

No.

IN THE
SUPREME COURT OF THE UNITED STATES

ALBON DIAMOND,
Petitioner,

v.

MARK S. INCH,
SECRETARY, FLORIDA DEPARTMENT OF
CORRECTIONS,
Respondent.

**On Petition for Writ of Certiorari
to the Eleventh Circuit Court of Appeals**

**APPENDIX TO
PETITION FOR WRIT OF CERTIORARI**

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IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 20-13330-D

ALBON C. DIAMOND,

Petitioner - Appellant,

versus

SECRETARY, DEPARTMENT OF CORRECTIONS,

Respondent - Appellee.

Appeal from the United States District Court
for the Northern District of Florida

ORDER:

Albon Diamond, a Florida prisoner serving a life
sentence after a jury convicted him of several charges

for sex offenses involving a minor, seeks a certificate of appealability (“COA”) to appeal the District Court’s dismissal of his 28 U.S.C. § 2254 habeas corpus petition. In his counseled § 2254 petition, Mr. Diamond claimed that he was actually innocent.

I.

As background, Mr. Diamond was charged with two counts of lewd and lascivious molestation involving a child; three counts of sexual battery involving a child; one count of battery of a child by expelling certain fluids; one count of lewd or lascivious battery involving encouragement, force, or enticement of a child; one count of protection of minors from obscenity; and one count of lewd or lascivious conduct.

At trial, the government provided witness testimony that Angela Atkinson and her family, including her nine-year-old son, MBA, and

eight-year-old son, RJA, moved to Pensacola, Florida, to help Mr. Diamond, Atkinson's adopted father, after he suffered a stroke. However, Ms. Atkinson testified that Mr. Diamond required little assistance and "went back to doing almost everything that he normally did."

MBA and RJA sometimes spent the night at Mr. Diamond's house. Mr. Diamond bought them tight-fitting underwear and would ask them to wear it to bed. MBA testified that Mr. Diamond sometimes pulled MBA close and pulled down his underwear, and asked MBA to show Diamond his penis. RJA testified that Mr. Diamond would (1) touch RJA's penis and ask RJA to touch his penis, (2) put RJA's penis in his mouth and ask RJA to put his penis in RJA's mouth, and (3) put his penis in RJA's anus and ask RJA to put his penis in Diamond's anus. When RJA put his penis in Mr. Diamond's anus, Diamond was on his hands and

knees. Once, Mr. Diamond had RJA and his friend, KS, put their penises in each other's mouths while he took pictures. MBA, RJA, and their friends also looked at pornography on Mr. Diamond's computer.

While testifying on Mr. Diamond's behalf, KS denied that Diamond had shown him "dirty Internet pictures," touched him inappropriately, or made him take off his shirt or strip down to his underpants. Mr. Diamond's children also denied that they had ever seen pornography in his house or witnessed him behave inappropriately. They described Mr. Diamond as "very weak" after his stroke, saying that he had limited mobility and difficulty moving his left arm and leg.

Mr. Diamond testified he "lost [his] entire left side" after the stroke and, because of his medical conditions, he was unable to perform sexually. He denied showing the boys any pornography, ever

touching a child inappropriately, or requesting that MBA and RJA wear the underwear that he had purchased.

A jury found Mr. Diamond guilty of all counts, and the trial court sentenced him to life in prison. Mr. Diamond appealed to Florida's First District Court of Appeal ("First DCA"), which summarily affirmed.

Mr. Diamond subsequently filed a motion for post-conviction relief under Fla. R. Crim. P. 3.850, arguing that trial counsel was ineffective for failing to obtain expert testimony regarding the effect of Diamond's medical conditions on his ability to maintain an erection and otherwise engage in the sexual activity alleged. At an evidentiary hearing, Dr. David Bear, an expert in neurology, testified that Ms. Atkinson's testimony about Mr. Diamond's physical condition was not consistent with Diamond's medical

records. He additionally stated the medical records showed that Mr. Diamond was not physically capable of holding himself up on his hands and knees, as RJA had alleged. Nevertheless, Dr. Bear admitted that Mr. Diamond was physically capable of touching the genitals of a child, enticing a child to touch his genitals, placing his mouth over the penis of a child, enticing a child to place his mouth over Diamond's penis, enticing a person to penetrate him with that person's penis, enticing a child to suck on the penis of another child while he took photographs, and soliciting a person to expose his genitals.

The state court denied Mr. Diamond's Rule 3.850 motion. Mr. Diamond appealed, and the First DCA affirmed. He then filed a petition for a writ of certiorari in the Supreme Court, which was denied.

Mr. Diamond then filed his § 2254 petition,

arguing that he was actually innocent because Dr. Bear testified that Diamond was physically incapable of engaging in some of the sexual abuse alleged. He said that Dr. Bear's testimony proved that RJA's allegations were false and undermined Ms. Atkinson's testimony about his physical condition. Acknowledging that this Court has declined to recognize freestanding actual-innocence claims in non-capital cases, Mr. Diamond argued that allowing such claims is consistent with the purpose of habeas corpus.

A magistrate judge recommended that the District Court dismiss Mr. Diamond's § 2254 petition as untimely. The magistrate reasoned that Mr. Diamond failed to file his petition within one year after his conviction became final, and that his actual-innocence claim did not open the gate to allow untimely § 2254 proceedings because he did not raise

a separate claim. It also determined that, even if Mr. Diamond's actual-innocence claim were timely, it was not cognizable in a § 2254 proceeding under this Court's binding precedent, and, in any event, Dr. Bear's testimony did not establish Diamond's actual innocence because "[i]t [could not] be said with any confidence that no reasonable juror would have found Petitioner guilty if Dr. Bear had testified to his opinion at trial."

The District Court adopted the recommendation, dismissed the § 2254 petition, and denied a COA. Mr. Diamond now moves this Court for a COA, arguing that it is at least debatable that he should be permitted to assert a freestanding actual-innocence claim because Dr. Bear's testimony showed that it was physically impossible for him to engage in some of the alleged sexual abuse.

II.

To obtain a COA, a habeas petitioner must make “a substantial showing of the denial of a constitutional right.” 28 U.S.C. § 2253(c)(2). Where the District Court denied a petition on procedural grounds, the petitioner must show that reasonable jurists would debate (1) whether the petition states a valid claim alleging the denial of a constitutional right, and (2) whether the District Courts procedural ruling was correct. *Slack v. McDaniel*, 529 U.S. 473, 484, 120 S. Ct. 1595, 1604 (2000). A COA will not be granted on an issue where the petitioner “does not provide facts, legal arguments, or citations of authority that explain why he is entitled to a certificate.” *Jones v. Sec’y, Dep’t of Corr.*, 607 F.3d 1346, 1353- 54 (11th Cir. 2010).

Reasonable jurists would not debate the District Court’s finding that Mr. Diamond’s freestanding

actual-innocence claim could not serve as an independent basis for federal habeas relief.¹ We have stated that “[a]ctual innocence is not itself a substantive claim, but rather serves only to lift [a] procedural bar.” *United States v. Montano*, 398 F.3d 1276, 1284 (11th Cir. 2005). Therefore, Mr. Diamond’s assertion that a freestanding actual-innocence claim is cognizable is foreclosed by binding precedent. *See Hamilton v. Sec’y, Fla. Dep’t of Corr.*, 793 F.3d 1261, 1266 (11th Cir. 2015) (“[N]o COA should issue where the claim is foreclosed by binding circuit precedent because reasonable jurists will follow controlling law” (quotation marks omitted)).

1 Because Mr. Diamond’s motion for a COA does not address the timeliness of his § 2254 petition or whether he can overcome the expiration of the statute of limitations with a showing that he is actually innocent, he has waived any claims with respect to those issues. *See Jones*, 607 F.3d at 1353- 54.

Neither would reasonable jurists debate the District Court's finding that, even if a freestanding innocence claim were cognizable, Mr. Diamond did not meet the high standard required for habeas relief. Dr. Bear's testimony regarding Mr. Diamond's physical limitations may have demonstrated that Diamond could not have sexually abused RJA in a manner that RJA described, but it did not prove that Diamond was physically incapable of committing the abuse alleged. Indeed, Dr. Bear acknowledged that Mr. Diamond was physically able to commit the charged offenses. And to the extent that Dr. Bear's expert testimony was inconsistent with RJA's and Ms. Atkinson's testimony at trial, the defense already put forth evidence that challenged the veracity of RJA's and Atkinson's allegations. Despite KS's testimony that Mr. Diamond had never engaged in inappropriate conduct with him,

and the testimony that Diamond was physically weak in the months following his stroke, the jury convicted Diamond of all charges.

Thus, it is not clear that Dr. Bear's expert opinion would have undermined RJA's and Ms. Atkinson's testimony to such a degree that no reasonable juror would have found Mr. Diamond guilty of the charged offenses. *See McQuiggin v. Perkins*, 569 U.S. 383, 386, 399, 133 S. Ct. 1924, 1928, 1935 (2013). It follows, then, that Mr. Diamond did not present sufficient evidence to establish a freestanding actual-innocence claim, even assuming such a claim were cognizable on federal habeas review. *See House v. Bell*, 547 U.S. 518, 555, 126 S. Ct. 2064, 2087 (2006).

Accordingly, Mr. Diamond's motion for a COA is DENIED.

[signature of Beverly B. Martin]
UNITED STATES CIRCUIT JUDGE

**Excerpt from the trial transcript, page 168,
testimony of Angela Atkinson**

[Mr. Gordon, the prosecutor]:

Q Did he need your assistance?

[Ms. Atkinson, witness]:

A. He did not need my assistance.

Q How well did he recuperate?

A I feel he recuperated remarkably. He recuperated very well. He went back to an almost normal life. Minus the limp and using a cane to stable himself, he went back to doing almost everything that he normally did, in my opinion.

**Excerpt from the trial transcript, pages 426-
427, testimony of Mr. Diamond**

[Mr. Diamond, witness]:

A. For my health circumstances, the most current issue was that in February of '07, while at the Navy Hospital for a routine appointment, I had –

[Mr. Mitchell, defense counsel]:

Q Can you see me –

A – I suffered a major stroke.

Q Can you see me okay?

A Yes.

Q I'm listening.

A While there for a routine examination, I suffered a major stroke. I lost my entire left side. I spent a month or so in the hospital going through rehab learning how to re-walk, how to basically regain the use of my side. I lost motor control. I had I guess what you call tactile, where I could feel things touching the skin and I could identify, but I couldn't control my muscles, and, basically, had to start all over again learning how to move my feet, move my hands. During that time I was also told that I have hypertension and I'm a diabetic.

**Excerpt from the trial transcript, page 461,
prosecution's closing argument**

[Mr. Gordon, the prosecutor]:

. . . . Ladies and gentlemen, Albon Diamond had suffered a stroke in February of 2007, and they came down supposedly to help him recover. When they got here, he didn't need their help. He was driving and going on about his daily activities within months, and most of the alleged incidents occurred towards the end of school and during the summertime after five months had past and the defendant had rehabilitated.

The Defense is going to argue that he was not physically capable of conducting these offenses. Use your own assessment of the credibility of the witnesses and the likeliness of that argument when determining whether or not that's credible.

**Excerpt from the trial transcript, pages 474-
475, defense counsel's closing argument**

[Mr. Mitchell, defense counsel]:

. . . . Mr. Diamond took the stand. He told you what you already heard, that indeed he had a stroke. He told that you he had diabetes. He told you that he had hypertension. He told you that he cannot perform sexually. He denied the allegations with everything that he has, and he told you that not only that he did not do this but he could not do this. So look for the evidence and consider it and consider the lack of the evidence.

**Excerpt from the trial transcript, pages 228-
233, testimony of R.J.A.**

[By Mr. Gordon, the prosecutor]:

Q. [Redacted name], where did he touch you?

A. Around my penis area.

Q. And what else happened?

A. After that, he put my penis in his mouth and
then he, like –

Q. Let's start with just the touching, okay.
When he was touching you, what would he do?

A. He would cup his hand into like a circle and

then move his hand back and forth over my penis.

Q. And did he ever ask you to touch him?

A. Yes, sir.

Q. And [redacted name- R.J.A.], can you describe what his penis looks like?

A. He had pubic hair, and he had this layer of skin that went over his – this extra layer of skin that went over his penis.

Q. Is that different from your penis?

A. Yes, sir.

Q. How is it different?

A. I don't have the layer of skin over my penis.

Q. And where on your penis is this layer of skin?

A. It was like – it was connected to like, it was connected to the front of the penis. Yeah.

Q. Now, were there other times when he did anything else?

A. Yes, sir.

Q. And what else would he do?

A. He would put my penis in his mouth, and he

would ask me to put my penis in his anus.

Q. Did he ask ever ask you to put his penis in your mouth as well?

A. Yes, sir.

Q. And [redacted name- R.J.A], where did this happen?

A. It happened in his room.

Q. With the door open or shut?

A. Shut.

Q. When you put his penis in your mouth, did

you ever taste anything?

A. Yes, sir.

Q. What did you taste?

A. I tasted this salty substance.

Q. And what do you think that is?

A. Senum (sic).

Q. What is senum?

A. It's this liquid that carries the sperm from the penis, basically.

THE COURT: Just lean forward into that

microphone, okay.

Q. (By Mr. Gordon) [Redacted name - R.J.A.],
how many times did have you to put your mouth on
Albon's penis?

A. I'm not sure, but more than once.

Q. And how many times did he put his mouth
on your penis?

A. Again I'm not sure, but more than once.

Q. Was it a lot more than one time?

A. Yes, sir.

Q. Now, what else would he do other than the mouth to penis?

A. He would have me put my penis in his anus; and he would sometimes put the tip of his penis in my anus.

Q. [Redacted name - R.J.A.], did he ever use any lotion?

A. Yes, sir.

Q. What kind of lotion would he use and when?

A. One time he heated up this baby oil and he asked me to lay down, and he gave me a massage with the baby oil.

And then another time he had this, like – my mom has it for scars when they start to hurt and stuff. And he put that over his penis when he wanted to stick the tip of it in my anus. And he would put it over my penis when he wanted to stick it in his anus.

Q. [Redacted name- R.J.A.], I know you're doing great. Continue to speak up, though, okay.

THE COURT: Why don't you put your hand right here? Pull that down. There you go. You're not going to hurt it, you can pull it down kind of hard. That's good. Now just lean in a little bit.

Q. (By Mr. Gordon) Okay, [redacted name- R.J.A.]. Did you ever feel anything happen when he put his penis in your anus?

A. Yes, sir.

Q. What happened?

A. He ejaculated.

Q. What does that mean?

A. The sperm came out of his penis.

Q. Could you feel that?

A. Yes, sir.

Q. What did it feel like?

A. Just like water coming into my anus.

Q. [Redacted name- R.J.A.], did your friends ever get involved in any of this activity?

A. Yes, sir.

Q. Which friends?

A. [redacted names- K. and T.]

Q. And what would you do with [redacted name- K.]?

A. Al would have me stick my penis in his anus and him stick his penis and my anus. And would he have this do this thing called a sixty-nine where I was on top of him and I had my mouth on his penis and he had his mouth on my penis.

Q. Was there a time when you came home from the beach with [redacted name- K.]?

A. Yes, sir.

Q. What happened that time?

A. When we came home from the beach, we just took a shower to get all the sand off.

Q. Now when you say you just took a shower, did Albon ask you to take a shower?

A. Yes, sir.

Q. And did you take a shower alone?

A. No; it was with [redacted name- K].

Q. And what happened?

A. Al had me put my penis in his anus, and he took pictures of it.

Q. How did that make you feel?

A. It made me feel kind of weirded out.

Q. And did you ever see Al and [redacted name- K.] engage in any sexual activity?

A. Yes, sir.

Q. What did you see?

A. I saw [redacted name- K.] put his mouth on Al's penis, and Al put his mouth on [redacted name- K.'s] penis. And I saw [redacted name- K.] put his penis in Al's anus.

Q. Where did that happen, [redacted name- R.J.A.]?

A. In his room.

Q. Whose room?

A. Al's.

Q. Did everything happen in Al's room?

A. Yes, sir.

Q. And what about [redacted name- T.]?

A. [Redacted name- T.]? He stuck his penis in Al's anus, and he stuck his penis in Al's mouth and stuck Al's penis in his mouth.

Q. Did you ever have to do anything with [redacted name- T.]?

A. Yes, sir.

Q. And I'm sorry, but what was that?

A. Al had me put my penis in [redacted name- T.'s] anus.

Q. [Redacted name- R.J.A.], when did all of this

stuff happen?

A. When school was just ending.

Q. And did it happen all at the same time or
over a period of time?

A. Over a period of time.

**Excerpt from the postconviction evidentiary
hearing transcript, pages 12-34, testimony of
Dr. Bear**

BY MR. MURRAY [postconviction defense counsel]:

Q. State your name for the record and spell it,
please.

A. David, D-A-V-I-D. Last name Bear, B-E-A-R.

Q. Where are you currently employed?

A. Emerald Coast Neurology.

Q. Is that located in the Baptist Medical Park
here in Pensacola?

A. Yes.

Q. Dr. Bear, what do you do at Emerald Coast
Neurology?

A. I'm a neurologist.

Q. Okay. Approximately how many patients do
you treat in a given year?

A. I treat about 15 to 20 patients per day, 5 days
a week. Take off a couple weeks a year for vacation, so
...

Q. Okay. What degrees do you have, and where
are they from?

A. I have – my medical degree is from Nova Southeastern University, and I have a master's degree from Barry University, and my undergrad in chemistry is from University of South Florida.

Q. Where did you do your residency?

A. In Dayton, Ohio, at Grandview Hospital.

Q. And your area of practice is neurology?

A. Yes, sir.

Q. Okay. Obviously you're licensed in Florida?

A. Yes, sir.

Q. How long have you been practicing in neurology?

A. Since 2006. So this summer, 10 years.

Q. Do you have any board certifications?

A. I do. I'm board certified in neurology; I'm board certified in neurophysiology; I'm board certified in sleep medicine; and I'm board certified in headache medicine.

Q. Okay. Do you have any memberships in any professional societies, associations?

A. American Academy of Neurology, American Headache Society.

Q. Are you a member of faculty – or in the past, have you been a member of faculty at any college or university?

A. Florida State, teach their fourth-year medical students in neurology, geriatrics.

Q. Have you ever testified before as an expert in a trial?

A. No, I have not.

Q. Dr. Bear, I've got what appears to be a CV that you had provided to me.

MR. MURRAY: Judge, if I could approach.

THE COURT: Sure.

MR. MURRAY: Show him to identify it.

Q. (By Mr. Murray) Can you identify that as your CV that you provided to me?

A. I – yes.

Q. Okay.

MR. MURRAY: Judge, I'd like to just – I'd like to have that marked, introduced into evidence.

THE COURT: Any objection?

MR. RIDLEHOOVER [the prosecutor]: No

objection.

MR. MURRAY: That will be Exhibit No. 1.

THE COURT: Do you have an exhibit number on it?

MR. MURRAY: I don't, I didn't pre-mark.

(Defendant's Exhibit No. 1 admitted into evidence)

Q. (By Mr. Murray) Dr. Bear, I contacted you and asked you to review some records on Mr. Diamond related to his stroke in 2007, and his subsequent treatment for that; is that correct?

A. Yes, sir.

Q. And based on your education, training and experience, are you comfortable rendering an opinion about muscle strength, weakness, motor skills, things like that?

A. Yes, sir.

Q. Likewise, are you comfortable rendering an opinion as to medical indicators in his records involving potential erectile dysfunction issues he may have been suffering at the time?

A. Yes.

MR. MURRAY: Judge, I'd ask the Court to recognize Dr. Bear as an expert in neurology.

Tender to Mr. Ridlehoover.

MR. RIDLEHOOVER: No objections.

MR. MURRAY: Go ahead.

WHEREUPON, DAVID BEAR,
having been first duly sworn, was examined and
testified as follows:

DIRECT EXAMINATION

BY MR. MURRAY:

Q. You were provided medical records to Mr.
Diamond relating to his stroke on February 13, 2007,
and his subsequent rehabilitation. Do you have those
records with you?

A. Yes, sir.

Q. Okay. And, in particular, were you provided with the radiological examination report from his MRI at the Navy hospital?

A. Oh, yes, sir. I was.

Q. Okay. How about his histories, physicals, assessments, and other notes from inpatient rehab?

A. Yes, sir.

Q. Outpatient notes and assessments?

A. From outpatient rehab, yes, sir.

Q. Uh-huh. Blood chemistry results?

A. Yes, sir. There were labs in here as well, yes.

Q. Having reviewed those records, what kind of stroke did Mr. Diamond suffer?

A. He suffered a brain stem ischemia.

Q. Is that a critical location – when it comes to having a stroke, is there anything significant about it being in the brain stem?

A. Well, in the brain stem, all the pathways are narrowed, so a small stroke can cause devastating physical findings, where the same-size stroke in the cortex you may not even notice or be very minimal.

Q. What are the medical records that you

reviewed – what do they reveal as to Mr. Diamond's motor skills and his physical abilities in general when he was admitted to inpatient rehab two days after his stroke?

A. On admission, he had significant motor weakness. He required assistance with ambulation.

His upper extremity weakness was even greater than his lower extremity weakness. They had him rated at upper extremity weakness as 2 out of 5, which means with motion of the elbow, which means you can't move the extremity against gravity. If gravity is limited, he can move against gravity, but with gravity or any force against it, it would not be able to hold.

Q. Okay. Any indication as to – I see you have 3-plus shoulder shrug; is that what you were talking

about on that?

A. No, it's – it's listed as ability to abduct the arm and forward-flex the arm. That might have been in his rehab notes – first rehab note it just says he – he remained challenged – this is a discharge summary from the inpatient rehab.

Q. Uh-huh.

A. Upper extremity weakness, but where he came back in but I guess the notes that I'm referring to are his outpatient. This would say: From outpatient date of service March 13 through April 10 of 2007.

Q. Okay. I'm going back before that to the patient evaluation conference reports dated February

20th, 2007, and February 28th, 2007; do you have those?

A. These are the physical therapy notes?

Q. Yes.

A. Yes, I do have those.

Q. Think we're looking –

A. So – yeah, so basically he needed – someone was standing beside him when he would try to swing to get in and out of bed. He had difficulty – no one had to lift him, but it said they would stand by to assist to make sure he was okay. When he came from moving from the bed to chair to wheelchair, he required some

assistance from the therapist. Let's see.

His upper –

MR. RIDLEHOOVER: Excuse me. What was the date?

THE WITNESS: Date on this note? Date of conference, February 20.

MR. RIDLEHOOVER: What year?

THE WITNESS: 2007.

MR. RIDLEHOOVER: Thank you.

A. He had – with – with walking, they had to assist, holding his hand on the on the walker. They had

to give him verbal cues during his walking as to not hyperextend the leg.

I'm looking for upper extremity in that note. I don't have those marked for – I don't have anything highlighted for upper extremity in that specific note.

Q. (By Mr. Murray) Do you have the discharge note from March B, 2007?

A. Yes.

Q. What was his physical condition as of the discharge from inpatient rehab on March 7?

A. At – at discharge note, the – the physician's words were: Remain challenged in left-upper extremity weakness; decreased range of motion in the left-lower

extremity with also left-lower extremity weakness.

And he required some assistance when negotiating 12 steps with – in any environmental barriers.

Q. So what does that mean, that he – that he couldn't take 12 steps and negotiate a environmental barrier without someone –

A. Right, without assistance. Most plain, flat, sturdy floor he seemed to be able to walk with standby assistance, but if there was any barriers involved he needed some assistance from someone.

Q. Okay. And then you were referencing the – afterwards, the outpatient care ran from March 18th, and we have notes from April 10th, 2007?

A. Right.

Q. What was – what was his physical condition at that time from April 10, 2007 outpatient rehab?

A. This is the note where she actually gives more of a detailed description of his upper extremity motor strength. In his right-upper extremity, which I guess wasn't related to the stroke, he had difficulty with opposing the thumb and the first three fingers.

In his left-upper extremity, his shoulder flexion is listed as 3-minus. I don't usually use minus until I get to the 4s, but 3 means you can do it against gravity, but if there's any resistance at all it's going to fall. So I would guess 3 minus out of 5, it would mean maybe you can barely move it, and it probably drops back down, I guess what the minus means.

His – and that's flexion forward.

Shoulder abduction, which means out to the side, she gives it 2-plus out of 5. So, again, 2 means you can move the limb, but it's – you have to take away gravity, so it has to move horizontal to gravity. So you would almost say it doesn't make sense, he – he couldn't move that anti-gravity.

So he couldn't do this, apparently, according to this the physician that documented it.

Q. And for the record, what you're doing is lifting your – lifting your arm up from –

A. Right.

Q. From pointing down –

A. That's shoulder abduction.

He – let's see. Elbow flexion and extension, to
flex and extend the elbow.

Q. So like doing a bicep curl?

A. Correct.

Q. That motion you're making is doing a bicep
curl?

A. He could do this.

Q. Could do that?

A. Right.

Q. Okay.

A. So he could do this against gravity, but with any force at all, he – he would weaken out. So she gives him a 4-minus out of 5 in that. That's where I do use minus.

To – to move the arm outward, he can do this – she says 3-minus. Again, I don't use minus until I get to 4 myself, but barely against gravity he could move the arm outward and away.

Q. So for the record, the motion you're making is –

A. It's a –

THE COURT REPORTER: I can only take one

person at a time.

Q. (By Mr. Murray) A motion by putting your arm up bent at the – at the elbow?

A. Right.

Q. To where the hand is kind of pointing towards the – the shoulder, and it's bent, and moving that to the outside?

A. Yes.

Q. Okay.

A. Let's see. With the wrist, he had 4 out of 5, so not normal by any means. So he's weak here, but he

could do against some resistance with the – with the wrist function.

Q. To flex the wrist?

A. To flex the wrist, yes.

Q. Okay. Dr. Bear, I – I related to you the trial testimony from several witnesses concerning Mr. Diamond's physical progress during the time frame during this case, correct?

A. Yes.

Q. In particular, I related that Mr. Diamond testified at trial that he had suffered a major stroke, lost his entire left side, spent a month or so in the

hospital going to rehab, learning how to re-walk, how to basically regain the use of his left side, lost motor control, he could feel things touching his skin, but he couldn't control his muscles, basically had to start all over again learning how to move his feet and move his hands.

Is that what I told you?

A. Yes, sir.

Q. I told you that his son testified he was very weak, very weak, not able to do a lot, left side pretty much dead, couldn't do any heavy lifting, maybe a pound, not more than five minutes, very weak, correct?

A. Yes, sir.

Q. And then his daughter testified that he was very weak, had to use his cane, had trouble walking, needed help being able to get up and down the stairs, didn't have control of his left arm all that much, and would somewhat drag his left leg, depending on how tired he was. Needed help getting up the stairs, and sometimes she'd be walking behind him, and he'd almost fall down on the – on top of her.

Relayed that to you, correct?

A. Yes, sir.

Q. And on the other hand, I relayed that his step-daughter testified that she got to – got here to his house in April – on April 1st, and, quote, Surprised he really didn't need my help. When I first got there, he walked with just a slight limp, had a cane to stabilize

himself, moved around very well, maneuvered his house very well up and down stairs, did not need my assistance, went back to almost a normal life, minus the limp, which he used the cane to stabilize himself.

I relayed that to you, correct?

A. Yes, sir.

Q. Was the last one that I just related to you, the step-daughter's testimony that was contrary to the others, is that consistent with Mr. Diamond's medical records, in your expert opinion?

A. No, sir.

Q. So, the assertions that by April 1st he really didn't need any help, just walking around with a slight

limp and maneuver the house up and down the stairs, does that match with the objective medical evidence that you've reviewed?

A. No, sir.

Q. Okay. And, likewise, I relayed to you testimony and statements from Mr. Diamond's grandson at trial regarding the manner in which – which he and Mr. Diamond reportedly engaged in sexual acts with him.

In particular, there were a number of occasions where Mr. Diamond was purportedly behind him on his hands and knees having sex with him, and where then the – the boy was reportedly behind Mr. Diamond having sex with Mr. Diamond while Mr. Diamond was on his hands and knees.

I relayed that to you, correct?

A. Yes, sir.

Q. And I let you know that this would be a child who was approximately 8 years old?

A. Yes, sir.

Q. And that the time frame that we would be looking at would be April 1st through, at the latest, August 2007?

A. Yes, sir.

Q. Based on your review of the medical records, and based on your education, your training and your

experience, would Mr. Diamond have been physically capable, with his motor skills at the time, to engage in these activities?

A. No. I would say no, not on his hands and knees holding himself up, not according to these notes.

Q. Dr. Bear, I also related to you that Mr. Diamond stated at trial he was unable to achieve and maintain an erection?

A. Yes, sir.

Q. Are there any objective medical evidence that you reviewed that would supplement his claims of erectile dysfunction?

A. In the notes, he's diagnosed as having diabetes, hypertension, peripheral neuropathy, and he was placed on anti-hypertensive medications, two of them.

Q. Would those combination – would that combination indicate erectile dysfunction?

A. Well, these are all risk factors. These are the most common risk factors. It's not necessarily a hundred percent after – many men after stroke – even women after stroke have problems with sexual function.

Q. Can someone fake the type of stroke Mr. Diamond had?

A. No.

Q. Can someone fake hypertension?

A. No.

Q. Can someone fake diabetes?

A. No.

Q. So this is not something you have to rely solely on self-reporting by your patient; you can look at the objective medical evidence and see if he's indicated?

A. Yes, sir.

Q. Are there exercises in – in inpatient or

outpatient rehab for strokes where they try to rehabilitate erectile dysfunction?

A. Not that I'm aware of.

Q. Are there any tests that can be performed if an individual is truly experiencing erectile dysfunction medically?

A. There are – there are tests that can be performed.

There was – if it's still available, I've never ordered one – but there is a test called a nocturnal penile tumescence test. It's where sensors are placed on the penis, because most men will achieve erections during REM stage sleep.

Q. Last question: Were you practicing in 2007
in Pensacola?

A. I was.

MR. MURRAY: All right. All the questions I
have.

THE COURT: All right. Mr. Ridlehoover.

CROSS-EXAMINATION

BY MR. RIDLEHOOVER:

Q. Good afternoon, Dr. Bear.

A. Good afternoon.

Q. I'm Ken Ridlehoover with the state attorney's office. Just a few questions.

If I understood what you said a minute ago that, from review of these records, that you didn't take, somebody else did, and that you have never examined Mr. Diamond?

A. Yes, sir.

Q. Is that correct?

A. Yes, sir.

Q. Have you ever met him?

A. No, sir.

Q. So you're relying upon the records of some other medical professionals?

A. Yes, sir.

Q. And do you know for a fact that those are the complete and total medical records that were maintained on behalf of Mr. Diamond during this time in question?

A. No, sir.

Q. All right. Now, based upon your review of those, can you tell whether or not Mr. Diamond had the – at the time in 2007, we're talking – I'm talking about between April of 2007 and October of 2007 – whether or not Mr. Diamond had the capability to

intentionally touch, in a lewd and lascivious manner, the breast, genital area, genitals, buttocks or clothing covering them, of a person less than 12 years of age?

A. He could do that with his right hand.

Q. Okay. And could you tell us during that same period of time, whether he would be able to intentionally force or entice the person under 12 years of age to touch in a lewd or lascivious manner his genital or the genital area, or buttocks, or clothing covering them?

A. I don't know – I – entice someone? I – I guess.
What does that mean, like, offer them –

Q. Candy –

A. – money, or –

Q. Candy or something in exchange.

A. I guess.

Q. It's a common-sense definition.

A. He could – I guess anyone can do that. A paraplegic can do that, I guess.

Q. During that same time in question, can you tell us within a reasonable degree of medical probability whether he can commit a sexual battery on a person 12 years of age by placing his mouth over the penis of that individual?

A. Physically, yes, he could do that.

Q. And could he have been able to entice another person to place that person's mouth over his penis?

A. I guess entice, yeah.

Q. Well, I mean –

A. As long as – yes, he could do that.

Q. I'm not asking you to guess within a reasonable degree of –

A. Yeah, he can do that. Oh, yeah. Yeah, sure.

Q. All right. And do you know whether or not – maybe you can or can't tell – if he could cause a person to come into contact with blood, seminal fluid, urine or feces by throwing, tossing, projecting or expelling such material by way of an ejaculation?

A. Yeah, if he could – and again, it's – I'm guessing here – if he could get an erection, he should be or he might be able to ejaculate. And I guess he could have tossed it with his right hand.

Q. Okay. And so, you can't really tell us from looking at those medical records whether or not he would have been able to do that?

A. No.

Q. And would he have been able to encourage, force, or entice another individual to penally penetrate him with that person's penis or penile (sic) and have union with that person?

A. I guess so. I'd say yes. Depends on the position. Not the way this other attorney described it.

Q. There is conceivably a position where that could occur?

A. Oh, sure.

Q. All right. And would he have had the capability to direct or entice a child to suck the penis of another child while he's taking photographs of that act?

A. I guess.

Q. Assuming he has the ability – there's nothing

–

A. There's nothing that says cognitively he couldn't have done that.

Q. All right. And would he have been able to take pornographic images, videos or movies of a person while he was at this period of time under this condition?

A. Yes.

Q. So there's nothing prohibiting him from getting a camera or video machine and taking those

videos?

A. No.

Q. And would he have been able to solicit another individual to expose that person's genitals to him?

A. Yes.

Q. Medically, I mean.

A. Yes.

MR. RIDLEHOOVER: Okay. I don't have any other questions.

THE COURT: Any redirect?

MR. MURRAY: Yes, please. Just briefly.

REDIRECT EXAMINATION

BY MR. MURRAY:

Q. Dr. Bear, if you treated Mr. Diamond in – in 2007, March of 2007, April of 2007, May of 2007, June of 2007, if you would have treated him then, would you have been able to tell a jury whether he was still suffering from the same afflictions that his medical records indicated?

A. If I –

Q. In other words, if you were his treating

doctor.

A. Right.

Q. And treated him, could you come in and tell a jury much more precisely, These are the things that he is suffering from currently?

A. Yes.

Q. Okay. But would you have been able to conduct tests on him directly to determine, for example, if he was able to obtain and maintain an erection?

A. Yes.

Q. You were not asked to do that, were you?

A. No.

Q. With respect to the medical opinions you gave today, would another healthcare professional reach a different conclusion than you've reached based upon review of these objective records?

MR. RIDLEHOOVER: Objection, Your Honor; speculation.

THE COURT: I'm going to sustain the objection.

MR. MURRAY: No further questions, Judge.

THE COURT: Okay. Can this –

MR. MURRAY: Actually, Judge, can I proffer the answer to that one?

THE COURT: Yes, you can proffer it.

MR. MURRAY: Thank you.

Q. (By Mr. Murray) Would another healthcare professional have reached a different conclusion than you would reach in your expert opinion, based on your training and your experience, and your education, would another doctor look at these medical records and reach a different opinion than you reached today?

A. No, this is – I mean, it's a standardized grading scale of motor strength, so I think any physician who conduct – conducts an examination on

an individual for motor strength would say, This is what the man would have looked like at the time of the examination, unless this physician did this examination wrong.

MR. MURRAY: Thank you.

THE COURT: Okay.

MR. RIDLEHOOVER: May I have a follow-up question?

THE COURT: Sure. This is followup to the proffer.

Q. (By Mr. Ridlehoover) Doctor, as to the series of questions I asked you on cross-examination.

A. Yes, sir.

Q. Had another medical professional done the same thing you did, would you think they would have concluded the same you did in response to my questions?

A. I think so. Yes, sir.

MR. RIDLEHOOVER: Thank you.

MR. MURRAY: Judge, I'd like to admit the medical records that he relied upon.

THE COURT: Any objection to the medical records coming in, Mr. Ridlehoover?

MR. RIDLEHOOVER: No, no objection.

THE COURT: Okay. We'll go ahead and admit
the medical records as Exhibit 2.

(Defendant's Exhibit No. 2 admitted into evidence)

THE COURT: All right. Can this witness be
excused?

MR. MURRAY: Sorry, I apologize.

MR. RIDLEHOOVER: As far as I'm concerned,
Your Honor.

THE COURT: All right. You may step down.
You are now excused.