 A. He has a laundry list of tests that would  
14 probably take two, three or four days to do, yet he  
15 states he was able to do them with someone who is a  
16 slow talker in five hours. But in the tests, there is  
17 no test data to confirm that he actually did some of  
18 those tests, and yet it's 22 pages long, yet there is  
19 no data to show any of the tests that were claimed to  
20 have been done, so I thought it was curious.

21 And he, in addition, said things  
22 like profoundly hemiparetic, which is obviously more  
23 strange because hemiparesis by definition means you are  
24 only partially paralysed. When you are profoundly  
25 hemiparetic, as he called it, you can't walk, yet he

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1 walks on his own. So by definition you are not  
2 profoundly hemiparetic. There were some issues in it,  
3 yes, sir.

4 Q. You were accusing because you, in fact,  
5 in his 20 page report that he actually conducted tests  
6 because that is something because you are not used to  
7 doing that, conducting tests?

8 A. Sir, you are confused again.

9 Q. I'm asking you a question, sir. Listen  
10 to my question.

11 A. Say it again.

12 THE COURT: I already know he didn't  
13 conduct any tests.

14 BY MR. ORAM:

15 Q. Were you confused by Dr. Kinsora  
16 conducting tests given the fact that you have said  
17 there is really no necessity for someone like you to  
18 conduct tests?

19 A. I don't have any confusion about this  
20 case, sir.

21 Q. You were able to do that in the hour you  
22 met with him?

23 A. I have 28 years of experience.

24 MR. ORAM: Nothing further, Judge.

25 THE COURT: Mr. Owens?

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## REDIRECT EXAMINATION

1  
2 BY MR. OWENS:

3 Q. Did the defendant get angry with you  
4 during the two interviews that you did?

5 A. Yes, sir.

6 Q. How so?

7 A. When I pointed out that he was claiming  
8 to have no memory, but then I pointed out some of the  
9 things he was saying, he got very angry.

10 Q. Was that kind of like how he did here in  
11 court with an outburst?

12 A. He was more angry then.

13 Q. Is there anything inconsistent about what  
14 is in Dr. Kinsora's report that struck you as curious?

15 A. I think Dr. Kinsora's report is typical  
16 of those professional opinions often rendered for  
17 defense teams.

18 Q. Would Dr. Kinsora's report say anything  
19 about the defendant's ability to get angry?

20 A. Well, you would have to read it because I  
21 only scanned it because it wasn't really relevant to  
22 what I had done, but I could read it and give you an  
23 opinion.

24 Q. Do you remember Dr. Kinsora's report  
25 saying something about the defendant being in effect

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1 lobotomized?

2 A. That was silly.

3 Q. Would you agree with that?

4 A. That is absolutely false.

5 Q. Why?

6 A. He had a small stroke on one side.

7 MR. ORAM: Judge, I object to small  
8 stroke. The man said he hadn't even read the reports.  
9 He hasn't read them, how would he know that?

10 THE COURT: I agree. How do you come to  
11 that conclusion?

12 THE WITNESS: We know that because he is  
13 not densely hemiparetic, and he is quite functional at  
14 ESP, so it has to be a fairly modest stroke or he would  
15 have more deficits.

16 THE COURT: Okay. Is that what you base  
17 on just your observations of him?

18 THE WITNESS: Yes, ma'am.

19 THE COURT: Okay.

20 BY MR. OWENS:

21 Q. You say that he has hesitant speech,  
22 which you could hear, and was using syntactic aphasia  
23 at a slow pace. What does that mean?

24 A. That means you may drop some of the  
25 adjectives and conjunctions and so forth, which is

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1 classic for expressive aphasia. He does, I believe,  
2 have expressive aphasia, but it's not dense or totally.  
3 He can convey his ideas, but with effort.

4 MR. OWENS: I will pass the witness.

5 MR. ORAM: Yes. I have a few more,  
6 Judge.

7 THE COURT: We are back to cross.

8 MR. ORAM: Recross.

9 THE COURT: Okay. Go ahead.

10

11

REXCROSS EXAMINATION

12 BY MR. ORAM:

13 Q. If UMC Dr. Steven Agatamd, A-g-a-t-a-m-d,  
14 an M.D. neurosurgeon, stated that Mr. Mulder's  
15 prognosis for improvement was poor, would you disagree  
16 with that, sir?

17 A. All that would mean is that he was  
18 incorrect at the time. That was contemporariness with  
19 his stroke, and he obviously misunderstood his  
20 prognosis.

21 Q. The treating physician at University  
22 Medical Center in town here was incorrect when he said  
23 that?

24 A. It sure seems to be that way. It's hard  
25 to predict the future when you have an accute stroke,

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1 sir.

2 Q. The doctor at UMC may not be qualified to  
3 make such a decision?

4 A. I didn't say that. I said that he was  
5 incorrect in his diagnosis because it's hard to  
6 prognosticate during an acute stroke.

7 Q. If the doctor at UMC stated progress for  
8 recovery poor, he would be transferred for nursing care  
9 and possible speech rehabilitation, would you have any  
10 reason to dispute that?

11 A. I don't dispute he said that.

12 Q. Does that seem accurate from what you  
13 know of this case?

14 A. That would be standard for a stroke  
15 patient leaving a stroke unit or acute care, yes.

16 Q. Would it be unusual that a stroke victim,  
17 in this case Mr. Mulder, would not have been able to  
18 communicate with nurses?

19 A. Acutely, that wouldn't be unusual at all.  
20 Like I said, often the first four to eight weeks you  
21 get much better.

22 Q. That is just your opinion of overall what  
23 happens to people?

24 A. Not only my opinion, but science of  
25 neurology as taught in today's residencies.

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1 Q. What is the point of rehabilitation then?

2 A. It often helps people keep their joints  
3 from getting stiff, and the therapy often helps with  
4 the physical rehabilitation of muscles and joints.

5 Q. How about speech rehabilitation, what is  
6 the point of that?

7 A. It really doesn't do as much as as people  
8 think, but it does help some to have practice, but  
9 typically people get better in the first four to eight  
10 weeks with their speech anyway, but it does help some.

11 Q. Basically, the American Stroke  
12 Association recommending speech rehabilitation for  
13 people is pretty much not that important because you  
14 are going to get better anyway, right, Doctor?

15 A. I didn't say it's not important. I said  
16 that the gist of it is most people get better on their  
17 own, but speech therapy certainly doesn't hurt and  
18 often helps.

19 MR. ORAM: Nothing further.

20 MR. OWENS: Nothing further.

21 THE COURT: Thank you very much for your  
22 testimony here today. You may step down. You are  
23 excused. You can go back to Ely.

24 THE WITNESS: Okay. Thank you.

25 MR. OWENS: I have got one last

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1 five-minute witness.

2 THE COURT: From Ely?

3 MR. OWENS: Yeah.

4 THE COURT: Okay.

5 MR. OWENS: I would like to call the  
6 corrections officer to the stand. I apologize I didn't  
7 get his name ahead of time.

8 MR. ORAM: Would the record --

9 THE COURT: Would you please state your  
10 name.

11 CORRECTIONS OFFICER: Richard  
12 Santistevan.

13 MR. ORAM: This witness has been sitting  
14 in here the entire time, and Mr. Owens did tell me he  
15 was going to call him at the break. It does cause me  
16 concern that the witness has been sitting in the  
17 courtroom and is now going to testify to things that, I  
18 guess, I'm going to learn now.

19 MR. OWENS: I have told Mr. Oram what he  
20 is going to testify to, and we can lay a foundation.

21 THE COURT: We don't have any rule that  
22 says a witness can't sit in a courtroom during a  
23 hearing unless someone tells me they wanted to exclude  
24 everybody.

25 MR. ORAM: I probably should have. I

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1 didn't know. I knew all the doctors were outside. I  
2 didn't know he would be a witness.

3 THE COURT: Okay, go ahead.

4 MR. OWENS: I certainly didn't either  
5 until the break.

6  
7 OFFICER RICHARD SANTISTEVAN,  
8 having been first duly sworn, was  
9 examined and testified as follows:

10  
11 THE CLERK: You may have a seat. We need  
12 you to state your name and spell your last name for the  
13 record.

14 THE WITNESS: Officer Richard  
15 Santistevan, S-a-n-t-i-s-t-e-v-a-n.

16  
17 DIRECT EXAMINATION

18 BY MR. OWENS:

19 Q. Officer, you are employed with the Ely  
20 State Prison; is that correct?

21 A. No, sir. Nevada Department of  
22 Corrections, Transportation Division.

23 Q. You transported Michael Mulder here to  
24 court today?

25 A. Correct.

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1 Q. From where? High Desert?

2 A. High Desert State Prison.

3 Q. During the break a few minutes ago when  
4 the judge was handling another matter, you came up to  
5 me in the hallway and mentioned something to me; is  
6 that right?

7 A. Yes, I did.

8 Q. Go ahead and tell the Court what it is  
9 that you mentioned to me.

10 A. Basically, the change in the defendant's  
11 demeanor of how he spoke.

12 Q. Change in what? Tell me about the  
13 incidents that you are referring to.

14 A. Basically, his conversation with myself  
15 and my fellow officer and his fellow inmates, he talked  
16 fairly well.

17 Q. When did you observe that? Was it today?

18 A. Today.

19 Q. On the way to court here?

20 A. Correct.

21 Q. He conversed with you and with other  
22 inmates on the way here?

23 A. His fellow inmate, yes. The one we  
24 transported with us.

25 Q. That was different than what?

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1           A.       Say that again.

2           Q.       You observed him earlier this morning  
3 talking to you and this other inmate. You said that  
4 was different from what other?

5           A.       From his conversation with his attorney.

6           MR. ORAM: Objection. Was that here in  
7 open court?

8           THE WITNESS: Yes, sir.

9           MR. ORAM: Could I voir dire the witness?

10          THE COURT: I'm not going to let him talk  
11 about anything he heard Mr. Mulder talking to Mr. Oram  
12 about.

13          MR. OWENS: Let's not talk about the  
14 words. Let's talk about the manner in which he was  
15 speaking, and although this may have been to his  
16 attorney, were there other people present?

17          THE WITNESS: No.

18          MR. OWENS: I was in the courtroom,  
19 wasn't I?

20          THE COURT: Just because the C.O. is  
21 present doesn't mean he would have no privilege. A  
22 C.O. is generally present.

23          MR. OWENS: I was present.

24          THE COURT: You heard Mr. Oram's  
25 conversation with Mr. Mulder?

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1 MR. OWENS: Everyone in the courtroom can  
2 overhear a conversation that takes place. I don't  
3 think it was confidential. I can lay the foundation.  
4 I don't think it was confidential communication,  
5 although, I think I can do what I need to without going  
6 into any content of what was said.

7 THE COURT: Okay.

8 BY MR. OWENS:

9 Q. Let's just talk about -- without talking  
10 about what was said to the attorney, describe the  
11 manner in speaking that you heard the defendant do.

12 A. It was a total change.

13 Q. How so?

14 A. From speaking more fluently and straight  
15 to kind of dumbfounded.

16 Q. Dumbfound in what case?

17 A. More like lost in his conversations  
18 sense.

19 Q. Was he stuttering when you overheard him  
20 speaking in court?

21 A. I can't recall that stuttering.

22 Q. Was he speaking slow or fast in court?

23 A. A lot slower.

24 Q. Slow in court?

25 A. Yes.

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1 Q. Did he seem to have trouble finding words  
2 in court?

3 A. Yes.

4 Q. Earlier when you were speaking with the  
5 defendant or you overheard him speaking with the other  
6 inmate, was it fast or slow?

7 A. That was a little faster. A lot more  
8 fluent.

9 Q. Lot more fluent?

10 A. Right.

11 MR. OWENS: That's all I have

12 THE COURT: Cross-examination?

13

14

CROSS-EXAMINATION

15 BY MR. ORAM:

16 Q. Sir, did you hear Mr. Mulder blurt out in  
17 court today, that's a lie?

18 A. Yes, sir.

19 Q. Did that sound like he was stuttering?

20 A. No.

21 Q. Court heard it, right? Did he sound like  
22 he was talking with you and your other officer more  
23 clear and to the point?

24 A. Yes.

25 Q. So what he did in front of the Judge

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1 today was consistent with what he was, the way he was  
2 talking with you, correct?

3 A. Correct.

4 Q. Did you hear the questions I asked him?

5 A. Yes.

6 Q. Did you hear me ask him a trick question?

7 A. No.

8 Q. You didn't?

9 A. No.

10 Q. Could you hear the context of what we  
11 were talking about?

12 A. Yes.

13 Q. I did ask him who his lawyer had been at  
14 trial?

15 A. Yes.

16 Q. What did he say?

17 THE COURT: Mr. Oram.

18 MR. ORAM: For the purpose of that little  
19 hearing, I want to waive it right now. I mean, they  
20 brought it out.

21 MR. OWENS: It's client privilege to  
22 waive it.

23 THE COURT: I'm very concerned about  
24 this.

25 MR. ORAM: I am too, Judge, but they

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1 brought it up, and now I want to show what I was  
2 doing.

3 THE COURT: I told Mr. Owens don't go  
4 into the content. I don't want to go into that. This  
5 is a very sacred privilege.

6 MR. ORAM: Yes, your Honor.

7 THE COURT: I would think it's yours.

8 MR. ORAM: It isn't mine.

9 THE COURT: It's Mr. Mulder's.

10 MR. ORAM: Can I the ask Court  
11 something?

12 THE COURT: Yes.

13 MR. ORAM: Is the Court going to take a  
14 lot of emphasis on what this officer said in this  
15 hearing?

16 THE COURT: I want to wait until -- I  
17 have only heard witnesses that have been favorable, so  
18 I guess I would say the State's position is not  
19 incompetency, and that he is able to proceed and assist  
20 in a post-conviction proceeding. I would like to wait  
21 until I hear everything. I like to wait and  
22 considering everything, but I'm not going to tell you  
23 how much weight I'm going to give to any evidence. But  
24 I'm very uncomfortable with you getting into asking  
25 this officer if he heard things that you discussed with

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1 Mr. Mulder, because it's Mr. Mulder's privilege, not  
2 yours.

3 MR. ORAM: But you see, they put me in a  
4 situation, your Honor. Look at the situation they put  
5 me in. They are overhearing what was said in the  
6 conversation that he was stuttering.

7 THE COURT: Demeanor.

8 MR. ORAM: But it's not, doesn't show --  
9 if I was to say, Judge, you know, something to you that  
10 would confuse you to see what your answer would be and  
11 what your demeanor would be, look like you were having  
12 difficulty with it without saying. Do you see my  
13 point?

14 THE COURT: Uh-huh.

15 MR. ORAM: I will move on from that.

16 THE COURT: Because I'm just concerned.  
17 I don't want you to waive the privilege.

18 BY MR. ORAM:

19 Q. Sir, you saw me ask Mr. Mulder questions  
20 without saying what I asked?

21 A. Yes.

22 Q. Would you agree with me, going back for a  
23 second, that what he did in front of the Judge today  
24 was consistent with the way he talked with you on the  
25 trip down here?

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1 A. Yes.

2 Q. He showed the Judge that he could talk  
3 freely?

4 A. Yes.

5 Q. Only time you saw any difference in  
6 your opinion was during a brief conversation with  
7 myself?

8 A. That's correct.

9 Q. You claim to have overheard what I was  
10 asking?

11 A. I was sitting right behind you.

12 Q. But the way you are saying he was acting  
13 with me is different than the way he acted when he  
14 blurted out in court?

15 A. Like I said, the way he spoke, he didn't  
16 answer only but one question. I'm saying his demeanor  
17 changed of a lost state.

18 Q. How about his demeanor as he has been  
19 sitting here in front of the Judge while the hearing  
20 has been going on? Does that seem consistent?

21 THE COURT: I have had the opportunity to  
22 see his demeanor here in court, so I really don't need  
23 someone else to tell me their opinion of his demeanor.

24 BY MR. ORAM:

25 Q. Was it similar with what he was like when

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1 you were transporting him down here?

2 A. He was very respectful. Did what he was  
3 told, but he spoke very well.

4 Q. Did he limp?

5 A. Yes.

6 Q. What side of his body limped?

7 A. His left side.

8 Q. Did you ever hear him stutter when he  
9 was talking to you or have difficulty with  
10 language?

11 A. No.

12 Q. None at all?

13 A. Not really.

14 Q. Did you discuss anything complex with  
15 him?

16 A. No, I didn't.

17 Q. Just simple --

18 A. Simple conversation.

19 MR. ORAM: Nothing further, Judge.

20 THE COURT: Okay. Thank you very much.  
21 You can step down. At this point, who else do we have?  
22 We have all the Ely people that can go back home?

23 MR. ORAM: Yes.

24 MR. OWENS: Yes.

25 THE COURT: You have your doctor who is

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1 local.

2 MR. ORAM: I wonder if he can come in so  
3 we can arrange scheduling.

4 THE COURT: Right. Please ask the doctor  
5 to come in. Officer Santistevan to transport him  
6 back to High Desert or just stay there until we need  
7 him?

8 CORRECTIONS OFFICER: Yes. Can we get a  
9 new order?

10 THE COURT: You need one?

11 CORRECTIONS OFFICER: At least 24 hours  
12 before we can get him here.

13 THE COURT: Okay. Mr. Owens, will you  
14 make sure I get a new order to transport Mr. Mulder  
15 back from High Desert?

16 MR. OWENS: Yes.

17 MR. ORAM: I don't know if Mr. Owns has a  
18 schedule here.

19 THE COURT: Looks like Tuesday at  
20 11:00 o'clock. Probably only need about -- I will give  
21 you about another hour.

22 MR. OWENS: Tuesday morning is bad.

23 MR. ORAM: Wednesday possibly? I have a  
24 10:00 o'clock in Henderson, a misdemeanor trial, or  
25 Thursday I have a hearing in here.

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1 THE COURT: At what time?

2 MR. ORAM: It's on your 9:15.

3 THE COURT: Only problem is I have him at  
4 High Desert when he is really supposed to be at Ely. I  
5 really only would like to keep him at High Desert for  
6 shortest time as possible.

7 MR. ORAM: Is there any way we can do it  
8 Tuesday afternoon? At, let's say 1:00?

9 THE COURT: I can probably do Tuesday  
10 afternoon.

11 MR. OWENS: Works for me.

12 THE COURT: 1:00 o'clock. Doctor, can  
13 you be here at 1:00 o'clock?

14 DR. KINSORA: 1:00 o'clock on Tuesday,  
15 sure.

16 THE COURT: We will make sure, Officer,  
17 that you get him a new order. Can you just fax it to  
18 the officer?

19 CORRECTIONS OFFICER: We don't need  
20 a new order now that you are giving us a direct  
21 date.

22 THE COURT: Good. Tuesday March 17th --  
23 no, not Tuesday. Not March 17th.

24 THE CLERK: Tuesday, March 15th at  
25 1:00 o'clock.

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1 \* \* \* \* \*

2 LAS VEGAS, NEVADA, MARCH 15, 2005, 1:00 P.M.

3 \* \* \* \* \*

4 THE COURT: State of Nevada versus  
5 Michael Mulder, C138790. He is present in custody.  
6 Mr. Oram, I think we are down to your witness.

7 MR. ORAM: Yes, your Honor. He is right  
8 outside. Dr. Thomas Kinsora.

9 THE COURT: Why don't I have report from  
10 this doctor?

11 MR. ORAM: You should, your Honor. It  
12 would have been given to Justice Douglas

13 THE COURT: It's an old one.

14 MR. ORAM: Very old. It was from '03,  
15 your Honor

16 THE COURT: Okay. Thank you very much.

17  
18 DR. THOMAS KINSORA,  
19 having been first duly sworn, was  
20 examined and testified as follows:

21  
22 THE CLERK: We need you to state your  
23 name and spell your last name for the record.

24 THE WITNESS: Thomas Kinsora,  
25 K-i-n-s-o-r-a.

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1 MR. ORAM: Your Honor, while I'm going  
2 through it, would you want -- I'm not sure if I have a  
3 copy.

4 THE COURT: I have a lot of the reports.  
5 Let me just make sure.

6 THE WITNESS: It looks like this on the  
7 front.

8 THE COURT: I have read it before. I  
9 read it because it was attached to the previous motion,  
10 correct?

11 MR. ORAM: Yes, it would be attached to a  
12 motion.

13 THE COURT: But I don't think I actually  
14 have a copy of it in front of me, but I do recall  
15 seeing that and reading it. That's okay. I have the  
16 file here. I can probably just pull it from the file  
17 because it is attached to the motion to vacate,  
18 correct?

19 MR. ORAM: Yes.

20 THE COURT: I don't know if that's what  
21 you'r entitled to.

22 MR. ORAM: I'm not sure if it was  
23 attached to that one, but it was attached to something  
24 at some point, your Honor.

25 THE COURT: That's correct.

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1 THE WITNESS: I would be happy to leave  
2 this with you when I'm done.

3 THE COURT: Okay. Thank you.  
4

5 DIRECT EXAMINATION

6 BY MR. ORAM:

7 Q. Doctor, how are you employed?

8 A. I'm currently in private practice as a  
9 clinical neuropsychologist.

10 Q. Were you asked by myself to examine  
11 Mr. Michael Mulder?

12 A. Yes, I was.

13 Q. Were you appointed by the Court?

14 A. You know, I'm not sure if I was appointed  
15 by the Court or not. I know I was contacted and I was  
16 told that there was a case pending and that they wanted  
17 me to go up to Ely to see this gentleman. I'm not sure  
18 what route I was referred over here. I was obviously  
19 appointed by the Court.

20 Q. Okay. What are your qualifications as a  
21 psychologist? What is your background?

22 A. Well, I was P.Ph.D. in clinical  
23 psychology, specialty in neuropsychology. I did my  
24 undergraduate in Wayne State University in Detroit. I  
25 did my graduate Ph.D. program at California, at the

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1 California school. I then went to a predoctorial  
2 internship at the Veterans Administration Medical  
3 Hospital where I spent about two thirds of my time on  
4 the neurology unit seeing neurology patients and going  
5 through neurology rounds with a neurology resident.  
6 Then spending part of my time in Mt. Hygiene Clinic  
7 working with psychiatry patients.

8 From there, I received additional  
9 training in neuropsychology at the Rehab Institute of  
10 Michigan where I worked on the stroke unit for a little  
11 over a year, seeing hundreds of stroke patients doing  
12 neuropsychological assessments on each one of them.

13 After that, I was transferred over  
14 to the Traumatic Brain Injury Unit where I became the  
15 lead neuropsychologist on the Traumatic Brain Unit and  
16 also seeing a decent amount of stroke patients during  
17 that time. I have seen thousands of stroke patients  
18 over the years.

19 Then from that point, I was doing my  
20 research during that period on different types of  
21 memory processing. At that point, I was looking at the  
22 different relationship between early Alzheimer's and  
23 the memory impairment that we see in Parkinson's  
24 disease. I was also heading up some research in memory  
25 processing and trying to develop a new memory measure

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1 that was looking at a specific area of memory  
2 processing that hadn't been tapped into before.

3 Q. Let me stop you. Have you been qualified  
4 in the Eighth Judicial District Court as an expert?

5 A. Yes, I have.

6 Q. Approximately how many times?

7 A. You know, I'm not sure. Somewhere  
8 between 15 and 20, probably a little bit more.

9 Q. Have you testified in capital cases  
10 before?

11 A. Yes, I have.

12 MR. ORAM: Your Honor, at this time, we  
13 would offer him as an expert.

14 MR. OWENS: No objection.

15 THE COURT: He can offer expert  
16 testimony.

17 BY MR. ORAM:

18 Q. Did you examine Michael Mulder on  
19 May 2, 2003?

20 A. Yes, I did.

21 Q. Where did you examine him, sir?

22 A. At the Nevada State Prison in  
23 Carson City, Nevada.

24 Q. Prior to examining him, did you review  
25 any records?

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1           A.       Yes. I had quite a few medical records  
2 from early on, but they included also records from  
3 University Medical Center, physician orders, medical  
4 charts as well some medical records from before the  
5 stroke occurred.

6           Q.       Did you note some of the UMC records in  
7 your assessment?

8           A.       Yes, I did.

9           Q.       I would like to briefly go through some  
10 of those that you noted.

11          A.       Sure.

12          Q.       Do you know that Mr. Mulder was flown via  
13 ambulance, air ambulance, from Ely to UMC down here in  
14 Las Vegas?

15          A.       Yes. I believe he was.

16          Q.       You also noted that he was intubated?

17          A.       Correct.

18          Q.       What does that mean?

19          A.       That is basically where his respiration  
20 was so hard and he wasn't able to sustain it on his  
21 own, they actually, they will put a tube through your  
22 neck, right here, in order to allow you to breath or  
23 else intubate you through your throat and put you on a  
24 respirator in order to help you breath. Typically it  
25 involves a hole.

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1           Q.       You also noted that as a treating  
2 physician at UMC indicated that Mr. Mulder's prognosis  
3 for recovery was poor?

4           A.       Correct. I mean, at that point, if you  
5 look at the CT scan, he had a rather large left  
6 thalamic and basal ganglion stroke, which is kind of an  
7 internal structure in the brain. It's below the cortex  
8 itself. It's in an area that involves a lot of  
9 pathways of communication. Usually, those types of  
10 strokes very often result in death. When they don't  
11 result in death, they often result in really fairly  
12 profound deficits.

13          Q.       Did you note in your assessment where UMC  
14 medical records showed that Mr. Mulder was making no  
15 attempt to gesture and no attempt to communicate and  
16 thereafter was having great difficulty in his  
17 communication with the doctors?

18          A.       Correct. This is really classic after a  
19 stroke. He was probably almost in an uncommunicable  
20 state at one point. Then eventually as he was able to  
21 be aware of what was going on around him, he probably  
22 was unable to even speak at the beginning because of  
23 the aphasia.

24          Q.       When you say aphasia, what do you mean?

25          A.       The routes that were damaged in the

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1 stroke damage your ability to find words kind of in  
2 your mental dictionary and also damage your ability to  
3 understand language that you hear. So he was kind of  
4 damaged on both ends of the spectrum there.

5 Aphasias can be receptive, which  
6 means you don't understand what is being said, or  
7 expressive, meaning you don't know how to explain what  
8 you are thinking.

9 Q. Result of that, would speech  
10 rehabilitation in a normal stroke victim, what I mean  
11 by that is someone who is not incarcerated, would that  
12 be something that would assist them to recover?

13 A. It will help quite a bit, but again, you  
14 are not going to take someone who has aphasia and just  
15 by virtue of speech and language pathology bring him  
16 back anywhere near normal. But you can often improve  
17 their communication skills to the point that they are  
18 able to convey basic needs; they are able to have  
19 somewhat of a conversation depending on how bad the  
20 aphasia is.

21 I have seen some patients with  
22 thalamic strokes like this who actually have really no  
23 capacity to understand at all. Their ability to  
24 process language is gone. Even teaching them basic  
25 symbols or hand gestures for what they need is

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1 sometimes difficult. It kind of runs the spectrum.

2 Q. Before we get any further into  
3 Mr. Mulder, what you found with the assessment, I want  
4 to ask was there a time that you noted that he had  
5 fallen in the hospital on a couple of occasions?

6 A. Correct. I know you are looking on a  
7 paper. What page are you looking on?

8 THE COURT: You can do that on page  
9 eight?

10 MR. ORAM: Yes. Excuse me, your Honor.  
11 It is on page five, inmate tried to convey that he had  
12 fallen.

13 THE COURT: Okay. Thank you.

14 BY MR. ORAM:

15 Q. You also noted that previous medical  
16 records showed that he was of average intelligence  
17 prior to the stroke on page six?

18 A. Yeah. We don't really have a good amount  
19 of testing. Most of it is just based on some partial  
20 stuff that was done, some partial testing that was  
21 done, and some basic impressions I think that some of  
22 the psychological service people kind of came up with  
23 when they interviewed him.

24 Q. There was something, Doctor, that we had  
25 previously talked about a situation where something had

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1       come out of Mr. Mulder's body?

2               A.       Yeah.  At one point, when you are coming  
3       out of a stroke, you are often very confused.  Your  
4       awareness of how little one side of your body works is  
5       often not there, so what you often see with stroke  
6       patients is they think -- they remember walking their  
7       control life; they get up out of bed to go use the  
8       bathroom, and then it hits them again, that that whole  
9       one side doesn't work.

10                       What you find with stroke patients  
11       is they don't remember from one moment to the next  
12       especially early on.  20 minutes later they will  
13       completely forget that they had fallen.  They will try  
14       to get up again, and they will fall again, and they are  
15       reminded again that that side doesn't work.

16                       He had fallen at one point and  
17       actually pulled his catheter out, which was probably an  
18       incredibly painful experience because at the end of a  
19       catheter in your penis, they put a little balloon that  
20       kind of blows up to keep it in there.  He apparently  
21       fell and pulled that completely out and was helped back  
22       up into his bed.

23               Q.       From reviewing his medical records from  
24       University Medical Center, were you able to determine,  
25       in your opinion, the severity of the stroke or the lack

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1       thereof?

2               A.       This was a pretty severe stroke, just  
3       reading through the CT scans, the result of the amount  
4       of blood where the stroke was located. In almost every  
5       case when you see a stroke on that side, you are  
6       almost -- things you are definitely going to be looking  
7       for is a marked hemiparesis or weakness on the opposite  
8       side of the body, which you see with Mr. Mulder.  
9       Marked aphasia, significant memory problems, a variety  
10      of other cognitive problems because that particular  
11      area is sort of a way station for communication routes  
12      that go from the back of the brain to the front of the  
13      brain from the motorstrip on the part of the brain to  
14      your spinal cord to where you are able to move that  
15      particular part of your body. It's a really very  
16      important area.

17             Q.       Lastly, with regard to UMC records,  
18      before you assessed Mr. Mulder, you have testified that  
19      you reviewed the medical records from UMC. Why is that  
20      important? In other words, why didn't you just go  
21      interview Mr. Mulder and not charge the State for  
22      reviewing medical records? Why is it important to do  
23      that?

24             A.       Well, you know, if somebody were to tell  
25      me that he had a stroke, conceivably they could be

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1 faking on one hand. On the other hand, you also -- if  
2 you have seen a lot of stroke patients and you have  
3 read a lot of CT scan reports and stuff like that and  
4 you have read a lot of rehab notes, you begin to know  
5 what you are seeing, what you are going to be expecting  
6 when you see that level of severity.

7           If it was a real mild stroke and  
8 only a small amount of blood, yet I see a guy that is  
9 completely incapacitated, I'm going to wonder why there  
10 is a difference. Where this particular guy I expected  
11 a really severe stroke initially, I expected some  
12 recovery. I expected a marked one-sided hemiparesis,  
13 and I expected a certain amount of other deficits, that  
14 kind of puts me in the correct frame of mind, what am I  
15 going to be looking at and assessing when I see that  
16 patient.

17           Q.       You went up and you visited  
18 Michael Mulder in Ely?

19           A.       Correct.

20           Q.       How much hours did you spend with him?

21           A.       It was Carson City.

22           THE COURT: I thought he said  
23 Carson City.

24           THE WITNESS: I'm sorry. I'm not  
25 actually sure. I actually thinned out my file, and I

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1 don't have the amount of hours I was there, but I had  
2 gotten there pretty early in the morning and left  
3 fairly late in the afternoon.

4 BY MR. ORAM:

5 Q. Did you conduct any tests upon  
6 Mr. Mulder?

7 A. Yes. Actually, quite a few. If you look  
8 actually on my report, if you look at page ten, I have  
9 a list of tests administered, but it's incorrect.  
10 Apparently when I dictated that, I was probably going  
11 to go back and move that around and add some that I had  
12 given and take some away. I apparently never did that.  
13 If you look at the results of the test, when I go  
14 through the report, it will list each of the tests that  
15 I gave. But in any case, I administered as full a  
16 battery as I could.

17 We are dealing with an individual  
18 whose expressive language is very poor, and right off  
19 the bat, that knocks out a lot of the tests that I  
20 would normally have given because he can't properly  
21 express himself, and what you are going to end up with  
22 is a test that looks look, it's recalling impaired, but  
23 he may have done better at it had he been able to  
24 express himself.

25 He also had trouble understanding

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1 things. Some tests that I tried to explain to him and  
2 he just couldn't understand what the test demands were,  
3 so we couldn't give it.

4 Q. Was he cooperative with you?

5 A. He was very cooperative.

6 Q. Did you perform an I.Q. test on him?

7 A. Yes. Before I get into that, I do want  
8 to point out the issue of assessing effort. I think  
9 that is probably important before I even begin to  
10 interpret things like I.Q. and all these other things.

11 The first question I ask especially  
12 in a legal case, is is this guy messing with me. Is he  
13 handing me a line of bologna basically, and he doesn't  
14 really have impairments. With this particular guy,  
15 what I did was I administered three different measures  
16 that look very difficult, but we know with even severe  
17 brain injury patients they intend to do within a  
18 certain range. Yet people who think that they are  
19 trying to pretend that they have a brain impairment  
20 will do very, very poorly on these tests because it  
21 looks hard and you expect yourself to do very poorly on  
22 it.

23 Example of one of them is where I  
24 showed him 50 faces, and I told him you need to  
25 remember as many of those 50 face as he could. On the

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1 surface this appears to be very, very difficulty task.  
2 Afterward, I show him pairs of faces, and he has to  
3 pick the faces out of there that I showed him of the  
4 50. Most people who look at that task doubt that they  
5 are going to be able to remember more than 15 or 20  
6 faces because it just seems like that's a hard test.

7 We know from research that, number  
8 one, your chances, just by sheer statistics, your  
9 chances are you are going to get 50 percent of them.  
10 You are going to get 25 of them because you only have a  
11 choice of two to pick from. No matter what you pick,  
12 you are going to get about half, even if you never seen  
13 them before. We know severe brain injury patients  
14 typically get somewhere around 70 percent and above,  
15 60, 70 percent above. When you see people who are  
16 faking, they often get below 50 percent.

17 All the tests I gave him related to  
18 that. It gets complicated, but that is kind of in a  
19 nutshell what it looks like. On all the tests I gave  
20 him, he actually did very, very well on those measures.

21 Q. On that particular test, the face test,  
22 how did Mr. Mulder go?

23 A. He got 90 percent of the faces.

24 Q. What were you able to determine from the  
25 fact that he was able to get nine out of ten faces he



1 had seen correct? Were you -- what were you able to  
2 determine?

3 A. That and the other measures I gave him in  
4 that regard tell me that he is probably putting out  
5 pretty decent effort because if he wanted to show me  
6 some memory problems, he probably would have done much  
7 poorer on those measures. That to the --

8 THE COURT: Let me ask you this: You  
9 show him 50 faces and you say please try remember as  
10 many of these 50 faces as you can?

11 THE WITNESS: Correct.

12 THE COURT: Then you just show him the 50  
13 faces again singly?

14 THE WITNESS: No. Actually, you show him  
15 pairs of faces. He sees two faces; one of them, one of  
16 the faces he has seen before; one of them is a new  
17 face.

18 THE COURT: It was one that wasn't in the  
19 50?

20 THE WITNESS: Right.

21 THE COURT: That's what I thought. I  
22 wanted to make sure.

23 THE WITNESS: Every time he sees one of  
24 the panels with two faces, he has got a 50-50 shot.  
25 Most people don't figure that out when they are taking

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1 it.

2 BY MR. ORAM:

3 Q. On page ten of your report you indicate  
4 that you had done testing to see if he was essentially,  
5 you don't use the word, but I think the word is  
6 malingering?

7 A. Correct.

8 Q. Did you make an assessment based upon  
9 that test, face test, and the other ones that you did  
10 as to whether you believe Mr. Mulder was malingering?

11 A. Based on those test findings, which he  
12 did great on, based on my observations of him working  
13 with me, and based on the fact that all of the deficits  
14 and severity of all the deficits are really in line  
15 with left thalamic basal ganglia strokes. I don't know  
16 that he would have ever known, but my feeling was that  
17 he put out a good effort on the measure.

18 Q. With regard to the I.Q. test, what was  
19 his overall score?

20 A. His overall score was 69. We placed him  
21 at the mentally retarded range. If you look closely at  
22 the report, there are a lot of qualifications related  
23 to that because to give I.Q. tests to stroke patients,  
24 there are a lot of complications in terms of validity  
25 related to that.

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1 THE COURT: What does that mean? Does  
2 that mean that his test, I.Q. test isn't really valid?

3 THE WITNESS: I.Q. test presumes that the  
4 individual did not have anything that caused brain  
5 damage after they are born basically. When you  
6 interpret an I.Q. test, the assumption is that nothing  
7 else happened in their life. This is where they would  
8 be functioning at. It becomes very difficult then to  
9 compare somebody with a 69 I.Q. after an injury to  
10 somebody who has the I.Q. and they are the same age and  
11 they have always had a 69 I.Q.

12 But it does give you a basic idea of  
13 his ability to kind of understand his world. It's much  
14 lower than what it probably ever was. It's just not  
15 there like it was. But don't make the error of  
16 thinking that he is going to be the same as someone who  
17 gets a 69 who has always had a 69 because there is a  
18 major difference is in the two.

19 BY MR. ORAM:

20 Q. Because of the traumatic brain injury  
21 suffered at a later date?

22 A. Exactly. Because he had the capacity at  
23 one time to understand things, to think deeply. Even  
24 though we see a 69 here, there are probably preserved  
25 different areas that are preserved still that are going

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1 to be really hard to tap into that somebody who always  
2 had a 69 may have never had.

3 Q. Another doctor has testified last  
4 Thursday and this doctor performed an I.Q. test. I can  
5 tell you that the I.Q. test that she performed on  
6 Mr. Mulder came up with the identical result of 69.  
7 Does that surprise you, Doctor, that you both performed  
8 I.Q. tests on him and you both came up and the exact  
9 same number?

10 A. It surprises me she got the exact same  
11 number, but the fact that she got within approximately  
12 eight or ten points, that would be what I would expect.  
13 That would suggest that he probably performed at the  
14 same level of efforts on both of them.

15 Q. With an I.Q. test, is memory -- do you  
16 look for memory as part of an I.Q. test? In other  
17 words, does it get a score?

18 A. Something called working memory does, but  
19 it's as a neuropsychologist, I can't tell truthfully  
20 that really has lot to do with memory. It has more to  
21 do with intentional buffering or your ability to hold  
22 information briefly in your mind, which is a little bit  
23 different than memory per se. He did very poorly on  
24 that. He was in the 0.5 percentile.

25 Q. Does that mean if you had 200 people, he

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1 would be in the bottom count?

2 A. Correct. Correct. Those particular  
3 tasks are things like if I were to give you four  
4 numbers, you have to tell them back to me in reverse  
5 order. Those kinds of things. If I were to give you  
6 five numbers, you have to say them back in the same  
7 order. Those kinds of memory tasks when you are  
8 holding information in your mind, working out math in  
9 your mind for example.

10 Q. Did you note with Mr. Mulder you had,  
11 whether he claimed to have memory loss as a result of  
12 the stroke?

13 A. Yeah. In my interview with him, he  
14 explains basically that he has spots throughout his  
15 childhood and does have things like that he remembers,  
16 but also lots of gaps. He, for example, told me he  
17 didn't remember that his brother had died. Completely  
18 forgot that he died and had to be told after the stroke  
19 that that happened. He forgets his family faces, what  
20 they look like.

21 I have some research. I have a  
22 couple abstracts here, and there is one in particular  
23 that is really very, very similar to him. I have an  
24 individual, same stroke area, and what you find in  
25 these patients, and this is common, is a loss of

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1 audiobiographical memory over the past decade or two.  
2 That means that you lose big spots in your life. I  
3 have had patients who after the stroke could not  
4 remember their marriage and were broken, emotionally  
5 broken up because they couldn't remember marrying their  
6 wife. They couldn't remember their kids being born  
7 anymore. They couldn't remember major things in their  
8 life.

9                   When they give tests on this issue,  
10 the tests to that person are autobiography, and they  
11 find that there are major, major problems with their  
12 ability to remember. You also find that when you look  
13 at famous events, there is a different test out there  
14 to look at famous events, like the Kennedy  
15 assassination, the Berlin wall falling, all those basic  
16 kinds of things, you know. These patients often have  
17 very poor memory of those events, and they have really  
18 impaired memory of even putting those in the correct  
19 time sequence.

20                   It's plausible that there are gaps  
21 in his memory. It's very consistent with a thalamic  
22 stroke.

23           Q.       In your experience, Doctor, it's fair to  
24 say that some stroke victims suffer from memory loss,  
25 but they can remember some things from, let's say,

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1 their childhood and forget others?

2 A. Correct. You will have gaps. Some  
3 things may seem very vivid. Some things may be  
4 completely gone.

5 Q. In your report on page 17 in the middle,  
6 you state most researchers agree that severe damage to  
7 expressive and receptive language will in every case  
8 cause significant memory disruption. What does that  
9 mean when you said that?

10 A. This has a lot to do with cognit or  
11 processing in general. Memory in the human system is  
12 extremely reliant on language processing. If we didn't  
13 have language processing, our memory for events would  
14 have to be pushed into just your visual, what you could  
15 remember seeing and smelling and those other senses.  
16 So we would be kind of rendered more like the memory  
17 you see in a chimpanzee or orangutan or something like  
18 that, because if you don't have the language, you don't  
19 have the hooks to create memory.

20 Memory, I mean part of the reason we  
21 are so good as human beings in terms of creating things  
22 and keeping long relationships and civilization and  
23 stuff is because we are able to form memory through all  
24 the hooks that we place on it through language.  
25 Example, if I say the word dog, most of us in our brain

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1 we start activating different areas, the visual image  
2 of a dog, names of dogs that we have had,  
3 characteristics that dogs have, four legs, tail, you  
4 know, and stuff like that, and those hooks are, lots of  
5 those hooks are created with verbal information.  
6 Something like a dog is very visual, so a lot of it is  
7 visual.

8 But when you get into remembering  
9 conversations, remembering long passages, remembering  
10 half an hour talk or something like that, you have to  
11 rely on your verbal processing to make those hooks for  
12 memory. Once you start losing that processing you lose  
13 your ability to create those hooks.

14 Q. I want to go back to speech for a second.  
15 Did you note in his UMC records that the nurses had  
16 written a report that when he wanted or was referring  
17 to a carrot, he referred to it as a horrah,  
18 h-o-r-r-a-h?

19 A. Correct.

20 Q. Is that consistent with someone who  
21 suffered a stroke, that they are unable to communicate  
22 certain words?

23 A. Exactly. Those are called paraphasia.  
24 There is a variety of different kinds of paraphasia.  
25 Thesnonemic (phonetic) paraphasia where the words that

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1 they give you sound like the words you're supposed to  
2 come up with. Like instead of saying pencil, he says  
3 trencil. Kind of sounds like pencil, but not quite.  
4 Semantic paraphasia, where he sees a dog and he says  
5 camen. That was one example I used in my report there.

6 Then there are things called  
7 neologisms, basically making up words that don't have  
8 any connection. Like a horrah or something like that,  
9 is what you see in severe aphasia patients where the  
10 words or whatever they come up with is way off.  
11 Doesn't even sound like something similar.

12 Q. Let me ask you, Doctor, while we were in  
13 court last Thursday, one of the doctors was testifying,  
14 and Mr. Mulder sat right here and called him a liar.

15 THE COURT: No. I think he shouted that  
16 that's not true or that's a lie. It was more -- it was  
17 a sentence.

18 MR. ORAM: He said a whole sentence just  
19 like the Judge told you.

20 THE WITNESS: Uh-huh.

21 MR. ORAM: Is that consistent? In other  
22 words --

23 THE COURT: In fact, I think it was in  
24 response to the Doctor said he seems to do fine in the  
25 prison. He seems to do fine and gets along well in the

1 prison system. He responded with, that's a lie or  
2 that's not true.

3 THE WITNESS: He will come up with a  
4 sentence. In fact, him and I talked for a long time.  
5 He comes up with sentences, really simple sentences.  
6 He can often complete them right away. Emotional  
7 things, he may come out with whole sentences when he  
8 becomes more emotional. But most sentences lack key  
9 important words. I have one example that I think I  
10 quoted in the report where he says --

11 THE COURT: What page?

12 THE WITNESS: Page seven. He said, I  
13 asked him about him getting depressed. He went on for  
14 a long time trying to tell me that he doesn't get  
15 depressed, and he can't figure out why he doesn't get  
16 depressed like he used to. This is what he said. He  
17 said great, great mood, waiting for shitty day.  
18 Waiting for shitty day. Not come. Basically he  
19 couldn't come up with the words to fill it in right  
20 because he communicated fairly well I was trying to  
21 say. He keeps waiting for a shitty day, but it doesn't  
22 seem to come.

23 Again, we can talk about some of the  
24 reasons why that is. It has a lot to do with the  
25 connection to the frontal lobe probably made him a

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1 little bit disinhibited, a little bit more euphoric on  
2 some levels. That doesn't mean he is not going to get  
3 depressed, but it means that his steady state may be  
4 much diferent than what his steady state was before in  
5 terms of emotional functioning.

6 BY MR. ORAM:

7 Q. With regard to communication with him,  
8 you were able to converse with him about certain  
9 points?

10 A. Certain basic things, yes. But when I  
11 began to try to explain some of the more difficult  
12 tasks I wanted him to do, when I get into longer  
13 passages, he starts to really have difficulty. Again,  
14 in the language section, I actually gave him some  
15 standardized measures of his ability to basically  
16 understand basic commands, which is kind of a  
17 cornerstone to figure out where he is going to  
18 understand most of what we are saying here today.

19 Q. What was your conclusion?

20 A. My conclusion is that these are severely  
21 impaired. They really are. One of the measures I gave  
22 him, he was basically looking at a series of tokens in  
23 front of him. I was asking him things like -- in fact,  
24 I will give you some of the exact quotes. Example,  
25 touch the green circle and the red square.

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1 THE COURT: What page?

2 THE WITNESS: It's not in my report.  
3 It's my data I'm looking at. If you look on page 15 is  
4 where I discussed the language processing --

5 THE COURT: Case 815?

6 THE WITNESS: On page 15. Sorry. One of  
7 them was touch the little, green circle and the big,  
8 red square. There are just too many words in there for  
9 him to be able to follow those correctly. But if you  
10 go to very basic things, like touch the green circle  
11 and the black square, some of the time he can do it.  
12 Some of the time he can't.

13 Any time you try to add more complex  
14 elements in speech is where he really begins to fall  
15 off. I will give you an example of more complex  
16 elements. Something like instead of the green square,  
17 touch the black square. That completely threw him off.  
18 Unless you hadn't touched the white circle, touch the  
19 blue square. That processing, he just couldn't do it.  
20 He couldn't do it.

21 Basic, did you ever touch the black  
22 circle, come sit down, did you take a shower today, how  
23 was lunch, he can do that stuff. He can communicate  
24 those things fairly well. That's why in day-to-day  
25 life he can do well. He couldn't live on his own, but

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1 day-to-day life, if he is around the yard and stuff  
2 like that, he probably has conversations with people.  
3 Probably understands some of what is being said, but he  
4 understands a lot less than what you think he does.

5 In a lot of cases when I was working  
6 with him, he would tell me he understood it. Then I  
7 would ask him to show me, and he couldn't do it. I  
8 think he thought he understood it, but he didn't  
9 understand it.

10 BY MR. ORAM:

11 Q. On that same page, page 15, in the last  
12 paragraph you say he would also likely demonstrate  
13 inadequate but simplistic understanding of legal  
14 questions, such as do you know why you are here in  
15 court today?

16 A. Yeah.

17 Q. Would it be your conclusion that if we  
18 were to ask him today why he is here, he may  
19 understand?

20 A. I think he probably would. It might take  
21 a while for you to understand what he is saying, but I  
22 think he would understand.

23 Q. Was there a problem with Mr. Mulder that  
24 he would use foul language?

25 A. Yeah. You see that with stroke patients.

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1 One of the things that is preserved, we don't know why  
2 it is, but cuss words and highly emotional words, like  
3 no, even like you are a liar could be one of them, I  
4 don't know. But things that are connected through the  
5 limbic system, which is kind of our emotional seat in  
6 your brain. There seems to be no direct route, so  
7 expressive -- when you put somebody under a lot of  
8 pressure or you are hurting them, they may come out  
9 with full sentences, and you see that with stroke  
10 patients a lot.

11 When I was working in the stroke  
12 unit, I remember vividly multiple patients who that was  
13 all they could say is cuss words. They are so happy to  
14 be able to say a word. Sometimes you can ask them to  
15 do something, and they would swear because they were  
16 trying to come up with a different word, but that's the  
17 only words that would come out, is swearing words  
18 because it's the only words they had access to,  
19 basically cussing.

20 Q. You described on page 18 of your report  
21 that one might consider Mr. Mulder an individual who  
22 had been given a modified frontal lobotomy by nature or  
23 perhaps accidentally self-inflicted from his use of  
24 methamphetamine?

25 A. Correct.

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1 Q. What does that mean?

2 A. Basically the thalamus, the basal ganglia,  
3 that whole inner structure inside the brain, and I have  
4 got some pictures, I don't know if this is going to  
5 help a whole lot, but I can kind of show it to, your  
6 Honor. This is kind of a cross section of the brain  
7 right here. This is, right here is the little bit  
8 above where his stroke was. His stroke was back here.  
9 I didn't have access to his. His stroke was a little  
10 bit back here, but that's kind of what a stroke would  
11 look like. It's the interior area of the brain.

12 THE COURT: You didn't see the CAT scans?

13 THE WITNESS: No, I didn't see them. I  
14 didn't see the films. All I saw were the reports. I  
15 got interpretations. I'm not a radiologist, so it  
16 wouldn't have necessarily helped me a lot other than  
17 looking at them.

18 But in any case, it's an internal  
19 structure. What happens under those little folds in  
20 the brain is basically a lot of wiring. Those internal  
21 structures are bundles of communication routes that go  
22 from one area of the brain to the other.

23 The thalamus, in the area that was  
24 injured in his, is kind of a communication route to  
25 consciousness for him, for all of us. There are a lot

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1 of connections from that area to the frontal lobe.  
2 When you damage that area, you damage some of the  
3 aspects of the functioning of the frontal lobe, not all  
4 of them, but some of them. What you sometimes see with  
5 those patients is a change in their ability to problem  
6 solve, a change in their ability to regulate their  
7 emotions sometimes.

8 Sometimes you see people completely disinhibited.  
9 Sometimes where you see patients who become sexually  
10 disinhibited and they couldn't control their hands.  
11 Then whenever they get an impulse, they go forward into  
12 the impulse. He is not anywhere near that.

13 But there is a little bit of  
14 euphoria sometimes with him. I think compared, how he  
15 was because he sounds like a bit of a better person  
16 than before. I don't think he was a really happy guy  
17 before. I think this is a surprise for him because he  
18 is feeling like he is happier, more than he ever was.  
19 That's because of a frontal lobe connection kind of  
20 syndrome.

21 Q. I think we are getting close to the end  
22 here, Doctor. On page 21, you say in your experience  
23 with stroke patients I have observed many who recall  
24 only spotty segments of his life. He seemed  
25 inappropriately content with the notion that he

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1 murdered someone, but this is likely future of organ  
2 break down brain damage. What did you mean by the fact  
3 that he seemed inappropriately content with the notion  
4 that he murdered someone?

5 A. I spoke with him for quite a while about  
6 trying to get him to understand why are you here; why  
7 are you in prison? What is this all about? He  
8 understands he is here because of murder. He basically  
9 told me he doesn't really even remember being in Nevada  
10 before his stroke. Remembers Ely kind of, but he  
11 doesn't really remember that whole segment when he came  
12 to Nevada. I don't think he was here for a long time.  
13 I think he probably wasn't here for a long time when  
14 the crime occurred, but he doesn't remember that whole  
15 aspect.

16 But he basically communicated to me,  
17 this is my recollection of it, is he was involved in a  
18 lot of things that he shouldn't have been involved in  
19 in his life. He was involved in criminal activities,  
20 and the notion that he might have murdered someone may  
21 be true. He doesn't know. That's what he says.  
22 I don't think there is any way for us to know whether  
23 he remembers all that or not.

24 But I will say if you look at  
25 research and from a limbic lesion and basal ganglia

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1 lesions, it's one of the few areas of the brain where  
2 you can actually knock out memory for large segments of  
3 your life and important segments of your life.

4 Q. Last week a doctor testified words to the  
5 effect that it would not or seem impossible to have  
6 memory of certain things when you were young and not to  
7 have memory, completely lost memory of other things.  
8 Does that seem true to you?

9 A. Was it somebody that knows much about  
10 memory? It's completely untrue. We know from research  
11 that there is actually syndromes where you lose major  
12 spots of memory for autobiographical information. I  
13 have got some abstracts right here that I would be  
14 happy to leave here, but there are several instances in  
15 here.

16 There is one that I spoke about  
17 before where autobiographical memory, much of it was  
18 gone. I have seen many patients. Working on the  
19 stroke unit there are many patients who lost major  
20 parts of their lives. Couldn't remember going to  
21 college. They know they got their degree, but they  
22 have no memory anymore of it yet they remember their  
23 kids being born. They remember whatever else. It's  
24 spots. That is very plausible.

25 Q. You have seen that with people completely

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1 disassociated with the criminal justice system?

2 A. Oh, many, many, many. That's all I work  
3 with, are neurological patients patients who have brain  
4 injuries and stuff like this. That's most of what I  
5 work with.

6 Q. On page 21 you address the question, and  
7 I believe you covered it, can Mr. Mulder effectively  
8 assist counsel. I believe your conclusion was no. If  
9 you could summarize for the record why you came to the  
10 collusion that Mr. Mulder could not effectively assist  
11 counsel?

12 A. Sure

13 THE COURT: Before you address that, I  
14 just want to make sure that this doctor and this  
15 witness understand the setting because, obviously,  
16 whether he could assist his counsel at the time of  
17 trial, in my opinion, is different than whether he can  
18 assist him in post-conviction proceedings. Because  
19 generally in post-conviction proceedings it's all based  
20 upon the record.

21 MR. ORAM: Yes. Well, your Honor, I will  
22 lay a better foundation.

23 THE COURT: Okay. Thank you.

24 BY MR. ORAM:

25 Q. Doctor, before we get into whether he can

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1 assist counsel in a post-conviction proceeding, it is,  
2 and I think State would have no objection, that I would  
3 review a criminal record; I would review a whole  
4 transcript of a trial. And then one of the things, one  
5 of the major things you would be looking for is what is  
6 called ineffective assistance of counsel would be  
7 actually saying that his trial attorney or the  
8 appellate attorney who does the appeal had made errors.  
9 One of the ways that I do that is I can go to the  
10 client and say, where do you think your attorney has  
11 made a mistake. Sometimes they say, I gave him five  
12 witnesses. They were alibi witnesses, and they never  
13 went out and talked to them. Tha's a for instance. Or  
14 they can make all sorts of allegations, my attorney  
15 never came to visit me in jail and didn't know what the  
16 case was about. Things like that.

17 I want to ask you do you think that  
18 Mr. Mulder would be helpful in assisting me in pointing  
19 out areas of his trial or his appeal where he thought  
20 errors had been made?

21 A. The simple answer is probably not. I  
22 think that he is going to have a very hard time  
23 compared to anyone else, actually remembering a lot in  
24 terms of what had gone on during the trial. I don't  
25 know if remembers it at all. If you take him through

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1 each bit, some of it may come back. I don't know. I  
2 doubt it though. Secondly --

3 THE COURT: Let me ask you this: Is that  
4 ever going to change?

5 THE WITNESS: No.

6 THE COURT: Is he going to be like this  
7 permanently?

8 THE WITNESS: He will be like this  
9 permanently. All of the fixing that his brain was  
10 going to do is pretty much done right now. I don't  
11 think he is going to be brought to competency at any  
12 point, even with therapy, so basically, no, I don't  
13 think he can properly assist.

14 BY MR. ORAM:

15 Q. Would he be good at recalling important  
16 details from the trial or the appeal that I could  
17 discuss with him? In other words, hypothetically,  
18 Doctor, let's say this: It didn't happen in this case,  
19 but let's say Mr. Mulder told Judge Cherry and his  
20 trial attorneys that he had an alibi. Again, that did  
21 not happen here. If he told them five witnesses, would  
22 it be plausible that he would remember that this had  
23 occurred and that they had failed to go out and  
24 interview them?

25 A. If what he is saying is true and he

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1 doesn't remember that portion of his life, then no. In  
2 addition, he wouldn't even understand the hypothetical  
3 you just gave me fully. Do you know what I mean? You  
4 just gave me a hypothetical right now. If you are  
5 going to those kinds of hypotheticals or anything that  
6 is a long sentence like that, he is not even going  
7 to -- I'm not sure he is going to definitely understand  
8 that. I think he is going to have trouble with that.

9 Q. If he did know, he would have difficulty  
10 communicating?

11 A. If he did remember it very well and  
12 remembered the incident or remembered enough of the  
13 trial, I don't know that he would understand the  
14 material that you are reviewing with him. If you  
15 understand what I mean. If you are saying on this date  
16 your attorney said this and that, and was that what you  
17 wanted him to do or did he do something wrong within  
18 that. I don't know that he is going to physically  
19 understand that question.

20 Q. Is it your opinion, Doctor, that on post  
21 conviction for what I have described needs to be done,  
22 that Mr. Mulder is competent to assist me?

23 A. I believe he is not competent.

24 THE COURT: What? That he never will be?

25 THE WITNESS: He never will be brought to

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1 competency, no. I think he understands lots of basic  
2 sentences. He can get along fairly well like that, but  
3 once you get to something that is this important for  
4 him, I don't think he can handle it. I don't think he  
5 can cognitively in language processing wise handle it.

6 Q. Doctor, one of the doctors said that they  
7 had reviewed your report. They referred to you as a  
8 typical defense expert. Did you in any way draft this  
9 report in a way to help Mr. Mulder? That wasn't true?

10 A. No. I work as hard as I can to be as  
11 honest and straight shooting as I can with this. This  
12 is based on, many, many patients that I work with.  
13 This is based on what my understanding is, what he is  
14 in terms of what he is going to need to understand.  
15 That is my honest opinion. There are many cases. When  
16 I get called in by defense, they don't use my report.  
17 I get called in to cases where I go and tell the people  
18 the guy failed all the malingering things. I think he  
19 is about something.

20 Q. You have done that before in defense  
21 cases?

22 A. In defense cases, in personal injury  
23 cases, I have lots of attorneys that won't use me  
24 anymore because they are not happy because I find the  
25 guy faking. They thought they saw a lot of money in

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1 their eye in the lawsuit, but that's not what I'm here  
2 for. I'm here to try get an honest opinion as how I  
3 see that particular patient.

4 Q. Is it your opinion that Mr. Mulder is not  
5 malingering in this case?

6 A. No. It's my opinion that he has worked  
7 hard on the measures. He gave it his best efforts.  
8 What you see in terms of his communication skills is  
9 really where it's at.

10 Q. Last question on direct examination.  
11 Doctor, did you take an SAT to go to school?

12 A. I think so.

13 Q. If I asked you to take an SAT and to get  
14 a score in the bottom five percent, not the lowest, but  
15 I want you to be right at the bottom five percent, does  
16 that make sense?

17 A. Correct.

18 Q. Let's say you had -- if SAT was from one  
19 to 100, I want you to be number five, that's what I  
20 want your score to be. You tried to fake that to get  
21 the number five, then took the same SAT or a similar  
22 SAT months later and got the identical score or you  
23 were trying to get the identical score, do you think  
24 you could do that?

25 A. No, I don't think so.

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1 MR. ORAM: Nothing further.

2 THE COURT: Mr. Owens?

3 MR. OWENS: Thank you.

4

5 CROSS-EXAMINATION

6 BY MR. OWENS:

7 Q. Dr. Kinsora, your examination of  
8 Mr. Mulder was on May second of '03. That's about two  
9 years ago. Does that pose any kind of problem in terms  
10 of perhaps he has gotten better in the last two years  
11 or is that possible in his condition?

12 A. I think over a period of two years there  
13 probably would be some very mild improvement. I'm not  
14 really sure, but we are already a couple years, two  
15 years, couple months after stroke. If you look at the  
16 curve of recovery for strokes is a very sharp curve.  
17 Much sharper than what you see with traumatic brain  
18 injury. I would anticipate that by the one-year mark  
19 you are not going to see much change in functioning  
20 after that. If you look at stroke research, definitely  
21 by 18 months there is really wherever the person is  
22 functioning is usually where they remain.

23 Q. You had evaluated the defendant  
24 approximately two years after his stroke; is that  
25 right?

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1 A. Correct.

2 Q. Now it's been almost about four years  
3 since he had his stroke; is that right?

4 A. Yes.

5 MR. OWENS: Do we have the medical  
6 records that were introduced at the last hearing or the  
7 prison records?

8 THE COURT: You mean last Thursday?

9 MR. OWENS: Yes, last Thursday.

10 THE COURT: Certainly.

11 BY MR. OWENS:

12 Q. Directing you to page seven on your  
13 report, you talk about some medical kites.

14 THE COURT: You are going to hand him  
15 what has been previously marked and admitted into  
16 evidence as?

17 MR. OWENS: State's Exhibit One. If I  
18 can find the medical kites in here.

19 BY MR. OWENS:

20 Q. You did have access to the prison records  
21 in your evaluation; is that right?

22 A. Correct.

23 Q. Showing you that portion of State's  
24 Exhibit One, I have located where the kites begin over  
25 here under the tab marked kites. In your report you

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1           apparently looked at these kites and you noted that  
2           they had obviously been written by someone other than  
3           the defendant; is that right?

4           A.       I believe so, yes.

5           Q.       What packet in there did you see that  
6           indicated to you that they had been written by someone  
7           else?

8           A.       Well, it looks like he signed this, but I  
9           don't know whether someone else wrote this and he  
10          copied it, one of the other inmates. It's just hard to  
11          tell where that came from.

12          THE COURT: Why do you think that  
13          somebody else wrote it?

14          THE WITNESS: When I look at his  
15          signature right here and I look at these, these are  
16          much better written letters than his signature  
17          certainly. But again, I have no idea whether he wrote  
18          it or not.

19          BY MR. OWENS:

20          Q.       There is obviously some misspellings,  
21          like here's the word secretary. According to your  
22          secretary at your office, it's misspelled, right?

23          A.       Uh-huh.

24          Q.       Is that something you might expect with  
25          his language problems, right?

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1           A.       No. I would expect to see much worse  
2 than that. This could have been another inmate. There  
3 are a lot of people that can't spell in the prison  
4 system. If you look at his writing up here and the  
5 size of his letters and the way he is writing it right  
6 there, this does not look like it's the same. It just  
7 doesn't look the same to me. It doesn't look like it's  
8 written by him.

9           Q.       You are not a handwriting expert, right?

10          A.       I'm not a handwriting expert.

11          Q.       The signature looks like it might be his?

12          A.       The signature looks like it might be his.

13          Q.       He is able to hold a pen and sign his  
14 name?

15          A.       Correct.

16          Q.       Whether it's him actually writing out the  
17 complaint or someone else doing it on his behalf, that  
18 would indicate he is able to communicate some medical  
19 needs to someone who fills this out and explain his  
20 needs to the prison staff. Does that sound right?

21          A.       He probably complained his need that he  
22 needed his glasses fit. Something like that.

23          Q.       I will take that back.

24          A.       But I don't by that it's his handwriting.

25          Q.       The kites that you looked at, he was able

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1 to express a need for large print; the need for  
2 eyeglasses, blood sugar level check, toothache, his  
3 second mattress to be renewed. Whether or not he wrote  
4 them, these all appear to be complaints that he  
5 expressed to someone and then they appear in written  
6 form trying to get what he needed?

7 A. Correct.

8 Q. He is able to communicate his needs?

9 A. His basic needs, yeah. When he is  
10 uncomfortable and he needs something, I think he does  
11 fine with that.

12 Q. In fact, on page 16 of your report you  
13 indicated that he is able to, looking at the top on the  
14 right side, that he is able to write very simple  
15 sentences with a high error, right? He was able to  
16 write?

17 A. Yes.

18 Q. In sentence form?

19 A. Yes.

20 Q. Going back to pages seven and eight of  
21 your report. There is a section called subjective  
22 complaints. It's about a page and a half of single  
23 spaced bulleted items all about the defendant's  
24 background. That is all information that you learned  
25 from Mr. Mulder during your interview with him; is that

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1 right?

2 A. Correct.

3 Q. You think you were with him from early  
4 morning until late evening?

5 A. I don't remember the exact time. I  
6 probably got there --

7 THE COURT: Someplace in his report it  
8 said he was there for five hours.

9 MR. OWENS: Yes. I think that's on  
10 page --

11 THE WITNESS: 19.

12 MR. OWENS: 19, yes at the bottom. I was  
13 able to spend approximately five hours with Mr. Mulder.  
14 Does that sound about right?

15 THE WITNESS: That probably would be  
16 about right.

17 BY MR. OWENS:

18 Q. This information that you listed on that  
19 section, it was a complaint of things that he was able  
20 to communicate to you?

21 A. Correct.

22 Q. Everything about being whether or not he  
23 was depressed, this previous sentence you said about he  
24 keeps waiting for a shitty day and it doesn't come, he  
25 did not eat well for the first six months after his

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1 stroke, et cetera, et cetera. It goes on and on.  
2 These are all things you learned from him; is that  
3 right?

4 A. Again, I learned through his way of  
5 speaking and spending a lot of time trying to  
6 understand what he is saying.

7 Q. It's more difficult perhaps to speak with  
8 Mr. Mulder, you can't, perhaps, communicate with him  
9 like a regular adult, but you are able to get  
10 information out of him; is that right?

11 A. Yes. Yes, sir, definitely.

12 Q. I believe you say somewhere in your  
13 report that you asked a lot of yes-or-no questions. In  
14 that paragraph under subjective complaints, his  
15 response to yes or no questions, is that how you went  
16 about this interview, you asked yes-or-no questions and  
17 he answered with one-word answers?

18 A. Well, no, because I worked with enough  
19 aphasia patients to know that you can't always rely on  
20 yes or no. You sometimes have to ask other questions  
21 to see whether yes or no is really what they meant.  
22 It's a little bit more complicated than that. Only way  
23 I can even explain it is if you actually spend a couple  
24 hours talking with him to get a flavor for how you  
25 communicate. If you take some time, you can get some

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1 basic exchanges and get a good understanding of where  
2 he is at.

3 Q. When he spoke to you in this interview,  
4 was his speech slow and stuttered or was it more fluid  
5 and fast?

6 A. It's fluid and faster.

7 Q. During the interview with you?

8 A. Yes. During the interview he spoke at a  
9 pretty normal rate. Finding the word, finding the key  
10 word for what he is trying to say was hard. He is more  
11 likely to put in kind of filler words, but miss the key  
12 words, the important piece that he is looking for.

13 Q. Did you ever observe Mr. Mulder  
14 surreptitiously when he wasn't aware you were watching  
15 and observed how he speaks to prison guards or other  
16 inmates?

17 A. I have watched him going back and forth  
18 talking with the guard before he came in, but I don't  
19 recall. I never watched him in the yard.

20 Q. You say that on the bottom of page eight  
21 he knows that he was convicted of killing somebody  
22 because he reads about it in his legal papers; is that  
23 right?

24 A. Correct.

25 Q. Is that something he understands, that he

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1 has been convicted of murder?

2 A. He understands that. Again, when we  
3 talked about reading, it means he is probably looking  
4 at it. I'm not sure he is understanding completely  
5 because when he tested, his reading was somewhere at  
6 the second grade level with reading comprehension.

7 Q. Are you aware that he is checking out  
8 books from the prison library by Dean Koontz and  
9 perhaps other authors on a much higher level than  
10 second grade reading level?

11 A. Since the stroke you are saying?

12 Q. Yes.

13 A. No, but I don't know how well he would  
14 read that.

15 Q. He is able to read his legal papers well  
16 enough to know he has been convicted of murder, right?

17 A. Yes.

18 Q. Turn to associate history at the top of  
19 page nine. Mr. Mulder was able to communicate to you  
20 that he was born in Illinois, grew up in Phoenix. Then  
21 Riverside, California. He has two sisters, three  
22 brothers; is that right?

23 A. Correct.

24 Q. Also able to communicate to you that he  
25 started using heroin as teen-ager and had an addiction

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1 for many years?

2 A. Correct.

3 Q. Next section on education, work, left  
4 side. He was able to communicate to you that he  
5 finished eleventh grade, got a G.E.D., did two years of  
6 Pima College, was B or C grade student; is that right?

7 A. Correct. Again, all of this requires a  
8 lot of time questioning him to get that information.  
9 It's not like he just kind of blurt this stuff out. He  
10 attempts to find words. I have to do guessing for him.  
11 Then he arrives at them.

12 Q. It takes more effort to communicate with  
13 him?

14 A. Correct.

15 Q. The section on bilateral observation,  
16 still on middle of page nine. You say he worked very  
17 hard to communicate. He wants to be understood; is  
18 that right? He is willing to cooperate with someone  
19 who is willing to spend time to try to understand him?

20 A. Yes.

21 Q. You also said that he understands simple  
22 one-step sentence. I think you kind of explained that  
23 on direct examination a little bit?

24 A. Correct.

25 Q. You also said that the instructions need

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1 to be short and questions phrased in simpler terms.  
2 Again, this is referring to his ability to communicate.  
3 You just need to change the manner in which you  
4 communicate with him?

5 A. Just in terms of basic understanding  
6 those immediate questions, yeah, but there is a bigger  
7 aspect of comprehending that you are not going to be  
8 able to get out with that.

9 Q. Let's look at the next page, page ten.  
10 The tests administered, these were not accurate. You  
11 didn't -- was it that some of these tests you did not  
12 give or that the tests weren't listed here that you  
13 did?

14 A. Both. That actually is part of boiler  
15 plate. When I did my dictation, it goes to the lady  
16 that types it up. She has those already in there. I  
17 usually eliminate the ones that I didn't use and add  
18 the ones that I did.

19 Q. Can you do that for us now?

20 A. Sure. I can read them, and you can check  
21 them. Boston naming test.

22 Q. These are ones you gave?

23 A. Yes. Category test. Connor's  
24 Continuance Performance Test. Facial Recognition Test.  
25 The interview obviously. One that is not on there that

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1 kind of fits in here is called Dalls Kaplan Executive  
2 Functioning Test. I gave two subtests out of that.  
3 The sorting test and the tower test. I gave the  
4 narrative writing sample, which I do have some samples  
5 of his writing that you can look at. The Pace Auditory  
6 Serial Addition Test. Wechsler Adult Intelligence  
7 Scale, Roman Numeral Three. The Wechsler Memory Scale  
8 Revised. I gave just specific tests from that. I  
9 gave, this is not on here, the test of nonverbal  
10 intelligence. I gave tokens test, which is the  
11 comprehension test. Those can all be done with the  
12 time that I had seen him.

13 Q. There are about 19 tests that are boiler  
14 plate language that appeared on here as being  
15 administered, but in fact, they weren't?

16 A. Yeah. Those in my editing, I apparently  
17 went through the whole, read through in my editing, but  
18 never fixed that part when I put the report out.  
19 Anybody who read the tests and anybody that actually  
20 know things, some of these tests, you see that every  
21 test that I gave is listed under the performance so --

22 Q. The Minnesota Multiphasic Personality  
23 Inventory, that is one you did not give?

24 A. Correct.

25 Q. About how many questions on that?

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1 A. 567 true and false statements.

2 Q. The fact that you didn't give that test,  
3 even though it appears on here, that doesn't have  
4 anything to with the fact that my expert last Thursday  
5 said that would have been impossible to have completed  
6 that test with all these others in five hours that you  
7 were with the man, would it?

8 A. I'm not sure what you are saying. That's  
9 why I didn't give it?

10 Q. Yeah. Were you aware they had rendered  
11 testimony to that affect?

12 A. I'm not sure what their testimony was.  
13 But no. Lots of these I didn't give because of the  
14 time constraints. A lot of them I didn't give because  
15 of their emphasis on language. Some of them I just  
16 didn't give because I get to choose what tests I give.  
17 I didn't want to give them.

18 Q. Bell lingual testing, on page 11, you  
19 said he did not begin any of the tests until the  
20 examiner was sure he fully understood the task demand.  
21 The last sentence of the second paragraph?

22 A. Correct.

23 Q. Comprehension problems were appropriately  
24 addressed and circumvented. What did you mean by that?

25 A. I had to feel comfortable that he

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1 understood what he needed to do in the test before I  
2 really felt comfortable giving him the test. There  
3 were a few, in fact, I might have started giving and  
4 realized there is no way he understood it, and we  
5 stopped. I felt he understood the basics.

6                   You are putting blocks out in front  
7 of him. You are showing him what you want him to  
8 build. You basically say you need to make this. He  
9 could understand that. I would give him words, what  
10 does bicycle mean, he understood that. Basically, I  
11 felt that he understood enough of the task demand for  
12 the test to be relatively valid.

13               Q.     You were able to address his impairments  
14 and circumvent them in such way that you could still  
15 communicate these tasks to him?

16               A.     For these very basic, simple tasks, yes.

17               Q.     An attorney could do the same thing in  
18 compensating for any impairment Mr. Mulder has, find a  
19 way to address and circumvent those language problems?

20               A.     Again, I think we are talking about two  
21 apples and he is or something, apples and bananas or  
22 whatever. They are two different things. The  
23 complexity of a case relays on his memory for it, relays  
24 on his ability to understand what could be long  
25 passages of information. That's where I think he

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1 starts to fall apart. If the instructions were really  
2 long, I don't think we would have been able to give him  
3 the test.

4 Q. You can shorten down those instructions  
5 into more simple, one-step sentences; isn't that true?

6 A. Yes, as it applies to the case. If all  
7 of the cases could be actually provided in that simple  
8 of a form, then I would say he might be able to  
9 understand it. I'm just, I'm not confident it can be.

10 Q. Look at the unattainable concentration  
11 mental speed on page 13.

12 A. Yes.

13 Q. Says that he was virtually unable to  
14 mentally track and manipulate information in his mind.  
15 You see that sentence? It's in the first paragraph  
16 under interpretation of performance?

17 A. Yes.

18 Q. You say is a serious impaired reaction  
19 time?

20 A. Correct.

21 Q. Do you think that Mr. Mulder, perhaps you  
22 answered this on direct examination, that he can  
23 mentally track and keep up with these proceedings here  
24 in court?

25 A. Do I think that he can keep up with them?

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1 Q. Yes. Can he stay, keep attention and  
2 concentration and keep up mentally at a speed to  
3 understand what is being said here and is going on in  
4 court?

5 A. In terms of speed, I think his reaction  
6 time isn't severe enough to be an issue in court here.  
7 We are talking about milliseconds here. His ability to  
8 stay focused I think is fine. I think it's impaired  
9 technically if we had a kid here, I might say he might  
10 have trouble in class staying focused, but it's not  
11 impairing his ability in the court. I don't think that  
12 is going to effect that at all.

13 Q. Were you done?

14 A. I was going to say but the language  
15 processing, I think that really more is the key.

16 Q. Listening to someone speak, that language  
17 processing, that is difficult or forming the words to  
18 speak?

19 A. He can stay focused, but I don't believe  
20 that he picks up as much as of what we are saying as he  
21 probably should for what is at stake for him.

22 Q. Does he pick up sufficient information so  
23 that he can assist his counsel?

24 MR. ORAM: Judge, I object to the  
25 question as being vague and ambiguous. Does he mean

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1 that to assist his counsel in that he is in court today  
2 or in what way?

3 MR. OWENS: It's all a matter of  
4 agreement. I don't think State is challenging the fact  
5 he is impaired. It's a question of to what degree he  
6 is impaired.

7 THE COURT: I agree, but I think that's  
8 what I'm supposed to decide.

9 MR. OWENS: Okay. I will move on.

10 BY MR. OWENS:

11 Q. Like for the example Mr. Oram or perhaps  
12 it was the Judge gave you that one of our doctors last  
13 week made some comment, I don't know if it was in  
14 regard to the books he read or what, it was the doctor  
15 who said he functions fine at the prison, doesn't need  
16 special help and Mr. Mulder blurted out something to  
17 the effect of that's a lie or that's not the truth.  
18 That would demonstrate that he does understand what is  
19 going on in court and was able to reply quickly,  
20 wouldn't you agree?

21 A. I think for what was said he probably  
22 understood that. I don't know if he would understand a  
23 statement in the context of a lot of other things that  
24 was being said that he had to follow though. I know it  
25 sounds like a subtle difference, but there is a

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1 difference.

2 Q. Look at page 15, language skills. You  
3 said in the middle of first paragraph, despite his  
4 severe expressive aphasia, knew mixture of words,  
5 annotations, gestures. He can express basic needs  
6 fairly well. That is something you have already kind  
7 of talked about. He is able to communicate, but just  
8 in a different way than perhaps a normal adult?

9 A. For his basic needs, yes.

10 Q. The next paragraph, he is able to  
11 comprehend simple commands; is that right?

12 A. Inconsistently, even mostly.

13 Q. Then the question I think Mr. Oram  
14 directed to you in the third paragraph there, he would  
15 also like to demonstrate an adequate, but simplistic  
16 understanding of legal questions, such as do you know  
17 why you are in court today, is that something that he  
18 can understand that basic, that beyond a basic need he  
19 is able to understand it, wouldn't you agree?

20 A. Right.

21 Q. Look at the section on memory and new  
22 learning on page 17. Very first sentence, memory  
23 complex area nearly impossible to accurately measure  
24 aphasia patients; is that right?

25 A. In terms of accurately measure their

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1 verbal memory, yeah, it's pretty hard.

2 Q. You have spoken about that already on  
3 direct examination, that this is a definite area you  
4 can't say for sure he remembers and what he doesn't?

5 A. I can't say for sure he has memory  
6 problems. I have feel very definite in that because  
7 it's almost a necessity with a language deficit. But I  
8 certainly can't say whether he really does remember  
9 what happened eight or ten years ago or whether he  
10 remembered conversations he had with his attorney 30  
11 minutes before. I can just say that I know he probably  
12 remembers a lot less than he should.

13 Q. Jumping over to page 21, under the  
14 section does he understand his crimes and is he  
15 remorseful. When the defendant relates to you that he  
16 denies any recall of being in Nevada, you state whether  
17 he is being honest or not is unclear and would be  
18 impossible to verify; is that right?

19 A. Correct.

20 Q. You said that it's common symptoms of  
21 stroke patients to have spotty memory, and so in fact,  
22 lose large portions of their memory; is that right?

23 A. With certain stroke patients, yes.

24 Q. But memory isn't stored chronologically  
25 like a file system where you can reach in and you pull

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1 out all the memories from such and such date to another  
2 date; isn't that right?

3 A. That's not the way memory is usually  
4 impaired, but there is also not some consistency with  
5 that because there are numerous cases that you can cite  
6 neurology, from neurology research that shows that  
7 autobiographical memory can be selectively impaired,  
8 and there can be something, if there is tapering and  
9 you see these with course of patients. For example,  
10 where their memory for famous faces, for example,  
11 slowly gets worse as it goes down, which is contrary to  
12 most memory impairment. Most memory impairments occur  
13 where remote memory is intact and more recent ones are  
14 impaired. There are a lot of exceptions to that.

15 When you are talking thalamic  
16 strokes, lots of weird things happen there. You have  
17 much damage to specific parts of people's lives, and I  
18 have one research, one case example, and there are more  
19 of them, of someone with the exact same kind of stroke  
20 who did lose autobiographical memory, specific parts of  
21 his life.

22 Q. Mr. Mulder does remember large portions  
23 of his life growing up. He related to you all that  
24 information. We went over in that first section about  
25 where he grew up and how many brothers and sisters he

1 has. He remembers certain things like that?

2 A. There are certain things he remembers.  
3 There are lots of other things I asked him that we  
4 couldn't get any answer on. There are a lot of things  
5 he doesn't seem to remember at all.

6 Q. Then there is a block of time when he was  
7 here in Nevada where he remembers nothing at all from  
8 that. You don't find that inconsistent?

9 A. There are many blocks that he doesn't  
10 remember at all. The portrayal of him remembering  
11 everything that has a block is completely wrong. There  
12 are lots of blocks he doesn't remember. He doesn't  
13 remember his brother's death. He can't remember his  
14 family.

15 THE COURT: When did his brother die?

16 THE WITNESS: 20 years ago or so. He  
17 didn't remember that he died. He can't remember that  
18 period where he died. He was told afterward. That is  
19 really consistent with what you see with this  
20 particular kind of stroke. Blocks can be gone.

21 BY MR. OWENS:

22 Q. Wouldn't you expect him to remember  
23 something about his time here in Nevada instead of  
24 losing every single memory during that specific time?

25 A. I don't know. I imagine if we went

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1 through everything step by step, some things may come  
2 back. He remembers pieces of it.

3 Q. Look at the next section on page 18.  
4 excessive self-recogulatory systems. This is a section  
5 where you talk about this being in effect a modified  
6 frontal lobotomy.

7 THE COURT: What page are you on?

8 MR. OWENS: Page 18.

9 THE COURT: Okay.

10 BY MR. OWENS:

11 Q. Excessive self-regulatory systems. Down  
12 at the bottom of that paragraph where we speak about  
13 frontal lobotomy and the specific pathways that have  
14 been damaged appear to be those that cause anger  
15 reactions; is that right?

16 A. Right. Some of the pathways that are  
17 related to emotional regulation, that was probably  
18 poorly worded, but that are related to emotional  
19 regulation have been damaged.

20 Q. This explains why he smiles; he is  
21 euphoric; expresses that he is in a good mood a lot,  
22 that plays into that and hences explains it to you; is  
23 that right?

24 A. Correct.

25 Q. Does that mean he is incapable of getting

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1 angry or frustrated?

2 A. No. No. What we see with these patients  
3 are we all have resting states. Some people have a  
4 resting state of kind of being somber, depressed.  
5 After a head injury, we may see that they seem to be in  
6 a good mood a lot. Just the opposite. You see people  
7 that are often pretty normally affected, they have a  
8 pretty regular emotional tone regularly. They get a  
9 head injury, they seem to always be in a bad mood.  
10 That doesn't mean that doesn't change because you may  
11 see a range of reactions. You may see extreme anger,  
12 outbursts at times. It's just that there are resting  
13 states that is a little bit different. It's more  
14 consistent with what I see with frontal lobe patients.

15 Q. Look at your summary section,  
16 specifically this question that you are answered here  
17 on page 21, can Mr. Mulder effectively assist Counsel.  
18 You say realistically, no. Then you have one, two,  
19 three, four, five, six, seven bulleted items there.  
20 Let's talk about that first bulleted item,  
21 understanding of the complexity of the case likely  
22 impaired. Why do you think that this case is complex?

23 A. I guess to put it simply --

24 THE COURT: We can probably cut to the  
25 chase. What do you know about this case? What have

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1 you reviewed about the facts of this case?

2 THE WITNESS: If my understanding is  
3 correct, there are a couple things here, but number one  
4 is there could be a new trial regarding his guilt or  
5 not; is that correct?

6 MR. OWENS: We get to ask the questions,  
7 but --

8 THE COURT: That's why I want to know  
9 what he has reviewed.

10 THE WITNESS: If there were a traffic  
11 violation, if this were something that doesn't involve  
12 his life, a long time in prison, something like that,  
13 there i a lot at stake, I would say, well, you know, he  
14 is probably good enough to go.

15 BY MR. OWENS:

16 Q. Because this is a death penalty case and  
17 it's a murder. That is different than say, like you  
18 say, a traffic ticket or maybe simple possession of  
19 drugs?

20 A. On one hand, that makes it complex in and  
21 of itself. Secondly, we are asking him to remember  
22 information that occurred a long time ago and to  
23 understand language that is necessary to get him to  
24 understand where gaps might be within the other trial  
25 that may have been mistakes, things that he might have

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1 remembered before the stroke that should have been  
2 addressed, but now they are not going to come to mind  
3 because he doesn't have the capacity to bring them up  
4 or to remember them or necessarily to convey them. The  
5 ability to listen to a large body of what had happened  
6 before, there is a lot of stuff that goes on in your  
7 mind that is formulating problems, weighing options,  
8 weighing things that have happened and kind of putting  
9 it all up in a line in your mind. I don't think he can  
10 do that.

11 Q. You believe that he would be competent if  
12 this were like a possession of marijuana where he  
13 wasn't facing prison time?

14 A. Possibly.

15 Q. Because of bare nature of the death  
16 penalty case and possibly punishment and stakes at  
17 issue, he is not competent for a case like that?

18 A. You are talking about much more in terms  
19 of evidence being brought in. You are talking about a  
20 complete review of his initial case, which I don't  
21 think he has the capacity to fully go through and  
22 comprehend as well as he should. That complicates  
23 things. It is different than a marijuana possession or  
24 a traffic ticket where there is not a lot of evidence  
25 brought in. There is not some long hearing. It's

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1 basic information. There you go.

2 Q. Do you agree with me that the potential  
3 consequences of a case have nothing to do with  
4 someone's competency and ability to assist counsel  
5 because the punishment might be more severe in a case  
6 like this than, say, for a traffic ticket that  
7 shouldn't impact your opinion of his competence to aid  
8 his counsel, should it?

9 A. Again, it gets back to the task at hand.  
10 The task at hand for a simple case is different than  
11 the task at hand for a case that involves murder and  
12 all the evidence that has to be brought in. Task at  
13 hand is not reviewing a simple case with a short amount  
14 of information and evidence. You are talking about  
15 reviewing a big case with a lot evidence, and there is  
16 volumes of information, so it's not just that it's a  
17 murder case, a marijuana case or whatever. It's  
18 everything inherent in a murder case. It's the volumes  
19 of information that I'm worried he would not be able to  
20 handle that.

21 Q. I thought when you first started  
22 testifying on this point that it was more the  
23 consequence and the seriousness of the outcome, and  
24 that's why you likened it to a traffic ticket? I  
25 thought that was your concern, not so much the task at

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1 hand. I want to make sure I understand.

2 A. It's not why I made that decision. I'm  
3 saying that is a reality that is present. That's a  
4 reality that I meant. It's a difference between  
5 falling on a step and falling off a cliff. There is  
6 definitely a difference.

7 Q. Look at the next bulleted point of his  
8 ability to make important decisions by properly  
9 weighing various factors is impaired. What important  
10 decisions do you think he might need to make in this  
11 case here?

12 A. Well, again, I would have to look at all  
13 the facts of the case, and I have no idea at any given  
14 moment if his attorney says this is where we are at, we  
15 can go this way with the case or we can go that way.  
16 These are things you need to weigh, and these are the  
17 things you need to consider basically and making this  
18 or that decision. That's kind of where I'm concerned  
19 about his ability to do that.

20 Q. Are there unimportant decisions that he  
21 is capable of making, it's just the important ones that  
22 he is not?

23 A. There are unimportant ones. Well, I  
24 mean, I suppose there are unimportant decisions he is  
25 going to have to make. I don't know what they might

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1 be.

2 Q. Unimportant you are referring to the  
3 consequence and the ramification of the decision. He  
4 is not up to making a serious decision like that, but  
5 unimportant decisions that aren't going to have a big  
6 outcome, he is not competent to make those decisions,  
7 is that what you are saying?

8 A. We are talking such a hypothetical here.  
9 I guess I would have to know exactly what question you  
10 are asking to kind of answer that.

11 Q. What did you mean by important decision?  
12 You are the one that brought it up as a factor that,  
13 say, that he can't effectively assist counsel to make  
14 an important decision?

15 A. All right. An example, again, I'm not an  
16 attorney, if an attorney turns to him and says,  
17 Mr. Oram turns to him and says this is the information  
18 that we have of the prosecuting attorney and this is  
19 what they are going to try to use it in that way or  
20 that way, here's some information. Right here we can  
21 go this way or that way with the case or we can have  
22 you try to testify versus not or we can have this  
23 witness come on or not, but there is the risk that  
24 brings this person on up, there are things that become  
25 complex. I can't guess them all.

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1 Q. By important you mean complex, not  
2 necessarily the important decisions have greater  
3 consequences, but that they are more complex?

4 A. Yeah, probably more complex decisions  
5 that take multiple factors to weigh in on.

6 Q. You are taking into account that he has  
7 an attorney that can make sense of these decisions  
8 right? This isn't a case Mr. Mulder is seeking to  
9 represent himself or to come into court and litigate  
10 these issues himself, right?

11 A. Correct.

12 Q. Look at the next bulleted point. His  
13 ability to understand what is being said by his  
14 attorney and what is being said in court is severely  
15 impaired. That was one of the factors that you look  
16 at, right?

17 A. Yes.

18 Q. We have already had the example where  
19 last Thursday he blurted out words about that's not the  
20 truth, indicating that he was understanding what is  
21 going on in court, and you agree with that to some  
22 degree he is able to understand?

23 A. To some degree he does understand what is  
24 going on in court.

25 Q. He was able to understand you and your

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1 test instructions in questions that you put to him over  
2 the course of five hours. An attorney could do the  
3 same sort of thing as you did to be able to communicate  
4 with the defendant; is that right?

5 A. For which is, I think, information that  
6 doesn't mean he is going get a bigger picture though,  
7 but yeah.

8 Q. Look at the next bulleted point of his  
9 ability to retain important details during proceedings  
10 and pull them together when needed to help, assist  
11 counsel is impaired. Are you saying then that  
12 competency requires the ability to retain detailing?

13 A. I think part of the ability to assist  
14 counsel is his vigilance in listening to testimony and  
15 following that testimony through and through days  
16 later, then they are hearing somebody else making the  
17 connection in his mind of remember when so and so said  
18 that. That's not the way I remember it or that's not  
19 what exactly happened or that is inconsistent because  
20 if I did this, then they must have said that or  
21 something like that. Stuff that the attorney may never  
22 be aware of. I guess that's kind of what I was getting  
23 at.

24 Q. What is your understanding of the legal  
25 standard of competency to pursue a post-conviction

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1 proceeding?

2 A. I don't know. I have never seen anything  
3 related to specific competency for that.

4 Q. If you are looking at his ability to  
5 retain information and his memory, those are something  
6 that you expect to find important for competency, but  
7 not necessarily anything that is required in some sort  
8 of the legal definition that you aware of?

9 A. Within the legal definition the ability  
10 to assist counsel is in there. The ability to assist  
11 counsel, if you knock somebody out, knock their memory  
12 out completely, hypothetically claim an unnecessary  
13 particular event, they can tell you anything that you  
14 need to know about how the court works. They remember  
15 all their past, but they can't remember from one moment  
16 to the next. Could they assist counsel properly if  
17 they couldn't even remember from one moment to the  
18 next, whether he is listening in court? I would have  
19 to say no because they can't assist counsel in  
20 retaining the information over a period of a trial.

21 Q. Someone with amnesia would not be  
22 competent then?

23 A. I'm not going to make blanket statements  
24 like that, but it would probably be very difficult for  
25 them, for competent. I think it would make it much

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1 more difficult.

2 Q. Any defendant that said I can't remember  
3 the facts of that crime, I don't remember it. I can't  
4 help counsel, then you would be inclined to say then  
5 they are not competent because they don't have a  
6 memory?

7 A. No. No. We are talking about memory of  
8 following. His present memory of following the  
9 proceedings from day-to-day and being able to remember  
10 the parts that he needs to remember.

11 Q. I may have jumped down to the next  
12 bulleted point where you do talk about the ability to  
13 recall important details related to the period around  
14 the crime.

15 A. Yes. Again, assess his memory now,  
16 whether he is telling us truth or not about remembering  
17 it in that block of time, I have no idea. I have no  
18 idea. It would be true, could be, might not be true,  
19 but I will tell you that we know from thalamic lesions  
20 and basal ganglia lesions and strokes there is a higher  
21 likelihood autobiographical memory will be impaired.  
22 It is plausible.

23 Q. That impairment of the memory is what  
24 renders someone incompetent in your mind?

25 A. Not necessarily the memory of the crime.

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1 If the person doesn't remember the crime at all, claims  
2 that they don't, you could possibly go forward with  
3 proceeding I would think. If they remember from moment  
4 to moment and they remember conversations with you and  
5 understand what you are saying, I'm not sure because  
6 there are other facts around the case.

7 Q. Let's go back to the case of the amnesia  
8 person. Someone with amnesia doesn't remember the  
9 crime or their trial, are you saying that they would be  
10 competent to assist counsel or not not? I thought you  
11 were indicating they would not be able to?

12 A. Amnesia occurs from the injury on. You  
13 may remember everything from before. If I got in a car  
14 accident and all the details but from that accident on  
15 up can't lay down new memories. That means that you  
16 might be able to remember your crime exactly. You  
17 might remember every single moment of those days or the  
18 lack of crime thereof or whatever. But your ability to  
19 lay down new memories within the courtroom and follow  
20 conversation and remember them, process them, aside  
21 from the processing, just memory, your ability to  
22 remember what was said half an hour before or 20  
23 minutes before by another witness, if that's gone, it  
24 would seem hard to be able to assist counsel, to be  
25 able to recognize things that the attorney couldn't

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1 possibly recognize things you need to help your  
2 attorney with.

3 Q. Go to the last bulleted point, his  
4 ability to reason on abstract level is impaired. Are  
5 you aware that he would have an attorney who can  
6 reasonably abstract, I think Mr. Oram can do that, so  
7 why would it be necessary for the defendant to be able  
8 to reason abstractly if he has an attorney to do that  
9 for him?

10 A. I don't think that in and of itself would  
11 render somebody incompetent. I think that it does  
12 contribute to the difficulties that his attorney would  
13 have getting him to understand. Some of the more  
14 difficult, abstract aspects of the case and the  
15 proceedings.

16 MR. OWENS: That concludes my  
17 examination.

18 THE COURT: Any redirect?

19 MR. ORAM: Very briefly, your Honor.

20

21 REDIRECT EXAMINATION

22 BY MR. ORAM:

23 Q. You were asked if when you spoke with  
24 Mr. Mulder he was stuttering or whether he was fluid in  
25 his speech. You said he was fluid in his speech?

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1 A. Yeah. He was fairly fluid in his speech.

2 Q. He wasn't trying to talk to you in such a  
3 manner where he was stuttering and acting like he  
4 didn't understand? He didn't do that, did he?

5 A. No. No. He tries to find words. He can  
6 actually speak at decent, kind, decent, it's just that  
7 there are a lot of things missing in it.

8 Q. Would it surprise you that while  
9 travelling from prison on a bus that he was able to  
10 fluidly talk to other inmates?

11 A. I bet he probably was. I believe the  
12 contents -- if you recorded it, you would see that it  
13 wasn't right.

14 Q. You took handwriting samples from him?

15 A. Yes, I did.

16 Q. Was that one of the reasons on the kites  
17 that you thought that it wasn't his handwriting except  
18 for his signature?

19 A. I figure --

20 THE COURT: I don't know why we keep  
21 getting into that because clearly he is not a  
22 handwriting expert.

23 MR. ORAM: Okay. That's fine. It's just  
24 State had raised the issue.

25 THE COURT: I know. I'm just going to

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1 ignore all that because I don't think there is any  
2 evidence, I mean, this doctor said clearly it's not him  
3 who wrote it, but I'm going to disregard that.

4 BY MR. ORAM:

5 Q. With regard to your conclusion with a  
6 that as a result of the testing that Mr. Owens had gone  
7 over with you, he went through all the different tests  
8 you had done and the ones you had not done?

9 A. Correct.

10 Q. Did you know what tests the State's  
11 expert had conducted, if any?

12 A. No. I haven't seen anything from them.

13 Q. Not only did you draw your conclusions  
14 from your tests, you did it from reviewing UMC records?

15 A. Correct. His ability to communicate  
16 throughout his recovery in the hospital afterward and  
17 what we know about that level of deficit.

18 Q. Lastly, you were asked about what  
19 standard was for competency on a capital post  
20 conviction. I want to ask you do you believe that  
21 Mr. Mulder has difficulty in communicating rationally  
22 based upon everything that you have reviewed and tested  
23 him on? Is that question clear to you?

24 A. He has the ability to communicate  
25 rationally with basic needs and things like that.

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1 MR. ORAM: Nothing further.

2 THE COURT: Recross?

3 MR. OWENS: No.

4 THE COURT: Thank you very much for your  
5 testimony. You may step down. You are excused.

6 THE WITNESS: Did you want the report?

7 THE COURT: Found it. Thank you.

8 Anything else from either side?

9 MR. ORAM: Your Honor, unfortunately if I  
10 can just tell the Court where I'm at. After the  
11 hearing last Thursday, in particular the prison guard  
12 who testified. I contacted a friend of the court. I  
13 call him a friend of the court because he actually  
14 signed the post conviction when we were unsure, I think  
15 it was Mr. Peterson at the time, unsure what to do, so  
16 we looked at this procedure of having a friend of the  
17 court sign the post-conviction because I filed a  
18 56-page post conviction.

19 His name is Father Keifer. He  
20 testified at the penalty phase. He is a Roman Catholic  
21 priest. I have called him Thursday afternoon, received  
22 a response back from him Friday and asked him was he  
23 still in communication with Mr. Mulder. He indicated  
24 he was, that I would ask him some questions, which I  
25 won't get into. I asked him would it be possible for

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1 him to come here today and testify. He indicated he  
2 could not because of his busy schedule. He could after  
3 Easter. Apparently, that is something important. I  
4 don't know if --

5 THE COURT: Where is he?

6 MR. ORAM: He is in Phoenix, Arizona. He  
7 was in California at the time when I called on  
8 Thursday. He returned my phone call. He has some  
9 interesting points that I think may be important to the  
10 Court about the difference in communication before and  
11 after the stroke with Mr. Mulder. The letters that he  
12 had seen from Mr. Mulder before and after the stroke, I  
13 don't know how much weight the Court would put on that  
14 especially too since I would be asking for this to be  
15 extended through until April 18th. If Court wanted to,  
16 I am most prepared to argue right now what we have  
17 heard and perhaps put him on in April or --

18 THE COURT: You mean to rebut?

19 MR. ORAM: Yes.

20 THE COURT: The corrections officer said?

21 MR. ORAM: Yes. Basically to state what  
22 his condition has been and what he found his condition  
23 to be in a communication level.

24 MR. OWENS: Judge, I think he has  
25 rebutted with the doctor here about how he is capable

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1 of fluid speech on basic needs and just making small  
2 talk with people. I think Mr. Oram made his point, and  
3 to interject a lay opinion at this point when we have  
4 been relying on experts to date, there was another  
5 request that they wanted to call in Judge Cherry and  
6 Lee McMahan, the trial attorneys, to show how he has  
7 been efficient. It's not an issue.

8 We know he had a stroke, and it has  
9 impaired him. That's not a question. That's  
10 different. It's how impaired is he. I think the  
11 experts and your Honor are in a better position to be  
12 deciding that than lay people brought in to.

13 THE COURT: Right.

14 MR. ORAM: I will submit it.

15 THE COURT: I don't know if it helps to  
16 tell you that the C.O., I'm going to give very little  
17 weight to that. I have all these experts with just  
18 tremendous education backgrounds, those are the people  
19 that I would like to rely upon.

20 MR. ORAM: Yes. I'm ready for argument.

21 THE COURT: Okay. Before you do,  
22 Mr. Oram, again, because I got this from  
23 Justice Douglas in the middle of one of the issues post  
24 conviction, you filed your post-conviction brief?

25 MR. ORAM: Yes.

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1 THE COURT: When was it filed?

2 MR. ORAM: It was filed so long ago. I  
3 did not bring that particular file. But it was, I can  
4 tell you sort of the order of how things occurred.  
5 What I did, your Honor, is I reviewed the record. I  
6 found my issues. I wrote them up. I went, and I don't  
7 remember if while I was writing them I went to see  
8 Mr. Mulder or if I had finished it and then saw  
9 Mr. Mulder. At some point, I went up to Ely to see  
10 Mr. Mulder. Filed the writ. I believe, if I'm not  
11 mistaken, that the State may have made some statement  
12 about the fact that it was not verified. I'm not sure  
13 of that. I'm not sure of that, but it became an issue  
14 that it was not verified.

15 I then came back to the Court, and I  
16 reported to Justice Douglas I was having difficulty  
17 when I went to see Mr. Mulder. Of course, I told him  
18 it would be on the record that I can't communicate with  
19 this gentleman about the issues in the case. At the  
20 time, I had never run into that. I had done numerous  
21 post convictions, but I had never run into that issue.  
22 I run into people not wanting to cooperate with me;  
23 they don't want to talk to me, but I had never run into  
24 that situation, so I didn't know what to do. So I  
25 filed the writ on the issues that we had.

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1 Justice Douglas then questioned me  
2 whether there was any proof that this man had a stroke.  
3 At the time, I was sort of unsure. I don't recall  
4 exactly how we got the UMC records. I think it was by  
5 a subpoena issued by the Court. So at some point, the  
6 Court received UMC records and the State and myself.  
7 Based upon that, I asked for the appointment of  
8 Dr. Kinsora. The judge did that. We got the report.

9 Justice Douglas then said the words  
10 to the effect of I know the court -- I think  
11 Justice Douglas was not as informed as we are all on  
12 briefing of mental retardation, but said it appeared  
13 the man became mentally retard. Justice Douglas  
14 wanted State to have some expert conduct tests. Then  
15 we had the long, long, long delay. Finally, this Court  
16 issued an order to show cause. Then we had the tests.  
17 That's sort of the background as best as I can recall  
18 over the last few years.

19 THE COURT: Because I want to know the  
20 posture. You have filed a post-conviction writ?

21 MR. ORAM: Yes.

22 THE COURT: It's not verified?

23 MR. ORAM: No. Then I left one thing  
24 out.

25 THE COURT: Verified by Father Keifer?

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1 MR. ORAM: As a friend of the court.  
2 THE COURT: As a friend of the court, but  
3 you have done a full review of the record?  
4 MR. ORAM: Yes.  
5 THE COURT: As a lawyer, you determined  
6 what the issues were that you could tell by the record?  
7 MR. ORAM: That's correct.  
8 THE COURT: You have raised those issues?  
9 MR. ORAM: I most certainly did.  
10 THE COURT: But you believe that there  
11 may be other issues that you don't know about because  
12 you haven't been able to communicate with Mr. Mulder?  
13 MR. ORAM: Correct.  
14 THE COURT: You filed the petition after  
15 he had the stroke?  
16 MR. ORAM: Correct.  
17 THE COURT: Because when was the date of  
18 the stroke?  
19 MR. ORAM: It was March third of 2001.  
20 MR. OWENS: It was March of '01.  
21 MR. ORAM: I'm sorry, your Honor. Said  
22 March. I provided report dated 3-15 indicating that  
23 Mr. Mulder was admitted into UMC. I imagine right  
24 within days of that.  
25 MR. OWENS: It was 3-15-01.

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1 MR. ORAM: Yes, I filed the supplemental  
2 brief after the stroke.

3 MR. OWENS: There was a petition for writ  
4 of habeas corpus filed May seventh of '01, which we  
5 filed an opposition to. Then there was a supplement  
6 filed July 20th of '01, which we responded to. Then  
7 Mr. Oram replied to it.

8 MR. ORAM: That should be the large  
9 supplement.

10 THE COURT: Were you ever able to consult  
11 with Mr. Mulder regard his post-conviction issues  
12 before he had the stroke?

13 MR. ORAM: No. I never met Mr. Mulder  
14 before he had the stroke. I went up to Ely and saw him  
15 through glass. I made an appointment to see three or  
16 four other clients up there. I remember that his was a  
17 very short meeting. Ten minutes. May have been my own  
18 fault. I just became frustrated and left. I went and  
19 visited other people. I wasn't able to get what I  
20 thought was anything out of this man. Then I reported  
21 back to the judge that I was having problems.

22 THE COURT: Since then, how many times  
23 have you met with Mr. Mulder?

24 MR. ORAM: I have never gone back up to  
25 Ely to meet with him. I communicated, actually sort of

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1 odd, but there was another death-row inmate of mine who  
2 would keep me sort of up to date on things. I would  
3 tell him what was going on in terms of he would say is  
4 there anything going on. I would tell him there were a  
5 few times that I brief conversations with Mr. Mulder of  
6 limited significance.

7 Perhaps this was -- I'm not trying  
8 to in a way talk to Court about his competency when I  
9 say this, but it was fruitless. It was sort of just  
10 like call me occasionally and I will try to tell you  
11 what is going on because there was nothing -- I  
12 received from the prison phone calls, probably ten a  
13 day, from different prisons in Nevada. I talk to  
14 occasionally two, three, four of these people a day and  
15 have for many years. Sometimes have good, valuable  
16 conversations with my clients. Sometimes I have  
17 hostile conversations with some of my clients.

18 THE COURT: Sure. It's normal.

19 MR. ORAM: Yes. I have never had what I  
20 would call a meaningful conversation with Mr. Mulder.  
21 If I was to go up to Ely to visit him, I almost feel  
22 like it takes me four hours to get up, four hours to  
23 back, \$125 bucks an hour. I would be charging State a  
24 lot to come back and have the Court say what did you  
25 get out of him. I think I would be like, well, the

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1 weather was nice, and he is feeling better today. That  
2 seems like an awful lot of money to waste Court and  
3 State time if I don't really believe I'm going get lot  
4 of it. I have billings in the past. To go back and  
5 look at all my billing sheets for different  
6 conversations with him, but under the minimum ones you  
7 can put down, and I have never had any kind of real  
8 conversation.

9 THE COURT: It appears the first time you  
10 had met him, you had about a ten-minute conversation  
11 with him that you believed was fruitless?

12 MR. ORAM: Yes.

13 THE COURT: You were frustrated and you  
14 went and spoke to other inmates?

15 MR. ORAM: Not frustrated with him.

16 THE COURT: I understand. Frustrated  
17 with the situation of not being able to communicate  
18 with him. But since then, you haven't had any other  
19 sit down, face-to-face, let's talk about your case  
20 communication with him besides in here the last couple  
21 of days?

22 MR. ORAM: No. No. Never. Other than  
23 on the phone. Again, those were not the kind of  
24 discussions we are are talking about.

25 THE COURT: Do you see where I'm going

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1 with this? Because it appears this doctor that  
2 testified today was able to gain a lot of information  
3 from Mr. Mulder. I mean a lot of information.

4 MR. ORAM: Your Honor, he didn't know who  
5 his trial attorneys were within the last few weeks.  
6 That was something I asked him. I don't know what you  
7 could really get out of this when I'm asking him what  
8 did Judge Cherry, if anything, do wrong. I have no  
9 problem keeping him down here and going over and  
10 sitting down with him and saying what did Judge Cherry  
11 do wrong. What happened? What went wrong in your  
12 case? What issues do you have? Do you have witnesses?  
13 Do you have any objection to what I'm saying in this  
14 writ? I can do that. I think I will be back very  
15 quickly.

16 That could be one of two things.  
17 Either it's legitimate, or two, he is very, very clever  
18 and realizes what I'm doing here and realizes the  
19 proper responses would be like I don't remember.

20 THE COURT: Mr. Mulder, what do you think  
21 you are doing here today? Why are you today in the  
22 courtroom?

23 THE DEFENDANT: To be with my attorney  
24 see if I can help him prove I'm healthy.

25 THE COURT: Can you look at me,

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1 Mr. Mulder?

2 THE DEFENDANT: Yeah.

3 THE COURT: Why do you think you are here  
4 today?

5 THE DEFENDANT: To see my attorney  
6 because is he capable of helping me prove innocence.

7 THE COURT: Okay. Do you know who this  
8 is?

9 THE DEFENDANT: Yes.

10 THE COURT: Who is that?

11 THE DEFENDANT: Christopher Oram.

12 THE COURT: Is he your lawyer?

13 THE DEFENDANT: Yeah.

14 THE COURT: Sounds like he knows why he  
15 is here.

16 MR. ORAM: Yes. I think the doctor put  
17 that he knows he is here. He is here on a competency  
18 hearing.

19 THE COURT: I will allow you to proceed.  
20 I just wanted to get a feel for how much interaction  
21 that you had with Mr. Mulder.

22 MR. ORAM: If you could just follow up on  
23 that because I know tonight I might regret this. I  
24 have had periodic conversations with the man.

25 THE COURT: Over the phone?

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1 MR. ORAM: Yes, over the phone, just  
2 never gone up there. I thought the best thing to do  
3 was have a psychiatrist do this and figure out if he  
4 was wasting my time or, in fact, there was malingering,  
5 so I think we heard from those doctors, but we have a  
6 69 I.Q. Does Court want to hear my argument?

7 THE COURT: Sure, I would.

8 MR. ORAM: Your Honor, the State -- I  
9 filed this brief, and there is a binding case on this  
10 matter. It is coming out of the Ninth Circuit. I  
11 believe it's Rohan, R-o-h-a-n, a 2003 case. I cited a  
12 case out of Illinois Supreme Court. It's not even  
13 persuasive because tapping is clearly enunciated by  
14 Federal Court appeals for our District Court.

15 They say that apparently in the  
16 Rohan case that the State Court did not do what this  
17 Court did, and that was perform a competency hearing,  
18 having Ninth Circuit aid, having concluded he has a  
19 statutory right to compel them in his Federal habeas  
20 proceeding. The District Court, State District Court  
21 adequately protected him when it refused to stay  
22 proceedings.

23 Later, it says accordingly, when we  
24 hold incompetent capital petition case claims that  
25 could potentially -- he has to have the ability to

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1 communicate rationally, refusing State's proceeding  
2 pending resolution of competency denies him statutory  
3 rights. There was something that was said by their  
4 doctor --

5 THE COURT: I agree with you that if I  
6 make a determination that he's incompetent, that the  
7 proceedings have to be stayed, but I think State's  
8 position is we have to make that determination first.  
9 Would you agree standard of competence on a  
10 post-conviction proceeding is different than if he were  
11 going to go trial?

12 MR. ORAM: Correct. It is.

13 THE COURT: Okay. It seems to be pretty  
14 low.

15 MR. ORAM: I would disagree with that.

16 THE COURT: You would?

17 MR. ORAM: Ninth Circuit said requiring  
18 incompetent petition says counsel is to identify  
19 precisely what prisoner would tell me were he able  
20 seems likely to illicit responses from the attorney.  
21 If I need that, I wouldn't have to ask. They actually  
22 put that in their case.

23 Your Honor, in the Atkins case,  
24 U.S. Supreme Court gave us a standard for what mental  
25 retardation was. This District Court strictly looked

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1 at the law and said this didn't happen before age 18.

2 But I want to go back to I.Q. It's  
3 69. That's what our doctor said. What their doctors  
4 said, I have really thought that question through.  
5 Obviously, this Court looked at the SAT, so did  
6 Mr. Owens and so did myself. I don't think this Court,  
7 no matter how dilligent this Court may be, could go  
8 into a test and say you get one to 100, I want you to  
9 be at a six. Fake it. Get to a six, and then do it  
10 again. Judge, I don't think you could do it. You  
11 could try to pretend that you lack intelligence, but to  
12 do them simultaneously and get the same score on two  
13 separate tests through two separate doctors seems  
14 unbelievable. My client is at, he is at 69.

15 You have the U.S. Supreme Court says  
16 that is one of the standards you look at for mental  
17 retardation. He doesn't meet that standard, but he  
18 most certainly does meet the lack of mental standard if  
19 he is at 69.

20 I would like to address their  
21 doctors. It causes me concern a couple of what the  
22 doctors' comments, especially, I believe it was  
23 Mr. Terrell Bishop, Judge, he didn't review the medical  
24 records. He didn't even look at the UMC records. I  
25 remember the Court specifically stating he has the

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1 records. How is it that you do not or words to that  
2 effect. State had a long time to get Mr. Bishop to try  
3 to do his job. There had to be an order to show cause.

4 Bishop didn't even review the  
5 medical records. State didn't provide him with the  
6 medical records. He came in and said he didn't really  
7 need to experience review the medical records.  
8 Conducted no tests. None. Met with him on two  
9 occasions for a total of a little over an hour. He  
10 conclude that his memory loss is completely fictitious.  
11 Made no sense. Demeaned, I think he demeaned quite a  
12 few people in the court, Mr. Bishop did. He said that  
13 our doctor was just a typical defense expert. I take  
14 exception to that. I ask the Court to consider the  
15 fact that our doctor was appointed by Justice Douglas.  
16 He looked at the UMC records, performed --

17 THE COURT: If it helps you, I don't  
18 necessarily consider him a defense expert. He was  
19 appointed by the Court.

20 MR. ORAM: But it was somewhat alarming  
21 that they were come with the conclusion he is competent  
22 having performed no tests, haven't looked at his  
23 medical records. I don't quite understand how the  
24 State could put someone forward like that and say yes,  
25 he qualified. It's almost like he looked through a

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1 magical crystal ball and he can just tell Mr. Mulder,  
2 after talking to him for an hour, is just full of  
3 memory, and it made no sense.

4                   Their other doctor came in and said,  
5 yes, I performed the tests on him. He was cooperative.  
6 He is a 69. She also said when the Court asked her  
7 does he have a memory of the trial, she said he claims  
8 not to. Then I asked her, well, how would he be  
9 competent if he doesn't have memory of the trial?

10                   Thought it was interesting that I  
11 didn't quote Rohan. He said, well, you can read the  
12 transcripts and you could file it, but I still have a  
13 problem.

14                   The Ninth Circuit said requiring  
15 incompetent petitions, their counsel has to identify  
16 precisely what the petitioner would tell him it seems  
17 more likely to elicit a response. If I knew that, I  
18 wouldn't have to ask him that. That's what he should  
19 have told a psychologist. If he could he tell me, I  
20 wouldn't have to ask. I wouldn't have to do this  
21 particular hearing. I wouldn't have to argue that he  
22 is incompetent.

23                   The problem is it isn't just about  
24 me reviewing a record. I need to know from him. In a  
25 record, your Honor, on appeal, I do so many appeals,

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1 what you do on appeal is you look at it and then all  
2 the time I hear inmates say, you know, my attorney  
3 didn't do this and that. It's not in the record, so  
4 deal with that at a later date. You deal only with  
5 what's in the record. In fact, if I go up to the  
6 Supreme Court and I say one of the jurors outside said  
7 this, understand they are going to come back in and say  
8 where is that in the record, and I would be in trouble  
9 referring outside the record.

10 Post conviction is the opposite.  
11 You usually have found issues. The appellate attorney  
12 has made tremendous errors. A lot of the post  
13 convictions I have done have been asking defendants  
14 what went wrong. What did your attorney do wrong.  
15 Lots of times you are doing them, 90 percent of the  
16 time you are going to hear things that you just sort of  
17 throw out of the window because they are not  
18 legitimate. But there are sometimes where a defendant  
19 says, listen, I gave him this list of alibi witnesses,  
20 and he didn't even bother to investigate.

21 THE COURT: What other issues have you  
22 raised? You filed the 52-page post conviction. What  
23 are the issues that you raised?

24 MR. ORAM: Specifically, one of the  
25 biggest issues was there was -- this was an elderly

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1 gentleman who was murdered, and he was bound with duct  
2 tape. It was a heinous crime, your Honor. In it there  
3 was a partial print on some of the duct tape. There  
4 was a conflict of the one of the experts for the State.  
5 If I recall, the State's expert initially from Metro  
6 said there was no identifiable -- he couldn't be  
7 identified. Then the State produced an expert who came  
8 in and said I could identify it by looking at it with a  
9 magnifying glass, and I was able to do that. That's  
10 what he came in and testified to.

11 The defense stood up in opening  
12 arguments, I believe that they waived their opening  
13 argument until the State rested their case. This  
14 was Ms. McMahon who stood up and said ladies and  
15 gentlemen -- it was very a short opening argument. It  
16 said we have one expert. He is going to come in here,  
17 and he is a fingerprint examiner. He is going to tell  
18 you essentially he is going to rebut the FBI expert.

19 THE COURT: Judge Pavlikowski didn't  
20 qualify him, but allowed him to testify.

21 MR. ORAM: Right. What was even worse,  
22 your Honor, was that Mr. Sharp, it was almost comical,  
23 the cross-examination by Mr. Sharp. What I mean by  
24 that is, boy, did the State have a job because I  
25 remember they were questioning the defense expert over

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1 whether he had a P.O. box. It was bordering on comical  
2 how poor the defense expert was. Very, very bad. In  
3 fact, it was so bad, I believe that although Judge  
4 Pavlikowski let him testify as a lay person the Nevada  
5 Supreme Court. In their decision said --

6 THE COURT: He shouldn't have even done  
7 that.

8 MR. ORAM: No. He shouldn't have done  
9 that. What I thought was particularly poorly done in  
10 this case was that you tell a jury that your whole  
11 theory is that, look, we have got this expert. He is  
12 going to come in here and he is going to rebut the  
13 State's expert, and we are home and dry. No sooner  
14 than you are done, you put your expert on the stand and  
15 he is so poorly qualified that you have a situation  
16 where you have a judge saying, I don't think this man  
17 can even testify. I will let him do so as a lay  
18 witness because, my goodness, if Judge Pavlickowski had  
19 done what the Supreme Court had done, can you imagine  
20 the proceedings? Can you imagine a capital trial in  
21 here where all I do is stand up and say this is my  
22 expert. Here we go. Then you hear, and say, Mr. Oram,  
23 the guy is not expert. I'm not letting him testify.  
24 I'm looking at the judge, saying, Judge, I have no  
25 defense. How did that happen, Judge? How on earth

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1 does that happen?

2 That hurt his case, and their  
3 fingerprint expert is all over the place. This is not  
4 something that is difficult to find. You can find a  
5 fingerprint expert.

6 THE COURT: But it seemed like this was  
7 kind of a complex mixture because the fingerprint was  
8 on the duct tape. So I know print analysis is  
9 generally accepted, but it sounded like this type of  
10 fingerprint analysis was somewhat complex.

11 MR. ORAM: It would have -- it wouldn't  
12 have been to have somebody qualified. I imagine he can  
13 bring in a few people who say, the Court can say she is  
14 qualified or he is qualified. But to bring somebody in  
15 and say, Mr. Oram, I went out and got my brother who,  
16 let's say works as a bartender, you bring him in and  
17 that's who you got qualified. I think there were  
18 problems.

19 I don't want get this wrong, but I  
20 believe Mr. Sharp was pointing out that the man had  
21 been, if I'm not mistaken, they were refusing to  
22 qualify him in District Court Eight. I'm not that sure  
23 of that, but it was very bad. That was one of the  
24 biggest issues that we had or that I felt for trial the  
25 portion of it.

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1 THE COURT: On ineffectivness?

2 MR. ORAM: Yes, ineffectiveness  
3 assistance. There were other claims I am not as  
4 familiar with it because it was so long ago. Today I  
5 was dealing with competency, not the actual substance  
6 of my post conviction. Those were some of the issues I  
7 need Mr. Mulder for. It jumped right out of the paper  
8 on me when I was reading it.

9 It also seemed that how could the  
10 Supreme Court say that the man wasn't qualified. By  
11 doing that, I get -- it would have been my contention  
12 before this Court that they are admitting that  
13 ineffective assistance of counsel, you can't call  
14 experts on something like that and then not have him  
15 called for idenitification as an expert. The Supreme  
16 Court says that don't want all people --

17 THE COURT: Didn't Supreme Court say the  
18 judge did not use his discretion by saying the expert  
19 is not qualified?

20 MR. ORAM: Yes.

21 THE COURT: I don't think they said we  
22 also agree the person wasn't qualified.

23 MR. ORAM: They went further.

24 THE COURT: They did? No. They did say  
25 since the person wasn't qualified and agree with that,

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1 you can't not qualify an expert and then allow him to  
2 give expert testimony.

3 MR. ORAM: I agree with what the Supreme  
4 Court said. I think Judge Pavilowski was in such a bad  
5 situation, I can only imagine this Court being in a  
6 situation where all this money being expended trying a  
7 capital murder case, you have got a jury sitting over  
8 there and all of sudden --

9 THE COURT: It's happened in civil cases  
10 before, but I understand the differences.

11 MR. ORAM: This man was sentenced to die  
12 for this. There was some allegation, your Honor, about  
13 his girlfriend at the time who was a potential  
14 co-defendant. It was Mr. Mulder's expectation at the  
15 time that she was the one. She was the guilty one.  
16 There was --

17 THE COURT: This was his defense at the  
18 time of the trial, that his girlfriend did it?

19 MR. ORAM: Yes.

20 THE COURT: What happened to her?

21 MR. ORAM: Your Honor, as I recall, the  
22 State gave her --

23 THE COURT: Because she was arrested with  
24 him.

25 MR. ORAM: Yes. Either she got a very,

1 very favorable deal or she was not prosecuted, and I  
2 just don't recall that fact right now. She was  
3 essentially a star witness. The fingerprint had  
4 corroborated her. That was particularly important.

5 If you could go back to the  
6 competency, your Honor, my doctor did a thorough job.  
7 He performed tests. He has testified that in the past  
8 he has not agreed with civil case or defense attorneys  
9 trying to get information out of him. I would suggest  
10 that he was very straight forward, very thorough, and  
11 has determined this man is not competent. Why is he  
12 not competent? He can't communicate with me rationally  
13 about these factors. Let me explain. Questions just  
14 about the fingerprint, just as we are going through, I  
15 can't have that conversation with Mr. Mulder. I can't.

16 THE COURT: It appears as though you  
17 haven't tried. With all due respect, I can understand  
18 sitting down with him for the first time and not really  
19 knowing the wealth of information that we know now, it  
20 would be frustrating, but it appears as though, even  
21 the last witness seemed to suggest to me that it just  
22 takes a while, that you can get information out of him,  
23 that you have to just get little bits and pieces at a  
24 time.

25 MR. ORAM: If he doesn't remember the

1 trial, which is what the State's expert said, he  
2 doesn't remember the trial, what would be the point in  
3 sitting down with the man and asking him what went  
4 wrong in the trial if he claims not to remember the  
5 trial? I think I would be wasting my time, but I can  
6 do it. Then --

7 THE COURT: It's the thing, but then I  
8 get in a position of putting you on the stand.

9 MR. ORAM: Would the Court, if I came  
10 back in here and met with him this afternoon and came  
11 back in here and said, you know what, your Honor, I  
12 honestly tried. I spent all night with him. You know  
13 what? He can't remember the trial, so he is  
14 incompetent. Would the Court really be interested in  
15 me saying something like that? I don't think so nor  
16 would I want to be in that situation. I would rather  
17 leave it up to the expert rather than make  
18 representations to this Court of what I'm doing with my  
19 client. I think it's fruitless. I don't think he has  
20 or I would submit that on the evidence that we have  
21 heard, that he doesn't have the mental capability to go  
22 forward on this post conviction.

23 THE COURT: Okay. When you went up to  
24 Ely to meet him for that first time, did you have the  
25 petition prepared or were you just going up to talk to

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1 him in advance of the preparing the petition?

2 MR. ORAM: I don't recall. Only way I  
3 can tell you that is from my billing sheet. I keep  
4 billing sheets every day. I can look at my billing  
5 sheets, then look at the date when I filed the brief.  
6 I probably had been reviewing it, but again, I do not  
7 know reviewing -- usually what I do is I don't get to  
8 the point where I'm done and then go see the person.  
9 That's not my practice. Usually I talk to them. They  
10 call me. I visit them. We start getting an idea of  
11 where you want to go with it so I just get to know the  
12 answer to that question.

13 He can't communicate; however, your  
14 Honor, if you were to stay this or alternatively your  
15 Honor were to determine that this is a case of one of  
16 first impression and that he can't be executed, then I  
17 don't see why we can't go forward with the post  
18 conviction because the way I read Ninth Circuit, they  
19 make it specific to capital cases.

20 He has got a 69. I don't know how  
21 this man, first of all, is competent to die. I think,  
22 again, it's one that has not been briefed, obviously  
23 hasn't been. I don't see these issues, but I think  
24 it's important.

25 I was thinking about it over the

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1 weekend. I don't think that the U.S. Supreme Court nor  
2 our own court has looked at death-row inmates who of  
3 the age of 18 get Alzheimer's, Parkinson's or some kind  
4 of, in this case, stroke, and determine a person like  
5 that is capable of being executed. In other words, is  
6 that person who has Alzheimer's into his 60s clearly  
7 doesn't understand what is going on, is that person  
8 capable and should we as society execute that person?  
9 I think that is something, I hope, I know it's not  
10 before Court today, but I hope the Court will --

11 THE COURT: I'm assuming you are going  
12 to -- I'm assuming that issue is going to be before the  
13 Nevada Supreme Court, so I'm asking are you going to  
14 raise that issue based upon my denial of the previous  
15 motion?

16 MR. ORAM: I am. Today I thought we  
17 would just deal with competency.

18 THE COURT: I agree, but the issue seem  
19 to intertwined.

20 MR. ORAM: They are.

21 THE COURT: They really are.

22 MR. ORAM: They are. I'm willing to  
23 argue that right now because it is one of first  
24 impression. It's not like I can count and say here's  
25 the standared. Atkins is the only case of that case

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1 you can't execute the mentally retarded. What is  
2 mentally retarded below 75? As Court pointed out, our  
3 statute says has to be before age 18.

4 THE COURT: In Atkins, the person was  
5 mentally retarded when they committed the crime.

6 MR. ORAM: Yes.

7 THE COURT: Here he later becomes what  
8 you have alleged as mentally retarded by self-induced  
9 methamphetamine injections in the Nevada Department of  
10 Corrections.

11 MR. ORAM: Correct.

12 THE COURT: So it's interesting. I  
13 assume the Nevada Supreme Court is going to have to  
14 answer that.

15 MR. ORAM: One way or the other.

16 THE COURT: They are the U.S. Supreme  
17 Court.

18 MR. ORAM: Every time I have ever had  
19 any reversal of a death sentence, which has been about  
20 three, either State or I take it up as also interesting  
21 is what cross appeals is that I have had the death  
22 sentence reversed, but the guilt is upheld, so I appeal  
23 and they appeal. We do these cross appeals. No matter  
24 what happens in this court, it's going up to the Nevada  
25 Supreme Court.

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1 THE COURT: I know. That's why I hope  
2 they are appealing.

3 THE COURT: What do you want me to do  
4 today?

5 MR. ORAM: Find him incompetent.

6 THE COURT: You want me to find him  
7 incompetent to assist you in post-conviction proceeding  
8 and stay his post-conviction proceeding?

9 MR. ORAM: Yes.

10 THE COURT: Which would basically stay  
11 his execution for an unknown period because this doctor  
12 says he is never going to get better.

13 MR. ORAM: Yes. Then if the Court did  
14 that, then I would think based on that doctor's  
15 statement, that the State would then have no choice but  
16 to appeal it. Then we would be up in Nevada Supreme  
17 Court fighting over whether this should be stayed and  
18 perhaps -- when it goes there, I will argue all of the  
19 issues.

20 I would ask the Court to find him  
21 incompetent. I would ask Court to find that he is not  
22 competent to be executed, and the second one, not  
23 competent to assist me on the post conviction. As you  
24 said, they are intertwined by sort of similar. I would  
25 ask for --

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1 THE COURT: Because haven't I already  
2 found that he was okay to be executed based upon the  
3 last ruling?

4 MR. ORAM: Because of he was not --

5 THE COURT: Mentally retarded?

6 MR. ORAM: Because of 18.

7 THE COURT: Now you are asking me to say  
8 he is not capable of being executed because he is  
9 incompetent? Is that different?

10 MR. ORAM: It is different in that before  
11 I was asking you not to find him not competent to be  
12 executed because he was mentally retarded. Court  
13 pointed out, I don't want to keep using that word  
14 because Court has rules against me. I understand why  
15 because of age of 18.

16 Now I'm saying forget age 18. Look  
17 at it as a case of first impression. Find that he is  
18 not competent to be executed because of his low I.Q.  
19 He meets the standards that the U.S. Supreme Court is  
20 going in toward we are not going to execute people who  
21 have serious mental deficiencies regardless of whether  
22 itself induced or not.

23 Your Honor, I see a lot of people  
24 who don't take care of themselves and perhaps -- I  
25 smoke --

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1 THE COURT: You smoke?

2 MR. ORAM: I smoke. Perhaps some day  
3 somebody is going to say if you had cancer, it was  
4 self-induced. I don't think that's exactly the  
5 standard. There is no exception to the Ninth Circuit  
6 saying if he is not competent, you can't -- if he  
7 is not competent, you can't go forward unless it  
8 was self-induced, in which case you can go  
9 forward.

10 Lastly, your Honor, I think with  
11 regard to stroke, if someone has a stroke, stroke is  
12 ugly. It is absolutely ugly. Anybody who has seen  
13 stroke or seen somebody who they love have a stroke,  
14 realizes that they just don't get better like the  
15 State's doctor said. They don't get better. It's not  
16 true. If you had ever had the misfortune of seeing  
17 that, people would realize that they don't just get  
18 better, and there is a need for rehabilitation. That's  
19 why the American Stroke Association is there.

20 Rather than going on any further, I  
21 will let Mr. Owens have a chance. I ask you that find  
22 him not competent

23 COURT REPORTER: Can I just change my  
24 paper first.

25 THE COURT: We'll take a ten-minute

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1 recess. I didn't realize we were going that long.

2 (Brief recess.)

3 THE COURT: Mr. Owens, you can finish.

4 MR. OWENS: I'm asking that your Honor  
5 find the defendant competent to proceed with his  
6 post-conviction proceeding based on the legal standard,  
7 which is less than what is required to be competent for  
8 a trial where you are more actively involved in the  
9 court hearing. We don't even know if this  
10 post-conviction thing is going to get to an evidentiary  
11 hearing even. It's just a process of writing a brief,  
12 which has been done by Mr. Oram.

13 The level of input that is needed by  
14 a defendant post conviction is less and the standard  
15 of competence is less. I'm not sure that was fully  
16 understood initially by the defendant's expert. The  
17 I.Q. score, I don't see that as a particularly relevant  
18 a issue of competency though it appears to be in the  
19 mentally retarded range. Even people who are found  
20 mentally retarded are still competent typically. The  
21 Atkins decision talks about that.

22 You can have low I.Q. and be  
23 competent, which really only requires that you are able  
24 to communicate with counsel. I think that is  
25 completely demonstrated that the defendant can

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1 communicate. It may be more difficult. The attorney  
2 may need to take extra measures or steps to communicate  
3 with his client than a regular client who is not  
4 impaired, but certainly communication with Mr. Mulder  
5 is capable and can be done as demonstrated by their own  
6 expert who spent five hours talking with him and  
7 learning a wealth of information from him.

8 The experts who have been  
9 characterized as State experts, just to refresh  
10 the Court's memory, these are not experts that we  
11 selected. This is Judge Douglas who appointed them  
12 pursuant to NRS 176.425 to do an evaluation. That was  
13 more for the competency to be executed, which they  
14 refer to as insanity, which is different than the  
15 credible defense of insanity. Kind of makes for some  
16 confusion there.

17 THE COURT: I just want to make sure the  
18 record is clear because that insanity issue has reared  
19 it's head, and I thought that we fully resolved that,  
20 that it wasn't properly before the Court, that the  
21 statute provided for how it's to be brought, and I  
22 think it's actually the warden that would have to bring  
23 that issue before the Court.

24 MR. OWENS: Right.

25 THE COURT: The warden has not done that.

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1 MR. OWENS: Right. That was kind of when  
2 there was an order to show cause, the A.G. got involved  
3 and there are documents or files State's position is  
4 that this wasn't raised by the warden. The judge  
5 shouldn't have invoked 176.425 was their argument, but  
6 ultimately this was the doctor at the prison that made  
7 that report and evaluation, and those were referenced  
8 or sent down to the Court, but they didn't have  
9 available to them the UMC records. They weren't  
10 experts that I had gone out and hired and provided them  
11 every piece of evidence. Just want to make that clear  
12 for the record. If that has been raised properly,  
13 176.425 by the prisons, then the attorney general needs  
14 to be standing here in my place today. I agree that  
15 the issue is properly before The court.

16 This issue of memory, I just don't  
17 see memory as being part of the analysis for  
18 competency. The court cases don't really speak about  
19 memory. They speak about ability to communicate with  
20 counsel.

21 THE COURT: Right. That's what I'm  
22 concerned about because basically it says, and I agree  
23 with you, I think the standard in post-conviction  
24 proceedings is less than the standard to stand trial  
25 for obvious reasons. But the case that you cite in

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1 your brief says that the defendant has to be able to  
2 communicate his allegations of constitutional  
3 depravation to his attorney. He has to be able to say  
4 this is what I think went wrong either at pretrial,  
5 during trial or with my appellate counsel.

6 MR. OWENS: These are legal issues.  
7 Seldom are they in a position to say where there were  
8 legal errors from cases. That's where an attorney's  
9 expertise comes in. Certainly they can, the attorney  
10 will take into account what their client tells them,  
11 but he has to ferret out the issues, the issues that  
12 have merit. Certainly Mr. Oram has seen those issues  
13 and finds they have merit.

14 If the ability to remember the trial  
15 or the crime, if that was the standard, good heavens,  
16 we prosecute people all the time that either rightfully  
17 or wrongfully claim to have no memory of the crime.  
18 That doesn't make them incompetent. They are still  
19 able to communicate to counsel. Maybe they can't  
20 communicate as well because it would be better if they  
21 remembered and would be able to assist counsel, but I  
22 don't see that competency for post conviction requires  
23 some sort of memory. That's beyond the party's  
24 capability to even investigate. As the expert said, we  
25 don't know for sure what his memory is or is not. For

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1 that to be the standard, that just seems wrong. I  
2 don't see that as being the a determining factor in  
3 these cases.

4 I just would focus back on his  
5 ability to communicate. Mr. Oram can go talk to him  
6 and tell him in simple terms what issues he saw, and  
7 the defendant can -- what needs to happen is the  
8 defendant needs to verify this petition. That wasn't  
9 done. It was done by some father, some  
10 Reverend Keifer, but before that could happen, there  
11 needs to be a finding of incompetency first before you  
12 can have someone else come in. Then we would have to  
13 put Father Keifer on the stand to see what his  
14 background is, what his relationship is with the  
15 defendant, et cetera, et cetera. None of that  
16 happened, so I don't think that verification is  
17 good.

18 If your Honor finds the defendant  
19 competent, that would be my request, is that Mr. Oram  
20 sit down with the defendant, talk over this writ, see  
21 if there are any additional issues that the defendant  
22 would want to have raised. He has certainly been able  
23 to communicate with his counsel in this proceeding to  
24 talk about some of the issues on competency. They have  
25 leaned over and had conversations together. He can

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1 certainly do that in terms of post-conviction brief.  
2 Then he should submit a verification of the petition or  
3 a supplement with any additional issues and verify  
4 that. There are provisions in NRS Chapter 34 that the  
5 attorney can sign the verification, either or.

6 If your Honor were to find him  
7 incompetent to proceed with post-conviction proceeding,  
8 I don't agree it necessarily would have to be stayed.  
9 Of course, that's where we look into the possibility of  
10 having a next of friend litigate post conviction on the  
11 defendant's behalf. Certainly it's a possibility it  
12 was discussed in Colando, I think it is. Next of  
13 friend wouldn't necessarily have any memory of the  
14 crime, and yet in the right circumstances, they would  
15 be capable of carrying on the defendant's defense.  
16 That's where we would be looking to go and not stay the  
17 proceedings necessarily because I think the evidence is  
18 there to find him competent, and ask you that you do  
19 so.

20 THE COURT: Anything else, Mr. Oram?

21 MR. ORAM: Just very briefly, your Honor.  
22 At least one State expert said he appeared he  
23 represented he had no memory of the trial. My expert  
24 said he claimed to have no memory of the trial.

25 THE COURT: Why are you calling him your



1 expert when you asked me not to refer to him as your  
2 expert?

3 MR. ORAM: I'm sorry.

4 THE COURT: Do you really think that the  
5 two that came in first are the State's experts and the  
6 last one your expert?

7 MR. ORAM: I just see them as State  
8 called them.

9 THE COURT: Okay.

10 MR. ORAM: Dr. Kinsora said he appeared  
11 or claimed to have no memory of it. It was Dr. Milner  
12 who claimed also that he said he had no memory of the  
13 trial. He can't assist me in that I told the Court  
14 that's what I had been informed by the defendant as  
15 well.

16 Lastly, your Honor, if the Court  
17 finds him incompetent, then pursuant to the Rohan  
18 decision, I believe that there is no choice but to stay  
19 the proceeding. With that, I submit it.

20 THE COURT: At this time, I am going to  
21 find that he is competent to assist in his  
22 post-conviction proceeding. Now, I want to know how  
23 you want to proceed, Mr. Oram, because I know there are  
24 two issues before we even get to the writ. I  
25 understand this is all going to go up. Are you going

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1 to make the decision to take these two issues up to the  
2 Supreme Court right now or do you want to proceed?  
3 Because we haven't even gotten to your 52 page  
4 petition.

5 MR. ORAM: Right. Your Honor, is there  
6 any way that I could have some time? I'm not sure  
7 that I know it's a final ruling, but I can't appeal  
8 unless it is a final ruling. Is there any way you can  
9 give me a couple of weeks to research that and then  
10 come back?

11 THE COURT: I don't know the final  
12 answer. That's why I am asking you.

13 MR. ORAM: I do not either. One thing I  
14 not want to do is sign the verification for him or go  
15 and have him sign something where I don't feel that he  
16 is competent and then have the State be able to say on  
17 appeal it was verified. I'm not quite sure. I have  
18 never had this situation, so I'm not quite sure if,  
19 which way to proceed with this. I would hate for us to  
20 go through the whole proceedings, call Judge Cherry,  
21 everything as substantive issues, then have the Supreme  
22 Court say, make some determination that the case should  
23 come back. Perhaps I should research it and see if I  
24 should take it up on this issue first. But again I'm  
25 just --

SHERRY GRAHAM  
Certified Court Reporter, #378.

1 THE COURT: I agree. I don't know the  
2 answer, so I think it's probably going to take you some  
3 time to determine how you want to proceed.

4 MR. ORAM: Yes, your Honor.

5 THE COURT: How about 30 days?

6 MR. ORAM: Could I, please?

7 THE COURT: Then you can come back and  
8 you can inform us if you are either going to take it up  
9 on appeal of the two issues that have already been  
10 determined or if you want to move forward and set a  
11 hearing for the petition. Has the petition been fully  
12 briefed?

13 MR. ORAM: It has. There is -- I would  
14 like to brief that last issue just so it's on the  
15 record. This is the issue of first impression, one we  
16 addressed sort of today.

17 THE COURT: Incompetent, period, to be  
18 executed.

19 MR. ORAM: Correct, incompetent period  
20 to be executed. There is Supreme Court, Nevada  
21 Supreme Court case that recently came out about  
22 aggravators --

23 THE COURT: It's the McConnell.

24 MR. ORAM: I want to go back and look at  
25 the aggravators in this case again just to see if I

SHERRY GRAHAM  
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1 have any issues.

2 THE COURT: Maybe Mr. Owens would  
3 probably know better. Is the McConnell decision final?  
4 Because I know the Washoe County D.A.'s office had  
5 petitioned for a rehearing.

6 MR. OWENS: That is exactly where it was.  
7 Our files filed a friend-of-the-court brief. Washoe  
8 County actually filed a petition for rehearing. The  
9 Supreme Court ordered the defendant in that case to  
10 file an answer. They could have just denied the  
11 petition for rehearing or whatever, but they didn't.  
12 They ordered the defense to respond. They have now  
13 done that.

14 There was also a friend-of-the-court  
15 brief from some other defense affiliated party so they  
16 are reviewing paperwork. They could have oral argument  
17 on it. They could have them brief further issues or  
18 come out with a ruling tomorrow and say no petition for  
19 rehearing, denied. That where it's at. Until that is  
20 resolved, the McConnell decision is not in. It could  
21 be changed. It might stand as it is, but it could be  
22 changed in a minor way or a major way. Doesn't really  
23 bind it. I know there are a number of cases in this  
24 jurisdiction that are kind of in limbo waiting to see  
25 the outcome of it.

SHERRY GRAHAM  
Certified Court Reporter, #378

1 THE COURT: It's accurate because I have  
2 some decisions that I believe are kind of in limbo that  
3 I have allowed the parties to continue those matters  
4 until we do have a final decision regarding the  
5 McConnell issues. If you tell me that you believe you  
6 have a McConnell issue, then I would probably want to  
7 do the same thing.

8 MR. ORAM: I haven't looked at it  
9 carefully enough on substantive to see if that would be  
10 an issue for Mr. Mulder. Perhaps what we can do, as  
11 Court suggested, is pass it 30 days, then I can inform  
12 the Court whether I would take it up on appeal or  
13 rather proceed with a writ itself, and if I decide to  
14 proceed with the writ itself, perhaps Court would give  
15 us an additional period of time to brief any other  
16 issues.

17 THE COURT: Sure I would. To supplement  
18 the issue that we sort of talked about today?

19 MR. ORAM: Correct. It would be  
20 anything that was recent that I think needs to be put  
21 in.

22 THE COURT: Okay. 30 days.

23 MR. ORAM: Thank you, your Honor.

24 THE CLERK: Status check?

25 THE COURT: Sure, just a status check on

SHERRY GRAHAM  
Certified Court Reporter, #378

1 how to proceed.

2 THE CLERK: April 14th at 9:15 for status  
3 check.

4 MR. ORAM: Thank you. Mr. Mulder does  
5 not need to be here?

6 MR. OWENS: Mr. Oram wants Mr. Mulder to  
7 remain down here at High Desert so he can communicate  
8 with him.

9 THE COURT: Good. Yes.

10 MR. OWENS: Or can he to back to prison.

11 MR. ORAM: Court's indulgence.

12 (Attorney-client consult.)

13 MR. ORAM: Could he stay at High Desert,  
14 your Honor, if that's not a difficulty?

15 THE COURT: Sure. We will just order  
16 that he be held there. How long do you want me to hold  
17 him there?

18 MR. ORAM: Until at least April 14th.  
19 Could we go out 60 days? He doesn't need to be down  
20 here for that time, but that would give me an  
21 opportunity to be able to go see him.

22 THE COURT: Sure.

23 MR. ORAM: It's only 45 minutes up.

24 THE COURT: Keep him at High Desert for  
25 60 days from today.

SHERRY GRAHAM  
Certified Court Reporter, #378

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THE DEFENDANT: 60 days?

THE COURT: 60 days.

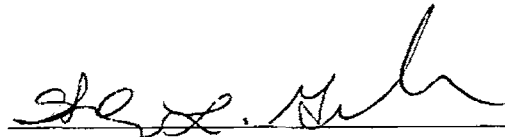
THE DEFENDANT: Okay.

THE COURT: Thank you.

MR. ORAM: Thank you very much.

\* \* \* \* \*

Attest: Full, true, accurate transcript of  
proceedings.



Sherry L. Graham, CCR #378

SHERRY GRAHAM  
Certified Court Reporter, #378

No. \_\_\_\_\_

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OCTOBER TERM, 2018

IN THE SUPREME COURT OF THE UNITED STATES

=====

MICHAEL JOSEPH MULDER, Petitioner,

v.

WILLIAM GITTERE, Warden, Respondent.

=====

*On Petition for Writ of Certiorari to the  
Supreme Court of the State of Nevada*

=====

**PETITIONER'S APPENDIX**

Volume II of IV  
(APP. 001- APP. 770)

=====

**CAPITAL CASE**

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## VOLUME 1

Appendix	App. No.
Appendix A	Transcript of Hearing, <i>State of Nevada v. Mulder</i> , District Court, Clark County, Nevada Case No. C138790 (May 13, 2005) .....APP0001-00192

## VOLUME II

Appendix B	Transcript of Hearing Volume I, <i>Mulder v. E.K. McDaniel, et al.</i> , District Court, Nevada Case No. 3:09-cv-00610 (August 2, 2011) .....APP0193-0367
Appendix C	Transcript of Hearing Volume II, <i>Mulder v. E.K. McDaniel, et al.</i> , District Court, Nevada Case No. 3:09-cv-00610 (August 2, 2011) .....APP0368-0493

## VOLUME III

Appendix D	Transcript of Hearing Volume III, <i>Mulder v. E.K. McDaniel, et al.</i> , District Court, Clark County, Nevada Case No. 3:09-cv-00610 (August 4, 2011) .....APP0494-0715
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## VOLUME IV

Appendix E	Order, <i>Mulder v. Baker, et al.</i> , District Court, Nevada Case No. 3:09-cv-00610 (September 26, 2011) .....APP0716-0748
Appendix F	Order, <i>Mulder v. Baker, et al.</i> , District Court, Nevada Case No. 3:09-cv-00610 (May 1, 2013) .....APP0749-0751
Appendix G	Order of Affirmance, <i>Mulder v. State of Nevada</i> , Supreme Court, Nevada Case No. 69490 (July 26, 2018) .....APP0752-0768
Appendix H	Order Denying Rehearing, <i>Mulder v. Baker, et al.</i> , Supreme Court, Nevada Case No. 69490 (September 21, 2018) .....APP0769-0770

# APPENDIX B

# APPENDIX B

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UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA  
BEFORE THE HONORABLE PHILIP M. PRO, DISTRICT JUDGE  
---o0o---

Michael Joseph Mulder, : No. 3:09-cv-610-PMP-RAM  
: August 2, 2011  
Petitioner, :  
-vs- : United States District Court  
: 333 Las Vegas Boulevard  
E.K. McDaniel, et al., : Las Vegas, Nevada  
: **VOLUME I**  
Respondents. :  
:

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**TRANSCRIPT OF EVIDENTIARY HEARING  
TO DETERMINE PETITIONER'S COMPETENCY  
TO PROCEED WITH HABEAS ACTION**

A P P E A R A N C E S:

FOR THE PETITIONER: Brian Abbington  
Sarah Hensley  
Attorneys at Law

FOR THE RESPONDENTS: Heather Proctor  
David Neidert  
Deputy Attorneys General

Proceedings recorded by digital recording produced by  
computer-aided transcript  
**PMP/FTR: 080111@1:05pm**

Transcribed by: KATHRYN M. FRENCH, RPR, CCR  
NEVADA LICENSE NO. 392  
CALIFORNIA LICENSE NO. 8536

1 Las Vegas, Nevada, Monday, August 1, 2011, 1:05 p.m.

2 ---OoO---

3

4 THE COURT: All right. We're now convened in  
5 Mulder v McDaniel, et al., 09-civil-610.

6 Thank you, Donna.

7 We have on behalf of petitioner, Brian Abbington and  
8 Sarah Hensley for the Petitioner. The Petitioner is present.

9 We have Heather Proctor and David Neidert on behalf  
10 of respondents, E.K. McDaniel, et al.

11 And the matter is on for evidentiary hearing to  
12 determine petitioner Mulder's competence to proceed with the  
13 pending Habeas action.

14 I've received the briefs, that the parties have  
15 submitted, and I see I have on my bench exhibits -- Donna,  
16 these were submitted by?

17 THE CLERK: Yes, Your Honor. This is by the  
18 Petitioner.

19 THE COURT: Petitioner. Okay. Thank you.

20 THE CLERK: I also have some that were submitted  
21 by Ms. Proctor.

22 THE COURT: Okay. Fine. Thanks very much.  
23 Well, we'll go through those as necessary.

24 I just wanted to address a couple of preliminary  
25 matters at the outset and then, frankly, get into the

1 evidentiary presentation, which I think is what brings us all  
2 together and we can deal with the argument and so forth  
3 separately. But the witness' time is valuable and we want to  
4 get that done.

5           There is some evidentiary issues or questions that  
6 were raised in the briefs and that we probably should address,  
7 one related to the disclosure of the correctional officers,  
8 the names of correctional officers assigned to Mulder and at  
9 particular times, and, also, the production of the I-File.  
10 But, I sense that may be moot.

11           Are there still production issues that the parties  
12 have?

13           MR. ABBINGTON: Yes, Your Honor. I've  
14 approached Mr. Neidert and Ms. Proctor this morning in regard  
15 to the I-File and the production that we've received so far.  
16 In particular -- I don't know if the Court wants to go into  
17 specifics right now or -- but they advised me that they're  
18 not sure whether or not this is the complete file. They  
19 have received assurances from the jail, but there are some  
20 inconsistencies within the production that we've received so  
21 far.

22           Do you want me to --

23           THE COURT: No, that's fine. As long as we get  
24 you on the microphone.

25           MR. ABBINGTON: So, for example, in the I-File,

1 a great portion of it relates to the commissary records. And  
2 the government is making a -- has a contingent that the  
3 commissary records in this case are particularly important  
4 because it reflects Mr. Mulder's ability to order from  
5 commissary and track an order, track his balances, things  
6 like that. And the commissary records we have, we show that  
7 Mr. Mulder has been in -- at Ely State Prison since 1998.  
8 The records we have begin in 2003, have a complete gap for  
9 2004, a complete gap for 2005, and then end on March 11th,  
10 2010. So that, by their presence, they're not complete.  
11 They're obviously have a gap from '04 to '05.

12 THE COURT: Okay.

13 MR. ABBINGTON: I talked to Ms. Proctor and  
14 Mr. Neidert prior to Your Honor coming out, they advise  
15 that they thought that the records only went back to '06,  
16 but the presence of the '03 record, as I told them, belies  
17 that argument.

18 THE COURT: No, I understand. But, do these --  
19 has the State produced everything the State has? In other  
20 words, what -- the file as it exists. There may be things  
21 that don't exist and can't be produced. I understand that.

22 MR. ABBINGTON: Well, I would say that if  
23 there was a cutoff in 2006, then we shouldn't have a record  
24 from 2003.

25 THE COURT: No, I appreciate that.

1 MR. ABBINGTON: And so then we have other things  
2 that, also in the I-File, that are also sort of indicative  
3 of that sort of thing. We have the -- what seems to be the  
4 kites and the communications between Mr. Mulder and Ely Prison  
5 staff. And those seem to be incomplete as well. Some of the  
6 documents are undated, but many of them are between 1998 and  
7 2000 and are prior to his stroke.

8 We have inmate request forms which seem to -- which  
9 are also relevant to the issue of the commissary, and those  
10 forms date from July 7th, 2009, through August the 20th,  
11 1998. It was difficult because they're not in any order.

12 Miss Proctor and Mr. Neidert explained to me that  
13 they received -- they turned them over in the order that they  
14 were received, but they're actually completely out of order.  
15 It's no way of telling, when you turn the next page, it could  
16 be from 2010 or from 1998. But, in any sense, these run only  
17 from 2009 to 1998, so we have about two years that are missing  
18 there.

19 And then we also have Mr. Mulder's intake forms.  
20 And my understanding is that there is a classification process  
21 that takes place every time he leaves the prison. I know that  
22 he's left the prison recently for this hearing, but he also  
23 left in 2001 --

24 THE COURT: To go Carson.

25 MR. ABBINGTON: I'm sorry?

1 THE COURT: To go to Carson for examination.

2 MR. ABBINGTON: Yes, he went there. He also,  
3 in 2005, was summoned to State District Court, and so he was  
4 also housed at High Desert Prison there. The records we have  
5 seem to stop. There is a chronological record that seems to  
6 run almost from the time he's admitted to the prison, but  
7 then it stops December 7th, 1999. And so there is, really,  
8 no dated chronology of interactions between Mr. Mulder and  
9 Mr. -- and the staff at the prison.

10 That's particularly important here because we  
11 also made a point about the fact that they only listed one  
12 correctional officer and didn't provide information related  
13 to the other correctional officers that, that have interacted  
14 with Mr. Mulder. Our concern, being very straightforward,  
15 is that to pluck one officer out of the dozens of officers  
16 who interacted with him, and, yet, we don't have any of the  
17 information of any of his interactions with pretty much  
18 anybody at the prison, other than his kites and requests, that  
19 pretty much leaves us unable to conduct a constitutionally  
20 significant examination of any of the witnesses.

21 THE COURT: And when you say "any of the  
22 witnesses," obviously, the witnesses you're not aware of,  
23 but how does --

24 MR. ABBINGTON: The witnesses that they're --

25 THE COURT: -- that encumber your ability to



1 examine the doctors and --

2 MR. ABBINGTON: I can do the doctors. But, I  
3 think the doctors will say he can order off a commissary,  
4 therefore, he's competent. That's what they said in their  
5 report and that's what the State -- the government has argued  
6 in their prehearing brief. So that we would need -- and my  
7 doctors say I need the entire, the entirety of his ordering  
8 history from the time he's been there, through the present  
9 time, and they have a theory that might explain why he is  
10 able to make these orders and able to explain why the State  
11 has their contention, and we have our contention, and neither  
12 person really has to be wrong.

13 But, in any event, we don't have those records,  
14 so we can't really cross-examine them about any of the  
15 things that happened, what his preorder, what his ordering  
16 patterns were, what his method of accounting prior to the  
17 stroke. These records start in 2003, which is, at least, a  
18 year-and-a-half after the incident.

19 THE COURT: With regards to the witnesses you  
20 plan to call today, tomorrow, the next day, and however many  
21 days, I just want to make sure I understand your position  
22 clearly. Are you telling me that you're not prepared to go  
23 forward?

24 MR. ABBINGTON: No, we can move forward. For  
25 example, today, I would be calling Dr. William Noel and

1 Amy Fettig. I believe that their testimony is not really  
2 affected by these documents. I wanted to bring this to the  
3 Court at the earliest opportunity so that -- my understand is  
4 that the acting warden and the other officers from the --  
5 Officer Williams, and the social worker will be testifying on  
6 Wednesday. So if we address this today, then, by Wednesday,  
7 maybe that would give Miss Fettig -- excuse me, Ms. Proctor  
8 and Mr. Neidert the opportunity to get those records and  
9 supplement what we have right now.

10 THE COURT: Okay. What about Dr. Toomer? Were  
11 you going to be calling Dr. Toomer?

12 MR. ABBINGTON: We'll call Dr. Toomer. I think  
13 he's probably, given the -- we figure maybe -- I allowed two  
14 hours for Dr. Noel and two hours for Ms. Fettig, which will  
15 probably take us until five o'clock. That could be wrong.  
16 So, I thought that maybe Dr. Toomer wouldn't be here until  
17 tomorrow.

18 THE COURT: All right.

19 MR. ABBINGTON: Dr. Toomer conducted testing of  
20 his own, so his diagnosis is not --

21 THE COURT: Dependent.

22 MR. ABBINGTON: Dependent on the I-File. I  
23 think it helps us to insulate him and Dr. Kessel from  
24 criticism, which is one of the reasons I wanted them to be  
25 present during the testimony of the State's evidence.

1 THE COURT: Sure. And Dr. Kessel's testimony  
2 would not be implicate by the I-File then?

3 MR. ABBINGTON: I think it would be helpful  
4 for Dr. Kessel's testimony to have the I-File. At that point,  
5 we would be trying to argue, or seeking to show the complete  
6 history of Mr. Mulder's ordering patterns. And we have  
7 some -- Dr. Kessel has some testimony that might be relevant  
8 on that point.

9 THE COURT: Okay. And Mr. Oram's testimony  
10 wouldn't --

11 MR. ABBINGTON: Mr. Oram is probably not  
12 related to the I-File. Mr. Oram would give his own direct  
13 observations of Mr. Mulder that date back to 2002, 2005.

14 THE COURT: Okay. All right.

15 Well, Ms. Proctor, tell me about the I-File that's  
16 existent, its production and so forth.

17 MS. PROCTOR: Yes, Your Honor.

18 The canteen records, first I would like to address.  
19 My understanding from the canteen records, when I requested  
20 those from the Nevada Department of Corrections, were they  
21 only existed from 2006 forward. We do have one page  
22 from 2003. We produced everything to opposing counsel.  
23 But, my understanding was the records before 2006 no longer  
24 existed.

25 THE COURT: All right. So there was the single

1 page in 2003, you said, that was included?

2 MS. PROCTOR: Correct.

3 THE COURT: All right. The canteen records.  
4 All right.

5 Now, what about -- now that's not part of the  
6 I-File?

7 MS. PROCTOR: That is not part of the I-File.

8 THE COURT: Okay.

9 MS. PROCTOR: The I-File is an institutional  
10 file kept by the prison. Again, Mr. Abbington mentioned  
11 that it was not in much of an order. We produced it as we  
12 received it. My understanding was we received the entire  
13 file. We produced the entire file to Mr. Abbington as it  
14 exists.

15 THE COURT: And when did you produce it?

16 MS. PROCTOR: Uh, two, three weeks ago.

17 THE COURT: Okay. Okay. So you've had just a  
18 couple of weeks to go through and try to get it date organized  
19 or --

20 MR. ABBINGTON: I thought it came in right  
21 before the prehearing brief, which would have been, like,  
22 the 21st or the 22nd. I don't know if that's accurate.

23 MS. PROCTOR: That --

24 MR. ABBINGTON: Does that sound about right?

25 MS. PROCTOR: Yeah.

1 MR. ABBINGTON: So I guess it's been eight  
2 days ago.

3 THE COURT: Eight or 10 days ago. Okay. Ten or  
4 11 days ago?

5 MR. ABBINGTON: I think that's right.

6 THE COURT: Okay.

7 MS. PROCTOR: And we have not requested any  
8 updates on those records since we first requested them. It  
9 would be, probably, in August when we were first addressing  
10 the opposition to the Motion For Stay, so there would not be  
11 more current information.

12 THE COURT: But the institution has advised you  
13 that is the entire file?

14 MS. PROCTOR: At the time we ordered the records  
15 last August, that was correct.

16 THE COURT: All right. So you mean there may be  
17 new stuff since August?

18 MS. PROCTOR: There may be a couple of documents  
19 sent to them.

20 THE COURT: All right. How long would it take  
21 to get those?

22 MS. PROCTOR: I can certainly have my assistant  
23 ask.

24 THE COURT: They could probably fax them to you,  
25 I would think.

1 MS. PROCTOR: Yes, sir.

2 THE COURT: Let's get that updated.

3 Now, what about -- now, there was -- would that  
4 include the kites?

5 MS. PROCTOR: I would request everything, since  
6 August of last year, to be sent up.

7 THE COURT: And what about the list of  
8 correctional officers on the tier with the petitioner;  
9 those who would have an opportunity to interact with them?

10 MS. PROCTOR: Your Honor, Mr. Abbington has  
11 requested a list of every officer who has interacted with the  
12 petitioner since 2002. That would be an extreme hardship on  
13 the prison, and I did not ask for a list of every officer that  
14 had interacted. I had asked the prison --

15 THE COURT: I'm not sure how anybody would know  
16 every officer who interacted. I think it would be more a  
17 matter of who is assigned to a particular locale, location,  
18 where they could have the opportunity to do so. You wouldn't  
19 have any way of knowing who it was who actually --

20 MS. PROCTOR: Correct, Your Honor. My  
21 understanding is that at Ely State Prison, the officers have  
22 rounds where they serve in different units at different times,  
23 so there's no one guard that will serve at a particular unit  
24 for an extended period of time. So, we could potentially be  
25 talking about the majority of the guards at Ely State Prison.

1 THE COURT: Okay. Okay. Do you have any idea,  
2 roughly, how many people we're talking about?

3 MS. PROCTOR: No, Your Honor. We have called  
4 one correctional officer. We are also calling the case  
5 worker.

6 THE COURT: All right.

7 MS. PROCTOR: So --

8 THE COURT: Well, they certainly might have  
9 some information on how many it will be or who they will be.

10 Mr. Abbington, what about, what about that? It's  
11 really difficult to produce the names of people who have  
12 interacted. I don't know how you could possibly --

13 MR. ABBINGTON: I think I was -- we -- in our  
14 response to the prehearing brief, we had said "the assigned  
15 officers." But I mean, the fact is they only provided one.  
16 I mean, we would say it would be very, very difficult to do  
17 all these other things --

18 THE COURT: There's got to be more than one;  
19 yeah.

20 MR. ABBINGTON: There's got to be more than  
21 one.

22 THE COURT: Yeah.

23 MR. ABBINGTON: They have a Sergeant Robert  
24 Hendricks, who is repeatedly in the pages they have that  
25 involve interaction between staff and Mr. Mulder. I don't

1 know if he's there, but, literally, one person is the only  
2 person we were provided.

3 THE COURT: Right. Who at the prison would  
4 know -- who carries that roster?

5 You know, I wish I had total recall of all of  
6 my cases. A few years ago, I had trial involving Ely,  
7 involving -- I think it was death row Ely. I can't remember.

8 Yeah, it was. And we had several correctional  
9 officers, and had quite a long list of people and so forth.  
10 And they were people who had, like, the roster and the logs  
11 and so forth.

12 MS. PROCTOR: And, Your Honor, I would have  
13 to find out. Ely has gone through a change recently.  
14 Warden McDaniel is now Associate Director McDaniel. And the  
15 acting --

16 THE COURT: But that wouldn't change the  
17 records, would it?

18 MS. PROCTOR: Yes. And I will be happy to  
19 supplement and to change the name of the respondent. However,  
20 the current warden, and I'm not sure if it's the acting warden  
21 or if she is now the warden, was the associate warden of  
22 operations previously.

23 THE COURT: Is she here?

24 MS. PROCTOR: She will be. We had her on  
25 our witness list, if there are any questions regarding the



1 I-File.

2 THE COURT: Okay. When is she schedule to be  
3 here?

4 MS. PROCTOR: Wednesday morning.

5 THE COURT: Wednesday. Well, you'll talk to her  
6 by phone between now and then, obviously.

7 MS. PROCTOR: Correct.

8 THE COURT: Well, you know, get her on the phone  
9 and get -- so that she can get faxed down to you the list  
10 of -- I don't know what the term is, the roll?

11 MS. PROCTOR: The roster.

12 THE COURT: -- the roster of duty officers, of  
13 correctional officers on the tier where the petitioner has  
14 been. I mean, I know they've got these records. I've seen  
15 them in other cases. It's just a matter --

16 MS. PROCTOR: Would you require that roster  
17 to go back all the way to 2002? I mean has not been at the  
18 same prison the entire time. He has been transported.

19 THE COURT: Well, no, it would only be where  
20 he was. But why shouldn't we include -- I mean the roster  
21 is not going to be -- I don't know how long it's going to be,  
22 how many pages it's going to be, but why not have the entire  
23 roster? That doesn't mean each of these people would be  
24 witnesses. It may be just -- in fact, I don't know,  
25 Mr. Mulder, how you're going -- I'm sorry, Mr. Abbington --

1 how you're going to discern from that list who you would want  
2 to inquire of further.

3 MR. ABBINGTON: I would probably go through --  
4 that's where the I-File becomes important because you would  
5 go through the I-File. The officers who interacted with  
6 Mr. Mulder other than his requests, I would say 70 percent  
7 of the information we were provided by the prison relates to  
8 things he's buying, things he's asking for.

9 So in terms of what the actual interactions with  
10 Mr. Mulder, it's not that big, even since 1998. So, we're  
11 really talking about the names of officers, give me the names  
12 of officers. I could go through the I-File and compare those  
13 people that they provided versus the names of the people that  
14 I have there.

15 THE COURT: All right.

16 MR. ABBINGTON: And then I could ask them  
17 cogently --

18 THE COURT: Yeah.

19 MR. ABBINGTON: -- about what it is that they  
20 observed.

21 THE COURT: Well, if they've got to Xerox five  
22 pages, they have to Xerox 50 pages, however many pages it is.  
23 I don't know how long it would be, but I would think they must  
24 be kept in a particular sequential order.

25 MS. PROCTOR: And I can certainly find out about

1 that, Your Honor.

2 THE COURT: Yeah.

3 MS. PROCTOR: But, it also sounds like  
4 Mr. Abbington is going through the existing I-File to get  
5 this information as to which --

6 THE COURT: Well, maybe some of the information.  
7 What we may do is, later on today, we may get the  
8 associate warden on the phone here from court, and we can talk  
9 to her. It would be a lot quicker to get her on the line and  
10 just kind of go through it with her.

11 MS. PROCTOR: Uh-huh.

12 THE COURT: But, I want to be able to move to  
13 other things and start to move some of these witnesses too,  
14 because their time is valuable.

15 There was an issue concerning exclusion of  
16 witnesses. And let me just say, certainly, in terms of  
17 lay witnesses, I think that's certainly a worthy thing to  
18 do if the parties are invoking the Rule of Exclusion. But  
19 as far as I'm concerned, the experts the parties have can  
20 be present during the testimony of other experts, and their  
21 opinions, to some degree, may be based upon hypothetical, on  
22 things which are not evidence, and including what others say.  
23 So, I'm not going to exclude expert witnesses.

24 MS. PROCTOR: Your Honor, I would just put on  
25 the record, both of our experts are Piasecki and Dr. Bradley

1 will be appearing by video conference from Reno, Wednesday  
2 morning and Thursday, and they are not able to --

3 THE COURT: Ah, I'd forgotten about that.  
4 That's unfortunate.

5 Well, then, they won't be here, but you can  
6 certainly pose to them anything that the others have testified  
7 to, if it gives rise to a question for them. It's certainly  
8 appropriate to do that. They can comment on that. That would  
9 be appropriate.

10 MS. PROCTOR: I would also note, Your Honor,  
11 that, in the prehearing reply brief, Mr. Abbington said he  
12 had no problem excluding Dr. Kessel and the other experts.

13 THE COURT: Doctor who?

14 MS. PROCTOR: Dr. Kessel and his other experts.

15 MR. ABBINGTON: Well, after -- I think this is  
16 actually very difficult to -- because they're appearing by  
17 video conference, it lacks some of the immediacy of the  
18 confrontation between the witnesses, as it were, so I --  
19 because that was such a point, conceded that point that I  
20 would not ask my witnesses to be here.

21 THE COURT: All right. Fine.

22 Well, I'm not saying you got to have people here.  
23 Obviously, you don't have to, if you can't.

24 Now, Mr. Abbington, there was an issue raised  
25 concerning you as a witness at some point. How did you

1 propose to handle that? Were they declarations from you  
2 which the respondent can cross-examine, I suppose, or just a  
3 statement?

4           What did you have in mind in terms of that; have  
5 Ms. Hensley examine you?

6           MR. ABBINGTON: Actually, yes, Your Honor, we --  
7 in our prehearing brief, and in our response to the prehearing  
8 brief, I believe it was contemplated -- what contemplated, at  
9 least, was a fact-based testimony, similar to what the Court  
10 might receive from Mr. Oram --

11           THE COURT: Right.

12           MR. ABBINGTON: -- on Wednesday.

13           THE COURT: Communication and so forth.

14           MR. ABBINGTON: It would not be related to our  
15 communications, related to my defense. It would be related  
16 to my observations.

17           I had provided an affidavit which I filed in the  
18 Motion to Stay which, actually, it was the reason why I  
19 thought about testifying, was because the State took issue  
20 with several points in my affidavit regarding my patience, or  
21 lack thereof with Mr. Mulder; my ability, or lack thereof, to  
22 break things down to him on a basic level, to facilitate his  
23 understanding. So they've, essentially, made my -- our point  
24 is -- my point is, they've essentially made me a fact issue  
25 witness here and so, now, this is what happens.

1 THE COURT: All right.

2 Ms. Proctor.

3 MS. PROCTOR: Yes, Your Honor. We are not  
4 asking for disassociation or recusal or anything of the  
5 Federal Public Defender's Office, or Mr. Abbington, from the  
6 case itself. What we object to is appearance as both and  
7 advocate and a witness at this hearing. He cites several  
8 cases in his reply brief; however, in those cases, the  
9 attorney who is testifying as a witness was not running the  
10 hearing in question. They were appearing as prior counsel,  
11 as a witness in a subsequent --

12 THE COURT: Well, like, Mr. Oram.

13 MS. PROCTOR: Correct. And that's what we  
14 object to; is Mr. Abbington acting as both advocate in this  
15 hearing and as a witness in the same hearing.

16 THE COURT: But he's already offered an  
17 affidavit, or could offer a declaration which you would be  
18 entitled to cross-examine.

19 MS. PROCTOR: Correct. And if he was limited to  
20 that affidavit, then that would be -- we would not be opposed  
21 to that.

22 THE COURT: I understood your testimony would be  
23 pretty much along the lines of the affidavit?

24 MR. ABBINGTON: That would be 100 percent  
25 correct, Your Honor. So if they don't have any objections to

1 that, I'm not looking to exceed the bounds of the affidavit.

2 THE COURT: Right. Well, I could receive the  
3 affidavit, and then you could ask him questions, if you want  
4 to cross-examine him on the affidavit, what he said in his  
5 affidavit, and he would be allowed to testify in response. I  
6 would allow that.

7 MS. PROCTOR: Well, that would be fine, Your  
8 Honor.

9 THE COURT: Perhaps that would solve the issue.

10 MR. ABBINGTON: Anything I have to say is in the  
11 affidavit.

12 THE COURT: Yeah.

13 Okay. What we could do is receive the affidavit  
14 and let Ms. Proctor cross-examine you on the contents of the  
15 affidavit. And that would, at least, I think, satisfy the  
16 issue, and it wouldn't, it wouldn't put you in a position of  
17 being called as a witness in violation of 3.7. And even to  
18 the extent it arguably would, I think these are rather unusual  
19 circumstances, and I would allow it. So --

20 Well, tell me about -- oh, there was one other issue  
21 concerning authenticity of records. I think it related to the  
22 reason for calling the associate warden.

23 Is there some issue to records being produced  
24 actually being what they purport to be, or a foundation  
25 existing for them or -- I would assume that records that come

1 from the prison would be accepted.

2 MR. ABBINGTON: My only -- no, I was actually  
3 surprised to see the acting warden listed as a fact witness.  
4 My only question regarding the file and the authenticity of  
5 the file is the completeness of the file.

6 THE COURT: Well, and she may be of great help  
7 on that.

8 MR. ABBINGTON: Right.

9 THE COURT: And that's why I think maybe  
10 getting her on the phone later on today might be a good, a  
11 good thing or --

12 MR. ABBINGTON: It would at least resolve that  
13 issue about the 2004 --

14 THE COURT: Yeah.

15 MR. ABBINGTON: -- 2005 records, and these other  
16 classification records.

17 THE COURT: Right.

18 MR. ABBINGTON: I think it would be important  
19 to know.

20 THE COURT: Okay. Well, let's --

21 MS. PROCTOR: I would certainly -- I know Warden  
22 Baker would certainly be relieved not to appear in person.

23 THE COURT: She's got plenty to do, I'm sure, in  
24 Ely, and not having to travel down.

25 MS. PROCTOR: Certainly. The only reason she



1 was listed was because there might be a question as to that.

2 THE COURT: Okay. No, that's fine.

3 Well, we can probably satisfy what we need from the  
4 associate warden, or from the warden, by getting her on the  
5 phone.

6 Well, are there any other issues before we get  
7 started with Dr. Noel, was it, that the parties have?

8 MR. ABBINGTON: There's only one issue that's  
9 not related to the experts, Your Honor, and I actually spoke  
10 to one of the marshals in charge of Mr. Mulder; is that he is  
11 in a lock box which immobilizes his arms. He already has the  
12 problem with his right arm anyway. This is not a comfort  
13 issue. It -- even though I say that he doesn't have the  
14 ability to communicate well, I would think that this pretty  
15 much disables him from communicating with me at all, other  
16 than a whisper.

17 THE COURT: Now, you -- how is the -- I'm sorry.  
18 The restraints?

19 MR. ABBINGTON: The restraints completely  
20 immobilize his hands. He can't write a note. He can't --

21 THE COURT: Oh.

22 MR. ABBINGTON: -- tap my shoulder. He can't  
23 do anything other than talk out loud. And I don't think that  
24 would be --

25 THE COURT: All right.

1 MR. ABBINGTON: -- beneficial to anyone.

2 THE COURT: All right. You want him to be able  
3 to write a note, to write notes?

4 MR. ABBINGTON: Well, either a note or just -- I  
5 talked to the correctional officers. They advised me that  
6 this is pretty much a body chain that he's in today but that,  
7 tomorrow -- and I asked them, I would ask you, if tomorrow  
8 they could maybe loosen the restraint. Today's testimony  
9 ought to be pretty straightforward.

10 THE COURT: Yeah, tomorrow we can do that.  
11 Obviously, I refer to the marshals in terms of the security  
12 issues, but I think we could certainly see it so that he's  
13 got, even though he may be -- the chain may be connected --

14 MR. ABBINGTON: That's fine.

15 THE COURT: He's left-handed now, as I recall  
16 from the papers?

17 MR. ABBINGTON: That is correct.

18 THE COURT: So --

19 MR. ABBINGTON: That is correct.

20 THE COURT: -- so his left arm would be free  
21 enough to be able to write notes for you. I certainly don't  
22 have a problem with that.

23 MR. ABBINGTON: Yes, sir.

24 THE COURT: And he could certainly communicate  
25 talking to Ms. Hensley and talking to you quietly. I mean

1 that happens all the time.

2 MR. ABBINGTON: Right.

3 THE COURT: You got to be able to talk to your  
4 client.

5 MR. ABBINGTON: At this point, he wouldn't be  
6 able -- if I was engaged in the examination, he wouldn't even  
7 be able to tap me on the shoulder.

8 THE COURT: Correct. Correct.

9 Yeah, no, no, he can't be walking around. We  
10 wouldn't want him doing that.

11 Okay. Well, tomorrow, we can release that restraint  
12 sufficient so he can at least use --

13 MR. ABBINGTON: That would be great, Your Honor.

14 THE COURT: -- his left hand to write.

15 And, Ms. Proctor, anything that you've got before we  
16 call the first witness?

17 MS. PROCTOR: Nothing further, Your Honor.

18 THE COURT: Great.

19 Well, go ahead. Call your first witness then,  
20 Mr. Abbington.

21 MR. ABBINGTON: All right. We would call  
22 Dr. William Noel. And we would (inaudible).

23 THE COURT: All right. Mr. Noel, come on up,  
24 Dr. Noel, if you would, please. Come on up to the witness  
25 stand right here and be sworn by the clerk, sir.

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**DR. WILLIAM NOEL,**

called as a witness on behalf of the petitioner,  
was sworn and testified as follows:

THE CLERK: Please take your seat.

If you would state your full name for the record and  
spell your last name.

THE WITNESS: William Kenneth Noel, N-o-e-l.

THE COURT: Thank you, doctor.

Go ahead, Mr. Abbington.

MR. ABBINGTON: Thank you, Your Honor.

**DIRECT EXAMINATION**

BY MR. ABBINGTON:

Q Doctor, could you state your full name for the record --

THE COURT: He just did.

MR. ABBINGTON: Oh, I'm sorry. Get that in your  
head.

BY MR. ABBINGTON:

Q And could you set out your education -- would the  
State -- are you interested in stipulating to his --

MS. PROCTOR: I would stipulate.

MR. ABBINGTON: Okay. So, assuming that we  
would move forward from that.

THE COURT: I'm sorry. I didn't hear the  
stipulation. You turned.

1 MS. PROCTOR: We would so stipulate that he is  
2 a medical expert, Your Honor.

3 THE COURT: All right. Fine. And we also have  
4 a report, though it's undated, in the Exhibit 1, when was that  
5 prepared? Do you have any idea?

6 MR. ABBINGTON: I believe -- or I could ask the  
7 doctor that.

8 THE COURT: Doctor, I have this Exhibit 1 before  
9 me, a report which bears your signature. Can you take a look  
10 at that and see which -- which volume has, Donna, has the --

11 THE CLERK: It's --

12 THE WITNESS: This one?

13 THE COURT: Yeah, that one.

14 Take a look at -- just flip to Tab 1, doctor, if you  
15 would, please.

16 THE WITNESS: (Witness complies.)

17 THE COURT: And at the last page, page 21,  
18 there's a signature.

19 Is that your signature?

20 THE WITNESS: It is.

21 THE COURT: Does that appear to be a report  
22 which you prepared?

23 THE WITNESS: Yes, sir, it does.

24 THE COURT: And do you know when it was -- it  
25 doesn't have a date that I can see.

1 THE WITNESS: 2007.

2 THE COURT: 2007. Do you remember when in 2007?

3 THE WITNESS: I have the original in my pocket.

4 Could I look at that?

5 THE COURT: Sure. Sure. Absolutely.

6 THE WITNESS: November 2nd, 2007.

7 THE COURT: November 2nd, 2007. Thanks very  
8 much.

9 All right. And just so we can kind of speed things  
10 along, I take it, you are going to offer this report?

11 MR. ABBINGTON: Yes, Your Honor.

12 THE COURT: Is there any objection to the  
13 report?

14 MR. NEIDERT: No, Your Honor.

15 THE COURT: All right. The report of Dr. Noel  
16 dated -- now the status is November 2, 2007, Exhibit 1, will  
17 be received.

18 (Whereupon, Exhibit 1 -- Dr. Noel report, was  
19 received in evidence.)

20 THE COURT: And, the stipulation that he is a  
21 medical doctor, as set forth in the report and stipulation of  
22 the parties.

23 So, go ahead.

24 MR. ABBINGTON: Thank you, Your Honor.

25 ///

1 BY MR. ABBINGTON:

2 Q Dr. Noel, have you practiced in Ely, Nevada?

3 A Yes, sir; I did.

4 Q What were your years of practice there?

5 A Around '92 until very late in the year '94.

6 Q All right. And how did you -- did you -- as far as this,  
7 how did you come to be involved in the ACLU investigation of  
8 Ely State Prison?

9 A Amy Fettig of the ACLU called me and said they were  
10 looking for a family practice, Board Certified physician,  
11 who had practiced in Ely, had practiced in Ely, who would be  
12 willing to look at some prison health records and maybe  
13 examine some prisoners, and give them an opinion as to the  
14 appropriateness of their care. And I said that I would.

15 THE COURT: Now, when did Ms. Fettig contact  
16 you?

17 THE WITNESS: 2007.

18 THE COURT: 2007. And you were no longer  
19 practicing in Ely at the time?

20 THE WITNESS: No, sir; I was not. I was no  
21 longer in practice.

22 THE COURT: Where were you living then when  
23 she --

24 THE WITNESS: Boise, Idaho.

25 THE COURT: Boise, Idaho. Okay.

1 All right.

2 BY MR. ABBINGTON:

3 Q Is that where you live today?

4 A Yes, sir; it is.

5 Q And so when was your first -- when did you first meet  
6 with Amy Fettig, and regarding the Ely prison?

7 A They sent me copies of all the medical records that they  
8 got from the prison on CD ROMs, and I had poured over those  
9 in great length. And then she called me and asked me to  
10 meet her in Ely, to go to the prison and see as many of the  
11 personnel there as we could. And I did that and we went.

12 Q When did that meeting take place?

13 A 2007, before this report was completed.

14 Q May 2007; is that familiar with you?

15 A That sounds about right. It was summer.

16 Q Okay. Do you recall who you saw that day back in 2007?

17 A I don't remember all the names, but I remember  
18 Mr. Mulder.

19 Q All right. Now, there were two visits that you made to  
20 Ely State Prison, is that correct, with ACLU?

21 A Yes.

22 Q One was the initial -- I just need you, for a quick  
23 second -- when was the initial meeting with Amy Fettig? And  
24 then you went back with some other people, or did you go --

25 A I only went with Amy Fettig.



1 Q Both times?

2 A Yes.

3 Q All right.

4 A And I think they were on consecutive days or, perhaps,  
5 they weren't. My memory --

6 Q No, I think you're right about that.

7 How long did you spend at Ely State Prison?

8 A Forever. Many, many hours. Several hours both times.

9 Q And you reviewed the records of how many -- do you  
10 remember how many inmates' records you reviewed before you  
11 went out to the prison?

12 A Oh, 35. I had reviewed these records over a several  
13 month period before I went down and seen --

14 Q Before you even went there?

15 A Yes.

16 Q All right.

17 THE COURT: Were these all death row defendants,  
18 if you recall, or were they throughout the Ely prison?

19 THE WITNESS: I thought they were, but I have  
20 since received letters from some of the inmates that indicate  
21 that perhaps all of them weren't.

22 THE COURT: Okay.

23 THE WITNESS: I truly don't know. I didn't get  
24 into what they did or where they were.

25 THE COURT: Okay.

1 BY MR. ABBINGTON:

2 Q So your investigation was strictly related to the medical  
3 treatment they were receiving at the facility?

4 A Their conditions and the medical care that they had been  
5 receiving and were receiving.

6 Q Of the 35 inmates that you -- whose records you reviewed,  
7 and you subsequently interviewed, was Mike Mulder one of those  
8 inmates?

9 A Yes, he was.

10 Q And you visited him in the presence of Amy Fettig?

11 A I did.

12 Q And that took place when? Is that in June -- is that in  
13 June of 2007?

14 A May or June, somewhere in there. I never had  
15 (inaudible).

16 Q This is the visit on consecutive days that we're talking  
17 about?

18 A Yes.

19 Q Now, can you tell the Court what you saw when you met  
20 Mr. Mulder?

21 A I saw a gentleman who had great difficulty in locomoting.  
22 Great difficulty in speech. It was very difficult for him to  
23 put together a couple of ideas and speech. I'm not convinced  
24 that he necessarily said what he meant to say. And when I  
25 talked to him, I'm not totally convinced that he totally

1 understood everything that I said, but we managed to  
2 communicate between Amy Fettig and myself. We, we spent, I  
3 would imagine, 20, 25 minutes with him.

4 Q What were you trying to communicate with him about?

5 A His paralyzed right side and, specifically, his arm. It  
6 was a very severe contracture of the right arm, and the  
7 contracture should never really have been allowed to occur.  
8 When you have a stroke and you lose innervation to a part --

9 Q I'm sorry. What was that term you used?

10 A Central innervation from the brain to --

11 Q What's --

12 A -- body part.

13 Q Can you tell us what that is?

14 A That's -- when you lose the part of the brain that  
15 controls the body parts --

16 Q All right.

17 A -- the muscles both go into spasm, both extensors and,  
18 and flexors. Extensors raise that hand; flexors pull my hand  
19 down. In the human body, flexors are stronger than extensors,  
20 so they predominate, and the muscles get scar tissues in them  
21 and form this constant contracture, and pull the wrists and  
22 fingers down, down, down. The longer it's there, the more it  
23 pulls down. It will, likely, break the wrist bones if it's  
24 allowed to continue.

25 And these things, back when he had the stroke, if

1 he had been put in a brace and given some physical therapy,  
2 or even some months after, or maybe a year or two after, he  
3 had been given adequate physical therapy and put in an  
4 adequate form (inaudible) brace, that would fit a contractured  
5 hand, you could have prevented a great deal of this  
6 contracture from happening.

7 THE COURT: How would that have affected any  
8 aphasia or any other communicative abilities he had?

9 THE WITNESS: It probably wouldn't have helped  
10 this communicating ability, other than he probably wouldn't  
11 have had the discomfort and frustration of having a body part  
12 that didn't work.

13 So that, these kind of brain injuries, it's very  
14 frustrating for them because they tell their body to do  
15 something, and it won't, and they get very frustrated and  
16 very angry at themselves.

17 THE COURT: With regard -- have you had a chance  
18 to meet with Mr. Abbington about the purposes of this hearing,  
19 the focus of this hearing in terms of the competency --

20 THE WITNESS: Yes.

21 THE COURT: -- of the petitioner?

22 THE WITNESS: Yes, sir.

23 THE COURT: Okay. And would the, would the  
24 contraction that you talked about, in your medical judgment,  
25 how would that affect his competency to assist counsel in

1 connection with his habeas case?

2 THE WITNESS: I think it would be very  
3 bothersome, and it's very frustrating to him. But I don't  
4 think that's the main factor in keeping him from assisting  
5 in his own --

6 THE COURT: Okay. Well, I think we want to  
7 focus on the things that relate to the issues before --

8 MR. ABBINGTON: I understand. I was just --

9 THE COURT: -- before us.

10 MR. ABBINGTON: This was just a background  
11 information of the -- I was going to ask him about verifying  
12 Mr. Mulder, and then we were going to talk about those things.

13 THE COURT: Okay. Well, let's go ahead and move  
14 on to the issue that brings us here.

15 MR. ABBINGTON: All right.

16 BY MR. ABBINGTON:

17 Q This man here, who is sitting here in the blue, is this  
18 Mike Mulder, the Mike Mulder you met?

19 A He sure looked a lot different when I saw him, but --

20 Q How did he look then?

21 A He had more hair. I think he had some facial hair.

22 Q Okay. Now, the judge asked you about issues related to,  
23 to Mr. Mulder's competency. And, specifically, I want to talk  
24 about what you observed.

25 Who was present when you were trying to talk, when

1 you were meeting with Mr. Mulder, if you recall?

2 A There was some guards. I think Dr. Bannister was there  
3 for part of the patients. I don't truly remember. I'm sure  
4 Mr. Bannister was there because he gave me some medical  
5 information on Mr. Mulder that was not in his medical record  
6 that I saw. And, Amy Fettig was there.

7 THE COURT: Now, was Dr. Bannister -- did he  
8 work at Ely, or what was his role?

9 THE WITNESS: It's my understanding that  
10 Dr. Bannister is in charge of the medical services for the  
11 prison system for Nevada. That was what I was led to believe,  
12 essentially.

13 THE COURT: All right. Thank you.

14 BY MR. ABBINGTON:

15 Q The questions that you were asking of Mr. Mulder, can  
16 you explain for the Court what kind of information you were  
17 trying to obtain?

18 A We tried to tie down how he was doing. He managed to get  
19 the idea across that he was having a lot of trouble showering  
20 because he would trip and fall trying to get into the shower.  
21 He just needed a simple step to get into the shower, and  
22 Dr. Bannister said, oh, that would be provided, and could be  
23 provided right away. I don't know if it ever was or not.

24 And I really emphasize trying to get the man a  
25 brace. I've not seen his arm yet today, but it was not like

1 that at that time. I mean, it was pretty well useless. And  
2 I'm sure it was uncomfortable at times for him.

3 Q I understand.

4 A And it was difficult to extract from Mr. Mulder concepts  
5 and ideas, other than extremely simplistic ones.

6 Q That's what I want you to talk to the Court about.

7 What kind of concepts and ideas did you have  
8 difficulty having Mr. Mulder understand or communicate to  
9 you?

10 A If you stuck with a very simple single idea, you could  
11 pretty well get that idea across and try to extract some  
12 information. Once you started to get more than one idea  
13 together, or a complexity of ideas together, it, it's like  
14 it didn't quite connect. It was like it was sort of  
15 confusing, and there was almost a barrier there that just  
16 wasn't getting across. I don't think that Mr. Mulder truly  
17 understood, and I don't think that he necessarily was putting  
18 forth to me ideas that he meant to put forth. I don't think  
19 I could really be sure he was saying what he meant to say. I  
20 wouldn't understand everything that he said. He spoke with a  
21 great deal of frustration of speech and of enunciation.

22 Q Now, when you talk about the frustration of speech, this  
23 is separate and apart from this frustration of his arm?

24 A Yes. This was just trying --

25 Q This was just a frustration of him being able to vocalize

1 words?

2 A Right; just trying to put ideas together.

3 Q Okay. So, when you talk about him being able to talk  
4 about a single idea, is that -- were you able to stack one  
5 idea or one question on top of another? Or, were you just  
6 talking about simple ideas related to his actual physical  
7 condition?

8 A It took a little while to get this idea of him not  
9 being able to shower because he would trip and fall getting  
10 into the shower. Now, that involves I can't shower, right?  
11 All the way to I stumble when I tried to get in. That was a  
12 very involved thing.

13 Q So it was very difficult for him to even express that  
14 problem to you?

15 A Very difficult, very frustrating, I'm sure, for him.

16 Q How long do you think it took just for him to be able to  
17 explain to you that he was falling in the shower?

18 A Probably ten minutes. And it took both Miss Fettig and  
19 myself. Of course she could understand some things that I  
20 couldn't, and I understood some things that she couldn't.  
21 It was very, very frustrating for Mr. Mulder. If you talk  
22 to him for any length of time, you become aware that the  
23 connections just aren't there.

24 Q What is your -- what is your opinion about his ability  
25 to communicate, his speech, whether it was impaired or not?



1 A I can't address what it is today. He may have received  
2 very intensive speech therapy at Ely, although I doubt it.  
3 At that time, I don't see how you could really formulate a  
4 strategy or gain information or impart information of any  
5 complexity at all. I don't think that's something that he  
6 could assist in at all.

7 THE COURT: What was he able to tell you  
8 during -- you said 25 minutes you were with him?

9 THE WITNESS: About that. I'm just  
10 guesstimating. It's about what we spent with everybody.

11 THE COURT: And you and Miss Fettig and  
12 Dr. Bannister?

13 THE WITNESS: Yes.

14 THE COURT: And what kind of room was it that  
15 you were in? Were you in a cell?

16 THE WITNESS: It was a room with examining  
17 tables in it, and we had a nurse and a guard or two, and  
18 myself and Dr. Bannister and Ms. Fettig.

19 THE COURT: Did you perform any kind of medical  
20 examination of --

21 THE WITNESS: We didn't have any tools. They  
22 didn't provide us any tools. And it was pretty much a, very  
23 much a hurry up. We got to get these guys somewhere for lunch  
24 break or whatever.

25 THE COURT: So it was mostly conversation or

1 efforts -- not physical examination?

2 THE WITNESS: Right.

3 THE COURT: Okay. And during the 20, 25 minutes  
4 or so, whatever it was, you were putting questions to him?

5 THE WITNESS: Trying to talk to him.

6 THE COURT: Okay. And with regard to his  
7 understanding of what you were -- give me an example of  
8 what you might have asked him, that you recall, and how he  
9 responded.

10 THE WITNESS: My -- I'm sure I said something  
11 about does the contracture in your arm cause you pain? And  
12 then I went backwards. I got nothing, and I went back and  
13 explained about a contracture. And that didn't seem to make  
14 any connections. And so then I changed and said the muscle  
15 spasm in your arm that pulled your fingers down, and he kind  
16 of went like that (indicating).

17 THE COURT: Right.

18 THE WITNESS: And I said does that hurt a lot?  
19 And he said something that I couldn't understand. And I think  
20 Amy said, I didn't understand that either. And it was just --  
21 it was full of frustration.

22 THE COURT: All right. Was there any  
23 communication you had with him where you thought he understood  
24 what you said, or was able to communicate with you, or  
25 did he just not communicate other than to appear to be

1 frustrated?

2 THE WITNESS: We were trying -- a nurse was  
3 telling us something about that they had gotten him a brace.  
4 And he tried to tell us that the brace they got him didn't  
5 fit. And that took about the rest of the time. And that  
6 was a very complex idea to try to get together and get across.

7 THE COURT: All right.

8 THE WITNESS: And a lot of that was done by  
9 gesture.

10 THE COURT: All right.

11 All right. Go ahead.

12 BY MR. ABBINGTON:

13 Q So when you're talking to him, are you using terms like  
14 contracture, or are you trying to use simpler terms to try to  
15 communicate with him?

16 A I think I said contracture at first, and then I stopped  
17 that and went to simple everyday words, thinking that was the  
18 problem. And that wasn't the problem. The problem was trying  
19 to comprehend these complex ideas.

20 Q Do you have an opinion as to -- well, first your  
21 observation. In your opinion, did Mr. Mulder seem to have  
22 difficulty understanding what it was you were saying to him?

23 A Yes.

24 Q Did he have difficulty understanding, forming sentences  
25 to repeat -- to communicate with you?

1 A Very much so.

2 Q Did you observe then -- in your opinion, was there this  
3 problem of communication, added from what you're saying to him  
4 and what he hears, and what he's trying to say and what he  
5 actually says?

6 A I don't think they're related at all. I think there's --  
7 there's no confusion there. I don't trust that he totally  
8 gets what I say, and I don't trust that what he says is  
9 necessarily what he is trying to say.

10 Q Would it be a fair statement to say that the majority  
11 of communication that you could get from him, or you were able  
12 to make with him, was related to very basic concepts like are  
13 you in pain? Does this hurt? Does this feel good?

14 A Ultra simplistic ideas. Very simple ideas. And, one  
15 idea at a time.

16 Q Do you have an opinion, a medical opinion, about  
17 Mr. Mulder's brain and its ability to function?

18 A Severely impaired.

19 Q When you say "severely impaired," what does that mean? I  
20 mean on a scale of one to ten -- that doesn't really make any  
21 sense.

22 Would you have any confidence in anything Mr. Mulder  
23 tells you, or are there some limits; is there a point at which  
24 you're not com -- at which you would lose comfort with what he  
25 tells you?

1 A Simplistic ideas like bad; I hurt; or good; or t.v., yeah  
2 I could understand, really, those. But you start to get into  
3 feelings and what did you do when, and what did you say when,  
4 or what was done here or there, I don't think that it connects  
5 in a manner that you can totally rely on at any degree at all.

6 THE COURT: Dr. Noel, I want to make sure I  
7 understand the scope of your examination that's in your  
8 November 2nd report of 2007. The report is a gross report  
9 that includes a lot of different inmates that you interviewed,  
10 I recognize the names of several of them. And at pages 11 and  
11 12 is the text concerning your meeting with Mr. Mulder, and  
12 that focuses, just as you have in your testimony, on the  
13 physical therapy to repair damage to the arm and fingers, hand  
14 and so forth, and, also, some other aspects of the interaction  
15 between you and Ms. Fettig and Mr. -- or Dr. Bannister, and  
16 his, his disability, the absence of a ramp and so forth. It  
17 doesn't extend into a neurological examination or other  
18 examination.

19 Did you have other occasions where you met with  
20 Mr. Mulder to evaluate him?

21 THE WITNESS: No.

22 THE COURT: So it was this single meeting that  
23 you had?

24 THE WITNESS: Yes.

25 THE COURT: Did you perform neurological

1 examination of him or --

2 THE WITNESS: I didn't have the equipment. I  
3 was just trying to get some simple ideas. I was concerned  
4 with his physical being more than anything.

5 THE COURT: No, I understand that.

6 What I'm driving at, I want to make sure, since  
7 the issue here relates to his mental competence, your  
8 testimony concerning your opinion of his competence, his  
9 mental competence is based upon that single interview that  
10 you had with him?

11 THE WITNESS: It is. That single time, yes.

12 THE COURT: Okay. All right. All right.

13 Mr. Abbington.

14 BY MR. ABBINGTON:

15 Q Just a couple more things. And so you -- did you have  
16 any -- the judge already asked you, you didn't have any  
17 other visits at the prison other than this one visit with  
18 Mr. Mulder?

19 A No, sir; I did not.

20 Q All right. And regards the interaction with Mr. Mulder's  
21 expressing these statements to you, this is in the presence  
22 of other guards at the prison, as well -- in addition to  
23 Dr. Bannister?

24 A Yes, sir.

25 Q Do you recall the name of those guards or any of those

1 people?

2 A I do not.

3 Q All right. Okay.

4 MR. ABBINGTON: Thank you very much.

5 THE COURT: Thank you.

6 Mr. Neidert, did I understand that you're going to  
7 examine?

8 Go ahead, you may cross-examine.

9 **CROSS-EXAMINATION**

10 MR. NEIDERT:

11 Q Is it Dr. Nole (phonetic) or No-ell? I don't want to  
12 mispronounce your name, sir.

13 A Just like Christmas.

14 Q Just like Christmas. I can remember that.

15 Dr. Noel, you were a dental practitioner not a  
16 doctor?

17 A Family practice.

18 Q Family practice. So not a neurologist by training?

19 A No.

20 Q You're not a psychiatrist by training?

21 A No.

22 Q And what you've testified today, and I know we're  
23 repeating ourselves to some degree, was as -- a basis of  
24 one, that one visit at the Ely State Prison in 2007?

25 A That's correct.

1 Q And the report indicates and, just make it clear, your  
2 report indicates October 8th and 9th 2007. You've testified  
3 summer.

4 Would you agree that the October dates are probably  
5 the correct dates? It's not that big of an issue, but that's  
6 what you wrote down in your report.

7 A It was probably as close to summer as May is.

8 Q Okay. In Ely, it's never close to summer, is it?

9 A That's true.

10 Q And with respect -- you examined -- who provided the  
11 medical records that you looked at in this case?

12 A The ACLU sent them to me.

13 Q Okay. And did these report to be all the medical  
14 records that they had with respect to the various inmates  
15 you reviewed, including Mr. Mulder?

16 A The ACLU told me that they were assured these were the  
17 complete and total medical records of the people.

18 Q Okay. And, and you accepted the representation that  
19 those were all the records that they had and that they gave  
20 you all they had, and all that?

21 A I had no choice.

22 Q Okay. You -- your report indicates that after you met  
23 with Mr. Mulder, you had a conversation with Dr. Bannister?

24 A Yes.

25 Q And Dr. Bannister said, wait a second. He was not left



1 alone after his stroke. He was transported to University  
2 Medical Center in Las Vegas?

3 Do you remember that?

4 A Yes, I do.

5 Q And in your report, you seem to discount Dr. Bannister's  
6 representations?

7 A Well, sir, in medicine, there is a rule: If it's not  
8 written down, it didn't happen. And there was nothing in his  
9 medical records that indicated anything to do with this at  
10 that time.

11 Q Okay. Does the -- are the I-Files and records that we  
12 supplied, are they on the witness stand?

13 THE COURT: I don't know.

14 MR. NEIDERT: I don't know either.

15 THE COURT: Are they exhibits?

16 UNIDENTIFIED SPEAKER: Yes.

17 THE COURT: What's your exhibit?

18 MR. NEIDERT: Uh, I'm looking, at this point,  
19 at Bate stamp numbers in the 900s. I don't know what --

20 THE COURT: Well, I don't know. Are your  
21 exhibits marked by number?

22 MR. ABBINGTON: They're exhibit numbers. I  
23 don't know exactly --

24 UNIDENTIFIED SPEAKER: It would be Exhibit 509.

25 MR. NEIDERT: Exhibits 509.

1 THE COURT: Exhibit 509.

2 Donna, can you help the witness find Exhibit 509 in  
3 the binders up there. I'm not sure which one it would be in.

4 THE CLERK: Exhibit 509.

5 THE COURT: Okay. And what page of 509? What  
6 page of 509?

7 MR. NEIDERT: Looking specifically at, at page,  
8 Bate stamp is 930, our 930 in the lower right-hand corner.

9 THE COURT: Can you find that doctor?

10 THE WITNESS: You're looking for which page,  
11 sir?

12 MR. NEIDERT: The one that says R-930 in the  
13 upper right-hand corner.

14 THE WITNESS: R-930.

15 MR. NEIDERT: Yes.

16 THE WITNESS: I got 902. I'm headed there.

17 MR. NEIDERT: Yes. Okay.

18 THE WITNESS: -12, -26 -- here it is; R-930.

19 BY MR. NEIDERT:

20 Q And would that be part of the records that you reviewed  
21 or does that page look familiar?

22 A No, sir; it does not.

23 Q Okay. So that's not a record that you saw?

24 A No, sir.

25 Q Okay. And the same with 931, which would be the next

1 page.

2 A No, sir; I have never seen this page before.

3 Q Okay.

4 THE COURT: Mr. Neidert, just tell me what  
5 these -- are these UMC records or --

6 MR. NEIDERT: These are -- these are, -well, the  
7 two that I looked at, I had him look at, are -- have, at the  
8 top, the word "Progress Notes", which I believe are Ely State  
9 Prison medical records.

10 THE COURT: Oh, all right.

11 All right. So you don't recall seeing those  
12 particular records?

13 THE WITNESS: I can assure you they weren't in  
14 the records I saw.

15 THE COURT: All right.

16 BY MR. NEIDERT:

17 Q And R-96?

18 A R-9 -- which one?

19 Q 66.

20 A 66.

21 Q This is a memo to the Utilization and Review Committee of  
22 the Nevada Department of Corrections, Ely State Prison, a memo  
23 dated February 9th of 2005.

24 Is that something you saw?

25 MR. ABBINGTON: Your Honor, I'm sorry. I

1 have to object. It's not been shown where these records  
2 came from.

3 MR. NEIDERT: Well --

4 MR. ABBINGTON: And are they --

5 MR. NEIDERT: Well, we're --

6 MR. ABBINGTON: -- part of the medical records?

7 MR. NEIDERT: Well, they're probably --

8 MR. ABBINGTON: Well, he wasn't --

9 MR. NEIDERT: They're all part of the medical  
10 records.

11 THE COURT: I'm sorry. They're part of the  
12 what?

13 MR. ABBINGTON: The medical records from Ely  
14 State Prison?

15 MR. NEIDERT: Yes.

16 MR. ABBINGTON: And your question is to  
17 Dr. Noel --

18 THE COURT: Whether he saw them.

19 MR. ABBINGTON: -- if he saw these records?

20 MR. NEIDERT: Yes.

21 MR. ABBINGTON: I think these records are out --  
22 I think he has seen these records since then, if you give him  
23 a copy of them. I believe --

24 MR. NEIDERT: Well, I'm going to have him look  
25 at them. You know, he -- and I --

1 Do you see that, sir?

2 THE WITNESS: Yes, sir. I don't remember ever  
3 seeing this before either.

4 BY MR. NEIDERT:

5 Q Okay.

6 A Now, I saw some medical records that are, now, part of  
7 his medical record, that were not part of his medical record  
8 when I saw him.

9 Q Okay.

10 A But I don't remember any of this that you just asked me  
11 about.

12 Q And I -- certainly if you didn't see it, you didn't  
13 see it. I'm not trying -- if it wasn't something that was  
14 provided to you, you would have no way of knowing about it.

15 And --

16 A Now, this is discussing the splint they gave him. I  
17 never saw this ever.

18 Q Okay. And, likewise, if you look at 985, you didn't see  
19 this record either?

20 A 985?

21 Q Yes, sir, which has to do with physical therapy.

22 A This appears to be an evaluation and report. I never  
23 saw anything to do with any physical therapy in his medical  
24 chart.

25 Q Okay. And, uh, if you'd look at pages, starting 991, did

1 you see these records for the University Medical Center?

2 MR. ABBINGTON: Your Honor, now we're outside  
3 the scope of the prison records. He's now going to UMC  
4 records.

5 MR. NEIDERT: These records were --

6 MR. ABBINGTON: The question is -- you want to  
7 ask him any and all records related to Mr. Mulder's treatment  
8 or --

9 THE COURT: No, no. All he's asking is whether  
10 he saw these records approximately before, or during, his  
11 visit in October of 2007, when he interviewed. That was my  
12 understanding.

13 MR. ABBINGTON: Okay.

14 THE COURT: And he said, thus far, he hasn't.  
15 He had certain records Miss Fettig had given him, or someone.

16 THE WITNESS: I have never seen this record  
17 before.

18 BY MR. NEIDERT:

19 Q Okay. And if you look at that record, it seems to  
20 indicate some sort of -- that Mr. Mulder was actually at the  
21 University Medical Center sometime in March of 2001.

22 THE WITNESS: It's 4/25 -- no, that's his birth  
23 date, I guess. Trying to see the record.

24 You know, the date on this is so blotted out, I  
25 can't -- something 15, 2001. So I don't know whether it's

1 three or four. It looks like it might have been a three,  
2 but I've never seen the paper at any rate.

3 BY MR. NEIDERT:

4 Q But these were not part of the records that Miss Fettig  
5 provided you?

6 A No. The note about Mr. Mulder would have been a little  
7 kinder to Ely State Prison if I had seen this.

8 Q I would imagine so. I'm not disagreeing with you and  
9 I'm not trying to -- I guess -- I guess my point is that there  
10 were -- at least, now, you're seeing records from Ely State  
11 Prison that indicate that Mr. Mulder in fact --

12 THE COURT: Well, go ahead and ask him a  
13 question. You can argue to me what it shows.

14 MR. NEIDERT: Okay.

15 BY MR. NEIDERT:

16 Q At the time you saw Mr. Mulder in 2007, you came away  
17 with a belief that he did not receive, basically, any real  
18 medical treatment at all following his stroke on March 15th,  
19 2001?

20 A Well, he was unable to tell me that he had received any  
21 treatment.

22 Q Okay?

23 A And the chart that I had seen had huge temporal gaps in  
24 it.

25 Q And, uh --

1 THE COURT: Well, let me make sure again. Go  
2 back -- I just want to go back to your report.

3 As I understand the task you were requested to  
4 perform by Ms. Fettig on behalf of the ACLU, it involved  
5 making an assessment on medical care, at large, at Ely State  
6 Prison; am I correct?

7 THE WITNESS: It was to assess the medical care  
8 for the specific people that they gave me records of.

9 THE COURT: All right.

10 THE WITNESS: There wasn't any way I could judge  
11 the thing at large.

12 THE COURT: All right. So, at least, for the  
13 some 35 --

14 THE WITNESS: Yes.

15 THE COURT: -- people that you saw. And you  
16 didn't select those 35?

17 THE WITNESS: I did not.

18 THE COURT: Ms. Fettig, or someone at the ACLU,  
19 said here's 35 individuals we would like you to evaluate or  
20 take a look at?

21 THE WITNESS: Yes, sir.

22 THE COURT: All right. And so when you went  
23 to Ely for those two days in October, you were there to see  
24 a great number of people, and spend whatever time you could  
25 with each one of them, and do your evaluation and prepare



1 your report.

2 THE WITNESS: That's true.

3 THE COURT: All right. You weren't given a  
4 specific task with regard to Mr. Mulder, for example, to  
5 evaluate his competence, his intellectual level, intelligence  
6 level, anything of that sort?

7 THE WITNESS: No.

8 THE COURT: Okay.

9 All right.

10 BY MR. NEIDERT:

11 Q And would you agree with me, Dr. Noel, that the records  
12 you're seeing today are -- provide a little bit more of a  
13 complete picture as to the care that Mr. Mulder received  
14 following his stroke in March of 2001?

15 A Well, I've not looked at all of these.

16 Q Well, at least what you're seeing, your seeing more than  
17 just being left in the cell?

18 A Yes.

19 Q Which is something that your report seems to suggest  
20 happened?

21 A Yes. Correct.

22 Q At least more than that happened?

23 A Yes.

24 Q And that UMC was somehow involved, at some point in time,  
25 in his case?

1 A Yes.

2 Q And with respect to what the judge just asked, have you  
3 ever done a competency evaluation for whether somebody is  
4 competent to stand trial or to be executed or for any other  
5 legal purpose in the criminal justice system?

6 A It seems I had done competency evaluations, I believe,  
7 for disability.

8 Q Okay.

9 A I am not a psychiatrist, but it is not difficult to  
10 assess a pretty good picture of somebody's mental state just  
11 by having a talk with them about simple everyday things.

12 Q And, basically, you're not -- are you aware of what  
13 the legal test is for competency in the criminal justice  
14 context?

15 A No, sir; I am not.

16 Q Okay. And -- but you're prepared to testify that, based  
17 on your review of the records, and your interactions with  
18 Mr. Mulder, that he, he's definitely suffered a stroke, and  
19 that stroke caused a brain injury to his left hemisphere?

20 A Yes.

21 Q Okay. And I'm not trying to put -- I'm not trying to  
22 argue with you --

23 THE COURT: Go ahead. Go ahead. Just state  
24 another question. You don't need to qualify it.

25 BY MR. NEIDERT:

1 Q When -- I want to make sure I have this clarified in my  
2 mind. When you were trying to communicate with Dr. -- with  
3 Mr. Mulder in his cell, or at the examining place at Ely State  
4 Prison, that 20, 25 minutes, were you asking open-ended  
5 questions, or were you asking yes/no questions, or were you  
6 asking multiple choice questions?

7 How were you trying to communicate with him?

8 A Well, sir, when he first came in, I didn't know anything  
9 about, other than what I had seen in his medical records. And  
10 I addressed him as I would have addressed you: How are you?  
11 How are you feeling?

12 And you don't get knowing looks like he understood.  
13 You don't really get answers. And you begin to understand,  
14 very quickly, that you better simplify the way -- the first  
15 thing I asked him was about the contracture in his arm. And  
16 that was just gone. I mean, I had to simplify that down.  
17 And you very quickly become aware that any complexity of  
18 ideas is not going to be exchanged.

19 Q And how did he communicate his difficulty with showering?

20 A He communicated that to us.

21 Q How did -- I mean, how did he convey that thought process  
22 to you?

23 A It started with something about couldn't bathe or  
24 couldn't shower. And I didn't understand that. Amy Fettig  
25 did. And then we asked why. And then he pointed to his

1 foot or something, and made a stumbling motion, that he was  
2 stumbling trying to get in the shower. And Bannister seemed  
3 to be aware of that and said that he had been told -- or the  
4 nurse or somebody in that room said he has trouble getting  
5 into the shower because he stumbled. And Bannister said, I  
6 think we can prepare him with a step. I mean, I don't  
7 remem -- this has been years ago, and I was unaware that I  
8 would ever be in a courtroom for this, but that's the best  
9 that my memory serves.

10 Q Okay. Thank you, Dr. Noel.

11 MR. NEIDERT: I don't believe I have any other  
12 questions at this time.

13 THE COURT: Thank you.

14 Anything else, Mr. Abbington?

15 MR. ABBINGTON: Yes, sir. I have just a few  
16 quick questions.

17 **REDIRECT EXAMINATION**

18 BY MR. ABBINGTON:

19 Q Do you have that binder that he's talking about? Do you  
20 have that up there?

21 A The one he was asking about?

22 Q Yes, sir?

23 A Yes, sir; I have it right here.

24 THE COURT: Exhibit 509.

25 ///

1 BY MR. ABBINGTON:

2 Q All right. So I can be clear, and maybe I wasn't  
3 clear enough, you never -- when was the first time you  
4 ever met me?

5 A You?

6 Q Yes, sir?

7 A Yesterday.

8 Q All right. Did you ever get retained by our office; we  
9 asked you to come and evaluate Mr. Mulder and evaluate him for  
10 competency?

11 A No.

12 Q All right. Our conversations evolved in about what?

13 A Uh, did I see Mr. Mulder and look at his medical records  
14 back in 2007? Did I do see him because ACLU asked me?

15 Yes. And that's been pretty much it.

16 Q When you went to see Mr. Mulder and Dr. Bannister, was  
17 there, were you a little disappointed in him as a doctor?

18 A Yes, sir; I was.

19 Q Why?

20 A I don't think he cared.

21 Q Why do you say that?

22 A He had a rather callous, almost flippant attitude, and  
23 he tried to hire me right in front of Amy Fettig.

24 Q Hire you to do what?

25 A Uh, to quit the ACLU and come be their prison doctor.

1 Q Did you accept that offer?

2 A I did not.

3 Q All right.

4 Now, you say in your report that Mr. Mulder was  
5 severely disabled by this, by his stroke, and was given  
6 absolutely no physical therapy to repair that damage.

7 Did any of the pages that Mr. Neidert drew your  
8 attention to, did that change your opinion?

9 A Yes. There's a write-up in here about physical therapy.

10 Q All right. Now --

11 A But, it was not extensive from what I saw.

12 Q I understand.

13 Could you please turn to that page R-966?

14 A R-966?

15 Q Yes, sir.

16 A Okay, sir.

17 Q All right. Without reading this for you, but there's --  
18 if you could read for the Court the last full sentence  
19 beginning with: "The patient..."

20 A The last full sentence beginning --

21 Q The first paragraph, there's a sentence, the second  
22 sentence in the paragraph, it says that: "The patient was  
23 seen at Ely State Prison..."

24 A "The patient was seen at Ely State Prison on 12/31/02 by  
25 Dr. Williamson, and he was using his splint and opening his

1 fingers normally. He has, obviously, right parietal  
2 paraplegic, and is mildly aphasic. Neuro see him 1.1-12.  
3 Impact right arm diaphoretic and flushed."

4 Q All right. It says it -- well, could you explain for me  
5 what mildly -- what aphasic means?

6 A Aphasia is the inability to speak.

7 Q And so in 2005, the prison saw Mr. Mulder -- excuse me,  
8 in 2002, Mr. Mulder was, according to this record, was seen  
9 by a Dr. Williamson, who described him as being mildly  
10 aphasic?

11 A That's what he says.

12 Q All right. Is there -- what -- more fully, what does  
13 aphasia, what does aphasia mean, besides the inability to  
14 speak? Is there the inability to form thoughts? What is  
15 exactly is that?

16 A The medical term aphasia means the lack of ability to  
17 speak. Mildly aphasic -- and you have to extrapolate here  
18 and give an opinion, which I'm not totally comfortable with --  
19 but that means that, to some degree -- you're saying mild  
20 here -- you can't speak words.

21 Now, that means either you can't formulate the  
22 words to speak, or else you can't make the sounds with your  
23 mouth that are words. And I don't know -- it would take some  
24 extensive testing to determine which of those was going on.

25 Q Okay. Now, on the third paragraph, it talks about the

1 splint. And, apparently, there's an old splint and a new  
2 splint. If you could read the second sentence and the third  
3 sentence in the third paragraph relating to the splint.

4 A "The old splint was a low temperature plastic with a  
5 reinforced brace on the wrist. The \$141.06 split is also off  
6 the shelf, but made of a higher temperature plastic that will  
7 last longer. Mr. Mulder's old splint was reinforced at the  
8 wrist. That was the only part of the splint that didn't  
9 break. Mr. Sisian (phonetic) is proposing reinforcing the  
10 entire splint so it should last a very long time.

11 Q That's February 9th, 2005?

12 A That's what they're saying; yes.

13 Q Now, did you see Mr. Mulder in October -- was it 2007?

14 A Seven.

15 Q Did he have a splint?

16 A No, sir.

17 Q Did officer -- Dr. Bannister offer an explanation for why  
18 he didn't have one?

19 A I remember spe -- I was seeing if I wrote it down -- I  
20 remember specifically Dr. Bannister -- of course,  
21 Dr. Bannister promised that everything was going to be  
22 fixed every time we found a problem. But, he said that  
23 they would see to it that he got into a proper splint that  
24 was molded to his arm, that would keep his arm from deforming  
25 more and pulling down. Those contractures will actually break



1 the bones in your wrist, if they're allowed to go.

2 Q All right. If you could turn to page R-985.

3 A All right, sir.

4 Q Now, there is a, I believe there's some notes, a  
5 consultation request; is that correct?

6 This is one of the pages that Mr. Neidert brought to  
7 your attention.

8 A Yeah.

9 Q What's the presumed diagnosis on this page?

10 A "Partial paraplegia with right side effect, and mildly  
11 aphasic. Right arm is diaphoretic and is flushed."

12 Q Did you notice anything about Mr. Mulder's right arm when  
13 you saw him?

14 A He had a severe contracture. It was not being able to  
15 be moved. He had some flushing of his arm. And he had  
16 some inappropriate diaphoresis on his arm. That's because  
17 the parasympathetic nervous system doesn't work anymore.

18 Q So that was your observations in October 2007; very  
19 similar to what someone here in this consultation request  
20 observed in February of 2003?

21 A Yes.

22 Q Has your opinion about Mr. Mulder's ability to  
23 communicate with you regarding anything but very basic  
24 ideas related to his life, pain, anger, basic ideas, has  
25 that changed by any of the documents that Mr. Neidert

1 showed you?

2 A No, sir.

3 Q Do you have an opinion as to whether or not -- so your  
4 opinion as to -- that his inability to communicate with you  
5 was such that you remembered years later?

6 A As we concluded our meeting with each patient, we  
7 said is there anything you would like to tell us? And he just  
8 kind of hummed, except there wasn't any way we could really  
9 communicate on that level.

10 MR. ABBINGTON: Thank you, Your Honor. I'll  
11 pass the witness.

12 THE COURT: Thank you.

13 Anything further, Mr. Neidert?

14 MR. NEIDERT: No, Your Honor.

15 THE COURT: Thank you, doctor. You can step  
16 down, and watch your steps as you go down those three stairs.

17 All right. Well, your next witness is Miss Fettig  
18 then?

19 MR. ABBINGTON: Yes. We would like to release  
20 Dr. Noel.

21 THE COURT: Yes, certainly. There's no need to  
22 keep him hanging here.

23 If you --

24 MR. ABBINGTON: And our next witness is  
25 Amy Fettig. I'll step out in the hallway and grab her.

1 THE COURT: I was just going to say, before you  
2 do, if it would be good to get the associate warden on the  
3 phone about these records, so that we could kind of speed  
4 that up -- I keep saying associate warden. She's the acting  
5 warden.

6 MS. PROCTOR: I believe she's acting. I don't  
7 know if she's permanent or not.

8 THE COURT: Okay. Do you have a phone number  
9 for her?

10 MS. PROCTOR: I have her cell number.

11 THE COURT: Oh, are you --

12 (Witness falls.)

13 THE COURT: That's why I say watch your step.  
14 Are you okay?

15 THE WITNESS: When you get old, Your Honor --

16 THE COURT: Yeah, hey --

17 THE WITNESS: -- it doesn't work like it used  
18 to.

19 THE COURT: I've been 32 twice. I know the  
20 feeling.

21 MS. PROCTOR: Your Honor, it's my understanding  
22 that she is traveling today. We can certainly try to contact  
23 her.

24 THE COURT: Do you have a phone number for her?

25 MS. PROCTOR: I have a cell phone number for

1 her.

2 THE COURT: Go ahead and give it to Donna. She  
3 can try to reach her. Let's give it a shot.

4 Is he okay?

5 MR. ABBINGTON: He says he's going to be okay,  
6 Your Honor.

7 THE COURT: All right.

8 MR. ABBINGTON: He didn't want to file a report.

9 THE COURT: He's welcome to. That's -- we've  
10 got a sign right there and we always warn people. And God  
11 love them --

12 MR. ABBINGTON: He was looking towards the door,  
13 you know, that's --

14 THE COURT: It's a dangerous place.

15 MR. ABBINGTON: I think she must have just run  
16 to --

17 THE COURT: That's okay. We're trying to call  
18 the warden.

19 MR. ABBINGTON: Oh, okay. Great.

20 THE CLERK: I'm going to put you on our speaker  
21 system. Am I calling you on a cell phone? Do you have a land  
22 line you want me to contact you on?

23 Okay. Why don't I call you back on that.

24 Okay. Great. Thank you.

25 THE COURT: We're going to call her back on a

1 different line.

2 THE CLERK: Yeah, it was on a cell phone. I'm  
3 going to call her on a land line.

4 Hi, Miss Baker, I'm going to transfer you over to  
5 our telephonic system here in the courtroom so we can hear  
6 you over the speaker, if you hold on just a minute. Thank  
7 you.

8 WARDEN BAKER: Hello?

9 THE CLERK: Yes, Miss Baker?

10 WARDEN BAKER: Yes.

11 THE COURT: Okay.

12 THE COURT: All right. Thanks, Donna.

13 Warden Baker, this is Judge Pro in Las Vegas.  
14 Good afternoon.

15 WARDEN BAKER: Good afternoon, Your Honor.

16 THE COURT: We just wanted to touch base.  
17 We're in court. I have counsel for respondents -- pardon  
18 me -- Ms. Proctor and Mr. Neidert; as well as Mr. Abbington  
19 and Ms. Hensley on behalf of Petitioner Mulder. And an  
20 issue came up concerning records that we wanted to touch  
21 base with you on as, probably, the person, if you didn't  
22 know the answer, at least you would be in the best position  
23 to get the answer for us.

24 A question came up regarding production of a list  
25 of correctional officers who have worked the tier or the unit

1 where Mr. Mulder has been incarcerated, at least while at Ely  
2 State Prison on death row. There was one officer identified,  
3 but the roster of correctional officers on duty.

4 And I don't know, Ms. Proctor, let me turn to you.  
5 You had communicated -- who had you communicated with at the  
6 prison regarding the identity of these guards, these  
7 correctional officers?

8 MS. PROCTOR: Your Honor, I communicated with  
9 Sky Holman, who I believe is the Warden's secretary or --

10 THE COURT: Sit down so she can hear you on the  
11 microphone. Just speak right into that mike and keep your  
12 voice up nice and loud like me.

13 MS. PROCTOR: I communicated with Sky Holman at  
14 the prison, who I believe communicated with Miss -- Warden  
15 Baker.

16 THE COURT: Okay. And your understanding was,  
17 with regards to these records, was what; that they don't  
18 exist or they --

19 MS. PROCTOR: As to the roster, the Warden had  
20 given me the names of the witnesses who we are calling to  
21 appear for the hearing.

22 THE COURT: Well, what we're driving at is  
23 trying to get the roster that would include the names of  
24 those correctional officers who would have had either  
25 interaction or the opportunity to interact with Mr. Mulder

1 while he's been at Ely, since he had his stroke.

2           What -- what kind of records -- I know I've had  
3 other cases where we've had duty rosters and so forth; those  
4 related to who was on duty at a particular time when certain  
5 events occurred at the prison and such.

6           Are those kept in one central location?

7           WARDEN BAKER: Yes, Your Honor. I believe  
8 when I was first questioned about this, I had advised that  
9 Associate Warden Brooks would have been the best person to  
10 contact regarding who was assigned to what unit, depending  
11 what date, year you're referring to.

12           I believe at the time I was first contacted  
13 about this, I was the Associate Warden over Programs, and  
14 Ms. Brooks was signed to custody. Now I've been promoted to  
15 the Warden of the facility, but I would still say that Warden  
16 Brooks would have access to all those documents.

17           THE COURT: Okay.

18           WARDEN BAKER: Uh, and --

19           THE COURT: And --

20           WARDEN BAKER: Again, for a time frame, I don't  
21 know if you're talking 10 years, 15 years, some of those  
22 documents are on retention policy. We might not even still  
23 have --

24           THE COURT: Understood. I think we're just  
25 driving at whatever rosters -- and let me ask Mr. Abbington.

1           You're looking for rosters of those correctional  
2 officers that would have -- be in proximity to your client,  
3 from the time of the stroke forward.

4           Now, if they're not retained, they're not retained,  
5 but at least such as exist, those records; am I correct?

6           MR. ABBINGTON: That's correct, Your Honor. We  
7 have -- the stroke onset date is March 15th, 2001.

8           THE COURT: Right.

9           MR. ABBINGTON: So I figure we got about,  
10 you know, little bit more than 10 years of officers that  
11 interacted with him, and so other ones would be -- it would  
12 be helpful.

13           THE COURT: So we would be looking at  
14 approximately 10 -- 10 years, ten-and-a-half years, if  
15 they still exist, depending how long the duty rosters are  
16 retained.

17           So, it would be Associate Warden Brooks who would  
18 be the contact person who could most easily access them?

19           WARDEN BAKER: Yeah. And if I could explain  
20 something with that, too. You know, every year, we do a shift  
21 bid. So, you would have officers that bid into that shift and  
22 for that post where Mr. Mulder was housed. But, you know,  
23 for call-offs or things like that, someone else could get  
24 assigned for a day or two.

25           THE COURT: Absolutely. No, no, I think all



1 we're trying to find is some -- Mr. Abbington wants to be  
2 able to cross-reference that to what he has in the I-File.  
3 And, also, if there was a correctional officer who happened  
4 to be there on a lawful, a lot of times, or with considerable  
5 frequency, who might be a potential --

6 WARDEN BAKER: I gotcha.

7 THE COURT: -- witness. I mean not -- nobody  
8 really cares if it's somebody who fills in for somebody and  
9 they're there once.

10 WARDEN BAKER: Uh-huh.

11 THE COURT: I don't think.

12 Now, what, what I want to do, we're in the middle  
13 of court proceedings. We're taking testimony. But when we  
14 recess, I would want to be able to make sure that Ms. Proctor  
15 and Mr. Abbington, perhaps jointly, could get on the phone  
16 with then Associate Warden Brooks, or whoever could get this  
17 material together -- or would you be able to let him know?

18 Are you at the prison today?

19 WARDEN BAKER: Yeah, I'm at the prison.  
20 Associate Warden Brooks is not. But lieutenant -- I have a  
21 lieutenant that could probably access that information. I  
22 would have to double check right now.

23 THE COURT: Could you begin that process for us?

24 WARDEN BAKER: I sure can.

25 THE COURT: And then I'll have Ms. Proctor

1 contact you, along with Mr. Abbington, later today, and  
2 maybe get an update as to -- we've got the two numbers here,  
3 phone numbers -- as to where that stands. Probably be in  
4 another hour, hour-and-a-half or so. I would think around  
5 four o'clock, we might be at that point where they could do  
6 that, and maybe pin down where it stands.

7 I think what we're driving at, and, counsel, correct  
8 me if I'm wrong, but part of the thought was if we can get  
9 these records -- and there's no issue that they are what they  
10 purport to be -- as I understand it, neither of you were  
11 seeking to call Warden Baker down here as a witness then,  
12 if all it was to say these are the records from Ely.

13 MR. ABBINGTON: That's he correct, Your Honor.  
14 It's not the authenticity. It's the completeness. That's all  
15 we're talking about.

16 THE COURT: Okay.

17 MS. PROCTOR: Your Honor, we had also discussed  
18 updating the I-File since I had received a copy of it --

19 THE COURT: Yeah.

20 MS. PROCTOR: -- in August of 2010. If we could  
21 work with --

22 THE COURT: Go ahead and explain that,  
23 Ms. Proctor. Go ahead and explain that to the Warden.

24 You have the I-File from August of last year?

25 MS. PROCTOR: Yes.

1 THE COURT: But you needed any updates from  
2 that?

3 MS. PROCTOR: Correct. And if Warden Baker  
4 could fax any updates to my office, I could provide them to  
5 Mr. Abbington, and she would not have to appear Wednesday  
6 morning.

7 THE COURT: Yeah.

8 WARDEN BAKER: This is the only problem with any  
9 updates. That I-File would have been sent with Mr. Mulder  
10 when he was transferred to High Desert for -- to be there for  
11 his court hearing.

12 THE COURT: Okay. So, they've got it. They've  
13 got it at High Desert?

14 WARDEN BAKER: Uh-huh. I could certainly call  
15 High Desert for you and see if their records could get that  
16 information sent to you.

17 THE COURT: That would be great. We're just  
18 looking for a practical way to get whatever updates there are  
19 in the I-File.

20 WARDEN BAKER: And that's from what date, Your  
21 Honor?

22 THE COURT: August 1, 2010 forward.

23 WARDEN BAKER: And where should these be faxed  
24 to?

25 THE COURT: To Ms. Proctor's office.

1                   What's your fax number, Ms. Proctor?

2                   MS. PROCTOR: 775-684-1102.

3                   WARDEN BAKER: Okay. I'll start working on  
4 both of these and then expect a phone call maybe around 4:00  
5 on one of my numbers.

6                   THE COURT: Yeah, we'll take a break --

7                   WARDEN BAKER: And then I can surely update you.

8                   THE COURT: We'll take a break to -- make sure  
9 we break at 4:00 so they can both get on the phone with you  
10 and kind of go over that and see where we stand.

11                  WARDEN BAKER: Okay. I'll see what I can get on  
12 these rosters and on the documents from the I-File.

13                  THE COURT: Thanks. And Mr. Abbington, anything  
14 further before --

15                  MR. ABBINGTON: Yeah, can I pose -- yes, it's  
16 just -- I'm hoping maybe we're talking about the same thing.  
17 I have what I think are NDOC records for Mr. Mulder and his  
18 particular inmate number, and -- but of those records, these  
19 records stop in 1999. And these are the actual entries that  
20 we were talking about. Maybe I'm not -- chronological entries  
21 of persons --

22                  THE COURT: I think I'll --

23                  MR. ABBINGTON: -- having contact with him.

24                  THE COURT: Why don't we do this. Let's take  
25 just a short break while we have the Warden on the line, and

1 why don't you and Ms. Proctor step up to the microphones so  
2 you can talk more clearly, and discuss that with her. Because  
3 she may understand what you're talking about, and I don't.  
4 And I don't need to until you get them.

5 So, let's -- we'll take just a ten-minute break  
6 so you can do that, or even Ms. Fettig. But then you can  
7 follow-up with the Warden at around four o'clock. Okay?

8 All right. Thank you very much, Warden.  
9 Appreciate it. And hope we can save you a trip all the way to  
10 Las Vegas.

11 All right. Thank you.

12 (Recess taken.)

13 THE COURT: Okay. Counsel, did you go ahead  
14 and get things squared away with the warden then, for now?

15 MR. ABBINGTON: We had an idea, actually, that  
16 came up while we were talking to the acting warden and --

17 THE COURT: Sit down, folks. Yeah.

18 MR. ABBINGTON: And subject to your approval --  
19 Mr. Neidert and I were just talking about this -- which is  
20 the idea that we could -- they say that the entire file goes  
21 with Mr. Mulder wherever he goes, and so that it may be at  
22 High Desert.

23 THE COURT: Right.

24 MR. ABBINGTON: They say his file is at High  
25 Desert. There's also some confusion between -- I think it

1 would be a fair statement between, between Heather Proctor and  
2 Dave Neidert and myself and the warden, as to what actually  
3 constitutes an I-File that, apparently, commissary records are  
4 not normally portions of the I-File, and were only added in  
5 for the purposes of this hearing so that the actual I-File,  
6 complete I-File would be at High Desert and that, possibly,  
7 we could work around the Court's schedule and go and actually  
8 see it.

9 THE COURT: Yeah.

10 MR. ABBINGTON: And if that was okay, we could.

11 THE COURT: That's fine.

12 MR. ABBINGTON: You know, we have some witnesses  
13 who may have some --

14 THE COURT: Tomorrow morning, I've got  
15 conference calls at 8:00, 8:30, and a TRO application,  
16 preliminary injunction at 9:00. So we wouldn't be starting  
17 until 9:30. I'm happy to start -- you can go up there before  
18 court and take a look at it.

19 MR. ABBINGTON: We actually had -- well, since  
20 we're not calling -- probably won't be calling Warden Baker, I  
21 actually did have one of my experts, Dr. Toomer, is in from  
22 Florida. It would be better to get him in and out on Tuesday.

23 THE COURT: You're right.

24 MR. ABBINGTON: So if I could, maybe Wednesday,  
25 instead of calling Warden Baker.

1 THE COURT: Yeah.

2 MR. ABBINGTON: We could substitute that time  
3 and --

4 THE COURT: That's fine.

5 MR. ABBINGTON: -- and do that.

6 THE COURT: Have no illusions, I don't want  
7 you, just because we blocked it off for the week, to feel  
8 you have to plan the week.

9 MR. ABBINGTON: Oh, no.

10 THE COURT: I never planned on using the week.  
11 I would rather have the witnesses wait than all of us.

12 MR. ABBINGTON: I just said that because  
13 Mr. Oram is not available until Wednesday afternoon no  
14 matter what I did.

15 THE COURT: No, that's fine. That's fine.

16 MR. ABBINGTON: And so --

17 MS. PROCTOR: The only concern that I have  
18 with that, Your Honor, is Dr. Piasecki, we have her scheduled  
19 for Wednesday morning, and she's only available Wednesday or  
20 Thursday morning.

21 THE COURT: We'll get her in Wednesday morning.  
22 She's going to be via video, right?

23 MS. PROCTOR: Correct.

24 THE COURT: Yeah. We'll get her in at the time  
25 scheduled. Whatever we committed to in terms of the video

1 presentation, we'll take then. I remember -- I think we even  
2 talked to her on the phone, as I recall.

3 MS. PROCTOR: Your Honor, I --

4 THE COURT: Maybe not.

5 MS. PROCTOR: -- I don't think so.

6 THE COURT: In court, when we were in the  
7 hearing?

8 MR. ABBINGTON: I don't think so.

9 THE COURT: We do that a lot. It's really  
10 helpful. Speeds things up.

11 Okay. All right. Call your next witness then.

12 MR. ABBINGTON: Thank you Your Honor.

13 It will be Amy Fettig, Your Honor. I'll just grab  
14 her.

15 THE COURT: Great.

16 Did Miss Fettig, Ms. Hensley, have a report?

17 MS. HENSLEY: No, she didn't, Your Honor.

18 THE COURT: No. Thank you.

19 Great. Ms. Fettig, come on up to the witness stand,  
20 if you would, please, and be sworn by the clerk.

21 And please watch your step as well.

22 THE WITNESS: I will.

23 THE COURT: Believe it or not, those steps are  
24 a consequence of complying with the Americans With  
25 Disabilities Act.



1 Truly. We have a ramp from this side and we have  
2 an elevator on that side and, hence -- and I think that's done  
3 more damage to people than just having started and finished  
4 the steps.

5  
6 **AMY FETTIG**,  
7 called as a witness on behalf of the Petitioner,  
8 was sworn and testified as follows:

9  
10 THE CLERK: Have a seat.

11 Please state your full name for the record and spell  
12 your last name, please.

13 THE WITNESS: Sure. Amy Fettig, F-e-t-t-i-g.

14 THE COURT: Great.

15 And, Donna, could you pump up that volume a bit.

16 And keep your voice up, Ms. Fettig. Speak right  
17 into the microphone.

18 Go ahead, counsel.

19 MR. ABBINGTON: Your Honor, just to be clear,  
20 the Court had said earlier this morning that it was okay to  
21 have the experts in?

22 THE COURT: Yes.

23 MR. ABBINGTON: We do have Dr. Toomer, who is a  
24 psychologist.

25 THE COURT: That's fine.

MR. ABBINGTON: Okay.

THE COURT: We'll likely get to him today.

1 MR. ABBINGTON: That's why we actually had -- we  
2 actually had him, out of an abundance of caution, had him come  
3 over.

4 THE COURT: Go ahead. Excellent. Yeah.  
5 Excellent.

6 **DIRECT EXAMINATION**

7 BY MR. ABBINGTON:

8 Q So can you -- did you already state your full name?

9 THE COURT: She did.

10 MR. ABBINGTON: And I always do that again.

11 BY MR. ABBINGTON:

12 Q Ms. Fettig, how are you employed?

13 A I am senior staff counsel at the National Prison Project  
14 of the ACLU.

15 Q And how long have you been so employed?

16 A I've had two stints at the ACLU Prison Project. The  
17 first was two years and a few months, when I was right out  
18 of law school. I was a litigation fellow. I subsequently  
19 left for private practice, and then I returned, a little over  
20 four-and-a-half years ago.

21 Q How did the National Prison Project come to be involved  
22 in the investigating healthcare at Ely State Prison?

23 A Uh, when I initially came back to the prison project,  
24 the ACLU, in conjunction with the ACLU of Nevada, the prison  
25 project had started looking at medical care at the women's

1 prison here in Las Vegas. As a result of the interest, I  
2 believe, the federal defender reached out to the ACLU in  
3 Nevada in January of 2007, indicating that they believed there  
4 were serious problems with medical care at Ely State Prison,  
5 that they had been investigating the medical there for some  
6 years -- medical care there for some years, and had done a  
7 great deal of advocacy on behalf of their clients. They  
8 thought that the medical care was actually interfering with  
9 their ability to represent their clients adequately.

10           However, despite repeated efforts to get adequate  
11 care for their clients, they had run up against a brick wall  
12 with the officials at Ely State Prison, and within the Nevada  
13 Department of Corrections. So they had, virtually, no where  
14 else to go. Due to the nature of the federal defender, they  
15 cannot file Section 1983 civil rights suits, so they turned  
16 to the ACLU of Nevada, and the ACLU of Nevada brought us in;  
17 myself in particular, in January of 2007, for a conference  
18 call with Franny Forsman and Gary Taylor of the Federal  
19 Defender.

20       Q All right. Who was present -- who else was involved in  
21 that from the ACLU?

22       A Attorneys and the director from the ACLU of Nevada, Gary  
23 Peck and Lee Rowland (phonetics).

24       Q All right.

25           Now, at some point, a decision was made to retain

1 Dr. Noel?

2 A Uh, yes. It was several months subsequent to that phone  
3 call. After that phone call, the federal defender turned over  
4 their substantial records of investigation, and we evaluated  
5 it. It took me some months to go through the formal process  
6 of the ACLU, and our attorney panel within the prison project,  
7 to get the case approved for investigation.

8 Once that was done, in May of 2007, myself and  
9 another attorney in the prison project, Margaret Winter,  
10 accompanied Gary Taylor to Ely State Prison to interview a  
11 number of clients, all of them were death row clients. They  
12 were the clients of the federal defender. And after those  
13 interviews, based on what we learned during the course of  
14 those interviews and her record review, we decided that we  
15 needed a medical professional, a doctor, to take a look at  
16 various records.

17 THE COURT: I'm sorry. When did you say that  
18 you and the other attorney went to Ely to interview the  
19 inmates?

20 THE WITNESS: May of 2007.

21 THE COURT: May of 2007. All right.

22 THE WITNESS: All right.

23 THE COURT: And these were all death row  
24 inmates?

25 THE WITNESS: Yes.

1 THE COURT: And also all federal defender habeas  
2 clients?

3 THE WITNESS: Yes.

4 THE COURT: All right.

5 All right. Thank you.

6 BY MR. ABBINGTON:

7 Q So my understanding is that these inmates come to your  
8 attention because of the fact that they're represented by the  
9 Federal Public Defenders Capital Habeas Unit?

10 A Yes.

11 Q All right. So your initial involvement -- the initial  
12 visit was in May 2007?

13 A Correct.

14 Q Do you recall what number of inmates you saw at that  
15 time, I mean, just a rough number?

16 A I want to say it was five or six prisoners with severe  
17 medical issues.

18 THE COURT: And did all of the -- how many  
19 total -- because I think Dr. Noel testified there were 35,  
20 some 35.

21 THE WITNESS: This was prior to that.

22 MR. ABBINGTON: That would be later on, Your  
23 Honor. This is not at that point.

24 THE WITNESS: Yes.

25 THE COURT: Oh, later on. All right.

1           So these were exclusively people, that you  
2 understood from Ms. Forsman or her staff, were clients who  
3 had medical issues?

4           THE WITNESS: Yes.

5           THE COURT: All right. Okay.

6           Okay.

7           THE WITNESS: So after we interviewed those  
8 clients, and we had records from the federal defender  
9 regarding those clients, we realized that we needed a medical  
10 expert to do a review. What we were hearing from the clients  
11 were horrific stories of the inad -- grossly inadequate  
12 medical care. We wanted an expert to take a quick look at  
13 some of the records to confirm some things for us before  
14 proceeding.

15           THE COURT: Was Mr. Mulder one of those five  
16 that was interviewed?

17           THE WITNESS: No, he was not.

18           THE COURT: He -- okay.

19           MR. ABBINGTON: He comes along later, Your  
20 Honor.

21           THE COURT: All right.

22           THE WITNESS: So after this initial -- once we  
23 determined we needed a medical expert, actually, Gary Taylor  
24 from the federal defender recommended Dr. Noel to us, because  
25 he had practiced in Ely State Prison. He had been a physician

1 at the local hospital. He had also done a great deal of  
2 practice, his practice in rural areas, so we obtained his  
3 resume. He had functioned as an expert in Nevada previously.

4 We got his resume. We interviewed him about the  
5 nature of the work and his capacity to undertake it. He  
6 indicated immediately to me that he, he favored the death  
7 penalty, and that he was not a card-carrying member of the  
8 ACLU, but that he believed it was a physician's duty to  
9 provide adequate and ethical care to patients, regardless of  
10 his or personal feelings about the individual. So, I felt  
11 that he was an ideal candidate to be -- to review the records  
12 and give us an honest and thorough opinion.

13 He did that. And in June of 2007, based upon all  
14 of the investigation he had done up until then, and the  
15 findings of the expert, we reached out to Howard Skolnik, then  
16 Director of the Nevada Department of Corrections, in a letter  
17 indicating our extreme distress over the nature of medical  
18 care at Ely State Prison, our belief that there could be  
19 systemic Constitutional violations at that facility, and we  
20 requested a meeting with him.

21 Director Skolnik responded, and myself, Margaret  
22 Winter, from my office, who's the Associate Director, and  
23 Lee Rowland, then staff attorney at the ACLU of Nevada, met  
24 with Director Skolnik in June of 2007.

25 At that meeting, Director Skolnik was present, as

1 was his attorney, Janet Trout, and a number of deputy  
2 directors. We requested, at that time, based on our findings,  
3 we indicated to Director Skolnik that we needed an order to  
4 either confirm or find that what we -- what we had discovered  
5 so far, was an aberration in the systems of care. We  
6 requested to take a look at a number of records, to take a  
7 sampling of the medical records at Ely State Prison.

8 At that meeting, Director Skolnik did not agree or  
9 disagree to provide us that access, but he subsequently did.

10 So, in July of 2007, we rapidly tried to gather as  
11 many medical releases as we could. My project reached out  
12 to the prisoners that we had been in contact with, but the  
13 federal defender also reached out to prisoners that they  
14 had been in contact with. And whatever releases we managed  
15 to get by early July, we submitted to the Department of  
16 Corrections. And then, subsequently, those records were  
17 copied at Ely State Prison in July of 2007, and then they  
18 were returned to my office.

19 At that time, we requested both the current medical  
20 record and, also, all archived medical records which were --  
21 constitute the full institutional record. It's typical to  
22 thin records in an institutional setting, but to keep them in  
23 an archive because, of course, there's a lot of information;  
24 especially, for prisoners who have been there a long time.

25 THE COURT: And, again, were these exclusively



1 death row inmates you were looking at?

2 THE WITNESS: No, they were not. No, they were  
3 not. It was a sampling. There were some individuals that we  
4 knew of from death row from the federal defender, but there  
5 were also folks that just sent in a release because, perhaps,  
6 their buddy passed it to them at the facility.

7 So, there were some folks we knew had medical  
8 conditions, but our idea was to sample as broadly as we  
9 possibly could --

10 THE COURT: All right.

11 THE WITNESS: -- to get a snapshot of care  
12 there.

13 BY MR. ABBINGTON:

14 Q So to clear this up, the Federal Defenders Office  
15 contacted you about exclusive death row inmates that they're  
16 representing --

17 A That is correct.

18 Q -- they want you guys to pay attention to. In the course  
19 of investigating those guys, you get releases from people who  
20 are also at Ely State Prison, but are not on death row?

21 A That's correct.

22 Q And are not represented by FPD?

23 A That is correct.

24 Q All right. In June -- so this would have taken place  
25 in July, and now we're up to July 2007 with the medical

1 releases?

2 A Yes.

3 Q What happens then?

4 A Uh, paralegals from the federal defender, a lawyer from  
5 the ACLU of Nevada, bring in copying, scanning equipment to  
6 Ely State Prison, and they scan every record that they are  
7 given by the facility.

8 We then have those on disk, and we provide them to  
9 Dr. Noel to review. It takes him several months to review  
10 them. And then, in September, we get initial feedback from  
11 him on the 35 records.

12 We then contact Director Skolnik and his counsel,  
13 and indicate that our findings of Dr. Noel indicate that  
14 there -- there is a very good possibility, indeed, he believes  
15 an almost certainty, that there is gross medical inadequacies  
16 at Ely State Prison. And upon -- in reading his draft report,  
17 we believe that there are Constitutional violations at that  
18 facility.

19 In response to the cases we highlighted for the  
20 Department of Corrections, we are allowed to go to the  
21 facility, Ely State Prison, to meet with the Medical Director  
22 of the Nevada Department of Corrections, Dr. Bruce Bannister  
23 and, also, interview the prisoners in the presence of  
24 Dr. Bannister.

25 I accompany Dr. Noel on that trip. That takes place

1 October 8th and 9th of 2010.

2 Q Were you present when Dr. Noel conducted his interviews?

3 A Yes, I was.

4 Q Now, one of the people that was interviewed by Dr. Noel  
5 and yourself was Mike Mulder?

6 A That's correct.

7 Q Could you identify him here in court today?

8 A Yes. He is the man with the glasses in the blue jumpsuit  
9 sitting at counsel table.

10 THE COURT: All right. The record will reflect  
11 the identification of the petitioner.

12 MR. ABBINGTON: Thank you, Your Honor.

13 BY MR. ABBINGTON:

14 Q So, this would have been either October the 9th -- it  
15 would be fair to say you don't remember whether it was the  
16 8th or the 9th, but it was --

17 A Yes. I don't remember if we interviewed him on the 8th  
18 or the 9th, but I do remember the interview.

19 Q Was there an attempt to make -- interview all 35  
20 prisoners, or was it certain prisoners who came to your  
21 attention out of the 35?

22 A Dr. Noel, he chose the prisoners who he thought he most  
23 needed to interview because we thought that, in the course of  
24 two days interviewing 35 prisoners, it would be difficult to  
25 achieve.

1 Q Right. These interviews took place at Ely?

2 A Yes.

3 Q At the prison there?

4 A Yes.

5 Q All right. So do you recall other prisoners that you  
6 interviewed besides Mr. Mulder?

7 A Yes, I do. However, I would say that, of those  
8 interviews, and there were about ten, I think Mr. Mulder has  
9 stuck in my mind over the years.

10 Q Could you explain to the Court why Mr. Mulder stuck in  
11 your mind since 2007.

12 A Partially because his situation was so dire and so sad.  
13 I guess the pathos of his case was very effecting. Also, it  
14 was so difficult to communicate with him both because of his  
15 paralysis, but more so, I believe, because of his limitations  
16 cognitively. That became apparent to me, and I had not fully  
17 expected that based on Dr. Noel's previous review.

18 THE COURT: Is this the only time you met  
19 Mr. Mulder, was on that October 8th or 9th interview?

20 THE WITNESS: That is the only time I met him in  
21 person. I subsequently corresponded with him.

22 THE COURT: All right. But you had not met him  
23 personally previous to that?

24 THE WITNESS: No.

25 THE COURT: Or since?

1 THE WITNESS: No.

2 THE COURT: Other than here in court?

3 THE WITNESS: No.

4 THE COURT: Okay. And did you correspond with  
5 him before the October 8, 9 event?

6 THE WITNESS: No. I believe we did not  
7 correspond with him before that time. His -- the release --  
8 his release came from the federal defenders.

9 THE COURT: All right.

10 THE WITNESS: I had been aware of his name  
11 because other prisoners. When we do investigations, we reach  
12 out to prisoners and say, if you know of anybody who would  
13 be interested in talking with us, who has an issue, have  
14 them write us. And his name had come up in other prisoner's  
15 correspondence as someone who was limited, and who needed  
16 medical assistance in a dire way.

17 THE COURT: All right.

18 BY MR. ABBINGTON:

19 Q In October 2007, Mr. Mulder wasn't represented by the  
20 Federal Public Defenders Office. Who did you talk to  
21 regarding -- about his case?

22 A Because we knew that he was -- when we got his release,  
23 we realized he was a death row prisoner. And anyone who was  
24 represented by another attorney, we contacted their attorney  
25 prior to submitting their release to the Department of

1 Corrections, in order to get permission from the attorney  
2 to review the records. And so we contacted -- I believe his  
3 name was Christopher Oram --

4 Q That is correct.

5 A -- to get approval.

6 Q Why did you feel it necessary to talk to Mr. Oram rather  
7 than obtain a release directly from Mr. Mulder?

8 A Well, anyone who was represented by counsel I did  
9 contact. And because there -- because I had heard from other  
10 prisoners that he could be limited, especially, I wanted to  
11 make sure that I contacted his counsel. But in the normal  
12 course of business, I would never have submitted a release  
13 from a prisoner who was represented without contacting their  
14 counsel.

15 Q So you did talk to Mr. Oram about him?

16 A I did. I did.

17 Q Okay. Now, the, the time that you actually spent with  
18 Mike Mulder in October of 2007, can you describe to the Court  
19 what those -- the communication that you had with him, and  
20 if there was any difficulty at all in communicating with him?

21 A Yes. It was very difficult to communicate with  
22 Mr. Mulder. I should say that the interviews were primarily,  
23 of course, conducted by Dr. Noel, who was there as the expert.  
24 I was there to introduce myself, to explain to the prisoner  
25 what we were doing there, why we were there, to ask for his

1 permission to speak with him. And I do believe I had some  
2 interactions with Mr. Mulder trying to coax answers out of  
3 him, when it became clear it was difficult for him to both  
4 understand what we were talking about but, also, to respond  
5 to it.

6 I would say in, in his attempt to respond to  
7 Dr. Noel's questioning about his care, he clearly had things  
8 he thought he wanted to say, but it was very, very difficult  
9 for him to formulate those responses. For example, when the  
10 issue came up about his right hand, and the contracture in  
11 that hand post-stroke, due to the lack of any physical  
12 therapy, the issue of whether or not he had a brace was  
13 discussed. And the nurse, I believe at the time, indicated  
14 he had been given a brace, but he didn't use it.

15 And then he, Mike Mulder, Mr. Mulder tried to  
16 respond to that, and it took a very long time for us to  
17 finally understand that he had been given a brace, but  
18 because his hand was so knarled, it wouldn't fit over his  
19 hand, so that it could not be used.

20 Q How long do you think it took him to explain that thought  
21 to you?

22 A It was some minutes. I would say each of our interviews  
23 were not terribly long. They were probably between 15 and  
24 30 minutes generally; however, his was one of the longer  
25 interviews. Partially because of the issues involved but,

1 also, due to the difficulty of communication.

2 Q At the time when you were going through the prison, are  
3 you looking for -- there was some -- are you contemplating  
4 litigation at that point?

5 A We, of course, knew it was a possibility; especially,  
6 in October, after we had Dr. Noel's findings of the systemic  
7 level of grossly inadequate care. So, at that time, in the  
8 back of my mind, although my first goal was to come to  
9 resolution without litigation, and we subsequently did try  
10 to achieve that; however, that didn't work.

11 But in October, one of the chief things on my mind,  
12 of course, was if we were going to bring a Class action, we  
13 would need to find named plaintiffs, Class representatives.  
14 So, those interviews in October were useful for me looking  
15 for Class representatives.

16 When I met Mr. Mulder, it became painfully clear  
17 to me that he would never be able to serve as a Class  
18 representative because what you need to look for in Class  
19 litigation, in general, but also in particular with prison  
20 litigation, is someone who can navigate the internal grievance  
21 procedure. They have to fully exhaust.

22 In my estimation of Mr. Mulder, he would never be  
23 able to actually navigate that process of appeal, a deadline,  
24 of technical issue. I also felt that he would never be able  
25 to serve as a Class representative. I did not think that he



1 could make a reasoned judgment, which is required of a Class  
2 representative. And I did not think that, as an officer of  
3 the court, I could represent to the judge that this individual  
4 would be an adequate Class representative.

5 THE COURT: Let me go back. I don't have any  
6 questions about his status as a Class representative or  
7 capacity, but when you talked to Mr. Oram, his attorney, did  
8 you discuss with Mr. Oram the circumstances of the litigation  
9 then pending in state court regarding relief being sought  
10 pertaining to the death penalty that had been imposed in state  
11 court and the competence issue?

12 THE WITNESS: Right. You know, I had, I had  
13 some recollection. I knew that he was in state court, and  
14 that there were some questions about his mental capacity  
15 post-stroke. So, that rings a bell.

16 THE COURT: Were you privy to any of the  
17 psychological or psychiatric reports, evaluations that had  
18 been done?

19 THE WITNESS: No; not at that time.

20 THE COURT: In connection with the State  
21 proceedings, at the time of the October 8, 9 meetings?

22 THE WITNESS: No, no. So when I met him,  
23 no, I had some inkling that he had capacity issues. But  
24 upon meeting him and evaluating him, as a lawyer, looking  
25 at potential Class representatives, my interaction with him

1 indicated to me that he could never serve as a Class  
2 representative.

3 THE COURT: Okay. Where did the inkling prior  
4 to going there come from then? You said you had some inkling;  
5 where did you derive it?

6 THE WITNESS: I did talk with Chris Oram and,  
7 also, having other prisoners identify him as somebody who  
8 needed a lot of assistance.

9 THE COURT: Okay. Okay.

10 All right.

11 BY MR. ABBINGTON:

12 Q When you asked -- did you obtain Mr. Oram's permission to  
13 have Mr. Mulder execute a release, or did he --

14 A Once we --

15 Q -- or did -- how did that happen?

16 A Once we received a release from him, we, we reviewed  
17 all the prisoners for whom we had released to see whether  
18 or not they might be represented by other counsel. And so  
19 when we learned that Mike, Mr. Mulder, was a death row  
20 prisoner, we, of course, assumed he was represented by  
21 counsel. And I believe I contacted Gary Taylor to find out  
22 who his attorney was.

23 Q Okay. Did Mr. Oram allow, allow you to proceed on his --  
24 did he give you his permission to obtain a release from  
25 Mr. Mulder?

1 A He --

2 Q Or did he ask you --

3 A He -- yes. He gave me the permission to use the release.

4 Q All right. Without telling me what he said, did you  
5 actually -- did you have a protracted discussion with Mr. Oram  
6 about Mr. Mulder and his condition?

7 A I don't recollect --

8 Q All right.

9 A -- having an extended conversation. But, certainly, I  
10 was aware that he was still in state court.

11 Q Now, this idea about being a named plaintiff, is this,  
12 would this be a complex activity? Does this call for complex  
13 judgments on the part --

14 THE COURT: She didn't say a named plaintiff.  
15 She said a Class representative.

16 MR. ABBINGTON: A Class representative; right.

17 THE COURT: He could be a member of the Class.  
18 Was a Class action ever filed?

19 THE WITNESS: Yes, it was subsequently file.

20 THE COURT: All right. And was Mr. Mulder a  
21 member of the Class?

22 THE WITNESS: The Class was defined as all  
23 prisoners at Ely State Prison, so he was a member of the  
24 Class, but he was not one of the named plaintiffs who would  
25 be a Class representative.

1 THE COURT: All right. He didn't opt out of  
2 the --

3 THE WITNESS: No, no.

4 THE COURT: What's the status of that  
5 litigation?

6 THE WITNESS: That case was settled and a  
7 settlement was approved by the Court October of 2010.

8 THE COURT: Okay. All right.

9 So Mr. Mulder is not currently a litigant in that  
10 case?

11 THE WITNESS: No, no, he -- as a beneficiary of  
12 the settlement.

13 THE COURT: Okay. All right.

14 Okay. Good.

15 BY MR. ABBINGTON:

16 Q Maybe -- I want to be clear about that.

17 When we, in talking about this, my understanding  
18 was that they -- your questions that you're looking for, when  
19 you actually do have named plaintiffs, that they are -- there  
20 were certain decisions you were looking for from those people,  
21 and that you thought Mr. Mulder was incapable of making.

22 Could you outline what those are?

23 A Absolutely. When we evaluate potential named plaintiffs  
24 who will be Class representatives, and in at decision to  
25 having to navigate a grievance process, what we are looking

1 for is an individual who can make reasoned judgments about  
2 both his own welfare, but the welfare of the Class at large.

3 For example, in settlement, what we would do,  
4 and what we did do in this case, is provide copies of the  
5 settlement to each of the named plaintiffs, and then go and  
6 meet with each of them and discuss the provisions, why we  
7 thought settlement was a good idea, what we thought it would  
8 bring for the Class, answer any questions, and have them  
9 ultimately decide whether or not they would agree to the  
10 settlement.

11 Q Do you think Mr. Mulder was capable of answering those  
12 type of questions?

13 A Oh, absolutely not.

14 Q Do you think he was capable of making reasonable  
15 judgments about his own welfare?

16 A I would say no. In my subsequent correspondence with  
17 him, and after meeting him, I made sure that my letters -- and  
18 that is a primary way that prison litigators would communicate  
19 with clients -- I had to simplify that language. And,  
20 generally, our language, when we deal with our prisoner  
21 clients, is simplified because we recognize that literacy  
22 levels and educational levels and cognitive issues are pretty  
23 prevalent in this population.

24 So even though lawyers are not very good in  
25 writing in clear simple language, we try to as much as we

1 can. But after meeting with Mr. Mulder in October of 2008,  
2 my correspondence with him, I made sure that I wrote in the  
3 simplest terms possible; that anytime I asked a question, it  
4 would be a relatively easy yes/no question.

5 I made sure that each -- that I separated each by --  
6 I didn't write in paragraphs. I wrote just in sentences  
7 with spaces. I tried to make it as simple as possible.

8 THE COURT: Now, how much correspondence did you  
9 have? How soon after the October 8th, 9th meetings did you  
10 begin correspondence with Mr. Mulder?

11 THE WITNESS: I believe December or January was  
12 the first letter. And then subsequent to that, I did receive  
13 a response from him which I followed up -- this must have been  
14 May.

15 Now he received, he -- we write to the Class  
16 updating them on various aspects of the litigation, and  
17 he would have been on that list. But letters I wrote  
18 specifically to him soliciting a response, or asking for  
19 information, about two or three.

20 THE COURT: Two or three letters, you wrote?

21 THE WITNESS: Uh-huh.

22 THE COURT: And how many responses?

23 THE WITNESS: I believe he responded twice.

24 THE COURT: Twice. And when was the last  
25 correspondence with him, if you recall?

1 THE WITNESS: It would have been -- I believe it  
2 was May of 2008.

3 THE COURT: May 2008.

4 THE WITNESS: After -- the case was filed in  
5 March of 2008.

6 THE COURT: So within a period of less than a  
7 year after the first meeting?

8 THE WITNESS: Yes.

9 THE COURT: And maybe those are already  
10 exhibits, I don't know.

11 Is the correspondence an exhibit?

12 MR. ABBINGTON: I don't believe so. The  
13 correspondence between Ms. Fettig and Mr. Mulder is not a  
14 part of our -- it's not an exhibit to the petition.

15 THE COURT: Okay. Tell me about -- what was  
16 the nature of the -- what were asking him for, communicating?  
17 I know you said you communicated regarding the status of the  
18 Class action of everybody.

19 THE WITNESS: Uh-huh.

20 THE COURT: But, specifically, with Mulder, what  
21 were you corresponding with him about? What was the subject  
22 matter?

23 THE WITNESS: I wanted to follow-up with some  
24 of the issues that arose during our interview with him in  
25 October because, at that time, we were told accommodations

1 would be made for the shower. We were told that he would get  
2 a brace. We were told that they would look into providing  
3 physical therapy.

4 THE COURT: All right.

5 THE WITNESS: And so that -- those were the  
6 nature of my questions.

7 THE COURT: And his responses to you, what was  
8 the nature of the responses?

9 THE WITNESS: For example, you would ask him  
10 is your leg still hurting, and he could respond, yes, my leg  
11 is still hurting.

12 THE COURT: All right.

13 THE WITNESS: Or, yes, I still have problems  
14 getting into the shower.

15 THE COURT: And what about the brace for the  
16 arm?

17 THE WITNESS: I believe he indicated that he was  
18 not given any brace.

19 THE COURT: All right. And the next round of  
20 correspondence, was it the same subject matter?

21 THE WITNESS: Roughly the same; yes.

22 THE COURT: Oh, so all following up on his  
23 medical condition and accommodations to meet any disabilities  
24 he had at the prison?

25 THE WITNESS: That's correct.



1 THE COURT: Did any of the correspondence relate  
2 to his mental acuity in any way?

3 THE WITNESS: I believe he indicated he had been  
4 given an IQ test.

5 THE COURT: All right.

6 THE WITNESS: And I asked him about it, and  
7 he responded that he couldn't find it, that he had looked  
8 everywhere, but he found one document that he then did send  
9 to me.

10 THE COURT: All right. And what was the  
11 document; do you recall?

12 THE WITNESS: I believe it was -- it was  
13 actually a report of an expert done for Christopher Oram.

14 THE COURT: All right.

15 THE WITNESS: I think it actually was the IQ  
16 test. He just didn't know that that was the document.

17 THE COURT: All right. And had that IQ test  
18 been administered to him after the October 2007 interview  
19 then?

20 THE WITNESS: I think the document was prior to  
21 that.

22 THE COURT: Okay.

23 THE WITNESS: It hadn't been in our medical  
24 record review.

25 THE COURT: Fine.

1 THE WITNESS: But it wasn't, perhaps, part of  
2 the institutional file.

3 THE COURT: All right. And since we don't have  
4 the records, describe -- were these handwritten letters that  
5 he sent you?

6 THE WITNESS: Yes.

7 THE COURT: I assumed you typed yours.

8 THE WITNESS: Yes.

9 THE COURT: But the responses are handwritten?

10 THE WITNESS: That's correct.

11 THE COURT: And were you able to read the  
12 writing? Was it difficult to read or easy to read?

13 THE WITNESS: It, it looked like a child's  
14 script.

15 THE COURT: Okay.

16 THE WITNESS: Which was consistent with my  
17 impression of him during our interview; he was very  
18 child-like.

19 THE COURT: All right.

20 THE WITNESS: So, it was not surprising.  
21 Very basic, maybe a second or third grader would write like  
22 that.

23 THE COURT: Now, you had no comparison with what  
24 he -- the way he wrote prior to 2001?

25 THE WITNESS: No.

1 THE COURT: Okay.

2 THE WITNESS: No. But, certainly, in comparison  
3 to letters I received from other prisoners, it -- they --  
4 these letters stood out because they are very, very basic.

5 THE COURT: Okay. All right. Thank you.

6 Go ahead.

7 BY MR. ABBINGTON:

8 Q In terms of these follow-up letters, is this -- were  
9 those correspondence related to his participation in the  
10 lawsuit, or was there something in particular that caused  
11 you to correspond with Mr. Mulder after you met?

12 A It was only the follow-up, because his situation  
13 seemed so dire at our interview, and his medical needs were  
14 apparently not being met in any way, and we had had assurances  
15 from Dr. Bannister, the Medical Director, that things would  
16 be done for him.

17 Those were the nature of my questions; to see  
18 whether or not they did follow-up and handle his medical  
19 care.

20 THE COURT: Did you get back in touch with  
21 Bannister to check on that then, about the accommodation of  
22 the shower, for example?

23 THE WITNESS: I -- at the time I received full  
24 responses, we had filed the lawsuit, so I could not directly  
25 communicate with Dr. Bannister.

1 THE COURT: Okay. Okay.

2 BY MR. ABBINGTON:

3 Q When was the lawsuit filed?

4 A March of 2008.

5 Q And what happened after the lawsuit was filed?

6 A It took us about a year to get a Class certification, so  
7 in March of 2009 the case was certified as a Class.

8 We then entered into discovery. That took us quite  
9 a long time and was not amicable, so that went on for several,  
10 several months until, finally, we were able to get our experts  
11 into the facility in December of 2009.

12 Q So you had two more, two different medical experts?

13 A Yes.

14 Q And this --

15 A Yes.

16 Q -- did not involve Dr. Noel at all?

17 A No. These are two separate medical experts. They toured  
18 the facility and reviewed records, interviewed staff and  
19 prisoners over the course of three, four days, I believe it  
20 was, in December 2009.

21 Following that partial discovery and the expert  
22 tour, the parties came together to talk settlement in January  
23 of 2010. We subsequently sought a stay of discovery so that  
24 the parties could continue settlement talks.

25 THE COURT: I don't mean to interrupt but,

1 really, the progress of the Class action litigation --

2 MR. ABBINGTON: That's fine.

3 THE COURT: -- doesn't pertain.

4 MR. ABBINGTON: That's, that's fine. We're --

5 BY MR. ABBINGTON:

6 Q So since the settlement, and as taken in, have you had  
7 anymore interaction with Mr. Mulder?

8 A No.

9 Q All right.

10 Now, in identifying his -- in spending time with  
11 him, you spent a lot of time with a lot of the prisoners and  
12 this is kind of what you do. I mean, uh, you've been working  
13 with the Prison Project for a long time.

14 In the universe of prisoners, where does Mike Mulder  
15 sit in terms of functioning?

16 A I would say he sits near the bottom certainly. He is  
17 very low functioning. There was another prisoner that we  
18 met during our first interviews in May of 2007, who I also  
19 clearly decided that he would certainly not qualify as a Class  
20 representative due to his cognitive limitations. But in my  
21 experience with prisoners in general, who are not a well  
22 educated, and oftentimes high achieving group, he is, he is  
23 very low functioning even --

24 Q So he's low functioning within a low functioning group?

25 A Yes; that's my belief.

1 Q I think you said that you noticed that he had a change of  
2 personality as well --

3 A Uh --

4 Q -- or there's a document. What's your position on that?

5 A I, I don't know about his change of personality.

6 Q All right.

7 A The one thing I would say is, during my interaction  
8 with him, what was notable about him was that he was so  
9 happy. Prisoners, as a group, generally, aren't so  
10 happy-go-lucky. And he, despite his seemingly dreadful  
11 medical conditions, was strangely upbeat, in addition to being  
12 child-like. But I would say that's sort of separate from --  
13 his personality seemed unusually gleeful. But separate  
14 from that, his functioning seemed very child-like.

15 Q His functioning seemed very child-like.

16 Would you also, uh, characterize his communications  
17 as being child-like, and on a child-like level?

18 A Yes. Yes. He felt to me, like, you know, a second or  
19 third grader, perhaps.

20 Q Thank you.

21 MR. ABBINGTON: I pass the witness, Your Honor.

22 THE COURT: Thank you.

23 Cross-examine.

24 MR. NEIDERT: Yes, Your Honor.

25 THE COURT: Mr. Neidert.

1 **CROSS-EXAMINATION**

2 BY MR. NEIDERT:

3 Q Ms. Fettig, it's a fair statement that the prison  
4 litigation itself settled without any admission of liability  
5 by the Nevada Department of Corrections?

6 A That's why we settle.

7 Q Okay.

8 MR. NEIDERT: And, Your Honor, I'd just, for  
9 the record, either would ask the Court to take judicial notice  
10 of case 3:08-115-LRH, which was this case. It's certainly  
11 within the territorial jurisdictions of this court.

12 THE COURT: Well, I can. I don't know --

13 MR. NEIDERT: And I'd ask -- I mean, to the  
14 point it has any relevancy to these hearings at all. We  
15 discussed it.

16 THE COURT: Yeah. I don't know what relevance  
17 the Class action litiga -- it explains why --

18 MR. NEIDERT: Right.

19 THE COURT: -- the interaction took place.

20 MR. NEIDERT: Right.

21 THE COURT: But, that's about the extent of it.

22 BY MR. NEIDERT:

23 Q With respect to the medical records, are you aware that,  
24 perhaps, not all of the medical records, specifically with  
25 Mr. Mulder, were included in the medical records that were

1 provided to Dr. Noel?

2 A Although we were told we were going to be given the full  
3 medical record, after Dr. Noel reviewed all 35, uh, he found  
4 strange lapses in the medical records, information that should  
5 have been there that wasn't, so that made us believe that we,  
6 perhaps, weren't given the full record. But, we had no way  
7 of knowing.

8 Q So you believe you were or were not given the full  
9 record?

10 A We were told we were given the full record, but the  
11 medical expert's review seemed to indicate that the medical --  
12 either we -- I don't know if it was deliberate or not but,  
13 certainly, the medical record keeping practices were an issue  
14 in his report because they were so poor, and the information  
15 that should have been there wasn't.

16 Q Did you review the medical records yourself with respect  
17 to Mr. Mulder?

18 A No, I didn't.

19 Q Okay. So -- now, you've testified that after meeting  
20 with Mr. Mulder -- and the judge asked you some questions  
21 in respect to this, too -- that you -- the correspondence,  
22 you had some correspondence with Mr. Mulder. You sent him  
23 letters, and he sent back responses to those letters?

24 A That's correct.

25 Q And you testified that, basically, you simplified the



1 letters because you had concerns about his mental functioning  
2 but, uh, but he responded to those letters?

3 A He did respond -- oh, I received two responses from him.

4 Q You received two responses from him. And the response,  
5 would you agree with me, that the responses, as you've  
6 described them, were appropriate in that you asked him  
7 specific questions and he provided you answers to those  
8 questions that corresponded with the questions that you  
9 asked him?

10 A There were some aspects of the questions that he didn't  
11 respond to. For example, he would respond to, "Is your leg  
12 still hurting," but he would not respond to a question such  
13 as: "If you have not received physical therapy, you should  
14 kite for medical care and let me know what response you get."

15 Q So --

16 A So, the simple questions he was able to respond to.

17 Q So it sounds to me, because I haven't seen these letters  
18 either, obviously, that his responses were very concrete as  
19 opposed to abstract in his responses to you?

20 A Uh --

21 Q I mean he answered your questions, the concrete questions  
22 with concrete answers. And what it sounds like to me, is  
23 you're saying -- is when you gave him something that was more  
24 detailed and maybe required a little more abstraction, he had  
25 difficulty, or did not respond to those questions?

1 A I would say if questions that were yes or no, or very  
2 easy to understand, he could, he could respond to basic  
3 questions about his pain or if he got medication. That sort  
4 of thing.

5 Q So, like I said, concrete responses to concrete  
6 questions. And it's your testimony that your interaction  
7 with him was approximately, you said it was the high end,  
8 about 30 minutes one day at Ely State Prison, and then two  
9 letters you sent to him that you responded to thereafter;  
10 is that correct?

11 A That's correct.

12 Q And that in that 30 minutes that you were with him that,  
13 for the most part, it was Dr. Noel asking questions, and you  
14 observing their interaction, as opposed to you directly having  
15 interaction with Mr. Mulder?

16 A I did directly interact with him, but the majority of the  
17 interview was conducted by Dr. Noel.

18 Q And it's your testimony that you had difficulty  
19 communicating with him during that 30-minute meeting?

20 A Both myself and Dr. Noel had difficulty.

21 Q And in the follow-up letter of one of the questions you  
22 asked him about, an IQ test or something like that, and he  
23 actually sent you back a document that at least had to do with  
24 IQ testing by somebody at some point in time?

25 A That's correct; although, he thought it was the wrong

1 document.

2 Q He thought it was the wrong document, but it was actually  
3 the correct document?

4 A That's correct.

5 Q Okay.

6 MR. NEIDERT: I have nothing further at this  
7 time of this witness, Your Honor.

8 THE COURT: Thank you.

9 Mr. Abbington, anything further?

10 MR. ABBINGTON: No, Your Honor. I would ask  
11 that Ms. Fettig be released.

12 THE COURT: Yeah, certainly. No need for  
13 Ms. Fettig to have to stand by, so you can be excused.

14 Watch your step as you go down.

15 THE WITNESS: Thank you, Your Honor.

16 THE COURT: Please be careful.

17 MR. NEIDERT: Have a safe flight back to  
18 Washington.

19 THE WITNESS: Appreciate it.

20 THE COURT: All right. Counsel, let me  
21 just ask, with regard to recontacting the warden, did you  
22 have to contact her at 4:00, or did you go ahead and take  
23 care of stuff so that you don't need to call her back at  
24 four o'clock?

25 MR. ABBINGTON: No. The only thing we --

1 came from them, she offered that perhaps there was another  
2 associate warden who was actually in charge of the information  
3 that we were asking about, a Warden Brooks, that formerly --

4 THE COURT: I mean is she expecting to hear from  
5 you at four o'clock still?

6 MS. PROCTOR: Yes.

7 MR. ABBINGTON: My understanding is yes.

8 THE COURT: Okay.

9 Well, we've still got some time, so can we go ahead  
10 and get started with another witness then?

11 MR. ABBINGTON: Yeah, doctor --

12 THE COURT: Then we can always break at  
13 four o'clock so you can make that call.

14 MR. ABBINGTON: Cool.

15 MS. HENSLEY: Your Honor, may I have a moment to  
16 confer with counsel?

17 THE COURT: Sure.

18 (Counsel confer.)

19 MS. HENSLEY: Thank you, Your Honor.

20 THE COURT: Dr. Toomer, was it?

21 MS. HENSLEY: Yes.

22 THE COURT: Is he here or is he outside?

23 MS. HENSLEY: Yes, he's --

24 THE COURT: Oh, he's here? Okay. Fine.

25 Doctor, please, if you would come on up to the

1 witness stand and be sworn by the clerk, sir.

2

3 **DR. JETHRO TOOMER,**  
4 called as a witness on behalf of the Petitioner,  
5 was sworn and testified as follows:

6

7 THE CLERK: Have a seat.

8

9 Would you state your full name for the record and  
10 spell your last name, please.

11

12 THE WITNESS: Jethro W. Toomer; J-e-t-h-r-o.  
13 Last name T-o-o-m-e-r.

14

15 THE COURT: All right. Thank you.

16

17 Go ahead Ms. Hensley.

18

19 MS. HENSLEY: Your Honor, I have an  
20 understanding that the State will stipulate to his admission  
21 as an expert in forensic psychology and, also, to his report,  
22 which is located at tab number 2 in our notebook.

23

24 THE COURT: All right. December 2009,  
25 December 23, 2009?

26

27 MS. HENSLEY: Yes, Your Honor.

28

29 THE COURT: Right.

30

31 And so stipulated, counsel?

32

33 MS. PROCTOR: So stipulated, Your Honor.

34

35 THE COURT: Great. Thank you.

36

37 Go ahead then. We can go right to testimony of  
38 the witness concerning his forensic psychological examination.

39

40 \\

**DIRECT EXAMINATION**

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BY MS. HENSLEY:

Q Good afternoon, Dr. Toomer. How are you doing today?

A Just fine. And you?

Q Good. Thank you.

Did you meet with Mr. Mulder?

A Yes, I did.

Q When was that?

A I met with Mr. Mulder on the 7th of December, 2009, at the facility at Ely.

Q Do you recall how long you spent interviewing Mr. Mulder?

A Uh, it was in excess of three hours, three to four hours. Something like that.

Q Could you describe his general appearance and demeanor when you met with him?

A Um, he, he appeared, as he was escorted to the interview room, he was cooperative. His affect was a little constricted. But, generally, he was cooperative, and he attempted to respond to requests for information. One of the things that I recall is that, upon entering, he was very apologetic from the very beginning, and he indicated -- one of the things that he apologized for was the fact that he, uh, could not readily recall information or retrieve information. And the other thing that he apologized for was that he said at times, he said at various times, he said I tend to just blurt

1 out information or statements or whatever, or words, for no  
2 apparent reason.

3 THE COURT: Did he spontaneously offer this or,  
4 when you began the interview, did you first explain to him why  
5 you were there?

6 THE WITNESS: Yes.

7 THE COURT: And what you were going to do?

8 THE WITNESS: Yes.

9 THE COURT: How did that --

10 THE WITNESS: Well --

11 THE COURT: Or did he blurt out that he was  
12 apologetic?

13 THE WITNESS: No, no, I explained to him my  
14 purpose for being there.

15 THE COURT: What did you tell him?

16 THE WITNESS: I told him that I had been  
17 retained by his counsel to conduct a psychological evaluation  
18 to assess his functioning at the current time, and that I  
19 would prepare a report that would be submitted to his, to  
20 his counsel that would address issues related to his  
21 functioning and his capacity to work with his attorney.

22 THE COURT: And as far as you could discern,  
23 did he appear to understand what you were telling him as to  
24 why he was there?

25 THE WITNESS: Well, I went through that

1 about three times. I tried to break it down in terms of  
2 compartmentalizing one or two sentences at a time with respect  
3 to trying to convey the information because, when I initially  
4 explained the entire process, there was a kind of quizzical  
5 look that suggested to me that he, that he did not follow.  
6 And so I went back and tried to simplify concretize what I  
7 was saying in regard to those particular components.

8 THE COURT: And before you went to Ely to see  
9 him, what had you had the opportunity to review? Were there  
10 either medical, psychological, or psychiatric evaluations, any  
11 records that you had?

12 THE WITNESS: I had reviewed some information  
13 regarding his psychotropic history, and I was aware of the  
14 fact that he had suffered a stroke in 2001. And so the -- you  
15 know, I had the, the information with regard to direct appeal,  
16 and those kinds of documents, I had reviewed prior to going --

17 THE COURT: Any other tests, reports, or results  
18 that you did?

19 THE WITNESS: Uh, I had -- I had reports  
20 that had been completed by, I believe, prison personnel,  
21 psychological evaluations, and psychiatric evaluations that  
22 had been conducted prior to my going.

23 THE COURT: And any reports that had been  
24 prepared in connection on behalf of Mr. Mulder in the State  
25 court proceedings, or Mr. Oram or anybody else?



1 THE WITNESS: No. I did not see those.

2 THE COURT: Okay. All right. Thank you.

3 Go ahead.

4 BY MS. HENSLEY:

5 Q Is it fair to say that when you were reviewing these  
6 reports, they included the report of Dr. Milner and Dr. Bishop  
7 and Dr. Cansora (phonetic)?

8 A That is correct; yes.

9 THE COURT: Refresh my recollection, who were  
10 they? Were those medical personnel at Ely?

11 THE WITNESS: Dr. Milner is a prison  
12 psychologist. And Dr. Bishop is a psychiatrist there at  
13 the facility.

14 THE COURT: Okay.

15 THE WITNESS: And they all had submitted  
16 reports.

17 THE COURT: Thank you.

18 BY MS. HENSLEY:

19 Q How did you proceed with your evaluation of Mr. Mulder;  
20 what was your first step?

21 A Well, the first step in the process is try to establish  
22 some level of rapport in terms of trying to put the individual  
23 at ease. I mean these are just general kinds of things that  
24 constitute the, the evaluative process, to try to talk to them  
25 about things that may not necessarily relate to the specifics

1 of the case. How are they doing? How are they getting along?

2 I try to get some ideas as to how they're sleeping.  
3 Their appetite. Those kinds of things. Because, sometimes,  
4 they would give you a clue as to how the person is functioning  
5 overall.

6 I would try to get some ideas to exactly how they  
7 are doing and how they're coping at, you know, at that  
8 particular, that particular juncture, before I get into the  
9 specifics with regard to why I'm there; i.e., being the  
10 specifics of the evaluation.

11 Q How was Mr. Mulder able to communicate with you during  
12 that initial period where you're just getting to know him?

13 A It became fairly obvious that his communication processes  
14 were limited, and that I had to be very careful in terms of,  
15 in terms of speaking; in terms of speed, in terms of ideation;  
16 in terms of sequencing; in terms of just the entire process.  
17 As I mentioned earlier, in terms of basically trying to be  
18 as concrete as possible in terms of how information was  
19 presented; being as, as single minded, if you will, in terms  
20 of presenting one idea at a time, as opposed to something that  
21 requires understanding of two or three steps of comprehension.

22 Q If you recall, could you give us an example of a question  
23 and answer exchange you had with Mr. Mulder that would  
24 illustrate what you're saying?

25 A Well, for example, when I -- as I indicated a little

1 earlier, when I went, went in, and I was talking to him  
2 about, initially about the purpose of the evaluation, the  
3 idea of being retained by counsel, the idea of conducting an  
4 evaluation; and part of that process is I'm here, you know,  
5 to conduct an evaluation that will consist of my administering  
6 a certain number of tests, of protocols that will require you  
7 to participate and do certain things. And as a result of  
8 that, I will, you know -- I will conduct the evaluation. I  
9 will interpret the results. I will prepare a report.

10           You know, I would describe all of that. And then,  
11 as I indicated earlier, it was fairly obvious that he did not  
12 grasp all of those particular components, so I had to go back,  
13 and we'd go back, and I'd say I was retained by, by counsel.  
14 And I would indicate counsel, Mr. Brian Abbington -- that kind  
15 of thing -- was the individual whom I spoke who retained my  
16 services. Okay? That, you know, I'd kind of close that off.  
17 That's been done.

18           Then the next thing we talk about is, uh, what I'm  
19 going to do. I was asked to come and conduct a psychological  
20 evaluation and a psychological evaluation consisting of -- I  
21 have certain types of tests. And I would show him that.

22           So that's how -- I mean I'm not going to go through  
23 it step by step, but that's how it's broken down. And then,  
24 you know, then after that, I would take all of these and I  
25 would go -- you know, go back to my office and whatever, do

1 the interpretation, the analysis, the interpretation, the  
2 preparation of the report, and all of those kinds of steps  
3 that follow.

4 Q Is it fair to say then that, at least with respect to  
5 this initial part of your interview, that you could only speak  
6 in single minded concepts to Mr. -- with Mr. Mulder?

7 A Yes. And, and I had to constantly remind myself to  
8 do that because, typically, when we communicate -- you  
9 communicate, you know, we juxtapose ideas. We have two or  
10 three thoughts within one particular conversant moment, and  
11 so you have to constantly remind yourself of the fact that you  
12 can't -- that that won't work. You have to constantly remind  
13 yourself that you have to basically concretize, simplify and  
14 what have you, how you are communicating.

15 Q What indications do you have from Mr. Mulder that he  
16 wasn't understanding you when you were speaking in the  
17 conjunctive?

18 A Uh, one is the -- just the nonverbal. The face says  
19 that. You know, it's kind of like the look that you get  
20 when a person doesn't quite understand what is being said.

21 And so one is the, is the nonverbal component.  
22 And then, from time to time, what I would do is I would ask  
23 the individual to repeat or to give their understanding or  
24 recollection of what was said. And if they can't do that,  
25 then it's back to square one. I'm either before square one,

1 in terms of what you're trying to communicate or how you're  
2 trying to communicate.

3 Q What did you do next after the initial "getting to know  
4 you" period?

5 A Well, what I, I did after that was to try to explain, as  
6 best I could, the tests, and what the tests were about, what  
7 the goal of each test was, and what the test measured in as  
8 simple language as possible, so that the person would have  
9 some indication of what this process was, you know, all about.

10 Q How long did it take you to explain what those tests were  
11 and what their goals were?

12 A Well, it varied because the tests vary in complexity. So  
13 it would take, in some cases, I could show -- for example, in  
14 one of the protocols, that gives some indication as to whether  
15 or not there might be some underlying organic impairment or  
16 neurological involvement. The individual is required to look  
17 at what we call stimulus cards that have drawings.

18 And the individual is then asked to duplicate the  
19 drawing on a separate sheet of paper. And what the individual  
20 is actually asked to do is a task that requires them to  
21 utilize the visual apparatus. You have to cognitively process  
22 it, and then they have to use their motor skills to duplicate  
23 what they have seen.

24 If there is some level of disfunction between those  
25 particular components, it would be reflected in deficits in

1 the -- in what they reproduce, in the discrepancy in what they  
2 reproduce, and what the original stimulus card was -- what the  
3 real stimulus card was.

4           And at the very basic level, for example,  
5 individuals who have Alzheimer's can't do the task. They  
6 can't complete the task because that process has been  
7 disrupted. And so, so that's one of the tests that was -- and  
8 so that, to explain that is a lot simpler than explaining, for  
9 example, the IQ assessment which contains, like, ten subtexts.

10           THE COURT: Well, going back to Bender --

11           THE WITNESS: Yes.

12           THE COURT: -- the Bender test. The motor  
13 function of a person after a stroke could be impaired. And  
14 if he has to use a hand that he wasn't -- trying to do  
15 something with my left hand when I'm right-handed, would  
16 that not, perhaps, affect my ability to duplicate the designs  
17 without regard, perhaps, to my other cognitive abilities,  
18 which is the motor skill deficit?

19           THE WITNESS: Well, what happens is that  
20 that can happen. But what we do, in terms of looking at  
21 the particular reproduction, is we compare them to the data  
22 of an individual who have organic, different types of organic  
23 impairment. So it's not just a matter of -- it could be,  
24 it could be, say, for example, right hemisphere or left  
25 hemisphere. That would affect what the person does;

1 especially, if the person has been right-handed dominant  
2 before or left-handed dominant before. If that was  
3 affected, usually what will happen is that the individual  
4 may have tried to utilize the opposite hand. And so that  
5 would have been taken into account, but we would look at the  
6 data in regard to that, what you described but, also, with  
7 respect to the normative data that looks at the discrepancies  
8 that tend to be most characteristic of people who suffer from  
9 aphasia, dementia, or, like, delirium.

10 THE COURT: And they're distinct from simply the  
11 motor capacity?

12 THE WITNESS: Yes.

13 THE COURT: All right.

14 BY MS. HENSLEY:

15 Q What were the results of the Bender test?

16 A Well, the Bender Gestalt designs reflected a number of  
17 deficits in terms of functioning. The first thing, and one of  
18 the first things that you look for in terms of, in terms of  
19 the responsiveness, is the issue of, of response latency, and  
20 the degree of difficulty.

21 Usually, under normal circumstances, the Bender can  
22 be completed five to seven minutes, that kind of thing. When  
23 there is organic impairment, brain damage or some organic,  
24 some neurological involvement, then the time is protracted,  
25 and so you get response latency. And, also, you get the whole

1 issue of difficulty. And he had both of those in terms of  
2 his, his completion.

3 He had difficulty and there was response latency --  
4 in other words, the idea of that discrepancy coming about in  
5 terms of time required and actual completion, so there was  
6 difficulty in terms of his looking at the object, processing  
7 it, and then using motor skills to duplicate, to duplicate the  
8 particular item.

9 So, you would have that time discrepancy there with  
10 respect to what was going on. And that's one of the initial  
11 indicators that you have some organic based deficits that  
12 impact on functioning. And we look at -- overall, we look  
13 at, for example, the discrepancy in terms of their number of  
14 indicators.

15 For example, you look at spacing. How space is  
16 used. We look, for example, at pressure -- I'm sorry --  
17 compression in terms of whether they are bunched together or  
18 whether they are scattered all over, whether the person asks  
19 for an additional page. We look, for example, at pressure  
20 and pressure from the perspective of the heavy line quality  
21 versus normal to a light line quality.

22 We look, for example, at certain components, for  
23 example, individuals who have neurological impairment, have  
24 difficulty, for example, with angles. They have difficulty  
25 with closure; for example, objects that are supposed to be



1 closed, which tend to be less open. They have difficulty  
2 completing angles, and angles will be off target and what have  
3 you.

4           So, we have all those kinds of things that we  
5 look at. And then we looked at one of the main factors that  
6 we often see with regard to, with regard to neurological  
7 involvement is you find that individuals can, for example, to  
8 have -- really, they tend to reproduce designs that look very  
9 much like what you would get from a youngster, somebody of a  
10 much younger chronological age; three years old, four years  
11 old. Something like that. And you -- the more neurological  
12 involvement you have, the less similarity you have between  
13 the stimulus figure and the figure that is reproduced by the  
14 individual.

15 Q In Mr. Mulder's case --

16 A Uh-huh.

17 Q -- can you describe what his designs looked like in  
18 relation to the stimulus?

19 A Those were the ones I just described.

20 Q Okay. With the angles?

21 A With the angles, the primitive nature. They looked as  
22 though they were produced by someone of a much younger  
23 chronological age.

24 Q What chronological age would you say they would most  
25 resembled?

1 A Oh, I would say somewhere, like, around 5, 6. Something  
2 like that.

3 Q Did you conduct other tests besides the Bender Gestalt  
4 design test?

5 A Yes. The Bender Gestalt design is used as a screening  
6 instrument.

7 Q Okay.

8 A For example, in, as part of the process, we look to see  
9 how the individual is functioning, and whether there is a  
10 likelihood of some neurological involvement. And that just  
11 has -- that has diagnostic implications because, for example,  
12 let's just say you evaluate someone, and the individual, as  
13 part of the evaluation, presents the clinical assessment and  
14 the test results, that those particular components suggest  
15 that they're schizophrenia. Well, if there is neurological  
16 involvement, from a diagnostic perspective, the neurological  
17 impairment, what we call the cognitive disorder, NOS, "not  
18 otherwise specified," would become the primary diagnostic  
19 entity for that particular individual as opposed to the  
20 schizophrenia or what have you.

21 So the Bender is utilized to see whether or not --  
22 what degree there is the likelihood of some underlying organic  
23 impairment. And then subsequent to that, you have a  
24 neuropsychological, or you have a neuropsychiatric evaluation  
25 done to further rule out exactly what has taken place.

1           The other -- excuse me, the other -- one of the  
2 other instruments that I utilized was the Wechsler Adult  
3 Intelligence Scale, Fourth Edition. And that was primarily to  
4 look at intellectual functioning, to assess how and to what  
5 degree there was intellectual impairment, or intellectual  
6 impairment, or intellectual function as a result of the, in  
7 this particular case, the stroke, or just in terms of the  
8 individual's functioning.

9           And Mr. Mulder, in terms of the, this particular  
10 instrument, Mr. Mulder, Mr. Mulder's results reflected an IQ  
11 of 70, an IQ score of 70. That is consistent with testing  
12 that had been done at the prison earlier and it, also -- but  
13 the other part that was, I think, interesting, was that his  
14 areas of weakness were all in the areas that tapped various  
15 dimensions of abstract reasoning ability.

16           You know, we have concrete and we have abstract.  
17 Concrete is just the basic one to one type of reasoning.  
18 When we talk about abstract reasoning, we're talking about a  
19 person's ability to go beyond the logical meaning of words,  
20 or to go beyond the obvious meaning of words to project  
21 consequences based upon whatever is being discussed and so  
22 forth and so on.

23           And so we have that, that component that's reflected  
24 in terms of, you know, in terms of his functioning, because  
25 the IQ score is an average that we have different subtests.

1 And then you take the score from the subtests and you average  
2 them, and that's how you get the overall IQ score.

3 Well, in some cases, in the extreme case that had  
4 happened -- in some cases you get some individuals who are  
5 very good in terms of, say, their verbal skills. And so that  
6 will offset, uh, portions of the instrument that measured  
7 nonverbal skills. And so you get an IQ score, and an IQ  
8 score, really, by looking at the score, doesn't necessarily  
9 give you a clear picture of what we're talking about in terms  
10 of IQ. That's why I like to look at the subtests, to see  
11 exactly what, what is going on with respect to functioning.

12 In this particular case, abstract reasoning,  
13 because that's a, that's a critical component in terms of  
14 functioning. And in terms of the circumstances in this  
15 particular case --

16 THE COURT: You said you have another test to  
17 compare it to. Is that from the prison? Was that a  
18 pre-stroke IQ test he had had?

19 THE WITNESS: Uh, let me see.

20 Uh, Dr. Milner evaluated him at the prison. Uh,  
21 Dr. Milner saw him November '03, and then again in 8/04.

22 THE COURT: Those were post.

23 THE WITNESS: So, after.

24 THE COURT: After the stroke.

25 THE WITNESS: After the stroke; right.

1 THE COURT: What about -- did you have, as a  
2 benchmark, any, Wechsler test prior to the --

3 THE WITNESS: I did not have.

4 THE COURT: -- the event of the stroke?

5 THE WITNESS: I did not have any test results  
6 prior to the stroke.

7 THE COURT: So you wouldn't have the basis to  
8 compare what specifically -- what impact the stroke had on  
9 his --

10 THE WITNESS: No. In terms of IQ?

11 THE COURT: -- intelligence functioning as  
12 compared to 19 --

13 THE WITNESS: No.

14 THE COURT: -- 79 or something?

15 THE WITNESS: No. What we have here is just  
16 consistency in terms of the deficit functioning subsequent to  
17 the stroke.

18 THE COURT: All right. All right. Thank you.

19 BY MS. HENSLEY:

20 Q Are you familiar with the test that involves remembering  
21 three objects?

22 A Yes. Uh-huh.

23 Q Is that part of a certain protocol?

24 A Yes. That's a -- that's an instrument that is utilized,  
25 uh, to, uh, assess, uh, cognitive decline or cognitive

1 disfunction, and it's an instrument that is basically a  
2 screening instrument. And it's used, for example, in -- for  
3 example, it's used quite a bit, for example, in probate cases,  
4 where you're looking at issues of competency, where you're  
5 looking at testamentary capacity, or where you're looking at  
6 those kinds of issues; person being subject to undue influence  
7 and so forth and so on.

8 But, it's a screening instrument that has a number  
9 of components, and it suggests whether or not there is --  
10 whether or not there is underlying impairment. And it's  
11 followed up with further testing.

12 THE COURT: I apologize, but it's four o'clock,  
13 and I want to make sure that we don't leave the warden hanging  
14 if she's got some information for you. So, why don't we take  
15 just a short break.

16 And, Donna, maybe you could dial the warden in Ely  
17 again and let counsel talk to her about where you stand on  
18 that, and then we can reconvene with the doctor and conclude  
19 his testimony.

20 Okay.

21 THE WITNESS: That would be great.

22 THE COURT: Let's take a ten-minute break so we  
23 can accomplish that.

24 And maybe you can find out where she stands with the  
25 Associate Warden Brooks, and whomever else it was that she was

1 going to check with. Okay?

2 Okay. And, Donna, if you could dial that for them,  
3 that would be great.

4 THE CLERK: Yes, Your Honor.

5 THE COURT: Thanks.

6 Watch your step, doctor, too, going down.

7 (Recess taken.)

8 THE COURT: Okay. Ms. Hensley, go ahead. You  
9 may continue.

10 MS. HENSLEY: Thank you, Your Honor.

11 BY MS. HENSLEY:

12 Q Before we broke, we were talking about the protocol with  
13 remembering three objects. And you had testified that it was  
14 a screening device?

15 A Yes.

16 Q Who usually administers that screening device?

17 A Uh, that screening device, called the Folstein  
18 Mini-Mental Status Inventory, is usually administered by the  
19 clinician who is conducting an evaluation, as an initial  
20 screening instrument to derive some inclination as to whether  
21 or not there is any significant impairment with respect to  
22 functioning.

23 Q When you say "clinician," do you mean a psychologist or  
24 psychiatrist?

25 A Psychologist, psychiatrist; yes.

1 Q And how is it administered?

2 A It is an instrument that consists of, I believe, the  
3 first five items are verbal items where the individual is  
4 asked to, uh -- it's given, for example -- well, let me start  
5 at the beginning.

6 The first question, I believe, has to do with the  
7 day of the week and the month and the year. And then the  
8 individual is asked to identify where they are at that  
9 particular point in time in terms of specific location, city,  
10 state, that kind of thing.

11 Q Right.

12 A Then it goes on to the point where it gives the  
13 individual three items, and the individual is instructed to  
14 repeat the items after me. Okay?

15 Now, after the person has repeated the items, I  
16 want you -- the person is instructed I want you to remember  
17 those items because, in a few minutes, I'm going to ask you  
18 to repeat them.

19 Then they move on to another item which, for  
20 example -- which would be referred to as serial sevens,  
21 where the individual is asked to, uh, start at 100, pretend  
22 that you have a hundred, subtract seven, okay? Subtract seven  
23 from that; subtract seven from that. That kind of thing.

24 Then they have the last couple of items there  
25 that requires the individual to do something similar to the



1 Bender, except it's only one item, one design. And the  
2 individual is asked to duplicate that design. Then the  
3 individual is asked, okay, now, what were those three words  
4 like?

5           So, those are the items that comprise that  
6 particular inventory.

7 Q And that -- those items always comprise of that  
8 inventory?

9 A Yeah, uh-huh. Yeah.

10 Q How much, if any, prompting is appropriate, would you  
11 say, when you're giving this test?

12 A Uh, prompting, really, is not appropriate, other than,  
13 you know, when you say prompting, you're encouraging the  
14 person to do their best, but you're not being suggestive or  
15 anything like that. So if you, if you mean by prompting  
16 you're suggestive in some way or whatever, you know, that's  
17 inappropriate. But to say to the person, uh, try to do your  
18 best or what have you, try to encourage the person, that's  
19 acceptable.

20 Q What value does this protocol have, if it's just this  
21 protocol that's given? Does it have any diagnostic value?

22 A Uh, what, if -- in terms of conducting evaluations, for  
23 example, let's say -- it really depends in terms of its use.  
24 It is a streaming instrument, and it should be followed up  
25 based upon what is found. You can get, uh, none, to mild, to

1 moderate, to severe disfunction, the cognitive disfunction,  
2 based upon the results.

3           Based upon those results then, an individual, the  
4 clinician would refer the individual for further testing,  
5 neuropsychological, neuropsychiatric, or what have you, to  
6 pinpoint exactly what's going on.

7           Now, in a treat -- treating setting, treatment  
8 setting, a hospital and what have you, a lot of times what  
9 you find is the individual will give that particular  
10 instrument that protocol, and look at it in terms of  
11 functioning, how the individual functions, and will not  
12 call for any further evaluation. Just simply go forward  
13 based on that.

14       Q    But in a forensic situation, is it appropriate to just  
15 use that tool and make a diagnosis from it?

16       A    No.

17       Q    Thank you.

18           Did you have the opportunity to review any records  
19 that indicated Mr. Mulder's level of schooling before his  
20 stroke?

21       A    Uh, I believe he had -- yes. I did review records that  
22 reflected his schooling. He had some initial difficulty but,  
23 subsequently, had progressed to the point that he subsequently  
24 was able to hold some type of employment, and to function  
25 effectively, at least for a limited period of time.

1 Q How many years of schooling did he complete, if you  
2 recall?

3 A Uh, let's see. Uh, he dropped out of school, uh, in  
4 11th grade. And he earned a high school equivalency diploma  
5 during the period that he was incarcerated in Arizona. Uh --  
6 and I believe he earned an AA degree when he was in Arizona  
7 around 1983, I believe it was.

8 Q What would you say Mr. Mulder's prognosis is?

9 A Uh, I would say that his prognosis is, uh, guarded to  
10 poor.

11 Q Can you elaborate?

12 A Well, guarded to poor means that, uh, there will be --  
13 that, I believe, that given what has transpired, he's probably  
14 maximized in terms of how far he will achieve, or how far he  
15 will grow from this particular point. I think there will be  
16 some pockets of improvement. For instance, small signs of  
17 improvement. But in terms of any significant progression, you  
18 won't see that.

19 Q How do Mr. Mulder's cognitive impairments affect his  
20 ability to understand these habeas proceedings, in your  
21 professional opinion?

22 A I think that what you have here, and what should be  
23 pointed out is that what you were talking about, that given  
24 his current level of functioning, you're talking about someone  
25 whose primary reasoning ability and reasoning process is

1 concrete, so that there is very little, if any, abstract  
2 reasoning ability.

3           The individual is able to function and can handle,  
4 as we indicated earlier, one kind of, say, instructions;  
5 can communicate in a very simple, very basic level. But  
6 when you move into the level of abstraction, it becomes  
7 very difficult.

8           Not to digress, but, as an example, uh, under normal  
9 circumstances, individuals in their developmental history,  
10 usually around age 11 or 12, you see them moving from what we  
11 call concrete reasoning to abstract reasoning, where they can  
12 go beyond the narrow meaning of words in their head. That's  
13 when you begin to see that under normal circumstances.

14           And so when you have an impairment that comes with  
15 some type of cardiovascular assault or accident, then what  
16 we're talking about is someone whose functioning remains at  
17 a very basic level, what we call concrete.

18       Q    What -- would Mulder be able to make reasoned decisions  
19 and choices?

20       A    No.

21           THE COURT:   What about his memory and his  
22 capacity to respond adequately to the questions about  
23 historical information?

24           THE WITNESS:   Uh, when there is cardiovascular  
25 assault, stroke, what have you, what -- Alzheimer's and other

1 similar types of difficulties, what you can find is that  
2 long-term reasoning tends to be more reliable than short term  
3 reasoning. That's why Alzheimer's individuals who have family  
4 members and what have you, who have Alzheimer's and what have  
5 you, they're astonished the person can remember something from  
6 way back, but can't remember what happened yesterday or an  
7 hour ago. So, you have that.

8 But you -- even with the reliability of the  
9 long-term reasoning, that would tend, also, to be slighted  
10 at times, but it would be more reliable than short term.

11 BY MS. HENSLEY:

12 Q Why would long-term reasoning be more reliable than short  
13 term reasoning?

14 A Well, it has to do, in large part -- not necessarily in  
15 large part, it has to do, in part, with the fact that it was  
16 early on. It occurred at a time where the individual was  
17 functioning -- not necessarily maximally, but was functioning.

18 And so what happened is that memory, depending on,  
19 now, what part of the brain is affected, that memory tends to,  
20 tends to remain. That memory tends to persist longer than  
21 what happened an hour, an hour ago or (inaudible).

22 As I mentioned, when we first started, he apologized  
23 when I first -- in the first few minutes or so, 45 minutes  
24 of our interaction. And I see that a lot. I do a lot of  
25 evaluations for reporting and what have you, and what tends

1 to happen is that individuals, when they're with some, uh,  
2 assaults, impairment at some level, they are aware of the  
3 decline in terms of functioning that they aren't able to  
4 reason, they aren't able to remember, they aren't able to  
5 recall, that they aren't able to retrieve information, memory  
6 and what have you that they -- as they used to. They are  
7 aware of that deficiency. And what I have found in my own  
8 experience is that the pain and the trauma of that seems to  
9 be even more pronounced the more accomplished the person was.  
10 I mean, it's (inaudible) academically prior to the onset of  
11 the trauma.

12 THE COURT: So the insight that they have, and  
13 the embarrassment over that diminished ability, is that  
14 something that with patience, the time, the repetitive  
15 queries, can be overcome? Or is it -- can you speculate even  
16 whether that's --

17 THE WITNESS: No. It usually, as a rule,  
18 cannot be overcome. What tends to happen in terms of any  
19 kind of retraining or what have you, there are certain kinds  
20 of behavioral components that -- behavioral, I guess you might  
21 call it (inaudible) that are called into play that they try  
22 to teach individuals in terms of helping them cope. But, they  
23 won't get back to where they were before. You know, writing  
24 things down, coding. Or whatever, but it never returns to  
25 the, you know, to the original in terms the (inaudible).

1 Q Is there any way to objectively gauge the reliability of  
2 a person's memories?

3 A Uh, no. Only in terms of looking at other sources of  
4 data, using that, but not in and of itself.

5 Q So if the person was the only source of data, you  
6 wouldn't be able to tell if their memory was reliable  
7 or not?

8 A Uh, no.

9 Q What is your overall diagnosis of Mr. Mulder?

10 A Uh, as a psychologist, my overall diagnosis, uh, for  
11 Mr. Mulder was that he suffers from, uh, what is called a  
12 cognitive disorder not otherwise specified. And that is  
13 a diagnostic category for individuals who manifest, uh,  
14 psychological impairment as a result of some cognitive  
15 disfunction, or some neurological involvement, or some  
16 assault to the brain. And in this case, it was the stroke.

17 Q What does that mean, from a practical standpoint?

18 A It means that, as a result of the impact of the trauma,  
19 the individual is going to manifest qualitative impairment in  
20 terms of the psychological, in terms of intellectual, and in  
21 terms of cognitive function.

22 MS. HENSLEY: Your Honor, may I have a moment to  
23 confer with counsel?

24 THE COURT: Certainly.

25 (Counsel confer.)

1 BY MS. HENSLEY:

2 Q Dr. Toomer, did you also diagnose Mr. Mulder with  
3 receptive and expressive aphasia, or are you aware of that  
4 diagnosis?

5 A Yes. I described that as an aspect of disfunction.

6 Q And what is the difference between receptive and  
7 expressive aphasia?

8 A Well, receptive has to do with, uh, an individual's  
9 ability to internalize, to comprehend the communication  
10 process, the information that is directed towards him or her.  
11 And the expressive component is the individual's ability to  
12 take that particular information that is internalized and to  
13 respond appropriately, to digest, if you want to use that  
14 particular term, and then to react or respond based upon  
15 what has been internalized and processed.

16 So if you have this organic impairment, this brain  
17 impairment, for whatever reason, then that loop, for want of  
18 a better term, is going to be, uh, disrupted. And so what  
19 you'll have in an individual who manifests deficits in terms  
20 of receiving information -- and that's why we have to go with  
21 concretizing, that's why you have to simplify. They're going  
22 to have trouble in terms of understanding. And then they're  
23 going to have trouble with the expressive component in terms  
24 of how they respond.

25 They, for example, will not be able to, to, uh,



1 to act on that particular information in a meaningful way.  
2 They'll have difficulty, say, weighing alternatives,  
3 projecting consequences, managing conflicting data. They'll  
4 have problems -- they have all those types of problems  
5 because the loop has been destroyed, in essence, disrupted or  
6 destroyed. And so expressive, the receptive expressive loop  
7 that most of us, uh, manifest is just not there. We hardly --  
8 we very rarely think a lot of it because it comes naturally.  
9 But where there has been some assault on the brain, that loop  
10 is broken, and so the individual, the individual's functioning  
11 in that regard is simply, is simply not there.

12 THE COURT: Were the receptive and expressive  
13 aphasia, a result of some sort of organic brain impairment,  
14 damage, is that something that, over time, again, with  
15 therapy, can be retrained or turned around?

16 THE WITNESS: No. What you basically do is  
17 you prepare the individual for coping at that level so that  
18 there's no further decompensation or deterioration. That's  
19 what your -- that's what we're doing because you can't -- you  
20 won't be able to recover, or to go back and recoup what has  
21 been lost.

22 THE COURT: Oh, I understand. Not recouping.  
23 I'm think of relearning, learn anew somehow.

24 THE WITNESS: Well, what they -- what happened  
25 is they help individuals try to learn to adapt ways to learn

1 whatever it is they're capable of learning, to be less than  
2 before.

3 THE COURT: Language or speech?

4 THE WITNESS: Language.

5 THE COURT: I'm thinking of Gabriel Giffords  
6 that we read about and so forth.

7 THE WITNESS: Right. And it's going to be --  
8 see, one of the things -- I digress, but I think one of the  
9 disservices that the media does, is the media makes it look  
10 like -- the media makes it look like it's kind of a smooth  
11 process. But, believe me, if you've ever been in a facility,  
12 it is not. And it's going to be a long, long time -- I mean  
13 just think about it. How -- in what situation have you ever  
14 seen, in terms of what limited coverage she's gotten, where  
15 she's doing anything similar to what she was doing before?

16 THE COURT: Right.

17 THE WITNESS: You see pictures, and you see  
18 pictures of her with others. But the others, the usual stuff  
19 that -- it's going to be a long, long time.

20 THE COURT: That may not be the only disservice  
21 of the media, but I won't get into that. That's a different  
22 subject.

23 THE WITNESS: Oh, yeah. Right. But, that's  
24 what happens.

25 ///

1 BY MS. HENSLEY:

2 Q And to be clear, Mr. Mulder's loop, to use your  
3 expression, is broken?

4 A Exactly.

5 MS. HENSLEY: Thank you. I have nothing further  
6 at this time.

7 THE COURT: All right. Thank you.

8 Cross-examination.

9 Miss Proctor.

10 I would kind of like to finish the doctor today, so  
11 we'll just push on because, gosh, he's here from, what,  
12 Florida, I think, weren't you?

13 THE WITNESS: Yeah.

14 MS. PROCTOR: I'll do what I can, Your Honor.

15 **CROSS-EXAMINATION**

16 BY MS. PROCTOR:

17 Q Good afternoon, doctor.

18 A Good afternoon.

19 Q My name is Heather Proctor, and I'm with the State of  
20 Nevada, and I represent the respondents in this matter.

21 You examined Mulder for approximately three to four  
22 hours; is that correct?

23 A Yes. Something like that. Yes.

24 Q And he was cooperative in his evaluation?

25 A I'm sorry?

1 Q He was cooperative in his evaluation?

2 A Yes.

3 Q And you stated in your report that he had vocabulary,  
4 punctuation, and his grammar was adequate; is that correct?

5 A Yes.

6 Q Can you explain how that works into your evaluation that  
7 you've just described to the Court?

8 A Just that he could make himself understood. I mean I  
9 could, I could figure out what he was, was communicating to  
10 me. It wasn't like I was, say: "Now, what did he say?"

11 No. I could -- he could make himself understood.

12 Q So, there was a certain level of communication between  
13 you?

14 A It was at a very basic level, yes, but he would make  
15 himself understood.

16 Oftentimes, with situations like this, individuals  
17 may, may not even, in terms of sending and receiving messages,  
18 they may even omit certain words. But the point is that  
19 you are -- the other person was able to make -- is able to  
20 understand and make sense out of what they are saying, so they  
21 are -- the people aren't fluidly psychotic, if you will, in  
22 terms of their communication, so that nobody understands what  
23 they're saying. They are, they are understandable.

24 Q Okay. And you were able to simplify and clarify --  
25 excuse me, simplify and clarify your questions so that

1 Mr. Mulder was able to understand?

2 A Yes.

3 Q And he was able to apologize in advance for his lack of  
4 ability to get his point across at times?

5 A That's what he indicated to me as he had gotten to the  
6 process, and I was trying to explain what was, what was going  
7 to occur.

8 Q And he apologized in advance that he, at times, he used  
9 expletives that he did not mean to use?

10 A Yes. That did not happen, but he did apologize.

11 Q And he was able to describe his family background to you?

12 A An outline; yes.

13 Q And with regard to the Bender Gestalt --

14 A Bender Gestalt, yes.

15 Q Thank you.

16 You mentioned to the Court that you will take into  
17 consideration if the individual has a background in -- as a  
18 post-stroke victim, and he is compensating for the use of a  
19 dominant hand; is that correct?

20 A Yes. If we are, we are aware of that; yes.

21 Q And with that compensation in this case, you still  
22 found that he came in with a chronological age of about 5  
23 to 6?

24 A No. What I was saying was that oftentimes one of the  
25 factors we utilize in terms of assessing the Bender Gestalt

1 (inaudible) is the notion that oftentimes reproduction are  
2 similar to those produced by someone with younger  
3 chronological age, 5, 6, 7. That kind of thing. Yes.

4 Q On the Wechsler?

5 A Wechsler.

6 Q Thank you. Adult Intelligence Scale, you found an IQ of  
7 70?

8 A Yes.

9 Q Can you describe how that test is administered?

10 A Uh, there are -- the Wechsler Adult Intelligence Scale is  
11 made up of 10 subsets, each which mirrors different aspects of  
12 function. One has to do with verbal. One has to do with  
13 reasoning. That kind of thing. And so the individual is  
14 given each subtest, is instructed with a practice component  
15 prior to that particular, that particular test being  
16 administered. Some are timed and some are not.

17 So, overall, that's, that's how the test is  
18 structured. That's how the test is administered. And, uh, as  
19 I indicated before, the -- what is, what you get with regard  
20 to the results of the test, you get an overall aptitude score,  
21 and then you get a separate score on the different subtests,  
22 and they all makeup the total IQ score. And so you have that  
23 particular -- all of those factors feeding into what we  
24 call -- when you say IQ, what is referred to as a full scale  
25 IQ score.

1 Q And so you say that some of these tests are timed and  
2 some are not?

3 A Yes.

4 Q Do any of these test permit you to work with someone, in  
5 the case of Mulder, where he needs some additional assistance,  
6 some simplification, some clarification of questions?

7 A No. That's done beforehand.

8 And so the individual is asked, you know, for  
9 example, if there is a practice component, the individual is  
10 asked, not do you understand. If you're explaining the test,  
11 what the individual is supposed to do, there's a practice  
12 component. The individual is allowed to do that. Do you  
13 understand? And from that point on, you aren't allowed to  
14 provide any further assistance --

15 Q So --

16 A -- to the individual.

17 Q So are these tests scientifically valid for individuals  
18 who are post-stroke victims?

19 A Yes.

20 Q And you state that he's given some information prior to  
21 taking the test?

22 A Regarding the test.

23 Q Regarding the test. And then he's, basically, on his own  
24 for the test?

25 A Well, he's -- but the test is explained what they're

1 expected to do. And then the individual, there is a practice  
2 component, and the individual is asked to complete the  
3 practice. And that is where you give any assistance that the  
4 person might need. But once the person has completed that  
5 and they indicate that they understand, from that point on,  
6 they're on -- they're on their own.

7 Q So if it's somebody who requires assistance on a more  
8 regular basis, how would they do on an IQ test?

9 A When you say on a regular basis --

10 Q If -- you said that once they get past that practice  
11 component --

12 A Right, component.

13 Q -- then they're required to continue with the rest of the  
14 test on their own.

15 A That test.

16 Q Correct?

17 A Complete that test.

18 Q So if he required assistance on that first practice  
19 component, would he be permitted assistance on the rest of  
20 that test?

21 A No. You get assistance on the practice. So, you just go  
22 over the practice component.

23 Q And do the tests take into account an individual who uses  
24 a nondominant hand for completing the test?

25 A Well, the dominant versus the nondominant hand would



1 not necessarily figure into the particular tests that the  
2 individuals are taking with regard to this. For example, the,  
3 the Bender Gestalt design was one particular component where  
4 that would be, where that would be an issue, dominant versus  
5 nondominant hand. That was -- one test with Dr. Reed, it's  
6 called the visual puzzle. But the individual -- really, the  
7 dominant versus nondominant hand is really not that critical  
8 because all the individual has to do is make an X to indicate  
9 a response.

10 So, it's not like there are tests here that require  
11 them to do things that require use of their hand. Many of  
12 these require their giving verbal responses. So the dominant  
13 versus the nondominant would not figure in here.

14 Q And how would his aphasia enter into these IQ tests and  
15 your ability to understand his responses?

16 A Well, the aphasia would impact the individual's  
17 performance by virtue of the individual being able to recall  
18 information, uh, because some of the information that would  
19 require to be tested, it's information that the individual  
20 might have acquired through some formal or informal  
21 educational process. So you get into the whole issue of  
22 retrieval. You get into the time tests. You get into the  
23 whole issue of speed in terms of responsiveness. And so  
24 that's where all of the, all of the problems that you get with  
25 aphasia would come into play and would impact on what this

1 person, this person does or does not do.

2 Q Thank you, doctor.

3 You talked about the Three Objects Test in terms of,  
4 I believe, this is how it's conducted.

5 Do you conduct that test as part of your --

6 A The Folstein?

7 Q Yes.

8 A The mini-status.

9 Q Do you conduct that test during your evaluations?

10 A I do that sometimes, yes, depending upon the nature of  
11 the evaluation.

12 Q All right. Thank you.

13 In terms of your findings on the MCMI-III profile --

14 A The Millon, Millon Clinical Inventory Three, yes.

15 Q Thank you.

16 You find that he demonstrated through the test, a  
17 malevolence, vacillation, became distraught and irrationally  
18 negative and contentious, fighting principles, controlling  
19 others before they control him, that he may engage in risky  
20 behavior; did you find those principles present in Mr. Mulder  
21 while you were evaluating him?

22 A No.

23 Q What would you describe his demeanor, as far as was he  
24 malevolent during your evaluation of him?

25 A No. He wasn't malevolent. He wasn't oppositional. He

1     tried. And my impression was that he tried to be cooperative.  
2     He was impaired in those attempts, on that attempt, to be  
3     cooperative. I did not find him to do oppositionalize  
4     (inaudible) limited, impaired. He basically attempted to  
5     function as best he could.

6                   THE COURT: Did you have the opportunity, in  
7     connection with your evaluation of Mr. Mulder, to talk to  
8     other individuals who interacted with him and knew him?

9                   THE WITNESS: You mean from the prison setting?  
10    No, I did not.

11                   THE COURT: Okay. From any, any setting.

12                   THE WITNESS: No.

13                   THE COURT: Other than the prison setting.

14                   THE WITNESS: No. I have -- your question would  
15    I (inaudible) at one point. I had access to records,  
16    psychotropic history, where the reaction was, to him, was  
17    described. But I did not have a chance to talk directly to  
18    the individual.

19                   THE COURT: No. I was thinking more in terms of  
20    people might have said, you know, I've talked with him and I  
21    have difficulty. I think he doesn't understand me, or I  
22    think --

23                   THE WITNESS: No.

24                   THE COURT: -- I have difficulty in  
25    communicating. Anybody like that?

1 THE WITNESS: No, I haven't.

2 THE COURT: Okay. Thank you.

3 Go ahead.

4 BY MS. PROCTOR:

5 Q Doctor, you found that with a reasonable degree of  
6 psychological certainty, that he demonstrated predispositional  
7 family and environmental variables.

8 How does that affect his competency to assist habeas  
9 counsel?

10 A I'm sorry. What was the last part?

11 Q How does that affect his competency to assist habeas  
12 counsel?

13 A What, what -- what tends to happen is that when an  
14 individual experiences predispositional adversarial variables  
15 during the part of their developmental history, part of their  
16 family history, what it does is it negates the stability and  
17 predicability of life necessary for an individual acquiring  
18 consistent pattern of behaving and thinking. And, as a  
19 result, you have an individual who grows up, whose functioning  
20 is characterized by impulsivity, by a lack of trust, by an  
21 inability to engage in protracted cognitive processing because  
22 of their impulsivity. It adversely affects their interaction  
23 with other individuals, whether that be an attorney, or  
24 whether that be in terms of their being able to function.  
25 But, that is only one small part of Mr. Mulder's overall

1 presented picture.

2 But, oftentimes, you have that component that  
3 impacts on functioning. That's why you have a lot of  
4 individuals who, basically, in terms of their later  
5 functioning, cannot function effectively. They take one  
6 step forward and two steps backwards because of that inability  
7 to function effectively in an organized fashion.

8 Q And how does that component affect Mr. Mulder  
9 post-stroke?

10 A Well, that's -- what you have, if you have that  
11 particular component as a factor that has existed over time,  
12 and so you've got that particular component existing over  
13 time, and then you superimpose this particular cognitive or  
14 organic assault on that particular set of adversarial kinds of  
15 functioning, and it just simply makes -- it simply exacerbates  
16 the process and the dynamic that, that will affect the  
17 individual's functioning.

18 Q Uh-huh. What legal standard did you use in your report  
19 to determine that Mr. Mulder is not competent to proceed in  
20 these proceedings?

21 A Well, the competency factor, you know, the rational  
22 factor, the understanding, his able to communicate with his  
23 attorney with a reasonable degree of rational understanding,  
24 those are the factors -- those are forensic standards that you  
25 use.

1           In this particular case, we're talking about whether  
2 the person can do that with regards to the appeal process.

3       Q    Did you make any determination as to whether he has the  
4 capacity to understand his current legal position?

5       A    Yes.

6       Q    And what was that?

7       A    That he could not.

8       Q    Did you discuss his current legal position with him?

9       A    Yes.

10      Q    Did he respond regarding his current legal position in  
11 terms of his appeals?

12      A    He knew of that process. You know, he knew of appeals,  
13 but he couldn't explain, in any significant detail, exactly  
14 what it entailed and what it was all about.

15      Q    And did you make a determination as to whether or not he  
16 was overall competent?

17      A    I'm sorry. He was what?

18      Q    Did you make an overall determination as to whether or  
19 not he was competent?

20      A    You mean genuinely competent?

21      Q    Yes.

22      A    I addressed that, I believe, in -- yes, in, uh, I believe  
23 the third -- well, the second full paragraph on page 7.

24                   MS. PROCTOR: If I could have a moment, Your  
25 Honor.

1 THE COURT: Yes.

2 MS. PROCTOR: Your Honor, I'm finished  
3 (inaudible).

4 THE COURT: Okay.

5 Anything else, Ms. Hensley?

6 MS. HENSLEY: Briefly, Your Honor.

7 THE COURT: All right.

8 **REDIRECT EXAMINATION**

9 BY MS. HENSLEY:

10 Q Just a point of clarification.

11 A Yes.

12 Q Dr. Toomer, in preparation for this hearing, you did talk  
13 to our other witnesses about Mr. Mulder; is that correct?

14 A Oh, yes. I was thinking of before my evaluation.

15 THE COURT: And you say "other witnesses," which  
16 witnesses, so I know.

17 MS. HENSLEY: Ms. Fettig --

18 THE COURT: Who did you talk to would be the  
19 easiest way.

20 THE WITNESS: I talked to Dr. Kessel; uh,  
21 Ms. Fettig.

22 MS. HENSLEY: Dr. Noel?

23 THE WITNESS: Dr. Noel. I believe those are the  
24 individuals I had spoken to.

25 ///

1 BY MS. HENSLEY:

2 Q What is your level of confidence, given Mr. Mulder's  
3 prognosis and diagnosis, in his ability to listen?

4 A What is my --

5 Q Level of confidence.

6 A Level of confidence in his ability to listen?

7 Q Yes.

8 A I believe that his listening ability is very, very, very  
9 limited. That it is, in essence, momentary. Maybe a little  
10 more.

11 But to get back to the loop and what have you, it  
12 breaks down; so, extremely limited.

13 Q What is your confidence, level of confidence in his  
14 ability to incorporate thought?

15 A No. That's one of the -- that's one of his deficits that  
16 seems to be prominent in terms of individuals who experience  
17 some type of assault. And we're talking about, here,  
18 integrating information. Those are all abstract components  
19 of thought; the ability to, uh, for example, go beyond the  
20 limited meaning of words; to integrate information, minimum  
21 information; to use that information; and to plan -- in terms  
22 of planning and reaching certain conclusions, all those are  
23 components of abstract thought limited to engage inferential  
24 thoughts, the ability to integrate and synthesize information.  
25 All those are components of abstract thought that are



1 basically lost in, you know -- when individuals have some  
2 assault such as this.

3 Q When Mr. Mulder speaks --

4 A Uh-huh.

5 Q -- can we be certain that the answers he gives are the  
6 same as the answers he intends to give, or do you think -- or  
7 is there some disparity between those?

8 A Uh, no. I think that what you're going to find is  
9 disparity. And it's what I indicated earlier: What you're  
10 going to get, if you could possibly track on a consistent  
11 basis, is you'll get moments of lucidity, uh, paired with  
12 moments where the individual appears, appears to be, and is,  
13 totally unaware of what is going on in terms of being able to  
14 internalize and act upon it, and make decisions based on it.

15 So, you're going to get those, those kinds of  
16 reactions in terms of how the individual responds to his  
17 environment. And what is certain is the uncertainty in terms  
18 of what, what you get, and the reliability in terms of what  
19 you get, and how that can change from one point to the next,  
20 because you got issues of memory and retention and all those  
21 kinds of things that are at opposites.

22 THE COURT: Are you saying that, during these  
23 lucid intervals, he's able to understand, perhaps, what his  
24 attorney or you or somebody else is saying to him, and to  
25 respond appropriately?

1 THE WITNESS: Well, I should -- I don't want to  
2 say lucid (inaudible) lucid moments where the individual,  
3 for example, you can say something and the individual will  
4 understand or will reflect that he understood, and then will  
5 turn around tomorrow and it's all gone.

6 THE COURT: When you interviewed Mr. Mulder, did  
7 he seem to have understanding or insight to the fact that he,  
8 he's under -- in the State of Nevada under a sentence of  
9 death?

10 THE WITNESS: Oh, he's aware of that.

11 THE COURT: And when you talk to him about the  
12 appeal process that, that there is an appeal, his attorneys  
13 are representing him in connection with an appeal of that  
14 sentence --

15 THE WITNESS: Yeah.

16 THE COURT: -- and trial issue?

17 THE WITNESS: Yeah.

18 THE COURT: All right. Good.

19 BY MS. HENSLEY:

20 Q To clarify, Mr. Mulder wasn't able to explain to you any  
21 part of the appeals process or where he was at?

22 A No. He just knows the term "appeal" and that's about --  
23 if you ask him about, you know, what's going to happen, what's  
24 the role of the attorney in that process, he can't go any  
25 further than this idea of the appeal.

1 Q Is the memory loss also a product of your diagnosis of  
2 dementia?

3 A Well, I, I didn't diagnose him as dementia; although, he  
4 does have characteristics of dementia. And that's because,  
5 uh, in dementia, whether you're talking about a stroke,  
6 whether you're talking about dementia, or whether you're  
7 talking about dementia, Alzheimer's variety of it or what have  
8 you, you have similar areas of the brain that are impacted, so  
9 you get similar kinds of, kinds of (inaudible).

10 Q Thank you.

11 MS. HENSLEY: I have nothing further.

12 THE COURT: Thank you.

13 Anything further, Ms. Proctor?

14 MS. PROCTOR: Nothing further, Your Honor.

15 THE COURT: All right. Then can Dr. Tumor be  
16 excused?

17 MR. ABBINGTON: We would -- that would be --

18 MS. PROCTOR: Yes, Your Honor.

19 THE COURT: Thank you doctor. You can be  
20 excused and get on back home then. Thank you, sir.

21 Again, watch your step going down.

22 Counsel, when you had the chance to reconvene with  
23 the warden on the phone, were you able to get any further  
24 clarification as to what might be forthcoming?

25 MS. PROCTOR: Yes, Your Honor. She was, Warden

1 Baker was able to fax the case notes requested, and the few  
2 documents that had updated the I-File, to my office. I was  
3 having those documents forwarded to --

4 THE COURT: Sent down --

5 MS. PROCTOR: -- to the public defender.

6 THE COURT: Okay.

7 MS. PROCTOR: She was also faxing the roster  
8 dating back to 2007. Anything prior to that, she has to check  
9 with Warden Baker -- I'm sorry, Warden Brooks, who is going to  
10 be back tomorrow.

11 THE COURT: Okay. Okay. Good.

12 And did that -- I think we'd already gotten to the  
13 bottom of the canteen records. Your understanding was those  
14 only went back to the 2006 date, but there was the one page  
15 of 2003 that was --

16 THE WITNESS: That's, that's my understanding.

17 THE COURT: Okay.

18 MS. PROCTOR: From the Department of  
19 Corrections, Your Honor.

20 THE COURT: Well, Mr. Abbington, where do we  
21 stand, from petitioner's standpoint, on these -- obviously  
22 you're waiting --

23 MR. ABBINGTON: I haven't seen --

24 THE COURT: -- production.

25 MR. ABBINGTON: -- what it is they're intending

1 to fax us. But in the course of going through everything that  
2 counsel has provided -- I want to be clear I'm not accusing  
3 counsel of hiding the ball at all -- but in the course of  
4 going through this file, because it basically -- it's hard to  
5 even describe it. It's just a box of a binder of papers.  
6 Each one, you turn one page it's 1998; turn the next page,  
7 it's 2009.

8 THE COURT: Right.

9 MR. ABBINGTON: But I have a piece of paper that  
10 may be helpful to the Court, and it's the -- the I-file that  
11 we have been provided is, apparently -- and there was some  
12 question from talking to the warden, about what actually goes  
13 in the I-File. Because she thought, according to her, the  
14 commissary records, those records are not normally part of the  
15 I-File, where they are about 60 percent of the documents we  
16 have been provided.

17 THE COURT: Okay.

18 MR. ABBINGTON: But in terms of what should be  
19 in the I-File, we have a cover sheet that, apparently, was in  
20 this materials that indicates that there are several -- that  
21 there's a state court order or a -- I should say Department of  
22 Corrections order method in which an I-File should be kept,  
23 and order, including dividers, chronological order, and other  
24 documents which are not part of what they have right now. And  
25 I think if the Court would take a look at it, it might be

1 helpful to the Court in addressing whether or not what it is  
2 what have you. And Mr. Neidert said --

3 THE COURT: No, pass it up. Yeah, let me take a  
4 look at it.

5 MR. ABBINGTON: -- uh, volunteered to let us  
6 go -- he would be willing to let us go up to the prison. The  
7 theory is that they've moved the entire I-File when they  
8 moved --

9 THE COURT: To High Desert.

10 MR. ABBINGTON: -- Mr. Mulder. But there's  
11 several categories, entire categories of information, Attorney  
12 General correspondence, correspondence directly to when, when  
13 Mr. Mulder changes housing assignments, grievance committees,  
14 other things that are definitely are not even, they're not  
15 even included. There's not even a divider for those areas --

16 THE COURT: Okay.

17 MR. ABBINGTON: -- or information. It appears  
18 that those areas were not touched, and that information was  
19 not provided.

20 So I think the first alternative, I would say, I  
21 would be willing to go up and look at the actual I-file. And  
22 the alternative would be to have the warden explain what it is  
23 they're doing with that file.

24 THE COURT: Well, I think you would want to look  
25 at it first. Because if you look at the original and it's in

1 this format --

2 MR. ABBINGTON: And if it's in that order, then  
3 we got no problem.

4 THE COURT: -- you'll say bless you to those  
5 folks, and say let's physically duplicate it right now, and  
6 whatever, and the dividers and so forth.

7 MR. ABBINGTON: I think that's exactly correct.  
8 But on the other part, if their, the theory is --

9 THE COURT: If it's in a box like what was  
10 delivered to you, then you would probably want to know more.

11 MR. ABBINGTON: That would be correct.

12 THE COURT: Right.

13 MR. ABBINGTON: And I think that, especially, in  
14 a situation where there -- I mean I don't want to hide the  
15 ball. My understanding is the State experts will be relying  
16 heavily on Mr. Mulder's ability to write and correspond with  
17 guards, with prison personnel, and to order food from the  
18 commissary. So the fact of -- if they keep those records --  
19 according to them, there's no -- there's nothing in there  
20 indicating that some of these things go back to 1998, and we  
21 have them. Some of them go back to 2006 with the 2003 one  
22 page exception, and we don't have any of them. So it seems  
23 like that, just by their own documents that they provided, if  
24 the theory is that things past a certain year are destroyed,  
25 then we shouldn't be in possession of documents from 1996.

1 But, we are. And so --

2 THE COURT: No -- but I mean something could  
3 be --

4 MR. ABBINGTON: It could be.

5 THE COURT: -- overlooked.

6 MR. ABBINGTON: Perfectly innocent.

7 So we're just thinking maybe the better course would  
8 be for us to take some time and go look at that. We could  
9 have Dr. Kessel here tomorrow, and then my testimony, and that  
10 pretty much closes us out.

11 THE COURT: Okay.

12 MR. ABBINGTON: We went pretty quick.

13 THE COURT: Okay. So what -- so you're  
14 proposing to go look at the file tomorrow then, is that what  
15 you all -- because you've got --

16 MR. NEIDERT: I would like to suggest to Your  
17 Honor that based on the speed, and based on we have our  
18 witnesses available -- because, you know, estimating times in  
19 these are always kind of difficult -- we could tell them they  
20 don't need to be here until Wednesday afternoon or Thursday,  
21 or whatever, for some of our people that perhaps --

22 THE COURT: If you can get them here sooner --

23 MR. NEIDERT: Tomorrow afternoon.

24 THE COURT: -- I'm happy to do that. But --

25 MR. NEIDERT: We could finish up. They could



1 basically finish up everything. But I realize, as fast as  
2 we're going, even though this court has a ten o'clock hearing  
3 on something else, we probably could -- once we complete their  
4 case, then we -- my suggestion is that we recess at that point  
5 and then we -- then various (inaudible) High Desert.

6 THE COURT: So tomorrow afternoon go up --

7 MR. NEIDERT: Tomorrow afternoon. That will be  
8 useful -- the Court --

9 THE COURT: And the videotape witness is not  
10 until Wednesday?

11 MS. PROCTOR: That's correct, Your Honor.

12 THE COURT: Okay.

13 MS. PROCTOR: Dr. Piasecki is Wednesday morning.  
14 Dr. Bradley is on Thursday.

15 MR. NEIDERT: So Tuesday afternoon seems like a  
16 real good time to try to go there while we still have some  
17 time.

18 THE COURT: Gosh, I know they're busy people,  
19 but is there any -- the Thursday testimony, is there any way  
20 that that doctor could be available Wednesday, too, sometime?

21 MS. PROCTOR: We have both Dr. Bradley and the  
22 two personnel from the prison scheduled for Thursday.

23 THE COURT: Okay. You've got other people who  
24 are going to be here Wednesday?

25 MS. PROCTOR: I can see if we can get the prison

1 personnel here Wednesday afternoon.

2 THE COURT: Oh, then do that. Absolutely. I  
3 mean, they're in Ely, but I would rather get them down here,  
4 get them on and get them off, because there's no point in  
5 having court where we have two hours a day.

6 MS. PROCTOR: Absolutely.

7 THE COURT: That's just wasting everybody's time  
8 and --

9 MS. PROCTOR: And we would certainly be happy to  
10 return to Reno earlier, Your Honor.

11 THE COURT: You might like to get home, some of  
12 you.

13 MR. NEIDERT: My wife would like to see me, Your  
14 Honor; so, yes.

15 THE COURT: All right.

16 Well, fine. Tomorrow morning we'll reconvene. I do  
17 have, as I said that TRO -- Donna, we got those conference  
18 calls early, but the TRO is at 9:00?

19 THE CLERK: No, Your Honor. It's set at 8:30.

20 THE COURT: Oh, the TRO is at 8:30. Perfect.

21 Okay. Well, then we can reconvene, let's say, 9:30,  
22 just to be safe. I don't want to have an issue. We can  
23 reconvene at 9:30 tomorrow morning.

24 And you've got Dr. Kessel, you say, that's here  
25 tomorrow?

1 MR. ABBINGTON: Yes, Your Honor. That would  
2 be -- I actually listed myself ahead of Dr. Kessel, so I  
3 would -- we would resolve the issue of my affidavit, and then  
4 I intend to ask her about questions related to --

5 THE COURT: Great.

6 MR. ABBINGTON: And then we could close up.

7 THE COURT: Well, be prepared to address  
8 whatever questions you want to counsel from -- in  
9 cross-examining his affidavit. That shouldn't take a long,  
10 long time.

11 MR. ABBINGTON: Right.

12 THE COURT: Then Dr. Kessel. Then if we don't  
13 have anybody else to get on, then, you're right, go on up to  
14 High Desert, eyeball the file.

15 Have you seen, Ms. Proctor and Mr. Neidert, have you  
16 seen an actual original I-File previously?

17 MS. PROCTOR: I have seen a different I-File.

18 THE COURT: Not in this case, but I mean a --

19 MR. NEIDERT: Your Honor, I have seen an actual  
20 I-File, not Mr. Mulder's, but I've seen other inmates. I know  
21 what they look like.

22 THE COURT: They, I mean this is kind of  
23 schematic as to what they --

24 MR. NEIDERT: Well, what they are, Your Honor,  
25 if my memory -- is it's a file and it's divided, as that,

1 in sections.

2 THE COURT: Okay.

3 MR. NEIDERT: And put -- and color coded and tab  
4 it.

5 THE COURT: Because that's pretty easy to follow  
6 if you got something like that.

7 MR. NEIDERT: So it's pretty easy to follow.  
8 It's not just in a box.

9 MR. ABBINGTON: The thing that we got was the  
10 exact opposite, is we got a binder that you open the page and  
11 you guess what's on the next page.

12 THE COURT: Okay.

13 MR. ABBINGTON: So you have to read it pretty  
14 much page by page. I went ahead and broke them down into  
15 sections and into years, and that's how I found --

16 THE COURT: Well, if they can produce it in this  
17 form, that just makes sense.

18 MR. ABBINGTON: That would be perfect.

19 THE COURT: Okay. All right.

20 Do you need this back then?

21 MR. ABBINGTON: Yes, please.

22 THE COURT: Donna.

23 MR. ABBINGTON: That's the only one I have.

24 THE COURT: All right.

25 Well, counsel, we'll reconvene at 9:30 tomorrow

1 morning and proceed, then, with the two witnesses we  
2 indicated. And then if you can get to High Desert and take  
3 a good look at what's available, that will allow things to  
4 progress.

5 And get to work on your witnesses from Ely so they  
6 can get down here --

7 MS. PROCTOR: I will try to get them.

8 THE COURT: -- rather than wait until Thursday.  
9 There's no point in keeping them waiting until Thursday. I  
10 can get a lot done in a day if we've got the time.

11 MS. PROCTOR: I agree, Your Honor.

12 THE COURT: Okay. All right.

13 Thank you everybody. We'll see you tomorrow morning  
14 at 9:30.

15 MR. ABBINGTON: Thank you, Your Honor.

16 MS. HENSLEY: Thank you, Your Honor.

17 MS. PROCTOR: Thank you.

18

19 (Court Adjourned.)

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I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

\s\ Kathryn M. French

August 18, 2011

\_\_\_\_\_  
KATHRYN M. FRENCH, RPR, CCR  
Official Reporter

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I N D E X

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I N D E X O F E X H I B I T S

<u>EXHIBIT NUMBERS:</u>	<u>MARKED</u>	<u>RECEIVED</u>
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# APPENDIX C

# APPENDIX C

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UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA  
BEFORE THE HONORABLE PHILIP M. PRO, DISTRICT JUDGE  
---o0o---

Michael Mulder, : No. 3:09-cv-610-PMP-RAM  
: Petitioner, : August 2, 2011  
: -vs- : United States District Court  
: E.K. McDaniel, et al., : 333 Las Vegas Boulevard  
: Las Vegas, Nevada  
: Respondents. : **VOLUME II**  
:  
:

**TRANSCRIPT OF EVIDENTIARY HEARING  
TO DETERMINE PETITIONER'S COMPETENCY  
TO PROCEED WITH HABEAS ACTION**

**A P P E A R A N C E S:**

FOR THE PETITIONER: Brian Abbington  
Sarah Hensley  
Attorneys at Law

FOR THE RESPONDENTS: Heather Proctor  
David Neidert  
Deputy Attorneys General

Proceedings recorded by digital recording produced by  
computer-aided transcript  
**PMP/FTR 080211@9:40a.m.**

Transcribed by: KATHRYN M. FRENCH, RPR, CCR  
NEVADA LICENSE NO. 392  
CALIFORNIA LICENSE NO. 8536

1 Las Vegas, Nevada, Tuesday, August 2, 2011, 9:40 a.m.

2 ---OoO---

3

4 THE COURT: Have a seat everybody. Good  
5 morning.

6 All right. We're reconvened in Mulder v McDaniel,  
7 09-610.

8 Counsel, as I recall when we recessed yesterday, we  
9 were talking about Dr. Kessel and Mr. Abbington's affidavit,  
10 or declaration, being subject to cross-examination. And then  
11 you all were going to make your way to High Desert to look at  
12 the I-File.

13 Is that still the plan? Did you verify that it's  
14 there?

15 MS. PROCTOR: Yes, Your Honor. We have a  
16 two o'clock appointment with High Desert.

17 THE COURT: Excellent. Okay.

18 Well, then, I take it you would want to start with  
19 Dr. Kessel and get her on her way.

20 MR. ABBINGTON: Actually, I was -- I wanted to  
21 start with me, so Dr. Kessel could witness my testimony.

22 THE COURT: Oh, okay.

23 MR. ABBINGTON: And be done with me once and for  
24 all.

25 THE COURT: Okay. Then the affidavit that's

1 subject to question, do you have an extra copy of it so I  
2 don't have to dig through --

3 MR. ABBINGTON: Certainly, Your Honor.

4 THE COURT: Jim, have you got a copy? Well, you  
5 may need your copy.

6 STAFF ATTORNEY: I've got two copies.

7 THE COURT: You've got two copies? The man  
8 thinks ahead. Thank you.

9 All right. I've got it in front of me. It's at  
10 Document 18-9 in the Court's docket. February 4, 2010 is the  
11 date of the filing, the affidavit of Mr. Abbington is actually  
12 dated February 4, 2010, and, and that's the affidavit you were  
13 speaking of; am I correct?

14 MS. PROCTOR: Yes, Your Honor. And it's at  
15 Tab 4 of the exhibit binder as well.

16 THE COURT: Also Tab 4. All right.

17 I'll receive Exhibit 4 so the record is clear in  
18 that regard.

19 (Whereupon, Exhibit 4 -- a document, was received in  
20 evidence.)

21 THE COURT: Okay. Great.

22 MS. PROCTOR: Well, Your Honor, before we begin,  
23 I would like to move for admission of respondent's exhibits  
24 501 to 505 and 508 to 517.

25 THE COURT: 501 --

1 MS. PROCTOR: To 505.

2 THE COURT: -- to 505.

3 What were the others?

4 MS. PROCTOR: 508 --

5 THE COURT: 508.

6 MS. PROCTOR: -- to 517.

7 THE COURT: 517.

8 Is there any objection to those four exhibits?

9 MR. ABBINGTON: No, Your Honor. We went over  
10 the State's proposed exhibits. The only exhibits that I had  
11 problems with were the I-File and the commissary records.  
12 Everything else -- so my understanding, without memorizing  
13 those numbers --

14 THE COURT: Yes.

15 MR. ABBINGTON: -- was that as long as those two  
16 things are not included.

17 MS. PROCTOR: And that's correct, Your Honor.

18 THE COURT: Okay. Those will be received then.

19 THE CLERK: And it's 508 to 517?

20 MS. PROCTOR: Correct.

21 THE CLERK: Including -- okay.

22 THE COURT: 508 to 517 inclusive; 501 and 505.

23 MR. NEIDERT: 501 through 505.

24 THE COURT: Oh, 501 through 505.

25 MS. PROCTOR: Right.

1 THE COURT: I'm sorry. Got it.

2 (Whereupon, Exhibits 501 through 505 -- documents,  
3 were received in evidence.)

4 (Whereupon, Exhibits 508 through 517 -- documents,  
5 were received in evidence.)

6 MS. PROCTOR: Basically, everything but 506 and  
7 507.

8 THE CLERK: Okay.

9 THE COURT: That's easier. Everything except  
10 506 and 507. All right.

11 All right. Okay. Let's go ahead then and deal with  
12 the other -- you know, I hate to subject you to it, but it  
13 might be easier, so everybody can hear you, you want to come  
14 on up and just be sworn, Mr. Abbington.

15 MR. ABBINGTON: That's fine, Your Honor.

16 THE COURT: And, Miss Proctor, you can go ahead  
17 and put your questions on the affidavit to counsel.

18 MS. PROCTOR: Thank you, Your Honor.

19 **BRIAN ABBINGTON,**  
20 called as a witness on behalf of the Petitioner,  
21 was sworn and testified as follows:

22 ( THE CLERK: Please be seated.

23 Please state your full name for the record and spell  
24 your last name.

25 THE WITNESS: Brian Anthony Abbington; last name

1 is A-b-b-i-n-g-t-o-n.

2 THE COURT: Thank you, Mr. Abbington.

3 Go ahead.

4 **DIRECT EXAMINATION**

5 BY MS. PROCTOR:

6 Q Good morning, Mr. Abbington.

7 A Good morning.

8 Q You stated in your affidavit that your first meeting with  
9 Mr. Mulder was September 29th, 2009?

10 A Yes, that sounds right.

11 Q How many times did you meet, personally, with Mr. Mulder  
12 prior to filing the Motion For Stay?

13 A I want to say three, maybe four times, maximum.

14 Q In the last month, or prior to filing the motion?

15 A Prior to filing the Motion For the Stay.

16 Q And approximately how long were each of those visits?

17 A I'd usually stay for all, for the full ride. So I  
18 usually get there, you know, 8:30, nine o'clock, and stay  
19 there until three o'clock, or whenever they kick you out. So,  
20 I would stay five-and-a-half hours.

21 Q And when you were speaking to Mr. Mulder, did you discuss  
22 general topics, like, the weather, sports?

23 A Uh, generally, no. I, I like to -- I'll tell ya, from  
24 the very first time that I met Mike, it was clear that he had  
25 some difficulties even understanding me, or being able to

1 answer the questions that I was putting to him. So the idea  
2 of -- we pretty much try to stay very close to the topic at  
3 hand. We don't talk about anything else unless, of course,  
4 he brings it up, and then I will engage in reciprocal  
5 conversation with him.

6 Q And without going into detail, did you discuss the crime  
7 with him?

8 A Oh, I have discussed the offense with him.

9 Q Okay. And what was his demeanor during your meetings?

10 A He, uh -- Mike's a very likable client. I'm used to --  
11 I've been doing this for about 25 years now, and I can list,  
12 you know, some clients he that I've really had problems with  
13 and then there's clients that I've really liked. And I would  
14 say that Mike falls in a category that he's very easy to like  
15 because his personality now is a very -- is a very likable  
16 person, self-effacing, uh, you know -- so, for example, he,  
17 in talking with him, he, his affect will be disproportionate  
18 or inappropriate for what he's saying.

19 So if I ask him a question, like, I'll give you a  
20 great example: How much is a new t.v.?

21 New t.v., \$350.

22 \$350, that's a lot of money.

23 I know, damn.

24 And he's say, well, there's a plug in fee.

25 How much is the plug in fee?



1           \$75.

2           What's the plug in fee for?

3           I don't know.

4           And, you know, I know you got to pay it.

5           And so we talked about me getting -- I told him that  
6 after this was over, he's losing his housing assignment, that,  
7 uh, I knew that he would lose his housing assignment. I  
8 figured I could do something nice for him and buy him a t.v.  
9 So he says, well, you can't buy it for me. You got to pay the  
10 plug in fee.

11           So, we talked about the plug in fee, like, four  
12 different times. And I get it, but I think it's difficult for  
13 him to talk about it.

14       Q    So he's able to communicate at some level with you?

15       A    Oh, it would be the same way that I talk to my  
16 granddaughter Kayla. She knows papa lives in Las Vegas and  
17 she wants to come out and stay with me. She'd like to drive.

18       Q    What type of questions did you use with, uh, Mr. Mulder  
19 in terms of asking about the case? Did you ask compound  
20 questions?

21       A    No. I asked open -- and both times I asked him  
22 open-ended questions. Most -- the difference between Mike,  
23 and I would say most people, not just on death row but, if  
24 you're representing somebody on a DUI or an assault, cause of  
25 bodily injury, is you walk in the door, you don't have to ask

1 them anything. They start telling you why they're not -- why  
2 they shouldn't be there of why; what's the minimum sentence  
3 they should be getting or why -- who else they know who's  
4 gotten a better deal than the deal they're currently offered.  
5 Things like that.

6           So they're more -- the attorney is along for the  
7 ride with the client. The client is going to a destination.  
8 I want to get out. I want -- you know, whatever it is. I  
9 want a divorce. I want to get out of prison. I want my old  
10 lady to bring my kids back. Whatever that thing is the  
11 current person is coming to the lawyer for, the lawyer -- to  
12 make that situation better, so they start asking you or  
13 telling you what you need to do to make it better.

14           In Mike's situation, I come in and I ask him how can  
15 I help you? And then we inevitably talk about things that  
16 have to deal with, you know, getting in the shower, his arm,  
17 his shoes. Life stuff that has very little to do with the  
18 other stuff.

19           So, in answer to your other question, like you said,  
20 do we talk about sports or women or other things? I don't  
21 start those conversations. I start talking about his case and  
22 our conversation, inevitably, leads to things that are more  
23 pedestrian, less involved, and more -- you know, the things of  
24 life, sex and money, and fun. What to do for fun, or how they  
25 would have fun if they could have fun.

1 Q When you try to talk to him about your case, do you read  
2 from the legal documents?

3 A I actually bring copies of the legal documents with me.  
4 I, when we first started off, I brought copies of everything  
5 that had been filed by everybody so far, and Mike sat there  
6 and he tried to look -- he looked through the stuff and he, he  
7 kind of drops his affect. He sort of drops his eyebrows and  
8 he's, like, damn, I used to be able to read this. I can't  
9 read this now.

10 I say can I leave it with ya? And I said, it --  
11 well, the first time I left him, like, a copy of the stay  
12 petition and I said, you know, I'll leave this with you and  
13 then we'll talk about it, and then we never ever talked about  
14 it. When I came out to talk to him about it, he says I  
15 couldn't do anything with that stuff. I had some other -- he  
16 said I don't know if I should have other guys looking at it.

17 And I was, like, I would rather you didn't have the  
18 other guys looking at this stuff. He said, well, I have guys  
19 that help me out with stuff, you know, ordering stuff, doing  
20 stuff. But I didn't really want him to share our information;  
21 our pleading, our strategy, you know, with other, other death  
22 row inmates. That's just not good.

23 Q Did you try to read from any of those documents to him?

24 A Oh, I have read to him repeatedly. The -- where we are  
25 now is I don't -- I still bring the stuff because I want to

1 try to explain it, and not explain it from a point of view  
2 of a legal point of view, almost like a -- if I was trying  
3 to explain something really important to somebody, like my  
4 granddaughter, who I care about, but I know that she, on some  
5 level, she understands that I want what's best for her, that  
6 I've never done anything bad to her, that she can trust me and  
7 so I don't -- I don't want my judgment to substitute Mike's  
8 judgment.

9 I could make -- I could get Mike to sign a  
10 400-page pleading accusing Judge Pro of improprieties if  
11 he believes me, he trusts me. But, that's not representation.

12 Q Now, when speaking about the case, do you try alternative  
13 types of questions with him, multiple choice questions, true  
14 and false to attempt to communicate with him?

15 A Well, I wouldn't necessarily do multiple choice questions  
16 because I'm not trying to trick him. I think where we are  
17 right now is he, I would ask him, like -- or say, for example,  
18 we were talking about his sister. He has two sisters. And  
19 when I, when I would bring up something about his sisters,  
20 Mike knows what sister -- I mean so I'm not saying that he's,  
21 uh, completely a vegetable, like someone who is on a G tube in  
22 a nursing home. He knows he has sisters. But, the difference  
23 is that he doesn't know why I want to ask him about his  
24 sisters.

25 So I'll say what about your -- do you remember when

1 your sister came to court? He's like, yeah, damn, I didn't  
2 get to see her. You know, I told them I wanted to see her.

3 So I was like -- so then when I go through the next  
4 thing about what about the sister, and the fact that she was  
5 already in court, did your lawyers talk to you about talking  
6 to her? And then he would say, I don't know. I didn't know  
7 she was going to be there. I got a chance to talk to her.  
8 And so we're right back to where we were.

9 Is he sincere about wanting to talk to his sister?  
10 Yes. Does he remember that she came to court and she was in  
11 the court testifying against him? Yes. Do you remember you  
12 didn't get a chance to talk to her? Yes. But, anything about  
13 strategies, his lawyers talking about cross-examining his  
14 sister, using her as a mitigation witness, those conversations  
15 are, are flying over his head like a F-22. We don't hear  
16 them. We don't see them.

17 Q Does he lose track of his thoughts?

18 A I mean in, in the sense that I'm not sure what his  
19 thought is. So say, for example, when we were, we're reading  
20 the reports, I brought up the reports of the doctors. I  
21 told him that your Dr. Piasecki was going to talk to him;  
22 Dr. Bradley was going to talk to him; and that these doctors  
23 were from the State.

24 And so then he was, like, well, have I met them  
25 before? And I was, like, no. There's whole -- there's new

1 people.

2           And so then we'll talk about the idea of them coming  
3 up to test him. And then I'll say what day; which one of them  
4 was coming. And he'd say, sure. I haven't seen them before.  
5 And so he's been through a bunch of doctors. He's seen a lot  
6 of people. I think he's -- he, Mike, does know that there are  
7 different doctors. I'm not sure he knows which doctor works  
8 for who. So that if Dr. Bradley and Dr. Toomer show up on the  
9 same day, I wouldn't -- I wouldn't think he would say, oh,  
10 Dr. Toomer works for Brian. I need to work harder for him.  
11 Dr. Bradley works for the State, I need to be more guarded  
12 with him. I don't think that there is a part of him that's  
13 able of treating those people differently in that situation.  
14 As long as they were nice to him, then everything would be  
15 okay.

16           MS. PROCTOR: If I could have a moment,  
17 Your Honor.

18           THE COURT: Yes.

19           MS. PROCTOR: We have no further questions, Your  
20 Honor.

21           THE COURT: Well, let me ask you, then, about we  
22 have -- did you, at some point, explain, or attempt to explain  
23 to the petitioner why he was coming here; what this hearing  
24 was about?

25           THE WITNESS: Yes. I, I wrote Mike a letter,

1 and I've seen him lots of times. And the only time he has  
2 ever called me -- and over, I think, it's been about two  
3 years, over two years of representing him, he's only called  
4 me one time because he found out he was being rolled up to  
5 High Desert, and he wanted to know if he'd done something  
6 wrong.

7 THE COURT: And did -- when you've communicated,  
8 he's been here now --

9 THE WITNESS: I wrote him a letter. He got the  
10 letter. But even the letter didn't really register. What  
11 registered is roll up procedure starts. And he's, like, why  
12 are they rolling me up? I didn't do anything. And I said,  
13 this is about that thing we talked about.

14 THE COURT: And when you explain to him the  
15 purpose of the hearing, why he was coming to Las Vegas for  
16 the hearing, did he respond in any way indicating he  
17 understood?

18 THE WITNESS: This is about the doctors.

19 THE COURT: And while he's been here, and your  
20 efforts to communicate with him, has he been able to listen to  
21 the testimony during the hearing we had yesterday?

22 THE WITNESS: When Dr. Toomer was testifying  
23 yesterday, he was about 15 minutes into talking. Mike tapped  
24 me on the shoulder. He says, I don't understand a thing this  
25 guy is saying. And I said most people don't understand what

1 he's saying. Don't feel bad about it, Mike.

2 My goal is not to make him feel bad about this  
3 situation. But the truth is, when I went to see Mike on  
4 Friday -- excuse me -- yes, right before -- after the Court  
5 scheduled this hearing and they transferred him to High  
6 Desert, so I guess that would have been Thursday or Friday of  
7 last week?

8 Thursday. And so I went to see him and I wanted  
9 to tell him what happened, everything. We spent an  
10 hour-and-a-half at High Desert talking about the fact that  
11 High Desert is not as nice as Ely. The guards at High Desert  
12 are not as nice. They're still not letting him shower.  
13 They're not letting him brush his teeth. They didn't give  
14 him a toothbrush. They didn't give him any toothpaste until  
15 the morning I arrived.

16 They put him in a chain where the chain runs around  
17 behind his back and so -- excuse me -- and so he was cuffed.  
18 And so when I bought him a Dr. Pepper and a sandwich, he had  
19 to lean back like this, and hold the drink in order to pour it  
20 into his mouth by force of gravity.

21 We weren't able to talk about what -- Julie Kessel  
22 is coming in and what she's going to say. The difference  
23 between Julie Kessel being a psychiatrist, and Jethro Toomer  
24 being a psychologist. Things that I've tried to talk to him  
25 about, I'd say, 20 times.



1           And that Dr. Milner, uh, who examined him, he didn't  
2 remember Dr. Milner. He remembers people based on whether or  
3 not they're good or bad people; whether they're nice or mean  
4 people. And so Dr. Bishop testifies in 2005 that Mike's  
5 getting all his needs met in the prison. Mike hollers out,  
6 "That's a lie," so he said, well, he wasn't getting all his  
7 needs met at the prison. That's a very concrete idea to him.

8           So I told him that it's very important that no  
9 matter what anybody said here today, that he couldn't yell out  
10 in front of you. That that was important. That this is an  
11 important courtroom, and that we wanted to be quiet and get  
12 along with the judge.

13           And so those are the kinds of things that I get from  
14 Mike. I spent an hour-and-a-half with him so that he sits  
15 here quietly, and so that I could tell him, yesterday, to tap  
16 me or to nudge me. Or, I put on his glasses. I give him  
17 water. I'm his -- I'm his nurse maid. I'm not his attorney.

18           THE COURT: When you talk to him, I take it you  
19 attempted to talk to him about his trial proceedings in state  
20 court.

21           THE WITNESS: Yes, I have.

22           THE COURT: Is he able to, does he have recall,  
23 an ability to respond to you concerning the trial, post-trial  
24 proceedings?

25           THE WITNESS: His recall of pretty much

1 everything is diminished. There are some things that he  
2 remembers well. There are times when Mike will use a, a ten  
3 cent word like "cordial." And I'm, like, well, that's -- you  
4 know, he says, "Well, that guy was cordial. He was nice."  
5 And say okay.

6 So, I, when I try to talk to him about the case, I,  
7 I didn't really understand this at first. So when I went to  
8 see him the very first time, I thought -- he reminded me, he  
9 reminded me of my 20th high school reunion. And I went to my  
10 reunion. I ran into a guy who was a big trickster. And when  
11 I would see him I'd say, "Hey, John, how's things going?"

12 "I'm doing okay."

13 And I said -- I thought he was -- we used to mess  
14 around a lot in school and I said, "You're messing with me."  
15 And he says, "I got hit by a car on my bike."

16 And that's how it is with Mike. He can talk to me,  
17 but he has difficulty in forming words and sentences, and they  
18 are always about the situation we're in. "This room is cold.  
19 This room is hot. I am hungry. I am sleepy. I like that  
20 guy. I don't like that guy. Julie is nice. Julie's not  
21 nice." We're not talking about whether or not he should waive  
22 his privilege against self-incrimination, and whether or not  
23 Julie should read the Miranda warnings to him. That's --  
24 we've never had that level of communication.

25 So when I call -- when I first started representing

1 him there, I went to see him that first time. I left him all  
2 the stuff. And I called Chris Oram. And I said, "How did you  
3 do anything with this guy?"

4 And he says, "I didn't. I couldn't. I don't know  
5 what was going on." He says, "He's one" -- he says, "I don't  
6 think I spent five minutes with the guy."

7 I'm said, "I spent, like, five hours with him and  
8 I'm not sure that I got accomplished anything."

9 And he says, "Well, I only spent five minutes  
10 because the County is not paying for that."

11 And so I said, "I understand."

12 And that's kind of how it's been, junk; is that  
13 he -- Mike's a nice guy. He means well. He wants to help. I  
14 think everybody, all the doctors say he cooperates with them.  
15 The only question is whether or not the next word that comes  
16 out of his mouth is the word that I put in his mouth or a  
17 doctor puts in his mouth. It would be, like, finishing a  
18 sentence, I like my mom because...; mom stays in Detroit  
19 because...

20 Nobody knows the end of that sentence. My mom  
21 doesn't even know the end of that sentence. Only one person  
22 in the whole world knows the end of that sentence. It's me.

23 And so when I'm sitting there with him, he's like,  
24 "Did you like -- growing up, you were the youngest kid. Did  
25 you like growing up? Mom spanked us some, but it was nice.

1 We had a good life."

2 "Somebody went by, made my dad cry." "I said, I  
3 think that was me, Mike," because we had sent by an  
4 investigator to his dad's place, and his dad -- made his dad  
5 sad that Mike was in prison. So he told, he told one of the  
6 other kids and they -- word got back to Mike. And he says --  
7 and he was kind of mad at us. And he said, "I don't know who  
8 it is. Somebody made my dad cry." And it was my investigator  
9 who went by there and talked to him.

10 And so then I say, "I'm sorry Mike. It was probably  
11 me. I made her go by there."

12 He says, "Well, I don't want my dad to cry."

13 And I said, "Okay."

14 Are we talking about waiving mitigation? No. I  
15 just think he doesn't want his dad to be unhappy. Does  
16 he mind if his dad talks to us? No. But, that's not a  
17 conversation we're actually having. I got a dozen clients who  
18 will call me up and say, if you call my mom again, if you do  
19 any of that stuff, I'm waiving -- I'm writing a letter to the  
20 judge. I'm doing whatever. Mike's just, you know, "I don't  
21 want my dad, my dad to cry." He must have said it, like,  
22 eight times. And I felt completely terrible that I had done  
23 that, but I didn't have another way out of it.

24 THE COURT: All right. Thank you.

25 Go ahead.

1 BY MS. PROCTOR:

2 Q You mentioned that he remembers Dr. Bishop and that he  
3 stood up. Does he remember the context of Dr. Bishop's  
4 testimony?

5 A I don't think if Dr. Bishop walked in and sat next to you  
6 and Dave Neidert, I don't think he'd know that's Dr. Bishop.  
7 He remembers that there was a guy who came to court and lied  
8 on him, and that guy is a bad guy. And so he knows that that  
9 guy who came to court and lied on him.

10 I say that guy was Dr. Bishop. He's not coming this  
11 time. And he says, "Okay. He's a bad guy. He lied. I'm not  
12 getting everything I need."

13 Q So he was aware that this occurred in court?

14 A He got yelled at by the judge for yelling at the guy.

15 Q Okay.

16 MS. PROCTOR: I have nothing further, Your  
17 Honor.

18 THE COURT: All right. Thank you.

19 Any --

20 MS. HENSLEY: No redirect, Your Honor.

21 THE COURT: All right. Thank you.

22 Thank you. You can step down.

23 THE WITNESS: Thank you, Your Honor.

24 THE COURT: All right. Then, next, we can go  
25 ahead and call Dr. Kessel if she's present.

1 MR. ABBINGTON: Yes, she is.

2 THE COURT: Great.

3 Doctor, if you would come on up and be sworn by the  
4 clerk, please.

5  
6 **DR. JULIE BETH KESSEL,**  
7 called as a witness on behalf of the PETITIONER,  
8 was sworn and testified as follows:

9 THE CLERK: Please be seated.

10 If would you state your full name for the record and  
11 spell your last name.

12 THE WITNESS: Julie Beth Kessel; K-e-s-s-e-l.

13 THE COURT: Thank you.

14 Go ahead, Mr. Abbington.

15 MR. ABBINGTON: Thank you, Your Honor.

16 **DIRECT EXAMINATION**

17 BY MR. ABBINGTON:

18 Q Dr. Kessel, how are you employed?

19 A I'm employed full time by Cigna, an insurance company  
20 where -- National Medical Director for college policy,  
21 emerging technology. I also maintain a small private practice  
22 doing forensic psychiatric experience.

23 Q All right. And your, by training and education, you're a  
24 medical doctor?

25 A I'm a medical doctor with a specialty in psychiatry and,  
specifically, within psychiatry, psychopharmacology, pain

1 management and forensic psychology.

2 Q Could you just briefly set forth your educational  
3 background and experience for Judge Pro.

4 THE COURT: In the interest of time, I know that  
5 the doctor's C.V. --

6 MR. ABBINGTON: Oh, you have the C.V.? Okay.

7 THE COURT: It's attached -- at least it's  
8 attached to the earlier copy.

9 I'm assuming, Exhibit 3, there's no objection to 3,  
10 I trust?

11 MR. NEIDERT: No objection, Your Honor.

12 THE COURT: The doctor's report. The report of  
13 January 4, 2010, yeah, the C.V. is attached.

14 So go ahead, if you want to cover with regards to --

15 MR. ABBINGTON: Okay. No, we'll -- if the State  
16 would stipulate that Dr. Kessel is an expert, we'll move  
17 forward.

18 MR. NEIDERT: I will stipulate that Dr. Kessel  
19 is a Forensic Psychiatrist and that her C.V. accurately  
20 reflects her educational background and experience.

21 THE COURT: All right. Good. She can offer  
22 expert opinion testimony within the scope of her field of  
23 expertise.

24 MR. ABBINGTON: All right.

25 THE WITNESS: Thank you.

1 MR. ABBINGTON: All right.

2 BY MR. ABBINGTON:

3 Q Did you have occasion to evaluate Mike Mulder? And we'll  
4 start with the first time that you evaluated him.

5 A Yes, I did. The first time I evaluated Mr. Mulder was on  
6 November 23rd of 2009 at Ely.

7 Q Why did you conduct that evaluation?

8 A You specifically asked that I evaluate Mr. Mulder's  
9 ability to assist counsel in his appeal proceedings,  
10 specifically, his competency to do that.

11 Q And how long did that evaluation -- how long did that  
12 take? How long were you there?

13 A Approximate -- I was with him approximately four,  
14 four-and-a-half hours.

15 Q Now when I say why, the purpose of your evaluation was to  
16 determine his competency? Or what was your -- you went out  
17 there to do, what were you doing when you saw him?

18 A Assessing his ability to assist counsel in his death  
19 penalty appeal process. So, yes, his competency to  
20 participate in the appeal process.

21 Q Did you review records as a part of that evaluation  
22 process?

23 A Yes, I did.

24 Q Could you tell the Court which records you reviewed?

25 A Sure. I'm referring to my report because there were



1 quite a few:

2 The direct appeal opinion and the post-conviction  
3 appeal opinion transcript of testimony of Dr. Mortolar  
4 (phonetic) at the penalty phase;

5 Report of Dr. Mortolar;

6 Transcripts of evidentiary hearings across a  
7 number of dates, including testimony of multiple clinicians,  
8 Carol Milner; Terrell Bishop; prison psychiatrist Dr. Cansora,  
9 uh, et cetera.

10 But in addition to that, I reviewed medical records  
11 with regard to Mr. Milner and his intracerebral hemorrhage,  
12 otherwise known as a stroke, in March of 2010;

13 Some elementary school records, as well as some high  
14 school records.

15 Q Now, you may have already said this, you also reviewed  
16 the Nevada Supreme Court opinions?

17 A Yes.

18 Q Okay. All right.

19 Now, did you, as a result of that, did you prepare a  
20 report of your findings?

21 A Yes, I did. And I assume we're still referring to that  
22 first assessment, so my responses are relative to that first  
23 assessment; yes.

24 Q Okay.

25 THE COURT: And I'm sorry, is that a report

1 separate from Exhibit 3 then?

2 MR. ABBINGTON: That's --

3 THE COURT: Is that a distinct report?

4 MR. ABBINGTON: It should be number 3.

5 THE COURT: Oh, number 3.

6 On number 3, on page 2, take a look at page 2 of  
7 that under "identification." I'm assuming it's a typo, but  
8 there's a reference to Mr. Frey.

9 MR. ABBINGTON: Yes, that is.

10 THE WITNESS: Oh, of course. Of course, yes.

11 THE COURT: You're referring there to --

12 THE WITNESS: Yes, of course.

13 THE COURT: -- to the petitioner?

14 THE WITNESS: Of course, Mr. Mulder; yes.

15 THE COURT: Okay.

16 MR. ABBINGTON: Thank you, Your Honor.

17 At this time, Your Honor, we would tender  
18 petitioner's Exhibit 3, which is the report.

19 THE COURT: Yes. No, I think I've received  
20 that, but in objection to 3.

21 MR. NEIDERT: I don't have any objection to  
22 number 3 at this time, Your Honor.

23 THE COURT: All right. Three will be received.

24 (Whereupon, Exhibit 3 -- Dr. Kessel's report, was  
25 received in evidence.)

1 BY MR. ABBINGTON:

2 Q All right. Dr. Kessel did you arrive at any diagnostic  
3 conclusions as a result of that first interaction with  
4 Mr. Mulder on November 23, '09?

5 A Yes, I did.

6 Q And could you explain what your conclusions regarding his  
7 competency are?

8 A Yes, there were four primary diagnostic conclusions:

9 One was that Mr. Mulder had dementia due to the  
10 stroke;

11 The second was that he had what's diagnosed formally  
12 as personality change due to intracerebral hemorrhage; also  
13 known as stroke;

14 Polysubstance addiction -- an admission, of course;  
15 and

16 A medical diagnosis including receptive expressive  
17 and anomic aphasia, which are the consequences of his stroke,  
18 accompanied by right-sided hemiparesis, which means partial  
19 paralysis.

20 Q Okay. Can you explain for the record, what anomic  
21 aphasia is and how that would affect someone's functioning.

22 A Of course, yeah. Let me address that his aphasia --  
23 aphasia means inability to communicate in a general way. And  
24 then we characterize the kinds of aphasia that are present.  
25 He has three specific kinds of aphasia related to damage to

1 different parts of his brain:

2           One receptive aphasia; meaning, he has difficulty  
3 comprehending things that are spoken or written;

4           The second is expressive aphasia, which is  
5 controlled by a different part of the brain, where he has  
6 difficulty formulating thoughts and expressing them; and

7           The third is anomic aphasia, where he has specific  
8 difficulty naming things; anomia, unable to name.

9       Q    Did those -- would that diagnosis, or a diagnosis of  
10 receptive aphasia, in and of itself, be disabling?

11       A    Very conceivably. Each of these diagnoses can vary in  
12 their extent and severity. Receptive aphasia typically means  
13 that someone's unable to, meaningfully, comprehend spoken  
14 and/or written language. And often that results in a  
15 meaningful deficit of comprehension.

16       Q    And would expressive aphasia, could you detail what that  
17 is.

18       A    Again, those things vary on a scale, a continuum. But  
19 expressive aphasia means that somebody is unable to formulate  
20 thoughts in their mind, manipulate words or information, and  
21 express them in a way that conveys meaningful verbal language  
22 to somebody else.

23       Q    And, lastly, I think you explained it, but -- and  
24 differentiate that from anomic aphasia in which way?

25       A    Anomia is the inability to name things, name objects,

1 name people, identify things based on -- naming things  
2 based -- it's word finding difficulty is basically what it is.  
3 And when you have a receptive and expressive aphasia, you very  
4 commonly have anomia along with it. It would be unusual not  
5 to have anomic aphasia, if you had the extent of receptive and  
6 expressive aphasia that Mr. Mulder has.

7 Q So when you said this was on a continuum, where does he  
8 fall in this continuum?

9 A It's moderately severe.

10 Let me explain that further. I say moderately  
11 severe because he has the capacity to communicate some of  
12 his thoughts. He has the capacity to understand very basic  
13 concepts and to communicate very basic concepts. If it was  
14 severe, he wouldn't be able to speak at all. He wouldn't be  
15 able to demonstrate any capacity to get his needs met at all,  
16 and sometimes that happens. In those cases, people are often  
17 incapacitated to the point where they require nursing home  
18 placement.

19 So I offer, on a continuum for Mr. Mulder,  
20 moderately severe. It's not as bad as that, but he has  
21 profound deficits in his ability to understand what is being  
22 said beyond a simple concept, or to express it beyond a simple  
23 concept.

24 Q Okay. Is there an additive effect to these different  
25 forms of aphasia?

1 A Absolutely. One in itself could, at a moderately severe  
2 degree of pathology, be disabling. But in a combined way, it  
3 increases someone's potential frustration. It reduces their  
4 capacity to comprehend and express things in a more marked  
5 way.

6 Q So that, for example, if we're doing this construct, what  
7 I say to Mr. Mulder and what he hears may be -- there's a  
8 disconnect from what I'm saying to what he's hearing me say.  
9 And that's the receptive aphasia?

10 A Yes; that's correct. And that was noted in -- and  
11 perhaps we'll talk about that later, but that was noted in a  
12 number, a number of contexts in my interview where, typically,  
13 I would sort of make up this number, ask a thousand questions.  
14 I ask a lot of questions during an interview but, for  
15 Mr. Mulder, I would need to ask more, like, 5000 questions.  
16 I would need to break each question down into something very  
17 simple to make sure he understood the point of what I was  
18 asking because, when I asked a normal question that I might  
19 typically ask of someone, he couldn't understand that.

20 Q Okay.

21 A And that was evident in his responses, very commonly.  
22 His response --

23 Q Can you give me an example of that?

24 A Um --

25 Q If you can.

1 A Sure. Let me find one.

2 THE COURT: Well, page 7, the paragraph:

3 "Mr. Mulder's memory was difficult..." it says.

4 THE WITNESS: Yes.

5 THE COURT: You discuss there: "...due to his  
6 substantial receptive, expressive and anomic language  
7 deficits; however, it was clear that he had at least partial  
8 memory for his past, the events leading up to the homicide,  
9 and elements of the trial. It is clear that he is unable to  
10 offer specific details for much of his life, though is able to  
11 provide an outline of relevant events in his life."

12 Does that address what you were just trying to  
13 describe?

14 THE WITNESS: Um, yes. Yes and no. I'll -- for  
15 instance, if I, if I were to ask Mr. Mulder, "Where did you  
16 grow up? What was it like?" You know, "tell me about your  
17 background. Where did you grow up? What was it like? What  
18 was your home like?"

19 "Arizona." And I think that's actually a specific  
20 example that I --

21 THE COURT: So in asking him an open-ended  
22 question, tell me about your home life or where did you --  
23 tell me about your home life and he say Arizona as opposed to.

24 THE WITNESS: Exactly. So he, got --

25 THE COURT: A narrative --

1 THE WITNESS: Yeah. He got an element of what I  
2 was trying to ask him. I'm trying to ask him a contextual  
3 question about what was it like, what his experience was, but  
4 what he answers is slightly off point. It's an answer. And,  
5 in some ways, it's even pretty close to the content of what I  
6 was asking, but it's -- he's not understanding what I'm asking  
7 him.

8 THE COURT: All right.

9 THE WITNESS: And he's getting the first part of  
10 that, you know, where did you grow up.

11 "Michael, what was it like, et cetera."

12 "Arizona."

13 That's a good example. That kind of example played  
14 out over and over again, which is why I needed to ask so many  
15 specific small questions.

16 THE COURT: Well, did that kind of example, did  
17 that continue, or manifest itself when you talked to him about  
18 his trial or about the crime that he's charged with?

19 THE WITNESS: Yes, over and over. In fact, in  
20 the, in the second interview where -- and I know that we're  
21 not, we're not up to that yet -- but in the second interview,  
22 where I went to see him to further elaborate on how well was  
23 he able to understand what was going on in his proceeding, uh,  
24 the interview for about three-and-a-half hours was focused on  
25 legal issues, coming back to them, et cetera. And I actually



1 have a number of very, sort of, focused examples of the  
2 difficulty he had in that context. Yes.

3 BY MR. ABBINGTON:

4 Q You also diagnosed him as having dementia?

5 A Yes, I did.

6 Q Could you explain a little bit about that; what dementia  
7 is, and how that diagnosis affects him?

8 A Yes. Dementia means a reduction in mental capac -- in  
9 cognitive capacity. Typically, it manifests by a reduction of  
10 intellect, IQ points, or cognitive function; such as speech,  
11 language and memory, from a base line, due to a medical  
12 process.

13 So, I diagnosed that in Mr. Mulder because the  
14 evidence suggests, and there's some records to show, for  
15 instance, that his function before the stroke was more or less  
16 average. There are two I.Q. tests from the past suggesting an  
17 I.Q., I think in the second grade, of 96; and in the fifth  
18 grade of 85. Both within the normal, low normal, but normal  
19 range of function.

20 There is plenty of information to suggest, at least  
21 during intervals of his life, he worked and did other things  
22 that characterize taking care of himself for better or for  
23 worse. However, after the stroke, his repeated intellectual  
24 function testing indicates a marked and significant decline of  
25 his intellectual IQ points, 69; and 2003, I think 69 again;

1 and 2004, 70 -- which is, statistically, the same as 69 in  
2 2009 -- accompanied by these moderately severe deficits in his  
3 ability to understand or express language, so -- and a  
4 reduction of his general fund of information. It was noted  
5 by Dr. Milner. It was noted by Dr. Cansora. It was noted by  
6 Dr. Toomer. And, of course, by myself. All of those things  
7 constitute a reduction in one's intellectual capacity due to a  
8 medical problem, in this case, a rather large stroke.

9 Q Okay. The two things. The, the scores of the doctors  
10 you cited, Dr. Cansora, he was a defense expert, a defense  
11 psychiatrist that was retained by --

12 A Yes.

13 Q -- Chris Oram?

14 A Yes, he was.

15 Q Dr. Milner was the State psychiatrist?

16 A Yes, she was.

17 Q Or psychologist?

18 A Yes.

19 Q And then Dr. Tumor, do you credit those scores -- do you  
20 think those are statistically significant?

21 A Oh, they're the same. They're the same. They're valid  
22 as evidenced by the reports that were offered by those three  
23 experts, and they're significantly reduced from a pre-stroke,  
24 pre-stroke intellectual function that would have been  
25 characterized as normal. In fact, an I.Q. of below 70

1 counts as mentally retarded.

2           The difference -- Mr. Mulder is not mentally  
3 retarded -- the difference between mental retardation and  
4 dementia is people with mental retardation have a congenital  
5 problem. They don't acquire the developmental growth, the  
6 intellectual growth that people without retardation do. So,  
7 they're developmentally disabled.

8           Mr. Mulder was not developmentally disabled. On  
9 the other hand, dementia happens, typically, after the age  
10 of 18. Very common in older age, of course, and constitutes  
11 a deterioration from one's base line.

12           So, that's the difference. But from an IQ point of  
13 view, he is -- he has an intellectual equation that's on the  
14 border of mild mental retardation, and he's functioning both  
15 emotionally and intellectually at a second grade level.

16 Q How old are you in the second grade -- would someone  
17 normally be in the second grade?

18 A About eight, about eight years old.

19 Q Okay. So the -- other than the differentiation that -- I  
20 think this is an APA differentiation between the onset before  
21 18, which is necessary for a diagnosis of mental retardation  
22 and dementia, which allows a diagnosis after the age of 18,  
23 other than that, do you see the same sort of intellectual  
24 functioning in Mr. Mulder you would see in a mentally retarded  
25 person?

1 A Yes, with the exception of a mentally retarded person  
2 would not necessarily have expressive or receptive or anomic  
3 aphasia.

4 Part of the reason Mr. Mulder likely tests so low is  
5 because of those aphasic conditions. A mentally retarded  
6 person probably doesn't have aphasia. They simply have  
7 delayed intellectual, delayed and impaired intellectual  
8 development.

9 Q Does aphasia have an added effect with the, with the  
10 substandard intellectual functioning receptor?

11 A Oh, absolutely. Not only has he difficulty in  
12 understanding and communicating, but he's lost a fair amount  
13 of his typical pre-stroke, pre-stroke fund of information.

14 Q Is there a loss of brain mass as a result of this stroke?

15 A Oh, absolutely. If we were to -- the original imaging  
16 studies that were noted in the hospitalization subsequent to  
17 his stroke indicates a very large area of blood-filled  
18 brain matter, and something called a shift, a midline shift,  
19 suggesting that that blood is pressing the other part of the  
20 brain against the vault of the brain. And that blood will  
21 result in loss of brain volume. That blood will kill brain  
22 cells and result in a loss of blood volume. He has -- I'm  
23 sorry, brain volume. He hasn't had a recent imaging study  
24 that I was able to identify, but those early studies show he  
25 has loss of brain matter.

1 Q You also diagnosed him with personality change secondary  
2 to this injury?

3 A Yes, I did.

4 Q Could you detail that further?

5 A Yes. Prior to this injury, prior to the stroke, the  
6 best information I was able to cull from all those records,  
7 suggests that there was an irritable, impulsive, angry guy,  
8 who, who, uh, got into a lot of trouble, made very bad  
9 choices, had very low frustration tolerance, was hostile.

10 Subsequent to the stroke, he is a happy guy. He,  
11 Mr. Mulder, in spite of his circumstance, is happy. In fact,  
12 at one point, he actually conveyed to me that, "It doesn't get  
13 any better than this" -- referring to his living situation.

14 He smiles. He's jovial. He's polite. He's  
15 cooperative. That's something that's been demonstrated all  
16 through his post-stroke interviews. And he's no longer the  
17 irritable, angry man that he was. He has some awareness of  
18 that but, mostly, he says the guards tell me I'm a nicer guy.  
19 Or, at one point, he told me, um, he uses curse words pretty  
20 indiscriminately. They blurt out and they populate all of his  
21 sentences. He'll apologize for them sometimes. But, at one  
22 time, he laughed and he said, "I'm a happy -- I'm a happy MF  
23 since this happened to me. It doesn't get any better than  
24 this."

25 And so personality change due to a medical or

1 organic condition, I diagnosed that because there's a very  
2 distinct change in his personality, the way he interacts with  
3 people, the way he views the world, and his own sense of  
4 pleasure and satisfaction since having this rather massive  
5 stroke.

6 Q Thank you.

7 Why did you determine that Mr. Mulder was not  
8 competent?

9 A Um, in a, in a -- in a summarized way, one, because he  
10 was unable to understand what I was asking him. His responses  
11 were off point. If I asked two concepts in one sentence, he  
12 was unable to manage two concepts in one sentence. If I asked  
13 him one legal concept, he perseverated on issues that had  
14 emotional importance to him.

15 So, for instance, in our -- almost the entirety  
16 of the first interview, he perseverated on the role of  
17 fingerprints in his case. He made a number of comments about,  
18 uh, Mike Cherry was his attorney. Mike Perry was his judge.

19 It wasn't clear to me if he understood that there  
20 was a difference between Mike Perry and Mike Cherry. And  
21 there isn't. There isn't.

22 Q To him, there isn't. There is actually no Mr. -- did  
23 you --

24 A There's no Mr. Perry, right. It's Mike Cherry.

25 He was unable to engage in a meaningful discussion

1 of his legal case. He was able to remember emotional things,  
2 like, when he recalls that Dr. Bishop, in his mind, said --  
3 lied about him. So he recalls that, and he can talk about it.  
4 And in very much the way that you described, Dr. Bishop is a  
5 bad man or he'll curse, he'll curse about Dr. Bishop. Lee was  
6 a nice lady. Amy was a nice lady, et cetera.

7 But, he wasn't able to talk about legal concepts  
8 that required manipulation of information. In spite of his  
9 knowing the simple function of courtroom personnel and, in  
10 fact, in spite of being able to give some account of the  
11 events that happened that led to his arrest, he wasn't able --  
12 he didn't understand the difference between the federal and a  
13 state proceeding. He didn't understand that fingerprints --

14 THE COURT: He's not alone in that respect.

15 THE WITNESS: Well, that is -- it's a  
16 complicated -- true enough. True enough, Your Honor.

17 He didn't understand that fingerprints were not the  
18 primary issue for his appeal. It took a very long time for  
19 him to recognize that his stroke was part of the issues of the  
20 proceeding.

21 He asked me if I knew you, as part of our initial  
22 assessment. He, really, had a very, very primitive  
23 appreciation of the nuances of his case, and the role he  
24 had in helping his legal team.

25 ///

1 BY MR. ABBINGTON:

2 Q Was he able to -- do you recall his discussions about  
3 remembering me when you met with him the first time?

4 A Yes. He referred to you as "that black guy." On one  
5 occasion, he identified you as gave. He indicated that he  
6 likes that black guy. That black guy is helping him out.

7 When I said that your name was Brian, he said, yeah,  
8 Brian. But, he wasn't able to spontaneously offer your name.  
9 He wasn't able -- he didn't have a consistent memory of the  
10 times that you had come to see him, et cetera. He was very  
11 focused on -- you brought up the fact that his, his father  
12 was upset as a result of being interviewed. That took up,  
13 probably, an hour of the first interview that I saw him.  
14 Very ruminated over emotionally charged things, to the  
15 exclusion of legal issues that had an impact on his appeal.

16 Q So that your, what your, your observations -- you  
17 listened to me testify here just a few minutes ago?

18 A Yeah, I did.

19 Q Your observations back in November of 2009 were very  
20 similar to that?

21 A Absolutely.

22 Q Even though I, I wasn't present at that?

23 A No, you weren't.

24 Q All right. What elements were you able to talk about?  
25 Were you able to identify with him, able to understand and



1 communicate with him on some level about his life?

2 A I was. Yes, I was. He had -- uh, people with, um, with  
3 the kind of damage that he has as a result of the stroke,  
4 it -- if I can could use an analogy, it's, like -- well,  
5 there's two issues.

6 One, people who suffer brain damage or dementing  
7 illnesses tend to have better, better long-term recall than  
8 short term memory. So many of the details of their long-term  
9 history will remain in tact. On the other hand, they may have  
10 difficulty forming new memories or have difficulty with their  
11 short term memory. Very common in dementing illnesses such  
12 as, classically, in Alzheimer's, for instance. Someone  
13 remembers all the details of growing up, can't remember very  
14 much about what they did more recently, or from the time they  
15 developed the dementia.

16 And that was evident with Mr. Mulder. He, uh, was  
17 capable of giving me an outline of his past -- not always  
18 great -- with dates. Very good with emotional situations  
19 about his past. And we were able to progress through the  
20 interview. Again, I had to breakup my questions into very  
21 simple things, and I used records to fill in a lot of the  
22 details of his history.

23 For instance, he couldn't tell me anything about  
24 school, except that he didn't like it. He interjected that,  
25 at one point, he jumped off a building when he was in a --

1 when he was a young kid. So, he was able to give me an  
2 outline of history and details. But, a lot of the information  
3 I needed to fill in through other records, which I shared  
4 with him, and I had to be very careful not to lead him into  
5 offering information.

6 Q This issue of prompting or leading him into information,  
7 can you explain why that's a problem?

8 A Well, he's a happy, relatively agreeable guy at this  
9 point, so, um -- and he appears to not really want or have  
10 the insight to meaningfully convey what he does and doesn't  
11 understand. So, for instance, if I said something, like, uh,  
12 you know, "Were you close to your mother?"

13 "My mom? Yeah, yeah, loved her."

14 I could ask him again, "Were you not close to your  
15 mother?"

16 "No -- yeah, not close to my mother."

17 So it was very difficult to -- I had to be very  
18 careful to avoid asking a leading question that had a yes, no  
19 answer because his response to a yes/no answer was unreliable.

20 So, it was very important to ask open-ended  
21 questions and try to -- and I'll use the word -- excuse me --  
22 here, prompt context. So, "Michael, where did you grow up?  
23 What was it like?"

24 Arizona.

25 "What was it like?"

1           So, I would consider that might be a prompt. So  
2 I kept having to come back to prompt him with open-ended  
3 questions in order to get him to give relatively brief  
4 unsophisticated answers. And that's how we limped along the  
5 interview process.

6       Q   How did you -- what did you learn about his substance  
7 abuse history?

8       A   Well, his substance abuse history is rather remarkable.  
9 He was -- he grew up in a family of substance-using siblings  
10 and substance-using extended family as well. And we're  
11 talking about from alcohol to heroin to intravenous drug use.  
12 And, in fact, he became an intravenous drug user at the age of  
13 15, which is relatively remarkable. That's an unusually  
14 aggressive form of drug addiction. And that pervaded a lot, a  
15 lot of his life. Although, he was able to maintain a period  
16 of five years of sobriety from about 1991 through '96, and  
17 function relatively well during that time. But, he has a  
18 life-long struggle with, I would -- I would characterize his  
19 drug addiction as, uh, very severe.

20           THE COURT: You mentioned the IQ test when he  
21 was in elementary school.

22           THE WITNESS: Yes.

23           THE COURT: Did you have other benchmarks you  
24 were able to refer to, pre-stroke, that you were able to use  
25 as a gauge?

1 THE WITNESS: Yes. Not specific IQ tests.

2 THE COURT: No, no, I understand.

3 THE WITNESS: Right. Yes, there is.

4 THE COURT: In terms of his aphasia --

5 THE WITNESS: Yes.

6 THE COURT: -- and what his communication skills  
7 were prior?

8 THE WITNESS: Yes.

9 THE COURT: His receptor, reception?

10 THE WITNESS: Yes, I was. He was able to  
11 acquire two to three years of college credits and get, and  
12 work toward an AA degree, which he eventually obtained, which  
13 indicates, at the very least, an average level of intellect.

14 Now, that was at a community college environment.

15 THE COURT: Right.

16 THE WITNESS: So it may not be the most  
17 sophisticated academic environment, but it was adequate for  
18 him to attend school and acquire credits towards that degree.

19 THE COURT: What about writing, something that  
20 he wrote; letters or correspondence, anything?

21 THE WITNESS: I did not see correspondences  
22 prior to. There are some -- there are some records that I  
23 reviewed, in the last day or two, that were very focused prior  
24 to the stroke.

25 THE COURT: Transcripts of testimony and entire

1 proceedings, things of that sort?

2 THE WITNESS: Well, there wasn't very much to  
3 show his facility in those documents with language.

4 THE COURT: And what about the consistency of  
5 the organic damage to his brain that you saw in the tests that  
6 had been performed after the stroke?

7 THE WITNESS: Yes.

8 THE COURT: In your view, how consistent is the  
9 results that you observed, to the nature of that organic  
10 injury?

11 THE WITNESS: It's highly consistent. He  
12 sustained a stroke in an unusual part of the brain; in the  
13 lower part of the brain. And in that part of the brain, a  
14 number of things happened. Interestingly, uh, pain is  
15 modulated through those pathways, so people tend to  
16 experience, typically, a little less pain, if you have a  
17 stroke in the thalamic region of the brain.

18 As -- in addition to that, it's a part of the brain  
19 that has a lot of connections to memory formation and to  
20 executive functions. So, it's in a pathway location. If you  
21 eliminate connections in that region, you cutoff connections  
22 to the front part of the brain. So the spottiness of his  
23 vocabulary -- for instance, I did not hear him offer a word  
24 such as "cordial," like Mr. Abbington suggested. But he did,  
25 he did have, uh -- there was evidence, uh, you could see that

1 there was some intellectual function, historically, trying  
2 to get out. There were times when he could express something  
3 that suggested, at one time, he may have had a better  
4 understanding of that concept. I think of it as shrapnel  
5 on the brain. He had a shrapnel like stroke, and it punched  
6 holes in the various parts of the brain. But in some of the  
7 parts of the brain, he's still able to communicate thoughts  
8 in those particular parts of the brain. That's very  
9 consistent with the level of injury and the location of his  
10 stroke.

11 The aphasia is a higher level cortical function  
12 element of damage, and there's very, very specific parts of  
13 the brain that, that get knocked out, where you see this kind  
14 of aphasia. And they're documented in the record.

15 THE COURT: Thank you.

16 BY MR. ABBINGTON:

17 Q Now, what did you note about his work history?

18 A Well, for the most part, because of his extreme drug use,  
19 he has a very spotty work history. However, during the period  
20 when he had an interval of about five years of sobriety, he  
21 was able to maintain an unskilled worker job such as roofing,  
22 dry wall, et cetera. And he was able -- even able to pay  
23 taxes during that time. So all of that was non-existent,  
24 again, during intervals when he was using drugs. But when he  
25 wasn't, there was some evidence of some capacity to maintain

1 some employment.

2 Q You said he's -- one of your diagnoses was a drug  
3 dependency which was?

4 A Heroin and methamphetamine largely.

5 Q All right. Now, you still -- that dependency still  
6 exists, but it's just inactive while we're in prison?

7 A It's in remission.

8 Now, there have been times in Mr. Mulder's life  
9 when he spent about ten years, cumulatively, in jail of one  
10 sort of another, before going to jail this time. And during  
11 those episodes in jail, he used drugs pretty consistently.  
12 So even during those intervals, he was still drug dependent.  
13 He was just acquiring them in the correctional setting.

14 Q The stroke he had as a result of drugs acquired in a  
15 correctional setting?

16 A That's correct.

17 Q All right. Do you -- what about his mental health  
18 history?

19 A Uh, there, there's no formal mental health history.  
20 There's some suggestion, as a child, he may have had some  
21 attentional problems with hyperactivity. He talked out loud  
22 in Class. He got in trouble in Class. He couldn't sit  
23 still. He was very impulsive. Didn't like doing his  
24 homework. But, it's very hard to tell, historically, with the  
25 records that I had at the time, whether that was a product of

1 his dysfunctional home environment, or if that was a product  
2 of some pre-stroke attentional problem.

3           So, that's not clear. There is no formal  
4 psychiatric history at all, until all of these evaluations  
5 post-stroke.

6 Q What about his medical history?

7 A Well, his medical history is similarly what we call  
8 noncontributory, absent, prior to the stroke. Since the  
9 stroke, he has, you know, a substantial medical history very  
10 specifically related to his stroke. So, he has a severe  
11 contracture of his upper right extremity, and the kinds of  
12 physical ailments that we have heard and read about as a  
13 result of the stroke itself. He doesn't have other major  
14 medical problems at this time. There is some suggestion he  
15 may have had a blood clot, but that would be related to the  
16 stroke.

17 Q All right. What did you note about his -- so in  
18 reviewing his, I guess his symptoms as a whole, what did you  
19 determine about his functioning?

20 A Yeah, when a psychiatrist says "review of symptoms,"  
21 we're really talking about mental health and medical issues  
22 that surround major symptoms. So, for instance, we ask about  
23 sleep and appetite, and energy and mood, and that kind of  
24 thing. Remarkably, he described good mood, good energy, good  
25 appetite, felt happy. So, there was nothing negatively



1 remarkable; although the fact that he was so jovial, giddy  
2 and, basically, happy with the situation was, was somewhat  
3 abnormal. Consistent with the personality change due to an  
4 organic --

5 Q But incongruous to his --

6 A Incongruous. Incongruous. But, otherwise, unnotable.

7 He did not appear, for instance, to have something I  
8 would identify as a major mental illness, like schizophrenia,  
9 or even major depression or bipolar disorder.

10 Q Did you -- you conducted a mental status exam on  
11 Mr. Mulder?

12 A Yes, I did.

13 Q And can you explain what a mental status exam is and why  
14 it's important.

15 A A mental status exam, for a psychiatrist or a  
16 psychologist, is our version of a physical examination. So  
17 just like a medical doctor may poke on someone's stomach to  
18 elicit a sign of appendicitis, we, in the psychiatric world,  
19 go through a number of elements to elicit signs and symptoms  
20 of illness, or unusual perceptions. And we, we may even poke  
21 a little to try to elicit some things that may be harder to  
22 find.

23 So his particular mental status exam was remarkable  
24 for a number of things, none of which suggested, again, major  
25 mental illness, like, psychosis or schizophrenia, or bipolar

1 disorder. Obviously, his physical, the observation revealed  
2 that he had marked hemiparesis, partial paralysis of the right  
3 side of his face and body; pretty substantial contracture of  
4 his upper right extremity, with some mottling of his skin.  
5 All of that is consistent with his medical issues from --  
6 well, I'll skip to some of the more behavioral things of note.

7 He was jovial and happy and appropriately giddy.  
8 He blurted out curse words inappropriately at times.  
9 Sometimes he apologized for them, and sometimes he didn't  
10 seem to be aware that he had done that.

11 His thoughts were poorly organized. He was not able  
12 to spontaneously come up with different kinds of things to  
13 talk about, except things that impacted his day-to-day life,  
14 like, "I need a splint for my hand;" or "these, these sour  
15 cream chips are good. Can I get more," type of thing.

16 So, he had very little spontaneity of meaningful  
17 thought. He was -- his speech was grossly disarthric. He  
18 had gross difficulty expressing words. He used words  
19 inappropriately. For instance, I'm assuming Perry and  
20 Cherry were an example of misuse of words. Unfortunately,  
21 those misuse of words sometimes made him very difficult to  
22 understand, and conveyed something that was, uh, not accurate.

23 His responses to, and I've already described some of  
24 this, but his responses to, to things really consisted of very  
25 simple responses; typically, one word or, uh, expletives such

1 as "God damn," and "yeah," or "I don't know," or -- I mean he  
2 used them over and over and over again in response to any  
3 number of different, uh, questions, et cetera.

4           Those were the highlights of the mental status exam.  
5 We do go through some simple tests of cognitive function and  
6 he dem -- he clearly demonstrated deficits with his short term  
7 memory and his ability to name things and to form appropriate  
8 words and concepts. He was able to, uh, make basic  
9 similarities, like, a banana and an orange have peels. But,  
10 nothing more sophisticated than that.

11 Q Not that they're fruit or whatever?

12 A Well, the response was that they have peels.

13 Q Is that a sign of concrete thinking?

14 A It can be, yes. It's consistent with concrete thinking.  
15 What's more consistent with concrete thinking is if you ask  
16 for something more sophisticated, he can't offer that. For  
17 instance, what's the relationship between a tree and a rabbit,  
18 something like that, which might prompt somebody -- well,  
19 those two things are both moving for instance. That's not  
20 something he would do. That, very clearly, suggests concrete  
21 thinking.

22 Q Concrete thinking is a sign of organicity?

23 A Yes, it is.

24 Q Why is that important?

25 A Well, it's consistent with his stroke. It's consistent

1 with all of the evaluations that have been done. It's  
2 consistent with, uh -- it was, you know, important to the  
3 conclusions that I drew.

4 And, finally, he didn't have any suicidal thinking,  
5 nothing of that nature.

6 Q Okay.

7 A Again, he was pretty, a pretty happy guy.

8 Q What were the important historical considerations for you  
9 regarding your medical, psychological, and neuropsychological  
10 assessments?

11 A Well, it was very important to go back through the  
12 history of the assessments that had been done, uh, so, for  
13 instance, very important to see that, in the second and fifth  
14 grade, there was standardized I.Q. points, I.Q. scores. Very  
15 important to know that he had accomplished some college  
16 credits. Very -- in fact, had an Associate's degree.

17 Very important to see the assessment during the  
18 stroke itself. So, for instance, there were two weeks of  
19 medical assessments, and he was unconscious for a lot of that.  
20 After his stroke, he was intubated. He wasn't able to follow  
21 simple commands, et cetera. So that places, in context, the  
22 severity of that organic insult. This wasn't just a small  
23 event. This was a huge event. And, then, to see what  
24 elements of recovery there were over the years.

25 So we have the first formal testing starting to

1 happen in 2003. We have Dr. Cansora with, uh, I think defense  
2 counsel. And we've got Dr. Milner and Dr. Bishop with the  
3 prison. And they're all -- I mean there's some exceptions  
4 because Dr. Bishop felt that he was not telling the truth, but  
5 they observed a lot of very similar things. Dr. Milner and  
6 Dr. Cansora came out with the exact same intellectual quotient  
7 points there. Clearly showed that, from the time of the  
8 stroke to 2003, 2004, when these things happened, he had  
9 recovered some capacity for speech and memory because, at  
10 the time of the incident, he was literally unconscious and  
11 couldn't follow commands at all.

12 So, there was some recovery that happened in the  
13 first two to three years after the stroke. That would be  
14 normal. You might not see a lot of recovery, but you could  
15 probably see some recovery.

16 And then there are additional, there are additional  
17 assessments. There's an assessment in 2007, I think it was,  
18 when the, I think it was the ACLU and the doctor there become  
19 involved in his case and are observing the same deficits that  
20 we're seeing in 2003. And then I come along in 2009.  
21 Dr. Tumor comes along in 2009. And even Dr.s Bradley and  
22 Piasecki, in 2010, were all saying similar disarthric quality  
23 to his speech; trouble following commands; difficulty  
24 understanding; requires a lot of prompting; variable ability  
25 to give consistent history. But, we're all getting -- the

1 outline is the same:

2 He grew up in Arizona, used drugs at 15, et cetera.  
3 We're getting the same scale of our outline, so there's a  
4 lot of consistency in looking at the history of those  
5 records. And a lot of that had to do with why I arrived at  
6 my conclusions that, one, he had dementia; two, he had the  
7 personality change; and, three, that he's functioning at  
8 pretty much a second grade level now.

9 Q And so you reached a conclusion regarding Mr. Mulder's  
10 competence to assist counsel and rationally communicate  
11 regarding this case?

12 A Yes, I did.

13 Q What's -- what is your conclusion about that?

14 A I felt he was incapable of meaningfully assisting counsel  
15 in the preparation and deliberations that were required to  
16 develop an appropriate strategy for his appeal, and that he  
17 was, as a result of that, not competent to proceed.

18 Q Subsequent to coming to that conclusion, did you have a  
19 second occasion to examine Mr. Mulder?

20 A I, I did. I did. I went back to see him in, uh, March  
21 of 2011, March 22nd of 2011, back to Ely. And, at that time,  
22 I was interested in seeing had there been any change in his  
23 mental state because I -- he had been working with his legal  
24 team over the course of that year-and-a-half or so, so it  
25 would be important to see what had he gained, if anything,

1 and to have an opportunity, frankly, to see him interact  
2 directly with you.

3           So I had already developed a history and had  
4 reviewed additional records which were consistent with the  
5 history that I had developed earlier, but really wanted to  
6 specifically focus on elements of the case and the interaction  
7 with you, and what he had gained in a year-and-a-half of your  
8 counsel.

9       Q    Did you -- and when did -- that evaluation took place  
10 March 22nd, 2011?

11       A    Yes.

12       Q    How long were you there this time?

13       A    It took approximately three-and-a-half hours.

14       Q    All right.  Could you, uh, did you arrive at any  
15 diagnostic conclusion as result of that interview?

16       A    I did.  My diagnostic conclusions remain the same based  
17 on the evaluation and the additional review of records.

18       Q    And your conclusion regarding your competency?

19       A    Uh, I affirmed that he was not competent to proceed to,  
20 to -- in his appeal case.

21       Q    All right.  So then your, your original diagnoses of  
22 dementia, aphasia, and organic personality change due to  
23 stroke and polysubstance abuse and remission due to  
24 incarceration, those stayed the same?

25       A    Yes.

1 Q All right. Could you tell us a little bit -- could you  
2 tell a little bit about what you witnessed in the interaction  
3 between Mr. Mulder and myself.

4 A I'll limit that to things that I thought were relevant  
5 about the interaction. First, you know, we start out with,  
6 "Hi, Mr. Mulder. How are you? Do you remember me?" And kind  
7 of the reason that we're here.

8 And, of course, you were with me during that  
9 evaluation, and the evaluation was largely an opportunity for  
10 me to observe your interactions with him, but I still offer my  
11 disclaimer and kind of try to get an understanding of do they  
12 know why we're hear, et cetera.

13 When you -- so we started the interview, and I  
14 asked simple things, like, you know, "Mr. Mulder, what's the  
15 date today?" So his initial response to that was that it was  
16 April 20th of 2011. It was March 22nd, and he's counting on  
17 his fingers the months. He was close. I mean, it wasn't bad.  
18 It was 2011, earlier part of the year, so I was satisfied with  
19 that. But, it wasn't perfectly on.

20 Q About a month off, a little bit?

21 A About a month off.

22 When you stepped out to get snacks for Mr. Mulder,  
23 uh, I asked him if he, if he knew who you were. And he  
24 didn't, but he knew that he liked you. He thought your name  
25 might be Dave. I suggested that your name was Brian and he



1 said, yeah.

2           So that's kind of how the interview got started.  
3 I made a number of points that I thought were relevant to  
4 the legal issues that you were talking to him about, and I  
5 interrupted you a number of times to have an opportunity to  
6 recant what you had just said, and to see what he understood  
7 or didn't understand.

8           So one of my observations was, and I assume this is  
9 because you're an attorney, you would offer legal concepts and  
10 he would appear to be following, and you would say do you  
11 understand? He'd say yeah, or sometimes no. You would try to  
12 rephrase but, uh -- and I noted that you were making efforts  
13 to reduce the complexity of your language, but he didn't have  
14 a meaningful understanding. And here's why I drew these  
15 conclusions. I would stop and ask him about what we had just  
16 talked about. I made a few notes.

17           Can I comment on them?

18 Q Yes, please.

19 A Okay. All right. So -- excuse me.

20           Okay. Now one of the -- these are kind of in  
21 chronological order --

22           THE COURT: I just want to make sure, this did  
23 not result in the preparation of the report?

24           MR. ABBINGTON: No. The only report was the  
25 first one.

1 THE COURT: Okay. Because I didn't have it, so  
2 I --

3 THE WITNESS: Okay.

4 Should I proceed?

5 BY MR. ABBINGTON:

6 Q Go ahead, please.

7 A Okay. So I made a number of points. You were talking  
8 about the idea that his original attorneys needed to spend  
9 more time in the courtroom with him, to be present more in the  
10 court. And his responses had to do that -- with the fact  
11 that, quote, Lee -- referring to his attorney, I think,  
12 Elizabeth McMann -- who is deceased at this point -- quote,  
13 "Lee was a shit. Never said nuthin'." Then he said "Mike  
14 Cherry, Mike Perry, they were good for me."

15 Now, Mike Cherry and Mike Perry are the same person,  
16 and they weren't so good for him. And that was something that  
17 you were trying to convey that, um, in saying that they needed  
18 to be more present, et cetera.

19 So point number one, he had an emotional  
20 recollection of his attorneys. Confused their names. Liked  
21 one. Didn't like the other. And missed your point.

22 Another point, uh, the issue of the polygraph  
23 came up and he said, uh, he said that if he passed the  
24 polygraph he could go home. And you had to talk to him  
25 about the fact that it was the defense team that gave him the

1 polygraph and that it wasn't really relevant to the case.

2           So, again, he seemed to miss the point of what role  
3 did a polygraph have, if anything.

4           There was a lot of discussion around an issue  
5 related to counsel, his own counsel, indicating that he was a  
6 future danger, and conceding that point, and that that was a  
7 potential problem. And he said simply, "I wasn't no danger."  
8 He missed the point that his own lawyer said he was a future  
9 danger, and he missed the distinction between a play weapon  
10 and a real weapon, and was giggling as he was talking about  
11 this. So he knew you were talking about future danger, but he  
12 didn't understand how it was relevant to his case.

13 Q Do you remember what the example was that was used with  
14 the play weapon? Why it was -- or do you recall that?

15 A Well, he had robbed -- he had committed a robbery and  
16 he used a play gun. And he laughed and he said something to  
17 the effect of "play gun." And that was -- is that what you're  
18 getting at? I could reference --

19 Q Well, we were talking about his specific -- if you  
20 recall, we were talking about this whole thing of future  
21 dangerousness and --

22 A That's correct. Right.

23 Q Okay.

24 A Right. I have some other examples --

25 Q No, no, that would be great. I guess I was saying that

1 when he -- when Mike start talking about the play gun, was  
2 that relevant to the conversation we were having then?

3 A No, it wasn't.

4 Q Okay. Go ahead.

5 A Okay. There was a point about -- and, again, these are  
6 in chronological order. We're an hour, hour-and-a-half into  
7 the discussion. He's pretty preoccupied with fingerprints  
8 and, if only they could have somehow the testimony of the  
9 fingerprint expert thrown out, he could go home.

10 So you're trying to explain to him that that's  
11 not -- so that that's not a main focus of the case, but he's  
12 totally obsessed with that point and wants to come back to it  
13 time and time again. So, in spite of your -- and we stopped a  
14 number of times to go over this point in particular because  
15 this is a theme that he's focused on a lot.

16 Q Yes.

17 A He didn't get it. He kept coming back to fingerprints.  
18 And this will come up later, a couple hours into the  
19 evaluation. We're back to fingerprints. And I'll get there.

20 You talked to him about the stroke interfering with  
21 his ability to understand things, and that his attorney, the  
22 main attorney, one of the main attorneys in his case had  
23 passed away and couldn't testify about, uh, what it was like  
24 to communicate with him before the stroke. And, somehow,  
25 this -- he -- this reminded him of Father Chuck, who never

1 lies. And, uh, I'm still not exactly sure what that had  
2 to do with, uh, the stroke interfering with his ability to  
3 understand. Father Chuck is a friend of his, a support of  
4 his, and he -- this triggered a thought that Father Chuck  
5 would be helpful somehow because he doesn't lie.

6 Q And then do you remember, do you recall what he said when  
7 I said that Father Chuck might not be helpful?

8 A I could consult with my notes.

9 Q Okay.

10 A (Witness reviews notes.)

11 No. I'm not, I'm not quite sure.

12 Q Okay.

13 A Clear about that.

14 Q But do you have any -- okay. We'll go on to another --

15 A Yeah, I have a number --

16 Q There was some concern he had regarding this Father Chuck  
17 being someone of value to him?

18 A Yes. There was discussions with Father Chuck an ally --  
19 or not an ally to his case, but a lot of this was very  
20 difficult to follow.

21 What was evident based on these discussions, was  
22 you were communicating one thing, and he was responding to  
23 something else, something more emotional, something that  
24 triggered a memory about Father Chuck.

25 Okay --

1 Q The next thing was about the names of the people that  
2 came out to test him?

3 A Right. He intermittently recalls them. He did not  
4 recall them at the time that you were asking about them. He  
5 did ask, after you mentioned a few names, he, uh, asked who  
6 they were working for, including Dr. Toomer, was he working  
7 for the prosecution? So, he doesn't understand that  
8 Dr. Toomer was working with his legal team on his behalf.

9 Okay. You came back to talking about the stroke  
10 and issues related to competence, and his response was, uh,  
11 "Man, these sour cream and onion chips are good." And  
12 then, eventually, said this is the first time he's hearing  
13 anything about this, that he was confused by your bringing up  
14 competence at that time, which is something that had come up  
15 earlier.

16 Then there was a discussion about, uh, a concern  
17 that should he testify or not. And you indicated that you  
18 didn't think that that was the best idea for him, and he  
19 indicated, uh, with -- he said I'm fine with that -- referring  
20 to testifying. And that was after you had indicated you  
21 didn't think that was a good idea. He says, "Fine. Fine.  
22 Right. Doctors, doctors, doctors. I'm fine with that,"  
23 referring that he would be happy to testify. He didn't get  
24 your point about that. It was off point.

25 Another, another point, he recalled Amy, the

1 attorney for the ACLU, describing her as a nice lady who  
2 helped him win.

3 Q Did he recall her name or anything, or is that just  
4 something that we provided, we provided to him?

5 A I provided that to him.

6 Q All right.

7 A He did not recall Dr. Noel at all. At this point, we're  
8 two-and-a-half, I don't know, two-and-a-half hours or so  
9 into the evaluation. And I stop and go through a series of  
10 redundant simple questions: "Mr. Mulder, what do you think  
11 are the main issues in your case?" And his immediate and then  
12 perseverative response was fingerprints.

13 Q You said perseverative response, What do you mean by  
14 that?

15 A I mean over and over and over again. He has a lot of  
16 difficulty moving away. And I would rephrase it, "Mr. Mulder,  
17 uh, Brian tells you that the stroke is part of the case and  
18 that the fingerprints are really not a primary case."

19 His response to that, "Come on, man."

20 At a later point, closer to the latter part of  
21 the interview, I'm asking, again, "What do you think is the  
22 main part of what Brian is talking to you about?"

23 "Well, fingerprints."

24 And you say, at this point, "No."

25 And he says, uh, "What's the point then? I don't

1 have a fuckin' chance."

2           And you were talking to him about the generic  
3 concepts of ineffectiveness of counsel, but he was focused  
4 on fingerprints. And without the fingerprints, he thinks  
5 they're -- that's the end of the case.

6           So those were some of the highlights I was going to  
7 offer, Your Honor. The difference between state and federal,  
8 but that's, that's not really -- he didn't understand the --

9           THE COURT: The concept of federalism?

10 BY MR. ABBINGTON:

11 Q We were talking -- we also talked about the past  
12 proceedings, I think, and the reasons --

13 A Yes.

14 Q -- reasons why that was not binding here. And that  
15 was --

16 A Right. Yes. Right. Yes, we did. You did.

17 Q All right. Let's talk about Mr. Mulder's prognosis now?

18 A Okay.

19 Q What is his prognosis?

20 A Well, prognosis refers to what is his ability to show,  
21 demonstrate any improvement of his cognitive function, or  
22 his medical condition, depending if we're talking about his  
23 prognosis for his medical condition or his cognitive function.

24           So, do you want me to address both of those?

25 Q Yes, if you could.



1 A Okay. With regard to -- when somebody has a stroke of  
2 this nature, you can see some recovery in the first, let's  
3 say, maybe out to 2, 3, years recovery is, uh, enhanced  
4 with immediate and intensive rehabilitation. So there are  
5 different kinds of rehabilitation. There's physical  
6 rehabilitation, and there's something called cognitive  
7 rehabilitation. Those things need to start immediately,  
8 post-stroke. Whether they start post-stroke or not, your  
9 recovery is pretty much maximized at two, three years. You  
10 may, you may have some improvement, slight improvement for  
11 longer than that, but pretty much out at two to three years  
12 is probably where you're going to land. That's with or  
13 without cognitive or physical rehabilitation because, as  
14 the brain is recovering, that's the time to do the  
15 rehabilitative activities. After the brain has settled,  
16 it's -- well, it's -- it's nearly impossible to make  
17 substantial improvements after that.

18 Now, with regard to his physical condition, without  
19 continued -- without some kind of intervention for his  
20 physical condition, things like the contracture in his wrist  
21 may continue to get worst and he may actually break bones in  
22 his wrist. So there's some concern about his prognosis for  
23 his medical condition. He's at risk to develop blood clots in  
24 his legs because of his paralysis and in his arm, et cetera.

25 With regard to his, uh, cognitive capacity, he's

1 maxed out at his level of improvement. It doesn't matter if  
2 we provide cognitive rehabilitation at this point, his  
3 prognosis is what we call guarded; meaning, there's virtually  
4 no opportunity for further improvement. This is his new  
5 baseline.

6 Q So --

7 THE COURT: It's as good as it gets?

8 THE WITNESS: It's as good as it gets.

9 BY MR. ABBINGTON:

10 Q So when he says --

11 A In medical terms, he's at maximal medical improvement.

12 Q All right. Is his dementia reversible?

13 A No, his -- and, again, it's all kind of part of that,  
14 if -- I could have substituted dementia for cognitive  
15 impairments as I was just talking a few moments ago. No, the  
16 dementia is a result of that dramatic stroke, and his recovery  
17 is what it is.

18 Now as he ages, of course, he's susceptible to all  
19 of the emergence of new and, you know, chronic medical  
20 conditions that we're all subject to as we age, which will  
21 aggravate those cognitive issues that he has. He's also at  
22 risk for medical complications to the, uh, to the fact that  
23 he can't -- he's not using his arm or leg very much. So  
24 what happens in those situations is he is susceptible to the  
25 development of a blood clot. If he develops a blood clot,

1 things could get worse for him because blood clots can travel.  
2 So he has some potential demise as he ages, but he doesn't  
3 have the opportunity for rehabilitation at this point in his  
4 mental state or, substantively, in his physical condition.

5 Q So his situation could get worse, but it can't get  
6 better?

7 A That's right. Yes.

8 Q And his -- so the same thing would apply to your  
9 diagnosis of the three different types of aphasia that he  
10 suffers from as well?

11 A Yes. They're maximally, medically improved.

12 Q And organic personality disorder --

13 A Yes. On the very positive side, sometimes we see this.  
14 It's nice when you do see it. But on the very positive side,  
15 he's had a favorable personality change as a result of this  
16 stroke and, therefore, his life is more tolerable to him than  
17 it may otherwise be.

18 Q So, reasonably, he'll stay like this. He'll be this nice  
19 happy guy --

20 A Yes.

21 Q -- who doesn't mind -- gets along with everybody?

22 A Yes.

23 Q Could anything have been done for Mr. Mulder post-stroke?

24 A Well, the standard of care would have been to get  
25 physical rehabilitative therapy for his physical condition,

1 speech therapy for his speech condition, cognitive  
2 rehabilitation for speech, and his, uh, ability to manipulate  
3 concepts and formulate ideas.

4 Cognitive rehabilitation is not an incredibly  
5 effective intervention, but it's a standard of care that  
6 applies to it because of the small increments that it can do;  
7 that it can have in some people. So it would have been  
8 standard. It may have been useful. It would not have been  
9 dramatically useful, but it may have been a little bit useful.  
10 Hard to say. Likely would not have impacted his cognitive  
11 function a great deal, but may have a little. His physical  
12 condition could be a bit better. He does not -- the chances  
13 are, are very good that physical rehabilitation may have  
14 abbreviated the degree to which his right arm is contracted,  
15 and improved the function that he has on the right side of his  
16 body. He --

17 THE COURT: In terms of --

18 THE WITNESS: Yes, sir.

19 THE COURT: -- brain function, mental function,  
20 do I understand you that, even with the first three years of  
21 the stroke, therapy is --

22 THE WITNESS: We do it.

23 THE COURT: -- is -- well, we talked yesterday  
24 with Dr. Toomer about Gabriel Giffords, for example.

25 THE WITNESS: Oh.

1 THE COURT: Now he said it is grossly overstated  
2 what the media portrays, he felt. Lo and behold, I see she  
3 cast a vote in Congress --

4 THE WITNESS: She did.

5 THE COURT: -- late yesterday. I don't know if  
6 that says more about her or Congress, but it is --

7 MR. ABBINGTON: She wouldn't be the first  
8 person.

9 THE COURT: -- good to see. But, he seemed  
10 skeptical that there would be -- maybe we shouldn't attribute  
11 too much to what is portrayed in the media and so forth with  
12 regard to --

13 THE WITNESS: Well, I'm not --

14 THE COURT: -- improvements.

15 THE WITNESS: -- I'm not familiar with the  
16 discussion that happened yesterday --

17 THE COURT: No, no. He wasn't professing to be  
18 specific or familiar with her case. But in, in petitioner's  
19 case, in your opinion, would there have been particular  
20 interventions that would have been productive in terms of  
21 restoring -- or can you tell at this point?

22 THE WITNESS: Uh, the chances are, uh, slim that  
23 they would have resulted in significant improvements in his  
24 cognitive function. They're unlikely. We do them anyway.  
25 It's standard of care. We do them. There are, uh -- there

1 are much better studies to show improved outcomes in ability  
2 to express speech. So, you're trained in moving the muscles  
3 of your larynx to make words come out properly, and he would  
4 have benefitted from that. And we're pretty good at doing  
5 that post-stroke. But improving that aphasia, not the  
6 disarthria, the motor problem he has with speech, but  
7 improving the concept formation, we're not very good at doing  
8 that.

9 THE COURT: And what was done in the case of  
10 the petitioner post -- after the stroke? Was, was there any  
11 type of -- other than, obviously, maintaining, he was -- I  
12 understand he was intubated, and he was not conscious for a  
13 couple of weeks or 20 days, something to that effect. But,  
14 were there therapies that were employed to try and --

15 THE WITNESS: Well, we have a medical record  
16 from 3/15 to 3/31 --

17 THE COURT: Right.

18 THE WITNESS: -- that shows the acute  
19 post-stroke care. But I'm not -- I'm not familiar with any  
20 other interventions occurring. I think approximately 2006,  
21 2007 or something, there was some recommendation that he get  
22 some kind of treatment. But I -- one, I don't think he had  
23 substantive treatment. And, second, at that point, it would  
24 have been too late.

25 THE COURT: Okay. All right. Thank you.

1 BY MR. ABBINGTON:

2 Q So you, you have reviewed his medical records, and the  
3 fact is he didn't get any physical therapy?

4 A Yeah. There wasn't any that I could see.

5 THE COURT: I'd understood physical therapy  
6 we're talking about, but I was asking --

7 MR. ABBINGTON: I should have --

8 THE COURT: -- about the --

9 MR. ABBINGTON: I should have said  
10 rehabilitative therapy. I --

11 THE WITNESS: Oh, cognitive rehabilitation  
12 definitely did not occur.

13 THE COURT: Right. That's what I was  
14 concerned --

15 THE WITNESS: Yeah. That would need to be  
16 delivered in a specialized setting.

17 BY MR. ABBINGTON:

18 Q When you say that standard of care, what do you mean by  
19 that?

20 A Well, what I mean --

21 Q Is that like saying it's universal or --

22 A In a legal context, it is that it would be expected that  
23 a doctor, with a reasonable understanding of these conditions,  
24 would prescribe cognitive rehabilitative therapy. That would  
25 be the standard of the profession in these circumstances.

1 Q If Mr. Mulder was evaluated by, uh, Department of  
2 Correction staff, and who found him to be mildly aphasic,  
3 would you agree with that rec -- that finding?

4 A No. I think he is more than mildly aphasic. He's  
5 moderately, severely aphasic.

6 Q All right. Now, in terms of -- you've had, also, the  
7 opportunity to read the findings of Dr. Bradley and Dr.  
8 Piasecki, the --

9 A Yes, I did.

10 Q -- psychiatrists retained by the State?

11 A Yes.

12 Q All right. Let's --

13 THE COURT: Let's take a ten-minute break before  
14 we get into that.

15 How much longer do you think you have on direct?

16 THE WITNESS: I'd say maybe 15 minutes; maybe  
17 10, 20.

18 THE COURT: Okay.

19 Then cross?

20 MR. NEIDERT: Hopefully, we'll be done before  
21 lunch, Your Honor.

22 THE COURT: Well, okay. Well, I still think --

23 MR. NEIDERT: I think a break is very  
24 appropriate, Your Honor, but.

25 THE COURT: Yeah, I want to give my staff a



1 chance to break. We haven't had a lot of breaks today, and we  
2 started pretty early.

3 All right. We'll take ten minutes and then we'll  
4 reconvene.

5 MR. ABBINGTON: Thank you, Your Honor.

6 THE COURT: I just wanted to make sure you get  
7 out to High Desert with the time limit you'd set for  
8 yourselves.

9 MR. NEIDERT: And I think our times were  
10 approximate, Your Honor.

11 THE COURT: They can probably wait for you.

12 (Recess taken.)

13 THE COURT: All right. We'll go back on the  
14 record.

15 That's all right. Have a seat, please.

16 Go ahead, Mr. Abbington.

17 MR. ABBINGTON: Thank you, Your Honor.

18 BY MR. ABBINGTON:

19 Q I believe we left off with --

20 THE COURT: Dr. Piasecki and --

21 BY MR. ABBINGTON:

22 Q -- the reports of -- the findings of Dr.s Bradley and  
23 Piasecki. Does that sound --

24 A Yes.

25 Q All right. Let's -- discussing Dr. Bradley first, what

1 are your comments about his assessment?

2 A Um, I think -- first, I know that his assessment to be  
3 about an hour-and-a-half long, I believe. He, he indicated  
4 that Mr. Mulder had difficulty understanding complex  
5 information, express complex ideas. He indicated that he had  
6 word finding difficulty, as well as articulation, that motor  
7 quality of making speech happen. He also indicated that he  
8 was able to communicate with him with the use of, I think he  
9 indicated prompting, rephrasing and, uh, I think it was --

10 Q Restating?

11 A -- restating. Restating. Restating, rephrasing and  
12 prompting, he was able to communicate. He did identify the  
13 issue of fingerprints and attributed Mr. Mulder's focus  
14 on fingerprints as part of his assessment of why he was  
15 competent. He was able to understand, in Dr. Bradley's  
16 assessment, the issue that fingerprints were a significant  
17 part of the case. The fact is they're not a significant part  
18 of the, this element of the case, so I was, uh -- I found  
19 that to be significant.

20 He -- Mr. Mulder can talk about different elements  
21 of the case, it's just that they're not prioritized or  
22 meaningful in the context of legal strategy. But,  
23 nevertheless, Dr. Bradley concluded that they were.

24 He did indicate that he -- he basically indicated  
25 that his memory was in tact and used an abbreviated, highly

1 abbreviated form.

2 THE COURT: I apologize for interrupting. Let  
3 me go back.

4 You testified about the propensity of the petitioner  
5 to persevere on the fingerprint aspect?

6 THE WITNESS: Yes.

7 THE COURT: And, from your perspective, that  
8 indicating not competence, but the antithesis. Dr. Bradley  
9 says that, because he keeps coming back to the fingerprint  
10 issue, that shows insight into his -- or the ability to  
11 comprehend his legal situation.

12 THE WITNESS: Dr. Bradley did not indicate that  
13 he kept coming back to fingerprints. Dr. Bradley noted,  
14 specifically, he was able to talk about fingerprints and their  
15 relationship to the case.

16 THE COURT: All right.

17 THE WITNESS: And, therefore, that's the only  
18 specific reference to his case that Dr. Bradley identifies.  
19 Based on that, he -- I assume it's based on that because  
20 there's not anything else that's specific -- based on that, he  
21 concludes that he's competent, as well as the fact that, from  
22 Dr. Bradley's point of view, Mr. Mulder has intact memory. He  
23 uses two pieces of information to support the fact that his  
24 conclusion of fact that he has intact memory, one, is that  
25 he was able to convey, in the hour-and-a-half, hour and

1 forty-five minutes that they were talking, some outline of  
2 his history. And he was able to talk about various things.

3 The second part was his assessment that he could  
4 recall three out of three objects at five minutes, which is an  
5 element of something we call, formally call the Folstein exam,  
6 also called the mini-mental state exam. But, it's one element  
7 out of about 20 for a total score of 30. And he indicates  
8 that, based on that, that his memory is in tact.

9 He also indicates that he prompted him to recall  
10 those objects. You can't -- you know, prompting someone to  
11 call those objects is not part of the way you administer the  
12 Folstein. So I would challenge his conclusion that his memory  
13 is in tact, or that his ability to discuss fingerprints  
14 constitutes meaningful understanding or capacity to interact  
15 with counsel.

16 THE COURT: Thank you.

17 THE WITNESS: You're welcome.

18 BY MR. ABBINGTON:

19 Q Do you remember the interaction with Mr. Mulder and I  
20 regarding the fingerprints and the fingerprint experts that  
21 they had hired at the trial level, and my efforts to try to  
22 discuss that with him? The --

23 A Yes, I do. There's a sequence I wrote down,  
24 specifically, around this. I do remember fingerprints  
25 were a big part of the discussion that you had with him in

1 that three-and-a-half hour evaluation.

2 Q Do you recall whether or not I tried a discussion  
3 regarding whether or not -- the effort to see fingerprint  
4 evidence as a whole?

5 A Yes. My recollection is that -- it's not going to be  
6 based here, it's going to be a vague recollection -they were  
7 not a substantive part of the case and couldn't be relied upon  
8 in this particular instance as a primary issue. That's all I  
9 remember.

10 Q But as you set forth earlier, when we finished talking,  
11 Mr. Mulder had said, well, if it's not fingerprints, I don't  
12 have a chance.

13 A He said it using a number of expletives but, yes.

14 Q All right.

15 A Yes.

16 Q Do you agree with Dr. Bradley's conclusions?

17 A No, I don't.

18 Q Well, and could you explain that.

19 A Um, yes, I think that Dr. Bradley chose information upon  
20 which to base his conclusion that was selective and that, uh,  
21 was presented in such a way as to highlight the limited  
22 capabilities that Mr. Mulder has, rather than to evaluate his  
23 responses in the context of all of the other information  
24 that's available. And his use of the words -- I mean his  
25 admitted use of the tools to help him offer information;

1 rephrasing, restating and prompting, is exactly what I try to  
2 avoid in my evaluation so as to -- not to draw a conclusion  
3 that I wanted to draw but, rather, to allow Mr. Mulder to  
4 express what he was capable of expressing, rather than to  
5 tacitly agree or disagree with what I said.

6           No, wait. I think he used -- I think his evaluation  
7 suggests he used a relatively close-ended approach to the  
8 evaluation and, therefore, drew conclusions that were based on  
9 a limited focus.

10       Q    Particularly in a forensic context, in not just in  
11 a post-conviction or habeas, or even a capital habeas  
12 proceeding, why would prompting, rephrasing, and restating  
13 be problematic in terms of attorney/client communications?

14       A    Well, prompting, restating and rephrasing don't  
15 necessarily allow the defendant, or person who is being  
16 interviewed, to expressing their own particular point of  
17 view. They allow for a basic agreement, or lack of agreement,  
18 and a conclusion to be drawn on the part of the interviewer  
19 that the person understands, by virtue of their agreement or  
20 disagreement. That's not -- in psychiatry, we learn, in order  
21 to arrive at appropriate answers, you need to ask open-ended  
22 questions. You may need to rephrase the question in another  
23 open-ended way to make sure that the person understands, but  
24 you can't prompt the response; particularly, in a person who  
25 has difficulty expressing himself, or where there's a concern

1 that somebody doesn't understand a question. You can ask  
2 a hundred different ways, but you have to wait for the  
3 answer that reflects either an understanding, or lack of  
4 understanding. It takes -- it takes time, and it takes  
5 patience as well.

6 Q So -- but using the example I used when I was testifying,  
7 you were present for that, if I was to, say, substituted  
8 myself for Mr. Mulder, when I was a kid my mom was -- and then  
9 somebody would say nice? And I would say nice. And I would  
10 agree with that, and it might not be the word I was actually  
11 looking for saying --

12 A Yes. Yes. Yes.

13 Q All right.

14 A Yes. And you may be left with the impression that that's  
15 what he intended, and it may or may not have been what he  
16 intended.

17 Q All right. Let's go on to Dr. Piasecki. What are your  
18 comments about her assessment?

19 A Um, well, I, I don't agree with her conclusions. And,  
20 again, she concluded that he was competent and capable, um, of  
21 assisting counsel. But, there are a number of -- there are a  
22 number of interesting things. And, frankly, this was similar  
23 in Dr. Bradley's report. Neither of them diagnosed aphasia,  
24 even though they both describe disarthria or trouble talking,  
25 trouble understanding, trouble coming up with concepts.

1 Neither of them actually identified that he's actually  
2 aphasic, suggesting, again, a focused assessment that could  
3 have been potentially avoided, looking at some of the medical  
4 issues that are impacting his ability to interact. But,  
5 specifically, she indicates that he's able to describe legal  
6 strategies to mitigate his sentence that appear reality based,  
7 but she doesn't identify what any of them are.

8 So she draws a conclusion, but her assessment  
9 doesn't allow us to, um, determine what, what she was talking  
10 about or how she arrived at that conclusion. So she says he's  
11 able to describe some potential strategies that had potential  
12 to change his conviction to a lesser offense and remove him  
13 from death row. He described a possible series of events that  
14 could allow for his eventual release.

15 Well, if my review of the information is accurate,  
16 he's probably talking about fingerprints because he believes  
17 that if the fingerprint issue can be introduced as the  
18 substantive aspect of this appeal, he's going home. But, we  
19 don't know because Dr. Piasecki didn't actually document what  
20 specific things she was talking about.

21 She did make note --

22 Q Is that problematic -- excuse me for interrupting.

23 But is that problematic that that's not listed in  
24 her report?

25 A Well, it's problematic in this particular situation where



1 just what he says and just what the issues that he wants to  
2 talk about are is relevant, so --

3 THE COURT: Counsel, she's going to testify.  
4 You'll have a chance to ask her.

5 MR. ABBINGTON: Obviously. But I just meant  
6 from a, from a psychiatric point of view, are these things  
7 that should be documented in her report.

8 THE WITNESS: Yes. And these are, you know,  
9 these are words that, you know -- these are conclusions of a  
10 psychiatrist doing a competency assessment would say he, he --  
11 I mean it basically suggests he can weigh, manipulate, and  
12 prioritize information. But, it's a conclusion that's not  
13 substantiated by the elements of her examination. But the  
14 language is something that we, you know, may conclude, if the  
15 elements of the evaluation supported it.

16 BY MR. ABBINGTON:

17 Q So this -- we're talking about the standard of care  
18 before. The standard of practice as a psychiatrist. You --  
19 you're having those sort of conversations with him and you're  
20 going to cite an ability, you would cite that specifically in  
21 your report?

22 A Well, either that, or they're available in your written  
23 notes to support that you've actually -- what the information  
24 is that allows you to draw that conclusion. Otherwise, you  
25 really just don't know. It may very well be that there was an

1 interview characterized by a leading style of interaction, and  
2 then you might conclude that he knows, et cetera. Or the  
3 fingerprints, it may have been that that discussion reflected  
4 his concern about fingerprints and his belief that if he can  
5 get the fingerprints in, he could go home.

6 THE COURT: But no -- whatever the basis is,  
7 we're not going to know what it is until she testifies --

8 THE WITNESS: Exactly.

9 THE COURT: -- or her notes --

10 THE WITNESS: There you go.

11 THE COURT: -- are reviewed.

12 THE WITNESS: Yes. Yes; that's correct.

13 Now, she did also -- she did also note that he  
14 stammered. He had word finding difficulty. She made --  
15 here's -- she made another conclusion that his abstract  
16 thinking on comparisons was in tact, but we don't know --  
17 again, we don't know what she asked him, if it was a banana  
18 and an orange, or if it was something more. We don't know.  
19 So I appreciate the language she uses in her conclusions, but  
20 the report itself doesn't support them.

21 She also describes that he's capable of, uh, doing a  
22 thousand push-ups and tracking that, and that he's capable --  
23 at least by her review -- that his canteen records for a  
24 period of four weeks reflected that he was capable of managing  
25 his bank account. Those are conclusions that she draws.

1           And the issue of counting to a thousand with  
2 push-ups is, is of note because I asked him about that. He  
3 is a fit -- he's a fit man. And, you know, asking about do  
4 you exercise; what's your energy like, et cetera, how do you  
5 handle your daily routine, is part of what would be considered  
6 (inaudible) system. So, I talked to him, actually, about his  
7 push-ups. He said he does push-ups and stomach crunches each  
8 day. And he says he does a thousand push-ups. And I asked  
9 him, "How in the world do you count to a thousand?" And -- or  
10 "How do you know that you did a thousand push-ups?"

11           And he had a way of using a deck of cards. So when  
12 he explained this to me -- and, again, it was kind of in this  
13 staccato, limping along way to get the information -- a one is  
14 11, a 2 is 12. And, somehow, the -- you have to do that three  
15 times, three decks to get to a thousand. And --

16       Q   Do those numbers add up?

17       A   So I added the numbers because I -- you know, I thought,  
18 wow, that's an interesting adaptive, you know; except, that  
19 the numbers add up to about 750. If you multiply that by  
20 three, you're up to 2250. And it's doubtful that he's doing  
21 that.

22           But the point was that, using three decks of cards  
23 to get to a thousand, I couldn't figure out how he could do  
24 that. I couldn't figure out how the numbers would add up to a  
25 thousand, or it would be completely inconsistent that he

1 could actually keep track of a thousand, even though testing  
2 indicates he can do simple addition.

3           Okay. So with regard to the -- but she concludes,  
4 because he says he does a thousand and he uses cards to do it,  
5 that he's, he's capable.

6           The other thing she uses is his canteen records for  
7 a period of four weeks. And I looked at the canteen records.  
8 I looked back around a year-and-a-half, two years, and it  
9 looks like he, uh, he orders an awful lot of junk food  
10 throughout the month. An awful lot of junk food. And it  
11 pretty much amounts to about sixty to \$150 a month. Usually,  
12 it lands at about ninety or so. And it's pretty consistent.  
13 And, he tends to maintain a pretty good balance in his bank  
14 account. I don't know that that -- that I could draw a  
15 conclusion that he's actively managing his bank account. It  
16 looks like he orders a lot of junk food every month, and it  
17 amounts to about a hundred bucks. And somebody is putting  
18 money into his account, sometimes a hundred, sometimes three  
19 hundred. I mean somebody is putting money in there, and he's  
20 typically maintaining a good balance well in excess of the  
21 amount that he spends.

22           I'm not sure, however, that I would conclude that  
23 that suggests he has a sophisticated way of tracking his bank  
24 account. I think he's just ordering the same amount of junk  
25 food each month.

1 Q The presence of these can -- and the fact that he's been  
2 ordering things off of the canteen at Ely for at least  
3 13 years, give or take, not counting stints in at High Desert  
4 for court hearings, is there, is there something that can be  
5 gleaned from that?

6 A Well, I don't have all of, you know -- I, I know there's  
7 been a discussion of the I-file this morning. I don't have  
8 all the records to look and see what he's been doing exactly  
9 all these years, but Mr. Mulder functions as a man of habit,  
10 and habits that existed before the stroke are likely to be  
11 preserved and continued after the stroke, so long as they are  
12 relatively straightforward. He spent a lot of his life in  
13 prison. He had a number of years in prison prior to the  
14 stroke. My guess is he's probably been ordering a lot of junk  
15 food for a lot of years.

16 Q Did you have a chance to review some of his -- these, uh,  
17 some of the records that we did have from, from the State's  
18 file?

19 A I did that recently; yes.

20 Q All right. And do you notice any difference in his  
21 communications with prison staff, and these inmate requests  
22 and book requests that you reviewed?

23 A Well, there's a couple things that are notable. Prior to  
24 the stroke, clearly, you can see his handwriting is pretty  
25 good and very -- pretty succinct. And he's ordering, you

1 know, Dean Koontz and other sort of, uh, political thriller  
2 and thriller type books -- and quite a few of them, actually.

3           After the stroke, somebody else is typically doing  
4 the writing for him. He's signing it. And you can tell that  
5 it's very squiggly unstable handwriting. And, uh, in a time  
6 or two after the stroke, the books appear to be the same, but  
7 then they're not. Then they're all about pornography and  
8 pictures of women. Things like that. I mean no more thriller  
9 type novels after the first couple of orders.

10           And I -- it would be unusual that he would have been  
11 able to order those kinds of books right after the stroke, so  
12 I'm guessing they're maybe leftover from before the stroke,  
13 and they didn't get executed, or they were -- they were just  
14 around and recopied something, or had somebody copy them. But  
15 it's clear that, after those first couple, he's not reading  
16 those kinds of books anymore.

17 Q So now all the pictures, some of them more involve photo  
18 books of women naked?

19 A Nudity, right. And female sexual things. Yes.

20 Q Okay. Just wrapping up.

21           Did you agree with any of Dr. Piasecki's comments?

22 A Well, I agree he, uh -- I agree that he has cognitive  
23 problems.

24           Now, she diagnosed cognitive disorder. I diagnosed  
25 dementia. So I think I agree with the basic contention there

1 that he's got brain damage, but I don't agree with her  
2 conclusion that he's competent.

3 Q All right. In making your assessment that he's not  
4 competent, what specific legal concept did you review or  
5 consider?

6 A Whether he could assist -- whether he knew the factual --  
7 whether he knew the facts of his case, whether he could  
8 identify principles in his case, whether he could work  
9 meaningfully with counsel, whether he could express his  
10 own will in his interactions with counsel, in a generic way.

11 Q Right. So having seen Mr. Mulder on two different  
12 occasions for a total of somewhere over 10 hours, reviewed all  
13 these records, reviewed every -- all the other reports and  
14 these other documents, what are -- what's your ultimate  
15 conclusion? Do you still have the same conclusion regarding  
16 his diagnosis that you had before?

17 A Yes. I saw him a total of about eight hours. And, yes,  
18 the conclusions that are represented in my first report remain  
19 my -- remain the conclusions that I'm offering here within a  
20 reasonable degree of medical certainty:

21 He has dementia due to the stroke;

22 He has a personality change due to the stroke;

23 He has a complex aphasic disorder as a result of the  
24 stroke; and

25 He has hemiparesis, meaning half his body is

1 paralyzed as a result of the stroke.

2 Q And you --

3 A He also has a history of substance abuse. He has not  
4 used substances since his stroke.

5 Q And, ultimately, you conclude that he is not able to  
6 assist counsel and he's not competent --

7 A That is correct.

8 Q -- in this proceeding.

9 And your conclusion is made within a reasonable  
10 degree of medical and psychiatric certainty?

11 A All of my conclusions are; yes.

12 MR. ABBINGTON: I pass the witness, Your Honor.

13 THE COURT: Thank you.

14 Mr. Neidert.

15 **CROSS-EXAMINATION**

16 BY MR. NEIDERT:

17 Q Of course, just from a housekeeping standpoint, the  
18 report has the word "draft" all over. Was there a final  
19 report, or was the draft the final report in this case?

20 A I think that -- I think there was no final report after  
21 this report.

22 Q Okay. So even though it says "draft," there's not a  
23 subsequent report after that?

24 A Correct.

25 Q And with respect to your visit with, uh, Mr. Mulder this



1 year, you did not draft any formal report?

2 A That's correct. And, yes; that is correct.

3 Q Okay. So, so, today, you're relying on your notes from  
4 that, but not a report per se?

5 A Correct.

6 Q It's your testimony that, that Mr. Mulder's stroke  
7 resulted in what you diagnosed as dementia and what would --  
8 and make analogies to mental retardation, except the mental  
9 retardation is something that's diagnosed prior to the  
10 onset -- by age 18; is that correct?

11 A Well, they have some other substantive differences, but  
12 it's more of a layman analogy than it is a medical analogy.

13 Q Right.

14 A Yes.

15 Q So I guess my question would be, is, you made your  
16 conclusions about -- and we've heard a lot about what you said  
17 Mr. Mulder was capable of. Could you, in layman's terms, to  
18 help us, if, if you were dealing with a mentally retarded  
19 person, somebody who had -- was diagnosed prior to the age of  
20 18 with mental retardation with an IQ of 69 or 70, which is --

21 A Excuse me. Uh-huh. Yes.

22 Q -- which is what Mr. Mulder has been diagnosed with,  
23 would -- what would be different in that person than with  
24 Mr. Mulder in his ability to communicate with counsel and  
25 things of that nature?

1 A Well, a significant difference is that somebody -- so  
2 let's say, emotionally and even intellectually, because  
3 of the IQ, they're both functioning at about a seven-,  
4 eight-year-old level. The main difference is that somebody  
5 with mental retardation doesn't necessarily have aphasia at  
6 all. I mean somebody with mental retardation, typically, has  
7 a more -- not always, but typically mental retardation is sort  
8 of a diffused and generalized overall, even reduction of  
9 intellectual function.

10 In Mr. Mulder's case, he has that testing outcome  
11 that is the same as somebody on the border of, borderline  
12 mental retardation to mild mental retardation. But, he has  
13 the additional specific deficits of that aphasia; that he  
14 can't actually get the words out. He can't actually  
15 understand what's coming in. He can't name things very well.  
16 Those are things that you might not see in a mentally retarded  
17 person, unless they had a super imposed stroke, or other kind  
18 of illness.

19 For instance, somebody with -- I mean people with  
20 cerebral palsy are not necessarily mentally impaired at all.  
21 However, somebody with cerebral palsy could wind up with  
22 mental retardation and have had a stroke at the time of  
23 delivery. So you might see somebody like that, but not  
24 usually. Somebody with mental retardation usually doesn't  
25 have aphasia in the same way that he has it.

1 Q But with respect to a person that was mentally retarded  
2 as opposed to Mr. Mulder and his brain injury, that person  
3 would also have some of the same difficulties in communicating  
4 with counsel that you described with Mr. Mulder, wouldn't that  
5 be fair statement?

6 A I think that -- I think that is probably so; yes.

7 Q And that would include, perhaps, emphasize concentrating  
8 on issues that are not perhaps legally significant, such as  
9 the fingerprint issue that you keep coming back on, a mentally  
10 retarded person might think those fingerprints are really  
11 important, so I have to keep reminding my attorney how  
12 important they are -- just as Mr. Mulder does? I mean that's,  
13 that's possible?

14 A Yes.

15 Q And I'm sure you're aware that, in our legal system,  
16 mentally retarded people are prosecuted on a regular basis  
17 and, in fact -- and they're legally competent?

18 MR. ABBINGTON: Objection, Your Honor. The  
19 State went to great pains to argue that Mr. Mulder was not  
20 mentally retarded and addressed that in a prehearing brief.

21 MR. NEIDERT: And I'm not saying he is mentally  
22 retarded.

23 MR. ABBINGTON: So this almost seems kind of  
24 irrelevant.

25 MR. NEIDERT: I'm asking hypothetically.

1 THE COURT: No, no, no, I understand you're not.

2 No. Overruled. If the witness can answer the  
3 question, she can answer it.

4 BY MR. NEIDERT:

5 Q Did you understand the question?

6 You understand that people that are mentally  
7 retarded, not Mr. Mulder, but just people in general that are  
8 mentally retarded, that commit criminal acts, are criminally  
9 prosecuted and are considered to be competent to assist their  
10 attorneys --

11 A Well, sometimes --

12 Q -- even though they're mentally retarded?

13 A I would imagine that there are cases where they're not  
14 and where they are. But I think the default would be that  
15 they are, unless you demonstrate that they're not.

16 Q Okay. But, and -- but some of the behaviors you noted  
17 in Mr. Mulder, the -- for example, the obsession with the  
18 fingerprint, could be something you might see with a mentally  
19 retarded person with the same kind of limitations and  
20 cognitive ability?

21 A It's possible. Yeah.

22 Q Okay. You, in your report, you talk about the facts of  
23 this case. And I'm specifically, if you have your report, I'm  
24 looking at pages where you have marked, pages 5 and 6. And  
25 they're marked Bate stamped 39 and 40.

1 A Yes.

2 Q Those are, uh -- in fact, did you get those -- where did  
3 you get those facts from?

4 A I, I got these facts from a combination of Mr. Mulder, as  
5 well as testimony and records that I had available at the time  
6 of the preparation of this report.

7 Q So -- but Mr. Mulder -- because you wrote "Mr. Mulder's  
8 report." I'm assuming that, when you write that, that's  
9 something that Mr. Mulder specifically told you?

10 A You're right. Yes.

11 Q So Mr. Mulder could have reported to you that, uh, for  
12 example, that that last paragraph on page 5, Mr. Mulder  
13 reports that he and Kim were living together for three months  
14 prior to the homicide?

15 A Yes.

16 Q And he was serving as her pimp during that period?

17 A Yes. Yes, he was.

18 Q And based on your review of the other record and the  
19 court decision in this case, is that an accurate reflection of  
20 what appeared to be happening in the three-month period prior  
21 to the homicide?

22 A I think -- I think it's relatively accurate; yes.

23 Q Okay. And the -- and, likewise, with respect to the, uh,  
24 the victim in this case, uh, not paying him, and Mr. Mulder  
25 bringing back those two, two other people sort of, whatever

1 their role was, and leaving the victim with them --

2 A Yes.

3 Q -- Mr. Mulder reported all that?

4 A Yes, he did.

5 Q And that -- and Mr. Mulder told you, basically, that, uh,  
6 he left the victim alive with these two other individuals?

7 A Yes.

8 MR. ABBINGTON: Your Honor, I'm going to  
9 object to this line of questioning because we -- as we cited  
10 in our prehearing brief, specific questions regarding the  
11 facts of the offense to mental health professionals are not  
12 appropriate. The issue here is his ability to communicate,  
13 not his ability to recite specific facts.

14 The same objection would apply if the State was  
15 going to ask Mr. Mulder these same sort of questions when  
16 they -- if they were to call him, because I would imagine  
17 that's --

18 THE COURT: I thought counsel was asking  
19 the witness whether Mr. Mulder was able to relate these  
20 particular facts --

21 MR. ABBINGTON: Correct.

22 THE COURT: -- when queried.

23 MR. ABBINGTON: I think what the question -- my  
24 understanding of case law is that the questions go to his  
25 ability to communicate the facts, not the specific facts that

1 were communicated. The report is in --

2 THE COURT: I'll let you all argue that to being  
3 what the standard would be but, no, I mean, it's in the  
4 report. I'll let the witness continue and overrule the  
5 objection.

6 Go ahead.

7 BY MR. NEIDERT:

8 Q So he, he was able -- he would relay these facts to you?

9 A Yes.

10 Q And including his claim that he used the legal -- you  
11 know, the -- that somebody else committed the homicide?

12 A Yes. Yes. And I'll add that I'd read the opinions and  
13 so could interact with him around some of the things as well,  
14 to ask some questions, et cetera. But, yes, he offered a  
15 report of this. Yes.

16 Q And when you're dealing with a criminal defendant in a  
17 case, the -- would you agree that the primary role of the  
18 attorney is to have their, uh, client do -- tell them the  
19 facts as, as the client understands the facts to be?

20 A I think that's an important part of what the client  
21 should do; yes.

22 Q And in this case, by your own report, this -- Mr. Mulder  
23 is able to report, uh, the facts of his homicide -- of the  
24 homicide he stands convicted of, as he understands them?

25 A As he understands them; yes.

1 Q And these facts aren't -- are rational facts. They're  
2 not some, you know, aliens came down who zapped the victim to  
3 death. These are, these are my facts, and they correspond  
4 with what, what the court opinions and the trial records  
5 reflect are --

6 A For the most --

7 Q -- or the defense has raised, et cetera?

8 A For the most part, yes. And they do not appear to be,  
9 uh, as you've suggested, psychotic in their quality.

10 Q And he was also -- uh, he was also able to relate to you  
11 social history with respect to his family and things of that  
12 nature?

13 A Yes, he did. He did. I -- in preparation of the report,  
14 of course, I looked at other documents. But, yes, he was.

15 Q And so he could communicate that. He was able to  
16 communicate that information to you as well?

17 A Yes.

18 Q So you -- your -- you also put great weight at least --  
19 and maybe I'm putting more weight on your testimony than you  
20 were meaning to put on it -- that he had a hard -- he has a  
21 difficult time understanding legal concepts?

22 A Yes.

23 Q He does understand he's currently on the death row at  
24 Ely State Prison?

25 A He does.



1 Q He understands he's on the death row at Ely State Prison  
2 because he stands convicted of killing the specific victim in  
3 this case?

4 A Yes.

5 Q In 1998 or so?

6 A Yes. Yes.

7 Q And he understands that, if all the appeals and  
8 everything are unsuccessful, there's at least a possibility  
9 that, at some point in time, the State might strap him to a  
10 gurney and execute him.

11 A He does understand that. Yes.

12 Q So he understands all these concepts?

13 A Yes. He understands those concepts.

14 Q But -- so when you say that he doesn't understand legal  
15 concepts, is it safe -- is it fair to say -- and I don't want  
16 to put words in your mouth --

17 A Uh-huh.

18 Q -- that he doesn't understand legal concepts his attorney  
19 might be saying I think this is important, and then he can't  
20 wrap his head around that but, instead, he wants to talk about  
21 what he thinks is important?

22 A He can't weigh, manipulate, or prioritize information  
23 that his attorney talks to him about. But he can, and he has,  
24 latched on to what's important to him and expresses that over  
25 and over again, whether it's relevant to the appeal or not.

1           Yes, he has a belief about that and he expresses  
2 it.

3       Q    And a belief that, somehow, the fingerprint evidence  
4 is just all wrong and if he can clear himself on the  
5 fingerprints, he can get -- he might get to go home?

6       A    Yes.

7       Q    And, in his mind, that's it's big priority in the case  
8 because he doesn't want to delay things. He figures if he can  
9 get all this fingerprint evidence out, then maybe somebody  
10 will -- if they believe, will say, oh, if the fingerprint  
11 evidence is gone, then they'll say we don't have a case  
12 against you anymore.

13       A    That seems to be his primary focus.

14       Q    And he certainly was able to communicate that as a focus  
15 to you?

16       A    Oh, yes.

17                       MR. NEIDERT: Can I have a minute, Your Honor?

18                       THE COURT: Yes.

19 BY MR. NEIDERT:

20       Q    Just a few other little things. We talked -- I  
21 apologize. I need to get close to this microphone.

22                       You looked -- you reviewed the reports of  
23 Dr. Piasecki and Dr. Bradley?

24       A    Yes, I did.

25       Q    And, basically, the -- if I heard you right, starting

1 with, uh -- we'll start with Dr. Bradley, is you criticize  
2 him, uh, because you thought that he was doing prompting,  
3 rephrasing, and restating, which you consider inappropriate as  
4 a part of a competency evaluation?

5 A I used his words.

6 Q Okay.

7 A Those were his words. And I think the brevity of his  
8 report, and the conclusions that he drew, uh, suggest that  
9 rephrasing, restating, and prompting led to a lot of his  
10 conclusions.

11 Q But you don't know, without hearing him testify or, uh,  
12 what exactly -- while he used those words, you don't know what  
13 he meant when he says he was prompting, he was rephrasing, he  
14 is restating?

15 A Um --

16 Q You --

17 A -- I think that they -- I mean I would say that, that  
18 they have probably, uh, relatively definable meaning. But,  
19 you're right, that I don't know exactly what he meant by that.  
20 He does --

21 Q Dr. Bradley is probably better able to explain what he  
22 meant by those phrases in his report?

23 A Oh, that's true. I imagine he would be. He does -- and  
24 I understand that one might rephrase, restraighten -- restate  
25 and prompt Mr. Mulder. That's, that's a good way to get

1 through the interview with him because it's hard to get  
2 through if you don't do that, no matter how much time you  
3 spend with him. But, it compromises the degree to which you  
4 can draw conclusions.

5           The other thing is that he put, I believe, in his  
6 note, that he prompted the memory recall with -- he said -- I  
7 think it was Dr. Bradley -- a category prompt. So, in that  
8 case, I think we do know what he did.

9       Q     And what is a category prompt?

10       A     He probably gave some word that belonged in a category,  
11 like, uh, soccer ball, and maybe he used a prompt ball,  
12 something like that. I don't know exactly what he used, but  
13 something that would draw one's mind -- a clue. It would be  
14 a clue.

15       Q     Okay. And so, obviously, you disagree with his ultimate  
16 conclusions?

17       A     I do; yes.

18       Q     And do you, you disagree with his -- and you disagree  
19 with, I think based on at least how his report is presented,  
20 you disagree with, uh, how he might have conducted his  
21 interview, and that his interview seemed relatively short to  
22 you based on Mr. Mulder and your dealings with him?

23       A     Um, I'm making a note that it was -- I think he said it  
24 was an hour-and-a-half, hour and forty-five minutes. And  
25 his use of the words "prompting, restating, and rephrasing"

1 suggests a certain kind of interview. That's all.

2           And I think that, uh -- well, I suppose that I would  
3 challenge that that is not, necessarily, the best way to  
4 interview somebody like Mr. Mulder. But, I don't know exactly  
5 what Dr. Bradley did. I wasn't there, of course.

6   Q   But his diagnosis of cognitive -- under actions one of  
7 the diagnostic impression -- cognitive disorder not otherwise  
8 specified; it's in the same ball park, so to speak, as your  
9 diagnosis? It's a little bit different, but it's in the  
10 same -- he recognized that Mr. Mulder has a cognitive  
11 disorder --

12   A   Yes.

13   Q   -- of some kind?

14   A   That is correct -- yes; that's correct.

15   Q   I mean he didn't gloss it over completely. He doesn't  
16 say this guy seems perfectly normal to me. I don't see any  
17 problems.

18   A   Right.

19   Q   Correct?

20   A   Correct. We're in the same ball park.

21   Q   You're in the same ball bark with that and every -- and  
22 just as you're in the same ball park with the substance abuse  
23 being in remission, whether it's forced or not.

24   A   Yes.

25   Q   So -- and then with Dr. Piasecki, if I heard you right,

1 your criticism of Dr. Piasecki was that she had conclusions,  
2 but her report is not specific as to how -- what's the basis,  
3 what's behind the conclusions. It seemed more like a general  
4 statement with the conclusions?

5 A Yes. Yes.

6 Q And so, at this point, you're not. You can't tell  
7 because you can't read her mind, and you didn't see her  
8 notes, what, what thing brought -- caused her to reach those  
9 conclusions just reviewing her report?

10 A That's true.

11 Q Dr. Kessel, do you do competency evaluations on any kind  
12 of a regular basis? Have you done it in the past? I'm just  
13 trying to remember from your background.

14 A Yeah. Well, from, from 1992 through 1994, two-and-a-half  
15 years, I was a Medical Director at the Norris Town Forensic  
16 Assessment Unit. So anybody who was deemed not competent to  
17 proceed to trial would be, uh, sent to my unit, and then it  
18 would be my responsibility, as the unit director, to either  
19 restore them to a competency sufficient to allow them to go to  
20 trial, or to communicate with the Court that they were not in  
21 fact going to be able to achieve competency. I did that for  
22 two-and-a-half years on behalf of the Commonwealth.

23 For another two-and-a-half years, uh, on behalf of  
24 the Court of Common Pleas in Philadelphia, I served at the  
25 discretion of the Court to do competency assessments on

1 pretrial defendants. So I would say that I've done, uh, a lot  
2 of them; yes.

3 Q Okay. And I'm not putting that down, but that's -- in  
4 your current practice, you don't do it very much anymore?

5 A I would say that my psychiatric practice now, it's part  
6 time. My full-time work is with Cigna.

7 Q With Cigna?

8 A Yeah. I mean I would, you know, qualify that, that I  
9 engage in regular forensic work.

10 Q Well, and I'm not challenging your qualifications. I was  
11 just asking, you know, where it was at.

12 Would you agree that, with respect to Mr. Mulder,  
13 basically, his aphasia is such that, generally, people have a  
14 hard time communicating with him?

15 Would you agree with that? I mean --

16 A That his aphasia causes --

17 Q Yes.

18 A -- there to be a difficult time with communicating.

19 Q Communicating both ways.

20 A I would agree with that; yes.

21 Q And -- but that if things are explained to him, if you  
22 take complex strategies and you simplify them, divide them  
23 into discrete parts, that, uh, Mr. Mulder is more able, at  
24 that point, to answer each of the parts as opposed to this  
25 long complex question, or to convey information?

1 A Oh, let me break -- if you don't mind, let me answer that  
2 in parts.

3 Simple concepts are easier for him to understand  
4 than complex concepts; yes. Breaking things into simple  
5 concepts as they relate to his activities of daily living;  
6 yes. Simple concepts as they relate to his legal proceeding,  
7 he can't internalize. He can't weigh, prioritize, or  
8 manipulate information in a meaningful way, even if you break  
9 that into simple concepts.

10 And that, for instance, would be evident in the, in  
11 the discussions that -- particularly in the second evaluation,  
12 where Mr. Abbington was going over, uh, things pretty  
13 redundantly. We would come back to them. I'd rephrase them  
14 in a lot of different ways, and he still couldn't get them.

15 So, it's a complex answer. In general, simple  
16 things are easier for him to understand; yes.

17 Q And would you agree with me, having done forensics in the  
18 past in Pennsylvania, that at the trial -- at the time of  
19 trial, when a person before they faced a jury, is, you know,  
20 the -- that's -- the competency then is of a paramount  
21 importance to be able to assist their attorneys to gather all  
22 the information to present, present whatever defense we're  
23 going to raise in the trial?

24 MR. ABBINGTON: Objection, Your Honor. The  
25 standard for competency is the same for trial as for habeases.



1 It's the standard in the Ninth Circuit. I don't know how we  
2 could ask that question at this point.

3 THE COURT: Well, I was just, really, focusing  
4 more on relevance. We're not at the trial stage right now.

5 MR. NEIDERT: I understand that.

6 THE COURT: We're concerned with --

7 MR. NEIDERT: I understand. I -- I -- my  
8 question -- my follow-up question was going to be, Your Honor,  
9 at the point where we're dealing with an appellate process,  
10 we're dealing with a developed record, the -- I was going to  
11 ask her whether the participation of a defendant would be,  
12 in her opinion, be greater or less than it would be at the  
13 preparing for a trial --

14 THE COURT: Okay. That goes -- yeah, I don't  
15 think that's within the scope of her -- you're calling for a  
16 legal opinion now, and that's something we'll be talking  
17 about. For example, if we have issues that can be decided as  
18 a matter of law on habeas, does it matter whether the -- a  
19 petitioner is competent? That's kind of --

20 MR. NEIDERT: And that's what I'm getting at,  
21 Your Honor.

22 THE COURT: -- what you're suggesting. And,  
23 that, you can all argue to me because I don't think the  
24 witness can help you on that.

25 MR. NEIDERT: Okay. And that's fine, Your

1 Honor.

2 BY MR. NEIDERT:

3 Q At this point, Dr. Kessel, thank you for your time. I  
4 have no other questions.

5 THE COURT: Thank you.

6 THE WITNESS: Thank you.

7 THE COURT: Anything further, Mr. Abbington?

8 MR. ABBINGTON: Actually, yes, Your Honor. I'm  
9 sorry.

10 **REDIRECT EXAMINATION**

11 BY MR. ABBINGTON:

12 Q Dr. Kessel, you also consulted Dr. Toomer regarding that  
13 case?

14 A Yes, I did.

15 Q Correct.

16 One of his concerns was that, I believe he testified  
17 yesterday -- and you were present for part of his testimony?

18 A No, I wasn't.

19 Q No, you were not. He was present for another person.

20 All right. The -- is there a difference between  
21 communicating with Mr. Mulder and communicating with someone  
22 of just low intelligence? That there's this idea here that,  
23 if we talk to him in little, three-letter words and five-word  
24 sentences, that everything will be okay.

25 Will it be okay?

1 A No, it won't. It won't be okay. There is a difference.

2 Q Can you tell us what that is?

3 A Yes. Uh, Mr., Mr. Mulder -- and I used this analogy a  
4 little bit earlier -- Mr. Mulder, metaphorically had shrapnel  
5 go off in his head; that he has areas of his brain that are  
6 destroyed; areas of his brain that are damaged; areas of his  
7 brain that have recovered to some degree. Somebody with, uh,  
8 you know, mental retardation, or otherwise diffusely impaired  
9 intellectual function doesn't have that.

10 So, for instance, Mr. Mulder has very specific  
11 deficits in his ability to develop abstract thoughts, to  
12 weigh and manipulate and prioritize data in excess of somebody  
13 who simply has low intellectual function. He has spotty,  
14 specific, moderately severe deficits in a number of areas that  
15 would be impaired in a mentally retarded person, but wouldn't  
16 necessarily be impaired way out of proportion to their  
17 intellectual function.

18 Q As regards to the results of his intracerebral hemorrhage  
19 and stroke, have you noticed -- what would you say regarding  
20 his ability to store, form, store, retrieve and manipulate,  
21 weigh, or prioritize memory, language, and speech?

22 A Oh, there -- they are all severely impaired. The likely  
23 single retained relative strength that he has is his ability  
24 to recognize faces when he sees them.

25 So, for instance, if he sees you, he's going to know

1 he met you before, but he may not be able to say, oh, Brian,  
2 I -- he's my lawyer. But if he sees you, he'll have some  
3 recollection. So that is a relative strength for him.  
4 Unfortunately, it's really not related to his competence. It  
5 has more to do with his ability to get through the day in a  
6 structured environment.

7 Q So just so we're clear, so we're not skirting this at  
8 all. Given his severity of impairment, he's lucky to  
9 recognize me, let alone talk to me?

10 A Yes; that would be a fair statement.

11 Q All right. So can be a participant or a director of  
12 these habeas proceedings that he's involved in now, or is he  
13 just along for the ride with me?

14 A To the extent that he is able to passively allow you to  
15 represent you because he trusts you, he can be a participant.  
16 But, he can't direct or have a discretionary view of what  
17 you're doing.

18 Q Would you think that Mr. Mulder has any ability to recall  
19 the jury selection in his case in 1996, and any conversations  
20 that he had with counsel regarding jury selection?

21 A I didn't specifically ask him about jury selection, so I  
22 would -- I would anticipate he may have some vague memory, but  
23 would not be able to communicate specific discussions between  
24 he and his attorney. But, I didn't specifically ask him about  
25 that.

1 Q One of the issues that he and I discussed when you were  
2 present was this idea that his, one of his lawyers -- that  
3 he's entitled to two Rule 250 qualified attorneys.

4 Do you recall --

5 A Yes.

6 Q -- us trying to have that conversation?

7 A I do.

8 Q How did that go?

9 A Uh, I believe -- well, it didn't go well. He missed your  
10 point. He came back to the point of one was a nice attorney.  
11 One was not a nice attorney. One did a good job. One didn't  
12 do a good job. But he didn't understand that they needed to  
13 be present and working on his case together, and, uh, working  
14 substantively in time on his case.

15 Q Do you recall making -- talking about a claim that we had  
16 that one of his attorneys had left the trial --

17 A Yes.

18 Q -- several different times during the trial --

19 A I do remember that.

20 Q -- and was not present. And do you recall he had  
21 difficulty remembering who that person was?

22 A Yes.

23 Q Even though I say that that person is central to his  
24 case?

25 A Yes.

1 Q Who was that person?

2 A Well, I, I have to come back to my notes. I believe that  
3 it was Mr. Cherry.

4 Q Right. He has him down as being Perry?

5 A Yes. Well, Mr. Cherry or Mr. Perry variously.

6 Q In regards to criticism of Mr. Cherry's performance  
7 at trial, what was Mr. Mulder able to internalize about  
8 Mr. Cherry that you recall?

9 A Just a minute.

10 Q Sure. Sure.

11 A Okay. The names get a little confusing for me as well.

12 Q No, I understand.

13 A He felt favorably about Mr. Cherry. He did not feel  
14 favorably about the attorney that was with him most of the  
15 time.

16 Q You mean Elizabeth McMann, who is now deceased?

17 A Yes. Yes. He felt --

18 Q Do you remember -- I'm sorry. Go ahead.

19 A He felt that she did not represent him well, but  
20 Mr. Cherry did.

21 Q Was he able to discuss -- do you recall whether we were  
22 able to discuss, at all, anything that we got -- anything  
23 related to Elizabeth McMann, other than whether he liked her  
24 or didn't like her?

25 A He knew that she had died.

1 Q Do you know if he could recall anything specific about  
2 her performance at his trial?

3 A No, he could not. Just that he didn't like her.

4 Q All right. Regarding victim impact evidence, do you  
5 recall whether he was able to discuss that at all?

6 A I don't recall that.

7 Q All right. Did he -- did Mr. Mulder, is he capable of  
8 recalling specific incidences of, of prostitutes, of  
9 statements that were made during the course of his trial, or  
10 does he just have an emotional memory of that trial?

11 A That's a -- uh, no, he can't recall specifics. I think  
12 that the way that you characterize that, he has an emotional  
13 memory for things that registered as emotionally important to  
14 him. Those things he can remember. But, he can't remember  
15 specifics about other conversations or even specific  
16 statements that happened that upset him.

17 Q In your presence, did Mr. Mulder show great difficulty or  
18 inability -- or was he capable of reading? Did you try to have  
19 him read some things there while you were there?

20 A I did. I did ask him to read some things. He would stop  
21 in frustration and basically say he used to be able to read,  
22 but he really can't anymore.

23 Q So he's not going to be capable of, like, reading jury  
24 instructions and making decisions about which ones we should  
25 challenge and which ones we shouldn't?

1 A No. And I, I do believe Dr. Piasecki indicated things  
2 should be provided to him in writing. And that would be of no  
3 use to him.

4 Q So if I was to give a copy -- I could copy this, this  
5 entire petition, give it to him for a year, would that do any  
6 good?

7 A Absolutely not. It would do no good whatsoever.

8 Q So if he read a page a day, would that help?

9 A He wouldn't be able to read a page a day.

10 Q Would he be --

11 A And it, and it wouldn't help. He, he wouldn't be able to  
12 get through. It would be hard for him to get through a full  
13 sentence. He would have to register each word, and then he  
14 would have to figure out what the words meant in context to  
15 each other. And because of his aphasia, he can't do that.

16 Q So he's reading a word at a time with no connection to --

17 A That's right.

18 Q -- what the words are that came before?

19 A That's right. No context. Somebody would have to  
20 provide that for him. It would have to be exceedingly simple  
21 and redundant. And, frankly, it would have to be an emotional  
22 experience for him. He couldn't internalize it in any other  
23 way.

24 Q So he could tell me what he felt about it?

25 A Yes.



1 Q But he couldn't tell me what he remembers?

2 A Yes, sir; that's correct.

3 Q Or, what he thinks about it or what he wanted to do about  
4 it?

5 A That's correct.

6 Q As far as any, any of his, any conversation we had  
7 regarding his ability to assist trial counsel, or his  
8 conversations with trial counsel, did Mr. Mulder demonstrate  
9 any ability to recall those conversations?

10 A No, he didn't.

11 Q He just, once again, if his -- his reflection of trial  
12 counsel was the ones he liked; the ones he didn't like?

13 A That's right.

14 Q This -- we talked about, when we were present, we talked  
15 about this woman Christina Wildabell (phonetic), who is  
16 actually Mr. Cherry's substitute counsel during his trial.

17 Was Mr. Mulder able to recall Ms. Wildabell at all?

18 A No. No, he wasn't.

19 Q So, obviously, he wouldn't be of any help to anything --  
20 any claims that involve Ms. Wildabell?

21 A That's e correct.

22 Q Or Elizabeth McMann, other than the fact that he liked  
23 her --

24 A He didn't like her.

25 Q Or he didn't like her. And Michael Cherry, other than

1 the fact that he didn't like him --

2 THE COURT: He did like him.

3 THE WITNESS: He did like him.

4 MR. ABBINGTON: He did like him, didn't like  
5 her. I'm sorry. I got that mixed up.

6 BY MR. ABBINGTON:

7 Q All right. The trial judge, did he have any memory of  
8 the trial judge or the judge that overruled -- that ruled  
9 over, presided over his case?

10 A He identified the judge as Mike Perry. And I know that's  
11 not who the judge was, and said he did good by him.

12 Q The judge was Judge Pavcoski (phonetic). So this  
13 Mike Perry is Mike Cherry?

14 A Yeah. I assume Mike Perry is Mike Cherry.

15 Q All right. Is Mr. Mulder capable of reading -- if I gave  
16 him a copy of a transcript, could I leave it with him and come  
17 back in a year and he could read it?

18 A No.

19 Q Could I sit there with him and we could go over page, and  
20 a page at a time, one page per day, for the rest of our lives,  
21 would that be okay?

22 A You could do that indefinitely. It would not impact his  
23 ability to understand what you had expressed to him.

24 Q All right. So this whole thing of discussing case names  
25 and which, which theories we want to pursue are not -- that's

1 not a conversation I'm ever going to have with him?

2 A That's correct. He trusts you to do what you want  
3 him to do. To the extent that he trusts you, he can be a  
4 participant, passive participant.

5 Q Back -- back to these fingerprints. Do you remember I  
6 had a conversation with the State -- excuse me, his defense  
7 counsel? This Mr. Cherry had hired a guy to do the  
8 fingerprints who was unqualified. His name was Howard Dolder  
9 (phonetic) and we had a conversation with Mr. Mulder about  
10 that.

11 Do you recall that conversation?

12 A Yes, I do.

13 Q What was he able to recall about Mr. Dolder, if you  
14 recall, or his disqualification as an expert as his trial?

15 A I don't recall specifically, but I, I do remember him.  
16 And I could consult with my notes, if you like.

17 Q Sure.

18 A But I do remember him ruminating about he wasn't  
19 qualified and his testimony should be thrown out.

20 Q Now, did we have occasions, in the course of those  
21 conversations, where I -- where you asked -- you asked  
22 Mr. Mulder a question that I had asked him earlier?

23 A Yes.

24 Q And then he changed his answer completely and admitted to  
25 you that he just had said something.

1 Do you recall several of those incidents?

2 A Yes. I have a series of questions, about an  
3 hour-and-a-half in, where I -- do you want me to reference  
4 them?

5 Q Yes, please.

6 A All right. I stopped the interview or the discussion  
7 that you and he were having and asked Mr. Mulder to tell me --  
8 and this is pretty simple, what are the -- "Michael, what are  
9 the main issues in the case?"

10 "Fingerprints. I'm positive they'll let me out.  
11 Fingerprints. Metro Police couldn't find any prints. Come  
12 on, man." I quoted that.

13 I said to him, "What else is important?"

14 "That's the main one."

15 I say to him, "What is Brian talking to you about  
16 today?"

17 "October. We'll see down south. October. We're  
18 going to see, all the doctors and me, and we're going to see  
19 the judge. See if I gonna help Brian solve my case."

20 Okay. And this is me now intervening again. "What  
21 does Brian say about the main point?"

22 "He doesn't want it. He doesn't want it cuz', uh,  
23 October."

24 Then I say, "What are his main concerns?"

25 "I can't really work with him to solve the case."

1 I say, uh, "What's the issue?"

2 "I" don't know. Stroke.

3 "Stroke isn't part of my case, is it?"

4 And that's kind of a full quote that I took notes  
5 of. So it was pretty evident that he had something in his  
6 mind that had to do with an October -- I presume an October  
7 hearing, although I'm not completely certain. He thought  
8 fingerprints were important.

9 At one point during the conversation, he seemed to  
10 convey something about the fact that the stroke was relevant,  
11 but then he didn't seem to understand that was relevant.

12 Q So he's not sure what's relevant and what's not?

13 A No. It was a -- I made -- I made some notes during  
14 that, that -- my observations of this interview: "Michael's  
15 contribution is meaningless. Brian has to lead on everything.  
16 Michael's off point, abbreviated, and inappropriate."

17 I mean that was about half-way through. I just made  
18 a little note at the top of the page for me as we were kind of  
19 going through this.

20 Q You made that at time we were going through that  
21 interview?

22 A Yeah. Uh-huh.

23 Q In the -- how long did we spend together that --

24 A About three-and-a-half hours --

25 Q All right.

1 A -- with Mr. Mulder.

2 Q If, if we were to re prize that entire conversation all  
3 over again, do the same three-and-a-half hours all over again,  
4 just like before, would we be any better off than we were back  
5 in March?

6 A No.

7 Q Is Mr. Mulder qualified to talk about the denial of  
8 expert assistance at his trial?

9 A No.

10 Q Can he talk about the proportionality of the death  
11 sentence?

12 A No.

13 Q Nevada's capital murder scheme?

14 A No.

15 Q His memory of events, is it reliable? Is it the sort of  
16 memory that you would be willing to rely on in the more --  
17 most personal of your own personal affairs?

18 A No. No. Although he had a skeletal abil -- you know, he  
19 had an ability to provide a skeleton, but I would want to  
20 confirm what he reported.

21 Q Bringing your attention to that -- Dr. Bradley examined  
22 Mr. Mulder. How many children did Mr. Mulder tell he had --  
23 tell Dr. Bradley he had?

24 A None.

25 Q How many did he tell Dr. Piasecki he had?

1 A I think one.

2 Q Is there any doubt everyone seems, that's evaluated him,  
3 yourself, Dr. Tumor, Dr. Piasecki, and Dr. Bradley all agree  
4 that he is cooperating within the fullest extent of his  
5 ability?

6 A Yes. The only person I think who felt he wasn't  
7 cooperating was Dr. Bishop, way back in 2003, when he  
8 interviewed Mr. Mulder with Dr. Milner, who did think he  
9 was cooperating.

10 Q And Dr. Bishop is the same one that said that Mr. Mulder  
11 was getting all his needs met at the prison, even back in '98,  
12 before his arm reached the degree of contracture that exists  
13 today?

14 A Yes.

15 Q All right.

16 Can Mr. Mulder understand the complexities of lethal  
17 injection process in the three chemical proceeding?

18 A No.

19 Q All right. So as -- in closing, the -- his inability to  
20 form, store, retrieve, manipulate, weigh and prioritize  
21 memory, language and speech, essentially mean that any  
22 conversation that I have with him, I can't bank on it; that  
23 that's really what he meant to say or that -- what he meant to  
24 say; that he heard what I, what I said; that he understood  
25 what I said; that what he intends to say and what he actually

1 says are all the same thing?

2 A That's correct. Those four elements of communication are  
3 unreliable in him.

4 Q And that's to a reasonable degree of medical and  
5 psychiatric certainty?

6 A Yes, it is.

7 MR. ABBINGTON: That's all, Your Honor.

8 THE COURT: All right. Thank you.

9 Mr. Neidert?

10 MR. NEIDERT: Nothing further, Your Honor.

11 THE COURT: All right. Thank you, doctor.

12 Can the doctor be excused now?

13 MR. ABBINGTON: Yes, please.

14 THE COURT: No need for her to stand by.

15 Thanks very much. Watch your step as you go down.

16 THE WITNESS: Right. Right. Will do.

17 THE COURT: We already lost one witness.

18 All right. Counsel, before we break, I just wanted  
19 to get an update on where we stand on the others.

20 Now, we have doctor -- I know you're going off to  
21 High Desert. Tomorrow morning, was it 10:00 a.m. we had  
22 Dr. Piasecki?

23 MS. PROCTOR: I have her available at  
24 nine o'clock, Your Honor. I don't know what your calendar  
25 is.



1 THE COURT: Oh, we can accommodate.

2 We don't have anything at 9:00, Donna, do we?

3 THE CLERK: No, Your Honor.

4 THE COURT: So all we'd need would be to make  
5 sure Shawn is ready to go with the video, but 9:00 a.m. is  
6 good.

7 And then what about the other witnesses? Oram is  
8 not available until Thursday, as I recall.

9 MS. PROCTOR: No. He's tomorrow.

10 MR. ABBINGTON: He's tomorrow afternoon, Your  
11 Honor.

12 THE COURT: Tomorrow afternoon?

13 MR. ABBINGTON: He's available tomorrow  
14 afternoon or Thursday afternoon, if that --

15 THE COURT: Oh, no --

16 MR. ABBINGTON: -- if tomorrow doesn't work for  
17 the Court.

18 THE COURT: But he would be available tomorrow,  
19 okay.

20 What about Dr. Bradley? Was he the one that was  
21 Thursday?

22 MS. PROCTOR: Dr. Bradley is Thursday morning.

23 THE COURT: And what time?

24 MS. PROCTOR: I have him currently scheduled for  
25 ten o'clock. I have my secretary trying to get a hold of him

1 to see if we can move that up to 9:00.

2 THE COURT: Yeah. If we could make it 9:00. It  
3 would be great. But I'll put 9:00 or 10:00.

4 How about Williams and Peltzer?

5 MS. PROCTOR: I have them coming into Vegas this  
6 evening, so they should be available tomorrow.

7 THE COURT: So after Piasecki, we could go ahead  
8 and go to Williams and Peltzer, and then Oram in the  
9 afternoon.

10 MR. ABBINGTON: That would be great, Your Honor.  
11 I think Mr. Oram said that anytime after -- that he has a  
12 doctor call tomorrow, but anytime after 1:30, I think, is what  
13 I had him scheduled for.

14 THE COURT: 1:30. Okay. We'll say 1:30  
15 tomorrow for Oram, and then Williams and Peltzer following  
16 Piasecki and/or Oram, depending how long -- they probably  
17 won't take a long, long time?

18 MS. PROCTOR: I wouldn't think so.

19 MR. ABBINGTON: No, I wouldn't think so.

20 THE COURT: Okay. Good. Good.

21 Yeah, if you could get Dr. Bradley to move up to  
22 9:00 on Thursday, that would be great.

23 Well, good luck with your record hunt this afternoon  
24 then, and we'll see you tomorrow morning at nine o'clock.

25 And, Donna, if you would communicate with Shawn just

1 to let him know.

2 THE CLERK: Yes, Your Honor.

3 THE COURT: We'll start at nine o'clock. Maybe  
4 he could be here a little before 9:00 so we can make sure we  
5 get that video system operational.

6 MS. PROCTOR: Absolutely.

7 THE COURT: Okay. Thank you all.

8

9 (Court Adjourned.)

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I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

\s\ Kathryn M. French

August 18, 2011

\_\_\_\_\_  
KATHRYN M. FRENCH, RPR, CCR  
Official Reporter

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I N D E X

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I N D E X O F E X H I B I T S

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No. \_\_\_\_\_

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OCTOBER TERM, 2018  
IN THE SUPREME COURT OF THE UNITED STATES

=====

MICHAEL JOSEPH MULDER, Petitioner,

v.

WILLIAM GITTERE, Warden, Respondent.

=====

*On Petition for Writ of Certiorari to the  
Supreme Court of the State of Nevada*

=====

**PETITIONER'S APPENDIX**

Volume III of IV  
(APP. 001- APP. 770)

=====

**CAPITAL CASE**

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## VOLUME 1

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## VOLUME III

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## VOLUME IV

Appendix E	Order, <i>Mulder v. Baker, et al.</i> , District Court, Nevada Case No. 3:09-cv-00610 (September 26, 2011) .....APP0716-0748
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# APPENDIX D

# APPENDIX D

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UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA  
BEFORE THE HONORABLE PHILIP M. PRO, DISTRICT JUDGE  
---o0o---

Michael Joseph Mulder, : No. 3:09-cv-610-PMP-RAM  
:   
Plaintiff, : August 4, 2011  
:   
-vs- : United States District Court  
: 333 Las Vegas Boulevard  
E.K. McDaniel, et al., : Las Vegas, Nevada  
:   
Defendant. : **VOLUME III**  
:   
:

**TRANSCRIPT OF EVIDENTIARY HEARING  
TO DETERMINE PETITIONER'S COMPETENCY TO  
PROCEED WITH HABEAS ACTION**

A P P E A R A N C E S:

FOR THE PETITIONER: Brian Abbington  
Sarah Hensley  
Attorneys at Law

FOR THE RESPONDENTS: Heather D. Proctor  
David Neidert  
Deputy Attorneys General

**PMP/FTR: 080411@9:00am**

Proceedings recorded by digital recording produced by  
computer-aided transcript

Transcribed by: KATHRYN M. FRENCH, RPR, CCR  
NEVADA LICENSE NO. 392  
CALIFORNIA LICENSE NO. 8536

1 Las Vegas, Nevada, Wednesday August 3, 2011, 9:10 a.m.

2 ---OoO---

3

4 THE COURT: Good morning, everybody. Have a  
5 seat.

6 All right. How did your trip to High Desert go  
7 yesterday, and were you able to look at the Inmate File?

8 MR. ABBINGTON: Yes, we were, Your Honor. And  
9 we --

10 THE COURT: Was it in the same condition as the  
11 one you got?

12 MR. ABBINGTON: That would be no.

13 THE COURT: Okay. Well, I'm glad they don't  
14 maintain them that way. That's good to hear. It's kind of --

15 MR. ABBINGTON: It was -- I think it would  
16 be a fair statement to say it didn't have all the tabs and  
17 indicators we were looking for in the -- under the scheme of  
18 the I-File, but it did have all the materials that counsel has  
19 provided. So in that sense, everything we have is everything  
20 that's in there. And that's --

21 THE COURT: Right. Well, you've got what the  
22 State got. I mean that's --

23 MR. ABBINGTON: Well, I got what they have.

24 THE COURT: Yeah. Okay.

25 MR. ABBINGTON: I think anything else

1 would be --

2 THE COURT: But now it's in a more organized  
3 fashion, you can make hide nor hair of it?

4 MR. ABBINGTON: That's correct. And I think  
5 that any, any other connections would be something that  
6 I might question the witness about, the back of other  
7 documentation, but it would not go -- but it would not go  
8 to the admissibility of the file.

9 THE COURT: So do we need the warden to truck  
10 down here?

11 MR. ABBINGTON: I would not request that,  
12 Your Honor.

13 THE COURT: Okay.

14 MR. ABBINGTON: Unless they just wanted to, out  
15 of an abundance of caution, for their own purposes. But other  
16 than --

17 THE COURT: Okay. Okay.

18 MS. PROCTOR: Your Honor, based on that, we  
19 would just ask for the admission of Exhibit 506 and 507, which  
20 is the I-File.

21 THE COURT: Any objection, then, to 506 or 507?

22 MR. ABBINGTON: No, Your Honor. Like I said, I  
23 may ask some questions regarding the other stuff with some of  
24 their other witnesses.

25 THE COURT: Okay.

1 MR. ABBINGTON: But as far as admissibility, no,  
2 I don't have a problem.

3 THE COURT: Excellent. Okay. Well, I'll  
4 receive 506 and 507.

5 (Whereupon, Exhibits 506 and 507 -- I-File, was  
6 received in evidence.)

7 THE COURT: And I had Donna check with you on  
8 Dr. Bradley, not able to reach you because we were just -- we  
9 had him trying to move to 9:00 tomorrow morning?

10 MS. PROCTOR: Yes, Your Honor. We certainly  
11 have that hope that we can move him to nine o'clock.  
12 However, my office is still trying to reach him. That is  
13 my secretary's goal today, is to try to reach him to move  
14 him to nine o'clock.

15 THE COURT: All right. All right. Great.

16 Well, then, we have our next witness, I believe. I  
17 see someone on the video.

18 Good morning, doctor. Can you hear me all right?

19 THE WITNESS: Yes, I hear you (unaudible).

20 THE COURT: Good morning.

21 All right. Why don't we go ahead -- are you all  
22 ready to proceed with the next witness then?

23 MR. NEIDERT: Yes, Your Honor. And  
24 it's, actually, our witness at this point in time. It's  
25 Dr. Piasecki.

1 THE COURT: Yeah, go ahead, Mr. Neidert. Come  
2 on up.

3 And, Donna, if you would please administer the oath  
4 to Dr. Piasecki -- is it Piasecki? How do you pronounce it?

5 THE WITNESS: It's Piasecki.

6 THE COURT: Thank you. To Dr. Piasecki.

7 THE CLERK: Yes, Your Honor.

8  
9 **DR. MELISSA PIASECKI,**  
10 called as a witness on behalf of the Respondents,  
11 was sworn and testified as follows:

12 THE CLERK: Thank you. Please be seated.

13 And if you would state your full name for the record  
14 and spell your last name.

15 THE WITNESS: Melissa Piasecki, last name,  
16 (inaudible).

17 THE COURT: And, Dr. Piasecki, if at anytime, if  
18 you have difficulty with the transmission of hearing this,  
19 hearing what's being said, just tell us if we're not coming  
20 through clearly, and we'll kind of go back over the same  
21 territory for you.

22 THE WITNESS: Thank you.

23 THE COURT: All right.

24 Go ahead, Mr. Neidert.

25 \\

\\



1 THE COURT: Okay.

2 (Off the record.)

3 RECORDER: Okay.

4 THE WITNESS: Do you hear that? The  
5 microphone -- can you hear that? Does that help at all?

6 THE COURT: Joan, can you hear?

7 RECORDER: Yes.

8 THE COURT: It does?

9 RECORDER: Yes.

10 THE COURT: Apologize. We'll just ask you to  
11 keep that microphone nearby and maybe direct your comments to  
12 that. I know it's awkward because you'd prefer to look at  
13 what you're seeing on your video monitor, but, if you can  
14 direct your voice to that microphone, that will probably help  
15 us.

16 Okay. Let's go back on and try.

17 Go ahead, Mr. Neidert.

18 BY MR. NEIDERT:

19 Q And, again, you -- your background, is it a Forensic  
20 Psychiatrist?

21 A Yes.

22 Q And, Dr. Piasecki, do you do any teaching with respect  
23 to -- in forensic psychiatry?

24 A I do. I have teaching degrees in both medical and  
25 (inaudible) education settings.



1 Q And is there a specific area in the legal education  
2 setting that you teach -- what specific area in the legal  
3 education do you teach as a Forensic Psychiatrist?

4 A (Inaudible).

5 Q Do any of those, one of those courses -- do any of those  
6 courses have to do with the competency of prisoners in the  
7 criminal justice system?

8 A Uh, yes. There is, uh, (inaudible) competency to stand  
9 trial and (audible).

10 Q And you teach both those classes?

11 A I can.

12 (Digital recording, witness is inaudible.)

13 Q Were you asked by the Attorney General's office in Nevada  
14 to evaluate a prisoner named Michael Mulder?

15 A Yes, I was.

16 Q Did you do an evaluation with respect to Michael Mulder?

17 A Yes.

18 Q Do you remember where you did that, uh, that evaluation  
19 at?

20 A Yes. I did that at the -- in Carson City at the Nevada  
21 State Prison.

22 Q Do you remember, approximately, when that was?

23 A That was on June 11th, 2010.

24 MR. NEIDERT: Your Honor, I don't know how to go  
25 about this. I would have asked Dr. Piasecki to identify

1 Mr. Mulder, but I'm not sure if she can see him with the  
2 monitor.

3 THE COURT: That's not necessary. It's  
4 unnecessary. We'll accept -- I'll make the finding that -- I  
5 take it there's no need --

6 MR. ABBINGTON: I'll stipulate to his presence  
7 at the examination, Your Honor.

8 MR. NEIDERT: I just wanted to make sure the  
9 record was clear, Your Honor.

10 THE COURT: Yeah, it's clear. Mr. Mulder is  
11 here.

12 BY MR. NEIDERT:

13 Q And do you remember how long -- or what date you met with  
14 him?

15 A Yes, it was on June 11th 2010. And I met with him for,  
16 approximately, one and half hours.

17 Q And as a result of that evaluation, were you able to  
18 reach a conclusion as to whether or not Mr. Mulder was  
19 competent?

20 A Yes. And I made the conclusion that he was competent and  
21 could (inaudible).

22 Q Okay. Did you review any other documentation, in  
23 addition to actually speaking with Mr. Mulder, in making  
24 your evaluations?

25 A Yes. Reviewed a number of medical records and reports.

1 Q Uh, including the report from Dr. Milner, Dr. Cansora,  
2 Dr. Toomer, and Dr. Kessel?

3 A Yes.

4 Q What was the setting where you met with Mr. Mulder at the  
5 Nevada State Prison?

6 A I met with him in a (inaudible), which was a, uh,  
7 (inaudible). You know, he was at a table. There was no  
8 screen between us.

9 Q And was Mr. Mulder cooperative?

10 A Yes.

11 Q And what was his affect?

12 A I'm sorry?

13 Q What was Mr. Mulder's affect in the meeting? Was he --

14 A He was upbeat, friendly, (inaudible).

15 Q And --

16 THE COURT: I apologize.

17 Joan, yes?

18 RECORDER: I couldn't hear (inaudible). If she  
19 (inaudible) so that when she's speaking (inaudible). If  
20 Miss Piasecki could keep that in mind, so she's speaking  
21 (inaudible).

22 THE COURT: Okay.

23 RECORDER: (Inaudible).

24 THE COURT: You have -- no, no. Well, we need  
25 to address it because we're going to have it again tomorrow

1 with Dr. Bradley. Let's see if Shawn can come up and maybe  
2 can be of some assistance.

3 And do we have anybody in Reno who can --

4 THE CLERK: Well, Shawn can call Chris  
5 (inaudible).

6 THE COURT: Okay.

7 THE CLERK: (Inaudible).

8 THE COURT: Doctor, I apologize. If you could  
9 standby again just for a moment while we get a technician up  
10 who might be able to deal with this.

11 Donna, do you know if the system is setup, is it  
12 over a telephone, so we've got a telephone line open that's  
13 giving feedback, I'm assuming?

14 THE CLERK: (Inaudible).

15 THE COURT: No? And how about the courtroom  
16 next door? Are there any proceedings in 7D ongoing currently  
17 that might entail this system?

18 THE CLERK: No. I was there this morning  
19 (inaudible).

20 THE COURT: Okay. All right.

21 THE CLERK: (Inaudible).

22 THE COURT: Pardon me?

23 THE CLERK: Can I stop it again?

24 THE COURT: Go ahead and try that.

25 THE CLERK: Speak into the microphone just for a

1 moment. We're trying to test our audio control here in the  
2 courtroom.

3 THE WITNESS: (Inaudible).

4 THE CLERK: Okay. Okay. I was turning it down.  
5 Okay. Could you keep talking a little bit. Now I'm  
6 turning it --

7 THE WITNESS: (Inaudible).

8 RECORDER: Actually, it's a little cloudy.  
9 (Off the record.)

10 THE CLERK: I know. No, you're not getting  
11 anything.

12 Okay. Thank you.

13 THE WITNESS: (Inaudible).

14 THE CLERK: But this definitely does raise and  
15 lower the volume on the video conference coming in.

16 (Off the record.)

17 THE CLERK: Okay. Ms. Piasecki, I'm sorry. We  
18 need you to talk again.

19 THE WITNESS: Not a problem. I will say a few  
20 things and you can check the volume as a result.

21 THE CLERK: Okay. They're saying that's great.  
22 You sound great.

23 THE WITNESS: Okay. Perfect.

24 THE CLERK: All right.

25 THE WITNESS: Okay. Terrific. Let me know if

1 you want any changes in the lighting because I can adjust the  
2 lighting in this room as well, if it's hard to see.

3 THE CLERK: Okay. I think we're good unless you  
4 need it adjusted for any reason.

5 Say something else one more time, please.

6 THE WITNESS: Okay. August 3rd, 2007.

7 THE CLERK: Okay. The court reporter is asking  
8 that you speak into the microphone when we test it. If you  
9 could speak a little slower.

10 THE WITNESS: Sure. Sure. Are the words a  
11 little blurry?

12 RECORDER: When she speaks in full sentences, I  
13 can hear one word -- (inaudible).

14 THE CLERK: Yeah, just a little, she's saying.

15 THE WITNESS: Okay. I'll (inaudible) down.

16 THE CLERK: Okay. Does that sound good?

17 RECORDER: (Inaudible).

18 THE CLERK: All right. I think -- are we ready?

19 Okay, counsel. I think we're ready.

20 (Back on the record 9:42:35)

21 THE COURT: Okay. Let's give it a try.

22 Have a seat.

23 Let's give it a try and see how our system is now  
24 working.

25 Mr. Neidert, why don't you proceed with your next

1 question of Dr. Piasecki.

2 MR. NEIDERT: Your Honor, just as a matter of  
3 inquiry, with respect to the record, do I need to start over  
4 or --

5 THE COURT: No, no. I think we're okay. We've  
6 got a record.

7 MR. NEIDERT: Okay. Thank you.

8 BY MR. NEIDERT:

9 Q When we had our interruption, you were testifying that  
10 you met with Mr. Mulder at the Nevada State Prison in a room  
11 where he sat across from you, and you conducted your, your  
12 examination in that manner?

13 A Yes.

14 Q Now, you -- were you aware going into this that  
15 Mr. Mulder had suffered a stroke in 2001?

16 A Yes.

17 Q And did you do anything differently with respect to your  
18 examination because of the history of stroke that, uh, that  
19 Mr. Mulder had suffered?

20 A I paid more attention to mental status testing.

21 Q Did you -- and just to help me understand, what exactly  
22 is a stroke?

23 A A stroke, which is also called a cerebral vascular  
24 accident, or an intracerebral hemorrhage, is a problem with a  
25 blood vessel in the brain. And in Mr. Mulder's case, the

1 problem was that a blood vessel in his brain leaked blood or  
2 hemorrhaged.

3 Q And at -- when he had this stroke, what did it do to him  
4 physically and mentally and all that?

5 A The stroke was in a part of the brain that affected both  
6 his speech and his motor abilities.

7 Q And did you -- and did you notice, when you met with  
8 Mr. Mulder, difficulties that he had with both speech and in  
9 his motorability?

10 A As well as memory, yes.

11 Q So Mr. Mulder -- at the prison, Mr. Mulder sat down  
12 across from you and you started talking with him. What kind  
13 of question did you ask him?

14 A Well, I started off by asking him if he understood the  
15 purpose of my evaluation and who I was retained by for the  
16 evaluation.

17 Q And --

18 THE COURT: How did he respond to your question?

19 THE WITNESS: He appeared to understand that  
20 I was there at the request of the Attorney General and not  
21 defense attorneys, and that my job was to talk to him and  
22 find out how well he was able to understand and assist in his  
23 appeal.

24 THE COURT: And were you able to understand his,  
25 his comments to, uh, his wards to you as he was speaking?



1           What was his manner of speech and how difficult was  
2 it to understand him?

3           THE WITNESS: At, at first, I had to, uh,  
4 acclimate to his style of speech. He had spontaneous speech,  
5 so he spontaneously verbalized. And, at first, I had  
6 difficulty understanding the flow of his speech because there  
7 was a, you might even consider a telegraphing pattern where  
8 there wasn't every word you would expect in a sentence. Some  
9 words were missing, or some words were exchanged with others.  
10 However, after 10 or 15 minutes, I became more accustomed to  
11 that speech. And, at that point, I felt that the  
12 comprehension on my part was quite good.

13           THE COURT: All right. Thank you.

14 BY MR. NEIDERT:

15 Q Was Mr. Mulder, uh, able to recount his recent history in  
16 the post-stroke period since 2001?

17 A Yes, he was.

18 Q And what was he able to tell you?

19 A He was able to describe for me his adjustment following  
20 the stroke at Ely. For example, he was able to describe for  
21 me the difficulties he had getting in and out of the shower,  
22 and the difficulties he had in the prison yard. But, how he  
23 had adapted quite well to many other activities of daily  
24 living.

25           He was also able to describe for me when he was

1 asked to get on the bus at Ely and to come to Carson City and,  
2 at that time, he did not know, or was not told that it was for  
3 evaluations at the Nevada State Prison.

4 Q Okay. Was he able -- did he describe anything he had  
5 done to adapt to life post-stroke?

6 A Yes. He told me that, for example, in his exercise  
7 routine, he had developed a method of counting the number of  
8 push-ups and the number of sit-ups that he did by using  
9 playing cards.

10 Q Did he explain how he used these playing cards to do  
11 this?

12 A He did. He had a system where cards had different  
13 values. And he was able to use the value on the card as a  
14 way to track the number of sit-ups or push-ups he had done.

15 Q And did he tell you how many push-ups and sit-ups he  
16 tried to do a day?

17 A He said he did up to fifteen hundred push-ups in a day,  
18 and up to 320 sit-ups in a day.

19 Q Did he describe anything else he did as part of his  
20 normal life as a prisoner in the state prison?

21 A He described his grooming. He described watching  
22 television and following the L.A. Dodgers and the L.A. Lakers.  
23 He described some difficulties he had with reading, and that  
24 he no longer read books.

25 Q And why -- did he say why he was no longer able to read

1 books?

2 A That he could no longer follow the narratives in the  
3 books that were fiction or nonfiction. I think he still  
4 enjoyed books that were more just pictures.

5 Q Did he report difficulties in other things?

6 A Yes. He reported to me that he used to play the card  
7 game called Spades, and he is no longer is able to play that  
8 card game, and he was no longer able to play checkers either.

9 Q Did he -- did you -- you said that he had a stroke on the  
10 left side of his brain that affected the left side of his  
11 brain?

12 A Yes.

13 Q And if I'm not mistaken, that means it was the right side  
14 of his body that had the physical affect of the stroke; is  
15 that correct?

16 A That's correct.

17 Q Do you know if, prior to the stroke, Mr. Mulder was  
18 left-handed or right-handed?

19 A I believe he was right-handed.

20 Q How did -- and what is the physical you could observe  
21 with respect to his right hand?

22 A His right hand appeared to be in a contraction posture,  
23 so the muscles of his right hand had contracted and he was in,  
24 uh, handcuffs or wrist cuffs at the time. So I couldn't see  
25 the range of motion, but it appeared to be that he had a

1 decreased ability to extend and flex his right arm and his  
2 right hand.

3 Q And so is it fair to say that, as a result of the stroke,  
4 he had to sort of train himself to be left-handed?

5 A Yes.

6 Q Did he report to you how he was able to write kites and  
7 make other communications with the prison authorities in  
8 writing?

9 A He said he was learning to write with his left hand,  
10 although it was difficult, and he was, at times, getting  
11 help from other inmates to help him write.

12 Q Was he able to recount people who had visited him at the  
13 prison?

14 A He was. He was able to tell me about, uh, friends as  
15 well as legal visits.

16 Q Did he tell you specifically who had visited him?

17 A Yes. He told me that there was a former priest from  
18 Arizona who visited him. He also said that his brother  
19 Craig visited him, but not since the economy took a hit  
20 because his brother Craig was -- owned his own business.

21 Q And did he mention anything about his attorney?

22 A He did. He mentioned that -- I'm going to look through  
23 my notes here -- that the attorney had come down three times  
24 to see him.

25 I believe he's talking about his current attorneys.

1 We did also talk about his attorneys back in 1997.

2 Q Did he remember who his attorneys in 1997 were?

3 A No, he did not.

4 Q Did he remember who his current attorney was?

5 A He didn't remember his name, but he saw a piece of  
6 paper that had the name on it, and he recognized the name  
7 from the paper. And then, later, he spontaneously recalled  
8 Mr. Abbington's name.

9 Q And he recalled all that without prompting from you?

10 A Yes. And he recalled that his attorney was located in  
11 Las Vegas.

12 THE COURT: Doctor, let me ask, did you discuss  
13 with Mr. Mulder his understanding, his current understanding  
14 of his legal proceedings; what was going on with regard to his  
15 case?

16 THE WITNESS: Yes. Mr. Mulder stated that he  
17 understood that there was an appeal, and that his attorneys  
18 were attempting to delay his execution by finding -- through a  
19 finding of incompetence to proceed.

20 He stated that he did not agree with this strategy,  
21 and that his preference would be to have an appeal based more  
22 on the actual conviction. That he would, uh -- that the best  
23 thing that could happen would be if the appeal resulted in  
24 a finding of manslaughter and a sentence of -- a reduced  
25 sentence of 20 years, which would allow him to consider life

1 out of prison.

2 THE COURT: Now, in explaining or in  
3 communicating that to you, how -- how did he verbalize those  
4 concepts you've just testified to? I'm assuming he didn't  
5 speak, just as you did, and give a description, or that  
6 insight into his situation. How did he communicate it to you?  
7 Was it choppy as you've indicated? Was it something you had  
8 to draw out from him over a long period of time? How did he  
9 communicate that?

10 THE WITNESS: I asked him a question of what is  
11 the best thing that could happen as a result of the current  
12 legal proceedings, and he told me all of the following  
13 without further prompting: He said the judge would give me  
14 20 years -- and I didn't tape-record this. These are my  
15 notes. So there may have been some more choppiness than is  
16 reflected in my notes. But the notes that I have:

17 That the judge would give me 20 years if I killed  
18 him. And I don't know that I did. I didn't mean to. It  
19 would change to manslaughter, that I didn't mean to.

20 MR. NEIDERT: Those were his words.

21 THE COURT: All right. And then any -- anything  
22 else? You mentioned delay due to competence and disagreement  
23 with his attorney. How did he communicate that?

24 THE WITNESS: I'll go back to my original notes.  
25 That will be most helpful.

1 I didn't make notes that reflect very clearly  
2 Mr. Mulder's words. What I wrote was he feels attorneys are  
3 working mainly to delay his execution and does not agree with  
4 the strategy.

5 THE COURT: All right.

6 MR. NEIDERT: So you --

7 THE COURT: All right. Go ahead.

8 BY MR NEIDERT:

9 Q You don't remember the exact words, but that was a  
10 definite thought that he conveyed to you?

11 A Yes.

12 Q Did you -- you said that he had trouble with specific  
13 words. What kind of word problems did he have with you?

14 A Uh, when he was describing the reasons that his brother  
15 couldn't visit, he had a hard time with the word "economy."  
16 And when there was a word "usually," that was a word that took  
17 several efforts. And it might have been that I understood  
18 well enough and we moved on at that point.

19 Q Okay. Was he able -- was Mr. Mulder able to recount  
20 where he grew up and incidents in his life prior to stroke and  
21 things of that nature?

22 A Yes, he was.

23 Q What was he able to tell you?

24 A He was able to tell me about his family origin, about his  
25 experiences with his father and with his brothers. He was

1 able to describe for me his community college in Arizona, some  
2 of the work that he had done in the past, and some of the  
3 difficulties he had had prior to his conviction for this  
4 crime.

5 Q What did he -- was he able to describe specifically past  
6 legal problems, for example?

7 A I'm checking my notes to see how much I -- I don't  
8 believe that's an area that I covered in much depth during my  
9 interview, so I can't address that directly.

10 Q Looking at page 2 of your report, if that might be of  
11 some assistance in that. Under "Developmental History," you  
12 have some information. Did you get that information from  
13 Mr. Mulder himself or from other records?

14 A Some of the information is from other records. So the  
15 information related to his prior convictions, I don't see in  
16 my notes where I documented or recorded our conversation, so  
17 that may have been from other records.

18 Q Okay. Were you --

19 THE COURT: Well, let me ask you, in that area  
20 of your report, you, you report that Mulder recalled his  
21 father hitting him twice, and that he left home in high school  
22 after his father took a swing and hit at me. And that's in  
23 quotes. Was, was that something directly from Mr. Mulder?

24 THE WITNESS: Yes, it was.

25 THE COURT: All right. Thank you.



1 BY MR. NEIDERT:

2 Q And did he tell you about his substance abuse history?

3 A He did.

4 Q And what did he tell you about that?

5 A He told me how he was introduced to substances  
6 through older siblings. He describes how he had used  
7 methamphetamine over his lifetime with periods of sobriety.  
8 And he described for me three years of sobriety within the  
9 correctional setting; five years outside the correctional  
10 setting; and then, of course, no use since his stroke in 2001.

11 Q And -- okay.

12 THE COURT: Doctor, I hate to jump around, but  
13 on your report, page 2, you have the recent history. It's two  
14 paragraphs just before medical history.

15 THE WITNESS: Yes.

16 THE COURT: And the second paragraph:  
17 "Mr. Mulder reported few visitors. The priest and brother  
18 and so forth."

19 And after that, the next sentence is: "He reported  
20 frustration with word finding, difficulties with his attorney  
21 and others."

22 That, can you explain that to me? What did he  
23 say? Did he have difficulty finding the right words in  
24 communicating with his attorney or others, or what was he,  
25 what was he commenting on there.

1 THE WITNESS: Yes. I asked Mr. Mulder if he  
2 thought he was competent to proceed, and he told me that he  
3 had problems, mainly, with the talking part.

4 THE COURT: All right. And he stated that: "He  
5 feels like a dick because sometimes he talks excessively and  
6 is unduly cheerful among his death row peers."

7 Were those his words, or is that what he  
8 communicated that, that he either recognized in himself,  
9 that he was particularly cheerful or talkative?

10 THE WITNESS: Yes. He was referring to exactly  
11 that; that, that in the social setting of death row, he feels  
12 awkward and, uh, out of place at times, conspicuous because he  
13 is so cheerful in that setting.

14 THE COURT: So did he seem to recognize in  
15 himself that he was inordinately cheerful on death row  
16 compared to others?

17 THE WITNESS: Yes, he seemed to have that  
18 self-awareness.

19 THE COURT: And the use of swear words is the  
20 last thing commented in that paragraph: "That he uses  
21 profanity frequently," he says, "without intending to."

22 How did he explain, explain that, the use of  
23 profanity?

24 THE WITNESS: During the interview, there was  
25 several times when he spontaneously said "damn," and then he

1 said that he apologized. He said, "I cuss a lot. I don't  
2 mean to."

3 THE COURT: How did that manifestation comport  
4 with your understanding of his medical and mental condition?  
5 In other words, is that something that seemed an inappropriate  
6 manifestation of his actions, or is that consistent with the  
7 stroke that he experienced, in your medical view?

8 THE WITNESS: That's consistent with the  
9 language problems he has following his stroke.

10 THE COURT: Okay. Go ahead.

11 BY MR. NEIDERT:

12 Q And is cheerful mood, that he's also mentioned, is that  
13 also a manifestation of his stroke, in your opinion?

14 A It is.

15 Q And why is that?

16 A The brain has areas that are, uh, involved in the  
17 regulations of mood. And strokes on the left side of the  
18 brain can result in clinical depression and depressive  
19 symptoms.

20 In Mr. Mulder's case, the way that the stroke  
21 manifested, actually had the opposite effect where, instead  
22 of having additional symptoms along the lines of depression,  
23 his symptoms are cheerfulness, happiness -- and what I see  
24 from other evaluators as well -- a consistently upbeat mood.

25 Q Okay. Did you do any kind of mental status examination

1 on Mr. Mulder?

2 A I did.

3 Q And what did that involve?

4 A A mental status examination, most broadly speaking, it is  
5 an evaluation of an individual's appearance, behavior, speech,  
6 thinking, and cognition.

7 Q So what did you do with respect to Mr. Mulder in those  
8 records?

9 A With respect to the appearance and behavior, speech,  
10 most of that is observation and documentation. With regards  
11 to his, uh, thought content, I screen for the presence of  
12 psychotic symptoms, such as hallucinations or delusions. I  
13 screen for the presence of possible mood symptoms, such as  
14 suicidal thoughts. And there were none.

15 For the cognitive screening, I went through a series  
16 of questions related to orientation, registration, naming,  
17 reading, short term recall, and a concentration task of serial  
18 subtractions.

19 Q Okay. And did you, did you -- how was he oriented to the  
20 date, with respect to the date of the, uh -- what date he  
21 thought it was, at least when you interviewed him?

22 A He was oriented to June 9, 2010, although the evaluation  
23 was on June 11th.

24 Q So in his own internal thought, or his own -- he was off  
25 by two days?

1 A Yes.

2 Q And he knew where he was at?

3 A Yes. He knew he was in the Nevada State Prison in Carson  
4 City, Nevada.

5 Q Was he able to register and repeat your name?

6 A He was.

7 Q You did a -- you indicated in the report you did an  
8 unrelated word task. What three unrelated words did you do?

9 A This is a standard task to it assess for short term  
10 memory. And the three words were book, coat, and apple. And  
11 registration is whether or not someone can repeat those words  
12 back. So, whether or not they have the language ability to  
13 register those words and then repeat them. He did have that  
14 ability.

15 Q Uh --

16 A Then after -- sorry.

17 Q I'm sorry. So you said the words and he said them back  
18 to you at that point in time?

19 A Yes.

20 Q And then go on. You were going to go on and I  
21 interrupted you. I apologize.

22 A And then after a few other tasks, I went back and asked  
23 him if he could tell me what those three words were again.

24 Q So he --

25 A He spontaneously recalled one word, but it was clear that

1 he -- go ahead.

2 Q Do you know which word that was?

3 A Yes. He spontaneously recalled the word "book."

4 Q Okay. And then what happened?

5 A He said he could not recall the other two words, and so I  
6 went through a standard prompt.

7 Q What kind of prompt did you use? What do you mean by a  
8 standard prompt?

9 A Well, after he was unable to spontaneously recall the  
10 words, after the delay, I prompted him that one of the words  
11 was a piece of clothing.

12 Q And he remembered coat at that point in time?

13 A Correct. And then I prompted him that the other word was  
14 a type of fruit, and he guessed banana. So, he couldn't  
15 recall that third word.

16 Q So he spontaneously -- let me make sure I have this  
17 right. He spontaneously remembered one word. He remembered a  
18 second word, "coat," after you gave him a prompt. And he  
19 could not remember the fruit?

20 A Correct.

21 THE COURT: And what did that indicate to you  
22 that -- the deficit in recalling those three words without any  
23 prompting.

24 THE WITNESS: That, that indicated to me that he  
25 had some impairment of short term memory and that he did have

1 some positive response to prompt.

2 THE COURT: All right.

3 BY MR. NEIDERT:

4 Q After you, what other task did you do besides remembering  
5 the three words?

6 A I asked him to do a serial subtraction task, which is a  
7 concentration task where someone starts with the number and  
8 then subtracts backwards, counting aloud.

9 Q And, specifically, what -- what did you have him subtract  
10 backwards?

11 A I asked him to start at the number 20 and subtract  
12 backwards by threes.

13 Q And what was he able to do?

14 A He was able to start with 20; go to 17; 14 -- at which  
15 point he went to 7 -- I'm sorry. He went to 10. So, he made  
16 an error at that point. Then 7. And then he made an error  
17 going to 2 -- I'm sorry. Made an error going to 5. And then  
18 subtracted 3 to 2. So, he had some errors in that task.

19 Q Okay. Did you have him do any test with respect to  
20 reading?

21 A I did. I asked him to read a sentence, which the  
22 sentence was "Close your eyes." He read the sentence and,  
23 uh, closed his eyes in response to it.

24 Q And you didn't try to assess his writing or his drawing  
25 skills?

1 A I did not. He was in handcuffs, I was unable to assess  
2 those.

3 Q You, your report indicates, and I'm reading from it, it  
4 says: "Mr. Mulder demonstrated abstract thinking on a series  
5 of comparisons."

6 What do you mean by that?

7 A I gave him some words and asked him what do these words  
8 have in common. So, for example, I gave him the words boat  
9 and car, and I asked him what do these words have in common.

10 An abstract response would be a property or a  
11 category that the two words belong to. A concrete response  
12 would relate to the physical properties of those words.

13 So, with boat and car, a concrete response would be  
14 that they're made of metal or they, uh, use gasoline. What he  
15 told me is that they both are for travel. And I thought that  
16 that was an abstract response.

17 Although it's is not reflected in my report, I also  
18 asked him to interpret a proverb, also, to assess his abstract  
19 thinking. And in one case, he was able to give an abstract  
20 interpretation and, in another case, he was not.

21 Q Could you give us -- could you tell us what those two  
22 cases were, if you would, doctor?

23 A Yes. When I said "Blood is thicker than water," he said,  
24 "You don't tell on your brother."

25 Q And do you consider that to be abstract?



1 A Yes. Because it related to the idea of blood being a  
2 familial connection rather than the concrete property of  
3 blood/fluid.

4 Q What about when he gave a concrete response?

5 A Well, he couldn't, he couldn't respond to "A bird in the  
6 hand is worth two in the bush." He said he didn't know what  
7 that meant.

8 Q Okay.

9 A And for the sake of completeness, I would like to say  
10 that when I gave him commonalties of two words, I asked him  
11 what does a seed and an egg have in common. He said he didn't  
12 know that. So just as with the proverbs, there was some  
13 evidence of his being able to abstract -- uh, apply abstract  
14 thoughts on one example, but not the other.

15 The same is true in the commonalties. He was able  
16 to note abstract properties of one pair of words. But with  
17 another pair of words, he said he didn't know.

18 Q So it's your testimony that, while he can do abstract  
19 thinking, to some extent, he also has some deficits in that  
20 area?

21 A Exactly. Especially with the more difficult kinds of  
22 abstractions.

23 Q Did, did you ask him any questions at all about, uh, the  
24 crime he's in prison for?

25 A Yes. A few.

1 Q Do you know what you asked him and how he responded?

2 MR. ABBINGTON: Your Honor, while she's looking  
3 for those notes, we made this objection and outlined this in  
4 the prehearing brief. I believe that the issue here, and  
5 the argument is that this is the, the test here is the  
6 communication, not the actual facts delivered.

7 MR. NEIDERT: And, Your Honor, I'm not even  
8 asking this for the truth of the matter asserted. I'm just  
9 asking what he was able to relate. And I think what he told  
10 the doctor is certainly highly probative to this court's  
11 determination.

12 THE COURT: Well, you know, I'm not. Under  
13 Rowland (phonetic), of course, as I understand the moving  
14 papers, you're really focusing on the communication prong, and  
15 disavowed, really, the prong concerning understanding his  
16 situation, at least in so far as it relates to the crime of --

17 MR. NEIDERT: And I --

18 THE COURT: -- conviction. But, no, I'll allow  
19 the testimony in this area, and then you all can argue to me  
20 what it evidences, and with regard to the Rowland, such as I  
21 understand them, components --

22 MR. NEIDERT: Thank you, Your Honor.

23 THE COURT: -- or component that's at issue.

24 No, the witness can answer the question. I think  
25 she's searching through her notes right now.

1 MR. ABBINGTON: Also, Your Honor, I think, in  
2 light of the fact that Dr. Piasecki has referred to her notes  
3 several times, we would like to have a copy of those notes.

4 THE COURT: All right. That's something that's  
5 appropriate.

6 MR. NEIDERT: And, Your Honor, we would likewise  
7 -- and, frankly, you know, as the case moves forward, we  
8 would make a similar request with respect to their expert;  
9 specifically, Dr. Kessel and, in particular, the interview in  
10 March where we didn't have a report.

11 THE COURT: Right. She was referring to notes  
12 on those.

13 MR. ABBINGTON: So we're going to call and get  
14 them. That's fine.

15 THE COURT: Yes. Just get copies of them.

16 MR. NEIDERT: Were you able to -- what did you  
17 ask about with respect to the crimes of which he's convicted?

18 THE WITNESS: Indirectly, we discussed it when I  
19 asked him what is the best thing that could happen as a result  
20 of this appeal. And as I already mentioned, he talked about  
21 the charge, perhaps, being changed to a manslaughter or a  
22 conviction for manslaughter based on lack of intent.

23 The other time we specifically talked about his  
24 crime, or the crime for which he was convicted, was he talked  
25 to me about some, uh, convictions for taking a car and a gun

1 and said that he didn't feel like they had proof that he took  
2 a car or a gun, and felt like that was an important part of  
3 the case.

4 He also talked about fingerprints and some concerns  
5 he had about the evidence related to fingerprints at his  
6 original trial.

7 THE COURT: Did he explain that any further;  
8 what, exactly, his concern about fingerprint evidence at his  
9 trial was?

10 THE WITNESS: One moment, please. Sorry about  
11 that.

12 THE COURT: Okay. Sure.

13 THE WITNESS: (Witness reviews notes.)

14 I don't see my notes, specifically, about what the  
15 fingerprint question was --

16 THE COURT: All right.

17 THE WITNESS: -- or what the fingerprint  
18 concerns were.

19 THE COURT: All right. Thank you.

20 BY MR. NEIDERT:

21 Q Did you find something, doctor?

22 I'm sorry. I think I interrupted you. Did I  
23 interrupt you, doctor?

24 A No.

25 Q Okay. Did Mr. Mulder remember past legal proceedings

1 concerning competency?

2 A He did. He recalled a 2005 proceeding.

3 Q And what did he remember about that?

4 A He recalled that, after his stroke, there were two men  
5 and a woman who came to see him, and that he went to court  
6 and he was angry that one of the men who testified in those  
7 proceedings accused him of faking his symptoms.

8 Q And did he, uh, did he tell you what he considered his  
9 main limitations to be?

10 A When I asked him about his self-assessment of competency,  
11 he said, "Mainly the talking part."

12 Q Okay. Did he have -- did he express concern about his  
13 memory?

14 A He did.

15 Q How did he express that?

16 A I believe he said there were things he wanted tell his  
17 attorneys and he wasn't sure -- I'm sorry. I'm best when I  
18 look at my notes rather than go off my own memory.

19 (Witness reviews notes.)

20 I believe that he told me that, in 1997, he had --  
21 and this is his quote: "Good important stuff that he told his  
22 attorney," and he wasn't sure he was able to acquire all of  
23 the same information for his current attorneys.

24 Q Okay. And based on your interviews, were you able  
25 to make, say, a diagnosis with respect to Mr. Mulder

1 psychiatrically?

2 A Yes. My diagnosis was a cognitive disorder second to  
3 brain injury. And also in my diagnosis, I noted substance  
4 dependence, based on his history of heroin, marijuana, and  
5 methamphetamine use, which is now in remission.

6 Q Okay. Yesterday, did you -- did you review, as part of  
7 preparing for this, the report of Dr. Julie Kessel?

8 A Yes. I reviewed what is, uh, marked as a draft report.

9 Q And with respect to Dr. Kessel, she, she wrote his  
10 diagnosis as dementia due to intracerebral hemorrhage;  
11 personality change due to intracerebral hemorrhage; stroke,  
12 polysubstance addiction and remission. Medical diagnosis  
13 includes receptive, expressive and anomic aphasia, and right  
14 side hemiparesis, which she put in partial paralysis, all  
15 due to stroke.

16 Do you agree or disagree with Dr. Kessel's diagnoses  
17 that -- with respect to Mr. Mulder?

18 A I agree based on the -- based on my assessment and the  
19 records, the difference between a dementia diagnosis and a  
20 cognitive disorder diagnosis, that the dementia diagnosis is  
21 somewhat more specific, in that it indicates that these are  
22 permanent deficits related to the brain injury. So we're,  
23 we're basically saying the same thing. She's just including a  
24 little bit more specificity in her diagnosis.

25 Q Okay. And you would agree with respect to the receptive,

1 expressive, and anomic aphasia?

2 A Yes. He does have difficulties with the expression of  
3 language. At times, he has difficulties with word finding, so  
4 that's the anomic aphasia.

5 The receptive aphasia was not as evident, in my  
6 assessment, but there's likely some degree of difficulty with  
7 receiving language as well.

8 Q So from a diagnosis standpoint, you're in general  
9 agreement with Dr. Kessel?

10 A Yes.

11 Q Did you also -- Dr. Kessel, uh, just so you -- just  
12 for point of reference, you also indicated she looked at  
13 the tests that were done by various psychologists and  
14 neuropsychologists in this case? Did you review those as  
15 well?

16 A I did.

17 Q Could you tell the Court the difference between how a  
18 psychologist would do -- does an evaluation, as opposed to a  
19 psychiatrist?

20 A Sure. Psychologists are experts in assessment through  
21 standardized testing. So, for example, an I.Q. test is  
22 something that a psychologist is trained in doing and a  
23 psychiatrist is not. A psychiatrist's orientation is more  
24 aligned with general medicine, related to a degree program, an  
25 M.D. degree program, and more integration of psychiatric

1 findings or symptoms, with general understanding of physiology  
2 and anatomy, from a slightly different training and a slightly  
3 different professional scope of activities.

4 Q Are psychiatrists trained to evaluate the testing done by  
5 psychologists?

6 A They -- we have some training, or some exposure to the  
7 testing done by psychologists. And some individuals have  
8 additional training. So, for example, in my forensic  
9 psychiatry fellowship, we did have additional training in some  
10 psychological testing measures.

11 Q Now, all of the psychologist's reports seem to indicate  
12 that Mr. Mulder has an IQ in the 69 to 70 range.

13 Do you remember seeing that?

14 A Yes, I do.

15 Q Do you, generally, think those are accurate measurements  
16 of Mr. Mulder's intelligent quotient?

17 A I believe they reflect the damage done by the stroke and  
18 its affect on his speech, memory, verbal abilities. IQ  
19 testing, in some ways, depends heavily on someone's verbal  
20 abilities, or reflects someone's verbal abilities.

21 So with the problems that he's had following the  
22 stroke, it's entirely consistent that his IQ would be measured  
23 in a lower range.

24 Q Now, he's not mentally retarded though, is he?

25 A No, he is not.



1 Q And mental retardation actually has a very specific  
2 definition in medicine and psychology, doesn't it?

3 A Yes. One of the core elements of mental retardation is  
4 that the onset is prior to age 18.

5 Q So if somebody has a brain injury, as Mr. Mulder did,  
6 and they score a lower IQ, they're not considered mentally  
7 retarded, they're considered -- they're given another  
8 diagnosis?

9 A That's correct.

10 Q Now, doctor, just for point of reference, yesterday,  
11 Dr. Kessel testified that, in her opinion, Mr. Mulder  
12 functions at, approximately, the second grade level, or the  
13 level of about an eight-year old.

14 Would you agree or disagree with that assessment?

15 A I would disagree because I think it's very difficult to  
16 map Mr. Mulder's level of functioning onto a normal  
17 developmentally trajectory of childhood.

18 Q And why is that?

19 A Because, as an adult, he's retained some strengths. And  
20 he also has some deficits that are different than the normal  
21 developmental gains that a child has.

22 Q Were you -- did you also examine Dr. Bradley's report  
23 where he assessed Mr. Mulder's competency?

24 A Yes. That was provided to me after I completed my  
25 evaluation.

1 Q Do you agree or disagree with Dr. Bradley's conclusions?

2 A I agreed with Dr. Bradley's conclusions.

3 Q Now, there's one, one thing that struck me in looking at  
4 Dr. Bradley's report is that, apparently, Mr. Mulder told you  
5 and Dr. Kessel that he had a child that he had no contact  
6 with, but he told Dr. Bradley that he didn't have any  
7 children. Is that significant in your mind?

8 A Um, that's a pretty important piece of biographical  
9 information to have a major discrepancy, so I would be  
10 interested in actually speaking with Dr. Bradley first to  
11 make sure there wasn't an error somehow in the report because  
12 that is, that is a significant discrepancy.

13 Q Significant in what ways?

14 A That's a life event that one would consider important  
15 enough to have registered well in the memory.

16 Q Does that -- assuming that Mr. Mulder actively told  
17 Mr. -- Dr. Bradley, I don't have any kids, or words to that  
18 effect, would that, in any way, change your opinion with  
19 respect to Mr. Mulder's competency?

20 A No, because his competency is related to his  
21 understanding of his legal affairs, not of his family  
22 affairs.

23 Q And, in your professional opinion, Mr. Mulder understands  
24 his legal position?

25 A Yes.

1 Q And in your professional opinion, Mr. Mulder is able to  
2 assist counsel in these proceedings?

3 A Although Mr. Mulder does have some deficits, my finding  
4 is that, with some careful wording of questions and patience,  
5 he is able to have a conversation, share information, share  
6 opinions. I believe he's able to assist his attorneys.

7 MR. NEIDERT: Could I have a moment, Your Honor?

8 THE COURT: All right.

9 BY MR. NEIDERT:

10 Q Dr. Piasecki, you testified that you have actually helped  
11 teach judges in Judicial College, and have done work with  
12 respect to mental competency.

13 Do you remember that testimony?

14 A Yes.

15 Q Part of that is being able, at least in your opinion, as  
16 a Forensic Psychiatrist, is the ability to help an attorney  
17 formulate legal strategy a part of the competency of  
18 determination?

19 A To formulate legal strategy? No. I don't believe --

20 Q Yeah, or to make -- or to make strategic decisions?

21 A I believe that, to be competent, an individual does need  
22 to be able to make decisions. But I don't believe they need  
23 to be able to formulate legal strategy.

24 Q Okay. Thank you, doctor.

25 MR. NEIDERT: I have no other questions at this

1 time.

2 THE COURT: Thank you.

3 Mr. Abbington, you may cross-examine.

4 MR. ABBINGTON: Thank you, Your Honor.

5 THE COURT: While Mr. Abbington is gathering  
6 some materials, doctor, you've been sitting there quite a  
7 long time, do you need a break? I know we probably kept you  
8 sitting when we had ours.

9 THE WITNESS: I'm fine.

10 THE COURT: Okay.

11 THE WITNESS: Thanks.

12 THE COURT: Go ahead.

13 **CROSS-EXAMINATION**

14 BY MR. ABBINGTON:

15 Q Good morning, doctor. How are you?

16 A I am well. Thank you.

17 Q All right. I've never done this before, so if I get a  
18 little scrambled, please have patience with me.

19 You examined Mr. Mulder, and that conversation took  
20 place on June 11th, 2010?

21 A Yes.

22 Q Did you -- and you say that, you stated that he, uh, he  
23 thought it was June the 9th?

24 A Yes.

25 Q Did you try to change his mind about that or did you just

1 let him go on with that belief?

2 A I don't recall if I corrected the date or not at that  
3 time.

4 Q All right.

5 THE COURT: Is that significant, in your  
6 judgment, whether he knew whether it was June 11th versus  
7 June 9th?

8 THE WITNESS: No. I find that with  
9 institutionalized people, it's very easy for them to  
10 lose track of the date. So, I did not find that to be  
11 significant.

12 BY MR. ABBINGTON:

13 Q Would you think it's significant that he knew that he was  
14 at Nevada State Prison in as much as he can't leave there?

15 A Uh, in as much as he can't -- I'm sorry. The rest of the  
16 question?

17 Q As he couldn't leave there, since he was in Nevada State  
18 Prison. You talked about him being bussed there, and the fact  
19 that he knew that he was in the prison. His orientation to  
20 place, would that be significant to you?

21 A Uh, only that it suggested that he had intact  
22 orientation.

23 Q Okay. So things that we -- there were some things that I  
24 think we can -- that I wanted to ask you more about and just  
25 to have an understanding about.

1                   Do you agree that Mr. Mulder was cooperative, then,  
2 with you?

3       A    Yes, he was.

4       Q    And he gave his genuine effort? He tried his best?

5       A    He appeared to; yes.

6       Q    All right. And so he -- this, this stroke, this -- your  
7 records -- you've reviewed the medical records. You believe  
8 that stroke actually did occur?

9       A    Definitely. Yes.

10      Q    And as a result, did he -- does, does he have a brain  
11 bleed, or does he have blood on his brain?

12      A    He had a brain bleed, which resolved when he was  
13 hospitalized, but he has some resulting deficits from brain  
14 injury that's not healed.

15      Q    Is that likely to improve?

16      A    At this time it's unlikely there will be much more  
17 improvement.

18      Q    All right. With -- are you familiar with the standard of  
19 care for post-stroke treatment?

20      A    Yes, I am.

21      Q    Would be -- would cognitive rehabilitation therapy have  
22 been indicated for Mr. Mulder following his stroke?

23      A    Yes, it would have.

24      Q    And can you -- can you find out, in your review of the  
25 records, is it -- it appears that he was denied that; is

1 that correct?

2 A I did not see evidence that he received cognitive  
3 therapy.

4 Q Okay. In regard to his word finding difficulties, you  
5 stated in your report that he seeks cues when struggling with  
6 a word.

7 Would you explain what you mean by that?

8 A Um, let's see if I can give an example.

9 (Reviews notes.)

10 There was, within point in the assessment, where he  
11 lost track of what we were talking about, and I was able to  
12 cue him back to the topic. It might have been something along  
13 the lines of we were talking about the quality of his sleep in  
14 prison.

15 Q Okay.

16 A And he, at one point, said I forget what I was talking  
17 about. And I would cue him, we were talking about your sleep.  
18 And then he would be able to go back and talk about his sleep.

19 Q All right. Now, so when you say that he's oriented to,  
20 to date and place in your report, he's really not oriented to  
21 date?

22 A Correct. He's off by two days.

23 Q All right. Now, you did indicate in your report that  
24 Mr. Mulder is motivated to assist his defense attorney?

25 A Yes.

1 Q And that his main -- and his own statement was his main  
2 limitation was in communication?

3 A That was his statement. It was mainly the talking that  
4 was his problem.

5 Q Do you think that's true?

6 A I think it's the most obvious difficulty. I think he  
7 does have other difficulties with understanding, but I think  
8 his main problem is communicating through speech.

9 Q So when -- but when he says "communicating" though,  
10 communicating means what he's saying, as well as what he's  
11 hearing.

12 You would agree with that?

13 A When I asked him what his most -- the biggest problem  
14 was, he said it was the talking part.

15 Q Okay.

16 A So I think he identifies difficulties with speech as  
17 being the biggest problem.

18 Q Now, you read doctor -- you've reviewed Dr. Cansora's  
19 report, Dr. Milner's report, Dr. Toomer's report, Dr. Kessel's  
20 report, and the medical records from Ely state -- from Nevada  
21 Department of Corrections, because he's been at other places  
22 other than Ely State Prison, correct?

23 A Yes.

24 Q Okay. So, now, in this problem of communicating,  
25 Dr. Cansora talks about him -- and I'll go back to him more --



1 but he talks about this is not a guy who is a normal person or  
2 a -- I think he used the example of a person with formed ideas  
3 of communication -- who is unable to, uh, to communicate those  
4 ideas. That, in fact, his problem is that -- Mr. Mulder's  
5 problem is that he is a brain-damaged person who is having  
6 trouble trying to communicate ideas.

7           Would you agree that assessment?

8     A     I would agree that Mr. Mulder has brain damage and, as  
9 a result of brain damage, one of the manifestations is  
10 difficulty with talking and speech.

11    Q     Okay. When we talked about his ability to register and  
12 repeat your name, at what age would someone develop that  
13 ability? What would you expect -- or who would be able to do  
14 that?

15    A     Well, my name is a long name. It's Piasecki. So, I  
16 would expect registration and repeating that name would start  
17 in early grade school.

18    Q     First, second grade?

19    A     Around there; yes.

20    Q     Okay. Now, the test that you gave him regarding his  
21 short term recall, is this a Folstein exam?

22    A     It was part of a Folstein Mini-Mental Status Exam, but  
23 not a hundred percent of it, because I didn't do some parts of  
24 it, and I modified others.

25    Q     All right. The -- in terms of these mental status

1 examinations that you're conducting, and a full  
2 neuropsychological workup, which one would you say was  
3 a more thorough inquiry into a person's mental health  
4 function?

5 A A neuropsychological workup would give you much more  
6 detail about an individual's cognitive abilities and deficits.

7 Q Is a Folstein examination, is Folstein ability to  
8 recall -- mini-mental health status examination; is that right  
9 or does that sound close to right?

10 A Mini-Mental Exam.

11 Q Mini-Mental Status Exam.

12 A MMSE.

13 Q All right. And is that -- what's the normal time limit  
14 that should elapse between the introduction of the words and  
15 the requests for recall?

16 A There is what -- well, in terms of the Folstein, there  
17 may be a protocol that specifies an exact amount of time for  
18 the delay. I typically use a three-minute delay.

19 Q All right. And you're familiar with the Folstein asking  
20 for a five-minute delay?

21 A There are one minute delays, three-minute delays, and  
22 five-minute delays. So there's a different range of delay  
23 that you can use for that test.

24 Q So, strictly speaking, the three minutes, would that be  
25 an advantage over the five minutes that you would expect to

1 see even more -- even a further diminished recall after five  
2 minutes than after three?

3 A You would; yes.

4 Q All right. And Mr. Mulder's inability to recall two or  
5 three words after three minutes, tell us about his function --  
6 what does that tell us about him?

7 A That tells us that he has some problems with short term  
8 memory.

9 Q Would you agree that the words you're talking about with  
10 him in terms of, you know, like, apple and coat -- and I  
11 forget what was the third one?

12 A Book.

13 Q Book. Uh, that those are fairly simple words that  
14 he would have to understand in order to repeat those back  
15 to you?

16 A Yes, they are.

17 Q Can you explain how he comes up with banana? It seems  
18 so -- it doesn't even have the same first letter or anything,  
19 like apple, avocado. Just -- banana just seems completely  
20 incongruous.

21 A Yeah, I think because I cued him with fruit, that was the  
22 one that he could think of at the time. That was his best  
23 guess.

24 Q I don't want to get out of order in this examination, but  
25 is there a danger that, in Mr. Mulder's eagerness to fulfill

1 or answer these questions, that the answer we assume, or the  
2 prompt might actually prompt him to give a different answer  
3 than the one he wants to give?

4 A It's possible.

5 Q Okay. What is the, the ability to name common objects?  
6 What, what type of common objects did you have him indicate  
7 that he understood that they were?

8 A Uh-huh. That's a test for naming -- I believe the term  
9 anomic aphasia was used by Dr. Kessel. If somebody is unable  
10 to name common objects, that would also be evidence of anomic  
11 aphasia. I asked him to identify a pen and a ring.

12 Q Okay. And at what age would you think that a person  
13 would be able to identify a pen as a pen?

14 A Uh, probably kindergarten, first grade, around there, as  
15 opposed to a pencil or a crayon.

16 Q I have a three-and-a-half-year-old granddaughter. She  
17 know what a pen is. Is she just precocious, or am I just  
18 extraordinarily proud of her?

19 A I think both.

20 Q All right. What about crayons. If kids knows what  
21 crayons are, are they -- the idea that they would be -- would  
22 Mr. Mulder similarly be able to identify crayons?

23 A I think he would, but I would want to check that to be  
24 sure.

25 Q What is his inability to proceed on the serial

1 subtraction test? What does that tell us about his function?

2 A That indicates that he has some deficits in his  
3 concentration and attention. Even though that seems like a  
4 math test, it's actually a test of sustained attention or  
5 concentration, because it's a serial task. So, it shows that  
6 he has difficulty with continuity of attention.

7 Q Actually, you -- do you credit Dr. Cansora's results  
8 that shows that he has arithmetic functioning in the sixth  
9 grade level, would you agree with that assessment?

10 A I have no reason to disagree.

11 Q So then, as you're saying, this is not a matter of him  
12 being able to subtract. It's matter of him being able to  
13 concentrate?

14 A Exactly.

15 Q So this is a man who, at age 42, can't go 20, 17, 14, 11.  
16 He's going to another number completely?

17 A Exactly. I believe he made two errors in that series.

18 Q Okay. What did you have him read?

19 A I had him read a sentence on a blank piece of paper, and  
20 I asked him to do what the sentence said. And the sentence  
21 was "Close your eyes."

22 Q About what age would you expect someone to be able to do  
23 that?

24 A As soon as they're able to read, so anywhere between four  
25 and six.

1 THE COURT: And was he asked to read the  
2 sentence aloud, or to just read it to himself?

3 THE WITNESS: I just asked him to read it, and  
4 to follow the direction that the sentence indicated.

5 BY MR. ABBINGTON:

6 Q Did he read it aloud?

7 A I don't recall.

8 THE COURT: But as I recall your testimony, he  
9 closed his eyes after looking at the sentence?

10 THE WITNESS: That's true.

11 BY MR. ABBINGTON:

12 Q So you're saying that this is something that a four- to  
13 six-year-old could do?

14 A If they could read, and you told them to read the  
15 sentence and do what it says, if a four-year-old can read  
16 sentences, or a five-year-old or a six-year-old, depending on  
17 how precocious that child is, most children can read sentences  
18 by the end of their sixth year.

19 Q All right. Mr., Mr., uh, Neidert asked you about  
20 specific examples of abstract thinking. Is it significant --  
21 in order to, to have abstract thinking, what, what abilities  
22 need to be present?

23 A Abstract thinking requires the ability to think in  
24 concepts rather than in objects.

25 Q So -- okay.

1           So in terms of concepts, what kind of concepts is  
2 Mr. Mulder able -- what kind of concepts are you asking him  
3 about at that point?

4       A    Asking for him to abstract into categories rather than  
5 physical properties of an object.

6       Q    Now, I believe yesterday Mr. -- we've had testimony here  
7 that Mr. Mulder is able to classify things as good or bad;  
8 people as nice or good, or things like that. Would that be  
9 the kind of category you're talking about?

10      A    More categories along the lines of functional categories  
11 or organizational categories.

12      Q    Okay. Is it significant that you believe that  
13 Mr. Mulder -- I'm Brian Abbington. So do you believe that  
14 he talks about -- he wasn't able to recall my name, correct?

15      A    Correct, not until he saw it. And then he'll recall it  
16 later.

17      Q    All right. But you asked him, at some point, did he  
18 recall the name of his current attorneys?

19      A    He may have seen it -- let me look at my notes, please.

20                   (Witness reviews notes.)

21      Q    While you're doing that, I'm going to ask the judge  
22 something.

23                   Your Honor, I would like to go to as far as I can,  
24 but I think, at some point, obviously, her notes are going to  
25 be important. Maybe we could take a break and they could fax

1 those over or whatever. I don't have any of those.

2 THE COURT: Do you have copies of those,  
3 Mr. Neidert?

4 MR. NEIDERT: No, Your Honor.

5 THE COURT: Okay. Donna, we'll have to contact  
6 somebody up there to make sure they step in and get those.

7 Jim, maybe you would know who that would be.

8 STAFF ATTORNEY: Maybe the clerk could think of  
9 someone (inaudible).

10 THE COURT: Could you do that, and see if maybe  
11 Chris could do it, or Lia or Jake. Maybe they could step --  
12 because I'm not even sure which room we're talking about, but  
13 that would be a good idea. Then when they get there --

14 STAFF ATTORNEY: Get the notes from her now or  
15 wait until --

16 THE COURT: Yeah. Then they could copy them and  
17 fax them down.

18 STAFF ATTORNEY: Okay.

19 THE COURT: And I'll give you the number to fax  
20 them to. 702 --

21 STAFF ATTORNEY: Sorry.

22 THE COURT: 464-5511.

23 And, Donna, is there an alternate transmission?

24 THE CLERK: (Unaudible).

25 THE COURT: That's ours. Okay. Thank you.



1 STAFF ATTORNEY: All right.

2 THE COURT: Okay. Mr. Abbington, I think the  
3 doctor is ready to respond to your question.

4 BY MR. ABBINGTON:

5 Q Just to be clear --

6 A He could --

7 Q -- I'm going to have to -- well, what were you going to  
8 say?

9 A I was going to say he could not spontaneously recall your  
10 name, but he recognized it when he saw it on a piece of paper.

11 Q Did he remember the name of his State post-conviction  
12 attorney?

13 A He did not.

14 Q Or his trial attorneys?

15 A He did not.

16 Q Is he able to distinguish what one did that he liked  
17 versus what another did that he didn't like?

18 A I didn't go into that line of questioning, so I don't  
19 know.

20 Q Do you think he's capable of having that conversation?

21 A He might be. I don't know.

22 Q After talking -- so after talking to him for 90 minutes,  
23 you would say, for sure though, that he does not remember who  
24 his trial lawyers were or anything about their performance  
25 that he liked or didn't like?

1 A What I would say is that we talked about his 1997  
2 attorneys briefly, but I did not specifically ask him about  
3 his performance. And as I look at my notes, I see that I  
4 didn't indicate that I specifically asked him what the  
5 attorneys names were. I think because he didn't recall  
6 your name, I didn't ask him about the past attorney names  
7 either.

8 Q It would be a pretty good bet that if he can't remember  
9 my name, he won't remember the lawyer from 2001 or the lawyer  
10 from 1997.

11 A That may have been why I didn't pursue it at the time.

12 Q What were the, uh, but he is motivated to assist me?

13 A Yes.

14 Q Would you think that there is a danger that in his --  
15 that he might be eager to please me, and that we might -- I  
16 might prompt him to say something that he normally would not  
17 say, or he might not say?

18 A I think it's possible.

19 Q What were the potential strategies that had a potential  
20 to change his conviction from a lesser offense and remove him  
21 to a lesser offense and move him from death row?

22 A One was to address the intent. He believed that it's  
23 possible his -- it would be proved that he didn't mean to  
24 kill the man -- although, he did state if I killed him, and  
25 I don't know that I did, I didn't mean to.

1 Q So he's --

2 A So one would be to the address the question of intent.

3 Q Okay. Were there any other strategies?

4 A Yes. He talked about the fact that he never took a car  
5 or a gun, and that that was used against him during his  
6 criminal proceedings. And then he also addressed the fact  
7 that there were issues with the fingerprints. Those are the  
8 three areas that I recall him discussing with regards to  
9 possible ways to decrease his sentence.

10 Q Was he able to tell you where his fingerprints were found  
11 or why he thought they were invalid?

12 A I recall from the discovery where it was reported. I  
13 don't remember him telling me that his fingerprints were found  
14 in any particular place.

15 Q That's fine.

16 And so regards his memory of the offense, it really  
17 boils down to his -- he's saying that I didn't do it or, if I  
18 did it, I didn't mean to do it.

19 A Correct. As well as I was never -- I never took a gun.  
20 I never took a car. That was never proven.

21 He also had some questions about whether or not his  
22 ex-girlfriend was improperly used as a witness against him.

23 Q Did he say why?

24 A I don't recall.

25 Q All right. Just to be clear, when I asked you about the

1 sentence of -- you had him write a direction on a piece of  
2 paper, and then he complied with the direction -- the "close  
3 your eye" thing -- I heard you to say that that was something  
4 that a four- to six-year-old person could do; is that right?

5 A Some four-year-olds read, so I don't want to close  
6 the window to -- but, generally, people start reading in  
7 kindergarten and first grade. And a kindergartner, or a first  
8 grader, if they can read a full sentence, and you asked them  
9 to do what the sentence says, a reader should be able to do  
10 that.

11 Q All right. So -- but that would be a lot different from  
12 him reading, like, books, or even, even like a kid's book,  
13 than the sentence that you propose, which is a very short and  
14 direct sentence?

15 A Correct. Correct. A lot of text would be a different  
16 kind of task than a simple sentence.

17 Q Okay. Did Mr. Mulder --

18 THE COURT: Well, let me ask with regard to the  
19 reading capacity. As was just made clear, a four-year-old who  
20 could read should be able to read that sentence and comply  
21 with the directive, so could a 40-year-old or an 80-year-old.  
22 Really, it's something that anyone, once they can read, should  
23 be able to comply with, if they have the cognitive ability to  
24 understand what's communicated in the sentence; am I correct?

25 THE WITNESS: Correct.

1 THE COURT: Now, with regard to more complex  
2 written material, did you go any further and test the  
3 cognition, the ability, or the, perhaps, it would be, again,  
4 dealing with the receptive aphasia element; the ability of  
5 Mr. Mulder to read something more than a three- or four-word  
6 sentence and comply with the task.

7 THE WITNESS: No, I did not.

8 THE COURT: And in your review of the materials  
9 that you had examined, did you see any indications of tests  
10 that had been given that, that would comment or inform on that  
11 question?

12 THE WITNESS: Uh --

13 THE COURT: If you recall.

14 THE WITNESS: I could look back at some of the  
15 neuropsychological testing to see what kind of reading tests  
16 were done at that point, but I'm not sure I can recall without  
17 looking through those reports.

18 THE COURT: And that's fine. I didn't mean for  
19 you to go back through all the reports. I'm just concerned  
20 with what you had in your own mind.

21 We have one of our staff members that's present from  
22 the Court, and if you wouldn't mind, you've got your yellow  
23 sheets there. Those are the notes we've been talking about.  
24 If you could provide those to him so that he could make a  
25 photocopy to be faxed down here, that would be great.

1 Thank you. And I couldn't see who was there, but  
2 I'm sure -- oh, he's stepping out.

3 And then would you please bring those back to the  
4 doctor after you make the copies.

5 COURT STAFF: Yes, Your Honor.

6 THE COURT: Great. Bring those right back so  
7 she could have the benefit of those for purposes --

8 COURT STAFF: It would be, approximately, four  
9 minutes, sir.

10 THE COURT: Thanks very much.

11 It might be a good time to take a break. Before we  
12 do, maybe I could -- I want to clear something up in my mind  
13 with regard to the cognitive function of Mr. Mulder versus the  
14 communicative function of Mr. Mulder. I think all of us can  
15 recognize some, such as those having discussion, we can carry  
16 on a conversation, for example, assuming the words that are  
17 used are words that we understand, then I can respond to your  
18 questions. You can respond to my questions and so forth.  
19 And we can compare that to a person who has no capacity to  
20 communicate -- I don't know why I think of it, maybe some of  
21 you are familiar with Dalton Trumbo's book, Johnny Got His  
22 Gun, a person who's wounded in World War I, and unable to  
23 communicate in any way, ultimately, there is. And, yet, his  
24 mind is perfectly in tact. He can hear what's going on about  
25 him. He can understand what is occurring. He's trapped in a

1 body that can't communicate.

2 And that would be an extreme communicative aphasia  
3 or whatever, or expressly aphasia, would it not; that is, lost  
4 the capacity to talk. Here, we're talking about something in  
5 between.

6 Now, there's been clear testimony about the aphasia,  
7 whether we call it mild or extreme, the communicative skills  
8 that, that are exhibited by Mr. Mulder. But, I would like  
9 to focus, just for a moment, on the cognitive aspect, what he  
10 understands.

11 Are you describing a person who, when you speak to  
12 him, here's what you're saying and, internally, in his mind,  
13 he understands what you are saying, but he's simply incapable  
14 of finding the words to respond to express what he wants to  
15 respond to you?

16 Or is it both? Is he having difficulty receiving  
17 what you're saying, computing, finding the words in his mind  
18 to understand? When you say, uh, pollucid, he doesn't think  
19 crystal clear or something.

20 What, exactly, is he receiving, as far as you can  
21 determine?

22 THE WITNESS: What I would respond is that  
23 all the questions that I asked him, he responded to every  
24 question. It might have been I don't know; such as, when I  
25 asked him what does a seed and an egg have in common? But,

1 he did respond to every question. So he, logically, responded  
2 to the questions, and that the answers were related to the  
3 question.

4 And there were times when he had some spontaneous  
5 speech, told me about things in his past, where the thoughts  
6 come together. I understood what he was talking about, where  
7 he was going. He may have had difficulties finding the exact  
8 word and, at one time, may have had, uh, a block at -- in the  
9 flow of his thoughts. But, he stayed on topic. So I believe  
10 that he understood, based on how relevant his questions were,  
11 to the questions that I asked.

12 THE COURT: Now, prior to his stroke, and I  
13 guess there's no way of absolutely knowing this, but had you  
14 asked him, had you recited to him the proverb, "A bird in the  
15 hand is worth two in the nest," or a bird -- or, I'm sorry,  
16 seed and egg, is there any way of knowing whether he would  
17 have been able to more appropriately respond to those  
18 questions.

19 THE WITNESS: There are many people who have not  
20 had a stroke who are unable to answer those questions. Those  
21 are fairly routine questions that I ask many, many people  
22 during evaluations, and many people who have not had strokes,  
23 are not able to answer those questions. So, those are not  
24 specific to having had a stroke. In fact, there are many  
25 people who have not had a stroke who have a difficult time



1 with abstraction, even based on no known cognitive injury or  
2 brain injury. It may be a level of intelligence testing, or  
3 it might relate to their educational level.

4 THE COURT: Okay. All right.

5 Well, the doctor has her notes back. I think  
6 the gentleman came back in with your notes, but we need to  
7 get those transmitted.

8 Let's go ahead, then, and take a ten-minute break so  
9 we can gather those notes together. And, Doctor, you can take  
10 a break, too. I hope you're not locked in there.

11 THE WITNESS: No, I'm good.

12 THE COURT: Good. All right. Then step out,  
13 if you need to, and we'll keep everybody comfortable, and  
14 we'll reconvene in ten minutes. And, by then, we should have  
15 the photocopies for all of you of those notes.

16 MR. ABBINGTON: Thank you, Your Honor.

17 THE COURT: Okay.

18 (Recess taken.)

19 THE COURT: All right. We're back on the Mulder  
20 case and everyone is back.

21 Go ahead. And we did get the notes faxed from Reno  
22 and, actually, the transmission came through, very, very well.  
23 And I can even read the doctor's notes somewhat, so that's  
24 helpful. Thank you for that.

25 All right. Go ahead, Mr. Abbington.

1 MS. PROCTOR: Your Honor, if I could interrupt  
2 for just a moment. I did receive word from my office that  
3 Dr. Bradley will be available at 8:45 for a nine o'clock  
4 tomorrow.

5 THE COURT: Great. Great. So we can start  
6 Dr. Bradley a little earlier tomorrow. That's wonderful.  
7 Thank you.

8 MS. PROCTOR: Thank you.

9 THE COURT: All right.

10 MR. ABBINGTON: Your Honor, would it be too much  
11 trouble to ask the court recorder -- I don't know how you do  
12 those read-backs here in federal court.

13 THE COURT: I don't do read-backs. Just ask  
14 another question.

15 MR. ABBINGTON: Okay. I will.

16 THE COURT: That way I avoid the problem.  
17 Go ahead.

18 MR. ABBINGTON: All right, Your Honor.

19 BY MR. ABBINGTON:

20 Q Did you -- we were talking about him, the idea of Mike,  
21 Mike Mulder's ability to read, and I think we agreed that that  
22 was at --

23 THE COURT: I mean, we were talking about Dalton  
24 Trumbo, if that --

25 MR. ABBINGTON: Right. Well, that's what it

1 was. Okay. Thank you.

2 THE COURT: I don't think we need to go back  
3 through that unless --

4 MR. ABBINGTON: Okay. Thank you.

5 BY MR. ABBINGTON:

6 Q Would you agree that that is not -- kind of a follow-up  
7 on what the judge was asking -- that this is not a case of  
8 someone who can reason well, but simply cannot express  
9 himself? Would you agree --

10 A I, I think that he has some problems with reasoning and  
11 with expression, but I think the expression problems are much  
12 more prominent.

13 Q Okay.

14 THE COURT: That is, really, what I was driving  
15 at in trying to understand. If you were -- I don't want  
16 to you assign a percentage, but your answer, as I understand  
17 your testimony, the deficits he suffers as a result,  
18 apparently, of the stroke, the organic brain damage, has  
19 impaired his ability to, to communicate verbally or, in  
20 other matters, to a greater degree, than it has impaired  
21 his ability to understand and think within his own mind;  
22 am I correct?

23 THE WITNESS: As far as I can tell, the  
24 difficulties he has with thinking relate, partly, to memory;  
25 partly to attention or concentration. But, his real

1 difficulty is in expressing his words.

2 THE COURT: All right. Thank you.

3 BY MR. ABBINGTON:

4 Q So if we were talking about, in terms of degree of  
5 impairment, he has a severe impairment, inability to express  
6 himself in words.

7 Would you agree with that?

8 A I would say he has a significant impairment.

9 Q All right. He also has an impairment in his thinking?

10 A Yes.

11 Q All right. So in -- just going, kind of filling out this  
12 idea with the judge, this is not the guy in, Johnny Got His  
13 Gun, who is trapped in a chair -- trapped in a bed with his  
14 face blown off, and can't form words and talk about all of his  
15 life and experiences that he's thinking about right at this  
16 moment. This is a brain-damaged guy, with scattered shot  
17 damage to his brain, who is really incapable of accessing a  
18 lot of his memories and thoughts?

19 A Um, I would say that my observation is he has difficulty  
20 accessing some memories, and with forming short term memories.  
21 I wouldn't be able to say that it's -- I wouldn't be able to  
22 give you a quantity of how much of his long-term memory is not  
23 available to him because there's been some discrepancies in  
24 the record about that.

25 Q Okay. Do you believe he has difficulty reading?

1 A I believe he has difficulty reading books, yes.

2 Q Okay. And this idea that he's, he's -- in considering  
3 his situation, I mean, part of your review of this is  
4 considering his situation, the situation in which he finds  
5 himself. You believe Mr. Mulder would -- genuinely, does not  
6 want to be on death row?

7 A I believe he would like to get off of death row, yes.

8 Q So he would be genuinely motivated to name his attorneys,  
9 the attorneys that have performed below standard? He would be  
10 motivated to expose those individuals, but he's not able to do  
11 that?

12 A I don't recall asking him for the names of his attorneys  
13 in the past. As you mentioned, it's unlikely that he would  
14 have been able to remember them if he couldn't remember your  
15 name, but I didn't ask him that question.

16 Q You think it would be unlikely he would be able to  
17 remember specific events that occurred during the course of  
18 his trial in 1997?

19 A I think he recalls some of the events from his trial in  
20 '97, yes.

21 Q I don't doubt that he recalls some of the events. I --  
22 but, I mean, would it be a fair statement to say that he has  
23 lost, other than what -- than the items you've detailed in  
24 your report, anything other than that, he probably doesn't  
25 have anymore because you've asked him about it?

1 A My report and my notes reflect the topics we talked  
2 about. It certainly did not focus on his 1997 trial.

3 Q Would it be a fair statement to say that your training,  
4 education, and experience in this area far exceeds that of  
5 the average attorney?

6 A Yes.

7 Q So you would be more trained and skilled in knowing  
8 how to talk to Mr. Mulder and extract this information from  
9 him?

10 A Yes.

11 Q Does his low IQ exacerbate his communication difficulty?

12 A I believe his IQ measure reflects his communication  
13 difficulties.

14 Q Do you think that he, other than his communication  
15 difficulties, would not have a low IQ?

16 A Uh, Dr. Kessel refers to some early testing prior to the  
17 stroke, but I'm not sure that that was made available to me.

18 So prior to his stroke, he did get a G.E.D. He did  
19 attend community college. I don't have reason to believe that  
20 he had an abnormally low IQ prior to the stroke.

21 Q No, I agree with you on that. I think he probably had --  
22 would you agree that he probably had, probably, an average IQ?

23 A Probably average; yes.

24 THE COURT: She didn't see -- Dr. Kessel  
25 testified to the Wechsler test, I believe, in second grade

1 and fifth grade, something to that effect, did she not? And  
2 she even gave the results in her testimony or something -- one  
3 of the two doctors who testified previously did. So, we know  
4 what the IQ tests revealed at second grade level and fifth  
5 grade level from that test, but I don't think the witness  
6 characterized it because she said she hadn't seen that data.

7 MR. ABBINGTON: No. I characterized him as  
8 having a low IQ.

9 Would you agree that he has a low IQ --

10 THE COURT: Well, now? Now?

11 MR. ABBINGTON: Yes, now.

12 THE COURT: It is what it is, but your  
13 question -- her response to you was that the intelligence  
14 quotient measured was a reflection of his communication  
15 difficulty.

16 MR. ABBINGTON: Correct.

17 THE COURT: Not the cause of his communication  
18 difficulties.

19 BY MR. ABBINGTON:

20 Q Did you understand -- is that what you meant by that  
21 answer, doctor?

22 A The IQ testing that he had, at this most recent  
23 evaluation, post-stroke, reflected his language deficits,  
24 because one of the ways we measure IQ is by someone's ability  
25 to remember things and to use language.

1 Q So, doctor, Dr. Cansora talks about that -- that because  
2 the language, uh, testing is -- I can't remember exactly how  
3 he said it -- the language of testing, do you recall that?  
4 Did you read Dr. Cansora's report in its entirety? You did,  
5 didn't you?

6 A I did. I did.

7 Q All right. I'll get back -- I'm come back to that.  
8 Okay. That's not a problem.

9 You believe that Mr. Mulder is capable of genuine  
10 reciprocal conversation?

11 A Yes.

12 Q Is that with or without prompting?

13 A I believe it's without prompting, depending on the topic.

14 Q So what does that mean?

15 A That means, when we're talking about his sports teams --  
16 and I know nothing about sports, so I'm not able to prompt  
17 people about sports -- that is a reciprocal conversation that  
18 flowed.

19 When we talked about his questions about the  
20 fingerprints, that was a conversation that he responded to  
21 prompting.

22 Q But, as you stated, you couldn't remember -- he didn't  
23 state anything other than the fingerprints were a concern.  
24 He was unable to say why they were a concern?

25 A Correct. So, perhaps, that's not the best example.



1 Q Did you review the record, the direct appeal and the  
2 State post-conviction opinion of this case?

3 A I may have seen that in the materials this morning that  
4 were provided.

5 Was it from January of 2006?

6 Q The direct appeal should have been, would have been, I  
7 think, in about '98 or '99.

8 A Oh. I don't know if I saw that.

9 Q Okay.

10 A I don't think I saw that.

11 Q Could Mr. Mulder give you one specific example of  
12 anything that I have ever done that benefitted him?

13 A I did not ask him an example. He did say that he was  
14 grateful for your assistance.

15 Q Right.

16 A But I didn't ask him -- he didn't spontaneously provide  
17 any examples.

18 Q He's grateful for what I'm doing, but he doesn't -- he  
19 couldn't -- he didn't name anything that I've ever done for  
20 him?

21 A He did not name anything spontaneously, and I didn't  
22 ask him.

23 THE COURT: You did not -- she said she did not  
24 ask him that question, so --

25 MR. ABBINGTON: Didn't ask him. All right.

1 BY MR. ABBINGTON:

2 Q Now, when he made the statement that he's, he's  
3 cooperative, cooperating with his attorneys, what exactly  
4 did he tell you he was doing to cooperate with his attorneys?

5 A Are you referring to something I wrote or something I've  
6 said?

7 Q Something -- I'm talking about his, your statement in  
8 regard to that he was -- hold on just a second.

9 "He is motivated to assist his defense attorney and  
10 expressed gratitude to Mr. Abbington for his efforts on his  
11 behalf."

12 And that was the question was could you name one --  
13 could he -- what efforts had I undertaken, on his behalf, that  
14 he was grateful for?

15 A Uh-huh. He said that your job was to keep him from  
16 getting executed and to ask the judge for the evaluation  
17 that we were conducting at that time. Ask the judge. Let me  
18 talk to you and see if I can work with them to get the best  
19 deal possible.

20 So, he expressed -- I see now in my notes, he  
21 expressed appreciation for the proceedings that relate to, uh,  
22 the evaluation, the calling into question of competency, and  
23 to see if he can get a better deal down the road.

24 Q So he's glad I'm doing this competency proceeding, but  
25 he's also thinking that the delay is bad?

1 A He is glad that you're keeping him from getting executed,  
2 but he doesn't agree with the strategy to, mainly, delay the  
3 execution. He would like for it to be more a strategy that  
4 addressed the actual sentencing.

5 Q And he would like to go home?

6 A He would also, eventually, like to be released from  
7 prison.

8 Q That's a pretty concrete idea, isn't it?

9 A Yes.

10 Q Now, in regards to these playing cards, did he explain  
11 to you how he uses the playing cards?

12 A He explained to me that different suits had different  
13 values. So, diamonds had a value of ten. So the four of  
14 diamonds would mean 14. And he would use those to help him  
15 count through many, many repetitions of an exercise.

16 Q Do you think he's actually capable of doing that --

17 A I --

18 Q -- counting to a thousand?

19 A I did not ask him to demonstrate it. I saw that, uh,  
20 he's referred to his exercises with other evaluators. I see  
21 that he's bought playing cards through the commissary back in  
22 2006, so I think it's possible.

23 Q He says that he can't play cards. Do you believe that  
24 he's correct about that; he's unable to play cards?

25 A He said he can't play Spades, and I'm not familiar with

1 that game. He said he can't play that card game.

2 Q Okay. You're not familiar with Spades or how it works?

3 A No, not at all.

4 Q Do you credit that he's unable to play checkers, do you  
5 believe that he's correct about that?

6 A I believe he -- I believe him when he says he can't play  
7 checkers.

8 Q Is that a hard game to play?

9 A It's not a hard game to play, but it does take sustained  
10 attention, and I think he has some problems with that.

11 Q Have you ever seen that chicken that can play  
12 tic-tac-toe?

13 A I think I have.

14 Q Uh --

15 THE COURT: I haven't. So that goes right by  
16 me.

17 MR. ABBINGTON: There's an actual -- there's  
18 a chicken that plays in a store front, I believe it's in  
19 California, who can play tic-tac-toe. And you can't beat him.  
20 I don't think anybody can beat him. He, like, sits in the  
21 store window and beats everybody.

22 I don't know if you're familiar with that. It's --  
23 they use that as an example of mental status exam stuff.

24 Would you agree with that?

25 THE WITNESS: I've not seen it used.

1 BY MR. ABBINGTON:

2 Q Are you familiar with that?

3 A I've not seen it used as an example of mental status  
4 exam, but I do know that chickens and also pigeons can be  
5 taught to play tic-tac-toe.

6 Q All right. His statement that his father took a swinging  
7 hit at me, uh, while dramatic, that's, that was one of the  
8 things he was able to relate to you about his family?

9 A Yes.

10 Q We had some testimony yesterday that these emotional  
11 centers of the brain with Mr. Mulder may have remained in  
12 tact, and that items or parts of his history that have a high  
13 emotional characteristic to them, he's able to recall those.

14 Would you agree or disagree with that statement?

15 A I would say I don't have enough information to agree or  
16 disagree. I have pockets of information of different things  
17 that he's told me and has told others, but I don't know enough  
18 about comparing emotional versus non-emotional events.

19 Q And Dr. -- and Mike Mulder's report to Dr. Bradley that  
20 he did not have any children, Dr. Bradley also noted that he  
21 was cooperative, as did most of you, I think most everyone  
22 else.

23 What do you think about his reporting that he did  
24 not have any children to Dr. Bradley?

25 A I thought that was puzzling. And I was interested in

1 whether or not there could have been an error on Dr. Bradley's  
2 part. I am puzzled by it.

3 THE COURT: Counsel, help me out, all of you,  
4 what does the record show? Does the petitioner have a child  
5 or not?

6 MR. ABBINGTON: He has one child.

7 THE COURT: Well, so he does have one child?

8 MR. ABBINGTON: Yes, sir.

9 THE COURT: Okay. So that would be the accurate  
10 response?

11 MR. ABBINGTON: That would be correct.

12 THE COURT: Okay.

13 BY MR. ABBINGTON:

14 Q Is it relevant to the diagnosis of dementia that  
15 Mr. Mulder's IQ was documented at 96 and 85 before the onset  
16 of the stroke and, after, uh, his IQ is now, at best, 70,  
17 with a much reduced fund of information? Is that relevant  
18 to you?

19 A Uh, with regards to his competency?

20 Q With regard to a diagnosis of dementia.

21 A Oh, that's consistent with a diagnosis of dementia.

22 Q Now, you said you tracked -- we had a big, not a dispute,  
23 an inquiry into the accuracy of Mr. Mulder's canteen records.  
24 Were you able -- you were able to review those. From what  
25 time period did you review it?

1 A I reviewed his canteen records that were provided. Let's  
2 see, here, my report says what I was looking at.

3 (Witness reviews notes.)

4 I just wrote prison canteen store purchase records.  
5 So, it was whatever was provided to me by the Attorney  
6 General's office. And I would have to look and see what that  
7 cover letter said about -- and as I -- here we go.

8 Yeah, I just received, uh, prison canteen store  
9 purchase records, and they were stamped 4, 5, 6 to 653.

10 MS. PROCTOR: Your Honor, it's Exhibit 507 of  
11 respondents --

12 THE COURT: Exhibit 507. Thank you.

13 Okay. Go ahead. What's your question about?

14 BY MR. ABBINGTON:

15 Q So did you -- in your report, you say that you limited  
16 this just to the four-week time period; is that right?

17 A Uh, no. I gave an example of a four-week time period. I  
18 didn't limit my review of kite requests to those four weeks.

19 Q How do you know that that accurately reflected his  
20 ability to track?

21 A It suggested to me, when I did the review, that he was  
22 tracking the order and the funds in his account over that  
23 period of time; that he was tracking that information.

24 Q Did you test his addition and subtraction and ask him,  
25 specifically, how he tracked his canteen order?

1 A I did not.

2 Q One of the things we had -- Dr. Kessel testified  
3 yesterday that his card counting strategy, that there's no  
4 possible mechanism that ends with an even number of a thousand  
5 or fifteen hundred; that there's no even number analysis  
6 that can be done with that. That even given his own unique  
7 numbering system, that --

8 THE COURT: No, counsel. I think she said you  
9 could not get an even number.

10 MR. ABBINGTON: She said --

11 THE COURT: Her construction was that it would  
12 be -- that if he -- she said if he did it three times, each  
13 time it would come up to 750, as I recall the record, which  
14 would be significantly higher than a thousand push-ups and  
15 200 and 250 sit-ups. As I understood this witness' testimony,  
16 she talked about ascribing a numeric value to a diamond card.

17 Did he have different numeric values for cards that  
18 were not diamonds, hearts, spades, clubs? Or do you recall?  
19 Do you recall the specifics of his -- how he employed the  
20 cards in some kind of gauge?

21 THE WITNESS: The one, the one example I have is  
22 that diamonds were assigned a value of ten, so a four of  
23 diamonds was 14. An Ace would be 30.

24 THE COURT: And nothing about spades, clubs,  
25 whether they were different?



1 THE WITNESS: I didn't go into that level of  
2 detail.

3 THE COURT: Okay.

4 MR. ABBINGTON: All right.

5 THE COURT: And you didn't do any mathematical  
6 calculation to see, if you use those values ascribed to  
7 diamonds, that you would come up with the same number of  
8 push-ups and sit-ups that he claimed to be doing.

9 THE WITNESS: No. I, the only mathematical  
10 assessment I did was with regard to those serial three  
11 subtractions.

12 THE COURT: Right. Right.

13 THE WITNESS: And, again, that was more of a  
14 test of his concentration abilities than a math --

15 THE COURT: Not a mathematical test to see if he  
16 could get to a two at the end of the day?

17 THE WITNESS: Correct.

18 THE COURT: Right. Yeah. Okay.

19 BY MR. ABBINGTON:

20 Q Given his physical condition, do you think Mr. Mulder is  
21 actually capable of doing fifteen hundred push-ups a day?

22 A He said he was doing one arm push-ups and that he wanted  
23 to build up to that.

24 I don't know. I certainly didn't have an  
25 opportunity to see him do push-ups, so I don't know.

1 Q All right. But would you agree that fifteen hundred  
2 one arm push-ups would be a pretty substantial event; ability?

3 A Yes, it would be. It would definitely be; yes.

4 THE COURT: Our CSOs can do them, but I don't  
5 think I could.

6 BY MR. ABBINGTON:

7 Q All right. So going over -- it appears that you and  
8 Dr. Kessel do have several points of agreement. You agree,  
9 then, with her diagnosis of aphasia?

10 A Yes.

11 Q Is there a reason why you did not diagnose Mr. Mulder  
12 with aphasia?

13 A Aphasia is not a DSM psychiatric diagnosis, so I did  
14 not include that in my, uh, Axis I diagnosis because it's --  
15 it's just the way that they categorize things according to  
16 this, uh, schema for psychiatric diagnoses. She's a little  
17 bit of a different diagnostic schema.

18 Q Okay.

19 A She didn't use an Axis I, Axis II, so mine is a little  
20 bit different in the way I laid it out. I did include, under  
21 Axis III, that's where we put our medical conditions. I put  
22 cognitive changes, very broad statement. Aphasia, certainly,  
23 would fit under there. If you wanted to specifically include  
24 it, you would put it under Axis III.

25 Q All right. So you would agree, though, that the aphasia,

1 as defined, is listed in the DSM-IV and DSM-IV-TR?

2 A It may be listed as an example of a language disorder.

3 Q Do you have a copy of the DSM-IV or TR with you?

4 A I didn't bring one with me today.

5 Q All right. Would you disagree with me if I was to  
6 represent to you that in -- on page 820, in the Appendix, it  
7 defines aphasia as an impairment in the understanding or  
8 transmission of ideas by language in any of its forms;  
9 reading, writing, or speaking, that is due to injury or  
10 disease of the brain centers involved in language?

11 Would that be fair?

12 A That would be the descript --

13 THE COURT: The definition that --

14 THE WITNESS: The description; yes. Yes.

15 BY MR. ABBINGTON:

16 Q All right. And so Mr. Mulder does have the brain injury  
17 portion of the program?

18 A Yes.

19 Q He has a brain injury. And you noted that he had, I  
20 believe in your report, a cerebral vascular accident with  
21 cognitive changes?

22 A Yes.

23 Q Okay. And there is damage to the pathways that lead to  
24 the left frontal lobe, so he's had significant disruption of  
25 language processing; would you agree with that?

1 A He has disruption of language processing, not just with  
2 regards to that frontal lobe connection, but the language  
3 centers in other parts of the brain as well.

4 Q In fact, Dr. Cansora compared Mr. Mulder as someone  
5 who had had a modified brain lobotomy; would you agree with  
6 that --

7 A I think that --

8 Q -- statement?

9 A I think that's a little bit of a difficult statement to  
10 make because lobotomies, by their nature, are very surgically  
11 precise, and he had a broader injury than that.

12 Q So he's even worse off than somebody who had a lobotomy?

13 A Uh, he has, I think, a different kind of injury than a  
14 lobotomy.

15 Q As regards to his language, would you agree with  
16 Dr. Milner's characterization that he exhibits responses  
17 that would be inconsistent with an individual with similarly  
18 reported education?

19 A Yes. That his current level of responses are  
20 inconsistent with someone who has a G.E.D. and went to  
21 community college.

22 Q And so his -- when he states he's unable to track  
23 narratives and books, would that qualify as a form of  
24 receptive aphasia?

25 A Yes. He has difficulty with reading language and

1 registering narratives; yes.

2 Q And this statement, his father took a swinging hit at me,  
3 is pretty much my father took a swing at me, or my father  
4 tried -- took a swing or tried to hit me, is the idea, but the  
5 actual quote is "father took a swinging hit at me," correct?

6 A Yes.

7 Q And so that -- would that qualify as a demonstration of  
8 expressive aphasia?

9 A That would qualify as a word substitution that would be  
10 consistent with expressive aphasia.

11 Q All right. So, now, in terms of Mr. Mulder's ability to  
12 communicate -- and I understand that in your practice, in your  
13 experience, you are running across people who are even worse  
14 off than Mr. Mulder?

15 A Yes. I've seen people who have worse aphasia.

16 Q And maybe the complete inability to care for themselves,  
17 people that are -- I think that's where I'll leave it; unable  
18 to care for themselves.

19 A Yes.

20 Q All right. So in -- do you have a copy of -- did you  
21 review medical records as part of it, or as part of your  
22 review?

23 A Yes.

24 Q So I don't know if you have these around, but maybe you  
25 just know them from reviewing them, that they talked about the

1 fact that even shortly after his stroke, which took place  
2 in -- on March 15th, 2010, he gets back to, uh, the infirmary,  
3 and they're paying pretty close atten -- they're paying some  
4 more, some increased attention to him; would you agree with  
5 that?

6 A Yes.

7 Q And he's still having these problems with expressing  
8 himself; for example, on April the 6th he called a carrot a  
9 Hora (phonetic).

10 Are you familiar with that?

11 A I don't remember that specifically, but I remember he  
12 had some real difficulties communicating shortly after his  
13 stroke.

14 Q Dr. Cansora spent about five hours with Mr. Mulder, and  
15 separate from reviewing these records and things, in terms of  
16 ability to communicate and communicate needs, some of those  
17 abilities he had even after the stroke, right? He regained  
18 them even shortly after the stroke?

19 A Yes.

20 Q So, say, for example, on April the 10th, his staff said  
21 he's oriented to staff. He's able to speak yes or no. And,  
22 he's oriented. He's alert. He knows when he has to have a  
23 BM.

24 THE COURT: You say April the 10th of what year  
25 now?

1 MR. ABBINGTON: 2001. I'm sorry, Your Honor.

2 BY MR. ABBINGTON:

3 Q So he's able to have those -- in your conversations with  
4 him, that same sort of ability to communicate his needs; if  
5 he had to go to the bathroom, he wouldn't have sat there and  
6 actually just gone to the bathroom on himself, he would have  
7 had a guard or somebody take him to the bathroom?

8 A Right. So early in the recovery, what you're describing,  
9 he's in the infirmary and he's expressing basic needs; yes.

10 Q Right.

11 A And --

12 Q He's maintained that? He's still able to express the  
13 basic needs?

14 A Yes.

15 Q What level of functioning, like, say, for example, the  
16 ability to -- as they noted on April 10th -- to let someone  
17 know when he has to have a BM, so it's a bowel movement,  
18 that -- how old would someone have to be in order to  
19 communicate that need?

20 A Uh, there are some places where children are potty  
21 trained at age one. So, conceivably, as early as one year  
22 old.

23 Q All right. Would you agree with the statement that  
24 Dr. Cansora has in his report that says it is clear throughout  
25 the notes that Mr. Mulder continued to have rather profound

1 expressive aphasia with great difficulty conveying his needs,  
2 but with an adequate understanding of what is said to him for  
3 simple and basic needs?

4 A I -- excuse me, is Dr. Cansora referencing a specific  
5 time period in that statement?

6 Q I believe that would be --

7 A Or is that in general?

8 Q I believe that was -- I believe this time period from  
9 3/15/01 -- or 3/28/01, when Mr. Mulder was unable to make  
10 gestures or unable to communicate. His eyes were open, he's  
11 unable to respond. And in about, a little bit over 21 days  
12 later, he's doing a little bit better.

13 A Uh-huh. Okay.

14 Q All right.

15 A So --

16 Q Would you agree with the characterization that even then,  
17 he has this profound expressive aphasia, that that hasn't --  
18 that that profound expressive aphasia did not interfere with  
19 his ability to communicate simple and basic needs?

20 A At that time, in 2001, I would agree that's a good  
21 representation.

22 Q Would it be -- do you agree with Dr. Kessel's diagnosis  
23 that he suffers from dementia?

24 A Yes.

25 Q Once again, you didn't have that noted in your report; is



1 there a reason for that?

2 A I used a more general term of cognitive disorder  
3 secondary to brain injury. I don't have a specific reason  
4 for not using dementia. I agree that it also applies as a  
5 diagnosis.

6 Q Would it be, if we were -- if you had an opportunity to  
7 amend your report, would you amend it to include these two  
8 diagnoses as being more specific and applicable to Mr. Mulder;  
9 the diagnoses of aphasia and dementia?

10 A I believe that the dementia diagnosis is more precise  
11 because it does reflect the nature and duration of the  
12 deficits. Aphasia, I would probably add that to Axis III. If  
13 asked to do another report, I would -- it would be consistent  
14 with his presentation. So, I don't think that it would, uh,  
15 be a big deviation from what I've got now, but I wouldn't have  
16 any problem doing it.

17 Q Okay. So in terms of what we're getting from  
18 Dr. Cansora, Dr. Milner and Dr. Toomer, would you agree  
19 that a full neuropsychological battery would be more probative  
20 and more reliable than a Mini-Mental Status Exam or a full  
21 mental status exam?

22 A Probative and reliable for what purpose?

23 Q For purposes of determining competency?

24 A Actually, no.

25 Q Why not?

1 A Because competency is really restricted to a narrow set  
2 of functions.

3 Q Would you agree that Mr. Mulder's inability -- do you  
4 think that he's capable of reading a newspaper?

5 A I don't know if he's competent -- or if he's capable.  
6 Excuse me. I don't know if he's capable of reading a  
7 newspaper.

8 Q Would it be a fair statement to say that you don't think  
9 he's capable of reading a newspaper?

10 A I think he might be able to read parts of a newspaper --

11 Q Like the comics?

12 A -- like the sports areas.

13 Q Would you -- are you familiar with his orders from the  
14 commissary, his book requests?

15 A I am.

16 Q Do you know the change in his, the nature of his book  
17 requests following the stroke?

18 A Yes. It went from fiction to just pure graphical books.

19 Q Pictures of naked ladies?

20 A Yes.

21 Q Uh, would you agree that Mr. Mulder has word finding  
22 problems? You said word finding problems?

23 A Yes.

24 Q Comprehension problems?

25 A Some comprehension problems; yes.

1 Q His memory is poor?

2 A His -- he has deficits in his short term memory and,  
3 also, in some of his longer term memory, yes.

4 Q These are findings that Dr. Cansora made so -- to give  
5 you reference to what they are. This -- his reporting that he  
6 curses more than he used to, uh, Dr. Cansora believes that  
7 this is related to these emotional centers and their ability  
8 to, to continue in the -- even despite the deficits in his  
9 other vocal centers -- thinking centers.

10 Would you agree with that characterization?

11 A Uh, I'm not sure I would agree with that. I just don't  
12 know if there's a lot of science, specifically, about the  
13 cursing. Maybe Dr. Cansora, um, is more aware of the science  
14 on that. I'm hesitate to agree or disagree because I just  
15 don't know how well that's developed.

16 Q Dr. Cansora came out with a full scale IQ for Mr. Mulder,  
17 grading him in the second percentile.

18 Do you think that test was reliable?

19 A Yes.

20 Q And when he says he's in the second percentile, what does  
21 that mean?

22 A That means of all the people who are scored with that IQ  
23 test, 98 percent of the people perform at a higher level.

24 Q And his verbal IQ is a 66, and in the first percentile?

25 A Yes.

1 Q Would you agree with that?

2 A That's consistent. I would agree.

3 Q So then 99 percent of the people that took that test do  
4 better than him?

5 A Yes.

6 THE COURT: I don't want to go back through your  
7 testimony previously about how you ascribed the IQ test to  
8 either reflection. I think, as you said of his condition, as  
9 opposed to the genesis of his condition, but there's been  
10 quite a bit of testimony concerning comparative age groups,  
11 reading levels, or grade levels and so forth. And I want to  
12 make sure I understand, from the standpoint of your testimony,  
13 what I should draw from that.

14 When we -- it's a convenient, and maybe an  
15 understandable comparison to say someone can read a sentence  
16 and act appropriate at the age of four to six, or when they  
17 can read, or that they read at a certain level, second grade  
18 or whatever, level, when we use those points of reference, is  
19 it intended to be your testimony that, uh, the recipient,  
20 myself, or the attorneys, should conclude that that means  
21 that the person then functions as a four-year-old or a  
22 six-year-old or an eight-year-old for all purposes, or is  
23 that simply a benchmark for purposes of comparison? And if  
24 so, what conclusion should we draw from it?

25 That's a terribly compound question, but --

1 THE WITNESS: I understand that. I believe  
2 the best way to think of it is a benchmark for a specific  
3 skill, such as reading ability or, uh, other kind of specific  
4 abilities. I think it's very difficult to apply that kind of  
5 development yardstick to an adult because Mr. Mulder doesn't  
6 have a developmental disorder. He doesn't have a disorder,  
7 such as mental retardation, where he matured up to the age of  
8 a six-year-old and then it stopped. He progressed all the way  
9 to full development with normal or low average intelligence,  
10 and then had injuries which specifically knocked out areas of  
11 his cognitive functioning, taking those specific areas down to  
12 a lower developmental stage. But, there are other areas that  
13 are in tact. So, I think that yardstick is helpful only with  
14 very specific kinds of functioning.

15 THE COURT: That's helpful. That's what I was  
16 driving at. There may be other areas where a person would  
17 function at an age appropriate level then?

18 THE WITNESS: Correct.

19 THE COURT: All right.. all right. Thank you.

20 BY MR. ABBINGTON:

21 Q So, for example -- to follow-up on what Judge Pro just  
22 asked about, in Dr. Cansora's report, on page 11, I don't know  
23 if you've seen it, in the bottom of the report --

24 A Okay.

25 Q And this is going to be the last paragraph, last

1 paragraph on that page. It says: "With that said, it's  
2 important to point out that since Mr. Mulder is presumed to  
3 have operated in an average range, intellectually, prior to  
4 the stroke. Many of the social skills and knowledge based  
5 skills are reflective of normal functioning. This is because  
6 he lost some, but not all, of his acquired skills."

7           So, for example, if he liked baseball before, he  
8 likes baseball now. If he liked football before, he likes  
9 football now. But that's a hundred miles away from he used to  
10 read Dean Koontz novels before, and now he sits and looks --  
11 reads pictures about Tracy Lords autobiography?

12       A    His -- first of all, I have to say that I've not found  
13 the page. I've got a page 11 here on Dr. Cansora's report,  
14 but I'm not sure if it's the same pagination as you are  
15 looking at.

16       Q    It's a start --

17       A    Is it the, under the intellectual testing part?

18       Q    Correct. The second paragraph begins with "I  
19 administered 10 of the 14..."

20       A    Yes.

21       Q    "-- subtests." And so this would be the last paragraph  
22 that starts with, "with that said..."

23       A    Okay. There we go.

24           Uh, so, yes, he makes the point that Mr. Mulder has  
25 lost some, but not all of his acquired skills, such as his

1 language skills, such as his skills in being able to read a  
2 novel. And he's lost his ability to play checkers, but he  
3 hasn't lost his ability to say, uh, write letters or send out  
4 cards or keep track of certain things in his life.

5 Q Right. He has a lot -- say, for example, he hadn't  
6 forgotten that, that, uh, that his dad took a swing at him  
7 back when he was a kid or --

8 A Correct. And he hasn't.

9 Q Actually, he didn't say when it was.

10 A Right.

11 Q Did he tell you when that happened?

12 A Yeah. He said that was during his sophomore year in  
13 high school, that his father hit him because he was ditching  
14 school. And his father took a swinging hit at him, and that's  
15 when he decided that he couldn't live in that home anymore.

16 A Dr. Cansora says that these sort of emotional centers and  
17 this -- that that sort of memory would remain, even though his  
18 other functioning was, was impaired.

19 Would you agree with that assessment?

20 A It's difficult for me to agree with that because I just  
21 haven't had a chance to see a comparison of Mr. Mulder talking  
22 about things like people coming to visit him at the jail, his  
23 brother's jail visits, and how much he can recall of that,  
24 perhaps, being a low emotional thing compared to something  
25 related to his trial, which was a high emotion thing.

1 Q Okay. So say --

2 A I just haven't had a chance to compare them.

3 Q So if, for example, someone had had the opportunity to  
4 be present and for -- I'll give you Dr. Kessel was present,  
5 and during those events, and expresses, was able -- was  
6 testifying regarding Mr. Mulder's impairment on these kind of  
7 complex issues, would you credit that sort of testimony?

8 A Uh, it's a little bit difficult for me to evaluate her  
9 testimony when I haven't personally reviewed it.

10 Q Okay. We may -- we provided copies of her notes to the  
11 State's counsel, so maybe we'll come back to that. We'll go  
12 on to something else.

13 So, in working memory, Dr. Cansora tested Mr. Mulder  
14 and came back with a score of 61, which puts him in a point  
15 15th percentile, which means --

16 A Uh-huh.

17 Q -- as I understand, that means that 99.5 percent of the  
18 people that take that test would do better than him?

19 A That would be an accurate interpretation; yes.

20 Q What would you -- what -- how would you characterize a  
21 score that was in the fifth, one-half of a percentile, a point  
22 fifth percentile range?

23 A I would characterize that as moderately to severely  
24 impaired.

25 Q You would have to be -- I mean the population of people



1 who would be more impaired than Mr. Mulder is, how far? What  
2 percentage?

3 A It would be very small.

4 Q So it is probably more of a severe impairment or a  
5 moderate impairment?

6 A Uh, are you referring to a specific score in the report?  
7 Because I might be able to track a little better.

8 Q Yeah. He gave him a score, on page 11, that same page,  
9 he talks about the score for working memory. And I believe  
10 he, at a later point, gives that percentage on where the  
11 percentile is. Let's see if I can get that page.

12 A I see arithmetic scores.

13 Q Yeah. Its in the second paragraph on page 11: "When  
14 scoring his performance, reasonable license...", is that  
15 sentence. And it says, "Even with such license, Mr. Mulder  
16 performed within the mentally retarded range overall, 69 for  
17 verbal intellect. It's 66. And a borderline mentally  
18 deficient range for special reasoning at 74."

19 A Uh-huh.

20 Q "And in the mentally retarded range for working memory  
21 skills at 61."

22 And I believe --

23 A Yeah.

24 Q -- later on, there's a chart where he goes through those.

25 A Gotcha.

1 Q Are we okay on that?

2 A We are good with that.

3 Q Okay. So Dr. Cansora also says that, in part of this,  
4 he gives the example of -- which I think is kind of relevant  
5 to what the judge used -- of a concert pianist who could  
6 lose their ability to speak and reason, yet might retain the  
7 ability to play previously learned material.

8 So, you would have this person who was sitting  
9 there playing Beethoven, yet, they were unable to speak or  
10 reason.

11 Is that possible?

12 A That is; yes.

13 Q All right. So this -- Dr. Cansora's finding that  
14 Mr. Mulder does not comprehend passages, well at all, would  
15 you agree with that statement?

16 A Uh, I would agree that, uh, Dr. Cansora's report says  
17 that. Because I did not give Mr. Mulder a test of passage, I  
18 can't independently verify it.

19 Q In the sense that you gave him three words, he's unable  
20 to remember two without prompting, is that the kind of person  
21 that you think could read a paragraph of a, of a legal  
22 pleading?

23 A I think it's unlikely.

24 Q Now, I, earlier, I note in his report that it says that  
25 his, uh, arithmetic scores were at the sixth grade level.

1 They're actually in a fourth grade level. And his reading  
2 comprehension is at the second grade level.

3 Do you think those test results are reliable?

4 A Um, I have no reason to doubt Dr. Cansora's, uh -- the  
5 validity of Dr. Cansora's testing or reporting.

6 Q What -- is it the validity of his testing, is it enhanced  
7 by the fact that his scores were duplicated in large extent by  
8 Dr. Milner in 2003 and 2004 and, again, by Dr. Toomer years  
9 later?

10 A Yes. The convergence of findings helps reinforce the  
11 validity of these findings.

12 Q And the, the difference in the scores between a 69 and  
13 the 70, would you agree that that's not statistically  
14 significant?

15 A Right. That's not significant, given the inherent  
16 standard error within all of these tests. There's always  
17 going to be a little range of findings.

18 Q Now, Dr. Cansora grades Mr. Mulder's ability to read at  
19 the second grade level. Would -- do you think that that test  
20 result is reliable?

21 A Yes. I think it's consistent with his, uh, other  
22 testing, and it appears to be valid.

23 Q So Dr. Kessel testified that he's functioning somewhere  
24 around the second grade level, which would be six to eight  
25 years of age.

1           You would agree with that then?

2       A    Uh, I would agree that his reading, or his specific  
3 language abilities, as tested by these psychological tests,  
4 reflects the typical ability of a child in that range. I  
5 wouldn't characterize general functioning that age range, but  
6 I would say those specific abilities, as tested and reported,  
7 would reflect that age range.

8       Q    Could you tell us what the working memory, what that IQ  
9 test is testing for?

10      A    Working memory is sort of like when your computer is on  
11 and you're working on a document, but you can't -- you haven't  
12 saved it to the hard drive yet. Working memory is that  
13 temporary place where your, uh, consolidating and, uh,  
14 bringing information in, but you haven't stored it. You  
15 haven't saved it to the hard drive yet. For long-term memory  
16 is once it's been saved to the hard drive.

17      Q    Is this where Mr. Mulder's aphasia becomes problematic,  
18 in the sense that he's -- what he's hearing and listening to  
19 is what, what Dr. Cansora talked about. Is if he's actually  
20 interpreting, what percentage of what he's hearing is he  
21 actually interpreting even before it's stored, and that that  
22 amount is that ability is diminished, that inability is  
23 impaired?

24      A    I think he may have two separate impairments. One being  
25 the ability to understand complex sentences and track

1 information that's complex or drawn out, and he may also have  
2 a separate problem, which is storing information short term.

3 Q Okay. So when Dr. Cansora says that Mr. Mulder's  
4 virtually unable to mentally track and manipulate information  
5 in his mind, you would agree with that statement?

6 A I think he's impaired in his ability to track information  
7 in his mind, and that's why I think he has made use of other  
8 ways of tracking information.

9 Q Well, given that his working memory is worse than  
10 99.5 percent of the population that's taken this exam, who  
11 would be -- can you give an example of someone whose memory is  
12 worse than Mr. Mulder and what they would be able to do?

13 A I can't give you a specific example, but I do know that  
14 Mr. Mulder has developed some ways to adapt to his memory  
15 problems that are not reflected in the, uh, testing.

16 Q His card sorting and card counting abilities, in terms  
17 of keeping this up for something that is -- you'll agree that  
18 that's an adaptive measure for something that's relatively  
19 simple in terms of counting to a thousand. He could just  
20 count to a thousand, mark numbers off on a piece of paper,  
21 put a mark on the wall, things like that. And, instead, he's  
22 come up with this elaborate -- he's advised you that he's come  
23 up with this elaborate process in place of that?

24 A That's one --

25 Q Wouldn't it be simpler --

1 A -- example.

2 Q Wouldn't it be simpler --

3 A That's one example. I think there's other examples,  
4 though.

5 Q Okay.

6 THE COURT: What would some of the other  
7 examples be?

8 THE WITNESS: When I was looking through his,  
9 his prison store records, I saw that he has, in addition to  
10 buying food items, he bought an address book in 2007 and he  
11 sends Christmas cards, Valentine's, birthday cards. He buys  
12 stamps. I think he tracks information, uses his address book.  
13 And I'm not sure how he tracks information in terms of when  
14 to send a birthday card, or if he sends it around the time  
15 of someone's birthday. But, it does suggest that he's also  
16 tracking other kinds of information, not just simply counting  
17 the number of push-ups or sit-ups.

18 BY MR. ABBINGTON:

19 Q He's using the cards for that?

20 A I don't know what he's using to track the, uh, dates for  
21 sending birthday cards but, clearly, if he's got an address  
22 book and he's buying stamps and envelopes and sending cards,  
23 he's -- he's communicating and tracking some other kinds of  
24 information.

25 Q How old would you have to be to be able to do that?

1 A Um -- whooh. I'm not sure I've ever thought about how  
2 old you have to be to manage a address book and send out  
3 cards.

4 Q You mean like, say, for example --

5 A Grade school?

6 Q Right. I was -- okay. Okay. That's good.

7 Dr. Cansora found that Mr. Mulder sustained  
8 attention skills are mildly to moderately impaired, and  
9 his ability to remain focused is below normal.

10 Would you agree with that?

11 A Yes.

12 Q He remains concrete. Dr. Cansora said that as well?

13 A I'm not sure exactly what Dr. Cansora is referencing. I  
14 think there's some evidence, from my assessment, that he may  
15 not perform perfectly on tests of abstraction, but he is able  
16 to do some tests of abstraction.

17 Q Now, do you agree with Dr. Cansora's statement that his  
18 abstract reasoning skills dropped sharply as the language  
19 processing demands increase?

20 A I think it's likely that that would be the case; yes.

21 Q So if you -- your letter -- in the piece of paper that  
22 you gave him, et cetera, just saying Close your eyes, if you  
23 had told him to walk to the corner, rubbing his stomach and  
24 patting his head, would he have been able to do that?

25 A I, I don't know if he would be able to do that. I do

1 know that, based on Dr. Kessel's report, the more complex  
2 sentences were, the more difficulty she had with exchanging  
3 information with him. But when she was able to break it down  
4 to single concept sentences, it seemed to be more effective.

5 Q Now, Dr. Cansora saw Mr. Mulder, this is in 2003. You  
6 believe these results are still valid?

7 A I think they're generally valid. He may have had some  
8 improvement, but they wouldn't have been very significant. I  
9 think by 2003, most of the recovery he was going to have from  
10 his brain injury probably had happened.

11 Q Okay. So when -- and I believe I was trying -- I was  
12 trying to find this sentence earlier, when Judge Pro had asked  
13 you about whether or not Mr. Mulder was a person who was  
14 trapped -- excuse me, trapped in his own mind and inability to  
15 communicate; that he had these thoughts, but he just couldn't  
16 express them. And on page 15 of Dr. Cansora's report --

17 A Uh-huh.

18 Q --it's at the bottom. It would be the last two, three  
19 full sentences on that page, on that report.

20 A Uh-huh.

21 Q It says: "This is not a case that Mr. Mulder can  
22 reason well but simply cannot express his understanding.  
23 It is a case that his ability to form abstract thought is  
24 compromised significantly. This is the nature of this type  
25 of aphasia."



1           Would you agree with that?

2       A    Uh-huh. I would say that his ability to form abstract  
3 thought is somewhat compromised. I think the degree of it  
4 might be subject to interpretation.

5       Q    His statement that: "Research tells us higher level of  
6 reasoning is always compromised to some extent in these  
7 areas..."

8           Would you agree or disagree with that statement?

9       A    Can you show me where that is?

10      Q    Yes. If you can give me just a second, I'll find it.

11      A    Right there. It's right above -- right above there.

12      Q    Thank you.

13           Yes, it's there.

14      A    Yeah.

15      Q    "It important to remember that he presents with  
16 expressive and receptive aphasia, and research tells us that  
17 higher level of reasoning is always compromised to some extent  
18 in these cases."

19      A    I don't know if I agree with that because I do believe  
20 there are cases where people have difficulty -- again, that  
21 locked-in syndrome where we don't know how compromised people  
22 are. And after the fact, we learn that people may not  
23 actually be that compromised when they're able to communicate  
24 with alternative measures.

25           So, I'm not sure I agree with that.

1 Q You -- you're not sure that the higher level of reasoning  
2 is always compromised? Is that the part you're talking about?

3 A Correct.

4 Q Or, not the part about the receptive and -- expressive  
5 and receptive aphasia, you'll agree with that part?

6 A I agree with the added statement that his expressive  
7 aphasia, his -- his difficulties with expression seemed  
8 to be more significant than his difficulties with receiving  
9 information or receiving verbal information.

10 Q Regarding this aphasia, Dr. Milner -- who was retained by  
11 the State in 2003, 2004 -- she found the presence of -- she  
12 diagnosed Mr. Mulder with aphasia.

13 Would you consider that to be a reliable diagnosis?

14 A The aphasia? Yes.

15 Q And, uh, in reviewing his records, it seems that if I  
16 could turn you to -- do you have the State's production on  
17 this? This is going to be Exhibit 509 and page R-985.

18 A R-985?

19 Q Yes.

20 A Is this Dr. Milner's report.

21 Q Actually this should be a consultation request, off-site  
22 consultation request from Ely Prison, and the date of service  
23 is 2-11-03 -- so this actually predates Dr. Milner's report.

24 A Okay. R-985.

25 THE COURT: While the witness is looking for

1 that, I want to try to finish her testimony before we break  
2 for lunch. How much longer do you have on cross?

3 MR. ABBINGTON: Maybe 25 minutes.

4 THE WITNESS: Okay. I found it.

5 MR. ABBINGTON: I'm sorry.

6 THE COURT: How long?

7 MR. ABBINGTON: May be 25 minutes.

8 THE COURT: Okay. Okay.

9 Go ahead, the witness has found the page.

10 MR. ABBINGTON: All right.

11 BY MR. ABBINGTON:

12 Q Do you know who the author of this document is? Is it  
13 possible to tell?

14 A Um, the consultation request?

15 Q Yes.

16 A It says -- uh, I don't see a person's name on here.

17 Q Okay. All right. And then the next page, on page  
18 R-986 -- oh, excuse me. Before I go with that page, I  
19 should go back to 985.

20 The presumed diagnosis for Mr. Mulder was -- could  
21 you read that, please.

22 A Partial paraplegia, with right side affect, and mildly  
23 aphasic. Right arm is diaphoretic and flushed.

24 Q All right. This diaphoretic, could you explain what that  
25 means.

1 A Sweaty.

2 Q Okay. Now, on, uh, page 986, the second paragraph, the  
3 last paragraph, I notice this is prepared by a R. Fallilo,  
4 M.D. (phonetic), it refers to a Dr. Williamson.

5 Did you review any records from a Dr. Williamson as  
6 part of your review?

7 A I don't recall specifically reviewing records from  
8 Dr. Williamson.

9 Q All right. They also -- this report also refers to  
10 Mr. Mulder as being mildly aphasic.

11 This, this diagnosis of aphasia, is this a very  
12 difficult diagnosis to make?

13 A The general diagnosis is not difficult to make; however,  
14 there may be difficulties in calibrating it mild, moderate,  
15 severe. There may be difficulty in finding standards to sort  
16 through that.

17 Q So the fact that the prison staff called him mild is not  
18 dispositive on that issue?

19 A No. It could be that, uh, they're using a different  
20 calibration.

21 Q All right. Now, Dr. Cansora, and I -- if I can find the  
22 page before I ask you this question -- he seems to indicate  
23 that this severe damage to expressive and receptive language  
24 will, in every case, cause significant memory disruption.

25 Would you agree with that statement?

1 A I'm reluctant to agree to it because I just lack, uh, an  
2 awareness of the research on that specific point.

3 Q Would you defer to Dr. Cansora's diagnosis and findings  
4 on that point?

5 A I would -- I would agree with his diagnosis of aphasia,  
6 but I'm not sure I would endorse his interpretation about a  
7 hundred percent of people with these kinds of problems also  
8 have significant memory problems.

9 Q Okay. Now, on page, well let's see, this is on page 18,  
10 at the top of the page. There's a box that's set -- before  
11 we get there -- that has one of these areas of remaining  
12 functioning; that Mr. Mulder's recognition memory is  
13 relatively intact, that he scores an average range in that  
14 area.

15 Would you agree?

16 A Yes, I see that.

17 Q You think that's a reliable finding?

18 A Yes.

19 Q Is it -- so what he talks about, and he uses the example  
20 of while he cannot recall sufficient details of a complicated  
21 and important conversation from his attorney, he will  
22 likely recall the gist of a brief conversation that he had  
23 face-to-face with a guard or another inmate several days  
24 before. This makes him fairly functional, on a very concrete  
25 level, in a supervised setting.

1           Would you agree with that statement?

2       A    I haven't personally asked Mr. Mulder to give me details  
3 of a conversation with his attorney, so I can't respond  
4 directly to that. I do know that he does have some memory  
5 problems and that they're both short term and long-term,  
6 but I, I can't directly agree. But, I say there's some  
7 information that would, from my assessment, that would, uh,  
8 be impartial accord.

9       Q    Okay. So could we extrapolate from the fact that  
10 he can't remember my name, that recalling details of  
11 conversations with me may be something that he's incapable  
12 of doing?

13      A    It's possible. It's very possible.

14      Q    You say probable?

15      A    I don't know. It's very possible. I don't know  
16 probable.

17      Q    Okay. Now, Dr. Cansora goes on to say that in his  
18 understanding of the complexities of a case it is likely  
19 impaired; and his ability to make important decisions by  
20 properly weighing various factors is impaired.

21           Do you agree with that?

22      A    I would be curious about how Dr. Cansora, and also  
23 Dr. Kessel, who made a very similar comment in her report, I  
24 was curious how they assess the ability or inability to weigh  
25 factors, because that's a statement that suggests that they

1 did do a specific test, perhaps a hypothetical test. But I  
2 didn't see that in their report, so I was curious about that  
3 finding.

4 Q Did you perform hypothetical exams on him?

5 A I did not.

6 Q Do you think he's capable of processing hypothetical  
7 examples?

8 A I think a simple hypothetical, he would; yes.

9 Q How simple?

10 A Broken down into fairly simple language and offered  
11 simple choices based on the -- as opposed to open-ended;  
12 giving sort of a multiple choice.

13 Q Okay. But you asked open -- say, for example, on  
14 page 815 of his report, this would be the top of paragraph 3,  
15 Dr. Cansora, he basically is -- and this is in 2003. This is  
16 in 2003, so this is almost eight years before you go to see  
17 Mr. Mulder?

18 A Uh-huh.

19 Q It says that his severely impaired comprehension is  
20 not typically observed when one tries to have a, have small  
21 talk with Mr. Mulder, or when he is asked single, concrete --  
22 asked a single concrete command; sit down, brush your teeth,  
23 et cetera.

24 He also understands simple questions. How old are  
25 you; have you taken a shower today, et cetera. He would also

1 likely demonstrate an adequate but simplistic understanding of  
2 legal questions, such as do you know why you were in court  
3 today? Those are all open-ended questions, but they're very  
4 simple questions.

5           Would you agree that he has the abil --

6   A   My --

7   Q   Would you disagree that he the ability to answer more  
8 complex and abstract questions is compromised?

9   A   Um, based on my interview, I found some compromise. I  
10 also found evidence where his ability to answer abstract  
11 open-ended questions was not that compromised.

12   Q   For example?

13   A   What is the best thing that could happen as a result of  
14 this appeals process?

15   Q   I thought he said the best thing would be some kind of a  
16 deal.

17   A   Uh, that the appeals process would, uh, address his  
18 intent to kill, and that the charge would be dropped to a  
19 lower charge.

20   Q   So, understanding Mr. Mulder's understanding of what's  
21 going on so far, he can't remember the name of his trial  
22 lawyers, right?

23   A   Well, I didn't ask him about his trial lawyers. I did  
24 ask him your name. He didn't remember that.

25   Q   So --



1 THE COURT: Counsel, let's move it up to  
2 historical. The record is replete with what --

3 MR. ABBINGTON: So -- no problem.

4 BY MR. ABBINGTON:

5 Q The ability to communicate with his attorneys within the  
6 courtroom is impaired.

7 Would you agree or disagree with that statement?

8 A I believe it's somewhat impaired.

9 Q His ability to recall important details related to the  
10 period around the crime is likely impaired.

11 Would you agree or disagree with that statement?

12 A I would believe it's somewhat impaired.

13 Q The ability to reason on an abstract level, as he had  
14 prior to the stroke is impaired?

15 A Relative to the prior -- to his stroke; yes, it's  
16 impaired.

17 Q All right. And try to go a little further.

18 There's problems with Mr. Mulder's -- would you  
19 agree that Mr. Mulder has problems with his entire thought  
20 process?

21 A Uh, no. I think that some areas of his thought process  
22 are probably not problematic.

23 Q He said that he -- when he was talking to Dr. Milner  
24 in 2003, she gave him the example of a fire in a movie  
25 theater. He said he would just run. And then she gave --

1 A That's an assessment of a hypothetical; yes.

2 Q Right. And when she asked him if he was lost in the  
3 forest, how would you get out?

4 A He said he would start a fire. And then he was unable to  
5 detail how he would get out -- away from the fire, which seems  
6 to show pretty problematic reasoning there.

7 A Yes, that would reflect problematic reasoning.

8 Q All right. Dr. Milner stated that Mr. Mulder had  
9 moderate impairment in the following areas: Comprehension,  
10 judgment, general knowledge, long-term memory.

11 Is that too many? Maybe I should stop and break  
12 those down.

13 A moderate impairment in comprehension and judgment;  
14 would you agree?

15 A I would say that he has moderate, mild to moderate  
16 impairment in all of those areas; yes.

17 Q Long-term memory?

18 A I believe so. Yes.

19 Q And expression or definition of vocabulary?

20 A Yes.

21 Q Arithmetic functions?

22 A Yes.

23 Q Now, when we're saying arithmetic functions, that's  
24 important because it's not just his ability to do math. It's  
25 to calculate, calculate a cause and effect relationship

1 between things. If this happens and this happens, then this  
2 will be the result, or is that --

3 A No. I think it's more about math in terms of how she  
4 assesses it. I could double check that, but I think it's more  
5 about just math skills.

6 Q Would you -- and she also states that his comprehension  
7 abstraction are moderately impaired as well?

8 A Yes.

9 Q All right. Also impaired is his attention,  
10 concentration, and immediate recall?

11 A Yes.

12 Q Now you saw impairment in his immediate recall as well?

13 A Yes.

14 Q All right. Dr. Milner also administered several IQ --  
15 excuse me -- IQ tests. She came out with a verbals IQ score  
16 of 70 --

17 THE COURT: Counsel, I've got to ask, why are  
18 you having this witness simply chronicle what, what I  
19 understood were already in the record?

20 MR. ABBINGTON: Well, I'm asking her whether or  
21 not -- my under -- well, maybe I'll rephrase this question,  
22 Your Honor.

23 THE COURT: I mean, all you're having her do  
24 is just -- you're recounting what another examiner said  
25 and asking the witness to verify that's what they said.

1 MR. ABBINGTON: I guess what it would be like,  
2 in the weight of all of these reports, and all these things,  
3 how he -- how did she not come to -- how do her conclusions  
4 vary so much from experts that were even retained by the  
5 State? Dr. Milner was an expert retained by the State.

6 THE COURT: All right. Well, if that's your  
7 question, go ahead and pose it.

8 MR. ABBINGTON: I'm sorry. Like I said, I could  
9 rephrase that. I do apologize.

10 BY MR. ABBINGTON:

11 Q Do you believe that Dr. Milner's report is reliable?

12 A Yes.

13 Q So, therefore, you would -- her, her diagnosis that:  
14 "Mr. Mulder has the inability, at present, to utilize higher  
15 levels of extraction and association," you would agree with  
16 that statement?

17 A I would agree that he has difficulty, that he's somewhat  
18 impaired in those areas. I would say that it's not an  
19 absolute problem that he's somewhat impaired in those areas.

20 Q Now, he used this example of "The grass being greener on  
21 the other side," you gave him that proverb?

22 A Right.

23 Q What did he do with that?

24 A Well, first he corrected me when I said the grass is  
25 greener on the other side, and he said, no, the grass is

1 always greener on the other side. So he corrected me in  
2 terms of the way that the, that the statement is, uh, usually  
3 used. And then he gave me an interpretation that I did not  
4 think was accurate.

5 Q Which was?

6 A You don't -- it means you don't play on the other side.

7 Q That's neither concrete nor -- what kind of a response is  
8 that?

9 A I would say that that's a response that indicates that he  
10 doesn't understand the proverb.

11 Q Dr. Cansora also noted that same sort of problem with him  
12 that, in terms of an inability to understand a passage, he  
13 recalled the passage, but it was clear that, from his answer,  
14 that he misunderstood the passage.

15 Would you agree with that?

16 A I think Dr. Cansora used more of a narrative passage  
17 rather than a proverb.

18 Q Are you aware of any -- are you -- when Mr. Mulder talks  
19 about his legal strategy, he's basically talkin' about  
20 somebody making a deal that could get him out of prison?

21 A He's -- my interpretation of it was that he would be, uh,  
22 retried on a lesser charge that could eventually allow him to  
23 be released from prison.

24 Q And that's under the theory that he didn't do it but, if  
25 he did do it, he didn't remember, and he didn't -- and he

1 didn't remember and he did do it, he didn't mean to do it?

2 A Uh, that he -- that -- he's not saying that he did it.  
3 But if he did it, he didn't mean to do it; that there was no  
4 intent and, therefore, it would have been manslaughter.

5 Q All right.

6 Now, Dr. Kessel saw Mr. Mulder for a longer period  
7 of time, over two occasions, and in the presence of counsel.  
8 Would you believe that her findings would be entitled to  
9 deference over yours, in as much as she had the opportunity to  
10 watch Mr. Mulder interact with me?

11 A Well, I, I don't have any, uh, report from her regarding  
12 an observed interaction, so it's difficult for me to know how  
13 to respond to that.

14 Q You will agree, though, that her report is more -- I  
15 believe you called it more specific in terms of the diagnosis  
16 of dementia, and the diagnosis of aphasia, receptive,  
17 expressive and anomic, and all of those are applicable.

18 You do not disagree with those?

19 A I don't disagree with her diagnosis. I think that they  
20 are, uh, accurate and consistent with mine, just somewhat more  
21 specific.

22 MR. ABBINGTON: Pass the witness, Your Honor.

23 THE COURT: Thank you.

24 Did you have anything further, Mr. Neidert?

25 MR. NEIDERT: Yes. Yeah. I'll be much shorter,

1 I think. I know you want to be done before lunch with this  
2 witness. I do have a few questions, Your Honor.

3 THE COURT: Go ahead. And come on up. I'd like  
4 to wrap up so we can excuse the witness rather than take a  
5 lunch break and have to have her come back. So I don't know  
6 what your schedule is like, doctor, and -- but I don't want  
7 you --

8 THE WITNESS: I do have a teaching obligation at  
9 1:00, so I would be grateful if it was possible --

10 THE COURT: All right. Let's -- we'll wrap,  
11 we'll wrap it up before lunch.

12 So go ahead, Mr. Neidert.

13 MR. NEIDERT: And I don't want to retread a  
14 whole lot of information that we already covered.

15 THE COURT: No. I won't let you. So just --

16 **REDIRECT-EXAMINATION**

17 BY MR. NEIDERT:

18 Q I was noticing in your notes, and it's something we  
19 didn't talk about, with respect -- would you look at page 3 of  
20 your notes -- by the way, Your Honor, just to make a record, I  
21 would ask the notes be made a part of evidence in this case,  
22 as part of the report.

23 THE COURT: Certainly. I'll receive the notes.

24 Page 3?

25 MR. NEIDERT: Yes. Page 3.

1 BY MR. NEIDERT:

2 Q There's nothing that says -- and I'm curious because I  
3 just saw it and it just struck out at me, it said -- you asked  
4 about fingerprints. And your note says, "Yes, I don't want to  
5 tell you."

6 Is that what he said?

7 A You know, I'm having a hard time understanding my notes  
8 here because I remember when fingerprints came up he was very  
9 pleased. He says, "I feel good you brought it up." He was  
10 definitely interested in, and aware that fingerprints were an  
11 issue, so he wasn't reluctant to talk about it. I don't quite  
12 know how to interpret the sentence that I wrote, "I don't want  
13 to tell you," because, clearly, he was, uh, eager to talk  
14 about it.

15 Q Okay. I just saw that note and it just kind of confused  
16 me, doctor. I just want to sort of clarify what that meant.

17 There was a lot of testimony, and towards the end,  
18 where he -- where you agreed that there was difficulty with  
19 respect to comprehension and judgment and long-term memory,  
20 et cetera. How does that, in your mind, weigh into a  
21 determination as to whether or not Mr. Mulder is competent?

22 A Uh-huh. I'd like to address that in two ways. The  
23 first is that, in my experience and training, the standard  
24 for competency does not require average intelligence,  
25 comprehension, memory, attention. Someone can definitely



1 have below average abilities and still be competent. So, just  
2 the presence of deficits, as measured by neuropsychological  
3 testing, that, that does not make someone incompetent. What  
4 makes them incompetent is the inability to understand their  
5 charge, their legal proceedings, or their ability to interact  
6 with their attorneys.

7 So, on the one hand, I, I think it's a lot of  
8 consistencies with my findings of deficit on the other folks.  
9 I think the difference is that I don't assume, or I don't  
10 interpret the presence of those deficits to mean incompetence  
11 because, based on my interactions with Mr. Mulder, and my, uh,  
12 observations of how he's learned to adapt to his deficits, I  
13 think he does have the ability to understand the proceeding,  
14 to understand his legal situation, and to have dialogue that's  
15 meaningful with his attorneys.

16 Q And, in fact, somebody who actually is truly mentally  
17 retarded can, in fact, be competent in your opinion?

18 A Yes. There's many, many people who have mental  
19 retardations who have been found competent to stand trial.

20 Q Now, you were asked whether a full neuropsychological  
21 exam was more probative with respect to competency. Why --  
22 you said, no, it wasn't. Why is it not?

23 A Well, even though it's interesting and perhaps helpful  
24 for the people working with Mr. Mulder on a day-to-day basis  
25 to know what his deficits are, when it comes down to

1 competency, it really doesn't translate into a percentile  
2 or a IQ number. It really is about someone's function  
3 abilities at the time of assessment.

4 So, again, someone can be mentally retarded with an  
5 IQ in the 50s, and still be found competent because, even  
6 though they do have deficits and are in a very low percentile  
7 in terms of verbal or other kinds of abilities, they still  
8 would be able to understand their situation, understand the  
9 proceedings, use, perhaps, some aids, such as taking notes  
10 or having information presented to them in smaller or more  
11 simple, uh, increments, but they could still be competent.

12 Q Okay. And, in your opinion, expert opinion, how does  
13 aphasia affect the competent determination?

14 A Aphasia, in itself, does not render someone incompetent,  
15 if they're still able to understand what other people are  
16 telling them about their legal situation and able to  
17 communicate with their attorneys.

18 Q And, in your opinion, Mr. Mulder can do both those  
19 things?

20 A Yes -- with some help, but, yes.

21 Q Okay. And you, uh, you reviewed the canteen records and  
22 thought they were significant with respect to competency.

23 Why is that?

24 A Uh, in my report, I noted that he had made an order and  
25 then tracked the sum of his account about whether or not there

1 was appropriate accounting of the funds for his order back in  
2 June to the beginning of July of 2009. I also thought that  
3 his use of an address book, buying Valentine's in February,  
4 Christmas cards in November, and buying a lot of stamps, a lot  
5 of envelopes, indicates that he's tracking information and  
6 exchanging communications with people in a verbal form.

7 Q Okay. And how does abstract or concrete thinking affect  
8 competency?

9 A I believe that relates, mainly, to understanding the  
10 legal proceedings and assisting his attorneys in making  
11 decisions that are somewhat abstract.

12 Q And you believe that Mr. Mulders has these abilities?

13 A When he described for me the differences in different  
14 kinds of murder charges based on having intent, I found that  
15 to be an example of an abstract legal concept that he was  
16 applying appropriately to our conversation.

17 Q So there is nothing that having reviewed all these other  
18 expert opinions today, and as part of the cross-examination,  
19 that causes you to change your opinion at all with respect to  
20 Mr. Mulder's competency?

21 A No. It confirms my opinion that he definitely does have  
22 deficits and does need information to be presented in a  
23 certain way. But, he does maintain competency to proceed.

24 Q Okay. Thank you very much.

25 MR. NEIDERT: I have no other questions.

1 THE COURT: Thank you.

2 Any recross then on that score?

3 MR. ABBINGTON: Fairly brief, Your Honor. Less  
4 than five minutes.

5 THE COURT: Step right up and let's get started.

6 **RECROSS-EXAMINATION**

7 BY MR. ABBINGTON:

8 Q Is it -- are you familiar with, uh, any of the case law  
9 regarding habeas proceedings?

10 A Habeas proceedings? I don't think so. No.

11 THE COURT: Well, hold on. I don't think we  
12 want to get into that. You can ask her questions and you can  
13 argue to me, but --

14 MR. ABBINGTON: No, I was just going to ask her,  
15 then I was going to phrase what, whatever else I was going to  
16 ask her.

17 BY MR. ABBINGTON:

18 Q Do you think that Mr. Mulder is capable of weighing  
19 and reweighing -- weighing a decision about which claims to  
20 include in his petition and which ones to take out?

21 A I think if he received the information in a very simple  
22 vocabulary and in multiple forms, such as written as well  
23 as verbal, I think he could reason through some, through  
24 decisions about information to include in his, in his claims.

25 Q How is that answer not belied by the fact that you said

1 he can't read? I mean how am I supposed -- if I'm his  
2 attorney, how do I get him this material in a written form,  
3 for a guy that's reading a sentence, "Close your eyes"?  
4 How can I give him a real sentence -- he can't read the  
5 newspaper. How do I get him to read this pleading?

6 A I don't think literacy is required for competency, so I  
7 believe that those are two separate kinds of abilities. And  
8 if he can't understand information in legal terms, I don't  
9 know if it's possible to break it out into simpler terms, or  
10 for it to be communicated to him in a non-written way.

11 Q All right. But in terms of -- I'm not talking about his  
12 ability to read. I'm talking about my understanding. We  
13 talked about just this receptive aphasia and his inability to  
14 read anymore. And Dr. Bradley talks about the fact that he's  
15 unable to read. You talk about his impaired ability to read  
16 and his -- and you've already testified that he probably can't  
17 read the newspaper, but maybe sections of the newspaper. But,  
18 he's not going to be readin' the editorial section of the  
19 newspaper ever?

20 A Right. Right.

21 Q All right.

22 Now, would Mr. Mulder be able to assist counsel  
23 in deciding, uh -- in recalling specific jurors or the jury  
24 selection process at his trial in 1997?

25 A I don't think he would be able to do that, no.

1 Q Do you think that Mr. Mulder is capable of discussing  
2 direct appeal counsel's performance, past counsel's  
3 performance at trial, on direct appeal or in State  
4 post-conviction?

5 A I think he would be able to recall some aspects of past  
6 counsel. I don't think he would be able to recall the  
7 majority of the details.

8 Q Would it be a fair statement that he would remember the  
9 things that had an emotional quality to it, but other things  
10 he would not?

11 A I think he would recall factual information. Some of  
12 it may have an emotional quality. Some may not. But, I  
13 don't think he would have a complete recall of those events.

14 Q Do you think he would recall whether or not his attorneys  
15 were actually present, which attorneys were present and which  
16 attorneys weren't? He has a claim that one of his lawyers  
17 came into court, left court, came back in, and was --  
18 basically absented himself from a proceeding when he should  
19 have been there.

20 Do you think Mr. Mulder is capable of recalling that  
21 or even discussing that incident?

22 A I think probably not. I think he would have to rely on  
23 other sources of information for that.

24 Q Do you think he would recall a specific testimony that  
25 was admitted at his trial or why he found it to be offensive?

1 A Um, I know that he recalled some testimony from his  
2 ex-girlfriend and had problems with, uh -- thought it was  
3 problematic. I don't know how -- if there's other testimony  
4 he would be able to specifically recall. Again, I think he  
5 would have to rely on the record for the details.

6 Q Would it be a fair statement to say that the testimony  
7 of his ex-girlfriend -- because the -- his ability to remember  
8 people that he's known for a long time -- that this has, and  
9 it has an emotional component to it, that it has aided his  
10 ability to remember that aspect of the trial?

11 A I think it's possible.

12 Q All right. Do you think he would be capable of recalling  
13 specific instances of prosecutorial misconduct that occurred  
14 during his trial or whether or not he told his trial  
15 lawyers --

16 MR. NEIDERT: I'm going to object. I think  
17 we're getting into areas I'm not sure -- I'm not sure that  
18 someone who's not well educated could get into these areas,  
19 and he's asking about prosecutorial misconduct.

20 THE COURT: I'm not sure it's the standard we're  
21 called upon to apply anyway, the way it's phrased, but that  
22 you all can argue to me.

23 But, restate your question.

24 MR. ABBINGTON: I can rephrase it.

25 THE COURT: Yeah, restate it. Let me make sure

1 I understand your question.

2 BY MR. ABBINGTON:

3 Q Mr. Mulder has a claim in his petition that there were  
4 repeated instances of prosecutorial misconduct that occurred  
5 during his trial, and that that claim is also exacerbated by  
6 the fact that his lawyers, one of his lawyers kept leaving,  
7 coming and going. And I'm asking you whether or not you  
8 believe he has the capacity to consult with counsel regarding  
9 those events?

10 A I think it would be difficult for him to have specific  
11 recall of those events.

12 Q Do you think he could actually read a verdict form or  
13 discuss anything related to a verdict form, or something of  
14 that nature?

15 A You know, I think it would depend on the language  
16 level of the verdict forms. I've seen some of those juror  
17 instructions and sometimes they're worded in a way that  
18 require a pretty high level of reading.

19 Q Having discussed these fingerprints with him, do you  
20 think he's capable of understanding a, a Daubert challenge to  
21 fingerprint evidence, even understanding what the idea is  
22 about?

23 A No, I don't think so.

24 Q Okay. You think he would have the memory of the trial  
25 judge or anything that happened regarding the judge or trial



1 of his case?

2 A I think he would remember some things about the trial  
3 judge.

4 Q Some things. But it would be, say, for example, same  
5 thing with the incident with the prison psychiatrist. He  
6 remembers that because the guy accused him of lying or faking  
7 it, so he may remember that the rest of his life.

8 Would you agree with that?

9 A Right. He may remember some things about the trial  
10 judge, but, again, he would probably have to rely on the  
11 record to see the exact -- uh, exactly what the judge said  
12 and did.

13 Q Do you think that Mr. Mulder is, if -- under this idea  
14 that I would be using visual aids, can you give me an example,  
15 give the Court an example of what sort of an aid I could  
16 give -- could I give him. Could I send him a copy of his  
17 petition and ask the Court to give him a year to read it and  
18 then, maybe, at the end of that year, he would be able to talk  
19 about what he read?

20 A No. I don't think that's the -- I don't think extra time  
21 is what he'll need. I think what he'll need is to have  
22 information broken down into simpler language and possibly  
23 presented in other modalities. So --

24 Q Is there --

25 A -- for example -- oh, go ahead.

1 Q No. Go ahead. Finish your sentence.

2 A I'm just pulling this one out of the air today, but it  
3 might be possible that you could record a DVD of someone  
4 explaining something about the proceedings, and then send it  
5 to him, and he could watch it on his television.

6 Q Is that because he processes visual information? What  
7 would -- why would that be better?

8 A I think it would be better because a person explaining  
9 it to him would be able to use simple language and simple  
10 sentences. And that, I think, would improve his comprehension  
11 and retention of the information.

12 Q Have you ever been involved in such a procedure?

13 A I have not.

14 Q Do you think that Mr. Mulder's capable of recalling or  
15 even engaging in a conversation about his right to expert  
16 assistance, or whether or not his trial lawyers discussed  
17 which experts to hire?

18 I'll give you an example: This fingerprint that you  
19 talked about, did he ever talk to you about this Mr. Dolder?  
20 Did he mention Mr. Dolder to you?

21 A No. But, I think I saw some reference to two fingerprint  
22 experts in the, uh, in the materials today.

23 Q Do you think he's capable of understanding the difference  
24 of what fingerprint evidence is all about, loops, whirls,  
25 dots, those sort of things? Do you think he's able to

1 understand that?

2 A No, I don't.

3 Q In terms of he wants to get out -- and that's a pretty  
4 concrete thought -- do you think he's capable of understanding  
5 other alternative punishments other than the idea of just get  
6 getting out?

7 A Well, I did ask him what's the worst thing that could  
8 happen as a result of the appeals process? And we talked  
9 about the possibility of execution and, actually, the  
10 procedure for execution.

11 Q So, dying would be the worst thing that could happen?

12 A Yes.

13 Q That's a fairly concrete thought, would you agree?

14 A Yes.

15 Q All right. As regards his memory of his childhood, do  
16 you -- my understanding is that that's also impaired?

17 A Um, I -- I'm not aware of specific impairments about his  
18 long-term memory about his childhood. He was able to tell me  
19 quite a bit of specific details. I didn't, uh, spend as much  
20 time talking about his childhood as, uh -- I didn't spend that  
21 much time exploring areas that he wasn't able to answer.

22 Q Is there --

23 A Everything I asked he was able to answer.

24 Q Sorry about that.

25 Is there a reasonable -- is there a reason for

1 concern that Mr. Mulder trusts me, likes me. And if I'm  
2 prompting him, that he may end up -- we may end up doing  
3 what I want to do rather than what he wants to do in this  
4 case?

5 A Although he expressed disagreement with, uh, the  
6 strategy -- so, you know, expressing a willingness to disagree  
7 with his attorney, I think you're right; I think there is a  
8 potential risk that he will, uh, he will respond in ways that  
9 reflect more his willingness to try to help than his ability  
10 to help.

11 Q Thank you.

12 MR. ABBINGTON: I pass the witness, Your Honor.

13 THE COURT: All right. Thank you very much,  
14 doctor. I appreciate your testimony. We can go ahead and  
15 excuse you at this time. You can gather up your stuff and  
16 just leave the other records or materials, the exhibits there.

17 And, counsel, what we'll do is we'll take a break.  
18 Let's take a break until 1:30, so that's about 40 minutes for  
19 lunch. And then we'll reconvene at 1:30.

20 I don't recall who our next witness was, was it Oram  
21 today or was it Williams and Peltzer?

22 MR. ABBINGTON: I had planned for it to be  
23 Mr. Oram, Your Honor, but I haven't talked to him. I would  
24 hope that he had called me, but I will call him.

25 THE COURT: Well, I don't care. Whoever it

1 is we'll just take him at 1:30, whichever witness. And  
2 certainly --

3 MR. ABBINGTON: That's fine. That would be  
4 great.

5 THE COURT: Certainly if his schedule is such  
6 that we need to take him first, we'll do that.

7 All right. Thank you. Thank you everybody. We'll  
8 see you all --

9 THE WITNESS: Thank you.

10 THE COURT: -- in forty -- make it an hour.  
11 We'll make it 20 minutes to. I want to give staff a decent  
12 break, and they, otherwise, just won't get it.

13 MR. ABBINGTON: Thank you, doctor.

14 THE COURT: All right. Thank you.

15 (Noon recess taken.)

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1 Las Vegas, Nevada, Wednesday, August 3, 2011, 1:50 p.m.

2 ---OoO---

3

4 THE COURT: Have a seat everybody.

5 Okay. We're reconvened in the Mulder case and ready  
6 to proceed with the next witness. And I see the next witness  
7 is here.

8 Go ahead.

9 MR. ABBINGTON: The next witness is here. It's  
10 Christopher Oram.

11 THE COURT: Yeah, Mr. Oram, come on up, if you  
12 would. We weren't quite sure whether we had you scheduled  
13 properly. So glad you're back with us.

14 THE WITNESS: Sorry, Your Honor. I've been  
15 running back and forth, so I'm sweating a little bit.

16  
17 **CHRISTOPHER ORAM,**  
18 called as a witness on behalf of the Petitioner,  
19 was sworn and testified as follows:

20 THE CLERK: Please be seated.

21 If you could state your full name for the record,  
22 spelling your last name.

23 THE WITNESS: My full name is Christopher Oram.  
24 My last name is O-r-a-m, M, as in Mary.

25 THE COURT: Okay. Great. Thank you.

Go ahead, Mr. Abbington.

1 MR. ABBINGTON: Thank you, Your Honor.

2 BY MR. ABBINGTON:

3 Q Mr. Oram, how are you employed?

4 A I'm an attorney here in Clark County Nevada.

5 Q And how long have you been an attorney?

6 A Since 1991.

7 Q All right. And you've been licensed here in Nevada since  
8 1991?

9 A Correct.

10 Q All right. Now, uh, your practice involves criminal --  
11 criminal legal defense?

12 A That's correct.

13 Q And, as well -- do you have a post-conviction practice  
14 as well?

15 A Yes.

16 Q All right. Do you recall the gentleman here in the blue  
17 uniform sitting to my right?

18 Do you know who he is?

19 A Yes. That's Michael Mulder.

20 Q All right. How did you come to know Mr. Mulder?

21 A I was appointed by the Court to represent Mr. Mulder in  
22 his post-conviction relief.

23 Q All right. Now, when did -- when did that appointment  
24 take place?

25 A I could not accurately tell you.

1 Q I mean just round number -- round year date?

2 A Uh, can you lead me a little bit?

3 Q I think he would have appeared in front of judge, uh,  
4 Shelly -- Michelle Leavitt in about 2005, with an evidentiary  
5 hearing on Mr. Mulder's competency --

6 A Uh, he --

7 Q -- and filed a petition. It would have been about in  
8 2002.

9 A Yes, because it was Judge Douglas who is now on the  
10 Supreme Court and I appeared before him before it was  
11 reassigned to Judge Leavitt.

12 Q I only have a couple things I wanted to address out of  
13 order.

14 Does Justice Douglas -was, was he the district court  
15 judge in this case?

16 A He was.

17 Q Was he also, uh, one of the justices that signed off on  
18 the -- on one of Mr. Mulder's direct appeals in the Nevada  
19 Supreme Court?

20 A I would have to look at the decision of the Nevada  
21 Supreme Court. I seem to remember that one of the justices,  
22 Justice Cherry signed off on the decision, and he was  
23 Mr. Mulder's trial counsel.

24 Q All right. Is that a problem?

25 A I saw it as --



1 Q Did you see that as a problem?

2 A Well, yes. I saw it as an issue because, if you're  
3 defending Mr. Mulder and asking a jury to spare his life, then  
4 I got Judge Leavitt to overturn the death sentence, and then  
5 the Nevada Supreme Court reversed Judge Leavitt's decision, so  
6 I would have thought that trial counsel (sic.) defending  
7 Mr. Mulder could not sign the decision and putting back in  
8 place the death sentence.

9 Q Have you ever tried to talk to Mr. Mulder about that  
10 claim?

11 A I have tried to talk to Mr. Mulder on several occasions;  
12 however, I would not talk to him -- I was unable to talk to  
13 him about significant substantive matters.

14 Q Now, we're going to close that up, but I just wanted,  
15 while we were talking about that issue, it just seemed  
16 appropriate --

17 THE COURT: Well, when you first were appointed  
18 to represent Mr. Mulder, had he already suffered the stroke?

19 THE WITNESS: Your Honor, the first time I saw  
20 him he had suffered the stroke.

21 THE COURT: All right.

22 THE WITNESS: I don't want to say something  
23 inaccurate, and I know I was appointed. And then right after,  
24 he suffered the stroke.

25 THE COURT: All right.

1 THE WITNESS: But the first time --

2 THE COURT: But when you first encountered or  
3 met him he already -- it was after he had had the stroke?

4 THE WITNESS: Yes, Your Honor.

5 THE COURT: All right.

6 BY MR. ABBINGTON:

7 Q Okay. Now, but I want to -- back to this topic.

8 One of the -- and we've talked about several other  
9 things, but in terms of you representing Mr. Mulder in his  
10 State post-conviction proceedings --

11 A Correct.

12 Q -- and, right away, one of the issues that came to your  
13 mind was this idea that Mr. Cherry, Judge Cherry was on the --  
14 he was a district court judge -- well, first, he's on the  
15 State Public Defender's Office, correct?

16 A He was a State Public Defender.

17 Q And he represents Mr. Mulder at trial?

18 A Correct.

19 Q And then, later on, signs off on the opinion that denies  
20 him relief?

21 A Reversing the decision that gave him a new penalty phase;  
22 yes.

23 Q All right. So that would be a fairly important issue?

24 A I thought it was.

25 Q All right. And just, for example, is that an issue that

1 you were able -- that you believed Mr. Mulder was able to  
2 discuss?

3 A Do you mean him, as a person, discuss?

4 Q He as -- yes.

5 A I never could have substantive conversations with  
6 Mr. Mulder. That is why I went to the district court  
7 originally, after my first meeting with him, and told the  
8 court I need all of these medical records. Something is wrong  
9 with this defendant.

10 Q Now, let's talk about that first meeting.

11 So, you went -- you're appointed by the Court to  
12 represent him in state post-conviction?

13 A Correct.

14 Q And you travel up to Ely to go visit him?

15 A Correct.

16 Q And when you go visit Mr. Mulder, what did you observe  
17 when you see him the first time?

18 A Well, I recall that I had seen several other inmates  
19 because, when you go up to Ely, it's a good idea to see  
20 several inmates at a time. I remember that I had meaningful  
21 meetings with these inmates, except for when I met with  
22 Michael Mulder. When I tried to discuss with him -- discuss  
23 the case with him, he -- it was very problematic. I can  
24 describe to the Court what was problematic. When I would talk  
25 to him, he would begin to try to express things about his

1 case. And he always did the same sort of odd thing. And I  
2 remember it distinctly. He would say, with one of the hands  
3 that was not bad, he would say, "Oh, damn." And that's all I  
4 would get out of him. I mean, I could get other things out of  
5 him but nothing substantive. And based on that, I just sort  
6 of -- it was such a meaningless meeting, other than to, you  
7 know, assure him that I was going to try to help him. I tried  
8 to be polite.

9           And I left, and immediately, notified the Court  
10 that I felt that Mr. Mulder had significant difficulties.

11 Q When you say its was very problematic, I mean, have you  
12 had the opportunity to work with inmates or with defendants  
13 who have low IQ?

14 A I have.

15           I would say it this way: That I probably have  
16 handled somewhere in the range of two- to three-hundred first  
17 degree murder cases in this state, and I can deal with people  
18 that are not intelligent. You may recognize that having  
19 discussed a case with them, but he was different. He could  
20 not have a discussion of any substantive type. I could not  
21 get anything substantive out of Mr. Mulder.

22 Q Now, did you attempt to ask him questions not using big  
23 words?

24 A Yes.

25 Q How did that work for you?

1 A Nothing worked. And it became painfully obvious this was  
2 not -- you know, when you're talking to jurors, or you're  
3 doing voir dire on a capital murder case, a lot of times  
4 jurors don't understand words that we use in court, so you  
5 talk in words, almost as though you're talking to youthful  
6 students, let's say. It was going nowhere. Something was  
7 wrong with Mr. Mulder. It was obvious. And I was not sure  
8 at the time I was meeting him for the first -- on the first  
9 occasion, what it was, but it was obvious.

10 Q All right. Now, in terms of -- what did you -- what were  
11 you trying to accomplish during that first visit with him?

12 A Just figure out what he thought of the case. A lot of  
13 times people say my lawyer didn't do X, Y, and Z. My lawyer  
14 didn't call this person to the witness stand. I think my  
15 lawyer made a mistake. Please do this. Please do that.  
16 That type of matter. And to let him know that I was there for  
17 him to try to consider any concerns he may have, and just a  
18 general meeting with the client. It's just sort of a basic  
19 thing that you do when you first start a case.

20 Q So, in your opinion -- well you said you've handled two-  
21 or three-hundred first degree murder cases?

22 A I've been saying that for years now, so I imagine it's  
23 probably more, but I think that's a conservative estimate.

24 Q All right. Would you -- would it be a fair statement --  
25 and I think you said that you had dealt with people of low IQ;

1 do you think there was something here besides an intelligence  
2 problem with Mr. Mulder?

3 A That was obvious. It was obvious that there was  
4 something physically wrong with him as well as -- whether I  
5 say mentally, I don't -- I don't know how -- it's difficult  
6 for me to understand exactly what stroke does to a human  
7 being. It's difficult. So I, I can't -- I've struggled with  
8 that, even in the briefing I did in this particular case,  
9 whether, you know, somebody has a mental difficulty; they're  
10 paranoid schizophrenic, or they're mentally challenged, versus  
11 somebody who probably had nothing wrong with them and then  
12 suffers a stroke and then is different and has the appearance  
13 of having mental difficulties.

14 Q The petition that you filed on Mr. Mulder's behalf,  
15 did you have any real -- did you have any assistance or  
16 cooperation from him in -- I shouldn't say cooperation.

17 Was he able to assist you in preparing and -- in the  
18 preparing and filing of that state habeas petition?

19 A No.

20 THE COURT: What, specifically, were you  
21 trying to obtain from Mr. Mulder that you were not able to  
22 obtain? In other words, what did you want him to be able to  
23 communicate with you about that would be of help to you in  
24 formulating the petition?

25 THE WITNESS: That's an excellent question,

1 Your Honor.

2 THE COURT: Thank you.

3 THE WITNESS: I think that what we're doing is  
4 you're trying to find out -- you know, you get a case, let's  
5 say a capital case like this, and they deliver it to your  
6 office, somewhere between 4 and 20 banker boxes.

7 THE COURT: Okay.

8 THE WITNESS: And you're in a sea of this. A  
9 lot of times a defendant can give you some indication. It may  
10 be that, you know, my mother was never contacted. Why didn't  
11 they contact a psychologist to interview her? Aren't they  
12 supposed to do that? Things that tip me off to start in a  
13 particular direction.

14 Oftentimes, Your Honor, defendants will tell you  
15 things that are of no consequence. Why didn't they call an  
16 alibi? Well, then, you realize there's DNA.

17 THE COURT: Sure.

18 THE WITNESS: Fingerprints, and you realize,  
19 well, that -- I could see why the lawyer was doing that.

20 So I don't really know what I was trying to get  
21 out of him, other than general information, and find out what  
22 kind of complaints he had. And so I guess that would be the  
23 best answer, is it would almost be a situation where, if you  
24 weren't permitted to talk to the defendant, that's what I was  
25 left with, so that everything was done to what I could read

1 and figure out from the transcripts, and talking to witnesses,  
2 talking to the trial attorneys, but nothing coming from the  
3 defendant.

4 THE COURT: All right. So were there certain  
5 issues or claims -- you've mentioned one, the potential  
6 conflict in the trial attorney participating in a ruling --  
7 but were there things that were already in the can, so to  
8 speak, that were the product of the trial process, that you  
9 were able to sink your teeth into, that wouldn't have mattered  
10 whether Mr. Mulder were even there, in terms of addressing, as  
11 compared to things that you needed to talk to him about?

12 THE WITNESS: Well, one thing that strikes me in  
13 the case, as I recall, one of the trial attorneys has now  
14 passed, Your Honor, but I believe she gave the open argument.  
15 They waived opening argument until the State had closed the  
16 case.

17 THE COURT: All right.

18 THE WITNESS: And you can read the opening  
19 argument, anyone could, you could read it in a matter --  
20 before the clock strikes 2:00, because I believe, from my  
21 memory, it's less than a page long. And the whole argument  
22 is: "Now you're going to hear from our fingerprint expert who  
23 will tell you that the fingerprint or thumbprint on the duct  
24 tape is not really what the State says it is."

25 So, right after that -- that's their whole opening



1 argument -- they call the man, the fingerprint expert, and  
2 he's not a fingerprint expert at all. In fact, the Nevada  
3 Supreme Court, on direct appeal, ruled that that man was not  
4 qualified, and the district court should not even have let him  
5 testify.

6 And I remember thinking, how did that occur? How  
7 does something like that occur? So that would be something I  
8 would want to tell the defendant: Did you discuss this? Did  
9 you ask them? I mean, how did this occur?

10 And so that would be one of many factors that I  
11 would ask somebody because it just seemed so odd. And it's  
12 such a small part of the trial transcript that it, when you  
13 read it, it is kind of startling to think that the experienced  
14 defense attorneys would rely upon a single individual and,  
15 within moments, that person is discredited.

16 THE COURT: So the fingerprint element was  
17 what was touted in the opening statement by the defense, by  
18 Ms. McMann?

19 THE WITNESS: Correct. And that was --

20 THE COURT: That was it, basically?

21 THE WITNESS: It's one page. That's it. And  
22 it's going to be -- you're going to hear that person right  
23 now.

24 THE COURT: Yeah. And when you would meet with  
25 Mr. Mulder, after you became his counsel, did you try to talk

1 to him about the fingerprint issue?

2 THE WITNESS: No.

3 THE COURT: Did he ever use the word  
4 "fingerprint" or talk about fingerprints?

5 THE WITNESS: No.

6 THE COURT: How many times did you meet with  
7 him?

8 THE WITNESS: Your Honor, I can't accurately  
9 tell you that. I could tell you that every time we came to  
10 court, I would have time, in the holding cells, that I met  
11 with him a few times, but I couldn't accurately tell you.  
12 I did, at some point, ask that he be appointed psychologists  
13 so that they could meet with him to see if he could assist.

14 THE COURT: And that --

15 THE WITNESS: Yes. And another thing, just  
16 being physically responsible, I -- when you drive up to Ely,  
17 it's four hours both ways. And so to go up there, charge the  
18 State for all this time, when I know I'm not going to have a  
19 meaningful conversation, it's what we've done right here.

20 THE COURT: Right.

21 THE WITNESS: It --

22 THE COURT: Did you have -- when you would go to  
23 Ely, went to Ely the first time -- how many times do you think  
24 you went to Ely to see him all together.

25 THE WITNESS: I can't accurately say. I think I

1 saw -- they kept him at High Desert, I believe, for a while  
2 after.

3 THE COURT: Okay. And when he had court  
4 proceedings here, he's being kept at High Desert?

5 THE WITNESS: Correct.

6 THE COURT: And was that easier to meet with him  
7 then -- did you meet with him there.

8 THE WITNESS: I did, but it -- again, the same  
9 consequence; there was no meaningful discussion.

10 THE COURT: All right. All right. Thank you.

11 Go ahead.

12 BY MR. ABBINGTON:

13 Q Now, in regards to this fingerprint expert stuff, there  
14 are -- were you able to have a discussion with Mr. Mulder  
15 regarding what his trial lawyers did or didn't do in his case  
16 at his trial?

17 A No.

18 Q Go ahead.

19 A Just that I remember when I would ask him along those  
20 lines what did he think had gone wrong, that seems like  
21 something -- I can't tell you accurately that's what I said,  
22 but something along those lines, do you remember the trial?  
23 Do you remember what happened? Do you think there were any  
24 problems? That's where he would do that thing with the hand.  
25 I remember succinctly. I don't remember which hand, but he

1 would say, "Oh, damn." He would try to say something, and  
2 then he would just get completely flustered, and that was the  
3 end of that.

4 Q All right. Did you try to suggest to him to fill in  
5 the blanks for the words he was trying to use, or were you  
6 able to do that? Did you try to do that?

7 A No, because -- no, I couldn't fill in words because he  
8 wasn't making -- it wasn't that he didn't make sense; it's  
9 there was no meaningful conversation with him. In fact,  
10 there was a death row inmate named Lawrence Caldwell, who has  
11 since been executed. I represented Mr. Caldwell on his  
12 post-conviction. Mr. Caldwell would call me and he would  
13 relay information to me about Mr. Mulder. And I remember  
14 that occurring, and I thought it was very odd that I was now,  
15 essentially, being assisted by Mr. Caldwell.

16 THE COURT: What kind of stuff would Caldwell  
17 talk about?

18 THE WITNESS: He would tell me, uh, that, if he  
19 could be kept updated on his case. If I could tell Caldwell,  
20 Caldwell thought he could help him, just tell him what was  
21 going on. Because I remember there was a long period of time  
22 where we were obtaining psychologists, and -- I don't know why  
23 I speculate to this, but I think I'm probably accurate, that  
24 Mr. Mulder probably wondered what was going on in his case,  
25 and here was Caldwell, who could tell him your lawyer is

1 working.

2 THE COURT: All right.

3 BY MR. ABBINGTON:

4 Q Now, were you comfortable relying on Mr. Caldwell's  
5 interpretation of Mr. Mulder?

6 A Actually, I was. He was -- it wasn't significant. It  
7 wasn't something that we -- he was relaying real substantive  
8 matters to me. Formally, I would say no. But to tell  
9 somebody, okay, here we have a court date, or we have a brief  
10 due on this time. I did feel comfortable with that.

11 Q Just basic information about --

12 A Basic information.

13 Q Do you think he was capable of understanding anything but  
14 the most basic communication with you, Mr. --

15 THE COURT: You're talking about Mulder?

16 MR. ABBINGTON: Yes, sir; Mr. Mulder.

17 THE WITNESS: He was not capable, in my  
18 opinion, of understanding anything other than the most basic  
19 principles.

20 BY MR. ABBINGTON:

21 Q This fingerprint expert, Howard Dolder, who was  
22 eventually -- was eventually struck by the Court, and then  
23 the Nevada Supreme Court says he shouldn't be called as an  
24 expert, does Mr. -- was Mr. Mulder capable of understanding  
25 what the substance of this fingerprint claim is, or what the

1 problem is with this Mr. Dolder and his, and his expertise or  
2 lack thereof?

3 A I, I don't think I had that conversation. It's, it's  
4 such a reasonably simple problem to explain to somebody. I, I  
5 don't know. I guess I would have to test Mr. Mulder, but he  
6 did have really limited abilities, and I was trying to -- it  
7 was a complex case, a lot of things were happening. And so I  
8 guess, in a sad way, I sort of gave up trying to explain it to  
9 him. I remember when the Supreme Court had reversed his new  
10 penalty phase, I tried to explain that and that was very  
11 disappointing.

12 THE COURT: Other than -- you mentioned, of  
13 course, the fingerprint situation. Based on your review of  
14 the trial record, were there other areas that you wanted to  
15 discuss with Mr. Mulder that you were unable to?

16 THE WITNESS: The penalty phase specifically,  
17 Your Honor.

18 THE COURT: Okay.

19 THE WITNESS: The penalty phase, because there  
20 were issues with the trial. I remember the female who, uh,  
21 was an alleged accomplice in this particular case. I had  
22 interest in that. But, anytime you see a death sentence --

23 THE COURT: That was the former girlfriend Kim  
24 or --

25 THE WITNESS: Right. They had, supposedly, gone

1 over and acted together, allegedly. But with regard to a  
2 penalty phase, obviously, since it was capital, I'm very  
3 concerned about how the penalty phase went, and whether there  
4 was proper mitigation provided. In other words, lot of times  
5 a defendant will tell you I don't know why we didn't call my  
6 mother.

7 THE COURT: Sure.

8 THE WITNESS: And so those were the type of  
9 things that I would be very interested in, but, again, it  
10 went nowhere. But it's not that it went nowhere, it's just  
11 that I didn't pursue it because I knew I couldn't pursue that.

12 BY MR. ABBINGTON:

13 Q All right. Would you -- would it be a fair statement to  
14 say that there are -- there were claims or issues that you  
15 would have liked to include, you would have liked to have  
16 included in Mr. Mulder's state habeas petition, but were  
17 unable to because of the fact that you couldn't communicate  
18 with him?

19 A I can't say that because I, I don't have the knowledge.  
20 In other words, if Mr. Mulder had something to tell me, then I  
21 just don't know it.

22 Q So, at this point, you don't even know what you don't  
23 know about his case?

24 A Right.

25 Q All right. Just a quick couple of things.

1           Did you think Mr. Mulder is capable, in your  
2 interactions with him, do you think he's capable of reasonably  
3 consulting with counsel, to a habeas counsel, to a rational  
4 degree of understanding regarding the determination of  
5 aggravating and mitigating circumstances?

6       A    Now?

7       Q    Yes, sir.

8       A    He -- here is the difficulty that -- my understanding,  
9 from what I've learned from stroke, is that stroke -- you  
10 can assist somebody if they receive rehabilitation. And I  
11 believe, because I did some research on it, to see what needs  
12 to be done from somebody who suffers stroke. There can be  
13 rehabilitation given, but no rehabilitation, at least none  
14 that I'm aware of, is being given to Mr. Mulder. So, I would  
15 imagine that the brain probably does not prepare itself, but  
16 I'm most certainly not qualified to make those decisions.

17           If I went and talked to Mr. Mulder now, which I have  
18 not done in a year or two, I don't know how long it's been,  
19 but a long time, I would imagine I would run into the same  
20 thing. I would be shocked if I could have a substantive  
21 discussion with Mr. Mulder, and I would wonder how the brain  
22 had repaired itself.

23       Q    All right. But you, personally, when you were  
24 representing him in '02, '05, even as recently as '05,  
25 could you have had a rational discussion with him --



1 A No.

2 Q -- about the application of aggravating and mitigating  
3 circumstances?

4 A No.

5 Q How about jury instructions?

6 A No.

7 Q How about the impartiality -- the right, the need for  
8 the judge to be an impartial, uh, arbiter of facts. Do you  
9 think he's capable of remembering specific facts or anything  
10 that happened during his trial? Was he able to communicate  
11 anything like that, along those lines to you?

12 A No.

13 Q Now, was -- you didn't represent him on direct appeal?  
14 It's my understanding the Public Defender's Office represented  
15 him on direct appeal.

16 A Correct.

17 Q Who also represented him at trial?

18 A Correct.

19 Q So this issue, of any issue related to ineffective  
20 assistance of counsel, wasn't raised on direct appeal; is  
21 that correct?

22 A Correct.

23 Q So were you able to discuss anything regarding any issues  
24 related to ineffective assistance of counsel with Mr. Mulder  
25 in the time that you represented him?

1 A No.

2 Q How about direct appeal, counsel's performance?

3 A No. I believe it was Lee McMann, the same person who was  
4 also co-counsel during the trial.

5 Q Right. Elizabeth McMann has since died; is that correct?  
6 She's passed?

7 A Unfortunately.

8 Q And, obviously, she would be incapable of discussing this  
9 case?

10 A Yes.

11 Q You said that when -- I believe we had -- would you be  
12 surprised if Mike Mulder was under the impression that there  
13 was, there was someone named a Mike Perry that was involved  
14 in this case, but it was actually Mike Cherry? Would that  
15 surprise you that he had mis --

16 A No, no, it wouldn't surprise me at all.

17 Q All right. So you think that Mr. Mulder was -- when  
18 you represented him, was Mr. Mulder capable of assisting you  
19 or communicating with you regarding his right to effective  
20 assistance of counsel at trial?

21 A No.

22 Q And would he have been able to discuss or even bring up  
23 instances of impermissible or unduly prejudicial victim impact  
24 evidence that was submitted at his trial?

25 A No.

1 Q How about instances of prosecutorial misconduct? Did you  
2 have any ability to discuss those kinds of issues with him?

3 A No.

4 Q Just so I'm clear, any of these things I'm talking about  
5 now, does it seem to you as almost, like ridiculous, that I  
6 would ask you those kinds of questions?

7 A Yes, because I believe -- this is an argument I made  
8 to Judge Leavitt, and I believe one of the psychologists or  
9 psychiatrists testified that Mr. Mulder knew that he had been  
10 convicted of first degree murder but did not know why. And I  
11 remember I argued to the, to the district court, and I believe  
12 to the Nevada Supreme Court, that it would be unusual to  
13 execute a human being who would know that they have been  
14 found guilty of murder, sentenced to death, but does not know  
15 why.

16 Q So he's not even capable of litigating a Ford (phonetic)  
17 sort of a claim, you would think?

18 A That was my opinion.

19 Q All right. How about would he be able to read a verdict  
20 form?

21 A I --

22 Q In your opinion.

23 A I would doubt it, but I --

24 Q Did you try to get him to read stuff, did you write him  
25 letters or try to communicate with him in writing using small

1 words or something like that?

2 A I couldn't accurately tell you.

3 Q Okay. Do you think that there's any combination of  
4 coaching, writing, small words, memory aids, or anything  
5 like that that would have helped you to represent Mr. Mulder  
6 to be able to extract information from him?

7 A No.

8 Q Do you think that Mr. Mulder is able to recall or, or  
9 intelligently discuss with counsel his right to expert  
10 assistance and understand what that means?

11 A I -- it wasn't when I was representing him.

12 Q I think we already talked about jury instructions.

13 Now, there was -- we had -- there's an argument  
14 that you talked -- and you talked about this, that his  
15 ex-girlfriend was noted as an accomplice?

16 A Correct.

17 Q Okay. Were you able to have discussions with him about  
18 his ex-girlfriend or his memory of her activities with this  
19 offense, or at or around the time of the crime back then?

20 A No.

21 Q All right. Do you think his memory of these events would  
22 have gotten better or worse since 2002?

23 A Again, that goes to, uh -- I would think an opinion of  
24 somebody far greater than me, who would understand the brain,  
25 if the brain is that damaged -- which I saw in those lengthy

1 reports from UM, University Medical Center -- I do not know,  
2 without therapy, if the brain heals itself.

3 Q You reviewed -- they had Dr. Milner and Dr. Cansora  
4 examine Mr. Mulder. They gave him some neuro side test.

5 Do you remember Dr. Cansora --

6 A I do.

7 Q -- tested him?

8 A I do remember Dr. Cansora.

9 Q All right. You would have been representing Mr. Mulder  
10 during that time period?

11 A Yes.

12 Q You reviewed Dr. Cansora's report?

13 A Yes, sir.

14 Q Regarding his competency, found him incompetent, found  
15 him to be the type of person who could handle simple  
16 instructions; to sit, do things like that.

17 Do you think -- would you agree with or disagree  
18 with that assessment?

19 A Sure. I could tell him to sit down. I could do that  
20 when we sitting, like you are, with him at counsel table. I  
21 could tell him sit down.

22 Q So he's not like somebody in a nursing home with a  
23 feeding tube in their stomach. I mean, he actually -- you  
24 were able to talk to him. You just couldn't talk to him about  
25 the things you wanted to talk to him about?

1 A Sure. I could talk to him. I could tell him that there  
2 was going to be a hearing today. The judge is going to make  
3 a decision. And I suppose, to a limited extent, you were  
4 using words that are designed almost as though you're talking  
5 to a child. But that is different than substantive matters.

6 Q I understand. So, when you say that, do you have  
7 children?

8 A Yes.

9 Q About, uh -- on what level do you think that  
10 Mr. Mulder -- just a layman's opinion -- but on what grade  
11 level or age level do you think Mr. Mulder was functioning  
12 when you met him?

13 A I, I don't -- I don't know. I have -- I'm lucky  
14 enough to have a pretty smart child, and I've been able to  
15 communicate with my child.

16 Q How old is that child that you're talking about?

17 A I'll tell you what, my mother suffered a stroke, okay,  
18 before, uh, Mr. Mulder. And so I -- my mom, my mother could  
19 cover it up a bit better, and so I could not tell what I  
20 was dealing with Michael Mulder.

21 I, I could have a discussion with my child at age, I  
22 would -- as I recall, four or five. He's 14 now. Four or  
23 five, I could have a discussion about limited things with my  
24 child, more than just sit, stand, there is the judge. And so  
25 I don't -- I can't accurately say, but I would think that

1 Mr. Mulder was functioning at a very low level, very low  
2 level.

3 Q Are you -- is there anything you would do differently if  
4 you were representing him today?

5 A No.

6 Q Thank you.

7 MR. ABBINGTON: I'll pass the witness.

8 THE COURT: All right. Thank you.

9 Cross-examination, Ms. Proctor?

10 **CROSS-EXAMINATION**

11 BY MS. PROCTOR:

12 Q Good afternoon, Mr. Oram.

13 A Good afternoon.

14 Q You filed the original federal habeas -- state habeas  
15 petition in May of 2010; does that sound accurate?

16 A I think that would be the original supplement.

17 Q The original petition?

18 A Okay.

19 Q Uh, actually, we have the -- in the exhibit book,  
20 respondents Exhibit 514, would you --

21 THE COURT: One of the three binders there.  
22 Yeah.

23 THE WITNESS: You want me to look at that?

24 BY MS. PROCTOR:

25 Q Yes, please.

1 A You want me to go 514?

2 Q Correct.

3 A Okay. I've got that. I've got it there.

4 Q Does that appear to be the original habeas petition?

5 A It does.

6 Q And Exhibit 515 is the supplemental petition?

7 A It, it says that, and it appears to be. It's not file  
8 stamped.

9 Q In the supplemental petition, you were able to raise  
10 15 claims. What were the basis of those claims? How did you  
11 raise those claims?

12 A I would have done a number of different things. I  
13 would have read the trial transcript, read the boxes that I  
14 discussed -- I don't remember if it was four or if it was ten.  
15 I read through them and had discussions with different people  
16 involved in the case. And from that, then I would raise the  
17 issues that I saw.

18 Q Were you able to meet with Lee McMann before her passing?

19 A I, I believe I was. I did talk to Ms. McMann about  
20 numerous cases. However, I, I can't -- I think my bill would  
21 accurately reflect that. I don't have an independent memory  
22 of talking to Miss McMann about the case.

23 Q Do you have any recollection of discussing the case with,  
24 uh, Mr. Cherry?

25 A No.



1 Q Okay. When you met for the first time with Mr. Mulder,  
2 would that have been before or after you filed the initial  
3 State habeas petition?

4 A I'm guessing, but I would think before.

5 Q And that would have been at Ely State Prison that's --

6 A Yes. I believe that's correct.

7 Q During the State evidentiary hearing, do you remember  
8 telling the Court that you only met with Mr. Mulder for ten  
9 minutes, and then you never went back to Ely State Prison?

10 A I don't independently remember saying that. However,  
11 that sounds just about accurate because, like I said, during  
12 the discussion, he just kept saying, "Oh damn." And it -- I  
13 remember we were through glass. It was just going nowhere,  
14 and so I did not want to drive back up there and go through  
15 the same process.

16 Q Okay. And that evidentiary hearing was about 2005?

17 A Uh, if that's what it says.

18 Q You mentioned that you had also met with him a few times  
19 at High Desert State Prison.

20 A I believe that I met with him at High Desert State  
21 Prison, and I also met with him when he would come to court.  
22 The Court would give me an opportunity to talk with him.

23 Q How many -- how long did you spend with him when he came  
24 to court?

25 A Well, he, he would be there for hours at a time, and we

1 would have breaks. And I would get to talk to him beforehand.  
2 That type of thing. But, again, without reviewing my records,  
3 I couldn't accurately give you a time, exact time frame.

4 Q Okay. And approximately how long -- how many times do  
5 you think you went to High Desert State Prison to meet with  
6 him?

7 A I can't accurately tell you. But what I would tell you,  
8 and I remember, I think I went back up to Ely after the Nevada  
9 Supreme Court had denied or had reversed the ruling given in  
10 the new penalty phase. I can't tell you exactly how long I  
11 met with him, other than the sort of general discussions that  
12 we would have.

13 Q When you spoke about inmate Caldwell relating  
14 information, what kind of information was he relating?

15 A Things as though is there a due date coming up? Is  
16 there a court date coming up? Those type of very minor  
17 matters.

18 I seem to recall something that Lawrence Caldwell  
19 told me that he, uh, gave him assistance, that he gave  
20 Michael Mulder -- that inmates would help him, and that I  
21 could -- I know it sounds odd -- trust Lawrence Caldwell to  
22 give him that information -- which, for whatever reason, I  
23 did.

24 Q Would you be surprised that Mr. Mulder was able to convey  
25 facts regarding the crime to several of the experts who have

1 testified during this hearing?

2 A It depends on what facts. I remember that he knew that  
3 he had been convicted of first degree murder, but he did not  
4 know why, or at least that's what the psychologist said. It  
5 depends on what the facts were of the crime --

6 Q Okay.

7 A -- that he said to experts.

8 Q Would you be surprised to know that he was able to convey  
9 some of his family history to some of the experts who have  
10 testified in this hearing?

11 A No, because he did to our psychologist as well.

12 Q Uh-huh.

13 MS. PROCTOR: If I may have a moment, Your  
14 Honor.

15 THE COURT: You may.

16 MS. PROCTOR: Nothing further, Your Honor.

17 THE COURT: Thank you.

18 Anything further, Mr. Abbington?

19 MR. ABBINGTON: No, Your Honor. That's all.

20 THE COURT: All right. Can Mr. Oram be excused  
21 then?

22 MR. ABBINGTON: I would ask that he be excused.

23 THE COURT: Great. Thanks.

24 Thank you.

25 THE WITNESS: Thank you very much, Your Honor.

1 THE COURT: All right, then, the next witness is  
2 Mr. Peltzer or Mr. Miller?

3 THE WITNESS: Officer Williams.

4 THE COURT: Officer Miller (sic.). Great.  
5 Do you want to ask him to step in then.

6 Was it Miller or Williams? I have Williams.

7 MS. PROCTOR: Williams.

8 THE COURT: Williams. Okay.

9 While we're waiting for Mr. Williams, there was some  
10 discussion about the notes of Dr. Kessel an also, tomorrow,  
11 Dr. Bradley. I don't know if he's got notes that he's going  
12 to rely on or anything of the sort.

13 Do we have any idea?

14 MS. PROCTOR: I need to contact him. I will be  
15 contacting him this afternoon.

16 THE COURT: Just make sure that we get those.

17 But, Dr. Kessel, do you have those.

18 MS. PROCTOR: I do, Your Honor. May I approach  
19 your clerk?

20 THE COURT: Great. Yeah. And did you already  
21 give a copy to --

22 MR. ABBINGTON: We have a copy.

23 MS. PROCTOR: I did.

24 THE COURT: Great. Thank you.

25 Come on up. I'm sorry.

1           Officer Williamson, come on up to the witness stand,  
2 if you would, please, and be sworn by the clerk, sir.

3           Yeah, right up there.

4                                   **DAVID WILLIAMS,**  
5           called as a witness on behalf of the Respondent,  
6           was sworn and testified as follows:

7                           THE CLERK: Thank you. Please be seated.

8                           Would you state your full name for the record and  
9 spell your last name.

10                           THE WITNESS: David James Williams,  
11 W-i-l-l-i-a-m-s.

12                           THE COURT: Thank you.

13                           Go ahead, Ms. Proctor.

14                                   **DIRECT EXAMINATION**

15 BY MS. PROCTOR:

16 Q   Officer Williams, how are you employed?

17 A   I'm sorry?

18 Q   How are you employed?

19 A   I'm a Senior Correctional Officer at Ely State Prison.

20 Q   And what does your job entail?

21 A   I'm the Senior Officer on, uh, in the Unit 3 housing unit  
22 at Ely State Prison.

23 Q   And what is Unit 3?

24 A   Unit 3 is our CMU, Condemned Men's Unit, more commonly  
25 referred to as Death Row.

1 Q Do you know Michael Joseph Mulder?

2 A Uh, I do; yes.

3 Q Do you see him in the courtroom?

4 A Um, yes.

5 Q And can you describe what he's wearing?

6 A Uh, it looks like he's got a blue jumpsuit on, and I  
7 guess a white t-shirt on underneath that.

8 THE COURT: The record will reflect the  
9 identification of Mr. Mulder.

10 MS. PROCTOR: Thank you, Your Honor.

11 BY MS. PROCTOR:

12 Q How do you know the petitioner?

13 A How do I know him?

14 Q Yes.

15 A Uh, well, as I said, I'm the senior officer on "A" day  
16 shift in Unit 3, and Mr. Mulder is an inmate housed in that  
17 unit. He has, uh, tier time and yard time and things like  
18 that. And I'm in a position where I talk to him and converse  
19 with him occasionally. And, uh, I see him daily.

20 Q And how long have you known Mr. Mulder?

21 A I've known Mr. Mulder, now, for about two-and-a-half  
22 years real well on a daily basis. I've known him for,  
23 probably, seven or eight years. But it's been about  
24 two-and-a-half years now that I've actually been assigned  
25 to his housing unit, so I know him pretty well now.

1 Q Can you tell me what a typical day for an inmate in  
2 Unit 3 is?

3 A Sure. A typical day would be the inmate, the inmates  
4 have breakfast at around, I guess, about 5:00 a.m. And then  
5 at about eight o'clock a.m., they have -- the unit is split  
6 into groups, about four groups. And depending on whose group  
7 whose turn it is, uh, they, they'll come out and have day room  
8 time together, up to 12 in a group. They can have -- we call  
9 it tier time, where they can come out and, uh, play, play  
10 cards and socialize, and hang around with each other for  
11 several hours at a time in our day room area.

12 Or, it might be their yard time that day and, in  
13 which case, they would -- that particular group, uh, would  
14 go out to the rec yard and play handball or basketball or  
15 whatever.

16 Then as the day progresses they, you know -- and  
17 they do that pretty much all day long, that kind of stuff.  
18 And then they have dinner in the evening at around 3:00 or  
19 4:00 in the afternoon. And then it's lights out about  
20 9:00 p.m. So --

21 Q Does Mulder participate in yard time?

22 A I'm sorry, ma'am.

23 Q Does Mr. Mulder participate in yard time?

24 A Yes, he does.

25 Q And do you recall what kind of exer -- activities he does

1 on yard time?

2 A Uh, when he's on the yard, I notice -- he mostly walked  
3 around and socializes with guys. He doesn't really play a lot  
4 of handball, or things like that, you know, with his -- he's  
5 had some physical limitations. And, so he's, uh -- he just  
6 walks around and socializes mostly. I've noticed on tier  
7 time, it's where he -- Mr. Mulder does some exercising -- what  
8 he can do.

9 Q And what exercising is that?

10 A Uh, I've noticed he, uh, does one-handed push-ups. And  
11 I've noticed that he'll stand by a table on the tier and kind  
12 of do, uh, pull-ups while standing up. You know, just kind  
13 of little things like that.

14 Q You mentioned that he has some physical limitations.  
15 What limitations have you noticed?

16 A What physical limitations?

17 Q Yes.

18 A I notice that he's got, he's got, uh -- it's some  
19 physical impairments when it comes to walking. You know,  
20 it's pretty noticeable. And it's obvious that he has, uh,  
21 some problems with walking -- although he was able to walk  
22 around just fine. I mean, but, you know, there's a definite  
23 limp there.

24 He's got one arm. I believe it's his right arm  
25 that's -- that seems to be, uh, not real usable. I don't see



1 him do much with that arm, and it's obvious that it's, it's  
2 severely handicapped.

3 Q What other activities does Mr. Mulder do on the tier?

4 A Uh, he spends a lot of time just socializing with other  
5 inmates. I've seen him play cards with inmates. He, uh --  
6 he's fairly well liked. A lot of people talk to him. He  
7 gets around and he's kind of a social butterfly, you might  
8 say. I know one thing he does everyday, everyday when he has  
9 tier time at least, is he cleans his cell. He comes out and  
10 gets a broom and a mop and he cleans his cell. And when he  
11 finishes that, he kind of just, uh, mills around and goes  
12 from group to group of people and/or table to table, just,  
13 uh, socializing with, with fellow inmates.

14 THE COURT: You mention that he plays cards with  
15 fellow inmates. Do you -- are you aware of what kind of card  
16 games, specifically, he plays?

17 THE WITNESS: I don't know, sir. I --

18 THE COURT: All right.

19 BY MS. PROCTOR:

20 Q Have you ever seen him play checkers?

21 A I don't recall seeing him play checkers.

22 Q Okay. How often do you personally communicate with  
23 Mr. Mulder?

24 A Uh, gosh, um, it's hard to say. Probably, uh, at  
25 least a couple of times a week, two or three -- few times

1 a week. Maybe some weeks, I might not talk to him. Other  
2 weeks I might talk to him two or three or four times, brief,  
3 little brief conversations.

4 Q Can you describe some of those conversations that you've  
5 had with him?

6 A Uh, usually it's just, uh, Mr. Mulder will come -- will  
7 come to my location and ask me for a, uh -- oh, a book request  
8 or a kite, or maybe a money order or something like that, or  
9 soap or, uh, a lot of times, uh, Mr. Mulder will have a visit.  
10 I don't know whether they're family, or an attorney visits,  
11 or what, but I will contact him and tell him that he's got a  
12 visit he needs to prepare for, get ready for. So, we talk  
13 about that a little bit, and things like that.

14 Q Are you -- does he seem to understand what you're saying  
15 to him?

16 A Yes.

17 Q Do you have any difficulty understanding him when he  
18 speaks to you?

19 A No.

20 Q Does he use profanity when he speaks to you?

21 A No. I don't recall him ever doing that.

22 Q What is his personality? How would you describe his  
23 personality?

24 A Uh, with me, uh, it's pretty much just business-like  
25 with Mr. Mulder. And I -- when we talk, it's just inmate and

1 officer. There's not much personality there. But I notice  
2 when he's socializing on the tier, he's a personable guy.  
3 He's -- I see him, uh, joking and laughing with, with other  
4 inmates. And they -- and he seems quite comfortable in  
5 socializing. He's got some personality.

6 Q Do you speak to Mr. Mulder any differently than you  
7 would any other inmate on the tier?

8 A No.

9 MS. PROCTOR: No further questions, Your Honor.

10 THE COURT: All right.

11 Mr. Abbington.

12 MR. ABBINGTON: Thank you, Your Honor.

13 **CROSS-EXAMINATION**

14 BY MR. ABBINGTON:

15 Q How do you speak to other inmates on the tier?

16 A How do I speak to other inmates? Uh, gosh, I -- just  
17 straightforward. I tell them, uh, if I have a phone call  
18 saying that they need to be some where, I tell them to get  
19 ready to go. If they're rolling up maybe for a bed move  
20 or something, I just tell them what they need to do.

21 If they come and ask me a question, I answer it to  
22 the best of my ability and, uh, I just talk to them like, uh,  
23 this -- any -- like I would talk to anybody, any other normal  
24 people.

25 Q Would it be a fair statement to say that most of your

1 communication with Mr. Mulder, and any other inmates at Ely,  
2 is kind of command-based; go do this, pick up this, time for  
3 this, go do this, stuff like that?

4 A At times. Not always. Of course, of course, it's my  
5 position to, to let them know when it's time to do this or  
6 go there or do that, but --

7 Q I don't mean that in a bad way. Your job is to make  
8 sure that they're in a certain place at a certain time?

9 A Sure.

10 Q And never -- and not in a place where they shouldn't  
11 be --

12 A Sure.

13 Q -- at a time when they shouldn't be there?

14 A Sure.

15 Q So that's perfectly okay?

16 A Yeah.

17 Q But I'm just saying -- I don't want to be flippant -- but  
18 you're not discussing the budget shortfall with him?

19 A No.

20 Q Whether or not Congress it going to agree to raise the  
21 debt ceiling; you're not doing that?

22 A No, of course not.

23 Q All right. Do you think Mr. Mulder is capable of  
24 having those kinds of conversations in your interactions  
25 with him?

1 A Uh, yes. If we were to get into a conversation like  
2 that, Mr. Mulder has not demonstrated to me that he has  
3 any, uh, physical limitations with his, when it comes to  
4 conversations about anything that we've talked about.

5 Q What do you normally talk to him about?

6 A Uh, like I said, generally, it's pretty short, uh,  
7 discussions. And I don't know if you could really call  
8 them discussions. We talk about -- I'll tell them, hey, you  
9 got a visit here. You need to get ready to go to a visit.

10 Q So he's not one, like one of these guys -- you have  
11 guys at Ely who are like that who were, like, in their cell  
12 kicking the wall, throwing feces.

13 You have those guys?

14 A Absolutely.

15 Q He's not one of those guys?

16 A No, he's not.

17 Q He's, generally, a person who is easy to get along with.  
18 You ask him to do something, he pretty much does it?

19 A Yes; that's correct.

20 Q Gets along with all the other guys, and the other guys  
21 kind of look out for him because they kind of feel sorry for  
22 him?

23 A I don't know. They get along with him well. I don't  
24 know if they feel sorry for him or not, but he does have a  
25 good rapport with inmates.

1 Q They're not taking advantage of him. There's nobody -- I  
2 mean, Death Row is the kind of place where people might take  
3 advantage of each other?

4 A I suppose it could be. I don't think anyone takes  
5 advantage of Mr. Mulder. He generally seems to have a  
6 rapport with other inmates.

7 Q Yeah, I think that's true.

8 Do you think he's capable of doing fifteen hundred  
9 single arm push-ups every single day?

10 A Uh, fifteen hundred? I don't know if he would be capable  
11 of that or not. I would -- I would find that hard to believe,  
12 personally.

13 Q Have you -- I would think so.

14 How old -- when you see Mr. Mulder and he does these  
15 push-ups, how long does it take him to do one?

16 A Uh, gosh, I don't know. I've never really thought about  
17 it that much. He, uh -- most of what I see Mulder do, uh, as  
18 far as that, as physical exercise goes, it is -- I've noticed  
19 him, as I said a minute ago, he stands -- he'll stand by a  
20 table and do a lot of stuff, you know, pulling and pushing and  
21 do what he can, but I have seen him on the floor, too, doing  
22 some, doing some, uh, push-ups.

23 Q But, I mean, he's not, like, Jack Palance at the Academy  
24 Awards knocking out one arm push-ups, you know --

25 A No, no. You know, it's obvious that Mulder has physical

1 limitations.

2 Q All right. And is he getting any sort of treatment for  
3 his injuries? Does he have a splint for his arm?

4 A I, I believe he does have a splint, some kind of a brace  
5 or something for his arm. I've noticed that he wears a glove  
6 a lot. I believe it's his right arm. He wears a glove a lot.  
7 I've heard his hand gets cold circulation problems, so he  
8 wears a glove a lot, and I believe he does have some kind  
9 of a brace on his arm, or it seems like.

10 Q And would it be a fair statement that Death Row is a  
11 structured environment?

12 A Yes.

13 Q So he performs well in this structured environment?

14 A Yes, he does.

15 THE COURT: Speaking of the structure of the  
16 CMU Unit 3, and the tier that you're in, how many, how many  
17 inmates are there in that particular part of the unit where  
18 you were circulating?

19 THE WITNESS: On -- the unit is kind of split in  
20 half. It's Unit 3 A-Wing and B-Wing.

21 THE COURT: And you're in A-Wing?

22 THE WITNESS: Well, I run both wings.

23 THE COURT: Oh, you're in both. Okay.

24 THE WITNESS: And Mr. Mulder is on A-Wing, and  
25 that's, uh, that's -- all CMU inmates are housed on that wing.

1           On B-Wing, B-Wing is about half CMU and half of  
2 other inmates under, under different kinds of sentences.

3           THE COURT: All right.

4           THE WITNESS: So there is 40 --

5           THE COURT: In the wing where Mr. Mulder is, the  
6 A-Wing, how many beds? How many --

7           THE WITNESS: There are 48, 48 beds on each  
8 wing.

9           THE COURT: It's fully occupied?

10          THE WITNESS: Yes, sir. Mr. Mulder is in a  
11 group of 12. His group consists of 12 people. If all -- if  
12 everyone in his group came out at one time to go on the tier  
13 or to the yard, there could be -- there would be 12. With an  
14 exception, there's a couple of guys that live on B-Wing that  
15 have crossover privileges because there's only so many beds  
16 on A-Wing.

17          THE COURT: Right.

18          THE WITNESS: So we got some guys on B-Wing that  
19 we crossover. And there can be 13 or 14 guys out at a time  
20 for that reason. But, actually, in his tier group, there's,  
21 on that wing, there's 12 people.

22          THE COURT: And your interaction with Mr. Mulder  
23 would be, principally, when he's having tier time out amongst  
24 others or on the yard.

25          THE WITNESS: Yes, sir.



1 THE COURT: All right.

2 THE WITNESS: Or some -- and, yes, that's  
3 correct. A lot of -- most of my dealings with Mr. Mulder are  
4 when he's standing at my window talking to me. Occasionally,  
5 I go out on the tier and walk around and I interact with  
6 inmates and talk to them and I see Mulder. We don't seem to  
7 talk too much at those times for some reason.

8 THE COURT: And do they have designated times of  
9 the day for yard time?

10 THE WITNESS: Yes, sir.

11 THE COURT: How much time do they have; an hour,  
12 two hours?

13 THE WITNESS: When they go to yard, it depends  
14 on whether they have morning yard or afternoon yard. If they  
15 have morning yard, they come out at eight o'clock and, uh,  
16 they go back in for count at 10:45.

17 THE COURT: All right.

18 THE WITNESS: After noon yard, it would be 11:30  
19 to 2:30 in the afternoon. So 11:30 a.m. to 2:30 p.m. would  
20 be, would be that afternoon yard time.

21 THE COURT: And how about tier time where they  
22 basically got --

23 THE WITNESS: Tier time is the same thing,  
24 same amount of hours, just depending on whether you're on  
25 tier or --

1 THE COURT: Just the reverse.

2 THE WITNESS: Yeah, just the reverse. Exactly.

3 THE COURT: Okay. And so you are in the yard  
4 all the time when Mulder is in the yard, or in the tier all  
5 the time when he's there, or does your duty take you different  
6 times different places?

7 THE WITNESS: Uh, most of my time is spent in  
8 the control room, uh, observing the inmates from my control  
9 room. I do go out onto the tier occasionally and walk around  
10 and talk to them and interact with them, to some degree. But,  
11 most of my time is spent in the control room. That's where,  
12 really, my job is.

13 THE COURT: All right.

14 THE WITNESS: When they're on the yard, I don't  
15 go out on the yard. We don't do that. When they're on the  
16 yard, officers don't generally go out there.

17 THE COURT: That was going to be my next line of  
18 question.

19 Is that yard time, whether it's Mulder's group or  
20 the other group, when they're in the yard, it's the inmates.  
21 But unless there's a problem or an issue, correctional  
22 officers are not down amongst them talking and interacting?

23 THE WITNESS: That's correct.

24 THE COURT: And how about during tier time? Of  
25 course you're in the Command Center, but are there other

1 officers milling about with them, correctional officers?

2 THE WITNESS: Occasionally; yes, sir.

3 THE COURT: But, routinely, I mean,  
4 day-in-and-day-out.

5 THE WITNESS: Uh, I don't think I would say  
6 routinely. It's kind of sporadic. No real, uh, routine to  
7 it. We go out and, uh, occasionally go out and walk around  
8 just whenever. There's really no routine to it.

9 THE COURT: Okay.

10 THE WITNESS: A lot of times, medical will  
11 come in and need to see inmates, so we'll go out.

12 THE COURT: Sure. If you've got a purpose for  
13 going to a particular cell.

14 THE WITNESS: True.

15 THE COURT: Or to see a particular person.

16 THE WITNESS: Right.

17 THE COURT: Then that would --

18 THE WITNESS: Right.

19 THE COURT: Otherwise, is the observations  
20 that you have of Mulder, and anyone else, regarding how they  
21 interact with other inmates and so forth, based on what you  
22 see from a -- somewhat of a distance then.

23 THE WITNESS: Well, it's what -- it's usually  
24 what I observed from my control room. And, as I said,  
25 occasionally, I do go out on the tier and walk around and

1 actually talk to them and interact face-to-face with these  
2 guys. But, most of my time is spent in the control room.  
3 That's where I really -- I, I should be most of the time.

4 THE COURT: And if an inmate wants to transact  
5 some business with you, comes with a question or a concern,  
6 they come to the window? There's a window?

7 THE WITNESS: Yes.

8 THE COURT: A Command Post window?

9 THE WITNESS: There is.

10 THE COURT: And they --

11 THE WITNESS: There's a window with bars, and  
12 they can come up there and get my attention. And I'll walk  
13 over to the window and we talk --

14 THE COURT: Oh.

15 THE WITNESS: -- from there.

16 THE COURT: How often would you say Mr. Mulder  
17 comes up to talk to you at the Command window?

18 THE WITNESS: Uh, probably a couple of times a  
19 week, I guess, for one thing or another. He'll ask for some  
20 soap to shower, or he'll ask for some kind of paperwork, a  
21 kite or something like that.

22 THE COURT: And is that a large number of times  
23 compared to other inmates; or pretty typical?

24 THE WITNESS: No. In fact, he probably, uh,  
25 either typical or maybe even a little less than typical. I

1 probably -- Mulder probably doesn't approach me as often as  
2 some other inmates do, and maybe a little more than a few  
3 other inmates. So --

4 THE COURT: And when he approaches you, do you  
5 have difficulty understanding what he's saying, or can you  
6 understand his words. Does he seem to have difficulty  
7 expressing himself?

8 THE WITNESS: No. I understand Mulder just fine  
9 when he talks to me.

10 THE COURT: If he wanted soap, would he come up  
11 and just say soap, or I need soap or -- I mean what -- how --

12 THE WITNESS: Oh, he'd probably say, uh -- gosh,  
13 I don't know -- I need soap; or he might just say soap. I,  
14 I'm not -- honestly, I'm not sure.

15 THE COURT: Okay.

16 THE WITNESS: Soap. Yeah, Mulder does have,  
17 and it's noticeable, he has, uh, a speech impediment, a  
18 speech problem, I think. You know, I'm not an expert,  
19 certainly, but I've always assumed that it was, uh, related  
20 to his other physical problems, you know, that he also has --  
21 when he speaks, it's noticeable that he has a speech problem,  
22 but he -- but he is understandable. I can understand what  
23 he's saying. He understands what I'm saying.

24 THE COURT: Are you familiar with his medical  
25 history, stroke, or any other medical history?

1 THE WITNESS: Not really. I've heard that about  
2 -- that he had a stroke. And I've heard why and things, but  
3 I've never really gotten into his, his medical history too  
4 deeply.

5 THE COURT: What about other inmates; do you  
6 have conversations with other inmates -- without getting into  
7 what they say -- about Mulder at all?

8 THE WITNESS: No. I never have. No.

9 THE COURT: Okay.

10 THE WITNESS: No, I've never talked to another  
11 inmate about Mulder ever, that I can think of.

12 THE COURT: All right. Thank you.

13 Go ahead, Mr. Abbington.

14 BY MR. ABBINGTON:

15 Q You reviewed -- you've handled -- -- do you handle kite  
16 requests?

17 A Do I handle kite requests?

18 Q Yes, sir.

19 A Generally, not. I forward them on to whoever the kite  
20 is addressed to.

21 Q So when did you first start acting with Mr. Mulder?

22 A When did I first --

23 Q Yes, sir.

24 A I guess when I became assigned to that housing unit.

25 Q And when are we talking about; when would that be?

1 A That would have been about two-and-a-half years ago  
2 when I -- I've been working that unit straight now for  
3 about two-and-a-half years. But in years prior to that,  
4 uh, I worked intermittently in Unit 3, off and on, sometimes  
5 for months at a time. Sometimes for, you know, just,  
6 occasionally, a day here and a day there. Much of my  
7 career, a lot of my career has been spent in Unit 3. I've  
8 been there almost 21 years now, and a lot of it has been in  
9 Unit 3.

10 Now, Mr. Mulder has not been there all that time.  
11 You know, I think -- I don't know. I can remember him  
12 being there the last, probably, eight or ten years, but --  
13 and, again, I've only known Mr. Mulder, really known him,  
14 personally, uh, if you can -- if I could say that word.  
15 And I don't know how personal it is -- but for about  
16 two-and-a-half years since I got assigned to that unit.

17 Q Were you -- did you know Mr. Mulder prior to March 15th,  
18 2001?

19 A No.

20 Q So you never interacted with him before he had the  
21 stroke?

22 A No, I didn't.

23 Q All right. And in the time that you've known him,  
24 he's always pretty much been like he is now, the type of  
25 person who uses a combination of words and gestures to get

1 his point across?

2 A That's correct.

3 Q Like this thing that the judge said, where he might say  
4 soap, or I want some soap. Those sort of things.

5 A Yeah.

6 Q He's not coming up and saying I feel sticky and nasty and  
7 I need to shower; he's not saying that?

8 A No, not at all. He's pretty -- like the judge said, he  
9 kind of just uses the words he needs to use to get his point  
10 across, and he gets that across real well.

11 Q So would it be a fair statement to say that he's able to  
12 communicate his basic wants and needs to you?

13 A Yes, sir.

14 Q And that's pretty much it?

15 A Yeah.

16 Q That's the extent of your conversations with him  
17 regarding his basic wants, needs that he needs for you to  
18 provide for him as a guard at the prison?

19 A That would be correct; yes.

20 MR. ABBINGTON: Thank you. I'll pass the  
21 witness.

22 THE COURT: Thank you.

23 Anything further, Ms. Proctor?

24 MS. PROCTOR: Nothing further, Your Honor.

25 THE COURT: All right.



1 Thank you, Officer Williams. You can step down.  
2 Please watch your step as you go down there.

3 And you can call your next witness.

4 MS. PROCTOR: It would be Harry Peltzer.

5 THE COURT: All right.

6 MR. ABBINGTON: Your Honor, could I have,  
7 like, 20 seconds for a comfort break? I'll be right back.

8 THE COURT: Yeah. Go ahead.

9 Go ahead anybody else.

10 (Brief recess taken.)

11 THE COURT: All right. Mr. Peltzer, if you  
12 please come up to the witness stand, stand right here, and  
13 be sworn by the clerk, sir.

14 **HARRY PELTZER,**  
15 called as a witness on behalf of the Respondent,  
16 was sworn and testified as follows:

17 THE CLERK: Please be seated.

18 Please give us your full name for the record and  
19 spell your last name for the record.

20 THE WITNESS: Harry Dean Peltzer, P-el-t-z-e-r.

21 THE COURT: Thank you.

22 Go ahead, Ms. Proctor.

23 **DIRECT EXAMINATION**

24 BY MS. PROCTOR:

25 Q Mr. Peltzer, how are you employed?

1 A I'm a case worker at Ely State Prison.

2 Q And how long have you been at that prison?

3 A Ten years.

4 Q And what is your job duties?

5 A Pardon me?

6 Q What do you do in your job?

7 A My job, mainly consists of classifying inmates properly  
8 and, uh, preparing them for release.

9 Q And where is your physical office located?

10 A My office is located in Unit 3, A-Wing.

11 Q And --

12 A Excuse me. B-Wing.

13 Q B-Wing.

14 Do you know Michael Mulder?

15 A Yes, I do.

16 Q Can you see him in the courtroom?

17 A Yes, I do.

18 Q Can you describe what he's wearing?

19 A Uh, he has a blue jumpsuit and short reddish blonde  
20 hair.

21 THE COURT: The record will reflect the  
22 identification of defendant.

23 MS. PROCTOR: Thank you.

24 BY MS. PROCTOR:

25 Q How do you know Mr. Mulder?

1 A Mr. Mulder is a Death Row inmate at Ely State Prison in  
2 the unit I'm a case worker.

3 Q How long have you known him?

4 A I'd say four to five years.

5 Q How is Mr. Mulder classified?

6 A He is classified MLUD, which stands for Maximum Lockup  
7 Death Row.

8 Q What are the privileges for inmates on that?

9 A Well, it varies upon depending on the wing he's on.  
10 He's on the A-Wing. Certainly, he has tier privileges  
11 where 12 inmates at a time can go out on an open tier and  
12 visit.

13 He also has yard time where the same 12 inmates  
14 can go into a small recreation yard for exercise, or to play  
15 some small area sports.

16 Q Have you observed Mr. Mulder on yard time?

17 A Yes, I have.

18 Q What does he do on yard time?

19 A Basically, he's either visiting with other inmates or  
20 exercising.

21 Q What kind of exercise does he do?

22 A They, uh, they do some calisthenics, like, sit-ups  
23 or push-ups or things -- and things like that that I've  
24 observed. It could be more.

25 Q And on the tier time, what have you observed

1 Mr. Mulder do?

2 A Basically conversing with other inmates, uh, talking  
3 with them, walking on the tier in a small group or playing  
4 cards at various tables.

5 Q How often do you observe Mr. Mulder on either the yard  
6 or the tier?

7 A Could you say that again, please.

8 Q How often do you see Mr. Mulder during a typical week  
9 on the tier?

10 A Actually, since my office isn't on that tier, I don't  
11 see him that often. I do go over there on occasion to  
12 return grievances or talk with other inmates. And I would  
13 say that maybe once every two weeks, once a week, sometimes  
14 it might be three weeks, and then sometimes it might be  
15 longer, if I have no reason to go out there when he's on  
16 tier time, or when I have reason when he's not -- doesn't have  
17 tier time.

18 Q Are you aware that Mr. Mulder suffered a stroke in 2001?

19 A Pardon me?

20 Q Are you aware that he suffered a stroke from 2001?

21 A Yes, I am.

22 Q Does he have any special Classification due to his  
23 post-stroke status?

24 A Not in Classification. He might have some medical  
25 classifications, but I'm not aware of those because those

1 are confidential.

2 Q How often do you communicate with Mr. Mulder?

3 A Uh, I have -- I don't communicate very often. He's a  
4 very quiet inmate. The last time I spoke with Mr. Mulder,  
5 he had returned from a medical out of -- or some court things.  
6 He returned to Ely State Prison. At that time, I approached  
7 his cell and asked him if he was ready to return to the A-Wing  
8 and, at that point in time, he said yes. He was ready to  
9 return.

10 Q When you have conversations with Mr. Mulder, does it  
11 appear that he understands what you're telling him?

12 A Yes.

13 Q And do you understand what he tells you?

14 A Yes.

15 Q How complicated are your discussions with Mr. Mulder?

16 A Very simple. Nothing complicated.

17 Q Is that the typical conversation you might have with  
18 another inmate?

19 A Yes, it -- the conversation depends upon what the issue  
20 is. I mean, he doesn't seem to have too many issues with our  
21 Classification process.

22 Q All right.

23 MS. PROCTOR: I have no further questions at  
24 this time, Your Honor.

25 THE COURT: All right. Thank you.

1 Mr. Abbington.

2 **CROSS-EXAMINATION**

3 BY MR. ABBINGTON:

4 Q Sir, could you please restate your name. I'm not sure  
5 we're pronouncing that right.

6 A Harry Peltzer, P-e-l-t-z-e-r.

7 Q And you're in charge of Classification?

8 A Yes.

9 Q So are you in charge of the I-File as a case worker?

10 A I have access to it.

11 Q But you're not -- do you add information to it?

12 A I can.

13 Q Do you?

14 A Yes, I do, when I have -- when there's a reason to.

15 Q All right. Do you have a copy of the State's exhibits  
16 up there?

17 THE COURT: Yes. All, all exhibits are there;  
18 four binders.

19 Which number do you want him to look at?

20 MR. ABBINGTON: I think this is -- this would be  
21 part of the I-File.

22 MS. PROCTOR: The I-File is Exhibit 506.

23 THE COURT: 506.

24 MS. PROCTOR: Correct.

25 THE COURT: There are three binders there,

1 506 -- maybe, Donna, can you help?

2 506. Great. Just open it up to 506, and there's  
3 probably some Bate stamp numbers.

4 MR. ABBINGTON: Excuse me just a second,  
5 Your Honor.

6 THE COURT: Go ahead.

7 BY MR. ABBINGTON:

8 Q Okay. So can you turn to page R-262? It should be in  
9 this, what will be Volume I of this document.

10 A All right. 262.

11 THE COURT: Right. Exhibit 206 (sic.).

12 THE WITNESS: R-262. Okay.

13 BY MR. ABBINGTON:

14 Q Now, is this, is this -- that starts off with a picture.  
15 I'm looking at a picture of Mr. Mulder; is that right?

16 A Yes.

17 Q Is that the Classification, is this a -- would come under  
18 Classification documents?

19 A Yes. It would be part of his documentation in his  
20 I-File. It doesn't come from Classification, it comes from  
21 Custody.

22 Q Whose job is it to keep these entries?

23 A This would be the property sergeant's. They keep these  
24 pictures.

25 Is that what you're saying?

1 Q Uh, yes, sir.

2 A Right.

3 Q All of that stuff.

4 All right. So if you would turn to page R-271, can  
5 you tell me what that document is?

6 A Yeah, it's a Classification, chronological entry.

7 Q What do those entries purportedly represent?

8 A Well, these were entries that were placed in his I-File  
9 for various Classification hearings. If he were to come back  
10 into prison or to ESP, or to go out -- if he would have sat  
11 down for a regular review, if he would have sat down for an  
12 ad seg review, an entry would be made in this format.

13 Q So every time that he -- would that -- would an entry be  
14 made every time he leaves the prison?

15 A There should be, yes. There should be some kind of an  
16 exit entry.

17 Q Say, for example, he leaves Ely to go Nevada State Prison  
18 for a surgery procedure, have a hernia surgery. It's my  
19 understanding, at some point, should that be entered into  
20 there?

21 A There would be the uh, the medical information might not  
22 be, but there would be an entry indicating that he left ESP to  
23 go to NSP for medical.

24 Q Would these entries be made the entirety of his  
25 incarceration at the institution?



1 A There should be.

2 Q Is there any reason why his stopped in 2000?

3 A Why these stopped in 2000?

4 Q Yes, sir.

5 A Yes. Because, in 2000, we went to a computerized system.

6 Q And where would we find those entries?

7 A It would be found in our NOTIS, which is Nevada Offender  
8 Tracking System.

9 Q And that's no longer part of the I-File?

10 A Yes, it is part of the I-File.

11 Q So anything related to that would be in this inmate  
12 tracking system?

13 Is there a name for that, or a acronym for that?

14 A NOTIS; N-O-T-I-S.

15 Q NOTIS?

16 A Yes.

17 Q So if we wanted to have access to -- there should be  
18 entries of where chronological Classification entries  
19 regarding Mr. Mulder, that extend onto December 5th, 2000, all  
20 the way to the present?

21 A Correct.

22 MR. ABBINGTON: Your Honor, at this time, we  
23 would ask for those documents to be provided because that  
24 wasn't part of the I-File we saw yesterday. I don't think  
25 that's the State's fault but, obviously, if they are keeping

1 those entries, we would like to see them.

2 THE COURT: All right.

3 Ms. Proctor.

4 MS. PROCTOR: Your Honor, I would be happy to  
5 have somebody get ahold of the prison and try to get those.  
6 Uh --

7 THE COURT: These are in electronic format, on  
8 the computer? You have to physically print a copy of them?

9 THE WITNESS: You can print those; yes, sir. We  
10 have capability of printing out all of those chronological  
11 entries.

12 THE COURT: But you just don't keep them in  
13 printed form, you keep --

14 THE WITNESS: No. We keep them in the computer.

15 THE COURT: Okay. Okay. But, yeah, let's go  
16 ahead and get those. We're going to be recessing shortly.  
17 You can put a call in and get that.

18 MR. ABBINGTON: Thank you, Your Honor.

19 THE COURT: All right.

20 THE WITNESS: Thank you.

21 BY MR. ABBINGTON:

22 Q So my understanding is we were looking -- one of the  
23 issues -- we end up going out, looking for the I-File  
24 yesterday. We were looking for entries -- these are entries  
25 would include this, this down call that Mr. Mulder has on

1 March 15th of 2000, and then chronological entries regarding  
2 his movement in the Department of Correction system from 2001,  
3 like the last ten years?

4 A Yes.

5 Q So --

6 A There would be -- there should be a chronological  
7 entry, but there would also be an entry done by Custody that  
8 indicates that he left ESP on a certain date, and at a certain  
9 time, and that he arrived and was in transit between those  
10 two institutions and arrived at the incoming institution at a  
11 particular time. All of that is recorded in our computer  
12 system.

13 Q Great. And that would be a record of his movements and  
14 his interactions with prison staff for the last ten years?

15 A Yes, it should be in there. I can't guarantee you, but  
16 it should be.

17 Q Okay.

18 Now, in regard to the entries that we have here so  
19 far, is there anyone who's tasked with the job, or with the  
20 responsibility of maybe stopping by Mr. Mulder's cell once a  
21 day or once a week or once a month or once a year, to see how  
22 he's functioning?

23 A Not necessarily. We do a regular review, which is called  
24 a periodic review, but it is not necessarily done personally.  
25 It can be done non-personally.

1 Q What do you mean non-personally?

2 A It can be done reviewing -- going through his NOTIS  
3 files and see if anything has changed; if he has changed  
4 his custody level, if he has had his sentence overturned or  
5 things like that. And, just checking to make sure that his --  
6 all of his information is the same.

7 Q Okay. So just so I'm clear, I'll give you an example.  
8 In Pennsylvania, they have a system where, once a day, they  
9 have an inmate status form and everybody gets one. It's a  
10 little deal that, sometime during that day, 2:30 in the  
11 afternoon, 2:30 in the morning, somebody goes by and makes  
12 sure that this person was physically present in cell X, and  
13 how they were doing that day.

14 You guys don't have that?

15 A Yes, we do. We have that. We have several counts a day.  
16 Mr. Mulder is assigned to a certain cell. Custody staff go by  
17 his cell five or six times a day and make sure that he is in  
18 that cell.

19 Q Do they record or report what his status --

20 A They record the number of inmates that are in that unit  
21 and that tier on the top floor and the bottom floor. They  
22 don't record by name, no.

23 Q They don't record what he's doing?

24 A Or by number.

25 Q Or what his activities are?

1 A No.

2 Q So the only thing that would really be recorded would be  
3 unusual occurrences, if he was unconscious, things like that?

4 A Correct.

5 Q So would it be a fair statement to say that any  
6 interaction that you have with Mr. Mulder, or most staff  
7 have with Mr. Mulder is on a very basic, what does this guy  
8 need for the day to keep living in the prison?

9 A Yes.

10 Q Not having any protracted discussions about his case or  
11 anything like that?

12 A No.

13 Q Are there guys at the prison who are like that? That  
14 you can't help but talk to them about their case because they  
15 insist on it?

16 A Yes, sir; there are certain inmates who are -- who will  
17 aggressively pursue interaction with staff members about  
18 various issues.

19 Q But Mr. Mulder is not one of those people?

20 A No, he's not. He's very quiet.

21 Q Would it be a fair statement to say that, other than  
22 advising staff of what he wants or needs, his immediate  
23 needs, you pretty much don't talk to him at all?

24 A No.

25 MR. ABBINGTON: Pass the witness.

1 THE COURT: Okay.

2 When you said "no," you mean yes; that's correct?

3 THE WITNESS: That is -- that is correct.

4 Right.

5 THE COURT: That is correct.

6 THE WITNESS: That is correct.

7 THE COURT: Okay. Good.

8 Ms. Proctor.

9 MS. PROCTOR: Very briefly, Your Honor.

10 **REDIRECT EXAMINATION**

11 BY MS. PROCTOR:

12 Q Mr. Peltzer, are you familiar with the printout, case  
13 note printout report?

14 A Yes, I am.

15 Q Is -- will that contain the chronological Classification  
16 information you're discussing?

17 A Yes, it will.

18 Q If we were to ask you to printout the Classification  
19 information, would this be the report you would generate?

20 A I'm -- I'm fairly certain I can. I'm fairly certain I  
21 have access to that.

22 MS. PROCTOR: Your Honor, if I can show the  
23 witness this report.

24 THE COURT: Sure.

25 MR. ABBINGTON: Could we -- are we going to mark

1 that separately, I suppose.

2 THE COURT: Yeah. We'll mark it as next in  
3 order, Donna. I don't know what the number is.

4 THE CLERK: It would be Respondents 519.

5 THE COURT: 519. Okay. That would be 519 for  
6 identification.

7 (Whereupon, Exhibit 519 -- a document, was marked  
8 for identification.)

9 THE COURT: And can you recognize what 519 is?

10 THE WITNESS: Yes. It is a case note printout  
11 report.

12 THE COURT: Case note printout report; is that  
13 what you would printout from this NOTIS system?

14 THE WITNESS: Yes.

15 THE COURT: And does that contain the  
16 chronological data that was discussed previously; inmate  
17 transported from Ely --

18 THE WITNESS: Yes.

19 THE COURT: -- to Carson; when he departs when  
20 he was received, et cetera?

21 THE WITNESS: Yes.

22 THE COURT: Okay. So that's what you would be  
23 going to look for, right?

24 MS. PROCTOR: That's my understanding, Your  
25 Honor.

1 THE COURT: Would there be anything else printed  
2 out of this NOTIS system if you were --

3 THE WITNESS: You mean is there other reports  
4 you can printout?

5 THE COURT: You mentioned the report, the Chrono  
6 report previously before you saw that? Is that the report you  
7 were talking about?

8 THE WITNESS: Yes. This is the report I'm  
9 talking about.

10 THE COURT: I'm not asking if there's something  
11 else on the computer system.

12 THE WITNESS: Right.

13 THE COURT: I'm sure there's tons of stuff.  
14 Okay. And when was that printout? Can you tell?  
15 Does it have a print date?

16 THE WITNESS: It says it was printed on  
17 August 1st, 2011 at 3:06 p.m.

18 THE COURT: Okay. Well, we know where  
19 Mr. Mulder has been since then.

20 MS. PROCTOR: Your Honor, this is part of the  
21 packet that was, when we were discussing whether or not  
22 Mr. Abbington had the entire I-File, this was part of the  
23 packet that was faxed to his office.

24 THE COURT: Okay.

25 MR. ABBINGTON: Okay. That makes more sense,



1 Your Honor.

2 THE COURT: Then you've got it then.

3 MR. ABBINGTON: Okay.

4 THE COURT: All right. I don't have any trouble  
5 receiving a copy of it, just so the record is clear.

6 MR. ABBINGTON: I don't think anybody explained  
7 to us what -- I don't think, to either one of us, to them or  
8 to us, yesterday or today, what this was. They just sent it  
9 to us.

10 THE COURT: Got it. Okay.

11 But you've told us what it is?

12 THE WITNESS: Yes.

13 THE COURT: All right.

14 Do you have any questions about the content of it?

15 MS. PROCTOR: Nothing further, Your Honor.

16 THE COURT: Okay. Thank you.

17 And do you have any questions for the witness?

18 MR. ABBINGTON: Just a real quick question.

19 THE COURT: Concerning the content of it?

20 MR. ABBINGTON: Yes. Okay to, uh --

21 THE COURT: I'm sorry.

22 MR. ABBINGTON: I said just a couple of quick  
23 questions.

24 THE COURT: Sure. Yeah. Go ahead.

25 MR. ABBINGTON: Is it okay to approach the

1 witness?

2 THE COURT: Oh, absolutely. No. Sure.

3 **REXCROSS-EXAMINATION**

4 BY MR. ABBINGTON:

5 Q Now, we're going to talk about 1, 5, and 8.

6 A Okay.

7 Q And 8-11-08.

8 A Yeah.

9 Q Actually, this one, 3-8-05.

10 A Okay.

11 MR. ABBINGTON: Now, is it okay if I pose  
12 questions from here?

13 THE COURT: Absolutely.

14 BY MR. ABBINGTON:

15 Q We have an entry here of March 8, 2005. And this is,  
16 this is the Classification -- this converts to (inaudible)?

17 A Well, that -- this was a con -- we had a prior computer  
18 system.

19 Q Okay.

20 A It was called NCIS.

21 Q Okay.

22 A When we went to this system called NOTIS, we hired a  
23 firm to take all of those, all that -- all those entries that  
24 were under the NCIS and convert them into NOTIS. So that is a  
25 conversion entry, okay?

1           If you go down here, after, I believe it was 2006,  
2 July 1st, 2006, you would see everything should have a name.  
3 See here is the last conversion.

4           Then this one on 8-13-07, by me, that's my name.

5       Q    Okay.

6       A    And it will have a name there of who did the actual  
7 entry.

8       Q    Are you -- are you his assigned like social worker?

9       A    I'm his case worker.

10      Q    Case worker. And the case worker -- what is your job?

11      A    My job at Ely State Prison, as a case worker, is  
12 classifying inmates properly.

13      Q    Okay.

14      A    And Mr. Mulder's case, his Classification is set by the  
15 legislature as being a Death Row inmate. There is not any  
16 Classification system that we need for Mr. Mulder because  
17 he is required to stay at Ely State Prison unless under  
18 exceptional circumstances.

19      Q    Does he have any medical condition that is noted on this  
20 chart?

21      A    I don't have access to his medical chart. I couldn't  
22 know that.

23      Q    All right. If we go through these entries then, here,  
24 March 8, 2005 --

25      A    Right.

1 Q -- it says here -- would you read this line beginning  
2 with last physical?

3 A Uh, "last physical 7-27-04." Okay. "No medical or  
4 mental health restrictions noted. No disciplinary or court  
5 action pending."

6 Q Then we move out here. I guess we're moving backwards  
7 January 5th, 2008.

8 A Okay. And this is -- this is a, this is a case worker  
9 at, I believe, at NSP. His name is Burkey. Personal review,  
10 (inaudible) review, RFS-11, medical 11. That's Classification  
11 11. He had no restrictions at that time.

12 Then 11-01, mental health 101. Death Row max  
13 custody inmate. No medium or minimum consideration. He has  
14 no disciplinary in the last two years. Claims no CNCs, which  
15 is -- which is, uh --

16 Q No CMS?

17 A Acronym -- CMS for enemies.

18 Q Okay.

19 A And no medical problems. He is not working or  
20 programing. He still has pending court in Clark County.  
21 Next court date is 1-14-08. He does receive visits. No  
22 changes to next -- NOK; next of kin. Remain max APSP until  
23 finished with court maybe (inaudible) at High Desert, burglary  
24 (inaudible) people that reviewed his Classification.

25 Q All right. And then, right here, just finish this page,

1 8-11-2008?

2 A Okay. ESP regular review nonpersonal, nonsmoker. Inmate  
3 scheduled to review records with the client per current staff,  
4 currently housed MLUD, which is maximum lockup, Death Row,  
5 with all privileges. RFS-11. That's his (inaudible) score.  
6 And that is, that is part of an objective Classification, the  
7 inaudible score, which would apply to other inmates that were  
8 not on Death Row.

9 Q Okay.

10 A Okay. Serving death sentence for murder. First ESP  
11 since 2-06, from HDSP. Housed at ESP in the past, first time  
12 in 7-15 of '98. Inmate has no listed enemies. No noted  
13 STGs -- which is security (inaudible) affiliation, and no  
14 list of detainer. Last disciplinary was 8-4-03 at M-10, which  
15 is a minor.

16 Inmate has no listed medical or mental health  
17 restrictions. Currently unassigned since 11-2-04. NOK,  
18 which is next of kin, and smoker status updated through memo  
19 sent to inmate. Remain ESPMLUDR (inaudible).

20 Q Thank you. So now what this means is, as I understand  
21 it, is he's on highest security Classification?

22 A Yes.

23 Q And has been on that Classification?

24 A Yes.

25 Q So there's no consideration that he might be moved to

1 a lower or lesser stringent Classification. He's considered  
2 as much of a threat as any other inmate on Death Row?

3 A Yes.

4 Q Even given his present physical condition, like -- that  
5 does not change?

6 A That -- and that will not change.

7 Q And that probably won't change?

8 A That won't change.

9 Q Is there any indication as to whether or not  
10 Mr. Mulder -- it showed here one thing that you read is  
11 that, in 2005, his last physical was 7-27-04 of -- is there  
12 any provision to make sure that Mr. Mulder receives, uh,  
13 health examinations from a doctor on a regular basis?

14 A Uh, I would imagine there would be, but I would not have  
15 any access to that kind of information. That is a medical  
16 issue.

17 THE COURT: I think he indicated that medical  
18 records --

19 THE WITNESS: Are confidential.

20 THE COURT: -- concerning inmates are kept  
21 separately.

22 THE WITNESS: Yes, they are.

23 THE COURT: They're not generally available on  
24 your computer system or to anybody who works --

25 THE WITNESS: No. They're only accessible to

1 the medical staff and the warden.

2 BY MR. ABBINGTON:

3 Q Is there someone at the prison whose job it is to make  
4 Mr. Mulder's stay there less onerous?

5 A Make it less what?

6 Q Onerous; less horrible.

7 A Oh. Uh, no.

8 Q So when -- even when we have this person, Mr. Mulder,  
9 would you say that he is suffering from any sort of physical  
10 disability?

11 A Would I say he is?

12 Q Yes.

13 A Well, I believe he is suffering from some physical  
14 disabilities; yes, I do.

15 Q Is there anything that you, as his case worker, would do  
16 to change his Classification?

17 A I can't. That's beyond the scope of my duties.

18 Q So you couldn't recommend him for cognitive therapy or  
19 physical therapy or stuff like that?

20 A No. There is no access to that at Ely State Prison.

21 Q Whose job would it be to recommend that sort --

22 A It would be the Director of Nursing and his medical  
23 provider.

24 Q Now, if you take Mr. Mulder out for outside  
25 examination -- has he been outside -- has he been treated

1 by an outside doctor?

2 A I do not know that, if he has or not. I don't have  
3 access to that information.

4 Q So your job is just to make sure that he's in the prison  
5 and track where he goes back and forth. It's not really your  
6 job to make sure of how he lives in that prison on a  
7 day-to-day business?

8 A Not medically, no.

9 THE COURT: If a person has -- if a person has  
10 a medical issue, they have a cold, or they don't feel well,  
11 some -- they injure themselves in some fashion that's not  
12 apparent to staff --

13 THE WITNESS: Right.

14 THE COURT: -- how do they gain access to  
15 medical attention, the nurse? Is it through a kite to go  
16 see the nurse.

17 THE WITNESS: Yes. It's through a medical kite.  
18 They submit a kite to the Medical Department, which is their  
19 own special kite. It's not available to any other department  
20 within the prison, and they request a visit to see the  
21 provider.

22 THE COURT: Okay. And who do they submit that  
23 kite to?

24 THE WITNESS: They submit that kite to Custody  
25 staff in the unit.



1 THE COURT: All right. So somebody who's not in  
2 medical --

3 THE WITNESS: No.

4 THE COURT: -- would see it, at least when it's  
5 submitted?

6 THE WITNESS: Yeah, yeah. And I need to correct  
7 myself on that. If there is medical staff in the unit at that  
8 time, and they go by and they see a medical kite, they will  
9 retrieve it out of the inmate's board.

10 THE COURT: All right. And separate and apart  
11 from an inmate initiating something like that through a  
12 medical kite, are, are there, to your knowledge, routine  
13 checks that are made with regard to all inmates concerning  
14 medical, to your knowledge?

15 THE WITNESS: Not to my knowledge there isn't.

16 THE COURT: All right. Okay. All right.

17 BY MR. ABBINGTON:

18 Q So if I was -- are you familiar with Danny Jones?

19 A With who?

20 Q Danny Jones.

21 A No.

22 Q Death Row inmate found sittin' up in his cell, dead as a  
23 door nail, sittin' on --

24 A When was -- Danny Jones at Ely State Prison?

25 Q Yes, sir.

1 A No. I'm not familiar with that.

2 Q All right. So as regards that idea, we've had some  
3 doctors --

4 A Oh, excuse me. I -- now, I am familiar with that. Yes.  
5 I was the case worker in that unit at that time, yes.

6 Q What happened to Mr. Jones?

7 A That, I do not know. He was found deceased in his cell.

8 Q Sitting upright?

9 A That, I don't know. I don't have access to that  
10 information.

11 Q Between the date that Mr. -- assuming that Mr. Mulder  
12 is, stays at the prison until he's executed or dies of other  
13 causes, whose job would it be to look in on him until the day  
14 that he dies?

15 A It would be a Custody staff when they do their, they  
16 do their counts. They look for unusual circumstances with  
17 inmates. We have a daily, uh, count, a standup count to make  
18 sure that the inmates are alive. And it's called the annual  
19 or the daily health and welfare count.

20 Q Are you familiar with the allegation that Mr. Jones had  
21 been dead for some time? He was just sitting upright on his  
22 bed?

23 A No, I'm not.

24 Q You're not saying that that didn't happen?

25 A I'm not saying that it did or didn't. I don't know.

1 Q And as far as Mr. Mulder -- Mr. Mulder is not going  
2 to get any extra treatment or therapy for his condition at  
3 all?

4 A I can't say that. There may be -- there -- medical may,  
5 uh, deem, uh, that he needs some kind of special treatment.  
6 And we do have inmates who are housed in other institutions  
7 who are death inmates because of their medical necessity.

8 Q Correct. But my understanding is that, that under these  
9 notes, he's never going to be removed from Ely State Prison?

10 A At that time, on those notes, maybe he would not be.  
11 But, that doesn't mean that things can't change.

12 Q So --

13 A Things change all the time.

14 Q Sure. These notes start in May 7th of 2004, and continue  
15 through July 27th, 2011. So, about seven years, would that be  
16 a fair statement?

17 A I would say that would be a fair statement.

18 Q So that already, if that was going to change, it would,  
19 based on his condition, something would have been done? So as  
20 long as he stays as he is right now, this is probably what's  
21 going to happen with him?

22 A That would be a medical decision, sir. I would not know  
23 that.

24 Q And it would be his job to bring that to staff's  
25 attention?

1 A Yes, it would be.

2 Q Do you know what Mr. Mulder's IQ is?

3 A No, I don't.

4 Q Is there anyone at the prison whose job it would be to  
5 know what's going on with Mr. Mulder?

6 A With his --

7 Q Do you think he has a medical problem?

8 A Does he have medical problems?

9 Q Does he have a medical problem?

10 A He --

11 Q As he sits here today, he drops an arm from this  
12 (inaudible).

13 A Uh-huh. Yes, he does.

14 Q (Inaudible).

15 A And he has medical restrictions noted in our computer  
16 system.

17 Q But he doesn't have medical restrictions?

18 A He does now. If you look, if you would look at his last  
19 reviews, I will say that he has medical restrictions of, uh,  
20 several medical restrictions.

21 Q When did that change?

22 A Well, it would change when he, uh, went out after having  
23 a stroke. When he -- several of those entries indicated that  
24 he had no medical restrictions or mental health restrictions.  
25 And then after he returned from -- he was taken out of Ely

1 State Prison, uh, presumably, after having a stroke. I  
2 don't know that officially, because I don't have access to  
3 his records. But after he came back, medical changed his  
4 restrictions. His Class and his restrictions.

5 Q Do you know when he had a stroke?

6 A No, I don't. In fact, I wasn't aware he had a stroke  
7 until recently because it's a medical issue. I don't have  
8 access to medical issues.

9 Q Would he be seen by a doctor on a regular basis?

10 A Yes, if he requested it; yes, he would.

11 Q But, otherwise, you don't have a doctor that would walk  
12 down, walks through the hallways and says, man, that guys got  
13 jaundice. Hey, that guy's eyes are yellow. Hey, that guy is  
14 laying on the ground?

15 A No, sir.

16 MR. ABBINGTON: Could I have a second, Your  
17 Honor?

18 THE COURT: Yeah.

19 BY MR. ABBINGTON:

20 Q Are you familiar with the ACLU lawsuit?

21 A Am I familiar with it?

22 Q Yes, sir.

23 A I know that it exists. I'm not familiar with it.

24 THE COURT: What's your understanding as to what  
25 it was about?

1 THE WITNESS: My understanding was that inmates  
2 that -- that the ACLU, on behalf of inmates at Ely State  
3 Prison, sued Ely State Prison due to inadequate healthcare.

4 THE COURT: All right. And are you aware of the  
5 resolution of that case?

6 THE WITNESS: I'm somewhat aware of that. A  
7 proctor was supposed to have been, uh, named to, to oversee  
8 and be a liaison between the inmates and the Administration of  
9 Ely State Prison. I do not know if that has ever happened.

10 THE COURT: Okay. You're not aware of how  
11 that's --

12 THE WITNESS: I do not know the progress in it,  
13 no.

14 THE COURT: Okay. All right. Thank you.

15 BY MR. ABBINGTON:

16 Q Can I approach the witness, Your Honor?

17 THE COURT: Sure.

18 BY MR. ABBINGTON:

19 Q I can show you this entry, like, February 26th, 2008?

20 A Okay.

21 Q (Inaudible.)

22 A (Inaudible.)

23 Q This is medical restrictions here as of '07?

24 A Well, schedule (inaudible.) USP personal review. This  
25 one here says he had, uh, no mental, medical restrictions --

1 one he had medical restrictions 5, 6, 8, 9, 10 and 11.

2 Q All right.

3 A And that was -- Rene Baker did that on 8-1-2008. And if  
4 you go back -- and I don't know exactly -- you could probably  
5 find --

6 Q So 8-13-07, he's still under no medical or mental health  
7 restrictions?

8 A (Witness reviewing document.)

9 Right. He was not -- he did not have any medical  
10 restrictions at that time.

11 Q In 2007?

12 A In 2007.

13 Q And that's cited sometime here in 2008?

14 A Yes, he was.

15 Q Are you familiar with Dr. Noel and the people from ACLU  
16 that came out to Ely State Prison about the medical care?

17 A No, I am not.

18 Q But in this document that we looked at, it's last -- we  
19 can be sure that, as of August the 13th 2007, Mr. Mulder was  
20 still on this situation with no special medical or mental  
21 health restrictions.

22 A That's what the chrono indicates; that he did not.

23 Q Now, as far as your individual, your conversations with  
24 Mr. Mulder, would it be a fair statement to say that these  
25 have all been rather goal directed: He needs something; he

1 asks you for it; you guys provide it; end of story?

2 A Yes.

3 Q Thank you.

4 MR. ABBINGTON: Pass the witness.

5 THE COURT: All right. Thanks very much.

6 Thank you, Mr. Peltzer. You may step down. Watch  
7 your step as you go down the stairs there.

8 THE WITNESS: Okay.

9 THE COURT: And did the respondents have  
10 any other witnesses then to present today? I know we have  
11 Dr. Bradley tomorrow morning at 9:00.

12 MS. PROCTOR: Not this afternoon, Your Honor.

13 THE COURT: And Mr. Abbington, on behalf of  
14 petitioner, any other witnesses?

15 MR. ABBINGTON: No, Your Honor. We -- I think  
16 we're done.

17 THE COURT: Okay. We'll wait then until  
18 tomorrow morning. Probably, as I said, a good idea to be  
19 here just a bit early so that we can test out the video  
20 equipment.

21 How long would you anticipate Dr. Bradley being;  
22 about the same as the doctor this morning?

23 MS. PROCTOR: I would think, with  
24 cross-examination, would be no more than three hours,  
25 Your Honor.



1 THE COURT: No more than what?

2 MS. PROCTOR: Three hours.

3 MS. HENSLEY: That's a safe estimate, Your  
4 Honor.

5 THE COURT: Okay. Okay. Fair enough. We  
6 should wrap up the evidentiary portion then. Okay. Good  
7 enough.

8 Okay. We'll go ahead and be in recess until  
9 nine o'clock tomorrow morning then.

10 MR. ABBINGTON: Thank you, Your Honor.

11 MS. PROCTOR: Thank you.

12 MR. ABBINGTON: Thank you very much.

13 Your Honor, one thing. I did ask these guys about,  
14 and I know the courts loathe to involve themselves in safety  
15 issues. Mr. Mulder -- - apparently, uh, the people at the  
16 prison took his glasses away from him and they're bifocals.  
17 They're bifocals, yeah --

18 THE COURT: Okay. And which prison; at High  
19 Desert?

20 MR. ABBINGTON: High Desert or something  
21 somewhere between -- he does.

22 THE MARSHAL: That situation is squared away.  
23 I believe his glasses were taken away at High Desert State  
24 Prison. He couldn't bring them here because they wouldn't  
25 allow it here at the courts.

1 THE COURT: At this court, they wouldn't  
2 allow --

3 THE MARSHAL: Federal, they won't let them bring  
4 them inside the place.

5 THE COURT: But, you guys can bring them in.

6 THE MARSHAL: No. They weren't even letting  
7 us do that. I guess it was a call made by our sergeant or  
8 lieutenant up there that said you just don't need bring them.

9 So I guess we can probably get them through, if it's  
10 a need be. It's probably no problem.

11 THE COURT: Well, no, I could tell the marshals  
12 to allow him to have his glasses.

13 Do you want him to have his glasses with him  
14 tomorrow?

15 MR. ABBINGTON: Yes, sir.

16 THE COURT: Yeah.

17 THE MARSHAL: Shouldn't be a  
18 problem (inaudible).

19 THE COURT: I'll just order, on the record, that  
20 the marshals allow you to bring the glasses in.

21 THE MARSHAL: It's not really us. It's more --

22 THE COURT: Yeah. No, no, when you get here  
23 tell them Pro said you can bring them, and they can talk to  
24 me. And they won't --

25 MR. ABBINGTON: Right. He said that he had

1 lost the glasses and he hadn't had a shower since he got  
2 transferred on Sunday. And so I would just ask --

3 THE COURT: Well, I don't know anything about  
4 showering here. I would assume High Desert he can get --

5 MR. ABBINGTON: I figured I'd just bring it to  
6 the Court's -- I appreciate the glasses. I feel better about  
7 it already.

8 THE COURT: Yeah. I don't know what shower  
9 facilities they've got but, certainly, he can get his glasses.  
10 High Desert he can get a shower, I assume.

11 MR. ABBINGTON: Cool.

12 THE COURT: All right.

13 MS. PROCTOR: Thank you, Your Honor.

14 THE COURT: Thank you.

15

16 (Court Adjourned.)

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I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

\s\ Kathryn M. French

August 25, 2011

\_\_\_\_\_  
KATHRYN M. FRENCH, RPR, CCR  
Official Reporter

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I N D E X O F E X H I B I T S

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No. \_\_\_\_\_

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OCTOBER TERM, 2018

IN THE SUPREME COURT OF THE UNITED STATES

=====

MICHAEL JOSEPH MULDER, Petitioner,

v.

WILLIAM GITTERE, Warden, Respondent.

=====

*On Petition for Writ of Certiorari to the  
Supreme Court of the State of Nevada*

=====

**PETITIONER'S APPENDIX**

Volume IV of IV  
(APP. 001- APP. 770)

=====

**CAPITAL CASE**

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## VOLUME 1

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Appendix H	Order Denying Rehearing, <i>Mulder v. Baker, et al.</i> , Supreme Court, Nevada Case No. 69490 (September 21, 2018) .....APP0769-0770



# APPENDIX E

# APPENDIX E

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**UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA**

MICHAEL JOSEPH MULDER, )  
 )  
 Petitioner, )  
 )  
 vs. )  
 )  
 RENEE BAKER,<sup>1</sup> *et al.*, )  
 )  
 Respondents. )  
 )  
 \_\_\_\_\_ )

3:09-CV-00610-PMP-WGC

**ORDER**

In this action brought under 28 U.S.C. § 2254, petitioner Michael Mulder, through counsel, has made a motion for a stay pursuant to *Rohan ex rel. Gates v. Woodford*, 334 F.3d 803 (9<sup>th</sup> Cir. 2003), which requires a court to stay capital habeas proceedings upon a showing that the petitioner is incompetent. Docket ##18/19. For the reasons set forth below, the motion shall be granted.

**I. PROCEDURAL BACKGROUND**

In February 1998, a jury sitting in the Eighth Judicial District Court for Nevada returned verdicts finding Michael Mulder of (1) first degree murder, (2) robbery (victim 65 years of age or older) and (3) burglary while in possession of a firearm. After a penalty phase hearing, Mr. Mulder was sentenced to death for the murder. The jury found the following aggravating circumstances for the murder: (1) the murder was committed while Mulder was engaged in the commission of or an

<sup>1</sup> Renee Baker is substituted for her predecessor, E.K. McDaniel, as Warden of Ely State Prison. Fed. R. Civ. P. 25(d).

1 attempt to commit burglary (2) the murder was committed while Mulder was engaged in the  
2 commission of or an attempt to commit robbery and (3) Mulder was previously convicted of two  
3 violent felonies.

4 Mulder timely appealed his conviction and sentence to the Nevada Supreme Court. On  
5 January 18, 2000, the Nevada Supreme court affirmed Mulder's conviction in a published opinion,  
6 *Mulder v. State*, 116 Nev. 1, 992 P.2d 845 (2000). Mulder filed a petition for rehearing which was  
7 denied. His petition for writ of certiorari to the United States Supreme Court was also denied.  
8 *Mulder v. Nevada*, 531 U.S. 843 (2000).

9 In January 2001, the state district court appointed Christopher R. Oram as post-conviction  
10 counsel for Mr. Mulder. In May 2001, Oram filed a petition for post-conviction relief in the state  
11 district court, then, in July 2001, a supplement to the petition. While that proceeding was pending,  
12 Oram also filed a motion to reverse sentence of death because of a  
13 stroke Mulder suffered on March 15, 2001, at Ely State Prison (ESP). The state district court  
14 ordered psychological testing and subsequently, in October 2004, denied the motion.

15 In January 2005, Oram filed a motion to stay all habeas proceedings until Mulder was found  
16 competent to assist counsel. The state district court held an evidentiary hearing on March 10 and 15,  
17 2005, and found Mulder competent to assist counsel and to proceed with the post-conviction  
18 proceedings. In February 2006, the court entered an order denying Mulder's ineffective assistance  
19 of counsel claims, but granting penalty phase relief based on *McConnell v. State*, 120 Nev. 1043,  
20 102 P.3d 606 (2004).<sup>2</sup>

21 Both the State and Mulder appealed. In June 2009, the Nevada Supreme Court entered an  
22 order reversing the state district court's decision to grant relief under *McConnell* and affirming the  
23 lower court's decision to find Mulder competent and to otherwise deny relief. Mulder filed a

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25 <sup>2</sup> In *McConnell*, the Nevada Supreme Court ruled that it is "impermissible under the United  
26 States and Nevada Constitutions to base an aggravating circumstance in a capital prosecution on the  
felony upon which a felony murder is predicated." *McConnell*, 102 P.3d at 624. The Nevada Supreme  
Court subsequently decided that *McConnell* represents a change in the substantive law, and that it  
therefore is to be applied retroactively. See *Bejarano v. State*, 146 P.3d 265, 274 (Nev. 2006).

1 petition for rehearing that was denied in September 2009. On October 15, 2009, Mulder's counsel  
2 filed a petition for writ of habeas corpus in this court, which initiated this proceeding. On January  
3 20, 2010, counsel, the Federal Public Defender's office (FPD), filed an amended petition.

4 On February 4, 2010, the FPD made its motion for a stay pursuant to *Rohan*. In response to  
5 that motion, the State moved the court for permission to have Mulder examined by their own mental  
6 health experts. In granting that motion, the court allowed respondents 60 days to have their experts  
7 complete their examination of Mulder and set a deadline, subsequent to those examinations, for the  
8 State to respond to the motion for a stay.

9 On January 11, 2011, this court entered an order concluding that Mulder had made a  
10 threshold showing sufficient to warrant a competency determination. On August 1-4, 2011, this  
11 court held an evidentiary hearing to assist in that determination.

## 12 **II. EVIDENCE PRESENTED**

### 13 **A. Exhibits**

14 The following is an overview of relevant portions of the exhibits admitted into evidence at  
15 the evidentiary hearing.

#### 16 *1. Report of Dr. William Noel*

17 Dr. Noel is a doctor of osteopathic medicine who, according to his report, is board certified  
18 in family practice with 35 years of clinical experience, mostly involving primary care and  
19 emergency medicine. (Pet. Ex. 1, P0001.) He was contacted by the ACLU in 2007 to review health  
20 records of prisoners at ESP. (*Id.*) After reviewing the records, he traveled to the prison to discuss  
21 his findings with the medical director of the Nevada Department of Corrections (NDOC). During  
22 that visit, he was able to speak with several prisoners whose cases he had identified as urgent,  
23 including Mulder. (*Id.*)

24 Noel noted in his report that, based on the medical records he reviewed, it did not appear as  
25 if Mulder had received any treatment for his stroke in March 2001 and was not taken to the hospital  
26 until two weeks after it occurred. (*Id.*, P0011.) He also noted, however, that the NDOC medical

1 director told him that Mulder had actually been taken to the hospital immediately. (*Id.*) Noel found  
2 that Mulder was extremely impaired on his right side and had difficulty walking and talking. (*Id.*,  
3 P0011-12.) He concluded that Mulder had been a victim of malpractice due to ESP's failure to  
4 provide therapy and a wrist brace to prevent the severe contracture of his right wrist. (*Id.*, P0012.)  
5 Noting that Mulder had told him that he had fallen several times trying to get into the shower, Noel  
6 also commented on ESP's failure to accommodate Mulder's disability. (*Id.*)

7 *2. Psychological Evaluation by Carol Milner, Ph.D.*

8 Dr. Milner was a staff psychologist at ESP who examined Mulder in November 2003. (Resp.  
9 Ex. 501, R12-13.) She conducted another assessment of Mulder in August 2004 in response to a  
10 request for a competency evaluation. (*Id.*, R14-15.) During the second evaluation, Mulder  
11 completed the Wechsler Adult Intelligence Scale - Revised (WAIS-R), netting a full scale IQ score  
12 of 69. (*Id.*, R14.)

13 Dr. Milner reported that her second evaluation was consistent with her first in that both  
14 showed that Mulder "had difficulty with general knowledge and exhibited responses that would be  
15 inconsistent with an individual with similarly reported education," demonstrated expressive aphasia  
16 and word finding difficulties, and had difficulty "with judgment and abstraction, and common  
17 problem solving ability." (*Id.*, R15.) She opined that his impairments "may be consistent with both  
18 the stroke he suffered from as well as repeated polysubstance abuse initiated in his teen years." (*Id.*)

19 *3. Neuropsychological Assessment by Thomas Kinsora, Ph.D.*

20 Dr. Kinsora examined Mulder at Nevada State Prison in May 2003 at the request of Oram,  
21 Mulder's state post-conviction counsel. (Resp. Ex. 502.) According to Kinsora, his assessment  
22 revealed several areas of cognitive impairment including the following: intellectual functioning in  
23 the mentally retarded range (i.e., full scale score of 69);<sup>3</sup> spelling, reading comprehension, and math  
24 skills significantly lower than normal; problems with attention, reaction time, and mental tracking;

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26 <sup>3</sup> Kinsora's report warns, however, that the validity of Mulder's IQ score is questionable given his circumstances – i.e., someone whose has lost some, but not all, of his acquired skills (most notably expressive language) due to his stroke.

1 severe deficits understanding and expressing language; significant deficits with abstract reasoning;  
2 and significant deficits in verbal memory for both immediate and delayed recall of stories and on  
3 measures of recognition. (*Id.*, R36.)

4 Kinsora opined in his report that Mulder cannot realistically assist counsel and gave several  
5 reasons. He noted the Mulder is *severely* impaired in his ability to understand what is being said by  
6 his attorneys and what is being said in court. He also noted that Mulder is impaired in his ability to  
7 do the following: make important decisions by properly weighing various factors, communicate with  
8 his attorneys and within the courtroom, retain important details during proceedings and pull them  
9 together when needed to assist counsel, and reason on an abstract level as he had prior to his stroke.  
10 In addition, he listed Mulder's ability to understand the complexities of his case and to recall  
11 important details from time period of the crime as *likely* impaired. (*Id.*, R37.)

12 4. *Transcript of March 2005 Evidentiary Hearing in State Court*

13 At this hearing on Mulder's motion to stay proceedings due to his alleged incompetence, the  
14 state district court heard testimony from three medical experts – Milner, Kinsora, and Terrell  
15 Bishop, a psychiatrist at ESP. (Resp. Ex. 503.)

16 Dr. Milner testified about her evaluations of Mulder in 2003 and 2004. She stated that, as to  
17 the former, her initial conclusions were that Mulder had some degree of memory with regard to his  
18 schooling, his family, and his girlfriend at the time of the murder, but had difficulty with memory  
19 and comprehension in relation to more specific information. (*Id.*, R49-50.) She also concluded that  
20 Mulder displayed both expressive and receptive aphasia. (*Id.*, R50-51.) Milner also testified about  
21 administering the WAIS-R and Mulder receiving a full-scale IQ score of 69. (*Id.*, R51.)

22 Dr. Milner further testified that she did not have difficulty conversing with Mulder during  
23 either evaluation – i.e., he was able to understand her and communicate to her and she was able to  
24 understand him. (*Id.*, R51-52.) She also felt that Mulder understood why he was being evaluated

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1 and had a basic understanding of the procedural posture of his case. (*Id.*, R52-53.) She opined that  
2 was Mulder capable of communicating with and assisting post-conviction counsel with his case.  
3 (*Id.*, R54.)

4 On cross-examination, Dr. Milner testified that Mulder had told her that he had no memory  
5 of his trial. (*Id.*, R56-57.) She also testified that Mulder's expressive aphasia and lack of effort may  
6 have contributed to a depressed IQ score. (*Id.*, R64.)

7 Dr. Bishop testified that he evaluated Mulder twice at ESP, once in 2003 and once in 2004.  
8 (*Id.*, R70.) He reported that Mulder's claims as to lack of memory of entire blocks of time were  
9 inconsistent with things he said at other points in his interview and with the type and location of the  
10 stroke he suffered. (*Id.*, R72-74.) Dr. Bishop noted some aphasia, but stated that Mulder was able  
11 to comprehend well and respond well if given time to do so. (*Id.*, R74.)

12 Dr. Kinsora testified that he performed tests to screen for malingering and found that Mulder  
13 was making a good effort. (*Id.*, R126-29.) He testified about Mulder receiving an IQ score of 69,  
14 and pointed out that, while it shows Mulder's ability to "understand his world" is much lower than it  
15 was prior to his stroke, there is a "major difference" between someone with a 69 IQ after a brain  
16 injury and someone the same age who has always had a 69 IQ. (*Id.*, R130.) Kinsora stated that  
17 Mulder scored very poorly (0.5 percentile) on the part of the test that assessed working memory.  
18 (*Id.*, R131-32.)

19 Dr. Kinsora testified that his interview and testing of Mulder revealed lapses or gaps in long  
20 term memory that were consistent with the type and severity of the stroke he suffered. (*Id.*, R 132-  
21 34.) He also testified that research showed that severe damage to expressive and receptive language  
22 causes significant memory disruption because memory is extremely reliant on language processing.  
23 (*Id.*, R134.) He noted that Mulder possesses the skills necessary to understand basic commands and  
24 to communicate his basic needs, but that he begins to have difficulty when more complex elements  
25 are added. (*Id.*, R139-140.) He also testified that it is not uncommon for stroke victims to lose  
26 substantial portions of their autobiographical memory. (*Id.*, R145.)

1           5. *Psychological Evaluation by Jethro W. Toomer, Ph.D.*

2           Dr. Toomer is a forensic psychologist retained by Mulder's current counsel, assistant federal  
3 public defender Brian Abbington. (Resp. Ex. 504, R232.) According to his curriculum vitae, he is a  
4 consulting psychologist, specializing in forensic psychology and working as a professor in the  
5 Graduate Training Program in Mental Health Counseling at Florida International University. (*Id.*,  
6 R241.)

7           Dr. Toomer examined Mulder and administered several diagnostic tests in December 2009.  
8 According to Toomer's report, Mulder is a "poor historian with respect to his developmental history  
9 and apologizes for being unable to provide a logical, coherent and sequential account of events."  
10 (*Id.*, R234.) Even so, it appears from the report that Mulder was able to provide Toomer with  
11 general facts regarding his family history and make-up, educational background, his criminal  
12 history, and his past substance abuse. (*Id.*)

13           Toomer noted that communication with Mulder "often requires simplification and  
14 clarification" and that "receptive and expressive aphasia" were prominent throughout the  
15 evaluation." (*Id.*, R233.) He also noted, however, that Mulder "is able to make himself readily  
16 understood with certain boundaries" and that "[a]t a very basic level some of his ideas reach their  
17 intended goal without loosening of association." (*Id.*)

18           The report also indicates that Toomer tested Mulder's IQ, obtaining a full scale score of 70.  
19 (*Id.*, R235.) Toomer noted that the results of various sub-tests showed deficits "associated with  
20 abstract reasoning ability and the ability to transition from concrete to abstract reasoning," as well as  
21 deficits in "concentration, visual memory, eye/hand coordination, visual/motor speed and the ability  
22 to learn non-verbal material." (*Id.*, R236.) Other tests, according to Toomer, showed organic brain  
23 dysfunction (Bender Gestalt Designs), chronic substance abuse (SCID), and a moderate to severe  
24 level of impairment in overall personality organization (MCMI-III). (*Id.*, R234-37.)

25           Toomer summarized his opinion as follows:

26                   [B]ackground factors including predispositional family and environmental  
variables, substance abuse, erratic, unpredictable and stressful developmental history



1 combined with the 2001 cardiovascular accident has had a profound [effect] on  
2 [Mulder's] life and functioning, rendering him unable to assist post-conviction  
counsel, given secondary thought processing deficits which appear prominent.

3 (*Id.*, R238.).

4 6. *Psychiatric Assessment by Julie B. Kessel*

5 Dr. Kessel is a psychiatrist retained by AFPD Abbington. (Pet. Ex. 3, P0035.) She is a  
6 medical doctor licensed in Pennsylvania, North Carolina, and Florida and is currently employed as  
7 the Senior Medical Director for CIGNA, an insurance company. (*Id.*, P0046; docket #69, p. 21.<sup>4</sup>)  
8 She maintains a small private practice doing forensic psychiatry. (*Id.*) She examined Mulder on  
9 November 23, 2009, and prepared a report dated January 4, 2010. (Pet. Ex. 3, P0035-44).

10 Kessel noted in her report that Mulder spoke with “stuttering and slurred speech, and  
11 frequent mispronunciation of sounds and words,” did not seem to have control of his speech at  
12 times, and “used curse words frequently and out of context at times.” (*Id.*, P0040.) She also noted  
13 that Mulder was friendly and polite and seemed fully cooperative and that he was “happier than his  
14 circumstances seemed to warrant.” (*Id.*)

15 Kessel reported that, during her evaluation, Mulder was “difficult to understand, because of  
16 the dysarthric motor quality of his speech as well as his difficulty finding and using words to express  
17 himself.” (*Id.*, P0041.) In addition, it was not always clear to her what ideas he was trying to  
18 convey or to what question he was responding. (*Id.*) She noted Mulder’s thought content was  
19 poorly organized and, if a sentence contained more than one idea, he could not respond to it. (*Id.*)  
20 She also found, however, that he was able to get basic ideas across and was able to respond to some  
21 things more easily than others. (*Id.*) Mulder was able focus on issues “charged with emotional  
22 content” and seemed fixated on them. (*Id.*)

23 Kessel’s report contains a fairly detailed account of his life history, which was apparently  
24 related to Kessel by Mulder himself. (*Id.*, P0037-39.) Even so, Kessel concluded that Mulder’s

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26 <sup>4</sup> Unless otherwise noted, all citations to page numbers for documents located on the court’s  
docket refer to the CM/ECF pagination, which often differs from the page number on the imaged  
document.

1 memory was difficult to assess due to his language deficits. (*Id.*, P0041.) She further concluded that  
2 Mulder had a “at least partial memory for his past, the events leading up to the homicide, and  
3 elements of the trial,” and was able to “provide an outline of relevant events in his life,” but that it  
4 was clear to her that he “is unable to offer specific details from much of his life.” (*Id.*)

5 Kessel summarized her findings by stating, in part:

6 My examination is consistent with the presence of dementia, expressive,  
7 receptive, and anomic aphasia, and a change in personality whereby he is content,  
8 easygoing and happy. His memory, language and motor behavior appears [*sic*] to  
9 have improved gradually over a number of years, in spite of lack of formal  
10 rehabilitative services. His memory is inconsistent, appears stronger when linked to  
11 emotional content, and his ability to form and recall new memory is markedly  
12 impaired. His ability to communicate his basic needs and interests is preserved at this  
13 point. His ability, however, to engage in meaningful dialogue and to discuss matters  
14 or importance to his future, or to weigh alternative bits of information to the extent he  
15 is competent to assist in his own appeal is inadequate. . . .

16 (*Id.*, P0043-44.) Like Toomer, Kessel opined in her report that Mulder is not competent to assist  
17 counsel in these proceedings. (*Id.*)

18 *7. Psychiatric Evaluation by Melissa Piasecki, M.D.*

19 Dr. Piasecki is a forensic psychiatrist who evaluated Mulder on June 11, 2010, at the State’s  
20 request. (Resp. Ex. 510.) According to her curriculum vitae, she is a professor of psychiatry at the  
21 University of Nevada School of Medicine and on the faculty of the National Judicial College.  
22 (Resp. Ex. 511, R1130.) She completed a fellowship in forensic psychiatry and teaches a legal  
23 course on competence to stand trial. (*Id.*; docket #71, p. 7-8.)

24 According to Dr. Piasecki’s report of the June 2010 evaluation, Mulder reported to her that,  
25 other than difficulties with the shower, he is able to maintain his hygiene independently and  
26 described for her his daily exercise routine. (Resp. Ex. 510, R1127.) He further reported that he is a  
sports fan of several sports teams, that he is unable to write well with his left hand, and that he  
enjoyed reading before his stroke but is no longer able to track the narratives in books. (*Id.*) The  
report also indicates that Mulder reported that he is not able to keep track of card games or checkers.  
(*Id.*)

1 Mulder related some of his personal history to Dr. Piasecki, including his family background  
2 and history of substance abuse. (*Id.*, R1127-28.) Piasecki noted in her report that Mulder’s speech  
3 was “spontaneous and non-fluent” and that he “often stammered and had word finding difficulties.”  
4 (*Id.*, R1128.) She also noted that Mulder occasionally lost track of his thoughts in mid-sentence.  
5 (*Id.*) Dr. Piasecki indicated that Mulder reported his mood as “good” and that he appeared “upbeat  
6 and cheerful.” (*Id.*)

7 With respect to cognitive screening, Dr. Piasecki reported that Mulder was oriented as to  
8 date and location (although he was two days off on the date) and was able to register and repeat her  
9 name. (*Id.*) In addition, he was able to recall, after a three minute delay, one of three words  
10 spontaneously and another with prompting. (*Id.*) Mulder accurately repeated a phrase and named  
11 common objects, performed serial subtractions with errors after the third number, and was able to  
12 read and follow simple commands. (*Id.*) Finally, she noted that Mulder demonstrated abstract  
13 thinking on a series of comparisons. (*Id.*)

14 Piasecki reported that Mulder knew that his attorney was working on his case, but was  
15 unable to name him (although he did recognize his name on a document and spontaneously recalled  
16 it later in the interview). (*Id.*) Mulder also knew that his attorney was attempting to prevent him  
17 from being executed and expressed motivation to assist him in that regard. (*Id.*) Piasecki also noted  
18 that Mulder was able to “describe potential strategies that had potential to change his conviction to a  
19 lesser offense and remove him from death row.” (*Id.*) In addition, Mulder expressed to her that he  
20 would prefer that his attorney pursue a strategy that could allow for his eventual release, rather than  
21 focusing on delaying his execution. (*Id.*) Finally, Piasecki stated that Mulder recalled past legal  
22 proceedings regarding his competence and expressed concern that a physician once testified that he  
23 was faking his impairments. (*Id.*)

24 Piasecki diagnosed Mulder with cognitive disorder secondary to brain injury, but concluded  
25 that he demonstrated competence to proceed with his habeas proceeding despite the stroke he  
26 suffered in 2001. (*Id.*, R1129.) She specifically found as follows:

1           Although Mr. Mulder’s speech is non-fluent and he has word finding  
2 difficulties, he was able to sustain narratives and participate in a reciprocal  
3 conversation with prompting. I did not observe Mr. Mulder having difficulties  
4 understanding my speech and he was responsive to my questions throughout. He is  
5 motivated to assist his defense attorney and expressed gratitude to Mr. Abbington for  
6 his efforts on his behalf. Mr. Mulder demonstrated logical thinking regarding his  
7 legal situation and described strategies his attorneys might use to help him.

8 (*Id.*)

9           8. *Psychiatric Evaluation by Lindell Bradley, M.D.*

10           Dr. Bradley is a psychiatrist who evaluated Mulder at the State’s request on June 14, 2010.  
11 (Resp. Ex. 512.) According to his testimony at the evidentiary hearing, Dr. Bradley works half-time  
12 at Lake's Crossing Center, where he does evaluations of legal competence. (Docket #72, p. 4.) He  
13 also testified that he has about 20 years of experience in “civil competency matters.” (*Id.*)

14           In his report, Bradley stated that Mulder was able to accurately state the purpose of the  
15 evaluation. (Resp. Ex. 512, R1146.) Bradley reported that Mulder described his mood as “good”  
16 and told him that his mood had improved since his stroke. (*Id.*, R1147.) He also reported that  
17 Mulder was “able to relate recent and past personal history,” including aspects of his family  
18 background, his substance abuse history, his educational background, and his medical history. (*Id.*,  
19 R1147-48, R1150.)

20           Bradley found that Mulder’s “thought process was goal-directed and that he was able to  
21 answer questions in a goal-directed manner.” (*Id.*, R1148.) He also noted that Mulder had difficulty  
22 with word-finding and pronunciation, but that, with some guidance and additional questioning, he  
23 was able to “adequately express even fairly complex ideas.” (*Id.*)

24           In addition, Bradley noted that Mulder was able to recall that he had seen Dr. Piasecki the  
25 previous week and that Mulder volunteered that some the questions she had asked him were  
26 identical to those Bradley asked. (*Id.*) Mulder also told Bradley that he was found guilty of murder  
and sentenced to death and, though he maintained his innocence, described for Bradley details of the  
crime, including the fact that the victim was an “old man” and was bound with tape and that Mulder

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1 was also convicted of stealing a gun and a car from the victim, neither of which were ever found.  
2 (*Id.*, R1149.)

3 Bradley reported that Mulder understood that the role his attorney was to assist him with  
4 legal appeals and expressed faith in his attorney to work on his behalf. (*Id.*) According to Bradley,  
5 Mulder told him that his attorney had been denied permission to attend the evaluation and, when  
6 asked why his attorney was not allowed to be present, Mulder stated that the judge was probably  
7 concerned that his attorney would try to influence the course of the evaluation. (*Id.*)

8 Bradley stated in his report that he discussed hypothetical scenarios with Mulder and that  
9 Mulder told him that he would like to have his death sentence overturned if he could be sentenced to  
10 twenty-five years in prison, which would allow him to look forward to eventual release. (*Id.*)  
11 Bradley also noted that Mulder told him that the Phoenix Police Department was not able to identify  
12 fingerprints left on the tape used on the victim, but that an FBI expert was brought in and identified  
13 the prints as belonging to Mulder. (*Id.*) Mulder told Bradley that he wanted to appeal on that  
14 ground because the FBI agent was not an expert and was wrong about the fingerprints. (*Id.*)

15 Bradley reported that Mulder could state the month, year, day of the week, and his current  
16 age, as well as the name of the prison where he normally resides, when he had arrived at his current  
17 location, and when he would be returning to ESP. (*Id.*, R1149-50.) When asked to remember three  
18 objects for later recall, Mulder subsequently stated that he could not recall any of them. (*Id.*,  
19 R1150.) However, with category prompts and encouragement, he named all three objects. (*Id.*) On  
20 serial subtractions of three from twenty, Mulder made it to fourteen, “then made minor errors which  
21 he didn’t self-correct.” (*Id.*) He failed to perform a complex word problem, but was able to follow a  
22 three-step command. (*Id.*)

23 Bradley concluded that Mulder has the capacity to understand and communicate rationally  
24 with his attorney. (*Id.*, R1151.) He noted Mulder’s deficits in comprehension of complex and  
25 detailed information and difficulties in expressing complex ideas. (*Id.*) Even so, he found as  
26 follows:

1 Mr. Mulder shows good recall of matters pertaining to his criminal case. His  
2 thought process is organized and goal-directed. He understands the legal process. He  
3 demonstrated good understanding of his criminal case and of the purpose of appeals.  
4 He can discuss his legal case, the process of appeals and can rationally consider  
hypothetical situations regarding his sentence. He demonstrates no psychosis or  
disturbance of mood which would interfere with his ability to work with his attorney  
in the course of his appeals. . . .

5 (*Id.*)

6 9. *Mulder's Prison Records*

7 The prison records for Mulder admitted into evidence at the evidentiary hearing are, for the  
8 most part, unremarkable in terms of either proving or disproving Mulder's competence. A  
9 substantial portion of the records consists primarily of standard intake and classification information  
10 and various documents related to the criminal proceeding that resulted in Mulder's convictions and  
11 death sentence. (Resp. Ex. 506., R262-343, R418-35.)

12 Also included in the records are numerous inmate book requests and inmate request forms  
13 for other items and services. (*Id.*, R344-414.) At the evidentiary hearing, Dr. Kessel testified that  
14 these requests are notable because they show that, prior to the stroke, Mulder's handwriting is  
15 "pretty good and . . . pretty succinct" and that he typically requested "political thriller and thriller  
16 type books," while after the stroke, somebody else is doing the writing for him, and Mulder's  
17 signing it in "very squiggly unstable handwriting." (Docket #69, p. 84-85.) Kessel also noted that, a  
18 time or two after the stroke, the type of books requested appear to be the same, but then they are all  
19 about pornography and pictures of women. (*Id.*) Based on this court's review of the records, Kessel  
20 is, for the most part, correct in her assessment of the requests, although there at least a few requests  
21 for books in the thriller genre dated a year or more after Mulder's stroke. (Resp. Ex. 506, R363-65.)

22 The prison records also include notices and dispositions of disciplinary infractions assessed  
23 against Mulder. (*Id.*, R436-49.) Most of the infractions are fairly innocuous (e.g., losing his prison  
24 ID card), with an exception being a pre-stroke incident in which he was accused of arguing with a  
25 correctional officer and calling him a "faggot bitch." (*Id.*)

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1           Lastly, the records include approximately 200 pages of records related to Mulder's prison  
2 trust account and canteen purchases. (Resp. Ex. 507, R456-653.) Dr. Piasecki reported in her report  
3 and testified at the evidentiary hearing that her review of these records showed that Mulder had the  
4 ability to track his canteen orders and the funds in his prison account. (Resp. Ex.510, R1129; docket  
5 #71, p. 78.) Dr. Kessel disagreed with this assessment. (Docket #69, p. 83-84.) In her opinion, it  
6 appeared as if Mulder was simply in the habit of purchasing the same merchandise (primarily junk  
7 food) each month and that someone would routinely deposit an amount into the account that  
8 exceeded the amount of Mulder's expenditures. (*Id.*)

9           10. *Mulder's Medical Records*

10           Approximately 500 pages of medical records were admitted into evidence at the evidentiary  
11 hearing. (Resp. Ex. 508, 509.) Though voluminous, these records are of limited benefit in the  
12 current competence inquiry. As far as Mulder's mental impairments are concerned, the reports and  
13 evaluations discussed above provide more specific and relevant insight to Mulder's condition and  
14 level of functioning.

15           With respect to Mulder's general medical condition, the parties do not dispute that, on March  
16 15, 2001, Mulder suffered a stroke or cerebro-vascular accident (CVA) in the left side of his brain,  
17 which is also referred to in the records as a left basal ganglion hemorrhage and a left periventricular  
18 intraparenchymal hemorrhage. (Resp., Ex. 508, R739-42.) The records further confirm that, as a  
19 result of the stroke, Mulder has right side hemiparesis with significant muscle contracture associated  
20 with his right wrist and impaired speech identified throughout the records as a dysarthria and/or  
21 aphasia.

22           At the evidentiary hearing, both parties sought to elicit testimony regarding Mulder's post-  
23 stroke medical care and whether he may have benefitted from various types of therapy. In the  
24 court's view, however, those issues have little bearing on whether Mulder is currently competent  
25 under the relevant standard.

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**B. Testimony**

The following is an overview of relevant portions of witness testimony given at the evidentiary hearing.

1. *Dr. William Noel*

Dr. Noel testified that he was contacted Amy Fettig of the ACLU in 2007 “to look at some prison health records and maybe examine some prisoners, and give them an opinion as to the appropriateness of their care.” (Docket #68, p. 29.) He explained that, after he had spent several months reviewing the records, Fettig asked him to accompany her on a visit to the prison. (*Id.*, p. 30-31.) During that visit, he and Fettig were able to meet with Mulder. (*Id.*, p. 32.)

Noel testified that Mulder impressed him as someone who had great difficulty with speech. According to his testimony, Noel was not convinced that Mulder said what he meant to say or understood what Noel was saying to him. (*Id.*, p. 32-33.) He noted that “if you stuck with a very simple single idea, you could pretty well get that idea across and try to extract some information,” but that “once you started to get more than one idea together, or a complexity of ideas together, . . . it was like it was sort of confusing, and there was almost a barrier.” (*Id.*, p. 37.) Noel also noted that Mulder spoke with “a great deal of frustration of speech and of enunciation.” (*Id.*)

On cross-examination, Noel indicated that he was a family practitioner, not a neurologist or psychiatrist. (*Id.*, p. 45.) It was also established that Noel had not been provided all of Mulder’s medical records prior to drafting the report discussed above, in which he criticized the treatment Mulder received following his stroke. (*Id.*, p 46-53.)

2. *Amy Fettig*

Amy Fettig is senior staff counsel at the National Prison Project of the ACLU. (*Id.*, p. 80.) In her testimony, she explained that the FPD had contacted the ACLU in 2007 about the medical care of its clients at ESP, which the FPD felt was interfering with its ability to adequately represent them. (*Id.*, p. 81.) She testified about accompanying Dr. Noel to interview prisoners, including Mulder, about their medical care. (*Id.*, p. 88-90.)



1 She stated that, of the prisoners they interviewed, Mulder had stuck out in her mind over the  
2 years because his case “was so dire and so sad.” (*Id.*, p. 90.) She also stated that it was very  
3 difficult to communicate with Mulder and that she remembered trying to coax answers out of him  
4 when it became clear it was difficult for him to understand what they were talking about and, also, to  
5 respond to it. (*Id.*, p. 92-93.) As an example of Mulder’s difficulty formulating responses to  
6 questions, she noted that it took “a very long time” for him to convey to them that he was not using a  
7 brace for his contracted wrist because the brace that had been provided did not fit over his gnarled  
8 hand. (*Id.*)

9 Based on her interactions with Mulder, Fettig concluded that, if the ACLU were to bring a  
10 class action, Mulder could not serve as a class representative because she did not think that he was  
11 not capable of exhausting administrative remedies or making a reasoned judgment on behalf of the  
12 class. (*Id.*, p. 94-95.) Subsequent to her visit, Fettig sent two or three letters to Mulder and received  
13 two responses from him. (*Id.*, p. 100.) She explained that she made sure to write to him in the  
14 simplest terms possible and asked only easy, yes-or-no questions. (*Id.*) Fettig compared his  
15 responses to those of a second or third grader in terms of handwriting and content. (*Id.*, p. 104-105.)

16 Fettig’s impression of Mulder was that, even among the generally low-functioning prison  
17 population, he functions “near the bottom.” (*Id.*, p. 107.) She also noted that Mulder differed from  
18 most prisoners in that, despite his unfavorable circumstances, he was strangely upbeat and happy.  
19 (*Id.*, p. 108.)

20 3. *Dr. Jethro Toomer*

21 Dr. Toomer testified about his December 2009 evaluation of Mulder. He stated that Mulder  
22 was generally cooperative and attempted to respond to requests for information. (*Id.*, p. 116.) He  
23 recalled that, at the beginning of the evaluation, Mulder apologized for not being able readily recall  
24 information and for his tendency to blurt out words inappropriately. (*Id.*, p. 116-17.) Once the  
25 evaluation began, Toomer recognized that Mulder’s communication processes were limited and that,  
26 as a result, information had to be presented to him one idea at a time in simple, concrete terms. (*Id.*,

1 pp. 117-18, 120-21.)

2 When asked about the results of the tests he administered, Toomer testified that Mulder's  
3 performance duplicating designs in the Bender Gestalt test showed the presence of neurological  
4 impairment. (*Id.*, p. 125-28.) With respect to the full scale IQ score of 70, Toomer noted Mulder's  
5 areas of weakness "were all in the areas that tapped various dimensions of abstract reasoning  
6 ability." (*Id.*, p. 129.)

7 As for Mulder's prognosis, Toomer indicated that, while there may be "some pockets of  
8 improvement," Mulder will not progress significantly beyond his current level of functioning. (*Id.*,  
9 p. 137.) When asked how Mulder's cognitive impairments affected his ability to understand these  
10 habeas proceedings, Toomer stated:

11 I think that what you have here, and what should be pointed out is that what  
12 you were talking about, that given his current level of functioning, you're talking  
13 about someone whose primary reasoning ability and reasoning process is concrete, so  
14 that there is very little, if any, abstract reasoning ability. The individual is able to  
function and can handle, as we indicated earlier, one kind of, say, instructions; can  
communicate in a very simple, very basic level. But when you move into the level of  
abstraction, it becomes very difficult.

15 (*Id.*, p. 137-38.)

16 With respect to memory, Toomer suggested that Mulder's long-term memory was likely  
17 more reliable than his short-term memory, which is common in stroke victims. (*Id.*, p. 138-39.)  
18 Toomer testified that his overall diagnosis of Mulder was that he suffers from a cognitive disorder,  
19 not otherwise specified, which is a diagnostic category for individuals who manifest a psychological  
20 impairment as a result of some cognitive dysfunction, neurological involvement, or assault to the  
21 brain (in this case, a stroke). (*Id.*, p. 144.)

22 Toomer's direct testimony concluded with a discussion of receptive and expressive aphasia,  
23 both of which he found present in Mulder's case. (*Id.*, p. 142-44.) He explained that receptive  
24 aphasia has to do with an individual's ability to comprehend and internalize information directed  
25 towards him or her, while expressive aphasia has to do with the individual's ability to take that

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1 information and respond appropriately. (*Id.*) According to Toomer, a person with an organic brain  
2 impairment that disrupts the “expressive receptive loop” will have difficulty “weighing alternatives,  
3 projecting consequences, [and] managing conflicting data.” (*Id.*)

4 4. *Brian Abbington*

5 Mr. Abbington’s direct testimony was presented by way of an affidavit. (Pet. Ex. 4.) That  
6 testimony was augmented through cross-examination and responses to questions from the court at  
7 the evidentiary hearing. (Docket #69, p. 5-20.)

8 According to his affidavit, Abbington has been an attorney for 23 years and an AFPD for the  
9 last nine years, with a case load consisting entirely of federal capital habeas cases. (Pet. Ex. 4, p.  
10 P0052.) He has represented Mulder since October 2009 and met with him for the first time on  
11 September 29, 2009. (*Id.*) Abbington noted that Mulder demonstrates some difficulty talking in that  
12 it appears to require “great concentration and effort.” (*Id.*, p. P0053.) Abbington also noted that  
13 Mulder is less frustrated while listening and that he appears to acknowledge his inability to  
14 comprehend a discussion “any more complex than his immediate needs, which largely relate to his  
15 life in prison.” (*Id.*) Due to his concerns about Mulder’s ability to communicate, Abbington  
16 contacted Drs. Kessel and Toomer to examine Mulder and render an opinion as to his competence.  
17 (*Id.*)

18 On cross-examination, Abbington reported that he had met with Mulder three or four times  
19 and that each visit lasted about five and a half hours. (Docket #69, p. 6.) He noted that Mulder is  
20 very likeable and self-effacing. (*Id.*, p. 7.) He compared talking to Mulder with talking to his young  
21 granddaughter and explained that, unlike most clients, who typically want to focus on their case,  
22 Mulder would typically talk about more mundane, less involved subjects. (*Id.*, p. 8-9). Abbington  
23 testified that Mulder’s is unable to read or understand legal documents, that he trusts Abbington and  
24 understands that Abbington is trying to help him, but that Mulder understands only on the most basic  
25 level what is occurring in his case. (*Id.*, p. 10-19.)

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1           5. *Dr. Julie Kessel*

2           Dr. Kessel testified about examining Mulder on November 23, 2009, and subsequently  
3           witnessing a legal consultation between Abbington and Mulder on March 22, 2011. She testified  
4           that her November 2009 assessment resulted in four primary diagnostic conclusions: Mulder has  
5           dementia due to the stroke; he underwent a personality change due to the stroke; he has a poly-  
6           substance addiction; and he has receptive, expressive and anomic aphasia and partial paralysis also  
7           as a result of the stroke. (Docket #69, p. 26.)

8           She characterized his aphasia as “moderately severe” because he has the capacity to  
9           understand very basic concepts and to communicate very basic concepts, as opposed to severe  
10          aphasia where a patient would not be able to communicate at all. (*Id.*, p. 28.) She explained that, in  
11          eliciting information from Mulder, she had to break each question down into multiple simple  
12          questions to make sure he understood the point of what she asking because he was unable to  
13          understand a question she might typically ask in an interview. (*Id.*, p. 29-31.)

14          Kessel also elaborated on her other diagnoses. She stated that she diagnosed Mulder with  
15          dementia because his post-stroke IQ scores, compared to those obtained prior to his stroke, show a  
16          decline of cognitive ability as a result of the stroke and that subsequent to the stroke he is  
17          functioning intellectually and emotionally at a second grade level. (*Id.*, p. 32-35.) With respect to  
18          his personality change, she cited to records suggesting that, prior to the stroke, he was “an irritable,  
19          impulsive, angry guy, who . . . got into a lot of trouble, made very bad choices, had very low  
20          frustration tolerance, [and] was hostile,” while subsequent to the stroke, he is happy, jovial, and  
21          polite. (*Id.*, p. 36.)

22          When asked why she had concluded that Mulder was not competent she responded, in part,  
23          that Mulder was unable to understand what she was asking him, his responses were off point, that he  
24          was unable to manage two concepts presented in one sentence and, that if asked about a legal  
25          concept, he perseverated on issues that had emotional importance to him. (*Id.*, p. 37.) She noted

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1 that, “for almost the entirety of the first interview, he perseverated on the role of fingerprints in his  
2 case.” (*Id.*)

3 She compared Mulder’s brain injury to shrapnel going off in his head in the sense that  
4 specific areas of the brain have been destroyed or damaged, resulting in specific deficits in specific  
5 areas of functioning. (*Id.*, pp. 45, 106.) She also noted that it is common for someone who has  
6 suffered a brain injury to retain the ability to recall events from their long-term history, but have  
7 difficulty forming new memories or have difficulty with their short-term memory. (*Id.*, p. 40.)

8 Kessel also discussed conducting a mental status examination on Mulder and finding that  
9 he “was jovial and happy and [in]appropriately giddy, [and] blurted out curse words inappropriately  
10 at times,” that his “thoughts were poorly organized,” and that he “was not able to spontaneously  
11 come up with different kinds of things to talk about, except things that impacted his day-to-day life.”  
12 (*Id.*, p. 49) She also noted that he had gross difficulty expressing words and used words  
13 inappropriately, which made him difficult to understand and rendered his statements inaccurate.  
14 (*Id.*)

15 As for her observations of Mulder’s meeting with Abbington, Kessel gave several examples  
16 of instances in which Mulder failed to grasp or misunderstood the legal and factual concepts  
17 Abbington attempted to discuss with him in relation to his case. (*Id.*, p. 57-63.) She also noted that,  
18 throughout the interview, Mulder was preoccupied with the fingerprints issue. (*Id.*)

19 Kessel also testified about her impressions of the evaluations of Dr. Bradley and Dr.  
20 Piasecki. She did not agree with Dr. Bradley’s conclusions because she felt that he was selective in  
21 choosing information upon which to base his conclusions and that he presented that information in a  
22 way that highlighted Mulder’s limited capabilities. (*Id.*, p. 76-77.) She also faulted him for using a  
23 close-ended approach to the evaluation (by, for example, prompting responses), which, in her view,  
24 resulted in conclusions that were based on a limited focus. (*Id.*) As for Dr. Piasecki’s evaluation,  
25 Kessel noted that her report does not mention aphasia and contains broad conclusions without  
26 discussing the information supporting those conclusions. (*Id.*, p. 78-79.)

1 On cross-examination, Kessel conceded that Mulder had been able to report to her facts  
2 related to the crimes for which he was convicted and some of his personal history. (*Id.*, p. 91-95.)  
3 She also indicated that Mulder was aware that he was on death row and that, if his appeals were not  
4 successful, he could potentially be executed. (*Id.*, p. 95-96.)

5 6. *Dr. Melissa Piasecki*

6 Dr. Piasecki testified about her June 2010 evaluation of Mulder. She noted that Mulder's  
7 stroke was in a part of the brain that affects both speech and motor ability, which, along with loss of  
8 memory, was apparent to her when she examined him. (Docket #71, p. 15.) She stated that it took  
9 her ten or fifteen minutes to get used to Mulder's speech pattern, but after that she was able to  
10 comprehend what he was saying quite well. (*Id.*, p. 16.) She indicated that Mulder was able to  
11 recount his personal history since his stroke in 2001, including some of the difficulties he had  
12 encountered and how he was able to adapt to them. He also told her that was no longer able to do  
13 certain things like play checkers or the card game "spades" or follow the narratives in books. (*Id.*, p.  
14 16-18.)

15 According to Piasecki, Mulder related to her that he understood that he had an appeal  
16 pending and that his attorneys were attempting to delay his execution through a finding of  
17 incompetence. (*Id.*, p. 20.) He also stated that he did not agree with that strategy and, instead,  
18 preferred that the appeal be based more on the actual conviction, with the best thing result being a  
19 finding of manslaughter and a reduced sentence of 20 years, which would allow him to consider life  
20 outside of prison. (*Id.*, p. 20-21.) Piasecki also testified that Mulder was able to recount events in  
21 his personal history that occurred prior to his stroke, as well as a chronological history of his  
22 substance abuse. (*Id.*, p. 22-24)

23 Piasecki conducted a mental status examination on Mulder which caused her to conclude that  
24 he was capable of abstract thought, but that he had some deficits in that area, especially with respect  
25 to more difficult abstractions. (*Id.*, p. 27-32.) She also found that Mulder had "some impairment" of  
26 short term memory. (*Id.*, p. 29.) She stated that her primary diagnosis for Mulder was a cognitive

1 disorder secondary to a brain injury, but that she did not necessarily disagree with Kessel's  
2 diagnoses of dementia with expressive, receptive, and anomic aphasia (with the possible exception  
3 of receptive aphasia which Piasecki found less evident). (*Id.*, p. 37-38.)

4 When asked her opinion as to Mulder's ability to assist counsel in these proceedings, she  
5 stated:

6 Although Mr. Mulder does have some deficits, my finding is that, with some  
7 careful wording of questions and patience, he is able to have a conversation, share  
8 information, share opinions. I believe he's able to assist his attorneys.

8 (*Id.*, p. 42.) She also testified that, while Mulder did not know the answer to some of her questions,  
9 his responses were generally relevant and logical. (*Id.*, p. 62-63.) In her opinion, Mulder has some  
10 difficulty reasoning related partly to memory and partly to attention or concentration, but that his  
11 primary difficulty is in expressing words. (*Id.*, p. 66-67.)

12 Similar to Kessel, Piasecki noted that, unlike someone with a disorder such as mental  
13 retardation in which development progresses to a certain level then stops, Mulder progressed to full  
14 development with normal or low average intelligence, then had injuries that knocked out specific  
15 areas of his cognitive functioning, taking those areas down to a lower developmental stage, with  
16 other areas remaining relatively in tact. (*Id.*, p. 92.) She noted from prison records that Mulder  
17 bought an address book in 2007 and that he buys stamps and greeting cards for various occasions,  
18 which, to her, meant that he had been able to adapt to his memory deficit and was able to track  
19 information and communicate to some extent. (*Id.*, p. 101.) She agreed that Mulder's ability to  
20 form abstract thought is somewhat compromised, but noted that "the degree of it might be subject to  
21 interpretation." (*Id.*, p. 104.)

22 *7. Christopher Oram*

23 Mr. Oram testified about his representation of Mulder in state post-conviction proceedings.  
24 He recounted going to ESP to meet with Mulder in person and not being able to elicit any  
25 substantive information from him. (Docket #71, p. 138-39.) He indicated that he curtailed his visits  
26 with Mulder at ESP because he did not want to charge the State for the trip when he knew he would

1 not have a meaningful conversation. (*Id.*, p. 145.)

2 Oram testified that when he tried to ask Mulder about what had occurred in his case, Mulder  
3 responded with “oh damn,” then get flustered and not be able to relate any information. (*Id.*, p. 146-  
4 47.) He stated that relied on another death row inmate to relay information to and from Mulder  
5 about his case. (*Id.*, p. 147-48.) Oram indicated that he was unable to have a rational discussion  
6 with Mulder about the various issues related to his case. (*Id.*, p. 151-55.)

7 When asked on cross-examination whether he remembered remember telling the state court  
8 that he only met with Mr. Mulder for ten minutes, and then never went back to Ely State Prison,  
9 Oram stated that he did not remember telling the court that, but that it sounded accurate. (*Id.*, p.  
10 160.) However, he also stated that he visited Mulder at High Desert State Prison and during court  
11 appearances. (*Id.*, p. 160-61.)

12 8. *David Williams*

13 Mr. Williams is a senior correctional officer at ESP stationed on the condemned men’s unit  
14 (CMU), more commonly known as death row. (*Id.*, p. 164.) He testified that, in that capacity, he  
15 converses with Mulder occasionally and sees him daily. (*Id.*, p. 165.) According to Williams,  
16 Mulder typically spends yard time walking around and socializing. During tier time, he exercises,  
17 socializes and occasionally plays cards with other inmates, and routinely cleans his cell. (*Id.*, p.  
18 167-68.) Williams described his conversations with Mulder as being fairly brief and straightforward  
19 with Mulder showing no difficulty in speaking or understanding what is being said. (*Id.*, p. 169-70.)  
20 He noted that Mulder appears “quite comfortable” socializing with other inmates. (*Id.*, p. 170.)

21 In response to questioning from the court, Williams stated that Mulder has a noticeable  
22 speech impediment which he assumes is related to his apparent physical impairments. (*Id.*, p. 180.)  
23 On cross-examination, he indicated that his conversations with Mulder are generally confined to  
24 Mulder’s basic wants and needs. (*Id.*, p. 183)

25 9. *Harry Peltzer*

26 Mr. Peltzer is a caseworker at ESP, whose job mainly consists of classifying inmates and



1 preparing them for release. (*Id.*, p. 184-85.) He testified that he sees Mulder on the tier or in the  
2 yard a few times a month and that, during yard time, he is either visiting with other inmates or  
3 exercising and, during tier time, he is either conversing with other inmates, walking on the tier in a  
4 small group, or playing cards. (*Id.*, p. 186-87.) He further testified that he rarely communicates  
5 with Mulder and, when he does, it is usually a very simple discussion. (*Id.*, p. 188.) During those  
6 conversations, Peltzer understands what Mulder says to him and it appears to Peltzer that Mulder  
7 understands what Peltzer says to him. (*Id.*)

8 10. *Dr. Lindell Bradley*

9 Dr. Bradley testified about his June 2010 evaluation of Mulder. He noted that Mulder  
10 displayed expressive aphasia, but that Mulder was able to explain to him the purpose of the  
11 evaluation. (Docket #72, p. 6.) Bradley stated that Mulder has difficulty with fluency and clearly  
12 articulating words that he is trying to express, but that, with assistance, Mulder was able “to pretty  
13 fully express himself, to the extent that he was able to communicate reasonably complex  
14 and abstract notions.” (*Id.*, p. 8.) He explained that “with assistance” meant that he needed to be  
15 patient and that, when Mulder said something that was not clear, he would ask him in his own  
16 words, “if he intended to say this or that,” to which Mulder would “indicate yes or no.” (*Id.*, p. 8-9.)  
17 Bradley stated that Mulder seemed “truly interested” in expressing his independent thoughts, rather  
18 than just agreeing with whatever Bradley said. (*Id.*, p. 9-10.)

19 Bradley testified that Mulder complained about having a bad memory, although Bradley  
20 thought Mulder “seemed to have a pretty good memory and be able to convey quite a bit of detailed  
21 information.” (*Id.*, p. 11.) Bradley indicated that a factor that lead him to conclude Mulder was  
22 competent to assist counsel was that Mulder was able to respond to a question about the ideal  
23 outcome of the appeals process in a manner that showed Mulder was able think abstractly and  
24 consider alternatives that were better than his current situation and within the realm of possibility.  
25 (*Id.*, p. 11-12.) That factor combined with Mulder’s memory and description of details related to his  
26 recent past and his more remote past showed Bradley that Mulder had a good ability to both

1 understand questions and communicate complex information and to do so in a manner that was  
2 organized and in good detail with regards to things he could recall. (*Id.*, p. 13.)

3 Bradley's clinical assessment of Mulder's memory, based on Mulder's responses to questions  
4 and information he volunteered, showed good recall of recent events and a good understanding of  
5 his situation, as well as a good comprehension of information and good retention of information.  
6 (*Id.*, p. 20.) Bradley also noted that Mulder was able answer questions in a goal-directed manner,  
7 which meant that he was "on target" with regard to the nature of his answer and that he was able to  
8 put his answer together "in an appropriately sequenced way to have good meaning." (*Id.*, p. 21.)

9 When asked to give examples of Mulder's ability to convey complex ideas, Bradley noted  
10 that Mulder had told him that his brother had died of AIDS, and that he had contracted AIDS as a  
11 result of being homosexual, which showed that Mulder was able to grasp the concept that being  
12 homosexual was a high risk factor for contracting AIDS. (*Id.*) Another example he gave was that  
13 Mulder was able to describe his substance abuse, including IV use, and to volunteer that he had been  
14 tested for HIV and hepatitis C, which showed that he understood the concept that IV drug use can  
15 infect one with both AIDS and hepatitis. (*Id.*, p. 21-22.) As a third example, Bradley cited Mulder's  
16 complaints about the fingerprint evidence in his case, wherein he was able to express the idea that if  
17 the judge had not allowed the expert to be qualified as an expert, his testimony would not have been  
18 allowed and, therefore, the fingerprints would not have been discovered. (*Id.*, p. 22.) Finally,  
19 Bradley referred again to Mulder's response to his question about ideal outcomes to his appeal  
20 which included scenarios that would be acceptable to him, as opposed to continuing on in a  
21 maximum security prison. (*Id.*)

22 Bradley also testified that Mulder expressed positive thoughts about his current attorney and  
23 trusted his attorney to work hard on his behalf, which Bradley considered a factor in the competency  
24 analysis because, in some cases, a defendant may have the cognitive skills to assist his attorney, but  
25 be prevented from doing so due to psychotic thoughts or delusions about the attorney. (*Id.*, p. 24-  
26 25.) According to Bradley, Mulder also expressed a desire for his attorney to focus on the

1 conviction itself, rather than trying to have the death sentence set aside. (*Id.*, p. 25-26.)

2       When asked about Dr. Kessel’s conclusions, Bradley disagreed that Mulder’s cognitive  
3 impairments rose to the level of dementia. (*Id.*, p. 28-30.) Also, while he noted some receptive  
4 aphasia, he felt Mulder’s receptive impairments were quite mild and were pretty easily compensated  
5 for by, for example, slowing down and then clarifying or restating for Mulder what he was trying to  
6 express. (*Id.*, p. 30-31.) With respect to Dr. Toomer’s report, Bradley questioned the relevance and  
7 accuracy of IQ scores in Mulder’s case because the tests have not been standardized for use on  
8 people who have “the very specific and, oftentimes, narrow set of deficits that are associated  
9 with a stroke.” (*Id.*, p. 32.) He further explained that a person who attains average intelligence as an  
10 adult, then tests at an IQ score of 70 after a stroke will have far higher functional capacities than  
11 someone who has an IQ of 70 from birth. (*Id.*, pp. 33-34, 52.)

12       On cross-examination, Bradley stated that Mulder has difficulty expressing complex ideas,  
13 suffers from cognitive slowing (i.e., his cognitive processing of information is slowed down), and  
14 that he demonstrates deficits in the comprehension of complex and detailed information. (*Id.*, pp.  
15 45, 58, 72.) He explained that his conclusion that Mulder had a good understanding of the legal  
16 process was based upon Mulder’s ability to describe what he had been convicted of, why he had  
17 been sentenced to death, and that he was in the process of appealing that with the assistance of his  
18 attorney. (*Id.*, p. 62.) In addition, Bradley stated that Mulder was able to clearly identify the roles of  
19 the defense attorneys, prosecuting attorneys, and judge, describe the process and purpose of the plea  
20 bargain, and discuss and identify what witnesses are, what evidence is, and what juries do. (*Id.*)

### 21       **III. LEGAL STANDARD**

22       Under 18 U.S.C. § 3599(a)(2), state inmates sentenced to death have the right to counsel in  
23 their federal habeas proceedings. The Ninth Circuit has read into that provision the additional right  
24 to be competent to assist that habeas counsel. *Rohan*, 334 F.3d at 813. Competence for *Rohan*  
25 purposes means the petitioner has “the capacity to understand his position and to communicate  
26 rationally with counsel.” *Id.* at 819. Because Mulder’s counsel admittedly makes no claim that

1 Mulder lacks the capacity to understand his position or current circumstances (docket #42, p. 10-11),  
2 the analysis in this case is focused on the “rational communication” prong of the *Rohan* test.

3 In his pre-hearing brief, Mulder’s counsel contends that Mulder is incompetent unless he is  
4 able to:

5 . . . understand the current legal situation; understand the nature of the charges against  
6 him; understand relevant facts; understand legal issues and procedures; understand  
7 potential defenses; understand the possible dispositions, pleas, and penalties; appraise  
8 the likely outcome; appraise the roles of defense counsel, prosecutor, judge, jury,  
9 witnesses and petitioner; identify witnesses; relate to counsel in a trusting and  
10 communicative fashion; comprehend instructions and advice; make decisions after  
11 receiving advice; maintain a collaborative relationship with counsel and help plan  
12 legal strategy; follow testimony for contradictions or errors; testify relevantly and be  
13 cross examined if necessary; challenge prosecution witnesses; tolerate stress during  
14 court appearances and while awaiting court appearances; disclose pertinent facts  
15 surrounding the alleged offense; and protect himself and utilize available legal  
16 safeguards.

17 Docket #53, p. 4. Mulder cites no legal authority for such a broad and exacting test for determining  
18 competence in *any* context, much less a federal habeas proceeding. And, as the State points out in  
19 its response brief, a habeas proceeding does not require as much participation or input from the  
20 client as a criminal trial and typically does not implicate several of these factors. Docket #56, p. 2-3.  
21 While the specific scope of the *Rohan* competence standard has not been clearly defined by the  
22 Ninth Circuit, the requirement that the petitioner “understand his position” is presumably part of the  
23 test so that the petitioner make fundamental decisions about the course of the litigation, while the  
24 “rational communication” requirement ensures that the petitioner can comprehend counsel’s advice  
25 and also relate the facts necessary to advance his habeas claims.

26 In determining a petitioner’s competence, it is reasonable for the court to consider counsel’s  
observations and evaluations of the petitioner. *Medina v. California*, 505 U.S. 437, 450 (1992)  
(citing *United States v. David*, 511 F.2d 355, 360 (D.C. Cir.1975); *United States ex rel. Roth v.*  
*Zelker*, 455 F.2d 1105, 1108 (2<sup>nd</sup> Cir.1972)). The court can also consider the observations of  
witnesses in long term daily contact with petitioner in addition to, or rather than, conclusions of

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1 expert witnesses based on relatively brief periods of examination. *United States v. Birdsell*, 775  
2 F.2d 645, 651 (5<sup>th</sup> Cir. 1985).

3 In *Nash v. Ryan*, 581 F.3d 1048, 1050, 1055 (9<sup>th</sup> Cir. 2009), the Ninth Circuit extended the  
4 right to competence in a federal habeas proceeding to federal appellate proceedings notwithstanding  
5 the “record-based nature of an appeal.” More recently, in *In Re Ernest Valencia Gonzalez*, 623 F.3d  
6 1242, 1244 (9<sup>th</sup> Cir. 2010), the court held that a *Rohan* stay was available in a federal district court  
7 proceeding even when the “claims are record-based or legal in nature.” The *Gonzalez* court stated as  
8 follows:

9 . . . Rather than relying upon categorical rules, *Nash* made clear that the “inquiry  
10 should be whether rational communication with the petitioner is essential to counsel's  
11 ability to meaningfully prosecute” a capital habeas claim. *Id.* at 1054. Had the  
12 district court undertaken the claim-specific inquiry required by *Nash*, he would have  
been compelled to conclude that “communication with [Gonzales] is essential to  
counsel's ability to meaningfully prosecute” Gonzales's habeas claims. *Id.* . . .

13 *Gonzalez*, 623 F.3d at 1245. More recently, in *Blair v. Martel*, 645 F.3d 1151, 1156-57 (9<sup>th</sup> Cir.  
14 2011), the court recognized that a competency determination is not necessary when a habeas petition  
15 raises “only claims for relief that fail as a matter of law.”

16 As to the burden of proof, the court in *Blair* adopted the same procedures set forth in *Mason*  
17 *ex rel. Marson v. Vasquez*, 5 F.3d 1220 (9<sup>th</sup> Cir. 1993), a case involving a death-sentenced state  
18 prisoner who wanted to abandon his federal habeas petition during the course of those proceedings.  
19 *Blair*, 645 F.3d at 1154. Those procedures were explained as follows:

20 When a habeas petition has been filed in the federal district court, appropriately  
21 invoking the court's jurisdiction and the mental competency of the petitioner is  
22 reasonably questioned, it is the obligation of the court to determine the petitioner's  
23 mental competence. Initially sufficient evidence must be presented to cause the court  
to conduct an inquiry. After that point it is no one's burden to sustain, rather it is for  
the court to determine by a preponderance of the evidence whether the petitioner is  
mentally competent to withdraw his petition.

24 *Id.* at 1154-55 (quoting *Mason*, 5 F.3d at 1225).

25 For reasons set forth in this court's order of January 11, 2011, Mulder has made an initial  
26 showing sufficient to warrant a competency determination. Docket #43. Thus, at this point, neither

1 party carries the burden of proof on the issue of competence. Instead, the court must determine by a  
2 preponderance of the evidence whether the petitioner is mentally competent to prosecute his petition.  
3 *See Blair*, 645 F.3d at 1155.

4 **IV. ANALYSIS**

5 Mulder contends that claims in the petition alleging ineffective assistance of counsel are  
6 claims that would benefit from Mulder's ability to rationally communicate with counsel. (Docket  
7 #18, p. 9.) The court notes that Mulder's amended habeas petition does, in fact, contain claims of  
8 ineffective assistance of counsel, including a claim that trial counsel failed to investigate and present  
9 available mitigating evidence in the penalty phase of his trial. In light of the very broad approach  
10 taken by the court of appeals in *Nash* and *Gonzalez*, this court is compelled to conclude that Mulder  
11 has raised at least one claim that meets this threshold requirement. As noted above, Mulder  
12 concedes that he understands his current position. Thus, the remaining question for the court to  
13 decide is whether Mulder has the capacity to communicate rationally with counsel.

14 The stroke Mulder suffered in March 2001 left him with significant physical and mental  
15 impairments. As to the latter, there is general agreement among the mental health experts that  
16 Mulder's cognition, memory, and ability to communicate were negatively impacted by the stroke,  
17 while his general disposition and mood were likely improved. The problem confronted by the court  
18 is that the opinions of the experts differ as to the severity of Mulder's impairments and the extent to  
19 which they impact his capacity to rationally communicate with counsel.

20 As an initial matter, the court gives little weight to the overall results of the IQ tests  
21 administered to Mulder, which placed his full-scale IQ at or near 70. The testimony and evidence  
22 establish that Mulder's non-intelligence related impairments adversely affected his performance on  
23 these tests. In addition, various experts took care to point out that the overall functional capacity of  
24 someone who is born with an IQ of 70 will be significantly lower than someone like Mulder, who  
25 attained at least low average intelligence as an adult, then tested at 70 subsequent to a brain injury.

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1           It is noteworthy that Dr. Kessel and Dr. Piasecki both described the impact of Mulder's  
2 stroke in very similar terms – i.e., that it knocked out specific areas of cognitive functioning while  
3 having little or no impact with respect to other areas. Practically all of the experts discussed above  
4 found or conceded that Mulder is afflicted with some degree of expressive and receptive aphasia.  
5 Dr. Kessel characterized Mulder's aphasia as "moderately severe," meaning that he is only able to  
6 understand very basic concepts and to communicate very basic concepts. Dr. Toomer and Dr.  
7 Kinsora also emphasized Mulder's aphasia and its impact on his ability to process incoming  
8 information and respond appropriately.

9           On the other hand, Dr. Bradley noted that Mulder has difficulty with fluency and articulating  
10 words, but that, if assisted, he can communicate reasonably complex and abstract notions. Both Dr.  
11 Bradley and Dr. Piasecki discounted the severity of Mulder's receptive aphasia and concluded that it  
12 could be overcome by speaking to him more slowly and, if necessary, by clarifying or rephrasing  
13 what one is saying to him. Both also noted that Mulder's responses to their questions were on point  
14 and logical.

15           With respect to Mulder's memory, it is apparent that from the numerous reports and  
16 testimony of the mental health experts that Mulder can recall and relate a substantial portion of his  
17 personal history and various events from his past. Dr. Toomer and Dr. Kessel both noted that, given  
18 the nature of his injury, it is likely that Mulder's long-memory is better than his short-term and  
19 working memory. Even so, Dr. Kessel, Dr. Linsora, and even Dr. Milner all questioned Mulder's  
20 ability to recall and relate specific information about past events. On the other hand, neither Dr.  
21 Piasecki nor Dr. Bradley were convinced that Mulder's long term memory is more than mildly  
22 impaired.

23           Each of the attorneys who have interacted and testified at the evidentiary hearing noted  
24 similar problems in communicating with Mulder. Ms. Fettig and Mr. Abbington both noted  
25 significant difficulty in eliciting information from Mulder, partly due to Mulder's inability to  
26 understand the question posed and partly due to the effort required for him to formulate an answer.

1 Mr. Abbington and Mr. Oram both testified about their inability to discuss with Mulder substantive  
2 issues related to his case. Dr. Noel's testimony corroborated the testimony of the attorneys by  
3 noting Mulder's difficulty with speaking and his apparent inability to comprehend more complex  
4 ideas.

5 In the court's view, the testimony of Mr. Peltzer and Mr. Williams is not particularly helpful  
6 in assessing whether Mulder is competent under *Rohan*. Both indicated that their conversations with  
7 Mulder are typically brief and confined to subject matter that is simple and straightforward. While  
8 both noted that Mulder frequently socializes and plays cards with other inmates, neither provided  
9 any specific details about those interactions.

10 In light of the foregoing, the court concludes that Mulder is capable of *some level* of rational  
11 communication with counsel. Mulder is able to logically respond to questions, especially when they  
12 are simplified or broken down into parts. He is able to remember and convey to counsel information  
13 about his background and occurrences in his recent and remote past. In addition, at least some of the  
14 mental health experts are convinced that he his capable thinking and communicating, to some extent,  
15 on an abstract level. This court notes, however, that the Ninth Circuit's opinion in *Rohan* and its  
16 subsequent opinion in *Nash* condition competence on the capital habeas petitioner's ability to  
17 "provide first-hand insight into the earlier proceedings," which, depending on the type of claim at  
18 issue, might include the ability to "identify aspects of his personal history that should have been, but  
19 were not, elicited [by trial counsel]," to "testify about the extent of his trial counsel's efforts to elicit  
20 that mitigating evidence from him," to "direct counsel to circumstantial evidence of his  
21 incompetence at the time [of trial]," and to "offer his side of the story" with respect to his  
22 interactions with trial counsel. *Nash*, 581 F.3d at 1056; *Rohan*, 334 F.3d at 818.

23 The evidence before the court does not support a finding that Mulder is capable of rationally  
24 communicating on a level that would allow him to impart information of this type to counsel. While  
25 it may be unrealistic to expect a habeas petitioner to remember all the details of a proceeding that  
26 occurred more than thirteen years ago, Mulder's impairments allow him to convey only the most

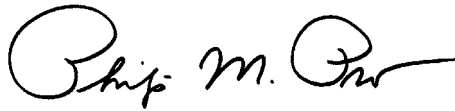


1 basic and selective information about what occurred during his trial, what interactions he may have  
2 had with trial counsel, or what evidence from his background counsel should have introduced in  
3 mitigation. The various reports in the record, as well as testimony of both expert and lay witnesses,  
4 cast considerable doubt on Mulder's ability to comprehend questions from counsel that are not  
5 phrased in simple, concrete terms. And, although there is evidence that Mulder is able to  
6 spontaneously provide information about his case, he seems to dwell on certain issues to the  
7 exclusion of others. Several witnesses also testified that Mulder's difficulties in expressing himself  
8 and choosing the right words made them question the accuracy of what he was saying. Applying the  
9 burden of proof mandated by the court in *Blair*, the preponderance of the evidence does not support  
10 a finding that Mulder is capable of the level of rational communication necessary to find him  
11 competent under *Rohan* and *Nash*. Accordingly, these proceedings shall be stayed until Mulder is  
12 competent.

13 **IT IS THEREFORE ORDERED** that petitioner's motion to stay federal habeas corpus  
14 proceedings (docket #18) is GRANTED.

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DATED: September 26, 2011.



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PHILIP M. PRO  
United States District Judge

# APPENDIX F

# APPENDIX F

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**UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA**

MICHAEL JOSEPH MULDER, )  
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 Petitioner, )  
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 vs. )  
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 RENEE BAKER, *et al.*, )  
 )  
 Respondents. )  
 )  
 \_\_\_\_\_/

3:09-CV-00610-PMP-WGC

**ORDER**

The United States Court of Appeals for the Ninth Circuit Court has vacated this court's September 26, 2011, order staying petitioner's federal habeas proceedings pending restoration of competency (ECF No. 74) and remanded the case for reconsideration in light of *Ryan v. Gonzales*, 133 S.Ct. 696 (2013). ECF No. 86. Based on the extensive record before this court bearing on the issue of petitioner's competency (primarily, ECF Nos. 62-72), as well as this court's previous findings and conclusions on that issue (ECF No. 74), there is very little, if any, likelihood that petitioner will regain competence in the foreseeable future. As such, a stay of proceedings due to petitioner's lack of competence is no longer appropriate. *See Gonzales*, 133 S.Ct. at 709.

As discussed in the status conference held on April 29, 2013, proceedings shall now resume and respondents shall file a response to petitioner's amended petition for writ of habeas corpus (ECF No. 7) on or before **August 1, 2013**. In addition, petitioner may move for a stay pursuant to *Rhines*

1 v. *Weber*, 544 U.S. 269 (2005), any time prior to (or on) that date. In the meantime, however, the  
2 parties shall confer regarding whether this case may be amenable to settlement. On or before **June**  
3 **10, 2013**, the parties shall file a joint statement advising the court whether they wish to engage in  
4 further settlement discussions and, if so, whether they want the magistrate judge assigned to this case  
5 to assist with those discussions.

6 **IT IS SO ORDERED.**

7 DATED: May 1, 2013

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UNITED STATES DISTRICT JUDGE

# APPENDIX G

# APPENDIX G

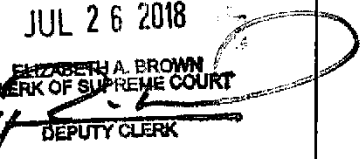
IN THE SUPREME COURT OF THE STATE OF NEVADA

MICHAEL JOSEPH MULDER,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 69490

FILED

JUL 26 2018

ELIZABETH A. BROWN  
CLERK OF SUPREME COURT  
BY  DEPUTY CLERK

*ORDER OF AFFIRMANCE*

This is an appeal from a district court order denying appellant's postconviction petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; Michelle Leavitt, Judge.

Appellant Michael Mulder bound, beat, and murdered 77-year-old John Ahart. He also stole Ahart's gun, watch, jewelry box, and car. A jury convicted Mulder of first-degree murder, robbery of a victim over the age of 65, and burglary while in possession of a firearm and sentenced him to death. This court affirmed the judgment of conviction on appeal. *Mulder v. State*, 116 Nev. 1, 992 P.2d 845 (2000). Mulder unsuccessfully sought relief in a prior postconviction petition for a writ of habeas corpus. *State v. Mulder*, Docket No. 46800 (Order Affirming in Part and Reversing in Part, June 17, 2009). Mulder filed the instant petition in the district court on December 9, 2014. The district court denied the petition as procedurally barred, and this appeal followed.

*Procedural bars*

Mulder's petition is subject to several procedural bars. First, the petition was untimely as it was filed more than 14 years after remittitur issued from his direct appeal. *See* NRS 34.726(1). Additionally, the petition was successive because Mulder had previously filed a postconviction petition, and it constituted an abuse of the writ because he raised claims new and different from those raised in his previous petition. *See* NRS 34.810(1)(b), (2). Petitions that are untimely, successive, or that constitute an abuse of the writ are subject to dismissal absent a showing of good cause and actual prejudice. NRS 34.726(1); NRS 34.810(1)(b), (3). To establish good cause, a petitioner must "show that an impediment external to the defense prevented him or her from complying with the state procedural default rules." *Hathaway v. State*, 119 Nev. 248, 252, 71 P.3d 503, 506 (2003). "An impediment external to the defense may be demonstrated by a showing that the factual or legal basis for a claim was not reasonably available to counsel, or that some interference by officials, made compliance impracticable." *Id.* (internal quotation marks omitted). A petitioner must set forth a valid basis to excuse the procedural bars for an evidentiary hearing to be warranted. *Pellegrini v. State*, 117 Nev. 860, 869, 34 P.3d 519, 525 (2001).

Additionally, the State pleaded laches pursuant to NRS 34.800. Because the petition was filed more than 5 years after the decision on direct appeal, Mulder was required to overcome the presumption of prejudice to the State in responding to the petition and in its ability to retry him. NRS 34.800(2). To overcome the first presumption, Mulder had to "show[ ] that the petition is based upon grounds of which [he] could not have had

knowledge by the exercise of reasonable diligence before the circumstances prejudicial to the State occurred.” NRS 34.800(1)(a). To overcome the second presumption, Mulder had to “demonstrate[ ] that a fundamental miscarriage of justice has occurred in the proceedings resulting in the judgment of conviction or sentence.” NRS 34.800(1)(b).

As good cause to overcome the procedural bars, Mulder contends that his alleged incompetency prevented his claims from being raised earlier, that prior postconviction counsel provided ineffective assistance, that intervening Supreme Court authority provides a new claim for relief, and that the State’s failure to disclose material exculpatory and impeachment evidence prevented claims from being raised earlier. Additionally, he argues a fundamental miscarriage of justice will occur should his petition not be considered on the merits.

*Incompetency*

Mulder argues that the factual bases for the claims raised in his second petition were not available when he filed his first postconviction petition due to his stroke and resulting mental deficits. He asserts that first postconviction counsel was unable to elicit any substantive information from him or to have a rational discussion about the issues. He references memory deficits and communication and comprehension difficulties as well as a federal court’s determination in 2013 that he was incompetent and unlikely to regain competence in the foreseeable future.

It is not clear that Mulder’s stroke, resulting mental deficits and memory and comprehension difficulties provide good cause under Nevada law. *See Phelps v. Director*, 104 Nev. 656, 660, 764 P.2d 1303, 1306 (1988) (holding organic brain damage at birth and borderline intellectual



disability do not establish sufficient cause to overcome procedural bars). Although some courts have suggested that a petitioner's incompetency could constitute good cause if it prevented the petitioner from assisting prior postconviction counsel on a fact-based claim, *see, e.g., Council v. Catoe*, 597 S.E.2d 782, 787 (S.C. 2004), this court has never done so. Even if this court were to follow those courts, Mulder's alleged incompetency would only be relevant to the extent it prevented the factual basis for a claim from being reasonably available to his former postconviction counsel. *See Hathaway*, 119 Nev. at 252, 71 P.3d at 506. Mulder, however, fails to demonstrate his competency was required to develop a specific claim and resulting prejudice or a fundamental miscarriage of justice.<sup>1</sup>

The overwhelming majority of Mulder's claims are based in the record or the law: (1) categorical exclusion from the class of defendants eligible for the death penalty; (2) invalid special verdicts at penalty hearing; (3) invalid harmless-error analysis by this court in the first postconviction appeal; (4) prosecutorial misconduct; (5) errors during voir dire; (6) improper admission of unreliable evidence at penalty hearing; (7) invalid lethal injection procedure in Nevada; (8) invalid jury instructions; (9) unconstitutionality of elected judges; and (10) ineffective assistance of appellate counsel. Thus, any alleged incompetency cannot be good cause because the bases for these claims were available at the time the first petition was filed and did not require Mulder's competency. As to Mulder's

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<sup>1</sup>We note that this court affirmed a finding that Mulder was competent at the time of his first postconviction proceedings. *State v. Mulder*, Docket No. 46800 (Order Affirming in Part and Reversing in Part, June 17, 2009).

claim of cruel and unusual conditions of confinement, the district court correctly found that this claim is not cognizable in a postconviction petition for a writ of habeas corpus. *Bowen v. Warden*, 100 Nev. 489, 490, 686 P.2d 250, 250 (1984) (“We have repeatedly held that a petition for writ of habeas corpus may challenge the validity of current confinement, but not the conditions thereof.”). Disregarding those claims that are record based or are based in the law, only one claim raised in the second petition may have required Mulder’s competency to develop a factual basis—that trial counsel were ineffective for failing to investigate and present readily available mitigation evidence, to rebut the State’s arguments concerning future dangerousness, and to present evidence of Mulder’s positive adjustment in a structured setting as mitigation.

Nevertheless, Mulder does not demonstrate his alleged incompetency provides good cause for the delay in raising the ineffective-assistance-of-trial-counsel claim because he only makes bare and vague allegations regarding what information he could not remember or communicate to first postconviction counsel and what facts or evidence he subsequently was able to obtain. “To avoid dismissal [of a second or successive petition], [a petitioner] *must plead and prove specific facts* that demonstrate good cause for his failure to present claims before . . . .” *State v. Eighth Judicial Dist. Court (Riker)*, 121 Nev. 225, 232, 112 P.3d 1070, 1075 (2005) (emphasis added). Because of the vagueness in his pleading, Mulder does not demonstrate that his alleged incompetency prevented the factual basis of his claim from being developed sooner and consequently that his incompetency provides good cause for the delay in asserting that claim. *See Pellegrini*, 117 Nev. at 890, 34 P.3d at 539 (“Although [petitioner]

contends that he was incompetent and insane . . . throughout the prior proceedings, the declaration fails to set forth facts to demonstrate how [petitioner's] mental state related to any impediment in asserting the grounds for relief now raised in the second petition.”); see also *Moore v. State*, 134 Nev., Adv. Op. 35, 417 P.3d 356, 359 (2018) (explaining that a petitioner who alleges good cause based on newly available facts must identify those facts).

In addition, Mulder fails to demonstrate not only that specific information has come to light that was not previously available due to his incompetency but that he then raised a claim based on that information within a reasonable time of discovering it. See *Hathaway*, 119 Nev. at 252-53, 255, 71 P.3d at 506, 508 (holding that good-cause arguments must be made in a timely fashion). Most of Mulder's claims were raised in a petition he filed in federal court in 2009 and amended in 2010. Thus, any claims that he was able to raise in federal court in 2009 or 2010 would not have been raised within a reasonable time when he filed his second state petition in 2014.

Mulder also fails to demonstrate actual prejudice. He argues that first postconviction counsel could have successfully litigated a claim that trial counsel did not present enough mitigating evidence, specifically referencing evidence related to his difficult upbringing, his genetic predisposition to drug addiction, his introduction to drugs at an early age, his criminal conduct being linked to his drug addiction, his ability to function as a contributing member of society when sober, and his lack of violent infractions while in prison. But trial counsel did present mitigation

evidence related to Mulder's troubled upbringing, unsupportive family,<sup>2</sup> addiction and rehabilitation efforts, and good character. Mulder fails to demonstrate that more mitigation evidence of the same nature would have had a reasonable probability of producing a different outcome at trial, and therefore the claim would not have been successful. *See Strickland v. Washington*, 466 U.S. 668, 695 (1984) (stating that the petitioner "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different" in order to demonstrate prejudice).

Based on all the above, we conclude the district court did not err by determining that Mulder had not demonstrated good cause based on his alleged incompetence.<sup>3</sup>

*Ineffective assistance of postconviction counsel*

Mulder claims ineffective assistance of first postconviction counsel constitutes good cause for the delay in filing the instant petition. While postconviction counsel's ineffectiveness may constitute good cause to

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<sup>2</sup>We note that Mulder claims trial counsel were ineffective for failing to investigate and present testimony from Mulder's family. But at the penalty phase, the defense investigator testified that she met with Mulder's brother Craig, his sister Lisa, and his parents and that she attempted to procure their attendance and testimony on his behalf during the penalty phase. The investigator testified she was unsuccessful in her attempts.

<sup>3</sup>To the extent Mulder argues that he is incompetent to be executed, this claim is wholly separate from his claim that incompetency provided good cause to file an untimely and successive petition. We do not address Mulder's competency to be executed as there are other mechanisms by which a capital defendant may challenge the execution of his sentence based on his current mental status. *See* NRS 176.425; NRS 176.455.

file claims in a successive petition, those claims are subject to NRS 34.726(1); *Riker*, 121 Nev. at 235, 112 P.3d at 1077; *Pellegrini*, 117 Nev. at 869-78, 34 P.3d at 525-31, and must be raised within a reasonable time after they become available, *Hathaway*, 119 Nev. at 252-53, 71 P.3d at 506.

Mulder filed his second postconviction petition in state court on December 9, 2014, nearly 5 years after remittitur issued from his first postconviction appeal on December 30, 2009. Mulder claims he filed his petition within a reasonable time when current counsel was appointed by the federal court in 2009, a stay was granted in federal court based on Mulder's incompetence, the stay was lifted in 2013, Mulder unsuccessfully sought reconsideration of that decision, another stay was granted for Mulder to exhaust his state remedies, and he filed the instant petition within 3 months of the second stay. He also avers that he filed the instant petition within a reasonable time of completing the investigation prompted by his meeting with a doctor.

Mulder fails to demonstrate he acted within a reasonable time.<sup>4</sup> Litigating his federal petition during the time between this court's issuance of remittitur from his first postconviction appeal and the filing of his second state postconviction petition does not amount to good cause. *See Colley v. State*, 105 Nev. 235, 773 P.2d 1229 (1989), *abrogated by statute on other*

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<sup>4</sup>Mulder claims that the strict one-year timeline outlined in *Rippo v. State*, 132 Nev., Adv. Op. 11, 368 P.3d 729, 738 (2016), *vacated on other grounds by Rippo v. Baker*, 580 U.S. \_\_\_, 137 S. Ct. 905 (2017), does not apply to him as *Rippo* was decided after he filed this second petition. Notwithstanding the one-year timeline, we conclude the nearly 5-year gap between the resolution of Mulder's first postconviction appeal and the filing of the instant petition was not reasonable.

*grounds as stated in State v. Huebler*, 128 Nev. 192, 275 P.3d 91 (2012). Therefore, Mulder fails to demonstrate he raised this claim within a reasonable time, and the district court did not err by denying this good-cause claim.

*Intervening authority*

Mulder claims that intervening authority provides good cause for the delay in bringing one of his claims. Intervening caselaw may constitute an impedimental external to the defense that provides good cause for a delay where the “legal basis for [the] claim was not reasonably available.” *Hathaway*, 119 Nev. at 252, 71 P.3d at 506 (quotation marks omitted).

Mulder alleges that *Hall v. Florida*, 572 U.S. \_\_\_, 134 S. Ct. 1986 (2014), provides good cause to bring claim 1 in his second petition: that he is categorically excluded from the death penalty because he is intellectually disabled. He posits that *Hall* invalidates this court’s prior decision that he had not met the requirements for this exclusion because his intellectual disabilities presented after the developmental period (birth to 18 years of age). However, the Court specifically stated that age of onset was not at issue in *Hall*. *Id.* at 1993. And, more recently, the Court observed that “the onset of the[] deficits while still a minor” is a core element of the “generally accepted, uncontroversial intellectual-disability diagnostic definition.” *Moore v. Texas*, 581 U.S. \_\_\_, 137 S. Ct. 1039, 1045 & n.3 (2017). Thus, Mulder fails to demonstrate *Hall* is intervening authority that provides good cause to argue that our requirement that the intellectual disability manifest during the developmental period has been invalidated.

Mulder also argues that *Hall* created a new consensus analysis for deciding whether a punishment is cruel and unusual and that the analysis considers the infrequent use of capital punishment against intellectually disabled persons. He alleges that the *Hall* analysis is different from previous caselaw because it requires consideration of professional literature and the consensus of the mental health community, as opposed to the legal community, and because it takes into account the actual sentencing practices and data.

The Court in *Hall* relied upon and frequently cited older cases when discussing its consensus analysis. 572 U.S. at \_\_\_, 134 S. Ct. at 1996-98; see also *Roper v. Simmons*, 543 U.S. 551, 562 (2005) (outlining the Court's evolution in arriving at the conclusion that juveniles cannot be sentenced to death, specifically noting the Court's prior determinations regarding national consensus as to the execution of juveniles and of intellectually disabled persons); *Atkins v. Virginia*, 536 U.S. 304, 315-16 (2002) (referencing a consensus of states that exempted the intellectually disabled from the imposition of the death penalty before concluding "[t]he practice . . . has become truly unusual, and it is fair to say that a national consensus has developed against it"). Indeed, *Atkins* referenced not only the trend among the states in conducting its consensus analysis but also literature from the American Association on Mental Retardation and the American Psychological Association as well as the input of various religious communities. 536 U.S. at 316 & n.21. The same varied consideration can be found in *Roper*, where the Court considered the rate at which states had abolished the execution of juveniles as well as professional literature and scientific and sociological studies regarding the differences between

juveniles and adults. 543 U.S. at 565-66, 569-70. The analysis in *Hall* thus is not new. Accordingly, we conclude the district court did not err in determining that Mulder had not demonstrated good cause based on intervening legal authority.

*Brady claim*

Mulder claims he can demonstrate good cause based on the suppression of material evidence by State actors. Under *Brady v. Maryland*, 373 U.S. 83 (1963) and its progeny, a prosecutor is required “to disclose evidence favorable to the defense when that evidence is material either to guilt or to punishment.” *Huebler*, 128 Nev. at 198; 275 P.3d at 95 (internal quotation marks omitted). “To prove a *Brady* violation, the accused must make three showings: (1) the evidence is favorable to the accused, either because it is exculpatory or impeaching; (2) the State withheld the evidence, either intentionally or inadvertently; and (3) prejudice ensued, i.e., the evidence was material.” *Id.* (internal quotation marks omitted). “Good cause and prejudice [to excuse a procedural bar] parallel the second and third *Brady* components; in other words, proving that the State withheld the evidence generally establishes cause, and proving that the withheld evidence was material establishes prejudice.” *State v. Bennett*, 119 Nev. 589, 599, 81 P.3d 1, 8 (2003).

Mulder claims the State failed to disclose evidence concerning the caseloads of each defense attorney working on Mulder’s case, provide audio or video recordings or a transcript of a witness’s statement to police, and surrender documents related to the prosecutor’s conversation with the



same witness.<sup>5</sup> We conclude he fails to demonstrate a *Brady* violation. Defense counsels' caseloads do not constitute favorable evidence relevant to Mulder's guilt or sentence. And Mulder has not demonstrated that the State possessed, or was required to produce, a recording or transcript of the witness's statement or that he was entitled to the prosecutor's notes. See NRS 174.235(1)(a), (2)(a).

Mulder also claims that the State only recently disclosed evidence that supports his claim that the conditions of his confinement as a capital inmate are cruel and unusual. A challenge to the conditions of confinement is not cognizable in a petition for a writ of habeas corpus, see *Bowen v. Warden*, 100 Nev. 489, 490, 686 P.2d 250, 251-52 (1984), and Mulder fails to demonstrate that evidence regarding the conditions of confinement would have been material to guilt or punishment. As such, he fails to establish a *Brady* violation. Accordingly, we conclude the district court did not err by rejecting the *Brady* claims as good cause.

*Fundamental miscarriage of justice*

Despite Mulder's failure to show good cause for the delay in bringing the second petition, "[t]his court may excuse the failure to show cause where the prejudice from a failure to consider the claim amounts to a fundamental miscarriage of justice." *Pellegrini v. State*, 117 Nev. 860, 887, 34 P.3d 519, 537 (2001) (internal quotation marks omitted). A fundamental

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<sup>5</sup>To the extent Mulder argues he was not provided with proof that the witness was notified of her rights pursuant to *Miranda v. Arizona*, 384 U.S. 436 (1966), this claim is belied by the record and he lacks standing to make it. See *Bowman v. United States*, 350 F.2d 913, 915 (9th Cir. 1965) ("[T]he privilege against self-incrimination is personal to the witness.").

miscarriage of justice requires “a colorable showing” that the petitioner is “actually innocent of the crime or is ineligible for the death penalty.” *Id.* This court has limited actual innocence claims regarding a petitioner’s eligibility for the death penalty to claims focusing on the elements of the crime and the aggravating circumstances as opposed to mitigating circumstances. *See Lisle v. State*, 131 Nev. 356, 362-68, 351 P.3d 725, 730-34 (2015) (holding that new mitigating evidence cannot be used to demonstrate actual innocence of the death penalty).

Mulder claims he can demonstrate a fundamental miscarriage of justice because he is ineligible for the death penalty based on his mental infirmities. Mulder fails to cite to any authority in support of this argument. He has not shown that he was ineligible for the death penalty in that he could not be *sentenced* to death; instead, he argues that he cannot be *executed* given his current mental status.

Mulder also claims that new mitigating evidence, or the cumulative effect of constitutional errors, makes it more likely than not that no reasonable juror would have imposed a sentence of death. Mulder fails to allege he is actually innocent of the crimes or to demonstrate he is ineligible for the death penalty based on actual innocence of the aggravating circumstances. Therefore, Mulder fails to demonstrate a fundamental miscarriage of justice would occur from the failure to consider his claims on the merits.

*Laches*

Mulder was required to overcome the presumption of prejudice to the State in its ability to retry him by demonstrating a fundamental miscarriage of justice. *See* NRS 34.800(2). As outlined above, Mulder’s

petition does not demonstrate that he is actually innocent of the crime or is not eligible for the death penalty. Therefore, he has not demonstrated a fundamental miscarriage of justice to rebut the presumption under NRS 34.800. *See Pellegrini*, 117 Nev. at 875, 34 P.3d at 529 (“[I]t is conceivable that a petitioner could demonstrate good cause for failure to comply with the one-year time limit [of NRS 34.726] and actual prejudice, but laches would nevertheless bar the claim because of prejudice to the State and failure to demonstrate a fundamental miscarriage of justice.”).

*Motion for stay and guardian ad litem*

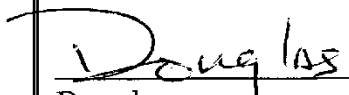
Mulder challenges the district court’s denial of his motion for a stay based on incompetency. He acknowledges that this court has never held there is a right to competency in postconviction habeas proceedings, and there is no provision for postconviction competency in the state constitution or in statute. *Cf.* NRS 178.400(1) (“A person may not be tried or adjudged to punishment for a public offense while incompetent.”). As there is no state provision requiring a stay of postconviction proceedings based on incompetency, we conclude the district court did not err by denying Mulder’s motion for a stay.


Mulder also challenges the district court’s denial of his motion for the appointment of a guardian ad litem. He relies on NRCP 17(c) and NRS 12.050(3). NRCP 17(c) applies to persons “who do[ ] not have a duly appointed representative” and provides that the court shall appoint a guardian ad litem for an “incompetent person not otherwise represented in an action.” And the purpose of NRS 12.050 is to protect incompetent persons when they are a party to an action. *Baker v. Baker*, 59 Nev. 163, 171-72, 87 Nev. 800, 803 (1939). While this court has recognized “next

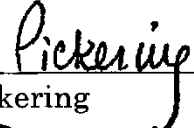
friend” status to allow for the prosecution of a writ of habeas corpus on behalf of an incompetent person, *see Calambro v. Second Judicial Dist. Court*, 114 Nev. 961, 969, 964 P.2d 794, 799 (1998), Mulder is represented by counsel and has been so represented since current counsel was appointed in 2009. Mulder fails to make clear why a guardian ad litem is necessary to protect his interests or to initiate a petition when the instant petition has been filed and he has a representative (counsel) to litigate on his behalf.<sup>6</sup> Accordingly, we conclude the district court did not err in denying Mulder’s motion for a guardian ad litem.


Having considered Mulder’s contentions and concluded that they lack merit, we

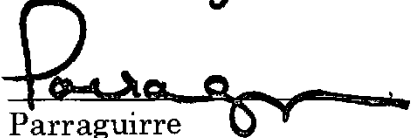
ORDER the judgment of the district court AFFIRMED.<sup>7</sup>

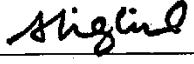
  
\_\_\_\_\_, C.J.  
Douglas

  
\_\_\_\_\_, J.  
Gibbons

  
\_\_\_\_\_, J.  
Pickering

  
\_\_\_\_\_, J.  
Hardesty

  
\_\_\_\_\_, J.  
Parraguirre

  
\_\_\_\_\_, J.  
Stiglich

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<sup>6</sup>We find no merit in the argument that current counsel’s failure to file the instant petition sooner establishes counsel is not acting in Mulder’s best interests, thereby demonstrating the need for a guardian ad litem.

<sup>7</sup>The Honorable Michael Cherry, Justice, did not participate in the decision of this matter.

cc: Hon. Michelle Leavitt, District Judge  
Federal Public Defender/Las Vegas  
Attorney General/Carson City  
Clark County District Attorney  
Eighth District Court Clerk

# APPENDIX H

# APPENDIX H

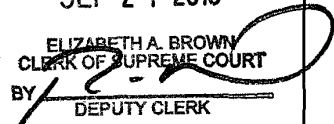
IN THE SUPREME COURT OF THE STATE OF NEVADA

MICHAEL JOSEPH MULDER,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 69490

**FILED**

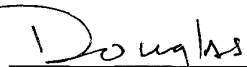
SEP 21 2018

ELIZABETH A. BROWN  
CLERK OF SUPREME COURT  
BY  DEPUTY CLERK

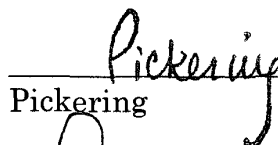
*ORDER DENYING REHEARING*

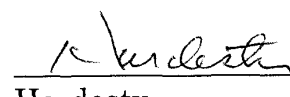
Rehearing denied. NRAP 40(c).


It is so ORDERED.<sup>1</sup>

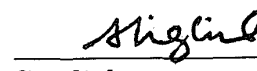
  
\_\_\_\_\_, C.J.  
Douglas

  
\_\_\_\_\_, J.  
Gibbons

  
\_\_\_\_\_, J.  
Pickering

  
\_\_\_\_\_, J.  
Hardesty

  
\_\_\_\_\_, J.  
Parraguirre

  
\_\_\_\_\_, J.  
Stiglich

cc: Hon. Michelle Leavitt, District Judge  
Federal Public Defender/Las Vegas  
Attorney General/Carson City  
Clark County District Attorney  
Eighth District Court Clerk

<sup>1</sup>The Honorable Michael Cherry, Justice, voluntarily recused himself/herself from participation in the decision of this matter.