

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF ARIZONA

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<b>Roger Mark Scott,</b>	)	
	)	No. <b>CV 97-1554-PHX-PGR</b>
Petitioner,	)	
	)	
vs.	)	Phoenix, Arizona
	)	October 5, 2010
<b>Charles L. Ryan, et al.,</b>	)	9:32 a.m.
	)	
Respondents.	)	
	)	

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**BEFORE: THE HONORABLE PAUL G. ROSENBLATT, JUDGE**

**REPORTER'S TRANSCRIPT OF PROCEEDINGS**

**EVIDENTIARY HEARING**

**VOLUME I**

**Pages 1 through 172**

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Proceedings Reported by Stenographic Court Reporter  
Transcript Prepared by Computer-Aided Transcription

1           There's water here if you need it. Remember to speak  
2 up and into the microphone.

3           And this will be the exhibits they'll ask you about.

4           THE WITNESS: Thank you.

5                                 DIRECT EXAMINATION

09:52:50

6 BY MR. BURKE:

7 Q. Good morning.

8 A. Good morning.

9 Q. Could you state your name for the record, please?

10 A. Thomas Gorman, G-O-R-M-A-N.

09:53:02

11 Q. And, Mr. Gorman, what is your profession?

12 A. I'm a criminal defense attorney.

13 Q. And where did you attend law school?

14 A. Marquette University, Milwaukee, Wisconsin.

15 Q. And what year did you graduate from Marquette?

09:53:16

16 A. 1985.

17 Q. In what courts -- what Bars have you been admitted to?

18 A. Marquette University has what's called the diploma  
19 privilege, so you don't have to take a Bar exam if you graduate  
20 from Marquette. So upon graduation I was admitted to the  
21 Wisconsin Bar.

09:53:34

22           In 1987 I took the Arizona Bar, and was admitted to  
23 practice in Arizona. And in 1987 I also took the Illinois Bar,  
24 and was admitted to practice in Illinois. And in 1996 or '97 I  
25 took the California Bar, passed it, and was admitted to

09:53:55

1 practice in California.

2 Q. And can you tell the Court what courts you have been  
3 admitted to practice in?

4 A. I have been admitted to practice in the Supreme Court, the  
5 Ninth Circuit, the Federal District Court here in Arizona, the  
6 Eastern District of Wisconsin Federal Court. That was in 1986.  
7 I think that's it. 09:54:13

8 Q. And what area of law do you practice?

9 A. I specialize in criminal defense.

10 Previously my practice was, primarily from the time of 09:54:36  
11 an internship program in law school through about 1996,  
12 primarily all trial work. And I made a transition into federal  
13 habeas work, either capital or noncapital, State  
14 post-conviction and appellate work in about '96 to the present.  
15 Although I still do try cases. 09:55:02

16 Q. So on occasion you still try cases?

17 A. Yes.

18 The most recent significant trial I did was about  
19 three years ago, I think, which was a first degree murder case  
20 in Phoenix. 09:55:15

21 Q. But the vast majority of your practice over the 25 years  
22 since you graduated from law school has been in the area of  
23 criminal law?

24 A. Yes. Even before I graduated it was in criminal law.

25 I had a year internship with the Wisconsin State 09:55:38

1 Public Defender's Office, in which I tried a case to a jury,  
2 did a habeas petition. And then while still in law school I  
3 had an internship with the Winnebago State Attorney's Office  
4 where I prosecuted cases. I tried dozens of misdemeanor and  
5 traffic matters. And then I also second chaired first degree  
6 murder prosecution. That was in 1982.

09:56:00

7 Q. So this was when you were in law school?

8 A. Under the student practice rule you could do that in  
9 Illinois and Wisconsin.

10 And I've been doing criminal law, specializing it ever  
11 since then.

09:56:16

12 Q. Well, could you outline then for us what your employment  
13 history has been and how you have -- what arenas you've  
14 practiced criminal law?

15 A. Yes. As I said, while in law school, starting in my second  
16 year, I was in internship programs through graduation.

09:56:31

17 Upon -- well, prior to graduation I worked for a firm called  
18 Calvey, Mitchell & Baxter, which was a small firm in downtown  
19 Milwaukee. The partner who I worked for primarily was a former  
20 Assistant U.S. Attorney, Terry Mitchell, who had a large  
21 criminal practice. And he was my mentor.

09:56:55

22 And upon graduation, because he would get retained on  
23 cases, he'd just send me into Federal Court in Wisconsin  
24 defending people charged with federal crimes and such.

25 Q. So right out of law school you were in court representing

09:57:14

1 criminal defendants?

2 A. Yes. And I had a jury trial within a month of graduating  
3 from law school.

4 Q. And how long were you with the firm in private practice in  
5 Milwaukee? 09:57:29

6 A. I was with Calvey, Mitchell & Baxter for approximately two  
7 years. One of those years as a clerk, one year as a lawyer.  
8 And that's when I decided, after growing up with Wisconsin  
9 winters, to move to Arizona.

10 Q. And what year would that have been? 09:57:43

11 A. I came to Arizona in '87, took the Bar in '87, and secured  
12 a job with the Maricopa County Public Defender's in 1987.

13 Q. And how long were you employed by the Maricopa County  
14 Public Defender's Office?

15 A. I believe it was two years and seven months. 09:58:00

16 Q. So what year did you leave the Maricopa County Public  
17 Defender's Office?

18 A. I left -- and I did this just for clarity for business  
19 purposes and such. My first day of private practice as a sole  
20 practitioner was January 1st, 1990. 09:58:17

21 Q. So am I correct that for at least a certain amount of time  
22 you were employed in the Maricopa County Public Defender's  
23 Office at the time that the trial counsel, Roland Steinle in  
24 this case, was employed there?

25 A. That is correct. 09:58:34

1 Q. Did you know Mr. Steinle?

2 A. When I was in Milwaukee, I knew who Mr. Steinle was. He  
3 attended Marquette, although approximately ten years before I  
4 did. But I would see him around the Milwaukee County  
5 Courthouse. I knew who he was. And I knew who he worked for,  
6 which was Jerry Boyle, who was a -- someone who I was aware of  
7 in Milwaukee.

09:58:48

8 Q. Okay. When you left the Maricopa County Public Defender's  
9 Office in 1990, what did you -- what work did you commence on  
10 then?

09:59:07

11 A. When I left in 1990, I took all appointments on serious  
12 felony matters. I was on the CJA panel beginning in 1990, in  
13 Federal Court here. And I took appointments out of Maricopa  
14 County. And murder cases, a lot of first degree murder cases.  
15 I took a federal habeas petition, which I litigated for  
16 approximately nine or ten years.

09:59:36

17 I did basically all serious cases that I was either  
18 appointed on or retained.

19 Q. Have you ever represented a defendant in a capital case?

20 A. I have defended -- had a capital case on my case load I  
21 would say at all times since 1989, either a trial level case, a  
22 federal habeas -- capital federal habeas, or a capital direct  
23 appeal. In some form I was defending or representing a capital  
24 defendant, either someone who had been sentenced to death, or  
25 who the State was seeking to secure a death sentence against.

10:00:00

10:00:33

1 Q. Okay. Could you give us an example by name of a case, a  
2 capital case, which you were the trial counsel?

3 A. I was trial counsel in *State versus Walter Spears*, that was  
4 1989, as a public defender. That was a death penalty case that  
5 was resolved by plea. 10:01:04

6 I had a capital trial level case in Holbrook, which I  
7 believe would be Navajo County, in 2000.

8 I had capital cases in Maricopa County in the early  
9 nineties. For example, Damon Kerl, K-E-R-L, was a 16-year-old  
10 charged with three separate capital offenses. 10:01:34

11 And I tried a capital case before that, *State versus*  
12 *Roger Raymond Gonzales*. He was on parole for a homicide and  
13 was charged with a contract murder. And there was multiple  
14 aggravators because of the manner of death. I tried that to  
15 verdict. 10:02:00

16 I've been defending Kyle Sharp, who was sentenced to  
17 death in 1997, for 11 years --

18 Q. Let me just clarify. That is the case that's in State  
19 post-conviction; correct?

20 A. That is in State post-conviction in Cochise County. 10:02:16

21 Q. So you did not represent Mr. Sharp in his trial?

22 A. No.

23 Q. Have you ever represented a criminal defendant in a penalty  
24 phase of a capital case?

25 A. No. All of the cases that I have had, which are at least 10:02:31

1 ten or a dozen capital cases, I've resolved pretrial or they've  
2 been contested. And there were two of those. And one resulted  
3 in acquittal. The other one, it's complicated to explain, but  
4 it was contested, but it was resolved with a life sentence.

5 Q. Was that -- the second case to which you refer, was that a 10:02:55  
6 case that was being tried in Arizona at the time that the  
7 United States Supreme Court decided the case of *Ring versus*  
8 *Arizona*?

9 A. Yes.

10 Q. And you were in trial in that case on that day, in fact, 10:03:10  
11 weren't you?

12 A. I was in pretrial proceedings. It was a prison murder in  
13 which my client had a prior homicide, so that's an aggravator.  
14 He was in prison for a first degree murder. And it was an  
15 execution murder, three white supremacists who met in the 10:03:31  
16 prison yard, while on video, and shanked the leader of the  
17 Mexican Mafia 47 times and killed him.

18 Q. You said that that was a contested case, but it was  
19 resolved before penalty phase?

20 A. It was resolved pretrial, because I walked my client in and 10:03:51  
21 pled him to the Indictment, as a tactical move. Because I felt  
22 I could convince the trial judge to only notice him, because of  
23 the *Ring* decision, that the only possible penalty was natural  
24 life. And I knew that once the judge noticed him on that being  
25 the maximum penalty, that if there was some change in the 10:04:19



1 following weeks, that he could not be sentenced under that plea  
2 because he was not properly advised of the maximum penalty.

3 Then I also urged the judge to accept the plea at that  
4 time --

5 MS. BLOMO: Objection to the narrative form of the  
6 testimony.

10:04:38

7 THE COURT: Sustained.

8 Was that in the *Spears* case that you're talking  
9 about -- you're testifying to?

10 THE WITNESS: No, this was in *State versus Sizemore*,  
11 which was a prison murder case, Your Honor.

10:04:48

12 BY MR. BURKE:

13 Q. Mr. Gorman, was your tactical decision in that case  
14 successful?

15 A. Yes. The judge accepted the plea, jeopardy attached. The  
16 following week the Attorney General's Office filed a motion to  
17 revoke the plea. And the Attorney General's Office were found  
18 to have waived their argument because they failed to object at  
19 the time of the change of plea that death was still on the  
20 table.

10:05:05

10:05:23

21 Q. Okay.

22 A. And that was appealed to the Arizona Supreme Court, and the  
23 AG's Office lost their argument.

24 Q. Can you give us an example of a capital case in which  
25 you've represented a defendant on direct appeal?

10:05:35

1 A. I -- since 2003 I've been attorney of record on four  
2 capital direct appeals to the Arizona Supreme Court.

3 *State versus Cropper*. His death sentence was  
4 reversed. I was counsel for Mr. Cropper.

5 Q. Do you know who the trial counsel was in Mr. Cropper's  
6 case? 10:05:57

7 A. Roland Steinle.

8 *State versus Hall*. I was the attorney in Mr. Hall's  
9 capital direct appeal to the Arizona Supreme Court. The  
10 Arizona Supreme Court reversed his conviction on the capital  
11 charge, and Mr. Hall is currently awaiting retrial in Maricopa  
12 County. That was in 2003, the reversal. 10:06:11

13 I was attorney of record for Gary Wayne Snelling. And  
14 on August 9th, I believe, the Arizona Supreme Court reversed  
15 his death sentence and imposed a sentence of natural life. 10:06:34

16 Those were my capital direct appeals.

17 And I was attorney of record on another one, *State*  
18 *versus Anderson*. That was affirmed. And he's presently, I  
19 believe, in post-conviction.

20 Q. Okay. Mr. Gorman, you mentioned earlier that you  
21 represented a defendant by the name of Kyle Sharp? 10:06:53

22 A. Yes.

23 Q. And that case is in State post-conviction proceedings?

24 A. Yes.

25 Q. Were the issues in Mr. Sharp's case similar to the issues 10:07:05

1 presented to the Court in this case?

2 A. Yes, very much so.

3 Q. And how so? What issue did you have to litigate in that  
4 case?

5 MS. BLOMO: Objection to the relevance of a case  
6 totally unrelated to this one.

10:07:20

7 MR. BURKE: Your Honor, this is relevant to show  
8 Mr. Gorman's experience as a capital defense attorney, his  
9 experience with the issues to which he will be testifying today  
10 as an expert.

10:07:35

11 THE COURT: The objection is overruled.

12 You may answer.

13 THE WITNESS: Okay. Could I have the question  
14 repeated, please?

15 BY MR. BURKE:

10:07:43

16 Q. Could you briefly explain for us the similarity between the  
17 issue in *Mr. Sharp's* case and the issue before the Court in  
18 this case?

19 A. The -- the issue in the *Sharp* case, which resulted  
20 in -- one of the reasons, in his death sentence being reversed,  
21 was the failure of trial counsel to secure a minimally  
22 competent capital defense team, which would have included a  
23 Mitigation Specialist, and the failure of the defense counsel  
24 to investigate, develop and present relevant, present and  
25 available mitigating evidence at the capital sentencing

10:08:01

10:08:26

1 proceeding.

2 Q. Did you have an evidentiary hearing in *Mr. Sharp's* case?

3 A. Yes.

4 Q. How long was that evidentiary hearing?

5 A. It -- to give you an aggregate number of trial days or 10:08:38  
6 hearing days would be difficult because we were -- had hearings  
7 in February, and March, in July. But I'm sure ten days of  
8 hearings total, at least.

9 Q. Okay. And were you ultimately successful in that case?

10 A. The trial judge found both attorney error and prejudice, 10:09:02  
11 and vacated *Mr. Sharp's* death sentence. And right now we're in  
12 pretrial proceedings in Cochise County to determine whether the  
13 State's going to retry and attempt to secure a death sentence  
14 again.

15 Q. And do you continue to represent *Mr. Sharp*? 10:09:21

16 A. Yes.

17 Q. Can you give --

18 THE COURT: And when was this tried?

19 THE WITNESS: The *Sharp* case was originally tried in  
20 1997. 10:09:32

21 BY MR. BURKE:

22 Q. Can you give us an example of a federal capital habeas  
23 proceeding which you've represented a capital defendant?

24 A. Yes. I was appointed, I believe -- I'm doing this by  
25 memory. But I believe I was appointed by the Honorable Robert 10:09:49

1 Broomfield, Federal District Court Judge, to represent Patrick  
2 Poland on a federal capital habeas petition. And I represented  
3 Mr. Poland in Federal District Court and before the Ninth  
4 Circuit through March of -- March 15th of 2000.

5 Q. And what is significant about the date of March 15th, 2000? 10:10:16

6 A. Well, the matter was concluded because he was executed.

7 Q. In Mr. Poland's case in federal habeas, were you required  
8 to research and brief issues regarding ineffective assistance  
9 of counsel?

10 A. Yes. That was one of the claims. And Judge Broomfield 10:10:37

11 appointed Mary Durand as a Mitigation Specialist to investigate  
12 and develop mitigation as to that claim.

13 Q. Mr. Gorman, are you qualified under Rule 6.8 of the Arizona  
14 Rules of Criminal Procedure?

15 A. Yes. 10:10:57

16 Q. And what is Rule 6.8?

17 A. Rule 6.8 are the minimum competency requirements or  
18 criteria under the Arizona Rules of Criminal Procedure that  
19 were issued on an emergency basis by the Arizona Supreme Court  
20 in, I believe, 1997. 10:11:15

21 Q. Can you tell the Court, if you know off the top of your  
22 head, what are the minimum requirements of 6.8 to be qualified?

23 A. I did not memorize it. And I don't have it in front of me.  
24 But I can tell you it has to do with a certain commitment to  
25 capital defense work, both in experience and training, that's 10:11:36

1 demonstrated.

2 But if I had a rule book I could walk you through  
3 them.

4 Q. That's fine. Thank you.

5 Have you ever served as learned counsel in a federal  
6 capital trial? 10:11:51

7 A. I was appointed as learned counsel in four cases here in  
8 Federal District Court.

9 State versus -- or excuse me, the *United States of*  
10 *America versus Kevin Augustiniak*. I participated in that case 10:12:09  
11 in both phase one and phase two. Phase two negotiations with  
12 Main Justice in Washington, D.C. That case, eventually the  
13 death penalty was not noticed by Main Justice, and the case  
14 eventually was dismissed with prejudice in Federal Court, and  
15 it's been refiled in State Court in Arizona. 10:12:37

16 I was appointed as learned counsel in *United States of*  
17 *America versus Winston Brown*, which involved a triple homicide.  
18 It was a drug rip-off theory of prosecution. And in pretrial  
19 proceedings, in objecting to a continuance by the  
20 Government -- 10:13:04

21 MS. BLOMO: Objection to the narrative form of the  
22 testimony.

23 MR. BURKE: We can move on, Your Honor. That's fine.

24 BY MR. BURKE:

25 Q. I'd like to move on to discuss your training in the area 10:13:10

1 of -- the trainings that you've attended in the area of capital  
2 representation. But before I do, Mr. Gorman, I want to ask  
3 you: Are there any areas of practice, pertaining specifically  
4 to capital representation defense, in which you have engaged  
5 that I have failed to ask you?

10:13:28

6 A. Well, I think you've asked -- I've done trials, direct  
7 appeals. Well, I've done clemency proceedings. I've gone to  
8 the governor's office to attempt to secure clemency.

9 I believe the only thing I have not actually done in  
10 terms of a proceeding or a forum is a federal capital direct  
11 appeal. I've never done that.

10:13:55

12 And because I've been successful in resolving cases, I  
13 have not done a penalty phase proceeding, per se. Although I  
14 have prepared extensively on all my cases for a possible  
15 penalty proceeding.

10:14:17

16 Q. In the course of your 25 years of practice, have you  
17 attended any seminars or training that was specifically geared  
18 towards the representation of indigent capital defendants?

19 A. Yes.

20 Q. And can you tell us what those trainings were?

10:14:34

21 A. Yes. Most recently -- and I've done this since I got my  
22 first capital case. Because it's overwhelming, at least for me  
23 it was, as a young lawyer to get a death penalty case. So I  
24 made it my purpose to always make sure I was informed on the  
25 law and the proceedings. And I've done this for the past 20

10:14:59

1 years.

2 But most recently I went -- and this is a four-day  
3 seminar. It's put on by the California --

4 MS. BLOMO: Objection. Narrative.

5 MR. BURKE: Your Honor, this is not narrative. He's 10:15:12  
6 responding to my --

7 THE COURT: Overruled.

8 THE WITNESS: Most recently I went to a capital  
9 defense seminar in Monterey, California. It's a four-day  
10 seminar. And it's an intensive seminar. I mean, it's ten, 12 10:15:24  
11 hours a day. And addresses not just the legal aspect of  
12 capital defense work, but there's a huge component to capital  
13 defense work, which is being familiar with the sciences as they  
14 pertain to defenses, potential defenses of a capital defendant.

15 BY MR. BURKE:

16 Q. Any other trainings that you've attended?

17 A. Yes. Either annually or biannually for the past 20 years I  
18 go to these seminars that are intensives. They're like three  
19 or four days.

20 I went to what's called the Airlie Conference, which 10:16:05  
21 is by invitation only.

22 Q. And for the record is that spelled A-I-R-L-I-E?

23 A. Yes. And that's put on in Warren, Virginia.

24 And I was invited by the Federal Habeas Resource  
25 Counsel, Denise Young, who works for the administrative offices 10:16:24



1 of the Court --

2 Q. Mr. Gorman, is that a seminar that can only be attended by  
3 invitation?

4 A. Yes.

5 And so I was able to attend because she invited me. 10:16:34  
6 She invited me because she's familiar with my capital defense  
7 work. She is also put in a case I handled in seminar materials  
8 at a habeas conference as an example how to defend a capital  
9 defendant.

10 And then I have them listed through my resume. I've 10:16:56  
11 attended a lot of federal --

12 Q. For brevity sake, maybe that's the best question I could  
13 ask you, you have these trainings listed in your CV?

14 A. A large sampling of them, yes.

15 MR. BURKE: Okay. Your Honor, Mr. Gorman's CV has 10:17:12  
16 already been admitted, by stipulation. It is Exhibit 5 to this  
17 proceeding. And so we will submit that resume as further  
18 evidence of Mr. Gorman's training and experience.

19 BY MR. BURKE:

20 Q. Mr. Gorman, what is the focus of your practice today? 10:17:32

21 A. Well, if someone wants to retain me, I don't generally turn  
22 away business on noncapital work. But I presently have, I  
23 believe, three capital cases. And having those three is more  
24 than a full-time job. Two are pending direct appeals before  
25 the Arizona Supreme Court. And then the *Sharp* matter, I'm 10:17:58

1 basically at this stage getting ready for a retrial. That's a  
2 trial level capital case.

3 And those three cases is more than enough.

4 Q. And just to clarify, you do have experience and have had  
5 experience in the early 1990s in representing capital  
6 defendants -- indigent defendants; correct? 10:18:20

7 A. Yes to both questions. And I've represented indigent  
8 defendants since I was in law school.

9 Q. Are you familiar with the standards of practice applicable  
10 to an attorney representing an indigent capital defendant in  
11 the early 1990s? 10:18:40

12 A. Going all the way back to the eighties I'm conversant on  
13 it, based on my experience and training.

14 Q. Have you ever testified as an expert before in a court  
15 proceeding? 10:18:58

16 A. I've testified as a standard of care expert in two other  
17 court proceedings.

18 Q. And where were those proceedings?

19 A. Both of them were in Cochise County Superior Court. One  
20 before the Honorable Frederick Newton, the other before the  
21 Honorable Daniel Slayton. 10:19:10

22 MR. BURKE: Your Honor, at this time, in light of  
23 Mr. Gorman's 25 years of experience and training as a capital  
24 defense attorney, I would ask that the Court recognize him as  
25 an expert on the standard of care of capital defense attorneys 10:19:27

1 in 1989, 1990 and 1991.

2 THE COURT: Any objection?

3 MS. BLOMO: No, Your Honor.

4 THE COURT: Admitted.

5 BY MR. BURKE:

10:19:41

6 Q. Mr. Gorman, you mentioned a few moments ago your attendance  
7 at the Airlie Seminar in Virginia. Do you recall what year you  
8 attended that seminar?

9 A. Could I refresh my memory by looking at my resume?

10 Q. Certainly.

10:19:55

11 Do you have a copy in front of you?

12 A. Yes, sir.

13 I attended the Airlie Conference in Warren, Virginia  
14 from July 9th through Sunday, July 12th of 2009.

15 Q. Do you recall meeting me at that seminar in 2009?

10:20:11

16 A. Yes, I believe that's the first time I met you.

17 Q. Okay.

18 MR. BURKE: Oh, Your Honor, just to clarify, for the  
19 record I misspoke. Mr. Gorman's CV is actually Exhibit 4, not  
20 Exhibit 5. But it, too, has also been stipulated to.

10:20:36

21 THE COURT: Mr. Gorman is an expert. The Court's well  
22 familiar with him from years past.

23 MR. BURKE: Thank you.

24 BY MR. BURKE:

25 Q. At that -- at that seminar in Airlie, did you and I discuss

10:20:47

1 Mr. Scott's case?

2 A. Yes.

3 Q. And did I, as a result of our conversation, ask that you  
4 consult with the Office of the Federal Public Defender as an  
5 expert for purposes of preparing for the hearing that we're at  
6 today?

10:21:05

7 A. Yes.

8 Q. And at some point after you began to work as an expert  
9 consulting with us, did I ask you to testify in this hearing?

10 A. Yes.

10:21:20

11 Q. Okay. Are you familiar with the National Association of  
12 Criminal Defense Lawyers?

13 A. Very much so.

14 Q. And what is that organization?

15 A. The National Association of Criminal Defense Lawyers is a  
16 national organization that sponsors seminars and a monthly  
17 publication that define the standards of practice for criminal  
18 defense attorneys in both noncapital cases and capital cases.

10:21:32

19 Q. And what is their monthly publication called?

20 A. The Champion.

10:21:56

21 Q. Do you know how long The Champion -- how many years  
22 The Champion has been published?

23 A. At least -- it may be earlier, but I became aware of it in  
24 the 1980s.

25 Q. And do you know, in the 1980s was The Champion publishing

10:22:10

1 articles on the development of mitigation evidence in capital  
2 cases?

3 A. Yes. Specifically and expressly explaining how to  
4 investigate, develop, and present mitigation in a capital  
5 proceeding.

10:22:30

6 Q. And this was as early as the 1980s?

7 A. Yes. And if I can refresh my recollection, I have a few  
8 articles that I could specifically cite to you.

9 Q. Do you have them with you?

10 A. Yes.

10:22:43

11 MR. BURKE: Your Honor, would that be acceptable, if  
12 Mr. Gorman were to look at the articles he has to refresh his  
13 recollection?

14 THE COURT: Certainly.

15 MR. BURKE: Thank you.

10:22:53

16 THE WITNESS: In The Champion publication of August  
17 1986 there was a very detailed article entitled Zen and the Art  
18 of Mitigation Presentation or the Use of Psychosocial Experts  
19 in the Penalty Phase of a Capital Trial. And that discussed  
20 the need to investigate, develop, and present mitigation, and  
21 also the need to secure a Mitigation Specialist on a capital  
22 case.

10:23:35

23 There was an article in the June of 1987 The Champion  
24 entitled Using the Mitigation Specialist and the Team Approach.

25 And once again, it emphasized the need in all capital cases to

10:23:59

1 secure a Mitigation Specialist, and begin investigating,  
2 developing and preparing to present mitigation in a capital  
3 case.

4 Q. And that second article you said was from 1987?

5 A. The second article was from June of 1987. 10:24:17

6 Q. And you mentioned the term "Mitigation Specialist" in  
7 referring to both of those articles. What, to your  
8 understanding, is a Mitigation Specialist?

9 A. A Mitigation Specialist has a different skill set than a  
10 lawyer. A Mitigation Specialist is someone who has very good 10:24:37  
11 interview skills in terms of getting people to disclose secrets  
12 that they don't want to disclose to anyone. Because that's  
13 part of collecting mitigation. So it's very good interview  
14 skills. The interview skills perhaps even of a social worker  
15 or a counselor, et cetera. 10:25:02

16 Then a Mitigation Specialist is also -- needs to be  
17 familiar with the symptoms of mental health problems or head  
18 injury problems, trained to recognize things such as, you know,  
19 the facial features of someone that might suggest fetal alcohol  
20 syndrome. All these social science and physical science 10:25:31  
21 indicators that would lead the Mitigation Specialist to pursue  
22 that and put the attorney on notice of it.

23 Q. In your 20 years of practice -- 25 years of practice, have  
24 you ever retained a Mitigation Specialist in a capital case?

25 A. Yes. 10:25:51

1 Q. And you mentioned previously the *Sharp -- State versus*  
2 *Sharp* case; correct?

3 A. Correct.

4 Q. And you represented Mr. Sharp in State post-conviction?

5 A. Correct.

10:26:05

6 Q. At the evidentiary hearing in that case did you call a  
7 Mitigation Specialist to testify as an expert?

8 A. Yes.

9 MS. BLOMO: Your Honor, I'm going to object. I think  
10 this is beyond the scope of the evidentiary hearing. It hasn't  
11 been remanded for ineffective assistance of counsel for failing  
12 to retain a Mitigation Specialist.

10:26:15

13 THE COURT: We've already established that Mr. Gorman  
14 is an expert. This seems like you're trying to lay more  
15 foundation for his qualifications.

10:26:32

16 MR. BURKE: No, Your Honor, I'm not.

17 Mr. Gorman will testify today that an integral part of  
18 the minimal standard of a competent attorney in a capital case  
19 is to work with -- to retain and work with a Mitigation  
20 Specialist. But --

10:26:50

21 THE COURT: But we've established that he is an  
22 expert, so you can just go right to his opinion, I think. I  
23 think that's the -- the Government's --

24 MR. BURKE: Your Honor, I would move to admit  
25 Exhibit 57 in this case, which is the transcript of the

10:27:01

1 testimony of Mary P. Durand in the case of *State versus Sharp*.

2 Miss Durand is a Mitigation Specialist. And she  
3 testified in that case specifically about the use of Mitigation  
4 Specialists in capital cases in Arizona in the 1980s and 1990s,  
5 which is an issue directly relevant to this Court's  
6 determination of trial counsel's deficient performance.

10:27:27

7 MS. BLOMO: Your Honor, we object to the admission of  
8 that exhibit.

9 The scope of this remand goes to voluntariness, and it  
10 goes to the alleged failure of Mr. Steinle to present evidence  
11 about brain injury or neurological dysfunction. This was not  
12 remanded to determine whether Mr. Steinle was ineffective in  
13 failing to retain a Mitigation Specialist.

10:27:40

14 Further, Miss Durand is not here to testify. I can't  
15 cross-examine her. So beyond the relevance, I'm also unable to  
16 cross-examine what they're basically putting forth as  
17 testimony.

10:27:59

18 MR. BURKE: May I be permitted to respond, Your Honor?

19 THE COURT: Briefly.

20 MR. BURKE: Okay. Your Honor, Miss Blomo  
21 mischaracterizes the remand in this case.

10:28:09

22 The Ninth Circuit ruled that when Mr. Scott's case was  
23 pending in District Court, his claim that his attorney had  
24 rendered ineffective assistance of counsel in failing to  
25 develop, present mitigation evidence at his capital trial, the

10:28:26



1 Court in the Ninth Circuit Court ruled that that claim was  
2 properly before this Court. This Court ruled that it was not  
3 and, therefore, failed to address it.

4 We can direct the Court to the Court's -- to  
5 Mr. Scott's pleadings in the District Court. The issue was 10:28:44  
6 clearly presented as one of failure to develop mitigation at  
7 the capital stage of the proceeding. It's something that fell  
8 squarely within the issue before the remand to this Court. It  
9 has never been limited at any point to the question of the --  
10 solely the question of brain damage. It was a much broader 10:29:03  
11 claim. And the Court ruled that that claim was properly before  
12 this Court.

13 THE COURT: Well, Mr. Gorman can testify as to whether  
14 or not a Mitigation Specialist should have been appointed in  
15 this particular case, certainly Mr. Scott. But Miss Durand's 10:29:18  
16 testimony in another case concerning the importance of a  
17 Mitigation Specialist is simply not relevant and it's  
18 not -- it's hearsay for this proceeding.

19 So the objection is sustained.

20 MR. BURKE: We would ask, though, that the Court does 10:29:38  
21 within its discretion does have the right to take judicial  
22 notice of testimony in a court proceeding. And we would submit  
23 that because it is not an out-of-court statement it is not  
24 hearsay.

25 And we reserve the right, in light of Miss Blomo's 10:29:50

1 statement, to call Miss Durand in rebuttal if we believe it's  
2 necessary.

3 THE COURT: Proceed with your examination.

4 MR. BURKE: Thank you, Your Honor.

5 BY MR. BURKE:

10:30:03

6 Q. Mr. Gorman, in working with our office in this case, were  
7 you asked to review certain documents?

8 A. Yes.

9 Q. Were you asked to review the -- well, first let me ask you,  
10 what documents were you asked to review?

10:30:17

11 A. I have a -- an itemized list which I can go through  
12 briefly, if that would answer your question.

13 Basically the trial attorney's file. And significant  
14 portions of the record, the trial record. The decisions by the  
15 Arizona Supreme Court on all three defendants. The Ninth  
16 Circuit decision of Mr. Scott's case.

10:30:45

17 And then if you want me to be more specific, I have an  
18 itemized list of approximately five pages of the materials that  
19 I reviewed.

20 Q. I think that's adequate for our purposes.

10:31:06

21 Were you given an opportunity by our office to review  
22 the actual original trial file in this case?

23 A. Yes.

24 Q. Do you recall what -- what those files -- how large they  
25 were or what they were contained with?

10:31:29

1 A. Two standard sized banker boxes, square, brown. The file  
2 was somewhat in disarray. And I looked through it generally.  
3 I didn't read every piece of paper or anything. I just  
4 generally went through it looking for certain items.

5 The materials you sent me included most of the things 10:31:53  
6 that I was looking for in the trial file. So I didn't find  
7 much in there of note.

8 Q. Okay. Based on your reviews of those records, did you form  
9 an opinion as to whether Roland Steinle met the standard of a  
10 minimally competent capital defense attorney? 10:32:16

11 MS. BLOMO: Objection, Your Honor. I believe this is  
12 a question for you to answer. And Mr. Gorman is not able to  
13 offer any expert testimony that's not already within your own  
14 knowledge and understanding.

15 THE COURT: Well, you've brought the cart before the 10:32:30  
16 horse. Whether or not he's entitled to opine as to the  
17 standard of care needs to come after the record reflects --  
18 this court record reflects the background and the circumstances  
19 and the facts attendant to this case.

20 MR. BURKE: Well, Your Honor, we have 10:32:55  
21 presented -- this Court has recognized Mr. Gorman as an expert  
22 on the standard of care. Mr. Gorman has testified as to his  
23 review of the record in this case.

24 And so -- and as to Miss Blomo's objection,  
25 Your Honor, Mr. Gorman is testifying as to a factual issue, 10:33:15

1 which is only one prong of this Court's decision. This Court  
2 must decide whether trial counsel rendered constitutionally  
3 ineffective assistance of counsel. Mr. Gorman is testifying  
4 about a prong of that analysis, which is the standard of care  
5 applicable to attorneys in 1989, 1990, 1991.

10:33:35

6 THE COURT: This is a de novo hearing before this  
7 Court to make certain findings. And when you ask him as  
8 foundation, did you review the entire record in this case, and  
9 he says, yes, he did some, reviewed some of the papers, that's  
10 not an adequate foundation. You're going to have to present to  
11 the Court and to him of what it was that he looked at.

10:34:00

12 MR. BURKE: Certainly, Your Honor, we can do that.

13 THE COURT: You just jumped to the final conclusion.  
14 And while he may ultimately be entitled to express his opinion  
15 in that regard, not in the record's present form.

10:34:20

16 MR. BURKE: Okay. Thank you, Your Honor. I will  
17 try -- I will attempt to remedy that deficiency.

18 Could I have just one moment, Your Honor?

19 THE COURT: Why don't we take a brief recess.

20 (Recess at 10:34 a.m., until 10:48 a.m.)

10:34:46

21 THE COURT: I think that we need to refocus here just  
22 for a moment before we get too far down the road.

23 You know we have very narrow marching orders from the  
24 Ninth Circuit. And while relevancy is obviously a moving  
25 concept, specifically we're told that we need to determine that

10:48:27

1 trial counsel rendered ineffective assistance of counsel  
2 because he did not investigate and present mitigating evidence  
3 of Scott's traumatic brain injuries and their effect on his  
4 mental processes during the sentencing phase.

5 So try not to get too far from that line, because 10:48:55  
6 we're not going to be -- we're not called upon to retry him on  
7 every conceivable issue.

8 MR. BURKE: Your Honor, may I respond? Because I  
9 believe that the Court is taking an improperly narrow view of  
10 the Ninth Circuit's opinion. And I would point in that regard 10:49:16  
11 to instances in the opinion where the Ninth Circuit also refers  
12 to Mr. Steinle's failure to present evidence of a Plea  
13 Agreement. That is in the opinion, Your Honor. It's discussed  
14 in this opinion.

15 It talks about evidence of the failure to present 10:49:31  
16 testimony about Mr. Milke's request for leniency.

17 The question before the Ninth Circuit --

18 THE COURT: And they referred to that specifically,  
19 and that's what we're going to definitely consider.

20 MR. BURKE: But the issue before the Ninth Circuit, 10:49:50  
21 and it's in the briefing of the Ninth Circuit, is the question  
22 of whether this Court, in its ruling, improperly found a claim  
23 of ineffective assistance of counsel at penalty phase to be  
24 procedurally defaulted.

25 THE COURT: They said it wasn't. 10:50:08

1 MR. BURKE: Excuse me?

2 THE COURT: They said it was not defaulted.

3 MR. BURKE: That's right. And they demanded for a  
4 de novo evidentiary hearing on that claim.

5 That claim extends far beyond the question of -- the 10:50:17  
6 sole question of whether trial counsel presented evidence of  
7 brain injury.

8 Now let me tell you, Your Honor, that is the -- that  
9 is the great focus of our case today. I'm not going to mislead  
10 you. Most of what we're going to present to you concerns that 10:50:32  
11 issue.

12 But the issue that's been remanded to this Court is  
13 not limited solely to the question of brain damage. The  
14 Attorney General improperly suggests a narrow reading of the  
15 Court's opinion. It just does not -- it's not justified by the 10:50:46  
16 briefing, by the oral argument to the Court, and by the  
17 pleadings before the District Court here when the case was  
18 before it before.

19 So my concern is, Your Honor, that if the Court  
20 improperly restricts what we are able to present at this 10:50:59  
21 hearing, we may find ourselves back here in two years doing it  
22 again.

23 THE COURT: Well, not necessarily. But the Court is  
24 bound by what it's directed to do.

25 Now I will reread and reread this opinion again, but 10:51:16

1 there's no question that that's what they said that this Court  
2 must do. So that's got to be the main focus.

3 As I say, we're not going to be so narrowly tied to  
4 that conclusion that we aren't going to get at least some  
5 testimony in concerning other issues. But we can't be going  
6 off that line very much. Or you've got to convince the Court  
7 why it's not bound by these particular marching orders.

10:51:42

8 MR. BURKE: And I will do my best to honor this  
9 Court's ruling. And I ask your indulgence, if I do, rein me  
10 back in. I'm not deliberately trying --

10:52:06

11 THE COURT: No, I understand.

12 MR. BURKE: And I will also tell the Court, by way of  
13 explanation, my co-counsel and I are habeas lawyers, not trial  
14 lawyers, so this is all somewhat of a new experience to us as  
15 well. So in many ways we tend to run afield, we apologize in  
16 advance.

10:52:21

17 THE COURT: We've all got our duties, and we'll all  
18 try to perform them as best we can.

19 MR. BURKE: Thank you, Your Honor.

20 I'd like, if we may -- oh, there's one other  
21 administrative issue, Your Honor, that I'd like to address.

10:52:34

22 Mr. Scott is present today in custody, and he is  
23 accompanied by guards from the Arizona Department of  
24 Corrections. Mr. Scott is currently handcuffed, and we've  
25 discovered in the last hour so that he's been here he is

10:52:50

1 developing very serious bruising on his arms.

2           Could you just raise your arms perhaps?

3           That occurred because of the handcuffs that are on  
4 him. I've spoken to the Department of Corrections Officials  
5 that are here, and they are -- if the Court is willing, they  
6 have no problem, and correct me if I'm wrong, but having  
7 Mr. Scott's handcuffs removed for purposes of the hearing  
8 today.

10:53:13

9           THE COURT: Is that all right, Officer?

10           CORRECTIONS OFFICER: Yes.

10:53:26

11           THE COURT: Remove the handcuffs.

12           MR. BURKE: Thank you, Your Honor.

13 BY MR. BURKE:

14 Q. Mr. Gorman, are you prepared to continue?

15 A. Yes.

10:53:39

16 Q. What I would like to do is spend a few minutes going over  
17 the documents that you reviewed in this case. And I  
18 have -- you have before you a list of those documents to help  
19 you in your recall of what you reviewed. And we have given a  
20 copy to the Attorney General as well. So we will go through  
21 those and we'll look at what you examined in the file in this  
22 case.

10:53:58

23           Can you tell us, Mr. Gorman, what is the -- what is  
24 the first thing that you reviewed in this case?

25 A. If I could, with the Court's permission, refresh my

10:54:17



1 recollection. I have an itemized list that is too extensive  
2 for me to recall.

3 THE COURT: Certainly.

4 THE WITNESS: Okay. I looked at materials sent to me  
5 by your office. The 1989 death penalty statute. The case file 10:54:32  
6 folder containing attorney case log of Roland Steinle.  
7 Attorney notes regarding jail visits of Roland Steinle and  
8 co-counsel William Foreman. Scott's, quote, life story.

9 BY MR. BURKE:

10 Q. Mr. Gorman, for the record, I'd like to show you what's 10:54:58  
11 been admitted as Exhibit 45 to this hearing, and ask you to  
12 tell me if this is the document --

13 May I approach the witness?

14 THE COURT: Let the courtroom deputy provide it.

15 THE WITNESS: Yes, I have the exhibit in front of me. 10:55:26

16 BY MR. BURKE:

17 Q. And, Mr. Gorman, is that the document that you referred to  
18 just now as Mr. Scott's life story?

19 A. Yes.

20 Q. Okay. And do you know, was that document admitted at the 10:55:33  
21 aggravation/mitigation hearing in Mr. Scott's case?

22 A. Yes.

23 Q. Can you continue with your list of what you reviewed in  
24 this case?

25 A. Yes. I also reviewed medical releases that were signed by 10:55:47

1 Mr. Scott and that were blank. I reviewed --

2 Q. Let me stop you right there and ask you another question  
3 about that.

4 For the Court, the medical releases to which  
5 Mr. Gorman is referring are Exhibit 47.

10:56:01

6 Suzie, could you bring up Exhibit 47 for us?

7 Does that appear on the screen in front of you,  
8 Mr. Gorman?

9 A. Yes.

10 Q. Okay. Does that appear to be the medical releases that you  
11 reviewed? 10:56:19

12 A. Yes.

13 Q. Okay. And where you did find those medical releases?

14 A. You provided -- your office provided them to me separately,  
15 and then later when I secured trial counsel's file, I found  
16 them in trial counsel's file also. 10:56:33

17 Q. Okay. When you were reviewing trial counsel's file --

18 First let me ask you: These medical releases are  
19 blank; correct?

20 A. They're blank as to who they're sent to and who they're  
21 from. They're signed and dated by Roger Scott and by Roland  
22 Steinle. 10:56:54

23 Q. Is the use of these types of medical releases common  
24 practice for criminal defense attorneys in capital cases?

25 A. Yes. You want to get a large collection of signed releases 10:57:13

1 so you have them in your file. So any time you need to secure  
2 records of a client, you have them and you don't have to make  
3 another jail visit.

4 Q. Okay. In your review of the trial file in this case, did  
5 you see any indication through correspondence or notes that any 10:57:29  
6 releases were sent to any agency?

7 A. I saw no indication of that, either in the trial file or  
8 any of the other materials that I've reviewed. And I've also  
9 reviewed materials that communicated it was not done.

10 Q. Okay. And can you explain to us what those materials are? 10:57:55

11 A. I believe Mr. Steinle acknowledged that he didn't attempt  
12 to collect any records.

13 Q. And your basis for that belief is from what?

14 A. I believe it's in the materials I was provided, that he  
15 made that statement. 10:58:16

16 Q. Okay. Can you continue then, and go over the other  
17 materials that you've reviewed in reaching an opinion in this  
18 case?

19 A. I reviewed the report of Dr. Alexander Don, who is a  
20 psychiatrist who conducted a Rule 11 competency evaluation of 10:58:36  
21 Mr. Scott in the pretrial proceedings.

22 I reviewed the plea -- written Plea Agreement slash  
23 plea offer signed by Noel Levy, who was the prosecutor who  
24 prosecuted the case. The plea offer was to second degree  
25 murder. 10:58:56

1 Q. Let me ask you a couple of questions about that plea.

2 That was provided to you with the materials that we  
3 sent you; is that correct?

4 A. Correct. And I found the original carbon -- and this is  
5 the way they used to do it, it reminded me of how old this case  
6 was. The Plea Agreement with the carbons in between the pages,  
7 that was in the trial counsel file.

10:59:12

8 Q. Okay. Did you find in your review any notes pertaining to  
9 a Plea Agreement in this case?

10 A. I found notes of both Mr. Steinle and Mr. Foreman, who was  
11 his co-counsel, on a number of issues. I don't recall  
12 specifically if there were notes that addressed the Plea  
13 Agreement, or whether it was in Mr. Steinle's Affidavit,  
14 because he also drafted an Affidavit that I reviewed.

10:59:32

15 Q. Mr. Gorman, I'd ask that you take a look at Exhibit 50  
16 that's been admitted in this proceeding. And for the -- 50 is  
17 trial notes that you reviewed. And I'll ask you to turn to --

10:59:56

18 A. I have exhibit -- what's marked as Plaintiff's Exhibit 50  
19 in front of me. And it appears to be the handwritten notes of  
20 William Foreman.

11:00:27

21 Q. Now in reviewing those notes of April 9th, 1990, do you see  
22 any reference to a Plea Agreement?

23 A. Yes.

24 Q. And on an unrelated matter, but since we have this up,  
25 could you also read for the Court the last entry on that page

11:00:47

1 of notes from April 9th, 1990?

2 A. Defendant has head injuries, wh slash affect his ability to  
3 remember.

4 Q. Now do you also remember reviewing what is Exhibit 39 to  
5 this proceeding, which is an Affidavit prepared by trial  
6 counsel Roland Steinle in April of 1998?

11:01:09

7 A. I read the Affidavit prepared by Mr. Steinle. I don't have  
8 a independent recall of exactly what was in it.

9 Q. Would it assist you if we were to bring it up on the  
10 screen?

11:01:31

11 It's Exhibit 39. It's already been admitted.

12 A. Yes.

13 Q. And can you tell me, does Mr. Steinle also admit in his  
14 Affidavit that there was a plea offer to second degree murder  
15 in this case?

11:01:45

16 A. Can you direct me to the paragraph?

17 THE CLERK: Here's the exhibit.

18 THE WITNESS: Oh, thanks.

19 I have Plaintiff's Exhibit 39 in front of me. I'm  
20 taking a look at it now.

11:01:55

21 At paragraph 4 of Exhibit 39 there begins a discussion  
22 of a plea offer.

23 BY MR. BURKE:

24 Q. Okay. So returning then to the materials that you reviewed  
25 in this case. You said that you reviewed the Plea Agreement,

11:02:14

1 and we discussed where you found that and where you found  
2 references to that. What other documents did you review?

3 A. A request for expenditure of funds for Dr. Tatro,  
4 T-A-T-R-O.

5 Sheriff's letters showing no disciplinary action 11:02:34  
6 history. That was the Maricopa County Sheriff's Office letter  
7 describing Mr. Scott's conduct while in custody pretrial.

8 Q. Do you know if that was an exhibit that was admitted in  
9 Mr. Scott's sentencing hearing?

10 A. Yes. One thing I did was I went to the capital sentencing 11:02:51  
11 proceeding, because I was interested in what was presented by  
12 counsel, and I looked at every -- he called no live testimony.  
13 It was rather easy. He just filed letters and whatnot. And so  
14 I read those -- all exhibits. I think there was five or six.

15 Q. Okay. 11:03:17

16 A. And that was his evidence presented at capital sentencing  
17 proceeding.

18 And the Sheriff's letter was one of them. It was like  
19 a single line or two-line letter.

20 Q. Okay. Can you continue with what documents you reviewed in 11:03:27  
21 this case?

22 A. The Rule 11 materials, which included the transcripts where  
23 counsel, Mr. Steinle, first raised the competency issue with  
24 the Honorable Peter D. D'Angelo in Maricopa County Superior  
25 Court. 11:03:52

1           Then the standard documents that are issued pursuant  
2 to that request, which is a minute entry from the Court, the  
3 order appointing the two experts, which were in that case  
4 Dr. Alexander Don, who is a psychiatrist, and Dr. Tatro, who is  
5 a psychologist.

11:04:11

6 Q. Do you recall if the order appointing those doctors gave  
7 any instructions to trial counsel in assisting the doctors in  
8 conducting their Rule 11 evaluation?

9 A. Yes.

10 Q. And what was -- what were the instructions?

11:04:25

11 A. It's a standard order at that time in Maricopa County that  
12 a judge issues which tells the State and the defense to provide  
13 the mental health expert who's going to do the competency  
14 determination police reports and whatnot that are relevant to  
15 their assessment of their inquiry, which is the competency  
16 standard, which is -- the test is whether the defendant has the  
17 present ability to understand and assist his counsel. And then  
18 the other test is the basically what's the McNaughton test, to  
19 make an inquiry if there's any defect or there was any defect  
20 present. When I'm saying -- cognitive or mental health defect  
21 at the time of the offense.

11:04:52

11:05:18

22 Q. In your review of the record in this case, we've confirmed  
23 that you reviewed an Affidavit prepared by Roland Steinle in  
24 April of 1998; correct?

25 A. Correct.

11:05:32

1 Q. Do you recall -- and I would direct your attention to  
2 Exhibit 39, which should be on the screen in front of you.

3 A. I have the exhibit itself in front of me.

4 Q. Okay. And if you turn to the second page of that exhibit  
5 at paragraph 22, could you read that for the Court?

11:05:45

6 And this is from the Affidavit of Roland Steinle.

7 A. I'm reading paragraph 22. I did not provide any family,  
8 social or medical history to Dr. Tatro, or provide family  
9 members to Dr. Tatro to assist Dr. Tatro in forming his opinion  
10 about Mr. Scott's competency. Parenthesis, Dr. Tatro did  
11 obtain some of his history from Mr. Scott himself, close paren,  
12 semicolon.

11:06:08

13 Q. As a capital defense attorney, do you have any concerns  
14 about a psychologist obtaining history from the defendant who's  
15 being evaluated?

11:06:33

16 A. I'm sorry, could you repeat the question?

17 Q. Sure. Do you have any concerns about the -- about a  
18 psychologist performing a Rule 11 evaluation in a capital case  
19 and only having access to the defendant's self-reported medical  
20 and mental history?

11:06:52

21 A. Well, it's contrary to the protocols within the mental  
22 health profession itself. That was testified to by Dr. Don in  
23 his testimony, he pointed that out. So that would be my first  
24 concern.

25 Q. And that was Dr. Don's testimony at the sentencing hearing

11:07:14



1 in this case, or was it at the trial, if you recall?

2 A. It was one of the two, when he was called as a State's  
3 witness.

4 Q. So --

5 A. And that's my understanding also, is the -- if you have  
6 someone who is alleged to be incompetent, to have that person  
7 be the sole basis or source of your information for your  
8 opinion, is not proper practice, either as a mental health  
9 person or as a lawyer, in attempting to secure a reliable and  
10 credible opinion.

11:07:25

11:07:47

11 Q. In reviewing the record in this case, including the  
12 transcripts, do you recall if Dr. Tatro testified that there  
13 was any other source for his knowledge of the defendant, if he  
14 obtained information from any other source?

15 A. Yes, it sticks out in my mind because I was shocked by it.  
16 He said he read the newspaper before he went and evaluated  
17 Mr. Scott. And that was the independent source of his  
18 information, other than the self reporting of Mr. Scott. That  
19 was Dr. Tatro's under oath testimony.

11:08:06

20 Q. Thank you.

11:08:27

21 Could you then, returning to the discussion of the  
22 documents that you reviewed in this case, can you tell us what  
23 you then next examined or reviewed?

24 A. I don't know if I mentioned this, so I'll -- I  
25 referenced -- or I reviewed the attorney notes reference the

11:08:47

1 Rule 11 proceeding. I reviewed information pertaining to an  
2 individual named Ernie Sweat, S-W-E-A-T. I reviewed  
3 Dr. Tatro's evaluation, his report, and his notes. I reviewed  
4 pleadings which were material to the issues defined by the  
5 Ninth Circuit for this hearing.

11:09:16

6 Q. Can you identify some of those pleadings, please?

7 A. The motion for examination of Mr. Scott's mental condition,  
8 which was the Rule 11 pleading. The State's motion in limine  
9 regarding Dr. Tatro's testimony for purposes of trial; the  
10 State was seeking to restrict his testimony. The responsive  
11 pleading of Mr. Steinle to State's motion in limine regarding  
12 Dr. Tatro's testimony. State's reply regarding Dr. Tatro on  
13 that issue.

11:09:38

14 I also reviewed the transcripts and arguments of  
15 counsel on that issue. It went to an issue that was important  
16 for my consideration as to the state of mind of Mr. Scott at  
17 the time of the offense and at the time he made his statement  
18 to the police.

11:10:00

19 I reviewed the mitigation memorandum drafted by  
20 Mr. Steinle. As I said previously, I reviewed the exhibits  
21 that were admitted by Mr. Steinle at the capital sentencing  
22 aggravation/mitigation hearing.

11:10:18

23 Q. Do you recall sitting here today what exhibits those were?

24 A. I can tell you. I have them -- I brought them with me.

25 Q. Okay. Why don't you refresh your recollection by reviewing

11:10:40

1 those.

2 A. All right. I have the defendant's list of witnesses  
3 authored by Mr. Steinle. He lists four potential witnesses for  
4 trial. I have the clerk's list of exhibits that were offered  
5 and admitted by Mr. Steinle at the aggravation/mitigation  
6 hearing. And then I have the individual exhibits in front of  
7 me also.

11:11:18

8 Q. Okay. And for the record, the exhibits that were admitted  
9 at the sentencing proceeding have been admitted in this  
10 evidentiary hearing as Exhibits 41 through 46.

11:11:36

11 Could you briefly identify for us what the exhibits  
12 were that were presented by trial counsel at Mr. Scott's  
13 aggravation/mitigation hearing?

14 A. A one-sentence letter from the Sheriff's Office, Maricopa  
15 County Sheriff's Office. A handwritten letter, which appears  
16 to be two, authored by Mr. Scott's mother. Dr. Tatro's report  
17 that he prepared as part of the competency evaluation. And the  
18 life story authored by Roger Scott that we previously  
19 discussed.

11:12:03

20 Q. And perhaps I missed your reference to this, was there also  
21 a letter from a person by the name of Jane Dollahan,  
22 D-O-L-L-A-H-A-N?

11:12:41

23 A. I don't have that in front of me presently, but that is --

24 Q. Mr. Gorman, we'll show you on the screen Exhibit 43 --

25 A. Okay.

11:13:03

1 Q. -- that's been admitted in this proceeding.

2 Have you reviewed that letter?

3 A. Okay. I read that. I read that also. I have that in  
4 front of me. Oh, I see her name. Okay.

5 Q. What other documents or records did you review in this  
6 case? 11:13:14

7 A. The Special Verdict. I looked at the jail visitation log,  
8 which documents the number of visits Mr. Scott received and by  
9 who and the length of time while he was in pretrial proceedings  
10 from the time of his arrest until he was no longer in the 11:13:44  
11 Sheriff's custody of Maricopa County. I reviewed trial  
12 transcripts, which I can go through if you'd like.

13 Q. Would you identify which trial transcripts you reviewed in  
14 this case?

15 A. The transcript of the proceeding of January 22nd, 1990, 11:14:02  
16 which is the pretrial conference, which included State's motion  
17 for Rule 11 exam as to Defendant Styers. Scott's pro per  
18 motion for contract counsel. And I should note I also reviewed  
19 the testimony of Styers, his testimony from his trial.

20 Q. And was that testimony admitted at Mr. Scott's trial? 11:14:32

21 A. On the motion of Mr. Steinle, yes.

22 Q. On the motion of defense counsel that testimony was  
23 admitted?

24 A. Yes.

25 Q. Do you recall the general nature of Mr. Styers' testimony 11:14:42

1 that was admitted by trial counsel in this case?

2 A. Yes.

3 Q. What do you remember -- what do you recall about that  
4 testimony?

5 A. It identified Mr. Scott as the shooter. 11:15:03

6 Q. In your review of the record in this case, was the theory  
7 of the prosecution in this case that Mr. Scott was the shooter  
8 of Christopher Milke?

9 A. No.

10 Q. So the only instance that you saw in your review of 11:15:18  
11 evidence suggesting that Mr. Scott was the shooter was  
12 introduced by his defense counsel?

13 A. It wasn't suggesting, it was affirmative, expressed, direct  
14 testimony of Styers that Mr. Scott shot the child. That was  
15 introduced by Mr. Steinle. 11:15:38

16 Q. Did Mr. Steinle -- was Mr. Steinle able to cross-examine  
17 Mr. Styers on that testimony?

18 A. No, because Mr. Styers invoked his Fifth Amendment right to  
19 remain silent.

20 Q. What other exhibits -- or excuse me, what other documents 11:15:51  
21 did you review, Mr. Gorman?

22 A. The transcripts of February 20th, 1990, which was a  
23 pretrial conference in front of the Honorable Peter P.  
24 D'Angelo.

25 The transcripts of March 5th, 1990, which is another 11:16:05

1 pretrial conference before Judge D'Angelo.

2 The April 2nd, 1990 pretrial conference transcripts,  
3 which were in front of the Honorable Peter T. D'Angelo.

4 The April 10th, 1990, pretrial conference transcripts  
5 pertaining to discussion about a plea offer and competency  
6 issues in front of Judge D'Angelo. 11:16:28

7 And it should be noted, in all of these transcripts  
8 I'm referring to, I also reviewed the minute entries that were  
9 issued by the judge who presided over the proceedings.

10 Q. Okay. And what else did you review? 11:16:50

11 A. The September 24th, 1990 pretrial conference in front of  
12 Judge D'Angelo.

13 The October 3rd, 1990 motion to sever Scott and Styers  
14 before Judge D'Angelo.

15 The October 31st, 1990 motion to continue in front of  
16 Judge D'Angelo. 11:17:06

17 The November 15th, 1990 proceeding before  
18 Judge D'Angelo.

19 The November 28th, 1990 proceeding before  
20 Judge D'Angelo. 11:17:22

21 The January 14th, 1991 proceeding before the Honorable  
22 David Cole, C-O-L-E. That was the -- consisted of pretrial  
23 motions, voluntariness hearing, testimony of Detective Armando  
24 Saldate, S-A-L-D-A-T-E, and Detective Robert Mills. The  
25 Court's findings pertaining to that hearing. The Court's 11:17:48

1 minute entry.

2 The January 15th, 1991 trial transcripts involving  
3 jury selection.

4 The January 16th, 1991 trial regarding jury selection.  
5 These are all in front of Judge Cole. 11:18:05

6 The January 17th, 1991 trial, opening statements of  
7 trial counsel for the State, Noel Levy, L-E-V-Y, and  
8 Mr. Steinle.

9 The January 21st, 1991 testimony of Detective Armando  
10 Saldate and Detective Robert Mills. 11:18:26

11 The January 22nd, 1991 trial testimony of Detective  
12 Robert Mills and Detective Jim House.

13 The January 24th, 1991 trial testimony of George  
14 Bulduc, B-U-L-D-U-C, medical examiner; Detective Jim House;  
15 Detective Charles Massino; Detective Jeffrey Yost, Y-O-S-T; 11:18:53  
16 Officer Rodney Lee; Officer Robert Kavanagh, K-A-V-A-N-A-G-H.

17 The January 28th, 1991 trial transcripts testimony of  
18 Officer Robert Kavanagh, Detective Robert Jones, Detective  
19 Joseph Pestrosino, P-E-S-T-R-O-S-I-N-O.

20 Q. Mr. Gorman, it's probably sufficient if you just identify 11:19:25  
21 the date of the transcript --

22 A. Okay.

23 Q. -- rather -- I don't think we need to know exactly who  
24 testified.

25 But let me just clarify. When you say you reviewed 11:19:32

1 these, did you read these transcripts in their entirety?

2 A. The majority of them I did. On some of them which I  
3 considered not material I just skimmed. You know, some I  
4 concentrated on every question and every answer. Others I  
5 didn't feel were -- while I wanted to look at them generally, I 11:19:51  
6 didn't really study them, let's say.

7 Q. And then can you give us the rest of the dates for the  
8 transcripts you reviewed?

9 A. Certainly.

10 January 29th, 1991; January 30th, 1991; January 31st, 11:20:04  
11 1991; February 4th, 1991; February 5th, 1991; February 6th,  
12 '91; February 7th, '91; April 5th, '91; April 12th, '91, which  
13 was the aggravation/mitigation hearing; April 22nd, '91, which  
14 was the sentencing.

15 Q. Okay. You also testified that you actually looked at the 11:20:33  
16 trial file in this case; correct?

17 A. That's correct.

18 Q. I'd like to draw your attention to what's been admitted as  
19 Exhibit 54 in this proceeding. And ask you if you recall  
20 reviewing that document and where you found it. 11:20:52

21 A. Okay. I have what's marked as Plaintiff's Exhibit No. 54  
22 in front of me. And there was a copy of this in both trial  
23 counsel's file and also your office provided me a copy.

24 And I wasn't quite finished in telling you what I  
25 looked at in addition to trial counsel's file. 11:21:31



1 Q. Oh, I apologize. Please answer your -- answer that  
2 question first then.

3 A. Your office provided me -- and this document is an  
4 example -- a number of documents that pertained to the issue  
5 before this Court on two CDs. And also, I don't know if this  
6 document was on the CD or if you provided it separately --

11:21:48

7 Q. And when you say "this document" you're referring to  
8 Exhibit 54?

9 A. Exhibit 54.

10 So what I'm telling you is, the list I provided you is  
11 not all inclusive.

11:22:07

12 Now in terms of the trial counsel file, yes, I saw  
13 this in trial counsel's file, a copy of what's marked as  
14 Plaintiff's Exhibit 54.

15 Q. And that's a confidential memorandum from someone by the  
16 name of Garrett Simpson?

11:22:23

17 A. Yes.

18 Q. Do you know Garrett Simpson?

19 A. Yes.

20 Q. Okay. And who is Mr. Simpson?

11:22:31

21 A. I met Mr. Simpson in the 1980s. He was a Maricopa County  
22 Public Defender. And at the time he authored this memorandum,  
23 Plaintiff's Exhibit 54, he was a appellate lawyer with the  
24 Maricopa County Public Defenders, and handled capital direct  
25 appeals to the Arizona Supreme Court.

11:22:55

1 Q. And you read this memorandum; correct?

2 A. I read it several times.

3 And I read the supplement to motion to withdraw  
4 authored by Mr. Simpson on the same issue.

5 Q. Okay. Did Mr. Simpson address the issue of Roland  
6 Steinle's performance as counsel in Mr. Scott's case in this  
7 memorandum?

11:23:11

8 A. He addressed the issue of a potential ineffective  
9 assistance of counsel claim on omissions of Mr. Steinle.

10 Q. And omissions at what stage of the case, do you recall?

11:23:35

11 A. He addressed the -- yeah, both pretrial proceedings. The  
12 voluntariness hearing being the pretrial proceeding. The  
13 failure to file appropriate pretrial motions on a Fourth  
14 Amendment issue. And the failure to present live testimony at  
15 the capital aggravation/mitigation hearing.

11:24:08

16 Q. Okay. If you would, please, looking at Exhibit 54 --

17 Can you highlight the second paragraph beginning with  
18 the word "first"?

19 (Discussion held off the record)

20 BY MR. BURKE:

21 Q. Mr. Steinle, can you read for us beginning on the --

22 A. Mr. Gorman.

23 Q. I'm sorry, Mr. Gorman.

24 The fifth line of the second paragraph of Exhibit 54.

25 At the end of the line there's a sentence beginning with

11:25:05

1 "first." Could you read that to the Court, please?

2 Well, actually, can you begin the sentence before  
3 that, "since then"?

4 A. "Since then, I have completed the record and found two  
5 colorable IAC issues on which I feel should brief you. First,  
6 comma, Roger testified at trial that he confessed and consented  
7 to search of the apartment only after Detective Saldate  
8 threatened to tear the apartment apart looking for evidence and  
9 to interrogate Wilma if Scott didn't confess. But" --

11:25:23

10 Did you want me to continue?

11:25:51

11 Q. No.

12 Then if you could, please, skip to the sentence  
13 beginning with "similarly" on the same paragraph.

14 A. "Similarly, even though there was a claim that the  
15 confession was the product of police misconduct, there was no  
16 motion to suppress the search. It was inconsistent to argue  
17 the confession was coerced, but not claim the consent to search  
18 was coerced."

11:26:07

19 Q. Did you consider this document relevant in forming your  
20 opinion in this case?

11:26:26

21 A. Yes.

22 Q. You said, in fact, that you read it several times?

23 A. Yes.

24 Q. Do you agree with the statements made by Mr. Simpson, his  
25 critique of Mr. Steinle's performance?

11:26:43

1 A. I agree with what he said. I think there was criticisms  
2 that were omitted that he could have included. But, yes, I  
3 agree with the affirmative criticisms he had of Mr. Steinle, or  
4 his characterization that there are certainly issues and there  
5 would need to be an explanation, if there is one.

11:27:03

6 Q. Okay. Mr. Gorman, in your review of the trial counsel's  
7 file in this case, did you find any medical records for  
8 Mr. Scott?

9 A. No.

10 Q. Did you find any school records?

11:27:17

11 A. No.

12 Q. Any employment records?

13 A. No.

14 Q. Did you find records from any government agency?

15 A. Not that I can recall now. Not of any significance, if  
16 there were any there.

11:27:27

17 Q. I'd like to direct your attention, Mr. Foreman --  
18 Mr. Gorman, to a memo of notes by Mr. Foreman, Exhibit 51,  
19 which has been admitted in this proceeding. I don't believe  
20 you -- do you have that in front of you?

11:27:55

21 THE CLERK: I'm sorry, which exhibit?

22 MR. BURKE: 51.

23 THE CLERK: He does. He does.

24 MR. BURKE: He does.

25 THE WITNESS: Okay. I have Exhibit No. -- Plaintiff's

11:28:13

1 Exhibit No. 51 in front of me.

2 BY MR. BURKE:

3 Q. Okay. And we aren't able to bring it up on the  
4 TrialDirector's screen, but can you tell the Court what this  
5 document is and if you reviewed it? 11:28:26

6 A. It's a memorandum to Roland Steinle, it's from  
7 Bill Foreman, subject Roger Scott, dated February 5th, 1990.  
8 And it's a short memorandum.

9 Q. Now let me ask you, based on your review of the file,  
10 February 5th, 1990, would that be relatively early on in 11:28:45  
11 Mr. Scott's case?

12 A. Mr. Scott was indicted December 8th of 1989, so this would  
13 have been less than two months post Indictment.

14 Q. And what is -- what is the substance or the subject of this  
15 memorandum? 11:29:04

16 A. Mr. Foreman states he visited Mr. Scott at the Madison  
17 Street Jail on February 2nd of 1990, and that Mr. Scott  
18 provided Mr. Foreman with names and addresses of persons who he  
19 states, meaning Mr. Scott, would be willing to write letters to  
20 the judge or speak on his behalf. And then he lists the people 11:29:28  
21 there by name, their address and their phone numbers.

22 Q. In your review of trial counsel's file in this case, did  
23 you see any correspondence or notes or memoranda referencing  
24 any interviews or investigations of any of the persons listed  
25 in this memorandum? 11:29:56

1 A. No.

2 Q. Did you see any memoranda or notes of interviews of any  
3 witnesses in the trial counsel's file?

4 A. I saw what I call no mitigation work-up. Meaning --

5 Q. What do you mean by that?

11:30:16

6 A. -- investigating -- investigating facts and circumstances,  
7 whether they be documents or persons, to attempt to develop and  
8 potentially present mitigation.

9 Q. Have you identified for the Court the entirety of the  
10 documents, pleadings, paperwork that you reviewed in this case?

11:30:45

11 A. I don't believe I addressed all of them.

12 Q. Are there any additional documents or pleadings or  
13 transcripts that you feel are significant that you reviewed in  
14 this case that I failed to ask you about?

15 A. Well, I read notes of Mr. Steinle pertaining to the  
16 Affidavit. I read -- I think I referenced these generally --  
17 notes of Mr. Steinle pertaining to a Rule 11. I've read all  
18 the Ninth Circuit published opinions on the three defendants in  
19 this matter. I've read the Arizona Supreme Court decisions.

11:31:00

20 I also brought up I believe the docket -- or looked at  
21 the docket information on them. No, I may not have done that.  
22 But I did look at a number of things that I didn't document I  
23 looked at. And you sent me things that aren't on your  
24 inventory.

11:31:26

25 But I looked at everything I thought I needed to to

11:31:44

1 evaluate the issues that were presented to me.

2 Q. Okay. And having reviewed those documents, did you form an  
3 opinion as to whether Mr. Steinle met the standards of a  
4 minimally competent defense counsel in his investigation and  
5 development and presentation of mitigating evidence in this  
6 case? 11:32:04

7 MS. BLOMO: Your Honor, I'd object to how broad the  
8 question is. Again, the scope of this hearing on remand is  
9 narrow as to voluntariness and the head injury.

10 MR. BURKE: Your Honor, for the reasons we mentioned 11:32:15  
11 earlier, we believe that it's erroneous for this Court to limit  
12 it to that. That is not the basis for the Ninth Circuit's  
13 ruling. The Attorney General is overemphasizing the Court --  
14 Ninth Circuit's reliance on certain language without focusing  
15 on the specific issue that was before the Court. 11:32:32

16 And so I would ask that Mr. Gorman be able to testify  
17 in that regard.

18 THE COURT: Well, two comments by the Court.

19 First of all, it is the ultimate determiner of the  
20 relevant evidence that's presented to it. And it can give 11:32:52  
21 weight to testimony, not give weight to expert testimony.

22 Is my battery dead? Probably. No. I just didn't  
23 have it turned on.

24 So this is not necessary -- necessarily a big issue.  
25 The Court can admit evidence and then determine that it is not 11:33:25

1 relevant. The Attorney General's going to have an opportunity  
2 to cross-examine this witness on the witness' opinions. The  
3 Court can determine whether or not this opinion is overly  
4 broad.

5 And under all of those circumstances the objection is 11:33:47  
6 overruled. And you may answer.

7 THE WITNESS: Okay. Judge, may I have the question  
8 read back to me?

9 MR. BURKE: Yes, I'll --

10 THE COURT: You want the courtroom deputy -- or the 11:33:59  
11 court reporter to read it back or do you wish to rephrase it?

12 MR. BURKE: I'm not sure I was completely finished  
13 with it, so let me -- well, let's have the courtroom --  
14 reporter read it back to Mr. Gorman, and we'll see if that was  
15 a complete question. 11:34:12

16 (The record was read from page 73, line 2 to line 6)

17 THE WITNESS: Yes, I formed an opinion.

18 BY MR. BURKE:

19 Q. And what was that opinion?

20 A. That his performance was below the prevailing norms and 11:34:36  
21 standard of care for a competent capital counsel at that time,  
22 meaning 1989 slash 1990.

23 Q. And can you explain why you reached that opinion?

24 A. Based on the standards that were applied, both in a capital  
25 context -- because his errors are not limited to failure to 11:35:08



1 perform as a capital defense counsel. His errors include  
2 failing to perform as a minimally competent trial counsel,  
3 meaning how to conduct a hearing, how to present evidence,  
4 et cetera. And those derive from a number of sources. The  
5 National Association of Criminal Defense Lawyers, the Arizona 11:35:42  
6 statutes and procedural rules. Those are objective standards  
7 on how to conduct hearings and put attorneys on notice of the  
8 burden of proof and the issues.

9 The case law, which I'm sure this Court and counsel is  
10 familiar with, *Williams v Taylor*, *Wiggins v Smith*, *Porter* 11:36:02  
11 *versus McCollum*, M-C-C-O-L-L-U-M, all cases in which the  
12 Supreme Court found that trial counsel has an obligation to  
13 conduct -- and this is a term of art -- thorough investigation  
14 of a defendant's background.

15 In all three of these cases the crime, which, of 11:36:31  
16 course, was capital murder, were committed in the 1980s. So  
17 the Supreme Court in these three decisions, and in others,  
18 applied the 1989 ABA Guidelines as standards, not as rules, and  
19 found that in those cases trial counsel was deficient in his  
20 performance because trial counsel failed to fulfill their 11:37:01  
21 obligation to conduct a thorough investigation.

22 Q. Let me just ask you briefly, did you compare Mr. Steinle's  
23 performance in this case with the standards set forth in the  
24 cases that you have said -- that you've just mentioned?

25 A. That's one of the standards I applied in determining what 11:37:21

1 the prevailing professional norms were at the time Mr. Steinle  
2 was representing Mr. Scott.

3 As I said, I considered other what I considered  
4 prevailing professional norms which would put a competent  
5 lawyer on notice of how to pursue certain things.

11:37:44

6 For example, The Champion articles. The Arizona  
7 Capital Representation Project was in existence at that time.  
8 They were eager for people to call them for consultation. It  
9 was free. They were the experts in the state.

10 The trial practice that is taught at Marquette, which  
11 has to be very practical and workman oriented, because at  
12 Marquette we get what's called a diploma privilege, meaning we  
13 can practice law the day we get out of law school. Mr. Steinle  
14 attended there.

11:38:08

15 What I was taught in every Public Defender's Office,  
16 which was the standards articulated by NACDL, that was both in  
17 Milwaukee, Wisconsin State Public Defender's Office, and the  
18 training director in the Maricopa County Public Defender's  
19 Office was Laurie Shanks, who taught at the National  
20 Association of Criminal Defense Lawyers.

11:38:30

11:38:52

21 I was given a scholarship when I was a Maricopa County  
22 Public Defender to the National Association of --

23 THE COURT: I think we're running a little too far  
24 here --

25 THE WITNESS: I'm sorry.

11:39:06

1 THE COURT: One question in regard to Steinle and the  
2 Marquette program. You said he was there ten years before you.

3 THE WITNESS: Correct.

4 THE COURT: Do you know if that program existed ten  
5 years prior to your attendance?

11:39:17

6 THE WITNESS: My best understanding, Your Honor, is  
7 that the diploma privilege has been in existence for Marquette  
8 for a long time, including when he attended. And it kept many  
9 graduates in Wisconsin who did not want to leave the state and  
10 have to take a Bar exam.

11:39:33

11 BY MR. BURKE:

12 Q. Mr. Gorman, I'd like to briefly discuss a distinct issue  
13 from the question of mitigation, and that concerns the other  
14 issue before the Court on remand, which is the question of  
15 whether trial counsel rendered deficient performance in his  
16 efforts to suppress the confession of Mr. Scott in this case.

11:39:49

17 Did you, at our request, review documents and  
18 transcripts and pleadings related to that issue?

19 A. Yes.

20 Q. Okay. And were those documents and pleadings and  
21 transcripts mentioned by you moments ago in your discussion of  
22 what you reviewed in this case?

11:40:07

23 A. Yes.

24 Q. And based on your review of those pleadings and records,  
25 did you form an opinion as to whether trial counsel in this

11:40:20

1 case met the standard of a minimally competent trial attorney  
2 in mitigating the issue of the voluntariness of Mr. Scott's  
3 confession?

4 A. Yes.

5 Q. And what is that opinion? 11:40:35

6 A. He performed below the standard of care.

7 Q. And why do you reach that conclusion?

8 A. It is linked to his failures as a capital defense lawyer  
9 also. But separate and apart from that, he did nothing really  
10 to put the voluntariness of the statement in issue because of 11:40:59  
11 the way he conducted the hearing, and his omissions.

12 So I can address both. But they're both involved.

13 Q. Well, address for me first then the question of how it ties  
14 into the -- his role as a capital defense attorney. And in  
15 that regard, are you familiar with the term "front loading"? 11:41:26

16 A. Front loading mitigation, yes.

17 Q. And what is that -- what does that expression mean?

18 A. It means that -- and it's consistent with counsel's  
19 obligation to immediately secure a capital defense team,  
20 meaning a Mitigation Specialist. At the beginning of the case 11:41:42  
21 you immediately start collecting mitigation. So any  
22 opportunity you have to front load the mitigation, meaning,  
23 present it somehow to the Court in anticipation of a future  
24 capital sentencing proceeding, you start getting the mitigation  
25 on the record, if it's in your client's interests, in pretrial 11:42:05

1 proceedings, and leading up to the capital sentencing  
2 proceeding.

3 Q. Could evidence of mitigation have any independent -- in  
4 addition to -- as I understand what you're saying, sort of  
5 preparing the Court for the evidence it will hear, could  
6 evidence of what we term mitigation have any independent  
7 relevance for purposes of a voluntariness hearing?

11:42:20

8 A. Absolutely. There -- in this case there were material  
9 issues that would both be consistent on the issue of a knowing,  
10 intelligent, voluntary waiver of Mr. Scott's Fifth and Sixth  
11 Amendment rights, and a knowing, intelligent, voluntary waiver  
12 of his Fourth Amendment right, which was, did he have the  
13 cognitive ability, education, et cetera, to waive those rights  
14 under the totality of the circumstances.

11:42:43

15 That would also -- all of the work that could be  
16 directed towards that would also be consistent with a capital  
17 sentencing proceeding that he was of inferior intellect, could  
18 be duped, et cetera, taken advantage of, which went to a  
19 statutory mitigator, the nexus mitigator, which goes to that  
20 there was an impairment, but not so significant to be a  
21 defense, but impacted the defendant's ability to conform his  
22 conduct to the requirements of law.

11:43:04

11:43:33

23 So if the mitigation investigation had been begun as  
24 it should have been immediately with a Mitigation Specialist,  
25 and the collection of all of this evidence that appeared was

11:43:56

1 never looked into by counsel that went to traumatic head  
2 injury, potentially brain injury, the 1987 C-scan, all of those  
3 things were relevant at the voluntariness hearing to the  
4 *Miranda* issue and to the voluntariness issue, which are two  
5 separate inquiries.

11:44:19

6 That was one failure of Mr. Steinle. And I can go on  
7 in more -- in terms of voluntariness hearing.

8 Q. Well, what was the -- you say "one failure." Did you  
9 identify another failure in Mr. Steinle's performance?

10 A. Well, Mr. Scott was -- let's say, I'm not going  
11 to -- because I'm not here to argue any position, if I say in  
12 custody or in the company, he was with the police from  
13 midnight -- approximately midnight or earlier of December 3rd  
14 until he made his statement, which was an admission, however  
15 many hours that was later, at 2:00 p.m. or noon, you know --

11:44:34

11:45:00

16 Q. Do you recall, did we provide you with a chronology of  
17 Mr. Scott's --

18 A. Yes, you did.

19 Q. -- questioning?

20 A. Yes, ah-hah. I didn't mention that earlier, yes, you did.

11:45:14

21 Q. That is not admitted as an exhibit in this proceeding. And  
22 we're just offering it for Mr. Gorman's purposes to refresh his  
23 recollection.

24 A. Well, I can keep speaking while I look for it.

25 Q. That's fine.

11:45:30

1 A. All right. Yes, I've seen it. And it's identified as  
2 Scott Interrogation Chronology.

3 Did you want me to give this to you to mark as an  
4 exhibit?

5 Q. That's okay. That's fine. 11:45:49

6 A. All right.

7 All right. And yes, I've reviewed that.

8 Q. Now is it your understanding from that document that it  
9 is -- that the information on that document was obtained from  
10 the police reports in Mr. Scott's case? 11:46:03

11 A. Yes. And I had your paralegal, Angela Fairchild, prepare  
12 what I called a timeline of the time that Mr. Scott was in  
13 police company or custody at the police department, and the  
14 names of the police officers who were responsible for watching  
15 him or securing the room that he was contained in, so that I 11:46:28  
16 knew as much as I could about the length and location of the 15  
17 or 18 hours, whatever it was, that elapsed before he made his  
18 admission to Detective Saldate.

19 Q. And in your review of that document, did it appear to you  
20 that Mr. Scott was, at any time during the 18 to 19 hours that 11:46:52  
21 he was at the police station or being questioned by the police,  
22 essentially ever alone or left alone?

23 A. No, because -- and then it wasn't just that, it's just that  
24 my familiarity with police practices, they're not going to  
25 leave a first degree murder suspect to roam around the police 11:47:17

1 department by himself. So someone was always physically  
2 assigned to make sure he stayed in the room or were in the room  
3 with him.

4 Q. Was there any indication that he was ever permitted to  
5 rest? 11:47:32

6 A. "Rest" meaning lay down?

7 Q. Lay down.

8 A. I didn't see any of it.

9 Q. Was there any indication that, if you recall, that he was  
10 provided with medication that he might have needed? 11:47:46

11 A. I don't recall any affirmative evidence that he was  
12 provided with medication.

13 But to get back to your question, the significance  
14 was, the way counsel conducted the voluntariness hearing, I was  
15 very careful to read -- 11:48:07

16 MS. BLOMO: Objection. This is not responsive to a  
17 question.

18 THE COURT: Sustained.

19 BY MR. BURKE:

20 Q. You stated earlier that you saw two areas in which  
21 Mr. Steinle was deficient in this case. I want to focus on the  
22 second area in which you found him deficient. 11:48:12

23 Did Mr. Steinle call any witnesses at the suppression  
24 hearing in this case?

25 A. No. 11:48:27



1 Q. Did he advise his client not to testify?

2 A. Mr. Steinle affirmatively stated on the record in the  
3 transcript at the voluntariness hearing that at the advice of  
4 counsel Mr. Scott would not testify.

5 Q. And in your opinion, given the facts presented in this  
6 case, does that fall below the standard of a minimally  
7 competent criminal defense attorney?

11:48:45

8 A. In this case on that issue, yes, I agree with Mr. Simpson,  
9 who identified that as a problem.

10 Q. And why is that?

11:49:01

11 A. Because the trial court needed affirmative factual  
12 evidence, separate and apart from what Detective Saldate  
13 testified to, as to how the statements he made affected  
14 Mr. Scott as to the voluntariness issue.

15 Detective Saldate testified that he told Mr. Scott  
16 that he was going to search his mother's apartment. And  
17 Detective Saldate testified that Mr. Scott stated words to the  
18 effect of, oh, that would kill her. All right?

11:49:29

19 Without Mr. Scott testifying that that wasn't slang  
20 for, oh, she'd be upset or, you know -- his intention that he  
21 really believed it would kill her, the judge didn't have any  
22 factual basis to find it was coercive. That could be  
23 interpreted a number of ways.

11:49:56

24 Q. Can you think of possible strategic reasons why trial  
25 counsel did not call his client to testify at the suppression

11:50:18

1 hearing?

2 A. No, because the -- his testimony -- as Mr. Simpson sets  
3 forth in his memorandum and motion, his testimony and his  
4 cross-examination would have been limited to the issue before  
5 the Court, meaning whether it was a knowing, intelligent,  
6 voluntary waiver of *Miranda*, and whether what occurred before  
7 he made his confession was coercive.

11:50:38

8           So he still had Fifth Amendment protection as to the  
9 State attempting to cross-examine him on the confession itself.

10 Q. But Mr. Steinle did cross-examine both of the police  
11 detectives who testified at the voluntariness hearing; correct?

11:50:59

12 A. Yes.

13 Q. Did -- and it was a somewhat lengthy cross-examination;  
14 correct?

15 A. I would not consider it lengthy. I consider it short.

11:51:17

16 Q. Okay. In your review of that cross-examination, did  
17 Mr. Steinle obtain any information helpful to his client's  
18 motion for suppression?

19 A. No, because the officers either said they didn't recall,  
20 disagreed with the question, or said they did not know. So  
21 Mr. Steinle's questions are not evidence, and none of the  
22 answers provided by the police officers made the point he  
23 wanted. And he didn't introduce any impeachment, nor did he  
24 call any of these officers who could have demonstrated the  
25 circumstances of Mr. Scott's custody that we referred to

11:51:35

11:51:59

1 earlier in the timeline going through each officer.

2 Q. Is there any other opinion that you formed with regard to  
3 the two issues before the Court, mitigation and voluntariness,  
4 that you have not told us about today, that I failed to ask  
5 you? 11:52:20

6 A. Well, it goes to the -- to both the voluntariness hearing  
7 and the capital sentencing proceeding. You know, the  
8 preparation on these is so methodical and time consuming you  
9 have to start immediately. And there should have been a social  
10 history prepared in advance of the voluntariness hearing. 11:52:40  
11 There should have been a neuropsychologist secured for the  
12 voluntariness hearing, both on the issue of Mr. Scott's  
13 cognitive defects and also regarding sleep deprivation, the  
14 length of time he was awake.

15 And neuropsychologists were used in Arizona at that 11:53:05  
16 time. There's a 1986 decision, I believe it's *State versus*  
17 *Ferguson*, in which a neuropsychologist was used for purposes  
18 similar to that in a noncapital case.

19 All of the records that pertained to the traumatic  
20 head injuries itself. He had, I believe it was a car accident 11:53:26  
21 at 12 years old.

22 All of those should have been marked and admitted.

23 They all go to his ability to waive a fundamental right or to  
24 have his will overborne. So all of these are interrelated.

25 And he should have put on the voluntariness hearing addressing 11:53:46

1 all of that. And Mr. Scott's testimony would have been limited  
2 to the waiver only. And that's how he should have done it.  
3 And it would have allowed him to prepare and crystallize his  
4 evidence he could have presented at the capital sentencing  
5 proceeding.

11:54:10

6 MR. BURKE: Thank you, Mr. Gorman.

7 I have no further questions.

8 THE COURT: It's five to 12:00. I don't suppose we  
9 should start cross-examination now. But we will after lunch.  
10 And if you'll be back and ready to go at 1:15.

11:54:22

11 (Recess at 11:54 a.m., until 1:17 p.m.)

12 THE COURT: You may take the witness, Counsel.

13 CROSS-EXAMINATION

14 BY MS. BLOMO:

15 Q. Good afternoon, Mr. Gorman.

13:17:44

16 A. Good afternoon.

17 Q. I wanted to review a little bit some of your experience.

18 You were admitted to practice law in 1985 in  
19 Wisconsin, I believe; is that correct?

20 A. Correct.

13:17:55

21 Q. And then you were admitted into Arizona on May 9, 1987.  
22 Does that sound about right?

23 A. Correct.

24 Q. And immediately after that you went to work for the  
25 Maricopa County Public Defender's Office where Roland Steinle

13:18:04

1 was already employed; is that right?

2 A. Yes.

3 Q. Now I just wanted to clarify something. The *Sharp* case  
4 that you mentioned on direct exam, that's a PCR,  
5 post-conviction relief, matter that you've been working on for  
6 a considerable time; correct? 13:18:21

7 A. Correct. In Cochise County Superior Court, State of  
8 Arizona.

9 Q. And you did not represent Mr. Sharp at the trial level, did  
10 you? 13:18:34

11 A. No.

12 Q. And the date of violation in the *Sharp* case was in 1997, I  
13 believe you testified?

14 A. That was the year of his capital sentencing proceeding.

15 Q. Okay. Now you were assigned as a public defender your  
16 first trial level capital case in 1989; is that right? 13:18:45

17 A. That's my best recollection.

18 Q. You don't remember exactly when in 1989 though?

19 A. Correct.

20 Q. And that was the *Walter Spears* case? 13:18:59

21 A. That's my best recollection, yes.

22 Q. And you were lead counsel on that case; is that right?

23 A. I was the only counsel.

24 Q. Okay. So you were lead counsel and you were sole counsel?

25 A. Correct. 13:19:11

1 Q. Now currently most of your work is associated with capital  
2 appellate post-conviction relief and habeas matters; correct?

3 A. Well, when you say most of my work currently, I have a case  
4 that's close to being in a trial setting right now. So  
5 it's the *Sharp* case. 13:19:37

6 Q. That's pending a resentencing proceeding?

7 A. Well, we're in kind of a gap because, while your office has  
8 conceded they're not going to file a petition to review the  
9 Arizona Supreme Court on the sentencing issue, the judge  
10 vacated the death sentence, we, the defense, have not conceded 13:19:57  
11 we're going to drop a petition for review on the guilt phase  
12 until we get confirmation from your office you're not going to  
13 seek the death penalty.

14 Q. Okay.

15 A. So if we get the confirmation, it's going to be resolved 13:20:10  
16 with a plea. If we don't, we're going to be in a position for  
17 review and then back to a trial setting.

18 Q. But I think you testified previously in 1996 you started  
19 focusing more of your work on appellant post-conviction relief  
20 and habeas matters; is that right? 13:20:27

21 A. That's correct, yes.

22 Q. Okay. And as somebody who works in that area, I'm sure  
23 you've had occasion to raise claims of ineffective assistance  
24 of counsel?

25 A. Oh, most certainly. I just got back from the Ninth 13:20:37

1 Circuit --

2 THE COURT: Counsel --

3 THE WITNESS: I'm sorry.

4 THE COURT: -- you answered the question.

5 THE WITNESS: Yes, sir. 13:20:45

6 THE COURT: Even experts know that they're supposed to  
7 answer the questions directly.

8 THE WITNESS: That's right.

9 BY MS. BLOMO:

10 Q. And in raising claims of ineffective assistance of counsel, 13:20:50

11 I'm sure you've become quite familiar with the 1989

12 ABA Guidelines?

13 A. The 1989 Guidelines?

14 Q. Yes.

15 A. Yes. 13:20:59

16 Q. Okay. Now you would agree with me that the 1989 ABA  
17 Guidelines for the appointment and performance of counsel in  
18 death penalty cases were adopted in February of 1989. Does  
19 that sound right?

20 A. I assume they were adopted in 1989. 13:21:14

21 Q. Okay.

22 A. Right.

23 Q. You wouldn't disagree with February?

24 A. I wouldn't disagree.

25 Q. Okay. Isn't it true that your appointment to the 1989 13:21:22

1 *Walter Spears* case did not comply with the 1989 ABA Guideline  
2 5.11(a)(2), which suggests that lead counsel in a capital case  
3 should have a minimum of five years litigation experience in  
4 criminal defense?

5 A. Oh, I don't think I was qualified to be appointed. I agree 13:21:40  
6 entirely.

7 Q. And you would agree that as sole counsel it also didn't  
8 comply with the 1989 ABA Guidelines?

9 A. Absolutely.

10 Q. Now Roland Steinle was appointed to the Scott case in 13:21:50  
11 December 1989; correct?

12 A. Correct.

13 Q. And around that time you would agree that Mr. Steinle was  
14 trying a lot of capital cases?

15 A. Correct. 13:22:04

16 Q. And at that point in 1989 Mr. Steinle had 13 years  
17 experience as a lawyer with significant experience in criminal  
18 defense litigation?

19 A. Well, I can't testify to that.

20 Q. Well, you testified previously that in Milwaukee he worked 13:22:18  
21 for Jerry Boyle; isn't that right?

22 A. Correct.

23 Q. And previously you've indicated that Jerry Boyle  
24 represented Jeffrey Dahmer, the serial killer; is that correct?

25 A. I explained that to you in a deposition. I didn't testify 13:22:31



1 to it here.

2 Q. Right.

3 A. Right.

4 Q. And when you arrived at the P.D.'s office, Mr. Steinle was  
5 already working there?

13:22:40

6 A. Right.

7 Q. Okay. And you would also agree that Mr. Steinle brought  
8 William Foreman on as co-counsel in the Scott case?

9 A. I don't know if Mr. Steinle did. Mr. Foreman --

10 Q. Mr. Foreman served as co-counsel in the Scott case?

13:22:53

11 A. Right.

12 Q. Okay. In 1991 you took to trial the only capital case  
13 you've ever tried in your career; is that right?

14 A. Uh-huh. Yes.

15 Q. And that successfully resulted in acquittal on the first  
16 degree murder charge, so there was no penalty phase in that  
17 case, not a capital penalty phase anyway?

13:23:05

18 A. Correct. He was acquitted of both conspiracy to commit  
19 first degree murder and he was acquitted of first degree  
20 murder.

13:23:22

21 Q. So you have never tried the penalty phase of a capital  
22 case?

23 A. No.

24 Q. And you've never represented a capital defendant in an  
25 aggravation or mitigation hearing?

13:23:28

1 A. No.

2 Q. And you've never represented a defendant in a capital  
3 sentencing proceeding?

4 A. No.

5 Q. You would agree with me that the standard for ineffective  
6 assistance of counsel flows from the U.S. Supreme Court  
7 decision in *Strickland versus Washington*?

13:23:35

8 A. Yes.

9 Q. And *Strickland versus Washington* remains good law today?

10 A. Yes.

13:23:50

11 Q. And *Strickland* is an objective standard which only requires  
12 minimum competency?

13 A. That's correct. The Sixth Amendment is the minimum  
14 competency analysis.

15 Q. Now Dr. Tatro was one of the -- was one of the doctors used  
16 by Mr. Steinle in this case; is that right?

13:24:00

17 A. Dr. Tatro, my understanding, was the only -- you call him a  
18 doctor -- doctor, that's his title. But my understanding was  
19 he's the only doctor used by Mr. Steinle.

20 Q. And you have worked with Dr. Tatro before?

13:24:23

21 A. Yes.

22 Q. You don't have any recollection of ever working with  
23 Dr. Alexander Don on a case though; is that right?

24 A. I am familiar with his name. He may have been on a case  
25 that I handled in the eighties, because there was a large

13:24:49

1 number of competency evaluations done based on the nature of my  
2 practice, which was a lot of indigent appointed cases as a  
3 public defender. And he was one of the experts that was on the  
4 Court's panel, for lack of a better word, that was appointed to  
5 do competency evaluations.

13:25:10

6 So I was familiar with him. I don't know if I ever  
7 used him. I don't remember specifically, but people used him.

8 Q. And similarly you don't remember specifically if you worked  
9 with Dr. DiBacco on a case?

10 A. It would be the same answer. I recognized his name. And,  
11 you know, it's possible he did a competency evaluation on a  
12 case. But --

13:25:23

13 Q. Okay. I'd like to go over some of the materials that you  
14 relied upon in forming your opinion in this case.

15 And I can ask to hand him the exhibits or if you would  
16 prefer to --

13:25:39

17 MR. BURKE: Why don't we just hand them. We're having  
18 some problems with our TrialDirector.

19 MS. BLOMO: That's fine.

20 Exhibit 45.

13:25:57

21 THE WITNESS: Okay. I have in front of me Plaintiff's  
22 Exhibit No. 45.

23 BY MS. BLOMO:

24 Q. And is that a copy of the life history that was handwritten  
25 by Mr. Scott?

13:26:14

1 A. Appears to be.

2 Q. Okay. If you could look specifically to page 2 first.

3 Mr. Scott describes a car accident that occurred when I think  
4 he was 13 years old?

5 A. Okay. 13:26:25

6 Q. And you would agree with me that Mr. Scott makes no mention  
7 of any head injury there; is that correct?

8 A. Well, do you mean expressly or impliedly?

9 Q. I mean expressly.

10 A. Well -- 13:26:46

11 Q. There's no mention of head injury, is there?

12 A. On page 2 -- I mean, do you want me -- are you going to  
13 limit it to a certain sentence? Because I can't --

14 Q. Well --

15 A. I'd have to read the entire document. Is your question is 13:26:58  
16 the entire document or if it's to a specific sentence?

17 Q. No, I'm talking page 2. And I don't know if I should count  
18 the lines down. Let's see --

19 A. Well, I'm at a sentence that begins: When I was 13 I got  
20 hit by a car at 40 miles per hour. For three days they thought 13:27:11  
21 I would die or never walk again at best.

22 Q. Right. And so there's no mention of a head injury. That's  
23 the extent of the description of the accident; is that right?

24 A. There was a comma and more to the sentence, but it doesn't  
25 mention specifically the words "head" or "injury" in that 13:27:29

1 sentence, no.

2 Q. And then if you go to page 4 of that same exhibit,  
3 Mr. Scott mentions a 1974 -- and I think it's 1, 2, 3 --

4 A. In 1974 I wrecked --

5 Q. In 1974 I wrecked my motorcycle. 13:27:53

6 A. Uh-huh, I see it.

7 Q. And Mr. Scott references hurting his back and neck, but he  
8 makes no mention of a head injury; correct?

9 A. Not in that sentence.

10 Q. Well, not in that document. 13:28:04

11 Would you like a moment to look through it?

12 A. If you want me to read the entire document I can.

13 Q. You don't have to read it out loud. But I assume that you  
14 had reviewed this document previously in forming your opinion.

15 Do you have a recollection that it does contain  
16 information about a head injury? 13:28:17

17 A. I examined the record to determine if there was evidence of  
18 a head injury. This document I looked at. I don't  
19 remember if head injury was mentioned in it or not. I did find  
20 references to head injuries that were expressed to counsel in  
21 other portions of the record. 13:28:34

22 Q. Right. We're just talking about this portion of the record  
23 right now.

24 A. Okay. Well, like I said, I can answer a specific sentence.

25 I can't answer the entire document because I don't have a 13:28:44

1 complete recall of what's in it.

2 Q. Well, the document is in evidence. So we'll move on to  
3 Exhibit 58.

4 THE CLERK: He should have 58.

5 THE WITNESS: I have what is marked as Plaintiff's  
6 Exhibit No. 58, which appears to be a minute entry from  
7 Superior Court regarding a Rule 11 evaluation.

13:29:12

8 BY MS. BLOMO:

9 Q. And you would agree with me based on that minute entry  
10 Dr. Tatro and Dr. Don were ordered to determine Mr. Scott's  
11 mental state at the time of the crime in addition to his  
12 competency; correct?

13:29:31

13 A. Could I have a moment to read it?

14 Q. Yeah. I think specifically number 1 and number 3 of the  
15 first section.

13:29:46

16 A. Yes, number 3 addresses the probable mental condition of  
17 the defendant at the time of the offense. So that was one of  
18 the inquiries.

19 And what was your other question?

20 Q. Just that he was asked to consider the mental status at the  
21 time of the offense in addition to competency.

13:30:00

22 A. Correct.

23 MS. BLOMO: Does he have Exhibit 11?

24 THE CLERK: No, he does not.

25 THE WITNESS: I have what's marked as Plaintiff's

13:30:28

1 Exhibit 11, which is Alexander M. Don's report of July 2nd,  
2 1990.

3 BY MS. BLOMO:

4 Q. And if you would turn to page 6.

5 A. I am at page 6. 13:30:52

6 Q. Paragraph 4. And at the bottom of paragraph 4 you would  
7 agree with me, would you not, that Dr. Don opined that  
8 Mr. Scott had normal memory functioning?

9 A. Could you tell me which sentence you're --

10 Q. It's the last line of that sentence. 13:31:17

11 A. Of the fourth paragraph?

12 Q. And I'm paraphrasing. But let me know if you disagree with  
13 me, that Dr. Don was essentially opining that Mr. Scott had  
14 normal memory functioning.

15 A. Okay. I'm just trying to find where -- he's also -- 13:31:30

16 He describes some of the oral statements of Mr. Scott.  
17 And the last clause of the sentence states, "both being  
18 consistent with normal memory functioning."

19 Q. And if you go to paragraph 5, the first two lines, you  
20 would agree with me that Dr. Don opined that Mr. Scott had no  
21 impairment of abstract reasoning? 13:32:07

22 A. Based on his oral discussions with Mr. Scott, and whatever  
23 else Dr. Don did, he says, "indicating no impairment of  
24 abstract reasoning."

25 Q. And lines 3 and 4 of that paragraph, Dr. Don also was of 13:32:32

1 the opinion that Mr. Scott was of average intelligence;  
2 correct?

3 A. He said he's considered to be of average intelligence.

4 Q. Okay. Do you have Exhibit 12?

5 A. Okay. Are we done with this one?

13:32:57

6 Q. Yes. We are.

7 A. Okay. I have what's marked as Plaintiff's Exhibit 12 in  
8 front of me.

9 Q. And is that a transcript dated February 4th, 1991?

10 A. Volume 2. Yes.

13:33:22

11 Q. And I would ask you to turn to page 143, lines 24 and 25.

12 And if you could read from starting "and" on line 24.

13 A. I'm sorry, you want me to start reading at line 24?

14 Q. On page 143.

15 A. Oh, 143, I'm sorry.

13:33:53

16 And did you want me to read it out loud or to myself?

17 Q. Yeah, if you could read it out loud starting at "and."

18 A. Line 24 of page 143, I don't see an "and." The first word  
19 I have at line 24 is "brain damage."

20 Q. Right. And then if you go further on to the -- there's a  
21 period.

13:34:12

22 A. Oh, I see. Okay.

23 "And there was no evidence that he had any organic  
24 brain damage."

25 Q. And this is the testimony of Dr. Don; is that correct?

13:34:22



1 A. It appears to be.

2 Q. Okay. And turning to page 144 of that same transcript,  
3 lines 18 and 19, isn't it true that Dr. Don testified that he  
4 found no abnormality on the mental status examination?

5 A. What the transcript reads is, "I could find no evidence of  
6 mental -- of any abnormality on his mental status examination." 13:34:58

7 Q. And going down to lines 20 to 22, isn't it true that  
8 Dr. Don testified that he found no impairment in memory  
9 deficit?

10 A. That's what the transcript reads. 13:35:29

11 Q. And didn't he also testify, going down to lines 23 to 25,  
12 that he found that Mr. Scott had no difficulty in concentrating  
13 and communicating?

14 A. He qualifies that by adding, "based on the mental  
15 examination." Or that's the qualification to the question. 13:35:49

16 Q. In the question.

17 A. Which Dr. Don addresses also in other portions of his  
18 testimony.

19 Q. And turning to page 145, lines 1 through 3, isn't it true  
20 that Dr. Don also testified that Mr. Scott displayed no  
21 difficulty with recall, based on the test? 13:36:02

22 A. I'm sorry, what line was that?

23 Q. Lines 1 through 3.

24 A. His answer to the question was, "No."

25 Q. Right. And the question was, "And was there anything in 13:36:21

1 the test that would indicate difficulty with recall"; correct?

2 A. That was the question.

3 Q. Okay. Turning to page 152 of the same transcript --

4 And you've reviewed this transcript previously; isn't  
5 that right? 13:36:40

6 A. I reviewed all of Dr. Don's testimony, both at the trial  
7 and at the other proceeding. I believe he testified at the  
8 aggravation/mitigation hearing also. But I read all his  
9 testimony regarding this case.

10 Q. Okay. So turning to page 152, specifically line 19 through 13:36:56  
11 line 23, would you agree that in that section of testimony  
12 Dr. Don is indicating that the lack of information that he  
13 believes exists goes to a diagnosis of personality disorder?

14 A. All right, because I want to make sure I understand your  
15 question, what you want me to review, could you tell me first 13:37:24  
16 what you want me to read and then what the question is?

17 Q. If you could read lines 19 through 23 on page 152.

18 A. Okay.

19 Okay. And what's your question?

20 Q. And actually, you know what, why don't you read further, 13:37:49  
21 lines 24 to line 3 on the next page.

22 A. Okay.

23 Q. And would you agree with me that based on that testimony  
24 Dr. Don is indicating that the lack of information he believes  
25 exists goes to a diagnosis of personality disorder? 13:38:09

1 A. Well, I agree that -- two things. That Dr. Don said there  
2 was an insufficient basis of information for a diagnosis, which  
3 would include personality disorder.

4 Q. Well, the diagnosis -- the -- specifically the diagnosis  
5 that he's talking about is a diagnosis of personality disorder; 13:38:36  
6 isn't that right?

7 A. Right. And the predicate for not being able to give a  
8 diagnosis, because there was insufficient data. And what he  
9 was referring to --

10 Q. Right. 13:38:48

11 A. -- was self reporting of the defendant only.

12 Q. Right. And this was relating to Dr. Tatro's diagnosis of  
13 personality disorder; correct?

14 A. Correct.

15 Q. Okay. It's not going to a diagnosis of cognitive 13:38:57  
16 impairment, is it?

17 A. Personality disorder by definition has to do with a  
18 person's personality, it's not a cognitive diagnosis.

19 Q. And it's not going to the issue of competency, is it?

20 A. The diagnosis of personality disorder? 13:39:16

21 THE COURT: Excuse me, let me interrupt here. I  
22 thought we were talking about Dr. Don's testimony.

23 MS. BLOMO: We are.

24 BY MS. BLOMO:

25 Q. Maybe I need to clarify that the personality disorder that 13:39:26

1 we're referring to, Mr. Gorman, isn't it right that Dr. Tatro  
2 made a finding that the defendant suffered from personality  
3 disorders; is that correct?

4 A. That's correct. And this is Dr. Don's critique of that.

5 Q. Right. And Dr. Don did not believe there was enough  
6 information to find that the defendant suffered personality  
7 disorder; correct? 13:39:43

8 A. Right. He felt there wasn't a basis for Dr. Tatro's  
9 opinion.

10 Q. Okay. Turning to -- do you have Exhibit 15? 13:39:54

11 A. I have what's marked as Plaintiff's Exhibit 15, which is  
12 the Affidavit of Donald Tatro, T-A-T-R-O.

13 Q. And turning to Section A2 of that Affidavit, Dr. Tatro  
14 states that he administered to Mr. Scott the Bender  
15 Visual-Motor Gestalt test, the Finger Drawing Test, and the  
16 Sentence Completion Test; correct? 13:40:34

17 A. That's what he states at paragraph 2 of his Affidavit.

18 Q. And you have reviewed Dr. Tatro's report in this case?

19 A. Yes.

20 Q. And you would agree with me that Dr. Tatro did not find  
21 that Mr. Scott suffered from any cognitive impairment? 13:40:45

22 A. Yes, I'd agree with that.

23 Q. Okay. What Dr. Tatro found, as we discussed before, were  
24 personality disorders; correct?

25 A. Correct. 13:41:01

1 Q. And turning to Exhibit 13. I don't know if you have  
2 Exhibit 13.

3 A. I have what's marked as Plaintiff's Exhibit No. 13, which  
4 is a report authored by Donald Tatro, clinical psychologist,  
5 dated August 2nd, 1990. 13:41:35

6 Q. And turning to page 16 of that report, Dr. Tatro gives a  
7 diagnosis of personality disorder; correct?

8 A. Yes, he gives a diagnosis.

9 Q. And turning back one page to page 15, I'd like you to go  
10 down to the second paragraph, the third line down. And if you 13:42:06  
11 could read to yourself --

12 And you've reviewed this report before; correct?

13 A. That's correct.

14 Q. And if you could read to yourself lines -- starting at line  
15 three in paragraph two; three, four and five. 13:42:22

16 A. The indented paragraph? The indented paragraph?

17 Q. Yeah, it's indented -- I believe the second full indented  
18 paragraph starting "With the results." And if you look three  
19 lines down starting with "His extreme."

20 A. Okay. 13:42:42

21 Q. Read that sentence to yourself.

22 A. All right.

23 Okay, I read it.

24 Q. Okay. And again, I don't mean to keep belaboring the fact,  
25 but you have reviewed this report before? 13:42:57

1 A. Yes.

2 Q. And based on what you reviewed of this report and that  
3 section of the report, you would agree with me, wouldn't you,  
4 that Dr. Tatro believed that Mr. Scott's personality traits and  
5 disorders would make him an easily manipulated dupe? 13:43:08

6 A. That's what Dr. Tatro's expressing in his report.

7 Q. Okay. Now you sort of agree with Dr. Don here that you  
8 believe this diagnosis of personality disorder was unsupported;  
9 is that right?

10 A. I agree that -- yeah, that Dr. Tatro didn't have any 13:43:25  
11 foundation, because he relied solely on self reporting.

12 Q. Okay. I'd like you to turn to Exhibit 3.

13 Does he have Exhibit 3?

14 THE CLERK: No.

15 THE WITNESS: I have what's marked as Plaintiff's 13:43:55  
16 Exhibit 3 in front of me, which are transcripts of the April  
17 22nd, 1991 Special Verdict of the Honorable David R. Cole in  
18 this matter.

19 BY MS. BLOMO:

20 Q. Okay. And could you please turn to page 18? 13:44:14

21 A. Okay.

22 Q. And going all the way down to the bottom of the page, line  
23 24, it's number 16, and goes onto the page 19.

24 A. Okay.

25 Q. Okay. You would agree with me that the sentencing judge in 13:44:38

1 this case found Mr. Scott's psychological history to be a  
2 mitigating factor, particularly because it was connected to  
3 Mr. Scott's involvement in the crime?

4 A. Okay. And your question again regarding paragraph 16 is  
5 what? 13:45:18

6 Q. Would you agree with me that the sentencing judge in this  
7 case found Mr. Scott's psychological history as mitigating --  
8 as a mitigating factor, particularly because he found it was  
9 connected to his involvement in the crime?

10 A. He states he found the mitigating circumstance does exist. 13:45:30

11 Q. And that he believed it was -- there was a nexus or a  
12 connection between his psychological characteristics and his  
13 involvement in the crime?

14 A. That's what paragraph 16 says.

15 Q. Yes. 13:45:46

16 And now if you could just turn to Exhibit 54, which I  
17 believe is Garrett Simpson's --

18 A. Memo.

19 Q. -- memorandum.

20 A. I'm not sure I have it. I may. 13:46:12

21 THE CLERK: It was up there. Let me just double  
22 check.

23 THE WITNESS: I might have it. I've got a lot here.

24 THE CLERK: Yeah, it's up there somewhere.

25 THE WITNESS: Are you sure it's 54? 13:46:30

1 MS. BLOMO: I do have it marked as 54.

2 THE COURT: Garrett Simpson?

3 MS. BLOMO: Yes.

4 THE CLERK: There it is.

5 THE WITNESS: Thank you.

13:46:43

6 I have what's marked as Plaintiff's Exhibit 54, which  
7 is a memorandum of Garrett Simpson of November 7th, 1991.

8 BY MS. BLOMO:

9 Q. Okay. And if you go to paragraph 2 -- I guess let's look  
10 at line 10, paragraph 2, it starts with "His testimony." And  
11 if you read that section starting with "His testimony," you  
12 would agree that Mr. Simpson is talking about the potential of  
13 Mr. Scott's testimony had he testified at the voluntariness  
14 hearing. Is that right?

13:47:03

15 A. Uh-huh.

13:47:27

16 Q. And then if you go to the next sentence, if you could read,  
17 it starts with "I readily." If you could read that section out  
18 loud, "I readily," that sentence.

19 A. "I readily concede that this is a huge set of  
20 contingencies, but in a death case it will be raised sooner or  
21 later."

13:47:48

22 Q. And if you could go to page 2 of that same exhibit,  
23 paragraph 1. And the sentence -- second sentence, excuse me,  
24 of that paragraph starts with, "I know." If you could read  
25 that sentence.

13:48:12



1 A. "I know you appreciate that I am not alleging you and Bill  
2 were ineffective, but that the gravity of the case requires  
3 setting up every possible argument for relief," period. "I  
4 know we all agree the big error was Roger's refusal to take the  
5 deal."

13:48:31

6 Q. And if you turn back to page 1, paragraph 2, you would  
7 agree that Mr. Simpson says in the first part of paragraph 2,  
8 ineffective -- or "effective assistance of trial counsel is  
9 eventually always questioned in capital cases."

10 A. Yeah, I agree with that. It's a fundamental right in the  
11 Arizona system.

13:48:59

12 Q. Now you have no opinion as to the prejudice prong of  
13 ineffective assistance of counsel in this case because your  
14 role is not as a fact finder; is that right?

15 A. My role is not that of a fact finder; that is correct.

13:49:20

16 Q. And that means you have no opinion as to whether the facts  
17 actually show that Mr. Scott sustained brain injuries that  
18 affect his neurological functioning; correct?

19 MR. BURKE: Objection, Your Honor. That goes to the  
20 question of the factual basis of the case and deficient  
21 performance, not to the question of prejudice as to  
22 whether -- as to whether it had some impact on the outcome of  
23 Mr. Scott's sentencing hearing.

13:49:34

24 So I think she may not accurately describe what  
25 constitutes prejudice versus sufficient performance and simply

13:49:47

1 facts of the case.

2 THE COURT: Overruled.

3 You may answer.

4 THE WITNESS: Could I have the question read back,  
5 Your Honor? 13:49:57

6 THE COURT: Yes.

7 (The record was read from page 107, line 16 to 18)

8 THE WITNESS: Well, I have an opinion.

9 MS. BLOMO: If I can have a moment, Your Honor.

10 BY MS. BLOMO:

11 Q. Okay. I deposed you previously in this case; isn't that  
12 right?

13 A. Yes.

14 Q. Last week, I think.

15 And if you disagree with this, let me know. But did 13:51:00  
16 you not tell me at that time, quote, I mean, whether or not the  
17 reports existed or witnesses could have provided information,  
18 that goes to the prejudice prong. I'm not giving an opinion on  
19 prejudice.

20 Is that right? Did you say that? 13:51:14

21 A. Right. But the question you asked me also goes to  
22 deficient performance, the question you asked me here.

23 Q. Going to the voluntariness issue for a moment, under the  
24 circumstances of this case, you would not have put Dr. Tatro on  
25 to testify at the voluntariness hearing, would you? 13:51:39

1 A. He was not prepared to testify and he was the wrong expert.

2 Q. I'm just asking for a yes or no answer to that question.

3 A. No, I would not.

4 Q. You would not have put him on?

5 A. Right. 13:51:50

6 Q. And I think you've indicated previously, and I'm not saying

7 necessarily in testimony, but you would have put an expert on

8 to testify about the head injuries to show that Mr. Scott was

9 of such low intelligence or so cognitively impaired as to be

10 unable to knowingly, voluntarily or intelligently waive 13:52:06

11 *Miranda*. Is that something you would have pursued?

12 A. I definitely would have investigated it, developed it, and

13 presented it with the appropriate expert, yes. With or without

14 a nexus. Meaning, just -- you could have testimony simply on

15 the fact of the traumatic injuries he sustained to his head. 13:52:28

16 And then you could also have an explanation without examination

17 of Mr. Scott, *per se*, on what type of cognitive problems that

18 can cause. And you can do that with a neuropsychologist.

19 Q. You would agree with me that two independent experts

20 evaluated Mr. Scott, and they both found that he was competent 13:52:52

21 to waive his constitutional rights; correct?

22 A. No, I disagree, they were not independent experts. An

23 independent expert is an expert secured by defense counsel that

24 is separate from a court appointment list.

25 Q. Okay. Two experts evaluated Mr. Scott, whether they were 13:53:10

1 independent or otherwise, and they both determined that he was  
2 competent to waive his constitutional rights; correct?

3 A. They were qualified as an expert -- as experts, I assume  
4 since they were on the competency list, and their opinion was  
5 he was competent. 13:53:30

6 Q. You would agree with me that defendants should not  
7 necessarily be put on the witness stand to testify in all  
8 voluntariness hearings; is that right?

9 A. That's correct.

10 Q. But it's your opinion that you would have put Mr. Scott on 13:53:43  
11 to testify at the voluntariness hearing in this case, even  
12 though you'd never met him, you never communicated with him,  
13 you don't know what he would say, and you don't know how he  
14 would fare on cross-examination?

15 MR. BURKE: Objection. Compound question. 13:53:56

16 THE COURT: Overruled.

17 THE WITNESS: Yes, I would put him on.

18 BY MS. BLOMO:

19 Q. You would agree that back in 1989 Noel Levy was a very  
20 experienced prosecutor? 13:54:10

21 A. In, I'm sorry, 1989?

22 Q. Um-hum.

23 A. Yes, uh-huh.

24 Q. And that Mr. Levy's handled a large number of death  
25 penalty cases, perhaps as many as any prosecutor in Maricopa 13:54:19

1 County?

2 A. I couldn't say that. I have no reason to doubt it. I've  
3 tried a first degree murder case against him, and I knew he  
4 regularly did first degree murder cases. Death penalty cases,  
5 I know he did I believe all three with these codefendants. But  
6 other than that I don't have a specific knowledge. But I have  
7 no doubt that he's an experienced capital prosecutor.

13:54:35

8 Q. And you would also agree that at the voluntariness hearing  
9 Roland Steinle argued that the combination of factors, length  
10 of time, lack of sleep, food and medication were coercive  
11 factors, and argued that the -- Mr. Scott's statements in this  
12 case were involuntary?

13:54:56

13 A. He argued that, but he presented no evidence of that.

14 Q. But he did argue it?

15 A. He argued it.

13:55:12

16 Q. And he cross-examined witnesses on those issues; correct?

17 A. He asked questions.

18 Q. Would you agree that cross-examination of the State's  
19 witnesses is sometimes the most important evidence in a case  
20 for the defense?

13:55:24

21 A. Only if you get an answer that affirms the point you're  
22 attempting to make in your question. If you simply ask  
23 questions, questions have no evidentiary value. It's the  
24 answer. So you can question a person, cross-examination, and  
25 have a great cross-examination theme or questions, but if you

13:55:43

1 don't get an answer that makes your point, and you don't  
2 introduce impeachment or call witnesses, it's served no  
3 purpose.

4 THE COURT: Mr. Gorman, you're driving me crazy.

5 THE WITNESS: I'm sorry. 13:55:58

6 THE COURT: Because I'm an old judge, and I've done  
7 things I believe the right way for a long time. When the  
8 question asks for a yes or no answer, answer yes or no. If you  
9 say you can't, then we'll give you permission to say what you  
10 believe. 13:56:15

11 THE WITNESS: Absolutely, Your Honor. Thank you.

12 THE COURT: Start off with that.

13 BY MS. BLOMO:

14 Q. I'll repeat the question.

15 Would you agree that cross-examination of the State's  
16 witnesses is sometimes the most important evidence for the  
17 defense? 13:56:22

18 A. You said "sometimes"; is that right?

19 Q. I did.

20 A. Sometimes, yes. 13:56:33

21 Q. In fact, on your website, *lawyergorman.com*, you highlight  
22 how important cross-examination was in the only capital case  
23 you've ever tried, which is *State versus Roger Raymond*  
24 *Gonzales*; correct?

25 A. I don't recall. 13:56:49

1 Q. Let me know if this sounds right. Do you write on your  
2 website that, quote, Attorney Gorman, through cross-examination  
3 of the State's witnesses, demonstrated that each State witness  
4 was either unreliable because of drug addiction or had a motive  
5 to lie.

13:57:03

6 A. That sounds correct.

7 MS. BLOMO: I have no further questions.

8 THE COURT: Redirect?

9 MR. BURKE: Briefly, Your Honor, yes. Thank you.

10 REDIRECT EXAMINATION

13:57:13

11 BY MR. BURKE:

12 Q. Mr. Gorman, the Attorney General asked you questions about  
13 your experience and asked -- or pointed out that you had never  
14 tried a capital case in a penalty phase; is that correct?

15 A. I was asked that.

13:58:11

16 Q. And your answer was that you have never tried a capital  
17 case in the penalty phase; is that correct?

18 A. Not in the penalty phase.

19 Q. Okay. Can you tell the Court, what is the objective of a  
20 capital defendant -- capital defense attorney representing a  
21 defendant in a capital case -- let's see if I can -- let me  
22 rephrase the question.

13:58:26

23 Do you view the fact that you have never tried a  
24 capital sentencing proceeding as a mark of failure?

25 A. No.

13:58:50

1 Q. Do you view it as a mark of success?

2 A. Yes.

3 Q. Can you tell us why?

4 A. Because the main objective as soon as you get a capital  
5 case is to move heaven and earth to resolve it without a  
6 penalty phase proceeding. And that's reflected in the  
7 ABA Guidelines. And so I view it as a success. And a lot of  
8 the best capital defense lawyers have tried very, very few  
9 capital cases because they get them resolved ahead of time.

13:59:00

10 And if you don't it's considered a failure. The last  
11 place you want to be is in a capital trial. You want to  
12 resolve it pretrial.

13:59:28

13 Q. Miss Blomo asked you some questions regarding Mr. Scott's  
14 handwritten life story that was submitted at his mitigation  
15 hearing. And if I remember correctly she asked you questions  
16 regarding Mr. Scott's statements about being hit by a -- by an  
17 automobile going 40 miles per hour when he was 13 years old; is  
18 that correct?

13:59:45

19 A. Yes, I was asked that.

20 Q. Okay. As a capital defense attorney, if you were aware  
21 that a client had been struck by an automobile going 40 miles  
22 per hour, had been -- if I remember Mr. Scott's statement --  
23 thought to be close to death for three days, what red flags  
24 would those put up for you?

14:00:00

25 A. That he sustained a tremendous impact, if he's 12 years old

14:00:22



1 and he gets hit by a car going 40 miles per hour. Which just  
2 on that fact alone would put you on notice that he potentially  
3 had a head injury and potentially a brain injury.

4 Q. Would you attempt to obtain any records?

5 A. I would -- and this is reflected in the Supreme Court case  
6 law I reference the earlier --

14:00:45

7 THE COURT: Counsel.

8 THE WITNESS: Oh, I'm sorry.

9 THE COURT: Would you have attempted to obtain  
10 records?

14:00:56

11 THE WITNESS: Yes.

12 Thank you, Judge.

13 BY MR. BURKE:

14 Q. Would you have attempted to obtain any records?

15 A. Yes.

14:01:03

16 THE COURT: Why?

17 THE WITNESS: Well --

18 MR. BURKE: Excellent question.

19 THE WITNESS: I would have attempted to secure records  
20 for a number of reasons. And it would be to first prove the  
21 trauma of the impact. In other words, the police reports and  
22 the witnesses, which gives information as to the trauma, his  
23 brain, and perhaps head, his body sustained. So the records of  
24 the accident.

14:01:14

25 Then the records of any treatment, of course, to look

14:01:40

1 for anything that would relate to mitigating evidence,  
2 specifically a head injury.

3 Then I would want to get the school records to compare  
4 his school performance before he was 13 years old and had this  
5 injury, and his school performance after he was -- had this  
6 accident. 14:02:04

7 BY MR. BURKE:

8 Q. Now did you review Mr. Scott's school records in this case?

9 A. I --

10 Q. I simply don't remember, that's -- 14:02:20

11 A. No. I'm aware there was records collected. And no.

12 Q. All right. Would you have used -- would your client's  
13 statement that he'd been hit by an automobile at the age of 13  
14 have put you -- raised red flags about obtaining expert  
15 assistance in the case? 14:02:44

16 A. A Mitigation Specialist.

17 Q. And why the Mitigation Specialist?

18 A. Because that would be the beginning of the investigation.

19 And then the questions you put to me earlier about  
20 would I collect records would be a function of a Mitigation  
21 Specialist who, in addition to collecting the records, would  
22 then interview family members, teachers, and compare behavior  
23 and cognitive functioning before and after the accident. 14:03:00

24 And then as you compile what's known as the social  
25 history, which is what Dr. Don was referring to was absent in 14:03:23

1 the record, you would then have the Mitigation Specialist  
2 recommend appropriate experts. And I have no doubt the  
3 Mitigation Specialist would have recommended in this case what  
4 you did in post-conviction, was get a neuropsychologist.

5 Q. The Attorney General asked you several questions about the 14:03:41  
6 report -- reports prepared by Dr. Don and Dr. Tatro in this  
7 case; correct?

8 A. Yes, I was asked questions.

9 Q. And the doctors in both of those -- both of those doctors  
10 in their opinions -- in their reports rendered opinions; is 14:03:59  
11 that correct?

12 A. That's correct.

13 Q. Do you recall this morning I attempted to obtain an opinion  
14 from you before laying any foundation for that opinion?

15 A. I recall that. 14:04:11

16 Q. Okay. Do you have concerns about the foundation that these  
17 doctors had for the opinions they reached in this case?

18 A. Yes.

19 Q. And what are those concerns?

20 A. Well, the concerns are these -- and it's reflected in the 14:04:25  
21 prevailing norms and standards of how to prepare an expert in  
22 terms of a defense counsel, which is to provide them with a  
23 social history, corroborating evidence, aside from just the  
24 self reporting of the defendant. And that's done by -- the  
25 term is triangulating the evidence. Meaning, you get your 14:04:57

1 statement from the defendant, you collect records,  
2 institutional records, medical records, school records, and  
3 then you conduct interviews of lay persons, teachers,  
4 et cetera, throughout his life. Then you compile that in a  
5 social history, which is a narrative. That goes to the expert 14:05:20  
6 so the expert has a basis for their opinion.

7 Q. Did Dr. Tatro have that information in this case?

8 A. No. Dr. Tatro read the newspaper and talked to the  
9 defendant.

10 Q. Did Dr. Don have that information? 14:05:32

11 A. No. And that's reflected in Dr. Don's testimony.

12 Q. I'd like to turn your attention to Exhibit 3, which I  
13 believe you have before you. It is the Special Verdict in this  
14 case.

15 A. Okay. I have Exhibit 3, which is -- 14:05:56

16 MS. BLOMO: I think I might have picked up the  
17 wrong --

18 THE COURT: 3 is the transcript.

19 MR. BURKE: Excuse me, Your Honor, you're correct, it  
20 is the transcript from the sentencing of Mr. Scott in this 14:06:10  
21 case.

22 THE WITNESS: Correct. I have Exhibit 3, which is the  
23 April 22nd, 1991 transcript.

24 BY MR. BURKE:

25 Q. And Miss Blomo asked you to look at pages 18 and 19 of that 14:06:19

1 transcript; is that correct?

2 A. Yes, paragraph 16.

3 Q. And she asked you whether the trial judge in this case  
4 found Mr. Scott's, quote, psychological history, end quote, as  
5 mitigation; is that correct?

14:06:37

6 A. Yes.

7 Q. And did the trial judge find that in this case? Did he  
8 find his psychological history as mitigation?

9 A. Yes.

10 Q. It's not a trick question.

11 A. He found -- pardon me?

12 Q. Go ahead. I'd sorry.

13 A. Yes.

14 Q. Okay. Now do you recall what evidence of psychological  
15 history trial counsel presented to the trial judge in this  
16 case?

14:07:07

17 A. The only thing trial counsel presented was the letters that  
18 he had marked to move into evidence as exhibits.

19 So if Judge Cole considered more than Dr. Tatro's  
20 report, which was one of them, he could have considered the  
21 letters also, some of them. But that's the only thing he  
22 introduced.

14:07:26

23 Q. Okay. And Dr. Tatro diagnosed a personality disorder;  
24 correct?

25 A. Correct.

14:07:38

1 Q. And am I correct in saying that you have concerns about  
2 the validity of his findings? About the -- let me rephrase  
3 that.

4 You have concerns about the information that was  
5 provided to him as foundation for that conclusion?

14:07:48

6 A. He didn't have a foundation for his opinion.

7 Q. Okay. Are you familiar with Arizona case law from the  
8 1980s that discussed the relevant weight to be given evidence  
9 of personality disorder as opposed to organic brain damage?

10 A. I'm not -- I can't specifically quote you case law as to  
11 the value of one versus the other, but --

14:08:13

12 MR. BURKE: Okay. All right.

13 No further questions. Thank you.

14 THE COURT: That's all, sir. You may step down.

15 THE WITNESS: Okay. Thank you, Judge.

14:08:49

16 MS. GARCIA: Your Honor, we'd like to call Russ  
17 Stetler to the stand, please.

18 THE CLERK: Mr. Stetler, if you'll please come  
19 forward.

20 Please raise your right hand.

14:09:47

21 (RUSSELL STETLER, PETITIONER'S WITNESS, SWORN)

22 THE CLERK: Please have a seat, sir.

23 THE WITNESS: Thank you.

24 THE CLERK: There's water here if you need it. And  
25 speak up and into the microphone.

14:10:11