

COPY

FILED

MAR 4 1993

CLERK OF THE COURT
DEPUTY

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF MOHAVE

STATE OF ARIZONA,

Plaintiff,

vs.

ROBERT WAYNE MURRAY,

ROGER WAYNE MURRAY,

Defendants.

Cause No. CR-13057

PRESENTENCE HEARING

154 Pgs

Before the Honorable James E. Chavez, Judge

Tuesday, October 6, 1992

9:50 a.m.

Kingman, Arizona

Reporter's Transcript of Proceedings

Appearances:

For the State:

James J. Zack,
Deputy County Attorney
315 N. Fourth Street
Kingman, Arizona 86401

For Robert W. Murray:

M. Ruth O'Neill,
Attorney at Law

For Roger W. Murray:

Frank E. Dickey, Jr.,
Gerald Gavin,
Deputy Public Defenders
Kingman, Arizona 86401

Reported by: Rick A. Pulver, Official Reporter

MOHAVE COUNTY SUPERIOR COURT, DIVISION IV



I N D E X

	<u>Page</u>
1	
2	
3	
4	
5	
6	
7	
8	
9	
10	
11	
12	
13	
14	
15	
16	
17	
18	
19	
20	
21	
22	
23	
24	
25	

DEFENSE WITNESSES:ANGELA HALL

Direct Examination by Mr. Dickey 10

Cross-Examination by Mr. Zack 22

Redirect Examination by Mr. Dickey 26

RUBY BRADFORD (Previously Sworn)

Direct Examination by Mr. Dickey 27

Cross-Examination by Mr. Zack 35

Redirect Examination by Mr. Dickey 37

BRENDA MURRAY (Previously Sworn)

Direct Examination by Mr. Gavin 38

Cross-Examination by Mr. Zack 60

Redirect Examination by Mr. Gavin 66

JOHN DAVID HEWITT

Direct Examination by Mr. Gavin 71

Cross-Examination by Mr. Zack 95

Redirect Examination by Mr. Gavin 118

ERNIE MAKINSON

Direct Examination by Mr. Dickey 121

Cross-Examination by Mr. Zack 132

Redirect Examination by Mr. Dickey 140

E X H I B I T S

	<u>Init. Ref.</u>	<u>In Evid.</u>
Defense Exhibit S-M	9	9
Defense Exhibit S-N	9	9
Defense Exhibit S-O	9	9
State's Exhibit S-1	24	--
Defense Exhibit S-P	121	124
State's Exhibit S-9	137	140
Defense Exhibit S-A	141	---
Defense Exhibit S-T	142	142
Defense Exhibit S-B-2 to S-B-4	142	143
Defense Exhibit S-B-6 to S-B-11	142	143
Defense Exhibit S-L	142	143
Defense Exhibit S-S	144	144
Defense Exhibit S-Q	145	145
Defense Exhibit S-R	145	145
Defense Exhibit S-U	145	146

P R O C E E D I N G S

THE COURT: Okay. Please be seated. Okay. This is CR-13057. Counsel are present, defendant is present, that being Roger Wayne Murray.

Are you ready to proceed with the mitigation phase as concerns Roger Wayne Murray? Mr. Dickey, are you ready to proceed?

MR. DICKEY: Yes, Your Honor.

THE COURT: Mr. Zack?

MR. ZACK: Yes, Your Honor.

THE COURT: Mr. Dickey, will you present your first witness?

MR. DICKEY: Your Honor, before we proceed to the mitigation evidence, the State having rested its aggravation case in the penalty phase trial, on behalf of the defendant, Roger Murray, he moves for a judgment in his favor on the aggravating factors. The first factor listed by the State is pecuniary gain. At the trial which the State relies, the State admitted that it could not prove who killed Dean and Jackie. So, as a matter of law there is no proof of premeditation since the State admitted both at the beginning and the close of its case it couldn't prove who killed Dean and Jackie. The State did not prove the time of the death. The State did not prove the sequence of events. Thus, the State could not

1 show the factors for invoking the death penalty. The most
2 the State could show was circumstances that could lead to
3 a conviction for a felony murder, which requires life
4 imprisonment under the McDaniel case.

5 In the two killings, the aggravating factors of
6 the two killings, the situation is the same. Although the
7 defendants were each convicted of two killings, the State
8 admitted it could not prove who did the killing, it just
9 said essentially to the Court that, well, somebody did.
10 They were there, so somebody did, so they are both guilty.
11 We believe that's insufficient evidence, and again, what
12 we have is another felony murder situation which requires
13 life under the McDaniel case.

14 As far as the cruel, heinous and depraved
15 aggravating factor, the State did not show -- again, did
16 not show who killed Dean and Jackie. The factor without
17 limitation is unconstitutionally vague as indicated by the
18 Supreme Court of the United States, although the Supreme
19 Court of the United States has indicated that if the
20 Arizona Supreme Court placed limitations on this
21 particular aggravating factor -- in fact, if you read the
22 dissent in the Walton case, and also if you look at the
23 cases cited therein, it shows in fact that the Supreme
24 Court has not limited this particular aggravating factor,
25 but has applied it in a wide variety of cases. So, in

1 fact we have no limitation, which means that the
2 particular aggravating factor is unconstitutional. Since
3 the State could not establish legally the cruel, heinous
4 and depraved because they could not prove who did the
5 killing, again, the life sentence is one that should be
6 authorized.

7 Now, in connection with these particular
8 factors, as the Court knows, the State has to prove the
9 case by evidence which is legally admissible under the
10 rules of evidence and proves the case beyond any
11 reasonable doubt. We submit since the State has already
12 admitted that it could not prove who did the killings, it
13 follows therefore that the most that the Court can impose
14 in this type of case is life imprisonment. With regard to
15 the tape which the prosecutor indicated he was going to
16 offer against Roger Murray, we submit that that Motter
17 tape has to be excluded as to Roger Murray because there
18 is no -- it's hearsay, and hearsay upon hearsay. It
19 denies the confrontation and cross-examination rights
20 under the United States and the Arizona Constitutions, and
21 there's been no showing that the witnesses is unavailable
22 or that due diligence was used to obtain his presence.
23 For those factors we believe that the tape should be
24 excluded as to consideration for Roger's portion of the
25 case.

1 THE COURT: Mr. Zack, any comments?

2 MR. ZACK: Your Honor, the fact is of course the
3 jury did find the defendant guilty beyond a reasonable
4 doubt of two premeditated murders, so any argument the
5 State didn't prove that, is absurd. Other claims as to
6 the applicability of the death penalty, there will be
7 arguments later, but in State v. Gillies at 142 Ariz. 564,
8 the Supreme Court specifically upholds the death penalty
9 even though Gillies himself didn't kill the victim. The
10 evidence in that case was that Mr. Gillies, the defendant,
11 handed the rock to a codefendant who then proceeded to
12 smash the victim's head. The State Supreme Court said
13 that is enough for the death penalty. Basically what Mr.
14 Dickey has related to you, again, for the jury argument,
15 all his motions, statements, have previously been ruled
16 upon. The simple fact is, the jury has found the
17 defendant guilty of premeditated murder.

18 THE COURT: Any further discussion, Mr. Dickey?

19 MR. DICKEY: No, Your Honor. We believe that under
20 the McDaniel rule, which basically says if there's two
21 people involved and the State cannot prove who killed,
22 then the life is the one which is appropriate.

23 THE COURT: What we have here is a verdict of first
24 degree murder and also a verdict of felony murder. Based
25 on the verdicts, there is no grounds for the Court to

1 consider the McDaniel rationale in this case. So, your
2 Motion For A Directed Verdict on the death penalty phase
3 is denied, and we will take up your argument on the tape
4 when it is actually presented by the State in today's
5 case.

6 Mr. Dickey?

7 MR. DICKEY: Yes, Your Honor. Roger Murray will
8 submit mitigation on his portion of the case. In this
9 particular case, Roger Murray of course claims,
10 notwithstanding the Court's ruling, that the State has not
11 shown the aggravating factors calling for imposition of
12 the death penalty as to Roger. Legally, the most that can
13 be shown is felony murder. And we are talking not about
14 the factual situation, except in so father as it is
15 available to sustain the legal conclusion. Roger Murray
16 expects to show facts concerning his childhood, his age,
17 and other aspects of his life which call -- which are
18 substantial enough to call for leniency. Roger Murray
19 would offer the testimony of, I believe it was Mr. Legg
20 and Mr. Freeman, in connection with the matters involving
21 the consumption of alcohol at or near the time of the
22 incident in question.

23 We believe the evidence will show that Roger
24 was, in this particular situation, a relatively minor
25 actor wherein his brother took the lead in the case. Also

1 we believe that the, and we offer again in evidence, the
2 report of Dr. Potts in the case. We would also offer as
3 -- in the case we will offer certain letters and
4 documentations from people involving members of the
5 family.

6 THE COURT: Any additional opening, Mr. Zack?

7 MR. ZACK: No, Your Honor.

8 THE COURT: Okay. Thank you. Mr. Dickey, you may
9 proceed.

10 MR. DICKEY: At this time, Your Honor, we would
11 offer, pursuant to stipulation, what has been marked S-M,
12 S-N, and S-O.

13 THE COURT: Any objection, Mr. Zack?

14 MR. ZACK: Your Honor, I'm not stipulating that this
15 comes in. However, I did tell Mr. Dickey and I had told
16 the Court I'd do nothing with those letters purportedly
17 written by Robert which he says he killed the victims.
18 So, essentially the State takes no position.

19 THE COURT: Okay. Defense Exhibits S-M, S-N, and
20 S-O are admitted into evidence.

21 MR. DICKEY: Call Angela Hall.

22 ANGELA HALL,

23 being first duly sworn by the clerk, was examined and
24 testifies as follows:

25 :::

1 DIRECT EXAMINATION

2 BY MR. DICKEY:

3 Q. Would you tell us your name, please? Could you
4 tell us your name, please?

5 A. Angela Hall.

6 Q. And where do you live, Angela?

7 A. Red Bay, Alabama.

8 Q. And are you related to Roger Murray?

9 A. Yes.

10 Q. And what is the relationship?

11 A. He's my brother.

12 Q. All right. Now, did you and he grow up
13 together in the same household?

14 A. Yes.

15 Q. And how close in age was Roger to you?

16 A. About two years difference.

17 Q. Is he older or younger than you?

18 A. Older.

19 Q. You are the baby in the family, then?

20 A. Yes.

21 Q. All right. How did you and Roger get along?

22 A. Good.

23 Q. And when you say good, what do you mean?

24 A. He was like a protector.

25 Q. How did Roger get along with the other members

1 of the family, other brothers and sisters?

2 A. Good, I guess.

3 Q. And how many brothers and sisters do you have?

4 A. Well, two brothers, and one sister, other than
5 me.

6 Q. All right. And how -- what was the age
7 difference between you and your brothers and sisters?

8 A. Age difference between all of us?

9 Q. Yes. In other words, between you and your
10 sister, what was the age difference, and then between you
11 and your older brother, what was the age difference?

12 A. I don't know.

13 Q. All righty. Now, how did -- you indicated that
14 Roger used to act as your protector.

15 Why did you need a protector?

16 A. He was just acting as a big brother should.

17 Q. I see. All right. Now, the -- how did Roger
18 get along with his dad?

19 A. Good, sometimes. Sometimes not.

20 Q. And when you say good sometimes, tell us what
21 you mean?

22 A. I don't know how to explain it.

23 Q. Well, if you could just do the best you can.

24 A. Well, sometimes daddy was mean to him.

25 Q. Was daddy mean to you?

1 A. No.

2 Q. Did Roger give daddy -- this is Ken Murray,
3 right?

4 A. Yeah.

5 Q. Did he give daddy a reason to be mean to him?

6 A. Well, everybody always does something wrong,
7 but Roger always got blamed for everything I done, too.

8 Q. Did you get in trouble from time to time?

9 A. No. Not much.

10 Q. Well, you say that Roger took the blame for
11 you.

12 Why did he do that?

13 A. Because I always blamed it on him.

14 Q. All right. How did Roger get along with his
15 mother?

16 A. Good.

17 Q. And how did daddy act as a disciplinarian?

18 A. It depends on how mad you made him.

19 Q. What do you mean by that?

20 A. Well, sometimes if he got mad enough he'd hit
21 with his fist.

22 Q. All righty. Did he use anything else for
23 discipline besides his fist?

24 A. A belt or a switch.

25 Q. And did Roger receive a lot of that type of

1 punishment?

2 A. I don't know.

3 Q. Well, now, did you live in more than one place
4 back in your part of Alabama?

5 A. What do you mean?

6 Q. In other words, did you live in several
7 locations, several cities or towns, or --

8 A. No.

9 Q. -- country, that sort of thing?

10 A. Just -- no. Not a whole lot of them. Just
11 about three or four different places.

12 Q. All right. Can you tell us where you lived?

13 A. Lived in Russellville, Muscle Shoals,
14 Sheffield, Florence. That's it.

15 Q. I see. And those areas that you have mentioned
16 are in the northwest part of Alabama; is that correct?

17 A. I guess.

18 Q. Now, were you living at home when Roger was
19 living at home when he got in trouble with the law?

20 A. When?

21 Q. Well, let's say when you were living in
22 Russellville?

23 A. Living in Russellville?

24 Q. Yes.

25 A. Probably.

1 Q. All right. Do you know what kind of trouble he
2 got into in Russellville?

3 A. I don't know exactly what you mean.

4 Q. Well, was he charged with committing a criminal
5 offense when he was there in Russellville?

6 A. I don't know. He wasn't there. He wasn't
7 living there at the time.

8 Q. Where was he living; do you know?

9 A. I had no idea. Daddy kicked him out.

10 Q. I see. When was that?

11 A. I don't know when it was. I can't give you a
12 date.

13 Q. All righty. Did your daddy act differently
14 towards various members of the family?

15 A. Yeah.

16 Q. And how did he act differently?

17 A. Well, the boys always got in trouble for
18 everything the girls done.

19 Q. All right. So, you and -- your sister's name
20 is what?

21 A. Shonna.

22 Q. Your other brother's name is?

23 A. Robert.

24 Q. And so, Roger and Robert took the brunt of the
25 punishment for things that you and Shonna did?

1 A. Most of the time.

2 Q. How was your mother as a disciplinarian?

3 A. She wasn't real strict.

4 Q. Excuse me?

5 A. She wasn't real strict.

6 Q. I see. Now, with regard to Roger, during the
7 period of time that you were growing up and he was growing
8 up and he was around you, did you ever know him to consume
9 alcoholic beverages?

10 A. No.

11 Q. Did your family attend a church back there in
12 Alabama?

13 A. No.

14 Q. Can you tell us how Roger acted emotionally?

15 A. What do you mean? Emotionally what?

16 Q. Well, was he calm, was he active? Can you just
17 tell us how he acted when things -- first of all, how did
18 he act when things went wrong?

19 A. Aggravated.

20 Q. And did he get aggravated easily?

21 A. Not all the time.

22 Q. Now, when you lived in Russellville, did you
23 live in Russellville itself, or did you live outside of
24 Russellville?

25 A. Outside of Russellville.

1 Q. Is that up in the area where your dad lives?

2 Daddy?

3 A. Yeah.

4 Q. All right. You say you lived in Muscle Shoals.

5 Where did you live in Muscle Shoals?

6 A. In the city.

7 Q. Did your dad have a business there?

8 A. Yes.

9 Q. What kind of business did he have there?

10 A. It was a club.

11 Q. Is that a nightclub?

12 A. Yeah.

13 Q. And back in Alabama some of the counties are
14 dry. That means they don't allow alcohol to be sold, and
15 some are -- would allow alcohol to be sold; is that
16 correct?

17 A. Yeah.

18 Q. And this nightclub that he had, was that in
19 Colbert County?

20 A. Yes.

21 Q. And that is a wet county?

22 A. Yes.

23 Q. And back during the time you were growing up
24 there in Russellville, did Roger and Robert or you or
25 Shonna do any work?

1 A. I didn't. Robbie did. Roger did a little
2 bit.

3 Q. And what type of work did Roger do?

4 A. Just help with daddy feeding the cows and
5 stuff.

6 Q. You lived on sort of a farm, a ranch, outside
7 of Russellville?

8 A. Yeah.

9 Q. All right. Now, this work that Roger did, was
10 he paid for that?

11 A. No.

12 Q. Get an allowance?

13 A. No.

14 Q. How was Roger's health back when he was growing
15 up with you and the other members of the family?

16 A. I don't know. I can't answer that.

17 Q. All right. Do you remember him getting injured
18 or hurt when he was growing up?

19 A. I remember him chopping his foot with an ax.

20 Q. All right. Any other types of injuries you
21 recall him having?

22 A. No.

23 Q. How did Roger relate to other people, that is,
24 non-family members around the area in Russellville?

25 In other words, was he friendly, was he

1 standoffish, shy, what?

2 A. Friendly.

3 Q. When he was back in Russellville with you did
4 he have lots of friends, a few friends, what?

5 A. Lots of them.

6 Q. Now, would you consider Roger to be a talker, a
7 doer, or a follower?

8 A. Could you repeat that?

9 Q. I said, would you characterize Roger as a
10 talker? That's a person that talks a lot. Or a doer, a
11 person that doesn't talk a lot but does something or acts
12 out whatever he wants to do, or a follower who follows
13 behind somebody else?

14 A. I don't know.

15 Q. All right. You and your -- excuse me. You and
16 your family, as you've indicated, moved around northwest
17 Alabama from time to time.

18 Your mother and your dad divorced; is that
19 correct?

20 A. Yes.

21 Q. Was there a change in Robert's -- or, Roger,
22 excuse me, after your mother and dad were divorced?

23 A. Yes.

24 Q. And what sort of change did you notice?

25 A. He acted -- he -- he felt like he didn't get

1 any attention. He done stuff to get attention.

2 Q. Such as what?

3 A. Anything.

4 Q. Well, if you could help us out a bit, try to be
5 a little more specific as to things that you remember he
6 did to try to get attention?

7 A. I don't know. I can't think of anything
8 specific right now.

9 Q. Do you remember a situation where he got in
10 trouble for turning over tombstones?

11 A. Yes.

12 Q. And was he living at home at that time?

13 A. Yeah.

14 Q. And you were a couple grades behind him in
15 school?

16 A. Something like that.

17 Q. And did you go to the same schools that he did?

18 A. Yes.

19 Q. And were you able to observe his activities in
20 school?

21 In other words, did you see him around school
22 and everything?

23 A. Not a whole lot.

24 Q. All right. Did Roger participate in sports
25 activities?

1 A. Yes.

2 Q. And what type of sports activities did he
3 participate in?

4 A. He played football and baseball.

5 Q. Was he good at those sports?

6 A. Yeah.

7 Q. Did the family come out to watch him?

8 A. Part of them.

9 Q. Who did and who didn't?

10 A. Mother went and watched him, and daddy didn't.

11 Q. All right. Your daddy for a while was involved
12 in what is commonly known as bookmaking; is that correct?

13 A. Yeah.

14 Q. When you were growing up, did you and your
15 brothers and sisters know about that?

16 A. I can't -- I was little then. I wasn't old
17 enough to remember much about that.

18 Q. So, that's something that you learned about
19 later, correct?

20 A. I knew a little bit about it, but I wasn't
21 really old enough to understand what it was.

22 Q. All right. Other than Roger getting in trouble
23 for knocking over the tombstones, do you remember anything
24 else that he got in trouble for?

25 A. I can't think right now.

1 Q. How -- would you tell us about the difference
2 between the way your dad treated Roger and the way your
3 mother treated Roger? If there is a difference?

4 A. Well, I don't know how to explain any of that.

5 Q. Well, just try to do the best you can, if you
6 could.

7 A. Well, daddy hardly ever stayed -- he hardly
8 ever talked to anybody. Mama was always there. Daddy
9 hardly ever stayed in the house.

10 Q. All right. So your mother was around,
11 basically, and raised you folks?

12 A. Basically, yes.

13 Q. And your dad was usually off someplace,
14 correct?

15 A. Outside the -- out in the field somewhere.

16 Q. And he was running, when you were in
17 Russellville, he was running the farm that you had?

18 A. Yes.

19 Q. And when he opened the nightclub in Muscle
20 Shoals, he was basically running the nightclub there most
21 of the time?

22 A. Yeah.

23 Q. Your daddy have any other work, types of work
24 that he did?

25 A. I don't know.

1 Q. During the time that you were growing up, did
2 Roger use to get upset easily?

3 A. No.

4 Q. And how did Roger and Robbie get along?

5 A. I don't know.

6 Q. I take it you didn't observe them together or
7 anything like that?

8 A. I wasn't around Robbie much.

9 Q. I see. Robbie was the oldest one in the family
10 of the children?

11 A. Yes.

12 MR. DICKY: I have no further questions.

13 THE COURT: Mr. Zack?

14 CROSS-EXAMINATION

15 BY MR. ZACK:

16 Q. You had a lot of friends, yourself, in that
17 area, didn't you?

18 A. Yes.

19 Q. And you knew a lot of kids your age as you were
20 growing up?

21 A. Yeah.

22 Q. Both boys and girls?

23 A. Yeah.

24 Q. And of course you knew your brother, Roger.

25 Was there anything -- did he seem normal like the rest of

1 the kids?

2 A. Yeah.

3 Q. And you say he did not get upset very easily?

4 A. No.

5 Q. You said sometimes your father was mean to
6 Roger and would hit him with his fist.

7 How often did you see that?

8 A. Just once or twice.

9 Q. Your mother didn't work outside the home when
10 you were growing up, did she?

11 A. No.

12 Q. She did the cooking and cleaning and laundry,
13 and --

14 A. Yeah.

15 Q. The real work of the family, probably?

16 A. Yeah.

17 Q. So, the only income you would have is what your
18 father earned?

19 A. Yes.

20 Q. When you said he wasn't around that much, he
21 was off working on the farm?

22 A. Yes.

23 Q. When he, your brother Roger played baseball and
24 football and your father didn't go, would your father be
25 working at those times?

1 A. I can't remember.

2 Q. How old was Roger when he left the household
3 where you lived?

4 A. I'm not sure. I have to think about that. I
5 guess about 14 or 15.

6 Q. That's how old Roger was?

7 A. Somewhere around there. I can't give you an
8 exact date or --

9 Q. That's fine. You say that Roger chopped his
10 foot with an ax once.

11 Do you remember any other serious injuries at
12 all?

13 A. I can't remember. I don't know. There may
14 have been, I can't remember, though.

15 Q. Do you know Roger's birthday?

16 A. I know it's July 28. I don't know what year.
17 '70, I think.

18 (Mr. Zack is getting something from the clerk.)

19 Q. Showing you what has been marked as State's
20 Exhibit S-1, the page with the photograph on it.

21 Do you recognize that as your brother, Roger?

22 A. Yeah.

23 Q. And is that his date of birth?

24 A. Yeah.

25 Q. 7-28-70?

1 A. Yeah.

2 Q. And would you agree with me, reading from the
3 page, it talks about date sentenced, 9-30-88, the crime of
4 burglary three, and receiving a sentence of four years,
5 six months confinement?

6 Would you agree with me that's on the same
7 page?

8 A. Yeah.

9 Q. And are you aware of your brother's criminal
10 record?

11 A. Probably not all of it.

12 Q. What do you know about it?

13 A. Well, I know about the tombstones, I know about
14 something that happened in Phil Campbell or somewhere
15 in --

16 Q. I am sorry, I can't hear?

17 A. Something happened in Phil Campbell and
18 Russellville. I know it happened. I don't remember what
19 year it was.

20 Q. Were you aware that he went to prison?

21 A. Sir?

22 Q. Are you aware that he went to prison?

23 A. Yes.

24 Q. Are you aware he got in trouble when he was
25 still a juvenile under the age of 18?

1 A. Yes.

2 Q. What trouble was that, if you recall?

3 A. Tombstones, wasn't it?

4 Q. You don't know?

5 A. The tombstones, I think.

6 Q. I just want to know what you know.

7 A. What I know?

8 Q. Does Roger know right from wrong?

9 A. Yeah.

10 Q. Does he know it's wrong to kill people?

11 A. Yes.

12 MR. ZACK: Nothing further.

13 THE COURT: Mr. Dickey?

14 REDIRECT EXAMINATION

15 BY MR. DICKEY:

16 Q. Did -- when you and your brothers or sisters
17 got in trouble, did your mother try to keep that from your
18 daddy?

19 A. Sometimes.

20 MR. DICKEY: No further questions.

21 THE COURT: Anything else, Mr. Zack?

22 MR. ZACK: No, Your Honor.

23 THE COURT: Okay. You are excused.

24 MR. DICKEY: Call Ruby Bradford.

25 THE COURT: Okay. Ms. Bradford, you were sworn in

1 yesterday, so there's no need to be sworn in. You are
2 still under oath.

3 MS. BRADFORD: Sir?

4 THE COURT: You are still under oath. Please be
5 seated.

6 RUBY BRADFORD,
7 having been previously sworn by the clerk, was examined
8 and testifies as follows:

9 DIRECT EXAMINATION

10 BY MR. DICKEY:

11 Q. For the record, will you tell us your name,
12 please?

13 A. I am Ruby Bradford.

14 Q. And how are you related to Roger Murray?

15 A. I am Roger's aunt.

16 Q. And where do you live?

17 A. I live in Russellville, Alabama.

18 Q. And how long have you lived there?

19 A. Well, I've lived there off and on for 40 or
20 more years.

21 Q. I see. And over the period of time that you
22 lived there, was there a period of time when Roger, his
23 family lived there also?

24 A. Yes, sir.

25 Q. And during that period of time that you lived

1 there and Roger lived in that area, did you have a chance
2 to observe him?

3 A. Yes, sir.

4 Q. And where over that period of time did you have
5 a chance to see and observe Roger?

6 A. Well, I was teaching at East Franklin Junior
7 High School and I had 5th and 6th grade PE, and Roger was
8 in my class. Also, Roger used to come and spend the
9 nights with me when he was younger.

10 Q. I see. Now, you say he was in your class.
11 That was a physical ed class?

12 A. Physical education.

13 Q. Yes. And how was he and how did he act in
14 sports?

15 A. Real good.

16 Q. All right. And as a teacher, when he was in
17 your class, did you have a chance to observe his
18 activities with other children?

19 A. Yes.

20 Q. And can you describe how he acted around other
21 children?

22 A. Well, he was real -- I don't know exactly how
23 to say this. I guess we'd call -- teachers would say
24 hyperactive or something to that extent. He was real
25 outgoing, you know, and made friends easily. But, he

1 wasn't a discipline problem to me at all.

2 Q. I see. All right. In observing him acting
3 with other children, did you observe him going along with
4 the crowd, so to speak?

5 A. Well, I'd say sometimes, sometimes not.

6 Q. All right. And did Roger, when you observed
7 him back when he was in school, did he do a lot of
8 talking?

9 A. Pardon?

10 Q. When Roger was in school and you had a chance
11 to observe him, did he do a lot of talking?

12 A. Yes. Roger is outgoing, very friendly.

13 Q. And back during that period of time, do you
14 know of him bragging also?

15 A. Did I do what?

16 Q. Know him to do a lot of bragging?

17 A. Riding?

18 Q. No. Bragging.

19 A. Oh, bragging. No. I don't recall anything.
20 We were pretty active in PE, you know, we'd do things. We
21 don't do a lot of talking, we do a lot of action.

22 Q. All right. Did you have a chance to observe
23 him other than, say, in the physical education classes?
24 When he was in school?

25 A. Well, yes, uh-huh.

1 Q. And when he was in the physical education
2 class, was he good in sports?

3 A. Yes, he was.

4 Q. And what type of sports did he like to play?

5 A. Well, we did basketball, volleyball, softball,
6 and he was just ready to go when -- whatever you named, we
7 will do today.

8 Q. You didn't have any disciplinary problems with
9 him, I believe you've indicated, but from your observation
10 do you know whether he caused disciplinary problems for
11 other teachers in school?

12 A. Well, I think he's just an average boy, you
13 know. If you have been a teacher you know what that
14 means. We do have discipline problems.

15 Q. Did the fact that you were his aunt have
16 anything to do with him behaving for you?

17 A. Well, I believed so. I thought he and I had a
18 good relationship.

19 Q. Did you have a chance to observe Roger's
20 relationship with other members of his family, such as his
21 dad and his mom?

22 A. Well, I wasn't around the family a lot except
23 on holidays, and as far as how they disciplined the
24 children, I really don't know anything firsthand, you
25 know.

1 Q. All right. On holidays, would -- was there
2 anything that you can recollect that was unusual in
3 connection with Roger's activities?

4 A. Did you say unusual?

5 Q. Yes.

6 A. I don't recall.

7 Q. And most of your observations then were of
8 Roger in school and when he was staying with you,
9 correct?

10 A. Yes. Uh-huh.

11 Q. And how was his health back during that period
12 of time?

13 A. I'm afraid I didn't understand your question.

14 Q. I am sorry. How was his health during that
15 period of time?

16 A. His health?

17 Q. Yes.

18 A. Well, good, as far as I know.

19 Q. All right. Did he, to your knowledge, during
20 the period of time that you were acquainted with him, ever
21 have any injuries?

22 A. Well, yes. I recall that he got his foot cut
23 at one time, and then he was -- his dad and a friend, my
24 uncle, were at a horse sale and he fell and hit his head
25 on the sidewalk. My uncle was telling us about -- he was

1 just young then. I don't know exactly what age that was.
2 Other than that, I didn't -- I don't really recall
3 anything else.

4 Q. And were you acquainted with the types of
5 grades, that is, types of scores that Roger made while he
6 was in school?

7 A. Well, not so much so then. Since I only had
8 him -- you know, I didn't have him for the other classes,
9 but I've had a chance to observe some of his records since
10 then, yeah.

11 Q. And what did his records show?

12 A. Well, I remember one record that my brother and
13 I picked up from Muscle Shoals, I forgot what school that
14 was, but Roger had missed a lot of school and we were just
15 really shocked to see that he hadn't been in school, you
16 know, at the age he was.

17 Q. All right. I see. And did you know or were
18 you around when he had his -- got in the trouble with the
19 law?

20 A. Was that in Muscle Shoals?

21 Q. Muscle Shoals or Russellville or elsewhere?

22 A. Well, yes. I was in Russellville, uh-huh.

23 Q. And what do you recollect about the trouble he
24 got in with the law there?

25 A. Well, he was with some group of people and --

1 and they had stolen some things. I don't know exactly
2 what it was right now. Seemed like an air conditioner,
3 but I'm not exactly sure.

4 Q. I see. Now, you mentioned that there was an
5 incident where Roger hit his head.

6 Did he receive medical treatment for that, to
7 your knowledge?

8 A. I am sorry, I can't hear you.

9 Q. I am sorry. I will have to try to speak up.
10 You mentioned about Roger hitting his head one time --

11 A. Oh, yes.

12 Q. -- when he was there. Did he receive medical
13 treatment for that, to your knowledge?

14 A. No. My uncle said that they talked it over and
15 thought about taking him by because he had a knot on his
16 head, but Roger said he was fine, you know, so they didn't
17 take him for treatment.

18 Q. Now, when Roger was in school in the classes
19 that you observed him in physical ed, did he have any
20 problems in the way of fighting with other children?

21 A. Well, occasionally, I suppose. I mean, I did
22 have those problems sometimes. I don't recall with Roger,
23 but it could have been.

24 Q. Is there anything else that you can think of
25 that you recollect from the time that you had Roger either

1 in your classes in school or had him home visiting you
2 that you think we ought to know about?

3 A. Well, I don't know if it is anything. When he
4 was away I kept in touch with him, I wrote him, and --
5 but, I guess that's all that I --

6 Q. Now, did Roger appear to be the type who was
7 seeking attention when he was in your class in school?

8 A. Well, I don't know exactly -- it's -- if he was
9 seeking attention or he was just always ready to
10 participate, you know, just ready to go. You know, I have
11 a group of students that don't want to get up off the
12 seat, then you have a group that's ready to participate,
13 and Roger was one of the ones that I never had any
14 problem, let's get the games going.

15 Q. All right. And did you find that to be because
16 they wanted to show what they could do?

17 A. Well, it might be for some people, but for me,
18 I love sports too, and for me it was just because I love
19 to do the sports and I was ready to play, you know, and I
20 couldn't say what he was thinking.

21 Q. But, he never talked to you about any problems
22 he had, the way he was thinking or anything like that,
23 during the time?

24 A. Well, no. I talked to Roger. He was smoking
25 when he'd come to my house. I used to talk to him and

1 tell him he needed to throw them away and things like
2 that, you know.

3 Q. So, you were trying to direct or guide him?

4 A. Sir?

5 Q. You were trying to direct or guide him?

6 A. Well, yes.

7 MR. DICKEY: I have no further questions.

8 THE COURT: Mr. Zack?

9 CROSS-EXAMINATION

10 BY MR. ZACK:

11 Q. Ms. Bradford, could you have a seat there for
12 just one moment?

13 In your field, school teaching career -- I am
14 sorry. Would you like --

15 A. I'm all right.

16 Q. I just have about one question. In your school
17 teaching career you probably dealt with thousands of
18 children?

19 A. Well, hundreds.

20 Q. And you probably knew Roger Murray better than
21 most of the students that you had?

22 A. Pardon?

23 Q. You probably knew Roger Murray better than most
24 of the students that you had or kids you knew?

25 A. What do you mean by better?

1 Q. Better. I mean because he's a relative, you
2 knew him better than most of your students?

3 A. I didn't think he was any better than anyone
4 else.

5 Q. No, no, no. Do you believe that you knew
6 Roger?

7 A. That I know Roger better?

8 Q. Yes.

9 A. Well, I probably did, but I tried to know all
10 my students because I found out that's the only way that
11 you can get close to them.

12 Q. Compared to all the other students that you had
13 and all the children that you have known in your life,
14 would it be fair to say you saw Roger as a normal, average
15 kid like the rest of them?

16 A. Well, he wasn't like all the children. We have
17 a group, we call them hyperactive. I don't know, maybe
18 that's not the word I should use, but they're just always
19 ready to go, you know, ready to do something, and -- I
20 don't know if that's the word that I should use or not.

21 Q. Well, was he outgoing like a lot of kids?

22 A. Yes. He was outgoing, very friendly.

23 Q. Was he friendly like a lot of kids?

24 A. He was friendly, yes.

25 Q. Was he interactive with kids like a normal kid?

1 A. Yes.

2 Q. In your estimation, do you think he's a nice
3 kid?

4 A. Well, of course I do, yes.

5 MR. ZACK: Nothing further.

6 A. I mean, I could see his faults as well as his
7 good points, you know, but -- you know, when we love
8 someone, I guess we want to see the good points, don't
9 we?

10 REDIRECT EXAMINATION

11 BY MR. DICKEY:

12 Q. What type of faults did you observe in Roger?

13 A. Well, his smoking habit was one that I told
14 him, you know, wasn't good for his health. And
15 especially, you know, being a physical education teacher,
16 I knew that was definitely against his health, you know.
17 And I also encouraged him to go to worship services with
18 me and things of that type.

19 Q. Did you ever know him to drink alcoholic
20 beverages?

21 A. I don't know of it. I have heard that he did,
22 and I am sure he did. From what they tell us in school,
23 you know, about 85 percent of teen-agers do drink, but to
24 my knowledge, I don't know.

25 Q. But you never observed it?

1 A. Pardon?

2 Q. But you never observed it?

3 A. No, I didn't.

4 MR. DICKEY: No further questions.

5 THE COURT: Anything else, Mr. Zack?

6 MR. ZACK: No, Your Honor.

7 THE COURT: Thank you. You can step down. Mr.
8 Dickey?

9 MR. GAVIN: Your Honor?

10 THE COURT: Yes?

11 MR. GAVIN: We would call Brenda Murray to the
12 stand.

13 THE COURT: Okay. You were sworn in yesterday also.

14 BRENDA MURRAY: Yes, sir.

15 BRENDA MURRAY,
16 having been previously sworn by the clerk, was examined
17 and testifies as follows:

18 DIRECT EXAMINATION

19 BY MR. GAVIN:

20 Q. Good morning, ma'am.

21 A. Good morning.

22 Q. Could you state your name for the Court,
23 please?

24 A. Brenda Murray.

25 Q. And your address?

1 A. San Antonio, Texas.

2 Q. Okay. What is your relationship to my client?

3 A. I am his mother.

4 Q. How long did you raise Roger for? How long
5 were you in the household when Roger was young, was
6 growing up?

7 A. 'Till he was 14.

8 Q. Ma'am, I'm going to ask you some questions
9 about medical problems Roger had as a child.

10 A. Okay.

11 Q. Did you ever -- did Roger ever have any broken
12 bones?

13 A. Oh, yeah. He's had -- broke two, broken arms,
14 broken collarbone, busted head. Yup.

15 Q. Did that seem pretty excessive to you?

16 A. Well, it started when he hit 1st grade on
17 through to, I guess he was about 13, the last broken
18 bone.

19 Q. How did he get those broken bones in most
20 instances?

21 Was there a pattern to that?

22 A. Well, I'd say he broke his arm the first time
23 on a slide, sliding down a sliding board. The second time
24 he fell. I'm not sure how he fell. The collarbone, he
25 fell off a horse and broke. And the busted head, he

1 slipped on the ice running around the barn.

2 Q. You heard his Aunt Ruby testify that she
3 thought he was hyperactive?

4 A. Oh, definitely hyperactive.

5 Q. What type of things would he do regarding
6 hyperactivity?

7 A. Oh, he was just wanting to be on the go all the
8 time. He was always doing something. Getting in the hay.
9 It's -- running through the fields. Just on the go all
10 the time.

11 Q. How was his attention span? Did that
12 hyperactivity seem to affect that?

13 A. Sometimes.

14 Q. How's that?

15 A. Well, sometimes he just wasn't interested in a
16 whole lot. He'd rather be out doing some -- other times
17 he'd want to sit down and read. Most of the time he'd
18 want to be up doing something.

19 Q. Could he stay at any activity for a long
20 period, or did he have to change?

21 A. Sometimes he could, yeah. Come into sports, he
22 stayed at it.

23 Q. Roger liked sports?

24 A. Yeah, he did. When he was six years old he
25 started sports. He was playing football when he was six.

1 Q. Okay. What about other medical problems, Mrs.
2 Murray?

3 A. Well, he was running fevers back -- let's see.
4 He was about in the 2nd and 3rd grade, he run a fever at
5 104 and 105, and they never did figure out what it was.

6 Q. How long did he have that fever for; do you
7 remember?

8 A. It run on and off for about six, seven months,
9 and we put him in a hospital and -- but they couldn't find
10 out what it was.

11 Q. I am sorry?

12 A. They never did figure out what it was. The
13 doctors didn't know what caused it.

14 Q. When you say six or seven months --

15 A. Now, it would pop up, you know, maybe once or
16 every two or three weeks. There for a while it was going
17 on for every couple days, and he'd have them at school and
18 the school would not call me or anything. And I had rode
19 to the bus stop, picked him up, and find him lying on the
20 side of the ground burning up with a fever, he couldn't
21 walk down the hill, and I'd call the doctor, take him in.
22 By the time he got there, though, it was already gone.
23 So, they put him in the hospital, and they couldn't find
24 out what it was.

25 Q. Why wouldn't the school call you regarding

1 those fevers?

2 A. I have no idea. It's just a country school.
3 They didn't pay a whole lot of attention to things like
4 that.

5 Q. Didn't they believe Roger had a fever?

6 A. Evidently they didn't.

7 Q. Did you say -- did you just say that you found
8 him in the roadway?

9 A. Yeah. He got off the bus and laid down at the
10 foot of the hill. Our driveway was like a quarter of a
11 mile down, and he didn't have the energy with the fever to
12 walk down the hill.

13 Q. Okay. Now, these fevers you said went on for
14 several months.

15 How long would the average fever last?

16 A. Sometimes overnight, sometimes just -- it would
17 pop up and go down in three or four hours.

18 Q. That was usually about 104, 5; is that correct?

19 A. Yeah. More than once I throwed him in the
20 shower to get it down.

21 Q. Okay. Did his father ever take him to the
22 hospital regarding his fever?

23 A. No. I took him.

24 Q. Why didn't his father take him?

25 A. He just didn't believe in doctors.

1 Q. He didn't believe in doctors?

2 A. No. I don't think so. To him, you know, it's
3 all in your head. I mean, he trained me. If I -- if I
4 thought I was sick, it was in my head, I was never sick.
5 I still, to this day -- because, you know, you condition
6 yourself.

7 Q. Did his father ever place his hand on Roger's
8 forehead? Did he ever feel a fever?

9 A. No.

10 Q. Did he ever take an interest in Roger's --

11 A. No, not really. I mean, when they are sick,
12 that was my problem, not his.

13 Q. Ma'am, Aunt Ruby mentioned the fact that Roger
14 was injured with an ax.

15 Do you recall that incident?

16 A. I sure do. That was -- he was 15, 16.

17 Q. If you went into a little detail what
18 happened --

19 A. I sure can. He chopped his foot wide open, and
20 his dad refused to take him to the -- his father refused
21 to take him to the hospital.

22 Q. Why was that?

23 A. I don't have no idea. I was divorced from him
24 then, and he his wife didn't allow me to come see my kids
25 there, so my daughter had went over there and she took him

1 to the hospital, and he stayed in the hospital for a week.

2 Q. Do you remember what daughter that was, ma'am?

3 A. Yeah. It was Shonna.

4 Q. Shonna.

5 A. And the doctor said it's a miracle he didn't
6 lose his foot because it cut the ligaments and everything.
7 They had to put pins and everything in it. He stayed in
8 the hospital for a week, then he had to go back.

9 Q. Did they have to do surgery on his foot?

10 A. Yeah. They done some surgery, but I am not
11 sure what all they done.

12 Q. Did his father visit him in the hospital when
13 he was in there?

14 A. No, sir. I stayed there the whole time he was
15 in there.

16 Q. You were there the whole time?

17 A. I was there the whole time.

18 Q. What about other problems, ma'am, regarding his
19 bladder?

20 Did he have problems as a child regarding --

21 A. Roger? No, not really.

22 Q. Are you familiar with the term, anuresis?

23 A. No, not really. I don't know.

24 Q. Bed wetting?

25 A. No.

1 Q. Did Roger have any problems along those lines?

2 A. Roger? Not really, after he got, you know,
3 normal age. About three or four years old, and stopped,
4 you know. No, not really.

5 Q. Did he ever get out of bed and urinate in the
6 corner of the room?

7 A. No. I don't remember him doing it. I know he
8 used to sleep walk.

9 Q. He used to sleep walk?

10 A. I used to find him outside.

11 Q. Did you take him to a doctor regarding sleep
12 walking?

13 A. No.

14 Q. How about his father?

15 A. No.

16 Q. Can you recall any other medical problems that
17 Roger may have had as a child?

18 A. No. Right now, I can't.

19 Q. Aunt Ruby mentioned smoking. Do you remember
20 him starting to smoke?

21 A. Oh, yes, sir. He used to steal my cigarettes.

22 Q. Used to steal your cigarettes?

23 A. Yeah, they did.

24 Q. What age was that, ma'am; do you recall?

25 A. He was probably 12.

1 Q. 12 years old?

2 A. Yes. And I'd get onto him, lecture him, and
3 promise, mom, I won't smoke no more. Sneak right back
4 around and do it again, just like all boys.

5 Q. Did your other children also do that?

6 A. Well, my girls -- my older girl didn't start
7 smoking 'till she married. My youngest one does not smoke
8 today. The boys both smoke.

9 Q. Aunt Ruby mentioned that Roger at one time had
10 hit his head, apparently on the sidewalk.

11 Do you remember that incident?

12 A. No. I was never told about that.

13 Q. Okay. You -- he was not -- you were not in the
14 home when that happened?

15 A. No. They was at a cattle sale. Now, I was in
16 the home. They never come home and told me about it.

17 Q. His father never told you about that incident?

18 A. No. To him it was nothing.

19 Q. What was your husband's opinion of doctors?

20 A. Well, I don't think he liked doctors. He would
21 never say, but he would never go to one, and he didn't
22 care for his kids going. He didn't want his kids going.
23 He was afraid it was a penny out of his pocket, if you
24 want to know the truth about it.

25 Q. Let's talk about Ken for a few minutes, Roger's

1 dad, since we are on the subject.

2 What type of discipline would Ken give Roger?

3 If Roger did something wrong?

4 A. Well, it's according to how mad he got at
5 them.

6 Q. At his maddest?

7 A. At his maddest, he'd use his fists.

8 Q. How would he use his fists?

9 A. Well, he'd just tell him, if you are going to
10 act like a man or you're going to be a man, I am going to
11 whip you like a man. And I have seen him do it when he
12 was 10, 11 years old.

13 Q. And he'd strike Roger?

14 A. Yes.

15 Q. With a -- his closed fist?

16 A. Yes.

17 Q. When he was 10 or 11 years old?

18 A. Yes.

19 Q. Do you remember why, what incidents
20 reciprocated that?

21 A. It was something to do about the farm and
22 something Roger didn't want to do that his dad wanted him
23 to do. I don't remember exactly what it was.

24 Q. How would you characterize Ken? Was he a
25 strict disciplinarian?

1 Was he -- did he care about the children? Was
2 he lax?

3 A. I don't know whether he was strict. He just --
4 he didn't voice any opinion about anything. He -- it
5 didn't matter to him, you know, if they played ball or
6 stayed home or -- I really don't know what he -- his
7 opinion would even be, because he never --

8 Q. Did he seem to care about the children, about
9 Roger specifically?

10 A. Yeah, he did. Up 'till, I guess 'till -- well,
11 just before we divorced, and then he just totally -- I
12 think he tried to forget he even had kids, if you want to
13 know the truth.

14 Q. Aunt Ruby mentioned he was involved in sports?
15 Roger?

16 A. Right.

17 Q. Did his father ever attend any of Roger's sport
18 activities?

19 A. Pardon?

20 Q. Did Roger's father ever attend any of his
21 sporting activities?

22 A. Sometimes the football games. But, not very
23 often.

24 Q. Did he ever go hunting with him?

25 A. With Roger? I think maybe once.

1 Q. How would you characterize their relationship?
2 Was it close, distant?

3 A. No. It wasn't close at all.

4 Q. Maybe we could switch a little bit here.

5 A. Okay.

6 Q. Let's compare you to Ken as far as discipline.
7 Did you agree with Ken's approach to discipline?

8 A. No. We had several disagreements over it.

9 Q. And how did you disagree with him?

10 A. Well, when he decided he wanted to use the
11 belt, he used a belt. I mean, if he decided to use his
12 fist, he used a fist. A lot of times I did keep things
13 from him because I knew what he did, he would do.

14 Q. You would keep things from Roger's father?

15 A. Right, because I knew exactly what he would do
16 to him.

17 Q. What would that be, ma'am?

18 A. He would beat on him.

19 Q. Physical retaliation?

20 A. Right.

21 Q. And he would use not only closed fists, but a
22 belt; is that what you said?

23 A. Yes.

24 Q. What type of belt was that?

25 A. A belt about yay wide. (Indicating)

1 Q. And he would strike Roger with it?

2 A. Oh, yeah.

3 Q. Where would he strike him?

4 A. Anywhere he could hit. I --

5 Q. All over his body?

6 A. Yeah.

7 Q. His face and head, also?

8 A. Well, he's popped him a few times on the head,
9 yes.

10 Q. Ma'am, you eventually divorced from Roger's
11 father; is that correct?

12 A. Yes.

13 Q. Do you know what kind of an effect that had on
14 Roger?

15 Did you notice anything?

16 A. Oh, yeah. It tore him apart. From the day
17 Roger was born up to the day that we divorced he seen his
18 dad every day. He was there. Roger respected his dad.
19 It didn't matter what his dad done to him, Roger was --
20 thought there was nobody but his dad. But, his dad done
21 things before we divorced, and --

22 Q. What type of things, ma'am?

23 A. Well, of course, Ken was a womanizer. He went
24 with these women, and the thing is, he was staying in a
25 trailer, this is in Muscle Shoals, and Roger stayed with

1 him on weekends. But, he got to taking his women in there
2 and Roger caught him. Of course, he called Roger a liar,
3 denied it and, you know, Roger just lost all faith and
4 confidence in his dad after that.

5 Q. So, Roger actually saw him with other women?

6 A. Right.

7 Q. While you were still married?

8 A. And he caught him, and his dad called him a
9 liar.

10 Q. Did you believe Roger?

11 A. Yeah, I believed Roger. I knew it was going
12 on. That's something that you try to protect your kids
13 from.

14 Q. We have heard other testimony, and I believe
15 you testified yesterday.

16 Did Ken own a book -- or, did he run a
17 bookmaking operation?

18 A. That's what he done for a living.

19 Q. What type of activity did that involve, ma'am?

20 A. You set beside a telephone, people call you and
21 make bets with you, and you go collect the money and you
22 pay.

23 Q. People would call your house and make bets?

24 A. Yes, sir.

25 Q. Did Roger ever answer the telephone when people

1 trying to place bets would call --

2 A. Yes.

3 Q. -- that you know?

4 A. Yes. He's answered the phone. They never
5 dealt with him, but he has answered the phone.

6 Q. As far as you know, Roger and the other
7 children knew what was going on regarding that activity?

8 A. Yeah. They knew what was going on. It went on
9 'till '83.

10 Q. Were they ever told that was wrong, that was
11 against the law?

12 A. Yeah. But -- but, you know, if they seen their
13 dad do it, they don't figure it was too bad.

14 Q. Did his father ever tell him that it was
15 against the law?

16 A. No. His dad's philosophy is somebody's going
17 to get their money, he might as well.

18 Q. We heard testimony yesterday regarding Robert,
19 that Robert worked with his father.

20 Did Roger ever work for his father?

21 A. Roger worked for his dad on the farm, and when
22 he opened the club, he put Roger to work in the club.

23 Q. He worked in a nightclub?

24 A. Right.

25 Q. What did Roger do in the nightclub?

1 A. He is -- was what you call a bar-back. He
2 carried ice and took the beer and the liquor to the bars.
3 I guess he started when he was 15.

4 Q. 15 years old?

5 A. Yes. And he never got paid for it. His dad
6 didn't dish out money easily. At any time.

7 Q. What was his -- why wouldn't his father pay
8 him?

9 A. I don't know. I guess he felt that that was
10 their job to work for him. Now, he paid Robbie, but
11 Robbie had a family to support. But, you know, he didn't
12 pay Roger, although Roger was living with me at the time.
13 It wasn't like he was living in the house with his dad.

14 Q. So, he wasn't earning his keep with his father,
15 he was living with you?

16 A. He was living with me.

17 Q. At the time Roger was working with his dad, how
18 were his grades at school?

19 A. He wasn't in school.

20 Q. He wasn't in school?

21 A. No. By the time he was 16 he was not in
22 school.

23 Q. Why wasn't he in school, ma'am?

24 A. He just -- I don't know. Well, he went -- he
25 had a lot of problems when the tombstone thing, and they

1 had asked me if he was on drugs and alcohol, and I said
2 no, but I don't know whether he was or not. You know, at
3 that time he -- we was going through a lot of problems
4 during the divorce and all, and I sent him to Birmingham
5 for evaluation and study. He went to school there.

6 Q. Who was having a lot of problems during the
7 divorce? Was it the whole family, or just Roger?

8 A. Basically all of them was. I believe it really
9 shocked them.

10 Q. When all this was going on, how was the
11 supervision of Roger?

12 A. Well, I tried to keep track of him. Sometimes
13 you couldn't because -- he run across this little boy
14 where he lived at when I -- I didn't know at the time that
15 went on, was on drugs.

16 Q. A friend of Roger's was on drugs?

17 A. Well, I wouldn't call him a friend, an --

18 Q. An associate?

19 A. Yes. It was a neighbor, and he'd sneak out
20 with the boy.

21 Q. His father ever tell him to stay away from that
22 boy?

23 A. No.

24 Q. What about you?

25 A. Oh, yeah. I told him. But, you know, kids

1 don't always listen to what you -- what you tell them.

2 Q. Getting back to Roger's school. You said he
3 was out of school by the age of 16?

4 A. Yeah.

5 Q. Did he have academic problems when he was a
6 young child?

7 A. Roger didn't have any problems in school 'till
8 -- like I said, most of his problems started after the
9 divorce. There was never any trouble with Roger. He went
10 to school, no problem. And he just -- he got to where he
11 just really didn't care.

12 Q. Why do you think that is, ma'am?

13 A. Well, because his dad shunned him. I mean, his
14 dad would not come and see him after we divorced. If they
15 seen their father, I had to take them to him, pick them
16 up, because he refused to come and get them. They didn't
17 care if they come to his house or not.

18 Q. And you said before Roger really looked up to
19 his father?

20 A. He did, no matter what he done to him.

21 Q. Did he seek his father's approval?

22 A. Pardon?

23 Q. Did he seek his father's approval in the things
24 that he did?

25 A. Yeah, he did.

1 Q. Did he ever get that approval?

2 A. No. I don't think so.

3 (Mr. Gavin is conferring with Roger Murray.)

4 Q. Ma'am, do you recall an incident when Roger was
5 apparently at his father's house and was struck in his
6 jaw?

7 A. Yes, I remember that. It was --

8 Q. Can you relate to the Court briefly what
9 happened?

10 A. Well, Roger was staying, him and Angie was
11 there for the weekend.

12 Q. Where were they, ma'am?

13 A. They were at his dad's house in Muscle Shoals,
14 and the lawn mower tore up, and his dad whipped him for it
15 and he socked him in the jaw. He didn't break it or
16 anything, but he bruised him up pretty good, then brought
17 him back to his house and said he never wanted him at his
18 house again.

19 Q. Did he say that in front of Roger?

20 A. Oh, yes. More than once he said things like
21 that.

22 Q. Ma'am, did you ever make any attempts to get
23 Roger back into school once he was out?

24 A. Yeah, I tried.

25 Q. What happened?

1 A. Roger just wouldn't go. I put him in school
2 and he'd sneak off. He had -- just didn't care anymore
3 about school.

4 Q. Did you have a lot of problems with Roger
5 regarding the law when he was a child?

6 A. No. Roger never got in trouble 'till after he
7 was 14 years old. He was almost 15.

8 Q. Around 14, 15, he started getting in trouble?

9 A. Uh-huh.

10 Q. Do you remember what type of things he got in
11 trouble -- what type of things he did?

12 A. He really didn't do anything but the tombstone
13 thing, and then this. I wasn't even in the state when he
14 got in trouble the last time.

15 Q. The tombstone incident, do you remember what
16 happened with that? Briefly?

17 A. Yeah. They snuck out of the house and went
18 with this Scott White, which I found out later was an
19 alcoholic and was on drugs, which I didn't know at the
20 time.

21 Q. What happened with the tombstones, ma'am?

22 A. They just tipped some over, and then they got
23 caught.

24 Q. What happened to them; do you remember?

25 A. Yeah. It's when Roger got sent to Birmingham,

1 and the other boy got sent to rehab because he -- I would
2 not say that Roger was on drugs and alcohol because I
3 didn't think he was, but right now I am not sure.

4 Q. Did you ever discipline Roger regarding that
5 incident?

6 A. Yeah, I disciplined him. But -- he obeys
7 discipline. He spent a year away from home. First time
8 ever away from us.

9 Q. Ma'am, I realize you left the house when Roger
10 was approximately 14 years old?

11 A. Uh-huh.

12 Q. What was the relationship between Roger and
13 Robbie before you left?

14 Robert's your other son?

15 A. Well, they were just brothers, ordinary
16 brothers. They got along. They fussed, they'd feud, just
17 like the girls fussed and feud, and they'd take each other
18 apart and they'd argue amongst each other. You know, just
19 normal.

20 Q. The problem with the law and the problems that
21 he had in school, did you ever seek to get him psychiatric
22 help?

23 A. Oh, yeah. I took him. Doctor said there
24 wasn't nothing wrong with him but he was a spoiled brat,
25 that he clings to his mama too much. That was it. That's

1 what his daddy said. That's what the dad told his
2 psychiatrist.

3 Q. The psychiatrist told you he was just a spoiled
4 brat?

5 A. Yeah.

6 Q. That he had no other psychological problems
7 that he could see?

8 A. Yeah. Exactly. That's what he said.

9 Q. That was one psychiatrist that you took him to?

10 A. Yes.

11 Q. Did you agree with him?

12 A. No. I didn't agree with him.

13 Q. Did you take him to another psychiatrist?

14 A. I can't. That took money. I had no money, and
15 his dad didn't want to pay for nothing. I mean, I had to
16 fight him tooth and nail to get child support, then he
17 finally quit paying that.

18 Q. Despite what the psychiatrist said, do you
19 believe Roger needed help?

20 A. Oh, yeah. Roger was having a lot of problems
21 then. He wasn't out getting -- out getting in trouble,
22 but he needed somebody to talk to.

23 Q. And as far as you know, he didn't get that
24 somebody to talk to?

25 A. No. When he went to Birmingham and they give

1 him psychiatric treatment and talked to him, and he talked
2 psychotic first of all, then --

3 Q. Once he got out of there, was there any
4 additional help for him?

5 A. No. They just -- no.

6 MR. GAVIN: No further questions, Your Honor.

7 THE COURT: Mr. Zack?

8 CROSS-EXAMINATION

9 BY MR. ZACK:

10 Q. How old were you and -- strike that. How old
11 was Roger when you and Kenneth got divorced?

12 A. He was 14, a little over 14.

13 Q. I am a little confused. You say after you got
14 divorced Kenneth wouldn't have anything to do with Roger?

15 A. He didn't have anything to do with any of his
16 kids.

17 Q. But, at age 15 Roger's working for him at the
18 club?

19 A. Well, yeah.

20 Q. And --

21 A. That doesn't mean he had anything to do with
22 him, he just put him in there. Actually Robbie put him in
23 there to keep him off the street because he had nothing
24 else to do.

25 Q. You mentioned once when -- well, when Roger cut

1 his foot with an ax, that he was living with Kenneth and
2 his wife at that time?

3 A. That's because he had no choice. His daddy
4 couldn't pay child support, and I wasn't making enough
5 money to support them.

6 Q. So, he was back with his father for some time
7 after the divorce?

8 A. Right. Not because his dad really wanted him
9 there.

10 Q. How long was he back with his father?

11 A. How long was he there? He was probably there
12 six months.

13 Q. When you were still married to Kenneth, you
14 mentioned that his father would hit him with his fists.

15 How often did you see his father hit Roger with
16 his fists?

17 A. Well, he didn't do it 'till he got older. He
18 was about eight years old, nine. Probably half a dozen
19 times or so over a five year period.

20 Q. You saw Roger's father hit him with his fists
21 six times?

22 A. Average about a year apiece. He'd yell, and he
23 really throws a temper tantrum.

24 Q. How often did you see his father hit Roger with
25 a belt?

1 A. Oh, not that often, because -- he used to use a
2 big old switch.

3 Q. How often did you see him hit Roger with a
4 switch?

5 A. Quite often.

6 Q. How often?

7 A. How often?

8 Q. How many times a year?

9 A. How many times a year? I don't know. There
10 was a lot of times. I don't count it. I didn't.

11 Q. Was it once a month?

12 A. Probably.

13 Q. Is that about accurate?

14 A. A month, yeah. Once or twice a month.

15 Q. So, it would be untrue then if someone said
16 that his father beat him with sticks and a belt at least
17 once a day?

18 A. Yeah. I can't say that.

19 Q. Would that be untrue?

20 A. That would be untrue.

21 Q. How often would his father yell at Roger?

22 A. Oh, he yelled all the time.

23 Q. What did he yell about?

24 A. What did he yell about? A lot of things. I
25 mean, he yelled at them if they wouldn't take his boots

1 off after work.

2 Q. Constantly?

3 A. Not constantly. He yelled all the time, and
4 it's one of them things you usually try to stay out of the
5 room or out of the house.

6 Q. Prior to the divorce did Roger and his father
7 get along? I mean, you say Roger respected his father?

8 A. Yeah.

9 Q. Would you say they got long?

10 A. Yeah.

11 Q. Would you say they got along prior to the
12 divorce?

13 A. Yeah.

14 Q. So, it would be untrue if someone said that
15 Roger and his father never got along up to the age of 15?

16 A. I wouldn't say they never got along. They --
17 Roger would have respected his dad, it didn't matter what
18 his dad done to him. Both my boys did. They'd set and
19 take whatever he dished out and never say a word.

20 Q. Do you agree with, Roger's father didn't get
21 along, in fact --

22 A. Pardon?

23 Q. You would agree Roger and his father did get
24 along prior to the divorce?

25 A. Yeah. I mean, they got along. The biggest

1 thing is, Roger was resentful to him. Well, he lost
2 respect when his dad stood and called him a liar and stuff
3 like that.

4 Q. And that was what age?

5 A. Roger was 14.

6 Q. Prior to the break up of your marriage and when
7 you were still living with Kenneth, was there always food
8 on the table?

9 A. Oh, yeah.

10 Q. Always clothes?

11 A. Yeah. I mean, may not have been the best in
12 the world, but there was clothes.

13 Q. Nobody went hungry in the family?

14 A. No.

15 Q. Nobody went unclothed?

16 A. No.

17 Q. Did you celebrate birthdays, Christmas,
18 holidays?

19 A. We celebrated. It's not because his dad wanted
20 to. His dad didn't believe in Christmas and holidays.

21 Q. Did Roger get presents from you and other
22 people on his birthday?

23 A. Sometimes. Not always.

24 Q. What else? Did he get Christmas -- did he get
25 presents?

1 A. Oh, yeah.

2 Q. Would Roger get in fights when he was a kid?

3 A. In fights? No. Not really. He fought with
4 his sister.

5 Q. How about fights with other kids at school or
6 anything like that?

7 A. Well, no more than any other kid did.

8 Q. Do you ever notice if Roger ever got hit in the
9 head with a cross-tie in some accident?

10 A. I don't know, but I kind of doubt it. They used
11 cross-ties a lot at the farm.

12 Q. You don't have any knowledge?

13 A. But, like I said, if it didn't happen where I
14 seen it, it wasn't told. It didn't matter what it was, I
15 was never told.

16 Q. Did you ever see Roger have seizures?

17 A. Pardon?

18 Q. Did you ever see Roger have seizures?

19 A. No.

20 Q. Roger eventually got his high school diploma,
21 didn't he?

22 A. Yes.

23 Q. Pardon me?

24 A. I think so.

25 Q. And didn't he take one college credit?

1 A. Yeah. He -- he got a certificate to be a
2 paralegal.

3 Q. Where is that from?

4 A. That's when he went to jail the last time.

5 Q. Do you know any occasion where Roger lost
6 consciousness?

7 A. Not around me.

8 Q. And when Roger was a child, was he allowed to
9 participate in school activities, and wanted to?

10 A. Yeah.

11 Q. Would you be there at home when he got off
12 school to take care of them?

13 A. Yeah, always.

14 MR. ZACK: Nothing further.

15 THE COURT: Mr. Gavin?

16 REDIRECT EXAMINATION

17 BY MR. GAVIN:

18 Q. Getting back to what Mr. Zack brought up, how
19 much time did his father spend with Roger? When he was
20 growing up?

21 A. When he was growing up? Not really a lot of
22 time.

23 Q. Was he busy with his job?

24 A. Oh, yeah.

25 Q. Was he busy with his bookmaking?

1 A. Right.

2 Q. Was he busy with his women friends?

3 A. I don't know about his women friends. I don't
4 know anything about that 'till in '84. That's when I
5 found out what was going on. Other than -- if anybody
6 told me he was messing around, I would have denied it.
7 So, I really -- he was gone a lot during the day and
8 evenings when he was supposedly out doing his job. So, I
9 don't know what he done.

10 Q. You hear in the media a lot about quality time,
11 parents and children and quality time.

12 Did he give them a lot of quality time?

13 A. No. Didn't give them much time at all.

14 Q. Does Ken know about what is going on out here
15 in Arizona?

16 A. Yes, sir, he does.

17 Q. He knows that both Roger and Robbie are facing
18 some very serious charges?

19 A. Yes, he does. And that they have been
20 convicted. Yes, he does. He knows.

21 Q. Yet, he's not here today?

22 A. No. He's not here today.

23 Q. Do you have any explanation for why he may not
24 be here today?

25 A. I have no idea. I don't try to guess him. I

1 have no idea.

2 Q. Do you think --

3 A. I didn't ask him.

4 Q. Is it just a question of finances?

5 A. No. He could afford it.

6 Q. He chooses not to be here today with his sons,

7 correct?

8 A. Right. He chooses not to be.

9 Q. Mr. Zack brought out the fact that Roger was
10 struck with a fist maybe only six times.

11 Is it ever permissible to strike a child with a
12 fist?

13 A. Never. I didn't say he was struck just six
14 times.

15 Q. I am sorry.

16 A. He's been hit on more than one time with about
17 six different occasions. Ken Murray never stopped at one
18 time at anything.

19 Q. He would punch him more than once then?

20 A. Right.

21 Q. How many times would he punch him?

22 A. Until you either get between him or he wore
23 himself out. A lot of times -- I know, I have taken some
24 of them hits. I have had my ribs broke from him several
25 times.

1 Q. You have been struck by Ken also?

2 A. Yes.

3 Q. And you have been injured?

4 A. Yes. That's how nobody ever knew. That's
5 something that you don't tell.

6 Q. Did you and Roger ever get your Christmas
7 presents that made up for that striking?

8 A. Pardon?

9 Q. Did you ever receive Christmas presents that
10 made up for those blows?

11 MR. ZACK: Objection. Argumentative, speculation.

12 THE COURT: Sustained.

13 Q. BY MR. GAVIN: You said Roger's father would
14 hit him with things other than his fist?

15 A. He used a belt or switch, yeah.

16 Q. And you said about once a month?

17 A. A average.

18 Q. Apparently -- did he believe in corporal
19 punishment, striking his children for discipline?

20 A. I guess he did, he done it.

21 Q. What about you, ma'am? Did you subscribe to
22 that?

23 A. No. I used a, like a little hickory switch a
24 few times, but mine was mostly sent to the bedroom, or
25 forbidden to go somewhere, or grounded, or couldn't use

1 the telephone.

2 Q. So, you used a entirely different system of
3 discipline?

4 A. Yeah.

5 MR. GAVIN: Nothing further, Your Honor.

6 THE COURT: Mr. Zack, any other questions?

7 MR. ZACK: No, Your Honor.

8 THE COURT: Okay. You are excused. We are going to
9 take a short recess while the court reporter changes
10 paper.

11 (A recess was taken from 11:25 a.m. to 11:35 a.m.)

12 THE COURT: Please be seated. Okay. I have been
13 informed by counsel that they need some time before we
14 proceed to the next phase, and for that reason we are
15 going to break until 1:30. I do need to see all counsel,
16 including Ms. O'Neill, back here for a few minutes. So,
17 we are in recess.

18 (A recess was taken from 11:36 a.m. to 1:45 p.m.)

19 THE COURT: Okay. Please be seated. Okay. We are
20 back on the record.

21 Mr. Dickey, are you ready to proceed?

22 MR. DICKEY: Mr. Gavin will be conducting the
23 examination.

24 MR. GAVIN: Yes, Your Honor, we are ready to
25 proceed. Mr. Murray would call John Hewitt to the stand.

1 JOHN DAVID HEWITT,
2 being first duly sworn by the clerk, was examined and
3 testifies as follows:

4 DIRECT EXAMINATION

5 BY MR. GAVIN:

6 Q. Good afternoon, Professor. Could you state
7 your name, please, full name, for the record?

8 A. John David Hewitt.

9 Q. Where do you live?

10 A. Flagstaff, Arizona.

11 Q. What is your occupation?

12 A. I am a professor of criminal justice.

13 Q. Where is that, sir?

14 A. Northern Arizona University.

15 Q. Dr. Hewitt, were you contacted by me regarding
16 this case?

17 A. Yes, I was.

18 Q. Did I ask you to review some documents and
19 listen to testimony here in Court?

20 A. Yes.

21 Q. And you are here for this case?

22 A. Yes.

23 Q. And, Doctor, I am going to ask you some
24 questions regarding your background, okay?

25 Where did you receive your undergraduate

1 education?

2 A. Western Washington State College in Bellingham,
3 Washington.

4 Q. When did you graduate; do you remember?

5 A. 1968.

6 Q. Did you go on to receive a masters degree?

7 A. Yes, I did.

8 Q. Where was that?

9 A. Ball State University in Muncie, Indiana.

10 Q. What subject was that in?

11 A. Sociology.

12 Q. Do you remember approximately when that was?

13 A. I graduated from there, 1969.

14 Q. Did you continue on with your education?

15 A. Yes.

16 Q. Did you receive a doctorate in your field?

17 A. Yes, I did.

18 Q. Where was that from, sir?

19 A. Washington State University in Pullman,
20 Washington.

21 Q. And again, do you remember the date on that?

22 A. 1975.

23 Q. Have you taught in the field of sociology?

24 A. As to sociology and in criminal justice.

25 Q. The first positions that you held?

1 A. In West Virginia, a small state college,
2 Glenville State College, I taught sociology primarily.
3 And the college at Westerville, small private college in
4 Westerville, Ohio, I was an instructor in sociology there.

5 Q. After that did you go on to become an assistant
6 professor anywhere?

7 A. After receiving my doctorate, I was assistant
8 and director at Valparaiso University, Valparaiso,
9 Indiana. Then I went -- I was there one year, and went to
10 Ball State University where I taught in the -- it was
11 combined sociology/criminal justice department the first
12 year, and then we divided off, and I was in the department
13 of criminal justice from then on. I taught there 14
14 years.

15 Q. Okay. Did any of the positions that you held
16 in your past, did they involve research in this field?

17 A. Yes, they do.

18 Q. Do you know where that was?

19 A. Studies in the field of criminal justice,
20 criminology, that is what you're asking?

21 Q. Yes.

22 A. Yes. I was engaged in research on juvenile
23 delinquency and adult crime, violent crime, judicial
24 sentencing, then worked in studies of sentencing revisions
25 and reform.

1 Q. And you stated before that you're now a full
2 professor?

3 A. I am a full professor at Northern Arizona
4 University.

5 Q. What specific department was that?

6 A. Criminal Justice.

7 Q. Do you have experience in your field outside
8 academia?

9 A. Some. I've been on the board of directors of
10 Youth Service Bureau, working with delinquent children.
11 Better Home For Boys just outside of Muncie, Indiana. I
12 was on the board of directors there, and I was responsible
13 for hiring some of the staff and working with some of the
14 counselors and developing programs. Worked at the
15 Rockville Training Center For Delinquent Youth in
16 Rockville, Indiana, and taught on the, probably about 12
17 occasions, courses at the Indiana State Reformatory in
18 Pendleton, Indiana. It's a maximum security prison, the
19 department of corrections.

20 Q. Did you work in -- on both positions that you
21 just mentioned, does that involve a lot of juvenile
22 offenders?

23 A. At Better Home For Boys, Youth Service Bureau,
24 and Rockville Training Center were all juvenile. The
25 state reformatory, I worked with inmates ranging in ages

1 from 18 to probably early 60's.

2 Q. So, you have worked with both children and
3 adults?

4 A. Yes.

5 Q. I am going to address publications that you
6 have been involved with.

7 Do you currently have any books in production?

8 A. I am currently working on a second edition of a
9 textbook on juvenile delinquency. The first edition has
10 been out for a few years now. Currently working on a
11 Introduction To Criminal Justice textbook, and under
12 contract to write a book on criminology.

13 Q. Okay. Since in the early 1980's, have you had
14 a number of other books published or coauthored other
15 books?

16 A. A book that impacts the sentencing reform in
17 Indiana, some other research bibliographies, and about 25
18 or so articles.

19 Q. Okay. What would you say the general topic of
20 those -- I don't expect you to go into every one of those.

21 Generally, what would those articles cover?
22 What type of subjects?

23 A. Oh, over the career, touched on a lot of
24 different subjects. My early work was on judicial
25 sentencing and sentencing discrimination. Eventually I

1 was involved in some of the work on impact of the
2 sentencing guidelines, instituting it in a couple
3 different communities. Did some research on
4 victim/offender relationships in Muncie, Indiana that
5 historically, over time, the changing relationships
6 between victims and offenders and sentence outcomes. More
7 recently I turned my attention to focus on juvenile
8 delinquency, and I have been looking at the role or the
9 relationship of child abuse and neglect in the
10 delinquency.

11 Q. Okay. And those are the books that you have
12 been involved with; is that correct?

13 A. Books and articles.

14 Q. And articles. And those articles date back --
15 you started writing articles back in the '70's; is that
16 correct?

17 A. Probably the first was published in 1976. '75
18 or '76.

19 Q. Okay. Sir, do you hold any professional
20 memberships?

21 A. The American Society of Criminology, and
22 Academy of Criminal Justice Scientists.

23 Q. Okay. Do you have any area of specialization
24 that you feel is your area of specialization?

25 A. Over the past four or five years it's probably

1 been on juvenile delinquency.

2 Q. Okay. I am going to switch gears a little bit.

3 People have an idea of what a psychiatrist is.

4 What does a sociologist do?

5 A. A lot of things. A lot of different fields of
6 sociology. What ties them altogether probably is the
7 focus on the impact of social structures and social
8 processes on human behavior, how people operate within
9 groups, social groups, patterns of socialization. For
10 example, the role of the family, the role of the school,
11 in development of the individual.

12 Q. Okay. And you are a sociologist; is that
13 correct?

14 A. My degree is in sociology. My primary areas
15 are criminology and juvenile delinquency.

16 Q. I assume since you are in this field, can
17 principals of sociology be applied to the criminal justice
18 field?

19 A. Absolutely. This is what the discipline of
20 criminal justice is largely built upon, our sociological
21 principals.

22 Q. That is a recognized field in sociology?

23 A. Criminal justice is largely involved out of
24 sociology. Most academic departments of criminal justice
25 have their origins in sociology departments, and as

1 departments grow and sub-fields emerge and get larger,
2 they tend to break off in universities and develop
3 separate disciplines.

4 Q. Is that discipline, is it safe to say that
5 across the country that is an accepted discipline?

6 A. Yes.

7 Q. What types or forms of data do you utilize in
8 your work?

9 What do you find useful, or what do you rely
10 on?

11 A. Well, again, that depends on the kind of
12 studies that I have done, from survey data, to secondary
13 data analysis, drawing upon court and police department
14 records, to secondary analysis of larger survey data
15 collected by others. As opposed to, for example,
16 psychology may provide more case studies or studies of
17 individual person's opinion, we tend to collect or
18 aggregate data.

19 Q. So, you are more generalized than a
20 psychiatrist who only looks at one person, makes a case
21 study; is that correct?

22 A. Right.

23 Q. You normally don't make case studies in your
24 type of work, do you?

25 A. Not in the field of sociology or criminal

1 justice, no.

2 Q. Professor, I provided you with a number of
3 documents; is that correct --

4 A. Yes.

5 Q. -- regarding this case? Do you recall what
6 some of those documents were that I provided to you?

7 A. The Presentence Investigation Report in this
8 case, school records, early school records, interviews
9 with persons conducted, I believe, in Alabama, reports
10 from a couple of different institutions.

11 Q. Did I show you a report from Dr. Potts?

12 A. Yes. Most recently I saw the report from Dr.
13 Potts.

14 Q. Okay. Did you have a chance to review those
15 documents?

16 A. Yes, I have.

17 Q. Were you in the courtroom today when Mrs.
18 Murray and Ms. Bradford and Angie testified?

19 A. Yes, I was.

20 Q. Did you have any problems hearing what they
21 were saying today?

22 A. No.

23 Q. Have you had an opportunity to speak with Roger
24 Murray personally?

25 A. Yes, I have.

1 Q. And you spoke with him once; is that correct?

2 A. Actually, two separate occasions. Once here in
3 the courtroom at the end of this morning's session, and
4 again over at the jail.

5 Q. Would you have preferred to interview Roger
6 more?

7 A. Oh, absolutely more. Any serious case, if you
8 have a little bit more time to talk with a person.

9 Q. Given that, do you feel comfortable that you
10 have got, heard enough information to make reliable
11 decisions in this case as far as your feelings on it?

12 A. Yes, I do.

13 Q. Given your education and experience, Doctor,
14 the numerous documents that you reviewed, your discussion
15 with Roger, the testimony that you have heard in court
16 today, did you formulate any opinions on this case?

17 A. Yes, I have.

18 Q. Would you share with the Court some of those
19 opinions?

20 MR. ZACK: Your Honor, I object primarily on the
21 relevancy 'till we know what mitigation this goes toward.

22 MR. GAVIN: I will be more specific.

23 THE COURT: That's the same -- be more specific on
24 what you are asking opinions for.

25 MR. GAVIN: Thank you, Your Honor.

1 Q. BY MR. GAVIN: Let's get down to specifics,
2 Doctor.

3 You said that in your work sociologists often
4 look at the dynamics of social groups; is that correct?

5 A. Yes.

6 Q. Families, are they part of what you consider?

7 A. Yes.

8 Q. You have heard testimony today regarding
9 Roger's family; is that correct?

10 A. Yes, I have.

11 Q. Is that correct?

12 A. Yes.

13 Q. Did you read documents that related to Roger's
14 family?

15 A. Yes, I have.

16 Q. Did you form any opinions as to whether that
17 family relationship that Roger enjoyed was a nurturing
18 one?

19 A. Yes, I have.

20 Q. What opinions did you come to, Doctor?

21 A. It is a very non-nurturing family environment.
22 Want me to elaborate?

23 Q. Can you expand on that, please?

24 A. There's a couple things that stand out in it.
25 One is that his father is a very significant figure to

1 him, and was also very abusive, excessive use of corporal
2 punishment, beatings with his fists, with switches, and on
3 occasion with belts. Is a very abusive kind of behavior
4 by any adult towards any child. When it occurs in the
5 home, it takes on a magnified significance. My opinion
6 was that Roger had a strong desire to please his father,
7 to get his father's approval and to get his father's
8 attention. He screwed up a lot in the minor ways, and was
9 not getting that. In fact, he was getting the opposite.
10 He was getting punished often for things that he was
11 either covering up for a sibling, or that he had done that
12 was not terribly serious misbehavior.

13 On the other hand, his mother was apparently a
14 rather caring mother, relatively weak and powerless in
15 that dynamic of mother/father/child. Regardless of the
16 amount of nurturing that she might have provided in his
17 early years, that was more than negated by the abusive
18 behavior by the father. Such abuse is frequently
19 correlated, is broadly correlated, we find, in studies
20 with juvenile delinquency, aggressive behavior, acting out
21 on maladaptive behavior even in adulthood.

22 Q. Doctor, let me rephrase what you are saying.
23 Are you saying that because Roger's father was strict, his
24 mother was perhaps passive, maladaptive behaviors may have
25 stemmed from that type of discipline?

1 A. There are a amount of studies that show that
2 inconsistent discipline in the home, you get harsh
3 discipline, passive discipline, permissiveness by the same
4 parent or by different parents, it's unpredictable for the
5 child often. And inconsistent discipline is more negative
6 in its long term effects than consistent strict,
7 consistent permissive. That can contribute -- the
8 contradictory patterns of child rearing could be
9 contributed to maladaptive behavior, but that
10 contradiction of permissiveness and abusive parenting is
11 probably not as significant as the, what is sometimes
12 characterized as strict discipline. This is more than
13 strict discipline, this is abuse. This is physical abuse.

14 Q. This actually crossed the lines of strict
15 discipline, in your opinion?

16 A. I believe so.

17 Q. Does the frequency of that abuse matter as far
18 as that -- your determination, can you be abused if you
19 are only struck six times with a fist?

20 A. If you are struck six times with a fist, by a
21 parent, in your childhood, that is probably significant.
22 The frequency, if you are struck once with a belt as a
23 child, total, that probably is not going to have much of a
24 serious impact. The combination of being hit with a fist
25 at least a half dozen times, being hit with a switch which

1 would result in welts, and add to that being hit and
2 having your mother intervene and seeing her hit at the
3 same time, it compounds it. These experiences interact
4 and compound one another.

5 Q. What's the effect on a person, Doctor, if
6 they're confronted with all those confounding and
7 confrontational signals?

8 A. Generally, now you have maladaptive behavior,
9 but that maladaptive behavior can take different forms.
10 For some teen-agers it may result in suicide. For others
11 it might become eating disorders, or for others it might
12 simply be psychiatric problems needing counseling, and the
13 child may get the counseling, and they have that for a
14 period of time. The other may take the form of
15 aggressiveness, perhaps even violence, either directed at
16 the family member they see responsible for their
17 frustration, anger, or fear, or towards someone else.
18 Possibly a teacher, possibly some other person in
19 authority. Possibly a neighbor, possibly a stranger.
20 It's difficult to predict any individual, and in later
21 behavior that's a consequence of that particular abusive
22 behavior. But, those are typical outcomes.

23 Q. You say, Doctor, that someone that's abused
24 will have some maladaptive consequences to it?

25 A. I think the literature is overwhelming on that.

1 Children that are abused, there are consequences to this,
2 and generally they are -- they are all maladaptive in some
3 form. It could easily be nothing more than alcoholism as
4 an adult, drug abuse as an adult, becoming a parent and
5 beating your own children then. It will take its forms
6 and its consequence in varied sorts of ways, but they
7 generally are maladaptive. There are very, very few
8 children who are abused who grow up and are truly well
9 adjusted adults.

10 Q. Just because somebody is abused, Doctor, does
11 that mean that they are going to be involved in a murder?

12 A. No.

13 Q. Does that -- that's atypical, isn't it? Is
14 that out of the ordinary?

15 A. It is atypical for anybody. General population
16 it's very atypical, but even among those who are abused,
17 murder is atypical, impulsive. Impulsive, aggressive
18 impulsive behavior is not atypical, acting out is not
19 atypical. Those who are categorized as serial killers
20 are almost uniformly found to be abused as children.
21 That's an atypical kind of person who kills someone.

22 Q. Doctor, you have heard testimony and read
23 documents in this case.

24 Did you form any opinion as to the emotional
25 stability of this particular family that Roger came out

1 of?

2 A. Oh, I think most would characterize it as a
3 dysfunctional family. The relationships were not
4 nurturing, reinforcing. There was a lot of inconsistency,
5 and there were on occasions, abusive, brutal behavior.

6 Q. Now, you mentioned that Roger's mother was
7 powerless; is that correct?

8 A. Well, powerless to overcome the negative impact
9 of his father.

10 Q. Why is that, sir? Why do you think that?

11 A. My impression is, my opinion is that Roger
12 cared more about meeting his father's approval. He cared
13 more about having his father's attention and to please
14 him. Having the outbursts of violence directed at him by
15 his father is not compensated by his mother's attention.

16 Q. So, no matter what his mother bestowed upon
17 him, Christmas gifts, home cooked meals, in your opinion,
18 could that make up for his father's lack of inattention?

19 A. No, not at all.

20 Q. I am sure it will be brought up that most
21 people that are abused, of course, don't become
22 murderers.

23 Are you aware of any studies regarding prison
24 populations? The percentage of abused people that wind up
25 incarcerated?

1 A. There are a variety of studies, more done on
2 juvenile populations, and they range, because studies are
3 done in different states with different institutions with
4 different juvenile populations, but they generally find a
5 range of between 40 percent and 80 percent of the
6 juveniles in the institutions were abused as children.

7 Q. From your studies, Doctor, and your education,
8 the work that you've done in the field, does that number
9 -- is that significantly higher than a normal random
10 population from the outside?

11 A. Yes, it is.

12 Q. You said before that you, as part of the
13 documents that I gave you, that you had reviewed Dr.
14 Potts' examination; is that correct?

15 A. Yes.

16 Q. And I realize Dr. Potts is not in your field,
17 he's in another field.

18 You have had a chance to read through that?

19 A. Yes, I have.

20 Q. And given your slant in your particular field,
21 did anything in Dr. Potts' report that -- was not
22 consistent with what you believed, what your opinions
23 wound up being in this particular case?

24 A. I saw nothing in that report that was
25 inconsistent with my own observations.

1 Q. Getting back to some of those documents that I
2 provided to you, Doctor. As you know from those
3 documents, Roger had a fairly involved criminal background
4 when he was younger, more than most children, let's say.

5 Do you believe the authorities correctly
6 addressed his problem at that particular time?

7 A. No. They seemed to clearly identify the
8 problem, and a number of the evaluations indicated a
9 tendency towards aggression, characterizes passive
10 aggressive or impulsive aggressive, a time bomb waiting to
11 go off. They clearly had seen that Roger was a youth with
12 serious problems, and they didn't seem to address it at
13 all. There was a punitive approach as opposed to a
14 therapeutic approach.

15 Q. Including putting their efforts on a grade
16 scale, with A being excellent and F being a total failure,
17 where would you put these past authorities' dealings with
18 Roger as far as their attempts to address his problems at
19 that point?

20 A. I am usually generous in giving grades out in
21 class, but I'd give a D minus at best. They knew he had a
22 problem here, and for whatever reasons, whether it's state
23 funding, lack of bed space in institutions, too many
24 people coming in the front door, got to push them out the
25 back door. They appeared to give routine custodial care

1 and let him out.

2 Q. Do you believe there's steps that could have
3 been taken back then?

4 A. Oh, I think so.

5 Q. If they addressed that, would have addressed
6 Roger's problems --

7 A. One of the evaluations even suggested clearly
8 that he needs it and he needs it immediately, he needs it
9 very soon or there will be serious problems in the
10 future. Through proper therapy some of the problems that
11 Roger has had individually could have been addressed, very
12 possibly, had the local community been able to intervene
13 in the family, work with Roger within the context of the
14 family, work with his mother. My feeling is that his
15 father may have been likely to not be willing to work with
16 authorities to try and solve these problems, but the rest
17 of the family seemed to be, possibly, so willing. That
18 might have had an impact.

19 Q. Do you believe if Roger's father was perhaps a
20 little more cooperative, he would have got the help he
21 needed?

22 A. Oh, I think if his father had been more
23 cooperative, that would have also indicated a little more
24 care and affection. But, I think clearly had he been
25 willing to go to resources that were available -- I am not

1 sure what resources were available in northwest Alabama,
2 but had he been willing to pay attention to his son's
3 needs and see that there was somebody other than himself
4 that had some needs to be met, it might have been solved
5 back then.

6 Q. The question is going to be asked. We might as
7 well ask it now.

8 Did Roger know that killing is wrong?

9 A. I think so. I think that he probably knew to
10 kill people is wrong. The problem comes in where people
11 have a belief that something is right, something is wrong,
12 and then that belief gets obscured in any given
13 situation. The heat of the moment. We know about
14 possibly obscuring a sense of what is wrong, but also
15 sufficient external stimulus on a person can fog
16 decisions, judgments. And while he may have known
17 sometime before, even earlier the same day, yes, killing
18 is wrong, at any given moment that could have been fogged
19 over, obscured in some way, confused.

20 Q. What type of stimulus, Doctor, would cause that
21 fog-over?

22 A. Alcohol or drugs could. The excitement of a
23 criminal activity could. A robbery. The encouragement of
24 another person could. If a person doesn't have good self-
25 control in general, if there is a lot of impulsive

1 behavior, that moment can be an impulsive act regardless
2 of knowing right and wrong.

3 Q. Let's go back to his family, Doctor, the way he
4 was brought up and discipline systems that we discussed
5 before.

6 Would that have any effect, do you believe, as
7 far as his impulsivity as an adult?

8 A. I don't think he was taught to control that.
9 Much of what I read and what I heard this morning was
10 just, there was not a whole lot of, was the gist of, there
11 was not a whole lot of inculcation of values. There
12 wasn't a religious element in the life. There was not an
13 attempt by his most significant adult figures, his father,
14 to teach him a sense of morality, what was right, what was
15 wrong. In fact, quite the contrary. It appears as though
16 his father, although he would beat him on occasion for
17 misbehavior, often misbehaviors that he was beaten for
18 were infractions of his father's rule.

19 There were occasions where his father would
20 allow or even encouraged Roger to be involved in non law
21 abiding behavior. So, the modeling of correct behavior or
22 legal behavior just wasn't coming through well here. His
23 other significant figure, most significant father figure,
24 was probably his older brother who introduced him to a
25 variety of activities, including illegal activity. So,

1 there's not a strong sense that this family was a social
2 unit in which he was being taught a good sense of moral
3 values.

4 Q. So, role models as far as Roger is concerned --
5 do you believe his father was a good role model?

6 A. Very, very negative role model.

7 Q. In what sense, sir?

8 A. You are talking aggression, taught him to solve
9 problems, or you react to something that's frustrating to
10 you by striking out. He taught him that it was okay to
11 violate the law as you define it, okay to violate it.
12 There was a selfishness, a lack of caring, and I couldn't
13 find the positives in that. He did, in our interview he
14 did indicate that -- Roger indicated his father taught him
15 a lot of things, to drive tractors, bulldozers, helped him
16 learn a lot of skills, but most of these were skills that
17 Roger was learning to the advantage of his father to get
18 something done, not because he was going to prepare Roger
19 for a career to go out in the world to be productive.

20 Q. So, you didn't sense that he was passing this
21 knowledge along as bonding between father and son, only as
22 instruction to another working; is that correct?

23 A. Yeah. And that came through in the testimony
24 regarding working at the club as well. Not getting paid,
25 simply expected to do this work for the benefit of the

1 father.

2 Q. Doctor, do you believe, in your experience and
3 background, that working in a bar at age 15 is a healthy
4 environment for a boy?

5 A. I don't believe it's a very healthy environment.

6 MR. ZACK: Objection. I don't know what expertise
7 he would have on that, based upon his qualifications.

8 THE COURT: Sustained.

9 Q. BY MR. GAVIN: Let's go back to role models for
10 a second, Doctor. We are talking about his father.

11 What about his brother? You had a discussion
12 with Roger. Did he look up to his brother?

13 A. Both with the interview with Roger and from the
14 other documentation, it appeared that Roger looked up to
15 his brother very much. There was about a five year age
16 difference, I believe, and he seemed to admire his older
17 brother.

18 Q. Was his older brother involved in a lot of
19 significant experiences in Roger's life?

20 A. Based on the interview, it appears as though he
21 was significant in introducing Roger to marijuana and
22 perhaps alcohol, and learning about sex.

23 Q. Given that and the other documents that you
24 studied, did you get more of a sense of whether Roger was
25 more of a leader or a follower?

1 MR. ZACK: Your Honor, I think I am going to object
2 to the line of questioning. While certainly the witness
3 has some qualifications as a sociologist, there's no
4 evidence that he's a psychiatrist or psychologist who can
5 talk about an individual as opposed to groups.

6 THE COURT: I agree that there may be something to
7 the objection, so I'm going to instruct the witness to
8 qualify any answer by limiting it to his field of study.
9 So, you may answer that.

10 THE WITNESS: I couldn't hear the last part of what
11 you said.

12 THE COURT: Okay. You may answer with that
13 understanding, keep it within your field of expertise.

14 THE WITNESS: Okay.

15 MR. GAVIN: Do you need the question repeated?
16 Rick, could you possibly have the question repeated,
17 please?

18 Never mind. I have got it, Doctor.

19 Q. BY MR. GAVIN: After interviewing Roger and
20 going through documents, did you come to an opinion as to
21 whether Roger was more of a leader or a follower? Again,
22 staying within your field of expertise.

23 A. I didn't see evidence of being a leader in his
24 activities within the family or at school. He was a
25 member of teams, a football team and baseball team very

1 early, early elementary. But, he was a member of the
2 team, he was not the team captain, he was not apparently
3 the leader of this particular team. He didn't show any
4 evidence of being a leader within the family, either,
5 taking a lead to correct things that went wrong. And he
6 didn't take -- see any sense of leadership in extracting
7 himself from an abusive situation.

8 MR. ZACK: Your Honor, if the witness is going to
9 answer essentially the follow-up question as the Court
10 asked him to do, base that opinion based upon his --

11 THE COURT: Well, Mr. Zack, I will allow you to
12 cross-examine him on that.

13 MR. GAVIN: We have no further questions at this
14 time, Your Honor.

15 THE COURT: Okay. Mr. Zack.

16 CROSS-EXAMINATION

17 BY MR. ZACK:

18 Q. You are a sociologist, correct?

19 A. Yes, I am.

20 Q. You are not a psychiatrist?

21 A. That is true.

22 Q. You are not a psychologist?

23 A. That is true.

24 Q. In fact, your area of expertise is to, as you
25 described earlier, essentially deal with groups and what

1 ramifications that has to society as opposed to individual
2 work-ups?

3 A. It includes the interaction of group
4 experiences on the individual.

5 Q. You testified that abuse can lead to delinquent
6 acts; is that correct?

7 A. Yes, it is.

8 Q. Do you have any studies on how many children
9 are abused and in fact don't commit delinquent acts?

10 A. The studies that exist out there show clearly
11 there are children who are abused that do not become
12 delinquent per se. They do tend to engage in maladaptive
13 behaviors of one sort or another. That may be a decline
14 in academic performance in school, it may be withdrawing
15 from social groups, it may be eating disorders, it might
16 be alcohol eventually. Of course, that's legal, but if
17 they are still youths it would be a delinquent act.
18 There's not much to show that children who are severely
19 abused aren't subject to consequences of that abuse. They
20 do have consequences, and it results in behaviors as
21 youths and as adults that are undesirable.

22 Q. How do sociologists choose those groups to
23 study to determine what made them the way they were?

24 A. Well, some studies focus exclusively on youths
25 who are institutionalized. Others work with youths who

1 are in community service, probation department. Others
2 use high school or junior high populations of
3 non-incarcerated youths. There are a number of studies
4 that use self-report survey instruments ranging from
5 localized studies to national surveys, where youths report
6 on their own delinquent behavior whether or not they have
7 ever been arrested or adjudicated delinquent. Studies
8 done at the University of Colorado by Dale Elliot would be
9 probably the best in that area, and they find that there
10 is reported delinquency and reported abuse in those
11 populations, as well.

12 Q. In the populations of people who do not become
13 criminals?

14 A. Some do not. Yes. These are -- these kind of
15 surveys are of youths not yet even adjudicated. They
16 haven't been arrested necessarily. These are random
17 surveys of youths.

18 Q. And some of those youths, people, who have not
19 committed any crimes, were abused; is that correct?

20 A. They exist in that population, too.

21 Q. Just because somebody is abused does not lead
22 them inexorably towards a life of crime, does it?

23 A. That's true.

24 Q. How long did you speak with the defendant
25 prior to your testimony?

1 A. Perhaps 45 minutes.

2 Q. That was just today?

3 A. Yes.

4 Q. You and I spoke briefly in my office this
5 morning; is that correct?

6 A. That is true.

7 Q. Maybe for about 20 minutes?

8 A. Perhaps.

9 Q. And I asked you then generally what you were
10 going to be testifying about; is that correct?

11 A. Yes.

12 Q. And that is what you have testified about; is
13 that correct?

14 A. I hope it has.

15 Q. What your opinion is now is the same as it was
16 this morning?

17 A. I believe so.

18 Q. And you had that opinion this morning before
19 you ever spoke to the defendant, correct?

20 A. That is true.

21 Q. And you had that opinion this morning before
22 you ever heard directly from the family members of -- the
23 defendant's sister, aunt, and mother; is that correct?

24 A. That opinion is based on my review of the
25 reports that was provided me.

1 Q. Pardon me?

2 A. The material that was provided to me.

3 Q. And was everything the family said today on the
4 stand -- let me back up.

5 You had your opinion this morning before you
6 heard that testimony, the same as it is now, right?

7 A. My opinion is the same.

8 Q. And that opinion was formed before you heard
9 from the family members or talked to the defendant,
10 correct?

11 A. It was in the midst of being formed. I think I
12 realized I would be hearing testimony in the morning, and
13 I realized I would be open to hearing something different
14 perhaps that would change my opinion, but it was largely
15 consistent with what I had begun to form as an opinion.

16 Q. Is it your belief that the testimony you heard
17 this morning is consistent with the written reports that
18 you base your opinion on?

19 A. Largely, yes.

20 Q. And you base part of your opinion on the
21 Presentence Report; is that correct?

22 A. I had read that, yes.

23 Q. And that report that you read prior to today
24 included the defendant telling the probation officer his
25 father would beat him with sticks and a belt at least once

1 a day; is that correct?

2 A. It said that, yes.

3 Q. And that's not what you heard in court this
4 morning, is it?

5 A. No, it is not.

6 Q. Also told the probation that he and his father
7 never got along, so he left home at age 15 or 16; is that
8 correct?

9 A. I believe that's what the PSI says.

10 Q. And that's what you heard testimony of this
11 morning, isn't it?

12 A. The testimony this morning varied from that as
13 well as some of the other materials in the file provided.

14 Q. And Dr. Potts' report said, amongst other
15 things, that he frequently got into fights at school,
16 correct?

17 A. I believe that was the wording, or close to it.

18 Q. And that is not the testimony you heard this
19 morning from the family; is that correct?

20 A. It is not consistent with the -- with what the
21 family said. It does not mean that other school officials
22 might not have verified it.

23 Q. Have you talked to any other school officials?

24 A. No, I have not.

25 Q. Dr. Potts' report also included indications the

1 defendant was a bed wetter, would urinate in the room at
2 night; is that correct?

3 A. It stated that.

4 Q. And that's what you read before today?

5 A. I read that this morning.

6 Q. However, the testimony of the defendant's
7 mother this morning was different than that; is that
8 correct?

9 A. The mother's testimony was different.

10 Q. Did Dr. Potts indicate the defendant did poorly
11 in school?

12 A. I don't recall his observation on that.

13 Q. Are you aware of the testimony this morning
14 that he in fact completed high school and got a college
15 credit; is that correct?

16 A. That was stated.

17 Q. Were you aware of that prior to this morning?

18 A. The record, I recall his school record. I
19 don't recall seeing documentation of college credit. I
20 heard that this morning. The paralegal course, I believe,
21 at the institution.

22 Q. Would it be fair to say that the probation
23 report, Dr. Potts' report, indicate that the defendant got
24 into a lot of trouble as a child?

25 A. I think it showed that he was in trouble as a

1 child.

2 Q. You heard the defendant's mother testify this
3 morning that Roger was not much of a -- did not have --
4 was not much of a problem, didn't get into much trouble
5 until she and her husband got divorced; is that correct?

6 A. Yes. I think then we were talking about two
7 different kind of notions of trouble. Trouble of younger
8 adolescence which may be within the normal range of
9 trouble, versus more problematic trouble as a teenager.

10 Q. The report of Dr. Potts', and -- Dr. Potts
11 indicated he was never treated for any of his problems; is
12 that correct?

13 A. The report states that.

14 Q. And you heard this morning, however, that the
15 mother did take the defendant to a psychiatrist as a
16 child, and the psychiatrist's opinion was that he was a
17 spoiled brat; is that correct?

18 A. That was the testimony.

19 Q. And you also heard testimony that while in the
20 institution in Birmingham, I believe, that he did receive
21 counseling there?

22 A. I recall the testimony saying that he was in
23 the institution, that he was evaluated. I don't recall
24 that he was given counseling, nor do I recall that he was
25 really given counseling from any documentation that I

1 covered. The evaluations, by themselves, are not
2 counseling.

3 Q. Did you review a report entitled Certification
4 Report signed by a Max Todd, dated July 27th, '88?

5 A. I don't recall the signature. It may have been
6 in that file.

7 Q. I will just show you this and see if you have
8 seen that one.

9 A. Yes, I did see this.

10 Q. And doesn't this report in fact state that,
11 Past Treatment Efforts, Roger received counseling from the
12 Franklin County Juvenile Court while he stayed at the
13 Colbert-Lauderdale Attention Home in Sheffield, Alabama.
14 Dr. Joseph P. Sides, Ph.D with the Riverbend Center for
15 Mental Health in Florence, Alabama, evaluated Roger on the
16 27th of December, 1984. The diagnostic impression was
17 that Roger had a conduct disorder, undersocialized, and
18 aggressive. Dr. Sides stated that Roger would remain at
19 odds with society until some drastic steps were taken to
20 change his antisocial behavior. After that, Roger
21 received more than one year of treatment and
22 rehabilitation while at the Alabama Department of Youth
23 Services.

24 Is that correct?

25 A. It states that.

1 Q. Pardon me?

2 A. It does state that. I might add, that we often
3 assume that a person who is in a correctional institution
4 is in fact provided with treatment as opposed to simply
5 custody. And we know the reality of those state systems.
6 There's very little, if any, real treatment that occurs
7 there. It's primarily custody. The fact that he was in
8 an institution and there were counselors in the
9 institution does not, by itself, mean he was given
10 treatment.

11 Q. While we are on that subject, would it be fair
12 to say that for counseling to be effective when it's
13 available, the recipient has to take advantage of it?

14 A. It's more effective if the recipient is
15 positively oriented towards it.

16 Q. And you can have all the counseling in the
17 world provided to somebody who just doesn't care, and it's
18 not going to do any good, is it?

19 A. That is true.

20 Q. Did you read the report of Joseph P. Sides,
21 the consulting psychologist, the evaluation dated December
22 27, 1984?

23 A. I probably did.

24 (Mr. Zack is handing the report to the witness.)

25 A. Yes.

1 Q. Does it appear that that report states, Roger
2 certainly has the intellectual capabilities of succeeding
3 academically, at least through high school; apparently he
4 has always chosen to otherwise; he simply does not care?

5 Doesn't it say that?

6 A. It does say that.

7 Q. You used the word dysfunctional family this
8 morning or this afternoon.

9 What is a functional family?

10 A. One that has a parent or parents that nurture
11 children in the family, that do what they have available
12 to them to do for benefit of the child, care for the
13 child's needs, emotional, physical needs.

14 Q. How many fully functional families are there?

15 A. Not enough.

16 Q. I don't mean that facetiously, but aren't you
17 -- what percentage of families are dysfunctional to some
18 degree?

19 A. The minority of them. Although, if you say
20 dysfunctional to some degree, by to some degree would add
21 everybody in there in all likelihood, but we are not
22 talking about a continuum. You then, obviously -- and
23 some families are more dysfunctional than others. Most
24 families that are most dysfunctional, that have the most
25 elements of dysfunctionality in them, are more clearly

1 identified from those that are rarely or only slightly
2 dysfunctional.

3 Q. Would a severely dysfunctional family probably
4 include divorced parents?

5 A. It could, but not necessarily. Alcoholic
6 parents.

7 Q. It could, but not necessarily. How about
8 parents who refuse to properly clothe their kids?

9 A. That may be purely a function of resources.

10 Q. Let's say they had the resources and didn't
11 care.

12 Would that make a severely dysfunctional
13 family?

14 A. It would not make it, by itself, a severely
15 dysfunctional family, no.

16 Q. Would it be dysfunctional if they just choose
17 not to ever be at home? Either parent?

18 A. That would contribute.

19 Q. Where the children had to come home from school
20 and make their own supper and put themselves to bed, would
21 that be more dysfunctional?

22 A. Not necessarily. It depends on the other
23 dynamics of the family. The children might understand why
24 the parents aren't there, the parents are away at work.
25 They might have -- understand they have these

1 responsibilities and will get the nurturing otherwise.

2 Q. What if the other one was at work and the other
3 one just didn't care and just wasn't around; would that be
4 dysfunctional?

5 A. That would contribute.

6 Q. What about one that, you know, didn't care if
7 their kids got proper meals; would it --

8 A. That would contribute.

9 Q. How about a family that didn't care about
10 birthdays or holidays or Christmas?

11 A. That would certainly add to it.

12 Q. Would you agree with me that there are
13 certainly far more dysfunctional families than the one you
14 heard about with the Murray's?

15 A. Yes.

16 Q. Couple points before I forget. Some of the
17 basis of your opinion, you testified that basis for your
18 opinion -- you testified that the defendant's older
19 brother introduced the brother to criminal activities,
20 marijuana, sex, et cetera.

21 On what basis do you make that statement?

22 A. I made that statement based on Roger's -- my
23 interview of Roger.

24 Q. On anything else but the interview of Roger?

25 A. No.

1 Q. You said that the defendant was not inculcated
2 with values.

3 Certainly he does understand that killing is
4 wrong, doesn't he?

5 A. I believe so.

6 Q. And that robbing is wrong?

7 A. I think so. To qualify that second one,
8 though, the robbing, because he was involved apparently
9 with his father indirectly, taking phone calls in his
10 bookmaking operation. Seeing his father use marijuana.
11 Wrong behavior, taking things or stealing, I think he
12 probably knew it was wrong, but it probably was not viewed
13 as wrong as some other kind of things.

14 Q. Well, would you think that taking money at
15 gunpoint from somebody is more wrong than taking money
16 from a consensual bet?

17 A. Sure.

18 Q. Would you agree that on the day that the crimes
19 for what the defendant's been convicted here, that he knew
20 right from wrong?

21 A. I probably couldn't testify to that day, to his
22 mental state of that day or his condition. I'm not sure
23 if there were tests -- I don't recall seeing tests whether
24 or not he had been using alcohol or drugs in the last 24
25 hours or so.

1 Q. When he got up this morning -- the murders
2 occurred somewhere around midnight. But, when he got up
3 on the morning of that day, did he know right from wrong?

4 A. I think in a general sense, yes.

5 Q. Now, you said that some people don't know right
6 from wrong based upon external stimuli, right?

7 A. Right.

8 Q. Is there any point at which the defendant did
9 not know right from wrong during commission of the crime?

10 A. Well, I think what I was trying to say, it
11 clouds your awareness of right or wrong, or your judgment,
12 your judgment based upon what you might have as knowledge
13 for what is right and wrong. So, it can cloud that.

14 Q. If you were going to form a opinion whether a
15 particular person knew right from wrong, you'd have to
16 know the sequence of events then?

17 A. To know the sequence of events and condition of
18 the person.

19 Q. And knowing what happened during the course of
20 the crime and who was around and exactly what was
21 happening would be important, would it not, for you to
22 form the opinion whether at the time of the offense the
23 defendant knew right from wrong?

24 A. That would be important.

25 Q. What did the defendant tell you about the

1 sequence of events when he committed the crime of murder?

2 A. We didn't talk about that at all.

3 Q. You didn't ask him?

4 A. No.

5 Q. You don't know what happened then during the
6 murders?

7 A. I know from the PSI.

8 Q. Do you know the amount of planning that went
9 into the murders?

10 A. I don't believe there was anything even
11 indicated in the PSI that there was any planning.

12 Q. Well, as to -- for the ability of the defendant
13 to know right from wrong, would it make a difference to
14 your opinion if you knew that he and his brother bought a
15 sawed -- not sawed, but a shotgun two days before the
16 murders and sawed it off?

17 A. Was your question in terms of knowledge of
18 right and wrong?

19 Q. Well, you said you didn't know whether the
20 defendant knew right or wrong at the time of the murder,
21 you couldn't tell because you didn't have enough
22 information.

23 MR. GAVIN: I'm going to object, Your Honor. That
24 is assuming facts not in evidence on this question.

25 THE COURT: Objection is overruled.

1 Q. BY MR. ZACK: Let me -- at the time the
2 defendant killed the victims, did he know right from
3 wrong?

4 A. I would assume.

5 Q. Or are you qualified to answer that?

6 A. I don't think it would be possible to know at
7 that moment, no. I could not answer at that time of the
8 incident, no.

9 Q. Is your answer then you just don't know, or
10 can't know?

11 MR. GAVIN: Your Honor -- I am going to object to
12 this, Your Honor. The question is calling for
13 speculation. My client is not a mind reader. He doesn't
14 know what was going through the mind that day.

15 THE COURT: Well, Mr. Gavin, you already opened it,
16 so I am going to allow the question. It's overruled.

17 A. Your question is, is it possible to know. I
18 think it is probably not possible for me to know what was
19 in the defendant's mind.

20 Q. BY MR. ZACK: Do you believe in capital
21 punishment?

22 A. I'm not in principal normally opposed to
23 capital punishment. I believe there are occasions where
24 it may be appropriate.

25 Q. And what occasions are those?

1 A. Premeditation, assassination. A premeditation
2 is well planned out, a contract killing. I think there
3 are certain kinds of mass killings, serial killings. I
4 think in the case of Jeffrey Dommer, Milwaukee, I would be
5 able to support the death penalty in that case.

6 Q. Regardless of what his upbringing was like?

7 A. I think that there can be occasions that the
8 ultimate heinousness of the crime puts a little
9 significance to the crime. The political murderer,
10 significance of the crime. For me, like I say, it
11 generally has to be a very serious offense. A serious
12 kind of capital murder, much greater than average.

13 Q. Regardless, again, of what kind of upbringing
14 the person went through?

15 A. I think in my own mind there can be occasions
16 where, regardless of upbringing, it could be justified.

17 Q. And the type of crime, does that mean that at
18 some point the upbringing of a person becomes less than an
19 excuse for the conduct of the defendant when he commits a
20 crime?

21 A. Probably ultimately. I have to admit, this is
22 an evolving position of mine. I used to be strongly and
23 absolutely opposed to the death penalty, so I'm not as,
24 maybe, clear in my thinking on the death penalty as some
25 others. Most of it is clearly a case by case situation.

1 Q. And again, depending on the seriousness and the
2 premeditation involving the crime, does that become less
3 of an excuse?

4 Does the child's upbringing become less of an
5 excuse for them committing it?

6 A. I think if you get to a point where you see no
7 potential at all of redemption or of rehabilitation. And
8 I have seen that redemption in also murderers I worked
9 with. I have also read about cases where I feel it's
10 probably not good. But, there are differences.

11 Q. So, in your opinion then, somebody who commits
12 violent crimes on more occasions is less excused by their
13 childhood?

14 MR. GAVIN: Your Honor, I am going to object. This
15 has been asked and answered. He's already testified to
16 this and given an answer.

17 THE COURT: Well, sustained, Mr. Zack.

18 MR. ZACK: I am asking the number of crimes that a
19 person commits -- let me rephrase it.

20 Q. BY MR. ZACK: If somebody commits violent
21 crimes on different occasions, again, is that less an
22 excuse? I am not talking about seriousness, I am talking
23 about different occasions.

24 A. You are talking about general crimes, not
25 homicide necessarily?

1 Q. Right.

2 A. I think over time, developing a consistent
3 pattern of violence, probably begins to outweigh the role
4 of the childhood, because part of their role of the
5 childhood is an indication of the ability to change. And
6 additional violent crime, series of violent crimes, a
7 series of homicides, may show that the person's not likely
8 to change.

9 Q. Hypothetically then, if the defendant, two
10 weeks prior to murdering two people here in Grasshopper
11 Junction, broke into the house of an elderly --

12 MR. GAVIN: I am going to object, Your Honor. This
13 is introducing something that's totally irrelevant if what
14 Mr. Zack is going to try to do is what I think he's going
15 to do. My client has been accused of a crime out of state
16 that has not been proven. Mr. Zack is attempting to use
17 that now. That's improper.

18 THE COURT: Your objection is overruled.

19 Q. BY MR. ZACK: Again, hypothetically, if the
20 defendant, two weeks prior to killing two people here,
21 broke into the house of an elderly woman, smothered her,
22 put a pillowcase over her head and beat her up and robbed
23 her, over the course of two years, is that less of an
24 excuse?

25 Is the childhood less of an excuse for that

1 conduct then, and then repeated it essentially two weeks
2 later, but killed the victims?

3 A. If what you are asking is, would an incident
4 such as that mean that we would not consider the childhood
5 experiences as much, my answer would be no. As goes in
6 the positive answer, positive to negative, negative to
7 positive -- what I was trying to suggest is, if we have a
8 pattern of behavior over a period of years, or extreme,
9 for example a serial killer who has killed a number of
10 people in a relatively short period of time, I think a
11 couple of incidents within a fairly small time space, one
12 additional incident does not mitigate against that
13 childhood experience.

14 Q. At what point do we decide somebody has a free
15 will, that they are choosing to commit crimes?

16 A. I think it varies by the individual.

17 Q. Are you suggesting that this crime of which the
18 defendant is convicted was some sort of impulsive behavior
19 controlled by his childhood?

20 A. I think that it's possible that it was affected
21 by his childhood experiences. That the childhood
22 experiences could have contributed in such a way that it
23 left him less able to control his behaviors.

24 Q. Made him more impulsive?

25 A. Made him more impulsive, more aggressive.

1 Q. Do you believe that this was an impulsive
2 crime? Or do you have enough information to know?

3 A. My opinion would be the homicide appears
4 impulsive. That the robbery perhaps not, but the homicide
5 -- I came across nothing in my review of the files that
6 would suggest that the homicide was anything other than an
7 impulsive act.

8 Q. Did you ask the defendant about that when you
9 spoke with him?

10 A. No. We did not talk about any of that.

11 THE COURT: Mr. Zack I hate to interrupt you, but
12 we have been going for a while and I am sure the court
13 reporter needs a break. I'd like to take a brief recess
14 and allow you to finish your cross-examination when we
15 come back.

16 (A recess was taken from 2:55 p.m. to 3:10 p.m.)

17 THE COURT: Okay. Please be seated. Mr. Zack?

18 MR. ZACK: Thank you.

19 Q. BY MR. ZACK: Just a few more questions. What
20 I was getting at, Mr. Hewitt, before the break, or what I
21 am trying to -- you testified that, I believe, right and
22 wrong could be obscured by external stimulus, alcohol,
23 drugs, excitement of the moment, somebody else's -- I
24 can't remember from my notes whether it was somebody else
25 doing it, involved at the same time, and not exhibit good

1 self control.

2 Is it correct that you really have no knowledge
3 as to exactly what happened at Grasshopper Junction when
4 the defendants murdered two people?

5 A. I have no specific knowledge of what happened
6 that day.

7 Q. Would it be an indication of more planning and
8 less impulsive behavior if the robbery was planned two
9 days ahead of time?

10 A. A robbery --

11 Q. Yes.

12 A. -- planned, and a robbery carried out, the
13 robbery would not appear impulsive.

14 Q. Would taking a sawed-off shotgun with you to
15 the robbery indicate some planning for its use?

16 A. It could.

17 Q. Would going out of your way and purchasing a
18 shotgun and sawing it off two days before the robbery
19 indicate a less impulsive act?

20 A. It could.

21 Q. Did you ever ask your colleagues about their
22 upbringing, university colleagues?

23 A. Yes.

24 Q. Did any of them ever indicate to have abusive
25 fathers?

1 A. None among any of my colleagues.

2 Q. Friends you have talked to that indicate that
3 they had abusive fathers?

4 A. Yes.

5 Q. What do they do for a living now?

6 A. One is a chef, one is a housewife.

7 Q. And they are not criminals, are they?

8 A. Not to my knowledge.

9 Q. In your studies have you found people who are
10 placed in what you call functional families, who ended up
11 being criminals?

12 A. Yes. That can occur.

13 MR. ZACK: Nothing further.

14 THE COURT: Mr. Gavin?

15 REDIRECT EXAMINATION

16 BY MR. GAVIN:

17 Q. Doctor, Mr. Zack asked you if, in your
18 experience, if there are families that are far more
19 dysfunctional than the Murray family; is that correct?

20 A. Yes.

21 Q. And you said you believe so?

22 A. Yes.

23 Q. What about going the other way? In your
24 studies have you come across families that are far -- or,
25 less dysfunctional than the Murray family?

1 A. I think most are.

2 Q. Or show some continuum?

3 A. Almost a relatively normal curve of family
4 dynamics, and the majority would be characterized as less
5 dysfunctional.

6 Q. Placing the Murray family on a continuum, are
7 they more dysfunctional or less dysfunctional than a
8 normal family?

9 A. More dysfunctional than a normal family.

10 Q. Doctor, the materials that I sent you, do they
11 concentrate basically on Roger's childhood upbringing?

12 A. Yes. About primarily through age 14 or 15.

13 Q. And with the exception of the PSI report and
14 Dr. Potts' report, did I send you any other additional
15 documents regarding his adult life?

16 A. No, you did not.

17 Q. Did I ask you to concentrate on his adult life
18 in your --

19 A. No.

20 Q. -- review?

21 A. You asked me to focus on his adolescence.

22 MR. GAVIN: No further questions, Your Honor.

23 THE COURT: Any additional questions, Mr. Zack?

24 MR. ZACK: No, Your Honor.

25 THE COURT: Thank you. You are excused.

1 MR. DICKEY: Your Honor, the next witness will be
2 Ernie Makinson. I believe he's over at the jail and will
3 need to be brought over.

4 THE COURT: He should be here shortly. I called the
5 jail and asked them to bring him. Counsel, approach the
6 bench.

7 (An off the record discussion was had at the bench
8 between the Court and all counsel.)

9 (A brief pause was had in the proceedings.)

10 THE COURT: I take it Mr. Makinson isn't here yet?

11 MR. MILAM: No, Your Honor.

12 THE COURT: Okay. We will be in recess 'till he
13 gets here.

14 (A recess was taken from 3:20 p.m. to 3:30 p.m.)

15 THE COURT: Okay. Please be seated. Mr. Dickey,
16 call your next witness.

17 MR. DICKEY: I guess, Your Honor, at this time I'd
18 call E. Makinson.

19 THE COURT: Okay. Mr. Makinson, will you stand and
20 be sworn?

21 ERNIE MAKINSON,
22 being first duly sworn by the clerk, was examined and
23 testifies as follows:

24 :::

25 :::

DIRECT EXAMINATION

BY MR. DICKEY:

Q. Would you tell us your name, please?

A. My real name is Ernie Lucas Abraham Makinson.

Q. And Mr. Makinson, you understand that you have been sworn to tell the truth in this matter, correct?

A. Yeah, I do.

Q. And you understand that if you don't tell the truth you could be subject to prosecution for perjury?

A. I have no doubt about it. Either way.

Q. And if you want to, I'm sure that the Court would have counsel represent you before you testify in this matter; do you understand that?

A. Yes.

Q. Do you wish to have counsel available to advise you or represent you?

A. No. I have already been threatened.

Q. Showing you what's been marked Exhibit S-P for identification.

I ask you if you can identify that?

A. Yes, I do. I give that to Roger Murray after I was threatened by the DA.

Q. And is that your handwriting?

A. It is.

MR. DICKEY: Offer Exhibit S-P for identification

1 into evidence.

2 THE WITNESS: Sir? Before I answer any further
3 questions, I'd like to make sure everybody understands
4 that I personally don't like Murray. And that's -- we
5 don't get along, but I'm not going to sit here and falsify
6 evidence to convict somebody.

7 THE COURT: Mr. Zack, any objection?

8 MR. ZACK: Yes, on the relevancy.

9 THE COURT: Mr. Dickey? Objection is overruled. I
10 agree with --

11 MR. ZACK: Your Honor, if I could be heard on that?

12 THE COURT: Yes.

13 MR. ZACK: It's certainly not true. Even if it were
14 true, I don't see what issue that goes to in this
15 hearing.

16 THE COURT: I will repeat myself in a minute. Did
17 you hear Mr. Zack, Mr. Dickey?

18 MR. DICKEY: Your Honor, it goes to the matter of
19 mitigation relating to a basis for leniency. If the
20 information which is to be developed in questioning Mr.
21 Makinson relates to what he claims in the letter, we
22 believe it would be relevant concerning matters involving
23 the possible use of the Motter tape and the Motter
24 transcript as it relates to Roger Murray.

25 THE COURT: I am sorry, Mr. Dickey, could you

1 explain that again? Somehow does -- they relate to the
2 Motter transcript?

3 MR. DICKEY: Well, Your Honor, it appears at least
4 from the tenor of the letter that it happened, and this is
5 what I need to develop through testimony. It appears that
6 it happened at or about the same time that Mr. Motter
7 supposedly became involved in this case. And if it is
8 something that relates to finding a jailhouse snitch to
9 provide evidence to help convict or to bolster the case
10 against Roger Murray either in the guilt phase or in the
11 sentencing phase, we believe that it's relevant to show
12 that there is a course of conduct here which affects the
13 constitutional rights of my particular client.

14 THE COURT: Mr. Zack, anything else?

15 MR. ZACK: Your Honor, as I indicated prior to this
16 hearing starting, I wasn't going to seriously object to
17 anything that the defense wants to put into evidence, let
18 them make whatever record they wanted. This will just --
19 because to admit it, would give it even a scintilla of
20 credibility. And again -- and I will take the stand here
21 and testify myself if need be, but it's just not true.
22 And again, if it were true, I have yet to hear, even
23 taking it hypothetically as true, how that affects guilt
24 or innocence or aggravation/mitigation for anything the
25 State has done. The State never called Mr. Motter, never

1 introduced his testimony at trial. I'm just in a loss to
2 see how they could possibly be relevant. Perhaps that Mr.
3 Makinson wanted a trip back to Kingman from DOC one more
4 time.

5 THE COURT: Well, I had previously ruled that I
6 would allow it into evidence. I said at the time that it
7 was marginally probative. By that I hope that no one
8 takes that to mean that I believe it in any way. I will
9 admit it to allow the defense to try make some kind of
10 record on this. If they can. So, it is admitted.

11 Mr. Dickey, do you have any other questions?

12 MR. DICKEY: Yes, Your Honor, I do.

13 Q. BY MR. DICKEY: Mr. Makinson, in that letter
14 you indicated that someone in an official capacity had
15 contacted you, correct?

16 A. Yes.

17 Q. And who was that person?

18 A. Zack and Moon, two DA's.

19 Q. And when did they contact you?

20 A. On 3-16 I think, I believe, '92.

21 Q. And where did they make contact with you?

22 A. At the jail.

23 Q. And in connection with that contact, what took
24 place? What happened?

25 A. They gave me some papers to copy. I copied

1 them. It was typed up. I was supposed to copy it in my
2 handwriting to show a initiative on my part that I was
3 willing to testify against said defendant, and for doing
4 so I would get the same sentence my codefendant received,
5 who is a very violent person. He got two years, and I
6 have a nonviolent record, and I ended up with four years
7 because I refused to testify. And I was -- copied these
8 papers, and then after I copied them I handed them back
9 and said, dig this. Now, this is a new deal; you are
10 going to testify in court that Murray gave you this
11 information, and you are going to help me convict him as a
12 ace in the hole in case you have to -- in case the trial
13 goes bad. We'll call you and have you testify that Murray
14 stated these statements, that you just rewrote it in your
15 own handwriting.

16 Q. And what were the statements that you copied?

17 A. Stuff like we took two individuals back from
18 the restaurant into the house or trailer. We used a
19 certain gun. My brother did this, I did that. We went
20 into the restaurant, we did that. Something about some
21 chase and they threw a bunch of guns out on some dead-end
22 road. This is over a year, almost a year ago, and I'm not
23 familiar with Murray's case except for what the DA
24 instructed me to write down.

25 Q. Now --

1 A. I was to be used as an ace in case the trial
2 went bad.

3 Q. All right. Now, did you ever talk with Roger
4 Murray or Robert Murray about the facts of the case that
5 they were charged with?

6 A. No. It's pretty common knowledge within the
7 jail and with the officers and most of the lawyers, me and
8 Murray don't get along. We don't like each other, and I
9 am sure if we ever get a chance we are going to fight.
10 But, I ain't going to sit here and lie for a DA, you
11 know, falsify evidence to put somebody away. It ain't
12 happening. I want my freedom, but I don't want it that
13 bad.

14 Q. All right. What else within this document that
15 you --

16 A. A letter. It was a couple documents. A -- a
17 letter. It -- there was a statement of what the case is
18 about, about some stuff in Alabama and other states
19 supposedly they did, and it was just a bunch of
20 statements. And the deal was, I rewrote it in my
21 handwriting. I admit that I did that. It's in my
22 handwriting. There's no question that it's in my
23 handwriting, but I was given a typed letter to rewrite
24 from the DA, and I put it in my handwriting. And the deal
25 was just to rewrite it, and that he would give me the same

1 deal that Greg Mickelus received for escaping in 1988,
2 March 13th, from the Mohave County Jail. Mickelus has a
3 complete record of violence. I mean, undisclosed
4 violence, armed robbery on old folks, bombs, making bombs,
5 selling dope to junior high kids, high school kids, and
6 yet he got only two years, and I had none of that on my
7 record and I ended up with four.

8 Q. Now, in connection with this, was there -- did
9 you keep a copy of the handwritten documents that you said
10 that you made?

11 A. No. It was a couple documents. No. As I
12 rewrote them, he took them and said, now, this is a -- dig
13 this, this is the deal, you are going to testify against
14 Murray, you are going to say that he told you this stuff
15 in court if the trial goes bad. This is what is going to
16 happen, this is what you are going to do, and if you don't
17 do it, we are going to file assault charges on you, we are
18 going to give you extra time in prison for the escape, we
19 are going to do this, and you are going to do it, by God,
20 or you are going to do extra time, I will see to that. I
21 am the DA, and I will keep you in prison, what -- you are
22 going to do what I want. I said, you know what, you can
23 threaten me all you want, all that, whatever, I'm not
24 doing it.

25 Q. All right. Were you ever in the same pod with

1 Roger Murray?

2 A. Yeah, I was. We threw piss on each other, and
3 that's in jail. We don't like each other.

4 Q. All right. Where was your cell in relation to
5 Roger's?

6 A. Mine's 11, and his is 15. His is four cells
7 away from each other. Every time he'd walked by my cell,
8 I'd throw something on him.

9 Q. All right. Now, in addition to the people you
10 already named, were there any other people there at the
11 same time?

12 A. That saw me throw stuff on him?

13 Q. No. When you wrote out those documents, was
14 there anyone else there?

15 A. No. Just the DA. The DA. There was no cops,
16 there was no officers, there was no lawyers, there was no
17 investigators. There was nothing at all.

18 Q. Now, on that particular day, did you have a --

19 A. Morning, it was morning.

20 Q. -- court --

21 A. Early morning.

22 Q. -- court proceeding the 16th?

23 A. Yeah. I think I did go for arraignment or
24 something. No. I went the next day. I don't know. It's
25 like thirt -- you know, at least 16 -- is almost nine

1 months ago. January, February, March. Last March.

2 Q. During the period of time that you were in the
3 same pod with Murray, did you become acquainted with a
4 William Motter?

5 A. Motter?

6 Q. Yes.

7 A. No. I am afraid I don't. I might if I see
8 him, but I'm not good with names.

9 Q. That name doesn't ring any bells with you?

10 A. No, sir, it doesn't. Motter?

11 Q. Other than what you've claimed happened with
12 regard to this letter, were any other persons mentioned
13 besides Roger Murray?

14 A. Yeah, his brother.

15 Q. How about anybody besides his brother?

16 A. Yes. Some elderly lady back east, and a Rose
17 or something, something like that. Two -- there's a man
18 and woman, I remember something about a man and a woman, a
19 restaurant, a house or a trailer behind the restaurant.
20 Some shotguns. Supposedly some duct tape, some money, and
21 then something about a chase and a dead-end road, and then
22 another, the lady back east, back in Alabama, with a knife
23 to -- to somebody's throat. Somebody put a knife to
24 somebody's throat, somebody, you know. That's what I
25 remember, something about alleged -- all these things that

1 they allegedly did. I didn't know whether he did or not.

2 Q. Now, did you read accounts in the newspaper
3 about that --

4 A. No.

5 Q. -- the Murray's were accused of?

6 A. No. I -- see, I was down in DOC, Department of
7 Corrections, and I came up for my -- my escape thing. And
8 see, then -- then the night before that this all happened
9 the cops really wailed on me. I have photographs. I
10 mean, they really wailed on me. I had black eyes, bloody
11 lip, broken nose. My investigator and lawyer took
12 pictures of it. And then here's the article from the
13 paper, and it says nothing about the black eyes or the
14 broken nose or the fat lip. All it says is that Mr.
15 Makinson received a hurt on his finger. And -- and the
16 next day they interview me. Well, dig this, we are going
17 to file charges on you, on escape, on assault, and we will
18 make them stick. Either you help us or you're going to
19 prison, buddy, and that's all I know.

20 Q. Did you hear any radio accounts of what the
21 Murrays were accused of?

22 A. No. A-Pod is a maximum security pod where
23 you're locked down, and sometimes you don't even get
24 showers. There's no TV, there's no radio, also no
25 newspaper. There's no nothing. And me and Murray don't

1 get along, so how else would I know about the police
2 reports, the alleged crimes in Alabama, somebody --
3 somebody -- some restaurant, about duct tape, shotguns,
4 three or four, five bullet wounds to someone, to the
5 female's body, three bullet wounds to the guy's body. I
6 mean, I wouldn't know all about this if the DA didn't
7 instruct me, you know. I don't know. We are not allowed
8 any communication with the media.

9 Q. Did you read any police reports or incident
10 reports, departmental reports, supplied to you by Roger
11 Murray?

12 A. Oh, no. We don't get along. You can ask any
13 officer in the Mohave County Jail, anytime he goes by my
14 room I throw piss on him, and that's how it's going to
15 be. We don't get along. We don't like each other. And
16 it's pretty well, pretty common that we don't. And he
17 throws piss on me. I mean, it's not like one way here.
18 We don't like each other.

19 Q. And did you agree to what you claim were the
20 terms of this offer?

21 A. Yeah, at first, because I didn't see anything
22 wrong with rewriting a bunch of statements. I wasn't
23 going to testify, I knew that in my heart, and rewriting,
24 rewriting these statements didn't seem a big deal to me.

25 (Mr. Zack and Mr. Dickey are conferring.)

1 Q. Now, Mr. Makinson, did you -- and this is a
2 question you don't have to answer if you don't want to.

3 Did you communicate this to your lawyers?

4 A. Not to my knowledge. I said they were thinking
5 about some deal or something like that. Might have, might
6 not have. I knew the day after me and Zack talked I might
7 have said something to my lawyer about some deal that the
8 DA's willing to make, or the DA -- talked with the DA or
9 something like that. I might have said that. I might
10 have.

11 MR. DICKEY: I have no further questions.

12 THE COURT: Mr. Zack?

13 CROSS-EXAMINATION

14 BY MR. ZACK:

15 Q. Your testimony, Mr. Makinson, that on March
16 16th, who came to see you? From the DA's office?

17 A. Well, you know who.

18 Q. Who?

19 A. You did. You, in the morning.

20 Q. Who else?

21 A. That's all at that time. That's all.

22 Q. And I came totally unannounced?

23 A. You know you did. You were there, man.

24 Q. Where did we meet?

25 A. Down at that interview room across the

1 classification thing.

2 Q. What time?

3 A. Early. Early in the morning.

4 Q. Was Mr. Moon with me?

5 A. No, he wasn't.

6 Q. Did Mr. Moon ever come and talk to you?

7 A. No.

8 Q. You testified on direct --

9 A. I said the DA's. You're the head of the DA's.
10 You're part of the DA's.

11 Q. Did you ever write me a letter asking me to
12 come and talk?

13 A. No. I copied them.

14 Q. Did you ever write me letter prior to March
15 16th asking me to come to you, just prior to March 16th,
16 so you could tell me things?

17 A. I copied a bunch of letters you gave me, Zack.
18 You know I did, and I know you did. There isn't much to
19 tell. This happened. This, this, and this happened, and
20 there isn't much else to tell. This, this, and that. You
21 can't -- you can ask all the questions you want, and I
22 can't answer half of them because I don't know.

23 Q. It's your testimony, Mr. Makinson, that you
24 never wrote me letters asking me to come talk to you?

25 A. I copied a bunch of letters you gave me.

1 Q. Did you ever write to Sheriff Cook?

2 A. I copied a bunch of letters you gave me.

3 Q. Did Sheriff Cook ever come to meet with you?

4 A. Yeah. We were downstairs. I asked him about
5 the escape and Joe Bonzelet's involvement, why did he walk
6 away when he was a sheriff and he ripped off this county
7 and he never went to prison, and why did this happen when
8 there was so much evidence against the sheriff, that he
9 never spent one iota's time in prison. But, he's the
10 sheriff of that county, and he ripped that county off and
11 you never sent him to prison, and I asked Joe Cook, why
12 did that happen.

13 Q. When did you meet with Joe Cook?

14 A. It was in the morning.

15 Q. What day?

16 A. I'm not sure. It's early, early in the
17 morning. He was there in the morning.

18 Q. Was it the same day that I came and talked to
19 you supposedly?

20 A. It might have been. Might have been before or
21 after you came.

22 Q. Well, was it the same morning as I supposedly
23 came?

24 A. It's been a long time. It could have been, you
25 know. But, you did come. You can't deny that.

1 Q. Certainly I can.

2 A. Well, yeah, you could. Just like you didn't
3 send the sheriff to prison. You can cover up anything you
4 want.

5 Q. And what did Joe Cook talk to you about?

6 A. I talked to him about -- he asked me why I
7 escaped, and I told him I was getting pretty roughed up by
8 John Bonzelet and no one would stop it, and there was
9 photographs of me getting roughed up, and no one cared, so
10 I escaped because I got tired of getting beat up on.

11 Q. Did you ever talk to Joe Cook about offering to
12 testify against the Murrays?

13 A. No. I said something about you, something
14 about that you might offer the deal or something to that,
15 or something. I don't remember all of it.

16 Q. Didn't you ask Joe Cook, by your testimony,
17 that if you could get a deal you'd testify against the
18 Murrays.

19 A. No, I didn't. I am sure you will have him on
20 the stand to say I did, but no, I didn't.

21 Q. Didn't you write to Cook asking him --

22 A. I copied those letters you gave me, and that's
23 what I did, and that's all I did.

24 Q. Did you ever write a letter to Joe Cook?

25 A. I copied those letters you gave me. Now, if

1 you -- that was in the part of the letters that I rewrote,
2 then, yeah, I guess I did. If it is not part of the
3 letters I rewrote, then no, I didn't. My statement with
4 Joe Cook was why wasn't ex-sheriff Joe Bonzelet put in
5 prison. Why can he get away with all the crimes that he
6 got away with.

7 Q. Who all did you write letters to while you were
8 in the county jail?

9 A. I didn't write any letters. I rewrote the
10 letters that you gave me.

11 Q. You never sent any letters through the county
12 mail system to the DA's office?

13 A. I am sure you could get an envelope, produce an
14 envelope.

15 Q. My question was, did you ever do it, Mr.
16 Makinson?

17 A. I never did it, no. I am sure you can produce
18 an envelope that was -- went through the mail system to
19 prove that this never happened, but it did happen.

20 Q. Again, Mr. Moon, Bob Moon, never came to talk
21 to you; is that your testimony?

22 A. Yeah. He never did, no.

23 Q. And you never asked Joe Cook --

24 A. I said something about what you said.

25 Q. Did you ever ask Joe Cook for a deal to testify

1 against the Murrays?

2 A. No. I said something about you saying
3 something about testifying, something about -- about --
4 something about something. Now, if you got a letter that
5 I rewrote from your handwriting, then yeah, I did. Zack,
6 people are getting tired of your crookedness. Judge's
7 wives, you are getting away with cocaine deals,
8 ex-sheriffs don't go to prison.

9 Q. Anything else? Keep coming. Anything else?

10 A. Don't threaten me anymore. If you --

11 Q. Anything else about what was going on that's
12 not being prosecuted?

13 Judge's wives, sheriff's. Anybody else?

14 A. Well, it's true, and in the paper. Everybody
15 knows about it.

16 Q. Showing you what's been marked as State's
17 Exhibit S-9.

18 A. That's my handwriting.

19 Q. Did you write that?

20 A. It's my handwriting. I am sure I copied it
21 from the stuff you gave to me.

22 Q. Did you write this whole three page letter?

23 A. That's my handwriting.

24 Q. Did you write it?

25 A. I rewrote it, yes, I did, from your typed stuff.

1 MR. ZACK: State moves introduction of State's
2 Exhibit S-9.

3 A. I told you about eight pages that I rewrote,
4 and I rewrote it. I did it. I -- you know, there's no
5 doubt, it's in my handwriting.

6 Q. BY MR. ZACK: While defense counsel is looking
7 at that, Mr. Makinson, what's your criminal record?

8 A. I have a burglary criminal record, escape
9 criminal record, escape from Mohave County Jail March 13,
10 1988. I went straight. No one cared that I went
11 straight.

12 Q. Let's just back up, Mr. Makinson. A couple
13 years ago I prosecuted you for burglary, did I not?

14 A. Yeah. I threw a bunch of rocks through the gas
15 station window while I was on acid. A total of \$26 worth
16 of change was found on me, and there was like 13 broken
17 windows all through the city of Kingman. And you sent me
18 to prison for six years for throwing rocks through
19 windows, yes. And you counted it as burglary, yes, that's
20 true.

21 Q. And you were also convicted of escape; is that
22 correct?

23 A. Yes. I was convicted of escape. You gave me
24 four years when you gave Mickelus, a real violent person,
25 two years, but yet you gave me four years and I got no

1 violence.

2 Q. Add while you were escaped from the Mohave
3 County Jail, you were convicted of burglary in Nebraska;
4 is that correct?

5 A. No. That's 1980 burglary. I was put on
6 probation. It was a probation revocation. They had a six
7 year old warrant on me. I was working on the boat,
8 Santarres fishing boat.

9 Q. Can you tell me, do you have a conviction for
10 burglary in the first degree out of the superior court in
11 Kenai, Alaska?

12 A. 1982 or '80, yes, that's correct.

13 Q. Do you have another burglary conviction in the
14 district court of Boulder, Colorado?

15 A. What year?

16 Q. 1984.

17 A. Almost 10 years ago. Yeah, you bet I do. I am
18 a real desperado.

19 Q. And two counts of burglary that I prosecuted
20 you on?

21 A. Throws rocks through windows, by God, real
22 killer.

23 Q. And the escape charge, correct?

24 A. Yeah, escape charge.

25 Q. And you are presently facing additional

1 charges?

2 A. Because of assault, yup. I am sure that's
3 going to be prosecuted fully. Yet, I get the black eyes,
4 broken nose, and fat lip, and no one else gets -- and I
5 get charges on me, yup. You fucked up, Zack. I don't
6 falsify information for you.

7 MR. ZACK: Nothing further. Just an exhibit.

8 THE COURT: Mr. Gavin, do you have the exhibit?

9 MR. GAVIN: Yes, Your Honor.

10 THE COURT: Do you have any objection to the exhibit,
11 Mr. Dickey?

12 MR. DICKEY: No, Your Honor.

13 THE COURT: State's S-9 is admitted into evidence.

14 Mr. Dickey, any redirect?

15 MR. DICKEY: Just one question.

16 REDIRECT EXAMINATION

17 BY MR. DICKEY:

18 Q. Mr. Makinson, why did you say that Mr. Moon was
19 present at the time?

20 A. I didn't. I said DA's were.

21 Q. DA's. You mean more than one?

22 A. Well, he's the head of the DA.

23 Q. What I am asking you is, were there more than
24 one --

25 A. No.

1 Q. -- prosecutors present?

2 A. Not that I remember. I had black eyes, broken
3 nose that day, so I wasn't into taking numbers and
4 counting people.

5 MR. DICKEY: No further questions.

6 MR. ZACK: Nothing further.

7 THE COURT: The witnesses is excused.

8 MR. MAKINSON: Thank you.

9 THE COURT: Mr. Dickey, call your next witness.

10 MR. DICKEY: We have no further witnesses, Your
11 Honor. We would, if we have not already done so, we would
12 offer the Dr. Potts' evaluation, which I believe was S-A
13 from yesterday.

14 THE COURT: I think that's -- do you have --

15 THE CLERK: Frank, you have a bunch of exhibits
16 here.

17 THE COURT: I have the one of Dr. Potts' evaluation
18 in the court file, and I'll -- you know, I will take
19 judicial notice of it, if that's what you want, but I
20 don't know that you have marked that particular exhibit.
21 Okay. Well, of course, the evaluations were, for that,
22 was admitted yesterday, was for Robert Murray. There is a
23 different evaluation for Roger Murray, and that's the
24 point that I am trying to get across.

25 MR. DICKEY: We would ask that the evaluation for

1 Roger Murray be admitted into evidence for mitigation.

2 THE COURT: Mr. Zack, any objection to that?

3 MR. ZACK: No, Your Honor.

4 THE COURT: It's ordered -- I am going to order that
5 a copy of the exhibit be marked. I don't know, can you
6 tell me what the exhibit number would be?

7 (The clerk is conferring with the Court.)

8 THE COURT: Okay. We will order that a copy of that
9 be marked as S-T, and it's admitted in this hearing.

10 MR. DICKEY: All right. And we would also ask that
11 the letters from yesterday, S-B-2, S-B-3, S-B-4, S-B-6,
12 S-B-7, S-B-8, S-B-9, S-B-10, S-B-11, and S-L be admitted
13 into evidence in so far as they make reference to Roger
14 Murray.

15 THE COURT: Any objections, Mr. Zack?

16 MR. ZACK: I object on the relevance. I'd like to
17 know what the mitigator of those letters go toward.

18 THE COURT: Mr. Dickey, secondly, the Court's not
19 going to admit them partially. They are either all coming
20 in for the Court's consideration, or not. And we had a
21 bifurcated hearing. I am not sure why you admitted them,
22 but I will admit them if you will tell me what the
23 probative reason for admitting them is.

24 MR. DICKEY: Well, Your Honor, it's my recollection
25 that most of those letters, and I believe those are ones

1 that they were sent to the Court, to the probation office,
2 and the Court has furnished us with copies of, and mention
3 both Robert and Roger. And so, of course, we would -- the
4 whole letter would be in because they have already been
5 admitted as to Robert. So, we are just offering them for
6 anything that may relate to Roger related to mitigation
7 involving him, or pleas on his behalf in connection with
8 the issue of leniency.

9 THE COURT: Any additional comments, Mr. Zack?

10 MR. ZACK: I still don't see the relevancy, unless
11 they -- at an aggravation/mitigation hearing, anyway,
12 unless there's some enumerated mitigator they are going
13 toward.

14 THE COURT: Mr. Dickey, all we are looking for, all
15 I am looking for, is for you to tell me what issue those
16 letters go to.

17 MR. DICKEY: As I indicated, Your Honor, they go to
18 the issue, the mitigator of anything about the defendant's
19 life which calls for leniency and a sentence less than
20 death.

21 THE COURT: Thank you. The Exhibits, S-B-2, S-B-3,
22 S-B-4, 6, 7, 8, 9, 10, and 11 are admitted. Also, S-L are
23 admitted in this hearing as well.

24 Is there anything else, Mr. Dickey?

25 MR. DICKEY: Yes, Your Honor. We would also offer

1 the package of documents from the department of
2 corrections in Alabama relating to Mr. Roger Murray. They
3 are designated, I believe, as S-S.

4 THE COURT: Any objection, Mr. Zack?

5 MR. ZACK: Again, I just ask what relevancy, what
6 mitigator they go toward?

7 MR. DICKEY: They go towards -- these are documents
8 from his situation back in Alabama. They go towards the
9 mitigator showing his background and -- his general
10 background and his activities when he was younger, back in
11 Alabama.

12 THE COURT: Any additional comments, Mr. Zack?

13 MR. ZACK: I am not sure that any case ever
14 recognized general background, quote, unquote, as a
15 mitigator. And I don't mean to be picky on this, but I
16 think it's important that we know what we are talking
17 about so we know what I am arguing against, presenting
18 rebuttal against. So, the -- only general background, the
19 State would still ask for more specifics.

20 THE COURT: Well, with regard to those records from
21 the department of corrections, I think they are probative
22 to the issues on mitigation, so I am going to receive
23 those. If nothing else, they are probative in the same
24 way that the letters are probative, so I am going to admit
25 them. That's Defendant's Exhibit S-S.

1 MR. DICKEY: And I would also offer Exhibit S-Q,
2 which is a interview which was done by Hulon Murray with a
3 Paul Edward Michael, for the purpose of showing the
4 defendant's background and his activities while he was
5 growing up in the Alabama area. And the same is true of
6 S-R, which is a interview that Mr. Hulon Murray did with
7 Martina Eargle.

8 THE COURT: Can I see those exhibits?

9 MR. ZACK: No objection.

10 THE COURT: Okay. Defendant's S-R and S-Q are
11 admitted into evidence.

12 MR. DICKEY: At this time, Your Honor, we would
13 submit what has not been marked as yet -- we would submit
14 a letter from Roger Murray to the Court. For the record,
15 Your Honor, that's S-U for identification.

16 THE COURT: Objections, Mr. Zack?

17 MR. ZACK: Yes, Your Honor. This might properly be
18 submitted as part of the defendant's right to allocution,
19 but it's certainly not evidence. If the defendant wants
20 to say these things, he can take the stand and testify and
21 be subject to cross-examination, but the State submits
22 that this takes the rules, the relaxed rules of evidence
23 in these proceedings too far.

24 THE COURT: Mr. Dickey?

25 MR. DICKEY: Your Honor, we -- for our

1 Identification we ask that that be admitted, but we submit
2 it on the basis of Mr. Murray's right to allocution.

3 MR. ZACK: As long as it's not evidence and it's
4 part of his right to allocution, that's fine with the
5 State.

6 THE COURT: Well, I understand what it is, and I
7 understand what you are saying about it not being
8 supported by facts. I am going to admit it as part of
9 this hearing. So, the Defendant's Exhibit S-U is
10 admitted. Hearsay is admissible at this hearing, and I
11 will consider it.

12 MR. DICKEY: I believe we admitted the letters at
13 the beginning of the proceeding, along with the Hale
14 report.

15 THE COURT: Along with what?

16 MR. DICKEY: The Hale report from Hale, John Hale.

17 MR. ZACK: The handwriting?

18 THE COURT: I don't know whether they were or were
19 not, Mr. Dickey, at this point.

20 MR. DICKEY: Perhaps the clerk can enlighten us.

21 THE COURT: Well, I have noted that you admitted
22 Exhibits S-M, S-N, and S-O. Those were the first exhibits
23 I have that were admitted in this case. Okay. And that
24 is the Hale document and the two letters.

25 MR. DICKEY: And with that, Your Honor, Roger Murray

1 rests.

2 MR. ZACK: Your Honor, if I may, the State intends
3 to start its rebuttal with regard to Mr. Makinson's
4 testimony while I have Mr. Moon here. I would start it
5 today. Essentially, I would call myself to testify that
6 Mr. Makinson lied about everything he said and I never met
7 with him in the jail. I will offer that as an avowal, and
8 if the defense counsel won't take it as such and stipulate
9 to it, then I'd call myself to the stand.

10 THE COURT: Mr. Dickey, any comments?

11 MR. DICKEY: We'll take Mr. Zack's avowal, Your
12 Honor.

13 THE COURT: And anything else on this subject, Mr.
14 Zack?

15 MR. ZACK: No, Your Honor.

16 THE COURT: All right. We had scheduled rebuttal
17 for tomorrow. There was one issue that Ms. O'Neill wished
18 to raise today. So, let's get that on the record. Okay.
19 I haven't thought of this until just now, Ms. O'Neill, but
20 your client is not present.

21 You wouldn't -- do you wish to take that up in
22 his presence tomorrow morning?

23 MS. O'NEILL: Your Honor, I would be willing to
24 waive my client's presence for purposes of this hearing.

25 THE COURT: This involves -- Mr. Zack, I understand

1 there's a witness from Las Vegas you intend to call?

2 MR. ZACK: Yes, Your Honor.

3 THE COURT: And what is his name?

4 MR. ZACK: Tom Ward.

5 THE COURT: And will he be making any court
6 identification, an in court identification?

7 MR. ZACK: No.

8 THE COURT: Okay. Ms. O'Neill?

9 MS. O'NEILL: Your Honor, I want to, for purposes of
10 the record, I want a ruling from the Court regarding my
11 Motion To Suppress Identification Testimony I filed August
12 4th, which was based on a motion I filed March 3rd prior
13 to trial regarding testimony of Mr. Ward, and the
14 authority for that is contained in the third motion. This
15 was not ruled on prior to trial because Mr. Zack stated
16 Mr. Ward wasn't going to be called. It was not ruled on
17 at a prior hearing subsequent to this because Mr. Zack had
18 indicated Mr. Ward wasn't going to be called. Basically,
19 we would submit to the Court that any identification that
20 Mr. Ward can make in this case would be tainted by prior
21 contacts that he's had with the State and prior
22 identification proceedings at which he was not able to
23 identify my client, and to my knowledge, not able to
24 identify Mr. Roger Murray, although I am not aware whether
25 there was a line-up regarding that.

1 We object to any identification of, or
2 attempted identification by the witness, Tommy Ward, of
3 Robert Murray. We also object to any attempt by Mr. Ward
4 to identify any items which may be in evidence from the
5 trial, including any guns that may be in evidence from the
6 trial. And the authority's stated in the motions that I
7 previously filed.

8 THE COURT: Okay. Thank you. Mr. Zack?

9 MR. ZACK: Your Honor, with regard to the shotgun,
10 I'll briefly outline the facts surrounding that. The
11 detectives, when they went through the defendants'
12 vehicle, found a phone number to Las Vegas. I believe it
13 was on the atlas that was submitted in evidence already.
14 They checked it out. It turned out to be the phone number
15 of Tom Ward. The detective contacted him to see what was
16 going on. Turned out that Mr. Ward told the detective
17 that he sold a shotgun. I don't know the exact date. It
18 was two or three days prior to the murders here. He sold
19 it to a man. He didn't have serial numbers at the time.
20 He thereafter checked through the people he traded the
21 computer for. He traded the computer for a gun a number
22 of years earlier. He provided -- that serial number was
23 supplied to Detective Ingrassi, and that serial number is
24 the same serial number as the weapon found in the
25 defendants' vehicle.

1 Identification of the shotgun is based upon
2 serial numbers because it was not in the same condition
3 when Mr. Ward sold it. It had been sawed-off, obviously
4 in the two or three days after he sold it preceding the
5 murders. So, in terms of identification of the shotgun,
6 it will be for the serial numbers. Probably most of the
7 testimony of Mr. Ingrassi. Certainly hearsay is
8 admissible. I am not quite sure what the defense point
9 is. That it's a -- certainly she can cross-examine
10 Detective Ingrassi about whether he can read serial
11 numbers correctly. In terms of the -- maybe I am missing
12 defense's point. In terms of the shotgun identification,
13 that's how the State intends to do it.

14 THE COURT: Ms. O'Neill?

15 MS. O'NEILL: Your Honor, by this motion in asking
16 that the Court preclude those things, we are not by any
17 stretch of the imagination admitting that any of this
18 testimony may be relevant tomorrow. But, if the Court
19 lets it in, I believe that there is in the disclosure that
20 I received in this case, the indications are not -- or, it
21 wasn't clear to me from reading the disclosure the State
22 gave me, that Mr. Ward gave anybody a serial number to
23 anything. The information I received was that Mr. Ward
24 gave the names of the -- some people he had purchased guns
25 from to detectives, and that they talked to people who had

1 serial numbers for guns, and they got a serial number that
2 matched. I think that it's a tenuous connection, at best.
3 I'm not sure it's relevant to anything against my client
4 in rebuttal based upon the mitigation that was presented
5 yesterday, but we will take that up tomorrow. But, I
6 think it's important for the Court to issue a ruling on
7 what is or is not precluded by way of identification, to
8 get that out of the way.

9 MR. ZACK: Your Honor, just -- Ms. O'Neill struck
10 one point. It wasn't Mr. Ward who gave the serial numbers
11 to detectives, it was the person who had gotten the
12 computer for the gun that Mr. Ward got out of that
13 transaction.

14 THE COURT: Mr. Dickey, you didn't join in this
15 motion. At least I don't recall your joining in this
16 motion.

17 Do you have any comments on this motion now?

18 MR. DICKEY: Well, Your Honor, we fail to see the
19 relevancy of this in connection with the mitigation
20 portion of the hearing. It sounds like this more relates
21 to matters involving the guilt phase which is already
22 passed. I would point out to the Court from just a
23 practical matter, that the only thing that could be shown
24 as, that this shotgun was the one that was found on the --
25 in the defendants' possession at the time that they were

1 stopped -- there is no evidence to show that this
2 particular shotgun was used in the commission of this
3 offense, at all. Any shotgun of that size or caliber
4 could have been used to commit this particular offense, so
5 there is a foundational portion missing there because it
6 really doesn't have anything to do with proving or
7 rebutting the mitigation which has been offered in
8 connection with this case by either side.

9 We would feel that it would be irrelevant to
10 the issues in this particular case, and again, even if it
11 were established that this gun had been sold, there's no
12 showing because they cannot identify the person to whom it
13 was sold. There's no showing how these particular people,
14 the Murrays, came into possession of the particular gun or
15 where they got it, and so we believe that there is no
16 relevancy and there is -- and would be a lack of
17 foundation.

18 THE COURT: With regard to Ms. O'Neill's motion,
19 since there is going to be no in court identification of
20 the defendants, there's no need to take up an evidentiary
21 hearing. And I think that your motion is not well taken
22 as far as identification of the shotgun and matching
23 serial numbers are concerned. So, with regard to that
24 motion, it is denied as far as the testimony that is
25 expected for tomorrow.

1 Is there anything else we need to take up
2 tonight?

3 MS. O'NEILL: Your Honor, to clarify then, you are
4 denying the motion regarding the shotgun, and you are
5 relying on statements by the State that no in court
6 identification of my client would be attempted; is that
7 correct?

8 THE COURT: Yes. And if that changes, then
9 obviously my ruling would change.

10 MS. O'NEILL: Your Honor, I would ask the Court to
11 rule that the State may not attempt in court
12 identification of my client.

13 THE COURT: Mr. Zack?

14 MR. ZACK: I'd ask the Court to hold it. If he
15 shows up here tomorrow and says that's him over there --
16 you know, I don't expect that to happen. But, I restate
17 my position. I don't intend to ask him whether he
18 couldn't pick him out as an in person line-up a year ago.
19 That there's certainly some taint there, the State agrees
20 with that. I don't intend to ask him.

21 THE COURT: Well, I think I am going to rule on it
22 at this time. And that is, I'm going to prohibit the
23 State from making in court identification tomorrow based
24 on prior statements that you didn't intend to use it.
25 Also, that there were some other identification procedures

1 that may have tainted any in court identification. The
2 State has, at this time, no intent to use it, so therefore
3 I am going to prohibit it from being used. It is ordered
4 that the State can admit evidence regarding the
5 identification of the shotgun.

6 Is there anything else that we need to take up
7 up tonight?

8 MR. ZACK: Not from the State.

9 MS. O'NEILL: Not at this time, Your Honor.

10 MR. DICKEY: No, Your Honor.

11 THE COURT: Okay. Thank you. We are in recess
12 until 9:30 tomorrow morning.

13 (The proceedings concluded at 4:25 p.m. on October
14 6, 1992.)

15

16

17

18

19

20

21

22

23

24

25