

**IN THE
SUPREME COURT OF FLORIDA
TALLAHASSEE, FLORIDA**

CASE NUMBER 16-2013-CF-005781-AXXX-MA
CR-D (Circuit)

APPEAL NUMBER SC18-822

DONALD JAMES SMITH
VS
STATE OF FLORIDA

Appellant____, }
Appellee____, }

RONNIE FUSSELL,
CLERK
OF THE CIRCUIT AND
COUNTY COURTS

RECORD ON APPEAL

VOLUME 2

Appeal from the Circuit Court

Duval County, Florida

BEFORE THE HONORABLE JUDGE MALLORY COOPER

PUBLIC DEFENDER
FOR APPELLANT

ATTORNEY GENERAL
FOR APPELLEE

IN THE CIRCUIT COURT OF THE FOURTH
JUDICIAL CIRCUIT, IN AND FOR DUVAL
COUNTY, FLORIDA

DONALD JAMES SMITH

CASE NO: 16-2013-CF-005781-AXXX-MA
DIVISION: CR-D (Circuit)

APPELLANT

STATE OF FLORIDA

APPEAL NO: SC18-822

APPELLEE

VOLUME 2

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IN THE CIRCUIT COURT OF THE
FOURTH JUDICIAL CIRCUIT, IN
AND FOR DUVAL COUNTY, FLORIDA.

Case No: 2013-CF-5781-AXXX-MA
Division CR-D

STATE OF FLORIDA

-vs-

DONALD JAMES SMITH,

Defendant,

PROCEEDINGS taken before the
Honorable Mallory D. Cooper, Judge of the Circuit Court,
on February 5, 2018, and as reported by Faye M. Gay,
Certified Realtime Reporter, Registered Merit Reporter,
and Certified Legal Video Specialist.

OFFICIAL REPORTERS, INC.
421 W. Church St., Suite 701
Jacksonville Florida 32202
904-358-2090

1 APPEARANCES:

2 MELISSA NELSON, Esquires,
3 State Attorneys,
4 Appearing on behalf of the State of Florida.

5

6 MARK CALIEL and VANESSA SANCHEZ-WHEELER, Esquires,
7 Assistant State Attorneys,
8 Appearing on behalf of the State of Florida.

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10 JULIE SCHLAX and CHARLES FLETCHER, Esquires,
11 Appearing on behalf of the Defendant.

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PROCEEDINGS

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WITNESS

PAGE

Jury Selection.....4

1 (Defendant present.)

2 THE COURT: Okay. Everyone is in here now.
3 Mr. Smith is present, all the attorneys are
4 present.

5 And I think we have some things to do on the
6 record before we bring in the panel of 100 people
7 and fill out their questionnaires.

8 MS. SCHLAX: Yes, Your Honor, good morning.
9 Julie Schlax and Charles Fletcher on behalf of
10 Mr. Smith who sits in the courtroom with us.

11 Your Honor, I would like the opportunity to
12 supplement our record and renew our motion for
13 change of venue. There were a number of articles
14 this weekend in both News4Jax and Florida
15 Times-Union detailing evidence that we have deemed
16 inadmissible either by agreement or by court order
17 and obviously that includes labelling him
18 repeatedly as a sexual offender, outlining in
19 detail his prior offenses.

20 We had agreed to certain redactions within
21 the 911 tape that they quoted verbatim within the
22 article and so it is our belief and great fear we
23 will not be able to sit a fair and impartial jury
24 on behalf of Mr. Smith and we renew that motion.

25 THE COURT: Any objection to supplementing

1 the record?

2 MR. CALIEL: No objection to supplementing
3 the record, Your Honor. I believe we'll flush all
4 those questions out during the process of the
5 questionnaires in jury selection.

6 THE COURT: All right. We'll do that.
7 Motion granted.

8 MS. SCHLAX: And, Your Honor, we have had an
9 opportunity to go over with Mr. Smith both
10 instructions that the Court is intending to use in
11 the questionnaire. We have no objection to the
12 use of those preliminary instructions.

13 THE COURT: Okay. Mr. Smith, if we could
14 place you under oath, please, in case we have any
15 questions. If you would stand, please.

16 THE DEFENDANT: Sure.

17 THE COURT: Thank you.

18 (Defendant sworn.)

19 THE DEFENDANT: I do.

20 THE COURT: Thank you. And your attorney has
21 indicated there's an explanation I'm going to give
22 to the Court, it's called confidential juror
23 questionnaire sheet that I'm going to go over with
24 the panel just to tell them about the
25 questionnaire and also instruction I'm going to

1 give at the end of filling out their
2 questionnaires regarding not watching or listening
3 to the news and your attorney has indicated you
4 have no disagreement with those, is that correct?

5 THE DEFENDANT: That's right.

6 THE COURT: And additionally I've asked for
7 permission to explain the questionnaire. I'm not
8 going to go over the questionnaire, there's a
9 couple of things I believe in there, trial and
10 things like that that I just need to give them a
11 little bit more information. And you have no
12 objection to that?

13 THE DEFENDANT: No, ma'am.

14 MS. SCHLAX: And, Your Honor, I wanted to
15 formally introduce to the Court Dr. Brooke Butler.
16 She will be sitting at counsel table with us
17 through the jury selection proceedings only and if
18 she could please be introduced to the jury. I was
19 -- I did not remember that Dr. Butler did grow up
20 here in Jacksonville. She currently resides in
21 the Tampa, St. Pete area, but she did do all of
22 her younger years in Jacksonville.

23 THE COURT: Dr. Brooke Butler, is that
24 correct?

25 MS. SCHLAX: Yes, Your Honor.

1 THE COURT: Okay.

2 MR. CALIEL: And, Your Honor, based upon that
3 representation that she did grow up here, I would
4 ask when you introduce her, because she is not one
5 of the parties that is on the listing on the
6 questionnaire, that if anybody knows Ms. --
7 Dr. Butler or recognizes her if they could raise
8 their hand so we could -- at least identify them.
9 We can go into it further on further questioning,
10 but we just need to identify those individuals.

11 THE COURT: Any objection?

12 MS. SCHLAX: No, Your Honor.

13 THE COURT: In other words, she's not one of
14 the ones listed on the questionnaire?

15 MS. SCHLAX: Right.

16 THE COURT: When we ask if they know each and
17 every party, person. So I'll just do that.

18 MS. SCHLAX: Yes, Your Honor. And Dr. Butler
19 will let us know if she recognizes anyone within
20 the panel. We'll communicate that.

21 THE COURT: And I think what I'll do, rather
22 than asking the jury at that point, or depending
23 on at that point, I'll just introduce everybody
24 and then when I go over the questionnaires,
25 confidential juror questionnaire information, also

1 when I talk to them about the actual questionnaire
2 I'll mention that her name was inadvertently left
3 off, is there anybody that knows her. I just
4 don't want to do it out of order. It doesn't make
5 sense to me.

6 MS. SCHLAX: Yes, Your Honor.

7 MR. CALIEL: Yes, Your Honor.

8 THE COURT: Thank you.

9 All right. Our clerk is notifying the jurors
10 that we want group B and group C at 3:00 so we'll
11 be doing group A first which is the first 100.

12 All right. Is everyone ready for the panel to
13 come in?

14 MS. SCHLAX: Yes, Your Honor.

15 MR. CALIEL: Yes, Your Honor.

16 THE COURT: All right.

17 We're ready to bring them in. Thank you.

18 BAILIFF: Jury's entering the courtroom.

19 (Prospective jurors present.)

20 BAILIFF: Ladies and gentlemen of the jury
21 panel, will you rise and raise your right hand to
22 be sworn in by Madam Clerk.

23 (Prospective jurors sworn.)

24 (Affirmative response from prospective
25 jurors.)

1 THE COURT: You may be seated.

2 Good morning, ladies and gentlemen. My name is
3 Judge Mallory Cooper and you're part of a 300-person
4 panel for jury selection of a jury for the trial of
5 the case of the State of Florida versus Donald
6 Smith. This is going to be a multi-week trial and
7 I'll tell you a little bit more about that in a
8 minute, but because we have so many jurors that have
9 been summonsed for this trial, we have a special
10 process in place for introducing you to us and then
11 later on for us to question you.

12 You're the first 100 of the 300 and in a few
13 minutes we're going to give you a questionnaire and
14 you'll fill out that questionnaire and then you'll
15 be free to go for the day and you'll be coming back
16 tomorrow. I'll give you some more information about
17 that in a moment.

18 I want to introduce everyone in the courtroom
19 to you. First of all, as I said, I'm Judge Mallory
20 Cooper.

21 Representing the State we have State Attorney
22 Melissa Nelson, Assistant State Attorney Mark
23 Caliel, and Assistant State Attorney Vanessa
24 Wheeler-Sanchez.

25 Thank you.

1 Representing Mr. Smith, and Mr. Smith is
2 sitting to your right. He has on kind of a pale,
3 peach-colored shirt, I would say, and has glasses on
4 his head and he's represented by Ms. Julie Schlax,
5 Mr. Chuck Fletcher and assisting them today is
6 Dr. Brooke Butler.

7 Thank you.

8 We have two clerks in front of me, Leslie Smith
9 and David Cherok.

10 We have our court reporter who is Faye Gay.

11 One of our -- head of our IT department is Mike
12 Smith over here in the box. And from our staff
13 attorney's office we have Brooks Collins over here
14 in the corner.

15 And then we have bailiffs in here, Jeff Farah.

16 If you'll raise your right hand I'll introduce
17 you.

18 Shannon Parsons, James Adayo (phonetically),
19 Carl Sinstrom (phonetically), Mike Bowman. He's in
20 the back there. He brought you in. And Marley
21 Albright, she helped bring you in.

22 That's everybody in the courtroom.

23 I'm going to ask you in a moment, when the
24 questionnaires are passed out, the first thing I'm
25 going to ask you to do is to put your juror number

1 on every page. There are four pages in your
2 questionnaire and we'll need you to put your number
3 on each and every page.

4 I'm also going to tell you that you're not to
5 say anything out loud or make any comments out loud
6 during this session. First you will have an
7 opportunity to write an explanation for the answers
8 that you give on the questionnaire and, secondly,
9 when we bring you back tomorrow we'll be dealing
10 with you where we can ask you questions and you can
11 make comments to us at that time if you need to.

12 I do want to tell you a little bit about the
13 questionnaire before we hand it out. The
14 questionnaire is designed to help the Court and the
15 lawyers select a jury in this case. By the use of
16 the questionnaire the process of jury selection will
17 be shortened. The questions are not being asked to
18 invade your privacy, but to help select a fair and
19 impartial jury. If there is any reason why you feel
20 you might not be able to be a completely fair and
21 impartial juror, it is your legal duty and
22 obligation to inform the Court.

23 All of the information in the questionnaire
24 will be kept confidential and will not be
25 distributed to anyone except the attorneys in the

1 case and me. To maintain confidentiality the Court
2 will redact the completed questionnaire with -- from
3 the completed questionnaire your name and any other
4 information that will tend to reveal your identity.
5 Please respond to each question as fully and
6 complete as possible.

7 Please keep in mind that there are no right or
8 wrong answers. Only complete or incomplete answers.
9 If you do not understand the question, please write
10 I do not understand and the question will be
11 explained to you in court tomorrow.

12 Since the questionnaire is a part of the jury
13 selection process, the questions must be answered by
14 you under penalty of perjury as you are already now
15 under your oath. You must fill out this
16 questionnaire by yourself. Please do not ask anyone
17 to help you answer any of the questions. Also
18 please do not discuss your answers on the
19 questionnaire with anyone else. And that includes
20 the people you're sitting with in the panel today.
21 You are instructed not to seek out, read or conduct
22 any research about the defendant, Donald Smith, the
23 deceased, Cherish Perrywinkle, or anything else
24 about this case. Specifically, you must not do any
25 research using any internet search engine, message

1 boards, chat rooms, blogs or social media. Do not
2 read any articles in the newspaper or online and do
3 not listen to any news reports on the radio or on
4 the television.

5 If any juror does such research, this would be
6 juror misconduct and all of our time and effort will
7 be wasted and it will be necessary to start this
8 process all over again.

9 Furthermore, if a juror violates this order
10 from the Court the juror may be subject to contempt
11 of court charges, punishable by a fine and/or jail
12 time.

13 Let me just say I've been a judge for over 20
14 years, I've never given a juror jail time, but
15 that's just to tell you how very important this is
16 that you follow the instructions.

17 We're going to hand out the questionnaires now
18 and I would ask that all you do right now is put
19 your number, your juror number, on all four pages of
20 your questionnaire and then I'll give you further
21 explanation.

22 MR. CALIEL: Your Honor, may counsel and I
23 approach just briefly?

24 THE COURT: You may.

25 (Counsel for the State and defense approached

1 the bench for a side-bar conference out of the
2 hearing of the prospective jurors and court
3 reporter.)

4 THE COURT: Ladies and gentlemen, just to
5 clarify the number we need is the number on your
6 little button, not on your name tag. Your 1
7 through 11, we need No. 10 or 55 or whatever your
8 number is, that's the number we need on your
9 questionnaire. 1 through 100.

10 Do you all have a clipboard?

11 (Affirmative response from prospective
12 jurors.)

13 THE COURT: Okay. Does everybody have their
14 number on all four pages? And it's the number on
15 your button, 1 through 11, is that correct?

16 (Affirmative response from prospective
17 jurors.)

18 THE COURT: Okay. Now, I'm going to give you
19 some information before you fill it out. Some of
20 this information might be repetitive. That's just
21 the way trials are. There's repetitive
22 information from time to time.

23 You put your juror number, 1 through 100, on
24 each of the four pages of your questionnaire.

25 Now I'm going to explain the schedule to you.

1 There is a question that asks you about being able
2 to be a juror for the length of this trial. Trials
3 are very fluid occasions. We never know for sure
4 what's going to happen on any given day at any given
5 time, but we can give it our best estimate.

6 Our best estimate is that it may take us the
7 majority of this week to select the jury to try this
8 case. That being the case, we anticipate that we
9 will start the trial on Monday, next Monday,
10 February 12th, and we anticipate that that phase of
11 the trial will last approximately four days. That
12 being the case, we would wait until the next week,
13 if it's necessary, for a second phase of the trial,
14 and because the next week starts with Monday,
15 February 19th, and Monday February 19th is a
16 holiday, and the courthouse is closed and many of
17 you who might have children that are out of school
18 then, we would not start that second phase, if it is
19 necessary, until Tuesday, the 20th. So we think
20 that stage of the trial, if it becomes necessary,
21 would be approximately three days.

22 So we're talking about jury selection this
23 week, trial next week for approximately four days,
24 and a second phase of trial starting on Tuesday, the
25 20th, for approximately three days. Again, I cannot

1 tell you for sure that those approximations are
2 correct, but that's as close as we can get right
3 now.

4 I think I've already told you, please do not
5 discuss your questions or answers with anybody in
6 here with you and I'll give you further instructions
7 on that later and please do not say anything out
8 loud. If you have a question, please just write it
9 on your questionnaire. If you do not know how to
10 answer a question, or you are too uncomfortable
11 answering a particular question, just put I don't
12 know how to answer or put a question mark or put I
13 can't answer, anything that tells us that we need to
14 discuss that with you later. It's okay if you don't
15 know how to answer a question. But we need to know
16 that's the reason you left something blank.

17 There is media that will be attending not only
18 jury selection but the trial. They are not allowed
19 to identify jurors or potential jurors in any
20 manner. So you're not to worry about that.

21 So if you would now go ahead and answer the
22 questions in your questionnaire and we will collect
23 them when everyone is finished. But take your time
24 and answer correctly.

25 Thank you.

1 Pardon me for interrupting. I do need to add
2 one thing. At the bottom of page 1 it asks if you
3 know or have a personal or business relationship
4 with me or with any of the attorneys and we
5 neglected, accidentally, to leave off Dr. Brooke
6 Butler who I introduced to you earlier. She's
7 sitting at the far right over here and you would
8 need to let us know if you know her as well.

9 Thank you.

10 (Jurors executing questionnaires.)

11 THE COURT: Is there anyone who is still
12 working on their questionnaire? Raise your hand.

13 (No response from prospective jurors.)

14 THE COURT: I don't see any hands. Everyone
15 has completed?

16 (No response from prospective jurors.)

17 THE COURT: You can answer out loud.

18 (Affirmative response from prospective
19 jurors.)

20 THE COURT: Okay. Is there anyone who has
21 not completed?

22 (No response from prospective jurors.)

23 THE COURT: I know I told you not to say
24 anything out loud, but you can answer my question.

25 Okay. What I'd like for you to do now is take

1 your questionnaire out of the clipboard and you're
2 sitting, there's 100 of you, there's 50 on each side
3 and the way you're sitting is starting over here on
4 your right, my left, from the wall to the aisle,
5 starting with No. 1 going across, just to the aisle
6 all the way back to 50 and then over here starting
7 on the aisle to the wall, 51 and all the way back to
8 100. So they're going to try to collect them in
9 order. So if you pass your questionnaire down and
10 each of you put it on the bottom of the one before
11 you, so you've got 1 on top, 2, 3, 4, all the way
12 back down to the end of each row.

13 And over here if you'll do the same thing, only
14 this time you need to put your questionnaire on top
15 so that the person on the right is the bottom
16 questionnaire and the person on the aisle is the top
17 questionnaire. If you just pass them down they'll
18 be collected.

19 Just bring them up and give them to the clerk.
20 Thank you.

21 And one of our jurors left the courtroom,
22 probably to use the restroom, is that right?

23 BAILIFF: It wasn't one of the jurors.

24 THE COURT: It wasn't one of the jurors.

25 Great. So everyone is in here. Great.

1 Okay. I'm going to read you another
2 instruction. Some of it will be repetitive and then
3 I'll tell you about your schedule.

4 During the course of this jury selection
5 process we will be taking recesses at which time you
6 will be able to separate and go about your personal
7 affairs. During these recesses, you should not
8 discuss the case with anyone, nor permit anyone to
9 say anything to you or in your presence about the
10 case. If anyone attempts to say anything to you or
11 in your presence about this case, please tell them
12 that you are a prospective juror and ask them to
13 stop. If they persist, please leave them at once
14 and find one of the bailiffs who will then advise me
15 and we can take care of the matter from that point.

16 As you can understand, because of the sensitive
17 nature of this case, we need to make sure that there
18 are no outside influences because we are attempting
19 to get a jury who can fairly and impartially try
20 this case and who have limited knowledge of the case
21 and have not formed any fixed opinions about the
22 case, people who can be open-minded and render a
23 verdict based solely on the evidence and testimony
24 that you will see in the courtroom, not from outside
25 factors or influences.

1 This case is to be tried only on the evidence
2 presented during trial, in your presence and in the
3 presence of the defendant, the attorneys and the
4 Judge. Jurors must not conduct any investigation of
5 their own. This includes reading newspapers,
6 watching television, or using a computer, cell
7 phone, the internet, any electronic device or any
8 other means at all to get information related to
9 this case or to the people and places involved in
10 this case.

11 This applies whether you are in the courthouse,
12 at home or anyone -- anywhere else. You must not
13 visit places mentioned in the trial or use the
14 internet to look at maps or pictures to see any
15 place discussed during the trial or during the jury
16 selection.

17 Jurors must not have discussions of any sort
18 with friends or family members about this case or
19 the people and places involved. So do not let even
20 the closest family members make comments to you or
21 ask questions about the trial. In this age of
22 electronic communication I want to stress again that
23 just as you must not talk about this case
24 face-to-face you must not talk about this case by
25 using any electronic device.

1 You must not use phones, computers or other
2 electronic devices to communicate. Do not send or
3 accept any messages related to this case or your
4 jury service. Do not discuss this case or ask for
5 advice by any means at all, including posting
6 information on an internet website, chat room or
7 blog.

8 Now, when you leave the courthouse and you go
9 home or you go to work, people are going to ask you
10 are you on a jury, what jury is it, and you just
11 simply have to answer, I'm sorry, but the Judge told
12 me I cannot talk about the case, period. Just tell
13 them the Judge ordered it and they'll understand.

14 Now, we've got you divided in three groups of a
15 hundred. You're the first group and you're going to
16 be excused for the day and you are free to go and go
17 about your business as long as you follow the
18 instructions I just gave you and gave you earlier.
19 And we need you to be back here at 10:00 o'clock
20 tomorrow morning and you will report to the jury
21 assembly room where you started today. And we will
22 not be bringing you up in this large group tomorrow.
23 We will be bringing you up in smaller groups in case
24 there's anything we need to ask about your
25 questionnaire or anything else.

1 So you know how long we anticipate this matter
2 will last. Whether or not you'll end up on the jury
3 is a different question. We don't know that yet.
4 But we do need you to cooperate and be available for
5 us to question as we choose the jury to try this
6 case.

7 We all thank you for your time and attention
8 today and you are free to go. You do need to wear
9 your button with your number, 1 through 100, when
10 you come back tomorrow. That number is very
11 important. That's how we identify you because if
12 the media is in the courtroom we don't want to use
13 your names because, as I told you, we keep all of
14 that confidential. So that button is very, very
15 important.

16 You can leave your clipboards in your seat and,
17 again, you're free to go. Thank you so much.

18 (Prospective jurors absent.)

19 (Three prospective jurors remaining.)

20 THE COURT: All right. Evidently there's a
21 couple of jurors that have issues that need to be
22 resolved today.

23 Were we able to get juror No. [REDACTED]

24 BAILIFF: She's in the ante room.

25 THE COURT: Okay. The first one I believe is

1 juror No. ■■■, is that correct, sir?

2 PROSPECTIVE JUROR: Yes, ma'am.

3 THE COURT: All right. And I believe you
4 have indicated to one of the bailiffs that you
5 have a doctor's appointment tomorrow.

6 PROSPECTIVE JUROR: Yes, ma'am.

7 THE COURT: And that that's a doctor's
8 appointment that you cannot change, is that
9 correct?

10 PROSPECTIVE JUROR: That is correct, ma'am.

11 THE COURT: The attorneys may want to ask you
12 further questions about that.

13 PROSPECTIVE JUROR: Yes, ma'am.

14 THE COURT: So we can determine what to do.

15 MR. CALIEL: No questions from the State,
16 Your Honor.

17 MS. SCHLAX: None from the defense, Your
18 Honor.

19 THE COURT: And is there an agreement on
20 having him come back or not?

21 MS. SCHLAX: We don't have any objection to
22 him being excused.

23 MR. CALIEL: The same, Your Honor.

24 THE COURT: And have you had an opportunity
25 to ask your client to make sure?

1 THE DEFENDANT: It's fine.

2 THE COURT: Okay. All right, sir. You're
3 excused. You're free to go.

4 PROSPECTIVE JUROR: Thank you, ma'am.

5 THE COURT: Thank you, sir, for letting us
6 know.

7 (Prospective juror excused.)

8 THE COURT: And I'm sorry, but I can't see
9 who the next one is.

10 BAILIFF: [REDACTED]

11 THE COURT: No. [REDACTED].

12 PROSPECTIVE JUROR: I have airline tickets to
13 --

14 THE COURT: Okay. Just a second. I need to
15 find my -- my list.

16 Here it is. No. [REDACTED], right?

17 PROSPECTIVE JUROR: Yes.

18 THE COURT: And you have airline tickets?

19 PROSPECTIVE JUROR: I have airline tickets
20 purchased. They were purchased January 3rd
21 because we have a business trip in California and
22 we leave Wednesday morning at 6:30 and we don't
23 return until the 14th and it's pretty serious.

24 MS. SCHLAX: No questions by the defense,
25 Your Honor.

1 MR. CALIEL: No questions by the State, Your
2 Honor.

3 THE COURT: And --

4 MS. SCHLAX: No objection to the juror being
5 excused.

6 MR. CALIEL: Same with the State, Your Honor.

7 THE COURT: It is No. [REDACTED] correct?

8 PROSPECTIVE JUROR: Yes.

9 THE COURT: All right. No. [REDACTED] you're
10 excused. Thank you.

11 PROSPECTIVE JUROR: So I can be excused.
12 Thank you.

13 (Prospective juror excused.)

14 BAILIFF: The last one is No. [REDACTED], Your Honor.

15 THE COURT: No. [REDACTED] yes, sir.

16 PROSPECTIVE JUROR: Yes, ma'am. I'm supposed
17 to be out of town for work tomorrow as well. I
18 have airline tickets. I fly out at 5:30.

19 THE COURT: At 5:30 a.m.?

20 PROSPECTIVE JUROR: Yes, ma'am.

21 MS. SCHLAX: No questions by the defense,
22 Your Honor.

23 MR. CALIEL: Same with the State, Your Honor.

24 THE COURT: And he may be excused?

25 MS. SCHLAX: No objection to him being

1 excused.

2 MR. CALIEL: No objection, Your Honor.

3 THE COURT: All right. Thank you, juror No.

4

5 (Prospective juror excused.)

6 THE COURT: I did ask them to hold juror No.

7 █. If you all could discuss how you want to

8 handle that and let me know.

9 (Defense counsel conferring with defendant.)

10 THE COURT: Whether she needs to come back

11 tomorrow or whether she's excused.

12 (Defense counsel conferring with defendant.)

13 MS. SCHLAX: Your Honor, based on the Court

14 letting us know that █

15 correct, Your Honor?

16 THE COURT: █

17 MS. SCHLAX: █ We think, you

18 know, based on her potential communications with

19 you as a judge and your husband being a lawyer and

20 your son being a prosecutor, running for a judge,

21 we would motion for her to be challenged for

22 cause.

23 MR. CALIEL: Your Honor, we have no objection

24 to excusing juror No. █

25 THE COURT: All right. Juror No. █ is

1 excused. She's either excused completely or if
2 she wants -- if she prefers to go back down to the
3 jury assembly area to see -- bring her in and I'll
4 tell her.

5 (Prospective juror present.)

6 THE COURT: Juror No. [REDACTED], you're being
7 excused from this trial and it's up to you, you're
8 free to leave for the day or you're free to go
9 back down to jury assembly and see if there are
10 any other trials in need of jurors. It's entirely
11 up to you.

12 PROSPECTIVE JUROR: Okay. Thank you, Judge.
13 I would like to go see if I could go to another
14 one.

15 THE COURT: Thank you so much. We appreciate
16 that.

17 And I would ask the media, you're not to
18 identify jurors, obviously, if you identified her as
19 [REDACTED] you would be identifying her so please do
20 not identify [REDACTED]
21 [REDACTED] was excused. Thank you.

22 And, Mr. Smith, you agree to excuse juror No. [REDACTED]
23 who has a doctor's appointment tomorrow, No. [REDACTED] who
24 has airline tickets for work to go out of town, and
25 No. [REDACTED] who also has airline tickets for work, and

1 No. [REDACTED] is that correct?

2 THE DEFENDANT: Yes, ma'am. Yes, ma'am.

3 THE COURT: Are there any other exceptions or
4 objections to the discussions?

5 MS. SCHLAX: No, Your Honor.

6 MR. CALIEL: None from the State, Your Honor.

7 THE COURT: You know what? I think you can
8 leave the clipboards and just pass out the
9 questionnaires.

10 BAILIFF: We got them already on.

11 THE CLERK: They're already put on.

12 THE COURT: They're already ready. Never
13 mind. Pick them up.

14 I had Madam Clerk go ahead and notify jury
15 assembly that we want group B at 1:00 o'clock and
16 group C at 3:00 o'clock and I think those times are
17 going to work fine. And I think we agreed to bring
18 group B back tomorrow at 1:00 and group C back
19 Wednesday at 9:00.

20 MS. SCHLAX: Yes, Your Honor.

21 MR. CALIEL: Yes, Your Honor.

22 THE COURT: For the attorneys, juror No. [REDACTED] is
23 the only one that didn't put their number on the
24 questionnaire. Is it all right with you if I put
25 the number?

1 MS. SCHLAX: Yes.

2 MR. CALIEL: Yes.

3 BAILIFF: Judge, could I approach for a
4 second while they're here?

5 THE COURT: What?

6 BAILIFF: Juror No. [REDACTED]
7 female, she fell on the escalator going down.
8 We're calling rescue for her. Is there a way we
9 can tell her not to come back tomorrow because
10 she's very shaken up?

11 MS. SCHLAX: Yes.

12 BAILIFF: She probably close to meets the age
13 requirements. She looks -- she's [REDACTED]

14 THE COURT: She's younger than me.

15 BAILIFF: Well, she doesn't look that. I'll
16 say that. So she's probably younger than me. She
17 just doesn't look that way. Anyway, she's very
18 shaken up, we're calling rescue for her. So we're
19 going to --

20 THE COURT: I just need the attorneys to put
21 it on the record.

22 MS. SCHLAX: We don't have any objection.

23 THE COURT: She can be excused?

24 MS. SCHLAX: Yes, Your Honor.

25 THE COURT: You're okay with that, Mr. Smith?

1 MR. CALIEL: We have no objection.

2 MS. SCHLAX: Yes, Your Honor, I've had an
3 opportunity to speak to Mr. Smith about it.

4 THE COURT: Okay. Juror No. [REDACTED] is also
5 excused and the attorneys have given me the
6 permission to put the correct juror No. on juror
7 No. [REDACTED]'s questionnaire on each page. That person
8 wrote down their whole other number.

9 You all don't need copies of the questionnaires
10 from the people we excused, do you?

11 MS. SCHLAX: No, Your Honor.

12 MR. CALIEL: No, ma'am.

13 THE COURT: I have them. I'll hold on to 'em
14 and if there's any reason.

15 MR. CALIEL: Your Honor, actually just for
16 record sake I think probably be easiest because
17 they have to be made part of the court file so
18 we'll have them if anything comes up in a later
19 proceeding, assuming --

20 THE COURT: I mean I can put them -- I can
21 just put the original in the court file, right?

22 MR. CALIEL: Well, I think both sides
23 probably need a copy of that questionnaire for our
24 records in the event of a conviction for post
25 conviction purposes as well.

1 THE COURT: Well, they can be copied
2 separately because they're not going to be -- that
3 much can be copied separately. We still need it
4 ten copies, but separately.

5 All right. We're going to bring group B at
6 1:00 and group C at 2:00 and they're checking to see
7 if the clerk can go ahead and start copying or if
8 they have to wait until the end.

9 MR. CALIEL: Yes, Your Honor.

10 THE COURT: Is there anything else we need to
11 do?

12 MR. CALIEL: Nothing from the State, Your
13 Honor.

14 Ms. Schlax.

15 MS. SCHLAX: I'm sorry.

16 THE COURT: Is there anything else we need to
17 do?

18 MS. SCHLAX: No, Your Honor.

19 THE COURT: All right. We'll be in recess
20 until 1:00 o'clock or a few minutes before 1:00
21 because we've got the panel coming at 1:00. If I
22 could just see the attorneys for a second.

23 (Counsel for the State and defense approached
24 the bench for a side-bar conference out of the
25 hearing of the court reporter.)

1 (Recess.)

2 (Defendant present.)

3 THE COURT: Are you all ready?

4 MS. SCHLAX: Yes, Your Honor.

5 THE COURT: For the record, Mr. Smith is
6 present as are all the attorneys and they're
7 lining up jurors 101 through 200.

8 Thank you.

9 BAILIFF: It will be just a couple of
10 minutes. They have a few in the bathroom so
11 they're making their way back down.

12 THE COURT: Okay. Thank you.

13 BAILIFF: We're missing one juror, they did
14 find him. He is on the way up right now, ma'am.

15 THE COURT: Okay. Thank you so much.

16 BAILIFF: Are you ready, Judge?

17 THE COURT: We're ready.

18 BAILIFF: The jury's entering the courtroom.
19 (100 prospective jurors entering courtroom.)

20 BAILIFF: Everybody here, ma'am.

21 THE COURT: Thank you.

22 BAILIFF: Ladies and gentlemen of the jury
23 panel, will you rise and raise your right hand to
24 be sworn in by Madam Clerk.

25 (Prospective jurors sworn.)

1 (Affirmative response from prospective
2 jurors.)

3 THE COURT: Thank you. You may be seated.

4 Good afternoon, everyone. My name is Judge
5 Mallory Cooper and I'm going to give you some
6 information in a moment. The first thing I want to
7 do, though, is stress to you that it's very
8 important that during this session you not make any
9 comments out loud or speak with anyone next to you.
10 I'll give you some more instructions on that in a
11 moment. I wanted to start off with that.

12 You're here for jury selection in the case of
13 the State of Florida versus Donald Smith. And we
14 anticipate that this trial will take some parts of
15 this week and the next two weeks and I'll go over
16 that schedule with you a little bit more detail in a
17 minute because there's a question on your
18 questionnaire about the scheduling.

19 Before I do that, the first thing I want to do
20 after already telling you not to speak out loud, is
21 to introduce the people that are in the courtroom.

22 I am Judge Mallory Cooper and I will be trying
23 the case.

24 In this case the State is represented over on
25 your left by Stone Melissa Nelson, Assistant State

1 Attorney Mark Caliel and Assistant State Attorney
2 Vanessa Wheeler-Sanchez.

3 Thank you.

4 And, again, on your right side, the defendant
5 in this case, Donald Smith, and he is represented by
6 Julie Schlax and Chuck Fletcher and they are being
7 assisted today by Dr. Brooke Butler.

8 Thank you.

9 In front of me our two -- my two clerks, Leslie
10 Smith and David Cherok, and over here further to
11 your left is my court reporter, Faye Gay.

12 Over here in the corner, we keep him in the
13 corner, is somebody from our staff attorney's
14 Office, Brooks Collins, and then we have all the
15 bailiffs. We have Officer Jeff Farah.

16 If they'd raise their hands, please.

17 Shannon Parsons, she's right there in front of
18 you.

19 James Adayo, he's there in the back there in
20 the middle. And Carl Sinstrom over here on our
21 right. And our two civilian bailiffs, Mike Bowman
22 and Marley Albright are in the back.

23 So that's everybody that you'll see in the
24 courtroom. I mean that could change from time to
25 time, but that's generally who you'll be with in the

1 courtroom.

2 The first thing I'm going to do now after doing
3 that is read to you some information about the
4 questionnaire that we're going to pass out to you in
5 a few minutes.

6 It's a confidential juror questionnaire and the
7 questionnaire is designed to help the Court and the
8 lawyers select a jury in this case. By the use of
9 the questionnaire the process of jury selection will
10 be shortened. The questions are not being asked to
11 invade your privacy, but to help select a fair and
12 impartial jury. If there is any reason why you feel
13 you might not be able to completely -- be a
14 completely fair and impartial juror, it is your
15 legal duty and obligation to inform the Court.

16 All of the information in the questionnaire
17 will be kept confidential and will not be
18 distributed to anyone except the attorneys in the
19 case and me.

20 To maintain confidentiality, the Court will
21 redact from the completed questionnaire your name
22 and any other information that will tend to identify
23 you.

24 Please respond to each question fully and
25 completely as -- as much as you can. Please keep in

1 mind that there are no right or wrong answers, only
2 complete or incomplete answers.

3 If you do not understand a question, please
4 write I do not understand and the question will be
5 explained to you later.

6 Since the questionnaire is part of the jury
7 selection process, the questions must be answered by
8 you under penalty of perjury. You're already under
9 oath now to participate in this jury selection
10 process.

11 You must fill out this questionnaire by
12 yourself. Please do not ask anyone to help you
13 answer any of the questions. As I said, if you
14 don't know how to answer one, just put I don't know
15 how to do this or I don't understand and we'll go
16 over it with you later.

17 Also please do not discuss your answers to the
18 questionnaire with anyone else. You are instructed
19 now not to seek out, read or conduct any research
20 about defendant Donald Smith, the deceased Cherish
21 Perrywinkle or anything else about this case.
22 Specifically you must not do any research using any
23 internet search engine, message boards, chat rooms,
24 blogs or social media. Do not read any articles in
25 the newspaper or online and do not listen to any

1 news reports on the radio or on television.

2 If any juror does such research this would be
3 juror misconduct and all of our time and effort
4 would be wasted and it will be necessary to start
5 this process all over.

6 Furthermore, if a juror violates this order
7 from the Court the jury may be subject to contempt
8 of court charges punishable by a fine and/or jail
9 time.

10 Let me say I've been a Judge over 21 years,
11 I've never put a juror in jail, but it's important
12 that you know that that is a sanction that tells you
13 how important it is that you follow these
14 instructions.

15 I'll tell you a little bit about the schedule.
16 Now, as you may know just from being in the jury
17 assembly room, there are 300 jurors that have been
18 summoned for this particular jury selection and we
19 have already talked with the first 100. You're the
20 middle group, the middle two 100, Nos. 101 through
21 200, and when we're through with you, we have one
22 more group of 100 that we will be talking to and
23 having them fill out a questionnaire. And that's
24 all we're going to be able to do today.

25 So when we pass out the questionnaires, I'll

1 give you a few more instructions. You'll complete
2 your questionnaires and when you're through, when
3 the whole group is through, because we have to
4 collect them in order, then you'll be free to go to
5 return tomorrow at 1:00 o'clock and we begin the
6 second phase of the jury selection tomorrow. First
7 with the first group in the morning and then with
8 you in the afternoon and that final group may not
9 come back until Wednesday morning.

10 We anticipate that this jury selection may take
11 the better part of this week. Therefore, we
12 anticipate also that the trial itself will start
13 next Monday, which is February 12th, and we
14 anticipate that the trial will take approximately
15 four days. We also anticipate that if there is a
16 second phase to this trial, which there could be,
17 that it would start the following week and the
18 following week, Monday February 19th, is a holiday,
19 a federal holiday, and the courthouse is closed and
20 many people will have children out of school that
21 day and so we won't start that day with the second
22 phase, we'll start Tuesday, February 20th.

23 So trials are very fluid. We never know for
24 sure exactly how they're going to be, but that is
25 our best estimate, that it will take all of this

1 week to select the actual jury. That doesn't mean
2 you'll end up on the jury, but you'll be involved in
3 the process for part of this week, if not all this
4 week. Next week, the trial will be about four days
5 and the following week, if necessary, starting on
6 Tuesday, the 20th, three days or so for the final
7 phase.

8 I wanted to tell you that there's a question on
9 your questionnaire about scheduling for the trial.
10 And I think that's all I need to tell you now.

11 I will have the questionnaires handed out to
12 you and you have numbers on you. You have a hanging
13 tag, it has a long number, and you have a button
14 that has a short number and your buttons should be
15 starting over here from No. 101 all the way to the
16 back over here to No. 200. And I need you, before
17 you do anything else or even look at your
18 questionnaire, to please put that button number on
19 all four pages of the questionnaire. And once
20 everybody has done that, I'll give you a few more
21 instructions before you start on the questionnaire.

22 So we're going to pass those out now. They're
23 four pages long. Please put your button number, 101
24 through 200, on all four pages of your questionnaire
25 and I'll give you some more instructions.

1 Remember all you're supposed to do right now is
2 put your number, your button number, on all four
3 pages, because I need to give you some instructions.

4 The first group, I told them not to say
5 anything out loud and then when I asked them a
6 question, they were afraid to answer, so I'm going
7 to ask you a question. It's okay to answer it. Has
8 everybody got their number on all pages of their
9 questionnaire?

10 (Affirmative response from prospective
11 jurors.)

12 THE COURT: Is there anyone who needs more
13 time?

14 (No response from prospective jurors.)

15 THE COURT: Okay. Let me give you a couple
16 more instructions. You don't have to look at the
17 questionnaire for these, but at the bottom of the
18 first page it's asking if you know some of the
19 people involved in the case, myself as well as the
20 attorneys, and we neglected to also put Dr. Brooke
21 Butler over there for the defense.

22 If you happen to know her, if you would write
23 that in, please, we would appreciate it.

24 Additionally, as I've already told you, don't
25 ask anybody how to answer your questions. If you

1 don't know, just put I don't know how to answer or
2 put a question mark and we'll ask you about it
3 later. Don't talk to your fellow panel members
4 about your questionnaire or your answers. And you
5 may see, I want you to know that you may see media
6 in here today or other days during this week and
7 that's okay, they're allowed to be in here, it's an
8 open session, but they are not allowed to film you
9 or in any way identify you. In other words, they
10 can't record your voice or film your face or
11 anything that would identify you. And so I wanted
12 you to be aware of that, but you don't need to
13 worry, they're very aware of the rules and they do
14 follow them.

15 So, I'm going to ask you now in a second to go
16 ahead and fill out your questionnaire and we have to
17 wait until everyone has finished filling out their
18 questionnaire before we collect them and when we get
19 to that point we'll collect those questionnaires and
20 I'll give you a little bit more information. After
21 that you're going to be released today to come back
22 tomorrow at 1:00 o'clock to the jury assembly area
23 and I will go over that with you again.

24 So now take your time, there are no wrong
25 answers, and fill out your questionnaires the best

1 you can.

2 Thank you.

3 (Prospective jurors executing questionnaires.)

4 THE COURT: It's hard for me to see
5 everybody. I try to look for heads that are still
6 looking down, but is there anyone who is still
7 working on their questionnaire? If so, will you
8 raise your hand.

9 (No response from prospective jurors.)

10 THE COURT: Everyone is --

11 BAILIFF: Right here.

12 THE COURT: There's someone. Just let us
13 know when they're done. That's fine. We want you
14 to take the time you need.

15 All right. I think everyone is finished. Is
16 there anyone who's not finished?

17 (No response from prospective jurors.)

18 THE COURT: Okay. I don't see any hands.
19 This is what you're going to do -- just listen to
20 me first before you do anything. You're going to
21 take your questionnaire out of the clipboard and
22 you're siting from the lowest number over here
23 against the wall in the front all the way to the
24 highest number over here against the wall in the
25 back. So for the questionnaires to be in order,

1 this side over here, your right side, the people
2 along the wall need to pass their questionnaires
3 down and everybody needs to put their
4 questionnaire under the stack so they'll be in
5 order, 1, 2, 3, whatever. Over here it's the
6 reverse. When you start from the wall to pass
7 your questionnaire as to the center, everybody
8 needs to put their questionnaire on top of the
9 stack so that the higher number's at the bottom.

10 So if you'll do that and pass your
11 questionnaires down to the center, we'll collect
12 them. Just keep your clipboard.

13 Okay. Thank you.

14 I'm going to read you another instruction. It
15 may be a little bit repetitive. Sometimes you'll
16 hear some things over and over again. That's,
17 again, just how trials operate. And then you'll be
18 excused and I'll tell you what to do about coming
19 back.

20 During this course of this jury selection
21 process we will be taking recesses at which time you
22 will be able to separate and go about your personal
23 affairs. During these recesses you should not
24 discuss the case with anyone, nor permit anyone to
25 say anything to you or in your presence about this

1 case. If anyone attempts to say anything to you or
2 in your presence about this case, please tell them
3 that you are a prospective juror and ask them to
4 stop. If they persist, please leave them at once
5 and find one of the bailiffs who will then advise me
6 and we can take care of the matter from that point.

7 As you can understand, because of the sensitive
8 nature of this case, we need to make sure that there
9 are no outside influences because we are attempting
10 to get a jury who can fairly and impartially try
11 this case and who have limited knowledge of the case
12 and have not formed any fixed opinions about the
13 case. People who can be open-minded and render a
14 verdict based solely on the evidence and testimony
15 that you will see in the courtroom and not from
16 outside factors or influences.

17 This case must be tried by you only on the
18 evidence presented during the trial and in your
19 presence and in the presence of the defendant, the
20 attorneys and the Judge. Of course, we're not
21 trying the case right now, but these instructions
22 still apply.

23 Jurors must not conduct any investigation of
24 their own. This includes reading newspapers,
25 watching television or using a computer, cell phone,

1 the internet, any electronic device or any other
2 means at all to get information related to this case
3 or the people and places involved in this case.

4 This applies whether you are in the courthouse,
5 at home or anywhere else. You must not visit places
6 that might be mentioned or use the internet to look
7 at maps or pictures to see any place that is
8 discussed.

9 Jurors must not have discussions of any sort
10 with friends or family members about the case or the
11 people or places involved. So do not let even the
12 closest family members make comments to you or ask
13 questions about this case.

14 In this age of electronic communication I want
15 to stress again that just as you must not talk about
16 this case face-to-face, you must not talk about this
17 case by using any electronic device. You must not
18 use phones, computers or other electronic devices to
19 communicate. Do not send or accept any messages
20 related to this case or your jury service.

21 Do not discuss this case or ask for advice by
22 any means at all, including posting information on
23 an internet website, chat room or blog.

24 Now, we'll make every effort to consume as
25 little of your time as possible, but as I told you,

1 we think this jury selection will take the better
2 part of a week. We're in the first stage of that
3 now. The second stage starts tomorrow. And I'm
4 asking you to be back at 1:00 o'clock in the jury
5 assembly area.

6 You will not come up here as a group tomorrow.
7 You'll come up here as a smaller group and you will
8 have an opportunity at that time to ask questions if
9 you have any questions, but mainly we'll be asking
10 you some questions to be able to proceed to the next
11 stage of jury instruction -- I mean jury selection.
12 I'm sorry.

13 All of us thank you for your time and attention
14 today and if you go home or back to work and
15 somebody asks you about what you've been doing, what
16 case you're on, how long you're going to be here,
17 anything like that, you just simply say the Judge
18 ordered me not to talk about it and hopefully
19 they'll -- they'll leave it at that.

20 Thank you again. You're free to go. I'll see
21 you tomorrow at 1:00 o'clock. Thank you.

22 (Prospective jurors absent.)

23 BAILIFF: Four of them say they have
24 scheduling problems, Judge.

25 THE COURT: All right. What's the lowest

1 number?

2 BAILIFF: What's your number?

3 BAILIFF: [REDACTED].

4 THE COURT: [REDACTED] is the lowest?

5 PROSPECTIVE JUROR: [REDACTED]

6 THE COURT: Who's [REDACTED] All right, sir.

7 You're No. [REDACTED] What's the issue you have?

8 PROSPECTIVE JUROR: I [REDACTED] and all
9 my classes are all scheduled around that time
10 because I know we're supposed to be here tomorrow
11 at 1:00 p.m. and I do have a class so I wouldn't
12 be able to make the -- like maybe it seems like so
13 last minute.

14 THE COURT: How long -- would your classes
15 start? The classes you're in now, do they start
16 in January?

17 PROSPECTIVE JUROR: Yes.

18 THE COURT: And do they finish in like April
19 or May?

20 PROSPECTIVE JUROR: Yes.

21 THE COURT: And what year are you?

22 PROSPECTIVE JUROR: I'm currently a
23 sophomore.

24 THE COURT: Sophomore?

25 PROSPECTIVE JUROR: (Nods head.)

1 MS. SCHLAX: No questions by the defense,
2 Your Honor.

3 MR. CALIEL: Your Honor, may I have a moment?
4 (State and defense counsel conferring.)

5 MR. CALIEL: No questions, Your Honor.

6 MS. SCHLAX: Your Honor, the defense has no
7 objection to excusing Mr. --

8 MR. CALIEL: As does the State, Your Honor.
9 We have no objections to excusing juror No. [REDACTED]

10 THE COURT: Juror No. [REDACTED] you're excused.
11 Thank you for your time and attention.

12 PROSPECTIVE JUROR: Thank you.

13 (Prospective juror excused.)

14 THE COURT: And the next one is [REDACTED]?

15 PROSPECTIVE JUROR: Yes, ma'am.

16 THE COURT: All right. Juror [REDACTED] what is
17 the issue that you have?

18 PROSPECTIVE JUROR: I haven't been employed
19 for too long and --

20 COURT REPORTER: I can't hear you.

21 PROSPECTIVE JUROR: I haven't been employed
22 too long and I just started a business up and so
23 I'm contracted to work with two -- with two major
24 house builders here. And so I do have contracts
25 with them and I have to actually meet tomorrow and

1 actually I have to be to work the rest of the
2 month. And so -- and I'm self-employed. I don't
3 have anyone work for me. That's all.

4 THE COURT: All right. I want to make sure I
5 have this correct. You're self-employed?

6 PROSPECTIVE JUROR: Yes.

7 THE COURT: You are a subcontractor, is that
8 correct?

9 PROSPECTIVE JUROR: Yes, ma'am.

10 THE COURT: And what kind of work do you do?

11 PROSPECTIVE JUROR: Landscaping.

12 THE COURT: Landscaping?

13 PROSPECTIVE JUROR: Yes.

14 THE COURT: But you work for people that are
15 building homes?

16 PROSPECTIVE JUROR: Yes, ma'am.

17 THE COURT: Not for homeowners?

18 PROSPECTIVE JUROR: No, not homeowners. I do
19 have some homeowners and, in fact, one of the
20 builders I take care of their property.

21 THE COURT: Okay. But mostly you work on
22 their new homes?

23 PROSPECTIVE JUROR: Yes, ma'am.

24 THE COURT: New home sites. And if you don't
25 work you don't get paid?

1 PROSPECTIVE JUROR: Yes, ma'am.

2 THE COURT: Is that right?

3 PROSPECTIVE JUROR: You got it.

4 MS. SCHLAX: No questions by the defense and
5 we have no objection to excuse [REDACTED]

6 MR. CALIEL: No objections from the State,
7 Your Honor.

8 THE COURT: All right. Thank you,
9 [REDACTED] You're free to go and we appreciate
10 your time.

11 BAILIFF: Next number is [REDACTED] Your Honor.

12 THE COURT: All right.

13 THE COURT: Okay. [REDACTED] What is your issue?

14 PROSPECTIVE JUROR: I'm one of two drivers
15 for a family-owned trucking company and if I don't
16 go to work, the stuff can't get delivered and if
17 we can't be paid, we can't eat. My whole family
18 depends on my making the income.

19 THE COURT: What type of product do you have?

20 PROSPECTIVE JUROR: Particularly we have the
21 [REDACTED] contract, hauling all the [REDACTED] food,
22 which they own a Mexican company, and we haul it
23 all across Florida. And I'm supposed to be in
24 Winter Haven tonight and I'm supposed to be in
25 south Florida tomorrow. It's really going to be

1 bad for our company if I'm stuck here.

2 MS. SCHLAX: No questions and no objection to
3 excusing the juror.

4 MR. CALIEL: The State would agree and we
5 have no objection.

6 THE COURT: All right. Juror No. [REDACTED] is
7 that right?

8 PROSPECTIVE JUROR: Thank you. I appreciate
9 it.

10 THE COURT: Juror No. [REDACTED], you're excused.

11 BAILIFF: [REDACTED] is the next number.

12 PROSPECTIVE JUROR: Good afternoon, Your
13 Honor. I'm employed [REDACTED]
14 [REDACTED] I work graveyard.
15 I worked last night from 11:00 to 7:00 and no one
16 could give me an answer what should I do with my
17 summons. I checked with all of my watch commanders
18 and nobody could tell me what to do and this
19 morning when the judge told us what we needed to
20 do, he said state medical issues, and no one could
21 give me a clear answer about being excused.

22 THE COURT: Okay. Are you a corrections
23 officer?

24 PROSPECTIVE JUROR: Yes, ma'am.

25 THE COURT: And you're No. [REDACTED] is that

1 correct?

2 PROSPECTIVE JUROR: Yes, ma'am.

3 MS. SCHLAX: Your Honor, there's no questions
4 and we have no objection to excusing this
5 gentleman.

6 MR. CALIEL: Your Honor, just briefly.

7 Sir, your only concerns are your work
8 schedule, correct?

9 PROSPECTIVE JUROR: Yes, sir, I work
10 graveyard and, honestly, I didn't know whether it
11 was confidential or anything where I'm employed.
12 No one could really tell me what should I do. I
13 want to be excused.

14 MR. CALIEL: You want to be excused?

15 PROSPECTIVE JUROR: Yes, sir.

16 MR. CALIEL: Why is that?

17 PROSPECTIVE JUROR: I never been part of a
18 jury or anything, court or anything, so I just
19 don't --

20 MR. CALIEL: And it's sort of the unknown.
21 Obviously you work in the criminal justice system.
22 You know how important it is --

23 PROSPECTIVE JUROR: Yes, sir.

24 MR. CALIEL: -- to have jurors. Do you
25 believe that your employment [REDACTED]

1 [REDACTED] would affect your ability to be
2 fair and impartial in viewing the evidence?

3 PROSPECTIVE JUROR: No, that's -- no, because
4 that's the job I do.

5 MR. CALIEL: Okay. And so obviously part of
6 your responsibility is partly to take an oath as a
7 corrections officer to be fair and impartial,
8 right?

9 PROSPECTIVE JUROR: Yes.

10 MR. CALIEL: Okay. And so your main concern,
11 and obviously [REDACTED] when you contact
12 him, if you are selected as a juror, if you're
13 asked to come back today, or tomorrow or later on
14 in the week, the [REDACTED] aware of the role that
15 you serve and he's required under the law to
16 excuse you from your employment for that purpose.
17 Do you believe that as long as [REDACTED] who's
18 obviously your employer, will accommodate your
19 attendance that there's anything about your
20 employment, whether coming into contact with law
21 enforcement officers on a day-to-day basis, that
22 would interfere with your serving on this jury?

23 PROSPECTIVE JUROR: No.

24 MR. CALIEL: And so the Court can obviously
25 contact your supervisors, your supervisors are

1 informed that you're needed for this week and
2 potentially later on if you're selected as a
3 juror, you don't have any problems serving as a
4 juror?

5 PROSPECTIVE JUROR: No.

6 MR. CALIEL: You just need a letter from the
7 Court notifying your supervisors that you would be
8 unavailable --

9 PROSPECTIVE JUROR: Yes.

10 MR. CALIEL: -- during the next couple of
11 days, if not weeks if you're selected?

12 PROSPECTIVE JUROR: Yes, sir.

13 MR. CALIEL: Thank you, sir.

14 I don't have any further questions.

15 Your Honor, we do have an objection. I don't
16 think this is a cause that needs to be effectuated
17 at this time

18 THE COURT: Well, can I ask one or two
19 questions?

20 MR. CALIEL: Sure.

21 THE COURT: That I don't think he's answered.
22 Have you worked with this gentleman at all?

23 PROSPECTIVE JUROR: No, but sometimes
24 indirectly I end up in the area escorting.

25 THE COURT: Okay. Would anything about that

1 affect your ability to be fair and impartial?

2 PROSPECTIVE JUROR: No, ma'am.

3 THE COURT: So you're asking that he come
4 back tomorrow for the next stage?

5 MR. CALIEL: Yes, Your Honor.

6 THE COURT: All right. I don't see any harm
7 in that. I mean I think we can get into a lot
8 more detail then. So okay. So you'll have to
9 come back tomorrow at 1:00 o'clock.

10 PROSPECTIVE JUROR: Okay. Do I need to get
11 some documentation for my job tonight or anything
12 from someone?

13 THE COURT: I -- from your job?

14 PROSPECTIVE JUROR: Something to let them
15 know that I -- usually we just call in and have
16 like -- if I had a doctor's appointment I would
17 have documentation or something.

18 THE COURT: Do you have your summons?

19 PROSPECTIVE JUROR: I -- no, it came -- I
20 registered online, but they took it downstairs.
21 The only thing I have now is this.

22 THE COURT: He can keep his card to show
23 them? Is that what you're saying?

24 BAILIFF: Yes.

25 THE COURT: Yeah, you have to bring it back

1 with you.

2 PROSPECTIVE JUROR: Yes, ma'am.

3 THE COURT: Take a card with you and --
4 they're taking their buttons with them, too,
5 right? Yeah. Take your card and button with you
6 to work and tell them -- it doesn't mean you'll
7 end up on the jury.

8 PROSPECTIVE JUROR: Yes, ma'am.

9 THE COURT: But you need to come to the
10 second step. Okay?

11 PROSPECTIVE JUROR: Yes, ma'am.

12 THE COURT: Thank you so much.

13 PROSPECTIVE JUROR: Thank you.

14 (Prospective juror absent.)

15 MS. SCHLAX: Your Honor, can I be excused to
16 --

17 THE COURT: We're going to have a five-minute
18 recess. And he gets to also, if that's what he
19 needs to do.

20 We're going to be in recess for about five to
21 seven minutes, something like that, and then we'll
22 bring the next panel in.

23 (Recess.)

24 (Last juror's name was [REDACTED])

25 (Defendant present.)

1 THE COURT: May I see the attorneys at
2 side-bar, please?

3 (Counsel for the State and defense approached
4 the bench for a side-bar conference out of the
5 hearing of the court reporter.)

6 BAILIFF: Juror entering the courtroom, Your
7 Honor.

8 THE COURT: Good afternoon, sir. You're
9 juror No. [REDACTED], correct?

10 PROSPECTIVE JUROR: Yes, sir -- yes, ma'am.

11 THE COURT: Okay. And remember don't say
12 anything out loud. I'm going to ask you some
13 questions. You can answer my questions yes or no.
14 Do you understand?

15 PROSPECTIVE JUROR: Yes, ma'am.

16 THE COURT: I've reviewed your questionnaire
17 as have the attorneys. Is everything on the
18 questionnaire correct, yes or no?

19 PROSPECTIVE JUROR: Yes, ma'am.

20 THE COURT: And based on your questionnaire,
21 you've indicated you do not feel you can be fair
22 and impartial, is that correct?

23 PROSPECTIVE JUROR: Yes, ma'am.

24 THE COURT: Ms. Schlax or Mr. Fletcher?

25 MS. SCHLAX: No questions, Your Honor.

1 MR. CALIEL: No questions from the State,
2 Your Honor.

3 THE COURT: Both parties agree that No. [REDACTED]
4 should be excused based on his questionnaire
5 answers?

6 MR. FLETCHER: Yes, Your Honor.

7 MR. CALIEL: Yes, Your Honor.

8 THE COURT: All right. Thank you, sir. We
9 appreciate your time. You're free to go.

10 PROSPECTIVE JUROR: Thank you.

11 THE COURT: We're ready for the next hundred
12 whenever they're ready to bring them in.

13 BAILIFF: The jury's entering the courtroom.

14 (100 prospective jurors entering courtroom.)

15 BAILIFF: Ladies and gentlemen of the jury
16 panel, will you rise and raise your right hand to
17 be sworn in my Madam Clerk.

18 (Prospective jurors sworn.)

19 (Affirmative response from prospective
20 jurors.)

21 THE COURT: You may be seated. Thank you.
22 Did that one juror come back?

23 BAILIFF: Yes, ma'am.

24 THE COURT: Thank you. Good afternoon,
25 everyone. My name is Judge Mallory Cooper. I

1 know you've been waiting all day and we appreciate
2 your patience. We will try to take as little of
3 your time as we can.

4 You're here for jury selection on the case of
5 the State of Florida versus Donald Smith. I'm
6 going to go over some information, we're going to
7 give you a questionnaire, I'm going to talk to you
8 about how to fill that out. Not how to answer
9 your questions, but just some general information
10 about it. I'll give you some more information
11 after that.

12 I want to introduce to you the people that are
13 involved in the case and that are in the courtroom.
14 The defendant in this case is Donald Smith. I've
15 already told you I'm Judge Mallory Cooper. It's
16 right here in front of me if you forget.

17 The State in this case is represented by the
18 State Attorney Melissa Nelson, Assistant State
19 Attorney Mark Caliel and Assistant State Attorney
20 Vanessa Wheeler-Sanchez. On the other side of the
21 courtroom is Mr. Smith and he is represented by
22 Julie Schlax and Chuck Fletcher and they're assisted
23 today by Dr. Brooke Butler.

24 Thank you.

25 In front of me are my two clerks, David Cherok

1 and Leslie Smith.

2 Over here is my court reporter, Faye Gay.

3 Over here is someone from the Staff Attorney's
4 Office. His name is Brooks Collins. The officers
5 you see in the courtroom, they'll raise their hand,
6 are Officer Jeff Farah, Shannon Parsons, James Adayo
7 and Carl Sinstrom and the two un-uniformed bailiffs
8 are Mike Bowman and Marley Albright. They're in the
9 back by the door. Those are the people that you'll
10 probably see in here with me.

11 Definitely the attorneys, of course, are on
12 the case, they'll be with the case for the whole
13 trial.

14 I'm going to read you a questionnaire
15 instruction sheet, or an information sheet before we
16 pass out the questionnaires.

17 The questionnaire you're going to get is
18 designed to help the Court and the lawyers select a
19 jury in this case. By use of the questionnaires the
20 process of jury selection will be shortened.
21 Questions are not being asked to invade your
22 privacy, but to help select a fair and impartial
23 jury. If there's any reason why you feel you might
24 not be able to be a completely fair and impartial
25 juror, it is your legal duty and obligation to

1 inform the Court.

2 All of the information in the questionnaire
3 will be kept confidential and will not be
4 distributed to anyone except the attorneys in the
5 case and me.

6 To maintain confidentiality, the Court will
7 redact from the completed questionnaire your name
8 and any other information which would tend to reveal
9 your identity.

10 Please respond to each question as fully and
11 completely as possible. Please keep in mind that
12 there are no right or wrong answers, only complete
13 and incomplete answers. If you do not understand
14 the question, please write I do not understand and
15 the question will be explained to you later.

16 Since the questionnaire is part of the jury
17 selection process, the questions must be answered by
18 you under penalty of perjury. You are already under
19 oath as a venire person and so it's your obligation
20 to answer all questions, whether I or the attorneys
21 ask them or on the questionnaire truthfully.

22 You must fill out the questionnaire by
23 yourself. Please do not ask anyone to help you with
24 your questionnaire. Also please do not discuss your
25 answers to the questionnaire with anyone.

1 You are instructed not to seek out, read or
2 conduct any research about the defendant, Donald
3 Smith, the deceased, Cherish Perrywinkle, or
4 anything else about this case. Specifically you
5 must not do any research using any internet search
6 engine, message boards, chat rooms, blog or social
7 media.

8 Do not read any articles in the newspaper or
9 online and do not listen to any news reports on the
10 radio or on the television.

11 If any juror does such research it would be
12 juror misconduct and all of our time and effort
13 would be wasted and it would be necessary for us to
14 start this process all over.

15 Furthermore, if a juror violates this oath from
16 the court, the juror may be subject to contempt of
17 court charges punishable by a fine and/or jail time.

18 Now, I've told the other groups I've been a
19 judge over 20 years. I've never put a juror in
20 jail. But that information is correct and it's
21 there to tell you how important it is that you do
22 follow these instructions. Additionally, for
23 today's session I'm going to tell you that you do
24 not need to speak out loud at all for any reason
25 except when I ask you a question as a group for you

1 to answer yes or no.

2 Other than that, please do not speak out loud.

3 When we pass out the questionnaires to you, I'm
4 going to give you a little bit more information,
5 including more information about the length of this
6 case.

7 So we're going to pass them out and what I need
8 you to do is not look at anything in the
9 questionnaire until I give you some instructions.
10 But I do need each of you to put your juror number
11 on your button -- your juror numbers on your button
12 are from 201 to 300. That number needs to go on all
13 four pages of your questionnaire. Not the number on
14 your name tag or your juror tag, but the number on
15 your button. Please put that on all four pages of
16 your questionnaire and then do not do anything else
17 until I give you some instructions.

18 Okay. Will everybody make sure they put their
19 button number, 201 to 300, on all four pages of
20 their questionnaire and please do not leave one
21 out.

22 Okay. Has everybody done that? You may
23 answer out loud.

24 (Affirmative response from prospective
25 jurors.)

1 THE COURT: Does anybody need more time?

2 (No response from prospective jurors.)

3 THE COURT: Okay. All right. Let me go over
4 the schedule with you a little bit. You're the
5 third group of a hundred in each group we've had
6 in here today to go over these questionnaires and
7 that's all we can do today, get the questionnaires
8 completed so that we can review them.

9 A trial is a very fluid event and we never know
10 for sure how long a trial will take, but it is our
11 best estimate that it may take us all or most of
12 this week to select a jury for this case. Because
13 we're starting with a 300 number. And we'll dwindle
14 that down until we get to the jury that we need, but
15 that might take us the entire week. Because of that
16 then we anticipate that the trial itself, the
17 presentation of evidence, et cetera, will begin next
18 week on Monday, February 12th, and we anticipate
19 that the trial will take approximately four days.

20 There's also the potential of a second phase of
21 the trial, and if that's correct, it would be the
22 following week. The following week that begins on
23 Monday, February 19th, and that is a holiday. It's
24 a federal holiday. Even though we're not a federal
25 courthouse, our courthouse is closed that day and

1 many people have children who will be out of school
2 that day. So we won't start that day. We would
3 start the next day, Tuesday, the 20th.

4 So our anticipation is all or most of the week
5 to select the jury, approximately four days of trial
6 next week and approximately three days of trial on
7 the second phase the following week, if that becomes
8 necessary, but not starting on Monday, the 19th,
9 starting on Tuesday, the 20th. So I wanted you to
10 be aware of that schedule because there's a question
11 about the timing of the trial for you to answer.

12 Again, if you don't know the answer to a
13 question or you're uncomfortable answering a
14 question, although, as I've told you, all of your
15 personal information will be redacted, no one could
16 connect the questionnaire back to you. But if
17 you're uncomfortable with that, you can either write
18 I don't know how to answer, you can put a question
19 mark, you can put I wish to discuss, something so we
20 know why there's no answer to that question. And we
21 will take care of that later.

22 I think that's everything -- oh, one other
23 thing. On the first page of the questionnaire, you
24 don't need to look right now, but at the bottom it
25 asks if you know any of us, meaning myself or the

1 attorneys. There's other questions about other
2 people. But myself and the attorneys are on page 1.
3 We inadvertently left off Dr. Brooke Butler who is
4 the person who is assisting, she's not an attorney,
5 but she's assisting the attorneys for Mr. Smith. So
6 if you know her, if you would please write that in
7 that you do so we'll know that.

8 There's no right or wrong answers. Everybody
9 take their time completing these questionnaires. I
10 do not collect them until everybody is finished, but
11 don't ask anybody for help and go ahead and fill out
12 your questionnaires for us. Thank you.

13 (Prospective jurors executing questionnaires.)

14 THE COURT: Okay. You can answer this
15 question out loud, too. Is everyone through
16 filling out their questionnaire?

17 (Affirmative response from prospective
18 jurors.)

19 THE COURT: Is there anyone who needs more
20 time?

21 (No response from prospective jurors.)

22 THE COURT: No. Okay. We actually have 300
23 jurors that we've been dealing with today. You're
24 the third group, as I told you, No. 201 through
25 300. All we can do today with three groups is get

1 the questionnaires completed and do some
2 ministerial tasks that we need to do to prepare
3 for later in the week.

4 The next thing I call is phase two of jury
5 selection will be a little bit more interactive
6 where we can talk with you and you can talk with
7 us, but this group, you're free tomorrow, you're
8 going to be free to go now. I've got some
9 instructions to give you, but after that you're
10 going to be free to go, but you'll need to return
11 Wednesday morning at 9:00 o'clock for the second
12 phase of the jury selection.

13 The other two groups are coming back
14 tomorrow, one in the morning and one in the
15 afternoon. Once we get through that phase then we
16 can perhaps move on to the third phase.

17 Whether you'll make the cut, as they say, for
18 the third phase or not, we don't know that at this
19 point, but at this point all 300 people need to
20 come back so we can do the next part of the jury
21 instruction process. But I don't want you to come
22 back tomorrow and sit with nothing to do, so I'm
23 going to have you come back Wednesday at 9:00
24 o'clock.

25 Before you leave, I'm going to read you

1 another instruction. A lot of what we tell you is
2 repetitive, but that's just how it operates.

3 During the course of this jury selection
4 process we will be taking recesses at which time you
5 will be able to separate and go about your personal
6 affairs. During these recesses you should not
7 discuss the case with anyone, nor permit anyone to
8 say anything to you or in your presence about this
9 case. If anyone attempts to say anything to you or
10 in your presence about this case, please tell them
11 you are a prospective juror and ask them to stop.
12 If they persist, leave them at once, find one of the
13 bailiffs if you're in the courthouse. They will
14 advise me and then we can take care of the matter
15 from that point, or you can bring it to my attention
16 the next time you come back to court.

17 As you can understand, because of the sensitive
18 nature of this case, we need to make sure that there
19 are no outside influences because we are attempting
20 to get a jury who can fairly and impartially try
21 this case and have limited knowledge of the case and
22 have not formed any fixed opinion about the case.
23 People who can be open-minded and render a verdict
24 based solely on the evidence and testimony that they
25 would see in the courtroom, not from outside factors

1 or influences.

2 Even during jury selection, although you're not
3 seeing it yet, during the trial the only thing you
4 can base a decision on, if you're a juror, is the
5 evidence presented during the trial in your presence
6 and in the presence of the defendant, the attorneys
7 and the Judge.

8 Jurors must not conduct, or potential jurors,
9 must not conduct any investigation of their own.
10 This includes reading newspapers, watching
11 television or using a computer, cell phone, the
12 internet, any electronic device or any other means
13 at all to get information related to this case or to
14 the people and places involved in this case. This
15 applies whether you are in the courthouse, at home
16 or anywhere else.

17 You must not visit places that might be
18 mentioned or use the internet to look at maps or
19 pictures to see any place that is -- if it is
20 discussed.

21 Jurors must not have discussions of any sort
22 with friends or family members about this case or
23 the people and places involved. So do not let even
24 the closest family members make comments to you or
25 ask questions about the trial.

1 In the age of electronic communication I want
2 to stress again that just as you must not talk about
3 this case face-to-face, you must not talk about this
4 case by using any electronic device. You must not
5 use phones, computers or other electronic devices to
6 communicate. Do not send or accept any messages
7 related to this case or your jury service. Do not
8 discuss this case or ask for advice by any means at
9 all, including posting information on an internet
10 website, chat room or blog.

11 Now, when you get home, or when you get back to
12 work, somebody's liable to ask you, well, did you
13 get selected for a jury, what jury are you on, how
14 long you're going to be there, things like that, and
15 you must simply say I've been instructed by the
16 Judge that I cannot answer any questions about my
17 jury service, period, and hopefully that will
18 alleviate any issues.

19 You're going to be free to go now. You leave
20 your clipboards in your bench. Make sure you have
21 your juror tag and your juror button when you come
22 back. You report to the jury assembly room
23 Wednesday morning at 9:00. You will not be brought
24 up in a big group like this. You'll be brought up
25 in smaller groups for us to talk with.

1 We thank you all for your patience and your
2 time and your service and you're free to go.

3 BAILIFF: Their questionnaires.

4 THE COURT: I'm sorry. I forgot. My bad. I
5 was trying to get you out of here quickly.

6 We've got to collect your questionnaires and
7 you're sitting over here, your number is 201 to 250
8 and over here 251 to 300. So over here you're left
9 to right from the wall to the aisle. Over here from
10 the aisle to the wall. So over here, the first
11 person in the first row pass your questionnaire, the
12 next person put it under hers, keep putting it
13 underneath so they're in order. Now, over here you
14 do the opposite. The last person, keep putting
15 yours on top of hers so they come in order to the
16 center.

17 All right. Thank you, everybody. We'll see
18 you back Wednesday morning at 9:00 o'clock. Thank
19 you.

20 (Prospective jurors absent.)

21 BAILIFF: No. [REDACTED] and No. [REDACTED]

22 THE COURT: [REDACTED]

23 BAILIFF: Both of them travel-related.

24 THE COURT: All right. Juror No [REDACTED] Can
25 you tell us what your conflict is?

1 PROSPECTIVE JUROR: I leave to go on a trip
2 to Mexico on Monday morning.

3 THE COURT: You already have your airline
4 tickets or however you're going?

5 PROSPECTIVE JUROR: Yes.

6 THE COURT: Just approximately when will you
7 return? In other words, you'll be gone for a
8 week, two weeks?

9 PROSPECTIVE JUROR: I return Saturday. So
10 like I'm more than happy to take part, but like if
11 it was tomorrow I could return Monday, but I don't
12 know how it would work.

13 THE COURT: Okay. And is that a personal
14 trip or a business-related trip?

15 PROSPECTIVE JUROR: It's personal/business.
16 It's like a reward for work.

17 THE COURT: Okay. Any questions?

18 MS. SCHLAX: No questions by the defense,
19 Your Honor. And no objection to excusing her.

20 MR. CALIEL: No objection due to the
21 out-of-country travel schedule, Your Honor.

22 THE COURT: All right. Thank you. You're
23 free to go. We appreciate your time and service.

24 PROSPECTIVE JUROR: Thank you.

25 (Prospective juror excused.)

1 THE COURT: Was the other No. [REDACTED]

2 BAILIFF: No. [REDACTED] Your Honor.

3 PROSPECTIVE JUROR: Yes, ma'am. Two weeks
4 ago I accepted a career change position in
5 Nashville, Tennessee, and I'm actually moving this
6 weekend. So I won't be a resident of Florida
7 anymore after Saturday.

8 THE COURT: You made it just under the wire,
9 didn't you?

10 PROSPECTIVE JUROR: It was a good offer. I
11 couldn't refuse it.

12 THE COURT: Thank you. You said Saturday of
13 this week?

14 PROSPECTIVE JUROR: Yes, ma'am.

15 THE COURT: And actually move there?

16 PROSPECTIVE JUROR: Yes.

17 THE COURT: You're not returning here?

18 PROSPECTIVE JUROR: No, ma'am.

19 THE COURT: Okay. Any questions?

20 MS. SCHLAX: No questions, Your Honor, and no
21 objection to excusing him.

22 MR. CALIEL: No objections to excusing him.

23 THE COURT: All right, sir. You're excused.
24 Thank you for your time. Maybe you'll get
25 summonsed up there. You never know.

1 PROSPECTIVE JUROR: Thank you, ma'am.

2 THE COURT: Thank you.

3 (Prospective juror excused.)

4 THE COURT: We've got one other one. I'm
5 waiting on somebody to contact me back. There he
6 is now.

7 (Pause.)

8 THE COURT: All right. That other juror can
9 go. She has to come back at 9:00, just like the
10 rest in that group. We've got two jurors that
11 didn't put their names on their questionnaires.

12 THE CLERK: Correct.

13 THE COURT: But we know who they are.

14 MR. CALIEL: They put their numbers.

15 THE COURT: They put their numbers. Are you
16 okay with that? One of them signed it and put
17 their name on the signature line and the other one
18 put their juror number on the signature line.

19 MR. CALIEL: I am fine with it.

20 THE COURT: We can get it straightened out
21 tomorrow when they come back.

22 MR. CALIEL: Yeah.

23 THE COURT: Before you all keep doing that,
24 let's get back to whatever we need to do to finish
25 up.

1 MS. SCHLAX: Okay.

2 THE COURT: Leslie, these two go back in the
3 stack. We can identify. We'll get it
4 straightened out on Wednesday. It's got their
5 number.

6 THE CLERK: Okay.

7 MS. SCHLAX: I guess, Your Honor, we can
8 start with -- the defense has no objection to any
9 of the instructions given by the Court.

10 THE COURT: Okay. Thank you. And? I know
11 you had an opportunity to discuss with your client
12 anyone who was excused.

13 MS. SCHLAX: Yes, Your Honor.

14 THE COURT: He's under oath. Do you agree
15 you did discuss that?

16 THE DEFENDANT: Yes, ma'am.

17 THE COURT: And you're okay with everyone who
18 was excused?

19 THE DEFENDANT: Yes, ma'am.

20 THE COURT: Thank you.

21 I don't know what else. There was something.

22 MR. CALIEL: The verdict.

23 THE COURT: Oh. This is entitled Defendant's
24 Motion in Limine regarding final verdict, is that
25 correct?

1 MR. CALIEL: That is correct, Your Honor.

2 THE COURT: All right. I'm going to deny
3 that and I'll follow up with a written order.
4 That was No. 9 on the index of pending motions.

5 MR. CALIEL: Yes, Your Honor.

6 THE COURT: Is there anything else that we're
7 all waiting on which does not require us to be on
8 the record? The Clerk's Office graciously agreed
9 to make our copies of the questionnaires for all
10 of us to use and the first set, the first hundred
11 is here and being collated while we wait on the
12 third set. So I don't think we need to be on the
13 record, do we?

14 MR. CALIEL: I don't believe so, Your Honor.
15 Just scheduling wise we -- I think it's an
16 agreement that we're going to go in recess,
17 defense will stay here and we'll get our copies,
18 we'll review those and then we're going to
19 reconvene tomorrow morning to discuss what we've
20 reviewed. I think that's it. I don't think
21 anything further is needed from the State on the
22 record.

23 Julie, do you need anything else on the record
24 before going into recess?

25 MS. SCHLAX: No, Your Honor.

1 THE COURT: Well, it's going to be awhile I
2 think before we have these.

3 MR. CALIEL: Yes.

4 THE COURT: So I'm not leaving until we get
5 them, I may not sit here the whole time, but we
6 can be in recess. Do you need to speak with your
7 client before he's sent back?

8 MS. SCHLAX: No, Your Honor. We need to
9 collate all these so that he can have something to
10 discuss. Right now we're on 87 -- 86.

11 THE COURT: Pretty good.

12 MS. SCHLAX: We're going forward.

13 THE COURT: So the jury is coming back at
14 11:00 so we should start at 9:00.

15 MR. CALIEL: I think so.

16 MS. SCHLAX: We actually had told them 10:00
17 o'clock, Your Honor.

18 THE COURT: You're right. We did tell them
19 10:00 o'clock. Mr. Caliel keeps thinking --

20 We need to be an hour earlier. We can start
21 earlier. Do you want to start at 8:30?

22 MS. SCHLAX: I think maybe we should.

23 MR. CALIEL: The State's available.

24 THE COURT: We'll be in recess.

25 (Evening recess.)

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IN THE CIRCUIT COURT OF THE
FOURTH JUDICIAL CIRCUIT, IN
AND FOR DUVAL COUNTY, FLORIDA.

Case No: 2013-CF-5781-AXXX-MA

Division CR-D

STATE OF FLORIDA

-vs-

DONALD JAMES SMITH,

Defendant,

PROCEEDINGS taken before the

Honorable Mallory D. Cooper, Judge of the Circuit Court,
on February 6, 2018, and as reported by Faye M. Gay,
Certified Realtime Reporter, Registered Merit Reporter,
and Certified Legal Video Specialist.

OFFICIAL REPORTERS, INC.
421 W. Church St., Suite 701
Jacksonville Florida 32202
904-358-2090

1 APPEARANCES:

2 MELISSA NELSON, Esquire,
3 State Attorney,
4 Appearing on behalf of the State of Florida.

4

5 MARK CALIEL and VANESSA SANCHEZ-WHEELER, Esquires,
6 Assistant State Attorneys,
7 Appearing on behalf of the State of Florida.

7

8 JULIE SCHLAX and CHARLES FLETCHER, Esquires,
9 Appearing on behalf of the Defendant.

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1 (Defendant present.)

2 THE COURT: Could I see the attorneys at
3 side-bar for a second?

4 MR. CALIEL: Absolutely.

5 (Counsel for the State and defense approached
6 the bench for a side-bar conference out of the
7 hearing of the court reporter.)

8 THE COURT: Good morning, sir. What is your
9 name?

10 MALE SPEAKER: Larry Guinnette
11 (phonetically).

12 THE COURT: Okay. You're certainly welcome
13 to be here, but I did want to advise you of one
14 thing. This is a high-profile trial, therefore,
15 obviously there are some rules in place that are
16 not normally in place. And one of those is you're
17 not allowed to identify a juror. We are going to
18 use their number, not their name.

19 But anything you hear or see today that would
20 affect their confidentiality cannot leave the
21 courtroom. Do you understand that?

22 MALE SPEAKER: Yes, Your Honor.

23 THE COURT: As long as you do that you're
24 welcome to be here.

25 MALE SPEAKER: Thank you for letting me in.

1 THE COURT: Thank you, sir.

2 I think I need to put on the record that your
3 client is in the courtroom, even though we're not
4 talking on the record right now.

5 MS. SCHLAX: Yes, Your Honor.

6 THE COURT: So it's clear he's here while
7 you're going over this. Thank you.

8 (Counsel and defendant reviewing jury
9 questionnaires.)

10 MR. CALIEL: Your Honor, may counsel and I
11 approach briefly?

12 THE COURT: You may.

13 (Counsel for the State and defense approached
14 the bench for a side-bar conference out of the
15 hearing of the court reporter.)

16 THE COURT: Okay. Is everyone ready to get
17 started?

18 MR. CALIEL: Yes, Your Honor, the State is
19 ready to proceed.

20 MS. SCHLAX: Yes, Your Honor, Julie Schlax
21 and Charles Fletcher on behalf of Mr. Smith.

22 THE COURT: Thank you. You may be seated.

23 The first thing I want to do is wrap up a
24 couple of things from yesterday. And I had read to
25 the panel of a hundred each a confidential juror

1 questionnaire information sheet as well an
2 instruction before I excused them regarding their
3 responsibility not to garner any outside information
4 about the case. And as well, as you know, the
5 jurors each filled out a juror questionnaire. So I
6 have a copy of each of those and that will be Court
7 Exhibit No. 1, a composite exhibit, for the record.

8 I also have -- there were several jurors during
9 each of the panels of 100 that needed to be excused
10 for legitimate legal reasons, work, travel, daycare
11 issues, things like that. So I have their
12 questionnaires, which we've removed from the 300.
13 There was one juror who had an emergency childcare
14 issue. He was in the last group of 100 and needed
15 to be excused before that group ever came in to go
16 to his child's school. And so he did not fill out a
17 questionnaire. So there's no questionnaire for No.
18 264.

19 So I'm giving the clerk a composite Exhibit 2,
20 Court Exhibit, the questionnaires from the jurors
21 that were excused and the notice on the record that
22 No. 264 did not have a questionnaire because he was
23 excused before coming in to fill one out.

24 And I think that's all the ministerial items
25 that we need to do before we get started. So I'm

1 ready.

2 MR. CALIEL: Your Honor, we've discussed with
3 the Court and counsel a procedure and if the State
4 could proffer possible cause challenges first.
5 We're just going to go in numerical order starting
6 obviously with 1 and going through the first 100.
7 After reviewing the questionnaires the State
8 believes that juror No. 2 should be struck for
9 cause.

10 MS. SCHLAX: And no objection, Your Honor.
11 Juror No. 2 indicated that he could not follow the
12 law.

13 THE COURT: Okay. He'll be excused for
14 cause. I guess I need to put on the record we
15 received 300 questionnaires yesterday at the end
16 of the day. Copy from each group, the State,
17 defense, Court, et cetera, have a copy of those
18 questionnaires and I think we need to put on the
19 record that all of us, the attorneys, Mr. Smith,
20 the Court, have reviewed the first 200 and that's
21 the groups we're dealing with today, first groups
22 of a hundred and 200, first two groups, so having
23 reviewed those I'll grant the motion for cause on
24 juror No. 2.

25 MR. CALIEL: Your Honor, we also, after

1 reviewing the questionnaires, would strike juror
2 No. [REDACTED] for cause.

3 MS. SCHLAX: And, Your Honor, no objection by
4 the defense. This juror No. [REDACTED] stated that they
5 could not follow the law.

6 THE COURT: Juror No. [REDACTED] will be excused for
7 cause.

8 MR. CALIEL: Next will be juror No. [REDACTED]

9 MS. SCHLAX: And, Your Honor, no objection as
10 to juror No. [REDACTED] This juror indicated that they
11 could not follow the law.

12 THE COURT: So I take it I'm pulling the
13 questionnaires out to make a court exhibit of the
14 ones that are being excused for cause today.

15 So the last one suggested and agreed to by
16 both parties, No. [REDACTED] that person is excused for
17 cause.

18 MR. CALIEL: The next would be juror No. [REDACTED]
19 Your Honor. We move to strike juror No. [REDACTED] for
20 cause.

21 MS. SCHLAX: Your Honor, may I remain seated?

22 THE COURT: You may.

23 MS. SCHLAX: Thank you.

24 THE COURT: You both may.

25 MS. SCHLAX: Your Honor, the defense does not

1 agree to this juror being struck for cause. The
2 only -- the only indication is that although she
3 indicated she had formed an opinion as to
4 defendant's guilt or innocence, she indicated she
5 could follow the instructions of this Court and
6 put aside anything she's heard. She also
7 indicated that she has a strong feeling about the
8 death penalty and explained my faith prevents me
9 from being for the death penalty.

10 We would suggest that further questioning is
11 necessary to explore whether or not she can truly
12 follow the law and this being a death penalty
13 case, it's critical that we explore fully their
14 feelings on the death penalty and explain the true
15 law, the true law in regards to the death penalty
16 and how a decision is arrived at by each juror is
17 not common knowledge. We think that further
18 questioning is necessary before this particular
19 juror is stricken for cause.

20 MR. CALIEL: We would agree for further
21 questioning based upon their arguments, Your
22 Honor.

23 THE COURT: All right.

24 MR. CALIEL: Judge, the next juror is juror
25 No.

1 MS. SCHLAX: And, Your Honor, the defense
2 does not agree to juror No. [REDACTED] being stricken for
3 cause. Again, the comment was I believe that some
4 people deserve the death penalty for their crimes,
5 although I want nothing to do with that decision.
6 I think further questioning is necessary to
7 understand what this juror's true feelings are
8 about the death penalty and whether or not,
9 although they may not enjoy the process of being
10 on a death penalty panel, if ultimately asked to
11 make a decision in regards to it, certainly
12 there's no indication on its face of this
13 questionnaire that this person cannot rise to the
14 test.

15 MR. CALIEL: Judge, I respectfully would
16 submit when an individual under oath says they
17 want nothing to do with the death penalty, that
18 seems to me that they are unable to follow the
19 law, but if we need to explore that further, we'll
20 agree to explore that further.

21 THE COURT: Okay. She did say she could
22 follow the law. We'll explore it further and see
23 where she really sits.

24 MR. CALIEL: Judge, the next juror is juror
25 No. [REDACTED]

1 MS. SCHLAX: And, Your Honor, the defense has
2 no objection to this juror being stricken for
3 cause. This juror indicated that they could not
4 follow the law.

5 THE COURT: Juror No. [REDACTED] is excused for
6 cause.

7 MR. CALIEL: The next juror, Your Honor,
8 would be juror No. [REDACTED]

9 MS. SCHLAX: And, Your Honor, the defense has
10 no objection. The juror indicated they could not
11 follow the law.

12 THE COURT: Juror No. [REDACTED] is excused for
13 cause.

14 MR. CALIEL: The next juror, Your Honor,
15 would be juror No. [REDACTED]

16 MS. SCHLAX: Your Honor, no objection. This
17 juror indicated they could not follow the law.

18 THE COURT: No. [REDACTED] is excused for cause.

19 MR. CALIEL: Next would be juror No. [REDACTED]

20 MS. SCHLAX: And, Your Honor, based on the
21 answers within the questionnaire, the defense has
22 no objection.

23 THE COURT: Juror No. [REDACTED] -- excuse me -- [REDACTED]
24 is excused for cause.

25 MR. CALIEL: Juror No. [REDACTED] Your Honor.

1 MS. SCHLAX: Your Honor, the defense has no
2 objection based on the answers within the
3 questionnaire, could not follow the law.

4 THE COURT: Juror No. [REDACTED] is excused for
5 cause.

6 MR. CALIEL: Next, Your Honor, would be juror
7 No. [REDACTED]

8 MS. SCHLAX: Your Honor, based on the answers
9 in the questionnaire, although I think it likely
10 this juror upon very simple further questioning
11 would end up causing themselves, I think it's
12 ambiguous in regards to whether or not this person
13 can follow the law and render a fair and impartial
14 verdict as well as ultimately make the decision
15 necessary in regards to the death penalty.

16 THE COURT: Is that an objection?

17 MS. SCHLAX: It is, Your Honor. Sorry.

18 THE COURT: I wasn't sure.

19 MR. CALIEL: Your Honor, we are referring to
20 not following the law, but rather question 6
21 regarding hardship. Juror No. 1 indicated that
22 they have a husband that's a hundred percent
23 disabled veteran that they provide care for.
24 They're also under a doctor's care and would have
25 to cancel multiple appointments, on medication,

1 stated that she needed to keep appointments for
2 her and her husband that are currently scheduled
3 through the VA and -- and don't usually reschedule
4 them -- the VA does not usually reschedule those
5 appointments.

6 Based upon the hardship presented in the
7 answers to question 6, we believe they're cause
8 challenges.

9 MS. SCHLAX: And, Your Honor, the greatest
10 difficulty, and we have a number of these that
11 allege hardship, but they don't really do those
12 with specificity, and there isn't -- although
13 obviously it would clearly be a hardship, she
14 didn't say when these doctors' appointments were,
15 if there's any available alternative for care for
16 her husband. Admittedly her answer to question 5
17 is problematic in that she does clearly indicate
18 that she could render a verdict based only on the
19 evidence and law presented to her in the trial.
20 But I just think on the face of this document the
21 defense cannot agree to her being a cause strike.

22 THE COURT: All right. Well, she's already
23 coming back so we've already inconvenienced her,
24 if you will, based on her hardship issues. So
25 we'll go ahead and question her when they come in.

1 If she hadn't already come back, I might look at
2 it differently -- well, I assume she came -- not
3 came back, is coming back, they're not here till
4 10, but I'll reserve on that one and we'll have a
5 few questions to see if she can more specifically
6 indicate what the hardships are.

7 MR. CALIEL: Next would be juror No. [REDACTED] Your
8 Honor.

9 MS. SCHLAX: Your Honor, the defense has no
10 objection. This juror indicated they could not
11 follow the law.

12 THE COURT: Okay. Juror [REDACTED] will be excused
13 for cause.

14 MR. CALIEL: Next would be juror No. [REDACTED], Your
15 Honor.

16 MS. SCHLAX: The defense has no objection.
17 This juror indicated they could not follow the
18 law.

19 THE COURT: Juror [REDACTED] is excused for cause.

20 MR. CALIEL: Next, Your Honor, would be juror
21 No. [REDACTED].

22 MS. SCHLAX: Your Honor, the defense has no
23 objection. This juror indicated that they could
24 not -- they could not follow the law.

25 THE COURT: Juror No. [REDACTED] is excused for

1 cause.

2 MR. CALIEL: Next, Your Honor, would be juror
3 No. [REDACTED]

4 MS. SCHLAX: Your Honor, the defense has no
5 objection. This juror indicated they could not
6 follow the law.

7 THE COURT: Juror No. [REDACTED] is excused for
8 cause.

9 MR. CALIEL: Next would be juror No. [REDACTED]

10 MS. SCHLAX: Your Honor, no objection. This
11 juror indicated that they could not follow the
12 law.

13 THE COURT: Juror No. [REDACTED] is excused for
14 cause.

15 MR. CALIEL: Next, Your Honor, would be juror
16 No. [REDACTED]

17 MS. SCHLAX: No objection by the defense,
18 Your Honor. This juror indicated they could not
19 follow the law.

20 THE COURT: No. [REDACTED] is that right?

21 MS. SCHLAX: Yes.

22 THE COURT: Okay. Just a moment. No. [REDACTED] is
23 excused for cause.

24 MR. CALIEL: Next, Your Honor, would be juror
25 No. [REDACTED]

1 MS. SCHLAX: And, Your Honor, no objection
2 from the defense. This juror indicated that they
3 could not follow the law.

4 THE COURT: Juror No. [REDACTED] is excused for
5 cause.

6 MR. CALIEL: Next, Your Honor, would be juror
7 No. [REDACTED]

8 MS. SCHLAX: No objection, Your Honor. This
9 juror indicated they could not follow the law.

10 THE COURT: Juror No. [REDACTED] is excused for
11 cause.

12 MR. CALIEL: Next, Your Honor, would be juror
13 No. [REDACTED]

14 MS. SCHLAX: And, Your Honor, the basis for
15 the State's cause challenge is a specific
16 vacation, travel, pre-paid for February 21st
17 through 24th for anniversary. Based on the fact
18 this is a sworn document and the Court did place
19 them under oath, we'll agree to the cause
20 challenge.

21 THE COURT: No. [REDACTED] is excused for cause.

22 MR. CALIEL: Next, Your Honor, would be juror
23 No. [REDACTED]

24 MS. SCHLAX: The defense has no objection.
25 This juror indicated they could not follow the

1 law.

2 THE COURT: Juror No. [REDACTED] 4 is excused for
3 cause.

4 MR. CALIEL: Next, Your Honor, would be juror
5 No. [REDACTED]

6 MS. SCHLAX: I originally checked that off
7 that we agreed to it. Oh, I'm sorry. We did. I
8 just had it out of order. Your Honor, the defense
9 has no objection. This juror indicated that they
10 could not follow the law.

11 THE COURT: No. [REDACTED] is excused for cause.

12 MR. CALIEL: Next, Your Honor, we have juror
13 No. [REDACTED]

14 THE COURT: Let me go back to No. [REDACTED] 5 for a
15 moment because I've been looking at these as you
16 called them out and I just want to put on the
17 record that although he was noncommittal, he
18 indicated he didn't think he could follow the law
19 and markedly not follow the law. He also by his
20 answers indicated he definitely could not follow
21 the law.

22 So who's the next one?

23 MR. CALIEL: Your Honor, the next is juror
24 No. [REDACTED]

25 MS. SCHLAX: And, Your Honor, the defense has

1 no objection. The juror indicated they could not
2 follow the law.

3 THE COURT: No. [REDACTED] is excused for cause.

4 MR. CALIEL: Next, Your Honor, we had juror
5 No. [REDACTED] based upon a medical hardship outlined in
6 question 6.

7 MS. SCHLAX: And, Your Honor, the defense has
8 no objection, besides specifying the medical
9 hardship, ultimately he thought it would affect
10 his ability to be a fair and impartial juror based
11 on his own medical concerns.

12 THE COURT: No. [REDACTED] is excused for cause.

13 MR. CALIEL: Next would be juror No. [REDACTED] Your
14 Honor.

15 MS. SCHLAX: The defense has no objection.
16 This juror indicated they could not follow the
17 law.

18 THE COURT: Juror No. [REDACTED] is excused for
19 cause.

20 MR. CALIEL: Next would be juror No. [REDACTED]

21 MS. SCHLAX: Actually there's another one.

22 MR. CALIEL: I apologize. I did skip over
23 juror No. [REDACTED] I apologize.

24 THE COURT: [REDACTED]?

25 MR. CALIEL: [REDACTED]

1 MS. SCHLAX: Your Honor, the defense has no
2 objection. This juror indicated they could not
3 follow the law.

4 THE COURT: No. [REDACTED] is excused for cause.

5 MR. CALIEL: Next would be juror No. [REDACTED]

6 MS. SCHLAX: Your Honor, the defense has no
7 objection. This juror indicated they could not
8 follow the law.

9 THE COURT: Juror No. [REDACTED] is excused for
10 cause.

11 MR. CALIEL: Next would be juror No. [REDACTED]

12 MS. SCHLAX: Your Honor, the defense has no
13 objection. This juror indicated they could not
14 follow the law.

15 THE COURT: Juror No. [REDACTED] is excused for
16 cause.

17 MR. CALIEL: And the last out of the first
18 100, Your Honor, is juror No. [REDACTED]

19 MS. SCHLAX: And the defense has no
20 objection, Your Honor. This juror indicated he
21 could not follow the law.

22 Your Honor, there were two additional causes
23 that the defense would like to put forward.

24 THE COURT: Okay. Just a moment.

25 No. 97 is excused for cause.

1 THE COURT: Who's the first one?

2 MR. CALIEL: [REDACTED].

3 THE COURT: [REDACTED] I'm ready.

4 MS. SCHLAX: Your Honor, the concern of why I
5 feel she has risen to a level of cause is she
6 indicated in question 4 that she had formed an
7 opinion as to the defendant's guilt. She then on
8 the last page indicates that although she thinks
9 that she could be a fair and impartial juror, she
10 then goes on to say, please explain, I have two
11 beautiful granddaughters and I can relate to how
12 the family feels. I would definitely want him
13 executed for his horrible crime. So she's
14 indicating that, number one, she's already found
15 him guilty in her mind and, number two, in her
16 mind the death penalty should therefore be
17 automatic.

18 MR. CALIEL: Your Honor, we believe that juror
19 No. [REDACTED] answers that she could follow the law,
20 despite the fact that she had already rendered an
21 opinion and that her feelings towards the death
22 penalty, she hasn't indicated that she couldn't
23 follow the law as instructed by this Court. Many
24 jurors -- and, in fact, it's an aggravating factor
25 under the law that if a child is killed it's

1 something that the jury may consider in
2 aggravation. I don't think, based upon her answers
3 alone, that she has risen to the level of cause and
4 we would just ask to further question her to
5 determine whether or not she can follow the law,
6 set aside her feelings and have an open mind for
7 deliberations when it comes to the penalty phase.

8 MS. SCHLAX: Your Honor, one additional thing
9 I would add, Dr. Butler was very attentive and her
10 primary concern as these questionnaires were being
11 filled out was to watch the jurors for any signs of
12 emotion. This particular juror, she has distinct
13 notes, was openly crying as she filled out the
14 questionnaire.

15 MR. CALIEL: Unfortunately, Your Honor, none
16 of that's on the record. I think we just have to
17 explore that individually with that particular
18 juror.

19 THE COURT: Well, I certainly didn't observe
20 that. Even if it occurred, I wouldn't have been
21 able to observe it from my vantage point. Had she
22 been in the first row on either side all of us
23 could. But she's going to be here anyway. I'll
24 reserve ruling on your request to excuse that
25 juror. The State or the defense can ask her a

1 couple of quick questions and that should finalize
2 the decision.

3 What's the other number?

4 MS. SCHLAX: Actually in re-reviewing, Your
5 Honor, I think it just got misplaced. This person
6 needs further questioning in regards to the
7 hardship.

8 THE COURT: What's the number?

9 MS. SCHLAX: [REDACTED] I apologize.

10 THE COURT: [REDACTED]?

11 MS. SCHLAX: [REDACTED] I originally put in our
12 cause.

13 THE COURT: Okay. Just a moment. Let me get
14 to it.

15 MS. SCHLAX: But I don't think the hardship
16 is clearly enunciated to rise to the level of
17 cause at this point.

18 THE COURT: Anything further from the State?

19 MR. CALIEL: No further cause challenges,
20 Your Honor.

21 THE COURT: Well, any response on juror No.

22 [REDACTED]?

23 MR. CALIEL: I think both sides just want to
24 bring juror No. [REDACTED] back to explore the hardship.

25 THE COURT: Okay. That's fine.

1 Madam Clerk, would you put Mr. Smith under
2 oath, please?

3 (Defendant sworn.)

4 THE DEFENDANT: Yes, ma'am.

5 THE COURT: Thank you, Mr. Smith.

6 We're dealing this morning with the first 100
7 panel that came yesterday and we've gone through
8 their questionnaires. As you recall, you were
9 excused yesterday as you agreed to, but now we've
10 gone over cause challenges and I just need to make
11 sure -- I know that they did, but I need to make
12 sure on the record. Did you have an opportunity to
13 discuss these cause challenges with your attorneys?

14 THE DEFENDANT: No.

15 THE COURT: Oh, you have not had an
16 opportunity to talk to them?

17 THE DEFENDANT: No. But I'll -- I'll waive
18 that opportunity. They're my attorneys and I -- I
19 trust their judgment.

20 THE COURT: Okay. Well, let me do this then.
21 Let's -- we won't recess exactly, but let me give
22 your attorneys a chance to go over the ones that
23 they -- they asked the Court grant for cause --

24 THE DEFENDANT: Excuse me. I heard the
25 argument, most of the arguments here and that

1 seemed like basis for cause.

2 THE COURT: Well, even so, let me let you
3 have a minute to talk with them in case there's
4 any other things that you want to know or ask them
5 about their challenges.

6 THE DEFENDANT: Okay.

7 THE COURT: Okay? So we'll just be at ease
8 for a few minutes.

9 We'll be in recess for a few minutes but
10 Mr. Smith can remain with his attorneys.

11 (Defense counsel conferring with defendant.)

12 MS. SCHLAX: Your Honor, would you like to go
13 back on the record to discuss Mr. Smith's and I's
14 discussions about jurors excused.

15 THE COURT: I'm ready to go on the record
16 when you are.

17 MS. SCHLAX: Your Honor, sure. I guess just
18 to make it clear on the record, the first 100,
19 Mr. Smith was getting something to eat and so our
20 mediation specialist, Dr. Brooke Butler, and
21 myself went through and these were the most
22 obvious cause challenges. Every one of these
23 jurors that we just excused indicated, we
24 discussed with Mr. Smith as we were going through
25 the second 100 that he was present with, that

1 anyone who identified themselves as having
2 previously formed an opinion and that they would
3 not be able to disregard what they had seen
4 previously and render a verdict just based on what
5 was placed in front of them during the guilt
6 phase, that those were clear challenge for causes.
7 And he indicated he was very comfortable with us
8 getting rid of those people. There are a number
9 of people that we are seeking further questioning
10 on and we've gone over in regards to everyone
11 who's going directly to 80.

12 THE COURT: Is that correct, Mr. Smith?

13 THE DEFENDANT: Yes.

14 THE COURT: Okay. The State and your
15 attorneys and now you, and the Court reviewed the
16 questions of the persons that had been requested
17 to be excused for cause and they have clearly
18 indicated and put on the record a reason why they
19 are a cause challenge and I wanted your attorneys
20 to go over that with you, but now that they have,
21 do you understand that?

22 THE DEFENDANT: Yes, ma'am.

23 THE COURT: And you're okay with the ones
24 that were excused for cause?

25 THE DEFENDANT: I am.

1 THE COURT: No questions about that?

2 THE DEFENDANT: No.

3 THE COURT: Okay. Madam Clerk and Mr. Clerk
4 brought to my attention that they wondered if it
5 would be advisable on juror No. [REDACTED] that was
6 excused before he came in and therefore didn't
7 fill out a questionnaire, that we put a blank
8 questionnaire in the record. As you know in the
9 future when people are reviewing files there may
10 be a question as to why there isn't one for that
11 number and then you have to go back to the
12 transcript to find out the answer to that
13 question. I have a blank one. I can put the No.
14 [REDACTED] and put juror excused prior to entering
15 courtroom and, therefore, did not fill out the
16 questionnaire or whatever you'd like for me to
17 put, just so there's something there in the paper
18 documents.

19 MS. SCHLAX: I am in agreement with that,
20 Your Honor. I think that we're trying to be
21 helpful that we should put juror excused for
22 childcare emergency prior to entry in the
23 courtroom.

24 THE COURT: Okay. And do you have any
25 problem with me putting that?

1 MS. SCHLAX: No, Your Honor.

2 THE COURT: State?

3 MR. CALIEL: No objections, Your Honor.

4 THE COURT: I want to make sure that I have
5 the numbers correct on cause challenges before we
6 proceed. I have No. [REDACTED] No. [REDACTED] No. [REDACTED] These are
7 the ones we did today. Not yesterday. No. [REDACTED]
8 No. [REDACTED] No. [REDACTED] No. [REDACTED] No. [REDACTED], No. [REDACTED], No. [REDACTED],
9 No. -- is [REDACTED] a cause?

10 MR. CALIEL: It is, Your Honor.

11 THE COURT: Thank you. And [REDACTED]?

12 MR. CALIEL: Yes, Your Honor.

13 MS. SCHLAX: Yes, Your Honor.

14 THE COURT: Was a cause. And then [REDACTED]?

15 MS. SCHLAX: No, Your Honor.

16 MR. CALIEL: Yes.

17 MS. SCHLAX: I apologize. Yes, Your Honor.

18 THE COURT: [REDACTED] [REDACTED]?

19 MS. SCHLAX: Yes, Your Honor.

20 THE COURT: [REDACTED].

21 MS. SCHLAX: Yes, Your Honor.

22 THE COURT: [REDACTED]

23 MS. SCHLAX: Yes, Your Honor.

24 THE COURT: [REDACTED]

25 MS. SCHLAX: Yes, Your Honor.

1 THE COURT: [REDACTED]

2 MS. SCHLAX: Yes, Your Honor.

3 THE COURT: [REDACTED]

4 MS. SCHLAX: Yes, Your Honor.

5 THE COURT: [REDACTED]

6 MS. SCHLAX: Yes, Your Honor.

7 THE COURT: [REDACTED]

8 MS. SCHLAX: Yes, Your Honor.

9 THE COURT: [REDACTED]

10 MS. SCHLAX: Yes, Your Honor.

11 THE COURT: [REDACTED]

12 MS. SCHLAX: Yes, Your Honor.

13 THE COURT: [REDACTED]

14 MS. SCHLAX: Yes, Your Honor.

15 THE COURT: [REDACTED] and [REDACTED] Is that right?

16 MR. CALIEL: Those are all the jurors that --
17 that the State had indicated based upon the
18 arguments.

19 THE COURT: Okay.

20 MR. CALIEL: Your Honor, the next thing I was
21 going to suggest to the Court is the -- there are
22 a number of jurors that the State believes can be
23 passed on to the 80 panel for the overall jury
24 selection. There may be some disagreements as to
25 those and obviously we can question those

1 disagreements, but if we can agree to any of those
2 jurors, then at least we can excuse these jurors
3 until Thursday morning as well.

4 MS. SCHLAX: Your Honor, out of the first 100
5 I misspoke earlier. There were only one, two,
6 three, four, five, six of the first hundred that
7 the defendant feels should be passed to Thursday.
8 That number increases for the second hundred.

9 MR. CALIEL: Okay. I had substantially more,
10 Your Honor. I don't know how you want to deal
11 with that. I think my number was closer to 31
12 jurors that had nothing on their questionnaires
13 that would indicate any challenge. I can raise
14 them, we can look at them or we can agree just to
15 the six and go to individual questioning. However
16 the Court wants to go. But the State is very
17 liberal, I guess is the best way to put it, when
18 we were dividing up these jurors and that the ones
19 that we indicated based upon the four corners of
20 the document have no reasons to be struck for
21 cause. There may be peremptory strikes that may
22 be excused, but we didn't see any cause
23 challenges.

24 THE COURT: Do you know if yours are the same
25 as his?

1 MS. SCHLAX: I would hazard a guess that the
2 ones we've chosen probably are included in the
3 list. I think probably the distinction the State
4 is making that we're not comfortable with is that
5 the State may have been very comfortable if
6 someone indicated, yes, I've been exposed to
7 pretrial publicity, but then simply checked the no
8 it wouldn't affect my verdict. Some were
9 ambiguous enough in terms of what they had been
10 exposed to that we feel incumbent upon ourselves
11 to know have they been exposed to things that are
12 not proper consideration for the guilt phase. And
13 we can question them and, of course, we need to do
14 that in a private setting so as not to expose
15 other jurors to things that would be inadmissible
16 during the guilt phase. We can't really make that
17 determination and I think that's probably where we
18 somewhat disagree.

19 We received and I know the Court's had the
20 opportunity to review these, some people are very
21 specific as to what they had heard. Most were
22 very general. Oh, basically what was reported in
23 News4Jax or basically what's reported at the -- at
24 the top. We felt we need to go into more detail
25 with them on exactly what they had been exposed to

1 and whether or not they could truly put that aside
2 as to reach a fair and impartial verdict and
3 penalty phase.

4 MR. CALIEL: Your Honor, they can indicate
5 the six they had. Obviously there are many land
6 mines with some of the subject matter in the case
7 and if they believe they need to question those
8 additional 25 jurors, hopefully it won't be
9 lengthy questioning, but it may be safe to do so.
10 So if defense counsel can indicate those,
11 hopefully we agree on these six, but if they can
12 indicate for the record which six they believe are
13 able to be passed over, then we'll agree.

14 THE COURT: Why don't you indicate the six
15 and you do the same and then I'll put them out.

16 MS. SCHLAX: Sure. Do you want to do so
17 informally, Your Honor?

18 THE COURT: That's fine. See if you have the
19 same six.

20 (State and defense counsel conferring.)

21 MR. CALIEL: Your Honor, the list that was
22 provided by counsel we have no objection to
23 passing those jurors through to jury selection.

24 MS. SCHLAX: The full -- full six?

25 MR. CALIEL: Yes.

1 MS. SCHLAX: So all six. And I'll bring them
2 to the Court's attention.

3 THE COURT: And has your client had an
4 opportunity to view this?

5 MS. SCHLAX: Yes, Your Honor.

6 THE COURT: Is that right, Mr. Smith?

7 THE DEFENDANT: I'm reviewing them now,
8 ma'am.

9 THE COURT: Okay. Let me know when you're
10 finished. Take your time.

11 (Defense counsel conferring with defendant.)

12 MS. SCHLAX: Your Honor, after reviewing
13 these again with my client, we agree to juror No.
14 [REDACTED] being passed through to Thursday.

15 THE COURT: Let me ask you this. If I
16 understand you correctly, it's just the one juror,
17 correct?

18 MS. SCHLAX: Yes.

19 THE COURT: Let's bring them all in and
20 question them. Bringing one juror separately from
21 everybody else, you know, if there was a group of
22 them I could understand it, but I'm not sure that
23 accomplishes anything.

24 MS. SCHLAX: That's fine, Your Honor. And
25 some of them, honestly, further questioning will

1 be very, very brief.

2 THE COURT: I realize that and I don't have
3 any problem with that at all. And I think if
4 there's any issue at all -- what do you all think
5 about excusing one juror to come back?

6 MR. CALIEL: Judge, I think we can just bring
7 them all up. I think it will look unusual just to
8 send one person home, if that's going to be the
9 case.

10 THE COURT: I agree.

11 MR. CALIEL: What I'd like to suggest, Judge,
12 and I know there had been some just preliminary
13 discussions about questioning the jurors
14 individually and how we would go, would the State
15 go, typically I would say it's always our burden,
16 we would like to go first, but in particular, and
17 I can enumerate the jurors numbers so counsel can
18 indicate this, I would suggest with the following
19 juror, that the defense goes first because we have
20 no questions to ask of these jurors specifically.
21 And so I would defer to the defense to question
22 these individual jurors because, like I said, we
23 believe that they didn't indicate anything that
24 would prevent them from moving on. Starting would
25 be juror No. ■, juror No. ■ juror No. ■ juror

1 No. [REDACTED], juror No. [REDACTED] juror No. [REDACTED] and juror No.
2 [REDACTED], juror No. [REDACTED] juror No. [REDACTED] juror No. [REDACTED]
3 juror No. [REDACTED] juror No. [REDACTED] juror No. [REDACTED] juror
4 No. [REDACTED] juror No. [REDACTED] juror No. [REDACTED] juror No. [REDACTED]
5 juror No. [REDACTED] juror No. [REDACTED] juror No. [REDACTED] juror
6 No. [REDACTED], juror No. [REDACTED], juror No. [REDACTED] juror No. [REDACTED]
7 juror No. [REDACTED] juror No. [REDACTED] juror No. [REDACTED] juror
8 No. [REDACTED] juror No. [REDACTED] juror No. [REDACTED] juror No. [REDACTED]

9 [REDACTED] I guess nobody has any questions for. So we'll
10 just leave it at that. Juror No. [REDACTED] Juror No.
11 [REDACTED], juror No. [REDACTED]. And that's the list of the
12 jurors that we don't have any questions for at
13 this time. We may have questions depending on
14 their answers to the defense questions.

15 THE COURT: All right. That should give you,
16 as you've requested, quite a few that you can
17 question first.

18 MS. SCHLAX: Yes, Your Honor. That's
19 acceptable to the defense.

20 THE COURT: Okay. So does everyone agree
21 that we can give the numbers of the jurors that
22 everyone has agreed should be excused for cause to
23 juror/witness so they can go down and bring them
24 up as a group? This would be the whole group that
25 are all going to be excused. Once they come up

1 here, they can sit in the seats in the back and
2 they don't have to be in particular order. They
3 just need to come in and have a seat and we'll
4 explain to them that we're grateful for their
5 service and they're no longer needed and they're
6 free to go.

7 After that they should be putting together our
8 first group of ten which we're going to question
9 individually and they should be brought up shortly
10 after this initial group. Well, you all can figure
11 that out. The first ten you've got left need to be
12 in the next group. So do you need me to write these
13 numbers down for you?

14 BAILIFF: Yes, ma'am.

15 THE COURT: Okay. As I go over them, you all
16 make sure that I have them correct, but I think we
17 need the first group to be juror No. [REDACTED] No. [REDACTED], No.
18 [REDACTED] No. [REDACTED],
19 [REDACTED] and
20 [REDACTED] Is that correct?

21 MR. CALIEL: That is the list of cause
22 challenges that the State had recorded.

23 THE COURT: Those are the jurors that both
24 the State and the defense would agree can be
25 excused for cause.

1 And then whatever is left down there in order
2 we need the first ten brought up so we can start --

3 BAILIFF: Okay. I'll just have them get them
4 ready when I go back down to get them. I'll bring
5 these up real quick and I'll have them lined up to
6 go get them after you've dismissed them.

7 THE COURT: Okay. These people can come in
8 in order and have a seat.

9 BAILIFF: Okay.

10 (Bailiff approached the bench.)

11 THE COURT: Can I see the attorneys at
12 side-bar, please?

13 (Counsel for the State and defense approached
14 the bench for a side-bar conference out of the
15 hearing of the court reporter.)

16 THE COURT: Juror No. [REDACTED] has had a medical
17 emergency and is having to be transported by
18 rescue. Therefore, that juror will not be
19 available for any further questioning or to
20 participate in the jury.

21 Thank you.

22 All right. Don't let them come in for just a
23 minute. If anybody needs to use the restroom this
24 is a good time. We'll take a short recess.
25 Mr. Smith or anybody else. And we won't bring those

1 cause jurors in until we resume, but just for a few
2 minutes we'll be in recess.

3 (Recess.)

4 (Defendant present.)

5 THE COURT: I think what we're going to need
6 to do, based on how this morning has gone, is
7 we'll question the ten jurors each individually
8 and have them wait in the hall and then once
9 decisions are made bring them back in and excuse
10 them or whatever it is we're going to do. I don't
11 think we can do it while they're in here. You
12 have to have time to talk to your client. I mean
13 I just think that's a better way to do it. We'll
14 question all ten of them and then we'll give you
15 whatever opportunity you need and whatever
16 opportunity the State needs to consult and then
17 you all can let me know your decision as to
18 whether you agree or not.

19 MS. SCHLAX: Yes, Your Honor.

20 THE COURT: Do you all agree with that or do
21 you have a better way? I don't know of a better
22 way to do it.

23 MR. CALIEL: I think while they're here, Your
24 Honor, I think that's probably the most efficient
25 way, especially with the movement of the jurors.

1 MS. SCHLAX: The only suggestion I might
2 have, and I agree with this general concept, is
3 just the time it takes for someone to walk out of
4 the room, maybe we just spontaneously determine if
5 it is going to be a cause challenge, we argue it
6 right then and there and we can bring all ten in
7 at one time and let them know our ultimate
8 decision.

9 THE COURT: I don't want to bring them in at
10 one time until they're going home. I don't want
11 to do that.

12 MS. SCHLAX: Okay.

13 THE COURT: We're dealing with them
14 individually. There's no reason why you can't use
15 that time to discuss it with your client and
16 things like that.

17 MS. SCHLAX: Sure.

18 THE COURT: And already have your decision
19 made. Or even if you don't need more than a
20 minute, go ahead and discuss with the State.

21 MS. SCHLAX: Okay.

22 THE COURT: Do you agree this is going to be
23 a cause challenge and we can get ready at the end,
24 that will just make it quicker. But I don't want
25 them going out. I don't like that idea. I don't

1 mind if they went and came back in, but that
2 doesn't save any time.

3 MS. SCHLAX: Right.

4 THE COURT: And you may need longer for some
5 of them than others.

6 MS. SCHLAX: Okay.

7 THE COURT: So I think we have them wait and
8 then once we've made a decision for all ten, bring
9 them in individually and tell them what they're
10 doing and send them on their way.

11 MS. SCHLAX: Yes, Your Honor.

12 THE COURT: All right. So the group of
13 jurors that it's been agreed on the record will be
14 excused for cause, that group is here. May they
15 come in?

16 MR. CALIEL: Yes, Your Honor. The State's
17 prepared.

18 THE COURT: All right.

19 MS. SCHLAX: As is the defense, Your Honor.

20 (Prospective jurors present.)

21 THE COURT: Thank you, ladies and gentlemen.
22 What I'm going to do is I just need to make sure
23 that each of you we requested come up is here. So
24 I'm just going to have you raise your hand as I
25 call your number. No. [REDACTED] No. [REDACTED] No. [REDACTED] Oh, I'm

1 sorry. That was yesterday. I'm sorry. No. [REDACTED]
2 No. [REDACTED] No. [REDACTED] No. [REDACTED] No. [REDACTED] No. [REDACTED] No.
3 [REDACTED] No [REDACTED] No. [REDACTED] No. [REDACTED]. No. [REDACTED] No. [REDACTED]
4 No. [REDACTED] No. [REDACTED] No. [REDACTED] No. [REDACTED]. No. [REDACTED] No.
5 [REDACTED] No. [REDACTED] No. [REDACTED] No. [REDACTED] No. [REDACTED] No. [REDACTED] --
6 [REDACTED]

7 Did I skip anybody?

8 MR. CALIEL: Yes, Your Honor, juror No. [REDACTED].

9 MS. SCHLAX: [REDACTED]

10 THE COURT: I'm sorry. No. [REDACTED] Thank you.
11 I'm sorry. I got various notes written on here
12 and I just didn't see it. Thank you.

13 Ladies and gentlemen, you're going to be
14 excused. We've had the opportunity to go over all
15 the questionnaires, both the State and the defense
16 and the Court have reviewed all the questionnaires,
17 and for various reasons you do not need to continue
18 with the jury selection process. I am sure you must
19 question why we couldn't let you know that yesterday
20 but I hope you'll understand that we had 300
21 questionnaires to read. Those of you in the early
22 group, we didn't finish until late in the day with
23 the last group and then we spent our evening and
24 this morning reviewing.

25 But with that being said, all of us would like

1 to thank you for your willingness to serve. You
2 have completed your jury duty. When you leave
3 they're going to collect your juror buttons and your
4 juror hang tag and you are free to go about your
5 ordinary business.

6 Thank you all very much for your willingness to
7 serve.

8 (Excused prospective jurors absent.)

9 THE COURT: Is everyone ready to proceed? I
10 don't know if our group is out there or not.

11 MR. CALIEL: Yes, Your Honor, the State is
12 ready to proceed.

13 MS. SCHLAX: Yes, Your Honor.

14 BAILIFF: Judge, is the clerk's office
15 bringing them up or are we going down to get them?

16 THE COURT: Just the next ten.

17 BAILIFF: Next ten.

18 THE COURT: Bring the next ten. They don't
19 come in. They sit out there. We'll bring them in
20 one at a time.

21 BAILIFF: Do we got a list of what ten?

22 THE COURT: Oh, it's No. [REDACTED] You all check
23 me. [REDACTED] and [REDACTED] Let's go
24 ahead and bring [REDACTED], since that's -- that's the
25 whole first page of our jury.

1 BAILIFF: So ■ and ■?

2 MS. SCHLAX: ■ we just excused for cause,
3 Your Honor.

4 THE COURT: We did?

5 THE CLERK: Uh-huh.

6 MS. SCHLAX: We didn't?

7 MR. CALIEL: No.

8 MS. SCHLAX: I apologize.

9 THE COURT: So that's one, two, three, four,
10 five, six, seven, eight, nine, ten. It's 11, but
11 it completes the page. Do you have the numbers
12 okay?

13 BAILIFF: Yes, ma'am.

14 THE COURT: Okay. Thank you.

15 Jeff, they're going to sit over here, first
16 jury seat.

17 BAILIFF: Yes, ma'am.

18 THE COURT: And that gives us a closer seat
19 so we can all hear everybody.

20 BAILIFF: Yes, ma'am.

21 THE COURT: And when they leave here they
22 need to remain in the hall until we talk to each
23 of the 11 that they're bringing up and then we'll
24 make decisions and we'll let them know. So they
25 just need to wait out there.

1 BAILIFF: At some point do you want to go
2 down and get the next ten before these are
3 released?

4 THE COURT: Yeah, I think once we get to No.
5 [REDACTED] because we've got -- we've got [REDACTED] through [REDACTED].
6 There's a lot of people we've already excused so
7 once we get to [REDACTED], we'll be on that first one and
8 then one more so the next group -- well, they can
9 be brought up, but they need to sit in a different
10 place. They can't be sitting with the ones we've
11 already dealt with. Yeah, we don't need to have
12 to wait for them to come up. They need to be up
13 here.

14 BAILIFF: I'm not going to know which numbers
15 to get. If you want to slide me a sticky with the
16 numbers on it, I can pass it.

17 THE COURT: For the next group?

18 BAILIFF: Yeah, you slide me a sticky, I'll
19 send them down to get them.

20 THE COURT: Next group will be.

21 BAILIFF: I'll keep that on my desk in case
22 you need to refer back to it before I send them
23 down.

24 THE COURT: I might have them put the juror
25 in like the third seat because my view from here

1 is directly and through the court reporter. If
2 you all don't mind.

3 MS. SCHLAX: Yes, Your Honor. No objection.

4 THE COURT: I think you might be able to see
5 them a little better, too.

6 MS. SCHLAX: Yes, Your Honor, I agree.

7 MR. CALIEL: Whichever.

8 THE COURT: Ms. Schlax, can you see the third
9 seat?

10 MS. SCHLAX: I can, Your Honor. Isn't the
11 first seat, the podium in the way?

12 MR. CALIEL: I'll just move it so the third
13 seat is fine.

14 MS. SCHLAX: No, that's perfect, Your Honor.

15 THE COURT: Okay.

16 BAILIFF: We got everybody, ma'am.

17 THE COURT: Okay. Everybody ready?

18 MR. CALIEL: Yes, Your Honor.

19 MS. SCHLAX: Yes, Your Honor.

20 THE COURT: And, Jeff, we're going to put the
21 juror in the third seat so we can all see.

22 BAILIFF: Yes, ma'am.

23 THE COURT: Okay. We can bring in juror No.

24

25 BAILIFF: Juror No. [REDACTED]

1 BAILIFF: I just found out, Judge, two of
2 them went to the restroom real quick.

3 BAILIFF: No, they need to go.

4 THE COURT: Let them go.

5 BAILIFF: It's No. ■ and ■.

6 THE COURT: Then ■ can come in.

7 BAILIFF: Juror No. ■.

8 (Prospective juror present.)

9 THE COURT: Good morning. We're going to
10 have you have a seat.

11 BAILIFF: The third chair in.

12 THE COURT: Good morning, juror No. ■. As
13 you know, we're using numbers so that you're not
14 identified and we have all reviewed all the
15 questionnaires from your group and there's some
16 follow-up questions for some of you and that's
17 what you hear for this morning.

18 PROSPECTIVE JUROR: Okay.

19 THE COURT: The State and defense might both
20 want to ask you questions. It depends. And when
21 we're through, you'll wait outside and we'll let
22 you know whether you continue or whether you're
23 excused. Okay?

24 PROSPECTIVE JUROR: Okay.

25 MR. CALIEL: May it please the Court.

1 THE COURT: Sure. Mr. Caliel for the State.

2 MR. CALIEL: Thank you, Your Honor.

3 Good morning.

4 PROSPECTIVE JUROR: Good morning.

5 MR. CALIEL: In relying the questionnaires
6 that you filled out, you did indicate that you had
7 seen some media coverage in regards to this
8 particular case.

9 PROSPECTIVE JUROR: Yes.

10 MR. CALIEL: And that you have formed an
11 opinion. Is that accurate?

12 PROSPECTIVE JUROR: Yes.

13 MR. CALIEL: Okay. The Court will instruct
14 you if you're selected as a juror that you are
15 only to consider the evidence that's presented
16 here in trial. Do you feel that you would be able
17 to set aside any previously formed opinions based
18 upon what you've seen or heard or read and make a
19 decision based upon only the evidence which is
20 presented here in this courtroom?

21 PROSPECTIVE JUROR: I'm not sure.

22 MR. CALIEL: Okay. Why do you believe you're
23 not sure?

24 PROSPECTIVE JUROR: Cause I have pretty
25 strong opinions about this. So I'm not sure that

1 it could be -- I'm not -- I just -- I guess until
2 I would -- I'm not sure. I'm not sure.

3 MR. CALIEL: Okay. And to be clear, as
4 you're aware, the Court will instruct you later on
5 in the proceedings that the defendant, Mr. Smith,
6 is to be presumed innocent until that presumption
7 is overcome by evidence presented here in this
8 courtroom.

9 PROSPECTIVE JUROR: (Nods head.)

10 MR. CALIEL: Despite the fact that you formed
11 an opinion, do you believe that you could presume
12 Mr. Smith innocent as you're supposed to pursuant
13 to the law and maintain that presumption of
14 innocence until the State has presented evidence
15 to overcome that presumption of innocence?

16 PROSPECTIVE JUROR: Right. I -- I
17 understand. My dad's an attorney so I understand
18 how it all goes. I just also know that I'm also
19 human and I've seen and read a lot. So I mean I
20 could try. That's all I can say is I could try.

21 MR. CALIEL: And let me just ask this and I
22 think this would pinpoint this. Do you believe,
23 based upon the opinion that you formed and what
24 you have read, that you have a reasonable doubt as
25 to whether or not you could be fair and impartial

1 to Mr. Smith?

2 PROSPECTIVE JUROR: Based on what I have read
3 and what I have seen, it would be very difficult
4 to convince me otherwise.

5 MR. CALIEL: Okay.

6 PROSPECTIVE JUROR: I'm not saying it
7 couldn't be done, but it would be very, very
8 difficult.

9 MR. CALIEL: Do you believe what you have
10 read and seen in the media would play a part in
11 how you view the evidence in this case?

12 PROSPECTIVE JUROR: Again, as a -- from a
13 human perspective, yes.

14 MR. CALIEL: You also indicated that you have
15 an eight year old child, correct?

16 PROSPECTIVE JUROR: Yes.

17 MR. CALIEL: And that this would be extremely
18 difficult on you, given the fact that the victim
19 in this case was eight years of age at the time of
20 death?

21 PROSPECTIVE JUROR: Yes.

22 MR. CALIEL: I don't think anybody is eager
23 to listen to facts about the death of an eight
24 year old child. That being said, do you believe
25 that your personal family make-up would affect how

1 you view the evidence because it's so close to
2 your family?

3 PROSPECTIVE JUROR: Of course. Again, I mean
4 it's human nature. I mean just to be fair and
5 honest, at one point I started my Master's in
6 counseling and one of the reasons I decided not to
7 finish pursuing it is because some of the things I
8 heard is very difficult to separate. So I
9 realized it's probably not the best field for me.
10 So I think from a human perspective it would be
11 very, very difficult to when I go home to my
12 little eight year old to separate what I am seeing
13 and hearing based on the evidence that's
14 happening. I also have another child, too, who is
15 a little bit older, but it's just too close to
16 home for me. I think it would be very difficult
17 for me.

18 MR. CALIEL: Your Honor, may I have a moment?

19 THE COURT: You may.

20 (State counsel conferring.)

21 MR. CALIEL: Thank you, ma'am. I have no
22 further questions.

23 MS. SCHLAX: No questions, Your Honor.

24 THE COURT: If I could just ask you, please,
25 to wait in the hall. We'll let you know something

1 as soon as we can. Please do not discuss anything
2 that was mentioned in the courtroom until we have
3 an opportunity to talk to each of the jurors who
4 are waiting outside.

5 PROSPECTIVE JUROR: Okay.

6 THE COURT: Thank you so much.

7 PROSPECTIVE JUROR: Thank you.

8 THE COURT: And when she goes out, you can
9 bring in juror No. [REDACTED]

10 BAILIFF: Same way you came in.

11 PROSPECTIVE JUROR: Okay.

12 (Prospective juror absent.)

13 MR. CALIEL: Your Honor, procedurally does
14 the Court mind if I maintain at the podium as the
15 jurors come in and out. Might save a little bit
16 of time.

17 THE COURT: No. We need to do whatever is
18 best. It's going to be a long process so whatever
19 makes it a little easier.

20 BAILIFF: Juror entering the courtroom.

21 (Prospective juror present.)

22 BAILIFF: Good morning, sir. Just take the
23 third chair in.

24 THE COURT: Good morning, juror No. [REDACTED] As
25 you know, we're using your number, not your name.

1 We're not being rude, but that protects your
2 confidentiality. We've all reviewed your
3 questionnaire. Just a few follow-up questions.

4 PROSPECTIVE JUROR: Sure.

5 THE COURT: Start with Mr. Caliel from the
6 State. Thank you.

7 MR. CALIEL: Thank you, Your Honor.

8 Juror No. 3, you had indicated that English was
9 not your primary language, correct?

10 PROSPECTIVE JUROR: Yes, that's correct.

11 MR. CALIEL: Do you believe that you would
12 have any difficulty in sitting as a juror based
13 upon the fact that English is not your primary
14 language?

15 PROSPECTIVE JUROR: No, I don't have problem,
16 but some -- some words it's going to be hard to
17 me. Not all the words. I understand how to speak
18 and I understand what the word like, but sometimes
19 I have difficult with some words. Not all the
20 words.

21 MR. CALIEL: And you're currently employed,
22 correct?

23 PROSPECTIVE JUROR: Yes, sir.

24 MR. CALIEL: And you have a Bachelor's
25 Degree?

1 PROSPECTIVE JUROR: Yes.

2 MR. CALIEL: In education. And in reading
3 your juror questionnaire, you were able to read
4 the juror questionnaire in its entirety, correct?

5 PROSPECTIVE JUROR: All of it, yes.

6 MR. CALIEL: And then you also were able to
7 answer appropriately the questions and you wrote
8 all of your answers in the English language,
9 right.

10 PROSPECTIVE JUROR: Yes, sir.

11 MR. CALIEL: Do you have any difficulty in
12 comprehending or understanding any of the subject
13 matter in the questionnaire?

14 PROSPECTIVE JUROR: No.

15 MR. CALIEL: You also indicated, sir, that
16 you -- your job sometimes may be, I guess, an
17 impediment to you serving as a juror because of
18 your work schedule and you also have children that
19 you have to watch.

20 PROSPECTIVE JUROR: Yes, sir.

21 MR. CALIEL: Given the schedule that the
22 Judge announced yesterday, where we expect the
23 jury selection would take throughout the course of
24 this week and then the trial would last for four
25 days next week and potentially three days the

1 following week, do you believe that you could make
2 accommodations both for work and then also for
3 your children so that you could serve effectively
4 as a juror in this case?

5 PROSPECTIVE JUROR: No. No, sir.

6 MR. CALIEL: And why not?

7 PROSPECTIVE JUROR: The work sometimes like I
8 have to cover somebody doesn't come to work, so I
9 have to cover them. I have to be -- I have to be
10 at work.

11 MR. CALIEL: Okay.

12 PROSPECTIVE JUROR: The kids -- my wife can
13 take care of them, that's not a problem.

14 MR. CALIEL: Okay. Are there other employees
15 who also work at your place of business?

16 PROSPECTIVE JUROR: Yes, sir.

17 MR. CALIEL: How many employees work there on
18 a daily basis?

19 PROSPECTIVE JUROR: Seven. Seven employees.

20 MR. CALIEL: And understanding that, of
21 course, it's a hardship for any juror who has to
22 miss work or be away from their day-to-day
23 activities, but there would be other employees at
24 the place of business who could cover you if, in
25 fact, you were required to serve as a juror in

1 this case?

2 PROSPECTIVE JUROR: Yes, sir. Yes, sir.

3 MR. CALIEL: Okay. Thank you, sir. I don't
4 have any further questions.

5 THE COURT: Ms. Schlax or Mr. Fletcher?

6 MR. FLETCHER: I don't have any questions,
7 Your Honor.

8 THE COURT: No questions?

9 MR. FLETCHER: No.

10 THE COURT: All right. Juror No. [REDACTED] --

11 MR. CALIEL: Your Honor, hold on one second.
12 There was --

13 THE COURT: Okay.

14 MR. CALIEL: And when you answered your
15 question is there any other matter that may affect
16 your ability to serve as a juror, were you
17 referring to the language barrier that you were
18 talking about that certain words you can't
19 understand or was there something else?

20 PROSPECTIVE JUROR: No, just understand.

21 MR. CALIEL: Just understand.

22 PROSPECTIVE JUROR: Yes.

23 MR. CALIEL: Thank you, sir. I don't have
24 any further questions.

25 THE COURT: Mr. Fletcher.

1 MR. FLETCHER: I'm sorry. I do have a couple
2 of follow-ups.

3 THE COURT: That's fine.

4 MR. FLETCHER: Just on the language issue,
5 sir, there might come a point in the trial where
6 we get a little bit scientific. Do you think
7 those types of terms will cause a problem for you?

8 PROSPECTIVE JUROR: Yeah, that's what I
9 mentioned, you know, like sometimes a couple of
10 words is going to be hard to understand the
11 meaning.

12 MR. FLETCHER: Okay.

13 PROSPECTIVE JUROR: But usually I understand
14 most of whatever, like I do.

15 MR. FLETCHER: And you're not so shy that if
16 you hear something you don't understand, you
17 wouldn't hold your hand up and say --

18 PROSPECTIVE JUROR: I have no problem, no,
19 sir.

20 MR. FLETCHER: That's all I have. Thank you.

21 THE COURT: Anything further?

22 MR. CALIEL: Nothing further from the State,
23 Your Honor.

24 THE COURT: Juror No. [REDACTED] we're going to ask
25 you to wait in the hall. We'll let you know

1 something as quick as we can. I would caution you
2 not to discuss this conversation with anybody
3 waiting out there with you. You all can talk
4 about other stuff, but not this case. Okay?

5 PROSPECTIVE JUROR: Yes, ma'am.

6 THE COURT: Thank you.

7 PROSPECTIVE JUROR: Um-hum.

8 THE COURT: As he's going out, juror No. ■
9 can be coming in.

10 (Prospective juror absent.)

11 BAILIFF: No. ■.

12 (Prospective juror present.)

13 BAILIFF: Good morning, sir. Take the second
14 chair in.

15 THE COURT: Good morning, juror No. ■ Thank
16 you for coming back today. We're still using your
17 number so as not to identify you and we have
18 reviewed your questionnaire and just have a few
19 follow-up questions.

20 We'll start with Mr. Caliel from the State.

21 MR. CALIEL: Thank you, Your Honor.

22 Juror No. ■, in reviewing your questionnaire
23 you had raised an issue in regards to the fact that
24 you were a little nervous about photos of death or
25 related injuries.

1 PROSPECTIVE JUROR: Yes.

2 MR. CALIEL: Understanding in any homicide
3 case, if you are to sit as a juror, you will be
4 asked to look at the evidence in the case and
5 there will be photographs in this case that may be
6 unpleasant for people to look at. But do you
7 believe that you could serve your civic duty and
8 serve in that role as a juror and evaluate the
9 evidence and be able to consider the evidence in
10 its entirety and still be fair and impartial to
11 both the State of Florida and to Mr. Smith?

12 PROSPECTIVE JUROR: I feel I'd always be
13 fair, either way you look at it, but I -- I kind
14 of go like this if I see like -- see accidents
15 when police comes to a scene. I can't look at
16 those.

17 MR. CALIEL: I understand that certain things
18 are very unpleasant to look at. I'll be frank
19 that as you can imagine, based upon what you've
20 heard from the Court already in the form of the
21 questionnaire and what we're talking about here
22 today, that there will be some photographs that
23 will be unpleasant to look at. But do you believe
24 for the purpose of serving in your role as a juror
25 that you could look at that evidence as it relates

1 to the law and the defendant's guilt in this case
2 and reach a fair and just verdict in this case?

3 PROSPECTIVE JUROR: I'll be -- I'll always
4 want to be fair. I mean that's just the way it
5 is, but I just got to be honest, I'm not good at
6 looking at --

7 MR. CALIEL: Graphic nature of photographs?

8 PROSPECTIVE JUROR: Deceased. My mother
9 passed away. And I couldn't get from here when
10 she was in the coffin, you know. If there was 12
11 jurors and there was no way I had to be the 11th
12 -- to the 12th one, I'd absolutely do it, but
13 there's a car accident involving people I would --
14 of course I would help, but if there was all us in
15 here that could help, I would rather be the one
16 calling 911. But I wouldn't walk away and not
17 help.

18 MR. CALIEL: Understood.

19 PROSPECTIVE JUROR: I don't know how to say
20 that.

21 MR. CALIEL: And let me see if I can maybe
22 narrow it down for you. It would be difficult for
23 you as maybe many jurors to have to look at
24 something graphic in nature. But if you were
25 called upon to do so, do you believe you could

1 look at it this time, as unpleasant as it may be,
2 and serve your role as a juror?

3 PROSPECTIVE JUROR: I'd answer yes to that
4 but I'm not sure about looking at the picture.
5 The whole picture.

6 MR. CALIEL: Okay. Do you have concerns
7 because --

8 PROSPECTIVE JUROR: I would be -- I wouldn't
9 be on one side or the other. I just don't like
10 looking at the pictures. As far as being partial
11 to say yes or no, make up my mind, seeing the
12 photo or something to say somebody's guilty or not
13 guilty, I just -- I just have problems looking at
14 the pictures. If I have absolutely have to, yes,
15 and if I did I would be partial about it, but...

16 MR. CALIEL: And so --

17 PROSPECTIVE JUROR: I'm just really, really
18 nervous at this point as well. I just --

19 MR. CALIEL: I understand and I expect that a
20 lot of people may share your feelings. But what
21 you're saying is while you would not want to look
22 at the photographs, if you were called upon to do
23 so as your role in a jury you could do so and the
24 photographs themselves wouldn't sway you one way
25 or the other, it would be the evidence in the

1 case.

2 PROSPECTIVE JUROR: I would only be
3 opinionated by the evidence. As far as looking at
4 that picture, I mean I know I'd have to, but I
5 really don't want to.

6 MR. CALIEL: You would prefer not to, but you
7 could if called upon?

8 PROSPECTIVE JUROR: Yes, sir.

9 MR. CALIEL: You indicated in your questions
10 in regards to the death penalty that you don't
11 have strong feelings about the death penalty, but
12 you stated the death penalty would have to be
13 absolute not a guessing expedition. What did you
14 mean by that?

15 PROSPECTIVE JUROR: There's a lot of people
16 that's put to death as we all know from past
17 experiences that weren't guilty and if there was
18 like a photo or what you're saying and it was
19 very, very obvious that somebody put a gun to
20 somebody's head and killed 'em, I'm for the death
21 penalty. But if it's somebody 200 feet away and
22 they say they positively identified somebody, I
23 might have room for caution on that.

24 MR. CALIEL: Okay.

25 PROSPECTIVE JUROR: I'm not against the death

1 penalty, but I just would want it to be a one
2 hundred percent for sure thing.

3 MR. CALIEL: Okay.

4 PROSPECTIVE JUROR: I wouldn't want to guess
5 at it.

6 MR. CALIEL: And absolutely. You would want
7 to make sure that you had proof beyond a
8 reasonable doubt that the person was guilty before
9 you would even consider that, is that right?

10 PROSPECTIVE JUROR: Absolute.

11 MR. CALIEL: Okay. And then your final
12 indication where you said you don't believe you
13 have anything else that would affect your ability
14 to be a fair and impartial juror, and I think the
15 quote here is I'm not a blood and guts type of
16 person, that certainly relates back to the
17 photographs and things we've already discussed?

18 PROSPECTIVE JUROR: Yes, sir.

19 MR. CALIEL: Thank you, sir. I don't have
20 any further questions.

21 PROSPECTIVE JUROR: Yes, sir.

22 THE COURT: Ms. Schlax.

23 MS. SCHLAX: Thank you.

24 Mr. Gentry, I'm going to show you a photograph,
25 sir, and it's not --

1 THE COURT: Would you use his number?

2 MS. SCHLAX: I apologize.

3 THE COURT: Use his number.

4 MS. SCHLAX: Excuse me.

5 THE COURT: Not his name.

6 MS. SCHLAX: Juror No. [REDACTED] And it's -- this
7 is not graphic in any kind of way, sir. I want to
8 tell you that up front. I'm showing you this --
9 this picture for an important reason and we
10 appreciate so much you being candid. This is a
11 picture of a child.

12 PROSPECTIVE JUROR: Yes, ma'am.

13 MS. SCHLAX: Okay. And what we go through
14 this process, sir, to try to understand are there
15 -- we ultimately need folks that can critically
16 analyze what are sometimes just horrific pictures.
17 And I'll be frank, what I'm showing it is not a
18 horrific picture.

19 PROSPECTIVE JUROR: Yes, ma'am.

20 MS. SCHLAX: But it's to bring to the
21 forefront of your mind that if you were selected
22 for this jury you would be not only called upon,
23 but required to critically analyze extremely
24 graphic photos of this child's demise. And once
25 you critically analyze that ultimately reach a

1 verdict. And I couldn't help but notice when you
2 were talking to Mr. Caliel you indicated I would
3 not be impartial when I saw what we're -- we're
4 telling you is a fair comment will be extremely
5 graphic photos. Knowing that, sir, and we ask you
6 just in all candor can you give Mr. Smith a fair
7 trial knowing that's what you're going to see?

8 PROSPECTIVE JUROR: Fair trial portion, yes.
9 I don't want in my mind those kind of pictures.
10 Is that the one in question?

11 MS. SCHLAX: It is. And, sir, I can't help
12 but notice that you're visibly getting very
13 uncomfortable.

14 PROSPECTIVE JUROR: (Nods head.)

15 MS. SCHLAX: And that's something that we, of
16 course, want to take into consideration because if
17 you're -- if you're overcome with emotion, it's
18 very hard, and I know you want to be fair and I
19 have every belief that you would do everything in
20 your power to be fair, but do you think it's fair
21 to say that the emotion of seeing very graphic
22 photos of this child's demise will cause you such
23 inner turmoil that it will be difficult to reach a
24 fair and impartial verdict based solely on the
25 evidence?

1 PROSPECTIVE JUROR: If you're asking me if I
2 see the bad photos you're talking about --

3 MS. SCHLAX: Yes, sir.

4 PROSPECTIVE JUROR: -- and would I apply
5 automatic guilty to someone that's going on trial
6 for that, I can't go just on the graphic photos.
7 It would have to be -- it would have to be that
8 person was proven to do the crime.

9 MS. SCHLAX: Okay. Would you be so overcome
10 with emotion, sir, that that emotion would impact
11 how you view the evidence in the case?

12 PROSPECTIVE JUROR: I -- I don't think so,
13 but I don't like looking. I just -- we have to go
14 on safety, I work at -- at a job where you have to
15 watch safety things every now and then, you know,
16 you know, to help prevent accidents, and I -- I
17 explained before, I look away from the gory stuff,
18 car wrecks, and then that's an accident, this is
19 something very different, of course.

20 MS. SCHLAX: Okay.

21 PROSPECTIVE JUROR: I don't know if I'm
22 answering that correctly.

23 MS. SCHLAX: No, you're --

24 PROSPECTIVE JUROR: But I just -- I just hate
25 looking at that.

1 MS. SCHLAX: Okay.

2 PROSPECTIVE JUROR: And after seeing the face
3 put to it and describing it, it just makes it even
4 worse. It's sad.

5 MS. SCHLAX: Let me ask it --

6 PROSPECTIVE JUROR: All right.

7 MS. SCHLAX: In a different way. Do you
8 think being asked to go through this process that
9 you just, as a fellow human being, can go through
10 this process? You know, let me put it this way.

11 PROSPECTIVE JUROR: I really, really, really
12 want to answer yes, but I think it's something
13 might stick with me for the rest of my life. I'm
14 not a hundred percent sure. Not nothing implying
15 guilt, just something that looking at the
16 pictures. Because you guys both already said it's
17 going to be bad pictures.

18 MS. SCHLAX: I want you to assume that this
19 next question that you have been chosen for the
20 jury, that you have seen the most graphic photos
21 you could even possibly imagine right now. And
22 this is a hypothetical. I want you to assume that
23 you've been convicted beyond all reasonable doubt
24 that Donald Smith, in fact, is the person that
25 caused this child's demise. Would the death

1 penalty at that point be automatic in your mind?

2 PROSPECTIVE JUROR: All reasonable doubt?

3 MS. SCHLAX: All reasonable doubt. You --

4 PROSPECTIVE JUROR: I would have to -- I
5 would really have to consider it very highly.

6 MS. SCHLAX: Okay. Ultimately you're going
7 to be explained the law in regards to how the
8 death penalty, and it's a process, and there are
9 aggravating factors that you would -- you would be
10 able to consider and those would need to be proven
11 beyond and to the exclusion of a reasonable doubt.
12 And then there would be mitigating factors that
13 you could consider. You know, essentially
14 someone's entire life would be put forth and so,
15 again, assuming that we are past this stage where
16 you have endured very graphic photos, would you be
17 able to consider mitigating evidence?

18 PROSPECTIVE JUROR: Of course.

19 MS. SCHLAX: Okay.

20 PROSPECTIVE JUROR: I just wanted to make
21 sure I understood the question.

22 MS. SCHLAX: Okay. I don't have anything
23 further for this juror at this time.

24 THE COURT: Anything further?

25 MR. CALIEL: I don't have anything further,

1 Your Honor. But before we bring the next juror, I
2 do need to bring up a matter before the Court.

3 THE COURT: Okay. Juror No. [REDACTED] thank you for
4 your time. You're going to get to go outside. We
5 need to talk to all ten of you and then we'll let
6 you know something. Please do not discuss with
7 other jurors at all anything we talked about in
8 view of the questions or answers. And we'll have
9 you back in as quickly as we can and give you a
10 decision. Okay?

11 PROSPECTIVE JUROR: Yes.

12 THE COURT: Thank you.

13 (Prospective juror absent.)

14 THE COURT: We can't bring the next one in
15 yet. We have to wait a minute.

16 We have one thing we need to do on the record
17 before we bring the next one in.

18 Go ahead, Mr. Caliel.

19 MR. CALIEL: Your Honor, at this point in
20 time I have to lodge an objection and we had no
21 argument on the record in regards to the use of
22 the photograph of the victim in this case, Cherish
23 Perrywinkle. Primarily the discussion in where we
24 consented to the use was if there was an issue as
25 to the identity of the child and to explore

1 pretrial publicity. However, I fear, based upon
2 the manner in which the photograph was used,
3 particularly with the last juror that we
4 questioned, is it is doing exactly what the
5 defense argued the autopsy photos would do in the
6 trial portion. The entire examination, Ms. Schlax
7 held the photograph of the victim up and was --
8 was inquiring. I think you can show the
9 photograph, show that it's a child, but when
10 you're trying to elicit and inflame responses from
11 the jurors, based upon the innocent picture of a
12 child, I think that goes beyond what the State was
13 intending to agree to and I think there has to be
14 some boundary, you show the picture, but just the
15 entire questioning when we're repeatedly talking
16 about graphic photographs and holding the picture
17 of the child in front of the jury members, goes
18 beyond identifying the child for the sake of
19 pretrial publicity and goes to enrage, potentially
20 enrage or inflame the passions of the jurors to
21 the point where they cannot fairly answer the
22 questions.

23 So I have some concern in the manner in which
24 it's being used, I think it can be used to
25 identify the victim, it can be used this is a

1 child, do you understand this is going to be a
2 child and you're going to see pictures of the
3 child but to repeatedly ask the questions and to
4 hold the picture up for the entirety of the
5 questioning goes beyond what we agreed to and we
6 do have an objection to that use.

7 MS. SCHLAX: And, Your Honor, I never -- the
8 State agreed to my motion, but I think if you read
9 my motion and I indicated even in prior pretrial
10 off record discussions that I was not using it so
11 that they could identify Cherish Perrywinkle in
12 terms of pretrial publicity, that I thought it was
13 essential for the jury selection process to,
14 especially when we talk about the imposition of
15 the death penalty and their feelings on the death
16 penalty and whether or not they can consider
17 mitigating circumstances, when you're talking
18 about a child, which is a specifically enumerated
19 aggravating factor.

20 I understand that they have an objection and
21 obviously the Court is able to limit me, but my
22 motion and my intent, which I felt I had made very
23 clear to the Court and to the State, was not so
24 that they could just simply identify Cherish
25 Perrywinkle as the victim in the case, but, in

1 fact, be faced with the knowledge that they're
2 going to ultimately be asked to make a personal,
3 moral, individual decision based on the death of a
4 child. And the best way that I can attempt to get
5 at those true feelings and their ability to
6 actually consider mitigation, as is required by
7 the law, is to show a photograph of her.

8 MR. CALIEL: And, Your Honor, I thought there
9 was a discussion that the photograph was not going
10 to be put on an easel and presented in front of
11 the jury members for the entire portion of the
12 questioning, that they would be shown the
13 photograph and then the photograph would be put
14 down and they can ask questions in regards to
15 that. But to stand in front of the jury member
16 who's becoming emotional and to continually show
17 the face of the child in that jury member's face I
18 think goes beyond the scope of what we discussed.
19 I think they need to see the photograph so they
20 understand what we're talking about, they
21 understand who the victim is, but to maintain and
22 hold that photograph throughout the course of the
23 entire questioning only serves to dig into the
24 emotion and inflame the jury's answers and I think
25 that is where our objection lies.

1 THE COURT: Do either of you have a copy of
2 your original motion that the State agreed to?

3 MS. SCHLAX: I have -- I have it
4 electronically, Your Honor.

5 THE COURT: If you could just tell us what
6 date it was filed, I think the Clerk can find it
7 for me. Never mind.

8 (Staff Attorney approaching side-bar.)

9 THE COURT: Okay. I'm looking at your
10 motion. It's entitled motion to request the
11 defense be permitted to show photograph of the
12 victim during jury selection and after some
13 discussion the State agreed, but I must say that
14 what the motion says is asking the Court to allow
15 the defense to show a photograph during the jury
16 selection process.

17 MS. SCHLAX: Yes, Your Honor. And the --

18 THE COURT: Wait a second.

19 MS. SCHLAX: Oh, I apologize.

20 THE COURT: And there's nothing else in there
21 except asking to show. My understanding of show,
22 for whatever reason you needed to show it to them
23 and the State agreed, and was to show it to them.
24 This seems no different to me than when -- back
25 when we used to use the older evidence carts and

1 the State would put a picture of the deceased body
2 up on the evidence cart and then walk away and
3 never take it off and it's on there and on there
4 and on there, and the defense could -- when they
5 finally realized it, they objected and, of course,
6 it was not something that should have been
7 allowed. They show it and then they take it off.

8 So you can show the photograph to the jury
9 member or panel member and you can then refer to
10 it and you can refer to her age, but I agree that
11 it might as well be on the easel the way it was
12 used and I don't think that was my intention in
13 granting the motion, nor the State's intention
14 from their argument in agreeing to the motion. So
15 I mean even the pictures that they're going to
16 show during the trial are not going to be left up
17 for them to just look at ad infinitum, which in
18 this case is not a long period of time. They're
19 shown and then we move on to something else.

20 So to me the word show, I'm not saying you
21 lift it up and put it down, but once you show it
22 and ask the question, to me needs to be put aside
23 and you continue to refer to it, her age, whatever
24 you would like to about the evidence that you're
25 trying to get them to understand that they may be

1 seeing, that it relates to that child shown in the
2 photograph, but not to keep the photograph up
3 there the whole time you're questioning the juror.

4 I agree with the State. That's not what they
5 agreed to. And I granted the motion based on that
6 agreement. It's not what I thought the motion
7 said. It's not what I view the motion says today.
8 It just says show. It doesn't say I'd like to
9 keep the photograph out the entire time I'm
10 questioning the jury because I think it's
11 important for whatever reason. It just says show.
12 I'll ask you to show it, ask the first question
13 about it, put it aside and refer to it if you need
14 to. The photograph I showed you of the eight year
15 old victim we're talking about or whatever in that
16 regard, and not to keep it up the whole time
17 you're questioning the juror. So that's my
18 ruling.

19 MS. SCHLAX: And I completely understand the
20 Court's ruling, but just so, because we did not
21 argue this pretrial based on the agreement, let me
22 go ahead because that was not my understanding of
23 the agreement that was made in regards to the lack
24 of objection by the State. It's critical under
25 Morgan v. Illinois found at 504 US 719, and as I

1 illustrated in the motion, that the defense must
2 be allowed to ask case-specific questions in order
3 to effectively exercise the defendant's
4 constitutional right to a jury trial comprised of
5 jurors whom can critically evaluate the evidence
6 presented and specifically a juror's ability to
7 impose life as well as death.

8 The reason, and we may end up, unfortunately,
9 having to come down to semantics in terms of if I
10 show the jurors, and I imagine that -- this
11 particular juror I felt it necessary to address
12 this now because he specifically said he was not
13 sure if he could look at photographs of her
14 demise, but I anticipate having to use it in the
15 larger full panel instruction of exactly how long
16 I can show it to them so that they truly actually
17 contemplate their ability to sit and make that
18 personal, moral, individual decision in regards to
19 penalty.

20 And just simply flashing the photo, I would
21 suggest to the Court, and I will try to use
22 reasonable discretion, and obviously will abide by
23 any restrictions the Court places upon me, but in
24 order -- you know, some of these jurors will -- have
25 not thought about how they feel about the death

1 penalty. To some, when they truly recognize that
2 this child is no longer amongst us and assuming for
3 the purposes of my questions, which I'm forced to do
4 at this process, even without a conviction, because
5 we do not bifurcate this process, I have to be able
6 to arouse in them, if they have an inner prejudice
7 that will be so severe that they cannot follow the
8 law and consider mitigating circumstances. This is
9 the best way I know how to do that.

10 And, again, I understand the Court's ruling,
11 but I think it's -- it's so imperative in this
12 process and the reason we're taking so much time to
13 do this is to truly get jurors who are capable of
14 truly following the law, not just death qualified in
15 the sense that they can impose the death penalty,
16 but then they can also consider the alternative and
17 perfectly legal punishment which is mandatory life
18 in prison without parole

19 THE COURT: All right. Before the State
20 responds I want to correct one thing. I don't
21 think I said that you could only flash the
22 photograph. I think what I said was that you
23 could show the photograph, ask your initial
24 question about the photograph, and then put it
25 aside, which to me is not the same as flashing a

1 photograph. So I just wanted that to be clear.

2 MS. SCHLAX: I don't mean to be disrespectful
3 to the Court --

4 THE COURT: No, I understand. I'm not saying
5 up and down. I'm just saying once you've asked
6 your initial question about the photograph,
7 whatever that question might be, and I'm not
8 saying that there could be a potential juror or a
9 time in questioning the panel, whatever we end up
10 with, 80, we hope, that you might not say, Judge,
11 may we approach the bench and say this is why I
12 think I need to show the photograph again. Let me
13 do this, that's fine, this one area of inquiry
14 that's come up from the juror, I feel like, and I
15 would have to rule on that. So I'm not ruling
16 out, again, you can't ever show it again, but for
17 this purpose you got the age of the child, their
18 knowledge of the case and do they know it's --
19 well, just, for example, the first one knew, she
20 had an eight year old daughter, she knows this is
21 an eight year old child. They know some of these
22 things.

23 So in combination with your being able to
24 show a photograph of Cherish Perrywinkle, the
25 alleged victim, I think you can get into your

1 questions of what you need to find out about their
2 abilities, but again, now we get back to the
3 State, they haven't responded, but I just wanted
4 to clarify the flashing. I don't think I'm
5 limiting you to -- I know I'm not limiting it to
6 that.

7 Mr. Caliel.

8 MR. CALIEL: Obviously, Your Honor, the fact
9 that an eight year old is involved and the fact
10 they need to inquire as to whether or not the mere
11 fact in and of itself, that that would affect
12 their determination in a penalty phase, but one
13 thing we also have to do is remember we're not
14 going through and we're not fully instructing them
15 now, but the law makes the fact that she's eight
16 years old an aggravating factor.

17 Now, I don't think we need to at this
18 juncture get into the entire this is what you have
19 to do and this is weighing, but it is a legal
20 consideration, the fact that this was a child
21 victim is a legal consideration that they can use
22 to determine and it's up to the jurors to place as
23 much weight or as little weight as possible.

24 Now, I think the question, which is
25 appropriate is would the fact that the victim was

1 under the age of 12 or eight years old prohibit
2 you from analyzing and considering anything. She
3 asked that of this juror and he said, no, I would
4 consider the mitigation as well. But we have to
5 remember the law has said that that's an
6 aggravating factor and so we have to be careful
7 when we sit there and say, well, will this play a
8 part or will that greatly affect, because they're
9 allowed to greatly be affected by that aggravating
10 factor.

11 They could say that nothing could potentially
12 outweigh it, but they just have to be able to
13 listen to that evidence and I think that's the
14 difficult legal argument that we're talking about
15 in a vacuum here because they're not being
16 presented all the aggravation and all the
17 mitigation and instructed on the weighing
18 requirements that are there. But this is a legal
19 factor, unlike other things that can inflame the
20 passion of a jury. This has legally been
21 established as something they could consider being
22 proven beyond a reasonable doubt as to whether or
23 not the death penalty is appropriate. So I'm just
24 concerned when you get too much into the fact that
25 the child victim, that, again, the defense is

1 going down the road which they wanted to prevent
2 us from doing, which is without purpose inflaming
3 the passions of the jury based upon a photograph
4 without a specific purpose. As long as they tie
5 it to a purpose it's fine, but if all they're
6 trying to do is elicit an emotional response from
7 the jury we believe that's inappropriate and if it
8 happens again obviously we'll raise a
9 contemporaneous objection.

10 THE COURT: Well, I think I've ruled and I
11 think both of you or both sides, the five of you,
12 three on one side and two on the other, are very
13 experienced attorneys and can come up with ways to
14 deal with this issue. But, again, I -- I
15 certainly think that it's been agreed the defense
16 can show the picture, you may ask your question
17 about the picture, put the picture or photograph
18 aside and, again, if there becomes a need to do
19 more with the photograph, I'm not saying you can't
20 request to do that, but what you cannot do, I'm
21 ruling, is put the photograph up and keep it up
22 the whole time that you're talking to the juror.
23 There's other ways you can find out how they feel
24 once they've seen the picture, if they haven't
25 seen it already. Reminded of it today. There's

1 other ways to remind them this is who we're
2 dealing with, this is what you're going to be
3 asked to do, this child is this age, et cetera, et
4 cetera, et cetera. That's my ruling.

5 We can bring in juror No. [REDACTED]
6 (Prospective juror present.)

7 BAILIFF: Over here. Take the second chair
8 in.

9 THE COURT: Good morning, juror No. [REDACTED] I'm
10 over here. Thank you for coming back in. We have
11 all reviewed the questionnaire that you filled out
12 and the State and/or the defense may have some
13 follow-up questions.

14 We'll start with Mr. Fletcher.

15 MR. FLETCHER: Thank you, Your Honor.

16 Juror No. [REDACTED] you indicated on your
17 questionnaire that you have not heard anything about
18 this case. Is that still true?

19 PROSPECTIVE JUROR: Just what's come flashed
20 across the news as I go in and out the house.
21 That's about it. Just seen and heard the names
22 and that sort of thing.

23 MR. FLETCHER: Okay. Was that since
24 yesterday or was that prior to yesterday?

25 PROSPECTIVE JUROR: I haven't heard anything

1 recently, but I mean that was back when.

2 MR. FLETCHER: Okay. If I told you it's been
3 in the paper everyday for the last five or six
4 days, you have not seen any of it?

5 PROSPECTIVE JUROR: No, I don't really, you
6 know.

7 MR. FLETCHER: Okay. Do you have a specific
8 memory of what you did see? Other than what we
9 put in the questionnaire itself as far as the
10 allegations.

11 PROSPECTIVE JUROR: The only thing I saw that
12 I can remember is the -- when I walk in and out of
13 the house there is -- I don't know if that was
14 recently or then, but video of the Walmart parking
15 lot. That's about all I remember.

16 MR. FLETCHER: That's what sticks out?

17 PROSPECTIVE JUROR: Yes.

18 MR. FLETCHER: That's all I have, Your Honor.

19 THE COURT: Any questions from the State?

20 MR. CALIEL: No questions, Your Honor.

21 THE COURT: Thank you, juror No. ■■■ If
22 you'll remain in the hallway, we'll let you know
23 something in just a few minutes. Please do not
24 discuss with other panel members your questions
25 and answers.

1 PROSPECTIVE JUROR: Thank you.

2 THE COURT: Thank you.

3 (Prospective juror absent.)

4 THE COURT: You can bring in juror No. ■ once
5 juror No. ■ leaves.

6 BAILIFF: Please take the second chair in.

7 MR. CALIEL: May I proceed, Your Honor?

8 THE COURT: You may.

9 Good morning, juror No. ■

10 PROSPECTIVE JUROR: Good morning.

11 THE COURT: Thank you for being here and we
12 reviewed your questionnaire and the State or the
13 defense just have a few follow-up questions.
14 Thank you.

15 MR. CALIEL: And, ma'am, in reviewing your
16 questionnaire, and I just want to double-check,
17 questions 4 and 5 related to each other. Question
18 4 related to if you answered yes have you formed
19 an opinion as to the defendant's guilt, if you had
20 answered that you had seen media coverage or
21 whatnot. You answered no. The follow-up question
22 was if you answered question 4 yes, can you follow
23 the instructions of the Court and base your
24 verdict only on the evidence and law in the case
25 and you indicated no, and I think you may have

1 misread the question.

2 PROSPECTIVE JUROR: Okay.

3 MR. CALIEL: And so when you answered that,
4 was that a mistake when you wrote that down?

5 PROSPECTIVE JUROR: Yes. I'm sorry.

6 MR. CALIEL: Okay. You do believe that you
7 could follow the law and the instructions of this
8 Court?

9 PROSPECTIVE JUROR: Yes, I could.

10 MR. CALIEL: Thank you, ma'am. That's all.
11 Thank you.

12 PROSPECTIVE JUROR: Okay.

13 THE COURT: Ms. Schlax.

14 MS. SCHLAX: Good morning.

15 PROSPECTIVE JUROR: Good morning.

16 MS. SCHLAX: How long have you lived in -- in
17 Jacksonville?

18 PROSPECTIVE JUROR: Since 2014.

19 MS. SCHLAX: Okay. I see that you're a
20 student. Are you going to college here?

21 PROSPECTIVE JUROR: Yes, I do.

22 MS. SCHLAX: And which college do you go to?

23 PROSPECTIVE JUROR: [REDACTED]

24 MS. SCHLAX: And what are you studying
25 currently?

1 PROSPECTIVE JUROR: Nursing.

2 MS. SCHLAX: Okay. And you indicated that
3 you had no knowledge about this case before --

4 PROSPECTIVE JUROR: No.

5 MS. SCHLAX: -- before actually filling out
6 this questionnaire.

7 PROSPECTIVE JUROR: No, I don't.

8 MS. SCHLAX: Since you filled out this
9 questionnaire, just being in the courthouse
10 yesterday, you would have filled out the question
11 rather early in the day. Have you learned
12 anything else about this case?

13 PROSPECTIVE JUROR: No, I haven't.

14 MS. SCHLAX: Okay. I don't have any further
15 questions. Thank you.

16 MR. CALIEL: No follow-up, Your Honor.

17 THE COURT: Thank you.

18 Juror No. [REDACTED] thank you. We're going to ask you
19 to wait in the hall for a few minutes and then we'll
20 let you know how we're going to proceed. Please do
21 not talk with the other panel members about your
22 questions and answers.

23 PROSPECTIVE JUROR: Okay. Thank you.

24 THE COURT: Thank you.

25 And when she goes out you can bring in juror

1 No. [REDACTED].

2 (Prospective juror absent.)

3 (Prospective juror present.)

4 BAILLIFF: Take the second chair in.

5 THE COURT: Thank you, juror No. [REDACTED]. I want
6 to let you know we've gone over the questionnaires
7 and there was just a few follow-up questions.
8 That's what you're in here for now.

9 Mr. Caliel.

10 MR. CALIEL: Thank you, Your Honor.

11 Sir, you had indicated that you had seen some
12 of the media coverage prior to coming to court
13 yesterday involving the case; is that accurate?

14 PROSPECTIVE JUROR: That's correct.

15 MR. CALIEL: And on question 4 of the
16 questionnaire you indicated that you have formed
17 an opinion based upon the media coverage that you
18 had seen. Is that correct?

19 PROSPECTIVE JUROR: Yes.

20 MR. CALIEL: What is that opinion?

21 PROSPECTIVE JUROR: I mean from watching the
22 different things, I watch a lot of TV, kind of
23 retired now. I just at this time felt he was
24 guilty.

25 MR. CALIEL: Okay. Obviously the next

1 question that was posed to you, if you are to base
2 your verdicts in this case solely upon what you
3 have seen in this courtroom in the form of
4 evidence and what has been presented in the form
5 of testimony, you indicated that you could reach a
6 fair and impartial verdict based solely upon the
7 evidence and testimony in court. Can you do that?

8 PROSPECTIVE JUROR: I believe I can. You
9 know, I watch TV, you know, there's a lot of fake
10 news on TV today so how do I know whether it's
11 true or not. But you get information and you have
12 to make decisions, you know, from that, from what
13 I've seen that -- I formed my opinion.

14 MR. CALIEL: Can you come into this courtroom
15 with an open mind, listen to the evidence which is
16 presented here within this courtroom and only
17 reach your verdict based upon what you hear in the
18 form of testimony and see in the form of evidence
19 --

20 PROSPECTIVE JUROR: I believe I can.

21 MR. CALIEL: -- in this courtroom.

22 PROSPECTIVE JUROR: I can.

23 MR. CALIEL: Thank you.

24 You also indicated somewhat that you may have
25 a hardship. I think you just said you're

1 partially retired, but you also have a fabrication
2 business or work room.

3 PROSPECTIVE JUROR: My wife has a business
4 which I work at. It's just two of us. If it was
5 a week or two or something I can call it vacation.
6 But it's a situation when she has three clients
7 and if I was out for a month we would lose all
8 three clients and be out of business and no
9 business.

10 MR. CALIEL: Understood. The Court outlined
11 yesterday the schedule that probably for the
12 duration of this week we would be selecting a
13 jury, then next week we anticipate four days worth
14 of testimony and then, if required for a penalty
15 phase, the penalty phase would conclude the
16 following week, which would be the 20th, the 21st
17 and the 22nd of February. Given the outline
18 schedule by the Court, do you believe that you
19 could serve as a juror without enduring any undue
20 hardship with your wife's business?

21 PROSPECTIVE JUROR: I don't believe so
22 because we have deadlines that are due in that
23 time which will not be met and there are only
24 three clients, you lose your clients you'd be out
25 of business. Like I said, two or three days I

1 don't think is a problem, but if you start pushing
2 weeks. She does window treatments for model homes
3 and she has four model homes due on the 26th.
4 They also need to be installed by me. Otherwise
5 she would not be able to perform that duty and
6 would lose that client and 50 percent of her
7 business.

8 MR. CALIEL: Okay. And so do you feel that
9 if we had four days next week and then three days
10 the following week, which would take you up to the
11 22nd, that that would present such a hardship that
12 you -- it would affect how you -- your
13 concentration or your ability to serve?

14 PROSPECTIVE JUROR: It would, because I would
15 still have to go home and work after serving here.
16 If it's not sequestered, not sure what's going on,
17 but I would still have to go home after I do my
18 duties here and perform duties at work to help her
19 complete her duties so we can attempt to hit the
20 deadlines.

21 MR. CALIEL: And do you believe that you
22 couldn't do both effectively and that you would
23 miss the deadlines if you served as a juror in
24 this case?

25 PROSPECTIVE JUROR: Probably not because I'd

1 be working ten to 20 hours a day. I mean, again,
2 I don't know how long you stay here. This is my
3 first time doing this. But I don't know how many
4 hours are put in here at court compared to time I
5 get off and going back home and putting in six to
6 eight hours to perform my duties there.

7 MR. CALIEL: What we would anticipate as the
8 schedule would be that we would begin sometime
9 around 9:00 o'clock in the morning and then we
10 would conclude sometime between 5:00 and 5:30
11 every evening. I think you had mentioned a
12 deadline of the 26th of February. And obviously
13 we've already indicated that we're not going to be
14 working this weekend, we're not going to be
15 working the following weekend and a three-day
16 weekend and then the time after the 22nd. Do you
17 think under those circumstances it would pose an
18 undue hardship for you to serve as a juror if that
19 was the schedule that was outlined?

20 PROSPECTIVE JUROR: When you say the final
21 day is the 20th --

22 MR. CALIEL: 22nd. I apologize.

23 PROSPECTIVE JUROR: 22nd. I'm trying to
24 explain to you she makes window treatments which
25 are drapery panels, pillows and things so she's

1 probably got in the next three weeks a hundred
2 items to make of which I have to participate in
3 and then possibly to install so I think it would
4 be a hardship. I would love to serve but -- and
5 would I do what I have to do, yes. You know,
6 again, being up 16, 20 hours a day working, you
7 know, it's been a long time since I've done that
8 so I really don't know how my mental capacity
9 would be at that time.

10 MR. CALIEL: Thank you, sir. I don't have
11 any further questions.

12 THE COURT: Any other questions?

13 MR. FLETCHER: Just a follow-up, Judge.

14 THE COURT: Sure.

15 MR. FLETCHER: Thank you.

16 Chuck Fletcher for Donald Smith.

17 Juror No. [REDACTED] on your questionnaire you
18 indicated that you had heard something about the
19 alleged victim's mom, Rayne, in the past.

20 PROSPECTIVE JUROR: To the extent you see the
21 different parties' in this event on television.

22 MR. FLETCHER: And in the questionnaire we
23 put forth out sort of what we think the State is
24 going to present against Mr. Smith, the basic
25 allegation, and that was right on the

1 questionnaire. Other than seeing that similar
2 story line in the news, did you see anything in
3 the news about Donald Smith's past?

4 PROSPECTIVE JUROR: Yes.

5 MR. FLETCHER: And can you tell me a little
6 bit about what you heard.

7 PROSPECTIVE JUROR: Again, I don't know that
8 it's true, that he was a convicted sex offender.

9 MR. FLETCHER: Okay. That's what you've
10 heard?

11 PROSPECTIVE JUROR: That's what I've heard.

12 MR. FLETCHER: And if we tell you that you
13 have to come in next week, if you're chosen on
14 this jury, and you have to set all that stuff
15 aside, anything about his past, and give him a
16 fair and impartial trial, can you do that?

17 PROSPECTIVE JUROR: I think I can. I will
18 tell you that I've seen a lot of things in the
19 past and a lot of cases dictate your future.

20 MR. FLETCHER: Okay.

21 PROSPECTIVE JUROR: Actions. Not your
22 future, but the actions that you take.

23 MR. FLETCHER: So being honest, that's going
24 to be hard for you to set that what you've heard
25 aside?

1 PROSPECTIVE JUROR: Could possibly be, yes.

2 MR. FLETCHER: That's all I have. Thanks.

3 THE COURT: Anything further?

4 MR. CALIEL: Nothing further, Your Honor.

5 THE COURT: Juror No. [REDACTED]. Thank you. We'll

6 ask you to wait in the hall for a few minutes.

7 We'll let you know something as soon as we can.

8 And please do not discuss your questions and

9 answers with the other panel. Thank you.

10 If you would bring in juror No. [REDACTED] after juror

11 No. [REDACTED] leaves the courtroom.

12 (Prospective juror absent.)

13 (Prospective juror present.)

14 THE COURT: Good morning, juror No. [REDACTED]

15 We've reviewed all the questionnaires. We just

16 have a few follow-up questions for you.

17 PROSPECTIVE JUROR: Okay.

18 MS. SCHLAX: Good morning. It's really hard

19 not to say your name, but we do that just to

20 remind you everything is confidential. You will

21 never be identified.

22 PROSPECTIVE JUROR: Okay.

23 MS. SCHLAX: How long have you lived in

24 Jacksonville?

25 PROSPECTIVE JUROR: About six and a half

1 years.

2 MS. SCHLAX: And you had indicated that you
3 have not heard anything about the factual scenario
4 or this case.

5 PROSPECTIVE JUROR: I have not.

6 MS. SCHLAX: Okay. Since you filled out this
7 questionnaire, and that was rather early in the
8 day yesterday, have you heard something more about
9 this case?

10 PROSPECTIVE JUROR: I have not.

11 MS. SCHLAX: Okay. I don't have any further
12 questions.

13 THE COURT: Any questions?

14 MR. CALIEL: No questions, Your Honor.

15 THE COURT: All right. Juror No. [REDACTED] you can
16 walk back out. You need to remain in the hall.
17 We'll let you know something in a few minutes, but
18 please do not discuss this brief question and
19 answer with the other panel member.

20 PROSPECTIVE JUROR: Okay.

21 THE COURT: Thank you.

22 PROSPECTIVE JUROR: Thank you.

23 THE COURT: And juror No. [REDACTED] can come in as
24 juror No. [REDACTED] leaves.

25 (Prospective juror absent.)

1 (Prospective juror present.)

2 THE COURT: Good morning, juror No. [REDACTED]
3 Thank you for coming back today. We reviewed all
4 the questionnaires. The attorneys just have a few
5 follow-up questions.

6 Mr. Fletcher.

7 MR. FLETCHER: Thank you, Your Honor.

8 Juror No. [REDACTED] how are you doing today?

9 PROSPECTIVE JUROR: Fine.

10 MR. FLETCHER: After reading your
11 questionnaire you did answer yes to hearing things
12 about the case from the news.

13 PROSPECTIVE JUROR: Um-hum.

14 MR. FLETCHER: And other than what we wrote
15 on the questionnaire, where we sort of outlined
16 what he's been accused of doing, have you heard
17 anything else about Donald Smith?

18 PROSPECTIVE JUROR: No.

19 MR. FLETCHER: Have you heard anything about
20 his past?

21 PROSPECTIVE JUROR: No.

22 MR. FLETCHER: Have you been watching the
23 news this last week?

24 PROSPECTIVE JUROR: No.

25 MR. FLETCHER: When was it that you

1 originally heard about it?

2 PROSPECTIVE JUROR: About when it happened.
3 When it originally happened.

4 MR. FLETCHER: So several years ago?

5 PROSPECTIVE JUROR: Yeah.

6 MR. FLETCHER: And you didn't watch anything
7 yesterday after court?

8 PROSPECTIVE JUROR: No.

9 MR. FLETCHER: That's all I have. Thank you.

10 THE COURT: Anything further?

11 MR. CALIEL: No, Your Honor.

12 THE COURT: All right. Juror No. [REDACTED] thank
13 you. And you're going to remain in the hall just
14 for a few minutes. We'll let you know something
15 as quick as we can. Please do not discuss your
16 questioning with any of the other jurors -- jury
17 members.

18 PROSPECTIVE JUROR: Yes, ma'am.

19 THE COURT: And when juror No. [REDACTED] leaves,
20 juror No. [REDACTED] can come in.

21 BAILIFF: Yes, Your Honor.

22 (Prospective juror absent.)

23 (Prospective juror present.)

24 BAILIFF: Take the second chair in.

25 PROSPECTIVE JUROR: Okay.

1 THE COURT: Good morning, juror No. [REDACTED]
2 We've reviewed all the questionnaires and there's
3 a few follow-up questions and I'm going to ask
4 one. The firm for which you work, it's all civil
5 work, correct?

6 PROSPECTIVE JUROR: Correct.

7 THE COURT: They do not practice criminal
8 law, correct?

9 PROSPECTIVE JUROR: That's correct.

10 THE COURT: Thank you.

11 MR. CALIEL: May I proceed, Your Honor?

12 THE COURT: Sure.

13 MR. CALIEL: Good morning, ma'am.

14 In reviewing your questionnaire you indicated
15 in question 4 that you had seen some media coverage
16 or heard some things about the case.

17 PROSPECTIVE JUROR: Yes.

18 MR. CALIEL: But at that point in time you
19 had formed an opinion about the case. What is
20 that opinion?

21 PROSPECTIVE JUROR: That he's guilty.

22 MR. CALIEL: Okay. And the follow-up
23 question was do you believe that you could set
24 aside those things that you've heard about the
25 case and render a verdict based upon the evidence

1 and the law presented here in this courtroom and
2 you indicated yes.

3 PROSPECTIVE JUROR: (Nods head.)

4 MR. CALIEL: Do you believe that that is
5 true, that you've seen some things, you reached a
6 conclusion because it's how much, you see
7 something on television, you might reach an
8 opinion, but can you set that opinion aside and
9 come into this courtroom with an open mind? Can
10 you do that?

11 PROSPECTIVE JUROR: You know, I thought about
12 that all night and I don't know. I just really
13 don't know if I can or not.

14 MR. CALIEL: Okay. Do you feel that there's
15 a possibility that you would be tainted by what
16 you've heard, even though it may not be evidence
17 in the case?

18 PROSPECTIVE JUROR: Yes.

19 MR. CALIEL: Okay. The Court will instruct
20 you as a juror that you are to disregard anything
21 that takes place outside this courtroom. I know
22 it's difficult, we're human, we have our life
23 experiences and what we've seen and heard, but
24 could you abide by the Court's ruling and orders
25 and listen to the evidence, look at the evidence,

1 hear the testimony, and consider that and that
2 alone in reaching a verdict in this case?

3 PROSPECTIVE JUROR: I would do my best to do
4 that but I'm not positive I can do that.

5 MR. CALIEL: You believe that it's a
6 possibility that you could be affected by outside
7 influences?

8 PROSPECTIVE JUROR: From what I've heard so
9 far. I mean it came on the news last night and I
10 stopped it so I didn't watch -- I won't watch
11 anything, you know, until I know if I'm a juror or
12 not.

13 MR. CALIEL: Okay. You work in the legal
14 community, correct?

15 PROSPECTIVE JUROR: Yes.

16 MR. CALIEL: Obviously you know there's a
17 reason why trials take place in courtrooms with
18 rules of evidence, correct?

19 PROSPECTIVE JUROR: Yes.

20 MR. CALIEL: Because it's the evidence and
21 the evidence alone that should be what jurors
22 consider in reaching any determination when it
23 comes to a court of law. Is that accurate?

24 PROSPECTIVE JUROR: Yes.

25 MR. CALIEL: Okay. You also indicated that

1 you have granddaughters and in your questionnaire
2 you brought forward that that was something you
3 wanted to bring to our attention and that you
4 indicated that if, in fact, this was proven beyond
5 a reasonable doubt against the defendant that you
6 think that the death penalty would be appropriate
7 under the circumstances.

8 PROSPECTIVE JUROR: Yes.

9 MR. CALIEL: Okay. Now, that's based upon
10 solely what you hear. You haven't been instructed
11 on what the law is, correct?

12 PROSPECTIVE JUROR: Correct.

13 MR. CALIEL: Okay. You haven't been
14 instructed on the process that a juror should go
15 through to consider both aggravating and
16 mitigating circumstances, in short those are
17 things that -- about the crime that may suggest
18 that the death penalty is appropriate, that's an
19 aggravator. Things about the crime or the
20 defendant or the defendant's life that may suggest
21 that the death penalty may not be appropriate are
22 what we call mitigators. You'll learn that one of
23 the aggravators that is imposed or outlined by the
24 law is the fact that a child was killed under the
25 age of 12. And so that is a factor that you would

1 consider in weighing those factors together to
2 determine appropriate punishment.

3 Do you believe, based upon what you have
4 heard and the fact that this was a child, in and
5 of itself, would make it impossible for you to
6 weigh the mitigation in this case, to consider
7 other factors that may come into play as to what
8 an appropriate punishment is?

9 PROSPECTIVE JUROR: It would be hard. I mean
10 she's dead. A life for life. I mean like if he
11 killed someone in a car accident, it's not his
12 fault. This was intentional, he did it on
13 purpose.

14 MR. CALIEL: Okay.

15 PROSPECTIVE JUROR: You know, life for life.

16 MR. CALIEL: The law dictates that capital
17 punishment or the death penalty is appropriate in
18 certain circumstances and not every murder is
19 appropriate for the death penalty and that the
20 Court will instruct you as to how to weigh
21 circumstances and determine whether or not the
22 death penalty is appropriate, but simply put,
23 every murder the death penalty is not appropriate.
24 Understanding that one of the aggravating factors,
25 the fact that a child is killed here, is an

1 aggravator that we expect could be proven beyond a
2 reasonable doubt and in all likelihood will be
3 proven beyond a reasonable doubt, the fact that
4 that aggravator was proven beyond a reasonable
5 doubt, in and of itself, would you automatically
6 disregard any mitigation that may be presented in
7 regards to the defendant's life or character, or
8 could you consider that and then weigh that -- the
9 fact that a child was killed may be heavy and may
10 have a lot of weight in your mind, but could you
11 keep an open mind and at least consider it? You
12 don't need to prejudge it, but at least consider
13 the mitigation in this case and see whether or not
14 that affects the other aggravating factors and
15 whether or not you believe the death penalty is
16 appropriate?

17 PROSPECTIVE JUROR: I guess I could, yes.

18 MR. CALIEL: And let me just ask this
19 question. And I think this will sum it up. Some
20 of the language that you've used is I hope or I
21 think or I guess. Okay? Unfortunately in this
22 type of proceeding we need to have some sort of
23 certainty. Can you affirm that you could consider
24 only the evidence that you hear in this courtroom
25 and the testimony in reaching a determination as

1 to whether or not the defendant is guilty or not?
2 Can you affirm, can you say I will only consider
3 the evidence and the testimony that I hear in the
4 courtroom?

5 PROSPECTIVE JUROR: Yes.

6 MR. CALIEL: And in doing so can you also
7 affirm that you can keep an open mind and listen
8 to the law and listen to the instructions that the
9 Court will give you in evaluating, if it becomes
10 necessary, whether or not the death penalty is the
11 appropriate punishment in this case?

12 PROSPECTIVE JUROR: Yes.

13 MR. CALIEL: Okay. Thank you, ma'am.

14 I don't have any further questions.

15 THE COURT: Ms. Schlax.

16 MS. SCHLAX: Thank you.

17 Good morning.

18 PROSPECTIVE JUROR: Good morning.

19 MS. SCHLAX: We appreciate you being candid
20 with us and that's -- that's why we take so much
21 time to do this, because obviously this is an
22 important process. I first want to ask you about
23 -- I guess your emotional level yesterday when you
24 were filling out that questionnaire. When you
25 walked up into this courtroom yesterday morning,

1 did you realize this was the case that you were
2 going to be asked to sit on?

3 PROSPECTIVE JUROR: No.

4 MS. SCHLAX: Okay. When you physically saw
5 Mr. Smith, did you have a reaction to him?

6 PROSPECTIVE JUROR: Um-hum.

7 MS. SCHLAX: Okay. And forgive me, but you
8 -- you almost appeared to be tearing up right now.

9 PROSPECTIVE JUROR: Yes.

10 MS. SCHLAX: And I'm sorry. You have to say
11 something out loud.

12 PROSPECTIVE JUROR: Yes.

13 MS. SCHLAX: Okay. And, ma'am, the last
14 thing we want to do is to make things
15 uncomfortable for you. And what we're trying to
16 determine is that emotion, and obviously you just
17 through living here in Jacksonville and being
18 aware of this situation, you've shared with us
19 you've not only formed an opinion, but you're very
20 aware of what you believe to be the facts of the
21 case and it's causing an emotional reaction to
22 you. Is that emotion at such a level where you're
23 not going to be able to focus on the legal issues
24 that you're asked to make?

25 PROSPECTIVE JUROR: Until you're in that

1 position it's hard to say if I will or not, but I
2 would do my best to do so.

3 MS. SCHLAX: Okay. And we still appreciate
4 that and your willingness to serve and, you know,
5 the thing I always think of, and you do civil
6 work, is I've never had an issue in my life with
7 medical malpractice, but if I had or one of my
8 family members had, I would not be an appropriate
9 juror for a medical malpractice case. What we're
10 trying to figure out is the knowledge that you
11 have and the emotion that it's already causing
12 you, can you be a fair and impartial juror in this
13 case? And I ask you just to look into your own
14 soul and you know yourself better than anybody
15 else. And just be honest with us if this just
16 isn't the appropriate case for you.

17 PROSPECTIVE JUROR: Honestly, I'm going to be
18 like this. Through probably the whole thing.
19 Especially if I have to look at pictures. I'll
20 probably just lose it.

21 MS. SCHLAX: And let me -- let me tell you
22 there are going to be some graphic photographs in
23 this case. And, again, I'm going to show you one
24 photograph, and this is not graphic, but just so
25 that you can understand the magnitude that we're

1 asking you, that we're asking you that ultimately
2 you're going to have to reach a decision and that
3 first decision is going to be asked of you to
4 presume him innocent and it sounds like you're
5 struggling just with that concept a little bit.
6 Is that fair to say?

7 PROSPECTIVE JUROR: Yes.

8 MS. SCHLAX: Do you have a reasonable doubt
9 as to whether or not you can presume Mr. Donald
10 Smith innocent as we sit here today?

11 PROSPECTIVE JUROR: Yes.

12 MS. SCHLAX: You have a regard about that?

13 PROSPECTIVE JUROR: Yes.

14 MS. SCHLAX: Okay. I don't have any further
15 questions. I really appreciate your time, ma'am.

16 THE COURT: Anything further?

17 MR. CALIEL: Nothing further, Your Honor.

18 THE COURT: Okay. Juror No. ■■■, thank you so
19 much. We do need you to wait in the hallway for
20 just a few minutes and we'll let you know
21 something as soon as we can and please do not
22 discuss your question and answers with the other
23 jurors that are waiting out there. Thank you so
24 much.

25 PROSPECTIVE JUROR: You're welcome.

1 THE COURT: Once she leaves No. [REDACTED] can come
2 in.

3 (Prospective juror absent.)

4 THE COURT: It's ten till 12:00. Do you all
5 want the next group of ten brought up or do you want
6 them all sent to lunch to come back? We're way off
7 schedule, but they have to have lunch. So we can do
8 it now or do it later.

9 BAILIFF: Judge, I already have them up here.

10 THE COURT: They're already up here.

11 MS. SCHLAX: Then let's just go.

12 THE COURT: We'll keep going. That's fine.

13 (Prospective juror present.)

14 BAILIFF: Second chair in.

15 THE COURT: Yes, ma'am, you may sit down.
16 Good morning, juror No. [REDACTED]. We're still using
17 your numbers so as not to identify you. We've
18 reviewed your questionnaires and there's a few
19 follow-up questions.

20 PROSPECTIVE JUROR: Okay.

21 THE COURT: Thank you.

22 MR. FLETCHER: Good morning, juror No. [REDACTED]

23 PROSPECTIVE JUROR: Good morning.

24 MR. FLETCHER: After reading your
25 questionnaire the only question I have for you is

1 you indicated you have seen news coverage of this
2 case.

3 PROSPECTIVE JUROR: Yes.

4 MR. FLETCHER: And on the questionnaire, we
5 agreed and we put down sort of what he's being
6 excused of. Is that what you've seen on the news?

7 PROSPECTIVE JUROR: Yes.

8 MR. FLETCHER: And how -- how long ago did
9 you see this on the news?

10 PROSPECTIVE JUROR: Oh, it was briefly, the
11 other day it came across my phone so...

12 MR. FLETCHER: Okay.

13 PROSPECTIVE JUROR: I didn't get a chance to
14 go into it because I was busy.

15 MR. FLETCHER: Okay. Do you know anything
16 based on the news about Donald Smith's past or his
17 history?

18 PROSPECTIVE JUROR: No.

19 MR. FLETCHER: So it was just the outline of
20 the case basically?

21 PROSPECTIVE JUROR: Outline of the case.

22 MR. FLETCHER: That's all I have.

23 THE COURT: Any further questions?

24 MR. CALIEL: No questions.

25 THE COURT: All right. Juror No. [REDACTED] if

1 you'll wait in the hall we'll let you know
2 something as soon as we can. Please do not
3 discuss the questions and answers with the other
4 jurors.

5 Thank you.

6 All right. We've reached the end of the first
7 group.

8 BAILIFF: Your Honor, sorry. No. [REDACTED] if
9 you're ready.

10 THE COURT: You're right. No. [REDACTED] There's
11 one more. Sorry.

12 (Prospective juror present.)

13 BAILIFF: Come here and take the second chair
14 in.

15 THE COURT: Good morning, juror No. [REDACTED]
16 Thank you for being here this morning. We
17 reviewed the questionnaires and we just have a few
18 follow-up questions.

19 PROSPECTIVE JUROR: Okay.

20 MR. CALIEL: Good morning, ma'am.
21 Specifically, ma'am, I'm going to direct your
22 attention, you indicated that you did have strong
23 feelings about the death penalty, correct?

24 PROSPECTIVE JUROR: Yes.

25 MR. CALIEL: And specifically, and I'm

1 quoting you, my faith prevents me from being for
2 the death penalty.

3 PROSPECTIVE JUROR: (Nods head.)

4 MR. CALIEL: Do you believe that your
5 religious beliefs would prevent you from ever
6 recommending the death penalty regardless of the
7 facts and circumstances?

8 PROSPECTIVE JUROR: I think that -- I think
9 it would be hard for me to do it, but there
10 probably are circumstances under which I could be
11 persuaded.

12 MR. CALIEL: And it's hard for us at this
13 juncture to skip ahead and go to the penalty
14 proceedings, but in brief discussions there are
15 going to be factors that the Court will instruct
16 you to consider. Aggravating factors are factors
17 about the case or the circumstances that may guide
18 you to believe that the death penalty is
19 appropriate, mitigating factors are circumstances
20 about the case or the defendant's history that may
21 suggest that the death penalty is not appropriate.
22 And as a juror you're going to be asked to weigh
23 those factors, the aggravators versus the
24 mitigators, if the aggravators are found to be
25 proven beyond and to the exclusion of a reasonable

1 doubt. Let me ask you, what are your personal
2 religious beliefs about the death penalty?

3 PROSPECTIVE JUROR: I believe that our lives
4 are God given and that everybody, including
5 fetuses, have the right to life from conception to
6 natural death. That's what I believe.

7 MR. CALIEL: Obviously the law in the State
8 of Florida allows for, under certain
9 circumstances, if the defendant is found guilty of
10 first degree murder, that the jury members can
11 consider whether or not the death penalty is an
12 option. Given your personal religious beliefs, do
13 you believe that you could weigh the evidence
14 fairly and go through that weighing process and
15 then if you believe the aggravation outweighed the
16 mitigation as the law outlines, recommend a death
17 sentence?

18 PROSPECTIVE JUROR: Probably so.

19 MR. CALIEL: Most importantly, the law has
20 changed recently in the State of Florida. It used
21 to be that a unanimous jury decision was not
22 required, but now within the State of Florida each
23 and every juror must agree that the aggravation
24 exists and that the aggravation outweighs the
25 mitigation and that they believe unanimously that

1 the death penalty is appropriate. It is a process
2 that must be gone through. Despite your religious
3 beliefs, do you believe you could go through that
4 process, follow the law and stand up in this
5 courtroom and hearken to a verdict which would
6 sentence Mr. Smith to death?

7 PROSPECTIVE JUROR: I would have to hear the
8 evidence. I can't tell you now whether -- how I
9 would be then, but I would have to hear the
10 evidence to know -- to know the answer to that
11 question.

12 MR. CALIEL: Absolutely. And we expect you
13 to consider the evidence and only the evidence in
14 this courtroom in reaching that determination. Do
15 you believe, though, with your religious beliefs
16 that you could listen to the evidence and if the
17 evidence and the law said, yes, it's appropriate
18 to impose the death penalty --

19 MS. SCHLAX: Objection, Your Honor. I
20 apologize. May we approach?

21 THE COURT: You may.

22 MS. SCHLAX: I'm sorry. We need the court
23 reporter.

24 (Counsel for the State and defense approached
25 the bench for a side-bar out of the hearing of the

1 jury, where the following proceedings were had:)

2 MS. SCHLAX: Your Honor, what we're
3 approaching is a misstatement of the law. He's
4 trying to suggest to this juror that she will have
5 to agree with the other 12 jurors and, no, she
6 does not. The jury is going to be told again and
7 again that after an individual decision that they
8 are certainly expected to discuss and deliberate
9 together, but it is an individual decision and
10 that if one juror says I want to impose life
11 imprisonment then that's the verdict and it's a
12 lawful verdict and we keep -- we keep getting
13 close to that. And at this juncture for this
14 setting I would suggest that this juror has
15 clearly articulated she is willing to consider the
16 death penalty as an option and so I think we're
17 getting far afoot of what's going to -- Mr. Caliel
18 is attempting to do the second phase of jury
19 selection in this phase. She's clearly not in a
20 cause position. She's articulated that she can
21 consider the death penalty.

22 MR. CALIEL: I don't think she's answered the
23 last question, can she stand in this courtroom and
24 hearken to a verdict and say that I believe this
25 person deserves death if she feels that's

1 appropriate under the law and the facts.

2 MS. SCHLAX: And there's my difficulty with
3 the way he's phrasing it. He's making it appear
4 that she would have to impose that and, no, she
5 does not. She has said that she thinks she could
6 personally impose the death penalty and that's the
7 true question.

8 MR. CALIEL: What I'm asking her is is she
9 able to consider the facts and the evidence and
10 stand up in that jury box and say he deserves to
11 die. And that's the question I'm asking, because
12 she has a faith or religious belief against the
13 death penalty and if she cannot hearken to her
14 verdict, which involves the death penalty, I need
15 to know about it.

16 THE COURT: Well, I agree he needs to know.
17 There's probably a way to do it that's not
18 objectionable to the defense, which is if you --
19 something along -- I'm not telling you what to
20 say. Don't get me wrong. But if you were to
21 listen to the facts and the evidence and reached
22 on your own individually the decision that you
23 felt that the death penalty was appropriate, are
24 you able to tell us that in open court. I mean --

25 MR. CALIEL: I'll use the Court's phrasing.

1 I don't think it's that much different.

2 THE COURT: I think there's a way to get to
3 where you're not asking her to agree with
4 everybody else, you're just asking her to reach
5 your own opinion and if your own opinion is, A,
6 can you do B. You're still getting what I think
7 you like --

8 MR. CALIEL: I agree, but in anticipation
9 I'll move on with this particular juror. In
10 anticipation we don't get to that point unless
11 they all agree in the jury room and I think that's
12 where it is. Ms. Schlax is absolutely correct, if
13 they don't agree and if one juror disagrees
14 they're allowed to disagree and they're allowed to
15 say life, that's the law, but they all have to
16 agree on a death penalty before we pull them out
17 and we ask them about that verdict and we have to
18 be able to explore that.

19 MS. SCHLAX: I respectfully disagree.

20 MR. CALIEL: That's what the law is, it has
21 to be a unanimous verdict.

22 PROSPECTIVE JUROR: They have to agree.

23 THE COURT: I have to say I may have
24 misspoken earlier. He's correct. They have to
25 become unanimous before they ever come out. So

1 there's got to be a way to ask the question again.
2 Maybe I didn't come up with it the right way. If
3 you're a member of a jury and every member of a
4 jury, including you, determines that the death
5 penalty is appropriate, are you able to come out
6 here and say that. Or something along those
7 lines.

8 MR. CALIEL: I think what I can do for the
9 purpose of this juror is say, if you reach a
10 determination based upon the evidence and the law
11 that the death penalty is appropriate, and all of
12 your other jurors agree with you, and that is the
13 verdict of the jury as a whole, can you come out
14 into this courtroom and hearken to that verdict.

15 MS. SCHLAX: I'm fine with that. Because
16 that's a correct statement of the law. I think we
17 were getting too close to suggesting to her that
18 her obligation of being on this jury would be to
19 unanimously agree with her fellow jurors. And she
20 does not have such an obligation.

21 THE COURT: All right.

22 MR. CALIEL: You said potato, I say potahto.

23 THE COURT: She agrees with that. Do it that
24 way.

25 (Thus the side-bar conference ended.)

1 MR. CALIEL: Thank you. Your Honor, may I
2 proceed?

3 THE COURT: You may.

4 MR. CALIEL: And, ma'am, I think let me
5 rephrase the question. In regards to evaluating
6 the death penalty, if you're sitting as a juror,
7 listening to the evidence and the law as
8 instructed by the Court and you reach a personal
9 decision in that analysis that the death penalty
10 is appropriate, and all of your other jurors agree
11 with you and that is the unanimous verdict of the
12 jury as a whole, could you come into open court
13 and stand up and hearken to your verdict in this
14 courtroom and say that the death penalty is
15 appropriate for Mr. Smith?

16 PROSPECTIVE JUROR: I think so, so, yes.

17 MR. CALIEL: Okay. And, again, I hate to
18 pick with language, but that's what we do as
19 lawyers sometimes. We have to be certain in this
20 context that you're able to do so and follow the
21 law, if that's the case. Okay? And you qualified
22 it with I think so. Do you believe there is a
23 possibility that your personal religious beliefs
24 may adversely affect your ability to follow the
25 law in this case?

1 PROSPECTIVE JUROR: No, I think that the law
2 would -- I think you need to follow the law.
3 That's what we're here for. So I think you need
4 to follow the law.

5 MR. CALIEL: Okay. Thank you.
6 I have no further questions.

7 THE COURT: Anything further?

8 MS. SCHLAX: No, Your Honor. Thank you.

9 THE COURT: Juror No. [REDACTED] if you would just
10 remain in the hall for a few minutes we'll try to
11 let you know something and please do not discuss
12 the questions, please, that you had in here with
13 the other panel members. Thank you.

14 Okay. We're going to go over these 11. Go
15 ahead. Before I bring in another group.

16 (Prospective juror absent.)

17 THE COURT: If we bring the next ten in, then
18 we have to go over 21 people before we can let
19 them know if they're staying or going. Continuing
20 or excused. It's five after 12:00. So I -- I
21 think it's better to do these 11 and let them be
22 on their way and do the next group and let them be
23 on their way rather than having 21 waiting, how
24 much longer it's going to be.

25 MS. SCHLAX: Yes, Your Honor.

1 THE COURT: Is that all right? Several of
2 these are fairly quick. Others might be a little
3 more complicated.

4 MS. SCHLAX: Yes, Your Honor.

5 THE COURT: So we start with juror No. [REDACTED]

6 MS. SCHLAX: The defense would move for
7 cause.

8 MR. CALIEL: No objection.

9 THE COURT: All right. No. [REDACTED] will be excused
10 for cause.

11 No. 3.

12 MS. SCHLAX: No motion, Your Honor.

13 MR. CALIEL: The State agrees that No. [REDACTED] can
14 be moved onto the panel.

15 THE COURT: I'm sorry. Ms. Schlax, have you
16 had time to talk to your client before?

17 (Defense counsel conferring with defendant.)

18 MR. FLETCHER: I think we're good, Judge.

19 THE COURT: So both sides agree that juror
20 No. [REDACTED] can be brought back Thursday at 9:30 for
21 jury selection?

22 MS. SCHLAX: Yes, we agree.

23 THE COURT: Juror No. [REDACTED]

24 MS. SCHLAX: Your Honor, the defense would
25 move for cause. Looking at the totality of the

1 answers, I think there's a sincere reasonable
2 doubt as to his ability, number one, to sit
3 through the guilt phase and reach a fair and
4 impartial verdict and, number two, reach a lawful
5 decision under the death penalty. He was
6 beginning to become emotional, although he
7 repeatedly said he would try and that he thinks he
8 could. Based on the totality of his answers I
9 would suggest that juror No. [REDACTED] be stricken for
10 cause.

11 MR. CALIEL: Your Honor, we would disagree.
12 We believe that despite the fact that he said he
13 would be emotional, he said that if he were
14 required to sit as a juror he could do so. He
15 wouldn't like looking at the pictures. I don't
16 think any juror is going to like looking at these
17 pictures. But he said that he could look at the
18 pictures and consider them and reach a verdict
19 based upon the law and the evidence in this case
20 and I think he affirmed that on multiple
21 occasions, despite the fact he got emotional, he
22 maintained that he could, if required to do so,
23 serve in that role and serve as a juror. He
24 repeatedly said he could be fair.

25 THE COURT: I think you've already put it on

1 the record, but what doesn't show up in
2 black-and-white writing was his demeanor, which
3 was, as you stated, emotional. He was visibly
4 uncomfortable with the questioning. His demeanor
5 was very unsure about his answers. However -- and
6 what he said was, as I recorded it and remember
7 it, he didn't want to look at the photos. He
8 didn't say he couldn't. He said he did not want
9 to. And he was nervous about having to do that,
10 but in the end he did say that he could if he had
11 to and that he would follow the law.

12 So I'm not sure if he rises to the level of a
13 cause challenge. So I'm not going to excuse him
14 now. But I'm going to make a note of that and put
15 a question mark by him and at the end of the day,
16 if you re-raise the questioning or the -- the
17 request to have him excused for cause, I'll see
18 where we are then because during the actual jury
19 selection we may find other things. So I'll deny
20 it for now, but I understand it's likely to come
21 back up again so he'll need to come back Thursday
22 at 9:30 to continue.

23 Juror No. [REDACTED]

24 MS. SCHLAX: No motion, Your Honor.

25 MR. CALIEL: We would accept him to move

1 forward.

2 THE COURT: He'll come back Thursday at 9:30
3 for jury selection.

4 Juror No. [REDACTED]

5 MS. SCHLAX: No motion, Your Honor.

6 MR. CALIEL: We would accept juror No. [REDACTED] to
7 move forward to the next phase.

8 THE COURT: Okay. He'll come back Thursday
9 at 9:30 for jury selection.

10 Juror No. [REDACTED]

11 MS. SCHLAX: Your Honor, the defense would
12 move for a motion for cause. Your Honor, I
13 apologize. Mr. Fletcher was riding me. He
14 indicated upon questioning by Mr. Fletcher that he
15 was aware of his prior record and that it would be
16 extremely difficult not to consider that and set
17 that aside. Additionally, in regards to the
18 hardship based on his work period, you know, our
19 largest concern would be that he would get to the
20 point where, especially, if we found ourselves in
21 a penalty phase, that he would be extremely
22 frustrated and not give due consideration to
23 potential penalty phase evidence.

24 MR. CALIEL: Your Honor, we wouldn't agree to
25 the hardship, but I think based upon his statement

1 that he was aware that he was a sex offender and I
2 think he made some statement about you can predict
3 future behavior based on one's past actions, I
4 think that is sufficient enough to strike him for
5 cause.

6 THE COURT: Juror No. [REDACTED] will be stricken for
7 cause.

8 No. [REDACTED]

9 MS. SCHLAX: No motion, Your Honor.

10 MR. CALIEL: We would accept juror No. [REDACTED] to
11 move forward.

12 THE COURT: Again, come back Thursday at 9:30
13 for jury selection.

14 Juror No. [REDACTED]

15 MS. SCHLAX: No motion, Your Honor.

16 MR. CALIEL: We would accept juror No. [REDACTED] to
17 move forward, Your Honor.

18 THE COURT: [REDACTED] will be asked to come back
19 Thursday at 9:30 for jury selection.

20 No. [REDACTED]

21 MS. SCHLAX: The defense would move for cause
22 in regards to this juror.

23 MR. CALIEL: We would agree, Your Honor.

24 THE COURT: No. [REDACTED] will be excused for cause.

25 No. [REDACTED]

1 MS. SCHLAX: No motion, Your Honor.

2 MR. CALIEL: We would agree that juror No. [REDACTED]
3 can move forward, Your Honor.

4 THE COURT: She'll be asked to come back
5 Thursday at 9:30 for jury selection.

6 And No. [REDACTED]

7 MS. SCHLAX: No motion, Your Honor.

8 MR. CALIEL: We would agree that she has no
9 cause challenges articulated on the record.

10 THE COURT: All right. She'll be asked to
11 come back Thursday at 9:30 for jury selection.

12 Mr. Smith, you agree with all that?

13 THE DEFENDANT: Yes, ma'am.

14 THE COURT: Any questions about it?

15 THE DEFENDANT: No, ma'am.

16 THE COURT: Have you had time to talk with
17 your attorneys about it?

18 THE DEFENDANT: Yes, ma'am.

19 THE COURT: Okay. I think I could bring in
20 all the ones that are coming back in a group and
21 just tell them they are going to move to the next
22 phase of jury selection, be back here at 9:30
23 Thursday, let them leave and then bring the others
24 all in and just say you're excused and you've
25 completed your jury service. Don't have to do it

1 individually.

2 MS. SCHLAX: I agree.

3 THE COURT: All agree?

4 MR. CALIEL: I agree, Your Honor.

5 THE COURT: So we need number -- you all make
6 sure this is correct, [REDACTED] and

7 [REDACTED]

8 MR. CALIEL: Yes, Your Honor.

9 MS. SCHLAX: Yes, Your Honor.

10 BAILIFF: Your Honor, may I read it back to
11 you, please?

12 THE COURT: Yes.

13 BAILIFF: [REDACTED], and [REDACTED]

14 THE COURT: Correct. There's who we need in
15 a group. They can come and sit in the front row
16 or the front two rows.

17 MR. CALIEL: Your Honor, may we approach
18 briefly while they're bringing that group in?

19 THE COURT: Yes.

20 (Counsel for the State and defense approached
21 the bench for a side-bar conference out of the
22 hearing of the court reporter.)

23 THE COURT: All right. Ladies and gentlemen,
24 I'm going to ask you to raise your hand when I say
25 your number so for the record we have all you

1 here. Juror No. [REDACTED] Juror No. [REDACTED] Juror No. [REDACTED]
2 No. [REDACTED]. No. [REDACTED] No. [REDACTED] No. [REDACTED] And No. [REDACTED]

3 (Prospective jurors indicating.)

4 THE COURT: Is that everybody? Everybody
5 raise their hand?

6 (No response from prospective jurors.)

7 THE COURT: Okay. What we're going to do now
8 is I'm going to excuse you for today and you're
9 excused for tomorrow, but you need to be here
10 Thursday morning at 9:30 in the jury assembly area
11 for us to proceed to the third phase of the
12 questioning. We need to formally find out a few
13 additional things from your questionnaires which
14 we did today and now you're free to go, but you do
15 need to be back at 9:30 Thursday morning, which is
16 February 8, for us to continue this process.
17 Okay? So we'll see where we are then and thank
18 you for your time and attention and please do not
19 watch TV. You all have been really good because
20 you mentioned it. Do not watch any TV, listen to
21 any news, let any of your family or friends talk
22 to you and we'll see you back Thursday morning in
23 the jury assembly area at 9:30 and we'll have you
24 out as quickly as we can to continue with this.
25 Thank you.

1 (Prospective jurors absent.)

2 MS. SCHLAX: Your Honor --

3 THE COURT: Before that we need to put
4 something on the record. Before that the -- my
5 instructions about lunch were misunderstood and
6 they already sent the ten to lunch and we don't
7 have that issue. They sent the others out. So
8 everybody has gone to lunch. We just excused out
9 of the courtroom the people that we had determined
10 out of the first group would come back Thursday
11 continuing jury selection.

12 And the defense would like to place something
13 on the record.

14 MS. SCHLAX: Your Honor, just what the record
15 doesn't capture, which is when informed they would
16 continue on into the next phase of jury selection,
17 juror No. [REDACTED] visibly became upset again, was
18 shaking his head and grabbed a Kleenex. He
19 actually started crying.

20 THE COURT: I saw that as well. Anything
21 further?

22 MR. CALIEL: Nothing further.

23 THE COURT: I did observe it from my vantage
24 point so that's on the record. And I have it in
25 my notes, too.

1 BAILIFF: Your Honor, juror No. ■■■ is outside.
2 He's upset and says he does not want to serve.

3 THE COURT: Okay. Just a second. All right.
4 What would you all like me to do?

5 MR. CALIEL: Judge, we'll agree to strike
6 juror No. ■■■ for cause. It's obvious based upon
7 his visceral reaction and asking to speak with the
8 Court that he's having an issue and I think it's
9 safe with the number of jurors that we have to
10 excuse him.

11 THE COURT: Check with your client.

12 MS. SCHLAX: I will.

13 THE COURT: Make sure he agrees.

14 THE DEFENDANT: Yes, ma'am.

15 THE COURT: You agree juror No. ■■■ to be
16 stricken for cause?

17 THE DEFENDANT: Yes, ma'am.

18 THE COURT: Maybe my memory is not correct,
19 but I believe he did ask for that already. Is
20 that correct? Earlier?

21 MS. SCHLAX: Yes, Your Honor, we had moved to
22 strike him for cause.

23 THE COURT: Okay. I'm just going to bring
24 him in -- well, I'll bring him in with the others
25 and just say he's excused from jury selection. Is

1 that all right?

2 MS. SCHLAX: Yes, ma'am.

3 THE COURT: We've got one, two, three, plus
4 him. So I'll bring them all in. Juror No. [REDACTED]--

5 BAILIFF: [REDACTED] and [REDACTED].

6 THE COURT: [REDACTED] and [REDACTED]

7 BAILIFF: Yes, Your Honor.

8 THE COURT: All right. Wait, wait, wait,
9 wait. Okay. That's right. Okay. That's right.

10 (Prospective jurors present.)

11 THE COURT: I'm going to get you to raise
12 your hands when I call your number. Juror No. [REDACTED]
13 juror No. [REDACTED] juror No. [REDACTED] and juror No. [REDACTED]

14 (Prospective jurors indicating.)

15 THE COURT: Okay. Thank you all for your
16 willingness to serve and for your time that you've
17 given us so far this week. You're going to be
18 excused. You have completed your jury duty and
19 you have no need to come back again. But we
20 really do appreciate your willingness to serve.
21 It is an important civic duty and we thank you for
22 your time and you may leave and go about your
23 ordinary business. Thank you.

24 PROSPECTIVE JUROR: Your Honor, I'm sorry. I
25 apologize.

1 THE COURT: That's okay.

2 (Prospective jurors excused.)

3 THE COURT: All right. All the other jurors
4 in group 1 or group A, the first 100 jurors that
5 we dealt with, we've now gone through juror [REDACTED]
6 Others have been previously out of that group
7 excused for cause or were excused yesterday for
8 other reasons, but we had the remainder of that
9 group of 100. I think Jeff said the ten, that ten
10 that we were bringing up will be back at ten of
11 1:00?

12 BAILIFF: Yes, ma'am.

13 THE COURT: Ten of 1:00. I know we're not
14 going to be ready by then, they know we're not
15 going to be ready by then. Just tell me when you
16 want to reconvene because you all need to talk
17 about the cause things. And actually what we
18 could do is go ahead and do those ten and then go
19 over the cause challenges for the second group of
20 200, rather than delaying this group of ten who
21 has already been up here, gone to lunch and come
22 back.

23 MR. CALIEL: Yes, Your Honor, what I'm going
24 to do is I'm going to give our list to defense
25 counsel before we leave to go to lunch so I'm

1 giving them what we believe to be cause challenges
2 and those who we did not have any questions for
3 we'll move on without questioning. They can
4 cross-reference and either cross them off my list
5 and we'll be able to work through that pretty
6 quickly.

7 MS. SCHLAX: Melissa already gave it to me.

8 (State and defense counsel conferring.)

9 THE COURT: All right. What time would you
10 all like to reconvene? I know people usually need
11 at least 45 minutes in order to be able to get
12 something.

13 MS. SCHLAX: Right. 1:15 is enough time.

14 MR. CALIEL: 1:15 would be fine.

15 THE COURT: We'll reconvene at 1:15.

16 MR. CALIEL: Thank you, Your Honor.

17 (Recess.)

18 (Defendant present.)

19 THE COURT: You all want to start with the
20 ten or start with the colloquies? Where do you
21 want to start with the causes?

22 MS. SCHLAX: Yes, Your Honor, I think we have
23 agreement as to a group that will be cause of the
24 next hundred as well as a group that will go
25 directly to the 80.

1 THE COURT: Oh, okay.

2 MS. SCHLAX: And I think we're comfortable
3 with presenting that to the Court so they can
4 notify those jurors and they can leave the
5 courthouse.

6 THE COURT: Okay.

7 MR. CALIEL: Your Honor, I will begin -- one
8 second.

9 THE COURT: So we're dealing at this point
10 for a few minutes with jurors 101 through 200,
11 correct?

12 MS. SCHLAX: Correct.

13 MR. CALIEL: Correct, Your Honor. Your
14 Honor, the State would move to strike juror No.
15 [REDACTED] for cause.

16 MS. SCHLAX: And no objection by the defense,
17 Your Honor, based on the questionnaire that
18 indicates they could not follow the law.

19 THE COURT: Okay. [REDACTED] is excused for cause.

20 MR. CALIEL: Next would be juror [REDACTED]

21 MS. SCHLAX: And no objection by the defense,
22 Your Honor.

23 THE COURT: No. [REDACTED] is excused for cause.

24 MR. CALIEL: Next would be juror [REDACTED] Your
25 Honor.

1 MS. SCHLAX: No objection, Your Honor, based
2 on the questionnaire.

3 THE COURT: Juror [REDACTED] is excused for cause.

4 MR. CALIEL: Next would be juror [REDACTED]

5 MS. SCHLAX: No objection, Your Honor, based
6 on the questionnaire.

7 THE COURT: Juror [REDACTED] is excused for cause.

8 MR. CALIEL: Next would be juror No. [REDACTED],
9 Your Honor.

10 MS. SCHLAX: No objection, Your Honor, based
11 on the questionnaire.

12 THE COURT: Juror No. [REDACTED] is excused for
13 cause.

14 MR. CALIEL: Next would be juror No. [REDACTED]

15 MS. SCHLAX: No objection by the defense,
16 Your Honor, based on the questionnaire.

17 THE COURT: Juror No. [REDACTED] is excused for
18 cause.

19 MR. CALIEL: Next would be juror No. [REDACTED]

20 MS. SCHLAX: No objection by the defense,
21 Your Honor, based on the questionnaire.

22 THE COURT: No. [REDACTED] is excused for cause.

23 MR. CALIEL: Next would be juror No. [REDACTED]

24 MS. SCHLAX: No objection by the defense,
25 Your Honor, based on the questionnaire.

1 THE COURT: No. [REDACTED] is excused for cause.

2 MR. CALIEL: Next would be juror No. [REDACTED]

3 THE COURT: [REDACTED]

4 MR. CALIEL: [REDACTED] yes, Your Honor.

5 MS. SCHLAX: And no objection, Your Honor,
6 based on the questionnaire.

7 THE COURT: No. [REDACTED] is excused for cause.

8 MR. CALIEL: Next, Your Honor, would be juror
9 No. [REDACTED]

10 MS. SCHLAX: No objection, Your Honor, based
11 on the questionnaire.

12 THE COURT: No. [REDACTED] is excused for cause.

13 MR. CALIEL: Next, Your Honor, would be juror
14 No. [REDACTED]

15 MS. SCHLAX: And no objection, Your Honor,
16 based on the questionnaire.

17 THE COURT: [REDACTED] is that right?

18 MS. SCHLAX: Yes, Your Honor.

19 MR. CALIEL: Yes, Your Honor.

20 THE COURT: No. [REDACTED] is excused for cause.

21 MR. CALIEL: Next, Your Honor, would be [REDACTED]

22 MS. SCHLAX: No objection, Your Honor, based
23 on the questionnaire.

24 THE COURT: No. [REDACTED] is excused for cause.

25 MR. CALIEL: Next, Your Honor, would be juror

1

[REDACTED]

2

MS. SCHLAX: No, sir, Your Honor, based on
the questionnaire.

3

4

THE COURT: [REDACTED] is excused for cause.

5

MR. CALIEL: Next, Your Honor, would be juror

6

[REDACTED]

7

MS. SCHLAX: No objection, Your Honor, based
on the questionnaire.

8

9

THE COURT: No. [REDACTED] excused for cause.

10

MR. CALIEL: Lastly, Your Honor, juror No.

11

[REDACTED]

12

MS. SCHLAX: And no objection, Your Honor,
based on the questionnaire.

13

14

THE COURT: Juror No. [REDACTED] excused for cause.

15

(State and defense counsel conferring.)

16

MR. CALIEL: Your Honor, one additional juror
by agreement. Juror [REDACTED]

17

18

THE COURT: I'm sorry. What's the number?

19

MR. CALIEL: [REDACTED]

20

MS. SCHLAX: And no objection, Your Honor,
based on the questionnaire. And specifically,
Your Honor, medication that he articulates he's
currently taking, lawfully prescribed, but needs a
large amount.

21

22

23

24

25

THE COURT: [REDACTED] is excused for cause.

1 MR. CALIEL: Your Honor, those are the cause
2 challenges we've agreed to. There is also a list
3 of 19 that both the State and the defense agree
4 can be moved on to Thursday morning. Would you
5 like to have that list now as well?

6 THE COURT: I would in just a minute. May I
7 please go back over causes, just make sure I have
8 the numbers and paperwork.

9 I have No. [REDACTED]

10 MS. SCHLAX: Yes, Your Honor.

11 THE COURT: [REDACTED]

12 [REDACTED] Is that right?

13 MS. SCHLAX: Yes, Your Honor.

14 MR. CALIEL: Yes.

15 THE COURT: Okay. And then [REDACTED]

16 MS. SCHLAX: Yes, Your Honor.

17 MR. CALIEL: Yes, Your Honor.

18 THE COURT: [REDACTED] and [REDACTED]

19 MS. SCHLAX: Yes, Your Honor.

20 THE COURT: Is that right? Okay.

21 MR. CALIEL: Yes, Your Honor.

22 THE COURT: You have a list of jurors from
23 the second group of 100 that we can excuse to come
24 back Thursday morning?

25 MR. CALIEL: Yes, Your Honor.

1 THE COURT: Okay.

2 MR. CALIEL: Juror [REDACTED]

3 THE COURT: Okay.

4 MR. CALIEL: Juror [REDACTED]

5 THE COURT: Okay.

6 MR. CALIEL: Juror [REDACTED]

7 THE COURT: Okay.

8 MR. CALIEL: Juror [REDACTED]

9 THE COURT: Okay.

10 MR. CALIEL: Juror [REDACTED]

11 THE COURT: Okay.

12 MR. CALIEL: Juror [REDACTED] Juror [REDACTED]

13 THE COURT: Okay.

14 MR. CALIEL: Juror [REDACTED]

15 THE COURT: Okay.

16 MR. CALIEL: Juror [REDACTED].

17 THE COURT: [REDACTED]?

18 MR. CALIEL: [REDACTED] yes, Your Honor. Juror
19 [REDACTED]

20 THE COURT: Okay.

21 MR. CALIEL: Juror [REDACTED]

22 THE COURT: Okay.

23 MR. CALIEL: Juror [REDACTED]

24 THE COURT: All right.

25 MR. CALIEL: Juror [REDACTED]

1 THE COURT: Okay.

2 MR. CALIEL: Juror [REDACTED]

3 THE COURT: Okay.

4 MR. CALIEL: Juror [REDACTED]

5 THE COURT: Okay.

6 MR. CALIEL: Juror [REDACTED]

7 THE COURT: Okay.

8 MR. CALIEL: Juror [REDACTED].

9 THE COURT: Okay.

10 MR. CALIEL: Juror [REDACTED]

11 THE COURT: Okay.

12 MR. CALIEL: And lastly, juror No. [REDACTED]

13 THE COURT: Let me go ahead and send them
14 down with the first group. And we need -- [REDACTED] and
15 [REDACTED] and 1 [REDACTED]

16 [REDACTED] From the second group we
17 need [REDACTED]

18 [REDACTED] and

19 [REDACTED] All that correct?

20 MS. SCHLAX: Yes, Your Honor.

21 THE COURT: Okay. These are the two groups
22 we need. They are two separate groups, one and
23 two, brought up out of the second 200 -- the
24 second 100. And we can excuse them and then I'll
25 tell you what to do with the rest. These are the

1 ones that are out there waiting.

2 BAILIFF: I've got them sitting out this end
3 over here, ten. So you want me to bring both
4 groups up or just one group at a time?

5 THE COURT: Well, they're all going to be in
6 here in a few minutes.

7 BAILIFF: You want to bring everybody up
8 then?

9 THE COURT: Well, you can bring them all up.

10 BAILIFF: Okay.

11 MR. CALIEL: Your Honor, may we approach
12 briefly?

13 THE COURT: Yes.

14 (Counsel for the State and defense approached
15 the bench for a side-bar conference out of the
16 hearing of the court reporter.)

17 THE COURT: Okay. Are they out there or do
18 we know?

19 BAILIFF: Not yet.

20 THE COURT: Not yet.

21 Let me put one thing on the record. Mr. Smith,
22 your attorneys and the State and I just went over
23 jurors that would be excused, number one, for cause
24 and, secondly, jurors that would come back on
25 Thursday to begin the actual jury pool selection

1 process for the trial and did they have time to talk
2 with you about all that?

3 THE DEFENDANT: Yes, ma'am.

4 THE COURT: And you agree with all those?

5 THE DEFENDANT: Yes, ma'am.

6 THE COURT: Any questions about any of that?

7 THE DEFENDANT: No.

8 THE COURT: Okay. So the one group is going
9 to come in, be excused for cause. They'll leave.
10 The next group will come in and be asked to come
11 back Thursday at 9:30 and then the rest of those
12 second 100, this is the group from 101 to 200,
13 they'll be asked to come back tomorrow morning at
14 9:00 and go through this process we're going
15 through now. And then we'll continue on with
16 groups of ten coming in one at a time to be
17 questioned individually.

18 THE DEFENDANT: Okay.

19 THE COURT: All right.

20 BAILIFF: Your Honor, the first group is
21 outside. The second group is on their way up.

22 THE COURT: Bring them in.

23 They don't have to sit in order. They can
24 sit anywhere. Doesn't matter.

25 (Prospective jurors present.)

1 THE COURT: Thank you, ladies and gentlemen.
2 I'm going to call out your number and get you to
3 raise your right hand just to let us know you're
4 here. That way you can put your hand down. No.

5

6

and

7

(Prospective jurors indicating.)

8

THE COURT: Did I leave anybody out?

9

MR. CALIEL: Yes, Your Honor.

10

THE COURT: I did. I'm sorry. I missed one.

11

Oh, I left two out. What are their numbers?

12

MR. CALIEL: and

13

PROSPECTIVE JUROR: And

14

THE COURT: and They're all

15

here, correct? I'm sorry. I missed a row. Your
16 row.

17

We've gone over the questionnaires and based on

18

responses to the questionnaires, this group that

19

I've just gone over your numbers is excused and you

20

have completed your jury duty. You have nothing

21

left to do but turn in your tag and your pin and

22

you're free to go about your life as an ordinary

23

citizen, but we do want to thank you for your time

24

and your patience. We really appreciate it. It's

25

very important that you are here and waiting, even

1 though it might not seem important to you, it's a
2 great part of the system so thank you for that. And
3 you can be on your way. Thank you.

4 (Prospective jurors excused.)

5 THE COURT: Okay. Now, we need the next
6 group which just got brought up which starts with
7 No. [REDACTED]

8 (Prospective jurors present.)

9 THE COURT: Thank you, ladies and gentlemen.
10 I'm going to read out your number and I need you
11 to raise your hand so I can make sure you're here
12 and I'm reading all the numbers correctly. I've
13 missed one or two.

14 So the first one is [REDACTED],

15 [REDACTED]

16 [REDACTED]

17 (Prospective jurors indicating.)

18 THE COURT: Did I miss anybody?

19 (No response from prospective jurors.)

20 THE COURT: Okay. Ladies and gentlemen, we
21 have reviewed all the questionnaires, as you know
22 there were 300 jurors called for this trial
23 yesterday. We finished having the jurors fill out
24 questionnaires at the end of the day late and so
25 we couldn't even read them until last night and in

1 the morning. We've done that now and each of you
2 is asked to come back Thursday at 9:30 to continue
3 the jury selection process. So you're free to go
4 today. You do not have to come back tomorrow, but
5 you do need to come to the jury assembly room by
6 9:30 on Thursday morning. And we thank you for
7 your time and your patience and you're free to go
8 for now. Thank you.

9 MR. CALIEL: Your Honor, if we could have the
10 cautionary instruction.

11 THE COURT: Oh, yes, don't forget, don't
12 watch the news, read the paper, talk to your
13 friends or family, look online or do anything that
14 would give you information about the case, because
15 if you do end up getting chosen to be on the
16 actual jury, you have to make your decisions based
17 solely on what you hear and see in the courtroom
18 with all of us present.

19 So if you could continue to follow those
20 instructions. You're still under your jury oath
21 until you're released at some point. So thank you
22 again and you're free to go. Thank you.

23 (Prospective jurors absent.)

24 THE COURT: Okay. Is everybody ready to
25 start on our next ten from the first 100 that are

1 requiring some individual questions?

2 MS. SCHLAX: Yes, Your Honor.

3 MR. CALIEL: Yes, Your Honor.

4 THE COURT: I think we're on --

5 MS. SCHLAX: No. [REDACTED]

6 THE COURT: Juror No. [REDACTED] So we're ready.

7 (Prospective juror present.)

8 THE COURT: Good afternoon, sir, No. [REDACTED]

9 Thank you for being here today so we can continue
10 with jury selection.

11 We have gone over the questionnaires and
12 there are just a few follow-up questions that need
13 to be asked. So the attorneys will ask you now.
14 Thank you.

15 MS. SCHLAX: Good afternoon.

16 PROSPECTIVE JUROR: Hi.

17 MS. SCHLAX: Juror No. [REDACTED] and it's very
18 awkward for me to call you that, I apologize for
19 that, but we don't want to reflect your name. You
20 had indicated that you had no prior knowledge of
21 anything concerning this case or the allegations
22 in the case.

23 PROSPECTIVE JUROR: Correct.

24 MS. SCHLAX: And that's correct. You filled
25 this out about midway through the day. Have you

1 learned anything about the case since that time?

2 PROSPECTIVE JUROR: No.

3 MS. SCHLAX: Okay. I don't have anything
4 further. Thank you.

5 MR. CALIEL: No questions, Your Honor.

6 THE COURT: Okay. Juror No. [REDACTED] if you'll
7 wait in the hall, I'll let you know something as
8 quick as we can. It will be a few minutes.
9 There's ten of you out there at a time. We'll
10 talk to all them and we'll let you know something.

11 PROSPECTIVE JUROR: Okay.

12 THE COURT: Thank you.

13 PROSPECTIVE JUROR: Thank you.

14 THE COURT: Juror No. [REDACTED] can come in when
15 juror No. [REDACTED] leaves.

16 (Prospective juror absent.)

17 (Prospective juror present.)

18 BAILIFF: Take the second chair in.

19 THE COURT: Juror No. [REDACTED] good afternoon.

20 We've gone over the questionnaires and
21 there's a few follow-up questions for some of you
22 and that's what you're going to do now and one of
23 the attorneys will ask questions. Thank you.

24 MR. FLETCHER: Thank you, Your Honor.

25 Good afternoon, juror No. [REDACTED] How are you

1 doing today?

2 PROSPECTIVE JUROR: Good, sir.

3 MR. FLETCHER: Sir, I just have a couple of
4 questions. You have seen some news coverage about
5 this case.

6 PROSPECTIVE JUROR: Yes, sir.

7 MR. FLETCHER: On the questionnaire itself, on
8 the back -- on the front page, I think it's page 2,
9 we have listed the allegations against Mr. Smith.

10 PROSPECTIVE JUROR: Yes, sir.

11 MR. FLETCHER: Have you learned anything else
12 about Mr. Smith on the news that wasn't right
13 there?

14 PROSPECTIVE JUROR: No, sir.

15 MR. FLETCHER: Do you know anything about Mr.
16 Smith's past, anything like that?

17 PROSPECTIVE JUROR: No, sir.

18 MR. FLETCHER: That's all I have.

19 MR. CALIEL: No question, Your Honor.

20 THE COURT: Thank you, juror No. [REDACTED]. If you
21 will wait in the hall and we'll let you know
22 something in a little bit. We've got ten of you
23 up here at a time to go through and we'll let you
24 know something after we go through all of them.

25 Juror No. [REDACTED] can come in after juror No. [REDACTED]

1 leaves.

2 BAILIFF: Yes, Your Honor.

3 (Prospective juror absent.)

4 (Prospective juror present.)

5 BAILIFF: If you'll take the second chair in,
6 ma'am.

7 THE COURT: Juror No. [REDACTED] good afternoon.
8 Thank you for being here again today.

9 We've gone over all the questionnaires and one
10 or more of the attorneys just a couple of follow-up
11 questions

12 PROSPECTIVE JUROR: Okay.

13 THE COURT: Thank you.

14 MR. CALIEL: Good afternoon, ma'am. You had
15 indicated on question -- part of the questionnaire
16 that you formed an opinion about the defendant's
17 guilt or innocence by listening to or observing
18 the news coverage prior to coming to court
19 yesterday, is that correct?

20 PROSPECTIVE JUROR: Well, yes.

21 MR. CALIEL: Okay. What opinion did you
22 reach about the defendant's guilt or innocence?

23 PROSPECTIVE JUROR: Well, I mainly just meant
24 that I just -- the news coverage from when it
25 happened.

1 MR. CALIEL: Okay. Have you reached any sort
2 of conclusions or in your mind have you reached an
3 opinion as to whether or not the defendant is
4 guilty or innocent as he sits here today, based
5 upon that news coverage alone?

6 PROSPECTIVE JUROR: Well, I've not been
7 offered any other choice.

8 MR. CALIEL: Okay. You followed up in
9 question 5 and you indicated that you could put
10 aside everything that you heard outside the
11 courtroom, listen to the evidence that's presented
12 here in the courtroom, the testimony, the physical
13 evidence, and reach a conclusion based upon that
14 and render your verdict based only upon what you
15 hear in this courtroom. Is that accurate?

16 PROSPECTIVE JUROR: Yes.

17 MR. CALIEL: Okay. And so despite the fact
18 you heard some news coverage prior to coming in
19 yesterday, you can make your verdict -- or make
20 your decision and render a verdict based solely
21 upon what you hear in this courtroom, correct?

22 PROSPECTIVE JUROR: Yes, correct.

23 MR. CALIEL: You can disregard whatever you
24 may have heard previously and only consider what
25 you hear inside this courtroom?

1 PROSPECTIVE JUROR: Yes.

2 MR. CALIEL: Thank you, ma'am. I don't have
3 any further questions.

4 THE COURT: Ms. Schlax.

5 MS. SCHLAX: Thank you.

6 Good afternoon. When I looked, ma'am, at your
7 -- at your questionnaire, you had indicated that
8 once you received your summons that a friend had
9 kind of mentioned, oh, you might end up being on
10 this specific case, correct?

11 PROSPECTIVE JUROR: Correct.

12 MS. SCHLAX: Okay. And so at that point did
13 you kind of, I guess, refresh your memory?

14 PROSPECTIVE JUROR: No, I didn't. I mean I
15 do remember the headlines.

16 MS. SCHLAX: Okay.

17 PROSPECTIVE JUROR: And I was very worried
18 that it would be this case.

19 MS. SCHLAX: Why were you worried, ma'am?

20 PROSPECTIVE JUROR: I just did not expect to
21 be brought in for a criminal case.

22 MS. SCHLAX: Okay. And please understand --
23 number one, we should have mentioned this again.
24 You know, everything you tell us in here is
25 completely confidential. And we are certainly not

1 trying to change your opinion on anything. You
2 are absolutely entitled to your opinion. Those
3 that ultimately are seated on the jury, we may
4 well both argue in regards to our opinions, but
5 we're not at that stage yet. And what we're
6 trying to determine is who are appropriate jurors
7 that feel they can look impartially at some very
8 serious evidence and reach a legal decision. Do
9 you think you can do that, ma'am?

10 PROSPECTIVE JUROR: I believe I could, yes.

11 MS. SCHLAX: Okay. In regards to the news
12 coverage that you've seen previously, and I think
13 in your words you said, well, it would kind of
14 presented, there wasn't -- and I take that to
15 mean, and don't let me put words in your mouth,
16 they're presenting it as if he's absolutely
17 guilty, correct?

18 PROSPECTIVE JUROR: Correct.

19 MS. SCHLAX: And would you say -- I guess let
20 me just ask you. How many different articles or
21 news blurbs do you think you've encountered in
22 regards to that?

23 PROSPECTIVE JUROR: Very little.

24 MS. SCHLAX: Okay.

25 PROSPECTIVE JUROR: I do remember, like I

1 said, the headlines years ago. I've been without
2 a working TV for quite awhile and I don't watch
3 the news much anyway. I just don't pay much
4 attention, I guess.

5 MS. SCHLAX: Okay. And the reason it is so
6 important, there has been so much media coverage,
7 is that when someone is accused of a crime in our
8 country, their jurors must presume they are
9 innocent. Now, ultimately the State can present
10 evidence, but the reason we go into such detail
11 and taking so much of your valuable time is trying
12 to determine have you just been given so much
13 information before you walked into this courtroom
14 that you can't presume him innocent as we sit here
15 today?

16 PROSPECTIVE JUROR: No. I -- I can't say
17 that I have -- how do I put this? That I have
18 been convinced that he's guilty. Okay?

19 MS. SCHLAX: Okay.

20 PROSPECTIVE JUROR: I don't know all the
21 evidence.

22 MS. SCHLAX: Okay. And has there been any
23 evidence or any press articles that you remember
24 that talks about Mr. Smith's past in any kind of
25 way?

1 PROSPECTIVE JUROR: No.

2 MS. SCHLAX: Okay. Okay. I don't think I
3 have any further questions. Thank you.

4 THE COURT: Anything further?

5 MR. CALIEL: No further questions, Your
6 Honor.

7 THE COURT: All right. Juror No. [REDACTED] thank
8 you so much for your time. There's ten of you out
9 there. We'll let you know how we're going to
10 proceed when we can. Shouldn't be too much
11 longer. Thank you.

12 And when juror [REDACTED] leaves juror No. [REDACTED] may come
13 in.

14 (Prospective juror absent.)

15 (Prospective juror present.)

16 BAILIFF: Take the second chair in.

17 THE COURT: Good afternoon juror No. [REDACTED].
18 We've gone over all the questionnaires and the
19 attorneys have some questions that they may want
20 to ask you just to follow-up on your
21 questionnaire. And we all thank you for being
22 here like you're supposed to be and I'll turn it
23 over to the attorneys and I thank you.

24 MR. CALIEL: Thank you, Your Honor.

25 Ma'am, you have indicated on your questionnaire

1 that you had been exposed or you saw a media report
2 this past Sunday, but you summarize that in your --
3 in your section on question 3 to basically be the
4 same facts as we put on the factual basis up at the
5 top of the page.

6 PROSPECTIVE JUROR: Pretty much.

7 MS. SCHLAX: Okay. Based upon that we went
8 to question 4 and indicated have you formed an
9 opinion about the case. At first you checked no
10 or you may have inadvertently checked no and then
11 you checked yes. Have you formed an opinion about
12 the case?

13 PROSPECTIVE JUROR: Yes.

14 MR. CALIEL: And what is that opinion?

15 PROSPECTIVE JUROR: Well, it was based on
16 what I had read.

17 MR. CALIEL: Okay.

18 PROSPECTIVE JUROR: And it was very limited,
19 it wasn't a lot that I read. And information that
20 I read I chose an opinion.

21 MR. CALIEL: Okay. The next question then
22 asks can you set aside what you've read before and
23 base your verdict solely upon what you hear and
24 see in the courtroom during the course of this
25 trial and your answer was yes.

1 PROSPECTIVE JUROR: Correct.

2 MR. CALIEL: Can you promise to do that?

3 PROSPECTIVE JUROR: Promise.

4 MR. CALIEL: And are you capable of
5 disregarding anything you may have seen or read in
6 the media and only base your verdict based upon
7 the evidence which is presented here in this
8 courtroom?

9 PROSPECTIVE JUROR: Absolutely.

10 MS. SCHLAX: Follow-up question that I have
11 for you, you indicated in question 7 that you also
12 had strong feelings about the death penalty and in
13 quoting you it says, I believe that some people
14 deserve the death penalty for the crimes -- for
15 their crimes, although I want nothing to do with
16 that decision.

17 As you were instructed by the Court, the
18 death penalty is a potential sentence in this
19 particular case and if you are asked to serve as a
20 juror in this case, you would have a role and you
21 would play a part in that decision-making process,
22 if we proceed to the second phase of the trial,
23 which is if the defendant is found guilty then
24 what the appropriate punishment is. Given your
25 statement there, do you believe that you could

1 serve in that role and if you felt it appropriate,
2 based upon the evidence and the law that the Court
3 will instruct you on, that you could make a
4 recommendation, along with your other jurors, that
5 the defendant receive the death penalty for what
6 he did?

7 PROSPECTIVE JUROR: Is that how it works,
8 that you have to agree with everybody else?

9 MR. CALIEL: Absolutely -- well, correct
10 that. You do not need to agree with everybody
11 else, but the jury as a whole has to be unanimous.
12 Meaning if one juror can't perform that role of
13 weighing the evidence and going through that
14 evaluation, or if one juror says I believe life in
15 prison is appropriate, then life in prison will be
16 the ultimate sentence. The question that I ask is
17 you said you didn't want to have any part in
18 playing that decision. You believe that the death
19 penalty can be appropriate under certain
20 circumstances, correct?

21 PROSPECTIVE JUROR: Correct.

22 MR. CALIEL: Okay. Where my concern lies is
23 can you be a part of that process, can you sit and
24 listen to what we call aggravating factors or
25 factors about the case which may lead you to

1 believe that the death penalty is appropriate, and
2 determine whether or not those factors exist and
3 outweigh the mitigation or the factors that may
4 lead you to believe that a life sentence may be
5 appropriate? Can you go through that evaluation
6 and that process?

7 PROSPECTIVE JUROR: Yes.

8 MR. CALIEL: Okay. Do you believe that after
9 you went through that process and you reached a
10 conclusion that if your conclusion was that the
11 death penalty was appropriate, based upon all the
12 factors involved in this case, could you in open
13 court hearken to your verdict and recommend that
14 the defendant be put to death for what he did?

15 PROSPECTIVE JUROR: No.

16 MR. CALIEL: Why not?

17 PROSPECTIVE JUROR: The easiest way I can
18 explain is I never really thought about the death
19 penalty in other -- only in a casual atmosphere,
20 you know. To be here, if they deserve it, yeah,
21 until I put the badge on and this on and realized
22 the potential of the decision, it would still have
23 to be my own and -- and I don't think I can offer
24 the death penalty or be supportive of that.

25 MR. CALIEL: So do you believe that under no

1 circumstance could you ever recommend that the
2 death penalty be imposed?

3 PROSPECTIVE JUROR: It almost feels like -- I
4 don't know. I haven't heard the trial, I don't
5 know -- you know, I don't know.

6 MR. CALIEL: Okay.

7 PROSPECTIVE JUROR: To be honest.

8 MR. CALIEL: And understanding that fact, but
9 if you heard the evidence and the law and the
10 evidence rose to your level, you believed that the
11 death penalty was appropriate, could you then
12 stand up in this courtroom and say, yes, the death
13 penalty is appropriate and Mr. Smith deserves to
14 be punished with the death penalty?

15 PROSPECTIVE JUROR: I don't know how to
16 answer that.

17 MR. CALIEL: And I know these are very
18 difficult questions. I guess do you feel --

19 PROSPECTIVE JUROR: I can speak freely?

20 MR. CALIEL: Sure, please.

21 PROSPECTIVE JUROR: I believe in life
22 imprisonment is, you know, I don't believe in
23 taking somebody's life.

24 MR. CALIEL: So no matter what the evidence
25 is and no matter what the law is, do you believe

1 that your verdict would always be, regardless,
2 life in prison, or your recommendation would
3 always be life in prison based upon your feelings?

4 PROSPECTIVE JUROR: I would feel so.

5 MR. CALIEL: Thank you, ma'am. I don't have
6 any further questions.

7 THE COURT: Any questions?

8 MR. FLETCHER: No, Your Honor.

9 THE COURT: Okay. Thank you, juror No. [REDACTED]
10 Now, there's ten of you up here, you'll sit out
11 there with them in a few minutes and I'll bring
12 you back in and let you know how you're going to
13 proceed. Okay?

14 PROSPECTIVE JUROR: Okay.

15 THE COURT: Thank you very much. And please
16 do not talk about your questions and answers.
17 Thank you.

18 And when juror No. [REDACTED] goes out, juror No. [REDACTED] --
19 excuse me -- [REDACTED] can come in.

20 (Prospective juror absent.)

21 (Prospective juror present.)

22 BAILIFF: Take the second chair in, ma'am.

23 PROSPECTIVE JUROR: All right.

24 THE COURT: Thank you, juror No. [REDACTED] And
25 we've gone over your questionnaire, everybody's

1 questionnaires and we just have a few follow-up
2 questions. Okay. This is Mr. Caliel. He's going
3 to start.

4 MR. CALIEL: Good afternoon, ma'am.

5 PROSPECTIVE JUROR: Hi.

6 MR. CALIEL: Ma'am, you had indicated that
7 you had observed or heard or read general news
8 coverage about this case before yesterday,
9 correct?

10 PROSPECTIVE JUROR: Um-hum.

11 MR. CALIEL: Then you also indicated that you
12 had formed an opinion about the defendant's guilt
13 or innocence based upon that news coverage.

14 PROSPECTIVE JUROR: Yes.

15 MR. CALIEL: What is that opinion?

16 PROSPECTIVE JUROR: Guilty.

17 MR. CALIEL: Okay. And that's based solely
18 upon what you've read in the newspaper or seen on
19 TV or read online, those type things?

20 PROSPECTIVE JUROR: Right.

21 MR. CALIEL: You then also indicated that you
22 could put all that aside and render a verdict
23 based solely upon the evidence that you hear in
24 this courtroom. Can you do that?

25 PROSPECTIVE JUROR: Yes.

1 MR. CALIEL: Okay. Do you believe that what
2 you've heard in the media would affect how you
3 view the evidence in this case, ma'am?

4 PROSPECTIVE JUROR: I -- yeah. Yeah.

5 MR. CALIEL: Why is that?

6 PROSPECTIVE JUROR: Because it -- well, from
7 what I've heard in the media, it seems that the
8 person is guilty.

9 MR. CALIEL: Okay. Now, to quote the
10 president, but, you know, sometimes the media may
11 not accurately report certain things, correct?

12 PROSPECTIVE JUROR: That's true.

13 MR. CALIEL: And would you agree there's a
14 reason why we don't try criminal cases or any
15 legal case in the media. We try them in
16 courtrooms.

17 PROSPECTIVE JUROR: I agree.

18 MR. CALIEL: Because we have the rules of
19 evidence and a judge is presiding and rules upon
20 the admissibility of evidence and things of that
21 nature.

22 PROSPECTIVE JUROR: Yes.

23 MR. CALIEL: Okay. And would you agree
24 that's the best way to do things?

25 PROSPECTIVE JUROR: I agree.

1 MR. CALIEL: Can you set aside everything
2 you've read or heard before yesterday morning and
3 render a verdict solely based upon the evidence
4 that is presented here at trial and the testimony
5 that you hear at trial, the law that the Judge
6 will instruct you on?

7 PROSPECTIVE JUROR: I can.

8 MR. CALIEL: Okay. And so you can set aside
9 everything you've heard before and still base your
10 verdict solely upon what happens during the course
11 of this trial?

12 PROSPECTIVE JUROR: I can.

13 MR. CALIEL: Thank you, ma'am.

14 I don't have any further questions.

15 THE COURT: Any questions?

16 MR. FLETCHER: Yes, Your Honor.

17 Good afternoon, juror [REDACTED]

18 PROSPECTIVE JUROR: Hi.

19 MR. FLETCHER: Just so I'm clear, when you
20 were first talking with Mr. Caliel you said you
21 could set everything aside and decide the case
22 just on what you hear in the courtroom, but then
23 you said with that outside, outside stuff, outside
24 knowledge affect your ability, your ability to do
25 that. You said yes as well.

1 PROSPECTIVE JUROR: Well, that's because he
2 asked me after, once I see the testimony and the
3 evidence can I not rely on what I saw outside and,
4 yes, I can.

5 MR. FLETCHER: Okay. Let me ask you a little
6 bit about what you saw on the outside. You
7 indicated on your form that you -- you've heard
8 things about Mr. Smith and I think the victim's
9 mom, Rayne.

10 PROSPECTIVE JUROR: Yes.

11 MR. FLETCHER: Okay. Do you remember what
12 you have heard about Rayne?

13 PROSPECTIVE JUROR: That she basically
14 allowed it to happen.

15 MR. FLETCHER: Okay. What did you hear about
16 Mr. Smith, other than what was written on here at
17 the top?

18 PROSPECTIVE JUROR: That's it. Just the
19 incident. Nothing about him other than that.

20 MR. FLETCHER: Nothing about his past or
21 where he's from, anything like that?

22 PROSPECTIVE JUROR: No.

23 MR. FLETCHER: Thank you. That's all I have.
24 Thank you, Judge

25 THE COURT: Anything further?

1 MR. CALIEL: Nothing further from the State,
2 Your Honor.

3 THE COURT: Juror 22, thank you. There's ten
4 of you out there and we have a few more to ask
5 just a few questions. As soon as we're through
6 we'll let you know how we're going to proceed.

7 PROSPECTIVE JUROR: Okay.

8 THE COURT: Please don't talk about your
9 questions and answers. Just remain outside and
10 we'll bring you back in as quick as we can. Thank
11 you.

12 PROSPECTIVE JUROR: Thank you.

13 THE COURT: And when juror No. [REDACTED] goes out,
14 juror No. [REDACTED] can come in.

15 (Prospective juror absent.)

16 (Prospective juror present.)

17 BAILIFF: Take the second chair in.

18 THE COURT: Juror No. [REDACTED] thank you. We've
19 gone over all the questionnaires and the attorneys
20 have a couple of follow-up questions for you.

21 PROSPECTIVE JUROR: Okay.

22 THE COURT: Thank you.

23 MR. CALIEL: Thank you, Your Honor.

24 Sir, you had indicated that you had heard
25 information in the media prior to coming to court

1 yesterday. Information about the case, the
2 defendant, the victim and the victim's mother, is
3 that accurate?

4 PROSPECTIVE JUROR: Yes.

5 MR. CALIEL: You indicated in your
6 questionnaire that you have reached an opinion
7 regarding the defendant's guilt or innocence.
8 What is that opinion?

9 PROSPECTIVE JUROR: Just my -- from what I
10 saw in the news stories that seemed like they have
11 a lot of facts linking the defendant with the
12 victim.

13 MR. CALIEL: Okay. And so basically, based
14 upon what the news was reporting, you believe that
15 there were bits and pieces of information or
16 evidence that might be presented at trial that
17 would link the defendant with the victim?

18 PROSPECTIVE JUROR: Yes.

19 MR. CALIEL: Obviously you then answered in
20 the next question on the questionnaire, you could
21 base your verdict solely based upon the evidence
22 and the law presented here during the course of
23 the trial. Is that true?

24 PROSPECTIVE JUROR: Yes.

25 MR. CALIEL: Okay. So even though you've

1 heard these items in the media or the bits and
2 pieces of information in the media, can you
3 promise us that you will render a verdict based
4 solely upon the evidence that you hear in the
5 courtroom from the witness stand in the form of
6 the evidence presented at trial?

7 PROSPECTIVE JUROR: Yes.

8 MR. CALIEL: You don't feel that what you've
9 heard is going to influence that verdict in one
10 way or another?

11 PROSPECTIVE JUROR: No, sir.

12 MR. CALIEL: Thank you, sir.

13 I don't have any further questions.

14 THE COURT: Anything further?

15 MS. SCHLAX: Yes, thank you.

16 THE COURT: Okay.

17 MS. SCHLAX: Good afternoon, juror No. [REDACTED]

18 PROSPECTIVE JUROR: Good afternoon.

19 MS. SCHLAX: What do you do for Adams and
20 Reese?

21 PROSPECTIVE JUROR: I'm an offices services
22 clerk. I maintain the files and I do ordering
23 inventory and I do a little bit of secretarial
24 work when -- when they need back-up. I do a
25 little bit of everything.

1 MS. SCHLAX: Okay. And what kind of law do
2 they practice?

3 PROSPECTIVE JUROR: It's mainly commercial
4 litigation and bankruptcy in our office. We have
5 other offices that do a little bit of everything,
6 but our office is just commercial litigation,
7 bankruptcy.

8 MS. SCHLAX: When you received your summons,
9 did you talk to any of your bosses that are
10 lawyers about the fact that you were summoned?

11 PROSPECTIVE JUROR: I let them know that I
12 was summoned.

13 MS. SCHLAX: Okay. Any conversations with
14 the lawyers about the fact that you may be on a
15 jury, specifically on this case?

16 PROSPECTIVE JUROR: No.

17 MS. SCHLAX: Okay. And I think you told us
18 that you had already formed an opinion based on --
19 based on the media coverage?

20 PROSPECTIVE JUROR: Yes, when I first heard
21 this.

22 MS. SCHLAX: And here's the real question.
23 And you working for a law firm, and I see you have
24 a bachelor's in business, where did you go to
25 school?

1 PROSPECTIVE JUROR: UNF.

2 MS. SCHLAX: Okay. Ultimately those that sit
3 and actually hear this case, they need to presume
4 Mr. Donald Smith innocent. Can you do that?

5 PROSPECTIVE JUROR: I believe so.

6 MS. SCHLAX: Okay.

7 I don't have any other questions. Thanks for
8 your time

9 THE COURT: Anything further for the State?

10 MR. CALIEL: Nothing further, Your Honor.

11 THE COURT: Okay. Juror No. [REDACTED] if you'll
12 step out in the hall, in a few minutes we'll try
13 to have you back in and let you know how we're
14 going to proceed.

15 Thank you.

16 When juror No. [REDACTED] goes out, juror No. [REDACTED] can
17 come in.

18 (Prospective juror absent.)

19 (Prospective juror present.)

20 BAILIFF: Ma'am, take the second chair in.

21 THE COURT: Good afternoon, juror [REDACTED] We've
22 gone over all the questionnaires and just have a
23 few follow-up questions.

24 MR. FLETCHER: Thank you, Judge.

25 THE COURT: Mr. Fletcher.

1 MR. FLETCHER: Good afternoon, juror 24.

2 PROSPECTIVE JUROR: Hi.

3 MR. FLETCHER: Ma'am, after reading your
4 questionnaire I just have a couple of questions.
5 You indicated that you had, I guess, some
6 knowledge about this case I guess from the news?

7 PROSPECTIVE JUROR: Yes.

8 MR. FLETCHER: And if you remember your
9 questionnaire up in the top of that same page,
10 there's sort of a factual outline of what the
11 State is alleging Mr. Smith did. Did you learn
12 anything from the news that's different from that?

13 PROSPECTIVE JUROR: No. Other than hearing
14 about the news where it was in somewhere off of
15 Dunn Avenue which I think I recall now.

16 MR. FLETCHER: Okay. Did you learn from the
17 news anything about Mr. Smith's background?

18 PROSPECTIVE JUROR: No.

19 MR. FLETCHER: Where he's from or anything
20 like that?

21 PROSPECTIVE JUROR: No, sir.

22 MR. FLETCHER: Okay. And on the very back of
23 the form on the last page you talk about being for
24 the death penalty. Do you remember that?

25 PROSPECTIVE JUROR: Yes, sir.

1 MR. FLETCHER: Do you think it applies in
2 every case, is it automatic?

3 PROSPECTIVE JUROR: No, sir, not in every
4 case.

5 MR. FLETCHER: So there's certain cases that
6 it will apply to and certain that it won't.

7 PROSPECTIVE JUROR: Yes, sir.

8 MR. FLETCHER: And you're willing to go
9 through that process of deciding if you're called
10 upon to be a juror in this case?

11 PROSPECTIVE JUROR: Yes, sir.

12 MR. FLETCHER: That's all I have.

13 THE COURT: Any further questions?

14 MR. CALIEL: No further questions, Your
15 Honor.

16 THE COURT: Thank you, juror [REDACTED] If you'll
17 just wait in the hall, I'll try to give you some
18 information, all of you, as soon as we can.
19 There's two more to be questioned, maybe three,
20 and then we'll let you know something. Okay?

21 Thank you.

22 Is that the gentleman from the clerk's office
23 out there?

24 BAILIFF: Yes.

25 THE COURT: Let him come in first before you

1 bring in the next juror.

2 I just wanted to give you some timeline
3 information.

4 THE CLERK: Okay.

5 THE COURT: This is taking longer than we
6 thought it would. We're just getting ready to
7 have individual questioning of juror No. [REDACTED] of the
8 first 100 so we're not going to get to the second
9 hundred today and we did go through, the attorneys
10 met, they made agreements on jurors out of the
11 second 200 that could be excused for cause and
12 other jurors who did not go through, need to go
13 through the individual questioning and can just
14 come straight back on Thursday morning before us
15 to hopefully begin start selecting the actual
16 jury.

17 So those people have all been excused. The
18 cause people have been completely excused and the
19 others, we have passed the jurors to come back on
20 Thursday. That leaves you with quite a few people
21 downstairs that we are not going to get to today.
22 So, number one, we need you to let them know to
23 come back tomorrow morning instead of staying here
24 longer today. There's no point. We're not going
25 to get to them.

1 And if I could, what time would you all like me
2 to come back tomorrow? They came at 9:30 today, is
3 that right?

4 THE CLERK: Came at 10:00.

5 THE COURT: Oh, they came at 10:00.

6 MR. CALIEL: We won't have the delay like we
7 did this morning because we --

8 THE COURT: If they could come back at, say,
9 9:30?

10 MR. CALIEL: 9:30.

11 THE COURT: 9:30 tomorrow. The issue you're
12 going to have is, so maybe you'll tell that group
13 to come up here to the atrium or maybe to
14 Courtroom 407 because the third group of a
15 hundred, the 201 through 100, is due here tomorrow
16 at 9:00 o'clock. So however you want to do it so
17 it's not confusing. We had both, we can give you
18 information today on that third group, but we're
19 not far enough along to be able to do that. So
20 they're going to have to come in. The jurors,
21 though, that were asked to call in in case we
22 needed additional, they can be excused.

23 THE CLERK: Okay.

24 THE COURT: That group can be excused. But
25 the 201 through 300 I need to come in. They may

1 not be here very long, but we have no way to know
2 what we're going to need.

3 THE CLERK: Is it your intent to keep those
4 two groups separate?

5 THE COURT: No, they don't have to be
6 separate. But we won't be doing the same things
7 with them. They can be in the jury room together.

8 THE CLERK: We have plenty of room down there
9 if that's the way you want to do it.

10 THE COURT: That's fine. Yeah, that's fine.
11 So our group will be coming in that we're going to
12 individually question around 9:30 and the group of
13 300 -- we may know enough by in the morning, but
14 we may not, as to whether or not we're going to
15 need them to wait to be individually questioned.
16 We'll do our best to --

17 THE CLERK: So the group downstairs that's
18 down there now, 9:30 tomorrow?

19 THE COURT: Correct. Because we can't get to
20 them today. And I don't want them just to sit
21 there all day.

22 THE CLERK: Right.

23 THE COURT: Tell them to come back tomorrow.
24 The ones that are in the first group, I'm sorry,
25 up through 100 needs to stay. It's just the 200

1 group that goes and comes back.

2 THE CLERK: 101 to 200.

3 THE COURT: Yes. Because we're going to
4 question all them today. We're getting ready to
5 bring up a new group of ten in just a minute.
6 We're almost through with our second group of ten.
7 So if they're under 100 they stay. If they're 101
8 to 200 they come back tomorrow at 9:30 and if
9 they're 201 through 300 we'll see them tomorrow at
10 9:00 and we'll do our best to let them know as
11 quickly as we can if we're not requesting to need
12 them or to start who we have Thursday and things
13 like that so they're not just sitting there.
14 Thank you so much.

15 THE CLERK: Thank you.

16 THE COURT: We really appreciate it.

17 You could bring in the next juror, which is
18 juror No. [REDACTED].

19 (Prospective juror present.)

20 THE COURT: Thank you, juror No. [REDACTED] We've
21 gone over all the questionnaires and just have a
22 few follow-up questions. This is Ms. Schlax.

23 MS. SCHLAX: Good afternoon. We appreciate
24 you coming back. We've had a chance to look at
25 your jury questionnaire. Prior to entering the

1 courthouse yesterday, you had never heard of the
2 allegations concerning this case?

3 PROSPECTIVE JUROR: I don't believe so.

4 MS. SCHLAX: Since you took part in this
5 process yesterday, has anyone approached you or
6 have you learned things other than what was the
7 summary of the case?

8 PROSPECTIVE JUROR: There was -- the news was
9 on in my house last night and I heard just a
10 little bit that they said about it.

11 MS. SCHLAX: Okay. Do you remember what that
12 was?

13 PROSPECTIVE JUROR: Just that he was on trial
14 for murdering a little girl.

15 MS. SCHLAX: Okay. Any -- anything about his
16 past or where he's from?

17 PROSPECTIVE JUROR: No.

18 MS. SCHLAX: Okay. When you realized that
19 that was on, did you -- did you make any kind of
20 effort to stay away from it?

21 PROSPECTIVE JUROR: I was actually on the
22 phone walking through the room so I just didn't
23 even -- you know, content, potentially watch it.
24 Just --

25 MS. SCHLAX: Sure. But you immediately tried

1 to get yourself out of that situation?

2 PROSPECTIVE JUROR: Yeah, I mean I was
3 walking through the room so I was kind of walking.
4 I did see a picture of the little girl up there.
5 It disturbed me.

6 MS. SCHLAX: I wanted to discuss with you
7 very briefly about that. You just said that you
8 saw a picture of the girl involved.

9 PROSPECTIVE JUROR: Um-hum.

10 MS. SCHLAX: And that upset you.

11 PROSPECTIVE JUROR: Yes.

12 MS. SCHLAX: Okay. We're also aware that you
13 put on your juror questionnaire that you believe
14 in the death penalty.

15 PROSPECTIVE JUROR: Yes.

16 MS. SCHLAX: Okay. Can you kind of expand on
17 that for me? What do you mean by that, I believe
18 in the death penalty?

19 PROSPECTIVE JUROR: I just believe that
20 people that commit that type of crime that they
21 should be penalized for it.

22 MS. SCHLAX: And then when you say penalized,
23 meaning that it should automatically be the death
24 penalty.

25 PROSPECTIVE JUROR: Yes, if you cause the

1 death of someone else, then that person shouldn't
2 have the right to live.

3 MS. SCHLAX: Okay. I want you to assume for
4 a second that you sat on this jury, that you
5 listened to all the evidence and you found beyond
6 and to the exclusion of every reasonable doubt
7 that Donald Smith caused death of this child. Is
8 there any other punishment in your mind besides
9 the death penalty?

10 PROSPECTIVE JUROR: Not if he's found guilty,
11 no.

12 MS. SCHLAX: Okay. I don't have any further
13 questions, Your Honor.

14 THE COURT: Any questions?

15 MR. CALIEL: Yes, Your Honor.

16 Now, ma'am, do you believe in every murder case
17 the death penalty is appropriate?

18 PROSPECTIVE JUROR: What I just said, yeah,
19 if you cause someone else to die.

20 MR. CALIEL: Now, the law, and the Judge will
21 instruct you as to what the law is, is that not
22 every murder case necessarily is a death penalty
23 case. Okay. Do you believe, despite your
24 personal beliefs, that you could follow the law as
25 the judge instructs you?

1 PROSPECTIVE JUROR: I'll try.

2 MR. CALIEL: Okay. You say I'll try, but can
3 you affirmatively give us a promise that even
4 though you have a strong belief about the death
5 penalty that you could listen to the law as the
6 Judge will instruct you and go through the
7 evaluation process necessary, if we get to that
8 phase, to determine whether or not the death
9 penalty is appropriate in this case?

10 PROSPECTIVE JUROR: To the best of my ability
11 I would.

12 MR. CALIEL: Okay. The -- and the law, just
13 so you know, we can't talk about all the
14 aggravating and mitigating circumstances at this
15 stage of the proceeding, but one of the legal
16 factors is the fact that the victim is under the
17 age of 12 and that's something that you can
18 consider as to whether or not the death penalty is
19 appropriate. That being said, could you also
20 consider the Judge will instruct you as to other
21 factors which are called the mitigating factors or
22 reason why a life sentence may be more appropriate
23 than a death sentence? Could you at least listen
24 to those factors and evaluate those factors and
25 sort of weigh them as the Court will tell you, to

1 reach a conclusion as to whether or not the death
2 penalty is appropriate in this case?

3 PROSPECTIVE JUROR: I would.

4 MR. CALIEL: Okay. And so can you promise us
5 that you won't automatically just, if he's found
6 guilty, he must receive the death penalty? Will
7 you go through the process of listening to the
8 evidence in the penalty phase, listening to the
9 law and evaluating that and determining whether or
10 not the death penalty is appropriate or not?

11 PROSPECTIVE JUROR: I don't know if I can
12 answer that till I have -- I'm in a situation.

13 MR. CALIEL: Well, all I'm asking you at this
14 point in time is can you have an open mind? Can
15 you listen to the evidence in the penalty phase,
16 can you listen to the law and make a determination
17 at that juncture, once you know what the evidence
18 is and once you know what the law is, can you make
19 a decision with an open mind as to whether or not
20 the death penalty is appropriate or will you
21 automatically say he was found guilty, death
22 penalty is the only sentence I can impose?

23 PROSPECTIVE JUROR: In my mind, okay, I have
24 an eight year old granddaughter. If someone did
25 to her what was done to this little girl, yes, I'd

1 want him to have the death penalty.

2 MR. CALIEL: And I understand that because
3 you have a relative who's right around the age of
4 the victim in this particular case, and I think
5 any parent or any grandparent would have personal
6 feelings about that and that's why parents or
7 grandparents aren't members of the jury when the
8 case goes before the Court, and that's why they're
9 not the ones making the decision as to what's
10 appropriate in that particular case. So
11 understanding that if it were your child or your
12 grandchild you would want the death penalty
13 imposed, can you have an open mind in evaluating
14 the evidence in this case and make a determination
15 as to whether the death penalty is appropriate
16 based upon the law and the evidence that you will
17 be presented at trial?

18 PROSPECTIVE JUROR: I would listen to what
19 I'm told.

20 MR. CALIEL: Okay. And so you feel you can
21 do that, you can listen to the evidence, keep an
22 open mind. In the end your decision may be I
23 think the death penalty is appropriate or it could
24 be, no, I believe life in prison is appropriate,
25 but can you have an open mind to both options?

1 PROSPECTIVE JUROR: I just don't see in this
2 case how it could not be appropriate.

3 MR. CALIEL: Okay. I understand. Thank you,
4 ma'am.

5 THE COURT: Thank you, juror No. [REDACTED]
6 We've got two more jurors out of your group
7 that came up together to talk to and we'll try to
8 let you know something shortly after that. It
9 shouldn't be much longer. We appreciate your
10 time. Don't speak about your questions and
11 answers to anyone. Okay?

12 (Prospective juror absent.)

13 THE COURT: And juror No. [REDACTED] can come in when
14 juror No. [REDACTED] goes out.

15 BAILIFF: Just take the second chair. Second
16 chair. One more over.

17 PROSPECTIVE JUROR: One more over?

18 THE COURT: That's so I can see you. Thank
19 you, juror No. [REDACTED] We've gone over all the
20 questionnaires and we just have a few follow-up
21 questions. Thank you.

22 MR. FLETCHER: Thank you, Your Honor.

23 How are you doing juror [REDACTED]?

24 PROSPECTIVE JUROR: Hanging in there.

25 MR. FLETCHER: Okay. Just -- I was a little

1 bit confused by your questionnaire because you
2 answered no after answering no before and it kind
3 of messed me up. On question 4 you answered that
4 you had not formed an opinion about this case.

5 PROSPECTIVE JUROR: I don't know anything.

6 MR. FLETCHER: So you don't know anything
7 about the case?

8 PROSPECTIVE JUROR: No.

9 MR. FLETCHER: You're not watching it on the
10 news or anything like that?

11 PROSPECTIVE JUROR: (Shakes head.)

12 MR. FLETCHER: And then it says can you
13 follow the instructions -- if your answer to
14 question 4 was yes, can you follow the instruction
15 of this court, put aside anything you've heard
16 about this case and render a verdict based solely
17 on the evidence and law presented during the trial
18 and then you answered no.

19 PROSPECTIVE JUROR: I was misunderstanding.

20 MR. FLETCHER: So you meant to say yes?

21 PROSPECTIVE JUROR: Yes.

22 MR. FLETCHER: That's all I have. Thank you.

23 THE COURT: Anything further?

24 MR. CALIEL: No questions Your Honor.

25 THE COURT: Thank you, sir. If you'll wait

1 in the hall I'll let you know something in just a
2 couple of minutes and when juror No. [REDACTED] goes out,
3 [REDACTED] can come in.

4 And we need the next group of ten to come up,
5 Jeff.

6 BAILIFF: They're here.

7 THE COURT: They are.

8 (Prospective juror absent.)

9 BAILIFF: Take the second chair in, sir.

10 THE COURT: Good afternoon, juror No. [REDACTED]
11 We've gone over all the questionnaires and we have
12 a few follow-up questions for you. This is
13 Ms. Schlax. She's going to ask you some
14 questions.

15 MS. SCHLAX: Good afternoon, sir.

16 PROSPECTIVE JUROR: Good afternoon.

17 MS. SCHLAX: My understanding from reading
18 your questionnaire is that you have read something
19 about -- about this case prior to becoming a juror
20 yesterday. That you indicated yes.

21 PROSPECTIVE JUROR: I read something?

22 MS. SCHLAX: (Nods head.)

23 PROSPECTIVE JUROR: About this -- I didn't
24 read anything, no, ma'am. I -- I heard about this
25 case Sunday night at about 11:30.

1 MS. SCHLAX: Okay.

2 PROSPECTIVE JUROR: To be honest with you,
3 that's the first I heard from it.

4 MS. SCHLAX: And what did you hear, sir?

5 PROSPECTIVE JUROR: Well, it came on
6 television.

7 MS. SCHLAX: Okay.

8 PROSPECTIVE JUROR: And I said, my wife and
9 my daughter were there, and said you haven't heard
10 about the case and I said no. And then I heard on
11 the news they were telling me about it.

12 MS. SCHLAX: Okay.

13 PROSPECTIVE JUROR: And I left out the room
14 and the next morning my wife knew I was coming to
15 -- here for jury, it came on the news that they
16 had 300 people coming and she said that's probably
17 you and that's it.

18 MS. SCHLAX: Okay.

19 PROSPECTIVE JUROR: That's all I know.

20 MS. SCHLAX: Okay. Anything that either your
21 daughter or wife said or anything you might have
22 heard on the news that has caused you to form any
23 kind of opinion?

24 PROSPECTIVE JUROR: To be truthful with you,
25 no. I didn't listen that long.

1 MS. SCHLAX: Okay. And you had -- you had
2 indicated, sir, that you are a pastor and you had
3 some concerns about the trial lasting multiple
4 weeks.

5 PROSPECTIVE JUROR: Yes, ma'am.

6 MS. SCHLAX: Okay. And the schedule right
7 now that, as we understand it, is you may be asked
8 to come back Thursday and Friday of this week.
9 Several days next -- the following week and then
10 several days the rest of the -- the third week.

11 PROSPECTIVE JUROR: Yes, ma'am.

12 MS. SCHLAX: Potentially. Would that --
13 would that schedule present any kind of severe
14 hardship?

15 PROSPECTIVE JUROR: Not -- well, I am on
16 demand a lot. And I think I would have to kind of
17 take it from there. I'm on call a lot.

18 MS. SCHLAX: Sure.

19 PROSPECTIVE JUROR: And because then sometime
20 I'm not.

21 MS. SCHLAX: Okay.

22 PROSPECTIVE JUROR: So that would be as
23 truthful as I could give you.

24 MS. SCHLAX: Okay. I don't have any further
25 questions. Thank you, sir.

1 PROSPECTIVE JUROR: All right.

2 MR. CALIEL: No questions, Your Honor.

3 THE COURT: Thank you, juror No. [REDACTED]. If
4 you'll step out in the hall. Do not discuss your
5 questions or answers with anyone and we'll try to
6 let you know something in just a minute. Thank
7 you.

8 PROSPECTIVE JUROR: All right.

9 (Prospective juror absent.)

10 THE COURT: Do you want a few minutes with
11 your client to go over everything or the State may
12 need a few minutes. So that ten, we can go ahead
13 and excuse them or --

14 MS. SCHLAX: Certainly, Your Honor. I think
15 we're ready.

16 THE COURT: So we can go ahead and do the
17 cause and bring them back on Thursday.

18 MR. CALIEL: Yes, Your Honor. The State --

19 THE COURT: I think they might need a moment.

20 MS. SCHLAX: I don't think we --

21 THE DEFENDANT: No.

22 MR. CALIEL: Judge, we would move to strike
23 juror No. [REDACTED] for cause.

24 MS. SCHLAX: And, Your Honor, I can't state a
25 legal objection why or state why it doesn't rise

1 to the level of cause.

2 THE COURT: Okay. I agree. Juror No. [REDACTED]
3 will be stricken for cause.

4 MR. CALIEL: The next strike for cause, Your
5 Honor, would be juror No. [REDACTED]

6 MS. SCHLAX: No objection, Your Honor.

7 THE COURT: Juror No. [REDACTED] will be stricken for
8 cause.

9 MR. CALIEL: The remaining of the jurors in
10 question, the State would agree to move on to the
11 next phase.

12 MS. SCHLAX: If I could just have a moment to
13 confer.

14 THE COURT: Sure.

15 (Defense counsel conferring with defendant.)

16 MS. SCHLAX: Your Honor, we agree with the
17 State that all remaining jurors move on to the
18 next phase.

19 THE COURT: So we're talking about juror Nos.
20 [REDACTED] and [REDACTED]?

21 MR. CALIEL: Yes, Your Honor.

22 MS. SCHLAX: Yes, Your Honor.

23 THE COURT: Okay. So Nos. [REDACTED] and [REDACTED] -- that's
24 from before. I apologize. No. [REDACTED] and [REDACTED] are the
25 two that are going to be excused for cause.

1 MS. SCHLAX: Yes, Your Honor.

2 THE COURT: And, Mr. Smith, do you agree with
3 that?

4 THE DEFENDANT: Yes, ma'am.

5 THE COURT: And do you agree with the others
6 being passed to Thursday to begin the actual jury
7 selection?

8 THE DEFENDANT: Yes, ma'am.

9 THE COURT: Any questions with that?

10 THE DEFENDANT: No, ma'am.

11 THE COURT: And have you had time to talk to
12 your attorney?

13 THE DEFENDANT: Yes, ma'am.

14 THE COURT: Okay. We need jurors No. 20 and
15 25.

16 (Prospective jurors present.)

17 THE COURT: Thank you. Just for the record,
18 I'm going to ask you to raise your hand when I
19 call your number. No. [REDACTED] and No. [REDACTED].

20 (Prospective juror indicating.)

21 THE COURT: Okay. Thank you.

22 The two of you are going to be excused. You
23 completed your jury duty. All you have left to do
24 is to turn in your hanging tag and your round button
25 and we want to thank you for your willingness to go

1 through the process and serve as jurors. It is a
2 very important civic duty and we could not operate
3 our system without you. So we're grateful for your
4 time, but you have completed your service and you're
5 free to go.

6 Someone will collect your tag and your button
7 when you walk out the door. Thank you.

8 PROSPECTIVE JUROR: Thank you.

9 (Prospective jurors excused.)

10 THE COURT: And now we need the other eight.

11 The other eight from the [REDACTED]

12 [REDACTED] and [REDACTED]

13 (Prospective jurors present.)

14 THE COURT: Okay. Thank you, ladies and
15 gentlemen. I'm going to call your number out. I
16 just need you to raise your hand and make sure for
17 the record it reflects you are back in here. No.
18 [REDACTED], No. [REDACTED], No. [REDACTED], No. [REDACTED], No. [REDACTED], No. [REDACTED], No. [REDACTED]
19 and No. [REDACTED].

20 (Prospective jurors indicating.)

21 THE COURT: Okay. So all of you are back in
22 here. We completed the questionnaire phase of the
23 process and now we move on to the next phase and
24 all of you will need to come back Thursday at
25 9:30. You're free to go today. You're not

1 required to be here tomorrow. And we'll start the
2 actual jury selection hopefully Thursday right
3 after you arrive at 9:30 Thursday. I think they
4 keep their buttons and their tag.

5 BAILIFF: Yes, ma'am.

6 THE COURT: Make sure you wear them back with
7 you on Thursday and please do not watch the news,
8 listen to the news, look anything up online. All
9 those instructions I gave you, you're still under
10 oath as a potential juror and so it's
11 inappropriate for you to research or do any kind
12 of checking about this case. You'll learn
13 everything you need to know about it eventually
14 and we thank you for your time and attention and
15 we'll see you at 9:30 Thursday morning. And the
16 jury assembly room is where you go and then you'll
17 be brought in here. Thank you.

18 (Prospective jurors absent.)

19 THE COURT: We have 37 more. So I think we
20 need to take a short recess. We'll start with the
21 next ten. Okay. We'll be in recess until 3:15.

22 (Recess.)

23 (Defendant present.)

24 THE COURT: Okay. Is everybody ready in the
25 next group?

1 MR. CALIEL: Yes, Your Honor.

2 THE COURT: So this will be numbers [REDACTED] through
3 [REDACTED] I think.

4 And are they out there, those ten?

5 BAILIFF: Yes, ma'am.

6 THE COURT: So we're ready for juror No. [REDACTED]
7 Thank you.

8 (Prospective juror present.)

9 BAILIFF: Take the second chair in.

10 PROSPECTIVE JUROR: Okay.

11 THE COURT: Thank you, juror No. [REDACTED] We've
12 gone over all the questionnaires and just have a
13 few follow-up questions.

14 PROSPECTIVE JUROR: Yes, ma'am.

15 MR. FLETCHER: Good afternoon, juror [REDACTED]

16 PROSPECTIVE JUROR: Good afternoon.

17 MR. FLETCHER: On your questionnaire that you
18 wrote that really the only way you know this case
19 is when it first happened you saw it on the news.

20 PROSPECTIVE JUROR: On the news, yes.

21 MR. FLETCHER: Okay. Have you followed it
22 over the years?

23 PROSPECTIVE JUROR: Well, yes and no. When
24 it does come on the news, I haven't really gotten
25 into, you know, what really happened, but I knew

1 the trial was coming up soon.

2 MR. FLETCHER: Okay. And on the
3 questionnaire you indicated you knew who Donald
4 Smith was.

5 PROSPECTIVE JUROR: Yes, from previous.

6 MR. FLETCHER: And you recognize the name
7 Cherish?

8 PROSPECTIVE JUROR: Yes.

9 MR. FLETCHER: But you did not know who Rayne
10 Perrywinkle was?

11 PROSPECTIVE JUROR: No.

12 MR. FLETCHER: So you know nothing about her
13 past or anything?

14 PROSPECTIVE JUROR: No.

15 MR. FLETCHER: Do you know anything about
16 Donald Smith's past from any of the news
17 reporting?

18 PROSPECTIVE JUROR: No.

19 MR. FLETCHER: That's all I have. Thank you.

20 MR. CALIEL: No questions, Your Honor.

21 THE COURT: Thanks, juror No. [REDACTED] and if
22 you'll wait in the hall and don't discuss your
23 questions and answers. If you'll wait in the
24 hall.

25 PROSPECTIVE JUROR: Okay. Thank you.

1 THE COURT: No. [REDACTED] can come in when number [REDACTED]
2 leaves.

3 (Prospective juror absent.)

4 BAILIFF: Take the second chair, sir.

5 PROSPECTIVE JUROR: Yes, sir.

6 THE COURT: Good afternoon, juror No. [REDACTED]
7 We've gone over the questionnaires and we just
8 have a few follow-up questions for you.

9 PROSPECTIVE JUROR: Yes.

10 MS. SCHLAX: And good afternoon.

11 PROSPECTIVE JUROR: Good afternoon.

12 MS. SCHLAX: Just looking over your
13 questionnaire, sir, you had indicated that you
14 evidently had had some kind of information before
15 coming to court yesterday and you reflected it was
16 just the same information as above.

17 PROSPECTIVE JUROR: Yes, ma'am.

18 MS. SCHLAX: Okay. Do you remember where was
19 the source?

20 PROSPECTIVE JUROR: The news, I think.

21 MS. SCHLAX: Okay. And do you remember
22 anything about hearing anything that's not
23 reflected in that factual scenario? Meaning
24 anything about supposedly Mr. Smith's past or
25 anything about the mother's involvement?

1 PROSPECTIVE JUROR: The only other thing I
2 can remember is something about finding somebody
3 on a bench maybe or...

4 MS. SCHLAX: Okay.

5 PROSPECTIVE JUROR: Seems like I might be
6 getting that from something else, though.

7 MS. SCHLAX: But I guess ultimately, and my
8 main question to you is those that are ultimately
9 selected for this jury, they must do what we call
10 presume Mr. Donald Smith innocent at the beginning
11 of the case.

12 PROSPECTIVE JUROR: Yes, ma'am.

13 MS. SCHLAX: Can you do that?

14 PROSPECTIVE JUROR: Yes, ma'am.

15 MS. SCHLAX: I don't have any other
16 questions. Thank you.

17 MR. CALIEL: No questions, Your Honor.

18 THE COURT: Thank you, juror No. [REDACTED] Wait in
19 the hall for a few minutes and they'll let you
20 know when you might need to come back.

21 PROSPECTIVE JUROR: Thank you.

22 THE COURT: Please don't discuss your
23 questions and answers with anyone. Thank you.

24 And if juror No. [REDACTED] can come in when juror No.
25 [REDACTED] leaves.

1 (Prospective juror absent.)

2 (Prospective juror present.)

3 BAILIFF: Ma'am, if you'll take the second
4 chair in. You can sit down.

5 THE COURT: Good afternoon, juror No. [REDACTED]

6 PROSPECTIVE JUROR: Hi.

7 THE COURT: Thank you for being here. We've
8 gone over the questionnaires and the attorneys
9 just have a couple of follow-up questions. Thank
10 you.

11 MR. FLETCHER: Good afternoon, juror [REDACTED]

12 PROSPECTIVE JUROR: Good afternoon.

13 MR. FLETCHER: In your questionnaire you
14 indicated the only thing you knew about this case
15 was when you were walking, I guess to the
16 courthouse, somebody said something about a
17 kidnapping of a man?

18 PROSPECTIVE JUROR: Yeah.

19 MR. FLETCHER: This case -- you read the
20 little factual scenario on it. It happened in
21 2013. Since 2013 to now have you heard anything
22 on the news about it?

23 PROSPECTIVE JUROR: No.

24 MR. FLETCHER: Nothing about a man named
25 Donald Smith?

1 PROSPECTIVE JUROR: No, sir.

2 MR. FLETCHER: Or Cherish Perrywinkle?

3 PROSPECTIVE JUROR: No, sir.

4 MR. FLETCHER: Okay. So you don't know
5 anybody in this case.

6 PROSPECTIVE JUROR: I don't watch TV.

7 MR. FLETCHER: That's all I have. Thank you.

8 MR. CALIEL: No questions, Your Honor.

9 THE COURT: Juror No. [REDACTED], I'm going to excuse
10 you to the hallway. We'll try to let you know
11 something as quick as we can and please don't
12 discuss your questions and answers with anybody.
13 Thank you.

14 And when juror No. [REDACTED] leaves, juror No. 34 can
15 come in.

16 (Prospective juror absent.)

17 (Prospective juror present.)

18 BAILIFF: Ma'am, if you'll take the second
19 chair in.

20 THE COURT: Good afternoon, juror No. [REDACTED]
21 Thank you again for serving. We've gone over all
22 the questionnaires and the attorneys just have a
23 few follow-up questions for you.

24 MS. SCHLAX: Hi. Good afternoon. How long
25 have you been with [REDACTED]

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[REDACTED]

PROSPECTIVE JUROR: For 34 years.

MS. SCHLAX: Okay. Have you ever worked as

[REDACTED]

PROSPECTIVE JUROR: No.

MS. SCHLAX: What's your position there?

PROSPECTIVE JUROR: I am a supervisor in the fraud, [REDACTED].

MS. SCHLAX: Okay. During your tenure of 34 years, have you ever had any kind of supervisory duties or any duties in regard to the branch of [REDACTED] that deals with child abuse allegations?

PROSPECTIVE JUROR: No.

MS. SCHLAX: Okay. You had mentioned that you have been aware, not only of the case, but specifically you were, I guess, heard or read something about Donald Smith, Cherish Perrywinkle, and Rayne Perrywinkle.

PROSPECTIVE JUROR: Um-hum.

MS. SCHLAX: So all three names were familiar to you?

PROSPECTIVE JUROR: Yes.

MS. SCHLAX: Okay. And you had listed kind of in summary fashion, which we appreciate that

1 you had, I guess, news, arrest and all the
2 information list in the summary.

3 PROSPECTIVE JUROR: Um-hum.

4 MS. SCHLAX: And I guess my question to you
5 is besides what was contained in the summary, what
6 other things had you heard about before you walked
7 into this courthouse?

8 PROSPECTIVE JUROR: Basically I think just
9 everything in the summary.

10 MS. SCHLAX: Okay. Was there anything
11 additional like in regards to anything about the
12 mother, Rayne Perrywinkle, or about Mr. Smith's
13 past?

14 PROSPECTIVE JUROR: I had saw on the news
15 maybe a couple of days before I came here, I saw
16 the mother on the news speaking.

17 MS. SCHLAX: Okay.

18 PROSPECTIVE JUROR: Just giving her -- her
19 take on things.

20 MS. SCHLAX: Okay. And did that have any
21 kind of emotional impact on you?

22 PROSPECTIVE JUROR: No.

23 MS. SCHLAX: Okay. Our ultimate question at
24 this stage of the proceedings is because there's
25 been so much media attention, and obviously you

1 know what you've seen, those that sit on the jury
2 at the beginning of the trial, they must presume
3 Mr. Smith innocent. Can you do that?

4 PROSPECTIVE JUROR: I believe I can.

5 MS. SCHLAX: Okay. Why do you -- and I'm not
6 trying to mince words with you, but why do you say
7 I believe I can?

8 PROSPECTIVE JUROR: Because at first I didn't
9 think that I could and then during the process I
10 found out that in myself that I could.

11 MS. SCHLAX: Okay. Meaning what kind of
12 debate was going on in your mind?

13 PROSPECTIVE JUROR: I -- when I came to here
14 yesterday it just -- I had a different take, just
15 being here, altered some of the things that I
16 felt.

17 MS. SCHLAX: Can you share with me what
18 changed for you? I guess let me ask it this way.
19 Before you walked in the door --

20 PROSPECTIVE JUROR: Um-hum.

21 MS. SCHLAX: -- you obviously, I guess,
22 realized it was a potential, knowing what you know
23 about the case, that you would be called to be a
24 potential juror in this case, Donald Smith case.

25 PROSPECTIVE JUROR: I did because I had heard

1 on the news that it started on the 5th and I -- I
2 mean but it could have been any case.

3 MS. SCHLAX: Sure. Sure.

4 PROSPECTIVE JUROR: But when I got here and
5 came in I guess the human factor, I was able to
6 see him as a human being.

7 MS. SCHLAX: Okay. I don't think I have any
8 other questions. I appreciate your time. Thank
9 you.

10 MR. CALIEL: No questions, Your Honor.

11 THE COURT: All right. Thank you, juror No.
12 [REDACTED] If you'll step outside -- No. [REDACTED] I'm sorry.
13 No. [REDACTED]. If you'll step outside and we'll call you
14 back in in just a few minutes.

15 And when juror No. [REDACTED] walks out, juror No. [REDACTED]
16 can come in.

17 (Prospective juror absent.)

18 (Prospective juror present.)

19 BAILIFF: Ma'am, if you'll take the second
20 chair in.

21 THE COURT: Juror No. [REDACTED] thank you. We
22 appreciate your time today. We've gone over the
23 questionnaires and the attorneys just have a
24 couple of follow-up questions for you. Okay?

25 PROSPECTIVE JUROR: Yes, ma'am.

1 THE COURT: Thank you.

2 MR. FLETCHER: Thank you, Judge.

3 Good afternoon, juror [REDACTED].

4 PROSPECTIVE JUROR: Good afternoon.

5 MR. FLETCHER: I read your questionnaire
6 answers and you indicated that the first time you
7 ever heard about this case was the morning of it.
8 Coming to court or last week?

9 PROSPECTIVE JUROR: No, before I came to
10 court, which is Monday.

11 MR. FLETCHER: Okay. And do you remember
12 what you heard on the news?

13 PROSPECTIVE JUROR: On the news it was the
14 defendant, I heard that he was arrested for a
15 child -- child molesting or something.

16 MR. FLETCHER: That he was arrested for that?

17 PROSPECTIVE JUROR: Yes, I didn't pay
18 attention a lot because I had to go to work.

19 MR. FLETCHER: So you turned it off and
20 walked out?

21 PROSPECTIVE JUROR: Yeah.

22 MR. FLETCHER: Okay. Was it a whole lot
23 different from what we wrote up here about he's
24 alleged to have done?

25 PROSPECTIVE JUROR: No.

1 MR. FLETCHER: Pretty much the same thing?

2 PROSPECTIVE JUROR: Yes.

3 MR. FLETCHER: And that's all you remember
4 about it?

5 PROSPECTIVE JUROR: Yes, sir.

6 MR. FLETCHER: What about back in 2013? Do
7 you remember hearing about the case at all?

8 PROSPECTIVE JUROR: No, 2013 I was in -- I
9 think I was in Atlanta, Georgia.

10 MR. FLETCHER: How long have you been in
11 Jacksonville?

12 PROSPECTIVE JUROR: I moved from Atlanta like
13 February sometime. My lease expired February and
14 I moved sometime March.

15 MR. FLETCHER: In 2013 or 14?

16 PROSPECTIVE JUROR: No, 2017.

17 MR. FLETCHER: Okay. So you've only been
18 here about a year. Based on what you're telling
19 us, you haven't really heard any news about this
20 case.

21 PROSPECTIVE JUROR: No.

22 MR. FLETCHER: That's all I have. Thank you.

23 THE COURT: Anything further?

24 MR. CALIEL: Yes, just one brief follow-up
25 question, Your Honor.

1 THE COURT: Okay.

2 MR. CALIEL: And, ma'am, I appreciate your
3 time. I just have one follow-up question. You
4 had written down on the answer to question 6,
5 which was talking about how long it took to serve
6 and things of that nature. I feel that this case
7 should be the defendant's should be proving guilty
8 or innocence. What did you mean by that?

9 PROSPECTIVE JUROR: What I mean by that until
10 he's proven guilty.

11 MR. CALIEL: So he should be presumed
12 innocent until proven guilty?

13 PROSPECTIVE JUROR: Yes, sir.

14 MR. CALIEL: Thank you so much.

15 PROSPECTIVE JUROR: You're welcome.

16 THE COURT: Thank you so much, juror No. [REDACTED]
17 And if you'll wait in the hall I'll try to let you
18 know something in a few minutes. And please don't
19 discuss your questions and answers with anyone.

20 PROSPECTIVE JUROR: Sure.

21 THE COURT: When juror No. [REDACTED] goes out, juror
22 No. [REDACTED] can come in.

23 (Prospective juror absent.)

24 (Prospective juror present.)

25 BAILIFF: Come on in and take the second

1 chair up, sir.

2 THE COURT: Good afternoon, juror No. [REDACTED].
3 Now, we've been through over all the
4 questionnaires and we just have a few follow-up
5 questions for you. Okay.

6 MR. CALIEL: Good afternoon, sir.

7 PROSPECTIVE JUROR: Hi.

8 MR. CALIEL: I'd like to direct your
9 attention to your answer regarding do you have any
10 strong feelings for or against the death penalty.
11 And you wrote would prefer a life sentence over
12 the death penalty for defendants. Why do you hold
13 that belief, sir?

14 PROSPECTIVE JUROR: I guess my -- my main
15 feeling about that is that I guess it feels kind
16 of hypothetical to punish a person for killing
17 someone by killing them.

18 MR. CALIEL: Okay. The law in the State of
19 Florida, obviously allows for capital punishment
20 and if you are selected to serve as a juror in
21 this particular case and the defendant is found
22 guilty at trial of first degree murder, the next
23 phase of the trial involves the jury's
24 participation in evaluating what the appropriate
25 sentence would be. You said it would be

1 hypothetical to impose death on somebody who's
2 taken a life. Do you believe that you could
3 follow the law, consider the death penalty as a
4 potential punishment in this case and evaluate
5 that and return a verdict in this case or do you
6 feel based upon your feelings that there is no way
7 you would ever make a recommendation that the
8 death penalty be imposed?

9 PROSPECTIVE JUROR: I think it depends on the
10 circumstances. I wouldn't say, you know,
11 absolutely zero percent death penalty. I guess
12 first -- my first thought when it comes to that
13 situation.

14 MR. CALIEL: Okay. So to say you may not be
15 in favor of the death penalty or have strong
16 feelings that the death penalty be utilized, but
17 you're not saying it's an impossibility that you
18 could ever recommend the death sentence if you
19 felt it was appropriate under the facts and the
20 law?

21 PROSPECTIVE JUROR: Correct.

22 MR. CALIEL: Thank you. I don't have any
23 further questions.

24 MS. SCHLAX: No questions, Your Honor.

25 THE COURT: All right. And juror No. [REDACTED] I'm

1 going to have you wait in the hall with the others
2 that came up with you and we'll try to let you
3 know something as quick as we can and please do
4 not discuss your questions and answers with
5 anybody. Thank you, sir.

6 And when juror No. [REDACTED] leaves, juror No. [REDACTED] can
7 come in.

8 (Prospective juror absent.)

9 (Prospective juror present.)

10 BAILIFF: Take the second chair in, sir.

11 PROSPECTIVE JUROR: Yes, sir.

12 THE COURT: Thank you, juror No. [REDACTED] We've
13 gone over all the questionnaires and just have a
14 few follow-up questions.

15 Mr. Fletcher

16 MR. FLETCHER: Thank you, Judge. Good
17 afternoon, juror No. [REDACTED] How are you doing?

18 PROSPECTIVE JUROR: I'm doing well, thank
19 you.

20 MR. FLETCHER: I've read your questionnaire
21 and you know some things about this case from I
22 guess it's News4Jax and Times-Union?

23 PROSPECTIVE JUROR: Yes, sir.

24 MR. FLETCHER: What you wrote down there was
25 in some sense exactly what is contained in --

1 PROSPECTIVE JUROR: Yeah, no, I understand,
2 but those are the facts I know I've seen on the
3 news, I don't get to watch the news that often. I
4 go to work at 4:30 in the morning so I don't watch
5 a lot of news and I'm usually asleep by then and
6 most of the things I've heard was initially when
7 it happened.

8 MR. FLETCHER: Have you read any of the
9 articles or seen any stories in the last week?
10 There were a lot of them.

11 PROSPECTIVE JUROR: Briefly in the news.
12 Yeah, briefly. I didn't read any of the articles.

13 MR. FLETCHER: Okay. Did those articles or
14 the news stories, did you learn anything new about
15 Rayne Perrywinkle?

16 PROSPECTIVE JUROR: No, sir, I did not.

17 MR. FLETCHER: How about Donald Smith? Did
18 you learn anything about his past or anything like
19 that?

20 PROSPECTIVE JUROR: I did not.

21 MR. FLETCHER: So it was just basically what
22 we told you?

23 PROSPECTIVE JUROR: Yes.

24 MR. FLETCHER: That's all I have. Thank you.

25 PROSPECTIVE JUROR: Thank you.

1 THE COURT: Any question?

2 MR. CALIEL: No questions, Your Honor.

3 THE COURT: Thank you, sir.

4 If you'll wait in the hall we'll try to let
5 you know something as quickly as possible and
6 please do not discuss your questions and answers
7 with anyone.

8 PROSPECTIVE JUROR: Yes, ma'am.

9 THE COURT: Thank you, sir.

10 PROSPECTIVE JUROR: Thank you.

11 THE COURT: And when juror No. [REDACTED] leaves,
12 juror [REDACTED] may come in.

13 (Prospective juror absent.)

14 (Prospective juror present.)

15 BAILIFF: Ma'am, take the second chair in.

16 THE COURT: Good afternoon, juror No. [REDACTED]
17 We've gone over all the questionnaires and we just
18 have a few follow-up questions.

19 Ms. Schlax.

20 MS. SCHLAX: Good afternoon, No. [REDACTED] I
21 notice you are a high school teacher. What age
22 within the high school do you teach?

23 PROSPECTIVE JUROR: Social studies, so 15 to
24 18.

25 MS. SCHLAX: You had mentioned a number of

1 social accounts. Do you actively Tweet?

2 PROSPECTIVE JUROR: No. As a teacher they
3 tell us not to like or do a lot. So if I do it
4 it's just re-Tweeting. I went to Florida so I
5 like Gator sports stuff. Other than that nothing.

6 MS. SCHLAX: And you had indicated you sort
7 of remember the news story. Do you -- are you
8 someone who does not watch --

9 PROSPECTIVE JUROR: I don't watch local news.

10 MS. SCHLAX: How about your access on
11 Facebook? Have you seen any kind of Facebook
12 posts or news articles posted by any of your
13 friends?

14 PROSPECTIVE JUROR: Totally forgot about it.
15 The only reason I knew something yesterday was
16 somebody asked me if I was one of the jurors on
17 that. That's the only time I've seen anything
18 about it and then I kind of vaguely remembered it
19 from before.

20 MS. SCHLAX: I don't have any other
21 questions. Thanks.

22 MR. CALIEL: No questions, Your Honor.

23 THE COURT: Okay. Juror No. [REDACTED], ask you to
24 wait in the hall. We'll try to let you know
25 something in just a few minutes. And please don't

1 discuss your questions and answers with anyone.

2 Thank you.

3 And when juror No. [REDACTED] leaves, juror No. [REDACTED] may
4 come in.

5 (Prospective juror absent.)

6 BAILIFF: Ma'am, take the second chair in.

7 THE COURT: Good afternoon, juror No. [REDACTED].
8 We've gone over all the questionnaires and the
9 attorneys just have a couple of follow-up
10 questions. Thank you.

11 MR. CALIEL: Good afternoon, ma'am.

12 Ma'am, when we reviewed the question that dealt
13 with any hardships that you may have because of the
14 length and the duration of the trial, you indicated
15 that your husband was disabled and you were his
16 primary caregiver

17 PROSPECTIVE JUROR: Right.

18 MR. CALIEL: Also that both you and your
19 husband have a number of doctors' appointments
20 over the next couple of weeks.

21 PROSPECTIVE JUROR: That's true.

22 MR. CALIEL: And that that is set up through
23 the Veteran's Association.

24 PROSPECTIVE JUROR: My husband is a hundred
25 percent disabled Veteran and they set up all his

1 appointments usually and we get them in the mail
2 and I bring him to them because he's bilateral
3 amputee so I am his primary caregiver. I am a
4 nurse. I do work PRN at different places, but I'm
5 not employed full-time anywhere.

6 MR. CALIEL: Okay.

7 PROSPECTIVE JUROR: So I work around
8 whatever.

9 MR. CALIEL: Okay.

10 PROSPECTIVE JUROR: And that is the reason
11 why, because like today I had an appointment and I
12 must do medication and I really shouldn't have
13 missed that appointment, but I thought I would
14 come to it yesterday and it was going to be kind
15 of over. I didn't know until it was too late for
16 me to reschedule.

17 MR. CALIEL: Okay. We apologize for that.
18 We do appreciate that you --

19 PROSPECTIVE JUROR: No, I just --

20 MR. CALIEL: We appreciate that you're here.
21 So what would be the -- the appointments that are
22 scheduled over the next two week? The schedule as
23 we have it planned out right now is that the jury
24 selection would last for the remainder of this
25 week, in all likelihood.

1 PROSPECTIVE JUROR: Right.

2 MR. CALIEL: And then next week the trial
3 will begin on Monday and will last for probably
4 three or four days. So the bulk of next week.
5 And then the penalty phase, if we do have to
6 proceed to a penalty phase, would be the following
7 week, the 20th through the 23rd. Do you have
8 appointments that your husband has scheduled at
9 that point in time?

10 PROSPECTIVE JUROR: Well, I do have -- we do
11 have some more appointments, but like I fix his
12 breakfast and stuff like that. I have to know
13 what time I'm coming and what time I'm going. I
14 got to have a schedule. I can't be -- I came
15 today. I came at 10:00.

16 MR. CALIEL: If you're selected as a juror
17 you would have a pretty regular schedule. We'd
18 begin sometime around 9:00 in the morning and we'd
19 conclude sometime around the 5:00 o'clock or 5:30
20 hour in the afternoon. If we maintained a regular
21 schedule and you knew in advance that you were
22 going to have to be there, would that still be a
23 hardship to serve as a juror?

24 PROSPECTIVE JUROR: I just don't think I need
25 to have this strain. I have a lot going on and

1 then to have to worry about this, you know, you
2 know.

3 MR. CALIEL: No, I totally understand.

4 PROSPECTIVE JUROR: I just -- I want to do a
5 good job, you know.

6 MR. CALIEL: Sure.

7 PROSPECTIVE JUROR: So...

8 MR. CALIEL: Do you believe that the
9 hardships and everything you have going on would
10 affect your ability to sit as a juror in this
11 case?

12 PROSPECTIVE JUROR: I would be like I got to
13 go, I got things I got to do.

14 MR. CALIEL: Thank you, ma'am.

15 I don't have any further questions.

16 THE COURT: Any questions?

17 MR. FLETCHER: No, Your Honor.

18 THE COURT: All right. Thank you, juror No.

19 █ If you'd wait in the hall I'll let you know
20 something in just a few minutes. And please don't
21 discuss your questions and answers with anyone.

22 And when juror No. █ goes out, we need juror
23 █ to come in. Juror █ will be the last of ten.

24 (Prospective juror absent.)

25 (Prospective juror present.)

1 BAILIFF: Sir, take the second chair in.

2 THE COURT: Juror No. [REDACTED] thank you. We've
3 gone over the questionnaires and the attorneys
4 have just a few follow-up questions for you.

5 MS. SCHLAX: Good afternoon, juror [REDACTED] We
6 saw from your questionnaire that you work as a
7 doctor.

8 PROSPECTIVE JUROR: Correct.

9 MS. SCHLAX: Is that at [REDACTED] or --

10 PROSPECTIVE JUROR: [REDACTED] yes, ma'am.

11 MS. SCHLAX: And you're a doctor of
12 osteopathic medicine. Have you ever had any other
13 I guess specialties?

14 PROSPECTIVE JUROR: Well, so you start out in
15 medicine and then you specialize in whatever you
16 want to. I do surgery and critical care medicine.

17 MS. SCHLAX: Okay. Actually I don't have any
18 other questions for you.

19 MR. CALIEL: No questions, Your Honor.

20 THE COURT: All right. Thank you, sir. And
21 if you'll wait in the hall, we'll let you know
22 something in just a moment. Okay?

23 PROSPECTIVE JUROR: Yes.

24 THE COURT: Thank you.

25 (Prospective juror absent.)

1 THE COURT: I think that's ten, is that
2 right?

3 MR. CALIEL: Yes, Your Honor.

4 THE COURT: So I'll give the State time to
5 confer and the defense time to speak with your
6 client and you all let me know when you're ready.

7 (Defense counsel conferring with defendant.)

8 MR. CALIEL: Judge, are you ready?

9 THE COURT: Yes.

10 MR. CALIEL: Judge, the only strike the State
11 has is juror No. [REDACTED] based upon the hardship that
12 she had with her disabled husband and the
13 appointments.

14 THE COURT: Juror No. [REDACTED]

15 MR. CALIEL: [REDACTED]

16 MS. SCHLAX: Your Honor, after consulting
17 with Mr. Smith, no objection by the defense.

18 THE COURT: All right. Juror No. [REDACTED] is
19 stricken for cause.

20 MR. CALIEL: Your Honor, the remainder of the
21 ten jurors that we inquired of, we have no
22 objection to having them move on to the next
23 phase.

24 MS. SCHLAX: And no objection by the defense,
25 Your Honor, after conference with Mr. Smith.

1 THE COURT: Okay. So if I understand
2 correctly, [REDACTED] and [REDACTED]
3 will all move on, correct?

4 MR. CALIEL: Yes, Your Honor.

5 MS. SCHLAX: Yes, Your Honor.

6 THE COURT: Okay. Let me just mark that.
7 And you agree with that, Mr. Smith?

8 THE DEFENDANT: Yes, ma'am.

9 THE COURT: All right. Are you all ready to
10 proceed with the next -- actually we'll bring the
11 rest of them up because the jury has been there
12 all day, but we'll do them in order and start with
13 No. [REDACTED]

14 Are you all ready?

15 MS. SCHLAX: Yes, Your Honor.

16 THE COURT: All right. We're ready for No.
17 [REDACTED]

18 THE CLERK: Are you going to excuse the --

19 THE COURT: I'm sorry. You're right. Right,
20 right, right. I need to bring in juror No. [REDACTED] by
21 herself.

22 (Prospective juror present.)

23 THE COURT: Juror No. [REDACTED] based on your
24 further answers clarifying your husband and your
25 situation, you're going to be excused. You've

1 completed your jury service. We appreciate very
2 much your willingness to come in for us yesterday
3 and today. And they're going to collect your
4 hanging tag and your button and you're free to go
5 about your life. Thank you.

6 PROSPECTIVE JUROR: Thanks.

7 (Prospective juror excused.)

8 THE COURT: And then the other nine, [REDACTED]
9 through [REDACTED] if they haven't been excused for some
10 other reason, they all need to come in.

11 (Prospective jurors present.)

12 THE COURT: Okay. Ladies and gentlemen, let
13 me get you to raise your hand when I say your
14 number so the record is clear that you're here.

15 No. [REDACTED] No. [REDACTED] No. [REDACTED] No. [REDACTED] No. [REDACTED], No. [REDACTED],
16 No. [REDACTED] No. [REDACTED] and No. [REDACTED].

17 (Prospective jurors indicating.)

18 THE COURT: Did I miss anybody?

19 (No response from prospective jurors.)

20 THE COURT: No. Okay. We've completed that
21 phase of the jury selection and we just need you
22 to be back Thursday at 9:30 in the jury assembly
23 room for the final stage of jury selection. So if
24 you'll report there at 9:30, we should get started
25 shortly thereafter on Thursday. You're free to go

1 for the rest of the day today and you're free to
2 not come in tomorrow, but we do need you back at
3 9:30 on Thursday. Thank you all so much for your
4 time. We appreciate it.

5 PROSPECTIVE JUROR: Thank you.

6 (Prospective jurors absent.)

7 THE COURT: Okay. You can bring in juror No.

8 [REDACTED] Thank you.

9 (Prospective juror present.)

10 THE COURT: Good afternoon, juror No. [REDACTED]

11 Base on the questionnaires the attorneys have a
12 few follow-up questions.

13 MS. SCHLAX: Good afternoon. We noticed you
14 were active duty Navy so how long have you lived
15 in Jacksonville?

16 PROSPECTIVE JUROR: For about two years.

17 MS. SCHLAX: And during that time have you
18 deployed at all?

19 PROSPECTIVE JUROR: Not since then. We came
20 over here from deployment.

21 MS. SCHLAX: Okay. And you indicated that
22 prior to walking in this courthouse you had not
23 heard or read or anything about the allegations
24 contained in this case?

25 PROSPECTIVE JUROR: No, ma'am. First time.

1 MS. SCHLAX: Since you filled out this
2 questionnaire and just being in the courthouse,
3 going through this process, at any point did you
4 learn anything additional about this case,
5 overhear anything?

6 PROSPECTIVE JUROR: No, ma'am.

7 MS. SCHLAX: And I guess my real question to
8 you, sir, is that everyone is entitled to be what
9 they call presumed innocent? Can you do that?
10 Can you presume my client, Mr. Smith, innocent?

11 PROSPECTIVE JUROR: Presume as in?

12 MS. SCHLAX: Can you right now as we're
13 sitting here today --

14 PROSPECTIVE JUROR: Everybody's innocent
15 until proven guilty.

16 MS. SCHLAX: I appreciate it, sir. Thank
17 you.

18 MR. CALIEL: No questions, Your Honor.

19 THE COURT: Thank you, sir. You can step in
20 the hall. We'll try to let you know something as
21 soon as we can.

22 And when juror No. [REDACTED] goes out, juror [REDACTED] can
23 come in. Thank you.

24 (Prospective juror absent.)

25 (Prospective juror present.)

1 BAILIFF: Take the second seat, yes, sir.

2 PROSPECTIVE JUROR: Thank you.

3 THE COURT: Juror No. [REDACTED] thank you. We
4 appreciate your time today. And we've gone over
5 the questionnaires. The attorneys just have a few
6 follow-up questions.

7 PROSPECTIVE JUROR: Sure.

8 THE COURT: Thank you.

9 MR. FLETCHER: Thank you, Your Honor.

10 Good afternoon, juror [REDACTED] I read your
11 questionnaire. The answer as to the questionnaire,
12 and you mostly have learned things about this case
13 just from the news?

14 PROSPECTIVE JUROR: Yes, sir.

15 MR. FLETCHER: Were you aware of this case
16 back in 2013 when it first happened?

17 PROSPECTIVE JUROR: No, sir.

18 MR. FLETCHER: When did you start to hear
19 about it?

20 PROSPECTIVE JUROR: Probably about two years
21 ago, maybe three. I remember probably a couple of
22 years.

23 MR. FLETCHER: And is it something you've
24 sort of followed as it goes through the news?

25 PROSPECTIVE JUROR: Just whenever it pops up

1 on my phone.

2 MR. FLETCHER: And how do you get it through
3 your phone? Is it on --

4 PROSPECTIVE JUROR: Just comes up, Jax for
5 News loads.

6 MR. FLETCHER: And you read some of the
7 articles over the weekend?

8 PROSPECTIVE JUROR: No.

9 MR. FLETCHER: Do you know anything about
10 Rayne Perrywinkle's past that was discussed in the
11 paper or on the news?

12 PROSPECTIVE JUROR: No.

13 MR. FLETCHER: How about Donald Smith's past?

14 PROSPECTIVE JUROR: None.

15 MR. FLETCHER: Nothing about his prior life
16 or anything?

17 PROSPECTIVE JUROR: No, sir.

18 MR. FLETCHER: That's all I have. Thank you.

19 MR. CALIEL: No questions, Your Honor.

20 THE COURT: Thank you, juror No. [REDACTED] If
21 you'll wait in the hall, we'll try to let you know
22 something as soon as we can. You have to come out
23 this way. Sorry. We've got you roped in. Thank
24 you.

25 PROSPECTIVE JUROR: You're welcome.

1 THE COURT: And as soon as juror No. [REDACTED]
2 leaves, [REDACTED] can come in.

3 (Prospective juror absent.)

4 (Prospective juror present.)

5 BAILIFF: Ma'am, take the second seat in.

6 PROSPECTIVE JUROR: Second seat?

7 BAILIFF: Yes, ma'am.

8 THE COURT: Good afternoon, juror No. [REDACTED]
9 We've been over all the questionnaires and the
10 attorneys just have a few follow-up questions for
11 you. Okay?

12 PROSPECTIVE JUROR: Okay.

13 THE COURT: Thank you.

14 MS. SCHLAX: And good afternoon.

15 PROSPECTIVE JUROR: How you doing?

16 MS. SCHLAX: Good. I hope it hasn't been too
17 long out there.

18 We've had an opportunity to look over your
19 questionnaire. And in it you indicated that you had
20 already, just based on all the news coverage you've
21 seen, formed an opinion in regards to defendant's
22 guilt or innocence. Is that true?

23 PROSPECTIVE JUROR: True.

24 MS. SCHLAX: Okay. And what is that opinion?

25 PROSPECTIVE JUROR: Well, I -- I can't say

1 guilty or not guilty, you know.

2 MS. SCHLAX: Okay. So -- well, let me ask it
3 this way. You wrote in your -- and I'm going to
4 quote you. It was -- the question was can you
5 briefly write out what you have heard. He killed
6 her and kidnapped her.

7 PROSPECTIVE JUROR: Yeah, that's what I heard
8 on the news. Okay.

9 MS. SCHLAX: And all the news stories portray
10 it as if done deal, he did it.

11 PROSPECTIVE JUROR: That's what the news say
12 he did it.

13 MS. SCHLAX: Okay. And here's our question
14 to you. Is everyone in this country entitled,
15 when they start a criminal trial, to be what we
16 call presumed innocent?

17 PROSPECTIVE JUROR: Right.

18 MS. SCHLAX: Meaning that you have to presume
19 or believe he's innocent.

20 PROSPECTIVE JUROR: Right.

21 MS. SCHLAX: Now, the difficulty we have is
22 that the news has been blaring forever since this
23 thing occurred that Mr. Smith did this.

24 PROSPECTIVE JUROR: Right.

25 MS. SCHLAX: So as we sit here today, if you

1 were selected to be a juror in this case, can you
2 presume or believe Mr. Smith is innocent?

3 PROSPECTIVE JUROR: I can't say that.

4 MS. SCHLAX: You cannot say that?

5 PROSPECTIVE JUROR: No, I cannot say that.

6 MS. SCHLAX: Okay. Meaning that you can't
7 give him his constitutionally entitled presumption
8 of innocence?

9 PROSPECTIVE JUROR: Right.

10 MS. SCHLAX: Because you've just seen so much
11 news?

12 PROSPECTIVE JUROR: Yes.

13 MS. SCHLAX: Okay. And it's convinced in
14 your mind --

15 PROSPECTIVE JUROR: Yes.

16 MS. SCHLAX: -- that, in fact, he's already
17 guilty?

18 PROSPECTIVE JUROR: (Nods head.) I can't say
19 that because I don't know.

20 MS. SCHLAX: Okay.

21 PROSPECTIVE JUROR: Yeah, I'm just going by
22 what I hear on the news, they say he guilty. You
23 know, I wasn't there, I don't know what really
24 happened, you know. But I'm just saying I just
25 heard, you know, I really don't look at the news

1 that much so I happened to be looking at TV and
2 seen it cross the news. That's really the only
3 thing I know about the case, yes.

4 MS. SCHLAX: And the news reports that you
5 have seen, did -- do you remember anything in
6 particular about Mr. Smith's past?

7 PROSPECTIVE JUROR: No.

8 MS. SCHLAX: Okay. It's just as you wrote
9 down he killed her and kidnapped her.

10 PROSPECTIVE JUROR: Right.

11 MS. SCHLAX: Okay. I don't have anything
12 further.

13 THE COURT: Do you have any question?

14 MR. CALIEL: No questions, Your Honor.

15 THE COURT: All right, ma'am, if you'll wait
16 in the hall, we'll try to let you know something
17 as quick as we can. Please do not discuss your
18 questions and answers with anybody.

19 PROSPECTIVE JUROR: Yes, ma'am. Thank you.

20 THE COURT: And when juror No. [REDACTED] leaves
21 juror No. [REDACTED] may come in.

22 (Prospective juror absent.)

23 (Prospective juror present.)

24 BAILIFF: Take the second seat in, jury.

25 THE COURT: Thank you, juror No. [REDACTED] We've

1 been over all the questionnaires and the lawyers
2 just have a couple of follow-up questions for
3 you. Thank you.

4 MR. FLETCHER: Thank you, Your Honor.

5 Good afternoon, juror [REDACTED]

6 PROSPECTIVE JUROR: Good afternoon.

7 MR. FLETCHER: We've read over your
8 questionnaire and really my only question is you
9 indicated I guess first time you heard about this
10 case was the morning of jury selection?

11 PROSPECTIVE JUROR: I usually don't watch the
12 local news as a rule and I got this fancy antenna
13 for my TV, and I was trying it out to see if I
14 could pick up local news and it was that morning
15 they said there was going to be jury selection for
16 that case.

17 MR. FLETCHER: Okay. In your questionnaire
18 that was sort of a little factual scenario that
19 they're alleging Mr. Smith did certain things.
20 Did you learn anything on the news other than
21 that?

22 PROSPECTIVE JUROR: No. All I heard was it
23 was going to be jury selection today for that
24 case.

25 MR. FLETCHER: Okay. So they didn't talk

1 about what is alleged to have done or anything
2 like that.

3 PROSPECTIVE JUROR: Uh-huh.

4 MR. FLETCHER: And do you know anything about
5 Rayne Perrywinkle? Do you know who that is?

6 PROSPECTIVE JUROR: Just I heard that name
7 that morning on the news and then a couple of
8 times here I've heard the name.

9 MR. FLETCHER: Okay. And have you learned
10 anything in anybody talking out there in the
11 hallway, just overhearing people or anything?

12 PROSPECTIVE JUROR: They've all been not
13 talking about it, just like they're told to.

14 MR. FLETCHER: Okay. Just as instructed.
15 That's all I have, thank you.

16 MR. CALIEL: Brief follow-up. Your Honor.

17 Juror No. [REDACTED] good afternoon. You indicated
18 based upon your religious beliefs that you're
19 strongly opposed to the death penalty.

20 PROSPECTIVE JUROR: Um-hum.

21 MR. CALIEL: Except in very rare
22 circumstances.

23 PROSPECTIVE JUROR: Um-hum.

24 MR. CALIEL: What are those very rare
25 circumstances?

1 PROSPECTIVE JUROR: I view it as a tool for
2 society to neutralize threats to society and I
3 don't personally think that we have a real need
4 for that. Maybe some places in the world that
5 have Al Qaeda, Taliban, un -- disorganized
6 societies, things like that, maybe they have no
7 other choice than to resort to that for to safety
8 of the people, but I personally don't think that
9 it's necessary for us.

10 MR. CALIEL: Okay.

11 PROSPECTIVE JUROR: When life in prison is an
12 option to remove that threat from society.

13 MR. CALIEL: So does that mean -- when you
14 talk about it in rare circumstances, you're
15 talking about places other than in the United
16 States?

17 PROSPECTIVE JUROR: It's conceivable that
18 somebody could explain to me out west or on the
19 border or somewhere there's, you know, places in
20 the US that may need that but as far as I'm -- as
21 far as I'm aware there's no place where the law is
22 not able to apprehend people and send them to
23 prison.

24 MR. CALIEL: So in -- and you wouldn't view
25 Jacksonville as an exception to that then, that

1 there's no need for the death penalty here in
2 Jacksonville?

3 PROSPECTIVE JUROR: No, I don't believe.

4 MR. CALIEL: If you are asked to sit as a
5 juror in this particular case and the defendant is
6 found guilty of first degree murder, the second
7 phase of this trial would be the jury's ability to
8 review the evidence and consider whether or not
9 the death penalty or life in prison is
10 appropriate. Are you stating that under no
11 circumstance could you ever recommend the death
12 penalty in this case?

13 PROSPECTIVE JUROR: I don't believe I would
14 ever recommend the death penalty. I can -- I can
15 look at facts objectively and make a determination
16 without emotion.

17 MR. CALIEL: But regardless of what those
18 facts were or what the law was, you could never
19 recommend the death penalty?

20 PROSPECTIVE JUROR: No, sir.

21 MR. CALIEL: Okay. Thank you. I don't have
22 any further questions.

23 THE COURT: Okay. Thank you, sir. And if
24 you'll wait in the hall, we'll try to let you know
25 something as quickly as we can. Please do not

1 discuss your questions and answers with anyone.

2 PROSPECTIVE JUROR: Yes, sir.

3 THE COURT: And I was glad to hear you say
4 everybody was being quiet and following my
5 instructions. That was very good. Thank you.

6 And when juror No. [REDACTED] leaves, juror No. [REDACTED] can
7 come in.

8 (Prospective juror absent.)

9 (Prospective juror present.)

10 BAILIFF: Ma'am, take the second seat in.

11 PROSPECTIVE JUROR: Okay.

12 THE COURT: Good afternoon, juror No. [REDACTED].
13 We've been going over all the questionnaires and
14 the attorneys have a few follow-up questions.

15 PROSPECTIVE JUROR: Okay.

16 THE COURT: Thank you.

17 MS. SCHLAX: And good afternoon.

18 PROSPECTIVE JUROR: Hello.

19 MS. SCHLAX: We had a chance to look over
20 your questionnaire and you had indicated that you
21 have been familiar through media accounts of this
22 case.

23 PROSPECTIVE JUROR: Yes, ma'am.

24 MS. SCHLAX: We're trying to kind of get an
25 idea of you wrote for us that -- I want to make

1 sure I read this right. Just an account of the
2 media on the account of victim and -- and family.
3 Besides this -- you know, we gave you a little
4 factual summary in regards to what the allegations
5 are against Mr. Smith. What else from the media
6 do you remember?

7 PROSPECTIVE JUROR: Just basically was just
8 the notice that there was someone allegedly
9 arrested or picked up for allegedly for the young
10 girl. That was basically the only thing I heard.
11 Because I was -- it was the morning, it was in the
12 morning and I'm doing other things in the house.
13 So I really just had it for background noise, just
14 that I noticed somebody had been picked up on this
15 -- due to this young victim that whatever took
16 place. And I didn't see all the -- I didn't hear
17 all the details of it at that time. So -- and
18 basically just the media, just overall the media
19 said that there was a young girl was killed and
20 that they had picked up an individual for
21 allegedly killing that young girl. That's
22 basically all I, you know, heard from that
23 particular incident and other incidents. Just
24 basically that's it. That the -- the person who
25 allegedly killed this girl is being arrested.

1 MS. SCHLAX: Okay.

2 PROSPECTIVE JUROR: And that's it. I mean
3 basically I hadn't read any details, the details
4 of everything that took place. Just that they
5 picked up somebody that allegedly was allegedly
6 arrested for the killing of this young girl.

7 MS. SCHLAX: And do you recall when -- when
8 was this that you remember?

9 PROSPECTIVE JUROR: Saturday, like a
10 Saturday, because I was home from work. So I was
11 doing things in the house, housework and, you
12 know, just basically chores in the house and stuff
13 and I heard it on the media on that Saturday
14 morning.

15 MS. SCHLAX: Was this something that happened
16 six months ago or...

17 PROSPECTIVE JUROR: I don't remember the
18 actual date on that Saturday. I just remember
19 that they had -- that this young girl was missing
20 and that they had allegedly arrested this person
21 for this -- the killing of this young girl and
22 that's -- I don't remember the exact date, I don't
23 remember the exact time. I just remember it was
24 on a Saturday that I heard the media.

25 MS. SCHLAX: Okay. And I guess once you had

1 learned of the arrest, whenever that was --

2 PROSPECTIVE JUROR: Right.

3 MS. SCHLAX: -- did you then follow the case?

4 PROSPECTIVE JUROR: No. No, I -- I'm kind of
5 an anti media person a little bit. I think the
6 media over -- over -- over -- they don't wait till
7 all the facts are in. They say what they want
8 everybody to hear to get the ratings from the
9 television, whatever, so I just wait until I can
10 actually read it in the newspaper or the final
11 outcome of something that took place and I just --
12 I don't -- I don't follow it, per se, that kind of
13 -- I'd rather hear more positive and especially
14 for America at this time and age. Maybe I'm being
15 a little bit wishful or whatever, but I just think
16 that it's -- the media can be more positive on
17 certain things more than more negative.

18 MS. SCHLAX: You mentioned in regards to the
19 newspaper. Do you consider the newspaper
20 different than the media?

21 PROSPECTIVE JUROR: No, because I don't read
22 a lot of newspaper. I just hear, you know, I just
23 try to see overall where the results of certain
24 things were, you know, maybe how, for instance,
25 let's say there was something that happened at the

1 war, you know, a certain battle or something like
2 that, I like to know through the -- just what took
3 place, you know, and where our troops are and that
4 type of thing. But domestic things going on I
5 don't really follow it, per se. So I'm just that
6 way because I think the media just over hypes
7 things too much.

8 MS. SCHLAX: Okay. I appreciate your time,
9 ma'am. No further questions.

10 THE COURT: Any questions?

11 MR. CALIEL: No questions, Your Honor.

12 THE COURT: Thank you, juror No. [REDACTED] If
13 you'll wait in the hall we'll try to tell you
14 something as quick as we can.

15 PROSPECTIVE JUROR: I'm sorry, Judge. I
16 didn't hear you.

17 THE COURT: If you'll wait out in the hall,
18 we'll try to let you know something as quick as we
19 can. And don't discuss your questions and answers
20 with anyone.

21 And when juror [REDACTED] leaves [REDACTED] may come in.

22 (Prospective juror absent.)

23 (Prospective juror present.)

24 BAILIFF: Take the second seat in, sir.

25 PROSPECTIVE JUROR: All right.

1 THE COURT: Thank you, juror No. [REDACTED] We've
2 gone over the questionnaires and the attorneys
3 just have a few follow-up questions for you.

4 PROSPECTIVE JUROR: Okay.

5 MR. CALIEL: Thank you, Your Honor.

6 Juror No. [REDACTED] in the section where we talk
7 about hardships or insurmountable hardships you
8 brought up the fact that you were a single father
9 and that missing a week or a period of time for a
10 few weeks could be an extreme hardship on you.

11 PROSPECTIVE JUROR: Yeah.

12 MR. CALIEL: Given the schedule the Judge
13 outlined, do you believe that would be a hardship
14 for you to serve as a juror in this case?

15 PROSPECTIVE JUROR: I mean I feel like if I
16 -- the schedule for -- I would be out for two
17 weeks, I mean it would definitely make it hard for
18 me to -- to -- I live paycheck to paycheck so
19 definitely it would be hard for me to make those
20 mortgage payments, but...

21 MR. CALIEL: And you are the district manager
22 with -- I think it's Champion Brands?

23 PROSPECTIVE JUROR: Yes.

24 MR. CALIEL: Do they not allow leave for jury
25 service so that if you are selected and it's a

1 court order for you to serve as a juror, you're
2 not going to get any compensation for that period
3 of time?

4 PROSPECTIVE JUROR: No, I won't get any
5 compensation, but they allow you to leave without
6 compensation.

7 MR. CALIEL: Okay. But you know yourself
8 personally it would be an extreme hardship upon
9 you to not have a paycheck because it would be
10 obviously this week we're going to be in for the
11 rest of this week, the majority of next and part
12 of the third week.

13 PROSPECTIVE JUROR: It would be difficult.
14 Definitely.

15 MR. CALIEL: Do you feel that that would
16 affect your ability to serve and concentrate as a
17 juror because you would be worried about --

18 PROSPECTIVE JUROR: No.

19 MR. CALIEL: Okay. So while it would be
20 difficult, I guess the best way for me to put it
21 is would you be willing to make that sacrifice to
22 serve as a juror in this case, if needed?

23 PROSPECTIVE JUROR: Yes. Yes.

24 MR. CALIEL: Okay. Thank you. I appreciate
25 it.

1 THE COURT: Any questions?

2 MR. FLETCHER: Judge, I do have a couple.

3 Juror No. [REDACTED] after reading your -- your
4 questionnaire, you followed this case a little bit
5 on the news?

6 PROSPECTIVE JUROR: Um-hum.

7 MR. FLETCHER: Have you watched it recently
8 on the news?

9 PROSPECTIVE JUROR: No.

10 MR. FLETCHER: When is the last time you
11 remember hearing anything about it?

12 PROSPECTIVE JUROR: It's probably been --
13 it's probably months, to tell you the truth, just
14 looking over, I go through the Jacksonville.com
15 and some stuff there once in awhile, but not...

16 MR. FLETCHER: Okay. And do you know
17 anything about the alleged victim's mom or
18 anything like that?

19 PROSPECTIVE JUROR: No.

20 MR. FLETCHER: About her past.

21 PROSPECTIVE JUROR: No.

22 MR. FLETCHER: Do you know anything about
23 Donald Smith's past?

24 PROSPECTIVE JUROR: No.

25 MR. FLETCHER: Just the basic outline?

1 PROSPECTIVE JUROR: Yeah.

2 MR. FLETCHER: Thank you. That's all I have.

3 THE COURT: Thank you, juror No. [REDACTED] If
4 you'll wait in the hall, we'll try to let you know
5 something as quick as we can. Shouldn't be too
6 much longer.

7 And when juror No. [REDACTED] leaves, juror No. [REDACTED] can
8 come in.

9 (Prospective juror absent.)

10 (Prospective juror present.)

11 BAILIFF: Ma'am, if you'll take the second
12 seat in.

13 THE COURT: Thank you. Juror No. [REDACTED] -- [REDACTED] --
14 yeah, [REDACTED] we've been going over the questionnaires
15 and the attorneys just have a few follow-up
16 questions for you. Thank you.

17 MR. CALIEL: Juror No. [REDACTED] good afternoon.
18 As instructed, you were told to put a question
19 mark if you didn't know how to answer a question
20 on the questionnaire.

21 PROSPECTIVE JUROR: Yeah, I got a little
22 confused on part of it. I kind of figured you'd
23 ask about it, but...

24 MR. CALIEL: Okay. And going back to the
25 questionnaire, question 4 you indicated that you

1 had heard and discussed with family members some
2 of the facts and circumstances of the case.

3 PROSPECTIVE JUROR: Yeah, when it first
4 happened I seen it. My mom is an advocate for
5 watching the news, did you see, so yes.

6 MR. CALIEL: You also indicated that based
7 upon what you had heard that you had formed an
8 opinion about the case.

9 PROSPECTIVE JUROR: I got to be honest, I
10 really don't think I'm going to be a candidate for
11 this. I don't.

12 MR. CALIEL: Why?

13 PROSPECTIVE JUROR: Because it would be hard
14 -- I know by law it's -- you're usually innocent
15 until proven guilty and, unfortunately, I mean
16 discussing it with my mother and stuff, I don't
17 feel like I can be fair. I really don't.

18 MR. CALIEL: To Mr. Smith?

19 PROSPECTIVE JUROR: Correct.

20 MR. CALIEL: Okay. You don't believe you
21 could give him the presumption of innocence he is
22 due --

23 PROSPECTIVE JUROR: Right.

24 MR. CALIEL: -- when he comes into the
25 courtroom?

1 PROSPECTIVE JUROR: Right. And it's not
2 right. I'm not saying -- I'm not a bad person.
3 I'm being honest.

4 MR. CALIEL: And you feel that -- and I
5 appreciate your honesty and your candor, that
6 based upon everything you've heard in your
7 discussions with your mother that you couldn't
8 give Mr. Smith a fair trial?

9 PROSPECTIVE JUROR: No.

10 MR. CALIEL: Thank you, ma'am. I don't have
11 any further questions.

12 THE COURT: Anything further?

13 MR. CALIEL: No questions, Your Honor.

14 THE COURT: Thank you, juror No. [REDACTED] We
15 appreciate your time. We'll let you know
16 something in a few minutes. Take your time. I
17 see you have something on. I see you limping.

18 PROSPECTIVE JUROR: Yeah, my knee. Thank
19 you.

20 THE COURT: When juror [REDACTED] leaves, juror No.
21 [REDACTED] may come in.

22 (Prospective juror absent.)

23 (Prospective juror present.)

24 BAILIFF: Sir, take the second chair in.

25 THE COURT: Juror No. [REDACTED] Thank you. We've

1 been going over the questionnaires and we have a
2 few follow-up questions for you.

3 PROSPECTIVE JUROR: Okay.

4 THE COURT: Thank you.

5 MR. CALIEL: Thank you, Your Honor.

6 Juror No. [REDACTED] on the hardship section of the
7 questionnaire you indicated that you had a hardship
8 regarding you and your fiancée and getting back and
9 forth to work. Could you explain that to us?

10 PROSPECTIVE JUROR: I'm the driver, one car,
11 about 45 minutes a day driving her to work and
12 then back and I go to work and back and go pick
13 her up, come back. It's about three hours a day
14 just driving around.

15 MR. CALIEL: Okay. Does she have the ability
16 to drive --

17 PROSPECTIVE JUROR: She has no license.

18 MR. CALIEL: You're the only means of
19 transportation for her?

20 PROSPECTIVE JUROR: Correct.

21 MR. CALIEL: Do you believe based upon the
22 schedule that was outlined by the Court yesterday
23 where we would be here for potentially the better
24 part of this week, four days next week, and then
25 three days the week of the 20th, which is a short

1 week because of the holiday, that that would cause
2 an insurmountable hardship for you?

3 PROSPECTIVE JUROR: She doesn't have that
4 much time and I don't have any time off I can
5 take.

6 MR. CALIEL: So that would -- there's no way
7 you could coordinate her being able to get to work
8 and the time off?

9 PROSPECTIVE JUROR: I've been trying to get
10 somebody to drive her, but haven't gotten anybody.

11 MR. CALIEL: You've been unable to make
12 arrangements for that period of time?

13 PROSPECTIVE JUROR: Yes.

14 MR. CALIEL: Thank you. I don't any further
15 questions.

16 THE COURT: Any questions?

17 MS. SCHLAX: No, Your Honor.

18 THE COURT: If you'll please wait in the
19 hall, we'll let you know something in a minute.
20 Please don't discuss your questions and answers
21 with anyone.

22 PROSPECTIVE JUROR: Thank you.

23 THE COURT: And when juror No. [REDACTED] leaves, No.
24 [REDACTED] can come in.

25 (Prospective juror absent.)

1 (Prospective juror present.)

2 BAILIFF: Sir, take the second seat in.

3 THE COURT: Thank you, juror No. [REDACTED] We just
4 have a few follow-up questions for you from the
5 questionnaire. Thank you.

6 MS. SCHLAX: Good afternoon, juror [REDACTED]. You
7 indicated -- I guess first let me ask you how long
8 have you lived in Jacksonville?

9 PROSPECTIVE JUROR: A little over two years.

10 MS. SCHLAX: Okay. And you indicated on the
11 questionnaire that prior to walking into the
12 courthouse and filling out this questionnaire you
13 knew absolutely nothing and had heard nothing --

14 PROSPECTIVE JUROR: Correct.

15 MS. SCHLAX: In regards to this case. Since
16 you filled out this questionnaire, anything
17 changed in that regard?

18 PROSPECTIVE JUROR: I've heard like stuff a
19 little bit, but other than that, no.

20 MS. SCHLAX: And, you know, unfortunately I'm
21 going to ask you what stuff.

22 PROSPECTIVE JUROR: Just about the case in
23 general and what -- people were like what this is
24 about, whatever, and I just said kind of, that's
25 about it.

1 MS. SCHLAX: I appreciate that you're trying
2 to convey, but I don't know what that means. Who
3 have you been speaking to about, I guess, you
4 potentially being on the jury?

5 PROSPECTIVE JUROR: No one really. I mean
6 people just like, you know, because I had to tell
7 work that I was on jury duty, so that was about
8 it.

9 MS. SCHLAX: Okay. And I know one of the
10 concerns you raised in your questionnaire, and I
11 kind of wanted to follow-up with you, is have you
12 determined with work in regards to what would
13 happen to compensation, that kind of thing, if you
14 are selected for the jury?

15 PROSPECTIVE JUROR: I'm still waiting on a
16 reply back.

17 MS. SCHLAX: Okay. How long have you been
18 working there?

19 PROSPECTIVE JUROR: As far as like how long
20 I've been working there now?

21 MS. SCHLAX: Yes.

22 PROSPECTIVE JUROR: Since August.

23 MS. SCHLAX: Okay. And so you -- you
24 inquired, I mean, because your concern was,
25 depending on if my employer offers reimbursement.

1 Are you a salaried employee?

2 PROSPECTIVE JUROR: Technically hourly.

3 MS. SCHLAX: Okay. And so does your paycheck
4 vary based on the number of hours that you work?

5 PROSPECTIVE JUROR: Well, I'm full-time, like
6 80 -- 80 hours whenever. But usually it doesn't
7 really vary too much so...

8 MS. SCHLAX: Okay. And I guess what -- is
9 there any way you can try to find out for us in
10 terms of whether or not you're going to receive
11 reimbursement? When are you hoping to get that
12 answer?

13 PROSPECTIVE JUROR: Hopefully like today, by
14 the end of the day today.

15 MS. SCHLAX: Okay. And I guess, you know,
16 certainly that's something the Court and the
17 attorneys can take into consideration, but we, you
18 know, obviously this is going to be a sacrifice
19 for anybody who's ultimately selected for the
20 jury. Can you help me understand why you feel
21 like it would be a severe hardship any more than
22 what you've told me?

23 PROSPECTIVE JUROR: Just so I can pay for
24 like my house and stuff.

25 MS. SCHLAX: Sure. Sure. I understand that

1 you -- if you don't have a paycheck.

2 PROSPECTIVE JUROR: Yeah.

3 MS. SCHLAX: But I guess my -- my disconnect
4 is not understanding why you think you wouldn't
5 get your normal salary.

6 PROSPECTIVE JUROR: Oh, I don't -- I don't
7 know because I didn't -- I don't know from my
8 employer. I'd have to check with them. I've
9 already e-mailed them but I'm not really sure.

10 MS. SCHLAX: Okay. You just haven't heard
11 back from them.

12 PROSPECTIVE JUROR: Yes.

13 MS. SCHLAX: Okay. Okay. All right. I
14 don't have any further questions. Thank you.

15 THE COURT: Thank you.

16 Anything from the State?

17 MR. CALIEL: Just briefly, Your Honor.

18 Sir, is it safe to say that if you were
19 required to make the sacrifice you could make the
20 sacrifice and serve as a juror and work that out
21 with your employer?

22 PROSPECTIVE JUROR: I'm sorry, yeah.

23 MR. CALIEL: Thank you. I have no further
24 questions.

25 THE COURT: Anything else?

1 Okay. You're free to go out into the hall.
2 We'll try and let you know something in just a few
3 minutes. Please do not discuss your questions and
4 answers with anyone. Thank you.

5 PROSPECTIVE JUROR: Yes, ma'am.

6 THE COURT: And when juror No. [REDACTED] leaves, [REDACTED]
7 can come in.

8 (Prospective juror absent.)

9 (Prospective juror present.)

10 BAILIFF: Sir, take the second chair.

11 THE COURT: Thank you, juror No. [REDACTED] We've
12 been going over the questionnaires and the
13 attorneys just have a couple of follow-up
14 questions for you.

15 MR. FLETCHER: Juror No. [REDACTED] how are you
16 doing today?

17 PROSPECTIVE JUROR: All right, sir.

18 MR. FLETCHER: Good. Can you tell the Court
19 or tell us all where you work?

20 PROSPECTIVE JUROR: I work at the jail, the
21 Pretrial Detention Facility.

22 MR. FLETCHER: Okay. And you've come into
23 contact with Donald Smith?

24 PROSPECTIVE JUROR: Yes.

25 MR. FLETCHER: Do you know what it is that

1 he's alleged to have done?

2 PROSPECTIVE JUROR: Yes.

3 MR. FLETCHER: Have you had conversation --

4 PROSPECTIVE JUROR: Not the specifics, but,
5 yes.

6 MR. FLETCHER: And where do you get your
7 information from?

8 PROSPECTIVE JUROR: Off the jail system, the
9 jail information.

10 MR. FLETCHER: Okay. So you can look him up
11 online, internally within JSO I guess?

12 PROSPECTIVE JUROR: Within JSO.

13 MR. FLETCHER: Okay. Does it give you any
14 information about him other than what was on this
15 questionnaire?

16 PROSPECTIVE JUROR: No.

17 MR. FLETCHER: Does it tell you anything
18 about his background or his past?

19 PROSPECTIVE JUROR: No.

20 MR. FLETCHER: Okay. You've also learned
21 some things about -- go ahead.

22 PROSPECTIVE JUROR: It does tell you criminal
23 history, but it doesn't tell you his past.

24 MR. FLETCHER: Okay. So you're aware of his
25 criminal history?

1 PROSPECTIVE JUROR: Yes.

2 MR. FLETCHER: Did you also see that on the
3 news?

4 PROSPECTIVE JUROR: Yes.

5 MR. FLETCHER: Do you think if you're a juror
6 in this case that you can set aside your personal
7 knowledge of Mr. Smith's background and give him a
8 fair trial?

9 PROSPECTIVE JUROR: That's a tricky question.
10 That's kind of hard. Because my job --

11 MR. FLETCHER: Just for the record you paused
12 for about seven or eight seconds, kind of stared.

13 PROSPECTIVE JUROR: Yes, because I have to
14 be impartial and do my job so, yes, but I still do
15 know his criminal history because I've worked at
16 JSO for so long.

17 MR. FLETCHER: Okay. But you think you could
18 set that aside and give him a fair trial and
19 presume that he's innocent? You have to sit there
20 as a juror, if you're chosen, and when this --
21 when the trial starts you are giving him the
22 presumption of innocence. Can you completely
23 erase all that stuff that you know about him
24 firsthand or from your -- from your employment?
25 You can't, right?

1 PROSPECTIVE JUROR: (Shakes head.) I
2 couldn't.

3 MR. FLETCHER: Okay.

4 PROSPECTIVE JUROR: Because --

5 MR. FLETCHER: It's impossible, right?

6 PROSPECTIVE JUROR: It's impossible. There's
7 no way. I'm not going to sit here and say I can.

8 MR. FLETCHER: That's all I have.

9 MR. CALIEL: No questions. No questions.

10 THE COURT: If you'll just wait in the hall
11 we'll let you know something in just a couple of
12 minutes. Don't discuss your questions and answers
13 with anybody.

14 (Prospective juror absent.)

15 THE COURT: So he was No. 10 of that group. So
16 let's go to those so those people can move on. So
17 we'll start at No. [REDACTED]

18 MR. CALIEL: Judge, of that ten, starting
19 with juror No. [REDACTED] we'd strike juror No. [REDACTED] for
20 cause.

21 MS. SCHLAX: We don't have a legal objection,
22 Your Honor.

23 THE COURT: All right. [REDACTED] will be stricken
24 for cause.

25 MR. CALIEL: The next juror will be juror No.

1

[REDACTED]

2

MS. SCHLAX: No objection, Your Honor.

3

THE COURT: [REDACTED] will be stricken for cause.

4

MR. CALIEL: Juror No. [REDACTED]

5

MS. SCHLAX: Your Honor, I don't think he rose to the level -- no, I apologize. I'm mixing them up. No legal objection, Your Honor.

7

8

THE COURT: On [REDACTED], correct?

9

MS. SCHLAX: On [REDACTED]

10

THE COURT: All right. [REDACTED] will be stricken for cause.

11

12

MR. CALIEL: And we would also strike juror No. [REDACTED].

13

14

MS. SCHLAX: No objection by the defense, Your Honor.

15

16

THE COURT: Juror No. [REDACTED] will be stricken for cause. So out of the last group of ten, No. [REDACTED] [REDACTED] and [REDACTED]?

18

19

MR. CALIEL: Yes, Your Honor.

20

THE COURT: Do you agree with that, Mr. Smith?

21

22

THE DEFENDANT: Yes.

23

THE COURT: And the others will be asked to come back on Thursday at 9:30 to continue with the jury selection process.

24

25

1 THE DEFENDANT: Yes, ma'am.

2 THE COURT: Is that correct?

3 THE DEFENDANT: Yes, ma'am.

4 MS. SCHLAX: If I could have one brief moment
5 with my client.

6 THE COURT: Sure. Of course.

7 (Defense counsel conferring with defendant.)

8 MS. SCHLAX: Your Honor, there is one juror
9 [REDACTED] the defense would raise for a cause challenge.
10 This -- this juror was the one that indicated that
11 she had already, because the media coverage,
12 formed an opinion, did not think she could --
13 could not presume Mr. Smith innocent, and we
14 tender her for a cause challenge.

15 MR. CALIEL: Juror No. [REDACTED]

16 MS. SCHLAX: Yes.

17 MR. CALIEL: We won't object.

18 THE COURT: All right. [REDACTED] will also be a
19 cause challenge.

20 You agree with that, Mr. Smith?

21 THE DEFENDANT: Yes, ma'am.

22 THE COURT: Okay. So we got [REDACTED]
23 and [REDACTED] correct? Is that correct?

24 MS. SCHLAX: Yes, Your Honor, I apologize.

25 THE COURT: Bring in, please, juror No. [REDACTED]

1 [REDACTED] and [REDACTED]

2 (Prospective jurors present.)

3 THE COURT: Thank you, ladies and gentlemen.
4 For the record, I'm going to call your number and
5 have you raise your hand so the record shows you
6 are in here now. No. [REDACTED], No. [REDACTED], No. [REDACTED] Raise
7 your hand, please.

8 PROSPECTIVE JUROR: Sorry.

9 THE COURT: Thank you. [REDACTED] and [REDACTED]

10 (Prospective jurors indicating.)

11 THE COURT: Okay. The five of you are
12 excused. You've completed your jury duty. We
13 thank you very much for your time and attention.
14 I know even just two days is kind of rough for you
15 guys out there. So we really appreciate it. When
16 you leave the bailiffs are going to take your
17 hanging tag and your button and you're free to go
18 about your life as an ordinary citizen with our
19 sincere thanks. Thank you.

20 (Prospective jurors excused.)

21 THE COURT: What I've got left is I've got
22 that juror no. [REDACTED] and [REDACTED], is that
23 correct?

24 MR. CALIEL: Yes, Your Honor.

25 MS. SCHLAX: Yes, Your Honor.

1 THE COURT: Those will all be asked to come
2 back Thursday at 9:30. We need [REDACTED] and

3 [REDACTED]

4 (Prospective jurors present.)

5 THE COURT: Thank you. I'm going to say your
6 number and just have you raise your right hand
7 just so the record reflects that you are back in
8 the courtroom. Juror No. [REDACTED] juror No. [REDACTED] juror
9 No. [REDACTED] juror No. [REDACTED] and juror No. [REDACTED]

10 (Prospective jurors indicating.)

11 THE COURT: Okay. The five of you are going
12 to be asked to come back Thursday at 9:30 to
13 continue with the jury selection process and we
14 should be able to start shortly after you get here
15 on that day. And that will be the final phase of
16 the jury selection process. There will be a
17 number of you that we will be starting with that
18 day.

19 Thank you for your time and attention today.
20 Please do not talk with anyone about your experience
21 here today and remember my rule that I gave you not
22 to look at the TV or read the paper, listen to
23 radio, talk with other people. It's very important
24 and you're still under your oath as jurors until
25 you're excused. So you're free to leave for the day

1 and we'll see you back Thursday at 9:30 in the jury
2 assembly room and we'll have you brought up here as
3 quickly after that as possible. Thank you.

4 (Prospective jurors absent.)

5 MS. SCHLAX: Judge, could we take a very
6 short comfort break?

7 THE COURT: We're going to take a break.
8 What time is it?

9 THE CLERK: 4:47.

10 THE COURT: Let's take a break until 5:00
11 o'clock.

12 MR. CALIEL: Judge, I just didn't count. I
13 think we have 27 jurors of this group still left
14 to question.

15 THE COURT: That should be right. And do you
16 have any idea how many we passed total?

17 MR. CALIEL: [REDACTED]

18 THE COURT: To Thursday?

19 MR. CALIEL: 48 have been passed to Thursday.

20 THE COURT: Okay. 27 still to do today.

21 Okay. Seems to be going a little bit quicker.

22 And they brought 'em all up so they're all right
23 here when we come back. So we'll start back at
24 5:00 o'clock. Thank you.

25 (Recess.)

1 (Defendant present.)

2 THE COURT: Okay. I think we're on No. [REDACTED]

3 Is everybody ready to move along?

4 MS. SCHLAX: Yes, Your Honor.

5 MR. CALIEL: Yes, Your Honor.

6 THE COURT: Bring in juror No. [REDACTED] please.

7 (Prospective juror present.)

8 BAILIFF: Ma'am, take the second chair.

9 THE COURT: Thank you, juror [REDACTED] We just had
10 a few follow-up questions from your questionnaire.

11 MS. SCHLAX: And good evening.

12 PROSPECTIVE JUROR: Good evening.

13 MS. SCHLAX: Juror No. [REDACTED] you did not list
14 what you do [REDACTED] What do you do for them?

15 PROSPECTIVE JUROR: I'm a -- I'm a sorter.

16 MS. SCHLAX: Okay. Okay. And how long have
17 you lived in Jacksonville?

18 PROSPECTIVE JUROR: Three years now.

19 MS. SCHLAX: Okay. And where had you moved
20 from?

21 PROSPECTIVE JUROR: From Georgia.

22 MS. SCHLAX: Okay. And you had indicated
23 that prior to coming to the courthouse yesterday
24 you had not heard anything in regards to this
25 case.

1 PROSPECTIVE JUROR: No.

2 MS. SCHLAX: Okay. Are you somebody who
3 watches local news at all?

4 PROSPECTIVE JUROR: Not much. No.

5 MS. SCHLAX: And since you filled out this
6 questionnaire, just from being in the courthouse
7 and being part of this experience, have you
8 learned or overheard anything additional other
9 than what you put on this questionnaire?

10 PROSPECTIVE JUROR: No.

11 MS. SCHLAX: Okay. I don't have any further
12 questions. I appreciate your time.

13 THE COURT: Anything else?

14 MR. CALIEL: No questions, Your Honor.

15 THE COURT: Thank you. If you'll wait in the
16 hall, we'll try to let you know something as
17 quickly as we can. Please do not discuss these
18 questions or answers with anyone.

19 PROSPECTIVE JUROR: All right.

20 THE COURT: And when juror No. [REDACTED] leaves,
21 juror [REDACTED] can come in.

22 (Prospective juror absent.)

23 (Prospective juror present.)

24 BAILIFF: Ma'am, take the second chair in.

25 THE COURT: Juror No. [REDACTED] we've been going

1 over the questionnaires. We've just got a few
2 follow-up questions.

3 MR. FLETCHER: Thank you, Judge.

4 Good afternoon, juror [REDACTED]

5 PROSPECTIVE JUROR: Hi.

6 MR. FLETCHER: After reading your
7 questionnaire I just have a couple of questions.
8 You've been hearing the various names that are
9 involved in this case for the last couple of
10 years?

11 PROSPECTIVE JUROR: I've been -- yeah.

12 MR. FLETCHER: So have you followed anything
13 on the news?

14 PROSPECTIVE JUROR: I don't really follow
15 news. I don't really watch the news. I kind of
16 listen to it as I'm going around the house.

17 MR. FLETCHER: And this case occasionally
18 pops up?

19 PROSPECTIVE JUROR: Sure.

20 MR. FLETCHER: You had written something,
21 sort of a factual scenario in the questionnaire
22 itself that kind of outlines the allegations that
23 the State is making against Mr. Smith. Do you
24 know anything other than that? Have you gotten
25 anything else from the news other than that just

1 little snip?

2 PROSPECTIVE JUROR: No, like yesterday
3 morning I heard that they were doing jury
4 selection and that his attorney was trying to move
5 the case.

6 MR. FLETCHER: Okay.

7 PROSPECTIVE JUROR: Because they didn't feel
8 like he could get a fair trial. This morning I
9 heard jury selection might end up taking all week.
10 That was on the news.

11 MR. FLETCHER: Okay. So you're still
12 watching the news or did you turn it off right as
13 they were saying that?

14 PROSPECTIVE JUROR: No, I'm in the kitchen.
15 The news is in the living room.

16 MR. FLETCHER: Okay.

17 PROSPECTIVE JUROR: I'm not really watching
18 it. It's just --

19 MR. FLETCHER: And have you learned anything
20 on the news about this case as to Rayne
21 Perrywinkle's past or Donald Smith's past or
22 anything like that?

23 PROSPECTIVE JUROR: I never even heard Donald
24 Smith's name until today and yesterday.

25 MR. FLETCHER: Okay.

1 PROSPECTIVE JUROR: I've heard Perrywinkle.

2 MR. FLETCHER: That's all I have.

3 THE COURT: Anything further?

4 MR. CALIEL: No questions, Your Honor.

5 THE COURT: Juror No. [REDACTED] if you'll wait in
6 the hall, we'll try to let you know something as
7 soon as possible.

8 PROSPECTIVE JUROR: Yes, ma'am.

9 THE COURT: Please do not discuss your
10 questions or answers with anyone.

11 And when juror No. [REDACTED] leaves, juror [REDACTED] can come
12 in.

13 (Prospective juror absent.)

14 (Prospective juror present.)

15 BAILIFF: Sir, take the second seat in.

16 THE COURT: Thank you, juror No. [REDACTED] We've
17 been going over the questionnaires and the
18 attorneys just have a few follow-up questionnaires
19 -- I mean questions for you.

20 PROSPECTIVE JUROR: Okay.

21 MS. SCHLAX: Good evening, sir. How long
22 have you lived in Jacksonville?

23 PROSPECTIVE JUROR: I was born in
24 Jacksonville.

25 MS. SCHLAX: Okay. So I guess essentially

1 your whole life?

2 PROSPECTIVE JUROR: [REDACTED] yes.

3 MS. SCHLAX: And, sir, you had indicated on
4 your questionnaire that prior to walking into the
5 courthouse yesterday you actually had not heard
6 anything about this case.

7 PROSPECTIVE JUROR: If I did I didn't
8 remember it.

9 MS. SCHLAX: Okay. Since you've been a part
10 of this process, has that spurred any kind of
11 memories of knowing anything about this case?

12 PROSPECTIVE JUROR: Tried to remember if I
13 had heard anything on the news or if I did know
14 it's not something I can recall.

15 MS. SCHLAX: So I think it's probably fair to
16 say then that -- and the reason we're going
17 through this kind of intense process and asking
18 you to give up so much of your time is there has
19 been a tremendous amount of media coverage. It
20 sounds like you have not been someone who noticed
21 or watched that.

22 PROSPECTIVE JUROR: I don't watch the news
23 religiously.

24 MS. SCHLAX: Okay. So it seems like it's
25 probably pretty fair to say you can actually

1 presume my client, Mr. Smith, innocent as we sit
2 here today.

3 PROSPECTIVE JUROR: I'm open at this point.
4 I don't know your client or any of the happenings
5 relating to the case.

6 MS. SCHLAX: Okay. Okay. And that's what we
7 appreciate knowing and that's what we've been
8 searching for, sir, so we appreciate the amount of
9 time that you've spent.

10 My next question I want you to assume something
11 for me. Okay? And it's just part of the process
12 and based on what you wrote in your questionnaire.
13 I want you to assume that you've been selected for
14 this jury, I want you to assume that it's been
15 proven beyond and to the exclusion of every
16 reasonable doubt that, in fact, my client committed
17 this murder and sexual battery on an eight year old
18 child. Knowing yourself, sir, could you ever
19 consider any other punishment besides the death
20 penalty?

21 PROSPECTIVE JUROR: Could I consider anything
22 other than that?

23 MS. SCHLAX: Yes.

24 PROSPECTIVE JUROR: Life in prison.

25 MS. SCHLAX: Okay. And is that something

1 that you could consider if you assume that the
2 State of Florida will be able to meet its burden
3 and prove him guilty of killing an eight year old
4 child?

5 PROSPECTIVE JUROR: I could, I believe.

6 MS. SCHLAX: Okay. So ultimately, and we'll
7 talk about this a lot more through the process,
8 you could listen to aggravating circumstances, but
9 also consider all of the mitigating circumstances
10 and circumstances of a person's life?

11 PROSPECTIVE JUROR: I believe so.

12 MS. SCHLAX: Okay. I appreciate your time,
13 sir. I don't have any further questions at this
14 time.

15 PROSPECTIVE JUROR: Okay.

16 MR. CALIEL: No questions, Your Honor.

17 THE COURT: Thank you, sir. Please step out
18 in the hall and we'll try to let you know
19 something as quickly as we can.

20 PROSPECTIVE JUROR: Thank you.

21 THE COURT: Do not discuss your questions and
22 answers with anyone and when juror No. [REDACTED] leaves,
23 juror No. [REDACTED] can come in.

24 (Prospective juror absent.)

25 (Prospective juror present.)

1 THE COURT: Juror No. [REDACTED], thank you. We just
2 have a few type questions from your questionnaire.
3 Thank you.

4 MR. FLETCHER: Good afternoon, juror [REDACTED]

5 PROSPECTIVE JUROR: Hello.

6 MR. FLETCHER: After reading your
7 questionnaire, just a couple of simple questions.
8 You indicated that you have heard about this case
9 before.

10 PROSPECTIVE JUROR: Yes. Like many years
11 ago. I mean I don't know --

12 MR. FLETCHER: So you heard about it sort of
13 when it first happened?

14 PROSPECTIVE JUROR: Yes.

15 MR. FLETCHER: Have you followed it in the
16 news at all?

17 PROSPECTIVE JUROR: Not really. I try not
18 to.

19 MR. FLETCHER: Did you hear about it at all
20 last week. It's been in the paper, on the news.

21 PROSPECTIVE JUROR: Yeah, well, like in the
22 morning when I get up to go to work and I have it
23 on. I can hear little bits of it.

24 MR. FLETCHER: We have written into the
25 questionnaire a little fact pattern and it's the

1 allegations that the State has made. Do you know
2 anything else other than that about the case?
3 Have you learned anything from the news about
4 Rayne Perrywinkle or about Donald Smith's past or
5 anything like that?

6 PROSPECTIVE JUROR: No.

7 MR. FLETCHER: Okay. That's all I have, Your
8 Honor.

9 THE COURT: Any question?

10 MR. CALIEL: No questions, Your Honor.

11 THE COURT: Thank you, juror No. [REDACTED] If
12 you'll wait in the hall, we'll try to let you know
13 something pretty quickly and please do not discuss
14 your questions and answers with anyone.

15 PROSPECTIVE JUROR: Yes, ma'am.

16 THE COURT: Thank you. And when juror No. [REDACTED]
17 leaves, juror No. [REDACTED] can come in.

18 (Prospective juror absent.)

19 (Prospective juror present.)

20 BAILIFF: Take the second seat in.

21 THE COURT: Thank you juror No. [REDACTED] We just
22 have a few follow-up questions from the
23 questionnaires.

24 MS. SCHLAX: Good evening.

25 PROSPECTIVE JUROR: Good evening.

1 MS. SCHLAX: Just a few follow-ups, sir. How
2 long have you lived in Jacksonville?

3 PROSPECTIVE JUROR: Since the Navy brought me
4 here in '88. I stepped away for awhile and
5 returned back in I think '90.

6 MS. SCHLAX: And you indicated that prior to
7 walking into the courthouse yesterday you had not
8 heard anything in regards to the allegations in
9 this case.

10 PROSPECTIVE JUROR: No, I haven't.

11 MS. SCHLAX: Are you someone who watches the
12 local news at all?

13 PROSPECTIVE JUROR: No, I like CNN, Fox a
14 lot, but I don't watch the local news.

15 MS. SCHLAX: Okay. And since you filled out
16 your questionnaire, you did so rather early in the
17 day, have you just being part of this process
18 heard anything additional in regards to what
19 you've been instructed in court?

20 PROSPECTIVE JUROR: No, I haven't.

21 MS. SCHLAX: And the reason we go through
22 this process, sir, is that ultimately we're
23 looking for jurors that can uphold the
24 Constitution and actually presume my client
25 innocent. Can you do that?

1 PROSPECTIVE JUROR: Yes. Well, I mean I'll
2 hear everything and make a decision, but --

3 MS. SCHLAX: But right now as we stand here
4 today, not having heard any evidence in regards to
5 this case, can you presume my client innocent?

6 PROSPECTIVE JUROR: Having not heard
7 anything, yes.

8 MS. SCHLAX: I don't have any further
9 questions. Thank you.

10 THE COURT: Any questions?

11 MR. CALIEL: No questions, Your Honor.

12 THE COURT: Thank you, juror No. [REDACTED] If
13 you'll step out in the hall. Please do not
14 discuss your questions and answers with anyone and
15 we'll try to let you know something in the next
16 few minutes.

17 Thank you, sir.

18 And when juror No. [REDACTED] leaves, juror No. [REDACTED] can
19 come in.

20 (Prospective juror absent.)

21 (Prospective juror present.)

22 BAILIFF: Ma'am, take the second seat in.

23 THE COURT: Thank you, juror No. [REDACTED]. We just
24 have to ask a few follow-up questions from the
25 questionnaire. Okay? And Mr. Fletcher will do

1 that.

2 MR. FLETCHER: Good afternoon, juror [REDACTED]
3 After reading your answers to your questionnaire,
4 I just have a couple of questions. You've heard
5 about the case through the news?

6 PROSPECTIVE JUROR: Yeah.

7 MR. FLETCHER: And I think you said maybe an
8 alert went off on your phone when it very first
9 happened.

10 PROSPECTIVE JUROR: Yes, on my phone.

11 MR. FLETCHER: So you don't really follow-up
12 with it. If you happen to be watching the news,
13 it pops up with something you remember?

14 PROSPECTIVE JUROR: Yeah.

15 MR. FLETCHER: Do you recall if you watched
16 any news reports on it last week?

17 PROSPECTIVE JUROR: No, I don't typically
18 watch the news.

19 MR. FLETCHER: How about newspaper articles,
20 the story?

21 PROSPECTIVE JUROR: No, not recently. Like
22 when it first happened.

23 MS. SCHLAX: Okay. And do you know anything
24 about the mom, Rayne Perrywinkle's, past or
25 anything?

1 PROSPECTIVE JUROR: No.

2 MR. FLETCHER: Do you know anything about
3 Donald Smith's past, heard anything?

4 PROSPECTIVE JUROR: (Shakes head.)

5 MR. FLETCHER: That's all I have. Thank you.

6 THE COURT: Any questions?

7 MR. CALIEL: No questions.

8 THE COURT: Thank you, juror [REDACTED] Step out in
9 the hall. We'll try to let you know something in
10 the next few minutes, but please do not discuss
11 the questions and answers with anyone. Thank you.

12 PROSPECTIVE JUROR: Yes.

13 THE COURT: When juror [REDACTED] leaves, juror No.
14 [REDACTED] can come in.

15 (Prospective juror absent.)

16 (Prospective juror present.)

17 BAILIFF: Ma'am, take the second seat.

18 THE COURT: Juror No. [REDACTED] e've been going
19 over the questionnaires and we just have a few
20 follow-up questions for you. Thank you.

21 MS. SCHLAX: Good evening.

22 PROSPECTIVE JUROR: Hi.

23 MS. SCHLAX: How long have you lived in
24 Jacksonville?

25 PROSPECTIVE JUROR: Since January of 2016.

1 MS. SCHLAX: And I apologize. Actually I
2 just read that, that you had indicated that in
3 your -- in your questionnaire. You also indicated
4 that you ended up actually, I guess, actively
5 seeking information, meaning you personally
6 Googled for information.

7 PROSPECTIVE JUROR: Yeah. Just to...

8 MS. SCHLAX: Okay. Do you remember what your
9 search was?

10 PROSPECTIVE JUROR: Just -- I think I put
11 both names in.

12 MS. SCHLAX: Okay. And then at that point do
13 you remember what information you were given?

14 PROSPECTIVE JUROR: Just pictures. I didn't
15 really read. I just -- pictures.

16 MS. SCHLAX: Okay.

17 PROSPECTIVE JUROR: And then I just went out,
18 it was like the same thing that I was hearing.

19 MS. SCHLAX: Okay. And so was one of those
20 pictures a picture of the child involved, Cherish
21 Perrywinkle?

22 PROSPECTIVE JUROR: Yeah.

23 MS. SCHLAX: Okay.

24 PROSPECTIVE JUROR: But just the picture.

25 MS. SCHLAX: Sure. And you indicated that

1 even though you -- you had seen, I guess, various
2 news accounts, you had not formed any kind of
3 formal opinion as to defendant's guilt or
4 innocence.

5 PROSPECTIVE JUROR: No.

6 MS. SCHLAX: Okay. You did, however, see
7 some kind of photograph of him in an orange
8 jumpsuit.

9 PROSPECTIVE JUROR: News.

10 MS. SCHLAX: Okay. And what did you take
11 that orange jumpsuit to mean?

12 PROSPECTIVE JUROR: I don't -- that just
13 stood out. I'm not sure why. Just -- it just
14 stood out.

15 MS. SCHLAX: Okay. Also based on your --
16 your questionnaire, you let us know that you do
17 have strong feelings, I guess I would based on
18 your response say, for the death penalty.

19 PROSPECTIVE JUROR: (Nods head.)

20 MS. SCHLAX: Okay. I'm going to ask you to
21 assume for a second. I'm going to ask you to
22 assume and, you know, part of the -- the process
23 is this -- although we're going to further
24 question jurors on Thursday, I want you to assume
25 that you are selected for the jury and that

1 ultimately the State of Florida proves beyond and
2 to the exclusion of every reasonable doubt that,
3 in fact, Donald Smith caused the death of this
4 eight year old child, and I'm going to use that
5 there was absolutely no reason for it. It wasn't
6 an accident, wasn't a mistake, wasn't insanity,
7 that the State of Florida has proven beyond a
8 reasonable doubt that he killed this child and
9 sexually battered this child. Can you, knowing
10 yourself, ever consider any other punishment than
11 the death penalty?

12 PROSPECTIVE JUROR: You mean like life?

13 MS. SCHLAX: Life in prison without
14 possibility of parole.

15 PROSPECTIVE JUROR: No, I hate to be cliché,
16 an eye for an eye. I hate to be cliché.

17 MS. SCHLAX: No, we appreciate it. At this
18 juncture no one is trying to change people's
19 honest, well-held beliefs and feelings. We're
20 just trying to understand what those are. Okay?
21 And if you feel like an eye for an eye and that's
22 absolute, then we just need to know it.

23 PROSPECTIVE JUROR: Like I said, not that
24 anyone has reason, not like it's self-defense or
25 whatever, but just no.

1 MS. SCHLAX: Okay. If there's no reason, you
2 know, like self-defense, it's an eye for an eye?
3 Meaning if the State of Florida proves he sexually
4 battered and killed this child the death penalty
5 is the only appropriate punishment?

6 PROSPECTIVE JUROR: (Nods head.)

7 MS. SCHLAX: Okay. I appreciate you being
8 candid with us.

9 PROSPECTIVE JUROR: Um-hum.

10 MR. CALIEL: Thank you.

11 Good afternoon, ma'am. Well, I'll follow that
12 on what the defense attorney was talking about
13 there. Let's assume for a second the defendant is
14 found guilty. That means we go to another phase of
15 the trial. It's what we call the penalty phase and
16 the Judge will give you a lot of law and a lot of
17 instructions. Well, two of the things that
18 Ms. Schlax just told you about, the fact that she's
19 a child and the fact that she was sexually battered
20 when she was killed are what we call aggravating
21 circumstances and those are factors that could lead
22 a juror, or all the jury as a whole, to consider
23 that the death penalty is appropriate. And the
24 State can't go forward and seek the death penalty if
25 an aggravating circumstance doesn't exist. But the

1 Judge is also going to instruct you in the penalty
2 phase, that's what we call mitigating circumstances.
3 Circumstances of the crime or the defendant's mental
4 or personal history that may give reason why the
5 crime occurred the way it did.

6 Now, that being said, while we agree that
7 there's aggravating circumstances or we wouldn't be
8 here asking these questions, can you consider the
9 mitigating circumstances, the background of the
10 defendant and his history, and weigh that to
11 determine what an appropriate sentence is? Can you
12 at least consider it in going to that penalty phase
13 with an open mind?

14 PROSPECTIVE JUROR: Like insanity or
15 something?

16 MR. CALIEL: Not insanity, but there are a
17 number of mitigating factors. The judge will
18 instruct you a little bit more when we get to that
19 phase of the trial what there are. But there are
20 a number of factors. It could be mental health
21 history, it could be, you know, a family history
22 or background. It could be substance abuse. It
23 could be a number of different things, but those
24 are all factors that you could consider in
25 weighing whether or not the death penalty is

1 appropriate or life in prison without the
2 possibility of parole.

3 So that being said, because you don't know
4 the evidence at this point in time. You've heard
5 some aggravating factors. She's a child, she's
6 been raped, and you're to presume those things in
7 the hypothetical that Ms. Schlax gave you, presume
8 that we've proven those things, so aggravation has
9 been proven. Can you at least listen in the
10 penalty phase to any background or mitigation
11 that's presented and listen to it with an open
12 mind? Now, it may never outweigh the aggravation
13 that this is a child, but can you still weigh it,
14 consider it and leave it open as a possibility in
15 going into the penalty phase?

16 PROSPECTIVE JUROR: I mean I can try. I mean
17 I can't tell you that -- you know, I can't say
18 that I definitely would because -- I just can't
19 see, you know, those circumstances being that --
20 like you said, I don't know his background and how
21 he grew up and all those other things.

22 MR. CALIEL: And the key is this, and this is
23 very sort of unfair of us to ask at this point in
24 time, you don't know what you're going to hear.

25 PROSPECTIVE JUROR: Um-hum.

1 MR. CALIEL: You could hear a lot, you could
2 hear a little. It's up to each individual juror
3 to place whatever weight they see the mitigation
4 having and whatever weight they see the
5 aggravation that's been proven by the State beyond
6 a reasonable doubt to have. And you can weigh
7 that and you may say the aggravation is so great
8 and the mitigation is so little that you don't
9 wish to impose a life sentence and that's your
10 choice as a juror. But the whole point is can you
11 go through that process and listen to what's
12 presented, because you don't know. Maybe there's
13 something in the mitigation that may have some
14 weight in your mind, that may be important to you.
15 Can you keep an open mind going into the penalty
16 phase and listen to the evidence and not
17 predetermine right now, oh, he's found guilty, I
18 must give him the death penalty? Can you keep an
19 open mind?

20 PROSPECTIVE JUROR: Again, I can try. That's
21 -- that's --

22 MR. CALIEL: Knowing what you know now
23 without anything more, would you agree that you
24 couldn't impose the death penalty because you
25 heard none of the evidence in the penalty phase?

1 PROSPECTIVE JUROR: You're saying that since
2 I don't know anything, all I know is she died and
3 he was alleged to have done these things, but not
4 as evidence -- what are you saying again?

5 MR. CALIEL: That you wouldn't have enough
6 information to even render any verdict, death or
7 life, at this point.

8 PROSPECTIVE JUROR: I'm not feeling the trick
9 question.

10 MR. CALIEL: Lawyers are good about that,
11 aren't we?

12 PROSPECTIVE JUROR: Yeah, I feel like it's a
13 trick question. It's like you want me to say, but
14 I can't -- I just don't want to say. You see what
15 I'm saying?

16 MR. CALIEL: Well, what I want from you, the
17 best that you can, is do you feel that you must
18 impose the death penalty if the defendant killed
19 and raped a child? Do you feel in your heart of
20 hearts, no matter what evidence is presented, if
21 we prove he raped and murdered a child, are you
22 automatically going to vote for the death penalty
23 and not consider the mitigation at all? Because
24 let's put it this way. If he rapes and murders a
25 child, the death penalty is an option for you to

1 consider.

2 PROSPECTIVE JUROR: Um-hum.

3 MR. CALIEL: Will you ignore any and all
4 mitigation and vote death simply because
5 aggravation has been proven or can you at least
6 keep an open mind to see what mitigation is
7 presented?

8 PROSPECTIVE JUROR: Again, I can try.

9 MR. CALIEL: Okay.

10 PROSPECTIVE JUROR: I tell you that.

11 MR. CALIEL: That's the best you can give me,
12 that is the best we can.

13 PROSPECTIVE JUROR: That's the best I can do.
14 Sorry.

15 MR. CALIEL: I appreciate it.

16 THE COURT: Thank you, juror No. 66.

17 Did you have anything else?

18 MS. SCHLAX: No, ma'am.

19 THE COURT: If you'll step out in the hall,
20 we're going to try to let you all know something
21 in the next few minutes. Please do not discuss
22 your questions and answers.

23 PROSPECTIVE JUROR: Okay.

24 THE COURT: As soon as juror No. [REDACTED] leaves,
25 juror [REDACTED] can come in.

1 (Prospective juror absent.)

2 (Prospective juror present.)

3 BAILIFF: Sir, take the second chair in.

4 THE COURT: Thank you, juror No. [REDACTED]. We have
5 a few follow-up questions from your questionnaire
6 and Mr. Fletcher will ask the questions.

7 MR. FLETCHER: How are you doing today, juror
8 [REDACTED]? Can't call you by your real name.

9 PROSPECTIVE JUROR: I'm a little tired just
10 like you all probably are.

11 MR. FLETCHER: We are a little tired. I've
12 read your questionnaire and you know about the
13 case and I guess it's from radio and some other
14 sources and you discussed it with your family?

15 PROSPECTIVE JUROR: Yes, sir.

16 MR. FLETCHER: Do you remember when it first
17 happened?

18 PROSPECTIVE JUROR: No, no.

19 MR. FLETCHER: When did you first start
20 seeing it in the news?

21 PROSPECTIVE JUROR: I remember hearing it
22 sometime ago and then in the last week it's been
23 all over the radio.

24 MR. FLETCHER: Okay. Have you read -- up
25 until yesterday had you read stories online or

1 read stories in the newspaper?

2 PROSPECTIVE JUROR: Not reading them.

3 MR. FLETCHER: Just the radio?

4 PROSPECTIVE JUROR: Yeah, I don't read. I
5 mean I read, but not --

6 MR. FLETCHER: You what?

7 PROSPECTIVE JUROR: I read, but not the
8 newspaper.

9 MR. FLETCHER: Do you know anything about
10 Rayne Perrywinkle, the child's mother? Have you
11 heard anything about her on the news, on the
12 radio?

13 PROSPECTIVE JUROR: Not on the news, but,
14 Your Honor, I have another disclosure that I need
15 to tell the Court.

16 THE COURT: Okay.

17 PROSPECTIVE JUROR: When I informed my
18 employer last night about my potential schedule, I
19 work for a law firm, and he -- the principal at
20 the law firm I talked to said if you are on this
21 jury or pool, you need to let them know that the
22 mother had reached out to him to represent her.
23 He does pro bono work. So he just said I should
24 disclose that, if this was the jury.

25 MR. FLETCHER: Okay. And do you know whether

1 or not he actually represents her?

2 PROSPECTIVE JUROR: He does not represent
3 her.

4 MR. FLETCHER: It was just somebody that
5 contacted him?

6 PROSPECTIVE JUROR: Yes.

7 MR. FLETCHER: And you never had any contact
8 with her?

9 PROSPECTIVE JUROR: No, sir.

10 MR. FLETCHER: Knowing that, that mom is
11 seeking some sort of legal help, would that affect
12 your decision in any way in this case?

13 PROSPECTIVE JUROR: No, sir.

14 MR. FLETCHER: If you're picked to be a
15 juror, can you set all that aside?

16 PROSPECTIVE JUROR: Yes, sir.

17 MR. FLETCHER: So back to what I was saying,
18 based on what you've heard on the radio and
19 elsewhere, do you know anything about her other
20 than what you said?

21 PROSPECTIVE JUROR: No, sir.

22 MR. FLETCHER: How about Donald Smith's past?
23 Do you know anything about him?

24 PROSPECTIVE JUROR: No, sir.

25 MR. FLETCHER: Okay. That's all I have, Your

1 Honor.

2 THE COURT: Has the State got any questions?

3 MR. CALIEL: Yes, just a few follow-up
4 questions.

5 Sir, you indicated on your questionnaire that
6 I'm for the death penalty, especially in murder
7 cases.

8 PROSPECTIVE JUROR: Yes, sir.

9 MR. CALIEL: In particular, when you say
10 you're for the death penalty, do you mean that you
11 could impose the death penalty only when it's
12 appropriate?

13 PROSPECTIVE JUROR: Yes, sir.

14 MR. CALIEL: You don't believe that every
15 murder deserves the death penalty?

16 PROSPECTIVE JUROR: No, sir.

17 MR. CALIEL: Thank you. I don't have any
18 further questions.

19 THE COURT: Just a minute. Let me check
20 something. The questionnaire that you filled out,
21 without stating what it is, your employer, that
22 the law firm?

23 PROSPECTIVE JUROR: Yes, ma'am.

24 THE COURT: Okay. I just don't recognize the
25 name. They don't do criminal law, correct?

1 PROSPECTIVE JUROR: They do not. [REDACTED]
2 had represented, sometime ago, assisting with
3 another -- another murder that a parent reached
4 out to him.

5 THE COURT: Okay. And you said the mother
6 had reached out. Has he been hired to help her --
7 well, not hired because you said it was pro bono.
8 Is he actively helping her?

9 PROSPECTIVE JUROR: No, ma'am, he turned it
10 down.

11 THE COURT: Okay. Do you know how long that
12 was?

13 PROSPECTIVE JUROR: No, ma'am.

14 THE COURT: Okay. Thank you, sir.

15 Any other questions based on my question?

16 MS. SCHLAX: No, Your Honor.

17 MR. CALIEL: No.

18 THE COURT: I was trying to formalize that a
19 little more than what we had on the record. Thank
20 you so much. And if you'll wait in the hall,
21 we'll try to let you know something as quickly as
22 possible. Should be just a few minutes.

23 PROSPECTIVE JUROR: Thank you.

24 THE COURT: When juror No. [REDACTED] leaves, juror
25 No. [REDACTED] can come in.

1 (Prospective juror absent.)

2 (Prospective juror present.)

3 BAILIFF: Ma'am, if you'll take the second
4 chair in.

5 THE COURT: Okay. Juror No. [REDACTED] we're just
6 doing some follow-up questions from your
7 questionnaire. Ms. Schlax is going to ask you
8 some questions. Okay?

9 MS. SCHLAX: Good evening.

10 PROSPECTIVE JUROR: Good evening.

11 MS. SCHLAX: Just reviewing your
12 questionnaire, how long have you lived in
13 Jacksonville?

14 PROSPECTIVE JUROR: 19 years.

15 MS. SCHLAX: And you had indicated that you
16 had heard absolutely nothing about this case prior
17 to walking into the courthouse yesterday.

18 PROSPECTIVE JUROR: No, I haven't.

19 MS. SCHLAX: Are you someone that does not
20 watch local news?

21 PROSPECTIVE JUROR: I work very late at
22 night. I just don't watch news.

23 MS. SCHLAX: Okay. And anything about the
24 process, you being at the courthouse yesterday,
25 has anything else changed in your questionnaire,

1 in terms of overhearing conversations or being
2 exposed to anything?

3 PROSPECTIVE JUROR: No, ma'am.

4 MS. SCHLAX: Okay. I appreciate your time.
5 Thank you.

6 THE COURT: Any questions?

7 MR. CALIEL: No questions, Your Honor.

8 THE COURT: Thank you, ma'am. If you'll wait
9 in the hall, we'll try and let you know something
10 in just a few minutes and please do not discuss
11 these questions or answers with anyone. Thank
12 you.

13 And when juror No. [REDACTED] leaves, juror No. [REDACTED]
14 can come in.

15 (Prospective juror absent.)

16 (Prospective juror present.)

17 BAILIFF: Ma'am, take the second chair in.

18 THE COURT: Juror No. [REDACTED] thank you. We've
19 gone over all the questionnaires and we just have
20 a few follow-up questions. Mr. Fletcher is going
21 to ask you some questions.

22 PROSPECTIVE JUROR: Okay.

23 MR. FLETCHER: Thank you, Judge. It's about
24 time to start saying good evening. Good evening,
25 juror [REDACTED] Ma'am, am I correct in reading your

1 question correctly that you don't know anything
2 about this case?

3 PROSPECTIVE JUROR: No, I just moved here two
4 years ago.

5 MR. FLETCHER: If I told you it was on the
6 news every night last week and in the paper every
7 day last week and today and yesterday, you haven't
8 seen any of it?

9 PROSPECTIVE JUROR: No.

10 MR. FLETCHER: Okay. So you can be
11 completely fair in this case? You don't know
12 anybody?

13 PROSPECTIVE JUROR: Yes.

14 MR. FLETCHER: I do want to ask you a couple
15 of questions about the death penalty. You wrote
16 I'm all for the death penalty in certain cases,
17 especially involving children. Okay. You
18 understand that there are two possible -- there
19 are two phases in this case.

20 PROSPECTIVE JUROR: Right.

21 MR. FLETCHER: If the jury -- if you're on
22 the jury and you find that Mr. Smith committed the
23 crime, if you find that beyond a reasonable doubt,
24 then we will go into what's called the penalty
25 phase. The Judge will instruct you on what I

1 would call a weighing process where you weigh
2 those, you weigh the crime, you weigh the fact
3 that there's a child involved, but you also weigh
4 things on the other side about Mr. Smith. Can you
5 keep an open mind and engage in that weighing
6 process or --

7 PROSPECTIVE JUROR: Yes.

8 MR. FLETCHER: -- do you feel like
9 automatically he should get the death penalty?

10 PROSPECTIVE JUROR: No.

11 MR. FLETCHER: You can go through the
12 weighing process?

13 PROSPECTIVE JUROR: Yes.

14 MR. FLETCHER: That's all I have.

15 MR. CALIEL: No questions, Your Honor.

16 THE COURT: Juror No. [REDACTED] if you would wait
17 in the hall, we'll have an answer for you in just
18 a few minutes. But please do not discuss your
19 questions and answers from this session with
20 anyone.

21 PROSPECTIVE JUROR: Yes, ma'am.

22 THE COURT: Thank you.

23 PROSPECTIVE JUROR: You're welcome.

24 THE COURT: And that's ten so I think we
25 should go ahead and take care of ten. That will

1 leave us with 17 more.

2 (Defense counsel conferring with defendant.)

3 MS. SCHLAX: Your Honor, there's only one
4 juror we would move for cause on, which is juror

5

6 THE COURT: [REDACTED]?

7 MR. CALIEL: Your Honor, I believe it's
8 difficult to ascertain that she is a cause
9 challenge. She said she would try to go through
10 that weighing process which she can't commit. I
11 think it's impossible for us to ask a juror to
12 commit to the process because they don't know
13 what's going to be taking place. She said she
14 would try to go in with an open mind. The
15 difficulty is we were having her assume the two
16 aggravating circumstances had been proven beyond a
17 reasonable doubt.

18 Quite frankly, if two aggravating
19 circumstances have been proven beyond a reasonable
20 doubt, and she goes in with an open mind, but
21 she's not sure if she can impose a life sentence,
22 that's within her right as a juror. Because those
23 two aggravating circumstances, the sexual battery
24 and the fact that the victim was a child, could be
25 so weighty in her mind that nothing would outweigh

1 that process and that's why she said she would
2 try, but I don't think that what she had said is
3 giving rise to a cause challenge under the
4 hypothetical presented to her because it assumes
5 multiple aggravating circumstances proven beyond a
6 reasonable doubt. At that point in time it's her
7 right to impose the death penalty if she sees fit.

8 MS. SCHLAX: Your Honor, the difficulty that
9 we're going to have, and there are going to be
10 jurors that are going to express, and I agree that
11 the correct statement of the law is that if they
12 find Mr. Smith guilty of the murder of this child
13 that's an aggravating factor in and of itself and
14 so at that point he does become death eligible.
15 But we need to inquire and know if these jurors,
16 at that moment, will automatically assume that the
17 death penalty is the only appropriate punishment
18 and she was candid and she was candid in this
19 questionnaire that she believes an eye for an eye.

20 When given examples of when she wouldn't
21 think the death penalty was appropriate, one was
22 self-defense, which we all know legally would not
23 be first degree murder. And thus would not be
24 eligible. All of her statements, and she even --
25 and I'll try my best to quote what she said in

1 regards to Mr. Caliel's questions, I can't see any
2 circumstances, meaning in regards to mitigation,
3 you want me to say that I can. And then
4 ultimately on the question of can you keep an open
5 mind, I can try.

6 That's not death qualified. What she is
7 saying is if someone's proven guilty of first
8 degree murder then the death penalty is the only
9 appropriate penalty. And that's what she said and
10 the two aggravating factors, and there are other
11 aggravating factors that the State alleges, and
12 we'll have to talk to the full panel in regards to
13 those, but if they -- if a juror is going to
14 immediately go to -- if it has been proven that
15 this child was killed, then the death penalty is
16 the only appropriate punishment, then they are not
17 open to his constitutional right to not only have
18 death qualified but life qualified jurors. People
19 who can actually go through that process. And her
20 saying I can try leaves a very reasonable doubt as
21 to whether she's an appropriate death qualified
22 juror in this case.

23 THE COURT: Anything further?

24 MR. CALIEL: Your Honor, the only thing
25 further I can say is the defense in the

1 hypothetical question asked this juror to presume
2 two of the most weighty aggravating circumstances
3 that are available to any juror in making that --
4 making that decision and so in a vacuum I think it
5 is impossible for any juror to say if you are to
6 presume that he raped and murdered a child could
7 you consider life? Well, I don't know, I can try.
8 But they don't know what they're presenting, they
9 don't know what mitigation is going to be
10 presented.

11 THE COURT: I'm going to grant the challenge
12 for cause. We almost always require a juror at
13 some point to give us a definite yes or no answer
14 because we can't foresee I'm not sures or I don't
15 know or I will try kind of things and we know that
16 those are -- legally we know a lot that this juror
17 doesn't know. We're asking a lot of her. She's
18 thinking, well, I mean think she's sitting there
19 going, um, these are two very weighty mitigators,
20 but the two most weighty that there are, and she
21 isn't thinking that. She's not a lawyer and she
22 doesn't know all that.

23 I think in combination with her written
24 questionnaire she is a cause challenge and I'm
25 going to grant it.

1 MR. CALIEL: Your Honor, if I could make one
2 request. And I guess it's the manner in which we
3 question the jurors when it comes to aggravators.
4 I would argue we're asking jurors to commit to
5 something when they don't -- they're assuming
6 proof of aggravating circumstances without any
7 evidence or any suggestion of what mitigation may
8 be and then asking them to commit to an issue.
9 And so I do find that difficult because some of
10 the aggravators we can't talk about in jury
11 selection. Can't talk about the fact that he
12 tried to kidnap somebody in 1992. And obviously
13 that's something that may have great weight and
14 may sway them one way or the other. I just think
15 we have to tread carefully on when we start
16 getting jurors to try to commit when we're telling
17 them to assume the two aggravating circumstances
18 have been proven beyond a reasonable doubt,
19 because now we're forcing them to go through the
20 evaluation without having all the evidence at
21 hand.

22 THE COURT: Well, I'll pay more attention to
23 that, but I think you need to object at the time
24 the question is posed. But with this juror it is
25 what it is, it was posed the way it's posed and

1 also in combination with her written question, I
2 think she's a cause challenge. I do think we have
3 to be careful. I've said it already, generally
4 speaking, to my knowledge, these are not legally
5 trained persons that we have on the jury. In
6 fact, people don't want legally trained persons on
7 a jury, but we have to be kind of careful how we
8 pose the question because they have to be able to
9 answer the question one way or the other. They
10 can't be put in a position where the only way to
11 answer a question is the way the questioner would
12 like them to answer it. And I'm not saying any
13 one person is doing anything, but we do have to be
14 cautious about that.

15 It's almost 6:00 o'clock. It's the end of
16 the day, while they may not be doing much, I don't
17 know what they've been doing, but my guess is
18 they've been reading, talking or having their
19 lunch, but they're tired. They have
20 responsibilities at home they may not be quite as
21 perky as they would be at this time of the day.
22 So we need to consider that, too.

23 Any other cause challenge?

24 MR. CALIEL: No, Your Honor.

25 MS. SCHLAX: No, Your Honor.

1 THE COURT: So [REDACTED] and [REDACTED]
2 are all going to be asked to come back Thursday
3 for jury selection and then the one cause
4 challenge I think for the defense will be excused,
5 is that correct?

6 MS. SCHLAX: Your Honor, I think additionally
7 [REDACTED]

8 MR. CALIEL: [REDACTED] and [REDACTED], Your Honor.

9 THE COURT: I'm sorry. [REDACTED] and [REDACTED] They'll
10 all be asked to come back.

11 MR. CALIEL: Yes, Your Honor.

12 THE COURT: All right. I think just bring in
13 No. [REDACTED] first, please.

14 (Prospective juror present.)

15 THE COURT: Thank you, juror No. [REDACTED]. You
16 have completed your jury duty. Thank you so much
17 for your time and your service you have given us
18 here. The bailiffs will collect your hanging tag
19 and your button and you're free to go about your
20 business as an ordinary citizen, but we do
21 appreciate you serving your civic duty with us
22 this week. Thank you. You're free to go.

23 Then we're going to need jurors No. [REDACTED]
24 [REDACTED] and [REDACTED] correct?

25 MR. CALIEL: Correct.

1 MS. SCHLAX: Yes, Your Honor.

2 (Prospective jurors present.)

3 THE COURT: I'm going to say your juror
4 number and ask you to raise your right hands so we
5 can be sure that everyone is back in the courtroom
6 whose number I call.

7 No. [REDACTED], No. [REDACTED] No. [REDACTED] No [REDACTED]
8 and [REDACTED].

9 (Prospective jurors indicating.)

10 THE COURT: Did I leave anybody out?

11 (No response from prospective jurors.)

12 THE COURT: Okay. We've completed this phase
13 of the jury selection process and you will need to
14 come back Thursday. Today is Tuesday. Thursday
15 at 9:30 to the jury assembly area for us to begin
16 the actual jury selection.

17 When you go to the jury assembly area, we will
18 do our best to get started with that as quickly
19 after that as we can, but we anticipate it will be
20 at least by 10:00 o'clock.

21 You're still under your oath and my orders not
22 to watch television or listen to the news or read
23 the paper or look online or ask your friends or
24 family or let them talk to you. You're not to get
25 any information about the trial. You will get all

1 the information that you are allowed to consider
2 during the trial itself.

3 Now, the trial doesn't start till next week.
4 Thursday is just the beginning of the selection of
5 the actual jury from a panel and we've been
6 narrowing that panel during the week to a workable
7 number for us to use. Thank you for your time. We
8 know it's not easy, we know it's inconvenient and we
9 really appreciate it and we'll see you at 9:30
10 Thursday morning. Thank you.

11 (Prospective jurors absent.)

12 THE COURT: Okay. We have, I think 16 more
13 because I've just been informed that juror No. 99
14 did not show up today and I've just looked at his
15 questionnaire and he had just started a new job
16 and he was afraid of missing work and so I guess
17 he on his own took that literally and didn't miss
18 work today, I'm not sure, but he's not here and
19 hasn't been here all day. So we'll talk about
20 that later, but he won't be coming in for
21 questioning. And then I think we can go ahead
22 with the next juror, which would be juror No. [REDACTED]
23 correct? Since we're down to 17 we might do them
24 all. I don't think they're going to be that
25 lengthy. So...

1 (Prospective juror present.)

2 THE COURT: Thank you, juror [REDACTED] We're just
3 doing some follow-up questions from the
4 questionnaire and Ms. Schlax is going to ask you
5 those questions. Thank you.

6 MS. SCHLAX: How long have you lived in
7 Jacksonville?

8 PROSPECTIVE JUROR: 23 years.

9 MS. SCHLAX: And you had indicated on your
10 questionnaire that you have no familiarity, no
11 knowledge, had heard nothing about this case prior
12 to walking into the courthouse.

13 PROSPECTIVE JUROR: No, ma'am.

14 MS. SCHLAX: Okay. Just this part as being
15 part of this process and having been at the
16 courthouse now a very long time, have you heard
17 anything additional about this case?

18 PROSPECTIVE JUROR: No.

19 MS. SCHLAX: Okay. Do you watch the local
20 news at all?

21 PROSPECTIVE JUROR: No, ma'am.

22 MS. SCHLAX: Okay. And so I guess it's fair
23 to say what we're truly looking for through this
24 process is someone who can actually presume my
25 client Mr. Smith innocent as we sit here today.

1 Can you do that?

2 PROSPECTIVE JUROR: I'm sorry.

3 MS. SCHLAX: Can you presume him innocent,
4 meaning you presume or believe he is innocent
5 because no evidence has been presented?

6 PROSPECTIVE JUROR: Yes, ma'am.

7 MS. SCHLAX: Thank you. I appreciate your
8 time.

9 MR. CALIEL: No questions, Your Honor.

10 THE COURT: All right. Thank you, juror No.
11 [REDACTED] And if you'll step out in the hall, we'll try
12 to have you all an answer pretty quickly. Okay?

13 PROSPECTIVE JUROR: All right.

14 THE COURT: Don't discuss your questions and
15 answers with anyone. Thank you.

16 Juror No. [REDACTED] can come in when juror No. [REDACTED]
17 leaves.

18 (Prospective juror absent.)

19 (Prospective juror present.)

20 BAILIFF: Ma'am, take the second seat in.

21 THE COURT: Thank you, juror No. [REDACTED]

22 We just finished going over the
23 questionnaires earlier today so we're asking some
24 follow-up questions and Mr. Caliel will do that.

25 MR. CALIEL: Thank you, Your Honor.

1 Sir, you had indicated that given the schedule,
2 the trial, that you may have a hardship regarding
3 your employment because you were self-employed. Can
4 you please explain that?

5 PROSPECTIVE JUROR: Yes, I'm a self-employed
6 courier and if I don't work I've got to give it to
7 somebody else and they get paid. I mean the job
8 gets done but not by me.

9 MR. CALIEL: Okay. As you can imagine with
10 all the jurors who have been here all day,
11 everybody has jobs or other activities that they're
12 going to have forfeit or sacrifice to become a
13 juror in this case.

14 PROSPECTIVE JUROR: Right. Right.

15 MR. CALIEL: Are you willing to make that
16 sacrifice to serve as a juror in this case?

17 PROSPECTIVE JUROR: Yes, if I have to.

18 MR. CALIEL: Thank you. I don't have any
19 further questions.

20 MR. FLETCHER: Hold on. Hold on.

21 THE COURT: Just a minute.

22 Do you have any other questions?

23 MR. FLETCHER: Yes.

24 THE COURT: Okay.

25 MR. FLETCHER: Good evening, juror ██████████

1 PROSPECTIVE JUROR: Good evening.

2 MR. FLETCHER: In your questionnaire you
3 indicated you do have some knowledge about this
4 case.

5 PROSPECTIVE JUROR: Yes, sir.

6 MR. FLETCHER: If you can briefly tell me
7 where you got it.

8 PROSPECTIVE JUROR: Mostly from the newspaper
9 and telling.

10 MR. FLETCHER: That the day it happened
11 coming forward or just the last couple of weeks?

12 PROSPECTIVE JUROR: No, from the day it
13 happened forward.

14 MS. SCHLAX: You've been sort of following
15 it?

16 PROSPECTIVE JUROR: It's been in the news
17 quite a bit, yes.

18 MR. FLETCHER: Did you see any of the stories
19 last week on the news or did you read?

20 PROSPECTIVE JUROR: The stories regarding
21 this case?

22 MR. FLETCHER: Yes, sir.

23 PROSPECTIVE JUROR: Yeah, I believe I did.
24 They were talking about selecting a jury and all
25 that.

1 MR. FLETCHER: Okay. You answered yes when
2 -- when asked if you have read or if you knew
3 anything about Rayne Perrywinkle. The victim's
4 mom.

5 PROSPECTIVE JUROR: Yes, I knew of her
6 through the newspapers.

7 MR. FLETCHER: Okay.

8 PROSPECTIVE JUROR: I don't know her
9 personally.

10 MR. FLETCHER: Okay. Do you know anything
11 about Donald Smith's past? Did anything come out,
12 stick out to you in the newspaper articles or the
13 news stories?

14 PROSPECTIVE JUROR: No, not really. Until
15 that incident happened, that was the first time I
16 ever heard of it.

17 MR. FLETCHER: But the stories they talked
18 about his past at all or is it just limited to --

19 PROSPECTIVE JUROR: I really -- I didn't pay
20 a lot of attention if it did.

21 MR. FLETCHER: Okay. That's all I have, Your
22 Honor.

23 THE COURT: All right. Thank you, sir. If
24 you'll wait in the hall, we'll try to have an
25 answer for you pretty quickly.

1 PROSPECTIVE JUROR: Thank you.

2 THE COURT: And please do not discuss your
3 questions and answers with anyone.

4 And when juror No. [REDACTED] leaves, juror No. [REDACTED] can
5 come in.

6 (Prospective juror absent.)

7 (Prospective juror present.)

8 BAILIFF: Sir, please take the second chair.

9 THE COURT: All right, thank you juror No.
10 [REDACTED] We're just asking some follow-up questions
11 from your questionnaire.

12 PROSPECTIVE JUROR: Okay.

13 THE COURT: Okay. Thank you.

14 MS. SCHLAX: And good evening.

15 PROSPECTIVE JUROR: Good evening.

16 MS. SCHLAX: Sir, you had indicated that
17 prior to walking into the courthouse yesterday you
18 had heard nothing in regards to this case.

19 PROSPECTIVE JUROR: Nothing.

20 MS. SCHLAX: Okay. Since you've been part of
21 this process and now in the courthouse for quite a
22 long time today, have you overheard any kind of
23 thing about this case or received any kind of
24 information about this case?

25 PROSPECTIVE JUROR: Nothing.

1 MS. SCHLAX: Okay. How long have you lived
2 here in Jacksonville?

3 PROSPECTIVE JUROR: It was either the
4 Christmas of 2014 or the Christmas of 2015.

5 MS. SCHLAX: Okay. And are you somebody that
6 watches local news at all?

7 PROSPECTIVE JUROR: Well, I will be quite
8 honest, I was watching the local news, Action News
9 Jax when I first got here because I'm the type of
10 person to be -- I want to know what's going on
11 around me. Unfortunately, I stopped watching the
12 local news because it seemed like everyday there
13 was either a death or a murder or another body
14 found so I just stopped watching the local news.

15 MS. SCHLAX: Okay. So I guess it's pretty
16 fair to say that at this -- at this juncture that
17 you can actually presume my client innocent.

18 PROSPECTIVE JUROR: Say that.

19 MS. SCHLAX: Can you presume my client
20 innocent?

21 PROSPECTIVE JUROR: Yes, ma'am. I don't know
22 him. I don't know nothing. So at this point he
23 is innocent to me.

24 MS. SCHLAX: So nothing about the case,
25 nothing's been presented to you?

1 PROSPECTIVE JUROR: Nothing at all.

2 MS. SCHLAX: I appreciate your time.

3 PROSPECTIVE JUROR: You're welcome.

4 MR. CALIEL: No questions, Your Honor.

5 THE COURT: Thank you, juror No. [REDACTED] Go out
6 in the hall for a few minutes. We'll try to let
7 you know something as quickly as possible. And
8 please don't discuss your questions and answers
9 with anyone.

10 PROSPECTIVE JUROR: Not a problem.

11 THE COURT: And when juror No. [REDACTED] leaves,
12 juror [REDACTED] can come in.

13 (Prospective juror absent.)

14 (Prospective juror present.)

15 BAILIFF: Take the second seat in, ma'am.

16 THE COURT: Thank you, juror No. [REDACTED] We're
17 just following up with some questions from the
18 questionnaire and Mr. Fletcher is going to ask you
19 some questions.

20 MR. FLETCHER: Thank you, Judge.

21 Good evening, juror [REDACTED] I've read your
22 questionnaire and just have a couple of questions
23 about how you know about this case.

24 PROSPECTIVE JUROR: Okay.

25 MR. FLETCHER: So when did you first hear

1 about it?

2 PROSPECTIVE JUROR: It's been awhile. I mean
3 I just recall it coming on the news. I don't
4 typically watch the news. I watch it in the
5 morning to see the weather.

6 MR. FLETCHER: Okay. And is it something
7 that pops up every once in awhile?

8 PROSPECTIVE JUROR: It's been a good while.

9 MR. FLETCHER: And I'll just tell you this
10 last week and this weekend it's everyday. Have
11 you seen anything in the last week?

12 PROSPECTIVE JUROR: No.

13 MR. FLETCHER: Other than this little factual
14 scenario we put in here about what he is alleged
15 to have done, do you know anything also about
16 Mr. Smith?

17 PROSPECTIVE JUROR: No, nothing. Basically
18 what I know is what you stated there.

19 MR. FLETCHER: Nothing about his past?

20 PROSPECTIVE JUROR: No.

21 MR. FLETCHER: That's all I have, Your Honor.

22 THE COURT: All right. Any questions?

23 MR. CALIEL: No questions, Your Honor.

24 THE COURT: Thank you, juror No. [REDACTED] If
25 you'll wait in the hall, we'll let you know

1 something as quick as possible.

2 Please don't discuss your questions and
3 answers with everyone and when juror No. [REDACTED]
4 leaves, juror No. [REDACTED] may come in.

5 (Prospective juror absent.)

6 (Prospective juror present.)

7 BAILIFF: Sir, take the second chair in.

8 THE COURT: Good afternoon, juror No. [REDACTED] We
9 are just asking a few follow-up questions from the
10 questionnaire and Mr. Caliel is going to start.

11 MR. CALIEL: Good evening, sir.

12 PROSPECTIVE JUROR: Good evening.

13 MR. CALIEL: In reviewing your hardship
14 answer to the questionnaire, you indicated that
15 you had a business trip scheduled for the 15th of
16 February.

17 PROSPECTIVE JUROR: Sunday, yes.

18 MR. CALIEL: Is that trip something -- well,
19 I guess it's Sunday the 11th through the 15th, so
20 it's all next week.

21 PROSPECTIVE JUROR: Yes. It is.

22 MR. CALIEL: Okay. Is that something that
23 you cannot reschedule that you have nonrefundable
24 tickets or is it something that if you were asked
25 to sit as a juror in this case that you could

1 reschedule?

2 PROSPECTIVE JUROR: It's a big company
3 meeting so everything is already purchased out,
4 room's booked, the whole thing. So unfortunately,
5 that's why I put that on there.

6 MR. CALIEL: Okay. Thank you, sir.

7 I don't have any further questions.

8 MS. SCHLAX: No questions, Your Honor.

9 THE COURT: All right. Thank you. Juror No.
10 [REDACTED] if you'd wait in the hall. We're going to try
11 to let the rest of you all know something as
12 quickly as possible. Thank you.

13 Juror No. [REDACTED] can come in when juror No. [REDACTED]
14 leaves.

15 (Prospective juror absent.)

16 (Prospective juror present.)

17 BAILIFF: Sir, take the second chair in.

18 THE COURT: Thank you, juror [REDACTED] We're just
19 asking some follow-up questions from the
20 questionnaire and Ms. Schlax is going to do that
21 now. Thank you.

22 MS. SCHLAX: Thank you.

23 Good evening.

24 PROSPECTIVE JUROR: Good evening.

25 MS. SCHLAX: We were looking over your

1 questionnaire, sir, and you had indicated that
2 prior to walking into the courthouse yesterday you
3 had heard nothing about this case.

4 PROSPECTIVE JUROR: That's correct.

5 MS. SCHLAX: Okay. And being a part of this
6 process you've now been at the courthouse for a
7 very long time. Have you heard anything
8 additional about this case?

9 PROSPECTIVE JUROR: No, ma'am. Not --
10 nothing on top of what was said yesterday in the
11 courtroom.

12 MS. SCHLAX: Okay. In regards to the
13 synopsis that you were given contained within the
14 questionnaire?

15 PROSPECTIVE JUROR: Yes, ma'am.

16 MS. SCHLAX: Okay. How long have you lived
17 in Jacksonville?

18 PROSPECTIVE JUROR: My whole life.

19 MS. SCHLAX: Okay. And are you somebody that
20 -- that watches the local news at all?

21 PROSPECTIVE JUROR: No, ma'am.

22 MS. SCHLAX: Okay. Do you make an effort not
23 to watch the local news or...

24 PROSPECTIVE JUROR: No, I don't make an
25 effort not to, but it's -- it's schedule

1 conflicts.

2 MS. SCHLAX: Okay. Okay. I don't have any
3 other questions. I appreciate you coming in.

4 THE COURT: Any questions?

5 MR. CALIEL: No questions, Your Honor.

6 THE COURT: All right, sir. You can go back
7 out in the hall and we'll try to let the rest of
8 you know something as quickly as possible. Please
9 don't discuss your questions and answers with
10 anyone.

11 PROSPECTIVE JUROR: Yes, ma'am, thank you.

12 THE COURT: And when juror No. [REDACTED] leaves,
13 juror No. [REDACTED] can come in.

14 (Prospective juror absent.)

15 (Prospective juror present.)

16 BAILIFF: Ma'am, if you'll take the second
17 chair in.

18 THE COURT: Thank you, juror No. [REDACTED] We're
19 doing some follow-up questions from the
20 questionnaire and Mr. Fletcher is going to do
21 that.

22 MR. FLETCHER: Thank you, Judge.

23 Good morning, juror No. [REDACTED] I was reading
24 over your questionnaire and you indicated you have
25 no knowledge of this case.

1 PROSPECTIVE JUROR: I don't.

2 MR. FLETCHER: How long --

3 PROSPECTIVE JUROR: I travel like to West
4 Virginia and Maryland and I haven't been here that
5 long. I'm just here to have back surgery, living
6 here for a year.

7 MR. FLETCHER: Okay. So you've lived here
8 for a year?

9 PROSPECTIVE JUROR: Almost.

10 MR. FLETCHER: How about in the last week?
11 Have you watched news at all?

12 PROSPECTIVE JUROR: No.

13 MR. FLETCHER: Don't watch the news or read
14 the newspaper?

15 PROSPECTIVE JUROR: No, I don't get one.

16 MR. FLETCHER: So you know nothing at all
17 this case?

18 PROSPECTIVE JUROR: No, I don't.

19 MR. FLETCHER: How about yesterday, has
20 anybody in the hall been talking about it?

21 PROSPECTIVE JUROR: No, sir, not to me.

22 MR. FLETCHER: That's all.

23 MR. CALIEL: No questions.

24 THE COURT: Well, do you live somewhere else
25 and you're just here?

1 PROSPECTIVE JUROR: I have been here for 11
2 months. I had back surgery and Dr. Keller wanted
3 me to live here for about 15 months. I lived in
4 Ft. Myers before I lived here and I moved up here,
5 sold my house down there and I travel back north
6 to visit my grandchildren all the time. But I'm
7 full-time here.

8 THE COURT: You did actually move here?

9 PROSPECTIVE JUROR: Yes.

10 THE COURT: Thank you so much. If you'll
11 step in the hall, we'll try to let you all know
12 something as quickly as we can.

13 PROSPECTIVE JUROR: Thank you.

14 THE COURT: Thank you.

15 When juror No. [REDACTED] goes out, juror No. [REDACTED] can
16 come in.

17 (Prospective juror absent.)

18 (Prospective juror present.)

19 BAILIFF: If you'll take the second chair,
20 ma'am.

21 THE COURT: Thank you, juror No. [REDACTED]. We're
22 just following up on some questions from your
23 questionnaire and Mr. Caliel is going to start for
24 us. Thank you.

25 MR. CALIEL: Good evening, ma'am. Ma'am,

1 during the hardship question on the questionnaire
2 yesterday you indicated that your job may pose a
3 hardship that would take away your full attention
4 from the trial. Can you explain that to us,
5 please?

6 PROSPECTIVE JUROR: Yes. I am -- I'm a
7 cosmetologist so I'm self-employed and I'm
8 basically working off a commission-based job so
9 pretty much if I miss work then I don't make any
10 money, therefore, I don't have any money to really
11 pay my bills and I kind of have to support my
12 family back at home so it's really hard for me to
13 necessarily take days off of work from it so...

14 MR. CALIEL: And understanding that and many
15 of the jurors who are here today will be
16 questioned throughout the course of this process
17 and potentially serve are going to be leaving
18 their jobs and coming in. Do you feel that the
19 hardship presented will be so insurmountable that
20 you could not serve as a juror in this case if you
21 were asked to make that sacrifice?

22 PROSPECTIVE JUROR: I believe so, yes.

23 MR. CALIEL: I don't have any further
24 questions.

25 MS. SCHLAX: No questions, Your Honor.

1 THE COURT: All right. Thank you, juror No.

2

3 And if you'll wait in the hall, we'll try to
4 let the rest of you know something as quickly as
5 we can. But please do not discuss your questions
6 or answers with anyone. Thank you.

7 (Prospective juror absent.)

8 THE COURT: And when juror [REDACTED] leaves, juror
9 85 can come in.

10 (Prospective juror present.)

11 BAILIFF: Ma'am, take the second chair in.

12 MR. CALIEL: Thank you. Juror No. [REDACTED],
13 correct?

14 PROSPECTIVE JUROR: Yes.

15 THE COURT: We're just following up on some
16 questions from the questionnaire and Mr. Fletcher
17 is going to lead.

18 PROSPECTIVE JUROR: Okay.

19 MR. FLETCHER: Thank you, Judge.

20 Good evening juror No. [REDACTED]

21 PROSPECTIVE JUROR: Hi.

22 MR. FLETCHER: In your questionnaire you
23 indicated no knowledge of this case, is that
24 correct?

25 PROSPECTIVE JUROR: Correct.

1 MR. FLETCHER: So you haven't seen anything
2 on the news or in the newspapers or on Facebook or
3 anything?

4 PROSPECTIVE JUROR: Basically what I saw on
5 the questionnaire yesterday was the first that I
6 remember seeing anything.

7 MR. FLETCHER: Okay.

8 PROSPECTIVE JUROR: If I saw anything it was
9 years ago and I haven't seen anything since.

10 MR. FLETCHER: Okay. Fair enough. You're
11 moving to -- is it South Carolina or Virginia or
12 both?

13 PROSPECTIVE JUROR: I'm going for work. I'm
14 not moving.

15 MR. FLETCHER: But that's not until the 26th
16 of February?

17 PROSPECTIVE JUROR: Correct.

18 MR. FLETCHER: And as to the death penalty,
19 you believe in the death penalty as an appropriate
20 way to rectify certain crimes?

21 PROSPECTIVE JUROR: Correct.

22 MR. FLETCHER: Is that right? Let me ask you
23 this. Do you think every single murder case a
24 person should automatically get the death penalty
25 if they're found guilty?

1 PROSPECTIVE JUROR: No.

2 MR. FLETCHER: Without getting into all the
3 particulars, you understand if you do find
4 Mr. Smith guilty beyond a reasonable doubt we'll
5 have a penalty phase and it's -- to boil it down
6 it's kind of a weighing process. Do you agree to
7 go through that process?

8 PROSPECTIVE JUROR: Yes.

9 MR. FLETCHER: Okay. That's all, Your Honor.

10 THE COURT: Anything further?

11 MR. CALIEL: No questions, Your Honor.

12 THE COURT: Thank you. And we'll try to have
13 an answer for all of you out there in just a
14 minute and please do not discuss your questions
15 and answers with anyone. Thank you.

16 PROSPECTIVE JUROR: Thank you.

17 THE COURT: When juror [REDACTED] leaves, juror [REDACTED]
18 can come in.

19 (Prospective juror absent.)

20 (Prospective juror present.)

21 BAILIFF: Ma'am, if you'll take the second
22 seat in.

23 THE COURT: Thank you, juror No. [REDACTED]

24 We're just following up with some questions
25 from the questionnaire and Mr. Caliel is going to

1 start by asking you some questions.

2 MR. CALIEL: Thank you, Your Honor.

3 Ma'am, you indicated on your answer to question
4 6 that you had some concern about a possible
5 hardship because you were unaware of whether or not
6 your company would pay you for your time off.

7 PROSPECTIVE JUROR: Yes.

8 MR. CALIEL: Have you been able to confirm
9 with them whether or not you will be paid while
10 serving as a juror?

11 PROSPECTIVE JUROR: Well, they pay up to so
12 many days and then we can use PTO.

13 MR. CALIEL: How many days?

14 PROSPECTIVE JUROR: She didn't say. She said
15 let them know what the circumstances were and they
16 would --

17 MR. CALIEL: So it sounds like the company is
18 willing to work with you and it's not going to be
19 any undue hardship based upon their response.

20 PROSPECTIVE JUROR: Yes.

21 MR. CALIEL: Okay. Thank you. I don't have
22 further questions.

23 THE COURT: Ms. Schlax.

24 MS. SCHLAX: Good evening.

25 You had indicated that based on the original

1 news reports of coverage that you have formed a
2 definite opinion in regards to the defendant's
3 guilt or innocence?

4 PROSPECTIVE JUROR: I just was responding to
5 knowing about the case.

6 MS. SCHLAX: Okay. And here's the reason we
7 ask. This isn't the news media. This is, in
8 fact, a court of law and my client, Mr. Smith is
9 constitutionally entitled to have his jury presume
10 him innocent. It's what is required. There's
11 been so much news coverage, it's natural that
12 people that have been exposed to it may have
13 already formed an opinion. Are you in that
14 category?

15 PROSPECTIVE JUROR: No. I don't feel that I
16 am.

17 MS. SCHLAX: Okay. And so can you make sure
18 that you disregard anything you've heard outside
19 of this courtroom?

20 PROSPECTIVE JUROR: Yes.

21 MS. SCHLAX: Okay. How much coverage have
22 you been exposed to?

23 PROSPECTIVE JUROR: Mostly at the beginning.

24 MS. SCHLAX: Okay. Do you remember anything
25 in regards to Mr. Smith's past or where he's from?

1 PROSPECTIVE JUROR: No. I just really pay
2 more attention because I'm a mother and a child is
3 missing, you know, you are on alert so, you know,
4 you listen to see. But mostly after that, that
5 was basically it.

6 MS. SCHLAX: Okay. And in regards to -- to
7 the -- and this is always a tricky question.
8 Obviously we want jurors that are able to give
9 their full time and attention to very difficult
10 decisions that may lie ahead. If it doesn't work
11 out with your job, are you going to hold it
12 against Mr. Smith that you're sitting on the jury?

13 PROSPECTIVE JUROR: No. I mean I have enough
14 PTO so it wouldn't really affect me. I just
15 didn't know if they were -- could I use it or
16 would they be willing to work with me. So that
17 was the issue.

18 MS. SCHLAX: Okay. And what dose PTO stand
19 for?

20 PROSPECTIVE JUROR: Paid time off.

21 MS. SCHLAX: So are you essentially having to
22 use sick days or vacation days?

23 PROSPECTIVE JUROR: Actually I have separate
24 sick days.

25 MS. SCHLAX: But is this considered the same

1 as vacation?

2 PROSPECTIVE JUROR: Yes.

3 MS. SCHLAX: I appreciate your time. Thank
4 you.

5 THE COURT: All right. Juror No. [REDACTED] if
6 you'd wait in the hall, we'll try to let you all
7 know something pretty quickly. Please do not
8 discuss your questions or answers with anybody.
9 Thank you.

10 And when juror No. [REDACTED] leaves, juror No. [REDACTED] can
11 come in.

12 (Prospective juror absent.)

13 (Prospective juror present.)

14 BAILIFF: Take the second seat in, sir.

15 THE COURT: Thank you, juror No. [REDACTED] We're
16 just asking a few follow-up questions from the
17 questionnaire and Mr. Fletcher will do that.

18 MR. FLETCHER: Thank you, Your Honor.

19 Good evening, juror [REDACTED]

20 I read your questionnaire and you indicated
21 that you heard about this case basically at the time
22 that it happened.

23 PROSPECTIVE JUROR: Yes, sir.

24 MR. FLETCHER: And that was on the news?

25 PROSPECTIVE JUROR: News or radio one. I'm

1 not a hundred percent positive.

2 MR. FLETCHER: And you remember it back from
3 back in 2013?

4 PROSPECTIVE JUROR: I just remember briefly
5 hearing about it.

6 MR. FLETCHER: Have you heard about it since
7 then?

8 PROSPECTIVE JUROR: No, sir.

9 MR. FLETCHER: If I told you it had been in
10 the news 30 times since this, have you seen any of
11 those reports?

12 PROSPECTIVE JUROR: Actually I don't watch
13 local news. The profession that I'm in I don't
14 watch local news.

15 MR. FLETCHER: What you heard in the news
16 back then, was it basically what we put in the
17 questionnaire?

18 PROSPECTIVE JUROR: Pretty much. The -- the
19 situation that happened.

20 MR. FLETCHER: Okay. And do you know
21 anything more than what was in there?

22 PROSPECTIVE JUROR: No, sir.

23 MR. FLETCHER: Okay. Do you know anything
24 about Rayne Perrywinkle, for instance?

25 PROSPECTIVE JUROR: No, sir.

1 MR. FLETCHER: Do you know anything about
2 Donald Smith?

3 PROSPECTIVE JUROR: No, sir.

4 MR. FLETCHER: That's all I have.

5 MR. CALIEL: No questions, Your Honor.

6 THE COURT: All right. Thank you, sir, if
7 you'll just wait in the hall, we're going to let
8 you all know something as quickly as we can, but
9 do not discuss your questions and answers with
10 anyone.

11 PROSPECTIVE JUROR: Yes, ma'am.

12 THE COURT: When juror No. [REDACTED] leaves, juror
13 No. [REDACTED] can come in.

14 (Prospective juror absent.)

15 (Prospective juror present.)

16 BAILIFF: Ma'am, take the second chair in.

17 THE COURT: Thank you, juror No. [REDACTED] We're
18 just trying to do some follow-up questions from
19 your questionnaire and Mr. Caliel is going to ask
20 you.

21 MR. CALIEL: Good evening, ma'am.

22 Ma'am, you indicated in your answer to
23 question 6, which talked about insurmountable
24 hardships, you gave a response detailing the fact
25 that you're a stay-at-home mother and you have

1 three children under the age of 13.

2 PROSPECTIVE JUROR: Four.

3 MR. CALIEL: I apologize. I missed one.

4 Four children under the age of 13 and it was very
5 difficult to be here yesterday. Understanding the
6 schedule that has been outlined, are you able to
7 make arrangements for the care of the children to
8 allow you to be a juror in this particular case?

9 PROSPECTIVE JUROR: I don't think I can. I
10 mean I've been juggling the past couple of days as
11 it is calling in favors and begging people to take
12 the kids to school, to pick them up, get them to
13 their activities and it's been very difficult.

14 MR. CALIEL: In addition to that, the
15 schedule as outlined would be for the remainder of
16 this week, the majority of next and then with the
17 potential of bleeding over into the week of
18 February 20th and that's just something that you
19 could not --

20 PROSPECTIVE JUROR: That's --

21 MR. CALIEL: Perform. Thank you, ma'am. I
22 don't have any further questions.

23 THE COURT: Any questions?

24 MS. SCHLAX: No questions, Your Honor.

25 THE COURT: All right. Thank you, juror No.

1 [REDACTED] If you'll wait in the hall, we're going to
2 try to let you all know something in just a few
3 minutes, but do not discuss your questions and
4 answers with anyone.

5 When juror No. [REDACTED] leaves, juror No. [REDACTED] can
6 come in.

7 (Prospective juror absent.)

8 (Prospective juror present.)

9 BAILIFF: Sir, take the second chair in.

10 PROSPECTIVE JUROR: All right.

11 THE COURT: Thank you juror No. [REDACTED] We've
12 just got a few follow-up questions from the
13 questionnaire. Ms. Schlax is going to do that.

14 MS. SCHLAX: Thank you.

15 And good evening, sir.

16 Sir, you indicated on your questionnaire that
17 prior to coming to court yesterday you had
18 absolutely no knowledge of this case whatsoever.

19 PROSPECTIVE JUROR: Correct.

20 MS. SCHLAX: And just having been part of
21 this process now, you've obviously been in the
22 courthouse a very long time today as well as
23 yesterday. Anything that you have overheard or
24 been exposed to?

25 PROSPECTIVE JUROR: No.

1 MS. SCHLAX: Okay. You also shared some
2 personal information with us. If we could assure
3 you that we can take an appropriate breaks and
4 that -- that Her Honor is very gracious, that if
5 anyone is uncomfortable, including me, that we can
6 let her know and take an appropriate break, do you
7 think you have any -- any problem sitting as a
8 juror?

9 PROSPECTIVE JUROR: No.

10 MS. SCHLAX: I thank you for your time.

11 THE COURT: Wait.

12 MR. CALIEL: No questions.

13 THE COURT: No questions. Okay. You can go
14 back out in the hall. We're going to try to let
15 you all know something in a few minutes but please
16 do not discuss your questions and answers with
17 anyone and when juror No. 94 leaves, juror No. [REDACTED]
18 can come in.

19 (Prospective juror absent.)

20 (Prospective juror present.)

21 BAILIFF: Ma'am, take the second chair in.

22 PROSPECTIVE JUROR: Second?

23 BAILIFF: Yes, ma'am.

24 THE COURT: Thank you, juror No. [REDACTED] We are
25 just doing a few follow-up questions from the

1 questionnaire. I believe Mr. Caliel is going to
2 start.

3 MR. CALIEL: Good evening, ma'am.

4 PROSPECTIVE JUROR: Hello.

5 MR. CALIEL: Ma'am, in going through and
6 reviewing your questionnaire, going directly to
7 your response that you have strong feeling about
8 the death penalty and you indicated a life for a
9 life.

10 PROSPECTIVE JUROR: Yes.

11 MR. CALIEL: Do you believe that no matter
12 the circumstance that any killing that the death
13 penalty is the only punishment that should be
14 considered?

15 PROSPECTIVE JUROR: I feel strongly. I also
16 feel to the point that if someone was -- depending
17 how they died, the person that did it should
18 probably get the same. If they were able to do
19 that. Eye for an eye kind of thing.

20 MR. CALIEL: Do you believe -- and let's
21 assume for a second that Mr. Smith is found guilty
22 at the initial phase of the trial. Given the
23 circumstances, he's charged with killing an eight
24 year old girl, do you think automatically that you
25 would vote for death in the penalty phase or could

1 you consider and weigh the options and consider a
2 life sentence based upon the law and the
3 circumstances as that penalty phase goes through
4 to completion?

5 PROSPECTIVE JUROR: Like I said, I know I put
6 that on the questionnaire, I'm a mother, I know if
7 it was me I'd feel like if I didn't have my child
8 in my life I don't think that person should.

9 MR. CALIEL: So you would automatically vote
10 for death?

11 PROSPECTIVE JUROR: Um-hum.

12 MR. CALIEL: Thank you, ma'am. I don't have
13 any further questions.

14 THE COURT: Any questions?

15 MS. SCHLAX: No, Your Honor.

16 THE COURT: All right. Juror No. [REDACTED] if
17 you'll wait in the hall, we're going to have an
18 answer for all of you very shortly. Please do not
19 discuss your questions and answers with anyone.

20 And when juror No. [REDACTED] leaves, juror No. [REDACTED] may
21 come in.

22 (Prospective juror absent.)

23 (Prospective juror present.)

24 BAILIFF: Sir, take the second seat in.

25 THE COURT: Thank you, juror No. [REDACTED] We're

1 just asking a few follow-up questions from the
2 questionnaire and Mr. Caliel will do that.

3 MR. CALIEL: Good evening, sir. You
4 indicated in the section on the questionnaire that
5 you had a hardship because of your work situation
6 and you get paid by commission. Could you explain
7 that to us, please?

8 PROSPECTIVE JUROR: Well, I'm a retail sales
9 consultant [REDACTED] and we get paid by the hour,
10 but our biggest pay comes from the commission.

11 MR. CALIEL: Okay.

12 PROSPECTIVE JUROR: It's like this is like --
13 this is considered a short month which starts on
14 Friday so it goes faster and we actually have a
15 pretty -- pretty steady, hard quota we have to
16 meet.

17 MR. CALIEL: Now, that being said, obviously
18 you've seen all the other jurors who have been
19 here today and everybody has their employments and
20 their outside jobs, other than serving as a juror.
21 Do you think that if you are asked to be called
22 upon to serve as a juror you can make a sacrifice
23 and serve as a juror during the time frame in
24 which the Judge has outlined? I guess our
25 question is would it pose such a hardship that it

1 would be affect your ability to concentrate and to
2 sit and listen to the evidence?

3 PROSPECTIVE JUROR: Yes, it would because as
4 I've been here like the last two days, all I'm
5 thinking about is that quota.

6 MR. CALIEL: And just to follow-up real
7 quick, you also indicated when you said you had
8 strong feelings about the death penalty that if
9 you take a life then yours should be handed over.
10 Do you believe that in every murder case the death
11 penalty is appropriate?

12 PROSPECTIVE JUROR: No, sir, no, sir. When
13 you present the evidence, you know, to that only
14 stands for me if the evidence is right. Like for,
15 you know, say like vehicular homicide, like an
16 accident or something like that, you know, I don't
17 think it should be put in place.

18 MR. CALIEL: Okay. Thank you.

19 PROSPECTIVE JUROR: All right.

20 MS. SCHLAX: No questions, Your Honor.

21 THE COURT: Thank you, juror No. [REDACTED] And
22 we'll try to let you know something in just a
23 minute. Please do not discuss your questions and
24 answers with anybody in the hall.

25 PROSPECTIVE JUROR: Okay.

1 THE COURT: When juror No. [REDACTED] leaves, juror
2 [REDACTED] can come in. And juror No. [REDACTED] left.

3 (Prospective juror absent.)

4 (Prospective juror present.)

5 BAILIFF: Take the a second chair.

6 PROSPECTIVE JUROR: Second chair?

7 BAILIFF: Yes, sir.

8 THE COURT: Thank you, juror [REDACTED] We're just
9 asking a few follow-up questions from the
10 questionnaire.

11 MS. SCHLAX: Thank you.

12 Good evening.

13 PROSPECTIVE JUROR: Good evening.

14 MS. SCHLAX: We had a chance to look at your
15 questionnaire, sir, and we appreciate --

16 PROSPECTIVE JUROR: Pardon me. I didn't --

17 MS. SCHLAX: We had a chance to look at your
18 questionnaire and we appreciate you filling that
19 out for us. I guess the first thing that concerns
20 me, who texted you that -- that if you were put on
21 this case as a juror you should, in their words,
22 put the bastard to death.

23 PROSPECTIVE JUROR: It was a client from
24 Macclenny.

25 MS. SCHLAX: Okay.

1 PROSPECTIVE JUROR: I also got a text from
2 the doctor Sunday that talked about this case.
3 This was Sunday.

4 MS. SCHLAX: Okay.

5 PROSPECTIVE JUROR: And then the text on
6 Monday came as I was preparing at home to come
7 down here. And, you know, just...

8 MS. SCHLAX: Okay. So is it fair to say,
9 sir, that you've actually got some pressure on you
10 that if you were selected for a jury, before
11 hearing any evidence in this case, you have
12 people, people that you respect, pressuring you to
13 impose the death penalty?

14 PROSPECTIVE JUROR: No, I don't feel any
15 pressure from those guys.

16 MS. SCHLAX: Okay.

17 PROSPECTIVE JUROR: It's just their opinions
18 and whatever.

19 MS. SCHLAX: Okay. Let's talk for a second.
20 You did describe that some hardship that --

21 PROSPECTIVE JUROR: Yes.

22 MS. SCHLAX: Okay. Can you tell me a little
23 bit -- a little bit more about that?

24 PROSPECTIVE JUROR: Well, my mother, she'll
25 be 85 this year, she has a -- an array of health

1 issues. You know, it's like I'm married, but my
2 wife lives in Tennessee and I told my wife I
3 couldn't leave my mom, you know, so -- because my
4 mother is the most important woman in my life.
5 And, you know, I know my wife will tell me about
6 the Bible says differently. People use the Bible
7 and those sayings when it's convenient for them, I
8 think. But personally, you know, my mom comes
9 first. So, you know, it's -- it's just like right
10 now, she's probably -- I had to call her because I
11 knew she's in a panic because I'm not there.
12 Especially when it gets dark. And because she
13 won't take a bath before I -- if I'm not there.
14 Certain things she won't do because of her
15 equilibrium and she had a knee replacement and
16 she's the only person that I know that had a knee
17 replacement where when she walks her knee buckles
18 back and it's been eight years now and I don't
19 know where the surgeon is, but, you know, it's
20 something that I want to address because it makes
21 her feel ashamed to go out, do things because she
22 -- I guess she kind of feels like she's a cripple
23 or -- but actually she's not.

24 MS. SCHLAX: Sure.

25 PROSPECTIVE JUROR: You know, she's kind of

1 -- she's a smoker and, you know, I try to get her
2 to stop, but then, you know, I realize, you know,
3 mom's almost 85 years old. She's lived long
4 enough to do what the heck she wants.

5 MS. SCHLAX: Okay.

6 PROSPECTIVE JUROR: And the thing about it
7 is, you know, I don't buy her any cigarettes now
8 because she have to get them herself, but, you
9 know, I just left it at that because she knows the
10 dangers, she's aware of what smoking causes and,
11 like I said, you know, these are her golden years,
12 if that's what she enjoys, and I'm going to let
13 her do it. You know, I'm not going to be trying
14 to chastise her.

15 MS. SCHLAX: Sure. Sure. Well, let me ask
16 you about you also raised a concern that you can't
17 really afford financially to miss opportunities at
18 work. Are you commission based?

19 PROSPECTIVE JUROR: Well, I'm just
20 self-employed.

21 MS. SCHLAX: Oh, okay.

22 PROSPECTIVE JUROR: And I just work for
23 myself. And it's slack. The last two days has
24 really cost me. But I know that I have a civic
25 duty to do so, you know, I got to get it done.

1 But, you know, as far as -- you know, my mother --
2 well, anyway, there's not a whole lot of money
3 coming into the household because I am
4 self-employed and have been for -- since 1996, you
5 know, I'm a licensed massage therapist, I do
6 personal training and I do an array of things to
7 help people function better. You know, that is my
8 thing.

9 MS. SCHLAX: Let me ask it this way. The
10 current schedule would be if you move on from this
11 stage of jury selection, you would probably be
12 here at the courthouse on Thursday and Friday of
13 this week, you would be here at the courthouse all
14 of the next week, Monday, Tuesday, Wednesday,
15 Thursday, Friday, probably from about 9:00 a.m.
16 till about 5:00 or 6:00 p.m. and then, if
17 necessary, the following week you would be here
18 probably three days out of that week.

19 And so here's my question. And we do take
20 this into consideration. Because you work for
21 yourself, is it going to become such an
22 inconvenience and sacrifice that you start -- you
23 start focussing on your own wellbeing in terms of
24 financial issues and your mom's wellbeing in terms
25 of her, you know, health issues that you stop --

1 THE COURT: All right. Thank you, sir. If
2 you'll step out in the hallway, we're going to try
3 to have an answer for all the rest of you as
4 quickly as possible. Please don't discuss your
5 questions and answers with the other jurors.

6 I'll give you a minute to talk to your client.

7 Judge Healey called me. I'm just going to call
8 him in case it has to do with the jury/witness area.
9 I just want to make sure that it's not that.

10 (Defense counsel conferring with defendant.)

11 THE COURT: Okay. That was about one of the
12 other trials really needs to use 407 to finish
13 their jury selection. Judge Norton had a large
14 number of jurors. And we don't need it anymore,
15 but they needed to know we didn't need it anymore.
16 So that's all that was.

17 MR. CALIEL: Your Honor, I think we have the
18 -- we've all agreed on the cause challenges on the
19 last panel.

20 THE COURT: Okay.

21 MR. CALIEL: The first juror would be juror
22 No. [REDACTED]

23 THE COURT: I'm sorry. That door made a
24 noise right when you said it.

25 MR. CALIEL: [REDACTED]

1 THE COURT: [REDACTED] for cause.

2 MR. FLETCHER: We agree, Judge.

3 THE COURT: What?

4 MR. FLETCHER: We agree.

5 MR. CALIEL: Juror No. [REDACTED]

6 MR. FLETCHER: We agree, Your Honor.

7 THE COURT: Okay.

8 MR. CALIEL: Juror No. [REDACTED]

9 MR. FLETCHER: We agree, Your Honor.

10 THE COURT: All right.

11 MR. CALIEL: Juror No. [REDACTED]

12 MR. FLETCHER: We agree, Your Honor.

13 MR. CALIEL: And juror No. [REDACTED]

14 MR. FLETCHER: We agree. Ms. Schlax said

15 agreed No. [REDACTED].

16 MR. CALIEL: I'm sorry. We agree No. [REDACTED]

17 MR. FLETCHER: I agree.

18 THE COURT: So we've got juror No. [REDACTED]

19 [REDACTED] and [REDACTED] Is that right?

20 MR. CALIEL: Yes, and also, of course, [REDACTED] who

21 didn't show up.

22 THE COURT: Well, yeah, [REDACTED] didn't show up.

23 Okay. I've got [REDACTED] -- I'm sorry. Let me

24 start at the beginning. [REDACTED] and

25 [REDACTED] to bring in, is that right?

1 MR. FLETCHER: Yes, Your Honor.

2 MR. CALIEL: That's sounds correct, Your
3 Honor.

4 THE COURT: Do you all have those numbers?

5 BAILIFF: Yes, Your Honor.

6 THE COURT: Okay. Bring them in, please.

7 I'm going to call your numbers out loud. I
8 need you to raise your hand when I say your number
9 so the record will reflect you're back in the
10 courtroom.

11 Juror No. [REDACTED], and [REDACTED]

12 (Prospective jurors indicating.)

13 THE COURT: Did I miss anybody?

14 (No response from prospective jurors.)

15 THE COURT: Okay. The six of you are
16 actually going to be excused. You have completed
17 your jury service. When you leave they will take
18 your hanging tag and your button and you can go
19 about your life as an ordinary citizen again. We
20 are very grateful for your time and patience. We
21 know it's not easy, but we really appreciate it
22 and could not operate our system without you. So
23 thank you and you're free to go.

24 (Prospective jurors excused.)

25 THE COURT: Okay. The rest of them can come

1 in.

2 (Prospective jurors present.)

3 THE COURT: Okay. Thank you, ladies and
4 gentlemen. I'm going to call out your number and
5 ask you to raise your hand just so the record can
6 reflect that you are back in the courtroom.

7 Juror No. [REDACTED], juror No. [REDACTED], juror No. [REDACTED]
8 [REDACTED] and [REDACTED].

9 (Prospective jurors indicating.)

10 THE COURT: Did I miss anybody?

11 (No response from prospective jurors.)

12 THE COURT: Okay. We have finished going
13 over this phase of the jury selection process and
14 those of you who are in here with me now will need
15 to report back on Thursday morning at 9:30 to the
16 jury assembly area.

17 We hope to get started by 10:00 o'clock in
18 our regular jury selection. We hope to have a
19 full panel for jury selection at that time. You
20 do not need to come back tomorrow, but you do need
21 to be here Thursday at 9:30 in the jury assembly
22 area and we thank you. We know this is not an
23 easy process. But we thank you for your time and
24 attention and your willingness to serve and go on
25 home now and we'll see you Thursday morning.

1 Thank you.

2 MR. CALIEL: Your Honor, just the cautionary
3 instruction as well.

4 THE COURT: Oh, and don't forget you're still
5 under your jury oath. Please do not get any
6 information from anywhere or anyone about this
7 case and don't look up information about this case
8 while you're still in the process of the jury
9 selection. Thank you.

10 (Prospective jurors absent.)

11 THE COURT: Okay. One thing before we
12 recess. Mike Smith from our IT department did
13 provide me with a -- I don't know what this is
14 called, a DVD or whatever it's called, of jury
15 qualification. Remember you all had wondered
16 because of it being set. I've got this. Do you
17 all want it as a court exhibit or do you want to
18 review it first?

19 MS. SCHLAX: I would like it as a court
20 exhibit, Your Honor.

21 MR. CALIEL: We would agree.

22 THE COURT: This will be Court Exhibit 3. Is
23 that right, Madam Clerk?

24 THE CLERK: Yes, ma'am.

25 THE COURT: Okay. Anything else we need to

1 do before we recess?

2 MR. CALIEL: Your Honor, our count is that we
3 are at 67 to advance to Thursday morning. So I
4 think we can inform --

5 THE COURT: That's very good.

6 MR. CALIEL: I think we can inform the clerk
7 that we will not need, nor do we need to review
8 the last 100 jurors. I'm fairly confident --

9 THE COURT: I'll get in touch with them.

10 They're not still here, are they, Leslie?

11 THE CLERK: I don't know. I would assume
12 not.

13 MS. SCHLAX: I thought we sent them home to
14 return tomorrow.

15 THE COURT: I'm talking about staff to let
16 them know. And Judge Healey had asked me that,
17 too, and I said I don't know yet. I have their
18 phone numbers and can text them and let them know
19 with everyone's permission, including Mr. Smith,
20 that when the 300 show they can just be let go.
21 We've got another hundred --

22 THE DEFENDANT: Oh, yeah, we've got plenty.

23 THE COURT: We've got plenty and you agree
24 with everything we did with everybody today?

25 THE DEFENDANT: Yes, ma'am.

1 THE COURT: Had time to talk to everybody on
2 your team about that?

3 THE DEFENDANT: Yes, ma'am.

4 THE COURT: Okay. Okay. I'll let 'em know.

5 MS. SCHLAX: The only other thing I was going
6 to suggest, Your Honor, is that just the further
7 questioning and now having a much better idea that
8 it does take a period of time, even if it's very
9 limited questions, that we tell the latter 50, if
10 we tell 150 on to come back at 2:00 o'clock.
11 Allow them to leave the courthouse --

12 THE COURT: We're going to be at 80 way
13 before then.

14 MS. SCHLAX: I think we will as well, but
15 what it will say to them having to sit at this
16 courthouse, having to get the 80.

17 MR. CALIEL: I don't think at the rate we
18 were going, we were dismissing two, maybe three
19 per ten jurors. They'll know in the first hour if
20 they need to go home, unless something unusual
21 happens. I don't think we need to excuse 50
22 people and have them come back because they're
23 going to come back at a later time than we're
24 actually going to need them. I think if they're
25 just waiting downstairs, we need 13 jurors, I

1 think we can get that pretty quick.

2 THE COURT: Let's have them come in. They're
3 going to have a hard enough time getting a
4 hundred. Let's have them do that, the last
5 hundred, not the ones we're dealing with. Let's
6 let the jury/witness people handle that first and
7 get their excuses and all that and then we'll
8 revisit -- we will have started, but we'll revisit
9 where we are and what we need to have these people
10 do.

11 MS. SCHLAX: And the only other I guess
12 concern I'd like to raise to the Court, and it's
13 -- you know, obviously I had lodged an earlier
14 objection. I had supplied a questionnaire that I
15 -- I thought appropriate for this case.
16 Ultimately the Court -- and quid pro quo myself,
17 ultimately arrived at the questionnaire that we
18 used. My concern that I think we may see when we
19 truly begin death qualifying these jurors is that
20 we have a lot more cause challenges than maybe we
21 were anticipating based on the question that we
22 put on the questionnaire. And I've discussed this
23 informally with Mr. Caliel. We just, except with
24 rare exception, we did not get a lot of responses
25 in regards to the death penalty. I think it might

1 be prudent, even after we get the 80, to keep at
2 least perhaps 20 extra and maybe not even have
3 them as part of the large panel, but it may be
4 prudent. We've spent a lot of time getting to
5 this part.

6 THE COURT: If we have 20 extra we put them
7 in here. The idea of going through it twice,
8 which you have to do if you go to a separate
9 group, I would rather just have them in here.
10 I'll let you all discuss it. We won't decide
11 tonight, but if it's decided we need a hundred,
12 I'd rather have them all at once because it's just
13 too -- I mean we'd spend -- it took us a day with
14 80, it would take us at least well into the
15 afternoon with 20. Not because there's so many --
16 so fewer because you have to ask every single
17 thing again and other things come up.

18 MR. CALIEL: Half of the panel will be struck
19 for cause, Judge, for that to be an issue. And I
20 just don't foresee that being an issue. There are
21 36 -- there are ten strikes for each side, 16
22 jurors, which mean we have 44 cause challenges out
23 of 80 jurors. I can't imagine 44 people causing
24 themselves after we've already extensively gone
25 through a lot of those issues with the jury when

1 it comes to publicity and things of that nature.

2 THE COURT: Go over those numbers again.

3 MR. CALIEL: Each side gets ten strikes. We
4 have 16 jurors we've agreed, four alternates.

5 THE COURT: Those are the --

6 MR. CALIEL: Those are the 36.

7 THE COURT: Right.

8 MR. CALIEL: So that would be 44 cause
9 challenges out of the 80 before we would need to
10 get to 81, 82, 83, and I just cannot envision 44
11 cause challenges after already individually
12 questioning these jurors.

13 THE COURT: Well, 44 cause and 36 peremptory,
14 is that right?

15 MR. CALIEL: 44 cause and 20 peremptory and
16 then the 16 on the panel.

17 THE COURT: Okay. I got it. I got it. All
18 right. We'll talk about it in the morning.

19 MS. SCHLAX: Yes, Your Honor.

20 THE COURT: I mean so far we have not needed
21 anywhere near what we thought we were going to
22 need.

23 MS. SCHLAX: Agreed.

24 THE COURT: It's not 500, we're nowhere near
25 that, 300, we're probably not going to need that.

1 So I think we think of it that way, I agree
2 there's no questioning, but that questioning is
3 done in every death penalty case.

4 MS. SCHLAX: True.

5 THE COURT: And typically -- and we've
6 already excused some of those that would normally
7 get excused during that process. So I'm fairly
8 comfortable. Let's think about it overnight and
9 talk about it in the morning.

10 MS. SCHLAX: Yes, Your Honor.

11 (Evening recess.)

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IN THE CIRCUIT COURT OF THE
FOURTH JUDICIAL CIRCUIT, IN
AND FOR DUVAL COUNTY, FLORIDA.

Case No: 2013-CF-5781-AXXX-MA

Division CR-D

STATE OF FLORIDA

-vs-

DONALD JAMES SMITH,

Defendant,

JURY SELECTION PROCEEDINGS taken before the
Honorable Mallory D. Cooper, Judge of the Circuit Court,
on February 7, 2018, and as reported by Faye M. Gay,
Certified Realtime Reporter, Registered Merit Reporter,
and Certified Legal Video Specialist.

OFFICIAL REPORTERS, INC.
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4 Appearing on behalf of the State of Florida.

5

6 MARK CALIEL and VANESSA WHEELER-SANCHEZ, Esquires,
7 Assistant State Attorneys,
8 Appearing on behalf of the State of Florida.

9

10 JULIE SCHLAX and CHARLES FLETCHER, Esquires,
11 Appearing on behalf of the Defendant.

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1 (Defendant present.)

2 MS. SCHLAX: Good morning, Your Honor.

3 THE COURT: Good morning.

4 MS. SCHLAX: Julie Schlax and Charles
5 Fletcher appearing on behalf of Mr. Donald Smith.
6 If we could start this morning. And I've shown
7 these to the State. These are the newspaper
8 articles that appeared this weekend. We wanted to
9 supplement the record in regard to the motion for
10 change of venue.

11 THE COURT: Okay. I believe the State had
12 agreed and the Court had granted that motion to
13 supplement record.

14 MR. CALIEL: That's correct, Your Honor. We
15 have no objection to having those exhibits for
16 that purpose.

17 THE COURT: Okay. Are the jurors outside or
18 are they downstairs?

19 BAILIFF: Downstairs, ma'am.

20 THE COURT: They're downstairs?

21 BAILIFF: Yes. That's across the hall, these
22 jurors here.

23 THE COURT: Somebody told me they were going
24 to bring them all up and I think they're more
25 comfortable downstairs.

1 BAILIFF: They're still down there, Judge.

2 THE COURT: Okay. So I think we just need to
3 continue, starting with juror [REDACTED] I have
4 questions.

5 MR. CALIEL: Your Honor, the same procedure,
6 ten at a time coming up. No, those are -- yeah,
7 ten at a time and then we'll make the challenges
8 after every ten. My count shows, and we can
9 address this once we begin. I know the defense
10 had suggested yesterday we need to get to a
11 hundred. We can cross that bridge when we get the
12 80. We need 13 additional jurors at this point in
13 time, we've already passed 67 to the next phase
14 so...

15 THE COURT: Okay. By my records we would
16 need juror No. [REDACTED]
17 [REDACTED] is that correct?

18 MR. CALIEL: Yes, Your Honor.

19 MS. SCHLAX: Yes, Your Honor.

20 THE COURT: The others have been excused for
21 various reasons or told to come back tomorrow.

22 Did you get the numbers okay?

23 BAILIFF: Would you repeat for me?

24 THE COURT: Sure. [REDACTED]

25 [REDACTED] and [REDACTED]

1 BAILIFF: You want those up, right?

2 THE COURT: Yes. And I'll go ahead and make
3 the list for Officer Farah for the next group.

4 BAILIFF: Yes, ma'am.

5 BAILIFF: The jurors for across the hall are
6 still out here. They haven't taken them in yet.

7 THE COURT: They're still out there?

8 BAILIFF: Yes, ma'am.

9 BAILIFF: They're lining them up now to take
10 them in.

11 BAILIFF: I'll move 'em.

12 BAILIFF: Do you want to wait until they go
13 into their courtroom until I bring in ours?

14 THE COURT: I think we have to because if we
15 put them right around the corner it will take too
16 long to bring them back.

17 BAILIFF: Correct. They are lining them up
18 now to take them in.

19 BAILIFF: I'll slide them to their courtroom
20 to make them closer to their courtroom.

21 THE COURT: I think by the time you go down
22 and get them and come back they'll be fine.

23 MR. CALIEL: Your Honor, while we're waiting
24 on the jurors, may counsel and I approach briefly
25 on a procedural matter for tomorrow?

1 THE COURT: Sure.

2 (Counsel for the State and defense approached
3 the bench for a side-bar conference out of the
4 hearing of the court reporter.)

5 MS. SCHLAX: Your Honor, Mr. Smith has
6 indicated that he needs to have a private
7 conversation with us.

8 THE COURT: Okay.

9 MS. SCHLAX: Could we, I guess, go into
10 either of the conference rooms and take care of
11 that?

12 THE COURT: Back here?

13 MS. SCHLAX: Yes.

14 THE DEFENDANT: Well, I need to speak to all
15 of my defense team at one time. I can only talk
16 to one person at a time on the phone and I need to
17 have an interactive conversation with my defense
18 team.

19 THE COURT: I'm not sure what we can do about
20 that.

21 THE DEFENDANT: I mean I don't mind, you
22 know, if a bailiff is with us or whatever. I need
23 to -- just need to be a group conversation so
24 input can be put in and...

25 THE COURT: Okay. Well, first of all, I've

1 been notified that it's going to be a few minutes
2 before they bring the jury up, because Judge
3 Healey kindly agreed to go down and excuse the
4 group from 201 to 300 with our thanks, saying they
5 can go. So they can't get our ten out until
6 they're through with that and so we've got a few
7 minutes and the only way I know to do that is for
8 the rest of us to leave. But I don't know that we
9 can do that.

10 THE DEFENDANT: I don't know either. I'm
11 just telling you what need that I have.

12 THE COURT: Yeah, I understand your need. I
13 just am not sure how to accomplish it.

14 MR. CALIEL: We're willing to step out, Your
15 Honor.

16 THE COURT: I'm willing to leave. I'm not
17 worried about you all and me. I know you'd be
18 willing to do it, but there's a lot of other
19 people in here.

20 (Court conferring with bailiff and clerk.)

21 THE COURT: You don't have to leave. We're
22 going to try to secure this room.

23 MR. CALIEL: Yes, Your Honor.

24 MEDIA PERSON: Judge, may I ask a question?

25 THE COURT: Pardon?

1 MEDIA PERSON: May I ask a question?

2 THE COURT: Yes.

3 MEDIA PERSON: (Inaudible name) First Coast
4 News. I just wanted to make sure during your
5 side-bars if there's conversation that could be
6 happening in open court. I just wanted to express
7 that concern that we're not discussing logistics
8 and things that we could be talking about or
9 things that are of interest to the public. Again,
10 I just wanted to make that request.

11 THE COURT: Typically our side-bars are just
12 trying to figure out how to move the jurors
13 around, how we're going to let people know that
14 we've selected the number we need for tomorrow
15 because they're going to help us with the chart
16 for the jurors' numbers. Things like that. Is
17 that what you're asking me to do on the record?

18 MEDIA PERSON: I would ask that anything that
19 doesn't need to be discussed in a side-bar setting
20 be discussed in open court, if possible. Yes, if
21 that's possible.

22 THE COURT: Well, we'll do the best we can.
23 Once the jurors are in here or the prospective
24 jurors are in here today, and as well as tomorrow
25 when we have the panel in here, then there will be

1 things we'll have to do at side-bar, that they
2 cannot be aware of. But we'll do our best that if
3 it's something like whether or not we can have
4 coffee this afternoon, we talked about that. If
5 you prefer that on the record we'll do it on the
6 record.

7 MEDIA PERSON: Thank you, Judge.

8 THE COURT: And this thing that they're
9 requesting now, normally it would be out of all of
10 our presence. None of us are back there for that.

11 MEDIA PERSON: Right.

12 THE COURT: And we're making arrangements,
13 since it's more than one person, for them to do
14 that in there. But that's not something any of us
15 can have access to. It's a private conversation
16 between the defendant and his attorneys. So I
17 don't anticipate there'll be much of that. But
18 this is the first time I've been asked to do it
19 and he's entitled to it so we'll figure that out.
20 But none of us will be going in there. A bailiff
21 will be going in there, but no one else.

22 MEDIA PERSON: Thank you, Judge.

23 MEDIA PERSON: Judge Cooper, can I be on the
24 record as well as to what she's saying? (Inaudible
25 name) here from Channel 4.

1 THE COURT: Regarding side-bars?

2 MEDIA PERSON: Yes, ma'am.

3 THE COURT: As long as you understand there's
4 certain things that have to be done at side-bar
5 because they cannot be done in front of whoever,
6 whether it's in front of a juror or in front of a
7 witness or in front of whomever, they have to be
8 done at side-bar. But anything that we can do on
9 the record, I'll ask the attorneys rather than
10 asking to approach side-bar, if they can have a
11 moment on the record to address whatever issue it
12 is that they need to address.

13 MEDIA PERSON: Thank you, Your Honor.

14 BAILIFF: I have the okay to put them in
15 there.

16 THE COURT: Okay.

17 (Defendant and defense attorneys and Ms.
18 Butler leaving courtroom and going into conference
19 room at 9:50 a.m.)

20 (Defendant and defense attorneys and
21 Ms. Butler returning to courtroom at 10:05 a.m.)

22 THE COURT: Okay. For the record, Mr. Smith
23 and his attorneys and Ms. Butler are back in the
24 courtroom after the requested private conference.

25 And our ten jurors, prospective jurors, are up

1 here. I think that you were with Mr. Smith when the
2 news asked if we could handle side-bar matters on
3 the open record if they're not things that have to
4 be handled at side-bar. And, of course, what we
5 were talking about earlier, most of could have been
6 handled on the record. It wasn't anything that
7 needed to be necessarily off the record. It's just
8 a comfort thing to have everybody together to talk.
9 So I told them, I think the State understood, if
10 it's something that we can handle in open court we
11 will, but there will be a lot of things that have to
12 be handled at side-bar. They understand that. And
13 that -- that depends to a great deal who is in the
14 courtroom, if we have jurors in the courtroom, we
15 have to do things at side-bar more often. I told
16 them we'd try to do it. It's just a procedural
17 thing, are we ready to call the next ten, take a
18 break, things like that. We can do that on the
19 record.

20 MS. SCHLAX: Yes, Your Honor.

21 THE COURT: Okay. I think I stated that
22 correctly.

23 So are you all ready for the first juror? It's
24 juror [REDACTED].

25 MR. CALIEL: The State is ready to proceed,

1 Your Honor.

2 MS. SCHLAX: As is the defense.

3 (Prospective juror present.)

4 BAILLIFF: Ma'am, if you'll take the second
5 chair in.

6 THE COURT: Good morning, juror [REDACTED] We're
7 in the process -- or the stage of the process now
8 where we're going to bring people in individually
9 to go over some further questions from their
10 questionnaire and Ms. Schlax is going to question
11 you. She's right in front of you.

12 MS. SCHLAX: Good morning.

13 PROSPECTIVE JUROR: Good morning.

14 MS. SCHLAX: It's very awkward to call you
15 juror [REDACTED] but that's what we do. I'm going to
16 remind you, ma'am, that everything you tell us is
17 completely confidential. I know it can sometimes
18 be intimidating to have cameras but they cannot
19 record your voice or you in any way, shape or
20 form.

21 PROSPECTIVE JUROR: Okay.

22 MS. SCHLAX: We had an opportunity to look
23 over your questionnaire and appreciate the time
24 you took in filling it out. I just want to get
25 into a little bit more detail in terms of you

1 indicated that you were familiar before you walked
2 in the door on Monday, not only about the case,
3 but specifically Donald Smith, Cherish Perrywinkle
4 and Rayne Perrywinkle. All three of those names
5 were familiar to you?

6 PROSPECTIVE JUROR: Yes.

7 MR. CALIEL: And you told us in a summary
8 fashion that you basically had heard about the
9 crime and what resulted, how and where.

10 PROSPECTIVE JUROR: Um-hum.

11 MS. SCHLAX: Can you give me an idea of is
12 this a story you kind of followed?

13 PROSPECTIVE JUROR: No, but it was all over
14 the media so it was hard not to.

15 MS. SCHLAX: Sure. Do you remember, it's
16 alleged that this happened in 2014.

17 PROSPECTIVE JUROR: Um-hum.

18 MS. SCHLAX: Do you remember the initial news
19 report?

20 PROSPECTIVE JUROR: I do.

21 MS. SCHLAX: Okay. And so was it something
22 that periodically through the years you would hear
23 snippets about, I guess, the process and refer in
24 your own mind back to those original news stories?

25 PROSPECTIVE JUROR: I don't know if I'd say

1 periodically. Whenever I was watching the news if
2 it came up, then I would hear about it.

3 MS. SCHLAX: And how often do you watch the
4 news?

5 PROSPECTIVE JUROR: Nightly usually, but not
6 always.

7 MS. SCHLAX: Okay. This past week, leading
8 up to Monday, there have been quite a number of
9 news stories as well as the nightly news. Did you
10 watch those?

11 PROSPECTIVE JUROR: I did see them.

12 MS. SCHLAX: And is there anything about
13 Rayne Perrywinkle's past or Mr. Smith's past that
14 you remember hearing about in the news?

15 PROSPECTIVE JUROR: Just what was reported.
16 More or less that last weekend's newspaper had
17 some articles that I did see more in detail.

18 MS. SCHLAX: Okay. And do you remember some
19 of those details?

20 PROSPECTIVE JUROR: I do. Talked about his
21 priors and then her situation with losing her
22 other children after the incident happened.

23 MS. SCHLAX: Okay. And ultimately here's our
24 question to you. It sounds like you have received
25 a lot of information in this case because of the

1 news media.

2 PROSPECTIVE JUROR: Yes.

3 MS. SCHLAX: Ultimately the people who are
4 chosen for this jury, it's a constitutional right
5 to be presumed innocent, you know, someone must be
6 proven guilty beyond and to the exclusion of a
7 reasonable doubt in a courtroom by the evidence
8 presented solely in the courtroom. Knowing
9 yourself, ma'am, and knowing what you have viewed,
10 can you give that presumption to my client as we
11 sit here today?

12 PROSPECTIVE JUROR: I can based on the
13 evidence, although my personal feelings as a
14 mother, I would probably be a little biassed.

15 MS. SCHLAX: Okay. And I'll talk about that
16 for a second and I appreciate you just being
17 candid. That's why we're going through such an
18 extensive process. How many kids do you have?

19 PROSPECTIVE JUROR: I have one.

20 MS. SCHLAX: How old is your child?

21 PROSPECTIVE JUROR: 24.

22 MS. SCHLAX: And obviously you've raised this
23 child all the way up.

24 PROSPECTIVE JUROR: Um-hum.

25 MS. SCHLAX: Is it a female child?

1 PROSPECTIVE JUROR: Yes.

2 MS. SCHLAX: Okay. Do the mere allegations
3 in this case bring up strong emotion in you?

4 PROSPECTIVE JUROR: Sure. It's your worst
5 nightmare.

6 MS. SCHLAX: Okay. And obviously you relate
7 to it on a deeply personal level.

8 PROSPECTIVE JUROR: Um-hum.

9 MS. SCHLAX: Okay. Knowing that, can you
10 affirm that you can give Mr. Smith a fair trial?

11 PROSPECTIVE JUROR: I'm not sure. I know
12 it's a yes or no, but it's hard to say.

13 MS. SCHLAX: Okay.

14 PROSPECTIVE JUROR: Because I do have strong
15 feelings.

16 MS. SCHLAX: Okay. Let me -- let me take it
17 a step further and let's see where we go. You've
18 seen the photograph of Cherish Perrywinkle.

19 PROSPECTIVE JUROR: Yes, I have.

20 MS. SCHLAX: Okay. Repeatedly, I'm sure.

21 PROSPECTIVE JUROR: Um-hum.

22 MS. SCHLAX: And you almost appear to me, and
23 it's just something that we have to establish for
24 the record, like it's emotional even just talking
25 about it.

1 PROSPECTIVE JUROR: Sure. Anxiety gets the
2 best of you thinking about the circumstances.

3 MS. SCHLAX: Sure. And in the course of this
4 trial there's going to be some very graphic
5 photos --

6 PROSPECTIVE JUROR: Exactly.

7 MS. SCHLAX: -- that are presented as part of
8 the evidence. I want you to assume for a moment
9 that you're chosen for this jury, that you have
10 listened to all the evidence presented to you in
11 court and that you find beyond and to the
12 exclusion of a reasonable doubt that, in fact, my
13 client did sexually batter and kill this young
14 child, knowing your thoughts about the death
15 penalty, could you ever consider life imprisonment
16 after that?

17 PROSPECTIVE JUROR: No.

18 MS. SCHLAX: Okay. I really appreciate you
19 being candid with us. I don't have any further
20 questions.

21 PROSPECTIVE JUROR: Okay.

22 MR. CALIEL: Just some follow-up, Your Honor.
23 Good morning, ma'am

24 PROSPECTIVE JUROR: Good morning.

25 MR. CALIEL: Let me talk a little bit to you

1 about the fact that you're a mother and how
2 personal this can be for any parent and I think
3 you said and probably true for any parent, this
4 would be a parent's worst nightmare, right?

5 PROSPECTIVE JUROR: Um-hum.

6 MR. CALIEL: A child taken, kidnapped, raped,
7 murdered, that being said, would you find
8 Mr. Smith guilty if the State had evidence to
9 establish his guilt beyond a reasonable doubt
10 solely because of the allegations in the case?

11 PROSPECTIVE JUROR: No.

12 MR. CALIEL: Obviously you would sit down and
13 you would weigh the evidence, you would determine,
14 because if Mr. Smith was innocent you wouldn't
15 convict him simply because the allegations are he
16 killed a child.

17 PROSPECTIVE JUROR: Correct.

18 MR. CALIEL: You would evaluate the evidence
19 and if we didn't do our job, we didn't prove our
20 case, you wouldn't find him guilty just for sake
21 of what he's charged with.

22 PROSPECTIVE JUROR: Right.

23 MR. CALIEL: The other issue when it comes to
24 the death penalty, and I know, and there's going
25 to be some much more instruction about this later

1 on, but there are factors that are in the law that
2 make the death penalty possible under the law.
3 Before the State can even seek the death penalty,
4 we have to establish and be able to prove beyond a
5 reasonable doubt that an aggravating factor
6 exists. We call them aggravating factors. Those
7 are reasons why the crime is deserving of the
8 death penalty. Two of those factors Ms. Schlax
9 talked to you about. The fact that it's a child
10 victim, that's an aggravating factor, the fact
11 that it occurred during the course of a sexual
12 battery, you'll learn later on, if you're chosen
13 as a juror, that's another aggravating factor.

14 Obviously those can be considered by each and
15 every juror individually and that can be very
16 weighty to you as a mother, the fact that he's
17 killed a child can be a very serious aggravating
18 factor. That being said, would you ignore any
19 evidence about the defendant's background, his
20 history, anything that may in his life experience
21 be a reason why maybe the death penalty wouldn't
22 be appropriate, or could you listen to that
23 evidence and weigh it?

24 Now, what weight you give it is up to you as
25 a juror. You know, you could give much more

1 weight to the fact that he killed a child and very
2 little weight to the fact that he had something
3 occur in his history, but could you at least
4 listen to the evidence?

5 PROSPECTIVE JUROR: Yes.

6 MR. CALIEL: Okay. Could you consider the
7 evidence that's presented to you and go through
8 that weighing process of evaluating the
9 aggravating factors and the mitigation that's
10 presented and then it's your job as a juror to see
11 what has weight and what does not have weight?

12 PROSPECTIVE JUROR: Yes.

13 MR. CALIEL: Okay. Do you believe that you
14 could go through that weighing process, as
15 instructed by the Court?

16 PROSPECTIVE JUROR: Yes.

17 MR. CALIEL: Okay. So to say automatically
18 -- assume for a second in the defense's
19 hypothetical that Mr. Smith is proven beyond a
20 reasonable doubt to have committed this crime, you
21 can follow the law, you won't automatically impose
22 the death penalty simply because he killed a
23 child?

24 PROSPECTIVE JUROR: Right.

25 MR. CALIEL: Okay. You would consider all

1 the mitigation, you would consider all the
2 aggravation and go through that weighing process
3 as the Court instructs you?

4 PROSPECTIVE JUROR: Yes, sir.

5 MR. CALIEL: Thank you, ma'am. I don't have
6 any further questions.

7 THE COURT: Anything further?

8 MS. SCHLAX: No, ma'am, not at this time.

9 THE COURT: Thank you, juror 101. If you'll
10 remain in the hallway outside. Please do not
11 discuss the questions and answers with anyone and
12 we'll let you know something as soon as we can.

13 PROSPECTIVE JUROR: Thank you.

14 THE COURT: Thank you for your time.

15 When juror 101 leaves, juror 103 may come in.

16 (Prospective juror absent.)

17 (Prospective juror present.)

18 BAILIFF: Ma'am, if you'll take the second
19 chair in.

20 THE COURT: Good morning, juror 103. We're
21 just bringing you in individually to ask some
22 follow-up questions from your questionnaire.

23 PROSPECTIVE JUROR: Good morning.

24 THE COURT: Thank you for your time.

25 MR. FLETCHER: Thank you, Judge.

1 Good morning, juror [REDACTED]

2 PROSPECTIVE JUROR: Good morning.

3 MR. FLETCHER: Ma'am, I've read over your
4 questionnaire and you have seen some -- some
5 things about this case in the news.

6 PROSPECTIVE JUROR: Yes.

7 MR. FLETCHER: And did you see it when it
8 first happened or is it just something you saw
9 last week?

10 PROSPECTIVE JUROR: When it first happened.

11 MR. FLETCHER: Is it something you've sort of
12 followed over the years? Been in the news a lot.

13 PROSPECTIVE JUROR: No.

14 MR. FLETCHER: When it first happened you saw
15 it and when is the next time you remember?

16 PROSPECTIVE JUROR: I think it was around the
17 time when it was just in the news when it first
18 occurred.

19 MR. FLETCHER: Okay.

20 PROSPECTIVE JUROR: Not following the case.
21 I can't say specifically, but it was around the
22 time that -- when the news first broke.

23 MR. FLETCHER: Okay. How about over the
24 last, say ten days, because it's been in the news
25 everyday?

1 PROSPECTIVE JUROR: No.

2 MR. FLETCHER: You indicated on the
3 questionnaire that you knew the characters, so to
4 speak. You know who Donald Smith is?

5 PROSPECTIVE JUROR: Just what I saw. I don't
6 know anyone personally, but just what was focussed
7 on the news. That's why I asked certain questions
8 in that regard.

9 MR. FLETCHER: Okay. One of the questions
10 was have you heard or read anything about the
11 victim's mother, Rayne Perrywinkle, and you
12 indicated yes.

13 PROSPECTIVE JUROR: Just on the television
14 news.

15 MR. FLETCHER: Just from that initial story?

16 PROSPECTIVE JUROR: Yes.

17 MR. FLETCHER: How about Mr. Smith just from
18 the initial story?

19 PROSPECTIVE JUROR: Initial story.

20 MR. FLETCHER: And other than what we've put
21 on the questionnaire, a little fact pattern about
22 what's alleged to have happened, do you know
23 anything else about Mr. Smith?

24 PROSPECTIVE JUROR: No.

25 MR. FLETCHER: Nothing about his past or

1 anything?

2 PROSPECTIVE JUROR: No.

3 MR. FLETCHER: Nothing about Rayne
4 Perrywinkle's past?

5 PROSPECTIVE JUROR: No.

6 MR. FLETCHER: That's all I have, thank you.

7 MR. CALIEL: No questions, Your Honor.

8 THE COURT: Thank you, juror [REDACTED] If you'll
9 wait in the hallway we'll try to let you know
10 something as quick as we can.

11 PROSPECTIVE JUROR: Thank you.

12 THE COURT: Please don't discuss these
13 questions and answers with anyone.

14 PROSPECTIVE JUROR: Certainly.

15 THE COURT: Thank you.

16 PROSPECTIVE JUROR: Thank you.

17 THE COURT: When juror [REDACTED] leaves, juror [REDACTED]
18 may come in.

19 (Prospective juror absent.)

20 (Prospective juror present.)

21 BAILIFF: You can take the second seat in.

22 THE COURT: Good morning, juror No. [REDACTED]
23 We're bringing each of you in individually just to
24 ask some follow-up questions from your
25 questionnaire. But I noticed -- are you okay?

1 PROSPECTIVE JUROR: I was in a car accident
2 in December and I have a torn ACL in both knees
3 and I told them that Monday and they said we don't
4 care, basically, and just come in here anyway and
5 miss therapy.

6 THE COURT: Would it be easier for you, I'm
7 just asking would it be easier for you to have a
8 wheelchair just to get around the building?

9 PROSPECTIVE JUROR: I don't mind. It's just
10 they keep moving us from this room, turn around
11 and send us to the next room and send us to the
12 next room. And even out there on the benches they
13 were upset that I was sitting on the wrong bench
14 and wanted me to move to another bench when there
15 was 45 benches that were empty. So I didn't
16 understand.

17 THE COURT: I'm so sorry that it's been
18 inconvenient when you're suffering with an injury,
19 but we try very hard with the number of jurors
20 that we have to make it comfortable, but I see
21 it's not been for you. Are you okay?

22 PROSPECTIVE JUROR: I'm fine. I know the
23 importance of this case so, yes, I'm fine with it.

24 THE COURT: Okay. Mr. Caliel.

25 MR. CALIEL: Thank you.

1 And juror No. [REDACTED] good morning. Obviously we
2 refer to you by your juror number for
3 confidentiality reasons. And that was actually the
4 reason why I was going to inquire today of you,
5 following up on your answer to question 8, you said
6 something that needed to be brought to our
7 attention, that you do undergo physical therapy on
8 Tuesdays and Thursdays.

9 Obviously you heard the schedule as outlined by
10 the Court. We expect the jury selection will last
11 maybe the better part of this week. Next week we
12 expect the trial to be at least four days next week
13 and then if we proceed to the penalty phase it would
14 be three or four days the following week of the
15 20th.

16 PROSPECTIVE JUROR: Right.

17 MR. CALIEL: Given your physical condition,
18 based upon the car accident, do you believe you
19 would be able to physically serve, understanding
20 that you have some injuries that you're still
21 trying to rehab from?

22 PROSPECTIVE JUROR: I do if there's any way I
23 could at least -- kind of prop my feet up or
24 something because when I sit like this for hours
25 it does hurt. I mean it is, you know, but I mean

1 if I just have a step stool or something that I
2 can -- or heating pad or something. I don't mind
3 doing that.

4 MR. CALIEL: Okay. Do you believe if we were
5 able to make accommodations to your injuries that
6 you would be able to serve --

7 PROSPECTIVE JUROR: Yes, I do.

8 MR. CALIEL: And you're willing to serve
9 based upon that. Well, we greatly appreciate your
10 sacrifice and willingness to do that. Another
11 question you had, and I wanted to get a little bit
12 more clarification because you had marked no at
13 first and then yes, was in regards to capital
14 punishment, the death penalty, and simply put, you
15 put in your answer I'm pro death penalty. By
16 that, explain to me what you mean by pro death
17 penalty.

18 PROSPECTIVE JUROR: I feel like if the crime
19 warrants that, if found guilty, then I feel like
20 the death penalty should possibly be an option.

21 MR. CALIEL: Okay. So it's not as if every
22 murder case you --

23 PROSPECTIVE JUROR: Correct.

24 MR. CALIEL: -- you would impose the death
25 penalty?

1 PROSPECTIVE JUROR: Correct.

2 MR. CALIEL: You would be able to follow, and
3 I'm not going to get into a lot of it right now,
4 but there's a lot of law and the Judge will
5 instruct you how to evaluate if we get to that
6 point, whether or not the death penalty is
7 appropriate. Could you go through that evaluation
8 process and consider factors both in favor of the
9 death penalty and potentially factors that may
10 mitigate or say that a life sentence is
11 appropriate and doing a weighing analysis in that?

12 PROSPECTIVE JUROR: Correct.

13 MR. CALIEL: Okay. Perfect. I'm sorry to
14 hear about your knees.

15 PROSPECTIVE JUROR: There's one other thing
16 I'd like to say, because I was asked had I heard
17 about the case before. I heard about it when it
18 first happened, when the incident first happened,
19 and I haven't followed up with it, I don't watch
20 the news, I don't watch TV or read the paper or
21 anything. The only reason I knew that the trial
22 is coming up is my daughter called me the day
23 before and said the trial is coming up. I didn't
24 remember any of the details or anything and I
25 still don't know because I'm not into that.

1 MR. CALIEL: And you indicated you have not
2 formed any fixed opinions about guilt or innocence
3 in this case?

4 PROSPECTIVE JUROR: No.

5 MR. CALIEL: Based upon anything you heard?

6 PROSPECTIVE JUROR: Correct.

7 MR. CALIEL: Or anything your daughter said?

8 PROSPECTIVE JUROR: All she said was the case
9 is coming up.

10 MR. CALIEL: Thank you. I appreciate you
11 clarifying that. If you'd have a seat still. The
12 defense may have a few questions.

13 MS. SCHLAX: Good morning, juror [REDACTED]

14 How old is your daughter, ma'am?

15 PROSPECTIVE JUROR: They're 29.

16 MS. SCHLAX: Okay. And when you say they,
17 twins?

18 PROSPECTIVE JUROR: Yes.

19 MS. SCHLAX: Okay. You had mentioned in your
20 juror questionnaire and then you just said it
21 again, I know the importance of the case. What do
22 you mean by that?

23 PROSPECTIVE JUROR: I mean that if this is
24 the person that -- that did the crime, they need
25 to be looked at, but if they're the person that

1 did not do this crime then they need to also be
2 set free so they can find the correct person that
3 did this crime.

4 MS. SCHLAX: Okay. When your daughter called
5 you, had you already had conversations that you
6 had gotten a jury summons?

7 PROSPECTIVE JUROR: She -- yes, she had --
8 she had asked me -- she knew I was going to jury
9 duty. The reason she had actually called me is
10 because my twins have one of their best friends
11 was -- her life was taken by the hands of her
12 husband and his trial selection started Monday as
13 well. And she was more concerned that I was going
14 to be pulled on that, knowing that I would be --
15 she knew I would be out of that one, obviously,
16 for knowing the victim, the plaintiff and the main
17 witness, so that was basically why she was calling
18 me, to tell me that that trial was starting, and
19 then she just said just in general the other one
20 was starting and that's all that was said. It was
21 not any detail or anything.

22 MS. SCHLAX: Okay. You mentioned that really
23 for you personally you knew about the original
24 news story --

25 PROSPECTIVE JUROR: Correct.

1 MS. SCHLAX: -- years ago but have you not
2 followed the news or not a local news watcher.

3 PROSPECTIVE JUROR: Correct. Correct. When
4 we were in here Monday it really didn't click who
5 he was until they started talking.

6 MS. SCHLAX: Okay. And when you say "they
7 started talking", who started talking?

8 PROSPECTIVE JUROR: Well, just the brief
9 description that the Judge said and the name, you
10 know, just saying, you know, the child's name.

11 MS. SCHLAX: Okay. Anything about those
12 prior stories that you remember in regards to
13 Mr. Smith's past or Rayne (sic) Perrywinkle's
14 mother's past?

15 PROSPECTIVE JUROR: No. As a matter of fact,
16 walking in here Monday I didn't even know his
17 name.

18 MS. SCHLAX: And you told us in regards to the
19 death penalty being willing to go through that
20 process. How do you -- how do you feel about a
21 convicted child killer getting life in prison?

22 PROSPECTIVE JUROR: I guess it depends on the
23 circumstances.

24 MS. SCHLAX: And the circumstances of what?

25 PROSPECTIVE JUROR: I don't know. I haven't

1 heard the case.

2 MS. SCHLAX: Okay. And I guess I'm asking
3 circumstances of the crime?

4 PROSPECTIVE JUROR: Correct.

5 MS. SCHLAX: Or circumstances of the accused
6 and the accused's life?

7 PROSPECTIVE JUROR: I guess circumstances of
8 the crime. I mean I just -- you know, I don't
9 know. Like I said, I haven't heard the case to
10 say which way I would feel would be the
11 appropriate punishment.

12 MS. SCHLAX: Okay. I'm going to ask you to
13 assume for a second.

14 PROSPECTIVE JUROR: Okay.

15 MS. SCHLAX: That you're ultimately selected
16 on this jury and you sit through this jury and
17 you've been convinced beyond and to the exclusion
18 of a reasonable doubt that my client, in fact,
19 sexually battered and killed eight year old
20 Cherish Perrywinkle and so you found him guilty of
21 that. Could you consider life imprisonment for
22 him at that point?

23 MR. CALIEL: Your Honor, I'm going to object
24 to the form of the question. I don't think it's
25 fair as posed because only aggravation has been

1 posed to this witness in the hypothetical.

2 THE COURT: Would you rephrase the question?

3 MS. SCHLAX: Let me -- I want you to assume
4 that you're tasked with considering appropriate
5 punishment and it's been proven to you that a
6 child who was eight years old was sexually
7 battered and killed. At that juncture can you,
8 looking within yourself, ever consider giving life
9 imprisonment to that person?

10 PROSPECTIVE JUROR: I don't know that I can
11 answer that. I guess because I -- I guess I would
12 -- I feel like I would have an open mind. I feel
13 like I'm coming into this with an open mind. And
14 I guess I could consider that, yes. I mean I
15 could -- I can look at all options.

16 MS. SCHLAX: Okay. And as the State
17 mentioned, if, in fact, that was your verdict in a
18 guilt phase, two aggravating factors that you
19 would be able to consider is a contemporaneous
20 felony, which would be the sexual battery, and the
21 fact that the child was under the age of 12. But
22 what I'm hearing you say is that you would
23 consider the possibility of life imprisonment,
24 even knowing that those factors would be proven,
25 as a possible penalty. And, ma'am, for the

1 record, I'm going to just indicate, again, this
2 has been several seconds delay.

3 PROSPECTIVE JUROR: Right.

4 MS. SCHLAX: And let me say this. No one is
5 trying to change your opinion. You have your own
6 opinions that you walk into this courtroom with.
7 And no one is trying to tell you you should or
8 shouldn't have them. We're just ultimately
9 looking for jurors that can truly consider all
10 options.

11 PROSPECTIVE JUROR: I feel like I have an
12 open mind and I will look at all options. And I
13 feel like you're trying to get me to say something
14 differently, but that's ultimately how I feel.

15 MS. SCHLAX: I am not.

16 PROSPECTIVE JUROR: I feel like I'm
17 open-minded and will look at all options.

18 MS. SCHLAX: Okay. And I appreciate that.
19 Thank you for your time.

20 THE COURT: Anything further?

21 MR. CALIEL: Nothing further from the State,
22 Your Honor.

23 THE COURT: Okay. Juror 104, first of all,
24 take your time leaving the courtroom. And
25 secondly, if you'll remain in the hall we'll try

1 to let you know something as soon as we can, but
2 please don't discuss these questions and answers
3 with the other jurors.

4 PROSPECTIVE JUROR: Thank you.

5 THE COURT: And she's going to take her time,
6 but when she's gone out the door, then juror [REDACTED]
7 can come in.

8 BAILIFF: Sir, take the second seat in.

9 THE COURT: Good morning, juror [REDACTED] You
10 know we're using your numbers instead of your
11 names. We're even uncomfortable with that but
12 we're doing it. And we're asking some follow-up
13 questions from your questionnaire.

14 MR. FLETCHER: Good morning, juror [REDACTED]

15 PROSPECTIVE JUROR: Good morning.

16 MR. FLETCHER: We've got your questionnaire,
17 we read over your answers and I've got a couple of
18 follow-ups. You've been exposed to some news
19 coverage about this case.

20 PROSPECTIVE JUROR: Um-hum.

21 MR. FLETCHER: Can you tell us when it
22 started and when it ended.

23 PROSPECTIVE JUROR: When the event happened,
24 and it was limited, I would say, not to elaborate
25 too much on it, but in the business where I work,

1 the weather is the most important thing so I would
2 track the weather every morning so I would catch a
3 glimpse of what would happen at 5:00 on what would
4 happen, but not glued to it, so to speak.

5 MR. FLETCHER: You saw it when it first
6 happened and it was reported. Have you followed
7 it?

8 PROSPECTIVE JUROR: No.

9 MR. FLETCHER: Have you been exposed to
10 anything, say in the last week, because it's been
11 everywhere?

12 PROSPECTIVE JUROR: Just when I was -- about
13 three days ago, just that they were doing jury
14 selection for this particular case on the day that
15 I was coming here.

16 MR. FLETCHER: Okay.

17 PROSPECTIVE JUROR: Was all that I heard, but
18 not details necessarily. Just what was going on.

19 MR. FLETCHER: That's fine. And you
20 specifically remember the name Rayne Perrywinkle?

21 PROSPECTIVE JUROR: Just from that morning
22 was the one time when I heard it. She was
23 standing outside and somebody was interviewing her
24 and I saw her, her name on the screen.

25 MR. FLETCHER: Okay.

1 PROSPECTIVE JUROR: But before that no.

2 MR. FLETCHER: Did you hear anything about
3 her past?

4 PROSPECTIVE JUROR: No.

5 MR. FLETCHER: Did you hear anything about
6 Donald Smith's past?

7 PROSPECTIVE JUROR: No.

8 MR. FLETCHER: So mostly what you know about
9 is sort of what we put in the questionnaire?

10 PROSPECTIVE JUROR: Um-hum.

11 MR. FLETCHER: And pretty much nothing else
12 about the case?

13 PROSPECTIVE JUROR: Not really.

14 MR. FLETCHER: That's all I have.

15 MR. CALIEL: No questions, Your Honor.

16 THE COURT: All right. Thank you, juror No.

17 [REDACTED] And if you'll wait in the hall, we'll try to
18 let you know something as quickly as we can, but
19 please do not discuss these questions and answers
20 with anybody else. And you'll have to come this
21 way, if you want to get out.

22 PROSPECTIVE JUROR: Right.

23 THE COURT: When juror [REDACTED] leaves the
24 courtroom, juror [REDACTED] can come in.

25 (Prospective juror absent.)

1 (Prospective juror present.)

2 BAILIFF: Sir, take the second seat in.

3 THE COURT: Good morning, juror [REDACTED] We're
4 just bringing each of you in individually for some
5 follow-up questions from your questionnaire.

6 PROSPECTIVE JUROR: Sure.

7 THE COURT: And Ms. Schlax is going to ask
8 you some questions.

9 MS. SCHLAX: Good morning, juror No. [REDACTED]

10 PROSPECTIVE JUROR: Good morning.

11 MS. SCHLAX: You were kind enough to fill out
12 this questionnaire for us and had indicated you
13 did have some knowledge about the case prior to
14 entering the courthouse on Monday?

15 PROSPECTIVE JUROR: Um-hum.

16 MS. SCHLAX: When you say that you read about
17 the case online and it was similar to the factual
18 summary as stated, what we're trying to understand
19 is is there anything additional you heard in those
20 news stories, anything about the mother, Rayne
21 Perrywinkle, or Mr. Smith's past?

22 PROSPECTIVE JUROR: Can I see the summary in
23 print? Do you still have it there?

24 MS. SCHLAX: Sure.

25 May I approach the juror?

1 THE COURT: Sure. It doesn't have any notes
2 on it?

3 MS. SCHLAX: I do not.

4 (Prospective juror examining questionnaire.)

5 PROSPECTIVE JUROR: I think about the only
6 thing that I recall that's not in there is
7 purchase of clothes.

8 MS. SCHLAX: Oh, in terms of the factual
9 allegations?

10 PROSPECTIVE JUROR: Yeah.

11 MS. SCHLAX: Okay. And you had indicated
12 that you did not have any kind of fixed opinion in
13 regards to guilt or innocence.

14 PROSPECTIVE JUROR: That's right.

15 MS. SCHLAX: Just being a part of this
16 process, you obviously spent a lot of time in this
17 courthouse this week, just waiting. Anything
18 about this process or anyone attempted to approach
19 you in regards to providing more information or
20 their thoughts?

21 PROSPECTIVE JUROR: No.

22 MS. SCHLAX: About this case?

23 PROSPECTIVE JUROR: No.

24 MS. SCHLAX: Okay. I appreciate your time,
25 sir.

1 THE COURT: Anything further?

2 MR. CALIEL: No questions, Your Honor.

3 THE COURT: Thank you, sir. If you'll wait
4 in the hall, we'll try to let you know something
5 as quickly as we can and please do not discuss the
6 questions and answers with the others out there.

7 PROSPECTIVE JUROR: Sure. Absolutely.

8 THE COURT: Thank you.

9 And when juror [REDACTED] leaves, juror [REDACTED] may come
10 in.

11 (Prospective juror absent.)

12 THE COURT: He was born in [REDACTED] -- I mean

13 [REDACTED] --

14 MS. NELSON: We're going to ask about it.

15 THE COURT: Yeah.

16 (Prospective juror present.)

17 BAILIFF: Sir, if you'll take the second seat
18 in.

19 THE COURT: Good morning, juror [REDACTED]

20 We're just bringing each of you in
21 individually to ask a few follow-up questions from
22 your questionnaire. Mr. Fletcher is going to
23 start.

24 MR. FLETCHER: Thank you, Your Honor.

25 How are you doing, juror [REDACTED]?

1 PROSPECTIVE JUROR: Fine.

2 MR. FLETCHER: I've got your questionnaire
3 and I read through your answers and my only
4 question for you is you indicated that you have
5 been -- you've seen some of this case on the news.

6 PROSPECTIVE JUROR: Right.

7 MR. FLETCHER: And can you give me a short --
8 short answer as to what you've been exposed to?

9 PROSPECTIVE JUROR: I've been exposed to the
10 -- seeing the gentleman walk out with the young
11 lady and some other things that happened.

12 MR. FLETCHER: Okay. Other than the TV news,
13 have you read anything about the case?

14 PROSPECTIVE JUROR: No, I haven't.

15 MR. FLETCHER: Nothing in the newspaper?

16 PROSPECTIVE JUROR: No, not the newspaper.

17 MR. FLETCHER: You indicated that you had
18 heard things about, for instance, Rayne
19 Perrywinkle. That's on the questionnaire.

20 PROSPECTIVE JUROR: Yes.

21 MR. FLETCHER: Do you remember what you heard
22 about her?

23 PROSPECTIVE JUROR: I couldn't say.

24 MR. FLETCHER: How about Donald Smith? Do
25 you remember anything about Donald Smith other

1 than what was on the questionnaire?

2 PROSPECTIVE JUROR: All I remember is they
3 said he -- that he walked out with the young lady.

4 MR. FLETCHER: Okay. So, you don't really
5 know anything more than what we wrote down, basic
6 outlines?

7 PROSPECTIVE JUROR: No.

8 MR. FLETCHER: Okay. That's all I have, sir.

9 THE COURT: Anything further?

10 MR. CALIEL: No questions, Your Honor.

11 THE COURT: Okay. Juror [REDACTED] thank you.

12 And if you'll wait in the hall we'll try to
13 let you know something as soon as we can.

14 And when juror [REDACTED] leaves, juror [REDACTED] can come
15 in.

16 BAILIFF: Yes, Your Honor.

17 (Prospective juror absent.)

18 (Prospective juror present.)

19 BAILIFF: Sir, if you'll take the second seat
20 in.

21 PROSPECTIVE JUROR: Yes, sir.

22 THE COURT: Good morning, juror [REDACTED] We're
23 just bringing you all in individually to ask a few
24 follow-up questions and Mr. Caliel will start.

25 MR. CALIEL: Good morning, sir. Looking at

1 your answers to the hardship question that was on
2 the questionnaire, you indicated that your wife
3 and yourself were both full-time employees and you
4 have a young child at home.

5 PROSPECTIVE JUROR: Yes, sir.

6 MR. CALIEL: Could you explain the hardship
7 that serving on this jury would pose to your
8 family?

9 PROSPECTIVE JUROR: Financial hardship.
10 Other than that my son is in school full-time.
11 He's two years, three months and it would just be
12 a hardship financially, but I think it would be a
13 hardship financially for anybody.

14 MR. CALIEL: And that's sort of the question
15 that I would ask. Obviously you see the number of
16 jurors we brought in and the 16 people who are
17 eventually selected to serve as a juror in this
18 case will be having to step away from work, homes,
19 class and things of that nature. Is there
20 anything that would be unduly more hard on you
21 than the average juror or would it just be
22 obviously you would lose the income from that
23 particular day of you working?

24 PROSPECTIVE JUROR: I think you're right on.

25 MR. CALIEL: Would you be willing, if

1 necessary, to make that sacrifice to serve as a
2 juror in this case if you were called to do so?

3 PROSPECTIVE JUROR: I don't think I have a
4 choice.

5 MR. CALIEL: Okay. Let me follow-up with the
6 question on the death penalty because you
7 indicated that you did have strong feelings. Can
8 you explain that to me?

9 PROSPECTIVE JUROR: I think it's -- my
10 opinion is it's somewhat barbaric, it's kind of
11 old testament, an eye for an eye, but I have a lot
12 of feelings about it. I think -- well...

13 MR. CALIEL: And the death penalty is
14 something that is actually very divisive and
15 people have strong feelings like yourself. The
16 law in the State of Florida allows for the death
17 penalty to be considered under certain
18 circumstances.

19 PROSPECTIVE JUROR: Of course.

20 MR. CALIEL: Not every murder is a capital
21 punishment case, but if this defendant is found
22 guilty of first degree murder, part of your role
23 as a juror would be to go to what we call a
24 penalty phase where the State would present
25 evidence potentially in aggravation, you may hear

1 things about the defendant, in his history, his
2 background that may be mitigating circumstances or
3 suggest that a life sentence is appropriate. Can
4 you go through that evaluation process and listen
5 to the evidence and reach a conclusion with an
6 open mind?

7 PROSPECTIVE JUROR: I don't really think I
8 could ever see a time where I would vote to have
9 somebody's blood on my hands, regardless of their
10 history or the things that they've done. I think
11 there are more appropriate penalties.

12 MR. CALIEL: And so simply, even though the
13 law would ask you to go through this evaluation
14 process, you feel in your heart of hearts, and
15 it's fine to feel this way, that under no
16 circumstance, under no factor could you ever
17 impose the death penalty or even consider it as an
18 option?

19 PROSPECTIVE JUROR: I feel that a life
20 sentence is the death penalty.

21 MR. CALIEL: So you, yourself, could never
22 recommend the death penalty regardless of the
23 circumstances and the law?

24 PROSPECTIVE JUROR: I can't see a situation
25 where I would.

1 MR. CALIEL: Thank you, sir.

2 I don't have any further questions.

3 THE COURT: Thank you.

4 MS. SCHLAX: No questions, Your Honor.

5 THE COURT: All right. Thank you juror [REDACTED]
6 and if you'll wait in the hallway we'll try to let
7 you know something as quick as we can. Please do
8 not discuss your questions and answers with the
9 others.

10 PROSPECTIVE JUROR: Yes, ma'am.

11 THE COURT: When juror [REDACTED] leaves, juror [REDACTED]
12 may come in.

13 (Prospective juror absent.)

14 (Prospective juror present.)

15 BAILIFF: Ma'am, if you'll take the second
16 chair in.

17 PROSPECTIVE JUROR: Okay.

18 THE COURT: Good morning, juror No. [REDACTED]
19 We're just bringing you all in individually to ask
20 some follow-up questions from your questionnaire.
21 And Mr. Caliel will start. Thank you.

22 MR. CALIEL: Good morning, ma'am.

23 PROSPECTIVE JUROR: Good morning.

24 MR. CALIEL: Ma'am, I'd like to follow-up a
25 little bit on the hardship that you indicated on

1 the questionnaire. Can you explain a little bit
2 more about the business that you and your husband
3 work in and how that would affect your ability to
4 serve as a juror?

5 PROSPECTIVE JUROR: Right. We're
6 self-employed. We retired and started a business
7 driving cars that are bought online. So he
8 delivers cars and I drive the cars to bring him
9 home from different areas of Florida and Georgia
10 and South Carolina.

11 MR. CALIEL: And the Judge had outlined a
12 schedule, the best that we could, to sort of give
13 you an idea if you're selected as a juror when
14 you'll be needed to serve.

15 PROSPECTIVE JUROR: Right.

16 MR. CALIEL: And it would be probably for the
17 remainder of this week, four days next week and
18 potentially three days the following week.

19 PROSPECTIVE JUROR: Right.

20 MR. CALIEL: Given your work situation, do
21 you believe you could make the sacrifice and serve
22 as a juror in this case?

23 PROSPECTIVE JUROR: I could make the
24 sacrifice, yes.

25 MR. CALIEL: Okay. Great. I also want to

1 follow-up with the next question, when asked
2 whether or not you had strong feelings about the
3 death penalty, you stated, quote, I'm against the
4 death penalty.

5 PROSPECTIVE JUROR: I am.

6 MR. CALIEL: Can you explain that to me?

7 PROSPECTIVE JUROR: I always have been. I
8 just think you shouldn't be able to take a life.

9 MR. CALIEL: Okay. Obviously the death
10 penalty is an option in the State of Florida on
11 first degree murder cases, but not every murder
12 case is a death penalty case. Given your strong
13 held feelings about the death penalty, could you
14 ever impose or make a representation that the
15 death penalty is appropriate?

16 PROSPECTIVE JUROR: No.

17 MR. CALIEL: Regardless of what the law is,
18 regardless of what the evidence is, your verdict
19 would always be to never impose the death penalty?

20 PROSPECTIVE JUROR: Right.

21 MR. CALIEL: You wouldn't even consider it?

22 PROSPECTIVE JUROR: No.

23 MR. CALIEL: Okay. Thank you. I don't have
24 any further questions.

25 THE COURT: Any questions?

1 MS. SCHLAX: No, Your Honor.

2 THE COURT: All right. Thank you, juror No.

3 [REDACTED] If you'll remain in the hall, we'll try to
4 let you know something pretty quickly and please
5 do not discuss your questions and answers with the
6 others.

7 PROSPECTIVE JUROR: All right.

8 THE COURT: When juror [REDACTED] leaves, juror [REDACTED]
9 may come in.

10 (Prospective juror present.)

11 BAILIFF: Take the second chair in.

12 THE COURT: Good morning, juror No. [REDACTED]
13 We're just bringing you all each in individually
14 just to have some follow-up questions from your
15 questionnaire. Thank you, sir.

16 MR. CALIEL: Good morning, sir.

17 PROSPECTIVE JUROR: Good morning.

18 MR. CALIEL: Sir, on the questioning on the
19 questionnaire where it talks about hardship, you
20 indicated that you had a serious issue because you
21 were starting a new job. Can you explain that to
22 us, please?

23 PROSPECTIVE JUROR: Well, I just started with
24 'em and I don't know if they pay me for this or
25 anything like that and I got my three sons with me

1 now taking care of them so it's kind of like a
2 little strain on them, but I really looked at the
3 case and seen what was going on, I think it's real
4 sad, but you all probably don't want me in this
5 because I get real emotional with kids.

6 MR. CALIEL: And explain to me a little bit
7 when you say you get really emotional with kids.
8 What do you mean by that?

9 PROSPECTIVE JUROR: I would hurt somebody if
10 I seen them messing with a kid. I really would.
11 I think that's wrong. That's very wrong. So the
12 way I feel in it you don't want me.

13 MR. CALIEL: In short, based upon, obviously
14 you heard the allegations, you read the summary,
15 Mr. Smith is accused of the murder and rape of an
16 eight year old girl. Do you feel that -- that
17 your personally held feelings would make you
18 automatically be biassed against Mr. Smith?

19 PROSPECTIVE JUROR: I don't know Mr. Smith.
20 Mr. Smith, I don't know the situation. I'm a
21 trucker. I stay out of Jacksonville pretty much.
22 I don't know what goes on here so I haven't heard
23 the whole story but I heard there was a kid
24 involved so, you know, I'm listening, I can't say
25 he did it or not. I don't know.

1 MR. CALIEL: Okay. Assume for a second that
2 you were selected as a juror, you can keep an open
3 mind and presume him innocent right now, correct?

4 PROSPECTIVE JUROR: Yeah.

5 MR. CALIEL: Okay.

6 PROSPECTIVE JUROR: But he has been charged
7 with that kid. He does have some guilt to it. He
8 is charged.

9 MR. CALIEL: Well, how do you know that?

10 PROSPECTIVE JUROR: Well, because the lady
11 let him took off with the kid. You're responsible
12 for that. You've got to watch that kid close-eye.
13 You don't let that kid get out of your sight.
14 When I got somebody's kid, that kid is right
15 beside me. That kid's going nowhere, because,
16 first of all, I don't want to get into this kind
17 of crap, first of all. That's number one. Number
18 two is I love kids and animals.

19 MR. CALIEL: Okay. And it sounds like you
20 have really strong feelings about the allegations
21 in this case, and you're right about some things.
22 Do you believe that you would not be able to be a
23 good juror in this case because of those feelings?

24 PROSPECTIVE JUROR: Yeah, and I don't want to
25 know what happened because it really hurt.

1 Seriously, I watch a lot of shows and cases, and I
2 can't believe some humans how they act, like
3 monkeys. It's a shame. And it's not appropriate
4 and it needs to stop. You all need to put a stop
5 to this crap. All this little hand shake with
6 these kids, it be serious. You don't know what I
7 want to do. And I'm being honest with you.

8 MR. CALIEL: Thank you for your candor, sir.
9 I appreciate it.

10 PROSPECTIVE JUROR: Thank you.

11 MR. CALIEL: Hold on one second.

12 THE COURT: Any other questions?

13 MS. SCHLAX: No, Your Honor.

14 THE COURT: All right. Thank you, juror No.

15 [REDACTED] If you'll wait in the hall, we're going to
16 let you know something pretty quick. And please
17 do not discuss your questions and answers with the
18 others. Okay?

19 PROSPECTIVE JUROR: No problem.

20 THE COURT: Thank you, sir.

21 PROSPECTIVE JUROR: Thank you.

22 Leave?

23 BAILIFF: Yes, sir.

24 (Prospective juror absent.)

25 THE COURT: When juror [REDACTED] leaves, juror [REDACTED]

1 may come in.

2 (Prospective juror absent.)

3 (Prospective juror present.)

4 BAILIFF: Sir, if you'll take the second
5 chair in.

6 THE COURT: Good morning, juror [REDACTED]. We're
7 just bringing each of you in individually to ask
8 you a few follow-up questions from your
9 questionnaire and Ms. Schlax will start.

10 MS. SCHLAX: Thank you.

11 Good morning, Mr. Juror No. [REDACTED]. Sir, we
12 appreciate you filling out your questionnaire. And
13 I know that you said that you had just seen
14 headlines in regards to this case.

15 PROSPECTIVE JUROR: Um-hum.

16 MS. SCHLAX: Just verifying, any other
17 information that you've been presented with?

18 PROSPECTIVE JUROR: No.

19 MS. SCHLAX: Okay. You being in a process,
20 unfortunately you've been stuck at this courthouse
21 quite a bit this week and we appreciate that.
22 Anything through the process that you've
23 overheard?

24 PROSPECTIVE JUROR: No.

25 MS. SCHLAX: Okay. I did want to follow-up

1 in regards to the hardship. Because we are asking
2 a lot. Are you okay with the hardship of
3 potentially missing three weeks of work?

4 PROSPECTIVE JUROR: It's my duty so, yes.

5 MS. SCHLAX: Okay. I appreciate your time,
6 sir. Thank you.

7 MR. CALIEL: No questions, Your Honor.

8 THE COURT: Okay. Thank you so much juror
9 [REDACTED] and if you'll go back out in the hall, we'll
10 try to let you know something as quickly as we can
11 and please do not discuss your questions and
12 answers with the others.

13 PROSPECTIVE JUROR: Okay.

14 THE COURT: Thank you.

15 (Prospective juror absent.)

16 THE COURT: That's our first group of ten so
17 I'll give the defense some time to consult and the
18 State some time to consult and then we'll resume.

19 (Defense counsel conferring with defendant.)

20 MR. CALIEL: We're ready when you are.

21 MS. SCHLAX: We're ready, Your Honor.

22 THE COURT: Okay. Juror [REDACTED]

23 MS. SCHLAX: Your Honor, the defense would
24 move for cause. She began in regards to the
25 pretrial publicity which she indicated she watches

1 news every night. I don't know. We then moved on
2 to her feeling that she had prejudice because she
3 is a mother. She was tearing up in the process of
4 the voir dire. At first said would not consider
5 life imprisonment. The State attempted to
6 rehabilitate her, but I would suggest to the Court
7 that her clear answers, that there is a definite
8 reasonable doubt that she could fairly and
9 impartially live up to her duties and obligations
10 as a juror in this case.

11 MR. CALIEL: Your Honor --

12 MS. SCHLAX: And she -- I apologize. I'm
13 sorry to interrupt you. And she was very familiar
14 specifically with my client's priors. That she
15 indicated I don't know if she could --

16 MR. CALIEL: We agree, Your Honor.

17 THE COURT: She'll be stricken for cause.

18 Juror [REDACTED].

19 MS. SCHLAX: We're fine with having this
20 person, Your Honor.

21 MR. CALIEL: The State would agree, Your
22 Honor.

23 THE COURT: All right. She'll come back for
24 jury selection tomorrow at 9:30.

25 Juror [REDACTED]

1 MS. SCHLAX: Your Honor, she did not say
2 anything to justify a cause challenge. She'll
3 pass till tomorrow.

4 MR. CALIEL: We would agree, Your Honor.

5 THE COURT: That's fine. We'll certainly
6 pass her to tomorrow. I don't know if we can
7 provide the comfort she will need. I think we
8 can. A step stool I think we can provide. Not
9 tomorrow, but -- although maybe we can, depending
10 on where she sits.

11 MS. SCHLAX: My only -- my only concern, Your
12 Honor, is I feel like tomorrow she will probably
13 ultimately be caused. She was right on the cusp.

14 THE COURT: You're right. There was no cause.
15 I'll pass her until tomorrow for jury selection at
16 9:30. When she comes in tomorrow, they'll be
17 coming up here or they'll be going to jury
18 assembly?

19 Will she come straight up here?

20 BAILIFF: Whatever.

21 THE COURT: Whatever I say?

22 BAILIFF: Yes, ma'am.

23 THE COURT: I think normally for that they
24 would just come straight up here. There's plenty
25 of room and the jury selection across the hall I

1 think will be through by then. If it's not, we
2 might have to regroup, but my point was wherever
3 she comes, if she could stay where she is seated
4 until we bring her in. She seemed to be most
5 disturbed by moving from seat to seat to seat. So
6 if she comes up here, we can see her, you all can
7 see her, she can stay in whatever seat she takes,
8 hopefully, until she comes in here and we try to
9 rearrange where she's on the end of a row for her
10 comfort. I don't know. We'll see tomorrow. But
11 I'll have her come back tomorrow.

12 Juror [REDACTED]

13 MS. SCHLAX: We agree this juror can go to
14 the next level.

15 MR. CALIEL: The State agrees, Your Honor.

16 THE COURT: Okay. To come back tomorrow at
17 9:30.

18 Juror [REDACTED]

19 MS. SCHLAX: We agree he can go through to
20 the next round, Your Honor.

21 MR. CALIEL: We agree, Your Honor.

22 THE COURT: Juror [REDACTED] will be asked to come
23 back tomorrow for jury selection at 9:30.

24 Juror No. [REDACTED]

25 MS. SCHLAX: We agree he can go through, Your

1 Honor.

2 MR. CALIEL: The State would agree, Your
3 Honor.

4 THE COURT: Okay. We're assuming he's not a
5 hundred years old, correct?

6 MR. CALIEL: I think that's a scrivener's
7 error, Your Honor. Either that or I need to find
8 out what he eats.

9 THE COURT: Okay. We'll pass him to tomorrow
10 for jury selection.

11 Juror No. [REDACTED]

12 MR. CALIEL: Your Honor, we would move to
13 strike [REDACTED] for cause. I believe he said he could
14 not ever consider the death penalty as an option.

15 MS. SCHLAX: We agree, Your Honor.

16 THE COURT: Juror No. [REDACTED] is stricken for
17 cause.

18 And juror No. [REDACTED]

19 MR. CALIEL: Your Honor, for the same reason
20 we move to strike juror No. [REDACTED].

21 MS. SCHLAX: I apologize, no objection.

22 THE COURT: Juror No. [REDACTED] will be stricken
23 for cause.

24 Juror No. [REDACTED]

25 MS. SCHLAX: The defense would move for

1 cause.

2 MR. CALIEL: No objection, Your Honor.

3 THE COURT: Juror No. [REDACTED] will be stricken
4 for cause. And juror [REDACTED]

5 MS. SCHLAX: The defense agrees juror [REDACTED] can
6 move on to the next level.

7 MR. CALIEL: The State would concur.

8 THE COURT: Juror [REDACTED] will be allowed -- not
9 allowed, but requested to come back tomorrow at
10 9:30 for jury selection.

11 So I just want to make sure I have juror [REDACTED]
12 [REDACTED] and [REDACTED] for cause. [REDACTED]
13 and [REDACTED] to come back tomorrow for jury selection.
14 Correct?

15 MS. SCHLAX: Yes, Your Honor.

16 THE COURT: And for cause [REDACTED] and
17 [REDACTED]

18 Have them come in. Thank you.

19 (Prospective jurors present.)

20 THE COURT: Okay. Thank you, ladies and
21 gentlemen. Just for the record I need to show
22 that you are here so I'm going to announce your
23 number and when I do announce you, raise your
24 hand. Juror No. [REDACTED]. Juror No. [REDACTED] Juror No.
25 [REDACTED] And juror No. [REDACTED].

1 (Prospective jurors indicating.)

2 THE COURT: And each of them has raised their
3 hands.

4 The four of you are excused. You have
5 completed your jury service. We all thank you for
6 your time and your patience. We know it has not
7 been an easy week for you, but we appreciate your
8 willingness to serve.

9 When you leave they'll collect your hanging tag
10 and your button. You're free to go about your life
11 as an ordinary citizen.

12 Thank you so much.

13 PROSPECTIVE JUROR: Thank you, Your Honor.

14 PROSPECTIVE JUROR: Thank you, Your Honor.

15 (Prospective jurors excused.)

16 THE COURT: And now we need to bring in
17 jurors [REDACTED]. They're not there.

18 I'll give you numbers for the other jurors.

19 [REDACTED] and [REDACTED] They can be over
20 here. That's fine.

21 (Prospective jurors present.)

22 THE COURT: All right. I need to make sure
23 the record reflects that you are each back in the
24 courtroom. So I'm going to announce your number
25 and when I do, ask you to raise your hand.

1 Juror [REDACTED], juror [REDACTED] juror [REDACTED] juror [REDACTED]
2 juror [REDACTED] and juror [REDACTED].

3 (Prospective jurors indicating.)

4 THE COURT: Okay. They are all back in the
5 courtroom.

6 Each of you is going to be asked to return
7 tomorrow morning at 9:30 for jury selection where
8 we'll actually have a full panel and begin the jury
9 selection process and we will do what we can for
10 you, particularly have you on the end of a row, if
11 possible. I'm not sure we can, but we'll do what we
12 can to assist you with your injury.

13 PROSPECTIVE JUROR: Thank you.

14 THE COURT: And with that you're free to go.

15 Please return tomorrow at 9:30 in the jury
16 assembly room. I think that's where I told
17 everybody else to go, to the jury assembly room, and
18 you'll have to have your tag and your button and
19 we'll start as quickly after 9:30 as we can.

20 You're free to go for the rest of the day.
21 Please do not discuss the case among yourselves or
22 with anyone else, read any news, listen to any news
23 or look for anything online. In other words, do not
24 try to get any information about the case in between
25 today and tomorrow.

1 We thank you again for all your time this week
2 and you're free to go.

3 (Prospective jurors absent.)

4 THE COURT: All right. With everyone's
5 permission, we'll have just a short like
6 ten-minute break and -- are the next ten up here
7 already?

8 BAILIFF: Yes, ma'am.

9 THE COURT: All right. We'll have a
10 ten-minute break and then we'll start with the
11 next juror, No. 116.

12 (Recess.)

13 (Defendant present.)

14 THE COURT: Okay. Is everybody ready for the
15 next juror to come in?

16 MR. CALIEL: Yes, Your Honor.

17 THE COURT: Juror No. [REDACTED]

18 (Prospective juror present.)

19 BAILIFF: Ma'am, take the second chair in.

20 THE COURT: Good morning, juror [REDACTED] We're
21 just asking some follow-up questions from your
22 questionnaire that need to be asked individually.

23 Mr. Caliel.

24 MR. CALIEL: Thank you, Your Honor.

25 Ma'am, you indicated on question 6 that based

1 upon work you're travelling throughout the State of
2 Florida in the following weeks. Can you explain
3 that a little bit more for us?

4 PROSPECTIVE JUROR: I'm a training specialist
5 for a state-wide organization and I have a
6 training that I'm facilitating and if I'm not able
7 to do it then other employees will have to cancel
8 their plans to attend the training as well.

9 MR. CALIEL: Okay. Is this something that
10 had been preplanned?

11 PROSPECTIVE JUROR: Prior to being summoned,
12 yes.

13 MR. CALIEL: Is it something that would pose
14 an undue hardship for you? Would nobody else be
15 able to cover the training?

16 PROSPECTIVE JUROR: I have a colleague who is
17 out for medical reasons and she hasn't facilitated
18 this training before so I will need to talk to my
19 boss about perhaps being able to get her to be
20 able to get caught up in a week to cover for me.

21 MR. CALIEL: Okay. And that training was
22 scheduled for February 21st?

23 PROSPECTIVE JUROR: Yes.

24 MR. CALIEL: As for next week you don't have
25 any issues?

1 PROSPECTIVE JUROR: Next week I spoke to my
2 boss yesterday and we can get something
3 coordinated for that.

4 MR. CALIEL: So the issue would arise in the
5 following week, if we get to that point, the week
6 of the 21st?

7 PROSPECTIVE JUROR: Yes.

8 MR. CALIEL: Let me also ask you a little bit
9 about your feelings about the death penalty. You
10 indicated you had strong feelings and you did not
11 believe that the death penalty was appropriate.

12 PROSPECTIVE JUROR: Correct.

13 MR. CALIEL: Obviously this case there is the
14 potential if the defendant is found guilty that we
15 proceed to the next phase of the trial which is
16 penalty phase. Do you believe that you could go
17 into the penalty phase with an open mind or is it
18 impossible for you to ever recommend the death
19 penalty?

20 PROSPECTIVE JUROR: With my Master's Degree
21 studies in conflict resolution, I'm very strongly
22 against the death penalty.

23 MR. CALIEL: Okay. The Judge will instruct
24 you as to what the law is. Do you feel that your
25 personal feelings about the death penalty would

1 prohibit you from ever imposing the death penalty
2 no matter what the circumstance?

3 PROSPECTIVE JUROR: I would try my best to be
4 unbiassed, but really I feel strongly against the
5 death penalty.

6 MR. CALIEL: When you say you'd try your
7 best --

8 PROSPECTIVE JUROR: Yes.

9 MR. CALIEL: -- is it impossible for you to
10 tell me at this point in time, affirm that you
11 could consider the death penalty as an option?

12 PROSPECTIVE JUROR: Yes.

13 MR. CALIEL: So you can't foresee any
14 circumstance where you would stand up in court and
15 say, yes, I believe the death penalty is
16 appropriate?

17 PROSPECTIVE JUROR: I cannot.

18 MR. CALIEL: Thank you.

19 I don't have any further questions.

20 MS. SCHLAX: No questions, Your Honor.

21 THE COURT: Thank you, juror [REDACTED] If you'd
22 wait in the hall and please do not discuss your
23 questions and answers with anyone and we'll try to
24 let you know something as quickly as we can.

25 PROSPECTIVE JUROR: Thank you.

1 THE COURT: Thank you.

2 And as juror [REDACTED] leaves, then juror No. [REDACTED] can
3 come in.

4 (Prospective juror absent.)

5 (Prospective juror present.)

6 BAILIFF: Ma'am, if you'll take the second
7 chair in.

8 THE COURT: Good morning, juror No. [REDACTED].
9 We're just asking some follow-up questions
10 individually from the questionnaires and
11 Mr. Fletcher will start.

12 MR. FLETCHER: Thank you, Your Honor.

13 THE COURT: Thank you.

14 MR. FLETCHER: Good morning, juror [REDACTED]

15 PROSPECTIVE JUROR: Good morning.

16 MR. FLETCHER: I've read your questionnaire
17 and I just have a couple of questions for you.
18 You indicated that you know some things about this
19 case from the news?

20 PROSPECTIVE JUROR: (Nods head.)

21 MR. FLETCHER: Did you watch it -- did you
22 see some coverage when it first happened?

23 PROSPECTIVE JUROR: Yeah. Yeah.

24 MR. FLETCHER: And did you follow it ever
25 since?

1 PROSPECTIVE JUROR: Not -- just whatever has
2 been on the news, yeah.

3 MR. FLETCHER: Okay. Do you remember saying
4 uh oh, that's the case I heard about two years
5 ago? Are you that familiar with it?

6 PROSPECTIVE JUROR: I guess, yeah. Yeah.

7 MR. FLETCHER: Have you paid attention to the
8 news over the last, say, seven or eight, ten days?

9 PROSPECTIVE JUROR: Just that the trial was
10 coming up.

11 MR. FLETCHER: Okay. Did you read any news
12 articles about it?

13 PROSPECTIVE JUROR: No. I don't get the
14 paper.

15 MR. FLETCHER: Okay. In the questionnaire we
16 sort of put a fact pattern in there about the
17 allegations. Is that pretty much what you know?

18 PROSPECTIVE JUROR: Yes.

19 MR. FLETCHER: Do you know anything else
20 about it?

21 PROSPECTIVE JUROR: No.

22 MR. FLETCHER: Do you know anything about
23 Rayne Perrywinkle, for instance?

24 PROSPECTIVE JUROR: Just what I heard on the
25 news, that she's the mother.

1 MR. FLETCHER: Okay. How about Donald Smith?
2 Do you know anything about him?

3 PROSPECTIVE JUROR: Other than the news, no.

4 MR. FLETCHER: On the news did they tell you
5 about his past or where he's from, anything like
6 that?

7 PROSPECTIVE JUROR: I don't recall.

8 MR. FLETCHER: Okay. Okay. And question No.
9 -- the question about the death penalty, you wrote
10 that you were for the death penalty and that you
11 believe in the death penalty.

12 PROSPECTIVE JUROR: (Nods head.)

13 MR. FLETCHER: Do you believe that it should
14 be applied in every case where someone is
15 convicted of first degree murder?

16 PROSPECTIVE JUROR: I think every case is
17 different.

18 MR. FLETCHER: Okay. So if we -- if you get
19 there and you find Donald Smith -- you're on the
20 jury, you find that he's guilty beyond a
21 reasonable doubt, and we get to a penalty phase
22 where we're going to decide what happens to him,
23 you're willing to go through a weighing process --

24 PROSPECTIVE JUROR: Yes.

25 MR. FLETCHER: -- to determine which sentence

1 is appropriate?

2 PROSPECTIVE JUROR: Yes.

3 MR. FLETCHER: That's all I have.

4 MR. CALIEL: No questions, Your Honor.

5 THE COURT: All right. Thank you, juror [REDACTED]
6 and if you'll wait in the hall, we'll try to let
7 you know something as quickly as we can. And
8 please do not discuss your questions and answers
9 with the others.

10 PROSPECTIVE JUROR: Yes, ma'am.

11 THE COURT: Thank you.

12 And when juror [REDACTED] leaves, juror [REDACTED] may come
13 in.

14 (Prospective juror absent.)

15 (Prospective juror present.)

16 BAILIFF: Sir, take the second chair in.

17 THE COURT: Good morning, juror No. [REDACTED]
18 Thank you. We're just having a few follow-up
19 questions from your questionnaire, which all have
20 to be done individually, and Ms. Schlax will
21 start.

22 MS. SCHLAX: Good morning, juror [REDACTED] Sir,
23 we've had an opportunity to look at your
24 questionnaire and you had indicated that prior to
25 walking into the courthouse on Monday you had not

1 heard anything about this case.

2 PROSPECTIVE JUROR: Yes, ma'am. Nothing.

3 MS. SCHLAX: Okay. How long have you lived
4 in Jacksonville?

5 PROSPECTIVE JUROR: My whole life other than
6 about a few years I moved out, moved with my
7 family to West Virginia and then came back.

8 MS. SCHLAX: What years were those?

9 PROSPECTIVE JUROR: 2000, 1999.

10 MS. SCHLAX: Okay. So quite awhile back?

11 PROSPECTIVE JUROR: Yes.

12 MS. SCHLAX: How long have you worked at
13 Walmart?

14 PROSPECTIVE JUROR: Eight years. Be eight
15 years in June.

16 MS. SCHLAX: Which one do you work at?

17 PROSPECTIVE JUROR: Normandy.

18 MS. SCHLAX: Okay. You've seen through the
19 factual summary of the allegations that were given
20 to you that there was a Walmart involved.

21 PROSPECTIVE JUROR: Yes, ma'am.

22 MS. SCHLAX: But yet you heard nothing about
23 this case whatsoever?

24 PROSPECTIVE JUROR: No, ma'am.

25 MS. SCHLAX: Or no security concerns within

1 Walmart as an organization or anything that went
2 through, you know, as you worked there?

3 PROSPECTIVE JUROR: No, ma'am. That's
4 usually with a salary member of management higher.
5 I'm just a manager, hourly manager of a
6 department, so we really don't get involved with
7 those type situations, but there is usually
8 conference calls or something like that with the
9 salary members of management and security.

10 MS. SCHLAX: Okay. You've obviously had to
11 miss work.

12 PROSPECTIVE JUROR: Yes, ma'am.

13 MS. SCHLAX: Has it come up with anyone that
14 you've spoken to at your work in regards to that
15 you're a potential juror in this specific case?

16 PROSPECTIVE JUROR: No, ma'am. I just told
17 them I had my jury duty and that's it. I didn't
18 say nothing else.

19 MS. SCHLAX: Okay. Okay. And when you say
20 retailer, what specifically do you do in the
21 store?

22 PROSPECTIVE JUROR: I'm a department manager

23

24 MS. SCHLAX: I'm sorry.

25 PROSPECTIVE JUROR: I'm a department manager

1

2

[REDACTED] stuff like that.

3

MS. SCHLAX: Okay. So you yourself are upper management?

4

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PROSPECTIVE JUROR: Yes, but I'm not salary. Salaries usually have more of a hands-on with higher things than what we do. We get -- we answer to the assistant manager which is the first level of salary.

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MS. SCHLAX: Okay. And the whole reason we go through this process and have asked you to sacrifice so much of your time waiting to be questioned somewhat briefly is that ultimately we need jurors that can actually give the constitutional guarantee of a presumption of innocence to my client. Can you presume my client innocent as we sit here today?

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PROSPECTIVE JUROR: After reading the paper I would say no.

19

20

MS. SCHLAX: So when did you -- when did you read the paper, sir?

21

22

PROSPECTIVE JUROR: I read it whenever the -- well, whenever we did the questionnaire, I just read that little part. The way it seems it was not innocent.

23

24

25

1 MS. SCHLAX: Okay. So for you just reading
2 the allegations --

3 PROSPECTIVE JUROR: Yes, ma'am.

4 MS. SCHLAX: -- you feel that you would not
5 be an appropriate juror for this case and could
6 not give Mr. Smith his constitutional guarantee of
7 a fair and impartial trial?

8 PROSPECTIVE JUROR: I mean, yes, I could give
9 him the fair, yes. I meant if I felt like he was
10 guilty or innocent right now. But, yes, I could
11 give him a fair.

12 MS. SCHLAX: Okay. Well, and let me explore
13 that for a second with you.

14 PROSPECTIVE JUROR: Yes, ma'am.

15 MS. SCHLAX: As we sit here right now, do you
16 have an opinion as to whether he's guilty or not
17 guilty?

18 PROSPECTIVE JUROR: Yes, ma'am.

19 MS. SCHLAX: Okay. And what is that opinion?

20 PROSPECTIVE JUROR: My opinion is he is
21 guilty.

22 MS. SCHLAX: Okay. And what -- in your mind
23 what is that based on?

24 PROSPECTIVE JUROR: It's based on the fact
25 that there's no other solution of he's left with

1 her and nobody else has been -- seen them anywhere
2 else and the paper says. It just -- I have that
3 feeling.

4 MS. SCHLAX: Okay.

5 PROSPECTIVE JUROR: It's only -- I know it's
6 only real brief and it's real small, but after
7 just looking through it real quick like that, it
8 just seemed like it was...

9 MS. SCHLAX: Okay. Those that ultimately are
10 selected on the jury at the beginning of the
11 trial, which we would still be at the beginning of
12 the trial.

13 PROSPECTIVE JUROR: Yes, ma'am.

14 MS. SCHLAX: Before any evidence is
15 presented, must presume or believe Mr. Smith is
16 innocent. Can you do that at this point?

17 PROSPECTIVE JUROR: I don't believe so,
18 ma'am. Not with what I saw and I have a one year
19 old daughter so it was a little bit of a...

20 MS. SCHLAX: Hit a little too close to home?

21 PROSPECTIVE JUROR: Yes, ma'am.

22 MS. SCHLAX: Okay. I don't have any further
23 questions.

24 THE COURT: Any questions?

25 MR. CALIEL: Just briefly, Your Honor.

1 Good morning, sir.

2 PROSPECTIVE JUROR: Good morning.

3 MR. CALIEL: And I think when you keep on
4 saying, referring to the paper, you're talking
5 about the questionnaire and the factual summary --

6 PROSPECTIVE JUROR: Yes, sir.

7 MR. CALIEL: -- that we provided.

8 PROSPECTIVE JUROR: Yes, sir.

9 MR. CALIEL: Obviously the purpose of that
10 factual summary was to give you an idea of what
11 the facts were going to be, but you've heard no
12 evidence in this case.

13 PROSPECTIVE JUROR: Yes, sir.

14 MR. CALIEL: Correct? The Judge is going to
15 instruct you that from this point in time forward
16 you must presume Mr. Smith guilty. That you
17 cannot consider what was on that piece of paper as
18 evidence. Do you understand that?

19 PROSPECTIVE JUROR: Yes, sir, I understand.

20 MR. CALIEL: Can you set aside what you read
21 in that factual summary that we provided to you
22 and if you're selected as a juror sit in the jury
23 box with an open mind and consider only the
24 evidence that you hear from the witness stand or
25 the evidence that you see in the form of exhibits

1 in reaching a conclusion in this case?

2 PROSPECTIVE JUROR: I believe so, sir.

3 MR. CALIEL: Okay. The main reason why I ask
4 this, obviously we give you these facts and the
5 facts sound really bad, it was to try to jog your
6 memory, and you didn't have any knowledge of this
7 case before you came into the courtroom, correct?

8 PROSPECTIVE JUROR: Yes, sir, no.

9 MR. CALIEL: Now, can you, much like we would
10 ask you if you have seen or read a news article,
11 can you set aside what we told you in that little
12 paragraph or two and sit and listen to the
13 evidence and base your decision solely upon the
14 evidence that's in this case? Can you do that?

15 PROSPECTIVE JUROR: Yes, sir.

16 MR. CALIEL: Okay. And I guess that's the
17 question that we're trying to get at, is can you
18 presume -- because right now you would agree with
19 me you've seen no evidence in this case, right?

20 PROSPECTIVE JUROR: Yes, sir.

21 MR. CALIEL: You haven't heard a witness
22 testify, you haven't seen a photograph or seen a
23 piece of evidence?

24 PROSPECTIVE JUROR: No, sir, I don't like
25 listening to the news because of all the bad

1 things on it. I just rather move on with my life.
2 If I look at the news it's just mostly just the
3 weather. I don't try to pay attention to anything
4 else really.

5 MR. CALIEL: The law requires that the State
6 of Florida, myself, the State Attorney, Ms. Nelson
7 and Ms. Wheeler-Sanchez, it's incumbent on us to
8 prove the defendant is guilty beyond and to the
9 exclusion of a reasonable doubt.

10 PROSPECTIVE JUROR: Yes, sir.

11 MR. CALIEL: So at this point we've shown you
12 nothing. Would you agree with that?

13 PROSPECTIVE JUROR: Yes, sir.

14 MR. CALIEL: So if we don't show you
15 anything, we don't present the evidence, then what
16 must your verdict be?

17 PROSPECTIVE JUROR: It would have to be a
18 fair amount of evidence.

19 MR. CALIEL: And so if you don't get evidence
20 from us you would have to find him not guilty,
21 right?

22 PROSPECTIVE JUROR: Right.

23 MR. CALIEL: So understanding that concept
24 and that's how a trial works that you have to come
25 in and the slate has to be clean and you have to

1 only consider what you hear from that witness
2 stand, can you do that? Can you give Mr. Smith a
3 clean slate walking in and rely only upon the
4 evidence that you hear during the course of the
5 trial to make that determination?

6 PROSPECTIVE JUROR: Yes, sir.

7 MR. CALIEL: Okay. Can you hold me and
8 Ms. Nelson and Ms. Wheeler-Sanchez to our burden,
9 make sure that we prove this case beyond a
10 reasonable doubt before you find him guilty?

11 PROSPECTIVE JUROR: Yes, sir.

12 MR. CALIEL: So you can presume him innocent
13 then?

14 PROSPECTIVE JUROR: Yes.

15 MR. CALIEL: Thank you.

16 I don't have any further questions

17 THE COURT: Any follow-up?

18 MS. SCHLAX: No, Your Honor.

19 THE COURT: All right. Juror No. [REDACTED] if
20 you'll wait in the hall we'll try to let you know
21 something as soon as we can.

22 And please do not discuss your questions and
23 answers with anybody. Thank you.

24 PROSPECTIVE JUROR: Thank you.

25 THE COURT: And when juror [REDACTED] leaves, juror

1 ██████ may come in.

2 (Prospective juror absent.)

3 (Prospective juror present.)

4 BAILIFF: Sir, take the second seat in.

5 THE COURT: Good morning, juror No. ██████

6 PROSPECTIVE JUROR: Good morning.

7 THE COURT: We just needed to bring you in
8 individually just for a few follow-up questions
9 from your questionnaire.

10 PROSPECTIVE JUROR: Okay.

11 THE COURT: And Mr. Caliel will start.

12 MR. CALIEL: Good morning, sir.

13 PROSPECTIVE JUROR: Good morning.

14 MR. CALIEL: Sir, you had indicated that
15 based upon your employment that participating in
16 this trial could be a hardship. Could you explain
17 that to us, please?

18 PROSPECTIVE JUROR: Well, I can show you due
19 to physical limitations, I've got soft tissue
20 injury in both my arms as you can see the swelling
21 right here, it's in both of my arms. I'm
22 self-employed and I run a mobile detailing
23 business. I can hardly even do it. The last time
24 did it I had flare ups and I was down for two
25 days. I'm going to acupuncture for the treatment

1 of it and I'm on treatment, medication from him
2 has been -- I don't want to say a cuss word, but
3 you know what I'm saying. And from that I'm
4 having to drive Uber full-time right now and it's
5 not -- it's barely enough. I mean I'm struggling.
6 I'm struggling.

7 MR. CALIEL: Do you believe that
8 participating in this trial would pose such a
9 harsh financial hardship for you that it would be
10 impossible for you to serve?

11 PROSPECTIVE JUROR: Mentally -- I just want
12 to feel better. Like I'm -- I just don't feel
13 like I -- I can be honest and answer and do a good
14 job, I think, but I just -- I just mentally I just
15 don't think I'm ready.

16 MR. CALIEL: You don't believe mentally,
17 based upon --

18 PROSPECTIVE JUROR: What I'm going through.

19 MR. CALIEL: -- your injuries and what you're
20 going through that you could give your fair
21 attention to a trial?

22 PROSPECTIVE JUROR: Yes. This is just bad
23 timing.

24 MR. CALIEL: Also you had indicated in
25 regards to having strong feelings about the death

1 penalty that if somebody is found guilty of murder
2 that they should receive the death penalty.

3 PROSPECTIVE JUROR: Right.

4 MR. CALIEL: Is that every murder or would it
5 only be under certain circumstances?

6 PROSPECTIVE JUROR: I don't know how to
7 answer that.

8 MR. CALIEL: Well, let me see if I can help
9 you. The law will provide certain circumstances
10 in which the death penalty is appropriate. Not
11 every homicide or not every murder is a death
12 penalty case. Do you believe that you could go
13 into a penalty phase with a fair and open mind and
14 consider the possibility, if Mr. Smith is found
15 guilty, that life in prison could be a possible
16 option, in addition to the death penalty?

17 PROSPECTIVE JUROR: No. Yeah -- I mean,
18 yeah, you could do that. I just think that
19 justice should be served for the victims families
20 if found guilty.

21 MR. CALIEL: Yeah. And in this case from the
22 limited amount that you've heard of the
23 allegations, could life in prison be justice if,
24 in fact, he was found guilty?

25 PROSPECTIVE JUROR: I believe that he should

1 -- if he's found guilty he should, you know, it's
2 what I've always believed since growing up as a
3 kid that it's the death penalty if someone was
4 found guilty of something such as that.

5 MR. CALIEL: Thank you, sir. I don't have
6 any further questions.

7 THE COURT: Any question?

8 MS. SCHLAX: No, Your Honor.

9 THE COURT: Okay. Juror No. [REDACTED] thank you.
10 If you'll wait in the hall, we'll try to let you
11 know something as quickly as we can. And please
12 do not discuss your answers and questions with
13 anybody.

14 PROSPECTIVE JUROR: I promise I won't. I
15 won't.

16 THE COURT: Thank you, sir.

17 When juror 120 leaves, juror [REDACTED] can come in.

18 (Prospective juror absent.)

19 (Prospective juror present.)

20 BAILIFF: Ma'am, if you'll take the second
21 seat in.

22 PROSPECTIVE JUROR: Okay.

23 THE COURT: Good morning, juror No. [REDACTED]
24 We're just bringing each of you in for some
25 follow-up questions from your questionnaire and

1 Mr. Caliel will start. Thank you.

2 MR. CALIEL: Good morning.

3 PROSPECTIVE JUROR: Good morning.

4 MR. CALIEL: Ma'am, you indicated on your
5 questionnaire that you had strong feelings about
6 the death penalty. Could you explain that to us?

7 PROSPECTIVE JUROR: Like you getting on my
8 questionnaire, I don't believe a man has a right
9 to take a life. That only God does because he
10 gives life and he's the only one that has the
11 right.

12 MR. CALIEL: That has the right to do so.

13 PROSPECTIVE JUROR: Um-hum.

14 MR. CALIEL: As you can tell, because why
15 we're here and we're having this discussion, the
16 law in the State of Florida allows for the death
17 penalty to be imposed under certain circumstances.
18 Given your personal and religious beliefs, could
19 you believe that you could ever impose the death
20 penalty?

21 PROSPECTIVE JUROR: No, I don't.

22 MR. CALIEL: Okay. So regardless of the
23 circumstances, regardless of the facts, under no
24 circumstance do you believe you could ever impose
25 the death penalty?

1 PROSPECTIVE JUROR: No.

2 MR. CALIEL: Okay. Thank you. I don't have
3 any further questions.

4 MS. SCHLAX: No questions, Your Honor.

5 THE COURT: All right. Juror No. [REDACTED] if
6 you'd wait in the hall we'll try to let you know
7 something as quick as we can.

8 PROSPECTIVE JUROR: Thank you.

9 THE COURT: And please do not discuss your
10 questions and answers with anyone. Thank you.

11 And when juror [REDACTED] leaves, juror [REDACTED] can come
12 in.

13 (Prospective juror absent.)

14 MR. CALIEL: Judge, I believe juror No. [REDACTED]
15 was already excused. That was the gentleman who
16 had the issue on Monday.

17 THE COURT: Oh, I'm sorry.

18 MS. SCHLAX: Blood pressure?

19 THE COURT: Oh, the blood pressure.

20 MR. CALIEL: No, Moncrief was the gentleman
21 in the white shirt.

22 THE COURT: What now?

23 MR. CALIEL: He was the gentleman in the
24 white shirt who we brought in because of an issue.

25 THE COURT: Right. I'm sorry. Juror No.

1 [REDACTED] I gave you the wrong numbers earlier.

2 BAILIFF: I have it right. Thank you.

3 THE COURT: Okay. Thank you.

4 (Prospective juror present.)

5 BAILIFF: Ma'am, if you'll take the second
6 seat in.

7 THE COURT: Thank you, juror No. [REDACTED]

8 We're bringing each of you in individually
9 just for some follow-up questions from your
10 questionnaire and Mr. Caliel will start. Thank
11 you.

12 MR. CALIEL: Good morning, ma'am.

13 Ma'am, I just wanted to follow-up because you
14 brought it to our attention under the hardship
15 section that you said you have issues with memory
16 maybe. I'm quoting you, only that my memory is
17 not the best at this age.

18 PROSPECTIVE JUROR: It's just normal for this
19 age.

20 MR. CALIEL: All right. I understand.
21 Sometimes I forget things, even what I did
22 yesterday. But do you believe that your memory
23 issues would affect your ability to sit as a juror
24 or could you listen to the evidence and --

25 PROSPECTIVE JUROR: Yeah, I could listen to

1 it.

2 MR. CALIEL: Okay. Let me follow-up then
3 also with the question that was posed to you in
4 regards to something that might have to be brought
5 to our attention. You stated that you don't --
6 you do not want to see or hear about gruesome
7 details involved in this case and things of that
8 nature. Obviously I don't think any of us want to
9 have to talk about the death of an eight year old
10 child, but I do anticipate if you're asked to
11 serve as a juror in this case that a portion of
12 the evidence that will be presented will be some
13 photographs and the photographs are not pleasant.
14 They're not pleasant. They're fairly gruesome,
15 some may even describe them as shocking. But it
16 would be your role as a juror to listen to the
17 evidence and to review the evidence and part of
18 that evidence is the photographs involved in this
19 case. While I understand that nobody wants to
20 have to look at 'em, could you do so in your role
21 as a juror if asked to do so?

22 PROSPECTIVE JUROR: Yes.

23 MR. CALIEL: Okay. Understanding that they
24 could, you know, create an emotional response from
25 anybody, do you believe that simply by seeing

1 pictures that you couldn't proceed as a juror in
2 this case?

3 PROSPECTIVE JUROR: No, I just wouldn't keep
4 looking at 'em.

5 MR. CALIEL: And we're not going to ask you,
6 you don't need to stare at them. You don't need
7 to have them up in front of you for hours and
8 hours on end, but when asked at that portion of
9 the testimony, could you look at the photographs
10 when they depict certain things that are important
11 in the case, evidentiary issues in the case?

12 PROSPECTIVE JUROR: I guess it's like a
13 grown-up responsibility.

14 MR. CALIEL: Exactly. Unfortunately, we have
15 to do something sometimes that we don't like to,
16 but we so sort of suck it up. Do you think that
17 you could, you know, while not enjoying the
18 process, could you at least serve in that role?

19 PROSPECTIVE JUROR: Yes.

20 MR. CALIEL: Okay. All right. I don't have
21 any further questions.

22 THE COURT: Mr. Fletcher.

23 MR. FLETCHER: Thank you, Your Honor.

24 Good afternoon, juror [REDACTED]

25 PROSPECTIVE JUROR: Hi.

1 MR. FLETCHER: Ma'am, I want to ask you some
2 questions about the news coverage that you've seen
3 in this case. Can you tell me how long you've
4 been seeing it on the news?

5 PROSPECTIVE JUROR: Oh, I only read about it
6 after it happened. I haven't kept up with
7 anything since.

8 MR. FLETCHER: Okay. So right after it
9 happened a couple of years ago.

10 PROSPECTIVE JUROR: Yes.

11 MR. FLETCHER: What about this last say
12 seven, eight, ten days?

13 PROSPECTIVE JUROR: Oh, no.

14 MR. FLETCHER: If I told you it's been in the
15 news and paper every single day.

16 PROSPECTIVE JUROR: I don't get the paper and
17 I haven't heard the news.

18 MR. FLETCHER: Is your knowledge of the case
19 pretty much limited to what we kind of wrote?

20 PROSPECTIVE JUROR: Yes.

21 MR. FLETCHER: Okay. One thing we didn't
22 write, and nobody has told you here, is that you
23 -- and you wrote this, you said I think Smith has
24 a record. Do you remember that?

25 PROSPECTIVE JUROR: Oh, yeah.

1 MR. FLETCHER: Do you remember writing that?

2 PROSPECTIVE JUROR: But I'm not positive.

3 MR. FLETCHER: But that's something that's
4 sticking out in your memory.

5 PROSPECTIVE JUROR: I guess, if I wrote it
6 down.

7 MR. FLETCHER: Okay. And do you remember
8 being told what that record is?

9 PROSPECTIVE JUROR: No.

10 MR. FLETCHER: If it was something like
11 traffic deaths, is that something you think you
12 would have put down here or is it something more
13 serious?

14 PROSPECTIVE JUROR: Probably not.

15 MR. FLETCHER: Okay. So something must have
16 -- for that to still be there, it must have been
17 something significant.

18 PROSPECTIVE JUROR: But I can't remember
19 what.

20 MR. FLETCHER: Can't remember. Okay. Do you
21 think that your suspicion that he might have a
22 record will play into your decision as to whether
23 or not he's not guilty or he's guilty?

24 PROSPECTIVE JUROR: No.

25 MR. FLETCHER: And would you -- if you're in

1 the back and somebody in the back says, you know,
2 I think he's got a prior record, are you going to
3 participate in that conversation with that juror?

4 PROSPECTIVE JUROR: No, if it's not in
5 evidence.

6 MR. FLETCHER: If it's not in evidence,
7 you're going to consider it?

8 PROSPECTIVE JUROR: No.

9 MR. FLETCHER: You can set aside anything
10 you've read in the paper and may have heard on the
11 news and give Mr. Smith a fair trial.

12 PROSPECTIVE JUROR: Yes.

13 MR. FLETCHER: Thank you. That's all I have.

14 THE COURT: Anything further?

15 MR. CALIEL: No follow-up.

16 THE COURT: Okay. Juror No. [REDACTED] if you'd
17 wait in the hall we'll let you know something as
18 quick as we can.

19 And do not discuss your questions or answers
20 with anyone.

21 PROSPECTIVE JUROR: Okay.

22 THE COURT: When juror [REDACTED] leaves, juror No.
23 [REDACTED] can come in.

24 (Prospective juror absent.)

25 (Prospective juror present.)

1 THE BAILIFF: Ma'am, if you'll take the
2 second seat in.

3 THE COURT: Good morning, juror No. [REDACTED]
4 We're just bringing each of you in
5 individually for some follow-up questions from
6 your questionnaire and Ms. Schlax will ask you
7 some questions.

8 MS. SCHLAX: Good morning.

9 We've had an opportunity to look at your
10 questionnaire and I appreciate you spending so
11 much time so that we could go over it with you.

12 You had indicated, and I didn't know if you
13 received further information, that you were
14 concerned about a hardship in regard to your work.

15 PROSPECTIVE JUROR: (Nods head.)

16 MS. SCHLAX: Have you been -- having been
17 given the tentative schedule, have you been able
18 to communicate with your employer in regards to
19 how that will work?

20 PROSPECTIVE JUROR: Yeah. I won't be getting
21 any type of -- as far as being paid for it.

22 MS. SCHLAX: Sure. What have your
23 conversations with your employment been?

24 PROSPECTIVE JUROR: They're not allowing me
25 to continue to keep coming because we're only

1 certain amount of staff members inside of our
2 company.

3 MS. SCHLAX: And I think you will find that
4 legally they're not allowed to terminate your
5 employment based on your civic duty to have to
6 serve on a jury, but I guess more importantly to
7 you, and so it's important to us, how about
8 compensation? Will you, for any day that you --
9 that you miss, you will not be compensated at all?

10 PROSPECTIVE JUROR: No, ma'am.

11 MS. SCHLAX: Okay. Okay. And if you were
12 ultimately asked to make that sacrifice, could you
13 do that?

14 PROSPECTIVE JUROR: Yes, ma'am.

15 MS. SCHLAX: Okay. Do you think if, you
16 know, if the case proceeded through a guilt phase
17 as well as what they call a penalty phase where
18 you're listening to circumstances in regards to
19 Mr. Smith's life, do you think you could do so
20 knowing that, in fact, you're losing money?

21 PROSPECTIVE JUROR: No.

22 MS. SCHLAX: I'm sorry.

23 PROSPECTIVE JUROR: You asked me can I --

24 MS. SCHLAX: Do you think you'd be able to
25 listen and be fully attentive and focussed on what

1 you're hearing if you realized, wow, everything --
2 everyday that I'm here listening to the
3 circumstances of his life is a day I'm not getting
4 paid?

5 PROSPECTIVE JUROR: It's a hard question.
6 Yeah.

7 MS. SCHLAX: You think that would impact on
8 just how you focus on the evidence?

9 PROSPECTIVE JUROR: (Head nod.) Yes, ma'am.

10 MS. SCHLAX: I appreciate your time. I
11 appreciate you being here.

12 THE COURT: Any follow-up?

13 MR. CALIEL: No questions, Your Honor.

14 THE COURT: All right. Thank you, juror No.

15 ██████████ And if you'll wait in the hall we'll let you
16 know something pretty soon, but do not discuss
17 your questions and answers with anyone. Thank
18 you.

19 And when juror No. ██████████ leaves, juror No. ██████████
20 can come in.

21 (Prospective juror absent.)

22 (Prospective juror present.)

23 BAILIFF: Sir, you can take the second chair
24 in.

25 THE COURT: Good morning, juror No. ██████████

1 We're just bringing each of you in so we can ask
2 you some follow-up questions from the answers you
3 gave on your questionnaire.

4 PROSPECTIVE JUROR: Yes.

5 THE COURT: Okay. And Mr. Caliel is going to
6 start by asking you questions.

7 MR. CALIEL: Sir, you indicated on your
8 questionnaire that English was not your primary
9 language.

10 PROSPECTIVE JUROR: No.

11 MR. CALIEL: Do you have difficulty in
12 understanding English to the point where you can
13 not understand certain words or concepts?

14 PROSPECTIVE JUROR: Yes.

15 MR. CALIEL: And you had indicated that on
16 your questionnaire where you said at home you
17 speak Bosnian language.

18 PROSPECTIVE JUROR: Yes.

19 MR. CALIEL: Have you had difficulty
20 following the instructions and listening to what
21 the Court has said and understanding everything
22 the Court has said?

23 PROSPECTIVE JUROR: Yes. I'm not a hundred
24 percent sure, you know, like I'm missing so much
25 because it's not my first language, you know. And

1 sometime I miss parts. I mean that's me.

2 MR. CALIEL: Have you had difficulty
3 understanding how to do things that you've been
4 asked because of the language barrier?

5 PROSPECTIVE JUROR: Yes.

6 MR. CALIEL: Okay. No further questions,
7 Your Honor.

8 THE COURT: All right. Thank you, juror No.
9 126. If you can wait in the hall, we'll let you
10 know something pretty quickly, but please do not
11 discuss these questions and answers with the
12 others.

13 PROSPECTIVE JUROR: Okay.

14 THE COURT: Thank you. You're free to go
15 back out in the hall.

16 When juror [REDACTED] leaves, juror [REDACTED] can come in.

17 (Prospective juror absent.)

18 (Prospective juror present.)

19 BAILIFF: Ma'am, if you'll take the second
20 seat in.

21 PROSPECTIVE JUROR: Okay.

22 THE COURT: Good morning, juror No. [REDACTED] If
23 you'll recall, we're using numbers instead of your
24 names. And we're bringing you in individually
25 just to ask a few follow-up questions and Mr.

1 Caliel will start.

2 MR. CALIEL: Good morning.

3 PROSPECTIVE JUROR: Good morning.

4 MR. CALIEL: Ma'am, you had indicated based
5 upon your employment that there -- this trial may
6 pose a hardship. Can you explain to us a little
7 bit?

8 PROSPECTIVE JUROR: This time of year we're
9 -- well, first of all, my boss is the deputy
10 secretary for health and I oversee all clinical
11 services, dental services, pharmacy, behavioral
12 health, a lot of the services in the agency along
13 with two assistant directors. And we each
14 basically fill in for her when she's out in
15 Tallahassee and around the state.

16 MR. CALIEL: Obviously this is the time of
17 year where flu season is pretty significant.

18 PROSPECTIVE JUROR: Yes, and I'm also subject
19 matter expert for stuff like that as well.

20 MR. CALIEL: And do you believe, given the
21 schedule that the Judge has outlined, that being
22 out of work for the remainder of this week, pretty
23 much all of next week and a portion of the week
24 that follows would be a significant hardship?

25 PROSPECTIVE JUROR: Yes. As a matter of

1 fact, I have work in my bag. I was working on
2 contracts. We have HIV related contracts that are
3 coming up and STD services related contracts that
4 I'm responsible for helping to review because
5 those services fall under me.

6 MR. CALIEL: Understood. I guess the one
7 question I would have, though, it sounds like
8 obviously this is a fairly big organization and
9 you have certain responsibilities. Much like many
10 jurors who are going to be asked to serve in this
11 case, could you make the sacrifice, if asked to do
12 so, to serve in this case without any undue
13 hardship to you?

14 PROSPECTIVE JUROR: I -- I do whatever I need
15 to do, I guess.

16 MR. CALIEL: Okay.

17 PROSPECTIVE JUROR: She will have to take the
18 work with her to Tallahassee to do whatever needs
19 to be done.

20 MR. CALIEL: I can imagine. As you can
21 imagine, a lot of our fellow prospective jurors
22 come in have different fields of work but also
23 have different types of sacrifices that they're
24 going to have to make to serve as well so we
25 appreciate that.

1 Next I'd like to ask you a little bit about
2 your feelings about the death penalty because you
3 stated in your explanation I'm against the death
4 penalty with our current system. Why is that?

5 PROSPECTIVE JUROR: Our current system is
6 fairly broken and that's because it's made of
7 people. People are not often truthful and it's
8 unfortunate that in several circumstances, and not
9 necessarily that any of those were up for death
10 penalty, thinking off the top of my head, but
11 folks were found innocent after being found
12 guilty. Sometimes 20, 30 years later. That's a
13 loss of life, that's a loss of time with family.
14 And it's unfortunate. And a lot of it is not
15 necessarily based on the fact that we have newer
16 technology, but because someone lied.

17 MR. CALIEL: Okay. And I understand that,
18 the flaws within the system. And obviously death
19 is final.

20 PROSPECTIVE JUROR: Absolutely.

21 MR. CALIEL: Given your concerns and given
22 your feelings about the death penalty, do you feel
23 you could ever under any circumstance make a
24 recommendation that the defendant in this case be
25 put to death?

1 PROSPECTIVE JUROR: As a Christian it would
2 be difficult for me to do that.

3 MR. CALIEL: Okay. You said it would be
4 difficult.

5 PROSPECTIVE JUROR: I can't. And as a
6 physician I'm bound to preserve life as much as I
7 can and within my power and so, yeah.

8 MR. CALIEL: Do you believe that under no
9 circumstance could you ever recommend the death
10 penalty?

11 PROSPECTIVE JUROR: No, you should never say
12 never, but at this time I -- I -- it would be
13 difficult for me to think of a circumstance where
14 I could.

15 MR. CALIEL: Thank you.

16 I don't have any further questions.

17 THE COURT: Anything further?

18 MS. SCHLAX: No, Your Honor.

19 THE COURT: Thank you juror [REDACTED] If you'll
20 wait in the hall, we'll let you know something in
21 just a few minutes. But please do not discuss your
22 questions and answers with others.

23 PROSPECTIVE JUROR: Am I allowed to make a
24 statement? Because there's something I forgot to
25 put in my paperwork.

1 MR. CALIEL: Sure.

2 THE COURT: Any objection?

3 MS. SCHLAX: No, Your Honor.

4 THE COURT: Go ahead.

5 PROSPECTIVE JUROR: Monday night when I got
6 home, just thinking about the case, I recall that
7 this young -- Cherish was actually one of the
8 patients that was seen in one of our centers. I
9 did not go back and look in her record to see if I
10 was actually her physician at some point, but she
11 was a patient at one of our centers.

12 THE COURT: Is there anything about that that
13 would affect your ability to be fair and impartial
14 juror?

15 PROSPECTIVE JUROR: As a pediatrician, yeah.

16 THE COURT: It would?

17 PROSPECTIVE JUROR: Yeah, and knowing -- and
18 because I treat my patients like family, it makes
19 it a little more difficult.

20 THE COURT: Okay. Did you all have anymore
21 follow-up questions?

22 MS. SCHLAX: No, Your Honor.

23 MR. CALIEL: None from the State.

24 THE COURT: Thank you for letting us know
25 that.

1 We'll let you know something in just a few
2 minutes.

3 PROSPECTIVE JUROR: Thank you.

4 THE COURT: Again, please do not discuss your
5 questions and answers.

6 And when juror [REDACTED] leaves, [REDACTED] can come in.

7 (Prospective juror absent.)

8 (Prospective juror present.)

9 BAILIFF: Sir, take the second seat in.

10 PROSPECTIVE JUROR: Okay.

11 THE COURT: Thank you, juror No. [REDACTED]

12 We're just bringing each of you in
13 individually for a few follow-up questions from
14 your questionnaire.

15 Mr. Caliel.

16 MR. CALIEL: Thank you, Your Honor.

17 Good afternoon, sir.

18 PROSPECTIVE JUROR: Hi.

19 MR. CALIEL: Just to ask a couple of
20 follow-up questions based upon your hardship that
21 you indicated. Were you able to get in contact
22 with facility and fellow students regarding the
23 projects and the presentations that you had coming
24 up if you had to come back to serve later on this
25 week and in the future week?

1 PROSPECTIVE JUROR: If I have to it's fine.
2 It's just the only thing that I was worried about
3 was knowing what days because if I'm not here I
4 have to actually present and take those tests. If
5 I'm not -- if I am here, of course, they'll push
6 it. But my team has to give the presentation
7 without me so they have to know what slides to
8 prepare, things like that.

9 MR. CALIEL: And we're pretty certain that
10 jury selection will last this week. If you're
11 selected as a juror through the next process, it
12 would be four days at a minimum next week and then
13 at a minimum three days the following week. And
14 so you will know in advance what days you'll be
15 needed --

16 PROSPECTIVE JUROR: Okay.

17 MR. CALIEL: -- to be able to handle that.
18 So with that understanding, those hardships can be
19 taken care of and you can make accommodations?

20 PROSPECTIVE JUROR: Absolutely.

21 MR. CALIEL: Okay. The next question I
22 wanted to ask you was in regards to your answer
23 about the death penalty. You stated you do not
24 personally believe in the death penalty. You
25 indicated you don't believe it's a proper form of

1 punishment. Why is that?

2 PROSPECTIVE JUROR: I think if -- it's a
3 convoluted question.

4 MR. CALIEL: Lawyers ask those all the time.

5 PROSPECTIVE JUROR: So I'm not a religious
6 person so I don't think there's anything after
7 this. I don't know if it's acceptable for -- to
8 take that situation away from someone no matter
9 what the cause. I do think if someone was to be
10 punished for the actions they do, cutting it off
11 entirely doesn't really make them regret anything.
12 These people could be put into community service,
13 they could give back to the community, things like
14 that rather than just wait in a jail cell.

15 MR. CALIEL: That being said, obviously, and
16 you seem to indicate that based upon your answer.
17 The law in the State of Florida allows for the
18 death penalty under certain circumstances. Do you
19 believe that you could follow the law as the Court
20 instructs you and consider the death penalty as a
21 potential option in this case?

22 PROSPECTIVE JUROR: I'm -- I believe I stated
23 in the -- the next sentence that if the city,
24 people of the state vote that's the situation,
25 that's not my statement to make that they can do.

1 I think the law is the law. If people wanted that
2 to be the situation, or the governor wanted that
3 to be the situation, whatever the case may be, I
4 have to follow that until it's changed.

5 MR. CALIEL: Okay. Do you believe, though,
6 because sometimes some people have personal
7 beliefs, they want to try to follow the law, if
8 you were given the law in this case and you're
9 told how to evaluate and how to weigh the
10 circumstances and make a determination as to
11 whether the death penalty is appropriate or not,
12 do you believe you could follow that law and come
13 into this courtroom and recommend in open court
14 that the defendant, Mr. Smith, be put to death?

15 PROSPECTIVE JUROR: If he's guilty and that's
16 what the law indicates that's the situation that
17 happens, that's -- that's the way it happens. I'm
18 not going to make someone innocent. I'm not going
19 to make someone guilty if they're not guilty.
20 Whatever I see fit is the verdict, right?

21 MR. CALIEL: So you can set aside, even
22 though you don't personally have a belief in the
23 death penalty, you believe you could follow the
24 law and impose the death penalty when appropriate?

25 PROSPECTIVE JUROR: This is my job at this

1 point.

2 MR. CALIEL: Perfect.

3 PROSPECTIVE JUROR: I have to do what my job
4 tells me to do.

5 MR. CALIEL: Perfect. Thank you, sir.
6 Greatly appreciate it.

7 THE COURT: Anything further?

8 MS. SCHLAX: No, Your Honor.

9 THE COURT: Thank you, juror [REDACTED] We'll try
10 to let you all know something in a few minutes,
11 the ten of you that we just talked to, but please
12 do not discuss your questions and answers with
13 anybody. We'll have you back in shortly. Thank
14 you.

15 (Prospective juror absent.)

16 MR. CALIEL: Your Honor, before we bring in
17 juror [REDACTED] the reason why we had indicated we
18 might need to speak to her is they indicated that
19 they had a private matter that they needed to take
20 up. Are we doing any accommodations when it comes
21 to that beyond just speaking to them individually
22 or is that something that has to be done in open
23 court? Because there was that specific request.

24 THE COURT: Well, first of all, I think we
25 should go over the ten that we just done ten.

1 MR. CALIEL: Oh, that was tenth. I
2 apologize. I thought that was the tenth one. Is
3 that correct?

4 BAILIFF: Yes, ma'am.

5 MR. CALIEL: I apologize, Your Honor, I
6 thought the next one was ten.

7 THE COURT: Yes, there are times when jurors
8 would like to speak privately. We'll have to
9 figure out how we want to do that, but let's take
10 care of these ten so they can be on their way.
11 And I know you all need to speak briefly.

12 (Defense counsel conferring with defendant.)

13 MS. SCHLAX: I think we're ready, Your Honor.

14 MR. CALIEL: The State is ready to proceed,
15 Your Honor.

16 THE COURT: All right. Juror [REDACTED]

17 MR. CALIEL: Your Honor, we would strike
18 juror No. [REDACTED] for cause.

19 MS. SCHLAX: No legal objection, Your Honor.

20 THE COURT: All right. No. [REDACTED] is stricken
21 for cause. Juror No. [REDACTED]

22 MS. SCHLAX: She can move on to the next
23 round of questioning, Your Honor.

24 MR. CALIEL: State agrees.

25 THE COURT: She'll be asked to come back at

1 9:30 tomorrow for jury selection. Juror No. [REDACTED]

2 MS. SCHLAX: Your Honor, the defense would
3 move for cause on juror No. [REDACTED] The juror -- the
4 juror, when asked can you presume him to be
5 innocent, he said, no, based simply on what he had
6 read, he indicated he had a one year old daughter,
7 it hits too close to home, I think he is guilty.
8 The State ended up attempting to rehabilitate him,
9 but I would suggest to this Court that based on
10 his answers to the questions there is an absolute
11 reasonable doubt as to whether or not he could be
12 a fair and impartial juror and appropriate for
13 this jury. And, in fact, when I asked him the
14 question do you think you are an appropriate juror
15 for this type of case he indicated no.

16 MR. CALIEL: Judge, I respectfully disagree.
17 I believe that we did successfully rehabilitate
18 juror [REDACTED] and in the end I said could you come
19 into this courtroom with a clean slate, consider
20 all the evidence in this case, and presume
21 Mr. Smith innocent until we did our job and
22 overcame that presumption with the burden of proof
23 and he indicated that he could. So I think that
24 while he may be subject to a peremptory challenge
25 later on down the road based upon some of his

1 other statements, I think in the end he said he
2 could follow the law and hold the State to their
3 burden of proof.

4 (Defense counsel conferring with defendant.)

5 MS. SCHLAX: Your Honor, just additional
6 grounds, just so that the record is clear, there
7 was a somewhat legitimate concern that perhaps
8 this witness (sic) wasn't being truthful for two
9 reasons. One was his eight year employment with
10 Walmart where he -- he began to articulate that
11 only upper management might have been made aware
12 of scenarios and then he somewhat identified
13 himself as upper management, but tried to
14 distinguish it that he wasn't a salaried employee.
15 Then -- and I can't articulate to the Court that I
16 remember him saying it, but the defense team heard
17 him articulate facts that were not contained in
18 our factual scenario. Specifically he said
19 something about a van. I don't -- I was
20 questioning him, I don't -- I don't personally
21 remember him saying that, but I wasn't taking
22 notes. So I think based on all of those
23 circumstances there does, indeed, exist a
24 reasonable doubt as to whether or not juror No.
25 [REDACTED] can be a fair and impartial juror in this

1 case.

2 THE COURT: Response.

3 MR. CALIEL: My response is simply, Judge,
4 none of that applies to whether or not he's being
5 fair and impartial. Defense counsel or defense
6 team is making allegations that he wasn't
7 truthful. He's answered truthfully. He never
8 said anything about a van that I remember during
9 the course of his questioning.

10 THE COURT: I didn't hear anything about a
11 van.

12 MR. CALIEL: So I don't think any of what was
13 just supplemented gives rise to the level of a
14 cause challenge. In the end he said he could come
15 in with a clean slate and hold the State to their
16 burden of proof. That's what every juror has to
17 do.

18 THE COURT: I can go with the court reporter,
19 not now, I can go back with her and see. I don't
20 recall anything about a van. I'm not saying he
21 didn't say something about a van. If he did, I
22 didn't hear it.

23 He did say he could presume Mr. Smith innocent
24 based on the evidence and the law so he was
25 rehabilitated, if you will, on that issue. So I'm

1 not sure that he rises to the level of a cause
2 challenge right now.

3 I understood his distinction on the employment
4 that salaried management is treated differently than
5 unsalaried management and that he's unsalaried
6 management and that's why he wouldn't be at the
7 level where wherever what that is, sounded like the
8 next level up, the assistant manager, is the first
9 level that's salaried in the management part, even
10 though he manages the department. That's what I got
11 from it. But I didn't hear anything that sounded
12 untruthful.

13 But I think out of an abundance of caution I
14 need to review what he said regarding a van. I
15 don't recall that.

16 (Court reporter searching for the word "van" in
17 transcript.)

18 COURT REPORTER: I don't have van in the record
19 till Ms. Schlax mentioned it.

20 THE COURT: The only time van is in her
21 record is when you mentioned it.

22 MS. SCHLAX: Okay.

23 THE COURT: Nothing prior to that.

24 This is why I'm going to deny the challenge for
25 cause with the understanding that if you need an

1 additional peremptory challenge, at the actual jury
2 selection if you'll remind me, I'll certainly go
3 back to take care of that.

4 MS. SCHLAX: Yes, Your Honor.

5 THE COURT: So that person, No. [REDACTED], will be
6 asked to come back tomorrow at 9:30 for jury
7 selection.

8 Juror No. [REDACTED]

9 MR. CALIEL: Your Honor, juror [REDACTED] we would
10 move to strike for cause based upon his responses
11 to the death penalty questions.

12 MS. SCHLAX: No objection, Your Honor.

13 THE COURT: Juror [REDACTED] is stricken for cause.

14 Juror No. [REDACTED]

15 MR. CALIEL: Juror No. [REDACTED] the State will
16 move to strike for cause based upon her answers to
17 the death penalty questions.

18 MS. SCHLAX: No legal objection, Your Honor.

19 THE COURT: No. [REDACTED] will be stricken for
20 cause.

21 No. [REDACTED]

22 MS. SCHLAX: The defense would move to move
23 on to the next level of questioning.

24 MR. CALIEL: The State would agree.

25 THE COURT: On No. [REDACTED] Okay. She'll be

1 asked to come back at 9:30 for jury selection
2 tomorrow.

3 Juror No. [REDACTED]

4 MS. SCHLAX: The defense would move to strike
5 juror No. [REDACTED] for financial hardship. Just to I
6 guess to remind the Court, this was the young lady
7 who said she -- first she lied to say I'd be
8 terminated and we all know that that cannot
9 happen, but she would clearly not be compensated
10 for any day that she worked.

11 MR. CALIEL: We have no objection, Your
12 Honor.

13 THE COURT: I have that in my notes, too.

14 MR. CALIEL: I was just looking for that
15 notation. I couldn't remember the specific juror.

16 THE COURT: So [REDACTED] both parties agree can be
17 stricken for cause, correct?

18 MR. CALIEL: Yes.

19 MS. SCHLAX: Yes, Your Honor.

20 THE COURT: Juror No. [REDACTED]

21 MR. CALIEL: Your Honor, I think both parties
22 agree based upon the language barrier that we
23 would strike him for cause.

24 MS. SCHLAX: Agree, Your Honor.

25 THE COURT: No. [REDACTED] will be stricken for

1 cause. No. [REDACTED]

2 MR. CALIEL: The State would move to strike
3 for cause based upon her answers regarding the
4 death penalty.

5 MS. SCHLAX: No objection, Your Honor.

6 THE COURT: [REDACTED] will be stricken for cause.

7 And [REDACTED]

8 MS. SCHLAX: The defense would move this
9 juror move to the next round of questioning.

10 MR. CALIEL: We agree, Your Honor he.

11 THE COURT: [REDACTED] will be asked to come back
12 tomorrow at 9:30 for jury selection.

13 So let me see if I have it correct. [REDACTED]

14 [REDACTED] and [REDACTED] are all cause challenges or
15 cause excusals. And [REDACTED] and [REDACTED] will come
16 back tomorrow. Is that correct?

17 MS. SCHLAX: Yes, Your Honor.

18 THE COURT: All right. So the first thing we
19 need is we need jurors [REDACTED] and
20 [REDACTED] Those will be cause challenges.

21 MS. SCHLAX: Yes, Your Honor.

22 (Prospective jurors present.)

23 THE COURT: Thank you, ladies and gentlemen.
24 For the record I need the record to reflect that
25 you are in here so I'm going to ask you to raise

1 your hand when I call your number.

2 Juror No. [REDACTED], juror No. [REDACTED] juror No. [REDACTED]
3 juror No. [REDACTED] and [REDACTED]

4 (Prospective jurors indicating.)

5 THE COURT: Okay. The record will reflect
6 that they're all here.

7 Each of you is being excused from jury duty.
8 You have completed your jury duty. You are free to
9 go about your business as an ordinary citizen. When
10 you leave the bailiffs are going to collect your
11 hanging tag and your button and we all thank you so
12 much for your willingness to be here this week and
13 for giving us your time and attention and patience.
14 And you are free to go out the door. Thank you.

15 (Prospective jurors excused.)

16 THE COURT: Then I think we need, you all
17 make sure I've got this right. Jurors No. [REDACTED]
18 [REDACTED] and [REDACTED] Is that correct?

19 BAILIFF: Yes, Your Honor.

20 (Prospective jurors present.)

21 THE COURT: Thank you, ladies and gentlemen.

22 I need the record to reflect that you are, in
23 fact, back in the courtroom, so I'm going to say
24 your number and ask you to raise your hand when I
25 say your number. Juror No. [REDACTED], juror No. [REDACTED]

1 juror No. [REDACTED] and juror No. [REDACTED]

2 (Prospective jurors indicating.)

3 THE COURT: Okay. The record will reflect
4 that the four of you are all back in the
5 courtroom. The four of you are going to be asked
6 to return tomorrow at 9:30 for an actual jury
7 selection where we have a panel where we'll
8 question everybody together. We're going to start
9 at 9:30 or as shortly thereafter as we can. I
10 need you to report back to the jury assembly area
11 at 9:30 and we'll bring you up as quickly as we
12 can after that to start the jury selection
13 process.

14 Please do not discuss this case or get any
15 information about this case from anyone. You are
16 still under your oath as jurors and it's important
17 that you not get any additional information that
18 you don't already have in case you are selected
19 for the actual jury.

20 So you're free to go for today and to come back
21 tomorrow at 9:30. Thank you.

22 PROSPECTIVE JUROR: Where do we go to get a
23 note if we have to be here tomorrow?

24 THE COURT: I'm sorry. Where do you go to do
25 what?

1 PROSPECTIVE JUROR: To get a note that I'm
2 going to be here tomorrow.

3 THE COURT: If you'll go back to jury
4 assembly area and ask for that.

5 PROSPECTIVE JUROR: And we'll be able to ask
6 questions tomorrow if we have problems with
7 scheduling? We got something going on? Can we
8 talk to you about that tomorrow or today?

9 THE COURT: I'm sorry. I thought we -- if
10 you'll have a seat for a minute. And you're juror
11 number --

12 PROSPECTIVE JUROR: [REDACTED]

13 THE COURT: [REDACTED]. I thought we had addressed
14 work issues. Maybe not?

15 PROSPECTIVE JUROR: The first day here all
16 they asked for was the medical people and other
17 issues and then yesterday I tried addressing the
18 issue and everybody said that is for the judge,
19 they answer the question.

20 THE COURT: Do you all want to ask him
21 questions about anything?

22 MS. SCHLAX: Sure, Your Honor. Can you tell
23 us what the situation is?

24 PROSPECTIVE JUROR: Me and my wife, we
25 planned a cruise starting Saturday last year and

1 it's fully paid off, not refundable, 2 thousand
2 dollars and I just --

3 MR. CALIEL: When are you scheduled to leave?

4 PROSPECTIVE JUROR: The 10th through the
5 15th.

6 MR. CALIEL: No, that's -- we have no
7 objection.

8 MS. SCHLAX: No objection, Your Honor.

9 THE COURT: All right. We didn't know that.
10 I'm glad you brought it to our attention and based
11 on that we will excuse you. You have completed
12 your jury duty for this term and when you leave
13 they'll take your name tag and your button and we
14 thank you for your time and attention today.
15 Thank you very much.

16 PROSPECTIVE JUROR: Thank you.

17 THE COURT: So that's No. [REDACTED] Correct?

18 MR. CALIEL: Yes, Your Honor.

19 (Prospective jurors absent.)

20 THE COURT: So the record will reflect that
21 juror No. [REDACTED]s being excused for cause rather
22 than initially being brought back tomorrow for
23 jury selection.

24 MR. CALIEL: Yes, Your Honor.

25 THE COURT: So we're at juror No. [REDACTED] And

1 where are we on our number?

2 MR. CALIEL: We are four shy, Your Honor. I
3 anticipate, at least from what I see, there was
4 one issue that we have to discuss with juror [REDACTED]
5 But there is a series -- there are a series of
6 jurors that are coming that we didn't have any
7 questions to so I think we'll probably get in the
8 first five or six.

9 THE COURT: Are you all okay continuing on or
10 does anyone need a break before we continue to
11 question the next juror?

12 MS. SCHLAX: No, I'm fine. We'll try to
13 communicate somewhat so if we think we have it,
14 we'll stop the Court from calling the next juror.

15 THE COURT: Okay. All right. Then we need
16 to bring in juror No. [REDACTED]. Thank you.

17 MR. CALIEL: Your Honor, juror No. [REDACTED] was
18 the individual juror who made a request to speak
19 privately.

20 THE COURT: Wait a minute. I think what we
21 need to do with her, if you'll recall, when they
22 were filling out their questionnaires, there were
23 a hundred people in here, which is not exactly
24 private. So when she asked to speak privately, I
25 don't know if she's asking to speak privately

1 privately or if she's just asking to speak not in
2 front of this whole panel. So my intention would
3 be to ask her that. Are you comfortable
4 explaining whatever it is at this point with who's
5 in the courtroom and remind her that her identity
6 is protected or were you asking to speak even more
7 privately than that. If she's asking to speak
8 more privately than that, then I'd have to clear
9 the courtroom. There's nowhere else we can go,
10 because, of course, all of you and the press and
11 security and -- there's a lot of people still have
12 to be present. So let me see what she meant
13 because clearly, you know, normally someone would
14 make that request in a panel of all those people.
15 So let's see where we're at and then we'll go from
16 there. Is that all right with everyone?

17 MR. CALIEL: Yes, Your Honor.

18 MS. SCHLAX: Yes, Your Honor.

19 THE COURT: You can bring in juror No. [REDACTED]

20 (Prospective juror present.)

21 BAILIFF: Ma'am, take the second chair in.

22 Second chair.

23 THE COURT: Good morning, juror No. [REDACTED]

24 PROSPECTIVE JUROR: Good morning.

25 THE COURT: We are bringing people in

1 individually to follow-up up on their
2 questionnaire.

3 PROSPECTIVE JUROR: Okay.

4 THE COURT: Before anybody asks you a
5 question, I need to ask you a question about
6 something you put on your questionnaire. You
7 indicated you would like to speak privately. So I
8 don't know if by privately it's because there were
9 a hundred people in here.

10 PROSPECTIVE JUROR: Yeah, that's why, yeah.

11 THE COURT: And if you're comfortable
12 speaking now. Everyone that's in here now, I can
13 just explain, they either work for the State or
14 the defense or my court reporter, clerk or
15 security or help me. And there are a couple of
16 media in here. However, they are not allowed to
17 identify you or in any way connect you with
18 anything that you say.

19 PROSPECTIVE JUROR: Okay.

20 THE COURT: In any way. So are you
21 comfortable explaining your private issue further?

22 PROSPECTIVE JUROR: Yeah, that's fine.

23 THE COURT: Under those circumstances.
24 Okay. Mr. Caliel.

25 MR. CALIEL: Thank you, Your Honor.

1 THE COURT: Thank you.

2 PROSPECTIVE JUROR: You're welcome.

3 THE COURT: Juror No. [REDACTED] I just wanted to
4 make sure.

5 MR. CALIEL: Thank you. Juror No. [REDACTED] that
6 was the one area that we wanted to inquire about
7 is that you had indicated that there was something
8 you wanted to bring to our attention and it
9 involves your sister with a child endangerment
10 issue with her against her son. Can you explain
11 that to us a little bit.

12 PROSPECTIVE JUROR: Years ago when my sister
13 had her son she slammed him against the back of a
14 couch. She severely hurt him so he was taken into
15 custody so I'm not sure if that will affect the
16 case here, but that was something I wasn't sure.

17 MR. CALIEL: Okay. So your sister was taken
18 or arrested?

19 PROSPECTIVE JUROR: Um-hum.

20 MR. CALIEL: Was she ultimately charged with
21 a child abuse charge?

22 PROSPECTIVE JUROR: Yes.

23 MR. CALIEL: Based upon what you knew about
24 those circumstances, do you think your sister was
25 treated fairly under the circumstance?

1 PROSPECTIVE JUROR: She took a plea so I
2 don't know.

3 MR. CALIEL: Okay. Do you think it would
4 affect how you view the evidence in this case at
5 all?

6 PROSPECTIVE JUROR: No.

7 MR. CALIEL: And so nothing about that
8 situation would affect how you listen or hear or
9 make decisions in this case?

10 PROSPECTIVE JUROR: Correct.

11 MR. CALIEL: Okay. That's all I have.

12 PROSPECTIVE JUROR: Okay.

13 MS. SCHLAX: Just very briefly.

14 Do you still have a relationship with that
15 sister?

16 PROSPECTIVE JUROR: No.

17 MS. SCHLAX: Okay. And was the -- I guess do
18 you not have a relationship with her because of
19 that incident with her and her child?

20 PROSPECTIVE JUROR: Yes, it's been years.
21 Like we don't get along very well. That was kind
22 of like the icing on the cake so...

23 MS. SCHLAX: Okay. And you had indicated,
24 ma'am, in your questionnaire that prior to coming
25 into court on Monday that you had never heard

1 anything about this case.

2 PROSPECTIVE JUROR: Correct.

3 MS. SCHLAX: Okay. How long have you lived
4 in Jacksonville?

5 PROSPECTIVE JUROR: Almost two years.

6 MS. SCHLAX: Okay. And are you somebody that
7 watches local news?

8 PROSPECTIVE JUROR: No.

9 MS. SCHLAX: Okay. The question we, you
10 know, ultimately need to arrive at is we're
11 looking for jurors who can fair and impartially
12 try the case. Can you, as we sit here today,
13 presume my client innocent?

14 PROSPECTIVE JUROR: I can't presume that.

15 MS. SCHLAX: I'm sorry.

16 PROSPECTIVE JUROR: I can't presume that.

17 MS. SCHLAX: Why is that?

18 PROSPECTIVE JUROR: Because I don't know the
19 facts, I don't know what happened. I'm the type
20 person I have to have the facts and for myself to
21 see who's innocent and who's guilty.

22 MS. SCHLAX: Okay. So you're waiting for the
23 trial to begin and you will make your decision
24 after being presented evidence and making your own
25 evaluation?

1 PROSPECTIVE JUROR: Correct.

2 MS. SCHLAX: Okay. I don't have any further
3 questions. I appreciate your time.

4 PROSPECTIVE JUROR: You're welcome.

5 THE COURT: I have a couple.

6 Because you did put a question mark, if you
7 remember, when I was telling you all how to fill out
8 your questionnaires, I said if you're not sure or
9 whatever you can put a question mark. You do have a
10 question mark for No. 4 and No. 5. Did you --

11 PROSPECTIVE JUROR: That was related to the
12 news, correct?

13 THE COURT: One was whether or not you had
14 formed an opinion and one was whether or not you
15 could follow the instructions in reaching your
16 verdict.

17 PROSPECTIVE JUROR: Okay.

18 THE COURT: Did you need further explanation
19 on either of those?

20 PROSPECTIVE JUROR: No.

21 THE COURT: So you had answered you had not
22 formed a specific opinion?

23 PROSPECTIVE JUROR: Correct.

24 THE COURT: And that you -- and since you
25 mentioned that -- well, you didn't have to answer

1 the next one. Maybe that's why you put a question
2 mark.

3 PROSPECTIVE JUROR: Yeah. It was confusing,
4 yes.

5 THE COURT: I just wanted to clarify that in
6 case you had anything else.

7 PROSPECTIVE JUROR: Thank you.

8 THE COURT: Thank you so much.

9 PROSPECTIVE JUROR: You're welcome.

10 THE COURT: And if you'll wait in the hall,
11 we'll try to let you know something in a few
12 minutes.

13 PROSPECTIVE JUROR: Thank you.

14 THE COURT: Please do not discuss your
15 questions and answers with anyone.

16 PROSPECTIVE JUROR: Thank you.

17 THE COURT: And when juror [REDACTED] leaves, juror
18 [REDACTED] can come in.

19 (Prospective juror absent.)

20 BAILIFF: Ma'am, if you'll take the second
21 seat in.

22 PROSPECTIVE JUROR: Okay.

23 THE COURT: Good morning, juror No. [REDACTED] Or
24 actually good afternoon it is now. We've been
25 bringing you each in individually just to ask a

1 few follow-up questions from your questionnaire.
2 And Mr. Fletcher is going to ask you the question.

3 MR. FLETCHER: Good morning, juror No. [REDACTED]

4 PROSPECTIVE JUROR: Good morning.

5 MR. FLETCHER: You indicated on your
6 questionnaire that you have heard some things
7 about this case through the news.

8 PROSPECTIVE JUROR: I don't think I said
9 through the news. Did I say gossip?

10 MR. FLETCHER: Through gossip? Yes, you did
11 actually. Well, you said what I know I learned at
12 the time of the crime and this was through gossip.

13 PROSPECTIVE JUROR: Through gossip.

14 MR. FLETCHER: Okay. So how did you hear --

15 PROSPECTIVE JUROR: I don't get the newspaper
16 and I don't watch the news so it's always someone
17 tells me.

18 MR. FLETCHER: So when it happened you just
19 heard about it through just word of mouth?

20 PROSPECTIVE JUROR: Yes. And I think I might
21 need to be excused because I did not think of this
22 connection. It was through a teacher of the
23 child.

24 THE COURT: You know a teacher of the child?

25 PROSPECTIVE JUROR: Um-hum.

1 THE COURT: So I'll let Mr. Fletcher follow
2 up on that as to how it would affect your ability
3 to serve.

4 MR. FLETCHER: When you realized that you
5 knew this teacher that was a teacher of the child,
6 did you have conversations with that teacher?

7 PROSPECTIVE JUROR: No. That was like four
8 years ago.

9 MR. FLETCHER: So how did you find out that
10 your friend is a teacher who knew the child?

11 PROSPECTIVE JUROR: I remembered it myself
12 because of how we talked about four years ago, but
13 I didn't think of it when I was here on Monday.
14 When you asked if I knew anybody out here, I
15 didn't.

16 MR. FLETCHER: Okay.

17 PROSPECTIVE JUROR: But when I was home I
18 realized that is a connection that I didn't think
19 about at the time.

20 MR. FLETCHER: Well, being that that
21 connection exists, can you set that aside next
22 week, if you're on this jury, can you set that
23 aside, your feelings about that, and give
24 Mr. Smith a fair trial?

25 PROSPECTIVE JUROR: Yes. From the evidence I

1 can give a fair trial.

2 MR. FLETCHER: Okay. So that would not
3 affect your verdict in this case?

4 PROSPECTIVE JUROR: No, I just thought you
5 all wanted to know what connections we had.

6 THE COURT: Sure. Thank you.

7 MR. FLETCHER: Okay. Okay. That's all I
8 have, Judge.

9 THE COURT: Anything further?

10 MR. CALIEL: Just a quick follow-up. Ma'am,
11 you indicated that in the question regarding the
12 death penalty that you were against the death
13 penalty, but support the law. Explain that to me
14 just a little further. You have personal feelings
15 against the death penalty, but you understand the
16 law allows for the death penalty.

17 PROSPECTIVE JUROR: Well, the law in the
18 State of Florida supports that, then if someone is
19 guilty of such a crime, then, yes. I just know
20 that I could not pull the switch.

21 MR. CALIEL: You couldn't actually be the
22 executioner?

23 PROSPECTIVE JUROR: No.

24 MR. CALIEL: And while you won't be the
25 executioner, per se, if you were asked to serve as

1 a juror in this case you will be called upon to
2 make a decision as to whether or not the death
3 penalty should be imposed or not.

4 PROSPECTIVE JUROR: Um-hum, yes.

5 MR. CALIEL: Given your personal feelings
6 regarding the death penalty, could you ever make
7 the recommendation that the defendant be sentenced
8 to death for the crime that he committed?

9 PROSPECTIVE JUROR: I don't know that I
10 could.

11 MR. CALIEL: Thank you.

12 THE COURT: Anything further?

13 MR. FLETCHER: No, Your Honor.

14 THE COURT: All right. Juror No. [REDACTED] if
15 you'll wait in the hall and we'll get back to you
16 as quickly as we can.

17 PROSPECTIVE JUROR: Thank you.

18 THE COURT: Please don't discuss your
19 questions and answers with anyone.

20 PROSPECTIVE JUROR: I won't.

21 THE COURT: When she leaves, juror No. [REDACTED]
22 can come in.

23 (Prospective juror absent.)

24 (Prospective juror present.)

25 BAILIFF: Ma'am, if you'll take the second

1 seat in.

2 THE COURT: Good afternoon, juror No. [REDACTED]
3 We're just bringing you in individually just for a
4 few follow-up questions from your questionnaire.

5 MS. SCHLAX: And good morning juror [REDACTED] You
6 had indicated on your questionnaire, which we've
7 had a chance to look at, that you -- you did see
8 some, I guess specific news reports.

9 PROSPECTIVE JUROR: Just what's regular on
10 TV.

11 MS. SCHLAX: Okay. And I guess I'm trying to
12 get a better feel for how often do you watch the
13 local news.

14 PROSPECTIVE JUROR: I don't get a chance to
15 watch it much. I usually leave and go to work in
16 the morning, I come home and sometimes I watch it,
17 sometimes I don't. I just wait for Jeopardy to
18 come on.

19 MS. SCHLAX: Okay. Fair enough. But you did
20 remember, I guess, at least hearing some
21 indication, specifically the TV news, about
22 picking jurors?

23 PROSPECTIVE JUROR: Yes, ma'am.

24 MS. SCHLAX: In terms of the numbers of
25 people that were going to be brought in, that kind

1 of thing?

2 PROSPECTIVE JUROR: Yes.

3 MS. SCHLAX: Do you remember the factual
4 scenario that we gave you in terms of the
5 allegations in this case?

6 PROSPECTIVE JUROR: No.

7 MS. SCHLAX: That was at the top. Was there
8 anything additional that you've heard in the news
9 that was not contained within that?

10 PROSPECTIVE JUROR: No. Like I said, I
11 haven't -- I really haven't watched it.

12 MS. SCHLAX: Okay. And ultimately, as you
13 sit here today, can you be a fair and impartial
14 juror in regards to this case?

15 PROSPECTIVE JUROR: Having lost a child of my
16 own, I don't think I could.

17 MS. SCHLAX: Okay. And I appreciate you
18 sharing that with us.

19 PROSPECTIVE JUROR: Um-hum.

20 MS. SCHLAX: When did you lose your child?

21 PROSPECTIVE JUROR: 30 years ago.

22 MS. SCHLAX: Okay. And how old was your
23 child?

24 PROSPECTIVE JUROR: Two.

25 MS. SCHLAX: Okay. And so understandably

1 that is a very, very personal horrible experience
2 and I imagine you have thought about that,
3 unfortunately, from the time you walked in here on
4 Monday.

5 PROSPECTIVE JUROR: Um-hum.

6 MS. SCHLAX: Okay. I don't have any further
7 questions, ma'am. I appreciate your time. Thank
8 you.

9 PROSPECTIVE JUROR: I can go?

10 MR. CALIEL: No follow-up, Your Honor.

11 THE COURT: Juror No. [REDACTED] if you'd wait in
12 the hall, we'll try to let you know something
13 pretty soon.

14 PROSPECTIVE JUROR: Okay.

15 THE COURT: Please do not discuss your
16 questions and answers with anyone.

17 PROSPECTIVE JUROR: Okay.

18 THE COURT: Thank you. When she leaves,
19 juror [REDACTED] can come in.

20 (Prospective juror absent.)

21 BAILIFF: Sir, if you'd take the second chair
22 in.

23 THE COURT: Thank you, juror No. [REDACTED] We're
24 just bringing everyone in for a few follow-up
25 questions from your questionnaire.

1 Mr. Fletcher will ask the questions.

2 MR. FLETCHER: Thank you, Judge.

3 Good afternoon, juror [REDACTED]

4 PROSPECTIVE JUROR: Good afternoon.

5 MR. FLETCHER: I've read over your
6 questionnaire and I just have a couple of
7 follow-up questions for you.

8 Can you tell me what it is you have heard
9 about this case on the news?

10 PROSPECTIVE JUROR: Honestly I don't really
11 remember -- excuse me -- remember it. I was on
12 duty as a firefighter in 2015 and died, was two
13 months in a coma. I lost a lot of my long-term
14 memory and in the previous two years I lived in
15 central Florida and I've been back for almost a
16 year working.

17 MR. FLETCHER: Okay. So when you read the
18 factual scenario in the survey or in the
19 questionnaire, is that pretty much what you --
20 you've already heard?

21 PROSPECTIVE JUROR: Yes.

22 MR. FLETCHER: Okay. Have you watched much
23 news in the last ten days?

24 PROSPECTIVE JUROR: No, sir.

25 MR. FLETCHER: Do you know anything about

1 Rayne Perrywinkle's past or Donald Smith's past?

2 PROSPECTIVE JUROR: No, sir.

3 MR. FLETCHER: That's all I have. Thank you.

4 MR. CALIEL: No questions, Your Honor.

5 THE COURT: All right. Thank you, sir.

6 If you'll wait in the hall, we'll get back to
7 you as quickly as we can. Please do not discuss
8 your questions answers with anyone.

9 PROSPECTIVE JUROR: Thank you.

10 THE COURT: And when he leaves juror 141 can
11 come in.

12 (Prospective juror absent.)

13 MR. CALIEL: Your Honor, we --

14 (State and defense counsel conferring.)

15 (Prospective juror present.)

16 BAILIFF: Ma'am, if you'll take the second
17 chair.

18 THE COURT: Thank you, juror [REDACTED]

19 We've been bringing each of you in
20 individually just for a few follow-up questions
21 from your questionnaire and Ms. Schlax will do
22 that.

23 MS. SCHLAX: Thank you.

24 Good morning, juror No. [REDACTED] How are you
25 doing?

1 PROSPECTIVE JUROR: Fine.

2 MS. SCHLAX: We've had a chance to look over
3 your questionnaire. We appreciate you filling it
4 out.

5 You had indicated that you do remember seeing
6 some kind of news, but you didn't remember a lot
7 of detail.

8 PROSPECTIVE JUROR: Right.

9 MS. SCHLAX: Because this is such a
10 critically important case, we wanted to, from the
11 time that you enter the courtroom and filled this
12 out on Monday, have you been remembering other
13 details from the news media?

14 PROSPECTIVE JUROR: (Shakes head.)

15 MS. SCHLAX: Okay.

16 PROSPECTIVE JUROR: No.

17 MS. SCHLAX: Okay. You also had shared with
18 us some personal medical concerns.

19 PROSPECTIVE JUROR: Um-hum.

20 MS. SCHLAX: And nothing remains changed
21 about that?

22 PROSPECTIVE JUROR: No.

23 MS. SCHLAX: Okay. All right. We appreciate
24 your time so much, ma'am. Thank you.

25 MR. CALIEL: No questions, Your Honor.

1 THE COURT: All right. Thank you. If you'll
2 remain in the hall, we'll try to let you know
3 something as quickly as we can. Thank you so
4 much. Please don't discuss these questions and
5 answers with anyone even though they were very
6 brief.

7 PROSPECTIVE JUROR: Okay.

8 (Prospective juror absent.)

9 THE COURT: And we need juror [REDACTED] to come in.

10 MR. CALIEL: Yes, Your Honor.

11 THE COURT: I'm not sure what you were trying
12 to tell me a minute ago.

13 MR. CALIEL: We were -- I think we've agreed
14 to excuse juror --

15 THE COURT: We're not at the number?

16 MR. CALIEL: We're not at the number yet.

17 THE COURT: Okay. Juror [REDACTED] can come in.

18 I'm sorry. I thought maybe --

19 MS. SCHLAX: I'm sorry.

20 (Prospective juror present.)

21 BAILIFF: Ma'am, if you'll take the second
22 seat in.

23 THE COURT: Good morning, juror 143.

24 We're just bringing everyone in individually
25 for a few follow-up questions from your

1 questionnaire and Mr. Caliel will start. Thank
2 you.

3 MR. CALIEL: Good morning, ma'am.

4 Just following up on your questionnaire, one
5 of the answers was to a hardship that you
6 indicated and you checked that you did have an
7 insurmountable hardship, but then you didn't
8 explain anything below.

9 PROSPECTIVE JUROR: I didn't mean to mark
10 that one.

11 MR. CALIEL: Okay. And that's why I asked,
12 because there wasn't anything there.

13 PROSPECTIVE JUROR: I'm sorry. I didn't mean
14 a hardship. I'm sorry. I marked the wrong thing,
15 but then I didn't want to mark it out.

16 MR. CALIEL: Okay. Perfect. That answers
17 that question.

18 The other question that I did have is you
19 stated that you have formed an opinion about the
20 defendant's guilt or innocence based upon what you
21 had heard from the media. Is that accurate?

22 PROSPECTIVE JUROR: Yes, sir, I've been
23 watching it ever since it started in 2013.

24 MR. CALIEL: Okay. What have you formed as
25 an opinion before you came to court today or

1 before you came to court this week?

2 PROSPECTIVE JUROR: I didn't even know any of
3 this was started when I came in here.

4 MR. CALIEL: What is your opinion of the
5 defendant's guilt or innocence?

6 PROSPECTIVE JUROR: Guilty.

7 MR. CALIEL: And that's based upon what
8 you've seen or read in the media?

9 PROSPECTIVE JUROR: Yes.

10 MR. CALIEL: Obviously one of the main
11 reasons why we have cases in courtrooms is that
12 the only evidence or the only facts that you're
13 supposed to be considering in making that
14 determination of guilt or innocence is what you
15 hear from the witness stand and see in the form of
16 exhibits or evidence.

17 PROSPECTIVE JUROR: No, I didn't see any of
18 that.

19 MR. CALIEL: And I understand you haven't
20 seen any of that, yet.

21 PROSPECTIVE JUROR: Right. Right.

22 MR. CALIEL: Can you set aside everything
23 that you've seen beforehand and only base your
24 verdict based upon what you see and hear in this
25 courtroom?

1 PROSPECTIVE JUROR: No, I think he's guilty.

2 MR. CALIEL: Okay. And you cannot give him
3 the presumption of innocence that he is due
4 because every person who's charged with a crime in
5 the United States is to be presumed innocent until
6 I do my job, which is prove him guilty beyond and
7 to the exclusion of a reasonable doubt.

8 PROSPECTIVE JUROR: Right.

9 MR. CALIEL: So can you presume him innocent
10 until I do my job?

11 PROSPECTIVE JUROR: Yes, I can.

12 MR. CALIEL: Okay. So --

13 PROSPECTIVE JUROR: Even though I answered
14 the question earlier.

15 MR. CALIEL: Well, and the reason why we want
16 to be clear about this is if you have any
17 reservation or if you have any doubts in your mind
18 that you can be fair to Mr. Smith and presume him
19 innocent until the State does its job and proves
20 him guilty, we need to know that.

21 PROSPECTIVE JUROR: Yes.

22 MR. CALIEL: Okay. So can you presume him
23 innocent?

24 PROSPECTIVE JUROR: Yes, I could.

25 MR. CALIEL: Okay. Can you follow the law

1 the Judge will instruct you on and then reach a
2 verdict based upon only the evidence in this
3 courtroom?

4 PROSPECTIVE JUROR: Yes, sir.

5 MR. CALIEL: Okay. Thank you. I don't have
6 any further questions.

7 THE COURT: Wait. Hold on.

8 PROSPECTIVE JUROR: Sorry.

9 THE COURT: I think Mr. Fletcher has a couple
10 of questions for you.

11 Thank you, Mr. Fletcher.

12 MR. FLETCHER: Thank you, Judge.

13 And good afternoon juror [REDACTED] And this may
14 have been the same kind of oversight, but in
15 questions 1 and 2 you checked that you knew about
16 the case beforehand, you knew who Donald Smith was,
17 you knew who Cherish Perrywinkle was and Rayne
18 Perrywinkle and then it asks you, well, to write out
19 how do you know about it and you left it blank.

20 PROSPECTIVE JUROR: From the television.

21 MR. FLETCHER: Okay. From TV?

22 PROSPECTIVE JUROR: Yes.

23 MR. FLETCHER: And getting back to when it
24 happened?

25 PROSPECTIVE JUROR: Yes.

1 MR. FLETCHER: And have you followed?

2 PROSPECTIVE JUROR: Yes.

3 MR. FLETCHER: So for the last four years
4 you've been following?

5 PROSPECTIVE JUROR: Yes.

6 MR. FLETCHER: How about this last week?

7 PROSPECTIVE JUROR: No.

8 MR. FLETCHER: There were articles in the
9 newspaper, there were articles online. It was all
10 over the news.

11 PROSPECTIVE JUROR: I don't get online. I
12 just paid attention to the TV but she said when he
13 can come in here Monday not to pay attention to
14 any of it.

15 MR. FLETCHER: What about Sunday?

16 PROSPECTIVE JUROR: No, I was watching
17 football.

18 MR. FLETCHER: Okay. Was it a good result
19 for you or bad result?

20 PROSPECTIVE JUROR: No, I lost.

21 MR. FLETCHER: Do you know anything about
22 Rayne Perrywinkle's past from the news media that
23 you have watched?

24 PROSPECTIVE JUROR: No, sir.

25 MR. FLETCHER: And how about Donald Smith's

1 past from the news media you have watched?

2 PROSPECTIVE JUROR: No, sir.

3 MR. FLETCHER: Nothing?

4 PROSPECTIVE JUROR: No.

5 MR. FLETCHER: Okay. Thank you.

6 That's all I have, Judge

7 MR. CALIEL: Nothing further, Judge.

8 THE COURT: Thank you. If you'll wait in the
9 hall, we'll let you know something pretty quickly.
10 Please don't discuss your answers with anyone.

11 PROSPECTIVE JUROR: Yes, ma'am.

12 THE COURT: When she leaves juror [REDACTED] can
13 come in.

14 (Prospective juror absent.)

15 (Prospective juror present.)

16 BAILIFF: Sir, you can take the second chair
17 in.

18 THE COURT: Good afternoon, juror [REDACTED] We're
19 just bringing you each in individually for a few
20 follow-up questions from your questionnaire and
21 Mr. Caliel will ask you questions.

22 MR. CALIEL: Good morning, sir.

23 PROSPECTIVE JUROR: Hi.

24 MR. CALIEL: Sir, you had indicated that
25 based upon what you have seen or read in the

1 media, online and on television that you had
2 formed an opinion about the guilt or innocence of
3 Mr. Smith. Is that true?

4 PROSPECTIVE JUROR: Yes.

5 MR. CALIEL: What opinion have you formed?

6 PROSPECTIVE JUROR: Well, since yesterday I
7 think, yeah, he is guilty and he should be killed.
8 I wish someone would do it in prison, just shank
9 him and put us out of our misery.

10 MR. CALIEL: Okay. And those are strong held
11 beliefs that you have about him based upon what
12 you've seen and heard?

13 PROSPECTIVE JUROR: Absolutely.

14 MR. CALIEL: I don't have any further
15 questions.

16 THE COURT: Any questions?

17 MS. SCHLAX: I don't -- I don't have any
18 further questions, Your Honor.

19 THE COURT: Okay. Thank you, juror No. [REDACTED]
20 If you'll wait in the hall, we'll let you know
21 something pretty quickly. And please do not
22 discuss your questions and answers with anyone.
23 Thank you.

24 And when juror [REDACTED] goes outside, juror [REDACTED] can
25 come in.

1 (Prospective juror absent.)

2 (Prospective juror present.)

3 BAILIFF: Ma'am, you can take the second
4 chair in.

5 THE COURT: Good afternoon, juror No. [REDACTED]
6 We're just bringing you in each individually for a
7 couple of follow-up questions from your
8 questionnaire.

9 PROSPECTIVE JUROR: Okay.

10 THE COURT: Okay.

11 Mr. Fletcher.

12 MR. FLETCHER: Good afternoon, junior [REDACTED]

13 PROSPECTIVE JUROR: Hello.

14 MR. FLETCHER: Having read your
15 questionnaire, I just have a couple of follow-up
16 questions for you. Can you tell me where it is
17 that you learned about the case? You seem to know
18 some things about the case.

19 PROSPECTIVE JUROR: Briefly on the news.
20 That's it.

21 MR. FLETCHER: Okay. Was it from back when
22 it happened or last week?

23 PROSPECTIVE JUROR: Back when it happened.

24 MR. FLETCHER: Okay. Have you seen anything
25 over the last ten days?

1 PROSPECTIVE JUROR: No.

2 MR. FLETCHER: And I could tell you it's been
3 on the news every single day, on the newspaper
4 every single day.

5 PROSPECTIVE JUROR: I don't watch TV
6 everyday.

7 MR. FLETCHER: Do you think other than what
8 we sort of gave to you in the questionnaire?

9 PROSPECTIVE JUROR: No, I don't. I don't
10 even remember the case to be honest with you, what
11 happened.

12 MR. FLETCHER: Okay. That's all I have.
13 Thank you.

14 THE COURT: Anything further?

15 MR. CALIEL: Nothing further.

16 THE COURT: All right. Juror No. [REDACTED], if
17 you'll wait in the hall, we'll let you know
18 something in just a few minutes. Please do not
19 discuss these questions and answers with anyone.

20 PROSPECTIVE JUROR: Okay.

21 THE COURT: Thank you.

22 You think we don't need another one?

23 MR. CALIEL: Your Honor, I believe, and I'll
24 confirm with counsel --

25 THE COURT: Don't bring the next one yet,

1 please. We have enough now.

2 MS. SCHLAX: If we could have a brief
3 conference with my client.

4 THE COURT: Sure. Of course.

5 (Defense counsel conferring with defendant.)

6 MS. SCHLAX: We're ready, Your Honor.

7 MR. CALIEL: Your Honor, I believe, and I'll
8 leave it up to defense counsel to confirm, that we
9 can pass on juror [REDACTED] and [REDACTED] which
10 would give us the 80 jurors that we were looking
11 for.

12 THE COURT: [REDACTED] -- I know you're going to
13 respond. [REDACTED] and [REDACTED]?

14 MR. CALIEL: It was [REDACTED].

15 THE COURT: I'm sorry. [REDACTED].

16 MR. CALIEL: [REDACTED] and [REDACTED].

17 THE COURT: Thank you. [REDACTED] and
18 [REDACTED] Correct?

19 MS. SCHLAX: I apologize. Say those to me
20 one more time because I had them organized as
21 causes.

22 MR. CALIEL: [REDACTED] and [REDACTED]

23 MS. SCHLAX: And, Your Honor, we do not
24 believe that [REDACTED] said anything that rose to the
25 level of cause.

1 THE COURT: Okay. Let's go back and do this
2 the way we've been doing it.

3 Juror [REDACTED], does everybody agree she's okay?

4 MS. SCHLAX: Yes, Your Honor. To proceed to
5 the next round.

6 THE COURT: She'll be asked to come back at
7 9:30 tomorrow for jury selection, correct?

8 MS. SCHLAX: Yes.

9 THE COURT: Juror [REDACTED]

10 MR. CALIEL: We would move to strike juror
11 No. [REDACTED] Your Honor.

12 MS. SCHLAX: No legal objection, Your Honor.

13 THE COURT: She'll be stricken for cause.

14 Juror [REDACTED]

15 MR. CALIEL: We'd move to strike juror [REDACTED]
16 for cause.

17 MS. SCHLAX: And no legal objection, Your
18 Honor.

19 THE COURT: 135 will be stricken for cause.

20 [REDACTED]

21 MR. CALIEL: We believe he can move through,
22 Your Honor.

23 THE COURT: Pardon.

24 MR. CALIEL: We believe he should be moved on
25 to the next phase.

1 MS. SCHLAX: Juror [REDACTED]?

2 THE COURT: Yes.

3 MS. SCHLAX: Yes, we agree as well.

4 THE COURT: Juror [REDACTED] will be asked to come
5 back tomorrow at 9:30 for jury selection.

6 Juror 141.

7 MS. SCHLAX: And we had agreed for a medical
8 hardship cause.

9 MR. CALIEL: The State concurs.

10 THE COURT: Yeah, she'll be excused for
11 cause.

12 Juror [REDACTED]

13 MR. CALIEL: The State sees no reason why she
14 can't move forward.

15 MS. SCHLAX: Agreed by defense.

16 THE COURT: Okay. He'll be asked to come
17 back tomorrow at 9:30 for jury selection.

18 Juror [REDACTED]

19 MR. CALIEL: Your Honor, I just want to be
20 clear because defense counsel said they had no
21 objection. Juror 145 said he presumed the
22 defendant innocent and that he wished that he
23 could be sent to prison so the inmates could shank
24 him and kill him. If they don't want to strike
25 him for cause, the State has no objection to

1 keeping that juror on the panel.

2 MS. SCHLAX: We'd like to keep him, leave him
3 on.

4 MR. CALIEL: Judge, he said he presumed the
5 defendant guilty. I mean I don't want --

6 MS. SCHLAX: As about 20 other jurors.

7 MR. CALIEL: I have no objection to moving
8 him on to the panel. Your Honor, I would just ask
9 that we be cautious because Mr. -- I won't state
10 his name. I apologize. Juror No. [REDACTED] has a
11 potential, based upon that inflammatory response,
12 to taint the entire panel.

13 THE COURT: I agree.

14 MR. CALIEL: I think he's -- he's established
15 a cause challenge, but I will leave it up to the
16 Court. I know the Court's ruling as to whether or
17 not cause has been established. I can't see why
18 defense would want him moved forward other than to
19 potentially taint the entire panel.

20 THE COURT: Can you read his response?

21 (Statement of juror read by court reporter.)

22 THE COURT: He is guilty, he should be
23 killed. I wish someone would shank him in prison.

24 I'll reserve ruling on that.

25 Juror No. [REDACTED]

1 MS. SCHLAX: Defense agrees that juror 146
2 can move on.

3 MR. CALIEL: State agrees. That's why we
4 stopped at juror [REDACTED]

5 THE COURT: Okay. [REDACTED] will be passed to
6 tomorrow at 9:30 for jury selection.

7 And I understand on how I rule that could give
8 us 41 -- 81. This is what I'd like to do. I'd like
9 to bring in the ones that are excused and excuse
10 them. I'd like to bring in the ones that we know
11 that are coming back tomorrow and tell them to come
12 back tomorrow. I'd like to send No. [REDACTED] to lunch
13 and have him come back after lunch and I'll rule.

14 MR. CALIEL: Judge, may I make one request,
15 because obviously I stopped questioning him based
16 on his responses and there was no rehabilitation.
17 If I need to lay a more accurate record, can we
18 bring him back in and question him further?

19 THE COURT: Yes, we can do that. Can I let
20 the others go, though, first?

21 MR. CALIEL: Yes.

22 THE COURT: And then bring him back in and
23 we'll go from there.

24 MS. SCHLAX: That's fine, Your Honor.

25 THE COURT: All right. I want to make sure I

1 have this correct. I have that juror [REDACTED]
2 [REDACTED] and [REDACTED] we're bringing back tomorrow.

3 Okay. Do you need those numbers again?

4 BAILIFF: I think I have them. You want
5 those first?

6 THE COURT: Yeah, I know that's backward,
7 but, yeah.

8 BAILIFF: Okay.

9 (Prospective jurors present.)

10 THE COURT: Okay. Thank you.

11 I need to make sure that the record is clear
12 that you're back in here so I may say your number
13 and ask you to raise your hand.

14 Juror No. [REDACTED]. Juror No. [REDACTED] Juror No. [REDACTED]
15 And juror No. [REDACTED]

16 (Prospective jurors indicating.)

17 THE COURT: Okay. The four of you are going
18 to be asked to come back tomorrow for the actual
19 jury selection panel. Does not mean you'll be on
20 the jury, but you'll be on the panel from which we
21 select the jury. So you're free to go today. I'm
22 going to remind you, please, do not look for any
23 information, ask for any information, look at the
24 news, read the paper, look online. It's very
25 important that your minds are kept clear until

1 this process is over. And if you'll be in the
2 jury assembly area at 9:30 tomorrow and we'll
3 bring you back up as quickly as we can. Okay?
4 Thank you.

5 (Prospective jurors absent.)

6 THE COURT: So now we have -- I need to make
7 sure my numbers are correct. I have [REDACTED]
8 [REDACTED] Is that it for cause?

9 MR. CALIEL: I think it is, Your Honor. And
10 I think that they can be excused for the remainder
11 -- I mean we can excuse them from here. The rest
12 of the panel has been sent to lunch already.

13 THE COURT: Oh, they have?

14 MR. CALIEL: I don't know. Are they
15 downstairs?

16 BAILIFF: Your Honor, I had a question,
17 though, what about [REDACTED]

18 THE COURT: She was in the last group.

19 BAILIFF: Okay. I'm sorry.

20 THE COURT: You're wondering about [REDACTED]?

21 BAILIFF: We have [REDACTED] and [REDACTED] out there.

22 THE COURT: Oh, you do?

23 BAILIFF: Yes, they were in the rest of the
24 ten.

25 THE COURT: I'm sorry. Bring in [REDACTED] and [REDACTED]

1 They're excused.

2 (Prospective jurors present.)

3 MR. CALIEL: Your Honor, I believe also there
4 were three others out in the hallway that could
5 come in for this part as well for three cause.

6 THE COURT: Oh, yeah, they could.

7 MR. CALIEL: Yeah, [REDACTED] and [REDACTED] can join
8 us as well.

9 (Prospective jurors present.)

10 THE COURT: Thank you, ladies and gentlemen.

11 I just need to make sure the record is clear
12 that you're back in the courtroom so I'm going to
13 say your number and ask you to raise your hand.

14 Juror No. [REDACTED] juror No. [REDACTED], juror No. [REDACTED]
15 juror No. [REDACTED] and juror No. [REDACTED]

16 (Prospective jurors indicating.)

17 THE COURT: Okay. The five of you are
18 excused. You have completed your jury duty. Your
19 service is over. You can go back to being a
20 normal citizen. We are going to collect your name
21 -- hanging tag and your button and all of us would
22 like to thank you. We know this has been a rough
23 week for you. We appreciate your time and
24 attention. You have completed your jury duty and
25 you're free to go. Thank you.

1 (Prospective jurors excused.)

2 THE COURT: He's not answering. He's in a
3 trial. I was going to see if he could go down and
4 excuse the jurors. It's a more personal excusal
5 than having the Clerk's Office doing it.

6 Is there any objection to the clerks here in
7 the courtroom letting them know they can excuse
8 the rest of our panel? I'm not talking about the
9 juror we're going to re-question, but the people
10 that are downstairs that were never brought up.
11 It is late so they can go on and go to lunch.

12 MS. SCHLAX: No, Your Honor, no objection.

13 MR. CALIEL: No, objection, Your Honor.

14 THE COURT: All right. Can you all notify
15 them downstairs? Are you able to do that?

16 (Clerk conferring with Court.)

17 THE COURT: Okay. Then we need to bring back
18 in juror [REDACTED]

19 MR. CALIEL: Your Honor, did the Court want
20 to do questioning or should the State do the
21 questioning?

22 THE COURT: No, I think you should do your
23 own follow-up.

24 MR. CALIEL: Thank you. I appreciate it.

25 (Prospective juror present.)

1 THE COURT: Okay. Juror No. [REDACTED] we just had
2 a few more follow-up questions for you and Mr.
3 Caliel is going to do that.

4 MR. CALIEL: Thank you, sir. Sir, I think
5 when I asked you the question would you presume
6 the defendant guilty, your answer was yes.

7 PROSPECTIVE JUROR: Yes.

8 MR. CALIEL: Okay. Are you unable to give
9 him the presumption of innocence that people are
10 afforded in this country when they go to trial in
11 a criminal case?

12 PROSPECTIVE JUROR: No, I can't.

13 MR. CALIEL: Okay. So you cannot presume him
14 innocent as the law dictates?

15 PROSPECTIVE JUROR: No.

16 MR. CALIEL: Okay. You also stated that --
17 not using your terminology, but you would prefer
18 to see him dead as quickly as possible?

19 PROSPECTIVE JUROR: Absolutely.

20 MR. CALIEL: So then if you were allowed to
21 be seated as a juror in this particular case,
22 would it be your belief that once and if he were
23 found guilty that the only punishment that you
24 would even consider would be killing him?

25 PROSPECTIVE JUROR: Yes.

1 MR. CALIEL: Would you not even consider life
2 in prison as a possibility?

3 PROSPECTIVE JUROR: I thought that before
4 yesterday, but I think he has inconvenienced a lot
5 of people, he destroyed a young girl's life and
6 he's inconvenienced thousands of people. I just
7 lost three days of my life. So --

8 MR. CALIEL: If you were sitting as a juror
9 in this case and the defendant were found guilty
10 you would automatically vote for death?

11 PROSPECTIVE JUROR: Yes.

12 MR. CALIEL: I don't have any further
13 questions, Judge.

14 THE COURT: Any question?

15 MS. SCHLAX: No questions, Your Honor.

16 THE COURT: All right, sir. If you'll wait
17 in the hall, we'll let you know something in just
18 a minute.

19 MS. SCHLAX: Your Honor, I think we would
20 probably jointly agree.

21 THE COURT: Oh, okay. That he can be
22 excused?

23 MR. CALIEL: Yes, Your Honor.

24 MS. SCHLAX: Yes, Your Honor. Based on the
25 answers.

1 THE COURT: Sir, I'm wrong. You don't have
2 to go back out in the hall. I'm going to let you
3 know, if you'll just stand there a minute. You're
4 excused from your jury duty. You have completed
5 it. We all thank you for your time and attention.

6 And they're going to take your tag and your
7 button when you walk out.

8 PROSPECTIVE JUROR: Thank you. Have a good
9 day.

10 THE COURT: Thank you.

11 (Prospective juror excused.)

12 THE COURT: All right. I think we can all go
13 to lunch. We need to be ready in the morning. I
14 don't think there's a lot to do.

15 Had you planned on giving me the instructions
16 to read to the jury? I'll get with the clerk in
17 the morning, but --

18 MR. CALIEL: The preliminary instructions for
19 the jury for jury selection?

20 THE COURT: Um-hum.

21 MR. CALIEL: I didn't see that there were --
22 I'll go through and find. I thought I had
23 forwarded to the Court the preliminary
24 instructions previously in an e-mail to Court and
25 counsel.

1 MS. SCHLAX: You have.

2 THE COURT: It's upstairs. It's check.

3 MR. CALIEL: If not, I can bring a hard copy
4 after lunch to the Court.

5 THE COURT: Wait a minute. I may have
6 brought it down. I believe it's upstairs. I'll
7 check. You may be right.

8 MR. CALIEL: If not, I can forward another
9 copy to Court and counsel and bring a hard copy
10 when we return.

11 THE COURT: I wouldn't worry about doing it
12 until I check and see if I have it already.
13 Because I think you may be correct. Wait a
14 minute. Here they are. I just -- I haven't been
15 looking at these because we've been looking at
16 questionnaires. Yes, I have it. Well, no, I have
17 the instructions for the jury. Once the jury is
18 picked. I have those.

19 MR. CALIEL: I don't think there are any new
20 instructions, other than the standard instructions
21 for the selection of the jury.

22 THE COURT: Okay.

23 MR. CALIEL: I can go back and look and see
24 if they have changed at all, but I thought --

25 THE COURT: That's fine. Wasn't there

1 something else we talked about we were going to --
2 oh, I'm going to tell them that it's not
3 bifurcated, but they'll be talked to in two
4 separate. So I'll read part and then part. So
5 I'll need to know how you want me to split that
6 up.

7 MR. CALIEL: Yes, I'll be doing both.

8 THE COURT: I know. But as far as what I
9 read to the jury, I'll need to know where you want
10 me to start and where you want me to start for the
11 second half. Isn't that what you asked?

12 MS. SCHLAX: Yes, Your Honor.

13 THE COURT: Okay. Can you all work on that
14 for me and tell me? I'll bring the jury
15 instructions down, but tell me exactly where you
16 want me to stop.

17 MS. SCHLAX: Yes, I have the proposed that
18 you had sent and so we can try to consult on what
19 we would be requesting the Court to read prior to.

20 THE COURT: From the --

21 MS. SCHLAX: To the death qualifying
22 questions.

23 THE COURT: Okay. I'll get the other part.

24 MS. SCHLAX: Yes, ma'am.

25 THE COURT: What time do you all want to come

1 back? 2:30?

2 MS. SCHLAX: That's fine.

3 THE COURT: Is that too late?

4 MR. CALIEL: No, that's fine.

5 THE COURT: We'll be in recess until 2:30.

6 Thank you.

7 (Recess.)

8 (Defendant present.)

9 THE COURT: Okay. We need to wait for --

10 MR. CALIEL: No, she won't be joining us this
11 afternoon, Your Honor.

12 MS. SCHLAX: Your Honor, I don't know if the
13 Court had received the --

14 THE COURT: Just received them.

15 MS. SCHLAX: Well, we've had an opportunity
16 to discuss amongst ourselves and I think we're
17 actually in agreement as to what the Court should
18 read in regards to when we begin to death qualify
19 the jury, that the Court actually instruct -- or
20 not instruct, but advise the jury that this is
21 applicable law before we begin that questioning.

22 THE COURT: Okay.

23 MR. CALIEL: Your Honor, what we did is sort
24 of merge the two proposals. The preliminary
25 instruction which we -- the State provided to the

1 Court and counsel, we are suggesting that that
2 instruction just be altered verbiage-wise, because
3 obviously the preliminary instruction assumes the
4 defendant has been found guilty, and so what we
5 are suggesting is, members of the jury, if you
6 find the defendant guilty of first degree murder,
7 and then that language would apply.

8 We have agreed to take out the first one,
9 two, three, four -- four and a half lines of the
10 third paragraph of that instruction on page 1.

11 THE COURT: And you've gotten ahead of me.

12 MR. CALIEL: I apologize.

13 THE COURT: Is this the one that we're
14 working on, looks like this?

15 MR. CALIEL: Yes, Your Honor.

16 MS. SCHLAX: Your Honor, it actually might be
17 easier to look at them side-by-side because
18 they're very, very similar.

19 THE COURT: Okay. All right. Let me start
20 from the beginning. Members of the jury, just
21 take out the --

22 MR. CALIEL: It would just be if you find the
23 defendant guilty in the first degree murder of
24 Cherish Perrywinkle, the only issue still before
25 you is to determine the appropriate sentence,

1 period.

2 MS. SCHLAX: And, Your Honor, I have what we
3 have both agreed to merged into one document that
4 I can e-mail to you.

5 THE COURT: Oh, okay.

6 MS. SCHLAX: Just so you're not having to
7 write and try to fashion it.

8 THE COURT: Perfect.

9 MR. CALIEL: Madam Clerk, if she e-mails that
10 to you, can you print it out?

11 THE CLERK: Yes.

12 THE COURT: That would be great. And I don't
13 have to look at this?

14 MR. CALIEL: No, I think we just have to read
15 it over and make sure that everything is there.
16 In essence, Your Honor, we have agreed to, with
17 some minor language changes, agree to the first
18 three pages of the standard preliminary
19 instruction and then adding the definition of
20 weighing the evidence that is provided in the
21 final instructions which are the standard
22 instructions. And there are two paragraphs to
23 that weighing instruction.

24 MS. SCHLAX: I apologize, Your Honor. I had
25 it and then -- it's not saving correctly, but I'm

1 getting older versions. Mr. Caliel and I just
2 went through and made the appropriate changes and
3 for some reason it didn't save properly. But I
4 can get it back.

5 MR. CALIEL: Your Honor, what I think we can
6 do for the record and for the Court is we can read
7 the language that we have and then if everybody is
8 in agreement to that language then we can just
9 have it available to the Court to read tomorrow
10 morning before we begin.

11 MS. SCHLAX: Okay. I just got it back. I'm
12 sorry.

13 THE COURT: You did.

14 MS. SCHLAX: I did.

15 THE COURT: You got it back where you can
16 e-mail it?

17 MS. SCHLAX: Right.

18 THE COURT: Okay. Thank you.

19 While she's doing that, I used to have a little
20 bit of talk with the jury just in general about voir
21 dire and all that kind of thing. That seems to be
22 probably not necessary under the circumstance since
23 we've already met with them. So I think what I'll
24 do is tailor this, make it very short before I get
25 into the preliminary instructions, since we've

1 already asked them questions about do you know
2 anything about the case and things like that. So
3 I'll tailor it for this particular trial. I will
4 need the witness list because I always ask them if
5 they know witnesses and I can get that in the
6 morning to read that.

7 MR. CALIEL: Yes, Your Honor.

8 (State and defense counsel conferring.)

9 MR. CALIEL: Judge, what I can do is I'll
10 supplement our witness list with the two witnesses
11 for the penalty phase and then if Ms. Schlax can
12 have the witnesses that they intend to call for
13 the penalty phase then we'll have those, too.

14 MS. SCHLAX: But the Court's going to
15 announce those names, correct?

16 THE COURT: Right.

17 MS. SCHLAX: They're just potential witnesses
18 at some point during the trial.

19 THE COURT: Yeah, and I tell them because
20 their name is listed doesn't necessarily mean they
21 will appear and also that occasionally we'll have
22 a witness appear whose name we don't have on the
23 list at this point. So that covers both things,
24 in case that does happen sometimes, somebody
25 decides not to call somebody or somebody becomes

1 available you didn't know was available. So I
2 tell them that.

3 But I think it's better at the beginning
4 because if they do know anybody, sometimes they're
5 related to a witness or live next-door to a
6 witness or something like that, we can ferret that
7 out early on in the process.

8 MR. CALIEL: Yes, ma'am.

9 MS. SCHLAX: And is Your Honor anticipating
10 using the normal set questionnaire that we use in
11 every criminal trial in Duval for the initial
12 recitement? Then it goes into spouse, it goes
13 into -- you and I can both, I guess, you and
14 Mr. Fletcher can handle that during normal jury
15 selection, but besides their name and occupation,
16 we haven't established any of the other answers to
17 the normal questionnaire that we ask in every
18 criminal case.

19 THE COURT: Well, unless it's changed, I have
20 it in my little file here on jury selection and
21 what I have is my name is, my date of birth is,
22 the area of town I live in, not their address,
23 just the area of town, which could make a
24 difference maybe sometimes.

25 MS. SCHLAX: But they've already provided the

1 address. I don't need to have them recite what
2 they've already given us. It's the other
3 questions.

4 THE COURT: How long they lived here, before
5 that where they lived, where they're employed.
6 We've got that. The kind of work I do, we've got
7 that. I'm single, married, separated, divorced,
8 whatever. My husband or significant other is
9 employed by, the kind of work they do. They have
10 this many children at home, their ages are, this
11 many children away from home, and their ages are
12 and what they do, something like a police officer
13 or something like that. I rent or own my home.
14 My relative, friend, acquaintance works for law
15 enforcement, State Attorney's Office or a criminal
16 defense attorney. I have or have not previously
17 served on a jury, it was a civil or criminal jury,
18 they did or did not reach a verdict, I was or was
19 not the foreperson. That's -- that's something I
20 usually go through with them.

21 MS. SCHLAX: No, I'm fine with the Court
22 doing the normal process and I have no problem
23 with omitting those questions we already have the
24 answers to. I was just inquiring whether the
25 Court had planned to do that.

1 MR. CALIEL: I'm fine with that, Judge, and
2 you can say that, you know, you don't need to
3 answer the questions that you've already answered
4 already.

5 THE COURT: I don't normally give it to them.
6 I make them answer them out loud. I know 80
7 people is a lot. It doesn't take them that long,
8 since we're going to cut it in half. I'll redo
9 it, take out what we already know. And one thing
10 I like about it is it teaches them that they have
11 to stand up to talk right off the bat.

12 MS. SCHLAX: Sure.

13 THE COURT: If they don't, I make them stand
14 up. So they're learning that when they're talking
15 they're going to be standing and I do tell them
16 that. But just doing that reinforces that. And
17 then you all take down the information that you
18 want from what they say and then we question them
19 and we can use that information. If you'd rather
20 me do it some different way I will.

21 MS. SCHLAX: No, I just wanted to make sure
22 because we've done an unusual procedure so far
23 that we were going to go back to that because it's
24 the most efficient way to get that information we
25 all need.

1 THE COURT: That's fine.

2 MR. CALIEL: Judge, I don't have a problem
3 since the occupation is listed there, sometimes
4 which is more defining to us as what they do. So
5 even if they repeat those questions I don't --
6 it's a mere second. We don't need their address
7 or things of that nature, but their occupation and
8 what they do. I mean some people say I'm a such
9 and such, I don't know what that means, but then
10 they follow it up with now I understand what
11 you're talking about. So I think that will be
12 fine.

13 THE COURT: Okay. So I'll just talk to 'em a
14 little bit. We've already gotten -- I'm not going
15 to talk to them very much. They're already sworn
16 in, correct?

17 MR. CALIEL: Yes.

18 THE COURT: They're still sworn in.

19 MS. SCHLAX: If the Court wouldn't mind --

20 THE COURT: Swear them in again?

21 MS. SCHLAX: Just to remind them of the
22 importance of the proceedings.

23 THE COURT: That's fine. That's fine. And
24 then we've already given them the trial schedule,
25 but I'll give it to them again, to remind them in

1 case something has come up and they need to bring
2 it to your attention or our attention. I tell
3 them they have to answer questions out loud, I
4 tell them how important Faye is. If she doesn't
5 record it it's not there, so they have to stand up
6 so she can hear them. And then I read the
7 Information and normally ask them if they have any
8 state of mind with reference to this particular
9 kind of case which would prevent you from acting
10 impartially, but I don't think I need to ask that.

11 MR. CALIEL: I think we've already asked the
12 question.

13 THE COURT: I think we've already gone over
14 that. And there's some jurors may have a
15 question. If you still want me to ask that I
16 will.

17 MS. SCHLAX: I unfortunately think that we do
18 need to ask that.

19 THE COURT: Okay. Then we have the witness
20 list and I ask them if they can -- normally I tell
21 them it's a criminal jury trial. They know that.
22 And that they're called upon to reach a verdict
23 finding the defendant either guilty or not guilty
24 and do they have any concern in a case where they
25 have to do that. I think they've already told us

1 that already. Not this case, but it's a criminal
2 case. Most of them have -- they say they can't
3 follow the law or impose the death penalty or
4 won't impose the death penalty or whatever they
5 told us. I'm not sure I need to do that. I ask
6 them if they can agree to follow the law. I
7 normally ask them if they have any physical
8 disability and since we didn't see some of them --

9 MS. SCHLAX: I would request that you conduct
10 it exactly as you did --

11 THE COURT: Okay.

12 MS. SCHLAX: -- do if they were walking in on
13 a Monday morning.

14 THE COURT: Now we give them the
15 questionnaire.

16 Do we have copies of it, Jeff?

17 BAILIFF: I can go get a copy.

18 THE COURT: I mean can we get 80 copies?

19 BAILIFF: Yes.

20 THE COURT: They have it in their seat, but
21 instead of them filling it out I have them
22 basically read it.

23 MS. SCHLAX: All right. Perfect.

24 THE COURT: I am this person, I do this.

25 (Court conferring with bailiff.)

1 THE COURT: And then I tell them you're going
2 to ask them some questions.

3 Now, the next thing we need to do, I need to
4 ask the clerks if they have a list of the jury?

5 THE CLERK: No, I can see if they can redo
6 it.

7 THE COURT: We don't want the numbers. Do
8 you have a list of the numbers in order that are
9 all on the jury?

10 THE CLERK: I just have -- I have this list
11 that has everybody.

12 (Clerk conferring with Court.)

13 MR. CALIEL: And just for the records sake,
14 Your Honor, what we are doing is the lowest
15 numerical number, through -- I think we made it
16 through [REDACTED] would be in the lowest numerical
17 number on the 1 through 80 and they'll be
18 hyphenated on the charts so we'll be going --
19 ascending up to the last juror who was sent
20 through would be juror No. 80.

21 THE COURT: I'm not sure about putting the
22 hyphenated number, but the box may have a number.
23 I'm not sure. I'll ask him when he comes up, if
24 he can't --

25 MR. CALIEL: I think he told us the box has

1 the number on it and then he'll put the previous
2 juror number instead of the name.

3 THE COURT: And we need to look at it, too,
4 because I don't think it's automatic. I don't
5 think it's ten across for four rows, because of
6 the way the rows go in.

7 MR. CALIEL: I thought what we had discussed
8 last week was that, for our charts sake, and
9 Mr. King said that they could accommodate that
10 they would bring in those benches.

11 THE COURT: You want the benches back now?

12 MR. CALIEL: They could bring in the benches
13 for the purpose that we could fit eight going back
14 because it was easier to do five rows of eight and
15 five rows of eight for 40 on each side and it
16 would be more symmetrical than jumbling between
17 ten to eight to seven to six or whatever it was
18 going to be.

19 THE COURT: We'll have to tell him. I don't
20 think it is. We'll explain to him when he comes
21 back. I'll take care of it.

22 We'll get copies of the questionnaire and I
23 have the jury instructions now that you all agreed
24 on. For the second half of the jury selection and
25 you all let me know at the time you want this

1 read.

2 MS. SCHLAX: Yes, Your Honor.

3 MR. CALIEL: I think once Ms. Schlax or --

4 MS. SCHLAX: Mr. Fletcher.

5 MR. CALIEL: -- Mr. Fletcher finishes his
6 initial jury selection process he'll indicate to
7 the Court that we're moving on to the next phase
8 and then I'll have an opportunity before
9 Ms. Schlax.

10 THE COURT: Okay. The last -- the very end
11 of the last sentence, I think there's an extra
12 word. If your decision if to impose the death --
13 is that if supposed to be there?

14 MR. CALIEL: I think it is if their decision
15 is to impose. It's probably just a typographical.

16 THE COURT: Is to impose. Says, to repeat
17 what I've said, if your verdict is that the
18 defendant should be sentenced to death, your
19 finding that at least one aggravating factor
20 exists must be unanimous. Your finding that the
21 aggravating factor or factors are sufficient to
22 impose death must be unanimous, and your finding
23 that the aggravating factor or factors found to
24 exist outweigh the established mitigating
25 circumstance or circumstances must be unanimous.

1 MS. SCHLAX: I think there's an extra if in
2 there.

3 THE COURT: And your decision to impose a
4 sentence of death.

5 MS. NELSON: I think it's an error in the
6 book, too.

7 MR. CALIEL: I think it's an error in the
8 publication of the standard.

9 MS. SCHLAX: It's inserted an extra if.

10 THE COURT: I was correct?

11 MR. CALIEL: Yes. And your decision if to
12 impose.

13 THE COURT: I think probably what happened is
14 at one point it probably said and if your decision
15 is to impose the sentence of death it must be
16 unanimous and they just reduced it and didn't
17 catch it.

18 MR. CALIEL: Well, it's poorly framed and I
19 understand what it's saying is your decision
20 should be, comma, if to impose death, comma, must
21 be unanimous. I think they left out the
22 punctuation. I think it's poorly punctuated, but
23 I think what they're trying to do is they're going
24 through the decision and saying if your decision
25 is to impose death it must be unanimous.

1 MS. SCHLAX: I agree with Mr. Caliel that I
2 would rather the Court not take out of any words
3 that are actually listed in the standard
4 instruction. There's only one if here.

5 MS. NELSON: Correct.

6 MS. SCHLAX: Let me compare mine. I would
7 rather not take out a word from the standard.

8 MS. NELSON: It's correct.

9 MS. SCHLAX: Instead put in the commas to
10 effect, you know, to effectively have it read as
11 it was meant to be.

12 THE COURT: That's fine. And your
13 decision -- comma, which I won't say -- if to
14 impose a sentence of death, comma, must be
15 unanimous.

16 MR. CALIEL: Yes.

17 MS. SCHLAX: Yes. If they inserted the word
18 if there, I don't think it should be taken out.

19 THE COURT: Okay. Our IT people are here.

20 Patrick, would you and Vince come down and get
21 the jury list?

22 IT PERSON: Yeah, we were called down.

23 THE COURT: What we've got is we've got the
24 original list of all the names. We only made it
25 through 100 --

1 MR. CALIEL: [REDACTED].

2 THE COURT: [REDACTED] And we're not going to need
3 anymore than that. Who else is on that page?
4 Madam Clerk has each name that's on the panel.
5 And do the boxes on the form have a number?

6 IT PERSON: Yes, ma'am. It will be like that
7 sample that I gave you, but with their names on
8 top of the number. I don't know if you remember
9 that printout I gave you.

10 MR. CALIEL: We don't need the name. All we
11 need is the number.

12 THE COURT: We don't want the name.

13 IT PERSON: Just the number?

14 MR. CALIEL: The number, like over the top
15 the number would be whatever their juror number is
16 because we're doing it anonymous. We're keeping
17 their --

18 IT PERSON: All right. That will be easier.

19 THE COURT: Is it ten per row, five rows on
20 each side?

21 IT PERSON: I have to look at my copy, but is
22 that how you want me to do it, Your Honor?

23 MR. CALIEL: Well, Judge, didn't we want, if
24 they could, five rows on each side of eight?

25 THE COURT: I'm sorry. Eight per row. I'm

1 sorry. Eight per row.

2 MR. CALIEL: So there would be eight per row,
3 40 on this side and 40 on this side.

4 IT PERSON: Okay. We'll do that. Yes,
5 ma'am.

6 THE COURT: So it'll go one through 40 over
7 there and 41 through 80 over here.

8 IT PERSON: Yes, ma'am, it will be the same
9 order on the example like I gave you. It will be
10 40 and 40.

11 THE COURT: Okay. Great. Thank you.

12 Is there anything else we need to do?

13 MS. SCHLAX: I don't think so, Your Honor.

14 THE COURT: I know you all have a lot to do.
15 So if there's not anything we can do, I think
16 we'll be in recess.

17 MR. CALIEL: I believe so, Your Honor. So
18 the plan tomorrow morning at 9:30, or once we get
19 all 80 is to go through the biographicals with the
20 jurors individually, get as far as we can with
21 that, I begin and if I'm able to finish before
22 lunch or we might have to take a lunch recess
23 while I'm questioning.

24 THE COURT: I'm not sure you'll be able to
25 finish. It takes awhile to read all, to read the

1 Indictment, it's going to take 80 people who will
2 stand up and tell us that, although it's a little
3 quicker than you might think. It's pretty quick.
4 I don't know if you'll have enough time to finish
5 before lunch.

6 MR. CALIEL: Thank you, Your Honor.

7 THE COURT: I think we should come at 9:00
8 o'clock, 9:15 tomorrow.

9 MR. CALIEL: That's fine. 9:15?

10 THE COURT: 9:15. Just in case there's
11 anything.

12 Okay. Thank you all very much.

13 MS. SCHLAX: Thank you, Your Honor.

14 (Evening recess.)
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IN THE CIRCUIT COURT OF THE
FOURTH JUDICIAL CIRCUIT, IN
AND FOR DUVAL COUNTY, FLORIDA.

Case No: 2013-CF-5781-AXXX-MA
Division CR-D

STATE OF FLORIDA

-vs-

DONALD JAMES SMITH,

Defendant,

TESTIMONY AND PROCEEDINGS taken before the
Honorable Mallory D. Cooper, Judge of the Circuit Court,
on February 8, 2018, and as reported by Faye M. Gay,
Certified Realtime Reporter, Registered Merit Reporter,
and Certified Legal Video Specialist.

OFFICIAL REPORTERS, INC.
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4 Appearing on behalf of the State of Florida.

5

6 MARK CALIEL and VANESSA WHEELER-SANCHEZ, Esquires,
7 Assistant State Attorneys,
8 Appearing on behalf of the State of Florida.

9

10 JULIE SCHLAX and CHARLES FLETCHER, Esquires,
11 Appearing on behalf of the Defendant.

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1 (Prospective jurors absent.)

2 (Defendant present.)

3 THE COURT: Good morning, everybody.

4 MR. CALIEL: Good morning, Your Honor.

5 THE COURT: Before we do anything
6 case-related, the flu is going around, and some in
7 IT has it, in Court Administration. So I've got a
8 lot of wipes. We've got plenty of this stuff.
9 Please do take care of yourselves, it's going to
10 be a long couple of days and long couple of weeks.
11 If you're going to use anything, I'll put these
12 where you can reach them.

13 If you all recall, one of the jurors had
14 surgery on both legs recently and had requested if
15 something to raise her legs a little bit and we do
16 have something for her and she ends up sitting on
17 the end of the row on the aisle, but there's a
18 bench next to her, too, but that will be very
19 easy, I think, for her to get in and out. So I
20 think we've taken care of that. And with that we
21 can talk about the case. And for the record
22 Mr. Smith is here, all the attorneys are here and
23 we're ready to proceed.

24 MS. SCHLAX: And, good morning, Your Honor.

25 Julie Schlax and Charles Fletcher appearing on

1 behalf of Mr. Smith.

2 Your Honor, there were just a number of things
3 I wanted to make sure that I articulated for the
4 record prior to beginning jury selection.

5 We would renew all previously filed motions,
6 including the change of venue. We did yesterday
7 supplement the record with the news articles that
8 were both in the -- I guess old school newspaper as
9 well as online and we -- we placed that in the
10 record. Additionally, there was a prior motion that
11 was granted in part in regards to the jury members,
12 prospective jury members criminal records and that
13 those would be shared with us by the state. I just
14 wanted to make sure that was still the understanding
15 with the State and the Court, that those would be
16 shared with us.

17 MR. CALIEL: Yeah, we can provide a copy of
18 those prior to the final selection process. We
19 have them downloaded onto a spreadsheet that we
20 probably should -- should be able to get that
21 information printed out and provide the hard copy
22 to the defense.

23 MS. SCHLAX: And the only other two motions
24 that I ask the Court to revisit, this Court had
25 previously ruled, after argument by prior counsel,

1 and I have two courtesy copies for the Court. One
2 is a motion to prohibit misleading references to
3 the advisory role of the jury at sentencing and
4 motion to prohibit any reference to the jury's
5 role at the penalty phase as being advisory or the
6 jury's penalty verdict as being merely a
7 recommendation.

8 And the Court had previously denied those
9 motions. I would -- I would argue, and ask the
10 Court to revisit those rulings, and I think the
11 State's position may have changed as well, based on
12 the recent Supreme Court decisions, both at the
13 Florida level as well as the United States level and
14 the legislation.

15 MR. CALIEL: And, Judge, we would agree that
16 given the change in the law, I think now the
17 language utilized in the standard instruction is
18 their decision to impose the death penalty and
19 that's the language that we would intend to refer
20 to throughout the course of jury selection and
21 closing argument and obviously that decision has,
22 if they decide to impose the death penalty, must
23 be unanimous.

24 THE COURT: Okay. So when these were
25 originally granted the law in Florida was

1 different and the jury only had to recommend, and
2 they only had to recommend by a margin of at least
3 seven to five, and that totally changed. Now the
4 verdicts all have to be unanimous and they have a
5 lot of findings they have to make.

6 So this being the motion to prohibit any
7 reference to the jury's role in the penalty phase
8 being advisory or to the jury's penalty verdict as
9 being a recommendation, I'll grant that motion.

10 And the defense motion to prohibit misleading
11 references to the advisory role of the jury at
12 sentencing, again I'll grant that motion.

13 MS. SCHLAX: And although I think the record
14 is probably clear when I say the words I'd like to
15 renew all previous motions, but if I can
16 articulate to the Court so there's no uncertainty.
17 We continue to seek to have a bifurcated jury
18 process. I know that this Court has previously
19 ruled and that we have planned on at some point
20 during this process specifically death qualifying
21 the jury. We would renew our motion for a
22 bifurcated process and have individual and
23 separate voir dire and separate penalty phase
24 jurors.

25 MR. CALIEL: And obviously, Judge, the Court

1 has previously ruled on that and the status of the
2 law is that one jury can decide both phases of the
3 criminal proceeding in a capital case and we would
4 maintain our position that that's appropriate.

5 THE COURT: Okay. It's on the record that
6 you're renewing that motion. Are there any
7 others?

8 MS. SCHLAX: Specifically, Your Honor, we
9 maintain our request for a change of venue,
10 although, obviously, the Court and court personnel
11 and attorneys have spent a lot of time, we've
12 remained steadfast in our belief that due to the
13 overwhelming media exposure that even those jurors
14 that we are going to question today have been
15 improperly prejudiced against my client from the
16 very beginning.

17 THE COURT: Mr. Caliel.

18 MR. CALIEL: Your Honor, I believe the Court
19 and counsel have gone through numerous safeguards,
20 including the individual questioning and the
21 questionnaires that were utilized, and maybe
22 surprisingly to some, a great majority of the
23 jurors have never even watched the media accounts
24 or even read any articles about this and this is
25 why the Court took that ruling under advisement.

1 We don't know what we're going to get until we get
2 here and the 80 people who have moved on in this
3 phase have all affirmed, under oath, that they
4 have not received any outside influence, other
5 than the minimal amount that was still contained
6 within that factual summary that we provided to
7 them and that they could set aside anything that
8 they had seen or read and be fair and impartial to
9 Mr. Smith during the course of this trial.

10 THE COURT: Okay. The only thing I would
11 add, it doesn't change the ruling, but the only
12 thing I would add, as you know there were a number
13 of jurors that we passed directly to the panel and
14 those jurors have not been questioned at all other
15 than filling out their questionnaire. And I
16 believe that during the questioning process, other
17 than going over the new questionnaire, that one of
18 the attorneys will be running that process, either
19 the State or the defense, and I would just caution
20 you if you see or hear anything that seems to
21 indicate that maybe we might need to talk to that
22 juror individually, we could just make a mark and
23 we can tell them that and when we excuse the jury
24 we can bring those individuals back in
25 individually, like we have done, to take their

1 testimony on anything that might be a problem or
2 that we might not have known that we needed to
3 know, things like that.

4 I did change the juror questionnaire. I got
5 concerned late last night that No. 1 said my name is
6 so Madam Clerk was kind enough to change it to my
7 juror number is. I just was afraid, even though I
8 told them not to say their name, they would see it
9 and say their name.

10 MS. SCHLAX: Sure.

11 THE COURT: So if everybody agrees that's
12 okay, that's the questionnaire. Everything else
13 is the same.

14 MS. SCHLAX: Yes, Your Honor.

15 MR. CALIEL: That's nine.

16 THE COURT: And they made arrangements for me
17 to be able to come sit down closer to the jury
18 panel so I can see their faces, which, as you
19 know, is important, and I know Madam Court
20 Reporter, at that point, once I go over the
21 questionnaires with them, which I do from here,
22 once I do that, I'll ask if you'll take a moment
23 to let us reposition ourselves so that Madam Court
24 Reporter and the Court can both get closer so she
25 can hear and see and I can hear and see.

1 MS. SCHLAX: Yes, ma'am.

2 THE COURT: And I do need to put your client
3 under oath for a couple of things before we get
4 started.

5 MS. SCHLAX: Yes, Your Honor.

6 THE COURT: Mr. Smith, if you'd stand and let
7 us place you under oath, please.

8 (Defendant sworn.)

9 THE DEFENDANT: I do.

10 THE COURT: Thank you, Mr. Smith.

11 Just two things this morning. One is it is
12 my understanding, from previous hearings, that you
13 are not requesting at this point that the jury be
14 sequestered during the guilt phase of the trial,
15 is that correct?

16 THE DEFENDANT: Will I have the option at a
17 later date of requesting that?

18 THE COURT: You have the option -- we'll
19 proceed today, they're not going to be sequestered
20 during the guilt phase. You have the option to
21 request that once they go out to deliberate.

22 THE DEFENDANT: Okay. I've forever lost my
23 right to question them during this stage of the
24 guilt?

25 THE COURT: I think we need to take a minute

1 and let you talk to your client. He's asking
2 questions that I'm not sure where he's headed.

3 MR. CALIEL: And, Your Honor, if I could
4 clarify the law, he has no right for the jury to
5 be sequestered at this juncture. It's a request
6 that can be made by the defense and ruled on by
7 the Court.

8 THE DEFENDANT: It just sounded to me like it
9 was offering or it was an option of mine and I had
10 understood that it was not. So that's fine.

11 THE COURT: Well, it's not a right to have
12 them sequestered at the guilt phase. It is a
13 right later. Your attorneys had originally asked
14 for that and they withdrew that with your
15 permission and I questioned you about that under
16 oath on the record. I'm just going over some
17 things that just need to be made clear before we
18 start questioning the jury and I was not offering
19 or not offering.

20 THE DEFENDANT: Okay.

21 THE COURT: I was just simply reiterating is
22 it true that you've waived any request to have the
23 jury sequestered during the guilt phase of the
24 trial, which is next week.

25 THE DEFENDANT: It is.

1 THE COURT: And then, yes, of course, as they
2 go out to deliberate we'll have to revisit that
3 and as the attorneys question this panel today,
4 they may mention that that's a possibility in the
5 future. So that they'll be aware of that ahead of
6 time.

7 THE DEFENDANT: That's fine.

8 THE COURT: Is that okay?

9 THE DEFENDANT: Yes, ma'am.

10 THE COURT: And then the other thing is, as
11 you know, we spent three days with questionnaires
12 and the individual questioning of the panel and
13 selected a panel of 80 to do the actual jury
14 selection and you have agreed all along with the
15 persons who were passed to today as well as the
16 ones that were stricken for cause and I just need
17 to reaffirm that on the record or need you to
18 reaffirm that on the record.

19 THE DEFENDANT: I did.

20 THE COURT: Okay. All right. Anything else?

21 MR. CALIEL: Judge, the only thing I would
22 make a request of, and this is what we had
23 discussed originally, a lot of the jurors have
24 been passed from Tuesday till today and I would
25 make a request, before we begin, has anybody, the

1 Court make a -- an inquiry has anybody seen or
2 heard anything outside of the courtroom in regards
3 to this case and if they could, could they show
4 their hands and then we could make the appropriate
5 inquiries if that is, in fact, the case before we
6 go any further.

7 THE COURT: Okay.

8 MS. SCHLAX: And, Your Honor. If I could
9 further request, not only have seen or heard from
10 any source, whether it be media or friends,
11 acquaintances, coworkers.

12 MR. CALIEL: We would concur.

13 THE COURT: Okay. And, as you know, the
14 introduction I give them has a lot of information
15 about stressing how important it is. So I'll
16 probably read that first and then just say, you
17 know, some of you have not had the opportunity to
18 be here all week and be questioned individually,
19 but if anyone has any information I need to know
20 that they all by you raising your hand. And then
21 I think at that point if anybody does raise their
22 hand we'll have to excuse the rest of the panel
23 and individually question them before we get
24 started.

25 MR. CALIEL: I agree.

1 MS. SCHLAX: I agree.

2 THE COURT: Okay. If I forget something, let
3 me know.

4 MS. SCHLAX: Yes, Your Honor.

5 THE COURT: Is the panel all downstairs?

6 BAILIFF: Yes, ma'am.

7 THE COURT: They're all downstairs? Okay.

8 Are you all ready for them to come up?

9 MS. SCHLAX: Yes, Your Honor.

10 THE COURT: Ms. Schlax, have you had a chance
11 to look at the witness list?

12 MS. SCHLAX: Oh, I did not.

13 THE COURT: Okay. Let me let you look at it
14 in case there are any changes.

15 MR. CALIEL: And, Your Honor, it does not
16 have witnesses for the defense on it. Those are
17 merely the State's witnesses. I can't advise.

18 THE COURT: Mr. Caliel, so Ms. Rozier was
19 Ms. Rozier initially and now she's Chappell?

20 MR. CALIEL: She's remarried as Chappell.
21 She's remarried since the date of this offense.
22 She and Chris were married before.

23 THE COURT: Okay.

24 BAILIFF: Judge, we're missing five.

25 THE COURT: Oh, we're missing five jurors.

1 So they're not all here yet. So with that in
2 mind, we're not going to bring them in yet. I'll
3 excuse myself just for a moment. I'll be right
4 back. Anybody else wants to be excused, good time
5 to do it.

6 (Recess.)

7 THE COURT: Are they all here?

8 BAILIFF: Jeff, I'll walk down there.

9 BAILIFF: Yes, sir.

10 Still missing two.

11 Missing one.

12 THE COURT: Now we're missing one. So
13 hopefully that person will show up shortly.

14 Our last juror just walked in so we have all
15 80.

16 Are you all ready for them to be brought up?

17 MS. SCHLAX: Yes, Your Honor.

18 MR. CALIEL: Yes, Your Honor. Do we know who
19 the juror was who was late?

20 THE COURT: [REDACTED] She was passed directly --
21 she may have heard the time wrong or something.

22 BAILIFF: They're on the way up.

23 THE COURT: Okay. Great. Thank you. I
24 didn't realize Judge Norton was still picking a
25 jury across the hall so there's a lot more

1 activity up here than normal still.

2 BAILIFF: You want them to come straight in,
3 Your Honor?

4 THE COURT: Well, I'd like to know they're
5 ready to come in before they start coming in.

6 MS. SCHLAX: Your Honor, I just wanted to
7 make sure, is the Court going to inform the jurors
8 that they will likely be here tomorrow? I just
9 want to know their expectations.

10 THE COURT: Yeah, we can do that. We've been
11 telling them it's going to be all week, but I can
12 retell them. I think they're likely to be here
13 tomorrow.

14 MS. SCHLAX: I think they are, too.

15 BAILIFF: They're being lined up now, Your
16 Honor. They're coming up the escalator.

17 THE COURT: Okay. As soon as they're all
18 ready, we're ready. I just want to know before
19 they start walking in.

20 BAILIFF: They're coming up. I can line them
21 up and bring them in for you.

22 THE COURT: Yes. I just need to know before
23 you start bringing them in.

24 BAILIFF: Yes, ma'am.

25 THE COURT: Thank you.

1 BAILIFF: Her car broke down and she had to
2 call a taxi. That's why she was late. They're
3 lining them up now. About two minutes.

4 THE COURT: That's fine.

5 They're ready? All right, is everyone ready
6 for the jury to come in -- or the panel to come
7 in?

8 MR. CALIEL: Yes, Your Honor.

9 MS. SCHLAX: Yes, Your Honor.

10 THE COURT: All right. You may bring 'em in.

11 BAILIFF: Everybody here, ma'am.

12 THE COURT: Thank you.

13 (Prospective jurors present.)

14 BAILIFF: Ladies and gentlemen of the jury
15 panel, will you rise and raise your right hand to
16 be sworn in by Madam Clerk.

17 (Prospective jurors sworn.)

18 (Affirmative response from prospective
19 jurors.)

20 THE COURT: You may be seated.

21 Good morning, ladies and gentlemen.

22 I want to start off by telling you that we
23 normally do not have this many jurors in the
24 courthouse. This is the most jurors we have ever
25 had by far in the courthouse and they're still

1 picking a jury across the hall that has almost this
2 many people on the panel so it's been a very unusual
3 and somewhat difficult week for the court personnel
4 and the Clerk's Office and everybody else. So any
5 inconvenience that you've suffered because of that,
6 we apologize. We've done everything we could to
7 make this as seamless as possible.

8 We're now to a panel from which we will select
9 a jury to try the case. And you're sitting from my
10 vantage point from left to right. So from the wall
11 to the aisle on this side and from left to right,
12 from the aisle to the wall on this side, starting
13 with the first seat over here, No. 1, and the last
14 seat over there in the back corner, No. 8.

15 I have some information that I normally read
16 when I welcome a jury panel for the jury selection
17 process. And some of it might be repetitive. In
18 fact, a lot of what you hear might be repetitive.
19 It's still important and I apologize for any
20 repetition.

21 This is a criminal trial, as you know, and I
22 realize as I said that service on a jury panel is
23 not necessarily convenient, but it does afford you
24 an opportunity to be a part of the administration of
25 justice by which the legal affairs and liberties of

1 your fellow citizens are determined and protected.
2 I will continue to make every effort to see to it
3 that the demands on your time are not unreasonable.

4 I did read not long ago a former United States
5 Supreme Court Justice, Justice Brandeis, said that
6 the most important position in America is that of a
7 citizen. And that's what you are, and this is part
8 of your duty, and we thank you so much for being
9 willing to do that.

10 This part of a trial is called voir dire. It's
11 a question and answer session. I'm going to ask you
12 some questions before the attorneys and then they
13 will ask you some questions. The questions I ask
14 you will be in response to your questionnaire and
15 you don't need to fill that out. We're going to go
16 over it orally.

17 Some of our questions, as you know, might seem
18 personal. However, we are not trying to pry into
19 your personal affairs. We just need to discover if
20 there's any reason why it might be better for you at
21 some other time to serve on a different jury.

22 We are looking for any preconceived opinions or
23 bias which you cannot lay aside or to see if you
24 have any personal experience or special knowledge
25 that might cause you to favor either party. The

1 object is to obtain a jury who will impartially try
2 the issues in this case, only upon the evidence
3 presented in the courtroom, without being influenced
4 by any outside factors.

5 In sum, these questions are designed to assure
6 each party a fair trial. You're going to be
7 required to answer all of our questions out loud.

8 Sitting over here toward the end of jury box is
9 our court reporter. And her recording of what is
10 said in this session and during the trial is the
11 legal transcript of the proceedings. And it's very
12 important that not only she, but me and everyone
13 else in the courtroom, is able to hear your answers.
14 In order to do that you're going to have to stand up
15 when you're talking. Because when you're in a group
16 this large if you're sitting down you're frequently
17 talking into the person's back in front of you and
18 we just can't hear you. And we have to be able to
19 hear you.

20 If you forget to stand up, either I or one of
21 the attorneys will remind you.

22 We're also going to give you a portable
23 microphone to use to assist. Some of you are like
24 me, nobody can hear me if I'm not talking in a
25 microphone. So we're going to use that for you as

1 well.

2 In this case, which is criminal, as I
3 introduced before, the State is represented by State
4 Attorney Melissa Nelson, by Assistant State Attorney
5 Mark Caliel.

6 MR. CALIEL: Good morning.

7 THE COURT: And by Assistant State Attorney
8 Vanessa Wheeler-Sanchez.

9 And the defendant in this case is Mr. Donald
10 Smith and he is represented by Ms. Julie Schlax.

11 MS. SCHLAX: Good morning.

12 THE COURT: And Mr. Chuck Fletcher.

13 MR. FLETCHER: Good morning.

14 THE COURT: And they continue to be assisted
15 by Dr. Brooke Butler.

16 Thank you.

17 I'm going to read you the Indictment in this
18 case. The Indictment is the charging document and
19 it's been filed and that's the document that
20 eventually brings this case to trial. You are not
21 to be influenced by the fact that an Indictment has
22 been issued. It is not evidence and it is not any
23 proof of guilt.

24 Clerk No. 16-2013-CF-005781-AXXX-MA, Division
25 CR-D.

1 In the Circuit Court of the Fourth Judicial
2 Circuit of the State of Florida, in and for Duval
3 County, spring term in the year 2013. State of
4 Florida versus Donald James Smith.

5 And this an Indictment for murder in the first
6 degree, kidnapping a child under the age of 13 years
7 and sexual battery on a child less than 12 years
8 old.

9 In the name of and by authority of the State of
10 Florida the grand jurors of the State of Florida and
11 County of Duval, empanelled and sworn to inquire and
12 true presentment make, in and for the body of the
13 County of Duval, upon their oaths do present and
14 charge that Donald James Smith, on or between the
15 21st day of June, 2013, and the 22nd day of June,
16 2013, in the County of Duval and the State of
17 Florida, did unlawfully and from a premeditated
18 design to effect the death of Cherish Perrywinkle,
19 did then and there kill the said Cherish
20 Perrywinkle, a human being, by strangling the said
21 victim, contrary to the provisions of Section 782.04
22 paren 1 paren A Florida Statutes.

23 For count two, the grand jurors of the State of
24 Florida and County of Duval, empanelled and sworn to
25 inquire and true presentment make, in and for the

1 body of the County of Duval, upon their oaths do
2 present and charge that Donald James Smith, on or
3 between the 21st day of June, 2013, and the 22nd day
4 of June, 2013, in the County of Duval and the State
5 of Florida, did confine, abduct or imprison Cherish
6 Perrywinkle, a child under the age of 13, forcibly,
7 secretly or by threat against her will and without
8 lawful authority, with the intent to commit or
9 facilitate the commission of a felony, to wit:
10 Sexual battery, and did commit a sexual battery upon
11 Cherish Perrywinkle, contrary to the provisions of
12 Section 787.01 paren 3 paren A Florida Statute.

13 And for count three, the grand jurors of the
14 State of Florida and County of Duval, empanelled and
15 sworn to inquire and true presentment make, in and
16 for the body of the County of Duval, upon their
17 oaths do present and charge that Donald James Smith,
18 on or between the 21st day of June, 2013 and the
19 22nd day of June, 2013, in the County of Duval and
20 the State of Florida, being a person 18 years of age
21 or older, did commit a sexual battery upon Cherish
22 Perrywinkle, or in an attempt to commit sexual
23 battery injured the sexual organs of Cherish
24 Perrywinkle, a person less than 12 years of age,
25 contrary to the provisions of Section 794.011, paren

1 2 paren A Florida Statutes.

2 And the Indictment is signed by the foreperson
3 of the Duval County Grand Jury at the time, and by
4 the State Attorney in office at the time.

5 Now, we've already gone over a lot of
6 information with all of you and some information,
7 more than that with some of you, but, again, I must
8 ask now that you've heard the charges made in the
9 Information, do any of you know anything about this
10 case, either through your own knowledge or by
11 discussion with anyone else or by reading or hearing
12 about it in any of the news media that we have not
13 already discussed with you? Anything new?

14 (No response from prospective jurors.)

15 THE COURT: I don't see any hands.

16 Do any of you have a state of mind with
17 reference to this particular kind of case which
18 would in any way prevent you from acting
19 impartially? If so, you can raise you hand.

20 (No response from prospective jurors.)

21 THE COURT: Okay. We've gone over that as
22 well. I don't see any hands.

23 The estimated length of this trial, as you
24 know, is four days next week and possibly three days
25 the following week. Again, a trial is a fluid

1 event, as you've learned this week. We can't always
2 get started or finish when we think we might. But
3 that's our goal and that's what we think. We also
4 think you'll be back here tomorrow to finish the
5 jury selection process.

6 We do take breaks when necessary. And we'll
7 also take a break for lunch everyday. And does this
8 schedule as I've explained it present a hardship to
9 anyone that you have not already told us about?

10 (No response from prospective jurors.)

11 THE COURT: And I don't see any hands.

12 I'm going to read you the names of the persons
13 who might possibly testify in this case. They will
14 not necessarily all testify and occasionally a
15 witness will appear whose name is not on the list.
16 But this is the list as we know it today. The
17 purpose of reading the list is to see if you happen
18 to know any of these witnesses.

19 The witnesses are Rayne Perrywinkle, Brad
20 Calhoun, Samantha Gray, Christopher Iber,
21 Christopher Rozier, Ashley Chappell, who was Ashley
22 Rosier at the time of the incident, Marquita Howard,
23 Christina Howard, Brenda Fillingim, T. L. Henson,
24 C. Wilke, K. A. Long. Those three are all with the
25 Sheriff's Office. Jerome Burton. J. A. Carter with

1 the Sheriff's Office. Dr. Valerie Rao, the Medical
2 Examiner. Nicole Lee who works with the Florida
3 Department of Law Enforcement. Detective Hinson,
4 D. C. Gonzalez and C. Carter who all work for the
5 Sheriff's Office. James Parker who is retired from
6 the Sheriff's Office. Kerri-Ann Buck, Dr. Heather
7 Holmes, Dr. Joseph Wu, Dr. Jeff Colino, Dr. Joseph
8 Sesta, James Akin, Michael Bossen, Detective Don
9 Alexander and Detective Lonnie Mills.

10 Does anyone recognize, simply from me reading
11 this list, that you know any of these witnesses?

12 (Negative response from prospective jurors.)

13 THE COURT: And I don't see any hands.

14 Let me just say that sometimes it happens
15 that you don't recognize a name, but then when a
16 person walks in to testify you recognize their
17 face and realize that you might know them. So if
18 you end up on the jury and that happens, you just
19 raise your hand and let me know and we'll handle
20 it then.

21 Can each of you agree to follow the law as I
22 instruct you in it, regardless of whether or not you
23 like the law or agree with the law? You may answer
24 out loud.

25 (Affirmative response from prospective

1 jurors.)

2 THE COURT: Is there anyone who cannot agree
3 to that?

4 (No response from prospective jurors.)

5 THE COURT: And I don't see any hands.

6 Now, many of you, as you know, again, we've
7 already talked to, but some of you we did not
8 follow-up until today. So I need to ask if any of
9 you who we have not previously talked to have any
10 physical disability which would prevent you from
11 serving as a juror. That could be a hearing
12 problem, a sight problem, the flu, which is going
13 around, an injury or anything that would make it
14 difficult or impossible for you to give your full
15 and undivided attention to this trial. Is there
16 anyone?

17 (No response from prospective jurors.)

18 THE COURT: And I don't see any hands.

19 Later on in the process you'll hear about
20 reasonable doubt. The State is required to prove
21 these allegations beyond and to the exclusion of
22 every reasonable doubt. You'll hear that the
23 defendant has the right to remain silent. Every
24 criminal defendant has the absolute right to remain
25 silent. They're not required to testify. They're

1 not required to present any evidence and they're not
2 required to prove anything. Does everyone
3 understand that?

4 (Affirmative response from prospective
5 jurors.)

6 THE COURT: Okay. And the State has the
7 burden of proof. They'll talk with you about
8 that. And the defendant has the presumption of
9 innocence, which many of you have heard about
10 already. At this stage of the trial no evidence
11 has been presented and he is presumed innocent.
12 Do you all understand that?

13 (Affirmative response from prospective
14 jurors.)

15 THE COURT: Is there anyone who disagrees
16 with that?

17 (No response from prospective jurors.)

18 THE COURT: Okay. No hands were raised.

19 Finally, as you would have noticed when I
20 read the witness list, some of the witnesses are
21 civilian and some work in law enforcement. Every
22 witness is treated the same. It's your obligation
23 as a juror to determine the credibility of each
24 and every witness.

25 Would anybody treat a law enforcement officer

1 different than they would treat a civilian witness
2 for purposes of judging their credibility?

3 (Negative response from prospective jurors.)

4 THE COURT: Okay. And I don't see any hands.

5 We're going to go over another questionnaire,
6 but we're going to do it orally. You're going to
7 stand and we're going to give you a portable
8 microphone to use. You don't have to read the
9 question. You just give us the information that the
10 question asks for. And I'm going to go over one
11 with you as if it were me so you'll understand. It
12 doesn't take that long generally to do this. But
13 you'll give your jury number. That's the first
14 thing you do. You just stand up with your form and
15 give us the information.

16 My juror No. is, my date of birth is. I don't
17 have to give you mine, but you have to give me
18 yours.

19 The area of town in which I live is, and we
20 don't want your address, again, just the area, the
21 general area, the beaches, downtown, whatever it is.
22 I have lived in Jacksonville for how many years and
23 before that I lived wherever you lived before
24 Jacksonville if you did, in fact, live somewhere
25 else and how long you lived there. Where you're

1 employed. And I know we have that already. Or
2 where you were employed before you retired. What
3 kind of work do you do. Just a simple explanation,
4 I'm a clerk at a store, I run the IT department at
5 such and such a business. Whatever your job
6 description is.

7 And then whether you are single, married,
8 separated, divorced, widowed, partnered, other,
9 anything. Whatever your current status is.

10 And then your husband, wife, or significant
11 other is employed by, and whoever they're employed
12 by. And the kind of work that he or she does.

13 There are so many children, whatever it is,
14 from zero to whatever the number is, living at home.
15 And then their ages. How many children living away
16 from home and their ages and their occupations.
17 Whether you rent or own your home.

18 Then it asks do you have a relative, friend or
19 acquaintance that works for law enforcement, State
20 Attorney's Office, or any criminal defense lawyer.

21 And then whether or not you've previously
22 served on a jury, whether it was civil or criminal,
23 whether or not the jury reached a verdict. Not what
24 the verdict was. Just whether the jury reached a
25 verdict. And whether or not you served as the

1 foreperson.

2 So, we're going to start over here. As I said,
3 that's seat No. 1. We're going to give you a
4 microphone to use. Oh, okay. Let me do one more
5 thing before we do that. I've got an instruction I
6 need to read you as well.

7 In order to have a fair and lawful trial there
8 are rules that all jurors must follow. A basic rule
9 is that jurors must decide the case only on the
10 evidence presented in the courtroom. You must not
11 communicate with anyone, including friends and
12 family members, about this case, the people and
13 places involved or your jury service. You must not
14 disclose your thoughts about this case or ask for
15 advice on how to decide this case.

16 I want to stress that this rule means you must
17 not use electronic devices or cell phones to
18 communicate about this case, including Tweeting,
19 texting, blogging, e-mailing, Instagraming, on and
20 on and on, what are the current state of affairs is
21 in the technology department, or posting any
22 information on a website or chat room or by any
23 other means at all. Do not send or accept any
24 messages to or from anyone about this case or your
25 jury service. In addition, your cell phones or

1 electronic devices must be turned off while you're
2 in the courtroom. You can have 'em, but they have
3 to be turned off.

4 You must not do any research or look up words,
5 names, maps or anything else that might have
6 something to do with this case. This includes
7 reading newspapers, watching television, using a
8 computer, cell phone, the internet, any electronic
9 device or any other means at all to get information
10 related to this case or the people and places
11 involved in this case. This applies whether you're
12 in the courthouse, at home or anywhere else.

13 All of us are depending on you to follow these
14 rules so that there will be a fair and lawful
15 resolution to this case. Unlike questions that you
16 may be allowed to ask in court, which will be
17 answered in court in the presence of the judge and
18 the parties, if you investigate, research or make
19 inquiries on your own outside of the courtroom the
20 trial judge has no way to assure that they are
21 proper and relevant to the case and the parties,
22 likewise, have no opportunity to dispute the
23 accuracy of what you find or to provide rebuttal
24 evidence to it.

25 And that is contrary to our judicial system

1 which assures every party the right to ask questions
2 about and rebut the evidence being considered
3 against it and to present argument with respect to
4 that evidence. Non-court inquiries and
5 investigations unfairly and improperly prevent the
6 parties from having that opportunity that our
7 judicial promises. Any juror who violates these
8 restrictions jeopardizes the fairness of these
9 proceedings and a mistrial could result that would
10 require the entire process to start over.

11 A mistrial is a tremendous expense and
12 inconvenience to the party -- parties, the Court and
13 the taxpayers. If you violate these rules, you may
14 be held in contempt of court and face sanctions such
15 as serving time in jail, paying a fine or both.

16 If you become aware of any violation of these
17 instructions, or any other instruction I give in
18 this case, you must tell me by giving a note to one
19 of the bailiffs who will then inform me.

20 And, again, as I told you Monday, I've never
21 held a juror in contempt and placed them in jail,
22 but you have to hear that because it tells you how
23 important this instruction is.

24 And since you've been coming and going already
25 three days this week and you're back for the fourth,

1 I do need to ask have you all been able to follow my
2 previous instructions that you are not to get any
3 information about this case from any outside source?
4 That includes media, TV, radio, newspapers,
5 internet, any other computer search, friends,
6 relatives or coworkers. Have you all been able to
7 abide by those instructions?

8 (Affirmative response from prospective
9 jurors.)

10 THE COURT: Is there anyone who has received
11 outside information?

12 (No response from prospective jurors.)

13 THE COURT: And I don't see any hands.

14 Okay. Now, back to where we were. We're going
15 to start with the questionnaires, we're going to
16 start with the juror in the first row. That's juror
17 No. ■.

18 We're going to continue to use your numbers,
19 not your names, and just give us the information on
20 the questionnaire,

21 PROSPECTIVE JUROR: My number is ■ date of
22 birth ■ I live in beaches area. I
23 lived in Jacksonville 15 years. I used to live
24 before in Amman, Jordan, for 25 years. Employed
25 by retail business. And before I was an attorney

1 back home. I'm a store manager. I'm married. My
2 wife, she doesn't work. I have four childrens.
3 They are 12, seven, four and one. And no children
4 living away from my home. I own my house. And I
5 don't know anybody work for law enforcement or --
6 and the answer is No. 13 is no.

7 THE COURT: What I think you meant to say is
8 your wife doesn't work outside the home. She does
9 work.

10 PROSPECTIVE JUROR: Yeah.

11 THE COURT: Just to clarify.

12 PROSPECTIVE JUROR: Yes, ma'am.

13 THE COURT: Okay. Thank you.

14 Juror No. [REDACTED].

15 Thank you, sir.

16 PROSPECTIVE JUROR: Thank you. I'm juror No.
17 [REDACTED]. Date of birth [REDACTED]. I live in the
18 westside. Lived in Jacksonville for 37 years.
19 Lived in Savannah before that for --

20 THE COURT: Can you hold the microphone up a
21 little closer?

22 PROSPECTIVE JUROR: I'm sorry.

23 THE COURT: Thank you.

24 PROSPECTIVE JUROR: Lived in Jacksonville for
25 37 years. Lived in Savannah before that.

1 Employed by Coggin Automotive. I'm an automobile
2 technician. Separated. No children living at
3 home. One child living away from home. 35. And
4 occupation is actually a ward of the state. I own
5 my home. Relative and acquaintance, same company
6 I work for, Coggin. I never served on the jury.

7 THE COURT: Okay. Did you say your 35 year
8 old works for the state?

9 PROSPECTIVE JUROR: No, he's a ward of the
10 state.

11 THE COURT: Oh, a ward of the state. Thank
12 you, sir.

13 Juror No. [REDACTED]

14 PROSPECTIVE JUROR: My jury number is [REDACTED] My
15 date of birth is [REDACTED] The area of
16 town I live in is Westside. I lived in
17 Jacksonville for four years and before that I
18 lived in New York for 16 years. I'm currently
19 employed by [REDACTED] Before I was not employed.
20 I was a full-time student. The kind of work I'm
21 going to start doing is retail. I'm single. No
22 children living at home. No children living away.
23 I own my home. No relatives, friends or
24 acquaintances. And I've not previously served on
25 jury duty.

1 THE COURT: Okay. Thank you, juror No. [REDACTED].

2 Juror No. [REDACTED]

3 PROSPECTIVE JUROR: My juror number is [REDACTED]

4 Date of birth is [REDACTED] I live in St.

5 Nicholas. I lived there about six and a half

6 years. Before that I lived in Arizona for 18

7 years. Employed by [REDACTED] I do production

8 ordering. I have a significant other. She's also

9 employed by [REDACTED] She does business office

10 associate. Zero children. I rent my home. I

11 have no relatives, friends or acquaintances that

12 work for law enforcement and I have never served

13 on the jury.

14 THE COURT: Okay. Thank you, Juror No. [REDACTED].

15 Juror No. [REDACTED]

16 PROSPECTIVE JUROR: My juror number is [REDACTED]

17 My date of birth is [REDACTED] I live on

18 the westside. I lived in Jacksonville for 15

19 years. I'm employed by [REDACTED] and I'm a

20 store manager. I'm single. My significant other

21 is employed by [REDACTED] He also does

22 Juvenile Justice Department, I believe. He's a

23 teacher. I have two children, ages four and nine.

24 I rent my home. And then I have my boyfriend who

25 works for the Juvenile Justice Department and I

1 have not been on the jury before.

2 THE COURT: Let me ask you something. First
3 of all, my apologies. I said juror No. [REDACTED] It's
4 juror No. [REDACTED]. You corrected me. Thank you.

5 Does he teach in the Juvenile Justice?

6 PROSPECTIVE JUROR: No, he teaches for
7 Juvenile Justice. I'm going to say that he is --
8 I guess he does like intake for the children.

9 THE COURT: Okay. Do you know where he works
10 exactly?

11 PROSPECTIVE JUROR: Downtown. I'm not really
12 sure.

13 THE COURT: Okay. Do you know if he's ever
14 had to appear in court for any of the cases?

15 PROSPECTIVE JUROR: No.

16 THE COURT: No he has not or no you don't
17 know?

18 PROSPECTIVE JUROR: He has not.

19 THE COURT: He has not. Is there anything
20 about his job that would affect your ability to be
21 fair and impartial?

22 PROSPECTIVE JUROR: No.

23 THE COURT: Okay. Thank you, juror No. [REDACTED]
24 Juror No. [REDACTED]

25 PROSPECTIVE JUROR: I'm juror No. [REDACTED] My

1 date of birth is [REDACTED] I live on the westside
2 of town. I've lived in Jacksonville for 39 years.
3 I'm employed by [REDACTED]. I'm a dental
4 assistant. I have a significant other. He works
5 for [REDACTED]. He does outside work. I have three
6 children living in the home 12, 18 and 20. No
7 children outside the home. I rent. I have no
8 relatives working in law enforcement. And I have
9 not -- I've not previously served on a jury.

10 THE COURT: Okay. Let me ask you, the 18
11 year old and the 20 year old, do they work at all?

12 PROSPECTIVE JUROR: Both go to work and
13 school.

14 THE COURT: What type of work do they do?

15 PROSPECTIVE JUROR: One works at McDonald's
16 and one works -- she's a -- a leasing agent.

17 THE COURT: Okay.

18 PROSPECTIVE JUROR: Um-hum.

19 THE COURT: Thank you, Juror No. [REDACTED]

20 Juror No. [REDACTED].

21 PROSPECTIVE JUROR: My juror number is [REDACTED]
22 My date of birth is [REDACTED] I live on the
23 westside. I have lived in Jacksonville for 30
24 years. And I lived in New Jersey for 36 years
25 before that. I'm retired now. I was employed by

1 various hospitals in the area. I was an RN. I am
2 married. My husband is now retired, but he worked
3 for a defense contractor and developed software
4 for the military. We have no children at home and
5 we have one child who's 37 years old and teaching.
6 I own my home. And I have a nephew who is a
7 police officer in New Brunswick, New Jersey, and I
8 have never served on a jury before.

9 THE COURT: Two things. Your nephew who is
10 in law enforcement in New Jersey, would anything
11 about that affect your ability to serve fairly and
12 impartially?

13 PROSPECTIVE JUROR: No.

14 THE COURT: Okay. And I'm sorry, but I
15 missed what your husband did.

16 PROSPECTIVE JUROR: He works for a defense
17 contractor. He develops software for the
18 military, fixing planes. He develops software to
19 teach them how to fly a plane or fix a plane.

20 THE COURT: Okay. So he doesn't work in any
21 security or law enforcement or for the Department
22 of Defense?

23 PROSPECTIVE JUROR: No.

24 THE COURT: Thank you, juror No. [REDACTED]

25 Juror No. [REDACTED]

1 PROSPECTIVE JUROR: No. [REDACTED] I
2 live at the beaches. I've been here for nine
3 years. Lived in New Hampshire for 15 years before
4 that. I'm employed by the [REDACTED]
5 [REDACTED] I'm a kitchen designer. I'm
6 married. My wife is employed by [REDACTED]
7 She is a human resource manager. I have no
8 children. There are no children living away from
9 home. I own my own home. I have no relatives,
10 friends or acquaintances in law enforcement. And
11 I've not previously served on a jury.

12 THE COURT: Okay. Thank you.

13 Juror No. [REDACTED], if you would hand the microphone
14 to --

15 BAILIFF: All the way back?

16 THE COURT: Yeah, all the way at the end and
17 then we'll start from the end of the row again
18 with juror No. [REDACTED]

19 PROSPECTIVE JUROR: I'm juror No. [REDACTED] My
20 date of birth is [REDACTED] I live in
21 Whitehouse. I lived in Jacksonville for 30 years.
22 Before that I lived in Deland, Florida, for 15
23 years. I'm employed by [REDACTED]
24 Before that I was in the Navy during Desert Storm.
25 The work I do for the peanut place is I'm a

1 driver. I am married. My wife is retired. I
2 have no children. I own my own home. I do -- I
3 do not have anybody that works for -- anybody that
4 works for enforcement and have not previously
5 served on a jury.

6 THE COURT: When you were in the Navy were
7 you involved in any way in law enforcement duties?

8 PROSPECTIVE JUROR: No, ma'am.

9 THE COURT: Okay. Thank you, sir.

10 Juror No. [REDACTED]

11 PROSPECTIVE JUROR: I'm juror No. [REDACTED] My
12 date of birth is [REDACTED] I live in the
13 Englewood area. I've lived in Jacksonville for
14 over 35 years. I was born and raised an Air Force
15 dependent. I've lived in many places. I am
16 self-employed. I have my own by boutique. I am
17 divorced. My significant other is employed by
18 [REDACTED] as an electrician. I do have
19 three children. They do not live in my home.
20 They are 21, 18 and 13. I rent my home. I do
21 have a friend in law enforcement agency and my
22 daughter is also dating a person in the law
23 enforcement agency.

24 THE COURT: Is that the 21 year old or the 18
25 year old?

1 PROSPECTIVE JUROR: It is the 18 year old and
2 he is a community service officer.

3 THE COURT: Okay. A couple of things. Did
4 the 18 year old or the 21 year old work?

5 PROSPECTIVE JUROR: Yes, the 21 year old
6 works at Jiffy Lube and the 18 year old works at
7 MOD Pizza.

8 THE COURT: Okay. And anything about your --
9 now, your friend and your daughter's person she's
10 dating, neither one of them were on the list of
11 witnesses I read, correct?

12 PROSPECTIVE JUROR: No, they were not.

13 THE COURT: Anything about those two facts,
14 that you have a friend in law enforcement or that
15 your daughter dates someone in law enforcement,
16 would either of those things affect your ability
17 to serve fairly and impartially?

18 PROSPECTIVE JUROR: No, ma'am.

19 THE COURT: Okay. Thank you, juror No. [REDACTED]

20 Juror No. [REDACTED]

21 PROSPECTIVE JUROR: My juror number is [REDACTED]
22 My date of birth is [REDACTED] I live on the
23 westside of Jacksonville. Been here for 38 years.
24 I'm employed by [REDACTED]
25 special accounts representative. I am married.

1 My husband is employed with [REDACTED] He does hazmat.
2 I have two children living at home. One is 18,
3 the other is 12. I rent. I have no friends or
4 acquaintances or relatives working with the
5 Sheriff's Department and I've never served on a
6 jury.

7 THE COURT: Okay. One of your children is
8 18?

9 PROSPECTIVE JUROR: Yes, he's in high school.

10 THE COURT: Does he work at all?

11 PROSPECTIVE JUROR: No, he doesn't.

12 THE COURT: Okay. I'm sorry. What did you
13 say your husband does?

14 PROSPECTIVE JUROR: He's hazmat, janitorial
15 at [REDACTED]

16 THE COURT: Hazmat?

17 PROSPECTIVE JUROR: Yes.

18 THE COURT: Does he work with law enforcement
19 at all?

20 PROSPECTIVE JUROR: No.

21 THE COURT: Okay. All right. Thank you,
22 juror No. [REDACTED]

23 Juror No. [REDACTED]

24 PROSPECTIVE JUROR: My juror number is [REDACTED]
25 My date of birth is [REDACTED] The area of town

1 in which I live is Murray hill. I've lived in
2 Jacksonville for 30 years. I am employed by [REDACTED]
3 [REDACTED] The kind of work I do is office
4 services clerk. I am married. And my wife is
5 employed by [REDACTED] The kind of
6 work she does is paralegal, they do probate work.
7 There are zero children living at home and I have
8 zero children. I own my home. My friend works --
9 one of my friends works for JSO and one of my
10 friends works for criminal defense lawyer. And I
11 have not previously served on a jury.

12 THE COURT: Okay. Couple of things. You
13 work for a law firm, correct?

14 PROSPECTIVE JUROR: Yes, ma'am.

15 THE COURT: And your wife works for a law
16 firm.

17 PROSPECTIVE JUROR: Yes, ma'am.

18 THE COURT: And I think we already determined
19 your law firm does not do criminal law, correct?

20 PROSPECTIVE JUROR: No, ma'am.

21 THE COURT: Neither does [REDACTED]
22 correct?

23 PROSPECTIVE JUROR: I'm sorry.

24 THE COURT: [REDACTED] does not do
25 criminal work either.

1 PROSPECTIVE JUROR: Not that I'm aware of. I
2 know she doesn't do any. My wife.

3 THE COURT: She works in probate.

4 PROSPECTIVE JUROR: Yes, ma'am.

5 THE COURT: You have a friend that's a JSO
6 officer and a friend that works in the defense
7 attorney office?

8 PROSPECTIVE JUROR: Yes, ma'am.

9 THE COURT: Would either of those things
10 affect your ability to serve as a fair and
11 impartial juror?

12 PROSPECTIVE JUROR: No, ma'am.

13 THE COURT: Thank you, juror No. [REDACTED]

14 Juror No. [REDACTED]

15 PROSPECTIVE JUROR: My jury number is [REDACTED] My
16 date of birth is [REDACTED] The area of town in
17 which I live is the southside. I have lived in
18 Jacksonville for 28 years. Before that I lived a
19 couple of years in South Carolina. I'm employed
20 by Duval County Public Schools. I am a teacher.
21 I am single. I have one child who lives in the
22 home, age is six. I own my own home. I have no
23 relatives or acquaintances that work for any law
24 enforcement, State Attorney's Office or criminal
25 defense lawyer. And I have not previously served

1 on a jury.

2 THE COURT: Do you mind telling us what grade
3 you teach or what age you teach?

4 PROSPECTIVE JUROR: It varies. I actually do
5 -- well, [REDACTED] and [REDACTED] this year.

6 THE COURT: [REDACTED] and [REDACTED]

7 PROSPECTIVE JUROR: Yes.

8 THE COURT: Thank you, juror No [REDACTED]

9 Juror No. [REDACTED]

10 PROSPECTIVE JUROR: My number is [REDACTED] My date
11 of birth is [REDACTED] Live on the beaches area.
12 For about 15 years. Before then Ft. Lauderdale.
13 I'm not employed at this time. Kind of work is
14 sales associate, furniture. My wife is
15 self-employed. She is an interior designer. I
16 have one child away and she is in the Marine
17 Corps. I own my own home. And have not
18 previously served on a jury before.

19 THE COURT: Okay. And do you have any
20 friends, relatives or neighbors or anybody in law
21 enforcement or any of those other agencies?

22 PROSPECTIVE JUROR: No.

23 THE COURT: Your daughter, is that correct,
24 daughter?

25 PROSPECTIVE JUROR: Yes.

1 THE COURT: In the Marine Corps, do you know
2 what her duties are?

3 PROSPECTIVE JUROR: She's at the Pentagon
4 right now.

5 THE COURT: Okay. Do you know if she in any
6 way is involved in security or law enforcement or
7 anything like that?

8 PROSPECTIVE JUROR: No.

9 THE COURT: Okay. Thank you, sir.

10 Juror No. [REDACTED]

11 PROSPECTIVE JUROR: I'm juror No. [REDACTED] I was
12 born [REDACTED] -- [REDACTED] I live in the area by
13 the airport. I have lived in Jacksonville for 65
14 years. I'm employed by [REDACTED] and
15 I'm a pastor. I am married. My wife is my
16 assistant pastor. She's a pastor also. I have no
17 children living in the home. I have two children
18 that live outside the home. They're 40, 36 and
19 46. I own my own home. I have no relatives or
20 acquaintances that work for law enforcement and
21 I've never served on jury.

22 THE COURT: Okay. Your children that live
23 outside the home, could you tell us what type of
24 work they do?

25 PROSPECTIVE JUROR: My daughter -- my oldest

1 daughter, she is the director of our school at my
2 church. My youngest daughter is my executive
3 secretary at the church.

4 THE COURT: That's nice. The school, I
5 didn't realize you had a school at your church.

6 PROSPECTIVE JUROR: Yes.

7 THE COURT: What grades are at your school?

8 PROSPECTIVE JUROR: Pre-K to 12th.

9 THE COURT: Oh, all the way through.

10 PROSPECTIVE JUROR: All the way through.

11 THE COURT: Thank you, sir. We appreciate
12 your time.

13 Juror No. [REDACTED]

14 PROSPECTIVE JUROR: My number is [REDACTED]. My
15 birthday is [REDACTED]. I live in Arlington. I have
16 lived in Jacksonville 30 some odd years. Before I
17 lived in Tallahassee in college. I'm employed by
18 [REDACTED] I'm a business support
19 specialist. I'm single. No children. I rent my
20 home. I have a couple of friends that works for
21 the Department of Corrections and I've never
22 served on the jury before.

23 THE COURT: Your friends that work for the
24 Department of Corrections, is there anything about
25 those friendships that would affect your ability

1 to be a fair and impartial juror?

2 PROSPECTIVE JUROR: No.

3 THE COURT: Thank you, Juror No. [REDACTED]

4 PROSPECTIVE JUROR: Thank you.

5 THE COURT: And we're going to pass the
6 microphone down to the wall to juror No. [REDACTED]

7 PROSPECTIVE JUROR: I'm juror No. [REDACTED] My
8 date of birth is [REDACTED] I live in the
9 Arlington area. I've lived in Jacksonville for 48
10 years. I was born in south Florida. I'm employed
11 by Publix. I am an [REDACTED] I am
12 divorced. My significant other works for
13 [REDACTED] who is a, you know, regular doctor. I
14 have one child 23 that lives at home, one child 29
15 that does not. The 23 year old, unfortunately,
16 doesn't work. The 28 year old is a manager of a
17 tobacco shop. I own my own home. My mother works
18 for [REDACTED] who is really just a family
19 attorney, but I know he's done some criminal tone
20 (sic) and I've never been on the jury.

21 THE COURT: Okay. A couple of things.
22 You're not the first juror that has children that
23 doesn't work. It happens all the time. But we
24 understand. Yeah, [REDACTED] he does a little
25 bit or used to do a little bit of criminal. I

1 don't know if he does it anymore.

2 PROSPECTIVE JUROR: He doesn't.

3 THE COURT: Is there anything about the fact
4 that your wife works there that would affect your
5 ability to serve fairly?

6 PROSPECTIVE JUROR: It's my mom.

7 THE COURT: I'm sorry. Your mom works there
8 that would affect your ability to serve?

9 PROSPECTIVE JUROR: Probably quite the
10 opposite.

11 THE COURT: Quite the opposite. Thank you,
12 sir.

13 Juror No. [REDACTED]

14 PROSPECTIVE JUROR: My juror No. is [REDACTED] My
15 date of birth is [REDACTED] I live in the Spring
16 Park area. I've lived in Jacksonville for five
17 years. And before that I lived -- I'm from
18 Michigan for 35 years. I'm employed -- I'm a
19 [REDACTED] I'm separated.
20 There's one child living at home who's 19. I also
21 have a 24 year old who is away from home. And he
22 is a security guard. I rent my home. I have no
23 -- I know nobody that works in law enforcement. I
24 have never served on a jury.

25 THE COURT: Okay. A couple of things. Does

1 the 19 year old work?

2 PROSPECTIVE JUROR: Yes, he does.

3 THE COURT: What type of work do they do?

4 PROSPECTIVE JUROR: Construction.

5 THE COURT: Construction. The child that
6 works as a security guard, is that a private
7 security firm or do you know?

8 PROSPECTIVE JUROR: It's rehab. Like a
9 project 180 rehab.

10 THE COURT: Okay. Do you know if he has law
11 enforcement training?

12 PROSPECTIVE JUROR: No.

13 THE COURT: Okay. Anything about his job
14 that would affect your ability to serve fairly and
15 impartially?

16 PROSPECTIVE JUROR: No.

17 THE COURT: Okay. And you said you're
18 separated. What does your -- was it your husband?

19 PROSPECTIVE JUROR: Um-hum.

20 THE COURT: What does he do?

21 PROSPECTIVE JUROR: Nothing.

22 (Laughter.)

23 THE COURT: Is that going to affect your
24 ability to be fair and impartial?

25 PROSPECTIVE JUROR: No.

1 THE COURT: Okay. Thank you, juror No. [REDACTED].

2 Juror No. [REDACTED]

3 PROSPECTIVE JUROR: My jury number is [REDACTED] My
4 date of birth is [REDACTED] I live on the
5 northside. I've lived in Jacksonville all of my
6 life. I'm employed by the State of Florida
7 [REDACTED] I am in
8 [REDACTED] I'm married. My husband
9 is retired. There is one child living in the
10 home, three away from home. That one is 16. The
11 others living away from home is 40, 38 and 32. I
12 own my home. I have one friend that is a JSO
13 officer. And I have not previously served on a
14 jury.

15 THE COURT: Okay. You said your husband is
16 retired. What type of work did he do?

17 PROSPECTIVE JUROR: Install air-conditioning
18 units.

19 THE COURT: And we've already determined that
20 your job with the [REDACTED]
21 [REDACTED] you've never had anything to do with
22 child abuse or neglect or anything like that?

23 PROSPECTIVE JUROR: Right.

24 THE COURT: And your friend that's with JSO,
25 would that friendship in any way affect your

1 ability to serve fair and impartially?

2 PROSPECTIVE JUROR: No.

3 THE COURT: And your grown children, do any
4 of those children work?

5 PROSPECTIVE JUROR: Yes.

6 THE COURT: What type of work do they do?

7 PROSPECTIVE JUROR: One of 'em work at ADT
8 and one is at Walmart.

9 THE COURT: Okay. Do you know which Walmart
10 they're at?

11 PROSPECTIVE JUROR: Out at [REDACTED]

12 THE COURT: Out toward the beaches?

13 PROSPECTIVE JUROR: Out toward the beaches.

14 THE COURT: Do you know if they were ever at
15 any other Walmart?

16 PROSPECTIVE JUROR: I do. But they were
17 always on the southside.

18 THE COURT: Thank you so much, juror No. [REDACTED]

19 Juror No. [REDACTED]

20 PROSPECTIVE JUROR: My juror number is [REDACTED]

21 My date of birth is [REDACTED] I live on the
22 northside. I have lived in Jacksonville almost a
23 year. Well, I used to live in Jacksonville like
24 maybe five years ago, three years, then I went
25 back to Atlanta, Georgia, and I stayed there for

1 four years. I'm employed at [REDACTED]
2 The kind of work I do is daycare teacher. I am
3 divorced. My husband, I have no contact. There
4 are two children live at home, ages 12. My
5 daughter, she's special need. And a 16 year old.
6 There are three children living away from home. I
7 think about age 25, 27 and 31. One of, my son,
8 he's attending Florida State College. He went to
9 Orlando, relocated to continue school. My other
10 son is 31, he is not employed. And my third son
11 is away. He works for a cleaning service in
12 Atlanta, Georgia. I rent. I -- I have no
13 acquaintance with law enforcement. I have not
14 previously served in a jury.

15 THE COURT: Okay. You said you're a daycare
16 teacher, correct?

17 PROSPECTIVE JUROR: Yes, ma'am.

18 THE COURT: What's the age of the children
19 that you work with?

20 PROSPECTIVE JUROR: Three. Three years old.

21 THE COURT: Three years old. Okay. Thank
22 you so much, juror No. [REDACTED]

23 No. [REDACTED]

24 PROSPECTIVE JUROR: My juror number is [REDACTED]
25 My date of birth is [REDACTED] I live on

1 the westside. I have lived in Jacksonville for 28
2 years. I'm self-employed. I'm a video game
3 artist. Single. I don't have any kids. I don't
4 own my own home. My sister is a lawyer for the
5 Department of Children and Families. I've never
6 been on a jury before.

7 THE COURT: Is she a lawyer for the
8 Department of Children and Families here?

9 PROSPECTIVE JUROR: Yes.

10 THE COURT: Okay. Does she ever talk to you
11 about her work?

12 PROSPECTIVE JUROR: Not -- not specifics, per
13 se.

14 THE COURT: Okay. Do you know if she
15 represents the Department of Children and Families
16 in court proceedings?

17 PROSPECTIVE JUROR: Yes, she does have to go
18 to court.

19 THE COURT: Okay. And do you know if that's
20 children that have been abused, neglected or
21 abandoned?

22 PROSPECTIVE JUROR: Yes, ma'am.

23 THE COURT: Okay. Anything about her job or
24 what you might know about her job that would in
25 any way affect your ability to serve fair and

1 impartially?

2 PROSPECTIVE JUROR: No, ma'am.

3 THE COURT: All right. Thank you, sir.

4 Juror No. [REDACTED]

5 PROSPECTIVE JUROR: My juror number is [REDACTED]

6 My date of birth is [REDACTED] I live in Mandarin.

7 I'm employed in -- been in Jacksonville for 15

8 year -- 13 years. South Florida for 13 years.

9 Employed by [REDACTED] I do supply logistics.

10 I am married. My wife works for the [REDACTED]

11 [REDACTED] She's a teacher. There are no children

12 at home. I have four children away, 32 who is a

13 bartender, 29 owns their own business, has a

14 painting business and home renovation. My 22 year

15 old son is in the Army, deployed in Iraq, and my

16 19 year old daughter is a student.

17 THE COURT: Your son that's in the Army, do

18 you know if any of his duties are law enforcement

19 related?

20 PROSPECTIVE JUROR: He is Army intelligence.

21 THE COURT: He's intelligence?

22 PROSPECTIVE JUROR: Yes, ma'am.

23 THE COURT: You said your wife is a teacher.

24 What grade does she teach?

25 PROSPECTIVE JUROR: She teaches VPK. Four

1 and five year olds.

2 THE COURT: Thank you, sir.

3 PROSPECTIVE JUROR: Do you want me to
4 continue?

5 THE COURT: Yes. Sorry.

6 PROSPECTIVE JUROR: My children, four
7 children -- well, we'll get to that. My 19 year
8 old is in college. I own my home. My third
9 cousin is a dispatcher in training for JSO. And I
10 know several retired south Florida police
11 officers. My dad was a cop, police officer. And
12 I have served on a jury, I was a foreman and we
13 did reach a verdict.

14 THE COURT: You were what?

15 PROSPECTIVE JUROR: The foreman of the jury.

16 THE COURT: Was that jury able to reach a
17 verdict?

18 PROSPECTIVE JUROR: Yes, we did.

19 THE COURT: And you have a third cousin with
20 JSO?

21 PROSPECTIVE JUROR: Yes, ma'am. She's a
22 dispatcher in training.

23 THE COURT: And your father was in law
24 enforcement?

25 PROSPECTIVE JUROR: He was.

1 THE COURT: And your -- you have retired --
2 friends that are retired law enforcement?

3 PROSPECTIVE JUROR: Correct. The
4 acquaintances through my father, yes.

5 THE COURT: Would any of those things affect
6 your ability to serve fairly and impartially?

7 PROSPECTIVE JUROR: No, ma'am.

8 THE COURT: All right. Thank you, sir.

9 Juror No. [REDACTED]

10 PROSPECTIVE JUROR: My juror number is [REDACTED]
11 My date of birth is [REDACTED] I live in San Marco.
12 I have lived in Jacksonville for 30 years with the
13 exception of the four years of college which was
14 in Gainesville and two years in Miami. I moved
15 back in 2012. I'm employed by [REDACTED]
16 [REDACTED] I am a high school social studies
17 teacher. I teach tenth and 12th grade. I am
18 single. No kids. I own my own home. My cousin
19 is a Public Defender here in Duval County. And I
20 have not served on a jury.

21 THE COURT: Your cousin who is with the
22 Public Defender's Office, would that relationship
23 in any way affect your ability to serve fairly and
24 impartially?

25 PROSPECTIVE JUROR: No, ma'am.

1 THE COURT: Okay. Thank you.

2 Juror No. [REDACTED]

3 PROSPECTIVE JUROR: My juror number is [REDACTED]
4 My date of birth is [REDACTED] I live in the
5 airport area. I have lived in Jacksonville for
6 the last seven years. Before that I lived in
7 Bradenton for four years. I was from Jacksonville
8 before that. That was my educational spree. I'm
9 employed by [REDACTED] I'm a
10 surgeon there. I am divorced. I do have a
11 significant other who is employed by [REDACTED] and
12 my ex-wife is also employed by [REDACTED] in
13 another area. They are -- my significant other is
14 a nurse. She works with nursing education. There
15 are three children who live at home during some of
16 the time. We have shared custody. Six, three,
17 and then my significant other has a two year old.
18 No children living away. I currently rent. I
19 don't have any acquaintances in law enforcement.
20 And I've not been on a jury previously.

21 THE COURT: In your duties do you ever work
22 in the emergency room or anything like that?

23 PROSPECTIVE JUROR: I have -- not in the
24 emergency room. I did work in the trauma setting
25 during some of my training. So I guess some

1 people would consider that the emergency room.

2 THE COURT: I don't know the proper name. Is
3 there anything about your job that would affect
4 your ability to be fair and impartial?

5 PROSPECTIVE JUROR: No, ma'am.

6 THE COURT: Okay. Thank you, sir.

7 And if you'd pass the microphone down the row
8 to the wall to juror No. [REDACTED]

9 PROSPECTIVE JUROR: My juror No. is [REDACTED] My
10 date of birth is [REDACTED] Area of town in which I
11 live is Mayport area. I have lived in
12 Jacksonville for coming up two years. Before that
13 I lived in the coast of Japan for a year and a
14 half. I'm employed by the military. I maintain
15 and repair electronic navigational equipment. I'm
16 single. I have no children. I rent. I have no
17 acquaintances or friends that work for the state
18 or law enforcement and I have not previously
19 served on the jury.

20 THE COURT: Okay. In your military job, you
21 did not work in the law enforcement area, correct?

22 PROSPECTIVE JUROR: No, ma'am.

23 THE COURT: Okay. Thank you, sir.

24 Juror No. [REDACTED]

25 PROSPECTIVE JUROR: Juror No. [REDACTED] Date of

1 birth [REDACTED] I live in the Lakewood Area.
2 Been in Jacksonville about 15 years. West
3 Virginia for the previous 40. Employed by
4 [REDACTED] I'm a
5 marketing director. Divorced. No children. I
6 rent. I have no relatives, friends or
7 acquaintances. I have served on a jury, it was
8 criminal, we did reach a verdict and I was the
9 foreman.

10 THE COURT: Okay.

11 Thank you, sir.

12 PROSPECTIVE JUROR: Yes, ma'am.

13 Juror No. [REDACTED].

14 PROSPECTIVE JUROR: I'm juror [REDACTED] My date of
15 birth [REDACTED] I live on the westside.
16 I've been in Jacksonville approximately 15 years.
17 Before that lived in Texas. I'm employed by [REDACTED]
18 [REDACTED] I'm a customer service representative.
19 My husband's a minister. There are no children.
20 We have no children. I own my home. I have no
21 friend or acquaintance in law enforcement. And I
22 have not previously served on a jury.

23 THE COURT: Okay. Thank you, juror No. [REDACTED]

24 Juror No. [REDACTED]

25 PROSPECTIVE JUROR: Juror number is [REDACTED] Date

1 of birth is [REDACTED] The area of town I live in
2 is the southside. I've lived in Jacksonville for
3 12 years and before that I lived in Orlando for
4 eight years. I am employed by [REDACTED]
5 It's a beer distributor. And I'm a district
6 manager. I am single. I have one child who is
7 three years old that lives at home. I own my
8 house. I do not have any relatives that work in
9 law enforcement and I have not previously served
10 on a jury.

11 THE COURT: Okay. Thank you.

12 The relatives that work in law enforcement,
13 would that in any way --

14 PROSPECTIVE JUROR: I don't have any.

15 THE COURT: Oh, you don't have any.

16 PROSPECTIVE JUROR: No.

17 THE COURT: Thank you, sir.

18 Juror No. [REDACTED]

19 PROSPECTIVE JUROR: Juror No. is [REDACTED] My date
20 of birth is [REDACTED] The area of town I
21 live in is Arlington. I've lived in Jacksonville
22 for two and a half years and before that I lived
23 in Pittsburgh, Pennsylvania, for four years. I'm
24 employed by [REDACTED] The kind of work I
25 do is IT support. I'm single. There's zero

1 children living ten home. Zero children living
2 away from home. I own my own home. I don't have
3 any friends or acquaintances that work for law
4 enforcement and I've not previously served on a
5 jury.

6 THE COURT: Okay. Thank you.

7 Juror No. [REDACTED]

8 PROSPECTIVE JUROR: My jury number is [REDACTED]

9 THE COURT: I'm sorry. [REDACTED]. Thank you.

10 PROSPECTIVE JUROR: My date of birth is

11 [REDACTED] The area I live in is westside. I lived
12 in Jacksonville for three years and I lived in
13 Georgia for 40 years. I'm employed by [REDACTED] I
14 sort packages. I'm divorced. There are two
15 children living in the home, 13 and three. I have
16 two away which is 27 and 25. And one works for
17 Frito-Lay and the other one is in the Navy. I
18 don't rent. I just live with the 25 year old. I
19 -- I'm not related to anyone in law enforcement.
20 I -- I've never served on a jury.

21 THE COURT: Your child that's in the Navy, do
22 you know what their duties are?

23 PROSPECTIVE JUROR: Airplanes.

24 THE COURT: So not working in any law
25 enforcement area of the Navy?

1 PROSPECTIVE JUROR: No.

2 THE COURT: Thank you, juror [REDACTED]

3 Juror No. [REDACTED]

4 PROSPECTIVE JUROR: I'm juror No. [REDACTED] I was
5 born [REDACTED] I live on the
6 southside. I was born and raised in New York,
7 lived in Charlotte, North Carolina, for six years
8 and I've been a total of 28 years in Jacksonville.
9 I'm employed by [REDACTED] I drive coaches.
10 I've been married three times. Can I just say
11 single?

12 (Laughter.)

13 THE COURT: Sure.

14 PROSPECTIVE JUROR: My first husband --

15 THE COURT: You don't have to go all the way
16 back.

17 PROSPECTIVE JUROR: Oh.

18 THE COURT: We don't need your life history.
19 Just your last husband.

20 PROSPECTIVE JUROR: The last husband was an
21 electrician.

22 THE COURT: Okay.

23 PROSPECTIVE JUROR: I shack up with my son.
24 He owns his home. He's 25. I have a 30 year old
25 son. My youngest is a plumber, my oldest son is a

1 maintenance technician. We have -- I say two and
2 a half children living in the home because my
3 youngest son's two sons are six and one. They
4 reside there and my other grandson visits every
5 other weekend. He's also six. I have no friends
6 or relatives in law enforcement and I have never
7 served on a jury.

8 THE COURT: Okay. And I'm putting down on
9 here that you're single.

10 PROSPECTIVE JUROR: Thank you. I'm staying
11 that way.

12 (Laughter.)

13 THE COURT: Juror No. [REDACTED]

14 PROSPECTIVE JUROR: My juror number is [REDACTED]
15 My date of birth is [REDACTED] I live in
16 the Mandarin area. I've lived in Jacksonville for
17 60 years. I'm currently retired, but before that
18 I was self-employed, owned a consumer electronics
19 company. I'm married. My wife worked in the
20 business with me. We have no children living at
21 home. I have one child that's 39 years old. He
22 is in IT for a local law firm. I own my own home.
23 I have no relatives or friends that work in law
24 enforcement. I have quite a number of
25 acquaintances in my business that I met that

1 worked in law enforcement and in the judicial
2 system. I've never served on a jury before.

3 THE COURT: Okay. A couple of things. And
4 let me just say after this we're going to take a
5 restroom break because several people have
6 requested that. But so just hold on to the
7 microphone. But your son works in IT for a law
8 firm. Do you know the name of it?

9 PROSPECTIVE JUROR: [REDACTED]

10 THE COURT: And they don't do criminal law,
11 correct?

12 PROSPECTIVE JUROR: No.

13 THE COURT: And then your acquaintances that
14 you met in business, we have this happen
15 sometimes, business owners that have customers
16 that are with law enforcement. Is there anything
17 about that that would affect your ability --

18 PROSPECTIVE JUROR: None of them are close
19 friends or -- I mean, doesn't work for a lot of
20 the people, but just as well.

21 THE COURT: Okay. So I just need to get an
22 answer on the record. Would that affect your
23 ability to be fair and impartial?

24 PROSPECTIVE JUROR: No.

25 THE COURT: Okay.

1 Ladies and gentlemen, we are going to take a
2 restroom break. When there's this many people,
3 people have to go to the restroom, we all are human.
4 So we'll be in recess for about 15 minutes. It
5 takes awhile for this many people to go out and come
6 back in. And then we'll complete the questionnaires
7 and we will take a lunch break.

8 So we'll be in recess for 15 minutes.

9 (Prospective jurors absent.)

10 (Defendant present.)

11 (Recess.)

12 (Defendant present.)

13 (Prospective jurors present.)

14 BAILIFF: Everybody is here, Your Honor.

15 THE COURT: Thank you.

16 We're going to continue with the
17 questionnaires. We are going to take a lunch break
18 when we're through with the questionnaires and
19 apparently there was several jurors who wondered
20 about the time we will conclude today. Our goal
21 today and everyday during the whole trial is to have
22 you recess at an approximate end of the business
23 day. We never know, you know, exactly when that'll
24 be, but sometime between 4:30 and 6:00 o'clock. It
25 just depends and some days we can't be quite as

1 good. It just depends on what's going on. But
2 today we will try to finish sometime shortly after
3 5:00, could even be a little before 5:00, could be a
4 little later than shortly after 5:00, but we will
5 also try our best to end when a normal business day
6 would end.

7 We're going to pass the microphone down to the
8 wall to juror No. [REDACTED]

9 PROSPECTIVE JUROR: My juror number is [REDACTED]
10 Date of birth is [REDACTED] I live in
11 the Arlington area. I have lived in Jacksonville
12 for 22 years and before that 40 some years in
13 Houston, Texas. I'm employed by [REDACTED]
14 [REDACTED] I'm a hazard claims damage reviewer. I'm
15 divorced. I have one 25 year old son that lives
16 with me. And I have two other sons that live away
17 from home, 34 and 35 year old. I own my own home.
18 I have no relatives or friends or acquaintances
19 that work for law enforcement. And I have
20 previously served on a jury and we did reach a
21 verdict and I was not the foreperson.

22 THE COURT: Was it civil or criminal?

23 PROSPECTIVE JUROR: Criminal.

24 THE COURT: And your children that are grown,
25 what do they do, if they work?

1 PROSPECTIVE JUROR: My 35 year old is -- he
2 works for Aflack and my 34 year old works for Bug
3 Out.

4 THE COURT: And what did your ex-husband do?

5 PROSPECTIVE JUROR: He works for --

6 THE COURT: If you know.

7 PROSPECTIVE JUROR: The hoisting crane up in
8 Louisiana.

9 THE COURT: Thank you juror No. [REDACTED]

10 Juror No. [REDACTED]

11 PROSPECTIVE JUROR: I'm No. [REDACTED] I was born
12 [REDACTED] I live in Riverside. I
13 lived in Jacksonville for 20 years. And Norfolk,
14 Virginia, before that. I'm employed as a customer
15 service manager for [REDACTED] I'm
16 single. I have no children. I own my own home.
17 Have no relatives, friends, acquaintances in law
18 enforcement. And I have served as an alternate
19 juror on a criminal case and they did reach a
20 verdict.

21 THE COURT: Okay. Thank you, Juror No. [REDACTED]

22 Juror No. [REDACTED]

23 PROSPECTIVE JUROR: I'm juror No. 64. My
24 date of birth is January 24th, 1984. I live in
25 the Venetia area of town. I've been in

1 Jacksonville for 34 years. I'm employed by [REDACTED]
2 [REDACTED] I'm an extended day
3 assistant. I'm single. I have no children. I
4 rent my home. I have no acquaintances or friends
5 that work for law enforcement. And I have never
6 served on a jury.

7 THE COURT: What are the ages of the children
8 that you work with?

9 PROSPECTIVE JUROR: I can work from --
10 anywhere from one to 12 years old.

11 THE COURT: Okay. But any of the children
12 that attend the school can go to the out of school
13 daycare?

14 PROSPECTIVE JUROR: Yes, ma'am.

15 THE COURT: Thank you, juror No [REDACTED].
16 Juror No. [REDACTED]

17 PROSPECTIVE JUROR: I'm juror No. [REDACTED]. My
18 date of birth is [REDACTED] I live in the
19 Lakewood area. Lived in Jacksonville for 22
20 years, prior to that New York for about 28 years.
21 I'm employed by [REDACTED]. The kind of work I do,
22 I'm a facilities manager and anything else they
23 need. I am married. My wife is employed by the
24 [REDACTED] She is a personal
25 assistant. I have two children living at home, 18

1 and 15. They're students. I have one child
2 living away, she's 20, and she's a student. I own
3 my own home. I have a cousin who is a police
4 officer in the State of New Jersey. I have
5 another officer friend in St. Johns County, the
6 Sheriff's Department, and we're friends with Judge
7 Howard and Judge Salvador. And I have not
8 previously been on a jury.

9 THE COURT: Okay. Just a minute. I'm still
10 writing. You told us a little bit about your
11 place of employment yesterday, but I don't think I
12 asked you. They don't do criminal work, do they
13 or do they?

14 PROSPECTIVE JUROR: No, ma'am.

15 THE COURT: Okay. And your cousin that's in
16 law enforcement and your friend that's in law
17 enforcement, would either of those things affect
18 your ability to be fair and impartial?

19 PROSPECTIVE JUROR: No, ma'am.

20 THE COURT: And then you said you're friends
21 with two judges. Would those friendships affect
22 your ability to be fair and impartial?

23 PROSPECTIVE JUROR: No, ma'am.

24 THE COURT: Okay. Thank you, juror No. [REDACTED]

25 Juror No. [REDACTED]

1 PROSPECTIVE JUROR: My juror number is [REDACTED]
2 My date of birth is [REDACTED] The area of town in
3 which I live is Mandarin. I have lived in the
4 Jacksonville area for 19 years and before that I
5 lived in Dallas, Texas. I'm employed by [REDACTED]
6 [REDACTED] and I'm a senior financial analyst so I
7 make financial investment opportunities and trust.
8 I am married and my husband is employed by [REDACTED]
9 [REDACTED] He is a service porter.
10 And I have a grandson living at home who is 16. I
11 have four children that live away, ages 36, 38, 39
12 and 40. I own my home. I do not have any
13 relatives, friends or acquaintances that -- that I
14 -- that I know in law enforcement, State
15 Attorney's Office or criminal defense. And I have
16 served on a jury. It was a criminal jury and I
17 was the foreman.

18 THE COURT: And did they reach a verdict?

19 PROSPECTIVE JUROR: Yes, we did.

20 THE COURT: Okay. Good. And then you got
21 four grown children, correct?

22 PROSPECTIVE JUROR: Yes, ma'am.

23 THE COURT: What do they do if they are
24 working?

25 PROSPECTIVE JUROR: They're teenagers -- oh,

1 four children. I'm sorry. My children are, one
2 is construction, one is an office manager, one is
3 a youth program assistant at Ft. Raleigh, Kansas,
4 and the other -- was that four?

5 THE COURT: That was three.

6 PROSPECTIVE JUROR: That was three. It's
7 hard to keep up. Construction, business office
8 manager, program assistant and -- who am I
9 missing? Oh, medical assistant.

10 (Laughter.)

11 THE COURT: The one that's in Ft. Riley, is
12 that person in the military?

13 PROSPECTIVE JUROR: Her husband used to serve
14 in the military. They're divorced. And she works
15 on the site there.

16 THE COURT: Okay. Great. Thank you, Juror
17 No. [REDACTED]

18 PROSPECTIVE JUROR: You're welcome.

19 THE COURT: Juror No. [REDACTED]

20 PROSPECTIVE JUROR: I'm No. [REDACTED] My date of
21 birth is [REDACTED] I live in the Mandarin area for
22 almost three years. Before that I lived in
23 Griffin, Georgia, for about 16. I'm retired from
24 Publix [REDACTED]. My husband's -- sorry.
25 My -- I'm a widow. I have no children living at

1 home. I have three children living out of the
2 home. 49, she works in Bank of America. 39,
3 she's a teacher, kindergarten. A son, I have no
4 idea. That is personal. I own my home. I have
5 no contact with any kind of law enforcement. And
6 I have never served on a jury.

7 THE COURT: Okay. Thank you, juror No. [REDACTED]

8 Juror No. [REDACTED]

9 PROSPECTIVE JUROR: My juror number is [REDACTED]
10 My date of birth is [REDACTED] The area
11 of town in which I live in is northside. I have
12 lived in Jacksonville area for 23 years. I'm
13 employed by [REDACTED] as a patient care
14 coordinator. Single. No kids. I own my own
15 home. No relative, friends or acquaintances of
16 law enforcement and I have not previously served
17 as -- served as juror.

18 THE COURT: Okay. Thank you, Juror No. [REDACTED]

19 Juror No. [REDACTED]

20 PROSPECTIVE JUROR: My jury number is [REDACTED] My
21 date of birth is [REDACTED] I live in
22 the beaches area. I have lived in Jacksonville
23 for 13 years. Before that I lived in Texas for 19
24 years. I am a self-employed Courier. I am
25 married. My wife is a retired massage therapy.

1 There was no children living at home. We have two
2 children living away. One is 42, he is a chef.
3 The other is 45, she's a geologist. I own my own
4 home. I have no friends, relatives or
5 acquaintances in law enforcement. And I have
6 served on a jury, criminal, and we did reach a
7 verdict.

8 THE COURT: And did you serve as the
9 foreperson?

10 PROSPECTIVE JUROR: No.

11 THE COURT: Okay. Thank you, sir.

12 PROSPECTIVE JUROR: You're welcome.

13 THE COURT: Can you all bring the microphone
14 up to this first row and start on the aisle, juror
15 No. [REDACTED]

16 PROSPECTIVE JUROR: I'm juror No. [REDACTED] My
17 birthday is [REDACTED] I live in
18 Arlington area. I lived in Jacksonville for four
19 years. I am employed -- no, I'm sorry. I lived
20 in Jacksonville for about four years. Before that
21 I was living in Birmingham, Alabama, for about 12
22 years. I am employed by [REDACTED] I am
23 account management representative. I am single.
24 I do not have children. I rent. And my father is
25 a sheriff in Jefferson County in Birmingham,

1 Alabama. My mother is a jail officer in Dothan,
2 Alabama, and I have never served on the jury.

3 THE COURT: Okay. Your parents' jobs, would
4 they in any way affect your ability to be fair and
5 impartial?

6 PROSPECTIVE JUROR: No, ma'am.

7 THE COURT: Okay. Thank you, juror No. [REDACTED]

8 Juror No. [REDACTED]

9 PROSPECTIVE JUROR: My juror number is [REDACTED]
10 My date of birth is [REDACTED] The area of town I
11 live in is Mandarin. I have lived in Jacksonville
12 for about 15 years. Before that I lived in
13 Guantanamo Bay, Cuba, for two years. I'm employed
14 by [REDACTED] I'm an accountant.
15 I'm divorced. My significant other is not
16 currently employed. He previously was in the
17 Marine Corps and is disabled. I have one child
18 living at home that is 12. There are two children
19 living away who are 22 and 25. One is
20 self-employed and the other is an aircraft
21 mechanic. I own my home. My ex-husband was
22 military police, United States Navy, and currently
23 still works in a security function for the
24 Department of Defense. I have not previously
25 served on a jury.

1 THE COURT: Okay. Couple of things. Your
2 significant other, what type of work did he do in
3 the military?

4 PROSPECTIVE JUROR: Infantry.

5 THE COURT: Infantry. And your ex-husband
6 has related work?

7 PROSPECTIVE JUROR: Correct.

8 THE COURT: Would that in any way affect your
9 ability to serve fairly and impartially?

10 PROSPECTIVE JUROR: No, it would not.

11 THE COURT: All right. Thank you.

12 Juror No. [REDACTED]

13 PROSPECTIVE JUROR: I am juror No. [REDACTED] My
14 date of birth is [REDACTED] I live on the westside
15 of town. I lived in Jacksonville for 27 years.
16 I'm employed by [REDACTED] I'm a lineman. I'm married.
17 My wife, she is employed by [REDACTED]
18 [REDACTED] She works in the cafeteria. I have no
19 children. No children live with me. I own my
20 home. I have acquaintances that work for JSO and
21 I have never previously served on a jury.

22 THE COURT: Your acquaintances that works for
23 JSO, would that in any way affect your ability to
24 serve fair and impartially?

25 PROSPECTIVE JUROR: No, ma'am.

1 THE COURT: Okay. Thank you, juror No. [REDACTED]
2 Juror No. [REDACTED]

3 PROSPECTIVE JUROR: I'm juror No. [REDACTED] My
4 date of birth is [REDACTED] I have lived here
5 for 16 months. I'm originally from West Virginia.
6 I am retired from the paper mill. I'm a widow.
7 My husband is deceased. He worked with making
8 rocket motors for the military. I have no
9 children living at home. I have one son 45. His
10 occupation is doing wells for gas stations. I
11 rent. No law enforcement relatives or friends.
12 And I was on a jury about 30 years ago and the
13 case was settled and we didn't do any verdict.

14 THE COURT: Okay. Thank you, juror No. [REDACTED]
15 Juror No. [REDACTED]

16 PROSPECTIVE JUROR: I'm No. [REDACTED] I was born
17 [REDACTED] I live by the beaches. I've lived in
18 Jacksonville for four years. Before that I was
19 born and raised in North Carolina. I'm employed
20 by [REDACTED] It is a trade show
21 company. I handle the marketing. I am married.
22 My husband is an engineer at Johnson and Johnson.
23 Zero children. We own our home. My uncle is
24 retiring this month as a captain in the Sheriff
25 Sheriff's Department in North Carolina. My dad's

1 best friend is retiring from the Greensboro Police
2 Department. I have a close friend who is an
3 Assistant District Attorney in Massachusetts. I
4 have not served on a jury.

5 THE COURT: Wait just a minute. You gave me
6 several people that are in that one category of
7 law enforcement or State Attorney's Office or
8 something like that. Would any of those
9 relationships affect your ability to serve fairly
10 and impartially?

11 PROSPECTIVE JUROR: It would not to the best
12 of my ability, but I would have to make a
13 conscious effort.

14 THE COURT: Okay. I'll leave that for
15 further questioning. And that's because of these
16 relationships with people who have worked in that
17 field?

18 PROSPECTIVE JUROR: Yes.

19 THE COURT: Okay. That's fine. The lawyers
20 might ask you further questions on that.

21 PROSPECTIVE JUROR: Sure.

22 THE COURT: Thank you so much.

23 PROSPECTIVE JUROR: Thank you.

24 THE COURT: No. [REDACTED]

25 PROSPECTIVE JUROR: I'm juror [REDACTED] My birth

1 date is [REDACTED] I live on the northside. I
2 have lived in Jacksonville for 43 years. I'm
3 employed by [REDACTED] I'm a
4 dialysis technician. I'm separated. I don't know
5 if my soon to be ex-husband is working or not. I
6 have four children. I have one 20 year old at
7 home, I have a 29 year old, he works for some form
8 of Juvenile Justice. I have a 26 year old who's
9 incarcerated and a 23 year old that isn't working.
10 And I've never previously served on a jury. Oh,
11 and I do rent.

12 THE COURT: Do you know what the son does
13 that works for Juvenile Justice?

14 PROSPECTIVE JUROR: He works out on Lane
15 Road. They take the kids out on outings and, you
16 know, watch 'em overnight and stuff.

17 THE COURT: Okay. And then you have a son
18 that's incarcerated.

19 PROSPECTIVE JUROR: Yes.

20 THE COURT: Anything about either of those
21 two things that would affect your ability to serve
22 fairly and impartially?

23 PROSPECTIVE JUROR: No, ma'am.

24 THE COURT: Okay. Thank you, juror No. [REDACTED]

25 Juror No. [REDACTED]

1 PROSPECTIVE JUROR: Juror No. [REDACTED] Date of
2 birth is [REDACTED] I live in Ft. George Island
3 area. I have lived in Jacksonville all my life
4 with the exception of about a year or two
5 travelling for work. I'm employed by [REDACTED]
6 [REDACTED] I'm a senior manager for domestic ground
7 operations. I am married. My wife is
8 self-employed. She runs a tanning salon that we
9 own. We have one child living at home that is ten
10 years of age. No children living away from home.
11 I do own my home. I have an uncle that is a
12 retired JSO officer and I have a few acquaintances
13 that work in the Sheriff's Department. And I've
14 never served on a jury.

15 THE COURT: Anything about your uncle or your
16 acquaintances that would affect your ability to
17 serve fairly and impartially?

18 PROSPECTIVE JUROR: No, ma'am, it would not.

19 THE COURT: Thank you, sir.

20 Juror No. [REDACTED]

21 PROSPECTIVE JUROR: I'm juror No. [REDACTED] Date
22 of birth [REDACTED] I've lived in Jacksonville for
23 42 years. I live in east Arlington. I am
24 employed by [REDACTED] as a manager. I
25 have three children. All three of 'em live away

1 from home, 37 hairdresser, 35 business
2 owner-entrepreneur, 36 Bank of America. I own my
3 own home. No relatives, friends, acquaintances
4 that work in law enforcement. I have previously
5 served on a jury duty. It was a criminal case.
6 And we did reach a verdict.

7 THE COURT: And were you the foreperson?

8 PROSPECTIVE JUROR: No, I was not.

9 THE COURT: Okay. You're a manager with
10 [REDACTED]?

11 PROSPECTIVE JUROR: [REDACTED]

12 Yes, Your Honor.

13 THE COURT: Do you work with law enforcement
14 in that regard?

15 PROSPECTIVE JUROR: No, ma'am.

16 THE COURT: Okay. Anything about your job
17 that would affect your ability to be fair and
18 impartial?

19 PROSPECTIVE JUROR: No, Your Honor.

20 THE COURT: All right. Thank you.

21 If you'd pass the microphone -- well, they'll
22 take the microphone for you and we'll start on the
23 aisle again with juror No. [REDACTED].

24 PROSPECTIVE JUROR: My juror number is [REDACTED].

25 My date of birth is [REDACTED] I live

1 in the southside. I'm in Jacksonville for the
2 last 17 years and before that I was -- for a year.
3 I work for [REDACTED] and I work for the
4 information technology team within [REDACTED].
5 I'm married and my wife is stay-at-home mom and
6 she takes care of our home and me. We have two
7 children, 18 and 15. The 18 year old is part-time
8 in school. I don't have any children living
9 outside. We own our home. I do not have any
10 friends or acquaintances in law enforcement or
11 State Attorney or criminal defense. And I have
12 never served on a jury before.

13 THE COURT: Okay. Your 18 year old, do they
14 work at all?

15 PROSPECTIVE JUROR: 18 year old, he works in
16 school part-time, about six hours a week.

17 THE COURT: Thank you, juror [REDACTED]

18 Juror [REDACTED]

19 PROSPECTIVE JUROR: Good afternoon. My juror
20 number is [REDACTED] My date of birth is [REDACTED]

21 [REDACTED] I live in northeast Jacksonville. I have
22 lived in Jacksonville for 18 years and prior to
23 that I lived in Orlando, Florida, for
24 approximately 26 years. Computed back and forth
25 to Troy, Alabama, for undergraduate studies. I am

1 employed by [REDACTED] and I am
2 the vice-president of human resources. I am
3 married. My husband is employed by [REDACTED]
4 [REDACTED], and he is a sales
5 manager. We have three children living in the
6 home. Their ages are ten, five and five. I own
7 my home. I do not have any relatives or friends
8 that work in law enforcement. However, my company
9 employs railroad police. I do not oversee that
10 staff and I work rarely with them. I have not
11 previously served on a jury.

12 THE COURT: Okay. Okay. You did explain
13 about the fact that your company does fire
14 security -- railroad security, but would anything
15 about that affect your ability to serve fairly and
16 impartially?

17 PROSPECTIVE JUROR: It would not.

18 THE COURT: Okay. Thank you, juror No. [REDACTED]
19 Juror No. [REDACTED]

20 PROSPECTIVE JUROR: I'm juror No. [REDACTED] My
21 birthday is [REDACTED] I live in Mandarin
22 area of Jacksonville. I've been here for 19
23 years. Before that born and raised in South
24 Carolina. I am a realtor with [REDACTED] I
25 am happily divorced. My significant other is

1 employed with [REDACTED] He's an
2 environmentalist. I have no children at home. I
3 have three children outside the home. I have twin
4 daughters that are 29. One is a realtor, the
5 other one is in retail. I have a 23 year old son
6 that is a construction manager. I own my own
7 home. And I haven't had any relationship in over
8 six or seven years, last I saw them. But I did
9 date someone who was a JSO officer. That has no
10 merit to anything. And I've never served on a
11 jury.

12 THE COURT: Okay. And you said you did not
13 feel that that would affect your ability to be
14 fair and impartial?

15 PROSPECTIVE JUROR: No.

16 THE COURT: Thank you, juror [REDACTED]
17 Juror [REDACTED]

18 PROSPECTIVE JUROR: My juror number is [REDACTED]
19 My date of birth is [REDACTED] I live
20 east of the airport. I have lived in Jacksonville
21 for about 15 years and before that I lived in
22 Daytona for about eight years. I'm employed by
23 [REDACTED] The kind of work I do, I am a store
24 manager. I've never been married, but I'm
25 recently engaged and my mother is delighted.

1 (Laughter.)

2 PROSPECTIVE JUROR: My fiancée is employed by
3 [REDACTED] She is the CFO. I have no
4 children living at home, have no children living
5 away. I own my own home. I do not have any
6 friends that work for law enforcement, State
7 Attorneys or criminal defense. And I've never
8 served on a jury.

9 THE COURT: I'm sorry. What is the nature of
10 the business that your wife -- excuse me --
11 significant other works for?

12 PROSPECTIVE JUROR: They are one of the
13 largest ink suppliers in the world.

14 THE COURT: Okay. Thank you, sir.

15 Juror No. [REDACTED]

16 I'm glad your mom's happy.

17 (Laughter.)

18 PROSPECTIVE JUROR: I'm juror No. [REDACTED] I was
19 born on [REDACTED] I live on the
20 westside. I've lived in Jacksonville for 37 years
21 and three years in North Carolina. I am currently
22 unemployed. I was laid off from Comcast after
23 working for 15 years for them. The majority of
24 the time I was a network analyst and last five
25 years I've been a project manager. Let's see. I

1 am single. I have to fix my employment status
2 before I can work on that one. Let's see. I have
3 no children. I rent my home. And I have -- I
4 know no one that works in law enforcement. And
5 I've never served on a jury.

6 THE COURT: Okay. Thank you, juror No. [REDACTED]
7 Juror No. [REDACTED]

8 PROSPECTIVE JUROR: My -- my jury number is
9 [REDACTED] Date of birth is [REDACTED] Area I live in is
10 in southside. I have lived in Jacksonville for 61
11 years. Previously in Georgia. I am employed -- I
12 was employed by [REDACTED] before I retired.
13 The kind of work I was doing was selector. I'm
14 married. My wife worked for -- now I forget what
15 kind of company it was. The kind of work she done
16 was exhaustive work. There are no children.
17 There are no children at the house. And I own the
18 home. And I have friends that work for -- work
19 for JSO. And I never previously served on the
20 jury.

21 THE COURT: Okay. Thank you. Your friends
22 that work for JSO, would that in any way affect
23 your ability to serve fairly and impartially?

24 PROSPECTIVE JUROR: No.

25 THE COURT: Thank you, sir.

1 Juror No. [REDACTED]

2 PROSPECTIVE JUROR: My juror number is [REDACTED]
3 My date of birth is [REDACTED] I live in the
4 Mandarin area. I grew up in Jacksonville but this
5 time around I've been here for 23 years. I'm
6 employed by the [REDACTED] I am an IT executive
7 there. I am married. My wife is employed by
8 [REDACTED] which is a
9 defense contractor. She's an HR manager. We do
10 have four children, 15, 16, 18, 21. Two are away
11 at college. Two are at home and one's at work.
12 We do own our own home. I have quite a few
13 acquaintances in the State Attorney's Office and
14 that sit on the bench, including Chief Judge Mark
15 Mahon, Charlie Cofer, Russ Healey.

16 THE COURT: You must play golf.

17 PROSPECTIVE JUROR: Yes. And yet I'm still
18 here. Also some criminal defense attorneys like
19 Mitch Stone. I've been summoned six times to
20 serve on a jury but never sat.

21 THE COURT: Well, because you play golf.

22 Anything about those friendships that would
23 affect your ability to serve fairly and impartially?

24 PROSPECTIVE JUROR: I don't think so.

25 THE COURT: Well, at some point --

1 PROSPECTIVE JUROR: No.

2 THE COURT: Well, I'm not telling you what to
3 say, but at some point during the process we'll
4 need a definitely yes or no. We don't need it now
5 but we will then.

6 PROSPECTIVE JUROR: Understood.

7 THE COURT: Thank you. Juror No. [REDACTED]

8 PROSPECTIVE JUROR: I'm No. [REDACTED] My date of
9 birth is [REDACTED] I live in, I believe they call
10 it the old Sandalwood area. 18 years. I'm
11 recently retired from [REDACTED]. I was a baker. I'm
12 divorced. My 24 year old granddaughter lives in
13 my home. Her significant other, he's 27, they
14 both work as convenience store clerks. There are
15 three great grand children that live with me, six,
16 three, and one. My grown daughter lives away from
17 home. She's 45. She lives in Shreveport,
18 Louisiana, and she's a homemaker. I own my own
19 home. I don't know anybody in law enforcement or
20 anything and I've never served on a jury.

21 THE COURT: Do you happen to know what your
22 ex-husband does?

23 PROSPECTIVE JUROR: Construction.

24 THE COURT: Construction. Okay. Thank you.

25 PROSPECTIVE JUROR: Um-hum.

1 THE COURT: Juror No. [REDACTED] If you'd pass the
2 microphone, it needs to go back off and on to the
3 aisle to juror No. [REDACTED]

4 PROSPECTIVE JUROR: My juror number is [REDACTED]
5 My date of birth is [REDACTED] I live in Mandarin.
6 I have lived in Jacksonville for five years. And
7 before that I lived in Miami for 34 years. I am
8 retired. And I was employed by court reporter
9 firm and I was a court reporter. I am widowed.
10 My fiancée is a day trader. I have no children in
11 the home. My children away are 38, a teacher,
12 preschool, 35, a paralegal for family law and
13 evictions, and 30, a teacher, high school. I own
14 my own home. I have an acquaintance who is an
15 attorney for the police union, I guess it is. And
16 I have served on a jury, it was criminal, we did
17 reach a verdict and I was not the foreperson.

18 THE COURT: Okay. And you said you're a
19 retired court reporter. In your job before you
20 retired, did you ever do any criminal?

21 PROSPECTIVE JUROR: Yes, I did.

22 THE COURT: Okay. Was that here locally?

23 PROSPECTIVE JUROR: No, it was in Miami.

24 Well, a little bit in Jacksonville but mostly in
25 Miami.

1 THE COURT: Is there anything about that work
2 or your acquaintance that is an attorney for the
3 police union that would affect your ability to
4 serve fairly and impartially?

5 PROSPECTIVE JUROR: No.

6 THE COURT: Okay. Thank you.

7 Juror No. [REDACTED]

8 PROSPECTIVE JUROR: My juror number is [REDACTED]
9 My date of birth is [REDACTED] I reside in
10 Mandarin. I have lived in Jacksonville for six
11 years and before that I lived in Macclenny,
12 Florida, for 21 years. I'm a full-time student
13 and I co-op for Medtronic Tech. The kind of work
14 I do is electrical engineer. I'm single. I have
15 no children at home. I have no children that live
16 away. I rent my home. I have no friends,
17 families or acquaintances in law enforcement and I
18 have not served on the jury before.

19 THE COURT: Thank you, juror No. [REDACTED]

20 Juror No. [REDACTED]

21 PROSPECTIVE JUROR: My jury number is [REDACTED]
22 My date of birth is [REDACTED] I live on the
23 northside of town. I have lived in Jacksonville
24 for about two years. Before that I lived in Ohio
25 for 13 years. I'm employed by [REDACTED]

1 I do record keeping. I am engaged or whatever.
2 He is employed by Mobile Services. He does like
3 sales of mobiles. There are two children
4 currently in the home. No children living away.
5 We rent our home. I do not know anybody who works
6 in law enforcement and I have not previously
7 served on the jury.

8 THE COURT: Okay. Let me ask you this. You
9 said you work for [REDACTED] correct?

10 PROSPECTIVE JUROR: Um-hum.

11 THE COURT: You said you work for [REDACTED]?

12 PROSPECTIVE JUROR: [REDACTED].

13 THE COURT: Right. There's another juror
14 panel member that --

15 PROSPECTIVE JUROR: I do not know her.

16 THE COURT: You all do not know each other.
17 Thank you, ma'am.

18 PROSPECTIVE JUROR: You're welcome.

19 THE COURT: Juror No. [REDACTED]

20 PROSPECTIVE JUROR: I'm No. [REDACTED] My date of
21 birth is [REDACTED] I live over in beaches. And I
22 have lived in Jacksonville for 26 years and then
23 the rest of my life I was in an area of California
24 for the last about 40 years. I am retired. I was
25 employed at [REDACTED] at Mayport Naval Base

1 and I was outside machinist. And I'm married and
2 my wife is also recently retired and she was a
3 flight attendant all her life, TWA, American
4 Airlines. I have no children in the home. I do
5 have two daughters. I really wasn't involved in
6 their lives. They're about 45 and 28, that's an
7 estimate. And, of course, I don't know where they
8 work. I don't even know where they live. Let me
9 see. Nobody I know in law enforcement. And I was
10 part of a jury and it was criminal and I wasn't
11 the foreman.

12 THE COURT: Okay. Did they reach a verdict?

13 PROSPECTIVE JUROR: Yes.

14 THE COURT: Okay. Thank you, sir.

15 Juror No. [REDACTED]

16 PROSPECTIVE JUROR: I'm juror No. [REDACTED] Date
17 of birth [REDACTED] I live on the westside. I've
18 been in Jacksonville for 30 years. Before that
19 Colorado for 14. I'm employed with [REDACTED]
20 The kind of work I do, I give medicine. I'm
21 single. There are zero children living in the
22 home. There are two children living away from
23 home. I rent. I have no one in law, state or
24 criminal. I have not previously served on a jury.

25 THE COURT: Okay. Thank you, juror No. [REDACTED]

1 Juror No. [REDACTED]

2 PROSPECTIVE JUROR: I'm juror [REDACTED] My date
3 of birth is [REDACTED] I have lived in
4 Jacksonville for almost five years. Previously I
5 was in Pensacola, Kentucky, Detroit. The kind of
6 work I do, I'm an [REDACTED]

7 [REDACTED] I am -- my significant other, he is
8 retired out of the military, Army and he works at
9 Command Aerospace on airplanes, repairs. I have
10 three children in the home and I have two outside
11 the home. The two outside the home is 18, 16, the
12 two -- the three inside the home is 14 year old
13 twins and an 11 year old. I own my home. I do
14 not know anyone in law enforcement. And I have
15 not previously served on the jury.

16 THE COURT: Okay. Thank you, juror No. [REDACTED]

17 Juror No. [REDACTED]

18 PROSPECTIVE JUROR: My juror No. is [REDACTED] My
19 date of birth is [REDACTED] The area of town in
20 which we live in is towards the beaches. I've
21 lived in Jacksonville for just under a year and
22 before that I was in Washington, D.C., area for a
23 year. I am employed by [REDACTED]
24 [REDACTED] The kind of work I do is I'm a client
25 account billing specialist so I deal with all the

1 client invoicing and insurance authorizations. My
2 significant other works for Baptist. He does
3 surgical pathology. There are no children. We
4 rent. I have no relatives or friends or
5 acquaintances in law enforcement. And I have not
6 previously served on a jury.

7 THE COURT: Okay. Thank you, juror No. [REDACTED]
8 Juror No. [REDACTED]

9 PROSPECTIVE JUROR: My jury number is [REDACTED] I
10 was born [REDACTED] I live on the westside. I
11 have been in Jacksonville for 21 years. I am
12 employed by [REDACTED] I pack boxes. I am single.
13 There's one children living in my home. He's 16.
14 He's my little brother. I live with my parents.
15 Both of my parents are involved in the state. My
16 dad is a corrections officer for sure -- he's a
17 corrections officer downtown and my mom is for the
18 juvenile -- Juvenile Justice Department. I have
19 not previously served on a jury.

20 THE COURT: The fact that your dad is a
21 corrections officer and that your mom works for
22 Juvenile Justice, do you know what she does for
23 them?

24 PROSPECTIVE JUROR: I think she does like the
25 paperwork when they first come in.

1 THE COURT: Intake like? Is there anything
2 about their jobs that would affect your ability to
3 serve fairly and impartially?

4 PROSPECTIVE JUROR: No.

5 THE COURT: And there was another juror that
6 worked for [REDACTED] Do you know her?

7 PROSPECTIVE JUROR: No.

8 THE COURT: And who over here.

9 (Prospective juror indicating.)

10 THE COURT: Do you know her?

11 PROSPECTIVE JUROR: No.

12 THE COURT: Okay. All right. Thank you,
13 juror No. [REDACTED] If you would pass the microphone
14 down the aisle to juror [REDACTED] Got two more and
15 then we'll break for lunch.

16 PROSPECTIVE JUROR: My juror number is [REDACTED]
17 My date of birth is [REDACTED] I live out near
18 the airport. Lived in Jacksonville for seven
19 years. Previously in Deland for seven. I'm
20 employed by [REDACTED]
21 I've an engineer assigned to administration. I'm
22 married. My wife is employed by Chase. She's an
23 appraiser. There are no children living in the
24 home. There are three children away from home
25 that are 27, 24 and 21. One's a pharmacist --

1 excuse me -- one's a pharmacist, one's a
2 pharmacist intern, one's a pharmacist tech. I own
3 my home. I have a relative that works for the
4 fire marshall's office. Actually a friend, not a
5 relative. And I've never served on the jury
6 before.

7 THE COURT: Your job, did you ever deal with
8 going to scenes of crashes or anything?

9 PROSPECTIVE JUROR: Yes.

10 THE COURT: You did. But you don't do that
11 now, correct?

12 PROSPECTIVE JUROR: No.

13 THE COURT: And then you also have a relative
14 that works in the fire marshall's office, correct?

15 PROSPECTIVE JUROR: It's actually a friend.
16 They work for the office of the fire martial.
17 Sorry about that.

18 THE COURT: I'm sorry. Anything about when
19 you used to do that kind of work or your friend's
20 job now or your job now that would affect your
21 ability to be fair and impartial?

22 PROSPECTIVE JUROR: No, ma'am.

23 THE COURT: Okay. Thank you, sir.

24 Juror No. No. [REDACTED]

25 PROSPECTIVE JUROR: My jury number is [REDACTED]

1 My date of birth is [REDACTED] I currently live
2 in east Arlington area. I've lived in
3 Jacksonville for 29 years. Prior to that I was in
4 Georgia for 13. I'm employed by [REDACTED]
5 [REDACTED] I'm a termite technician. I am married.
6 My wife works for McDonald's. She is an office
7 assistant. I have a 21 year old who lives at home
8 that works for Home Goods and a 22 year old in
9 college. And I own my own home, I have no
10 relative or acquaintance that works for JSO or
11 anything to do with that. And I've never served
12 on jury.

13 THE COURT: Okay. Thank you, sir.

14 Juror No. [REDACTED]

15 PROSPECTIVE JUROR: My juror number is [REDACTED]
16 My date of birth is [REDACTED] I live on the
17 southside. I've lived in Jacksonville my whole
18 life. I am currently unemployed, soon to be
19 full-time student. Before that I used to work as
20 a daycare teacher. I am married. My husband is
21 employed with [REDACTED] as a customer care
22 specialist. We have no children, but we're hoping
23 to change that soon. We rent. I have had a few
24 acquaintances in the law enforcement agency with
25 JSO through my family's connection. However, that

1 wouldn't affect my ability to serve on the jury.
2 And I have never previously served on a jury
3 before.

4 THE COURT: Okay. When you worked in daycare
5 before, what age children did you work with?

6 PROSPECTIVE JUROR: Six weeks to one year
7 olds.

8 THE COURT: So it was the little teeny ones?

9 PROSPECTIVE JUROR: Little, little ones.

10 THE COURT: Thank you.

11 PROSPECTIVE JUROR: You're welcome.

12 THE COURT: Juror No. [REDACTED].

13 PROSPECTIVE JUROR: Hi. I'm juror [REDACTED]. I
14 was born [REDACTED] I live in Mandarin. I have
15 been here for 46 years. I was born in New York
16 for -- and I lived there for five. I'm not
17 employed right now. The kind of work that I do is
18 watch my nephews from nine to one years old. I'm
19 married. My husband works for UPS. My husband is
20 a driver. I have no children. I have no children
21 living. We do rent -- we do own our home. I have
22 no friends, no acquaintance, nobody in the law
23 enforcement. I have been summoned twice. This is
24 my third time and I've never been on a jury.

25 THE COURT: Okay. The nephews that you

1 watch, how many of them are there?

2 PROSPECTIVE JUROR: They're ten, nine, two,
3 and one.

4 THE COURT: So four little boys.

5 PROSPECTIVE JUROR: There's four little boys.

6 THE COURT: All right. Thank you.

7 Juror No. [REDACTED]

8 PROSPECTIVE JUROR: I'm juror [REDACTED] My date
9 of birth is [REDACTED] I live in the
10 Arlington area. I lived here for 47 years. I'm
11 employed at [REDACTED] The kind of work I'm doing
12 now is I'm a recording specialist. I am married.
13 My husband works for Internal Revenue Services.
14 In the service center. I have one child at home
15 who's 15. I also have a child away from home.
16 He's 21 in college. He also work for the stadium
17 part-time. We own our home. I have a friend who
18 work for the fire department here in Jacksonville.
19 I have relatives who serve as JSO and also for
20 correction officer.

21 THE COURT: Have you ever served on a jury
22 before?

23 PROSPECTIVE JUROR: No, I have not. Sorry.

24 THE COURT: That's okay. Your friend that's
25 with the fire department and your relatives with

1 JSO or corrections officer, would any of that
2 affect your ability to be serve fairly and
3 impartially?

4 PROSPECTIVE JUROR: It would not.

5 THE COURT: It would not. Thank you.

6 Juror No. [REDACTED]

7 PROSPECTIVE JUROR: My juror number is [REDACTED]
8 Date of birth [REDACTED] I live in the beach
9 area. I lived in the Jacksonville -- I lived in
10 Jacksonville for 11 years. Before that Melbourne,
11 Florida, for 21. I'm employed with [REDACTED]
12 [REDACTED] I'm admissions coordinator.

13 I'm single. I have a significant other who works
14 at [REDACTED] He's a chef. We have two kids,
15 two and ten. They both live with us. No kids
16 outside the home. I own my home. I don't have
17 any relatives or friends with law enforcement.
18 And I never served on the jury.

19 THE COURT: Okay. Thank you.

20 Juror No. [REDACTED]

21 PROSPECTIVE JUROR: I'm juror [REDACTED] My date
22 of birth is [REDACTED] I live on the westside of
23 town. I've been in Jacksonville for 35 years.
24 Prior to that I lived in Dallas, Texas, for six
25 years. I'm employed by [REDACTED]

1 [REDACTED] I am a social worker. I work for the
2 case management department doing discharge
3 planning. I'm single. I have no children. I
4 rent my home. I have no friends or relatives in
5 law enforcement and I've not previously served on
6 a jury.

7 THE COURT: Okay. In your job do you work
8 directly with patients that are being discharged?

9 PROSPECTIVE JUROR: I do.

10 THE COURT: Are any of those children?

11 PROSPECTIVE JUROR: Sometimes.

12 THE COURT: And they are there for injury or
13 illness?

14 PROSPECTIVE JUROR: Pardon.

15 THE COURT: They're there because of either
16 illness or injury or surgery?

17 PROSPECTIVE JUROR: Correct.

18 THE COURT: Okay. Is there anything about
19 that that would affect your ability to serve
20 fairly and impartially?

21 PROSPECTIVE JUROR: No.

22 THE COURT: Thank you.

23 Juror No. [REDACTED]

24 PROSPECTIVE JUROR: I'm juror [REDACTED]. My date
25 of birth is [REDACTED]. The area of town I live on

1 is southside. I've been in Jacksonville all my
2 life. Currently I'm a caregiver for my dad.
3 Single. I have a son 20, daughter ten. No one is
4 living at the house with me as far as my kids. I
5 currently own my home. No relatives in law
6 enforcement. I've never been on jury before.

7 THE COURT: And one of your children is 20,
8 is that correct?

9 PROSPECTIVE JUROR: Yes.

10 THE COURT: Does that child work?

11 PROSPECTIVE JUROR: Yes. Amazon.

12 THE COURT: Where?

13 PROSPECTIVE JUROR: Amazon.

14 THE COURT: Okay. Amazon. I guess that's a
15 popular new place. Okay. Thank you.

16 Please pass the microphone down the aisle to
17 juror No. [REDACTED]

18 PROSPECTIVE JUROR: I'm juror No. [REDACTED] My
19 date of birth is [REDACTED] I live at the
20 beaches. I've lived in Jacksonville for nine
21 years and before that I lived in North Carolina
22 for 21 years. I'm employed by [REDACTED]
23 [REDACTED] and I'm in category management. I am
24 married. My husband is retired. He was a
25 university professor. We have no children. We

1 rent our home. I have a friend who is a circuit
2 court judge in Miami. And I have not previously
3 served on a jury.

4 THE COURT: Okay. You said your husband is a
5 retired professor, correct?

6 PROSPECTIVE JUROR: Yes.

7 THE COURT: What type of thing did he teach?

8 PROSPECTIVE JUROR: English.

9 THE COURT: English. And your friend is a
10 circuit judge in Miami?

11 PROSPECTIVE JUROR: Correct.

12 THE COURT: Anything about that that would
13 affect your ability to serve fairly and
14 impartially?

15 PROSPECTIVE JUROR: No, ma'am.

16 THE COURT: Thank you.

17 Juror No. [REDACTED]

18 PROSPECTIVE JUROR: I'm juror [REDACTED] My date
19 of birth is [REDACTED] I live in the
20 Avondale area [REDACTED] I -- prior to that I
21 lived in -- I lived in -- I lived here for 15
22 years. I lived in Georgia for 30 years. I'm
23 employed -- I'm an independent contractor. I do
24 home healthcare, taking care of elder people,
25 something that I love doing. And also I work

1 part-time [REDACTED] I'm single. I have three
2 kids. Their ages are 26, 24, 23 -- I mean 22.
3 And all of them reside in Georgia. I have one
4 granddaughter that's two years old. I rent. And
5 I don't have no acquaintance with any law officer
6 and I never served on a jury.

7 THE COURT: Okay. Your children that are
8 grown that live in Georgia, do they work?

9 PROSPECTIVE JUROR: Yes, two does.

10 THE COURT: What type of work?

11 PROSPECTIVE JUROR: My daughter is a medical
12 assistant and my son, one of them does
13 construction and the other don't work.

14 THE COURT: Okay. Thank you.

15 Juror No. [REDACTED]

16 PROSPECTIVE JUROR: My juror number is [REDACTED]
17 My date of birth is [REDACTED] The area of town
18 which I live is the westside. I have lived in
19 Jacksonville for three years. Before that I lived
20 in Tampa, Florida, for 11 years. I am employed by
21 [REDACTED] The kind of work I do, I work in
22 the nursing department. I'm single. I have one
23 child at home at the age of three. No children
24 living away from home. I rent. I do not have any
25 relative or friends that works for the law

1 enforcement and I have not previously served on a
2 jury.

3 THE COURT: Okay. And there was one other
4 person that worked, I think, for [REDACTED]
5 Did you all know each other?

6 PROSPECTIVE JUROR: No.

7 THE COURT: Thank you.

8 Juror No. [REDACTED]

9 PROSPECTIVE JUROR: Hi. My number is [REDACTED]
10 My date of birth is [REDACTED]. I live in
11 the Ft. Caroline area of town. I have lived in
12 Jacksonville for about 18 years. Before that I
13 lived in South Carolina for about ten years. I'm
14 employed by [REDACTED]
15 My job is I'm the clinical dietician there. I am
16 married. My husband is employed by Jacksonville
17 University. He teaches English there. I have one
18 child living in the home, age ten. No children
19 living elsewhere. We own our home. I do not have
20 any relatives or friends related to the things in
21 No. 13. I really didn't think I had
22 acquaintances, but listening to other people
23 brought a few things to mind. There is a JSO
24 officer that's the parent of another child at my
25 child's school that I don't even know their name,

1 but I do see them passing. My mother has a friend
2 who is some sort of judge in South Carolina that
3 I've met a couple of times. That's all I can
4 think of for that. And I have been on a jury
5 before. It's been, I think, over 20 years ago,
6 and it was in South Carolina and it was medical
7 malpractice. I don't know how that would be
8 categorized.

9 THE COURT: Okay. And your acquaintances
10 that you mentioned, the person who has the child
11 at school and your mom's friend who is a judge,
12 would any of that affect your ability to serve
13 fairly and impartially?

14 PROSPECTIVE JUROR: No, ma'am.

15 THE COURT: Thank you.

16 Juror No. [REDACTED]

17 PROSPECTIVE JUROR: I'm juror No. [REDACTED] My
18 date of birth is [REDACTED] I live on the
19 westside. I have lived in Jacksonville for four
20 years. Before that we were stationed in Aviano,
21 Italy. I am an office manager for [REDACTED]
22 [REDACTED] I work currently with
23 owner-operators for McDonald franchises on the
24 westside. I am married. My husband works for
25 United States Air Force. He is a recruiter. I

1 have no children. I rent my home. And I do have
2 two friends that work for Las Vegas Metropolitan
3 Police Department. One is a dispatcher. The
4 other is police officer. And I've not previously
5 served on a jury.

6 THE COURT: Two things. Your friends that
7 are in law enforcement, would that affect your
8 ability to serve fairly and impartially?

9 PROSPECTIVE JUROR: No, ma'am.

10 THE COURT: And your husband I take it was in
11 the Air Force -- he still is, but he's a recruiter
12 now?

13 PROSPECTIVE JUROR: Yes, ma'am, he does
14 recruiting here.

15 THE COURT: Did he ever work in any kind of
16 law enforcement area of the military?

17 PROSPECTIVE JUROR: He did like sensoring
18 when we were stationed in Aviano, but before that
19 it was not anything with law enforcement.

20 THE COURT: Okay. Anything about that that
21 would affect your ability to serve fair and
22 impartially?

23 PROSPECTIVE JUROR: No, ma'am.

24 THE COURT: All right. Juror No. [REDACTED]

25 PROSPECTIVE JUROR: I'm juror [REDACTED] My

1 birthday is [REDACTED] I live in -- I live on the
2 westside. I lived in Jacksonville for 38 years.
3 Lived in Nebraska for five years. I'm employed
4 with [REDACTED] I'm an automated side-load
5 driver. I'm married. My wife is self-employed.
6 She's a massage therapist. I have two kids living
7 at home, one 16 and one 21. The 21, his job is
8 he's a plant manager for a mobile home park and my
9 16 year old is still in the school. And I have
10 two kids living out of the home. One's 14 and
11 one's 17. And they're both in school. I have no
12 relatives or acquaintances in JSO or law
13 enforcement and I own my own home. I forgot that.
14 And I have previously been on a jury. I think it
15 was a criminal case. We did reach a verdict. And
16 I was not the foreman.

17 THE COURT: Okay. Thank you, sir.

18 Juror No. [REDACTED]

19 PROSPECTIVE JUROR: Juror No. [REDACTED] Date of
20 birth [REDACTED] I live on the westside. I've been
21 here for 15 years. Previously I lived in Cologne,
22 Germany. I'm employed by [REDACTED] I'm an account
23 manager. I am married. My wife is currently a
24 full-time student. I have three children, ten,
25 nine and eight. I rent. I don't know anyone in

1 law enforcement. And I've never served on a jury.

2 THE COURT: Okay. Thank you, sir.

3 And juror No. [REDACTED]

4 PROSPECTIVE JUROR: Juror [REDACTED] My date of
5 birth is [REDACTED] Live in Avondale.
6 I've lived in Jacksonville for 17 years and prior
7 to that in Miami with the exception of six years
8 in Gainesville. I'm employed by [REDACTED]
9 [REDACTED] I'm the executive director at [REDACTED]
10 [REDACTED] I'm married. My husband is a
11 retired educator. There are no children living at
12 home. I have three children that live away. I
13 have a 36 year old son that's a software
14 developer, a 33 year old daughter that is a driver
15 for a shift with Publix, and I have a 31 year old
16 son whose in orthopedic surgery residence. I own
17 my own home. I do not know anybody in law
18 enforcement and I have previously served on a
19 criminal jury. I was not the foreperson. And we
20 did reach a verdict.

21 THE COURT: Okay. Thank you, sir.

22 If you'd pass the microphone down, please.

23 Ladies and gentlemen, in just a moment we'll
24 break for lunch and I'm going to ask you to be back
25 at 2:00 o'clock, which is a little over an hour.

1 There's a lot of you to go places to get something
2 to eat and get back. There's a snack bar on the
3 second floor. It may be very busy or not. I don't
4 know. And there's places across the street and
5 around the corners and there's typically a food
6 truck to the west. I don't know if it's there
7 today.

8 You can go to lunch with other members of the
9 panel. That's okay. You just cannot talk about
10 this case in any way and, of course, again, you
11 cannot get any outside information about the case
12 while you're gone to lunch.

13 If you'll just come back to this floor, please
14 use the restroom before 2:00 o'clock, and we'll get
15 started right back up with questions from the
16 attorneys.

17 Thank you.

18 (Prospective jurors absent.)

19 THE COURT: Are there any legal exceptions or
20 objections to what's been done so far?

21 MS. SCHLAX: No, Your Honor.

22 MR. CALIEL: None from the State, Your Honor.

23 THE COURT: Okay. When we come back, I can
24 see them fine from up here, after you went to all
25 that trouble, but if you'd move the chair so Faye

1 can see over if she wants to go sit closer, but
2 I'm able to see them and hear them fine. We're
3 going to make sure they use the microphone. Help
4 me remember right before they come in to remind
5 them they have to stand and use the microphone
6 when they're giving answers.

7 MR. CALIEL: I'll remind them, too, Your
8 Honor, to identify themselves when they respond by
9 their jury numbers.

10 THE COURT: Okay. I think it went real well.
11 There was a lot of people to go through and we got
12 an hour late start. It would have been noon if we
13 had started on time. But we did pretty good.

14 MS. SCHLAX: Yes, ma'am.

15 THE COURT: All right. Thank you. See you
16 at 2:00 o'clock.

17 (Recess.)

18 (Defendant present.)

19 BAILIFF: Missing one juror, [REDACTED]

20 THE COURT: That's pretty good.

21 MR. CALIEL: Your Honor, just a scheduling
22 issue. Counsel and I were just concurring
23 regarding timing wise. Obviously we'll wait for
24 the jurors to get here. Depending on when we
25 finish the first phase and go to the strikes, I do

1 have some reservation, as does counsel, of
2 beginning death qualifying and stopping in the
3 middle.

4 THE COURT: I agree.

5 MR. CALIEL: And so depending on finishing up
6 at sometime after 4:00 o'clock we probably might
7 be able to send them home early today.

8 THE COURT: Are you saying you want to do
9 strikes after the first part before we get to the
10 second part?

11 MS. SCHLAX: Yes.

12 MR. CALIEL: If anybody was cause, we figure
13 for time-savings sake, rather than -- because
14 we're going to individually talk to each and every
15 one would goes through the second phase and I
16 would feel uncomfortable avoiding one, but I don't
17 want to spend 20 minutes talking to someone who is
18 going to be cause. So we would prefer if we could
19 just conduct cause strikes after the first phase
20 of the jury selection and only have the people
21 here death qualified who will pass on.

22 THE COURT: So you would want to -- I've
23 forgotten who's going to talk first for the
24 defense.

25 MS. SCHLAX: Mr. Fletcher.

1 THE COURT: Mr. Fletcher. So Mr. Fletcher
2 would finish, excuse the jury to the hall --

3 MS. SCHLAX: Unless we both kind of
4 communicate there are no cause challenges.

5 THE COURT: Okay.

6 MS. SCHLAX: And then we'll probably ask to
7 approach and we can dismiss them. I anticipate
8 there'll probably be at least somebody.

9 THE COURT: And then that person or person
10 will be excused, we'll bring them in separate.
11 Well, I don't know how I'm going to do that. Do
12 you want to bring them in first and then the
13 others back in?

14 MR. CALIEL: I believe that's probably the
15 best way.

16 MS. SCHLAX: That's probably the best
17 procedure.

18 MR. CALIEL: Hopefully from what it looks
19 like, I don't think there's going to be a large
20 number of cause challenges at this rate, I think
21 it's better if somebody does rise to the level of
22 cause and we agree upon it or it's argued to that
23 effect, I don't want to waste time talking to them
24 individually.

25 THE COURT: I'm fine with that. And I agree

1 about not starting the separate phase and leaving.
2 I think it's better to do it all at once. And
3 we'll start hopefully on time tomorrow and that's
4 all we'll have left.

5 MS. SCHLAX: And I guess I just -- I will try
6 to be as efficient as I can, that perhaps we
7 should -- if we were committed to trying to end at
8 5:00 or 6:00 tomorrow, and I'll know much better
9 --

10 THE COURT: Once we get started.

11 MS. SCHLAX: Right. At least it's possible
12 we could go into Saturday.

13 MR. CALIEL: Well --

14 THE COURT: I didn't think we would do that.
15 Maybe.

16 MR. CALIEL: I couldn't imagine, even if I
17 went extremely lengthy, I can't imagine it lasting
18 -- death qualification lasting much more than two
19 hours to go through the entire panel for me so by
20 lunchtime I'm tendering the panel to the defense.

21 MS. SCHLAX: And we'll see once we get
22 started how we go.

23 THE COURT: Hopefully he can maybe start at
24 9:00 and tender the panel before lunch and take a
25 lunch break.

1 MR. CALIEL: And, Your Honor, honestly, if
2 it's before 4:00 o'clock I may be able to do,
3 between Your Honor reading law and be able to do a
4 general discussion, I may be able to get a portion
5 of mine done. I don't mind splitting that up.
6 All of what I don't want to do is, I have my death
7 qualification sort of split up in two parts where
8 there's a discussion on the law and I'm going to
9 have some interaction, but at the very end I'm
10 individually going to ask a series of questions of
11 each juror. I just don't want to start that and
12 then stop in the middle. So I might be able to
13 even do a portion of my death qualification today
14 if we finish before 4:00 o'clock.

15 MS. SCHLAX: And mine is broken up in a
16 similar fashion.

17 THE COURT: Okay. We'll see how far we go.
18 If there's a lot of causes, that will take awhile.

19 All right. Are they all here now?

20 BAILIFF: Yes, ma'am.

21 THE COURT: Are you all ready for them to
22 come in?

23 MR. CALIEL: Yes, Your Honor.

24 THE COURT: And it is Mr. Fletcher first,
25 correct? I mean it's Mr. Caliel first, but you're

1 going to do the first part.

2 MR. FLETCHER: Yes, Your Honor.

3 THE COURT: We're ready. And for the record
4 Mr. Smith is here.

5 MS. SCHLAX: And we're going to use their
6 original numbers, correct?

7 MR. CALIEL: Yes. That's the only number
8 they know.

9 MS. SCHLAX: Right.

10 THE COURT: Yeah, their other numbers are
11 just a seat number.

12 BAILIFF: Jurors entering the courtroom.

13 (Prospective jurors present.)

14 THE COURT: Thank you, ladies and gentlemen.
15 I hope you enjoyed your lunch break. We're ready
16 to get started with the necessary part of jury
17 selection and I'll call on Mr. Caliel for the
18 State.

19 MR. CALIEL: Thank you, Your Honor.

20 THE COURT: Let me do one thing. Did you all
21 follow my instructions about not talking about the
22 case or getting any information about the case?

23 (Affirmative response from prospective
24 jurors.)

25 THE COURT: So would there be anyone who did

1 not follow my instructions?

2 (No response from prospective jurors.)

3 THE COURT: Who's going to raise their hand
4 and say they didn't.

5 (Laughter.)

6 THE COURT: Okay. Mr. Caliel.

7 MR. CALIEL: Thank you, Your Honor. May it
8 please the Court.

9 THE COURT: Sure.

10 MR. CALIEL: Counsel. Good afternoon, ladies
11 and gentlemen.

12 The first thing I would like to do is thank you
13 in advance on behalf of the State of Florida and all
14 the parties involved in this case. I know it's
15 already been a long week. We expect that this week
16 will continue until tomorrow and if you are selected
17 to be a juror in this case, we expect probably the
18 next two weeks your lives will be up to here in the
19 courthouse with us and so we would like to thank
20 you. Your service is greatly appreciated. Your
21 candor today is greatly appreciated and what I mean
22 by that is we're going to be asking a series of
23 questions.

24 We don't ask these questions to pry into your
25 personal lives or to get into your beliefs or your

1 thoughts about certain issues, but it's important to
2 us here today, it's important to the State of
3 Florida, it's important to Mr. Smith and his
4 lawyers, that we have true and honest answers to the
5 questions we ask and so understand that we're going
6 to be asking sometimes difficult questions,
7 sometimes questions you're not sure how to answer,
8 and that's okay. We just want the best honest
9 response that we can get from you.

10 And I may follow-up when you give a response,
11 we've heard a couple of them and I'll get back to
12 you all in a second, where there's uncertainty in
13 the answers and we may go back and try to ask a few
14 more questions to follow-up with you because we want
15 you to be as certain as possible going into this
16 process that you can come into this courtroom with
17 an open mind and be fair both to the State of
18 Florida and to the defendant, Donald Smith, in this
19 case.

20 Does everybody understand that?

21 (Affirmative response from prospective
22 jurors.)

23 MR. CALIEL: What I'm going to try to do is
24 ask some general questions about the case and give
25 you sort of a preview of what's going to take

1 place here. The first part of our questioning is
2 going to be in response to the guilt phase of the
3 trial. It's going to be is the defendant guilty
4 of what we've accused him of. And it's somewhat
5 unusual in this particular case because you know
6 possible punishment. Some of you who we've
7 already talked to in this case, we've talked about
8 the death penalty, and the possible penalties in
9 first degree murder case, but typically in a
10 criminal case jurors don't concern themselves with
11 punishment. They come into this courtroom and
12 they're supposed to keep an open mind and their
13 job is to evaluate the facts, determine what they
14 are, apply them to the law that the Judge will
15 instruct you on, and determine whether or not the
16 defendant is guilty or not. Typically jurors are
17 not concerned and should not concern themselves
18 with what punishment is in the case, because
19 that's not the role of a juror in a regular
20 non-capital case. We're different here today.
21 This is a capital case, the death penalty is in
22 play. So what that means is there's two phases to
23 the trial, the guilt phase, which will begin next
24 week, and if the defendant is proven beyond a
25 reasonable doubt at trial that he's guilty of

1 first degree murder, we will proceed to a penalty
2 phase. And it's hard for us to discuss that
3 because we haven't gotten past phase one yet, but
4 we have to explore your beliefs and your thoughts
5 in regards to the death penalty.

6 But does everybody understand that in the
7 first phase of a trial when you're determining did
8 the defendant commit the crimes that he's accused
9 of, in going through your process as a juror
10 punishment should not be a concern of yours. Do
11 you all understand that?

12 (Affirmative response from prospective
13 jurors.)

14 MR. CALIEL: Okay. I appreciate that.

15 So what I'm going to talk to you a little bit
16 about today is the first phase of the trial and then
17 I'll tender to the defense, we'll talk about the
18 first phase, we're going to talk about punishment
19 and the penalty phase a little bit later.

20 Just some procedural things so you understand
21 so the court reporter can get everything down. I
22 will ask certain questions of you all as a group or
23 as a whole, like I just did, and everybody has
24 verbal response. If someone has a response
25 different than the group as a whole, if your answer

1 is, no, and everybody is saying yes, I need to know
2 about it so please raise your hand and identify
3 yourselves so we can go back to you if your response
4 is different than anybody else.

5 Also, when I'm asking questions of you
6 individually I'm going to need you to identify
7 yourself by your juror number, like you have
8 already, because that's how the record will reflect
9 who we're talking to. And we'll need you to stand
10 because the courtroom is big and Madam Court
11 Reporter has to make sure she takes down everything
12 accurately. Okay? Does everybody understand and
13 promise to do that?

14 (Affirmative response from prospective
15 jurors.)

16 MR. CALIEL: Great.

17 Now just a few follow-up questions before I
18 start talking about the case in general. Starting
19 on what is my left side, your right side of the
20 courtroom, juror No. [REDACTED]

21 PROSPECTIVE JUROR: Yes, sir.

22 MR. CALIEL: Sir, you had indicated that back
23 in Jordan you were an attorney, is that correct?

24 PROSPECTIVE JUROR: Yes, sir.

25 MR. CALIEL: What type of law did you

1 practice?

2 PROSPECTIVE JUROR: Civil.

3 MR. CALIEL: Civil.

4 PROSPECTIVE JUROR: Yeah.

5 MR. CALIEL: Did you ever have any experience
6 in criminal law in Jordan?

7 PROSPECTIVE JUROR: No, sir.

8 MR. CALIEL: Do you believe that there's
9 anything about that experience and practicing
10 civil law in Jordan that would affect your ability
11 to be fair and impartial in this case?

12 PROSPECTIVE JUROR: No.

13 MR. CALIEL: Okay. Thank you, sir. I don't
14 have any further questions.

15 PROSPECTIVE JUROR: Thank you.

16 MR. CALIEL: Juror No. [REDACTED] Sir, you had
17 indicated and I just want to be clear, that your
18 son, the 35 year old son, was a ward of the state.
19 What did you mean by that?

20 PROSPECTIVE JUROR: He's incarcerated.

21 MR. CALIEL: Okay. I just wanted to make
22 sure it wasn't as if he was in a hospital or
23 something of that nature.

24 PROSPECTIVE JUROR: No.

25 MR. CALIEL: Okay. Thank you, sir. I

1 greatly appreciate that.

2 Juror No. [REDACTED] -- I apologize. That's not the
3 seat number. Juror No. [REDACTED]. Sir, you had indicated
4 that your sister was a lawyer for the Department of
5 Children and Families.

6 PROSPECTIVE JUROR: Yes, sir.

7 MR. CALIEL: Does she represent the State of
8 Florida in termination of parental rights cases?

9 PROSPECTIVE JUROR: I'm not sure.

10 MR. CALIEL: Okay. Do you have a lot of
11 discussions with your sister about her cases or
12 her work?

13 PROSPECTIVE JUROR: I talk to her about it,
14 but she doesn't give me like names or anything
15 she's not allowed to divulge.

16 MR. CALIEL: Sure. Sure. So she's appearing
17 on behalf of the State of Florida for the family
18 of the welfare of children that she represents?

19 PROSPECTIVE JUROR: Correct.

20 MR. CALIEL: Okay. And so while you may have
21 general discussions about that, do you think that
22 in talking with her about those issues that would
23 affect how you view evidence in this case?
24 Obviously this is a case that involves the
25 abduction of a child.

1 PROSPECTIVE JUROR: No.

2 MR. CALIEL: Thank you, sir. I greatly
3 appreciate it.

4 A general question I put to everybody, the
5 Judge has asked follow-up questions when we had two
6 jurors who worked in the same location. I want to
7 just be general. Does anybody, now that you've
8 heard the jurors' describe themselves, introduce
9 themselves to the Court, do you recognize or know
10 any other juror members on the jury panel? And if
11 so, please raise your hand.

12 (Prospective jurors indicating.)

13 MR. CALIEL: Okay. So I have a few. Let me
14 go first to this side of the courtroom and I'll
15 get back to that side. Please keep your hands
16 raised.

17 Ma'am, I believe it's juror No. [REDACTED].

18 PROSPECTIVE JUROR: [REDACTED]

19 MR. CALIEL: Yes, ma'am. Who do you know who
20 is also seated on the panel?

21 PROSPECTIVE JUROR: Juror [REDACTED] We work
22 together.

23 MR. CALIEL: You work together. Thank you,
24 Juror [REDACTED] This is the one juror you knew as
25 well?

1 MR. FLETCHER: Yes.

2 MR. CALIEL: Okay. The reason why we ask
3 this question is if you are asked to sit as a
4 juror in this case we want you all to
5 independently evaluate the evidence and then be
6 able to discuss the case. Would either of you,
7 either juror No. [REDACTED] or juror No [REDACTED] because you
8 work together, sway one way or the other based
9 upon what the other was saying simply because you
10 know each other and work together?

11 PROSPECTIVE JUROR: No.

12 PROSPECTIVE JUROR: No.

13 MR. CALIEL: Okay. You could independently
14 evaluate the evidence and then discuss that with
15 the rest of the jurors if you both happen to be
16 seated together?

17 PROSPECTIVE JUROR: Yes.

18 PROSPECTIVE JUROR: Yes.

19 MR. CALIEL: Juror No. [REDACTED], you also had your
20 hand up.

21 PROSPECTIVE JUROR: [REDACTED] I believe.

22 MR. CALIEL: Yes.

23 PROSPECTIVE JUROR: Juror No. [REDACTED]

24 PROSPECTIVE JUROR: Our children went to
25 school together.

1 MR. CALIEL: Same line of questioning with
2 both jurors [REDACTED] and juror [REDACTED] If by happenstance
3 you happen to be both seated on the jury panel,
4 could you serve and evaluate the evidence
5 independently or do you think your relationship
6 would affect how you deliberated this case?

7 Could you please stand up so the court
8 reporter can hear you.

9 PROSPECTIVE JUROR: I don't think my
10 knowledge of each other would impact my decision.

11 MR. CALIEL: Thank you. Same to you juror
12 No. [REDACTED]

13 PROSPECTIVE JUROR: Yes, sir.

14 MR. CALIEL: No impact?

15 PROSPECTIVE JUROR: No, sir.

16 MR. CALIEL: In the back and I can't see your
17 juror number. Juror No. [REDACTED] Yes, ma'am.

18 PROSPECTIVE JUROR: Juror [REDACTED].

19 MR. CALIEL: Okay. So juror No. [REDACTED], you know
20 juror No. [REDACTED] How do you know juror No. [REDACTED]

21 PROSPECTIVE JUROR: We attended the same
22 place of worship years ago, but not now.

23 MR. CALIEL: In the past you attended the
24 same church or place of worship, but not any
25 longer?

1 PROSPECTIVE JUROR: No, sir.

2 MR. CALIEL: Same line of questioning. Do
3 you feel, juror No. [REDACTED] that if the two of you
4 were seated on the same jury panel that that would
5 affect how you deliberate this case and evaluate
6 the evidence?

7 PROSPECTIVE JUROR: Not at all.

8 MR. CALIEL: And juror No. [REDACTED] same question
9 to you. Do you think that would affect how you
10 deliberate or view the evidence in the case?

11 PROSPECTIVE JUROR: It would not. No.

12 MR. CALIEL: Thank you, ma'am.

13 Three hands. Let's start in the front here.

14 And that's going to be juror No --

15 PROSPECTIVE JUROR: [REDACTED]

16 MR. CALIEL: [REDACTED] Thank you, sir.

17 PROSPECTIVE JUROR: You want me to stand up?

18 MR. CALIEL: Who do you know?

19 PROSPECTIVE JUROR: I've only met this
20 gentleman here. I don't even know his name, but I
21 was purchasing a spa years ago. I just recognize
22 his face.

23 MR. CALIEL: He thanks you for your business.

24 (Laughter.)

25 MR. CALIEL: But do you feel in any way that

1 that would affect how you deliberate?

2 PROSPECTIVE JUROR: No.

3 MR. CALIEL: Did you even remember him?

4 PROSPECTIVE JUROR: I'm sorry. No, I did
5 not.

6 PROSPECTIVE JUROR: Just wanted to be honest.

7 MR. CALIEL: That's okay. That's okay. He
8 really liked the spa, though. I'm sure that's why
9 he remembered you.

10 Any other hands that we had up here?

11 (Prospective juror indicating.)

12 MR. CALIEL: And your badge is turned
13 backward.

14 PROSPECTIVE JUROR: I'm [REDACTED]

15 MR. CALIEL: Juror [REDACTED] who do you know?

16 PROSPECTIVE JUROR: I know juror [REDACTED] We're
17 cousins.

18 MR. CALIEL: So we actually have family on
19 the jury panel together.

20 And that's the one person that you know as
21 well, juror No. [REDACTED]?

22 PROSPECTIVE JUROR: Yes.

23 MR. CALIEL: Same questions to you all. Can
24 you independently evaluate the evidence and
25 deliberate the case if you both happen to be on

1 the jury panel at the same time? And that's your
2 -- you're juror No. [REDACTED] That's your answer, you
3 can do that?

4 PROSPECTIVE JUROR: Yes, sir.

5 MR. CALIEL: Juror No. [REDACTED]

6 PROSPECTIVE JUROR: Yes.

7 MR. CALIEL: Thank you. Greatly appreciate
8 it.

9 Now, I'm going to pick on a couple of you.
10 Don't mean to do it, I don't, you know, mean to pry,
11 but juror No. [REDACTED] you knew it was coming. Judge
12 warned you. You had indicated that you would make a
13 conscious effort, quoting you, conscious effort, to
14 be able to be fair and impartial despite your ties
15 to law enforcement.

16 PROSPECTIVE JUROR: I am confident that I can
17 be fair and impartial, but I was saying I would
18 have to make a conscious effort.

19 MR. CALIEL: Okay.

20 PROSPECTIVE JUROR: That it would be very
21 intentional.

22 MR. CALIEL: So you're going to do your role.

23 PROSPECTIVE JUROR: Yes.

24 MR. CALIEL: You're going to evaluate the
25 evidence independently.

1 PROSPECTIVE JUROR: Yes.

2 MR. CALIEL: Okay. Do you believe that your
3 ties to law enforcement would affect how you
4 evaluate the evidence?

5 PROSPECTIVE JUROR: I do not. In a setting
6 like this I can put emotions aside and follow the
7 rules and take things very literally and be
8 analytical.

9 MR. CALIEL: And obviously you heard from the
10 witness list there's a number of law enforcement
11 officers who are going to testify in this case.
12 Do you believe that you would give them any more
13 credibility simply because they're a law
14 enforcement officer than a civilian witness?

15 PROSPECTIVE JUROR: No.

16 MR. CALIEL: You could evaluate their
17 testimony just like any other witness?

18 PROSPECTIVE JUROR: Yes.

19 MR. CALIEL: Okay. And then render your
20 opinion and determine their credibility based upon
21 what they say, not the fact that they're wearing a
22 blue uniform and have a badge on?

23 PROSPECTIVE JUROR: Correct.

24 MR. CALIEL: Thank you, ma'am. I appreciate
25 your answers.

1 Moving on then, it would be juror No. [REDACTED] -- I
2 apologize. That's seat [REDACTED] Juror [REDACTED]. And I
3 apologize, you all are going to hear me make that
4 mistake a lot. We have you in seat numbers so we
5 know where you're sitting, but we're also
6 maintaining your juror numbers from earlier in the
7 week.

8 So juror No. [REDACTED] You had indicated that you
9 know a number of the members of the judiciary and
10 some lawyers. I'm assuming [REDACTED].

11 PROSPECTIVE JUROR: One and the same.

12 MR. CALIEL: Wednesday night group.

13 PROSPECTIVE JUROR: Founding member.

14 MR. CALIEL: Founding member of the Wednesday
15 night group. Well, Jax Group. Sorry. We beat
16 you two years ago.

17 PROSPECTIVE JUROR: Well, so much for being
18 fair and impartial.

19 (Laughter.)

20 MR. CALIEL: I need to ask that question.
21 But knowing the members of the judiciary, knowing
22 the Public Defender, Mr. Cofer, Mitch Stone, do
23 you believe that will affect how you view the
24 evidence in this case?

25 PROSPECTIVE JUROR: I do not.

1 MR. CALIEL: Do you believe you can come into
2 this courtroom with an open mind and be fair and
3 impartial?

4 PROSPECTIVE JUROR: I do.

5 MR. CALIEL: Thank you very much.

6 Folks, just sort of a lesson to be learned from
7 that is if you answer a question that just shows a
8 little bit of waffling back and forth or a little
9 bit of uncertainty, chances are either myself or
10 somebody from the defense team will sort of ask
11 follow-up questions because we want to be as certain
12 as possible and some of our questions there may not
13 be any certainty, you may not be able to give us a
14 certain answer and we understand that. But, again,
15 we're just trying to be as thorough as we can
16 because if there's a hesitation, if you believe that
17 something in your background or something that
18 occurred outside of the courtroom before you come
19 through those doors will affect you in a way that it
20 may change how you view the evidence, let us know
21 about it. Can everybody promise to do that?

22 (Affirmative response from prospective
23 jurors.)

24 MR. CALIEL: I greatly appreciate it.

25 Now, as I've said, again, my name is Mark

1 Caliel. I'm an Assistant State Attorney. Along
2 with State Attorney Melissa Nelson and Vanessa
3 Wheeler-Sanchez, we will be representing the State
4 of Florida in this case. And just like every other
5 criminal case, the State of Florida walks into the
6 courtroom and we bear the burden of proof. Does
7 everybody understand that?

8 (Affirmative response from prospective
9 jurors.)

10 MR. CALIEL: Does everybody understand that
11 unless we do our job, unless we present the
12 evidence and establish beyond and to the exclusion
13 of a reasonable doubt the defendant is guilty of
14 the crimes he's accused, your decision ends there.
15 He should be found not guilty. Does everybody
16 understand that?

17 (Affirmative response from prospective
18 jurors.)

19 MR. CALIEL: We have to bear that burden.
20 It's in every courtroom across the country, the
21 State bears that burden of proof and it must be
22 beyond a reasonable doubt. Can you all promise to
23 hold us to that burden?

24 (Affirmative response from prospective
25 jurors.)

1 MR. CALIEL: Now, the Judge is going to
2 instruct you as to what proof beyond a reasonable
3 doubt is. And I'm not going to get into the law
4 now because it's a very detailed instruction of
5 what is a reasonable doubt and what is not a
6 reasonable doubt. Can everybody here promise to
7 follow the instructions, not only on that, but on
8 all the law that applies in this particular case?

9 (Affirmative response from prospective
10 jurors.)

11 MR. CALIEL: Can everybody? Can everybody
12 promise that they can follow the law even if they
13 disagree with the law?

14 (Affirmative response from prospective
15 jurors.)

16 MR. CALIEL: Okay. Now, you don't know what
17 the law is in this case yet. The Judge is going
18 to instruct you at various times throughout the
19 course of the proceedings as to what the law is.
20 Does everybody understand that it is not a juror's
21 role to question the law? That the law has been
22 established and a juror's role is to evaluate the
23 facts in a case and apply those facts to the law?
24 Can everybody promise to do that?

25 (Affirmative response from prospective

1 jurors.)

2 MR. CALIEL: Now, on our burden of proof, in
3 every criminal case the State must do two things.
4 We must first prove that a crime has been
5 committed and, secondly, prove that the defendant
6 is the person who committed the crime. And we
7 will do that through the course of presenting
8 evidence and testimony in this case. But before
9 we present a single piece of evidence, does
10 everybody understand that, and we talked to some
11 people about this already individually, that as
12 Mr. Smith sits here today he is to be presumed
13 innocent?

14 (Affirmative response from prospective
15 jurors.)

16 MR. CALIEL: Can everybody in this courtroom
17 at this time sit here and affirm they can presume
18 Donald Smith innocent at this stage?

19 (Affirmative response from prospective
20 jurors.)

21 MR. CALIEL: Is there anybody who has any
22 concern that they cannot do that? If so, please
23 raise your hand.

24 (No response from prospective jurors.)

25 MR. CALIEL: And I show for the record nobody

1 has raised their hand.

2 Now, as with every criminal case the defendant
3 charged is to be presumed innocent. Let's be clear
4 that does not mean the defendant necessarily is
5 innocent, but we haven't done our job yet and no
6 matter what the evidence is in a criminal case, no
7 matter what the weight of the evidence is, every
8 defendant must be presumed innocent at this stage.
9 Can everybody do that?

10 (Affirmative response from prospective
11 jurors.)

12 MR. CALIEL: Okay. Now, during the course of
13 the trial, if you are asked to be a member of this
14 jury panel, you will be seated up here in this
15 jury box and the evidence will be presented in
16 court, questions will be posed to witnesses on the
17 witness stand just to the left of the Judge and it
18 is your role as a jury to listen to the evidence
19 and evaluate the evidence. Can everybody serve in
20 that role?

21 (Affirmative response from prospective
22 jurors.)

23 MR. CALIEL: Now, you as a juror are the
24 finder of fact. Nobody else in this courtroom
25 during the course of a criminal trial finds the

1 facts in the case. The Judge will give you the
2 law that applies and so your role in deliberations
3 will be to determine what the facts are, what
4 happened on June 21st, 2013, and then apply those
5 facts to the law in the case. Can everybody do
6 this?

7 (Affirmative response from prospective
8 jurors.)

9 MR. CALIEL: Let me see a show of hands of
10 who was in the Walmart on June 21st, 2013, when
11 Cherish Perrywinkle walked out the door?

12 (No response from prospective jurors.)

13 MR. CALIEL: Not a one. Not a one of you.
14 We are going to be asking you to determine what
15 happened based upon testimony and evidence and
16 tell us what happened based upon that. Can you
17 serve in that role? None of you were there, but
18 can you listen to the facts presented by the
19 witnesses who testify, look at the evidence, and
20 reach a factual determination as to what happened
21 on that evening? Can you all do that?

22 (Affirmative response from prospective
23 jurors.)

24 MR. CALIEL: Is there anybody on the jury
25 panel who says, oh, gosh, you know, I wasn't

1 there, witnesses' memories can be off or fade or
2 things of that nature and I feel uncomfortable
3 serving in that role? Anybody feel that way?

4 (Negative response from prospective jurors.)

5 MR. CALIEL: Everybody can sit in this
6 courtroom, listen to the facts and determine for
7 us what happened on that day? You all can serve
8 in that role?

9 (Affirmative response from prospective
10 jurors.)

11 MR. CALIEL: Okay. This morning when we
12 began the Judge read to you what is the Indictment
13 in this case and there are three charges. Murder
14 in the first degree, kidnapping of a child under
15 the age of 13 and a sexual battery of a child
16 under the age of 12. Those are obviously
17 extremely serious charges. We all have talked
18 about, we've seen the factual pattern which talks
19 about how a victim in this case is eight years
20 old. Is there anybody when they heard those facts
21 and they heard that charging document felt
22 concerned about just having to sit and listen to
23 evidence involving that kind of thing happening?
24 Is anybody concerned about listening to that
25 evidence? If I could see a show of hands.

1 (Prospective jurors indicating.)

2 MR. CALIEL: Okay. Let me go first row by
3 row so -- and that way I don't miss anybody.

4 Starting in the first row. Nobody had any
5 concerns hearing the charges?

6 (No response from prospective jurors.)

7 MR. CALIEL: And the second row.

8 (Prospective juror indicating.)

9 MR. CALIEL: And juror No. [REDACTED] If you could
10 please stand, ma'am.

11 What about hearing the charges and knowing
12 what evidence may be presented concerned you?

13 PROSPECTIVE JUROR: More about the sexual
14 abuse because I know people that have been in that
15 -- you know, had that happen to them and how it
16 affected them and how it affected me with them
17 telling me this. So I got a little nervous, like
18 I don't know if I'm going to be able to, you know,
19 take that on because when I take stuff on I really
20 take it on. So it's more or less a personal
21 thing.

22 MR. CALIEL: Okay. And I appreciate it. If
23 you could just stand up just for a second because
24 I'm going to follow-up with that a little bit.

25 Obviously if you spoke about that with people

1 beforehand, it could be extremely personal to talk
2 about sexual abuse, especially sexual abuse of a
3 child.

4 PROSPECTIVE JUROR: Yes.

5 MR. CALIEL: That being said, do you believe
6 that that would affect how you view the evidence
7 in this case?

8 PROSPECTIVE JUROR: No.

9 MR. CALIEL: Do you believe that it would
10 affect your ability to be fair and impartial both
11 to the State of Florida and to the defendant in
12 this case?

13 PROSPECTIVE JUROR: No. Because I'm not here
14 to judge anybody. So I would be able to take it
15 on, but it's just personally when I heard that it
16 just did something to me, you know, it just made
17 me think back to them, so that was all it was.

18 MR. CALIEL: I appreciate that. Thank you.

19 PROSPECTIVE JUROR: You're welcome.

20 MR. CALIEL: Anybody else in the second row?

21 (Prospective juror indicating.)

22 MR. CALIEL: Yes, juror No. [REDACTED]

23 PROSPECTIVE JUROR: Basically I feel the same
24 way. I'm a little concerned that I'll be able to
25 handle what is going to be presented.

1 MR. CALIEL: Okay. And let me follow-up and
2 ask you a few questions. I will concede that
3 during the course of this trial, and this is for
4 anybody who gets selected as a juror. You're
5 going to have to hear testimony and see evidence
6 that is unpleasant. We will have photographs. We
7 don't enjoy the fact that we have to show these
8 photographs to the jury, but they are evidence in
9 the case as to what happened in this case. And I
10 expect you will see photographs of a deceased
11 eight year old girl, you will see some autopsy
12 photographs of what happened to her, both
13 physically as to how she was killed and,
14 unfortunately, sexually, as to how she was
15 sexually assaulted prior to her death.

16 Do you believe that despite the fact that you
17 have some concern that you could go into the
18 presentation of the evidence with an open mind and
19 be able to view the evidence? We're not going to
20 ask you to stare at it forever, but you have to be
21 able to look at the evidence in this case because
22 it's part of what the crime was and you have to be
23 able to evaluate the evidence. Can you serve in
24 that role?

25 PROSPECTIVE JUROR: I believe I can, yes. I

1 just got nervous about it.

2 MR. CALIEL: And that's understandable. I
3 don't -- you know, sometimes those of us who work
4 in the system get a little jaded. We've done this
5 before, we've been in court, we've seen
6 photographs before. I'm sure this is probably the
7 first time you and probably many of the jury
8 members, first time you're ever going to see any
9 photographs like this, and that can make you
10 nervous and that's natural. It's okay to be
11 nervous about having to serve in this role. Do
12 you believe that that nervous nature would affect
13 your ability to be fair and impartial to
14 Mr. Smith?

15 PROSPECTIVE JUROR: No.

16 MR. CALIEL: Do you think that nervousness
17 would affect your ability to do your job as a
18 juror and neutrally evaluate the evidence in this
19 case?

20 PROSPECTIVE JUROR: No.

21 MR. CALIEL: Okay. Anybody else in the
22 second row?

23 (No response from prospective jurors.)

24 MR. CALIEL: In the third row no.

25 (No response from prospective jurors.)

1 MR. CALIEL: And in the fourth row.

2 (Prospective juror indicating.)

3 MR. CALIEL: Back row.

4 (Prospective juror indicating.)

5 MR. CALIEL: Let me start with juror No. [REDACTED]

6 Ma'am, if you would please stand. What about
7 hearing the allegations in this case?

8 PROSPECTIVE JUROR: Both my daughters were
9 molested by a family member. I was sexually
10 molested when I was young. And I don't think I
11 can do this.

12 MR. CALIEL: I understand. You've had some
13 personal tragedy in your family. Do you feel that
14 based upon your personal experience that this is
15 probably not the best case for you?

16 PROSPECTIVE JUROR: I feel like it.

17 MR. CALIEL: I appreciate the candor, ma'am.
18 Juror No. [REDACTED]

19 PROSPECTIVE JUROR: You know, hearing the --
20 the charges against him, I originally as well.

21 COURT REPORTER: I'm sorry. I can't hear
22 him.

23 PROSPECTIVE JUROR: It's always been a great
24 fear of ours about our three children, two girls,
25 to protect. We've had -- we've had one friend in

1 particular had a child abused. It's very awkward
2 feeling, you know.

3 MR. CALIEL: It's sort of uneasiness in your
4 stomach when you hear something like that, when
5 you hear these allegations. Do you believe, juror
6 No. 68, that that uneasy feeling, though, will
7 affect your ability to be fair and impartial?

8 PROSPECTIVE JUROR: I compartmentalize. I
9 think I can compartmentalize very well. I believe
10 in the system.

11 COURT REPORTER: I'm sorry. I still can't
12 hear him.

13 THE COURT: I think we're going to have to
14 use the microphone.

15 MR. CALIEL: Yeah, if we could pass the
16 microphone down to juror No. [REDACTED] I'm the loud
17 mouth. She hears me all the time.

18 PROSPECTIVE JUROR: It's a little different
19 than reading questions on paper.

20 MR. CALIEL: Yes.

21 PROSPECTIVE JUROR: But I -- I'm
22 contemplating, since we had our discussion the
23 other day one-on-one about some of the questions
24 you asked me and going back and forth as well, and
25 I definitely -- I think some of my views may have

1 changed since we talked because we've had so much
2 time to think about this stuff, and I don't know
3 if I could be impartial, the more I've thought
4 about specific information.

5 MR. CALIEL: Okay. And so do you believe --
6 and obviously there were a lot of parents,
7 grandparents on this jury panel, everybody has a
8 family background here, but personally, do you
9 believe that because of your family member and how
10 close to home it is being the father of a child
11 about that age, that that would inhibit your
12 ability to neutrally evaluate the evidence?

13 PROSPECTIVE JUROR: I think I'm a clear cut
14 person and I can set the parameters, if you're
15 telling me this is the box we're working in, that
16 I can stay within that box.

17 MR. CALIEL: Obviously as a juror we do not
18 expect you all to turn into robots when you walk
19 through that door. We all come in this courtroom
20 with life experience, what has happened to us
21 beforehand, things we've learned, things we've
22 seen. But you are to rely on the evidence and the
23 evidence alone in this courtroom in reaching a
24 determination as to whether or not Mr. Smith is
25 guilty or not of the charges he's accused of. Do

1 you think you could do that? I understand we're
2 going to have thoughts that will run through our
3 head because we're human beings, but can you come
4 into the courtroom with an open mind, consider the
5 charges against this defendant based solely upon
6 the evidence, presume him innocent as he sits
7 here, and be a fair and impartial juror?

8 PROSPECTIVE JUROR: I think I could do that.

9 MR. CALIEL: Thank you.

10 Anybody else on the what is my left side,
11 your right side of the courtroom?

12 (No response from prospective jurors.)

13 MR. CALIEL: Let me move over to the other
14 side of the courtroom. First row, any show of
15 hands regarding the content and the charges that
16 we're talking about?

17 (No response from prospective jurors.)

18 MR. CALIEL: Nobody has raised their hand.

19 Second row.

20 (Prospective juror indicating.)

21 MR. CALIEL: Yes, sir, juror [REDACTED]

22 PROSPECTIVE JUROR: Yes. So to be fair, the
23 question I believe that you asked was do you have
24 a concern about the material, something to this,
25 and, yes, as a father of four, including the

1 youngest who's a daughter, I don't want to see
2 that. Probably nobody does. But that was
3 answering the question that you asked. The
4 follow-up question, do I believe that's going to
5 impact my ability to be fair and impartial, no.

6 MR. CALIEL: And I don't think anybody wants
7 to -- let me just ask the question in general.
8 Does anybody want to look at those pictures?

9 (No response from prospective jurors.)

10 MR. CALIEL: If so, please raise your hand.

11 (No response from prospective jurors.)

12 MR. CALIEL: Okay. But as your role as a
13 juror, it's your duty to evaluate the evidence in
14 this case. Do you believe you could evaluate the
15 evidence, as unpleasant as it may be, and we will
16 try to make it as limited as we possibly can for
17 the purposes of the trial, but can you evaluate
18 these photographs and be a fair and impartial
19 juror?

20 PROSPECTIVE JUROR: Yes.

21 MR. CALIEL: Thank you.

22 Anybody in the second row on this side of the
23 courtroom?

24 (No response from prospective jurors.)

25 MR. CALIEL: Third row.

1 (No response from prospective jurors.)

2 MR. CALIEL: Fourth row.

3 (No response from prospective jurors.)

4 MR. CALIEL: And the final row on the back.

5 (Prospective juror indicating.)

6 MR. CALIEL: Juror No. [REDACTED]

7 PROSPECTIVE JUROR: I just don't think I
8 could sit here truthfully and say that -- the
9 question was are you concerned. Yes, I'm
10 concerned. You guys presented the facts or the
11 summary on Monday so it's kind of been in my heart
12 since then. But I've been thinking everyday as
13 I've driven back and forth and I thought I spend
14 hours everyday in my job doing analysis of the
15 facts so I think I'm really able to disassociate
16 myself from that. And I really believe for some
17 reason I could be -- and I'm totally emotional
18 like I am about so many things, but I could really
19 evaluate it in a fair way, but I don't think it
20 would be honest for me to sit here and say I
21 wasn't concerned, because I am.

22 MR. CALIEL: No, and I greatly appreciate
23 your candor. It's natural. Like I'm sure all of
24 you at some point in time found out this wasn't a
25 petit theft trial, this was a murder trial, maybe

1 you all sort of had a little curiosity or concern
2 or nervousness. That safe to say with everyone?

3 (Affirmative response from prospective
4 jurors.)

5 MR. CALIEL: Despite that nervousness, you
6 don't think that's going to inhibit your ability
7 to be a fair juror?

8 PROSPECTIVE JUROR: I don't. I don't think I
9 could have said that a few days ago.

10 MR. CALIEL: Great. Thank you.

11 Would everybody agree if I hold up a picture of
12 a dead child, without more, that doesn't prove that
13 Donald Smith is guilty of anything, does it?

14 (Negative response from prospective jurors.)

15 MR. CALIEL: Okay. Is there anybody on this
16 jury panel who would simply convict Mr. Smith
17 because they saw a picture of a dead child?

18 (Negative response from prospective jurors.)

19 MR. CALIEL: Nobody on this jury panel, I
20 assume, would convict an innocent man solely
21 because the victim in the case was an eight year
22 old little girl. Is that accurate?

23 (Affirmative response from prospective
24 jurors.)

25 MR. CALIEL: Okay. So despite the fact that

1 you're going to see photographs that are
2 unpleasant, photographs that are, you know,
3 probably things you don't want to have to look at,
4 that fact in and of itself would not take away
5 Mr. Smith's right to have a fair trial. Can
6 everybody agree to do that?

7 (Affirmative response from prospective
8 jurors.)

9 MR. CALIEL: And aside from the one juror who
10 has already explained herself, can everybody
11 listen to the evidence, as graphic as it may be,
12 and look at it and be fair and impartial in this
13 case? Can everybody promise to do that?

14 (Affirmative response from prospective
15 jurors.)

16 MR. CALIEL: I want to talk a little bit more
17 specifically about the murder charge because
18 before we get into discussing the next phase of
19 the trial I hope to talk about what is first
20 degree murder and how it's established and the
21 Judge is going to instruct you as to what first
22 degree murder is at the conclusion of the case,
23 but I want to explore your thoughts on this ahead
24 of time. Clearly first degree murder in the State
25 of Florida can be proven two ways. One is the

1 premeditated murder of the victim in this case,
2 Cherish Perrywinkle. That the defendant at the
3 time he committed the act had the premeditated
4 intent to kill Cherish Perrywinkle. That is one
5 way we can prove first degree murder. The second
6 way we can prove first degree murder in the State
7 of Florida is what we call felony murder. And in
8 the State of Florida premeditation is presumed, if
9 the defendant is committing a crime that is
10 violent in nature and during the commission of
11 that crime a death occurs. Both ways can be
12 established and proven beyond a reasonable doubt.
13 The defendant intended the death of the victim and
14 carried that act out or -- or and the defendant
15 was committing an enumerated violent offense, and
16 in this case kidnapping and sexual battery, and
17 even if he didn't intend to kill the victim, if
18 the victim died, that's still first degree murder
19 and premeditation is presumed. Does everybody
20 understand those two different concepts?

21 (Affirmative response from prospective
22 jurors.)

23 MR. CALIEL: Can everybody on the jury panel
24 follow the law as it applies to premeditation?
25 And the easiest way to exemplify this outside of

1 this context is if I decide I'm going to go into a
2 bank and commit a bank robbery, it's a violent
3 crime. And during the commission of the bank
4 robbery I produce a gun and the gun discharges,
5 even accidentally, but I'm committing a robbery.
6 I'm guilty of first degree murder because I took a
7 life while I was committing a robbery. And under
8 the law of the State of Florida that's first
9 degree murder. Does everybody understand that?

10 (Affirmative response from prospective
11 jurors.)

12 MR. CALIEL: Is there anybody who feels that
13 they could not follow the law simply because maybe
14 the act was not premeditated? Anybody feel that
15 way?

16 (No response from prospective jurors.)

17 MR. CALIEL: Can everybody follow the law as
18 the Judge will instruct you as it goes to first
19 degree murder and evaluate both methods of first
20 degree murder? Both the intentional killing of
21 the victim and whether or not the victim was
22 killed during the course of a felony such as
23 sexual battery or kidnapping. Can everybody
24 promise to do that?

25 (Affirmative response from prospective

1 jurors.)

2 MR. CALIEL: Now, one of your fellow jurors
3 just mentioned something and I want to sort of
4 follow-up with you all and see if anybody else has
5 had more thought to what has been asked of you
6 already during the course of this week. Obviously
7 you came into the courtroom originally and you had
8 the jury questionnaires and you filled those
9 things out. Some of you we have talked to
10 individually since that point in time. Some not.
11 We're now on Thursday and it's now closing in on
12 3:00 o'clock in the afternoon. After reflection
13 has anybody felt that their answers that they have
14 previously given to us on any of those issues has
15 changed or that maybe you have to supplement what
16 you told us already because you put more thought
17 to that? Does anybody feel that way?

18 (No response from prospective jurors.)

19 MR. CALIEL: No one. Okay. Great. Well,
20 ladies and gentlemen, at this point in time that's
21 all the discussion that I have for you regarding
22 what we call the guilt phase of the trial. I will
23 get an opportunity at a later time, either today
24 or tomorrow, to discuss with you the penalty phase
25 of the trial. But I thank you for your time and

1 attention at this stage. Okay. Thank you.

2 THE COURT: Thank you, Mr. Caliel.

3 Mr. Fletcher.

4 MR. FLETCHER: Thank you, Your Honor. May it
5 please the Court.

6 THE COURT: Sure.

7 MR. FLETCHER: Counsels. Good afternoon,
8 ladies and gentlemen. My name is Chuck Fletcher.
9 Got two sides to look at. You have all been
10 introduced to Julie Schlax, Dr. Brooke Butler and
11 Donald Smith. Nobody -- I don't know any of you,
12 right?

13 (Negative response from prospective jurors.)

14 MR. FLETCHER: Juror No. [REDACTED] do you
15 occasionally go the Starbucks in San Marco?

16 PROSPECTIVE JUROR: I've been there a few
17 times, yes.

18 MR. FLETCHER: I've seen you there. We've
19 just walked by each other. I just recognized you.
20 We don't know each other.

21 This is a very serious case. Has everybody
22 gotten to that point?

23 (Affirmative response from prospective
24 jurors.)

25 MR. FLETCHER: Okay. I like to approach jury

1 selection with some concepts. I'll do some
2 follow-up questions. I'll ask questions.

3 Juror No. [REDACTED] If you leave here tonight and
4 you're driving down the road and somehow I've
5 gotten out in front of you and you're driving by
6 and you see a police car and my car and I'm
7 standing out in front of those and there's a
8 police officer talking to me and his lights are
9 on, what do you think?

10 PROSPECTIVE JUROR: That you probably got
11 pulled over because you did something.

12 MR. FLETCHER: I did something wrong?

13 PROSPECTIVE JUROR: Most likely. Well, if
14 you're outside of your car that's different.
15 Usually that means you're talking. If you're
16 still in your car and he's at your window that
17 means you did something.

18 MR. FLETCHER: Okay. Juror No. [REDACTED], the same
19 scenario, except now I'm in the back of the police
20 car. What are your thoughts? What are you
21 thinking?

22 PROSPECTIVE JUROR: I'm obviously thinking
23 you did something wrong.

24 MR. FLETCHER: Did something wrong. Okay.
25 And I totally understand.

1 Juror [REDACTED] now not only am I in the back of the
2 police car, but you can tell my hands are kind of
3 like this. Now I'm looking out the back like that.
4 What do you think?

5 PROSPECTIVE JUROR: You've been arrested for
6 something.

7 MR. FLETCHER: Did something wrong.
8 Everybody over here agree?

9 (Affirmative response from prospective
10 jurors.)

11 MR. FLETCHER: Kind of set you guys all up.
12 Is anybody presuming that I'm innocent?

13 (Prospective jurors indicating.)

14 MR. FLETCHER: A couple of you. [REDACTED] you're
15 presuming I'm innocent. Okay.

16 PROSPECTIVE JUROR: Just being accused.

17 PROSPECTIVE JUROR: Perception is different.

18 MR. FLETCHER: Perception is everything. No.

19 [REDACTED] Just being accused. Okay. Does everybody
20 see the little trick I played?

21 (Affirmative response from prospective
22 jurors.)

23 MR. FLETCHER: Okay. Does everybody
24 understand that Donald Smith, as he sits here
25 today, long time ago, there was a time when he sat

1 in a police car as people were driving by and
2 looking at him. Does everybody get that?

3 (Affirmative response from prospective
4 jurors.)

5 MR. FLETCHER: And a lot of people when you
6 see somebody in the back of the police car as you
7 drive by, you just have that gut feeling and I get
8 the same feeling. Well, he must be guilty. He's
9 in the back of the police car, especially if his
10 hands are back like this (indicating), right?

11 (Negative response from prospective jurors.)

12 MR. FLETCHER: Juror No. [REDACTED]

13 PROSPECTIVE JUROR: I would just think that
14 sucks.

15 MR. FLETCHER: Okay. Okay. You get this gut
16 feeling that because they're involved with the
17 police that probably they did something wrong.
18 It's just a gut feeling most of us would get. All
19 right?

20 Okay. What I'm trying to do, if we're going
21 to presume him innocent, when you come in here and
22 begin the trial, which is next Monday and for
23 today and tomorrow, can you presume, truly presume
24 he's innocent? Give him the benefit of that
25 constitutional right?

1 No. 20, can you do that?

2 PROSPECTIVE JUROR: Yes.

3 MR. FLETCHER: No. ■■■, can you do that?

4 PROSPECTIVE JUROR: Yes.

5 MR. FLETCHER: Mr. Caliel pointed out this is
6 not a typical murder case. You guys know more
7 about this case than probably any other murder case
8 in Jacksonville because a lot of you told us
9 yesterday and the day before in your questionnaires
10 that you've seen coverage on the news. This is one
11 that stands out, right? Can you set aside that,
12 not only presume him innocent, but kind of erase
13 that from your minds when you walk in here tomorrow
14 and the rest of today and Monday?

15 (Affirmative response from prospective
16 jurors.)

17 MR. FLETCHER: Okay. And the little
18 questionnaire that we provided to you, provided
19 you with sort of a factual scenario. Can you set
20 that aside and still give Mr. Smith a fair trial?

21 (Affirmative response from prospective
22 jurors.)

23 MR. FLETCHER: I'm going to ask some
24 follow-up questions of a bunch of you. But I can
25 do it kind of as a group. So I'm going to ask

1 five or six of you to stand up. No. [REDACTED], No. [REDACTED]
2 No. [REDACTED] and [REDACTED]. I still am picking on
3 [REDACTED]

4 See you at Starbucks.

5 All of you guys, when we were talking to you
6 a few minutes ago, during your questionnaires
7 today, that you knew people that were with law
8 enforcement. Is that correct?

9 PROSPECTIVE JUROR: That's correct.

10 MR. FLETCHER: Some of them are family
11 members, some are just friends, some are just
12 acquaintances. Okay. [REDACTED]. Does that -- will that
13 play into your decision?

14 PROSPECTIVE JUROR: No, sir.

15 MR. FLETCHER: Are you worried at all that at
16 the end of this trial, if you have found Donald
17 Smith not guilty, would it come into your mind
18 that maybe some your police officer friends,
19 acquaintances, whatever it is, would have a beef
20 with you if you talk about that?

21 PROSPECTIVE JUROR: That wouldn't affect me.

22 MR. FLETCHER: Okay. No. [REDACTED] how about you?

23 PROSPECTIVE JUROR: No, it would not. I
24 really don't talk to them. My father is deceased.

25 MR. FLETCHER: No. [REDACTED] how about you?

1 PROSPECTIVE JUROR: Not just those
2 acquaintances but all my acquaintances I would
3 have concern how they would treat me.

4 MR. FLETCHER: Okay. So as you're here
5 today, are you worried that there's an outside
6 influence that might play into any verdict you
7 come up with if you're a juror?

8 PROSPECTIVE JUROR: I do fear that, yeah.

9 MR. FLETCHER: Okay. Can you set that fear
10 aside if you're chosen for next week?

11 PROSPECTIVE JUROR: Well, I already have by
12 being here today.

13 MR. FLETCHER: Okay. But we asked the
14 question a little bit differently. Are you
15 worried about that?

16 PROSPECTIVE JUROR: Yeah.

17 MR. FLETCHER: Then I've got a couple -- you
18 can all sit back down. Thank you. I've got a
19 couple on the other side. No. [REDACTED] No. [REDACTED] and I
20 believe [REDACTED] Did I have [REDACTED]?

21 And No. [REDACTED] I think your father was a law
22 enforcement officer?

23 PROSPECTIVE JUROR: My father's best friend
24 and my uncle.

25 MR. FLETCHER: No. [REDACTED] how about you?

1 PROSPECTIVE JUROR: Uncle and close
2 acquaintances.

3 MR. FLETCHER: Okay. I'm going to take it a
4 little further. Let's say you're on this panel
5 and a police officer that you recognize, one of
6 your friends from JSO, pops his head in the
7 courtroom door on Tuesday and you're out here.
8 And as he pops in kind of scans and he recognizes
9 you, you recognize him and he winks at you.
10 Should I as Mr. Smith's attorney be worried that
11 you're going to somehow let that influence your
12 decision in this case?

13 PROSPECTIVE JUROR: No.

14 MR. FLETCHER: What if you get a text from
15 him later that night, and it's ambiguous, go get
16 'em? How about that?

17 PROSPECTIVE JUROR: No, it wouldn't.

18 MR. FLETCHER: You'll decide this case based
19 on what you hear next week in court?

20 PROSPECTIVE JUROR: Yes. I don't -- I don't
21 speak to those acquaintances and my uncle is
22 retired. We don't speak anything about either one
23 of our jobs. We try not to bring our work home,
24 either one of us.

25 MR. FLETCHER: Juror No. [REDACTED] is it the same

1 with you?

2 PROSPECTIVE JUROR: Yeah.

3 MR. FLETCHER: Okay. Now, you indicated you
4 would -- you'd have to make a conscious effort to
5 sort of set aside those relationships and any
6 influence they might have on you.

7 PROSPECTIVE JUROR: Correct.

8 MR. FLETCHER: Can you do that?

9 PROSPECTIVE JUROR: Yes.

10 MR. FLETCHER: Thank you. That's all I have.
11 Thank you No. [REDACTED]

12 All right. Mr. Caliel was talking to you folks
13 a minute ago, talk about the unpleasant nature of
14 the photographs that you will see in this case.
15 Juror 139. You're with Jacksonville Fire Rescue.

16 PROSPECTIVE JUROR: Yes, sir.

17 MR. FLETCHER: Are you out on the road these
18 days or are you in administration?

19 PROSPECTIVE JUROR: Administration.

20 MR. FLETCHER: Did you previously work
21 somewhere else where you were in a truck and out
22 on the road?

23 PROSPECTIVE JUROR: Yes.

24 MR. FLETCHER: Where was it?

25 PROSPECTIVE JUROR: Here.

1 MR. FLETCHER: Have you been to scenes of
2 crashes?

3 PROSPECTIVE JUROR: Yes, sir.

4 MR. FLETCHER: Like serious automobile
5 crashes?

6 PROSPECTIVE JUROR: Yes, sir.

7 MR. FLETCHER: Where people are killed or
8 horribly injured?

9 PROSPECTIVE JUROR: Yes.

10 MR. FLETCHER: So you've seen real life
11 bloody pictures, I take it, right?

12 PROSPECTIVE JUROR: Yes.

13 MR. FLETCHER: Will you be affected by
14 autopsy photos in this case?

15 PROSPECTIVE JUROR: Just when we're on the
16 scene emotions have to be set aside to do the job.

17 MR. FLETCHER: Okay. Okay. Thank you, sir.

18 PROSPECTIVE JUROR: Yes, sir.

19 MR. FLETCHER: And if I could have the same
20 people that Mr. Caliel talked to and I think I
21 took them down correctly. [REDACTED] If you
22 would stand up. [REDACTED]. Mr. Caliel talked
23 to you about those pictures. What if I go a
24 little further than what Mr. Caliel said. He
25 referred to them as unpleasant. Would it -- and I

1 think all of you said you could set aside any
2 feelings about that and still give this case the
3 attention it deserves and still provide Mr. Smith
4 with a fair trial. Right?

5 PROSPECTIVE JUROR: Yes.

6 MR. FLETCHER: What if I go a little further
7 and tell you they're just not just unpleasant
8 photos, they're gruesome, they're shocking. Would
9 that change any of your minds or anybody else's?

10 PROSPECTIVE JUROR: No.

11 MR. FLETCHER: I call you Mr. [REDACTED] Juror

12 [REDACTED] No?

13 PROSPECTIVE JUROR: No.

14 MR. FLETCHER: Juror [REDACTED]

15 PROSPECTIVE JUROR: No.

16 MR. FLETCHER: Juror [REDACTED].

17 PROSPECTIVE JUROR: No.

18 MR. FLETCHER: Juror [REDACTED] You had some
19 reservations earlier.

20 PROSPECTIVE JUROR: Nobody wants to see that
21 stuff.

22 MR. FLETCHER: We understand. We understand.

23 Juror [REDACTED]

24 PROSPECTIVE JUROR: No.

25 MR. FLETCHER: Juror [REDACTED] I think you've

1 indicated that it would be extremely tough for you
2 to do that.

3 PROSPECTIVE JUROR: (Nods head.)

4 MR. FLETCHER: Okay. Thank you.

5 Probably a strange question, but does everyone
6 here agree to give Donald Smith a fair trial?

7 (Affirmative response from prospective
8 jurors.)

9 MR. FLETCHER: And by fair trial, by trial,
10 when do we make the decision if he's guilty or not
11 guilty? Do we make it at the State's opening?

12 (No response from prospective jurors.)

13 MR. FLETCHER: After you hear all the
14 evidence. So if Ms. Nelson gets up and gives a
15 fantastic opening statement, you're still going to
16 give us the benefit of that doubt?

17 (Affirmative response from prospective
18 jurors.)

19 MR. FLETCHER: Juror No. [REDACTED] Where will the
20 evidence come from?

21 PROSPECTIVE JUROR: Testimony, the exhibits.

22 MR. FLETCHER: Okay. Do you think it's
23 conceivable that Mr. Caliel, Ms. Nelson, myself
24 and Ms. Schlax were there when this crime
25 happened? Do you think we were present?

1 PROSPECTIVE JUROR: No.

2 MR. FLETCHER: So what we say is not
3 evidence.

4 PROSPECTIVE JUROR: Right.

5 MR. FLETCHER: Does everybody understand
6 that?

7 (Affirmative response from prospective
8 jurors.)

9 MR. FLETCHER: And the Judge will instruct
10 you that what the lawyers say is not evidence.
11 The evidence will come from that witness stand and
12 from any exhibits that are offered into evidence.
13 Are you aware of any case or anything in your own
14 life where you have found someone to be a liar or
15 to have bias? Anything in your life?

16 PROSPECTIVE JUROR: There probably is, but I
17 can't retrieve it right now.

18 MR. FLETCHER: Okay. I heard this and I
19 don't remember which juror said -- you can sit
20 down. Somebody referred to as her ex-husband as
21 nothing. Where was that from? That's it. Juror

22 [REDACTED] Stand on up.

23 Just in your life's experience, you've been
24 lied to?

25 PROSPECTIVE JUROR: Yes.

1 MR. FLETCHER: And everybody here -- we've
2 all heard it in divorce cases, right? People lie
3 back and forth in divorce cases, right?

4 PROSPECTIVE JUROR: Yeah.

5 MR. FLETCHER: And even when they get up on
6 the witness stand put their hand on the Bible,
7 they still might lie. Right?

8 PROSPECTIVE JUROR: Yes.

9 MR. FLETCHER: Who determines if a witness is
10 lying?

11 PROSPECTIVE JUROR: The jury.

12 MR. FLETCHER: You guys do. Like I said, I'm
13 not a witness in this case, I can't judge. You
14 all are the judge of facts, right? Does everybody
15 understand your role in this case?

16 (Affirmative response from prospective
17 jurors.)

18 MR. FLETCHER: We've been talking a little
19 bit about defenses. Does anybody here watch
20 lawyer shows on TV? Throw your hands up because
21 I'm hearing different answers.

22 (Prospective jurors indicating.)

23 MR. FLETCHER: Lawyer shows, cops and robbers
24 shows, all that stuff. I'm not going to suggest
25 to anybody that self-defense has anything to do

1 with this case, but as lawyers myself and
2 Ms. Schlax, when we have a case we have to explore
3 all the evidence and look at all the possible
4 defenses. Everybody understands that, right?

5 (Affirmative response from prospective
6 jurors.)

7 MR. FLETCHER: Everybody has heard of
8 self-defense, right? Not saying this is a
9 self-defense case. I cannot imagine how that
10 could ever be.

11 Have you heard of things like alibi?

12 (Affirmative response from prospective
13 jurors.)

14 MR. FLETCHER: Okay. And juror No. [REDACTED] what
15 is an alibi?

16 COURT REPORTER: I can't hear her.

17 MR. FLETCHER: Stand up.

18 PROSPECTIVE JUROR: Oh, an alibi is the -- I
19 drew a blank. An alibi is what they're basically
20 going by.

21 MR. FLETCHER: Somebody comes in and
22 testifies that juror 15 was somewhere else so she
23 couldn't have done it?

24 PROSPECTIVE JUROR: Yes. My mind went blank.
25 Yes.

1 MR. FLETCHER: That's okay.

2 Does everybody know what an alibi defense is?

3 (Affirmative response from prospective
4 jurors.)

5 MR. FLETCHER: And I'm not saying there's an
6 alibi. Anybody ever watch the show where the
7 defense attorneys sit next to their clients, put
8 on evidence that somebody else committed the
9 crime? You've all seen that, right? That's a
10 possible defense. If we don't have any of those
11 as defenses, what do we do as his lawyers? No.

12

13 PROSPECTIVE JUROR: Me? Just got to -- you
14 don't have those as defenses, you have to provide
15 evidence.

16 MR. FLETCHER: We can challenge the other
17 side's evidence, right?

18 Okay. Anybody here ever watch Perry Mason?
19 Kind of dating myself.

20 (Negative response from some prospective
21 jurors.)

22 MR. FLETCHER: No. Did you like that
23 show?

24 PROSPECTIVE JUROR: Perry Mason, yes, sir.

25 MR. FLETCHER: Stand up.

1 About how many episodes did you watch?

2 PROSPECTIVE JUROR: How many episodes were
3 there? He still comes on ME-TV.

4 MR. FLETCHER: Okay. So probably 50, 60, 70.

5 PROSPECTIVE JUROR: Somewhere in that
6 ballpark.

7 MR. FLETCHER: For those of you who don't
8 know, Perry Mason is a defense lawyer, right?

9 PROSPECTIVE JUROR: He's a defense lawyer,
10 yes.

11 MR. FLETCHER: Do you remember shows where
12 three-quarters of the way through the show,
13 they're in the trial, he's defending his client,
14 he's cross-examining somebody and out of the blue
15 somebody in the audience stands up and says,
16 Mr. Mason, I did it?

17 PROSPECTIVE JUROR: Yes.

18 MR. FLETCHER: Okay. Is that real?

19 PROSPECTIVE JUROR: No, sir.

20 MR. FLETCHER: Is anybody going to hold
21 myself and Ms. Schlax to that burden?

22 (Laughter.)

23 MR. FLETCHER: If we don't put on these other
24 defenses I've talked about, does anybody expect
25 somebody to jump up out of the audience and say --

1 (No response from prospective jurors.)

2 MR. FLETCHER: If we don't put on any of
3 those things and nobody jumps up, it's simply the
4 job of the State to prove this case. Right?

5 PROSPECTIVE JUROR: Correct.

6 MR. FLETCHER: If they fail to prove it, what
7 would your verdict be?

8 PROSPECTIVE JUROR: He would have to be
9 declared innocent.

10 MR. FLETCHER: Thank you, sir.

11 PROSPECTIVE JUROR: Yes, sir.

12 MR. FLETCHER: Pick on somebody over there.
13 Juror No. [REDACTED] If you could stand up for me. In
14 this country we abide by a Constitution, right?

15 PROSPECTIVE JUROR: (Nods head.)

16 MR. FLETCHER: Sort of sets up the framework
17 of how it works, how the government works, right,
18 and it gives you individual rights, right?

19 PROSPECTIVE JUROR: Yes, sir.

20 MR. FLETCHER: You have the right to vote,
21 right?

22 PROSPECTIVE JUROR: (Nods head.)

23 MR. FLETCHER: If you were applying for a job
24 somewhere and your respective employer said do you
25 vote and you said, yeah, I vote, how would you

1 feel if he somehow held that against you? Didn't
2 even ask you who you voted for, but the fact that
3 you're a voter, held that against you. Would that
4 feel fair?

5 PROSPECTIVE JUROR: No, it wouldn't feel
6 fair. It would make me rethink where I was even
7 applying.

8 MR. FLETCHER: You have a constitutional
9 right to vote. You're exercising that right,
10 right?

11 PROSPECTIVE JUROR: Yes.

12 MR. FLETCHER: Let me pick on somebody else.
13 What's your number? I can't see it on you.

14 PROSPECTIVE JUROR: ██████.

15 MR. FLETCHER: No. ██████ Stand up for me.
16 You have a right in this country to own a firearm,
17 right?

18 PROSPECTIVE JUROR: Right.

19 MR. FLETCHER: And if you're applying for a
20 job somewhere and it says do you own a firearm,
21 you say yes and the person says, well, I'm not
22 going to hire you because you own a firearm.
23 Would you feel like you've been discriminated
24 against by exercising one of your constitutional
25 rights?

1 PROSPECTIVE JUROR: Yes.

2 MR. FLETCHER: Okay. Thank you.

3 Juror No. [REDACTED] would you stand up. Donald
4 Smith has the right to remain silent granted him
5 by the Constitution, right?

6 PROSPECTIVE JUROR: That's right.

7 MR. FLETCHER: We've all heard of the right
8 to remain silent. It's one of the biggest ones
9 most of us know because we watch TV, right? Let's
10 say we get through this entire trial next week,
11 into late Thursday, and the State of Florida rests
12 their case and the Judge says, defense, and we say
13 we recess our case. And you don't hear from
14 Donald Smith. He doesn't testify, he's exercising
15 his right under the Constitution not to testify.
16 Would you hold that against him?

17 PROSPECTIVE JUROR: No.

18 MR. FLETCHER: Why not?

19 PROSPECTIVE JUROR: I would probably do the
20 same thing.

21 MR. FLETCHER: Okay. He's exercising a
22 constitutional right and you shouldn't hold that
23 against him, right?

24 PROSPECTIVE JUROR: No.

25 MR. FLETCHER: Okay. And it's just like when

1 I asked juror No. [REDACTED] about the right to vote and
2 juror No. [REDACTED] about the right to own firearms.
3 They're exercising their constitutional rights to
4 do those things. You shouldn't hold that against
5 them, right?

6 PROSPECTIVE JUROR: Correct.

7 MR. FLETCHER: And -- thank you.

8 Juror No. [REDACTED] If we get to that point and
9 Donald Smith did not take the stand and the Judge
10 instructs you that you are not to hold that against
11 him, you are not to draw any inferences about what
12 he may have said or may have happened, you just
13 leave it out of the calculus when you're deciding
14 whether or not he's guilty or not guilty. You go
15 back in the jury room and juror No. [REDACTED] says, well, I
16 wanted to hear from Donald Smith. Juror No. [REDACTED]
17 will you look at No. [REDACTED] and say we're not supposed
18 to consider that. Would you do that?

19 PROSPECTIVE JUROR: Yes.

20 MR. FLETCHER: Does everybody understand
21 that?

22 (Affirmative response from prospective
23 jurors.)

24 MR. FLETCHER: Thank you, ladies and
25 gentlemen.

1 THE COURT: Can I see the attorneys at
2 side-bar.

3 MR. CALIEL: Yes, Your Honor.

4 THE COURT: Madam Court Reporter.

5 Wait, well, wait a second, Madam Court
6 Reporter.

7 (Counsel for the State and defense approached
8 the bench for a side-bar conference out of the
9 hearing of the prospective jurors and court
10 reporter.)

11 THE COURT: All right. Ladies and gentlemen,
12 after checking with the attorneys, and this will
13 happen all through the trial, but this is an
14 appropriate time for me to excuse you from the
15 courtroom. So this is an appropriate time for you
16 to use this for restroom breaks or anything else or
17 walk around a few minutes and we'll have you back
18 in as quick as we can. Thank you.

19 (Prospective juror absent.)

20 THE COURT: All right. Juror No. ■, they
21 just had a few follow-up questions. Can you scoot
22 over to the center so we can see you better?

23 If we can have the microphone, please, so we
24 can hear him.

25 He just has a couple of follow-up questions

1 for you.

2 MR. FLETCHER: Juror No. ■ you're originally
3 from Jordan?

4 PROSPECTIVE JUROR: Originally, yes.

5 MR. FLETCHER: And how long did you live in
6 Jordan?

7 PROSPECTIVE JUROR: Like 25 years.

8 MR. FLETCHER: And you were an attorney
9 there?

10 PROSPECTIVE JUROR: Yes, sir.

11 MR. FLETCHER: And you did civil work?

12 PROSPECTIVE JUROR: Actually in Jordan it's
13 different. It's different than the states here.
14 You know, when you graduate, you graduate general,
15 but you practice different ways.

16 MR. FLETCHER: Okay.

17 PROSPECTIVE JUROR: But I never involved in
18 criminal.

19 MR. FLETCHER: Okay. So you never did any
20 criminal defense or on the prosecution side?

21 PROSPECTIVE JUROR: No, sir.

22 MR. FLETCHER: But were you a citizen of
23 Jordan?

24 PROSPECTIVE JUROR: Yes, sir.

25 MR. FLETCHER: So you were aware of the laws

1 in your country?

2 PROSPECTIVE JUROR: Yes, sir.

3 MR. FLETCHER: As an attorney you're probably
4 more aware of them than a lot of people.

5 PROSPECTIVE JUROR: Sure.

6 MR. FLETCHER: What were the types of
7 punishment in Jordan if people committed theft or
8 things like that?

9 PROSPECTIVE JUROR: Like they go to jail.

10 MR. FLETCHER: Okay. How about if it's a
11 murder case, what sort of punishment?

12 PROSPECTIVE JUROR: Before it was like the
13 death penalty, but now they change, like you might
14 get life.

15 MR. FLETCHER: Okay. When you were there,
16 was it a system where if you were found guilty was
17 it automatically a death penalty?

18 PROSPECTIVE JUROR: No, no. Not it has to go
19 through a lot of like -- a lot of like -- it's a
20 long process. It's not right away.

21 MR. FLETCHER: Okay. So your system has sort
22 of evolved into something like our system?

23 PROSPECTIVE JUROR: It's almost like, yes.
24 Like they don't have really like fair -- fair
25 judgment. Not going to be right over there.

1 MR. FLETCHER: In Jordan?

2 PROSPECTIVE JUROR: Yes, sir.

3 MR. FLETCHER: And your lifetime of
4 experiences just living there and being an
5 attorney in that system, can you set all that
6 aside and be a juror in our system, is what I'm
7 asking you?

8 PROSPECTIVE JUROR: Yes, sure. Yeah.

9 MR. FLETCHER: You can set all that aside and
10 if you are on this jury you're not going to say,
11 well, in my country?

12 PROSPECTIVE JUROR: I'm in this country.
13 This is my --

14 MR. FLETCHER: And I'm completely ignorant to
15 a lot about your country. That's why I ask.

16 PROSPECTIVE JUROR: Yes. I'm ordinary
17 citizen. My country it's different. I'm
18 American. Not Jordanian.

19 MR. FLETCHER: That's all I have.

20 THE COURT: Do you have anything, Mr. Caliel?

21 MR. CALIEL: No questions, Your Honor.

22 THE COURT: Thank you, sir. We just needed
23 to ask you a few follow-ups. You're welcome to go
24 out in the hall, use the restroom, whatever you
25 want to do for a few minutes.

1 (Prospective juror absent.)

2 THE COURT: All right. If anybody needs to
3 use the restroom, go ahead and do that and then
4 we'll have argument.

5 (Recess.)

6 (Prospective jurors absent.)

7 (Defendant present.)

8 THE COURT: I think everybody is back. Are
9 you all ready to go on the record?

10 MS. SCHLAX: Yes, Your Honor.

11 THE COURT: You said you have a juror you'd
12 like to discuss for cause?

13 MS. SCHLAX: Yes, Your Honor, there are two
14 jurors. I've discussed this with Mr. Smith. The
15 first is original number juror [REDACTED] seated in the
16 [REDACTED] spot and juror No. [REDACTED] seated in the [REDACTED]
17 spot. That based on their responses to both
18 Mr. Caliel's and Mr. Fletcher's questions I think
19 they rose to the level of cause.

20 MR. CALIEL: The State concurs with both
21 strikes for cause, Your Honor.

22 THE COURT: I agree. So juror No. [REDACTED] and [REDACTED],
23 correct?

24 MS. SCHLAX: Yes, Your Honor.

25 THE COURT: Okay. Okay. Are they all ready

1 to come back in?

2 BAILIFF: Just one second.

3 THE COURT: Wait. But we need two of 'em in
4 here first by themselves. They're going to be
5 excused.

6 BAILIFF: Okay.

7 THE COURT: Juror No. [REDACTED] and juror No. [REDACTED].

8 BAILIFF: So you want them in right now?

9 THE COURT: Well, if they're ready. If
10 they'd come in.

11 BAILIFF: All right. Are you ready for them?

12 THE COURT: Yes.

13 (Prospective jurors present.)

14 THE COURT: Okay. Just so the record is
15 correct, I need to show that you are back in the
16 courtroom and so I'm going to say your number and
17 ask you to raise your hand. Okay? Juror No. [REDACTED]

18 (Prospective juror indicating.)

19 THE COURT: And juror No. [REDACTED]

20 (Prospective juror indicating.)

21 THE COURT: Okay. We're going to excuse you.
22 You have completed your jury service and you're
23 free to go. When you leave they'll take your
24 little hanging identification and your button.

25 Did you -- do you have your parking

1 validated?

2 PROSPECTIVE JUROR: Yes.

3 THE COURT: You do. Then you're ready to go.
4 We thank you, all of us thank you so much for your
5 time and attention and your truthful answers are
6 very important to the whole process. So you did
7 the right things by giving us your truthful
8 answers and we hope you enjoyed your experience
9 and we thank you again for your service and you're
10 free to go. And don't go -- you are free to go
11 when you walk out the door, go on about your
12 business. Okay.

13 (Prospective jurors excused.)

14 THE COURT: Mr. Smith, you're still under
15 oath. I think your attorney did say this, but you
16 do agree with those two being excused, correct?

17 THE DEFENDANT: Yes, ma'am.

18 THE COURT: Okay. Thank you. Are you all
19 okay with 9:00 o'clock tomorrow morning?

20 MR. CALIEL: I'm sorry.

21 THE COURT: Are you all okay at 9:00 o'clock
22 tomorrow morning, because at the end of this
23 session I need to tell them when to be back.

24 MR. CALIEL: Yes, Your Honor.

25 MR. FLETCHER: Yes, Your Honor.

1 MR. CALIEL: Judge, is there a time -- I know
2 the end of my questioning I'm going to
3 individually ask a series of three questions to
4 each juror individually. Is there a time when we
5 want to say if we don't get to that point early
6 enough that we're just going to conclude because I
7 can just pause at that point in time and say we're
8 going to recess for tomorrow or do you want me to
9 try to get through all that?

10 THE COURT: I have no idea how much time
11 you're talking about.

12 MR. CALIEL: I guess the point would be there
13 is there a time when --

14 THE COURT: I want them to be able to leave
15 here by 6:00 o'clock.

16 MR. CALIEL: 6:00 o'clock. On. I think I
17 might be able to finish.

18 THE COURT: When I say by 6:00 o'clock, if
19 it's 6:09 or 5:57. I mean I don't want them here
20 any later than approximately 6:00 o'clock and I'll
21 explain to them that one of the reasons we kept
22 going is because if they try to leave at 5:00
23 o'clock they can't go anywhere anyway. So we just
24 went ahead and finished the session rather than
25 waiting until tomorrow and they'll have an easier

1 time of getting home. Which is true.

2 MR. CALIEL: And you're going to read the law
3 before we start our death qualification.

4 THE COURT: Only because you reminded me. I
5 have to be reminded sometimes. Yes, I've got it
6 right here.

7 BAILIFF: Are you ready, Judge?

8 THE COURT: I'm ready. Thank you.

9 (Prospective jurors present.)

10 BAILIFF: That's everybody, ma'am.

11 THE COURT: Thank you.

12 Before we get started, how many of you parked
13 in the parking lot, garage across the street?

14 (Prospective jurors indicating.)

15 THE COURT: Did you all get your parking
16 tickets validated?

17 PROSPECTIVE JUROR: No.

18 THE COURT: Who did not get their parking
19 ticket validated?

20 (Prospective juror indicating.)

21 THE COURT: All right. We're going to take
22 them. Do you have them with you? We're going to
23 take them down and get them validated. Not that
24 we'll be here after 5:00, I don't know that, we
25 might. May be later than that. But they have to

1 be validated by 5:00 so since you don't have the
2 ability to run down there, we're going to take
3 them down there for you.

4 BAILLIFF: Anybody else? Parking passes?

5 THE COURT: Thank you.

6 When you come back tomorrow, while I'm thinking
7 about parking, when you get here tomorrow you're
8 going to come straight up to the atrium outside the
9 courtroom, you're not going to jury assembly because
10 we're going to start at 9:00. I'll go over that
11 with you in a little bit. You come line up and
12 we'll get started so bring your parking passes, your
13 ticket with you, they will be collected and taken
14 from you and validated and given back to you. Come
15 straight up here and don't worry about it and we'll
16 take care of it. Okay? And you gentlemen that
17 needed to have yours done, we'll get them back to
18 you, of course, before you leave today.

19 All right. Like the attorneys said, it's a
20 little bit difficult sometimes with a trial that can
21 potentially have two different phases to ask you
22 questions about a phase that we're not at yet or may
23 not get to at some point. But because we have to do
24 that during the jury selection process there is an
25 instruction that gets read during the trial in that

1 second phase, but it's also helpful to a panel to
2 hear that instruction now because it gives a better
3 idea of what it is that the attorneys will be
4 questioning you about. Okay? I'm going to read
5 that for you now.

6 Members of the prospective jury, if you have
7 found the defendant guilty, it's something that has
8 not been done, but if that happens only issue that
9 will be before you will -- that you will have to
10 determine is the appropriate sentence. The only
11 punishment for the crime of first degree murder is
12 either life imprisonment without the possibility of
13 parole or death.

14 The State and the defense may present evidence
15 relative to the nature of the crime and the
16 defendant's character, background or life. You are
17 instructed that this evidence is presented in order
18 for you to determine, as you will be instructed,
19 number one, whether one or more aggravating factors
20 are proven beyond a reasonable doubt; two, whether
21 one or more aggravating factors exist beyond a
22 reasonable doubt; three, whether an aggravating
23 factor or factors found to exist beyond a reasonable
24 doubt are sufficient to justify the imposition of
25 the death penalty; four, whether a mitigating

1 circumstance or circumstances are proven by the
2 greater weight of the evidence; five, whether the
3 aggravating factor or factors outweigh the
4 mitigating circumstance or circumstances and, six,
5 whether the defendant should be sentenced to life
6 imprisonment without the possibility of parole or
7 death.

8 At the conclusion of the evidence, and after
9 the argument of counsel, you will be instructed on
10 the law that will guide your deliberations. But I'm
11 telling you about it now to help you with the
12 questions and answers.

13 You'll hear it again later if it becomes
14 appropriate.

15 An aggravating factor is a standard to guide
16 the jury in making the choice between recommending
17 life imprisonment without the possibility of parole
18 or death. It is a statutorily enumerated
19 circumstance that increases the gravity of a crime
20 or the harm to a victim. You must unanimously agree
21 that an aggravating factor or factors were proven
22 beyond a reasonable doubt before it or they may be
23 considered by you in arriving at your final verdict.

24 In order to consider the death penalty as a
25 possible penalty, you must determine that at least

1 one aggravating factor has been proven beyond a
2 reasonable doubt. In order to consider an
3 aggravating factor, the State has the burden to
4 prove the aggravating factor beyond a reasonable
5 doubt.

6 A reasonable doubt is not a mere possible
7 doubt, a speculative, imaginary or forced doubt.
8 Such a doubt must not influence you to disregard an
9 aggravating factor if you have an abiding conviction
10 that it exists. On the other hand, if after
11 carefully considering, comparing and weighing all
12 the evidence you do not have an abiding conviction
13 that the aggravating factor exists, or if having a
14 conviction it is one which is not stable, but one
15 which wavers and vacillates, then the aggravating
16 factor has not been proved beyond every reasonable
17 doubt and you must not consider it in providing your
18 verdict on the appropriate sentence to the Court.

19 A reasonable doubt as to the existence of an
20 aggravating factor may arise from the evidence,
21 conflicts in the evidence or the lack of evidence.
22 If you have a reasonable doubt as to the existence
23 of an aggravating factor, you must find that it does
24 not exist. However, if you have no reasonable
25 doubt, you should find that the aggravating factor

1 does exist.

2 Before moving on to the mitigating
3 circumstances, you must determine that the
4 aggravating factor or factors are sufficient to
5 impose a sentence of death. If you do not
6 unanimously agree that the aggravating factor or
7 factors are sufficient to impose death, do not move
8 on to consider the mitigating circumstances.

9 Should you find a sufficient aggravating factor
10 or factors exist to justify recommending the
11 imposition of the death penalty, it will then be
12 your duty to determine whether the aggravating
13 factor or factors that you unanimously find to have
14 been proven beyond a reasonable doubt outweigh the
15 mitigating circumstances -- circumstance or
16 circumstances that you find to have been
17 established.

18 Unlike aggravating factors, you do not need to
19 unanimously agree that a mitigating circumstance has
20 been established. A mitigating circumstance is not
21 limited to the facts surrounding the crime. It can
22 be anything in the life of the defendant which might
23 indicate that the death penalty is not appropriate
24 for the defendant.

25 In other words, a mitigating circumstance may

1 include any aspect of the defendant's character,
2 background or life or any circumstance of the
3 offense that reasonably may indicate that the death
4 penalty is not an appropriate sentence in this case.

5 A mitigating circumstance need not be proven
6 beyond a reasonable doubt by the defendant. A
7 mitigating circumstance need only be proven by the
8 greater weight of the evidence, which means
9 evidence that more likely than not tends to prove
10 the existence of a mitigating circumstance. If you
11 determine by the greater weight of the evidence
12 that a mitigating circumstance exists, you may
13 consider it established and give that evidence such
14 weight as you determine it should receive in
15 reaching your conclusion as to the sentence to be
16 imposed.

17 The process of weighing aggravating factors and
18 mitigating circumstances is not a mechanical or
19 mathematical process. In other words, you should
20 not merely total the number of aggravating factors
21 and compare that number to the total number of
22 mitigating circumstances. The law contemplates that
23 different factors or circumstances may be given
24 different weight or values by different jurors.
25 Therefore, your decision-making process each

1 individual juror must decide what weight is to be
2 given to a particular factor or circumstance.
3 Regardless of the results of each juror's individual
4 weighing process, even if you find that the
5 sufficient aggravators outweigh the mitigators, the
6 law neither compels, nor requires you to determine
7 that the defendant should be sentenced to death.

8 Once each juror has weighed the proven factors,
9 he or she must determine the appropriate punishment
10 for the defendant. The jury's decision regarding
11 the appropriate sentence must be unanimous if death
12 is to be imposed. To repeat what I have said, if
13 your verdict is that the defendant should be
14 sentenced to death, your finding that at least one
15 aggravating factor exists must be unanimous.

16 Your finding that the aggravating factor or
17 factors are sufficient to impose death must be
18 unanimous, and your finding that the aggravating
19 factor or factors found to exist outweigh the
20 established mitigating circumstance or circumstances
21 must be unanimous. And your decision, if to impose
22 a sentence of death, must be unanimous.

23 Now, ladies and gentlemen, I have read this to
24 you because we think it will be helpful to you in
25 answering the questions and listening to the

1 attorneys' questions during this next phase of the
2 jury selection. You're not expected to remember
3 this. If you're on the jury and we get to a second
4 phase of the trial, all of this will be read to you
5 again and, additionally, if you serve on the jury
6 you go out to deliberate, then you're given a
7 written copy for the jury to look at if they need to
8 look back at anything. So this is simply to help us
9 help you during the jury selection process.

10 Mr. Caliel.

11 MR. CALIEL: Thank you, Your Honor. May it
12 please the Court.

13 THE COURT: Sure.

14 MR. CALIEL: Counsel.

15 Ladies and gentlemen of the jury, good
16 afternoon again.

17 I think I can say with confidence the good news
18 is this is the last time I'll speak with you before
19 you're either selected or excused as a juror. So
20 hopefully we can go through the subject matter
21 pretty quickly, but it will take some time. As you
22 heard when you came into this courtroom originally
23 and you were given a questionnaire, capital penalty
24 is a potential sentence in this case.

25 Can I see a show of hands that when you found

1 that fact out that gave you some concern or that
2 made you a little bit nervous? If I could see a
3 show of hands.

4 (Prospective jurors indicating.)

5 MR. CALIEL: A couple of hands here and on
6 this side so I'm going to go here first and go row
7 by row. Let me start with juror No. [REDACTED]. If you
8 could stand, please, ma'am. Why were you nervous
9 when you heard about the death penalty?

10 PROSPECTIVE JUROR: Because I don't believe
11 in capital punishment.

12 COURT REPORTER: I'm sorry. I can't hear
13 her.

14 THE COURT: Yeah, we're going to have to have
15 them stand and they're going to have to use the
16 microphone. Thank you.

17 PROSPECTIVE JUROR: The reason I was
18 concerned is because it's against my faith to
19 believe in capital punishment.

20 MR. CALIEL: And you and I had spoken
21 individually later on and you said despite the
22 fact that it was against your personal religious
23 beliefs that you felt that you could set that
24 aside and still consider it as an option because
25 that's what the law is in the State of Florida.

1 PROSPECTIVE JUROR: Yes.

2 MR. CALIEL: Thank you.

3 Juror No. [REDACTED]

4 PROSPECTIVE JUROR: Well, at the point I
5 found out it was going to be a death punishment
6 case, it really became real at that point. You
7 know, we were here all day Monday and nothing
8 really happened until we read that questionnaire
9 so that was when it became real to me.

10 MR. CALIEL: When it became real for you, did
11 you have concerns that you could serve in that
12 role?

13 PROSPECTIVE JUROR: No.

14 MR. CALIEL: Great. Thank you.

15 Any other hands on this side of the
16 courtroom?

17 (Prospective juror indicating.)

18 MR. CALIEL: I think juror No. [REDACTED]

19 PROSPECTIVE JUROR: No, just like the other
20 gentleman said --

21 MR. CALIEL: Let's pass you the microphone.
22 Otherwise Madam Court Reporter --

23 PROSPECTIVE JUROR: It's like he said, it
24 become real.

25 COURT REPORTER: I'm sorry. I can't hear

1 him.

2 MR. CALIEL: I apologize. The acoustics in
3 here are awful.

4 PROSPECTIVE JUROR: It's just a reality check
5 to see death penalty. Like you live so many years
6 and you hear about death penalty and now you're
7 involved with one potentially.

8 MR. CALIEL: But you believe you can serve in
9 that role?

10 PROSPECTIVE JUROR: Yes.

11 MR. CALIEL: Thank you.

12 Anybody else here on that side of the
13 courtroom?

14 (No response from prospective jurors.)

15 MR. CALIEL: My right, your left. See your
16 hands again.

17 (Prospective juror indicating.)

18 MR. CALIEL: Juror No. [REDACTED]

19 PROSPECTIVE JUROR: Sir, echoing what they
20 all said, I support the death penalty, but having
21 to bear the responsibility of potentially
22 sentencing someone to that is so great and a huge
23 responsibility. So it's concerning, but not
24 impossible.

25 MR. CALIEL: And you can serve in that role?

1 PROSPECTIVE JUROR: Yes.

2 MR. CALIEL: Thank you.

3 Hands still up on this side. Juror No. [REDACTED]

4 PROSPECTIVE JUROR: I think as we've talked
5 about it, I'm completely against it, capital
6 punishment as a form of punishment for anyone.
7 I'm not concerned that I wouldn't be able to make
8 that call. I'm more concerned on the potential
9 outcome afterwards.

10 MR. CALIEL: Let me explore that a little bit
11 further when you're standing up because we talked
12 the other day. We discussed that you have
13 personal beliefs that you are against the death
14 penalty.

15 PROSPECTIVE JUROR: Correct.

16 MR. CALIEL: However, in your sense of civic
17 responsibility, which I appreciate, you told me
18 that it's not your place to disregard the law,
19 that you would be able to follow the law if, in
20 fact, that were the case and you were selected as
21 a juror.

22 PROSPECTIVE JUROR: Correct.

23 MR. CALIEL: The one thing that you just
24 added right there I want to go into with you a
25 little bit further, is the after-effect. Let's

1 just assume for a second that you go through the
2 process, which the Judge just described, that you
3 felt you could follow the law and you believed in
4 your heart, based upon the law and the evidence
5 that was in front of you, that the death penalty
6 was appropriate. Could you hearken to that
7 verdict in this open courtroom?

8 PROSPECTIVE JUROR: Yes.

9 MR. CALIEL: What effect would that have on
10 you? Because you just said it may have an
11 after-effect.

12 PROSPECTIVE JUROR: I do not think I could
13 talk about that. I have no idea. I don't know
14 what effect that has on someone after a long time
15 period.

16 MR. CALIEL: Do you think that, for lack of a
17 better term, the anxiety of that would play a part
18 in whether or not you could serve in the role and
19 reach a verdict of the death penalty if it were
20 appropriate?

21 PROSPECTIVE JUROR: I don't think so.

22 MR. CALIEL: Thank you. Anybody else on this
23 side of the courtroom?

24 (No response from prospective jurors.)

25 MR. CALIEL: I don't see a show of hands.

1 Okay. Part of the reason why I asked that
2 question, and I think the questionnaire has
3 flushed this out for us a little bit, folks. Is
4 the questionnaire that you all filled out
5 basically asks the question do you have strong
6 feelings either for or against the death penalty
7 and we talked to some of you already.

8 Well, what I want to make sure is that nobody
9 slipped through the cracks. And what I mean by
10 that is this. The extreme ends of the spectrum
11 are people who are not what we call death
12 qualified or people who should not sit on a jury
13 where the death penalty is an option. Those
14 extreme ends are this. If somebody believes that
15 under no circumstance whatsoever, regardless of
16 what the law is, regardless of what the evidence
17 is, that under no circumstance they could ever
18 make a recommendation that the defendant be put to
19 death if he's found guilty, please raise your
20 hand.

21 (No response from prospective jurors.)

22 MR. CALIEL: Okay. I think we did our job
23 then with the questionnaire. Now let's go to the
24 other end of the spectrum. Is there anybody here
25 who believes that if you are found guilty of first

1 degree murder, without more, but simply you're
2 found guilty of first degree murder, you should
3 automatically be put to death? And if so, please
4 raise your hand.

5 (No response from prospective jurors.)

6 MR. CALIEL: Perfect. So the questionnaire
7 did work for us. Those are the two extreme ends
8 of the spectrum, folks. What that shows you is
9 what we want you to be able to affirm to us here
10 in this courtroom is that you can come into a
11 penalty phase with an open mind. Much like the
12 Judge just described, that you can evaluate the
13 evidence, you can evaluate the aggravation and
14 determine whether or not it exists and has the
15 State proven it beyond a reasonable doubt. And if
16 we have and the aggravation justifies the death
17 penalty, you go on to the next phase, which is
18 considering the mitigation. But does everybody
19 understand this, that if we fail in our job, the
20 State of Florida fails in our job to prove
21 aggravation beyond a reasonable doubt, that would
22 justify the death penalty, you stop right there?
23 Does everybody understand that?

24 (Affirmative response from prospective
25 jurors.)

1 MR. CALIEL: Okay. It is an evaluation
2 process, it's a step by step process, and if the
3 State of Florida fails to prove aggravation beyond
4 a reasonable doubt, or even if we do that, that
5 aggravation is not sufficient to impose the death
6 penalty, the jury's analysis ends there. You
7 don't even need to consider mitigation, you don't
8 need to worry yourself about the mitigation,
9 because the State has not met its burden and the
10 defendant should be sentenced to life. Does
11 everybody understand that?

12 (Affirmative response from prospective
13 jurors.)

14 MR. CALIEL: Does everybody affirm that they
15 can go through that process and if, in fact, the
16 State does not meet their burden you will sentence
17 the defendant to life? Can everybody promise to
18 do that?

19 (Affirmative response from prospective
20 jurors.)

21 MR. CALIEL: Okay. Let's talk a little bit
22 about the different phases that we have here. In
23 the penalty phase the State and the defense both
24 can present additional evidence. And so we're
25 going to have the trial next week, the guilt phase

1 of the trial, where you determine did Donald Smith
2 commit the crime. All right. If you find him
3 guilty of first degree murder, we then go to the
4 next phase and it's a separate proceeding and
5 additional evidence can be presented and at this
6 juncture it's not appropriate for us to talk about
7 additional evidence, but it is appropriate for us
8 to talk about that's not all you can consider,
9 because aggravation, as the Court has defined for
10 you, can be established in the evidence that you
11 hear at trial.

12 What I can tell you, ladies and gentlemen, is
13 that one of the aggravating circumstances that the
14 Court will instruct you on, if you get to that
15 phase in the trial, is the fact that if it is
16 proven beyond a reasonable doubt that the victim
17 was under the age of 12. That is a statutory
18 aggravating factor that if we get to that phase
19 you will be instructed on.

20 So obviously everybody in this courtroom
21 knows one thing, if he's found guilty of first
22 degree murder of Cherish Perrywinkle, and the jury
23 finds him guilty beyond and to the exclusion of a
24 reasonable doubt, we know one aggravating factor
25 will exist and will be proven beyond a reasonable

1 doubt because that's what you found in your
2 original verdict. You won't need additional
3 evidence to that fact. You'll hear that in the
4 first phase of the trial. Does everybody
5 understand?

6 (Affirmative response from prospective
7 jurors.)

8 MR. CALIEL: Okay. We already talked a
9 little bit about felony murder and how that's a
10 second way that you can prove beyond a reasonable
11 doubt that the defendant is guilty of first degree
12 murder. What you will hear later on in a penalty
13 phase, if we get to that phase, is that if the
14 defendant committed the killing during the course
15 of felony murder that's an aggravating factor that
16 can be proven beyond a reasonable doubt. So logic
17 puts it that if you find the defendant guilty of
18 first degree murder, felony murder, and you find
19 him guilty of sexual battery and kidnapping, that
20 in the guilt phase of the trial the State would
21 have established beyond and to the exclusion of a
22 reasonable doubt that a second aggravating factor
23 does exist. Does everybody understand that?

24 (Affirmative response from prospective
25 jurors.)

1 MR. CALIEL: So when it comes to that
2 aggravating factor additional evidence wouldn't
3 need to be presented because you've already
4 considered that evidence at trial. Does everybody
5 understand?

6 (Affirmative response from prospective
7 jurors.)

8 MR. CALIEL: So that puts us in a position
9 where you're going to understand where the
10 evidence can come from. The evidence at penalty
11 phase can come from the crime itself and the
12 testimony that you hear during the guilt phase, or
13 at additional evidence if it is presented at the
14 penalty phase. Does everybody understand that?

15 (Affirmative response from prospective
16 jurors.)

17 MR. CALIEL: Okay. Now, like I said, it's
18 sort of hard for us to ask you to keep an open
19 mind if we make you make assumptions, right?
20 Because we're talking right now about a penalty
21 phase and we're going to be talking as if we
22 assume that you've found the defendant guilty. So
23 it's awkward. It's difficult. And if you find
24 the defendant guilty of all the crimes that were
25 charged in the Indictment, you also were assuming

1 that you found two aggravating factors beyond and
2 to the exclusion of a reasonable doubt. Okay? So
3 we're telling you to keep an open mind, but we're
4 also telling you to assume for a second that the
5 State has already done part of what we're supposed
6 to do in the penalty phase.

7 So what I want you to think about when we
8 talk about this is can you keep an open mind to
9 the possibility that a penalty other than death is
10 an option in this case. Can everybody do that?

11 (Affirmative response from prospective
12 jurors.)

13 MR. CALIEL: Because we don't know what
14 mitigation exists. Even if the State does
15 establish the fact that she's under the age of 12
16 when she was killed and she was killed during a
17 sexual battery, how you weigh that is up to you as
18 the jury. How much weight, how much value you
19 give those aggravating factors, and any other
20 aggravating factors that are presented at trial,
21 and at the penalty phase, that is up to you as a
22 juror to determine how much weight to give that.
23 You could give it great weight, you could give it
24 little weight. But that's your role to determine
25 how much weight that is given.

1 The next step, if that's been proven beyond a
2 reasonable doubt, and you believe that they are
3 weighty aggravators so that the death penalty is
4 appropriate, is now you consider mitigation,
5 circumstance of the defendant, his life, his
6 character, things of that nature, that may mitigate
7 a death sentence, or circumstances of how the crime
8 was committed that may mitigate a death sentence.
9 You can give the same as the aggravation, as much or
10 as little weight as you want to that. And that is
11 your role as a juror.

12 But that being said, going into that weighing
13 process, can you keep your mind open to the
14 possibility that it could either be death or it
15 could be life? Can everybody affirm that they can
16 do that?

17 (Affirmative response from prospective
18 jurors.)

19 MR. CALIEL: Does anybody believe, for a
20 second, again, let's assume the defendant is found
21 guilty as charged in the Indictment. He's been
22 found guilty of killing, kidnapping and raping an
23 eight year old girl. Like we talked about, that's
24 an aggravating circumstance that have been proven.
25 Can everybody still, despite the fact that he's

1 been found guilty, and despite the fact that
2 aggravation is inherit in your verdict, can
3 everybody still leave open the option and go into
4 the penalty phase with an open mind? Can
5 everybody promise to do that?

6 (Affirmative response from prospective
7 jurors.)

8 MR. CALIEL: The Judge emphasized right there
9 at the very end, and I wanted to make sure that
10 everybody understands this with the law. Because
11 the law has changed in the State of Florida. If
12 the defendant is to be sentenced to death, the
13 jury must unanimously find, meaning all of the
14 jurors must determine that an aggravating
15 circumstance exists, it's been proven beyond and a
16 to the exclusion of a reasonable doubt, it
17 justified the imposition of the death penalty and
18 when weighed, in comparison to the mitigation,
19 then death penalty is still appropriate and the
20 aggravation outweighs the mitigation. Every juror
21 must agree to that. Does everybody understand
22 that?

23 (Affirmative response from prospective
24 jurors.)

25 MR. CALIEL: If one -- the jury will be

1 comprised of 12 individuals. If one person
2 disagrees, what must the verdict be as to
3 punishment?

4 PROSPECTIVE JUROR: Life.

5 (Prospective jurors responding life.)

6 MR. CALIEL: One person, one voice. Does
7 everybody understand that?

8 (Affirmative response from prospective
9 jurors.)

10 MR. CALIEL: Hence the reason why we need you
11 to go into this with an open mind and not set on
12 death or life when we go in. Because it has to be
13 unanimous. And like we talked about, it is --
14 there's no more serious punishment in the United
15 States. There's no more serious case than what
16 we're talking about here. Death is final.
17 Everybody agree with that?

18 (Affirmative response from prospective
19 jurors.)

20 MR. CALIEL: Now, understanding that process,
21 does everybody understand the weighing process
22 that goes through this? The Judge read you a
23 little bit of the instruction. When she says it's
24 not numerical, it's not a counting process, there
25 are certain aggravating factors that the law

1 allows. And only the aggravating factors that
2 apply in this case will be instructed to the jury
3 at the conclusion of this case. It's premature at
4 this stage to determine is it one, is it two, is
5 it five. We don't know. And we don't know at
6 this point in the process how many mitigating
7 factors exist. Is it one, is it ten, is it 20?
8 Could be a hundred mitigating factors. Aspects of
9 the defendant's life that could be in
10 consideration. But when you look at the
11 aggravation and the mitigation together, it's not
12 the number of them, but it's the value.

13 The simplest way to put it is this. If
14 you've got a pocketful of change and let's say
15 this pocket is aggravation and this pocket is
16 mitigation. Well, if this pocket has 15 quarters
17 and five dimes, compared to the same number over
18 here, which is all pennies, what has more weight?
19 What has more value in making that determination?
20 You all determine what value you give to the
21 aggravation. You all determine what value you
22 give to the mitigation in that weighing process.
23 Does everybody understand that?

24 (Affirmative response from prospective
25 jurors.)

1 MR. CALIEL: Understand this fact. You all
2 do not need to agree on the weight and the value
3 of the aggravation and mitigation. Because
4 individually one juror may find one aggravator
5 more weighty, another juror may find another
6 aggravator more weighty than that. That's your
7 role. The unanimous decision has to be that they
8 exist, they justify the death penalty and that
9 they outweigh the mitigation. Does everybody
10 understand that?

11 (Affirmative response from prospective
12 jurors.)

13 MR. CALIEL: Simplest way to define it is
14 this, and let's just talk about the two
15 aggravating factors that are inherit in the
16 verdicts if found guilty as charged. One juror
17 may found that it is extremely weighty that the
18 victim was eight years old at the time of the
19 crime. Another juror may find or give more weight
20 or more value to the fact that the killing
21 occurred during the course of a rape or a sexual
22 battery. That's fine. But you just need to
23 evaluate those weights individually, but reach a
24 unanimous decision as to what the appropriate
25 sentence is. Does everybody understand that?

1 (Affirmative response from prospective
2 jurors.)

3 MR. CALIEL: I'm going to go through a
4 process with each of you and I'm going to go
5 through it and it's, in essence, almost like the
6 questionnaire that we filled out earlier, but with
7 three simple questions. But these questions will
8 give us a little bit of insight into your thoughts
9 about the process and death penalty and capital
10 punishment. And it's a scale where you fall and
11 then can you serve your role.

12 So what I'm going to start to do, one by one,
13 and please bear with me and I apologize that this
14 will take sometime, just like those questionnaires
15 we filled out earlier today. But this is important
16 for us and I want you to consider the questions I'm
17 going to ask you before I start. The first is going
18 to be I want you to give me an answer to this.
19 Okay. You as a juror have one word or one phrase, I
20 don't want paragraphs and I don't want, you know, a
21 dissertation. A word or a phrase that would
22 summarize or tell us what your feelings about the
23 death penalty are. I want that one word from each
24 of you.

25 Now, you can share words because,

1 unfortunately, guys over here, you're going to be at
2 the end. Juror No. 3 is going to be our first juror
3 so you may share some of the same thoughts, some of
4 the same issues, but one word, one phrase to
5 summarize how you feel about the death penalty. The
6 second is I want you to put yourself on a sliding
7 scale.

8 Now, we've already determined the two extremes
9 of the scale. Never the death penalty, always the
10 death penalty are out of the scale. The scale is
11 this. On a scale of one to five, one being I'm
12 opposed to the death penalty, except in the rarest
13 of circumstances, and five being I'm strongly in
14 favor of the death penalty, where do you fall, one,
15 two, three, four, five. Just give me a number.
16 Because I'm looking for a word or a phrase, a number
17 and then, finally, a simple yes or no.

18 And that yes or no goes to at the conclusion of
19 the penalty phase, if it's the jury's role and
20 decision that the death penalty be imposed
21 unanimously, can you as a juror stand in this
22 courtroom, stand in these jury boxes over here in
23 front of these chairs, in open court, with everybody
24 to hear, and affirm to your verdict that Donald
25 Smith should be put to death.

1 As somebody said beforehand, that's heavy
2 stuff. But that is what you will be asked to do if
3 you go through that process. And your ultimate
4 decision and the decision of the jury as a whole is
5 to impose the death penalty. You will be asked to
6 stand in this courtroom and hearken to your verdict.
7 Can you do that? Okay?

8 So let's start and I'll lead you through the
9 process.

10 If I can get the microphone.

11 Thank you.

12 Juror No. ■.

13 PROSPECTIVE JUROR: Yes, sir.

14 MR. CALIEL: One word, describe your feelings
15 about the death penalty.

16 PROSPECTIVE JUROR: It's not going to be a
17 word. It's going to be a sentence. Is that okay?

18 MR. CALIEL: That's fine.

19 PROSPECTIVE JUROR: Okay. I believe the
20 defendant's life is very important, the victim's
21 life was very important, too. So like if we find
22 out he's guilty, so I don't have any problem to
23 give the death penalty for it. Because both lives
24 is important.

25 MR. CALIEL: On a scale of one to five, one

1 being opposed except in the rarest of
2 circumstances, and five being strongly in favor,
3 where do you fall?

4 PROSPECTIVE JUROR: Two.

5 MR. CALIEL: Okay. And if you determine, and
6 the jury determines as a whole that the death
7 penalty is appropriate, could you stand in this
8 courtroom and hearken to your verdict?

9 PROSPECTIVE JUROR: Yes, sir.

10 MR. CALIEL: Thank you, sir.

11 PROSPECTIVE JUROR: Thank you.

12 MR. CALIEL: Juror No. [REDACTED] One word, one
13 phrase.

14 PROSPECTIVE JUROR: Describing the death
15 penalty?

16 MR. CALIEL: Your feelings about it.

17 PROSPECTIVE JUROR: There are -- not only one
18 word, but there's certain things that I guess are
19 worthy of that penalty, I guess, you know.
20 Because of the severity, you know.

21 MR. CALIEL: Where do you fall in the scale?

22 PROSPECTIVE JUROR: If the penalty is -- if
23 -- if it is to be done, it's to be done.

24 MR. CALIEL: On a scale of one to five, where
25 do you fall? One --

1 PROSPECTIVE JUROR: Probably in the middle.

2 MR. CALIEL: 2.5?

3 PROSPECTIVE JUROR: Yeah.

4 MR. CALIEL: And can you hearken to your
5 verdict?

6 PROSPECTIVE JUROR: Yes.

7 THE COURT: I'm sorry. What was his number?

8 MR. CALIEL: His juror number, No. [REDACTED] Your
9 Honor.

10 THE COURT: No, his number 1 to 5.

11 MR. CALIEL: He said in the middle, two and a
12 half to three.

13 THE COURT: Okay. Thank you.

14 MR. CALIEL: Juror No. [REDACTED]

15 PROSPECTIVE JUROR: I would say three.

16 Personal, based on my personal beliefs, I would
17 say unfair.

18 MR. CALIEL: On a scale of one to five where
19 do you fall?

20 PROSPECTIVE JUROR: About a two.

21 MR. CALIEL: Can you hearken to your verdict
22 if death is to be imposed?

23 PROSPECTIVE JUROR: Yes.

24 MR. CALIEL: Thank you. Juror No. [REDACTED]

25 PROSPECTIVE JUROR: I'd say understanding.

1 MR. CALIEL: Understanding.

2 PROSPECTIVE JUROR: Yes.

3 MR. CALIEL: Where on the scale of one to
4 five do you believe that you would fall?

5 PROSPECTIVE JUROR: Three.

6 MR. CALIEL: And could you hearken to a death
7 verdict?

8 PROSPECTIVE JUROR: Yes.

9 MR. CALIEL: Thank you.

10 Juror No. [REDACTED]

11 PROSPECTIVE JUROR: I'm going to say
12 unfortunate, but necessary at times.

13 MR. CALIEL: Where do you think you would
14 fall on a one to five scale?

15 PROSPECTIVE JUROR: A three.

16 MR. CALIEL: And could you hearken to a death
17 verdict?

18 PROSPECTIVE JUROR: Yes.

19 MR. CALIEL: Thank you.

20 Juror No. [REDACTED]

21 PROSPECTIVE JUROR: I will say heavy and 2
22 and a half. And yes.

23 MR. CALIEL: Thank you.

24 PROSPECTIVE JUROR: Word is god-given and a
25 scale of one to five, one and no.

1 MR. CALIEL: I'm sorry. For the record, that
2 was juror No. [REDACTED]

3 PROSPECTIVE JUROR: Yes.

4 MR. CALIEL: Juror No. [REDACTED]

5 PROSPECTIVE JUROR: Uneasy. Probably a three
6 or four. And yes.

7 MR. CALIEL: Thank you. Your juror number,
8 sir?

9 PROSPECTIVE JUROR: [REDACTED]

10 MR. CALIEL: Juror No. [REDACTED]

11 PROSPECTIVE JUROR: I'd say it would be a
12 tough decision, but if it has to be that way, then
13 I will. On a scale of one to five, a two and a
14 half and, yes, I can do it.

15 MR. CALIEL: Thank you, sir.

16 Juror No. [REDACTED]

17 PROSPECTIVE JUROR: Neither for, nor against.
18 If the crime warrants it then, yes. Two and a
19 half and yes.

20 MR. CALIEL: Thank you.

21 Juror No. [REDACTED]

22 PROSPECTIVE JUROR: I would say sometimes
23 justified if the crime is heinous. I'd say I'm a
24 three and yes.

25 MR. CALIEL: Thank you, sir.

1 Juror No. [REDACTED]

2 PROSPECTIVE JUROR: Yes. I would say it is a
3 -- sometimes a necessary evil. Two. And yes.

4 MR. CALIEL: Thank you, ma'am.

5 Juror No. [REDACTED]

6 PROSPECTIVE JUROR: Let the crime fit the
7 verdict. Two and a half. Yes.

8 MR. CALIEL: Thank you, sir.

9 Juror No. [REDACTED]

10 PROSPECTIVE JUROR: Great waste. One. Yes.

11 MR. CALIEL: Thank you.

12 THE COURT: I'm sorry. I couldn't hear his
13 first answer.

14 MR. CALIEL: He said a great waste.

15 THE COURT: Thank you.

16 MR. CALIEL: I'm sorry. Your juror number?

17 PROSPECTIVE JUROR: Oh, [REDACTED]

18 MR. CALIEL: Juror No. [REDACTED].

19 PROSPECTIVE JUROR: Extenuating circumstances
20 I can see it. I'm a two. And yes.

21 MR. CALIEL: Thank you, ma'am.

22 PROSPECTIVE JUROR: I would say a necessary but
23 unfortunate punishment to a horrible crime.

24 MR. CALIEL: I'm sorry. Your juror number,
25 please. Juror No. [REDACTED].

1 PROSPECTIVE JUROR: I would say a three and
2 yes.

3 MR. CALIEL: Thank you.

4 Juror No. [REDACTED]

5 PROSPECTIVE JUROR: Unfavorable. I say like
6 a three. And yes.

7 MR. CALIEL: Juror No. [REDACTED].

8 PROSPECTIVE JUROR: I would say that I have
9 mixed feelings and I'm a three and yes.

10 MR. CALIEL: Thank you, ma'am.

11 Juror No. [REDACTED]

12 PROSPECTIVE JUROR: Feelings. Five. Yes.

13 THE COURT: I'm sorry. I couldn't hear her
14 first response.

15 MR. CALIEL: What was your first response?
16 The Judge could not hear you as to your feelings.
17 A word to describe your feelings.

18 PROSPECTIVE JUROR: Sad.

19 THE COURT: Okay. Thank you.

20 MR. CALIEL: Thank you.

21 Juror No. [REDACTED]

22 PROSPECTIVE JUROR: I guess hypothetical.
23 Probably a one. But, yes, I could.

24 MR. CALIEL: Thank you, sir.

25 Juror No. [REDACTED].

1 PROSPECTIVE JUROR: Unnecessary evil. A
2 three. And yes.

3 MR. CALIEL: Thank you.

4 Juror No. [REDACTED]

5 PROSPECTIVE JUROR: I'd say it's not a one
6 size fits all, it depends on the situation and the
7 background. I'd put myself at a three and yes.

8 MR. CALIEL: Juror No. [REDACTED]

9 PROSPECTIVE JUROR: Appropriate at times. A
10 three and yes.

11 MR. CALIEL: Thank you, sir.

12 PROSPECTIVE JUROR: I'd have to say the law is
13 written the way it was supposed to be, falls in the
14 parameters and has to be done. About three. And
15 yes.

16 THE COURT: Could you please identify their
17 numbers?

18 MR. CALIEL: I'm sorry. Juror No. [REDACTED]

19 Juror No. [REDACTED]

20 PROSPECTIVE JUROR: Life changing. Three.
21 And yes.

22 MR. CALIEL: Thank you. Juror No. [REDACTED]

23 PROSPECTIVE JUROR: [REDACTED] Heaviness and
24 sadness and a three and yes.

25 MR. CALIEL: Thank you.

1 Juror [REDACTED]

2 PROSPECTIVE JUROR: I would say does the
3 death penalty justify the convicted crime. Three
4 and yes.

5 MR. CALIEL: Juror No. [REDACTED]

6 PROSPECTIVE JUROR: I would say it's not
7 always necessary, but I'd say it's a three and
8 yes.

9 MR. CALIEL: I'm sorry, ma'am. Your juror
10 No.

11 PROSPECTIVE JUROR: [REDACTED]

12 MR. CALIEL: Juror No. [REDACTED]

13 PROSPECTIVE JUROR: I would say hard decision
14 and --

15 MR. CALIEL: On a scale of one to five.

16 PROSPECTIVE JUROR: One. And yes.

17 MR. CALIEL: Thank you, ma'am.

18 PROSPECTIVE JUROR: No. [REDACTED]. Totally on the
19 fence with the death penalty, but as long as the
20 State's case is proven beyond a reasonable doubt, I
21 have no issue with it.

22 MR. CALIEL: A one to five scale.

23 PROSPECTIVE JUROR: Two and a half.

24 MR. CALIEL: And you could hearken to your
25 verdict?

1 PROSPECTIVE JUROR: Yes.

2 MR. CALIEL: Thank you.

3 PROSPECTIVE JUROR: Ultimate penalty for the
4 ultimate crime. Three and yes.

5 MR. CALIEL: Thank you. And that's juror No.

6

7 PROSPECTIVE JUROR: Yes.

8 MR. CALIEL: Folks, since, unfortunately, my
9 age has taken my eyesight in places I don't
10 believe it will go, if you would announce your
11 juror number when you begin your statement,
12 please.

13 PROSPECTIVE JUROR: Juror No. [REDACTED] Sadness.
14 Three. And yes.

15 MR. CALIEL: Thank you.

16 PROSPECTIVE JUROR: No. [REDACTED] Final or tragic.
17 Three. And yes.

18 PROSPECTIVE JUROR: Juror No. [REDACTED]
19 Indifferent. Three and yes.

20 PROSPECTIVE JUROR: Juror No. [REDACTED] Sometimes
21 necessary. Three and yes.

22 PROSPECTIVE JUROR: Juror No. [REDACTED] Extreme in
23 rare circumstances. Two and a half.

24 MR. CALIEL: And can you hearken to your
25 verdict?

1 PROSPECTIVE JUROR: Yes.

2 MR. CALIEL: Okay.

3 PROSPECTIVE JUROR: Juror No. [REDACTED] Neutral.
4 Three and yes.

5 PROSPECTIVE JUROR: Juror No. [REDACTED] Necessary,
6 three, yes.

7 MR. CALIEL: Thank you, sir.

8 (Now going to right side of courtroom.)

9 MR. CALIEL: Is that right with juror No. [REDACTED]?

10 PROSPECTIVE JUROR: Juror No. [REDACTED] Everything
11 happens for a reason. Three. And yes.

12 PROSPECTIVE JUROR: Juror No. [REDACTED] Sometimes
13 necessary. Three and yes.

14 PROSPECTIVE JUROR: Juror No. [REDACTED] If
15 justifiable. Four and yes.

16 PROSPECTIVE JUROR: Juror No. [REDACTED] If I'm
17 shown without a reasonable doubt how brutal and
18 how bad it is, I would say four.

19 MR. CALIEL: And can you hearken to your
20 verdict?

21 PROSPECTIVE JUROR: Yes, sir, I could.

22 MR. CALIEL: Thank you.

23 PROSPECTIVE JUROR: No. [REDACTED] Final and heavy
24 responsibility and three and yes.

25 PROSPECTIVE JUROR: Juror No. [REDACTED] if

1 necessary, a three and yes.

2 MR. CALIEL: Thank you.

3 PROSPECTIVE JUROR: Juror No. [REDACTED]. If
4 warranted probably a three to four and yes.

5 PROSPECTIVE JUROR: Juror [REDACTED] If
6 appropriate, three and a half and yes.

7 PROSPECTIVE JUROR: Juror [REDACTED] Clearly
8 unhappy. No. 4. Yes.

9 PROSPECTIVE JUROR: Juror [REDACTED]. Irreversible
10 and final. And I'm a three and, yes, I will.

11 MR. CALIEL: Thank you.

12 PROSPECTIVE JUROR: Juror [REDACTED] I guess if
13 proven, an eye for an eye, a strong solid four, and
14 yes.

15 PROSPECTIVE JUROR: Juror [REDACTED] In favor.
16 Unfortunate. Three and a half and yes.

17 MR. CALIEL: Thank you, sir.

18 PROSPECTIVE JUROR: Juror [REDACTED] Use when
19 appropriate and I'd say about a three and yes.

20 PROSPECTIVE JUROR: Juror No. [REDACTED] If
21 appropriate yes and I'm a three.

22 MR. CALIEL: Thank you, sir.

23 PROSPECTIVE JUROR: Juror [REDACTED] Finality. A
24 four and yes.

25 PROSPECTIVE JUROR: No. [REDACTED] Let the

1 punishment fit the crime. Four.

2 MR. CALIEL: And can you hearken to your
3 verdict, ma'am?

4 PROSPECTIVE JUROR: Yes.

5 MR. CALIEL: Thank you.

6 PROSPECTIVE JUROR: Juror [REDACTED].
7 Disappointing. Three, yes.

8 PROSPECTIVE JUROR: Juror [REDACTED] Ineffective
9 deterrent, one and yes.

10 MR. CALIEL: Hold on one second.

11 Thank you, ma'am.

12 PROSPECTIVE JUROR: Juror [REDACTED] Detached,
13 four and a half, yes.

14 PROSPECTIVE JUROR: [REDACTED] And I hope it's
15 appropriate, but if I was in that position I'd
16 rather be put to death than stay the rest of my
17 life in prison. So I hope that's okay to say.
18 Four and yes.

19 PROSPECTIVE JUROR: Juror [REDACTED] If proven,
20 four, and yes.

21 MR. CALIEL: Thank you, ma'am.

22 PROSPECTIVE JUROR: Juror [REDACTED] I'm neutral
23 and yes.

24 MR. CALIEL: And where on the scale of one to
25 five?

1 PROSPECTIVE JUROR: Three.

2 MR. CALIEL: Right in neutral.

3 PROSPECTIVE JUROR: Juror [REDACTED] Serious and
4 with grave responsibility and consideration but
5 neutral, three and yes.

6 MR. CALIEL: Thank you.

7 PROSPECTIVE JUROR: Juror [REDACTED] Indifference.
8 3.5. And yes.

9 MR. CALIEL:

10 PROSPECTIVE JUROR: Juror [REDACTED] No greater
11 responsibility and 2.5 and yes.

12 PROSPECTIVE JUROR: Juror No. [REDACTED] If found
13 guilty and then absolutely necessary, without a
14 shadow of a doubt, then yes. Two and a half and
15 yes.

16 MR. CALIEL: Thank you, sir.

17 PROSPECTIVE JUROR: Juror [REDACTED] It depends on
18 the circumstances. Strong three. And yes.

19 PROSPECTIVE JUROR: Juror [REDACTED] Sad, 3.5,
20 yes.

21 MR. CALIEL: Thank you, ma'am.

22 PROSPECTIVE JUROR: Juror [REDACTED]
23 Disheartening. Final and unfortunate. A strong
24 four. And yes.

25 PROSPECTIVE JUROR: [REDACTED] Sad. Three. And

1 yes.

2 PROSPECTIVE JUROR: I'm juror [REDACTED] There are
3 no words to describe it this burden and I would
4 say I'm a 3.5 and yes.

5 MR. CALIEL: Thank you, ma'am.

6 PROSPECTIVE JUROR: Juror [REDACTED]. For me
7 personally if it's resulting in someone losing
8 their life I want the evidence to be absolute. So
9 where I range at is a four and yes.

10 MR. CALIEL: Thank you, sir.

11 PROSPECTIVE JUROR: No. [REDACTED]. Mindful of a
12 huge responsibility. Three and yes.

13 PROSPECTIVE JUROR: I'm completely stand on
14 the word of God, you live by the sword, you die by
15 the sword. Five and yes.

16 MR. CALIEL: Thank you, ma'am.

17 PROSPECTIVE JUROR: Juror [REDACTED] Unfortunate,
18 but if justice has been served, then, yes, a three
19 and yes.

20 PROSPECTIVE JUROR: No. [REDACTED] Complicated is
21 the first thing that came to mind, but
22 responsibility, glad there's guidelines. I'd rate
23 myself about a two and yes.

24 MR. CALIEL: Thank you, ma'am.

25 PROSPECTIVE JUROR: Juror [REDACTED] I would say

1 necessary evil, not to be taken lightly. I'm a
2 three and yes.

3 PROSPECTIVE JUROR: Death penalty means to me
4 taking one's life and I'm not against it and I'm
5 not, you know, for it, but I rank about a three
6 and yes, I could.

7 MR. CALIEL: Thank you, sir.

8 PROSPECTIVE JUROR: Juror [REDACTED] Needed. A
9 three. Yes.

10 MR. CALIEL: Thank you.

11 PROSPECTIVE JUROR: Juror [REDACTED] Necessary,
12 three and a half and yes.

13 MR. CALIEL: Juror No. [REDACTED] did you see any
14 common themes with your fellow jurors?

15 PROSPECTIVE JUROR: Should I stand?

16 MR. CALIEL: Please.

17 PROSPECTIVE JUROR: Yes, I think we're all
18 uneasy and have our own emotions about what --

19 MR. CALIEL: Thank you.

20 PROSPECTIVE JUROR: I guess I wasn't speaking
21 loud enough. I think we're all uneasy and realize
22 what a big responsibility this is.

23 MR. CALIEL: Does everybody agree with juror
24 [REDACTED]?

25 (Affirmative response from prospective

1 jurors.)

2 MR. CALIEL: This is not an easy process,
3 folks. Nothing about this case is going to be
4 easy. In the guilt phase, you're going to have to
5 see some things you probably never wanted to see.
6 Penalty phase you are going to have to make a
7 determination, and this is the bluntest way to put
8 it, your verdict, if you return a verdict of
9 death, you'll be saying that Mr. Smith deserves to
10 die. It doesn't get anymore serious, it doesn't
11 get anymore final than that. But you all believe
12 you can serve in that role, is that right?

13 (Affirmative response from prospective
14 jurors.)

15 MR. CALIEL: This is a serious situation. Is
16 there anybody who after hearing what everybody has
17 said and gravity of the situation weighing upon
18 you, is there anybody who believes they cannot sit
19 fairly and serve in that role?

20 (No response from prospective jurors.)

21 MR. CALIEL: No one?

22 (No response from prospective jurors.)

23 MR. CALIEL: Good.

24 (Prospective juror indicating.)

25 THE COURT: There's one hand.

1 PROSPECTIVE JUROR: I just want to say that

2 --

3 MR. CALIEL: Hold on one second. If you can
4 stand.

5 THE COURT: We need her jury number.

6 PROSPECTIVE JUROR: [REDACTED]

7 THE COURT: Thank you.

8 PROSPECTIVE JUROR: I can do it, but I
9 definitely would not be able to scrutinize a
10 photograph because I know what you look at can
11 stick with you.

12 MR. CALIEL: Thank you.

13 Aside from the comment that Ms. -- juror [REDACTED]
14 just gave us, can everybody set aside feelings of
15 sympathy or anger, because they have no place in
16 this courtroom?

17 (Affirmative response from prospective
18 jurors.)

19 MR. CALIEL: Can you reach your verdict based
20 upon the law and the evidence in this case? Can
21 everybody promise to do that?

22 (Affirmative response from prospective
23 jurors.)

24 MR. CALIEL: Ladies and gentlemen, I want to
25 thank you for your time and attention. It has

1 been a long week. And it's probably going to be a
2 long couple of weeks here, but I greatly
3 appreciate your candor and your honesty and I
4 thank you for your time and attention today.

5 (Some prospective jurors responding thank
6 you.)

7 THE COURT: Thank you, Mr. Caliel. As I told
8 you earlier, sometimes there's natural breaks in
9 what we're doing and this is a natural break in
10 what we're doing and I'm going to let you go and
11 come back at 9:00 o'clock tomorrow because we have
12 too much to finish today and this is a natural
13 break.

14 Did the two parking people get their tickets
15 back?

16 BAILIFF: Yes, ma'am.

17 THE COURT: I want you to go and scoot on out
18 of here so you can maybe miss the 5:00 o'clock
19 traffic. Please be here at 9:00 o'clock and do
20 not discuss the case or look for any information
21 or listen to any information about the case.

22 (Prospective jurors absent.)

23 THE COURT: Okay. Any exceptions or
24 objections to the proceeding this afternoon?

25 MS. SCHLAX: No, Your Honor. We'd just renew

1 all of our prior motions that have been filed.

2 THE COURT: Okay. Do you have something?

3 MR. CALIEL: No objections, Your Honor. The
4 only question we had was I think you had told them
5 with the instructions earlier that they're not to
6 look or say anything and we just need to make sure
7 we inquire again tomorrow obviously.

8 THE COURT: Yes. I'll just tell them again.
9 They wanted to get out.

10 MR. CALIEL: They wanted to get out I'm
11 pretty sure.

12 THE COURT: It's been a long week and this
13 was a long day for them. Okay. They're coming at
14 9:00 and I'll get here on time. So I think we
15 need to be here at quarter of 9:00 to get started
16 and I think we'll finish tomorrow.

17 MS. SCHLAX: I should be able to get
18 everything done in one day.

19 THE COURT: Okay. Thank you. We'll be in
20 recess.

21 (Evening recess.)

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IN THE CIRCUIT COURT OF THE
FOURTH JUDICIAL CIRCUIT, IN
AND FOR DUVAL COUNTY, FLORIDA.

Case No: 2013-CF-5781-AXXX-MA
Division CR-D

STATE OF FLORIDA

-vs-

DONALD JAMES SMITH,

Defendant,

TESTIMONY AND PROCEEDINGS taken before the
Honorable Mallory D. Cooper, Judge of the Circuit Court,
on February 9, 2018, and as reported by Faye M. Gay,
Certified Realtime Reporter, Registered Merit Reporter,
and Certified Legal Video Specialist.

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9

10 JULIE SCHLAX and CHARLES FLETCHER, Esquires,
11 Appearing on behalf of the Defendant.

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1 (Defendant present.)

2 MR. CALIEL: Good morning, Your Honor.

3 THE COURT: Good morning, everyone.

4 Is there anything we need to cover before we
5 bring the jurors in?

6 MS. SCHLAX: I don't believe so, Your Honor.

7 MR. CALIEL: No, and I would just remind the
8 Court to inquire if they've had any outside
9 contact or influence prior to beginning today. If
10 so, just have them raise their hand, but I'm
11 expecting probably not.

12 MS. SCHLAX: Your Honor, I'm going to
13 comment, or if the Court thinks it's inappropriate
14 for me to comment if the Court might advise them,
15 we're getting to the stage where we're seeing them
16 in the hallways and, of course, we're constantly
17 averting our eyes. I can either comment on it or
18 if the Court would let them know that even the
19 appearance of impropriety is inappropriate so we
20 will actively go out of our way not to have any
21 contact with them.

22 MR. CALIEL: And I would concur, Your Honor,
23 if maybe in opening remarks you could, you know,
24 sort of advise them as to what the rules are,
25 because, unfortunately, because they are outside

1 when we come in, we have to sort of look away and
2 I think that gives them the idea we're not being
3 rude, we're abiding by the Court's orders.

4 THE COURT: Sure. I have a couple of things
5 I'm wondering about, and, I'm sorry, I don't know
6 the juror's number, but there was a juror over
7 here on the right side that when they were
8 answering the three questions for the State, and I
9 don't remember how Mr. Caliel phrased it, but they
10 were to give a one word on how they thought about
11 the death penalty or felt about it or whatever.
12 One juror said, so I would think he would want to
13 --

14 MS. SCHLAX: It's juror No. [REDACTED] Your Honor.

15 THE COURT: [REDACTED] I didn't know just the way
16 he worded it if we ought to follow up on that one
17 thing with him individually.

18 MR. CALIEL: Judge, in speaking to counsel,
19 given what we both look at, and things may change
20 when this panel is done, I don't expect we're ever
21 going to get to No. [REDACTED] If it does look like
22 that, then maybe at the end of Ms. Schlax's
23 examination maybe we could bring him back in at
24 that point in time, but just pure mathematics with
25 the number of strikes and the number of causes

1 that have been executed at this point in time, I
2 can't envision that we're going to get to the
3 third row on the second side of the courtroom in
4 selection. So --

5 THE COURT: Okay. Well, I'm not sure what
6 you mean by that. Do you mean when we get to a
7 number that the two sides feel might be enough for
8 us to pull the actual jury and alternates that
9 we'll stop the questioning or do you mean there'll
10 be questioning of all of them but you don't think
11 it's time to go through that process, we'll get
12 that far?

13 MR. CALIEL: I don't think after everything
14 is said and done and both sides are completed we
15 are going to get --

16 MS. SCHLAX: We won't get to that side of the
17 courtroom, unless something dramatically happens,
18 and the good news that I can alert the Court, and
19 I'll alert them, based on the questioning that was
20 accomplished yesterday I'm going to be much -- I'm
21 going to be far more brief than I originally
22 planned.

23 THE COURT: Oh, okay.

24 MS. SCHLAX: It will still take me awhile,
25 but I'm going to concentrate primarily on the

1 first 40 because I think based on their answers so
2 far, I think we agree, there's no one who has said
3 anything that a motion for cause could be lodged.
4 So we each have ten strikes.

5 THE COURT: Okay. So if that's how you want
6 to do it, then on that one juror, we won't
7 follow-up with that during the group session and
8 if we need to bring him back in, if it becomes
9 necessary, him back in later.

10 MS. SCHLAX: I can't promise that he won't
11 volunteer because I'm going to talk about life
12 imprisonment. But I'm not going -- I have no
13 problem not going after him specifically.

14 THE COURT: I wasn't going to go after him,
15 but I just didn't know if you all thought that
16 that might be necessary. So that's fine.

17 The other two issues are I think you probably
18 solved one of them by what you just said. I thought
19 we would be in session Saturday and I didn't know
20 how to answer that and I know you don't really know
21 the answer to that, but it sounds like it's less
22 possible than it sounded like yesterday.

23 MS. SCHLAX: I feel very comfortable that I'm
24 going to finish my questioning in probably three
25 hours max, depending on unless we just get some

1 talkers. It might take awhile for us to a meet
2 with Mr. Smith to exercise our peremptories.

3 THE COURT: Sure.

4 MS. SCHLAX: But I feel pretty comfortable
5 saying we're going to get a jury today.

6 THE COURT: Okay. The other thing was not
7 talking to them about sequestration. I don't know
8 that we need to at this point, but if we need to
9 we need to. I know we're not dealing with that
10 issue now for next week and I know that I think I
11 can schedule things where it doesn't become
12 necessary because of an inability to finalize
13 something on a certain day, but other than that do
14 we need to bring that up with them or just wait?

15 MS. SCHLAX: I think we've talked about it in
16 the jury questionnaire.

17 THE COURT: We did?

18 MS. SCHLAX: We have to put it in the
19 questionnaire.

20 MR. CALIEL: I don't think it was.

21 THE COURT: We talked about the length of the
22 trial and I went over that with them and told them
23 what that meant was the week of jury selection,
24 the week of guilt phase and, if necessary, the
25 third week of the second phase. I don't think

1 we've talked with them about sequestration.

2 MR. CALIEL: We -- we have not, Your Honor.
3 Obviously it's a -- it's always a possibility. I
4 know both sides are going to try, and the Court,
5 are going to try to schedule it such that when the
6 jury gets the case for deliberations they're going
7 to have ample time prior to conclusion of the
8 workday to be able to consider things. And I
9 think both sides did not expect, but you can never
10 predict, is it going to be five minutes or five
11 hours or five days. So I think that at least at
12 some juncture maybe the Court can bring it up,
13 because there hasn't been a formal waiver.

14 THE COURT: Yeah, I wasn't asking if you
15 wanted to bring it up. I was asking if we need to
16 bring it up.

17 MS. SCHLAX: I guess in an abundance of
18 caution, I'd leave it to the discretion of the
19 Court.

20 THE COURT: Well, although we don't think
21 it's likely, if it's at all possible, I think they
22 have to know that. And they really have to know
23 if we felt like we needed to have them come
24 prepared for that on any certain day. So I don't
25 think it's going to be necessary, probably, but,

1 again, you're right, it could be five minutes,
2 five hours or five days. We don't know that. And
3 we don't push them on that, nor should we.

4 MR. CALIEL: I think probably the best way to
5 do it, Your Honor, is to advise that the Court is
6 going to attempt to schedule the trial such that
7 they will have, you know, ample time to
8 deliberate, however, it's up to them as to how
9 long it would take and there's a possibility that
10 if deliberations run long that sequestration of
11 the jury is a possibility and you may be asked to
12 -- or you may be required to -- not asked --
13 required to be sequestered until deliberations are
14 complete. I think that's probably the best way to
15 do it.

16 THE COURT: Are you okay with that?

17 MS. SCHLAX: I'm fine with that, Your Honor.

18 THE COURT: Can we go ahead and put Mr. Smith
19 under oath? I don't have anything now. In case
20 we have anything later.

21 Would you stand, please.

22 PROSPECTIVE JUROR: Sure.

23 (Defendant sworn.)

24 THE DEFENDANT: I do.

25 THE COURT: I don't have any questions for

1 you now, having concluded this particular part of
2 the trial or jury selection, but in case we have
3 any questions during the day, then you're already
4 under oath. Okay. Thank you.

5 Are they here?

6 BAILIFF: We are seven short.

7 THE COURT: Okay. We can't do anything until
8 they all get here.

9 Mr. Caliel, we only have 78 now, correct?

10 MR. CALIEL: Correct.

11 MS. SCHLAX: Correct.

12 THE COURT: We've excused two.

13 MR. CALIEL: That's correct.

14 MS. SCHLAX: Yes.

15 THE COURT: Okay. Our last juror is on the
16 way up.

17 They're all here?

18 BAILIFF: They're missing [REDACTED] and [REDACTED]

19 THE COURT: Oh, you're missing three?

20 BAILIFF: Yes.

21 THE COURT: Just a second.

22 (Court conferring with bailiff.)

23 THE COURT: Okay. We're still missing three.

24 We had an incorrect count earlier. The one we
25 thought we were waiting on is here, but there's

1 still three not here. So we're going to see if we
2 can find phone numbers and call them.

3 All right. So it's going to be at least ten
4 minutes because they're not here yet, the three of
5 them. They're going to call them and see if they're
6 on the way or if there's a problem. Whatever the
7 situation is.

8 We'll be in recess for ten minutes and
9 hopefully they'll have an answer. We'll be in
10 recess for ten minutes.

11 (Recess.)

12 (Defendant present.)

13 THE COURT: One of the jurors showed up so
14 we're down two. And the two that we're down, they
15 were able to leave a message for one, they didn't
16 answer the phone, they left them a message, and
17 the other one left no contact number.

18 MS. SCHLAX: What are their juror numbers,
19 Your Honor?

20 THE COURT: [REDACTED] and [REDACTED].

21 MR. CALIEL: What was the second one, Your
22 Honor? [REDACTED] and?

23 THE COURT: [REDACTED] and [REDACTED].

24 MR. CALIEL: [REDACTED]

25 THE COURT: Just for the record, it's 9:42 on

1 Friday, today is the 9th. February 9th, and the
2 jury was told to be here at 9:00 o'clock and we
3 started court approximately 12 minutes till 9:00
4 to follow-up on any matters that needed to be
5 addressed before the jury came in. And we've been
6 ready since 9:00 o'clock. So I'll leave it to the
7 attorneys to discuss since we have no way to know
8 what the reason is that they're not here. I know
9 one had a broken-down car yesterday but she's here
10 and I don't know if they're having transportation
11 problems. I don't know what the reason is we
12 can't reach them. So I'll let you all decide how
13 you want to proceed. I can tell you I don't have
14 any intention of waiting any longer than 10:00
15 o'clock. We started an hour late yesterday and
16 we're going to be an hour late today.

17 (State and defense counsel conferring.)

18 BAILIFF: I woke one of them up. He said he
19 would be here in 20 minutes. The other one we
20 have no contact information for.

21 THE COURT: Which one you wake up? ■■■ or ■■■?

22 BAILIFF: ■■■ Apparently I woke him up and
23 he's apologizing and said he'll be here in 20
24 minutes.

25 MS. NELSON: He lives in Mayport.

1 BAILIFF: I asked him how long. He said he
2 was sleeping. He said he could be here in 20
3 minutes. The other one, I got no number for him.
4 I can try to send a beat car by the house if you'd
5 like. I didn't get into where he might be, but he
6 was asleep.

7 THE COURT: I'm asking the attorneys, do you
8 want them to send a beat car for the other one
9 that we don't have contact information for?

10 MR. CALIEL: Judge, the State's position is
11 that we would strike both of them for cause.
12 We've left it up to the defense as to whether or
13 not they want to wait for them or not.

14 THE COURT: Okay.

15 MR. CALIEL: I don't want to inconvenience
16 the other 76 people any more than we already have.

17 MS. SCHLAX: Your Honor, we're comfortable
18 striking both.

19 THE COURT: Mr. Smith, I already placed you
20 under oath. Are you okay with that?

21 THE DEFENDANT: Fine by me.

22 THE COURT: You understand one of them would
23 try to get here. We don't think he could do it in
24 20 minutes because of where is, we think. The
25 other one we've had no contact. But you're okay

1 with going ahead and striking them for cause?

2 THE DEFENDANT: Yes, ma'am.

3 THE COURT: You can call the other one back
4 and tell him to go back to sleep.

5 BAILIFF: Yes, ma'am. The others are lined
6 up and ready.

7 (Prospective jurors present.)

8 BAILIFF: [REDACTED] just showed up, the one we
9 didn't have a contact number for. Do you want me
10 to bring him in?

11 THE COURT: Sure.

12 Good morning, ladies and gentlemen. First of
13 all, my sincere apologizes from all of us for you
14 having to wait. We have to wait until everyone's
15 here and please don't feel badly about anybody who
16 might have been late because we're all human and
17 things happen, but you're here now and we are going
18 to get started and we appreciate your waiting for
19 that to happen.

20 I do have a couple of preliminary things before
21 we go back to questioning. First of all, was
22 everyone able to follow my instructions not to get
23 any information about this case through the media,
24 TV, radio, internet, friends, family, coworkers, et
25 cetera? Was everybody able to follow that

1 instruction?

2 (Affirmative response from prospective
3 jurors.)

4 THE COURT: Was there anyone if they want to
5 raise their hand that did not follow my
6 instruction?

7 (No response from prospective jurors.)

8 THE COURT: No hands are raised.

9 Second of all, something we usually tell a
10 jury once it's selected, but because you've been
11 here so many days, you've seen the attorneys
12 probably, maybe me, I don't know, out and about in
13 the courthouse, and it's important for you to know
14 that we're not allowed any contact with you during
15 this process. If you're chosen to be on the jury
16 we're not allowed any contact with you outside of
17 the courtroom. All of our contact has to be in
18 the courtroom with everybody present on the
19 record. So if you have seen any one of us sort of
20 turn our eyes or look like we're trying to avoid
21 you, we actually are because that's our
22 responsibility and please don't take it
23 personally.

24 And finally, one other matter we have not
25 discussed and we're not going to discuss it in any

1 length right now, but you do need to be aware of it.
2 The law does require on a capital case that there
3 are certain times when a jury, not this panel, but
4 the jury itself, has to be sequestered. It's
5 incumbent upon me to schedule things as
6 appropriately as I can so that that does not have to
7 occur. However, as I told you, I think on Monday,
8 trials are very fluid events and I -- as you already
9 know, I'm not always in control of how things are
10 going to go or how time is going to be used, things
11 like that. So while I will make absolutely every
12 effort to see to it that we can accomplish our
13 duties without that having to occur, it's just
14 something you need to know about in case it does
15 have to occur. And we're not going to discuss it
16 now, but we may discuss it later, but I just wanted
17 you to be aware of that.

18 And with that we're ready to go back to
19 questioning and I'll call on Ms. Schlax who is going
20 to ask questions for the defense.

21 MS. SCHLAX: Thank you, Your Honor. May it
22 please the Court.

23 THE COURT: Yes.

24 MS. SCHLAX: Counsel.

25 Mr. Smith.

1 Good morning. Day five. This has been a long
2 process and the first thing I want to do is I want
3 to manage your expectations. In many ways what you
4 all have gone through this week, and you probably
5 actually spent more time waiting outside the
6 courtroom than you even have been inside the
7 courtroom, is manage your expectations about today.
8 I feel confident, I believe the State feels
9 confident, Her Honor feels confident this will be
10 the last day of jury selection. But if you had, you
11 know, lunch plans all set up, I don't think that's
12 realistic. It's very much like when you're in the
13 hospital and at time to be discharged and someone
14 doesn't tell you, well, the discharge process can
15 take three, four, five hours sometimes. That's what
16 I want to prepare you for.

17 Now, the other good news that I can give you is
18 because of the thorough questionings that my peers
19 did yesterday, I don't need to be as extensive as I
20 thought maybe I was going to at one time. I'm going
21 to have a lot of questions for you and most of my
22 questions, ladies and gentlemen, are not going to
23 require a yes or no answer. I want to hear you
24 talk. The more you talk and I'm not speaking the
25 better this process works. You know, Her Honor told

1 you that this was called the voir dire process and
2 do any of you speak French on the panel?

3 (No response from prospective jurors.)

4 MS. SCHLAX: For the record, I see no hands.
5 I don't either, but I've been told that that
6 actually means to speak the truth. And so a lot
7 of the questions, and I'm going to start. I have
8 a few just general where we're go row by row and
9 then I'm going to have some more intense questions
10 where I really want just your honest, candid
11 opinion.

12 Please understand this. At this stage of the
13 proceedings I'm not trying to convince you, nor is
14 the State of Florida, trying to convince you to
15 have any kind of feeling. We're not asking you to
16 judge any evidence, we're not asking you to change
17 the way you feel. We just want to know. Everyone
18 walked into this courtroom with their own life
19 experiences, their own thought process and we're
20 not trying to change them. We just need to know
21 them.

22 Okay. So let me start with -- and we'll take
23 it row by row. With what we need to know is, and
24 we've had a few folks share with us and so if you
25 previously shared this with you don't feel that you

1 have to share it with us again, but I need to know
2 if you or a close friend or a relative has been the
3 victim of a violent crime. And by violent crime I
4 don't mean having your house broken into, unless you
5 were home, and it was terrifying. I'm looking for
6 those kind of situations where you all have had to
7 endure your life or someone close to you with any
8 kind of violent crime.

9 And in the first row. Do we have any who have
10 had that happen?

11 (Prospective juror indicating.)

12 MS. SCHLAX: Okay. And juror No. [REDACTED]

13 THE COURT: Let's give them the microphone,
14 please. Thank you.

15 PROSPECTIVE JUROR: My son was car-jacked at
16 gunpoint.

17 MS. SCHLAX: How long ago was that?

18 PROSPECTIVE JUROR: Probably close to 20
19 years.

20 MS. SCHLAX: So he's alive?

21 PROSPECTIVE JUROR: Yeah, he did what he was
22 supposed to do, let them have the car, and
23 eventually the police found the car and we got the
24 car back, in terrible shape. But he was not
25 harmed.

1 MS. SCHLAX: Was anyone prosecuted for that?

2 PROSPECTIVE JUROR: Not to my knowledge.

3 MS. SCHLAX: Okay. Anything about that
4 experience that you think will enter into how you
5 deliberate this case?

6 PROSPECTIVE JUROR: No, I don't think so.

7 MS. SCHLAX: All right. Thank you.

8 And I think the juror next to you, juror No.

9 [REDACTED] Good morning.

10 PROSPECTIVE JUROR: Good morning.

11 MS. SCHLAX: What was your situation, if you
12 don't mind sharing?

13 PROSPECTIVE JUROR: About seven years ago my
14 second cousin was taken and found dead.

15 MS. SCHLAX: Okay. And was that here in
16 Duval County?

17 PROSPECTIVE JUROR: Yes, ma'am.

18 MS. SCHLAX: And it was your twin cousin,
19 meaning you guys were the same age?

20 PROSPECTIVE JUROR: Well, my mom and her mom
21 was sisters. We're not close in age, but, you
22 know, my baby cousin.

23 MS. SCHLAX: Okay. How old was she?

24 PROSPECTIVE JUROR: Like 20. 20s.

25 MS. SCHLAX: Was anyone prosecuted for that?

1 PROSPECTIVE JUROR: Yes.

2 MS. SCHLAX: Were you involved in that
3 prosecution?

4 PROSPECTIVE JUROR: No, I was not.

5 MS. SCHLAX: Okay. Do you think anything
6 about that experience, and obviously this was your
7 twin cousin, would affect how you deliberate on
8 this case?

9 PROSPECTIVE JUROR: No.

10 MS. SCHLAX: Thank you.

11 Anybody that I missed in the first row?

12 (No response from prospective jurors.)

13 MS. SCHLAX: How about in the second row?

14 (Prospective jurors indicating.)

15 MS. SCHLAX: Juror No. [REDACTED] good morning.

16 PROSPECTIVE JUROR: Good morning.

17 In 2005 I was working [REDACTED] in
18 Arlington and my god-brother was gunned down right
19 in front of me. So it affects me everyday still.

20 MS. SCHLAX: Sure.

21 PROSPECTIVE JUROR: I see it everyday. So I
22 do have issues with just being in the setting,
23 having to deal with this type of thing, and also
24 my best friend years ago was gunned down and he
25 died like five, six months later and his case is

1 still a cold case. There are no leads, you know,
2 we have people that say, you know, the person that
3 did it is in jail, but we have no leads and nobody
4 has been prosecuted for it. So it's been a lot of
5 that going around in my life lately.

6 MS. SCHLAX: Sure.

7 PROSPECTIVE JUROR: So it's just life.

8 MS. SCHLAX: That's a lot for anybody to
9 handle.

10 PROSPECTIVE JUROR: Yeah, so it's just
11 something I deal with day-by-day. I see it
12 everyday. He died right in front me so it's just
13 a lot to take on.

14 MS. SCHLAX: And that's fine. I apologize.
15 Did you have to participate in any kind of court
16 proceeding?

17 PROSPECTIVE JUROR: No. Actually the next
18 day after the guy who shot my god-brother was shot
19 the next day and he was taken to jail so we've
20 never had to go to court for it or anything so...

21 MS. SCHLAX: And I guess you know my
22 follow-up question, and obviously I understand.
23 One of the things that I have to say to all of you
24 that just truly inspired me and impressed me is
25 that it felt like when you were answering the

1 questions yesterday that all of you have taken
2 this very, very seriously and have looked into
3 your own hearts and soul in regards to how you
4 feel about things. Knowing everything that you
5 know and everything that you're going through, can
6 you set that aside and come in this courtroom and
7 render the appropriate decision when it's the time
8 to do so?

9 PROSPECTIVE JUROR: I can set it aside, but
10 it still doesn't -- it's still going to be in the
11 back of my head, you know, as going on with the
12 trial and everything, but I can set it aside and
13 focus on the facts and everything, but it's still
14 there. It's always going to be there.

15 MS. SCHLAX: Sure. Sure. Unfortunately,
16 there's no way to erase that.

17 PROSPECTIVE JUROR: Yes.

18 MS. SCHLAX: But you feel comfortable that
19 it's not going to impact how you view the evidence
20 --

21 PROSPECTIVE JUROR: No.

22 MS. SCHLAX: -- or the decisions you make?

23 PROSPECTIVE JUROR: No.

24 MS. SCHLAX: We appreciate that.

25 Juror No. [REDACTED] sir, good morning.

1 PROSPECTIVE JUROR: Yes, I had a nephew that
2 was stabbed several times. He died.

3 MS. SCHLAX: And when was that, sir.

4 PROSPECTIVE JUROR: That was about 20 --
5 about 21 years ago.

6 MS. SCHLAX: Was anyone prosecuted for that?

7 PROSPECTIVE JUROR: Never. No one was
8 prosecuted.

9 MS. SCHLAX: And anything about that
10 experience, sir, that you think will enter into
11 how you view the evidence in this case or how you
12 reach a decision required?

13 PROSPECTIVE JUROR: No, not really.

14 MS. SCHLAX: Thank you, sir.

15 PROSPECTIVE JUROR: All right.

16 MS. SCHLAX: And juror No. [REDACTED] sir.

17 PROSPECTIVE JUROR: My sister was sexually
18 assaulted about 15 years ago or so.

19 MS. SCHLAX: A sister that you're close with?

20 PROSPECTIVE JUROR: Yes.

21 MS. SCHLAX: Obviously that's a different
22 thing, especially considering the allegations in
23 this case. Do you think there's anything about
24 what happened to your sister and what she endured
25 that's going to enter into how you view the

1 evidence in this case?

2 PROSPECTIVE JUROR: No, ma'am.

3 MS. SCHLAX: Thank you.

4 Anyone that I missed in the second row?

5 (No response from prospective jurors.)

6 MS. SCHLAX: Anyone in the third row?

7 (Prospective juror indicating.)

8 MS. SCHLAX: Good morning, juror No. [REDACTED]

9 PROSPECTIVE JUROR: Good morning. My brother
10 was in a -- I guess attempted robbery at a pool
11 hall and then they shot into the pool hall
12 multiple times. And that was maybe ten years ago.
13 I can't be sure on the time.

14 MS. SCHLAX: Do you know if anyone was ever
15 prosecuted?

16 PROSPECTIVE JUROR: I believe that they were
17 later. I wasn't involved in any of those
18 proceedings or anything, but I don't think it
19 would have any sort of bearing on how I view the
20 case or anything.

21 MS. SCHLAX: Thank you, sir. Appreciate it.

22 Anybody else in the third row?

23 (No response from prospective jurors.)

24 MS. SCHLAX: Anyone in the fourth row?

25 (Prospective juror indicating.)

1 MS. SCHLAX: And good morning, juror No. [REDACTED]

2 PROSPECTIVE JUROR: My youngest son at 18
3 years old worked [REDACTED] and was
4 robbed at gunpoint.

5 MS. SCHLAX: And how long ago was that?

6 PROSPECTIVE JUROR: He's 25 now so seven.

7 MS. SCHLAX: So not that long ago.

8 PROSPECTIVE JUROR: Yes.

9 MS. SCHLAX: Do you know if anyone was of
10 prosecuted?

11 PROSPECTIVE JUROR: All four robbers, because
12 of my son's quick thinking, he took the phone off
13 the hook at 911 and left it and two police
14 officers were in the Planet Fitness across the
15 street, put on vests and came charging in. The
16 sad thing was one of them was a co-worker to my
17 son and he was a minor and it just ruined his
18 life, you know.

19 MS. SCHLAX: Sure. Sure.

20 PROSPECTIVE JUROR: Because they were
21 actually friends. He helped him with rides to
22 work and stuff.

23 MS. SCHLAX: Anything about that experience,
24 and I'm sure that was terrifying for your son,
25 that you think would affect how you view the

1 evidence in this case or make decisions in this
2 case?

3 PROSPECTIVE JUROR: No, ma'am.

4 MS. SCHLAX: Okay. Thank you.

5 And juror No. [REDACTED] good morning.

6 PROSPECTIVE JUROR: Good morning. My older
7 daughter was molested at eight.

8 MS. SCHLAX: And was that by a family member
9 or a stranger?

10 PROSPECTIVE JUROR: Friend, family friend.

11 MS. SCHLAX: Okay. And did you have to go
12 through the process of reporting that and was
13 anyone prosecuted?

14 PROSPECTIVE JUROR: No.

15 MS. SCHLAX: Okay. Obviously that's a very,
16 very personal experience and involved your own
17 daughter. Does she still struggle with that?

18 PROSPECTIVE JUROR: Yes.

19 MS. SCHLAX: Do you think anything about that
20 experience is going to spill over into how you
21 view the evidence in this case?

22 PROSPECTIVE JUROR: No.

23 MS. SCHLAX: Okay. I appreciate that.

24 Anyone else in the fourth row?

25 (No response from prospective jurors.)

1 MS. SCHLAX: Okay. How about in the fifth
2 row?

3 (Prospective juror indicating.)

4 MS. SCHLAX: Good morning, juror No. [REDACTED].

5 PROSPECTIVE JUROR: Good morning. We had a
6 friend of -- actually a daughter, family member,
7 that was sexually abused by a neighbor.

8 MS. SCHLAX: Okay. And did you end up having
9 to become involved in that in terms of any kind of
10 witness testimony or talking to the police?

11 PROSPECTIVE JUROR: No.

12 MS. SCHLAX: Do you know if anyone was ever
13 prosecuted?

14 PROSPECTIVE JUROR: It was settled outside.

15 MS. SCHLAX: Okay. Obviously that's a very
16 upsetting experience. Do you think that there's
17 anything about that experience that is going to
18 affect how you sit and deliberate on this
19 particular case?

20 PROSPECTIVE JUROR: No.

21 MS. SCHLAX: All right. Thank you, sir.

22 Going over to this side of the room and good
23 morning to all of you.

24 Just in the first row.

25 (Prospective juror indicating.)

1 MS. SCHLAX: Juror No. 85, good morning.

2 PROSPECTIVE JUROR: Hi. My uncle was shot
3 with a .22 and killed.

4 MS. SCHLAX: Was this one of your uncles that
5 was in law enforcement?

6 PROSPECTIVE JUROR: No, it's not.

7 MS. SCHLAX: Do you know if anyone was
8 prosecuted for that offense?

9 PROSPECTIVE JUROR: It did go to trial. I'm
10 not sure of the correct terminology, but there was
11 a plea bargain entered before -- before the jury
12 had a chance to decide.

13 MS. SCHLAX: Okay. And how long ago was
14 this?

15 PROSPECTIVE JUROR: About 17 years.

16 MS. SCHLAX: Okay.

17 PROSPECTIVE JUROR: So I was very young.

18 MS. SCHLAX: But obviously aware of it, it's
19 something you all talk about within your family.

20 PROSPECTIVE JUROR: Yes.

21 MS. SCHLAX: Anything about that experience
22 that you think might affect how you make decisions
23 involving this case?

24 PROSPECTIVE JUROR: No, I think, if anything,
25 I just take it very seriously.

1 MS. SCHLAX: Okay. Appreciate it, ma'am.

2 Anybody else in the first row?

3 (Prospective juror indicating.)

4 MS. SCHLAX: Good morning.

5 PROSPECTIVE JUROR: Good morning. I actually
6 had forget all about this, but I actually was
7 robbed at gunpoint when I was working for a
8 convenience store. This was in Birmingham,
9 Alabama, several years ago, but the gentleman came
10 in and pulled a gun on me and was trying to get
11 the money. Ironically, a customer was coming into
12 the store and they made him leave so I, you know,
13 didn't get hurt or anything, but I actually
14 suppressed the whole, you know, incident because
15 it was -- just kind of traumatizing. I had to
16 quit the job.

17 MS. SCHLAX: Sure.

18 PROSPECTIVE JUROR: Never went back after
19 that.

20 MS. SCHLAX: Right.

21 PROSPECTIVE JUROR: But I didn't get hurt or
22 anything, but it was a little traumatizing for
23 that moment.

24 MS. SCHLAX: Understandably so. And I'm
25 sorry. For the record, you're juror No. [REDACTED] I

1 don't think I greeted you properly to make sure
2 the record is clear.

3 No, I think I completely understand that you
4 would want to quit that job. Do you think there's
5 anything about that experience that might affect how
6 you view the evidence in this case or how you
7 ultimately make decisions in this case?

8 PROSPECTIVE JUROR: No, ma'am. Simply
9 because I never really -- let it affect me. I
10 quit the job, I just moved on. And I mean I
11 actually suppressed it until I was sitting here
12 hearing all this and I was, oh, my God, I did get
13 a gun put on me.

14 MS. SCHLAX: Okay. I'm sorry to drag that
15 back up.

16 PROSPECTIVE JUROR: That's okay.

17 MS. SCHLAX: I appreciate it. Thank you.

18 PROSPECTIVE JUROR: You're welcome.

19 MS. SCHLAX: Okay. Anyone in the second row?

20 (Prospective juror indicating.)

21 MS. SCHLAX: And good morning, juror No. [REDACTED]

22 PROSPECTIVE JUROR: Good morning. December
23 10th, 1983, my teenage cousin was brutally shot
24 and killed. He was tied up, beaten up and shot
25 execution-style four times.

1 MS. SCHLAX: Obviously you remember the exact
2 date.

3 PROSPECTIVE JUROR: I can tell you what I was
4 wearing.

5 MS. SCHLAX: And so it's one of those flash
6 bulb moments that I could never ask you, nor could
7 you ever turn off? And I apologize because I'm
8 not trying to drag up old horrible feelings.

9 PROSPECTIVE JUROR: No, you're fine.

10 MS. SCHLAX: Anything about that experience
11 that you think might affect how you not only view
12 the evidence in this case, but ultimately make
13 decisions in this case?

14 PROSPECTIVE JUROR: No. I don't think so. I
15 think if this case was about a child that was shot
16 I could not do this, but being that it was not I
17 can definitely put my feelings aside.

18 MS. SCHLAX: Okay. I appreciate your telling
19 us that.

20 Anyone else in the second row?

21 (No response from prospective jurors.)

22 MS. SCHLAX: How about in the third row?

23 (Prospective juror indicating.)

24 MS. SCHLAX: And I think we have someone.

25 Juror No. [REDACTED]

1 PROSPECTIVE JUROR: Good morning.

2 MS. SCHLAX: And good morning.

3 PROSPECTIVE JUROR: I believe it was like a
4 month before graduation I had a classmate, her and
5 her mother were shot and killed. So I mean it was
6 -- I didn't really know her that well, but we
7 talked occasionally. So it was, you know, it was
8 kind of a shocker.

9 MS. SCHLAX: Oh, sure.

10 PROSPECTIVE JUROR: And I mean I don't know,
11 I just -- it was just -- I never had somebody like
12 close to me, but I never had somebody that I knew,
13 you know, go through that experience. So it was
14 as if...

15 MS. SCHLAX: And, again, not trying to make
16 everyone relive some of the worst moments of their
17 lives, but oftentimes, and here's why we ask these
18 questions, oftentimes, you know, we've been using
19 words like troubling. I'm going to go much
20 further and I'm going to say gut wrenching. This
21 trial, those of you that remain with us next week,
22 gut wrenching, and those that have had personal
23 experiences with any kind of violent crime, it may
24 very well bring back up those emotions and so it's
25 helpful for us to know, and for you to, I guess,

1 kind of recognize, hey, listen, this may start
2 bubbling up, even though I suppressed it. And how
3 you're going to be able to deal with it and if you
4 can. Knowing how you felt about that experience,
5 do you think that anything about that experience
6 would end up affecting how you deliberate in this
7 case and how you ultimately reach decisions?

8 PROSPECTIVE JUROR: No.

9 MS. SCHLAX: I appreciate knowing it, though.
10 Thank you for sharing it.

11 Anyone else in the third row?

12 (No response from prospective jurors.)

13 MS. SCHLAX: How about in the fourth row?

14 (No response from prospective jurors.)

15 MS. SCHLAX: And for the record I don't see
16 any indication of any hands on the fourth row.

17 How about in the fifth row?

18 (Prospective juror indicating.)

19 MS. SCHLAX: And good morning, juror No. [REDACTED]

20 PROSPECTIVE JUROR: Good morning. My niece
21 was molested from age 9 to 11.

22 MS. SCHLAX: And because it's your niece,
23 I'll ask, juror No. [REDACTED] if this is a joint family
24 member.

25 PROSPECTIVE JUROR: No.

1 MS. SCHLAX: Okay. And was this a niece that
2 you're close to?

3 PROSPECTIVE JUROR: Yes, she's my niece.

4 MS. SCHLAX: Sure. And about how long ago
5 did -- I know you told me the age of her, but how
6 long ago?

7 PROSPECTIVE JUROR: It was my father that did
8 that. And was seven, eight years ago, because
9 she's 21 now. So...

10 MS. SCHLAX: Was your father actually
11 prosecuted?

12 PROSPECTIVE JUROR: Yes.

13 MS. SCHLAX: Okay. And did you have to
14 become involved in those court proceedings at all?

15 PROSPECTIVE JUROR: No.

16 MS. SCHLAX: Obviously that's a very
17 troubling, troubling experience.

18 PROSPECTIVE JUROR: I just believe in
19 justice.

20 MS. SCHLAX: Do you think that there's
21 anything about that very personal experience, and
22 obviously this was someone close to you, and,
23 unfortunately, the perpetrator was as well,
24 knowing the allegations in this case, would that
25 affect how you not only deliberate in this case,

1 but ultimately how you make decisions?

2 PROSPECTIVE JUROR: No, it won't.

3 MS. SCHLAX: I appreciate you explaining that
4 to us.

5 Anyone that I missed on the panel?

6 (No response from prospective jurors.)

7 MS. SCHLAX: Okay. Next I'd like to ask does
8 anyone have -- and I imagine most people have
9 known someone who struggles, but what I'm really
10 curious about is someone who is close to you,
11 whether it's a close friend or close family member
12 that have you a lot of contact with, that
13 struggles with any kind of substance abuse.
14 Whether it be alcohol, prescription narcotics,
15 illegal narcotics, anyone on the panel that's had
16 experiences with that, dealing with people that
17 are struggling with substance abuse?

18 (Prospective jurors indicating.)

19 MS. SCHLAX: And I'll kind of go through the
20 same process. We'll start on the first row.

21 Juror No. [REDACTED]

22 PROSPECTIVE JUROR: Yes, I have. My oldest
23 son is --

24 I'm juror [REDACTED]

25 My oldest son is deceased from use of illegal

1 drugs and my second child was -- he is a
2 recovering drug addict, has not been using drugs
3 for probably ten years. He was married to a
4 recovering drug addict.

5 MS. SCHLAX: Okay. So you've obviously seen
6 the extremes of both, those that overcome it and
7 survive beautifully and those that succumb to it.
8 Thank you for giving us that information.

9 Juror No. [REDACTED]

10 PROSPECTIVE JUROR: My children's uncle on
11 their dad's side, so I mean I still don't -- I
12 don't -- he looked terrible. Been years. He's
13 gotten worse, yes.

14 MS. SCHLAX: So I don't mean to put words in
15 your mouth. Is it fair to say it's progressing?

16 PROSPECTIVE JUROR: Yes.

17 MS. SCHLAX: Are there times where you have
18 contact with this person that they're -- that
19 they're --

20 PROSPECTIVE JUROR: Not anymore. I just ride
21 right by. I mean it's -- he don't look the same
22 anymore so I don't even want to be with him or
23 seeing that.

24 MS. SCHLAX: Sure. So obviously it's got to
25 the point you just have to let that person go.

1 PROSPECTIVE JUROR: Yes.

2 MS. SCHLAX: Thank you.

3 And juror No. [REDACTED] good morning.

4 PROSPECTIVE JUROR: Good morning. My dad
5 was, I guess the word I want to say a crack-head,
6 he used to be about 15 years ago and now he's been
7 clean and sober.

8 MS. SCHLAX: So he was able to get the help
9 that he needed?

10 PROSPECTIVE JUROR: Yes.

11 MS. SCHLAX: Okay. You still have, I guess,
12 probably pretty vivid memories --

13 PROSPECTIVE JUROR: Yes.

14 MS. SCHLAX: -- of when he was struggling
15 with that addiction?

16 PROSPECTIVE JUROR: Yes.

17 MS. SCHLAX: How long and what -- what time
18 frame was that you're talking?

19 PROSPECTIVE JUROR: Let's say from the time I
20 was born up until I was probably about 12, 13,
21 that I can remember.

22 MS. SCHLAX: Okay. And do you now enjoy a
23 close relationship with him?

24 PROSPECTIVE JUROR: Yes, um-hum.

25 MS. SCHLAX: Thank you for sharing it.

1 Anybody else on the first row?

2 (No response from prospective jurors.)

3 MS. SCHLAX: Okay. How about on the second
4 row?

5 (No response from prospective jurors.)

6 MS. SCHLAX: For the record I don't see any
7 hands.

8 How about on the third row?

9 (Prospective jurors indicating.)

10 MS. SCHLAX: All the way over to juror No.

11

12 PROSPECTIVE JUROR: My present girlfriend
13 actually was in prison for drug use, before I knew
14 her.

15 MS. SCHLAX: Okay. And through your
16 relationship has she shared with you that it -- it
17 was more than just usage, that it actually had
18 become to the point it was an addiction?

19 PROSPECTIVE JUROR: Oh, yeah. Yes.

20 MS. SCHLAX: And how is she doing now?

21 PROSPECTIVE JUROR: Oh, great. Awesome.

22 MS. SCHLAX: And how long has she beat it?

23 PROSPECTIVE JUROR: Well, she was in prison
24 for three years and she's been out for five. So
25 eight years.

1 MS. SCHLAX: Eight years. Thank you for
2 sharing that.

3 PROSPECTIVE JUROR: No problem.

4 MS. SCHLAX: Anybody on the fourth row?

5 (Prospective juror indicating.)

6 MS. SCHLAX: No. [REDACTED]?

7 PROSPECTIVE JUROR: [REDACTED]

8 MS. SCHLAX: [REDACTED] Thank you.

9 PROSPECTIVE JUROR: My father's significant
10 other had an issue with alcohol. That was for
11 about ten years. So like 1975 to 1985. She was
12 an alcoholic. She still is, but she's sober and
13 she's been sober ever since.

14 MS. SCHLAX: Okay.

15 PROSPECTIVE JUROR: So dealing with that when
16 you're a teenager, you know, and I had to deal
17 with that after my mother and father divorced, his
18 significant other girlfriend for those years, but
19 she had that problem with alcohol. But she's
20 sober now.

21 MS. SCHLAX: And how long has she been sober
22 now?

23 PROSPECTIVE JUROR: Since '85 so...

24 MS. SCHLAX: Okay.

25 PROSPECTIVE JUROR: -- many years.

1 MS. SCHLAX: Okay. And in your personal
2 experience with it, do you have vivid memories of
3 --

4 PROSPECTIVE JUROR: Not just, you know, just
5 telephone calls, her calling when she's, you know,
6 drunk, you know, just that. But do I have
7 nightmares about it or memories? No. It was just
8 a bad experience for us as his daughters. But
9 over the years -- over the years you just learn
10 that that's the past and you keep on going and
11 deal with, you know, other issues in life that
12 come your way.

13 MS. SCHLAX: Sure. Thank you, ma'am, for
14 sharing that.

15 Anyone else in the fourth row?

16 (No response from prospective jurors.)

17 MS. SCHLAX: How about in the fifth row?

18 (Prospective juror indicating.)

19 MS. SCHLAX: Juror [REDACTED]

20 THE WITNESS: Juror [REDACTED] I'm a recovering
21 alcoholic. I've been sober four and a half years.
22 My sister is a recovering addict. She's been
23 sober for about a year and a half. And my
24 grandmother was an alcoholic and she's been sober
25 for 40 years.

1 MS. SCHLAX: Okay. And congratulations.

2 PROSPECTIVE JUROR: Thank you.

3 MS. SCHLAX: Thank you for sharing that.

4 Anybody else that I missed on this side of
5 the room?

6 (Prospective juror indicating.)

7 MS. SCHLAX: Juror No.

8 PROSPECTIVE JUROR: [REDACTED]

9 MS. SCHLAX: [REDACTED] Good morning.

10 PROSPECTIVE JUROR: Good morning. My uncle
11 is an alcoholic.

12 MS. SCHLAX: Okay.

13 PROSPECTIVE JUROR: Didn't know it until
14 around 2012 and we have not seen or heard from him
15 for the past two or tree years.

16 MS. SCHLAX: Okay. And I guess is it
17 something he just announced or it was kind of just
18 understood, you don't see him anymore because he's
19 just succumbed to it or...

20 PROSPECTIVE JUROR: We all had a feeling that
21 something was wrong, but after my cousin's wedding
22 it became very clear to the whole family and then
23 there was violent incident and after that he took
24 off.

25 MS. SCHLAX: Okay. Anything about that

1 experience -- I mean were you close to him?

2 PROSPECTIVE JUROR: Close to my cousin and my
3 aunt. Not so much him.

4 MS. SCHLAX: Okay. All right. But for all
5 you know right now he's still succumbing to that
6 addiction?

7 PROSPECTIVE JUROR: As far as I know.

8 MS. SCHLAX: Thank you for sharing that.

9 Okay. So no one else on this side of the room?
10 How about on this side of the room, first row.
11 (Prospective jurors indicating.)

12 MS. SCHLAX: And good morning, juror No. -- I'm
13 sorry.

14 PROSPECTIVE JUROR: Juror [REDACTED].

15 MS. SCHLAX: Juror [REDACTED]

16 By the way, can I comment, I literally can't
17 believe that everyone has remembered to bring
18 their number. I've been so impressed with that.
19 That would never happen for me.

20 Juror No. [REDACTED]

21 PROSPECTIVE JUROR: Yes, juror No. [REDACTED]
22 Growing up my brother, he had a substance abuse
23 problem with just prescription drugs, and really
24 anything he could get his hands on. He's doing
25 awesome now, he's living up in Colorado, for

1 obvious reasons, but he's doing really good now.

2 (Laughter.)

3 MS. SCHLAX: A state he could move to.

4 PROSPECTIVE JUROR: But he's doing really
5 well. He's able to maintain up there and we have
6 a really good relationship with him.

7 MS. SCHLAX: Good. I'm glad to hear it.
8 Thank you for sharing that.

9 And good morning, juror No. [REDACTED]

10 PROSPECTIVE JUROR: My mom and dad suffer
11 from heroin abuse.

12 MS. SCHLAX: And how old were you when that
13 was affecting your life?

14 PROSPECTIVE JUROR: Between eight to probably
15 16.

16 MS. SCHLAX: And what happened when you were
17 16?

18 PROSPECTIVE JUROR: Well, I got pregnant at
19 14 so it just -- it was just a domino effect at
20 that point.

21 MS. SCHLAX: Well, I guess what I'm kind of
22 asking is have they overcome it?

23 PROSPECTIVE JUROR: Well, my mom is deceased
24 now, but my father, he did overcome it after a
25 stint in prison so...

1 MS. SCHLAX: How long has he been sober, to
2 your knowledge, then?

3 PROSPECTIVE JUROR: Probably over like 13
4 years.

5 MS. SCHLAX: And then are you able to have a
6 close relationship with him?

7 PROSPECTIVE JUROR: We okay. We speak, but
8 we're not as close as we probably should be.

9 MS. SCHLAX: Okay. Do you think that was a
10 reflection of the fact he, unfortunately, was
11 beating his heroin addiction?

12 PROSPECTIVE JUROR: Yeah, because he missed
13 so much of my life, you know, and we just really
14 didn't know each other or really life goes on and
15 you don't really -- sometimes you don't get a
16 chance to get to know a person again.

17 MS. SCHLAX: Sure. Thank you for sharing
18 that.

19 And juror No. [REDACTED] yes, sir.

20 PROSPECTIVE JUROR: Yes, grandfather,
21 alcoholic up until I think I was around 12 or 13
22 whenever he passed away from the alcohol abuse.
23 And then my brother-in-law just recently passed
24 away, possible drug overdose in prison for drug
25 possession.

1 MS. SCHLAX: So, unfortunately, you've seen
2 the side where people don't overcome it.

3 PROSPECTIVE JUROR: Yes.

4 MS. SCHLAX: That they lost their lives
5 because of the addiction.

6 PROSPECTIVE JUROR: Yes.

7 MS. SCHLAX: Okay. Thank you, sir.
8 Appreciate knowing that.

9 Anybody in the second row?

10 (Prospective juror indicating.)

11 PROSPECTIVE JUROR: Which way you want me to
12 go? This way or that way?

13 MS. SCHLAX: Whichever is easiest.

14 Good morning, juror [REDACTED]

15 PROSPECTIVE JUROR: I have a twin sister
16 that's an alcoholic and my father's side of the
17 family are all functioning alcoholics, all of
18 them. I also used to be, what I would consider to
19 be a problem drinker, enough so where I sought
20 help on my own and wound up becoming a counselor
21 for self-help recovery, which is a 12-step
22 program, and help out other people and I haven't
23 had a drink now in about seven years.

24 MS. SCHLAX: Has your sister been able to
25 overcome it?

1 PROSPECTIVE JUROR: Actually, no, she's
2 currently incarcerated on a related charge.

3 MS. SCHLAX: I appreciate knowing that.
4 Thank you for sharing that.

5 Juror No. [REDACTED]

6 PROSPECTIVE JUROR: My childhood best friend
7 and I quit hanging out. She got into drugs. Her
8 ultimate death was called accidental overdose, but
9 I'm not too sure that's the truth. I think she
10 just overdosed. My step-son was a drug addict and
11 he ultimately took his life.

12 MS. SCHLAX: Unfortunately, you also have
13 seen where you pay the ultimate price for not
14 being able to get off it.

15 PROSPECTIVE JUROR: Yes.

16 MS. SCHLAX: I appreciate knowing that.

17 Juror 103, good morning.

18 PROSPECTIVE JUROR: Good morning.

19 My father is a recovering addict. As far as
20 I can remember I -- he's used drugs. Throughout
21 my entire childhood, started with marijuana and
22 progressed from there. And he's been in rehabs
23 throughout his life and I would say he is sober
24 now, but it is a daily walk for him.

25 MS. SCHLAX: Sure.

1 PROSPECTIVE JUROR: So everyday is a new day.
2 He -- we are very close. I love him dearly. And
3 have been supportive of his recovering efforts
4 throughout the years, but it did affect us as a
5 family. His life decisions affected us as a
6 family. I would say that that process has
7 certainly monitored my decisions or have had an
8 intact on the decisions I make for myself to avoid
9 going down a path like that.

10 MS. SCHLAX: Sure.

11 PROSPECTIVE JUROR: But, yeah, he's doing
12 well and but it has altered his life in ways that
13 I'm sure he would not have desired. So...

14 MS. SCHLAX: And how long has he been sober
15 now?

16 PROSPECTIVE JUROR: So he's relapsed a few
17 times. I don't know how long the extent of he's
18 been sober. He was in another state. We speak
19 periodically throughout the year and I see him
20 several times throughout the year. So I can't say
21 honestly he's been sober for X amount of years
22 because I don't know when and if a relapse had
23 occurred.

24 MS. SCHLAX: Let me ask you --

25 PROSPECTIVE JUROR: He's doing well. Yeah.

1 MS. SCHLAX: How long has he been making a
2 concerted effort to beat his addiction?

3 PROSPECTIVE JUROR: Effort. I would say at
4 least a decade. At least a decade, yeah.

5 MS. SCHLAX: And through that decade you've
6 been able to maintain a relationship, even though
7 you recognize that there have been relapses?

8 PROSPECTIVE JUROR: Absolutely. Absolutely.

9 MS. SCHLAX: Thank you for sharing that.

10 PROSPECTIVE JUROR: You're welcome.

11 MS. SCHLAX: Anyone else?

12 (Prospective juror indicating.)

13 MS. SCHLAX: In the third row, good morning,
14 juror No. [REDACTED]

15 PROSPECTIVE JUROR: My fiancée, my daughter
16 and my nephew are recovering alcoholics.

17 MS. SCHLAX: Okay. And let's just go with --
18 let's start with your daughter.

19 PROSPECTIVE JUROR: Okay.

20 MS. SCHLAX: Have you been a big part of her
21 recovery?

22 PROSPECTIVE JUROR: Um-hum.

23 MS. SCHLAX: How long has she been recovered?

24 PROSPECTIVE JUROR: With a year. Year and a
25 half.

1 MS. SCHLAX: Okay. And your fiancée, was he
2 suffering from alcohol before you all were
3 together?

4 PROSPECTIVE JUROR: Yes.

5 MS. SCHLAX: He had already taken steps to
6 try to beat that addiction --

7 PROSPECTIVE JUROR: Yes.

8 MS. SCHLAX: -- before you all met?

9 PROSPECTIVE JUROR: Yes.

10 MS. SCHLAX: And so all these three people,
11 although you've seen them struggle with that, they
12 are on a road to recovery?

13 PROSPECTIVE JUROR: Yes.

14 MS. SCHLAX: All right. Thank you.

15 Good morning, juror No. [REDACTED]

16 PROSPECTIVE JUROR: Good morning. On my
17 father's side, my uncle is an alcoholic. I
18 haven't spoken to him in about 15 years. It broke
19 up his marriage. I don't know if he's recovered
20 now because we haven't seen him. On my mother's
21 side, my uncle's ex-wife is a recovered drug
22 addict. Because of her issue, she actually lost
23 custody of her kids. She was arrested a couple of
24 times. I haven't seen her in seven years. I know
25 that's she's still in rehab. But I don't have any

1 contact with her.

2 MS. SCHLAX: Okay. Thank you for sharing
3 that.

4 Anybody else in this third row?

5 (Prospective juror indicating.)

6 MS. SCHLAX: And good morning juror -- it's
7 [REDACTED] correct?

8 PROSPECTIVE JUROR: [REDACTED]

9 MS. SCHLAX: No, [REDACTED].

10 PROSPECTIVE JUROR: Yes, ma'am.

11 MS. SCHLAX: Thank you.

12 PROSPECTIVE JUROR: Okay. My step-father was
13 an alcoholic and in 1999, September 18th, I was
14 raped by him. And I'm the kind of person, I have
15 a child out of rape and he's 18. So I didn't give
16 him love. I didn't -- I'm very deep in my faith
17 when it come down to that type of thing. He was
18 really drunk, really drunk. And I forgive him and
19 I gave -- forgiven him. My child is strong, he's
20 in the military.

21 MS. SCHLAX: I should have mentioned this at
22 the start. And it can't be stated -- can't be
23 stated more. These -- this proceeding, this is
24 confidential. The reason we keep calling you all
25 by numbers, I want you all to have the absolute

1 assurance that everything -- and I imagine that
2 it's not an easy thing to say in front of complete
3 strangers and knowing that there's members of the
4 press that are in the back of the courtroom. It's
5 completely confidential, though. None of you
6 would ever -- this goes throughout the trial
7 process, including those that ultimately remain
8 with us for the trial, that your identities will
9 never be revealed in any kind of way.

10 Obviously those are serious things that
11 happened to you and you obviously have overcome
12 them so extremely well.

13 PROSPECTIVE JUROR: Um-hum. They are not me.
14 My strength is from that.

15 MS. SCHLAX: Those are good words to live by.

16 I do have to ask, of course, because of the
17 allegations in this case, that, you know, people
18 that have children and have close bonds with
19 children, I imagine everyone on this panel, if they
20 don't have children themselves, they've had a close
21 bond with a child.

22 PROSPECTIVE JUROR: Yes.

23 MS. SCHLAX: You obviously have a child
24 yourself.

25 PROSPECTIVE JUROR: Right.

1 MS. SCHLAX: You went through a very
2 horrible, horrible experience.

3 PROSPECTIVE JUROR: Um-hum.

4 MS. SCHLAX: Do you think that's going to
5 impact how you view the evidence in this case or
6 ultimately reach a decision?

7 PROSPECTIVE JUROR: Absolutely not. My son
8 is proof. That's where I am today.

9 MS. SCHLAX: Okay.

10 PROSPECTIVE JUROR: This was exceptional
11 circumstances what happened to me.

12 MS. SCHLAX: I appreciate so much you just
13 letting us know that. It's so helpful.

14 PROSPECTIVE JUROR: Okay.

15 MS. SCHLAX: Thank you.

16 Was there none in the -- in the fifth row?

17 (Prospective juror indicating.)

18 PROSPECTIVE JUROR: I'm juror [REDACTED]

19 MS. SCHLAX: Good morning, juror [REDACTED].

20 PROSPECTIVE JUROR: Good morning. My father
21 is an alcoholic. A functioning alcoholic. My
22 brother is also an alcoholic. My sister is a
23 recovering addict. She's been sober for 14 years.
24 And about two years ago I got out of a
25 relationship with a man that is an addict. He's

1 still using today. We were together for about
2 five years.

3 MS. SCHLAX: Okay.

4 PROSPECTIVE JUROR: So...

5 MS. SCHLAX: Obviously you just had to make
6 the decision that his destructive behavior you
7 couldn't be around it?

8 PROSPECTIVE JUROR: Correct.

9 MS. SCHLAX: Okay. Your sister that has been
10 able to, I guess, battle her addiction, if you
11 will, recognizing it's a day-to-day walk.

12 PROSPECTIVE JUROR: Yes.

13 MS. SCHLAX: Have you taken great part in
14 that -- in that recovery?

15 PROSPECTIVE JUROR: I'd like to think that I
16 helped in some ways. I mean she -- she had to do
17 the work. But I helped by being as supportive as
18 I could.

19 MS. SCHLAX: Okay. Thank you so much for
20 shearing that.

21 PROSPECTIVE JUROR: Thanks.

22 MS. SCHLAX: And good morning, juror No. [REDACTED]

23 PROSPECTIVE JUROR: My father was an
24 alcoholic, which eventually led to the destruction
25 of his marriage. Eventually he quit when he was

1 in his 40s. We did form a relationship later and
2 my brother used drugs and died from it. His
3 daughter was with him at the time that he died.
4 She was doing drugs also. And as far as I know,
5 she's still involved in that.

6 MS. SCHLAX: Still using?

7 PROSPECTIVE JUROR: Yes.

8 MS. SCHLAX: Okay. Your father, he ended up
9 being able to overcome his addiction?

10 PROSPECTIVE JUROR: Yes, he did.

11 MS. SCHLAX: So how long has he been able to
12 be sober?

13 PROSPECTIVE JUROR: He's deceased now, but
14 from age about 45 to 74 he didn't drink.

15 MS. SCHLAX: And he died at 74?

16 PROSPECTIVE JUROR: Yes, ma'am.

17 MS. SCHLAX: Thank you for sharing that.
18 Anyone in the last row?

19 (Prospective juror indicating.)

20 MS. SCHLAX: And good morning.

21 PROSPECTIVE JUROR: Good morning again.

22 MS. SCHLAX: Juror No. [REDACTED]

23 PROSPECTIVE JUROR: Yes. I am -- my kids'
24 father, he abused drugs and I'm an abuse victim
25 for 14 years and it -- what he did to me, it just

1 built me and make me stronger for my kids, but I
2 have overcome it, but at the same time it was a
3 struggle for me because I got out, I made it out
4 of the abuse and of his addiction, but the next
5 person didn't. Next person wound up getting
6 killed through violence.

7 MS. SCHLAX: And -- and so was he prosecuted
8 for that offense?

9 PROSPECTIVE JUROR: He's incarcerated, yeah.

10 MS. SCHLAX: Again, that's another one of
11 those that's really close to home. And, you know,
12 there may be parts of this trial that bring those
13 emotions back up. Anything about that experience,
14 and just knowing what you endured and overcame and
15 what happened to the next person?

16 PROSPECTIVE JUROR: I wouldn't say that it
17 would bring it back up, because I have over come
18 it.

19 MS. SCHLAX: Okay.

20 PROSPECTIVE JUROR: And I truly believe in
21 the system. I do. I believe in the system. And
22 it always work for me. So I truly believe in the
23 system, but it won't affect.

24 MS. SCHLAX: Thank you very much. Anyone --
25 anyone else?

1 (No response from prospective jurors.)

2 MS. SCHLAX: Okay. The next and probably --
3 well, two more that might take us a little bit of
4 time to go through individually and then we'll
5 start some admonish group type questioning, is
6 anybody who in their family, someone that you
7 interact with or a close friend that you interact
8 with often, that is struggling with mental health
9 issues?

10 (Prospective juror indicating.)

11 MS. SCHLAX: And I see we have one on this
12 side. Okay.

13 I'm sorry. Juror No. [REDACTED] ma'am.

14 PROSPECTIVE JUROR: My son -- my oldest son
15 is 31 years old. He's -- brings back childhood
16 that his father abused him, but I don't have the
17 facts, but now he's getting -- he's up north, New
18 York. He lived with me in Florida and he had a
19 temper and so I couldn't deal with him. So I sent
20 him back up north to my mom, he stay with my mom
21 and now he's getting help. I think -- I forgot
22 what it's called, the disorder, talks to himself
23 and he's going through that phase, but now he
24 getting treatment for that. So he's doing good.
25 Also have an apartment with a roommate and they --

1 they give him a lot of service help that he need.

2 MS. SCHLAX: Sure.

3 PROSPECTIVE JUROR: He's doing great.

4 MS. SCHLAX: Okay. So you've had personal
5 experiences, especially before your son was able
6 to, I guess, be correctly diagnosed and given
7 whatever aid that he needs, whether it be
8 medication or behavioral modification, you saw how
9 difficult it was before that occurred?

10 PROSPECTIVE JUROR: Yes.

11 MS. SCHLAX: Okay. Thank you for sharing
12 that, ma'am.

13 Anybody else?

14 (Prospective juror indicating.)

15 MS. SCHLAX: I'm sorry. Good morning, juror

16

17 PROSPECTIVE JUROR: Good morning. I have
18 major depressive disorder and anxiety. I've had
19 it since I was about 12. It's been a pretty big
20 struggle throughout my life. That's about it.

21 MS. SCHLAX: Obviously you are dealing with
22 it quite well.

23 PROSPECTIVE JUROR: I guess.

24 MS. SCHLAX: Well, I mean you're -- we know a
25 couple of things about your, you're gainfully

1 employed and -- but that's something that you just
2 have to struggle with?

3 PROSPECTIVE JUROR: Yeah. I mean, you know,
4 everyday is -- it's the same thing over and over
5 again, you know. I've gotten help for it and it's
6 always -- it's always there, it's always, you
7 know, it's always a big thing.

8 MS. SCHLAX: I think right behind you. Good
9 morning, juror No. [REDACTED]

10 PROSPECTIVE JUROR: Good morning. Juror No.
11 [REDACTED] My daughter suffered postpartum depression
12 after her second child and because of the stigma
13 she didn't receive the help that she needed, she
14 didn't seek the help. She was highly functional,
15 she was a VP at Merrill Lynch, and, you know, she
16 just wouldn't get help, so eventually it took a
17 toll on her and eventually she had to be
18 hospitalized and she received help, she started
19 getting the medication and help that she needed to
20 bring her back into line, and now she's
21 functioning, she's fine, she had two boys, two
22 sons, and she's -- she's fine now. She's back
23 doing what she normally does. She's not in those
24 high-stress situations the way she was before, but
25 she is -- she's doing fine. She's back up north,

1 she's taking care of her kids and it's been a
2 blessing. So it was a tough road.

3 MS. SCHLAX: Sure. I'm sure. How long did
4 she struggle before she was able to get the help
5 that she needed?

6 PROSPECTIVE JUROR: Let's see. I believe her
7 son was born like in 2'04. I believe it was in
8 2'06 or 2'07. 2'06 we started seeing changes and
9 things started happening and it was in 2'09 before
10 I think she got the help she needed, then she went
11 off and, you know, she started working again and
12 she kept going back and forth and she's like, oh,
13 I'm fine, I don't need this.

14 MS. SCHLAX: Right.

15 PROSPECTIVE JUROR: And so she -- eventually
16 it got to the point where she really did have to
17 -- had to actually put her in the hospital to make
18 her go and she got the help that she needed. I
19 believe it was 2010 when she really started
20 realizing, you know, I got to have this to
21 function. So...

22 MS. SCHLAX: But now we're in 2018 --

23 PROSPECTIVE JUROR: We're in 2018, she's
24 doing well.

25 MS. SCHLAX: Thank you for sharing that.

1 PROSPECTIVE JUROR: Thank you.

2 MS. SCHLAX: Anybody on this side of the
3 room?

4 (Prospective jurors indicating.)

5 MS. SCHLAX: And we'll start -- we'll start
6 in the first row. I believe it's juror No. [REDACTED]

7 PROSPECTIVE JUROR: Yes, ma'am. My cousin is
8 diagnosed with bipolar disorder and schizophrenia
9 so he's -- I think he was diagnosed maybe in high
10 school and he's now in his 40s. He's the one
11 whose father was murdered so that situation did
12 not help.

13 MS. SCHLAX: I'm sure. I'm sure. Are you
14 close to him?

15 PROSPECTIVE JUROR: I'm -- he's my favorite
16 person at family reunions. He actually lives in
17 North Carolina so I don't see him often. I do
18 love him, but I've never seen him at his low
19 point. I only see him when he's doing well.

20 MS. SCHLAX: Okay. Okay. But obviously it's
21 made you aware, I guess, through family stories
22 that probably him just explaining to you that
23 without the aid that things get very difficult for
24 him?

25 PROSPECTIVE JUROR: Yes.

1 MS. SCHLAX: Thank you for sharing that.

2 And juror No. [REDACTED]

3 PROSPECTIVE JUROR: My mom was a
4 schizophrenic.

5 MS. SCHLAX: And so obviously a difficult
6 childhood.

7 PROSPECTIVE JUROR: Yeah.

8 MS. SCHLAX: And was she diagnosed
9 schizophrenic?

10 PROSPECTIVE JUROR: Yes. Medicated also.

11 MS. SCHLAX: And were there issues with her
12 not taking her medication properly?

13 PROSPECTIVE JUROR: Yes, it caused me to have
14 to live with a family member.

15 MS. SCHLAX: All right. Okay. I appreciate
16 you letting us know that. Thank you.

17 PROSPECTIVE JUROR: Growing up I always knew my
18 sister was a little different and then when I was in
19 high school.

20 MS. SCHLAX: I'm so sorry to interrupt you,
21 just because I have to make sure, juror [REDACTED]
22 Thank you.

23 PROSPECTIVE JUROR: She was hospitalized for
24 mental illness. She struggled with that most of
25 her life.

1 Also my son took his life, 24 years later my
2 husband walked out the door. And so I went
3 through a deep depression at the time.

4 MS. SCHLAX: Sure. Was that something that
5 you were able to get some aid for?

6 PROSPECTIVE JUROR: Oh, absolutely. Yes, I
7 was -- I'm fine. I mean I went through 12-step
8 recovery which helped me through a lot of issues
9 that I had.

10 MS. SCHLAX: Okay. Thank you for sharing
11 that.

12 Anybody else on the second row on this side?

13 (No response from prospective jurors.)

14 MS. SCHLAX: How about in the third row?

15 (Prospective juror indicating.)

16 PROSPECTIVE JUROR: So my -- my roommate is
17 currently on antidepressants for anxiety
18 disorders. When I was -- when I was in high
19 school I went to a therapist for depression. My
20 parents didn't have a lot of appreciation for
21 medication for that so I moved out, I started
22 anti-depressants. I stopped taking them about a
23 year ago so I was on them for about five years.

24 My last relationship, my girlfriend was a
25 schizophrenic bipolar disorder, she was diagnosed

1 in high school and so she had to take a lot of
2 medication to handle mania and suicidal
3 tendencies. But when she's on medication she's
4 fine.

5 MS. SCHLAX: Okay.

6 PROSPECTIVE JUROR: She has to continuously
7 deal with that.

8 MS. SCHLAX: Right. And so it's a matter of
9 management, trying to keep up with it?

10 PROSPECTIVE JUROR: Exactly.

11 MS. SCHLAX: Those are difficult issues.

12 PROSPECTIVE JUROR: Yeah.

13 MS. SCHLAX: Thank you very much for sharing
14 that.

15 Juror No. [REDACTED]

16 PROSPECTIVE JUROR: I had a best friend in
17 school. We're not really -- she was like touched
18 growing up for about 20 years and that, you know,
19 led her down the wrong path. She -- I don't know.
20 She had to separate herself from everybody. So
21 that kind of like separated me from her. I tried
22 to keep contact with her to make sure she was
23 okay. She went through depression, I mean
24 obviously, and what really -- I guess what really
25 set her on the edge was when she, you know, the

1 last time she got touched she tried to take her
2 life, but it didn't, you know, it didn't happen,
3 she got caught. So...

4 MS. SCHLAX: And those are really tough
5 things. I mean mental illness can be such a
6 horrible, horrible thing. I really appreciate you
7 sharing that with us.

8 Anyone -- anyone else in the fourth row?

9 (No response from prospective jurors.)

10 MR. CALIEL: How about in the fifth row?

11 (Prospective juror indicating.)

12 PROSPECTIVE JUROR: I'm juror [REDACTED]

13 MS. SCHLAX: Thank you very much. My eyes
14 aren't that great.

15 PROSPECTIVE JUROR: I have a few people in my
16 family who have mental health problems. I myself
17 suffer from major depressive disorder and anxiety.
18 And my mom also has major depressive disorder. My
19 brother and sister have both been diagnosed with
20 bipolar disorder.

21 MS. SCHLAX: Okay. And all those people that
22 you -- that you named, so are you all able to help
23 each other and get the appropriate help within
24 the, you know, within the community, the medical
25 community?

1 PROSPECTIVE JUROR: My mom and I are both
2 being treated. My sister just recently sought
3 treatment. She's in Birmingham. My brother has
4 not gotten any treatment. He just -- I don't
5 think he believes in medication or counseling so
6 he's kind of tried to deal with this on his own.

7 MS. SCHLAX: Sure.

8 PROSPECTIVE JUROR: He does call me, but he's
9 not seeking any treatment.

10 MS. SCHLAX: Okay. And I imagine you are a
11 great resource for him.

12 PROSPECTIVE JUROR: I try to be.

13 MS. SCHLAX: Yeah. Thank you for sharing
14 that.

15 PROSPECTIVE JUROR: Sure.

16 MS. SCHLAX: Anyone -- anyone else in -- how
17 about in the fifth row?

18 (Prospective juror indicating.)

19 MS. SCHLAX: Juror No. [REDACTED] Good morning,
20 sir.

21 PROSPECTIVE JUROR: Good morning. My husband
22 does have bipolar disorder and depression.

23 MS. SCHLAX: Okay. And is that something
24 that he's comfortable receiving treatment for in
25 whatever form?

1 PROSPECTIVE JUROR: Yes, it's -- it's managed
2 by medication. Everything's fine.

3 MS. SCHLAX: Thank you for sharing that.

4 Ladies and gentlemen, I want to talk to you a
5 little bit about the law that Her Honor actually
6 gave you yesterday. And, you know, when we think
7 about it, at this stage of the proceedings it's
8 very, very difficult to talk to you about where we
9 could potentially be. And I need you to assume for
10 the reverse of my questioning that we are beyond a
11 guilt phase and the importance of what you may
12 ultimately be asked to do. And when we talk about
13 that and we talk about the law that's applicable, I
14 again will commend all of you for what appears to
15 me like serious thought within yourselves in terms
16 of the responsibility, the duty, the obligation of
17 being on a jury of this magnitude.

18 And to attempt to drive that home to you a
19 little bit more thoroughly, I'm not going to show
20 you an awful picture, but I am going to try to show
21 you a picture that will, in fact, even more have a
22 step away, jump the hurdle from a hypothetical
23 situation to what very well could be a real
24 situation where you're tasked with ultimately making
25 a very important decision. And so I show you this

1 picture of Cherish Perrywinkle.

2 (Ms. Schlax displaying photograph to
3 prospective jurors.)

4 MS. SCHLAX: And I do so out of respect, but
5 to drive home the emotions that have been within
6 you, I imagine from the time you sat down in your
7 chairs on Monday and realized we were going to be
8 talking about an eight year old child that no
9 longer walks this earth. And that's emotional.
10 Gut wrenching.

11 Your task, you'll have to assume for the
12 purpose of my questions, that you are seated on
13 the jury, that you have listened diligently to all
14 of the evidence and that you have reached a
15 unanimous verdict, that it has been proven beyond
16 and to the exclusion of a reasonable doubt that my
17 client, Donald Smith, caused the death of this
18 child. That it wasn't an accident, that it wasn't
19 any kind of insanity, that it wasn't a defense,
20 that this child no longer is here because of his
21 actions.

22 And then we have to think and talk about what
23 the death penalty laws and all of you, and that's
24 why I appreciate the thorough questioning that was
25 accomplished yesterday, all of you affirmed that

1 you understand the obligation of what you must do
2 and that looking within yourselves you believe you
3 can do that. All of you have already confirmed
4 that for the Court, for myself, for Mr. Caliel.
5 What I need to talk to you honestly about, and,
6 again, I'm not trying to change your opinion on
7 anything, I just want to know honestly what it is,
8 how you feel about certain things.

9 And so I'm going to start -- I'm going to
10 start with you, juror No. [REDACTED] I want you to
11 assume that, in fact, you've finished the trial,
12 it isn't hypothetical, you have found my client
13 guilty of the first degree murder and sexual
14 battery of this young child. Can you consider
15 life in prison?

16 MR. CALIEL: Your Honor, may I object and
17 approach with the court reporter?

18 THE COURT: You may.

19 (Counsel for the State and defense approached
20 the bench for a side-bar out of the hearing of the
21 prospective jurors, where the following
22 proceedings were had:)

23 THE COURT: Even though that's -- let's put
24 something over the microphone.

25 MR. CALIEL: Your Honor, I need to object at

1 this point in time to the hypothetical just posed
2 to juror No. [REDACTED] was that the jury was to presume
3 the two aggravating circumstances have been proven
4 beyond a reasonable doubt and then defense counsel
5 is asking her to commit that she can consider life
6 in prison at that point in time without the
7 consideration of mitigation. I would ask the
8 Court to correct counsel or the Court to direct
9 the jury that the law in place is to go through a
10 weighing process and that is just a step three, in
11 essence, and we've not reached that point and
12 she's asking the question and I don't think that's
13 appropriate, that there's a hypothetical posed
14 that's asking this juror to consider two very
15 weighty aggravating circumstances. There's been
16 no mention of mitigation, there's been no
17 consideration of the weighing option, and I think
18 this is a misstatement of the law and it's
19 misleading to the jury.

20 MS. SCHLAX: Your Honor, I haven't asked
21 anything improper. I'm asking her if she can
22 consider life in prison. I'm going to ask her --
23 my next question will be what are your thoughts
24 about it and then I'll start talking about the
25 weighing process and what will be required. I'm

1 just asking if there's just a complete aversion to
2 the concept of life in prison. We've got to talk
3 about it as a concept and how people feel about
4 it.

5 THE COURT: I think you can do that, but I am
6 concerned that you've given her the fact pattern
7 and asked her to assume -- it does ask her to
8 assume two aggravators. She may not know those
9 words.

10 MS. SCHLAX: Right.

11 THE COURT: But it asks her to assume and
12 then say whether or not she can consider life over
13 death or instead of death or along with death,
14 whatever, without knowing that there's another
15 step to that process. So I would just ask you to
16 rephrase the question. I don't want to tell you
17 what to say. That's up to you. But I think you'd
18 almost have to remind her that there's a process,
19 you know, guilt, there's two aggravators, there's
20 a weighing process, you have to determine if
21 they're even enough to go forward, if they are,
22 there's mitigators, you're going to hear a lot of
23 mitigators. At that point can you consider life.
24 I mean I agree it's misleading. Now, if you want
25 to get away from the -- the facts that you gave

1 her and just say one of the considerations in this
2 case is life, can you consider life without, I
3 guess, the misleading fact statement.

4 MS. SCHLAX: And, Your Honor, I don't know
5 how to have any meaningful inquiry with this jury
6 without assuming those two facts. I'm not asking
7 them to assume HAC. I'm not asking them to assume
8 anything that would not be reflected in their
9 original verdict. Their original verdict will
10 find that she's under 12 and that she was sexually
11 battered.

12 THE COURT: Right.

13 MS. SCHLAX: And so I just need to know their
14 thoughts on that. I would concede, and Mr. Caliel
15 and I have discussed, all of these jurors, every
16 single one of them, has been death qualified
17 appropriately and I'm not attempting to cause
18 anyone. They've all said that they can do the
19 weighing process, but I need to know their
20 thoughts about whether life imprisonment is so --
21 is so revolting to them that it makes me question
22 whether they can truly do that process.

23 Again, it's not a mathematical process. I
24 know they all can sit through the process. I'm
25 trying to identify and get them to think about

1 will I actually go through the weighing process or
2 -- or knowing those two facts, which will be
3 reflected in their original verdict, so if we have
4 a penalty phase those two facts are a given, how
5 they are going to be able to handle that. You
6 know, and that's one of the reasons we ask for
7 bifurcated jury selection. And I understand the
8 Court has already ruled on that, but by the time
9 they begin their even listening to the evidence
10 portion of the penalty phase, they've already
11 determined two of, as we call them, weighty
12 aggravators.

13 MR. CALIEL: Your Honor, of course, I'm not
14 going to suggest or demand that they go in any
15 significant fashion, but what I would suggest is
16 that the proper way to inquire is you'll hear that
17 -- the fact that she was 12 and the fact that she
18 was raped --

19 THE COURT: She's eight.

20 MR. CALIEL: Well, under 12 rather. The fact
21 that she was under 12 and the fact that she was
22 raped are two statutory aggravating factors. How
23 much weight would you give those aggravating
24 factors despite -- and would you believe that
25 they're sufficient to impose the death penalty and

1 would you go through the weighing process to
2 determine whether or not they -- that is
3 appropriate to --

4 THE COURT: I don't think I can make her do
5 that.

6 MS. SCHLAX: Yeah, respectfully, you did that
7 yesterday. I'm not going to do that.

8 THE COURT: No, no, no. Let me ask you this.
9 Let me think a minute. From what you told me in
10 response to his original argument, the question
11 was improper, I think you responded that you
12 wanted to ask that question and then you were
13 going to explain to them, as I understood what you
14 said, and if I'm wrong tell me, there's more to it
15 than just deciding from the verdict of guilt to
16 the penalty and just saying oh, okay, guilt -- I
17 mean life or death, that they have to go through
18 the weighing process. Is that --

19 MS. SCHLAX: I'm sure -- I don't -- depending
20 on different responses, because she's not the only
21 one I'm going to ask this of.

22 MS. NELSON: It's a male, to be clear for the
23 record. We keep talking about -- this is a male.

24 MR. CALIEL: Are you discussing about juror
25 [REDACTED] Because I think he's a male.

1 MS. SCHLAX: Juror [REDACTED] is a female.

2 MR. CALIEL: Female?

3 MS. NELSON: I thought we were talking about
4 a male.

5 MR. CALIEL: You're talking to the lady in
6 the purple sweater, correct?

7 MS. SCHLAX: Large earrings.

8 MR. CALIEL: No, she's accurate.

9 MS. NELSON: I'm wrong.

10 MS. SCHLAX: But I need to -- I need to talk
11 to these jurors, again, conceding they've already
12 been death qualified, I just want to know their
13 honest thoughts about how they would feel about
14 life in prison for someone who's been convicted of
15 that. That's the bottom line. And some may tell
16 me I'll go through the weighing process but I -- I
17 really am uncomfortable with that. Some may say I
18 am comfortable with that. I'm just trying to get
19 a clue who feels that way.

20 THE COURT: I think what I'm going to do is
21 take a recess and if you all have anything to
22 provide for me to look at, and I'll determine what
23 to do. I'm a little concerned about the question
24 being asked in the way it was, that it's
25 misleading to them. I know what you're trying to

1 get to. I don't think there's anything wrong with
2 trying to get to that, but I think the way the
3 question was posed is misleading. I think. I'm
4 not ruling yet. So let me think about it. I'm
5 going to let them go ahead and have a bathroom
6 break and we'll come back in 15 minutes.

7 MS. SCHLAX: Okay.

8 THE COURT: We won't bring them back in until
9 we've had any further argument or whatever needs
10 to be done and we can do it at side-bar or on the
11 record in open court, whichever you prefer.

12 MS. SCHLAX: Okay.

13 THE COURT: Whichever both of you prefer.
14 Okay.

15 MS. SCHLAX: Okay.

16 MR. CALIEL: Thank you, Your Honor.

17 (Thus the side-bar conference ended.)

18 THE COURT: Ladies and gentlemen, this is
19 going to take a little bit longer than I thought
20 it might, so I'm going to go ahead and give you a
21 break to use the restroom and things like that.
22 Your next break will be lunch. So if everyone
23 would recess from the courtroom, we'll have you
24 back in 15 minutes. Thank you.

25 (Prospective jurors absent.)

1 (Defendant present.)

2 THE COURT: I'm ready whenever you all are.

3 MR. CALIEL: And, Your Honor, I think
4 probably I should -- I should phrase my objection
5 for the record to be that I believe the question
6 posed to juror No. [REDACTED] was misleading in the fact
7 that it presumes facts in the record. The
8 question is asking for a commitment of the juror
9 without relying on the law which the juror must go
10 through to reach a conclusion in this case and so
11 based upon that I believe the question is
12 misleading and does not accurately reflect the law
13 that the juror must go through and that is the
14 basis for our objection.

15 THE COURT: Okay.

16 MS. SCHLAX: And, yes, Your Honor, I -- I
17 understand their objection. And I don't know
18 exactly how I phrased it, but, again, I will -- I
19 will indicate to the Court and to the State my
20 intention is to get their thoughts about
21 considering life imprisonment as an option. And I
22 will cite to the case of Morgan V. Illinois found
23 at 112 Supreme Court 2222, which was a 1992 United
24 States Supreme Court decision that actually
25 addressed this concern in regards to sufficient

1 voir dire.

2 In this particular case it took place in the
3 State of Illinois who handles jury selection a
4 little bit differently than we do in Florida. The
5 Judge actually does all of the questioning. And
6 there were repeated requests of the Court to
7 inquire not only if they were death qualified, but
8 essentially life qualified, that they can truly
9 consider life imprisonment as an available option.

10 That is what my intention of the rest of my
11 questioning is going to be. The exact wording
12 that I used to get there I -- I can't predict what
13 exactly I will be enunciating. I could suggest to
14 this Court there is nothing wrong with this
15 question. The juror looked like she was going to
16 struggle with it so I would open it up to what are
17 your thoughts about that, what are your thoughts
18 of any of you, knowing that it is likely, if you
19 are at a penalty stage in this proceeding, we know
20 two aggravating factors will have been proven and
21 I need to get their thoughts about imposing life
22 in prison.

23 Some people may say, and I think all already
24 committed that they will engage in the weighing
25 process. We accomplished that yesterday. I know

1 need to know what their thoughts, and if the
2 thought of life in prison is so abhorrent to them,
3 I just need to know that because it is a selection
4 process at this point.

5 THE COURT: Okay. Well, I find the question
6 is misleading, but I'll have the court reporter
7 read it back so we know what it was on the record.
8 And I agree I don't either remember it exactly,
9 the exact wording.

10 (Question read by court reporter.)

11 THE COURT: That was the question. I, again,
12 will find that it's misleading and I look back at
13 the standard instructions that I was -- that I
14 gave to the jury yesterday, both parties wanted me
15 at the beginning of the questioning about the
16 guilt phase -- I mean the penalty phase, to read
17 the instructions of what they would hear if they
18 were to reach that phase sitting as a juror, and
19 I'll just -- just -- just to synopsise what this
20 law says, and it basically says the law neither
21 compels, nor requires you to determine the
22 defendant should be sentenced to death. Once each
23 juror has weighed the proven factors, and that's
24 important, he or she must determine the
25 appropriate punishment for the defendant.

1 It clearly says, and I know I read it to 'em
2 yesterday, they're not lawyers -- well, one is, a
3 lawyer from Jordan, he doesn't practice law in
4 America and he's an American citizen now and has
5 been here for many years, but none of the rest of
6 them are legally trained. A couple do work in law
7 offices, but they're not lawyers, they don't even
8 know really a lot of the terms we use, but they've
9 heard them over and over again this week. That
10 really is the bottom line. Once each juror has
11 weighed the proven factors, he or she must
12 determine the appropriate punishment for the
13 defendant. They cannot, they're not allowed to
14 under the law, determine the appropriate
15 punishment without weighing the proven factors.
16 So to select a certain few factors and ask them
17 can they determine a certain element based on part
18 of what is required is misleading.

19 That is my ruling. So you can certainly go
20 on questioning the jurors, starting again with
21 juror [REDACTED] if that's what you would prefer to do,
22 but somehow you have to qualify it with the law
23 that's in place. Since we don't know, this is the
24 first, I believe, death penalty trial -- or
25 capital case trial in our circuit since the law

1 changed. Under the old law I think you might have
2 been able to ask that question that way, but under
3 the new law they're not allowed to jump straight
4 from guilt to the punishment. They have to do
5 certain things.

6 So you can ask them just generally can you
7 consider life in prison as an appropriate sentence
8 in the case, but once you qualify it with certain
9 things that they're required to consider, then
10 somehow they have to be notified that they're
11 considering everything that they have to consider
12 before they can commit.

13 I'm not going to tell you how to do it. I
14 don't know how you want to do it. You can decide
15 that. But somehow it has to be qualified in order
16 for it to be a question that is appropriate under
17 the law that they're required to follow now, that
18 they're going to be required to follow, if, in
19 fact, the case gets to that point. They can't,
20 under the law they would be violating their oath,
21 if they said, okay, it's guilty, life, or okay,
22 guilty, it's death. They're not allowed to do it.
23 So I think the question is misleading. And you
24 can go from there.

25 MS. SCHLAX: Candidly, I'm not sure I

1 understand the Court's ruling. I'm happy to back
2 up, and maybe I had gotten ahead of myself in
3 terms of asking the concept that I want to reach,
4 because I certainly have every intention of
5 talking to these jurors about the weighing
6 process. But ultimately that question or
7 something similar will be posed.

8 THE COURT: That's fine. After you talk to
9 them about the weighing process, you can ask them
10 that. I think the problem is that, as I see it,
11 is that it's being asked of them before all of the
12 steps, and I don't expect you to go through all
13 the steps or anything like that, but you're asking
14 them to commit to something they can do without --
15 well, it's not something they can commit to
16 because they're not allowed to do that. They're
17 just not allowed.

18 So I think you can ask them in general to
19 commit if life is an appropriate punishment, but
20 once you get into specific facts, I don't think
21 you can leave some out. Somehow you have to
22 qualify it. If you want to talk to them first
23 about the weighing process and then say can you
24 commit to a life sentence, that's fine.

25 MS. SCHLAX: Again, I'm not even asking them

1 to commit.

2 THE COURT: Not commit. Consider it.

3 MS. SCHLAX: Consider. I'm asking those that
4 consider, and I do have at least some fear that
5 there will be jurors that will indicate that
6 truly, looking within themselves, they can't.

7 THE COURT: I think you --

8 MS. SCHLAX: That may come out or not.
9 Again, I will concede that through the death
10 qualification process yesterday they all have
11 answered affirmatively and, quite frankly, with
12 great reflection that they can go through that
13 process. But I'm just trying to inquire to what
14 their true thoughts are about it.

15 THE COURT: I think you're absolutely
16 entitled to find out if they would choose to
17 consider one of the two punishments, just like we
18 were trying to find out yesterday if they would
19 consider one of the two punishments. You are
20 entitled to ask that for your client. I just
21 think the question needs to be rephrased or If you
22 prefer to talk to them a little bit about the
23 factors before you ask the question. However you
24 prefer to do it. There's no question they're
25 entitled to know that and there may be one who

1 will say I can't, I can't consider that. Clearly
2 that would be cause.

3 So anything further?

4 MR. CALIEL: Nothing further, Your Honor,
5 based upon your ruling. I just have some concern
6 that there is -- if they agree to the weighing
7 process, and at this point in time they don't know
8 any mitigation, no mitigation is being put before
9 them, and they believe in their mind if they
10 follow the law as the Court has instructed them
11 that those two aggravating factors that were just
12 described justify the death penalty, without more
13 information it is totally their prerogative to say
14 I think death is the only appropriate punishment,
15 based upon what I've heard. Because they're not
16 being asked to weigh anything. That's -- that is
17 the concern that I have. They've all agreed that
18 they'll go through this weighing process and if we
19 only give them aggravation and no mitigation has
20 been presented and you're asking them, well, can
21 you consider life in prison, if that's all you
22 know at this point in time, I think it's within
23 the law for them to say, no, because I put great
24 weight on those two aggravators, there's been no
25 mitigators presented and in my weighing analysis

1 the death penalty is the only punishment that's
2 appropriated, and that decision is legal based
3 upon the hypothetical given. If they refuse to
4 consider mitigation, then it may rise to a cause
5 challenge. But simply saying here's two
6 aggravators, you know nothing else, if you go
7 through this weighing process would you consider
8 life? I think it's legal for them to say no
9 because in my mind those are two weighty
10 aggravators and I have no mitigation. So I think
11 life -- or death is the only punishment I would
12 consider after going through that weighing
13 process. That's a legal verdict. That's a legal
14 decision.

15 THE COURT: Well, the statement of the law
16 that I stated, which I believe is where we're at,
17 is, again, once each juror has weighed the proven
18 factors, he or she must determine the appropriate
19 punishment. And I think that's my ruling.
20 Somehow -- I'm not going to tell the State or
21 defense how to ask their questions, but somehow
22 the law is clear and has to be included in the
23 information the juror is processing to be able to
24 answer the question, first of all legally, and
25 second of all, certainly within their heart and

1 soul, as you said, but it has to be a legal thing.

2 So I -- I think I've explained my ruling and
3 I think the defense, while they object, of course,
4 that objection is noted for the record, I think
5 they understand the ruling and we're all treading
6 new ground, but I think the law is what we have to
7 look to for how we do that if there's an issue,
8 and that's clearly what it is. They cannot say
9 what an appropriate punishment is that they would
10 consider without having weighed the proven
11 factors. So I believe that the defense will
12 formulate an appropriate question. If you don't,
13 I'm sure there'll be another objection. Okay?
14 Thank you.

15 Do you need a few minutes or can the jury come
16 on back?

17 MS. SCHLAX: No, I'm ready, Your Honor.

18 THE COURT: Okay. We're ready.

19 I'll leave it to you, Ms. Schlax, it's 25 till
20 12:00. You'll know when it's a natural break for
21 you, if you're not going to be able to finish before
22 lunch.

23 MS. SCHLAX: What time would you like to
24 start lunch?

25 THE COURT: It doesn't matter, as long as

1 it's sometime by 1:00 o'clock.

2 MS. SCHLAX: Would you like me just to keep
3 going until --

4 THE COURT: Until what you feel is a natural
5 break in your discussion.

6 MS. SCHLAX: Okay.

7 THE COURT: You know, it's 12:15 or is it
8 1:00. Wherever you feel it's a comfortable break.

9 MS. SCHLAX: Okay.

10 (Prospective jurors present.)

11 BAILIFF: Everybody here, ma'am.

12 THE COURT: Thank you.

13 Thank you, ladies and gentlemen.

14 I think that will be our last break until we
15 break for lunch and Ms. Schlax is going to continue
16 with her questioning.

17 MS. SCHLAX: Thank you, Your Honor. May it
18 please the Court.

19 THE COURT: Yes.

20 MS. SCHLAX: Let me back up just a little bit
21 and go back to after the Court read the
22 instruction yesterday. Ultimately those who
23 remain on this panel and if you, in fact, find my
24 client guilty, you will be sitting in what we call
25 the penalty phase. And we want to talk a little

1 bit about the difference between the penalty phase
2 and the guilt phase. And my memory was that we
3 had three prior foremen of prior criminal juries.
4 If my notes are correct, it was juror No. [REDACTED]
5 juror No. [REDACTED] and juror No. [REDACTED] correct?

6 PROSPECTIVE JUROR: Yes, ma'am.

7 MS. SCHLAX: Okay. All three of you were
8 prior foremen of criminal juries and as you
9 probably remember --

10 And actually because I've always been so
11 curious, juror No. [REDACTED], how did you become the
12 foreman?

13 PROSPECTIVE JUROR: They elected me.

14 MS. SCHLAX: Like a little mini election?

15 PROSPECTIVE JUROR: Correct.

16 MS. SCHLAX: I always wonder if people
17 volunteer.

18 PROSPECTIVE JUROR: They were all nervous. I
19 don't care. I'm not on trial. We're good.

20 MS. SCHLAX: Juror No. [REDACTED] how did you gain
21 your reign in power?

22 PROSPECTIVE JUROR: I was elected.

23 MS. SCHLAX: You were elected?

24 PROSPECTIVE JUROR: Yes.

25 MS. SCHLAX: Okay. Juror No. [REDACTED]

1 PROSPECTIVE JUROR: Took awhile to decide so
2 I volunteered.

3 MS. SCHLAX: Okay. Well, in that -- in that
4 context, and I don't know if you had extensive
5 deliberations in your cases, and we don't need to
6 delve into the details of those. Ultimately you
7 had to arrive at a decision unanimously, correct?
8 And there might have been conflicts in the
9 evidence that you had to resolve as a group.
10 That's what a unanimous verdict means. I want to
11 compare that and contrast it with what would
12 happen in a penalty phase. Because most of us
13 probably, before we walked into any courtroom,
14 have seen at least something on TV that gave us an
15 idea of how the unanimity requirement works and
16 how a criminal trial works. The penalty phase is
17 so very, very different because those ultimately
18 selected, if we do, in fact, have a penalty phase,
19 will be asked to make an individual, personal
20 moral decision. And that's what the law is. And
21 so while to actually give a just verdict all 12
22 must be unanimous, a verdict of 12 people
23 individually coming to the conclusion where just
24 even one says life imprisonment is appropriate
25 becomes a valid verdict and, in fact, a life

1 sentence. Does everyone realize that?

2 (Affirmative response from prospective
3 jurors.)

4 MS. SCHLAX: Okay. And I thought Mr. Caliel
5 had sort of explained that. On the -- on the
6 guilt side, if you as foreman had not been able to
7 reach a unanimous verdict, what would have
8 happened?

9 PROSPECTIVE JUROR: Hung jury.

10 MS. SCHLAX: That's right. Does everyone
11 realize there's no such thing as a hung jury in a
12 penalty phase? Everyone realize that?

13 (Affirmative response from prospective
14 jurors.)

15 MS. SCHLAX: Okay. And the reason that's
16 important is because the legislature has given us
17 a specific process and one of the reasons I want
18 to take a little time and go over what that
19 process is because it's not something you've seen
20 on TV. It's not something I imagine any of you
21 have had this I experience with, but the
22 legislature has said, okay, we're going to --
23 we're going to actually statutorily enumerate what
24 they call aggravators and we know that there will
25 be two, what they call aggravating circumstances

1 if, in fact, we are sitting at a penalty phase in
2 this case, that two will be proven. That the
3 child was under 12, in fact, there's going to be
4 no dispute. Cherish Perrywinkle was eight years
5 old. And if you find him guilty of sexual
6 battery, that there was a contemporaneous felony.

7 So two of those factors will have been
8 proven. So you know going into this analysis that
9 you have two aggravating factors. And then the
10 law contemplates, and I want to just touch upon a
11 second what they call mitigating circumstances.
12 And mitigating circumstances are anything and
13 everything within a person's life, their
14 character, their background, their experiences,
15 that might indicate that life imprisonment is
16 appropriate and it can be anything.

17 Now, here's the difference in the law between
18 guilt and penalty. Each of you may consider those
19 mitigating circumstances differently than your
20 fellow jurors. And so it comes down to -- and I'm
21 going to pick on juror No. [REDACTED] just because I left
22 off with her. Ma'am, you have had to make moral
23 decisions in your life, haven't you?

24 PROSPECTIVE JUROR: Yes.

25 MS. SCHLAX: When to have children, how to

1 raise them, what religion you practice. Can you
2 understand that the juror sitting next to you,
3 juror No. [REDACTED] thank you, might make those
4 decisions differently?

5 PROSPECTIVE JUROR: Yes.

6 MS. SCHLAX: Okay. Can everyone expect that,
7 respect that?

8 (Affirmative response from prospective
9 jurors.)

10 MS. SCHLAX: So, too, in a penalty phase, can
11 each of you consider what is presented in
12 aggravation and what is considered in mitigation
13 and weigh that process? And you have to go
14 through that process, and all of you all committed
15 yesterday that, in fact, you would go through this
16 process, that even though we know we're talking
17 about a child under the age of 12, all of you are
18 willing to go through that process. And you've
19 all indicated, and I assume that everyone is still
20 willing to go through that process, taking those
21 facts, correct?

22 (Affirmative response from prospective
23 jurors.)

24 MS. SCHLAX: What I want to talk to you about
25 is whether or not you can truly go through that

1 weighing process and ultimately reach a verdict
2 where you can look into the mirror with yourself,
3 because there's one thing, after you go through
4 that whole process, and you might not have even
5 heard these words but I will remind you of them
6 because they are the law, that after you go
7 through that process, and even if you consider and
8 weigh and ultimately come to the conclusion within
9 yourself that the aggravating factors outweigh the
10 mitigating factors, the law in the State of
11 Florida recognizes this: Regardless of the
12 results of each juror's individual weighing
13 process, even if you find that sufficient
14 aggravators outweigh the mitigators, the law
15 neither compels, nor requires you to determine
16 that the defendant should be sentenced to death.
17 And so, again, the law recognizes, unlike what we
18 have in every criminal trial, the law recognizes
19 that it's an individual moral decision that each
20 and everyone of you --

21 MR. CALIEL: Your Honor, at this time I would
22 object. Refer to the word moral three times and
23 no place in the law does it refer to it as being a
24 moral decision.

25 THE COURT: You want to rephrase your

1 question?

2 MS. SCHLAX: Okay. Again, it's an
3 individual, personal decision that each of you
4 will be tasked to make. And so I want to just
5 touch upon, when you think about that, how you
6 might feel if someone next to you thinks
7 differently than you. And I -- just because
8 you're right in front of me, juror No. [REDACTED]

9 PROSPECTIVE JUROR: The microphone.

10 MS. SCHLAX: He wants the microphone. Sorry.

11 PROSPECTIVE JUROR: I work in an area where
12 people have differing things all the time and you
13 have to work through them. I think everybody has
14 their beliefs or feelings or their own individual
15 circumstances that have led to the person that
16 they are and the way that they conduct their
17 business and the way that they do things.
18 Wouldn't hold that against anyone.

19 MS. SCHLAX: If you -- if you were back in
20 that jury room and you had ultimately engaged in
21 the weighing process for yourself and you made an
22 individual personal decision for yourself that the
23 death penalty was appropriate, and a fellow juror
24 went through that exact same process and
25 ultimately determined that their decision was life

1 imprisonment over death. Would you try to change
2 their mind?

3 PROSPECTIVE JUROR: No. I mean we've gone
4 through the process.

5 MS. SCHLAX: Okay.

6 PROSPECTIVE JUROR: That's the way that they
7 feel, then that's what ends up happening.

8 MS. SCHLAX: Okay. Can everyone agree with
9 that?

10 (Affirmative response from prospective
11 jurors.)

12 MS. SCHLAX: Okay. Do you think it's
13 important in a case like this for each person to
14 make an individual decision?

15 (Affirmative response from prospective
16 jurors.)

17 MS. SCHLAX: Okay.

18 PROSPECTIVE JUROR: And can I add --

19 MS. SCHLAX: Well, I was going to ask you one
20 other thing.

21 PROSPECTIVE JUROR: I'll stand here.

22 MS. SCHLAX: What are your thoughts about a
23 guilty child killer receiving life in prison?

24 PROSPECTIVE JUROR: I think that if the
25 person is found guilty, there are -- the penalty

1 is there are two different options for penalties
2 and I think you have to weigh the mitigating
3 circumstances. I mean it's not a one size fits
4 all process.

5 MS. SCHLAX: Okay.

6 PROSPECTIVE JUROR: So you -- you phrased the
7 question as how do I feel about a guilty child
8 killer receiving life imprisonment. It may be
9 appropriate for some.

10 MS. SCHLAX: Okay. So in your mind it's not
11 so far gone that really in my mind the only
12 penalty that's going to be appropriate is the
13 death penalty?

14 PROSPECTIVE JUROR: No, you have to go
15 through the process.

16 MS. SCHLAX: Okay. And I appreciate that.
17 Let me ask juror No. [REDACTED] sir. Do you agree with
18 juror No. [REDACTED]?

19 PROSPECTIVE JUROR: I'm No. [REDACTED]

20 MS. SCHLAX: I'm sorry. The first seat so I
21 was trying to take the easy way out.

22 PROSPECTIVE JUROR: Well, I don't agree with
23 him, honestly. Like it's different to me. That
24 like killing a child is -- it's a big -- big thing
25 like. And I think it should get the death

1 penalty.

2 MS. SCHLAX: Okay. And so what I'm hearing
3 you say is you're going to listen to everything.

4 PROSPECTIVE JUROR: Of course. May I say
5 something?

6 MS. SCHLAX: Sure.

7 PROSPECTIVE JUROR: Honestly, like yesterday
8 and the day before the State Attorney told us like
9 we should always consider him as innocent until we
10 hear the evidence and we know everything. And the
11 Judge told us don't listen to the news or media,
12 so now I feel like we judging right away, if I
13 tell you like death penalty. So to me I'm judging
14 him now, so I think I should not answer this
15 question now.

16 MS. SCHLAX: Okay. And here -- and please --
17 please understand this. It's improper for myself
18 or the State Attorney to get up and try to get
19 anyone to commit any -- any specific sentence
20 because you've not been presented with any kind of
21 evidence.

22 PROSPECTIVE JUROR: Exactly.

23 MS. SCHLAX: You've not seen any kind of
24 aggravating circumstances, you've not seen any
25 kind of mitigating circumstances.

1 PROSPECTIVE JUROR: Right.

2 MS. SCHLAX: Everyone is committing to going
3 through that process.

4 PROSPECTIVE JUROR: That's right.

5 MS. SCHLAX: What I'm trying to, I guess,
6 understand is your thoughts when we're dealing
7 with a child under 12, of how difficult it would
8 be to convince you that there's anything other
9 than the death is appropriate.

10 PROSPECTIVE JUROR: If you want me to answer,
11 no, the death penalty is the way for it, honestly.

12 MS. SCHLAX: But you have committed to going
13 through the process?

14 PROSPECTIVE JUROR: Of course.

15 MS. SCHLAX: Okay. And let me say this. I
16 imagine that there are a lot of people that think
17 to themselves when you're talking about the death
18 of a child --

19 PROSPECTIVE JUROR: Yes.

20 MS. SCHLAX: -- I will, I will listen to
21 mitigation, but it's the death of a child. And so
22 it's going to be very difficult --

23 PROSPECTIVE JUROR: Exactly.

24 MS. SCHLAX: -- for me to really consider
25 much more than the death penalty.

1 PROSPECTIVE JUROR: Sure.

2 MS. SCHLAX: And I understand that concern.

3 And I appreciate you for letting me know that.

4 PROSPECTIVE JUROR: Yes, ma'am.

5 MS. SCHLAX: Who else feels like juror No. [REDACTED]?

6 (Prospective jurors indicating.)

7 MS. SCHLAX: Okay. Let me -- let me pick on
8 juror -- juror No. [REDACTED] for a second.

9 And I appreciate you letting me know that.

10 You know, there are -- there are people that,
11 you know, I'm just going to throw it out there.
12 You know, sometimes you'll hear mitigation in
13 regards to severe substance abuse issues, you
14 know, and there are -- there are people that just
15 feel like, well, substance abuse issue is --
16 that's just an excuse. I really can't consider
17 that type of evidence, if anything mitigating,
18 because they had a choice to stop. Knowing how
19 you feel, that we know they're dealing with a
20 child, where do you fit in that category.

21 PROSPECTIVE JUROR: Well, regardless if it's
22 a child or somebody over the age of 13, you know,
23 I really can't gauge and judge off of that. If
24 it's going to be the death penalty, it doesn't
25 matter if they're 21, eight, two, 12, it doesn't

1 matter to me personally. It's about the facts and
2 what's really going on, you know, what really
3 happened to that person. I just can't say any
4 child under the age of eight, under the age of 12,
5 if somebody kills them automatic death penalty,
6 no. I'm not going to say that. I'm not going to
7 commit to that, agree with that or anything.

8 MS. SCHLAX: Right.

9 PROSPECTIVE JUROR: Because, you know, it's a
10 different value, you know, people put different
11 values on anything. You might kill a dog, might
12 kill 'em for killing my dog, you know, and that's
13 how some people feel in this world. So I don't
14 want to just say I'm totally committed to the
15 death penalty due to that fact or that one reason
16 that she was under the age of 12.

17 MS. SCHLAX: Sure.

18 PROSPECTIVE JUROR: So, you know, it's open
19 for me. It's all my personal decision, if I was
20 on this jury, the consensus, you know, everybody
21 gives their opinion and we just have a final
22 decision, but these questions that you're asking
23 us I can't fully say, yes, this is what I'm going
24 to do because we haven't gone through anything and
25 I just -- and I agree with him, I feel like I'm

1 judging, you know, before I even hear anything,
2 and I don't want to do that, and you're trying to
3 say step away and try to remove yourself -- you
4 know, remove, you know, hypothetically, I can't do
5 -- me personally, I can't do that because I'm
6 still sitting here, if we found him guilty, you
7 know, we went through the guilt phase, we're in
8 the penalty phase. So in my mind I'm like he's
9 already guilty, you know, so what are we going to
10 do next. So it's kind of hard to answer that kind
11 of question and I don't think it's really fair
12 because it's putting me in like an awkward
13 position, in an awkward thought so...

14 MS. SCHLAX: Well, what I hear you saying is,
15 okay, you're frustrating me, lady.

16 PROSPECTIVE JUROR: That part, too.

17 (Laughter.)

18 PROSPECTIVE JUROR: I'm sorry. It's been a
19 long week.

20 MS. SCHLAX: I apologize. I mean, you know,
21 my husband deals with me everyday.

22 Here's the thing. Again, I'm not asking you
23 to commit to anything. I'm trying to try to truly
24 understand people's views in regards to how they
25 might feel about mitigation and whether it would

1 get to the point where, yes, I'll sit and I'll
2 listen to it, but we're talking about the death of
3 a child. And I think there might be some people
4 who feel that way.

5 PROSPECTIVE JUROR: Yes.

6 MS. SCHLAX: And you know what? Completely
7 understandable.

8 PROSPECTIVE JUROR: Yes.

9 MS. SCHLAX: It sounds like you're not one of
10 those people.

11 PROSPECTIVE JUROR: No.

12 MS. SCHLAX: That for you it's going to be
13 really important to be presented with everything.

14 PROSPECTIVE JUROR: Yes.

15 MS. SCHLAX: There's only one thing that you
16 said that I just want to go back to, if you don't
17 mind, which is, you know, we kind of talk about it
18 and get a consensus, and the difference, again,
19 between a guilt phase deliberation and a penalty
20 phase deliberation is that while the foreman will
21 still preside and you all can discuss as a group
22 the mitigation that's presented, the aggravation
23 that's presented, you ultimately, if you've gone
24 through the steps, and just to repeat, the first
25 step is determining that aggravating -- at least

1 one aggravating circumstance has been proven
2 beyond a reasonable doubt.

3 PROSPECTIVE JUROR: Yes.

4 MS. SCHLAX: Making him essentially death
5 eligible.

6 PROSPECTIVE JUROR: Yes.

7 MS. SCHLAX: Then looking and weighing all of
8 the mitigating factors, whether you found them to
9 exist and our burden of proof on the mitigating
10 factors, just to make the law more convoluted for
11 you people, is not beyond a reasonable doubt, it's
12 the greater weight of the evidence.

13 PROSPECTIVE JUROR: Um-hum.

14 MS. SCHLAX: Then after you go through that
15 weighing process, then each of you individually
16 decides what the appropriate sentence is for you.

17 PROSPECTIVE JUROR: Yes.

18 MS. SCHLAX: And so it's not a consensus,
19 because at the end of the day, when you think
20 about it, the 12 who make that decision walk out
21 of the courtroom, maybe you've made friends with
22 some people by then, maybe not, but that decision
23 will be your final decision.

24 PROSPECTIVE JUROR: And with that being said,
25 so if the death penalty is on the table, 11 people

1 say yes and one person says, no, it's not going to
2 be -- the death penalty is off the table.

3 MS. SCHLAX: Right.

4 PROSPECTIVE JUROR: So either way we have
5 people in here that's very strong for the death
6 penalty, people that's not, you know, that's not
7 really for the death penalty. So either way, you
8 know, whoever gets back there, it's up to them.
9 Me personally, I don't want to have that
10 responsibility. Like on my conscience, you know,
11 I'm not that kind of person, so when I said a
12 consensus, you're right, everybody is their own
13 person when we get to that phase, though.

14 MS. SCHLAX: Right.

15 PROSPECTIVE JUROR: I can't say either here,
16 nor there how I would, you know, go about it,
17 despite everything, you know, despite the
18 mitigating circumstances. I might change my mind.
19 Maybe at first I'm like yes and then hearing some
20 of the mitigating circumstances, I might be well,
21 life in prison might be the best way for this. So
22 right now, you know, without everything, I really
23 can't just commit one way or the other, but I'll
24 keep an open mind about it and that's all I was
25 trying to say. And I don't like to judge people

1 before anything or hearing anything.

2 MS. SCHLAX: Right. No, and I think you just
3 said beautifully what I've been trying to convey.
4 And I guess my concern, and why I want to ask
5 somewhat of a hard question, is there may be
6 people that are thinking to themselves I know
7 they're talking about the death of a child and,
8 again, that's understandable. I appreciate it.

9 Let me pick on juror No. 26.

10 You can hand it right down.

11 PROSPECTIVE JUROR: Well, she said it all, I
12 think. I agree two hundred percent what she said
13 and the gentleman over here. We have to hear the
14 evidence before -- you know, I'm open-minded, but
15 the evidence will tell us what our verdict is going
16 to be.

17 MS. SCHLAX: Sure. Well, let me ask you this
18 with regards to -- and this is anyone who has an
19 opinion on this, please feel free to raise their
20 hands. Are you the kind of person that would
21 consider substance abuse mitigating or would you
22 think, you know what, that is kind of ridiculous,
23 people -- people, you know, they just need better
24 willpower, that was their choice, they chose to be
25 intoxicated? Where do you -- how do you feel

1 about that?

2 PROSPECTIVE JUROR: I think smoking
3 cigarettes and drinking, there's moderation in
4 everything. And some people do it and drugs also,
5 it'll take over your life and you really don't
6 have too much to say about it.

7 MS. SCHLAX: Can I ask you, do you feel like
8 it's a choice or do you feel like addiction is --

9 PROSPECTIVE JUROR: It's a choice. Like I
10 said, it's an addiction and you have that choice
11 to change it.

12 MS. SCHLAX: Okay.

13 PROSPECTIVE JUROR: But it's -- it's
14 overpowered, that's why there's help out there for
15 people that have abuse problems, you know. So --

16 MS. SCHLAX: I'm guessing in your -- what I
17 kind of hear you saying is like, okay, you've got
18 to recognize that to seek help and if you don't,
19 shame on you.

20 PROSPECTIVE JUROR: Well, that's why there's
21 friends that can, you know, try to help you, but a
22 lot of people will not accept help, you know, then
23 it's another story. But people can go back to it.
24 It's their habits, their bad habits.

25 MS. SCHLAX: And I know we had a juror. If

1 you wouldn't mind handing it back to juror No. [REDACTED]

2 PROSPECTIVE JUROR: I can say living with
3 somebody who has gone through it, has been
4 addicted, it's absolutely was not her choice to
5 live through that. She never -- nobody wants to
6 go to prison because of anything. So, yes, it's
7 your choice to start, but to quit it's not
8 necessarily your choice. It is something that
9 controls your life, takes over your life and makes
10 you do things that you would never have done in
11 your life.

12 MS. SCHLAX: Do other people agree with juror
13 No. [REDACTED]?

14 (Affirmative response from some prospective
15 jurors.)

16 MS. SCHLAX: Maybe you've got some agreement,
17 to be fair, let's hear what -- if we could give
18 the microphone to juror 175.

19 PROSPECTIVE JUROR: I don't agree with that
20 because I think people use substance to boost them
21 up, but I -- I just don't see that you taking that
22 and using it to make excuse for something you've
23 done.

24 MS. SCHLAX: Okay.

25 PROSPECTIVE JUROR: It's already there. It's

1 just like a ticking bomb just waiting to come out.
2 So and I think they try to use substance, alcohol,
3 whatever it is they want to use, for an excuse.
4 And I can say that I've been in that predicament
5 and I just don't see -- before you get into
6 anything, you already know what you're getting
7 into. And that's how I feel. I don't -- well, I
8 can't base this upon how I feel, it's what I know.
9 If I do something, I already have my mind made up
10 to do it. It just when I'm going to do it. And
11 if I choose to use drugs to get myself motivated
12 to do it, it's already been planted in me. It's
13 already in my heart to do. It's just like me,
14 going to do it. So I just don't agree with people
15 who say, you know, they don't know what they're
16 going to do, you know, they don't know how it's
17 going to affect. Yes, you do, because you have
18 other people around you and you see the effects of
19 others so I don't -- I don't agree with that.

20 MS. SCHLAX: Okay. And I appreciate your
21 opinion on that.

22 We've got somebody else. I think it's juror
23 No. [REDACTED]

24 PROSPECTIVE JUROR: Yes, [REDACTED]

25 I have watched several people, it's different

1 reasons to me, my personal opinion, it's different
2 reasons why people get addicted and you have people,
3 we have soldiers from overseas who come back, they
4 come back, they take one drink, after one and then
5 it's two, then they're alcoholic and have a problem.
6 A lot of people don't know they're coming about
7 these decisions before they make them. They're
8 trying to numb themselves. And I have seen it from
9 my own experiences from watching it with my own eyes
10 from my stepfather and that is why I made the
11 decision not to prosecute him on the level to make
12 sure he was serving 15 years in prison. I made sure
13 that it was ten years probation and followed by
14 registered sex offender. That was it. But to me a
15 lot of decisions people make, they're not -- they
16 don't know, there might be something wrong with
17 their mind mentally so a lot of this is behind it.
18 I don't want to just put more -- you know, blame --
19 put blame on someone because of what way everybody
20 else experiences. Everybody has their own different
21 reasons for why they are addicted, why this happened
22 to them and what drove them to this far. You can't
23 say a person with a mental problem, disorder,
24 bipolar, you know, depression, they didn't make a
25 decision to be depressed. They just needed help and

1 no one recognized it and would come and help them.
2 So my -- my opinion on that is I don't like to judge
3 people until I know what, when, where, how. How all
4 these things come about. It's not for me to make a
5 judgment on them. I just keep it in prayer, pray
6 for them. That's it.

7 MS. SCHLAX: And I respect that opinion. I
8 appreciate you sharing it with us.

9 Anyone else want to weigh in on this topic?
10 (Prospective juror indicating.)

11 PROSPECTIVE JUROR: I agree with everything.
12 I think that there are people -- oh, I'm juror 16.

13 MS. SCHLAX: Oh, thank you very much.

14 PROSPECTIVE JUROR: There are people that go
15 out and have a drink and that's that. There are
16 other people that go out and have a drink and
17 that's not that. They keep on drinking. So there
18 are some people that have a disposition to become
19 addicted and when people drink alcohol it affects
20 their way that they would normally think and it's
21 my belief that when people are drinking they don't
22 make the best decisions. So they may decide to
23 try drugs and if they're already predisposed to
24 becoming addicted, they already are drinking
25 alcohol, it's possible that they will become

1 addicted to the drugs. Now, is it their decision
2 to drink the alcohol in the first place? Well,
3 sure, but you can drink a drink and go home and
4 live your life. But the next person, they drink a
5 drink and they need to have another one. So I
6 agree with everybody.

7 MS. SCHLAX: I understand that. Well said.

8 And I think we had somebody else that wanted to
9 weigh in.

10 (Prospective jurors indicating.)

11 MS. SCHLAX: I think it's juror No. [REDACTED]

12 PROSPECTIVE JUROR: Yes. I want to say you
13 don't judge the book by its cover. But my mom
14 always say, we talking about adults, drugs,
15 drinks, we also got to look at when we're younger
16 in the family. Abuse. My mama always told me so,
17 you know, I have five children and she always said
18 you have to be very careful with your children,
19 they see what you do, drink, drugs, smoking, all
20 that. So I'm just saying it could be in the
21 child's childhood, you know, have to be very
22 careful how you raise your children, you don't
23 know where they're going. So that's what I got to
24 say. But I agree with what he said, you know, the
25 gentleman, the way he said it. This young lady

1 said it as well.

2 MS. SCHLAX: Right.

3 PROSPECTIVE JUROR: But yesterday I said
4 five.

5 MS. SCHLAX: You did.

6 PROSPECTIVE JUROR: And I say yes. And I
7 thought about it and say, you know what, maybe not
8 five, you know, because I'm looking at him,
9 because he's an old guy, you know, rest of life in
10 jail. You know, I really thought about that.

11 MS. SCHLAX: And I appreciate it. I mean
12 honestly, it's very apparent, I think, to all of
13 us in the courtroom that you all are putting a lot
14 of thought into this.

15 PROSPECTIVE JUROR: But a child? I had like,
16 you know, going back and forth. A child.

17 MS. SCHLAX: And you're recognizing that does
18 make a difference. It's a reason that it's a
19 specific aggravating factor that -- that increases
20 severity of the crime so that's why we have to
21 kind of take that for granted when we're
22 discussing --

23 PROSPECTIVE JUROR: Right.

24 MS. SCHLAX: -- are we going to actually be
25 able to go through this weighing process.

1 Because, again, I mean I could perfectly
2 understand if somebody said, no, there is no
3 weighing process for me. That's an understandable
4 emotion.

5 PROSPECTIVE JUROR: I got to see facts and
6 proof, the witness, and see all that to make that
7 judgment.

8 MS. SCHLAX: And I'm sorry.

9 PROSPECTIVE JUROR: I have to see facts.

10 MS. SCHLAX: Right.

11 PROSPECTIVE JUROR: Witness everything.

12 MS. SCHLAX: Right.

13 PROSPECTIVE JUROR: It's a process. That's
14 to determine.

15 MS. SCHLAX: You're more than willing to go
16 through that process?

17 PROSPECTIVE JUROR: Yes, ma'am.

18 MS. SCHLAX: And you look like, you know, I'm
19 already thinking about it.

20 PROSPECTIVE JUROR: Yeah. Yes, ma'am.

21 MS. SCHLAX: What kind of things would be
22 important for you to know as you go through that
23 process in terms of what would you want to know
24 about my client's life?

25 PROSPECTIVE JUROR: I'd like to know his

1 childhood, how was he raised, his education, how
2 he was in school, what's his occupation, what's
3 his hobby, lifestyle. You know, and his friends,
4 social, you know, associates.

5 MS. SCHLAX: Sure.

6 PROSPECTIVE JUROR: Employer. Things like
7 that.

8 MS. SCHLAX: Sure. And here's my question to
9 the panel. Is there anybody that's honestly
10 thinking to themselves, I don't want to know any
11 of that? I don't care. Please tell me honestly
12 if that's the way you feel.

13 (No response from prospective jurors.)

14 MS. SCHLAX: I'm not seeing anybody raise
15 their hands. But can we all agree that knowing
16 those types of things would be important as we go
17 through this weighing process?

18 (Affirmative response from prospective
19 jurors.)

20 MS. SCHLAX: Let me ask you this. And
21 actually I'll pick on the person next to you. I
22 appreciate you standing up. I'm going to pick on
23 -- I'm sorry. What's your juror No?

24 PROSPECTIVE JUROR: [REDACTED]

25 MS. SCHLAX: [REDACTED]. You've heard me read this

1 law that ultimately those sitting on the penalty
2 phase will be instructed on, which is the law
3 neither compels, nor requires you to determine
4 that the defendant should be sentenced to death.
5 And I use shorthand, I call that the mercy
6 instruction. Do you think that there's any room
7 for mercy in deliberations?

8 PROSPECTIVE JUROR: I would think that there
9 would be, but I wouldn't know until I got to that
10 phase.

11 MS. SCHLAX: Okay. Is there anyone who feels
12 like, you know what, no, for me that wouldn't be
13 something I would consider?

14 Juror No. [REDACTED]

15 PROSPECTIVE JUROR: Yes, ma'am.

16 MS. SCHLAX: Do you think the concept of
17 mercy could enter in those kind of -- as you're
18 going through this weighing process?

19 PROSPECTIVE JUROR: If I can go back to that
20 question for that.

21 MS. SCHLAX: Absolutely.

22 PROSPECTIVE JUROR: Okay. To me I don't
23 think that the drugs and alcohol is an excuse to
24 give somebody mercy because it's in his hand, you
25 know what I mean, the only excuse I can accept is

1 its like from God, if mental problems, something
2 like that. That's what I believe. Because if I
3 steal why he pay for it. You know what I mean,
4 like I'm the one responsible for my actions. So,
5 yeah, like the question what you asked me, if
6 somebody did something wrong, the mercy, like, you
7 know, not because of the drugs and stuff like
8 that, only if he got mental problem or something
9 like that, yes, I agree with that. But anything
10 else, no. Everybody should be responsible about
11 what he's doing. Because the whole community
12 involved in this problem, not just one. You know
13 what I mean, like so, yes, mercy only if like
14 mental problems or like from God, not like he's
15 doing it to himself.

16 MS. SCHLAX: Man's choices.

17 PROSPECTIVE JUROR: Yeah, not from my choice,
18 like to do drugs or alcohol, I hit somebody, I was
19 drunk, I can't do that.

20 MS. SCHLAX: Right. Okay.

21 PROSPECTIVE JUROR: Yeah.

22 MS. SCHLAX: I appreciate -- I mean that's a
23 fair --

24 PROSPECTIVE JUROR: Yeah, that's fair.

25 MS. SCHLAX: I doubt that you are alone in

1 feeling like that.

2 Who else feels as juror No. [REDACTED]?

3 (Prospective jurors indicating.)

4 MS. SCHLAX: We've got [REDACTED]. I've now
5 memorized your number.

6 We've got juror No. [REDACTED] What do you think,
7 juror [REDACTED]?

8 PROSPECTIVE JUROR: Juror [REDACTED]. I think
9 there's a personal responsibility that factors
10 into this. And the choices that we make limit our
11 possibilities in the future.

12 MS. SCHLAX: Okay.

13 PROSPECTIVE JUROR: So --

14 MS. SCHLAX: Well, the two possibilities that
15 we're talking about, that we're at this stage, are
16 mandatory life in prison with no possibility of
17 parole and the death penalty. So I mean in that
18 sentence, the actions, if proven beyond a
19 reasonable doubt, will severely limit.

20 PROSPECTIVE JUROR: I would be with juror No.
21 [REDACTED] The only mitigating circumstance that I could
22 probably see would be mental illness.

23 MS. SCHLAX: Okay. And I appreciate knowing
24 that. I think that's fair.

25 Juror No. [REDACTED] you agree with that?

1 And I also saw juror No. [REDACTED] You agree with
2 that as well?

3 PROSPECTIVE JUROR: [REDACTED] Yes.

4 MS. SCHLAX: I'm sorry.

5 Okay. And anybody else want to weigh in?

6 (Prospective juror indicating.)

7 MS. SCHLAX: Sure. Juror No -- juror No.

8 [REDACTED]

9 PROSPECTIVE JUROR: When the lady was talking
10 about she wanted to hear his background and things
11 like that, things I want to hear is what did this
12 child have for breakfast this morning, where did
13 this child -- what time did she go to bed last
14 night? Who are her friends she played with, and
15 if proven guilty, obviously we're not going to
16 have the answers to any of it, because she has no
17 voice.

18 MS. SCHLAX: Because for you it weighs -- it
19 weighs really, really heavy.

20 PROSPECTIVE JUROR: And so I feel if found
21 guilty, we owe it to her. We owe it to her.

22 MS. SCHLAX: And I'm glad you brought that
23 up. Because this is one of those crimes, when I
24 say gut wrenching, it is gut wrenching, there's no
25 one in this courtroom that doesn't think it's gut

1 wrenching. Do you feel, and you just kind of
2 articulated like a pressure, if you're ultimately
3 on this jury, in regards to it's expected that --
4 that the only form of justice --

5 PROSPECTIVE JUROR: No, that's not how I
6 feel.

7 MS. SCHLAX: -- would be the death penalty.
8 Okay.

9 PROSPECTIVE JUROR: I am for the death
10 parent. I am definitely for the death penalty,
11 but there are circumstances that do arise that
12 maybe the death penalty is not for this situation.

13 MS. SCHLAX: And so you just -- you already
14 have -- you're committed to doing the weighing
15 process?

16 PROSPECTIVE JUROR: I am committed to -- to
17 looking at all facts in this situation. I'm
18 willing to look at all the facts and I'm willing
19 to say, hey, yeah, there are certain circumstances
20 when that we can -- that I get a feeling that,
21 well, maybe he doesn't deserve to have life in
22 prison, but without a shadow of a doubt, that
23 there's no doubt in my mind that this is -- if the
24 evidence doesn't prove, I guess, that he should be
25 pardoned of the death penalty that I am for it.

1 MS. SCHLAX: Okay. Well said.

2 Who -- right next to you. Juror [REDACTED]

3 PROSPECTIVE JUROR: Juror [REDACTED] I respect
4 both sides, the State and the defense. And some
5 of the questioning that we received here today I
6 think that all life is precious so both the child
7 and the adult in this case, their lives are
8 precious. And I feel that, you know, going
9 through this process is important to hear both
10 sides and weigh those equally and fairly and
11 impartially. We all bring our individual life
12 experiences, our beliefs to everything we do
13 everyday, but I think it's important for us to,
14 you know, consider what's being presented through
15 the trial process and let that bring us to
16 whatever the ultimate decision is, whether that's
17 innocence, life, death or if there's another
18 option here.

19 I don't know. I think some of the
20 questioning is a bit -- it's disturbing me, to be
21 very honest with you, because we've been asked not
22 to prejudge and I think it starts to set our mind
23 set in that manner, but I do feel like everyone
24 has a choice. Obviously there are different
25 things that happen to people throughout their

1 lives that takes them down one path or another.
2 We've all talked about things in our family that
3 has happened that's resulted in unfortunate
4 decisions people have taken and others have
5 allowed that to stir them to a more positive
6 state, but I think it's our responsibility to be
7 fair, whoever is chosen to be selected to be a
8 juror in this case has to be fair and open-minded
9 and let the facts and the evidence lead us to the
10 right outcome.

11 MS. SCHLAX: And do you -- do you agree with
12 juror No. [REDACTED] that if you were selected on the
13 jury and you had arrived at your individual
14 decision that you would respect a fellow juror
15 that maybe arrived at a different one?

16 PROSPECTIVE JUROR: Yes.

17 MS. SCHLAX: I think we've all committed that
18 everyone will do that.

19 (Affirmative response from prospective
20 jurors.)

21 MS. SCHLAX: Juror No. [REDACTED] Where do you
22 weigh in on all this? We talked about a lot of
23 stuff.

24 PROSPECTIVE JUROR: Juror No. [REDACTED] Is the
25 term mercy sending somebody to prison for life or

1 putting them to death, I'm not sure there's mercy
2 either way that way. So they will no longer be a
3 part of our society.

4 MS. SCHLAX: And that would be a given.

5 PROSPECTIVE JUROR: Yeah. So that's how I
6 feel about it. I'm not sure there is a mercy role
7 or the death penalty is better or going to jail
8 for the rest of his life is better.

9 MS. SCHLAX: Anybody -- anybody else?

10 (Prospective juror indicating.)

11 MS. SCHLAX: I think if you don't mind, and I
12 will let you say whatever you wish to, can you
13 hand it down to juror [REDACTED]

14 PROSPECTIVE JUROR: I understand that there's
15 decisions to be made, but you have to hear one
16 hundred percent of the evidence before anybody
17 makes a decision for death or -- or life. There's
18 -- you know, his life is in our control or death,
19 and we can't make that decision here, right now.

20 MS. SCHLAX: Sure.

21 PROSPECTIVE JUROR: Until we hear one hundred
22 percent of the evidence.

23 MS. SCHLAX: And I appreciate -- I appreciate
24 you for reminding me, because, again, I'm not
25 trying to suggest that you guys should -- I've

1 been trying to -- and I think you all have already
2 accomplished it without any of my meddling, which
3 everyone realizes this is a serious event, what
4 we're being asked to do. I appreciate you
5 mentioning that.

6 Juror No. [REDACTED]

7 PROSPECTIVE JUROR: Okay. Going back to the
8 mercy, like, where -- if somebody kills somebody
9 else and why they kill them. He wasn't thinking
10 about mercy for them or something like that oh,
11 I'm not going to kill you or something. So then
12 the victim did not have any choice for mercy.

13 MS. SCHLAX: Right.

14 PROSPECTIVE JUROR: So the one who did the
15 crime, he should be treated the same way, don't
16 ask for mercy like, because the victim, like no
17 mercy to the victim. You know what I mean? Like
18 so why we give them mercy at this point?

19 MS. SCHLAX: Okay.

20 PROSPECTIVE JUROR: So like -- that's the
21 fair -- that's the fair actually like knowing
22 somebody to be fair for the victim and for the
23 defendant. Like she did not get mercy, he should
24 not get any mercy.

25 MS. SCHLAX: I think that's a fair view on

1 it.

2 PROSPECTIVE JUROR: That's what I feel
3 honestly.

4 MS. SCHLAX: Who agrees with juror No. [REDACTED]
5 (Prospective jurors indicating.)

6 MS. SCHLAX: Okay. And fair enough.

7 Juror No. [REDACTED] did you want to weigh in on this?

8 PROSPECTIVE JUROR: To be perfectly honest
9 with you, I don't know how this case escaped me.
10 But to be honest with you, I didn't really hear
11 about it until Sunday night. My wife said you
12 should have, but I didn't, you know, in my job,
13 I'm in a position where people constantly, we
14 don't agree with the statements that sometimes I
15 ask them to agree with. And I'm in a position
16 people disagree with me all the time. But I think
17 what I'm listening to here is that I would not
18 want this to turn into a vigilante here. I would
19 not. This is very serious. I applaud both sides
20 for going through this process because people --
21 evidently many people have heard much more about
22 this than I have. I'm learning more right now.
23 And I know that sounds in Jacksonville, how could
24 you not hear this? I do not know. I'm going to
25 be perfectly honest with you. I am busy, I'm not

1 trying to say I'm that busy, but I'm a very busy
2 man. I don't know how this -- I don't really
3 know, but I did. I missed this. But at the same
4 time I want to applaud you for taking us through
5 this process because this is extremely important
6 here. What we're dealing with. We're dealing
7 with a life that's already been lost and a life
8 that could be potentially lost and the thing is
9 that whatever decision a person comes up with in
10 that jury room, I don't think that we should be to
11 the point, well, how can you come up with that,
12 and I believe that's what you're saying.

13 MS. SCHLAX: Right.

14 PROSPECTIVE JUROR: I'm listening, I'm
15 listening, I'm listening, I'm listening and what
16 I'm hearing you saying is that regardless of what
17 we decide, if the person next to you says, no,
18 that's it, they have that right. They heard all
19 the evidence. The mercy issue is up to every
20 individual. If you want to apply mercy, that's up
21 to you. Mercy is an individual thing and I don't
22 think that should be excluded, if that's how you
23 want to feel. I know the victim didn't have a
24 chance to have mercy, but that's not the point
25 here. The point here is can we be fair. Can we

1 be fair. And maybe it was to my advantage not to
2 have heard all of that, all these weeks my wife
3 keeps saying to me how could you miss that, you
4 know, how. And I'm being perfectly -- I'm not
5 lying to you. I said I missed that.

6 MS. SCHLAX: Okay.

7 PROSPECTIVE JUROR: I totally missed that
8 until Sunday night and they had to bring -- I'm
9 saying what is this on here. They're giving me
10 all the information. I'm saying what -- where was
11 I? Where have I been? And I don't -- I don't --
12 I have no idea. I should have been better
13 informed and I shouldn't have missed all this, but
14 I'm saying the point that I'm hearing you say is
15 that regardless of what happens in that jury room,
16 when we get to the penalty phase if the person
17 next to you says, no, I don't think we should
18 invoke the death penalty, I think you saying
19 that's it. That's their right. That's their
20 right. Regardless of how you feel about it, walk
21 out and be upset, but that's the jury, same
22 information you heard. If that's what they decide
23 to do that, that's their decision.

24 MS. SCHLAX: Absolutely. Well said. Well
25 said.

1 I think we have one more from juror No. [REDACTED]

2 PROSPECTIVE JUROR: Well, I'm a daycare
3 teacher.

4 MS. SCHLAX: Daycare.

5 PROSPECTIVE JUROR: I'm a daycare teacher and
6 I take care of three and four year olds and I have
7 a daughter 12 years old and I just want to say
8 this is Monday morning, I've been here in
9 Jacksonville, Florida, for about almost a year,
10 not even a year yet, I don't like to listen to
11 news, you know, especially killing and all that's
12 going on, it's very depressing, you know, and I
13 just want to say that that morning, Monday
14 morning, I turned on the TV just to listen to news
15 about the weather.

16 MS. SCHLAX: Right.

17 PROSPECTIVE JUROR: And I turned on the TV,
18 I'm like, whoa, said, man, and I'm back to the
19 door in two seconds and I said to myself, wow, you
20 know, you know. So I mean I don't hardly watch
21 TV. So I'm just surprised that this has been
22 going on for a few years or four years, whatever,
23 when I read the paper said it happened 2013, I was
24 like, wow, you know. But I don't have no
25 connection with internet, Facebook. I really

1 don't even look into Facebook, but look in there,
2 see my old friends and I get off and that's it.

3 But this case is really serious and I just
4 don't want to hurt nobody's feelings. This is a
5 really serious case. I mean I don't want anyone
6 to be angry with me, but I don't think a lot of
7 people here is really being honest as far as the
8 death penalty or a sentence. I just want no one
9 to be angry with me, I'm just feeling that in my
10 heart.

11 MS. SCHLAX: You're feeling like your fellow
12 prospective jurors aren't being honest?

13 PROSPECTIVE JUROR: Yeah, I mean, I don't
14 want them being angry with me, but I'm just
15 feeling that, that they're not really being
16 truthful. This is really serious. They're
17 talking about the death penalty here. This man,
18 you know, he's older than me, you know, I mean --
19 I mean this is really something you really, really
20 think about. All the jurors in here, sitting
21 here, this is really serious.

22 MS. SCHLAX: Thank you.

23 PROSPECTIVE JUROR: Just being honest.

24 MS. SCHLAX: Okay. I think juror No. [REDACTED]

25 wanted to interject.

1 PROSPECTIVE JUROR: I said the other day that
2 I was on the fence about the death penalty and I
3 just want to clarify what I mean by that. I feel
4 like in some cases the death penalty is actually
5 the easier way out. And depending on the
6 circumstances, if someone has something to give
7 back to society and can do so by having life in
8 prison rather than the death penalty, because I
9 feel like we're being asked to make a decision
10 right here. We're not even jurors yet.

11 MS. SCHLAX: Right.

12 PROSPECTIVE JUROR: I mean it truly depends
13 on all the circumstances involved.

14 MS. SCHLAX: And it sounds like, you like
15 many, have articulated you're going to want to
16 hear all the circumstances and engage in that
17 weighing process yourself, then reach your own
18 decision.

19 PROSPECTIVE JUROR: Right. And I kind of
20 object to him objecting about you giving us the
21 other side of the card. I mean I'd like to hear
22 it, you know.

23 MS. SCHLAX: I'm sorry. Juror No. [REDACTED] good
24 morning.

25 PROSPECTIVE JUROR: Yes, ma'am. I've been

1 following it since it started.

2 MS. SCHLAX: Right.

3 PROSPECTIVE JUROR: It is sad and there does
4 need to be justice and, you're right, he's
5 innocent until he's proven guilty. But I don't
6 see how nobody could follow this. It's
7 heartbreaking. It's terrible. It's a child. But
8 you have to be fair.

9 MS. SCHLAX: Right. And, you know, the
10 premise of me talking to you guys this morning is,
11 again, it's because I don't get a chance to talk
12 to people after a verdict is reached. So I'm
13 asking you to assume, just so that we can try to
14 have a discussion about -- about this and we'll go
15 back to that, that weighing process.

16 PROSPECTIVE JUROR: See, I don't have
17 children. I just have nephews and nieces and
18 they're precious. Life is precious for children.

19 MS. SCHLAX: And I don't think there's anyone
20 that would disagree with you.

21 PROSPECTIVE JUROR: I understand that.

22 MS. SCHLAX: Um-hum. And I guess my -- my
23 question to you, and it's understandable that you
24 would feel strongly. We're talking about a child.

25 PROSPECTIVE JUROR: Right.

1 MS. SCHLAX: Is can you, just knowing
2 yourself, are you going to be able to engage in
3 that weighing process?

4 PROSPECTIVE JUROR: Yes, I will.

5 MS. SCHLAX: Okay. And in your mind, is
6 there --

7 PROSPECTIVE JUROR: My mind isn't on the
8 death penalty. My mind is on getting justice for
9 the little girl.

10 MS. SCHLAX: And I guess --

11 PROSPECTIVE JUROR: And being fair to him,
12 too.

13 MS. SCHLAX: I guess what you're saying --

14 PROSPECTIVE JUROR: We've had time to think
15 about it all week. The more you think, the more
16 there's other issues to be going on and figuring
17 out what went on, how everything works, and then
18 making your decision. That's being fair.

19 MS. SCHLAX: And it sounds like, ma'am, and
20 it can't ever be forgotten, that you almost feel
21 like, well, let's not forget that it was an eight
22 year old child, just like juror [REDACTED] had expressed.

23 PROSPECTIVE JUROR: Exactly. I have nieces
24 and nephews. They're nine, ten, two, and one.
25 Yes.

1 MS. SCHLAX: I think that's fair.

2 (Prospective jurors indicating.)

3 MS. SCHLAX: We've got a bunch.

4 MR. CALIEL: Your Honor, can we approach for
5 a second?

6 THE COURT: You may. Do you want the court
7 reporter?

8 MR. CALIEL: No.

9 (Counsel for the State and defense approached
10 the bench for a side-bar conference out of the
11 hearing of the prospective jurors and court
12 reporter.)

13 THE COURT: Ladies and gentlemen of the jury
14 panel, I've checked with the attorneys. We feel
15 this is an appropriate time to break for lunch.

16 This time there's some things we can do during
17 the lunch break to maybe shorten the afternoon
18 session. So rather than having you rush off to
19 lunch and rush back, in hopes of making the
20 afternoon session a little shorter, I want you to
21 take two hours for lunch, but two hours means,
22 please be back on the fourth floor, having gone to
23 the restroom, at 12:36 -- or 2:36. Please be up
24 there, please be ready to go, have your lunch and
25 the restroom break, and we hopefully will finish

1 this this afternoon. Thank you.

2 (Prospective jurors absent.)

3 THE COURT: In fairness, we're at lunch for
4 two hours. We may come back -- I'll give you a
5 specific time.

6 MEDIA PERSON: I just wanted to know the
7 reason.

8 THE COURT: We're not going to do anything
9 now. We're all breaking for lunch, but we may do
10 some things before the jury comes back. So we may
11 come back. Let me get what time everybody would
12 like. They're coming back at 2:36 so maybe if we
13 came back at 2:15. Would that give you all time
14 for lunch?

15 MR. CALIEL: Yes, Your Honor.

16 THE COURT: So we'll start back at 2:15 in
17 here. The jury will be back 20 minutes later. So
18 you all are welcome back at 2:15. Thank you.

19 All right. Thank you, everybody.

20 (Recess.)

21 (Defendant present.)

22 MR. CALIEL: I show, just for record's sake,
23 that right now, given the cause challenge that's
24 already been executed, the first 16 takes us
25 through juror No. [REDACTED] Are we going to consider

1 that panel and then keep on moving forward with
2 strikes taking place or are we going to go juror
3 by juror?

4 THE COURT: You mean seat No. [REDACTED]?

5 MR. CALIEL: Yes, seat No. [REDACTED]. I apologize.

6 THE COURT: What would you all like to do?

7 MS. SCHLAX: Probably consider the whole --
8 as a panel.

9 MR. CALIEL: So right now when we start at
10 strikes, it would be starting with -- I apologize.
11 It would be through seat 17 or juror No. [REDACTED]

12 MS. SCHLAX: Right.

13 MR. CALIEL: That's perfect. I think that's
14 easier to keep track of how many we have.

15 MS. SCHLAX: Right. I agree.

16 THE COURT: Okay. I'm not sure what you all
17 mean.

18 MR. CALIEL: What we mean is given the cause
19 strikes --

20 MS. SCHLAX: Well, maybe we should do it for
21 12.

22 MR. CALIEL: Oh, that's -- yeah, that's true.

23 MS. SCHLAX: Right. Let's do it for 12.

24 That until they're stricken, the first 12 jurors,
25 which because we have previous cause, No. [REDACTED] we

1 would be up to juror [REDACTED] in the 13th seat.

2 THE COURT: Okay.

3 MR. CALIEL: So unless anybody exercised a
4 strike --

5 MS. SCHLAX: That's the jury.

6 MR. CALIEL: That would be the panel, those
7 12 people.

8 THE COURT: Juror No. [REDACTED]

9 MR. CALIEL: Yes.

10 MS. SCHLAX: Yes.

11 THE COURT: Okay.

12 MR. CALIEL: And, Judge, just for the
13 record's sake, the State does not have any other
14 challenges that were not sought previously before
15 this process again.

16 MS. SCHLAX: For the record, Your Honor,
17 Julie Schlax, Charles Fletcher appearing on behalf
18 of Mr. Smith who sits to my right, we do not have
19 any exercises for cause.

20 THE COURT: Okay. Mr. Smith, do you
21 understand that no more questions are going to be
22 asked of the panel?

23 THE DEFENDANT: Yes, ma'am.

24 THE COURT: And you agree with that?

25 THE DEFENDANT: Yes, ma'am.

1 THE COURT: And we're going to start with the
2 selection of the actual jury.

3 THE DEFENDANT: Yes, ma'am.

4 THE COURT: And I'm sure your attorneys have
5 consulted with you regarding peremptory strikes
6 they might want to exercise?

7 THE DEFENDANT: Yes, ma'am.

8 THE COURT: All right. If we don't have any
9 strikes, then the panel would be seat No. ■■■, juror
10 No. ■■■ through seat No. ■■■ juror No. ■■■ correct?

11 MR. CALIEL: Correct, Your Honor.

12 MS. SCHLAX: Correct.

13 THE COURT: I usually go back and forth.

14 MR. CALIEL: That would be fine.

15 The State would exercise a peremptory strike
16 against juror No. ■■■ in seat ■■■.

17 THE COURT: And the defense.

18 MS. SCHLAX: And the defense would strike
19 juror No. ■■■ seated in seat ■■■

20 THE COURT: State.

21 MR. CALIEL: The State would strike juror No.
22 ■■■ seated in seat ■■■

23 THE COURT: And the defense.

24 MS. SCHLAX: The defense would strike juror
25 No. ■■■ seated in the ■■■ seat.

1 THE COURT: And the State.

2 MR. CALIEL: We would strike juror No. [REDACTED]

3 seated in seat [REDACTED]

4 THE COURT: And the defense.

5 MS. SCHLAX: Defense would strike juror No.

6 [REDACTED] seated in the [REDACTED] seat.

7 THE COURT: State.

8 MR. CALIEL: We would strike juror No. [REDACTED]

9 seated in seat [REDACTED]

10 THE COURT: Defense.

11 MS. SCHLAX: The defense would strike juror

12 No. [REDACTED] seated in the [REDACTED] seat.

13 THE COURT: And the State.

14 MR. CALIEL: We would strike juror No. [REDACTED] --

15 correct that -- [REDACTED] seated in seat [REDACTED]

16 MS. SCHLAX: The defense would strike juror

17 No. [REDACTED] seated in the [REDACTED] seat.

18 THE COURT: State.

19 MR. CALIEL: Juror No. [REDACTED] seated in seat [REDACTED]

20 MS. SCHLAX: The defense would strike juror

21 No. [REDACTED] seated in the [REDACTED] seat.

22 THE COURT: State.

23 MR. CALIEL: To verify, Your Honor, that

24 would take us, our [REDACTED] juror would be juror No.

25 [REDACTED] in seat [REDACTED]?

1 THE COURT: Say which one again.

2 MR. CALIEL: Juror No. [REDACTED] seated in seat [REDACTED]

3 THE COURT: I must have missed something or
4 else I can't count anymore. It looks to me like
5 the last juror would be in seat [REDACTED] No. [REDACTED]

6 MR. CALIEL: Seat [REDACTED] was struck for cause,
7 Your Honor. He was the Navy personnel.

8 THE COURT: I'm sorry. I'm using a new sheet
9 because my old sheet is so marked up I can't fit
10 anything else on it. Thank you. You're correct.

11 If we stop now, the 12 jurors would then be
12 [REDACTED] juror No. [REDACTED].

13 MR. CALIEL: The State would accept.

14 MS. SCHLAX: The defense would strike juror
15 No. [REDACTED] seated in the [REDACTED] seat.

16 THE COURT: State.

17 MR. CALIEL: The State would strike juror No.
18 [REDACTED] seated in seat [REDACTED]

19 THE COURT: The defense.

20 MS. SCHLAX: The defense would strike juror
21 No. [REDACTED] seated in the [REDACTED] seat.

22 THE COURT: State.

23 MR. CALIEL: Judge, are you prepared for us?

24 THE COURT: I'm sorry. I just didn't speak
25 loud enough. State.

1 MR. CALIEL: Juror No. [REDACTED] seated in seat [REDACTED]
2 THE COURT: Defense.
3 You've used eight strikes, I think.
4 MS. SCHLAX: Yes.
5 The defense would strike juror No. [REDACTED] seated
6 in the [REDACTED] seat.
7 THE COURT: State.
8 MR. CALIEL: We would strike juror No. [REDACTED]
9 seated in seat [REDACTED].
10 MS. SCHLAX: The defense would strike juror
11 No. [REDACTED] seated in the [REDACTED] and seat.
12 MR. CALIEL: We would strike juror No. [REDACTED] --
13 correct that -- juror No. [REDACTED] seat [REDACTED]
14 THE COURT: Is that ten each?
15 MS. SCHLAX: That's ten each.
16 MR. CALIEL: That's ten each, Your Honor.
17 THE COURT: If I recall correctly, for the
18 record, there was a juror yesterday --
19 MS. SCHLAX: But then he ended up actually
20 seeking to be excused because of his cruise.
21 THE COURT: Oh, okay.
22 MS. SCHLAX: So we're not requesting any
23 additional peremptories.
24 THE COURT: Okay. Do you want to seat --
25 MS. SCHLAX: Four alternates?

1 THE COURT: Yes. Do you want to ask
2 Mr. Smith if he's fine with that?

3 MS. SCHLAX: I'll ask him if he agrees with
4 the 12.

5 THE DEFENDANT: Yeah, we're good to go,
6 ma'am.

7 THE COURT: Okay. You agree with the 12.

8 MR. CALIEL: Your Honor, to clarify, as the
9 jury is seated now would be juror No. [REDACTED] juror No.
10 [REDACTED] juror No. [REDACTED] juror No. [REDACTED]
11 juror No. [REDACTED] juror No. [REDACTED] juror No. [REDACTED] juror
12 No. [REDACTED] juror No. [REDACTED] juror No. [REDACTED] and juror No.
13 [REDACTED]

14 THE COURT: That's what I have.
15 Is that what the defense has?

16 MS. SCHLAX: Yes. Yes.

17 THE COURT: Okay. Then we need to pick four
18 alternates. So how many strikes would you like
19 for that?

20 MR. CALIEL: I'll defer to the defense how
21 many they want.

22 THE COURT: I think usually it's two. Two
23 strikes, isn't it? When we're selecting two
24 alternates we have two strikes.

25 MS. SCHLAX: We'd ask for one strike per

1 alternate.

2 THE COURT: So four.

3 MS. SCHLAX: Yes.

4 THE COURT: That's what I'm saying. It will
5 be four strikes for the alternate.

6 State.

7 MR. CALIEL: We would accept juror No. [REDACTED].

8 MS. SCHLAX: As would the defense.

9 THE COURT: Juror No. -- you mean seat No.

10 [REDACTED]

11 MR. CALIEL: Seat No. [REDACTED] juror No. [REDACTED].

12 THE COURT: Then juror No. [REDACTED]

13 MR. CALIEL: The State would accept juror No.

14 [REDACTED]

15 MS. SCHLAX: The defense would strike juror
16 No. [REDACTED]

17 THE COURT: Juror No. [REDACTED]

18 MS. SCHLAX: Acceptable to the defense.

19 MR. CALIEL: We would accept juror No. [REDACTED]

20 THE COURT: Juror No. [REDACTED]

21 MS. SCHLAX: Was previously caused, Your
22 Honor.

23 THE COURT: Thank you.

24 Juror No. [REDACTED]

25 MS. SCHLAX: Is acceptable to the defense.

1 MR. CALIEL: We would strike juror No. [REDACTED]

2 THE COURT: Each of you used one strike, is
3 that correct?

4 MR. CALIEL: Yes, Your Honor.

5 THE COURT: Juror No. [REDACTED]

6 MS. SCHLAX: The defense would strike.

7 THE COURT: Juror No. [REDACTED]

8 MS. SCHLAX: Acceptable to the defense.

9 MR. CALIEL: The State would strike.

10 THE COURT: Juror No. [REDACTED]

11 MS. SCHLAX: So far the defense has only used
12 one or two?

13 THE COURT: Two.

14 MS. SCHLAX: And the State has used?

15 THE COURT: Two. Oh, yeah, two, I think.

16 They've stricken [REDACTED] and [REDACTED] and you've stricken --

17 MR. CALIEL: We have used two, Your Honor.

18 MS. SCHLAX: [REDACTED] is acceptable to the defense.

19 MR. CALIEL: [REDACTED] is acceptable to the State.

20 THE COURT: Juror No. [REDACTED]

21 MS. SCHLAX: The defense strikes juror No.
22 [REDACTED]

23 THE COURT: Juror No. [REDACTED]

24 MR. CALIEL: We would accept, Your Honor.

25 (Defense counsel conferring with defendant.)

1 MS. SCHLAX: [REDACTED] is acceptable, Your Honor.

2 THE COURT: I think that's four alternates.

3 MR. CALIEL: Yes, Your Honor, it is.

4 THE COURT: Numbers [REDACTED] and [REDACTED] Is
5 that correct?

6 MS. SCHLAX: Yes.

7 MR. CALIEL: That is correct, Your Honor.

8 THE COURT: So just to make sure I have this
9 correct. We're going to be asking juror No. [REDACTED]

10

11 [REDACTED] and [REDACTED] Is that correct?

12 MS. SCHLAX: Yes, Your Honor.

13 THE COURT: I think the way I used to do it
14 is bring the whole panel in, I'll tell the jurors
15 to remain in their seat, excuse the rest with our
16 thanks, they leave and then we bring the jurors
17 who have been chosen and put them in the jury box
18 so they'll see where they're going to be sitting
19 during the trial. I'll give them a few
20 instructions and then they'll go back into the
21 jury rooms, give their phone numbers and things
22 like that and then be released.

23 MR. FLETCHER: I'm sorry, Your Honor. We
24 were talking.

25 MS. SCHLAX: We didn't hear what you said.

1 THE COURT: Oh, didn't you? I think the way
2 we did it was I bring them all in, I tell them the
3 numbers who are going to be on the jury and tell
4 the jury to remain in their seats, I excuse
5 everyone else with our thanks and after they've
6 left bring the jurors up here one at a time to
7 their seats, I give them a few instructions and
8 then they go to the jury room with the bailiff to
9 give their phone numbers, get instructions on
10 their parking ticket, things like that and then
11 they leave.

12 MS. SCHLAX: Yes, Your Honor.

13 THE COURT: Is that all right or do you
14 prefer me to call them up?

15 MS. SCHLAX: I was going to suggest it might
16 be easier, there's so many jurors, for them to
17 leave instead of people having to step around
18 them.

19 THE COURT: That's what I'm saying.

20 MS. SCHLAX: Oh. To call them up and put
21 them in the box.

22 THE COURT: To bring them up here while
23 everyone's in here.

24 MR. CALIEL: I agree, Your Honor, because
25 they're sort of scattered about.

1 THE COURT: So I'll call their number, ask
2 them to come forward and Jeff or someone will show
3 them where to sit.

4 MS. SCHLAX: Yes.

5 THE COURT: Then once we get to the last one,
6 I'll excuse the others with our thanks and then
7 I'll talk to the jury.

8 MS. SCHLAX: Yes, Your Honor.

9 THE COURT: Is that how you all prefer it?

10 MS. SCHLAX: Yes, Your Honor.

11 BAILIFF: A start time for Monday?

12 THE COURT: What time do you want me to tell
13 them to be here on Monday? Are any of them here
14 that don't know how to be on time?

15 MS. SCHLAX: I don't think so.

16 MR. CALIEL: No, Your Honor.

17 THE COURT: What would you all like?

18 MS. SCHLAX: Should we say they should be
19 here at 9:00?

20 THE COURT: I think they should be here at
21 least at 9:00 and tell them we'll start by 9:30 or
22 tell them to be here at 8:30. I think it's easier
23 for them to be here at 9:00 because of the
24 traffic.

25 MR. CALIEL: I think 9:00 is fine.

1 THE COURT: And when I talk to the jury I'll
2 explain to them at least for the first day they'll
3 be pretty much a normal business day, you know,
4 they won't be here late. We don't know how the
5 rest of the week will go. We'll know more later.

6 Okay. Everybody ready?

7 BAILIFF: 9:00? I missed it. You said 9:00,
8 Judge?

9 THE COURT: We want the jury here at 9:00.

10 Before they come in, I don't know if I asked
11 you, do you agree with the panel and the alternates?

12 THE DEFENDANT: Yes, ma'am.

13 THE COURT: So those are the 16 people that
14 will be serving on the jury. You understand?

15 THE DEFENDANT: There'll be 16.

16 THE COURT: Okay. Normally they would just
17 wear a juror button. I don't know of any reason
18 why they would need the numbers.

19 MS. SCHLAX: No, Your Honor.

20 THE COURT: Madam Clerk has their numbers for
21 purposes of polling the jury. Remember that must
22 be done. So I don't think we need their numbers,
23 but as long as we've got them lined up by number.
24 I don't think they need to have their number
25 anymore.

1 MS. SCHLAX: I don't think so.

2 THE COURT: As long as they have a juror
3 button.

4 BAILIFF: And then Monday morning we're going
5 to have them come to the employee door and escort
6 them.

7 THE COURT: Right. You all explain that.

8 BAILIFF: Right. We'll walk them out the
9 employee door.

10 THE COURT: They tell them how to get in, how
11 to move, how to get up here. They bring them up
12 here and get their parking ticket, things like
13 that so they can come and get it. You won't see
14 them in the hall again. You might happen to see
15 them right when they're walking up. They'll be at
16 the door waiting on us. We'll probably already be
17 in here.

18 Is everybody ready for the jury panel to come
19 back in?

20 MR. CALIEL: Yes, Your Honor.

21 BAILIFF: Are you ready, Judge?

22 THE COURT: Ready.

23 (Prospective jurors present.)

24 BAILIFF: Everybody here, ma'am.

25 THE COURT: Thank you.

1 Thank you, ladies and gentlemen. I hope you
2 enjoyed that break. And because I gave you the
3 longer break, we were, in fact, able to complete
4 some responsibilities while you were on your break
5 so we can conclude this session and finish the jury
6 selection process.

7 In just a moment I'm going to announce the
8 numbers of the persons who will be on the jury.
9 Because this side over here is seated from left to
10 right for us and right to left for you, the lower
11 numbers are on the inside of the row. So if there's
12 more than one juror on the row, if the two or three
13 or four of you, whatever it is, will come out of the
14 row and go back in the aisle so that the last person
15 who's the lower number can come up first, they're
16 going to come up and be seated in the jury box so
17 they'll know where the seats are and Officer Farah
18 will direct them to where they need to sit. Over
19 here you're seated the other way, so how you're
20 called is the order you'll come up.

21 The following person -- everybody else needs to
22 remain in their seat for a few minutes.

23 The persons that will be serving on the jury by
24 number are juror No. [REDACTED] juror No. [REDACTED] juror No. [REDACTED]
25 and juror No. [REDACTED] in the first row. [REDACTED] and

1

[REDACTED]

2

BAILIFF: I need the low number first. Come all the way down there.

3

4

THE COURT: So it be [REDACTED] going in the row.

5

6

And the next row, jurors No. [REDACTED] and [REDACTED] So it will be [REDACTED]

7

8

BAILIFF: Yes, ma'am.

9

10

THE COURT: And the next row, jurors No. [REDACTED] and [REDACTED] And the next row juror No. [REDACTED] And the next row there's four, [REDACTED]

11

12

[REDACTED]

13

BAILIFF: Yes, ma'am. All the way in.

14

THE COURT: Over here on the front row, jurors No. [REDACTED]

15

16

Thank you.

17

Those of you in the jury box are going to stay for a few minutes while I give you some instruction. For the rest of you, all of us, all parties, the bailiffs, me, everyone, would like to thank you so much for your patience this week. We all really appreciate your willingness to serve. We know this has been an inconvenience and a very difficult week in a lot of ways, but our system would not work without your willingness to do this and all of you

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1 being here was extremely important and we thank you
2 for that.

3 You are free to go. You have completed your
4 jury service. Thank you.

5 (Prospective jurors excused.)

6 THE COURT: Thank you, ladies and gentlemen.
7 I'm going to give you a few what I call
8 housekeeping instructions. First of all, as you
9 will recall, we anticipate that the guilt phase of
10 the trial will probably take four days next week
11 and we will start Monday -- we will start everyday
12 when you come at 9:00 o'clock. We start a little
13 earlier, but we need you to come -- is that right,
14 9:00? Isn't that what we decided?

15 MR. CALIEL: Yes, Your Honor.

16 THE COURT: Well try to have you in here
17 started by 9:30, but we have things we have to
18 take care of everyday to get started. May not be
19 ready right at 9:00.

20 These are the seats for the trial. These are
21 the seats you need to sit in everyday and if you
22 forget where you need to sit we'll help you with
23 that.

24 You can park in the garage across the street
25 everyday that you're here and bring your parking

1 tickets and the bailiff is going to give you some
2 more information about that. They'll bring them
3 to us and they'll take them and get them validated
4 so you don't have to go through that process.

5 Back to the schedule, we anticipate if there is
6 a second phase it would start on Tuesday, the 20th,
7 because Monday, the 19th is a holiday and we
8 anticipate it would be three days. So that's the
9 anticipated schedule, four days next week, and if
10 necessary, three days the following week.

11 If you need to get verification of your service
12 for your employer, you do that through the clerk on
13 the second floor at jury assembly.

14 It's all right for you to bring bottled water.
15 That's the only thing you can bring into the
16 courtroom. But you can bring other beverages --
17 well, not all beverages, but you can bring a Coke or
18 whatever you prefer, tea, whatever. We'll have
19 coffee for you. You don't have to bring coffee.
20 And the clerk is providing that and they've also
21 agreed to provide some snacks so that when we do
22 take breaks during the day we need to do some things
23 and you'll go to the jury room and there'll also be
24 some things there for you, but if you're on a
25 special diet or anything like that you're welcome to

1 bring whatever you want to the jury room.

2 A lot of people get cold in here, particularly
3 if you're cold-natured, you might want to bring a
4 lightweight sweater or a light jacket so you have
5 something available if you do get cold.

6 Your cell phones or other electronic devices,
7 when you're here in trial, they are safe in the jury
8 room. No one can go in there. But you may bring
9 them into the courtroom if you're uncomfortable
10 doing that, but they have to be off. Not on
11 vibrate, not on silent. They have to be actually
12 off so that there's no inference, at least once
13 during the trial, whether it's me or somebody in the
14 audience or somebody will have a phone go off, but I
15 don't want it to be you. So you may leave them in
16 there. You'll have plenty of opportunity to check
17 your messages and things like that.

18 If you need a break and we're not taking a
19 break, all you have to do is raise your hand, say,
20 Judge, we need a break. You don't have to tell me
21 why. Just say, Judge, we need a break. And there's
22 always natural breaks every time a witness finishes
23 before the next witness comes in and we're always
24 willing for you to take a break if you need to take
25 a break. But if you do, we all take one at once.

1 You all have to be in here or you all have to be out
2 of here.

3 Again, the cautionary instruction about getting
4 information about the case from the outside. I
5 anticipate there will be a lot of coverage tonight,
6 maybe tomorrow or Sunday, maybe Saturday, tomorrow.
7 I'm tired, too. Please be careful and don't watch
8 the news, don't look at the news, change -- change
9 the channel. I'm not saying you can't watch TV, of
10 course you can, but change the channel if the news
11 is coming on.

12 Don't read the paper. You get the papers, just
13 ask your family to save it for you. They can give
14 you the lifestyle or the sports, but not the rest.
15 And, of course, don't let any family member or
16 friend give you any information. If they try to ask
17 you about it, you just simply say, again, that the
18 Judge has ordered you not to talk about it.

19 Again, we're not allowed to speak to you
20 outside of the courtroom so, again, we're not being
21 rude. We're just following the rules and I think
22 you can understand that.

23 I don't think there's anything else that we
24 need to discuss.

25 You're actually going to go into the jury room

1 so you can see what your jury room is and the
2 bailiffs will work with you on your -- we're going
3 to replace your number with a jury badge. We have
4 your numbers recorded. And they're going to talk to
5 you about your parking ticket, where they will meet
6 you each morning. They'll bring you up in a group
7 and they'll go over all that with you. So, thank
8 you, like the others, for your time and attention.

9 MR. CALIEL: Your Honor, the only thing in
10 case of an emergency should we gather their
11 numbers and give them a number in case somebody
12 needs to get in contact with us?

13 THE COURT: Please.

14 BAILIFF: There's a number on your sheet
15 right there. That's downstairs in the jury
16 assembly. See the phone number there?

17 THE COURT: And they're going to take your
18 phone numbers. We have to be able to reach you if
19 for some reason you don't need to come in, we need
20 to be able to reach you, and if for some reason
21 you're not here when you're supposed to be, we
22 need to check and make sure you're okay. So we do
23 need a number to reach you and nobody else has it
24 but the bailiffs and they'll destroy it when the
25 trial is over.

1 Anything else?

2 MS. SCHLAX: No, Your Honor.

3 MR. CALIEL: Not from the State.

4 THE COURT: Okay. With that and our
5 gratitude, you're free to go to the back. You
6 won't be there very long and then you'll be
7 released.

8 (Jury absent.)

9 THE COURT: Any exceptions or objections?

10 MR. CALIEL: None from the State, Your Honor.

11 MS. SCHLAX: No, Your Honor.

12 THE COURT: Is there anything else we need to
13 do before we recess?

14 MR. CALIEL: I don't believe so. You would
15 like us here at 8:45 on Monday?

16 THE COURT: I think so.

17 MS. SCHLAX: Yes, Your Honor.

18 THE COURT: I think as long as we get started
19 with them by 9:30, barring some sort of lengthy
20 discussion that has to be held on something that
21 we're not aware of yet, I think as long as we get
22 them in here. They'll have time to use the
23 restroom, get a cup of coffee. So they're okay
24 for a few minutes. And sometimes if we try to
25 rush them out too quick they're not ready. So

1 thank you all very much. I know it's been a
2 difficult week for everybody. We really
3 appreciate that. And get some rest and some good
4 food and we'll see you Monday morning.

5 You want the Defense Exhibit filed?

6 MS. SCHLAX: I think we probably should just
7 to create a record.

8 THE COURT: Okay. Ms. Schlax, you just want
9 the photo left as an identification number?

10 MS. SCHLAX: Yes, Your Honor, because it
11 won't be used again in the trial, but I think for
12 record, appellate purposes it should be.

13 THE COURT: Ms. Schlax and Ms. Nelson, the
14 first group that we struck, I did as a court
15 exhibit. There's questionnaires. We've struck
16 others since then and we also never even got to
17 some. Do you want them --

18 MS. SCHLAX: I think so as not to have an
19 issue, because I was just making a note for myself
20 that I better keep those -- I never withdrew them.
21 But the 200 to 300 --

22 THE CLERK: We have all the originals.

23 THE COURT: They have to be an exhibit.

24 MS. SCHLAX: I think we make our lives easier
25 in the long run to have those.

1 THE CLERK: Do you want them as one court
2 exhibit? I have all the cause separated out.

3 THE COURT: Yeah, that's fine.

4 THE CLERK: Do it as one composite?

5 THE COURT: That's fine. That's fine.

6 Is that all right?

7 MS. SCHLAX: Yes.

8 THE CLERK: Just do everything as one, not
9 separate them out. We have to pull those first
10 ones out. I just wanted to make sure you wanted
11 everything together.

12 MS. SCHLAX: No, I'm --

13 THE CLERK: The first handful that we struck
14 immediately.

15 MS. SCHLAX: No, just as long as we have all
16 300 in the record.

17 THE CLERK: Then we'll just do that.

18 MS. SCHLAX: As long as we have that.

19 (Evening recess.)

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IN THE CIRCUIT COURT OF THE
FOURTH JUDICIAL CIRCUIT, IN
AND FOR DUVAL COUNTY, FLORIDA.

Case No: 2013-CF-5781-AXXX-MA

Division CR-D

STATE OF FLORIDA

-vs-

DONALD SMITH,

Defendant,

TESTIMONY AND PROCEEDINGS taken before the
Honorable Mallory D. Cooper, Judge of the Circuit Court,
on February 12, 2018, and as reported by Faye M. Gay,
Certified Realtime Reporter, Registered Merit Reporter,
and Certified Legal Video Specialist.

OFFICIAL REPORTERS, INC.
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 Appearing on behalf of the State of Florida.

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 Appearing on behalf of the State of Florida

7

8 JULIE SCHLAX and CHARLES FLETCHER, Esquires,

9 Appearing on behalf of the Defendant.

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1 (Jury absent.)

2 (Defendant present.)

3 THE COURT: Good morning, everyone. I see
4 Mr. Smith is in the courtroom with his attorneys,
5 the State is present.

6 And I don't know if there's anything we need to
7 go over before we get started with the jury.

8 MS. SCHLAX: Your Honor, we'd just like to
9 renew all previous objections we have made. When
10 certain evidence is admitted, we will renew those
11 objections.

12 THE COURT: Okay.

13 MR. CALIEL: And, Your Honor, I've had a
14 conversation with defense counsel and our first
15 witness is the mother of the victim, Rayne
16 Perrywinkle.

17 As the Court remembers, there was a fairly
18 lengthy motion in limine hearing regarding items
19 pertaining to her testimony. A number of those
20 items were ruled on. However, a number were also
21 taken under advisement by the Court and its order
22 directed the defense to proffer that evidence.

23 I believe probably the most logical way to do
24 this would be that after the State finishes their
25 direct examination to excuse the jury to allow that

1 proffer at that point in time so that then the Court
2 can make a ruling as to the relevance of the items
3 that were enumerated in the Court's order.

4 THE COURT: Okay.

5 MS. SCHLAX: And that's fine, Your Honor.

6 THE COURT: There is a preliminary
7 instruction for the jury regarding Mr. Smith's
8 right to remain silent. Do you wish me to read
9 that to the jury?

10 MS. SCHLAX: Yes, Your Honor.

11 THE COURT: Okay. And who's going to open
12 for the State?

13 MS. NELSON: I am, Your Honor.

14 THE COURT: Okay. And for the defense.

15 MS. SCHLAX: I am, Your Honor.

16 THE COURT: Thank you.

17 Is our jury all here?

18 BAILIFF: No, ma'am, we're missing one.

19 THE COURT: Anyway, so we have to wait for
20 that last panel member to get here.

21 (Brief pause.)

22 THE COURT: My understanding is they're all
23 here now. The rest are coming, maybe on their way
24 up. We'll give them a couple of minutes and then
25 we'll get started.

1 (Brief pause.)

2 BAILIFF: They're here.

3 THE COURT: Are they ready or do they
4 probably need a minute?

5 BAILIFF: They probably need a minute.

6 THE COURT: Okay. Brief pause.

7 (Brief pause.)

8 BAILIFF: Are you ready?

9 THE COURT: Are they ready?

10 BAILIFF: Yes.

11 THE COURT: Everyone ready to get started?

12 MS. SCHLAX: Yes, Your Honor.

13 MR. CALIEL: Yes, Your Honor.

14 THE COURT: We're ready.

15 BAILIFF: The jury is entering the courtroom.

16 (Jury present.)

17 THE COURT: Thank you, ladies and gentlemen.

18 Madam Clerk, would you swear the jury for the
19 trial, please?

20 (Jury sworn.)

21 (Affirmative response.)

22 THE COURT: You may be seated.

23 Good morning, ladies and gentlemen of the jury.

24 (Jury responding good morning.)

25 THE COURT: I'll start with a question you'll

1 hear first everyday. Were you each able to follow
2 my instructions regarding not receiving any
3 outside information from any source on this case?

4 (Affirmative response from prospective
5 jurors.)

6 THE COURT: Was there anyone unable to do
7 that?

8 (No response from jurors.)

9 THE COURT: Okay. The record will reflect
10 that everyone has agreed that they followed my
11 instructions.

12 Thank you for doing that.

13 I know the weather wasn't really great for
14 getting here today, but thank you for those
15 efforts.

16 Ladies and gentlemen of the jury, you have been
17 selected and sworn as the jury to try the case of
18 the State of Florida versus Donald James Smith.

19 This is a criminal case. The defendant in this
20 case is charged with murder in the first degree,
21 kidnapping a child under the age of 13 years and
22 sexual battery on a child less than 12 years old.

23 The definition of the elements of those crimes
24 will be explained to you later.

25 It is your solemn responsibility to determine

1 if the State has proved its accusations beyond a
2 reasonable doubt against this defendant. Your
3 verdict must be based solely on the evidence or lack
4 of evidence and the law.

5 The Indictment, which I read to you last
6 Thursday, is not evidence and is not to be
7 considered by you as any proof of guilt.

8 It is the Judge's responsibility to decide
9 which laws apply to this case and then to explain
10 those laws to you. It is your responsibility to
11 decide what the facts of this case may be and to
12 apply the law to those facts. Thus the province of
13 the jury and the province of the Court are
14 well-defined and they do not overlap. This is one
15 of the fundamental principles of our system of
16 justice.

17 Before proceeding further, it will be helpful
18 if you understand how a trial is conducted. At the
19 beginning of the trial the attorneys will have an
20 opportunity, if they wish, to make an opening
21 statement. The opening statement gives the
22 attorneys a chance to tell you what evidence they
23 believe will be presented during the trial. What
24 the lawyers say is not evidence and you are not to
25 consider it as such.

1 Following the opening statements witnesses will
2 be called to testify under oath. They will be
3 examined and cross-examined by the attorneys.
4 Documents and other exhibits also may be produced as
5 evidence.

6 After the evidence has been presented, the
7 attorneys will have the opportunity to make their
8 final argument. Following the arguments by the
9 attorneys, the Court will instruct you on the law
10 that's applicable to this case.

11 After the instructions are given, you will then
12 retire to consider your verdict. You should not
13 form any defendant or fixed opinion on the merits of
14 this case until you have heard all the evidence, the
15 arguments of the lawyers and the instructions on the
16 law by the Judge. Until that time you should not
17 discuss the case among yourselves.

18 I'll now instruct you not to communicate with
19 anyone, including your fellow jurors, about this
20 case. No communication includes no e-mailing, text
21 messaging, Tweeting, blogging or any other form of
22 communication. You cannot do any research about the
23 case or look up any information about the case. If
24 you become aware of any violation of any of these
25 rules at all, please notify one of the bailiffs who

1 will notify me.

2 During the course of the trial the Court will
3 take recesses and you will be permitted to separate
4 and go about your personal affairs. During these
5 recesses you must not discuss this case with anyone,
6 nor permit anyone to say anything to you or in your
7 presence about this case. If anyone attempts to say
8 anything to you or in your presence about this case,
9 tell them that you are on the jury that is trying
10 the case and ask them to stop. If they persist,
11 leave them at once and immediately report the matter
12 to a bailiff who will advise me.

13 All cell phones, computers, tablets or other
14 types of electronic devices must be turned off while
15 you are in the courtroom. Turned off means that the
16 phone or other electronic device is actually off and
17 not in silent or vibrating mode.

18 You may use these devices during recesses, but
19 even then you may not use your cell phone or
20 electronic device to find out any information about
21 this case or to communicate with anyone about this
22 case or the people involved in this case.

23 Do not take photographs, video recordings or
24 audio recordings of the proceedings or of your
25 fellow jurors. After each recess please

1 double-check to make sure that your cell phone or
2 electronic device is turned off.

3 At the end of the case while you are
4 deliberating, you must not communicate with anyone
5 outside of the jury room and you cannot have in the
6 jury room with you any cell phones, computers or
7 other electronic devices.

8 We actually collect them before you begin
9 deliberations. We keep them for you out here. We
10 give you a contact number in case someone needs to
11 contact you in the case of an emergency and we can
12 receive those messages at that number and deliver
13 them to you. And we'll provide you with a contact
14 number when the time is necessary.

15 The case must be tried by you only on the
16 evidence presented during the trial in your presence
17 and in the presence of the defendant, the attorneys
18 and the Judge.

19 Jurors must not conduct any investigation of
20 their own. This includes reading newspapers,
21 watching television or using a computer, cell phone,
22 the internet, any electronic device or any other
23 means at all to get information related to this case
24 or the people and places involved in this case.

25 This applies whether you are in the courthouse,

1 at home or anywhere else.

2 You must not visit places mentioned in the
3 trial or use the internet to look at maps or
4 pictures to see any place discussed during the
5 trial.

6 Jurors must not have discussions of any sort
7 with friends or family members about the case or the
8 people and places involved. So, do not let even the
9 closest family members make comments to you or ask
10 questions about this trial.

11 In this age of electronic communication I want
12 to stress again that just as you must not talk about
13 this case face-to-face, you must not talk about this
14 case by using any electronic device.

15 You must not use phones, computers or other
16 electronic devices to communicate. Do not send or
17 accept any messages related to your jury service.
18 Do not discuss this case or ask for advice by any
19 means at all, including posting information on an
20 internet website, chat room or blog.

21 You may wonder what are the reasons for these
22 rules. These rules are imposed because jurors must
23 decide the case without distraction and only on the
24 evidence presented in the courtroom. If you
25 investigate, research or make inquiries on your own,

1 the trial judge has no way to make sure that the
2 information you obtain is proper for this case. The
3 parties, likewise, have no opportunity to dispute or
4 challenge the accuracy of what you find and that is
5 contrary to our judicial system which assures every
6 party the right to ask questions about and challenge
7 the evidence being considered against it and to
8 present argument with respect to that evidence. Any
9 independent investigation by a juror unfairly and
10 improperly prevents the parties from having that
11 opportunity that our judicial system promises.

12 Any juror who violates these restrictions
13 jeopardizes the fairness of these proceedings and a
14 mistrial could result that would require the entire
15 trial process to start over.

16 A mistrial is a tremendous expense and
17 inconvenience to the parties, the Court and the
18 taxpayers.

19 If you violate these rules, you may be held in
20 contempt of court and face sanctions such as serving
21 time in jail, paying a fine or both.

22 In every criminal proceeding a defendant has
23 the absolute right to remain silent. At no time is
24 the duty of a defendant to prove his innocence.
25 From the exercise of a defendant's right to remain

1 silent a jury is not permitted to draw any inference
2 of guilt and the fact that a defendant did not take
3 the witness stand must not influence your verdict in
4 any manner whatsoever.

5 The attorneys are trained in the rules of
6 evidence and trial procedure and it is their duty
7 to make all objections that they feel are proper.
8 When an objection is made, you should not speculate
9 on the reason why it is made. Likewise, when an
10 objection is sustained or upheld by me, you must
11 not speculate on what might have occurred had the
12 objection not been sustained, nor what a witness
13 might have said had he or she been permitted to
14 answer.

15 During the trial it may be necessary to confer
16 with the attorneys out of your hearing to discuss
17 matters of law and other matters that require
18 consideration by me alone. It is impossible to
19 predict when such a conference may be required or
20 how long it will last. When such conferences occur,
21 they will be conducted so as to consume as little of
22 your time as is necessary for a fair and orderly
23 trial of the case.

24 I think you've been given notepads and a pen.
25 If you would like to take notes during the trial you

1 may do so. On the other hand, of course, you're not
2 required to take notes if you do not want to. That
3 is left up to each one of you individually. I have
4 provided you with a notepad and a pen for your use
5 if you do wish to take notes. Any notes that you
6 take will be for your own personal use. However,
7 you are not allowed to take them with you from the
8 courtroom.

9 During recesses the bailiff will take
10 possession of your notes and will return them to you
11 when we reconvene. After you have completed your
12 deliberations, the bailiff will deliver your notes
13 to me, they will be destroyed and no one else will
14 ever read your notes.

15 If you do take notes, do not get so involved in
16 note-taking that you become distracted from the
17 proceeding. Your notes should be used only as an
18 aid to your memory. Whether or not you take notes,
19 you should rely on your memory of the evidence and
20 you should not be unduly influenced by the notes of
21 other jurors. Notes are not entitled to any greater
22 weight than each juror's memory of the evidence.

23 And, ladies and gentlemen, whether you're going
24 to take notes or not, if you would please just write
25 only your juror number on the top of your legal pad

1 on the first page so we can identify which seat it
2 belongs to. And don't write your name, just your
3 juror number.

4 Okay. It appears everyone has done that.
5 We're ready to proceed.

6 We start with opening statements, we start with
7 the State and I call on Ms. Nelson.

8 MS. NELSON: May it please the Court.

9 THE COURT: Yes.

10 MS. NELSON: Counsel.

11 Members of the jury.

12 Cherish Perrywinkle was eight years old. She
13 weighed 67 pounds. Separated from her mother, her
14 little sisters, from all she knew safe in this
15 world. She spent the last petrifying hours of her
16 life with him. He gagged her, he raped her, he
17 sodomized her, and then he strangled her. He gagged
18 her with such force her gums and her nostrils bled.
19 He strangled her with such force her eyeballs bled.
20 Cherish did not die quickly and she did not die
21 easily. In fact, hers was a brutal and torturous
22 death.

23 And after he killed her, he pulled her little
24 lifeless body through the woods, pushed it under the
25 water, forced it under a tree, and took asphalt

1 bricks and debris and weighed her down.

2 Because he planned for no one to find her. But
3 as you will learn, things did not go according to
4 his plans. He was caught. She was found. And
5 though not in enough time to save her young life, in
6 enough time to collect and gather the incriminating
7 evidence of his guilt. Evidence on her body and in
8 her body that would tell us, and now will tell you,
9 the grim truth of her horrific death.

10 This is our chance now to tell you about what
11 that evidence is. I'm Melissa Nelson and together
12 with Mark Caliel and Vanessa Sanchez-Wheeler we
13 represent the people of the State of Florida in this
14 matter.

15 And as Judge Cooper has told you, the State of
16 Florida has indicted the defendant, Donald Smith,
17 with the kidnapping of eight year old Cherish
18 Perrywinkle, with the sexual battery of Cherish
19 Perrywinkle, and with the first degree murder of
20 Cherish Perrywinkle. In lay terms for taking,
21 raping and killing her.

22 Ladies and gentlemen, the evidence in this
23 case, piece by piece, we will present to you and
24 show you and prove to you an insurmountable case of
25 guilt in this case. So what can you expect?

1 Defense counsel told you last week that the evidence
2 in this case is both gut wrenching and gruesome.
3 Those were their words. It is graphic, it is
4 disturbing, and while last week during jury
5 selection there were moments of levity where we and
6 he even laughed. I assure you there are no moments
7 of laughter in this trial. I do not think it will
8 be an overstatement to say that each of you will be
9 changed at the end of this trial. The evidence is
10 graphic, but every person has a constitutional right
11 to confront the evidence against him, no matter the
12 weight, the nature or the volume of that evidence.
13 It is your job to look at that evidence, the
14 evidence of his destruction. It is an important
15 duty and we thank you for your time already that
16 you've invested and for the time that you will
17 invest this next week.

18 Five years ago, almost five years ago, on a
19 humid night in June of 2013, Rayne Perrywinkle took
20 her three daughters, Cherish, [REDACTED] and [REDACTED] to
21 the Family Dollar and the Dollar General to shop for
22 clothes.

23 You will learn that Cherish was leaving the
24 next morning to go to California where she was going
25 to spend the summer with her father and her mother,

1 Rayne, wanted to send her there with new clothes.
2 Rayne didn't have a car, in fact, she didn't drive.
3 So she and her three little girls walked almost a
4 mile to the Family Dollar near their house. Rayne
5 had one hundred dollars to spend and there she
6 bought some things for their household, she looked
7 for some clothes, she didn't find any, she took her
8 daughters across the street to the Dollar General.
9 Shortly after they arrived there so did he.

10 He watched Rayne. He watched Rayne as she took
11 dresses to the counter and as she debated trying to
12 find out the prices of the dresses, and he watched
13 her after she determined the dresses were too
14 expensive for her to buy.

15 You'll learn that of that one hundred dollars
16 Rayne had to make sure she saved enough money for
17 the next morning to get her daughter, Cherish, in a
18 taxicab to the airport and her mother and Rayne back
19 to her home. He watched as she returned those
20 dresses.

21 Themes will become quite evident as you hear
22 the evidence in this case. Selection, intention,
23 and deception. You will see that he selected Rayne
24 Perrywinkle. He waited for Rayne Perrywinkle and
25 when she walked outside the Dollar General, he

1 introduced himself, started small talk, said, gosh,
2 you look like you have your hands full with those
3 little girls. He told her he had noticed she'd been
4 unable to buy that dress and then he told her that
5 he and his wife had a gift card to Walmart that they
6 didn't need and he would love to be able to share it
7 with Rayne. \$150. To Rayne Perrywinkle that might
8 as well have been \$5000. \$150 for Rayne Perrywinkle
9 would mean she could buy dresses for all three of
10 her little girls. Not just Cherish.

11 He told her that his wife would meet them at
12 the Walmart 15 minutes away. But you'll learn this
13 was a lie. A scam. A trap because Donald Smith
14 didn't have a wife. There was no gift card. And a
15 terrible, irresponsible and forever irreversible
16 mistake Rayne Perrywinkle agreed to that ride.
17 Rayne believed this man. She believed his offer of
18 a helping hand and she and her three daughters got
19 into his car, a van.

20 You will inevitably wonder how, how could she
21 be so naive. How could she put her own children at
22 such risk. But you'll have the opportunity this
23 morning, in fact, to meet Rayne Perrywinkle. The
24 nice thing about trials is that you get to meet
25 people at the witness stand. And I suspect it will

1 become abundantly clear to you why he picked her,
2 why he selected Rayne. You see, her naivete is what
3 he needed to get what he wanted.

4 At 8:38 p.m. Rayne and her daughters got into
5 this man's van and they left to go to Walmart. They
6 arrived maybe 15, 20 minutes later. He continued
7 his cunning ruse. He told Rayne to go ahead into
8 Walmart with her girls that he was going to keep
9 waiting on his wife and that he would come in when
10 his wife arrived with that gift card.

11 Rayne started shopping. \$150. She didn't go
12 to the make-up aisle to shop for herself or the
13 women's clothing section to shop for herself. She
14 filled her cart with three small piles of clothes.
15 One for each daughter.

16 He sometime later entered Walmart and you will
17 see the eerie, chilling video surveillance of him
18 walking down the center of the aisle looking row
19 after row for Cherish. You see, there are cameras
20 all over the Walmart Super Center from various
21 angles and you'll learn, in fact, that the
22 surveillance recordings in this case amounted to
23 almost 30 hours. And it's later in this case all of
24 those surveillance recordings were sent to Quantico,
25 Virginia, to the FBI where they reduced those tapes

1 to the relevance frames that show him and Rayne and
2 her three daughters.

3 And the FBI enhanced those pictures with arrows
4 so that the viewer, that's you, can actually watch
5 each of them as they move through the store. You'll
6 see Rayne and her little girls bouncing around.
7 You'll see Cherish alive and totally unsuspecting.

8 You'll learn that as they shopped he shopped,
9 too. He put only one thing in their cart. An item
10 that ultimately he didn't leave with, but one that
11 foretold his intention. A bundle of rope.

12 As you watch the video, you'll see at 9:30 him
13 walk through Walmart and an hour later at 9:41 you
14 will watch him exit Walmart with Cherish. Skipping
15 out right after him. And then a minute later you
16 will watch as his van leaves the Walmart parking
17 lot.

18 And because today you know how the story ends,
19 that surveillance video is chilling.

20 Now, at the time that he left Walmart no one
21 noticed because to anybody looking they looked like
22 a grandfather and a granddaughter. No one had any
23 reason to be alarmed. Rayne believed he was taking
24 her daughter to the front of the store where
25 McDonald's was to buy her a cheeseburger, and though

1 he had been a stranger to Cherish and her family,
2 just hours before he didn't represent danger to
3 them. He had earned that little girl's innocent
4 trust.

5 So you will see as she skips right out of
6 Walmart after him, because McDonald's had closed.
7 20 minutes went by before Rayne realized that the
8 McDonald's in that Walmart wasn't open. Where was
9 her daughter? Cherish was not there. Intuition
10 turned into dread and dread turned into panic as she
11 looked all over that store for her daughter. 20
12 minutes later she still had not found Cherish.
13 Every mother's darkest nightmare became Rayne
14 Perrywinkle's reality.

15 MS. SCHLAX: Objection, Your Honor.
16 Argumentative.

17 THE COURT: I'll overrule the objection.

18 MS. NELSON: Every mother's darkest nightmare
19 became Rayne Perrywinkle's reality. She would
20 never see her daughter Cherish alive again. 40
21 minutes after he had left the Walmart with Cherish
22 Perrywinkle, Rayne borrowed a phone because she
23 didn't have one, and called 911. Within a minute
24 the 911 operator issued a BOLO, that's called a
25 be-on-the-look-out for a white van. It went to

1 all law enforcement officers in the area. She
2 kept Rayne on the phone as she collected
3 information and she dispatched law enforcement
4 officers immediately to Walmart. They immediately
5 started reviewing surveillance tapes, hours ticked
6 by, and at 4:21 that morning they issued an Amber
7 alert.

8 As dawn broke things started to unfold
9 rapidly. At 9:00 a.m. that morning, Officer Tina
10 Henson with the Jacksonville Sheriff's Office was
11 at a traffic incident at the intersection of Dunn
12 Avenue and I-95. She was actually taking
13 information from two people who had been in a
14 vehicular accident when she noticed the white van
15 that had been the subject of that amber alert and
16 that BOLO drive by. She told the people I'll be
17 right back. Got in her car and started pursuing
18 this white van and radioed it in. You'll learn
19 that law enforcement took steps to effectuate a
20 felony traffic stop. Officers got in line in
21 procession to take the white van down. They
22 didn't know what they would find.

23 You'll hear from Officer Wilkie who's a K9
24 officer with JSO. He got behind that white van.
25 They effectuated the traffic stop, they told the

1 driver to get out of the car. He flamboyantly, as
2 you'll learn, complied, and it was this man.

3 Officer Wilkie cleared the van, looking for
4 Cherish. She wasn't in the van. You'll learn
5 nothing was in the van. The van had no back seats.
6 And not only was Cherish not there, the stroller
7 that Rayne had put in there when they left Dollar
8 General and her packages from the Family Dollar,
9 they were gone, too.

10 Officer Wilkie patted him down. And what I
11 expect will be powerful testimony, you will hear
12 what he yelled, she's in the water, she's in the
13 water. He didn't know where, he didn't know if it
14 was a pond, a retention pond, a swimming pool, a
15 lake, but he knew she was in the water because he
16 was sopping wet from the waist down.

17 What Officer Wilkie didn't know is that just 12
18 miles away, almost two hours earlier, Marquita and
19 Christina Howard, a mother and a daughter, saw that
20 white van backed up to a tree line off of Rutger's
21 Road. They thought it was unusual. They figured
22 something -- somebody was up to no good, but that
23 was the extent of what they thought about until they
24 got home and they heard about the Amber alert, that
25 police were looking for a little girl in a white

1 van. They jumped back in their car, they raced back
2 to that tree line but the van was gone.

3 That call to 911, because the Howard's called
4 911 and said, hey, we just saw a van, that call to
5 911 brought police to that tree line off of Rutgers
6 Road and ultimately, after this defendant had been
7 stopped and taken into custody, it brought Officer
8 Wilkie there, too.

9 Officer Wilkie arrived with his K9, Gator, and
10 from there he saw detectives, and even Mr. Caliel,
11 at the tree line searching, but what they didn't
12 know is what Officer Wilkie knew. Wilkie said
13 where's the water. And he told his dog to work.
14 You'll hear about how K9s work and immediately that
15 dog seized on a track. The track he left when he
16 left that wooded area.

17 And then he seized on a separate track,
18 trampled reeds that led through the woods into a
19 creek. He started circling around the shoreline.
20 Officer Wilkie knew she was close. And then he saw
21 her. Her long dark hair was floating under the
22 water. There was a make-shift wall of asphalt
23 rocks and cement that imprisoned her. Her body was
24 stuck under a tree. The orange sundress she was
25 wearing, watermelons, grapes, bananas. It was an

1 orange spot in the brackish water.

2 And while Officer Wilkie will tell you that
3 generally as a police officer their first response
4 is to rescue and save, you could tell she was dead.
5 So he stood by and waited until the crime scene
6 units came so an alligator wouldn't take her body
7 away.

8 Crime scene units came and they knew they had
9 to be both meticulous and fast because she was in
10 the water and evidence was subject to degradation.

11 You'll hear that the environment changed while
12 they were working, the tide went out, and that left
13 Cherish naked from the chest down, crouched in a
14 fetal position, beached in the marsh.

15 And as they worked the sun rose, they took
16 photography, they took swabs from her body, they
17 took evidence samples and as they worked ants began
18 to infest her body.

19 The Medical Examiner's Office came to the scene
20 where they, too, took photography, this vibrant
21 little girl who hours before had been bouncing
22 around in Walmart, was reduced to a subject of
23 forensic photography and crime scene collection.

24 And once they were done they zipped her little
25 body in a body bag and transported her to the

1 morgue.

2 You'll meet Dr. Rao. She's the chief Medical
3 Examiner here in Jacksonville and a forensic
4 pathologist. And before they conducted an autopsy
5 they collected a rape kit. They took a swab from
6 every orifice of Cherish's little body. Then the
7 next morning they undressed her, they washed her
8 body of the marsh, the ants, the dirt, they put her
9 on a sold steel table and they cut her hair so they
10 could see the circumference around her neck and they
11 conducted the autopsy.

12 Dr. Rao will testify to you about the myriad of
13 injuries suffered by this little girl. Her lips,
14 nose, teeth and gums injured from smothering, from
15 gagging, a hickey on her right breast from forceful
16 sucking, traumatic injury to her genitalia, and I'm
17 not going to mince words, you will hear her
18 genitalia was destroyed, is the word that Dr. Rao
19 used, from forceful rape and sodomy.

20 A hematoma to the back of her head from
21 blunt-force trauma and ligature scars around her
22 neck, deep bleeding in the strap muscles of her
23 neck, evidence of strangulation by ligature.

24 But the evidence that will tell you about her
25 struggle came from her green eyes. You'll learn

1 about petechia. That's when blood vessels burst
2 from force. She had petechia in her throat, in her
3 face, and in her eyes. And in addition to the
4 petechia she had severe and excessive hemorrhaging
5 in her eyeballs. Telltale evidence of his
6 strangulation and her struggle.

7 Dr. Rao will give you her opinion as to the
8 cause and manner of death. Homicide by mechanical
9 asphyxia, strangulation by ligature. And she will
10 tell you that the evidence tells her that Cherish
11 struggled and that she suffered before she died.
12 The evidence that the Medical Examiner collected
13 went to the Florida Department of Law Enforcement
14 where forensic serologists began to test it and
15 study it to determine if they could discern DNA.
16 The results semen in her vagina, in her rectum and
17 in her mouth.

18 And while some of those samples had, in fact,
19 degraded because of the brackish water, many hadn't.
20 The results of the DNA, his in her body, and her DNA
21 on his penis.

22 In addition to the forensic, the physical,
23 pathological and the surveillance evidence in this
24 case, you're going to have the opportunity to hear
25 his own revolting hubris, glowing about what he had

1 done. You see, while he was in the Duval County
2 Jail, unbeknownst to him, he had a conversation with
3 another inmate. There was tour of young girls
4 touring the jail. And they engaged in a
5 conversation. Said he sure would like to meet one
6 of those girls at the Walmart. He said 12 to 13
7 year old girls, that was his target area. And the
8 most revolting of all is the other inmate asked him
9 if she had a butt on her, yeah, for a white girl.
10 His words. This is the evidence we will present to
11 you.

12 There is a theory of trial practice that I
13 subscribe to and it's that when you talk to a jury
14 it's important to when you layout the evidence, let
15 a jury know where there are weaknesses in the
16 evidence. I'm here to tell you there are no
17 problems in the proof that will come before you. If
18 there are any deficiencies in the evidence, it's
19 that it will not answer those questions you will
20 inevitably have about that dark night.

21 The evidence will not tell you where he raped
22 her, how many times or for how long. It will not
23 tell you what object he used to hit her in the head
24 or what he wrapped around her neck. And the
25 evidence will not tell you when exactly between

1 10:45 when she was last seen alive with him and 7:15
2 when his van was seen against that tree line, when
3 exactly he killed her. But make no mistake, the
4 evidence that will come from that witness stand in
5 this courtroom, that you will hear, see, and touch
6 will prove beyond every reasonable doubt his guilt.

7 At the conclusion of this case, on behalf of
8 the people of the State of Florida, we will be
9 asking you to render verdicts of guilty for the
10 kidnapping of Cherish Perrywinkle, for the sexual
11 battery of Cherish Perrywinkle, and for the first
12 degree murder of Cherish Perrywinkle.

13 Thank you.

14 THE COURT: Thank you, Ms. Nelson.

15 Ms. Schlax.

16 MS. SCHLAX: Thank you.

17 May it please the Court.

18 Counsel.

19 Mr. Smith.

20 Good morning. We are here in this courtroom
21 because the State of Florida is seeking the death
22 penalty. And you have just heard an emotionally
23 charged opening statement designed to anger you.
24 What we are asking you to do, as Americans in the
25 country, is demand the State of Florida live up to

1 the burden of proof, for they share it alone. Do
2 not make any fixed opinion at this moment, but
3 listen to all of the questioning, including the
4 cross-examination. I will be upfront with you,
5 there may be people Mr. Fletcher and I do not
6 cross-examine. We will help you test this evidence
7 that the State brings forward and, unfortunately,
8 what that means that we will cross-examine Rayne
9 Perrywinkle.

10 For the State told you that she travelled to
11 this area about a mile from her house at about 6:30
12 at night, knowing that her daughter not only was
13 going to California the next morning, but would have
14 to get up at 4:00 o'clock in the morning to make a
15 6:30 flight. And so she brings these small
16 children, eight and under, one pushing a stroller,
17 into the both Dollar General and Family Dollar. She
18 uses \$31 of the hundred dollars that I guess she had
19 allotted, and bought miscellaneous things for the
20 home.

21 She decided against a \$7 dress for Cherish, and
22 although she will describe the stranger she
23 ultimately entrusts to have watch over her children
24 as creepy, she will tell you that at about 9:00
25 o'clock at night, having shopped in these first two

1 stores for almost two hours, she makes the decision
2 to get into a white van with shuttered windows, no
3 proper seats, and place her children in that van.

4 She goes with a complete stranger to a Walmart
5 over eight miles away without any kind of cell
6 phone, without any kind of transportation home,
7 without even having public transportation as an
8 option for that shuts down at 9:00 o'clock.

9 And you'll see surveillance tape of where she
10 was with this stranger and shops for over an hour.
11 And she doesn't flinch when Cherish, and you'll see
12 this with your very own eyes, wanders off with this
13 stranger. Not once, not twice, three to four times.
14 And she thinks nothing of the fact that this person
15 claims I'm going to go get cheeseburgers and Cherish
16 just wanders off. You'll watch the videotape. It
17 will be 39 minutes between when Cherish Perrywinkle
18 leaves her mother's sight and 911 is called.

19 You're also going to hear, I anticipate, from
20 two people that were married at the time, the
21 Roziers. They were in waiting for their father,
22 with their little, I believe newborn baby, in the
23 parking lot, and a white van comes over and they
24 roll down the window and never having known one
25 another before, this stranger says, follow us, we're

1 going to get cheeseburgers.

2 Ultimately they will come in and they will
3 identify that stranger. And they will tell you we
4 don't know if anyone else was in that van, but we
5 literally thought maybe we do know him, maybe he
6 somehow knows the father, they were trying to wait.
7 So they eventually go to McDonald's that's
8 physically outside of Walmart about two miles away.
9 They didn't look at 'em.

10 All these details will be important, ladies and
11 gentlemen, for you to make legal decisions in this
12 case. On June 22nd, 2013, a beautiful young child
13 lost her life. And I won't mince words. It is
14 horrendously tragic. We thank you for taking the
15 time to critically analyze every decision you must
16 make and we trust that you will make a legal
17 decision, not a decision based on emotion, not a
18 decision based on revenge or retribution. You are
19 all here because we trust you can do that.

20 Thank you.

21 THE COURT: Thank you, Ms. Schlax.

22 The State may call their first witness.

23 MR. CALIEL: Your Honor, the State would call
24 Rayne Perrywinkle to the witness stand.

25 THE COURT: Rayne Perrywinkle.

1 (Witness present.)

2 THE COURT: Good morning, Ms. Perrywinkle.
3 Stop right there and we'll have the clerk swear
4 you in.

5 (Witness sworn.)

6 THE WITNESS: Yes.

7 THE COURT: Thank you. If would you come
8 over here to the witness chair, please.

9 Ms. Perrywinkle, you have a soft voice. If
10 you'll speak into the microphone when you're
11 answering questions. Okay?

12 THE WITNESS: Yes, ma'am.

13 THE COURT: Thank you.

14 Mr. Caliel.

15 MR. CALIEL: May it please the Court, Your
16 Honor?

17 RAYNE PERRYWINKLE,
18 was called as a witness on behalf of the State, and after
19 being duly sworn, then testified as follows:

20 DIRECT EXAMINATION

21 BY MR. CALIEL:

22 Q Good morning, ma'am.

23 A Good morning.

24 Q Can you please move the microphone closer to
25 your mouth so everybody can hear you okay.

1 Can you please introduce yourself to the
2 jury.

3 A Rayne Perrywinkle.

4 Q Are you the mother of Cherish Perrywinkle?

5 A Yes.

6 Q Ma'am, how old was Cherish on June 21st of
7 2013?

8 A Eight years old.

9 Q And where were you and Cherish living at that
10 time?

11 A Tyler Avenue.

12 Q Excuse me, ma'am. If you could try to repeat
13 that answer because there's a little noise back here.

14 THE COURT: Do you need some Kleenex or
15 something?

16 THE WITNESS: I have some.

17 BY MR. CALIEL:

18 Q Where were you living back on June 21st of
19 2013?

20 A [REDACTED]

21 Q Is that here in Jacksonville, Duval County,
22 Florida?

23 A Yes.

24 Q Who else was living with you and Cherish at
25 the home?

1 A My ex-boyfriend, Aaron Pearson, my daughters
2 ██████████ and ██████████.

3 Q How old was ██████████ at that time?

4 A Five.

5 Q And ██████████?

6 A Four.

7 Q On the evening of June 21st, 2013, were you
8 preparing for Cherish to go on a trip the next day?

9 A Yes.

10 Q Where was she going?

11 A California to see her birth father.

12 Q And did she have plans and tickets to fly out
13 to California early the next morning?

14 A Yes.

15 Q At some point that evening did you decide to
16 go buy some things for her and for the household?

17 A Yes.

18 Q Did your boyfriend, Aaron, go with you that
19 night?

20 A No.

21 Q Did he provide you with some money to spend
22 so that you could go to the store and buy some things?

23 A Yes.

24 Q How much money did he give you?

25 A A \$100 bill.

1 Q And was that \$100 for buying everything at
2 the store or was that also for another purpose?

3 A Yes, another purpose.

4 Q What was that other purpose?

5 A To take Cherish to the airport the next day in
6 a taxi.

7 Q So in addition to buying items with the
8 hundred dollar bill, you had to have enough left over
9 to go to the airport with a taxi and back?

10 A Yes.

11 Q Did you drive at that time?

12 A No.

13 Q Did you even have a car?

14 A No.

15 Q So at some point you and the children walk to
16 the store that's nearby Edgewood Avenue?

17 A Yes.

18 Q How did you walk to the store? Did you have
19 a stroller with you?

20 A Yes.

21 Q And approximately how long did you and the
22 three children take to walk from your house to the
23 Family Dollar on Edgewood?

24 A About 20 minutes.

25 Q Once you were at the Family Dollar, did you

1 shop around and look for some items?

2 A Yes.

3 Q Did you actually make some purchases?

4 A Yes.

5 Q And were your children with you inside Family
6 Dollar?

7 A Yes.

8 Q Once you made your purchases at the Family
9 Dollar, did you walk across the street to the Dollar
10 General that was directly across Edgewood Avenue?

11 A Yes.

12 Q And again just walk with your kids and the
13 stroller back over to that store?

14 A Yes.

15 Q When you entered Dollar General, what were
16 you looking to buy at that time?

17 A A pencil sharpener.

18 Q And were you also looking potentially at
19 clothing, things of that nature?

20 A Yes.

21 Q What had you bought previously over at the
22 Family Dollar?

23 A Just some household items. Trash bags, some
24 headbands for my children.

25 Q And once you walked across the street to the

1 Dollar General, how long were you inside the Dollar
2 General shopping?

3 A Maybe an hour.

4 Q Were you looking specifically at any items of
5 clothing inside the Dollar General?

6 A Yes.

7 Q What were you looking at?

8 A It was a little black-and-white dress that I
9 saw, with hearts on it.

10 Q Did you actually go to the counter and
11 inquire of the employees as to how much that dress
12 was --

13 A Yes.

14 Q -- for sale?

15 Did you eventually buy that dress?

16 A No.

17 Q Why didn't you buy that dress?

18 A I didn't think I had enough money.

19 Q To both buy the dress and the items and then
20 also have enough money to go to the airport the next
21 day?

22 A Yes.

23 Q Now, Aaron, he had stayed at home, he didn't
24 go with you to these stores?

25 A No.

1 Q About how long do you think you were inside
2 the Dollar General?

3 A Possibly an hour, till maybe 8:30.

4 Q When you walked outside the Dollar General,
5 did a man talk to you?

6 A Yes.

7 Q What did this man look like? Describe him
8 for me.

9 A He had white hair.

10 Q The man who started talking to you, do you
11 see him here in the courtroom today?

12 A Yes.

13 Q Could you point to him and describe where
14 he's seated and what he's wearing today?

15 A (Indicating) he's wearing a blue shirt.

16 Q With the glasses on top of his head?

17 A Yes.

18 MR. CALIEL: Your Honor, may the record
19 reflect that the witness has identified the
20 defendant?

21 THE COURT: The record will so reflect.

22 MR. CALIEL: Your Honor, may I approach the
23 witness?

24 THE COURT: You may.

25 BY MR. CALIEL:

1 Q Ma'am, on June 21, 2013, the defendant didn't
2 look like this, did he?

3 A No.

4 MR. CALIEL: May I approach?

5 THE COURT: Yes.

6 BY MR. CALIEL:

7 Q I'm now showing you what's been previously
8 marked for identification purposes as State's Exhibit A
9 for identification. Do you recognize the person in
10 that photograph?

11 A Yes.

12 Q Does this photograph fairly and accurately
13 depict the way the defendant looked on June 21st when
14 you first encountered him?

15 A Yes.

16 MR. CALIEL: Your Honor, at this time the
17 State would move into evidence State's Exhibit A
18 as State's 1.

19 MS. SCHLAX: No objection, Your Honor.

20 THE COURT: State's Exhibit A will be entered
21 as State's Exhibit 1.

22 (Whereupon the foregoing item was marked in
23 evidence as State's Exhibit 1.)

24 MR. CALIEL: Your Honor, with permission of
25 the Court, may we publish a copy electronically?

1 THE COURT: You may.

2 Let me just tell the jury, you've got
3 monitors in front of you. It will be presented on
4 those monitors. The witness has one. Mine is
5 down low so I can still see everybody, but I'll be
6 seeing the same thing. If it stops working, raise
7 your hand and let us know. It happens sometime.

8 BY MR. CALIEL:

9 Q Ma'am, is your monitor on --

10 A Yes.

11 Q -- in front of you?

12 The monitor now shows State's Exhibit 1 in
13 evidence. Is that how the defendant was dressed when
14 you walked out of the Dollar General and met him for
15 the first time?

16 A Yes.

17 Q Had you seen him in the store before you
18 walked out?

19 A Yes.

20 Q Inside the Dollar General?

21 A Yes.

22 Q When did you first notice the defendant
23 inside the Dollar General?

24 A When I was in the shoe aisle trying on shoes
25 with my children. I looked to my right and he was

1 standing in the doorway looking right at us.

2 Q At some point in time when you were up
3 towards the front of the store, did you see him again?

4 A Yes.

5 Q What did he say to you when you walked out
6 the front door of the Dollar General?

7 A If you really want that dress I'll get it for
8 you.

9 Q Did he make any other comments to you about
10 your children?

11 A Yes.

12 Q What did he say?

13 A He said you look like you have your hands
14 full, I have couple of little ones.

15 Q Where was this in relation to the front door?
16 Where was he standing when he struck up this
17 conversation with you?

18 A He was near the front of the store.

19 Q Right at the front door entrance right as it
20 leads from the parking lot into the store?

21 A Yes.

22 MR. CALIEL: May I approach the witness
23 again?

24 THE COURT: You may.

25 BY MR. CALIEL:

1 Q Ma'am, I'm now showing you what's been
2 previously marked for identification purposes as
3 State's Exhibit B. Do you recognize that photograph?

4 A Yes.

5 Q Do you recognize that photograph to be a
6 photograph of the surveillance video from Dollar
7 General on June 21st of 2013?

8 A Yes.

9 Q Does this fairly and accurately show both you
10 and the defendant and identify them by arrows as you
11 walked out the front door of the Dollar General on June
12 21st of 2013?

13 A Yes.

14 Q And it shows the parking lot and front door?

15 A Yes.

16 MR. CALIEL: Your Honor, at this time the
17 State would move into evidence State's Exhibit B
18 for identification as State's Exhibit 2.

19 MS. SCHLAX: No objection, Your Honor.

20 THE COURT: State's Exhibit B will be entered
21 into evidence as State's Exhibit 2.

22 (Whereupon the foregoing item was marked in
23 evidence as State's Exhibit 2.)

24 BY MR. CALIEL:

25 Q Ma'am, looking at the monitor in front of

1 you, is that the location when he first spoke to you as
2 you were walking out the front door of the Dollar
3 General?

4 A Yes.

5 Q During the course of that conversation did he
6 make any mention of a gift card that he may have at
7 Walmart?

8 A Yes.

9 Q What did he tell you about this gift card?

10 A He said I have a \$150 gift card, waiting on my
11 wife.

12 Q Did he make you believe that he was going to
13 give you or allow you to use that hundred dollar -- or
14 \$150 gift card to buy items for your children?

15 A That's what I was thinking.

16 Q And did he continue to talk to you while he
17 was waiting for his wife?

18 A Yes.

19 Q Did you stand there in the Dollar General
20 parking lot during the course of that conversation?

21 A Yes.

22 Q How long were you there with him while he was
23 waiting for his wife?

24 A I'm not sure exactly.

25 Q Was it a number of minutes?

1 A Yes.

2 Q Did he tell you his wife was coming?

3 A I kept asking him where -- where she was.

4 Q What was his response?

5 A She's coming.

6 Q Did he tell you how she was coming?

7 A I asked him what does she drive. He said a
8 gold car.

9 Q So you waited with him at that point? You
10 were waiting to see if his wife came to give you the
11 gift card?

12 A Yes.

13 Q Did it begin to rain at some point while you
14 were waiting for his wife to arrive in this gold car?

15 A Yes.

16 Q What were the children doing?

17 A They were playing with their umbrella and
18 running around and having fun.

19 Q Just doing what kids would do?

20 A Yes.

21 Q What was the defendant doing while you were
22 waiting for his wife in this gold car to show up?

23 A He went and sat in the van with the door open.

24 Q Did the gold car or his wife ever show up in
25 the Dollar General parking lot?

1 A No.

2 Q After some period of time did he offer to
3 drive you and your children to the Walmart?

4 A Yes.

5 Q Had you been to the Walmart on Lem Turner
6 before?

7 A Yes.

8 Q How far away is it?

9 A Ten minutes at best.

10 Q That's driving, right?

11 A Yes.

12 Q So you didn't have a car, there was no way
13 for you and your children to walk to Walmart and back
14 that night, is that right?

15 A Right.

16 Q What did he say about his wife and the gift
17 card prior to you all going to Walmart?

18 A He said she's going to meet us there.

19 Q Did you believe him?

20 A Yes.

21 Q You had seen him in the store before and he
22 talks to you as soon as you come out. Were you
23 originally concerned about him?

24 A Yes.

25 Q Why?

1 A I thought he was going to steal my money
2 because he was watching me with the cashier. He was
3 standing to my right shoulder.

4 Q Then so when you go outside and this person
5 you had concern starts talking to you, were you still
6 concerned at that point?

7 A Not as much. I thought I was just being
8 paranoid.

9 Q Based upon the way he looked, his age, his
10 appearance, did you believe he posed a threat to you?

11 A No.

12 Q Did he tell you things about himself that
13 made you feel more comfortable?

14 A Yes.

15 Q What did he say?

16 A He said he worked for Habi-Jax and he talked
17 about church and he talked about the church he went to,
18 he asked me if I knew that church and I said no.

19 Q So you're having conversation with him. Did
20 you believe he was just being generous and trying to
21 help out?

22 A Yes.

23 Q But when the wife didn't show up in the gold
24 car, did he offer to drive you and your children to the
25 Walmart on Lem Turner?

1 A Yes.

2 Q What was your response to that offer?

3 A I waited because I wanted to see her show up.
4 I didn't jump at it right away.

5 Q You were still hoping that the wife would
6 come to Dollar General?

7 A Yes.

8 Q But she never came?

9 A No.

10 Q At some point did he again ask do you want to
11 go?

12 A Yes, he got snappy with me because I wouldn't
13 get in the van.

14 Q What do you mean he got snappy with you?
15 Describe that for me.

16 A He had an attitude, said you don't have to do
17 this. And he asked me if I wanted to see his driver's
18 license.

19 Q He asked whether or not you would like to see
20 his driver's license?

21 A Yes.

22 Q Did this sort of make you feel more
23 comfortable?

24 A Yes, I felt foolish after that. I thought I
25 was just being paranoid.

1 Q Why were you hoping that this gift card was
2 real?

3 A Because Cherish needed some clothes for her
4 trip.

5 Q Did you tell the defendant that Cherish was
6 going to California the next morning?

7 A Yes, I did. I said -- after he said to me you
8 look like you're trying to save money, I said Cherish
9 is going to California in the morning, she doesn't want
10 to go.

11 Q So ultimately did you decide to take him up
12 on his offer to drive to Walmart?

13 A Yes.

14 Q Were you still hoping at that point in time
15 that the gift card was real and that you could get
16 things for the children?

17 A Yes.

18 Q Did you still expect to see his wife at the
19 Walmart?

20 A Yes.

21 Q How did you all get into the van?

22 A He opened the door and I told him I couldn't
23 fold the stroller. He told me to just push it in.

24 Q When the doors of the van opened up, describe
25 for me what the inside of the van looked like?

1 A It was dark. There were blinds on the
2 windows. There was no seating in the middle and the
3 driver's passenger seat was pushed all the way down.

4 Q When you say the driver's passenger seat was
5 pushed all the way down, you mean like reclined back?

6 A Yes, like a Dentist chair.

7 Q Now, there were no seats in the middle you
8 said, but was there a bench seat in the back of the
9 van?

10 A Yes.

11 Q Did you put the stroller and the items that
12 you had purchased inside the van?

13 A Yes. He told me just push it in.

14 Q So you just pushed the stroller up into the
15 van, into the center portion of it?

16 A Yes.

17 Q Now, the van that we're talking about, the
18 photograph, State's Exhibit 2, which is up on your
19 monitor, the white van in the top center of that
20 photograph, is that the van we're talking about?

21 A Yes.

22 Q Once you pushed the stroller and the items
23 that you purchased up into the van, where did the kids
24 sit inside the van?

25 A In the back seat that had seatbelts.

1 Q What about you?

2 A I sat in the front seat.

3 Q And the defendant, he drove the van?

4 A Yes.

5 Q Did you leave the parking lot of the Dollar
6 General with the defendant to drive to Walmart?

7 A Yes.

8 Q Along with your children?

9 A Yes.

10 Q Did you have a cell phone at this time?

11 A Yes.

12 Q Did you have it on you?

13 A Yes.

14 Q Was it functional? Was it working?

15 A No, it wasn't working.

16 Q Why?

17 A Because my [REDACTED] year old daughter [REDACTED] put
18 it in the cat water to wash it, she told me.

19 Q Okay. So your phone had got wet so your
20 phone wasn't actually working at that point in time?

21 A Right.

22 Q Based upon what he had told you about the
23 wife and the gift card and about himself, did you feel
24 comfortable enough to get into the van and drive to
25 Walmart?

1 A Yes.

2 Q About how long did it take you and your
3 children and the defendant to drive from Walmart --
4 from Dollar General to the Walmart?

5 A About ten minutes because we drove there
6 frequently with my ex-boyfriend.

7 Q On the way to Walmart, did you continue to
8 talk and have small-talk and conversation with the
9 defendant?

10 A Yes.

11 Q What did you talk about?

12 A He wanted to know how old we were. And then
13 he told me he was 61.

14 Q Did he tell you his name?

15 A Yes, he did.

16 Q What name did he give you?

17 A Don.

18 Q Did he talk about the Habi-Jax and his wife
19 on the way there?

20 A Yes. I asked him what he did, because he had
21 a van and my boyfriend, my ex-boyfriend, wanted another
22 van. He said he worked for Habi-Jax.

23 Q Did he tell you a little bit more about his
24 wife?

25 A I asked him where is his wife from and he said

1 the Virgin Islands.

2 Q While driving from Dollar General to Walmart,
3 did you ever see his wife with this gold car that she
4 was apparently coming in?

5 A No.

6 Q Did you have any concerns while you were
7 driving in the van over there?

8 A Not so much because he told me it was safe.

9 Q He told you that you were safe?

10 A Yes. He looked in my face and told me I was
11 safe.

12 Q Did you want to believe him?

13 A Yes. Very much so.

14 Q Was that gift card something that you really
15 wanted to be able to get stuff for your children?

16 A Yes.

17 Q Eventually do you get to the Walmart?

18 A Yes, we did.

19 Q Did you immediately go right into the store
20 once you arrived at the Walmart parking lot?

21 A No.

22 Q What happened when you arrived their Walmart
23 parking lot?

24 A My children were getting fussy, they wanted to
25 get out of the van, and they told me I needed to get

1 out, and he took a phone call.

2 Q What do you mean he took a phone call?

3 A He took his phone out of his pocket and
4 started to talk.

5 Q Did you ever hear the phone ring?

6 A No. I thought it was on vibrate. I wasn't
7 paying attention.

8 Q So it appeared, based upon how he was acting,
9 that he took some sot of phone call?

10 A Yes.

11 Q Did he ever tell you anything more about his
12 wife or that she was coming still?

13 A He made it sound as if he was talking to her
14 about what we were going to eat. He said Chinese and I
15 thought, I didn't want Chinese food. I didn't say
16 anything.

17 Q So you just sat by while he apparently had a
18 conversation with somebody else on the other end of the
19 phone?

20 A Yes.

21 Q Did you wait in the Walmart parking lot in
22 the van for his wife in the gold car to arrive?

23 A For a few minutes, yes, then he told me to go
24 in first to the little girl's section and I'll meet you
25 in there.

1 Q So did you and your children get out of the
2 van and walk into the Walmart?

3 A Yes.

4 Q [REDACTED], Cherish?

5 A Yes.

6 Q What did you do with your stroller and the
7 items that you had purchased at the Dollar General and
8 Family Dollar?

9 A I left it in the van. I took the diaper bag
10 with me.

11 Q So you and your kids, you go inside the
12 store.

13 A Yes.

14 Q Where did you go once you went inside the
15 store? Did you get a shopping cart, things of that
16 nature?

17 A Yes, we did. Cherish wanted to look at a
18 necklace and thought we were looking at the jewelry and
19 I said, Cherish, I'm not here for myself, I'm here for
20 you. Then we went to go look at shoes.

21 Q Primarily did you do your shopping in the
22 children's section, whether it's the shoes or the
23 clothes?

24 A Yes.

25 Q How long were you shopping prior to the

1 defendant joining you inside the store?

2 A I'm not sure. Seemed like a long time.

3 Q Were you and the girls selecting items or
4 looking at items and placing them in the cart?

5 A Yes.

6 Q How did you arrange the cart so that you knew
7 what was for which girl or who?

8 A I put all the shoes in the middle and I put
9 the clothes on each end, end of the cart. I kept the
10 cart so I knew the sizes.

11 Q So like a pile for Cherish?

12 A Yes.

13 Q A pile for [REDACTED]?

14 A Destiny.

15 Q A pile for [REDACTED]?

16 A Yes.

17 Q At some point did the defendant, Donald
18 Smith, join you and your girls in the children's
19 clothing section of the store?

20 A Yes.

21 Q Did he begin to shop with you?

22 A No, he was just walking around watching us. I
23 asked him where's your wife.

24 Q What did he say?

25 A She's coming.

1 Q So he just stood there and watched as you and
2 the girls were shopping?

3 A Yes.

4 Q At some point did he put any items into your
5 shopping cart --

6 A Yes.

7 Q -- with the girls' clothing? What did he put
8 into the shopping cart?

9 A A rope.

10 MR. CALIEL: Your Honor, may I approach the
11 witness?

12 THE COURT: You may.

13 BY MR. CALIEL:

14 Q Ma'am, I'm now showing you what's been
15 previously marked for identification purposes as
16 State's Exhibit C. Do you recognize that photograph?

17 A Yes.

18 Q Does that photograph show the bundle of rope
19 that the defendant placed into the shopping cart while
20 you were shopping at Walmart?

21 A Yes.

22 Q Does the photograph fairly and accurately
23 depict the item that he selected and placed into the
24 shopping cart on June 21st of 2013?

25 A Yes.

1 MR. CALIEL: Your Honor, at this time we
2 would move into evidence State's Exhibit C as
3 State's 3.

4 MS. SCHLAX: No legal objection, Your Honor.

5 THE COURT: All right. That will be entered
6 as State's Exhibit B, entered as State's Exhibit
7 3.

8 (Whereupon the foregoing item was marked in
9 evidence as State's Exhibit 3.)

10 MS. SCHLAX: But, Your Honor, we would renew
11 all prior motions.

12 THE COURT: That will be noted for the
13 record. Thank you.

14 BY MR. CALIEL:

15 Q So, ma'am, this bundle of rope, that was the
16 only thing that this defendant placed in that shopping
17 cart?

18 A Yes.

19 Q How long were you inside the Walmart
20 shopping?

21 A About an hour and a half.

22 Q And throughout the course of this was Cherish
23 looking at items and trying some things on?

24 A Yes, she was.

25 Q Did she try any shoes in particular?

1 A He gave her two pairs of shoes to come show me
2 and see if I approved of them and I said, no, go put
3 them back. They were women's shoes.

4 Q Why didn't you approve of them?

5 A They were women's shoes. I -- at the time I
6 wasn't sure what was going on.

7 MR. CALIEL: Your Honor, may I approach the
8 witness again?

9 THE COURT: You may.

10 BY MR. CALIEL:

11 Q Ma'am, now showing you what's been previously
12 marked for identification purposes as State's Exhibit
13 D. Do you recognize that to be a surveillance
14 photograph on June 21st, 2013, that shows you, Cherish
15 and the defendant in the children's clothing section of
16 the Walmart?

17 A Yes.

18 Q Does that fairly and accurately depict that
19 -- where you were on that night shopping?

20 A Yes.

21 Q The arrows indicate both you, the defendant
22 and your daughter?

23 A Yes.

24 MR. CALIEL: Your Honor, at this time the
25 State would move into evidence State's Exhibit D

1 as State's 4.

2 MS. SCHLAX: No legal objection, Your Honor.

3 THE COURT: All right. State's Exhibit D
4 will be entered as State's Exhibit 4 in evidence.

5 (Whereupon the foregoing item was marked in
6 evidence as State's Exhibit 4.)

7 THE COURT: You may publish.

8 BY MR. CALIEL:

9 Q So, ma'am, if you look at the screen,
10 depicted here, the section where the arrows are above,
11 it shows both you, Cherish and the defendant, correct?

12 A Yes.

13 Q And that's where you were shopping for
14 clothing and shoes and things of that nature for the
15 children?

16 A Yes.

17 Q I know it's hard to remember exactly how long
18 you were there, but was it more than an hour that you
19 shopped inside Walmart looking for children's clothes?

20 A Yes.

21 Q And during that entire time what was the
22 defendant doing?

23 A He was looking and just wandering around
24 watching us, and I asked him was he okay, because I
25 didn't want to feel that I was wasting his time. I

1 wanted to hurry up and leave and get my children home.

2 Q Because obviously it's getting late. It's
3 sometime after 10:00 o'clock, right?

4 A Yes. I wanted to get Cherish home and wash
5 her hair for in the morning.

6 Q Because she had to fly out early the next
7 day?

8 A Yes.

9 Q Any time during this hour, hour and a half,
10 did his wife ever show up with that gift card?

11 A No.

12 Q Did he tell you that she was coming?

13 A Numerous times I asked him and he always said
14 she's coming.

15 Q Did you want to believe him?

16 A Yes, absolutely.

17 Q The items that you had stacked up for
18 [REDACTED] for [REDACTED] for Cherish, did you have enough
19 money yourself to buy those items?

20 A No.

21 Q Why not?

22 A Because with that hundred dollar bill that
23 Aaron had given me, he had put a cap on it saying I
24 could only spend 40 or 50 because I had to have enough
25 money the next morning to take us to the airport.

1 Q So these items, absent his generosity, you
2 could not have afforded these items?

3 A Yes.

4 Q What are your girls doing during this time
5 when you're picking up these items? Where are the
6 little girls?

7 A Just playing. Getting a little fussy because
8 it was getting late and they hadn't eaten any dinner.

9 Q Just doing what kids do when moms are
10 shopping?

11 A Right.

12 Q At some point while you were shopping inside
13 the Walmart, did the defendant make any mention to you
14 about getting some food?

15 A Yes.

16 Q What did he say and how did he say it?

17 A He used his hand and he said I'm going to
18 McDonald's, what do you want to eat.

19 Q Sort of like a sock puppet is what you're
20 describing to me?

21 A I thought it was odd.

22 Q Where was Cherish when he said this to you?

23 A She ran over to me.

24 Q Did she say anything to you?

25 A Yes, she did.

1 Q What did she say?

2 A She stood on my left and she said he's got a
3 \$150 gift card, I said is that what he told you, and
4 she said we're going to McDonald's, what do you want to
5 eat, and I said cheeseburgers and she said
6 cheeseburgers. And that was it.

7 Q At some point did the defendant walk towards
8 the front of the store where the McDonald's was?

9 A Yes.

10 Q Did Cherish follow after him?

11 A Yes.

12 Q What about the other two girls? Did they
13 stay with you?

14 A Yes.

15 Q Ma'am, why did you feel it okay to let
16 Cherish walk to McDonald's with the defendant?

17 A If he would have asked me if he could take her
18 I would have said no. But because McDonald's is inside
19 Walmart and people are in there I knew she would never
20 leave -- leave my sight.

21 Q Well, you've seen the photograph, the
22 photograph of the State's exhibit here. Did you know
23 and believe that there was surveillance cameras in the
24 Walmart?

25 A Yes, I did.

1 Q You knew the McDonald's was in the Walmart,
2 right?

3 A Yes.

4 Q Did you feel that if Cherish went to the
5 McDonald's with him inside the Walmart that she would
6 be safe?

7 A Yes.

8 Q Had you known that they were going to leave
9 the store, would you have let Cherish leave the store
10 with the defendant?

11 A No.

12 Q Did he ever ask you can Cherish come with me
13 to leave the store?

14 A No.

15 Q Would you have ever let your child leave the
16 store and leave the Walmart with this defendant?

17 A No.

18 Q You thought they were just going to get
19 cheeseburgers?

20 A Yes.

21 Q After they walk off, what do you do?

22 A I went to the shoe section because my [REDACTED]
23 year old [REDACTED] wanted a pair of shoes. A bigger
24 size.

25 Q Did you continue to shop for the girls and

1 look at clothes and things of that nature?

2 A I was just looking at the shoes. And then I
3 started to walk to the front of the store.

4 Q Had you heard an announcement about the store
5 would be closing?

6 A Yes.

7 Q And what time was the Walmart actually
8 clothing -- closing that night?

9 A 11:00 o'clock.

10 Q So did you gather up your kids and take your
11 purchases, or the items that you were looking to
12 purchase, and go towards the front?

13 A Yes.

14 Q Did you see Cherish anywhere in the store?

15 A No.

16 Q Did you see the defendant, Donald Smith,
17 anywhere in the store?

18 A No.

19 Q Did you look?

20 A Yes.

21 Q What did you do to look for them?

22 A I quickened my pace and I looked through every
23 aisle and the register. There was no one there.

24 Q Could you find Cherish?

25 A No.

1 Q How did that make you feel?

2 A I started to panic.

3 Q Did you look at the Walmart to see if they
4 were at the Walmart?

5 A They weren't there.

6 Q What about the McDonald's at the front of the
7 store?

8 A I went to the McDonald's.

9 Q Were they at the McDonald's?

10 A No.

11 Q Did your panic start to become worse?

12 A Yes.

13 Q Could you find your daughter and this
14 defendant anywhere in that store?

15 A No.

16 Q At some point did you seek help from the
17 Walmart employees to try to call for them?

18 A Yes, I was yelling call 911, my daughter's
19 been taken, and no one -- no one would help me right
20 away.

21 Q Finally at some point in time did one of the
22 Walmart employees loan you a phone?

23 A Yes.

24 Q And did you, in fact, call 911 that evening?

25 A Yes.

1 MR. CALIEL: Your Honor, may I approach the
2 witness?

3 THE COURT: You may.

4 BY MR. CALIEL:

5 Q Ma'am, I'm now showing you what's been marked
6 for identification purposes as State's Exhibit E. This
7 recording on this disk, prior to coming to court have
8 you had the opportunity to listen to the recording?

9 A Yes.

10 Q And did you sign on the disk itself with your
11 initials indicating that you had listened to this exact
12 recording?

13 A Yes.

14 Q Is the recording contained on this disk an
15 exact copy minus some minor redactions for court
16 purposes of your phone call to 911 on June 21st, 2013,
17 when you realized Cherish was gone?

18 A Yes.

19 MR. CALIEL: Your Honor, at this point in
20 time the State would move into evidence State's
21 Exhibit E as the next numbered exhibit, State's 5.

22 MS. SCHLAX: No legal objection, Your Honor.

23 THE COURT: Thank you.

24 State's Exhibit E is entered into evidence as
25 State's Exhibit 5.

1 (Whereupon the foregoing item was marked in
2 evidence as State's Exhibit 5.)

3 MR. CALIEL: And, Your Honor, with the
4 Court's permission we would like to publish
5 State's Exhibit 5 to the jury. We need some
6 assistance with IT to get the earphones out so it
7 can increase the hearing.

8 THE COURT: Okay.

9 (IT person conferring with jury.)

10 MR. CALIEL: Your Honor, may I publish?

11 THE COURT: You may.

12 (Whereupon the audiotape was played and
13 transcribed by court reporter as follows:)

14 911 OPERATOR: 911.

15 THE WITNESS: I was at Walmart (inaudible) my
16 daughter has been taken.

17 911 OPERATOR: What do you mean?

18 THE WITNESS: Taken by a stranger. I can't
19 find her.

20 911 OPERATOR: Okay. Ma'am, how old is your
21 daughter?

22 THE WITNESS: Eight and a half.

23 911 OPERATOR: You say you're at Walmart on
24 Lem Turner?

25 THE WITNESS: Yes, I am.

1 911 OPERATOR: Where did you last see her at?

2 THE WITNESS: Walmart. I met a man today at
3 Dollar General, he saw I was struggling to buy
4 them some clothes. He brought us here to buy some
5 clothes and I only left with him because he said
6 his wife was going to be here because I told him I
7 don't take rides with strangers.

8 911 OPERATOR: Okay. Ma'am, what's your
9 daughter's name?

10 THE WITNESS: Her name is Cherish.

11 911 OPERATOR: Cherish?

12 THE WITNESS: Yes.

13 911 OPERATOR: And her last name.

14 THE WITNESS: Perrywinkle with a P.

15 911 OPERATOR: Can you spell it for me,
16 please?

17 THE WITNESS: P-e-r-r-y-w-i-n-k-l-e.

18 911 OPERATOR: Is she a white or black
19 female?

20 THE WITNESS: Excuse me.

21 911 OPERATOR: Is she a white or black
22 female?

23 THE WITNESS: She's a white female. I can't
24 remember what clothes she's wearing because --

25 911 OPERATOR: Is she with this man?

1 THE WITNESS: Yes. (Inaudible) going to
2 McDonald's and he's never been in there because
3 the store is closed right now.

4 911 OPERATOR: Okay. Is he a white man or a
5 black man?

6 THE WITNESS: A white man. He's got white
7 short hair and he's got dark eyebrows.

8 911 OPERATOR: Did you say dark short hair?

9 THE WITNESS: No, he's got white hair.

10 911 OPERATOR: And dark eyebrows?

11 THE WITNESS: (Inaudible) he took her to the
12 -- he took her to the -- to the dressing room
13 twice and I was hoping that she would be okay.
14 And I was looking at the shoes. (Inaudible)
15 didn't want him to think I was overly protective,
16 freaking out, but now -- now I'm here and I find
17 it very odd because he knew that --

18 911 OPERATOR: Okay, ma'am. What color
19 vehicle does he drive?

20 THE WITNESS: It's a white van.

21 911 OPERATOR: Do you remember any stickers
22 or anything on the side of the van, anything that
23 you remember at all? Did it have tinted windows
24 or anything?

25 THE WITNESS: I know it's got carpet in the

1 van. And (inaudible) sorry.

2 911 OPERATOR: And he said what?

3 THE WITNESS: (Inaudible).

4 911 OPERATOR: Okay. Do you remember what --
5 did you see any tag on it or anything? Was it
6 (inaudible) tag?

7 THE WITNESS: No, I didn't look at that. I
8 feel like a fool.

9 911 OPERATOR: Okay. Do you remember what he
10 had on?

11 THE WITNESS: No, I don't remember anything
12 because I'm panicking right now.

13 911 OPERATOR: Okay. What's your name?

14 THE WITNESS: My name is Rayne, R-a-y-n-e.
15 He said his name's Don. He said he was supposed
16 to meet his wife here. His wife never showed up
17 and I couldn't figure out why he (inaudible) shop
18 at Dollar General.

19 911 OPERATOR: And he told you that he --
20 that you all were going to meet his wife at the
21 Walmart?

22 THE WITNESS: Yes. First she was supposed to
23 show up at Dollar General and then he (inaudible)
24 meet with her at -- at Walmart and we've been here
25 probably two hours. And she didn't show up and I

1 have this cart full of clothes and he said he was
2 going to pay for it with a hundred dollar gift
3 card and I --

4 911 OPERATOR: (Inaudible).

5 THE WITNESS: And I had a bag feeling. I
6 thought, well, I feel like pinching myself because
7 this is too good to be true. So I got to the
8 check out, he's not here, Cherish isn't here.
9 (Inaudible) she's eight years old. She's supposed
10 to go to California in the morning. (Inaudible)
11 and he knows because I told him this. He knew
12 when the store was closing. I had a bad feeling
13 about him.

14 911 OPERATOR: Okay. How long have you been
15 looking for him? When is the last time you saw
16 him for? How long ago?

17 THE WITNESS: About half an hour ago
18 (inaudible).

19 911 OPERATOR: (Inaudible) for half an hour?

20 THE WITNESS: Yes. She (inaudible) the
21 store. He knew that the store was closing. He
22 said he was going to McDonald's. She went to
23 (inaudible) stayed with me.

24 911 OPERATOR: (Inaudible) McDonald's inside
25 the store?

1 THE WITNESS: Yes, there's a McDonald's
2 inside the store. (Inaudible) somebody said they
3 saw him, but he's not here. He should have
4 (inaudible). He walked under (inaudible).

5 911 OPERATOR: Okay. Ma'am, where are you in
6 the store now? Are you outside or where?

7 THE WITNESS: No, I'm in the front of the
8 store. I think I need to hang out because --

9 911 OPERATOR: Are you a white female, black
10 female?

11 THE WITNESS: A white female (inaudible).

12 911 OPERATOR: What color shirt do you have
13 on?

14 THE WITNESS: I'm wearing a short black
15 polka-dot dress with flip-flop sandals with
16 (inaudible) my hair.

17 911 OPERATOR: And you're right in front of
18 the store?

19 THE WITNESS: Excuse me.

20 (Inaudible).

21 911 OPERATOR: Who are you talking to?

22 THE WITNESS: The Walmart employee
23 (inaudible) to my girls because they haven't had
24 anything to eat.

25 911 OPERATOR: What you say, ma'am?

1 THE WITNESS: They haven't had anything to
2 eat so the Walmart employee was talking to my
3 girls.

4 911 OPERATOR: Talking to your who?

5 THE WITNESS: My girls.

6 911 OPERATOR: Okay. You have more kids with
7 you?

8 THE WITNESS: Yes, I have two (inaudible) I
9 think he -- I think he took her.

10 911 OPERATOR: Okay. Ma'am, your eight year
11 old daughter, you think she's been taken. You say
12 you have other kids with you?

13 THE WITNESS: Yes, I do. He was -- he was --
14 he was giving my eight year old too much
15 attention. He wanted her to try these shoes that
16 were women's shoes and I told him, no, I said him
17 that's too high for her, I don't even wear shoes
18 that high. Maybe he was --

19 911 OPERATOR: Okay. And when did you meet
20 him today?

21 THE WITNESS: I met him at Dollar General on
22 Edgewood. I was struggling with my money to buy
23 the girls some clothes and he saw what I was doing
24 and he waited for me outside the store and he said
25 that he was waiting on his wife to show up and so

1 I waited around to meet her and she didn't show up
2 and then he said he was going to give us a ride to
3 (inaudible) Walmart and then we waited in the
4 parking lot for maybe 20 minutes for her to show
5 up. She didn't show up. So we all went into the
6 store. We've been here about two hours. And she
7 didn't show up. And I don't understand why he
8 would (inaudible).

9 911 OPERATOR: You're not wasting our time,
10 ma'am. We have officers on the way to you.

11 THE WITNESS: I can't remember what my child
12 is wearing. I need to sit down (inaudible) try to
13 remember what Cherish is wearing.

14 911 OPERATOR: Okay, ma'am. Just (inaudible)
15 and just try to (inaudible) what she's wearing and
16 what he's wearing so when the officers get there
17 you can tell them. Okay?

18 THE WITNESS: Yeah.

19 911 OPERATOR: Okay. Anything else about the
20 van or anything?

21 THE WITNESS: It had a line around the van
22 like a mental -- a metal (inaudible) I don't know
23 (inaudible).

24 911 OPERATOR: Like a pinstripe? Do you
25 remember what color the line was?

1 THE WITNESS: I think it was dark, maybe like
2 a silver. And it -- and it had a big space in the
3 middle of the van where he had taken out -- where
4 he had taken out a couple of seats and he put my
5 stroller in there -- or I put the stroller in
6 there. (Inaudible) or -- or (inaudible) go
7 through this. I feel responsible because I --
8 because I told him when I first met him there that
9 so -- I wasn't scared because I thought he was
10 (inaudible) outside the Dollar General (inaudible)
11 staying there and he said, well, if you really
12 want that dress for -- for my [REDACTED] year old, he
13 said I'll go get it for her. I should have told
14 him no, but I (inaudible) I'm so sorry (inaudible)
15 the clothes back in the store.

16 911 OPERATOR: Can you remember anything else
17 about him whenever you were talking to him? Did
18 he sound funny like he had an accent or anything?

19 THE WITNESS: He said he worked for Habi-Jax.

20 911 OPERATOR: He said he worked for
21 Habi-Jax?

22 THE WITNESS: Yes.

23 911 OPERATOR: Did he say where he lived?

24 THE WITNESS: No, I don't remember that. He
25 said his wife is from the Virgin Islands. We had

1 a little chat in the van on the way over.

2 911 OPERATOR: And did he say he lived on
3 that side of town or anything?

4 THE WITNESS: He said he was (inaudible) this
5 part of town. He wasn't sure about this part of
6 town. Oh, gosh. He knows the store is closed, he
7 knows McDonald's is closed. Why in the world
8 would he take my little girl (inaudible).

9 911 OPERATOR: You don't see the van in the
10 parking lot or anything where you all left it?

11 THE WITNESS: Well --

12 911 OPERATOR: Have you been outside to the
13 parking lot?

14 THE WITNESS: I went outside the door, but I
15 don't -- I don't see -- see the van.

16 911 OPERATOR: (Inaudible).

17 THE WITNESS: Yes, he took her. He took her
18 (inaudible).

19 911 OPERATOR: Okay. Who are you speaking
20 with, ma'am?

21 THE WITNESS: I'm speaking to a Walmart
22 employee.

23 Oh, my gosh. Oh, my gosh.

24 911 OPERATOR: Are you outside now, ma'am?

25 THE WITNESS: Yeah, there's two police

1 officers out here, two police cars.

2 911 OPERATOR: Okay. Go ahead and speak with
3 the officers.

4 THE WITNESS: All right.

5 (End of recording.)

6 BY MR. CALIEL:

7 Q Ma'am, on that 911 call you said you didn't
8 remember what Cherish was wearing. Do you remember
9 now?

10 A Yes.

11 Q What was she wearing at that?

12 A Purple flip-flops and an orange dress with no
13 sleeves with a fruit pattern on it. She had a pink
14 headband.

15 Q Ma'am, when your daughter followed after this
16 defendant towards McDonald's, was that the last time
17 you ever saw your daughter alive?

18 A Yes.

19 Q Thank you.

20 MR. CALIEL: I don't have any further
21 questions.

22 THE COURT: Ladies and gentlemen, this is a
23 time for us to take a short break. If you would
24 please step into the jury room. Please do not
25 discuss the case among yourselves.

1 Thank you.

2 (Jury absent.)

3 THE COURT: Ms. Schlax.

4 MS. SCHLAX: Your Honor, my client has just
5 indicated to me that he does not wish for me to
6 cross-examine Ms. Perrywinkle in any fashion. So
7 I think it probably would be appropriate to have
8 an inquiry.

9 THE COURT: Okay. Madam Clerk, would you
10 place Mr. Smith under oath?

11 (Defendant sworn.)

12 THE DEFENDANT: I do.

13 THE COURT: Thank you, Mr. Smith.

14 Earlier your attorneys had indicated that they
15 may want to have some discussion with the Court and
16 have some cross-examination of this witness, but
17 your attorneys told me now that you wish for them
18 not to do any cross-examination of this witness, is
19 that correct?

20 THE DEFENDANT: That's correct.

21 THE COURT: Do you understand there will not
22 be another opportunity for them to cross-examine
23 her? Do you understand that?

24 THE DEFENDANT: Blatant.

25 THE COURT: And you understand, of course, as

1 I told the jury, you're not -- you and your
2 attorneys, you're not required to do anything,
3 they're not required to cross-examine any
4 witnesses. Do you understand that?

5 THE DEFENDANT: Yes, ma'am.

6 THE COURT: And that is clearly how you wish
7 to proceed?

8 THE DEFENDANT: I don't want her to go
9 through anything that she doesn't have to go
10 through. I'm done.

11 THE COURT: Okay. So you don't want any
12 cross-examination?

13 THE DEFENDANT: No, ma'am.

14 THE COURT: And it's clear on the record your
15 age. You're 61, is that correct?

16 THE DEFENDANT: Yes, ma'am.

17 THE COURT: We've gone over this before,
18 you've got a work history, you've got an education
19 history.

20 THE DEFENDANT: Yes, ma'am.

21 THE COURT: You've understood everything
22 that's going on in the courtroom before making
23 this decision, is that correct?

24 THE DEFENDANT: Yes, ma'am.

25 THE COURT: All right. I do find that

1 Mr. Smith has freely advised Court and counsel he
2 wishes no cross-examination of this witness.

3 MR. CALIEL: Your Honor, can we approach on a
4 procedural matter?

5 THE COURT: Sure.

6 (Counsel for the State and defense approached
7 the bench for a side-bar conference out of the
8 hearing of the court reporter.)

9 THE COURT: If you could bring the jury back
10 in, please.

11 BAILIFF: Two in the restroom.

12 THE COURT: That's fine.

13 (Recess.)

14 THE COURT: We're ready.

15 BAILIFF: The jury's entering the courtroom.

16 (Jury present.)

17 THE COURT: You may be seated.

18 Ladies and gentlemen of the jury, I'm going to
19 send you right back out again in a second. We've
20 determined during the recess that it's better for us
21 to have a lunch break early today. I hope you'll
22 remember that I told you that trials are very fluid.
23 We never know exactly what's going to happen when.
24 So this is the first time you've been excused for
25 lunch since the trial started. If you brought

1 something to eat or wish to remain in the jury room
2 you may, but if you make a decision to stay there,
3 you have to stay there. You need to leave or stay.
4 So if you decide to stay there that's okay, but
5 you'll have to stay there during the lunch break.

6 If you prefer to go out, you can go with other
7 jurors. You cannot talk about the case, as you
8 know. And if you prefer to go downstairs to the
9 second floor cafe and get something and bring it
10 back to the jury room, you can do that, but if you
11 bring it back to the jury room, once you're in the
12 jury room you cannot leave again. So we're going to
13 be in recess until --

14 MR. CALIEL: Your Honor, before we go in
15 recess, I think we should conclude this witness
16 first.

17 THE COURT: Oh, I'm sorry. I apologize.
18 Sorry.

19 Any questions from the defense?

20 MS. SCHLAX: Your Honor, no questions.

21 THE COURT: All right. Thank you.

22 Anything further?

23 MR. CALIEL: Nothing further from the State.

24 THE COURT: May this witness be excused?

25 MR. CALIEL: She may be.

1 THE COURT: Ms. Perrywinkle, you're excused.

2 THE WITNESS: Thank you.

3 THE COURT: Thank you.

4 I'm going to ask that you be back at 12:20.

5 That gives you an hour and five minutes in case you
6 want to go somewhere and get something and come back
7 or get something to eat and come back.

8 Again, do not get any outside information on
9 the case and you cannot discuss the case among
10 yourselves. And we'll see you back at 12:20. We
11 should be able to move along. Thank you.

12 (Jury absent.)

13 THE COURT: We'll be in recess until 12:15.

14 The jury will be back at 12:20. Thank you.

15 (Noon recess.)

16 (Defendant present.)

17 THE COURT: All right. We told the jury to
18 be back at 12:20 and apparently they followed our
19 instructions, which is great.

20 Is everyone ready to proceed?

21 MR. CALIEL: The State's ready to proceed,
22 Your Honor.

23 MS. SCHLAX: Yes, Your Honor, the defense is
24 ready to proceed.

25 THE COURT: Okay. We're ready for the jury.

1 BAILIFF: Are you ready, ma'am?

2 THE COURT: We're ready.

3 BAILIFF: The jury's entering the courtroom.
4 (Jury present.)

5 THE COURT: You may be seated when you come
6 out from now on. You remain under oath for the
7 whole trial so you don't have to stand. You can
8 just sit. Thank you.

9 All right, ladies and gentlemen. I hope you
10 enjoyed your lunch break. We're ready to proceed.

11 The State may call their next witness.

12 MS. NELSON: Thank you, Your Honor. The
13 State of Florida calls Brad Calhoun to the stand.

14 THE COURT: Brad Calhoun.

15 (Witness present.)

16 THE COURT: Good afternoon, sir. Right in
17 front of me, Madam Clerk will swear you in.

18 (Witness sworn.)

19 THE WITNESS: I do.

20 THE COURT: Thank you, sir. If you'll have a
21 seat over here in the witness chair. Thank you.

22 MS. NELSON: May I inquire?

23 THE COURT: You may.

24 BRAD CALHOUN,

25 was called as a witness on behalf of the State, and after

1 being duly sworn, then testified as follows:

2 DIRECT EXAMINATION

3 BY MS. NELSON:

4 Q Mr. Calhoun, will you please introduce
5 yourself to the jury.

6 A My name is Bradley Wayne Calhoun.

7 Q Will you tell the jury how you're currently
8 employed.

9 A I'm a shift lead with Walgreen's.

10 Q Before working at Walgreen's, did you work at
11 the Dollar General?

12 A Yes, ma'am.

13 Q In what capacity?

14 A I was the assistant store manager.

15 Q And what Dollar General were you working at
16 as the assistant manager?

17 A The one on Edgewood.

18 Q I'm sorry.

19 A Edgewood.

20 Q Were you working there on June 21st of 2013?

21 A Yes, ma'am.

22 Q And will you describe for the jury what your
23 job entailed at the Dollar General?

24 A Basic store functions, count down money,
25 customer service, stocking.

1 Q Did you also sometimes work behind the
2 counter as a cashier?

3 A Yes, ma'am.

4 Q Are you familiar with the case of the State
5 of Florida versus Donald Smith?

6 A Yes, ma'am.

7 Q Let me direct your attention to June 21st,
8 2013. On that day, were you working at the Dollar
9 General?

10 A Yes, ma'am.

11 Q And did you have contact with a woman that
12 day who later became known to you as Rayne Perrywinkle?

13 A Yes, ma'am.

14 Q Will you describe for the jury your contact
15 with Ms. Perrywinkle?

16 A She was a frequent customer so we were on like
17 a friendly basis, but that's it.

18 Q Did you recognize her as a customer?

19 A Yes, ma'am.

20 Q And on June 21st, did she come to the Dollar
21 General on Edgewood Avenue?

22 A Yes, ma'am.

23 Q Do you remember approximately what time?

24 A Sorry.

25 Q Do you remember if anybody was with her?

1 A Her children.

2 Q How many?

3 A Three, I believe.

4 Q Were those little girls, little boys?

5 A Little girls.

6 Q I'm sorry.

7 A Little girls.

8 Q And had you seen them with their mother
9 before at the Dollar General as well?

10 A Yes, ma'am.

11 Q Did you also on that day have contact with a
12 man later who became known to you as Donald Smith?

13 A Yes, ma'am.

14 Q Do you see Donald Smith in court today?

15 A Yes, ma'am.

16 Q Will you please point him out and describe an
17 article of clothing he is wearing.

18 A Light blue shirt.

19 Q And he's seated where?

20 A To the left of me, to the left of you.

21 Q Thank you.

22 MS. NELSON: Your Honor, may the record
23 reflect the witness has properly identified the
24 defendant Donald Smith.

25 THE COURT: The record will so reflect he's

1 pointed in his direction.

2 BY MS. NELSON:

3 Q Mr. Calhoun, will you describe your
4 interaction with the defendant that day.

5 A He came in, walked around the store. He came
6 up to the front after a few minutes, asked me if we had
7 any adult magazines. That was about it. Until
8 Ms. Perrywinkle came up to the front. She was checking
9 out. There were some articles she left behind because
10 she couldn't afford them at the time and he came up and
11 inquired about that.

12 Q Okay. So let me walk back a little bit?

13 A Okay.

14 Q First of all, does Dollar General -- did it
15 sell adult magazines?

16 A No, ma'am.

17 Q And did you tell him that?

18 A Yes, ma'am.

19 Q You mentioned that Rayne Perrywinkle brought
20 some articles of clothing up to the cashier's desk, but
21 left them behind because she couldn't afford them?

22 A Yes.

23 Q Tell me about your interaction with her.

24 A She wanted some price checks. There was
25 clearance mark-down items and we were checking prices.

1 Q What were the articles of clothe?

2 A I believe there was some little dresses, stuff
3 like that.

4 Q Okay. And after you do the price check for
5 Ms. Perrywinkle, what did she do with the clothes?

6 A She left them right there at the counter.

7 Q And then what was your next interaction with
8 the defendant?

9 A He came up, asked if she wasn't able to afford
10 them and then he asked if it would be too forward to
11 ask if he could help pay for them.

12 Q Did you find that question to you strange?

13 A A little.

14 Q And what -- how did you respond?

15 A I just told him that that's not really my job,
16 I don't, you know, I don't want to tell anybody what is
17 right and what's wrong.

18 Q What, if anything, did you notice next about
19 the two of them? And by the two of them I mean
20 specifically the defendant and Ms. Perrywinkle.

21 A After a few minutes they were standing outside
22 the store talking.

23 Q And do you recall for how long they were
24 outside of the store?

25 A Maybe 15, 20 minutes.

1 Q And where were the little girls while
2 Ms. Perrywinkle was talking to the defendant outside?

3 A They were outside right in front of the store.
4 It had actually started to rain a little bit so they
5 had actually started trying to bring in some of the
6 stuff we had outside to help out.

7 Q The children did?

8 A Yes, ma'am.

9 Q Did you see Ms. Perrywinkle and her children
10 leave the property of Dollar General?

11 A Yes, ma'am.

12 Q And will you describe that for the jury,
13 please.

14 A They left with Mr. Smith. They got into a
15 van. That was probably about 15 minutes before
16 closing.

17 Q And could you see out the window of the
18 Dollar General from where you were located at the cash
19 register?

20 A Yes, ma'am.

21 Q Were you subsequently contacted by law
22 enforcement in this case?

23 A The next day.

24 Q And tell the jury about that.

25 A I actually had to call them back because they

1 had been given the wrong information the manager that
2 was on duty that morning. So I had to call back and
3 let them know that they needed to search later on in
4 the evening for the tapes they were looking for.

5 Q Okay. Explain what you mean.

6 A They had came to the store to search --

7 Q They being who?

8 A The police.

9 Q Okay.

10 A But they were searching the wrong time frame
11 on our security cameras so I called to let them know I
12 could walk them through the right time frame.

13 Q So let's talk about Dollar General's video
14 surveillance capabilities. Obviously the store had
15 cameras.

16 A Yes, ma'am.

17 Q And were you familiar with how the system
18 worked?

19 A Yes, ma'am.

20 Q And as part of your job as assistant manager
21 there, did you also take custody of surveillance video
22 when it was relevant to a particular issue in the
23 store?

24 A Yes, ma'am.

25 Q And did you do that in this case as well?

1 A Yes, ma'am.

2 Q And so when law enforcement contacted Dollar
3 General, you learned that they had been looking at, you
4 said an incorrect time frame?

5 A Yes, ma'am.

6 Q And how were you able to direct them to the
7 appropriate time frame that they needed to review?

8 A From the memory of just, you know, when the
9 interaction happened I'm able to go right back, punch
10 in, you know, within hours, search for it.

11 Q And that's what I'd like you to tell the jury
12 about. What prompted your memory about the night
13 before?

14 A Sorry. I walked into work, they told me about
15 it. As soon as I like heard about it, it just clicked.
16 I had heard -- when I got up that morning I had already
17 heard on the news about the incident at Walmart. It
18 wasn't until after I got in that day and my store
19 manager was telling me about the police coming to check
20 the cameras that I put two and two together.

21 Q When you say it clicked or that you put two
22 and two together, do you mean recalling this defendant?

23 A Yes, ma'am.

24 Q And specifically Ms. Perrywinkle leaving with
25 him?

1 A Yes, ma'am.

2 Q So you made contact with law enforcement.

3 A Yes, ma'am.

4 Q And did you begin yourself to review the
5 surveillance footage from the night before?

6 A Yes, ma'am.

7 Q And did you talk custody of Dollar General's
8 surveillance footage and turn it over to law
9 enforcement?

10 A Yes, ma'am.

11 Q In preparation for your testimony today, have
12 you taken the time to come to the State Attorney's
13 Office and review that original surveillance footage?

14 A Yes, ma'am.

15 MS. NELSON: May I approach the witness?

16 THE COURT: You may.

17 BY MS. NELSON:

18 Q Mr. Calhoun, let me show you what's been
19 premarked for identification purposes as State's
20 Exhibit F. Do you recognize these disks?

21 A Yes, ma'am.

22 Q And are these the disks that you, in fact,
23 reviewed in full at the State Attorney's Office?

24 A Yes, ma'am.

25 Q And were these disks the original

1 surveillance video that you collected and gave to law
2 enforcement?

3 A Yes, ma'am.

4 MS. NELSON: At this time I would tender into
5 evidence what's been premarked as State's Exhibit
6 F as the next numbered exhibit.

7 MS. SCHLAX: No objection, Your Honor.

8 THE COURT: All right. That will be entered
9 as State's Exhibit No. 6.

10 (Whereupon the foregoing item was marked in
11 evidence as State's Exhibit 6.)

12 BY MS. NELSON:

13 Q Mr. Calhoun, did you also have the
14 opportunity to look at a shortened version of those
15 original surveillance tapes?

16 A Yes, ma'am.

17 Q Let me show you what's been premarked for
18 identification as State's Exhibit H. And do you
19 recognize this disk as well?

20 A Yes, ma'am.

21 Q And is this, in fact, the shortened version
22 of the original surveillance footage that you provided
23 law enforcement?

24 A Yes, ma'am.

25 Q What -- what looks different about State's H

1 from the original surveillance footage that you
2 collected?

3 A From that one?

4 Q I'm sorry.

5 A From that one?

6 Q How is the redacted investigation different
7 than the original one?

8 A The interaction at the register where she left
9 the items behind, they don't have that angle on there.

10 Q We'll talk about that in a moment. Did you
11 notice there are arrows in --

12 A Yes, ma'am.

13 Q -- State's H?

14 A Yes, ma'am.

15 Q And what do those arrows reflect?

16 A Rayne Perrywinkle and Donald Smith.

17 Q And in looking at State's H, did you, in
18 fact, confirm that those arrows accurately reflect the
19 defendant and accurately reflect Rayne Perrywinkle?

20 A Yes, ma'am.

21 Q Let me take you back. You just mentioned
22 that State's Exhibit H does not capture the interaction
23 that the original surveillance videos do?

24 A Yes, ma'am.

25 Q Would you tell the jury what you mean by

1 that?

2 A They only did the angles where they're present
3 on the screen, not necessarily my interactions with
4 them. So they didn't put that into the actual FBI
5 clip.

6 Q Again, State's H, the shorter version of the
7 original surveillance videos now in evidence?

8 A Yes, ma'am. Yes, ma'am.

9 Q And last question. State's H, is it, in
10 fact, a true and accurate reflection, just shortened of
11 the original video surveillance that you collected and
12 gave to law enforcement?

13 A Yes, ma'am.

14 MS. NELSON: May I have just a moment?

15 THE COURT: Sure.

16 (State counsel conferring.)

17 MS. NELSON: I have nothing further. Thank
18 you.

19 THE COURT: Any cross-examination?

20 MS. SCHLAX: Yes, thank you.

21 CROSS-EXAMINATION

22 BY MS. SCHLAX:

23 Q Good afternoon, Mr. Calhoun.

24 A Good afternoon.

25 Q In fact, Ms. Perrywinkle and her children

1 were somewhat frequent customers at your store?

2 A Yes, ma'am.

3 Q Okay. And you would notice that they
4 normally got to your store like by walking?

5 A Yes, ma'am.

6 Q And, in fact, you kind of noticed after they
7 had left your store, you noticed this interaction
8 between Ms. Perrywinkle and the person you've
9 identified as Donald Smith?

10 A Yes, ma'am.

11 Q Okay. And I guess right at that exact same
12 time, someone that you kind of assumed was
13 Ms. Perrywinkle's friend also was talking to her,
14 correct?

15 A Yes, ma'am.

16 Q And then you kind of picked up on that
17 because of the way they greeted one another, that it
18 appeared Ms. Perrywinkle was familiar with this other
19 person?

20 A Yes, ma'am.

21 Q Okay. Do you remember did that person, was
22 it a female person?

23 A Yes, ma'am.

24 Q Did that person ever physically come into
25 your store?

1 A I don't remember. I don't think so.

2 Q Okay. And you found it unusual that
3 Ms. Perrywinkle brought herself and her three minor
4 children into the van that you saw them leave in,
5 didn't you?

6 A Yes, ma'am.

7 MS. SCHLAX: I don't have anything further,
8 Your Honor.

9 THE COURT: Any redirect?

10 MS. NELSON: No further questions.

11 THE COURT: May Mr. Calhoun be excused?

12 MS. NELSON: Yes, ma'am.

13 THE COURT: Thank you, sir. We appreciate
14 your time.

15 The State may call your next witness.

16 MS. SANCHEZ-WHEELER: Your Honor, may the
17 State next call Samantha Bray.

18 THE COURT: Samantha Bray.

19 (Witness present.)

20 THE COURT: Good afternoon, Ms. Bray. Come
21 right in front of me. The Clerk will swear you
22 in.

23 (Witness sworn.)

24 THE WITNESS: I do.

25 THE COURT: If you'll have a seat over here

1 in this chair. Thank you.

2 MS. WHEELER-SANCHEZ: May I proceed, Your
3 Honor?

4 THE COURT: You may.

5 SAMANTHA BRAY,
6 was called as a witness on behalf of the State, and after
7 being duly sworn, then testified as follows:

8 DIRECT EXAMINATION

9 BY MS. WHEELER-SANCHEZ:

10 Q Good afternoon. Would you please introduce
11 yourself and spell your last name for the record.

12 A Samantha Bray. B-r-a-y.

13 Q And where are you currently employed?

14 A Leslie's.

15 Q Where are you do at Leslie's?

16 A Manager.

17 Q What type of work do you do there?

18 A Retail.

19 Q Were you previously employed at Walmart?

20 A Yes.

21 Q Which specific Walmart?

22 A The Walmart on Lem Turner Road.

23 Q And when did you begin working for that
24 Walmart?

25 A In 2011.

1 Q Were you still working for Walmart on June
2 21st, 2013?

3 A Yes.

4 Q And what was your position?

5 A Asset protection associate.

6 Q And could you please describe your duties as
7 an asset protection associate.

8 A To protect company assets.

9 Q And while working for Walmart as an asset
10 protection associate, did you become proficient in the
11 Walmart surveillance system?

12 A Yes.

13 Q Can you describe that system for the jury.

14 A It's made up of many cameras, still cameras,
15 moveable cameras, and a DVR set.

16 Q How is surveillance recorded and stored?

17 A They get recorded onto a DVR system.

18 Q And where is that DVR system located within
19 the store?

20 A In the asset protection office.

21 Q And is it located on a desktop computer
22 within that office?

23 A Yes.

24 Q Is the asset protection office located in a
25 secured area?

1 A Yes.

2 Q Is access to that office limited?

3 A Yes, it is.

4 Q To whom?

5 A Upper management and asset protection
6 employees.

7 Q And are the recordings made automatically?

8 A Yes.

9 Q And do they contain date and time stamps?

10 A Yes.

11 Q I'd now like to draw your attention to June
12 21st, 2013. Were you working at Walmart that day?

13 A Yes.

14 Q Do you remember what time your shift began?

15 A Approximately 3:00 p.m.

16 Q And was the surveillance or the video
17 surveillance system working properly that day?

18 A Yes.

19 Q At some point that evening did officers of
20 the Jacksonville Sheriff's Office arrive on scene?

21 A Yes.

22 Q Do you remember approximately what time that
23 was?

24 A Between 8:00 and midnight.

25 Q And did those officers make contact with you?

1 A Yes.

2 Q And based on that contact were you asked to
3 assist them with their investigation?

4 A Yes.

5 Q How so?

6 A Pull back the video.

7 Q Could you describe the process of pulling
8 back video.

9 A You go to the desktop computer, you go into
10 the DCR system, you pull time and date and approximate
11 location.

12 Q And then from there what do you do?

13 A You save it and burn it to a disk.

14 Q Did you employ that process to obtain
15 specific surveillance footage of Walmart on the evening
16 of June 21st, 2013?

17 A Yes.

18 Q What date and approximate time frames did you
19 pull?

20 A June 21, 2013, between the hours of 8:00 p.m.
21 and midnight.

22 Q And how many disks did you use to burn that
23 surveillance?

24 A 16.

25 Q Were those videos altered or edited in any

1 way?

2 A No.

3 Q And what do you do with those disks?

4 A I turned them over to the Jacksonville
5 Sheriff's Office.

6 MS. WHEELER-SANCHEZ: Your Honor, may I
7 approach the witness?

8 THE COURT: You may.

9 MS. WHEELER-SANCHEZ: And for the record I'm
10 now approaching Ms. Bray, the witness, with what
11 has previously been marked for identification as
12 State's Exhibit G.

13 BY MS. WHEELER-SANCHEZ:

14 Q Ms. Bray, would you please take a look at
15 these disks.

16 (Witness examining exhibits.)

17 BY MS. WHEELER-SANCHEZ:

18 Q Ms. Bray, do you recognize these?

19 A Yes.

20 Q What do you recognize them to be?

21 A These are the disks we turned over to the
22 Jacksonville Sheriff's Office.

23 Q And do those disks contain the original
24 surveillance footage that you pulled on June 21st of
25 2013?

1 A Yes.

2 Q And do those disks fairly and accurately
3 represent and depict Walmart on the evening of June
4 21st, 2013?

5 A Yes.

6 MS. WHEELER-SANCHEZ: Your Honor, at this
7 time the State would move into evidence what has
8 previously been marked as State's Exhibit G as the
9 next numbered exhibit.

10 THE COURT: Any objection?

11 MR. FLETCHER: No, Your Honor.

12 MS. SCHLAX: No, Your Honor.

13 THE COURT: All right. Those will be State's
14 Exhibit 7 in evidence. Thank you.

15 (Whereupon the foregoing item was marked in
16 evidence as State's Exhibit 7.)

17 MS. WHEELER-SANCHEZ: And, Your Honor, at
18 this time the State has no further questions.

19 THE COURT: All right. Thank you.

20 Any cross-examination?

21 MR. FLETCHER: Yes, Your Honor. Just a
22 couple of questions.

23 CROSS-EXAMINATION

24 BY MR. FLETCHER:

25 Q Good afternoon, Ms. Bray.

1 A Good afternoon.

2 Q Ms. Bray, at your particular Walmart, the one
3 you were working at back on June 21st, 2013, how many
4 cameras were there in the store?

5 A A lot.

6 Q And they're all over the ceiling, right?

7 A The ceiling and the doors.

8 Q Okay. And when somebody walks into your
9 Walmart, was there a TV up there showing them walking
10 into Walmart?

11 A Yes.

12 Q So it's obvious to anybody in the store
13 that's doing anything they're going to be recorded,
14 right?

15 A Yes.

16 MR. FLETCHER: Thank you. That's all I have.

17 THE COURT: Anything further?

18 MS. WHEELER-SANCHEZ: No, Your Honor.

19 THE COURT: May this witness be excused?

20 MS. WHEELER-SANCHEZ: Yes, Your Honor.

21 THE COURT: Thank you for your time. You're
22 free to go.

23 MS. NELSON: The State calls Christopher Iber
24 to the stand.

25 THE COURT: Christopher Iber.

1 (Witness present.)

2 THE COURT: Good afternoon, sir. Right in
3 front of me. Madam Clerk will swear you in,
4 please. Thank you.

5 (Witness sworn.)

6 THE WITNESS: I do.

7 THE COURT: And our witness chair is actually
8 on this side of the courtroom. Different
9 courtrooms have different sides. Thank you.

10 BAILIFF: Watch your step going up. Adjust
11 the microphone the way you need it.

12 MS. NELSON: May I inquire?

13 THE COURT: You may.

14 CHRISTOPHER IBER,

15 was called as a witness on behalf of the State, and after
16 being duly sworn, then testified as follows:

17 DIRECT EXAMINATION

18 BY MS. NELSON:

19 Q Mr. Iber, will you please state your name for
20 the record.

21 A My name is Christopher Iber. Spelled I-b as
22 in boy e-r.

23 Q Thank you.

24 Will you tell the jury how you're employed.

25 A I am currently employed with the Federal

1 Bureau of Investigation's forensic audio-video and
2 image analysis unit in Quantico, Virginia.

3 Q Is there an acronym for your unit?

4 A FAVIAU.

5 Q How long have you worked for the FBI?

6 A This May will be 15 years.

7 Q And how long have you worked in the field of
8 photography?

9 A It's been over 30 years.

10 Q Will you explain to the jury what your unit
11 does, the FBI.

12 A As our name would indicate, we do forensic
13 analysis on audio, video and imagery. I'm an image
14 examiner of questioned photographic evidence. My
15 official title is photographic technologist. I do four
16 types of exams. I do comparison analysis, and that
17 would be comparing faces, clothing, cars, guns,
18 anything depicted in photographs or in videos. I also
19 do authenticity, has it been manipulated or changed or
20 did an image come from a particular camera. I also do
21 photogrammetry. Photogrammetry is simply the taking
22 measurements from photographs. So this would be height
23 determinations or velocity of a vehicle in a video, how
24 fast it was going. And then I also do enhancements.
25 This would simply be improving the imagery so you can

1 get more information from the video or the image.

2 Q Let me direct your attention to the case of
3 the State of Florida versus Donald Smith. Are you
4 familiar with this matter?

5 A Yes, ma'am.

6 Q Were you provided in Quantico, Virginia,
7 surveillance video footage from the Jacksonville
8 Sheriff's Office?

9 A Yes, I was.

10 Q Do you have your reports with you?

11 A Yes, ma'am, I do.

12 Q You may refer to those if you need to.

13 On what date did you receive surveillance
14 footage from the Jacksonville Sheriff's Office related
15 to the matter of State of Florida versus Donald Smith?

16 A I received two different groups of videos.
17 One is from Walmart and that would have been on June
18 8th in 2015. And then the other was from a Dollar
19 General store and that was December 8th, 2015.

20 Q Mr. Iber, what were you asked to do with
21 those two sets of videos?

22 A I was asked to -- to add indicators of
23 individuals that were depicted in the videos to help
24 assist in seeing their location within the videos.

25 Q Did you also reduce the number of hours to a

1 single of the original videos, to a single FBI disk?

2 A I did. When I was working on the videos I
3 noticed that the time frame was a long period of time
4 and so I requested if it would be okay for me to redact
5 the areas where the people of interest were not
6 displayed in the video, which shortened the video.

7 Q Mr. Iber, how did you identify -- you said
8 people of interest. How did you identify the relevant
9 parties in the video surveillance?

10 A I was -- it was indicated by Mr. Hinson from
11 the attorney's office which people were in the videos.
12 I was given exemplars and photographs of the people
13 that he was interested in.

14 Q And how did you indicate the relevant parties
15 in each of the videos?

16 A Originally the request was for me to do it
17 similar to the way my unit did the Boston Marathon
18 bombing videos for that court trial, but they used
19 circles and because these individuals within these
20 videos were so close together, circles would have been
21 very confusing so I chose arrows. So I used colored
22 arrows to indicate the people of interest.

23 Q And did you have an area arrow key that's
24 reflected on each of the redacted and enhanced videos
25 that you created?

1 A Yes, I did.

2 Q And does that key actually indicate the
3 colors you used for each relevant party?

4 A It does.

5 MS. NELSON: May I approach?

6 THE COURT: You may.

7 BY MS. NELSON:

8 Q Let me show you what's been introduced into
9 evidence as State's Exhibit G and ask you to take a
10 look at these DVDs.

11 (Witness examining exhibit.)

12 BY MS. NELSON:

13 Q Do you recognize these DVDs?

14 A Yes, I do.

15 Q Now, these have been tendered into evidence,
16 represented as being the original surveillance video
17 footage from the Dollar General. Did you review this
18 original footage in Quantico at the FBI?

19 A Yes, I did.

20 Q Let me show you now what has been premarked
21 for identification as State's Exhibit H. Would you
22 take a look at this. What do you recognize State's H
23 to be?

24 A This would be my results copy of the video
25 that I compiled.

1 Q And does this reflect the key that you
2 testified to with the arrows?

3 A Yes.

4 MS. NELSON: I'd like to tender what's been
5 marked as State's H as the next numbered exhibit.

6 MS. SCHLAX: We would renew all prior
7 objections and motions.

8 THE COURT: Okay. That will be noted for the
9 record and State's H will be entered into evidence
10 as State's Exhibit 8 over defense objections.

11 (Whereupon the foregoing item was marked in
12 evidence as State's Exhibit 8.)

13 BY MS. NELSON:

14 Q Let me also show you what has been introduced
15 into evidence as State's Exhibit 7. Ask you to take a
16 look at those. Does State's Exhibit 7 also reflect
17 your markings from the FBI when you reviewed that
18 original surveillance video?

19 (Witness examining exhibit.)

20 A Yes, it does.

21 Q Now, let me show you what's been premarked
22 for identification as State's Exhibit I and ask you if
23 you recognize this DVD.

24 A I do. This is the results copy that I
25 returned with the compiled.

1 MS. NELSON: Let me tender what's been
2 premarked as State's Exhibit I as the State's next
3 numbered exhibit.

4 MS. SCHLAX: And I apologize, Your Honor.
5 Subject to the prior objections and motion.

6 THE COURT: All right. Thank you.

7 State's Exhibit I will be entered as State's
8 Exhibit 9 over the previously expressed objection.

9 MS. NELSON: May I publish State's 8 and 9 to
10 the jury?

11 THE COURT: You may.

12 (Whereupon the foregoing item was marked in
13 evidence as State's Exhibit 9.)

14 MS. NELSON: I'm going to need a little bit
15 of help.

16 MS. SCHLAX: Your Honor, may we reposition
17 ourselves such as to put our back to you?

18 THE COURT: You may.

19 BY MS. NELSON:

20 Q Mr. Iber, do you recall how long the redacted
21 Dollar General video is?

22 A No. I do not recall the exact length of it.

23 (Videotape playing with no sound.)

24 BY MS. NELSON:

25 Q Mr. Iber, what does the blue arrow reflect?

1 A That would be one of the questioned
2 individuals that I was asked to indicate.

3 Q And your key at the beginning of this video
4 indicated that the blue arrow was Donald Smith, is that
5 correct?

6 A That is correct.

7 Q You don't know Mr. Smith?

8 A No, I do not.

9 Q You obtained that information from law
10 enforcement?

11 A That is correct.

12 (Videotape continuing to play with no audio.)

13 BY MS. NELSON:

14 Q Mr. Iber, let me pause this right here and
15 ask you, will you explain to the jury when you're
16 actually doing an enhancement such as this and using
17 arrows, how the process you undertake to do that?

18 A Sure. It's digital video so I use a nonlinear
19 editor. Adobe Premiere is the software that I use.
20 It's something that you can purchase off the shelf.
21 Within that software you are able to enhance videos,
22 edit videos as well. So you can add markers or you can
23 lighten or darken it or sharpen. It has different
24 types of filters that you can use with those videos.
25 This particular video the only thing that I added were

1 arrows.

2 MS. NELSON: For the record I'm hitting play
3 again.

4 (Videotape continuing to play with no audio.)

5 BY MS. NELSON:

6 Q Mr. Iber, let me direct your attention to the
7 orange arrow. And who is reflected by the orange
8 arrow?

9 A That would be Ms. Perrywinkle.

10 Q Again, you don't know Ms. Perrywinkle?

11 A That is correct.

12 MS. NELSON: For the record I'm hitting play
13 again.

14 (Video continuing to play with no audio.)

15 BY MS. NELSON:

16 Q Mr. Iber, is that from -- you have a note
17 here. There's a note three-minute lapse. Can you
18 explain that, please.

19 A The note in front means approximately
20 three-minute lapse. So to keep the video from being
21 too long, I redacted areas where the people of interest
22 weren't in the video and then I indicated how much time
23 had -- had actually lapsed or how much was redacted.

24 Q Thank you.

25 MS. NELSON: For the record, I'm hitting

1 play.

2 (Videotape continuing to play with no audio.)

3 MS. NELSON: Let me hit pause.

4 BY MS. NELSON:

5 Q There was a notation of overlap, different
6 from lapse. Can you explain what that is to the jury.

7 A So there's multiple cameras within the store
8 and so some of the cameras were capturing the
9 individuals at the same time. So if I wanted to --
10 instead of splitting screen and putting multiple
11 cameras up at the same time, I would just cut to
12 another camera and explain that there was some overlap.

13 MS. NELSON: For the record, I'll hit play.

14 (Videotape continuing to play with no audio.)

15 MS. NELSON: Let me pause.

16 BY MS. NELSON:

17 Q Mr. Iber, is this a different camera angle
18 from the one that we were just looking at, camera two?

19 A Yes, it would be a different camera.

20 Q And is that indicated by the CAM numerical in
21 the upper left-hand corner of the video?

22 A Yes, that is correct.

23 MS. NELSON: For the record I'm hitting play.

24 (Videotape continuing to play with no audio.)

25 BY MS. NELSON:

1 Q Once again, let me direct your attention to
2 the upper left-hand corner. Is what's reflected here
3 again a different camera angle than that inside the
4 store that we were just looking at?

5 A Yes.

6 Q This reflects outside of the store, a parking
7 lot?

8 A Yes.

9 MS. NELSON: For the record I've hit play.

10 (Videotape continuing to play with no audio.)

11 MS. NELSON: Okay. Let me pause here.

12 BY MS. NELSON:

13 Q There -- let me direct your attention to the
14 upper left side of the screen. Is that part of the
15 yellow arrow?

16 A It appears to be, yes.

17 Q And who did you -- who is indicated by the
18 yellow arrow?

19 A Cherish Perrywinkle.

20 MS. NELSON: For the record I'm hitting play.

21 (Videotape continuing to play with no audio.)

22 BY MS. NELSON:

23 Q Mr. Iber, let me pause this for a moment now.
24 This is the first time we see a white arrow. What does
25 the white arrow indicate?

1 A Actually this would be the second time. It
2 was also at the beginning of the video.

3 Q I'm sorry.

4 A That's okay. Indicating the van of interest.

5 (Videotape continuing to play with no audio.)

6 BY MS. NELSON:

7 Q Mr. Iber, did this conclude your work on the
8 Dollar General video?

9 A Yes.

10 MS. NELSON: May we approach?

11 THE COURT: Sure.

12 (Counsel for the State and defense approached
13 the bench for a side-bar conference out of the
14 hearing of the jury and court reporter.)

15 THE COURT: Ladies and gentlemen, the next
16 video that we're going to watch is an hour long.
17 Just need to know if you need a break before we go
18 into that hour long video?

19 (Juror indicating.)

20 THE COURT: Okay. There's 16 of you. A
21 break generally takes ten or 15 minutes so take
22 your time and the bailiff will let me know when
23 you're ready. We'll be in recess. Thank you.

24 (Jury absent.)

25 THE COURT: We'll be in recess for at least

1 ten minutes. Thank you.

2 (Recess.)

3 (Defendant present.)

4 THE COURT: Is everybody ready to proceed?

5 MR. CALIEL: The State's ready to proceed,
6 Your Honor.

7 MS. SCHLAX: The defense is ready, Your
8 Honor.

9 THE COURT: We're ready.

10 BAILIFF: Ready, Judge?

11 THE COURT: We're ready.

12 BAILIFF: The jury is entering the courtroom.
13 (Jury present.)

14 THE COURT: Thank you, ladies and gentlemen.
15 Ms. Nelson, you may proceed.

16 MS. NELSON: Thank you.

17 BY MS. NELSON:

18 Q Mr. Iber, now let me show you what's been
19 introduced in evidence as State's Exhibit 9, your
20 redacted version of the Walmart surveillance videos.
21 Did you use the same color key for this video as you
22 did for the Dollar General video?

23 A Yes, I did.

24 MS. NELSON: For the record I'm hitting play.

25 (Videotape playing with no audio.)

1 MS. NELSON: Let me pause.

2 BY MS. NELSON:

3 Q Mr. Iber, will you tell the jury how you're
4 able to identify that van as being the van of interest
5 and mark it with a white arrow.

6 A I was given time frames and cameras to
7 indicate what areas were pertinent and so I was able to
8 -- to know that was the van they were interested in.

9 Q And what is the time stamp on this screen?
10 Can you read it?

11 A It looks it's being cut off at the top a
12 little bit.

13 (Video continuing to play with no audio.)

14 BY MS. NELSON:

15 Q Now, you took, Mr. Iber, multiple different
16 DVDs from Walmart. Were each of those DVDs from a
17 different camera angle in that store?

18 A That is correct.

19 (Videotape continuing to play with no audio.)

20 BY MS. NELSON:

21 Q Mr. Iber, let me pause for a moment. We just
22 saw another substantial lapse of time. Was that the
23 amount of time that elapsed from the van driving out of
24 the parking lot?

25 A Yes.

1 Q Do you want me to -- do you want to see the
2 amount of time? Was it 18 minutes?

3 A It was approximately 18 minutes?

4 Q Okay. And that, again, was a time that you
5 redacted out of the version you put together because it
6 did not have the relevant parts reflected in it?

7 A That is correct.

8 Q Okay.

9 (Video continuing to play with no audio.)

10 BY MS. NELSON:

11 Q Mr. Iber, did that conclude your work in the
12 case of State of Florida versus Donald Smith?

13 A Yes, it did.

14 Q Thank you.

15 MS. NELSON: I have no further questions.

16 THE COURT: Any cross-examination?

17 MS. SCHLAX: No, Your Honor. Thank you.

18 THE COURT: May this witness be excused?

19 MS. NELSON: Yes, ma'am.

20 THE COURT: Thank you so much. We really
21 appreciate your time.

22 THE WITNESS: Thank you, Your Honor.

23 THE COURT: The State may call their next
24 witness.

25 MR. CALIEL: The State would call Christopher

1 Rozier.

2 THE COURT: Christopher Rozier.

3 (Witness present.)

4 THE COURT: Good afternoon, sir. Right in
5 front of me. Madam Clerk will swear you in.

6 Thank you.

7 (Witness sworn.)

8 THE WITNESS: Yes, I do.

9 THE COURT: Sir, if you'll have a seat over
10 here in the witness chair, please. Thank you.

11 MR. CALIEL: May it please the Court.

12 THE COURT: Yes.

13 CHRISTOPHER ROZIER,
14 was called as a witness on behalf of the State, and after
15 being duly sworn, then testified as follows:

16 DIRECT EXAMINATION

17 BY MR. CALIEL:

18 Q Good afternoon, sir.

19 A Good afternoon.

20 Q Can you please introduce yourself to the jury
21 and spell your last name for the court reporter.

22 A Christopher Derrick Rozier, my last name is
23 spelled R-o-z-i-e-r.

24 Q Mr. Rozier, I'd like to direct your attention
25 back to June 21st of 2013. Were you living in

1 Jacksonville at that time?

2 A No, I was living in Callahan.

3 Q And were you married?

4 A Yes.

5 Q Did you have a child?

6 A Yes.

7 Q What was the name of your child?

8 A Destiny.

9 Q And the name of your wife?

10 A Ashley Rozier.

11 Q At sometime in the evening of June 21st,
12 2013, did you and your wife and your daughter decide to
13 go shopping at the Walmart on Lem Turner Road?

14 A Yes, sir.

15 Q And what were you going shopping for?

16 A We were going to get WIC.

17 Q And what do you mean by going to get WIC?

18 A It was grocery assistance.

19 Q And so that afternoon and that evening you
20 were going to the Walmart to go grocery shopping using
21 your grocery assistance with WIC?

22 A Yes.

23 Q Approximately what time did you arrive at the
24 store?

25 A I don't remember what time I arrived. It was

1 sometime in the evening.

2 Q Sometime in the evening after dark?

3 A Yes.

4 Q And how long did you and your wife and child
5 shop in the Walmart that day?

6 A A couple of hours, two hours, hour and a half.

7 Q You bought your groceries?

8 A Yeah.

9 Q After you completed your grocery shopping,
10 did you all wait in the parking lot for a family
11 member?

12 A Yes, sir.

13 Q Why were you waiting for a family member?

14 A Because we were going to offer my ex-wife's
15 dad some of her -- some milk that we had gotten because
16 they give you so much.

17 Q And you said ex-wife. Since June of 2013,
18 have you and your wife actually split?

19 A Yes.

20 Q But on that evening after you completed your
21 grocery shopping, based on the amount of groceries that
22 you had, you were going to share some with her father?

23 A Yes.

24 Q Where did you go to wait for her father
25 outside the Walmart?

1 A Over to the side parking lot by the curb, over
2 off the side of the lawn and garden area.

3 Q What type of car were you and your wife
4 driving that night?

5 A A gold Toyota Corolla.

6 Q Were you driving or were you the passenger?

7 A I was the passenger.

8 Q And so your wife was driving?

9 A Yes.

10 Q And your daughter -- what's your daughter's
11 name again?

12 A Destiny.

13 Q And Destiny, she was in the back seat?

14 A Yes.

15 Q How old was she at the time?

16 A I believe she was about four.

17 Q So you just pulled off sort of off the side
18 of the main road to wait for your father-in-law to come
19 to get his portion of the groceries?

20 A Right.

21 Q How long do you think you were waiting in the
22 parking lot?

23 A I guess about 30 minutes, 40 minutes,
24 something like that.

25 Q And was her father working and then trying to

1 meet up with you at the Walmart?

2 A That's -- that was the arrangement, yes.

3 Q While you were waiting there at the garden
4 center in the parking lot, did a white van pull up next
5 to your car?

6 A Yes, sir.

7 Q When the white van pulled up next to your
8 car, was it closer to your side, the passenger side, or
9 closer to your wife's side?

10 A Closer to my side.

11 Q And so you were parked so that your window
12 was facing the lane of traffic?

13 A My window was -- yeah, yeah.

14 Q Were -- when this white van pulled up next to
15 you, did you know the person inside the van?

16 A No.

17 Q Did they say anything to you when they pulled
18 up next to you?

19 A I rolled my window down and they said we're
20 going to get cheeseburgers.

21 Q Who made that statement to you?

22 A The person in the van.

23 Q Describe him?

24 A He had a white moustache, white hair.

25 Q If you saw that person again, do you think

1 you'd be able to identify him?

2 A Yeah.

3 Q Do you see that person who was driving the
4 white van in the courtroom here today?

5 A Yes.

6 Q Could you please point him out and describe
7 where he's seated and what he's wearing.

8 A He's wearing a blue shirt, got glasses on top
9 of his head.

10 Q Seated in between the two people in suit?

11 A Yes.

12 MR. CALIEL: Your Honor, may the record
13 reflect the witness has identified the defendant
14 Donald Smith?

15 THE COURT: The record will so reflect.

16 BY MR. CALIEL:

17 Q So when the van pulled up next to you, where
18 was the driver's window of the van in comparison to
19 your window?

20 A It was up over my window.

21 Q So --

22 A It was a little ahead of me, too.

23 Q So a little ahead and based upon the size of
24 the vehicle, it was a little higher than where you
25 were?

1 A Yes.

2 Q Could you tell if anybody else was inside the
3 van at the time?

4 A I could not.

5 Q But you got a good enough look to see his
6 face?

7 A Yeah.

8 Q Had you ever met this man before?

9 A No.

10 Q Do you know why this man would have said
11 we're going for cheeseburgers to you and your wife and
12 your daughter?

13 A I have no idea.

14 Q How long was this interaction with the
15 defendant when he pulled up next to your car?

16 A Five, ten seconds.

17 Q When the van pulled off, could you tell where
18 it went?

19 A It pulled off and went to the outside of the
20 other entrance.

21 Q After the van pulled off, did you and your
22 wife have a conversation as to whether or not that may
23 have been her father in the van with the person who was
24 driving?

25 A Yes.

1 Q Did you decide to go see if you could follow
2 them and follow them to fast food restaurants that were
3 on that street?

4 A Yeah, we went down to see if they were there.

5 Q Did you go to the McDonald's down the street?

6 A We never went into the parking lot of the
7 McDonald's.

8 Q Did you drive by it?

9 A Yeah, we drove by it.

10 Q Did you see the white van and this defendant
11 who pulled up next to you?

12 A No.

13 Q Did you think that maybe they weren't going
14 to McDonald's and maybe went to Wendy's?

15 A Yeah, we thought maybe, yes.

16 Q Did you go to the Wendy's and see whether or
17 not they were in the Wendy's area?

18 A Yes, we did.

19 Q Did you see the white van --

20 A No.

21 Q -- or this defendant in the Wendy's parking
22 lot?

23 A No, I did not.

24 Q What did you and your wife do after you
25 checked those two locations? Did you go back to

1 Walmart?

2 A We went back to the same spot at Walmart we
3 were waiting.

4 Q Still waiting for her father to show up?

5 A Yes.

6 Q Did her father ever show up?

7 A No.

8 Q So eventually did you all drive back to
9 Callahan?

10 A Yeah.

11 Q The next day did the police go to your home?

12 A Yes.

13 Q Prior to the police arriving at your home,
14 did you know anything had happened at the Walmart that
15 evening?

16 A I did not.

17 Q Did you all even have television in your home
18 in Callahan?

19 A We didn't have cable or anything like that.

20 Q So until the police came knocking on your
21 door, you had no idea that anything had happened the
22 night before?

23 A No, I had no idea.

24 Q Did you tell the police when they arrived
25 what you saw and that you saw this defendant that day?

1 A Yes, I did.

2 Q Thank you, sir.

3 MR. CALIEL: I don't have any further
4 questions.

5 THE COURT: Any questions?

6 MS. SCHLAX: Yes, thank you.

7 THE COURT: All right.

8 CROSS-EXAMINATION

9 BY MS. SCHLAX:

10 Q Good afternoon, Mr. Rozier.

11 A Good afternoon.

12 Q This was -- this was at night. You do
13 remember that, correct?

14 A Yes, it was at night.

15 Q And your daughter, Destiny, was in the car in
16 the back seat?

17 A Yes.

18 Q Okay. And you would have been waiting long
19 enough that the security guard that patrols the Walmart
20 had come over to check on you?

21 A I don't remember.

22 Q Okay. But you were pretty familiar with this
23 area?

24 A I was pretty familiar with it, yeah.

25 Q Okay. And this was a very unusual

1 experience, correct?

2 A Yes.

3 Q You're sitting there and this person you've
4 never seen before in your life comes and stops their
5 car right next to yours, right?

6 A Correct.

7 Q And -- and evidently beckons enough to where
8 you roll the window down so that you can actually talk
9 to this person.

10 A Well, I just saw somebody there. I didn't
11 roll the window down.

12 Q Okay. And so you had the window down so that
13 you could hear and that person that you've identified
14 as Mr. Smith, he had his window down.

15 A Yes.

16 Q Okay. So you guys were able to hear and
17 you're literally within feet of each other.

18 A Correct.

19 Q Okay. And he says to you, we're going for
20 cheeseburgers.

21 A Yes.

22 Q And you and your wife got the impression that
23 you were to follow them, correct?

24 A That was the -- that's kind of the idea, yeah,
25 we thought maybe her father was with him.

1 Q Okay. Do you -- do you remember him saying
2 follow us?

3 A I don't remember that, no.

4 Q Okay. Do you think maybe you might have told
5 the detectives that it was we're going for
6 cheeseburgers, follow us?

7 A I could have.

8 Q Regardless, you did end up, I guess
9 eventually, attempt to follow him, correct?

10 A We -- we went to go see if they were down
11 there.

12 Q Okay. At both the McDonald's and then you
13 swung back through -- through the Wendy's?

14 A Correct.

15 Q Okay. And you didn't hear anything besides
16 this man's voice.

17 A I heard nothing but the man's voice.

18 Q Okay.

19 MS. SCHLAX: Nothing further, Your Honor.

20 THE COURT: Any redirect?

21 MR. CALIEL: Briefly.

22 REDIRECT EXAMINATION

23 BY MR. CALIEL:

24 Q So he pulls up and says we're going for
25 cheeseburgers.

1 A Correct.

2 Q Next to you in your gold car?

3 A Yes.

4 MR. CALIEL: I don't have any further
5 questions.

6 THE COURT: May this witness be excused?

7 MR. CALIEL: He may.

8 THE COURT: Thank you, sir. We appreciate
9 your time.

10 You may call your next witness.

11 MR. CALIEL: The State would call Ashley
12 Rozier Chappell. Now it's Ashley Chappell.

13 (Witness present.)

14 THE COURT: Good afternoon. Ms. Chappell
15 now, correct?

16 THE WITNESS: Yes, ma'am.

17 THE COURT: Okay. Madam Clerk will place you
18 under oath.

19 (Witness sworn.)

20 THE WITNESS: I do.

21 THE COURT: Thank you. If you'll have a seat
22 over here in the witness chair. Thank you.

23 MR. CALIEL: May it please the Court.

24 THE COURT: Yes, sir.

25 ASHLEY CHAPPELL,

1 was called as a witness on behalf of the State, and after
2 being duly sworn, then testified as follows:

3 DIRECT EXAMINATION

4 BY MR. CALIEL:

5 Q Good afternoon, ma'am.

6 A Good afternoon.

7 Q Can you please introduce yourself to the
8 members of the jury and spell your last name for the
9 court reporter.

10 A My name is Ashley Chappell, C-h-a-p-p-e-l-l.

11 Q Ms. Chappell, back in June of 2013, were you
12 going by the name of Ashley Rozier?

13 A Yes, sir.

14 Q Were you married at that time to Christopher
15 Rozier?

16 A Yes, sir.

17 Q Were you and your husband and daughter at
18 that point in time living in Callahan, Florida?

19 A Yes, sir.

20 Q I would like to direct your attention to the
21 evening of June 21st, 2013. At some point did you and
22 your husband and your -- ex-husband now and your
23 daughter, go to the Walmart on Lem Turner Road here in
24 Jacksonville, Florida?

25 A Yes, sir.

1 Q Why were you going to Walmart that night?

2 A It was food stamp night so we were getting
3 milk.

4 Q And you were getting food assistance and so
5 on. Does that mean you were going to buy groceries,
6 milk and things of that nature?

7 A We needed formula.

8 Q Approximately how long did you shop at the
9 Walmart on Lem Turner that evening.

10 A It was quite awhile. We were wasting some
11 time after Destiny watched her shows.

12 Q Eventually did you make your purchases?

13 A At one of the stores, yes, sir.

14 Q That evening did you buy a lot of milk using
15 the assistance?

16 A About four and a half gallons, I think it was.

17 Q Could you and your family use that much milk
18 before it would go bad?

19 A No, we already had some in the freezer.

20 Q So did you make some arrangements to meet up
21 with your father that evening so he could take some of
22 the milk that you had purchased?

23 A Yes, sir. I didn't want it to go to waste.

24 Q So after you made your purchases did you and
25 your husband and your daughter wait in the parking lot

1 for your father to arrive?

2 A We had made arrangements to meet right there
3 next to the garden center, yes, sir.

4 Q Was your father working that evening?

5 A He was.

6 Q Were you driving that night?

7 A Yes, sir.

8 Q What type of car were you driving?

9 A It was a gold Toyota Corolla.

10 Q And when you pulled up next to the garden
11 center to wait for your father, where did you position
12 your car in the parking lot?

13 A Okay. You would have the store and you would
14 have where you would have the main access road here, so
15 instead of pulling into a regular parking space we
16 actually pulled alongside of the curb right next to the
17 other entrance. We could see the oncoming traffic.

18 Q Okay. Was your side closest to the curb?

19 A Yes.

20 Q The driver's side. Was your daughter in the
21 back seat?

22 A Yes. She loves to listen to radio.

23 Q And then your ex-husband, Chris, was he in
24 the passenger seat?

25 A Yes.

1 Q Was he seated closest to the lane of traffic
2 if somebody would pull up beside you?

3 A Yes.

4 Q At some point in time while you were waiting
5 for your father, did a white van pull up next to your
6 car?

7 A With stripes on the side, yes, sir.

8 Q And did the driver of that white van make any
9 statements or comments to you?

10 A Yes, he did.

11 Q What did he say?

12 A We're going for cheeseburgers.

13 Q Could you hear that from where you were
14 seated in the car?

15 A Very clearly. It was very deliberate and
16 pronounced and I was like what. I was very confused.

17 Q Did you see the person?

18 A Yes, sir.

19 Q Describe him for us.

20 A Wearing a black or a dark-colored T-shirt, had
21 some kind of something on the front. I couldn't tell.
22 He had his left arm out of the window and one hand up
23 on the steering wheel. As far as facial, it was white
24 hair, kind of like a sandy white color, had a moustache
25 and looked to me like he had like -- almost like a 5:00

1 o'clock shadow. White gentleman.

2 Q If you saw that person again, do you think
3 you'd be able to recognize him?

4 A Yes, sir.

5 Q Do you see that person seated here in the
6 courtroom today?

7 A Yes, sir.

8 Q Could you point him out and describe where
9 he's sitting and what he's wearing?

10 A Light blue, light colored shirt with a tie,
11 right here (indicating).

12 MR. CALIEL: Your Honor, may the record
13 reflect that the witness has identified the
14 defendant, Donald Smith?

15 THE COURT: The record will so reflect.

16 BY MR. CALIEL:

17 Q Did you find it odd that the defendant had
18 made this comment to you?

19 A Yes. I didn't know who he was or why he was
20 there. My first recollection was, is my father in this
21 van, why is he trying to talk to us now.

22 Q Could you tell if there was anybody else in
23 the van with the defendant?

24 A There appeared to be someone in the front
25 seat. I don't know who or what, but, yes, there was

1 somebody on the front seat. I could tell a shadow for
2 sure.

3 Q How long was this interaction when he says
4 this comment about going for cheeseburgers before the
5 van actually pulls off?

6 A It was very -- it was a very quick exchange.
7 Almost like we had been friends forever and I was very
8 confused. Maybe it was, maybe less than a minute.

9 Q Did you see which direction the van drove off
10 in?

11 A Very clearly, yes. Where we were sitting, he
12 actually pulled around the corner and went towards, I
13 guess where the semis would exit and where the -- not
14 the stop light, but the stop sign, and turned towards
15 the right.

16 Q After the van drove off, did you wonder
17 whether or not your father was actually in the van?

18 A Yes, because it -- usually if I have baby with
19 us we would always go sit down and have something to
20 eat or at least grab a french fry or something so going
21 to have cheeseburgers or going to even get a frosty was
22 a very normal occurrence for us.

23 Q Did you and your husband and your daughter
24 decide to then follow after and see if you could catch
25 up with him?

1 A Yes, we did.

2 Q Did you drive down towards where the
3 McDonald's was on Lem Turner?

4 A And we circled the parking lot to make sure
5 the van wasn't there.

6 Q Did you ever see the van?

7 A Not once it left and turned right, no.

8 Q Did you ever see this defendant again?

9 A Not until today.

10 Q Did you go to another restaurant in case they
11 didn't mean McDonald's, they meant some place else?

12 A Yes, actually we went back around the
13 McDonald's because there's an entrance here, we went
14 around the McDonald's, came back up after the light
15 turned green, went through next to the bank in the Home
16 Depot and went to the Wendy's and we circled the
17 Wendy's parking lot before returning to Walmart.

18 Q When you circled the Wendy's parking lot did
19 you see the white van again?

20 A No, we didn't.

21 Q Did you see the defendant again?

22 A No.

23 Q You went back to the Walmart parking lot to
24 wait for your father?

25 A We decided it would be best just in case he --

1 we missed him in the exchange somehow.

2 Q How long did you wait in the Walmart parking
3 lot that evening?

4 A Total or after the exchange?

5 Q After the exchange?

6 A Two songs on the radio.

7 Q Two songs later?

8 A Two songs on the radio. We were thinking we
9 had the milk in the car, we didn't want it to sour and
10 go bad where nobody could use it.

11 Q So you never met up with your father that
12 night?

13 A No, he was otherwise occupied with his job.

14 Q The next day did police officers go to your
15 place in Callahan?

16 A Yes, and scared us.

17 Q Prior to the police showing up, were you
18 aware that anything had taken place at the Walmart the
19 night before?

20 A No, not at all.

21 Q Was that the first that you had heard of
22 anything taking place at Walmart?

23 A Very much so.

24 Q And did you identify the defendant to the
25 police when they asked you to identify him?

1 A They actually showed us a couple of sheets of
2 paper with his photo on it, so, yes, afterwards.

3 Q Thank you, ma'am.

4 MR. CALIEL: I don't have any further
5 questions.

6 THE COURT: Any cross?

7 MS. SCHLAX: Yes, thank you.

8 THE COURT: Okay.

9 CROSS-EXAMINATION

10 BY MS. SCHLAX:

11 Q Good afternoon.

12 A Good afternoon.

13 Q You ended up having to wait there trying to
14 connect with your -- with your dad for quite awhile,
15 correct?

16 A Yes, ma'am.

17 Q Long enough for the security guard that
18 travels around the parking lot to come around and check
19 on you three or four times?

20 A At least twice that I remember.

21 Q Okay. And this -- it was an odd occurrence,
22 correct?

23 A Very.

24 Q And this person drove close enough to where
25 his passenger or his driver's side window is right next

1 to your passenger window, correct?

2 A Yeah. That was my husband's passenger window,
3 but my car, yes.

4 Q I apologize. Were you driving, but so but
5 close enough to where each of you were able to get a
6 good enough look at him to identify him.

7 A Yes.

8 Q Okay. And the statement was we're going to
9 get cheeseburgers?

10 A Yes, ma'am.

11 Q Okay. And do you remember anything else that
12 was said?

13 A No, ma'am.

14 Q Okay. Could -- could it also have included a
15 statement follow us?

16 A It's possible.

17 Q Okay.

18 A It's been awhile. I don't remember exactly
19 what was said.

20 Q Regardless of exactly what was said, you all
21 did attempt to follow them.

22 A Yes, ma'am.

23 Q Okay. You went to a McDonald's location that
24 I guess you were familiar with the area?

25 A Yes, ma'am. It's right at the road.

1 Q And did you also even circle back to Wendy's?

2 A Yes, ma'am.

3 MS. SCHLAX: I don't have anything further.

4 Thank you, Your Honor.

5 THE COURT: Anything further?

6 MR. CALIEL: Yes, Your Honor.

7 REDIRECT EXAMINATION

8 BY MR. CALIEL:

9 Q Ma'am, obviously it was unusual that a total
10 stranger pulled up next to your car, correct?

11 A Right. I was wondering where's dad, is dad in
12 this car, why -- why did this person go try to contact
13 us. Why.

14 Q And aside from it being unusual that a
15 stranger pulled up, was there anything peculiar about
16 how he talked?

17 A He talked like he had known us for years, like
18 it was just a very friendly, hey, how you doing, we're
19 going for cheeseburgers kind of an attitude.

20 Q But normal, right?

21 A Of course.

22 Q Didn't seem like he was in distress?

23 A No, not at all.

24 Q Did he appear intoxicated to you?

25 A No. Not at all.

1 Q Just seemed normal?

2 A Yes, sir.

3 Q Thank you, ma'am.

4 MR. CALIEL: I don't have any further
5 questions.

6 THE COURT: May this witness be excused?

7 MR. CALIEL: She may be, Your Honor.

8 THE COURT: Thank you. We appreciate your
9 time today.

10 You may call your next witness.

11 MR. CALIEL: Your Honor, can we have a
12 five-minute recess just to allow our next witness
13 to arrive and get situated?

14 THE COURT: Well, it takes a little longer
15 than five minutes for a recess. So we'll be in
16 recess for about ten minutes, but then you all let
17 us know when you're ready. Okay?

18 (Jury absent.)

19 (Defendant present.)

20 THE COURT: Is everybody ready for the jury
21 to come out? The audience can come in.

22 All right. Is everyone ready for the jury to
23 come back in?

24 MR. CALIEL: Yes, Your Honor.

25 THE COURT: All right. We're ready.

1 BAILIFF: Ready, Judge?

2 THE COURT: Yes.

3 BAILIFF: The jury's entering the courtroom.
4 (Jury present.)

5 THE COURT: Thank you, ladies and gentlemen.
6 You may be seated.

7 The State may call their next witness.

8 MS. NELSON: Thank you. The State calls
9 Marquita Howard.

10 THE COURT: Marquita Howard.

11 (Witness present.)

12 THE COURT: Good afternoon, Ms. Howard.

13 THE WITNESS: Hi.

14 THE COURT: Come in front of me, Madam Clerk
15 will swear you in. Thank you.

16 (Witness sworn.)

17 THE WITNESS: Yes.

18 THE COURT: Thank you. If you'll have a seat
19 over here. It's our witness chair. Thank you.

20 MS. NELSON: May I inquire?

21 THE COURT: Yes.

22 MS. NELSON: Thank you.

23 MARQUITA HOWARD,
24 was called as a witness on behalf of the State, and after
25 being duly sworn, then testified as follows:

DIRECT EXAMINATION

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BY MS. NELSON:

Q Ms. Howard, will you please introduce yourself to the jury and spell your name for the record.

A Marquita Howard, M-a-r-q-u-i-t-a H-o-w-a-r-d.

Q Do you live here in Jacksonville, Florida?

A Yes, I do.

Q Did you also live in Jacksonville on June 22nd, 2013?

A Yes.

Q Will you tell the jury how you're employed.

A UF Health Jacksonville, family liaison.

Q Do you have a daughter named Christina?

A Yes.

Q And where does she work?

A Now she's at Southeast Orthopedics.

Q In June of 2013, where did Christina work?

A UF Health Jacksonville.

Q And did she have a car in June of 2013 --

A No, she --

Q -- to get to and from work?

A No, she rode with me. I took her.

Q Took her to work?

A To and from, yes.

1 Q And you'd pick her up as well?

2 A Correct.

3 Q Let me direct your attention to the specific
4 date of June 22nd, 2013. Do you remember that morning?

5 A Yes, I do.

6 Q And was your daughter working that morning at
7 UF Health?

8 A Yes.

9 Q Did you go to pick her up from work?

10 A Yes, I did.

11 Q What shift had she worked?

12 A She had worked a 12-hour shift from 7:00 p.m.
13 to 7:00 a.m.

14 Q And were you on time that morning?

15 A Yes.

16 Q Will you explain to the jury the route you
17 take -- you took that morning to pick her up?

18 A I left my house on Ellis Road, 1079, passed
19 down past all the streets to Broward Road and then 95
20 south and got off on 8th Street to UF Health.

21 Q Did you travel on your way home the same --
22 the same way?

23 A Yes.

24 Q After picking Christina up at work that
25 morning, did you travel back down Rutgers Road with

1 your daughter in the car?

2 A Yes, I did.

3 Q Did you notice something unusual?

4 A Yes.

5 Q Approximately what time did you notice
6 something unusual?

7 A Around 7:00 -- between 7:15 and 7:20.

8 Q And will you tell the jury what you noticed.

9 A I noticed a white van with blue stripes parked
10 behind the church in the area behind the shed there
11 with the doors -- the back doors open.

12 Q Okay. What -- let me orient the van. Which
13 direction was the van facing?

14 A The van was actually -- the front of the van
15 was facing Rutgers Road.

16 Q Okay. Let me direct your attention,
17 Ms. Howard, to your screen. You can use your fingers
18 on the screen for the record. I'm showing what's been
19 premarked as State's Z and later will be tendered into
20 evidence. Will you circle the church in this graph
21 that you mentioned.

22 (Witness indicating.)

23 BY MS. NELSON:

24 Q Do you know the name of that church?

25 A Highlands Baptist Church.

1 Q And will you indicate, using this photograph,
2 Rutgers Road?

3 (Witness indicating.)

4 BY MS. NELSON:

5 Q Will you use an arrow to show the jury which
6 way you were travelling when you saw the van?

7 (Witness indicating.)

8 BY MS. NELSON:

9 Q And now using the touch screen, will you show
10 the jury, using this photograph, where the van was
11 backed up along the tree line?

12 (Witness indicating.)

13 BY MS. NELSON:

14 Q Now, you mentioned that the back doors of the
15 van were open?

16 A Correct.

17 Q Was the back of the van up against the tree
18 line?

19 A Against -- yes, where the water is.

20 Q The front of the van --

21 A Was facing Rutgers Road.

22 Q Thank you. Let me now show you what's been
23 premarked as State's Exhibit K, will later be tendered
24 into evidence. This photograph of the white van with
25 the blue stripe around it, is this photograph of a van

1 consistent with that you saw in the tree line?

2 A Yes, it is.

3 Q So did you and your daughter have any
4 discussion about this van you saw on the tree line?

5 A Yes.

6 Q And what was that?

7 A We thought something fishy was going on.

8 Q Did you do anything about it?

9 A We didn't see anyone. We just kept going on,
10 headed to the house.

11 Q And what time did you arrive home that
12 morning?

13 A We arrived home about maybe 7:20, around
14 7:20ish or 7:25.

15 Q And did you talk to somebody after you
16 arrived home?

17 A Yes, when I got home my aunt called and she
18 told us that there was a -- an alert about a missing
19 child in our area at the Walmart and that they were
20 looking for a white van. And we immediately said we
21 just saw a van parked behind the church down the
22 street.

23 Q Was that the first you had learned about that
24 alert?

25 A Yes.

1 Q And what did you next do?

2 A We got in our -- my truck and we drove back
3 down the road. It was gone at that time.

4 Q What time did you -- would you say you got
5 back to the tree line?

6 A I want to say it could have been -- we could
7 have been home maybe five or ten minutes and it's only
8 like maybe 30 seconds down the road, if that long.

9 Q And when you got back to this place where you
10 had seen the van, the van was no longer there?

11 A Correct.

12 Q And what did you next do?

13 A I told Christina we need to call 911.

14 Q And did Christina call 911?

15 A Yes, she did.

16 Q And were you next to her when she made that
17 phone call?

18 A Yes, I was.

19 MS. NELSON: No further questions.

20 THE COURT: Any cross?

21 MR. FLETCHER: Thank you, Your Honor.

22 CROSS-EXAMINATION

23 BY MR. FLETCHER:

24 Q Ms. Howard, as you drove by you noticed the
25 van down by the river?

1 A Correct.

2 Q And when you had driven by previously on the
3 way to get your daughter, did you notice the van?

4 A No, I did not.

5 Q Did you -- as you were going down the road in
6 a different direction, do you remember looking that
7 way?

8 A No, I don't.

9 Q Okay.

10 A But I don't remember seeing it.

11 Q But as you're coming up the way and you're
12 returning, you go past the church and then the whole
13 section of woods sort of opens so you have more
14 opportunity and you're sort of looking in that
15 direction, correct?

16 A Correct.

17 Q And did you see anybody down by the van?

18 A No, I did not.

19 Q Did you look at it long enough to know
20 whether or not the windows were rolled down in the
21 front seats?

22 A No, I don't recall.

23 Q Okay. You just noticed the back doors were
24 open?

25 A Correct.

1 Q And how about through the woods past the van.
2 Could you see anybody down there?

3 A No, I couldn't.

4 MR. FLETCHER: That's all I have, Judge.

5 THE COURT: Anything further?

6 MS. NELSON: No, ma'am.

7 THE COURT: May this witness be excused?

8 MS. NELSON: Yes, Your Honor.

9 THE COURT: You may be excused.

10 Call your next witness.

11 MR. CALIEL: The State calls Christina Howard
12 to the stand.

13 THE COURT: Christina Howard.

14 (Witness present.)

15 THE COURT: Good afternoon, Ms. Howard.

16 Madam Clerk will swear you in.

17 (Witness sworn.)

18 THE WITNESS: Yes.

19 THE COURT: Thank you. You may come around
20 here to our witness chair. Thank you.

21 CHRISTINA HOWARD,
22 was called as a witness on behalf of the State, and after
23 being duly sworn, then testified as follows:

24 DIRECT EXAMINATION

25 BY MS. NELSON:

1 Q Ms. Howard, will you please introduce
2 yourself to the jury and spell your name for the
3 record.

4 A Yes, ma'am, my name is Christina Howard,
5 C-h-r-i-s-t-i-n-a H-o-w-a-r-d.

6 Q Is Marquita Howard your mother?

7 A Yes, ma'am.

8 Q How are you employed?

9 A I work at Southeast Orthopedics.

10 Q In June of 2013, will you tell the jury where
11 you were working then?

12 A Shands UF Health.

13 Q And how were you employed there?

14 A A sitter.

15 Q And did your mother at that time take you and
16 pick you up from your shifts at Shands?

17 A Yes, ma'am.

18 Q Were you living with your mother at the time?

19 A Yes.

20 Q Let me direct your attention to the morning
21 of June 22nd, 2013. Do you remember that morning?

22 A I do.

23 Q What shift had you worked at UF Health that
24 -- the night before?

25 A A 12-hour shift, 7:00 p.m. to 7:00 a.m.

1 Q So you started at 7:00 p.m. on June 21st?

2 A Yes, ma'am.

3 Q And your shift ended at 7:00 a.m. on June
4 22nd.

5 A Yes, ma'am.

6 Q Was your mom on time that morning to pick you
7 up from your shift?

8 A Yes, ma'am.

9 Q And how did you travel home with your mother
10 that day?

11 A Down Broward Road.

12 Q And then what road did you take from Broward
13 Road to get to your home?

14 A Rutgers.

15 Q Are you familiar with the Highlands Baptist
16 Church on Rutgers Road?

17 A Yes, ma'am.

18 Q That morning on Rutgers Road near the
19 Highlands Baptist Church, did you and your mother --
20 did you notice anything unusual?

21 A Yes, we were talking about it. We noticed a
22 van backed up behind Highlands Church with his doors
23 open facing out and we were just like, okay, somebody
24 must be doing funny business on the church property and
25 later on we got home to my mother's address. My sister

1 came out on the phone with my grandmother and that's
2 when she was like there's a little girl missing in your
3 area, which was Cherish. We hopped back -- well, she
4 described the van. We hopped back in the car, we was
5 like, oh, my God, we just seen the van, and by the time
6 we got there the van was gone.

7 Q Let me back you up a little bit. On your way
8 home from work, on your way home with your mom, when
9 you saw this van, approximately what time was it?

10 A Oh, goodness. It had to be around 7:15.

11 Q And what time did you arrive home after
12 seeing that van?

13 A We live like literally two minutes away. So
14 7:20.

15 Q Okay.

16 A Yeah.

17 Q You said that the back doors of the van were
18 open?

19 A Yes, ma'am.

20 Q And the back of the van was facing what
21 direction in relation to Rutgers Road?

22 A The back of it was facing the woods.

23 Q Okay. So, Ms. Howard, let me direct your
24 attention to what has been premarked as State's Exhibit
25 Z and will later be introduced in evidence. Is this

1 photograph an aerial photograph of the area which you
2 described to the jury?

3 A Yes, ma'am.

4 Q Using your finger, will you circle Highlands
5 Baptist Church.

6 (Witness indicating.)

7 BY MS. NELSON:

8 Q And using your finger will you describe for
9 the jury where you saw the van along that tree line?

10 A Would you like me to circle?

11 Q That would be fine. Thank you.

12 A Right in this area right there (indicating).

13 Q And were you travelling, Ms. Howard, this
14 direction on Rutgers Road on your way home
15 (indicating)?

16 A Yes, ma'am.

17 Q Will you describe the van?

18 A Yes, a white van with stripes on the side.

19 Q Let me direct your attention to what's been
20 premarked as State's Exhibit K. Does this look like
21 the van that you saw that morning?

22 A Yes.

23 Q After you returned home and you learned that
24 there was a missing little girl, what did you next do?

25 A We hopped back in the car and drove back down

1 to Highlands Church.

2 Q What plans did you have?

3 A Hopefully to see the van.

4 Q And when you arrived, what did you find?

5 A The van was not there. We rolled down the
6 windows, we screamed for Cherish, we drove around,
7 screamed for her name, hoping that we could hear a
8 little girl, anything.

9 Q Do you know what time that was in the morning
10 when you returned back? How much time had elapsed
11 between getting home and returning?

12 A We got back to the house around 7:20, we drove
13 back 7:22. I mean we -- we stayed out there looking
14 for her about a good 30 minutes to be honest.

15 Q When you returned to the area where the
16 church was and noticed the van wasn't there, what did
17 you next do?

18 A Called 911.

19 MS. NELSON: May I approach?

20 THE COURT: You may.

21 BY MS. NELSON:

22 Q Let me show you what's been premarked for
23 identification as State's Exhibit J and ask you if you
24 recognize this.

25 A Yes, ma'am, that's my initials.

1 Q Okay. And prior to your testimony before the
2 jury today, Ms. Howard, did you listen to this call?

3 A Yes.

4 Q Did you do that in my office?

5 A Yes.

6 Q And is this a true and accurate reflection of
7 the 911 call you made on the morning of June 21st,
8 2013?

9 A Yes, ma'am.

10 MS. NELSON: At this time I would tender
11 State's J as the next numbered State's Exhibit.

12 MR. FLETCHER: No objection, Your Honor.

13 THE COURT: All right. That will be entered
14 as State's Exhibit 10 in evidence.

15 (Whereupon the foregoing item was marked in
16 evidence as State's Exhibit 10.)

17 MS. NELSON: May I publish to the jury?

18 THE COURT: You may.

19 (Whereupon the audiotape was played and
20 transcribed by court reporter as follows:)

21 911 OPERATOR: 911 (inaudible)?

22 THE WITNESS: Hi, we're calling about a white
23 van on Rutgers Road, a white van. It was parked
24 behind some bushes. We heard that (inaudible).

25 911 OPERATOR: What street where?

1 THE WITNESS: Rutgers and -- behind Highlands
2 Church. Behind Highlands Church.

3 911 OPERATOR: (Inaudible) Rutgers.

4 THE WITNESS: Broward.

5 911 OPERATOR: Broward.

6 THE WITNESS: Yes, ma'am, a white van. It's
7 not there anymore. We don't know if he dumped
8 anything or (inaudible) so we're not sure that's
9 the van, but a white van was pushed all the way to
10 the back of the bushes this morning.

11 911 OPERATOR: So it's on Rutgers near
12 Broward near some bushes?

13 THE WITNESS: Yes. Right behind a church.

14 911 OPERATOR: Behind Highlands Church?

15 THE WITNESS: Yes, ma'am.

16 911 OPERATOR: Behind bushes. And how long
17 ago did you see it?

18 THE WITNESS: Oh, ma'am, we (inaudible) it
19 was like (inaudible) just now.

20 911 OPERATOR: All right. And you said it's
21 now gone?

22 THE WITNESS: Yeah. Yes, ma'am.

23 911 OPERATOR: You think (inaudible) just in
24 case he might have dumped something?

25 THE WITNESS: Right. We don't know

1 (inaudible) it was all the way in the back.

2 911 OPERATOR: Okay. What is your last name?

3 THE WITNESS: Howard.

4 911 OPERATOR: And what's your phone number?

5 THE WITNESS: 904-428-767 (inaudible).

6 911 OPERATOR: What address are you calling
7 from?

8 THE WITNESS: (Inaudible) Rutgers Road.

9 911 OPERATOR: All right. I'll go ahead and
10 put this in and I'll have an officer check it out.
11 Okay?

12 THE WITNESS: Okay. Thank you.

13 911 OPERATOR: Bye-bye.

14 THE WITNESS: Bye-bye.

15 (End of recording.)

16 BY MS. NELSON:

17 Q Ms. Howard, you said that you and your mother
18 drove around with the windows down calling out
19 Cherish's name. Where had you learned the name
20 Cherish?

21 A From my grandmother. I'm sorry.

22 THE COURT: Take your time.

23 THE WITNESS: My grandmother called and told
24 us.

25 BY MS. NELSON:

1 Q About the alert? That's where you got the
2 name Cherish?

3 MS. NELSON: I have no other questions.

4 THE COURT: Anything else?

5 MR. FLETCHER: No questions, Your Honor.

6 THE COURT: May this witness be excused?

7 MS. NELSON: Yes, ma'am.

8 THE COURT: Thank you. We appreciate your
9 time this afternoon.

10 You may call your next witness.

11 MR. CALIEL: Your Honor, the State would call
12 Brenda Fillingim, please.

13 THE COURT: Brenda Fillingim.

14 (Witness present.)

15 THE COURT: Good afternoon, Ms. Fillingim.
16 Take your time.

17 I don't know if you're able to raise your hand,
18 but we do need to place you under oath.

19 (Witness sworn.)

20 THE WITNESS: I do.

21 THE COURT: Thank you. And our witness chair
22 is over here. There's a little bit of like a
23 ramp. The bailiff will point it out to you so be
24 careful.

25 MR. CALIEL: May it please the Court.

1 THE COURT: Yes.

2 BRENDA FILLINGIM,

3 was called as a witness on behalf of the State, and after
4 being duly sworn, then testified as follows:

5 DIRECT EXAMINATION

6 BY MR. CALIEL:

7 Q Good afternoon, ma'am. Can you please
8 introduce yourself to the members of the jury and spell
9 your name for the court reporter.

10 A I'm Brenda Fillingim, B -- B-r-e-n-d-a
11 F-i-l-l-i-n-g-i-m.

12 Q Ms. Fillingim, do you live here in
13 Jacksonville, Florida?

14 A Yes, I do.

15 Q Where do you live?

16 A In Highlands.

17 Q And is that the place you were living back in
18 June of 2013?

19 A Yes.

20 Q How long have you lived in that neighborhood?

21 A 40 years.

22 Q I'd like to direct your attention to the
23 early morning hours of June 22nd, 2013. On that
24 morning were you up and about in the neighborhood?

25 A I was out. I had seen yard sales and I missed

1 the sign so I went down Rutger to go around the block
2 to go to it and I seen a van.

3 Q So let me back you up for a second. So you
4 were out yard saleing that morning?

5 A Yes, I was.

6 Q And during the course of your travels did you
7 see anything unusual parked behind Highlands Baptist
8 Church?

9 A Yes, there was a van backed into the woods,
10 the edge of the bushes, near the creek.

11 Q How is the van -- van positioned towards
12 where you were driving?

13 A Where was it positioned?

14 Q Yeah, was the driver's side facing the road
15 or the woods?

16 A No, it was backed in. So it was facing Rutger
17 Road and I was going toward Broward.

18 Q Can you describe the van for me.

19 A Basically it was white and had a big window in
20 it because I came this way and the lighting caught my
21 eye and I looked back.

22 Q Ma'am, if you look at the screen in front of
23 you, I'm now showing you what's been previously marked
24 for identification purposes and will be later marked as
25 State's Exhibit K. The van depicted in the photograph

1 -- should be on the screen in front of you. Does that
2 look like the van you saw parked behind the church?

3 A I saw the right side more than I did the rest
4 of it, but it does look kind of like it. The windows
5 look like it.

6 Q And now showing what's been previously marked
7 as State's Exhibit Z for identification purposes, will
8 be later admitted, if you could, this is an aerial
9 photograph of Rutgers Road and Broward Road. If I'm
10 identifying this X right here (indicating) as where the
11 church is, could you describe or show by marking on
12 your screen where you saw the van parked when you drove
13 by?

14 A It was about there, I think it was, because I
15 came out and there was a little paved driveway next to
16 the road and it was right in that area there
17 (indicating).

18 Q And if this is Rutgers Road right here, which
19 direction were you travelling when you saw the van?

20 A I was going towards Broward Road which would
21 be south.

22 Q So you were travelling in this direction
23 (indicating)?

24 A Yeah, that away, yeah.

25 THE COURT: Can you all see the red marks?

1 (Affirmative response.)

2 THE COURT: Okay.

3 BY MR. CALIEL:

4 Q Now, Ms. Fillingim, about what time were you
5 out yard saleing that morning?

6 A It was about 7:30.

7 Q Okay. Sometime after you had seen the van
8 did you go back to your home?

9 A Yes, I had went around the block and went to
10 the yard sale and I came back down Lenoid and turned on
11 Rutger to go to my house because I'm in between Rutger
12 and Biscayne.

13 Q When you went back to your house, did you see
14 the van again?

15 A No, I didn't go that far down.

16 Q Okay. You didn't travel that far down
17 towards where the church is?

18 A Uh-huh.

19 Q When you got back to your house, did you
20 learn that a little girl was reported missing out of
21 Walmart?

22 A Yes, when I went in I cut the TV on and I
23 don't remember exactly what I was doing in the house,
24 but I heard the news and they were talking about this
25 white van. I said, I looked and I said, I just seen

1 that. So I hopped in the car, barefooted and
2 everything, went back down there.

3 Q When you heard it on the TV after you got
4 back to your house, was that the first time you had
5 heard that the child was then reported missing?

6 A Yes, it was.

7 Q You hurried back, got in your car and
8 travelled back down there?

9 A Yes.

10 Q When you went back down to the location where
11 you had seen the van, was the van still there?

12 A No, it wasn't. It was gone.

13 Q It was gone. Was anybody else down at the
14 church property when you got there?

15 A Yes, there was another lady and her daughter
16 and I asked her, I said, did you see that van. She
17 said yes and she said she put a call in to 911. I
18 said, I'm going to the substation up on Dunn Avenue,
19 I'm going to go get somebody.

20 Q So did you actually drive from Highlands
21 Church to Dunn Avenue and try to get a police officer?

22 A Yes, I did. And I got two of them to follow
23 me back down there.

24 Q Thank you, ma'am.

25 MR. CALIEL: I don't have any further

1 questions.

2 CROSS-EXAMINATION

3 BY MR. FLETCHER:

4 Q Ma'am, when you saw the van down by the edge
5 of the woods, did you see anybody down there?

6 A No, I didn't see nobody. I just thought it
7 was weird for it being there.

8 Q How about could you see through the trees was
9 there anybody behind the van?

10 A No, it's real full.

11 MR. FLETCHER: That's all I have.

12 MR. CALIEL: Thank you, Your Honor. No
13 further questions.

14 THE COURT: Take your time and be careful
15 going back down that little ramp. Thank you.

16 THE WITNESS: Okay. Thank you.

17 THE COURT: The State may call their next
18 witness.

19 MS. NELSON: The State will call Officer Tina
20 Henson to the stand.

21 THE COURT: Officer Tina Henson.

22 (Witness present.)

23 THE COURT: Good afternoon, Officer.

24 THE WITNESS: How are you doing today?

25 THE COURT: Good. Right in front of me and

1 Madam Clerk will swear you in.

2 (Witness sworn.)

3 THE WITNESS: Yes, ma'am.

4 THE COURT: Thank you. And our witness chair
5 is over here. Thank you.

6 BAILIFF: Watch your step going up there.

7 TINA HENSON,

8 was called as a witness on behalf of the State, and after
9 being duly sworn, then testified as follows:

10 DIRECT EXAMINATION

11 BY MS. NELSON:

12 Q Good afternoon. Officer, will you please
13 introduce yourself to the jury and spell your name for
14 the record.

15 A Tina Henson, H-e-n-s-o-n.

16 Q How are you employed?

17 A I've been here for 18 years.

18 Q Were you employed with the Jacksonville
19 Sheriff's Office?

20 A Yes, ma'am, Jacksonville Sheriff's Office,
21 yes, ma'am.

22 Q And you've been employed with the JSO for 18
23 years?

24 A Yes, ma'am.

25 Q And how are you specifically assigned?

1 A Right now I'm in the offender tracking unit.

2 Q And in June of -- June 22nd of 2013, were you
3 working patrol?

4 A Yes, ma'am.

5 Q Do you remember that morning?

6 A Yes, ma'am, I do.

7 Q And what area of town in Jacksonville do you
8 -- were you patrolling?

9 A It's the Oceanway Airport area. It's called
10 zone 6.

11 Q Okay. Had you responded to a traffic
12 accident that morning?

13 A Yes, ma'am.

14 Q And where was that traffic accident?

15 A It's I-95 southbound all the way up Dunn
16 Avenue. Some people call it Bush Drive. I was
17 actually dispatched to Dunn Avenue, south I-95.

18 Q Prior to being dispatched that morning to
19 that car accident, had you received a BOLO,
20 be-on-the-look-out, related to a missing child?

21 A Yes, ma'am, I did.

22 Q Did you have information looking for a white
23 van?

24 A Yes, ma'am, I did.

25 Q While you were responding to the traffic

1 accident, were you actually out of your car?

2 A When I got there, I got out of my car, spoke
3 to the citizens that were involved in the crash and I
4 obtained their information and got back in my vehicle.

5 Q Did you, while you were responding to the
6 scene, actually notice a white van meeting the
7 description of the BOLO pass you on 95?

8 A Yes, I did.

9 Q What did you do next?

10 A I rolled down my window and I looked back at
11 the citizens and told them I'd be back. I came on the
12 radio, talked to headquarters and advised dispatcher
13 that I was behind a vehicle matching the description as
14 well as the tag on the vehicle.

15 Q What happened next?

16 A I turned my lights on just for a brief second
17 just to get in front of traffic, turned my lights back
18 off and then proceeded behind the vehicle.

19 Q Did you actually pull the white van over?

20 A No, ma'am. Well, I had assistance. I had to
21 wait until we had an air unit respond, if they can, the
22 K9 units respond. So I waited for other assistance, at
23 which -- I don't know who actually activated the lights
24 to stop the vehicle.

25 Q Is this called a felony traffic stop?

1 A Yes, ma'am, it is.

2 Q And so different than a regular traffic stop?

3 A Yes, ma'am.

4 Q And when you radioed this in, bringing in K9
5 or possibly the air unit, that's for officer
6 protection?

7 A Yes, ma'am, and for felony takedown.

8 Q Okay. So once K9 officer Wilkie got involved
9 in the takedown, where were you in relation to the
10 white van when the white van was actually stopped?

11 A I was on the back passenger side. I was like
12 the third or fourth vehicle to the back right.

13 Q And where was the stop of the white van
14 effectuated?

15 A I'm not sure what it's called. I know there's
16 railroad tracks on I-95 at -- I want to say Myrtle
17 Avenue. I'm not a hundred percent sure. I know
18 there's railroad tracks come in, I-10 splits and 95
19 south goes this way. We were on I-95 southbound right
20 there.

21 Q What was your role when the van was stopped?

22 A I was just protection. What happens when we
23 do felony stops there's always one in command does all
24 the transmitting and talking to the person driving the
25 vehicle, telling them orders, to get out of the vehicle

1 and everybody else is there just basically to protect
2 the officer.

3 Q And did you see the driver exit the vehicle?

4 A I could not see the driver exit the vehicle.

5 Q Did you see Officer Wilkie approach the
6 driver?

7 A I couldn't see him either.

8 Q Could you hear Officer Wilkie?

9 A No, ma'am.

10 Q Was there a time that you heard Officer
11 Wilkie actually yell something out?

12 A No, ma'am.

13 Q Let me show you what's been premarked as
14 State's Exhibit K and will later be tendered into
15 evidence.

16 Officer Henson, is this a true and accurate
17 reflection of the van that was stopped and the subject
18 of this felony traffic stop on June 22nd?

19 A Yes, ma'am.

20 Q Let me show you what's been premarked as
21 State's Exhibit L and will later be tendered into
22 evidence. Different angle of the same van.

23 A Yes, ma'am.

24 Q Is this a true and accurate reflection of the
25 traffic stop that day?

1 A Yes, ma'am.

2 Q Now, did you have any role in clearing the
3 van?

4 A No, ma'am.

5 Q Or actually taking the driver into custody?

6 A No, ma'am, I do remember seeing the back of
7 his head. That's all I saw when they took him into
8 custody. Other than that, no.

9 Q Did you return to the traffic accident that
10 morning?

11 A No, ma'am, Florida Highway Patrol came and
12 helped me out.

13 Q Okay. Officer, there's a badge number here
14 on this police vehicle, 296, R. J. Lasota. Was that
15 another officer who arrived at the scene?

16 A I believe so.

17 MS. NELSON: May I have one moment?

18 THE COURT: You may.

19 (State counsel conferring.)

20 MS. NELSON: Nothing further.

21 THE COURT: Any cross-examination?

22 MS. SCHLAX: Thank you.

23 CROSS-EXAMINATION

24 BY MS. SCHLAX:

25 Q Good afternoon, Officer.

1 A Good afternoon.

2 Q And I apologize if I missed it. What shift
3 had you worked that day?

4 A It's called dayshift. It's 5:15 in the
5 morning until 4:55 in the afternoon.

6 Q And when you came on duty that morning, how
7 were you alerted about the be-on-the-look-out?

8 A My sergeant, because of the area that I work,
9 there's hotels in that area. He told me to ride
10 through those areas and look at the hotels to see if I
11 see a white van.

12 Q Okay. And you were aware that the Amber
13 alert in this case went out at 4:21 a.m.?

14 A No, ma'am, I was asleep.

15 Q Okay. So when you -- when you got on duty,
16 were you made aware of the Amber alert?

17 A No, ma'am.

18 Q Only thing you were made aware of was
19 be-on-the-look-out for a white van?

20 A At the time, yes, ma'am.

21 Q And you ended up seeing this van about 9:00
22 a.m.?

23 A Without looking at the dispatch screen, I'm
24 not sure what time it was.

25 Q You just know that you were at a traffic

1 scene and actually saw it and then left that scene so
2 you could actually follow the van?

3 A Yes, ma'am.

4 Q How long did you follow it before enough
5 support personnel allowed you to -- someone to activate
6 the lights?

7 A I don't know the distances. I know it's from
8 I-95 and Dunn to wherever that exit is. I'm not sure.

9 Q And approximately how far is that?

10 A Don't know.

11 Q Is it five miles? Is it 20 miles?

12 A I don't -- I don't know.

13 Q This is the area you patrol everyday?

14 A Not the area that I'm in, no, ma'am. It was
15 divided.

16 Q Can you give me an estimate of it's less than
17 ten miles or more than ten miles?

18 A I would say less than ten miles.

19 MS. SCHLAX: I don't have anything further.

20 Thank you, ma'am.

21 THE COURT: Any redirect?

22 MS. NELSON: No, Your Honor.

23 THE COURT: Thank you, Officer. Take your
24 time stepping down.

25 You may call your next witness.

1 MS. NELSON: Officer Wilkie.

2 THE COURT: Officer Wilkie.

3 (Witness present.)

4 THE COURT: Good afternoon, Officer Wilkie.

5 Right in front of me, Madam Clerk will swear you
6 in.

7 (Witness sworn.)

8 THE WITNESS: I do.

9 THE COURT: Thank you. If you'll have a seat
10 over here in our witness chair. Thank you.

11 MS. NELSON: Your Honor, I need just a
12 moment, please.

13 THE COURT: Okay.

14 CHARLES WILKIE, SR.,
15 was called as a witness on behalf of the State, and after
16 being duly sworn, then testified as follows:

17 DIRECT EXAMINATION

18 BY MS. NELSON:

19 Q Good afternoon.

20 A Good afternoon.

21 Q Officer Wilkie, will you please introduce
22 yourself for the jury and spell your name.

23 A Absolutely. It's Charles Wes Wilkie, Sr. The
24 last name is W-i-l-k-i-e.

25 Q How are you currently employed?

1 A Currently I'm employed with the Jacksonville
2 Aviation Authority as a police officer.

3 Q Prior to joining the Jacksonville Aviation
4 Authority were you with the Jacksonville Sheriff's
5 Office?

6 A Yes, ma'am.

7 Q For how many years?

8 A Over 25 years.

9 Q And for the majority of the time that you
10 were with JSO, how were you assigned?

11 A I was a member of the K9 unit and a K9 handler
12 for over 18 years.

13 Q Who is your canine currently?

14 A Gator.

15 Q His name is Gator?

16 A Yes.

17 Q Is he retired?

18 A Yes, he retired with me.

19 Q He still lives with you?

20 A Yes, ma'am.

21 Q For how long have you had Gator?

22 A Over six years.

23 Q Will you explain to the jury how you train a
24 canine for tracking?

25 A For tracking it's really pretty simple. We

1 take little pieces of hotdog and we step on the ground.
2 The dogs are trained to where ground smells different
3 to them where you've stepped and where you haven't
4 stepped. So initially to entice them to stick their
5 noses down there, we put tiny pieces of hotdog down
6 where we step and then we go out about five or six
7 feet, then we place their toy hidden by the grass. So
8 initially they go a little bit, they eat their hotdog
9 and they find their toy. They don't realize when
10 they're in training the fact that the smell is
11 different than it is where you haven't stepped. As the
12 smell of the hotdog goes away, we get longer and longer
13 and longer and then we incorporate that into the decoy,
14 sometimes there'll be a decoy or a person there that
15 they get a reward when they find it. So that's the
16 very basics of having your dog track. He's tracking
17 ground disturbances is what he does.

18 Q I want to direct your attention to June 22nd,
19 2013. Do you remember that morning?

20 A Absolutely.

21 Q What time do you wake that up morning?

22 A Probably about 4:15.

23 Q And what was your shift that day?

24 A 5:00 a.m. in the morning until about 2:00
25 o'clock in the afternoon.

1 Q And when you awoke that morning did you
2 receive information about an Amber alert?

3 A Yes, I did.

4 Q And what, if anything, did you think when you
5 saw that Amber alert?

6 A I was walking down to get my police service
7 dog Gator out of the kennel and I heard the Amber alert
8 go off and I heard descriptions of the missing child
9 and the suspect and I just thought, well, this is
10 probably what we're going to be working on today,
11 because it was local, within our jurisdiction.

12 Q And why did you think that as a K9 officer?

13 A That's what we do. K9 is the supplement to
14 patrol. So that's what we do. We go out and we assist
15 patrol and if there's people that are missing,
16 sometimes there's people missing that they're Alzheimer
17 patients, for instance, and we'll go out and search the
18 wood lines, things like that. So anytime somebody is
19 missing we K9s play a vital role.

20 Q Approximately what time that morning did you
21 end up on the street?

22 A Just after 5:00 o'clock. We started our shift
23 at 5:00. We check on at our homes so I heard the alert
24 go out probably between 4:45 and 5:00 o'clock and I
25 loaded Gator up in my police vehicle and we started our

1 shift.

2 Q Did you also receive a BOLO that morning?

3 A Yes, ma'am I did.

4 Q Related to the same missing child?

5 A Yes, I did.

6 Q Will you explain to the jury what a BOLO is.

7 A A BOLO is a be-on-the-look-out. It's
8 information that we get from our dispatcher telling us
9 about something that's going on. It could be something
10 that's in our area or something that could potentially
11 could be coming to our area to be on the look out for.

12 Q So shortly after you started your shift that
13 morning, did you learn that another officer had, in
14 fact, had a visual on a white van meeting the
15 description of the BOLO?

16 A Yes, ma'am, I did.

17 Q And what did you do?

18 A I initially I was contacted by my dispatcher
19 who advised me to get over to I-95 south, that they
20 were behind the van, that the tag number did match and
21 they were currently following the van, had not
22 initiated a traffic stop, so no emergency equipment was
23 being displayed at this time. They were waiting for me
24 to be able to assist just in case it ended in a pursuit
25 and I would have the dog available for assistance if he

1 was needed.

2 Q And where were you when you first received
3 the dispatch information?

4 A I was down off of Main Street in what we call
5 zone 1, but it's just the area around 20th and Main and
6 down there is where I initially heard the transmission
7 from HQ to get over to 95.

8 Q And why is K9 a supplement to a traffic stop
9 such as this?

10 A A lot of times when we have a traffic stop,
11 which this was going to be what we call a felony
12 traffic stop, the person is believed to have committed
13 a felony. Then the dogs are utilized in a case where
14 someone flees the vehicle and that type of thing or
15 refuses to get out of the vehicle. They just give us
16 another tool to utilize to facilitate taking him into
17 custody.

18 Q How long did it take you, Officer Wilkie, to
19 get from where you were when you received the dispatch
20 to in line to help with -- assist with felony traffic
21 stop?

22 A Probably no more than a minute. Something
23 like that. I initiated my emergency equipment so I
24 could get over to I-95 and then shut it all back off so
25 I could be there in position ready when we get the

1 vehicle continued south on I-95 so I'd be in a position
2 to assist.

3 Q And did you participate in the felony traffic
4 stop of the white van?

5 A Yes, I did.

6 Q And where was that on 95?

7 A It was on 95 just before I-95 south, right
8 around Forsyth Street exit, in that area by the
9 overpass.

10 Q Were you the actual police vehicle that
11 effectuated the stop of the van?

12 A Yes, I was directly behind the van. I was the
13 first vehicle. There were no other police vehicles in
14 between the van and myself.

15 Q Explain to the jury, you've mentioned a
16 felony traffic stop. What -- what is involved in a
17 felony traffic stop that makes it different than a
18 regular routine traffic stop?

19 A Well, if you've experienced a normal traffic
20 stop, we don't call them routine because none of them
21 are, but in a routine traffic stop the violator of the
22 traffic or whatever, would remain in the vehicle and we
23 would just go up and make contact with you and explain
24 what's going on, that type of thing.

25 On a felony traffic stop obviously we feel

1 there's probable cause to believe the person in the
2 vehicle has committed a felony and so we ask them to
3 exit the vehicle and we do a certain step, series of
4 steps to make it safe for us as much as we can, and
5 then have them walk backwards to us and we try to take
6 them into custody safely.

7 Q Do you know who Donald Smith is?

8 A Yes, I do.

9 Q Will you identify him in the courtroom,
10 please.

11 A Yes, he's seated over to my left in a light
12 blue shirt.

13 Q I'm sorry.

14 A He's seated over to my left in a light blue
15 shirt with a striped tie.

16 Q Thank you.

17 MS. NELSON: May the record reflect the
18 witness has identified the defendant Donald
19 Smith?

20 THE COURT: The record will so reflect.

21 BY MS. NELSON:

22 Q Officer Wilkie, after effectuating the stop
23 of the van, was this defendant, in fact, the driver of
24 that van.

25 A Yes, he was.

1 Q Will you go ahead and walk the jury through
2 after the van stopped what you then instructed
3 defendant to do?

4 A Initially when the van was stopped I asked the
5 defendant to stick his hands out the window so we could
6 see both his hands were empty. Unfortunately, there
7 was a lot of background noise, one of the sirens I
8 think on one of the other cars was still going, so we
9 got another officer, I believe it was Officer Rob
10 Lasota got on his PSA system so it was very loud,
11 instructed him again to put his hands out the window.
12 And so he's seated in the driver seat. And what we
13 did, we just said put your hands out the window and he
14 did, but he did it in a different manner than I've ever
15 seen before. He put them out and crossed them as they
16 were out the window. Maybe it's nothing, but it was
17 just something that I haven't seen in close to 30 years
18 in law enforcement.

19 Q And you have a recollection of that?

20 A Yes, ma'am, I do.

21 Q And then what did you instruct the defendant
22 to do next?

23 A We asked him to take the keys out of the
24 ignition and toss them out of the vehicle so it renders
25 the vehicle immobile. And then we asked him to reach

1 outside and unlock the door -- or open the door using
2 the outside handle and not the inside handle. So we're
3 trying to see the hands as much as possible.

4 Q Let me show you, direct your attention to the
5 screen, show you what has been premarked as Exhibit K.
6 Do you recall this photograph?

7 A Yes, ma'am, I do.

8 Q Is this, in fact, a true and accurate
9 photograph?

10 A Absolutely.

11 Q Of the van that you stopped on June 22nd,
12 2013?

13 A Yes, ma'am.

14 Q I show you next what's been premarked as
15 State's Exhibit L, another angle of the van. Is this,
16 in fact, a true and accurate photograph of the traffic
17 stop and the van that you stopped on June 22nd?

18 A Yes, it is.

19 Q Did you approach the defendant to take him
20 into custody?

21 A Yes. Initially when Officer Lasota got on the
22 PA he ordered the defendant to get out of the van and
23 he did, he complied, he opened it from outside as we
24 asked and then he stood outside the van and we have him
25 do a series of things so we can kind of check and make

1 sure they don't have a weapon. One of these is we ask
2 them to stand facing away from us and we ask them to
3 lift their shirt, grab the top of their shirt and pull
4 it up as far as they can so it will expose their
5 waistline so we can see if there's a weapon around the
6 waistline.

7 Q Officer Wilkie, left me stop you there.

8 A Yes.

9 Q Because I'm going to ask to allow permission
10 for you to step off the witness stand.

11 MS. NELSON: May the witness step down?

12 THE COURT: Yes.

13 BY MS. NELSON:

14 Q I'd like you to demonstrate for the jury
15 after asking him to shake his clothing, I'd like you to
16 demonstrate for the jury what this defendant did.

17 A Yes, ma'am. So we ordered him out of the van,
18 he got out of the van, and then we asked him to lift
19 his shirt up like this, so he pulls it up and then we
20 ask him to turn in circles, then when he turned back
21 around we asked him to lower the shirt. And typically
22 what you'll get is this (indicating), and they just
23 lower and they'll put their hands back up or something
24 like that. But instead this is what I got
25 (indicating). So it was just, again, the crossed hands

1 and this was a little flamboyant, maybe, but it was
2 different than any other traffic stop that I'd been a
3 part of.

4 Q Did you approach him and pat him down to
5 ensure that there were no weapons on him?

6 A Yes, I did.

7 Q And did you also clear the van?

8 A Yes, I did.

9 Q But you patted him down before clearing the
10 van?

11 A Yes, ma'am.

12 Q Tell the jury what you noticed when you
13 patted him down.

14 A When he came back, Officer Lasota advised him
15 to come back towards me and at one point he gets close
16 enough, he can hear me without Officer Lasota having to
17 speak over the PA so I take over and we order him to go
18 down to one knee and then the other knee and cross his
19 ankles, put his hands on top of his head like this and
20 interlock his fingers. I approached and grabbed the
21 top of his head so I can tell if he was going to resist
22 or try to pull his hands apart, and I put cuffs on one
23 hand, typically the right wrist area, and I bring it
24 around and I drop the left arm down and I complete to
25 handcuff him at that point. And then I raise him up

1 and bring him back to me.

2 Am I allowed to stand up? I can show you.

3 MS. NELSON: May the witness stand?

4 THE COURT: He may.

5 THE WITNESS: So I'm going from here and I've
6 got him cuffed and I stand him up and then
7 typically what we do is what we call a cursory
8 search. So I want to just make sure I didn't miss
9 something when he had his jacket up or his shirt
10 up or whatever it was. So we do that by we put
11 one leg kind of in between the other -- his two
12 legs and we go to one side. That way I can reach
13 more around to the front without exposing myself
14 in an awkward position.

15 And so as I started to do the cursory search,
16 to pat him down real quick, before I passed him
17 off to another officer, I felt his pants and they
18 were soaking wet. It actually put water on my
19 hand.

20 BY MS. NELSON:

21 Q What did you do?

22 A I shouted out, oh, my God, she's in the water.
23 I just -- just an involuntary reaction. And when I
24 did, the defendant immediately went from looking
25 straight forward to turning and looking at me and

1 turning back away. He never said anything, but just
2 the look on his face kind of confirmed what the
3 physical evidence was telling me.

4 Q Approximately what time of morning was this?

5 A This was right around between 8:45 and 9:00
6 o'clock, somewhere around there, about the 9:00 o'clock
7 hour.

8 Q So did you next clear the van? Will you tell
9 the jury what clearing the van, clearing a vehicle
10 means.

11 A Yes, ma'am. After the defendant was placed
12 with another officer, I retrieved my police dog Gator
13 and we approached, myself and several other officers
14 and what we're doing is making sure there's not someone
15 else in the van, there's not another suspect or anyone
16 else in the van. And as we did that, I went up to the
17 driver's door, I used my police search dog, Gator, is
18 what I call concealment. In other words, I didn't just
19 put him just blindly into the van because there may be
20 someone innocent in the van, too, don't know that. So
21 I stopped him at the driver's seat and I just kind of
22 peeked over him and looked in the back to see the
23 interior of the van to see if I could see anyone and
24 from the front two seats in the middle of the back seat
25 -- excuse me -- the middle of the area in the back to

1 where I could see the front of the bench seat in the
2 back, I could tell that -- I could not see that there
3 was anyone there and my police service dog was not
4 indicating that there was anyone there. If there were
5 he would try to gain entry from smelling that, the
6 human odor.

7 Q Let me show you what's been premarked as
8 State's Exhibit M. By the way, before coming to trial
9 today to testify, did you review all of these
10 photographs in preparation for your testimony?

11 A Yes, ma'am, I did.

12 Q And is this, Officer Wilkie, in fact, a true
13 and accurate description of what the interior of that
14 van looked like on June 22nd --

15 A Yes, it is.

16 Q -- 2013?

17 This is a different angle. Premarked as
18 State's Exhibit N. Officer Wilkie, let me direct your
19 attention to here (indicating) in this photograph.

20 A Yes, ma'am.

21 Q Was the middle back seat of that van missing?

22 A Yes.

23 Q Did this conclude your involvement in this
24 matter?

25 A No, ma'am. It did at the traffic stop pretty

1 much. I had another officer came out from the back
2 side and opened up the back of the van while I stayed
3 in the front and checked back behind the bench seat you
4 see in the photo to make sure there was no one behind
5 it and then that concluded my time of the investigation
6 at the traffic stop location.

7 MS. NELSON: Your Honor, let me tender into
8 evidence as the next numbered exhibits what's been
9 premarked as K, L, M and N.

10 THE COURT: Any objection?

11 MR. FLETCHER: No, Your Honor.

12 THE COURT: All right. K will be marked
13 absence State's Exhibit 11, L as State's Exhibit
14 12, M as State's Exhibit 13 and N as State's
15 Exhibit 14.

16 (Whereupon the foregoing items were marked in
17 evidence as State's Exhibits 11 thru 14,
18 respectively.)

19 BY MS. NELSON:

20 Q Officer Wilkie, what was your next
21 involvement related to this case?

22 A Shortly after we completed the traffic stop
23 and we cleared the van, I was instructed by sergeant
24 Lonnie Mills of the homicide division that some -- some
25 evidence had been developed that they had a possible

1 location of where they believe the victim may be
2 located and I was asked to drive up to an area off
3 Rutgers and Broward Road. There was a church there
4 where they had been told that the van had in seen and I
5 was instructed to go to that area immediately and
6 that's exactly what I did.

7 MS. NELSON: May I approach?

8 THE COURT: You may.

9 BY MS. NELSON:

10 Q Officer Wilkie, let me show you a set of
11 photographs premarked in alphabetical order from
12 State's Exhibit O through State's Exhibit W. Did you
13 have an opportunity to review these photographs prior
14 to your testimony today?

15 (Witness examining exhibits.)

16 A Yes, ma'am, I did.

17 Q And are these, in fact, true and accurate
18 depictions of the scene off of Rutger Road that you
19 arrived at after the traffic stop?

20 A Yes, ma'am.

21 MS. NELSON: I would tender State's O through
22 W as the next numbered State's Exhibits.

23 MS. SCHLAX: No objection.

24 THE COURT: No objection?

25 MR. FLETCHER: Right.

1 THE COURT: O will be entered as 15, P as 16,
2 Q as 17, R as 18, S as 19, T as 20, U as 21.

3 You said through W, right?

4 MR. CALIEL: Correct, Your Honor.

5 THE COURT: E is 22 and W is 23, all in
6 evidence for the State.

7 (Whereupon the foregoing items were marked in
8 evidence as State's Exhibits 15 thru 23,
9 respectively.)

10 BY MS. NELSON:

11 Q When you arrived to Rutgers -- the area at
12 Rutgers Road, what did you immediately notice? Were
13 there detectives there, investigators there?

14 A Yes, ma'am, I saw State Attorney Mr. Caliel
15 there. I saw Lieutenant Schoonover from the homicide
16 unit and several other homicide detectives and they
17 were all walking about through the wooded area, there
18 was a little wooded area, behind the church doing a
19 search of the area.

20 Q When you got there, what was your first
21 question?

22 A I asked them where the water is.

23 Q Okay. At this time did you actually use
24 Gator?

25 A Yes, ma'am.

1 Q The way that you talked about having trained
2 him, did you ask him to go to work?

3 A Yes, ma'am.

4 Q Will you explain to the jury the instruction
5 you gave your dog?

6 A I give him -- we have a -- we use our commands
7 in German and I gave him a German command called sou
8 which means track and so we initiated out on the edge
9 of the wood line so he could find the track that led us
10 into -- I knew I needed to go get to the creek and so I
11 knew if he could find that track he could take us to
12 where I believed the victim was going to be.

13 Q Officer Wilkie, let me show you what's been
14 entered into evidence as State's Exhibit 15. I'll ask
15 you to look at your monitor. When you -- this is an
16 aerial view of the scene. And will you tell the jury
17 what body of water is reflected in this photograph?

18 A This is a small tidal creek that leads out to
19 the river. So it does fluctuate with the tide and this
20 is the body of water that was directly adjacent to the
21 wood line that I was asked to search.

22 Q And when you arrived, was this creek -- were
23 you able to see it when you arrived?

24 A Yes, ma'am. It was pretty much full tide.
25 All that you're seeing up here on the right-hand side

1 up to here (indicating), that was completely under
2 water.

3 Q But I mean --

4 A I'm sorry.

5 Q When you arrived and you said where is the
6 water?

7 A No, ma'am, I could not see the creek from
8 where I was at.

9 Q Okay.

10 A I misunderstood. I'm sorry.

11 Q No, that's okay. Can you -- I don't know
12 that this photograph will be the best, but can you show
13 the jury where you and Gator arrived using this
14 photograph?

15 A Well, we were way over further out this way,
16 I'll try to make an arrow on there, but we were further
17 out to the right of the screen and then we initially
18 started our search further back in the area along the
19 wood line (indicating).

20 Q Let me show you what's been introduced into
21 evidence as State's Exhibit 16. Is this, in fact, a
22 photograph of the wood line that you've described?

23 A Yes, ma'am.

24 Q So you described for the jury, after you
25 instructed Gator to work, to track, what he did.

1 A Initially when I got him out, I -- we were
2 down, as you can see where the orange tracks are at,
3 that's where there was tire tracks there, that we
4 believed came from the van and if can you see, it's
5 pretty close proximity, if you look back to the right
6 of the screen where the wood line is. So initially
7 when I told him the command to sou or to track, he
8 actually went a little bit to the left and he started
9 tracking right down the tire tracks because they put
10 out a lot of scent there, because I believe there was a
11 car that was driven there. That kind of way, in other
12 words, is what I'm talking about. So I brought him off
13 that and concentrated right up next to the wood line
14 and gave him the command again and made sure he stayed
15 tucked in close to the wood line and he didn't go very
16 far at all and he picked up the track and took off into
17 the woods.

18 Q Now, in this photograph in 16 you can see
19 there's orange paint. Was that there when you arrived
20 there?

21 A No, ma'am.

22 Q And let me take you back to State's 15.
23 Similarly in State's 15 there's orange paint reflecting
24 tire tracks. Was that there when you arrived?

25 A No, ma'am.

1 Q Now, you've mentioned that Gator actually,
2 once again he got off the tire tracks he worked another
3 track. Let me show you State's 17. Will you describe
4 for the jury what's reflected in State's 17.

5 A This is a path that Gator took down into the
6 water line. He immediately took off. I went adjacent
7 to him so in case -- the reason I did that is in case
8 he did -- he typically is going to track true, which
9 mean he stays right on top of the track. It's just the
10 way that he usually tracks and in doing so, I didn't
11 want to walk directly behind him and I didn't want to
12 mess up something if there was a footprint or there was
13 a piece of evidence, I didn't want to step on something
14 I didn't see as I'm watching him. So I went adjacent
15 to him and just paralleled him and I was walking the
16 tree line and I'd catch up to him until we got to the
17 water line.

18 Q Let me show you State's 18 and will you
19 explain to the jury what is reflected here?

20 A Yes, ma'am. These are the reeds and there was
21 some water there at the time, but as you can see,
22 they're pushed over and that's one thing that I noticed
23 once we got down to the water line, I could see a very
24 distinct pattern or path that had been taken.

25 MS. NELSON: Your Honor, may I have just a

1 moment?

2 THE COURT: You may.

3 (State counsel conferring.)

4 BY MS. NELSON:

5 Q When you got to the shore line of the creek,
6 will you describe the shore line to the jury.

7 A Yes, when I got to the shoreline there was a
8 lot of what I guess you'd call brick-and-brack, there's
9 pieces of asphalt and concrete like somebody had dumped
10 in there sometime in the past. So I noticed that was
11 along the edge of the shoreline.

12 Q Let me show you what's been entered into
13 evidence as State's Exhibit 19. Is this as reflected
14 in State's Exhibit 19 some of the asphalt that you saw
15 along the shore line?

16 A Yes, ma'am.

17 Q State's 20. Same question.

18 A Yes, ma'am.

19 Q Officer Wilkie, when you got to the
20 shoreline, how was your dog acting?

21 A He started to circle a little bit. He was
22 trying -- it was like he had gotten to the end of the
23 track and that's what they'll typically do, try to
24 figure out where to pick this up again, but obviously
25 for him the track stopped at the water and he was kind

1 of circling a little bit at that point.

2 Q What did that indicate to you?

3 A It indicated to me that we were close. We
4 weren't going to go up and down on the land side
5 anymore. It indicated to me that she was in the water
6 which is what I felt like we were going to find.

7 Q And tell the jury what you next saw.

8 A Next I -- I put Gator down so he would stay on
9 the shoreline and I could see on the side, I could see
10 a tree that was laying on its side. And in looking at
11 the reeds, they were kind of pushed down, they were a
12 little bit ahead of me, it almost looked like a
13 triangulation. There were reeds pushed down in a path
14 that Gator had gone down and then I'm looking from my
15 vantage point and I'm looking out and everything is
16 lined up with this tree that's directly ahead of me in
17 the water. It's in the water.

18 Q And did you ultimately see Cherish
19 Perrywinkle in the water?

20 A Yes, ma'am, I did. I walked over -- I'm
21 sorry.

22 Q Go ahead.

23 A I at that point walked over to the water and
24 what I could see up underneath the trunk of a tree was
25 Cherish laying on her left side and she was faced away

1 from me and her hair was kind of floating in the water.
2 She was under several inches of water.

3 Q You mentioned that she was under several
4 inches of water. At this time was it high tide in that
5 creek?

6 A I believe it to be high tide. It was up very
7 well.

8 Q Okay. Let me show you what is marked as
9 State's Exhibit 21. Officer Wilkie, direct your
10 attention right here. Is this the tree that you
11 described (indicating) being down, downed over the
12 water?

13 A Yes, ma'am, it is.

14 Q And the orange spot under the tree, is that,
15 in fact, the body of Cherish Perrywinkle?

16 A Yes, ma'am, it is.

17 Q Now, this photograph, Officer Wilkie, there's
18 not water in this photograph.

19 A Correct.

20 Q How does this photograph look different than
21 when you first came upon Cherish's body?

22 A When I first arrived and located Cherish's
23 body, the water was probably up to almost half-way up
24 to this tree trunk. There was a little bit of the tree
25 sticking out. That's why I happened to notice what it

1 was. But I could not see anything until I walked over
2 completely up to it. The water is kind of -- it's
3 brackish so it has a dark color to it and so I couldn't
4 see through it clearly like you could if you were at a
5 lake or something like that, clear water.

6 Q Now, as a law enforcement officer, your
7 entire life, your first reaction when somebody is hurt
8 is to do what?

9 A Your first reaction is to try to save them.
10 You're hoping that there's something you'll be able to
11 do that's going to save their life.

12 Q Was it apparent to you that Cherish
13 Perrywinkle was dead?

14 A Yes, ma'am, it was.

15 Q That being the case, what did you next do?

16 A The only thing I could do at that point, my
17 mind is racing about what I can and can't do in a
18 matter of seconds and all I could do is just stand by
19 her, protect her, preserve the evidence so that one day
20 whoever did this to her would be held accountable and
21 protect the scene as it were, because we were agreed
22 there was a chance of something coming up, an alligator
23 or whatever and that kind of thing. So I stood by the
24 water until I was relieved.

25 Q I'm going to show you two more photographs.

1 Show you State's Exhibit 22. Is this just a more
2 close-up photograph of what State's 21 was?

3 A Yes, ma'am.

4 Q Officer Wilkie, do you remember this orange
5 dress?

6 A Yes, ma'am, very, very vividly.

7 Q And why that is?

8 A My daughter has the same dress, or had.

9 Q Let me direct your attention to State's 23.
10 Will you orient the jury to this photograph, please.

11 A Yes, ma'am. This is -- this is the dress that
12 I saw on Cherish and this is the visual that I had when
13 she was underneath the water at the time that I saw
14 her.

15 Q Is this her ear (indicating)?

16 A Yes, ma'am.

17 Q This is her hair (indicating)?

18 A Yes, ma'am, but it was floating. It was
19 floating in the water so I had clear view of her face,
20 the right side of her face.

21 Q You said you stayed there until you were
22 relieved. Were you actually relieved by crime scene
23 unit technicians who came out to work the scene?

24 A Eventually I was. Officer Brian Hall relieved
25 me temporarily. I was pretty emotional at the time and

1 so I took a break and he took over and stood by until
2 the last little bit before the evidence technicians
3 took control of the scene.

4 Q Thank you.

5 MS. NELSON: I don't have anything further.

6 THE COURT: Any cross-examination?

7 MR. FLETCHER: Yes.

8 CROSS-EXAMINATION

9 BY MR. FLETCHER:

10 Q Officer, back to the felony stop.

11 A Yes, sir.

12 Q You indicated that Mr. Smith stuck his hands
13 out as -- it was so odd that you still remember it?

14 A Yes, sir.

15 Q Was that first time anyone has ever done
16 that?

17 A Ever crossed their arms when they stuck them
18 out, yes, sir.

19 Q And how many stops have you made over the
20 course of your career?

21 A Literally hundreds.

22 Q Okay. And what was so strange about it was
23 the way he did this with both hands?

24 A Yes.

25 Q And then he did something else strange when

1 you asked him to pick up his shirt?

2 A Yes, sir, when he released the shirt, most
3 people don't throw their hands in the air, but he did.
4 He raised his hands up above like that (indicating) and
5 then his head went back.

6 Q Okay. And you've described that as like
7 flamboyant?

8 A Well, it seemed a little bit much. It's just
9 something I didn't expect and I'd never seen it before.
10 And being in the K9 unit for 18 years typically all we
11 do is felony type calls and in-progress things. We
12 deal with a lot of people that have committed, you
13 know, a lot of crimes and it was just something I had
14 not witnessed before.

15 Q Okay. So it was just strange and you still
16 remember it and you have no explanation for it.

17 A Correct.

18 MR. FLETCHER: That's all I have.

19 THE WITNESS: Yes, sir.

20 THE COURT: Any redirect?

21 MS. NELSON: No, ma'am.

22 THE COURT: May he be excused?

23 MS. NELSON: Yes, ma'am.

24 THE COURT: Thank you, sir. We appreciate
25 your time today.

1 THE WITNESS: Thank you, ma'am.

2 THE COURT: The State may call their next
3 witness.

4 MR. CALIEL: The State would call Detective
5 Kim Long to the witness stand.

6 THE COURT: Detective Long.

7 (Witness present.)

8 THE COURT: Good afternoon, Detective Long.

9 (Witness sworn.)

10 THE WITNESS: I do.

11 THE COURT: And our witness chair is over
12 here. Thank you.

13 KIMBERLY LONG,

14 was called as a witness on behalf of the State, and after
15 being duly sworn, then testified as follows:

16 DIRECT EXAMINATION

17 BY MR. CALIEL:

18 Q Good afternoon.

19 A Good afternoon.

20 Q Can you please introduce yourself to the
21 jury.

22 A Yes. I'm Kimberly Ann Long.

23 Q How are you employed?

24 A With the Jacksonville Sheriff's Office.

25 Q How long have you been employed with the

1 Jacksonville Sheriff's Office?

2 A Almost 25 years.

3 Q What is your current assignment?

4 A I'm a detective in the crime scene unit.

5 Q And how long have you held that position as
6 a detective within the crime scene unit?

7 A About 17 and a half years.

8 Q Detective Long, if you could please briefly
9 describe what your role as a crime scene detective is,
10 particularly when it comes to the evidence
11 preservation?

12 A Yes, sir, it's my responsibility to
13 investigate the scene, document the scene, do what is
14 called the diagramming, and examine the area and look
15 for evidence and collect the evidence.

16 Q In your 17 years as a crime scene detective,
17 approximately how many death investigations have you
18 worked?

19 A I would probably say death investigations at
20 least 500.

21 Q And do you have specialized training and
22 experience that qualifies you to work what we call
23 major cases within that unit?

24 A Yes, we receive extensive training in as far
25 as crime scene investigations, crime scene management,

1 homicide investigations. Instruction and training.

2 Q Detective, I'd like to direct your attention
3 particularly to June 22nd of 2013. Were you working on
4 that day?

5 A Yes, I was.

6 Q And when did you first respond in regards to
7 the case of the State of Florida versus Donald Smith?

8 A At approximately 9:17 in the morning.

9 Q What was the first action you took?

10 A I responded to the termination point where the
11 van was stopped.

12 Q At that particular location, what work did
13 you do to preserve the van for possible evidentiary
14 purposes?

15 A We collected photographs of the vehicle as we
16 found it and then we closed all the doors and sealed it
17 with crime scene tape and we actually signed the
18 evidence tape sealing the doors.

19 Q So was the van then collected from that
20 location and taken to the JSO warehouse on Haines
21 Street?

22 A Yes, it was.

23 Q After you completed your work at the location
24 where the defendant was taken into custody, did you
25 then respond to the location behind Highlands Baptist

1 Church at Rutgers and Broward Road?

2 A Yes, sir, I did.

3 Q What did you first do when you arrived at
4 that location?

5 A When I first arrived at that location I
6 actually made contact with K9 Wilkie so he could just
7 kind of give me a brief synopsis of his actions when he
8 was at the scene.

9 Q And once you got the brief synopsis of what
10 happened, did you also speak with homicide detectives
11 to determine how you were going to begin to process
12 this location?

13 A Yes.

14 Q And what did you do first to begin your
15 investigation at that crime scene?

16 A First thing that we always do when we respond
17 to a scene is we take photographs of the scene, showing
18 everything as we see it without altering it in any way.

19 MR. CALIEL: Your Honor, may we approach the
20 witness?

21 THE COURT: You may.

22 BY MR. CALIEL:

23 Q Detective, prior to coming to court, have you
24 had the opportunity to come to my office and review the
25 evidence and photographs in this case?

1 A Yes, I have.

2 Q I'm now showing you in its entirety a stack
3 of photographs that will be marked State's Exhibit X
4 through State's Exhibit -- I believe the last one is Q,
5 before we get to this photograph which I'll hold off to
6 the side. Can you just look through those photographs,
7 please. So it will be State's Exhibit X through
8 State's Exhibit Q.

9 THE COURT: Double Q?

10 MR. CALIEL: Double Q, yes, Your Honor.

11 (Witness examining exhibits.)

12 BY MR. CALIEL:

13 Q And I apologize. It's X through Double R is
14 the final photograph in the stack I handed to you.

15 After reviewing State's Exhibit X through
16 Double R, do those photographs fairly and accurately
17 depict the crime scene as you responded on June 22nd of
18 2013?

19 A Yes, they do.

20 Q Also I'd like to show you what's been marked
21 for identification purposes as State's Exhibit TT. Do
22 you recognize that map?

23 A Yes, I do.

24 Q And does that map, which is an overall map of
25 Jacksonville, depict locations of this particular

1 investigation, where the defendant was stopped, where
2 the body was recovered, where the Walmart is and even
3 Mr. Smith's home location?

4 A Yes, it does.

5 Q Based upon you working as a police officer
6 for the past 25 years, does that map accurately reflect
7 the addresses and locations of the relevant scenes of
8 the investigation?

9 A Yes, it does.

10 Q Thank you.

11 MR. CALIEL: Your Honor, at this time I would
12 move into evidence State's Exhibit X through
13 State's Exhibit RR as the next numbered exhibits
14 which I believe will be State's 24 through 44.

15 MS. SCHLAX: No objection, but we would
16 preserve all my earlier objections.

17 THE COURT: Okay. That will be noted for the
18 record. So X is State's Exhibit 24, Y is 25, Z is
19 26, Double A is 27, Double B 28, Double C 29,
20 Double D 30, Double E 31, Double F 32, Double G
21 33, Double H 34, Double I 35, Double J 36, Double
22 K 37, Double L 38, Double M 39, Double N 40,
23 Double O 41, Double P 42, Double Q 43, and Double
24 R 44.

25 Is that right?

1 MR. CALIEL: I believe that's right, Your
2 Honor. I'm holding on to Double T for the time
3 being.

4 THE COURT: All right.

5 (Whereupon the foregoing items were marked in
6 evidence as State's Exhibits 24 thru 44,
7 respectively.)

8 BY MR. CALIEL:

9 Q Detective Long, showing you what's been
10 previously marked and moved into evidence as State's
11 Exhibit 25. Can you please explain to the jury what's
12 depicted on this diagram.

13 A Yes, what you're looking at is what we call a
14 diagram or completed diagram of the scene. As you can
15 see in the diagram on the top left corner, and I'm
16 going to mark it (indicating), this is what we call our
17 legends. It's just explaining what the -- what you're
18 actually looking at. If there are any items of
19 evidence that are marked on this diagram, as you'll see
20 No. 1, 2, 3, 4, those are what we call items of evidence
21 and then we describe what those particular items are
22 and then see it shows the basketball court, there's a
23 building, it shows on the right-hand side of the
24 diagram would be Rutger Road and you can see toward the
25 bottom right, you can see the church and it has an

1 arrow showing that's the direction towards the church.
2 And then we're actually looking, you'll see these lines
3 marking in red (indicating) and these are what I call
4 the tire tracks I saw in the grass area and then the
5 dark green and the light green area is the wood line
6 area and the marsh area and showing where you can see
7 where it says suspect trail that I'm marking
8 (indicating) and this is what we saw designated the
9 suspect trail and then the trail that K9 Wilkie used to
10 enter into the marsh area and it shows where the victim
11 is located in the water (indicating).

12 Q Based upon the victim's location in the
13 water, what steps were taken to preserve the path in
14 the wood line going towards her body to make sure that
15 no evidence was possibly destroyed?

16 A Once again, we wanted to make sure nobody
17 walked around where the tire tracks were at and we only
18 entered in through the area where K9 Wilkie entered in.
19 We stayed away from the area that there was depressions
20 in the grass and the marsh area where the suspect had
21 been and we actually went on to the other side of this
22 creek and we used JFRD, which is the fire department,
23 used one of their jon boats to take us over to the
24 other side so we could have just another view so it
25 would not disturb any marsh area.

1 Q And did, in fact, you along with other
2 investigators get into the boat on the other side of
3 the water and then approach the victim from the water
4 line so you could see her location without disturbing
5 the ground area directly in front of her?

6 A Yes.

7 Q I'm now showing you what's been previously
8 marked as State's Exhibit 25 in evidence. If you could
9 describe what is depicted here in this aerial
10 photograph.

11 A This is actually what we call an aerial
12 photograph crime scene. Detectives in the air in a
13 helicopter and they were able to take photographs so
14 we'll have what we call a birds eye view and in this
15 photograph as I'm marking the bottom (indicating), that
16 would be Broward Road and then I'm marking on the right
17 corner, kind of on the right corner, that is Rutgers
18 Road and this is what I deem the creek area. And you
19 can also see the -- you could kind of see as I'm
20 marking in the middle of the photograph tire tracks and
21 then, of course, to the right that I'm circling, that
22 is the church (indicating). This is a building that
23 was on the lot (indicating) and in the middle near the
24 tire tracks, tire tracks, there's the basketball court,
25 and then where the creek line is where you see the wood

1 line is, there's like kind of a blue. That is actually
2 a blue tent that we had set up over the body.

3 Q So when you made the --

4 MR. CALIEL: Mike, can you approach? I
5 apologize, Your Honor. The eraser shifted. I
6 want to make sure we're not publishing anything.

7 Thank you. I appreciate it.

8 BY MR. CALIEL:

9 Q In this area here on the other side, is that
10 how the approach was made then to approach the victim's
11 body from the water line (indicating)?

12 A Yes, sir. I'm not sure if that's the exact
13 area that we entered the water, but I know that there
14 was a house where the owners of the house allowed us
15 into and had a dock and we were able to enter over
16 somewhere in this area (indicating), we were able to
17 enter in the water and then took the boat to the other
18 side.

19 Q Now showing you what's been marked as State's
20 Exhibit 26. Can you describe further the tire tracks
21 that you described in the other photograph. I think
22 they're a little bit more visible in the photograph.

23 A Yes, this is just a little bit closer up of
24 the last graph that we just saw and you can definitely
25 see, I'm just going to circle both tire tracks, you can

1 see where there were tire tracks in the grass area
2 (indicating).

3 Q What efforts did you make to make those more
4 visible to the eye and especially obvious from the air
5 unit above?

6 A I actually spray painted, myself and Detective
7 Dougherty, who's another crime scene detective that
8 showed up out there, we actually sprayed it with like a
9 neon orange spray paint.

10 Q And did those tire tracks lead to the suspect
11 trail that you indicated on the diagram we were
12 previously looking at?

13 A Yes.

14 Q And so it appeared that some sort of vehicle
15 entered in this location and then came back out in the
16 same manner and then exited the grassy area
17 (indicating)?

18 A That's correct.

19 Q Now showing you what's been previously marked
20 State's Exhibit 15 in evidence. Can you please
21 describe what's depicted in this photograph.

22 A Yes, this is just another -- actually a closer
23 up photograph of the tire tracks so you can definitely
24 see them better as one set leads toward the area that
25 we deemed being the suspect entry point into the wood

1 line and then the other set is leaving and also you can
2 see in relation, you can see the tent that we have
3 placed over the body (indicating).

4 Q Now showing you State's Exhibit 27. Describe
5 what's depicted in this photograph.

6 A This is an aerial photograph. It's actually
7 facing to the east and it's just showing you a better
8 representation of where the body is located in the
9 marsh area and you can actually see, I'm circling --
10 kind of marking the area that the grass was depressed
11 where we deemed to be the suspect's exit point from the
12 body and kind of shows you the area where this is as
13 far as the lot and the church in relation to it
14 (indicating).

15 Q Based upon when you originally arrived in
16 this location and then as time passed, was the water
17 level receding during the course of the investigation?

18 A Yes, the water line receded.

19 Q Okay. And according to officers who first
20 arrived at the scene, including K9 Wilkie, was the
21 victim's body submerged in water when they first
22 arrived?

23 A Yes, and also when I first arrived it was
24 still submerged in water.

25 Q It still was submerged even when you arrived?

1 A Yes, sir.

2 Q Moving on to State's Exhibit 28. Could you
3 describe what's depicted in this photograph.

4 A Yes, sir, it's another aerial photograph.
5 It's closer, a closer view of the photograph we just
6 saw, again, you can see that we highlighted the wood
7 line or the grass that was depressed leading up into
8 the -- from the wood line up to the body (indicating).

9 Q I'm now going to circle just to the south,
10 south is probably the wrong description based upon the
11 direction, but just beneath where the blue tent is and
12 that depression where the reeds are matted down. Is
13 that where you and other detectives made entry to the
14 body and then also put the tent up in that location?

15 A Yes, sir, this is actually where -- what you
16 circled the depression in the grass, that's where the
17 jon boat, the boat that Fire Rescue -- the fire
18 department people and I -- and I believe Detective
19 Alexander, Homicide Detective Alexander, we were on the
20 boat, that's the location and how we entered into -- up
21 to the body so that caused that depression in the
22 grass.

23 Q Thank you.

24 Now moving on to State's Exhibit 29 in
25 evidence. If you can describe what's depicted in that

1 photograph.

2 A Yes. We're actually starting from the -- the
3 asphalt and this -- what you're actually looking at,
4 you're looking at tire tracks that I have marked with
5 orange paint and these tire tracks are located to --
6 between the two sets of tire tracks and these tire
7 tracks are actually located to the west of the tire
8 tracks and it's east of the location where the suspect
9 entered the wood line.

10 Q State's Exhibit 30 in evidence. Can you
11 describe what's depicted in that photograph.

12 A Yes, sir, these are actually the tire tracks
13 that we just saw in the previous photograph without
14 orange paint on them.

15 Q So even without the orange paint, when you
16 arrived at the scene you could distinctly see that a
17 vehicle had gone back to that particular location
18 without any additional aid?

19 A Correct.

20 Q Moving on to State's Exhibit 31.

21 A These are the same set of tire tracks that you
22 just saw, but now you're able to see how they start
23 leading back to the wood line and you can also see in
24 this photograph, and I'll circle it, there are some
25 orange flags, and this was just marking another area

1 where we had tire tracks and I don't know that they --
2 if we had, you know, spray painted them yet.

3 Q Now moving on to State's Exhibit 32. Again,
4 does this follow through around the corner and closer
5 up to the wood line itself?

6 A Yes, sir.

7 Q And now State's Exhibit 33. Are these the
8 tracks that you talked about that hasn't been painted
9 yet again, where they're visible just to naked eye?

10 A Yes, sir, the ones leading up to the wood line
11 and I haven't placed the orange flags by it yet either.

12 Q Now, this area right here, the wood line
13 that's depicted in that photograph, is beyond that wood
14 line the water and where the victim's body was actually
15 recovered?

16 A Yes.

17 Q Moving on to State's Exhibit 34. Again, is
18 this a closer viewpoint of how there was entryway into
19 that wood line?

20 A Yes, it is, and you can also see in this
21 photograph, among the trees you can see the blue tent
22 that I'm circling, you can see the blue tent that we
23 had placed over the body.

24 Q Did you and other crime scene detectives walk
25 the path that the suspect would have taken when the

1 body was placed in the water to determine whether or
2 not there was any items of evidence in between the
3 grassy area and where the body was?

4 A Yes.

5 Q Okay. And was anything of specific note
6 recovered in -- of value that you're aware of?

7 A We did not recover any evidence as far as
8 tangible evidence that we could take with us, but I did
9 note, and I took photographs of showing where different
10 branches had been broken leading to the area.

11 Q So you can see with the naked eye that there
12 was disturbance within that path leading up towards the
13 victim's body?

14 A Yes.

15 Q Branches broken. You could tell that they
16 were fresh?

17 A They appeared to be fresh.

18 Q Moving on to State's Exhibit 35. Can you
19 describe what's depicted in this photograph.

20 A Excuse me. Yes, this is actually in what I
21 call the marsh area and this is the area where the
22 suspect would have to walk through the wood line and
23 you're looking on to this grass area and this little
24 area I'm kind of (indicating) marking is the trail, the
25 area that we saw the depressed grass going into the

1 marsh.

2 Q So going back to State's Exhibit 34, this
3 would be on the side of the property looking into the
4 wood line, then when we move on to State's 35, this
5 would be on the water side of the wood line looking
6 back towards the church property.

7 A That's correct.

8 Q State's Exhibit 17, does this show the
9 disturbance to the branches that you had previously
10 described?

11 A Yes.

12 Q And again this is leading out towards where
13 the water was and the victim's body was eventually
14 recovered?

15 A Yes, this is actually leading away from the
16 water toward the church.

17 Q And now State's Exhibit 18 in evidence.

18 A This is actually on the marsh side and you see
19 the opening to where and then the trail, you see the
20 depression in the grass and at the bottom right you can
21 also see a fallen tree.

22 Q And is that the fallen tree where Cherish
23 Perrywinkle's body was recovered?

24 A Yes.

25 Q Moving on to State's Exhibit 36. Again, does

1 this show the length of that disturbance or where the
2 path was from the wood line to the marsh?

3 A Yes, it's showing the path.

4 Q I apologize. Now showing State's Exhibit 37.
5 Can you please describe what's depicted in this
6 photograph.

7 A Yes, other than the -- the blue tent that you
8 can see that we put over her body, this is a fallen
9 tree and as you can tell there's like a lot of grass
10 around the bottom part underneath where the tree is at,
11 see a yellow flag where we're marking certain areas of
12 the -- I think there was some asphalt, but inside right
13 underneath the fallen tree is the location where the
14 body of Cherish Perrywinkle was located.

15 Q Were items of debris, such as tree branches,
16 asphalt, rocks, were items placed upon her body?

17 A Yes. There were -- there was grass placed on
18 top of her. I think at least two to three pieces of
19 asphalt and a -- a branch.

20 Q So did it appear that there were obvious
21 efforts to try to conceal the body's location?

22 A Yes.

23 Q State's Exhibit 38. Can you describe what's
24 depicted in this photograph?

25 A Yes, this is actually from the other side of

1 the fallen tree. It's from the water side. And you
2 can see that there's a branch lying on top of the right
3 arm of Cherish Perrywinkle. And you can also see where
4 the grass has been placed on her body.

5 Q When you first arrive at this particular
6 location, looked at it as the water was up, how high is
7 the water level that is now obviously receded in this
8 photograph?

9 A Like I said, she was so large so it would have
10 to be at least to the bottom part of the tree.

11 Q Now, showing State's Exhibit 39 in evidence.
12 Please describe what's depicted in this photograph?

13 A This is a photograph where some of the -- the
14 asphalt and the grass had been removed from the body so
15 we could expose the body more.

16 Q The victim's body, when you removed the
17 asphalt and the grass, did she have on any underwear at
18 that point in time?

19 A No.

20 Q So the only thing she was wearing was the
21 dress, but it was pulled above her waistline? Above
22 her lower body?

23 A That's correct.

24 Q Now showing you State's Exhibit 40 in
25 evidence. Is this what you had previously described

1 and how items of debris, such as asphalt and branches
2 were placed upon her body?

3 A Yes, you can actually see some of the asphalt.
4 I'm going to circle the asphalt (indicating). In this
5 photograph you can see two distinct pieces of asphalt
6 and the grass that were laid over her body.

7 Q Clearly, I mean this is asphalt. This is
8 rock. This is not going to float on top of her body.
9 It would have to have been placed on top of the body
10 when she was placed in the water.

11 A That's correct.

12 Q State's Exhibit 19 in evidence. Is that a
13 piece of the asphalt that you removed that was trying
14 to conceal the body?

15 A Yes.

16 Q State's Exhibit 20 in evidence.

17 A This is another piece of asphalt that was on
18 top of her body to conceal it.

19 Q Now showing he what's been previously moved
20 into evidence as State's Exhibit 41. Could you
21 describe what's depicted in this photograph to the
22 jury.

23 A Yes, this is a -- what we call just an
24 overhead photograph and you can kind of see, focussing
25 on this is the log, the tree that she was under, and

1 this is just kind of showing the position of her and
2 you can definitely tell that she's wearing an orange
3 dress and at this point the branch had been moved away
4 from her.

5 Q Now showing you State's Exhibit 42 in
6 evidence. Can you describe what this depicts.

7 A By now the Medical Examiner had already
8 arrived and the body people, the ones that remove the
9 body, they had arrived and they had now removed it from
10 underneath -- underneath that tree.

11 Q And this is how she looked when she was
12 pulled out from underneath where she had been placed
13 under the tree?

14 A Yes.

15 Q State's Exhibit 43 in evidence. Describe
16 what's depicted in that photograph.

17 A We're just showing her face, just showing that
18 there's some blood evidence around her face and on her
19 lips. You can also see there appear to be some
20 ligature marks on her neck and some blood on her face.

21 Q Was there anything of specific importance to
22 those ligature marks around her neck, based upon your
23 training and experience you were observing?

24 A Well, by looking at the ligature marks and
25 then also, like I said, the Medical Examiner was on the

1 scene and we always look at their eyes, too, and within
2 their eyes she had what we call petechia hemorrhage
3 which is between the two is a classic -- it's classical
4 for asphyxiation or from strangulation.

5 Q And is this done while still at the scene to
6 try to determine possible cause of death even before
7 the autopsy is reviewing?

8 A You mean reviewing the body and taking
9 photographs? Yes.

10 Q So with the ligature marks, with the
11 hemorrhaging within the eyes, based upon your training
12 and experience, strangulation is likely a possibility?

13 A Yes.

14 Q In particular in State's Exhibit 43, and I'm
15 going to mark in this area here (indicating), while I
16 know it's difficult because of the size, those faint
17 specks, is that, in fact, ant activity that was on her
18 body in that location?

19 A Yes, that appears to be an activity.

20 Q And that was from the log and the water, the
21 area where her body was left and disposed of?

22 A Yes.

23 Q Now, moving on to State's Exhibit 44. Please
24 describe what's depicted in this photograph.

25 A It's just another angle photograph showing her

1 face, her neck and just part of her body.

2 Q And there were apparent injuries again to the
3 neck and the face that you could see just immediately
4 upon removing her from underneath the tree?

5 A Yes.

6 Q Before I go on further, let me approach you.
7 Now, based upon the ligature marks and then also the
8 hemorrhage that you saw within the eyes, after the body
9 was removed did you take swabs from the victim's neck
10 for possible DNA evidence to be examined by FDLE?

11 A Yes, I did.

12 Q Explain to the jury why that was important
13 based upon what you saw when you removed the body from
14 underneath the tree.

15 A Because when you see the ligature marks and
16 the petechia in the eyes, strangulation just by the
17 person touching may leave touch DNA behind and so
18 that's important for us to swab that area.

19 MR. CALIEL: Your Honor, may I approach the
20 witness?

21 THE COURT: You may.

22 BY MR. CALIEL:

23 Q Detective Long, I'm now showing you what's
24 been previously marked and identified as State's
25 Exhibit SS for identification. Do you recognize that

1 exhibit?

2 A Yes, I do.

3 Q And what do you recognize that exhibit to be?

4 A This is the touch DNA swab that I collected
5 from Cherish Perrywinkle's neck.

6 Q And is it in the same or substantially the
7 same condition as it was when you collected it from her
8 body on June 22nd of 2013?

9 A Yes, it is.

10 MR. CALIEL: Your Honor, at this time we
11 would move into evidence State's Exhibit SS as the
12 next numbered exhibit. It would be State's
13 Exhibit 45.

14 THE COURT: Any objection?

15 MS. SCHLAX: No objection, Your Honor.

16 THE COURT: That will be entered as State's
17 Exhibit 45 in evidence.

18 (Whereupon the foregoing item was marked in
19 evidence as State's Exhibit 45.)

20 MR. CALIEL: If I could have the witness step
21 down.

22 BY MR. CALIEL:

23 Q Step here next to the table and keep your
24 voice up for the court reporter.

25 If you could please describe for the jury

1 what the DNA swab consists of and how you take that
2 swab when you removed the body from underneath the
3 tree.

4 A Yes, as you can tell by looking at the
5 exhibit, you have a piece of paper which is -- they're
6 swabs, sterile swabs, and what we do is we put on a
7 pair of clean gloves and then we'll use distilled water
8 to examine it. We use distilled water. We usually use
9 one or two drops of distilled water and you can't see
10 it because it's still in the paper, but the swab really
11 on the end is a cotton swab, looks like a large Q-Tip.
12 We put about one to two drops, we don't want to
13 saturate it, we'll just put a few drops of water,
14 distilled water on there, and then what I'll do, the
15 area that I'm concentrating on, I would just make sure
16 that I swab around that area really well.

17 After I collect the swab I would actually -- I
18 would take this Q-Tip and I would place it back to the
19 -- the original packaging that it's in and then I will
20 sometimes, we have like what we call drying racks, it's
21 just a piece of hardie board that we have numbers in
22 it. And we'll take the swab and set it in there in
23 this paper, set it aside and make sure it's not --
24 because we make sure the paper is not contaminated with
25 anything else and then we'll let it dry for a little

1 while. Don't really have to but we do. And then we'll
2 put it in a manila envelope, saying what the swab was
3 and where we collected it from.

4 Q Thank you. You can retake the witness stand.

5 Detective Long, obviously the swab that was
6 showed the jury in State's 45, that was a swab you
7 collected around the neck. Did you also attempt to get
8 swabs from other areas of the body as well?

9 A Yes, I did.

10 Q And what other types of swabs did you take or
11 what other areas did you try to get possible DNA
12 evidence from?

13 A I'm going to use my reports to refresh my
14 memory, but I remember the log of the tree, that she
15 was under, I actually took swabs of that, as far as her
16 body, her wrists, her legs, her ankle, the area of her
17 back and her buttocks area that was exposed. I took
18 swabs from that area. Her right leg, her ankle, her
19 left ankle, the branch that was by her arm. The two
20 rocks, actually there were three rocks across the
21 asphalt, I took swabs from those and her right arm,
22 wrist and hand and left arm, wrist and hand.

23 Q Obviously you're hoping at this point in time
24 to possibly get DNA evidence of who may have done this
25 to her, correct?

1 A That's correct.

2 Q Given the nature of the crime scene, given
3 the nature of the area where she was placed in the
4 water, is that a concern with the degradation or
5 destruction of possible DNA evidence because she's in
6 the water?

7 A Yes.

8 Q And is that why you tried to take the swabs
9 as quickly as possible?

10 A Yes.

11 Q The Medical Examiner, however, would do a
12 more complete autopsy and collection of possibly any
13 other type of swabs that might be related to a sex
14 crime scene, correct?

15 A That's correct.

16 Q That wasn't something that you participated
17 in?

18 A No.

19 Q Once the body was removed and you fully
20 documented the evidence, did that pretty much conclude
21 your work at that particular location on that day?

22 A No, we actually had a line search to search
23 the -- the vacant lot to see if we could find any other
24 evidence. So we had other officers come out to assist
25 me with that and after we -- after we performed the

1 line search we don't -- there was like one other item
2 that might be a piece of evidence, I walked out to
3 photograph it and we collected it and then we -- we
4 measured in the area for the diagram.

5 Q In particular, was a stroller found at that
6 location? A child's stroller?

7 A Not to my knowledge, no.

8 Q Did you ever find any underwear belonging to
9 Cherish Perrywinkle in that location?

10 A No.

11 Q Did you ever find any items that were
12 recently purchased, household items or things of that
13 nature?

14 A No.

15 Q Did you ever find Cherish's pink or purple
16 flip-flops that she was wearing when she was last seen
17 in the Walmart?

18 A No.

19 MR. CALIEL: Your Honor, may I approach the
20 witness again?

21 THE COURT: You may.

22 BY MR. CALIEL:

23 Q I had previously discussed with you and just
24 showing you again, just to refresh your memory, State's
25 Exhibit TT in evidence. That's an overall map of the

1 city of Jacksonville, correct?

2 A That's correct.

3 Q And the locations, based upon your
4 investigation in this case and the relevant locations,
5 are they accurately indicated on that map?

6 A Yes.

7 MR. CALIEL: Your Honor, at this point in
8 time I would move into evidence State's Exhibit TT
9 as the next numbered exhibit. I believe it's
10 State's 46.

11 MS. SCHLAX: No objection, Your Honor.

12 THE COURT: Double T will be entered as
13 State's Exhibit 46.

14 (Whereupon the foregoing item was marked in
15 evidence as State's Exhibit 46.)

16 BY MR. CALIEL:

17 Q Now showing on the screen State 46. The
18 Walmart on Lem Turner Road is located in this general
19 after right off 295, correct?

20 A Yes.

21 Q Approximately how far was that from where the
22 victim's body was recovered?

23 A I'm going to say within ten miles, five to ten
24 miles.

25 Q Okay. The victim's body was recovered in

1 this location at the intersection of Rutgers and
2 Broward Road?

3 A Yes.

4 Q Further in the investigation, other items of
5 evidence were recovered at 2339 Broward Road. Is that
6 literally right down the street from Highlands Church?

7 A Yes, it is.

8 Q The Dollar General where the victim and her
9 mother originally met Donald Smith, is that depicted
10 accurately here on Edgewood Avenue, here in this area
11 (indicating)?

12 A Yes.

13 Q Approximately how far away is that from where
14 the Walmart is?

15 A I can't tell you exactly how far away it is.
16 It could be within ten to 20 miles maybe.

17 Q But consistent with a 15 to 20 minute car
18 ride?

19 A Yes.

20 Q And, again, the location where Donald Smith
21 was taken into custody at the intersection of I-95 and
22 I-10, is that accurately depicted on this map?

23 A Yes.

24 Q Then finally, upon arrest, Mr. Smith's
25 address is located, the defendant's home, was located

1 down here in this area, in Dupont Avenue and Segovia
2 Avenue. Is that accurately depicted upon that map?

3 A Yes.

4 Q Once you took the measurements, completed
5 your diagrams and placed all the items into the
6 property room, did that complete your work at the
7 particular scene on that day?

8 A Yes.

9 Q You had already indicated that the van itself
10 was taken back to the police impound lot, correct?

11 A Yes.

12 Q At a later time that was searched, however,
13 no evidence was recovered other than minor items in
14 that van, correct?

15 A Correct.

16 Q Thank you, ma'am.

17 MR. CALIEL: I don't have any further
18 questions at this time.

19 THE COURT: Any cross-examination?

20 MS. SCHLAX: No questions, Your Honor.

21 THE COURT: Okay. May this witness be
22 excused?

23 MS. SCHLAX: Yes, Your Honor.

24 THE COURT: Thank you. We appreciate your
25 time.

1 THE WITNESS: Thank you.

2 THE COURT: I think you indicated you have
3 two short witnesses?

4 MR. CALIEL: No, ma'am, I think those were
5 the last ones for today.

6 THE COURT: Those were the last ones for
7 today. Okay. I wasn't sure. Obviously I was
8 incorrect.

9 Okay, ladies and gentlemen, they're going to
10 stop for the day. I guess the next witnesses are
11 too long to keep going and you've had a long day. I
12 hope tomorrow we can get started with the regular
13 lunchtime. I think we will. And I will remind you
14 not to talk with anybody or get any information
15 about the case or listen to the news or the radio or
16 read the paper, et cetera, et cetera, et cetera.
17 You have to learn everything about the case in here
18 with all of us present.

19 You can leave your notes in your chair. We'll
20 collect them, lock them up and give them back to you
21 tomorrow.

22 And we look forward to seeing you at 9:00
23 o'clock tomorrow morning. Thank you.

24 (Jury absent.)

25 THE COURT: Any exceptions or objections to

1 today's proceeding?

2 MS. SCHLAX: No, Your Honor.

3 MR. CALIEL: Nothing from the State.

4 THE COURT: Anything else we need to do
5 before we recess?

6 MS. SCHLAX: No, Your Honor.

7 MR. CALIEL: Nothing from the State.

8 THE COURT: All right. We'll be in recess.

9 Thank you.

10 (Evening recess.)

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IN THE CIRCUIT COURT OF THE
FOURTH JUDICIAL CIRCUIT, IN
AND FOR DUVAL COUNTY, FLORIDA.

Case No: 2013-CF-5781-AXXX-MA

Division CR-D

STATE OF FLORIDA

-vs-

DONALD SMITH,

Defendant,

TESTIMONY AND PROCEEDINGS taken before the
Honorable Mallory D. Cooper, Judge of the Circuit Court,
on February 13, 2018, and as reported by Faye M. Gay,
Certified Realtime Reporter, Registered Merit Reporter,
and Certified Legal Video Specialist.

OFFICIAL REPORTERS, INC.
421 W. Church St., Suite 701
Jacksonville Florida 32202
904-358-2090

1 APPEARANCES:

2 MELISSA NELSON, Esquire,

3 State Attorney,

Appearing on behalf of the State of Florida.

4

5 MARK CALIEL and VANESSA WHEELER-SANCHEZ, Esquires,

6 Assistant State Attorneys,

Appearing on behalf of the State of Florida

7

8 JULIE SCHLAX and CHARLES FLETCHER, Esquires,

9 Appearing on behalf of the Defendant.

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1 (Jury absent.)

2 (Defendant present.)

3 THE COURT: Good morning, everyone.

4 MR. CALIEL: Good morning, Your Honor.

5 MR. FLETCHER: Good morning.

6 THE COURT: My understanding is we're still
7 waiting on one juror so we can't get started yet.
8 Is there anything we need to do before?

9 MR. CALIEL: Judge, just to give you the
10 heads-up, and I'll remind the Court and counsel
11 when that witness takes the witness stand, but if
12 you a recall from the suppression hearing, Officer
13 Gonzalez works in an undercover capacity and so at
14 that time prior to calling him, we make the
15 request to the Court that the video feeds and all
16 photography cease while he's testifying to
17 maintain the confidential nature of his work and
18 that way we don't sacrifice that.

19 THE COURT: Okay.

20 MS. SCHLAX: No objection, Your Honor.

21 THE COURT: Are we allowed to do that, to cut
22 all video feed when he testifies?

23 MR. CALIEL: Yes, Your Honor.

24 THE COURT: Okay.

25 MR. CALIEL: And when they do that I think

1 they can cut that through the cart and then make
2 sure that anybody with cameras within the
3 courtroom do not photograph him.

4 THE COURT: Okay. I don't know if you all
5 can hear him or not, but we do have one witness
6 that we ask you not to photograph in any way or
7 identify in any way and we'll let you know when
8 he's going to testify.

9 MEDIA PERSON: Thank you.

10 MR. CALIEL: Thank you, Your Honor.

11 THE COURT: And we're just waiting on one
12 juror to get started.

13 BAILIFF: We're good.

14 THE COURT: Okay. The jury is all here.
15 They'll let us know when they're ready to come
16 out.

17 I believe we can go ahead and swear in
18 Mr. Smith in case there's anything we need to ask
19 him during the trial.

20 If you would stand and raise your right hand.

21 (Defendant sworn.)

22 THE DEFENDANT: Yes, ma'am.

23 THE COURT: Thank you.

24 BAILIFF: All here, Judge, but in the
25 restroom.

1 THE COURT: Okay. Thank you.

2 BAILIFF: Ready, Judge?

3 THE COURT: Is everybody ready for the jury
4 to come out?

5 MR. CALIEL: Yes, Your Honor.

6 THE COURT: Defense?

7 MR. FLETCHER: Yes, Your Honor.

8 MS. SCHLAX: Yes, Your Honor.

9 THE COURT: Bring the jury in.

10 BAILIFF: The jury is entering the courtroom.

11 (Jury present.)

12 THE COURT: You may be seated.

13 Good morning, ladies and gentlemen. Thank you
14 for being here and we're ready this morning. I see
15 everybody is dressed warmly. It does get cold in
16 here. So good for you.

17 First of all, I have to ask you was everyone
18 able to follow my instructions that you're not
19 allowed to get any information about this case
20 outside of the courtroom? Did everybody do that?

21 (Affirmative response from jurors.)

22 THE COURT: Is there anyone who failed to
23 follow that instruction?

24 (No response from jurors.)

25 THE COURT: For the record we'll reflect that

1 no one indicated they failed to follow that
2 instruction.

3 We are ready to get started.

4 I'll ask the State to call the next witness.

5 MS. SANCHEZ-WHEELER: Yes, Your Honor. May
6 the State call Jerome Bruton.

7 THE COURT: Jerome Bruton.

8 (Witness present.)

9 THE COURT: Good morning, sir. Right in
10 front of me and Madam Clerk will swear you in.
11 Thank you.

12 (Witness sworn.)

13 THE WITNESS: I do.

14 THE COURT: Thank you, sir. Our witness
15 chair is over here.

16 MS. SANCHEZ-WHEELER: May it please the
17 Court.

18 THE COURT: Yes.

19 MS. SANCHEZ-WHEELER: Counsel.

20 JASON BRUTON,

21 was called as a witness on behalf of the State,
22 and after being duly sworn, then testified as follows:

23 DIRECT EXAMINATION

24 BY MS. SANCHEZ-WHEELER:

25 Q Good morning, Mr. Bruton. Would you

1 introduce yourself to the members of the jury and spell
2 your name for the record.

3 A Jerome Bruton, J-e-r-o-m-e B-r-u-t-o-n.

4 Q Mr. Bruton, are you from Jacksonville,
5 Florida?

6 A Yes.

7 Q Were you born and raised here?

8 A Yes.

9 Q Where do you currently live?

10 A Hilliard.

11 Q How long have you lived in Hilliard?

12 A Four years.

13 Q How are you employed?

14 A Through Dr. Pepper Snapple.

15 Q What kind of work do you do for Dr. Pepper
16 Snapple?

17 A Mechanic.

18 Q How long have you been a mechanic for
19 Dr. Pepper Snapple?

20 A 15 years.

21 Q Mr. Bruton, in February of 2012 did a
22 relative pass away?

23 A Yes.

24 Q Who was that?

25 A My uncle, Lewis Bruton.

1 Q And did your uncle have any children?

2 A No.

3 Q When he passed or after he passed away were
4 you tasked with the responsibility of caring for the
5 home and the property where he lived at the time he
6 passed?

7 A Yes.

8 Q And where was that home?

9 A The northside of Jacksonville off of Broward
10 Road.

11 Q Did you begin to manage that property in
12 2012?

13 A Yes.

14 Q And were you still taking care of the
15 property in 2013?

16 A Yes.

17 Q Was anyone living at the house?

18 A No.

19 Q Now, in April of 2013, did you check on the
20 property?

21 A Yes.

22 Q Did you notice anything unusual?

23 A No.

24 Q When was the next time you went to the home
25 after --

1 A In August of 2013.

2 Q Was the home equipped with an alarm system?

3 A Yes.

4 Q If someone had been inside that home between
5 April and August of 2013, would you have been notified?

6 A Yes.

7 Q Mr. Bruton, in preparation for your testimony
8 did you review photographs at the State Attorney's
9 Office?

10 A Yes.

11 Q Mr. Bruton, let me direct your attention to
12 the screen in front of you and I'm directing your
13 attention to State's Exhibit UU which would be --

14 COURT REPORTER: I'm sorry. I didn't hear
15 that.

16 MS. SANCHEZ-WHEELER: I would like to direct
17 the witness' attention to what has been previously
18 marked as State's Exhibit UU for identification,
19 and that would be later introduced into evidence.

20 BY. MS. SANCHEZ-WHEELER:

21 Q Mr. Bruton, what is this?

22 A That's my deceased uncle's house.

23 Q And is that a true and accurate depiction of
24 the house that's on Broward Road as you found it in
25 August of 2013?

1 A Yes.

2 Q When you went in August of 2013, what time
3 generally did you arrive?

4 A Morning.

5 Q And what was the purpose of your visit?

6 A To maintain the property, cut the grass.

7 Q Did you actually begin cutting the grass?

8 A Yes.

9 Q And as you were cutting the grass, did you
10 notice anything that caught your attention?

11 A Yes.

12 Q What was that?

13 A A stroller.

14 Q What color was the stroller?

15 A Blue.

16 Q Did it concern you that there was a blue
17 stroller on the property?

18 A Yes.

19 Q Where was the stroller located in relation to
20 the house?

21 A The westside of the home.

22 Q And, Mr. Bruton, I'd again like to direct
23 your attention to the screen, to what's previously been
24 marked for identification as State's Exhibit VV which
25 will later be introduced into evidence. What is this?

1 A That's the stroller.

2 Q And is that a true and accurate depiction of
3 the stroller that you found in August of 2013?

4 A Yes.

5 Q What did you do upon finding that blue
6 stroller?

7 A I had called my wife.

8 Q Why did you call your wife?

9 A To ask her if she remembered anything about a
10 stroller.

11 Q Did you remember that law enforcement
12 officers had been looking for a stroller in relation to
13 an investigation?

14 A She had reminded me and also asked me the
15 color of stroller.

16 Q So what did you do based on your conversation
17 with your wife?

18 A Called the Jacksonville Sheriff's Office.

19 Q And did a Jacksonville Sheriff's Officer
20 arrive on scene?

21 A Yes.

22 Q What did you do when that officer arrived on
23 scene?

24 A Pointed the stroller out to him.

25 Q Mr. Bruton, do you know Donald Smith?

1 A No.

2 Q Have you ever met him before?

3 A No.

4 Q Did anyone other than you have permission to
5 be on that property on Broward Road?

6 A No.

7 Q Are you familiar with the Highlands Baptist
8 Church?

9 A Yes.

10 Q How are you familiar with the church?

11 A My daughter and son attend the daycare there.

12 Q How far away is Highlands Baptist Church from
13 the property where you found the stroller?

14 A I'd say about two-tenths of a mile.

15 MS. SANCHEZ-WHEELER: Your Honor, may I have
16 a moment?

17 THE COURT: You may.

18 MS. SANCHEZ-WHEELER: No further questions.

19 THE COURT: All right. Any questions?

20 MR. FLETCHER: No questions, Your Honor.

21 THE COURT: All right. Thank you, sir. I
22 appreciate your time this morning.

23 THE WITNESS: Thank you.

24 THE COURT: You may call your next witness.

25 MR. CALIEL: Your Honor, the State would call

1 James Carter to the witness stand.

2 THE COURT: James Carter.

3 (Witness present.)

4 THE COURT: Good morning, sir. Madam Clerk
5 will swear you in.

6 (Witness sworn.)

7 THE WITNESS: So help me God.

8 THE COURT: Thank you. Have a seat over here
9 in the witness chair. Thank you.

10 MR. CALIEL: May it please the Court.

11 THE COURT: Yes, sir.

12 JAMES CARTER,

13 was called as a witness on behalf of the State, and after
14 being duly sworn, then testified as follows:

15 DIRECT EXAMINATION

16 BY MR. CALIEL:

17 Q Good morning, sir.

18 A Hello, sir.

19 Q Can you please introduce yourself to the
20 members of the jury.

21 A I'm James Carter.

22 Q Mr. Carter, how are you currently employed?

23 A I am retired.

24 Q And what occupation did you retire from?

25 A I was an officer for the Jacksonville

1 Sheriff's Office.

2 Q How long did you work for the Jacksonville
3 Sheriff's Office?

4 A A little over 23 years.

5 Q And your final assignment with the
6 Jacksonville Sheriff's Office, where were you assigned?
7 What division?

8 A I was a major crimes investigator for the
9 crime scene unit.

10 Q And directing your attention back to the
11 summer of 2013, was that the assignment that you had
12 held at that time?

13 A Yes, sir.

14 Q Specifically in August, August 10th of 2013,
15 were you dispatched to a residence at 2339 Broward Road
16 in regards to the recovery of a stroller related to the
17 death of Cherish Perrywinkle?

18 A Yes, sir, I did.

19 Q And when you arrived at that location, what
20 would have been the first thing that you would have
21 done?

22 A I met with the detective, I believe it was a
23 homicide detective, at the scene.

24 Q Did he direct you to possible evidence that
25 was located on that property?

1 A Yes, sir, he did.

2 MR. CALIEL: Your Honor, may I approach the
3 witness?

4 THE COURT: You may.

5 BY MR. CALIEL:

6 Q Sir, I'm now showing you a series of
7 photographs, first labelled for identification purposes
8 as UU, State's Exhibit UU in evidence, through State's
9 Triple A. If you could just review those photographs
10 for me briefly.

11 (Witness examining exhibits.)

12 A Yes, sir.

13 Q And prior to coming to court this morning,
14 have you had the opportunity to review State's Exhibits
15 Double U through Triple A?

16 A Yes, sir, I did.

17 Q And are these the photographs that you took
18 documenting recovery of the evidence on Broward Road on
19 August 10th of 2013?

20 A Yes, sir, they were.

21 Q And do they fairly and accurately depict the
22 house, the evidence and the recovery of that evidence?

23 A Yes, sir, they do.

24 MR. CALIEL: Your Honor, at this point in
25 time the State would move into evidence State's

1 Exhibit UU through Triple A as the next numbered
2 exhibits.

3 MS. SCHLAX: No objection, Your Honor.

4 THE COURT: We're on 47, right?

5 MR. CALIEL: Your Honor W the Court's
6 permission, may I publish them electronically to
7 the jury?

8 THE COURT: You may. Let me get them noted
9 for the record, though. UU is admitted as State's
10 Exhibit 47. VV 48, and WW 49, XX 50, YY 51, DD 52
11 and Triple A 53 in evidence.

12 (Whereupon the foregoing items were marked in
13 evidence as State's Exhibit 47 thru 53,
14 respectively.)

15 THE COURT: You may publish.

16 MR. CALIEL: Thank you, Your Honor.

17 BY MR. CALIEL:

18 Q Sir, I'm now showing what's been previously
19 marked for identification and then moved into evidence
20 as State's Exhibit 47. Could you please describe
21 what's depicted in that photograph.

22 A Just a photo of part of the front of the house
23 which included the driveway where I had parked my van.

24 Q And like you indicated, this is your crime
25 scene unit van that was parked in the driveway and

1 photographed?

2 A Yes, sir.

3 Q Were you directed to the location by
4 detectives as to where the evidence was located?

5 A Yes, sir.

6 Q Now, moving on to State's Exhibit 48 in
7 evidence. Please describe what's depicted in this
8 photograph.

9 A This is the westside of the home and showed
10 the stroller along with some trash cans.

11 Q And if we look at the top right corner, and
12 I'll circle here (indicating), on the photograph, is
13 that your evidence technician crime scene van?

14 A Yes, sir.

15 Q Okay. So in relation, going back to State's
16 Exhibit 47, this location where stroller was found was
17 around the corner from the house just adjacent to where
18 the driveway was in the house?

19 A That's correct, sir.

20 Q And this house, does it face directly to
21 Broward Road?

22 A Yes, it does.

23 Q Now showing you what's been previously marked
24 and moved into evidence as State's Exhibit 49. Is this
25 just a closer view of the stroller that was located?

1 A Yes.

2 Q And did this match the description of the
3 stroller that police had been looking for since June of
4 2013?

5 A I'm not familiar with that.

6 Q You're not familiar with that information.

7 Moving on to State's Exhibit 50. What's
8 depicted in this photograph?

9 A There were items from the store.

10 Q And these were items both that were purchased
11 as well as some children's items such as umbrellas and
12 things of that nature?

13 A Correct, sir.

14 Q So you had to actually lift the lid to see
15 the items contained within that trash can, correct?

16 A Yes, sir.

17 Q Moving on to State's 51, were these the two
18 umbrellas that were located inside the trash can that
19 we were just looking at in the previous photograph?

20 A Yes, sir, they are.

21 Q And did you collect those for evidentiary
22 purposes?

23 A Yes, sir, I did.

24 Q Moving on to State's Exhibit 52, is this the
25 bottom of that same trash can once you had removed the

1 items that were on top of the bottom of the can?

2 A Correct, sir.

3 Q Depicted here in the center (indicating) of
4 that photograph in State's 52, is that a pair of purple
5 or pink flip-flops that were in the bottom of the trash
6 can?

7 A Yes, sir.

8 Q And did you collect those in evidence as
9 well?

10 A Yes, sir, I did.

11 Q So moving now into State's Exhibit 53, are
12 these all the household items in evidence that you
13 collected and then boxed up from that scene in August
14 of 2013?

15 A Yes, sir, it is.

16 Q Okay. So in addition to the flip-flops and
17 the umbrella you mentioned the purchases from the
18 Dollar Store that were contained within the trash can.

19 A Correct, sir.

20 Q Thank you, sir.

21 Once you collected that evidence, did you
22 submit them into the property room as protocol for the
23 Jacksonville Sheriff's Office?

24 A Yes, sir, I did.

25 Q Thank you, sir.

1 MR. CALIEL: I don't have any further
2 questions.

3 THE WITNESS: Thank you.

4 MS. SCHLAX: No questions, Your Honor.

5 THE COURT: All right. Thank you.

6 Thank you, sir. We appreciate your time.

7 THE WITNESS: Thank you.

8 THE COURT: You may call your next witness.

9 MR. CALIEL: Your Honor, the State calls
10 Dr. Rao to the stand.

11 THE COURT: Dr. Rao.

12 MR. CALIEL: May we approach?

13 THE COURT: You may.

14 (Counsel for the State and defense approached
15 the bench for a side-bar conference out of the
16 hearing of the jury and court reporter.)

17 (Witness present.)

18 THE COURT: Good morning, Dr. Rao. Madam
19 Clerk will swear you in.

20 (Witness sworn.)

21 THE WITNESS: I do.

22 THE COURT: If you would have a seat over
23 here, please.

24 MS. NELSON: We're ready to proceed.

25 THE COURT: All right. Ladies and gentlemen

1 of the jury, I have a stipulation to read to you
2 that's been filed in this case, the case of the
3 State of Florida versus Donald James Smith.

4 The State and the defense hereby stipulate
5 that the following facts are true and you, the
6 jury, should accept said facts proven beyond a
7 reasonable doubt. The deceased person examined by
8 Dr. Valerie Rao, in Medical Examiner No. 13 dash
9 1034, was identified as Cherish Perrywinkle. And
10 this is signed by the defendant, the defense and
11 the State.

12 MS. NELSON: May I inquire?

13 THE COURT: You may.

14 MS. NELSON: Thank you.

15 DR. VALERIE RAO,
16 was called as a witness on behalf of the State,
17 and after being duly sworn, then testified as follows:

18 DIRECT EXAMINATION

19 BY MS. NELSON:

20 Q Good morning.

21 A Good morning.

22 Q Dr. Rao, please introduce yourself to the
23 jury, spell your name for the record.

24 A Yes, my name is Dr. Valerie Rao. My last name
25 is spelled R-a-o. I am the Chief Medical Examiner for

1 District 4 and part of District 3.

2 Q As a Chief Medical Examiner, what kind of
3 doctor are you?

4 A I am a forensic pathologist.

5 Q Will you tell the jury where you went to
6 college?

7 A Yes. So I got my degree in medicine in 1971,
8 after which I went to London. I got my degree in
9 India. The name of the medical school, St. Johns
10 Medical School in Bungalow, South India.

11 After returning to London I spent a year and a
12 half doing pathology at two hospitals, one St. Heliers
13 Hospital in south London, the other St. Andrews
14 Hospital in the east end of London.

15 After returning to the US I spent five years
16 doing residency training, two years doing clinical
17 pathology at Berkshire Medical Center, Pittsfield,
18 Massachusetts, two years doing anatomic pathology in
19 Albany Medical Center, Albany, New York, one year doing
20 forensic pathology in Baltimore for the State of
21 Maryland.

22 I'm board certified in clinical, anatomic and
23 forensic pathology.

24 I was a Medical Examiner in Tucson, Arizona
25 for a year, after which I went to Miami-Dade County

1 where I was an Associate Medical Examiner for a total
2 of 19 years.

3 I then took a chief position in the central
4 part of the state, District 5. I was there as Chief
5 Medical Examiner for three years.

6 I then took a teaching position at the
7 University of Missouri in Columbia, after which I came
8 to Jacksonville. I've been in Jacksonville for about
9 13 years.

10 Q So for a total of how many years have you
11 been a pathologist?

12 A 37 years.

13 Q Will you explain to the jury what pathology
14 is? You mentioned clinical, anatomical and forensic.
15 Will you go ahead and explain those to the jury,
16 please?

17 A Yes, so pathology is the study of disease in
18 the human body. So in order to become a Medical
19 Examiner you first have to be a general pathologist.
20 So there are two branches of general pathology. One is
21 anatomic pathology. For example, you went to a
22 hospital and you had your gall bladder removed or a
23 tumor removed, that specimen is sent to the anatomic
24 pathologist who would make the diagnosis of what it is.
25 So that is a period of two years.

1 The clinical pathology part is laboratory
2 tests. If you went to the hospital and you had a
3 battery of tests done, the clinical pathologist would
4 look at those tests. So that is a total of four years.

5 Then the subspecialty is forensic pathology
6 that I chose to pursue where one deals with sudden,
7 unexpected, unnatural death. So trauma, drug
8 overdoses, automobile accidents, stabbings, shootings,
9 bruises, lacerations, all these come under the purview
10 of the forensic pathologist.

11 Q In your experience, can you estimate the
12 number of autopsies that you have conducted?

13 A Thousands of cases.

14 Q What are your duties as the Chief Medical
15 Examiner here in Duval County?

16 A In the State of Florida the Medical Examiner
17 is required to sign a death certificate on cases of
18 sudden, unexpected, unnatural death. So the cause of
19 death and the manner of death are the duties of the
20 Medical Examiner in the State of Florida.

21 Q For how long have you been the Chief Medical
22 Examiner here?

23 A Since 2010.

24 Q As a result of conducting autopsies, do you
25 actually offer an opinion as to cause and manner of

1 death?

2 A Yes.

3 Q And do you take care during an autopsy to
4 document injuries or pathologies that you see and
5 observe?

6 A Yes.

7 Q How do you do that?

8 A So we have three ways of documentation. Just
9 in case one slips the mind in one area of documentation
10 you have the Triple way of documenting. One is with
11 photography. Extensive photography. The second is
12 with body diagrams. So these are very, you know, very
13 simple body diagrams that at the time of the autopsy we
14 take notes, we do the drawings so that when we are
15 dictating the case, which is the final way of
16 documentation, we will not forgot anything. So soon
17 after the autopsy is done, the autopsy is dictated and
18 typed and so that's the third way of documentation.

19 Q Thank you.

20 Have you testified in court as an expert
21 witness regarding your opinion on the cause of death?

22 A Yes.

23 Q How many times?

24 A Hundreds of times.

25 Q Have you ever been tendered as an expert

1 witness and rejected by any court of law?

2 A No.

3 MS. NELSON: At this time, Your Honor, I
4 would tender Dr. Rao as a witness in forensic
5 pathology.

6 MR. FLETCHER: We have no questions, Your
7 Honor.

8 MS. NELSON: As an expert witness. I'm
9 sorry.

10 THE COURT: All right. She'll testify as
11 such.

12 BY MS. NELSON:

13 Q Dr. Rao, are you familiar with the matter of
14 the State of Florida versus Donald Smith?

15 A Yes.

16 Q Did you conduct the autopsy of Cherish
17 Perrywinkle?

18 A Yes.

19 Q Did you take care to memorialize your autopsy
20 of Cherish Perrywinkle as you have just described to
21 the jury?

22 A Yes.

23 Q Have you also reviewed your work in
24 preparation for your testimony today?

25 A I have.

1 Q In addition to having reviewed your work, do
2 you also have a personal and independent recollection
3 of this particular case?

4 A Yes.

5 Q Before Cherish Perrywinkle's body was
6 transported to your office, did you, in fact, attend
7 the scene where her body was discovered here in
8 Jacksonville?

9 A I did.

10 Q Why?

11 A Because of the nature of the case. It was a
12 child that was abducted. It was something that the
13 entire City of Jacksonville was concerned about, being
14 that it was a child.

15 Q Did you direct at the scene where Cherish's
16 body was discovered, did you actually direct
17 photography to be taken of the body before it was
18 removed?

19 A Yes.

20 Q Before we get to the photographs let me ask
21 you, in preparation for your testimony today, did you
22 take care to reduce the extensive photography in this
23 case to those photographs which will assist you in
24 describing injuries sustained by Cherish Perrywinkle?

25 A Yes.

1 Q Dr. Rao, will you go ahead and explain to the
2 jury the steps you take in conducting an autopsy?

3 A Yes. So when the body comes to the Medical
4 Examiner's Office it comes under a particular number
5 that is unique to the deceased person and nobody else
6 gets that particular case number. After which a -- the
7 photographs are taken as-is, the way the body came
8 without any disturbance. Clothing is not removed,
9 nothing is touched. Photographs document the way the
10 body came into the Medical Examiner's Office. After
11 which the clothing is removed and in this particular
12 case the sex battery kit was done the day prior to the
13 autopsy so that the evidence would not be lost.

14 The following day the autopsy was performed
15 and, again, after the clothes are removed the body is
16 photographed again. After that the body is washed and
17 the injuries are photographed in detail, both in the
18 front of the body and the back of the body.

19 Then in this particular case there were
20 additional dissections that were performed and that was
21 also photographed.

22 During the process of the sex battery
23 examination a lot of evidence was collected.

24 Then a Y-shape incision was made from beneath
25 the collarbone right here (indicating). The incision

1 is extended to the middle and then the incision is
2 carried on to the pubic area.

3 The organs are looked at before removal. Each
4 of the organs is removed and the organs are sectioned,
5 serrated to look for the presence of anything that
6 could cause the death of an individual.

7 Pieces of tissue are taken from the organs.
8 For example, the heart, the liver, the lungs, looking
9 for microscopic evidence of maybe that there is a
10 disease process that escapes the naked eye.

11 So after that, prior to the start of the
12 autopsy, fluid is taken from the eye. It's called
13 ocular fluid. Blood is taken from the heart, urine is
14 taken from the urinary bladder, bile is taken from the
15 gall bladder. And these fluids are sent to the
16 laboratory to look for the presence of drugs and
17 alcohol that could account for the person's death.

18 And then an incision is made from one ear to
19 the other, the scalp is reflected forward and back, the
20 skull is removed, the brain is still intact in the
21 cranial cavity. Then it is removed, it's weighed, it's
22 sectioned, again looking for disease that could account
23 for the death of the individual. And after that an
24 autopsy report is developed.

25 Q You mentioned that in this particular case

1 you conducted the autopsy the day after Cherish's body
2 was transported to your office, is that correct?

3 A Yes.

4 Q On what day was that?

5 A So the date of the autopsy was the 23rd and
6 the sex battery kit was done the 22nd of June, 2013.

7 Q Did you determine the weight of Cherish
8 Perrywinkle?

9 A Yes.

10 Q What was that?

11 A She was 67 pounds.

12 MS. NELSON: May I approach the witness?

13 THE COURT: You may:

14 BY MS. NELSON:

15 Q Dr. Rao, let me show you a set of photographs
16 that have been marked in alpha order Triple B through
17 Triple -- through Quadruple V as in Victor. Have you
18 reviewed these photographs prior to your testimony
19 today?

20 (Witness examining exhibits.)

21 Q Did you review these photographs prior to
22 your testimony today?

23 A Yes.

24 Q And, in fact, are each of these photographs
25 photographs that were taken at your direction?

1 A Yes.

2 MS. NELSON: At this time I would tender into
3 evidence what has been premarked for
4 identification from State's Triple B to State's
5 Quadruple V.

6 MR. FLETCHER: Judge, we'd ask that the Court
7 take note of our prior objections.

8 THE COURT: That will be noted for the
9 record.

10 MR. FLETCHER: Thank you, Judge.

11 THE COURT: Triple B will be entered as
12 State's Exhibit 54, Triple C 55, Triple D 56,
13 Triple E 57, Triple F 58, Triple G 59, Triple H
14 60, Triple I 61, Triple J 62, Triple K 63, Triple
15 L 64, Triple M 65, Triple N 66, Triple O 67,
16 Triple P 68, Triple Q 69 and Triple R 70, Triple S
17 71, Triple T 72, Triple U 73, Triple V 74, Triple
18 W 75, Triple X 76.

19 Is there a Triple Y or we're not there on
20 that one yet? Okay. Triple Y is 77, Triple Z is
21 78.

22 MR. CALIEL: Your Honor, I apologize.
23 Triple Y is a demonstrative exhibit.

24 THE COURT: Oh, okay. So that -- I need to
25 go back then and not mark Triple Y. And Triple Z

1 will be No. 77 in evidence, correct?

2 MR. CALIEL: Correct.

3 THE COURT: And Quadruple A is 78 and
4 Quadruple B is 79, all in evidence.

5 (Whereupon the foregoing items were marked in
6 evidence as State's Exhibits 54 thru 79,
7 respectively.)

8 BY MS. NELSON:

9 Q Okay. Doctor, let me direct your attention
10 to your screen, please. Do you always take a
11 photograph of the face of the body that you are working
12 on reflecting the Medical Examiner number assigned to
13 the body?

14 A Yes.

15 Q Let me direct your attention to what's been
16 introduced into evidence as State's 54. Does this
17 photograph, in fact, reflect the Medical Examiner case
18 number assigned to Cherish Perrywinkle?

19 A Yes. So 13 dash 1034 means that in the year
20 2013 she was the 1,034th case that came to the Medical
21 Examiner's Office.

22 Q Dr. Rao, you mentioned that the body was
23 washed after it arrived to your office. Was her hair
24 also cut?

25 A Yes.

1 Q And for what reason?

2 A So during the autopsy when the scalp was
3 reflected there was an area of hemorrhage in her scalp
4 that couldn't be seen because the hair masked the
5 injuries on the scalp. So I shaved her entire head so
6 that if there was a pattern on her scalp we would be
7 able to see that and photograph it.

8 Q Okay. Next I'm going to, as we go through
9 your photographs, I'm going to first highlight for the
10 jury what to expect.

11 This next series of photographs, Dr. Rao, are
12 as to injures, superficial injuries to Cherish
13 Perrywinkle's body. Let me direct your attention to
14 what's been introduced into evidence as State's 55.
15 Will you please explain to the jury what is reflected
16 in this photograph?

17 A Okay. So what you are looking at are two --
18 two areas of injury. There's one right here
19 (indicating) and there's another one right there
20 (indicating). So the contrast between the two, what
21 you are looking at in this area (indicating) is
22 postmortem ant activity. The ants bite the body, you
23 know, anything that stays there, and she was in this
24 wooded area so there were a lot of ants there. So
25 after death that's why you have that very different

1 color that's yellow, dried and parchment like whereas
2 this area (indicating) -- you can't really see her
3 nipple because it's -- she's very light-skinned and it
4 kind of blends with the rest of her chest cavity --
5 chest area. But you can definitely see this is -- this
6 is where her nipple is (indicating) and she has
7 bruising right there (indicating). That was caused
8 prior to death while she was alive.

9 Q And do you have an opinion as to that injury?

10 A Yes.

11 Q Let me show you what's been introduced and
12 marked as State's Exhibit 56. Is this, in fact, a
13 close-up of the right nipple of Cherish Perrywinkle?

14 A Yes. So just to tell you this is -- this is
15 her nipple and areola, the brown area surrounding the
16 nipple is (indicating). And around that you can see
17 the bruising (indicating), the pink-blue discoloration.

18 Q Dr. Rao, what is your opinion as to that
19 injury?

20 A That is consistent with somebody sucking on
21 her breast.

22 Q Let me direct your attention to what's been
23 marked as -- introduced into evidence as State's
24 Exhibit 57. Will you orient the jury to this
25 photograph, please, and explain the injuries reflected in

1 it?

2 A Yes, so this is her left leg. This is the
3 knee area right here (indicating) so you can orient
4 where, which part of the body. You have bruising right
5 here (indicating), you have bruising right here
6 (indicating), right here (indicating), and you have a
7 scratch here, a small bruise there (indicating).

8 Q What were you able to determine as to when in
9 relation to death Cherish sustained these injuries?

10 A All her injuries that she sustained are prior
11 to her death, consistent with that time frame.

12 Q Let me direct your attention to photograph
13 58. Will you please explain what's reflected in this
14 photograph?

15 A So she has an injury right here (indicating),
16 she has an injury right there (indicating), smaller
17 bruises right there (indicating).

18 Q State's 59, will you explain to the jury what
19 this photograph is of?

20 A So you're looking at the back of her left leg
21 and she has a bruise right there (indicating). This is
22 the back of her knee. So to orient you, the back of
23 her knee and this is where her buttock area is right
24 there (indicating). She had a bruise on the back of
25 her left thigh (indicating).

1 Q State's 60. Will you please explain to the
2 jury what this photograph reflects?

3 A Yes. This is her right leg. To orient you
4 this is her knee, her right knee, she has a scratch
5 right there (indicating), she has a scratch right
6 (indicating).

7 Q Dr. Rao, you mentioned that you attended the
8 scene where Cherish's body was discovered and you saw
9 at the scene branches and trampled-down reeds and
10 various debris around her body, is that right?

11 A Yes.

12 Q And these scratches were consistent with
13 what, in your opinion?

14 A So it's consistent with when she was carried
15 to the area where she was thrown. The long grass would
16 scratch her leg and cause those injuries.

17 Q Let me show you State's 61. Will you please
18 describe to the jury what's depicted in State's 61?

19 A So this is the flank of her right thigh. She
20 has a bruise right there (indicating).

21 Q State's 62.

22 A This is the back of her right arm. She has a
23 bruise right there (indicating) and she has small
24 abrasions right there (indicating).

25 Q Okay. Dr. Rao, do you have an opinion as to

1 the cause and manner of death of -- of the death of
2 Cherish Perrywinkle?

3 A Sorry. I didn't get that.

4 Q Do you have an opinion as to how Cherish
5 Perrywinkle died?

6 A Yes.

7 Q And what is it?

8 A Mechanical asphyxia.

9 Q Will you explain what that is to the jury?

10 A So what she sustained was tremendous force on
11 her neck such that she basically -- she could not
12 breathe. She suffered swelling of her brain as a
13 result of lack of oxygen to the brain and as a result
14 of which she died.

15 Q Before we review the photographs taken of
16 Cherish Perrywinkle's neck, will you talk to the jury
17 -- I want you to talk to the jury about strangulation.
18 Do you have experience in strangulation cases?

19 A Yes, many, many times, yes.

20 Q And, in fact, based on your experience, will
21 you explain to the jury how long at a minimum it takes
22 before a person dies from strangulation?

23 A Okay. So you have different types of
24 strangulations. You have manual whereas somebody uses
25 their hands to cause the lack of oxygen to the brain.

1 You have a ligature which means that you have something
2 that you use to tie the neck of that person, again to
3 result in lack of oxygen to the brain. So these are
4 the types of strangulation that one gets.

5 So the time frame, we have to understand it is
6 not like something that is without movement between two
7 people. So if there is no movement between two people
8 and somebody is, for example, unconscious from drugs,
9 alcohol or elderly, there would not be that much
10 movement because to some extent you are incapacitated.
11 But here we have two people who -- who are in a
12 struggle. The child is not incapacitated and she is
13 going to struggle during this entire process.

14 So I cannot tell you exactly how much time it
15 would have taken to cause the lack of blood supply to
16 her brain and her death. She struggled because we have
17 evidence of that struggle.

18 So if there is no struggle and it's all, you
19 know, very -- we cannot do experiments on that. So
20 usually a period of three to five minutes of lack of
21 oxygen to the brain that person will die.

22 Q Okay. Next let's review the photographs of
23 Cherish Perrywinkle's neck.

24 Let me direct your attention to State's 63.
25 Will you please orient the jury to this photograph and

1 explain what it depicts.

2 A Okay. So to orient, this is the front of her
3 neck. You have her ears, left ear, right ear right
4 there (indicating), and this is the front of her neck.
5 So what are you seeing on her neck is this broad area
6 of bruising (indicating). And above and -- above the
7 area of bruising you have fine little pinpoint areas of
8 hemorrhage that are referred to as petechiae. So you
9 have it here, you can see the petechiae hemorrhage
10 right here and you can see the petechia hemorrhage
11 right here (indicating).

12 Q Dr. Rao, how is petechiae hemorrhage caused?

13 A So petechia hemorrhage, they look like little
14 spots and the reason you get that is when you occlude
15 the jugular vein by pressure on the neck, your blood
16 continues to flow through the carotid artery, the
17 vertebral artery. These are just blood vessels so I'm
18 just giving you the names but, you know, that's just
19 terminology. These are major vessels that supply
20 oxygen to the brain, but then the blood has to come
21 back to the heart and so they come back through the
22 vein, the jugular vein. So if you close off the
23 jugular vein the blood cannot go into the heart, as a
24 result of which all the vessels become so full and the
25 little blood vessels burst because they are overfilled.

1 And that process of bursting gives these little areas
2 of hemorrhage referred to as petechiae. So normally
3 you get them above the area where the neck is occluded.
4 Also on the face. If the child is light-skinned, like
5 in this case, then you can see it very well.

6 Q Dr. Rao, what opinion do you have of this
7 mark that I've circled on State's 63 (indicating)?

8 A So those are areas where there are abrasions
9 which means that the force applied and the friction
10 causes the skin actually to come off. So when the skin
11 comes off those are referred to as abrasions. Where
12 the skin is intact and there is injury underneath the
13 skin, those are all bruises or contusions. So she has
14 these bruises or contusions, you can see the blue areas
15 right here (indicating), but then she's got these
16 abrasions where the skin is actually rubbed off.

17 Q Let me direct your attention to -- I'll come
18 back to that. Direct your attention to State's 65.
19 You talked about petechial hemorrhaging. Is it
20 demonstrated more clearly in this photograph?

21 A Yes. So there are a few things you can see
22 right here. Here the skin, again, is abraded, right
23 there (indicating), right here (indicating). And it is
24 in a -- a linear pattern which means that in this case
25 there is a ligature used to strangle the child. So

1 that force that is exerted by the overlying ligature
2 that's used to strangle the kid actually caused the
3 skin to be abraded.

4 Q Let me direct your attention to State's 65.
5 Is this a photograph of the opposite side of Cherish's
6 neck as was reflected in the prior photograph?

7 A Yes.

8 Q And what do you see in this photograph?

9 A So here again you can see the bruising right
10 there (indicating), you can see bruising right here
11 (indicating), and it's in a linear pattern. You can
12 see the petechiae right -- right here (indicating) and
13 even in the area of the ligature occupation.

14 Q Dr. Rao, can you tell the jury anything about
15 the ligature used to strangle Cherish Perrywinkle?

16 A I was not able to actually see -- sometimes
17 you can see the weave of the fabric. I couldn't tell
18 you that, but I could tell you it was a little broad.
19 It could be a T-shirt that she was wearing or that was
20 used, a part from her clothing to -- to tie it so --
21 with so much force to give you that ligature mark.

22 Q Let me direct your attention to State's 67.
23 Does this reflect the right back side of Cherish
24 Perrywinkle's neck?

25 A Yes. Again, you can see the ligature mark

1 right there (indicating) and you can see the contusion,
2 abrasion, and abrasion right here (indicating).

3 Q State's 68. Is this the left side of the
4 back of her neck?

5 A Yes. Again, you can see the linear pattern
6 (indicating).

7 Q Let me go back now to State's 64. Will you
8 orient the jury to this photograph and explain what is
9 reflected here?

10 A Okay. So you're looking at her mouth and her
11 nose and her chin. So you see that all the injuries
12 are in like kind of a linear pattern, which to me
13 indicates that the pressure that was put like that
14 (indicating), so it caused all the injury on that area
15 of the face. So demonstrating this right here
16 (indicating), the bruising on the chin, the abrasion on
17 her lip, the abrasion right here (indicating). And
18 this is the nose, of the inside down, between the
19 nostrils. All -- if you look at it, it's like in one
20 pattern (indicating). So the -- the effect of
21 smothering or keeping her quiet would be force enough
22 to cause those injuries.

23 Q Now, these photographs are obviously taken
24 after Cherish Perrywinkle's body was cleaned and
25 yesterday the jury saw photographs of her body as it

1 was collected at the scene. Did you actually see that
2 her nostrils were bleeding from these injuries?

3 A Yes.

4 Q Let me direct your attention to State's 69.
5 Is this a close-up of the nostrils and of her lip of
6 Cherish Perrywinkle?

7 A Yes.

8 Q Does this photograph reflect those injuries
9 that you just told the jury about?

10 A Yes.

11 Q State's 70 also a close-up photograph of the
12 left nostril of Cherish Perrywinkle, is that right?

13 A Yes. And there's another feature that you can
14 see because if you look down here (indicating), this is
15 the gum margin between her teeth and her -- her gum so
16 that same pressure caused bleeding into the lining of
17 her gum.

18 Q Let me show you State's 71. I think there we
19 can see that bleeding.

20 A Yes, you can see the hemorrhage or bleeding
21 between the teeth and the gum margin (indicating).

22 Q Do you have an opinion as to causation for
23 the bleeding in the gum line?

24 A That, again, is the pressure that was applied
25 to the front of her face.

1 Q Now, you testified as to petechia in her face
2 on the skin. Did you also see petechia in both of her
3 eyes?

4 A Yes.

5 Q Will you explain to the jury how petechia in
6 the eye is caused?

7 A Okay. So it's the same concept. When the
8 blood vessels bringing blood back from the brain are so
9 overfilled they have no place to go because the -- the
10 original path is blocked as a result of which the
11 vessels rupture. And so in the eyes, which are -- the
12 vessels are very delicate, they burst. And the
13 experience is that if the struggle is intense the area
14 of hemorrhage is large and the -- if the struggle is
15 not that intense, they're very fine. For example, in
16 the elderly or somebody that is compromised either due
17 to drugs or alcohol.

18 Q Now, you mentioned hemorrhaging. So in
19 addition to the petechiae that you observed and
20 notated, did Cherish Perrywinkle also have hemorrhaging
21 in both of her eyes?

22 A Yes.

23 Q And how would you describe that hemorrhaging?

24 A Large, there are large areas and the
25 photographs will explain how -- how tremendous they

1 are.

2 Q So we'll now go through the photographs of
3 her eyes. Let me show you what's been marked as
4 State's Exhibit 72. Is this a photograph of Cherish
5 Perrywinkle's right eye?

6 A Yes.

7 Q And will you testify as to the injures
8 reflected in the photograph?

9 A Okay. So these are the small petechiae that
10 you see right here. When you flip the lid, you're
11 looking into the lid, referred to as the conjunctiva.

12 Q Dr. Rao, what is reflected here on her upper
13 eyelid?

14 A Okay. So on the upper eyelid she has an
15 abrasion, again where the skin is rubbed off. So a
16 pressure on that area.

17 Q Let me show you State's 73, also of her right
18 eye. Will you explain to the jury what's reflected
19 here?

20 A Okay. Here you can see the extent of the
21 hemorrhage. It's not the fine petechiae, but is
22 actually bleeding into the conjunctiva that you can see
23 in all these areas right here (indicating).

24 Q State's 74, is this a photograph of the left
25 eye of Cherish Perrywinkle?

1 A Yes.

2 Q And will you indicate to the jury the injury
3 reflected here?

4 A You have a large area of hemorrhage right
5 there (indicating).

6 Q State's 75, is that the top of that same eye?

7 A Yes. So once the fluid in the eye is removed
8 you can demonstrate, photograph the injuries better.
9 So that's what you're looking at. You're looking at
10 the -- the groove between the upper eyelid and the
11 lower eyelid and the globe of the eye. And so that's
12 what you're looking at right there.

13 Q And, lastly, State's 76, also of her left
14 eye. Will you explain to the jury what's reflected in
15 State's 76?

16 A Yes. So, again, the fluid is removed and you
17 can see the extent of hemorrhage into the conjunctiva.

18 Q You mentioned that you took a sexual battery
19 kit of Cherish Perrywinkle the day before you conducted
20 the autopsy, is that correct?

21 A Yes.

22 Q Will you explain to the jury the process you
23 undertake in collecting a rape kit?

24 A Yes. So when the body comes in, nothing is
25 done to the body. Fingernail -- fingernails are

1 examined to see if there are any broken fingernails,
2 because when you struggle on occasion that happens. So
3 the fingernails are cut and submitted separate, right
4 hand, left hand fingernails. And after that the body
5 is placed in a position where I can do a gynecological
6 examination.

7 Of course, this is a child so that was not the
8 test that we would do on an adult, for example. So
9 photographs are taken. The legs are spread. The anal
10 examination is done first. And the reason for that is
11 if the vaginal examination is done first, because of
12 the situation of how close the anus and the vagina are,
13 maybe the evidence from the vaginal, if it's done
14 first, will trickle down into the anus and that's the
15 reason the anus is done first.

16 So the anus is examined. Swabs are collected.
17 This child does not have any pubic hair because she was
18 really a small girl. So that part of it is not done.
19 Swabs are taken from the anus, swabs are taken from the
20 vagina, swabs are taken from the cervix. This girl is
21 a baby so you cannot see her cervix.

22 So many swabs are taken of the vaginal area
23 and fluid is -- we squirt fluid into the vaginal canal
24 and that is also submitted as evidence.

25 If there is anything extraneous, meaning

1 fibers, hair, that is also collected as it was in this
2 child.

3 And, of course, photographs are extensive
4 documenting the process of the injury and then that is
5 submitted along with blood, DNA card, which we have to
6 take DNA cards of a homicide, and I submitted it as
7 evidence with the same kit.

8 Q Once you take the swabs, do you take care to
9 mark them and then refrigerate them?

10 A Yes.

11 MS. NELSON: May I approach?

12 THE COURT: You may.

13 BY MS. NELSON:

14 Q Let me show you what's been premarked for
15 identification as State's Quadruple E, ask you if you
16 recognize this exhibit.

17 A Yes. So these are the swabs that are
18 submitted throughout the office. We have all the kits
19 that are sent to us and evaluated by staff. The labels
20 are prepared at the office. My signature and
21 description of what they are is written in my
22 handwriting. So these are the rectal swabs.

23 Q Let me show you what's been premarked for
24 State's identification as State's Quadruple C. What do
25 you recognize these to be?

1 A So these are, again, same type of containers.
2 My writing as to indicate what they are and our label
3 characterizing that as Cherish Perrywinkle.

4 Q And these are the vaginal swabs?

5 A Vaginal swabs, correct?

6 Q Dr. Rao, did you actually with the naked eye
7 observe fluid in her vaginal vault before you conducted
8 the swabbing?

9 A Yes.

10 Q Let me show you what's been premarked as
11 State's Quadruple D as in dog. Do you recognize those
12 swabs?

13 A Yes.

14 Q And what are they?

15 A So I took swabs from the top of her pubic area
16 instead of -- there's no hair, you can't comb it, so I
17 just swabbed the area just looking for evidence.

18 Q Now, at the Medical Examiner's Office you all
19 do not conduct laboratory testing on these swabs?

20 A No.

21 Q Let me show you what's been premarked for
22 identification as State's Quadruple F as in Frank. Are
23 those the oral swabs that you took from inside of
24 Cherish Perrywinkle's mouth?

25 A Yes.

1 Q You'll note, Dr. Rao, that Cherish is
2 actually spelled incorrectly on these exhibits. Will
3 you explain to the jury why that is?

4 A Yes. So the first day we got information from
5 the step-father and he spelled her name like that. The
6 following day the mother gave the correct spelling. As
7 a result of which we have a discrepancy in her first
8 name.

9 MS. NELSON: At this time, Your Honor, I
10 would tender State's Quadruple E into evidence,
11 State's Quadruple F, State's Quadruple D and
12 State's Quadruple C as the next numbered exhibits.

13 MR. FLETCHER: No legal objection, Judge.

14 THE COURT: All right. Quadruple C will be
15 entered as State's Exhibit 80, Quadruple D 81,
16 Quadruple E 82 and Quadruple F 83 in evidence.

17 (Whereupon the foregoing items were marked in
18 evidence as State's Exhibits 80 thru 83,
19 respectively.)

20 BY MS. NELSON:

21 Q So now I'm going to take you through injuries
22 sustained by Cherish Perrywinkle to her genitalia.

23 Will you tell the jury before we go through
24 the photographs what you observed?

25 A Okay. So looking at her genital area and her

1 anal area she had so much trauma. It was -- the
2 anatomy was totally destroyed by the injury that she
3 sustained both to her vaginal area and her anus.

4 Q Did you actually bring a book with you today
5 that you rely on for anatomical diagrams?

6 A Yes.

7 Q And, in fact, would an anatomical diagram of
8 a prepubescent female assist you in describing to the
9 jury where genitalia should be on a young girl?

10 A Yes.

11 Q Let me show you State's Triple Y. First of
12 all, for the record will you tell the jury where this
13 anatomical diagram comes from?

14 A Yes. So this is the book, Third Edition
15 Pediatric and Adolescent Gynecology, where, you know,
16 doctors can see the anatomy, because even sometimes
17 doctors don't know the anatomy and, you know, so that's
18 the reason these diagrams are put out.

19 Q And using this diagram, will you please point
20 out, obviously it's reflected, but the vagina and the
21 anus?

22 A Yes. So, you can see that the vagina is right
23 here (indicating). This area is important when we come
24 to describe injuries because that is where one passes
25 urine. So there is a distance between the area where

1 one passes urine and the vagina and there is quite a
2 distance between the vagina and where the anus is.
3 That is a large area of tissue, soft tissue.

4 Q Okay. I'm next going to show you State's 77,
5 which is a photograph of the genitalia of Cherish
6 Perrywinkle. Will you please orient the jury to this
7 photograph and describe the injuries reflected in this
8 photograph?

9 A Yes. So this is without spreading her legs.
10 Normally you can't see -- see this. You won't be able
11 to see this if you look at a regular girl because of
12 the fact of the labia cover everything. So but here
13 because of the way it is injured you can actually see
14 into her vagina.

15 So this is where -- this is the urethra where
16 one passes urine and you can see how red and swollen
17 that area is. And then you have the vagina and this is
18 the anus right here (indicating). And what is left
19 between the two is a very thin area of tissue. If you
20 bring your minds back to the first diagram.

21 Q Take you back there?

22 A Yes, where there is this broad area right here
23 (indicating) it is now reduced to a very thin, very
24 thin area of tissue. So anus and vagina (indicating).

25 Q Okay. We have a couple more pictures of

1 this. 78. Will you please orient the jury to the
2 direction of this photograph and explain the injury
3 reflected here?

4 A Okay. So here again it's not open but spread
5 to demonstrate it's just that's how it was because of
6 the tremendous injury that this child sustained. So
7 this is her anus (indicating) and then you have that
8 thin tissue between and this is her vagina
9 (indicating).

10 Q State's 79.

11 A Okay. So close-up this is where you pass
12 urine, you can see how red it is, how swollen it is.
13 This is her vaginal which normally we can't see, and
14 you can see all the tearing there and you can see the
15 anus. Very thin tissue there. Just you could feel it,
16 how thin it was.

17 Q You mentioned earlier that during an autopsy
18 you take dissections.

19 A Yes.

20 Q And you mentioned that you noticed an area in
21 Cherish's back of her head?

22 A Yes.

23 Q So you shaved her head?

24 A Yes.

25 Q And then cut her scalp so you could look at

1 the injury more closely?

2 A Yes.

3 Q And did you photograph that?

4 A Yes.

5 Q And what -- I'm going to direct your
6 attention now to State's 84 and ask you to explain to
7 the jury what is reflected here.

8 A Okay. So when the scalp is reflected back,
9 you have an area of hemorrhage right there
10 (indicating).

11 Q I'm sorry. Where?

12 A On the left side of her scalp right there
13 (indicating).

14 Q Right. And what -- how is that caused,
15 Dr. Rao?

16 A Blunt trauma.

17 Q I'm going to show you two more photographs of
18 the dissection taken of Cherish Perrywinkle's throat.
19 Will you first tell the jury what you saw when you
20 dissected her throat?

21 A Yes. So what we do is --

22 I'm sorry. I just need a break. Have about
23 five minutes.

24 THE COURT: You want a five-minute break?

25 I think we'll all take a break for ten

1 minutes. Thank you.

2 (Jury absent.)

3 MR. FLETCHER: Could I stand here and speak
4 to the Court, make an objection?

5 THE COURT: Sure.

6 MR. FLETCHER: Judge, we have the Chief
7 Medical Examiner on the stand crying during the
8 testimony about her autopsy and she's previously
9 testified that she has done thousands of
10 autopsies. We would at this point move for a
11 mistrial. We believe this is so prejudicial that
12 it cannot be cured by any kind of instruction and
13 ask for a mistrial at this time.

14 THE COURT: Any response?

15 MS. NELSON: I can inquire of her to ask why
16 this impacts her. I think she testified in
17 deposition, which we did not intend to elicit
18 here, that of the thousands of autopsies that she
19 has conducted this is among the worst.

20 Your Honor, I do not think this rises to the
21 level of a mistrial. She asked for a moment to
22 collect herself. So I mean...

23 THE COURT: Okay. I'll deny the motion for
24 mistrial. I think she'd like to leave the witness
25 chair for a couple of minutes.

1 MR. FLETCHER: Judge, if I can add a few
2 things.

3 Judge, we were here a month or two ago and
4 she testified about all these pictures during our
5 motions in limine and I don't remember any
6 emotional response from this witness. So I would
7 just again move for a mistrial. She's a
8 professional witness and it's -- it is a very
9 trying time for everybody in this courtroom when
10 these pictures are being presented. That's why we
11 filed a motion in limine on all of them. But to
12 have this particular witness break down like this,
13 I just think it's grounds for mistrial.

14 MR. CALIEL: Your Honor, only a simple
15 response to that. During the course of the motion
16 in limine the courtroom was cleared and there were
17 not people within 15 feet of Dr. Rao showing
18 visible emotion. Unfortunately, even doctors are
19 human beings and when you are describing brutal
20 injuries that they're describing in this nature
21 and 15 feet away from you you have people who are
22 being emotional, it's difficult for even
23 professionals to contain themselves. She did not
24 become sobbing, she asked to take a moment.
25 Throughout the course of this trial there's been

1 many a witness who has become emotional and part
2 of it is the emotion of being in here and the
3 importance of what's going on.

4 So I don't believe simply stating because in
5 a sterile environment in a motion in limine that
6 she didn't react that that somehow makes this more
7 traumatic. This is a natural human reaction that
8 anybody can have, especially when many people
9 within this courtroom are tearing up at this point
10 in time.

11 THE COURT: All right. The defense has made
12 a reason for their request and I'll deny the
13 motion for mistrial.

14 It'll be more than ten minutes. It will take
15 the jury longer than ten minutes just to use the
16 restroom. So let's from this point take ten
17 minutes and be in recess.

18 And she knows she can't be talked to about the
19 testimony or anything. She just needs the restroom
20 and things like that.

21 MR. FLETCHER: That's fine.

22 (Recess.)

23 (Defendant present.)

24 (Jury absent.)

25 THE COURT: Are you all ready to get started?

1 MS. NELSON: Yes, Your Honor.

2 MS. SCHLAX: Yes, Your Honor.

3 THE COURT: Are you ready for the jury?

4 MS. SCHLAX: Yes, ma'am.

5 MR. CALIEL: Yes, Your Honor.

6 THE COURT: All right. You can bring the
7 jury in.

8 MR. CALIEL: Your Honor, before we bring them
9 in, just advise the witness we're just going to
10 proceed on, there doesn't need to be any apologies
11 or comments about --

12 THE COURT: Yes.

13 Don't explain anything. Okay? They'll just
14 ask you the next question.

15 THE WITNESS: Yes.

16 THE COURT: Okay?

17 BAILIFF: Yes, Judge?

18 THE COURT: Yes.

19 BAILIFF: The jury is entering the courtroom.

20 (Jury present.)

21 THE COURT: All right. Thank you, ladies and
22 gentlemen. We're ready to proceed.

23 You may ask your next question.

24 MS. NELSON: Thank you.

25 BY MS. NELSON:

1 Q Dr. Rao, where is the larynx?

2 A Okay. So the larynx is the voice box, right
3 in this location (indicating).

4 Q And you mentioned you conducted a throat
5 dissection. And what did you see when you conducted
6 that dissection?

7 A So it's not -- it's the neck dissection that I
8 referred to, anterior, which means front, transection
9 where you have layer by layer of muscle that is
10 dissected looking for injury as a result of the
11 strangulation.

12 Q And what injury did you see?

13 A So she had hemorrhage into the skeletal
14 muscle, the muscles that lie right across right here
15 (indicating) and if you turn your neck you have muscles
16 right here (indicating). So she had bleeding into some
17 of those muscles.

18 Q Do you also collect clothing from a body when
19 the body comes to the Medical Examiner's Office?

20 A Yes.

21 MS. NELSON: May the witness step down, Your
22 Honor?

23 THE COURT: She may.

24 BY MS. NELSON:

25 Q Dr. Rao, let me show you what's been

1 premarked for identification as State's Y. Did you
2 look at the packaging of this this morning before your
3 testimony?

4 A Yes.

5 Q And did you identify this as the dress that
6 Cherish Perrywinkle was wearing when her body was
7 transported to the Medical Examiner's Office?

8 A Yes.

9 Q Is this, in fact, the same packaging from the
10 Medical Examiner's Office from which this dress was
11 originally packaged?

12 A Yes.

13 MS. NELSON: May I publish to the jury?

14 THE COURT: You may.

15 MS. NELSON: I'll tender this, State's
16 Quadruple Y, as the next numbered exhibit.

17 THE COURT: Any objection?

18 MR. FLETCHER: No, Your Honor.

19 THE COURT: All right. Triple Y -- Quadruple
20 Y, I'm sorry, will be State's Exhibit 84.

21 (Whereupon the foregoing item was marked in
22 evidence as State's Exhibit 84.)

23 BY MS. NELSON:

24 Q Now, in this case did you also go to the
25 Police Memorial Building to photograph Mr. Smith?

1 A Yes.

2 Q Do you see Mr. Smith in court today?

3 A Yes.

4 Q Will you please point him out and identify an
5 article of clothing he's wearing?

6 A Right there. He's wearing a tan-colored shirt
7 and a checked tie.

8 Q Is he seated at a table between two lawyers?

9 A Yes.

10 MS. NELSON: May the record reflect that the
11 witness, Dr. Rao, has identified the defendant
12 Donald Smith?

13 THE COURT: The record will so reflect.

14 BY MS. NELSON:

15 Q And will you explain to the jury for what
16 purpose you went to the Police Memorial Building?

17 A Yes. So after --

18 Q Let me interrupt you real quick and ask you
19 on what date did you go to the Police Memorial
20 Building.

21 A On the 22nd of June, 2013.

22 Q Approximately what time did you arrive there?

23 A I can't recall.

24 Q Okay. And did you -- I may have already
25 asked you --

1 A I think it was in the afternoon.

2 Q Okay. Did you also direct photography be
3 taken of Mr. Smith?

4 A Yes.

5 Q Okay. Dr. Rao, let me direct you to your
6 monitor again. State's 89. Does this photograph
7 reflect what Mr. Smith was wearing and what he looked
8 like when you went to the Police Memorial Building on
9 June 22nd, 2013?

10 A Yes.

11 Q Let me direct your attention to State's 93.
12 Is this a true and accurate photograph of the jeans and
13 the shoes he was wearing?

14 A Yes.

15 Q State's 94. Same question. Just a different
16 angle?

17 A Yes.

18 Q State's 95.

19 A Yes.

20 Q State's 96.

21 A Yes.

22 Q State's 97.

23 A Yes.

24 Q State's 98.

25 A Yes.

1 Q State's 99.

2 A Yes.

3 Q Did you have the opportunity, before your
4 testimony this morning, to actually look at the
5 clothing that was collected from Mr. Smith on June
6 22nd?

7 A Yes.

8 Q Let me ask you to step down again. Let me
9 show you what's been premarked for identification as
10 State's Quadruple X. Do you recognize this to be the
11 shirt that Mr. Smith was wearing?

12 A Yes.

13 MS. NELSON: May I publish to the jury?

14 THE COURT: Any objection?

15 MR. FLETCHER: No objection, Your Honor.

16 MS. NELSON: You want me to tender it first?

17 MR. FLETCHER: No, that's fine.

18 THE COURT: I need to go back after her
19 testimony and look at the numbers. I don't think
20 some of these numbers have been entered on the
21 record, some of these exhibits that were ID'd by
22 her, and you just went over a couple. So we'll
23 have to go back and do that. But I'll wait and do
24 that.

25 MS. NELSON: Okay.

1 BY MS. NELSON:

2 Q Dr. Rao, can you step over here, please? Let
3 me show you what's been premarked as Quadruple W. Did
4 you take a look at these this morning before your
5 testimony?

6 A (Nods head.)

7 Q And are these, in fact, the jeans that Donald
8 Smith was wearing on June 22nd?

9 A Yes.

10 MS. NELSON: Tender Quadruple W. May I
11 publish?

12 THE COURT: You may.

13 MR. FLETCHER: No objection.

14 THE COURT: Thank you.

15 You may proceed.

16 MS. NELSON: Thank you.

17 BY MS. NELSON:

18 Q Dr. Rao, did you direct that the defendant be
19 disrobed?

20 A Yes.

21 Q And for what purpose?

22 A For purposes of photography and evidence
23 collection.

24 Q And specifically did you want to look at his
25 penis?

1 A Yes.

2 Q For what reason?

3 A To make sure that any injuries or any
4 abnormalities be documented and interpreted because
5 that's what forensic pathologists do. We look at
6 injuries and we interpret injuries.

7 Q Let me direct your attention to State's
8 Exhibit 90. Will you please explain to the jury what
9 this photograph is of?

10 A Yes. This is the penis of Mr. Smith and he
11 does have abnormalities that are trauma-related,
12 meaning injuries.

13 Q Will you describe those injuries to the jury?

14 A Yes. So right here you can see (indicating)
15 that there is a circular bruise of the head of his
16 penis. And he has many areas of bruising (indicating)
17 on the shaft of his penis.

18 Q Dr. Rao, do you have an opinion as to the
19 injury reflected on the head of his penis as to how it
20 could be caused?

21 A Yes.

22 Q What is that?

23 A Sucking motion with -- with significant force.

24 Q Show you State's 91. Will you orient -- are
25 these your gloved hands reflected in this photograph?

1 A Yes.

2 Q And will you orient the jury to this
3 photograph, please?

4 A Okay. So this is the top of his penis and I
5 have extended it so that you can see the bruising
6 better and you can see the area of bruising on the top
7 on the outer surface of his penis.

8 Q And what if -- what, if any, opinion do you
9 have about the aging of this bruising?

10 A They are fresh injuries consistent with the
11 time frame of the death of this child.

12 Q And the last photo, State's 92. Will you
13 orient the jury to this photograph and explain what
14 injuries are reflected in it?

15 A So, this is again the shaft of his penis, the
16 long portion, and you have injuries on the sides of
17 bruising (indicating).

18 Q Did you also take swabs of his penis and from
19 his mouth?

20 A Yes.

21 Q In the same manner that you earlier testified
22 to as taking swabs from the body of Cherish?

23 A Yes.

24 MS. NELSON: May I approach?

25 THE COURT: You may.

1 BY MS. NELSON:

2 Q Let me show you what's been premarked as
3 State's Quadruple J, ask if you identify those to be
4 the swabs that you took from the defendant's penis on
5 June 22nd --

6 A Yes.

7 Q -- 2013?

8 A Yes.

9 Q Let me show you what's been premarked as
10 State's Quadruple K and ask you if you identify -- if
11 you recognize this exhibit as being the oral swabs that
12 you took from the defendant on June 22nd, 2013.

13 A Yes.

14 Q Last question for you. I know you've
15 explained your opinion as to cause and manner of death
16 being strangulation. We know that Cherish's body was
17 discovered in the water.

18 A Yes.

19 Q Was there any evidence of drowning?

20 A No.

21 Q Thank you.

22 MS. NELSON: I don't have anything further.

23 THE COURT: Any questions?

24 MR. FLETCHER: Yes, Your Honor. Very

25 briefly.

1 THE COURT: Can we move this one exhibit?

2 MR. CALIEL: I'll get it for you.

3 THE COURT: Or turn it sideways.

4 MS. NELSON: I'm sorry.

5 MR. CALIEL: I'll reposition them so it
6 doesn't block anyone's view.

7 THE COURT: Thank you.

8 MS. NELSON: I'm sorry.

9 THE COURT: That's okay.

10 MR. FLETCHER: May I proceed, Your Honor?

11 THE COURT: You may.

12 CROSS-EXAMINATION

13 BY MR. FLETCHER:

14 Q Dr. Rao, when you were present with
15 Mr. Smith, did you have somebody there taking pictures
16 for you?

17 A Yes.

18 Q And that was to document any injuries he had
19 to him, right?

20 A Yes.

21 Q And every injury would have been documented,
22 right?

23 A Correct.

24 Q Okay. Did he have any scratches, like on his
25 arms?

1 A No.

2 Q On his legs?

3 A No.

4 Q Okay. And let me ask you a couple of
5 questions, for lack of a better way of saying it, sort
6 of about the mechanics of strangulation. Once a person
7 tightens around another person's neck, you said that
8 death would occur between three to five minutes later?

9 A If it is not relieved, the pressure that's not
10 relieved, yes.

11 Q Okay. And how long before somebody blacks
12 out if you're putting pressure in that same place?

13 A Probably a couple of minutes.

14 Q Well, a couple of minutes could be three
15 minutes, right?

16 A Could be what? Sorry.

17 Q Two to three minutes? Is that what you're
18 saying?

19 A It could be.

20 Q Because you said that the time that it would
21 take them to die would be three minutes.

22 A Three to five minutes, yes.

23 Q Well, let me ask you this. Are you familiar
24 with the sport of MMA fighting?

25 A No.

1 Q Or wrestling, any of those things?

2 A Yes.

3 Q Okay. Two trained athletes in a cage, so to
4 speak, and one gets behind the other and starts to
5 choke him and he goes down, so he passes out, about 15
6 seconds. Have you ever seen that?

7 A Okay. So I want to talk about that a little
8 bit as to what the defense attorney has brought up.

9 Q Well, I just want to know have you ever seen
10 that.

11 A I have read about it.

12 Q Okay.

13 A I have not personally witnessed such an event.

14 Q Okay. That's all I have.

15 MR. FLETCHER: Thank you.

16 THE COURT: Any redirect?

17 MS. NELSON: No, ma'am.

18 THE COURT: May this witness be excused?

19 MS. NELSON: Yes.

20 THE COURT: Thank you, Dr. Rao. We
21 appreciate your time this morning.

22 Before you call your next witness, I need
23 to --

24 MR. CALIEL: Your Honor, I think what the
25 confusion was is certain photographs were all

1 tendered at once with Dr. Rao and even though they
2 weren't sequentially in there, I think, and I can
3 submit --

4 MS. NELSON: Already identified and tendered.

5 MR. CALIEL: I can submit to the Court an
6 identified list and to the clerk to see if that
7 clarifies the numbering of the exhibits. But I
8 think some were introduced first but then talked
9 about later.

10 THE COURT: Right.

11 MR. CALIEL: And I think that was the issue.

12 THE COURT: But we also have a couple that
13 were tendered, not used.

14 MS. NELSON: Not published.

15 THE COURT: You want them?

16 MR. CALIEL: We still want them as part of
17 the record, but not published.

18 MS. NELSON: Right.

19 THE COURT: Madam Clerk will get it straight.
20 Okay. You may call your next witness. Thank
21 you.

22 MR. CALIEL: Your Honor, the State would call
23 Nicole Lee to the witness stand and while she's
24 coming may I use a moment to prepare some
25 exhibits?

1 THE COURT: You may.

2 MR. CALIEL: Thank you.

3 (Witness present.)

4 THE COURT: Good morning.

5 THE WITNESS: Good morning.

6 THE COURT: As soon as Mr. Caliel gets out of
7 the way, Madam Clerk will swear you in.

8 (Witness sworn.)

9 THE WITNESS: Yes, I do.

10 THE COURT: Thank you. If you'll have a seat
11 in the witness chair.

12 THE WITNESS: Thank you.

13 NICOLE LEE,

14 was called as a witness on behalf of the State, and after
15 being duly sworn, then testified as follows:

16 DIRECT EXAMINATION

17 BY MR. CALIEL:

18 Q Good morning, ma'am.

19 A Good morning.

20 Q Can you please introduce yourself to the jury
21 and state your name and spell it for the court
22 reporter.

23 A My name is Nicole Lee, L-e-e. And I'm
24 employed by the Florida Department of Law Enforcement
25 in the Jacksonville Regional Crime Laboratory Biology

1 Section.

2 Q And what are your duties with the Florida
3 Department of Law Enforcement?

4 A I examine items of evidence for the presence
5 of biological material. I look for such things as
6 semen, saliva, hair roots suitable for STR DNA analysis
7 and I perform the DNA analysis and I use statistical
8 calculations that we need to go along with that.

9 Q Ma'am, if you could please tell the Court and
10 jury your training and educational experience that
11 prepared you for your role at FDLE.

12 A I earned a Bachelor of Science Degree from
13 Michigan Technological University in the field of
14 clinical laboratory sciences.

15 Once I got the position of crime laboratory
16 analyst with the Department -- Florida Department of
17 Law Enforcement, I went through two separate two-phase
18 training programs. The first phase of both was
19 learning how to use the testing, book work, written
20 exam and the second phase of both was supervised
21 casework under qualified analysts. The first set of
22 training was to identify the biological materials and
23 the second set of training was specific to the DNA
24 analysis.

25 Q And so how long have you been working in the

1 capacity as a biological analyst for the Florida
2 Department of Law Enforcement?

3 A I've been with the Department for 20 years and
4 I think I've been an analyst for 18 years.

5 Q And can you explain your duties and what you
6 do on a day-to-day basis for the Florida Department of
7 Law Enforcement biology section?

8 A Sure. I receive evidence from our evidence
9 intake section through a controlled process. Once I
10 have it in my custody, I go through it visually to
11 examine it, to identify the stains for DNA testing, and
12 then I take it through the DNA testing.

13 Upon completion of my testing there's several
14 reviews that the evidence goes through, data review by
15 a qualified analyst, a technical review of my complete
16 work and the report and conclusions I have by a
17 qualified analyst, and then the last review is an
18 administrative review done by one of the supervisors
19 prior to the case being released.

20 And then at that point it's completed and I
21 return the evidence back to our evidence intake section
22 to be returned to the submitting agency.

23 Q And if I could, could you please take the
24 jury through the process of your training when it comes
25 to specifically STR DNA analysis and the type of

1 analysis that you conduct at the Florida Department of
2 Law Enforcement.

3 A The training is involved. I think right now
4 it takes about a year to get through the entire
5 training process. And you start with such things as
6 known samples. So we know what results you should get.
7 And it's just a way to learn the testing, get
8 familiarized with the testing, how big a sample to
9 take. There's written examinations, there are oral
10 examinations, and then once you have passed all of
11 this, then you go through the supervised casework where
12 you're actually working casework with qualified
13 analysts before you are qualified to do it on your own.

14 Q And specifically during the course of
15 training with the Florida Department of Law
16 Enforcement, do you become proficient and do you, in
17 essence, go to school on the various techniques and the
18 methodologies utilized to conduct testing in a forensic
19 setting?

20 A Yeah, the testing is broken down into modules
21 and I believe there are 11 modules. And each is
22 specific. For example, within the DNA training there's
23 a statistics module, there's a mixture module to help
24 you identify mixtures and how to interpret mixtures in
25 the DNA results. There's a basic DNA module to learn

1 -- ensure that you have learned and are quite familiar
2 with the basic structure of DNA and then -- well,
3 actually I forget where I was going with that.

4 Q You were talking about the training modules.

5 A So then once you get through these training
6 modules, you are proficient and certified by the State
7 to complete analysis on independent casework. Once you
8 are out of training, there are rules in place to take a
9 proficient test which is an external exam these
10 purchased by the Department for you to take on a
11 semi-annual basis to ensure that you maintain the level
12 of testing that is expected.

13 Q Let me go back for a second and discuss with
14 you the statistical module, I think you previously
15 mentioned. Is a portion of your DNA training
16 understanding the statistics and the numerical
17 importance of the findings that you make when you doing
18 the DNA testing?

19 A Yes, it is important to us, within the
20 Department, to have a strong statistical background and
21 an understanding of how statistics are applied.
22 Because if I say that two DNA profiles match, without
23 giving weight to it through statistical analysis, we
24 can't really say how common or how rare that profile
25 is. When I give a statistical weight that helps

1 understand how unique that profile is in the given
2 population.

3 Q And have you been educated and become
4 proficient in the population statistical analysis that
5 accompanies DNA testing so that not only can you
6 conduct the testing, but then you can interpret those
7 results and give meaning to the results?

8 A Yes.

9 Q And is that part of your standard training
10 through the Department of Law Enforcement before you
11 become a certified DNA analyst?

12 A Yes, and it is a continued part of my work as
13 a DNA analyst.

14 Q Now, you've been working in the DNA field you
15 said for 18 years?

16 A Yes.

17 Q Okay. Obviously there have been advancements
18 in the technologies that have been utilized, correct?

19 A Correct.

20 Q As a part of your training, as a part of your
21 continuing education with the Florida Department of Law
22 Enforcement, do you keep abreast of new technologies
23 and new advancements in the field?

24 A Yes.

25 Q Do you attend continuing education training

1 and seminars to make sure you are current with all the
2 new techniques that are available in forensic settings?

3 A Yes, I was just at external training last
4 week, as a matter of fact.

5 Q And do you do so to maintain your expertise
6 and maintain your proficiency as a DNA analyst with the
7 Florida Department of Law Enforcement?

8 A Yes.

9 Q You discussed certification. Give me a
10 little bit more background in regards to the
11 certification process.

12 A The certification process is led by the
13 Department through our technical leaders. And they
14 take into account your ability to pass the written
15 exams, the oral exams that are given as well cumulating
16 into what is referred to as a mock trial to ensure that
17 you have the proficiency needed and required in the
18 position.

19 Q So you said you've been an analyst for 18
20 years. So has it been 18 years since you have been
21 certified as an expert in the field of forensic DNA
22 analysis through the Florida Department of Law
23 Enforcement?

24 A Yes. I have gone through additional training
25 programs as we updated our technologies. I wouldn't

1 consider that a recertification process, but, again,
2 it's something that throughout my years I have
3 undergone additional testing on these new techniques.

4 Q Throughout the course of your 18 years
5 approximately how many times have you been asked to
6 conduct DNA analysis on potential evidence in criminal
7 investigations?

8 A At this time I've released over 2000 reports.
9 Those aren't necessarily individual cases. Some cases
10 have multiple reports. I don't keep track of the
11 amount of times I've done DNA testing. It's been a
12 bunch.

13 Q And do you also maintain a record or have you
14 been tendered as an expert in the field of DNA
15 identification and population statistics through the
16 course of your employment with the Florida Department
17 of Law Enforcement?

18 A Yes. And I don't have an exact count of the
19 number of times, but I believe it's about 135 to 140
20 times.

21 Q So you testified as an expert witness a
22 hundred to a hundred 50 times or what were the numbers
23 again?

24 A Between 135 and 140.

25 Q 135 to 140. Is that here in the State of

1 Florida?

2 A Yes.

3 Q Is it in state court and other jurisdictions
4 as well?

5 A Yes.

6 MR. CALIEL: Your Honor, at this point in
7 time I would tender Ms. Lee as an expert in the
8 field of DNA analysis and population statistics
9 related to that analysis.

10 MS. SCHLAX: No questions, Your Honor.

11 THE COURT: All right. She'll testify in
12 that regard.

13 BY MR. CALIEL:

14 Q Now, Ms. Lee, I'd like to direct your
15 attention to the field of DNA analysis before we get
16 into your specific casework. Could you explain to the
17 jury members how it is that you began your work once
18 you receive a piece of evidence for possible analysis?

19 A So the first thing I do when I get the
20 evidence is I examine the packaging and make
21 notification -- notes on the packaging of the evidence
22 and then I open it and I do all of this in a clean work
23 environment with all of my personal protective
24 equipment on to ensure that I'm not introducing my own
25 DNA into the evidence as I'm looking at it.

1 And the first things I want to look for is the
2 condition of the evidence and if there's any staining
3 or hair and fibers present. I'll then microscopically
4 examine any microscopic findings with a microscope
5 later and then I can then do conventional serological
6 testing on any stains to identify, if I can, identify
7 the origin of these biological materials, before taking
8 it through the DNA process, which has many steps.

9 Would you like me to go into those now?

10 Q Well, before you go to those steps if you
11 could explain to the members of the jury how DNA is
12 used for identification purposes and then what steps
13 you take to try to identify DNA on items of evidence.

14 A So, the type of DNA that I would get is
15 nuclear DNA. It's found in the nucleus of cells and
16 it's inherited from your parents. So one individual
17 has half of their DNA from their mother and half from
18 their father. So what I'm looking for are these areas
19 on the DNA molecule that are different between
20 individuals.

21 We know that greater than 99 percent of our
22 DNA is the same so what I'm looking at these areas that
23 can differentiate. The areas that I would get are kind
24 of the placeholders between what determines your hair
25 color and your eye color and that sort of thing. And

1 by looking at these areas they are the same throughout
2 your body. So if I'm looking at a buccal swab or oral
3 swab, it should be the same as if I have a blood
4 standard and then I make a comparison of DNA I get from
5 evidence to DNA that I obtain from known individuals.

6 Q Now, when you're looking at profiles, who
7 selects the markers that you look at? Is it
8 standardized throughout the course of the field of
9 forensic DNA analysis?

10 A Yes, it is.

11 Q Can you explain how that works?

12 A Sure. We -- within the Department we purchase
13 a kit that contains the markers that we're interested
14 in testing and we do -- we do these kits because they
15 have been optimized for forensic testing. A lot of
16 times the samples we get are not clean, pristine
17 samples, they've been out in the environment. So the
18 companies or research that has been done into these
19 kits has optimized them so they're easy for me and
20 anyone else in the forensic field to work with and
21 compare across samples in states in different cases.

22 Q Now, forensic DNA, oftentimes we're talking
23 about very small amounts of DNA that we're analyzing,
24 correct?

25 A Yes.

1 Q How did you go about amplifying or looking at
2 that DNA in the trace amounts to be able to make an
3 identification as to what profiles or what DNA is
4 present on a piece of evidence?

5 A So one of the steps is amplification and
6 that's the step that we're talking about. When I found
7 a sample that is biological material that I want to
8 develop -- attempt to develop a profile from, I take it
9 to this little molecular xerox copy machine. And
10 essentially this is cycling through temperatures to
11 imitate the process that naturally occurs in our body
12 where a chain of DNA is copied or it's replicated to
13 make it longer. I'm only copying just those areas that
14 I'm interested in.

15 If we think of DNA like a book of -- a book,
16 what I'm photocopying is a specific word in a specific
17 chapter. I'm not doing the whole chapter because I'm
18 not interested in looking at all of it. This
19 amplification allows me to target the sweet spot of
20 DNA. Much like taking a photograph, I had too much DNA
21 when it comes to visualize it in the last step, it's
22 overwhelming, kind of like taking a picture and using a
23 flash when you don't need it, it's a sunny day. You
24 don't need a clear picture. And it also allows me, if
25 the sample is very, very small, making these copies can

1 produce enough that I can see a result or get a
2 profile.

3 Q What is the usefulness of DNA in the forensic
4 setting? For example, does each individual person have
5 their own independent DNA?

6 A Yes. Aside from identical twins, we each have
7 our own inherited profile from our parents. Siblings
8 will have similar profiles, but then it's not exact. I
9 can differentiate between siblings of parents. What I
10 cannot differentiate is identical twins.

11 Q So basically every person has their own
12 genetic fingerprint, per se, that identifies them and
13 aside from the occasion of identical twins each
14 individual person, even in this courtroom, if we're not
15 twins with one another, will have a different DNA
16 profile?

17 A Yes. Again, that's if I'm looking at multiple
18 markers on the DNA profile. If I'm just looking at one
19 area many people can have the same profile. Kind of
20 like a phone number. If you have a Jacksonville phone
21 number, you have a 904 area code, looking at just those
22 three numbers I can't differentiate individuals. But
23 when I take in the entirety of the phone number I can
24 differentiate people. Same thing with the DNA. As
25 long as I'm looking at enough markers or enough areas

1 on the DNA I can differentiate individuals.

2 Q Directing your attention to the work that you
3 conducted in the case of the State of Florida versus
4 Donald Smith, how many individual markers were you
5 utilizing at that point in time to conduct your DNA
6 analysis?

7 A 15 different markers, plus a gender marker
8 referred to as amelogenin.

9 Q Can you explain to the jury how you utilized
10 the data received when it comes to those 15 markers and
11 he then use your experience and your training in
12 population statistics to gather importance or qualify
13 how much DNA is there and who it belongs to.

14 A The easiest way for me to do that is to use an
15 example. So when I have a DNA profile, what I'm
16 looking at are numbers for each of the markers. So at
17 each of these 15 places I may have a 14, 15. So then
18 what I'm doing is trying to see how many times is that
19 14 and 15 together frequency in the population to get
20 an estimation of how common or how rare it is.

21 The easiest way for me to explain that is to
22 think of a group of ten individuals and I want to know
23 how many of those ten individuals have red hair. One
24 of them does. So they're one in ten. Now my question
25 next is how many of this -- in this group have red hair

1 and are wearing red shoes. Happens to be the same
2 individual. They have red hair and they have red shoes
3 so they're one in ten having red hair and one in ten
4 for wearing red shoes. So I combine that. Now they're
5 a hundred. So the rarity of finding somebody with red
6 hair and red shoes is one in a hundred, although I've
7 only looked at DNA of ten people because these things
8 are adequate. They combine together to get a bigger --
9 bigger rarity or frequency.

10 Q So what you're looking at is how rare this
11 profile is and the chance that it may be matched to
12 another person who may be walking this earth at that
13 time, right?

14 A Right. You utilize this database to see how
15 many times it has been seen to then calculate out how
16 -- how common or how rare I would expect it to be.

17 Q Again, this population database, who
18 maintains that?

19 A The database that I used at the time -- let me
20 see who maintains it. It was published in the Journal
21 of Forensic Science. So it is in a peer-reviewed
22 journal that anyone can use. Because it has been found
23 to be valid, it's gone through a statistical analysis
24 by statisticians to ensure it's a validated database,
25 and once it's published I can use it within the

1 Department for references.

2 Q And is that the same population database
3 that's utilized in law enforcement across the country?

4 A At the time, yes.

5 Q Now, directing your attention specifically to
6 the summer of 2013 and your work in this particular
7 case, can you please tell the jury how you first became
8 involved in this case, this case of the State of
9 Florida versus Donald Smith?

10 A I became involved in this case the same as any
11 case in the laboratory. It just happened to be
12 assigned to me on that particular day.

13 Q And when did you first receive items of
14 evidence in this case for possible DNA analysis?

15 A I picked up the evidence in my custody on June
16 25th of 2013.

17 Q And could you just enumerate for the members
18 of the jury the items of evidence that you did receive
19 in this particular case?

20 A At that time I received multiple items. Would
21 you like me to list all of them?

22 Q If you could, just list down what you
23 originally received and then we'll get into the work on
24 those items.

25 A I got a selection that was collected from

1 under the nails of Donald Smith's right hand, samples
2 from under the nail of Donald Smith's right hand,
3 buccal swab collected from Donald Smith, the actual
4 fingernail clippings from Donald Smith, a penile swab
5 from Donald Smith, a swab from a Walmart bag, a swab
6 from a piece of a Walmart bag, a swab of a tree log, a
7 swab of Cherish Perrywinkle's neck, a sexual assault
8 kit collected from Cherish Perrywinkle. Within that
9 were oral swabs, vaginal swabs, mons pubis and labia
10 swabs, anal swabs, right breast swabs, left breast
11 swabs, hairs, possible hairs that were collected from
12 the vaginal and anal area, her fingernail clippings,
13 her pulled head air, a vaginal stain slide, an anal
14 slide, a pair of jeans from Donald Smith, a bloodspot
15 card from Cherish Perrywinkle, and additional swabs
16 that were collected from Cherish Perrywinkle.

17 Q Now, as a part of your duties as a DNA
18 analyst with the Florida Department of Law Enforcement,
19 do you work with investigators and try to identify
20 specific pieces of evidence that may be more relevant
21 and more probative to produce DNA evidence?

22 A Yes. When I have a large list of evidence
23 like this, I try to focus my initial testing on
24 specific samples rather than just diving in and testing
25 it all at once.

1 Q And specifically what items did you want to
2 look at first when it came to this evidence to
3 determine what would be more probative for the purpose
4 of law enforcement investigation?

5 A In this case I began with the sexual assault
6 kit and the items contained within it.

7 MR. CALIEL: Your Honor, may I approach the
8 witness briefly?

9 THE COURT: You may.

10 MR. CALIEL: To gather a couple of different
11 things.

12 BY MR. CALIEL:

13 Q Ma'am, I'm now approaching you with what has
14 been previously marked as State's Exhibit 81. Can you
15 please describe what's contained in State's Exhibit 81?

16 A This is the swabs that I received of the mons
17 pubis and labia.

18 Q Sit that down for a second. Now showing you
19 what's been marked as State's Exhibit 82.

20 A Do you want me to identify it?

21 Q Yes. Can you identify what they are.

22 A Yes, these are the rectal or the anal swabs
23 that were in the sexual assault kit.

24 Q State's Exhibit 83. Could you please
25 identify that and how you recognize it.

1 A These are the oral swabs from inside the
2 sexual assault kit. I recognize them by my handwritten
3 case number, exhibit number and the dates of
4 examination.

5 Q State's Exhibit 80. Again, how do you
6 recognize it and what does it appear to be?

7 A And these are the vaginal swabs from inside
8 the sexual assault kit that I received that had my
9 handwritten markings on them.

10 Q So when you conducted your analysis of those
11 particular swabs and those particular items, did you
12 first review those items for possible serology to
13 determine whether or not there was the presence of
14 semen?

15 A Yes, I did.

16 Q Can you explain to the jury how you performed
17 that analysis before you go to DNA analysis.

18 A The identification of semen is a two-step
19 process. The first thing I do is a color-change test.
20 It's basically taking a very small sample of one of
21 these cotton tip swabs, applying this chemical to it to
22 see if there is a color change. If there's a color
23 change, it gives me an indication that semen may be
24 present. I take that same cutting to the next step,
25 which is to make a microscope -- microscope slide which

1 I then examine for the actual visualization of sperm
2 cells and their presence on -- on the swab.

3 MR. CALIEL: May I approach the witness?

4 BY MR. CALIEL:

5 Q I'm now showing you what's been moved into
6 evidence as State's Exhibit 87, identified as a penile
7 swab from defendant in this particular case. Do you
8 recognize that exhibit as well?

9 A Again, I do. My handwritten notations are on
10 the swab as well on the packaging as well as the yellow
11 FDLE label that was applied when it came into the
12 evidence intake section.

13 Q Now, once again you go through the step one
14 process where you're looking for the color change to
15 determine whether or not there is a possibility of
16 semen there and then you go to the microscopic
17 analysis. How do you prepare slides for that analysis?

18 A So I take the very small cutting from the swab
19 and I put it in what's called a microcentrifuge and
20 it's a very small tube. It's maybe an inch and a half
21 big. It allows me to add two drops of liquid to it at
22 which point the sperm cells can be released from the
23 cotton swab into solution. I can spin those cells down
24 and they form a pellet and they just all kind of clump
25 together at the bottom of that tube and then I can take

1 them from the tube, put them onto a glass slide. I dry
2 them so they're heat affixed to that slide and then I
3 can add two different stains to the slide. The stains
4 allow me to easier -- more easier visualize the sperm
5 cells separate from any skin cells that may also be
6 present on the slide. And then I put that in the
7 microscope and just look at it to identify what
8 structures are present.

9 MR. CALIEL: Your Honor, may I approach the
10 witness again?

11 THE COURT: You may.

12 BY MR. CALIEL:

13 Q I'm now showing you what has been marked as
14 State's Quadruple Z for identification purposes. Do
15 you recognize that exhibit?

16 A I do. These are slides that I prepared from
17 the samples in the sexual assault kit.

18 Q And is this a composite exhibit containing
19 all the slides that you prepared in this case?

20 A Yes. There are multiple slides within that
21 little plastic case.

22 Q And are they in the same or substantially the
23 same condition as they were when you prepared them and
24 then returned them to law enforcement?

25 A It appears that the case is still sealed as

1 when I sent it back out of the laboratory.

2 MR. CALIEL: Your Honor, at this point in
3 time the State would move State's Exhibit
4 Quadruple Z into evidence as the next numbered
5 exhibit.

6 THE COURT: Okay. I think it's Exhibit No.
7 103.

8 Is that correct, Madam Clerk?

9 THE CLERK: Yes.

10 THE COURT: If there's no objection.

11 MS. SCHLAX: No legal objection, Your Honor.

12 THE COURT: Thank you.

13 (Whereupon the foregoing item was marked in
14 evidence as State's Exhibit 103.)

15 BY MR. CALIEL:

16 Q Now, individually let me go through each one
17 of the exhibits.

18 Did you prepare, in fact, a smear slide of
19 the swabbing that was conducted of the defendant's
20 penis in State's Exhibit 87?

21 A I did.

22 Q And once you prepared the slide and reviewed
23 it microscopically, could you determine whether or not
24 there was the presence of semen or sperm on those
25 slides?

1 A Yes.

2 Q Explain that process to the jury and explain
3 what you found.

4 A So, when I made that slide and I looked at it
5 through my microscope, what I saw were sperm cells or
6 in my notes what I refer to as sperm heads present. I
7 saw them about one head per every three to five fields
8 that I looked at on the microscope slide.

9 Q And what type of volume that when you're
10 looking at one head per field of view?

11 A It's a fair amount. If we had what we refer
12 to as a neat semen stain where it's just straight semen
13 on a slide, I would be looking at sperm cells that are
14 too numerous to count in each of those fields, and
15 because it's less than that but there's still many
16 present on a slide, it's a pretty good amount of semen
17 present. I don't quantify it any further than to just
18 say how many I saw when I was looking at it.

19 Q Okay. So in short, the swabs of the
20 defendant's penis showed that he had semen or sperm on
21 those swabs?

22 A That's correct.

23 Q Let me move on to some of the swabs that were
24 taken from the sexual assault kit. First starting with
25 State's Exhibit 83, which are the oral swabs that were

1 taken from the victim when the sexual assault kit was
2 conducted.

3 A Yes. When I was looking at the slide that I
4 prepared from these swabs, the notation I made was that
5 they were rare, meaning that they were not as common,
6 they did not show up in every field or even every three
7 to five fields. Again, I didn't make a numerical
8 notation as to how many sperm cells I saw, just that
9 they were rare.

10 Q But based upon your observations
11 microscopically and the results from the oral swabs,
12 Cherish Perrywinkle had sperm or semen in her mouth?

13 A That's correct. The oral swabs are positive
14 for the presence of semen.

15 Q Okay. Moving on to the other swabs that were
16 taken and identified from the sexual assault kit, first
17 showing you what's been marked and moved into evidence
18 as State's Exhibit 81, mons pubis or labia swabs from
19 Cherish Perrywinkle.

20 A Again, I took this through the process of
21 making a microscope slide. It was semen, positive. I
22 did identify sperm cells, I did not quantify how much
23 other than it was rare, but semen was present on the
24 mons pubis and labia swabs.

25 Q Next State's Exhibit 80 in evidence, the

1 vaginal swabs from Cherish Perrywinkle.

2 A And these were the same. Semen was present.
3 I did identify a rare amount of sperm cells so these
4 are semen positive as well.

5 Q And then last State's Exhibit 82, which is
6 the rectal swabs from Cherish Perrywinkle taken when
7 the sexual assault kit was conducted.

8 A These were also positive for the presence of
9 semen. On these samples I was able to identify a range
10 of one to five sperm cells present per each individual
11 field that I looked at. So semen positive for the
12 rectal swabs.

13 Q So there was actually more semen present in
14 the rectal swabs than any of the other swabs that you
15 had viewed under the microscope?

16 A Yes, there were many more sperm heads present
17 in each of the fields that I looked at.

18 Q In layman's terms, just to summarize, Cherish
19 Perrywinkle had sperm or semen in her vaginal area, in
20 her vaginal swabs and then also inside her rectum,
21 based upon the evidence contained on these swabs?

22 A As well as in the buccal swabs, yes.

23 Q Now, Ms. Lee, during the course of your
24 evaluation of this evidence, did you use the evidence
25 that you just discussed, the presence of sperm and the

1 number of sperm present, to determine what samples may
2 be best used for DNA analysis?

3 A Yes, I did.

4 Q And how do you go about that process?

5 A In this instance I began with the sample that
6 had the most amount of semen identified. So the anal
7 swabs is what I first did the DNA process.

8 Q And did you also, I think you enumerated this
9 when you went through the list of items that were
10 received, did you also conduct DNA analysis on the neck
11 swabs from Cherish Perrywinkle that you received during
12 the course of the work in this case?

13 A I did do some testing on that neck swab, yes.

14 Q I'm now showing you what's been previously
15 marked for identification purposes as State's Exhibit
16 45. Do you recognize that exhibit?

17 A I do.

18 Q And how do you recognize that exhibit?

19 A Again the packaging that's present has the
20 FDLE identifying label that was applied when it came
21 into the Department as well as my handwritten initials,
22 case number and exhibit number and date that I examined
23 it. Both on outer packaging as well as on the inner
24 packaging of the swab.

25 Q Now, in regards to the neck swabs from

1 Cherish Perrywinkle's neck, can you explain the
2 difference or the type of DNA that you're looking for
3 in a neck swab versus swabs that show the presence of
4 semen or bodily fluids?

5 A In this instance I did not attempt to look for
6 semen. I did not do any of that initial testing. I
7 took a sample straight through the DNA process in an
8 attempt to identify any skin cells that may be present
9 that did not belong to Cherish Perrywinkle.

10 Q Also as a portion of the evidence that you
11 received, did you also receive what we call a known
12 standard or oral swabs from the defendant in this case,
13 Donald Smith?

14 A I did.

15 Q Now showing you what's been previously marked
16 and moved into evidence as State's Exhibit 88. Do you
17 recognize that exhibit?

18 A I do. Again, it has all of the FDLE markings
19 as well as my own markings. And this is the oral swab
20 that I tested from Donald Smith.

21 Q Okay. So this is the known standard that was
22 obtained from the defendant in this case?

23 A Yes.

24 Q Let me go back and retrieve one of the swabs.
25 And I'm going to present to you State's Exhibit 82,

1 which was the rectal swab that you identified that you
2 selected out of the sex kit would be the most probative
3 when it came to DNA analysis.

4 A Yes.

5 Q Okay. And, again, that was because it
6 appeared that there was more DNA present based upon
7 microscopic analysis?

8 A That's correct.

9 Q Okay. And you can just set that down right
10 there for a second.

11 When you go to this next phase of actually
12 conducting DNA analysis on the swabs that you had
13 taken, can you explain how that's done to the jury.

14 A The DNA testing is a multi-step process. Just
15 like I did in the initial testing to identify semen, I
16 take a piece of the swab, put it into another one those
17 microcentrifuge tubes and I start the DNA process. The
18 first thing I need to do is extract those cells off of
19 the swab and get them into the solution. And then I
20 extract the DNA from the cells present. So extraction
21 is the first step.

22 The next step is quantification and this is
23 just where I get a rough estimate of how much DNA is
24 present. And that's important as we discussed in the
25 next step, which is amplification, to know how much DNA

1 I have. I always try to target that sweet spot. I
2 don't want to have too little and I don't want to have
3 too much. So after amplification is the visualization
4 process and I use a genetic analyzer, which is just an
5 instrument that can see the DNA, what I see is a series
6 of spikes -- or peaks and valleys on a graph. And then
7 I compare the peaks from the unknown sample and the
8 evidence to the profiles that I develop from the known
9 individuals, which is the same process of extraction,
10 quantitation, amplification, and then getting that what
11 we refer to as an electropherogram or the visual
12 representation of the DNA.

13 Q So once you go through this process, is it
14 your hope to at all the markers you're testing for
15 obtain DNA profiles that can be interpreted for
16 evidentiary purposes?

17 A Yes. I always start the process attempting to
18 obtain complete DNA profiles, which means I would get
19 results at all of the 15 markers that I tested.

20 As I said before, a lot of times samples that
21 I get from an evidence sample are not pristine. They
22 have been in the environment. They could be dirty.
23 They may be very limited. So it's not unusual to get
24 an incomplete profile. And this just means I did not
25 get results at all of the markers I attempted. It

1 doesn't mean that the DNA has changed in any way, it
2 just means I can only see a portion of it. I didn't
3 get all of the results.

4 Q Let me talk about that for a second. You
5 said things from the environment. Obviously if the DNA
6 sample was exposed to water or to air, to dirt, things
7 of that nature, would that affect your ability to
8 potentially obtain a full profile or a profile at all?

9 A So DNA is really well protected in the nucleus
10 of the cell. In a dry state it's -- that's in a
11 temperature controlled environment it can be tested
12 many, many, many years out. Things that start to break
13 down or degrade the DNA, if we have bacteria present,
14 that would chew up the DNA and allow me not to get a
15 complete profile or no profile. Sunlight can degrade
16 DNA. Moisture can be bad in that it allows for the
17 growth of bacteria or mold which can inhibit my
18 results, but it also can have the effect of just
19 washing away the DNA or diluting it out to the point
20 that I can't see it. There are factors in dirt that
21 can inhibit DNA. There's a lot going against me in the
22 environment. If a sample is not dry and clean and
23 protected, stored in a -- in an envelope like it comes
24 into the laboratory.

25 Q So exposure of the victim's body to elements

1 to water, to air, things of that nature, all that could
2 affect the ability to get full profiles?

3 A That's correct.

4 Q Now, specifically did you run and obtain a
5 DNA profile of the defendant's known sample, which was
6 the buccal swabs that were taken from the defendant in
7 this case, Donald Smith?

8 A I did.

9 Q And were you able, based upon those samples
10 that were obtained from the defendant, to obtain a full
11 known profile of the defendant?

12 A Yes.

13 MR. CALIEL: Your Honor, may I approach the
14 witness?

15 THE COURT: You may.

16 BY MR. CALIEL:

17 Q I'm now showing you what's been previously
18 marked for identification purposes as 5-A. Do you
19 recognize this exhibit?

20 A I do.

21 Q And how do you recognize this exhibit?

22 A This is a representation of the summary sheet
23 that's in my case file of the profile that I obtained
24 from Donald Smith. I recognize it because I previously
25 had a chance to examine it and compare it to my case

1 file and my initials are present on the board.

2 Q Okay. And so this exhibit exactly mirrors
3 the work that you conducted in this case and the
4 profiles that were developed when it came to the known
5 sample of the defendant, Donald Smith?

6 A That's correct.

7 Q Okay. All right.

8 What sample is that up there?

9 A I think this is his oral swab.

10 Q Okay. Perfect.

11 MR. CALIEL: Your Honor, at this point in
12 time the State would move into evidence State's
13 Exhibit 5-A in as the next numbered exhibit.

14 THE COURT: Any objections?

15 MS. SCHLAX: No legal objection, Your Honor.

16 THE COURT: All right. That will be entered
17 as State's Exhibit 104 in evidence.

18 (Whereupon the foregoing item was marked in
19 evidence as State's Exhibit 104.)

20 MR. CALIEL: The Court's permission may I
21 have Ms. Lee step down to explain the exhibits and
22 her work in the case?

23 THE COURT: She may.

24 MS. SCHLAX: Your Honor, may I reposition
25 myself?

1 THE COURT: You may.

2 BY MR. CALIEL:

3 Q Ms. Lee, if you could please stand and sort
4 of face towards the court reporter, try to keep your
5 voice up so everything is on the record and I'll serve
6 as your easel, I guess, for lack of a better term.

7 Could you please explain to members of the
8 jury what's depicted on this exhibit and how the DNA
9 profile was obtained and then useful in your
10 examination.

11 A Sure. So what you have here are two columns.
12 The first column is the 15 markers that I actually
13 tested for, plus this gender marker, amelogenin.
14 Starting with amelogenin, you can say I've claimed an
15 XY. That's a male profile. If it was a female it
16 would be an XX.

17 Looking at each of the other markers or areas
18 that I tested you can see there are two numbers. So
19 let's start at the second column. Sample ID is my
20 exhibit number through the process. Came in to me as
21 Exhibit 3, all through my testing it was Exhibit 3, and
22 it was a sample from Donald Smith. I obtained these
23 results on the 9th of July, 2013.

24 So this first marker that I looked at is
25 DS1179 -- D8S1179 and I obtained a 10. Mr. Smith

1 inherited a 10 from one parent and a 13 from the other
2 parent. Without the parent samples I have no way to
3 differentiate who gave him which allele. Each of these
4 independent numbers is referred to as allele.

5 And as you go through the process, you see I
6 have two alleles at each of the markers. If we look at
7 D21S11 I have two 30s. These are 30, 30. That's
8 called a homozygote. That just means each parent gave
9 him a 30.

10 So this is the results of taking it through
11 the extraction, quantitation, amplification and then
12 each of these numbers would have been a peak on that
13 graph. So there would have been a peak here and that
14 represents the 10 and a separate peak a couple of spots
15 over representing the 13.

16 Q So you looked at all these locations and this
17 is the genetic inheritance that he got from his parents
18 that defined his personal profile?

19 A That's correct.

20 Q Okay. Thank you.

21 You can retake the witness stand for a
22 second.

23 I'm now showing you what's been previously
24 marked for identification purposes as 5-B. If you
25 could please examine the exhibit. Do you recognize

1 this exhibit?

2 A Yes, I do.

3 Q And what do you recognize it to be?

4 A This is a chart from my case file that has the
5 profile for Mr. Smith and the profile that I obtained
6 from the neck swab.

7 Q And is this an exact reproduction of the work
8 that you conducted in this case to demonstrate the
9 profiles that were developed off of the neck swab that
10 was taken from Cherish Perrywinkle?

11 A Yes.

12 MR. CALIEL: Your Honor, at this point in
13 time I would move State's Exhibit 5-B into
14 evidence as the next numbered exhibit.

15 MS. SCHLAX: No legal objection, Your Honor.

16 THE COURT: All right. That will be entered
17 as State's Exhibit 105.

18 (Whereupon the foregoing item was marked in
19 evidence as State's Exhibit 105.)

20 MR. CALIEL: And this is 105. That's 104.
21 Thanks.

22 And, again, Your Honor, may I have the witness
23 step down to explain the exhibits to the members of
24 the jury?

25 THE COURT: You may.

1 MS. SCHLAX: Your Honor, may I reposition
2 myself?

3 THE COURT: You may.

4 BY MR. CALIEL:

5 Q So State's Exhibit 45, was the next swab
6 taken from Cherish Perrywinkle and I'll insert that on
7 to the exhibit. Could you please explain to the
8 members of the jury the DNA profile that you obtained
9 from that swab from the neck of Cherish Perrywinkle.
10 And why don't we move down just a little bit to this
11 end so they can see.

12 A Sure. So the first -- so this chart has four
13 columns. The first column is the same, as on the last
14 chart. It has all the markers that I tested. The last
15 column is the same as the last chart. It's the profile
16 from Donald Smith. So these middle two ones are the
17 profile from Cherish Perrywinkle's neck swab. The
18 first of these two columns has a mixture. So what you
19 see here are more than two alleles at most of the
20 markers. So my DNA results I had a 10, 13, 14. When I
21 compared Cherish Perrywinkle's profiles it's her neck
22 so it doesn't surprise me that I have her DNA present.
23 When they swabbed her neck, her cells came off as well.
24 So what I do is I say this is her profile, I want to
25 know what's left over. What is that foreign result.

1 And that is what this third column is. So 9, 4 are the
2 results that could not have come from Cherish
3 Perrywinkle.

4 And when I compare the results that I have at
5 all of those markers to the profile from Donald Smith
6 they are a match. There are no differences as you go
7 down the line.

8 Q So you saw the exact DNA profile belonging to
9 this defendant on the touch DNA that was recovered from
10 the victim's neck in this case?

11 A That's correct.

12 Q Okay. You can retake the witness stand for a
13 second.

14 Ms. Lee, if I could, can I have you explain
15 the statistical importance or value of an exact profile
16 match in this particular case.

17 A So to say that Mr. Smith matches the profile
18 from her neck, without giving you the weight or how
19 rare it is in the population, it may turn out -- if I
20 don't let you know that I calculated the statistics and
21 how rare it is, without telling you that, it could be
22 seen in every person in the population. So I give
23 weight to it to let us know the rarity or how -- how
24 many times you would expect to see it in the
25 population.

1 Q And what was the population statistical
2 analysis with this particular profile, the foreign
3 profile that was recovered from the victim's neck?

4 A For unrelated individuals it is approximately
5 one in 35 quintillion.

6 Q How many zeros is that?

7 A So if you think about your numbers, you have
8 hundred, thousand, million, billion, trillion,
9 quadrillion, quintillion.

10 Q So how many people walk the face of the earth
11 at this point in time?

12 A Right now the estimate is between 7 and 7 and
13 a half billion individuals.

14 Q So given the statistical analysis in this
15 case, the population of the earth and the profile that
16 you obtained, can you say in your expert opinion that
17 this was an exact match to the defendant's DNA profile?

18 A I can look at the chart and see that it's an
19 exact match. This rarity of 35 quintillion makes it
20 extremely rare in the population.

21 Q Meaning with that many zeros on the end of
22 that profile that the likelihood of it being somebody
23 else other than this defendant is beyond rare, beyond
24 unlikely in this case?

25 A Short of an identical twin I would not expect

1 to see this exact profile at random in the population.

2 Q So the defendant's DNA was around the
3 victim's neck?

4 A It was on the neck swab, yes.

5 Q Moving on to State's Exhibit 5-C in evidence.
6 Can you please examine that exhibit. Do you recognize
7 it?

8 A I do. This is a chart of the results that I
9 obtained from the anal or the rectal swab.

10 Q And is this an exact reproduction of the work
11 that you conducted on the anal swabs in this case?

12 A Yes.

13 MR. CALIEL: Your Honor, at this point in
14 time we would move into evidence State's Exhibit
15 5-C in as the next numbered exhibit, which I
16 believe is 106.

17 MS. SCHLAX: No legal objection, Your Honor.

18 THE COURT: That will be entered as State's
19 Exhibit 106.

20 (Whereupon the foregoing item was marked in
21 evidence as State's Exhibit 106.)

22 MR. CALIEL: And, again, Your Honor, may I
23 have the witness step down?

24 THE COURT: She may.

25 And you may reposition.

1 MS. SCHLAX: Thank you, Your Honor.

2 BY MR. CALIEL:

3 Q And, again, State's Exhibit 82 were the
4 rectal swabs that were taken from the victim during the
5 course of the sex assault kit, correct?

6 A Yes.

7 Q And you had already determined, based upon
8 microscopic analysis, that the swabs contained the
9 presence of semen, correct?

10 A Yes.

11 Q So there were actually sperm within the field
12 when you looked at it so you could identify that and
13 then it was larger than the other swabs that you looked
14 at?

15 A That's correct.

16 Q Can you please explain the DNA analysis on
17 the rectal swabs and their importance when compared to
18 the defendant in this case, Donald Smith?

19 A So just like the last chart, again, column 1
20 are the markers that I tested. Column 4 is the profile
21 from Donald Smith. The second column is the profile
22 that I obtained from the anal or the rectal swabs and,
23 again, the results that I obtained were a mixture. Not
24 surprising that Cherish Perrywinkle is present on her
25 own anal swab or her rectal swab so, again, I used her

1 profile that I obtained from her blood standard and
2 backed out what had to come from her to see what was
3 left. And this third column is the foreign results
4 from the mixture column. So these -- this is the male
5 profile that was obtained from the anal swab and when I
6 compared it to the profile from Donald Smith, there
7 were no inconsistencies. They were an exact match.

8 Q Okay. And, again, obviously consistent, if
9 we're talking about sperm, semen, coming from a male
10 contributor, and that's indicated by the XY in the
11 amelogenin, correct?

12 A That's correct.

13 Q And that all of the other markers that you in
14 other forensic settings test for was the foreign
15 mixture or the foreign profile and that matched the
16 defendant, Donald Smith?

17 A Yeah. For example, if I covered these columns
18 and didn't tell you which was the foreign column and
19 which was the column for Donald Smith, there would be
20 no way to differentiate them because they are exactly
21 the same.

22 Q Thank you. You can take the witness stand.

23 Based upon the fact that it's the exact same
24 15 marker profile, did the same statistics apply to
25 this particular sample?

1 A Yes.

2 Q And so, again, how many zeros is that or
3 what's the statistical analysis of that?

4 A The number was one in 35 quintillion.

5 Q And, again, based upon population studies and
6 the weight of this, this is an exact match matching the
7 profile of the defendant, correct?

8 A Yes.

9 Q So the semen that was located inside her anus
10 at the time of the sexual assault kit matches the DNA
11 profile of the defendant?

12 A Yes.

13 Q So that many numbers, the likelihood would
14 be, absent an identical twin, that it would be in all
15 likelihood the defendant's DNA profile?

16 A That's correct.

17 Q Given those numbers, no margin for error.
18 This was an exact profile at all the markers that we're
19 talking about.

20 A Looking at the results it is an exact match.
21 In the frequency occurrence of that profile, is
22 extremely rare.

23 Q Thank you.

24 At a later point in time -- that was your
25 original analysis, correct, that was originally

1 reported out?

2 A Yes.

3 Q At the request of the State of Florida, did
4 you go back and review all the other items that were
5 present but maybe did not indicate as much DNA in the
6 microscopic analysis?

7 A Yes.

8 Q Can you explain to the members of the jury
9 the results that you obtained on that analysis when you
10 went through the second time. Were you able to find
11 the presence of DNA on other swabs such as the
12 swabbings from the mouth, the swabbings from the mons
13 pubis?

14 A Yes. I went back and attempted to obtain a
15 DNA profile from the oral swabs as well as from the
16 vaginal swabs.

17 Q Starting with the oral swabs, what were your
18 results?

19 A For the oral swabs I had no results foreign to
20 Cherish Perrywinkle. So the only results that I saw
21 were consistent with her.

22 Q Now, when you come to that microscopically,
23 you saw a sperm head in the swabs that were within her
24 mouth, correct?

25 A Correct.

1 Q What would explain why no DNA profile foreign
2 to Cherish Perrywinkle existed if you saw sperm, and
3 obviously they did not get there from the victim
4 herself?

5 A There just wasn't enough sperm cells present,
6 or foreign male DNA present, for me to detect it within
7 the mixture of her DNA result.

8 Q Now, that being said, we talked about some of
9 the factors that come into play such as water. Water
10 could wash away the DNA.

11 A Yes.

12 Q If the victim was submerged in water, that
13 could be a factor why those results were not there?

14 A Yes. And as an oral swab I don't know how it
15 got there or what happened after it may have been
16 deposited in her mouth. Such things as eating or
17 drinking, where it's in your mouth, can also wash it
18 away.

19 Q Did you also look at the mons pubis swab that
20 was previously moved into evidence and shown you?

21 MR. CALIEL: Your Honor, may I approach the
22 witness?

23 THE COURT: You may.

24 BY MR. CALIEL:

25 Q The oral swabs that we just discussed were

1 State's Exhibit 83. State's Exhibit 81, which is the
2 mons pubis and labia swabs, did you also review those
3 for only DNA analysis?

4 A Yes, but I did not do any additional DNA
5 testing on those swabs.

6 Q Because you were testing the anal swab area
7 and then followed up with the vaginal swab area,
8 correct?

9 A Yes.

10 Q So now moving on to the vaginal swabs of
11 Cherish Perrywinkle which were moved into evidence as
12 State's Exhibit 80, did you conduct DNA analysis on
13 those swabs?

14 A I did.

15 Q Okay. And were you able to obtain a full 15
16 marker DNA profile from the foreign DNA that was
17 obtained on those swabs?

18 A No. On the vaginal swabs I had an incomplete
19 foreign profile. So I was not able to get all the
20 results at all of the markers that I attempted.

21 Q What are some factors that can make a profile
22 incomplete with a foreign profile?

23 A Again, if there's just not enough of the
24 foreign profile present, it may result in a partial
25 profile. If it is a mixture of, in this instance,

1 Cherish Perrywinkle and the foreign profile, I may not
2 be able to differentiate what came from Ms. Perrywinkle
3 and what came from this foreign donor. I can see that
4 there are results there, that there is another person
5 there, but I can't always differentiate them.

6 MR. CALIEL: Your Honor, may I approach the
7 witness?

8 THE COURT: You may.

9 BY MR. CALIEL:

10 Q I'm now showing you what's been previously
11 marked for identification as 5-D. Do you recognize
12 that chart as you did the previous charts?

13 A I do.

14 Q And does State's Exhibit 5-D exactly
15 duplicate or replicate the work that you conducted on
16 the vaginal swabs in this particular case?

17 A Yes.

18 Q And does it demonstrate not only the foreign
19 profile but also the defendant's known profile in that
20 exhibit?

21 A Yes.

22 MR. CALIEL: Your Honor, at this point in
23 time I would move 5-D into evidence as I believe
24 107.

25 MS. SCHLAX: No legal objection.

1 MR. CALIEL: 107.

2 THE COURT: That will be entered as State's
3 107, 5-D.

4 (Whereupon the foregoing item was marked in
5 evidence as State's Exhibit 107.)

6 MR. CALIEL: As before, Your Honor, may I
7 have the witness step down and discuss the
8 exhibit?

9 THE COURT: You may.

10 BY MR. CALIEL:

11 Q State's Exhibit 80 were the vaginal swabs
12 taken from the victim. Can you explain to the jury
13 what's depicted in the chart, and explain specifically
14 where there were locations that you did not obtain all
15 the information for a full profile.

16 A Just like the previous charts, four columns,
17 the last column is Mr. Smith. The first column are the
18 markers that I tested. And then this second column is
19 the mixture I obtained from the vaginal swab. Again,
20 you see there are multiple areas that have more than
21 two alleles. And as you go down the chart for what I
22 pulled out as the foreign, after backing out her
23 profile that I expect to see on her vaginal swab, what
24 I'm left with at the first row is -- which is D8S1179,
25 10, 13 matches Mr. Smith. D21S11, 30, 30 matches

1 Mr. Smith. At D7SA20, the third of the markers, I have
2 a 10 plus. That means I know the foreign individual
3 had to donate the 10 to that mixture. The plus
4 indicates I don't know what the partner allele is. It
5 could be a 10, 10, it could be a 10, 11. It could be a
6 10, 12. I can't make that determination from that
7 mixture. There's just not enough information. It's
8 not distinguishable enough for me to know what that
9 extra allele is. I can compare that to Donald Smith
10 and see that it does have a 10, which matches him.
11 Because I don't know what that other allele is I cannot
12 make a comparison. This is considered as being a match
13 with him and inclusion with him because it's not a 10,
14 13 which would be different.

15 Q Let's talk about that. We've already talked
16 about profile matches and how the first two exhibits
17 matched him exactly. If one of these two alleles is
18 different than the defendant's in the foreign profile,
19 can you definitively exclude him as a contributor to
20 that mixture?

21 A Right. If I say this person has -- this
22 foreign donor has to have donated an allele that he
23 doesn't have, then it can't have been him that donated
24 it. By not knowing what that second allele is, it
25 doesn't exclude him, that says he still has the 10, so

1 he's still included there.

2 The next marker where I have the CSF1PO and it
3 says not determined, the results that I obtained were
4 an 11, 13. At that marker Cherish Perrywinkle is an
5 11, 13. So I can't make any determination as to what
6 the additional person donated. It turns out that
7 Mr. Smith has an 11, 13 so he's not excluded from that.
8 I can't make any determination as to what that foreign
9 person is there. And then the next one is D3S1358. I
10 was able to identify an 18 as a foreign individual.
11 What the partner is to that 18 I don't know. I can
12 still compare that to Mr. Smith. He is an 18. Also
13 there is a 16 within the profile. He's not excluded.
14 He would be included at that marker as well.

15 Q And was there another marker which was less
16 than an exact match to the defendant?

17 A Yes. Thank you.

18 D16S539 the foreign donor has to be an 11.
19 Again with these other ones there's a plus there
20 because I don't know what the extra -- the missing
21 allele is, the second allele or what we refer to as the
22 sister allele, but I can make that comparison to
23 Mr. Smith and see that he does have an 11 present.

24 Q Definitively, you cannot exclude Mr. Smith
25 from being a contributor to this profile, can you?

1 A That's correct. So when I calculate the
2 statistics for this match, the marker where I have no
3 determination would not be included in the statistical
4 calculations and then because there's only one allele
5 present at these others, that marker has less strength.
6 So if you looked at just the frequency of having two
7 markers present, a complete profile, that's going to be
8 more rare than if I look at where anybody would have an
9 18 present. So it's viewed statistically, it just
10 doesn't -- it doesn't have as much strength as having
11 both of these present.

12 Q Now, you may retake the witness stand.

13 Despite the fact that you didn't have a 15
14 profile match, given the information that you did
15 obtain from the foreign profile developed from the
16 vaginal smears, were you able to conduct a population
17 statistical analysis and determine how rare in the
18 population that profile was in comparison to Mr. Smith?

19 A Yes. A calculation, as I said, could be
20 calculated from those markers that are present and
21 those alleles that are present. At the time of
22 reporting I did not contemplate a separate statistic.
23 I just said it was consistent with the previous
24 profiles in which I calculated a complete statistic.
25 So I just reported that the profile, the foreign

1 profile from the vaginal swab is consistent with the
2 complete foreign profiles that I obtained from the neck
3 swab and the anal swab.

4 Q At a later point in time during the course of
5 discovery in this case did the State and defense both
6 ask you to go through that statistical analysis to see
7 how rare in the population it would be and what the
8 chance that that foreign profile in the vaginal area
9 was different than that of the defendant in this case,
10 Donald Smith?

11 A Yes.

12 Q And what was the statistical analyst based
13 upon that?

14 A That was one in 12 quadrillion.

15 Q And, again, quadrillion, if you can
16 demonstrate the number of zeros, how many zeros is
17 that?

18 A So we had hundred, thousand, million, billion,
19 trillion, quadrillion. I believe that's 18 zero.

20 Q So, again, with approximately seven billion
21 people on the face of the earth, it far exceeds the
22 number of people who actually walk this earth at this
23 point in time?

24 A That's correct.

25 Q So the likelihood that it was somebody other

1 than the defendant, Donald Smith, that deposited the
2 foreign profile that's within her vagina is -- again,
3 what were the numbers?

4 A One in 12 quadrillion.

5 Q And, again, you can't say it's an exact match
6 based upon the limited amount of information that was
7 obtained at those specific markers that you've
8 discussed?

9 A The results that I had, yes.

10 Q So to summarize your work in this case,
11 Ms. Lee, you were able to find the presence of semen on
12 multiple swabs, correct?

13 A Yes.

14 Q You then further analyzed those swabs that
15 contained some of the semen and where the sperm heads
16 were present to do the DNA analysis, correct?

17 A Yes.

18 Q And you were able to find full profile
19 matches on the DNA foreign samples in the victim's
20 rectal area and the touch DNA that was around her neck,
21 correct?

22 A Yes.

23 Q And then finally when it came to the vaginal
24 area, the statistics that you just reported, there was
25 a foreign profile that was consistent with the

1 defendant to those numbers in the quadrillions?

2 A Yes.

3 Q Thank you, ma'am.

4 MR. CALIEL: May I have a moment, Your Honor?

5 THE COURT: You may.

6 (State counsel conferring.)

7 MR. CALIEL: Your Honor, I have no further
8 questions at this time.

9 THE COURT: Any cross-examination?

10 MS. SCHLAX: Yes, Your Honor.

11 THE COURT: Okay.

12 CROSS-EXAMINATION

13 BY MS. SCHLAX:

14 Q Good afternoon, Ms. Lee.

15 A Good morning.

16 Q It's still morning. Yeah, good morning.

17 You were able to get a DNA profile in regards
18 to the touch DNA neck swab, correct?

19 A Yes.

20 Q So even though you've explained to us that
21 exposure to the elements, in this case submersion in
22 water, you were still able to get a full DNA sample?

23 A That's correct.

24 Q In regards to some of the other swabs that
25 you were given, specifically the right breast swabs and

1 left breast swabs, you did not find any DNA foreign to
2 Cherish Perrywinkle, did you?

3 A That's correct. I took samples from each of
4 those swabs through the DNA process and I did not
5 obtain any DNA profile. I did not have her profile or
6 any foreign profile present.

7 Q And same question in regards to her
8 fingernail clippings.

9 A On her fingernail clippings the samples that I
10 took through the DNA process, I was able to develop a
11 DNA profile that was consistent with Cherish
12 Perrywinkle. I did not have anything foreign on those.

13 Q Meaning you were able to get her full profile
14 and so DNA was there?

15 A Correct.

16 Q But nothing foreign to Cherish Perrywinkle
17 underneath her nails?

18 A That's correct. I did not develop a foreign
19 profile.

20 Q Okay.

21 MS. SCHLAX: I don't have anything further,
22 Your Honor.

23 THE COURT: Any redirect?

24 MR. CALIEL: Just briefly, Your Honor.

25 REDIRECT EXAMINATION

1 BY MR. CALIEL:

2 Q Does the amount of DNA that was originally
3 deposited affect whether or not DNA will be found when
4 you later look at the samples?

5 A Yes.

6 Q So if more DNA is deposited in a specific
7 location, such as the anus or the neck area, then the
8 likelihood, despite the elements, are that you may get
9 profiles because there's more DNA there in the first
10 place?

11 A Yes.

12 Q Thank you.

13 MR. CALIEL: I don't have any further
14 questions.

15 THE COURT: Anything further?

16 MS. SCHLAX: Nothing further, Your Honor.

17 THE COURT: Okay. May this witness be
18 excused?

19 MR. CALIEL: She may be, Your Honor.

20 THE COURT: Thank you, Ms. Lee. We
21 appreciate your time this morning.

22 Can I see the attorneys at side-bar regarding
23 scheduling? I don't need the court reporter.

24 (Counsel for the State and defense approached
25 the bench for a side-bar conference out of the

1 hearing of the jury and court reporter.)

2 THE COURT: All right. Ladies and gentlemen,
3 after talking to the attorneys, it looks like this
4 is a natural time for us to take a break for
5 lunch.

6 Let me ask you, did any of you try to leave
7 and go somewhere outside the building for lunch
8 yesterday? Did you have -- would you have needed
9 a little more time than you had?

10 JUROR: I was just right across the street.

11 THE COURT: You were just right across the
12 street. Okay. I looked at the weather. I think
13 it's okay. I don't think it's raining. But I
14 think what I'll do is ask you to be back at 1:15.
15 That gives you an hour and 20 minutes. You can
16 get out and walk a little bit, go a little bit
17 further if you want. You can go to lunch together
18 or separately. You can stay in the jury room, but
19 if you stay in the jury room you can't leave once
20 you make that decision. You can go downstairs and
21 get something and bring it back, because once you
22 come back you can't leave. And you can go to
23 lunch together, as I said, or separately, but you
24 cannot discuss the case among yourselves.

25 And do not get any information about the case

1 from any outside source.

2 So with that I'll see you back at 1:15. Thank
3 you.

4 (Jury absent.)

5 THE COURT: All right. Is there anything we
6 need to put on the record before we recess?

7 MS. SCHLAX: No, Your Honor.

8 MR. CALIEL: No, Your Honor. I just would
9 remind the Court that our second witness after
10 lunch break is the confidential witness or the
11 undercover witness and so I'll just remind the
12 Court at that time.

13 THE COURT: Okay. Mr. Smith is here and
14 he'll know to cut the feed for the second witness
15 after lunch.

16 And with that we'll be in recess. They're
17 coming back at 1:15. We'll come back at ten after
18 1:00 to get ready. Thank you. Be in recess.

19 (Noon recess.)

20 (Defendant present.)

21 THE COURT: Are you all ready when they're
22 ready?

23 MR. CALIEL: Yes, Your Honor.

24 MS. SCHLAX: Yes, Your Honor.

25 THE COURT: We should be ready in just a

1 moment.

2 MS. SCHLAX: Your Honor, we're aware that the
3 next three witnesses will deal with [REDACTED]
4 We'd just like the record to be absolutely crystal
5 clear that we are renewing both our motion to
6 suppress as well as the motion in limine in
7 regards to this particular piece of evidence.

8 THE COURT: Thank you. It's on the record.

9 BAILIFF: They're ready, ma'am.

10 THE COURT: All right.

11 BAILIFF: The jury's entering the courtroom.

12 (Jury present.)

13 THE COURT: Thank you, ladies and gentlemen.
14 You may be seated.

15 MR. CALIEL: Your Honor, the State would call
16 Robert Hinson to the stand.

17 THE COURT: Okay. Before he comes in, I just
18 need to ask one question. Was everybody able to
19 follow my instructions about not getting any
20 information outside of the courtroom on this case?

21 (Affirmative response from jurors.)

22 THE COURT: Is there anyone who did not
23 follow that instruction?

24 (No response from jurors.)

25 THE COURT: And the record will reflect that

1 no one has raised their hand.

2 Okay. You may proceed.

3 (Witness present.)

4 THE COURT: Good afternoon, sir. Madam Clerk
5 will swear you in.

6 (Witness sworn.)

7 THE WITNESS: I do.

8 THE COURT: Have a seat over here.

9 MR. CALIEL: May it please the Court.

10 THE COURT: Yes.

11 ROBERT HINSON,

12 was called as a witness on behalf of the State, and after
13 being duly sworn, then testified as follows:

14 DIRECT EXAMINATION

15 BY MR. CALIEL:

16 Q Good afternoon, sir.

17 A Good afternoon.

18 Q Can you please introduce yourself to the
19 members of the jury and spell your name for the court
20 reporter.

21 A My name is Robert Hinson, it's H-i-n-s-o-n.

22 Q Sir, what's your occupation?

23 A I'm a hospital pastor with one of our local
24 churches.

25 Q Prior to taking that position, were you

1 employed with the State Attorney's Office back in 2015?

2 A Yes, I was.

3 Q How long did you work with the State
4 Attorney's Office?

5 A From December of 2012 until the end of August
6 of 2017.

7 Q Prior to working with the State Attorney's
8 Office, did you have a career in law enforcement?

9 A Yes, sir, I did.

10 Q Where did you work before the State
11 Attorney's Office?

12 A For 27 years with the Jacksonville Sheriff's
13 Office, 26 to 27 years with the Jacksonville Sheriff's
14 Office.

15 Q During your term with the Jacksonville
16 Sheriff's Office, did you spend time as a homicide
17 investigator?

18 A Yes, sir, I did.

19 Q And, in fact, in the year of 2015, were you
20 assigned to me as a homicide investigator with the
21 State Attorney's Office?

22 A Yes, sir, I was.

23 Q Sir, I'd like to direct your attention to
24 April of 2015. Did there come a time when information
25 was brought to the State Attorney's Office's attention

1 from the Duval County Jail?

2 A Yes, sir.

3 Q Can you please explain how that information
4 came forward.

5 A We received information that the defendant,
6 Mr. Smith, and another inmate were talking through --
7 between two cells, isolation cells, through some chase,
8 from the informant. At that point in time we developed
9 an idea of how we wanted to possibly memorialize or
10 obtain that information if that conversation was taking
11 place.

12 Q Now, the information that we received was
13 from a confidential informant inside the jail, is that
14 correct?

15 A That's correct, yes, sir.

16 Q And at this point when the informant told you
17 about this, did he indicate that the defendant may be
18 talking about the facts and circumstances of his case?

19 A Yes, sir. There was a possibility that he was
20 doing that. Also that there possibly was some
21 conversation about disrupting court proceedings and
22 things. We just weren't sure what kind of information
23 we were going to get so when we decided to come up with
24 this idea of [REDACTED] to try to get
25 this information or obtain this conversation, that's

1 how we came up with it.

2 Q Okay. And the information was obtained with
3 you and myself present from that confidential
4 informant, is that correct?

5 A That is correct, yes, sir.

6 Q That took place in April. After April of
7 2015, what efforts did you make to investigate [REDACTED]
8 [REDACTED]
9 [REDACTED]?

10 A I spoke with jail intelligence officer Charles
11 Carter. He's familiar with the isolation cells and how
12 they're set up. I was not. How the layout was, how
13 the cells were adjacent to each other, and so I
14 approached him as far as talking about trying to get in
15 and look at the cell or an area -- or how we could
16 possibly [REDACTED].

17 I also went, after having him photograph the
18 cell and memorializing that, I went to a technical
19 support detective and asked him if there was -- what

20 [REDACTED]
21 [REDACTED] o
22 [REDACTED]
23 [REDACTED]
24 [REDACTED]? And
25 according to [REDACTED] who was helping me

1 with this, [REDACTED] So
2 he had -- after talking to him, [REDACTED] some of
3 that.

4 Q And when we're talking specifically about the
5 information that we obtained about how the conversation
6 was taking place, purportedly the inmates were
7 communicating back and forth [REDACTED]
8 [REDACTED] s?

9 A That's correct. The cells were set up in such
10 a way that [REDACTED]
11 [REDACTED] I'm not sure of the exact dynamic of it,

12
13
14
15
16
17

18 [REDACTED] if there was any conversation
19 taking place.

20 Q Eventually through the help of the technical
21 support unit of the Jacksonville Sheriff's Office, [REDACTED]
22 [REDACTED]
23 [REDACTED] ?

24 A Yes.

25 Q Directing your attention to June 23rd of

1 2015, through arrangements with the other detectives,

2

3 [REDACTED] within the Duval County Jail?

4 A Yes.

5 Q [REDACTED]

6 [REDACTED]

7 [REDACTED]?

8 A Yes.

9 Q As a part of your duties with the State
10 Attorney's Office, did you, in fact, listen to all the
11 hours that were captured [REDACTED]
12 [REDACTED] that took place?

13 A That's correct. I believe it was 74 and a
14 half hours I listened to.

15 Q And out of that time frame, did you identify
16 specific portions that were relevant to the case of the
17 State of Florida versus Donald Smith?

18 A I did.

19 MR. CALIEL: Your Honor, may I approach the
20 witness?

21 THE COURT: You may.

22 BY MR. CALIEL:

23 Q Detective, I'm now showing you what's been
24 previously marked for identification purposes as five
25 K. Do you recognize that disk?

1 A Yes, sir, that's the disk I signed.

2 Q Okay. And prior to coming to court, did you
3 have the opportunity to listen to the contents of five
4 K and identify that that was, in fact, the results of
5 [REDACTED] that was obtained during the
6 days between June 23rd of 2015 and June 30th of 2015?

7 A Yes.

8 Q And these specific clips were exact
9 recordings just four separate clips from that time
10 frame?

11 A That's correct.

12 Q Thank you. Thank you, Detective.

13 MR. CALIEL: I don't have any further
14 questions at this time.

15 THE COURT: Thank you.

16 Cross-examination?

17 MR. FLETCHER: No, Your Honor.

18 THE COURT: May this witness be excused?

19 MR. CALIEL: He may be, Your Honor.

20 THE COURT: Thank you. Appreciate your time
21 today.

22 THE WITNESS: Thank you.

23 THE COURT: You may call your next witness.

24 MR. CALIEL: Your Honor, at this point in
25 time we just need a moment. The next witness is

1 an undercover officer and we need to kill some
2 video equipment in the courtroom.

3 THE COURT: Okay.

4 (Brief pause.)

5 MR. CALIEL: Detective [REDACTED]

6 (Witness present.)

7 THE COURT: Good afternoon, Detective.

8 THE WITNESS: Good afternoon.

9 THE COURT: The clerk will swear you in.

10 (Witness sworn.)

11 THE WITNESS: I do.

12 THE COURT: Thank you. If you'll have a seat
13 over here, please. Thank you.

14 MR. CALIEL: May it please the Court.

15 THE COURT: Yes.

16

17 was called as a witness on behalf of the State, and after
18 being duly sworn, then testified as follows:

19 DIRECT EXAMINATION

20 BY MR. CALIEL:

21 Q Good afternoon, sir.

22 A Good afternoon.

23 Q Can you please introduce yourself to the
24 members of the jury.

25 A I'm Detective [REDACTED] with the Jacksonville

1 Sheriff's Office.

2 Q Can you spell your name, first and last, for
3 the court reporter.

4 A It's [REDACTED]
5 [REDACTED]

6 Q And how long have you been employed with the
7 Jacksonville Sheriff's Office?

8 A 23 years.

9 Q What's your current assignment within the
10 Sheriff's Office?

11 A I'm assigned to the technology support unit.

12 Q What does that assignment entail? How do you
13 conduct your day-to-day activities?

14 A We're attached to the narcotics units and then
15 we -- we do covert investigations.

16 Q And without divulging anything specific about
17 those covert investigations, do you also assist other
18 units and other agencies if, in fact, recording
19 equipment and things of that nature are needed to
20 follow-up on other investigations?

21 A Yes, I do.

22 Q Were you, in fact, contacted by Detective
23 Hinson from the State Attorney's Office in regards to
24 the case of the State of Florida versus Donald Smith?

25 A I was.

1 Q And based upon your conversations with
2 Detective Hinson, did you start to investigate [REDACTED]
3 [REDACTED]
4 [REDACTED]
5 within the Duval County Jail?

6 A I did.

7 Q What did you do to try to find [REDACTED]
8 [REDACTED]?

9 A I met with Detective Hinson who showed me
10 photographs of what we were looking at, the location,
11 and then from that [REDACTED]
12 [REDACTED].

13 Q Once the equipment was secured, did you,
14 along with Officer Carter from the Duval County Jail,
15 make arrangements for you to go in an undercover
16 capacity and place recording equipment within the pipe
17 chases in between the cells where Donald Smith and
18 another inmate were housed?

19 A That's correct.

20 Q How -- how did you go in without people
21 noticing who you were and what you were doing?

22 A [REDACTED]
23 [REDACTED]
24 [REDACTED]

25 Q Okay. And, you know, so typically if

1

2

3

4 A That's correct.

5 MR. CALIEL: Your Honor, may I approach the
6 witness?

7 THE COURT: You may.

8 BY MR. CALIEL:

9 Q I'm showing you a series of photographs that
10 are listed for identification, that are marked for
11 identification purposes as State's 5-E through State's
12 5-J. If you could please review those photographs.

13 (Witness examining exhibits.)

14 BY MR. CALIEL:

15 Q And, Detective, do the photographs that you
16 just reviewed fairly and accurately depict [REDACTED]

17

18

19

20 A They do.

21 MR. CALIEL: Your Honor, at this point in
22 time we would move into evidence State's E through
23 State's -- State's 5-E through State's 5-J as the
24 next sequential numbered exhibits.

25 MR. FLETCHER: No objection, Your Honor.

1 THE COURT: That would be subject to prior
2 objections, is that correct?

3 MR. FLETCHER: Yes, Your Honor.

4 THE COURT: Okay. 5-E would be 108, 5-F 109,
5 5-G 110. 5-H 111. 5-I 112 and 5-J 113 in
6 evidence.

7 (Whereupon the foregoing items were marked in
8 evidence as State's Exhibit 108 thru 113,
9 respectively.)

10 BY MR. CALIEL:

11 Q And, Detective, directing your attention to
12 the screen in front of you on the witness stand, I'm
13 now showing you what's been previously marked in
14 evidence as State's Exhibit 108. Could you please
15 describe what's depicted in this photograph.

16 A That's a door [REDACTED]

17 Q And is that door in the cellblock area in
18 between the particular cells in question in this case?

19 A Yes, it is.

20 Q Now showing you what's been marked as State's
21 Exhibit 109 in evidence. Please describe what's
22 depicted in that photograph.

23 A [REDACTED]

24 [REDACTED]

25 Q Now moving on to State's Exhibit 110. Could

1 you please describe what's depicted in that photograph?

2 A [REDACTED]

3 [REDACTED]

4 Q And were you able to actually [REDACTED]

5 [REDACTED]?

6 A Yes, sir, I was.

7 Q And so once you [REDACTED]

8 [REDACTED]

9 [REDACTED]

10 [REDACTED] that we're talking about here (indicating)?

11 A Yes.

12 Q And were you hoping that by doing so that

13 [REDACTED]

14 [REDACTED] was going to be

15 communications between the parties?

16 A Yes.

17 Q Moving on to State's Exhibit 111, can you
18 please describe what's depicted in this photograph.

19 A That's the inner cell of where the inmates
20 were placed in solitary.

21 Q And so this is the cell that shows from the
22 door looking into the actual cellblock or cell itself,
23 the housing area itself?

24 A Yes, sir.

25 Q And depicted [REDACTED]

1 (indicating) of that photograph, that the other side of
2 the vent that we just looked at, we're going back and
3 looking in State's Exhibit 110, is that the cell side
4 of that air vent which is depicted in the pipe chase?

5 A That is correct.

6 Q And, again, now showing what's been marked as
7 State's Exhibit 112, is this just a closer view from
8 inside the cell of that particular air vent?

9 A Yes.

10 Q State's Exhibit 113. Again, just a closer
11 viewpoint as to where that vent is located within the
12 cell?

13 A Yes.

14 Q On June 23rd of 2015, did you [REDACTED]
15 [REDACTED]
16 try to record possible conversation between the inmates
17 housed in those adjacent cells?

18 A I did.

19 Q And after approximately [REDACTED]
20 days of the time frame, did you go back in [REDACTED]
21 [REDACTED]?

22 A That is correct.

23 Q [REDACTED]
24 [REDACTED]
25 [REDACTED] correct?

1 A That's correct.

2 Q So you couldn't some place else [REDACTED]
3 [REDACTED] see what they were talking about?

4 A Correct.

5 Q So at some point in time after [REDACTED]
6 [REDACTED]
7 you, in fact, listen to portions of the recording [REDACTED]
8 [REDACTED] during that time
9 frame?

10 A Yes.

11 MR. CALIEL: Your Honor, may I approach the
12 witness?

13 THE COURT: You may.

14 BY MR. CALIEL:

15 Q Now showing you what's been previously marked
16 for identification purposes as five K. It's a disk.
17 Do you recognize that disk, sir?

18 A Yes, sir.

19 Q How do you recognize it?

20 A My initials and ID numbers are on the disk.

21 Q Prior to coming to court today, did you have
22 the occasion to listen to the excerpts from that disk
23 that you've marked with your initials and determine
24 that, in fact, they're exact copies or portions of the
25 footage that you obtained [REDACTED]

1

2

3 A I did.

4 Q Thank you.

5 and you'd tendered that back over to
6 Detective Hinson of the Jacksonville Sheriff's
7 Office --

8 A That's correct.

9 Q -- did you that conclude your investigation
10 in this case?

11 A Yes.

12 Q Thank you, sir.

13 MR. CALIEL: I don't have any further
14 questions.

15 THE COURT: Any cross-examination?

16 MR. FLETCHER: No, Your Honor.

17 THE COURT: May this witness be excused?

18 MR. CALIEL: He may be, Your Honor.

19 THE COURT: Thank you, sir. I appreciate
20 your time.

21 We just need a moment to hook those back up.

22 (Brief pause.)

23 MR. CALIEL: Your Honor, after a portion of
24 this testimony we'll be playing a recording so if
25 we could pass out the earbuds.

1 THE COURT: Okay. So you don't need them
2 immediately, but you will during the next
3 testimony. We'll give them to you now.

4 MR. CALIEL: Your Honor, the State would next
5 call Officer Charles Carter to the witness stand.

6 THE COURT: Officer Carter.

7 (Witness present.)

8 THE COURT: Good afternoon. Come in front of
9 me, Madam Clerk will swear you in.

10 (Witness sworn.)

11 THE WITNESS: Yes, ma'am.

12 THE COURT: Thank you. If you'll have a seat
13 over here, please. Thank you.

14 MR. CALIEL: May it please the Court.

15 THE COURT: Yes.

16 CHARLES CARTER,

17 was called as a witness on behalf of the State, and after
18 being duly sworn, then testified as follows:

19 DIRECT EXAMINATION

20 BY MR. CALIEL:

21 Q Sir, can you please introduce yourself to the
22 members of the jury and spell your name for the court
23 reporter.

24 A Yes. My name is Officer Carter. Work for the
25 Jacksonville Sheriff's Office in the Department of

1 Corrections in the intelligence unit.

2 Q And, Officer Carter, what's your first name?

3 A Charles.

4 Q Thank you.

5 Can you please explain to me your duties in
6 working at the Duval County Jail.

7 A Yes, sir. I do anything from assisting other
8 divisions inside the Sheriff's Office, anything from
9 gang units to violent crimes, anything they need help
10 with.

11 Q How long have you been employed with the
12 Jacksonville Sheriff's Office?

13 A Eight years and almost a month.

14 Q And during the time frame between June of
15 2013 to present time, have you been assigned to the
16 Duval County Jail?

17 A Yes, sir.

18 Q Specifically let me direct your attention to
19 the April to June time frame of 2015. Were you
20 contacted by Investigator Robert Hinson from the State
21 Attorney's Office in regards to a possible
22 investigation?

23 A Yes, sir.

24 Q And how did you assist Investigator Hinson in
25 following through with that investigation?

1 A They were asking for some questions about
2 taking pictures of a -- or I-block cells where inmates
3 are housed [REDACTED]
4 inside there, if need be, for a potential case they
5 were working on.

6 Q And did you assist in providing those
7 photographs and working with the technical support
8 unit?

9 A Yes, sir.

10 Q I'd now like to show you what's been
11 previously marked and moved into evidence as State's
12 Exhibit 108. Could you please describe to the jury
13 what is depicted in this photograph.

14 A That is a picture inside of our housing units.
15 It's a door that loads to the vent system where piping
16 is for water and for air vents.

17 Q This hallway where the person obviously is
18 standing where the photographs taken from, what is in
19 that hall area? What can you see in that hallway?

20 A That -- that is inside of a door. It's a
21 housing unit where inmates are housed.

22 Q And from the isolation cells, is there -- are
23 the windows out towards the dorm area itself?

24 A Yes, sir. Inside the I-block cells those have
25 a window in front that faces out.

1 Q And did that also have access or vantage
2 points to the elevator area and security vestibule area
3 where at times jail tours and things of that nature are
4 taking place?

5 A Yes, sir.

6 Q So there is a line of sight from inside the
7 isolation cell to outside where the elevator area and
8 vestibule area is located?

9 A Yes, sir.

10 Q Now showing you what's been previously marked
11 and moved into evidence as State's Exhibit 109. Could
12 you describe what's depicted in that photograph.

13 A Yes, sir. That's the piping for the water and
14 the electrical for the lights and things that are in
15 there for the toilets and things of that nature.

16 Q And where do these air vents actually lead
17 to? I know you followed up and looked through this.
18 Where did, I guess the air vents, from the cell then
19 lead to that exhaust out of the building?

20 A Yes, sir, they lead straight to the roof.

21 Q So this ventilation system then goes straight
22 up to the roof?

23 A Yes, sir.

24 Q Showing you now what's been previously marked
25 and moved into evidence as State's Exhibit 110.

1 Describe what's depicted in this photograph.

2 A The grates on the left and right would be the
3 air vents that are leading to both the I-block cells
4 that are housed beside each other.

5 Q Okay. So this where I put an R and I put an
6 L, those are the two grates that you're referring to?

7 A Yes, sir.

8 Q And so this pipe shape, it's sort of
9 triangular in nature in that they are isolating cells,
10 I guess share that common area, only separated by the
11 pipe chase?

12 A Yes, sir.

13 Q So the ventilation on the left leads to one
14 cell, the ventilation on the right leads to another
15 cell?

16 A Yes, sir.

17 Q That based upon information that was
18 obtained, did you work with [REDACTED] from the
19 technical support unit to try to figure out a method [REDACTED]
20 [REDACTED]?

21 A Yes, sir.

22 Q And did you actually assist him in entering
23 into the dorm [REDACTED]

24 [REDACTED]
25 where the defendant, Donald Smith, was located and then

1 another inmate?

2 A Yes, sir.

3 Q That brings me to a good point. You've been
4 working at the jail throughout the entire time frame
5 since June of 2013?

6 A Yes, sir.

7 Q During your work with the Jacksonville
8 Sheriff's Office did you become acquainted and have you
9 met the defendant in this case, Donald Smith?

10 A I haven't sat down and spoke with him or
11 anything, but I've heard him before, yes, sir.

12 Q Okay. And you've heard him interact with
13 other individuals?

14 A Yes, sir.

15 Q And this is over the long period of time in
16 between 2013 and today?

17 A Yes, sir. Just as where he's housed, it's a
18 walkway for everyone when you come straight off the
19 elevator.

20 Q Do you see the person who you know as Donald
21 Smith located here in this courtroom today?

22 A Yes, sir, right there.

23 Q Could you point him out and describe where
24 he's seated and what he's wearing.

25 A Yes, sir, he's to the left wearing a tannish

1 shirt with a blue-and-green tie.

2 Q Based upon working over the last four years
3 in the proximity where Mr. Smith is housed and working
4 in that housing unit, can you easily recognize his
5 voice?

6 A Yes, sir.

7 Q Now, on June 23rd, did you and [REDACTED]
8 [REDACTED] in the
9 cells where Donald Smith and another inmate were
10 housed?

11 A Yes, sir.

12 Q And about seven days later did you go back
13 [REDACTED] those
14 two cells?

15 A Yes, sir.

16 Q And during that entire time frame, was
17 Mr. Smith and the other inmate located within those
18 cells once they were moved into those cells [REDACTED]
19 [REDACTED]?

20 A Yes, sir.

21 MR. CALIEL: Your Honor, may I approach --
22 hold on one second beforehand.

23 BY MR. CALIEL:

24 Q Moving on to State's Exhibit 111, does this
25 basically show the interior of that isolation cell that

1 you're talking about?

2 A Yes, sir.

3 Q Where in this photograph, and you can depict
4 it by marking on the screen in front of you, where is
5 that air vent we were just talking about?

6 A It would be right here (indicating).

7 Q And then moving on to State's Exhibit 112, is
8 that just a closer viewpoint of that air vent?

9 A Yes, sir.

10 Q And, again, State's 113, just another vantage
11 point a little bit closer. That's directly above the
12 mirror and the sink and the bathroom facilities of that
13 cellblock, correct?

14 A Yes, sir.

15 MR. CALIEL: Your Honor, may I approach the
16 witness?

17 THE COURT: You may.

18 BY MR. CALIEL:

19 Q I'm now showing you what's been previously
20 marked for identification purposes as five K. Do you
21 recognize that disk?

22 A Yes, sir.

23 Q How do you recognize that?

24 A I signed the top line.

25 Q Prior to coming to court today, did you have

1 the opportunity to listen to the contents of recordings
2 that have been obtained on this disk and verify that
3 they were accurately obtained?

4 A Yes, sir.

5 Q Okay. And have you been -- had the
6 opportunity to identify those parties on that disk?

7 A Yes, sir.

8 Q And were you able to identify the parties on
9 that disk?

10 A Yes, sir.

11 Q Is this an exact recording [REDACTED]
12 [REDACTED] in the days
13 between June 23rd and June 25th of 2015?

14 A Yes, sir.

15 MR. CALIEL: Your Honor, at this point in
16 time we would move into evidence State's Exhibit
17 5-K as the next numbered exhibit.

18 MR. FLETCHER: Subject to our previous
19 objection, Judge, thank you.

20 THE COURT: All right. Over the previous
21 objection it will be admitted as State's Exhibit
22 114.

23 (Whereupon the foregoing item was marked in
24 evidence as State's Exhibit 114.)

25 THE COURT: Do they need to --

1 MR. CALIEL: Your Honor, at this point in
2 time I would ask that the jury members put on
3 their earphones. Make sure they're on as well.

4 THE COURT: Look and make sure that they're
5 on.

6 MR. CALIEL: With the Court's permission, may
7 I publish the exhibits to the jury?

8 THE COURT: You may.

9 (Whereupon the recording was played and
10 transcribed by court reporter as follows:)

11 VOICES ON RECORDING: (Inaudible). Yeah.
12 Look at that girl (inaudible) looking like that,
13 man, with fake eyelashes. See, her (inaudible)
14 should be the same. (Inaudible) yeah.

15 (Recording stopped.)

16 MR. CALIEL: Hold on one second.

17 (Whereupon the recording was played and
18 transcribed by court reporter as follows:)

19 VOICE ON RECORDING: Yeah. You should --

20 (Recording stopped.)

21 MR. CALIEL: I apologize, Your Honor. They
22 were having some technical difficulty.

23 (Whereupon the recording was played and
24 transcribed by court reporter as follows:)

25 VOICE ON RECORDING: The one in the back.

1 (Recording stopped.)

2 MR. CALIEL: Detective Carter, the voice that
3 you just heard that said the "one in the back," is
4 that the inmate who was housed directly adjacent
5 to the defendant Donald Smith?

6 THE WITNESS: Yes, sir.

7 (Whereupon the recording was played and
8 transcribed by court reporter as follows:)

9 VOICES ON RECORDING: Yeah (inaudible) turn
10 around, man. (Inaudible) these are young girls,
11 you hear, they're young, man. You look at a
12 girl's ass, you like, oh, oh, oh. You know how
13 old they are? About 12. 12, 13. But (inaudible)
14 on her ass.

15 (Recording stopped.)

16 BY MR. CALIEL:

17 Q The second voice that's on that recording, is
18 that the voice of Donald Smith?

19 A Yes, sir.

20 Q Okay. The person who said they're about 12?

21 A Yes, sir.

22 (Whereupon the recording was played and
23 transcribed by court reporter as follows:)

24 VOICES ON RECORDING: Yeah. You (inaudible).
25 Yeah. That's right in my alley right there.

1 (Inaudible) that's my target area right there.

2 That's what I like. (Inaudible) you would have
3 fun with that one.

4 (Recording stopped.)

5 BY MR. CALIEL:

6 Q Officer Carter, the person who said "that's
7 my target area, that's what I go after," whose voice
8 was that?

9 A The defendant's.

10 (Whereupon the recording was played and
11 transcribed by court reporter as follows:)

12 VOICES ON RECORDING: Are you sure that she's
13 12. Yeah. That's right in my alley, right there.
14 Huh? That's my target area right there. That's
15 what I like. (Inaudible) you would have fun with
16 that one. See, her (inaudible). (Inaudible) I
17 like that, man, with fake eyelashes, fake
18 ponytails, fake hair. Fake (inaudible). I'd like
19 to run into her at Walmart.

20 (Recording stopped.)

21 BY MR. CALIEL:

22 Q Officer Carter, the voice that just said "I'd
23 like to run into her at Walmart," is that the voice of
24 the defendant?

25 A Yes, sir.

1 (Whereupon the recording was played and
2 transcribed by court reporter as follows:)

3 VOICES ON RECORDING: (Inaudible) that's
4 ridiculous. (Inaudible) yeah. Cherish
5 (inaudible). Cherish had some butt on her. Yeah.
6 (Inaudible).

7 (Recording stopped.)

8 BY MR. CALIEL:

9 Q Let me just inquire. The voice that we just
10 hear that said "Cherish had some butt on her," that was
11 not this defendant, correct?

12 A Yes, sir.

13 Q That was the other inmate in the adjacent
14 cell?

15 A Yes, sir.

16 (Whereupon the recording was played and
17 transcribed by court reporter as follows:)

18 VOICES ON RECORDING: She didn't have nothing
19 like that, though. By golly, she ain't black.
20 She had a lot for a white girl.

21 (Recording stopped.)

22 BY MR. CALIEL:

23 Q The last voice that was depicted there that
24 said "'cause she ain't black, but she had a lot for a
25 white girl," is that the voice of this defendant?

1 A Yes, sir.

2 Q Officer Carter, this recording was made two
3 years after the defendant was arrested, wasn't it?

4 A Yes, sir.

5 Q Thank you.

6 MR. CALIEL: I don't have any further
7 questions.

8 THE COURT: Any cross-examination?

9 MR. FLETCHER: No questions, Judge.

10 THE COURT: All right. Thank you.

11 May the witness be excused?

12 MR. CALIEL: He may.

13 THE COURT: Thank you, sir. We appreciate
14 your time.

15 MR. CALIEL: Your Honor, at this time the
16 State of Florida will rest.

17 THE COURT: All right. Thank you, Mr.
18 Caliel.

19 Ladies and gentlemen of the jury, step into the
20 jury room. I'm not sure how long this will take.
21 We'll have you back out as quick as we can. Thank
22 you.

23 It'll be at least ten -- you have time to use
24 the restroom.

25 (Jury absent.)

1 MS. SCHLAX: Your Honor, we'd move for a
2 judgment of acquittal.

3 THE COURT: Okay. Do you have any argument
4 on the motion?

5 MS. SCHLAX: No, Your Honor.

6 MR. CALIEL: Your Honor, based upon the
7 standard of proof at this time, we believe the
8 State of Florida has met its standard. Not only
9 have we established a prima facie, but we believe
10 we have established a case of proof beyond a
11 reasonable doubt as to all charges against the
12 defendant.

13 THE COURT: All right. I'm deny the motion
14 for judgment of acquittal and find that the
15 evidence thus far taken in the light most
16 favorable to the State does present a prima facie
17 case.

18 Do you have any witnesses other than whether or
19 not Mr. Smith wants to testify?

20 MS. SCHLAX: No, Your Honor. After
21 consultation with my client, we will not be
22 presenting any witnesses.

23 THE COURT: Okay. Let's take a break so you
24 can speak with him about his options and if you'll
25 tell me how long you need, that's how long I'll

1 take.

2 MS. SCHLAX: We have had an opportunity to
3 discuss this prior to the beginning of trial and
4 throughout the trial. But --

5 THE COURT: Maybe a ten-minute recess?

6 MS. SCHLAX: That's fine.

7 THE COURT: Okay. We'll be in recess for ten
8 minutes. We need to clear the courtroom so they
9 can have their discussion.

10 (Recess.)

11 (Defendant present.)

12 MS. SCHLAX: Your Honor, we are ready to
13 proceed. We will not be calling any witnesses.

14 THE COURT: Okay.

15 Mr. Smith, you're already under oath from
16 earlier today, correct?

17 THE DEFENDANT: Yes, ma'am.

18 THE COURT: Your attorney has indicated you
19 have told them you do not wish to call any
20 witnesses on your behalf in this case, is that
21 correct?

22 THE DEFENDANT: Yes, ma'am.

23 THE COURT: They've also indicated that you
24 do not wish to testify, is that correct?

25 THE DEFENDANT: That's correct.

1 THE COURT: Okay. And you'll recall during
2 jury selection I read the jury a portion of the
3 instructions which I also read to them before we
4 started the trial that you have an absolute right
5 to remain silent, you're not required to present
6 evidence or witnesses or testimony or do anything,
7 it's up to the State, it's their burden of proof.
8 Do you understand that?

9 THE DEFENDANT: Yes, ma'am.

10 THE COURT: You do, however, if you wish,
11 have the right to testify in your own defense, but
12 you've indicated you do not wish to do that, is
13 that correct?

14 THE DEFENDANT: That's correct.

15 THE COURT: And you also have a right to
16 present witnesses, but you've also indicated you
17 do not wish to do that, is that correct?

18 THE DEFENDANT: That's correct, also.

19 THE COURT: And you're 61?

20 THE DEFENDANT: That's correct.

21 THE COURT: I didn't phrase that very well.
22 You're 61 years of age, correct?

23 THE DEFENDANT: Old.

24 THE COURT: And we've talked about your work
25 and education history in the past. I know you

1 have a high school diploma. I can't remember if
2 you have any college or skills training.

3 THE DEFENDANT: I do.

4 THE COURT: Okay. And you've worked at
5 various jobs, is that correct?

6 THE DEFENDANT: Yes, ma'am.

7 THE COURT: Have you had any difficulty
8 understanding anything about the proceedings?

9 THE DEFENDANT: No, ma'am.

10 THE COURT: Have you had any difficulty
11 understanding about your right to testify or not
12 testify, that you have a right to remain silent?

13 THE DEFENDANT: That was a lot of questions,
14 but I understand what you said. Yes, I
15 understand. I don't want to testify.

16 THE COURT: And you have the right to remain
17 silent?

18 THE DEFENDANT: And I have the right to
19 remain silent.

20 THE COURT: Any other questions about that?

21 THE DEFENDANT: I don't.

22 THE COURT: Okay. Did you have enough time
23 to discuss this with your attorneys before you
24 told me your decision?

25 THE DEFENDANT: Yes, ma'am.

1 THE COURT: Is there anything else you want
2 to ask them before I accept your decision?

3 THE DEFENDANT: No.

4 THE COURT: I do find that Mr. Smith has
5 freely and voluntarily electing to -- to
6 participate in his right to remain silent as well
7 as to not present any witnesses for a defense
8 case.

9 That means that we're through with the
10 testimony. I'll be sending the jury home today.
11 We'll be meeting right after that in here just to
12 formalize the jury instructions that they'll be
13 given. They'll come back tomorrow, there'll be
14 closing arguments from the State, the defense and
15 the State, and then I'll instruct them and they'll
16 deliberate. Do you understand all that?

17 THE DEFENDANT: Yes, ma'am.

18 MR. CALIEL: Your Honor, the only other
19 inquiry, because it will affect your excusal of
20 the jurors, is whether or not there's going to be
21 a waiver of sequestration during deliberations.
22 We don't know how long they're going to take, but
23 if there's no waiver of sequestration we might
24 want to have them come prepared tomorrow in the
25 event that they do not reach a decision before the

1 close of business.

2 MS. SCHLAX: Your Honor, my client and I have
3 had an opportunity to discuss it. We'll waive
4 sequestration.

5 THE COURT: And you're only waiving it at
6 this point just for the deliberations on the guilt
7 phase?

8 MS. SCHLAX: Correct.

9 THE COURT: I'm not asking you to do anything
10 further than that at this point.

11 Is that correct, sir?

12 THE DEFENDANT: Yes, ma'am.

13 THE COURT: And I don't think it's going to
14 be an issue. I mean I think I can time the thing
15 pretty well. I mean if we get well into the
16 afternoon on arguments and things, I might just
17 wait and bring the jury back the next day. I
18 think we'll be able to work around that.

19 But would it be correct for me to put on the
20 record that you are freely and voluntarily waiving
21 the right to sequestration during the guilt phase?

22 THE DEFENDANT: Yes, ma'am.

23 THE COURT: Actually I don't think it's going
24 to be an issue.

25 MR. CALIEL: I don't think --

1 THE COURT: If it becomes an issue, I'll ask
2 you again.

3 THE DEFENDANT: It's not going to be an
4 issue.

5 THE COURT: I think I can work the timing
6 out, but if we get to that point I'll inquire
7 again. I'm not going to tell them to come
8 prepared for it, but if it looks like we might
9 need to look into that I'll address it.

10 THE DEFENDANT: Okay.

11 MR. CALIEL: The State's ready to proceed.

12 MS. SCHLAX: The defense is ready to proceed,
13 Your Honor.

14 THE COURT: So when they come out, I'll ask
15 you to call your witnesses. You'll announce no
16 witnesses. And I'll tell the jury -- or you'll
17 announce that you're resting and I'll tell the
18 jury that we're through for the day and come back
19 in the morning.

20 MS. SCHLAX: Yes, Your Honor.

21 THE COURT: I think I'll tell them we'll
22 start at 9:30 tomorrow because we don't ever get
23 there at 9:00 o'clock. So I'll ask them to be
24 here at 9:15 and they'll be ready at 9:30.

25 We're ready.

1 BAILIFF: Are you ready, Judge?

2 THE COURT: We're ready.

3 BAILIFF: The jury is entering the courtroom.
4 (Jury present.)

5 THE COURT: You may be seated.

6 Ms. Schlax.

7 MS. SCHLAX: Your Honor, the defense rests.

8 THE COURT: All right. Ladies and gentlemen
9 of the jury, both the State and the defense have
10 rested their case. It's too late for us to get
11 into the next part of the trial today so I'm going
12 to send you home earlier. I'm going to ask you to
13 be back at 9:15 tomorrow. You don't seem to be
14 able to get 9:00 o'clock down quite right. So if
15 you're here at 9:15, we're here before you anyway,
16 but we'll hope to get started by 9:30, which gives
17 you some time in the jury room before we bring you
18 out.

19 Again, do not discuss the case among yourselves
20 or with anyone else. Do not look at news or
21 internet or listen to radio, read the paper, et
22 cetera, et cetera. You have the picture now, I
23 think. You can only have information that you get
24 in the courtroom with all of us present to make your
25 decision.

1 So with that we thank you for your time today
2 and you're free to go. Be here at 9:15 tomorrow
3 morning.

4 Thank you.

5 (Jury absent.)

6 THE COURT: Any exceptions or objections for
7 the record before we recess?

8 MS. SCHLAX: No, Your Honor.

9 THE COURT: I'm calling it recess, but we're
10 actually remaining to try to finalize jury
11 instructions for tomorrow morning, is that
12 correct?

13 MS. SCHLAX: Yes, Your Honor.

14 MR. CALIEL: Yes, Your Honor.

15 THE COURT: The trial itself, though, the
16 jury is in recess.

17 And I have a copy of the suggested
18 instructions. We're just dealing with tomorrow now,
19 not anything further on the instructions. Correct?

20 MS. SCHLAX: Yes, Your Honor.

21 THE COURT: Okay. Have you had time to go
22 over these with Mr. Smith?

23 MS. SCHLAX: I don't know that I have
24 provided these to Mr. Smith. They are the
25 standards. I've had an opportunity to go through

1 them, Your Honor.

2 THE COURT: Okay.

3 MS. SCHLAX: And I don't see anything that
4 isn't in the standard jury instructions.

5 THE COURT: Okay. I did want to let you all
6 know that Mike Smith, who as you know is our IT
7 person, they have a cart with -- I don't know the
8 right technical terms, whatever the jury would
9 need to play things if he wanted to review
10 evidence that was played.

11 MR. CALIEL: Yes.

12 THE COURT: They have that cart ready and
13 they need to know if the laptop needs to be
14 inspected, they'll bring it down here. I'm not
15 sure if we need to do that today or if you want to
16 do it tomorrow. I don't know that it does us any
17 good to do it today. I would think the defense
18 would say they want to inspect it tomorrow.

19 MR. CALIEL: I think tomorrow would be fine,
20 Your Honor. It's going to take some time to move
21 the exhibits into the jury room anyway. We can
22 probably do it at that point.

23 THE COURT: Okay.

24 MS. SCHLAX: Your Honor, I don't know if the
25 Court's taking notes, I don't want to interrupt

1 the Court, but we don't need any further time to
2 review the jury instructions.

3 THE COURT: Okay. I was just letting Mike
4 Smith know that if they want to bring that down
5 here in the morning and put it in there or leave
6 it in the courtroom, but we'll inspect it after
7 the instructions are given.

8 MS. SCHLAX: Yes, ma'am.

9 THE COURT: Okay. If you're ready, we can
10 start.

11 MS. SCHLAX: Yes, Your Honor.

12 THE COURT: If you've already gone over them,
13 well, I have a cover page which I sign and date.

14 MS. SCHLAX: No objections to that, Your
15 Honor.

16 THE COURT: All right. Also I have to get
17 another copy once they're corrected, if there are
18 any corrections. I give a copy to the jury. Is
19 there any objection to that?

20 MS. SCHLAX: No, Your Honor, we would request
21 that.

22 MR. CALIEL: No objection from the State, Your
23 Honor.

24 Your Honor, I know other judges have done it
25 this way. When you read the instructions, do you

1 want to have, Mr. Hughes has done in the past,
2 scroll through the instructions on the screen with
3 them?

4 THE COURT: I think it helps them.

5 MS. SCHLAX: I think that's very helpful,
6 Your Honor.

7 THE COURT: They've had a chance to actually
8 read them, quote unquote, off the screen and that
9 way when they have just the one set in the back
10 with the foreperson, whoever that is, they've
11 already all had a chance to read and listen, which
12 I think we all know means they learn better that
13 way, so I think that's a good idea.

14 So I'll have a cover page, I'll sign two, one
15 for the jury and I'll mark one that goes to the
16 clerk for the record.

17 And then thanking them for their attention.

18 MS. SCHLAX: And no objection to that, Your
19 Honor.

20 THE COURT: Statement of the three charges in
21 the Indictment.

22 MS. SCHLAX: And no objection, Your Honor.

23 THE COURT: The introduction to homicide.

24 MS. SCHLAX: No objection, Your Honor. It's
25 the standard.

1 THE COURT: It includes the instruction for
2 justifiable homicide, excusable homicide as well.
3 And then it goes on to the elements of murder in
4 the first degree.

5 MS. SCHLAX: And no objection, Your Honor.

6 THE COURT: And then felony murder first
7 degree.

8 MS. SCHLAX: No objection, Your Honor.

9 THE COURT: And then there are lesser
10 included crimes or attempts and the lesser
11 includeds there are listed for count one are
12 murder in the second degree and manslaughter.

13 MS. SCHLAX: And no objection, Your Honor.

14 THE COURT: Then the instruction for murder
15 in the second degree and the instruction or
16 manslaughter.

17 MS. SCHLAX: No objection to either the
18 second degree murder or manslaughter instruction.

19 THE COURT: Okay. Then for count two,
20 kidnapping, the instruction for that.

21 MS. SCHLAX: And no objection, Your Honor.

22 THE COURT: And then lesser included crimes
23 first count and the lesser included is false
24 imprisonment.

25 MS. SCHLAX: Yes, Your Honor. And no

1 objection.

2 THE COURT: The instruction for false
3 imprisonment.

4 MS. SCHLAX: And no objection to that, Your
5 Honor.

6 THE COURT: Because count two -- okay. Then
7 I guess count three is the sexual battery, is that
8 correct?

9 MR. CALIEL: It is.

10 THE COURT: So my copy says count two. So it
11 should be count three?

12 MR. CALIEL: Yes. That is a scrivener's
13 error, Your Honor. It should be count three.

14 Let me double-check and make sure the
15 kidnapping said count two and not three.

16 THE COURT: The sexual battery and kidnapping
17 say count two.

18 MR. CALIEL: Yes, Your Honor, that's just an
19 error that will be corrected in the top of sexual
20 battery as it relates to the count.

21 THE COURT: Okay. Then after the sexual
22 battery instruction there's a lesser included page
23 and the lesser included is battery. Is that
24 correct?

25 MS. SCHLAX: Battery is necessarily a lesser

1 included offense, Your Honor.

2 THE COURT: Okay. And then the instructions
3 for battery.

4 MS. SCHLAX: And no objection. It's the
5 standard.

6 THE COURT: The date of the crime is on the
7 instructions, on or between June 21st and June
8 23rd, 2013 -- I'm sorry -- June 22nd, 2013.

9 MS. SCHLAX: And no objection, Your Honor.

10 THE COURT: Venue in Duval County.

11 MS. SCHLAX: No objection, Your Honor.

12 THE COURT: And then standard instruction for
13 plea of not guilty, reasonable doubt and burden of
14 proof.

15 MS. SCHLAX: And no objection, Your Honor.

16 THE COURT: And then the weighing the
17 evidence. There could be some that don't apply.

18 MR. CALIEL: Judge, I believe only the first
19 five apply.

20 THE COURT: First five are usually standard
21 and then it looks like 6, 7, 8, 9, 10 do not apply
22 but I'll hear from the defense.

23 MS. SCHLAX: Your Honor, we would request No.
24 7. We didn't have any direct testimony, but in an
25 abundance of caution we request 7 as there's been

1 pressure. Dr. Rao specifically commented this
2 morning at the beginning of her testimony that
3 this case shocked the community and so we'd ask
4 for No. 7.

5 MR. CALIEL: Judge, I don't think that
6 applies, but I have no objection if the defense is
7 asking for the instruction and we'll provide the
8 instruction.

9 THE COURT: Okay. Is that the only one
10 you're asking for, 6 through 10?

11 MS. SCHLAX: I can't make any argument as to
12 the applicability of any of the others.

13 THE COURT: So 7 will be numbered as No. 6.

14 MS. SCHLAX: Yes.

15 THE COURT: And 7, 8, 9, 10 will be removed.
16 Is that what you're requesting?

17 MS. SCHLAX: Yes, Your Honor.

18 THE COURT: Then there's a page that will
19 apply, the defendant not testifying, correct?

20 MS. SCHLAX: Yes. And no objections to it as
21 provided.

22 THE COURT: And then there's a page on
23 defendant's statement which I would relate to the
24 wire.

25 MS. SCHLAX: Yes, Your Honor. No objection.

1 THE COURT: As well, I guess it could relate
2 to, I don't know, testimony from the mother.

3 Then eyewitness identification.

4 MS. SCHLAX: And no objection, Your Honor.

5 THE COURT: And the standard rules for
6 deliberations.

7 MS. SCHLAX: No objection, Your Honor.

8 THE COURT: Cautionary instruction.

9 MS. SCHLAX: No objection, Your Honor.

10 THE COURT: Notes. Which I tell them about
11 what to do with their notes.

12 MS. SCHLAX: No objection, Your Honor.

13 THE COURT: Verdict, which is the instruction
14 on verdict.

15 MS. SCHLAX: No objection.

16 THE COURT: Single defendant, multiple
17 counts.

18 MS. SCHLAX: No objection, Your Honor.

19 THE COURT: Verdict and submitting case to
20 the jury.

21 MS. SCHLAX: And no objection, Your Honor.

22 THE COURT: I don't have the proposed verdict
23 forms.

24 MR. CALIEL: A copy for the Court.

25 THE COURT: Okay. Thank you.

1 Do you have a copy, Ms. Schlax, Mr. Fletcher?

2 MS. SCHLAX: I do.

3 THE COURT: So the one for count one does
4 have --

5 MS. SCHLAX: And no objection as to the
6 verdict form for count one.

7 THE COURT: And it does have the lesser
8 includeds as we discussed them.

9 And the verdict for count two, they can find
10 the same -- they do on count one, too, but any
11 objection?

12 MS. SCHLAX: No, Your Honor.

13 THE COURT: It's findings they have to make
14 on count two. And then count three is a little
15 simpler, they just select one box or one line.

16 Any objection on count three?

17 MS. SCHLAX: No objection, Your Honor.

18 THE COURT: So in total there's no other
19 objection to basically standard instructions. We
20 are including eyewitness things they can consider.
21 I think that's it.

22 MR. CALIEL: That's it.

23 THE COURT: Do you all know who's going to
24 close?

25 MR. CALIEL: I'll be doing both closings for

1 the State, Your Honor.

2 MS. SCHLAX: And Mr. Fletcher.

3 THE COURT: Okay. You all can change your
4 mind.

5 Anything we need to do before we recess for the
6 day?

7 MS. SCHLAX: No, Your Honor.

8 MR. CALIEL: Nothing from the State, Your
9 Honor.

10 THE COURT: Do you need some time?

11 MS. SCHLAX: I think we're good, Your Honor.

12 THE COURT: Okay. All right. Thank you. We
13 will be in recess. Thank you.

14 (Evening recess.)

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IN THE CIRCUIT COURT OF THE
FOURTH JUDICIAL CIRCUIT, IN
AND FOR DUVAL COUNTY, FLORIDA.

Case No: 2013-CF-5781-AXXX-MA

Division CR-D

STATE OF FLORIDA

-vs-

DONALD SMITH,

Defendant,

TESTIMONY AND PROCEEDINGS taken before the
Honorable Mallory D. Cooper, Judge of the Circuit Court,
on February 14, 2018, and as reported by Faye M. Gay,
Certified Realtime Reporter, Registered Merit Reporter,
and Certified Legal Video Specialist.

OFFICIAL REPORTERS, INC.
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 Appearing on behalf of the State of Florida.

4

5 MARK CALIEL and VANESSA WHEELER-SANCHEZ, Esquires,

6 Assistant State Attorneys,

 Appearing on behalf of the State of Florida

7

8 JULIE SCHLAX and CHARLES FLETCHER, Esquires,

9 Appearing on behalf of the Defendant.

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1 (Jury absent.)

2 (Defendant present.)

3 THE COURT: Good morning, everyone.

4 For the record, Mr. Smith is present along
5 with his attorneys and the State.

6 And is everyone ready to proceed?

7 MR. CALIEL: The State is ready to proceed,
8 Your Honor.

9 MS. SCHLAX: The defense is ready to proceed.

10 THE COURT: Okay. Is everyone ready for the
11 jury to come out?

12 MS. SCHLAX: Yes, Your Honor.

13 MR. CALIEL: Yes, Your Honor.

14 THE COURT: We're ready.

15 BAILIFF: Ready, Judge?

16 THE COURT: We're ready.

17 BAILIFF: Jurors entering the courtroom.

18 (Jury present.)

19 THE COURT: You may be seated. You don't
20 have to stand. You can sit. You don't have to
21 stand. You may be seated.

22 Good morning, ladies and gentlemen of the jury.

23 First of all, were each of you able to follow
24 my instructions that you're not allowed to get any
25 evidence or information about this case outside of

1 the courtroom?

2 (Affirmative response from jurors.)

3 THE COURT: Is there anyone who was unable to
4 follow that instruction?

5 (No response from jurors.)

6 THE COURT: Okay. The record will reflect
7 that no one was unable to follow that instruction.

8 Will you please check and make sure that the
9 legal pad that you have has your correct juror
10 number on it, in case you want to take any notes
11 today.

12 With that we're ready to get started.

13 Both the State and the defense have now rested
14 their case. The attorneys will now will present
15 their final argument. Please remember that what the
16 State Attorneys say is not evidence or your
17 instruction on the law. However, do listen closely
18 to their arguments. They are intended to aid you in
19 understanding the case. Each side will have equal
20 time, but the State is entitled to divide this time
21 between an opening argument and a rebuttal argument
22 after the defense has given its closing argument.

23 Mr. Caliel.

24 MR. CALIEL: Good morning, Your Honor. May
25 it please the Court.

1 THE COURT: Yes, sir.

2 MR. CALIEL: Counsel.

3 Ladies and gentlemen of the jury, Cherish
4 Perrywinkle was eight years old and she weighed 67
5 pounds. She was eight years old and weighed 67
6 pounds.

7 As this defendant sits here in the courtroom
8 today, he may not look like much of a threat in his
9 shirt and his tie. But on that night, in comparison
10 to that little girl, he had the strength of a giant.
11 He selected her, he lured her away from her family,
12 safety. He made her feel safe through his lies and
13 his deception. And then he preyed on her. He drove
14 out of that parking lot of the Walmart to where no
15 eyes could see and no ears could hear and then that
16 little girl had to endure a nightmare no child
17 should ever have to endure.

18 She was gagged, so forcefully that her gums
19 bled, her lips tore, her nose was bruised. Him
20 trying to silence her, silence her screams. He
21 raped her, he sodomized her, he tore her apart. He
22 sucked on her breast, he made her suck his penis, he
23 left behind semen in her mouth and in every part of
24 her private area. And then he took something, we
25 don't know what, he wrapped it around that little

1 girl's neck and he strangled the life out of her.
2 He strangled her so hard that the blood vessels in
3 her face burst. Her eyes hemorrhaged because she
4 fought.

5 Dr. Rao said it took minutes, depending on how
6 she fought back, but you could tell through the
7 damage in her eyes that she fought until the last
8 breath left her body and he silenced her, and then
9 he took her and waded into the water, he entombed
10 her in that watery grave, hoping that no one would
11 find her, hoping that no one would see what he did.

12 In opening statement the defense attorneys
13 accused us of trying to anger you. And I submit to
14 you, ladies and gentlemen, that if you have anger
15 inside of you it's not because of what I said or
16 Ms. Nelson said. It's because of what you saw.
17 It's because of what he did.

18 But the Court will instruct you later on,
19 because your verdict should not be based upon
20 emotion, it should not be based upon anger. Let me
21 read to you the instruction that you will hear later
22 on today.

23 This case must not be decided for or against
24 anyone because you feel sorry for anyone or because
25 you are angry at anyone.

1 Your verdict in this case should be based upon
2 the legal analysis of the facts. The facts as you
3 see them, the facts as you find them, with
4 reflection and deliberation you are to speak to
5 what the truth is about what happened to Cherish
6 Perrywinkle on June 21st and June 22nd of 2013.
7 Reason, not emotion, should guide your
8 deliberations.

9 So in doing that let me go through the evidence
10 that I believe was established in mountains in this
11 courtroom the throughout the course of this week.

12 I want to talk to you a little bit about Rayne
13 Perrywinkle in those videos, those videos that you
14 saw from Dollar General, from Walmart, because Rayne
15 Perrywinkle, through her testimony on the witness
16 stand and through her frantic and panicked 911 call,
17 narrates for you what you see in silence on those
18 videotapes. It shows to you and explains to you
19 what is happening while you watch.

20 Rayne Perrywinkle arrived at Dollar General and
21 this defendant came sometime after. He walked in.
22 For what? He stood in front of the store, looked at
23 a couple of magazines. He asked Brad Calhoun do you
24 have adult magazines here. Mr. Calhoun said no.
25 And then he loitered because he saw them. He saw

1 those children playfully hopping around the store.
2 He saw Rayne and he loitered around the front of the
3 Dollar General and watched. He didn't buy anything.
4 He wasn't there to shop. He just watched them.

5 And you can eerily see that with the clarity of
6 hindsight now that we know what happened. You can
7 see what he does and how he just lingers there in
8 front of the store. And then he leaves.

9 He walks out of the store leaving behind the
10 Perrywinkle family. He goes to his van and opens
11 the door. Does he leave? Does he drive away? He
12 has no true purpose there other than to prey on
13 them. So he leaves his van and he goes back and he
14 waits four minutes and 20 seconds, leaning up
15 against that concrete pole in front of the Dollar
16 General Store, and he waits for them to walk out.
17 And then he pounces.

18 This is where the deception comes in. He saw
19 Rayne Perrywinkle inside that store. He saw that
20 she had her hands full with those children and he
21 saw that she was down on her luck and money was
22 tight. She's debating whether to buy or not buy a
23 \$7 dress at Dollar General because she needs money
24 to get Cherish to that airport the next day because
25 she's going to see her father. So Rayne decides

1 that she doesn't have enough money to buy that dress
2 and he offers. He offers to buy that dress.

3 Ladies and gentlemen, sometimes in this world
4 we like to think that there is goodness in man and
5 that day Rayne Perrywinkle hoped that his
6 intentions were true and pure, that he was just
7 being a Good Samaritan, generous. He saw her down
8 on her luck and he was going to help. That's what
9 she believed. We know that's not the case. He
10 offers this gift card. His wife is going to bring
11 it, driving the gold car, and they wait for nearly
12 20 minutes in the Dollar General parking lot. For
13 the wife that never showed up, for the car that
14 didn't exist.

15 She was wary of him, but he tried to earn her
16 trust by telling her things like where he went to
17 church, he worked for Habi-Jax, that he had little
18 ones of his own, and in outward appearances he
19 looks like a harmless old man. Little did she know
20 what lurked beneath the surface.

21 They go to Walmart, more conversation. He
22 tells her you're safe when they drive over there.
23 And they wait in the parking lot, again continuing
24 this ruse, this lie that his wife is on the way and
25 this gift card is there so that she can do what she

1 was incapable of doing on her own. Not buy for
2 herself, but buy for her three young children.

3 They loaded up that stroller, they put it in
4 the van and they waited in there until the kids were
5 getting anxious. The wife wasn't showing up. So
6 they go inside.

7 Did he leave? Did he give up on what he hoped
8 to accomplish that day? No. He goes in that store
9 after her and you see on that video how he walks
10 down, looking down every aisle. Looking for Rayne,
11 looking for those little girls. And then he stands
12 by in Walmart for hours, lurking, watching.

13 Then no one could tell his intent. He's
14 standing within feet of Walmart employees in the
15 shoe section. He engages with conversation right at
16 the front door with the McDonald's employee. To the
17 untrained eye he just looks like Uncle Joe who's
18 shopping with Rayne and the kids. But we get a
19 little glimpse of what was truly in his mind inside
20 of that Walmart.

21 Only thing he picked up, the only thing that he
22 placed in that shopping cart. Rope. We know the
23 intent behind that because we've seen what happened
24 afterwards.

25 I'm going to get something to eat. Do you want

1 anything? He had been with Cherish throughout the
2 course of the evening, close to her, befriended her,
3 and she runs up to her mother, says, we're going to
4 get something to eat. What do you want?
5 Cheeseburgers.

6 That's the last word that Rayne Perrywinkle got
7 to say to her little girl. Because she follows him
8 up to the front of the store, she stands with him in
9 front of McDonald's for moments, then she walks out
10 with him and gets in that van. You see it drive out
11 of the parking lot, stop next to the Roziers, and
12 then drive out the back and turn right onto Lem
13 Turner. And nobody ever sees that child alive
14 again.

15 You heard testimony about his apprehension.
16 You heard testimony about the discovery of Cherish's
17 little body. And I submit to you, ladies and
18 gentlemen, you heard from heroes on that witness
19 stand because when he placed that body in that river
20 he did not want that body to be found. On the
21 videotape he just looks like he's walking out the
22 door. He didn't want you to see what he did in the
23 hours that followed.

24 But Officer Henson, after being told that the
25 be-on-the-look-out, saw a van while she was

1 assisting an accident and at this time matched the
2 description and she got behind it and she called
3 Officer Wilke and other officers into the pursuit.
4 And Officer Wilke made that traffic stop, they
5 ordered him out of the car, and when he patted him
6 down he felt this defendant soaking wet and he
7 yelled out she's in the water. And his head
8 snapped, he turned, because in that instant he was
9 shocked that he knew that, that Officer Wilke knew
10 where she might be.

11 Marquita Howard, Christina Howard, Brenda
12 Fillingim, but for their observations, but for them
13 seeing something and saying something we may have
14 never found Cherish Perrywinkle, or if we did the
15 evidence which identifies her killer could have been
16 lost because of the time, because of the water,
17 because of the insects that you see in her body,
18 because of the gators that Officer Wilke feared
19 might take her away. Those three heroes saw
20 something, three citizens who didn't know Cherish,
21 they see the van, they didn't know about the Amber
22 alert, but when they found out they rush out of
23 their houses, they drive down to the scene. To do
24 what, I don't know. These women are just there to
25 try to help.

1 You saw Ms. Fillingim walk into this courtroom
2 with a cane and she told you she ran out of the
3 house without shoes on her feet. Trying to help,
4 trying to save that little girl. You heard how the
5 Howards cried out Cherish near the wood line, seeing
6 if she was somewhere there, not suspecting what he
7 would have done on her. But without their
8 observations, without their efforts, Officer Wilke
9 wouldn't have even known what water to search.

10 He goes back, after taking this defendant in
11 custody, and meets up at that location with homicide
12 detectives. He starts his search and his canine,
13 Gator, finds that little girl in a watery grave.

14 You heard from Detective Long the painstaking
15 efforts they took to preserve all the evidence that
16 they could find. Dr. Rao responded to the scene and
17 assisted on that day to try to preserve evidence,
18 and when they removed her body from underneath that
19 log and they could see, based upon the marks on her
20 neck and the blood in her eyes, she had been
21 strangled. Detective Long immediately swabbed her
22 neck. Before she was transported to the Medical
23 Examiner, she swabbed her neck at the scene. Hoping
24 there may be evidence left behind to identify her
25 killer.

1 And then Dr. Rao on that same day examined that
2 little girl's genitals. She swabbed her mouth, she
3 swabbed every orifice of her body and she collected
4 the evidence that proves to you in this courtroom
5 who is responsible for the horror that you saw in
6 those photographs. Because Nicole Lee told you when
7 she looked at those swabs she found semen in the
8 mouth, in the vagina, in her anus, and that when
9 those swabs were tested for DNA she found an exact
10 match to Donald Smith on what he left behind in that
11 little girl's rectum.

12 In her vagina not a full profile, but still a
13 DNA matching profile that still acceded the
14 possibility that it was anybody else than Donald
15 Smith that walked the face of the earth. The
16 statistical impossibility. Even though it had
17 degraded and it was interpreted, an exact match
18 around her neck where he strangled her to death.
19 His DNA. Nobody else's.

20 The true killer of Cherish Perrywinkle sits
21 across the courtroom from you right now. Those are
22 the facts. They are undisputed. They are
23 overwhelming. So what do you do with those facts
24 and how do you apply them to the law?

25 Ladies and gentlemen, the Judge will instruct

1 you throughout the course of the jury instructions
2 as to what the elements of these crimes are and I
3 want to just briefly go over them with you and
4 demonstrate how they have been proven beyond any
5 doubt. Let's start first with the sexual battery
6 charge.

7 The first element, Donald James Smith injured
8 the sexual organ of Cherish Perrywinkle in an
9 attempt to commit an act upon Cherish Perrywinkle in
10 which the sexual organ of Donald Smith would have
11 penetrated or would have had union with the anus,
12 vagina or mouth of Cherish Perrywinkle. She's under
13 the age of 12, he's over the age of 18 years.

14 You saw the photographs. Dr. Rao described the
15 injuries as devastating. When you compare those
16 photographs to the anatomical chart that was
17 published as an exhibit, it was unrecognizable how
18 much damage he inflicted with every thrust during
19 the rape. And he left behind his genetic
20 fingerprint so that we know exactly who did it.
21 Without more you have undeniable evidence of guilt
22 against this defendant, but then you have him.

23 VOICES ON AUDIOTAPE: (Inaudible) yeah.
24 (Inaudible) right there. Huh? (Inaudible) that's
25 my target area right there. That's what I go after.

1 (Inaudible) you have fun with that (inaudible). She
2 (inaudible) she ain't black. She had a lot for a
3 white girl.

4 (End of recording.)

5 MR. CALIEL: The arrogance, the hubris two
6 years later when he is describing an eight year
7 old's anatomy. That's his target area, that
8 that's what he goes after.

9 Donald James Smith forcibly, secretly or by
10 threat confined, abducted or imprisoned Cherish
11 Perrywinkle against her will, he had no lawful
12 authority to do so, and Donald James Smith acted
13 with intent to commit or facilitate the commission
14 of the sexual battery.

15 Secretly means the defendant intended to
16 isolate or insulate Cherish Perrywinkle from
17 meaningful contact or meaningful communications with
18 the public.

19 You can watch them walk out of that store.
20 Watch right here when he looks back over his
21 shoulder to see if anybody is following. Calm, they
22 walk out of the front door, Cherish in her pink
23 flip-flops that we later find next to Mr. Bruton's
24 house, thrown in a garbage can along with the
25 stroller nearby. And then this seems somewhat

1 inexplicable.

2 (Videotape playing.)

3 Drives up with her in the van, sitting next to
4 him, and engages two strangers, two people he
5 doesn't know, two people who don't know him. Why
6 would he introduce two more witnesses into this
7 case? You think about what he said to them. We're
8 going for cheeseburgers. And think about what he
9 had told them all along. My wife's coming. She
10 drives a gold car.

11 Probably as they were driving away Cherish may
12 have tried to get a little bit nervous because she's
13 leaving her mom behind, and he had to calm her, he
14 had to make her feel safe. So he continues this
15 ruse with these two strangers until he can pull
16 away. He pulls up right there, he makes that
17 right-hand turn and then she's gone. He gagged her,
18 concealed her.

19 The police were looking for him since 11:19
20 p.m. that night. That's when the first officers
21 arrived on the scene. And they were looking for
22 that van. But nobody can find them. Because he hid
23 her, he gagged her, and he had his way with her.
24 And that, ladies and gentlemen, is kidnapping
25 without any doubt.

1 And that's where he left her. He threw her
2 away, trying to hide her under that log, trying to
3 weight her body down so that nobody could ever see
4 what he did to her.

5 We talked about this a little bit in jury
6 selection, the two ways the State of Florida can
7 prove to you first degree premeditated murder. One
8 is felony murder and the instruction is before you.
9 As to count one, to prove the crime of first degree
10 felony murder, the State must prove the following
11 three elements beyond and to the exclusion of a
12 reasonable doubt. Cherish Perrywinkle is dead,
13 while engaged in the commission of a kidnapping or
14 sexual battery Donald James Smith causes the death
15 of Cherish Perrywinkle and that he is, in fact, the
16 person who actually killed Cherish Perrywinkle. We
17 just have already gone through the sexual battery
18 elements and the kidnapping element, and he is the
19 person who took her life during the course of those
20 felonies. And so, yes, he is guilty of felony
21 murder in the first degree.

22 And what is unique about this in your verdict
23 forms that you will see later is he can be both
24 guilty of felony murder in the first degree and
25 premeditated murder, and there is a section on that

1 verdict form for you to mark both findings, that he
2 killed her during the commission of a rape and
3 kidnapping and that he intended to take the life of
4 Cherish Perrywinkle then we go to the elements of
5 first degree murder, premeditated murder. Cherish
6 Perrywinkle is dead. The death was caused by the
7 criminal act of Donald James Smith and the killing,
8 there was a premeditated killing of Cherish
9 Perrywinkle.

10 And I know the Judge is going to instruct you
11 that premeditation can be formed in an instant, but
12 we have much more than that in this case. He had
13 been thinking about this all evening long. But it's
14 just not his intent, it's just not his thoughts that
15 establish beyond any doubt there's premeditation.

16 Ladies and gentlemen, since last week we've
17 asked you all to sacrifice your time and your
18 attention to this case so that we can seek the truth
19 about what happened to Cherish Perrywinkle. And on
20 behalf of the State of Florida I thank you for your
21 time and attention, but I'm going to ask you to give
22 me just a few more minutes.

23 I could publish these photos. You'll have them
24 back in the jury room. But I suspect you never need
25 to look at these photographs again, based upon what

1 you saw yesterday those images will forever be a
2 part of you. They will forever be a part of your
3 memory, burned into your memory. So I'm not going
4 to ask you to look at those again. What I'm going
5 to ask you to do is I want you all to sit here, give
6 me three minutes, I want you to just sit here and
7 quietly reflect as three minutes counts down.

8 (Computer clock counting down from three
9 minutes.)

10 MR. CALIEL: I want you to remember how he
11 waited for them out in front of the Family Dollar.
12 You can see that vision of video in your mind
13 right now.

14 I want you to remember how he feigned, faked
15 that he was sincere, that he was generous, to fool
16 them into trusting him. Remember the words of the
17 mother on the witness stand and in that 911 phone
18 call.

19 I want you to think in your mind and remember
20 that video of him lurking over the top of them in
21 the Walmart, that blue arrow so close to Cherish
22 throughout the course of those hours, waiting for
23 his opportunity to strike.

24 I want you to remember that little girl
25 walking happily with him toward the front of the

1 store, standing in front of McDonald's in hopes of
2 a cheeseburger. And then walking out that door
3 with him.

4 Now, I want you to go back to the memories
5 that are burned in your mind right now of those
6 pictures and I want you to remember what he did to
7 her, how he strangled the life from her body.
8 Three minutes.

9 That's how long Dr. Rao, how long you sat
10 there, that's how long it took, at a minimum, to
11 take her life while she fought, while she bled,
12 while every last breath left her body. He silenced
13 her and then he took her and dumped her in that
14 water. If that is not premeditated murder, then I
15 don't know what is.

16 Back in jury selection one of your fellow
17 jurors commented Cherish did not have a voice in
18 this courtroom. Respectfully, I disagree. Even in
19 death through the irrefutable physical evidence that
20 was left behind, the injuries to her body, the
21 biological evidence that he left on her and inside
22 of her, through that evidence she has a voice. And
23 from the grave she's crying out to you, Donald Smith
24 raped me. Donald Smith sodomized me. Donald Smith
25 strangled me until every last breath left my body.

1 In the final moments of her life this defendant
2 took from that little girl everything that was
3 innocent and pure. And then he took her life. Now
4 it's time to hold him accountable for what he did.

5 Ladies and gentlemen, find him guilty as
6 charged and hold him accountable for what he did.

7 Thank you.

8 THE COURT: Thank you, Mr. Caliel.

9 Mr. Fletcher.

10 MR. FLETCHER: Your Honor, the defense
11 waives.

12 THE COURT: You're waiving your closing
13 argument?

14 MR. FLETCHER: Yes, Your Honor.

15 THE COURT: Mr. Caliel, the defense has
16 waived their closing argument.

17 MR. CALIEL: Thank you, ma'am. The State has
18 nothing further.

19 THE COURT: All right. All right. With
20 that, ladies and gentlemen, the next stage is for
21 me to read you the instructions. We may need a
22 minute to go through them.

23 Nobody is allowed to come in or leave the
24 courtroom while I'm reading so that's why they're
25 leaving now.

1 Are you ready?

2 PARALEGAL: Yes, ma'am.

3 THE COURT: All right. Ladies and gentlemen,
4 I'm going to read you the instructions. They're
5 also going to be on your computer screen in front
6 of you. You can read along. And when you go into
7 the jury room to deliberate, you can have my copy
8 from which I am reading for your help if you need
9 it in the jury room. So you're not required to
10 remember all of this. You'll have a printed copy.

11 Members of the jury, I thank you for your
12 attention during this trial. Please pay attention
13 to the instructions I am about to give you.

14 Donald James Smith, the defendant in this case,
15 has been accused of the crimes of murder in the
16 first degree, kidnapping a child under the age of 13
17 years and sexual battery on a child less than 12
18 years old.

19 In this case Donald James Smith is accused of
20 murder in the first degree. Murder in the first
21 degree includes the lesser crimes of murder in the
22 second degree and manslaughter, all of which are
23 unlawful.

24 A killing that is excusable or was committed by
25 the use of justifiable deadly force is lawful.

1 If you find Cherish Perrywinkle was killed by
2 Donald James Smith you will then consider the
3 circumstances surrounding the killing in deciding if
4 the killing was murder in the first degree, or was
5 murder in the second degree or manslaughter, or
6 whether the killing was excusable or resulted from
7 justifiable use of deadly force.

8 The killing of human being is justifiable
9 homicide and lawful if necessarily done while
10 resisting an attempt to murder or commit a felony
11 upon the defendant or to commit a felony in any
12 dwelling house in which the defendant was at the
13 time of the killing.

14 The killing of a human being is excusable and
15 therefore lawful under any one of the following
16 three circumstances: One, when the killing is
17 committed by accident and misfortune, in doing any
18 lawful act by lawful means with usual ordinary
19 caution and without any unlawful intent or, two,
20 when the killing occurs by accident and misfortune,
21 in the heat of passion, upon any sudden and
22 sufficient provocation or, three, when the killing
23 is committed by accident and misfortune resulting
24 from a sudden combat if a dangerous weapon is not
25 used and the killing is not done in a cruel or

1 unusual manner.

2 Dangerous weapon is any weapon that taking into
3 account the manner in which it is used is likely to
4 produce death or great bodily harm.

5 I now instruct you on the circumstances that
6 must be proved before Donald James Smith may be
7 found guilty of murder in the first degree or any
8 lesser included crime.

9 There are two ways in which a person may be
10 convicted of first degree murder. One is known as
11 premeditated murder and the other is known as felony
12 murder.

13 As to count one, to prove the crime of first
14 degree premeditated murder, the State must prove the
15 following three elements beyond a reasonable doubt:
16 One, Cherish Perrywinkle is dead; two, the death was
17 committed by the criminal act of Donald James Smith,
18 and, three, there was a premeditated killing of
19 Cherish Perrywinkle.

20 An act includes a series of related actions
21 arising from and performed pursuant to a single
22 design or purpose.

23 Killing with premeditation is killing after
24 consciously deciding to do so. The decision must be
25 present in the mind at the time of the killing. The

1 law does not fix the exact period of time that must
2 pass between the formation of the premeditated
3 intent to kill and the killing. The period of time
4 must be long enough to allow reflection by the
5 defendant.

6 The premeditated intent to kill must be formed
7 before the killing.

8 The question of premeditation is a question of
9 fact to be determined by you from the evidence. It
10 will be sufficient proof of premeditation if
11 circumstances of the killing and the conduct of the
12 accused convince you beyond a reasonable doubt of
13 the existence of premeditation at the time of the
14 killing.

15 To prove the crime of first degree felony
16 murder the State must prove the following three
17 elements beyond a reasonable doubt: One, Cherish
18 Perrywinkle is dead; two, while engaged in the
19 commission of a kidnapping or sexual battery Donald
20 James Smith caused the death of Cherish Perrywinkle
21 and, three, Donald James Smith was the person who
22 actually killed Cherish Perrywinkle.

23 In order to convict the defendant of first
24 degree felony murder, it is not necessary for the
25 State to prove that the defendant had a premeditated

1 design or intent to kill.

2 In considering the evidence you should consider
3 the possibility that although the evidence may not
4 convince you that the defendant committed the main
5 crime of which he is accused, there may be evidence
6 that he committed other acts that would constitute a
7 lesser included crime. Therefore, if you decide
8 that the main accusation has not been proven beyond
9 a reasonable doubt, you will next need to decide if
10 the defendant is guilty of any lesser included
11 crime.

12 The lesser crimes indicated in the definition
13 of murder in the first degree are murder in the
14 second degree and manslaughter.

15 As to count one, to prove the lesser included
16 crime of second degree murder, the State must prove
17 the following three elements beyond a reasonable
18 doubt: One, Cherish Perrywinkle is dead; two, the
19 death was caused by the criminal act of Donald James
20 Smith and, three, there was an unlawful killing of
21 Cherish Perrywinkle by an act imminently dangerous
22 to another and demonstrating a depraved mind without
23 regard for human life.

24 An act includes a series of related actions
25 arising from and performed pursuant to a single

1 design or purpose.

2 An act is imminently dangerous to another and
3 demonstrating a depraved mind if it is an act or
4 series of acts that, one, a person of ordinary
5 judgment would know is reasonably certain to kill or
6 do serious bodily injury to another and, two, is
7 done from ill-will, hatred, spite or an evil intent
8 and, three, is of such a nature that the act itself
9 indicates an indifference to human life.

10 In order to convict of second degree murder, it
11 is not necessary for the State to prove the
12 defendant had an intent to cause death.

13 As to count one, to prove the lesser included
14 crime of manslaughter, the State must prove the
15 following two elements beyond a reasonable doubt:
16 One, Cherish Perrywinkle is dead and, two, Donald
17 James Smith intentionally committed an act or acts
18 that caused the death of Cherish Perrywinkle.

19 The defendant cannot be guilty of manslaughter
20 by committing a merely negligent act or if the
21 killing was either justifiable or excusable
22 homicide, as I have previously instructed you.

23 Each of us has a duty to act reasonably toward
24 others. If there is a violation of that duty,
25 without any conscious intention to harm, that

1 violation is negligence.

2 In order to convict of manslaughter by act, it
3 is not necessary for the State to prove that the
4 defendant had the intent to cause death, only an
5 intent to commit an act that was not merely
6 negligent, justifiable or excusable and which caused
7 death.

8 As to count two, to prove the crime of
9 kidnapping, the State must prove the following three
10 elements beyond a reasonable doubt: One, Donald
11 James Smith forcibly, secretly or by threat
12 confined, abducted or imprisoned Cherish Perrywinkle
13 against her will and, two, Donald James Smith had no
14 lawful authority to do so and, three, Donald James
15 Smith acted with intent to commit or facilitate the
16 commission of a sexual battery.

17 In order to be kidnapping the confinement,
18 abduction or imprisonment must not be slight,
19 inconsequential or merely incidental to the sexual
20 battery, must not be of the kind inherent in the
21 nature of the sexual battery, and must have some
22 significance independent of the sexual battery in
23 that it makes the sexual battery substantially
24 easier of commission or substantially lessened the
25 risk of detection.

1 Secretly means the defendant intended to
2 isolate or insulate Cherish Perrywinkle from
3 meaningful contact or meaningful communication with
4 the public.

5 Confinement of a child under the age of 13 is
6 against the child's will if such confinement is
7 without the consent of the child's parent or legal
8 guardian.

9 If you find the defendant guilty of kidnapping,
10 you must also determine whether the State has proved
11 the following aggravating circumstances beyond a
12 reasonable doubt: One, at the time of the
13 kidnapping Cherish Perrywinkle was under 13 years of
14 age and, two, in the course of committing the
15 kidnapping Donald James Smith committed a sexual
16 battery against Cherish Perrywinkle.

17 In considering the evidence you should consider
18 the possibility that although the evidence may not
19 convince you that the defendant committed the main
20 crime of which he is accused, there may be evidence
21 that he committed other acts that would constitute a
22 lesser included crime. Therefore, if you decide
23 that the main accusations have not been proven
24 beyond a reasonable doubt, you will need to decide
25 if the defendant is guilty of any lesser included

1 crime.

2 The lesser crime indicated in the definition of
3 kidnapping a child under the age of 13 years is
4 false imprisonment.

5 As to count two, to prove the lesser included
6 crime of false imprisonment the State must prove the
7 following two elements beyond a reasonable doubt:
8 One, Donald James Smith forcibly, secretly or by
9 threat confined, abducted, imprisoned or restrained
10 Cherish Perrywinkle against her will and, two,
11 Donald James Smith had no lawful authority to do so.

12 Secretly means the defendant intended to
13 isolate or insulate Cherish Perrywinkle from
14 meaningful contact or meaningful communication with
15 the public.

16 Confinement of a child under the age of 13 is
17 against the child's will if such confinement is
18 without the consent of the child's parent or legal
19 guardian.

20 If you find the defendant guilty of false
21 imprisonment, you must also determine whether the
22 State has proved the following aggravating
23 circumstances beyond a reasonable doubt: One, at
24 the time of the false imprisonment Cherish
25 Perrywinkle was under 13 years of age and, two, in

1 the course of committing the false imprisonment
2 Donald James Smith committed a sexual battery
3 against Cherish Perrywinkle.

4 As to count three, to prove the crime of sexual
5 battery upon a person less than 12 years of age, the
6 State must prove the following three elements beyond
7 a reasonable doubt: One, Donald James Smith entered
8 the sexual organ of Cherish Perrywinkle in an
9 attempt to commit an act upon Cherish Perrywinkle in
10 which the sexual organ of Donald James Smith would
11 have penetrated or would have had union with the
12 anus, vagina or mouth of Cherish Perrywinkle and,
13 two, Cherish Perrywinkle is less than 12 years of
14 age and, three, Donald James Smith was 18 years of
15 age or older at the time of the battery.

16 However, any contact done for bona fide medical
17 purposes is not a sexual battery.

18 Union means contact.

19 In considering the evidence you should consider
20 the possibility that although the evidence may not
21 convince you that the defendant committed the main
22 crime of which he is accused, there may be evidence
23 that he committed other acts that would constitute a
24 lesser included crime. Therefore, if you decide
25 that the main accusation has not been proven beyond

1 a reasonable doubt, you will next need to decide if
2 the defendant is guilty of any lesser included
3 crime.

4 The lesser crime indicated in the definition of
5 sexual battery, victim less than 12 years of age, is
6 battery.

7 As to count three, to prove the lesser included
8 crime of battery, the State must prove the following
9 element beyond a reasonable doubt: Donald James
10 Smith intentionally touched or struck Cherish
11 Perrywinkle against her will.

12 The State must prove that the crimes were
13 committed on or between June 21st, 2013, and June
14 22nd, 2013.

15 It must be proved only to a reasonable
16 certainty that the alleged crimes were committed in
17 Duval County.

18 The defendant has entered a plea of not guilty.
19 This means you must presume or believe the defendant
20 is innocent. The presumption stays with the
21 defendant as to each material allegation in the
22 Indictment, through each stage of the trial, unless
23 it has been overcome by the evidence to the
24 exclusion of and beyond a reasonable doubt.

25 To overcome the defendant's presumption of

1 innocence, the State has the burden of proving the
2 crime with which the defendant is charged was
3 committed and the defendant is the person who
4 committed the crime.

5 The defendant is not required to present
6 evidence or prove anything.

7 Whenever the words reasonable doubt are used,
8 you must consider the following: A reasonable doubt
9 is not a mere possible doubt, a speculative,
10 imaginary or forced doubt. Such a doubt must not
11 influence you to return a verdict of not guilty if
12 you have an abiding conviction of guilt. On the
13 other hand, if after carefully considering,
14 comparing and weighing all the evidence there is not
15 an abiding conviction of guilt, or if having a
16 conviction it is one which is not stable, but one
17 which wavers and vacillates, then the charge is not
18 proved beyond every reasonable doubt and you must
19 find the defendant not guilty because the doubt is
20 reasonable. It is to the evidence introduced in
21 this trial and to it alone that you are to look for
22 that proof.

23 A reasonable doubt as to the guilt of the
24 defendant may arise from the evidence, conflict in
25 the evidence or the lack of evidence.

1 If you have a reasonable doubt, you should find
2 the defendant not guilty. If you have no reasonable
3 doubt, you should find the defendant guilty.

4 It is up to you to decide what evidence is
5 reliable. You should use your common sense in
6 deciding which is the best evidence and which
7 evidence should not be relied upon in considering
8 your verdict.

9 You may find some of the evidence not reliable
10 or less reliable than other evidence.

11 You should consider how the witnesses acted as
12 well as what they said. Some things you should
13 consider are did the witness seem to have an
14 opportunity to see and know the things about which
15 the witness testified; did the witness seem to have
16 an accurate memory; was the witness honest and
17 straightforward in answering the attorneys'
18 questions; did the witness have some interest in how
19 the case should be decided; does the witness'
20 testimony agree with the other testimony and other
21 evidence in the case; and had any pressure or threat
22 been used against the witness that affected the
23 truth of the witness' testimony.

24 Whether the State has met its burden of proof
25 does not depend on the number of witnesses it has

1 called or upon the number of exhibits it has
2 offered, but instead upon the nature and quality of
3 the evidence presented.

4 The fact that a witness is employed in law
5 enforcement does not mean that his or her testimony
6 deserves more or less consideration than that of any
7 other witness.

8 Expert witnesses are like other witnesses with
9 one exception. The law permits an expert witness to
10 give his or her opinion. However, an expert's
11 opinion is reliable only when given on a subject
12 about which you believe him or her to be an expert.
13 Like other witnesses, you may believe or disbelieve
14 all or any part of an expert's testimony.

15 It is entirely proper for a lawyer to talk to a
16 witness about what testimony the witness would give
17 if called to the courtroom. The witness should not
18 be discredited by talking to a lawyer about his or
19 her testimony.

20 You may rely upon your own conclusion about the
21 credibility of any witness. A juror may believe or
22 disbelieve all or any part of the evidence or the
23 testimony of any witness.

24 The Constitution requires that the State prove
25 its accusation against the defendant. It is not

1 necessary for the defendant to disprove anything,
2 nor is the defendant required to prove his
3 innocence. It is up to the State to prove the
4 defendant's guilt by evidence.

5 The defendant exercised a fundamental right by
6 choosing not to be a witness in this case. You must
7 not view this as an admission of guilt or be
8 influenced in any way by his decision. No juror
9 should ever be concerned that the defendant did or
10 did not take the witness stand to give testimony in
11 the case.

12 A statement claimed to have been made by the
13 defendant outside of court has been placed before
14 you. Such a statement should always be considered
15 with caution and be weighed with great care to make
16 certain it was freely and voluntarily made.
17 Therefore, you must determine from the evidence that
18 the defendant's alleged statement was knowingly,
19 voluntarily and freely made.

20 In making this determination you should
21 consider the total circumstances including, but not
22 limited to, whether when the defendant made the
23 statement he had been threatened in order to get him
24 to make it and whether anyone had promised him
25 anything in order to get him to make it. If you

1 conclude the defendant's out-of-court statement is
2 not freely and voluntarily made, you should
3 disregard it.

4 You have heard testimony of eyewitness
5 identification. In deciding how much weight to give
6 this testimony you may consider the various factors
7 mentioned in these instructions concerning
8 credibility of witnesses. In addition to those
9 factors, in evaluating eyewitness identification
10 testimony you may also consider the capacity and
11 opportunity of the eyewitness to observe the
12 offender based upon the length of time for
13 observation and the conditions at the time of the
14 observation, including lighting and distance;
15 whether the identification was the product of the
16 eyewitness' own recollection or was the result of
17 influence or suggestiveness; the circumstances under
18 which the defendant was presented to the eyewitness
19 for identification; any inconsistent identifications
20 made by the eyewitness; any instance in which the
21 eyewitness did not make an identification when given
22 an opportunity to do so; the witness' familiarity
23 with the subject identified; lapses of time between
24 the event and the identification; whether the
25 eyewitness and the offender are of different races

1 or ethnic groups and whether this may have affected
2 the accuracy of the identification and the totality
3 of the circumstances surrounding the eyewitness'
4 identification.

5 These are some general rules that apply to your
6 discussion. You must follow these rules in order to
7 return a lawful verdict. You must follow the law as
8 it is set out in these instructions. If you fail to
9 follow the law, your verdict will be a miscarriage
10 of justice. There is no reason for failing to
11 follow the law in this case. All of us are
12 depending upon you to make a wise and legal decision
13 in this matter.

14 This case must be decided only upon the
15 evidence that you have heard from the testimony of
16 the witnesses and have seen in the form of the
17 exhibits in evidence and these instructions.

18 This case must not be decided for or against
19 anyone because you feel sorry for anyone or are
20 angry at anyone.

21 Remember the lawyers are not on trial. Your
22 feelings about them should not influence your
23 decision in this case.

24 Your duty is to determine if the defendant has
25 been proven guilty or not in accord with the law.

1 It is the Judge's --

2 Can you all approach side-bar, please?

3 (Counsel for the State and defense approached
4 the bench for a side-bar conference out of the
5 hearing of the jury and court reporter.)

6 THE COURT: Ladies and gentlemen, my
7 apologies. There's one error that I missed when I
8 was reviewing the instructions and we have to
9 correct that. So I'm going to ask you to take a
10 short recess, but with very strict instructions.
11 We are in the middle of me giving you those
12 instructions. We'll have it corrected when you
13 come back out.

14 Please do not discuss anything about what
15 you've heard so far or, of course, the trial.
16 You're not at that stage yet. Please excuse
17 yourself and we'll have you back out in ten or 15
18 minutes. Thank you.

19 (Jury absent.)

20 THE COURT: All right. Just so the record is
21 clear, there was one sentence in the rules for
22 deliberation that applies. That death penalty
23 statute does not apply under the new death penalty
24 statute and therefore I've made that correction.

25 Is it possible for me to find out about the

1 defendant waiving now?

2 MR. CALIEL: Yes, Your Honor.

3 MS. SCHLAX: Yes, sir.

4 THE COURT: Would you put Mr. Smith under
5 oath, please?

6 (Defendant sworn.)

7 THE DEFENDANT: I do.

8 THE COURT: Mr. Smith, if you would stay
9 standing, while I have the opportunity while the
10 jury is not in the courtroom, at the end of the
11 State's opening argument, your attorneys indicated
12 they were waiving final argument. The State then
13 presented nothing further because there was
14 nothing to rebut.

15 Did you agree with that decision?

16 THE DEFENDANT: Yes, ma'am.

17 THE COURT: And it's my understanding you've
18 had time to talk about that decision with your
19 attorneys?

20 THE DEFENDANT: Yes, ma'am.

21 THE COURT: Is there anything that you need
22 to know further than the fact that you're waiving
23 -- you did waive that closing argument that we
24 need to discuss before I accept that waiver?

25 THE DEFENDANT: No, ma'am.

1 THE COURT: All right. And I've put on the
2 record numerous times your age, your education,
3 your work history, things like that, and you have
4 indicated that you are freely and voluntarily
5 waiving that closing argument, is that correct?

6 THE DEFENDANT: Yes, ma'am.

7 THE COURT: I do find that Mr. Smith freely
8 and voluntarily waived closing argument and in
9 response to that the State presented no further
10 argument.

11 Thank you.

12 So we'll be in recess for about ten minutes.
13 We need to get that corrected and then we'll
14 complete the instructions.

15 Thank you.

16 (Recess.)

17 (Defendant present.)

18 (Jury absent.)

19 THE COURT: Before we bring everybody back
20 in, there was one thing that needed to be put on
21 the record.

22 MR. CALIEL: And, Your Honor, just for record
23 purposes, I went back, obviously given the concern
24 of the Court regarding the instruction under what
25 is 3 dot 10, rules for deliberation. In paragraph

1 5 it does state it is your duty to determine if
2 the defendant has been proven guilty or not in
3 accord with the law and it is the Judge's job to
4 determine a proper sentence if the defendant is
5 found guilty. The only instruction in the
6 standard instruction when it applies to capital
7 cases is that if we are in the penalty phase we
8 are to omit the second sentence of paragraph 5.
9 Obviously that rule for deliberations still
10 applies to count two and count three in the
11 current phase, and theoretically it would also
12 apply if the jury were to happen to find the
13 defendant guilty of a lesser included offense and
14 not the highest offense, which is first degree
15 murder. That being said, I believe the defense
16 has a motion to exclude it regardless.

17 MS. SCHLAX: We would, Your Honor. Based on
18 the circumstances of this case we would ask for
19 that to be removed.

20 THE COURT: Okay. And I have a new copy --
21 thank you for e-mailing that to Madam Clerk --
22 which removes the second sentence of No. 5 on the
23 page of rules for deliberation.

24 Mr. Smith, you agree with that?

25 THE DEFENDANT: Yes, ma'am.

1 THE COURT: All right.

2 With that I think we're ready to continue.

3 The public can come back in. Once they're seated
4 I'll bring the jury out.

5 All right. Is everyone ready for the jury to
6 return?

7 MS. SCHLAX: Yes, Your Honor.

8 BAILIFF: Are you ready, Judge?

9 THE COURT: We're ready.

10 BAILIFF: Jury is entering the courtroom.

11 (Jury present.)

12 THE COURT: Thank you, ladies and gentlemen.
13 You may be seated.

14 Thank you, ladies and gentlemen, for giving me
15 the time to make that correction. I appreciate
16 that. And we're ready to continue with my reading
17 of the instructions and you'll still see them on
18 your screen.

19 I'm going to start over on the rules for
20 deliberation, just so we're not stopping midway.
21 These are some general rules to apply to your
22 discussion. You must follow these rules in order to
23 return a lawful verdict. You must follow the law as
24 it is set out in these instructions. If you fail to
25 follow the law, your verdict will be a miscarriage

1 of justice. There is no reason for failing to
2 follow the law in this case. All of us are
3 depending upon you to make a wise and legal decision
4 in this matter.

5 This case must be decided only upon the
6 evidence that you have heard from the testimony of
7 the witnesses and have seen in the form of the
8 exhibits in evidence and these instructions.

9 This case must not be decided for or against
10 anyone because you feel sorry for anyone or are
11 angry at anyone.

12 Remember the lawyers are not on trial. Your
13 feelings about them should not influence your
14 decision in this case.

15 This is where we stopped and I'll start again.
16 Your duty is to determine if the defendant has been
17 proven guilty or not in accord with the law.

18 Whatever verdict you render must be unanimous.
19 That is each juror must agree to the same verdict.

20 Your verdict should not be influenced by
21 feelings of prejudice, bias or sympathy.

22 Your verdict must be based on the evidence and
23 on the law contained in these instructions.

24 Deciding a verdict is exclusively your job. I
25 cannot participate in that decision in any way.

1 Please disregard anything I may have said or done
2 that made you think I preferred one verdict over
3 another.

4 During this trial I have permitted you to take
5 notes. You will be allowed to take those notes into
6 the jury room during deliberations. You are
7 instructed that your notes are a tool to aid your
8 individual memory. You should not compare your
9 notes of those with other jurors in determining the
10 content of any testimony or in evaluating the
11 importance of any evidence. Notes are for the
12 note-taker's personal use in refreshing his or her
13 recollection of the evidence. They are not
14 evidence. Above all, your memory should be your
15 greatest asset in your recollection of the evidence.

16 You may find the defendant guilty as charged in
17 the Indictment or guilty of such lesser included
18 crime as the evidence may justify or not guilty.

19 If you return a verdict of guilty, it should be
20 for the highest offense which has been proven beyond
21 a reasonable doubt. If you find that no offense has
22 been proven beyond a reasonable doubt, then, of
23 course, your verdict must be not guilty.

24 The verdict must be unanimous. That is all of
25 you must agree to the same verdict. Only one

1 verdict may be returned as to each crime charged.
2 The verdict must be in writing and for your
3 convenience the necessary verdict forms have been
4 prepared for you. They are as follows.

5 Just for the record, I'll read the style of the
6 case, which is the upper right-hand corner, into the
7 record. In the Circuit Court of the Fourth Judicial
8 Circuit in and for Duval County, Florida. Case No.
9 16-2013-CF-005781-AXXX-MA. Division CR-D. State of
10 Florida versus Donald James Smith.

11 Verdict for count one. And if you'll see on
12 the left-hand margin are the lines that you'll make
13 your checks, whichever one applies to your verdict.

14 The first thing listed is we, the jury, find
15 the defendant guilty of first degree murder as
16 charged in the Indictment. If that is your
17 decision, you must go to the secondary part under
18 that which says, if you find the defendant guilty of
19 murder in the first degree you must check one or
20 both of the following findings. You can check we
21 further find the killing was premeditated and/or you
22 can check we further find the killing was done
23 during the commission or attempted commission of a
24 felony, to wit: Kidnapping or sexual battery.

25 And then another line out on the left margin,

1 we, the jury, find the defendant guilty of second
2 degree murder, a lesser included offense, or we, the
3 jury, find the defendant guilty of manslaughter, a
4 lesser included offense, or we, the jury, find the
5 defendant not guilty.

6 So say we all. Done at Jacksonville, Duval
7 County, Florida. And this will be signed and dated
8 by the foreperson. And I'll explain that in a
9 minute.

10 The verdict form for count two has the same
11 style of the case in the upper right-hand corner and
12 then you have -- it's a two-page verdict form, this
13 one. So you have three lines out in the left
14 margin. If you look at the verdict form as one
15 piece, it looks like this and way out here in the
16 left margin there are only three choices, but some
17 of the choices require you make some subfindings.
18 So the way that this reads, you're on page 1 of the
19 verdict form for count two, we, the jury, find the
20 defendant guilty of kidnapping as charged in the
21 Indictment.

22 If that is your decision and your verdict, then
23 you must go to A and B and fill those out. If you
24 find, this is A, if you find the defendant guilty of
25 this offense, you must choose one of the following

1 findings: Either we find the victim was under 13
2 years of age at the time of the offense, or we find
3 the victim was not under 13 years of age at the time
4 of the offense.

5 And then you must go on to B. If you find the
6 defendant guilty of this offense you must choose one
7 of the following findings: Either we find the
8 defendant committed a sexual battery on the victim
9 during commission of the offense or we find the
10 defendant did not commit a sexual battery on the
11 victim during the commission of the offense.

12 If your decision is not made on that page, then
13 there's two other lines on the second page. You may
14 choose, we, the jury, find the defendant guilty of
15 false imprisonment, a lesser included offense. If
16 that is your choice, again, you must make the
17 subfindings under A and B. A, if you find the
18 defendant guilty of this offense, you must choose
19 one of the following findings: Either we find that
20 the victim was under 13 years of age at the time of
21 the offense or we find the victim was not under 13
22 years of age at the time of the offense.

23 And then you must go on to B. B, if you find
24 the defendant guilty of this offense, you must
25 choose one of the following findings: Either we

1 find the defendant committed a sexual battery on the
2 victim during the commission of the offense or we
3 find the defendant did not commit a sexual battery
4 on the victim during the commission of the offense,
5 or back on the left-hand margin, if this is your
6 choice, you mark there, we, the jury, find the
7 defendant not guilty.

8 So say we all, done at Jacksonville, Duval
9 County, Florida. This to be signed and dated by the
10 foreperson.

11 The verdict form for count three has the same
12 style of the case and there are three choices and
13 there are no subfindings. So you either mark, we,
14 the jury, find the defendant guilty of sexual
15 battery upon a person less than 12 years of age as
16 charged in the Indictment, or we, the jury, find the
17 defendant guilty of battery, a lesser included
18 offense, or we, the jury, find the defendant not
19 guilty.

20 So say we all. Done at Jacksonville, Duval
21 County, Florida, to be signed and dated by the
22 foreperson.

23 A separate crime is charged in each count of
24 the Indictment and although they have been tried
25 together, each crime and the evidence applicable to

1 it must be considered separately and a separate
2 verdict returned as to each.

3 A finding of guilty or not guilty as to one
4 crime must not affect your verdict as to the other
5 crimes charged.

6 In just a few moments you will be taken to the
7 jury room by the bailiff. The first thing you
8 should do is choose the foreperson who will preside
9 over your deliberations. The foreperson should see
10 to it that your discussions are carried on in an
11 organized way and that everyone has a fair chance to
12 be heard.

13 It is also the foreperson's job to sign and
14 date the verdict form when all of you have agreed on
15 a verdict and to bring the verdict form back to the
16 courtroom when you return.

17 During deliberations jurors must communicate
18 about the case only with one another and only when
19 all jurors are present in the jury room.

20 You're not to communicate with any person
21 outside the juror about this case. Until you have
22 reached a verdict, you must not talk about this case
23 in person or through the telephone, writing, or
24 electronic communication, such as a blog, Twitter,
25 e-mail, text message, or any other means.

1 Do not contact anyone to assist you during
2 deliberations. These communications rules apply
3 until I discharge you at the end of the case.

4 If you become aware of any violation of these
5 instructions, or any other instruction I have given
6 in this case, you must tell me by giving a note to
7 the bailiff.

8 Many of you may have cell phones, tablets,
9 laptops or other electronic devices here in the
10 courtroom or in the jury room. And these rules do
11 not allow you to bring your phones or any of those
12 types of electronic devices into the jury room.
13 Kindly leave those devices on your seats where they
14 will be guarded by the bailiff while you deliberate,
15 or if they're in the jury room we'll give you an
16 opportunity to get them and bring them out here to
17 us.

18 If you need to communicate with me, send a note
19 through the bailiff signed by the foreperson. If
20 you have voted, do not disclose the actual vote in
21 the note.

22 If you have questions I will talk with the
23 attorneys before I answer so it may take some time.
24 You may continue your deliberations while you wait
25 for my answer. I will answer any questions, if I

1 can, in writing or orally here in open court.

2 During the trial items were received into
3 evidence as exhibits. You may examine whatever
4 exhibits you think will help you in your
5 deliberations. These exhibits will be sent into the
6 jury room with you when you begin to deliberate.

7 In closing, let me remind you that it is
8 important that you follow the law spelled out in
9 these instructions in deciding your verdict. There
10 are no other laws that apply to this case. Even if
11 you do not like the laws that must be applied, you
12 must use them. For two centuries we have lived by
13 the Constitution and the law. No juror has the
14 right to violate the rules that we all share.

15 Now, ladies and gentlemen, some housekeeping
16 matters. It's going to take us a few minutes, once
17 you're excused, to gather together the evidence.
18 We'll have a laptop brought back to you in case you
19 want to view any of the evidence on that and when
20 it's brought back to you, someone will explain to
21 you, in case you don't know, like me, how to use it.
22 But the first thing you should do is choose your
23 foreperson and make that decision and then you'll --
24 well, let me go back. We're going to excuse you,
25 you're going to bring any electronic devices back

1 out here to us, you're going to wait until the
2 evidence is delivered to you, because we can't
3 invade your providence while you're having
4 discussions about the case.

5 So we'll bring the evidence back to you. Once
6 we do that, close the door, you will let us know if
7 you're chosen a foreperson, you'll ring the buzzer,
8 the bailiffs will show you how to do that, and then
9 we'll know you've begun your deliberations.

10 You'll be given a contact number so that if you
11 need to let anybody know a contact number, in case
12 someone needs to reach you during your
13 deliberations. And all of your devices will be out
14 here where they're under the watchful eye of our
15 bailiffs. No one will take them. Make sure they're
16 off, though. And then the person won't need that
17 number if they need to contact you. They're going
18 to have an actual contact number to contact you.

19 When I send back the jury instructions, I'm
20 also going to send back the verdict forms. They're
21 separate. Nothing is stapled together. It would
22 make them too hard to use them, but they are paper
23 clipped.

24 And remember that one of the verdict forms is
25 two pages, count two, and keep your instructions in

1 order so if you need to look back at them you'll
2 know where to look.

3 Finally -- and I just want to make sure I have
4 these numbers correct.

5 Are you juror No. [REDACTED]?

6 JUROR: Yes, ma'am.

7 THE COURT: [REDACTED]?

8 JUROR: (Nods head.)

9 THE COURT: [REDACTED]

10 JUROR: Yes.

11 THE COURT: And [REDACTED]?

12 JUROR: Yes.

13 THE COURT: Okay. The four of you were the
14 alternates on the jury.

15 And do you have anything in the jury room?
16 Any of you?

17 (Jurors indicating.)

18 THE COURT: Sir, if you would let them go
19 back and get their belongings, please, and have
20 them come back out and wait until they get their
21 seats before we send the others out. We won't
22 send them out until you come back to your seats.

23 (Brief pause.)

24 THE COURT: And for the rest of you, again,
25 once they're back out, you will go get your

1 electronic devices, if you have any, and bring
2 them to us and then you'll go and we'll bring you
3 the evidence for you to use at your will and
4 you'll choose your foreperson and you may begin
5 your deliberations.

6 BAILIFF: Are you ready?

7 THE COURT: Yes. If they'll stand over there
8 on that side.

9 BAILIFF: Over here? You want them in here,
10 right?

11 THE COURT: Yeah, over here.

12 If you'll stand there a minute.

13 Now, for the rest of you, let the bailiff know
14 if you need a contact number given to someone who
15 might want to contact you in an emergency. Let that
16 person know the contact number, turn over your
17 electronic devices, we'll bring the evidence, you'll
18 choose your foreperson, ring the buzzer, tell us
19 you've chosen your foreperson and then you'll
20 deliberate.

21 If you'll step into the jury room.

22 (Jury leaving courtroom at 11:09 a.m. on
23 February 14th, 2018.)

24 THE COURT: One person might have left their
25 notes. I don't know if they need them or not. If

1 there's any notes, would you take them back there
2 just in case?

3 BAILIFF: Yes, ma'am.

4 BAILIFF: There's one right there.

5 THE COURT: Thank you. You all can go back
6 to your seats and have a seat.

7 The four of you, you are alternates, you
8 won't be in the deliberation room reaching a
9 verdict in this phase of the trial. However,
10 depending on what the verdict might be, there may
11 be a second phase of the trial next week. If
12 you'll recall, we thought this would take until
13 tomorrow. It still could. I don't know. But we
14 don't know whether we're going to need you next
15 week or not until we have a verdict. So if you
16 could sit here, not there, but here, we'll give
17 you a more comfortable place to sit in a few
18 minutes and, of course, you'll be free to go get
19 lunch and things like that, but we do need you to
20 remain until we determine whether we'll need you
21 next week.

22 If you'll stay there for a few minutes until we
23 get everything settled and we'll do something.

24 Thank you.

25 (Jury buzzed at 11:11 o'clock a.m.)

1 THE COURT: Have you taken the evidence back
2 in the courtroom?

3 THE CLERK: No, ma'am.

4 MR. CALIEL: No, ma'am.

5 THE COURT: Okay. We're waiting for them.
6 Is that all their electronic devices?

7 BAILIFF: Yes, ma'am.

8 THE COURT: Okay. Thank you.

9 You may take the verdict form and the evidence.
10 One of you want to go with them with the laptop
11 just so you're observing any instructions they need
12 to get.

13 MR. CALIEL: Your Honor, for the record, I've
14 spoken to Mr. Smith. I trust the laptop is
15 sufficient.

16 THE COURT: Mr. Smith, you mean Mr. Mike
17 Smith, the IT department?

18 MR. CALIEL: Yes, not the defendant. Mike
19 Smith.

20 MS. SCHLAX: And, Your Honor, for the record,
21 I've had an opportunity to look at the laptop. It
22 does not have capability to log into the internet.

23 THE COURT: Okay. So all they can do on it
24 is look at the evidence if they choose?

25 MS. SCHLAX: Yes, Your Honor.

1 (Evidence and verdict forms delivered to jury
2 at 11:13 a.m.)

3 THE COURT: Okay. It's 11:16. The jury
4 informed the bailiff that they have a foreperson
5 so we won't get a buzz for that, right? They're
6 not going to buzz us?

7 BAILIFF: No.

8 THE COURT: Okay. So they've started their
9 deliberations.

10 Any exceptions or objections to the morning
11 session?

12 MS. SCHLAX: No, Your Honor.

13 MR. CALIEL: No, Your Honor.

14 THE COURT: All right. We'll be in recess
15 now?

16 MR. CALIEL: Yes. Your Honor, if we excuse
17 the jurors, can we continue that cautionary
18 instruction?

19 THE COURT: No, I am. I'm going to ask them
20 to stay until we have a decision so they'll know
21 their schedule for next week.

22 We'll give you a place to sit in the back of
23 the courtroom and, of course, you can leave and go
24 down to the snack bar if you want, get something to
25 eat or drink. Again, you cannot discuss the case

1 with anyone, even among yourselves. If anyone tries
2 to approach you, ask you anything, let one of the
3 bailiffs know. Everyone is pretty good about that,
4 they understand the rules so I don't think anyone
5 will. So you're not able to talk with them because
6 I've told you you cannot and you can't discuss the
7 case among yourselves.

8 The bailiffs will find you a place to sit in
9 the courtroom while you wait and, again, if you need
10 to leave to go downstairs or go to the restroom or
11 anything like that, of course, you may, together or
12 separate. Entirely up to you.

13 So would you all show them a place to sit?

14 We're in recess.

15 (Recess.)

16 (Jury buzzed at 11:28 a.m.)

17 (Defendant present.)

18 (Alternate jurors present.)

19 THE COURT: Okay. So Mr. Smith is back in
20 the courtroom with his attorneys. The State is
21 present. My understanding is the jury has reached
22 a verdict. Is everyone ready for the jury to come
23 in?

24 MS. SCHLAX: Yes, Your Honor.

25 MR. CALIEL: The State is ready, Your Honor.

1 MS. SCHLAX: Yes, Your Honor.

2 THE COURT: All right. We're ready. Thank
3 you.

4 BAILIFF: Ready, Judge?

5 THE COURT: We're ready.

6 BAILIFF: The jury's entering the courtroom.
7 (Jury present.)

8 THE COURT: You may be seated.

9 You may be seated.

10 Thank you, ladies and gentlemen. It's my
11 understanding the jury has reached a verdict, is
12 that correct?

13 (Affirmative response from jurors.)

14 THE COURT: Are one of you the foreperson?
15 Do you have the verdict form?

16 JUROR: Yes.

17 THE COURT: Thank you, sir.

18 (Verdict forms tendered to Court.)

19 (Court examining verdict forms.)

20 THE COURT: All right. Madam Clerk, if you
21 would publish the verdicts.

22 THE CLERK: In the Circuit Court of the
23 Fourth Judicial Circuit, in and for Duval County,
24 Florida. Case No. 16-2013-CF-005781-AXXX-MA.
25 Division CR-D. State of Florida versus Donald

1 James Smith.

2 Verdict, count one: We, the jury, find the
3 defendant guilty of first degree murder as charged
4 in the Indictment.

5 We further find the killing was premeditated.

6 We further find the killing was done during
7 the commission or attempted commission of a
8 felony, to wit: Kidnapping and sexual battery.

9 Verdict, count two: We, the jury, find the
10 defendant guilty of kidnapping as charged in the
11 Indictment.

12 We find the victim was under 13 years of age at
13 the time of the offense.

14 We find the defendant committed sexual battery
15 on the victim during the commission of the offense.

16 Verdict, count three: We, the jury, find the
17 defendant guilty of sexual battery upon a person
18 less than 12 years of age as charged in the
19 Indictment.

20 So say we all. Done at Jacksonville, Duval
21 County, Florida. Signed the foreperson, February
22 14th, 2018.

23 THE COURT: Okay. Thank you, Madam Clerk.

24 Does either party wish to have the jury polled?

25 MS. SCHLAX: Yes, Your Honor.

1 THE COURT: Madam Clerk, if you would poll
2 the jury, please.

3 She's going to ask each one of you if this is
4 your verdict. She will ask you in order.

5 THE CLERK: Juror No. [REDACTED], is this your true
6 and correct verdict?

7 JUROR: Yes.

8 THE CLERK: Juror No. [REDACTED], is this your true
9 and correct verdict?

10 JUROR: Yes.

11 THE CLERK: Juror No. [REDACTED], is this your true
12 and correct verdict?

13 JUROR: Yes.

14 THE CLERK: Juror No. [REDACTED], is this your true
15 and correct verdict?

16 JUROR: Yes.

17 THE CLERK: Juror No. [REDACTED], is this your true
18 and correct verdict?

19 JUROR: Yes.

20 THE CLERK: Juror No. [REDACTED], is this your true
21 and correct verdict?

22 JUROR: Yes.

23 THE CLERK: Juror No. [REDACTED], is this your true
24 and correct verdict?

25 JUROR: Yes.

1 THE CLERK: Juror No. [REDACTED], is this your true
2 and correct verdict?

3 JUROR: Yes.

4 THE CLERK: Juror No. [REDACTED] is this your true
5 and correct verdict?

6 JUROR: Yes.

7 THE CLERK: Juror No. [REDACTED] is this your true
8 and correct verdict?

9 JUROR: Yes.

10 THE CLERK: Juror No. [REDACTED] is this your true
11 and correct verdict?

12 JUROR: Yes.

13 THE CLERK: Juror No. [REDACTED] is this your true
14 and correct verdict?

15 JUROR: Yes.

16 THE CLERK: Thank you.

17 THE COURT: Thank you, Madam Clerk.

18 Thank you, ladies and gentlemen of the jury.

19 Based on your verdict on count one, we will
20 have a second phase of this trial. I had told you
21 we would be here four days this week, we're only
22 here three days this week. You've finished your
23 work during the guilt phase, but we must come back
24 next week for a second phase of the trial called the
25 penalty phase.

1 If you'll recall, Monday is a holiday. We're
2 going to start on Tuesday. I need to let you know
3 ahead of time we may be here a little bit later on
4 Tuesday because some of the witnesses have to travel
5 and based on their schedules we need to get them in
6 and out on that day. So I would ask you to plan to
7 be here a little bit later on Tuesday than you have
8 been this week and I would ask you if you could to
9 be here at a quarter of 9:00 so that we can start at
10 9:00 o'clock.

11 You cannot discuss this case still among
12 yourselves or with anyone else and you cannot
13 discuss their deliberations with them. At this
14 point the trial is still continuing.

15 All 16 of you will be back. Meet back on
16 Tuesday morning.

17 And all 16 of you are excused now with our
18 thanks for your patience and your time this week and
19 we'll see you Tuesday morning at 9:00.

20 If you'll come this way.

21 (Jury absent.)

22 THE COURT: All right. Thank you, everyone.

23 Any exceptions or objections?

24 MS. SCHLAX: No, Your Honor.

25 MR. CALIEL: No, Your Honor.

1 THE COURT: All right. We'll be in recess
2 with the understanding that we need to resume in
3 the courtroom at a quarter of 9:00 Tuesday
4 morning, the 20th. I've asked the jury please to
5 be here by 9:00. I don't know if they'll do that
6 or not. We've not been too successful, but since
7 we thought we'd be a little later, I thought we'd
8 try to start.

9 With that, thank you, to all of you for your
10 time and efforts this week.

11 MS. SCHLAX: Your Honor, may we approach just
12 on scheduling?

13 THE COURT: Sure. Of course.

14 We're in recess.

15 (Evening recess.)

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IN THE CIRCUIT COURT OF THE
FOURTH JUDICIAL CIRCUIT, IN
AND FOR DUVAL COUNTY, FLORIDA.

Case No: 2013-CF-5781-AXXX-MA
Division CR-D

STATE OF FLORIDA

-vs-

DONALD JAMES SMITH,

Defendant,

TESTIMONY AND PROCEEDINGS taken before the
Honorable Mallory D. Cooper, Judge of the Circuit Court,
on February 20, 2018, and as reported by Faye M. Gay,
Certified Realtime Reporter, Registered Merit Reporter,
and Certified Legal Video Specialist.

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7

8 JULIE SCHLAX and CHARLES FLETCHER, Esquires,

9 Appearing on behalf of the Defendant.

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1 (Jury absent.)

2 (Defendant present.)

3 THE COURT: Still missing four?

4 BAILLIFF: Yes, ma'am.

5 THE COURT: We still don't have all our
6 jurors. So there are some preliminary matters we
7 could resolve while we wait for them?

8 MR. CALIEL: Yes, Your Honor.

9 Your Honor, for the record, and I have
10 discussed this with defense counsel, I have
11 deposed a number of these defense experts that
12 were listed in mitigation and based upon the
13 opinions that were tendered in deposition and in
14 some reports I think it would be appropriate to
15 have a colloquy at this point in time with the
16 defendant regarding the defense strategy. I would
17 almost equate it to being an admission to a lesser
18 included offense based upon what the experts
19 provided in deposition and the opinions that
20 they've tendered.

21 There's going to be a considerable amount of
22 evidence presented to this jury which one may deem
23 painting the defendant in a very bad light. It's
24 evidence that if the defense chose not to
25 introduce this evidence that there's no way the

1 State could introduce this evidence in a penalty
2 phase because it does not meet the requirements of
3 the law, particularly when it comes to prior Jimmy
4 Ryce commitments, prior convictions, his contacts
5 with the criminal justice system, all of which we
6 would not be able to put before this jury.

7 And based upon the light in which it paints
8 Mr. Smith, I think that we need to have a colloquy
9 on the record with the defendant that he
10 understands these -- these witnesses will be
11 testifying, that there's a number of matters that
12 they will discuss that are extremely damaging to
13 the defendant's character and, arguably, obviously
14 the defense is going to argue it for mitigation
15 purposes, but this is very damning evidence that
16 the defense is going to put forward that we could
17 not put forward before this jury. And I think
18 there has to be a discussion about that.

19 MS. SCHLAX: Your Honor, we're prepared to do
20 so.

21 THE COURT: All right. Would you place
22 Mr. Smith under oath, please?

23 THE CLERK: Please raise your right hand.
24 (Defendant sworn.)

25 THE DEFENDANT: I do.

1 THE COURT: Mr. Smith, were you able to hear
2 everything that Mr. Caliel just put on the record?

3 THE DEFENDANT: Yes.

4 THE COURT: Have you had a lot of time or
5 ample time to talk with your attorneys about
6 preparation and what type of defense they wish to
7 present to the jury during the penalty phase?

8 THE DEFENDANT: Yes, ma'am.

9 THE COURT: Do you understand that some of it
10 is information which had they not chosen to do
11 that the State would not be able to introduce?

12 THE DEFENDANT: I understand that.

13 THE COURT: And additionally, I'll just use
14 Mr. Caliel's words, some of it is damning to your
15 character. Do you understand that?

16 THE DEFENDANT: Yes.

17 THE COURT: And are you okay with that
18 defense strategy?

19 THE DEFENDANT: I have no objection to her
20 defense, no.

21 THE COURT: Okay.

22 MS. SCHLAX: And, Your Honor, if I can
23 specify just so the record is absolutely clear.
24 Dr. Heather Holmes will be the first witness
25 called by the defense during the penalty phase.

1 Dr. Holmes did prepare her written report which
2 was provided to my client. She then was deposed
3 and that deposition was provided to my client. In
4 that deposition, as well as her report, she talks
5 about reviewing the history and the psychiatric
6 history of my client extensively, reaching her own
7 diagnoses, which in many ways are not favorable,
8 but that is what we're dealing with.

9 Additionally, it is our intention, and we've
10 had ample time to discuss, that we will be asking
11 the Court to take judicial notice of multiple prior
12 convictions of Mr. Smith and it's our position and
13 our specific strategy that we will be explaining to
14 the jury that this is just further evidence of the
15 mental illness that he suffers from.

16 We've had ample time to discuss that. I
17 believe Mr. Smith has very competently understood
18 the risks with such presentation, but that's what
19 we're proceeding with.

20 THE COURT: Did you understand all of that,
21 Mr. Smith?

22 THE DEFENDANT: I did.

23 THE COURT: Okay.

24 MR. CALIEL: Your Honor, just one thing
25 further, and we had a conversation with defense

1 counsel, that Ms. Nelson is going to foreshadow
2 that in her opening statement and the defense has
3 no objection to us doing that. Obviously it's not
4 going to be burden-shifting, but there's been a
5 witness list, there's been a judicial notice
6 request for the Court and I think everybody
7 anticipates what evidence is going to be presented
8 and I don't think anybody is trying to play
9 procedural games here by saying it somehow
10 burden-shifts. So the defense has no objection to
11 Ms. Nelson mentioning that, however briefly, in
12 the opening statement.

13 THE COURT: Is that correct?

14 MS. SCHLAX: I certainly think she can
15 anticipate that I have filed previously the
16 request for judicial notice. We have every
17 intention of introducing these. I would,
18 obviously, caution there shouldn't be any argument
19 at this stage of the proceedings.

20 THE COURT: Correct. And I'm sure that there
21 won't be.

22 But back to Mr. Smith. You understand all of
23 this?

24 THE DEFENDANT: Yes, ma'am.

25 THE COURT: Have you had ample time to speak

1 with your attorneys about this strategy?

2 THE DEFENDANT: Yes, ma'am.

3 THE COURT: Do you need anymore time to speak
4 with them about this strategy?

5 THE DEFENDANT: None.

6 THE COURT: And we've gone over, I don't want
7 to keep doing it, but you're 61 years old,
8 correct?

9 THE DEFENDANT: Yes, ma'am.

10 THE COURT: And you have, I believe a high
11 school education, but also a work history, is that
12 correct?

13 THE DEFENDANT: That's correct.

14 THE COURT: And you've had no difficulty in
15 the past understanding these proceedings, is that
16 correct?

17 THE DEFENDANT: That's correct.

18 THE COURT: And do you have any difficulty
19 understanding what we're talking about today?

20 THE DEFENDANT: No, ma'am.

21 THE COURT: Okay. I do find that Mr. Smith
22 is freely and voluntarily adopting the defense
23 strategy, that he understands the risks, and that
24 he feels that that is the strategy they should
25 use.

1 Is that correct, sir?

2 THE DEFENDANT: That's correct.

3 THE COURT: Okay. There's two other things
4 -- well, I'm sorry. I didn't mean to interrupt
5 you.

6 MR. CALIEL: I apologize, Your Honor. One
7 additional thing I'll present to the Court at this
8 point in time, for the State's presentation of
9 evidence in this case the parties have agreed and
10 the defendant has signed off on a stipulation as
11 to the attempted kidnapping conviction. And I
12 would just present that to the Court. Following
13 the testimony from the witnesses that we intend to
14 call, we would just ask the Court to read into the
15 record the stipulation of the parties.

16 THE COURT: Is that correct?

17 MS. SCHLAX: That's correct, Your Honor.

18 THE COURT: I do have a stipulation that is
19 signed by Mr. Smith as well as Ms. Schlax, on the
20 back Mr. Smith and one of the attorneys for the
21 State. Whose signature?

22 MR. CALIEL: That would be my chicken
23 scratch, Your Honor.

24 THE COURT: Okay. I think I'll recognize it
25 in the future.

1 A couple of other things. In the preliminary
2 instructions there's, again, an instruction about
3 Mr. Smith's right to remain silent. Do you wish me
4 to read that?

5 MS. SCHLAX: Yes, Your Honor.

6 THE COURT: And, additionally, I think we've
7 discussed the fact that apparently the defense has
8 chosen not to have Mr. Smith dressed out in
9 civilian clothes, is that correct?

10 MS. SCHLAX: That is correct, with one
11 caveat, Your Honor. We need our client to be
12 unshackled so that he can take notes and
13 appropriately communicate with us.

14 THE COURT: Well, I guess we might have to
15 put something on the record from someone other
16 than me, but it's my understanding that there are
17 two avenues. One is you're dressed in civilian
18 clothes with the knee brace or you're dressed in
19 jail clothes with the four points and there's not
20 any other option, but I'm not testifying to that.
21 That's just my understanding. We do need to put
22 that on the record.

23 MS. SCHLAX: Yes, Your Honor. Because it
24 puts us in a predicament that we need to be able
25 to effectively communicate with our client and

1 oftentimes that is by in notes.

2 THE COURT: Well, it looks to me like he
3 could write it.

4 THE DEFENDANT: I can't.

5 THE COURT: Did you sign this stipulation?

6 THE DEFENDANT: Yeah, they took the handcuffs
7 off to do that. I mean, if necessary, I'll dress
8 out.

9 THE COURT: Well, that's something that
10 apparently you and your attorneys have discussed
11 as to whether or not that is part of your strategy
12 and I'm not trying to interfere with your
13 strategy. Your strategy is what it is. But I
14 don't make the rules as to what people can wear in
15 court so I guess we need to get something on the
16 record.

17 BAILIFF: Can I see you for a second, please?

18 THE COURT: Yes.

19 (Bailiff approached side-bar.)

20 THE COURT: All right. There is a procedure
21 if you request it. We'll have to do that before
22 the jury comes out.

23 But before I do that I need to get back to
24 whether or not Mr. Smith understands that having to
25 wear the jail clothes is part of the defense

1 strategy.

2 THE DEFENDANT: Yes, ma'am, I do.

3 THE COURT: Because you could, if you wish,
4 be dressed in civilian clothes.

5 THE DEFENDANT: Yes.

6 THE COURT: But it's apparently important,
7 for whatever reason, because I don't know what I'm
8 going to hear, you know, in the next couple of
9 days, but it's important for your argument
10 regarding your position that you be dressed in
11 your jail clothes. We are, however, going to
12 change the restraint. Do you understand that?

13 THE DEFENDANT: Yes, ma'am.

14 THE COURT: And you agree with that?

15 THE DEFENDANT: I do.

16 THE COURT: Okay. I do find that Mr. Smith
17 is freely and voluntarily agreeing to remain
18 dressed in jail clothes.

19 We will change his restraint because I've
20 been informed differently than I was originally
21 and we'll take care of that prior to the jury
22 entering into the courtroom so there's no
23 switching around while they're in here. So that
24 will take us a few minutes.

25 I'll step in the back. Before I do that, is

1 there anything else we need to put on the record?

2 MR. CALIEL: Nothing else from the State,
3 Your Honor.

4 MS. SCHLAX: The only other issue I bring to
5 the Court's attention is one of our experts, Dr.
6 Daniel Buffington, is already physically here at
7 the courthouse. He has requested, I think it's a
8 matter of the Court's discretion on whether or not
9 to allow him to watch the proceedings before and
10 after he testifies. I know the State objects to
11 it.

12 I think experts are excepted in regards to
13 the rule of omitting witnesses from hearing one
14 another. So we'd request for him to be able to be
15 in court.

16 MR. CALIEL: Well, Your Honor, this expert is
17 actually testifying as to his expertise in
18 pharmacology and the effects of drugs on the
19 system and the cognitive abilities of the
20 defendant. I'm not quite sure with the testimony
21 relating to a 1992 conviction why it would be
22 relevant.

23 And the fact that he has not reviewed any of
24 these materials before today creates problems.
25 When I deposed him, he was provided information

1 from the defense counsel and their mitigation
2 specialist. At that point in time he had had a
3 15-minute phone conversation with the defendant.

4 It's my understanding, Mr. Fletcher, that
5 since there's been one face-to-face meeting with
6 the defendant since he was deposed.

7 But based upon that, I don't believe that there
8 was a reliance on the testimony of the witnesses who
9 are going to be testifying.

10 THE COURT: The deposition was taken by the
11 State, correct?

12 MR. CALIEL: It was.

13 THE COURT: How -- I don't see how if they
14 deposed him all the information on which he's
15 relying -- I don't know enough to know what he's
16 testifying about or what period of time he's
17 testifying about, but if the State's had an
18 opportunity to depose him on what information he
19 apparently was going to use for his testimony, and
20 he gathers more information, then they're put in a
21 position of not being able to depose him on that
22 prior. Now, afterwards, if he's not going to be
23 called again, I would not think there's any
24 objection, then I'm going to let him be in the
25 courtroom, of course, but prior to his testimony

1 I'm not sure that would be the right thing to do.

2 MS. SCHLAX: Okay.

3 THE COURT: I'll deny the request to have him
4 sit in the courtroom prior to his testimony.

5 And does the State object also to him being in
6 the courtroom after his testimony?

7 MR. CALIEL: Your Honor, after he testifies I
8 have no objection to that. Like I said, based
9 upon his expertise, which we got his CV and we've
10 deposed him in regards to what he's considered. I
11 just don't believe him considering the testimony
12 of other defense experts that he hasn't already
13 previously discussed is appropriate because if it
14 changes something, like the Court says, then
15 that's going to put us in a position that we're
16 not expecting.

17 THE COURT: All right. Then we'll proceed in
18 that manner. He will not come in until he
19 testifies and he may remain as long as he wishes.

20 MS. SCHLAX: Yes, Your Honor.

21 THE COURT: Anything else?

22 MS. SCHLAX: No, Your Honor.

23 THE COURT: All right. We'll have to take a
24 short recess to readdress -- or address the
25 restraints.

1 THE DEFENDANT: Thank you.

2 THE COURT: Thank you.

3 We'll be in recess for a few moments.

4 (Recess.)

5 (Defendant present.)

6 THE COURT: We're still waiting on one more
7 juror so we're not able to proceed.

8 I do need to tell everybody that one of the
9 monitors was not working in the jury box this
10 morning. They fixed it, it is working, but in
11 order for it to work part of the panel is down
12 against the back wall instead of close in. I'll
13 explain to the jurors that are in that panel that
14 it does allow for the monitor to work and I'll
15 instruct them going in be careful walking past
16 that, although it's not really in their way.

17 So we'll be in recess until we have our 16th
18 juror.

19 Thank you.

20 MS. SCHLAX: Yes, Your Honor.

21 (Recess.)

22 (Jury absent.)

23 (Defendant present.)

24 BAILIFF: They're ready, ma'am.

25 THE COURT: All right. I think we're ready

1 to proceed.

2 Is everyone ready for the jury to come out?

3 MS. SCHLAX: Yes, Your Honor.

4 THE COURT: Is there anything else we need to
5 go over on the record first?

6 MR. CALIEL: Nothing from the State, Your
7 Honor.

8 THE COURT: We'll start with preliminary jury
9 instructions and, apparently, what you mentioned
10 earlier, Ms. Nelson will be giving the opening.

11 MR. CALIEL: That's correct, Your Honor.

12 THE COURT: And Mr. Fletcher for the defense?

13 MS. SCHLAX: That's correct, Your Honor.

14 THE COURT: All right. Bring them out.

15 BAILIFF: Ready, Judge?

16 THE COURT: Yes.

17 BAILIFF: Jury's entering the courtroom.

18 Please watch your step, please.

19 (Jury present.)

20 THE COURT: You may be seated.

21 Good morning, ladies and gentlemen. First of
22 all, of course, were each of you able to follow my
23 instructions that you're not allowed to get any
24 information about the case outside of the courtroom?

25 (Affirmative response from jurors.)

1 THE COURT: Was there anyone unable to follow
2 that instruction?

3 (No response from jurors.)

4 THE COURT: Okay. The record will reflect
5 that no one has indicated they were unable to
6 follow the instruction.

7 Sometimes our monitors that you watch evidence
8 on acts up a little bit so one of them right there
9 sort of in the front, there's a little bit of extra
10 material kind of on the floor in front of you.
11 That's so that the monitor will work. Okay?

12 We'll start today, I'm going to read you some
13 preliminary instructions, and it's a lot of
14 information. Some of it you've already heard.
15 There will be further instructions later on so you
16 don't have to memorize this or anything, but it's to
17 guide you as you listen to what's presented over the
18 next day or two.

19 Members of the jury, having previously found
20 the defendant guilty of murder in the first degree
21 of Cherish Perrywinkle the only issue still before
22 you is to determine the appropriate sentence.

23 The punishment for this crime is either life
24 imprisonment without the possibility of parole or
25 death.

1 The attorneys will now have an opportunity, if
2 they wish, to make an opening statement. The
3 opening statement gives the attorneys the chance to
4 tell you what evidence they believe will be
5 presented during the penalty phase of this trial.
6 What the lawyers say during the opening statements
7 is not evidence and you are not to consider it as
8 such.

9 After the attorneys have had the opportunity to
10 present their opening statements, the State and the
11 defendant may present evidence relative to the
12 nature of the crime and the defendant's character,
13 background or life. You are instructed that this
14 evidence is presented in order for you to determine,
15 as you will be instructed, one, whether one or more
16 aggravating factors are proven beyond a reasonable
17 doubt; two, whether one or more aggravating factors
18 exist beyond a reasonable doubt; three, whether an
19 aggravating factor or factors found to exist beyond
20 a reasonable doubt are sufficient to justify the
21 imposition of the death penalty; four, whether a
22 mitigating circumstance or circumstances are proven
23 by the greater weight of the evidence; five, whether
24 the aggravating factor or factors outweigh the
25 mitigating circumstance or circumstances; and six,

1 whether the defendant should be sentenced to life
2 imprisonment without the possibility of parole or
3 death.

4 At the conclusion of the evidence and after
5 argument of counsel you will be instructed on the
6 law that will guide your deliberation.

7 An aggravating factor is a standard to guide
8 the jury in making the choice between recommending
9 life imprisonment without the possibility of parole
10 or death. It is a statutorily enumerated
11 circumstance that increases the gravity of the crime
12 or the harm to a victim.

13 You must unanimously agree that if an
14 aggravating factor or factors were proven beyond a
15 reasonable doubt before it or they may be considered
16 by you in arriving at your final verdict.

17 In order to consider the death penalty as a
18 possible penalty, you must determine that at least
19 one aggravating factor has been proven beyond a
20 reasonable doubt.

21 In order to consider an aggravating factor the
22 State has the burden to prove the aggravating factor
23 beyond a reasonable doubt. A reasonable doubt is
24 not a mere possible doubt, a speculative, imaginary
25 or a forced doubt. Such a doubt must not influence

1 you to disregard an aggravating factor if you have
2 an abiding conviction that it is exists.

3 On the other hand, if after carefully
4 considering, comparing and weighing all of the
5 evidence you do not have an abiding conviction that
6 the aggravating factor exists, or if having a
7 conviction it is one which is not stable, but one
8 which wavers and vacillates, then the aggravating
9 factor has not been proven beyond every reasonable
10 doubt and you must not consider it in providing your
11 verdict on the appropriate sentence to the Court.

12 A reasonable doubt as to the existence of an
13 aggravating factor may arise from the evidence,
14 conflicts in the evidence or the lack of evidence.

15 If you have a reasonable doubt as to the
16 existence of an aggravating factor, you must find it
17 does not exist. However, if you have no reasonable
18 doubt, you should find that the aggravating factor
19 does exist.

20 Before moving on to the mitigating
21 circumstances, you must determine if the aggravating
22 factor or the factors are sufficient to impose a
23 sentence of death. If you do not unanimously agree
24 that the aggravating factor or factors are
25 sufficient to impose death, do not move on to

1 consider the mitigating circumstances.

2 Should you find sufficient aggravating factor
3 or factors exist to justify recommending the
4 imposition of the death penalty, it will then be
5 your duty to determine whether the aggravating
6 factor or factors that you unanimously find to have
7 been proven beyond a reasonable doubt outweigh the
8 mitigating circumstance or circumstances that you
9 find to have been established.

10 Unlike aggravating factors, you do not need to
11 unanimously agree that a mitigating circumstance has
12 been established.

13 A mitigating circumstance is not limited to the
14 facts surrounding the crime. It can be anything in
15 the life of the defendant which might indicate that
16 the death penalty is not appropriate for the
17 defendant. In other words, a mitigating
18 circumstance may include any aspect of the
19 defendant's character, background or life or any
20 circumstance of the offense that reasonably may
21 indicate that the death penalty is not an
22 appropriate sentence in this case.

23 A mitigating circumstance need not be proven
24 beyond a reasonable doubt by the defendant. A
25 mitigating circumstance need only be proven by the

1 greater weight of the evidence, which means evidence
2 that more likely than not tends to prove the
3 existence of a mitigating circumstance.

4 If you determine by a greater weight of the
5 evidence that a mitigating circumstance exists, you
6 may consider it established and give that evidence
7 such weight as you determine that it should receive
8 in reaching your conclusion as to the sentence to be
9 imposed.

10 After the evidence has been presented, the
11 attorneys will have the opportunity to make their
12 closing arguments. Following the closing arguments
13 by the attorneys, the Court will instruct you on the
14 law that is applicable to this case. After the
15 final instructions are given, you will retire to the
16 jury room to consider your verdict.

17 You should not form any definite or fixed
18 opinion on the merits of the case until you have
19 heard all the evidence, the argument of the lawyers
20 and the instructions on the law by the Judge. Until
21 that time you should not discuss this case among
22 yourselves.

23 I now instruct you not to communicate with
24 anyone including your fellow jurors about this case.
25 No communication includes no e-mailing, text

1 messaging, Tweeting, blogging or any other form of
2 communication. You cannot do any research about the
3 case or look up any information about the case.

4 If you become aware of any violation of any of
5 these rules at all, please notify court personnel of
6 the violation.

7 During the course of the trial the Court may
8 take recesses and you will be permitted to separate
9 and go about your personal affairs. During these
10 recesses you must not discuss the case with anyone,
11 nor permit anyone to say anything to you or in your
12 presence about the case. If anyone attempts to say
13 anything to you or in your presence about this case,
14 tell them that you are on the jury trying the case
15 and ask that person to stop. If they persist, leave
16 them at once and immediately report the matter to
17 any bailiff who will advise me.

18 All cell phones, computers, tablets or other
19 types of electronic devices must be turned off while
20 you are in the courtroom. Turned off means that the
21 phone or other electronic device is actually off and
22 not in a silent or vibrating mode. You may use
23 these devices during recesses, but then you may not
24 use your cell phone or electronic device to find out
25 any information about the case or to communicate

1 with anyone about the case or the people involved in
2 the case.

3 Do not take photographs, video recordings or
4 audio recordings of the proceedings or of your
5 fellow jurors.

6 After each recess please double-check to make
7 sure your cell phone or electronic device is turned
8 off.

9 At the end of the case while you are
10 deliberating, you must not communicate with anyone
11 outside of the jury room. You cannot have in the
12 jury room any cell phones, computers, or other
13 electronic devices. If someone needs to contact you
14 in an emergency, the Court can receive messages and
15 deliver them to you without delay. A contact phone
16 number will be provided for you.

17 The case must be tried by you only on the
18 evidence presented during the trial, in your
19 presence and in the presence of the defendant, the
20 attorneys and the Judge.

21 Jurors must not conduct any investigation of
22 their own. This includes reading newspapers,
23 watching television or using a computer, cell phone,
24 the internet, any electronic device or any other
25 means at all to get information related to this case

1 or to the people and places involved in this case.
2 This applies whether you are in the courthouse, at
3 home or anywhere else.

4 You must not visit places mentioned in the
5 trial or use the internet to look at maps or
6 pictures to see any place discussed during the
7 trial.

8 Jurors must not have discussions of any sort
9 with friends or family members about the case or the
10 people and places involved. So, do not let even the
11 closest family members make comments to you or ask
12 questions about this trial.

13 In this age of electronic communication I want
14 to stress again that just as you must not talk about
15 this case face-to-face, you must not talk about this
16 case by using any electronic device. You must not
17 use phones, computers or other electronic devices to
18 communicate. Do not send or accept any messages
19 related to this case or to your jury service. Do
20 not discuss this case or ask for advice by any means
21 at all, including posting information on an internet
22 website, chat room or blog.

23 What are the reasons for these rules? These
24 rules are imposed because jurors must decide the
25 case without distraction and only on evidence

1 presented in the courtroom. If you investigate,
2 research or make inquiries on your own, the trial
3 judge has no way to make sure that the information
4 you obtain is proper for the case. The parties,
5 likewise, have no opportunity to dispute or
6 challenge the accuracy of what you find.

7 That is contrary to our judicial system which
8 assures every party their right to ask questions
9 about and challenge the evidence being considered
10 against it and to present argument with respect to
11 that evidence. Any independent investigation by a
12 juror unfairly and improperly prevents the parties
13 from having that opportunity that our judicial
14 system provides them.

15 Any juror who violates these restrictions
16 jeopardizes the fairness of these proceedings and a
17 mistrial could result that would require the entire
18 trial process to start over. A mistrial is a
19 tremendous expense and inconvenience to the parties,
20 the Court and the taxpayers.

21 If you violate these rules, you may be held in
22 contempt of court and face sanctions such as serving
23 time in jail or paying a fine or both.

24 In every criminal proceeding a defendant has
25 the absolute right to remain silent. At no time is

1 it the duty of a defendant to prove his innocence.
2 From the exercise of a defendant's right to remain
3 silent a jury is not permitted to draw any inference
4 of guilt and the fact that a defendant did not take
5 the witness stand must not influence your verdict in
6 any manner whatsoever.

7 The attorneys are trained in the rules of
8 evidence and trial procedure and it is their duty to
9 make all objections they feel are proper. When an
10 objection is made, you should not speculate on the
11 reason why it is made. Likewise, when an objection
12 is sustained or upheld by me, you must not speculate
13 on what might have occurred had the objection not
14 been sustained, nor what a witness might have said
15 had he or she been permitted to answer.

16 During the trial it may be necessary to confer
17 with the attorneys out of your hearing to discuss
18 matters that require consideration by me alone. It
19 is impossible -- impossible to predict when such a
20 conversation may be required or how long it will
21 last. When such conferences occur, they will be
22 conducted so as to consume as little of your time as
23 necessary for a fair and orderly trial of this case.

24 If you would like to take notes during this
25 trial you may do so. On the other hand, of course,

1 you are not required to take notes if you do not
2 want to. That is left up to each one of you
3 individually. You've been provided with a notepad
4 and a pen for your use if you do wish to take notes.
5 Any notes that you take will be for your personal
6 use. However, you are not allowed to take them with
7 you from the courtroom.

8 During recesses we watch over your notes.
9 There's always a bailiff in here to make sure no one
10 approaches the jury box. And we have them waiting
11 for you to return. And then at night, of course, we
12 collect them and lock them up and then give them
13 back to you in the morning.

14 After you have completed your jury
15 deliberations and you've reached a final decision,
16 then your notes are delivered to me and they are
17 destroyed. No one will ever read your notes.

18 If you do take notes do not get so involved in
19 note-taking that you become distracted from the
20 proceeding. Your notes should be used only as an
21 aid to your memory. Whether or not you take notes,
22 you should rely on your memory of the evidence and
23 you should not be unduly influenced by the notes of
24 other jurors. Notes are not entitled to any greater
25 weight than each juror's memory of the evidence.

1 Ladies and gentlemen, will you check and make
2 sure you have your correct notepad with your number
3 on it?

4 (Affirmative response.)

5 THE COURT: Everybody's okay? Okay. With
6 that we're ready for opening statements and I'll
7 call on Ms. Nelson.

8 MS. NELSON: Thank you. May it please the
9 Court.

10 THE COURT: Yes.

11 MS. NELSON: Counsel.

12 Good morning. Two weeks ago when we first met,
13 the defendant, Donald Smith, was unknown to each of
14 you and presumed by everyone of you to be innocent.
15 But that's changed. Collectively, unanimously,
16 you've heard the horrific facts of this case and you
17 have found him guilty of the crimes with which the
18 State of Florida has charged him.

19 Now, this stage of the trial is penalty. The
20 State of Florida is asking you, each of you, to
21 sentence him to the ultimate penalty under the law,
22 and that is the death penalty.

23 A couple of weeks ago I had a chance to talk to
24 a sixth grade class, career day, about my job. And
25 a sixth grader asked a really bright question. Is

1 all homicide murder? You might think back to jury
2 selection. We talked about that similar topic. And
3 the answer is no. The killing of a human being, of
4 another human being, can in some cases be accidental
5 and in some cases it can be justifiable. It is not
6 always murder. And under the law all murders are,
7 in fact, not first degree murders. And also under
8 the law all first degree murders do not warrant the
9 death penalty.

10 As Judge Cooper has just instructed you, only
11 those murders in which the State proves beyond a
12 reasonable doubt a first degree murder is
13 aggravated, is the penalty of death warranted.

14 Last week it was the burden of the State of
15 Florida to prove to you beyond a reasonable doubt
16 that the defendant was guilty of the charges we
17 brought. This week it is our burden to prove to you
18 aggravation beyond a reasonable doubt.

19 In this phase we will focus on what makes this
20 particular first degree murder aggravated. And
21 Judge Cooper just told you that you, unanimously, in
22 order to render a sentence of death, must
23 unanimously agree that at least one aggravator has
24 been proven beyond a reasonable doubt. We submit to
25 you six aggravators in this case. Two of which

1 you've already found inherit in your verdict, three
2 of which have already been proven by the evidence
3 and one that you will shortly learn about today.

4 The first two, the defendant was engaged in a
5 kidnapping and sexual battery during the murder. If
6 the murder is committed during the commission of
7 certain felonies, the law recognizes this to be an
8 aggravating factor. We have proven and you have
9 already found this in your verdict.

10 Two, the victim was less than 12 years of age.
11 The law also recognizes that the murder of a child
12 is an aggravating factor -- aggravated factor and
13 you in your verdict have also already found this
14 aggravator.

15 Three, the State submits that the murder was
16 committed for the purpose of avoiding or preventing
17 a lawful arrest. The law also recognizes, as an
18 aggravating factor, that when a person murders
19 another human being in order to eliminate them as a
20 witness to their crime that murder is aggravated.

21 The next two, cold, calculated and
22 premeditated. Heinous, atrocious and cruel. Likely
23 both aggravators that you've heard about in your
24 lives. The first CCP, cold, calculated and
25 premeditated. This is an aggravating factor that

1 forces you to consider what his plans were, what his
2 intent was. This aggravator forces you to consider
3 what he went through. The evidence before you that
4 we presented last week already proves this factor.
5 The deception, the bundle of rope. That is the
6 evidence I submit that proves cold, calculated and
7 premeditated.

8 Heinous, atrocious and cruel. The law says
9 that the kind of crime intended to be included as
10 especially heinous, atrocious or cruel is one
11 accompanied by additional acts that show that the
12 crime was conscienceless or pitiless, was
13 unnecessarily torturous to Cherish Perrywinkle.

14 The reason when the Medical Examiner testified
15 that we submitted photographs of the injuries that
16 facilitated her testimony to you is because, ladies
17 and gentlemen, those pictures demonstrated what
18 words could not do justice to in terms of the
19 heinousness, the atrocity and the cruelty of this
20 murder.

21 The testimony of Dr. Rao was that Cherish,
22 quote, struggled through the entire process. She
23 told you it took between three to five minutes for
24 her to die. Tremendous force on her neck, that she
25 could not breathe, Cherish suffered swelling of her

1 brain as a result of a lack of oxygen. And two
2 photographs that we didn't publish to you, and that
3 means show to you, but that we entered into
4 evidence, and are in that notebook, are the neck
5 dissection and they show two things that Dr. Rao
6 testified to, that go specifically to this
7 aggravating factor. Her struggle was so intense and
8 evidenced by the amount of hemorrhage that she bled
9 in the strap muscles of her neck and her voice box,
10 her larynx. There's a photograph of it, the
11 petechia that you saw in her face and in her eyes
12 also was present on her voice box, her larynx. That
13 evidence was the evidence that told the Medical
14 Examiner, and now you, about Cherish Perrywinkle's
15 struggle for the last minutes of her life. Her
16 genital anatomy was, quote, totally destroyed.

17 We will not be putting on new evidence today in
18 addition to what you've seen and heard to prove
19 heinous, atrocious and cruel or cold, calculated and
20 premeditated. The evidence is already before you
21 and a matter of this record. But we will, however,
22 shortly be putting on chilling testimony, a
23 firsthand account, of what it's like to be afraid of
24 Donald Smith.

25 You're going to meet shortly Kerri-Ann Buck.

1 She's now 37 years old. She lives in the State of
2 New York, in the snowbelt, but she grew up here in
3 Jacksonville. And in 1992 this defendant, Donald
4 Smith, tried to kidnap her. She was 13, he was 36.
5 She was walking down the street in her neighborhood
6 when he solicited her. She kept walking. He was
7 driving a van. He got out of his van and he chased
8 her into a playground. She crawled up into a
9 sliding plastic tube. You'll hear how she spread
10 her little body like a spider in fear as he
11 threatened her to come out of the tube. You'll hear
12 from her that after that day when she was 13 she
13 didn't leave her home again.

14 She's the mother of four today, and her
15 parenting everyday since her firstborn was born has
16 been formed by the paralyzing fear she will tell you
17 about on that day in 1992.

18 Donald Smith was convicted of that crime and he
19 went to prison and that last aggravator is one that
20 the State submits to you is called prior violent
21 felony. That is the sixth of the aggravators that
22 we will prove beyond a reasonable doubt.

23 The Judge will instruct you later in this trial
24 about the process that you will undergo to determine
25 your sentence. And while there is no mathematical

1 equation that you must undertake, it is a weighing
2 process where you determine the weight, the
3 substance of the aggravation, and you compare it to
4 mitigation.

5 In jury selection you'll remember that one of
6 you mentioned that they, he or she, would like to
7 know more about Donald Smith. We expect that you
8 will hear from doctors, neurologists, and
9 neuropsychiatrists over the next two days and we
10 expect that these doctors that the defense will put
11 on will tell you that Donald Smith has brain damage.
12 We expect these doctors are going to tell you that
13 he has impulse control problems. We expect they
14 will tell you about Donald Smith's history. We
15 expect that they will blame the system. We expect
16 them to prove to you that since 1977 Donald Smith
17 has been committing sexually deviant and deceptive
18 crimes.

19 They will be offering this to you, we expect,
20 as mitigation for the murder of Cherish Perrywinkle.
21 The law you will hear, you learned it in jury
22 selection, we discussed it after jury selection and
23 you will be instructed on it again before you
24 deliberate, neither compels nor requires you to
25 determine that the defendant be sentenced to death.

1 The question before you is whether the aggravation
2 in this case, once fully proven, whether it is
3 sufficient to warrant the most ultimate penalty.
4 And, ladies and gentlemen, on behalf of the State of
5 Florida, I submit to you that it is.

6 THE COURT: Thank you, Ms. Nelson.

7 Mr. Fletcher.

8 MR. FLETCHER: Thank you, Your Honor. May it
9 please the Court.

10 THE COURT: Yes.

11 MR. FLETCHER: Counsel.

12 Good morning, ladies and gentlemen.

13 Last week it was about what he did. This week
14 we're going to explain how it happened.

15 I'm going to talk to you about mental illness
16 because that's what this is about. And it's not
17 going to be a pretty picture. It's rare that
18 defense attorneys bring forth evidence that make
19 their client look bad, but we are going to. You
20 need to see the full picture. It's up to you. It's
21 in this process.

22 As defense attorneys, once in awhile we find
23 ourselves like we did last week. Not much to work
24 with. From the defense perspective, that's a tough
25 case. We talked about in jury selection, we talked

1 about self-defense, talked about alibi. We didn't
2 have any of those things.

3 As Ms. Nelson discussed in her opening
4 statement, it was insurmountable. Hours of
5 videotape they didn't even show you. They just
6 reduced it down. No Perry Mason moment like was
7 alluded to in jury selection where somebody else
8 gets up and says they did it. Nothing.

9 And it's a hard case to try. You sit over
10 there on that side of the courtroom, watch all that
11 evidence come in, it's a little bit like a train
12 coming down the tracks blowing the horn and you
13 can't get out of the way.

14 We respect your verdict, we respect your time.
15 You probably noticed that at the end of last week we
16 didn't even get up to do a closing statement. What
17 could I have said? How could I stand up here and
18 say find Donald Smith not guilty? How could I do
19 that with a straight face with that amount of
20 evidence, with that DNA?

21 But this week it's about mental illness. And
22 you're going to hear from doctors, you're going to
23 hear from other witnesses about mental illness.

24 Ms. Nelson said in her opening that this was a
25 parent's worst nightmare, and then she said it the

1 second time a lot louder, and that's all true, but I
2 would submit to you that another parent is going
3 through a similar nightmare. Not as bad as this
4 one, and I don't want to compare, Donald Smith
5 started showing signs that something was wrong up
6 here (indicating) when he was five years old. He
7 was sexually aware at the age of five. He was doing
8 things that would get you classified as a voyeur at
9 ten. In his early 20s he masturbated in front of a
10 young girl. All signs of a pedophile, something, a
11 sickness up here (indicating), something he didn't
12 choose. There's something wrong up there
13 (indicating).

14 After that conviction in 1978 in his early 20s,
15 they labelled him a mentally disordered sex
16 offender. This train has been coming down the
17 tracks for years.

18 As Ms. Nelson told you, he attempted to kidnap
19 that girl and who knows what would have happened.
20 That's how strong this sickness is. That is how
21 sick he is up here (indicating).

22 He was in custody in 1999 and they did
23 evaluations on him. And I'll quote, he met the
24 criteria for a violent sexual predator and is likely
25 to reoffend. But the petition that got him there

1 legally, a couple of years later was dismissed. He
2 fell through the cracks and he's out again.

3 In 2009, this is something that Ms. Nelson
4 didn't tell you about because she's precluded from
5 telling you this, but we're trying to paint the
6 whole picture here. In 2009 Donald Smith
7 impersonated, acted like an employee of the
8 Department of Children and Families in order to try
9 to lure a girl out of her house. That is how sick
10 he is. And I don't even have to say it. Why did he
11 try to lure her out? That's how sick he is.

12 He has pedophilic disorder. He's a pedophile.
13 Again, nobody wakes up and says, hey, I think I'll
14 be a pedophile for the rest of my life. It's a
15 mental disorder.

16 We have 40 years, dating back to '77, I think,
17 of mental evaluations on Donald Smith. That's when
18 it was first documented, back in '77, '78.

19 About two weeks before this incident, before he
20 met the Perrywinkle's, he was on a cocaine binge.
21 Donald Smith knew something was wrong with him. He
22 never fit in. And he got on drugs. He's got a long
23 history of that as well. Our experts, our doctors,
24 will refer to that as self-medication.

25 He walks into the Mental Health Resource Center

1 and tries to get himself Baker Acted. It's a legal
2 proceeding where you basically are posing as a
3 threat to somebody and they hospitalize you. This
4 is two weeks before he met the Perrywinkles, about
5 11 days before. Walked in, admitted to being high
6 on cocaine, on a binge, just got released from
7 custody a couple of weeks before that. He's having
8 ideas of killing his drug dealer, committing violent
9 acts. He tries to get himself into this mental
10 health facility and they turn him away. Say come
11 back in a couple of weeks and we'll do another
12 interview. And you know what happens.

13 Think about the facts of this case. This is
14 how sick Donald Smith is. That strong pull that has
15 him attracted to young girls pulls on him so hard
16 that he walks into that Dollar General, walks around
17 in front of every single surveillance camera, and
18 obviously looking at Cherish. And he gets out,
19 takes them to Walmart, every single camera for
20 hours. That's how strong that pull is. He's going
21 to get caught. No matter what he does later on down
22 the road, he's going to get caught.

23 He tells Rayne his name is Don. He offers his
24 driver's license. Think about how sick you have to
25 be to do that.

1 Even puts the rope in the grocery cart,
2 foretelling what's in his mind, without any regard
3 for what anybody thinks about it. And then he
4 commits the act.

5 Before that he drives up to a car, no reason,
6 sticks his head out the window, says, hey, we're
7 going for cheeseburgers, leaving a space out there
8 to be identified by two people four and a half years
9 later.

10 That pull is so strong, not even thinking about
11 consequences. He's acting on the impulse. And it's
12 sick, we get that, you know that. That's how strong
13 it is. And that's how sick he is.

14 And two years later when he has no idea
15 anybody's listening, he's chatting it up at the jail
16 with the other guy in the other cell who -- the
17 little chase area. Remember what he said? Oh, 12
18 and 13 year olds, right up my alley. That's my
19 target range. That's just -- that's sick. He has a
20 mental illness. He is wired differently than me and
21 all of these people out here. He's wired
22 differently.

23 And you're going to hear from some
24 psychologists and you're going to hear from
25 neurologists, you're going to hear several different

1 doctors that all bring their areas of expertise into
2 this case to talk to you about Donald Smith's brain.
3 You're going to see the MRI, you're going to see his
4 PET scan, you're going to see the damage, right up
5 here (indicating). You're going to see what they
6 will describe as an area of degenerative process, a
7 disease, things that indicate as he was developing
8 as a baby that he was having disorders up here
9 (indicating). You'll see it. And you'll see that
10 his brain is smaller, it's atrophied over time, than
11 most people's brain. It doesn't work like my brain,
12 it doesn't work like those brains out there.

13 And one of the areas they talk about is
14 something called executive dysfunction. And it's
15 this area in the brain that controls your logic,
16 your reasoning, your decision-making. That area.
17 And it's corrupted.

18 One of the doctors describes the brain as a
19 tapestry. His is tattered. He didn't choose to be
20 that way. That's something that started as he was
21 developing. He didn't choose to be that way.
22 That's something that started as a young kid.

23 When you throw in the fact that he started
24 doing drugs at an early age to self-medicate,
25 perhaps starting as recreational, but it became an

1 addiction and it just becomes a powerful storm that
2 corrupts his brain. And in the end he cannot
3 control his impulses.

4 We are not saying that he's insane. He knows
5 right from wrong. That's not what the doctors are
6 saying. They're saying he is so sick up here
7 (indicating) that his physical problems up here,
8 damage to his brain, that when he has an impulse he
9 acts on it without regard for consequences.

10 It is not a pretty picture. This is all as
11 ugly as last week. We're not making excuses, we're
12 explaining it. Just to let you understand it.

13 You've been tasked with an incredible
14 responsibility. Each of you, and as a group,
15 you hold life or death in your hands for
16 Donald Smith.

17 And you'll go back and there will be a weighing
18 process, and hopefully you'll discuss this, all of
19 this, and the State's going to prove some
20 aggravators. We get that. But what Ms. Schlax
21 talked to you about in jury selection is that no
22 matter how many aggravators they have, no matter how
23 it's proven, beyond and to the exclusion of a
24 reasonable doubt, you still don't have to vote for
25 death. You can choose to show mercy, and sometimes

1 mercy is given to someone who might not even deserve
2 it.

3 So at the end of this week we'll ask you to
4 sentence Donald Smith to life in prison without
5 parole and he will wear that outfit just like that
6 (indicating) until the day he dies and nothing else.
7 And he will ultimately leave prison in a prison --
8 in a pine box.

9 Thank you, ladies and gentlemen.

10 THE COURT: Thank you, Mr. Fletcher.

11 The State may call their first witness.

12 MR. CALIEL: Your Honor, the State would call
13 Kerri-Ann Buck to the witness stand.

14 THE COURT: Kerri-Ann Buck.

15 (Witness present.)

16 THE COURT: Come right here, Ms. Buck, in
17 front of me. The clerk will swear you in.

18 (Witness sworn.)

19 THE WITNESS: Yes, I do.

20 THE COURT: Thank you. Our witness chair is
21 over here.

22 MR. CALIEL: May it please the Court.

23 THE COURT: Sure.

24 KERRI-ANN BUCK,
25 was called as a witness on behalf of the State,

1 and after being duly sworn, then testified as follows:

2 DIRECT EXAMINATION

3 BY MR. CALIEL:

4 Q Good morning, ma'am.

5 A Good morning.

6 Q Can you please introduce yourself to the
7 members of the jury.

8 A My name is Kerri-Ann Buck.

9 Q Ms. Buck, where do you currently live?

10 A Just outside Syracuse, New York.

11 Q And how long have you lived up there?

12 A On and off pretty much my whole life, besides
13 the time I lived here.

14 Q Back in your childhood did you live with
15 family here in Jacksonville, Florida?

16 A I did.

17 Q I'd like to direct your attention to
18 September 27th, 1992. How old were you at that time?

19 A 13.

20 Q And on that Sunday afternoon were you in your
21 neighborhood leaving your house?

22 A Yes.

23 Q Was that after church that morning?

24 A It was.

25 Q Where were you going?

1 A I was going to my friend Tamara's house.

2 Q Did she live within walking distance of your
3 house?

4 A A few city blocks, yes.

5 Q As you were walking to Tamara's house, did
6 you encounter a man in a van?

7 A Yes.

8 Q Could you describe the van to me?

9 A It was a gray van and the side windows were
10 tinted. It was a Chevy, I believe.

11 Q And the man who was driving that van,
12 describe him for me.

13 A He was probably close to 40, shoulder length
14 dark hair, pointy nose.

15 Q Did you get a good look at him?

16 A I did.

17 Q Did you see his face?

18 A Um-hum.

19 Q Do you see the man that was driving that van
20 in this courtroom here today?

21 A Yes.

22 Q Would you please point him out and describe
23 where he's seated and what he's wearing?

24 A Right there at that table in the orange
25 (indicating).

1 MR. CALIEL: Your Honor, may the record
2 reflect that the witness has identified the
3 defendant, Donald Smith?

4 THE COURT: The record will so reflect.

5 BY MR. CALIEL:

6 Q Ms. Buck, how did the defendant approach you
7 in the van on that day?

8 A He was coming toward me and had stopped, he
9 pulled more toward my side of the road and asked if I
10 knew a girl named Susie.

11 Q What was your response to him?

12 A I told him no.

13 Q What happened next?

14 A He -- he asked me if I went to Southside
15 Middle School and I also -- I did, but I told him no.

16 Q Why did you tell him no?

17 A Because he was a stranger.

18 Q Did he ask you if you wanted a ride?

19 A He did.

20 Q And what was your response to him?

21 A I told him no.

22 Q What happened after you told him no to the
23 ride?

24 A He demanded that I get into the van.

25 Q Obviously you were 13 years old at the time

1 and you described he was somewhere near 40. If you
2 could, the best as you can, describe to the members of
3 this jury how he demanded that you get in the van.

4 A He -- he told me to get the fuck in the van.

5 Q How would you describe the voice?

6 A Mean. Scary.

7 Q When he said this to you, what did you do?

8 A I ran.

9 Q Where did you run?

10 A I headed toward -- toward my friend Tamara's
11 house. At the time it was the only thing I knew to do.

12 Q Did the defendant chase after you in that
13 van?

14 A He did.

15 Q Did you try to run to some place, find a
16 place of safety?

17 A I'm sorry. Yes. I -- I'm sorry. I -- I
18 tried to run to -- to Tamara's house. At one point he
19 had cut me off at a crossroad and I just kept running.
20 And I did make it to Tamara's house and no one was home
21 and I pounded on the door and nobody answered.

22 Q Eventually did you try to find safety behind
23 the school?

24 A I did. And --

25 Q Where -- where in that school?

1 A Excuse me.

2 Q Where in the school area did you try to find
3 safety?

4 A Behind the school there was a small playground
5 and there was a big -- like a tube slide in the
6 playground and I got inside.

7 Q When you got inside the slide, did you try to
8 conceal yourself, hold yourself up in the slide so
9 nobody would see you?

10 A I did. I -- I was holding, pushing out with
11 my hands and my feet inside.

12 Q Did you hear this defendant come after you?

13 A I did.

14 Q What did you do?

15 A I was scared. I was -- it was sloping and I
16 was so afraid I was going to fall out and he was going
17 to find me.

18 Q Did you hear the van pull up to the
19 playground area?

20 A Yes.

21 Q Did you hear him say anything?

22 A He said, I know you're in there, you little
23 bitch. If you -- I'm going to find you.

24 Q Did you try to remain hidden?

25 A I'm sorry. What?

1 Q Did you try to remain hidden in the slide?

2 A I did.

3 Q How long do you think you were inside that
4 slide hiding from this defendant?

5 A It seemed like forever.

6 Q At some point did you hear the van drive
7 away?

8 A I did. I still stayed in there a little
9 longer after I heard it drive away.

10 Q When you felt really safe did you run for
11 help?

12 A I did.

13 Q Where did you go?

14 A I -- my sister had another friend on the
15 street close to the school so I ran there.

16 Q And once you got there, did you call your
17 family, your mother, your sister?

18 A I did.

19 Q And did you all contact the police?

20 A Yes.

21 Q Given how quick and how fast this happened,
22 were you able to get a tag number on September 27th of
23 1992?

24 A I wasn't. I was just trying to get away.

25 Q Did you come to see that van and that man

1 again in your neighborhood in the weeks that followed?

2 A Yes.

3 Q When did you see him?

4 A He was outside my house.

5 Q Did you tell your mother?

6 A I did.

7 Q What did you all do?

8 A We got in the car and went to look for the
9 license plate number.

10 Q Were you able to get it?

11 A Yes.

12 Q When you drove after him, did you make eye
13 contact with this defendant?

14 A I did.

15 Q Did he recognize who you were?

16 A He did. He -- he looked at me like he was
17 going to kill me.

18 Q Did you and your mother then contact the
19 Jacksonville Sheriff's Office and provide them with a
20 tag number?

21 A We did.

22 Q At some point in the days that followed did
23 you meet with Detective Parker from the Jacksonville
24 Sheriff's Office?

25 A Yes.

1 Q And did you tell him what happened?

2 A I did.

3 Q And did he provide or show to you what is
4 commonly referred to as a photospread or a series of
5 photographs?

6 A Yes.

7 Q Were you able back in 1992 at the age of 13
8 to identify the person who did this to you?

9 A Yes. I will never forget his face.

10 Q The person who chased after you into that
11 playground, is this the man who sits right here
12 (indicating)?

13 A Yes.

14 Q Why were you so afraid?

15 A I knew he was going to hurt me.

16 Q Even now, decades later, are you still
17 affected by what he did to you?

18 A Absolutely. And it affects the way I raise my
19 children.

20 Q Thank you, ma'am.

21 MR. CALIEL: I don't have any further
22 questions.

23 THE COURT: Any cross?

24 MS. SCHLAX: Briefly, Your Honor.

25 CROSS-EXAMINATION

1 BY MS. SCHLAX:

2 Q Good morning, Ms. Buck.

3 A Good morning.

4 Q I know it's difficult to come in here and
5 relive something that happened so long ago.

6 This happened in 1992?

7 A Yes.

8 Q And even though it's so many years later, you
9 had no difficulty identifying Mr. Smith, did you?

10 A Absolutely not.

11 Q And even though you were 13 years old, you
12 actually were part of a court process, weren't you?

13 A Yes.

14 Q You even gave a deposition even at 13 years
15 old.

16 A I did.

17 Q But that case did not go to trial, correct?

18 A No.

19 Q And, in fact, he ultimately served six years
20 for what you've just described.

21 A I -- I wasn't -- I was unaware of how much
22 time he served. I was young.

23 MS. SCHLAX: Thank you. I don't have any
24 further questions.

25 THE COURT: Any redirect?

1 MR. CALIEL: No redirect, Your Honor.

2 THE COURT: May this witness be excused?

3 MR. CALIEL: Yes, Your Honor.

4 THE COURT: Thank you for your time. Take
5 your time when you leave the witness chair and go
6 back outside.

7 THE WITNESS: Okay.

8 MR. CALIEL: Your Honor, at this time the
9 State would ask that the Court read the
10 stipulation of the parties to the members of the
11 jury.

12 THE COURT: Ladies and gentlemen of the jury,
13 I have another stipulation to read to you. It has
14 the style of the case and it reads as follows:
15 The State and the defense hereby stipulate that
16 the following facts are true and you, the jury,
17 should accept said facts proven beyond a
18 reasonable doubt. The defendant, Donald James
19 Smith was convicted of the crime of attempted
20 kidnapping in the Circuit Court in and for Duval
21 County, Florida, in case No. 1992-11193-CFA, on
22 January 15th, 1993. The victim of the attempted
23 kidnapping was Kerri-Ann Buck. And this is signed
24 by Mr. Smith, by Ms. Schlax on his behalf and by
25 Mr. Caliel for the State.

1 Thank you.

2 MR. CALIEL: Your Honor, the State has no
3 further evidence in aggravation.

4 THE COURT: Okay. With that I think what we
5 should do then is excuse the jury for a short
6 recess.

7 If you'll step in the back for about ten
8 minutes. Thank you.

9 (Jury absent.)

10 THE COURT: I don't know if you --

11 MS. SCHLAX: No, Your Honor, I wasn't -- I
12 wasn't anticipating addressing this orally. Our
13 first anticipated witness I know was landing at
14 11:00 o'clock. If the Court will indulge us, let
15 us see if we can't rearrange some witnesses to
16 allow for the waiting.

17 MR. CALIEL: Your Honor, we have no
18 objection. Ms. Buck's testimony was so powerful
19 we didn't feel we needed to put on anything else.

20 THE COURT: All right. Well, we'll be in
21 recess for ten or 15 minutes. It takes the jury
22 15 minutes to have a recess with 16 people. So go
23 ahead and see what you can rearrange and we'll
24 come back and we'll see where we're at.

25 We'll be in recess.

1 (Recess.)

2 (Jury absent.)

3 (Defendant present.)

4 MR. CALIEL: As Mr. Smith is approaching
5 counsel table, yesterday I reviewed, and I greatly
6 appreciate the defense providing me with the
7 demonstrative exhibits they were going to be
8 utilizing in testimony. I have reviewed Dr.
9 Buffington's Power Point and my only objection to
10 Dr. Buffington's Power Point, which I explained to
11 the defense this morning, is the Power Point
12 references psychiatric symptoms, psychiatric
13 effects. Based upon the deposition which I took,
14 Dr. Buffington's a qualified pharmacologist, but
15 he's not a medical doctor, he's received no
16 training in psychology or psychiatry. As a matter
17 of fact, his master's is in business. And I do
18 have an objection to him referring to psychiatric
19 symptoms and relating to psychiatric symptoms.

20 If he wants to talk about how cocaine
21 physiologically affects the body or how other
22 drugs affect the body and the impact that that can
23 have on the body, I think that's fine. When we
24 start to go into psychiatric effects of cocaine
25 usage, I think it falls outside the area of his

1 expertise and I would object to those portions of
2 his testimony. I think there's a couple of slides
3 of the multiple slide Power Point that refer to
4 that.

5 And that is the basis for my objection. I
6 don't believe he's qualified as an expert in
7 forensic psychology or psychiatry. And so I think
8 him opining on those issues falls outside the area
9 where he is qualified to testify and I would
10 object on that basis.

11 MR. FLETCHER: I would proffer his testimony,
12 Judge. I believe he's qualified.

13 THE COURT: All right. Well, first we have
14 to figure out, other than this doctor that we're
15 going to have a proffer from, there's no other
16 witness available until 12:00 or 12:30, is that
17 correct?

18 MS. SCHLAX: I apologize.

19 (Defense counsel conferring.)

20 MS. SCHLAX: No, Your Honor.

21 THE COURT: And I think what you're asking
22 is you want to go ahead and do the proffer for
23 Dr. Buffington, but you don't want him to testify
24 until after Dr. Holmes testifies.

25 MS. SCHLAX: Yes, Your Honor.

1 THE COURT: Is that correct?

2 MS. SCHLAX: Yes, Your Honor.

3 THE COURT: Just for the record, it's 10:47.
4 How long do you think the proffer will take? Just
5 generally. I know it's not specific.

6 MR. FLETCHER: I'll do some basic
7 introduction and then we'll skip straight to the
8 -- just do the part, see if he's qualified.

9 THE COURT: And you'd like the jury back at
10 12:30, is that correct?

11 MS. SCHLAX: If the Court thinks that's
12 sufficient. We'll be ready to proceed at 12:30,
13 Your Honor.

14 THE COURT: All right. Then I guess bring
15 the jury in and I'll tell them we have a delay
16 that can't be helped and have a little break and,
17 but it would have to include their lunch.

18 This is showing -- wait a second. Ms. Schlax,
19 whatever you're doing is showing on the monitors.

20 MS. SCHLAX: Oh, I apologize.

21 THE COURT: Thank you. If you could just
22 wait just a second. Thank you. I appreciate it.
23 Okay.

24 BAILIFF: Jury's entering the courtroom.

25 (Jury present.)

1 THE COURT: You may be seated.

2 Ladies and gentlemen of the jury, we've run
3 into a matter that's going to delay the next
4 testimony in front of you and I know it's a little
5 bit early for lunch unless you didn't eat breakfast.
6 But we can't proceed further until 12:30 today. So
7 you'll be on a break until 12:30 and that will need
8 to include your lunch break because we won't break
9 again for lunch after that.

10 Again, the instructions are the same. You're
11 not to speak with anyone or look for any information
12 about the case outside of the courtroom, and that
13 includes talking among yourselves, although you
14 certainly are free to go take a walk, go to lunch,
15 whatever you'd like to do with other members of the
16 jury. You just cannot discuss the case.

17 Again, if there's someone who prefers to stay
18 in the jury room, you can do that, but if that's
19 your decision then you have to stay there. You
20 can't stay and go. If you stay you stay, if you go
21 you go. If you want to go get something and bring
22 it back you may do that as well.

23 So with our apologies for any inconvenience,
24 we'll excuse you until 12:30 and we'll be ready to
25 proceed. Thank you.

1 (Jury absent.)

2 THE COURT: All right. You may be seated.

3 Is Dr. Buffington here to be called?

4 MS. SCHLAX: Yes.

5 THE COURT: We'll call Dr. Buffington for
6 purposes of a proffer.

7 (Witness present.)

8 THE COURT: Good morning. Come in front of
9 me and Madam Clerk will swear you in.

10 (Witness sworn.)

11 THE WITNESS: I do.

12 THE COURT: Thank you, sir. Our witness
13 chair is over here.

14 Dr. Buffington, is that correct?

15 THE WITNESS: Yes.

16 THE COURT: This is called a proffer. We're
17 going over your testimony outside the presence of
18 the jury --

19 THE WITNESS: Yes, ma'am.

20 THE COURT: -- to address any objections by
21 the State to any portion of that testimony.
22 You'll be called back later. That's when you will
23 testify.

24 Mr. Fletcher.

25 MR. FLETCHER: Thank you, Your Honor.

1 DANIEL E. BUFFINGTON,
2 was called as a witness on behalf of the Defense,
3 and after being duly sworn, then testified as follows:

4 EXAMINATION ON PROFFER

5 BY MR. FLETCHER:

6 Q Good morning. Please state your name.

7 A Dr. Daniel E. Buffington, B-u-f-f-i-n-g-t-o-n.

8 Q And, Dr. Buffington, what do you do for a
9 living?

10 A I'm a clinical pharmacologist at the
11 University of South Florida College of Medicine and
12 Pharmacy. I have a specialty practice where patients
13 are referred to me for medication monitoring,
14 therapeutic adjustments, drug interaction assessment.

15 I run a drug information services for primary
16 care and specialty physicians and health claims, and I
17 also serve as a medication safety expert under Health
18 and Human Services, specifically within Medicare.

19 Q Okay. And can you give us an idea of your
20 training and background and your education?

21 A Yes. The Doctor of Pharmacy is similar to a
22 Doctor of Medicine with the enhanced focus on
23 medication management. So it involves direct patient
24 care, pathophysiology, pharmacology, clinical research
25 training about new -- processes for new drug

1 development and medication safety and surveillance.

2 Following that I did a residency and
3 fellowship similar to what you see in medicine. The
4 residency was at Chatham Pharmacy Practice. The
5 fellowship was in clinical pharmacology, a specialty
6 service. I also completed an MBA with a healthcare
7 focus.

8 THE COURT: With what?

9 THE WITNESS: An MBA with a healthcare focus.

10 BY MR. FLETCHER:

11 Q Have you testified in court before as an
12 expert in the field of pharmacology?

13 A Yes, numerous times as early as the early
14 '90s.

15 Q Okay. Doctor, you have prepared a Power
16 Point presentation?

17 A That is correct.

18 Q To assist you in testifying?

19 A Yes, sir.

20 Q Can you -- I believe the State is objecting
21 -- I don't know the page number, but it starts with
22 psychiatric effects of chronic cocaine use.

23 MR. CALIEL: Actually I think it starts on --
24 the first objection is on case background where
25 it discusses prior psychiatric --

1 THE WITNESS: With what, sir?

2 MR. FLETCHER: I'm sorry. We've taken that
3 out.

4 MR. CALIEL: Oh, you've taken that out.

5 MR. FLETCHER: I'm sorry.

6 THE WITNESS: Yes, I'm on that slide.

7 BY MR. FLETCHER:

8 Q Okay. Doctor, with your training and
9 experience, can you explain to the Court how it is that
10 you are qualified to testify as to the effects of
11 chronic cocaine use and psychiatric --

12 THE COURT: Are you looking at the monitor or
13 at your --

14 THE WITNESS: Both.

15 THE COURT: Okay.

16 THE WITNESS: I confirmed with the monitor
17 that it's the same slide.

18 THE COURT: Same thing. Okay. I'm sorry.

19 THE WITNESS: Continue with the answer?

20 BY MR. FLETCHER:

21 Q Dr. Buffington, can you explain to the Court
22 or to us how it is that you are qualified to testify as
23 to the psychiatric effects of chronic cocaine use?

24 A Yes, sir. Well, the Doctor of Pharmacy Degree
25 is not limited to pharmacology. It can be the study of

1 just the independent substance. By its very nature I
2 have to understand that the coursework includes the
3 pathophysiology associated with every area of medicine.
4 So just like an MD degree includes all studies of the
5 body, so does the pharmacy degree. So it's part of the
6 core training.

7 In addition, it's also part of the spectrum of
8 services. I have patients who are referred to me or I
9 will see in practice settings that have psychiatric
10 issues and a psychiatrist, as a specialist, would refer
11 to me for questions about medications and the effect
12 they have on various psychiatric conditions.

13 So it is understating both the positive
14 attributes and therapeutic goals in conditions that are
15 being treated as well as the adverse side-effects or
16 toxicities for each of those categories.

17 So for psychiatry or psychopharmacology it's a
18 core component of my training, my research and the
19 active work that I do.

20 Q And how long have you been engaged in this
21 type of work?

22 A Since 1987.

23 Q Okay. And have you testified in court with
24 respect to the psychiatric effects of chronic cocaine
25 use on prior occasions?

1 A Multiple times.

2 Q And is that for just the defense or have you
3 ever worked on the prosecution side?

4 A Both sides. And that's state and federal.

5 Q Okay. And have you also testified as an
6 expert in civil cases?

7 A Yes.

8 Q Dealing with the same issues?

9 A Yes.

10 Q Okay.

11 A And I've testified for the State Attorney's
12 Office here as well.

13 Q And do you feel that you're qualified to
14 testify as to the psychiatric effects of chronic
15 cocaine use?

16 A Very much so.

17 Q You can talk about impaired executive
18 functioning?

19 A Yes.

20 Q Cocaine-induced paranoia?

21 A Yes.

22 Q On the next page in your Power Point
23 presentation you list risk factors and symptoms,
24 starting with the quantity of cocaine consumed and some
25 of the symptoms of cocaine use.

1 A That's correct. So with cocaine one of the
2 most severe adverse side-effects, other than
3 physiologic, so say high like blood pressure or a heart
4 attack, would be cocaine-induced psychosis. And with
5 that, what I listed on the left side are the risk
6 factors associated with the different types of many
7 forms or product formulations on the way that a person
8 can ingest cocaine.

9 And the risk factor for psychosis goes up with
10 the frequency, the type of route they're using. And on
11 the right side I've listed the symptoms that associate
12 with the cocaine-induced psychosis.

13 Q Okay. And have you testified before in a
14 court of law with respect to these same things?

15 A Numerous times.

16 Q Okay. And I think you said this earlier, but
17 you consult with psychiatrists about a patient's
18 medication?

19 A Yes. They -- they request consultation from
20 me about the patient's medications.

21 Q Okay. So you -- you actually know more about
22 medications and the medications' effects than a
23 psychiatrist?

24 A Physicians have one class of pharmacology
25 during their academic training. I spent four years in

1 mine. It is a specialty focused degree.

2 MR. FLETCHER: Your Honor, that's all I have.

3 THE COURT: Mr. Caliel.

4 MR. CALIEL: Thank you, Your Honor.

5 EXAMINATION ON PROFFER

6 BY MR. CALIEL:

7 Q Dr. Buffington, your training, though, you've
8 had no training in forensic psychiatry, correct?

9 A That's correct. Forensic just means
10 presentation to the court.

11 THE COURT: It just means what? I'm sorry.

12 THE WITNESS: Presentation into court or to
13 the court.

14 BY MR. CALIEL:

15 Q What type of psychiatric training do you
16 have?

17 A It is part of the core curriculum. It's part
18 of the experiential rotations. It was part of
19 additional training with sights for my clinical
20 rotations. It was part of my residency, it was part of
21 my fellowship. It's also part of the continuing
22 education that I do each year as well.

23 Q You're saying it's a part of. What
24 specifically have you taken -- I mean you're not a
25 psychiatrist, right?

1 A No. Just like in medicine, you study the
2 entire body.

3 Q Okay. And so you can't discuss the mental
4 illness, but rather the effect that medication will
5 have on the treatment.

6 A No, sir, patients are referred to me to help
7 control the mental illness diagnosis that someone else
8 may have identified, and that practitioner, whether
9 it's primary care, and there's more psychiatry work
10 done in primary care offices than in psychiatry
11 offices, either of those, primary care or specialty,
12 when they have a difficult patient will often refer
13 those to a practice like mine for additional guidance
14 and help.

15 Q So, in essence, we don't even need a
16 psychiatrist in any situation? We can just go straight
17 to you?

18 A No, sir, I wouldn't recommend that, nor is
19 that what I do in my practice. I have a specialty
20 focus on the psychopharmacology.

21 Q What do you mean by psychiatric effects of
22 chronic cocaine use?

23 A The effects of the substance and the chronic
24 substance use, those are different. So the effects of
25 the substance, this is a chemical, what is the effect

1 it's having on me when I ingest it. Chronic substance
2 abuse, and even more so with cocaine, is the effects
3 that it has on the body, the brain, mood, judgment,
4 affect, even after that drug is gone.

5 So the more frequent you use cocaine, the more
6 frequently patients present -- develop and present with
7 psychiatric symptoms. Paranoia being the prominent one
8 that typically drives patients from recreational use
9 into chronic use and abuse and into rehab because it
10 begins to manifest and take over as a result of the
11 chronic use. So it's not an intoxication question
12 specifically.

13 Q Do you have an expertise in how cocaine -- it
14 sounds like you're talking about the psychiatric
15 effects or the effects on the brain that cocaine would
16 have. Do you have an expertise in how cocaine usage
17 would affect other mental health diagnoses or
18 disorders?

19 A Yes, that's part of that training. As I've
20 stated, it's not simply -- my expertise is not simply
21 how much a drug weighs or what its property is. It's
22 that very issue that you're bringing up, and that is
23 what manifestations does it have with acute ingestion
24 and what impact does it have with chronic use and
25 abuse.

1 Q What effect would it have on pedophilia?

2 A None. That's a different condition. It's not
3 drug-induced.

4 Q So chronic cocaine usage would have no effect
5 on pedophilia?

6 A It could change an individual's inhibitions,
7 but it's not going to change the diagnosis to be used
8 for or specific about treating pedophilia or induce it.

9 Q In other words, cocaine doesn't cause
10 pedophilia?

11 A If it changes the inhibitions of an individual
12 who is a pedophile, then it could worsen that, but it
13 isn't going to produce pedophilia.

14 Q And physical symptoms of chronic and
15 extensive cocaine use, one of those physical symptoms
16 can actually be impotence, correct?

17 A Can be what?

18 Q Impotence.

19 A Or enhance performance.

20 Q But with chronic long-term cocaine use, it is
21 a common side-effect that the male may not be able to
22 get an erection.

23 A I wouldn't use the word common. And each
24 person is going to be individual. It's going to be
25 depending if it's frequently used as a sexual promoter

1 and for performance as opposed to inhibition.

2 Q Okay. But it's -- of course, none of this
3 use is legal?

4 A Well, cocaine --

5 Q Nobody prescribes crack cocaine, correct?

6 A Crack, no, but cocaine, yes, it is a
7 prescription medication.

8 Q What expertise would you have in regards to
9 how his incarceration without psychiatric therapy, how
10 can you form an opinion about that?

11 A I don't think it's an opinion. I think it's a
12 fact. His incarceration records, prior to being
13 released, indicate that at the time he was released he
14 was not receiving any therapy. So it's not an opinion.
15 It's a fact.

16 Q Well, that's a fact, but how does it affect
17 your opinion?

18 A It becomes instrumental in looking at -- this
19 is a broader discussion, but he initiated the use of a
20 psychiatric medication for psychosis, a product called
21 quetiapine or Seroquel, during that less than 30 day,
22 21 to 28 day period following his incarceration, and
23 that was inducing a new substance that impacts
24 neurotransmitters, chemicals in the brain. And when we
25 start a new medication, psychiatric change in dose of a

1 psychiatric medication, or terminate the psychiatric
2 medication, we have about a two-month to three-month
3 period where we may see exaggerated side-effects before
4 we see the full desired pharmacologic effects.

5 So what we know in this case is he initiated
6 crack cocaine use, the strongest, most intensive
7 effective cocaine, simultaneous with also starting
8 quetiapine during that period.

9 So we know that he wasn't on quetiapine and
10 stabilized. He came out of jail without any
11 psychiatric medication and started quetiapine and
12 cocaine during that 21, 28 day period.

13 Q But you have no records to show that,
14 correct?

15 A No, sir. Just like any patient, it's
16 self-report is what we have to work with.

17 Q Okay. So all the information about what he
18 was taking, the amounts, the duration, all that came
19 from the defendant?

20 A Correct. Just like every other patient.

21 Q We have no blood tests?

22 A No, I didn't see that the law enforcement or
23 prison did any type of toxicology work upon his
24 arrival.

25 Q And you keep on saying just like every other

1 patient. Well, you have seen patients before where you
2 have a history of prescribed narcotics, correct?

3 A Yes, so that's not -- it's not like in a
4 hospital setting, we're not going to have what we call
5 MAR, a medication and administration record. So even
6 though someone was dispensed a bottle of 30 tablets on
7 a given date, there's no record by another healthcare
8 professional documenting the date, time and dose.

9 So on any out-patient, even if I have
10 prescription records for -- what you're asking is what
11 evidence do I have that he took them on those dates. I
12 don't. Just like a regular patient.

13 Q Okay. Did you use any standardized
14 instruments that are used in forensic psychiatry or
15 psychology to test for malingering?

16 A The only thing I've been taught, and I use
17 routinely, has been functional for me over time, is the
18 style of questioning where at various times during an
19 interview process you're deriving the same content,
20 looking for the same answer and looking for variations
21 in the accuracy of that answer.

22 Q So you look for malingering based upon just
23 how you ask the questions?

24 A Stylistically and strategically, that is
25 correct.

1 Q Well, I guess, based upon your exposure to
2 psychiatry, in your training which you described, you
3 must be familiar with the SIRS test, right?

4 A Yes.

5 Q The Structured Interview of Recorded
6 Symptoms?

7 A Correct. And that's what I'm saying. I'm
8 doing a structured interview where I'm asking the same
9 question from a variety of directions.

10 Q Okay. But you didn't use the standardized
11 instrument?

12 A No.

13 Q Okay.

14 A But I did use routine medical records.

15 Q Okay. What about the Miller Forensic
16 Assessment Test? Did you utilize that?

17 A No.

18 Q What about the Test of Malingering Memory?

19 A Well, I think that's consistent with what I
20 just stated.

21 Q But these are standardized instruments that
22 are used. You're not using an instrument. You're just
23 making up your own malingering test as you go along by
24 how you ask questions.

25 A No, sir, in those tests, which are not routine

1 for every clinical intervention with any patient, are
2 the process of looking for a consistency of questions
3 throughout the structured interview.

4 Q But you didn't use any standardized tests
5 with Mr. Smith when you met with him to determine
6 whether or not he was malingering or not?

7 A No to a precise, no, nor do I see that done in
8 any clinical practice.

9 Q Okay. Are you aware of the fact that other
10 experts hired by the defense did utilize such tests?

11 A No, I'm not aware of each other experts'
12 reports.

13 Q Okay. Wouldn't you think that's important to
14 know about?

15 A Not if I'm doing the process of looking for
16 malingering myself.

17 Q So I mean if somebody else found he was
18 malingering, that he was malingering and exaggerating
19 symptoms, that wouldn't be important to you?

20 A That would have been during the time of their
21 interview and I didn't find malingering during mine. I
22 felt that he was forthright and consistent with his
23 answers.

24 Q And I guess I have to ask the question. When
25 we last spoke over the telephone, the only time you had

1 ever met with the defendant was 15 minutes over the
2 telephone before the deposition on the day of the
3 deposition; is that accurate?

4 A That is correct. I wanted to clarify some of
5 the questions I still had remaining prior to my
6 providing you with formal testimony, and in addition to
7 that you raised some additional questions during the
8 testimony or during the deposition that I had, and I
9 met with him about two weeks ago and got those answers
10 as well.

11 Q What were the additional questions that you
12 got answered after the deposition was taken?

13 A Yes, sir. You had asked specifically when did
14 he start the Seroquel and you also asked who he got it
15 from and I identified who that was.

16 Q Okay. Were those the only two questions that
17 were answered in the face-to-face interaction?

18 A That was the predominance of the interview. I
19 was there to interview other inmates and he was in the
20 same facility.

21 Q How long was your interaction with the
22 defendant at that time?

23 A On the second? Probably a half an hour.

24 Q Okay. So combined, both over the telephone
25 and in person, you met with this defendant for 45

1 minutes?

2 A To my recollection, yes.

3 MR. CALIEL: Thank you, Your Honor. I don't
4 have any further questions.

5 THE COURT: Any redirect?

6 MR. FLETCHER: No, Your Honor.

7 THE COURT: Okay. Thank you, sir.

8 They'll make argument, but we have to do that
9 out of your presence.

10 THE WITNESS: Yes, ma'am.

11 THE COURT: If you'll step outside. I'm not
12 sure, I don't think they're going -- you need to
13 check with them. I don't think they're calling
14 you until after lunch so they may need to tell you
15 where you could go for a little bit.

16 THE WITNESS: Okay.

17 MR. FLETCHER: Judge, I would submit to the
18 Court that he is qualified to testify in the
19 matters that he is testifying about, both for his
20 formal training, his education and his work
21 experience.

22 He testified that oftentimes psychiatrists
23 come to him to find out about a medication's
24 effect, various medications and how they effect the
25 psychiatrists' patients, and he's demonstrated to

1 the Court that he is fluent in those things and I
2 think he's qualified to testify.

3 THE COURT: Mr. Caliel.

4 MR. CALIEL: Your Honor, I think his
5 testimony will be more to the weight, not the
6 admissibility so I have no further objection.

7 THE COURT: I agree. He'll be allowed to
8 testify.

9 MR. FLETCHER: I'm sorry.

10 THE COURT: The State has argued or presented
11 that they feel that the argument goes more to
12 weight, not the admissibility. I agree so he can
13 testify.

14 MR. FLETCHER: Thank you.

15 THE COURT: You might want to let him know,
16 since he's not going to be testifying for a couple
17 of hours, where he might be able to go have lunch or
18 whatever it is you will need him to do.

19 MS. SCHLAX: Yes, Your Honor.

20 THE COURT: If you want him to stay here,
21 that's up to you, not me. But he may not be
22 local.

23 And we told the jury to be back at 12:30 and I
24 don't think there's anything else we can do until
25 then, is that correct?

1 MS. SCHLAX: That's correct.

2 Your Honor, as soon as the jury is back, the
3 first thing I would do before calling Dr. Holmes
4 is I will introduce, just so the Court is not
5 surprised, I have an update of the records
6 custodian for two business records that we will be
7 introducing as well as the prior judgment and
8 sentences. I won't publish them at that time, but
9 it will be the first thing that I do.

10 THE COURT: All right. I would ask that we
11 be back, the jury is 12:30 to start, that we be
12 back at 12:20 so we can get ready and be ready to
13 go at 12:30.

14 MS. SCHLAX: Yes, Your Honor.

15 THE COURT: And with that we'll be in recess
16 till 12:20.

17 MS. SCHLAX: Thank you, Your Honor.

18 THE COURT: And that will be your lunch
19 break. We will not be taking a lunch break.
20 Thank you.

21 (Noon recess.)

22 (Defendant present.)

23 (Jury absent.)

24 MS. SCHLAX: Your Honor, we appreciate the
25 Court indulging us. We should be ready to go for

1 the rest of the afternoon.

2 THE COURT: Okay.

3 MS. SCHLAX: We will do the three witnesses
4 that I was concerned that we might have to stay
5 late for. Additionally, Mr. Bossen has made
6 himself available.

7 THE COURT: Oh, okay.

8 MS. SCHLAX: So that will be the only change
9 in regards to the witness order.

10 THE COURT: Okay. You have four witnesses
11 total or five?

12 MS. SCHLAX: There will be four witnesses
13 called this afternoon, Your Honor.

14 THE COURT: We told the jury 12:30 so we'll
15 wait until 12:30.

16 Mr. Smith is back in the courtroom. Everyone
17 else is present.

18 Is there anything else we need to do before?

19 MR. CALIEL: Your Honor, that one issue,
20 Ms. Nelson is going tonight, just to let you know.

21 THE COURT: Okay.

22 MS. NELSON: Oh, you can go.

23 THE COURT: No. No, no, no, no. No, no.

24 Okay. Who is your first witness? Is it

25 Dr. Holmes?

1 MS. SCHLAX: Yes, Your Honor.

2 THE COURT: All right. Then is everyone
3 ready for the jury to come out?

4 MS. SCHLAX: Yes, Your Honor.

5 THE COURT: Are they ready?

6 BAILIFF: They were a couple of minutes ago.
7 They were ready.

8 THE COURT: Okay.

9 BAILIFF: One in the restroom, ma'am.

10 THE COURT: Okay.

11 BAILIFF: Are you ready, ma'am?

12 THE COURT: We're ready.

13 BAILIFF: The jury is entering the courtroom.
14 (Jury present.)

15 THE COURT: Thank you, everybody. You may be
16 seated.

17 Thank you, ladies and gentlemen.

18 Were you able to follow my instructions about
19 not receiving any information about this case
20 outside of the courtroom?

21 (Affirmative response from jurors.)

22 THE COURT: Is there anyone who was unable to
23 follow those instructions?

24 (No response from jurors.)

25 THE COURT: All right. The record will

1 reflect that everyone is following my
2 instructions.

3 We're ready to proceed. We should have no more
4 delays like this today.

5 And the defense may call their first witness

6 MS. SCHLAX: Thank you, Your Honor.

7 And, Your Honor, the first thing the defense
8 would like to do is I would seek to introduce
9 Exhibit A for identification, which is a business
10 record with accompanying affidavit from the Mental
11 Health Resource Center; B, the business record of
12 Precision Imaging MRI and PET Scan, with the
13 appropriate records custodian; as well as exhibits
14 G, H, I, J, K, L, and M, which are certified
15 judgments that we are seeking judicial notice of.

16 We'll tender that to the Court and we will
17 publish those at a later time.

18 THE COURT: All right. Thank you.

19 Any objection?

20 MR. CALIEL: No objection from the State,
21 Your Honor.

22 THE COURT: All right. I'm not sure I have
23 it right. Exhibit A, B, and G through M?

24 MS. SCHLAX: Yes, Your Honor.

25 THE COURT: Is that correct?

1 MS. SCHLAX: Yes, Your Honor.

2 THE COURT: So A will be Defense Exhibit 1, B
3 2, G -- A is 1, B is 2, G is 3, H is 4, I is 5, J
4 is 6, K is 7, L is 8 and M is 9, all evidence for
5 the defense.

6 (Whereupon the foregoing items marked in
7 evidence as Defense Exhibits 1 thru 9,
8 respectively.)

9 MS. SCHLAX: Thank you, Your Honor.

10 THE COURT: Thank you.

11 MS. SCHLAX: Your Honor, at this time the
12 defense would call Dr. Heather Holmes.

13 THE COURT: Dr. Heather Holmes.

14 (Witness present.)

15 THE COURT: Good afternoon. Come in front of
16 me and the clerk will swear you in.

17 (Witness sworn.)

18 THE WITNESS: I do.

19 THE COURT: Thank you. And the witness chair
20 is over here.

21 MS. SCHLAX: And may I inquire, Your Honor?

22 THE COURT: Yes.

23 HEATHER HOLMES,

24 was called as a witness on behalf of the Defense,

25 and after being duly sworn, then testified as follows:

DIRECT EXAMINATION

1

2 BY MS. SCHLAX:

3 Q Good afternoon.

4 A Good afternoon.

5 Q Can you please introduce yourself to the
6 jury.7 A Sure. My name is Dr. Heather Holmes. I'm a
8 clinical and forensic psychologist here in Florida.9 Q And, Dr. Holmes, can you start with, can you
10 give us your educational background?11 A Sure. I was born and raised in south Florida.
12 I then went away to obtain an undergraduate degree from
13 Marshall University in Huntington, West Virginia. I
14 had to do a major in English writing and psychology. I
15 then got a Master's Degree from Loyola College,
16 Maryland, Baltimore. That was in psychology.17 And then I received by Doctorate Degree from
18 George Washington University in Washington, D.C. in
19 psychology. And as part and parcel required for a
20 doctorate you have to do a one year full-time
21 internship under supervision. Graduation, I did that,
22 and became a psychologist with the Florida Department
23 of Corrections, our prison system here in Florida.24 Q And can you describe some of the things that
25 that involves.

1 A The internship or the --

2 Q The internship.

3 A I apologize to the Court.

4 THE COURT: That's okay.

5 THE WITNESS: Certainly. So I was based out
6 of Orlando and it's a minimum 40 hours a week
7 full-time for a year. I had several different
8 supervisors that were licensed clinical
9 psychologists here in the State of Florida. I
10 would travel between different institutions. The
11 majority of my time was spent at two different
12 institutions. One is Brevard Correctional, which
13 it's now closed, it was a youthful offender camp,
14 and that was a camp that was more based on
15 treatment because we had younger incarcerated men.

16 I had an individual therapy caseload, I did
17 sex offender treatment groups while I was there,
18 and I also was part of the panels and colleges
19 that review all of an inmate's records when he has
20 any previous arrests for a sexual crime and we
21 list any disciplinary problems, any medical
22 problems, any psychological issues, and then that
23 is then sent to Jimmy Ryce board in Tallahassee
24 for review.

25 The second portion of my internship was at

1 Lake Correctional Institution in Lake County and
2 that was, again, a male institution that has a
3 transitional care unit, stabilization unit, fancy
4 terminology for an inpatient psychiatric unit
5 within the Department of Corrections. So if you
6 come to prison and you're included in mentally ill
7 and you need to be on closer watch, have ready
8 access to a psychiatrist and psychiatric staff,
9 you would go to this hospital.

10 BY MS. SCHLAX:

11 Q What other training and experience have you
12 had?

13 A Well, it's been mostly in forensics. I have
14 several continuing education credits which are required
15 here in Florida, and in most states, to continue being
16 licensed. As with any field there's ongoing research.
17 So I have a subspecialty in the evaluation of sexual
18 offenders.

19 So a lot of my CEUs and continuing education
20 has been in the area of current research on sexual
21 offenders, which most does not occur here in the United
22 States, a little bit more less progressive than Europe
23 or Canada. So a lot of the research occurs there. So
24 sometimes it's long-distance learning. Other times
25 they'll come and teach. So the majority of it has been

1 along those lines.

2 I've also taught a couple of different
3 seminars on drug addiction, sexual offenders,
4 resentencing for juveniles, things of this sort.

5 Q Okay. And what does your current practice
6 consist of?

7 A Well, when my second child was born I decided
8 to discontinue therapy because I didn't want to be on
9 call. And, honestly, when you do forensic evaluations,
10 you are at the mercy of the court schedule and so I
11 didn't find it appropriate to keep cancelling and
12 rescheduling therapy patients.

13 So until five years ago I had a mixed practice
14 where I did individual therapy and I also did forensic
15 evaluations. Now I do exclusively evaluations in
16 therapy and about five to ten percent of them are for
17 nonforensic reasons, such as giftedness for school.
18 One year I did school psychology, attention deficit
19 hyperactivity disorder, learning disabilities, that
20 sort of thing. But the bulk of my practice is
21 evaluations for court.

22 Q Okay. So you say 90 percent. What types of
23 cases are you asked to consult on?

24 A It has changed over the years, just depending
25 on legislature, appellant post-conviction cases. In

1 the early part of my career I started in Dade County.
2 The entirety of my forensic practice were
3 court-appointed evaluations so that would mean the
4 judge would appoint forensic examiners to do
5 evaluations to see if somebody was competent to proceed
6 to court. Back at that time they paid for evaluations
7 to see if somebody was -- met the legal standard for
8 sanity at the time of the exam. They also would court
9 appoint mentally disordered sex offender evaluations so
10 I started with purely court-appointed evaluations.

11 From there I have a couple of evaluations that
12 was the request of the State and then kind of shifted
13 to more mitigation evaluations for the defense for
14 sentencing, and then as of recent there's been more
15 post-conviction.

16 So after somebody is sentenced, if there is an
17 appellate issue, and recently we have some death
18 penalty people coming back due to an appellate issue
19 and some juveniles that were sentenced to life as
20 juveniles that now are coming back. So currently the
21 majority of my practice is actually post-conviction
22 evaluations for things that have been coming back.

23 Q And have you appeared in court before?

24 A Yes.

25 Q And approximately how many times have you

1 testified in courts of the State of Florida?

2 A Over 50, probably. I'm sorry. I don't have
3 it specific.

4 Q I think I neglected to ask you, how long have
5 you practiced as a psychologist?

6 A I became licensed in 2005, I would say. I
7 don't know. I never counted. I was under supervision
8 for awhile and then I sat for my licensing exam in
9 2005.

10 Q And since that time you have developed a
11 specific, I guess expertise, if you will, in regards to
12 the evaluation of sex offenders as well as the
13 treatment of sex offenders?

14 A Yes. More on the evaluation side. I haven't
15 done the treatment since I worked for the Department of
16 Corrections.

17 MS. SCHLAX: Your Honor, at this time I would
18 tender Dr. Heather Holmes as a forensic
19 psychologist with an expertise in sex offender
20 evaluation and treatment within an incarcerated
21 setting.

22 MS. NELSON: No objection.

23 THE COURT: She'll be entitled to testify in
24 that regard.

25 BY MS. SCHLAX:

1 Q Dr. Holmes, I want to turn your attention
2 specifically to your involvement in this case with
3 Mr. Donald Smith. Were you requested by the defense
4 team to evaluate Mr. Smith in terms of any type of
5 mitigation under Florida law?

6 A Yes, I was contacted by you to see if I would
7 be willing to get involved in meeting with Mr. Smith to
8 determine whether or not there was a presence of any
9 mitigation that would be important to the State and the
10 Court and jury in this case to be aware of.

11 Q And how many times, if you can recall, did
12 you meet specifically with Mr. Smith?

13 A Three times.

14 Q And we'll get into more detail a little bit
15 later. But in regards to competency, you mentioned
16 before that that's sometimes something that you're
17 tasked with physically. Was Mr. -- was Mr. Smith
18 competent?

19 A Yes. No question.

20 Q Okay. I'm sure at times have you been called
21 upon to look into whether or not the issue of insanity
22 is an issue in the case?

23 A Yes.

24 Q Is that something that was involved with
25 Mr. Smith's analysis?

1 A Absolutely not.

2 Q Okay. Did you, in regards to your
3 evaluation, did you obtain what we call a social
4 history from Mr. Smith?

5 A Yes.

6 Q Okay. And how did Mr. Smith's relationship
7 with his mother factor into your psychological
8 assessment?

9 A I'm sorry. Could you repeat that?

10 Q Sure. How did Mr. Smith's relationship with
11 his mother factor into your psychological assessment?

12 A It was the single-most important relationship
13 he's ever had and possibly the only important
14 relationship he's ever had.

15 Q And just to kind of educate for the jurors,
16 when we say a social history how do you go about doing
17 that?

18 A I start every evaluation with a clinical
19 interview. The difference being interviewing a child
20 for giftedness or ADHD, you gather the information from
21 a parent. But when you're interviewing an adult, you
22 always -- at least when I start my clinical interview I
23 ask anything and everything I can to get to know a
24 person from birth and everything they can remember up
25 until the time that they are now.

1 So that includes, you know, personal history,
2 relationships, current relationships, adult
3 relationships, continuing relationships as well as
4 mother, father, step-parent, siblings, whether you were
5 raised by your grandma or your aunt, what was that
6 relationship like, whether or not the Department of
7 Children and Families was ever involved and removed you
8 from the home. Developmental history in terms of
9 milestones sometimes. Do you remember educationally
10 were you bullied, how was school, what was your
11 favorite class, your least favorite class. So it
12 really runs the gamut.

13 Obviously in a case that involves any sort of
14 sexual offense you do incorporate into that somebody's
15 sexual development history, at the age of which they
16 began either looking at pornography, if they have, the
17 age at which they began masturbating.

18 So you go a little bit further along those
19 lines, drug history, criminal history, everything that
20 has led up in somebody's life to the point that they
21 are at now.

22 Q And taking into all those factors that you do
23 and try to incorporate into any forensic setting, what
24 specifically about this case did you find relevant?

25 A Regarding his relationship with his mom?

1 Q Yes.

2 A I would describe it as a little bit
3 inappropriate in the sense of she has rescued Mr. Smith
4 repeatedly financially in terms of things she could do
5 to assist him in court, and understandably so,
6 obviously this is in hindsight, it was his mother and,
7 you know, judging one, but there's a level of
8 involvement that I think is beyond the norm, such as
9 paying off debts to people he purchased drugs from,
10 even when she's elderly. Funding when he's in prison a
11 lot of money because there are things that are required
12 of you in prison in terms of protection. And if you're
13 not able to fight and protect things you purchased, you
14 need to pay somebody else to do that.

15 There was a lot of above and beyond and
16 protect -- almost overprotectiveness in a sense, so
17 certainly and enmeshed relationship, I would argue.

18 Q And how about the absence of other close
19 relationships?

20 A Well, throughout Mr. Smith's childhood his
21 mother was bright, educated, married three bright and
22 educated men, so she -- none of which was Mr. Smith's
23 father. So he was raised by really two different
24 step-dads. And there was a lot of moving around due to
25 the nature of one of his step-father's professions. So

1 there was not really, I think, enough time to build
2 long-term relationships, long-term friendships because
3 he changed schools and locations every six to eight
4 months what he described.

5 So I think it's just somewhat due to
6 circumstances, a natural isolation that occurs for an
7 only child who only has a mother and a step-dad and
8 then continual moving. So I think it enhanced the
9 closeness that he has with his mom.

10 Q How -- how about his drug use, in regards to
11 the psychological implications of that?

12 A It started young. His step-father was a
13 psychiatrist, noticed that Mr. Smith was struggling and
14 was the first person, supposedly, to prescribe him
15 medication. So this started his preteen years with
16 very heavy medication. And then there was medication
17 kept in the house because it was long time ago. Now we
18 don't do that.

19 There was a point in time when he was in his
20 teen years and he could take medication, which was
21 okay, it was certainly back in the '70s and the '60s,
22 on his own, or could get 'em at local bars and at
23 school.

24 Q And let me just ask you, I guess, did
25 Mr. Smith ever deny that he had committed these acts to

1 you?

2 A No, he admitted them all.

3 Q How did that affect your evaluation when he
4 readily admits to committing these acts?

5 A Most sex offenders -- in fact, the initial
6 portion of sex offender treatment is to get the
7 offender to admit that they committed the particular
8 crime.

9 In the Department of Corrections we had a
10 16-week program. It would take us darn near eight of
11 them to get people to even admit they were -- they knew
12 the victim or that they were in the town at the time it
13 happened. Denial is --

14 MS. NELSON: At this time I'm going to
15 object. That is improper testimony. What's
16 relevant for this jury is her evaluation of this
17 defendant.

18 THE COURT: All right. Do you want to
19 rephrase your question?

20 MS. SCHLAX: I'll be happy to rephrase.

21 THE COURT: Thank you.

22 BY MS. SCHLAX:

23 Q During the course of your work on this case,
24 did you not only interview Mr. Smith three separate
25 times in 2015 and 2016, did you also review certain

1 materials?

2 A Yes.

3 Q Okay. And what materials did you review?

4 A Well, there was extensive materials provided.
5 There were records from -- that were labelled Jimmy
6 Ryce dismissal records. There was review of a
7 disposition statement in 2002, letters between
8 Dr. Harrison to Mr. Buffington or Baffington, I'm sorry
9 if I mispronounce that, to the State Attorney's Office
10 in 2007, emails between various department and
11 corrections -- or Department of Children and Families
12 employees in 2007. There were evaluations dating back
13 to 1977, psychological evictions.

14 Q And if I could stop you there for a moment.
15 These were psychological evaluations that were
16 conducted by the State of Florida?

17 A Yes. Some were court-appointed and then
18 others -- some were at the Jimmy Ryce Evaluation
19 Treatment Center where he was civilly committed for a
20 period of time, and then some were by psychologists
21 contracted or hired by the Department of Children and
22 Families that oversees the civil commitment.

23 Q And because we've brung that term out several
24 times, if you can explain what the Jimmy Ryce Civil
25 Commitment is.

1 A So after an offender has served a prison
2 sentence and has completed what's required by the
3 courts or what has been passed down by the courts as a
4 -- a sentence for a criminal act, the -- there's a
5 panel in Tallahassee that prior to the release back
6 into what we call EOS or end of sentence, back into the
7 community or their county of origin, they are reviewed
8 if they've ever committed or even been arrested for any
9 sexual offense.

10 So even if they're serving time on a drug
11 offense and they were previously arrested and convicted
12 of a sexual offense, they would still go through this
13 review process, and it starts at an institution where
14 the psychology staff will delineate and just list,
15 without recommendations, medical issues, psychological
16 treatment, any diagnosis that they have gone through,
17 their treatment at the Department of Corrections, any
18 medications they're on, as well as their disciplinary
19 reports, have they followed the rules, have they been
20 in trouble for any sex acts while in prison, and then
21 that information goes to the panel.

22 The panel decides if this person is a danger
23 to society or not. And if they believe that they might
24 be, there's an evaluation to see if they meet criteria
25 for civil commitment after their criminal sentence is

1 over.

2 So then civil commitment being danger to self
3 or others, and in this case it would be to others, is
4 overseen by the Department of Children and Families,
5 and so you will then have a doctor, psychologist,
6 psychiatrist, whomever, conduct an evaluation and make
7 a recommendation to the Department of Children and
8 Families as to whether or not this person is dangerous.
9 If they're deemed dangerous -- I mean it's changed over
10 the years, but if the court allows the civil commitment
11 the individual is then sent to a place in Arcadia,
12 Florida, somewhere outside Tampa, and it's a locked
13 facility. Very similar, I would, say to a psychiatric
14 hospitalization, involuntary hospitalization, and we
15 hope they would get intensive sexual offender treatment
16 while there.

17 Q And is there any time frame when someone has
18 met the criteria for civil commitment and actually been
19 committed by the State of Florida?

20 A There is. Like I said, it's changed over the
21 years so I'm not exactly sure because so many things
22 have, as with anything, have gained some improvement in
23 -- in the way things are handled or managed because
24 this is a very, you know, this program hasn't -- the
25 facility hasn't been here for 34 years. It's

1 relatively new.

2 Q Was the fact that Mr. Smith had been civilly
3 committed by the State of Florida in 2002 relevant to
4 your evaluation?

5 A Yes.

6 Q And as part of that review of those records,
7 did it become apparent that in 2002 he was not, as
8 you've explained in 2015 and 2015, readily admitting
9 his difficulty?

10 A As far as I'm aware of, everything I've read,
11 I've never seen him admit in anything I reviewed or
12 accept responsibility for any inappropriate sexual
13 proclivities, to put it mildly, ever before, no.

14 Q Before 2015?

15 A Before I met him, no.

16 Q What is the DSM-IV?

17 A Well, we're on the DSM-V now. We keep
18 thinking we're going to get better. It's a Diagnostic
19 and Statistical Manual, 5th Edition. Basically it was
20 developed by psychiatry because every psychological or
21 psychiatric story has a code and that code is then
22 utilized for insurance purposes.

23 But for professionals in psychology and
24 psychiatry there are criteria that needs to be met
25 before you can be diagnosed. So we can talk about it,

1 like, oh, he's, you know, he's bipolar, he's moody.
2 There's very specific criteria that has to be met for
3 that. So this book delineates the criteria that needs
4 to be met for a particular diagnosis to be made.

5 Q So is it somewhat fair to say that this is
6 the guide book for psychologists and psychiatrists in
7 diagnosing?

8 A Yes.

9 Q During your full evaluation, did you come to
10 any diagnoses?

11 A I did.

12 Q And can you explain what those diagnoses
13 were?

14 A Well, I gave major depressive disorder,
15 recurrent and moderate.

16 Q And if I could stop you right there. Help us
17 understand what does that mean.

18 A It means he meets -- he's clinically
19 depressed. In other words, this isn't you're sad
20 because you're going through a life stage. This isn't
21 grieving because you lost somebody close to you or you
22 lost your job. This is very specific feelings of
23 helplessness, kind of giving up. It can be an increase
24 or decrease in sleep, you know. So there's very
25 specific criteria that needs to be met and, again, as

1 with everything, it's on a continuum. It's not like
2 you're depressed or not. It's are you mildly,
3 moderate, severely or are you so depressed that you're
4 psychotic. So I put that he was, in my estimation, he
5 was moderate, and it's recurrent, it's been noted in
6 the records prior to this.

7 Q What else did you opine?

8 A Cocaine use disorder severe, in a controlled
9 environment.

10 Q And explain to us what does that mean.

11 A That means he is addicted to cocaine, the
12 addiction is severe and longstanding. And in a
13 controlled environment means he's only not using now
14 because he's in an environment where he can't obtain
15 it.

16 Q This obviously is self-reported from
17 Mr. Smith.

18 A Yes.

19 Q Could you also see within all the
20 documentation you reviewed continued references to
21 throughout the years, or the over 40 years of records,
22 that he, indeed, has a cocaine addiction problem?

23 A Yes.

24 Q Did you also diagnose him with pedophilic
25 disorder?

1 A Yes.

2 Q And help us understand, what is that.

3 A I mean I think everybody's heard the term
4 pedophile. It means there is a sexual attraction to
5 prepubescent children and that is required in order to
6 have a diagnosis of pedophilia. The specifier is
7 attracted to females.

8 So basically one of your dominant sexual
9 fantasies needs to be to prepubescent children. In
10 this case the specifier is females.

11 Again, I have no access, no clinician access,
12 to somebody's sexual fantasies without asking them and
13 hoping they're telling me the truth. He admitted to
14 this.

15 You look at the criminal history, the instant
16 offense to which he admitted straight on I'm guilty,
17 and he admitted to masturbating to these thoughts for a
18 very long time. So that's why you would get this kind
19 of -- he meets the diagnostic criteria for it.

20 Q And let me ask how, how is pedophilia
21 normally treated?

22 A Well, it can't be cured in terms of what
23 you're attracted to. There isn't enough therapy,
24 medication or anything in the world to change what I am
25 inherently attracted to or what anybody is. So if you

1 are attracted to, you know, tall, thin men, if that's
2 what you're attracted to, that's not going to change.

3 Just like somebody who's attracted to
4 children, you can't change what they're attracted to.
5 But you can -- the therapy is geared to get them to
6 change their behavior. In other words, you teach them
7 what the triggers are. Okay.

8 As with anybody, if you become a worse -- if
9 you have worse judgment when you drink alcohol, you
10 can't drink alcohol. If you become more sexually
11 turned on or titillated with cocaine, you cannot use
12 cocaine. If you are attracted to children, you cannot
13 be around them. You cannot place yourself in a
14 situation where there are children.

15 So in therapy we teach them cautionary things,
16 as well as encourage, and again this is self-report,
17 but you encourage them to stop masturbating because it
18 -- to this image because it reinforces it because
19 you're receiving gratification from it. And you try
20 and hope that the person can also be attracted to
21 something that's appropriate.

22 So you talk to them about if you're going to
23 masturbate or view porn that's allowed depending upon
24 the statement. The reason for this therapy, because
25 obviously child pornography is illegal, but if they're

1 able to view pornography at all then it needs to be
2 appropriate, age appropriate, no sadomasochism, nothing
3 of that nature.

4 So you can't change what somebody is attracted
5 to, but you can change and shape behavior. And that
6 would be the goal of therapy.

7 So usually somebody who has a pedophilic
8 disorder it can change if their masturbatory fantasies
9 change. Again that self-reports. You have to be
10 careful. Anybody who gets this disorder, a lot of
11 times it stays the same.

12 Q Is it -- is it something that's caused by
13 something?

14 A God, if I knew I'd be retired. There's a lot
15 of, you know, theories. It's not -- we don't believe
16 it's something you were born with. We believe it's
17 something that develops. Something goes awry during
18 the developmental time. And, then again, if you have
19 an attraction, something inappropriate, and you're
20 viewing that material either pornographically or, you
21 know, being a Peeping Tom, active, you know, for young
22 children or masturbating to the fantasies that you have
23 in your head, it reinforces it.

24 So it's something kind of goes off the rails
25 early on in development, in sexual development. Not

1 infants, child, I want to be clear, but in someone's
2 sexual development in terms of what they're becoming
3 attracted to and then it gets reinforced through either
4 continued masturbation or continued watching of
5 inappropriate pornographic materials.

6 So basically we don't believe we're born with
7 this. We believe it's something that gets derailed and
8 then gets reenforced.

9 Q And was there anything about the social
10 history that you obtained from Mr. Smith that gave you
11 any insight as to how it developed and magnified so
12 much in Mr. Smith?

13 A I mean certainly the continued drug use is
14 going to make somebody less -- it's going to make you
15 more inhibited. I said that backwards. Going to make
16 you less inhibited because anytime you are drunk or
17 high your inhibitions and judgment will clearly go out
18 the window.

19 So I would to love to say that there was this
20 one defining moment in his childhood, and he certainly
21 had an inappropriate relationship with his mom, and a
22 lot of people do and they don't turn out to be, you
23 know, pedophiles that murdered a child. So I can't pin
24 the tail on the donkey. I wish to God I do could, but
25 we just don't know. There was nothing that he told me

1 in his history that was like an aha thing. Honestly,
2 in these cases there usually isn't.

3 Q Did you also diagnose him with antisocial
4 personality?

5 A Yes.

6 Q Help us understand what this antisocial
7 personality means.

8 A Antisocial people are people who do what they
9 need to do to get ahead themselves in the world. Again
10 on a continuum. You can -- they're more comfortable
11 with lying, cheating and stealing than someone who does
12 not have this. They're more comfortable -- they have a
13 limited capacity for remorse sometimes. They also will
14 engage in behaviors to get their needs met. And the
15 more severe, it's kind of at all costs, so they'll
16 engage in doing what they need to do to get illegal
17 drugs. They'll engage in lying if it means they can
18 maintain employment or get whatever they need and,
19 again, people can have this and be fully functional,
20 it's just you don't have a lot of it, again, on a
21 continuum. The further you are along the continuum
22 usually the more criminal behavior you see.

23 Q Well, let me ask it this way in terms of
24 pedophilia or antisocial personality. Did someone
25 choose to be that way?

1 A No, antisocial personality cannot be diagnosed
2 prior to the age of 18. So if we think about it
3 developmentally, little children, well, lie or cheat.
4 It doesn't mean they're antisocial. It means
5 developmentally they haven't gotten to where they need
6 to get. We all know teenagers can be self-absorbed.
7 That doesn't mean they turn into raging narcissists.
8 It means developmentally you can't really assign them a
9 character or a personality pathology when they're still
10 developing. Adults, however, have completed their
11 character development, although arguably hopefully
12 people can get a little bit better, but that's why this
13 can only be diagnosed in adults. So you're not born
14 with this, no.

15 Q And so did you also diagnose him with
16 borderline personality features?

17 A Yes.

18 Q And can you help us understand that?

19 A People with borderline personality features
20 have a very difficult time with the gray. People are
21 either good or they're bad. They have a very difficult
22 time in interpersonal relationships. Any insult to
23 their ego they can become rageful. They have a very
24 difficult time accepting responsibility and kind of --
25 for anything negative. They don't like to attribute

1 negative characteristics to themselves. They either
2 can become suicidal or rageful. You know, again,
3 that's the personality, some features of it, not
4 necessarily the full-blown personality disorder.

5 Q And all of these things that we've discussed,
6 they are, in fact, mental illnesses?

7 A They're all in the DSM-V, yes.

8 Q Was there a well-established pattern of
9 proclivity towards mental illness?

10 A I mean since the earliest evaluation I saw,
11 which was in 1977, he was diagnosed with very similar
12 things, yes. So it's been present throughout the past,
13 gosh, 40 years.

14 Q And so you are aware that in 1977 he was
15 labelled a mentally disturbed sexual offender?

16 A Yes.

17 Q And recognizing the laws have changed, what
18 did that mean back in 1977?

19 A Well, Florida has an out-patient treatment for
20 mentally disordered sex offenders. Basically if you
21 have committed a sex crime to whether you can either
22 serve prison time and then go on probation, or it's a
23 lower level sex crime, you can go to an out-patient
24 group, sex offender treatment center groups, and you
25 qualify for this group if you also have some other

1 mental disorder. And, again, it could be anxiety,
2 depression, schizophrenia, bipolar disorder, whatever.
3 It could be anything. But you have to have some type
4 of mental disorder and have committed a sex offense.
5 And nowadays you have to admit to that sex offense in
6 order to obtain entry into this treatment program.

7 Q And did you, in fact, review some of these
8 evaluations that were -- that were included?

9 A Yes.

10 Q And what is a comprehensive psychological
11 profile?

12 A I mean it's a fancy name for a psychological
13 evaluation. Usually we'll do testing, sometimes
14 psychological testing, or maybe interview other people
15 or review records. Yes.

16 Q What was the earliest psychological profile
17 you reviewed?

18 A 1977.

19 Q And was that Dr. Mike Magainy (phonetically)?

20 A Give me one second because there are a bunch.
21 Yes, I have him and Dr. Ernest Miller, 1977.

22 Q And I think you've already explained to us
23 that back in 1977 Mr. Smith was diagnosed with the very
24 same thing that you articulated for us today.

25 A Yeah, I mean the nomenclature, fancy

1 terminology we have for it has changed, but
2 descriptively it's the same thing, yes.

3 Q And you mentioned that you are familiar with
4 the civil commitment proceedings here in Florida. What
5 is necessary for civil commitment within the State of
6 Florida from a psychological standpoint?

7 A You have to be considered a danger to others
8 in the sense of sexually acting out.

9 Q And in your personal review of the records
10 did you become aware that Mr. Smith was released from
11 the civil commitment center in 2002?

12 A Yes.

13 Q And was this based on a psychological
14 analysis?

15 A I believe it was a hearing so -- give me one
16 second. What I have in 2002 is records from
17 Dr. Vallely who opined that Mr. Smith was, quote, a
18 danger to children. He was noted to have an antisocial
19 personality disorder, tends to relapse on children when
20 he's using crack.

21 In July of that year, another doctor, Dr. --
22 and I apologize -- Neidigh, thank you, opined that he
23 could stop his antiandrogen shots, which kind of
24 curtail sex drive, and he continued with treatment and
25 doesn't have unsupervised contact with children.

1 In January of 2003 he was terminated from the
2 treatment program due to refusal to attend and
3 participate as required.

4 Q And so all of those things occurred after he
5 was released from the Civil Commitment Center?

6 A Right. He was released and given what we call
7 out-patient treatment, so he could do treatment from
8 home, and that is how the treatment went throughout
9 2002 into early 2003.

10 Q Did you also review records where he was
11 evaluated again in 2006?

12 A Yes.

13 Q And this, again, would have been by
14 psychologists for Mr. Smith based on continued criminal
15 behavior?

16 A Yes. I mean I don't know -- I assume the
17 Department of Children and Families ordered the
18 evaluation to be done because it was remitted to them,
19 but, yes, he was evaluated in October of 2006.

20 Q And did you find it unusual that Mr. Smith
21 would not have been found to have met the criteria for
22 involuntary commitment?

23 A Based on the evaluation I read, yes. It was
24 detailed in this evaluation in 2006 that he had
25 antisocial personality, exhibitionism. He had been

1 arrested very early on the '70s for flashing a child,
2 paraphilia not otherwise specified, saying that he was
3 sexually attracted to prepubescent and postpubescent
4 females. Cocaine dependence in remission in controlled
5 environment. But despite those findings the doctor's
6 recommendation was that he didn't meet the criteria for
7 civil commitment.

8 Q And so as a result he was released back into
9 the community?

10 A Yes.

11 MS. SCHLAX: Your Honor, may I have a moment?

12 THE COURT: You may.

13 MS. SCHLAX: No further questions.

14 THE COURT: Any cross-examination?

15 MS. NELSON: Thank you, Your Honor.

16 THE COURT: Thank you.

17 CROSS-EXAMINATION

18 BY MS. NELSON:

19 Q Good afternoon, Dr. Holmes.

20 A Good afternoon.

21 Q Just a moment.

22 Dr. Holmes, you have been retained by the
23 defense in this case, is that correct?

24 A Yes.

25 Q And you evaluated the defendant, Mr. Smith,

1 on three occasions, the purpose of which was to
2 determine if any mitigating factors relevant during the
3 penalty phase existed.

4 A Correct.

5 Q And, in fact, you determined that there was
6 nothing, to use your words, about him that is
7 mitigating, is that right?

8 A Yes. I think during deposition what I said is
9 that there's a possibility. Given cocaine use,
10 however, because it was voluntary it would be my
11 opinion that that wouldn't apply.

12 Q Okay. Let me ask the question again. You've
13 referenced your deposition. In fact, you testified
14 under oath previously that based on your evaluations
15 and your review of his history that there is, in fact,
16 nothing mitigating to him, is that correct?

17 A Yes.

18 Q You've also previously testified, Dr. Holmes,
19 that there is nothing about what he did that is
20 mitigating, is that correct?

21 A That's correct.

22 Q You had the opportunity to look at records as
23 soon as I think you said 1977?

24 A Yes.

25 Q And repeatedly since 1977 throughout those

1 records this defendant has been described as both
2 deceptive and manipulative?

3 A Yes.

4 Q And, in fact, you'd agree that in order for
5 any sort of treatment, for any disorder, to be
6 successful a participant has to be a willing
7 participant, is that correct?

8 A Yes.

9 Q And you also saw multiple times throughout
10 the years that this defendant, Donald Smith, when given
11 opportunities for treatment, rejected that treatment.

12 A Yes.

13 Q Now, he admitted to you during your
14 evaluation that he killed Cherish Perrywinkle.

15 A Yes, he did.

16 Q He admitted to you that he raped Cherish
17 Perrywinkle?

18 A Yes.

19 Q He admitted to you that he sodomized Cherish
20 Perrywinkle?

21 A I didn't ask, but he admitted. Let me be
22 clear. I didn't ask the specifics, quite frankly. He
23 said, yes, he had raped her, and, yes, he had killed
24 her, but I didn't go into the specifics of it.

25 Q And in light of your diagnosis of this

1 antisocial personality disorder, and consistent with
2 that, he exhibited no remorse whatsoever, did he?

3 A Was he crying and sad and begging forgiveness?
4 No. Did I ask him about remorse? No. Did he exhibit
5 anything that I could see perceptually in the moment
6 about this? No. And then I didn't ask. So I hope
7 that answers your question. There was nothing that I
8 saw that indicated remorse, no.

9 Q And as part of your work in this case, you
10 also have not taken the opportunity to review the
11 photographs in this case, the crime scene or the body
12 of Cherish Perrywinkle?

13 A No, but he admitted he did this. I mean
14 there's really -- I'm not the fact-finder in the case.

15 Q Correct. You have not reviewed any of the
16 photographs?

17 A Correct.

18 Q Neither have you reviewed any of the video
19 surveillance from the Dollar General where he first saw
20 Cherish Perrywinkle?

21 A No.

22 Q Nor have you reviewed any of the video
23 surveillance of this defendant at the Walmart, have
24 you?

25 A No, ma'am.

1 Q So also fair to say you have not reviewed the
2 video surveillance of this defendant leaving the
3 Walmart with Cherish Perrywinkle?

4 A No, I did not.

5 Q In fact, he told you he blamed Cherish
6 Perrywinkle for having had to kill her, didn't he?

7 A Yes.

8 Q He told you that he looked back, she got in
9 the van and he thought, quote, fuck, I'm a convicted
10 sex offender, how am I going to explain this?

11 A Yes.

12 Q In fact, you have an opinion that he is one
13 of the most dangerous sex offenders you have ever
14 evaluated?

15 A Yes, he is.

16 Q He told you he was angry that Cherish
17 Perrywinkle got in the van with him.

18 A Yes.

19 Q And you did not see, Dr. Holmes, that when he
20 drove out of the Walmart parking lot he actually
21 stopped to talk to two people he did not know. He
22 didn't tell you about that, did he?

23 A No. I -- and I didn't ask. Honestly, I
24 didn't know about it.

25 Q But when he was telling you that he killed

1 Cherish Perrywinkle because she got into his van, he
2 didn't tell you that he stopped his van and told two
3 people he had never seen before that he was going to
4 get hamburgers. He didn't tell you about that?

5 A No.

6 Q And you agree, even having a personality
7 disorder such as his, that certainly he can control
8 impulse, or is your opinion that he cannot control
9 impulse?

10 A The only thing that would interfere with the
11 impulse control would be drugs and alcohol. The
12 personality disorder is not related to -- impulsive
13 behavior can be part and parcel to it, but he's not --
14 it doesn't preclude you from exercising your ability to
15 control your impulses. Does that make sense?

16 Q Yes.

17 A Okay.

18 Q Now, of the records that you reviewed, in
19 fact, in 1992, the jury heard this morning from the
20 woman that he was convicted of attempting to kidnap.
21 And you know from reviewing the records that he
22 actually denied having attempted to kidnap her. He
23 denied those allegations.

24 A Yes.

25 Q Another thing you saw in those records is

1 that this defendant, throughout the years, blames other
2 people for the crimes he has committed.

3 A Yes.

4 Q And that is including in some cases he has
5 even blamed his lawyers. In that case he blamed his
6 lawyer for pleading to that -- that case, is that
7 right?

8 A I don't remember specifically, but I do
9 remember in review there has been issues that have been
10 raised with the lawyers. I can't remember if it was
11 that case, but in general, yes, I remember that.

12 Q So let me take you back to 1992. I think you
13 said that you believed there had been a hearing. Do
14 you have the records in front of you that you reviewed
15 related to Mr. Smith?

16 A No, dear God, there's thousands of pages.

17 Q Okay. Would you take me for my word if I
18 told you there wasn't a hearing, but rather an
19 agreement to a -- what is called a compliance plan?

20 A You're talking about 2002, correct?

21 Q No, 1992.

22 A I'm sorry.

23 Q Oh, I'm sorry. In 2002 as a result of the
24 1992 case.

25 A Yes, I would take your word for it.

1 Q Okay. And this defendant agreed to a
2 compliance plan that required him to take a drug that
3 would -- well, why don't you explain to the jury the
4 purpose of the drug he agreed to take?

5 A It -- again, I'm not a medical doctor, but in
6 general, you can voluntarily take a medication, a shot
7 of -- it's an antiandrogen shot. Basically it can
8 lower testosterone and it can -- well, it's known to
9 curtail sex drive or -- yeah, I mean it really does
10 lower your sex drive. So the purpose of taking those
11 kind of medications would be to lower your sex drive.

12 Q And that was in combination to a plan that
13 also he agreed to participate in treatment.

14 A Yes.

15 Q By agreeing to this compliance plan he
16 avoided the Jimmy Ryce hearing that you -- you
17 explained to the jury?

18 A Yes.

19 Q And shortly after, in fact, only three months
20 after agreeing to this plan, you reviewed records where
21 the psychologists write that he is refusing to do his
22 homework, is that correct?

23 A I don't remember the specifics, but I know a
24 couple of months in, yes, he was refusing to engage in
25 treatment.

1 Q In fact, refusing to participate?

2 A Correct.

3 Q And also refusing to take the drugs.

4 A Yes. I also believe that they were -- they
5 were stopped. I know he didn't want the shots because
6 they had adverse effects, which they can have, but at
7 the same time, like you said, this was part of the plan
8 he agreed to. So, yes, it was discontinued by -- and
9 correct me if I'm wrong -- but the doctor knew that he
10 was stopping because it was not being administered.
11 It's not a pill. It's a shot.

12 Q Oh, thank you. It is a shot.

13 You also saw in these records that as early
14 as 199 -- 1977 he had a normal EEG?

15 A Yes.

16 Q No organic brain damage?

17 A Not that I could see. Once again, that's
18 outside -- but what was written indicated that
19 everything was fine.

20 Q And the records as early as the '70s,
21 consistent with what you saw throughout the years, is
22 that Mr. Smith demonstrates little motivation to change
23 his sexually deviant and generally antisocial
24 behaviors?

25 A Correct.

1 Q You also saw in the records that this
2 defendant was described as manipulative.

3 A Yes.

4 Q Selfish?

5 A Yes.

6 Q Callous?

7 A Yes.

8 Q Uncaring?

9 A Yes.

10 Q Lacking empathy?

11 A Yes.

12 Q Remorse?

13 A Yes.

14 Q And conscience?

15 A Yes, those are all in previous doctors'
16 reports.

17 Q Now, you mentioned that you also learned
18 about his background relationship with his mother. You
19 said it was noteworthy.

20 A Yes.

21 Q And I think I understood you to say you found
22 their relationship noteworthy because she financed drug
23 debt for him?

24 A It seems to be very enmeshed. It's the only
25 relationship throughout his lifetime that he's had any

1 connection to anybody for more than a short period of
2 time. So it's not just that she was paying off drug
3 debt, but people he owed money to for other reasons.
4 It's -- there was a lot of rescuing and there just
5 seemed to be an enmeshed quality to it. Again, but
6 that's not explanatory.

7 Q And, Dr. Holmes, you have experience
8 evaluating people with a variety of different social
9 background and upbringing?

10 A Yes.

11 Q And would you agree with me that, in fact,
12 this defendant had a privileged background?

13 A Certainly financially, yes.

14 Q In fact, he even had the privilege of going
15 to private school?

16 A He -- yes, he went to private, I believe
17 private mission school.

18 Q And his family has had financial resources
19 ever since he's been a child?

20 A Yes.

21 Q And, in fact, his mother you described as
22 enmeshed, but throughout his life has taken care of him
23 financially?

24 A Absolutely.

25 Q Are you aware that this defendant had a

1 cardiac issue since -- since being held in custody,
2 since 2013? Are you familiar with that?

3 A Yes, he told me that he ended up in the
4 hospital for heart problems.

5 Q Nothing in your interaction with him
6 indicated any sort of brain damage?

7 A No.

8 Q In fact, I think the words you used in your
9 summary -- let me see. Mentally stable.

10 A Yes, he was mentally -- I mean other than
11 symptoms of depression, yes, he was mentally stable.

12 Q And intelligent?

13 A Yes.

14 Q And just so we are clear, there is nothing in
15 your evaluation, your opinion or your testimony before
16 the jury today, that is offered as mitigation related
17 to him or his offense, is that correct?

18 A That's correct.

19 Q Thank you.

20 MS. NELSON: I have nothing further.

21 THE COURT: Any redirect?

22 MS. SCHLAX: Yes, thank you.

23 THE COURT: You may.

24 REDIRECT EXAMINATION

25 BY MS. SCHLAX:

1 Q Dr. Holmes, how are you using the word
2 mitigation?

3 A I'm sorry. Could you rephrase that? I'm not
4 sure what you mean.

5 Q Sure. How are you using the word mitigation?

6 A The way I was taught, basically if somebody
7 had -- mitigation could be either good or bad, or both
8 sometimes, unfortunately, if you were beaten severely
9 as a child, if you were, you know, the result of a
10 pregnancy where your mother ingested alcohol or crack
11 cocaine or things that can affect an unborn child,
12 that's considered mitigation, mitigating. If you were,
13 you know, raped by your uncle, God forbid, that's
14 mitigating.

15 Mitigation could go in the other direction if
16 you have somebody who is potentially looking to get out
17 of incarceration, such as, you know, they're
18 intelligent or they have characteristics, resiliency,
19 ability to improve. So mitigation can be positive or
20 negative.

21 Q Is it fair to say it's any aspect of
22 someone's life that impacts what sentence is
23 appropriate?

24 A You mean judicial sentence?

25 Q Yes.

1 A I've never sat on a jury. I don't know how to
2 judge. I would say that's really up to the statute how
3 it's written and how it's determined by a jury or judge
4 at sentencing. Certainly that's a catch-all with the
5 death penalty, certain things that can affect somebody.
6 So there's several different things that could be
7 attributed to being labelled as mitigation.

8 Q Do you find it relevant for a jury's
9 consideration in this case all of the prior evaluations
10 that identify Mr. Smith as having mental illness and
11 likely to reoffend?

12 A Reading through the records I found it not
13 only sad, but shocking, to be quite frank.

14 Q In what way? Why were you shocked?

15 A In reading the evaluation in 2006, that talked
16 about the exact same things that were found from 1977
17 that I found in meeting with him.

18 Q And to be clear, it's not just he was
19 evaluated in 1977 and then he wasn't evaluated until
20 2006. We're talking about report after report after
21 report.

22 A Yes.

23 Q All of them identifying this mental illness?

24 A Nothing has changed other than there's been a
25 worsening of addiction because he's continued to use

1 and, quite possibly and quite likely, a worsening or
2 solidifying of the paraphilia because he's continued
3 using masturbatory fantasies to reinforce it.

4 I was just exquisitely surprised, reading all
5 the details of this report in 2006 to determine whether
6 or not he met criteria to be sent back to this
7 detainment facility, and I -- I expressed to -- I think
8 even in the deposition I wondered if it was a typo at
9 the end that said he didn't meet criteria, because this
10 person with these characteristics has been described as
11 dangerous, as a pedophile, as only able to contain his
12 drug addiction in a controlled setting, as not meeting
13 criteria because he's considered dangerous as a sexual
14 predator, I don't know who would be. I didn't see
15 anything in meeting with Mr. Smith that was any
16 different than what any of these examiners had seen
17 before.

18 In 2006 it was listed, all of these things
19 were listed, and then at the end the conclusion was but
20 he doesn't meet criteria. And, again, I'm not that
21 examiner, I didn't have him before me then. I'm not
22 saying that this was a good job or a bad job. I'm just
23 saying I'm perplexed by it. I don't understand how you
24 were given all of that information and your
25 recommendation to the Department of Children and

1 Families, which then goes to our State Attorney's
2 Office, is that he didn't meet the criteria. You tie
3 the prosecution's hands. I don't understand. I don't
4 know how it happened.

5 Q Ms. Nelson just went through that entire
6 report so you became aware of records where he was
7 denying and he wasn't open to treatment, he wasn't open
8 to understanding not only his pedophilia, but the
9 effect crack addition has on him. What changed in
10 2013?

11 A In my opinion nothing. He has resisted
12 treatment from the get-go. This is hard to treat. I
13 mean if you just have an addiction to cocaine or crack
14 cocaine, that in and of itself is hard to treat. If
15 you have that paired with, you know, pedophilia and
16 it's going to lower your inhibitions, you put those two
17 together and it's very difficult to treat. So even if
18 he meaningfully engaged in treatment, it's hard to
19 treat. The fact that he did not meaningfully engage,
20 the fact that he wanted to stop the shots, and I do
21 understand they have horrible, you know, side-effects,
22 but at the same time it's what you agreed to do to stay
23 out of prison.

24 So if you are not getting treated, nothing
25 changed. He didn't get -- there's nothing to make you

1 think he got any better. Meeting him in 2015, he's the
2 same as was described since 1977 and throughout the
3 records. I'm just surprised that given the
4 opportunity, I don't know how this conclusion was
5 reached.

6 MS. SCHLAX: May I approach the witness, Your
7 Honor?

8 THE COURT: You may.

9 BY MS. SCHLAX:

10 Q I'm going to show you what's been introduced
11 as Defense Exhibit 1 and ask you to take a look at it.

12 (Witness examining exhibit.)

13 Q And are these records that you reviewed?

14 A Yes.

15 Q Okay. What are those records documenting?

16 A There was a -- what's known as a Baker Act, a
17 psychiatric -- involuntary psychiatric hospitalization
18 where an individual is either taken to a psychiatric
19 hospital because they meet criteria for being a harm to
20 self or others or they can self-refer.

21 Q Okay. And those records detail that he was
22 Baker Acted in 2011. And then the second record, when
23 was he baker Acted the second time?

24 A 2013.

25 Q What was the specific date?

1 A June 9th, 2013.

2 Q So two weeks before this homicide?

3 A Yes.

4 Q And can you, from a psychological standpoint,
5 can you explain what is a Baker Act?

6 A In order to be psychiatrically hospitalized,
7 which is Baker Acted, you are held 72 hours at a
8 psychiatric locked facility because you are deemed
9 either -- based on that disorder, you are deemed either
10 a danger to yourself or a danger to others.

11 Q And so two weeks before the murder of Cherish
12 Perrywinkle, Donald Smith tried to Baker Act, mentally
13 Baker Act himself?

14 A Yes.

15 Q Did that impact your evaluation of Mr. Smith?

16 A He certainly was not stable and felt that he
17 was not safe. He reported being unable to get off
18 crack cocaine, being unable to sleep and having
19 homicidal thoughts.

20 Q And so when you were asked the question that
21 you found him mentally stable in your conversations
22 with him, help us understand is that going toward
23 competency?

24 A Well, when I met him it was 2015. He hadn't
25 had crack cocaine in two years so certainly, you know,

1 he -- the cycle that you go through -- and I'm not an
2 expert on drug abuse, but the cravings would have
3 subsided by then. Any sort of hallucinations or any
4 withdrawal that he might feel, you know, had subsided.
5 You know, he also had gone outside for some sort of
6 heart problem. So he had, for lack of a better term,
7 stability by being incarcerated for two years.

8 So when I saw him I found him mentally stable
9 because he's not -- he wasn't suicidal. There was
10 nothing that he was homicidal. He wasn't
11 hallucinating. You know, he had some depression, but
12 there was nothing -- he wouldn't have met criteria for
13 involuntary hospitalization when I saw him in 2015 as
14 he did then.

15 Q Okay. Through your entire evaluation, isn't
16 it true that in an institutional setting, confinement,
17 Mr. Smith does just fine?

18 A From what I understand and from what I
19 reviewed, it will stabilize him because it gets rid
20 of -- first, there's no access to children or child
21 pornography inside the institutional setting, either in
22 the Department of Corrections or I would assume in any
23 county facility. And there's no access -- usually no
24 access to drugs. I probably would be remiss if I
25 informed the jury that there are not drugs in prison.

1 There are drugs in prison. But it's much more
2 difficult to obtain.

3 And while he was incarcerated in Florida there
4 seemed to be some stabilization, at least in terms of
5 acting out. There was no violence.

6 Q Thank you.

7 MS. SCHLAX: I don't have anything further,
8 Your Honor.

9 THE COURT: Anything further, Ms. Nelson?

10 MS. NELSON: No, ma'am.

11 THE COURT: May this witness be excused?

12 MS. SCHLAX: Yes, Your Honor.

13 THE COURT: Thank you, Doctor. We appreciate
14 your time.

15 THE WITNESS: Thank you.

16 THE COURT: You may call your next witness.

17 MR. FLETCHER: Your Honor, we call Dr. Daniel
18 Buffington.

19 THE COURT: Dr. Buffington.

20 (Witness present.)

21 THE COURT: Good afternoon, Dr. Buffington.
22 Come right in front of me and Madam Clerk will
23 swear you in.

24 (Witness sworn.)

25 THE WITNESS: I do.

1 THE COURT: Thank you. You can have a seat
2 in the witness chair, please. Thank you.

3 DANIEL E. BUFFINGTON,
4 was called as a witness on behalf of the Defense,
5 and after being duly sworn, then testified as follows:

6 DIRECT EXAMINATION

7 BY MR. FLETCHER:

8 Q Good afternoon, sir.

9 Could you state your full name for the jury,
10 please.

11 A Dr. Daniel E. Buffington.

12 Q And, Dr. Buffington, what do you do?

13 A I'm a clinical pharmacologist at the
14 University of South Florida College of Medicine and
15 Pharmacy. I also have a specialty practice in Tampa
16 called Clinical Pharmacology Services where patients
17 are referred for high-risk medications, drug
18 interactions, adjustment of therapies and
19 pharmacogenetic testing. In addition to that I also
20 serve as a medications safety expert for the U.S.
21 Government for Medicare.

22 Q Okay. And briefly tell us -- tell the jury
23 what is pharmacology.

24 A So pharmacology is a study of medications or
25 substances that can be synthetic or they can be natural

1 substances and we study them for what affects they have
2 on the human body.

3 So from a clinical perspective we're looking
4 for what are positive desired therapeutic uses, but we
5 also look for the negative or adverse side-effects and
6 toxicities and how to manage those and where those may
7 be presented by drug interactions or genetic
8 metabolism.

9 Q And when we talk -- when you talk about
10 medications and, for instance, pharmaceutical products,
11 are you also educated on cocaine and crack cocaine?

12 A Yes, it includes both those that we use
13 medicinally, but also those illicit, that patients may
14 end up presenting with substance abuse disorders or
15 addiction, because those can interact with prescription
16 medications as well. And I also work as a resource
17 specialist for law enforcement, for Medical Examiners,
18 helping to evaluate the impact of those substances. So
19 it's not simply studying the medications. I am the
20 expert who, in a clinical setting, a primary care or a
21 specialist would refer to, or a Medical Examiner.

22 I'll hear questions about how to use the
23 medications for particular patients. We usually get
24 the more difficult to manage patient, or someone who
25 doesn't react or respond the same as everyone else, or

1 for a Medical Examiner looking at what pharmacologic
2 effects may have contributed to someone's death.

3 Q Okay. And can you tell the jury a little bit
4 about your educational experience?

5 A Yes. I did my undergraduate training at the
6 University of South Florida in Tampa in Biology and
7 Biochemistry. I did a Doctorate of Pharmacy Degree,
8 which is like an MD degree. It's a clinical doctorate,
9 except instead of one class in pharmacology for
10 physicians, I spend the entire four years on that
11 topic.

12 And in addition I did a post-graduate training
13 after the doctorate, I did a residency at Emory
14 University and a clinical research co-pharmacology
15 fellowship at Emory as well, and then also completed an
16 MBA with a healthcare focus.

17 Q Okay. And can you describe for the jury your
18 past years of work experience in this field?

19 A Yes, as I stated previously, there's academic
20 responsibility, teaching, mentoring students. Some of
21 that is also working with other faculty, helping to be
22 a resource for other faculty in their areas of
23 specialty as a consultant to their patient care
24 management or their clinical research design.

25 Over the years I've done numerous clinical

1 research trials starting as a principal investigator,
2 looking at new medications, comparing against
3 established. We do that on an in-patient or an
4 out-patient basis.

5 I have a specialty clinic that I refer to
6 where I have partners and colleagues in that practice
7 in the same specialty and, in addition, for about the
8 last four years I've been -- it's five now, been
9 working with the healthcare reform team as a medication
10 safety specialist.

11 So when we're looking at healthcare reform, it
12 can be tainted reform, access to health insurance, but
13 it also means improving quality. So one of the key
14 pieces of the research has been helping to make sure
15 that patients don't go over care and then are harmed.
16 The number one healthcare related harm is adverse drug
17 effects.

18 Q Sir, have you ever testified in court as an
19 expert in the field of pharmacology?

20 A Yes, sir, many times. Probably in excess of
21 250 times over -- since the early '90s in both state
22 and federal.

23 Q Okay. And in criminal cases, civil cases or
24 both?

25 A In both.

1 Q Okay. And have you ever testified for the
2 State Attorney's Office?

3 A Yes. Including the State Attorney's Office
4 here in Jacksonville.

5 Q Here in Jacksonville. Okay.

6 MR. FLETCHER: Your Honor, I would tender the
7 witness, tender Dr. Buffington as an expert in
8 pharmacology.

9 MR. CALIEL: No questions, Your Honor.

10 THE COURT: All right. Then he'll be
11 entitled to testify in that regard.

12 MR. FLETCHER: Thank you, Your Honor.

13 BY MR. FLETCHER:

14 Q Dr. Buffington, do you remember approximately
15 when you were first contacted by Ms. Schlax or myself
16 about getting involved in this case?

17 A I looked at that a few weeks ago. If my
18 memory recalls, it was somewhere in 2015 and then it
19 was awhile before I got more records to review.

20 Q Okay. As part of doing what we asked you to
21 do, did you prepare sort of a case summary that would
22 help you discuss with the jury what you find in this
23 case?

24 A Yes, sir, it is. Illustrations that help me
25 to prepare to review for testimony today, but they also

1 help the Court as well.

2 Q Okay. And is it up on your screen there?

3 A Yes, it is. I have the title screen.

4 Q What is the -- after the title screen, what
5 is the first thing that you do when you start to gather
6 records in this case?

7 A I start to build a case background. So just
8 like if I was going to present a patient case to a
9 colleague, I want to refresh myself in records. I'd go
10 through the backgrounds and gather information that's
11 been compiled based on previous healthcare
12 practitioners, previous records, and assemble that so
13 that that's a starting point. Then I'd look for things
14 that are relevant to my specialty, compile those, and
15 then eventually build towards developing an opinion or
16 set of opinions.

17 Q Okay. And, Dr. Buffington, I put up a case
18 background screen. That's on yours also, on your
19 screen?

20 A Yes, it is.

21 Q And of those things that you list, the past
22 medical history, the case summary, what is the most
23 relevant to you?

24 A Well, I think the past medical history as it
25 pertains to this case gives me an understanding of the

1 background of the individual. So knowing any previous
2 medical or psychiatric issues that lay the foundation.
3 Is this someone who is newly diagnosed with a
4 condition, whether it's depression or anxiety or
5 paranoia, or is this someone who has a base foundation
6 over the years of psychiatric complications? And there
7 were numerous both psychiatric and what I'll call
8 medical or physiological issues for his case.

9 Q Okay. And you've got them listed there?

10 A Yes, sir, I do.

11 Q Okay. After you do that, did you prepare a
12 list of medications that Donald Smith was currently on
13 at the time you met him, or since he was incarcerated?

14 A Yes, sir. So in this particular table I --
15 the information that's on the right is the information
16 that was a factor in his corrections healthcare record
17 in May of 2015. But I was able to go back and look for
18 information previously and found that his previous
19 psychiatric medications included Vortioxetine. That's
20 the star or the asterisk on the first line. And also
21 Zoloft, what's on the bottom line.

22 Now, why that becomes pertinent to me is I
23 will get a patient or an individual and I start to hear
24 about their medical conditions and I build a mental
25 list of your medications. It says a lot to me in

1 understanding how you got to that level.

2 So when we look at medications, some are very
3 introductory, some are moderate and some are very
4 intense. Some are reserved for more severe, more
5 difficult to manage cases.

6 What I see there is the Zoloft on the left,
7 historically, versus what he was needing for
8 psychiatric control of antidepressant therapy by May of
9 2015 was profoundly different. That's the difference
10 between, say, a Toyota Camry and a two-ton pick-up
11 truck. They're very different utility and they speak
12 to what the difficulty to manage it.

13 So just in looking at this prior and then over
14 a period of time I saw a progression of intensity of
15 what was required for medication management.

16 Q Okay. Dr. Buffington, if I could switch to
17 the next slide.

18 Talk to us a little bit about cocaine. We've
19 all heard the term cocaine, but can you tell us what it
20 is.

21 A Yes, so the reason this becomes pertinent to
22 this case is that on that earlier background slide it
23 was -- one of the revealing points was that not only
24 did Mr. Smith use cocaine, but he had a severe
25 substance abuse disorder with crack cocaine.

1 So I thought it would be important to help
2 explain to the Court that cocaine is something that we
3 use clinically, so it's used in surgeries, it's used in
4 plastic surgery and different procedures as a
5 vasoconstrictor. So it's something that we understand.

6 It's also abused. So people can take that and
7 abuse it. It's a bio-pharmacologic effect. So if you
8 think of alcohol, if you think of marijuana, those are
9 substances that are depressants, they calm you, they
10 settle you. Cocaine, if you think about people that
11 have abused it over the years, and misused, it's a
12 stimulant so it's used by athletes, it's used by
13 actors, it's used by celebrities. It's something that
14 increases your persona, increases your performance.

15 It comes with caveats and that's the problem
16 with repetitive abuse. So it's also a local
17 anesthetic. So for certain surgical procedures it can
18 also numb the clinical response. But with that it can
19 be taken or administered in several different forms,
20 from injectable to inhaled through the nose, to smoked
21 through the lungs, and even swallowed through the
22 gastrointestinal tract.

23 And the thing that's important to understand
24 here is the way medications work on the brain, so an
25 anti-depressant, anti-psychotic, an anti-anxiety, many

1 different categories, they all work to adjust chemicals
2 in the brain. They are predominantly dopamine,
3 serotonin and norepinephrine. So when you take cocaine
4 you're actually independently or artificially adjusting
5 those amounts. So that's how the drug works. You take
6 it, but it's where it works in the brain that is having
7 the affect.

8 And then it has certain metabolites, meaning
9 by-products, that this is the cocaine structure, you
10 would take it through whatever route and your body
11 eventually metabolizes it and breaks it into pieces and
12 eliminates it.

13 I've listed that there's three primary
14 metabolites that we see with cocaine that are
15 indicative of cocaine use.

16 I said earlier that you can take it through
17 different routes. Those different routes create
18 different effects. So the lesser route is the
19 inhalant. The -- when you smoke it it's a more intense
20 and a longer duration.

21 If you change the formulation of cocaine from
22 just the powder to a crystalline or a crack powder and
23 then smoke that, it has an even longer effect, quicker
24 onset, more intense cravings. And that's why if you
25 ever heard crack cocaine is the most addictive

1 substance.

2 So it's because of the change when it goes to
3 crack and you inhale it into your lungs, it has a more
4 potent effect and it also drives that feedback into
5 your brain for wanting the next amount or wanting that
6 intense craving, you know, to satisfy it. So it also
7 creates a longer, more sustained effect.

8 Q Okay. And can I move you to the how cocaine
9 effects my neurotransmitters slide.

10 A Yes, sir. So initially there's three primary
11 neurotransmitters. There's many neurotransmitters in
12 the brain, but these three are the ones that cocaine
13 affects. It'll affect it either way, but when it's
14 crack it affects it even more -- even more intensely.

15 Norepinephrine is that one in the upper
16 corner. That's where you get that increased sense of
17 alertness, concentration, energy, that pick-me-up, that
18 I'm stronger, I'm more -- I'm more me than I was
19 without it. But with that you also get some
20 side-effects. You get increased heart rate, you get
21 increased blood pressure. It's also the brain chemical
22 that's released, if you've heard flight or fright, when
23 something traumatic happens and you dump your
24 norepinephrine, you get that reaction.

25 The other is serotonin, to the right. Now,

1 that's where you get mood control. So it's a frequent
2 medication, serotonin and serotonin-related medications
3 for depression, and they also adjust mood, appetite and
4 sleep.

5 But when you mix those together, you're now
6 affected like cocaine does. Norepinephrine and
7 serotonin, now you start to build anxiety, difficulty
8 controlling impulses and irritability.

9 And then dopamine on the bottom is the one
10 that -- the neurotransmitter we associate with
11 pleasure. That's like the pleasure center of the
12 brain.

13 But the same thing, as you adjust, you start
14 artificially manipulating all three of these
15 neurotransmitters, you eventually change or decrease
16 your attention, increase aggression, violence, and
17 change in mood.

18 So this is why cocaine has an addiction. The
19 person wants that sense of boost, that personal
20 performance, but essentially what unravels that person
21 and drives them to some aha moment or to rehab or
22 something, is their life begins to unravel and one of
23 the most common is change in behavior, aggression and
24 paranoia. And that's a dangerous combination to add
25 'em together.

1 And, again, when you're adjusting dopamine,
2 you're going to also increase anger, aggressiveness,
3 hallucinations. And if you use cocaine chronically
4 long enough, eventually you develop psychoses. And
5 that's like its only psychiatric change in your
6 personality. You're now hearing things, seeing things
7 or believing things that aren't true.

8 Q Doctor, if I could move to the next slide.
9 Can you discuss with the jury the psychiatric effects
10 of chronic cocaine use.

11 A Yes. That's what I was just referring to. We
12 all have depend on it for coding, for judgment for
13 communications and relations. We depend on those
14 neurotransmitters to be in balance. So if you're using
15 one of those medications to treat depression or to
16 treat anxiety, that's also now in the care book bible
17 that we're using clinically to try to help adjust those
18 and watch for improvement or watch for symptoms.

19 Some of the psychiatric effects is
20 complications that go with chronic cocaine use or
21 cognitive impairment where you have impaired
22 decision-making, impaired judgment, impulsivity, and
23 this is predominantly because of the effects of cocaine
24 in the neurotransmitters in the prefrontal lobe where
25 you regulate impulse control.

1 The next is paranoia and psychosis. That's
2 the one I mentioned that usually unravels. Those
3 around the person will often see that behavior
4 employed. And because you may look at someone who's on
5 cocaine and not be able to tell that they're taking it,
6 they just seem more vibrant or more communicative and
7 you can't tell.

8 Now, if paranoia and psychosis come in, that's
9 something that suddenly you may -- you may be looking
10 for, but you can't always see someone who's on cocaine
11 or necessarily having the cocaine-related chronic
12 side-effects. They may have violent behaviors, they
13 develop a short fuse and anger and impulsivity. They
14 can have delirium, which is periods where they're just
15 absurdly confused, extremely confused on their
16 surroundings, on what's happening, and then could also
17 lead to, that's what I was stating, the psychosis. And
18 in that case there's many cases where there's been
19 reported homicides or suicides for individuals who are
20 chronically abusing cocaine.

21 Q Okay. And if I can take you back to the very
22 first one, impaired executive functioning.

23 A Yes.

24 Q Tell me a little bit more about that. Where
25 does our executive functioning sit in our brain?

1 A It sits in multiple centers, but it's the
2 baseline that affects our ability to live and
3 communicate together, take care of ourselves, to be
4 able to tend to activities of daily living, that we
5 would say taking care of hygiene, taking care of food,
6 taking care of communicating with others around us. So
7 it impacts judgment and attention and planning and your
8 mental flexibility.

9 Q Okay. And let's move -- we've gone over
10 cocaine abuse and psychosis. Let's switch to that one.

11 A Yes. So, again, this being the progressive
12 end of cocaine abuse, there are many risk factors that
13 predispose someone for this. So it could be the
14 quantity of cocaine that they're using, could be the
15 duration of time they've been abusing it. There's
16 changes that can take place in an individual over time.

17 In this particular case Mr. Smith started
18 using alcohol and marijuana at the age of, I think, 11
19 to 12 years old, started getting exposed to LSD in his
20 teens and then cocaine by his 20s, and by this time he
21 was in his 50s. He was 57 years old at the time of
22 this event and had had 30 some years of cocaine abuse.
23 It had become his drug of choice and addiction.

24 So there's also an onset dependence. He's
25 well into that. Routes of administration. I mentioned

1 to you earlier on that other slide that if you smoke
2 it, if it's crack, then you have a more intense high, a
3 quicker onset and a longer duration of effect.

4 Substance use disorder. If you had a
5 tendency -- if you had been diagnosed and had a
6 tendency to abuse this or other substances, it
7 increases your risk factor for developing psychosis.

8 And another important finding is -- remember I
9 said earlier when we use any of the psychiatric
10 medications, we're artificially adjusting your
11 neurotransmitter levels. So adding in any other
12 psychiatric medication, so if you're an individual
13 who's on psychotropic medication and starts using
14 cocaine, dangerous combo. If you're using cocaine and
15 you add in -- you now add in a new psychiatric
16 medication, dangerous combination as well.

17 And, in fact, in this particular case during
18 the period following his release from the jail, the
19 final time, he was -- also had started a psychiatric
20 medication known as quetiapine. That's the generic
21 name, or Seroquel is the brand name.

22 Q So, Doctor, that would have been in late May,
23 early June of 2013?

24 A That's correct. Within that 21 to 28 day
25 period before the event.

1 Q Okay. And where did you get it from that he
2 was starting to take Seroquel?

3 A Well, just like any other patient it's
4 important to question and validate what's there. I
5 noticed in some of the medical records that I received
6 or reviewed that it stated he had taken Seroquel and
7 last dose was two days prior. But I didn't see any
8 other medical records. So it was important for me to
9 ask of him where did you get that, how often were you
10 using it, how were you using it.

11 So in an interview with him I had already kind
12 of shaped what some of my questions would be based on a
13 review of the records, just like if somebody sent me a
14 new patient. And I was able to discern that he was
15 getting Seroquel, on medication that he knew what his
16 effect was. He had taken that in years prior so it's a
17 medication by name that he knew what his personal
18 reaction was, that it would help calm him and settle
19 him down.

20 Remember I said with the chronic cocaine and
21 crack cocaine use, that's something that is progressive
22 and he was using in a binge or back-to-back fashion.
23 That became a way for him to try to help settle back
24 down, and for lack of a better term, self-medicate.

25 And in that he was getting that from someone

1 by the name of Sissy who was the sister of the person
2 that he was buying the cocaine from, Omar.

3 Q Okay. And can you tell the jury what
4 Seroquel is.

5 A Seroquel -- remember I said earlier I looked
6 and saw a transition in the antidepressant medication?
7 Seroquel is much more potent as well. It's reserved
8 for very severe cases of bipolar depression or
9 psychosis. So it's an antipsychotic medication, not
10 just a garden-variety antidepressant. And with that
11 comes side-effect profiles as well. So now we've got
12 that medication added and the cocaine as well.

13 Q Okay. And, Doctor, can you tell the jury
14 what you end up with when you're on crack cocaine and
15 then you add in the Seroquel? What happens
16 physiologically?

17 A So, again he's now manipulating some of the
18 similar receptors, neurotransmitters. In the case of
19 Seroquel, it's also affecting dopamine and serotonin as
20 well. So we're getting an overlapping impact or
21 interaction at some of those same receptors, as well as
22 at the side-effect potential.

23 See if the next slide helps.

24 So if you were to spend a day in our clinic
25 with and you're around patients who are taking

1 different antidepressants, antipsychotics, anti-anxiety
2 medications, we have to look at patients in this
3 fashion, we have to counsel them in this way as well.
4 Anytime you start a new psychiatric medication, we're
5 now artificially changing or regulating those levels of
6 neurotransmitters and we have to watch to see is this
7 new combination going to be effective for you.

8 That watch period as a clinician is two to
9 three months. Now that's a long time for somebody who
10 wants relief immediately, who wants effects. And we
11 have to counsel patients you may experience adverse
12 side-effects, maybe to the degree that we even have to
13 remove that medication or discontinue it or alter the
14 dose, before we get to that two to three months.

15 So any change, and if you'll look at the
16 bottom here you'll notice that I've stated when you
17 start the new medication we've got to wait and get to a
18 period of equilibrium or stability. If I change a dose
19 of the medication, it's now another two to three months
20 to see the full impact of that. And we can also see
21 significant adverse side-effects on patients. Likewise
22 if we take the medication away.

23 So if the Seroquel was added in that 21 to 28
24 day period, we're not even to the point we are sure
25 we're going to get the desired effect. Now, granted he

1 was doing that independently. But that's a period of
2 concern.

3 Add to that the cocaine now affecting the same
4 neurotransmitters and you're now created, for lack of a
5 better term, a crock pot effect that could take months
6 to see. And the concern is re-equilibrating or
7 stabilizing.

8 So his concerns would be, in most patients and
9 in him as well, substance abuse, sleep, hygiene, stress
10 levels, nutrition. These are all things that can also
11 change or alter your neurotransmitters production and
12 response.

13 So I refer to this frequently as a
14 neurotransmitter storm. And whether it's independently
15 done or whether it's done as a clinician by adding or
16 changing one of these medications, there's a two- to
17 three-month period of significant -- of uncertain of
18 behavior.

19 Q Okay. And I'll move to the next slide. Can
20 you talk to the jury a little bit what happens when you
21 have this.

22 A So this kind of comes back a little closer to
23 this particular case of Mr. Smith. He has a profound
24 psychiatric history, including major depressive
25 disorder, symptoms that include auditory and visual

1 hallucinations. He had substance abuse disorder
2 history, antisocial personality, borderline
3 personality. These are all things that are previous
4 diagnoses from other practitioners who have managed or
5 worked with him over time. Pedophile, paraphilia,
6 psychopath, homicidal and suicidal.

7 He had been previously committed -- attempted
8 suicide multiple times and had also been Baker Acted
9 where someone's psychiatric status changes sufficient
10 to where they have to be held against their will until
11 you get them stabilized and managed.

12 The substance abuse disorder was profound. It
13 started in childhood and early teens, progressed with
14 significant medications all the way through a
15 substantial duration with cocaine throughout all his
16 adult years. Then a crack cocaine binge upon being
17 released from prison. He started to use -- binge use of
18 crack cocaine.

19 And bingeing is a term that, unlike in a
20 hospital, we don't -- anytime, even if a patient comes
21 to our clinic or goes to the hospital, you have to
22 self-report and tell us what you've taken or what
23 you've been doing. We don't have a list like the nurse
24 does at a nurse's station. But binge use and
25 high-volume use is an indicator that someone is in that

1 cycle, they're trying to feed that intense craving.

2 And he said he was using at binge-use level,
3 at high-volume use during that 21 to 28 days, and had
4 been constantly using for seven days prior with very
5 little sleep at all.

6 Sleep deprivation adds significantly to the
7 psychiatric instability as well. And then if you add
8 in quetiapine, a psychiatric medication, in addition,
9 that's now less than 30 days introduced.

10 So we've got a significant risk factor for
11 neurotransmitter disruption and altered behaviors and
12 thought processes, mood and stability in Mr. Smith at
13 that time.

14 Q And, Dr. Buffington, based on everything that
15 you know about Mr. Smith, about the things that you
16 knew prior to forming opinions about the prior records
17 that we have, we discussed with you, have you come up
18 with an opinion as to the pharmacological effects of
19 cocaine and even Seroquel on Mr. Smith and the chronic
20 use and what it has done to him?

21 A Yes, sir. My professional opinion is that
22 within a reasonable degree of medical and pharmacologic
23 certainly, that due to the combined effects of chronic
24 substance use and use disorder, that is from childhood
25 through current, multiple major psychiatric disorders,

1 chronic cocaine binge use or crack cocaine binge use,
2 including the recent addition of the psychiatric
3 medication, that Mr. Smith would have been impaired to
4 the degree that his normal judgment, skills and ability
5 were profoundly diminished.

6 Q Okay. And can you go over with the jury all
7 the things that you believe support your opinion you've
8 got listed?

9 A Yes, sir. So first was the opinion, and these
10 are things like how did you get there. One was he had
11 an extended period of no psychiatric therapy, and that
12 was during that prior incarceration. So we knew that
13 he needed therapy before. Now he's getting ready to be
14 released on no therapy. And actually even to be
15 released, he should have been released on specific
16 medication therapy and was not.

17 His medication profile from previously to what
18 I was able to discern during that -- during this
19 current incarceration is indicative of the severity of
20 the progression of the psychiatric condition, his
21 change in medications, his chronic cocaine use and
22 binge ingestion during that period of time was
23 significant and it included -- he testified that he
24 used cocaine even at that last window at the Walmart by
25 going into the bathroom to do a last hit. And it's my

1 understanding that he also had a burn on his leg from
2 putting the pipe -- crack pipe back into his pocket
3 from that use at that time.

4 He had sleep deprivation, profound sleep
5 deprivation, to the degree that he was having abnormal
6 dreams and fears, so he wasn't getting what we call
7 restorative sleep.

8 He had access to that psychotropic medication,
9 Seroquel or quetiapine, from that other individual,
10 Sissy, and was taking that. He was having auditory
11 hallucinations and delusions, hearing things. He was
12 hearing voices crying or talking. He was having visual
13 hallucinations and delusions where he would see
14 inanimate objects move. He described a leaf in one
15 particular example, where the leaf looked like it had
16 come to life.

17 He had visual disturbances like increased
18 sensitivity to light, which is common with cocaine. He
19 felt paralyzed at times by his surroundings because of
20 the paranoia, the terror or sense of the impending doom
21 to the degree that he would feel frozen at times or
22 having difficulty walking.

23 Depersonalization, that goes with the
24 psychosis where you end up feeling like an out-of-body
25 experience. Like at times he described like he was

1 watching himself. Not in his body, but watching
2 himself.

3 Emotional liability or mobility which is
4 significant changes from crying to positive and happy,
5 which is just like a pendulum, to the degree that he
6 was confused by those.

7 And another important issue with psychiatric
8 effects and intoxication is impaired memory. So I'm
9 sorry not saying that it's specifically like the
10 intoxication like you would think of with alcohol.
11 Somebody drank too much, now they're intoxicated. This
12 would be from the chronic use where you also have
13 impaired memory.

14 We look at memory as something that should be
15 fluid, something that you should be able to describe
16 what transpired. Someone said this and you said back.
17 I went from here to there. What he described on that
18 evening was a sense of snapshot memory or like photos.
19 In his words, he said staggered or stuttered images,
20 things like scenes out of an old black-and-white movie,
21 there are gaps between. So think of like if you took a
22 photo and then the next part of your memory is not
23 between, but another photo. And that's very consistent
24 with impaired cognition and intoxication as well.

25 MR. FLETCHER: That's all I have.

1 Thank you, Doctor.

2 THE COURT: Thank you.

3 Any cross-examination.

4 MR. CALIEL: Thank you.

5 THE COURT: Thank you.

6 CROSS-EXAMINATION

7 BY MR. CALIEL:

8 Q Good afternoon, Doctor.

9 A Good afternoon, sir.

10 Q Now, Doctor, your doctoral degree is in
11 pharmacology. You're not a medical doctor, is that
12 correct?

13 A That's correct. It is a medical specialty.

14 Q But you're not a medical doctor?

15 A Not an MD. A PharmD Degree, specializing in
16 pharmacology.

17 Q And so you're not a psychiatrist?

18 A That's correct. But it is a component of it,
19 the management of psychiatric conditions.

20 Q And you're not -- you don't hold any Ph.D. in
21 psychology either?

22 A No, that's correct.

23 Q Let's talk a little bit about what you were
24 provided. You were provided records from what the
25 defense gave you, correct?

1 A Yes, sir.

2 Q And you reviewed that prior to speaking with
3 Mr. Smith, correct?

4 A Yes, sir.

5 Q And you created your opinion in this case
6 based upon a review of the records that the defense
7 provided you in a 15-minute phone conversation with
8 Donald Smith; isn't that true?

9 A No, sir, it was an extensive review of the
10 records and I produced graphs. I had requested to be
11 able to confirm or validate some questions I had with
12 him and was able to do that in a phone call to him the
13 day prior to our deposition.

14 Q Oh, I'm sorry. It was an extensive review of
15 the records, but you talked to him for 15 minutes?

16 A That's correct. I had some very specific
17 questions that I needed from him to finish my opinions.

18 Q So you just had specific questions. So you
19 had formed an opinion even before you even spoke with
20 him for that short 15-minute period of time?

21 A No, sir, as I just stated, I drafted an
22 opinion. Of course, I had gone through the records.
23 Like if you're seeing a new patient, you may get
24 records to review, but when you talk to an individual
25 you may clarify or get information that you need to

1 solidify.

2 Q And so based upon this 15-minute phone
3 conversation and a review of records, you felt
4 confident that you could reach an opinion?

5 A Yes. And then you asked a few additional
6 questions and I answered that information as well.

7 Q Okay. And so it wasn't until I actually
8 asked you questions in deposition that you even
9 bothered to go to the Duval County Jail and actually
10 meet with this man; isn't that true?

11 A I didn't need to meet with him, but I did meet
12 with him because I was up here meeting with some other
13 inmates.

14 Q But you would agree that all of the
15 information that you were provided about his cocaine
16 usage, his drug usage in the 21 days between he was
17 released from prison and when he killed Cherish
18 Perrywinkle all came from him?

19 A Yes, it could only be from him.

20 Q Because there were no drug tests that were
21 presented, correct?

22 A Correct. Law enforcement had the chance, but
23 didn't do any toxicology testing the day they arrested
24 him.

25 Q And there were no prescriptions that he was

1 being prescribed at that point in time, correct?

2 A Correct, because the cocaine was illicit and
3 he was inquiring the Seroquel from someone else
4 independently.

5 Q Correct. So he was obtaining not only the
6 cocaine illegally, but he was obtaining the Seroquel
7 illegally, correct?

8 A That is correct.

9 Q And he was using the Seroquel not to treat
10 any mental health illness, but rather to control the
11 ups-and-downs of his binge cocaine usage?

12 A Yes, which persevered. He had previous
13 exposure and knew what that medication would do for
14 him.

15 Q And when you talked to him about this, I
16 think you said he had impaired memory, you asked him to
17 describe his memory, correct?

18 A Correct.

19 Q And he described it in the snapshot fashion,
20 but you never actually went through and talked to him
21 step-by-step as to what he did on June 21st and June
22 22nd, of 2013?

23 A You mean his actions to the child?

24 Q Just his actions throughout the course of the
25 entire time from 6:00 o'clock that night until he was

1 arrested the next morning.

2 A Correct. I did ask and he did not recall. He
3 only had snapshot visions of moments, not a total
4 recall.

5 Q Well, apparently one of those snapshot
6 visions was a picture of this victim's anatomy because
7 he was able to accurately describe that two years later
8 in a conversation in the Duval County Jail.

9 A I think he did accurately describe a few other
10 things to me as well.

11 Q So when he wants to remember things he's able
12 to recall that pretty easy.

13 A I don't think we refer to that a want to.
14 It's you and your memory is what you can recall.

15 Q But, again, you're relying on what he's
16 telling you and you're aware of the fact that other
17 experts have said he deceives, he lies and he
18 exaggerates symptoms, correct?

19 A No. If you have those reports, I'd be glad to
20 see 'em, but even then if you're saying he lied that
21 would be at that moment. I did not see that he was
22 diagnosed as a malingerer, which is a term we use
23 medically where someone doesn't describe something in
24 their past accurately for some particular reason, and
25 that could be dementia. Malingering isn't just a sense

1 of dishonesty. It could be dementia, it could be
2 following post-traumatic stress, things where you don't
3 have a solid memory but your articulation of those are
4 not accurate.

5 Q So the defense didn't bother to provide you
6 then Dr. Joseph Sesta's report where he provided
7 psychological testing, he determined him to over-report
8 and malinger to the point where it invalidated his
9 psychiatric symptoms?

10 A No, I did not see Dr. Sesta's report.

11 Q Oh, so you weren't provided that?

12 A Well, I was trying to finish. I did see
13 Dr. Sesta's report and that malingering or that change
14 would manifest over a continuum would not mean that
15 someone would do that on every occasion. There were
16 other people who saw him who didn't think he malingered
17 either.

18 Q You would agree with me that there's a
19 difference between a clinical setting and a forensic
20 setting, correct?

21 A Setting?

22 Q Setting. When you're meeting with a
23 potential patient, there's a difference when you meet
24 with him clinically or when you meet with him
25 forensically.

1 A Well, patients in the correctional setting get
2 healthcare as well, so I don't think it's the setting.
3 I think it might be a pretext is what you're asking.

4 Q I think it's -- because when somebody goes to
5 the clinic they're seeking help, and wouldn't you agree
6 with me that someone who is seeking help has an
7 interest in telling the truth so that they can get help
8 for whatever they need?

9 A Unless it's with diet or exercise or other
10 behaviors where even in clinical settings patients are
11 not always forthright.

12 Q But in a forensic setting, in fact, there has
13 to be caution used because, I think you used the term
14 already, individuals who know that they're facing
15 criminal sanctions have a tendency to malingering or
16 exaggerate what their symptomatology may be because it
17 serves their best interest.

18 A True. That's the same in clinical settings,
19 there may be motivation. And that's why we ask them
20 the questions in the particular style that you look --
21 you're trained as a clinician to look for exaggerations
22 and malingering. And at various times in the interview
23 you ask the same question a different way to look for
24 was there a trigger that got a different answer, was
25 there an exaggeration one time. If you see it you

1 begin to follow that and then you are able to discern
2 to the degree or magnitude that someone may be
3 exaggerating.

4 Q And so I understand it, you did this
5 technique in your extensive 15-minute phone
6 conversation with the defendant?

7 A Well, I also met with him another time. I met
8 with him and prepared to do the deposition with you.
9 That didn't mean it was done until I was ready.

10 Q Okay. And when you met with him the other
11 time, after the deposition, after you provided your
12 opinion, you did meet with him for an additional 30
13 minutes?

14 A That is correct.

15 Q So 45 minutes total for all the work that you
16 did in this case, face-to-face or on the phone with
17 him?

18 A That is correct. To clarify questions beyond
19 the records review and the information that I already
20 have.

21 Q And despite the fact that you thought you
22 were asking your questions to highlight malingerer,
23 you didn't use any of the standard forensic instruments
24 that are often used in psychological or psychiatric
25 setting such as the SIRS test, or M-FAST or Tom-FAST

1 (phonetically)?

2 A That's as little disingenuous. The SIRS test
3 is for 18 years and younger and he's 57 years old. So
4 there are other tests, but most of those even aren't
5 used clinically unless you are attempting to diagnose
6 someone as a malingerer. If you're interviewing a
7 person, then you use standard structured questions, you
8 ask open-ended. There's a whole series that you use,
9 and I did those in the course of that, and I do it in a
10 clinical setting as well.

11 Q Well, you keep on saying clinical setting.
12 This isn't a clinical setting. This is a forensic
13 setting. You saw him because he's facing the death
14 penalty.

15 A Correct, but I would not have the compulsion
16 to use a standardized form. I'm trying to ascertain
17 information for formation of an opinion. I'm not
18 attempting to diagnose him.

19 Q So all of your history regarding his cocaine
20 usage from May 31st to the date of his arrest came from
21 him, correct?

22 A Absolutely. The only person it could come
23 from.

24 Q And he claims he was binge using cocaine, in
25 particular, the seven days before this particular

1 incident?

2 A Yes, binge.

3 Q A constant use of cocaine?

4 A Well, back-to-back, yes. It's not every
5 minute like as soon as the previous dose wears off.
6 You've got to ascertain it or you've got to go get it.
7 But, yes, high-volume use back-to-back for the seven
8 days prior.

9 Q But knowing that's what he told you, you
10 never talked to his mother, did you?

11 A No.

12 Q Despite the fact that he was living with his
13 mother up until the day of his arrest?

14 A Understood, but I don't know that she would be
15 of utility for discerning what he took.

16 Q But she could testify how he was acting,
17 whether he was sleeping, whether he was not sleeping.
18 She could testify to visible outward appearance of her
19 son, right?

20 A Possibly, but I'm not aware of any of that
21 information in this case.

22 Q Because you didn't ask to talk to his mother?

23 A Correct.

24 Q And, in fact, you were unaware that he was
25 with his mother hours before he interacted with the

1 victim in this case furniture shopping?

2 A Right. So as I stated previously, and I'm
3 confused, did the other experts meet with his mother?

4 Q Yes.

5 A Okay. Then I'd prefer to see those records,
6 too.

7 Q I thought you hadn't seen those records.

8 A As previously stated.

9 Q Okay.

10 A So I as mentioned earlier --

11 Q I think you've answered my question, sir. If
12 I can ask the next one.

13 A I haven't because you were -- you asked me
14 about what she may see and I was trying to clarify for
15 the jury that you may not see outwardly visible effects
16 while somebody is on cocaine. Remember, you use the
17 product to go from lesser to bolder to more active to
18 more energy. It doesn't mean you can look at someone
19 on cocaine and say, like someone who's severely
20 intoxicated on alcohol, and have a lot of external
21 visible effects.

22 Q So he said he was delusional, right?

23 A At times. I don't know if those would have
24 been at times when he was standing next to his mother,
25 though.

1 Q He said he was having auditory
2 hallucinations?

3 A Yes. You don't see those externally.

4 Q Visual hallucinations?

5 A You don't see those externally.

6 Q He was acting paranoid?

7 A Yes.

8 Q Wasn't sleeping?

9 A Yes.

10 Q So in addition to not speaking with his
11 mother, you never reviewed any of the videos that were
12 captured in this case which show his behavior and his
13 conduct from about 7:00 o'clock at night until about
14 11:00 o'clock at night? You never viewed those either,
15 have you?

16 A Yes, I have.

17 Q Oh, you have. That was since we last talked?

18 A That is correct.

19 Q Oh, so you formed your opinion before you saw
20 the videos, but now that hasn't changed your opinion at
21 all?

22 A That is correct. Based on reviewing the
23 videos I didn't see anything that would change my
24 opinion.

25 Q You never spoke to Brad Calhoun, correct?

1 A That is correct.

2 Q He's the person who was at Dollar General who
3 interacted with him.

4 A Correct. You could see them having a
5 dialogue.

6 Q And you never spoke to the victim's mother in
7 this case, Rayne Perrywinkle?

8 A That's correct.

9 Q And she was with him probably that evening
10 longer than any other individual, correct?

11 A That's correct. But, again, these external
12 manifestations are not always seen with cocaine.

13 Q So he's on this seven-day bender on cocaine,
14 but none of these things would have been available or
15 readily accessible to somebody just walking by or
16 seeing this individual?

17 A These medications, no.

18 Q And you said while he went into the Walmart
19 bathroom he reported to you that he smoked cocaine in
20 the Walmart bathroom on the night of the incident,
21 correct?

22 A That's correct.

23 Q And you talked about a potential burn. I
24 assume this is smoking of the crack pipe and the
25 lighter and things of that nature.

1 A Correct.

2 Q So that was his methodology. Did he tell you
3 that was how he ingested cocaine?

4 A Yes.

5 Q So he told you those things.

6 Can you explain to me then when he was
7 arrested only hours later there wasn't a crack pipe and
8 there wasn't a lighter?

9 A No, sir, I don't know what he did with it in
10 between.

11 Q Okay. And, again, all that information, too,
12 came from him?

13 A Correct. It's the only person it could come
14 from.

15 Q Thank you.

16 MR. CALIEL: I don't have any further
17 questions.

18 THE COURT: Any redirect?

19 MR. FLETCHER: Yes, Your Honor.

20 REDIRECT EXAMINATION

21 BY MR. FLETCHER:

22 Q Dr. Buffington, as a pharmacologist you give
23 advice on the types of drugs to psychiatrists, is that
24 right?

25 A Correct. Specialists. So it could be

1 cardiologists, psychiatrists, oncologists and primary
2 care. There's actually more psychiatry management done
3 in primary care offices than even in psychiatrists.

4 Q Okay. So you're no stranger to how the drugs
5 work. In fact, you educate doctors on how the drugs
6 work?

7 A I teach the classes as well as serve as a
8 specialty consultation for patient care management.

9 Q Okay. And after this deposition that we --
10 Mr. Caliel has discussed with you, you and I met at the
11 Duval County Jail, right?

12 A That is correct. I had three other inmates I
13 was interviewing for clinical questions and knew that
14 he was at that facility and you made him available that
15 day.

16 Q Okay. And the only real follow-up that we
17 wanted to answer for Mr. Caliel was where he got the
18 Seroquel.

19 A That's correct.

20 Q Everything else you were relying on all
21 reports that you received from -- from all the people
22 in this case, right?

23 A Correct. I hadn't had, at the time of the
24 deposition, the videos but based on his comments on the
25 videos I requested access to see those and was able to

1 see those as well and felt that they were relevant but
2 not changing my opinion.

3 Q Okay. So it had nothing to do with your
4 opinion?

5 A That's correct.

6 Q And Mr. Caliel was asking about the physical
7 manifestations that you might have seen on this video
8 from taking crack cocaine. Is the seven-day binge on
9 alcohol going to look different than a seven-day binge
10 on crack cocaine?

11 A Significantly.

12 Q And what would you expect to see if someone
13 was on a seven-day binge on alcohol?

14 A Yes, it would have been someone who was very
15 sloppy, someone tired, lethargic, possibly not
16 communicating with people. In this particular case it
17 was the opposite. He was attentive, he was reading a
18 magazine, he was asking questions, interacting with
19 people.

20 Q And, Doctor, Mr. Caliel indicated to you
21 that -- in one of his questions that a person who went
22 to a facility for help would have an interest in being
23 honest about what he was on and what he was taking. Do
24 you remember that question?

25 A I do.

1 Q Okay. And are you aware of Mr. Smith's
2 attempt to Baker Act himself about 11 days before this
3 incident?

4 A Yes. Being self-aware of the degree of
5 problem or difficulty he was in.

6 Q Right. And have you seen that report?

7 A Yes.

8 Q And is it on your screen in front of you?

9 A Yes, it is.

10 Q And can you read over that report? Take
11 about a few minutes, just read over it.

12 A Yes. So this took place on 6/9 and presenting
13 complaint is him acknowledging I've been on a cocaine
14 binge for the last four days to the point I don't sleep
15 at all. Someone may lay down, try to close their eyes.
16 So to someone externally, you may think, oh, they just
17 laid down, but they don't go to sleep, they don't get
18 restorative sleep. They even have terrors and wake up.
19 So that's I'm presuming and that's common.

20 Q Okay. And this was on a form that was filled
21 out when he attempted to Baker Act himself, right?

22 A That's correct.

23 Q So he was seeking help, right?

24 A That's correct. And at no point in any of the
25 discussions that I had with him did he attempt to

1 mislead me. As a matter of fact, he was very
2 forthright over the years, the types of substances he
3 had been exposed to, and his own concerns of trying to
4 understand what went on.

5 Q And his statements to these people that he
6 had been on a cocaine binge for the last four days,
7 that's entirely consistent with what he told you.

8 A That is correct, although more days had
9 passed.

10 Q More days had passed. Thank you, sir.

11 THE COURT: Anything further?

12 MR. CALIEL: No further questions, Your
13 Honor.

14 THE COURT: May this witness be excused?

15 MR. FLETCHER: Yes, Your Honor.

16 THE COURT: Thank you, sir. We appreciate
17 your time today.

18 THE WITNESS: Thank you.

19 THE COURT: Ladies and gentlemen, we've been
20 out here about two hours. Let's take a recess
21 before we call the next witness. We'll take a
22 16-minute recess.

23 (Jury absent.)

24 (Defendant present.)

25 (Jury absent.)

1 THE COURT: Okay. Mr. Smith is back with his
2 attorneys and the State.

3 Is everyone ready to proceed?

4 MR. CALIEL: Yes, Your Honor.

5 MS. SCHLAX: Yes, Your Honor.

6 THE COURT: We're ready.

7 BAILIFF: Ready, Judge?

8 THE COURT: We're ready.

9 BAILIFF: The jury is entering the courtroom.
10 (Jury present.)

11 THE COURT: Thank you, ladies and gentlemen.
12 You may be seated.

13 The defense may call their next witness.

14 MS. SCHLAX: Thank you, Your Honor.

15 The defense would call Mr. Michael Bossen.

16 THE COURT: Mr. Michael Bossen.

17 (Witness present.)

18 THE COURT: Good afternoon, Mr. Bossen.

19 Right over here. Right in front of me, the
20 clerk will swear you in.

21 (Witness sworn.)

22 THE WITNESS: So help me God.

23 THE COURT: Thank you.

24 If you'll have a seat in the witness chair.

25 THE WITNESS: Thank you.

1 THE COURT: Thank you.

2 MS. SCHLAX: May it please the Court.

3 THE COURT: Yes.

4 MICHAEL BOSSEN,

5 was called as a witness on behalf of the Defense,

6 and after being duly sworn, then testified as follows:

7 DIRECT EXAMINATION

8 BY MS. SCHLAX:

9 Q Good afternoon. Can you please introduce
10 yourself to the jury.

11 A Yes, ma'am, my name is Michael Bossen.

12 Q And, sir, are you a lawyer licensed to
13 practice by the Florida Bar?

14 A Yes, I am.

15 Q How long have you been licensed to practice
16 law?

17 A Since 1991.

18 Q And do you have a specialty?

19 A Criminal defense.

20 Q And can you describe your work experience for
21 the jury.

22 A Yes. I graduated from Law school in 1990,
23 went to work for the State Attorney's Office as a
24 prosecutor.

25 Q How long were you a prosecutor, sir?

1 A About seven and a half years.

2 Q And during your -- and that was at this State
3 Attorney's Office here in Jacksonville, Duval County,
4 Florida?

5 A Yes.

6 Q Did you practice in both Duval and Clay
7 County?

8 A Yes, Duval, Clay and Nassau.

9 Q And during your tenure at that office, did
10 you engage in all different kinds of cases?

11 A Yes, I did.

12 Q If you had to estimate, how many criminal
13 cases did you handle as a prosecutor?

14 A In the seven years probably thousands.

15 Q And did that include criminal jury trials?

16 A Yes.

17 Q How many -- how many criminal jury trials, if
18 you had to estimate, as a prosecutor did you engage in?

19 A Going back to misdemeanor when we tried a lot
20 of cases, probably close to 50. Between 40 and 50,
21 probably.

22 Q And did some of those jury trials include
23 everything that you just mentioned, misdemeanors all
24 the way up to homicides?

25 A Yes.

1 Q When did you -- when did you begin your
2 criminal defense practice?

3 A In 2000.

4 Q Okay. And how many cases have you handled as
5 a criminal defense attorney?

6 A A lot.

7 Q Do you have any kind of an estimate?

8 A Probably 2500 at least.

9 Q And has that also included criminal jury
10 trials?

11 A Yes.

12 Q As a defense attorney as well?

13 A Yes.

14 Q Are you currently what we call death
15 qualified?

16 A Yes, I am.

17 Q Can you explain what does that mean?

18 A To be death qualified is certain criteria.
19 It's an application process. You have to have a
20 certain number of years of experience, of litigation, I
21 think five, then you have to have a certain number of
22 trials, at least nine or more of complex cases, three
23 of which have to do with murder cases, and you have to
24 have a continuing level of education and proficiency in
25 examining certain types of evidence, like forensic

1 evidence, ballistic evidence, ammunition, guns, medical
2 records. I think that's about it. But it's an ongoing
3 process of basically staying updated in the current
4 state of the law, specifically related to death penalty
5 cases.

6 Q And are you -- are you familiar with how
7 criminal cases are handled within this jurisdiction?

8 A Yes, I am.

9 MS. SCHLAX: Your Honor, at this time I would
10 tender Mr. Bossen as a lawyer with a legal
11 expertise in criminal law in Duval County,
12 Florida.

13 MR. CALIEL: No objection from the State,
14 Your Honor.

15 THE COURT: All right. He'll testify in that
16 regard.

17 THE WITNESS: Thank you.

18 BY MS. SCHLAX:

19 Q If you can, Mr. Bossen, can you explain to
20 the jury once a criminal charge is actually filed by
21 the State Attorney's Office how does that case resolve?

22 A It's typically, I think there's three ways,
23 mostly -- one that is the State who initiates the
24 charges could also drop the charges. That's one way.
25 The second way would be that if an individual wanted to

1 go to trial there would be a verdict that was reached
2 and then that would resolve the case, the verdict by
3 the jury. And then the third way, which is the most
4 common way, typically is a plea deal or plea
5 negotiations where basically both sides agree to a
6 term, whatever those terms are, and then everybody
7 signs off on it and then the case is resolved that
8 way.

9 Q And I think you've already told us this. So
10 is it unusual for a plea agreement to be reached in a
11 criminal court setting?

12 A No. That's actually the most common way, that
13 plea deals are negotiated on a regular basis the
14 majority of the time with cases. It's actually the --
15 it's a minority of cases that actually go through a
16 trial.

17 Q And what kinds of things affect a potential
18 plea agreement?

19 A The strength, the weaknesses of the State's
20 case, the individual who's accused, their record, their
21 criminal history, victim impact. The victims certainly
22 have a right, in this state there's actually a statute
23 which gives them a certain right to be heard, to be
24 part of the process, to be informed. Those -- those
25 are the primary.

1 Q I'll come back to that in a second. You
2 mentioned a specific Florida Statute. Are prosecutors
3 bound by what a victim wants if it's -- if it's
4 identified as victim in a crime?

5 A You mean -- could you clarify that?

6 Q Sure. If a victim wants a certain
7 disposition, are prosecutors in Florida bound to just
8 adhere to what they request?

9 A No. No. The prosecutors, they have to listen
10 and the victims are definitely part of the process, but
11 there are times, and there have been times in my
12 career, that there's certain things that have to happen
13 in cases that are contrary to what the victim wants in
14 a case.

15 Q Having been involved in the criminal justice
16 system since 1991, has information flowed more freely?

17 A Yes.

18 Q Okay.

19 A Absolutely.

20 Q Like when you were a prosecutor in 1991,
21 1992, 1993, did you have access, when you were making a
22 prosecutorial decision, to all the information in terms
23 of the defendant's prior record?

24 A Not typically, no. I mean we -- you had what
25 is referred to as an NCIC, which is kind of the old --

1 that was the best that it got, which basically told you
2 whether or not an individual had other prior criminal
3 records in other states, other jurisdictions in the
4 State of Florida, but, no, we didn't have that -- the
5 information a lot of times was just what was at-hand
6 locally and what was in the jail dockets as far as an
7 individual being locally charged and locally
8 prosecuted.

9 Q Okay. And then so you bring up a distinction
10 that if someone were prosecuted by the State Attorney's
11 Office, all of the prior record would be known to the
12 prosecutor making that decision.

13 A Yes. Yes. Typically, absolutely.

14 Q And so the prosecutor making the decision in
15 terms of what charge to file would know about whatever
16 record there was previously?

17 A Typically.

18 Q As well as the prosecutor making the decision
19 on what kind of a plea agreement might be reached?

20 A Yes. I agree with that.

21 Q If you can, can you explain what are
22 guidelines in sentencing?

23 A Guidelines are basically, it's a criteria that
24 was created by the legislature and they've kind of
25 morphed throughout the years. Prior to 1983 there were

1 no guidelines so the sentences that could be handed out
2 to individuals charged with crimes would be up
3 primarily to the discretion of the court, the judges,
4 to make a lot of those decisions. It changed in 1983.
5 In 1983 is when Florida decided to get -- do away with
6 parole. So prior to 1983 there was parole and the
7 sentences could be affected by that as well. So 1983
8 they had no parole. And then based on the level of
9 crime or based on the crime that was committed, it
10 would be given a certain criteria and in that criteria
11 there would be given certain points and the points
12 would be assessed. Other things that could be taken
13 into consideration would be like the person's prior
14 record would get a certain amount of points. If there
15 was a victim injury, that would be a certain amount of
16 points.

17 So there was a ceiling, which was kind of the
18 level, the highest level that you could get on certain
19 crimes, and then a floor which is lowest level.

20 That ran until 1994 and that changed again and
21 they basically came up with another formula,
22 mathematically inclined, and I'm not about to try to
23 explain it to you because I have to go back and use a
24 calculator to this day to try to determine what the
25 guidelines were or are.

1 But they kind of did away or started to do
2 away with that ceiling and giving basically -- the
3 Court still had discretion to give an increase to the
4 punishment if it was warranted. And then finally in
5 1998 is what we have now, which is basically the
6 Criminal Punishment Code which designates a certain,
7 again based on a formula, but is a little more certain,
8 is supposed to be a little more neutral across the
9 board, a certain amount of points assessed with a
10 certain formula with those per se criteria that gives
11 you a range where you should not, and sometimes cannot
12 go lower than that number, whatever that number is.
13 And that's applied across the board.

14 So in 1983, around then, prior, a lot of
15 discretion. The courts could do pretty much whatever
16 they wanted to do. And then as it kind of evolved it
17 became a little tighter. And that's why it's, you
18 know, in theory, applied equally across the board to
19 everybody, based on the type of crime or level of crime
20 that was committed by the individual.

21 Q Did it also -- it also changed the maximum or
22 ceiling?

23 A Yes. Yeah, in the earlier guidelines there
24 was a ceiling, like a recommended or permitted range
25 that was between this and this. What we have today is

1 we're not bound by that. The courts are not bound by
2 that. The courts can sentence all the way up to the
3 statutory maximum and in some cases even beyond that
4 based on the individual's record.

5 Q So like when you say statutory maximum let
6 me -- there are different levels of felonies, correct?

7 A Yes.

8 Q What are the different levels of felonies in
9 the State of Florida?

10 A The lowest level of felony is a third degree
11 felony. That's punishable by up to five years. So the
12 statutory maximum would be five years. If a person
13 commits -- and an example of a third degree felony
14 would be possession of cocaine, a third degree felony.
15 Possession of marijuana more than 20 grams, also a
16 third degree felony. Grand theft. So the lesser
17 crimes, though not as serious, not as violent crimes,
18 are third degree felonies. You could get up to five
19 years as the maximum, but typically on somebody that
20 commits that type of crime that doesn't have much of a
21 record you don't even score in the numbers that get you
22 high enough to go to incarceration and you could
23 potentially get probation. So that's like the third
24 degree felonies.

25 The second degree felony is a little more

1 serious. They're punishable by up to 15 years in
2 prison. And then the first degree felonies go up to 30
3 years. And then the more serious crimes are up to life
4 and then ultimately, on capital cases, the penalty
5 could ultimately be death.

6 Q And I'm going to ask you something in regards
7 to guidelines of incarceration. What -- what factors
8 affect a prosecutor in coming up with terms of
9 probation or out-of-custody type conditions?

10 A Again, I go back to the strength and
11 weaknesses of the case, if there's an issue with, for
12 instance, a witness or a victim being cooperative. So
13 the quality of the evidence. A person's need maybe for
14 rehabilitation, a first offender, somebody maybe
15 addicted to drugs that has a repeated pattern that
16 needs to be broken, a lack of record. And somebody
17 basically who -- who may be evaluated by a professional
18 that has, you know, a -- a meaningful or a potential to
19 succeed at probation could be considered as far as an
20 appropriate sentence in lieu of or in addition to
21 incarceration.

22 Q During your tenure at the State Attorney's
23 Office, did you work in what was called the Special
24 Assault Unit?

25 A Yes, I did.

1 Q And what kind of crimes did those prosecutors
2 focus on?

3 A Those were domestic crimes, sexual assaults,
4 child abuse, those types of crimes.

5 Q Was it unusual in that -- in those types of
6 cases to do what they call a split sentence?

7 A No. No.

8 Q And explain to the jurors what is a split
9 sentence.

10 A A split sentence is what I just said, a period
11 of incarceration or jail, not necessarily prison, but
12 it could be a Duval County Jail sentence and then
13 followed by probation once you finished the
14 incarceration part. So there's a punitive aspect to it
15 and then, again, a theory for rehabilitative aspect to
16 it.

17 Q And was this especially true in cases
18 involving sexual offenses?

19 A Yes.

20 Q And why was it important to have the
21 probationary conditions of sexual offenses?

22 A I think in the sexual assault type cases, or
23 really even the child abuse cases, as a prosecutor, at
24 least I do and I think the same is true and has been
25 true and it still is true, is that there is a concern

1 about the future, either dangerousness or future
2 ability of the individual who committed the crime, to
3 potentially commit an additional crime or additional
4 crimes. So that is kind of a safeguard where the
5 person is still under supervision and, again, it's only
6 -- it's applied in certain cases. You know, certain
7 cases people aren't ineligible and shouldn't be on
8 probation and that's a decision that's made and, again,
9 based on the specific facts of each case individually.
10 You can't just say blanketly across the board somebody
11 is a good probation candidate or not. So each -- each
12 case is different.

13 But that probationary period gives -- it's
14 kind of a fail-safe that allows the person to either
15 succeed or not succeed. But given the opportunity,
16 they have a chance to be rehabilitated throughout the
17 process.

18 Q And is that true for someone who's suffering
19 from a mental illness like pedophilia?

20 A Yes, I would say so.

21 Q I'm going to show you a number of documents.
22 Were you asked by myself to look up the prior record of
23 a Donald James Smith?

24 A Yes, I was.

25 Q Just for the record, you've never met

1 Mr. Smith, have you?

2 A No. I've been in court handling cases at the
3 same time that Mr. Smith's case is on the docket, but
4 I've had no conversations with him or never met him
5 before.

6 Q I'm going to first show you on your screen,
7 this has been introduced as Defendant's 3. Can you
8 explain for the jurors what are they looking at?

9 A All right. This is a judgment and sentence
10 which is basically a document that's generated by the
11 clerk once a case is resolved. And in this particular
12 case it has a case number at the top, 1977 dash 3161,
13 the county that we're in, which is Duval, the name of
14 the defendant, Donald J. Smith. It has the person who
15 represented, looks like his attorney, and then it has
16 what his -- the plea that was entered in this
17 particular case, has three -- looks like it has three
18 boxes. Where a person has been tried and found guilty
19 is the first box and that's not checked. The second
20 one is checked, which says the person entered a plea of
21 guilty to the following crime, and then it lists the
22 crime, the statute number, lewd and lascivious act,
23 looks like in the presence of a minor child under
24 Florida Statute 800.04.

25 Q And did you become familiar with the

1 allegations involved in this case from 1977?

2 A Yes, I did.

3 Q And what were those allegations?

4 A May I have one moment?

5 Q Yes.

6 A In that particular situation it appears that
7 it was a lewd assault on a child, which was a second
8 degree felony, in that Mr. Smith was accused and pled
9 guilty to masturbating in front of a five and an eight
10 year old child. Then it appears that he was evaluated
11 by a psychiatrist, Dr. Ernie Miller, and was sent to
12 treatment, a treatment center facility. He was
13 designated at that time as a mentally disordered sex
14 offender.

15 Q And at this point in 1977, number one, you
16 weren't practicing law back then were you, sir?

17 A No. I was probably on restriction. I think I
18 would have been like 13. So definitely on restriction.

19 Q And Mr. Smith would have been about 19 years
20 old.

21 A Okay.

22 Q Correct?

23 A His date of birth -- yes. That's correct.

24 Q And ultimately the judgment shows that the
25 final judgment was he was in prison for five years for

1 this offense. That was the final judgment?

2 A Yes, he did a term of, it looks like five
3 years, which would have been incarceration in Florida
4 State Prison, and that he had credit for one year and
5 139 days that he had previously served to him being
6 sentenced.

7 Q Guidelines would have applied back in 1977,
8 correct?

9 A No. In 1977 it would have been discretionary.

10 Q Okay.

11 A I think it wasn't until 1983 that -- because
12 on that case he actually received a -- he received a
13 12-months Duval County Jail sentence, but he actually
14 initially received a ten-year probationary sentence on
15 that.

16 Q And then he violated his probation?

17 A Right. The reason that he got to prison, but
18 he violated his probation. He was in treatment. My
19 records indicate he was in treatment at that facility
20 for less than a year and then once he came out -- I
21 think it's almost like it's a modern day, he was what
22 we call incompetent to proceed. If somebody is either
23 disabled or has a mental illness or an issue regarding
24 his ability to understand or know what's going on,
25 they're sometimes committed to the Florida State

1 Hospital. That's reviewed every six months or so.

2 Once that person is found competent, if they are found
3 competent, then they come back and face the charges.

4 So in this situation it appears that he was
5 sent to treatment as he was designated a mentally
6 disordered individual, but then didn't make it through
7 treatment and was only in treatment for -- and I don't
8 know the circumstances around that. Only in treatment
9 for 12 months or less, then given a probationary
10 sentence of ten years and then ultimately violated in
11 1981, which is about four years after the initial
12 charge.

13 Q And so then ultimately served a prison
14 sentence?

15 A Yes, of five years.

16 Q Okay. That's what's reflected in this final
17 judgment?

18 A Yes. That's the reason for the 139 days plus
19 12 months credit, because he did the 12 months first,
20 then he did probation, then he violated his probation
21 and received five years, but then got the credit for
22 the 12 months that he had previously done plus the 139
23 days that he was back in jail waiting sentence on his
24 violation.

25 Q I'm now showing you Defense 4. Is this also

1 a final judgment?

2 A Yes. It's a final judgment from 1991, in case
3 No. 91 dash 11745, which is listed in the top corner,
4 the right-hand corner. It lists Donald James Smith as
5 the defendant and then has two counts, one burglary,
6 one grand theft, that was entered on November 7th,
7 1991.

8 Q Okay. And the ultimate sentence -- well,
9 first, let me ask you on a burglary that's a second
10 degree felony, that's normally punishable by up to
11 what?

12 A 15 years.

13 Q And the grand theft, a third degree felony,
14 punishable normally up to?

15 A The statutory maximum on that would be five
16 years.

17 Q And what sentence did he receive?

18 A On this case it does appear that he had pled
19 guilty, I saw that on the first page, so he entered
20 into a plea negotiation with the State and received a
21 term of -- it looks like four months.

22 Q Okay.

23 A Credit for 31 days.

24 Q And in your experience as a prosecutor, is it
25 unusual when you have a subsequent felony to get a

1 lower sentence than the previous felony?

2 A I wouldn't say that's typical. I would -- I
3 would be kind of cautious in my answer only because I
4 don't know the specific facts about why the case was
5 resolved in the manner that it was resolved in, but
6 typically no. Typically in a situation a person that
7 commits a subsequent crime after being sentenced to
8 incarceration previously would not normally get less in
9 terms of incarceration than he got the first time
10 around. So that tells me that there was some sort of
11 issue or some sort of circumstance around the case that
12 necessitated a plea to a -- a four-month sentence.

13 Q I'm going to show you Defense 5.

14 A Okay.

15 Q And do you recognize this document?

16 A Yes. That's a document, again, judgement and
17 sentence from 1993 in reference to case 92-11193-CF.
18 It was in Division CR-F, which was -- which we no
19 longer have, but was an habitual offender or repeat
20 offender court, formally known as ROC.

21 Q And if you can explain what repeat offender
22 court, and specifically the habitual offender statute,
23 what is that under the Florida Statute that pertains to
24 the criminal justice system?

25 A It allows for the Court to exceed the

1 statutory maximum in circumstances where an individual
2 has a certain number of prior records and then has a
3 qualifying charge, that then allows the courts to go to
4 a higher sentence. For instance, a five-year third
5 degree felony normally could become a ten-year
6 sentence. A second degree goes from 15 up to 30. A
7 first degree goes from 30 up to life. So basically
8 it's an enhancement statute for people that are repeat
9 offenders.

10 Q And under the habitual offender statute --
11 the habitual felony offender statute still remains
12 Florida law even to this day, correct?

13 A Yes. Yes.

14 Q You mentioned that we no longer have repeat
15 offender courtrooms.

16 A Correct.

17 Q When were those removed from the Duval County
18 Courthouse?

19 A Fairly recently.

20 Q January 1?

21 A Right.

22 Q Of this year?

23 A I don't think so. Maybe -- that's real
24 recent. I think it was towards the end of last year,
25 if I'm not mistaken, but I don't think it was -- I

1 don't know if it was in the middle of the year. So I
2 don't -- I don't really know specifically the date, but
3 it was within a year or so at least.

4 Q But back in -- back in 1991 and continuing on
5 until the recent past, when you were in CR-C or CR-F
6 you were in what's called repeat offender court?

7 A Yes. It was CR-D and F.

8 Q And CR -- and CR-D and in CR-F, if you had
9 been what they called habitualized, meaning formal
10 notice has been given based on your prior record, do
11 guidelines apply?

12 A No, the guidelines no longer apply. So that
13 formula that we kind of talked about can basically get
14 tossed out. I mean the sentence is -- if you get hit
15 with an habitual offender notice then, you know, your
16 penalty is going to be doubled. So if you go to trial,
17 you lose on a first degree felony where you could be
18 potentially looking at 30 years, you're now looking at
19 life.

20 Q And this particular case of Defendant's 5 was
21 an attempted kidnapping and showing obscene material to
22 minors?

23 A Yes.

24 Q And are you familiar with the allegations in
25 that case?

1 A Yes, I am.

2 Q And what were they?

3 A Give me a second. This was a case that
4 involved Mr. Smith as the suspect trying to lure a
5 white female age 13 into his van. She fled and he
6 chased her to a park where she hid until he left.

7 And he later approached two other victims and
8 showed them pornographic magazines trying to lure them
9 into his van. They also fled, but were able to obtain
10 his tag number and these incidents were reported to the
11 police which then made for the basis of the -- of the
12 charges and the arrest.

13 Q And ultimately we're looking at the final --
14 the final judgment, and although you've just explained,
15 for the attempted kidnapping he could have received up
16 to life in prison?

17 A Correct. As an habitual offender, yes.

18 Q But a plea agreement was reached where he
19 served how much time?

20 A This judgment and sentence shows six years
21 Florida State Prison with three years credit and a
22 hundred and -- and I can't tell if it's 197 or 147
23 days. It also indicates that there was an original
24 sentence of January 15th, 1993 that was vacated and set
25 aside previously. So it looks like there was a

1 sentence that was imposed, it was set aside, and then
2 this six-year sentence was subsequently imposed.

3 Q Okay. And that original sentence was for 15
4 years?

5 A According to my notes, yes, it was 15 years
6 concurrent, yes. On -- it was 15 years Florida State
7 Prison was the original sentence.

8 Q And so this would have been the second
9 allegation and now conviction against Mr. Smith that
10 involved a sex crime against young children?

11 A Yes.

12 Q Okay. Would it be unusual not to see
13 probationary conditions?

14 A Would it be unusual?

15 Q Yes.

16 A In this situation it -- it would not be
17 unusual.

18 Q Okay. Let me -- let me ask you this. This
19 is 1992, 1993.

20 A Um-hum.

21 Q Did there become a recognition in the
22 criminal justice system that sex offender treatment was
23 something that was necessary for pedophile activity,
24 behavior?

25 A Yes, absolutely.

1 Q Was there kind of an awakening within the
2 criminal justice system that this was a mental illness?

3 A It was definitely at that time it was
4 beginning to be recognized as something that needed to
5 be dealt with through an extra period of monitoring
6 through probation, specifically related to mental
7 illness or sex offenses.

8 Q Okay. I'm going to show you Defendant's 6.
9 This is a final judgment for attempted purchase of
10 cocaine.

11 A Yes, ma'am.

12 Q And you cannot be habitualized on an
13 attempted purchase, can you?

14 A No. It wasn't one of the qualifying felonies
15 that allowed you to be habitual offender. It was a
16 list that basically it pertained to and this was not
17 one of the more serious crimes that were on that list.

18 Q Okay. And ultimately we have a final
19 judgment of five months?

20 A Correct.

21 Q In Duval?

22 A With 33 days, correct, so it was a quick plea
23 to the charge.

24 Q Now, drug charges oftentimes have qualified
25 probationary conditions to try to curb what's likely

1 addiction, correct?

2 A Correct. Depending on the individual's record
3 and depending on if there are any evaluations that
4 could be relied upon a probationary sentence could be
5 appropriate.

6 Q But that wasn't done in this case?

7 A No.

8 Q Could you explain for the jurors what is the
9 involuntary civil commitment law, sometimes referred to
10 as the Jimmy Ryce Law.

11 A The Jimmy Ryce Law was enacted by the
12 legislature in 1998, signed into law by Governor Lawton
13 Chiles in 1999, January 1, and what that does is it
14 allows for the State to initiate civil proceedings
15 against sexually violent predators after their sentence
16 has been impressed and has been served.

17 So if an individual is sentenced to a period
18 of incarceration, they finish, say it's five years,
19 they finish a five-year sentence. If the person has
20 prior issues, specifically related to sex offenses, has
21 been deemed a prior sex offender, then evaluations can
22 be done on that person that could basically keep him
23 committed on a year-to-year basis until either that
24 person is rehabilitated or shows some sort of
25 likelihood of success or not repeating his previous

1 behavior.

2 So it's a way that you can basically monitor
3 sex offenders, dangerous sex offenders, to keep them
4 off the streets.

5 Q Although we call it civil confinement, you're
6 familiar with the actual prison and it is a prison
7 setting?

8 A Correct, it is.

9 Q It is a lock-down facility?

10 A The prisoner does not get out, correct.

11 Q And, in fact, did the State of Florida
12 through the State Attorney's Office initiate such
13 petition against Donald James Smith?

14 A Yes. In my review of -- I did find that there
15 was, in fact, a Jimmy Ryce Civil Commitment initiation
16 done on Mr. Smith in reference to a 1999-1653 case.

17 Q And ultimately how are those cases resolved?
18 Is this -- this isn't a criminal prosecution. This is
19 a civil commitment.

20 A This is -- in those types of cases, there
21 again, it's kind of a blend. There's a certain -- once
22 it's determined by evaluators, psychiatrists, that a
23 person does meet the criteria for civil commitment, an
24 individual then is afforded an opportunity to enter a
25 disposition, a plea or to go through a trial. The

1 trial could be in front of a judge or it could be in
2 front of a jury, and the jury then must determine
3 beyond a lower threshold, I believe it's clear and
4 convincing evidence, that the person that actually
5 committed the offense is a danger or a likelihood to
6 reoffend. So it's all based on whether or not the
7 person is likely to reoffend or not. And if the person
8 is likely to reoffend, then the person remains in
9 commitment status.

10 Q And is it true that anytime someone gets a
11 prison sentence they will be evaluated to see if they
12 meet this criteria?

13 A Yes. That's how it's supposed to work,
14 correct.

15 Q Even if the offense that they go to prison
16 for on that particular occasion is not sexual related?

17 A Correct.

18 Q Okay. But ultimately it's the State of
19 Florida that either petitions or brings the Jimmy Ryce
20 or withdraws it?

21 A That's correct.

22 Q I'm showing you what's been marked as
23 Defendant's 7 introduced. Is this an order of release,
24 an order of dismissal?

25 A Yes, it is in reference to the same case that

1 I referenced, 99-1635, Donald Smith is the respondent.
2 He's not the defendant because it's not criminal. It's
3 civil. It is an order of release and order of
4 dismissal done and ordered at chambers April 15th of
5 2002.

6 Q And what does the term voluntarily dismissed
7 mean?

8 A Voluntarily dismissed would mean that it was
9 initiated and dismissed -- the dismissal was initiated
10 and signed off on by the State.

11 Q The State of Florida?

12 A Yes.

13 Q And that would be through the State
14 Attorney's Office?

15 A That's correct.

16 Q So -- so ultimately this resulted on April
17 15th, 2002, to Mr. Smith's release back into the
18 community?

19 A That is correct.

20 Q I'm going to show you Defendant's 8. This is
21 a final -- is this a final judgment?

22 A It is. It's in reference to several cases.
23 Two second degree felonies, two third degree felonies
24 involving property crimes, dealing in stolen property,
25 false verification of ownership in a pawn, which

1 basically means that when you go into a pawn shop you
2 sign acknowledging that you are the owner of the
3 property that's being pawned. And when it was found
4 out that Mr. Smith was not the owner, he was then
5 charged with false verification.

6 Q And as you've explained before, this case
7 took place in Division CR-D. And what's the
8 significance of CR-D?

9 A That would have been in repeat offender court.

10 Q Which means that the statutory maximums had
11 doubled, correct?

12 A Correct.

13 Q And the guidelines do not apply?

14 A That is correct.

15 Q So for this case, just his first count,
16 dealing in stolen property, what was the potential
17 sentence Mr. Smith could have received?

18 A 30 years.

19 Q Same for the second count?

20 A Yes. That would be 30 years on the second
21 count and --

22 Q And theoretically they could have been run
23 consecutive to each other?

24 A Not sure if the dealing in stolen property and
25 the false verification could have, but assuming that

1 the dealing in stolen property were two separate
2 incidences, then yes.

3 Q And -- and the third degree felonies would
4 have been punishable by up to life?

5 A It can, if you applied it as an habitual
6 offender.

7 Q Okay. And in your review of the record, was
8 the habitual offender statute brought up in that case?

9 A One second.

10 Yes, it does appear that he was designated an
11 habitual offender.

12 Q In your experience in the criminal justice
13 system, is it -- does that appear to be an unusual
14 sentence based on Mr. Smith's prior record?

15 A Based on his prior record it would cause some
16 concern as to why it was disposed in the manner that it
17 was disposed of, but, again, not knowing what was going
18 on with that particular prosecutor and the decision to
19 make the four-year offer that was ultimately used to
20 dispose of the case, I'm a little hesitant to commit
21 to, you know, why it happened or what the circumstances
22 were that -- that, you know, it did happen. But I
23 guess to answer your question, could have -- if you
24 asked the question could have Mr. Smith been, you know,
25 given or looked at a certain amount of time higher than

1 the four years, the answer would have been yes, but not
2 knowing specifically why it was dealt with in the
3 manner that it was dealt with.

4 Q And certainly your experience as both a
5 prosecutor as well as a defense attorney, people were
6 part of their job, correct?

7 A Absolutely.

8 Q And the individual decision by one person,
9 certainly there's so many different factors that come
10 into play?

11 A Correct.

12 Q I'm going to ask you to take a look at
13 Defendant's 9. This is the judgment and sentence filed
14 on March 20th, 2012.

15 A Okay.

16 Q And did you make yourself aware of the
17 allegations in this case?

18 A Yes, I did. This was the -- 2009-CF-12516,
19 two counts, one attempting, I believe an impersonation
20 of a public employee, and attempting child abuse, also
21 two lesser includeds, two first degree misdemeanors.

22 Q Okay. And that was the ultimate final
23 judgment, correct?

24 A That is correct.

25 Q What was the original arrest?

1 A The original arrest -- one second -- is -- in
2 this one it would have been unlawful impersonation of a
3 public employee.

4 Q And what level of felony was that?

5 A Third degree felony. Child abuse basically
6 could -- expecting to result in physical or mental
7 harm.

8 Q And what level would that be?

9 A A third degree felony. And extortion which
10 was a second degree felony. And then making obscene
11 phone calls which was a second degree misdemeanor.

12 Q And what charges were actually filed before
13 the ultimate resolution of this case?

14 A Give me one second.

15 Initially it looks like the first three were
16 filed. The making obscene phone calls were -- was
17 dropped. And prior to disposition of the case it
18 appears that there was an added in-court charge of -- a
19 reduced charge to an attempted unlawful impersonation
20 of a public employee and then a reduced charge of an
21 attempted child abuse, which would lower those two
22 charges from a third degree felony down to a first
23 degree misdemeanor.

24 Q And did you make yourself aware of the
25 allegations in that case?

1 A This one -- I actually did not on this one. I
2 didn't have -- actually, no, I take that back. I did.
3 It basically involved Mr. Smith -- initially the
4 warrant was for Mr. Smith who was calling and
5 identifying himself as a Department of Children and
6 Families Service investigator, calling a 12 year old
7 boy and then also asking to speak to another younger
8 individual in the house.

9 Q A female child?

10 A Correct.

11 Q All right. And ultimately that -- that case
12 was resolved for what we have the final judgment for.
13 Had -- had he been prosecuted in the felony, this was
14 in CR-F, so would that have brought habitual offender
15 status into play?

16 A Yes, it could have.

17 Q And what could he have been sentenced to on
18 extortion?

19 A On extortion, if it was proven, then it would
20 be a 30-year felony.

21 MS. SCHLAX: I don't have any further
22 questions.

23 THE COURT: All right. Thank you.

24 Any cross-examination.

25 MR. CALIEL: Yes, Your Honor. Thank you.

1 THE COURT: Thank you.

2 CROSS-EXAMINATION

3 BY MR. CALIEL:

4 Q Good afternoon, Mr. Bossen.

5 A Good afternoon, Mr. Caliel. How are you?

6 Q Doing well, sir.

7 You and I actually worked together for a
8 while in the State Attorney's Office, is that correct?

9 A We did. We were in the same division with
10 Steve Bledsoe as our supervisor.

11 Q That's correct.

12 A Correct.

13 Q And so you know what it takes to be a
14 prosecutor, correct?

15 A It's a very difficult job.

16 Q And you're trying to consider a lot of
17 information that's brought in front of you?

18 A Yes.

19 Q Would you agree with me to say that it's
20 impossible for any prosecutor to look into the future
21 and see who may commit murder?

22 A Absolutely.

23 Q But there are factors you can look at, like
24 somebody's criminal history, correct?

25 A Yes.

1 Q And you would agree in this particular case
2 Mr. Smith has an extensive and lengthy criminal
3 history?

4 A Yes, I do. I agree with that.

5 Q Let me talk with you a little bit about some
6 of the things that you discussed with defense counsel.
7 First let me go back to the 1977 case.

8 A Okay.

9 Q And that was the one which you referenced an
10 examination by Dr. Ernie Miller, correct?

11 A Yes, that is correct.

12 Q And actually in Dr. Miller's letter to Judge
13 Pate in that particular case, he indicated that there
14 was no organic brain damage and that the defendant's
15 EEG was normal?

16 A Yes, that is correct.

17 Q In fact, the defendant even indicated in that
18 examination he wanted to be a lawyer.

19 A I do recall seeing that.

20 Q And a second evaluation in that same case by
21 a Dr. David Saul, he, too, wrote a letter to Judge Pate
22 in that case indicating no organic brain damage was
23 found in this particular case.

24 A Correct.

25 Q So back in 1977 two separate examiners found

1 that he had no brain damage at that time?

2 A Yes.

3 Q Specifically when we talk about he wasn't
4 found incompetent to proceed, but back then instead of
5 Jimmy Ryce they had this mentally deranged or disturbed
6 sexual offender law.

7 A It was kind of -- yeah, it was kind of very --
8 it was -- there was no real category for it, but it was
9 you got something going on and you got to -- you got to
10 go somewhere to get it checked out basically. And it
11 was kind of a psychiatric type mental health let's see
12 what's happening.

13 Q Probably the precursor to what later became
14 the Jimmy Ryce Act?

15 A Absolutely.

16 Q That sex offenders can be dangerous and they
17 need to receive treatment for what they do.

18 A Right.

19 Q Let me jump ahead to the 1992, I believe it
20 was a '93 conviction of the attempted kidnapping case.

21 A Okay.

22 Q And you had an opportunity to review that.
23 Originally he was actually sentenced to 15 years in
24 Florida State Prison?

25 A Yes.

1 Q And so a fairly lengthy prison sentence,
2 right?

3 A Yes, that was -- that was a sentence that I --
4 that would have been, I think, on par, consistent with
5 the charge and his record and so, yeah, it was a
6 lengthy -- a lengthy sentence.

7 Q And then later on after the defendant filed a
8 pro se motion claiming that his lawyer was ineffective
9 when he was being represented, it came back and it was
10 brought back and that's when he received the six-year
11 sentence.

12 A Yes, that's correct. It was -- it was a
13 motion for reduction of sentence that was filed and was
14 denied. And then there was a -- what's known as -- as
15 we know it as a 3.850, which was basically that his --
16 that Mr. Smith had filed saying that his original
17 attorney who got him or represented him was ineffective
18 or incompetent. It came back on an appeal, what's
19 called remanded or sent back by the appellate court to
20 the trial court saying that for whatever reason there
21 was some issue based on what happened with Mr. Smith
22 and his trial attorney, and so that case was then
23 renegotiated, brought back to the table and that's what
24 the sentence was.

25 Q So based upon him filing his own motion to

1 have it reconsidered, he got a six-year sentence?

2 A That's correct.

3 Q Let me jump ahead a little bit now to the
4 Jimmy Ryce evaluation. The Jimmy Ryce process is that
5 the defendant would be examined by a team, correct? A
6 team that's run by the Department of Children and
7 Families.

8 A Yes.

9 Q And that team makes a recommendation as to
10 whether or not they believe the defendant meets the
11 criteria for involuntary commitment?

12 A Yes, it's basically a determination whether or
13 not -- they assess whether or not the person is
14 likelihood -- or likely to reoffend or the risk of the
15 person reoffending.

16 Q And in those Jimmy Ryce proceedings, in lieu
17 of what are plea negotiations where the case is tried,
18 oftentimes prosecutors enter into what's known as a
19 voluntary dismissal where he agrees to a treatment
20 plan, where he then agreed to go into treatment for his
21 sex -- sexual deviance?

22 A Yes, absolutely. And that specifically was
23 referenced in this case, that the individual,
24 Mr. Smith, at the time was deemed appropriate to go
25 into and agreed to a compliance plan.

1 Q And then after he went into the compliance
2 plan, shortly thereafter is when he commits these theft
3 offenses with the pawns and the DSPs that we discussed
4 in that J and S, correct?

5 A Yes.

6 Q And he received a four-year sentence at that
7 point in time for dealing in stolen property.

8 A Correct.

9 Q But also given his extensive criminal history
10 and the fact that he had been entered into an inventory
11 treatment plan previously, him going to prison at that
12 point in time would have then re-subjected him to Jimmy
13 Ryce evaluation again?

14 A Correct.

15 Q And are you aware of the fact that on that
16 second stint for Jimmy Ryce evaluation, the DCF said he
17 did not meet the criteria?

18 A Yes, I did see that.

19 Q And so at that time in the State of Florida
20 the State did not have an opportunity to object or to
21 contest DCF's recommendation?

22 A No.

23 Q And also in plea negotiations, as an example,
24 for plea negotiations with the dealing in stolen
25 property, sometimes prosecutors would take into

1 account, well, I'm going to give him four years in
2 Florida State Prison because they could have been
3 anticipating, given his criminal history and his sexual
4 deviance, that he would be Jimmy Ryced?

5 A Absolutely. That's a way to get the
6 individual back into the -- the State Prison System
7 which would then trigger, at least at the minimum, a
8 review for Jimmy Ryce.

9 Q And then the last offense, the J and S that
10 you discussed where he was originally charged with
11 felony offenses and then pled to lesser included
12 offenses, you're familiar with the prosecutor in that
13 case, correct?

14 A Yes, I am.

15 Q Obviously he's a seasoned prosecutor.

16 A Absolutely.

17 Q And it's not uncommon for prosecutors, when
18 there are legal issues in a case, to enter what is
19 called a lesser included offense or plea to a lesser
20 charge because that's all the evidence could establish
21 at that point in time?

22 A That's correct. Based on my understanding of
23 the facts and circumstances surrounding that case at
24 the time that case was basically scheduled to be
25 resolved or moving toward disposition, there was some

1 legitimate proof issues regarding the evidence in that
2 case. So it's very common I believe, you know, based
3 on my experiences previously and currently, that
4 prosecutors attempt to try to get the best possible
5 deal, so to speak, that they can on a case that they
6 can prove, based on what's in front of them at the
7 time.

8 Q And, in fact, as a result of that plea
9 negotiation he pled to two misdemeanors and he received
10 the maximum amount of incarceration that was possible
11 for the two misdemeanors that he pled to, two
12 consecutive years in the Duval County Jail?

13 A Correct.

14 Q Now, that being said, in reviewing this
15 entire criminal history, would you agree with me that
16 knowing what we know now, as we sit here today in this
17 courtroom, that this was a failure by the criminal
18 justice system? Mr. Smith was a failure of the
19 criminal justice system.

20 A Mr. Smith was able to somehow, and you hear it
21 all the time, people for different reasons fall through
22 the cracks, which I don't understand the origin of that
23 phrase. But I digress. Yes, Mr. Smith was a failure
24 through the criminal justice system, I agree.

25 Q One last question. You've stated that you

1 spent some time in the Special Assault Unit?

2 A Yes.

3 Q Or SAD as we liked to call it back then. And
4 that primarily was sex crimes and the prosecution of
5 sex offenders and domestic child abuse, those type of
6 cases. Are you familiar with the term capital sexual
7 battery?

8 A Absolutely.

9 Q And, in fact, count three in this Indictment,
10 sexual battery on a child under the age of 12, what we
11 call capital sexual battery where the only punishment
12 for that crime, if found guilty at trial, is a
13 mandatory life sentence.

14 A Correct.

15 Q So whether or not the defendant in this case
16 killed Cherish Perrywinkle or let her live, simply for
17 raping her he would have gone to prison for the rest of
18 his life.

19 A That is correct.

20 Q Thank you.

21 MR. CALIEL: I don't have any further
22 questions.

23 THE COURT: Anything further?

24 MS. SCHLAX: Just very briefly.

25 THE COURT: Sure.

REDIRECT EXAMINATION

1

2 BY MS. SCHLAX:

3 Q Mr. Bossen, you mentioned, going back to
4 Defendant's 9, that you had made yourself aware of the
5 personal facts in the case --

6 A Yes.

7 Q -- and it was in regards to an impersonation.
8 Ultimately a plea agreement was reached in felony court
9 for a plea to two misdemeanors, correct?

10 A Yes, it was in felony court and it was in the
11 repeat offender court, CR-F.

12 Q If they would have proceeded on any of the
13 felonies, the law at that time, if he had gone to state
14 prison he would have been reevaluated for Jimmy Ryce
15 once again with an additional sex crime allegation?

16 A Yes.

17 Q And when you say that it's your opinion that
18 -- that Mr. Smith's entire record kind of represents
19 someone who fell through the cracks, in your experience
20 those with mental health issues, are those the ones
21 that typically create the biggest predicaments?

22 A Absolutely.

23 Q For the criminal justice system?

24 A Absolutely. I think the biggest problem and
25 the biggest challenge to both prosecutors and defense

1 attorneys, judges, are the individuals who suffer from
2 legitimate mental health issues, there's nowhere to
3 treat them, there's nowhere to house them. It's a
4 common -- you can't give them free passes because they
5 commit heinous crimes, but at the same time if they're
6 deemed sick then it's just kind of a nobody really
7 knows what to do with them. You could punish them, but
8 when they get out they're still going to be sick. So
9 it's -- and they're not good candidates to be on
10 probation because you can't trust what they'll do. So
11 there's just -- it's a big problem, I think, that
12 moving forward is getting bigger and bigger, big
13 challenge for all of us to deal with.

14 Q Thank you, sir.

15 MS. SCHLAX: I don't have anything further.

16 THE COURT: Anything further?

17 MR. CALIEL: Briefly, Your Honor.

18 RE-CROSS-EXAMINATION

19 BY MR. CALIEL:

20 Q Let's be clear. His mental disorder is he's
21 attracted to prepubescent girls?

22 A From -- without really --

23 MS. SCHLAX: Objection, Your Honor. Beyond
24 the scope of his knowledge. I mean Mr. Bossen is
25 a very experienced attorney, but I don't think

1 he's been presented with any kind of psychological
2 data, any review of any reports.

3 THE COURT: I guess you can rephrase the
4 question as to what he learned from reviewing the
5 criminal record.

6 THE WITNESS: That's fine.

7 BY MR. CALIEL:

8 Q Yes, from what you reviewed from the criminal
9 record, and the fact that he was a mentally disturbed
10 sex offender, he was attracted to prepubescent girls,
11 that was his disorder?

12 A I'm hesitant to answer only in the sense that
13 I don't know all of his psychological issues, but I can
14 tell you from looking, and I don't know a lot of the
15 specific facts of the case and the nuances of the
16 defense or the State, but I can tell you from reviewing
17 his record that the offenses that he had been charged
18 with, had pled guilty to, had been accused of, have all
19 been related to that category.

20 Q Thank you.

21 THE COURT: Anything further?

22 MS. SCHLAX: Nothing further, Your Honor.

23 Thank you.

24 THE COURT: May Mr. Bossen be excused?

25 MS. SCHLAX: He may.

1 THE COURT: Thank you, Mr. Bossen.

2 THE WITNESS: Thank you, Your Honor. Good to
3 see you.

4 THE COURT: Have a good day.

5 THE WITNESS: Thank you.

6 THE COURT: The defense may call their next
7 witness.

8 MR. FLETCHER: Your Honor, the defense calls
9 Dr. Geoff Colino.

10 THE COURT: Before you start, can I see the
11 attorneys at side-bar just for a minute on a
12 scheduling matter?

13 (Counsel for the State and defense approached
14 the bench for a side-bar conference out of the
15 hearing of the jury and court reporter.)

16 THE COURT: Come ahead, please, sir. Thank
17 you for waiting a moment.

18 Right in front of me. Madam Clerk will swear
19 you in.

20 (Witness sworn.)

21 THE WITNESS: I do.

22 THE COURT: All right, take the chair over
23 here. Thank you.

24 MR. FLETCHER: May I proceed, Your Honor?

25 THE COURT: You may.

1 GEOFF COLINO,
2 was called as a witness on behalf of the Defense,
3 and after being duly sworn, then testified as follows:

4 DIRECT EXAMINATION

5 BY MR. FLETCHER:

6 Q Sir, could you state your full name for the
7 record, please.

8 A Geoffrey Lynn Colino.

9 Q And, Dr. Colino, what do you do for a living?

10 A I'm a forensic neurologist.

11 Q Could you pull the microphone up? Say that
12 again.

13 A Forensic Neurologist.

14 Q Okay. And can you tell the jury what a
15 forensic neurologist is.

16 A Well, a neurologist is a physician --

17 COURT REPORTER: I'm sorry. I can't hear you.

18 THE WITNESS: A neurologist is a physician of
19 the central and peripheral nervous system. The
20 central nervous system is the brain and spinal
21 cord.

22 A forensic neurologist is a physician who
23 performs neurology in the context of legal
24 issues.

25 BY MR. FLETCHER:

1 Q Okay. Can you tell the jury a little bit
2 about your educational experience.

3 A Sure. I went to medical school at University
4 of California in Davis in California. And I completed
5 my residency at Jackson Memorial Hospital in the VA
6 Healthcare System in Miami. My undergraduate precedes
7 that and probably it's not interesting.

8 Q Go ahead and tell them.

9 A I did undergraduate at a number of places, but
10 primarily Vassar College in upstate New York.

11 Q Okay. And what kind of work do you do on a
12 day-to-day basis?

13 A I am an expert witness in a variety of
14 different types of cases. The majority are criminal,
15 and by majority I mean more than -- more than 90
16 percent. I also do personal injury work and medical
17 malpractice.

18 Q Okay. And have you ever testified in court
19 as an expert in the field of forensic neurology?

20 A Yes.

21 Q About how many times?

22 A I'd say a little over 30.

23 MR. FLETCHER: Judge, at this point I would
24 tender Dr. Colino as an expert in forensic
25 neurology.

1 MS. NELSON: No objection.

2 THE COURT: All right. He'll testify in that
3 regard.

4 Thank you.

5 BY MR. FLETCHER:

6 Q Do you remember when you first got involved
7 in this particular case, the State of Florida versus
8 Donald Smith?

9 A I can tell you the date that I first saw
10 Mr. Smith. The one and only time I saw him is April
11 6th. The date of contact I want to say was -- strictly
12 speaking I don't recall, but a few months prior to
13 that. Maybe it would be February. I could check my
14 deposition because I -- during the depo I actually
15 looked it up.

16 Q That's okay. So you were contacted by the
17 defense in this case?

18 A Yes, correct.

19 Q And subsequently -- subsequent to that you
20 went and met with Mr. Smith at the Duval County Jail?

21 A Yes.

22 Q Okay. And what do you do to start out in a
23 case like this?

24 A Some cases I receive medical records in
25 advance. The majority of cases I don't. In this case

1 I did not receive any records so I went to the Duval
2 County Jail and did a history and physical with
3 Mr. Smith.

4 Q Okay. Is it appropriate in educating the
5 jury to go over those things before we get to MRIs and
6 things like that?

7 A I think that's a good idea. Neurology,
8 especially in this context, is a -- is a subspecialty
9 in medicine. And a neurologic examination covers a lot
10 of different things.

11 It starts with mental status. Mental status
12 is a very broad category. It includes one's thinking,
13 their ability to remember things, their orientation,
14 their level of alertness, and it's the one area of
15 neurology that most overlaps with psychology and
16 psychiatry.

17 The next -- typically sequentially we go to
18 the cranial nerves and the cranial nerves are --
19 there's -- is in the head and in the lesser extent the
20 neck. So your eyes have cranial nerves. Three of them
21 to move the eyeballs and then there's a specific
22 cranial nerve which receives visual input from the back
23 of the retina. There's a specific cranial nerve for
24 smelling, olfactory nerve.

25 I can keep going, but it gets pretty boring

1 pretty quick. But the cranial nerves coming from the
2 motor, big motor groups, small motor groups,
3 coordination, reflexes, sensation, gait, stance, how
4 someone walks, how they stand. I think that's
5 everything. Yes.

6 So, yeah, mental status, cranial nerves, motor
7 sensory, coordination, reflexes, gait and stance. So
8 the majority of it's physical, the physical form of
9 medicine, with the one area of mental status being
10 similar to psychiatry, psychology.

11 Q Okay. And when you met with Mr. Smith, did
12 you take a history on him?

13 A I did.

14 Q Okay. And did you learn anything from that
15 or did it give you areas to then pursue?

16 A It did. When I met with Mr. Smith I knew very
17 little about the -- the crime. I knew the date. So
18 one thing I do is I don't need, especially when I'm
19 starting an evaluation, to know any details.

20 So I asked Mr. Smith questions about his
21 history in general and then specifically about what I
22 call the date of the event when I meet with someone
23 facing charges. And if we start with the date of the
24 event, which is how my notes are arranged, and he told
25 me at the time the weeks and month leading up to the

1 June 21st, 2013, event, he told me that he couldn't
2 grasp or understand the feelings that he was
3 experiencing, he told me that he had reached out to
4 various agencies for help, that he was Baker Acted
5 twice. He stated that he wanted a comprehensive psyche
6 eval. And he said that he was seeing a progression of
7 his behaviors and wanted to stop. He said that he had
8 self-destructive behavior since childhood, but crack
9 cocaine, quote/unquote, turned me into a monster. And
10 that he wanted -- he attempted to -- here's a quote,
11 skating on thin ice and knew I was going to fall
12 through, and he was describing his feelings, but then
13 he described to me really remarkable self-medication or
14 substance abuse, whatever phrase you want to use, but
15 use of rather large amounts of crack. I think he even
16 -- I note here smoking every five minutes. Not
17 sleeping for more than eight days. That he was also
18 drinking, doing Xanax, Valium, Lortab, experiencing
19 some hallucinations, some allusions and misperceptions.
20 And that was the history around the event.

21 Q Okay.

22 A He told me about his other medical history.
23 He told me that his psychiatric history began very
24 young. He told me that he was sexually aware and
25 experiencing impulses at five years of age and engaging

1 in -- actually he said his first treatment was between
2 seven and ten years of age, he was put on Librium,
3 which is a sedative. But he said that voyeurism and
4 public masturbation began around ten or 13 years of
5 age.

6 And I have a note here that he remarked, while
7 I was obtaining the psychological history in general,
8 he said that prior to the event he was trying to put
9 some kind of barrier between me and myself, and that's
10 a direct quote. But basically a very lengthy history
11 of mental health disorders starting at a remarkably
12 young age.

13 Medical history also includes endocarditis
14 which is infection of the valves of the heart.

15 I believe on one occasion, perhaps two, but I
16 think one, two heart attacks, including one the month
17 immediately prior to May of 2013. So one month after a
18 heart attack there he is abusing all those substances.

19 Q Okay. Did you also do a physical exam?

20 A I did. And so when we say physical here we'll
21 call that -- that's the history that we kind of went
22 through right there just to make sure I didn't miss
23 anything. His mental status exam was -- was fairly
24 normal. I don't go into the same level of detail as a
25 neuropsychologist, but what I do have is that he -- he

1 got one out of five on serial 7, which is he basically
2 tells me you have a hundred dollars and you spend 7,
3 what have you got left and you keep doing 7,
4 subtracting 7, and he only executed that correctly
5 once. And that's an indication of an attention problem
6 and I believe that was a valid test for many reasons,
7 including that when we went to non-mathematical
8 attention, spelling a word like hotel, a five-letter
9 world, the same kind of testing, but from math and now
10 to name words, he did five out of five forward and
11 backwards.

12 So in addition, on cranial nerves -- keep
13 going through the mental status, on cranial nerves he
14 got a zero out of three on olfaction. So sensory
15 testing of smells. So what that consists of is I'd
16 bring in very different aromatic oils. I'd bring in
17 lemon, mint and coffee, and he got zero out of three.

18 His examination was also remarkable for a
19 tremor and --

20 Q Doctor, when you say a tremor, what do you
21 mean by tremor?

22 A A tremor is an involuntary movement of a limb.
23 It could be -- actually they are vocal tremors, too,
24 but in this case it was a limb. One of the tremors
25 most people are familiar with is Parkinson's, it's a

1 resting tremor. There's a thing called essential
2 tremor, which is the opposite. So the Parkinson's
3 tremor is at rest. An essential tremor occurs at the
4 end point of an action.

5 So people that experience this, you can ask
6 them if you're eating soup does the spoon go in okay,
7 the answer is yes, but as the spoon gets close to the
8 mouth the amplitude goes higher. It's very frustrating
9 because the soup is so close but then it's -- it's all
10 over.

11 Mr. Smith's tremor didn't really fall into --
12 it's not the postural tremor of essential tremor and
13 it's not -- it's not a classical tremor. So he had a
14 tremor not falling into a very clear category.

15 Q Okay. Is it something that you discussed
16 with him or did you just discern that?

17 A No, I did not discuss it with him. He was not
18 aware of it. I don't recall if I made him aware of it.
19 I don't think I did. But I don't want to say. I don't
20 know for sure.

21 Q Was that something that you kept in the back
22 of your mind or did you immediately form an opinion as
23 to any conditions that may --

24 A No, I put it, filed it away and just kind of
25 connected it, you know, ordered some testing for him.

1 You know, if I had to give an opinion as to its origin
2 at that time, I would have said it's probably either
3 due to traumatic brain injuries or to substance abuse.
4 That would have been my -- my thought process at the
5 time.

6 Q Okay. What did you next do after taking a
7 physical exam?

8 A After the physical -- oh, one other thing.
9 Sorry. On the review of systems, which is a question
10 and answer element of history taking, these are things
11 that he reported to me. So this was subjective
12 reporting. He reported experiencing black-out spells,
13 memory problems, light and sound sensitivity, some
14 speech problems. And what kind of ties in with the
15 tremor was he said that he had experienced some falls
16 and that he had noticed coordination deficits and a
17 change in his handwriting. And handwriting being fine
18 motor is often one of the earlier symptoms of a -- of
19 certain forms of neurodegenerative disease.
20 Neurodegenerative disease includes things like
21 Alzheimer's, Parkinson's and other things.

22 Q After the history and physical, did you order
23 any testing?

24 A Yes. I ordered an MRI, PET, and I ordered an
25 EEG which we never obtained. But MRI and PET we did

1 obtain.

2 Q So we did the MRI and not the EEG?

3 A MRI and PET we did, but not the EEG.

4 Q Okay. And for purposes of your testimony
5 today, what's the easiest to talk about first?

6 A I think let's focus on the MRI because it's --
7 and for the MRI, there's two -- two elements. There's
8 the quantitative and the qualitative. And I think we
9 have -- do you want me to show the jury?

10 Q Yes, I'm about to do that. Which one would
11 you like to discuss?

12 A Let me start with the neuroquant.

13 Okay, great.

14 Q Doctor, can you explain to the jury what it
15 is they're looking at on that screen?

16 A Absolutely. What we have here is the report
17 from the neuroquant triage and brain atrophy brain
18 study. And the way this neuroquant works is data is
19 acquired at any facility that has the right type of MRI
20 scanner, the data arrives at my office on a disc and
21 then it's uploaded from the disk to the Cortech website
22 and a report is generated.

23 And it's as objective and incontrovertible as
24 essentially anything in medicine. And that's because
25 there's no human involvement. So it's basically

1 computer-to-computer and we get the comparison of some
2 regions of the brain, each of these little labelled
3 areas. We start left, upper left, cerebral white
4 matter and the going down and across to the right.

5 Each of those regions is compared to a
6 database for age, gender and ethnicity. So Mr. Smith
7 is compared to white males in their late 50s, early
8 60s, and numbers are obtained compared to the normative
9 or normal population.

10 Q Okay. And what are -- what is the
11 significance in the -- of the numbers in the left-hand
12 column that are in blue?

13 A Basically everything that's in blue occurred
14 prior to the end of puberty. So, blue in these -- in
15 this case, each of these instances of blue means
16 abnormally large. And what that means in the nervous
17 system is between roughly six-months gestation and the
18 end of puberty the nervous system which the course of
19 developing throws out a whole lot of networks. It
20 throws out connections, if you will. I'm looking for a
21 metaphor. We throw too many Christmas lights and then
22 coming back and saying, okay, we only want a certain
23 number. So the nervous system makes all these
24 connections and then trims them back. And there's a
25 fancy medical term called synaptic pruning which,

1 again, takes place between roughly the second trimester
2 and then the end of puberty.

3 So the areas that are blue are abnormally
4 large. Large does not mean better or more functioning.
5 It means abnormally formed. And those areas are
6 abnormal from neurodevelopment. So they've been
7 abnormal since, at the very latest, the end of puberty.

8 Q And can you tell anything from those abnormal
9 areas? What does it mean?

10 A There's behavior correlations for certain
11 things. So let's walk through. So total cerebral
12 white matter on the left is abnormally large. And what
13 that tells me, just to use that same language, is that
14 the brain did not trim back those excess connections
15 and so it's -- it did not develop the way it was
16 supposed to.

17 And then similarly, if I can jump down over
18 one to the cerebellar white matter which on both sides
19 is abnormally large. I'm skipping the total cerebral
20 gray. I'll come to that. I'm sticking to blues for
21 now.

22 Q And that's the fourth one down?

23 A Third -- yeah, fourth one down. Sorry.

24 Q Okay.

25 A So in the case of total cerebral white matter

1 it's abnormally large on the left. In the case of the
2 cerebellar white matter it's on both sides and then
3 when we get down to -- and those only have like a very
4 specific behavioral correlation.

5 Then we get down to the thalamus and the
6 thalamus is a very important part of the brain. It's a
7 very deep structure and it is a relay. So any form of
8 sensory input, including vision, hearing, smell, touch,
9 goes through the thalamus up to the cortex. And the
10 cortex at the top, the most -- most outside part of the
11 brain that makes us humans, the most sophisticated part
12 of our brain.

13 The thalamus behavior is involved in
14 regulating awareness, making our sleep/wake cycle,
15 regulating arousal and aggression, regulating activity.
16 It's involved in cognition and deciding between
17 conflicting sensory stimuli. So if you've got
18 something that, you know, an input that says take the
19 ice cream, chocolate or vanilla, you're trying to
20 decide, or, you know, more complex decisions, that
21 takes place in the thalamus.

22 And in Mr. Smith's case it's -- it's abnormal.
23 So cognition is affected, decision-making is affected
24 and the regulation of activity is affected in the left
25 thalamus.

1 Q And these are things that developed or didn't
2 develop in him from the time --

3 A I think you can say between the second
4 trimester and the end of puberty. It's impossible for
5 me to say any -- you know, did this happen -- I tried
6 to ask myself did this happen before birth or after and
7 I have no way of knowing.

8 Q Okay.

9 A So next going down is the hippocampus which is
10 part of the temporal lobes and the limbic system. And
11 the hippocampus plays a very important part in behavior
12 inhibition, response inhibition.

13 When it was studied in the 1960s, it was
14 called the phrase slam on brakes. So you have an idea,
15 you process it and then you say, wait a minute, you
16 know, I'm thinking about reaching across a burning
17 flame to get something, oh, I don't -- I don't want to
18 do that.

19 And what's very important here for the
20 hippocampus is that they've done studies with animals,
21 particularly rats, where they say -- let's say, for
22 example, red light means pain. When the hippocampi or
23 hippocampus are abnormal, the rat will touch the red
24 light and get pain, come back and touch the red light
25 and get pain and keep doing so. So, you know,

1 inability to learn from painful, or any form of
2 negative experiences, is a feature of hippocampus
3 dysfunction.

4 So that's for experiences that we've already
5 have, but it also -- the hippocampus is important in
6 decision making for novel, new situations, situations
7 of concern to me, memory and the ability to suppress
8 strong desires.

9 Q And how does that apply in day-to-day life to
10 Donald Smith?

11 A The most, you know, easiest point to make,
12 it's so well-documented, is one month after a heart
13 attack he's doing crack cocaine. And I'm fairly
14 certain that the discharge papers would have said don't
15 do crack cocaine. Common sense would say don't do
16 crack cocaine. It wasn't crack alone. It was all the
17 other things, the Xanax and the Valium and the alcohol,
18 and he was smoking cigarettes and, you know, he'd just
19 had a heart attack. And that will be an instance of a
20 -- the equivalent of the rats that use the red light
21 and the pain and it's not modifying your behavior to
22 not experience pain.

23 Q Okay. And, in summary, the blue areas on
24 this report, neuroquant report, they're outside the
25 normal range of what you would see in a person of his

1 age?

2 A Exactly. So basically, you know, the numbers
3 and the percentages means that compared to the
4 normative database with the hippocampus on the left, 97
5 times out of a hundred his is abnormally large, and on
6 the right 98 times out of a hundred. So it's -- it's a
7 statistical analysis.

8 Q Okay. And let's move on to what are
9 highlighted in red.

10 A There's two more quick ones, the amygdala,
11 which is still part of the limbic system. So
12 decision-making, emotional reactions and, importantly,
13 olfaction, meaning smell. So it seems not likely to be
14 coincidental that Mr. Smith got zero out of three on
15 olfactory testing on -- on his neurologic examination
16 and then has abnormal -- abnormally enlarged amygdala
17 on both sides.

18 And then the kriglys and the tiggly is
19 (phonetically) interesting, of relevance, because that
20 is related to -- or it's involved in certain
21 neurodegenerative disease like Parkinson's, continually
22 releases dopamine and it's -- there's been some
23 literature to support abnormalities contained in with
24 violent crimes and malicious crimes.

25 And as a clinician what I've seen, or what's

1 also documented, is when you give dopamine replacement,
2 which is the way you treat a patient with Parkinson's,
3 the dopamine replacing medicine will make their
4 movement disorder better, will make their tremor less,
5 but you have to warn them that it may affect their
6 behavior. So but when we first -- when we started
7 using certain forms of dopamine replacement therapy, we
8 didn't do a very good job of telling patients this is
9 going to help you with your movements but watch out for
10 hypersexuality, gambling, risk-taking behaviors. And
11 there's a lot of literature about the verified
12 consequences that this -- these drugs, this family of
13 drugs, used for Parkinson's, these aside-effects that
14 these patients experienced.

15 So to me with Mr. Smith's history with drug
16 abuse and as well as his violent behaviors, it's not a
17 surprise that this is abnormal.

18 Q And all of these abnormalities that we
19 discussed, that's not something that a person has a
20 choice about, right?

21 A No. I mean this is -- again, between the
22 second trimester and the end of puberty this wouldn't
23 -- I mean I can't tell you what caused it, but I don't
24 see how there would be a choice involved in these
25 things happening to him.

1 Q Okay. Can we go on and talk --

2 A Yes.

3 Q -- about the red highlighted portions.

4 A So red is the opposite of blue here. That
5 means atrophied or abnormally small. And one thing to
6 note if we jump back to the left-hand side is the gray
7 matter on the right-hand side is -- sorry. The total
8 cerebral gray matter is abnormally small and that is
9 consistent with what we see on the conventional MRI
10 because he has diffused atrophy and what -- you know,
11 that is a statistically significant abnormality. We
12 don't have a specific behavioral correlate on that.

13 Q Okay. On your screen can you circle the area
14 in the picture on the brain that you're talking about?

15 A I don't think it's a touch. Oh, you're right.
16 Sorry. Well, I was glossing over, just saying that
17 this one here, the total cerebral gray matter, doesn't
18 have a strict behavioral correlate in terms of
19 understanding Mr. Smith, but it does show that there's
20 atrophy. And, again, atrophy is just a fancy term for
21 shrunk.

22 When we go over here, we start to have
23 behavior correlates. So the superior frontal cortex is
24 involved in self-awareness, self-regulation, emotional
25 regulation and impulse control. Again, Mr. Smith's

1 history shows a very profound deficit in all those
2 attributes.

3 Q Okay. And, Doctor, these are physical
4 abnormalities?

5 A These are physical abnormalities. Again, by
6 introducing the neuroquant it's as close to
7 incontrovertible as anything in medicine. It's FDA
8 approved, it's approved by every medical society in
9 North America, Europe, Asia, and it is not in any way
10 subjective. There's no human involvement.

11 I frequently make the point that if the
12 patient's name is spelled wrong or my name is spelled
13 wrong, I can't correct it. I can call Cortech and get
14 them to correct it.

15 Another instance is if they do -- if the image
16 sequences are in any way acquired wrong there's no
17 correcting it. So, for example, there's a facility
18 actually I worked with in Broward that, and the work
19 was intense, because for whatever reason they think
20 more is better. And so the image slides, you know,
21 going sideways, from side-to-side, they're supposed to
22 start right basically where the skull is. Not lateral.
23 They always -- this facility in Broward is always
24 catching air in here. So the good data is in there,
25 there's just too much data, but there's no way, with

1 the way that this system works, with no human
2 involvement, to just remove out the data you want and
3 toss out the data you don't.

4 Q Okay. Can you circle on the part of the
5 brain in the three pictures the area you're talking
6 about with the superior frontal.

7 A That one I can do. The other readings are
8 going to be too small for that resolution. The
9 superior frontal is like this area right here, maybe a
10 little bit forward (indicating).

11 Q And that's an area that you say is atrophied?

12 A Yes.

13 Q And that's basically shrunk?

14 A Shrunk.

15 Q And it is shrunk more in Donald Smith than in
16 a normal person or any other person of the same age?

17 A Vastly so, yes.

18 Q Okay. All right. We can move to the next --

19 A So the next one -- it is a touch screen. I
20 have to play with it.

21 So the pars triangularis -- and this is on the
22 left-hand side, that area has a name, it's called
23 Brodmann's area, and it's involved in language
24 function. And that is an area that's okay for
25 Mr. Smith on the left. But the right pars triangularis

1 is cognitive control of memory. It's in addition
2 learning from undesirable experiences and then what's
3 called no, no go. So you're on the fence about
4 something. Let's say you're driving and the light
5 turns from green to yellow and you're at that, you
6 know, do I hit the brakes or do I hit the gas. The
7 right pars triangularis is the part of the brain that's
8 responsible for that.

9 And his is abnormal with a percentile score of
10 one, meaning that, you know, 99 times out of a hundred
11 or less than -- let me rephrase the same thing. It's
12 less than one percent chance that this is statistically
13 in error. So there's greater than 99 percent
14 probability this is statistically significant, which is
15 as close to certainty as we ever get in medicine.

16 Q If I could interrupt, Dr. Colino. The idea
17 that this is the area that you learn from bad
18 experiences, or from any experience, and in his brain
19 it is shrunk?

20 A Absolutely.

21 Q Okay. And does that provide you with any
22 behavioral correlation to what he does on a day-to-day
23 basis?

24 A Yes. It suggests or states that he has
25 considerable difficulty regulating his behaviors, his

1 impulses, making decisions, learning from past
2 experiences, rationally assessing his own
3 self-interest.

4 Q Okay. And let me ask you a hypothetical. If
5 he commits a sexually-oriented type of crime, he gets
6 thrown in jail, does a couple of years in prison, does
7 he learn from that?

8 A Not with a brain looking like this. If he
9 does not learn from that this explains why, is the way
10 to put it.

11 Q All right. Can you go to the next area then.

12 A So primary motor is the next. And as the name
13 suggests it's a motor function of the frontal lobe so
14 it does not correlate greatly with behavior so we don't
15 have to spend a lot of time talking about it. What
16 it's consistent with, though, is his history of
17 traumatic brain injuries. Something is causing
18 shrinkage of these different parts of the brain.

19 I don't know if I can scroll. Can you scroll
20 a little bit so I can see the full right-hand side
21 column?

22 Q Scroll down?

23 A That. What I want to point out --

24 Q You can circle it. It's getting messy.

25 A I agree. I've got terrible handwriting.

1 Can we go a little further down so I can see
2 the full -- let's get the pictures out and just get
3 that right-hand column. That's great. You can stop
4 right there.

5 Okay. What I think is worth noticing is that
6 he kind of goes left, right, left and then both sides
7 and back to left. So it's very patchy. And it affects
8 the frontal lobe, the parietal lobe.

9 So the frontal lobe in the front, the parietal
10 is kind of in the middle, the temporal lobes are on the
11 side and the occipital lobe is in the back. So he's
12 got front, back, middle and left and right sides.

13 So when we talk about the primary motor, it
14 doesn't have a behavior correlate, but it does help me
15 come up with explanations. In other words, diffuse
16 processes affects the brain more. This was more like
17 the consequences of traumatic brain injury or an
18 asymmetric neurodegenerative disease. And when we get
19 to qualitative, the other images, we'll talk a bit
20 about the different diagnoses for neurodegenerative
21 diseases.

22 Next abnormality is here, primary sensory,
23 and, again, not a strong behavior correlate, but
24 consistent with trauma brain injury. We're getting
25 jostled around left, right, front, back.

1 And then these areas, though, in the lateral
2 occipital also is not with a behavioral correlate, to
3 enlighten us about Mr. Smith's behavior, but it is
4 consistent with and supportive of a history of
5 traumatic brain injuries and the consequences of those
6 traumatic brain injuries.

7 These areas here are correlated with
8 psychosis. So what we -- the temporal lobes have a
9 number of features and we have -- we see atrophy in
10 these specific regions in cases of epilepsy, in cases
11 of PTSD, in cases of schizophrenia and other psychotic
12 disorders.

13 We're starting to get into the mental health
14 profession so that's a little bit outside of my domain,
15 but I was interested in evaluating him for epilepsy
16 before I got this. So I ordered -- I placed the order
17 for the MRI and the EEG at the same time.

18 So in terms of his behavior, this correlates
19 not so much with behavioral regulation as with his --
20 the psychotic features that I think the other mental
21 health professionals will talk about and that I went
22 into briefly with the hallucinations and the like that
23 you forwarded to me.

24 Q And, again, the last two areas you had
25 circled, those are areas where you see profound

1 shrinkage in his brain?

2 A Exactly right.

3 Q And it's profound because it's not like a
4 normal brain?

5 A No, it's profoundly abnormal.

6 Q Okay.

7 A And remember he's being compared to a wide
8 population. I mean his age, gender and ethnicity
9 match, but it's not like he's being compared to, you
10 know, ten people. He's being compared to more than ten
11 thousand white males in their, you know, in his age
12 bracket.

13 Q Okay. That makes it more accurate?

14 A Yes.

15 Q Okay. Shall we switch to the next one?

16 A I think that's...

17 Q All right. And what report are we looking at
18 now?

19 A This is a -- a PDF of what we would call the
20 regular or the qualitative MRI. So when I order a
21 study there are sequences or certain sets of MRI
22 pictures that go straight to Cortech and generate the
23 -- the analysis that we just talked about. This is
24 qualitative. This is my analysis of his brain and what
25 I see. So --

1 Q Can you take us through each, from left to
2 right, tell us what you see.

3 A Right. Although I don't know that I have a
4 steady hand to point. What you see -- see that black
5 space in here? I mean all over. But it's most
6 pronounced. It's easiest to see in the very front
7 (indicating) and in the very back, but it's the whole
8 way around. And that's atrophy. That space is too
9 big. So his brain is shrunken considerably for his
10 age.

11 And what we see here (indicating), these are
12 ventricle spaces, these black spaces here, and they're
13 enlarged, but these guys here (indicating), those are
14 dilated also. And dilated ventricles are very
15 suggestive of a neurodegenerative process. So if we go
16 back to, just in our language, if we look -- if we
17 think back to this initial report, the neuroquant,
18 we've probably used two medical terms. The blue was
19 neurodevelopmental so something that happened between
20 second trimester and the end of puberty, and then
21 neurodegenerative, so these ventricles, the way that
22 they're shaped is strongly suggestive of, in my mind,
23 one of two neurodegenerative diseases, either chronic
24 traumatic encephalopathy or frontal temporal dementia.
25 And I couldn't tell you definitively which, but based

1 on his history I would -- I would say my inclination,
2 and strong clinical suspicion, would be that this is
3 CTE here (indicating), the disorder that's in the news
4 a lot for football players and the like.

5 Q And you say based on his history. What is it
6 about his history that suggests that?

7 A Well, it's -- excuse me. It's the -- at nine
8 years of age he fell off of his bicycle, hit his head
9 and lost consciousness and required sutures. And at 19
10 or 20 he was in a significant motor vehicle accident.
11 And those were the two that he reported. I would
12 imagine with his lifestyle, I don't mean this in a
13 disrespectful way, but with his lifestyle there has
14 probably been other instances of head trauma that were
15 not as remarkable to him so he didn't report them.

16 Q If we assume for this question that it is
17 CTE, what would you expect to see in him in the way he
18 acts?

19 A Well, CTE is an aggressive disease so the
20 first point to make is it continues even without
21 further head trauma, but the -- there is a wide range
22 of behavioral features, but episodic rage, poor impulse
23 control, violent behavior, light sensitivity, sound
24 sensitivity that he reported. He did not report
25 headaches. That's -- I would say fairly common there

1 would be headaches, but he still reports enough history
2 and symptoms as to be clinically probable CTE.

3 Q Okay. How about the next photo, the next
4 image?

5 A In the next image what we can see, if I can --
6 I'm trying to -- can you erase that? Let me try that
7 one again. I'll get a side spot. Thanks.

8 This out here (indicating), this is the cortex
9 and that's very thin and that's corroborated on the
10 neuroquant on the total cerebral gray matter. I can --
11 the neuroquant sees things all the time that I don't
12 see, but I can see this. So in this image down in the
13 lower left-hand corner we see that the gray matter is
14 thin and then as we saw up here (indicating), this
15 space, which is just fluid, cerebral spinal fluid,
16 that's too big. And then we can also see here that the
17 ventricles are rounded in a way they should not be.
18 And that constellation is very much like other
19 instances of -- of CTE that I've seen.

20 Q Okay. And the areas that you circled out
21 towards the top of that bottom left one, the black
22 space.

23 A Yeah.

24 Q Is that just more evidence of his brain
25 having shrunk?

1 A Exactly. So to line up here, I'll just make
2 it bolder again, this I'll try to -- I'll bring it to
3 the side. That black space is too big because the
4 brain has shrunk away from the skull so now that space
5 is filled with fluid.

6 In the next, the middle image, what we're
7 seeing here is that these grooves -- so, for example,
8 this divot here (indicating), and the way that these
9 guys are all round instead of crisp, those -- that's
10 secondary to the atrophy.

11 So when the brain shrinks a couple of things
12 happen. The fluid on the top or outside kind of fills
13 the gap, but as it shrinks the -- the distinction
14 between different subregions of the brain goes from
15 sharp to rounded. So the sulci are too prominent and
16 too rounded. And I think that's -- I mean I wouldn't
17 waste time with ventricles here.

18 This middle picture, middle lower picture,
19 really just shows the sulci and the atrophy. And you
20 can see the atrophy. Again you can see that space up
21 here (indicating), there's too much spinal fluid,
22 there's cerebral spinal fluid.

23 And the last image.

24 Q Yes, sir.

25 A All right. So the last image lower is a

1 different type of sequence called diffusion -- DTI,
2 diffusion tensor imaging, and what it does is it looks
3 to be very -- very specifically for disruptions of
4 white matter tracts.

5 So the analogy for the brain is that the gray
6 matter, which -- let me see. Let me go back over here
7 and there (indicating). The gray matter is like the
8 chips or the processors in a computer and the white
9 matter is like wire and it connects the processors to
10 the mother board and to hard-drives, or in the case of
11 a human being it connects the CT -- the cortex to
12 deeper structures like the thalamus that we spoke about
13 and ultimately down to our brainstem and spinal cord so
14 that we can feel things and move things.

15 What this sequence here is looking at is the
16 function of those white matter fibers, the wiring, and
17 what we see is a big gap. I'm not even going -- where
18 the green arrow is. I'm going to point my pen to it.

19 Q A big green arrow?

20 A Yeah, a big green arrow pointing to the lack
21 of activity. This is a function test. So what it
22 shows is that there is a profound loss of communication
23 between the frontal lobe, which is here, this is still
24 part of the frontal lobe (indicating), but the very
25 anterior part of the frontal lobe we have a disconnect

1 that's very large and that is essentially -- not even
2 essentially. That is secondary to trauma of some sort.

3 Q And, for instance, what kind of trauma?

4 A Head trauma. But whether it was the falling
5 off the bicycle at nine years of age -- excuse me -- or
6 the motor vehicle accident at 19 or neither of those
7 and something else I can't tell you. I just know that
8 that is a really remarkable loss of white matter tracts
9 in a very important part in terms of behavior.

10 Q Okay. And, Doctor, you see out in society
11 today, parents don't want their kids playing tackle
12 football. You've heard that?

13 A Yes.

14 Q And what's the reason for that?

15 A Well, it's because the data on even what we --
16 what used to be called trivial head trauma, the data on
17 the long-term consequences of it seems to be
18 overwhelmingly bad. You know, when I was a kid you
19 would play a sport and you got clocked or dazed or even
20 knocked out, you were told to shake it off. Not so
21 much anymore. The data is pretty clear, the studies on
22 the NFL, the incidents of -- there's some question
23 about the NFL studies being too sensitive because
24 they're self-reporting, but in any case parents are
25 concerned because they see what happens with, you know,

1 Aaron Hernandez. I'm not a big sports person, but, you
2 know, Aaron Hernandez --

3 MS. NELSON: I'm going to object at this
4 point. This goes --

5 THE COURT: I'll sustain the objection.

6 THE WITNESS: But to answer your question,
7 parents are concerned about their kids getting
8 head injuries because even mild head injuries,
9 mild in quotation marks, over time seem to be
10 correlating with profound adverse consequences.

11 BY MR. FLETCHER:

12 Q Okay. Does it affect a person's behavior 20,
13 30, 40 years down the road in anyway, or can it?

14 A I -- 20, 30 years is a bit of a large time
15 gap. I think what they're seeing now is more --
16 they're looking at it, the microscope is going the
17 other way. They're seeing instances of behavioral
18 changes sooner than would have been expected, but I
19 don't know that I can tell you exactly what the time
20 window would be. I think in general it's within a few
21 years that the behavior changes start and, you know,
22 there's a lot of variables to that. Number of
23 instances of head trauma, severity of the head trauma,
24 the treatment that was received, if any. There's so
25 many variables it's hard to make a predictive.

1 Q Okay. And do you have an opinion with
2 respect to this, what you've referred to as a brain
3 injury, how it effects Donald Smith?

4 A Yes, because this is very clearly in the
5 frontal lobes, and when we went through the
6 neuroquants, talked about all those specific subregions
7 the neuroquant has detected as abnormal. Here's a
8 different type of imaging study, a very different form
9 of MRI than that which is used for neuroquant, and it
10 shows yet another disruption of what we would call
11 executive functioning, the ability to control one's
12 behavior impulses, conform to law, learn from past
13 experiences and the like.

14 Q Okay. And that's where -- that area of the
15 brain and where the big green arrow is, that's where
16 those functions sit, basically?

17 A Yeah, I mean they -- well, actually I can't
18 say that because we don't have a single location, but
19 we know that, for example, down here is what will be
20 called the orbital frontal region, and orbital frontal
21 region lesion covers a syndrome with hypersexuality.
22 These folks are always touching their genitalia, they
23 are hyper oral, they even eat too much and the like.

24 Then there's another one where there's a
25 specific type of frontal lobe damage where it's going

1 to be opposite and they're apathetic and they just sit
2 around.

3 So executive function has many different
4 locations, but if you start damaging the frontal lobes
5 or disconnecting them, you're going to have
6 manifestations of all kinds of problems that we're
7 talking about. So we see it on the DTI and we see it
8 on the neuroquant, in two -- two very different types
9 of studies giving us -- leading us towards a very
10 similar conclusion.

11 Q Okay. And what is that conclusion in this
12 case?

13 A Well, the conclusion, I have to use a
14 metaphor, and the metaphor is the applies the brake and
15 basically executive functioning is the ability to exert
16 a stop impulse. So a bicycle brake has the hand lever
17 and the cable and the caliper that you squeeze and your
18 bike, its wheels will stop. In the case of Mr. Smith
19 that cable, if you will, is so frayed and stretched as
20 to be nearly nonexistent, nonfunctional. He can't
21 control his behaviors.

22 Q Thank you, Doctor.

23 MR. FLETCHER: Thank you.

24 THE COURT: Cross-examination.

25 MS. NELSON: Yes, ma'am.

CROSS-EXAMINATION

1

2 BY MS. NELSON:

3 Q Dr. Colino, you, sir, actually cannot tell
4 this jury when or what caused the injury that you spent
5 some time discussing with them that you've seen on the
6 brain scan?

7 A Which ones are we talking about, because when
8 it comes to --

9 Q Any of them.

10 A Well, that's not entirely true. The regions
11 that show up as enlarged, the blue, they occurred
12 between the second trimester and prior to the
13 conclusion of puberty.

14 Q Let me rephrase my question. The trauma that
15 you've just spent some time testifying about, in fact,
16 you cannot tell this jury when or what caused that
17 trauma.

18 A That's correct.

19 Q And, in fact, that trauma could have been
20 caused by lack of oxygen to a -- his brain during a
21 cardiac event?

22 A Not likely.

23 Q That preceded -- I'm sorry.

24 A Not likely. I can explain why.

25 Q Well, let me ask you this. You gave a

1 deposition in this case?

2 A Correct.

3 Q You were sworn to tell the truth in that
4 deposition?

5 A Yes.

6 Q Yes. You gave that deposition on January
7 25th of this year?

8 A Sounds right.

9 Q And before we get specifically to your --
10 what you said in that deposition about your -- the
11 heart attack or cardiac event, that deposition was
12 approximately 60 pages?

13 A Okay.

14 Q During that deposition Mr. Caliel asked you
15 about your opinion and your review of Mr. Smith's brain
16 scan?

17 A Yes.

18 Q And that entire deposition lasted how long?

19 A An hour or so.

20 Q An hour. And the purpose of the deposition
21 was for Mr. Caliel to talk to you about your opinions?

22 A Yes.

23 Q And never once in that entire deposition
24 while you answered questions did you mention CTE once?

25 A I used the phrase neurodegenerative disorder

1 several times.

2 Q You did not use the phrase CTE once in that
3 deposition?

4 A I believe that's true.

5 Q Now, let me return your attention to what you
6 had to say about the cardiac event, sir. Isn't it a
7 fact that you cannot say when this trauma occurred or
8 what made it occur?

9 A That's a true statement.

10 Q Thank you.

11 And, hypothetically, if Mr. Smith had
12 suffered a heart attack and the brain was deprived of
13 oxygen for a period of time because he was having a
14 cardiac issue, that could have potentially have caused
15 this?

16 A No, not really. Not likely.

17 Q I'm sorry, sir.

18 A Not likely.

19 Q Let me direct your attention --

20 A If I said that during the deposition, that may
21 be the case. I also was very clear in the deposition I
22 had two days of prep and I was sick as a dog.

23 Q Sir, your answer was the answer is yes.

24 Would you like me to show you a transcript of the
25 deposition?

1 A That would be great. Thank you. I just
2 explained what the truth is.

3 THE COURT: Okay. Just a moment. You may
4 approach.

5 MS. SCHLAX: Page and line.

6 MS. NELSON: Yes, counsel --

7 THE COURT: Page and line.

8 BY MS. NELSON:

9 Q I direct your attention to page 29 of the
10 deposition, lines 19 through 25. I'll ask you, sir, to
11 please review that question and answer.

12 (Witness reviewing transcript.)

13 A I think we should read the whole thing because
14 it's a very vague pronoun reference and, again, I don't
15 have a problem, you know, clarifying what I meant then,
16 if that's what you want.

17 Q Okay. Well, my question is specifically does
18 this deposition transcript -- line 25, the answer is,
19 quote, yes. Is that how this transcript reads, sir?

20 A Yes, it does.

21 Q Is this an inaccurate account of what you
22 said, sir?

23 A You're leading into a conclusion and I can
24 explain why a heart attack would not give the
25 appearance.

1 Q Well, why wouldn't you have done that when
2 you were asked in this sworn deposition?

3 A As I made clear, I had two days prep, was told
4 basically the depo is in two days. I was sick as a dog
5 and so if I jumped the gun with a yes, it was not an
6 intent to deceive. Perhaps I misspoke, but I think if
7 you look at it in the form of the entire context, if we
8 were to read the entire deposition to the jury, I don't
9 think that this would be a big issue.

10 Q Dr. Colino, you're testifying today in a
11 death penalty proceeding, correct?

12 A Yes.

13 Q You've been tendered as an expert in your
14 field, correct?

15 A Yes.

16 Q When you gave this deposition you were under
17 oath, correct?

18 A Yes.

19 Q You would agree with me that accuracy is
20 important when you tender opinions that people will
21 rely on in rendering a sentencing decision?

22 A I agree.

23 Q And so whether you misspoke or you were sick
24 or you jumped the gun, you agree that this transcript
25 is, in fact, accurate?

1 (No response.)

2 Q Yes, sir?

3 A No, I'm not going to answer that because,
4 number one, I never had a chance to review it so I did
5 not sign on it. I mean...

6 Q Sir, is your testimony that you were not
7 offered the opportunity to read this transcript?

8 A I was told there would be no time and so I was
9 told to waive my opportunity to review the transcript.

10 Q You, sir, waived your opportunity to review
11 this transcript. Yes or no?

12 A There was no time. I was told there would be
13 no time.

14 Q Sir, my question is simple. Did you, sir,
15 waive --

16 A Yes, I did.

17 Q -- your right --

18 A Yes, I did.

19 Q -- to review this transcript for accuracy?

20 A Yes, I did.

21 Q Sir, how much are you being paid an hour?

22 A \$400.

23 Q \$400. What is your bill to date?

24 A I don't know.

25 Q You don't know?

1 A I don't know.

2 Q You know those are questions that are going
3 to be asked. You said you've been -- you've testified
4 over 30 times in Florida?

5 A Yes.

6 Q So you came today and you have not reviewed
7 the amount of time you've invested in this case.

8 A Yes, that's true.

9 Q Okay. So can you give the jury an estimation
10 of the number of hours that you have devoted to this
11 case?

12 A Probably -- prior to coming up here for this
13 testimony, probably in the neighborhood of 20 hours.

14 Q 20 hours at \$400 an hour. And what will you
15 charge for your travel today and your return home?

16 A The same.

17 Q I'm sorry.

18 A The same rate.

19 Q \$400. But what will your -- you charge for
20 travel, I assume.

21 A Yes.

22 Q And what will today's bill be? How many
23 hours?

24 A Well, travel is roughly five hours between
25 offices and Jacksonville, I was about three hours

1 yesterday and I've been on this case today since 6:00
2 a.m. I'm not that good with math. So I'll leave it to
3 whoever's got a calculator.

4 Q You also said in that deposition, sir, that
5 the trauma that you testified to could be as a result
6 of his drug use, correct?

7 A We're mixing terms. You're applying the word
8 trauma to a cardiac event and to drug use and those are
9 not forms of trauma. You're mixing languages.

10 Q Why don't you clarify for me, please.

11 A Trauma is trauma, a physical event. Hypoxia
12 from a cardiac event, number one, has a different
13 appearance, but I would not use the word trauma. If I
14 did, I misspoke and if you want to read the entire
15 deposition, the number of times where I explained that
16 I have the flu, you know --

17 Q So you were inaccurate in giving your opinion
18 because you had the flu?

19 A You are making a very big deal about my saying
20 yes --

21 Q No. Sir, I'm making a big deal about the
22 fact that you're --

23 A Have you ever had the flu?

24 Q -- an expert witness offering an opinion to
25 this jury.

1 A I'm saying that as a human being I may have
2 said yes, either not fully processing the question or
3 because I had the flu, yes.

4 Q Okay. Let me move on.

5 You also said a couple of other things in
6 your direct examination today I want to ask you about.
7 You talked about this history of psychosis.

8 A Yes.

9 Q Sir, do you realize that in all of the
10 records, the psychiatric records, he has never been
11 diagnosed with a psychotic disorder?

12 A I was not aware of that.

13 Q So, in fact, when you told the jury his long
14 history of psychosis, you didn't know that, in fact,
15 that was inaccurate?

16 A I'm -- it's not inaccurate. It's what I'm
17 told. The history is a history.

18 Q Who has told you, sir, that he has a history
19 of psychotic disorders?

20 A Mr. Smith. And I believe it's correlated by
21 the document put together by the mitigation specialist,
22 Brooke Butler.

23 Q Do you know the difference between psychotic
24 disorders, sir, and personality disorders?

25 A I do.

1 Q He has never been diagnosed with
2 schizophrenia; do you accept that as true?

3 A I'll take your word for it.

4 Q He has never been diagnosed with bipolar
5 disorder; do you accept that as true?

6 A I do.

7 Q That's would be two examples of psychotic
8 disorders; true?

9 A Yes.

10 Q So, Doctor, when you told the jury, when you
11 referenced his long history of psychosis, you don't
12 have any evidence of --

13 A Nor did I put a great deal of weight on it
14 either. I just was discussing that the temporal lobes
15 are the region of the brain to which psychosis is
16 attributed.

17 Q Let me mention something else you told the
18 jury. You talked about his use of Lortab and drinking.
19 The records that I just referenced, sir, do you know
20 that this defendant has denied drinking?

21 A I do not know that.

22 Q You also, sir, made reference to violent
23 behaviors. Can you please reference to the jury what
24 violent behaviors, other than the case which we're here
25 on, that you're referencing? You talked about his

1 history of violent behaviors.

2 A Can you show me where I said that?

3 Q We can have the court reporter read back.

4 THE COURT: Would you like it read back?

5 THE WITNESS: I would. I would like to hear
6 the context.

7 THE COURT: Just a minute.

8 (Answer read by court reporter.)

9 BY MS. NELSON:

10 Q Doctor, you are not here diagnosing Mr. Smith
11 with Alzheimer's today, are you?

12 A No.

13 Q You're not diagnosing him with Parkinson's?

14 A No.

15 Q And you testified that his executive
16 functioning is impaired. We also -- our executive
17 function is where we make our decisions, is that
18 correct?

19 A Yes.

20 Q From where we make our decisions?

21 A Yes.

22 Q Also where we make decisions to deceive?

23 A Yes.

24 Q Now, you mentioned that this defendant told
25 you he fell off his bike when he was nine years old.

1 Do you know his birth date, that he was born in 1956?

2 A I have it, yes.

3 Q Okay. So fell off a bike when he was nine
4 years old and he got stitches. And so that would make
5 him -- that would be 1965. Did you review earlier
6 medical records of EEGs which show that he does not
7 have any organic brain damage in the 1970s?

8 A I was not provided those.

9 Q You conducted an interview with this
10 defendant. Did he admit to you that he killed Cherish
11 Perrywinkle and raped her and sodomized her?

12 A No.

13 Q Did you ask him any questions about what you
14 refer to as the event which brings us here?

15 A No, I did not. Specifically did not.

16 Q And why is that?

17 A Because I'm a neurologist, not a psychologist
18 or psychiatrist.

19 Q But I thought you said that history was
20 important to your opinions.

21 A History such as head trauma, history such as
22 substance abuse, history such as being -- he was born
23 prematurely, birth history. Not the details of the
24 crime. That's not really relevant for a neurologist.

25 Q But if you're here to opine to the jury that

1 his injury prevents him -- him from -- he can't control
2 his impulses, you don't think it would be important for
3 you to query him about what happened?

4 A No, I don't. I tend to get that information
5 from the arrest report, which I read. Many attorneys
6 also specifically advise me not to query the defendant
7 about their alleged crime. And so what's more
8 interesting or what's more informative to the
9 neurologist is his state of mind leading up to the
10 event, his state of health leading up to the event.

11 Q So you agree that you cannot tell the jury
12 when or what caused the injuries, the abnormalities in
13 his brain that you testified to?

14 A With one caveat, the blue occurred between the
15 second trimester and the end of puberty. As to the
16 red, I do not know when that occurred. I agree with
17 you there fully.

18 Q You also said earlier, you said you didn't
19 want to be disrespectful, but you assumed because of
20 his lifestyle that he has suffered other head trauma?

21 A I said it's highly likely. If I said assumed,
22 I'll take your word for it, yes.

23 Q So you just are making an assumption based on
24 what, sir?

25 A As I said, a person who is engaging in such

1 severe substance abuse they have -- and blacking out,
2 that is a lifestyle that tends to be strongly
3 associated with instances of head trauma.

4 Q Okay. But that is based on your assumption?

5 A I think that's based on my clinical
6 experience.

7 Q Okay. So let me be -- let me make sure that
8 the jury understands. He met with you and told you
9 that he fell off his bike at nine, is that right?

10 A Correct.

11 Q Had a car accident at 19, is that correct?

12 A Correct.

13 Q You have not reviewed any of the prior
14 medical records to look at former EEGs, scans of his
15 brain?

16 A I was not provided those.

17 Q But you haven't looked at them?

18 A Can't look at what I don't have.

19 Q And one more time, you haven't looked at
20 them, sir?

21 A I think you're asking a silly question. How
22 can I look at something I've never received?

23 Q You have not looked at the scans --

24 A Yes.

25 Q -- yes or no?

1 A Yes, it's a true statement.

2 Q Okay. And you, despite the fact that
3 Mr. Smith told you about two incidences, you are
4 assuming, because of this drug use, that there may have
5 been other situations of head trauma that you have no
6 evidence to support.

7 A I made a remark. I don't need to know how
8 these lesions appeared. I just need to know that they
9 are there.

10 Q That's right. You have no evidence to
11 support any other instances of head trauma today, is
12 that correct?

13 A That's not entirely true. And what I mean by
14 that is the pattern of appearance, the front, back,
15 left, right, is not likely secondary to hypoxia from
16 cardiac arrest because that would be a diffuse process
17 that specifically affects deep tissues of the temporal
18 lobes. The left, right, front, back pattern is that of
19 traumatic brain injury and DTI is specifically a
20 traumatic brain injury.

21 Q I know you said you have not reviewed how
22 much time specifically you have invested in this case
23 before coming here today. Have you submitted any bills
24 yet or do you do that at the end of the case?

25 A There was a bill submitted in 2016. I don't

1 know offhand.

2 Q You don't know --

3 A I think it was 6000 something, but I don't
4 know.

5 Q And you've been billing since that time?

6 A No, there wasn't a lot of activity until
7 fairly recently.

8 Q Okay. Thank you.

9 MS. NELSON: I have nothing further.

10 THE COURT: Any redirect?

11 MR. FLETCHER: Yes, Your Honor.

12 REDIRECT EXAMINATION

13 BY MR. FLETCHER:

14 Q Dr. Colino, is \$400 an hour for a neurologist
15 a lot of money?

16 A It's my JAC rate for almost a decade now. I
17 don't know what other neurologists charge, but it's
18 been unchanged for roughly ten years. It's roughly
19 where I started and hasn't gone up.

20 Q And by JAC you're talking about the Justice
21 Administration Commission over in Tallahassee?

22 A Right.

23 Q Which is the state agency that pays you?

24 A In every single county that I've ever been
25 appointed to, yes.

1 Q So every neurologist that works for the State
2 of Florida and testifies in cases for the defense side
3 gets paid \$400 an hour. That's their standard rate,
4 right?

5 A I don't know that. Only me. I can't say -- I
6 don't want to speculate.

7 Q But as a neurologist you work at a hospital
8 and make more than \$400 an hour?

9 A That's correct. And the way I also explain it
10 is the personal injury malpractice rate is \$600 an
11 hour.

12 Q Okay. You gave a deposition on this case,
13 right.

14 A Correct.

15 Q And that's an opportunity -- was an
16 opportunity for Mr. Caliel to ask you questions, right?

17 A Yes.

18 Q Did he ever specifically ask you about CTE?

19 A No.

20 Q Okay. So the fact that CTE is not mentioned
21 in your deposition is because he didn't ask about it?

22 A I think we put the responsibility on him for
23 that, but, again, I -- I think I was very clear that I
24 -- I think I had two days notice and I was sick as a
25 dog. So, you know, if I didn't go out of my way to

1 bring up CTE it's probably because I wasn't clear in my
2 sensorium, my thinking, and just general awareness of
3 the case wasn't what it is at present.

4 Q Okay. And with respect to whether or not a
5 heart attack or a cardiac event could cause what we see
6 in this image -- if I could circle it -- in that image
7 (indicating). Were you asked -- were you provided with
8 any information about that cardiac event? For
9 instance, if a person has a heart attack and it takes
10 four seconds and they just feel it, would that result
11 in oxygen being deprived to the brain?

12 A The answer to your -- that question is I don't
13 know, but the answer to the question as to whether or
14 not that could be from a heart attack the definitive
15 answer is, no, not possible. That's from trauma,
16 unequivocally.

17 Q Okay. And the State, if they want to, you're
18 aware of this, they could have their own neurologist
19 come and testify this week, right?

20 A Sure.

21 Q And I spent almost an hour with you up here
22 talking about these images, right?

23 A Yes.

24 Q And then you colored in areas on various
25 images showing us that his brain has shrunk, right?

1 A Shrunk in some areas and abnormally enlarged
2 in anothers.

3 Q And you show us an area, again I'll circle it
4 (indicating), that appears to be from traumatic brain
5 injury.

6 A Yes.

7 Q And Ms. Nelson hasn't asked you a single
8 question about a single one of these images.

9 A That's true.

10 MR. FLETCHER: That's all I have. Thank you.

11 THE COURT: Anything further?

12 MS. NELSON: No, ma'am.

13 THE COURT: May this witness be excused?

14 MR. FLETCHER: Yes, Your Honor.

15 THE COURT: Thank you, sir. We appreciate
16 your time today. You're free to leave.

17 Could I see the attorneys at side-bar regarding
18 scheduling?

19 (Counsel for the State and defense approached
20 the bench for a side-bar conference out of the
21 hearing of the jury and court reporter.)

22 THE COURT: All right. Ladies and gentlemen,
23 after speaking with the attorneys, that's our last
24 witness for today. We still anticipate that we'll
25 be here three days this week. I want to give you

1 as much information ahead of time as I can, even
2 though as you know sometimes it's not correct.
3 But my best guess is -- first of all, we'll start
4 at 9:30 tomorrow because we're just much better at
5 starting at 9:30. Because of the parking down
6 here and the traffic and everything, it's
7 difficult to be here. So we'll start at 9:30.
8 We'll be ready to go.

9 We believe that tomorrow for you will not be
10 a long day. It will be a shorter day, but we will
11 have things to do after you're excused in order to
12 prepare for the following day. So I don't think
13 you'll be here late tomorrow at all. And so you
14 can be prepared for that.

15 If you'll be here at 9:30 and please do not
16 discuss the case with anyone, even among
17 yourselves, or look for information outside the
18 courtroom.

19 We thank you very much for your time and
20 attention today. You're free to leave. Thank you.

21 (Jury absent.)

22 THE COURT: We're going to be in recess, but
23 we're not through for the day. We might have a
24 little more to put on the record in a few minutes.
25 I'm not sure. But the defense needs a little bit

1 of time to look into that. So we're in recess,
2 but we're not necessarily recessed for the day.

3 (Recess.)

4 (Defendant present.)

5 (Defense counsel conferring with defendant.)

6 THE COURT: We are back on the record.

7 If it looks like the jury is going to be in a
8 position where they're unable to make all of their
9 decisions Thursday during the day and we run into
10 the evening, then we need to know how we're going to
11 handle that. So I asked the defense to please speak
12 with Mr. Smith so we can give the jury some idea
13 tomorrow, if necessary, as well as the clerk and
14 security, as to whether or not if something was
15 going to need to be done.

16 MS. SCHLAX: Your Honor, we have discussed
17 this issue multiple times and I know the Court
18 will likely inquire of Mr. Smith, but we do not
19 wish for this jury to be sequestered.

20 THE COURT: Okay. Mr. Smith was sworn in
21 earlier today, correct?

22 THE DEFENDANT: Yes, ma'am.

23 THE COURT: Okay. And Ms. Schlax is right,
24 we've talked about this before and it's my goal to
25 schedule the best I can so that that is not an

1 issue. But you would have the right, if the jury
2 had started deliberating and had not finished by
3 the end of the evening, whatever time that was, to
4 have them sequestered until they reached their
5 decision, which would mean overnight. They would
6 come back and finish whenever they finish.

7 Your attorneys are telling me that after
8 discussion you wish to waive that right and not
9 have them sequestered, is that correct?

10 THE DEFENDANT: That's correct.

11 THE COURT: Okay. And have you had enough
12 time to talk with them before making that
13 decision?

14 THE DEFENDANT: Yes.

15 THE COURT: And I know we talked about the
16 issue of sequestration a couple of times earlier,
17 but if something happens and if you change your
18 mind if you would let us know immediately. Again,
19 I anticipate that our scheduling of everything,
20 which is we'll finish the witnesses tomorrow, we
21 think fairly early in the day, by early in the day
22 meaning earlier than this, we'll stay here, we'll
23 prepare for the jury instructions for the jury so
24 that when they come back on Thursday morning they
25 will hear the closing arguments, the instructions

1 and then begin deliberations. That's the most
2 effective thing that I can do scheduling-wise to
3 give the jury all the time they need without
4 having to reach the issue of people being
5 sequestered.

6 But for now I'm going to find that Mr. Smith
7 has freely and voluntarily waived his right to
8 sequestration at this point, that we will schedule
9 with the hopes of not having that become an issue
10 and we'll just move on and see what happens.

11 Thank you, sir.

12 Is there anything else we need to put on the
13 record?

14 MS. SCHLAX: Nothing from the defense, Your
15 Honor.

16 MR. CALIEL: Nothing from the State, Your
17 Honor.

18 THE COURT: Do you need some time before he's
19 taken back or are you all through for the day?

20 The jury is coming at 9:30 so we need to be
21 here at 9:15. We're not much better than they
22 are.

23 (Evening recess.)

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IN THE CIRCUIT COURT OF THE
FOURTH JUDICIAL CIRCUIT, IN
AND FOR DUVAL COUNTY, FLORIDA.

Case No: 2013-CF-5781-AXXX-MA
Division CR-D

STATE OF FLORIDA

-vs-

DONALD SMITH,

Defendant,

TESTIMONY AND PROCEEDINGS taken before the
Honorable Mallory D. Cooper, Judge of the Circuit Court,
on February 21, 2018, and as reported by Faye M. Gay,
Certified Realtime Reporter, Registered Merit Reporter,
and Certified Legal Video Specialist.

OFFICIAL REPORTERS, INC.
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Appearing on behalf of the State of Florida.

4

5 MARK CALIEL and VANESSA WHEELER-SANCHEZ, Esquires,

6 Assistant State Attorneys,

Appearing on behalf of the State of Florida

7

8 JULIE SCHLAX and CHARLES FLETCHER, Esquires,

9 Appearing on behalf of the Defendant.

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1 (Penalty phase resumed at approximately 9:30
2 o'clock a.m. on February 21st, 2018, where the
3 following proceedings were had:)

4 (Defendant present.)

5 (Jury absent.)

6 BAILIFF: We're missing four.

7 THE COURT: We just have to wait for the
8 jurors to come in.

9 MS. SCHLAX: Good morning, Your Honor.

10 THE COURT: Good morning.

11 MS. SCHLAX: Your Honor, I have the Power
12 Points that are being used. I do have separate
13 disks that have been identified. So the record is
14 clear, Dr. Colino has specifically two images that
15 he used, obviously Dr. Buffington did as well, and
16 I have separate disks and I'm enunciating that on
17 our exhibit list. We're not introducing those and
18 so they don't go back to the jury.

19 Dr. Wu's I will have to supplement because
20 they altered the Power Point between yesterday and
21 today.

22 THE COURT: Let's go ahead and put Mr. Smith
23 under oath in case we need to ask him anything
24 today.

25 Thank you, Mr. Smith.

1 (Defendant sworn.)

2 THE DEFENDANT: Yes, ma'am.

3 THE COURT: Thank you. I don't have anything
4 now, but just in case we have to ask you during
5 the day.

6 THE DEFENDANT: Fine.

7 THE COURT: Thank you.

8 BAILIFF: The last four are walking up now.

9 MS. SCHLAX: And also administratively, our
10 last witness will be the witness appearing via
11 Skype. We tested out the connection this morning
12 and it worked fine. What I would request is when
13 we're at that -- that point if I could ask to
14 excuse the jury briefly while we set that up just
15 to make sure that there are no issues and then
16 once we have him securely on the monitor, then ask
17 for the jury to come in.

18 THE COURT: Okay. Is that the last witness?

19 MS. SCHLAX: Yes, Your Honor.

20 THE COURT: So there'll be four witnesses
21 before that?

22 MS. SCHLAX: Yes, Your Honor.

23 THE COURT: Okay. So we may have to take a
24 recess prior to that.

25 MS. SCHLAX: Yes.

1 THE COURT: But when we get to that point if
2 I forget just let me know.

3 MR. FLETCHER: Your Honor, I have one simple
4 matter. Dr. Wu is going to be our first witness
5 and he has his Power Point on his laptop and it's
6 easier for him to see on the side of the laptop
7 what images are coming up and he wants to know if
8 he can set it up up there. He'll bring it and put
9 it right in front of him if that's okay.

10 MR. CALIEL: The State doesn't have any
11 objection to that.

12 THE COURT: Can he go ahead and do that so
13 when he comes in it's already set up?

14 MS. SCHLAX: We already have it loaded on the
15 court system. He just wants to see what's coming
16 next.

17 THE COURT: Oh, he just wants to open it up?

18 MS. SCHLAX: Right.

19 THE COURT: That's fine. So it doesn't have
20 to be hooked to anything?

21 MS. SCHLAX: No, Your Honor.

22 THE COURT: That's fine.

23 So our other four jurors are on the way up so
24 we should be able to get started.

25 Are there any other preliminary matters that we

1 need to address before the jury is all ready? It
2 will take them a minute to get ready once they get
3 here, I'm sure.

4 MR. CALIEL: Nothing from the State.

5 MS. SCHLAX: No, Your Honor.

6 THE COURT: Okay. Once they're ready, we'll
7 be ready.

8 BAILIFF: They're ready, Your Honor.

9 THE COURT: All right. The jury is ready.
10 Is everyone ready for the jury to come out?

11 MR. CALIEL: Yes, Your Honor.

12 THE COURT: All right. We're ready.

13 BAILIFF: Ready, ma'am?

14 THE COURT: Yes, sir. Thank you.

15 BAILIFF: The jury is entering the courtroom.
16 (Jury present.)

17 THE COURT: You may be seated.

18 Good morning, ladies and gentlemen.

19 Thank you for being here today, ready to get
20 started.

21 I need to start with my question were each of
22 you able to follow my instructions to not get any
23 information regarding this trial outside of the
24 courtroom?

25 (Affirmative response from jurors.)

1 THE COURT: Was there anyone unable to follow
2 my instructions?

3 (No response from jurors.)

4 THE COURT: All right. The record will
5 reflect that no one has indicated they were unable
6 to follow the instruction.

7 Please make sure you have your correct notepad
8 with your juror number on it.

9 And with that we're ready to get started and
10 the defense may call their next witness.

11 MR. FLETCHER: Thank you, Judge. We're
12 calling Dr. Joseph Wu.

13 THE COURT: Dr. Wu.

14 (Witness present.)

15 THE COURT: Good morning, Dr. Wu.

16 THE WITNESS: Good morning, Your Honor.

17 THE COURT: Right in front of me. Madam
18 Clerk will swear you in. Thank you.

19 (Witness sworn.)

20 THE WITNESS: I do.

21 THE COURT: Thank you, sir. Our witness
22 chair is over here.

23 MR. FLETCHER: May I proceed, Your Honor?

24 THE COURT: You may.

25 JOSEPH CHONG SANG WU,

1 was called as a witness on behalf of the Defense,
2 and after being duly sworn, then testified as follows:

3 DIRECT EXAMINATION

4 BY MR. FLETCHER:

5 Q Dr. Wu, can you state your full name and
6 introduce yourself to the jury.

7 A Yes, my full name is Dr. Joseph Chong Sang Wu.
8 It's J-o-s-e-p-h, C-h-o-n-g, S-a-n-g, W-u.

9 Q Dr. Wu, what do you do for a living?

10 A I'm a neuropsychiatrist who specializes in
11 neuroimaging.

12 Q When you say neuroimaging, what are we
13 referring to?

14 A The brain. Brain imaging.

15 Q Okay. Tell us a little bit your educational
16 experience.

17 A Yeah, I did my pre-medical education at
18 Stanford University. I graduated from there with
19 Honors in 1978. And then I went to medical school and
20 I graduated from the University of California, Irvine,
21 with my MD in 1982.

22 After that I did a residency in psychiatry
23 which I completed with Honors in 1986.

24 After that I did a fellowship in brain
25 imaging, PET and MRI imaging, which I completed in

1 1988.

2 After that I joined the faculty at the
3 University of California, Irvine and became an
4 associate professor there.

5 And then I recently retired last -- after 30
6 years of service at the University of California,
7 Irvine. I retired from there March of last year and am
8 currently a Professor Emeritus and still serve on the
9 faculty as an active volunteer clinical faculty --

10 COURT REPORTER: I'm sorry. I did not
11 understand what you said.

12 THE WITNESS: Oh, I'm sorry.

13 I still serve currently as an active voluntary
14 clinical faculty at the University of California,
15 Irvine, and I'm also a member of the faculty for
16 the UC Irvine forensic psychiatry fellowship
17 program at Napa State Hospital.

18 Napa State Hospital is the largest state
19 psychiatric institution for the criminally insane.
20 And so I teach about neuroimaging to the fellows
21 who are psychiatrists there. I teach about brain
22 PET and brain MRI imaging, about neuropsychiatric
23 disorders to the Napa State Hospital forensic
24 psychiatry fellows.

25 BY MR. FLETCHER:

1 Q Okay. And, Doctor, have you testified in
2 court before?

3 A Yes.

4 Q And about how many times?

5 A I testified on over a hundred occasions.

6 Q And on each of those hundred occasions were
7 you testifying as an expert in the field of
8 neuropsychiatry?

9 A Yes.

10 MR. FLETCHER: Your Honor, I would tender
11 Dr. Wu as an expert in the field of
12 neuropsychiatry.

13 MR. CALIEL: Your Honor, I have no questions
14 at this time.

15 THE COURT: All right. He'll be allowed to
16 testify in that regard.

17 BY MR. FLETCHER:

18 Q Dr. Wu, have you prepared a Power Point
19 presentation to assist you in testifying today?

20 A Yes, I have.

21 Q Okay. And is that what's up on our screen
22 right now?

23 A Yes.

24 Q Dr. Wu, could you tell us how you got
25 involved in the case of the State of Florida versus

1 Donald Smith?

2 A I was contacted by Julie Schlax and she asked
3 me if I would be willing to do an MRI brain assessment
4 of Mr. Donald Smith.

5 Q Okay. And some of these images that we're
6 going to be looking at we looked at yesterday with
7 Dr. Colino. Are you familiar with Dr. Colino?

8 A Yes.

9 Q And he is a neurologist and you're a
10 neuropsychiatrist. What is -- what do you bring to the
11 table that's different than what Dr. Colino did?

12 A The difference is that I focus more on the
13 mental illness aspect of brain imaging and so I look at
14 things like schizophrenia, depression, autism,
15 substance abuse. And so a -- and so a psychiatrist
16 would generally focus in those type of mental
17 illnesses, but there is a substantial overlap between
18 neurology, psychiatry and things such as brain injury
19 where both neurologists and psychiatrists see
20 individuals who have traumatic brain injuries.

21 Q And, Doctor, before we get into your
22 presentation. You're familiar with an x-ray, right?

23 A Yes.

24 Q And why would it not be very beneficial for
25 us to use an x-ray of Donald Smith's head or his brain?

1 A Well, x-rays are very primitive technology.
2 They've been around for over a hundred years and they
3 don't allow us to look at a lot of different properties
4 of the brain that newer or sophisticated MRI imaging or
5 PET imaging allows us to look at.

6 For example, with newer MRI imaging we can
7 look at the cables that connect different parts of the
8 brain to one another. They're like internet cables or
9 phone cables and you can see whether or not these
10 cables are disrupted or torn in some way that you can't
11 see that with an x-ray or you can look at things like
12 the ability to measure very small parts of brain with
13 very high precision and accuracy. They're involved
14 with things like the emotional eglacia (phonetically)
15 like the amygdala. And you can't do that kind of thing
16 with x-ray.

17 Or you can look at things like the ability to
18 measure how much sugar is being consumed different
19 parts of the brain. Sugar is a main fuel for the brain
20 and so we can use sugar consumption in different parts
21 of the brain to determine if there are abnormal
22 patterns consistent with histories of brain injury.

23 We know that x-rays are generally very
24 ineffective for detection of most traumatic brain
25 injuries, whereas these newer, more sophisticated MRI

1 or PET imaging are much more accurate and better.

2 THE COURT: Could I interrupt for a moment?
3 If you'd ask the witness to slow down a little
4 bit.

5 MR. FLETCHER: I'm sorry.

6 THE COURT: He's clearly very familiar with
7 his field but the rest of us are not.

8 MR. FLETCHER: Yes, Your Honor.

9 THE COURT: And for the jury and for the
10 court reporter and the Court it would be easier.

11 THE WITNESS: I'm sorry about that, ma'am.

12 THE COURT: You don't have to be sorry. But
13 if you could just slow down.

14 THE WITNESS: I'll do my best, yes.

15 THE COURT: Thank you.

16 BY MR. FLETCHER:

17 Q Okay. Dr. Wu, you've mentioned the MRI and
18 the PET scan. Are those the most advanced machines, so
19 to speak, for looking at the brain?

20 A Well, the MRI has many different capabilities.
21 And so the capabilities, especially with MRI involved
22 are some of the newer, more advanced, what we call
23 sequences and capabilities including diffusion tensor
24 imaging or the ability to measure white matter
25 hypointensities. And so these are all newer, more

1 advanced MRI imaging capabilities that are not
2 oftentimes used in the average hospital.

3 Q Okay. And are the MRI machines more advanced
4 than, say, EEG?

5 A Yes. MR -- EEG, conventional EEG, is like a
6 caveman technology I compare to the ability to look at
7 some of the more sophisticated qualities that we can
8 now look at with MRIs.

9 Q Okay. So we're using the best equipment we
10 have, right?

11 A Yes.

12 Q Okay. And if you would turn to the first
13 screen on your Power Point. Talk to us about what
14 you're going to do today.

15 A So I'm going to talk about four different type
16 of imaging. The first we will deal with MRIs. The
17 first type of MRI imaging, the MRI quantitative
18 volumetrics, or QV, for short, and that's the ability
19 to measure the different volumes of gray, like the
20 hippocampus or amygdala with very high precision and
21 accuracy to see if there are abnormalities in how large
22 or small different structures of the brain are.

23 The second type of MRI imaging I'll be talking
24 about will be something called white matter
25 hypointensity, or WMH, for short. And white matter

1 hypointensities are abnormalities that show up in the
2 MRI which are a reflection of things such as paternal
3 infection during pregnancy which can cause a
4 malformation of the wiring of the brain.

5 And the third type of MRI imaging I'll be
6 talking about is diffusion tensor imaging, or DTI, and
7 DTI looks at the ability to be able to measure the
8 cables that connect different parts of the brain to one
9 another, like the white matter cables that connect the
10 right side of the brain to the left side, the front to
11 the back.

12 And so I'll be talking about three different
13 times of MRI, quantitative volumetrics, white matter
14 hypointensity and the DTI.

15 And then I'll be talking lastly about
16 something called PET imaging. And PET is an imaging
17 that allows us to look at sugar metabolism. Sugar is a
18 main fuel for the brain and we can measure how much
19 sugar is being consumed in different parts of the
20 brain. We look at the functioning of the brain.

21 And -- and these four imaging techniques show
22 abnormalities that occur in utero and which created
23 abnormalities consistent with severe neurodevelopmental
24 disorders which have a significant impact in the
25 ability to be able to form normal human relationships

1 and the ability to -- and which result in abnormal
2 fixation or intensities, so that this severe
3 neurodevelopmental disorder is associated with kind of
4 being stuck on something and fixated.

5 And -- and so the first two ones I'll talk
6 about will show evidence that's consistent with this
7 severe neurodevelopment disorder, the MRI and
8 quantitative volumetrics and white matter
9 hypointensity.

10 And it also shows something that is consistent
11 with significant neurodegenerative disorder, which is a
12 result of multiple traumatic brain injuries which
13 causes a very high probability of developing a
14 condition called CTE, or chronic traumatic
15 encephalopathy, like what is seen in many athletes who
16 have sustained significant concussions and so -- and so
17 he has a combination of a severe life-long
18 neurodevelopment disorder, abnormality on imaging,
19 severe neurodegenerative disorders resulting from
20 traumatic brain injuries that likely occurred when he
21 was nine and 20. And so I'll be discussing those in my
22 presentation today.

23 Q Okay. What slide would you like me to start
24 with?

25 A If you can go to the next slide, please.

1 Q Sure.

2 A So the first one I want to talk about is MRI
3 quantitative volumetrics.

4 And if you could go to the next slide, please.

5 So MRI quantitative volumetrics, that is the
6 ability to be able to measure different parts of the
7 brain, like the hippocampus or the amygdala, with very
8 high accuracy.

9 And this has only been possible in the last 15
10 years with the advent of computing technology. When I
11 was a medical student and used measure all these
12 things, it would take literally like a week to measure
13 all the different parts of the brain. But with
14 advancing technologies we can develop algorithms that
15 can categorize different parts of the brain and measure
16 them with a very high precision and accuracy, something
17 that we used to do by hand manually. What would take
18 weeks we can now do in minutes.

19 And so a lot of it was developed and then
20 privatized. And so there's a company called Cortech
21 which has an FDA approved license for the measure of
22 brain volume.

23 And so let's go to the next slide, please.

24 And so this is an example of what we call
25 brain segmentation and differentiation. So that we

1 have out of this, this is the gray matter, so the pink
2 stuff is gray matter, the white stuff is white matter.
3 And the pink stuff is gray matter. And then the green
4 stuff represents things like the amygdala, the
5 hippocampus, and the brown is the cerebellum.

6 And so we have computers to separate out
7 what's gray matter and what's white matter and what's
8 amygdala, which is an important emotional center, with
9 very high precision and measure them.

10 And go on to the next slide, please.

11 And so this has been subjected to multiple
12 peer review and they're much more accurate than the
13 average radiologist at detecting atrophy. The human
14 eye is not very good at detecting, for example, a ten
15 or 15 percent decrease in volume or change in volume,
16 even if it's very significant, where these are very
17 accurate.

18 And if we could go on to the next slide,
19 please.

20 And so neuroquant is what is often that we'll
21 be using and --

22 Q Doctor, you mentioned peer review. What do
23 you mean by peer review?

24 A Peer review means that other doctors and
25 scientists or specialists in the area believe -- have

1 reviewed the article that's been published and have
2 deemed it to be scientifically and medically accurate
3 and so this is not junk science. This is something
4 that has been reviewed by other scientists and doctors
5 and published and then cited by other doctors.

6 Q Okay.

7 A And so -- and so this is a neuroquant report
8 and so the abnormalities I'll be focusing on in
9 particular are the first line is total cerebral white
10 matter and cerebella white matter. And you will see
11 that these show that Mr. Donald Smith has an abnormal
12 increase in white matter of his brain.

13 And if you move on to the next slide, please.

14 So I put these up here and so you can see that
15 he has abnormal increase in both sides, the cerebellum
16 in his white matter and increase in the left side of
17 his cerebral cortex.

18 Can you go on to the next slide, please.

19 So this shows -- it's just to indicate that.

20 And next slide, please.

21 Now, this is -- actually measured the white
22 matter in the cerebellum of Mr. Smith and compared it
23 with normal control averages. So he has 20 thousand
24 cubic millimeters of white matter compared to 15
25 thousand in normal controls. And so this is a

1 significant increase. It's almost 30 percent larger
2 than normal. And on the right side he has 23 thousand
3 cubic millimeters compared to 15 thousand in normal.
4 And this is almost 50 percent larger than normal. And
5 so this is something that is present in six out of a
6 thousand people.

7 And this type of abnormality, enlarged white
8 matter, is something that has been reported in severe
9 neurodevelopmental disorders with life-long patterns of
10 problems with relating in terms of social interaction.

11 And so people with this severe malformation or
12 miswiring, with the too much white matter have
13 significant problems with social interaction and they
14 have particular problem with being able to develop,
15 maintain and understand normal human relationships,
16 life-long, and they have problems with impairment and
17 empathy. They have -- their brain has difficulty being
18 able to experience the same empathy.

19 And they also have a behavior pattern, a very
20 restricted, repetitive pattern of abnormal intensity
21 and fixation where they become fixated on something and
22 they can't let it go and that's all they think about,
23 and they have it to an abnormal degree and --

24 Q Doctor, is that like being stuck in third
25 gear in a car?

1 A Yes, it's like being stuck in third gear and
2 not being able to shift out. And this is something
3 that they have a life-long fixation with something that
4 consumes them and -- and --

5 And if we can move on to the next slide,
6 please.

7 And so now this type of severe life-long
8 mental developmental disorder is also associated with a
9 large hippocampus and amygdala. And so having an
10 abnormally enlarged hippocampus and amygdala is also
11 associated with a severe or life-long
12 neurodevelopmental disorder.

13 And the hippocampus and amygdala are very
14 important emotional centers of the brain that help to
15 process normal human emotions. And so when he has this
16 abnormal enlargement, this is seen in this type of
17 severe neurodevelopment, causes severe problems with
18 social interaction and severe fixations.

19 Next slide, please.

20 Q Doctor, if I could back up a little bit.

21 A Sure.

22 Q When you're talking about the severe fixation
23 on something, what happens when you mix in with a
24 person who at an early age and throughout life has
25 become a pedophile?

1 A Well, this is the one -- this can become --
2 pedophilia can become the focus of this fixation,
3 abnormal propensities, where a person becomes
4 abnormally fixated to the point that they're not really
5 interested in anything else or much else in terms of
6 this is their main fascination, action, focus,
7 consumption and they can't shift gears.

8 Q Okay.

9 A Now, you know, I mean other people with this
10 might have a fixation on trains or, you know, on
11 ghosts, for example. So it's almost like once a person
12 severely sort of becomes fixated on something, whether
13 it's trains or pedophilia or ghosts, or it could be
14 something else, that's all they think about and they
15 become consumed with that thing.

16 Q Okay. And a person who has a
17 neurodevelopmental disorder like that, that causes this
18 fixation, that -- that's something that's sort of, for
19 lack of a better way of saying it, that's wired into
20 them.

21 A That's correct.

22 Q How their brain develops.

23 A That's correct. So this type of life-long
24 developmental disorder, we have this abnormal intensity
25 and focus and fixation on something. That is called

1 very repetitive, restrictive, that this is the only
2 thing -- the predominant thing they think about. And
3 it can -- and it can vary widely. Some people become
4 very fixated on butterflies or trains or -- and they
5 become experts in that field, or other things, and
6 sometimes that can be very useful, you know, because
7 sometimes if you become fixated on something like
8 computers, you might become a great computer scientist,
9 you know. Sometimes it can be functional, sometimes it
10 can be very maladaptive, you know. But the intensity
11 of the fixation is neurologically wired into the brain.

12 Now another cause for enlarged amygdala, an
13 enlarged amygdala, we see it on neuroquant, is severe
14 emotional neglect. And so -- so that is the second.
15 And Mr. Smith has -- had a history of being -- being
16 severely emotionally neglected.

17 And we know from -- we have a study with
18 Romaine origin. Now, in Romania, he was a dictator,
19 Causecsu, and he was fixated on how could the
20 population get larger and so he banned birth control
21 and so Romanian woman had ten, 15 kids and they -- and
22 a lot of these kids ended up in Romanian orphanages
23 where they got very little emotional care. And when
24 researchers went back and looked at these Romanian
25 orphans who were severely emotionally neglected, they

1 found they had abnormal enlarged amygdalae, just like
2 Mr. Smith.

3 Now, this, as I said, is a neurologic disorder
4 so there's two possible causes for this abnormal
5 enlargement in the amygdala. And these Romanian
6 orphans also grew up with a severe deficit in their
7 ability to be able to empathize, their ability to
8 interact. And so he has two possible reasons why these
9 might be a problem that he has neurologically.

10 If you could go to the next slide, please.

11 Q And, Doctor, these conditions, for lack of a
12 better word, they're set into motion at a very early
13 age.

14 A Yes. So this severe neurological disorder
15 appears to be due to some kind of malformation
16 interureteral while the brain is being developed and
17 it's believed that there are a number of possible
18 environmental factors that can cause this to occur. It
19 could be toxins, you know, and there's some evidence
20 just that certain environmental toxins might be a
21 factor. Actually there's different kinds of like weed
22 killers, you know, Round-Up, for example, you know.

23 I mean so being exposed to this kind of toxic
24 and all this and could be interureteral. It can be due
25 to possible internal streptococcal infections. It

1 could be due to other types of things. But some type
2 of environmental insult, interureteral, whether it's
3 toxin, whether it's infection can cause the -- what we
4 call the neurogenesis.

5 But the brain develops interureteral. The
6 brain has neurons that are being created, and that's
7 called genesis. And then they migrate or move along a
8 certain path and differentiate. And so when you have
9 these kind of environmental insults, whether it's
10 through some kind of environmental toxin or infection,
11 this can cause a miswiring of the brain that can cause
12 this kind of abnormal enlargement, white matter in
13 their brain, and it's an abnormal enlargement of the
14 amygdala and hippocampus.

15 And this can cause this type of syndrome, this
16 severe what I call neurodevelopmental disorder, this
17 severe deficit in ability to engage in normal social
18 interaction and the ability -- and with severe problems
19 with becoming abnormally fixated and this restrictive
20 kind of pattern of fascinations.

21 Q Okay. And, Doctor, you've used the term in
22 utero several times. What does that mean?

23 A In utero means while the baby is being carried
24 in the uterus of the mother. So during -- we have the
25 second and third trimester, if a mother is exposed to

1 come kind of toxin or has some kind of infection, that
2 appears to increase the risk of developing severe
3 neurodevelopmental disorder that causes the neurons to
4 grow incorrectly and to migrate incorrectly to a
5 correct path.

6 Now, he also shows abnormal quantitative
7 volumetrics that are right-sided. So a normal body
8 shows right-sided cerebral brain matter decrease. Now,
9 using a different type of MRI measuring software, we're
10 also seeing an abnormal decrease in the right than the
11 left side at three centimeters above the norm. So that
12 normally most brains are slightly larger on the right
13 side, 33 -- his was 33.18. His is actually smaller on
14 the right side, 32.3 to 3.87, and this is a significant
15 abnormality. This is about one in a thousand chance of
16 occurring by chance alone.

17 And so this is the kind of thing that we see
18 in individuals who have sustained some kind of brain
19 injury to the right orbit correclar (phonetically)
20 that has caused some kind of atrophy.

21 And so -- and so it also shows conditions of
22 abnormal increase in white matter, is abnormally larger
23 in the amygdala, and his right side is deficit. Now
24 this has significant implications.

25 So if we move on to the next slide, please.

1 We know that right side cortical injury can
2 result in abnormal sexual preferences. That brain
3 injury on the right side can result in a hypersexuality
4 or sexual disinhibition and can alter sexual
5 orientation towards children or can release a
6 pedophilic orientation in predisposed individuals.

7 That injuries sustained on the right side of
8 the brain are -- it can either alter their normal
9 sexual preferences and change their normal sexual
10 object preference so that if -- if someone normally
11 prefer adults it can actually cause a neurological
12 shift towards children.

13 And there are document reports for right side
14 brain injuries that cause -- where you see an input of
15 sexual orientation, where their track has shifted as a
16 result of this.

17 And so this is -- the right side is known to
18 do that and he had a right side injury in the cortex
19 that's measurable on neuroquant.

20 And if you move on to the next slide, please.

21 Q Doctor, when you say it is known to do that,
22 are you referring to out in the medical world those --
23 that idea has been peer reviewed by professionals and
24 it's just something that doctors think it is?

25 A Yes, I mean this is something that has been

1 peer reviewed, medical documented, right-sided injury
2 to the brain can cause alteration in sexual preference
3 or sexual object preference and can actually -- it
4 appears to be associated with an increase in pedophilic
5 orientation. So those are some of the findings that we
6 see on the MRI quantitative volumetrics.

7 So to sum up, it's an abnormal increase of
8 white matter which is seen in this kind of severe
9 life-long disorder with impairment in -- with social
10 interaction and restricted fixation. We see this
11 right-sided injury, which is associated with abnormal
12 sexual fixation, and we see -- and so those are the
13 main things we see with the quantitative volumetrics.

14 So let's shift gears now to white matter
15 hypointensities. Now, white matter hypointensities are
16 another way of looking at abnormalities that are a
17 result of malformation of cortical development due to
18 early neurogenesis, maturation, migration.

19 And so neurogenesis means regenerative or
20 creation of new neurons. Neurons sprout in the brain.
21 Maturation means that these neurons are kind of
22 immature and they have to mature and they have to move,
23 they have to migrate in the brain.

24 And so if you move on to the next slide,
25 please.

1 So this is not Mr. Smith's brain. This is an
2 illustration of what white matter hypointensities look
3 like for people who are not familiar with what white
4 matter hypointensities look like.

5 And so these little circles show areas of
6 white matter hypointensity. This is something that can
7 be measured, again, with high precision now with
8 computerized algorithms.

9 If we can move on to the next slide, please.

10 Now, we know that these kind of white matter
11 hypointensities can occur from things such as maternal
12 infection, like streptococcal internal infection or
13 chorioamnionitis or prenatal that can cause abnormal
14 increase in white matter hypointensities.

15 If we could move on to the next slide, please.

16 Now, if we look at Mr. Smith's white matter
17 hypointensity it looks abnormal. Normal is at about
18 1,757 cubic millimeters of white matter hypointensity,
19 with standard deviation around 494.

20 Now, Mr. Smith had over five thousand cubic
21 millimeters of white matter hypointensity. Now, this
22 has a peak at 1.7 times 10^6 . That means 1.7
23 out of a million persons would have this number of
24 hypointensity. And so this is almost triple the number
25 of white matter hypointensities that are the norm. And

1 so this is seen in individuals with this significant
2 life-long neurodevelopmental disorders with impaired
3 social interaction and empathy and abnormal fixated
4 obsession.

5 Now, we know that the higher the amount of
6 white matter hypointensities is associated with a
7 higher degree of just restrictive repetitive behavior,
8 that the higher white matter hypointensity research has
9 this shown is associated with a greater degree of
10 fixations, so they become more and more fixated, more
11 restricted, more repetitive fixation.

12 Q And that's your analysis about being stuck in
13 third gear?

14 A Yes, um-hum. And this is an extraordinarily
15 high degree of white matter hypointensity that is the
16 -- an intrauterine malfunction associated with likely
17 toxic environmental or infectious insults to the
18 developing brain.

19 And next slide, please.

20 Q Okay. Before we move on, Doctor, these
21 numbers right here, the odds of it occurring are one in
22 1.7 million people?

23 A Yes.

24 Q So Mr. Smith's brain, if we extrapolate that
25 out, the entire population of the United States is

1 about three hundred something million?

2 A Right.

3 Q This would occur in about 600 people?

4 A That's right.

5 Q So this isn't something you see very often?

6 A This is a very rare degree of white matter
7 hypointensities, this is highly abnormal, but it's the
8 kind of thing that we see in this severe
9 neurodevelopmental disorder with abnormal fixations.

10 Q Okay.

11 A Okay. So -- so we've talked about white
12 matter quantitative volumetrics, enlarged abnormal
13 white matter and the right-sided atrophy of the cortex.
14 We've talked about the white matter hypointensities.

15 So the third type of MRI imaging I'll be
16 discussing is MRI diffusion tensor imaging or DTI.

17 And if we could move on to the next slide,
18 please.

19 So this is an example of diffusion tensor
20 imaging in Mr. Donald Smith's brain. It's what we call
21 corpus callosum trichotomy. Now you'll see that there
22 are some areas that are kind of black. There --

23 Q Doctor, I believe you -- I believe you can
24 touch the screen with your finger and circle an area.

25 A So this area here (indicating) and this area

1 here (indicating) and these areas here (indicating),
2 these are areas of abnormal decreases in the -- what we
3 call the cables that connect the right side of the
4 brain to the left side of the brain. You can see that
5 other parts of the brain are intact, but -- but these
6 areas in particular show that there is a shortening on
7 the fiber tract length of the corpus callosum.

8 Now I'll be talking about how these fiber
9 tracts are measured. I'll talk about the physics
10 principle that underlie this more advanced MRI imaging
11 technology. And I'll be talking about another property
12 that we can derive. They're called anistrophe.

13 So if we can move on to the next slide,
14 please.

15 Okay. So this is my report. It talks about
16 abnormal decrease in anistrophe and this decrease in
17 fiber tract length.

18 And let's go on to the next slide, please.

19 Okay. So these red areas are areas of
20 abnormal increases in this area here, here, here, here
21 (indicating). These are -- these red spots are areas
22 that are abnormally high FA. That's seen in
23 individuals with old traumatic brain injuries and then
24 --

25 Let's move on to the next slide, please.

1 Okay. That's it. Can we move to the previous
2 slide?

3 Okay. So this area -- on this area in
4 particular here, that red spot, if we could -- is the
5 mid-corpus callosum.

6 If we could move on to the next slide, please.

7 Okay. So I'll be talking about that spot, but
8 first I'll be doing basic background as to how we can
9 measure these axons to the brain. And so the way
10 diffusion tensor imaging works is if you look at the
11 diffusion of water molecules in the axons. Axons are
12 these like cables that connect different parts of the
13 brain to each other, like the right side to the left
14 side or the front to the back, the top to the bottom.
15 They're like internet cables or phone cables except
16 that they're like long straws. And so you can look at
17 the diffusion of water molecules, this long straw that
18 connects different parts of the brain together.

19 And if we move on to the next slide, please.

20 So here is an axon and this is like a long
21 straw and the water molecule moves inside the straw
22 here.

23 And if we move on to the next slide, please.

24 Now, when he has a kind of head trauma, he has
25 like what we'll call a shearing of the straw, the axons

1 are shear, and then the water molecule is no longer
2 able to diffuse. It starts to leak out in these areas
3 around here (indicating).

4 And so this is what diffusion tensor imaging
5 looks at, is the integrity of those axons or straws and
6 the diffusion of the water molecules.

7 Now if we move on to the next slide, please.

8 And so what happens after he has some kind of
9 traumatic brain injury, you have shearing and then you
10 can have shortening, which is what we saw of those --
11 if we can go back to the -- the color image before.

12 Q So this right here (indicating)?

13 A Yes. And you can see how it -- it's
14 shorted-out. And then we go back to the very beginning
15 here. Right there.

16 So that's what we see here, is that these
17 black areas here, these are the result of shearing of
18 the axons. So these areas here are missing the normal
19 diffusion of water molecule in those areas.

20 So if we can go back to the previous slide
21 that we were at.

22 Okay. So if we move on to the next slide,
23 please.

24 Okay. So that's what we're seeing here.

25 And we move on to the next slide, please.

1 So now -- so a good metaphor to talk about is
2 if you use -- put a straw in a glass of water and you
3 put a drop of food dye or soy sauce in that straw, that
4 food dye is going to stay inside the straw. But let's
5 say the straw has a lot of holes in it, it was torn,
6 well, that food dye will start to diffuse out of the
7 hole of that straw. And that's what is happening when
8 we use at diffusion tensor imaging.

9 So if we could look at the next slide, please.

10 So this is -- here there's no straw and so
11 normally when you put a drop of food dye in a glass of
12 water it diffuses it in all directions equally.

13 So if we could move on to the next slide,
14 please.

15 So this what is we call isotropic diffusion,
16 like you've heard the term isosceles triangle which is
17 three right-sided equal lengths. Well, iso is equal
18 and trophy, like atrophy, you know, like -- so the
19 shape. So isotope means that water has a tendency to
20 diffuse isotope in all directions. But if we --

21 Next slide, please.

22 If you were to put that in a straw, then the
23 diffusion will no longer be isotropic, it will be
24 anisotropic. Well, an means not, not equal diffusion.
25 It will be highly anisotropic in its diffusion.

1 So if you can move on to the next slide,
2 please.

3 And so here is this straw which has a hundred
4 percent anisotropy and here is a straw with zero
5 percent anisotropy.

6 And so you can actually look at fractions,
7 they go from zero to one. And so here's the brain that
8 has an intact -- will have a higher fraction of say .7
9 where it is going to have -- damaged will have a lower
10 fraction, like .5, it will be closer to zero and
11 further away from one.

12 So if we move on to the next slide.

13 So, for example, a typical healthy anterior
14 corpus callosum would have a value of .75 and a typical
15 FA, or fractional anisotropic, or TBI, post-traumatic
16 brain injury is .6. And this will be about three
17 standard deviations from the mean so about 110 in a
18 thousand. And so we can -- another thing we can look
19 at with DTI is this fractional anistrophe.

20 Now if we go to the next slide, please.

21 And this is something that's well-accepted
22 and, you know, books on it, hundreds of articles on
23 this.

24 If we move -- move on to the next slide. Move
25 too fast there.

1 Q Oh, I'm sorry.

2 A Okay. So now I show you that red spot. So
3 here I've blown this up for the jury to have a closer
4 look at what's going on here. And I measured the FA in
5 that red spot and I've measured that FA in normal
6 controls. Normal control FA is value .63 with a
7 standard deviation of .04. That means that a .04 is at
8 two standard deviation, above and below the mean would
9 have 95 percent of the population. So .63 minus .8
10 which would be about .5 -- let's see. I think it would
11 be about .5 or 7 or something like that, .8 above,
12 .701, that would be like 95 percent. And it -- 10
13 deviation have a 99 percent of the population. So .12
14 is like from .51 to like .75 would have -- of the
15 population. He is almost 8 standard deviations out
16 from the mean.

17 Now, the chances of this occurring randomly
18 are 3.8 times 10 to minus 14 and it's 3.8 out of a
19 hundred trillion. Now, to help the jurors visualize,
20 what does this mean? What does a hundred trillion
21 mean? So, for example, a million seconds would be 11
22 and a half days. That's 10 to 6. A billion seconds,
23 10 to 9, would be 33 years. A trillion seconds would
24 be 32,000 years. And so his -- this abnormality in the
25 FA is something referred to 3.8 out of a hundred

1 trillion.

2 Now, to look at the earth's population, the
3 earth's population has about 12 billion people,
4 roughly, I think. Yeah. So the chances of this
5 occurring in any normal human being on earth is
6 essentially zero, you know, and so this is a highly
7 abnormal decrease in FA, but it's a kind of abnormal
8 decrease I see all the time in people who has sustained
9 significant brain injuries, and especially older brain
10 injuries.

11 And so this is not uncommon in individuals
12 with serious -- with a history of significant brain
13 injuries and so -- let's see. So --

14 Q So, Doctor, the chance of this occurring
15 naturally or just by -- by chance are astronomical, but
16 you do see it in people who have had brain injuries?

17 A In normal it would be 3.8 out of a hundred
18 trillion, which essentially means about as close to
19 zero as you can get mathematically. But in brain
20 injury this is very common. I see it all the time with
21 people with significant histories of multiple traumatic
22 brain injuries. And so this is -- and so -- and so
23 this would be very consistent with Mr. Smith's having
24 had some history of serious brain injury in the past.

25 And when I reviewed the records that were

1 provided to me by Brooke Butler, he has had at least a
2 couple of significant injuries, head injuries. He had
3 a significant head injury when he was 20 when he hit an
4 oak tree and he flipped his car and he had significant
5 head injury when he was nine when he was riding a bike.
6 And so this is the kind of thing that we would see -- I
7 would see in an individual who had that kind of
8 history.

9 Let's see. Can we move on, please?

10 Q Doctor, Brooke Butler has been introduced to
11 the jury before and she will be testifying later today.
12 You're indicating that you learned things from her by
13 talking to her, by reading her reports?

14 A Yes. I talked to her and read her reports,
15 yes.

16 Q She's our mitigation coordinator and your
17 understanding of that is she interviews a lot of
18 people, including Mr. Smith.

19 A Yes.

20 Q And provides you with sort of a factual
21 background about his life from the time that he's a
22 child up until now.

23 A She's a fact gatherer, yes.

24 Q Fact gatherer.

25 A Yes. So I rely on fact gatherers for

1 information about the patient's clinical history.

2 Q Okay.

3 A Okay. So if you can move on to the next
4 slide, please.

5 So this decrease in FA is consistent with very
6 significant traumatic brain injuries, all kind of
7 injury I see in people at high-risk for CTE, or chronic
8 traumatic encephalopathy, like what we see in a lot of
9 sports injuries these days, individuals with multiple
10 concussions, multiple brain injuries. And it's very
11 consistent with the kind of abnormalities that are on
12 neuropsychiatric tests that Dr. Sesta will be going
13 into much greater length, since that's his specialty,
14 but he has a number of neuropsychologist deficits that
15 are very consistent with this kind of abnormality,
16 including dichotic listening (phonetically), which is
17 the kind of thing you would see with this closed-up
18 abnormality because it involved the ability to connect
19 the right side of the brain to the left side of the
20 brain.

21 And CTE is a neurodegenerative disorder and
22 I'll go into a little more of what CTE is and what this
23 means behaviorally.

24 Q Okay. But before you do that, Doctor,
25 neurodegenerative disorder is a broader class of

1 conditions?

2 A Yes.

3 Q And CTE is one of those conditions that's in
4 that broader class?

5 A Yes, and it's subtitled. Others include
6 Alzheimer's disease, for example, is another disorder.
7 So this is a type of degenerative disorder. The brain
8 is deteriorating due to some pathology and this --
9 let's see.

10 Move on to the next slide, please.

11 And so -- and so he had -- when he was 20, in
12 1976, he hits an oak tree at Orange Picker Road, wrecks
13 his car, had a bicycle accident. And he has had other
14 problems, executive functioning, visual perceptual
15 function. Very consistent with a history of multiple
16 TBIs.

17 Q TBI is?

18 A Yes, traumatic brain injury. So I won't go
19 into those. Dr. Sesta will go into those.

20 Let's see. The next slide, please.

21 Now, I note that there are a number of very
22 important pain medications for brain injuries. So if
23 you sustain a brain injury then you're going to have a
24 much greater risk of becoming a substance abuser. We
25 know that brain injuries can affect the judgment center

1 of the brain, can affect the impulse regulation of the
2 brain. So we know that people with brain injuries are
3 much more likely to become highly addicted to multiple
4 substances because the brain areas that are involved
5 with judgment and impulse regulation are damaged.

6 And we also know that people with a brain
7 injury are much more likely to have severe mood
8 problems. And Mr. Smith has had a history of severe
9 depression, suicidal thought. That was reported in
10 2011.

11 We know that brain injury can result in
12 behavior that looks like antisocial behavior, where it
13 looks like you don't care about people, where you are
14 callous. But the important thing from a diagnostic
15 perspective is that antisocial personality disorder has
16 to be made in the absence of neurological insults that
17 can explain this. So this is in a person with an
18 intact brain.

19 Now, you can have antisocial behavior that is
20 a result of brain damage where your ability to regulate
21 impulses or judgment make you look like an antisocial
22 person. But it's not antisocial behavior personality
23 from a strictly medical perspective, but it can look
24 like that. Now, it can --

25 Q Doctor, is it possible a psychologist could

1 have interviewed Mr. Smith years ago and concluded,
2 without the type of testing you do, that he has
3 antisocial disorder?

4 A Yes. I mean if you are unaware of history of
5 brain injury that might have been a factor in this,
6 yes, I could see how it would be very easy to make a
7 misdiagnosis. This happens all the time because, you
8 know, doctors don't always have the complete historical
9 and medical records available on the people that
10 they're interviewing. And without that it's very easy
11 to make a misdiagnosis.

12 And we also know that brain injuries increase
13 the risk of developing psychotic disorders, and
14 Mr. Smith has a history of hallucinations that occur
15 intermittently, and this is consistent with a brain
16 injury.

17 And we know that brain injuries can increase
18 other impulse disorders so that you can become sexually
19 disinhibited with brain injuries.

20 And so there are many neurobehavioral
21 complications that result from brain injuries and this
22 DTI shows astronomical decrease and is highly
23 consistent with a history of multiple old traumatic
24 brain injuries.

25 The next slide, please.

1 Q And that's the picture you showed us earlier?

2 A Yes.

3 Q With the black spaces and then you drew the
4 lines down?

5 A Yes. Yes. And that red spot in the previous
6 slide.

7 Next slide, please.

8 And we know that having a history of multiple
9 traumatic brain injuries can also set one up for the
10 condition know as chronic traumatic encephalopathy.
11 This is linked to multiple old traumatic brain injuries
12 and this is the result -- this unleashes a cascade of
13 events in which the brain starts to deteriorate,
14 sometimes decades after the injury, which can result in
15 a progressive decline over time of memory, impulse
16 control, cognition.

17 And if we could move on to the next slide,
18 please.

19 And so if you look at a CTE type of brain at
20 the bottom versus a normal brain at the top, you'll see
21 that this area here include abnormalities that are
22 consistent with CTE and that there's shrinkage in the
23 brain and Mr. Smith has shrinkage on the right side of
24 his cortex of his brain.

25 Let me see. Next slide, please.

1 And we know that CTE is much more likely to
2 develop if you've had a traumatic injury earlier. So,
3 for example, we know that professional athletes who
4 start training before age 12 are much more likely to
5 develop CTE than professional athletes who started
6 playing after 12. And -- and we know the younger brain
7 is much more susceptible to diffuse brain injury which
8 leads to pronounced behavioral and cognitive deficits.

9 And Mr. Smith was nine when he had at least
10 one of his TBIs, which would put him in prime territory
11 or at risk for developing CTE, especially when you
12 combine this with a second injury at 20 when he had a
13 car that flipped.

14 The next slide, please

15 Q Doctor, we use this term TBI or traumatic
16 brain injury. Does it have to be a super serious
17 injury? I mean you see two kids collide on the
18 football field and one gets up and he's got a ding.
19 That's kind of what you're talking about, right?

20 A Well, it doesn't -- this can result --
21 concussions don't even necessarily have to have a
22 complete loss of consciousness. You can have what we
23 call operation conscious and we know this because one
24 professional athlete who had these concussions without
25 loss of consciousness who later developed CTE.

1 And so it's clear that a loss of consciousness
2 is not essential to having CTE. Having multiple brain
3 injuries is the prerequisite. And so, yeah, a lot of
4 times loss of consciousness is not required.

5 Q So traumatic brain injury, it's a big term,
6 but it doesn't necessarily have to be a big trauma.
7 That's what I'm getting at.

8 A That's correct. We know that multiple
9 concussions can set one up for this and that -- that's
10 it.

11 The next slide, please.

12 So -- and so we talked about three different
13 types of MRIs. We talked about MRI with abnormal
14 amount of white matter seen in severe neurodevelopment
15 with significant social impairment and abnormal
16 fixation. We've seen this MRI white matter
17 hypointensity which we see in people who have in
18 paternal insults like infections or toxic exposures.
19 We've seen DTI. These cables and with this abnormal
20 decrease where chances are like one in a hundred
21 trillion of this being normal and are very consistent
22 with traumatic brain injury.

23 I'm now going to shift gears and talk about
24 PET scans. And so PET scans are different kind of
25 imaging modality than PET scans -- than MRI imaging,

1 but they have been around for decades. There have been
2 thousands of articles that have talked about PET scans
3 and PET stand for positron emission topography.

4 And let me show you an example of a PET scan.
5 So this is a typical normal PET scan and you'll see
6 that in the normal PET scan you'll see the colors here
7 and the colors indicate the amount of sugar
8 consumption.

9 Red indicates areas of higher sugar
10 consumption and blue indicates lower sugar consumption.
11 Green is sort of in between. And we know that PET
12 scans are much more sensitive at detecting brain
13 injuries than say many MRI scans. So, for example, you
14 can actually have a normal typical MRI of a cadaver and
15 -- but if you were to get a PET scan of a cadaver you'd
16 get a blank screen. There's no sugar being consumed.
17 Or you can have someone who's in a coma who can have a
18 normal, conventional MRI sequence because the structure
19 of the brain appears normal, but if you were to do a
20 PET scan of someone in a coma the PET scan would be
21 like all blue or green, bluish-green, because there's
22 really no sugar being consumed. So we know that PET
23 scans are much more sensitive than traditional MRI
24 scans.

25 If you go to the next slide, please.

1 So how are PET scans -- what is basically the
2 function of PET scans? So PET scans rely on something
3 called a positron, which is short for positive
4 electron. A positive electron in the form of
5 antimatter. The electrons in our universe are normally
6 negatively charged. Now, antimatter doesn't normally
7 exist in our universe, but we can create antimatter
8 using a process called a cyclotron.

9 Now, the advantage of creating an antimatter
10 version of an electron that we combine antimatter with
11 matter, we get the transmission of the mass in the
12 matter and the antimatter into pure energy, meaning --
13 I'm not fancy pushing -- E equals MC square. E equals
14 energy and M equals the mass. So the mass is positive
15 electrons converted to energy.

16 And if any of you are science fiction fans you
17 may remember the show Star Trek in which the US
18 Enterprise was powered by a matter, antimatter engine.
19 Well, that show was science fiction. That combination
20 of matter and antimatter creates tremendous energy is,
21 in fact, a well-established physics principle and it's
22 a fundamental physics principle that underlines PET
23 scans.

24 And if we can on to the next slide, please.

25 So this is how we create an antimatter version

1 of an electron emitter. And so you'll see these
2 triangular magnets here if you look at the photo of the
3 cyclotron.

4 If you'll move on to the next slide, please.

5 This is a schematic of a cyclotron. You'll
6 see these two triangular magnets and these triangular
7 magnets will alternately either track or pelt charged
8 subatomic particles and get them to move in circles.
9 And so with each alternation of the traction propulsion
10 this charged upon particle moves faster and faster and
11 faster. It's kind of like clocking a merry-go-round.
12 So you get the merry-go-round to go faster and faster
13 and faster. So by the time the charged subatomic
14 particle comes out from the cyclotron and strikes a
15 target it's travelling at almost the speed of light,
16 which is 186 thousand miles per second. So the charged
17 subatomic particle is travelling about 99.99 percent
18 the speed of light. And it takes that kind of speed
19 for the charged subatomic particle to bombard from it
20 to create an antimatter emitter Flourene 18.

21 So if we move on to the next slide, please.

22 So the Flourene 18, which was created by this
23 bombardment of the charged subatomic particle is
24 attached to a sugar like -- called deoxyglucose. Sugar
25 is the main fuel for the brain and it is attached in a

1 hot cell.

2 So if could we go on to the next slide,
3 please.

4 So the next slide shows a radio-chemist in
5 front of a hot cell and there's a two-inch thick leaded
6 glass window which shields the radio-chemist from the
7 deadly radiation of the Fluorene 18. And he's using a
8 robotic limb to attach the Fluorene 18 to a sugar
9 molecule which will then be ejected into the patient.

10 So we can go on to the next slide, please.

11 And so in order to inject this patient we need
12 an intravenous line.

13 So move on to the next slide, please - --

14 Q So this chemical is injected into the patient
15 and it starts flowing through their blood system?

16 A Yes, exactly.

17 And so here is a model. The model has an IV
18 placed in his arm.

19 And then next slide, please.

20 And then here we're seeing it after the
21 radioactive sugar module is taken into the brain. It
22 takes about 30 minutes for the sugar molecule to be
23 absorbed by the brain. And then after that you place a
24 patient inside the -- the PET scanner. It's like a
25 giant doughnut here. And the PET scan is like --

1 If we move on to the next slide, please.

2 And here you see this E-plus module which is
3 being emitted from the Fluorene 18 sugar module and
4 it's combined with an E minus molecule here, the
5 regular electron. We have the antimatter, E plus, the
6 matter, and then they annihilate each other. And then
7 you have the energy that emerges at 180 degree angles
8 from the annihilation decay.

9 And so you have energy rays that come off and
10 spike these special detectors. We have --

11 COURT REPORTER: I'm sorry. I'm having a
12 really hard time understanding you.

13 THE WITNESS: I'll try to slow down. I
14 apologize. I'll try to slow down.

15 You have energy rays that strike the crystal
16 detectors and you have a coincidence circuit so
17 that when two detectors register a hit, the
18 coincidence circuit says, um-hum, there's an
19 energy rate here that came off that caused a
20 simultaneous registration of the energy rays and
21 so the computer draws a line between those two
22 crystals.

23 And if we move on to the next.

24 So basically --

25 THE COURT: Mr. Fletcher, I think if we took

1 a breath between each slide, just to give us just
2 a moment between, it would help all of us.

3 BY MR. FLETCHER:

4 Q Okay. Could you just slow it down a little
5 bit, Doctor.

6 A Yes, I'm sorry. I, know I've been told before
7 I speak too fast and I get excited and it's hard for me
8 to slow down. I will try to slow down. I sincerely
9 apologize.

10 Okay. So this is a schematic of the crystal
11 detectors in the PET scanner and so you can see that
12 when energy rays goes off it simultaneously starts two
13 crystals, a line is drawn between those two pairs of
14 crystal detectors. And so basically we're looking at
15 millions of these intersecting lines with areas that
16 have the Fluorene 18 antimatter that are the source of
17 millions more energy rays that emerge from that part of
18 the brain and areas that have less sugar and have fewer
19 energy rays coming from that part of -- there are fewer
20 intersecting lines where there's less sugar and more
21 intersecting lines where there's more sugar.

22 And so that's the basic physics behind how the
23 PET scan works.

24 Next slide, please.

25 Q So the last ten or so slides you basically

1 introduced the jury to the science behind how a PET
2 scan works?

3 A Yes.

4 Q And that gives you some of the most advanced
5 imaging of the human brain that we've ever seen?

6 A Yes, it's -- it's light years ahead of the
7 x-ray, EEG.

8 Let's move on to the next slide, please.

9 So if we can remove the red marks there.

10 So -- so PET scans are approved by Medicare,
11 for example, to assess Alzheimer's disease. It's much
12 more sensitive and accurate in detecting Alzheimer's
13 disease than your typical MRI scan. And so you'll see
14 that there's less sugar being consumed here in this
15 part of the brain. Has more control and it's less --
16 it's less red -- and let's see.

17 If we move on the next slide, please.

18 If you can remove those red marks again.

19 And so here this is a three-dimensional better
20 view of an Alzheimer's patient's brain compared to an
21 actual control and you'll see that there's a blue area
22 here, that there's a lot less sugar being consumed in
23 that part of the brain.

24 Let's see. Next slide, please.

25 And so we know that PET scans are considered

1 reliable for things like Alzheimer's disease and they
2 can help confirm a diagnosis.

3 Next slide, please.

4 Now, Mr. Smith had an abnormal PET scan before
5 and he had an abnormally low neocortical cerebella
6 ratio of an algorithm and abnormally high in the right
7 column. I'll go through what all this means. So it --

8 Okay. We can go on to the next slide, please.

9 And would you clear the red marks away,
10 please.

11 So in this area here, this is the cerebellum
12 here. Now, the cerebellum is this part of the brain in
13 the back. It's a small part in the back of the brain.
14 It's involved with things like coordination and balance
15 and normally it's colder than the rest of the brain,
16 the neocortex on top, the frontal parietal and
17 occipital lobe area. So normally the neocortex is
18 hotter than the cerebellum in the back.

19 And you can actually make a ratio that looks
20 at this halogen (phonetically) in the neocortex
21 compared with -- with -- in the cerebellum as the
22 denominator. And so in a normal brain the neocortex,
23 which would be the rest of this area here, would
24 normally be significantly hotter than the cerebellum.

25 With just eyeballing this I can say this is an

1 abnormal scan and now -- now this is obvious to someone
2 who has looked at a lot of patients with like CTE or
3 likely CTE or traumatic brain injuries.

4 If you're the kind of physician who doesn't
5 see a lot of traumatic brain injuries you probably
6 wouldn't recognize the pattern. You probably wouldn't
7 have seen it.

8 The average physician who does PET scanning
9 doesn't see a lot of brain injuries and the average
10 physician who does PET scanning sees mostly tumors.
11 And so if they saw this they might say, oh, this
12 doesn't show any tumor, so this must be a normal scan,
13 because they are unfamiliar with this kind of pattern.
14 But my subspeciality is brain injury and I see this
15 pattern a lot.

16 And it's not just a visual read which is
17 abnormal, but it is quantitatively and numerically and
18 statistically abnormal and I'll show you the statistics
19 of how I arrived at this quantitatively.

20 And if we can go on to the next slide, please.

21 If you could remove the red marks again.

22 So as is well-documented, visual analysis may
23 be insufficient to uncover subtle metabolic disruption.
24 More objective methods would be helpful or detectful,
25 such as STM. Statistical pattern, objective method for

1 assessing abnormalities.

2 So if I can go on to the next slide, please.

3 And so this is invaluable. Now, STM is not
4 normally used clinically, but it's very helpful in
5 forensic cases, especially in life or death matter
6 cases where it's, unfortunately, relying on numbers,
7 not just eyeballing an image.

8 Okay. The next slide, please.

9 And so if I do a statistical pattern mapping
10 analysis of Mr. Smith, you will see that he shows these
11 abnormalities, black spots here in the cerebellum,
12 which are highly abnormal, and if I --

13 Go to the next slide, please.

14 Okay. So these abnormal statistical increases
15 are five standard deviation abnormal. So this means
16 two out of ten million would have this kind of
17 abnormality on a PET scan. And so this is not just my
18 visual read. It's the statistic and objective
19 numerical data which shows this a highly abnormal brain
20 pattern.

21 And if I could move on to the next slide,
22 please.

23 Okay. And so if we look at this ratio here of
24 the neocortex here and look at the cerebellum here.
25 Normal neocortex that is hotter than the cerebellum.

1 Mr. Smith's neocortex is actually colder than his
2 cerebellum and the reason why it's colder than the
3 cerebellum is when he had a history of multiple
4 traumatic brain injury a long time ago this caused
5 diffused damage in the brain. The amount of sugar
6 being consumed in the neocortex is much colder than
7 normal. And this is a significant abnormality.
8 Neocortical and cerebella abnormality is 3.3 deviations
9 below the norm or roughly nine out of ten thousand.

10 Then if you move on to the next slide, please.

11 Now, this is the kind of pattern I see all the
12 time like in athletes who are at high risk for CTE.
13 This decrease in cerebellum ratio is something that has
14 been published in peer-reviewed literature and
15 publication.

16 And the next slide, please.

17 Now you know this was an abnormal increase in
18 this area of the brain here, the rostrum. This is an
19 area of the brain that is part of the temporal area.
20 This is the kind of abnormality that we see in certain
21 forms of like seizure disorders. Something called
22 epilepsy spectrum disorder. And so this -- and we know
23 that brain injuries can cause this abnormal increase in
24 this part of the brain.

25 This is the part of the brain that's also

1 involved with sexual preference, with sexual -- and so
2 this is an abnormal excitation, liken to some kind of
3 epileptic spectrum disorder, a traumatic brain injury,
4 and that involves regulation of sexual behavior.

5 Next slide, please.

6 Okay. So if we can remove that red mark again,
7 please.

8 Q And, Doctor, just to remind you, you're going
9 to talk a little bit about the history of Donald Smith
10 and this is stuff that you got from Brooke Butler.

11 A Yes. And the reason why I want to talk about
12 that in addition to the brain imaging is that
13 neuroscience literature is very clear that there is a
14 significant interaction between having the brain damage
15 and having an adverse environment, which includes
16 abuse.

17 And if you have an adverse environment, which
18 includes abuse like being molested or being neglected,
19 with your brain intact, you're much more likely to grow
20 up normal. But if you have a damaged brain and you
21 have abuse or neglect, you're much more likely to act
22 out violently.

23 And so -- and so the reason why this is
24 important is this interaction between the mood
25 developmental abnormalities that Mr. Smith was born

1 with, from likely maternal insult, such as toxic
2 exposure or infection which causes neurodevelopmental
3 disorder with severe social interaction impairment and
4 severe fixed abnormal fixation, but -- and he had this
5 neurodegenerative disorder which he acquired from
6 multiple traumatic brain injuries, which is an abnormal
7 decrease in connection to white matter and abnormal
8 reduction in sugar metabolism.

9 But he also, in addition to those two major
10 sources of brain abnormalities, has multiple adverse
11 life events, including being molested when he was eight
12 years old by two older boys, being emotionally
13 neglected, being raped in 1997 by two male inmates.

14 And so the combination of having multiple
15 abnormalities, from a developmentally acquired
16 malformation of the brain wiring and then brain injury
17 and being molested and neglected and abused, resulted
18 in catastrophic failure of impulse control.

19 Let's see. If we move on to the next slide,
20 please.

21 And so we know that the brain injuries can
22 affect impulse control and that -- and that there are
23 parts of the brain that act like a grate. Everyone has
24 impulses, but generally we curb our inappropriate
25 impulses. We have intact brains that say don't do

1 that, you know, but when your brain is damaged, either
2 from neurodevelopmental defect, from maternal insult,
3 like an infection or toxic exposure or brain injury, we
4 know that that ability of the brain to curb impulses is
5 damaged and so we're much more likely to act out.

6 Let's see.

7 And we also know that brain injury can
8 increase the likelihood of having other impulse control
9 problems like drug abuse. We know that drug abuse can
10 be a form of self-medication, that people try to use
11 drugs to help treat their depression if they're
12 depressed, they try and use stimulants to make them
13 feel better or if they feel anxious they try and use
14 these things, but we know that these stimulants or
15 other things can cause a catastrophic failure of
16 impulse control so you attempt to self-medicate your
17 depression is like trying to put out a fire by pouring
18 gasoline on it. You know, it is -- it is the exact
19 opposite thing you should be doing. But when people
20 are brain injured, their judgment is impaired, their
21 impulse regulation is impaired, they're trying to
22 self-medicate.

23 The things that they try to use to
24 self-medicate, the paradoxical, severely exacerbate the
25 impulse problem that they have as a result of brain

1 injury.

2 And that so -- let's see. So if we move on to
3 the next slide, please.

4 And so just to summarize, Mr. Smith has severe
5 MRI quantitative volumetrics and MRI white matter
6 hypointensity, consistent with a severe
7 neurodevelopment disorder and neurodegenerative
8 disorders, his MRI quantitative volumetrics shows
9 abnormal amounts of white matter, 50 percent higher
10 than normal in the cerebellum and consistent with a
11 severe neurodevelopment disorder characterized by a
12 profound life-long impairment in the ability to develop
13 normal relationships and with a profound abnormal
14 intense fixation. And he also shows right-side
15 cortical atrophy on the quantitative volumetrics which
16 would affect his sexual preference choice.

17 Oh, can we go back? I haven't finished that
18 yet.

19 And then the white matter hypointensity showed
20 an abnormal increase, almost triple the number, again
21 consistent with severe neurodevelopment disorders which
22 have cause I think maternal streptococcal infection or
23 toxic exposure to like weed killers or other things.

24 Okay. The next slide.

25 He also had significant MRI DTI abnormalities

1 where his FA shows an almost 50 percent decrease in the
2 mid-corpus callosum with a chance of that occurring
3 four out of a hundred trillion, you know, in the -- I
4 mean -- so, you know, that's -- it's -- you know, it's
5 really astronomical odds, you know, of this occurring
6 in a normal population, essentially impossible to find
7 in a normal population, but very common in people with
8 multiple severe brain injuries and very common in
9 people with high-risk of CTE, and we know that CTE
10 causes a decades-long deterioration in impulse control
11 that gets worse and worse over time. And that he also
12 shows a PET scan finding which shows an abnormal
13 decrease in neocortical and cerebella ratio, similar to
14 those with people at high risk for CTE.

15 And if you move on to the next slide, please.

16 And so he has kind of a perfect storm with
17 severe miswiring of his white matter, from likely in
18 utero insult from either toxic exposure or infection
19 and multiple head traumas. And -- and in addition to
20 all those he also has history of being sexually
21 traumatized, abused and physically and emotionally
22 abused and neglected.

23 And we know that, neurologically speaking, all
24 these combine to create an individual who is going to
25 have catastrophic failure in impulse control.

1 So that's my last slide.

2 Q Okay. I do have a couple of -- one or two
3 specific follow-ups, Doctor.

4 And if you could help me find my -- it's not
5 numbered but I'm looking for the slide. I think it's
6 36.

7 A Okay. Keep going. Okay. Keep -- keep going,
8 keep going, keep going, keep going, keep going. You
9 passed it. I see it. No, actually we have it.

10 Q More?

11 A Down toward the bottom. Keep going. Here.

12 Q That's it. Okay. Doctor, if a person has a
13 heart attack and they -- their brain is deprived of
14 oxygen for an extremely long time, would you see that
15 on an MRI?

16 A You could see that on MRI, but you wouldn't
17 see it localized.

18 Q When you say -- when you say localized, what
19 do you mean?

20 A Localized means just one area of the brain.
21 So this is the area of the brain and the most frequent
22 area of the brain for abnormal decreases due to
23 traumatic brain injuries. And it's because of the way
24 it is shaped. It's shaped like a -- like a long tree
25 branch and it goes down like a U and when you have a

1 concussion that bottom U is one of the subjects of the
2 most shearing force. And so that's an area of the
3 brain that's going to be the most disrupted. And so
4 this is the area that we see.

5 But with an anoxic episode you won't see it
6 localized in that area. You would see it diffuses.

7 Q What is an anoxic episode?

8 A An anoxic episode, if you had cardiac arrest
9 and you were without oxygen for a number of minutes you
10 could see this kind of decrease but it would be
11 throughout the whole brain, not just in this one area.

12 Q Okay. So would we see the red everywhere?

13 A Yes.

14 Q Okay. And, Doctor, heart attacks happen in
15 different ways. A person can have a heart attack while
16 walking, right?

17 A Yes, that's correct.

18 Q That doesn't necessarily mean they fall over
19 and pass out or black-out for ten minutes?

20 A That's right.

21 Q That's all I have, Doctor.

22 MR. FLETCHER: Thank you very much.

23 THE COURT: Cross-examination.

24 MR. CALIEL: Your Honor, should we take a
25 break just to -- we've seen a brunch of slides.

1 THE COURT: I think so. Let's take a
2 15-minute break. Thank you.

3 THE COURT: We'll be in recess for 15 minutes.
4 (Recess.)

5 (Defendant present.)

6 (Jury absent.)

7 THE COURT: Is everyone ready for the jury?

8 MR. FLETCHER: Yes, Your Honor.

9 THE COURT: We're ready.

10 BAILIFF: Are you ready, ma'am?

11 THE COURT: We're ready.

12 BAILIFF: The jury is entering the courtroom.
13 (Jury present.)

14 THE COURT: Thank you. You may be seated.
15 Mr. Caliel.

16 MR. CALIEL: Thank you, Your Honor. May it
17 please the Court.

18 CROSS-EXAMINATION

19 BY MR. CALIEL:

20 Q Good morning, Doctor.

21 A Good morning.

22 Q Doctor, you're not licensed to practice
23 medicine in the State of Florida, are you?

24 A No.

25 Q In fact, the scans that you reviewed in this

1 particular case, they had to be ordered by Dr. Colino
2 because you can't even prescribe those scans.

3 A That's correct.

4 Q But despite the fact that you're not licensed
5 to practice medicine in Florida, you've worked a lot in
6 Florida, haven't you?

7 A Yes.

8 Q In particular you've worked in capital cases
9 and cases in which people have been accused or
10 convicted of murder.

11 A Yes.

12 Q Probably in excess of 40 times, would you
13 say?

14 A Yes.

15 Q And you charge for your services, right?

16 A Yes.

17 Q How much?

18 A I believe it's 300 an hour.

19 Q 300 an hour. How much time have you already
20 devoted to your work in this particular case?

21 A I would estimate -- I'm not sure. I would say
22 maybe 30 hours, 23 hours.

23 Q So somewhere in the neighborhood of between 6
24 and \$9,000 worth of billable hours to this point in
25 time?

1 A That sounds about right, yes, um-hum.

2 Q And then, of course, your travel today and
3 your testimony here today --

4 A Yes.

5 Q -- that would be some more. So roughly you
6 can make in a case like this somewhere between 10 and
7 \$20,000 by appearing as an expert in this case?

8 A That's probably about right, yes.

9 Q And you've done so over 40 times with murder
10 defendants here in the State of Florida.

11 A That sounds about right, yes.

12 Q And, surprisingly, each and every time you've
13 been retained you have found something wrong with each
14 and every one of those murder defendants.

15 A The type of individuals who are generally
16 referred to me are generally individuals with some
17 significant neurological or psychological impairments
18 so it's not surprising.

19 Q Okay. But simply put, every time you've been
20 retained by the defense in the State of Florida to look
21 at somebody's brain you've found something wrong.

22 A I would say it's based on the type of patient
23 that's referred to me.

24 Q I understand what you're trying to say, but
25 I'm asking a very simple question. Every time you've

1 looked at an inmate in the State of Florida, you found
2 something wrong. Yes or no?

3 A I would say yes.

4 Q And so you keep on getting hired for these
5 type cases?

6 A Yes.

7 Q Now, Dr. Wu, you have never met Donald Smith,
8 correct?

9 A That's correct.

10 Q You have never spoken a word to Donald Smith.

11 A That's correct.

12 Q You are relying on the history or the
13 information that was provided by a mitigation
14 specialist and the defense attorneys in this particular
15 case.

16 A Yes.

17 Q So all that information that you're receiving
18 didn't come from the defendant, but it came from what
19 he's told other people.

20 A Yes. Or I believe the mitigation specialist,
21 it's also based on her discussion with other family
22 members, friends, et cetera.

23 Q Okay. But you've never been provided any
24 hospital records to review in this case, correct?

25 A I haven't seen any hospital records of the

1 brain injuries, that's right.

2 Q No medical records documenting brain injury?

3 A That's correct.

4 Q Now, you also work as a psychiatrist,
5 correct?

6 A Yes.

7 Q In short, that's a medical doctor who
8 specializes in psychiatric or psychological conditions.

9 A Yes.

10 Q So you're very familiar, because you worked
11 in a forensic setting, with the term malingering,
12 correct?

13 A Yes.

14 Q And, in short, malingering means faking or
15 making up symptoms, correct?

16 A Yes.

17 Q And wouldn't you agree in a forensic setting
18 where you're going to come into court and the
19 individual has an interest in what happens in the case,
20 not a treatment interest but an interest in the
21 outcome, it's very important to determine whether or
22 not the history you're being provided is accurate,
23 correct?

24 A I would say it's important for it to be as
25 accurate as possible, yes.

1 Q And there are multiple instruments,
2 psychological instruments, that are utilized to measure
3 whether or not an individual is malingering or not.

4 A Yes, there are malingering instruments.

5 Q In fact, I think you referred to them
6 earlier. Dr. Sesta, another one of the experts that
7 was retained by the defense in this case, he had done
8 some psychological testing to measure whether or not
9 the defendant was malingering, correct?

10 A Yes.

11 Q And, in fact, he determined that the
12 defendant was over-reporting or malingering symptoms,
13 correct?

14 A Yes.

15 Q To the point where Dr. Sesta's opinion was
16 that they invalidated all the psychological
17 symptomatology that he was giving history on.

18 A Yes.

19 Q So he was lying so he couldn't be trusted?

20 A Yes.

21 Q You've talked about TBI, traumatic brain
22 injury. Wouldn't you agree with me, Doctor, that not
23 everybody who suffers from a traumatic brain injury has
24 impulse control issues?

25 A That's correct.

1 Q So not everybody who suffers from a traumatic
2 brain injury also goes on cocaine binges, correct?

3 A That's correct.

4 Q And what you're describing to me here when
5 you're talking about traumatic brain injury doesn't
6 sound very traumatic. You're saying a simple fall off
7 a bike, walking into a wall, everyday occurrences could
8 cause this type of injury.

9 A Well, I would say that a fall off a bike
10 likely wouldn't, but it's possible, depending how
11 involved the fall, that one could have sustained a
12 traumatic brain injury. And there's also a car
13 accident where the car was flipped and that's
14 compounded.

15 Q And, obviously, I don't know if it's the
16 status in California as it is here in Florida, but
17 there are car accidents everyday coming to work, right?

18 A Yes.

19 Q Car accidents aren't infrequent events,
20 correct?

21 A Yes.

22 Q Not everybody gets in a car accident becomes
23 a pedophile, correct?

24 A That's right.

25 Q Not everybody who gets in a car accident

1 becomes a drug addict, right?

2 A That's correct.

3 Q There are other factors, other conscious
4 choices that are being made by individuals who suffer
5 traumatic brain injury?

6 A That's correct.

7 Q Now, since you've never actually spoken to
8 the defendant, you haven't actually learned from him
9 what he did with the victim in this case on June 21st
10 of 2013.

11 A That's correct.

12 Q You don't know what was going through his
13 mind because you've never asked him.

14 A That's correct.

15 Q And since you've never spoken to him about
16 the crime, you can't say whether or not his conduct was
17 based upon the brain injuries that you've testified to
18 here today or whether or not it was just his conscious
19 decision to rape and murder that child?

20 A I can say he has profound neuroimaging
21 abnormalities and that he has profound abnormalities in
22 conjunction with his history of being molested,
23 neglected, increase a likelihood of catastrophic
24 failure of impulse control.

25 Q I don't think you understood the question I

1 asked you. Let me repeat it just to be sure. And, oh,
2 by the way, I asked you this question beforehand when
3 you were under oath in deposition.

4 Since you have never spoken to the defendant
5 about what he did to that little girl on June 21st of
6 2013, and why he made those choices, you can't say
7 whether it's a result of impulse control or whether or
8 not he made the conscious decision to do those acts;
9 isn't that true?

10 A I --

11 Q Yes or no, sir? This is very easy.

12 A I'm trying to parse your question, see if I
13 fully understand the implications. So -- so you're
14 asking me whether or not, since I haven't spoken to
15 him, whether I can determine whether or not his action
16 was a result of impulse control failure or conscious
17 decision, is that correct?

18 Q Yes.

19 A I can't directly answer that question.

20 Q What's that, sir?

21 A I can't directly answer that question.

22 Q Well, you do remember giving a deposition in
23 this case, don't you, sir?

24 A Yes.

25 Q Okay. And you were sworn to tell the truth

1 just like you were sworn to tell the truth here today?

2 A Yes.

3 Q And referring counsel to page 22 line 19.

4 I asked you the following question. And
5 actually thought I wrote it down exactly the same way I
6 just asked you here today.

7 Okay. But without speaking to him directly,
8 specifically speaking to him about what led him to
9 commit the offenses in this particular case, and you
10 can't state whether or not his conduct was a
11 symptomatology of the brain abnormality you saw or
12 whether or not it was a conscious choice of the
13 defendant. And your answer, under oath during
14 deposition, was, yes, that's correct. Do you remember
15 saying that?

16 MS. SCHLAX: Objection, Your Honor. Improper
17 impeachment. If he's going to attempt to impeach,
18 he should read the entire answer to that question.
19 It wasn't just simply, yes, that's correct.

20 THE COURT: Well, first of all, I would ask
21 if you would show the question and answer to the
22 witness to see if he recalls being asked that and
23 answering the question.

24 BY MR. CALIEL:

25 Q I'll show you starting on page 22 line 19.

1 It's highlighted for your ease.

2 (Witness reading transcript.)

3 Q That was the question and that was your
4 answer, wasn't it?

5 A I mean it's correct, I can't state whether it
6 was a conscious decision or impulse control. And I
7 think that's what I just stated here so I don't see
8 what the contradiction is.

9 Q Actually I think you just said you couldn't
10 answer my question.

11 MR. CALIEL: Madam Court Reporter, would you
12 read back the witness' response.

13 THE COURT: From when you last asked him, the
14 question before you went to the deposition?

15 MR. CALIEL: Yes.

16 (Testimony read by court reporter.)

17 MR. CALIEL: Thank you, sir.

18 I don't have any further questions.

19 THE COURT: All right. There's more of the
20 answer that you wanted from the deposition
21 published to the jury. Of course Mr. Fletcher can
22 do that now.

23 REDIRECT EXAMINATION

24 BY MR. FLETCHER:

25 Q Doctor, you were asked about the places that

1 you're licensed and the places where you have
2 testified, right?

3 A Yes.

4 Q Where are you licensed?

5 A California.

6 Q And that's where you live, right?

7 A That's correct.

8 Q And how long have you lived in California?

9 A I would say since I was two. So 58 years.

10 Q So does that in any way prohibit you from
11 testifying anywhere else in the country?

12 A No, I testify frequently in multiple other
13 states.

14 Q And give us some examples of the types of
15 cases you've testified in other than in criminal cases.

16 A I testified in numerous civil litigation in
17 other states including New York, Washington and
18 Florida, Illinois.

19 Q Okay. And in those cases you are -- you are
20 offered as an expert and, for instance, you heard me
21 say I tender this witness as an expert in this field,
22 right?

23 A Yes.

24 Q And it's perfectly proper to be in a
25 different state testifying as an expert, right?

1 A That's correct.

2 Q Nobody requires that you have a license to
3 practice medicine in Florida before you walk in this
4 door, right?

5 A That's correct.

6 Q Okay. Some of those other cases you have
7 testified in, did they involve CTE?

8 A Yes.

9 Q And did you have anything to do with the
10 litigation that's going on in the NFL?

11 A I've been involved with some of the NFL
12 football players being involved in class-action
13 lawsuits.

14 Q And that's taken you all over the country,
15 right?

16 A Yes.

17 Q And that's because they have questions about
18 the things that are you an expert in, right?

19 A Yes.

20 Q Your education, everything you've done as a
21 professional for years and years and years has gotten
22 you to that point that you're sought after by those
23 people, right?

24 A Yes. I have a specialization of brain imaging
25 advanced techniques.

1 Q And you were asked about whether it was a
2 conscious decision to do those things to Cherish
3 Perrywinkle or if it was impulse control, right?

4 A Yes.

5 Q Okay. And the truth is the answer is it was
6 a conscious decision, but it's influenced by the way
7 his brain is structured?

8 MR. CALIEL: Objection, Your Honor. Counsel
9 is testifying.

10 THE COURT: I'll sustain the objection. If
11 you want to read his answer from the deposition,
12 of course, you may or you may ask him another
13 question.

14 MR. FLETCHER: I'll start over.

15 BY MR. FLETCHER:

16 Q If you could expand on that. Can a person
17 make a conscious decision to do something but be
18 influenced by how -- how that person is built, so to
19 speak?

20 A Yes. And clear that for an individual who has
21 certain fixations that they are struggling to deal with
22 and if that -- these -- the impulse control system is
23 damaged and this is going to impair the ability to curb
24 those impulses and so ultimately at some point it
25 becomes a philosophical question when damage to an

1 impulse or conscious choice comes into play, and it's
2 an area that is difficult to draw a precise line at. I
3 can say he has damage to areas that regulate impulse
4 control, that he has damage in terms of areas that
5 regulate sexual object preference, that he has damage
6 in terms of -- and that there are multiple
7 abnormalities in conjunction with multiple stresses
8 which make that impulse control even harder, but, you
9 know, I can't make a final say. All I can say is that
10 these are risk factors and it's kind of like -- it's
11 like a heart attack. If you have very high cholesterol
12 and smoke 30 packs a day you have -- you never exercise
13 and, you know, you're going to be -- you have family
14 history, you're going to be at much higher risk for
15 having a heart attack. But can I say precisely when
16 that person is going to have a heart attack? No, all I
17 can say is that person is going to be at much higher
18 risk.

19 Q Okay. And, Doctor, as far as obtaining
20 medical records. If you're looking for medical records
21 from when a 62 year old was nine years old, are those
22 sometimes hard to find?

23 A Yes, medial records are oftentimes destroyed
24 after seven years and so it's often impossible to get
25 earlier medical records. Now, the brain imaging

1 clearly shows the kind of abnormality that would be
2 consistent with that kind of history because the DTI
3 and FA, there's no way that that can be seen in a
4 normal individual, but it's very common in individuals
5 with TBI. And so just because there's no medical
6 record doesn't mean the TBI didn't occur. As a matter
7 of fact, the imaging shows that it very likely
8 occurred.

9 Q Okay. If a person who is 62 now had a car
10 accident when they were 20, those medical records, if
11 they were medical records, would be 40 years old,
12 right?

13 A Yes. It would be almost impossible to get
14 medical records that old in most cases.

15 Q Thank you, sir.

16 MR. FLETCHER: That's all I have.

17 THE COURT: Any questions?

18 MR. CALIEL: I have no further questions,
19 Your Honor.

20 THE COURT: May this witness be excused?

21 MR. FLETCHER: Yes, Your Honor.

22 THE COURT: Thank you, Dr. Wu. Take your
23 time stepping down.

24 THE WITNESS: Thank you, Your Honor.

25 THE COURT: You may call your next witness.

1 MS. SCHLAX: Thank you, Your Honor.

2 The defense would call Dr. Joseph Sesta.

3 THE COURT: Dr. Sesta.

4 (Witness present.)

5 THE COURT: Good afternoon, Doctor -- or good
6 morning. I guess it's still morning. Good
7 morning, Dr. Sesta.

8 Madam Clerk will swear you in.

9 (Witness sworn.)

10 THE WITNESS: I do.

11 THE COURT: Thank you, sir. If you'll have a
12 seat in the witness chair, please.

13 MS. SCHLAX: May it please the Court.

14 THE COURT: Please.

15 JOSEPH JOHN SESTA,

16 was called as a witness on behalf of the Defense,

17 and after being duly sworn, then testified as follows:

18 DIRECT EXAMINATION

19 BY MS. SCHLAX:

20 Q Good morning.

21 A Good morning.

22 Q Can you please introduce yourself to the
23 jury.

24 A I'm Joseph John Sesta.

25 Q And, sir, you are -- can you give us your

1 educational background?

2 A Sure. I have a Bachelor of Science Degree
3 from Stetson University here in Florida. I have a
4 Master of Science Degree in neuropsychology from Drexel
5 University in Philly. I have a Ph.D in
6 neuropsychology, also from Drexel. And I did a
7 post-doctoral fellowship in the department of neurology
8 at the University of Pennsylvania School of Medicine.
9 I have had training in psychopharmacology so I can
10 practice medicine. I then did one year of internship
11 and one year of residency in criminal forensic
12 psychology at the forensic services at Florida State
13 Hospital and then a year of residency in brain trauma
14 in Montgomery, Alabama.

15 Q And, sir, are you licensed -- are you a
16 licensed psychologist, neuropsychologist?

17 A I'm licensed to practice psychology in
18 Florida. I am licensed to practice medicine in
19 Louisiana.

20 Q And how does that work?

21 A In terms of the licensure?

22 Q Yes.

23 A That's sort of like a hybrid. I do both. In
24 Florida here I'm a neuropsychologist. I predominantly
25 see folks who have neuro or suspected neurological

1 disease or brain injury and come into contact with the
2 law. Sometime in the civil courts the focus is for
3 money. Get in a car accident or some chemicals spill
4 and get exposed to things and people who are involved
5 with the civil court system and then I do mostly crimes
6 that are punishable by life or imposition of the death
7 penalty as well as death penalty appeals when the
8 defendant is thought to have some form of either
9 neurological disease, brain damage or perhaps some type
10 of severe psychiatric disorder that requires
11 evaluation.

12 In my Louisiana practice I pretty much
13 practice psychiatric medicine. I see folks that come
14 in and I mostly prescribe medication for things like
15 depression, anxiety, bipolar disorders, insomnia.
16 Those would be things that I see. So I have a forensic
17 practice here and a clinical practice in Louisiana.

18 Q And how often are you in Louisiana doing your
19 clinical practice?

20 A I drive here. I don't fly. Unlike my
21 colleagues, I'm afraid to fly. So I drive from Florida
22 to Louisiana the first full week of every month.

23 Q And the rest of the time you devote to your
24 practice?

25 A Right, the rest of the time here in Florida.

1 Q Are you, in fact, board certified?

2 A I'm quadruple board certified.

3 Q And what does that mean?

4 A I've been peer reviewed and board certified in
5 adult neuropsychology, I've been peer reviewed and
6 board certified in pediatric neuropsychology. I've
7 been peer reviewed and board certified in mental
8 psychology and then I have a subspecialty in forensic
9 neuropsychology which is the application of
10 neuroscience to legal proceedings such as this.

11 Q Okay. And I'm not sure you told us, how long
12 have you been doing this?

13 A This is year 26 for me. So I had my 26th --
14 my silver anniversary in September. So this is my 26th
15 year.

16 Q If you can help us understand, because we've
17 heard from a lot of people with different titles and
18 we've heard from a psychologist and now you're a
19 neuropsychologist.

20 A Yes.

21 Q And we've also heard from a neurologist.

22 A Right.

23 Q Help us understand.

24 A Sure. As psychologists -- first of all, we're
25 all psychologists and there's neuropsychologists and

1 forensic psychologists. We all start out with the same
2 training and then we specialize in different areas.
3 Neuropsychologists are specially trained in evaluating
4 and examining brain function, particularly cognition.
5 That means thinking. We're interested in emotion and
6 behavior, but we're interested in how it's related to
7 diseases, illnesses and injuries of the human brain as
8 opposed to a childhood experiences and things that
9 other clinical psychologists might look at more than we
10 do. Not to say that we completely ignore those things,
11 but the focus of our scope of the examination is more
12 on how changes in brain function have to do with
13 changes in behavior and thinking and emotion.

14 Q And as result of that specialty, have you in
15 your experience and training become involved here in
16 the State of Florida in what they call SVP cases or
17 Jimmy Ryce law, the involuntary civil commitment?

18 A I have, right from the very start. The law
19 started I believe the end of '99 and they came and
20 solicited me for the job in 2000. And for two years I
21 was actually part of the State of Florida's sexually
22 violent predator program. I was a community evaluator.
23 I'd go out to prisons and I'd see gentlemen before they
24 got into prison to see whether or not they should go
25 out and then I came and testified about it. And then

1 since that time I've been doing it in private practice.

2 Q Since 2002?

3 A Right. This is my 18th year dealing with
4 sexually violent predator cases.

5 Q So that's -- that's something you continue
6 even up to including today?

7 A I saw six sexually violent predators last week
8 and week before over at the Florida Civil Commitment
9 Center in Arcadia, Florida. So, yes, I'm still very
10 actively involved in this.

11 MS. SCHLAX: I would tender Dr. Sesta as an
12 expert in neuropsychology as well as the sexually
13 violent predator program.

14 MR. CALIEL: No objections, Your Honor.

15 THE COURT: All right. He will be entitled
16 to testify in that regard.

17 BY MS. SCHLAX:

18 Q And, Dr. Sesta, I want to turn your attention
19 to the case involving Mr. Donald Smith.

20 A Yes.

21 Q You, in fact, have met with Mr. Smith, have
22 you not?

23 A I have, yes.

24 Q Okay. Was that as a result of a request for
25 a neuropsychological examination?

1 A It was.

2 Q And help us understand, again, what's --
3 number one, how much time did you end up spending with
4 Mr. Smith?

5 A Essentially a full day. In this case it took
6 5.3 hours. I don't break for lunch. You just bring
7 lunch and spend the whole time with them. So it took
8 almost five and a half hours to examine him.

9 Q And how does this differ from just a
10 psychological assessment?

11 A Well, we don't just talk to them and we don't
12 give just -- we don't give ink blot tests or those type
13 of things you might typically think of with
14 psychological tests. We basically, we're taking the
15 brain for a test run.

16 When my colleagues testified, you saw some
17 pictures of the brain. If you think about an
18 automotive analysis, if you pop the hood and look at --
19 look at the engine, that's kind of what the CAT scan
20 and the MRIs and the fancy scans you saw lets us do.
21 But sometimes, you know, you pop the hood of your car
22 and you look at the engine, everything looks okay, it
23 still doesn't run.

24 So the neuropsychological examination is sort
25 of like you take it for a test drive, you find out what

1 it can and can't do.

2 We measure everything from how fast he can tap
3 his fingers and his motor function to his sensory
4 function, how well he can feel, to his strength, to his
5 retention, his memory, his reasoning skills. Those are
6 all measured. They're fed into a computer.

7 The computer has a database of normal
8 individuals who do not have any neurological disease or
9 brain injury and then we have about over eight thousand
10 individuals with various forms of neurological disease,
11 dementia, stroke, Alzheimer's disease, Parkinson's
12 disease, Huntington's disease, various neurological
13 diseases, and the computer can tell us how did they do
14 compared to the normal group. And if they're not
15 normal, well, which -- which part of the abnormal group
16 do they match best. The dementia folks? Brain injury
17 folks? Who do they look like? So the computer helps
18 with that as well. That's what we do with the
19 neuropsych.

20 Q And we've had some prior cross-examination of
21 doctors that talked about your assessment that
22 Mr. Smith was malingering.

23 A For only the psychological. That's about 15
24 minutes of the 5.3 hours.

25 Q Right. If you can explain that. What was

1 the 15-minute portion? Because, again, you were
2 focussing solely on brain function, correct?

3 A Sure. At the very end of an examination,
4 either one of the other clinical psychologists will
5 then do a much more in-depth assessment.

6 I always do a brief psychological exam. It's
7 called a Symptom Checklist 90. It gives you 90
8 psychiatric symptoms and simply asks do you have any of
9 these and, if so, how often has this bothered you
10 during the past couple of weeks. And I can get an idea
11 just to see if the person is in any acute distress to
12 play off of my clinical examination. I also ask some
13 questions. So it gives me some data on it. And,
14 again, that's at the very end of the exam. It's about
15 15 minutes. And, yes, I did think that that was valid
16 with Mr. Smith. But the other five hours where we
17 looked at his brain function I did over a dozen faking
18 tests and they were all clean. So there's no evidence
19 at all that he was attempting to exaggerate or
20 fabricate any neurological injury.

21 And, of course, we know that now because we
22 have scans and the scans beautifully correlate with
23 what I found. So there's no issue at all about faking
24 the neurological component.

25 I do agree that he's not valid or is faking

1 the psychiatric complaints.

2 Q And so let's get right down to it. Based on
3 your assessment, did you find brain impairment?

4 A Yes, I did.

5 Q And help us -- help us understand. How do
6 you determine that?

7 A Sure. We look at the patterns of his
8 responses. I compared him to a normal group of
9 individuals and then looked at his pattern compared to
10 normals, and I found that he does not have normal brain
11 functioning.

12 We compared him to individuals who are his
13 same age, who are his same gender, who are his same
14 race and who has his same level of education, which is
15 about ninth grade. So compared to people who are just
16 like him, his brain doesn't function normally.

17 Q And translate that for us in terms of what
18 kind of behavior we'd expect to see.

19 A Well, it depends on what part of the brain is
20 at work. That's the next question. Like when I go
21 over results with patients, the first thing everyone
22 wants to know is is there anything wrong with the way
23 my brain is working. If the answer to that is no, you
24 go home and you're happy. We stop and there's nothing
25 more to talk about. If the answer is yes --

1 Q I apologize, Dr. Sesta. May I interrupt you
2 for one moment?

3 Do you have such evaluations?

4 A I'm sorry.

5 Q Do you have such evaluations? I know that
6 you've explained that there's brain impairment with
7 Mr. Smith, but in your -- all of your experiences, have
8 you done those kinds of assessments and the answer to
9 the first question, is the brain impaired, has the
10 answer been no?

11 A Oh, that's -- those are the good ones. I get
12 to give people good news, you don't have Alzheimer's
13 disease or you don't seem to have any after-effects of
14 this car accident. So, yes, there's lots of
15 examinations where I don't find brain injury and in
16 criminal cases, too, there's lots of examinations where
17 defense lawyers want me to find brain injury, but
18 there's just nothing there.

19 Q And is it fair to say -- we're skipping
20 ahead, but we'll come back to it.

21 If you're -- you were instrumental in
22 suggesting that brain imaging was appropriate in this
23 specific case?

24 A Yeah, I -- I asked for it. And that was based
25 on my examination. So if my exam -- you don't follow

1 normal examinations with invasive, costly and
2 potentially dangerous examinations.

3 I'm sure you heard of the PET scan, you have
4 to be injected with radioactive isotopes. So we would
5 never subject to anyone to that if your examination was
6 normal. So if your examination was abnormal, looks
7 like you have abnormal brain function, it's worth the
8 risk to look further.

9 And you folks probably have friends or
10 relatives or someone who's had CAT scans and PET scans
11 and the idea is if have they have abnormal clinical
12 findings it's worth the risk to have a scan.

13 Q So that's why you recommended the imaging
14 studies be done in this particular case?

15 A Right. And I also wanted the PET scan. I
16 wanted to look at function. I also wanted the
17 opportunity to be proven wrong.

18 What separates science from religion and
19 superstition is testability and falsifiability. We
20 have to be able to test it and you have to be able to
21 prove it false.

22 So the question is how do we prove it false.
23 Well, if my results look like there could be some
24 damage to his function, to the frontal lobes, it looks
25 like there could be some damage and dysfunction to the

1 right side of the brain, the right hemisphere, check it
2 out, see if I'm right. And, you know, and use
3 different doctors, so two different specialties,
4 neurology and neuropsychiatry, use different methods.
5 This is the Cadillac here. We had MRI, we had PET scan
6 and we had a fancy version of MRI. We had that DTI,
7 which you all thought looked like a pretty tree, like a
8 red tree that was probably lit up, and then we had QV,
9 we had the quantitative volumetrics where they actually
10 measured part of the brain.

11 So this is the Cadillac of work-ups that we
12 have here and they correlate beautifully with what I
13 found.

14 Q And what does that mean? What was --

15 A Well, we are both -- be different. I don't
16 know, I wasn't here. I don't know from hearing. I'm
17 assuming that you saw images that show that there's
18 something wrong with the frontal part of the brain.

19 There was one part, that DTI, that tree that
20 looked like it was lit up, looked like a whole big
21 clump of the branch is missing right up front. That's
22 something -- we don't see that.

23 COURT REPORTER: Excuse me. Would you slow
24 down, please.

25 THE WITNESS: I'm sorry.

1 So there's like a tree and there's a part of
2 the branches missing right out there in the
3 frontal lobe.

4 Well, that's exactly what we said should be
5 true from the neuropsych, should be showing
6 frontal lobe dysfunction. The right hemisphere
7 doesn't look like it's working as well as the left
8 hemisphere.

9 When they did the QVs, the right hemisphere
10 is atrophied. It's quite a bit smaller and
11 reduced from the left hemisphere.

12 So the studies, the neuroimaging studies,
13 validated what I found in my functional assessment
14 of the brain.

15 BY MS. SCHLAX:

16 Q And what was your functional assessment of
17 the brain?

18 A Again, there's brain injury. The severity of
19 the brain injury I thought was mild to moderate in
20 terms of what we call lateralization, left or right. I
21 thought the right side of the brain was more impaired
22 than the left. And in front and back I thought the
23 anterior, the front part of the brain, was more
24 impaired than the back.

25 The other question is, well, what's going on

1 here, what did this. It's a little harder to answer.
2 I think you probably saw it on QVs yesterday, that
3 stuff that had -- you saw red and blue stuff. And blue
4 big and red reduced. I don't know if they told you
5 that. Blue in this case is too big. Red, the parts of
6 the brain that were reduced, are too small. Neither is
7 good.

8 The blue stuff, the stuff that's too big, is
9 too big because of when the brain has to connect two
10 areas -- it's really amazing whether you think this is
11 the result of millions of years of evolution or whether
12 you think that there's a divine creator who did it, but
13 someone made a pretty amazing thing.

14 So when the brain has to connect points A and
15 B. If it wants a hundred connections it will send out
16 a thousand to make sure it gets those hundred, but then
17 later on in neurodevelopment, around puberty, you have
18 to go back and prune those extra connections that it
19 doesn't need. And when that doesn't happen you end up
20 with those blue areas that you saw that are too big
21 because the brain didn't go back and prune them down.
22 And that's associated with a host of neurodevelopment
23 disorders.

24 Then you have the red stuff. We teach our
25 students -- we tell them dogs can have ticks and fleas.

1 Look out for more than one thing being wrong. If the
2 world was kind to a scientist, you could only have one
3 thing wrong with you. If you had a stroke, that's the
4 only thing you'd ever have. You'd never get dementia,
5 you'd never have heart disease, you'd only have one
6 thing wrong with you. That's not how it works.

7 He has that neurodevelopment stuff, the blue
8 stuff, but then you saw the red, the stuff that was
9 atrophied or too small. That's likely some type of
10 neurodegenerative process.

11 I talked with my colleagues about what we
12 think it is, a neurologist thinks it's trauma or
13 someone mentioned CTE, chronic traumatic
14 encephalopathy. Maybe he's gotten conked in the head
15 more times than we think he has. I'm not really, to be
16 honest -- well, to be honest, I'm under oath. I don't
17 -- I'm not really on the CTE train there. I don't
18 think he had enough blows to the head to really have
19 chronic traumatic encephalopathy.

20 He fell off a bike when he was a kid at nine.
21 I've seen thousands of kids who have fallen off their
22 bikes. I'm not ready to say that that caused a major
23 brain injury.

24 And a car accident, I never heard about that.
25 He apparently told one of the other doctors about it,

1 which again, I don't know about the severity, how bad
2 it was.

3 But there's just two things. That CTE happens
4 in, you know, professional college football players and
5 high school, you know, that were slapping their brains
6 together again and again in practice, in ball games
7 again and again, you know, season after season, and we
8 get this CTE.

9 I just, in my experience, don't see that
10 happening from two trivial head injuries. So, again,
11 respectfully, I disagree with that being the cause of
12 injury there.

13 And then -- and then I don't know. When
14 you're a neuroscientist -- I tell my students to get
15 used to saying I don't know. Something is going on
16 there, I agree, neurodegenerative. Yes, it shouldn't
17 be there.

18 The scans were remarkable, those big spaces of
19 atrophy you saw, there's lots of water. Think of a
20 beach -- and I'm from Tampa -- when a hurricane comes
21 through, when the beach recedes the water comes in
22 close to the land. Well, that's what happens in the
23 brain. When the brain recedes, the cerebral spinal
24 fluid, water, goes and it gets thicker.

25 So he has a lot of big spots of cerebral

1 spinal fluid, water, in his brain because his brain is
2 pulling back or atrophying.

3 And to be honest with you, I don't know why
4 that's the case. Sometimes our doctor phrases are the
5 fullness of time, which means we don't know, but
6 hopefully if things go a little longer maybe we can
7 figure it out. So given the fullness of time maybe
8 we'll be able to figure out what's happening and why
9 Mr. Smith's brain is atrophying.

10 But as I sit here right now under oath, I'm
11 going to say I don't know, something's wrong with it
12 but I don't know exactly why. The neurodevelopmental
13 stuff I'm pretty sure of. He's got --

14 Q Dr. Sesta, do me a favor. Take a big breath.

15 Let's go back. You've given us -- you've
16 given us a lot of information.

17 And your role in this process is to do that
18 initial exam, to figure out, okay, should we go on with
19 further imaging, correct?

20 A Yes.

21 Q And we kind of got ahead of ourselves. What
22 was it that led you to that conclusion? What was it
23 about your examination?

24 A What I just described, that there was brain
25 injury, mostly in the frontal part of the brain and

1 mostly in the right part of the brain. And then I
2 wanted to further explore it, give someone the
3 opportunity to prove me wrong and then look for a
4 correlation. Did the scans show what I found on my
5 exam and, in fact, they did.

6 Q Okay. And that frontal, I guess it's the
7 right hemisphere dysfunction, help us understand what
8 that would indicate in terms of behavior.

9 A Sure. Real simple. The left side of your
10 brain activates your behavior. When they damage it,
11 people look sort of like bumps on the log. The fancy
12 name is aboulia, but they don't move much, they don't
13 talk much, they don't do much. They kind of sit there
14 like bumps on a log.

15 When the right side of your brain is damaged,
16 you look the opposite. You have what they'll call
17 pseudo psychopathy. You're much more energetic, you
18 talk more, you don't seem to have that much emotion.
19 Things like empathy, compassion seem to be missing. So
20 there's quite a different syndrome with them.

21 So with his right hemisphere problems we'd
22 expect him to be sort of a cold, emotionless person who
23 maybe is sort of active or have a lot of activity and
24 there's not a lot of ability to control his behavior.

25 The biggest thing the right hemisphere does in

1 cases like this is hit the brakes. The front part of
2 the brain and the right brain is to brake behavior.
3 The left hemisphere is the gas so when you -- it
4 activates behavior. The right hemisphere is more like
5 the brakes, it brakes behavior.

6 So Mr. Smith is stepping on the gas. He has
7 his left hemisphere works fine, but the brakes don't
8 work well and therefore things like anger, aggression,
9 sexuality. In order for us to all live together in
10 harmony, we have to be able to put the brakes on
11 behaviors that aren't socially appropriate, but
12 Mr. Smith has deficits in the parts of his brain that
13 help him to brake or control behavior.

14 Q So, in essence -- and I want to make sure
15 that the jurors understand. You're not suggesting that
16 Mr. Smith is not responsible for what he did on June
17 21st and 22nd of 2013?

18 A Absolutely not. I was asked to look at that.
19 It's called an insanity defense. The fancy term is
20 mental state at the time of the offense. It's an
21 insanity defense to see if someone goes to a hospital.
22 No, I didn't feel that at all. I think Mr. Smith is
23 responsible for his behavior, I think he knew what he
24 was doing and I think he knew what he was doing was
25 wrong. So I told you that I could not assist you with

1 any type of insanity defense.

2 Q But what you do have to explain to this jury,
3 in terms of mental mitigation, is that he doesn't have
4 his brake function that normal people have.

5 A Right. And that's -- I think if there's, you
6 know, anything, in a horrible case like this, that can,
7 you know, help any of us sleep better at night is at
8 some point you have to ask yourself how does one human
9 being do this to another, you know, and how do we sleep
10 at night knowing this.

11 Well, the only thing I can offer is his brain
12 is certainly not normal. This is not someone who has a
13 normal brain and this is not what people with normal
14 brains, you know, do. This is someone who has a lot of
15 other -- he has a lot of other things wrong with him.
16 He's a pedophile, he's a psychopath, but then he also
17 has this brain injury which will prevent him from
18 controlling his behavior the way the rest of us do to
19 live in society.

20 So there's one thing you can take away from
21 this is, you know, there's no question, I think you
22 heard it probably from other doctors, there's no
23 question that Donald Smith does not have a normal human
24 brain.

25 Q You were asked -- you were provided materials

1 in this case.

2 A A lot.

3 Q Okay. And a lot of those materials involved
4 Mr. Smith's prior involvement with the SVP or Jimmy
5 Ryce law. Are you familiar with those documents?

6 A Yes.

7 Q And if you can, because no one's really had
8 your level of expertise, explain how the SVP law was
9 created and how it was implemented.

10 A Sure. Just real quick, the sexually violent
11 predator law is a post-conviction law, meaning that it
12 is after a person commits a sexual offense and goes to
13 prison and serves their time for their sex offense,
14 before they get out of prison, we usually do that the
15 last year that they're in prison, they'll get a visit
16 from two doctors. They're usually psychologists, they
17 could be psychiatrists sometimes. There's two.

18 And they examine them to determine a couple of
19 things. One, do they have a mental abnormality.
20 Doesn't translate very well to science, but do they
21 have anything wrong with them psychiatrically? Do they
22 have a personality disorder? Do they have serious
23 difficulty in controlling their behavior and does this
24 make them likely to engage in future acts of sexual
25 violence if they're not committed for long-term care,

1 control and treatment? That's pretty much the elements
2 of the act.

3 Q And, in fact, were you -- were you aware that
4 Mr. Smith was, in fact, civilly committed in 2002 --
5 excuse me -- 2002?

6 A Yeah, that's sort of the added tragedy of this
7 is that he was confined in a secured treatment
8 facility, potentially indefinitely, and then let loose.

9 Q Were you also aware that after he had gone
10 out and committed other criminal acts and was re-sent
11 to prison that a colleague had assessed him and
12 determined that he did not meet the criteria?

13 A Yes. I read that report.

14 Q What -- having read that report, what can you
15 say about that situation?

16 A Well, respectfully, the person is a friend and
17 a colleague. I disagree. I think the pedophilia was
18 strong. What struck me that I don't usually see in
19 cases like this is that one offense -- I don't know if
20 you heard, but this individual, there was a little 13
21 year old girl that he -- that got chased. And the
22 report mostly portrayed Mr. Smith as an exposer, an
23 exhibitionist, what you guys know as a flasher, and
24 these are called hands-on sex offenses. No one wants
25 to see anyone's penis, but given, you know, given the

1 things that can happen to you, that's probably not the
2 worst thing. Okay? So that's what they thought was
3 the case with Mr. Smith.

4 But that one case where he's cruising the
5 neighborhoods, you know, in this van and he comes
6 across this little girl, and it's his MO that he tries
7 to lure the little girl into the van, and he can't get
8 her in the van.

9 Now, flashers are kind of used to this. I've
10 seen hundreds of flashers. Flashers want two things,
11 they want your reaction, what happens when they flash
12 you, and how long they can hold your reaction.

13 And the folks at exam actually tell me they
14 actually count one Mississippi, two Mississippi.
15 They'll actually count in their head to see how long
16 they can hold your attention before you turn around,
17 run away, et cetera, but they expect that to happen and
18 they go on the next person.

19 Well, when Mr. Smith encounters this little
20 girl and tries to lure her into the van, where
21 presumably he's going to flash her, because we know
22 he's flashed and masturbated to five and eight year old
23 girls before earlier in his criminal career. And the
24 girl runs. He doesn't just go on to the next person
25 like flashers usually do. He does something that's

1 unique.

2 I think I've seen almost 700 sexually violent
3 predators in Florida in 17 years, but Mr. Smith gets
4 out of the van and something that's, I mean literally
5 kind of every child's nightmare, he begins chasing her
6 down the street in what I believe is broad daylight.
7 Because it's a child, I don't think she's out at 2:00
8 o'clock in the morning. So he's chasing this child
9 down the street. I believe I read she was knocking on
10 doors trying to get help and he's chasing this child
11 down the street. What's going to happen if he catches
12 her? What is he going to do? How is this planned out
13 in his head? Is he going to commit a sex offense right
14 there in the park where she, thankfully, eludes him,
15 hides, can't get to her, or is he going to drag her
16 kicking and screaming in broad daylight back to the
17 van?

18 This offense in my mind is critical. If
19 there's any example of a severe difficulty in
20 behavioral control, this is the textbook definition of
21 it. I don't know any other case that more clearly
22 screams lack of behavioral control when you're
23 literally chasing children down the street in broad
24 daylight to take them back to your van.

25 So this in my mind would have -- really the

1 strength of his pedophilia is great. I mean he can't
2 even -- we all day see people we're sexually attracted
3 to, we turn away, we go about our business, but he
4 could not disengage from this child and, to me, that
5 would really drive home the pedophilia component. So I
6 disagree with my colleagues who didn't think that he
7 was a pedophile.

8 Of course, now Monday morning quarterbacking
9 we really know that's true because of the offense that
10 he committed which, of course, the little girl was only
11 eight years old. And so I think that would -- and then
12 the -- the sad part of this is, my understanding from
13 reading the reports and documents from the State
14 Attorney, is that he was let go because they didn't
15 think they could prove something called a Crane prompt
16 (phonetically) and actually talked about that serious
17 difficulty in behavioral control.

18 It's not enough to be a pedophile because
19 pedophiles can ultimately control their behavior. They
20 don't have to offend against children. Might be a
21 psychopath. Not all psychopaths kill people. They're
22 maybe mean people and nasty people and fire people and
23 do bad things to people, but not all psychopaths kill
24 people or rape people.

25 So what was it this case, the State didn't

1 think they could prove that serious difficulty in
2 behavior control, but they never even looked. No
3 neuropsychologist, neurologist, neuropsychiatrist or
4 any of the folks you heard testify here today ever,
5 ever saw Mr. Smith and did this type of examination.
6 And what's sad is this wasn't hard to find, folks. You
7 heard three different doctors using different methods,
8 I tested five and a half hours, some of my colleagues
9 used -- I think Dr. Wu used a PET scanner, PET scan
10 instrument, that Dr. Colino focussed more on the
11 neuroquant. But three doctors, three different
12 specialties, a bunch of different methods, we all found
13 the same thing because it wasn't hard to find. But you
14 got to look. And they didn't even look.

15 And that, to me, is what separates this case
16 from almost all of the ones I've done before, is that
17 we had him and we let him go because we didn't look,
18 because we didn't even find.

19 And this -- I mean I don't testify for the
20 State a lot, but pedophilia, psychopath, brain damaged.
21 Folks, this is not a hard case to take before a jury.
22 I mean no one is going to let this guy go when you
23 weigh out all those things.

24 So that, to me, is what separates this case
25 from anything I've ever seen in 17 years.

1 Q Thank you, sir.

2 MS. SCHLAX: I don't have any further
3 questions.

4 THE COURT: Any cross-examination?

5 MR. CALIEL: Yes, please. Thank you.

6 CROSS-EXAMINATION

7 BY MR. CALIEL:

8 Q I guess it's good afternoon now, Doctor.

9 A Three minutes ago, yes, sir.

10 Q Doctor, first you commented on something, and
11 I wanted to go back to that before I forgot in your
12 direct examination. You said a car accident you never
13 heard about.

14 A Yes.

15 Q Okay. Now, you met with Mr. Smith on
16 multiple occasions, correct?

17 A Once.

18 Q One time five hours?

19 A 5.3 hours, yes.

20 Q Okay. And part of that was to get as best of
21 a history and then conduct these neurological testings
22 that you've gone through.

23 A Yes.

24 Q Okay. He told you about the bike accident,
25 right?

1 A He did. Told me about the bike accident, age
2 nine.

3 Q And in your mind it seemed pretty
4 inconsequential?

5 A Yes.

6 Q But flipping a car, hitting an oak tree on
7 Orange Picker Road, that never came up, right?

8 A No, it did not.

9 Q He never told you about that?

10 A No, he did not.

11 Q Now, part of this testing, and I know -- and
12 I hate to put words in your mouth, but you seemed like
13 you were trying to minimize it. Part of your testing,
14 although it be 15 minutes, was to look at psychological
15 symptoms and you tested him and in 15 minutes you were
16 able to really determine that he's faking it, right?

17 A Oh, yeah. It was gross. Fakers don't often
18 do a good job of faking, they overdo it, and this was a
19 really grossly overdone faking so it wasn't hard to
20 figure this out.

21 Q I mean to the point he was so bad that it
22 totally invalidated all of the other psychological
23 symptoms that he was telling you about?

24 A Everything on that test, yeah. I don't
25 believe that Mr. Smith has really any of the type of

1 depression, anxiety, schizophrenia, psychosis. I don't
2 think he has any of those things.

3 Q Okay. All those things that perhaps maybe
4 the other experts relied upon to determine that cocaine
5 affected his brain in some function, such as
6 hallucinations, delusions things of that nature?

7 A Just to answer your question, cocaine is what
8 we call a psychoto emitted (phonetically) drug. It can
9 make normal people crazy. So he might have had those
10 symptoms while high on cocaine. I felt when I saw him
11 in the jail that he was free of any psychiatric
12 symptoms.

13 Q Okay. And you worked in a forensic setting
14 before. Part of the reason why you do this testing for
15 malingering is because when you're meeting with
16 Mr. Smith he has an interest in the outcome of this
17 proceeding and so people in a forensic setting, they
18 lie because they want whoever is examining them to come
19 to a conclusion they want, correct?

20 A That's exactly the symptoms of malingering.
21 Yeah, there has to be some external goal they want. In
22 my civil cases, it's fine. It's not an issue. They
23 want money.

24 When I was with the Army, it was relieving of
25 duty, they didn't want to go back to combat. And in

1 these type of criminal cases it's usually some type of
2 decrease in criminal culpability, to get away with
3 something or to lessen their sentence. Yeah, I agree
4 with you.

5 Q Okay. So he lies to lessen his sentence,
6 doesn't want death, wants life so he lies about it?

7 A At least in regard to his psychiatric
8 symptoms. I want to be very clear about separating
9 neurological and psychiatric. But I agree with you in
10 regard to the psychiatric symptoms, yes.

11 Q Now, you talked about and we discussed the
12 fact that you learned during the course of this case
13 that at some point in time he actually tried to obtain
14 the DSM. Can you explain to the jury what the DSM is?

15 A Yes, he told me that. Yes, the DSM is the
16 Diagnostic and Statistical Manual of Mental Disorders.
17 It's sort of the Bible that shrinks use. I mean
18 psychiatrists, psychologists.

19 It has, I guess, all the answers to all the
20 symptoms or disorders. So if you were trying to fake a
21 disorder, this would be your Bible to guide you to what
22 symptoms you should produce.

23 Q And you weren't surprised to learn that he
24 tried to get this because I think you said it's pretty
25 typical of sociopaths?

1 A Yes. By the way, sociopath and psychopath
2 mean the same thing so you can take your pick. But,
3 yeah, this is what psychopaths do. They're
4 manipulative, they're cunning, they're going to try to
5 trick you and fool you. So it's not surprising this is
6 what Mr. Smith did.

7 Q Now, the psychopaths, I think when we've
8 talked about it previously you talked about it in two
9 sort of forms. Bad person, bad deeds, right?

10 A Those are the two things that make up the
11 assessment for psychopathy. When you assess these
12 people, the first part of the examination has to do
13 with bad -- being a bad person, whether you lack
14 remorse, whether you lack empathy, whether you're
15 compassionate.

16 Oftentimes I'll ask people about their
17 families, oh, how old are your kids. They don't know.
18 You're really close to your mom. How old is she?
19 Where does she live? What's her telephone number? And
20 they can't tell you all those things.

21 And the second part is bad deeds. What kind
22 of deeds have you done? Have you been in trouble with
23 the law? Have you hurt people? What's the worst thing
24 you ever did to anyone in your whole life? And get
25 them to tell us about these things.

1 So, yeah, psychopaths have both parts. You
2 have the bad person part and then we have the bad deeds
3 part. And if you have enough of both of them your
4 score is high enough that you're called a psychopath
5 and Mr. Smith most certainly exceeds that threshold and
6 would be considered as psychopath.

7 Q So he's glib, he's smooth talking,
8 disingenuous?

9 A Oh, yeah, he is. He's very -- we sat there,
10 it sounds odd, but we sat there in jail and talked
11 about books for a long time because I wanted to see how
12 he interacted with people. And, yeah, he's real
13 charming, he's well-read, he's well-spoken.

14 It can give you a better idea of how he
15 encountered the victim's mom that he may have been able
16 to control her because he really is, you know, someone
17 who can talk to you.

18 Q And you already talked, he lacks remorse, he
19 lacks empathy, the ability to share or understand other
20 people's feelings. He lies, right?

21 A He does all those things, yes.

22 Q He exaggerates, he fabricates, he deceives.
23 That's what he does?

24 A That's what -- yes, that's what he does.

25 Q Now, I think you already told us about this,

1 but on June 21st and 22nd, 2013, he knew what he was
2 doing was wrong but he chose to do it anyway.

3 A Yes, that's my opinion.

4 Q And you talked about how he couldn't apply
5 the brakes. Now, people who have this impulse control,
6 they all don't act out in a sexually violent fashion,
7 correct?

8 A That's true. That's where the brain injury
9 comes in and makes this picture different. Right, this
10 sounds strange, say just a pedophile or just a
11 psychopath because those are clearly horrible things.
12 But if he was just a psychopath or just a pedophile and
13 had a normal brain we'd expect at least he -- at least
14 the brakes would work. Whether or not he would choose
15 to step on them would be a different story, but the
16 brakes would work. Here the brakes don't work very
17 well.

18 Q All right. So the brakes -- what we're
19 talking about here, because he's a pedophile, is he was
20 attracted to prepubescent children?

21 A In my mind there's no question about that,
22 yes. As young as age five.

23 Q And is this lack of control just affecting
24 his ability to do -- to push down those deviant sexual
25 impulses?

1 A I'm not sure I know what you're asking me.
2 Did he step into it? Correct me if I'm getting it
3 wrong. I think there's that gas and braking analogy.
4 The pedophilia in a psychopathy was the gas, that was
5 providing the drive that he had to sexually offend
6 against children, but he didn't have the brakes on one
7 side. So he had a foot on the gas real hard with his
8 pedophilia impulses and his psychopathic impulses, but
9 there was no brake to oppose those behaviors, as you
10 saw both with chasing the victim down the street and
11 this offense with Cherish, that it was the inability to
12 control his behavior.

13 Q He was unable to control his desire to be
14 with a child?

15 A Right. Because his pedophilic urges are
16 extremely strong.

17 Q But, in your opinion, that had nothing to do
18 with killing her?

19 A Right. Those are separate -- not all -- not
20 all pedophiles kill. In fact, it's pretty rare.
21 Because in this case -- again, this is my -- I know
22 it's going to sound awkward to you because you don't do
23 these cases. But for a pedophile to find a single mom
24 with three children, if I'm correct they were four, six
25 and eight, those are all ages he's sexually attracted

1 to, and a mom who's sort of willing to give him access
2 to children, many pedophiles have fostered this for
3 years, but Mr. Smith could not get past that -- that
4 urge to act out immediately and hence I think his
5 psychopathy and his brain injury led to this not just
6 being a molestation, but actually being a sexual
7 homicide.

8 Q Well, but, more importantly, it was your
9 opinion that he killed her because he thought that he
10 needed to avoid capture or he benefitted by not having
11 the victim alive?

12 A Oh, sure. Again, he's not dumb. Obviously
13 he's of the opinion that, you know, given -- we have to
14 talk about -- I had to go through 1200 autopsy
15 pictures. I don't know how many you all had to suffer
16 through. But it's horrific and there's no way to -- to
17 impose that type of anatomical trauma to a little girl
18 and then expect it to go undetected.

19 This isn't -- we have pedophiles who respond
20 they won't penetrate, they won't leave any evidence or
21 damage. They can keep doing it. You can't do what
22 Mr. Smith did to Cherish and expect it not to go
23 unnoticed. So I think that after he had done what he
24 did to her body that the only thing that he could do
25 would be to take her life.

1 Q To eliminate her as a witness?

2 A Absolutely.

3 Q Thank you, sir.

4 MR. CALIEL: I don't have any further
5 questions.

6 THE COURT: Any redirect?

7 MS. SCHLAX: No further questions, Your
8 Honor.

9 THE COURT: Thank you, Dr. Sesta. We
10 appreciate your time.

11 THE WITNESS: Thank you, Judge.

12 THE COURT: Can I see the attorneys at
13 side-bar regarding scheduling.

14 (Counsel for the State and defense approached
15 the bench for a side-bar conference out of the
16 hearing of the jury and court reporter.)

17 THE COURT: Thank you.

18 Ladies and gentlemen, after speaking with the
19 attorneys, we feel that this is the appropriate time
20 for your lunch break. So I'm going to excuse you
21 for lunch.

22 Are you all okay with just an hour? Can you go
23 to lunch and get back in an hour?

24 (Affirmative response from jurors.)

25 THE COURT: Okay. Everybody seems to be

1 saying okay.

2 You cannot speak with anyone about the case,
3 even among yourselves. You can't get any other
4 information about the case other than what you
5 will hear and see in the courtroom.

6 You may remain in the jury room if you wish,
7 but if you choose to do that, you remain. You
8 don't leave -- you can leave to go get something
9 to bring it back and then once you're back you
10 can't leave, or you can go off to get something to
11 eat.

12 So you're telling me an hour is okay so we'll
13 start back at 1:15. Thank you.

14 (Jury absent.)

15 THE COURT: Okay. For the court reporter,
16 there's three more witnesses. Dr. Brooke Butler,
17 who you've seen in here before during jury
18 selection, and a prison expert and Mr. Smith's
19 son. Then after the -- I don't know if the State
20 is going to have any rebuttal, and I'm not even
21 asking that now. But whenever we finish the
22 witnesses for the day, we'll excuse the jury and
23 we'll stay to go over jury instructions.

24 Is that correct?

25 MS. SCHLAX: Yes, Your Honor.

1 MR. FLETCHER: Yes, Your Honor.

2 MR. CALIEL: Yes, Your Honor.

3 THE COURT: We'll come back at 1:15. Thank
4 you.

5 (Noon recess.)

6 (Jury absent.)

7 (Defendant present.)

8 BAILIFF: We're missing two.

9 THE COURT: While we're waiting on the jury,
10 how does the slide thing work? Does it show up on
11 the screen?

12 MS. SCHLAX: Yes, Your Honor. What -- and I
13 believe --

14 THE COURT: You don't need him right now?
15 That's not the next witness, right?

16 MS. SCHLAX: What I do is I actually do it on
17 my computer and then we connected my computer and
18 we were able to successfully test that this
19 morning and then it will show up on the screen.
20 And the only thing I'll have to do, Your Honor,
21 I'll have to actually lift up my computer to show
22 Madam Clerk so that he can be sworn in.

23 BAILIFF: One more.

24 THE COURT: Okay. That's the last witness,
25 correct? So we need a break right before that

1 witness just to set up.

2 MS. SCHLAX: Correct. Directly after
3 Dr. Butler.

4 THE COURT: We're waiting on one more juror
5 and then we'll get started.

6 Is there anything else we need to put on the
7 record?

8 MS. SCHLAX: I don't believe so, Your Honor.

9 MR. CALIEL: Nothing from the State.

10 THE COURT: Okay.

11 MS. SCHLAX: I apologize, Your Honor.
12 There's something I think we do need to address on
13 the record.

14 THE COURT: Okay.

15 MS. SCHLAX: Right before the break the Court
16 had called us to side-bar in regards to --

17 THE COURT: That's right.

18 MS. SCHLAX: -- and I guess the Court can
19 articulate for the record what information you
20 were given.

21 THE COURT: Right. I was given information
22 right after the lunch recess started that one of
23 the jurors had questioned whether or not they had
24 an ability to ask a question of a witness. And
25 just for the record that happens much more in a

1 civil case than it does in a criminal case, but
2 the way that's normally done, if it's done, is for
3 the juror or jurors to write down the questions,
4 they're excused from the courtroom while the Court
5 and the attorneys for both sides review the
6 questions to determine if they are, in fact, an
7 appropriate matter for the jury to question or if
8 the questions are appropriate, whatever the case
9 may be, and then any question or questions that
10 everyone agrees are allowed, then the juror -- the
11 question is asked through the writing that the
12 juror has already given, we go over the question
13 in front of the jury and give the answer.

14 We don't have that all that frequently in our
15 cases so I asked the State and the defense about
16 that issue so they can determine how they wanted to
17 proceed over the break.

18 MR. CALIEL: And, Your Honor, the State's
19 position is had we addressed this in the beginning
20 of the trial, I know based upon having done it
21 before it is within the Court's discretion to
22 allow questioning, but because we are now so far
23 along in the process, both in the guilt and the
24 penalty phase, I think it would be inappropriate
25 to change and allow questions now with only three

1 remaining witnesses of all the witnesses that this
2 jury has heard from. And so it would be the
3 State's request not to allow that procedure,
4 basically because it's within the Court's
5 discretion and it hasn't been done up to this
6 point in time in the trial.

7 THE COURT: Anything further?

8 MS. SCHLAX: Your Honor, our position is if
9 we have a juror who would like more information,
10 this entire phase of the proceeding is certainly
11 to provide them with as much information as we
12 possibly can and that they might need to make this
13 very important determination, and if we have a
14 juror articulating that they would like the
15 opportunity to ask questions, subject to the
16 format the Court laid out in regards to there
17 might be questions that are asked that are
18 inappropriate for us to answer, we would request
19 they be allowed to do that.

20 THE COURT: Well, if the jury were
21 deliberating, which they're not at this point, of
22 course, that's not the issue, but if they were
23 deliberating and had a question we would follow
24 somewhat the same procedure. We ask the juror to
25 write the question down. They're not in the

1 courtroom. The question is delivered to the Court,
2 the Court and the attorneys go over the question
3 and determine, number one, if it's appropriate and
4 if it is appropriate how it should be answered,
5 whether we should bring the jury back out and
6 answer it in open court or just submit a written
7 answer, et cetera, et cetera, et cetera. I think,
8 I do not recall that I have ever had that happen
9 during a trial itself, whether it be the guilt
10 phase or penalty phase, in front of me, but I know
11 that it has happened in other courtrooms.

12 I suppose that we're not sure, just because
13 the juror asked the question as to whether or not
14 they can ask questions, we don't even know --
15 really it wouldn't be during the guilt phase, that
16 phase is over, but it could be from yesterday. We
17 don't know what they want to ask a question about.
18 So I'm thinking that we need to at least find out
19 what the question is and if it is appropriate to
20 answer it. I don't know. I don't know what the
21 question is. I agree with you, they haven't had
22 that opportunity or haven't been explained that
23 opportunity, except the instruction about jury
24 deliberations, if they have any issues that they
25 need to bring to my attention how to do it. We're

1 still waiting on one juror so even if I determine
2 --

3 BAILIFF: Everybody here, ma'am.

4 THE COURT: They're all here. Even if I
5 determine that it would be an appropriate way to
6 do it, I'm not even sure how to address it. I
7 guess the way to address it would be when the jury
8 comes back out -- and I'm just thinking this
9 through. I'm not saying what I am or am not going
10 to do, but I would then just say that it's been
11 brought to the attention of the Court that one of
12 you might have had a question that you would like
13 to pose regarding -- because the witnesses aren't
14 here anymore.

15 MR. CALIEL: And, Judge, that's the issue.
16 If we want to provide them with the opportunity to
17 pose a question to the remaining three witnesses,
18 which they haven't had the opportunity to do with
19 all the witnesses that previously testified, I
20 think you can do that. What is not appropriate is
21 for the jury to pose questions of witnesses who
22 have already been excused, a witness from
23 yesterday, and then allow the defense to -- or the
24 State, whichever side it may be, to recall the
25 witness to answer a specific question to the jury

1 after the witness has been excused. That's not
2 the purpose of the jury questioning as it's used
3 in this process. It's usually before the witness
4 is excused, does the jury have any questions, we
5 review them and if we're allowed to answer those
6 questions we do and the questions are asked and
7 answered before the witness has been excused. The
8 witnesses have all been excused and have been
9 released from the rules of sequestration at this
10 point in time so it's inappropriate to go back and
11 rehash something the witness has already
12 testified.

13 So I would have a specific objection if that
14 were the question. If they want to ask questions
15 of the next three witnesses, I believe it's in the
16 discretion of the Court. But to go back and
17 rehash or try to re-answer questions that were
18 posed of previous witnesses, I believe that's
19 inappropriate at this juncture.

20 THE COURT: Any response?

21 MS. SCHLAX: Your Honor, our only concern is
22 that obviously at this phase of the proceedings
23 this is an opportunity for these jurors to receive
24 any and all information that may be relevant or
25 helpful for them to answer the ultimate question

1 and if -- even knowing what question that they
2 had, I would conceded that the witnesses have been
3 excused. It might be helpful to us -- because
4 perhaps it was answered and they just missed it.
5 And if we review the transcripts, and we all have
6 been sitting through the proceedings, if it's
7 something that can be addressed in closing
8 statements then it would be helpful to both the
9 juror as well as to all the parties in this
10 proceeding. I mean I know I need to remind the
11 Court or everyone here that this is a death
12 penalty case and we're asking them to make one of
13 the most important decisions they will make in
14 their lives.

15 THE COURT: Yeah. How -- I mean how would
16 you propose that I would instruct them that we're
17 going to allow them to ask a question? I have no
18 problem instructing them that it's been brought to
19 my attention that they may want to ask questions
20 and for the rest of the witnesses that are
21 presented I'll ask them at the end of the witness'
22 testimony, you know, do you have any questions,
23 but for the witnesses that have already been
24 excused I'm not even sure how to pose the question
25 to them that would be appropriate.

1 MR. CALIEL: Frankly, Judge, it's
2 inappropriate for the jurors to be communicating
3 with the Court and the parties in regards to the
4 questions. It's our job to answer the questions.
5 If they remain unanswered, they're unanswered.
6 It's different when there's a witness on the
7 witness stand. If they have a follow-up question
8 to what the witness said courts have allowed, and
9 it is appropriate, when the courts deem it, to
10 allow the jurors to ask a question of the witness,
11 but they should not be allowed to say, hey,
12 Ms. Schlax, Mr. Caliel, I have a question, can you
13 clarify this for me. That's not the purpose of
14 that procedure and that is inappropriate.

15 THE COURT: I agree. I just am not sure,
16 other than just to tell them that it's been
17 brought to my attention and that all the other
18 witnesses have been excused. I'll be happy to ask
19 them at the end of each remaining witness'
20 testimony if they have any questions and the
21 procedure is if they do they have to write them
22 down, we have to excuse them and review them and
23 determine whether or not it's a question that can
24 be answered. Okay. That part I am okay with.
25 And I suppose they'll let us know if that wasn't

1 -- you know, all I know --

2 What did they say exactly? Just are we
3 allowed to ask questions?

4 BAILIFF: Yes, ma'am.

5 THE COURT: They didn't specify anything like
6 that?

7 BAILIFF: No, they didn't specify any
8 particular witness or anything. They just said
9 are they allowed to ask questions.

10 THE COURT: I think I can answer that and
11 say, yes, they are, of any witness that's
12 remaining. And I'll find out at the end of each
13 witness' testimony if they have anything.

14 MS. SCHLAX: Well, Your Honor, we haven't --
15 we haven't rested our case. This was the first
16 opportunity, you know, because it was a break,
17 that the juror indicated that they had a question
18 and so we're assuming, it may be a wrong
19 assumption, that it involved the last witness that
20 was on the stand. Maybe it was the one prior or
21 maybe it was something last week. We don't know.
22 I think probably in an abundance of caution we
23 should attempt to determine what that question was
24 and let them know that there is a procedure for
25 them to ask questions in the future. But we

1 haven't rested our case. If it was something that
2 we could easily correct or the transcript itself
3 speaks to it and we can comment on it in some way,
4 and it may very well be that the State will want
5 to employ the same procedure, depending on what
6 the question is.

7 MR. CALIEL: Questioning of the jury is
8 allowed of the witnesses and not of the parties.
9 It's the parties' job to present their case.

10 THE COURT: I agree with that. I think what
11 Ms. Schlax might be saying, and I don't want to
12 put words in her mouth, is at the very least for
13 the record we need to find out what the question
14 is, whether we answer it or not. It may be that
15 there is no question. It may be that the question
16 is can we ask questions. And I can answer that.
17 If that's the question, we're good to go. If that
18 doesn't address whatever that question meant, can
19 we ask questions, then I'll ask the juror to write
20 it down and we'll look at it and at least it'll be
21 part of the record. I think we do need to make it
22 part of the record, if it's not, in fact, just are
23 we allowed to ask questions. So --

24 MS. SCHLAX: I agree, Your Honor.

25 THE COURT: And I agree they can't be asking

1 the State or the defense to be bringing witnesses
2 back or presenting new testimony or anything like
3 that. It could be something that could be
4 answered from the record or the transcript. It
5 could be something in one of the exhibits and they
6 just easily could have missed it with these two
7 witnesses who were very knowledgeable in their
8 field, but because of that were very quick at
9 presenting their testimony and it was a little
10 difficult sometimes maybe for a lay person to
11 follow. I don't know. So I think we just need to
12 find out what it is. And I can find that out by
13 just saying I'm told that someone inquired are you
14 allowed to ask questions. You're allowed to ask
15 questions. We can do that of each remaining
16 witness. Does that answer your inquiry? If they
17 say yes, we're done. If they say no, I'll ask
18 them to write the question down, excuse them and
19 we'll look at it.

20 MS. SCHLAX: Yes, Your Honor.

21 THE COURT: Okay. Okay. Are you ready?

22 MR. CALIEL: Yes, ma'am.

23 BAILIFF: Are you ready, Judge?

24 THE COURT: We're ready.

25 BAILIFF: The jury's entering the courtroom.

1 (Jury present.)

2 THE COURT: You may be seated.

3 Thank you, ladies and gentlemen. I hope you
4 enjoyed your lunch break.

5 Were each of you able to follow my instructions
6 that you're not allowed to receive any information
7 about this case outside of the courtroom?

8 (Affirmative response from jurors.)

9 THE COURT: Was there anyone who was unable
10 to follow that instruction?

11 (No response from jurors.)

12 THE COURT: I don't see any hands raised.
13 For the record, no one was able or unable to
14 follow my instruction.

15 Secondly, I'd like to ask, it was indicated to
16 me that perhaps one of you had asked are you able to
17 ask questions. If one of you did ask that, I can
18 answer it by saying that it is possible for a juror
19 to ask a question regarding a witness' testimony, if
20 the witness is still here and available at the end
21 of their testimony. The way that's done is you can
22 write the question down, or you would have to write
23 the question down, present it to the Court, you
24 would be excused from the courtroom while the Court
25 and the attorneys for both sides review the question

1 to determine if it was, in fact, an appropriate
2 question to be answered, and then we would bring you
3 back and let you know whether or not the witness
4 could be asked that question. And if they could be
5 asked that question, we would ask that question for
6 you. Does that answer your question as to whether
7 or not you can ask questions?

8 JUROR: Yes.

9 THE COURT: Does everyone agree that answers
10 the question?

11 (Affirmative response from jurors.)

12 THE COURT: Okay. Anything further?

13 MS. SCHLAX: No, Your Honor.

14 THE COURT: Anything further?

15 MR. CALIEL: Nothing from the State, Your
16 Honor.

17 THE COURT: Okay. Thank you so much.

18 And you may call your next witness.

19 MS. SCHLAX: Thank you, Your Honor. The
20 defense would call Mr. James Aiken.

21 (Witness present.)

22 THE COURT: Good afternoon, Mr. Aiken.

23 THE WITNESS: Good afternoon, Your Honor.

24 THE COURT: You've got a great voice. We'll
25 be able to hear you.

1 Madam Clerk will swear you in.

2 (Witness sworn.)

3 THE WITNESS: So help me God.

4 THE COURT: Thank you, sir. If you'll please
5 have a seat over here.

6 THE WITNESS: Very well, Your Honor.

7 THE COURT: Thank you.

8 MS. SCHLAX: May it please the Court.

9 THE COURT: Yes.

10 JAMES AIKEN,

11 was called as a witness on behalf of the Defense,

12 and after being duly sworn, then testified as follows:

13 DIRECT EXAMINATION

14 BY MS. SCHLAX:

15 Q Good afternoon, sir.

16 A Good afternoon.

17 Q Can you please introduce yourself to the
18 Court.

19 A My name is James Evans Aiken, A-i-k-e-n.

20 Q And, Mr. Aiken, if you can tell us of your
21 professional experience within the prison system.

22 A Well, I'll be as succinct as I can. I started
23 in corrections about 45 years ago at the Manning
24 Correctional Institution in the position of a substance
25 abuse counselor in 1971.

1 This was a medium security prison that housed
2 youthful offenders and, of course, inmates that were
3 somewhat disruptive, to say the least. From there I
4 was promoted to administrative assistant to the warden
5 of that same facility. From there I was promoted to
6 the rank of deputy warden of that facility.

7 I was over classifications, security,
8 management of inmate population, disciplinary, all
9 aspects of the security system.

10 From there I became deputy warden at the State
11 Penitentiary in South Carolina. This was a maximum --
12 or maximum security facility that housed the most
13 dangerous predator inmate population in the South
14 Carolina Correctional System.

15 In fact, we took inmates from jails that were
16 in adjudicated status and moved them into this
17 particular prison when they could not be adequately
18 managed in the jail system.

19 From there I became warden of the Women's
20 Correctional Center in South Carolina. At that
21 particular time that institution was undergoing some
22 difficulties in relationship to the safety and staff,
23 of staff and inmates, as well as constitutional issues
24 and sound correctional practice.

25 So I was sent to that prison to so call put

1 the toothpaste back in the tube, to stabilize that
2 prison, not only as it relates to the protection of
3 staff, inmates and the public, but also to protect the
4 taxpayers' pocketbook. You have to look at the most
5 efficient way of operating correctional facilities.

6 From there I was sent back to the state
7 penitentiary as a warden, the chief executive officer
8 of the prison I just shared with you.

9 Also at that prison we managed their full
10 population as well as the mentally ill population that
11 were adjudicated in the civil system, and really
12 patients for the state hospital but they needed maximum
13 security settings, or should we call enveloping, and
14 they were housed also in that facility.

15 In that position I was required to carry out
16 executions --

17 MS. WHEELER-SANCHEZ: Objection, Your Honor.
18 Relevance.

19 THE COURT: I'm not sure where we're going
20 with this.

21 MS. SCHLAX: Your Honor, we're just
22 establishing his credentials at this point.

23 THE COURT: Well, I'm not sure what that last
24 statement has to do with his credentials.

25 MS. SCHLAX: Let me ask the following

1 question.

2 THE COURT: Okay.

3 BY MS. SCHLAX:

4 Q Have you attended executions in Florida?

5 A Yes, I have.

6 THE COURT: All right.

7 BY MS. SCHLAX:

8 Q Is it fair to say, sir, that you've been in
9 the prison system as an administrator for over four
10 decades?

11 A Yes, I've been involved with that also. Not
12 only in the State of South Carolina, I was commissioner
13 for corrections in the State of Indiana, commissioner
14 for corrections over the U.S. Virgin Islands as well as
15 a consultant and expert for the U.S. Justice
16 Department, National Institute of Corrections, where we
17 taught wardens how to be wardens, how to be wardens of
18 super-maximum security prisons. And that was at ADX,
19 the most secure prison in the world. As well as
20 classification, emergency response, managing various
21 aspects to include security threats, et cetera.

22 And also I was appointed as a member of the
23 Prison Rape Elimination Commission.

24 MS. WHEELER-SANCHEZ: Objection, Your Honor.

25 Relevance.

1 THE COURT: Can you all approach side-bar
2 with Madam Court Reporter?

3 MS. SCHLAX: Certainly.

4 (Counsel for the State and defense approached
5 the bench for a side-bar out of the hearing of the
6 jury, where the following proceedings were had:)

7 THE COURT: I'm not sure where we're headed.
8 I don't know what the purpose of him being here is
9 so it's hard for me to respond to the objections.

10 MS. SCHLAX: The purpose of -- the purpose of
11 his --

12 THE COURT: Testimony.

13 MS. SCHLAX: -- testimony is going to be that
14 he has -- he's a classifications specialist and he
15 has studied all the many times Donald Smith has
16 been in prison and that he's amenable to general
17 population. Now, he's going to go on to explain
18 that he will be a severe security risk because of
19 -- because of, you know, the fact of his age, his
20 vulnerability due to that and the nature of the
21 offenses.

22 MS. WHEELER-SANCHEZ: Your Honor, the State's
23 response would be that the witness' experience on
24 a prison rape commission has no bearing to any
25 mitigating factor in this case, and furthermore

1 this witness' testimony as to whether or not he's
2 observed executions or been to death row would
3 also be irrelevant to any mitigation as to this
4 defendant's character, record, life or the
5 circumstances of the offense.

6 MS. SCHLAX: And, Your Honor, again,
7 mitigation can be anything in regards to the
8 defendant's background, which would include all of
9 the times he's been in prison.

10 THE COURT: I think it can include that. I
11 don't have any problem with that. But I don't see
12 what his service on a rape commission or death
13 penalty -- or death chamber has to do with whether
14 or not this defendant would be a candidate to be
15 in the general population.

16 MS. SCHLAX: And, Your Honor, again, I'm just
17 establishing his credentials. I'm not going to
18 ask him about what he witnessed on death row. But
19 I'm, you know, I'm anticipating -- he is mostly
20 from South Carolina, I'm anticipating some
21 cross-examination of what your familiarity is with
22 Florida and so that's why I'm establishing what
23 his familiarity is with Florida. He's been to
24 many Florida institutions, has consulted in
25 regards to different wardens, and I'm just trying

1 to establish his credentials.

2 THE COURT: Okay. I'll allow it to a limited
3 degree. I mean I think if the goal later in his
4 testimony is to establish Mr. Smith's
5 appropriateness, and even what might his life be
6 like, I don't know. I don't know where you're
7 going with this. But in prison the general
8 population, stay a little light on things that
9 don't relate to that.

10 Like him being on a rape commission has no
11 bearing on whether or not he would be a person for
12 the general population. His having served in
13 death row in any capacity has no relevance, that I
14 can see from what you've told me, as to whether or
15 not Mr. Smith would be an appropriate candidate if
16 -- for the general population, even if he was
17 somewhat of a risk because of age and et cetera.
18 I can see him getting into all that.

19 So I would just ask that you establish his
20 credentials by staying more on the track of what
21 he's going to testify about. He's not going to
22 testify about rape. He's not going to testify
23 about the death penalty.

24 MS. SCHLAX: Well, he is going to testify
25 about rape.

1 THE COURT: Hum?

2 MS. SCHLAX: He will end up testifying about
3 rape.

4 MR. CALIEL: How is that relevant?

5 MS. SCHLAX: It's a management concern and
6 that's why it would be his opinion that he'd have
7 to be in protective custody. So I think his
8 experience in regards to all of those things is
9 relevant as he gives an opinion.

10 MR. CALIEL: Judge, I don't see how it's
11 relevant how, if he's sentenced to life, how DOC
12 classifies him, how he's incarcerated is relevant.
13 If they want to introduce I've looked at Mr.
14 Smith, I've looked at his record while he was
15 incarcerated, I don't think he poses a risk to
16 inmates or others, I think they're allowed to do
17 that. To make it seem like if he's in the general
18 population he's going to be raped, shanked or
19 stabbed or he has a risk of harm, that's
20 inappropriate. It doesn't apply to the
21 defendant's character.

22 THE COURT: I'm going to excuse the jury.

23 MR. CALIEL: Yes, Your Honor. Thank you.

24 (Thus the side-bar conference ended.)

25 THE COURT: Ladies and gentlemen, if you'd

1 step into the jury room for a few minutes. This
2 is going to take a little longer than I thought.
3 Thank you.

4 (Jury absent.)

5 THE COURT: All right. We were beginning to
6 have argument at side-bar regarding -- I think the
7 last statement was --

8 Does he need to leave while we have this
9 argument?

10 MS. SCHLAX: I don't believe so, Your Honor.

11 THE COURT: Hum?

12 MS. SCHLAX: I don't believe so.

13 MR. CALIEL: No.

14 THE COURT: Okay. But we mentioned another
15 area which was what -- what the anticipated
16 testimony might be. So it's two different things.
17 One is this gentleman, Mr. Aiken, has given us
18 his credentials, his background, what he's done,
19 how he ends up being here to testify about prisons
20 or anything about prisons because of his work
21 history, correct?

22 MS. SCHLAX: Yes, Your Honor.

23 THE COURT: Is that correct? And that was
24 the original objection, that he was talking about
25 things that didn't seem to indicate that they

1 would have anything to do with whether or not he
2 could talk about prisons. Like being on outside
3 commissions and things like that. I'll just put
4 it generally.

5 But then we got into the possibility or the
6 probability that the last thing he stated was
7 something along the lines of that he was a member
8 of a prison rape commission, is that correct, or
9 prevention commission?

10 THE WITNESS: That was correct, Your Honor.
11 I was appointed by the leadership of the senate,
12 the United States Congress, for the Prison Rape
13 Elimination Act that was passed unanimously by
14 congress under George Bush.

15 THE COURT: The Prison Rape Elimination Act,
16 correct?

17 THE WITNESS: That is correct, Your Honor.

18 THE COURT: And that's what the State
19 objected to, correct?

20 MR. CALIEL: Yes, Your Honor.

21 THE COURT: Okay. And then it became clear
22 to the Court that one of the reasons that that
23 perhaps from the defense prospective might be
24 relevant is because this gentleman may, in fact,
25 be talking about what happens in a prison setting,

1 including prison rapes, is that correct?

2 MS. SCHLAX: Yes, Your Honor.

3 THE COURT: So I excused the jury so we could
4 have argument about this prior to the jury -- it's
5 almost like a proffer, if you will.

6 MS. SCHLAX: Your Honor, I'll be happy to do
7 one of two ways. The State of Florida elected not
8 to depose Mr. Aiken, although he was listed on
9 December 5th. I'll be happy to proffer the entire
10 testimony and then the Court can decide and just
11 have to hear it again.

12 MR. CALIEL: Judge, we don't need to proffer
13 the entire testimony. If Mr. Aiken's testimony is
14 that he, based upon his experience and his
15 expertise, believes that Mr. Smith does not pose a
16 risk in general population to other inmates or
17 guard staff, I think that goes to Mr. Smith's
18 character. I think he can even generally say
19 based upon the charges that Mr. Smith has been
20 charged with and his age that perhaps he may have
21 to be placed in protective custody.

22 I think talking specifically about inmates
23 are raped, inmates are stabbed, sex offenders are
24 targeted, beat, killed, whatever it may be, has no
25 relevance to mitigation in this case and can only

1 possibly inflame the passions that either a juror
2 may think that that's too harsh and he ought to be
3 executed or I'd rather have him be raped and
4 stabbed in prison than executed by the State of
5 Florida, let's send him there. That's not
6 appropriate mitigation.

7 So if they want to talk about he's amenable
8 to incarceration and discuss how he would need to
9 be incarcerated, based upon the general nature of
10 the charge and his age, the State has no objection
11 to that. But bringing before the Court the fact
12 that potentially Mr. Smith could be stabbed,
13 raped, murdered in the general population because
14 of his offenses is inappropriate mitigation
15 testimony.

16 THE COURT: Okay. So I think -- I'll put
17 words in Mr. Caliel's mouth, if you will, we don't
18 need to proffer all of this gentleman's testimony,
19 just the testimony that would relate to anything
20 other than in general he's appropriate for a life
21 sentence for being placed in prison, that in
22 general, not with any specifics, because of his
23 age -- that's a specific, but because of his age
24 --

25 MS. SCHLAX: Well, and Mr. Aiken has spent a

1 tremendous amount of time reviewing the prior
2 incarceration records, specifically of Mr. Smith,
3 so that opinion is not based solely on Mr. Aiken's
4 vast knowledge of the system, but it's also based
5 on his personal review of the records.

6 THE COURT: Go ahead and proffer anything
7 that you feel like the State is objecting to. I
8 think it's pretty clear what they're objecting to.
9 In other words, I don't think you have to go back
10 and proffer his credentials. We can start with
11 what he reviewed and where you want to go with
12 that.

13 MS. SCHLAX: Okay.

14 EXAMINATION ON PROFFER

15 BY MS. SCHLAX:

16 Q Mr. Aiken, I'm going to fast-forward. If you
17 can, is there an informal hierarchy within the prison
18 system?

19 A Yes, it's an informal hierarchy. Within those
20 that's commonly called the convict code. It's informal
21 morays and rules and regulations that inmates follow
22 and it's been in existence for at least 45 years that I
23 know of.

24 Q And how would you -- how would you describe
25 any concerns specifically as it relates to Mr. Smith,

1 understanding that he has been convicted of capital
2 sexual battery and the murder of an eight year old
3 child?

4 A He -- his vulnerability level is very high.

5 Q Why is that?

6 A And the reason why is because of his age, the
7 nature of the offense, and his sexual criminal
8 activity, prior convictions, et cetera. He is a crime
9 target, so to speak, to be in protective custody and
10 have additional security enveloping due to the fact of
11 those factors alone, and there may be other factors,
12 but those are the driving factors, so to speak, in
13 classification and placement in a security setting for
14 Mr. Smith.

15 Q And specifically in regards to
16 classification, why would it be necessary to put him in
17 a specific security envelope in your consideration?

18 A Because his vulnerability is very high due to
19 the fact of the factors I just shared with you and as a
20 result thereof we have to separate him from the rest of
21 the population.

22 Q And how would you accomplish that?

23 A Individual cell. We would put him in a
24 specialized location with the appropriate level of
25 security, sight and sound supervision, as well as

1 reduce or eliminate his interactions with other
2 inmates.

3 Q And if you can help us understand, why would
4 that be necessary?

5 A It would be necessary due to the fact that
6 inmates, as you talked about a few moments ago, the
7 informal organization, they frown, and that's a very
8 light word, to individuals with his type of criminal
9 background.

10 And whether that person is a member of the
11 Aryan Brotherhood or the Gangster Black Disciples is
12 immaterial. They all hate inmates with this type of
13 record.

14 Q And when you say words like hate, what are
15 you getting at? Why would you physically have to try
16 to remove him from that population?

17 A It's common because in a number of
18 jurisdictions it's KOS, kill on sight, don't confuse me
19 with any mitigation, don't confuse me with any facts,
20 this is a child killer and therefore you are at the
21 lowest level of the hierarchy within a prison system
22 and people will take you out just on that general...

23 MS. SCHLAX: Your Honor, that's all.

24 MR. CALIEL: Your Honor, I think that's
25 exactly what the State is objecting to. It's not

1 relevant to mitigation. He can't predict the
2 future, but it has nothing to do with this
3 defendant. The fact that this defendant is at
4 risk for what he did is not mitigation to this
5 defendant and it does not lessen or prove his
6 character as to why he shouldn't be in general
7 population.

8 If that's the case, then the argument should
9 be we'll put him on death row then and then he
10 doesn't need to have it. That's inappropriate.
11 It doesn't go to this defendant's character, the
12 risk that he poses to himself, based on what he
13 chose to do, by other inmates in the prison
14 system, what the other inmates are going to do has
15 nothing to do with his character.

16 If they want to talk to Mr. Aiken about what
17 he has done in the past and that he's not a
18 security risk and he poses no risk to anybody
19 else, that's his character. He's amenable to life
20 incarceration versus the death penalty. If he had
21 stabbed multiple inmates, I'm sure we would
22 probably be arguing that as aggravation that he's
23 not amenable to life in prison.

24 But it's all about what his character is and
25 not what the others within the system would be

1 doing to him. That is not mitigation.

2 THE COURT: Any response?

3 MS. SCHLAX: And, Your Honor, I will cite the
4 actual -- the actual statements we tell the
5 jurors, which is any fact that they deem is
6 mitigation is mitigation. Anything -- and they
7 specify, and I'll actually even pull out the
8 actual instruction that we're going to give to the
9 jurors. A mitigating circumstance is not limited
10 to the facts surrounding the crime. It can be
11 anything in the life of the defendant which might
12 indicate that the death penalty is not appropriate
13 for the defendant.

14 In other words, a mitigating circumstance may
15 include any aspect of the defendant's character,
16 background or life or any circumstance of the
17 offense that reasonably may indicate that the
18 death penalty is not an appropriate sentence in
19 this case.

20 And I would suggest to the Court it's the
21 defense position that any factor that they deem
22 mitigating is mitigation.

23 THE COURT: Well, I'm looking at the same
24 thing, the instructions I read the jury. The same
25 instruction will be given them at the end of the

1 closing arguments, but it's the same thing they
2 were read at the beginning of the penalty phase.
3 And I'll repeat it, even though you just repeated
4 it. A mitigating circumstance is not limited to
5 the facts surrounding the crime. That's true.
6 It's not limited to the facts surrounding the
7 crime. In fact, we've heard an awful lot of
8 testimony already that had nothing to do with the
9 facts surrounding the crime. It can be anything
10 in the life of the defendant which might indicate
11 that the death penalty is not appropriate for the
12 defendant. Nothing about this testimony so far
13 has anything to do with the life of the defendant.

14 Now, his prior criminal record has something
15 to do with the life of the defendant, but what
16 might happen in his life after we leave here,
17 whenever it is when we leave here, is not even on
18 the table yet. We don't -- we don't know. So
19 it's not -- what he's testified to so far is not
20 yet anything in the life of the defendant, other
21 than I suppose he can certainly testify that he
22 reviewed his record and he has all these prior
23 incarcerations and what the crimes were for.

24 In other words, a mitigating circumstance may
25 include any aspect of the defendant's character.

1 What might happen to him in the general
2 population, I can see nothing to do with his
3 character.

4 His background, it definitely has nothing to
5 do with his background. His background is what it
6 is, but what results from that is not even on the
7 table yet. We don't know. We can guess, we can
8 presume, we could do all sorts of things, but it
9 doesn't exist yet.

10 Or any circumstance of the offense that
11 reasonably may indicate that the death penalty is
12 not appropriate. None of this has anything to do
13 with whether or not the death penalty is
14 appropriate. What it has to do with is whether or
15 not, even though a life sentence, it will be
16 argued, is appropriate for this gentleman, a life
17 sentence means something different because it
18 means he'll have to have more protection because
19 of those things, but it doesn't indicate that the
20 death penalty is not an appropriate sentence. It
21 merely indicates that while life might be
22 appropriate, his life in prison sentence would be
23 served differently than the majority of the other
24 inmates, although there would be some others in
25 similar circumstances, the envelope of protection

1 I think was the way it was worded.

2 I don't see how it's relevant to mitigation
3 at all. But I think I'd like to take a short
4 recess and I'll certainly review it and see if I
5 come up with anything. And if either of you have
6 any case law or anything you'd like to present in
7 some kind of prior case that would show that this
8 type of evidence is appropriate in a penalty phase
9 -- now it might be appropriate maybe, I'm not
10 saying it would be, it could be appropriate maybe
11 in a Spencer Hearing where it would be argued to
12 the Judge, look, there's this, you know, this is
13 what we couldn't present to the jury, but this is
14 important for the Judge to know, for the
15 sentencing person to know.

16 MS. SCHLAX: Your Honor, respectfully, by the
17 Court saying that to me you're conceding my
18 argument. They're the fact finders now, Your
19 Honor. They're the ones that --

20 THE COURT: They're the fact finders, I
21 agree, but he's still entitled -- if they were to
22 determine that death was the appropriate sentence
23 Mr. Smith would still be entitled to a Spencer
24 Hearing.

25 MS. SCHLAX: I understand that.

1 THE COURT: So he's still entitled to a
2 Spencer Hearing. There is still a role for the
3 Judge outside of what the jury finds. So I would
4 assume that if there was anything to present at a
5 Spencer Hearing it would be facts and the Judge
6 would be hearing facts that the jury did not hear.
7 But I don't know that. We've never done that here
8 before and we're all treading on new ground.

9 But I think the best thing to do is take a
10 15-minute recess, you all look for anything you
11 want to look for to present to me, but my initial
12 thought is that this testimony from this
13 gentleman, while a lot of it may be very important
14 for the jury to hear, anything about what kind of
15 protection he would have to receive if he were
16 given a life sentence, to me is not mitigating.
17 It's not what the statute or the instructions are
18 asking the jury to look at. So...

19 MR. CALIEL: Your Honor, we have a case
20 Ms. Wheeler-Sanchez has pulled. The cite is
21 Truehill v. State, cited at 211 So. 3d 930. It's
22 a 2017 case. And if the Court reviews starting
23 with headnote 32, it specifically addresses this
24 type of mitigation. What Truehill stands for is
25 exactly what we argued.

1 MS. SCHLAX: Your Honor, may I ask for a
2 copy?

3 MR. CALIEL: Yes.

4 THE COURT: Let me do this. You can finish
5 your statement, but then I think we need to take a
6 break. The defense needs an opportunity to review
7 this. I need an opportunity to review it.

8 MR. CALIEL: Absolutely. And just what the
9 premise is is talking about how the defendant
10 would be peaceful within the prison setting is
11 mitigation and is relevant. Talking about future
12 escapes or future harm that may come to the
13 defendant or whether he poses a risk later on,
14 speculative matters, are not. And Truehill speaks
15 to those matters.

16 THE COURT: Okay. Do you have a copy of it?

17 MS. SCHLAX: I just got it through e-mail.

18 MS. WHEELER-SANCHEZ: Your Honor, I just
19 e-mailed it and I know I have another copy. I'm
20 looking for it right now.

21 THE COURT: We'll take a 15-minute recess.

22 Thank you.

23 (Recess.)

24 (Jury absent.)

25 (Defendant present.)

1 THE COURT: Are you ready to go back on the
2 record?

3 MR. CALIEL: Yes.

4 MS. SCHLAX: Your Honor, I've had an
5 opportunity to look at the case law provided by
6 the defense and I understand the Court's ruling.

7 THE COURT: Okay. I'm not sure I ruled. I
8 said what I thought I was going to do, but we've
9 all reviewed the case of Truehill,
10 T-r-u-e-h-i-l-l, versus State. It's a Supreme
11 Court of Florida case in 2017 cited at 211 So. 3d
12 930. Particularly on page 21 of my printout it's
13 headnote 32. This was a post-conviction but the
14 complaint by the defendant in that case was the
15 trial court had excluded some testimony regarding
16 the likelihood or lack of likelihood that the
17 defendant in that case would be able to escape
18 from prison if he were given a life sentence. I'm
19 just quoting now the trial court granted the
20 State's motion in limine reasoning that the
21 likelihood of escape is not a character aspect of
22 the defendant and is different from mitigation
23 that focuses on whether the defendant, in that
24 case, is a peaceful person who can behave
25 appropriately in prison, which was what part of

1 the argument was, I assume, in that case. And it
2 goes on to talk about -- at page 954 in the cite,
3 citing other cases where testimony was proffered
4 or presented, but not allowed, regarding the fact
5 that a life sentence for first degree murder with
6 a minimum mandatory sentence of 25 years in one
7 case, that that was not relevant to the
8 defendant's character, record or circumstances of
9 the crime.

10 So I -- another case talked about parole,
11 whether or not the defendant would be likely to be
12 paroled. We don't have that issue anymore and
13 certainly not on this case. It would be life
14 without parole if the jury determined that death
15 was inappropriate, but several times the Supreme
16 Court has addressed it and found that items like
17 that regarding prison, what might happen if a
18 person was sentenced to life in prison, really had
19 nothing to do with the defendant's life, character
20 or background, and I find the same with this, that
21 what might happen to him in prison or how he might
22 have to be surrounded by a security envelope is
23 not relevant to mitigation so I'm not going to
24 allow that.

25 Back to the State's first objection, which

1 was to Mr. Aiken going over his credentials, I
2 will allow him to state his credentials, they are
3 part of his credentials, so the fact that he was
4 on the -- let me find it.

5 MS. SCHLAX: It's the National Rape
6 Elimination Act.

7 THE COURT: Yes, the fact that he was
8 involved in that is part of his qualifications.
9 As long as he doesn't get into anything about how
10 that has anything to do with Mr. Smith that's
11 fine. So I'll allow him to answer that and I
12 think that's where we are. Okay?

13 And your objection is noted for the record.

14 MS. SCHLAX: Thank you, Your Honor.

15 THE COURT: Okay.

16 MS. SCHLAX: We're ready to proceed.

17 THE COURT: All right.

18 THE WITNESS: Your Honor, may I make sure
19 that I understand your instructions?

20 THE COURT: Well, she's not going to ask you
21 the question.

22 THE WITNESS: Okay. That's good enough then.

23 THE COURT: You're going to continue with
24 your credentials, which include what you were on
25 when you were stopped, which is the act from

1 congress that you were asked to assist with. And
2 keep going on that and then Ms. Schlax will ask
3 you appropriate questions, which will not lead to
4 what would happen to him or what kind of security
5 he would have to have.

6 THE WITNESS: Very well, Your Honor.

7 THE COURT: Okay. Thank you.

8 You can bring the jury in.

9 BAILIFF: Two in the restroom.

10 THE COURT: Okay. They're not quite ready
11 for us.

12 BAILIFF: Are you ready, Judge?

13 THE COURT: We're ready.

14 BAILIFF: The jury is entering the courtroom.
15 (Jury present.)

16 THE COURT: Thank you, ladies and gentlemen.
17 You may be seated.

18 Ms. Schlax, you may continue.

19 MS. SCHLAX: Thank you, Your Honor.

20 FURTHER DIRECT EXAMINATION

21 BY MS. SCHLAX:

22 Q Mr. Aiken, I think we kind of left off with
23 the fact that you've been an administrator of prisons
24 for over 40 years.

25 A Yes, I've been involved with the correctional

1 systems for over 45 -- for over 45 years.

2 Q And is that just in South Carolina or have
3 you also been involved in other jurisdictions?

4 A I was Commissioner for Corrections, juvenile
5 and adult, for the State of Indiana as well as the
6 director of corrections for the United States Virgin
7 Islands, as well as providing technical assistance to
8 jurisdictions throughout the United States through the
9 U.S. Department of Justice, National Institute of
10 Corrections, teaching wardens how to be wardens,
11 teaching wardens how to be wardens of super-maximum
12 security prisons, classifications in which I classified
13 thousands and thousands of inmates, as well as to
14 assist in developing classification systems within the
15 population, as well as other issues such as
16 disturbance, control, riot control, hostage situations,
17 use of force, et cetera.

18 Q Did that also serve as an appointment on the
19 National Rape Elimination Act Commission?

20 A Yes, I was appointed by the leadership of the
21 senate, if I'm not mistaken. This was a unanimous
22 bill, believe it or not, that passed through congress
23 under George Bush for the Prison Rape Elimination Act
24 or Commission to develop national standards that were
25 published under President Obama. And it's throughout

1 the United States now in state and federal as well as
2 local jurisdictions.

3 Q And, sir, have you previously been qualified
4 as an expert in the areas of prison security and
5 classification?

6 A That is correct. Both federal and state
7 courts.

8 Q How many different states, sir?

9 A I'm just guessing, and most of these dealt
10 with -- what I mean dealt means the state as well as
11 federal, at least 23, 24 jurisdictions.

12 Q And does that also include Florida?

13 A That is correct, both state and federal as
14 well as the Queen's Bench in Canada.

15 MS. SCHLAX: Your Honor, at this time I would
16 seek to tender Mr. James Aiken as an expert in
17 prison security and classification.

18 MS. WHEELER-SANCHEZ: The State has no
19 questions, Your Honor.

20 THE COURT: All right. He will be entitled
21 to testify in that regard.

22 THE WITNESS: Thank you, Your Honor.

23 BY MS. SCHLAX:

24 Q And, Mr. Aiken, were you asked by myself to
25 review items concerning Donald Smith?

1 A That is correct.

2 Q And what did you -- excuse me -- what did you
3 review, sir?

4 A I reviewed criminal history, I reviewed some
5 psychological history from an operation perspective. I
6 reviewed some of the socialization processes that he's
7 been involved in.

8 Q Okay. And after a thorough review of those
9 records, in terms of you had mentioned one of the
10 important aspects of your positions over these last 40
11 years has been what you call classification.

12 A That is correct.

13 Q And have you formed an opinion in regards to
14 the classification of Donald Smith based on his prior
15 behavior?

16 A That is correct.

17 Q And what is that, sir?

18 A He would be housed in a very high security
19 setting. Use of the nomenclature would be maximum
20 security or close security environments.

21 Q Based on your review of his prior
22 incarceration records, does he pose any kind of a risk
23 to other inmates or to correctional staff?

24 A At the very lowest held probability of being a
25 threat to staff as well as other inmates.

1 Q And why is that, sir? What factors do you
2 assess when you're rendering that expert opinion?

3 A Obviously I looked at his previous
4 incarceration history and I looked at his age, which is
5 very important, that the older an inmate is the more
6 vulnerable inmate becomes within the security setting,
7 and less of a probability of him being involved with
8 random violence.

9 MS. WHEELER-SANCHEZ: Objection.

10 THE COURT: I think we're okay. He's going
11 to move on.

12 BY MS. SCHLAX:

13 Q And, sir, in regards to his past records,
14 this jury has been informed Mr. Smith has spent a
15 tremendous amount of time in prison.

16 A That is correct, yes.

17 Q Was there anything within his records that
18 showed in an institutionalized setting, both in the
19 Civil Commitment Center as well as the Department of
20 Corrections Prison System, that caused you concern in
21 terms of Mr. Smith's ability to be peaceful within that
22 institutional setting?

23 A In evaluating his prison record in prison
24 environment, the answer is no. You have to look at the
25 records from a prison context, yes.

1 Q And, sir, you are familiar with the Florida
2 Department of Corrections System?

3 A That is correct. I also assisted the State of
4 Florida through the Justice Department in the
5 development of their internal classification system
6 some years ago and I've also had the privilege of being
7 in a number of their facilities.

8 Q And you understand that although years ago
9 there was a parole option for those sentenced to life
10 in prison, that is no longer the case in the State of
11 Florida?

12 A As I understand it, yes. Not only in Florida,
13 but a number of other jurisdictions.

14 Q Thank you, sir.

15 MS. SCHLAX: I don't have any further
16 questions.

17 THE COURT: Any cross-examination?

18 MS. WHEELER-SANCHEZ: No, Your Honor.

19 THE COURT: All right. May this witness be
20 excused?

21 MS. SCHLAX: Yes, Your Honor.

22 THE COURT: All right. Thank you, sir. We
23 appreciate your time this afternoon.

24 THE WITNESS: Your Honor, thank you so much.
25 Have a good day now.

1 THE COURT: Thank you.

2 MS. SCHLAX: And, Your Honor, at this time
3 the defense would call Dr. Brooke Butler.

4 THE COURT: Dr. Butler.

5 (Witness present.)

6 (Witness sworn.)

7 THE WITNESS: I do.

8 THE COURT: Thank you, Dr. Butler. If you'll
9 have a seat in the witness chair, please.

10 THE WITNESS: Thank you.

11 MS. SCHLAX: If it may please the Court.

12 BROOKE BUTLER,

13 was called as a witness on behalf of the Defense,
14 and after being duly sworn, then testified as follows:

15 DIRECT EXAMINATION

16 BY MS. SCHLAX:

17 Q Good afternoon.

18 A Good afternoon.

19 Q Can you please introduce yourself to the
20 jury.

21 A My name is Dr. Brooke Butler.

22 Q And, Dr. Butler, you have been a part of the
23 defense team in regards to Donald Smith?

24 A Yes, I have.

25 Q When did you first become involved in this

1 case?

2 A I first became involved in this case
3 approximately October of 2014.

4 Q And your official title is mitigation
5 specialist.

6 A Correct.

7 Q Okay. If you wouldn't mind, walk us through
8 your personal educational background.

9 A I received my Ph.D. in legal psychology with a
10 minor program in social psychology from Florida
11 International University in 2000. Prior to that I
12 received my Master's Degree in Psychology from the
13 University of North Florida. It was a research case
14 program and that was in 1997. And then prior to that
15 in 1994 I received my Bachelor's Degree in Psychology
16 with a minor program in criminology from the University
17 of North Florida.

18 Q Okay. And so are you a licensed
19 psychologist?

20 A I'm not. The State of Florida only licenses
21 three different types of psychologists and that --
22 those types are clinical, counseling and educational
23 psychologists because those types of psychologists see
24 patients and I don't. I see clients. I don't treat or
25 diagnose mental illness and so as a result I'm not

1 licensed. There's no such thing in my field and so I'm
2 not licensed. If I could be I would be, if there was
3 such a thing in my field, but I'm not.

4 Q Okay. Is it fair to say your professional
5 experience is doing research?

6 A Correct. My background has strongly been in
7 research and the interception of psychology and the law
8 from a social psychological perspective.

9 Q Okay. And where do you currently work?

10 A I currently own a private practice in
11 Sarasota, Florida, and have done so since 2011.

12 Q And prior to owning your practice, what other
13 professional positions did you hold?

14 A Prior to holding my -- or owning my practice,
15 which focuses in the areas of psycho legal research,
16 mitigation and mitigation consulting, I worked in the
17 same capacity from I believe it was 2009 to 2011 for
18 the Office of the Public Defender, 12th Judicial
19 Circuit, and then prior to that I worked in the same
20 capacity as an independent contractor in both Sarasota
21 and Miami.

22 Q Have you held academic positions?

23 A Yes, I have.

24 Q And can you explain briefly those?

25 A Yes. I've held academic positions that are

1 both tenure track as well non-tenure track positions.
2 The New College of Florida, University of South
3 Florida, Sarasota, Florida International University and
4 the University of North Florida.

5 I was also on the institutional research
6 board, or the IRB, which is a group of both faculty and
7 non-faculty members that serve to protect the rights of
8 participants who take part in research conducted by the
9 faculty and staff -- for the faculty and the college.

10 Q All right. And have you published any
11 articles?

12 A Yes, I have.

13 Q And approximately how many cases have you
14 been appointed to or retained in or consulted on?

15 A I have been appointed to, retained in or
16 consulted on well over one hundred cases in the course
17 of my career.

18 Q And do the vast majority of those include
19 death penalty?

20 A Yes, the majority have been capital cases.

21 Q And have you previously given expert
22 testimony in court?

23 A Yes, I have.

24 Q Okay. If you can explain for the jurors what
25 the role of a mitigation specialist is.

1 A A mitigation specialist is a member of the
2 defense team that is responsible for researching the
3 biological, psychological, social psychological and
4 sociological factors that can impact the way that a
5 client perceives the world, the way that a client used
6 choices, as well as the way that a client makes
7 decisions.

8 This is done not only by interviewing the
9 client, but by gathering records or documents as well
10 as by conducting what we call collateral or
11 corroborative interviews. And so what we do is we
12 don't just take our client's word for it or the
13 defendant's word for it. We seek to corroborate the
14 information that we gather in meeting with the client.

15 Q And specifically are you also a social
16 historian?

17 A Yes.

18 Q And explain what that is, what we're asking
19 you to do today.

20 A Yes. A social historian is a person that can
21 also be a mitigation specialist and what they do is
22 they take the information that the mitigation
23 specialist, who very well might be the same person, has
24 gathered and they synthesize or they basically put it
25 together in order to create or narrate a client's life

1 story or life history in order to see how they got to
2 this particular point in time, from the former to the
3 present, and the point in doing so is to provide an
4 explanation, or multiple explanations, for their
5 behavior.

6 It's never to provide excuses, it's never to
7 provide justification. It's just to see why they've
8 made -- how they view the world, how they filter the
9 world through their personality, how situations have
10 impacted their personality, and vice-versa, and why
11 they behaved the way that they behaved.

12 Q In this particular case did you spend a
13 tremendous amount of time with Mr. Donald Smith?

14 A Yes, I did.

15 Q And can you estimate how many times you met
16 with him over the course of your three and a half years
17 working on this case?

18 A I met with him approximately -- I believe I
19 counted over one hundred hours with him.

20 Q And did you also interview others?

21 A Yes, I did.

22 Q How many other people did you interview in
23 regards to this case?

24 A I interviewed -- goodness. I have the list
25 here. We interviewed and then attempted to interview,

1 I would say at least 50 people. There was -- not all
2 mitigation research is the same in the sense that
3 sometimes with -- with a client who moves around a lot
4 it can be difficult to locate witnesses. Sometimes
5 with a client who's older, which is the case with
6 Mr. Smith, or Don is what I call him or people who know
7 him call him. It's difficult to locate witnesses due
8 to passage of time.

9 Some people, for example, much of his family
10 has passed away or suffered from illnesses that impact
11 their memory, like his father has Alzheimer's disease.
12 Some people have -- just simply can't be located. So
13 it can impact mitigation research. It's not, you know,
14 it's not for lack of trying, but it simply does impact
15 the mitigation research. But we certainly attempted to
16 locate any person that he -- any name that he gave us
17 we attempted to locate and interview in order to
18 corroborate the information that he gave us as well as
19 information that other people gave us.

20 Q And, Dr. Butler, obviously having spent so
21 much time with Mr. Smith, let me just ask you
22 point-blank. Did he ever deny to you that he was not
23 guilty of what happened to Cherish Perrywinkle?

24 A No. He always admitted that he was fully
25 responsible for his actions and took complete

1 responsibility for these crimes.

2 Q Did you -- did you ever try to get details
3 from him in terms of what -- what had occurred?

4 A No. We never talked about anything in great
5 detail because his guilt was never an issue.

6 As a mitigation specialist in a death penalty
7 case sometimes it seems a little strange that someone
8 could plead not guilty and get a mitigation specialist
9 who's focussing on the penalty phase of the offense
10 that's appointed very early in the case, but my role
11 was always to focus on this phase and so his guilt was
12 uncontroverted. We knew that he was never going to
13 contest whether or not he was guilty, and as a result I
14 left the -- the details of the offense and his
15 discussion of the details of the offense to other
16 experts who did discuss them in various degrees of
17 detail.

18 Q What types of records did you review during
19 your specific work on this case?

20 A I reviewed -- he sent us records releases to
21 over 40 facilities. We were able to obtain records for
22 approximately 26. Some had gone out of business, some
23 no longer had his records because of record retention
24 schedules in which people -- in which facilities shred
25 them after ten or seven years. And so in those -- in

1 the records that we were able to obtain, we did obtain
2 a lot of psychological and psychiatric records, some
3 medical records. We were able to obtain incarceration
4 records from both the Department of Corrections as well
5 as the Duval County Jail. We were able to obtain
6 records from the State of Florida, the Department of
7 Children and Families Services, which is where he was
8 committed as a -- a sexually violent predator at one
9 particular point in time years ago. HRS, which is what
10 the -- what DCF or the Department of Children and
11 Families Services used to be called. We were able to
12 obtain additional educational records and -- and
13 basically a -- basically a wide variety of records, as
14 many records as I could get I attempted to locate. If
15 he told me he went to a particular place or worked in a
16 particular place I tried to get those records.

17 Q Okay. And the people that you were able to
18 interview, what kinds of interviews did you conduct
19 with them?

20 A I did my best to conduct in-person interviews.
21 Those people tend to be more forthright when they are
22 -- when you sit down with them in person and usually at
23 their homes and in terms of the types of people that I
24 interviewed, I interviewed Don's family, the people who
25 are left of his family.

1 I did travel to Georgia to meet with his
2 biological father. I did meet with a half-sister whom
3 he had never met and who had never met him. I did
4 speak with his son. I interviewed childhood friends,
5 friends that he had had as an adult.

6 I also interviewed former mental health
7 practitioners who had treated him at a particular point
8 in time. And -- and people who had -- acquaintances,
9 people who had known him, former neighbors as well.

10 Q And based on all of these interviews and
11 gathering of records, were you able to kind of
12 construct several timelines regarding Mr. Smith's life?

13 A Yes.

14 Q Okay. If you can tell us about where and
15 when Don was born.

16 A Don was born in --

17 MR. CALIEL: Your Honor, I would object.

18 It's inappropriate to refer to the defendant by
19 Don. If they want to call him Mr. Smith that's --

20 THE COURT: We'll call him Mr. Smith.

21 THE WITNESS: Mr. -- Mr. Smith.

22 Mr. Smith was born on September 4th, 1956 in
23 Atlanta, Georgia, at Piedmont Hospital. He was a
24 premature baby. We know this by his -- his
25 mother's account and his birth certificate

1 indicated that he weighed six pounds and two
2 ounces at birth.

3 BY MS. SCHLAX:

4 Q How old was Mr. Smith's mother when she gave
5 berth to Mr. Smith?

6 A His mother, whose name was at that time
7 Patricia Crumbly, was 17 years old when she gave birth
8 to Don -- to Mr. Smith.

9 Q And -- and Mr. Smith's biological father,
10 what was his name?

11 A His name was Bobby James Gazaway.

12 Q And based on your interviews with his
13 biological mother, Patricia, she now goes by the name
14 of Patricia Moore, correct?

15 A Yes, she does.

16 Q So for either purpose I'm going to refer to
17 her as Ms. Moore.

18 A Sure.

19 Q Mr. Smith's mother, Ms. Moore. What were
20 some of the circumstances surrounding Mr. Smith's
21 birth?

22 A Well, Mr. Smith's biological father, Bobby, or
23 Mr. Gazaway, was 18 years old and so they were
24 teenagers and teenage sweethearts. The birth or the
25 conception was unplanned and as a result Patricia did

1 not receive the best prenatal care because she knew
2 that her parents back in the 1950s would not have
3 approved of a -- an unwed pregnancy, a surprise
4 pregnancy.

5 Her parents were named Beta and Donald Crumbly
6 and she had one sister. And her mother was described
7 by various people as, quote/unquote, cold, did not like
8 people.

9 Her father was a little more laid-back and a
10 little more interactive, but either way they were very
11 image conscious and they did not like the idea. She
12 knew they would not approve of the situation that she
13 had gotten herself in.

14 When she could no longer conceal the
15 pregnancy, she did reveal to her parents that she was
16 pregnant and they were extremely angry. They weren't
17 just angry that she was pregnant, but they were angry
18 that the father was, in fact, Mr. Gazaway, who they
19 viewed as a man who was really from the wrong side of
20 the tracks. They said a lot more derogatory terms or
21 they called him a lot more derogatory names and they
22 basically said that he wasn't good enough for their
23 daughter and that he certainly wasn't good enough for
24 their family. He --

25 Q Let me stop you for a moment.

1 A Sure.

2 Q Based on all these interviews, it's been
3 suggested that Ms. Moore's family was affluent.

4 A That is not the case in terms of the
5 beginnings. They worked, I believe in a cotton mill,
6 and so in terms of Mr. and Ms. Crumbly, her parents,
7 they were not affluent at all. They came, you know,
8 very humble beginnings. They would -- they wanted
9 people to believe that they had more than they actually
10 did. They perhaps tried to live beyond their means,
11 but they weren't wealthy at all. Appearances were very
12 important to them and so they were not -- they were not
13 affluent, but I do think that they pressured their
14 children to -- to perhaps break out a cycle of poverty.

15 And so when they found out that Patricia was
16 with Bobby, who had dropped out of high school, and it
17 was rumored, I have any idea how true this is, that his
18 father made moonshine --

19 MR. CALIEL: Your Honor, if I may object.

20 It's supposed to be about the defendant. We
21 haven't gotten there yet. If we could get to the
22 point.

23 THE COURT: Well, I'll ask Ms. Schlax --

24 MR. CALIEL: Objection as to relevance, Your
25 Honor.

1 THE COURT: Okay. Do you want to rephrase
2 the question to her? But also rumors I don't
3 think are anything that we can present to the
4 jury.

5 MS. SCHLAX: No, I apologize.

6 THE COURT: Thank you.

7 BY MS. SCHLAX:

8 Q Why is it -- why is it important in
9 understanding Donald Smith to relay Patricia Moore's
10 beginnings and the beginning of Mr. Smith's life? Why
11 is it important?

12 A Because it's how he was raised for the first
13 few years of his life, which were formative.

14 Q And what was that?

15 A It was very conflicted because her parents
16 forced them to -- they did get married and her parents
17 were very angry with them, said that if they continued
18 to be married they would force -- they basically
19 wouldn't speak to her again, particularly her mother,
20 and so they -- I don't know if you want to say forced,
21 but strongly coerced her to divorce the man that she by
22 all accounts loved.

23 And so she moved back in with her parents,
24 gave birth to Mr. Smith, and she lived with her parents
25 while Mr. Smith was -- for the first few years of his

1 life.

2 And she wanted to give up Mr. Smith for
3 adoption because she was a single mother. By that time
4 she had divorced Mr. Gazaway and she knew she didn't
5 have the means to support a son. And her parents got
6 wind of that and said, no, we'll adopt him, and she
7 knew how she had been raised and said, no, I don't want
8 to do that so I'm going to -- I'm going to raise him.

9 In terms of the environment that Mr. Smith
10 grew up in with her parents, it was abusive,
11 emotionally devoid of affection.

12 Q And, Dr. Butler, you've mentioned that
13 wherever you can you try to corroborate.

14 A Yes.

15 Q What kind of corroboration were you able to
16 develop in regards to that opinion, if you will, that
17 it was an abusive relationship?

18 A I spoke with Patricia, Mr. Smith's mother, and
19 over the course of a period of time we developed a
20 relationship to where she felt more comfortable in
21 disclosing this information. She is a woman who tends
22 to minimize problems and will say things along the
23 lines of her mother didn't like people and then in a
24 second -- in a second breath will say that her mother
25 ripped -- grabbed her son so hard that she ripped the

1 buttons off of his shirt or his overalls.

2 Q And talking about Mr. Smith?

3 A Mr. Smith, yes. Yes, her son. And so she'd
4 make one statement and then when you asked her for
5 examples you realized there might be a little
6 something, you know, something more significant
7 underneath. And that has been something I see. That
8 has been a little bit consistent with her, contrary to
9 exaggeration, she does tend to minimize.

10 Q These decisions between the parents and the
11 family, did -- did that affect whether Mr. Smith ever
12 had a relationship with his biological father?

13 A It did. It did. He did not know that he had
14 a biological father by the name of Bobby Gazaway until
15 he was nine years old.

16 To compound the confusion, I guess you could
17 say, Patricia called her father, whose name is Donald,
18 which I -- it's reasonable to presume that Mr. Smith
19 was named after him. She called her father Daddy Don.
20 And so for a period of time he thought her father,
21 which was his grandfather, was his father. And so it
22 was a confusing family situation.

23 Later on, and this is really fast-forwarding,
24 when he was nine years old and he had acquired a
25 step-father, he was just kind of looking through his --

1 his mother's jewelry box and he found a baby bracelet
2 that said Gazaway and he asked what it was and she said
3 -- at that point she told him that he had a biological
4 father and his name was Bobby James Gazaway.

5 Q Did Mr. Smith ever have a relationship with
6 Bobby Gazaway?

7 A He never had a relationship with Bobby
8 Gazaway. He met him for the first and only time when
9 he was 49 years old. And that was upon Mr. Smith's
10 instigation when he reached out to his father who lives
11 in a very rural section of Georgia, which is where I --
12 I visited that area, and they went and met for the
13 first time.

14 And the meeting didn't go as planned. It was
15 very awkward, as you might imagine. The biological
16 father, who had two other children that he knew of,
17 with whom he had kept in contact for a period of time.
18 One of Mr. Smith's half-siblings is -- they don't know
19 the whereabouts of now.

20 And Mr. Gazaway was just kind of apathetic
21 about the meeting and Mr. Smith was devastated that he
22 waited this long and the meeting had not gone very
23 well.

24 Q In regards to Ms. Moore, did your research
25 cause you to realize that she -- she did remarry?

1 A Yes, she did. Several times.

2 Q Okay. And what did those marriages, what
3 kind of impact did it have on the childhood of
4 Mr. Smith?

5 A It -- it created a sense of instability, it
6 created a sense of -- a real imbalance, I guess you
7 could say. The first time she remarried was when
8 Mr. Smith was approximately three years old.

9 And he has reported several times, without
10 hesitation, that his first memory was being taken from
11 his grandparents' home and kind of grasping at the --
12 at the door frames, trying to stay there, even though
13 his -- it was a less than ideal environment, his -- his
14 grandparents liked to show him off but were not exactly
15 affectionate, loving, caring parents, if you will.
16 They weren't prepared to be parents so they, you know,
17 they weren't -- weren't ideal in terms of caretakers.
18 But he described it as a very sudden situation because
19 he was left at home with them quite frequently.

20 And Patricia found a man named Clifton Smith,
21 married him and suddenly took him away from his
22 grandparents' home. And it was destabilizing and he
23 did love his grandfather very much and he suddenly had
24 a new home, a new father.

25 Mr. Smith, Clifton Smith, who did eventually

1 end up adopting Mr. Smith, Mr. Donald Smith, he was a
2 wealthy man, by all accounts. He was a Liberty
3 Insurance salesperson and did provide very much
4 financially, but emotionally it was an entirely
5 different story.

6 Q And ultimately were both Mr. Smith as well as
7 his mother open about that?

8 A Yes.

9 Q In terms of the effect that it had on
10 Mr. Smith.

11 A Yes. Yes.

12 Q Did Mr. Smith experience any other type of
13 abuse as a child?

14 A He did. He experienced from Mr. -- from
15 Clifton B. Smith he experienced a lot of verbal abuse.
16 Physical abuse.

17 Clifton Smith, for whatever reason, was very
18 jealous of the bond that he and his mother had, that
19 Mr. Donald Smith and his mother had, and would do
20 things like, if they were on vacation, one time he
21 locked him out of the hotel room and wouldn't let him
22 back in no matter how much he pounded on the door.

23 He would -- he didn't want his -- Mr. Donald
24 Smith to be comforted by his mother and so he would
25 push him out -- you know, he would remove him from the

1 bed or push him away and say, get out, go away, and he
2 was subjected to a lot of volatility in that
3 relationship.

4 Mr. Clifton Smith was obsessed with violence
5 on TV, war movies. He often marched around the house
6 as if he was a soldier himself and looked at himself in
7 the mirror. And it terrified Don -- excuse me --
8 Mr. Smith. And he didn't know how to take it. Looking
9 back at it now, Mr. Donald Smith, who just kind of
10 calls him that he was a strange bird, but back then he
11 -- it was certainly unsettling.

12 Mr. Clifton Smith also said things that were
13 sexually inappropriate to Mr. Donald Smith. He would
14 call him sexually inappropriate names. He would grab
15 at Mr. Donald Smith's buttocks and he would -- he would
16 do things like that.

17 Additionally, there was significant confusion
18 which can be considered abuse regarding boundaries and
19 mental illness. His grandmother at times would --
20 would tell him, grab him by the shoulders, shake him
21 and say that she wanted him to kill her if she ever
22 lost her mind. And he didn't understand it. He had no
23 idea what it meant. But, again, it's -- it's not
24 something you say to someone who's -- who's so young,
25 or really any child, for that matter, whatsoever.

1 Q Did Mr. -- I apologize.

2 A No, please.

3 Q Did Mr. Smith's childhood involve moving in
4 several different places?

5 A It did. Mr. Clifton Smith, as a salesperson,
6 his job involved moving from many different states and
7 as a result he was in, I believe it was -- let's see.
8 I believe there was Ohio, there was Richmond, there
9 were, you know, many different states that they moved
10 to and as a result Don -- excuse me -- Mr. Smith was
11 always the new kid in -- in school and as a result he
12 was often bullied when he was very young. And even
13 though he always felt very different and always felt
14 very alienated and had a hard time making human
15 connections with people, it made it worse when he was
16 the new kid and it made it worse when he would be
17 uprooted again to the northeast and he would not have
18 any friends.

19 And so he would resort to trying to mimic
20 others people's behavior to try to fit in. Didn't
21 really work. And oftentimes, sometimes he would even
22 resort to paying the kids to play with their toys,
23 which might have worked in the short run, but it didn't
24 make him fit in. And, you know, the kids would be
25 happy to take his money, but it didn't get him friends.

1 Q Did Ms. Moore end up remarrying again a third
2 time to Mr. Marvin Moore?

3 A Yes, she did.

4 Q And did that -- did that call for them living
5 in Jacksonville, Florida?

6 A Yes. She divorced Mr. -- Mr. Clifton Smith
7 very suddenly. And part of it was due to the way that
8 he treated her and part of it was due to the way that
9 she had treated -- that he had treated Mr. Donald
10 Smith.

11 And she noticed that -- that Mr. Donald Smith
12 had become -- had started wetting the bed or kept
13 wetting the bed long past the age of potty training, he
14 stopped eating, was super anxious and she knew that
15 clearly the situation wasn't great, but she ultimately
16 left because he was quite unkind to her. I know she
17 cited irreconcilable differences and that's her way of
18 minimizing the situation she was in. It certainly was
19 irreconcilable differences.

20 She did divorce him, I believe after seven
21 years of marriage, and they did move down to the
22 Jacksonville area and she married Dr. Marlin Moore, a
23 local, very prominent psychiatrist, just a few years
24 later.

25 Q And did Dr. Marlin Moore, the marriage to

1 him, did that impact Don's access to drugs?

2 A Oh, yes, very much so.

3 Q What did your investigation reveal?

4 A Dr. Moore was a psychiatrist. He had a home
5 practice and as a result he had wide access to
6 medications in his -- in his practice. And Mr. Smith
7 began to access those medications. He used -- he began
8 to kind of dabble in those medications. And if -- if
9 it was noticed by Dr. Moore or Patricia Moore at that
10 time, who Dr. Moore insisted that his wife and his --
11 and his son both call him Dr. Moore, not dad, not
12 Marlin, but they both had to call him Dr. Moore. If it
13 was noticed, they didn't say anything.

14 Additionally, Mr. Smith was sexually molested
15 at -- by two neighborhood boys and after the
16 molestation and him witnessing them molesting several
17 girls, his need to access the medications, for whatever
18 reason, increased.

19 And so this is something that -- this is
20 something that took -- took part -- that he took part
21 in and he did not receive any kind of counseling for.

22 Q As a teenager did Mr. Smith begin to, in
23 addition to the pharmaceuticals that he had access to
24 through Dr. Moore, did he begin to experiment with
25 alcohol, cigarettes, marijuana, LSD, PCP?

1 A Yes, he did. And he -- he experimented with
2 all of those, including MDA, Mescaline, Peyote,
3 Quaaludes and then cocaine. And -- and I know that
4 when he was on -- I believe when he was on PCP it kind
5 of caused him to dissociate or kind of split from
6 himself or lose periods of time.

7 Of course, it could be drug-related, and I'm
8 certainly not an expert on drugs so I can just leave it
9 at that, but he would often find himself kind of losing
10 periods of time. I don't recall what period of time.
11 And he would find himself kind of splitting from
12 himself and sometimes it was drug-related, sometimes it
13 might have been long-term effect, I really don't know,
14 but it was just something that he would do.

15 Q How did you substantiate his drug problem?

16 A I interviewed lay witnesses -- excuse me --
17 eight of whom corroborated, independently corroborated,
18 seeing him on drugs, witnessing the difference between
19 his -- the way he acted on drugs versus not.

20 Certainly his legal records, he has numerous
21 arrests for drug possession. His mental records, his
22 admissions to specifically I believe it was Shands
23 Hospital where he had been admitted for cocaine
24 poisoning specifically and the -- the side-effects that
25 can come from that.

1 Specifically there were -- there's a pulmonary
2 embolism that came when he began shooting up cocaine,
3 as well as heart issues that came from doing too much
4 cocaine and the chest pains and the issues that came
5 with that. The -- some of the incarceration records as
6 well.

7 And so there were a wide variety of sources.
8 And, of course, Mr. Smith was very open about the fact
9 that he had been experimenting with a wide variety of
10 drugs, but crack was something that he -- that he
11 became very addicted to and he -- it really impacted
12 him.

13 Q Through your investigation of talking to
14 other people as well as Mr. Smith himself, did
15 Mr. Smith literally have another name that he was --
16 that he went by in terms of a nickname to reflect this
17 cocaine use?

18 A Yes.

19 Q And what was that name?

20 A That name was "Veessie" (phonetically).

21 Q And did you speak to several people who
22 corroborate that he had this -- this different side of
23 him that was "Cocaine Veessie"?

24 A Right. Right. That people said that there
25 was -- they called him Don and then there was "Veessie".

1 And there was a big difference between the person who
2 was sober and the person who was on crack.

3 And on crack, specifically right around the
4 time of the incidences, the offenses, the crimes for
5 which he's been convicted, he was described as shaking,
6 paranoid, manic, disappeared for days on binges, and --
7 and -- and that he was just -- he was -- that he was
8 very much a different person and it was very clear that
9 he was high and would discuss wanting very much to get
10 treatment and not knowing how he could get off this
11 drug that really had a hold on him.

12 Q In fact, had substance abuse negatively
13 impacted his life?

14 A Oh, it's been profound, yes. Very much so.

15 Q Starting -- starting how long did it start
16 impacting his life?

17 A Starting from middle school I would say. I
18 know that we have a -- a sixth grade report card and --
19 at which time he was -- he was using, at which time he
20 was experimenting, and the teachers were commenting
21 that he didn't, you know, he wasn't putting forth an
22 effort, he seemed unmotivated, he was not performing
23 well, that he was reasonably intelligent, but they were
24 really scratching their heads as to what was going on
25 and -- and Mr. Smith had told me at that time that he,

1 you know, that he had already started experimenting
2 with alcohol, drugs, cigarettes, marijuana, those types
3 of things.

4 And then when he was raped in -- while
5 incarcerated, I know things escalated quite quickly and
6 then things would escalate again.

7 It's my understanding that when he -- his --
8 his first step-father, Mr. Smith, Mr. Clifford Smith,
9 passed away he did leave Mr. Donald Smith an
10 inheritance. That was, I would say approximately a
11 hundred thousand dollars, maybe more, maybe less, but
12 approximately. And he blew all of that in a matter of
13 weeks on crack, that he stayed up for days on end
14 without sleep, without eating, and just did -- was on a
15 crack binge for weeks and weeks and weeks and just blew
16 it all.

17 Q Where did Mr. Smith spend his 17th birthday?

18 A He spent his birthday -- I believe it was 16th
19 birthday, but I'd have to double-check. He spent it in
20 the Duval County Jail. He had been arrested for auto
21 theft.

22 Q So he started criminal behavior very quickly?

23 A He did.

24 Q When you -- when you look at -- at
25 Mr. Smith's life, beginning at age 17, how many arrests

1 had he had?

2 A He has had, I believe, in checking my notes, I
3 believe he's had in the State of Florida 28 arrests for
4 62 charges and in the State of Georgia he had one
5 arrest for three charges, specifically burglary, drugs
6 and theft by taking, and that was in the State of
7 Georgia and that was in 1975.

8 Q Did Ms. Moore recognize that Mr. Smith had a
9 drug problem?

10 A Early on, no. No. She was very much in
11 denial about that. She basically thought that he -- it
12 was a problem due to adolescence. Her focus, when
13 Mr. Smith was a child, was very much on keeping her
14 husbands happy and very much keeping her -- her social
15 status high. She -- she loved her son, she continues
16 to love her son in the best way that she knows how.
17 But growing up the way she grew up and the emphasis
18 that was placed on appearances, her focus was on
19 keeping her husbands happy and -- and she also tends to
20 minimize and she tends to -- I believe one statement
21 was that she tends to look forward, she doesn't look
22 back, and -- and she doesn't like to talk about things
23 that are negative, she doesn't like to talk about
24 things that are problematic, and so as a result
25 Mr. Smith didn't get treatment for his -- his drug

1 addiction. She wanted him to basically to pray his
2 addiction away and for some people that absolutely
3 works. He did, he prayed hard, and he went to -- he
4 has certificates for many, many Bible classes that he
5 took, but for him he needed more than that. And --

6 Q Would you say she actually enabled the
7 addiction?

8 A Yes, she did. She, in spite of the fact that
9 she didn't quite acknowledge it, she would give him
10 money to pay off drug dealers and actually drive him to
11 the areas where the drug dealers lived and would pay --
12 would help pay them off. And she would allow them to
13 come to her home. This is corroborated by someone who
14 lived at the home at the time. And -- and so the
15 transactions could take place, I guess you could say,
16 and so -- and again she -- it was hard for her to admit
17 that it was an addiction, per se. She viewed it more
18 -- viewed more of it as a not accepting God into his
19 life as opposed to a disease that he did have.

20 Q Through your -- your research and interviews,
21 besides incarceration, whether it be civil commitment
22 or jail or prison, did Mr. Smith have an address
23 different from his mother's?

24 A No, not unless it was -- not that I saw,
25 unless it was a court-ordered half-way house or

1 something like that. I don't recall seeing one.

2 Q So every time -- and this jury has received
3 evidence previously of prison sentences. Every time
4 he'd get out of jail or prison he would just come home
5 and live with his mother?

6 A Correct. He did -- when he was 15 he
7 was kicked out by Dr. Moore and so he lived on
8 the streets for a period of time because -- and
9 Dr. Moore kicked him out because he would not cut his
10 hair and so he lived on the street.

11 He did live with his grandparents for a brief
12 period of time when he was a teenager, but other than
13 that I didn't see anything -- any other address other
14 than his -- his mother's house or something that was
15 court ordered or a facility that -- that was, you know,
16 that had some degree of confinement.

17 Q Did Mr. Smith, in your investigation, kind of
18 give you a history of psychological difficulties,
19 depression?

20 A Yes.

21 Q And did you, in fact, create a timeline of
22 all the different records that you accumulated?

23 A Yes, I did.

24 Q If you can, did Mr. Smith ever attempt to
25 commit suicide?

1 A He did.

2 Q And what were the circumstances of that?

3 A The first attempt that I am aware of was a car
4 accident that he had on Orange Picker Road where he
5 drove his car off the road, I believe it was in 1980,
6 he did not seek medical treatment because he was trying
7 to kill himself. That was the first attempt that I was
8 aware of.

9 The second attempt I was aware of is when he
10 was in the Department of Corrections, and then the
11 third attempt that I was aware of is when he had a
12 relationship with someone who was HIV-positive -- who
13 he knew was HIV-positive and it was a long-term
14 relationship.

15 Q And was that at the Arcadia Civil Commitment
16 Center?

17 A Yes.

18 Q And that was, in fact, a male?

19 A Yes, it was a male.

20 Q Within the prison setting?

21 A Yes.

22 Q You have made yourself familiar with all of
23 the psychological reports that are completed by the
24 State of Florida over a 40-year period, is that
25 correct?

1 A Correct.

2 Q So you are aware that he was designated as a
3 mentally -- mentally disordered sex offender when he
4 was just a mere 20 years old?

5 A Correct.

6 Q And in 1999 he was designated as a sexually
7 violent predator?

8 A Yes.

9 Q And I guess my question to you, Dr. Butler,
10 is for four decades, essentially, from 20 years old to
11 where we sit at now, were you able to find evidence of
12 any of the normal milestones adults mark their lives
13 with?

14 A He -- he had a son, but I mean which having a
15 child can be a marker for some, and did get briefly
16 married, but even -- that was in prison and whatnot and
17 he explained it later, but other than that in terms of
18 graduating high school or finishing college or --

19 Q Getting a job?

20 A -- you know, renting an apartment or owning a
21 house or --

22 Q Going on vacation?

23 A Going on vacation.

24 Q Saving up for a new car?

25 A No.

1 Q Buying a new couch.

2 A No. It's -- it's very much like the -- the
3 records have indicated which was, you know, a very,
4 unfortunately, a very self-fulfilling prophecy in terms
5 of the inadequacy and immaturity and, you know,
6 everything that he thought about himself at age 20
7 came, you know, came true.

8 Q Dr. Butler, I'd like you to refer to your
9 screen.

10 And for the record this is State's Exhibit O
11 for identification, demonstrative exhibit only.

12 THE COURT: Is it State's Exhibit or Defense
13 Exhibit?

14 MS. SCHLAX: Excuse me. Defense Exhibit.

15 BY MS. SCHLAX:

16 Q And this is a composite exhibit. This
17 photograph that we're looking at, what is this a
18 photograph of?

19 A This is a photograph of Mr. Smith's mother,
20 Patricia Moore, and Mr. Smith when he was a baby.

21 Q And who is this?

22 A This is a picture of Mr. Smith's biological
23 father, Bobby James Gazaway.

24 Q And this is the father that he never knew?

25 A Correct. That was the father that he met for

1 the first time when he was 49.

2 This is a picture of Mr. Smith when he was
3 maybe about three or four years old, I think.

4 This is a picture in 19 -- 1960 so he would
5 have been about six years old, and this was -- that was
6 taken with his maternal grandmother, Vera Crumbly, and
7 that was at the wedding to Clifford Smith, his mother's
8 wedding.

9 That's a picture of him, Mr. Smith, and his
10 grandfather, Donald Crumbly.

11 This is a picture of Mr. Smith just a little
12 bit older with his maternal grandparents, Donald and
13 Vera Crumbly.

14 This is a picture when he was, say,
15 approximately eight years old. That's Mr. Smith.

16 This is a picture when he was -- when
17 Mr. Smith was approximately ten years old. A school
18 picture.

19 Q And the educational records that you
20 received, when did Mr. Smith drop out of school?

21 A He dropped out of school in approximately the
22 tenth grade and subsequently earned a GED and went to a
23 technical or trade school and completed approximately a
24 year and a half of that.

25 This is a picture of Mr. Clifford Smith, his

1 second -- his first step-father.

2 And this is a picture of Dr. Moore, Dr. Marlin
3 Moore.

4 Q Which would have been?

5 A His second step-father.

6 This is a picture of Mr. Smith as a teenager
7 with a rabbit, I believe.

8 This is a picture shortly before he dropped
9 out of school in the ninth grade and Mr. Smith is
10 circled.

11 This is a picture of Mr. Smith and his date at
12 a high school dance.

13 Q Okay. And ask you -- ask you, number one,
14 where did you get these photograph?

15 A I got these photographs from his mother,
16 Ms. Moore, Patricia Moore.

17 Q After this high school dance, were you able
18 to get any photographs of Mr. Smith living life?

19 A As -- no. Not -- not -- I was not able to.

20 And this is his third step-father who married
21 Ms. Moore while Mr. Smith was incarcerated. So he was
22 not -- he never got to know Mr. -- Mr. Johnston.

23 Q And Mr. Johnston is deceased at this point?

24 A No, Mr. Johnston is alive.

25 Q Are these the only adult photos you could

1 get?

2 A These were pretty much the only adult photos
3 that I could find.

4 Q And there are many more, are there not?

5 A Oh, yes, there are many more.

6 Q But this, in fact, shows the progression of
7 how Mr. Smith looked in life?

8 A Correct.

9 Q Does Mr. Smith's family have a history of
10 mental illness?

11 A Yes, they do.

12 Q And how about in terms of addiction?

13 A Yes. Both sides do. Regarding his mother's
14 side of the family, Mr. Smith's maternal aunt and
15 maternal great-aunt suffered from depression.

16 Regarding Mr. Smith's father's side of the
17 family, his biological father was emotionally unstable,
18 reported to have dramatic mood swings. People in the
19 family described him as, quote-unquote, crazy.
20 Additionally, his paternal aunt was known as -- was --
21 is regarded as intellectually disabled.

22 And then as far as addiction, addiction is
23 present in Mr. Smith's mother's side of the family.
24 Her maternal counsel and great-uncle were heavily
25 disease with alcoholism.

1 Addiction is present on his father's side of
2 the family in that his paternal uncle also was an
3 alcoholic.

4 Q And does his family have a history of
5 violence?

6 A Yes, they -- yes, they do.

7 Q Specifically on the biological father's side
8 of the family?

9 A Yes. His -- Mr. Smith's paternal uncle
10 murdered his paternal grandfather. And that was
11 corroborated by not only numerous family members, but
12 there was actually a newspaper article that I was able
13 to find that corroborated that incident. It was by
14 shooting. And according to the newspaper article, as
15 well as family members, they were able to -- to discern
16 that it was due to basically retaliation for abuse that
17 the son said that he couldn't take it anymore and he
18 shot his biological father.

19 Q What is the current status of Mr. Smith's
20 family?

21 A Mr. Smith's grandparents on both sides have
22 passed away. His biological father, Bobby Gazaway, is
23 probably suffering from Alzheimer's disease. His
24 biological mother, Patricia Moore, now is suffering
25 from breast cancer and undergoing treatment. He does

1 speak with her regularly and does support her and she
2 supports him.

3 He has a son and has been the best parent that
4 he could be given his life experiences being
5 incarcerated for as long as he has.

6 He never met his half-brother so -- and his
7 whereabouts are unknown. And he also never met his
8 half-sister so it's difficult to call them family when
9 they never met.

10 Q What is the status of Mr. Smith's current
11 physical health?

12 A He -- at the time of the offenses he was 56.
13 He's now 61. His eyesight and hearing are not -- are
14 experiencing some age-related changes.

15 Medical records indicate -- have indicated
16 that he's been diagnosed with chronic obstructive
17 pulmonary disease, or COPD, heart disease. He's been
18 diagnosed with endocarditis or inflammation of the sac
19 surrounding the heart as well as Hepatitis B and C. He
20 also has suffered several pulmonary embolisms due to
21 his -- his drug use. Due to his decades of crack use
22 his teeth were in great disrepair and as a result they
23 have been removed. The jail prohibits him from wearing
24 dentures. And then as previously discussed by other
25 experts, he is suffering from significant mental

1 damage.

2 Q Through the course of your investigation, was
3 it determined that he had literally been out of custody
4 from the Duval County Jail less than one month before
5 he killed Cherish Perrywinkle?

6 A Yes.

7 Q During that time period did he seek any kind
8 of help?

9 A Yes. He sought help originally from Shands
10 Hospital and they, in turn, put forth, I think it's
11 called a medical certificate, for a Baker Act and he
12 was transferred to a -- a mental health center.

13 In the records from Shands he was open about
14 the fact that he was a sex offender. In the records
15 from Shands he also said that he had an urge to, I
16 believe it was quote/unquote, intensely hurt someone.

17 I think -- I believe it was on June 9th, if
18 I'm not mistaken, he was taken to Shands on June 8th,
19 and then on June 9th is when he was transferred to the
20 Mental Health Center. And -- and they -- he was kept
21 at the Mental Health Center for not very long and I
22 believe told to read a pamphlet, their pamphlet.

23 Q What has Mr. Smith's behavior been since he's
24 been incarcerated?

25 A Since he's been incarcerated -- or I should

1 add that he has spent most of his life incarcerated.
2 He has been -- he has, in essence, an excellent
3 disciplinary record in terms of in the Duval County
4 Jail as well as in the Department of Corrections. He's
5 not been a physical threat to guards, he's not been a
6 physical threat to other inmates, and that in regard to
7 the Department of Corrections that was certainly when
8 he was a younger man and much stronger. Now he's much
9 older and much more -- in much more poor health, I
10 guess you could say, so he -- he would certainly be
11 prey as opposed to predator.

12 Q In the hundred hours that you have spent with
13 him, Dr. Butler, has he ever been disrespectful to you?

14 A No, he has not.

15 Q Thank you.

16 MS. SCHLAX: I don't have any further
17 questions, Your Honor.

18 THE COURT: All right. Any
19 cross-examination?

20 MR. CALIEL: Yes, Your Honor. Thank you.

21 CROSS-EXAMINATION

22 BY MR. CALIEL:

23 Q Good afternoon, Dr. Butler.

24 A Good afternoon.

25 Q Now, Doctor, your area of expertise is a

1 mitigation specialist, correct?

2 A That's one of my areas, yes.

3 Q Okay. And specifically in this case a
4 mitigation specialist is to compile information that
5 can be presented to the jury to potentially mitigate or
6 suggest a punishment other than death is appropriate,
7 correct?

8 A Correct.

9 Q And in addition to that you have experience
10 as a jury consultant and you actually joined us during
11 the course of the jury selection, correct?

12 A Correct.

13 Q And you've published on those articles, many
14 of the articles that you published, are, in fact,
15 articles on how to death qualify a jury, correct?

16 A Correct. As well as mitigation.

17 Q And to be frank, your role was to try to
18 assist the defense and get a jury that would recommend
19 a life sentence, not a death sentence, right?

20 A Right. That would be unethical on my part.

21 Q What's that? What would be unethical? I'm
22 sorry.

23 A To assist the defense team in trying to obtain
24 a death sentence.

25 Q No, my point would be that when you were

1 sitting in jury selection your role was to try to
2 assist them in finding a jury that would be more
3 inclined to recommend a life sentence?

4 A Right. I'm part of the defense team, correct.

5 Q And now you're presenting information for
6 them to consider in that vein, correct?

7 A Right. The information that I gathered.

8 Q You said specifically that when you spoke to
9 Mr. Smith, the defendant, that you didn't speak to him
10 about what happened on June 21st because guilt was
11 never an issue and you left that up to other experts to
12 explore.

13 A Correct. We did not speak about it in detail,
14 that's correct.

15 Q Okay. Well, you've seen the reports of all
16 the other experts and it's not surprising none of the
17 experts actually ever talked to him about what happened
18 between when he walked out of the Walmart and when --
19 when the -- when the body was found.

20 MS. SCHLAX: Objection, Your Honor. It's
21 beyond her personal knowledge.

22 MR. CALIEL: She's reviewed all the reports,
23 Your Honor.

24 THE COURT: I'll allow the question.

25 BY MR. CALIEL:

1 Q None of the experts, including yourself, have
2 ever asked him what happened from 10:41 when he walks
3 out the door until when he's arrested by the police on
4 I-10 and I-95. Nobody asked him that question?

5 A I can't tell you what other experts asked or
6 didn't ask.

7 Q But you reviewed the reports and none of them
8 have any of that information?

9 A Again, I can't tell you what they asked or
10 didn't ask.

11 Q But you didn't ask the question?

12 A I wouldn't. My focus was always on penalty
13 phase.

14 Q Now, when you were speaking in reference to
15 some of the abuse issues, and particularly the abuse
16 issues relayed about Clifton Smith, that was just from
17 Ms. Moore?

18 A From Ms. Moore as well as from Mr. Smith.

19 Q As a part of your review of all the documents
20 in this case you had an opportunity to review
21 Ms. Moore's sworn statement six days after Mr. Smith
22 was arrested, correct?

23 A Yes. I believe she had three sworn
24 statements.

25 Q She did.

1 A Yes.

2 Q I'm referring specifically, though, to the
3 sworn statement of June 20th of 2013. Do you remember
4 reviewing that document?

5 A Yes. I remember reviewing all the documents,
6 correct.

7 Q And during the course of that document or the
8 questioning that I asked of Ms. Moore immediately after
9 this defendant was arrested, but not charged, the
10 question was asked during the course of your marriage
11 were there any allegations or suspicions that Mr. Smith
12 had ever been abusive towards Donald. And her answer
13 under oath, just like you're under oath here today, was
14 no.

15 A Sure.

16 Q Okay. And following through on that same
17 sworn statement when there was some discussion about
18 treatment by Mr. Moore -- Dr. Moore that there was a
19 denial that he was inappropriate with him -- with him
20 at any point in time, correct?

21 A Inappropriate?

22 Q Abusive.

23 A I -- if -- if my memory serves correctly, and
24 I do have notes on all of them, she said that -- that
25 Mr. Moore -- excuse me -- Dr. Moore did not like,

1 quote-unquote, did not like children.

2 Q Correct.

3 A And that was her -- her statement which one
4 could infer a wide variety of things and that's what
5 she described it to me and then, of course, throughout
6 the years of my relationship with her she certainly did
7 elaborate on that.

8 And then regarding Mr. Smith she told me that
9 he would discipline him, quote/unquote, behind closed
10 doors. I also know -- I also recall in one of her
11 statements that she said that she admitted, I remember
12 -- I think it was her final statement at the very end
13 that she admitted that she probably overlooked a lot as
14 a parent, and that -- and possibly that could mean to
15 -- that could possibly be used to -- to explain some of
16 those things.

17 Q Well, to be clear, again, you reviewed her
18 sworn testimony?

19 A Yes.

20 Q It was -- were there any allegations or
21 suspicions that Mr. Smith had ever been abusive towards
22 Donald and her answer under oath was no.

23 MS. SCHLAX: Your Honor, I'm not objecting.

24 I think it's fine. But if we could just
25 articulate the date of the sworn statement.

1 MR. CALIEL: I'm simply referring to June
2 28th, 2013, page 7, line 13 through 16.

3 BY MR. CALIEL:

4 Q She said she -- there were no allegations or
5 suspicions that Mr. Smith had ever been abusive towards
6 Donald. Her answer was no under oath.

7 A Right. And I recall that and it doesn't
8 surprise me that she said that.

9 Q Okay. And then going on in that same sworn
10 statement during the course -- question was posed to
11 Ms. Moore, and I'm referring counsel to page 9, line 19
12 through 23, during the course of your marriage with
13 Mr. Moore, this would be Dr. Moore, were you ever aware
14 of any allegations or suspicions that Donald was being
15 either physically, sexually or emotionally abused by
16 the doctor. And her answer was no.

17 A Then -- correct, and I never suggested that --
18 excuse me -- Dr. Moore was sexually abusing Mr. Smith
19 or physically abusing. He was simply aloof, couldn't
20 be bothered, didn't have time for children, and -- and
21 that was what Ms. Moore said.

22 Q Okay. So it wasn't Ms. Moore's
23 characterization that he was abusive. It was your
24 characterization that he was abusive.

25 A That he was neglectful and -- I said that Mr.

1 -- I said that Mr. Smith was verbally, emotionally and
2 sexually, in my opinion, abusive. Mr. Moore was very
3 aloof, very neglectful, very dismissive, very
4 condescending toward Mr. Smith.

5 Q But Ms. Moore under oath denied both of those
6 things?

7 A No, she said she -- that he did not know how
8 to handle children or didn't have time for children,
9 which to me suggests someone who's not very interactive
10 with the child.

11 Q And, again, it's what you believe or what you
12 suggest when she was questioned, was he physically,
13 sexually or emotionally abused, she said no.

14 MS. SCHLAX: Objection, argumentative.

15 THE COURT: Let me rule on the objection.

16 When he asks the question, just answer the
17 question yes or no.

18 THE WITNESS: Right.

19 THE COURT: Your attorney will have an
20 opportunity to follow up if there's something she
21 feels needs to be expanded upon. So we can get
22 past this, just answer yes or no.

23 THE WITNESS: Sure.

24 I have a different interpretation.

25 BY MR. CALIEL:

1 Q You have a different interpretation of the
2 word no?

3 A With respect to Mr. Smith, it does not
4 surprise me that she said no because she told me that
5 Mr. Smith, Mr. Donald Smith, was disciplined behind
6 closed doors. I'm not disagreeing that she said that,
7 but she said behind closed doors.

8 Q Was Ms. Moore aware of this molestation that
9 you referred to from the boys in the neighborhood?

10 A Not to my knowledge.

11 Q Okay. So the only evidence of that
12 molestation came from this defendant?

13 A Yes, and psychological -- at least one
14 psychological evaluation that was done several decades
15 ago in which he did report that to a psychologist.

16 Q But, again, everything is coming from him?

17 A It is coming from him and to my knowledge she
18 was not. She did suspect that he was molested by a
19 family member, but she never confirmed that, she never
20 confronted it and she never did anything about it.

21 Q Okay. What about the suicide attempt on
22 Orange Picker Road? Was she aware of that?

23 A That I'm not sure about.

24 Q Okay.

25 A I don't know.

1 Q Did you get that from him?

2 A Excuse me.

3 Q Did you get that from the defendant?

4 A Yes.

5 Q That would have been the only place it would
6 have come from if it didn't come from Ms. Moore?

7 A Correct. We did not have any records from
8 that date.

9 Q Again, referring you back to the sworn
10 statement that was taken of Ms. Moore back on June 20th
11 of 2013, when asked the question, starting on the
12 bottom of page 9 moving on to the top of page 10, lines
13 1 through 5, were you aware of -- aware of any
14 traumatic incident or anything that happened, that
15 happened to your son, Donald Smith, that would have
16 been traumatic, such as robbery, rape or any
17 significant physical injury or things of that nature.
18 And her answer was no. Correct?

19 A Yes. I believe that she said that nothing
20 traumatic or any physical injury or anything of any
21 traumatic nature had ever happened to her son. I
22 believe that, yes, I do -- I do agree with that.

23 Q Okay. You had mentioned briefly the
24 marriage.

25 A Pardon me.

1 Q The marriage that resulted in the birth of
2 his son, Donald, Jr.

3 A Yes.

4 Q How long did that marriage last?

5 A I believe it was a few -- it was very brief.
6 I don't want to say exactly how long. I believe it was
7 perhaps a few years and Mr. Smith was incarcerated at
8 the time. So it wasn't as if they lived together.

9 Q And they divorced fairly shortly after he was
10 --

11 A Correct, yes.

12 Q -- he was released from jail?

13 A Yes.

14 Q And more specifically, in June of 2013, his
15 wife, ex-wife at this point in time, was living nowhere
16 in the State of Florida?

17 A No, I don't believe she was. No.

18 Q So any statements by this defendant that his
19 wife was coming with a gift card would have been a
20 deception and a lie?

21 A Correct.

22 Q Thank you, ma'am.

23 MR. CALIEL: I don't have any further
24 questions.

25 THE COURT: Any redirect?

1 MS. SCHLAX: Very briefly, Your Honor.

2 THE COURT: Sure.

3 REDIRECT EXAMINATION

4 BY MS. SCHLAX:

5 Q Dr. Butler, when you talk about your
6 relationship with Patricia Moore, and counsel just
7 referred you back to a sworn statement that was taken
8 very shortly after Mr. Donald Smith was arrested for
9 these crimes. Why does it not surprise you that she
10 would -- that she would claim there was no trauma, no
11 abuse, no violence?

12 A Sure. Well, the -- there were three
13 statements. She was reluctant to speak at all with
14 respect to at least one, hired an attorney for I think
15 perhaps the second one. I could stand corrected. But
16 she was reluctant to speak at all about anything.

17 And then with Ms. Moore's personality she does
18 -- she said clearly in one of the statements, you know,
19 we look -- we don't look back, we always look forward,
20 and she said -- another statement that she made very
21 clearly, said that -- that she -- that she overlooked
22 things as a mother. Very clearly.

23 In addition, she was aware that the State was
24 -- either had or was planning on or there was a good
25 possibility that they were going to seek the death

1 penalty against her son and I think she was very
2 frightened to provide them with any ammunition that
3 could lead to his execution.

4 Q You ended up spending a lot of time with
5 Ms. Moore --

6 A Correct.

7 Q -- in your mitigation?

8 A Yes.

9 Q When you began your investigation three and a
10 half years ago, did she minimize things to you?

11 A Yes, very much so. Very much so.

12 Q And through that evolving relationship, were
13 you able to learn more details?

14 A I did.

15 Q And the true story of the life and time of
16 Mr. Donald Smith?

17 A Correct.

18 MS. SCHLAX: I don't have anything further,
19 Your Honor.

20 THE COURT: Anything further from the State?

21 RECROSS-EXAMINATION

22 BY MR. CALIEL:

23 Q Ma'am, the sworn statement on June 28th, we
24 were asking questions that were actually mitigating
25 circumstances in Mr. Smith's life, such as injury,

1 rape, robbery, abuse. She denied those things,
2 correct?

3 MS. SCHLAX: Objection, Your Honor.

4 Argumentative. He's already established the
5 impeachment. At this point it's argumentative.

6 THE COURT: I'll overrule the objection.

7 BY MR. CALIEL:

8 Q There were things of mitigation, correct?

9 A What -- what professionals would know as
10 mitigation, but a lay person wouldn't know that --
11 wouldn't know those circumstances as mitigation.

12 Q And one thing that did change after June 28th
13 of 2013 is the State of Florida did file a notice of
14 intent to seek the death penalty against him?

15 A I'm not sure when the notice was filed, but,
16 yes, it was eventually filed, that's correct.

17 Q Thank you.

18 MR. CALIEL: I don't have any further
19 questions.

20 MS. SCHLAX: Nothing further, Your Honor.

21 THE COURT: May this witness be excused?

22 MS. SCHLAX: Yes, Your Honor.

23 THE COURT: Thank you, Dr. Butler.

24 Ladies and gentlemen of the jury, the next
25 witness is going to appear remotely and it will take

1 -- it's the last witness of the day. It will take
2 us a couple of minutes to get that set up. So if
3 you'd retire to the jury room for a few moments.

4 Thank you.

5 (Jury absent.)

6 THE COURT: All right. We'll be in recess
7 for just for a few minutes while everything gets
8 set up for the next witness.

9 (Recess.)

10 (Defendant present.)

11 (Jury absent.)

12 THE COURT: Mr. Smith is in the courtroom.
13 We can go on the record.

14 MS. SCHLAX: Your Honor, the State has raised
15 a legitimate concern in regards to we'd like to
16 keep confidential the private Skype account and so
17 while, of course, we'll have this playing in the
18 open courtroom, we would ask for it not to be
19 published to all to protect his Skype identity.

20 THE COURT: The witness' Skype identity?

21 MS. SCHLAX: Yes, Your Honor.

22 MR. CALIEL: Yes.

23 MS. SCHLAX: I don't believe there's an
24 objection to that.

25 MR. CALIEL: We have no objection, Your

1 Honor. We just want to avoid, if it is being live
2 streamed, anybody see the Skype account. They
3 might call in and interrupt the proceeding like
4 they did in a prior proceeding.

5 THE COURT: It shows on the screen?

6 MR. CALIEL: Yes.

7 THE COURT: It won't be broadcast.

8 MEDIA PERSON: Judge, as a member of the
9 media, I'd like to register my objection to that.
10 I don't have a legal argument, but I'd like to say
11 that in terms of access that the case has a great
12 deal of interest. I would say that watching this
13 testimony would be important to the people in the
14 media room who are watching the feed as well as
15 the people in the community who are following this
16 case.

17 THE COURT: Would you just for the record, I
18 know who you are, would you identify yourself for
19 the record?

20 MEDIA PERSON: Ann Schindler, First Coast
21 News.

22 THE COURT: Okay.

23 MEDIA PERSON: If you'll give me a moment,
24 I'll step outside and contact our legal team.

25 THE COURT: Before you try to contact them,

1 because they're not here, do you understand what
2 the issue is?

3 MEDIA PERSON: I do.

4 THE COURT: The issue is not that anybody
5 objects to normally -- obviously if he were here
6 in person --

7 (Alarm sounding off.)

8 THE COURT: There's information on the screen
9 that needs to be protected.

10 MEDIA PERSON: I understand.

11 THE COURT: I'm not trying to protect his
12 testimony or who he is, but protect the court from
13 having somebody, and the jury from having somebody
14 call into that account or having that account. We
15 don't make witnesses give out that information so
16 I don't know how to address your concerns, which I
17 understand, but still protect what needs to be
18 protected. But I also understand that you want to
19 go express that your attorneys and that's fine.

20 MEDIA PERSON: I'll suggest maybe there's a
21 different remedy.

22 THE COURT: Okay. See if they have a
23 different remedy.

24 MS. SCHLAX: Your Honor, the actual voice
25 will be played live. It's just what's actually

1 displayed on the jurors' monitors not be.

2 MR. CALIEL: Your Honor, the State, if it
3 becomes an issue, it looks like we're having an
4 issue with the technology anyway, if we have to
5 use the poly-com, the State has no objection to
6 having that telephonic testimony at this point.

7 THE COURT: Well, first of all, he's not
8 going to do anything from McDonald's, I can tell
9 you that now. If that's the only option, he isn't
10 appearing that way. He has to go to a place where
11 we can hear him without background.

12 MS. SCHLAX: I understand, Your Honor.

13 THE COURT: So if we have to do it by phone,
14 by poly-com, I don't have any problem with that.
15 The State doesn't have any problem with it. I
16 mean you may prefer not because you may want the
17 jury to be able to see him and maybe there's a way
18 to show his picture and screen out the information
19 that's a concern but yet have him appear on the
20 phone to talk. I don't know. Whatever you all
21 can figure out, but it's 4:05 and I hope we can
22 figure out in the next 15 minutes or so.

23 MS. SCHLAX: And I apologize to the Court.
24 We did test it this morning, thought we had this
25 all figured out.

1 THE COURT: No apologies necessary, but he
2 cannot appear from a McDonald's. Even if it's on
3 this he has to move somewhere where there's no
4 background.

5 MS. SCHLAX: I agree, Your Honor.

6 THE COURT: His Skype account and things like
7 that, he doesn't need to be in a public place
8 because our input back to him will be heard.
9 Somehow we need to figure that out.

10 MS. SCHLAX: Yes, Your Honor. If the Court
11 would like, I'll step out.

12 THE COURT: Yeah, whatever you all can figure
13 out is fine.

14 (Recess.)

15 (Defendant present.)

16 (Jury absent.)

17 THE COURT: You can go ahead and swear him
18 in.

19 MS. SCHLAX: Mr. Smith, the clerk is going to
20 actually swear you in.

21 THE WITNESS: Okay.

22 THE CLERK: Would you raise your right hand.

23 (Witness sworn.)

24 THE WITNESS: Yes.

25 THE CLERK: Thank you.

1 THE COURT: Let him know it's going to be a
2 minute before you can ask any questions.

3 MS. SCHLAX: It's going to be a minute before
4 we ask you questions. Okay?

5 THE WITNESS: All right.

6 MS. SCHLAX: And you do have to answer out
7 loud, Mr. Smith.

8 THE WITNESS: Okay. Okay.

9 THE COURT: For the record, just to address
10 the media's concerns earlier, I just need to put
11 on the record that the media objected to us not
12 broadcasting this witness completely and we were
13 able to figure out a way to cut out all the
14 identifying information off the account so that it
15 was not being broadcast and so we're able to
16 broadcast it and that alleviated, I believe, the
17 media's concerns.

18 Is that correct, Ms. Schindler?

19 MEDIA PERSON: I'm sorry.

20 THE COURT: We've alleviated your concerns
21 because we're now able to broadcast it.

22 MEDIA PERSON: Yes, that's correct.

23 THE COURT: Thank you.

24 Is everyone ready for the jury to come in?

25 MR. CALIEL: Yes, Your Honor.

1 THE COURT: We're ready.

2 There's a little delay like you see on
3 television when people are in two different cities
4 between you saying something and him hearing it and
5 then responding.

6 MS. SCHLAX: Yes, Your Honor.

7 BAILIFF: The jury's entering the courtroom.

8 (Jury present.)

9 THE COURT: You may be seated.

10 If you'll call your next witness and then
11 I'll explain to the jury.

12 MS. SCHLAX: Yes, Your Honor. The defense at
13 this time would call Donald Smith, Jr.

14 THE COURT: Okay. Now, ladies and gentlemen
15 of the jury, we had a little bit of difficulty
16 getting this connection so we went ahead and he's
17 already been sworn and is under oath.

18 Because he's in a different location, maybe
19 you've seen this on the news before, a person will
20 ask a question and the respondent looks like they
21 haven't even heard it for a second. There's a
22 little bit of time delay. Okay?

23 All right. You may proceed.

24 MS. SCHLAX: Thank you, Your Honor.

25 DONALD SMITH, JR.,

1 was called as a VIDEO witness on behalf of the Defense,
2 and after being duly sworn, then testified as follows:

3 DIRECT EXAMINATION

4 BY MS. SCHLAX:

5 Q Good afternoon, Mr. Smith. Can you introduce
6 yourself to the jury?

7 A My name is Donald Smith, Jr.

8 Q And, Mr. Smith, what part of the country are
9 you in right now?

10 A Maine.

11 Q And, sir, how old are you?

12 A 25.

13 Q Where were you born?

14 A Jacksonville, Florida.

15 Q And, Mr. Smith, obviously you know that my
16 name is Julie Schlax and --

17 A Yes.

18 Q -- I'm the attorney representing your
19 biological father Donald Smith?

20 A Yes.

21 Q Can you explain to the jury what memories you
22 have of your father as you grew up?

23 A I knew he was around when I was a baby, which
24 I don't remember, but then I remember when I was around
25 three or four or five I had a toy gun and I was

1 pointing it at him and he broke it over his knee, threw
2 it up on the roof, and then I had some baby plastic
3 handcuffs and he broke those.

4 Then when I was nine he had just got done with
5 a ten-year prison sentence and so I was really looking
6 forward to seeing him and his mom picked him up from a
7 rehab and he wasn't really interested in me at all and
8 that, you know, really hurt. Yeah.

9 Q Mr. Smith, did the absence of your father,
10 Donald Smith, the defendant in this case, help lure you
11 into substance abuse?

12 A It probably had something to do with it. I've
13 had a really crazy life. Wasn't all his fault, but,
14 you know, like I just -- I didn't have that father
15 figure around to lead me in the right ways and
16 definitely there was pain there, there was definitely
17 some abandonment issues.

18 And when I found drugs I wasn't seeking them
19 to ease pain, but I found out that it did ease pain, it
20 helped me to forget and so I just made it a habit that
21 lasted probably ten years.

22 Q Are you sober now?

23 A Yes.

24 Q How long have you been sober?

25 A About four or five years.

1 Q And has it continued to be a struggle for
2 you?

3 A Yeah.

4 Q Let me -- let me ask you a rather personal
5 question, Mr. Smith. Did you ever do illegal drugs
6 with your father, Donald Smith?

7 A Yes.

8 Q What was the earliest age that you did
9 illegal drugs with your father?

10 A 16.

11 Q Mr. Smith, how was it that you were able to
12 get sober?

13 A By the power of God and he continues to give
14 me strength and God has given me a purpose and
15 something to live for, and I've seen him do amazing
16 things in my life, things that are not humanly
17 possible, you know. I've been some through demonic
18 stuff myself, I couldn't even say the name of Jesus.
19 That's how you know there's power in that name, you
20 know.

21 Q What -- where are you in your life right now?
22 Are you attending classes?

23 A Yeah, I'm in Bible college and pursuing the
24 plan that God has for me one day at a time. I'm not
25 quitting. It's just something I've done my whole life,

1 I get tired sometimes, but I just don't quit, I keep
2 fighting the good fight of faith and God takes care of
3 me.

4 Q Mr. Smith, since your father has been
5 institutionalized in the Duval County Jail have you
6 developed a relationship with him?

7 A Yes. Like no one can take the place of my dad
8 because he is my blood and he is my real dad and I
9 definitely benefit from him. I talk to him at least
10 once a week. Most of the time twice a week. And he
11 gives me really good advice on just everyday
12 situations, problems that I may be going through and we
13 don't really talk about the past or anything. We just
14 talk about me and my life right now.

15 And this is something that he wasn't able to
16 do before when he was out on the streets because he was
17 chasing the drugs, which I know exactly what that's
18 like. It changes who you are, it changes what your
19 priorities are, what comes first, and he wasn't able to
20 have this kind of relationship with me while he was
21 doing that.

22 You broke up on that.

23 Q That's okay. I was letting that car go by.

24 Mr. Smith, has your father's
25 institutionalization helped you keep sober?

1 A Yeah, because I -- I think he's -- I could
2 have easily ended up in prison and part of me, you
3 know, feels like who would I have been if he would have
4 done all the things a father usually does with their
5 kid, you know, playing catch and going fishing and
6 stuff, but I've still learned just as good a lesson, if
7 not better, because -- because he wasn't around and I
8 never have to -- ever got to do any of those things
9 with my real dad. Now I know exactly what I need to do
10 as a father. So it taught me some great lessons.

11 Q Are you closer to your biological father,
12 Donald James Smith, than anybody else in your family at
13 this point?

14 A Him and my grandma, which is his mom, those
15 are the two people I'm closest with.

16 Q Do you look -- do you rook forward to talking
17 to your father now that he's inside?

18 A Yes.

19 MS. SCHLAX: I don't have any further
20 questions, Your Honor.

21 THE COURT: Any cross-examination?

22 MR. CALIEL: No questions, Your Honor.

23 THE COURT: All right. Tell him thank you.
24 We appreciate it.

25 MS. SCHLAX: Thank you very much.

1 THE WITNESS: Um-hum.

2 MS. SCHLAX: Your Honor, if we could just
3 have a brief moment.

4 THE COURT: Of course.

5 MS. SCHLAX: The defense rests, Your Honor.

6 THE COURT: Ladies and gentlemen, I need to
7 ask you to step into the jury room for just a
8 couple of minutes.

9 (Jury absent.)

10 THE COURT: You may be seated.

11 Just --

12 MS. SCHLAX: I didn't know if the Court
13 wanted to do a colloquy with him.

14 THE COURT: I do. That's why I excused the
15 jury.

16 Do you need more time to talk with him?

17 MS. SCHLAX: No, Your Honor.

18 THE COURT: Mr. Smith, if you'd stand.
19 You're already under oath from earlier today --

20 THE DEFENDANT: Yes, ma'am.

21 THE COURT: -- in case we needed to ask you
22 any questions.

23 Your defense has announced rest to their
24 portion of the case in the penalty phase. Do you
25 understand that?

1 THE DEFENDANT: Yes, ma'am.

2 THE COURT: Okay. Do you understand that
3 means they're not going to present any other
4 witnesses? They will have argument but not any
5 other witnesses. Do you understand that?

6 THE DEFENDANT: I do.

7 THE COURT: And have you had a discussion
8 with them about whether or not you would like to
9 testify during the penalty phase?

10 THE DEFENDANT: Many times.

11 THE COURT: Okay. You elected to remain
12 silent?

13 THE DEFENDANT: Yes.

14 THE COURT: You understand the jury has been
15 told several times that you, of course, can remain
16 silent, it's not your burden to prove anything?
17 You understand that?

18 THE DEFENDANT: Yes, I understand.

19 THE COURT: Now, the penalty phase you do
20 have some burden on the mitigating circumstances,
21 but your defense has spent two days on that. Do
22 you understand?

23 THE DEFENDANT: What's that now?

24 THE COURT: Your defense has spent two days.

25 THE DEFENDANT: Oh, yeah.

1 THE COURT: Part of two days presenting
2 witnesses in the mitigation phase on your behalf.
3 Do you understand that?

4 THE DEFENDANT: Yes.

5 THE COURT: As far as whether or not you're
6 going to testify, we've had numerous conversations
7 between you and I as well as numerous witnesses
8 who have testified here. You've got a GED, your
9 intelligence level is good, you've had no problem
10 understanding what's going on.

11 Have you had sufficient time to speak with
12 your attorneys before making your decision not to
13 testify?

14 THE DEFENDANT: Yes, ma'am.

15 THE COURT: Do you need anymore time to speak
16 with them?

17 THE DEFENDANT: No, ma'am.

18 THE COURT: And do you have any other
19 questions of me --

20 THE DEFENDANT: (Shakes head.)

21 THE COURT: -- for that issue?

22 THE DEFENDANT: No, ma'am.

23 THE COURT: And did they answer all of your
24 questions regarding the issue of testifying?

25 THE DEFENDANT: Yes.

1 THE COURT: I do find that Mr. Smith has
2 freely and voluntarily waived his right to
3 testify, that he does wish to elect to honor his
4 right to remain silent.

5 At this stage of the trial do you also
6 understand that all of the defense witnesses have
7 been presented for mitigation and that there will
8 be no further witnesses? Other than no witnesses,
9 but there will be argument certainly on his behalf
10 regarding mitigation.

11 Is all that correct, sir?

12 THE DEFENDANT: Yes, ma'am.

13 THE COURT: Okay. Thank you.

14 Does the State have anything else?

15 MR. CALIEL: There's no further evidence from
16 the State of Florida, Your Honor.

17 THE COURT: Okay. May I go ahead and send
18 the jury home?

19 MS. SCHLAX: Yes, Your Honor.

20 THE COURT: Do you all think 9:30 is a
21 reasonable goal for them to come back?

22 MR. CALIEL: I believe so.

23 MS. SCHLAX: Yes, Your Honor.

24 THE COURT: All right. If you would bring
25 the jury in.

1 MR. CALIEL: One last thing. Do you want to
2 deal with that sequestration issue in case they come
3 back in? Didn't we need to address that one more
4 time?

5 THE COURT: Sorry, Mr. Smith. If you'd stand
6 again.

7 We had talked yesterday about sequestration of
8 the jury. Once they go out to deliberate in either
9 stage of the trial you have the right to have them
10 sequestered. As you know, we try to explain
11 schedules so that that doesn't become an issue, that
12 hopefully after closing arguments and instructions
13 they will have enough time to make a decision, but
14 assuming they do not have enough time to make a
15 decision tomorrow you had told me yesterday that you
16 were going to waive the right to have them
17 sequestered. Is that still correct?

18 THE DEFENDANT: That's right.

19 THE COURT: Okay. Do you need anymore time
20 to talk to your attorneys about that?

21 THE DEFENDANT: No.

22 THE COURT: Okay. We will do everything we
23 can to try to have a resolution without that even
24 being an issue. But just in case, we need to know
25 how you feel and you're telling me that you do

1 waive sequestration of the jury if they're not
2 able to reach their verdict tomorrow.

3 THE DEFENDANT: Absolutely.

4 THE COURT: Is that right?

5 THE DEFENDANT: Yes.

6 THE COURT: I do find that Mr. Smith has
7 freely and voluntarily waived his right to
8 sequestration and for the record understands, and
9 as do the attorneys, that we have all tried to
10 schedule so that does not even become an issue.
11 So we'll see where we are tomorrow.

12 THE DEFENDANT: All right.

13 THE COURT: Thank you.

14 THE DEFENDANT: Thank you.

15 THE COURT: Anything else?

16 MR. CALIEL: Nothing else.

17 THE COURT: All right. You can bring the
18 jury in.

19 BAILIFF: Are you ready, ma'am?

20 THE COURT: We're ready.

21 BAILIFF: The jury is entering the courtroom.

22 (Jury present.)

23 THE COURT: Thank you, ladies and gentlemen.

24 You may be seated.

25 Ladies and gentlemen, after discussions with

1 the attorneys, there is no other witnesses that will
2 be presented and I'm going to release you to go home
3 to come back tomorrow morning at 9:30. We need to
4 remain to prepare for you in the morning.

5 Tomorrow we have closing arguments and
6 instructions and we need to be ready to present that
7 all to you at 9:30. So we will remain on our time
8 now and get all that finalized.

9 You are free to go and remember the
10 instruction, I know you know it well, do not try to
11 get any information in any way from anybody about
12 this case outside the courtroom and be careful going
13 home and we'll see you tomorrow at 9:30.

14 (Jury absent.)

15 THE COURT: Okay. Do you all have proposed
16 jury instructions?

17 MR. CALIEL: We do, Your Honor.

18 THE COURT: Have you all looked at each
19 other's?

20 MS. SCHLAX: And I have a copy of --

21 (State and defense counsel conferring.)

22 MR. CALIEL: We may not agree as to what they
23 are, but --

24 MS. SCHLAX: Right.

25 MR. CALIEL: -- we've incorporated all of

1 them into the instructions themselves.

2 THE COURT: Are you all agreeing to
3 everything you're handing me, is that correct?

4 MR. CALIEL: No, I only wish, Your Honor.

5 For the record, Your Honor, what we did is
6 they are obviously the standard instructions. We
7 then also included the aggravators that were
8 noticed and we believe there's evidence of, the
9 statutory mitigators, and then there is a long
10 listing of non-statutory mitigating factors that I
11 think we need to go over because I think some
12 either were not established or some -- or there
13 was no evidence of them, rather, but also some are
14 a new way of saying a previous witness has already
15 been listed, I guess would be closer.

16 THE COURT: All right. So let's just go over
17 -- a lot of the beginning part would be standard,
18 correct?

19 MR. CALIEL: Yes, Your Honor.

20 THE COURT: Okay. So I've got a cover sheet,
21 instructions to the jury. That will be tomorrow.
22 The final jury instructions for penalty phase
23 proceeding. The first page, the aggravating
24 factors alleged by the State are, one, previously
25 convicted of a felony involving the use of threat

1 or violence to another person; two, the first
2 degree murder was committed while Donald James
3 Smith, Sr., was engaged in the commission of a
4 kidnapping and sexual battery; three, the first
5 degree murder was committed for the purpose of
6 avoiding or preventing a lawful arrest; four, the
7 first degree murder was especially heinous,
8 atrocious or cruel, and then some defining
9 information after that; five, the first degree
10 murder was committed in a cold, calculated and
11 premeditated manner without any pretense of moral
12 or legal justification, and then there's some
13 identifying information after that, and then, six,
14 Cherish Perrywinkle was a person less than 12
15 years of age.

16 So before we go any further, is there any
17 objection to the -- well, any objection to the
18 Court reading those six aggravating factors and
19 the defining information contained in No. 4 and 5.

20 MR. FLETCHER: No, Your Honor.

21 MS. SCHLAX: No, Your Honor. I was just
22 double-checking something. No, they are the
23 standards.

24 THE COURT: Okay. Then we get back to
25 standard instructions on the third page of the

1 actual instructions.

2 And then on the fourth page of the actual
3 instructions after the standard instruction
4 paragraph about aggravating factors, the top
5 middle of the page, we then have among the
6 mitigating circumstances you may consider are, and
7 then we have, one, the first degree murder was
8 committed while Donald James Smith was under the
9 influence of extreme mental or emotional
10 disturbance; two, the capacity of Donald James
11 Smith to appreciate the criminality of his -- says
12 his/her, we have to take out the her, correct?

13 MS. SCHLAX: Yes.

14 MR. CALIEL: Yes.

15 THE COURT: -- his conduct or to conform his
16 conduct -- conduct to the requirements of law was
17 substantially impaired; three, Donald James
18 Smith's age at the time of the crime and, four,
19 the existence of any other factors in Donald James
20 Smith's character, background or life, or the
21 circumstances of the offense, that would mitigate
22 against the imposition of the death penalty.

23 And before we get into those let's make a
24 decision as to one through three.

25 MS. SCHLAX: Your Honor, we're requesting one

1 through three.

2 MR. CALIEL: I'm confused, Judge. What's the
3 inquiry?

4 THE COURT: The statutory mitigators, one,
5 they were committed while he was under the
6 influence of extreme mental or emotional
7 disturbance; two, capacity to appreciate the
8 criminality; three, his age at the time of the
9 crime. We just need to know if there's an
10 agreement on those three before we get into the --

11 MR. CALIEL: The State does not agree that
12 there is evidence of all three of those that can
13 be argued to the jury.

14 THE COURT: Okay. Then we get into No. 4
15 which leads us, I guess, into the non-statutory
16 mitigators.

17 MS. SCHLAX: Yes, Your Honor.

18 THE COURT: Which is the existence of any
19 other factors in his character, background or life
20 or the circumstances of the offense that would
21 mitigate against the imposition of the death
22 penalty. And these are lettered, rather than
23 numbered, is that correct?

24 MR. CALIEL: They are, Your Honor.

25 MS. SCHLAX: Yes.

1 THE COURT: And we have A through quadruple
2 N.

3 MR. CALIEL: I believe that's correct.

4 THE COURT: Okay. I guess -- these are all
5 your requested mitigators, is that correct?

6 MS. SCHLAX: That is correct, Your Honor.

7 THE COURT: Even though they might be
8 labelled different, those are the ones you
9 requested?

10 MS. SCHLAX: Yes, Your Honor, I provided
11 these to the State of Florida.

12 THE COURT: Okay. I think the easiest thing
13 to do is for the State to start pointing out ones
14 to which they disagree or do you want me to read
15 them all into the record?

16 MR. CALIEL: Judge, I think let's just go one
17 by one.

18 THE COURT: Okay.

19 MR. CALIEL: I think that's clearer for the
20 record to establish.

21 THE COURT: A, and instead of saying Donald
22 James Smith over and over, I'll just say his
23 biological father left before he was born. As a
24 result he never had a relationship with him.

25 MR. CALIEL: We have no objection.

1 THE COURT: Donald James Smith -- well, his
2 parents were forced to divorce by his maternal
3 grandparents who openly disapproved of his
4 biological father.

5 MR. CALIEL: No objection.

6 THE COURT: Okay. If you would add quotes at
7 the end of that statement because you've got
8 quotes at the beginning.

9 MR. CALIEL: Yes, Your Honor.

10 THE COURT: Do you see that, Ms. Schlax?

11 MR. FLETCHER: I do, Judge.

12 THE COURT: I'm sorry. Mr. Fletcher.

13 C, his mother suffered from depression during
14 her pregnancy and was 17 years old when she gave
15 birth.

16 MR. CALIEL: Judge, my memory may not be as
17 good as it was, but did Dr. Butler say she
18 suffered from depression? I don't recall that
19 testimony being brought out before the jury.

20 MS. SCHLAX: I would concede that testimony
21 was not brought out.

22 THE COURT: I don't remember it either. So
23 that will be changed to Donald James Smith's
24 mother was 17 years old when she gave birth.

25 MR. CALIEL: Yes. And we have no objection

1 to that.

2 THE COURT: And do you want it to say to him?
3 I mean when she gave birth to him?

4 MR. FLETCHER: It probably should.

5 MS. SCHLAX: Yes, Your Honor.

6 MR. CALIEL: Add, to him.

7 THE COURT: D, his mother had an extremely
8 rapid labor and delivery and he was born premature
9 with low birth weight.

10 MR. CALIEL: Your Honor, I think there was
11 evidence that he was born premature. I think low
12 birth weight is -- it is an interpretation. I
13 think the birth weight was -- was close to six
14 pounds two ounces?

15 MS. SCHLAX: Yes.

16 MR. CALIEL: Which I hope that's not too low,
17 but I don't think there was any evidence of
18 extremely rapid labor and delivery. I do not
19 recall Dr. Butler giving any evidence to that.

20 MS. SCHLAX: I did not hear any evidence of
21 that.

22 THE COURT: So I'll change it to his mother
23 --

24 MS. SCHLAX: Or Donald James Smith --

25 THE COURT: Donald James Smith, no apostrophe

1 S, was born premature with low birth weight. Is
2 that correct?

3 MR. FLETCHER: Yes, ma'am.

4 THE COURT: I think the jury can determine
5 whether they think six pounds whatever ounces it
6 was is low.

7 MS. SCHLAX: Yes, Your Honor.

8 MR. CALIEL: Okay.

9 THE COURT: E, Donald James Smith's mother
10 wanted to give him up for adoption. He was aware
11 of her wishes and this knowledge affected him
12 emotionally.

13 MR. CALIEL: Judge, I don't think there's any
14 evidence that he was aware of that. It was
15 brought out that she wanted to give him up for
16 adoption, but I don't remember there was any
17 discussion or any evidence presented that he was
18 aware of that.

19 MS. SCHLAX: My memory of the testimony was
20 that -- that Dr. Butler did indicate that he was
21 aware of that.

22 THE COURT: Well, I don't recall that, but
23 let's talk about it. He certainly wasn't aware of
24 it at the time, correct? He was an infant.

25 MS. SCHLAX: I'm sorry.

1 THE COURT: He certainly wasn't aware of it
2 at the time. He was an infant.

3 MS. SCHLAX: Right. But the testimony was
4 when the baby bracelet was found with Gazaway that
5 that's when it came out, that she had wanted to
6 give him up for adoption.

7 MR. CALIEL: No, it doesn't. That's when it
8 came out that he had a biological father.

9 MS. SCHLAX: An additional dad.

10 MR. CALIEL: I mean we can ask Madam Court
11 Reporter to check, but I don't think there was any
12 evidence that he found out that his mother wanted
13 to give him up for adoption.

14 THE COURT: Let's keep going. I'm going to
15 put a question mark right there. I don't know
16 what it would take for Madam Court Reporter to
17 find that.

18 (Testimony read by Court Reporter.)

19 THE COURT: I guess the only other thing you
20 could look for is baby bracelet.

21 (Testimony read by Court Reporter.)

22 THE COURT: There's no mention of him
23 becoming aware. He's aware now, obviously, but at
24 the time --

25 MS. SCHLAX: I'll concede that we don't have

1 testimony about that.

2 THE COURT: Okay. So, E would be Donald
3 James Smith's mother wanted to give him up for
4 adoption, correct?

5 MS. SCHLAX: Yes, Your Honor.

6 THE COURT: E, his mother always felt more
7 like a sister than a mother to her son and rarely
8 disciplined him.

9 MR. CALIEL: I don't remember evidence of
10 that.

11 MS. SCHLAX: Your Honor, I think we had
12 extensive testimony how she enabled his drug
13 habits, how she --

14 MR. CALIEL: I think those are separate
15 aggravators that are listed later on, but I don't
16 think there's -- or mitigators, but I don't think
17 there was evidence that she felt like she was a
18 sister to him, nor about awareness --

19 THE COURT: I don't recall any testimony
20 about she felt more like a sister or that she
21 rarely disciplined him. I agree there's a lot of
22 testimony about her enabling him, taking Mr.
23 Caliel's word that that is in here later.

24 MS. SCHLAX: No, I -- I agree it is.

25 THE COURT: Okay. I don't think there was

1 any testimony to that. I'll circle that. That's
2 F.

3 G, mental illness runs in his mother's side
4 of the family and in his biological father's
5 family.

6 MR. CALIEL: No objection, Your Honor.

7 THE COURT: Clearly we had that.

8 H, addiction runs in his mother's side of the
9 family and in his biological father's family.

10 MR. CALIEL: No objection.

11 THE COURT: I, emotional instability leading
12 to physical violence is present on Donald James
13 Smith's father's side of the family.

14 MR. CALIEL: I don't remember hearing
15 anything about his father's side of the family.
16 Paternal uncle, which is later on, but...

17 THE COURT: Well, that's next. But that is
18 his father's side of the family.

19 MR. CALIEL: Well, no, I understand that, but
20 the point being I think it's doubling, in essence.
21 Both of the same thing. The only evidence of that
22 is the fact that his paternal uncle shot his
23 grandfather to death. I mean I have no objection
24 if the Court feels that that fact in and of itself
25 establishes it, then I would not contest that that

1 fact was brought up before the jury.

2 THE COURT: Do you want them both in?

3 MS. SCHLAX: Yes, Your Honor.

4 THE COURT: I'm going to leave them both in
5 there.

6 I is emotional instability leading to
7 physical violence and J is the paternal uncle shot
8 his grandfather to death. Correct?

9 MS. SCHLAX: Yes, Your Honor.

10 THE COURT: K, his mother spent very little
11 time with him as a baby, instead focussing all of
12 her attention on finding a man who could provide
13 her with a lifestyle her parents felt she
14 deserved.

15 MR. CALIEL: No objection.

16 THE COURT: L, I guess it should be Donald
17 James Smith, without the apostrophe S, moved out
18 of his grandparents' home and his mother married
19 Clifton Smith, the man who formally adopted him,
20 which was extremely traumatic.

21 MR. CALIEL: No objection.

22 THE COURT: Need to take out the apostrophe
23 S.

24 MR. CALIEL: It sort of reads weird, but I'll
25 leave it, if that's the way the defense wants it.

1 The moving out of the home was extremely
2 traumatic. There was evidence of that. I don't
3 think the adoption was. It reads as if the
4 adoption was extremely traumatic, but that's fine.

5 MS. SCHLAX: It just identifies who the
6 person is.

7 MR. CALIEL: That's fine.

8 THE COURT: And Cliff was verbally and
9 emotionally abusive to Donald James Smith.
10 There's an extra period in there after 2.

11 MS. SCHLAX: Right.

12 THE COURT: Cliff screamed at his step-son
13 over minor things. He also locked Donald James
14 Smith outside as punishment. While walking Cliff
15 made sure that he was at least one block ahead of
16 Donald James Smith and Patricia.

17 MR. CALIEL: Judge, I don't believe there was
18 evidence that Cliff screamed at his step-son over
19 minor things or the last sentence while walking.
20 I think the rest there was evidence to.

21 MS. SCHLAX: I would concede the while
22 walking. I do think Dr. Butler indicated that --
23 that the emotional abuse -- emotional and verbal
24 abuse was screaming at him.

25 THE COURT: She clearly testified that he was

1 verbally and emotionally abusive and she talked
2 about the being locked outside. I'll take out
3 while walking. I don't remember her testifying
4 that Cliff screamed at his step-son over minor
5 things.

6 Can you look that up?

7 COURT REPORTER: The only time I find
8 screamed or screaming was just now.

9 THE COURT: Never found anything about
10 screaming.

11 MS. SCHLAX: I agree.

12 THE COURT: So it would be was verbally and
13 emotionally abusive to Donald Smith. He also
14 locked Donald James Smith outside as punishment.
15 Correct?

16 MS. SCHLAX: Correct, Your Honor.

17 THE COURT: Okay. And Cliff was physically
18 abusive to Donald James Smith. He threw things at
19 him. Cliff grabbed Donald James Smith by the neck
20 and beat him for minor things. Donald James Smith
21 was once -- for spilling pudding on the stove and
22 getting burned from it.

23 MS. SCHLAX: I'll concede we didn't have any
24 testimony to that.

25 THE COURT: On any of that?

1 MS. SCHLAX: I do think we did receive some
2 testimony that Clifford Smith was physically
3 abusive to Don, but no specifics.

4 MR. CALIEL: I don't remember any physically
5 abusive allegations.

6 (State and defense counsel conferring.)

7 MR. CALIEL: Your Honor, there was testimony.
8 So just Cliff was physically abusive with Donald
9 James Smith and leave it at that.

10 THE COURT: Okay. So it will read Cliff was
11 physically abusive to Donald James Smith.

12 Donald James Smith was traumatized by his
13 step-father's treatment, he became clingy, stopped
14 eating and wet the bed long past the age of
15 typical potty training.

16 MR. CALIEL: I'm fine with that.

17 THE COURT: B, Donald James Smith's
18 step-father demonstrated signs of mental illness.
19 He was paranoid and obsessed with violence, even
20 claiming he was part of the Gestapo. Donald James
21 Smith was terrified of what he witnessed.

22 MR. CALIEL: Judge, I don't believe there was
23 testimony of that.

24 MS. SCHLAX: I would concede there was no
25 specificity about Gestapo, but he was -- said he

1 was obsessed with violence.

2 MR. CALIEL: That he watched war movies. I
3 think there's a difference between obsessed. I
4 don't remember the signs of mental illness. If
5 they wanted that he was paranoid, Donald James
6 Smith's step-father was paranoid and obsessed with
7 violence even to the point that he walked around
8 like a soldier and saluting himself in the mirror,
9 is what the testimony was.

10 THE COURT: You agree it should say Donald
11 James Smith's step-father was -- I think we need to
12 put Cliff because he had more than one step-father.
13 And I know we're talking about Cliff right now.
14 Just to be clear, I think it needs to say Cliff,
15 doesn't it?

16 MR. CALIEL: Well, I think it could be just
17 put Clifford Smith was paranoid and obsessed with
18 violence, and then describe him marching around
19 the house and saluting himself in the mirror, if
20 we need that, and then the defendant was terrified
21 from what he witnessed.

22 MS. SCHLAX: Your Honor, we're satisfied with
23 Clifford Smith was paranoid and obsessed with
24 violence, Donald Smith was terrified of what he
25 witnessed.

1 THE COURT: Donald James Smith was paranoid
2 and obsessed with violence, period. Donald James
3 Smith was terrified of what he witnessed. Is that
4 correct?

5 MS. SCHLAX: Yes, Your Honor.

6 THE COURT: His job in the insurance
7 business -- should probably be Cliff's, apostrophe
8 S, job in the insurance business forced them to
9 move regularly. As a result Donald James Smith was
10 repeatedly uprooted from his home, adding to the
11 instability of his living environment.

12 MR. CALIEL: No objection.

13 THE COURT: Because of the frequent moves
14 Donald James Smith was frequently bullied. This
15 caused him to feel alienated, detached, despondent
16 and angry. Donald James Smith resorted to paying
17 other kids to play with their toys.

18 MR. CALIEL: No objection.

19 THE COURT: Donald James Smith was sexually
20 molested at the age of eight by two neighborhood
21 teenagers that forced him to masturbate and
22 perform oral sex on them.

23 MR. CALIEL: There was no evidence of the
24 last sentence.

25 MS. SCHLAX: I concede. There was no

1 specific evidence of that.

2 THE COURT: So simply say he was sexually
3 molested at the age of eight by two neighborhood
4 teenagers?

5 MS. SCHLAX: Yes, Your Honor.

6 THE COURT: T, the teenagers coerced Donald
7 James Smith into watching them violently sexually
8 molest several girls. He found the experience
9 confusing and frightening.

10 MR. CALIEL: No objection.

11 THE COURT: U, Donald James Smith did not
12 tell anyone about the molestation or what he was
13 forced to witness. The secret weighed heavily on
14 him and he was unsure how to handle his feelings.

15 MR. CALIEL: There's no evidence about how
16 the secret weighed upon him, there's no evidence
17 that he didn't tell anybody about it, only
18 evidence that came out was he didn't tell his mom
19 about it. She was specifically questioned about
20 that.

21 MS. SCHLAX: I'd like it changed to Donald
22 James Smith did not reveal the abuse to his
23 mother.

24 MR. CALIEL: So Donald James Smith did not
25 tell his mother about the molestation or what he

1 was forced to witness?

2 MS. SCHLAX: Did not reveal the sexual abuse
3 to his mother.

4 THE COURT: So it should read Donald James
5 Smith did not reveal the sexual abuse to his
6 mother?

7 MS. SCHLAX: Yes, Your Honor.

8 THE COURT: Period. Correct?

9 MS. SCHLAX: Yes, Your Honor.

10 THE COURT: V, Donald James Smith's mother
11 suspected that her sister's cousin Bob molested
12 her son, however, she did not confront them.

13 MR. CALIEL: I think there was evidence of
14 that.

15 THE COURT: W, Donald James Smith never
16 received treatment for the sexual abuse he
17 endured.

18 MR. CALIEL: I guess the question is when.
19 He's been in sexual therapy since 1977.

20 MS. SCHLAX: I think, Your Honor, it's well
21 within the knowledge of this Court, as well as
22 Mr. Caliel, that sex offender therapy versus sex
23 perpetrator -- excuse me -- sex offender sex
24 perpetrator therapy versus victimized therapy is
25 two completely different things and the testimony

1 was that he had never received treatment for any
2 of the sexual abuse he endured.

3 MR. CALIEL: The State has no objection.

4 THE COURT: X, Cliff was sexually
5 inappropriate with Donald James Smith. He touched
6 Donald James Smith on his buttocks, he called
7 Donald Smith sexually explicit names. Cliff also
8 talked about sexual acts in front of his eight
9 year old step-son.

10 MR. CALIEL: I don't remember the last
11 sentence.

12 MS. SCHLAX: I agree.

13 MR. CALIEL: What?

14 MS. SCHLAX: I agree with Mr. Caliel.

15 MR. CALIEL: The last sentence there was no
16 evidence of. I think through the sexually explicit
17 names there was evidence.

18 THE COURT: So I'll read, X, Cliff was
19 sexually inappropriate with Donald James Smith, he
20 touched Donald James Smith on his buttocks, he
21 called Donald James Smith sexually explicit names.
22 Is that correct?

23 MR. CALIEL: Yes.

24 MS. SCHLAX: Yes.

25 THE COURT: Y, Donald James Smith began to

1 get into trouble at school for minor offenses.

2 MR. CALIEL: There's no evidence of that,
3 Your Honor.

4 MS. SCHLAX: I concede. I don't remember any
5 evidence of that.

6 THE COURT: I'll take it out.

7 Z, Donald Smith did not receive discipline at
8 home or any kind of counseling after his parents
9 were notified of the difficulties he was having in
10 school.

11 MS. SCHLAX: I concede, Your Honor, that there
12 was no testimony of that.

13 THE COURT: All right. I'm taking out Y and
14 Z, correct?

15 MR. CALIEL: Yes, Your Honor.

16 THE COURT: AA, when his mother divorced
17 Cliff after seven years of marriage, this was yet
18 another change that brought instability into
19 Donald James Smith's life.

20 MR. CALIEL: That's fine.

21 THE COURT: BB, Donald James Smith's second
22 step-father, Dr. Marlin Moore, was a cold,
23 self-centered and aloof man who insisted that his
24 wife and step-son call him Dr. Moore.

25 MR. CALIEL: No objection.

1 THE COURT: Double C, after his mother
2 married Dr. Moore, Donald James Smith felt
3 helpless and angry. He missed Cliff, the man he
4 considered his real father.

5 MR. CALIEL: I don't remember there being any
6 evidence of that.

7 MS. SCHLAX: I do think Dr. Butler touched
8 upon this.

9 MR. CALIEL: I don't remember there being any
10 testimony that once Ms. Moore married Dr. Moore of
11 the defendant missing Cliff.

12 MS. SCHLAX: No, I would concede that there
13 wasn't any -- any testimony of how Mr. Smith felt
14 about the marriage of Patricia Moore to Dr. Moore.
15 I would concede that there was no testimony as to
16 that.

17 THE COURT: I'm sorry. I'm not sure what
18 you're saying. Are we deleting double C
19 completely or are we saying we're just deleting
20 the first sentence, more or less?

21 MS. SCHLAX: Deleting it entirely.

22 THE COURT: CC is deleted entirely.

23 DD, Dr. Moore was verbally and physically
24 abusive to Donald James Smith. He made it known
25 that he didn't have time for children.

1 MS. SCHLAX: I do think there was evidence of
2 that.

3 MR. CALIEL: Definitely the verbally. I
4 think it was clarified that all that was there was
5 he was disciplined behind closed doors, and
6 physically abusive is an interpretation.

7 THE COURT: I'll leave it. You're requesting
8 it be left, correct?

9 MS. SCHLAX: Yes, Your Honor.

10 THE COURT: I'll leave it.

11 Double E, as a teenager Donald James Smith
12 began self-medicating with hand fulls of pills from
13 Dr. Moore's home office. He took Benzodiazepine,
14 barbiturates, stimulants and narcotics. He was
15 never confronted with the drug use.

16 MR. CALIEL: Judge, I think there was
17 evidence that he self-medicated with pills from
18 Dr. Moore's home office. There was no evidence as
19 to what he self-medicated with and I don't -- and
20 I think there was evidence that he was never
21 confronted about his drug use.

22 I think it should read as a teenager Donald
23 James Smith began self-medicating with pills from
24 Dr. Moore's home office. He was never confronted
25 about his drug use.

1 MS. SCHLAX: I'm fine with that, Your Honor.

2 THE COURT: So double E will read as a
3 teenager Donald James Smith began self-medicating
4 with pills from Dr. Moore's home office. He took
5 -- we're taking out that next sentence.

6 MS. SCHLAX: Yes, Your Honor.

7 THE COURT: And leaving in he was never
8 confronted with drug use -- with the drug use.

9 MS. SCHLAX: Yes, Your Honor.

10 THE COURT: Double F, Donald James Smith's
11 occasional prescription pill usage turned into a
12 daily substance abuse. It affected his moods,
13 decision-making and impulse control.

14 MR. CALIEL: Your Honor, I don't think there
15 was any evidence of that.

16 MS. SCHLAX: Your Honor, I think the next
17 mitigating circumstance covers what the testimony
18 was.

19 THE COURT: So double F will be deleted?

20 MS. SCHLAX: Yes, Your Honor.

21 THE COURT: Double G -- and I realize these
22 will all be renumbered. Donald James Smith's drug
23 use accelerated to regularly using marijuana, LSD,
24 PCP, MDA, Mescaline, Peyote, Quaaludes and
25 cocaine.

1 MR. CALIEL: I'm fine with that, Your Honor.

2 THE COURT: Double H, Donald James Smith
3 dropped out of school in tenth grade. Although
4 Donald James Smith is intelligent, he had lost all
5 motivation based on drug use, depression and
6 anger.

7 MR. CALIEL: No objection.

8 THE COURT: Double I, as a teenager Donald
9 James Smith began to get arrested, but did not
10 receive any kind of discipline at home or
11 psychological treatment.

12 MR. CALIEL: I don't believe there was any
13 discussion of that. The only evidence that came
14 out is that he spent his 17th birthday in Duval
15 County Jail.

16 THE COURT: The only evidence came out what?

17 MR. CALIEL: He spent his 17th birthday in
18 Duval County Jail.

19 MS. SCHLAX: Your Honor, based on how the
20 testimony came out, we would request as a teenager
21 Don -- Donald James Smith began getting arrested.

22 MR. CALIEL: We're fine with that, Judge, if
23 we just delete the period after arrested and
24 delete the rest of the sentence.

25 THE COURT: So it will read double I, as a

1 teenager Donald James Smith began to get arrested,
2 correct?

3 MS. SCHLAX: Yes.

4 THE COURT: Double J, at the age of 15 Donald
5 James Smith began engaging in voyeurism. Although
6 his late night walks and neighborhood complaints
7 should have given his mother cause for suspicion,
8 she was too busy focussing on Dr. Moore's needs to
9 worry about her son.

10 MR. CALIEL: None of that evidence came out,
11 Your Honor.

12 MS. SCHLAX: Your Honor, the first sentence
13 did through -- and I apologize. I can't think of
14 which expert.

15 MR. CALIEL: Dr. -- no, it was today.
16 Dr. Sesta. I will agree to the first sentence.
17 Nothing else, though.

18 THE COURT: JJ will read at the age of 15
19 Donald Smith began engaging in voyeurism, is that
20 correct?

21 MR. CALIEL: Yes, Your Honor.

22 MS. SCHLAX: Yes, Your Honor.

23 THE COURT: And the rest will be deleted.

24 Double K, Donald James Smith spent his 18th
25 birthday in the county jail. His grandfather

1 brought him a flower cake to celebrate. Donald
2 James Smith's grandmother never spoke to him again.

3 MS. SCHLAX: I concede there's no evidence of
4 that.

5 THE COURT: Delete double K completely?

6 MS. SCHLAX: Yes, Your Honor.

7 THE COURT: Double L, Donald James Smith was
8 raped three separate times while incarcerated. He
9 did not report the attack to correctional
10 officers.

11 MR. CALIEL: Judge, I don't believe that
12 there was any evidence of how many times he was
13 raped. There was evidence that he was raped while
14 incarcerated. And I don't think there was any
15 evidence that he didn't report it to corrections
16 officers.

17 MS. SCHLAX: I think actually it was brought
18 out on cross.

19 THE COURT: Which? There's two different
20 issues.

21 MS. SCHLAX: I concede that there was only
22 testimony in regards to him being raped.

23 THE COURT: Okay. So to begin with, it will
24 read, double L, Donald James Smith was raped while
25 incarcerated, correct?

1 MS. SCHLAX: Correct.

2 THE COURT: All right. And then the second
3 sentence, which the State also objects to, is he
4 did not report the attack to correctional
5 officers.

6 MS. SCHLAX: I think it was established
7 during cross-examination that the -- she was
8 unable to corroborate that, that the only way she
9 got that information was, in fact, Donald James
10 Smith.

11 THE COURT: I'm sorry. Are you saying -- are
12 you saying that had he reported it she would have
13 been able to corroborate it and there would have
14 been a report about it?

15 MS. SCHLAX: Yes, Your Honor.

16 THE COURT: Is that what your you're saying?

17 MS. SCHLAX: She said she had gathered all
18 the incarceration records.

19 MR. CALIEL: I think that's just making
20 inference, Your Honor. The question on cross was
21 -- the only evidence of that was the word of
22 Donald Smith. I think saying -- then taking the
23 leap that he never reported the attack to any
24 corrections officers, there was no evidence of
25 that.

1 THE COURT: I think there's probably a way to
2 word that. I just can't think of it right now.
3 I'll let you guys work on that.

4 There's probably a way to word that second
5 sentence that --

6 MR. CALIEL: I think the way to put it is he
7 stated he did not report the attack, period.

8 THE COURT: Is that good enough? Same thing.

9 MR. CALIEL: Well, I mean he -- actually
10 there was no testimony of that.

11 MS. SCHLAX: Quite frankly, Your Honor, I'm
12 satisfied with Donald James Smith was raped while
13 incarcerated, period.

14 THE COURT: Just take out the second
15 sentence?

16 MS. SCHLAX: Yes, Your Honor.

17 THE COURT: So double L will read Donald
18 James Smith was raped while incarcerated.

19 Double N, when Donald James Smith was released
20 from jail his drug abuse spiralled into full-blown
21 crack addiction.

22 MR. CALIEL: No objection.

23 THE COURT: Double N, on crack Donald James
24 Smith's inability to control his impulses were
25 intensified to the point that he felt like another

1 person. On the streets Donald James Smith became
2 notorious for his behavior while high. He was
3 paranoid, manic, unstable, impulsive and prone to
4 violence.

5 MR. CALIEL: Judge, I remember there being
6 some sort of reference to his street name of "Crack
7 Veessie". I think there was some statements about
8 him being paranoid, manic and instable, but I do
9 not remember any testimony in regards to prone to
10 violence.

11 MS. SCHLAX: I'm fine with the removing the
12 sentence, Your Honor.

13 THE COURT: I'm sorry.

14 MS. SCHLAX: I'm fine with removing prone to
15 violence.

16 MR. CALIEL: So it should just read -- and
17 there's a grammatical error. Inability to control
18 his impulse, impulses -- impulse, his inability
19 was.

20 THE COURT: So double N is going to read on
21 crack Donald James Smith's inability to control
22 his impulses was intensified to the point where he
23 felt like another person. Is there anything after
24 that?

25 MS. SCHLAX: On the streets Don became

1 notorious for his behavior while high.

2 MR. CALIEL: We're fine with that.

3 THE COURT: And then take out the last
4 sentence?

5 MR. CALIEL: Just take out prone to violence.
6 There was testimony that he was paranoid, manic,
7 unstable and impulsive.

8 THE COURT: And impulsive, period. So double
9 N will read on crack Donald James Smith's
10 inability to control his impulses was intensified
11 to the point that he felt like another person on
12 the street. Donald James Smith became notorious
13 for his behavior while high. He was paranoid,
14 manic, unstable and impulsive. Is that correct?

15 MS. SCHLAX: Yes, Your Honor.

16 MR. CALIEL: Correct.

17 THE COURT: Double O, Donald James Smith's
18 mother enabled his drug addiction. She drove him
19 to pay off his drug debts and if he was unable to
20 make the trip paid them off herself. She
21 continued this for decades.

22 MR. CALIEL: I agree with everything except
23 the, continued this for decades. I don't think
24 there was any reference to the duration of that.

25 MS. SCHLAX: I thought there was. And that

1 she was aware of the drug problem his entire life
2 and would routinely --

3 MR. CALIEL: I'm fine with it, Judge.

4 THE COURT: Leave it as it is?

5 MR. CALIEL: That's fine.

6 THE COURT: Double P, at the age of 20 Donald
7 James Smith attempted suicide for the first time
8 by driving into an oak tree on Orange Picker Road.
9 He flipped his car, but survived the accident.
10 Donald James Smith did not receive treatment for
11 his injuries.

12 MR. CALIEL: No objection.

13 THE COURT: Double Q, Donald James Smith
14 dissociated for the first time while using PCP in
15 1977. This began a life-long pattern of splitting
16 from himself and losing periods of time.

17 MS. SCHLAX: Your Honor, we concede we didn't
18 bring out any of that.

19 THE COURT: Well, are you saying to take out
20 double Q?

21 MR. CALIEL: Yes, I think that's what she
22 said. There was no evidence of it.

23 (Defense counsel conferring with defendant.)

24 THE COURT: Ms. Schlax, were you saying just
25 to take out double Q?

1 MS. SCHLAX: Your Honor, my memory of the
2 testimony, and I think the next -- the next
3 mitigator is Don experienced a dissociative
4 episode, and I would concede there was no -- there
5 was no further testimony of on one occasion he
6 woke up in a woman's car without memory of how he
7 got there. There was -- there was testimony that
8 at least on one occasion he -- he had a
9 dissociative episode where he lost time.

10 THE COURT: Okay. So we're combining double
11 Q and double R, correct?

12 MR. CALIEL: Yes, Your Honor.

13 THE COURT: And so it should say Donald James
14 Smith --

15 MS. SCHLAX: Experienced a dissociative --
16 experienced a dissociative -- is that correct?
17 Dissociative experience due to drugs -- to drug
18 use.

19 THE COURT: Donald James Smith experienced a
20 dissociative episode --

21 MR. CALIEL: Episode.

22 MS. SCHLAX: Yeah, episode.

23 MR. CALIEL: And then it should say due to
24 drug use.

25 MS. SCHLAX: Drug use. Lost time.

1 MR. CALIEL: Where he lost time.

2 MS. SCHLAX: Yes. And I do think she said
3 that that occurred more than once.

4 MR. CALIEL: And then the last sentence is
5 stricken. So QQ becomes -- well, we're
6 eliminating QQ. We're going to have to relabel
7 all these with the ones we've already eliminated,
8 but QQ has been removed.

9 The next mitigator would be Donald James
10 Smith experienced dissociative episodes due to
11 drug use when -- where he lost time.

12 MS. SCHLAX: I agree with that.

13 THE COURT: Okay. SS, Donald James Smith
14 made a second suicide attempt in Duval County
15 Jail.

16 MR. CALIEL: No objection.

17 THE COURT: TT, at age 21 Donald James Smith
18 was diagnosed as passive-aggressive, mildly
19 depressed, sociopathic, impulsive, having
20 hysterical and schizoid feature, feeling alienated
21 from others and having sexual deviation and
22 voyeurism. He was designated as a mentally
23 disordered sex offender and committed to the North
24 Florida Evaluation and Treatment Center.

25 MR. CALIEL: No objection.

1 THE COURT: UU, throughout his adult life
2 Donald James Smith spent hundreds of dollars per
3 day on crack. During the year 2002 he spent more
4 than \$90,000 in a four-month period. He went on
5 binges that lasted for weeks. During these
6 episodes Donald James Smith did not eat or sleep.
7 He also had to do everything in his power to keep
8 himself from acting on his homicidal or suicidal
9 urges.

10 MR. CALIEL: Judge, there was no evidence as
11 to the last sentence, but we would concede there
12 was evidence to the previous portion.

13 THE COURT: Ms. Schlax.

14 MS. SCHLAX: I would concede that there wasn't
15 any specific testimony as to specifically having to
16 do everything in his power.

17 THE COURT: So I'm taking off the last
18 sentence, correct?

19 MS. SCHLAX: No objection, Your Honor.

20 THE COURT: Double V, Donald James Smith
21 fathered a son, Donald James Smith, Jr., born June
22 2nd, 1992. He married his son's mother, Francine
23 Brown, but the relationship was short-lived.

24 MR. CALIEL: No objection.

25 THE COURT: Double W, Donald James Smith was

1 far from the perfect father, however, he has tried
2 to parent his son to the best of his ability.

3 MR. CALIEL: There was testimony to that.

4 THE COURT: XX, Donnie, Jr., also cared for
5 his father and is protective of him even to this
6 day.

7 MR. CALIEL: I don't believe there was any
8 testimony of that.

9 MS. SCHLAX: I think the last witness, Donald
10 Smith, Jr., cares for his father.

11 THE COURT: That part I think you did. I
12 don't know about protective of him.

13 MR. CALIEL: Well, I don't know with the
14 protective. And the way it reads, the fact that
15 it's -- it should read, Donnie, Jr., cares for his
16 father. I think that is -- that evidence came
17 forward. The way this reads is also cared for his
18 father, as if he provided care for his father,
19 which he did not, and protecting him even to this
20 day. I think it should read Donald -- Donald
21 Smith, Jr., or Donnie, Jr., cares for his father
22 even to this day.

23 MS. SCHLAX: Based on the testimony, Your
24 Honor, we request Donald James Smith, Jr., has
25 developed a close relationship with his father

1 since -- since he's been incarcerated.

2 THE COURT: So XX will be Donald James Smith,
3 Jr.

4 MS. SCHLAX: Yes.

5 THE COURT: Has developed a close
6 relationship. Is that right?

7 MS. SCHLAX: Yes, Your Honor.

8 THE COURT: With his father since his
9 incarceration. Correct?

10 MS. SCHLAX: Yes, Your Honor. That's what we
11 would request.

12 THE COURT: Any objection?

13 MR. CALIEL: No objection.

14 THE COURT: YY, when Donald James Smith was
15 42 years old he was diagnosed as having antisocial
16 personality disorder, polysubstance dependence,
17 sexual disorder, not otherwise specified, and
18 cocaine dependence.

19 MS. SCHLAX: Your Honor, there was no
20 testimony that this occurred specifically at 42
21 years old. I think there was general -- I think
22 there was general testimony by Dr. Holmes of what
23 she currently had diagnosed him with and that he
24 had been diagnosed with that previously. So I'm
25 fine with -- and this will eliminate some other

1 mitigators. Donald James Smith has been
2 repeatedly diagnosed with. I think that's what
3 the testimony was.

4 MS. NELSON: I have a issue with TT.

5 THE COURT: Hum?

6 MR. CALIEL: I think we need to revisit TT,
7 Your Honor, because I don't think there was a
8 specific -- there was general testimony about
9 prior -- prior disorder diagnosis, but I don't
10 think it was specific at 21.

11 MS. SCHLAX: I think probably what it should
12 read because there was -- what we kept referencing
13 was not even his specific age, it was the year,
14 and it was -- it was 1978.

15 THE COURT: For TT?

16 MS. SCHLAX: I'm sorry. That's true. 1977.
17 That's what the judgment was for. That's when he
18 was labelled a mentally disordered sex offender.

19 THE COURT: That's for TT?

20 MR. FLETCHER: Yes, ma'am.

21 MS. SCHLAX: TT.

22 MR. CALIEL: Yes.

23 THE COURT: In 1977 at age 21.

24 MR. CALIEL: Yeah, he was diagnosed or
25 designated as a mentally disordered sex offender

1 and committed, but I don't think there was any
2 testimony about passive-aggressive, mildly
3 depressed, sociopathic, impulsive, having
4 hysterical or schizoid features, feeling alienated
5 from others and having the sexual deviation of
6 voyeurism. I don't think there was any testimony
7 of any of that.

8 MS. SCHLAX: I concede there was no specific
9 testimony in regards to that. The State
10 previously hasn't objected but I concede.

11 MR. CALIEL: So then in 1977 Donald James
12 Smith was designated as a mentally disordered sex
13 offender and committed to North Florida Evaluation
14 and Treatment Center.

15 THE COURT: Correct?

16 MS. SCHLAX: Correct, Your Honor.

17 THE COURT: And then we go back down to
18 double Y and it would say, Donald James Smith has
19 been repeatedly diagnosed with having antisocial
20 personality disorder, polysubstance dependence,
21 sexual disorder, not otherwise specified, and
22 cocaine dependence?

23 MS. SCHLAX: Yes, Your Honor.

24 THE COURT: And is there supposed to be a
25 comma after sexual disorder?

1 MS. SCHLAX: Yes.

2 THE COURT: There is?

3 MS. SCHLAX: That's the way that they
4 actually articulate it in the reports.

5 THE COURT: Double Z, in 1999 --

6 MR. CALIEL: Your Honor, I think Ms. Nelson
7 makes a good point. Nobody actually diagnosed him
8 as a sexually disorder, not otherwise specified.
9 I think you just put pedophilia in there.

10 MS. SCHLAX: I think that's more accurate
11 with the testimony that's come out.

12 THE COURT: Okay. So Donald James Smith has
13 been -- and this is YY, Donald James Smith has
14 been repeatedly diagnosed as having antisocial
15 personality disorder, polysubstance dependence --

16 MS. SCHLAX: Yes, Your Honor.

17 THE COURT: -- pedophilia and cocaine
18 dependence?

19 MS. SCHLAX: Yes, Your Honor.

20 MR. CALIEL: Yes.

21 THE COURT: Double Z, in 1999 Donald James
22 Smith was designated as a sexually violent
23 predator and subsequently committed to the Martin
24 Treatment Center through the Jimmy Ryce Civil
25 Commitment Act. While detained at MTC Donald

1 James Smith did not complete the treatment plan
2 developed for him.

3 MR. CALIEL: No objection.

4 THE COURT: Triple A, while at the Martin
5 Treatment Center Donald James Smith engaged in a
6 long-term sexual relationship with another patient
7 who was known for being HIV-positive. They
8 regularly engaged in unprotected sexual activity.
9 This was regarded as Donald James Smith's third
10 suicide attempt.

11 MR. CALIEL: I don't think it was designated
12 as long-term and I don't think there was any
13 testimony that they were regularly engaged in
14 unprotected sexual activity.

15 MS. SCHLAX: I would concede that.

16 THE COURT: So what should it read?

17 MR. CALIEL: That he engaged in a sexual
18 relationship with another patient who was known
19 for having HIV. This was regarded as his third
20 suicide attempt.

21 THE COURT: Do you agree?

22 MS. SCHLAX: I agree, Your Honor.

23 THE COURT: Triple B, when Donald James Smith
24 was 45 years old --

25 MS. SCHLAX: Your Honor, I would concede that

1 we have covered that mitigator previously.

2 THE COURT: So delete triple B?

3 MS. SCHLAX: Yes, Your Honor.

4 MR. CALIEL: Yes, Your Honor.

5 THE COURT: Triple C, in spite of the fact
6 that Donald James Smith did not participate in
7 counseling, he was released from the Martin
8 Treatment Center based on a decision made by
9 members of the State Attorney's Office in Duval
10 County.

11 MR. CALIEL: No objection.

12 THE COURT: Triple D, once released from the
13 Martin Treatment Center he was required to receive
14 a psychosexual evaluation and treatment.
15 Dr. James Vallely completed the evaluation and
16 concluded that Donald James Smith was highly
17 likely to reoffend.

18 MR. CALIEL: No objection.

19 THE COURT: Triple E, Donald James Smith was
20 ordered to undergo chemical castration as a form
21 of treatment. However, the State of Florida did
22 not require him to continue the protocol and was
23 terminated.

24 MR. CALIEL: That's not accurate. I actually
25 think the testimony was that he wished to

1 discontinue the treatment. And there was no
2 testimony of chemical castration. There was
3 testimony that he was receiving medication to
4 lower his sexual urges and that he decided to
5 cease that treatment.

6 MS. SCHLAX: I would concede that the
7 testimony was he was receiving medication. I
8 honestly can't remember if the testimony came out
9 that that was as a condition of the civil contract.
10 I don't remember and, therefore, if it was a
11 condition of his civil contract the only way he
12 could stop doing that is if it was not required of
13 him. And that was the testimony.

14 THE COURT: Okay. So how do you all want
15 this one to read?

16 MS. SCHLAX: Your Honor, I'm going to just
17 eliminate the entire mitigator.

18 THE COURT: Okay. We'll delete triple E.

19 Triple F, Donald James Smith was subsequently
20 arrested for dealing in stolen property and
21 burglary. He committed both offenses to support
22 his crack addiction.

23 MR. CALIEL: Your Honor, there was no
24 testimony as to why he committed the offenses. I
25 would also say it probably reads better because

1 these things aren't sequential, just say Donald
2 James Smith was arrested for dealing in stolen
3 property and burglary.

4 MS. SCHLAX: I would suggest that it should
5 merge with the next one. I concede there's no
6 testimony that it was committed for a specific
7 purpose.

8 MR. CALIEL: So combine triple F to read,
9 Donald James Smith was arrested for dealing in
10 stolen property, burglary and was eligible to
11 receive 30 years in prison as an habitual felony
12 offender, however, members of the State Attorney's
13 Office in Duval County permitted him to plead to a
14 reduced sentence of four years in prison, which he
15 served 30 months.

16 MS. SCHLAX: I would concede there's no
17 testimony about how much time he actually served.

18 MR. CALIEL: Yeah. I think it just ought to
19 be served four years in prison, Donald James Smith
20 was not placed on any form of supervision upon
21 release, because that was elicited from
22 Mr. Bossen.

23 THE COURT: Okay. Do you agree to all of
24 that?

25 MS. SCHLAX: Yes, Your Honor.

1 THE COURT: Triple --

2 MR. CALIEL: Your Honor, I agree with this.
3 We would object to the terminology "reduced". He
4 pled to a sentence of four years. He was facing
5 30. I think reduced is a qualification.

6 MS. SCHLAX: I don't have any objection to
7 that, Your Honor.

8 THE COURT: All right. Triple H, when Donald
9 James Smith was 50 years old he was diagnosed with
10 ASPD, exhibitionism, paraphilia, MLS, sexually
11 attracted to pre- and postpubescent females and
12 cocaine dependence in remission in a controlled
13 environment. However, it was determined that he
14 did not meet the criteria for civil commitment in
15 the Jimmy Ryce Civil Commitment Center, although
16 he had never received any meaningful
17 rehabilitation.

18 MS. SCHLAX: I agree it would have to be
19 reworded based on the evidence that was elicited.
20 I would suggest in 2006 the state psychological --
21 a state -- I think the evidence was a state
22 psychological assessment determined Donald James
23 Smith did not meet the criteria for civil
24 commitment in Jimmy Ryce Civil Commitment Center.
25 That's how it came out.

1 THE COURT: Can you read it again how you
2 think it should read?

3 MS. SCHLAX: Yes, in 2006 the State
4 psychological assessment determined that Donald
5 James Smith did not meet the criteria for civil
6 commitment in the Jimmy Ryce Civil Commitment
7 Center, although he had never received any
8 meaningful rehabilitation.

9 THE COURT: And take out the whole first
10 part?

11 MR. CALIEL: Yes, Your Honor.

12 THE COURT: Do you agree, Mr. Caliel?

13 MR. CALIEL: Yes, Your Honor.

14 THE COURT: Triple I, in 2011, Donald James
15 Smith Baker Acted himself. He reported homicidal
16 thoughts, auditory and visual hallucinations. He
17 also had a history of using cocaine and Lortab.
18 He was diagnosed as having a potential for
19 homicide, suicide and violence. The center
20 recommended one-on-one counseling and let him stay
21 three or four days. He never followed up with
22 therapy.

23 MR. CALIEL: Judge, I don't remember any
24 testimony about 2011.

25 MS. SCHLAX: It actually -- that was --

1 MR. CALIEL: Oh, it's the submitted business
2 record? No objection.

3 THE COURT: Triple J, in 2009 Donald James
4 Smith was arrested for attempting to lure a 13
5 year old girl while posing as a Department of
6 Children and Family -- it should be DCF, not CDCF,
7 correct?

8 MR. CALIEL: Yes.

9 THE COURT: -- worker. Although he could
10 have been sentenced to ten years in the Duval --
11 or the Department of Corrections, members of the
12 State Attorney's Office in Duval County agreed to
13 a plea agreement allowing a county jail sentence
14 which bypassed further screening into the Jimmy
15 Ryce Civil Commitment Center.

16 MR. CALIEL: Your Honor, I think -- I think
17 it should read if found guilty he could have been
18 sentenced to ten years.

19 MS. SCHLAX: I think that's accurate.

20 THE COURT: Okay. Triple K, on June 1st,
21 2013, Donald James Smith was released from the
22 Duval County Jail. He was not placed on any kind
23 of supervision by the State of Florida.

24 MR. CALIEL: That's fine. No objection.

25 THE COURT: Triple L, three weeks before

1 Cherish's murder, Donald James Smith called at
2 Shands Hospital and Jewish Family and Community
3 Services seeking psychological treatment. An
4 appointment was made for June 22nd, 2013.

5 MS. SCHLAX: I don't think there was any
6 specifics as to a specific appointment being made.
7 I would say that -- and I'm using my computer.
8 Should merge -- I think it should merge with MMM.
9 And MMM is based on a business record that's
10 entered into evidence.

11 (State and defense counsel conferring.)

12 MS. SCHLAX: Yes, sir, Dr. Butler commented
13 on that.

14 MR. CALIEL: She did.

15 THE COURT: All right.

16 MR. CALIEL: So eliminate triple L, just
17 include it in MMM is what we're saying.

18 MS. SCHLAX: She also indicated that he had
19 called at Shands Hospital. Dr. Butler testified
20 that first he went to Shands Hospital and then a
21 Baker Act and he was sent to the Mental Health
22 Resource Center, which we have the business record
23 entered into evidence.

24 THE COURT: Then I'm not sure what you're
25 asking as far as how -- we have both triple L and

1 triple M?

2 MS. SCHLAX: No, I think it should just
3 become one and it should read three weeks before
4 the murder of Cherish Perrywinkle Donald James
5 Smith called at Shands Hospital and was Baker
6 Acted. He stated that he was having violent
7 thoughts and wanted to get into a residential
8 program. The center gave him a new brochure and
9 told him to study and practice. They allowed him
10 to stay approximately 24 hours.

11 THE COURT: What does "called at Shands"
12 mean?

13 (Defense counsel conferring with defendant.)

14 MS. SCHLAX: And I think I -- I think her
15 testimony was he physically went there.

16 THE COURT: All right. So I don't know what
17 "called" --

18 MR. CALIEL: So it should be went to Shands
19 Hospital.

20 THE COURT: Okay.

21 MS. SCHLAX: And I'm fine with that.

22 THE COURT: And then take out and Jewish
23 Family Community Services.

24 MS. SCHLAX: Yeah, I don't remember any
25 reference specifically to that.

1 THE COURT: So three weeks before the murder
2 he went to Shands Hospital, and then was Baker
3 Acted?

4 MS. SCHLAX: Yes.

5 THE COURT: He stated that he was homicidal
6 and wanted to get into a residential program?

7 MS. SCHLAX: I agree.

8 MR. CALIEL: Yes.

9 THE COURT: Hum?

10 MS. SCHLAX: I agree.

11 THE COURT: And can you read over that next
12 part? I don't remember that.

13 MR. CALIEL: She did testify that they gave
14 him a brochure and told him to study it.

15 THE COURT: Okay. Okay. All right. So
16 that's corrected those two correctly?

17 MR. CALIEL: Yes, Your Honor.

18 MS. SCHLAX: Yes, Your Honor.

19 THE COURT: Okay. Triple N, days later
20 Donald James Smith was again Baker Acted. He
21 stated that he was having violent thoughts and
22 wanted to get into a residential program. The
23 center gave him a new brochure and told him to
24 study and practice. He stayed approximately one
25 day.

1 MR. CALIEL: No objection.

2 THE COURT: Triple O --

3 MR. CALIEL: Wait a second.

4 MS. SCHLAX: Wait.

5 MR. CALIEL: That seems like it's repeated,
6 Your Honor.

7 MS. SCHLAX: Right. I'm saying merge that
8 into just one, Your Honor. It should only be one.

9 THE COURT: Triple L, triple M and triple N
10 all merge into one?

11 MS. SCHLAX: Yes, Your Honor.

12 MR. CALIEL: Yes.

13 THE COURT: Okay. Triple O,
14 neuropsychological testing has indicated that
15 Donald James Smith's brain functioning is
16 abnormal. He has deficits in executive
17 functioning and poor impulse control.

18 MR. CALIEL: No objection.

19 THE COURT: Triple P, Donald James Smith's
20 neuropsychological disorders are exacerbated by
21 substance abuse and addiction.

22 MR. CALIEL: No objection.

23 THE COURT: Triple Q, medical testing,
24 specifically PET and MRI and DTI scans, have
25 revealed that Donald James Smith's brain

1 functioning is abnormal.

2 MR. CALIEL: No objection.

3 THE COURT: Triple R, Donald James Smith's
4 brain abnormalities are consistent with someone
5 who has suffered brain damage.

6 MR. CALIEL: No objection.

7 THE COURT: Triple S, due to the severity and
8 complexity of Donald James Smith's mental
9 illnesses he was under the influence of extreme
10 mental or emotional disturbance.

11 MR. CALIEL: I don't believe there was
12 testimony as to that.

13 MS. SCHLAX: I think that's repetitive
14 because we already have it within the statutory
15 mitigator.

16 THE COURT: All right. Take out triple S.
17 Triple T, due to the number -- let me start
18 over.

19 MR. CALIEL: It's a repeat of the statutory
20 mitigator again. SSS and TTT are just repeating
21 the statutory mitigators.

22 MS. SCHLAX: I concede that, Your Honor.

23 THE COURT: So take that out?

24 MS. SCHLAX: Take it out.

25 THE COURT: Triple U, Donald James Smith has

1 suffered from significant mental illness for most
2 of his life.

3 MR. CALIEL: No objection.

4 THE COURT: Triple W -- I'm sorry -- V,
5 Donald James Smith's mental illness is not
6 something he has chosen. He has a genetic
7 predisposition to mental illness.

8 MR. CALIEL: I don't think there was any
9 testimony as to genetic disposition --
10 predisposition.

11 MS. SCHLAX: I would concede. We have an
12 earlier mitigator where we talk about the
13 difficulties in his family is already -- that's
14 already accurately --

15 THE COURT: So just leave the first sentence?

16 MS. SCHLAX: Yes.

17 THE COURT: Triple W, Donald James Smith had
18 sought treatment for his mental illness but he was
19 never adequately treated.

20 MR. CALIEL: Your Honor, I would think that's
21 again a repeat. The only time we know he sought
22 treatment was when he sought Baker Act. So this is
23 just repeating what has already been stated
24 previously.

25 THE COURT: What does the defense say?

1 MS. SCHLAX: The defense is specifically
2 requesting it. I would concede, though, that we
3 have -- we have already put in two separate
4 mitigators.

5 THE COURT: So delete triple W?

6 MS. SCHLAX: I would concede that we already
7 have mitigators covering it.

8 THE COURT: Okay.

9 MR. CALIEL: Yes.

10 Your Honor, can we revisit JJJ for a second
11 because there was a factual inaccuracy. JJJ, the
12 victim in that case was nine years old.

13 THE COURT: Say that again.

14 MR. CALIEL: JJJ, the 2009 case where he was
15 attempting to lure a child by posing as a DCF
16 worker, that victim was nine years old.

17 THE COURT: Okay. Do you agree with that?

18 MS. SCHLAX: That's fine, Your Honor.

19 THE COURT: All right. Where are we?

20 MR. CALIEL: We are on triple X, Your Honor.

21 THE COURT: Because we're deleting double Y
22 because it's already been included, correct?

23 MR. CALIEL: Yes. Your Honor, I think that
24 triple X, triple Y --

25 MS. SCHLAX: Yes, I would concede that, Your

1 Honor.

2 THE COURT: You would concede what?

3 MR. FLETCHER: They've been done before.

4 MS. SCHLAX: Covered by --

5 MR. CALIEL: They've been covered by

6 previous.

7 THE COURT: So delete triple X and triple Y?

8 MR. CALIEL: Yes, Judge.

9 MR. FLETCHER: Yes.

10 THE COURT: Triple Z, Donald James Smith's
11 substance abuse and addiction are not his
12 choosing.

13 MR. CALIEL: Your Honor, I don't believe
14 there was any testimony to that.

15 MR. FLETCHER: Judge, we can take that out.

16 MS. SCHLAX: Oh, I apologize. I thought we
17 had agreed already.

18 THE COURT: We're taking out triple Z?

19 MS. SCHLAX: Yes.

20 THE COURT: Quadruple A, Donald James Smith
21 has sought treatment for substance abuse and
22 addiction, but they were not adequately treated.

23 MR. CALIEL: I don't remember any substance
24 abuse treatment that he sought.

25 MS. SCHLAX: I concede, Your Honor, that we

1 don't have any testimony of that.

2 THE COURT: So delete Quadruple A?

3 MS. SCHLAX: Yes.

4 THE COURT: Quadruple B, the State of Florida
5 failed to adequately treat, confine and supervise
6 Donald James Smith. As a result his mental
7 illness and addiction grew worse and he presented
8 an increasing threat to the community.

9 MR. CALIEL: Your Honor, I believe this is
10 repetitive to the Jimmy Ryce evaluation that we've
11 already discussed.

12 MS. SCHLAX: Your Honor, we -- we agree that
13 it can be removed.

14 THE COURT: Quadruple B will be deleted.

15 Quadruple C, Donald James Smith did not
16 choose his family.

17 MR. CALIEL: No objection.

18 THE COURT: Quadruple D, Donald James Smith
19 did not choose the way his family treated him.

20 MR. CALIEL: No objection.

21 THE COURT: Quadruple E, Donald James Smith
22 did not choose to be sexually molested.

23 MR. CALIEL: No objection.

24 THE COURT: Quadruple F, Donald James Smith's
25 childhood experiences shaped the person he became

1 as an adult.

2 MR. CALIEL: No objection.

3 THE COURT: Quadruple G, at the time of the
4 offenses Donald James Smith was 56 years old. He
5 is now 62 years old. That can't be right.

6 MR. CALIEL: He's 61.

7 MR. FLETCHER: Yeah.

8 MR. CALIEL: He's 61, Your Honor.

9 THE COURT: So at the time he was 56, he's
10 now 61, is that correct?

11 MR. FLETCHER: Yes, Your Honor.

12 MS. SCHLAX: Yes, Judge.

13 THE COURT: The average -- the average life
14 expectancy of a white male inmate in the
15 Department of Corrections --

16 MR. CALIEL: There's no evidence for that.

17 MS. SCHLAX: There's no evidence. We concede
18 that.

19 THE COURT: Delete Quadruple H.

20 Quadruple I, Donald James Smith is in poor
21 health. He has been diagnosed with chronic
22 obstructive pulmonary disease, COPD.

23 MR. CALIEL: Your Honor, I request that the
24 first line be stricken. He has been diagnosed
25 with COPD. I think poor health is a qualification

1 of that. He has been diagnosed with heart
2 disease, we did hear that as well, and he has been
3 diagnosed with Hepatitis C.

4 THE COURT: So it should just say the same as
5 the other two, just say he has been diagnosed,
6 correct?

7 MR. CALIEL: Yes, Donald James Smith has been
8 diagnosed.

9 THE COURT: So triple -- or Quadruple I will
10 read Donald James Smith is -- excuse me -- has
11 been diagnosed with chronic obstructive pulmonary
12 disease?

13 MS. SCHLAX: And, Your Honor, why don't we
14 just, comma, heart disease, and I don't believe we
15 had -- no, we did have testimony as to Hepatitis
16 C.

17 MR. CALIEL: B and C.

18 THE COURT: Yeah, B and C.

19 MS. SCHLAX: B and C. But if we just make
20 that all one.

21 THE COURT: So it would be just one category,
22 Donald James Smith has been diagnosed with COPD,
23 heart disease, Hepatitis B and Hepatitis C?

24 MS. SCHLAX: Yes, Your Honor.

25 MR. CALIEL: Yes.

1 THE COURT: Okay. Quadruple L, Donald James
2 Smith has been a strong support system for his
3 mother who is receiving treatment for breast
4 cancer.

5 MR. CALIEL: No objection.

6 THE COURT: Quadruple N, Donald James Smith
7 has had an exemplary disciplinary record in Duval
8 County Jail and Department of Corrections. He has
9 not been a threat to corrections officers or other
10 inmates.

11 MR. CALIEL: Your Honor, I don't think
12 there's been evidence of an exemplary disciplinary
13 record. I think he just has not posed a threat to
14 corrections officers or other inmates. I don't
15 think anyone testified to an exemplary
16 disciplinary record. Had they done so,
17 Ms. Wheeler-Sanchez would have impeached them with
18 the disciplinary record.

19 MS. SCHLAX: I wish I could think of how to
20 reword it.

21 (Defense counsel conferring with defendant.)

22 MS. SCHLAX: Donald James Smith --

23 THE COURT: I mean --

24 MS. SCHLAX: Prior incarceration records do
25 not -- do not indicate any threat -- any threat to

1 correctional officers or other inmates.

2 THE COURT: Mr. Caliel.

3 MR. CALIEL: Your Honor --

4 THE COURT: Couldn't it just say Donald James
5 Smith has not been a threat to correctional
6 officers or other inmates? Isn't that what we're
7 trying to say?

8 MS. SCHLAX: Yeah, that's fine.

9 MR. CALIEL: I think that's fine.

10 THE COURT: And if you want it more detailed,
11 in the Duval County Jail and the Department of
12 Corrections, if you want that added.

13 MS. SCHLAX: I think that covers it, Your
14 Honor.

15 THE COURT: Okay. Quadruple N, life in
16 general population can be challenging for an
17 inmate convicted of an offense against a child.

18 MR. CALIEL: I think that was specifically
19 excluded.

20 MS. SCHLAX: I concede based on the -- on the
21 prior testimony.

22 THE COURT: Okay. All right. Then we get
23 back to standard instructions which would be read
24 in the case which informs the jury of how to go
25 through this new process, how to weigh, and then

1 you get to the page where there's a list of
2 considerations for witnesses. And there's 1
3 through 10.

4 MR. CALIEL: Your Honor, I believe we can
5 eliminate 7, 9, and 10.

6 MS. SCHLAX: Agreed.

7 THE COURT: So 1 through 6 will be read, 7
8 will be deleted, 8 will become 7 and 9 and 10 will
9 be deleted, correct?

10 MR. CALIEL: Yes, Your Honor.

11 MS. SCHLAX: And, Your Honor, it's probably
12 appropriate at this juncture for me to renew my
13 prior request for the special jury instruction we
14 had requested regarding mercy.

15 THE COURT: Okay. The renewal of that
16 request will be noted for the record and I'll deny
17 that request.

18 Then it talks about opening statement and
19 considering the witnesses. Then we'll get to the
20 general rules that apply to their discussions.

21 After that -- after the general rules that
22 apply to your discussion, 1 through 5.

23 I don't think we have that next paragraph at
24 this point, do we?

25 MR. CALIEL: We can eliminate that, Judge.

1 We chose to preserve victim impact evidence for a
2 potential Spencer Hearing if we get to that point.
3 So there's no victim impact evidence for them to
4 consider.

5 THE COURT: Do you agree, Ms. Schlax?

6 MS. SCHLAX: To remove the victim impact,
7 yes.

8 THE COURT: That whole paragraph?

9 MS. SCHLAX: Yes, Your Honor.

10 THE COURT: Should the last sentence be read
11 at that point in time?

12 MS. NELSON: No.

13 THE COURT: Take out the whole paragraph?

14 MR. CALIEL: The whole paragraph, Your Honor.

15 THE COURT: Okay. And this thing about notes
16 and going to the jury and all this, the cell
17 phones, what to do during deliberations. Okay.

18 Then we get to the verdict forms. Have you
19 gone over these?

20 MR. CALIEL: Judge, I think the verdict forms
21 are all going to change. I think pages 1 and 2 --

22 THE COURT: Oh, because of the factors?

23 MR. CALIEL: Yeah. And page 1, 2, and 3 I
24 believe will remain the same. Page 4 is the
25 beginning of the non-statutory mitigating

1 circumstances. And so all those will have to
2 mirror the decisions we just made on the
3 instructions. But the format will be the same as
4 it's depicted here.

5 THE COURT: There's a 31-page verdict form,
6 correct, at least right now it is? It'll go down
7 a little bit.

8 MR. CALIEL: Yes. The first three pages
9 would be standard because those involve the
10 statutory aggravation and the analysis and then
11 the statutory mitigators starting on page 4 would
12 be -- so that should remain unchanged. Starting
13 on page 4 we'll then begin to edit out the
14 non-statutory mitigating circumstances as we just
15 detailed.

16 THE COURT: Okay. What time do you all want
17 to be here in the morning?

18 MR. CALIEL: What time does the Court need
19 us?

20 THE COURT: We need to be able to finalize
21 these. Of course, that shouldn't take a whole
22 long time. I assume the State will retype all
23 this, retype it or whatever you call that, e-mail
24 it to you.

25 You can make any corrections if they miss

1 something.

2 You can e-mail it to me after that.

3 MS. SCHLAX: That's fine, Your Honor.

4 THE COURT: We'll all be ready to kind of go
5 in the morning, but we'll just have to go over
6 particularly the verdict form.

7 MS. SCHLAX: Yes, Your Honor.

8 MR. CALIEL: So here at 9:00? They're coming
9 at 9:30 again?

10 THE COURT: They're supposed to be here at
11 9:30.

12 MR. CALIEL: Supposed to be.

13 THE COURT: I think 9:00 is probably a good
14 time.

15 MS. SCHLAX: I do, Your Honor.

16 THE COURT: Because we've covered the hard
17 part. It's just making sure everything was
18 redone. Okay. So 9:00 o'clock.

19 MS. SCHLAX: Yes, Your Honor.

20 THE COURT: Thank you, everybody.

21 MR. CALIEL: Thank you, Your Honor.

22 THE COURT: See you at 9:00 o'clock.

23 Oh, any exceptions or objections for the
24 record?

25 MS. SCHLAX: Just those previously noted

1 before in regards to our requests, Your Honor.

2 THE COURT: Okay.

3 (Evening recess.)

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IN THE CIRCUIT COURT OF THE
FOURTH JUDICIAL CIRCUIT, IN
AND FOR DUVAL COUNTY, FLORIDA.

Case No: 2013-CF-5781-AXXX-MA
Division CR-D

STATE OF FLORIDA

-vs-

DONALD JAMES SMITH,

Defendant,

TESTIMONY AND PROCEEDINGS taken before the
Honorable Mallory D. Cooper, Judge of the Circuit Court,
on February 22, 2018, and as reported by Faye M. Gay,
Certified Realtime Reporter, Registered Merit Reporter,
and Certified Legal Video Specialist.

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904-358-2090

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3 State Attorney,

 Appearing on behalf of the State of Florida.

4

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6 Assistant State Attorneys,

 Appearing on behalf of the State of Florida

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8 JULIE SCHLAX and CHARLES FLETCHER, Esquires,

9 Appearing on behalf of the Defendant.

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1 (Defendant present.)

2 (Jury absent.)

3 MR. CALIEL: Good morning, Your Honor.

4 THE COURT: Good morning, everyone.

5 I think I have the corrected instructions, the
6 verdict form.

7 MR. CALIEL: That's correct, Your Honor.

8 THE COURT: Okay. You can open the
9 courtroom. The public can come in.

10 There's not anything for me to do, correct?

11 MR. CALIEL: Yes.

12 THE COURT: Okay. All right. We're on the
13 record now.

14 Mr. Smith's in the courtroom, his attorneys, as
15 well as the State Attorneys are present.

16 And yesterday afternoon after we excused the
17 jury we went over the proposed jury instructions and
18 verdict forms and we made some corrections to those
19 and I have the new copy --

20 Have you had a chance to review the correction?

21 MS. SCHLAX: I have, Your Honor.

22 THE COURT: Any corrections to the
23 corrections?

24 MS. SCHLAX: No, Your Honor.

25 THE COURT: State okay with them as well?

1 MR. CALIEL: Yes, Your Honor.

2 THE COURT: Okay. What we determined we
3 would do, if I understand procedurally correctly,
4 we would have two closing arguments this morning.

5 MR. CALIEL: That's correct.

6 THE COURT: One from the State and one from
7 the defense.

8 MR. CALIEL: That's correct, Your Honor.

9 THE COURT: Who'll be doing the closing for
10 the State?

11 MR. CALIEL: I'll be closing for the State,
12 Your Honor.

13 THE COURT: And for the defense.

14 MS. SCHLAX: I will, Your Honor.

15 THE COURT: All right. And then after that I
16 think we'll take a break for a few minutes, 15
17 minutes or so. I think the instructions are going
18 to take awhile to read and go over the jury form
19 -- or verdict form with the jury and we allowed
20 them to -- we will allow them to remain here for
21 lunch so that we don't have to have a break in an
22 hour, a little over an hour for that, so we should
23 be able to go right from the closing arguments, a
24 break, instructions, verdict form, instructions,
25 and then discharge -- or excuse the jury to the

1 jury room to begin their deliberations.

2 Does that schedule meet with everyone's
3 approval?

4 MR. CALIEL: Yes, Your Honor.

5 MS. SCHLAX: Yes, Your Honor.

6 THE COURT: All right. I think we're still
7 waiting on a juror or two. Is there anything else
8 we need to --

9 I did want to ask one question on the
10 instructions verdict form. I'll be going over in
11 the instructions each of the mitigators. They
12 will be read to the jury. When I get to that part
13 on the verdict form, would there be any objection
14 to me not re-reading those and just telling the
15 jury what their job is at that stage and referring
16 them back to what's already been read and explain
17 to them as they'll see on the screen that they are
18 each listed individually and this is what they
19 must do or do you want me to read them all again?

20 (Defense counsel conferring.)

21 MS. SCHLAX: Correct. And the Court would
22 not read the aggravators as well.

23 MR. FLETCHER: On the verdict form.

24 MS. SCHLAX: On the verdict form. There are
25 six. We don't have any objection to the Court

1 just explaining the process.

2 THE COURT: I understand what you're saying.
3 You want it done for both? If I'm going to do it,
4 you want it done for both, both aggravators and
5 mitigators? If I'm not going to re-read them, you
6 want me to not re-read both, the mitigators and
7 the aggravators?

8 MS. SCHLAX: Correct.

9 MR. CALIEL: Your Honor, the State has no
10 objection to that procedure. I think you can --
11 because of the way the verdict form is formed out
12 you can explain that they have to make a finding,
13 you don't need to read it, but a special finding
14 has to be made before they even get to the
15 aggravators -- correction -- I mean before we get
16 to the mitigators. I apologize.

17 THE COURT: Right. So what I'll be doing, I
18 won't be reading the verdict form, I'll be
19 explaining the verdict form.

20 MS. SCHLAX: Yes, Your Honor.

21 THE COURT: Does anyone have any objection to
22 that?

23 MS. SCHLAX: No, Your Honor.

24 MR. CALIEL: No objection from the State.

25 THE COURT: So I'll read the aggravators and

1 the mitigators the same.

2 MR. CALIEL: Yes, Your Honor.

3 THE COURT: Okay. Then I'll tell them after
4 doing that that they go on to page -- they'll be
5 going to page 24 and then I'll go back to
6 explaining the different sections by reading them.
7 Okay. That's what we'll do.

8 So we just need to have all of our jury here so
9 we can get started.

10 (Pause.)

11 THE COURT: We should be ready in just a few
12 minutes. They're on their way up.

13 I don't know if you want to start or not, but
14 on LL at the top of the page it just looks
15 incorrect. It's LL at the top of the page. There's
16 nothing incorrect about it. It just doesn't have a
17 space there.

18 MR. CALIEL: Judge, we're going to see if we
19 can correct that spacing on that page.

20 THE COURT: That would be great. Thank you.

21 BAILIFF: Everybody here, ma'am.

22 THE COURT: Are they all ready?

23 BAILIFF: The last few are doing their lunch
24 menu.

25 THE COURT: Let's wait a few minutes. Give

1 them time for that and the bathroom.

2 BAILIFF: All right.

3 MR. CALIEL: Your Honor, while we wait, can I
4 step into the room for a second?

5 THE COURT: Yes.

6 (Pause.)

7 BAILIFF: Are you ready, ma'am?

8 THE COURT: Is everyone ready for the jury to
9 come out?

10 MS. SCHLAX: Yes, Your Honor.

11 MR. CALIEL: Yes, Your Honor.

12 THE COURT: You can bring them in.

13 BAILIFF: All right. Jury is entering the
14 courtroom.

15 (Jury present.)

16 THE COURT: You may be seated.

17 Good morning, ladies and gentlemen.

18 First of all, were you each able to follow my
19 instructions to not get any information about this
20 case from outside of the courtroom?

21 (Affirmative response from jurors.)

22 THE COURT: Anyone who did not follow those
23 instructions?

24 (No response from jurors.)

25 THE COURT: The record will reflect that no

1 one has indicated that they weren't able to follow
2 my instruction.

3 Thank you for being here. We are ready to get
4 started.

5 Both the State and the defense have now rested
6 their case. The attorneys now will present their
7 final argument. Please remember that what the
8 attorneys say is not evidence or your instruction on
9 the law. However, do listen closely to their
10 arguments. They are intended to aid you in
11 understanding the case. Each side will have equal
12 time.

13 Mr. Caliel.

14 MR. CALIEL: Thank you, Your Honor. May it
15 please the Court.

16 THE COURT: Yes.

17 MR. CALIEL: Counsel.

18 Ladies and gentlemen of the jury.

19 Mama, he's got a \$150 gift card and we're going
20 to McDonald's. Those were the last words of eight
21 year old Cherish Perrywinkle to her mother.
22 Innocent, trusting, she followed after that man, she
23 walked to the front of the store, she walked out the
24 front door of Walmart, she got into that van and no
25 one ever saw her alive again.

1 He stole her from her mother. He took her for
2 the purpose of satisfying his desires, for his
3 pleasure, he took her where no one would see, no one
4 would hear and then he viciously raped her.
5 Sodomized her. He destroyed her sexual anatomy.

6 And when he was done pleasuring himself he
7 looked at that child and he knew she was a witness
8 against him and he made the conscious choice to end
9 her life.

10 He wrapped something around her neck and for
11 over three minutes, while she fought, while she
12 struggled, while she suffered, he strangled the life
13 from her body.

14 Then he took her limp, lifeless body, trudged
15 through the woods, waded through the water and he
16 tried to hide what he did. He stuffed that little
17 girl's body under a log, he buried her under a tree
18 branch and debris and asphalt. He tried to hide
19 what he did. But, ladies and gentlemen, today in
20 this courtroom he cannot hide from you what he did.

21 On behalf of the State of Florida, Ms. Nelson,
22 Ms. Wheeler-Sanchez, we thank you for your time and
23 your sacrifice and your attention over the last
24 three weeks. It has been a long process, but it's
25 an important one. And we talked about how important

1 it was in jury selection.

2 Remember back and how we discussed the
3 presumption of innocence when it applied to the
4 guilt phase and how this defendant must be presumed
5 innocent until we, the State of Florida, met our
6 burden, until we did our job and we proved to you
7 that he was guilty of the crimes he was charged
8 with. And much like that burden, we share a similar
9 burden here today when it comes to the penalty
10 phase.

11 We discussed at length during jury selection
12 that we needed you to come into this process with an
13 open mind, that you could consider aggravation and
14 weigh it and evaluate it and force us to prove that
15 to you beyond a reasonable doubt, and consider
16 mitigation and go through that weighing process.

17 Much like he was presumed innocent, it didn't
18 mean he was innocent, and much like you have to come
19 into this process with an open mind, it does not
20 mean that life is an appropriate punishment in this
21 case. And you will make that determination by going
22 through the legal process that the Judge will
23 describe to you and we will talk about that now.

24 There are six steps that you must go through in
25 determining whether or not this defendant should be

1 sentenced to death or whether he should receive a
2 life sentence, three of which we bear the burden of
3 and if we don't get past step three you don't go any
4 farther.

5 First whether these aggravating factors are
6 proven beyond a reasonable doubt. Now, you will be
7 instructed and we will discuss later on the six
8 aggravating factors that apply in this case. These
9 are statutory circumstances which elevate the
10 gravity of the crime, or the harm to the victim, and
11 we must prove those to you beyond and to the
12 exclusion of a reasonable doubt.

13 Two, whether one or more of the aggravating
14 factors exist beyond a reasonable doubt. So of
15 those six that you will be instructed on you must
16 have at least one factor that you unanimously agree
17 to has been proven beyond a reasonable doubt. I
18 would submit to you already, ladies and gentlemen,
19 that your verdict from last week has already
20 established two of the aggravating factors beyond a
21 reasonable doubt, and we'll discuss that later. But
22 if you don't have at least one aggravating factor
23 proven beyond a reasonable doubt then your analysis
24 ends. It stops. It stops there. But I submit to
25 you we already have proven at least two.

1 The third step, whether an aggravating factor
2 or factors found to exist beyond a reasonable doubt
3 are sufficient to justify the imposition of the
4 death penalty.

5 So going step-by-step, are there aggravating
6 factors, have they been proven beyond a reasonable
7 doubt, and now in considering those that have been
8 proven beyond a reasonable doubt are they sufficient
9 to justify the death penalty. If your answer is no,
10 your analysis ends there. You don't need to go any
11 further. You don't need to even consider mitigation
12 at that point in time if you believe that the
13 aggravating factors that have been proven beyond a
14 reasonable doubt do not justify the death penalty.

15 I would submit to you humbly, you sat through
16 the evidence in this case, you've heard what
17 happened to that little girl, you heard the gravity
18 of the crime and harm to her. The aggravating
19 factors justify the death penalty in this case.

20 Once you get past that, then we move on to
21 mitigating circumstances and these are different.
22 These do not have to be proven beyond a reasonable
23 doubt. These simply have to be proven by the
24 greater weight of the evidence, more likely than
25 not, 51 percent.

1 The next step, whether the aggravating factor
2 or factors outweigh the mitigating circumstances.
3 And then, finally, whether the defendant should be
4 sentenced to life in prison without the possibility
5 of parole or death.

6 Are there aggravating factors? Are there
7 mitigating circumstances? Weighing those and
8 determining, based upon the weight that you apply,
9 what the appropriate sentence is. And your decision
10 must be unanimous if you are to impose the death
11 penalty. On each and every step of the way. Every
12 aggravator proven unanimously beyond and to the
13 exclusion of a reasonable doubt, every juror agrees
14 that those aggravators justify the imposition of the
15 death penalty, and that every juror agrees, after
16 going through that weighing process, that the death
17 penalty is appropriate. If one of you disagrees,
18 then it is a life sentence. Simple and to the
19 point.

20 Let's discuss, ladies and gentlemen, the
21 aggravating factors. We talked about how they must
22 be proven unanimously, beyond and to the exclusion
23 of a reasonable doubt. And, like I said, an
24 aggravating factor is a circumstance which increases
25 the gravity of the crime or the harm to the victim.

1 Common sense, it increases the gravity of the crime.
2 We've already discussed, we discussed back in jury
3 selection, the fact that this was a child, in and of
4 itself, increases the gravity of the crime. Nothing
5 more than her age and how vulnerable she was because
6 of that age. And that, in and of itself, in your
7 mind as a juror could be sufficient to justify the
8 death penalty. That one aggravating circumstance,
9 if it stood alone, could justify the death penalty.

10 But as we've discussed and as you will learn,
11 there are more than one aggravating circumstance in
12 this case, but no facts other than proven
13 aggravating factors can be considered in making a
14 determination as to whether or not the death penalty
15 is appropriate. You are only to consider the
16 aggravating factors and they are legally outlined
17 for you in this case.

18 Number one, Donald James Smith was previously
19 convicted of a felony involving the use or threat of
20 violence to another person.

21 Now, members of the jury, one witness was
22 called in the penalty phase by the State of Florida,
23 but that is not the only evidence of aggravation
24 because it's just not what happened this week that
25 you are to consider, but you are also to consider

1 the totality of the evidence that was presented last
2 week as well. And I submit to you the greater
3 majority of the evidence in aggravation was
4 presented last week when you heard of the crime and
5 you saw what happened, but Kerri-Ann Buck was not a
6 part of what happened on June 21st of 2013 and you
7 heard from her on Tuesday morning. You heard from
8 her what he did to her over 25 years ago.

9 It's a Sunday morning, just past noon, she had
10 gotten home from church and she's walking to a
11 friend's house. A man pulls up in a van. No
12 surprise, a van. Do you know where Susie lives?
13 No, I don't. Do you want a ride? No, thank you.
14 Get in the fucking van. That's what he said to her.
15 That's what that 36 year old man at the time said to
16 that 13 year old girl. Scared her to death. She
17 ran. Did he give up? Did he move on to the next
18 possible subject that might come along that he could
19 prey upon? No. He chased after her. He drove
20 after her and she ran for her life and she banged on
21 doors, and no one would answer and she ran to that
22 playground and she hid her little body up in the
23 tube of a slide like a spider pushing her limbs out
24 to hold herself up so she could conceal herself.
25 Terrified. And he drives and he gets out of the van

1 and he looks for her and says, where are you, you
2 little bitch, I'm going to find you. Thankfully for
3 Kerri-Ann Buck he gave up. He left. She ran for
4 help.

5 But it didn't end there. A week later he's out
6 in front of her house in that van to the point where
7 her and her mother go after him to get the tag
8 number. And he saw her and she saw him and she
9 described he looked at me like he wanted to kill me.
10 Over 25 years ago. You saw the terror in that woman
11 when she walked into the courtroom a quarter of a
12 century later.

13 Dr. Sesta said it best. What was he going to
14 do if he got her? With the clarity of hindsight
15 now, we know. But thankful for Kerri-Ann being
16 here, and he was convicted and he stipulates to that
17 on a stipulation that was read by the Court. That
18 has been proven beyond a reasonable doubt. Because,
19 remember, aggravation can come from the crime itself
20 or it can be part of him, about him, much like
21 mitigation. What about him and what he brought to
22 this crime before it ever happened. 25 years ago he
23 tried to kidnap a little girl. In June of 2013 he
24 accomplished what he set out to do. And because of
25 that, that is an aggravating factor in this case and

1 it has been proven to you beyond a reasonable doubt.

2 And when you think about the gravity of that,
3 how much weight that you as a juror place to that,
4 it's enormous.

5 The first degree murder was committed while
6 Donald James Smith was engaged in the commission of
7 a kidnapping or a sexual battery. This is one of
8 those factors that we discussed. You already made
9 this decision last week. You made this decision,
10 this defendant kidnapped that little girl. He took
11 her for his pleasure and he raped her. Proven
12 beyond a reasonable doubt in your verdicts last
13 week. It should be easy to consider. I would ask
14 you, though, to consider this fact in conjunction
15 with another aggravating factor that we'll talk
16 about later. Because the sexual battery and the
17 felony murder goes to how heinous, how atrocious and
18 how cruel this crime was and how much she suffered
19 at the hands of that man.

20 The murder was committed for the purpose of
21 avoiding or preventing a lawful arrest. What does
22 that mean? Getting rid of the witness. Silencing
23 Cherish Perrywinkle so she could not sit on that
24 witness stand and point him out and say that's the
25 man who rapped me. He killed her to silence her.

1 And there's some factors that you need to know
2 about and we talked about and some of that
3 information came out through the defense's
4 witnesses.

5 Remember back to what Mr. Bossen said. He was
6 going through the criminal history. One of the
7 questions that I posed to him was, Mr. Bossen,
8 you've reviewed the Indictment in this case, count
9 three is sexual battery of a person under the age of
10 12, capital sexual battery. What's the punishment
11 for that? Life in prison without the possibility of
12 parole. So even if he didn't kill her he would be
13 facing life in prison without the possibility of
14 parole. So he killed her to silence her.

15 Dr. Sesta said it best. And we'll get into
16 more of his mental issues, his pedophilia, his
17 impulse control. We'll talk about that later. But
18 what Dr. Sesta told you yesterday, unequivocally,
19 was his impulse control related to his pedophilia
20 and his desire to have sex with a child. The
21 murder, that's because he's a sociopath. He killed
22 her because he didn't want to get captured and he
23 didn't want to have her talk. The impulse control
24 was the rape. The murder was his conscious choice
25 to eliminate a witness, to make sure Cherish didn't

1 sit in that chair and point him out like Kerri-Ann
2 Buck did.

3 Dr. Colino talked a little bit about rats and
4 their ability to learn and how his ability to learn
5 from a bad experience was diminished. He learned
6 from 1992. He learned that even a little girl can
7 come into a courtroom and point him out. He learned
8 from that bad experience and he changed his ways to
9 get away with what he did. He silenced that little
10 girl to get away with the crime that he had
11 committed.

12 Yet again, that in and of itself, carries with
13 it enormous weight and gravity for you to consider.
14 Yet another aggravating circumstance that has been
15 proven beyond and to the exclusion of a reasonable
16 doubt.

17 I briefly talked about this. First degree
18 murder was especially heinous, atrocious or cruel.
19 Heinous means extremely wicked or shockingly evil.
20 Atrocious means outrageously wicked and vile. Cruel
21 means designed to inflict a high degree of pain with
22 the utter indifference to or even enjoyment of the
23 suffering of others. The kind of crime intended to
24 be included as especially heinous, atrocious and
25 cruel is one accompanied by additional acts that

1 show that the crime was conscienceless or pitiless
2 and was unnecessarily torturous to Cherish
3 Perrywinkle.

4 Let's talk about how she was killed. I want
5 you to hearken back to last week and I want you to
6 remember what Dr. Rao said. Remember what she told
7 you. We went through the exercise in closing
8 argument, three minutes at a minimum, where he
9 wrapped something around her neck and he strangled
10 her and he choked every last breath out of her body
11 to the point where her eyes bled. Her blood vessels
12 in her face burst and in her larynx and her voice
13 box burst. Her brain swelled. Every last second of
14 those three minutes until she fell, succumbed to
15 that, she fought. She fought. She knew what was
16 happening to her. She knew she was going to die.
17 And she tried to fight with every strength she had.

18 But it's just not how she died. The
19 circumstances of the killing go beyond how he took
20 her life. He stole her in the middle of the night
21 from her mother. Eight years old, frightened,
22 scared, alone, and he did things that she probably
23 didn't even understand. That an eight year old
24 can't understand. He stuck his penis in her mouth
25 and he made her suck on it to the point where it

1 bruised the tip of his penis. He sucked on her
2 breasts, leaving a hickey behind. All for his
3 pleasure. Not hers. To her horror. He raped her
4 anally, vaginally to the point that it tore the
5 flesh. In Dr. Rao's words, caused tremendous
6 injury, suffering. With thrust after thrust,
7 leaving his DNA behind inside of her, gagging her,
8 smothering her face to keep her quiet throughout the
9 entire incident. Heinous, atrocious and cruel? I
10 think those words do not give justice to what
11 happened to that little girl when she was raped and
12 when she was killed.

13 Just how she died has such gravity and shows
14 such harm to her that it cries out for the death
15 penalty. But it's only one of six. Cold,
16 calculated, premeditated. The first degree murder
17 was committed in a cold, calculated and premeditated
18 manner without any legal pretense or moral or legal
19 justification.

20 Cold means the murder was the product of calm
21 and cool reflection. Calculated means having a
22 careful plan or prearranged design to commit the
23 murder.

24 The next portion of this instruction which
25 defines this is what you all found last week, the

1 definition of premeditation. And if you remember
2 back in your verdict form, there were two ways, in
3 addition to the felony murder, which you found the
4 defendant guilty of, you also found beyond a
5 reasonable doubt and indicated in your verdicts the
6 killing was premeditated. That's what this
7 describes. However, in order for this aggravating
8 circumstance to apply, a heightened level of
9 premeditation demonstrated by a substantial period
10 of reflection, is required.

11 This period of reflection and premeditation
12 started on the south side of Jacksonville when this
13 defendant left home that day. Segovia Avenue, his
14 home with his mother. Southside. He goes to
15 Edgewood. Northside. Miles away. For what? You
16 see him on video. We watched him. He asked about
17 adult magazines, but he wasn't shopping. He was
18 hunting for his target. He went to that Dollar
19 General. God forbid, Cherish Perrywinkle walked
20 into his life. He saw her and he targeted her.
21 Her, her mother and her two sisters. You watched
22 him last week in that Dollar General. He didn't buy
23 a thing. He loiters in the front of that store.
24 Lingered, watching, lurking back from a distance,
25 but he's watching. You can see that. And then he

1 walks out front. He could have driven away. He
2 could have gone home. He walks to the van, he opens
3 the door. But he stays and waits and he positions
4 himself right in front of that door waiting for them
5 to leave.

6 And when Rayne Perrywinkle and those girls walk
7 out that door he strikes. But this time not like
8 Kerri-Ann Buck. Not trying to grab her impulsively
9 and throw her in the van and take her away. That's
10 impulse control. Instead he deceives, he plots, he
11 lies. You look like you've got your hands full
12 there. I've got some little ones myself at home. I
13 see you couldn't afford that dress in there. Can I
14 buy that for you? He's acting like a generous
15 stranger. My wife, she's on the way, and she's got
16 \$150 gift card to Walmart and you can have it. You
17 need it more than me. You can have that to buy
18 stuff for your kids. Lie after lie after lie.

19 There is no wife. You heard yesterday she
20 wasn't even in the State of Florida, his ex-wife, at
21 the time. There was no gift card. Instead of
22 grabbing 'em and throwing 'em in the van, he used
23 that gift card, he used the appearance of being
24 generous and charitable and he took advantage of
25 their need and he gained their trust.

1 He waited 20 minutes in front of that store
2 before they even got into the van. All the time
3 thinking, reflecting, calculating, how am I going to
4 do this, how am I going to do this.

5 The drive from Edgewood to Lem Turner. About
6 ten miles. Ten to 15 minutes. Still keeping up the
7 ruse, still lying, still trying to earn her trust by
8 giving Rayne the facts, all lies, but facts that
9 would try to make her feel more at ease. He even
10 told her you're safe, you're safe. Couldn't be
11 further from the truth.

12 And then he lets them out. They wait in that
13 Walmart parking lot for his wife to come in the
14 gold car. She doesn't come, the kids are getting
15 antsy, they go inside. He can leave. They're
16 inside, he could drive off, he could leave behind
17 those three little girls and their mother. But,
18 no, he goes in and you watch him on that videotape.
19 He walks in there with a purpose, looking up and
20 down every aisle until he sees them. His targets.
21 His victims.

22 He shops with them for over an hour and a half,
23 standing by, watching. He takes Cherish to the
24 dressing room on more than one occasion.
25 Impulsivity? Molest her there, grab her in the

1 room, do something, grab her. Not impulsive.
2 Reflective, calculated. He waits. But he shows in
3 his mind, through his actions, what's truly behind
4 his eyes when he puts that rope in that shopping
5 cart.

6 And then the opportunity presents itself. I'm
7 going for food, you want anything. And those little
8 girls hadn't eaten all night and Cherish is hungry
9 and she goes with him. And you see them sit there
10 and wait at the front of the store, in front of
11 McDonald's, where you see the McDonald's employee
12 mopping up, and he waits and says something to her,
13 turns and walks out. She follows after him. And
14 she gets in the van.

15 But his calculations don't end there. In
16 opening statement Mr. Fletcher in the penalty phase
17 said, well, it's Walmart, there's cameras everywhere
18 and he goes and introduces himself to total
19 strangers with her in the van. Why? Because he had
20 to keep her calm to get her away. They're still in
21 the parking lot. It's a gold car. We're going for
22 cheeseburgers, follow us. The Roziers don't know
23 what he's talking about. We know what he's talking
24 about, now hearing the entire story.

25 He's continuing this plan, this scheme to get

1 her away, to get her alone, and then he drives out
2 and disappears. And she disappears forever.

3 This wasn't minutes, this wasn't a half hour,
4 this is hours of reflection and planning to get what
5 he wanted, to satisfy his desires, and he wasn't
6 going to leave a witness behind and so he choked her
7 out for three minutes. Cold, calculated,
8 premeditated. Heightened premeditation, which adds
9 gravity to the crime.

10 And the obvious, she's under the age of 12.
11 Eight year old Cherish Perrywinkle. 67 pounds.
12 Dwarfed in comparison to him. The fact that she was
13 eight, in and of itself, could justify the death
14 penalty.

15 If you do unanimously find the existence of at
16 least one aggravating factor, or that the
17 aggravating factor or factors are sufficient to
18 impose a sentence of death, not or and, then you
19 begin the mitigation process. So I want you to
20 think about this. The way the law describes it, to
21 even get to the point of addressing the mitigation
22 you need to find at least one aggravating factor
23 proven beyond a reasonable doubt, and if only one is
24 proven and it justifies the death penalty then you
25 move on.

1 We have six aggravating factors. All with such
2 gravity, such weight, that, again, it screams out
3 for the death penalty. But you don't stop there.
4 Because you have to consider the mitigation, you
5 have to go through the process and consider what
6 mitigation is.

7 Mitigating circumstance, and I want to discuss
8 this a little bit because you will see in the
9 verdict form a long list of what could, if you find
10 it to be, what could be mitigating factors. And I
11 emphasize that, what could be.

12 A mitigating circumstance can be anything in
13 the life of the defendant which may indicate the
14 death penalty is not appropriate. It is not limited
15 to the facts surrounding the crime. A mitigating
16 circumstance may include any aspect of the
17 defendant's character, background or life or any
18 circumstance of the offense that may reasonably
19 indicate that the death penalty is not an
20 appropriate sentence in this case.

21 Let me distinguish for a second the difference
22 between facts and mitigating circumstances, because
23 throughout the course of this week you heard a lot
24 of facts. Simply because it's a fact that was
25 established this week does not make it a mitigating

1 circumstance. That is for you all to decide.
2 Because it's on that list that you are going to be
3 presented with the verdict form, that doesn't mean
4 it's a mitigating circumstance in this case. You
5 make that determination.

6 An example is this. The defendant's mother was
7 17 years old when she had the defendant and he had a
8 low birth weight. You're going to see that on the
9 verdict form. That's a fact, the State of Florida
10 will not contest that. That is a fact that has been
11 proven in this case beyond the greater weight of the
12 evidence. We'd say that's been proven beyond any
13 doubt. We're not contesting that. Is it
14 mitigation? Is that something that indicates that
15 the death penalty is not appropriate? Is it an
16 aspect of the defendant's character, background or
17 life or circumstance that says that a sentence other
18 than the death penalty is appropriate?

19 His mom had him when she was 17 years old. I
20 would submit to you that that's a fact, but it's not
21 a mitigating circumstance. And you are going to see
22 a long list of facts. You may consider some
23 mitigation, you may consider some simply to be that,
24 just facts, and it is you, the jury, who determine
25 those facts and determine whether or not it's

1 mitigation and that it's been proven to the greater
2 weight of the evidence.

3 But, again, simply because mitigation exists
4 that doesn't mean that the death penalty is not
5 appropriate. And we'll talk a little bit later
6 about the weighing analysis that you have to go
7 through. But that's what a mitigating circumstance
8 is.

9 Before we discuss the weighing process, I want
10 to discuss some of the evidence that was presented
11 during the course of this week. Evidence of facts.
12 You heard experts, you heard doctors. Is this
13 mitigation? How do we characterize these witnesses?
14 And I'd like to read to you again, and this is the
15 specific instruction as to how you weigh the
16 evidence and evaluate a witness' testimony because I
17 think it's very important to revisit. And these are
18 the rules that the Judge will tell you on how you
19 can evaluate a witness' testimony.

20 Did the witness seem to have an opportunity to
21 see and know the things about which the witness
22 testified? Did the witness seem to have an accurate
23 memory? Was the witness honest and straightforward
24 in answering the attorneys' questions? Does the
25 testimony -- witness' testimony agree with the other

1 testimony and other evidence in this case? Did the
2 witness have some interest in how the case should be
3 decided? Has the witness been offered or received
4 any money or any preferred treatment or benefit in
5 order to get the witness to testify? And did the
6 witness at some other time make a statement that was
7 inconsistent with his testimony that he gave -- he
8 or she gave in court?

9 You also are instructed about expert witnesses.
10 And the Court has already instructed you about that.
11 You heard about it last week. But expert witnesses
12 are like any other witness, with one exception. The
13 law permits an expert witness to give an opinion,
14 however, the expert's opinion is only reliable when
15 given on a subject about which you believe that
16 person to be an expert. Like any other witness, you
17 can believe or disbelieve an expert's testimony.

18 I put the witnesses that we heard from this
19 week from the defense into two categories. One
20 category is witnesses who told you what they saw,
21 and the second category is a category of witnesses
22 who told you what they want you to believe. Let's
23 talk about that latter category first, the witnesses
24 who told you what they want you to believe.

25 Let's talk about Dr. Buffington for a second.

1 Dr. Buffington is a pharmacist and I do not quibble
2 with his qualifications if I'm going to ask him what
3 effect does cocaine have on the human body. What
4 effect does a drug have when taken in combination
5 with another drug? That's his area of expertise.
6 Where I do take issue with Dr. Buffington is his
7 contention, his testimony that basically he became a
8 human lie detector.

9 What did we hear from Dr. Buffington? That he
10 spoke to the defendant for 15 minutes over the
11 telephone to establish his opinion before he was
12 deposed. And when pressed on issues in deposition,
13 he went back to answer a couple of questions and he
14 spent another 30 minutes meeting the defendant for
15 the first time face-to-face. But from that 15
16 minutes, oh, he could tell, because he's met with
17 patients before in a clinical setting and he knows
18 how to ask the questions, that this defendant was
19 being honest and truthful when he provided
20 information about these psychotic symptoms that he
21 was experiencing. He didn't administer any
22 standardized instruments that are used by
23 psychologists and psychiatrists. He talked to him
24 for 15 minutes.

25 Can you see the manifestation of all this

1 psychosis, this laundry list of what Donald Smith
2 told him he was experiencing? Auditory
3 hallucinations, visual hallucinations, delusions,
4 paranoia, sensitivity to light, extreme sensitivity
5 to light. All these things. Well, his testimony
6 was the persons interacting with him, his mother,
7 Rayne Perrywinkle, any of the employees in Walmart,
8 none of them could see these things that were taking
9 place. None of them. And how does he know?
10 Because Donald Smith told him so. The same Donald
11 Smith who all the other experts said is a sociopath
12 who lies and cheats, who deceives and who failed
13 miserably the instrument provided by Dr. Sesta which
14 showed he was faking psychiatric symptoms that
15 invalidated any of the information when it comes to
16 those type of issues, psychotic symptoms.

17 But Dr. Buffington, in his wealth of
18 experience, wants to tell you from that witness
19 stand, after you watched the videotape, no, it's
20 possible that he was going through all these things
21 and no one knew it. It's not even consistent with
22 what Dr. Butler said. Because we heard yesterday of
23 this alter ego, "Crack Veessie", I think is what they
24 referred to him as, on how people knew when he was
25 on drugs, because they could see the difference in

1 his personality and how he acted. But some how,
2 some way, through 15 minutes of conversation,
3 Dr. Buffington wanted you to believe, because Donald
4 Smith told him, that he was going through all these
5 psychotic symptoms, despite the fact that we watch
6 him for hours and he appears normal.

7 You want irrefutable proof that he wasn't going
8 through those psychiatric symptoms? Sensitivity to
9 light. Go back and watch the videotape. What's on
10 his head the entire time he's standing out in front
11 of Dollar General? His sunglasses. Hum, extreme
12 sensitivity to light, but he doesn't bother to take
13 his sunglasses and put them over his eyes when he's
14 standing out front waiting to strike on that young
15 girl.

16 Dr. Buffington knows his stuff when it comes to
17 pharmacology, but he wants you to believe what your
18 common sense, and even the defense's own experts who
19 were later called, will tell you is not true. He's
20 telling you what he wants you to believe.

21 Dr. Colino. Dr. Colino, I guess, changes his
22 testimony depending on whether or not he's got the
23 flu or not, which I caution you because one of the
24 first things he said when he got on the witness
25 stand was, I'm sorry, I'm a little under the

1 weather, I just -- I'm getting over the flu. But
2 Dr. Colino told you that despite the fact he said
3 under oath that a possible cause of some of these
4 brain injuries could have been a heart attack, and
5 he said it under oath in deposition, oh, I was under
6 the weather, I was having the flu and I only had two
7 days to prepare. Really?

8 What he can tell you is, yes, you look at the
9 brain scan and he's got brain damage. Okay?
10 There's something different about his brain than
11 from what somebody else's brain may have looked
12 like.

13 Now, I know we have a wide range in ages on the
14 jury panel. Some of you may remember this and some
15 of you may not. But back in the '80s there was this
16 great commercial on TV. It was an egg, this is your
17 brain. And crack, boom, sizzle, and it hits the
18 frying pan. This is your brain on drugs. Any
19 questions?

20 We heard about the long history of drug abuse
21 since his preteen years. And Dr. Colino and Dr. Wu,
22 none of them can tell you what caused the brain
23 damage. But they want to link it back to a fall off
24 a bike and a car accident when he was 20.

25 And, again, does the witness' testimony mesh

1 and compare with the other witnesses' testimony?
2 And again think back to Dr. Sesta. You're going to
3 hear me say this a lot during the course of this
4 closing argument. I feel like I almost might need
5 to pay for his witness fee because he said when I
6 first met with him he told me about this bike
7 accident and he was very trivial and inconsequential
8 and he never told me about a car accident.

9 What he also never told him about, and this
10 relates back to Dr. Buffington as well, he told him
11 about he, being the defendant, told him about how he
12 took Lortab with the crack cocaine. Not this
13 antipsychotic drug that he was relying on. He's
14 telling Dr. Sesta something different than what he
15 told Dr. Buffington. And Dr. Buffington is using
16 that to rely on to make his expert opinion. Because
17 garbage in, garbage out. If it was coming from him,
18 it couldn't be trusted. Dr. Sesta told you that.
19 But Dr. Colino, even when confronted, wouldn't admit
20 and tried to walk away from what he had said under
21 oath.

22 And then there was Dr. Wu. Same thing. PET
23 scans, imagery. I'm not going to contest that the
24 MRI showed something, but what they wanted to do,
25 what Dr. Wu and Dr. Colino wanted to do, is they

1 wanted to take a pretty picture and point to a
2 color and then say that means he did this, that
3 relates to his behavior. But when I asked that
4 question of Dr. Wu in deposition, that without
5 talking to that defendant, without finding out what
6 was going through his mind when he killed that
7 little girl, you can't say whether or not it was
8 because of his brain injury or if it was just his
9 conscious choice to do so. And in deposition it
10 was, yes, you are correct. And then here not so
11 straightforward.

12 He had to be pressed, and I believe at one
13 point in time, because I asked the court reporter to
14 read it back, he even denied what he testified to
15 only minutes beforehand. He wanted to make you
16 believe, this is a man who never talked to the
17 defendant, who never met the defendant, who only
18 looked at pictures of his brain, and he wants to
19 tell you how that, based upon what Brooke Butler
20 told him and the defense attorneys told him, how
21 that affected him at the time this crime was
22 committed.

23 And one thing that both Dr. Colino, Dr. Sesta,
24 Dr. Butler and Dr. Wu all share in common, even
25 Dr. Holmes, they'll talk to 'em about bike accidents

1 when they're nine, they'll talk to 'em about car
2 accidents when they're 20. Every aspect of the
3 defendant's life from in utero to where he sits here
4 today. But nobody wants to talk to him about what
5 happened from when that van drove out of the parking
6 lot and when that little girl was found. How can
7 you relate the picture to an action when you don't
8 even know what happened? And nobody bothered to
9 ask.

10 Dr. Buffington wanted to say, oh, well, he
11 didn't have a good memory and it was a snapshot
12 memory, this, that and the other. Well, he must
13 have got one heck of a snapshot because two years
14 later he had no problem describing that little
15 girl's anatomy to a fellow prisoner. Relying on
16 what he said.

17 And then Dr. Butler. What did she want you to
18 believe? She gained, I put to you, ladies and
19 gentlemen, the majority of the information from the
20 defendant and the defendant's mother. She relied on
21 what he said. She relied on what she said. But
22 when confronted about, well, she didn't talk about
23 physical abuse with Clifford Smith six days after
24 the homicide when she gave a sworn statement to the
25 State Attorney's Office. Well, then Dr. Butler

1 wants to interpret. She said she was researching
2 facts, but what she was really doing was she was
3 taking facts and interpreting them and then giving
4 them to you. The example, Clifton Smith physically
5 abused Donald Smith. When, where, how? Well,
6 Ms. Moore said that he disciplined him behind a
7 closed door. Is that physical abuse? No, she wants
8 to make that jump. She wants to make that
9 inference. She wants to make you believe that it's
10 physical abuse.

11 She talked about the poor cotton workers,
12 right? The grandparents. How it's not an affluent
13 background, but then you hear about Clifford Smith,
14 who was a well-to-do insurance salesman. Dr. Moore,
15 a prominent psychiatrist. This defendant didn't
16 live impoverished growing up. He left his
17 grandparents' house at the age of three.

18 I submit to you he probably has vague, if any,
19 memory of living with his grandparents, instead
20 living a life where he didn't have any issues when
21 it came to money. We know that because when
22 Mr. Smith died he gave him a hundred thousand
23 dollars or so to use on cocaine, apparently, is what
24 he chose to do.

25 Dr. Butler described, well, he was as good of a

1 dad as he could be. You remember her saying that?
2 He was as good of a dad as he could be.

3 We heard from Donald, Jr. Donnie, Jr., said he
4 had no relationship with his father until his dad
5 got arrested in this case. They want you to rely on
6 what the defendant was telling him to reach
7 conclusions so that they can present that as
8 mitigation to explain his actions without actually
9 asking what he did, why did you do it.

10 Impulse control. There you go. No impulse
11 control. That's what happened in this case. That
12 explains it all. I submit to you, ladies and
13 gentlemen, it does not.

14 Now, the witnesses that you heard from this
15 week that actually testified to what they saw, the
16 first of which is Donnie, Jr. You know, one of the
17 instructions, and we talked about this a little bit
18 last week, is your verdict should not be based upon
19 sympathy, because you feel sorry for anyone. It's
20 hard not feel sorry for Donnie, Jr. This is a
21 young man who had no relationship or had no father.
22 And he talked to you about that a little bit
23 yesterday and some of the troubles that he went
24 through, and I'm happy for him that he's tried to
25 rekindle at least some relationship or forgiven his

1 dad and they've talked about it.

2 And I understand that, you know, the decision
3 that you're making, the recommendation for the
4 death penalty, ultimately could mean that Donnie,
5 Jr., will lose his father. It's not pleasant to
6 think about. But your decision should not be based
7 upon sympathy, the same way your decision should
8 not be based that you should impose the death
9 penalty because of how you feel for Rayne
10 Perrywinkle and the sorrow that you feel for her.
11 This needs to be a legal decision.

12 And I submit to you ladies and gentlemen that
13 when you consider the testimony of Donnie, Jr.,
14 there was nothing mitigating about this crime.

15 Dr. Aiken. Again, facts we don't contest. He
16 was straightforward. This defendant doesn't pose a
17 risk to other inmates. He doesn't pose a risk to
18 corrections officers. We'll concede that. We'll
19 concede that fact. I guess that's a character in
20 the aspect of the defendant's life that he doesn't
21 pose a threat while incarcerated, that could be
22 mitigation, maybe that's a reason to impose a life
23 sentence versus the death penalty. I guess it
24 could be mitigation. But if so, what weight do you
25 apply to that? That he's a good prisoner.

1 Mr. Bossen. Now, Mr. Bossen's testimony
2 detailed this defendant's life as a criminal.
3 Unfortunately, it probably detailed and highlighted
4 for you all a failure in the system. He fell
5 through the cracks. I think those are the words
6 that Mr. Bossen used. He fell through the cracks.
7 The State of Florida had an opportunity in 2006 to
8 involuntarily commit Donald Smith as a Jimmy Ryce
9 offender, as a sexually violent predator, and Chris
10 Robinson, the evaluator, completed that evaluation,
11 said he didn't meet the criteria. End of story.

12 Hindsight being 20/20, we all know that that
13 was probably a grave mistake. But why does that
14 have anything to do with the defendant's character,
15 background or life that would suggest that
16 imposition of a life sentence instead of a death
17 sentence is appropriate? That he slid through the
18 cracks, that he got away with other crimes, that he
19 got four years instead of 30 on a DSP. It's not
20 mitigation. It's not mitigating to who he is or the
21 character of the crime. It might be an indictment
22 on the criminal justice system that he fell through
23 the cracks, but it's not mitigating to Donald Smith.

24 But, again, relate back to what Mr. Bossen told
25 us on cross-examination. And, again, this relates

1 to the aggravating circumstance of elimination of a
2 witness that then relates back to what Dr. Sesta
3 told us. This defendant, as to count three of the
4 Indictment, was facing mandatory life in prison,
5 even if he didn't kill her. So that's why he had to
6 get rid of her, to avoid capture, as Dr. Sesta said.

7 Dr. Holmes, I think she details pretty
8 extensively his treatment, his commitments, his
9 criminal history. And I think in her words, not
10 ours, there was nothing mitigating about what he did
11 or who he is. Nothing. And she describes him as
12 one of the most violent sex offenders she's ever
13 met. I don't see that as being an asset to the
14 defendant's character or background or life that
15 would suggest that the imposition of a life sentence
16 is more appropriate than a death sentence.

17 Then there's Dr. Sesta. Dr. Sesta was frank,
18 he was blunt, he was honest. He says, listen,
19 there's something wrong up here. My neurological
20 testing showed it. I can't tell what it was caused
21 from. And the PET scans revealed, even sort of
22 describe when you look at something, when you
23 describe how scans were used, that you can open up
24 the hood of the car, look at the engine and
25 everything looks great and you go to start it and

1 nothing. I'll certainly argue to you, ladies and
2 gentlemen, that you also can open up the hood of the
3 car and it's this rusty, beat-up, dusty, dirty
4 engine, but it kicks over and purrs like a kitten in
5 an instant.

6 Again, we are not contesting the fact that
7 somehow, some way, at some point in time during his
8 life he may have sustained brain damage or some sort
9 of injury to his brain. How, to what extent, how it
10 affected his impulse control, nobody asked him about
11 it when it came to this offense.

12 But what else did Dr. Sesta tell you? We heard
13 with Dr. Colino and Dr. Wu CTE. Right? The first
14 person who spent the most time, talked with him the
15 most, sat up there and said this isn't CTE, I don't
16 see the repeated trauma to the brain required for
17 CTE. I see a bike accident and that's it. Because
18 he wasn't even told about the car accident.

19 He ruled out CTE, despite what Dr. Wu and
20 Dr. Colino had said. And what does he say about
21 his impulse control? And this is vitally
22 important. His impulse control related to his
23 deviant sexual desires. And his cocaine usage. He
24 tried but he couldn't hit the brakes, he couldn't
25 press on those impulses that were coming from the

1 inside of the brain, his desire, this is
2 pedophilia, his desire to be with prepubescent
3 children. So that's why he wanted to have sex with
4 Cherish Perrywinkle.

5 Ladies and gentlemen of the jury, you are not
6 here this week to sentence Donald Smith for the
7 kidnapping or the rape of Cherish Perrywinkle. The
8 death penalty is not an option for those two crimes.
9 You are here to sentence him on the murder of
10 Cherish Perrywinkle and the defense's own expert
11 told you from that witness stand that her murder was
12 not the result of impulse control, it was a result
13 of his sociopathic behavior. He wanted to avoid
14 capture, he didn't want to get caught so he killed
15 her. That's not impulse control. That's
16 calculation. That's forethought. That's
17 premeditation.

18 Like I said earlier, impulse control, you grab
19 her and throw her into the van. Impulse control,
20 while you're standing out front of the dressing
21 room, you're standing and you grope her. It's not
22 standing by, waiting, calmly, calculating an
23 opportunity to strike. That's not impulse control.
24 That's premeditation. That's first degree murder.

25 Let's talk a little bit about the weighing of

1 the mitigating circumstances. Your decision
2 regarding the appropriate sentence should be based
3 upon aggravating factor or factors and established
4 mitigating circumstances that have been presented to
5 you during these proceedings. Okay. So you're to
6 look at the aggravators and the mitigating
7 circumstances as you see them. You must weigh all
8 of the following, whether the aggravating factor or
9 factors have been found to exist are sufficient to
10 justify the death penalty; B, whether the
11 aggravating factor or factors outweigh any
12 mitigating circumstances or circumstances found to
13 exist, and based upon all the considerations
14 pursuant to these instructions, whether or not the
15 defendant should be sentenced to life in prison
16 without the possibility of parole or the death
17 penalty.

18 The process of weighing aggravating factors and
19 mitigating circumstances is not mechanical. And
20 what that means, ladies and gentlemen, is this, it's
21 not a counting. Say their list is bigger than the
22 State's list so it must be a life sentence. Sort of
23 what we talked about ahead of time. It's not just
24 the quantity of the aggravation or mitigation. It's
25 the quality. It's the weight. Because certain

1 things have the weight of a mountain and other
2 things have the weight of a grain of sand. And you
3 can have a fistful of sand, millions of reasons, but
4 they don't have any weight. They don't have bearing
5 in this case. Because when you look at the gravity
6 and the severity and the sheer number, because it
7 does matter that there are six weighty aggravators
8 in this case, but I submit to you that, yes, you can
9 come into this process with an open mind, but much
10 like the defendant's presumption of innocence was
11 stripped in the guilt phase of the trial, the weight
12 of the aggravation that has been presented and
13 proven to you beyond and to the exclusion of a
14 reasonable doubt tells you in your hearts, in your
15 soul, in your mind what the right sentence is.
16 Because you go through that weighing process and
17 it's to you, each individual juror.

18 And let's talk about that for a second because
19 we did discuss this a little bit in jury selection.
20 This is not a straw vote. They call it
21 deliberations for a reason. If it was simply a
22 straw vote, we'd give you an anonymous ballot, you'd
23 vote, we'd collect it and see whether or not the
24 death penalty is appropriate, did everybody agree.
25 But there's to be discussion. That's what

1 deliberations entails. Some of you may have
2 questions about an aggravator, some of you may have
3 questions about a mitigator, and you all can discuss
4 that amongst yourselves, but each of you must reach
5 a conclusion, an individual conclusion, and place
6 weight on the aggravation and the mitigation as it
7 has been presented, but as a jury as a whole you
8 must unanimously recommend the death penalty.

9 Each and every one of you must find the
10 aggravators that exist beyond and to the exclusion
11 of a reasonable doubt, you must find that they are
12 sufficient to justify the imposition of the death
13 penalty and then you must go through that weighing
14 analysis and find that the aggravation outweighs any
15 and all mitigation that was presented and that the
16 death penalty is the appropriate sentence. That is
17 the process you go through in the back and you will
18 see the verdict forms and you will have to check
19 unanimously each and every one of the aggravators
20 that you as a jury as a whole find have been proven
21 beyond a reasonable doubt.

22 And then you will hearken to your verdict and
23 say, yes, the aggravation is sufficient to support
24 the imposition of the death penalty. Because if you
25 do not, then you don't even need to consider the

1 mitigation. You don't even need to go to that next
2 step. And then you go through each and every one of
3 the facts that have been presented to you here today
4 and throughout the course of this week.

5 And I call them facts because I leave it to
6 you, it is your choice, it is your decision to
7 determine what is mitigation and what is not.

8 The defendant is 61 years of age. That is a
9 fact and you can consider it potentially as
10 mitigation. It's your choice as to whether or not
11 that mitigates what he did in this case. That is
12 your choice as a juror. And then on the verdict
13 form you will show a vote, we find that this
14 mitigation exists, and it can be 1-11, or you can
15 find that it does not exist, 12-0, whatever it may
16 be. You do not need to agree on the mitigation.
17 That is something that you all can disagree on, as
18 long as it's been established by the greater weight
19 of the evidence to be mitigation.

20 But when you weigh that mitigation, when you
21 weigh that mitigation in comparison to the
22 aggravating factors in this case, I would submit to
23 you that your decision should be clear, your
24 decision should be unwavering, and that's the
25 process that we just talked about. It is each and

1 every one of yours right to give whatever weight you
2 desire, but to impose that death penalty you must be
3 unanimous.

4 Now, I suspect at some point in time when
5 Ms. Schlax is talking to you that you will hear the
6 instruction where despite the fact that you find
7 that the aggravation outweighs the mitigation under
8 no circumstance is any juror compelled to impose the
9 death penalty. It's your right as a juror to show
10 mercy. That is your right. But I submit to you,
11 ladies and gentlemen, based on what you have heard
12 and what you have seen during the course of this
13 trial Donald Smith is not deserving of your mercy.

14 This was the first picture in this trial that
15 you saw of Cherish Perrywinkle. Ms. Schlax showed
16 it to you in jury selection. This picture of this
17 beautiful innocent eight year old girl. These were
18 the last pictures taken of Cherish Perrywinkle. Her
19 body stuffed under a log by this defendant, her
20 bruised and battered face, blood in her eyes,
21 injuries to her mouth, her nose, her face, her neck,
22 the ligature marks from where he took every last
23 breath from her body, the force used so great that
24 her gums bled, her skin on her face and nostrils
25 tore when he was gagging her, pulling that ligature

1 so tight around it tore the skin around the edge of
2 her neck. That is what he did. That is what he did
3 in this case.

4 Ladies and gentlemen of the jury, I have had
5 this case for the last four and a half years and
6 after closing arguments this case will be in your
7 hands. And I trust that you will do what is lawful,
8 what is appropriate, what is just in this case. The
9 death penalty is appropriate. The death penalty is
10 just. And the death penalty is what he deserves for
11 what he did to that little girl. It's what he
12 deserves.

13 Thank you.

14 THE COURT: Thank you, Mr. Caliel.

15 Ladies and gentlemen of the jury, you've been
16 out here about an hour and 25 minutes. Do you need
17 a recess before --

18 (Affirmative response from jurors.)

19 THE COURT: Okay. I thought you might.
20 Let's take a 15-minute recess. Thank you.

21 (Jury absent.)

22 THE COURT: Before we recess -- you may be
23 seated. I found a couple of things. I read over
24 the corrected instructions and verdict form and I
25 just have a couple of questions for you to look at

1 while we're on recess. I've already mentioned
2 one. It was merely a typographical error.

3 Also in the instructions -- no, that's not in
4 the instructions. I'm sorry. In the verdict form
5 on page 4 at the top, I think you have to go back
6 and read it in conjunction with page 3, but it's
7 listing the statutory mitigators and they'll mark
8 whether or not they found the mitigator and then
9 they'll mark the vote. So when you get to 3 on the
10 bottom of page 3, they do that. So they've done
11 that on 1, 2, and 3. When you turn the page and go
12 to 4, that, I think, is contemplating the
13 non-statutory. It's a statutory mitigator, but it's
14 contemplating a non-statutory mitigator, and to my
15 knowledge there's no way for them to put a vote
16 there.

17 MS. SCHLAX: Right. I think there should be
18 a vote.

19 MR. CALIEL: Yeah.

20 MS. SCHLAX: I think based on the Court
21 granting my motion to list specifically all of the
22 non-statutory, that should simply be --

23 THE COURT: Well, it should say -- I mean I
24 should tell them they can consider the existence
25 of the other factors, which we're going to send --

1 MS. SCHLAX: Correct, Your Honor. Yes or no,
2 and it should be yes.

3 THE COURT: You all agree that should be
4 taken out?

5 MR. CALIEL: We agree, Your Honor.

6 So my understanding, Your Honor, just so we're
7 clear for the redaction, the Court wants us to
8 leave the paragraph that is subsection 4, but just
9 remove the interrogatory yes or no that lies
10 beneath and then go straight to the --

11 THE COURT: I believe that's what the intent
12 is.

13 MS. SCHLAX: Yes.

14 THE COURT: They need to know they're
15 considering the existence of these other factors,
16 but then they'll vote on them individually.

17 And then also on the last page, page 25, I'm
18 not sure, but I believe it should say in the middle
19 of that paragraph and that the aggravating factors
20 outweigh the mitigating circumstances in section C.
21 So they would have found at least an aggravating
22 factor in section A, that they're sufficient to
23 warrant a sentence of death in section C, and that
24 the aggravating factors outweigh the mitigating
25 circumstances in section D. I know that D is where

1 they're making that finding, but the aggravating
2 circumstances are in section C. I'm just not sure.
3 It just seems poorly worded. Is that the standard?

4 MR. CALIEL: It is. These are the ones that
5 were used in the two previous capital cases that
6 were retrials.

7 THE COURT: Were they standard instructions
8 or were they put together by the judges in those
9 cases?

10 MR. CALIEL: I believe they tracked the
11 standard. I'd have to check.

12 THE COURT: Okay. Well, if you all wish it
13 to stay like that, that's fine. I know that's
14 what they've done in section D, is made that
15 finding. I guess it's right. I just think it's a
16 little confusing. If you'll just have a look at
17 that one during the recess. If that's the
18 standard, I see what it's saying, I just think
19 it's poorly written. I mean if it's a standard
20 instruction, I'd just as soon use it as it is, but
21 what it's really saying is if they found that the
22 aggravating factors in section A outweigh the
23 mitigating circumstances in section C, that
24 they're making that finding in section D. So I
25 think that is saying the right thing. It's just

1 confusing. I don't think it would be confusing to
2 them necessarily.

3 MR. CALIEL: Right.

4 THE COURT: Because they're going through a
5 step-by-step process.

6 MR. CALIEL: Yeah, I think because of the way
7 they will be instructed by the Court to go through
8 it is to go through each process.

9 THE COURT: All right then. We'll take our
10 recess because it may be, depending on the length
11 of the close by the defense, we may go right into
12 instructions. It just depends. I'm not asking
13 anybody to limit, but if it's appropriate and the
14 jurors have this recess, we may just go right into
15 instructions.

16 So let's take our recess. Thank you. We'll
17 be in recess about ten minutes.

18 (Recess.)

19 (Defendant present.)

20 (Jury absent.)

21 THE COURT: Is everybody ready for the jury
22 if the jury is ready?

23 MR. CALIEL: Yes, Your Honor.

24 MS. SCHLAX: Yes, Your Honor.

25 THE COURT: When the copies come in, they'll

1 give one to you. One of the bailiffs will bring
2 one up to me around this way so they don't
3 interfere with Ms. Schlax.

4 And if they're ready, we're ready.

5 BAILIFF: Are you ready, Judge?

6 THE COURT: We're ready.

7 BAILIFF: The jury is entering the courtroom.

8 (Jury present.)

9 THE COURT: Thank you. You may be seated.

10 Thank you, ladies and gentlemen.

11 We're ready to proceed.

12 I'll call on Ms. Schlax.

13 MS. SCHLAX: Thank you, Your Honor. May it
14 please the Court.

15 Counsel.

16 Mr. Smith.

17 Good morning.

18 We are now at the point that Mr. Fletcher and I
19 knew from the very beginning we would be at. And
20 you now are at the point where you hold the greatest
21 power in your hands you will ever have. The power
22 of whether someone lives or dies.

23 It is an awesome responsibility, it is an
24 incredible burden, and I urge you to please listen
25 to me, even though it's been such an exhausting

1 process, and we appreciate your time going through
2 this process as you make one of probably the most
3 critical decisions you'll ever make in your life.

4 What you all did last week cannot be
5 underscored. You endured very difficult, gut
6 wrenching testimony. You applied that testimony to
7 the law and with your verdicts you ensured that
8 Cherish Perrywinkle got justice. It was justice you
9 handed out last week because Donald Smith will never
10 walk amongst us again and you all did that.

11 But I can't help but go back because after the
12 State's closing argument, and they went through
13 those facts again, and they're tough to hear. One
14 thing comes to mind, and that's anger, and we all
15 felt it, every single person in this room, and I
16 would suggest to you even Donald Smith is angered by
17 what we heard. And it's difficult to put that out
18 of your mind, but you can't base your verdict solely
19 on the anger that you feel for the life taken. You
20 must go through this process and it's so critically
21 important that you do so.

22 We are not suggesting that Donald Smith should
23 not be held accountable for his actions. You've
24 done that already. He will never walk amongst us
25 again.

1 He will be institutionalized for the rest of
2 his life. But what we need to focus on, ladies and
3 gentlemen, is one simple question. Do we execute
4 the mentally ill? Do we? At the close of all this
5 case everyone in this courtroom will walk out of
6 this courtroom and leave this case behind. Your
7 decision, though, will remain with each of you.
8 Donald Smith is the only one who will not walk out
9 of this courtroom. He will be shackled and taken
10 out and there'll be no question that he will ever
11 leave those shackles, no matter what the decision
12 is.

13 I want to talk to you about what we talked
14 about, it seems like so incredibly long ago, in jury
15 selection and it's somewhat hard to believe that it
16 was only three weeks ago. Feels like three months.

17 But the law in the State of Florida, and I'll
18 highlight it for you, is that regardless of anything
19 you find in aggravation or mitigation you are never
20 compelled nor required to hand out a death sentence.
21 And I want to contrast what you did last week. Last
22 week you were told if you find the elements of a
23 crime, if you, A, find that Cherish Perrywinkle was
24 killed and, B, that Donald Smith caused that death
25 and, C, that it was premeditated, once you found all

1 those facts it would have been a miscarriage of
2 justice not to find him guilty. Contrast that with
3 what we have in this situation. Because the law
4 ultimately is that if you find every aggravating
5 factor and you find not one mitigating circumstance,
6 not even one, and you find they so greatly outweigh
7 the mitigation presented, you still have the
8 ultimate discretion individually as human beings to
9 make the moral decision I don't want to impose the
10 death penalty. And that's the law.

11 And each one of you was chosen because you told
12 us two things. Number one, that you would go
13 through that process and make that individual
14 personal moral decision for yourself and, number
15 two, that you would respect the decision of each of
16 the others.

17 Mr. Caliel talked about deliberation and
18 certainly the law contemplates you will be in one
19 room. There is only one verdict form and ultimately
20 each of you will go through it together. But the
21 very last question you will be asked, ladies and
22 gentlemen, even after finding the aggravating
23 factors outweigh the mitigating circumstances, even
24 after unanimously finding that as a group, you then
25 are asked as individuals do I personally want to

1 impose the death penalty. And that is an individual
2 decision for each of you. You will not be bullied
3 for that decision. You must make it for yourself in
4 your own hearts, in your own soul, for that decision
5 will be with you for the rest of your life.

6 Now, I want to talk to you about mitigation.
7 What is mitigation? Mitigation is anything in your
8 mind that you decide warrants a life imprisonment as
9 an appropriate punishment. And we know that it will
10 be life imprisonment. There's no question of that.
11 The only time Mr. Smith will ever leave the custody
12 of the Department of Corrections is in a pine box.
13 The question is will that be as a result of a call
14 from a higher power or a call from our Governor.
15 You are entitled to respect as you go through that
16 process and determine what is the appropriate
17 decision for each of you individually.

18 The law contemplates that life in prison is an
19 appropriate punishment. We go through all this
20 process and ultimately it's up to each of you
21 individually to determine what is appropriate, when
22 you go back to the fundamental question, do we
23 execute the mentally ill. Because there's no
24 question about it.

25 So let's talk about what the mitigation is.

1 Donald Smith once was a young boy, but even at that
2 time when these photographs were taken we know from
3 the expert testimony in this case he was brain
4 damaged. Already at this stage he fundamentally had
5 brain damage.

6 You've seen from the expert testimony and
7 you've heard from these people, they spent a lot of
8 time, and it starts with a process.

9 Dr. Sesta does his initial assessment and his
10 assessment and what he's capable of with his
11 specialty is determining is there potentially
12 frontal lobe damage. And he goes through, he said
13 it took him over five hours in which to conduct that
14 examination. And his expert opinion was that he
15 suffered from brain damage, from an inability, from
16 a deficit, from a neurocognitive degenerative,
17 meaning getting worse as things go on. As he gets
18 older getting worse in impulse control. His brain
19 is not like ours.

20 You see the photographs on the screen. This
21 was on the MRI and you can see, ladies and
22 gentlemen, where this arrow is he's literally
23 missing a piece of his brain. He's walking around
24 with a missing piece of his brain.

25 Now, please let me make something clear. This

1 is not a case where we are attempting to claim
2 insanity. We are not suggesting he should not be
3 held accountable. Our job in this process has been
4 to provide you with as much information as possible,
5 the good, the bad, the true, and we can't escape
6 from the realities of what Mr. Smith's life has been
7 and we can't escape the fact this is a man who has
8 walked around his entire life with brain damage.

9 Dr. Wu actually presented to you these slides.
10 Donald Smith also has almost triple the number of
11 white matter hypointensities as normal. The odds of
12 this occurring by chance are 1.7 million. This
13 occurs in profound neurodevelopmental disorders with
14 impaired social interactions and empathy and with
15 abnormal fixated obsessions.

16 As you heard Dr. Wu explain, this is not
17 something Donald Smith can control. This is not
18 something Donald Smith ever chose. This is who he
19 was. This is who he is. And it's degenerative,
20 meaning it progresses and gets worse. What ends up
21 happening, as you go through this process, is
22 Mr. Smith sits vulnerable, exposed, all of his
23 life's, and I won't say accomplishments, because,
24 quite frankly, he doesn't have any, were displayed
25 for all of you all to see.

1 And Mr. Caliel and the State would argue
2 there's not a single piece of mitigation in regards
3 to that, his prior record isn't mitigation. Ladies
4 and gentlemen, I beg to differ, for it shows a man
5 who has struggled his entire life with an inability
6 to be a functioning adult.

7 I think his childhood, as you heard from Dr.
8 Butler's testimony, could best be summed up as
9 cementing his feelings of abandonment and
10 essentially worthlessness. No, he didn't struggle
11 for where the next meal was coming from, but he
12 struggled and starved for attention. And why?
13 Because his brain can't connect with people. His
14 brain doesn't allow it. You heard Dr. Holmes,
15 Dr. Sesta, tell you in no uncertain terms this is a
16 man who back in the '70s, when he was just a mere 19
17 years old, is diagnosed as antisocial and a
18 pedophile. He's someone who can't have normal human
19 relations. He's someone who can't have empathy
20 because he's sick. He didn't ask to be that way.
21 He was born that way.

22 He has significant PET scan signs that tell us,
23 beyond any doubt, that this is a man who has been
24 tormented by his own brain. He's got desires,
25 sexual desires, for what many of us in this society

1 would say are the most repugnant feelings possible.
2 He can't stop the obsession and the fixation on it.
3 He doesn't have the brakes, meaning he can't control
4 those impulses, and he knows it.

5 In 1977 he was diagnosed as a sexually --
6 sexually disordered offender. In 1999 and 2000 he's
7 labelled a sexual predator and actually committed,
8 committed to a state hospital to confine him. He
9 struggled for a long time and struggled. And what
10 would I show you that is probably the largest
11 evidence of his own internal struggle? And you'll
12 have it with you in the back. On June 9th, 2013, he
13 tries to Baker Act himself. He had just gotten out
14 of jail for two years. He had been in jail for two
15 years before this for trying to lure a young girl
16 and he gets out and he's already on June 9th trying
17 to commit himself to a residential program because
18 he knows he can't fight his urges. He's sick.

19 Addiction is one of those things that people
20 have very strong feelings about. But I submit to
21 you that the overwhelming evidence has been he never
22 could control it. He didn't choose to be an addict.
23 He chose to self-medicate because, as you heard from
24 the testimony, at such an early age, in the teenage
25 year, he knows and recognizes he's not like the rest

1 of us. He's not able to form those relationships,
2 the relationships that bond.

3 You heard Dr. Butler explain that she attempted
4 to interview over 50 people. Not one friend that
5 came forward. Not one person willing to stand up
6 and say I'm close to Donald Smith. And what is that
7 a reflection of, ladies and gentlemen? It's severe
8 mental illness. And you have to consider, as we
9 make this very difficult decision, do we execute the
10 mentally ill? Someone who's been mentally ill for
11 not a little while. Decades.

12 He sits before you a 61 year old man who
13 literally doesn't have any adult photos. Why did we
14 put on his prior judgments? Because it's just
15 further evidence of a man who was never able to
16 accomplish anything but criminal behavior, because
17 he's sick.

18 You look at every single one of those crimes
19 and, ladies and gentlemen, this is not a blame game,
20 but it is a reflection of, unfortunately, what the
21 system did. It failed him. It failed all of us.

22 This is Donald Smith's life, pictorially what
23 he accomplished in life and how he was so desperate,
24 so desperate to ultimately figure out how to exist
25 without the urges that are sexual in nature, without

1 the homicidal thoughts going through his mind,
2 without the suicide thoughts going through his mind,
3 how to exist. And on June 9th, 2013, he actually,
4 and he had done it before in 2011, you'll have these
5 records, recognized that he needed to be
6 institutionalized.

7 You heard from Dr. Holmes and it's not pretty,
8 it's uncomfortable. This is a man who when she
9 first met him fully and blatantly explained I'm a
10 pedophile, I'm just sick of denying it. I'm just
11 sick of denying it. Because he was an addict in
12 2013 and hit absolute rock bottom, and Cherish
13 Perrywinkle paid the price.

14 But he is certainly mentally ill and it's not
15 an excuse. We will all feel more comfortable
16 knowing that he will not walk among us again.

17 And I suggest to you, further reflection, that
18 he never existed as a functioning human being.
19 There are no stories of vacation, getting that first
20 job, getting promoted, filing taxes, saving up to
21 buy a new couch, saving up to buy a new car. None
22 of that. Because he was a man who struggled daily
23 with brain and drug addiction, pedophilia and
24 antisocial behavior. Severe mental illness.

25 He missed out on all of these things and

1 instead of photographs of him living life we have
2 photographs that clearly show when he wasn't in a
3 literal jail cell, when he wasn't confined he was
4 living with the torment of imprisonment of his own
5 mind.

6 The neurological evidence in this case is
7 uncontroverted and tells you everything you need to
8 know in regards to who Donald Smith is and his past
9 and it doesn't change, ladies and gentlemen, the
10 fact that Cherish Perrywinkle is gone.

11 What we have since that horrible day is Donald
12 Smith confined. Fully, absolutely isolated. And
13 the one thing that was so telling was his own son's
14 testimony in regards to now he's confined and he's
15 been forced into sobriety and he's been forced into
16 confinement and isolation, I can finally start to
17 have a relationship with him.

18 Donald Smith, through this process, through all
19 of these people examining him and reading reports
20 about himself, has finally been able to confront his
21 own demons of knowing that his brain does not work
22 correctly, of knowing that these horrible urges that
23 would overtake him were because of the brain damage.
24 And that doesn't excuse them. We are in criminal
25 court for a reason. We are talking about punishment

1 for a reason.

2 But no matter what your verdict today, it
3 doesn't bring Cherish back. And the easy thing to
4 do, as the State urges you, is to seek revenge.
5 Revenge does not make our society better. I say to
6 you, ladies and gentlemen, would killing Donald
7 Smith make this world a better place? Will it make
8 our human heart softer or will it make it harder?
9 If the state that I live in, that we all live in,
10 our society, is not kinder, more intelligent, more
11 humane than the horrendous acts that Donald Smith
12 committed, then I suggest we live in a difficult
13 world.

14 More and more we have seen just in recent
15 history the aftermath of unchecked mental illness
16 just in the past week. We've had an instance of
17 what appears to be horrible mental illness without
18 the appropriate remedy. And the remedy for Donald
19 Smith, as you heard from Dr. Sesta, who I agree told
20 you with no uncertain terms confinement is the only
21 appropriate remedy for Donald Smith. And he even
22 tried to do it to himself.

23 And the one thing about mental illness in
24 regards to the State's argument, when they talk
25 about a conscious decision, you don't turn mental

1 illness off, you don't wake up and say I'm not going
2 to be struggling with these urges that overtake me
3 everyday, you do not suddenly wake up one day and
4 say the crack addiction that I've become so
5 accustomed to, because I can't handle these mental
6 thoughts within my mind I'm just going to simply
7 stop. The only remedy is confinement. And as
8 Dr. Sesta said, the tragedy here is he had been.

9 As we go through this process, and as you truly
10 weigh what is in your hearts and minds, I suggest to
11 you the following: The quality of mercy is not
12 strength, it falls from the heavens like a gentle
13 rain to be placed beneath, it is twice blessed, it
14 is blessed by the person who gives it and it is
15 blessed by the person who receives it. Mercy is
16 above that center of power. It is an attribute to
17 God himself and earthly deeds most resemble --

18 MR. CALIEL: Your Honor, I would object as
19 inappropriate to bring religion into argument.

20 THE COURT: Do you want to rephrase?

21 MS. SCHLAX: Earthly deeds are at their best
22 when mercy is given. Mercy is something you give
23 even when someone doesn't deserve it.

24 Why is Donald Smith worthy of your mercy?
25 Because of his inherit flaws that have been

1 exposed to you, uncontroverted, the mental illness
2 he's struggled with his entire life.

3 An even more awesome power than death is the
4 power of life. And as you go through this process,
5 and the verdict will be lengthy and it will bring up
6 each circumstance that was brought to your
7 attention, and you have to consider that, but,
8 again, if you marked no to every single one of the
9 mitigating circumstances that have been brought out
10 to you, every single one, regardless of that
11 individual weighing process, the law neither compels
12 nor requires you to render a death sentence.

13 Abraham Lincoln once said, I have always found
14 that mercy bears richer fruits and strict justice.
15 I stand before you humbly to embrace the better
16 angels of your mercy. And I urge you vote for life
17 imprisonment without any possibility of parole. You
18 will never regret it.

19 Thank you.

20 THE COURT: Thank you, Ms. Schlax.

21 MR. CALIEL: Your Honor, may we approach on a
22 procedural matter?

23 THE COURT: Sure.

24 (Counsel for the State and defense approached
25 the bench for a side-bar conference out of the

1 hearing of the jury and court reporter.)

2 THE COURT: We just need a minute to get the
3 instructions up on the screen.

4 All right. Ladies and gentlemen, you're
5 going to be able to read along with me and just
6 like before you'll have my copy of what I'm
7 reading with you in the jury room so you don't
8 need to take notes or try to memorize anything.
9 You'll have it all in writing.

10 Members of the jury, you have heard all the
11 evidence and the argument of counsel. It is now
12 your duty to make a decision as to the appropriate
13 sentence that should be imposed upon the defendant
14 for the crime of first degree murder.

15 There are two possible punishments. Life
16 imprisonment without the possibility of parole or
17 death.

18 In making your decision you must first
19 unanimously determine whether the aggravating
20 factors alleged by the State have been proven beyond
21 a reasonable doubt. An aggravating factor is a
22 circumstance that increases the gravity of the crime
23 or the harm to a victim. No fact other than proven
24 aggravating factors may be considered in support of
25 a death sentence.

1 The aggravating factors alleged by the State
2 are, one, Donald James Smith was previously
3 convicted of a felony involving the use or threat of
4 violence to another person; two, the first degree
5 murder was committed while Donald James Smith was
6 engaged in the commission of a kidnapping and a
7 sexual battery; three, the first degree murder was
8 committed for the purpose of avoiding or preventing
9 a lawful arrest --

10 BAILIFF: Judge, it's not showing up on their
11 screens.

12 THE COURT: Oh, it's not? Oh. Sorry.

13 Is it showing now?

14 (Affirmative response from jurors.)

15 THE COURT: Do you all have to No. 4 at the
16 top of the page? Do you need me to go back or are
17 you okay?

18 JUROR: Okay.

19 THE COURT: 4, the first degree murder was
20 especially heinous, atrocious or cruel.

21 Heinous means extremely wicked or shockingly
22 evil.

23 Atrocious means outrageously wicked and vile.

24 Cruel means to inflict a high degree of pain
25 with utter indifference to or even enjoyment of

1 suffering of others.

2 The kind of crime intended to be included as
3 especially heinous, atrocious or cruel is one
4 accompanied by additional acts that show that the
5 crime was conscienceless or pitiless and was
6 unnecessarily torturous to Cherish Perrywinkle.

7 Five, the first degree murder was committed
8 in a cold, calculated and premeditated manner
9 without any pretense of moral or legal
10 justification.

11 Cold means the murder was the product of calm
12 and cool reflection.

13 Calculated means having a careful plan or
14 prearranged design to commit murder.

15 A killing is premeditated if it occurs after
16 the defendant consciously decides to kill. The
17 decision must be present in the mind at the time of
18 the killing. The law does not fix the exact period
19 of time that must pass between the formation of the
20 premeditated intent to kill and the killing. The
21 period of time must be long enough to allow
22 reflection by the defendant.

23 The premeditated intent to kill must be formed
24 before the killing. However, in order for this
25 aggravating factor to apply, a heightened level of

1 premeditation demonstrated by a substantial period
2 of reflection is required.

3 A pretense of moral or legal justification is
4 any claim of justification or excuse that though
5 insufficient to reduce the degree of murder,
6 nevertheless rebuts the otherwise cold, calculated
7 or premeditated nature of the murder.

8 And, six, Cherish Perrywinkle was a person less
9 than 12 years of age.

10 As explained before the presentation of
11 evidence, the State has the burden to prove an
12 aggravating factor beyond a reasonable doubt.

13 A reasonable doubt is not a mere possible
14 doubt, a speculative, imaginary or forced doubt.
15 Such a doubt must not influence you to disregard an
16 aggravating factor if you have an abiding conviction
17 that it exists. On the other hand, if after
18 carefully considering, comparing and weighing all
19 the evidence you do not have an abiding conviction
20 that the aggravating factor exists, or if having a
21 conviction it is one which is not stable, but one
22 which wavers and vacillates, then the aggravating
23 factor has not been proved beyond every reasonable
24 doubt and you must not consider it in providing a
25 verdict.

1 A reasonable doubt as to the existence of an
2 aggravating factor may arise from the evidence, a
3 conflict in the evidence or the lack of evidence.

4 If you have a reasonable doubt as to the
5 existence of an aggravating factor, you must find
6 that it does not exist. However, if you have no
7 reasonable doubt, you should find the aggravating
8 factor does exist.

9 A finding that an aggravating factor exists
10 must be unanimous. That is all of you must agree
11 that each presented aggravating factor exists.

12 You will be provided a form to make this
13 finding as to each alleged aggravating factor and
14 you should indicate whether or not you find each
15 aggravating factor has been proven beyond a
16 reasonable doubt.

17 If you do not unanimously find that at least
18 one aggravating factor was proven by the State, then
19 the defendant is not eligible for the death penalty
20 and your verdict must be for a sentence of life
21 imprisonment without the possibility for parole. At
22 such point your deliberations are complete.

23 If, however, you unanimously find that one or
24 more aggravating factors have been proven beyond a
25 reasonable doubt, then the defendant is eligible for

1 the death penalty, then you must make additional
2 findings to determine whether the appropriate
3 sentence to be imposed is life imprisonment without
4 the possibility of parole or death.

5 If you do unanimously find the existence of at
6 least one aggravating factor and that the
7 aggravating factor or factors are sufficient to
8 impose a sentence of death, the next step in the
9 process is for you to determine whether any
10 mitigating circumstance or circumstances exist.

11 A mitigating circumstance can be anything in
12 the life of the defendant which might indicate that
13 the death penalty is not appropriate. It is not
14 limited to the facts surrounding the crime. A
15 mitigating circumstance may include any aspect of
16 the defendant's character, background or life or any
17 circumstance of the offense that may reasonably
18 indicate that the death penalty is not an
19 appropriate sentence in this case.

20 Among the mitigating circumstances you may
21 consider are, one, the first degree murder was
22 committed while Donald James Smith was under the
23 influence of extreme mental or emotional
24 disturbance; two, the capacity of Donald James Smith
25 to appreciate the criminality of his conduct or to

1 reform his conduct to the requirements of law were
2 substantially compared; three, Donald James Smith's
3 age at the time of the crime and, four, the
4 existence of any other factors in Donald James
5 Smith's character, background or life, or the
6 circumstances of the offense that would mitigate
7 against the imposition of the death penalty.

8 And then these are listed and I'll read them.

9 Donald James Smith's biological father left
10 before he was born. As a result he never had a
11 relationship with him.

12 Donald James Smith's parents were forced to
13 divorce by his maternal grandparents who openly
14 disagreed with his biological father.

15 Donald James Smith's mother was 17 years old
16 when she gave birth to him.

17 Donald James Smith was born premature with low
18 birth weight.

19 Donald James Smith's mother wanted to give him
20 up for adoption.

21 Mental illness runs in Donald James Smith's
22 mother's side of the family and in his biological
23 father's family.

24 Addiction runs in Donald James Smith's mother's
25 side of the family and in his biological father's

1 family.

2 Emotional instability leading to physical
3 violence is present on Donald James Smith's father's
4 side of the family.

5 Donald James Smith's paternal uncle shot his
6 grandfather to death.

7 Donald James Smith's mother spent very little
8 time with him as a baby, instead focussing all of
9 her attention on finding a man who could provide her
10 with the lifestyle her parents felt she deserved.

11 Donald James Smith moved out of his
12 grandparents home when his mother married Clifton
13 Cliff Smith, the man who formally adopted him, which
14 was extremely traumatic.

15 Cliff was verbally and emotionally abusive to
16 Donald James Smith. He also locked Donald James
17 Smith outside as punishment.

18 Cliff was physically abusive to Donald James
19 Smith.

20 Donald James Smith was traumatized by his
21 step-father's treatment. He became clingy, stopped
22 eating and wet his bed long past the age of typical
23 potty training.

24 Cliff was paranoid and obsessed with violence.
25 Donald James Smith was terrified of what he

1 witnessed.

2 Cliff's job in the insurance business forced
3 them to move regularly. As a result, Donald James
4 Smith was repeatedly uprooted during the time,
5 adding to the instability of his living environment.
6 Because of the frequent moves Donald James Smith was
7 frequently bullied. This caused him to feel
8 alienated, detached, despondent and angry.

9 Donald James Smith resorted to paying other
10 kids to play with their toys.

11 Donald James Smith was sexually molested at the
12 age of eight by two neighborhood teenagers. The
13 teenagers coerced Donald James Smith into watching
14 them violently sexually molest several girls. He
15 found this experience confusing and frightening.

16 Donald James Smith did not reveal the sexual
17 abuse to his mother.

18 Donald James Smith's mother suspected that her
19 sister's husband, Bob, molested her son, however,
20 she did not confront them.

21 Donald James Smith never received treatment for
22 the sexual abuse he endured.

23 Cliff was sexually inappropriate with Donald
24 James Smith. He touched Donald James Smith on his
25 buttocks. He called Donald James Smith sexually

1 explicit names.

2 When his mother divorced Cliff after seven
3 years of marriage, this was yet another change that
4 brought instability into Donald James Smith's life.

5 Donald James Smith's second step-father,
6 Dr. Marlin Moore, was a cold, self-centered and
7 aloof man who insisted that his wife and step-son
8 call him Dr. Moore.

9 Dr. Moore was -- excuse me. Dr. Moore was
10 verbally and physically abusive to Donald James
11 Smith. He made it known that he didn't have time
12 for children.

13 As a teenager Donald James Smith began
14 self-medicating with pills from Dr. Moore's home
15 office. He was never confronted with the drug use.

16 Donald James Smith's drug abuse escalated to
17 regularly using marijuana, LSD, PCP, MDA, Mescaline,
18 Peyote, Quaaludes and cocaine.

19 Donald James Smith dropped out of school in the
20 tenth grade. Although Donald James Smith was
21 intelligent, he had lost all motivation based on
22 drug use, depression and anger.

23 As a teenager Donald James Smith began to get
24 arrested.

25 At the age of 15 Donald James Smith began

1 engaging in voyeurism.

2 Donald James Smith was raped while
3 incarcerated.

4 When Donald James Smith was released from jail
5 his drug abuse spiralled into full-blown crack
6 addiction.

7 On crack Donald James Smith's inability to
8 control his impulses was intensified to the point
9 that he felt like another person. On the street
10 Donald James Smith became notorious for his behavior
11 while high. He was paranoid, manic, unstable and
12 impulsive.

13 Donald James Smith's mother enabled his drug
14 addiction. She drove him to pay off his drug debts
15 and if he was unable to make the trip paid them off
16 herself. She continued this for decades.

17 At the age of 20 Donald James Smith attempted
18 suicide for the first time by driving into an oak
19 tree on Orange Picker Road. He flipped his car, but
20 survived the accident. Donald James Smith did not
21 receive treatment for his injury.

22 Donald James Smith experienced a dissociative
23 episode due to drug use where he lost time.

24 Donald James Smith made a second suicide
25 attempt in the Duval County Jail.

1 In 1977 Donald James Smith was designated as a
2 mentally disordered sex offender and committed to
3 the North Florida Evaluation and Treatment Center.

4 Throughout his adult life Donald James Smith
5 spent hundreds of dollars per day on crack. During
6 the year 2002 he spent more than \$90,000 in a
7 four-month period. He went on binges that lasted
8 for weeks. During these episodes Donald James Smith
9 would not eat or sleep.

10 Donald James Smith fathered a son, Donald James
11 Smith, Jr., born June 2nd, 1992. He married his
12 son's mother, Francine Brown, but the relationship
13 was short-lived.

14 Donald James Smith was far from the perfect
15 father, however, he has tried to parent his son to
16 the best of his ability.

17 Donald James Smith, Jr., has developed a close
18 relationship with his father since he has been
19 incarcerated.

20 Donald James Smith has been repeatedly
21 diagnosed as having antisocial personality disorder,
22 polysubstance dependence, pedophilia and cocaine
23 dependence.

24 In 1999 Donald James Smith was designated as a
25 sexually violent predator and subsequently committed

1 to the Martin Treatment Center through the Jimmy
2 Ryce Civil Commitment Act. While detained in MTC
3 Donald James Smith did not complete the treatment
4 plan developed for him.

5 While at the Martin Treatment Center Donald
6 James Smith engaged in a sexual relationship with
7 another patient who was known for being
8 HIV-positive. This was regarded as Donald James
9 Smith's third suicide attempt.

10 In spite of the fact that Donald James Smith
11 did not participate in counseling, he was released
12 from the Martin Treatment Center based on a decision
13 made by members of the State Attorney's Office in
14 Duval County.

15 Once released from the Martin Treatment Center,
16 he was required to receive a psychosexual evaluation
17 and treatment. Dr. James Vallyely completed the
18 evaluation and concluded that Donald James Smith was
19 highly likely to reoffend.

20 Donald James Smith was arrested for dealing in
21 stolen property and burglary and was eligible to
22 receive 30 years in prison as an habitual offender.
23 However, members of the State Attorney's Office in
24 Duval County permitted him to plead to a sentence of
25 four years in prison. Donald James Smith was not

1 placed on any form of supervision upon his release
2 from prison.

3 In 2006 the state psychological assessment
4 determined that Donald James Smith did not meet the
5 criteria for civil commitment in the Jimmy Ryce
6 Civil Commitment Center, although he had never
7 received any meaningful rehabilitation.

8 In 2011 Donald James Smith Baker Acted himself.
9 He reported homicidal thoughts, auditory and visual
10 hallucinations. He also admitted a history of using
11 cocaine and Lortab. He was diagnosed as having a
12 potential for homicide, suicide and violence. The
13 center recommended one-on-one counseling and let him
14 stay three or four days. They never followed up
15 with therapy.

16 In 2009 Donald James Smith was arrested for
17 attempting to lure a nine year old girl while posing
18 as a Department of Children and Families worker. If
19 found guilty he could have been sentenced to ten
20 years in the Department of Corrections, but members
21 of the State Attorney's Office in Duval County
22 agreed to a plea agreement allowing him a jail
23 sentence which bypassed further screening into the
24 Jimmy Ryce Civil Commitment Center.

25 On June 1st, 2013, Donald James Smith was

1 released from the Duval County Jail. He was not
2 placed on any kind of supervision by the State of
3 Florida.

4 Three weeks before the murder of Cherish
5 Perrywinkle, Donald James Smith went to Shands
6 Hospital and then was Baker Acted. He stated that
7 he was having violent thoughts and wanted to get
8 into a residential program. The center gave him a
9 new brochure and told him to study and practice.
10 They allowed him to stay approximately 24 hours.

11 Days later Donald James Smith was again Baker
12 Acted. He stated that he was having violent
13 thoughts and wanted to get into a residential
14 program. The center gave him a new brochure and
15 told him to study and practice. He stayed
16 approximately one day.

17 Neuropsychological testing has indicated that
18 Donald James Smith's brain functioning is abnormal.
19 He has deficits in executive functioning and poor
20 impulse control.

21 Donald James Smith's neuropsychological
22 disorders are exacerbated by substance abuse and
23 addiction.

24 Medical testing, specifically PET, MRI and DTI
25 scans, have revealed that Donald James Smith's

1 brain functioning is abnormal.

2 Donald James Smith's brain abnormalities are
3 consistent with someone who has suffered brain
4 damage.

5 Donald James Smith has suffered from
6 significant mental illness for most of his life.

7 Donald James Smith's mental illness is not
8 something he has chosen.

9 Donald James Smith did not choose his family.

10 Donald James Smith did not choose the way his
11 family treated him.

12 Donald James Smith did not choose to be
13 sexually molested.

14 Donald James Smith's childhood experiences
15 shaped the person he became as an adult.

16 At the time of the offenses Donald James Smith
17 was 56 years old. He is now 61 years old.

18 Donald James Smith has been diagnosed with
19 chronic obstructive pulmonary disease, COPD, heart
20 disease, Hepatitis B and Hepatitis C.

21 Donald James Smith has been a strong support
22 system for his mother who is receiving treatment for
23 breast cancer.

24 Donald James Smith has not been a threat to
25 correctional officers or other inmates in the Duval

1 County Jail and the Department of Corrections.

2 It is --

3 MR. CALIEL: Your Honor, may we approach on a
4 matter in regards to the jury instructions?

5 THE COURT: Yes. Of course.

6 (Counsel for the State and defense approached
7 the bench for a side-bar conference out of the
8 hearing of the jury and court reporter.)

9 THE COURT: Ladies and gentlemen, I'm going to
10 go back a couple of pages for a second to a
11 paragraph I read that's got the letters DDD. And
12 it's at the very top of the page you're looking at
13 now. We had stayed last night and corrected
14 everything and then we missed one thing.

15 This should read, and when you get the copy in
16 writing it will read, three weeks before the murder
17 of Cherish Perrywinkle Donald James Smith went to
18 Shands Hospital and was Baker Acted. He stated that
19 he was having violent thoughts and wanted to get
20 into a residential program. The center gave him a
21 new brochure and told him to study and practice.
22 They allowed him to stay approximately 24 hours.

23 And then it should stop. That's a repetition.
24 My apologies. We will have a corrected version of
25 it which you will get when you have your

1 instructions in the back.

2 Now we'll go back. We finished the listing of
3 the mitigators, the non-statutory mitigators, all
4 the way through Triple P and now I'll continue on.

5 It is the defendant's burden to prove a
6 mitigating circumstance or circumstances exist. As
7 explained before these proceedings, the defendant
8 need only establish a mitigating circumstance by the
9 greater weight of the evidence, which means evidence
10 that more likely than not tends to establish the
11 existence of a mitigating circumstance. If you
12 determine by the greater weight of the evidence that
13 a mitigating circumstance exists, you must consider
14 it established and give that evidence such weight as
15 you determine it should receive in reaching your
16 verdict about the appropriate sentence to be
17 imposed.

18 Any juror persuaded as to the existence of a
19 mitigating circumstance must consider it in this
20 case.

21 Further, any juror may consider a mitigating
22 circumstance found by another juror, even if he or
23 she did not find that factor to be mitigating.

24 Your decision regarding the appropriate
25 sentence should be based upon proven aggravating

1 factor or factors and established mitigating
2 circumstance or circumstances that have been
3 presented to you during this proceeding.

4 You will now engage in a weighing process. You
5 must weigh all of the following: A, whether the
6 aggravating factor or factors found to exist are
7 sufficient to justify the death penalty; B, whether
8 the aggravating factor or factors outweigh any
9 mitigating circumstance or circumstances found to
10 exist and, C, based on all the considerations,
11 pursuant to these instructions, whether the
12 defendant should be sentenced to life imprisonment
13 without the possibility of parole or death.

14 The process of weighing aggravating factors and
15 mitigating circumstances is not a mechanical or
16 mathematical process. In other words, you should
17 not merely total the number of aggravating factors
18 and compare that number to the total number of
19 mitigating circumstances. The law contemplates that
20 different factors or circumstances may be given
21 different weight or values by different jurors.
22 Therefore, in your decision-making process each
23 individual juror must decide what weight is to be
24 given to a particular factor or circumstance.

25 Regardless of the results of each juror's

1 individual weighing process, even if you find that
2 sufficient aggravators outweigh the mitigators, the
3 law neither compels, nor requires you to determine
4 that the defendant should be sentenced to death.

5 Once each juror has weighed the proven
6 factors, he or she must determine the appropriate
7 punishment for the defendant.

8 The jury's decision regarding an appropriate
9 sentence must be unanimous if death is to be
10 imposed.

11 To repeat what I have said, if your verdict is
12 that the defendant should be sentenced to death,
13 your finding that at least one aggravating factor
14 exists must be unanimous. Your finding that the
15 aggravating factor or factors are sufficient to
16 impose death must be unanimous. If your findings
17 that the aggravating factor or factors found to
18 exist outweigh the established mitigating
19 circumstance or circumstances must be unanimous and
20 your decision, if to impose a sentence of death,
21 must be unanimous.

22 You will be provided a form to reflect your
23 findings and decision regarding the appropriate
24 sentence. If your vote on the appropriate sentence
25 is less than unanimous, the defendant will be

1 sentenced to life in prison without the possibility
2 of parole.

3 The fact that the jury can make its decision on
4 a single ballot should not influence you to act
5 hastily or without due regard to the gravity of
6 these proceedings. Before you vote you should
7 carefully consider and weigh the evidence, realizing
8 that a human life is at stake, and bring your best
9 judgment to bear in reaching your verdict.

10 When considering the aggravating factors and
11 mitigating circumstances, it is up to you to decide
12 which evidence is reliable. You should use your
13 common sense in deciding which is the best evidence
14 and which evidence should not be relied upon in
15 making your decision as to what sentence should be
16 imposed.

17 You may find some of the evidence not reliable
18 or less reliable than other evidence. You should
19 consider how the witnesses acted as well as what
20 they said. Some things you should consider are did
21 the witness seem to have an opportunity to see and
22 know the things about which the witness testified;
23 did the witness seem to have an accurate memory; was
24 the witness honest and straightforward in answering
25 the attorneys' questions; did the witness have some

1 interest in how the case should be decided; does the
2 witness' testimony agree with the other testimony
3 and other evidence in the case; has the witness been
4 offered or received any money, preferred treatment
5 or other benefit in order to get the witness to
6 testify; and did the witness at some other time make
7 a statement that is inconsistent with the testimony
8 that he or she gave in court.

9 The fact that a witness is employed in law
10 enforcement does not mean that his or her testimony
11 deserves more or less consideration than that of any
12 other witness.

13 Expert witnesses are like other witnesses with
14 one exception. The law permits an expert witness to
15 give an opinion. However, an expert's opinion is
16 only reliable when given on a subject about which
17 you believe that person to be an expert. Like other
18 witnesses, you may believe or disbelieve all or any
19 part of an expert's testimony.

20 It is entirely proper for a lawyer to talk to a
21 witness about what testimony the witness would give
22 if called to the courtroom. The witness should not
23 be discredited by talking to a lawyer about his or
24 her testimony.

25 You may rely upon your own conclusion about the

1 credibility of any witness. A juror may believe or
2 disbelieve all or any part of the evidence or the
3 testimony of any witness.

4 The defendant exercised a fundamental right by
5 choosing not to be a witness in this case. You must
6 not be influenced in any way by his decision. No
7 juror should ever be concerned that the defendant
8 did or did not take the witness stand to give
9 testimony in the case.

10 These are some general rules that apply to your
11 discussion. You must follow these rules in order to
12 make a lawful decision.

13 You must follow the law as it is set out in
14 these instructions. If you fail to follow the law,
15 your decisions will be a miscarriage of justice.
16 There is no reason for failing to follow the law in
17 this case. All of us are depending upon you to make
18 a wise and legal decision in this matter.

19 Your decisions must be based only on the
20 evidence that you have heard from the testimony of
21 witnesses and have seen in the form of the exhibits
22 in evidence and these instructions.

23 Your decisions must not be based upon the fact
24 that you feel sorry for anyone or are angry at
25 anyone.

1 Remember the lawyers are not on trial. Your
2 feelings about them should not influence your
3 decisions.

4 Your decision should not be influenced by
5 feelings of prejudice, racial or ethnic bias or
6 sympathy. Your decisions must be based on the
7 evidence and on the law contained in these
8 instructions.

9 During this trial I've permitted you to take
10 notes. You will be allowed to take those notes into
11 the jury room during deliberations. You are
12 instructed that your notes are a tool to aid your
13 individual memory.

14 You should not compare your notes with those of
15 other jurors in determining the content of any
16 testimony or in evaluating the importance of any
17 evidence. Notes are for the note-taker's personal
18 use in refreshing his or her recollection of the
19 evidence. They are not evidence. Above all, your
20 memory should be your greatest asset in your
21 recollection of the evidence.

22 In just a few moments you will be taken to the
23 jury room by the bailiff. When you have reached
24 decisions in conformity with these instructions, the
25 appropriate forms should be signed and dated by your

1 foreperson.

2 And I'm going to stop here now and go to the
3 verdict form. We will go back to the remainder of
4 the instruction.

5 This verdict form is 25 pages long.
6 Fortunately, it is numbered. The instructions are
7 not numbered, but the verdict form pages are
8 numbered. And I'm going to go over it with you, but
9 it walks you through the process that we have all
10 talked with you about this morning.

11 So the verdict form starts, of course, with the
12 style of the case, in the Circuit Court, Fourth
13 Judicial Circuit, in and Duval County, Florida.
14 Case No. 16-2013-CF-005781-AXXX-MA. Division CR-D.
15 State of Florida versus Donald James Smith.

16 Then it says verdict as to sentence. We, the
17 jury, find as follows as to the defendant Donald
18 James Smith in this case.

19 A, aggravating factor. So this is your first
20 step, is step A. We, the jury, unanimously find
21 that the State has proven the following aggravating
22 factors beyond a reasonable doubt as to defendant
23 Donald James Smith in this case if, in fact, you
24 have found the aggravating factor to exist.

25 So, one, Donald James Smith was previously

1 convicted of a felony involving the use or threat of
2 violence to another person. And you either make the
3 finding yes or no, whatever your finding is, but you
4 have to mark it. And you only mark yes or no.

5 Two, the first degree murder was committed
6 while Donald James Smith was engaged in the
7 commission of a kidnapping and a sexual battery.
8 And you mark yes or no.

9 Three, the first degree murder was committed
10 for the purpose of avoiding or preventing a lawful
11 arrest and you mark yes or no.

12 Four, the first degree murder was especially
13 heinous, atrocious or cruel, and you mark yes or no.

14 Five, the first degree murder was committed in
15 a cold, calculated and premeditated manner without
16 any pretense of moral or legal justification, and
17 you mark yes or no.

18 And, six, Cherish Perrywinkle was a person less
19 than 12 years of age and you mark yes or no.

20 So, section A you're determining that the State
21 has unanimously -- I mean has proven beyond a
22 reasonable doubt an aggravating factor. You look at
23 each of the six aggravating factors and you mark yes
24 or no, has to be unanimous.

25 Then at the end of that section it says if you

1 answered yes to at least one of the aggravating
2 factors listed above, please proceed to section B.
3 If you answered no to every aggravating factor
4 listed above, do not proceed to section B. The
5 defendant, Donald James Smith, is not eligible for
6 the death penalty and will be sentenced to life in
7 prison without the possibility of parole.

8 Please sign and date the verdict form and
9 return it to the courtroom.

10 So that's your clear instruction. If you mark
11 yes on even a single aggravator you proceed. If you
12 mark no on all of them you don't proceed, you just
13 go to the end of the form.

14 So if you're proceeding to B, sufficiency of
15 the aggravating factors, reviewing the aggravating
16 factors that were unanimously found to be proven
17 beyond a reasonable doubt in section A above, we,
18 the jury, also unanimously find that the aggravating
19 factors are sufficient to warrant a possible
20 sentence of death, and you either mark yes or no.
21 And that's a unanimous finding.

22 If you answered yes to section B, please
23 proceed to section C. If you answered no to section
24 B, do not proceed to section C. The defendant,
25 Donald James Smith, will be sentenced to life in

1 prison without the possibility of parole.

2 Please sign and date the verdict form and
3 return it to the courtroom.

4 So, if you've answered yes and you go on to C,
5 C is on the top of page 3, statutory mitigating
6 circumstances. We, the jury, find that the
7 following statutory mitigating circumstances have
8 been established by a greater weight of the evidence
9 as to the defendant, Donald James Smith, in this
10 case. One, the first degree murder was committed
11 while Donald James Smith was under the influence of
12 extreme mental or emotional disturbance, and you
13 either answer yes or no. If you answered yes,
14 please provide below the numerical jury vote as to
15 the existence of this statutory mitigating
16 circumstance. A vote of how many yes to how many
17 no. This does not have to be unanimous. You just
18 put the vote.

19 Two, the capacity of Donald James Smith to
20 appreciate the criminality of his or her conduct or
21 to conform his conduct to the requirements of the
22 law was substantially impaired and you vote yes or
23 no, but if you vote yes you provide the numerical
24 jury vote as to the existence of the statutory
25 mitigating circumstance by a vote of whatever yes to

1 whatever no.

2 Three, Donald James Smith's age at the time of
3 the crime, and you vote yes or no. If you answered
4 yes above, please provide the numerical jury vote as
5 to the existence of the statutory mitigating
6 circumstance. And then you put down the vote.
7 Again, it does not have to be unanimous. You put
8 the numbers, how many yes to how many no.

9 And then, four, the existence of any other
10 factors in Donald James Smith's character,
11 background or life or the circumstances of the
12 offense that would mitigate against the imposition
13 of the death penalty.

14 And then all those factors I read to you that
15 have been in the instructions as mitigating
16 circumstances, other than the first three, which are
17 statutory, all of those have to be considered by
18 you, you have to look at every single mitigating
19 circumstance and on each -- these are now lettered
20 rather than numbered. So they're letters under the
21 number.

22 And on each one, and I'll just give an example.
23 On A, Donald James Smith's biological father left
24 before he was born. As a result he never had a
25 relationship with him. And you answer yes or no

1 that that's been established. If you've answered
2 yes, then please provide the numerical vote as to
3 the existence of this statutory mitigating
4 circumstance, and you put by a vote of how many to
5 how many you're finding that that statutory
6 mitigating circumstance exists. And you must go
7 through and do that with every single mitigator.
8 Does everyone understand that?

9 (Affirmative response from jurors.)

10 THE COURT: Thank you.

11 So we're going to go on now to -- you can go
12 to page -- and we'll do it on the screen. We're
13 going to go to page 23.

14 Okay. 23 is the conclusion of these mitigating
15 circumstances that you must address, and it ends
16 with PPP, Donald James Smith has not been a threat
17 to correctional officers or other inmates in the
18 Duval County Jail and the Department of Corrections,
19 and you are to indicate yes or no that that has been
20 established. And if you answered yes, please
21 provide below the numerical jury vote as to the
22 existence of this statutory mitigating circumstance.
23 And you put your vote of how many yes, how many no.

24 When you go to the next page, page 24, at the
25 top it says please proceed to section D regardless

1 of your findings in section C.

2 D, eligibility for the death penalty. We, the
3 jury, unanimously find that the aggravating factors
4 that were proven beyond a reasonable doubt in
5 section A above outweigh the mitigating
6 circumstances established in section C above. And
7 then you answer either yes or no and that must be a
8 unanimous finding.

9 If you answered yes to section D, please
10 proceed to section E. If you answered no to section
11 D, do not proceed. The defendant, Donald James
12 Smith, will be sentenced to life in prison without
13 the possibility of parole.

14 Please sign and date the verdict form and
15 return it to the courtroom.

16 Then on page 25, which is the last page of the
17 verdict form, E, jury verdict as to death penalty.
18 Having unanimously found that at least one
19 aggravating factor has been established beyond a
20 reasonable doubt in section A above, that the
21 aggravating factors are sufficient to warrant a
22 sentence of death in section C above, and that the
23 aggravating factors outweigh the mitigating
24 circumstances in section D above, you, the jury,
25 unanimously find the defendant, Donald James Smith,

1 should be sentenced to death. And you either answer
2 yes or no.

3 If no, by the numeric vote to impose a sentence
4 of life imprisonment without the possibility of
5 parole is as follows, and you mark how many voted
6 for life and how many voted for death.

7 If you answered yes, it would have to be
8 unanimous so that's automatically 12 people. You
9 don't have to list what the vote was.

10 If your vote to impose death is less than
11 unanimous, the trial court shall impose a sentence
12 of life without the possibility of parole.

13 So say we all. This 22nd day of February,
14 2018.

15 And, again, we're going to go back to the
16 instructions. We're almost through. But remember
17 that this verdict form has numbered pages. It's
18 important that you keep it in order. That will help
19 you in case it gets out of order. The instructions
20 are not numbered.

21 So we're going to go back to where we left off,
22 which is in the middle of the page.

23 During deliberations jurors must communicate
24 about the case only with one another and only when
25 all jurors are present in the jury room. You are

1 not to communicate with any person outside the jury
2 about this case. And you must not talk about this
3 case in person or through the telephone, in writing
4 or electronic communication such as a blog, Twitter,
5 e-mail, text message or any other means.

6 Many of you may have cell phones, tablets,
7 laptops or other electronic devices here in the
8 courtroom. The rules do not allow you to bring your
9 phones or any of those types of electronic devices
10 into the jury room. Kindly leave those devices on
11 your seat where they will be guarded by the bailiff
12 while you deliberate.

13 Do not contact anyone to assist you during your
14 deliberations. These communications rules apply
15 until I discharge you at the end of the case. If
16 you become aware of any violation of these
17 instructions, or any other instruction I have given
18 in this case, you must tell me by giving a note to
19 the bailiff.

20 During this trial items were received into
21 evidence as exhibits. You may examine whatever
22 exhibits you think will help you in your
23 deliberations. These exhibits will be sent into the
24 jury room with you when you begin to deliberate. If
25 you desire to view any other exhibits, please let me

1 know by submitting your request in writing.

2 I think you'll have all the exhibits out and
3 won't have to ask.

4 I cannot participate in your deliberations in
5 any way. Please disregard anything I may have said
6 or done that made you think I preferred one decision
7 over another.

8 If you need to communicate with me, send a note
9 through the bailiff signed by the foreperson. If
10 you have questions, I have to talk with the
11 attorneys before I answer so it may take some time.
12 You may continue your deliberations while you wait
13 for my answer. I will answer any questions, if I
14 can, in writing or orally here in open court.

15 In closing, let me remind you that it is
16 important that you follow the law spelled out in
17 these instructions. There are no other laws that
18 apply to this case. Even if you do not like the
19 laws that must be applied, you must use them. For
20 more than two centuries we have lived by the
21 Constitution and the law. No juror has the right to
22 violate the rules that we all share.

23 Jurors -- jurors No. 64, 70, 79 and 83, as you
24 know, are alternates and because the full panel of
25 jury members is still present and available to

1 deliberate, you will not participate in that
2 particular process. However, you're not leaving
3 yet. So you can go in the jury room, get your
4 personal belongings, and then you'll come back out
5 here and wait for a minute and I'll tell you what
6 you'll do next. Okay? Thank you. Leave your notes
7 in the chair.

8 (Alternate jurors absent.)

9 THE COURT: While they're doing that, in just
10 a moment I'll excuse you to the jury room. We
11 need to correct that page that I showed you on the
12 verdict form -- I mean on the instruction and the
13 copy, once it's corrected, that I read from will
14 be given to you. I separated the instructions
15 from the verdict form. The verdict form is long,
16 but it does take you appropriately through each
17 step. It should help you as you work through your
18 job in this case.

19 You may take your notes with you. You will
20 have all the evidence.

21 And I think that's everything. Right?

22 MR. CALIEL: Yes, Your Honor.

23 THE COURT: But you can't go yet. You have
24 to wait until the four alternates return. And if
25 you've got electronic devices in the jury room,

1 you'll have a moment to hand those to the bailiff.
2 If you have them out here, you can leave them in
3 your seat. And as you know, we won't let anybody
4 go to the jury box while we're in the trial.

5 MS. WHEELER-SANCHEZ: Your Honor, may I
6 approach?

7 THE COURT: Sure. Is that the corrections?

8 MS. WHEELER-SANCHEZ: Yes, Your Honor.

9 THE COURT: Wonderful. Thank you.
10 We've made a correction and moved everything
11 up. So it's a few pages different.

12 BAILIFF: Are you ready, Judge?

13 THE COURT: Yes. Are they waiting --

14 BAILIFF: Do you want them to come back in?

15 THE COURT: Where are they?

16 BAILIFF: Right here.

17 THE COURT: They can come back in over here.

18 (Alternate jurors present.)

19 THE COURT: These are correct now.

20 And so with that, ladies and gentlemen, you may
21 retire to the jury room to begin your deliberations.

22 (Jury retired at 12:55 o'clock p.m.)

23 THE COURT: Do they need the laptop?

24 MR. CALIEL: If they desire to view the
25 exhibits again they need to.

1 THE COURT: Just let them know if they need
2 the laptop to let us know.

3 Is that all right, Ms. Schlax?

4 MS. SCHLAX: Yes, Your Honor. I don't think
5 there was anything I introduced that requires a
6 laptop.

7 THE COURT: There's not, but in case they
8 want to review something else. We'll let them
9 know if they need a laptop to just let us know.
10 Do you need an excuse for work?

11 JUROR: I'm the only one?

12 THE COURT: We'll take care of it in just a
13 moment when the bailiff comes in.

14 Would you give your jury number to Ms. Smith?
15 Are they numbered? The boxes, the lunches. Are
16 they numbered?

17 JUROR: Yes.

18 THE COURT: Would you give your number to
19 Ms. Smith.

20 Thank you. We'll get it for you.

21 You may be seated.

22 Just for the record, we have our four
23 alternates here. We have a place for them to go to
24 be -- they cannot be with the jury, of course, and
25 you may not discuss the case among yourselves or

1 with anyone else. A little bit later if you want to
2 walk around or come sit in this courtroom or
3 whatever you want to do that's fine. You just
4 cannot talk to anybody. No one is to approach you.

5 JUROR: Are we allowed to walk outside then?

6 THE COURT: You are absolutely allowed to
7 walk outside. Of course, we have to wait a minute
8 and then they'll take you to your lunch.

9 BAILIFF: We have an officer can a take them
10 over there right now.

11 THE COURT: Okay. Sorry. There is someone
12 that can take you right now. Yes, I don't think
13 you'll be called back quickly like you were last
14 time so please enjoy your lunch and then please
15 enjoy a nice walk if you'd like. They just need
16 to know where you are in case we need to get you
17 back.

18 Thank you.

19 (Jury buzzed at 12:58 p.m.)

20 THE COURT: I assume that means they've
21 chosen the foreperson or they're testing the
22 button, one of the two. They're still delivering
23 stuff to them.

24 I think you can be seated.

25 Any exceptions or objections to the morning

1 proceeding?

2 MS. SCHLAX: Your Honor, we discussed it
3 amongst ourselves. We had originally agreed that
4 the Court was not going to specifically read each
5 of the aggravating factors. I recognize we could
6 have approached and asked the Court to again read
7 all the non-statutory mitigators, but we chose not
8 to do that.

9 THE CLERK: This one didn't have a number.

10 THE COURT: I have no idea. You can take it
11 over to her and see. You mean you had one with a
12 number and you had one with no number?

13 THE CLERK: Everything else was numbered.
14 This one is not and I didn't have one with her
15 number.

16 THE COURT: You did or did not?

17 THE CLERK: Did not.

18 THE COURT: Take it to her.

19 BAILIFF: 405 jury room.

20 THE COURT: When the jury reaches a verdict,
21 depending on when it is, I do have to read them
22 all. Thank you. I understand. Thank you for
23 your consideration.

24 Other than that, any other exceptions or
25 objections?

1 MS. SCHLAX: No, Your Honor.

2 MR. CALIEL: Nothing from the State, Your
3 Honor.

4 THE COURT: If you all are going to leave the
5 courtroom, the bailiffs need a way to be able to
6 reach you as long as you can be back in five
7 minutes or so. And I know you want to go to your
8 office. As long as you're close, that's fine.

9 Is there anything else we need to take care
10 of?

11 MR. CALIEL: Nothing from the State, Your
12 Honor.

13 MS. SCHLAX: Nothing from the defense, Your
14 Honor.

15 THE COURT: All right. Just one procedural
16 matter, if I could see the attorneys at side-bar.

17 (Counsel for the State and defense approached
18 the bench for a side-bar conference out of the
19 hearing of the jury and court reporter.)

20 THE COURT: All right. We'll be in recess.

21 (Recess.)

22 (Jury buzzed at 1:28 o'clock.)

23 (Defendant present.)

24 (Jury absent.)

25 THE COURT: Did they write it down?

1 BAILIFF: They've been instructed to. He's
2 checking.

3 (Pause.)

4 BAILIFF: They figured it out.

5 THE COURT: They don't need us.

6 BAILIFF: That's what they said. They said
7 they sat down and figured it out.

8 THE COURT: Does everybody agree we can be in
9 recess then?

10 MS. SCHLAX: Yes, Your Honor.

11 MR. CALIEL: Yes, Your Honor.

12 THE COURT: Thank you.

13 (Recess.)

14 (Jury buzzed at 3:03 o'clock p.m.)

15 (Defendant present.)

16 (Jury absent.)

17 THE COURT: My understanding -- well, first,
18 let me put on the record Mr. Smith is here with
19 his attorneys and the State is here.

20 It's my understanding that the jury has
21 reached a verdict.

22 Is everyone ready for the jury to come out?

23 MR. CALIEL: The State is ready, Your Honor.

24 THE COURT: All right. Let me just remind
25 everyone, first of all, that it is a very long

1 verdict, it will take quite awhile to read it and,
2 more importantly, it's very important that there
3 be no audible response, or physical, to the
4 verdict. It's a very emotional thing to have a
5 verdict read, but any emotions have to be kept in
6 check. If you don't feel like you can do that,
7 then you should wait outside and we'll let you
8 know immediately what the verdict was.

9 So with that we're ready for the jury to come
10 out.

11 BAILIFF: One in the restroom.

12 Are you ready, ma'am?

13 THE COURT: Yes, we're ready.

14 BAILIFF: The jury is entering the courtroom.

15 (Jury present.)

16 THE COURT: Thank you. You may be seated.

17 Ladies and gentlemen of the jury, it's my
18 understanding the jury has reached a verdict, isn't
19 that correct?

20 (Affirmative response from jurors.)

21 THE COURT: Do you have the verdict form?

22 JUROR: Yes.

23 THE COURT: If you would hand it to the
24 bailiff, please.

25 (Bailiff tendering verdict to Court.)

1 (Court examining verdict form.)

2 THE COURT: All right. I've reviewed the
3 form to make sure it was filled out correctly.
4 I'll read the verdict.

5 State of Florida versus Donald James Smith,
6 verdict as to sentence. We, the jury, find as
7 follows as to the defendant, Donald James Smith, in
8 this case.

9 We, the jury, unanimously find that the State
10 has proven the following aggravating factors beyond
11 a reasonable doubt as to the defendant Donald James
12 Smith in this case.

13 Donald James Smith was previously convicted of
14 a felony involving the use or threat of violence to
15 another person.

16 The first degree murder was committed while
17 Donald James Smith was engaged in the commission of
18 a kidnapping and a sexual battery.

19 The first degree murder was committed for the
20 purpose of avoiding or preventing a lawful arrest.

21 The first degree murder was especially heinous,
22 atrocious or cruel.

23 The first degree murder was committed in a
24 cold, calculated and premeditated manner without any
25 pretense of moral or legal justification.

1 Cherish Perrywinkle was a person less than 12
2 years of age.

3 Reviewing the aggravating factors that we
4 unanimously find to be proved beyond a reasonable
5 doubt in section A above, we, the jury, also
6 unanimously find that the aggravating factors are
7 sufficient to warrant a possible sentence of death.
8 And they have marked yes.

9 As to mitigators. We, the jury, find that the
10 following statutory mitigating circumstances have
11 been established by a greater weight of the evidence
12 as to the defendant, Donald James Smith, in this
13 case.

14 I'll read the mitigator and then the answer.

15 The first degree murder was committed while
16 Donald James Smith was under the influence of
17 extreme mental or emotional disturbance. No.

18 The capacity of Donald James Smith to
19 appreciate the criminality of his conduct or to
20 conform his conduct to the requirements of law was
21 substantially impaired. No.

22 Donald James Smith's age at the time of the
23 crime. Yes, by a vote of 12 to nothing.

24 Donald James Smith's biological father left
25 before he was born. As a result he never had a

1 relationship with him. No.

2 Donald James Smith's parents were forced to
3 divorce by his maternal grandparents who openly
4 disapproved of his biological father. No.

5 Donald James Smith's mother was 17 years old
6 when she gave birth to him. No.

7 Donald James Smith was born premature with a
8 low birth weight. No.

9 Donald James Smith's mother wanted to give him
10 up for adoption. No.

11 Mental illness runs in Donald James Smith's
12 mother's side of the father and his biological
13 father's family. No.

14 Addiction runs in Donald James Smith's mother's
15 side of the family and in his biological father's
16 family. No.

17 Emotional instability leading to physical
18 violence was present on Donald James Smith's
19 father's side of the family. No.

20 Donald James Smith's paternal uncle shot his
21 grandfather to death. No.

22 Donald James Smith's mother spent very little
23 time with him as a baby, instead focussing all of
24 her attention on finding a man who could provide her
25 with a lifestyle her parents thought she deserved.

1 No.

2 Donald James Smith moved out of his
3 grandparents' home when his mother married Clifton
4 Smith, the man who formally adopted him, which was
5 extremely traumatic. No.

6 Cliff was verbally and emotionally abusive to
7 Donald James Smith. He also locked Donald James
8 Smith outside as punishment. No.

9 Cliff was physically abusive to Donald James
10 Smith. No.

11 Donald James Smith was traumatized by his
12 step-father's treatment. He became clingy, stopped
13 eating and wet the bed long past the age of typical
14 potty training. No.

15 Cliff was paranoid and obsessed with violence.
16 Donald James Smith was terrified of what he
17 witnessed. No.

18 Cliff's job in the insurance business forced
19 them to move regularly. As a result Donald James
20 Smith was repeatedly uprooted from his home, adding
21 to the instability of his living environment. No.

22 Because of the frequent moves Donald James
23 Smith was frequently bullied. This caused him to
24 feel alienated, detached, despondent and angry.
25 Donald James Smith resorted to paying other kids to

1 play with their toys. No.

2 Donald James Smith was sexually molested at the
3 age of eight by two neighborhood teenagers. No.

4 The teenagers coerced Donald James Smith into
5 watching them violently sexually molest several
6 girls. He found the experience confusing and
7 frightening. No.

8 Donald James Smith did not reveal the sexual
9 abuse to his mother. No.

10 Donald James Smith's mother suspected that her
11 sister's husband, Bob, molested her son. However,
12 she did not confront them. No.

13 Donald James Smith never received treatment for
14 the sexual abuse he endured. No.

15 Cliff was sexually inappropriate with Donald
16 James Smith. He touched Donald James Smith on his
17 buttocks. He called Donald James Smith sexually
18 explicit names. No.

19 When his mother divorced Cliff after seven
20 years of marriage, this was yet another change that
21 brought instability into Donald James Smith's life.
22 No.

23 Donald James Smith's second step-father,
24 Dr. Marlin Moore, was a cold, self-centered and
25 aloof man who insisted that his wife and step-son

1 call him Dr. Moore. No.

2 Dr. Moore was verbally and physically abusive
3 to Donald James Smith. He made it known that he
4 didn't have time for children. No.

5 As a teenager Donald James Smith began
6 self-medicating with pills from Dr. Moore's home
7 office. He was never confronted with the drug use.
8 No.

9 Donald James Smith's drug use -- excuse me --
10 drug abuse escalated to regularly using marijuana,
11 LSD, PCP, MDA, Mescaline, Peyote, Quaaludes and
12 cocaine. No.

13 Donald James Smith dropped out of school in the
14 tenth grade. Although Donald James Smith was
15 intelligent, he had lost all motivation based on
16 drug use, depression and anger. No.

17 As a teenager Donald James Smith began to get
18 arrested. No.

19 At the age of 15 Donald James Smith began
20 engaging in voyeurism. No.

21 Donald James Smith was raped while
22 incarcerated. No.

23 When Donald James Smith was released from jail
24 his drug use spiralled into full-blown crack
25 addiction. No.

1 On crack Donald James Smith's inability to
2 control his impulses was intensified to the point
3 that he felt like another person. On the streets
4 Donald James Smith became notorious for his behavior
5 while high. He was paranoid, manic, unstable and
6 impulsive. No.

7 Donald James Smith's mother enabled his drug
8 addiction. She drove him to pay off his drug debts
9 and if he was unable to make the trip paid them off
10 herself. She continued this for decades. No.

11 At the age of 20 Donald James Smith attempted
12 suicide for the first time by driving into an oak
13 tree on Orange Picker Road. He flipped his car, but
14 survived the accident. Donald James Smith did not
15 receive treatment for his injury. No.

16 Donald James Smith experienced a dissociative
17 episode due to drug use where he lost time. No.

18 Donald James Smith made a second suicide
19 attempt in the Duval County Jail. No.

20 In 1977 Donald James Smith was designated as a
21 mentally disordered sex offender and committed to
22 the North Florida Evaluation and Treatment Center.
23 No.

24 Throughout his adult life Donald James Smith
25 spent hundreds of dollars per day on crack. During

1 the year 2002 he spent more than \$90,000 in a
2 four-month period. He went on binges that lasted
3 for weeks. During these episodes Donald James Smith
4 did not eat or sleep. No.

5 Donald James Smith fathered a son, Donald James
6 Smith, Jr., born June 2nd, 1992. He married his
7 son's mother Francine Brown, but the relationship
8 was short-lived. No.

9 Donald James Smith was far from the perfect
10 father, however, he has tried to parent his son to
11 the best of his ability. No.

12 Donald James Smith, Jr., has developed a close
13 relationship with his father since he has been
14 incarcerated. Yes, by a vote of seven yes to five
15 no.

16 Donald James Smith has been repeatedly
17 diagnosed as having antisocial personality disorder,
18 polysubstance dependence, pedophilia and cocaine
19 dependence. No.

20 In 1999 Donald James Smith was designated as a
21 sexually violent predator and subsequently committed
22 to the Martin Treatment Center through the Jimmy
23 Ryce Civil Commitment Act. While detained at MTC
24 Donald James Smith did not complete the treatment
25 plan developed for him. No.

1 While at the Martin Treatment Center, Donald
2 James Smith engaged in a sexual relationship with
3 another patient who was known for being
4 HIV-positive. This was regarded as Donald James
5 Smith's third suicide attempt. No.

6 In spite of the fact that Donald James Smith
7 did not participate in counseling, he was released
8 from the Martin Treatment Center based on a decision
9 made by members of the State Attorney's Office in
10 Duval County. No.

11 Once released from the Martin Treatment Center
12 he was required to receive a psychosexual evaluation
13 and treatment. Dr. James Vallely completed the
14 evaluation and concluded that Donald James Smith was
15 highly likely to reoffend. No.

16 Donald James Smith was arrested for dealing in
17 stolen property and burglary and was eligible to
18 receive 30 years in prison as an habitual offender.
19 However, members of the State Attorney's Office in
20 Duval County permitted him to plead to a sentence of
21 four years in prison. Donald James Smith was not
22 placed on any form of supervision upon his release
23 from prison. No.

24 In 2006 the state psychological assessment
25 determined Donald James Smith did not meet the

1 criteria for civil commitment in the Jimmy Ryce
2 Civil Commitment Center, although he had never
3 received any meaningful rehabilitation. No.

4 In 2011 Donald James Smith Baker Acted himself.
5 He reported homicidal thoughts, auditory and visual
6 hallucinations. He also admitted a history of using
7 cocaine and Lortab. He was diagnosed as having a
8 potential for homicide, suicide and violence. The
9 center recommended one-on-one counseling and let him
10 stay three or four days. He never followed up with
11 therapy. No.

12 In 2009 Donald James Smith was arrested for
13 attempting to lure a nine year old girl while posing
14 as a Department of Children and Families worker. If
15 found guilty he could have been sentenced to ten
16 years in the Department of Corrections, but members
17 of the State Attorney's Office in Duval County
18 agreed to a plea agreement allowing a county jail
19 sentence which bypassed further screening into the
20 Jimmy Ryce Civil Commitment Center. No.

21 On June 1st, 2013, Donald James Smith was
22 released from Duval County Jail. He was not placed
23 on any kind of supervision by the State of Florida.
24 No.

25 Three weeks before the murder of Cherish

1 Perrywinkle, Donald James Smith went to Shands
2 Hospital and then was Baker Acted. He stated that
3 he was having violent thoughts and wanted to get
4 into a residential program. The center gave him a
5 new brochure and told him to study and practice.
6 They allowed him to stay approximately 24 hours.
7 No.

8 Neuropsychological testing has indicated that
9 Donald James Smith's brain functioning is abnormal.
10 He has deficits in executive functioning and poor
11 impulse control. No.

12 Donald James Smith's neuropsychological
13 disorders are exacerbated by substance abuse and
14 addiction. No.

15 Medical testing, specifically PET, MRI, and
16 DTI scans, have revealed that Donald James Smith's
17 brain functioning is abnormal. No.

18 Donald James Smith's brain abnormalities are
19 consistent with someone who has suffered brain
20 damage. No.

21 Donald James Smith has suffered from
22 significant mental illness for most of his life.
23 No.

24 Donald James Smith's mental illness is not
25 something he has chosen. No.

1 Donald James Smith did not choose his family.
2 No.

3 Donald James Smith did not choose the way his
4 family treated him. No.

5 Donald James Smith did not choose to be
6 sexually molested. No.

7 Donald James Smith's childhood experiences
8 shaped the person he became as an adult. No.

9 At the time of the offense Donald James Smith
10 was 56 years old. He is now 61 years old. No.

11 Donald James Smith has been diagnosed with
12 chronic obstructive pulmonary disease, COPD, heart
13 disease, Hepatitis B and Hepatitis C. No.

14 Donald James Smith has been a strong support
15 system for his mother who is receiving treatment for
16 breast cancer. No.

17 Donald James Smith has not been a threat to
18 correctional officers or other inmates in the Duval
19 County Jail and the Department of Corrections. No.

20 We, the jury, unanimously find that the
21 aggravating factors that were proven beyond a
22 reasonable doubt in section A above outweigh the
23 mitigating circumstances established in section C
24 above. Yes.

25 Having unanimously found that at least one

1 aggravating factor has been established beyond a
2 reasonable doubt in section A above, that the
3 aggravating factors are sufficient to warrant a
4 sentence of death in section B above, and that the
5 aggravating factors outweigh the mitigating
6 circumstances in section D above, we, the jury,
7 unanimously find that the defendant, Donald James
8 Smith, should be sentenced to death. Yes.

9 And so say we all, this 22nd day of February,
10 2018. Signed and dated by the foreperson.

11 Members of the jury, we're going to ask each of
12 you individually about the verdict that you have
13 just heard. The question pertains to whether the
14 verdict as read by the Court was correctly stated.

15 Madam Clerk, would you poll the jury?

16 THE CLERK: Do you, juror No. [REDACTED] agree that
17 each of the findings in the verdict form is yours?

18 JUROR: Yes.

19 THE CLERK: Do you, juror No. [REDACTED], agree that
20 each of the findings in the verdict form is yours?

21 JUROR: Yes.

22 THE CLERK: Do you, juror No. [REDACTED] agree that
23 each of the findings in the verdict form is yours?

24 JUROR: Yes.

25 THE CLERK: Do you, juror No. [REDACTED] agree that

1 each of the findings in the verdict form is yours?

2 JUROR: Yes.

3 THE CLERK: Do you, juror No. [REDACTED] agree that
4 each of the findings in the verdict form is yours?

5 JUROR: Yes.

6 THE CLERK: Do you, juror No. [REDACTED] agree that
7 each of the findings in the verdict form is yours?

8 PROSPECTIVE JUROR: Yes.

9 THE CLERK: Do you, juror No. [REDACTED] agree that
10 each of the findings in the verdict form is yours?

11 JUROR: Yes.

12 THE CLERK: Do you, juror No. [REDACTED] agree that
13 each of the findings in the verdict form is yours?

14 JUROR: Yes.

15 THE CLERK: Do you, juror No. [REDACTED] agree that
16 each of the findings in the verdict form is yours?

17 JUROR: Yes.

18 THE CLERK: Do you, juror No. [REDACTED] agree that
19 each of the findings in the verdict form is yours?

20 JUROR: Yes.

21 THE CLERK: Do you, juror No. [REDACTED] agree that
22 each of the findings in the verdict form is yours?

23 JUROR: Yes.

24 THE CLERK: Do you, juror No. [REDACTED] agree that
25 each of the findings in the verdict form is yours?

1 JUROR: Yes.

2 THE CLERK: Thank you.

3 THE COURT: Thank you, Madam Clerk.

4 Ladies and gentlemen of the jury, you have
5 completed your jury service. It's been a long three
6 weeks.

7 On behalf of everyone involved in this case, I
8 would like to thank you for your patience and all
9 the time you've devoted to us. With that in a
10 moment you will be free to go.

11 You do not have any obligation to speak to
12 anyone about this case. If anyone talks to you
13 about the case and you don't want to speak about the
14 case, you do not have to speak about the case. If
15 you wish to speak about the case, then that's up to
16 you. You are now an ordinary citizen again and you
17 can go about your life in an ordinary manner.

18 I don't think anybody tomorrow will ask you if
19 you followed my instructions. You don't have to
20 hear that again.

21 Let me just do one more thing. I'll put this
22 in more legal terms than what I just said. I wish
23 to thank you for your time and consideration of this
24 case. I also wish to advise you of some very
25 special privileges enjoyed by jurors. No juror can

1 ever be required to talk about the discussions that
2 occurred in the jury room except by court order.
3 For many centuries our society has relied upon
4 juries for consideration of difficult cases. We
5 have recognized for hundreds of years that a jury's
6 deliberations, discussions and votes should remain
7 their private affair as long as they wish it.
8 Therefore, the law gives you a unique privilege not
9 to speak about the jury's work. Although you are at
10 liberty to speak with anyone about your
11 deliberations, you are also at liberty to refuse to
12 speak to anyone. A request to discuss either your
13 verdict or your deliberations may come from those
14 who are simply curious or from those who might seek
15 to find fault with you, from the media, from the
16 attorneys, or elsewhere. It will be up to you to
17 decide whether to preserve your privacy as a juror.

18 Again, ladies and gentlemen, thank you. You
19 are discharged.

20 (Jury excused.)

21 THE COURT: All right. You may be seated.

22 Any legal exceptions or objections?

23 MS. SCHLAX: No, Your Honor.

24 MR. CALIEL: None from the State, Your Honor.

25 THE COURT: Okay. Next we need to schedule a

1 Spencer Hearing, is that correct?

2 MR. CALIEL: Yes, Your Honor.

3 MS. SCHLAX: Yes, Your Honor.

4 THE COURT: Okay. How far out do you want to
5 schedule it?

6 MS. SCHLAX: I'm fine with the week of March
7 12th, Your Honor.

8 MR. CALIEL: Your Honor, I'm unavailable that
9 week. Is it possible to push it off, I think the
10 -- anytime the week of March 26th.

11 MS. SCHLAX: Yes, Your Honor.

12 THE COURT: The 28th?

13 MR. CALIEL: Yes.

14 THE COURT: Is it better for you all to have
15 it in the afternoon since you do have morning
16 calendar? We can do it in the morning, but I
17 don't want to interfere with your --

18 MS. SCHLAX: It's far out. We can make sure.

19 MR. CALIEL: Morning would be great, Your
20 Honor. I have depositions scheduled all that
21 afternoon.

22 THE COURT: All right. March 28th at 9:00
23 o'clock in Courtroom 406 for a Spencer Hearing.
24 And I'll have to check to make sure the courtroom
25 is available, et cetera, and I'll send you all an

1 e-mail and make sure you know, court reporter,
2 everybody, if that's okay. But for now March 28th
3 at 9:00 for a Spencer Hearing in this courtroom.

4 And with that I believe we're in recess.

5 MS. SCHLAX: Yes, Your Honor.

6 MR. CALIEL: Thank you, Your Honor.

7 (Thus the proceedings ended.)

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1 C E R T I F I C A T E

2

3 I, Faye M. Gay, hereby certify that the foregoing
4 transcript is a true and accurate transcription of my
5 Stenograph notes taken at the time and date stated herein.

6 Dated this 25th day of April, 2018.

7

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9

10 /S/ Faye M. Gay

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12 -----
 Faye M. Gay, CRR, RMR, FCR, RPR, CLVS

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IN THE CIRCUIT COURT OF THE
FOURTH JUDICIAL CIRCUIT, IN
AND FOR DUVAL COUNTY, FLORIDA.

Case No: 2013-CF-5781-AXXX-MA

Division CR-D

STATE OF FLORIDA

-vs-

DONALD SMITH,

Defendant,

TESTIMONY AND PROCEEDINGS taken before the
Honorable Mallory D. Cooper, Judge of the Circuit Court,
on March 28, 2018, and as reported by Faye M. Gay,
Certified Realtime Reporter, Registered Merit Reporter,
and Certified Legal Video Specialist.

OFFICIAL REPORTERS, INC.
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904-358-2090

1 APPEARANCES:

2 MELISSA NELSON, Esquire,

3 State Attorney,

 Appearing on behalf of the State of Florida.

4

5 MARK CALIEL and VANESSA WHEELER-SANCHEZ, Esquires,

6 Assistant State Attorneys,

 Appearing on behalf of the State of Florida

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8 JULIE SCHLAX and CHARLES FLETCHER, Esquires,

9 Appearing on behalf of the Defendant.

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1 THE COURT: Good morning.

2 MR. CALIEL: Good morning.

3 MR. FLETCHER: Good morning.

4 MS. NELSON: Good morning.

5 THE COURT: And Mr. Smith is present along
6 with his attorneys and the State.

7 And we're here for a Spencer Hearing and the
8 first matter is the motion for new trial. And I
9 need to briefly review this motion.

10 I think the only addition is paragraph 12, is
11 that correct?

12 MR. FLETCHER: That's correct, Your Honor.

13 THE COURT: Okay. Okay. I've reviewed the
14 motion. Is there any argument?

15 MR. FLETCHER: Judge, I will just rely on the
16 motion itself.

17 THE COURT: Okay. Thank you.

18 MR. FLETCHER: Thank you, Judge.

19 MR. CALIEL: Judge, in regards to the motion
20 for new trial, I believe all, except for the
21 amended addition, were all ruled upon
22 contemporaneously by the Court. We would rely
23 upon our previous argument. Memorandums will we
24 supplied to the Court in support to the State's
25 position.

1 As to the most recent addition, we would just
2 rely on the fact that, first and foremost, it was
3 an unobjected comment and, two, there is a
4 mischaracterization of a metaphor that the State
5 used analogizing the fact that the physical
6 evidence spoke from the victim and identified what
7 had occurred to her and we believe that there's
8 nothing improper about that argument and believe
9 the motion should be denied on those grounds.

10 In support, and we have discussed with defense
11 counsel, and I would submit as an agreed upon
12 stipulated State Exhibit that I'll present to Madam
13 Clerk at this time, to supplement the record as to
14 the claims regarding Dr. Rao's testimony. We are
15 supplying a video of the entire testimony that was
16 captured during the live stream. The record will
17 not show on the hard record the visual and
18 reactions that she had. I think the videotape
19 supplements the record as to how she reacted and it
20 was not, as characterized, in a sobbing or breaking
21 down fashion. She asked for a break and I think
22 that's demonstrated by what was captured on
23 videotape during the course of the trial.

24 So at this time by stipulation of the parties
25 we would submit that as a State's Exhibit for the

1 purpose of the motion for new trial.

2 MR. FLETCHER: No objection, Your Honor.

3 THE COURT: Anything further?

4 MR. FLETCHER: No, Your Honor.

5 THE COURT: All right. The motion for new
6 trial as amended with the new paragraph 12 is
7 denied.

8 As far as anything else that we're going to
9 do today, I believe the defense indicated they
10 have a witness they would like to call.

11 MS. SCHLAX: No, Your Honor.

12 THE COURT: Oh, no?

13 MS. SCHLAX: No, Your Honor.

14 THE COURT: Okay. Before we proceed, let me
15 place Mr. Smith under oath.

16 (Defendant sworn.)

17 THE DEFENDANT: I do.

18 THE COURT: Okay. Mr. Smith, I just need to
19 ask you, I know your attorneys have spoken with
20 you about today's hearing and evidently you're
21 fine with this, you do not wish for anybody to
22 testify at the Spencer Hearing on your behalf, is
23 that correct?

24 THE DEFENDANT: I believe that's correct.

25 THE COURT: Well, is it correct or not

1 correct?

2 THE DEFENDANT: Yes.

3 THE COURT: Okay. It's correct. And you've
4 had sufficient time to talk with your attorneys
5 before making that decision?

6 THE DEFENDANT: Yes, ma'am.

7 THE COURT: Do you need anymore time to speak
8 with them?

9 THE DEFENDANT: No, ma'am.

10 THE COURT: Do you have any questions about
11 that decision?

12 THE DEFENDANT: No.

13 THE COURT: Okay. You understand then we'll
14 proceed now with the State with presenting
15 testimony?

16 THE DEFENDANT: Yes, ma'am.

17 THE COURT: Well, your age and work history,
18 education, all that's clear on the record from
19 many times I've talked to you in the past.

20 I do find that Mr. Smith is freely and
21 voluntarily waiving right to present any witnesses
22 today at the Spencer Hearing.

23 Thank you, Mr. Smith.

24 Mr. Caliel.

25 MR. CALIEL: Yes, Your Honor. Good morning.

1 If it will please the Court, the first
2 witness we will call will be Gerald Wilkerson.
3 Mr. Wilkerson is an attorney representing
4 Mr. Billy Jarreau, the father of Cherish
5 Perrywinkle, and he has prepared a victim impact
6 statement that he would wish to give to the Court
7 at this time.

8 THE COURT: Okay. Do these witnesses need to
9 be placed under oath?

10 MR. CALIEL: Your Honor, they can be, yes.

11 THE COURT: Let's do that. Out of an
12 abundance of caution, if you don't mind.

13 (Witness sworn.)

14 MR. WILKERSON: I do.

15 THE COURT: Thank you, Mr. Wilkerson. You
16 may proceed.

17 MR. WILKERSON: Thank you, Your Honor.

18 My name is Gerald Wilkerson. I am Billy
19 Jarreau's attorney and friend and I have been
20 asked by him to read a victim impact statement
21 here because he cannot be present.

22 First of all, I would like to thank Melissa
23 Nelson, Mark Caliel, Vanessa Wheeler and all the
24 fine people at the State Attorney's Office for
25 their amazing dedication in finding justice for my

1 daughter Cherish.

2 I would like to thank the Court, the staff
3 and finally I would like to thank JSO for their
4 incredible work in this case.

5 Also I'd like to commend the defense
6 attorneys, Ms. Schlax and Mr. Fletcher, for their
7 professionalism and acknowledged difficulty of
8 their job and their commitment to another
9 profession.

10 Unfortunately, I cannot be present and I've
11 asked my attorney to read my statement. I was
12 asked to write a victim impact statement about how
13 losing my daughter so tragically has impacted my
14 life.

15 As I sit here thinking of the impact this
16 senseless murder has had on me and my family, I
17 realize that there's no way that words can
18 describe the impact of losing one's child. I'm
19 fighting back tears as I write this, but I push
20 through because this is the last thing I can and
21 must do for my child.

22 I never really believed in angels unless
23 Cherish came into my life. She was sweet, kind,
24 funny and pure love. She had so much potential
25 and the little time that I had with her on this

1 earth was precious to me. Cherish was the light
2 in my life and in the lives of so many people and
3 Donald Smith took that light out of this world.

4 I used to wake up and think about our time
5 together, the good times, when she would laugh and
6 when she would throw her arms around me and tell
7 me she loved me, when she would play with my son,
8 her younger brother. I used to dream big dreams
9 of a wonderful future. I would wonder will she
10 get married, what college will she go to, will she
11 have children. And now my life is filled with
12 sorrow, dread, and nightmares of knowing she's
13 gone and especially how she died. How horrible
14 those last minutes must have been for her, how she
15 must have called out for help and this feeling
16 that I wasn't able to help her.

17 I have so many regrets that I didn't have
18 more time with Cherish and I was looking forward
19 with spending more time, especially that summer
20 together. It all ended far too soon and my hopes
21 and dreams for Cherish and our special
22 relationship was smashed on June 22nd, 2013.

23 I remember getting up that morning and being
24 so excited that I was going to pick up my daughter
25 from the airport. I couldn't wait to give my

1 little girl a big hug. Instead of a hug I
2 received the most devastating news that any parent
3 can receive, that my child had been murdered. And
4 in that moment all of the dreams of our planned
5 summer and every summer to come everyday, every
6 moment, were destroyed. Taken from me by the
7 actions of Donald Smith.

8 Cherish isn't here to speak for herself. She
9 will never again be able to speak or laugh or dream
10 and as her parent I will never hear her voice or
11 know her thoughts or see her grow into the
12 incredible person I know she could have become.

13 Her brother, grandparents, cousins, all of us
14 will forever suffer from the void in our lives with
15 her gone. Donald Smith took that from her and he
16 took that from me and all of us.

17 And I never really believed in monsters. I do
18 now. And forever the images of my child's last
19 minutes on this earth will play out in my mind like
20 a private internal hell that never ends.

21 Respectfully, Cherish's loving father, Billy
22 Jarreau.

23 THE COURT: Thank you, Mr. Wilkerson.

24 MR. CALIEL: Your Honor, the State would also
25 call forward Rayne Perrywinkle.

1 THE COURT: All right.

2 THE WITNESS: Hi, Your Honor.

3 THE COURT: Good morning, Ms. Perrywinkle.

4 We're going to place you under oath.

5 (Witness sworn.)

6 Ms. PERRYWINKLE: Yes, I do.

7 MR. CALIEL: Ma'am, can you please state your
8 name for the record?

9 MS. PERRYWINKLE: Rayne Perrywinkle.

10 MR. CALIEL: And if could you try to keep
11 your voice up and speak into the microphone if you
12 can.

13 MS. PERRYWINKLE: Rayne Perrywinkle.

14 MR. CALIEL: Prior to coming to court, ma'am,
15 did you prepare a victim impact statement
16 regarding your daughter, Cherish Perrywinkle?

17 MS. PERRYWINKLE: Yes.

18 MR. CALIEL: Would you like to try to read
19 that for us?

20 MS. PERRYWINKLE: Yes.

21 Honorable Judge Cooper, when I lost Cherish I
22 lost everything. My life is never going to be the
23 same. I feel nauseous every morning and there's no
24 cure for the emotional pain inside of me. The year
25 after she was taken from me I screamed and cried

1 everyday.

2 I miss the simple things like brushing
3 Cherish's hair and snuggling up on the couch and
4 watching movies with her and her sisters Destiny and
5 Nevaeh. Cherish loved --

6 MR. CALIEL: Take a deep breath.

7 MS. PERRYWINKLE: Cherish loved cooking and
8 enjoyed spending time with me in the kitchen
9 cooking dinner and making Kool-Aid.

10 Cherish would play school with her little
11 sisters. She would be the teacher and they would
12 be the students. She loved reading to Destiny and
13 Nevaeh and they would color together for hours.
14 The three of them would play in the rain with
15 their umbrellas while I watched from the front
16 porch. We all enjoyed playing hide-and-seek in
17 the house together as a family.

18 Cherish's birthday is Christmas Eve. That day
19 and the holiday season will never again be a time of
20 joy or celebration. When other people are
21 celebrating Christmas Eve, to them it is Christmas
22 Eve, but in my mind it will always be Cherish's
23 birthday. Cherish used to believe Christmas was a
24 celebration of her birthday and all the fuss was for
25 her. But Cherish would share her day with her

1 sisters and they would all get to open one present
2 on Christmas Eve. Since she was taken from me we
3 never -- we have never been able to spend the
4 holidays together as a family and I never will
5 again.

6 Since June 22nd, 2013 my life has been turned
7 upside down. I lost Destiny and Nevaeh and all my
8 worldly possessions. I even lost my home. More
9 than anything else, I lost Cherish in the most
10 violent way possible. I will never get to see her
11 grow up. I will never see her get married and enjoy
12 her life. He has taken that from me and it can
13 never be returned. I have so much rage inside of me
14 for what he did. I have never felt this much hatred
15 in my life.

16 I feel what happened has turned my family and
17 friends against me. I see reminders daily of what
18 he took from me. Every white van I see is a
19 horrible reminder of what he did and how she
20 suffered. Every school bus I see is a reminder of
21 Cherish. Cherish loved riding the school bus. I
22 would eagerly wait for her to come home to share her
23 day with me.

24 I feel the pain of losing Cherish everyday. It
25 has been four years and nine months, but for me it

1 will always feel like yesterday and does. The
2 devastation of losing Cherish has never left me and
3 it never will.

4 I love and miss you, Cherish, today and
5 forever.

6 MR. CALIEL: Okay. Your Honor, the State has
7 no further evidence to present to the Court.

8 THE COURT: All right. Anything further from
9 the defense?

10 MS. SCHLAX: No, Your Honor.

11 THE COURT: All right. I'm going to give the
12 State and defense till April 26th at the end of
13 the day to file any written memorandum that they
14 feel would be appropriate in consideration for
15 sentencing and pass sentencing to May 2nd at 9:00
16 in Courtroom 406.

17 I believe that concludes the Smith case.

18 MR. CALIEL: Thank you, Your Honor.

19 THE COURT: Thank you.

20 We'll be in recess.

21 (Thus the proceedings ended.)

22

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25

1 C E R T I F I C A T E

2

3 I, Faye M. Gay, hereby certify that the foregoing
4 transcript is a true and accurate transcription of my
5 Stenograph notes taken at the time and date stated herein.

6 Dated this 30th day of July, 2018.

7

8

9

10 /S/ Faye M. Gay

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12 -----
 Faye M. Gay, CRR, RMR, FCR, RPR, CLVS

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IN THE CIRCUIT COURT OF THE
FOURTH JUDICIAL CIRCUIT, IN
AND FOR DUVAL COUNTY, FLORIDA.

Case No: 2013-CF-5781-AXXX-MA
Division CR-D

STATE OF FLORIDA

-vs-

DONALD JAMES SMITH,

Defendant,

PROCEEDINGS taken before the
Honorable Mallory D. Cooper, Judge of the Circuit Court,
on May 2, 2018, and as reported by Faye M. Gay, Certified
Realtime Reporter, Registered Merit Reporter, and
Certified Legal Video Specialist.

OFFICIAL REPORTERS, INC.
421 W. Church St., Suite 701
Jacksonville Florida 32202
904-358-2090

1 APPEARANCES:

2 MELISSA NELSON, Esquire,
3 State Attorney,
4 Appearing on behalf of the State of Florida.

5

6 MARK CALIEL and VANESSA WHEELER-SANCHEZ, Esquires,
7 Assistant State Attorneys,
8 Appearing on behalf of the State of Florida.

9

10 JULIE SCHLAX and CHARLES FLETCHER, Esquires,
11 Appearing on behalf of the Defendant.

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1 (Defendant present.)

2 THE COURT: Good morning.

3 I think everyone is here. Mr. Smith is
4 present as well as his attorneys and the attorneys
5 for the State.

6 I believe we had at least one motion we needed
7 to hear before we proceed, is that correct? A
8 motion for --

9 MR. FLETCHER: Yes, Your Honor.

10 THE COURT: -- post-verdict, presentencing,
11 mistrial and request for new penalty phase?

12 MR. FLETCHER: Yes, Your Honor.

13 THE COURT: I've reviewed the motion. You may
14 proceed.

15 MR. FLETCHER: Judge, I don't have anything
16 else to add to the motion, other than I will seek,
17 if the Court rules against us, I will seek to
18 supplement the record with a transcript of the
19 interview that I talked about in the motion.

20 THE COURT: Okay. Any objection to him
21 supplementing the record later with a transcript
22 of the interview about which the motion addresses?

23 MR. CALIEL: Your Honor, the only concern
24 that I have in addressing the motion itself is the
25 statement was taken out of context and the

1 interview that Mr. Fletcher is referring to within
2 the motion is not contained entirely in the
3 interview that he reviewed, that there is an
4 entire footage that was done which gives the
5 proper context as to what the nature of the
6 question was that elicited the response that he
7 finds objectionable. And so my objection would be
8 if he intends to introduce simply what was aired,
9 which is only a portion that Channel 4 chose to
10 air, I would object to that because it's not full
11 context and full conversation and statements made
12 during the course of the interview. If he is able
13 to obtain the entire footage from Channel 4 from
14 door-to-door as to everything that was said and
15 then provide that so it has the proper context.
16 At this point in time I don't think there's any
17 evidence whatsoever that there's been any affect
18 -- obviously the jury could not consider it in
19 reaching their verdict because it was post-verdict
20 and post-sentencing verdict. I know the Court is
21 not considering anything that was made,
22 out-of-court statements to media by either party
23 following this, and so I don't think there's any
24 evidence that it has affected the proceeding at
25 all so we believe it should be summarily denied

1 because there's no evidence to that. However, if
2 they do wish to supplement the record with a
3 transcript we would only agree to the entire
4 transcript, not the portions that merely made it
5 to Channel 4's website.

6 MR. FLETCHER: I will attempt to get both of
7 them, Judge.

8 THE COURT: All right. Then I would ask that
9 you share those with Mr. Caliel before you file
10 them, just to supplement the record. You may
11 agree or disagree. At that point if we need to
12 have a hearing on the filing of the transcript to
13 supplement the record, then we'll do that.

14 MR. FLETCHER: That's fine, Judge. Thank
15 you.

16 THE COURT: Did you have any other argument
17 as to the motion itself?

18 MR. CALIEL: Your Honor, the only arguments
19 that we could make is obviously there's no
20 evidence that it was done so in a manner to
21 influence the jury, which it could not because the
22 jury had already completed their work, nor the
23 Court. The statement that Mr. Fletcher is
24 referring to is a statement taken out of context
25 when Ms. Nelson was inquired as to her involvement

1 in the case and why she tried this case when it
2 was the first case that she had tried since she
3 was elected.

4 It is in no way relevant to the case law
5 which was cited by counsel where attorneys either
6 make arguments to the Court during sentencing or
7 to the jury during the course of closing arguments
8 that their verdicts or their sentence are intended
9 to send a message to the community and we believe
10 that the motion is without merit and has no legal
11 basis.

12 THE COURT: All right. I have reviewed the
13 motion, I looked into both your statements
14 regarding the motion and I'll deny the motion for
15 Post-Verdict, Presentencing Mistrial and Request
16 for New Penalty Phase with the understanding that
17 you all can for purposes of appeal supplement the
18 record with Mr. Caliel having an opportunity to
19 review the transcript before it's filed.

20 And if you need any court intervention at
21 that point, just let me know and we'll schedule a
22 hearing.

23 MR. FLETCHER: Thank you, Judge.

24 THE COURT: Is there anything else we need to
25 handle?

1 MR. CALIEL: Your Honor, the only other
2 matters that I would present to the Court for the
3 Court's consideration, the sentencing guidelines on
4 noncapital offenses, just having calculated, I
5 provided a copy to the defense. The total
6 sentencing points on the non-capital offenses,
7 there's only one which was the kidnapping under the
8 age of 13, scores 104 months to life in prison for
9 that particular offense. The other two counts in
10 which the defendant was found guilty were both
11 capital offenses which have mandatory sentences and
12 the guidelines do not apply to that.

13 Additionally, and I have documentation to file
14 with the restitution orders, and I've previously
15 shown to counsel a judgment and restitution order
16 for Victim's Crime Compensation Trust Fund for
17 \$2500. That was the amount paid by the Victim's
18 Crime Compensation Trust Fund for the burial of
19 Cherish Perrywinkle.

20 Additionally, we have submitted a request and
21 order for \$14,846.74 which is the accounting of the
22 cost of prosecution, for the costs of depositions,
23 transcripts and expert fees that were charged to the
24 State of Florida in preparation for the case. And I
25 would submit that proposed order and an accounting

1 invoice of the expenditures to the Court for the
2 Court's consideration.

3 THE COURT: Any objection?

4 MS. SCHLAX: No, Your Honor. We received the
5 prior accounting and acknowledge that there's
6 sufficient basis for that accounting. Obviously
7 my client is indigent and does not have any known
8 prospects to pay those fees.

9 MR. CALIEL: Your Honor, we would just
10 request the order just be entered and then any
11 point in time in the future should the defendant
12 become solvent by any other means then the State
13 of Florida can take action to try to satisfy those
14 judgments.

15 THE COURT: All right. Anything further?

16 MS. SCHLAX: And, Your Honor, we have
17 requested on behalf of the lawful owner, Patricia
18 Moore, for the release of property. We are filing
19 with the Court this morning a specific request and
20 acknowledgement by my client that the release of
21 that property would obviously mean that no further
22 testing could be completed on that. And I've had
23 an opportunity to go over that with my client and
24 he agrees.

25 Additionally, we will be also making a separate

1 request in regards to the computer that was seized
2 from Ms. Moore and it may require future hearings in
3 regards to that.

4 THE COURT: That's fine. If you need
5 anything in the future just let us know and we'll
6 schedule that.

7 MR. CALIEL: And, Your Honor, we have, and we
8 had discussions in regards specifically to the
9 van, which Ms. Moore was the lawful owner of the
10 van, with the stipulation, which has been
11 presented to the Court, we will direct the
12 Sheriff's Office that the State of Florida has no
13 further need for that evidence, it's already been
14 processed and the evidence has been -- that was
15 collected from the van has been retained.

16 As for the computer in question, which was the
17 McIntosh computer that was seized from the home of
18 the defendant, a forensic search of that computer
19 revealed contraband, specifically child pornography,
20 which makes the computer contraband at this point in
21 time and we cannot by law release that evidence to
22 Ms. Moore. And I explained that to counsel to try
23 to relay that to Ms. Moore. However, the images
24 that are contained on that computer are contraband
25 and we are not allowed to release them from police

1 custody.

2 MS. SCHLAX: And, Your Honor, I think the
3 difficulty is while Mr. Caliel may hold that
4 opinion, they've never been certified as such. No
5 one was charged. This was not evidence presented
6 at either of the penalty or the guilt phase.
7 Obviously if this computer contained images that
8 the State felt held some evidentiary value, the
9 actual computer, that piece of technological
10 equipment, is not necessary to preserve that
11 evidence. And so our position is that it should
12 be released to its rightful owner.

13 THE COURT: Okay. Well, you have not
14 formally requested that. You've let the Court
15 know that you're probably going to request that
16 and it may require a hearing. It sounds like it
17 will. So, again, whenever you're ready to proceed
18 with that, if you'll just let us know we'll
19 schedule a hearing date.

20 MS. SCHLAX: Yes, Your Honor.

21 THE COURT: Is there an order on this request
22 or a proposed order on this request for release?

23 MS. SCHLAX: Your Honor, this was fashioned
24 such that normally there wouldn't be an order from
25 the Court. It would be the State authorizing the

1 release and Mr. Caliel has now stated he would do
2 that.

3 THE COURT: Okay.

4 MR. CALIEL: Yes, Your Honor, all the other
5 property is going to be retained based upon the
6 nature and the potential appeals in this
7 particular case, but based upon the stipulation
8 that was entered by the parties we will contact
9 the Sheriff's Office and specifically allow the
10 release of the van itself to the rightful owner.

11 THE COURT: Okay. All right. Is there
12 anything further we need to do before we proceed
13 with sentencing?

14 MR. CALIEL: Nothing from the State, Your
15 Honor.

16 MS. SCHLAX: No, Your Honor.

17 THE COURT: All right. With no other matters
18 that need to be addressed, but this hearing was
19 scheduled today for the sentencing of Donald James
20 Smith.

21 I'm going to go ahead on count two, kidnapping,
22 and adjudicate Mr. Smith guilty and sentence him to
23 life in prison. There are surcharges on that count
24 of \$151 and \$151.

25 On count three, the sexual assault on a person

1 less than 12 years of age, I will adjudicate him
2 guilty and sentence him to life in prison. There
3 are surcharges on that count of \$201, \$151 and \$151.

4 In addition to the surcharges, there are court
5 costs of \$518 on this case as well as \$150 in
6 attorneys' fees.

7 And he does have 1,775 days credit on the case.

8 The State has requested, and there's no
9 objection to the restitution order being entered for
10 \$2500 to the Victim's Crime Compensation Fund and
11 \$14,846.74 for the cost of prosecution. And I'll
12 sign those shortly.

13 And is the State requesting that the counts be
14 consecutive or concurrent?

15 MR. CALIEL: Consecutive, Your Honor.

16 THE COURT: All right. Each of the sentences
17 will be consecutive as to counts one, two, and
18 three.

19 As to count one, the first degree murder charge
20 in the case, pursuant to Section 921.141 paren 4,
21 Florida Statute, the Court will file its written
22 sentencing order within 30 days of this hearing with
23 copies to be provided to the State, the defense and
24 the defendant. That order forms the legal basis
25 upon which the Court imposes sentence in this case.

1 The Court will now verbally summarize the
2 pertinent findings that will be included in its
3 written order.

4 In determining the defendant's sentence the
5 Court has considered the evidence presented during
6 the trial, including both the guilt and penalty
7 phases, the evidence presented at the Spencer
8 Hearing and the sentencing memorandum filed by the
9 parties, including the list of aggravating factors
10 and proposed mitigating circumstances.

11 In June, 2013, the defendant kidnapped,
12 sexually assaulted and murdered eight year old
13 Cherish Perrywinkle.

14 The defendant approached Cherish Perrywinkle
15 along with her mother and sisters after he saw them
16 shopping for clothing in a Dollar General Store.

17 The defendant gained the trust of Cherish
18 Perrywinkle's mother by promising to buy clothing
19 for Cherish Perrywinkle and her sisters at a nearby
20 Wal-Mart.

21 Defendant drove them to the Wal-Mart and
22 patiently waited for over an hour before luring
23 Cherish Perrywinkle away from her mother by
24 promising to buy her cheeseburgers at the McDonald's
25 in the front of the store.

1 Once in front of the store the defendant
2 convinced Cherish Perrywinkle to leave with him in
3 his van. She was never seen alive again.

4 After leaving the Wal-Mart the defendant
5 brutally sexually assaulted Cherish Perrywinkle,
6 causing shocking and horrendous injuries.
7 Thereafter the defendant used his hands and a
8 ligature to strangle Cherish Perrywinkle.

9 The hemorrhaging in her eyes, mouth and throat
10 indicates that she vigorously struggled for minutes
11 before losing consciousness.

12 The defendant then hid her body under logs and
13 other debris in a creek in an attempt to avoid
14 apprehension.

15 The Court finds, as did the jury, that the
16 State proved the existence of all six aggravating
17 factors beyond a reasonable doubt and each of those
18 factors were given great weight by the Court in
19 determining the appropriate sentence to impose.

20 Those aggravating factors are, one, the
21 defendant was previously convicted of a felony
22 involving the use or threat of violence to a person;
23 two, the murder was committed while the defendant
24 was engaged in the commission of a kidnapping and
25 sexual battery; three, the murder was committed for

1 the purpose of avoiding or preventing a lawful
2 arrest; four, the murder was especially heinous,
3 atrocious or cruel; five, the murder was committed
4 in a cold, calculated and premeditated manner
5 without any pretense of moral or legal
6 justification, and, six, Cherish Perrywinkle was
7 less than 12 years of age.

8 The Court also finds the defense established
9 various mitigating circumstances to which the Court
10 assigns varies degrees of weight.

11 To provide a brief summary, which should not be
12 considered a comprehensive account of the mitigating
13 circumstances considered by the Court, the defense
14 established the defendant has various neurological,
15 behavioral and psychological issues, including a
16 severe and long-standing cocaine addiction,
17 pedophilic disorder, antisocial personality
18 disorder, borderline personality features as well as
19 neurodevelopmental and neurodegenerative brain
20 abnormality.

21 The defense also established the defendant
22 attempted to Baker Act himself on two occasions due
23 to his inability to control his drug addiction and
24 homicidal ideations.

25 Ms. Schlax and Mr. Fletcher, I want to ask you

1 to present your client, Donald Smith, before the
2 bench for sentencing.

3 Thank you.

4 The Court has carefully considered and weighed
5 the proven aggravating factors and all mitigating
6 circumstances. The law requires the Court to give
7 great weight to the jury's unanimous recommendation
8 that the defendant be sentenced to death.

9 After assessing the proven aggravating factors
10 and all mitigating circumstances, as well as the
11 evidence presented to this Court at the Spencer
12 hearing, this Court agrees with the jury's
13 recommendation without reservation.

14 Accordingly, this Court finds that death is the
15 only appropriate penalty for the defendant, given
16 the highly egregious nature of this crime.

17 Donald Smith, you have not only forfeited your
18 right to live among us, but under the laws of the
19 State of Florida you have forfeited your right to
20 life at all.

21 The scales of life versus death for the murder
22 of Cherish Perrywinkle tilt unquestionably to the
23 side of death.

24 It is therefore ordered and adjudged that you,
25 Donald James Smith, are adjudicated guilty and

1 hereby sentenced to death for the murder of Cherish
2 Perrywinkle.

3 This sentence is subject to automatic review by
4 the Florida Supreme Court. Counsel will be
5 appointed by a separate order to represent you for
6 that purpose.

7 It is further ordered that you be transported
8 to the Department of Corrections to be securely held
9 on Florida's death row until the sentence can be
10 carried out as provided by law.

11 Donald James Smith, may God have mercy on your
12 soul.

13 Thank you. We'll be in recess.

14 (Thus the proceedings ended.)

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1 C E R T I F I C A T E

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3 I, Faye M. Gay, hereby certify that the foregoing
4 transcript is a true and accurate transcription of my
5 Stenograph notes taken at the time and date stated herein.

6 Dated this 30th day of July, 2018.

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10 /S/ Faye M. Gay

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 Faye M. Gay, CRR, RMR, FCR, RPR, CLVS

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