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

STATE OF ARIZONA,)
)
Plaintiff,)
)
vs.) No. CR95000271
)
KYLE DAVID SHARP,)
)
Defendant.)
_____)

July 29, 2008
Bisbee, Arizona

BEFORE: The Honorable WALLACE R. HOGGATT, Judge

REPORTER'S TRANSCRIPT OF PROCEEDINGS
EVIDENTIARY HEARING CONTINUING

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A P P E A R A N C E S

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1 I N D E X

2 WITNESS: EXAMINATION BY: ON PAGE:

3 MARY DURAN Mr. Gorman 4

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7 JAMES WHITE Ms. Lam 28

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10

11 EXHIBITS:

12 NUMBER: DESCRIPTION: RECEIVED ON PAGE:

13 169 Capital Cases; Zen and the Art of ... 9

14 170 Capital Cases; Using the Mitigation ... 9

15 171 ABA Supplementary Guidelines 19

16 172 The Champion; Obtaining Funds for ... 9

17 176 Affidavit of James White 192

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19 I James White Curriculum Vitae 65

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1 P R O C E E D I N G S

2 THE COURT: This is the continuing evidentiary
3 hearing in State of Arizona against Kyle David Sharp,
4 CR95000271. The record may show that counsel are present.
5 Mr. Sharp continues to waive his presence. Mr. Rohman is
6 also present. I believe our next witness, Ms. Duran, is
7 present.

8 And at this time, Mr. Gorman, the defendant may
9 call its next witness.

10 MR. GORMAN: Mary Duran, your Honor.

11 THE COURT: All right. Come forward please and be
12 sworn.

13

14 MARY DURAN,
15 called as a witness herein, being first duly sworn, is
16 examined and testifies as follows:

17

18 THE COURT: Take the witness stand please, ma'am.
19 You may proceed.

20 MR. GORMAN: Thank you, your Honor.

21

22 EXAMINATION

23 BY MR. GORMAN:

24 Q What is your name?

25 A Mary Patricia Duran.

1 Q And just for clarity, you're not feeling that well
2 today, correct?

3 A That's correct.

4 Q And you've had some illness the past two days?

5 A Yes, sir.

6 Q And you have MS and it may be related to that?

7 A Yes, sir.

8 Q Okay. So I'm sure if you need a break the judge
9 will give you one. And if you're having any problem, just
10 let the court know.

11 THE COURT: Just let us know.

12 THE WITNESS: Thank you, sir.

13 BY MR. GORMAN:

14 Q Now what is your profession?

15 A I'm a capital mitigation specialist currently
16 employed by the State Capital Post-Conviction Public
17 Defender Office in Phoenix.

18 Q And when did you start operating as a mitigation
19 specialist in Arizona?

20 A In the early 1980s.

21 Q And so is it fair to say pre1985?

22 A Oh yes.

23 Q And have you worked as a mitigation specialist
24 pre -- let's just say -- well, we'll start with 1985. Have
25 you worked as a mitigation specialist in Arizona as part of

1 a capital defense team pre1985 in Maricopa County?

2 A Yes, sir.

3 Q Yavapai County?

4 A Yes, sir.

5 Q Yuma?

6 A Yes, sir.

7 Q La Paz?

8 A La Paz might have been after '95. I'm not sure.

9 Q The question was '85, pre -- or excuse me --
10 pre'95

11 A Yeah, I'm not sure. It might have been close.

12 Q Coconino?

13 A Yes, sir.

14 Q Pinal pre'95?

15 A Yes, sir.

16 Q Gila?

17 A I think that might have been post.

18 Q Post '95?

19 A '95.

20 Q And what training have you received as a
21 mitigation specialist; and experience began in 1984?

22 A Um, I would say that I have probably 600 hours of
23 training. That began in 1983 and continues to this day.

24 I've attended NACDL training. I've gone to AACJ training in
25 California, Criminal Defense Training, NASA training. Not

1 to be an astronaut. It's a National Association of
2 Sentencing Advocates. Some years I went to two a year. I
3 have amassed a \$20,000 library of mitigation materials. And
4 on a weekly basis starting on Monday morning I read every
5 case that's come out of the Ninth Circuit, the Supreme
6 Court, and the Arizona Supreme Court.

7 Q And can you approximate how many death penalty
8 cases you've worked on in Arizona since 1985 as a mitigation
9 specialist and part of a capital defense team?

10 A Over 200.

11 Q And you mentioned the National Association of
12 Criminal Defense Lawyers. What is that?

13 A Well, that's a premiere organization for criminal
14 defense lawyers and ancillary staff, which I consider
15 myself, in the country. And they're closely related with
16 the ABA and the field of developed guidelines and accepted
17 standards for the practice of criminal law particularly in
18 death penalty cases.

19 Q And does the National Association of Criminal
20 Defense Lawyers have a publication?

21 A Yes, sir, they have a magazine called The
22 Champion.

23 Q And is that a trade magazine for criminal defense
24 lawyers that educates them on the current standard of care
25 and various criminal defense techniques?

1 A Yes, sir, it does.

2 Q And in the 1980s did The Champion publish articles
3 on mitigation investigation and what was necessary?

4 A Yes, sir, they certainly did, extensively actually
5 in the '80s. I think the first big article I ever read was
6 in '83 by Gary Goodpastor of Tucson; and then began reading,
7 getting and reading The Champion. And there were
8 extraordinary numbers of articles in The Champion about the
9 developing field of death penalty litigation following the
10 lead of the Supreme Court and ensuring that the practice was
11 done to meet the requirements of the law.

12 Q And are these articles in The Champion that
13 discuss how to appropriately conduct a mitigation
14 investigation in a capital case part of what you relied on
15 as your training and experience as a mitigation expert?

16 A Yes, sir.

17 Q I'm going to show you what's marked as Exhibit
18 169, 170, and 172.

19 (Discussion off the record between counsel.)

20 BY MR. GORMAN:

21 Q And do you recognize what's marked as Exhibit 169?

22 A Yes, sir.

23 Q And do you recognize what's marked as Exhibit 170?

24 A Yes, sir.

25 Q And do you recognize what's marked as Exhibit

1 189 -- or excuse me, 172?

2 THE COURT: 172.

3 MR. GORMAN: Thank you, your Honor.

4 THE WITNESS: Yes, sir, I do. I actually use
5 these two when I train.

6 BY MR. GORMAN:

7 Q You have to refer to them by exhibit number.

8 A I apologize. I'm using Exhibit 169 and 170 when I
9 do training.

10 Q Okay. And do you recognize these as published by
11 The Champion?

12 A Yes, sir.

13 Q And do you recognize that Exhibit 170 was
14 published in June of 1987?

15 A Yes, sir.

16 Q And do you recognize Exhibit 169 was published in
17 August of '86?

18 A Yes, sir.

19 Q And that Exhibit 172 was published in August of
20 '89?

21 A Yes, sir.

22 MR. GORMAN: Judge, I move for admission of 169,
23 170, 172.

24 MS. GARD: No objection.

25 THE COURT: 169, 170, 172 shall be marked and

1 received.

2 BY MR. GORMAN:

3 Q All right. I'm going to hand you what's marked as
4 Exhibit 169 which is entitled in bold letters, CAPITAL
5 CASES, Zen and the Art of Mitigation Presentation, or, The
6 Use of Psycho-Social Experts in the Penalty Phase of a
7 Capital Trial.

8 Is there any discussion on the validity or
9 invalidity in a capital sentencing proceeding for defense
10 counsel to rely on self-reporting of the defendant?

11 A Yes. They talk about how it is inappropriate to
12 rely on self-reporting for a variety of reasons, not the
13 least of which is that on occasion clients will tell you
14 their childhood was perfect when in fact a good mitigation
15 investigation would prove that it is anything but. And the
16 other part realizes that courts have not always found self-
17 reporting to have as much weight. So you must go out and
18 investigate and attempt to corroborate.

19 Q Well, you use the term inappropriate. Does the
20 article say it's inappropriate, or does it say it's wrong to
21 rely on self-reporting?

22 A Well, they say it's wrong.

23 Q It doesn't meet the standard of care?

24 A It does not meet any standard of care, no, sir.

25 Q Now I'm going to show you what's marked as Exhibit

1 170. It's a Champion article, bold letters, CAPITAL CASES,
2 Using the Mitigation Specialist and the Team Approach,
3 published June of '87.

4 Does that article discuss whether a mitigation
5 specialist is essential to a capital defense team?

6 MS. GARD: Your Honor, objection. Mr. Rohman has
7 already testified as to the need for a mitigation
8 specialist, as to the importance of a mitigation specialist.
9 So I think any additional testimony on that is irrelevant
10 and cumulative at this point, so I object on those grounds.

11 THE COURT: Well, it's relevant and material; not
12 quite cumulative yet. Let's see if we ever get to that
13 point. Overruled. You may answer.

14 THE WITNESS: Yes, it does. And actually one of
15 the officers, Jane Core, ran the mitigation section of the
16 Public Defender's Office in Ohio. I contacted them for
17 materials after reading this. And it says that you cannot
18 do a capital case without a mitigation specialist, and you
19 better start immediately.

20 BY MR. GORMAN:

21 Q And is the reason that one article references no
22 self-reporting should be relied on, and the second article
23 says a mitigation specialist is essential, is that because
24 to fail to do that fails to meet the minimum standard of
25 competency for a capital defense team?

1 A Yes, it does.

2 Q And is that because the defendant has the burden
3 of proof and has to produce evidence and meet a burden of
4 proof?

5 A That's correct.

6 Q In order to prove mitigators?

7 A That's correct.

8 Q Now I'm going to show you what's marked as Exhibit
9 172. And could you read the title of that?

10 A Obtaining Funds for Experts in Indigent Cases.

11 Q Now have you, before we get to that article, have
12 you personally had problems on capital cases that you've
13 been on or associated with where county administrators have
14 refused to give money for reasonable and necessary defense
15 resources?

16 A Yes, sir.

17 Q And in your experience what would a competent
18 capital defense counsel do?

19 A File a motion with the court requesting the funds
20 in accordance with Ake, Kendricks, and the myriad of cases
21 that came out concerning the defendant's right to have an
22 expert as to the areas of concern that are going to be
23 addressed in the mitigation phase.

24 Q Or for whatever resource he might need?

25 A Absolutely.

1 Q Is that kind of the blocking and tackling
2 fundamentals of capital defense work, to make a record and
3 apply for the court for funds if they're denied by the
4 county?

5 A I think it's the only thing you can do and be
6 competent is let the court know. Since appeals are based
7 only on the record, you have to make a record that you have
8 attempted and made all reasonable attempts to get funding;
9 and then have, at least have it on the record that you've
10 taken all steps possible.

11 Q And this Champion article, Exhibit 172, entitled
12 Obtaining Funds for Expert in Indigent Cases, published in
13 1989, does that address that and cover that?

14 A Oh, yes, sir. And actually it addresses all kinds
15 of experts that might be required, to include forensic
16 dentists and, and serology, neurology, cardiology, any kind
17 of issue, neurological issues, that might present.

18 Q Now you -- tell me if you're familiar with the
19 Capital Representation Project?

20 A Oh yes.

21 Q And approximately how long has that Capital
22 Representation Project been in existence?

23 A Well, they were a tremendous resource for me when
24 I was starting out. They were at -- Arizona State
25 University had given them space. And they were set up to

1 help all criminal defense lawyers doing capital cases
2 throughout this state.

3 Q And that was free of charge?

4 A Yes, sir.

5 Q So they would act as expert consultants -- you
6 want some water?

7 A I just took a sip. Thanks.

8 Q All right. So their charter was to provide expert
9 consultation for free to any private lawyer or public
10 defender who made an inquiry?

11 A Yes. And they developed a bank of motions. They
12 developed a bank of cases that were applicable. So if you
13 had a question you called Capital Representation, and they
14 were there.

15 Q And Denise Young was one of the operators or
16 persons who ran California Representation Project pre1995?

17 A Well, it's the Arizona Representation, Capital
18 Representation. And Denise Young. They had a mitigation
19 specialist. And they had access to law professors through
20 criminal law at Arizona State, and they were at our beck and
21 call.

22 Q And this was in existence in 1995, '96 and '97?

23 A Oh yes, sir. Still is.

24 Q And were you familiar with their opinion as to the
25 standard of care for a minimally competent capital defense

1 team, whether or not that included a qualified capital
2 mitigation specialist?

3 A Yes, sir.

4 Q And what was their opinion and what did tell
5 people?

6 MS. GARD: Objection. I don't see the relevance
7 of their opinion. If this witness has an opinion, that
8 might be another question. But for her to speak for the
9 Capital Representation's opinion, I don't feel that's
10 appropriate.

11 THE COURT: Overruled. You may answer.

12 THE WITNESS: They provided training and they gave
13 us handbooks. And they basically, pre-ABA guidelines, used
14 ABA guidelines almost to assist people in getting funding,
15 getting first and second chair, fact investigator,
16 mitigation specialist, paralegal, and other members of the
17 team as necessary.

18 Q I'm going to show you what's marked as Exhibit 138
19 which is an orange file that's labeled Capital
20 Representation Project. And this was taken out of Sharp's
21 trial counsel file. And direct your attention to the notes
22 on the second page, "Denise Young."

23 A Yes.

24 Q All right. And now you attended training with the
25 Capital Representation Project?

1 A Oh, they put on several trainings a year.

2 Q And you attended?

3 A Yes.

4 Q And you've consulted with the staff there?

5 A In the early years I was afraid they were going to
6 revoke my pass at ASU to get there, because I was alone as a
7 mitigation specialist. For many years I needed all the
8 support I could get, and they were there.

9 Q And did you consider them experts and rely on
10 their expertise in developing your expertise?

11 A Yes, sir.

12 Q And are you familiar and aware of what they would
13 tell anyone who called for a consultation as who the members
14 of the core defense team should be, capital defense team?

15 A The core defense team would be a first chair who
16 was death qualified. The second chair should also be
17 someone who was very knowledgeable in criminal law. A fact
18 investigator which was required by the Arizona constitution.
19 And a mitigation specialist to do the psychosocial history
20 and assist in choosing experts that were required for that
21 specific case. Paralegals and any mental health expert as
22 deemed appropriate for the particular situation at hand.

23 Q Okay. But their advice was not that a mitigation
24 specialist should be considered; their advice was that a
25 mitigation specialist was a mandatory requirement?

1 A A mitigation specialist was absolutely required.

2 Q Now in Exhibit 138 there's also two references to
3 the mitigation workbook, California Death Penalty Mitigation
4 Manual. Are you familiar with the California Attorneys for
5 Criminal Justice?

6 A Yes, sir. I'm a member.

7 Q And have -- are you familiar with the California
8 Mitigation Manual Workbook?

9 A Yes, sir. I have two copies. And they're
10 normally three to four thick, three-ring binders each.

11 Q And you -- have you attended their annual capital
12 workshop in Monterey, California?

13 A Yes, sir.

14 Q And pre1995 to the present has the California
15 mitigation workbook always advocated as a mandatory
16 requirement a mitigation specialist?

17 A Yes, sir.

18 Q There's no doubt about that?

19 A No, sir.

20 Q And you saw Denise Young's name in there?

21 A Yes, I did.

22 Q Has she always maintained that position also
23 through the 90s, that the mitigation expert is required for
24 a capital defense team at the trial level?

25 A Yes, sir.

1 Q Now I'm going to show you what's marked as
2 Defendant's Exhibit 171. And could you identify for the
3 court what that is please?

4 A Oh, these are the brand new supplementary
5 guidelines for mitigation function of defense teams in death
6 penalty cases.

7 Q Okay. And do you have your own copy?

8 A Oh, yes, sir.

9 Q All right. And are these relied on in your field
10 of expertise in forming any opinion or conducting any
11 investigation as a mitigation specialist?

12 A All three guidelines that have been promulgated
13 are relied upon by -- in capital cases.

14 Q Are relied on by you?

15 A Yes, sir.

16 MR. GORMAN: Okay. Move for the admission of
17 Exhibit 171, your Honor.

18 THE COURT: Any objection?

19 MS. GARD: May I see the document again, your
20 Honor?

21 THE COURT: Certainly.

22 MS. GARD: And I guess I would just renew my
23 objection, or our objections, to the use of the 2003
24 guidelines. But aside from that, no objection.

25 THE COURT: All right. Objection overruled.

1 Exhibit 171 shall be marked and received.

2 BY MR. GORMAN:

3 Q Does the supplement talk to the involvement of
4 attorneys in the involvement of mitigation investigation?

5 A Yes.

6 Q And what does the supplement to the guidelines
7 say?

8 A Says the attorney is ultimately responsible for
9 putting together a well-qualified team, for directing them
10 in their work, for ensuring that their work is of high
11 quality; that the presentation is also his responsibility,
12 whether the client wants it or not.

13 Q Now I want to ask you as to your opinion based on
14 your experience as a capital mitigation specialist in
15 Arizona. And let me ask you one other thing. Has the
16 Arizona Supreme Court recognized you in published, in a
17 published opinion or opinions as a very experienced
18 mitigation specialist?

19 A Yes, sir, on several occasions.

20 Q And was one of those decisions the Bocharski
21 decision?

22 A Yes, sir.

23 Q And that was reversed?

24 A In the reversal opinion.

25 Q They mentioned?

1 A Yes, sir.

2 Q All right.

3 THE COURT: When you say reversed, the Arizona
4 Supreme Court reversed either a conviction or a, or a death
5 penalty sentence?

6 MR. GORMAN: I'll clear that up, your Honor.

7 BY MR. GORMAN:

8 Q In -- Bocharski was sentenced to death first --
9 well, the first time?

10 A In Yavapai County he was sentenced to death.

11 Q And there was an issue whether sufficient
12 resources were provided for mitigation, is that right?

13 A That's correct. And the Arizona Supreme Court
14 overturned the sentencing because Yavapai County had refused
15 to provide funding; and, secondarily, that the judge had
16 speculated as to what the mitigation might have been since
17 they wouldn't let me go do the rest.

18 Q And your testimony as to the lack of resources was
19 relied on in part by the Arizona Supreme Court in reversing
20 his death sentence?

21 A Yes, sir.

22 Q And they recognized you as a very experienced
23 mitigation specialist?

24 A Yes, sir.

25 Q Okay. Now based on your experience in Arizona

1 since 1984, your familiarity with the practice of mitigation
2 in capital defense, do you have an opinion yourself, in
3 terms of Arizona community of capital defense lawyers, as to
4 what a minimally competent capital defense lawyer would do
5 regarding a mitigation specialist?

6 MS. GARD: Objection, cumulative to Mr. Rohman.

7 THE COURT: Overruled. You may answer.

8 THE WITNESS: Well, a competent death penalty --

9 MR. GORMAN: Minimally competent.

10 THE WITNESS: Minimally competent capital death
11 lawyer would have a mitigation specialist.

12 BY MR. GORMAN:

13 Q And that has been advocated in the literature
14 since the 1980s?

15 A Absolutely.

16 Q And do you know anyone who has any expertise in
17 capital defense who disputes that opinion of yours?

18 A I don't -- I can think of one lawyer who just
19 thinks that mitigation is ridiculous, doesn't do it.

20 Q But would he be considered a competent --

21 A I don't consider him competent, nor do the judges
22 in Maricopa County.

23 MS. GARD: Objection as to what the judges
24 consider.

25 THE COURT: Sustained. That portion of the answer

1 is stricken.

2 MR. GORMAN: Okay.

3 THE WITNESS: But all minimally competent criminal
4 defense capital case lawyers know that you start the team
5 approach the day you get assigned the case.

6 MR. GORMAN: No further questions, your Honor.

7 THE COURT: Thank you, Mr. Gorman.

8 And cross-examination, Ms. Gard.

9 MS. GARD: Just briefly. May I remain at counsel
10 table?

11 THE COURT: I'm sorry?

12 MS. GARD: May I question the witness from counsel
13 table?

14 THE COURT: So long as we can hear you, you may
15 remain.

16

17 EXAMINATION

18 BY MS. GARD:

19 Q Ms. Duran, can you please clarify your involvement
20 in the Bocharski case?

21 A Yes. I was after Mr. Bocharski was convicted.

22 Q On a PCR proceeding?

23 A No.

24 Q At the resentencing?

25 A No. Mr. Bocharski was charged with the first

1 degree murder in, I believe, 1995. And his lawyers did not
2 get anyone appointed to assist them in the team approach.
3 And after he was convicted I was contacted and asked to do
4 mitigation.

5 Q Okay. And with respect to the Kyle Sharp case,
6 you never worked on that case, did you?

7 A No, ma'am, I did not.

8 Q And you also never worked on any case in Cochise
9 County, did you?

10 A No, ma'am.

11 MS. GARD: I have no further questions, your
12 Honor.

13 THE COURT: Thank you, Ms. Guard.

14 Mr. Gorman, redirect?
15

16 EXAMINATION

17 BY MR. GORMAN:

18 Q Is Cochise County an exception to the ABA
19 guidelines that excludes Cochise County?

20 A Well, I don't think Cochise County is excluded
21 from the guidelines of the state constitution, the United
22 States constitution, statute, and practice.

23 MR. GORMAN: No further questions.

24 THE COURT: Thank you, Mr. Gorman.

25 And thank you Ms. Duran. You may step down.

1 THE WITNESS: Thank you.

2 THE COURT: And I believe that Ms. Duran was the
3 defendant's last witness. Is that correct?

4 MR. GORMAN: That's correct, your Honor.

5 THE COURT: So for purposes of this evidentiary
6 hearing the defendant rests, is that correct?

7 MR. GORMAN: That's correct, your Honor.

8 THE COURT: Thank you.

9 At this time the state may call its first witness.

10 MS. LAM: Thank you, your Honor. The state calls
11 Jim White.

12 THE COURT: All right. Is he here?

13 MS. LAM: He is.

14 (Witness summoned.)

15 THE COURT: Yes, if you would be so kind as to
16 leave those with the clerk on her table.

17 THE WITNESS: I've been known to do that, your
18 Honor.

19 THE COURT: Well, we'll get the clerk after both
20 of us if you do that.

21 MR. GORMAN: Judge, we have one caveat.

22 THE COURT: Yes.

23 MR. GORMAN: This is more administerial. We have
24 DVDs of the witness testimony from Indiana.

25 THE COURT: Okay.

1 MR. GORMAN: They are not, have not been marked
2 and part of the record yet. And I wanted to make sure,
3 because we have had problems, that you had a complete, and
4 also for the record, set that was perfect. And Mr. Rohman's
5 staff has finished reviewing a set, and he's supposed to get
6 it by Express Mail today, so presumably before 3:00.

7 THE COURT: And just for the record clarification,
8 the DVDs are of the witnesses who testified from Indiana
9 that we saw here in the courtroom?

10 MR. GORMAN: Correct. The video courtroom
11 testimony.

12 MR. ROHMAN: The February ones.

13 THE COURT: All right.

14 MR. GORMAN: And we don't have the March ones.

15 MR. ROHMAN: We just received the March ones, and
16 we haven't reviewed them yet.

17 MR. GORMAN: What we're going to ask, and we can
18 ask to do it by motion, and include for signatures, you
19 know, UPS or Express Mail, to supplement our case with these
20 proofed DVDs. And we may not get it done today. But we
21 wanted to file them and make them a part of the record.

22 THE COURT: Does the state have any objection to
23 that procedure, or any other position?

24 MS. LAM: No, your Honor.

25 THE COURT: All right. As far as I'm concerned,

1 that's fine. When, when they come in we can have them -- do
2 you want them filed in open court? Although we won't be in
3 open court at that time. Do you want them filed, or do you
4 want them received as exhibits?

5 MR. GORMAN: Received as exhibits and marked. And
6 then if the court can enter -- and I'll request it in
7 writing in a motion. I think that would be the simplest
8 way. And then if the court could mark each one as an
9 exhibit. And then reference in the minute entry their
10 exhibit number. Then for purposes of an appeal we can
11 reference the DVD by exhibit number that is designated by
12 the clerk.

13 THE COURT: Okay. So unless there's an objection,
14 and apparently there is none, when the DVDs come in they
15 will be marked in sequence with the next defendant's
16 designation. And there will be a motion and order
17 accompanying them, or perhaps submitted separately, which
18 will order that these DVDs be received into evidence. If
19 there's no objection by the state, I'll sign the order.

20 MR. GORMAN: Okay. Thank you, your Honor.

21 THE COURT: All right.

22 THE BAILIFF: Mr. White is here.

23 THE COURT: Oh, he is here? Let's have him come
24 in. He's been called.

25 Ms. Lam, will you be examining the witness, or

1 will she?

2 MS. LAM: I will be examining him. Can you hear
3 me from here, your Honor?

4 THE COURT: I can, yes.

5 MS. LAM: I'm only thinking because I have quite a
6 few exhibits, rather than drag them up to him.

7 THE COURT: So long as we can hear you from that
8 table, you may continue to use it.

9 MS. LAM: Okay. Thank you.

10 THE COURT: All right. We do have Mr. White.
11 Well, we need you sworn first. And we also need Mr. Gorman
12 back here.

13 MR. ROHMAN: He just went to the bathroom. He'll
14 be right back.

15 THE COURT: Well, as soon as we have all counsel,
16 then we can go.

17 But Mr. White, you can go ahead and be sworn at
18 this time.

19

20 JAMES WHITE,
21 called as a witness herein, being first duly sworn, is
22 examined and testifies as follows:

23

24 THE COURT: Go ahead and take the witness stand.

25 THE WITNESS: Is this all right, Judge?

1 THE COURT: That will be fine.

2 All right. Record may show that Mr. Gorman has
3 returned. In your absence Mr. White was sworn, and he took
4 the witness stand. But otherwise nothing happened in your
5 absence.

6 Ms. Lam, you may proceed.

7 MS. LAM: Thank you, your Honor.

8

9 EXAMINATION

10 BY MS. LAM:

11 Q Mr. White, can you hear me from here?

12 A Yes, I can.

13 Q If you don't mind, I'll stay here then. Would you
14 introduce yourself to the court, please?

15 A James White.

16 Q And what is your occupation, Mr. White?

17 A I'm a lawyer.

18 Q How long have you practiced law?

19 A Twenty-four years.

20 Q And where did you first practice?

21 A State of Kansas.

22 Q And when would that have been? When did you get
23 your JD?

24 A 1984.

25 Q Did that experience in Kansas include criminal law

1 as well as on other matters?

2 A Yes.

3 Q Where are you now admitted to practice?

4 A I am with an organization called The Southwest
5 Center for Law and Policy located in Tucson. And we're a
6 nonprofit corporation. We do training on domestic violence,
7 sexual assault, stalking, abusive persons, in Indian
8 country.

9 Q And are you admitted to practice in Arizona?

10 A Yes.

11 Q Do you also hold a position on the Court of
12 Appeals for the Potawatomi Nation?

13 A The Supreme Court, yes.

14 Q Could you explain to the court a little bit about
15 what that means?

16 A Okay. I am an enrolled member of the Citizen
17 Potawatomi National, which is located near Shawnee,
18 Oklahoma. And in 1990 -- excuse me, I'm trying to
19 remember -- 2004 I was elected to serve on the Supreme Court
20 of the Nation. So --

21 THE COURT: Could you pull the microphone a bit
22 closer?

23 THE WITNESS: Certainly, Judge.

24 THE COURT: A bit closer to you. Thank you.

25 THE WITNESS: So I'm a justice on the Supreme

1 Court.

2 BY MS. LAM:

3 Q Prior to becoming Legal Director for the
4 Southwestern Center for Law and Policy here in Tucson, did
5 you practice law in Sells, Arizona?

6 A Yes.

7 Q And in what capacity was that?

8 A My title was Chief Advocate of the Tohono O'odham
9 Nation Advocate, which is the tribal funded legal services
10 practice.

11 Q And where was your practice located from 1992 to
12 1998?

13 A Here in Cochise County.

14 Q And your position from 1992 to 1994?

15 A Deputy Public Defender.

16 Q At some point what was, I'm sorry, your -- I'm
17 distracted. Did you answer my question, 1992 to 1994
18 position?

19 A Yes. Do you want me to repeat the answer?

20 Q Yes, please.

21 A Deputy Public Defender.

22 Q And what was the nature of your representation in
23 that capacity?

24 A That was felony cases.

25 Q At some point did you become director of the

1 Cochise County Legal Defender's Office?

2 A Yes. In 1994 I was appointed by the Board of
3 Supervisors to be the legal director -- or excuse me, the
4 Legal Defender of Cochise County.

5 Q How many, if you recall, how many attorneys did
6 you supervise in that capacity?

7 A I think six, five or six.

8 Q Do you have any recollection of a number of felony
9 cases or homicide cases that you've tried, felony homicide?

10 A Four, I think.

11 Q And would this be prior to your representation in
12 Mr. Sharp's case?

13 A No.

14 Q Were you also death penalty certified?

15 A As I recall, according to the standards that were
16 written in effect at the time, yes.

17 Q Do you recall what those standards were?

18 A As I recall, to be lead counsel you had to have
19 either a certain number or certain experience in doing
20 felony matters. Beyond that I couldn't tell you.

21 Q Now in your representation of Mr. Sharp did you
22 also have co-counsel?

23 A Yes.

24 Q And who was that attorney?

25 A Margo Macartney.

1 Q When did you select Ms. Macartney to help you? I
2 assume you did select her?

3 A I'm sorry?

4 Q Did you select Ms. Macartney?

5 A I did. She was, one, she was an attorney in our
6 office. And, two, she had had notable success in some of
7 her felony trials.

8 Q Do you recall who the trial judge was in
9 Mr. Sharp's case?

10 A Yes.

11 Q And who was that?

12 A Judge Borowiec.

13 Q Had you tried other cases before him, Mr. White?

14 A I believe so, yes.

15 Q Do you have an opinion regarding his reputation
16 for fairness?

17 MR. GORMAN: Objection, irrelevant.

18 THE COURT: What is the relevance of his
19 reputation, Ms. Lam?

20 MS. LAM: Well, I'll move to strike. That's -- I
21 can move on.

22 THE COURT: You're withdrawing your question.
23 Very well.

24 BY MS. LAM:

25 Q Mr. White, do you remember the facts of this case?

1 A Vaguely, yes.

2 Q Would you say, would you -- how would you
3 characterize the nature of the case you had to work with
4 given the facts -- what facts do you remember, actually?
5 Let's clear that up actually.

6 A Okay. I remember that a gentleman by the name of
7 Kyle David Sharp was accused of murdering and sexually
8 assaulting the manager of a motel in Willcox, Arizona.

9 Q Would you agree or disagree that he was found in a
10 locked motel room with the victim?

11 A Yes.

12 Q And would you agree or disagree that she was
13 sodomized during that attack?

14 A I believe so, yes. Sexually assaulted. I can't
15 remember if it was sodomized or --

16 Q Now do you recall the aggravating factor that the
17 state alleged in this case?

18 A Not precisely.

19 Q Would you say that your representation in this
20 case was driven by your budget?

21 A I would say that we didn't have carte blanche
22 because we just didn't. But we tried to make the best use
23 of resources that we had.

24 Q And did you go to the Board of Supervisors to
25 request additional funds at some point?

1 A Yes. I believe that this, this case was the one
2 that I went back to the Board of Supervisors to request
3 additional funds.

4 Q And did you employ an investigator?

5 A I believe so.

6 Q Now did you have a mitigation specialist?

7 A No.

8 Q Had other members of this community used
9 mitigation specialists for homicide cases, felony homicide
10 cases at that point?

11 A Not to my knowledge.

12 Q Do you recall -- just one moment.

13 May I approach, your Honor?

14 THE COURT: You may.

15 MR. GORMAN: Can I see it?

16 MS. LAM: It's your exhibit, 138.

17 MR. GORMAN: Okay.

18 BY MS. LAM:

19 Q This has been marked and admitted as Exhibit 138.
20 It was found in your defense file.

21 MR. GORMAN: Can we use the actual exhibit if
22 you're going to use it to show the witness?

23 THE COURT: Well, I'll let counsel ask questions
24 as she wants. If you want the original, it is here. I'm
25 handing it to you.

1 MS. LAM: Thanks.

2 BY MS. LAM:

3 Q Would you identify the handwriting on that front
4 page for me?

5 A That's my handwriting.

6 Q Okay. And if you can, do you recognize the
7 handwriting on the subsequent two pages?

8 A No.

9 Q Fine. Mr. White, do you recall contacting the
10 Arizona Capital Representation Project for help during this
11 case?

12 A I believe that we did.

13 Q And what was the outcome of that?

14 A The best I can recall was at that time the Arizona
15 Capital Representation Project was, had been -- I don't know
16 if they had been defunded or they lost funding or something
17 had happened that they were not, um, at full speed. I don't
18 know how other to say that.

19 Q Now do you know an attorney by the name of Natman
20 Schaye?

21 A Yes.

22 Q Do you recall attending a defense counsel's
23 college, if you will, in Macon in 1995?

24 A National criminal defense college. Yes.

25 Q And was Mr. Schaye present at that meeting?

1 A Yes.

2 Q And do you recall having informal conversations
3 with Mr. Schaye during that time?

4 A I probably did.

5 Q And do you recall the essence or the matters that
6 you discussed in these informal conversations?

7 A No idea.

8 Q Mr. White, are you aware that some of the
9 so-called mitigation evidence that would have been available
10 to the defense was kind of a mixed bag, if you will? I
11 believe -- for example, testimony from Ms. Shannon Cassons
12 as far as being inconsistent. Do you recall that at all?

13 MR. GORMAN: I object. Lack of foundation.
14 There's been no evidence. And also to the form of the
15 question.

16 THE COURT: Well, sustained as to form. It
17 started out being one question, and I think it turned into
18 something else.

19 MS. LAM: Right.

20 THE COURT: But as to foundation, the question is
21 whether he was aware. But sustained. Rephrase.

22 BY MS. LAM:

23 Q Do you recall reviewing a telephonic interview
24 Shannon Cassons -- interview between Ms. Cassons and
25 Commander Rogers of the Willcox Police Department? And this

1 has been admitted -- I don't have the number. But it's been
2 admitted into evidence. Would you like to take a look at
3 that?

4 A I would be happy to. Are you referring to at the
5 time of --

6 Q Yes.

7 A -- the trial?

8 Q Prior to trial.

9 A I can't -- I couldn't recall when. I'm sure if it
10 was disclosed I probably -- I'm sure I did review it.

11 MS. LAM: And for the record, this would be
12 Exhibit 154.

13 THE COURT: Is that in evidence?

14 THE CLERK: Yes.

15 THE COURT: It is in evidence. Thank you.

16 MS. LAM: One moment, your Honor.

17 THE COURT: Yes.

18 THE WITNESS: Your Honor, can I have a glass of
19 water?

20 THE COURT: Water? Yes. We can do that. It's
21 Bisbee water, and some of the people here have not been
22 willing to trust Bisbee water.

23 THE WITNESS: Well, I drank it for a few years.

24 THE COURT: Well, I drink it.

25 MS. LAM: May I approach, your Honor?

1 THE COURT: You may. Do you want the exhibit? I
2 have it.

3 MS. LAM: That's fine. We'll let him --

4 THE COURT: 154.

5 MS. LAM: -- look at the original.

6 BY MS. LAM:

7 Q Does this look at all familiar to you?

8 A Well, I don't -- again, I don't specifically
9 recall. It appears to be a transcript of a telephonic
10 interview.

11 Q Would you have any reason to think it was not in
12 your defense file that was actually --

13 A No, I have no reason to believe that.

14 Q Now do you know who Shannon Cassons is, how she
15 was related to Mr. Sharp?

16 A I have no independent recollection of her
17 relationship. But it appears that she was, um, his aunt
18 perhaps?

19 Q That's correct, actually.

20 Your Honor, may I have Mr. White read from this
21 exhibit?

22 THE COURT: It's in evidence. Unless there's an
23 objection, you may ask him to read things that are in
24 evidence.

25

1 BY MS. LAM:

2 Q Mr. White, would you turn to page 3, to line 24
3 and read that sentence for me?

4 A This is Shannon Cassons speaking and it says,
5 "Kyle's been in trouble with the law since he was young."

6 Q Okay.

7 MR. GORMAN: This is Exhibit 154?

8 MS. LAM: Exhibit 154, yes.

9 MR. GORMAN: Thank you.

10 BY MS. LAM:

11 Q Would you mind turning to page 5, line 4 through,
12 through the end of the page, please?

13 A All right.

14 Q And identify the speaker, if you would.

15 A Line 4 is Ms. Cassons speaking. "Can I ask you
16 something?" It's a question.

17 Q And --

18 A Commander Rogers, line 5 responds, "Yes."

19 Ms. Cassons: "What did he use to strangle her?"

20 Commander Rogers: "Well, I, I, uh, can't tell you
21 that. Why is that --"

22 Ms. Cassons: "Can I tell you the reason?"

23 Commander Rogers: "O.K."

24 Reading line 10 now, Ms. Cassons: "When he, I
25 guess, was fifteen or sixteen, I'm not really sure which

1 one, he came over to my sister's trailer here in Tipton."

2 Commander Rogers: Line 15: "Uh-huh."

3 Ms. Cassons: Line 14: "She was home alone. Her
4 kids were -- I don't know. They were in school. I can't
5 remember now. He had come over there, you know, just
6 sitting around talking to her. He got up, he went into the
7 bathroom. He came back and he was standing up behind her
8 and he had on a flannel shirt. He had his arms tucked up
9 underneath the flannel shirt in the front."

10 Commander Rogers: Line 20. "Uh-huh."

11 Ms. Cassons: Line 21: "And Julie just happened
12 to turn around and said, Kyle what are you doing? What have
13 you got? Because he had been known to thief things, so she
14 thought he was stealing something from her. Kyle said
15 nothing. She said, what have you got underneath your shirt,
16 Kyle? Well, he pulled his hands out. He had a cord,
17 wrapped around both hands like a strangle -- like in a
18 strangle position."

19 Line 28 by Commander Rogers: "Uh-huh."

20 Q Now would you just turn the page and just read the
21 next four lines, please.

22 A Line 1 on page 6. Ms. Cassons: "Well, she made
23 him leave. He told her he just found that, that laying, he
24 was just playing, he found it laying on the bathroom floor.
25 Well, when he left she went into the bathroom. He had

1 jerked the cord out of her blow dryer."

2 Q On that same page, Mr. White, to line 22, please.
3 Actually, for completeness, why don't you start at 21. It
4 explains.

5 A This is Ms. Cassons speaking, line 21: "Yes,
6 Tipton. Her name is Lynn Collins, the probation lady. I
7 think she was his probation officer most of the time. He's
8 been in trouble since he was young. But he's never -- and
9 also Gary is going to be talking to you also. He was
10 investigated, Kyle was investigated in a death here. Well,
11 it wasn't a death at the time when he was, when he was
12 investigated. He was supposedly partying with a lady. Her
13 name a Joyce Green."

14 Q Please turn the page and continue on line 1.

15 A Line 1, page 7. Ms. Cassons: "They found Joyce
16 the day after Kyle was there. They were supposed, supposed
17 to be Kyle and three other people. And it was just Kyle.
18 Kyle was the last person seen with her."

19 Q Thank you. That's fine. Please turn to page 10,
20 to line 21 beginning with -- I'm sorry. Line 22 beginning,
21 "We've been."

22 A Okay. This is Ms. Cassons speaking: Line 22.
23 Part of line 22: "We've been, the girls in the family have
24 been kind of afraid of Kyle anyway after what he did to my
25 sister and --."

1 Q And continue.

2 A Commander Rogers, line 25: "About the --"

3 And then Ms. Cassons line 26: "Yeah, the cord."

4 Q Thank you. Now Ms. Cassons also -- excuse me.

5 Let me put this back.

6 MR. GORMAN: I'm going to object unless there's a
7 question somewhere here.

8 MS. LAM: It's coming.

9 MR. GORMAN: I mean, just having him reading
10 what's into evidence without a question is not appropriate
11 unless there's going to be a question.

12 THE COURT: Well, overruled. You may proceed.

13 MS. LAM: Thank you.

14 BY MS. LAM:

15 Q Mr. White, would you agree that that information
16 is not particularly mitigating for Mr. Sharp?

17 A I would agree.

18 Q Do you recall that Ms. Cassons then wrote a letter
19 to be considered by the judge? This is part of the
20 presentence report.

21 MR. GORMAN: I object to handing him a letter
22 before he's answered the question.

23 THE COURT: Well, I'm not even sure what the
24 question is, so sustained on that basis.

25

1 BY MS. LAM:

2 Q Do you recall that Ms. Cassons wrote a letter in
3 support of Kyle Sharp in the presentence report?

4 A I don't have an independent recollection of that,
5 but I do recall seeing a copy of the letter.

6 MS. LAM: Do you want me to use the original
7 exhibit?

8 THE COURT: Well, we can use a copy. That's all
9 right. Has it been marked?

10 THE CLERK: Which one is it?

11 MS. LAM: The presentence report.

12 THE CLERK: I could make a copy on a recess. Do
13 you have the -- we have the original only right now.

14 MS. LAM: And the letter is in there.

15 THE COURT: Are you only going to be referring to
16 the --

17 MS. LAM: I'm only going to be referring to the
18 letter.

19 THE COURT: Let's get the letter marked
20 separately. I have the original presentence report in front
21 of me which presumably has the letter.

22 THE CLERK: I believe I have it.

23 THE COURT: Separately marked?

24 THE CLERK: I believe so.

25 THE COURT: Okay.

1 MS. LAM: Oh, I do believe you're right. It was a
2 different exhibit.

3 THE COURT: And I will note there do appear to be
4 two separate letters from Ms. Cassons attached to the
5 presentence report. Each one has a different date; November
6 7, 1996, February 21, 1997.

7 MS. LAM: For the record, this is February 21st,
8 1997.

9 THE COURT: Okay. Any luck, Madam Clerk?

10 THE CLERK: February 21st and November 7th?

11 THE COURT: We have them.

12 MS. LAM: Right.

13 THE COURT: All right. We have State's Exhibits C
14 and D. So you may proceed.

15 MS. LAM: Thank you.

16 BY MS. LAM:

17 Q Mr. White, now take a look at the letter of
18 February 21st, 1997.

19 A All right.

20 Q Just the first two brief paragraphs.

21 A "My name is Shannon Cassons, Kyle Sharp's aunt. I
22 am writing to ask you to please spare Kyle's life. Kyle was
23 a very well-behaved child. He started to act up a little
24 bit when he was about 15. I think a lot of it had to do
25 with his stepfather."

1 Q Would you agree or disagree that this
2 characterization is different from her interview in which
3 she described him as in trouble all his life basically?

4 A Um --

5 MR. GORMAN: I would object on relevance. There's
6 been no foundation. The sentencing judge never saw it
7 before he sentenced him to death. He did not. It was
8 attached to the presentence report which wasn't reviewed, so
9 this has no relevance.

10 MS. LAM: Your Honor.

11 THE COURT: Response.

12 MS. LAM: Your Honor, it's relevant to what the
13 defense attorney knew was out there and as far as pursuing
14 mitigation and bringing lay witnesses to testify.

15 THE COURT: Overruled. You may answer.

16 THE WITNESS: Okay. It seems to be, the statement
17 that he was a very well-behaved child, seems to conflict
18 with what Ms. Cassons had stated to Commander Rogers in the
19 telephone interview.

20 BY MS. LAM:

21 Q And would you look at the last paragraph and read
22 that for the court?

23 THE COURT: On which one? I'm sorry.

24 MS. LAM: This is on February 21st, same letter,
25 1997.

1 THE COURT: Okay. Thank you.

2 THE WITNESS: The last paragraph?

3 BY MS. LAM:

4 Q Yes, please.

5 A "I am not afraid of Kyle, and I have never been
6 afraid that he would harm me. The rest of the family is
7 behind Kyle and feel like if Kyle did this crime then
8 drinking and drugs had to drive him to it."

9 Q Would you find this statement inconsistent with
10 her interview with Commander Rogers?

11 A Um, I really can't -- that's difficult for me to
12 say really because --

13 Q May I see this?

14 A Yes.

15 Q The portion of Exhibit 154 that you read from, did
16 you not read this portion about their attitude towards Kyle
17 after the cord incident?

18 A I do say -- I do see here in the transcript of the
19 telephonic interview she said, "We've been, the girls in the
20 family have been kind of afraid of Kyle anyway after what he
21 did to my sister and --." So that would seem to conflict
22 with what Ms. Cassons said. What she said in the telephone
23 interview would seem to conflict with what she wrote in the
24 February 21st, 1997 letter about being afraid.

25 Q So would you agree or disagree that if you had

1 brought Ms. Cassons as a lay witness that she would have
2 been impeachable through these two documents?

3 A I would think so.

4 Q Thank you.

5 Excuse me.

6 Now Mr. White, we've touched on an issue I'd like
7 to pursue with you. Are you -- do you recall the name of
8 Joyce Green and what consequence that had to your case?

9 A As I recall, Joyce Green was the lady in Indiana
10 who they had found in her home. I don't remember the
11 circumstances. And she was in a coma. Had been in a coma.
12 And then she later passed away.

13 Q Did this incident -- first of all, was Mr. Sharp
14 ever charged with anything in connection with this death?

15 A No.

16 Q Nevertheless, did it continue to pop up as an
17 issue in your trial?

18 A In the trial it was not an issue.

19 Q Was it not an issue because you were able to keep
20 that information out?

21 A We, as I recall, we did move, file a motion to, to
22 prevent any testimony or evidence regarding the situation
23 involving Joyce Green.

24 Q Now did you also oppose the state's intent to
25 bring other rather -- well, I don't want to characterize

1 it -- other prior acts of Mr. Sharp that were related by
2 Jeff Coleman? Do you recall that?

3 MR. GORMAN: I would object at this point. The
4 state's going into the work they did for guilt phase. The
5 issue is refined to be what they did or failed to do in
6 preparation for capital sentencing.

7 THE COURT: Ms. Lam, how does that relate to the
8 sentencing phase?

9 MS. LAM: Well, this doesn't happen in a vacuum,
10 your Honor. We should be able to show what the defense
11 counsel knew at the time of trial; and it certainly would
12 affect what he did at sentencing proceeding as far as
13 calling witnesses. Plus the court can consider anything in
14 the guilt phase as mitigation.

15 THE COURT: Well, to the extent this may touch
16 upon counsel's knowledge during the sentencing phase and at
17 sentencing, overruled. You may proceed.

18 BY MS. LAM:

19 Q Do you recall having Mr. Sharp evaluated by
20 Dr. Geffen?

21 A Yes.

22 Q Do you recall reviewing that? This is Exhibit
23 125, admitted.

24 May I approach, your Honor?

25 THE COURT: You may.

1 (Discussion off the record between the court and
2 clerk.)

3 BY MS. LAM:

4 Q And perhaps we should clarify. Do you understand
5 the purpose of this hearing, what the issue is specifically
6 that the court is considering?

7 A I think, I believe that the court is considering
8 whether Mr. Sharp received adequate representation during
9 the penalty phase.

10 MS. LAM: Now may I show this to the witness?

11 THE COURT: You may.

12 BY MS. LAM:

13 Q Um --

14 THE COURT: It's a copy of Exhibit 125.

15 MS. LAM: Yes, it's a copy.

16 BY MS. LAM:

17 Q In your representation and in having Dr. Geffen
18 examine Sharp, he did something of a social history, did he
19 not?

20 MR. GORMAN: I object to leading.

21 THE COURT: Sustained.

22 BY MS. LAM:

23 Q Did Dr. Geffen also provide information from
24 Sharp's life in Tipton, Indiana?

25 A As I recall he did do some bit of background

1 information, gathered some background information.

2 Q Did he independently do that?

3 A He -- I think he independently did that. And then
4 we provided him also with some information.

5 Q Do you happen to recall what information you
6 provided to him?

7 A Not specifically.

8 Q Okay. Again referring to his report would you
9 please read, it would be the last paragraph on page 4 and
10 just nine up on page 5, if you would for the court please.

11 A "Regarding the client's more recent maladaptive
12 patterns, the reviewed records included statements by
13 relatives and others who knew and related to him. The
14 outstanding event, prior to the incident for which he is
15 currently charged, was an incident which took place in
16 Indiana on 9/30/94, in which a woman died under somewhat
17 strange circumstances and in which Kyle and other witnesses
18 were questioned because of his apparent involvement with her
19 prior -- with her prior to her death. The statements
20 indicated that the client had apparently habitually been
21 using alcohol, marijuana and possibly other drugs. He was
22 involved in sexual affairs, the use of pornographic
23 literature that included violence, and some of the client's
24 behavior was described as, 'sick, sick, sick', such as
25 finding a child's dolls that had been cut and ripped in the

1 crotch area, under his bed. One of the witnesses described
2 an incident that seemed violent (the client had allegedly
3 tried to choke around the neck). Another witness told of
4 Kyle's swallowing bugs and razor blades and of having told
5 people that he had sex with a chicken and then cut its head
6 off."

7 Q As Mr. Sharp's attorney how would you characterize
8 information of that type?

9 A During the trial or during the sentencing?

10 Q During the sentencing.

11 A I think at that time we considered that to be not
12 helpful to Mr. Sharp.

13 Q Now do you recall having Dr. Geffen testify at the
14 aggravation/mitigation hearing?

15 A Yes.

16 Q And do you recall if he included some of this
17 social history in his testimony?

18 A I don't specifically recall that.

19 Q Okay. Would you agree or disagree that by
20 allowing Dr. Geffen to bring in some of the mitigation it
21 would have avoided cross-examination, more problematic
22 witnesses who had knowledge of this less than favorable view
23 of Mr. Sharp?

24 MR. GORMAN: I'd object. The question is vague.
25 View of Mr. Sharp? What incident is she asking him about?

1 BY MS. LAM:

2 Q In view of the portion of his, his report that
3 you've just read to the court, would you consider it more
4 expeditious, or a better tactic perhaps, to have Dr. Geffen
5 bring that information in, or to bring a lay witness who has
6 information on Mr. Sharp that is not particularly
7 flattering?

8 MR. GORMAN: I object to the form of the question.
9 It's vague. He listed approximately ten different
10 incidents. Which incident is she referring to?

11 MS. LAM: We can --

12 THE COURT: I'll overrule the objection.

13 If you understand the question, you may answer it.

14 THE WITNESS: I think that was the reason that it,
15 this information was presented through Dr. Geffen's report
16 or reports and not through live witnesses was, um, that it
17 would be duplicitous, duplicative. Which is the correct
18 word? Anyhow, it would just -- we had the information that
19 had been gathered. I think that it was not necessary to
20 call a live witness when we had the same information through
21 Dr. Geffen.

22 BY MS. LAM:

23 Q Do you agree or not agree that it might have been
24 better or would have been better to have admitted the
25 underlying documents that you provided to Dr. Geffen?

1 A Apparently so, yes.

2 Q Now you did bring or intend to bring a lay
3 witness, did you not, at sentencing?

4 MR. GORMAN: Objection, leading.

5 THE COURT: Sustained.

6 BY MS. LAM:

7 Q Did you intend to bring a lay witness?

8 A The only lay witness that I can recall right now
9 was his mother.

10 Q And did she come?

11 A She was at the sentencing hearing.

12 Q And did you present her testimony?

13 A No.

14 Q And why is that?

15 A She did not want to testify.

16 MS. LAM: Your Honor, could I have just a second?

17 THE COURT: You may. While counsel is checking
18 her notes, Mr. White, do you recall what Mr. Sharp's mother
19 might testify to had she been willing to testify?

20 THE WITNESS: Just the, what she knew about Kyle's
21 life up to that point, things about Kyle personally, and
22 some of the things that he had been through; again, to that
23 point in his life.

24 THE COURT: And do you recall today more
25 specifically what she might say about his life growing up or

1 the things that had happened during his life?

2 THE WITNESS: Well, that's hard to predict, your
3 Honor. But I, I think that, again, to give, to give Judge
4 Borowiec more of a flavor of, again, what Kyle had been
5 through through his mother. The fact that he had been
6 sexually abused, physically abused, that he had abused drugs
7 and alcohol, that he had been in counseling, that he had
8 been in placements, that he had, had had trouble with the
9 law.

10 THE COURT: All right. I'll leave it to counsel
11 to inquire more fully about such matters; both counsel.

12 And you may proceed, Ms. Lam.

13 MS. LAM: Thank you, your Honor.

14 BY MS. LAM:

15 Q Do you recall why she refused to testify?

16 A I think that, as I recall, she was very disturbed
17 and disappointed in her son. And I don't know that she said
18 it specifically, but again she was washing her hands of the
19 whole matter.

20 Q I'd like to return to, just briefly, to your
21 representation with Ms. Macartney. When you selected her to
22 help you in this case did she have any objection to that?

23 A No.

24 Q Did she express any opinion about her ability to
25 do this case with you?

1 A No.

2 Q If -- would you agree or disagree that the members
3 of your office at that time could be expected to have to
4 represent a capital defendant?

5 A At that time we had a mix of experienced and
6 inexperienced attorneys. And I'm trying to remember here.
7 We had, um -- sorry, I can't remember his name now. Bob.

8 THE COURT: Pomeroy.

9 THE WITNESS: Thank you. Pomeroy was a member of
10 our office. We had, we had Benna Troup. Well, wait a
11 minute now. I can't remember if Benna Troup was with us
12 then or later. She was the public defender and then moved
13 over to our office and did primarily dependencies cases.

14 We had Margo Macartney. We had Mike Politi. But
15 I can't remember if Mike was a member of the office. He was
16 brand new. Anyhow, since I was the head of the office I had
17 to make a selection of who I thought would, would be the
18 best person that we had on staff to assist in representing
19 Mr. Sharp. And I chose Ms. Macartney.

20 Q And what was your opinion of her work at that
21 time?

22 A Well, again, she had had some interesting results
23 in jury trials. She was not a particularly good trial
24 lawyer, but she had jury appeal. She was an older woman.
25 As I recall, she was, at the time she was in her late 50s or

1 mid to late 50s when we did this trial. And, and she seemed
2 to be able to write acceptably, research acceptably. And so
3 again, given the resources that I had and the amazing
4 successes that she had had at trial, at some trials, I chose
5 Ms. Macartney.

6 Q How much autonomy did she have as far as the terms
7 of the representation? Did you give her more or less a free
8 hand? Did you -- what was your working style?

9 A Well, I would think that we would have coordinated
10 efforts. And so she didn't have a free reign. It would not
11 have been advisable, I think, to have a team, to have
12 somebody having free reign. And so as I recall, we would
13 divide up tasks that needed to be done and discuss where we
14 were at the time as the case progressed.

15 Q So would you say that she had full knowledge of
16 the case?

17 A Well, I assume that she did.

18 Q Would she need your permission to investigate a
19 particular, a -- potential witnesses?

20 A Um, my permission? Well, I think it -- hopefully,
21 she would consult with me about what witnesses that she
22 wanted to contact or interview and why and what was
23 involved.

24 Q How was the communication between the two of you
25 in your view?

1 A Um, well, I thought it was okay. Margo was not
2 particularly the easiest person to work with because she had
3 her own ideas about things. But I thought we did okay.

4 MS. LAM: Mr. White, I believe that's all I have.

5 THE COURT: All right. Let's stop here for the
6 morning recess. It will be about 15 minutes time. Thank
7 you.

8 (A recess is taken. Thereafter, proceedings
9 continue as follows.)

10 THE COURT: We are continuing with State of
11 Arizona against Kyle David Sharp, CR9500271. Counsel are
12 present. Mr. Rohman is present. Mr. White is on the
13 witness stand.

14 And Mr. Gorman, you may proceed with
15 cross-examination.

16 MR. GORMAN: Thank you, your Honor.

17

18 EXAMINATION

19 BY MR. GORMAN:

20 Q Mr. White, what is the Southwest Center for Law
21 and Policy?

22 A The Southwest Center for Law and Policy is a
23 nonprofit corporation. And my wife, Hallie White, is
24 Executive Director. My title is Legal Director. We have
25 one other full time employee who is our, what we call our

1 Program Manager. So we're very small. We receive the bulk
2 of our funding from the U.S. Department of Justice, Office
3 on Violence Against Women. And we do, we provide training
4 and technical assistance to Indian tribes in the areas of
5 sexual assault, domestic violence, stalking, and abuse of
6 persons.

7 Q So are you an administrator, or do you train
8 people?

9 A I am both.

10 Q Okay. And when you train people, what do you
11 train them to do?

12 A Well, it depends on who our audience is. We have
13 a number of, of different audiences. We will train --

14 Q Well, let me stop you there. Do you train anyone
15 in trial practice?

16 A Yes.

17 Q Who do you train in trial practice?

18 A Judges, lawyers.

19 Q Okay. Now, these are judges who are licensed on
20 the Indian reservation?

21 A Well, some Indian reservations have licensing
22 requirements and others don't.

23 Q All right. Well, let's back up. Do you ever --
24 have you trained any judges who are Superior Court judges in
25 Arizona?

1 A No.

2 Q Have you trained any judges who are licensed in
3 other than the Indian tribal sovereignties?

4 A Yes.

5 Q And which jurisdiction?

6 A Well, we've had judges attend our conferences in
7 New Mexico, Washington, Minnesota, here in Tucson.

8 Q All right. And so you're training judges who are
9 sitting in state court and are practicing in any courts?

10 A No. These are tribal court judges.

11 Q All right. Well, I'll back up. I'm interested in
12 judges who are licensed to sit as judges, not on the Indian
13 reservations, but in any state in the union, in the United
14 States of America.

15 A We do not train District Court judges, per se. We
16 do not train Superior Court, per se.

17 Q Do you train any state -- have you ever trained a
18 state court judge who's licensed somewhere other than the
19 Indian reservation?

20 A We have had attendees who are, who are judges who
21 have been, were judges in nontribal courts.

22 Q And what courts were they judges in?

23 A Probably the lower courts, the Superior Court,
24 District Court level.

25 Q Have you trained any judges who preside over

1 felony cases?

2 A I don't know that specifically. But I would
3 assume. We do some things that are strictly civil in
4 nature. We do some things that are strictly criminal in
5 nature.

6 Q I would ask that you just listen to my question
7 and answer it directly; then stop. Okay? Can you do that?

8 A Go ahead, Mr. Gorman.

9 Q Have you ever trained a federal judge?

10 A No.

11 Q And how do you advertise these training sessions?

12 A We send out announcement brochures. We have a
13 database of about a thousand people.

14 Q And you send them around the country?

15 A We send them around the country.

16 Q All right. Do you in your --

17 A That's one method.

18 Q So you're teaching these judges trial practice?

19 A Yes.

20 Q And do you teach them about opening statements?

21 A We don't teach them about opening statements.

22 What we teach them more about is evidentiary matters.

23 Q All right. So you teach the judges the rules of
24 evidence?

25 A Rules of evidence are included in the trainings,

1 yes.

2 Q And do you teach them about, presumably,
3 admissibility of evidence, since you teach them the rules of
4 evidence?

5 A Yes.

6 Q And what is and is not admissible?

7 A Yes.

8 Q And that pertains to both witness testimony and
9 documents?

10 A Yes.

11 Q And do you teach them how to issue subpoenas?

12 A No.

13 Q Now I understand you're on the faculty of the
14 American Bar Association?

15 A No. I'm on the faculty of -- well, I used to work
16 for the American Bar Association in a limited capacity. But
17 now I'm on the faculty of the National Tribal Trial College.

18 Q What year or years were you on the faculty of the
19 American Bar Association?

20 A I think I did the first training, ABA training,
21 probably in maybe 2000, something like that.

22 Q So in 2000 were you a faculty member of the ABA?

23 A Yes.

24 Q And were you recognized in ABA publications as a
25 faculty member?

1 A In the materials that were distributed at the
2 conferences that I spoke at, I would have been noted in
3 there as a faculty member or a presenter.

4 Q And that was issued by the ABA?

5 A Yes.

6 Q Or did you create those fliers?

7 A The material -- no, I think it, the way it would
8 work at that time --

9 Q Well, I'm not asking you to -- if you don't
10 recall, you can say you don't recall. Were you ever
11 identified in a publication that was authored and produced
12 by the American Bar Association as being a member of their
13 faculty?

14 A Not one that they authored and produced. It would
15 have been one that I authored and produced.

16 Q Okay. So the ABA has never in writing
17 acknowledged that you were a member of their faculty?

18 A I don't really understand your question.

19 Q That's fine. Now were you always a faculty member
20 of the State Bar of Arizona?

21 A I have --

22 Q Were you a faculty of the State Bar of Arizona at
23 any time in your legal career?

24 A Yes.

25 Q What year?

1 A 2005 or 2006.

2 Q And did the State Bar of Arizona draft and publish
3 a document that identified you as a faculty member of the
4 Arizona State Bar?

5 A I don't believe so.

6 Let me correct that. The presentation that I did,
7 this was at the state bar conference, took place in Phoenix.
8 I prepared and presented the materials. And as I recall, on
9 the agenda I would have been identified as one of the
10 faculty members.

11 Q Now I'm going to show you what's marked as State's
12 Exhibit I. And did you draft that document?

13 A I believe so, yes, uh-huh.

14 Q You believe so, or you did draft it?

15 A Well, it's my resume, so I must have done it.

16 Q And you tendered this to Ms. Lam and Ms. Ryan when
17 you were interviewed a few months ago, correct?

18 A Yes.

19 Q Okay. So do you recall the date of that
20 interview? Was it within May of this year?

21 A With Ms. Lam or Ms. Ryan?

22 Q Both.

23 A I don't recall exactly.

24 Q Can you narrow it down to the month?

25 A No, I can't. It seems like I was first contacted

1 and spoke with Ms. Ryan and/or you at my office in person
2 within the last six to eight months perhaps.

3 Q Okay. So you have no recollection of meeting with
4 Ms. Lam, this woman who is sitting right here, and Ms. Ryan,
5 this woman who is sitting right here, at your office in
6 Tucson within the last three months?

7 A Again, I don't remember precisely when it was.

8 Q I didn't ask you if you remember precisely. I
9 asked if you have any recollection of meeting with Ms. Ryan.

10 THE COURT: One at a time.

11 MR. GORMAN: I wasn't finished with my question.

12 THE COURT: One at a time. Go ahead.

13 BY MR. GORMAN:

14 Q So do you have any recollection of being
15 interviewed on tape by Ms. Ryan and Ms. Lam, who are seated
16 right here, in the last three months in Tucson in your
17 office/home?

18 A I remember being interviewed and taped. I don't
19 remember the date.

20 Q Can you, can you confirm that it's within the last
21 three months?

22 A I cannot, Mr. Gorman.

23 Q Okay. Can you confirm it's within the last six
24 months?

25 A I believe, again, the last six to eight months,

1 yes.

2 Q I'm only asking about Ms. Ryan and Ms. Lam
3 interviewing you at your office on tape.

4 A I understand the question. I can't give you a
5 precise date, Mr. Gorman.

6 Q Okay. Do you deny it was within the last three
7 months?

8 A No, I don't deny it.

9 MR. GORMAN: Now this is Exhibit I, which I move
10 for its admission, your Honor.

11 THE COURT: Any objection?

12 MS. LAM: I'm sorry?

13 THE COURT: Exhibit I.

14 MS. LAM: No objection.

15 THE COURT: The resume.

16 MS. LAM: Exhibit I shall be marked and received.

17 BY MR. GORMAN:

18 Q This is what you are tendering as your present
19 qualifications?

20 A You're referring to the resume? That would not
21 be, it would not be -- I don't know when that was, was
22 produced. If I may take a look at it and see how timely it
23 is here.

24 Q Well, you admit providing it to Ms. Lam, correct?

25 A I'm sure I did. Some of this has changed since

1 this was produced.

2 Q Now do you agree or disagree that in 1995
3 Mr. Sharp was entitled to a minimally competent lawyer who
4 was versed in capital defense work?

5 A I, I agree with that.

6 Q And do you agree or disagree that Mr. Sharp was
7 entitled to a minimally competent defense team including a
8 lawyer qualified to defend a capital defendant, a second
9 chair who had like expertise, and an investigator and a
10 mitigation specialist?

11 A I agree that -- now mitigation specialist, that's
12 one that, that was not considered.

13 Q I'm not asking you that. I'm asking you as you
14 sit here right now do you agree or disagree that Mr. Sharp,
15 in order to have a minimally competent defense team, was
16 entitled to have a mitigation specialist in 1995?

17 A I agree that by today's standards that Mr. Sharp
18 would have been entitled to all resources available.

19 Q Let's be --

20 A Including a mitigation specialist.

21 Q Okay. Well, let's talk in specifics. All
22 resources available is a general term. I'm talking about
23 1995. All right?

24 A Yes.

25 Q Is your position that at that time Mr. Sharp was

1 not entitled to a mitigation specialist as part of a
2 minimally competent capital defense team?

3 A No.

4 Q So your position is he was entitled to a
5 mitigation specialist in 1995?

6 A I would assume that he would have been. However,
7 nobody --

8 Q I'm not asking you to assume.

9 A That was not anything that, that, that we were
10 aware of.

11 Q I'm not asking if you're aware of it. I'm simply
12 asking you if it's your opinion. I'm not asking what you
13 were aware of in 1995. I'm not asking what you assumed in
14 1995. I'm asking you --

15 A As of today.

16 Q -- as you sit here today is it your opinion that
17 in 1995 he was entitled to a mitigation specialist as part
18 of a minimally competent capital defense team?

19 MS. LAM: Objection, your Honor. This has been
20 asked and answered.

21 THE COURT: Overruled. You may answer.

22 THE WITNESS: Well, the way you ask the question,
23 Mr. Gorman, is difficult because you say don't -- you're not
24 in 1995. You're in 2008. So you're asking me to go, to
25 take today's standards and go back to 1995 and apply those.

1 As I recall, in 1995 there was no requirement for a
2 mitigation specialist per se.

3 MR. GORMAN: Move to strike the answer. He's not
4 responding to the question.

5 THE COURT: Well, it, it isn't responsive. Motion
6 granted.

7 BY MR. GORMAN:

8 Q Okay. What is the date today?

9 A July 29th, 2008.

10 Q Okay. I'm going to ask you what your opinion is
11 today on an issue. Okay?

12 A Okay.

13 Q Will you give me a direct answer to what your
14 opinion is today on an issue that is important to this case?

15 A On current events I can give you my opinion.

16 MS. LAM: Objection. This is not relevant to what
17 actually happened in 1995.

18 THE COURT: Overruled.

19 BY MR. GORMAN:

20 Q It's going to be about this case. And what I want
21 to know today in your opinion, based on what you know today,
22 was Mr. Sharp entitled to a mitigation specialist as part of
23 a capital defense team in order to be provided minimum
24 competence under the 6th and 14th Amendment?

25 A Today, yes.

1 Q So your opinion today is that he was denied the
2 basic resources to have a minimally competent capital
3 defense team in 1995. Correct?

4 A No.

5 Q Well, didn't you just say that today -- strike
6 that.

7 You're on the faculty of the ABA, correct?

8 A No.

9 Q But you were on the faculty of the ABA?

10 A Yes.

11 Q And as a faculty member you adopt the ABA
12 guidelines?

13 A Not necessarily.

14 Q So are you familiar with the ABA guidelines
15 regarding trial practice?

16 A No.

17 Q You teach as a professor, and you're a faculty
18 member of the ABA, and you don't know ABA guidelines as they
19 pertain to trial practice?

20 A Mr. Gorman, I told you I'm no longer a faculty
21 member on the ABA.

22 Q When you were on the faculty did you read the
23 guidelines?

24 A No.

25 Q Did you ever read the ABA guidelines when you were

1 Mr. Sharp's attorney?

2 A I don't recall.

3 Q Now would you agree or disagree that Mr. Sharp was
4 entitled to a high quality legal defense team?

5 A Yes.

6 Q And do you agree or disagree that Mr. Sharp was
7 entitled to a defense team that would zealously defend him?

8 A Yes.

9 Q And was Mr. Sharp entitled to a lawyer or lawyers
10 who would research relevant law on capital sentencing?

11 A Yes.

12 Q Was Mr. Sharp entitled to a lawyer or lawyers who
13 would research the rules of admissibility in a capital
14 sentencing proceeding?

15 A Yes.

16 Q Was Mr. Sharp entitled to a lawyer or lawyers who
17 knew how to subpoena documents?

18 A Yes.

19 Q Was Mr. Sharp entitled to a lawyer or lawyers who
20 knew how to subpoena out of state witnesses or out of state
21 documents?

22 A Yes.

23 Q And was Mr. Sharp entitled to lawyers who would
24 preserve the record?

25 A Yes.

1 Q And was Mr. Sharp entitled to lawyers who would
2 get resources necessary to investigate his background?

3 A Yes.

4 Q And was Mr. Sharp entitled to lawyers who if they
5 did not have the funds in their budget, were not given funds
6 through administrative request, to go to the court and get a
7 court order for the funds?

8 A Yes.

9 Q And why is it important for a capital defense
10 lawyer to go to court and request resources if they're
11 denied administratively?

12 A Well, obviously, by the severity of the case one
13 would want to do as much as possible to provide the
14 necessary representation. And if the governmental body
15 refused to provide that, those resources, and the court was,
16 was the last resort, then I would think that one might
17 utilize the court authority.

18 Q And you were aware of that in Mr. Sharp's case?

19 A I never went down that, that, that road.

20 Q I didn't ask you that. I said were you aware that
21 you had the ability and the opportunity to apply with the
22 court for a court order for money from the county for any
23 resource that you needed; correct?

24 A Yes.

25 Q And Judge Borowiec told you that, right?

1 A Well, I don't recall what he said, but yes, I
2 would have known that.

3 Q Well, do you remember being in court on the 17th
4 of May, 1996?

5 A No.

6 Q Would it refresh your recollection to see a
7 transcript of the proceeding?

8 A Yes.

9 Q I'm going to show you a transcript marked May 17th
10 of 1996, says appearances, Mr. James White.

11 Could you take a look at the first page and read
12 the entire page 24 to yourself.

13 A (Witness complies.) Okay.

14 Q So Judge Borowiec explained the procedure to you,
15 correct?

16 A Yes.

17 Q And he told you if you needed money and the county
18 wouldn't give it to you, he would issue a court order and
19 give it to you; correct?

20 A Yes.

21 Q Now --

22 Give me one minute, your Honor.

23 THE COURT: Yes.

24 (Discussion off the record between counsel.)

25

1 BY MR. GORMAN:

2 Q Now would you agree, Mr. White, that someone who
3 is a capital defense lawyer has a continuing duty to educate
4 themselves, to make sure that they're always improving their
5 area of expertise?

6 A Yes.

7 Q And that it's a learning process in defending a
8 capital defendant?

9 A Yes.

10 Q And that one should learn from their mistakes by
11 reviewing their case so they don't make the mistake again;
12 is that fair?

13 A I think that's fair.

14 Q Okay. So it's important to have kind of a review
15 of what one did if one is a capital defense lawyer
16 post-trial so they don't make the same mistake again. Is
17 that fair?

18 A Yes.

19 Q Now did you read the special verdict that Judge
20 Borowiec issued?

21 A I assume I did.

22 Q But you did not read the -- at least at the time
23 of your interview by Ms. Lam, you did not read the Arizona
24 Supreme Court published opinion in State versus Sharp;
25 correct?

1 A I had not read it, no.

2 Q Okay. So at no time had you read that, at least
3 prior to your interview by Ms. Lam, correct?

4 A That's correct.

5 Q Now how many death penalty cases have you taken to
6 capital sentencing?

7 A One.

8 Q And that was the Sharp case?

9 A Yes.

10 Q Okay. Now in 2008 when you gave Ms. Lam your
11 resume, Exhibit I, it included a reference to your single
12 capital defense sentencing experience, correct?

13 A Yes.

14 Q And under 1994-1998 under Legal Defender, tell me
15 if I read this correctly, you state in your resume, "Death
16 Penalty Certified (First Chair)."

17 A Yes.

18 Q And why had you not even read the decision of the
19 case that you were holding out as qualifying you as
20 certified in death penalty litigation?

21 A I was not involved in any of the appellate process
22 or post, post-trial matters.

23 Q Okay. Now I have a copy of the decision for you,
24 because I'm going to refer to it.

25 THE COURT: Counsel, if you're going to ask the

1 witness about that case, I should get the, the case in front
2 of me. I know we have it somewhere in the file, but it's
3 easier just to get the book.

4 Briefly, can you give me the citation so I can ask
5 my bailiff to bring the book in?

6 Oh, we have it here. Thank you. It is 193.

7 Thank you.

8 Will you bring 193 in?

9 I have the case. You may proceed.

10 BY MR. GORMAN:

11 Q Okay. Now you called two witnesses at the capital
12 sentencing proceeding?

13 A I don't recall how many witnesses. I know that
14 one of them was Dr. Geffen.

15 Q Did you call Dr. Streed?

16 A I don't recall.

17 Q Okay. I ask you to take a look at the transcript
18 of the March 11, '97 proceeding. And if you could read
19 what's listed, to yourself, as witnesses. And then I'll ask
20 you a question.

21 A Okay.

22 Q At the capital sentencing proceeding on March 11
23 who did the state call as a witness?

24 A I don't recall.

25 Q Under witness, under the document I just showed

1 you and you read, the first person listed, could you read
2 his name?

3 A Dr. Gary Flores.

4 Q So that was a state witness at the capital
5 sentencing proceeding?

6 A It appears so, yes.

7 Q Okay. And he was the pathologist?

8 A Yes.

9 Q And he was the pathologist for Cochise County?

10 A Yes.

11 Q And you called Dr. Streed and Dr. Geffen?

12 A Yes.

13 Q And Dr. Streed met Mr. Sharp a few weeks before he
14 testified, correct?

15 A I don't recall.

16 Q Do you deny that he was hired post guilt verdict?

17 A I don't recall at what point that he was hired.

18 Q And the only live person that Dr. Streed
19 interviewed who witnessed any of the mitigation was
20 Mr. Sharp, correct?

21 A Mr. Sharp was present.

22 Q Pardon me?

23 A If I understand your question, Mr. Gorman,
24 Mr. Sharp was present during the, the sentencing hearing.

25 Q No. In order to prepare for the sentencing

1 hearing Dr. Streed needed information, correct?

2 A Yes.

3 Q And Dr. Streed interviewed one live human being
4 who witnessed the sexual abuse that Mr. Sharp had sustained
5 as a child, correct?

6 A I don't recall that.

7 Q You don't recall that Dr. Streed interviewed
8 Mr. Sharp?

9 A I'm sure that he interviewed Mr. Sharp, yes.

10 Q But you have no recollection of him interviewing
11 any other live person?

12 A No, I don't.

13 Q And you understand that we have obtained your
14 entire trial file when I was appointed in 2000 on this case?
15 Did you know that?

16 A I assumed that you would have it, yes.

17 Q And that Mr. Rohman, here to my right, reviewed
18 the entire file for what was present or absent. Were you
19 aware of that?

20 A No.

21 Q Now Dr. Geffen had no in-person interviews in
22 preparation for the sentencing hearing with anyone who was a
23 witness to the mitigation other than Mr. Sharp, correct?

24 A I believe that's correct.

25 Q Because Dr. Geffen never went to Indiana, correct?

1 A Correct.

2 Q Dr. Streed never went to Indiana?

3 A Correct.

4 Q You never went to Indiana?

5 A Correct.

6 Q Ms. Macartney never went to Indiana?

7 A Correct.

8 Q Your investigator never went to Indiana?

9 A Correct.

10 Q So how many Rule 11s would you say you have done
11 in Cochise County on noncapital matters?

12 MS. LAM: Objection, your Honor, that's not
13 relevant.

14 THE COURT: Overruled. You may answer. Well, but
15 for clarification, are you talking about throughout the
16 time, whether before or after the Sharp case?

17 MR. GORMAN: Yes.

18 THE COURT: Okay. You may answer.

19 THE WITNESS: I know that I had done some. I do
20 not recall the number.

21 BY MR. GORMAN:

22 Q Okay. Now, and then after Dr. Streed and
23 Dr. Geffen interviewed their one witness, which was
24 Mr. Sharp, then they were done with their in-person witness
25 interviews, correct?

1 A According to their -- them, yes.

2 Q Well, I'm asking according to you. Did they,
3 either one, conduct a second in-person interview of a
4 witness other than Mr. Sharp?

5 A No.

6 Q And that's according to you?

7 A Yes.

8 Q Now you agree that as lead counsel you were
9 ultimately responsible to research relevant case law on how
10 to conduct a capital sentencing proceeding, correct?

11 A Yes.

12 Q And even if you're not a capital attorney, you are
13 a trained lawyer. And isn't it basic from the time you get
14 out of law school that if you don't know a rule, you look it
15 up?

16 A Yes.

17 Q And you look up the statute if one pertains,
18 right?

19 A Yes.

20 Q And you look up the case that might interpret a
21 statute?

22 A Yes.

23 Q And then after you know the law, then you prepare
24 to go forward with your case?

25 A Yes.

1 Q And as early as 1995 the Arizona Supreme Court had
2 made clear that self-reported, uncorroborated evidence
3 offered in mitigation was not substantial evidence and could
4 not be considered for leniency; isn't that right?

5 A I don't recall.

6 Q Well, did you research and read the 1995 decision,
7 State versus Murray, M-U-R-R-A-Y, 184 Ariz. 9, at page 455,
8 906 P.2d 542, at page 578?

9 Did you ever read that decision before designing
10 your plan for defending Mr. Sharp at a capital sentencing
11 proceeding?

12 A I don't recall.

13 Q Well, what legal research did you do in regards to
14 the capital sentencing proceeding?

15 A I don't recall precisely what preparations were
16 made.

17 Q Did you read State versus Stokley, S-T-O-K-L-E-Y,
18 182 Ariz. 505 at page 520-21, a 1995 decision where it was
19 held that an -- discounting an expert's opinion that the
20 defendant's capacity to appreciate the wrongfulness of his
21 conduct when he committed the crimes was diminished because
22 it was based entirely on the defendant's self-reported
23 alcohol consumption and blackout on the night of the
24 murders?

25 A I remember the Stokley case because that was an

1 important case. It originated in Cochise County. And as I
2 recall Judge Borowiec was the presiding judge.

3 Q Did you read the decision?

4 A Yes, I'm sure I did.

5 Q And, and so that case you were aware prior to the
6 Sharp sentencing proceeding that the Supreme Court would
7 not -- they repeatedly warned in the Stokley decision, for
8 example, you said you're aware of, they would not consider
9 uncorroborated self-reported claims of abuse by a capital
10 defendant as evidence substantial enough to call for
11 leniency. So you're saying you were aware of that?

12 A I was. But I did not consider it to be
13 unsubstantiated and uncorroborated.

14 Q Well, let's talk about corroboration. Did you
15 mark as an exhibit for admission into evidence at the Sharp
16 capital sentencing proceeding a single document?

17 A I do not recall.

18 Q Did you move into evidence on the record for a
19 single document, institutional record, audiotape, any
20 exhibit whatsoever? Did you offer that on behalf of your
21 death penalty client and ask that it be admitted into
22 evidence?

23 A I don't recall.

24 Q Did you subpoena a single fact witness, an
25 eyewitness, to the extraordinary sexual abuse Mr. Sharp had

1 experienced from age 4 to 12?

2 A No.

3 Q Did you subpoena a single fact witness to testify
4 about the violence that he had witnessed and that he had
5 been a victim of his entire adolescence and preteenage
6 years?

7 A No.

8 Q Did you subpoena a single fact witness to testify
9 as to his family's history of violence, incest, sexual
10 abuse, drug and alcohol addiction?

11 A No.

12 Q Did you a single -- did you subpoena a single
13 witness to testify to a single fact?

14 A Lay witness, no.

15 Q Well, an expert witness can be a fact witness.
16 Did you subpoena a single fact witness who witnessed the
17 abuse or could corroborate it that you argued existed?

18 A No.

19 Q Now in the guilt phase, if Mr. Roll had called a
20 medical examiner other than Dr. Flores, who had not
21 conducted the autopsy, and hearsayed in his entire case
22 through Dr -- the doctor who he called who had not done the
23 autopsy, who had just read the police reports and all of
24 that, but no eyewitnesses, no documents admitted, nothing,
25 would you move for a Rule 20 verdict at the close of the

1 state's case?

2 A Could you repeat the question, Mr. Gorman? I'm
3 sorry.

4 Q Well, at your capital sentencing proceeding you
5 called two experts and presented no witnesses to any events
6 that you say existed. Right?

7 A Yes.

8 Q And you called two experts and introduced as
9 evidence no documents that you say proved the facts that you
10 say existed. Right?

11 A I don't recall whether the -- apparently they were
12 not offered into evidence. I don't have any independent
13 recollection of that.

14 Q Do you dispute that you offered no document into
15 evidence?

16 A No, I do not.

17 Q Okay. And the record obviously is the record, so
18 if there's no motion to move an exhibit into evidence, you
19 never moved. Correct?

20 A Correct.

21 Q You're not alleging that something was done off
22 the record, are you?

23 A No.

24 Q Okay. So if a prosecutor, let's say in the Sharp
25 case, had called two experts who had nothing to do with the

1 case other than they showed up a couple of weeks before the
2 trial, read some documents, and then the prosecutor called
3 them as witnesses and introduced no exhibits, called no fact
4 witnesses, at the close of their evidence would you move for
5 a Rule 20?

6 A I don't know.

7 Q Is that a hard question?

8 A Perhaps.

9 Q Perhaps?

10 A It would depend on the circumstances.

11 Q So you possibly would have refrained from arguing
12 a Rule 20 motion in that circumstance, is that what you're
13 saying?

14 A Again, it would be a matter of speculation. I
15 don't really know, Mr. Gorman.

16 Q Well, you understand --

17 A I assume that if I felt that, that, that, if I
18 felt that I had a legal basis for it, then I would have done
19 it.

20 Q Well, you're an expert in trial practice, correct?

21 A I teach people in trial practice, yes.

22 Q Is that because you have expertise in trial
23 practice?

24 A Yes.

25 Q Does that make you an expert in trial practice?

1 A No. But I have expertise.

2 Q Okay. So you are someone with expertise, but
3 you're not an expert?

4 A I do not carry, as far as the state bar is
5 concerned, I do not have a specialization.

6 Q Okay. Who certified you as a first chair death
7 penalty qualified lawyer?

8 A As I recall, under the rules and based at the
9 time.

10 Q No. I want to know did someone certify you?

11 A No.

12 Q No one certified you?

13 A No.

14 Q You just put that on your resume?

15 A Yes.

16 Q And that was based on the Sharp case?

17 A Yes.

18 Q The case that you didn't read the Arizona Supreme
19 Court decision affirming his death sentence; that case,
20 right?

21 A Again, I was not involved in the proceedings at
22 that point in time.

23 Q Oh. Okay.

24 Judge, I'm not sure of the page in your published
25 opinion. I have page 9 of 14 of a computer-generated

1 printout.

2 THE COURT: All right. Actually, the paragraph
3 number would be helpful.

4 MR. GORMAN: Um, paragraph 34.

5 THE COURT: All right. It starts on page 423 of
6 the, of volume 193 of the Arizona Reports.

7 BY MR. GORMAN:

8 Q Okay. Now before I get to the decision, did you
9 review A.R.S. 13-703 prior to the capital sentencing
10 proceeding?

11 A I don't recall.

12 Q Well, as a, someone with expertise in trial
13 practice, would that have been prudent to review the
14 sentencing statute prior to a capital sentencing proceeding?

15 MS. LAM: Objection, your Honor. It's
16 speculation.

17 THE COURT: It's not speculative. But the
18 question calls for prudence? Well, overruled. You may
19 answer.

20 THE WITNESS: I would think it would be, yes.

21 BY MR. GORMAN:

22 Q Would Mr. Sharp be entitled to a lawyer who would
23 review and understand A.R.S. 13-703, the capital sentencing
24 statute?

25 A Yes.

1 Q Now what is your opinion; that you reviewed it or
2 didn't review it?

3 A I don't have any recollection. I would, if I may,
4 assume that I did.

5 Q And the burden of proof is defined in the statute,
6 correct?

7 A I don't recall.

8 Q Well, you knew going into the capital sentencing
9 proceeding that the capital defendant has the burden of
10 proof regarding evidence offered to prove mitigators,
11 correct?

12 A Yes.

13 Q And you knew that the burden you had to meet was
14 by a preponderance of the evidence, correct?

15 A According to reading paragraph 34 which refreshes
16 my memory, yes.

17 Q Well, I'm just asking you then. And let's move
18 that out of the way so you're not distracted.

19 Are you saying you're not certain whether you knew
20 what the burden of proof was prior to Sharp's capital
21 sentencing?

22 A Mr. Gorman, this happened a number of years ago.
23 And I do not recall in some cases specific -- specifics.

24 Q Well, wasn't that something fundamental that you
25 should be able to say: Of course I knew what the burden of

1 proof was before I went into a capital sentencing
2 proceeding. Is that an unreasonable proceeding?

3 A The question, the question, no, the question was
4 did I or do I. And my response is I do not recall. But I
5 do agree that a prudent lawyer would have read the
6 sentencing statute and understood it.

7 Q So you can't say as a fact that you understood
8 what the burden of proof was prior to Sharp's capital
9 sentencing proceeding?

10 A I don't recall.

11 Q So you don't know. You might not have known it;
12 is that what you're saying?

13 A No. I'm saying I don't recall.

14 Q Okay. Do you, do you admit or deny that you did
15 not know what the burden of proof was?

16 A I can neither admit nor deny, Mr. Gorman. I do
17 not recall.

18 Q So if someone testified that you did not know what
19 the burden of proof was, would you not contest that as a
20 fact?

21 A Somebody testifying as to what I knew? I don't
22 know.

23 Q What I'm asking -- you said you have no basis to
24 testify about whether you knew what the burden of proof was
25 because you have no recollection. Right?

1 A I do not recall. That's correct.

2 Q So if someone came here and testified that you did
3 not know what the burden of proof was, you would have to
4 just say: I don't remember. They might be correct in their
5 assertion.

6 Is that fair?

7 MS. LAM: Objection, your Honor, that's
8 speculative.

9 THE COURT: It is. Sustained.

10 BY MR. GORMAN:

11 Q Now you do agree though that a capital defense
12 lawyer should know that he had the burden of proof at a
13 capital sentencing, right?

14 A Yes.

15 Q And a capital defense lawyer in Arizona should
16 know in '95 what the burden of proof was, right?

17 A Yes.

18 Q And a -- and you would agree that a capital --
19 minimally competent capital defense lawyer should have been
20 familiar with the four published opinions that report that
21 self-reported evidence in mitigation would never be
22 considered substantial evidence?

23 A I would agree with that.

24 Q And you can't testify that you were aware of those
25 cases, so we don't know whether you were minimally

1 competent; do we?

2 A I do not recall the specifics because of the time
3 frame.

4 Q So you have -- do you have any evidence that you
5 could offer, document, another person, anything, where you
6 could demonstrate that you were aware that self-reported
7 evidence by a capital defendant was never considered
8 substantial evidence in mitigation calling for leniency?

9 A I have no witnesses and no documentation.

10 Q And you drafted no memos in your file for your
11 review, or Margo Macartney's, that outlined the substantive
12 or procedural fundamental law as it pertained to Sharp's
13 capital sentencing proceeding, did you?

14 A I don't recall.

15 Q Well, you agree that if you did it would have been
16 in the trial file, correct?

17 A It's possible that it would be in the trial file.
18 It's possible that it would not be in the trial file. It
19 depends on a number of factors.

20 Q Okay. Do you agree that it's important to
21 maintain everything you did on a capital case, on this case?

22 A I think it's important to, to try to maintain
23 everything you did in every case.

24 Q Well, I'm talking about this case. Was it
25 important to you at the time to keep a master file that

1 documented everything you did and did not do?

2 A I can't answer that, Mr. Gorman.

3 Q So you don't know if it was important or not?

4 A I think it's important to.

5 Q No. I asked you if it was important on this case
6 to maintain a file that included the records of what you did
7 and did not do. Was that important in this case?

8 A Mr. Gorman, I'm having a difficult time answering
9 that question, I'm sorry, because --

10 Q Then the answer is you can't answer the question.
11 It calls for a yes or no answer, doesn't it? It was either
12 important or not, wasn't it?

13 A It would be important for subsequent --

14 Q You've answered the question.

15 A -- counsel, yes.

16 Q Do you know any legal work that you destroyed?

17 A I don't recall.

18 Q Now I'm going to read you what begins at paragraph
19 41. And this is from the Arizona Supreme Court decision in
20 State versus Sharp, 193 Ariz. 414. "Evidence of a childhood
21 like that described above, no matter how horrific, cannot be
22 given substantial weight as statutory or nonstatutory
23 mitigating factor when the evidence is as limited as in this
24 case. First, the appellant" -- meaning Sharp -- "offered
25 only self-reported evidence, which the trial court could not

1 corroborate. This court has repeatedly held that
2 self-reported evidence may be given little or no mitigating
3 weight."

4 Did you understand what they meant when they made
5 that statement in their decision?

6 A I understand self-reported evidence, yes.

7 Q Okay. So you intended to do the hearing without
8 putting any documents into evidence, is that right?

9 A No.

10 Q So did you forget to put the documents into
11 evidence?

12 A Apparently so.

13 Q And what would you attribute your forgetfulness
14 to?

15 A I can't recall. I do not know.

16 Q Do you have a bad memory?

17 A Well, you mean overall, Mr. Gorman?

18 Q Well, let's start with this case.

19 A I can tell you that in -- I don't know if this is
20 a factor or not -- in 2001 I almost died from encephalitis,
21 which of course affects the central nervous system.

22 Q So you were afflicted, maybe not diagnosed, but
23 according to how you felt about your physical and cognitive
24 health somehow negatively impacted prior to Sharp's capital
25 sentencing proceeding? Is that what you're implying?

1 A No. All I'm -- you were asking me about my
2 memory. And I said -- you didn't specify when.

3 Q Yeah. I said in this case.

4 A In this case?

5 Q Yeah. You weren't defending Sharp in 2001, were
6 you?

7 A No.

8 Q Were you defending him in '95, '96, and '97?

9 A I understood your question to be overall. But in
10 1995 I'm not aware that I had any limitations.

11 Q Okay. So what are you testifying to now? That
12 you showed up to the capital sentencing proceeding on
13 March 11th and you had documents that you intended to move
14 into evidence and simply forgot?

15 A It appears to be the case, Mr. Gorman.

16 Q Okay. What documents did you bring with you to
17 the capital sentencing proceeding that you intended to
18 introduce into evidence that you forgot to do?

19 A I would say that all the reports, all the
20 statements, everything that the experts used to formulate
21 their opinions were included.

22 Q So if you forgot to introduce the documents, you
23 intended to do so but failed to do so simply because of a
24 mistake? You forgot?

25 A I believe it was an oversight.

1 Q Is an oversight a mistake?

2 A Yes.

3 Q So you did not make a decision that was in
4 Mr. Sharp's interest to fail to introduce those exhibits
5 that you brought to court; you simply forgot to introduce
6 them?

7 MS. LAM: Your Honor, this is asked and answered.

8 THE COURT: Sustained.

9 BY MR. GORMAN:

10 Q It was not a tactical decision to fail to
11 introduce documents into evidence, was it? You forgot?

12 A Yes. It was not a tactical decision.

13 Q Now is that because -- did you bring the documents
14 to court because you knew that self-reported claims of abuse
15 was insufficient evidence in mitigation as a matter of law?

16 A I would have to assume so.

17 Q Now are you familiar with the uniform act to
18 secure the attendance of witnesses from without a state in a
19 criminal proceeding?

20 A I, I know of it. I know that it exists.

21 Q Have you ever subpoenaed someone from out of
22 state?

23 A I don't believe so.

24 Q Were you competent as a lawyer at the time to
25 research an Arizona statute and learn the law for applying

1 for issuance of an out-of-state witness or document?

2 A Yes.

3 Q And I'll show you what's marked Defense Exhibit
4 173. Now have you ever had issued a subpoena duces tecum?

5 A Are you talking about out of state or in state
6 or --

7 Q Anywhere. Anywhere.

8 A Yes.

9 Q And what is a subpoena duces tecum?

10 A It is an order to appear with specified
11 documentation or documents or things.

12 Q And can you have them authenticated by the
13 custodian of record of those documents?

14 A I don't understand. Would you ask the question
15 again, please?

16 Q Well, would you issue the -- or have the subpoena
17 issued and have the custodian of record of the document you
18 wanted served with the subpoena?

19 A Yes.

20 Q And you've done that before?

21 A Yes.

22 Q And Article 23 provides, of the Arizona Revised
23 Statutes, provides the instructions on how to subpoena
24 records and subpoena witnesses, correct?

25 A Well, I know it's the title here. And I assume

1 that it's -- if I may have just one second, Mr. Gorman, I'll
2 look here and see what, because I don't have any independent
3 knowledge of this.

4 MS. LAM: Objection, your Honor. The witness has
5 already said he has not subpoenaed out-of-state witnesses.
6 So whether or not he's aware of these procedures is
7 irrelevant.

8 THE COURT: Well, I haven't heard the next
9 question yet. Overruled for now. Let's see where it goes.

10 THE WITNESS: Well, in, Mr. Gorman, in --

11 THE COURT: I'm sorry. I didn't know there was a
12 pending question. If there was, I missed it.

13 BY MR. GORMAN:

14 Q Okay. You agree there's a statute in 1995, 1996,
15 1997 that would have permitted you to apply for the court
16 for the issuance of a subpoena to an out-of-state person or
17 institution to require their attendance in Cochise County,
18 correct?

19 A Yes.

20 Q Now did you subpoena Toni Phelps to testify?

21 A I don't believe so.

22 Q Well, the fact is you never drafted a subpoena for
23 anyone to testify at the capital sentencing proceeding,
24 isn't that right?

25 A I don't recall.

1 Q Well, did you ever file a motion with the court
2 for a continuance because a witness who you attempted to
3 serve with a subpoena could not be served and you needed a
4 continuance for that reason?

5 A No.

6 Q Did you ever ask that a warrant be issued for a
7 witness that you had served with a subpoena to a capital
8 sentencing proceeding for failure to comply with the
9 subpoena?

10 A No.

11 Q So is it fair based on what you've testified to in
12 its entirety that you subpoenaed no one to the capital
13 sentencing proceeding?

14 A I don't recall whether Dr. --

15 Q Let's say other than Dr. Geffen or Dr. Streed.

16 A Okay. The answer would be --

17 Q You subpoenaed no one?

18 A I subpoenaed no one.

19 Q Okay.

20 (Discussion off the record between counsel.)

21 BY MR. GORMAN:

22 Q Barry David Phelps is a witness who was present
23 and available in 1995, '96, and '97 in the area of Tipton
24 County, Indiana. And he testified in this PCR proceeding
25 that he sodomized Mr. White -- or excuse me. Not

1 Mr. White -- Mr. Sharp, from the age of four, when Mr. Sharp
2 was four years old, for many, many years on a weekly basis.
3 He signed an affidavit to that effect. He made a statement
4 under video. And he testified under oath. And we're
5 talking probably hundreds of acts of sodomy against
6 Mr. Sharp.

7 Would that have been in his interest, for you to
8 subpoena Barry David Phelps and call him as a witness at the
9 capital sentencing proceeding?

10 A That's a tough question.

11 Q What's tough about it?

12 A The difficulty in this case that I felt we faced,
13 and the choices that were made --

14 Q I didn't ask you about the case. You said it was
15 a tough question. I said what about the question was tough.
16 Just what about the question was tough?

17 A I was trying to answer your question, Mr. Gorman,
18 if you'll give me opportunity.

19 Q Well, are you aware that the Arizona Supreme Court
20 said that the allegations, self-reported allegations of
21 child abuse were uncorroborated? You are aware of that now,
22 aren't you?

23 A I'm aware of that now, yes.

24 Q And is the fact that Mr. Sharp was sodomized at
25 four years old, does that in any way aggravate his sentence?

1 A I would hope it would not.

2 Q You would hope it would not?

3 A That's correct.

4 Q Okay. Now you're aware that the state has to
5 allege aggravation, correct?

6 A Yes.

7 Q And the state is required to only allege the
8 aggravators that are set forth by statute, correct?

9 A Yes.

10 Q Is there any aggravator for being sodomized when
11 you're four years old?

12 A No.

13 Q And so the only value that can have is a
14 mitigating value, correct?

15 A Perhaps.

16 Q Perhaps. I'm talking about in the Sharp case.

17 A I understand, Mr. Gorman.

18 Q So you think the evidence of sodomy -- you didn't
19 want to bring that in, is that what you're saying?

20 A Well, the evidence was there. It was included in
21 not only Mr. Sharp's reporting, but other, as I recall,
22 other folks back in Indiana.

23 Q I want to know prior to the sentencing hearing did
24 you want to prove that he had been sexually assaulted when
25 he was a pre-teenager?

1 A No.

2 Q So why do you have Dr. Geffen testify and talk
3 about it?

4 A To give the sentencing judge some background
5 information on Mr. Sharp that we learned from, not only from
6 Mr. Sharp, but from other folks back in Indiana that knew
7 him, either relatives or friends or whatever.

8 Q So you thought it was helpful to Mr. Sharp to have
9 Dr. Geffen testify that he was sexually assaulted but not
10 bring up the frequency, the degree, the years that he had
11 been subject to it?

12 A I'm not sure that I agree with that. I, I think
13 the hesitation, the strategy was not to get into some of the
14 results of his -- that -- of the sexual, the sexual abuse
15 that Mr. Sharp had experienced when he was a child.

16 Q I'm not talking about results. I'm talking about
17 the act. You alleged that he was sexually abused as a child
18 and that should be mitigator, correct?

19 A Yes.

20 Q You have the burden of proof, correct?

21 A Yes.

22 Q You have the burden of persuasion, correct?

23 A Yes.

24 Q You have the burden of production, correct?

25 A Yes.

1 Q You called no witness, fact witness, to prove that
2 he had been sexually assaulted as a four-year-old, correct?

3 A Correct.

4 Q You introduced no document to prove that he had
5 been sexually assaulted as a four-year-old, correct?

6 A Well, I didn't -- as we already talked about, no
7 documents were admitted into evidence at the sentencing
8 hearing.

9 Q So the answer is you admitted no document -- not
10 just at the sentencing hearing, at any time in the entire
11 proceeding, that went to him being sexually abused at four
12 years old. Isn't that right?

13 A Yes. I don't believe they would have been
14 appropriate during the trial stage to present that
15 information.

16 Q I didn't ask you if it was appropriate.

17 A You said during the proceedings, Mr. Gorman.

18 Q Isn't during the proceedings -- I simply asked a
19 fact; not whether it was appropriate. You never introduced
20 a document proving that he had been sexually assaulted at
21 four years old?

22 A That's correct.

23 Q So knowing that you had the burden of proof,
24 knowing that you had the burden of persuasion, knowing that
25 he, his -- the allegations you made about sexual abuse would

1 not be considered as mitigation, you introduce no evidence
2 on it, but brought it up anyways. That was your intent?

3 A No, that was not the intent.

4 Q But that's what happened, isn't it?

5 A Apparently so, yes.

6 Q Apparently so? Do you doubt that's what happened?

7 A No. It appears that that's true, Mr. Gorman.

8 It's an expression.

9 MR. GORMAN: Now, Judge, you want to take a break
10 at this point?

11 THE COURT: Well, I was willing to go ahead to
12 noon, but if you want to take the break now to go through
13 your notes, that's fine.

14 MR. GORMAN: It would be better, Judge.

15 THE COURT: Perhaps, before we do, let me ask
16 something for clarification, Mr. White.

17 THE WITNESS: Yes, your Honor.

18 THE COURT: I believe that you testified that you
19 were aware of the Stokley case --

20 THE WITNESS: Yes.

21 THE COURT: -- primarily because it occurred here
22 in Cochise County?

23 THE WITNESS: Correct.

24 THE COURT: Trial occurred here. It was Judge
25 Borowiec's case and so forth.

1 And I think, if I remember correctly, during your
2 testimony you said you believe that you read the decision in
3 that case? Is that true?

4 THE WITNESS: Well --

5 THE COURT: If you don't know, that's fine.

6 THE WITNESS: Judge, I really honestly don't
7 recall when I read the decision, but I do recall reading the
8 decision.

9 THE COURT: All right. Do you recall whether you
10 read the decision in the Stokley case before or after the
11 aggravation/mitigation hearing in this case?

12 THE WITNESS: I do not recall, your Honor.

13 THE COURT: Okay. Well, we'll leave it there
14 then. We'll start up again at 1:30. Thank you.

15 (A recess is taken. Thereafter, proceedings
16 continue as follows.)

17 THE COURT: We have continuation of the
18 evidentiary hearing in State against Kyle David Sharp,
19 CR95-271. Counsel are present. Mr. White is on the witness
20 stand. And it is still cross-examination.

21 Mr. Gorman, you may proceed.

22 MR. GORMAN: Thank you, your Honor.

23

24

EXAMINATION CONTINUES

25

1 BY MR. GORMAN:

2 Q What is National Association of Criminal Defense
3 Lawyers, Mr. White?

4 A It is a volunteer organization which one can join.
5 And it is a group of like-minded people who probably
6 primarily practice at criminal defense.

7 Q And as indicated in its name, it's a national
8 organization, correct?

9 A Yes.

10 Q And they have a publication called The Champion,
11 correct?

12 A Yes.

13 Q And you thought so well of their organization that
14 you attended the NACDL Trial Practice College in Macon,
15 Georgia in 1995?

16 A Yes.

17 Q And you went there for training and trial
18 practice?

19 A Yes.

20 Q And the reason you had Cochise County pay for that
21 training is you felt that was an organization that had
22 expertise in trial practice?

23 A Yes.

24 Q And you attended that in '95. And you met and had
25 more than one conversation with Natman Schaye?

1 A I think that's correct, yes.

2 Q And The Champion --

3 MS. RYAN: I'm sorry. (A book dropped.)

4 BY MR. GORMAN:

5 Q -- publication, that describes the standard of
6 care for various areas of criminal defense, correct?

7 A Yes.

8 Q Have you ever belonged to the National Association
9 of Criminal Defense Lawyers?

10 A I'm not certain. I may have for a short period of
11 time, but I don't recall.

12 Q And you also sent Margo Macartney to the National
13 Association of Criminal Defense Lawyers Trial Practice
14 College in Macon, Georgia when she was a deputy under your
15 supervision, correct?

16 A I have no reason to dispute that. I don't recall
17 specifically.

18 Q And the National Association of Criminal Defense
19 Lawyers and The Champion were advocating as early as 1986
20 that it was attorney error to conduct a capital sentencing
21 proceeding that was based on self-reported evidence of a
22 capital defendant, correct?

23 A I'm not aware of that, Mr. Gorman.

24 Q Okay. Could you look at the article that's been
25 previously admitted into evidence, Exhibit 169, entitled Zen

1 and the Art of Mitigation Presentation, dated August of
2 1986?

3 A Uh-huh. Okay.

4 Q All right. Do you dispute that the National
5 Association of Criminal Defense Lawyers as an entity, and
6 the publication The Champion, put on notice to all criminal
7 defense lawyers nationally in the '80s that self-reported
8 evidence at capital defense seminars -- or sentencing was
9 attorney error? Do you dispute that?

10 A I do not.

11 Q And in 1987, perhaps earlier, the National
12 Association of Criminal Defense Lawyers as an entity, and
13 through its publication The Champion, in June of '87
14 expressly stated that a mitigation specialist is essential
15 to a capital defense team; isn't that right?

16 A I have no personal knowledge of that, Mr. Gorman.

17 Q Do you dispute it?

18 A I do not.

19 Q Now Natman Schaye in 1995 was an expert in capital
20 litigation, correct?

21 A Um, I don't have any reason to dispute that.

22 Q And he was on various committees with the National
23 Association of Criminal Defense Lawyers that dealt with
24 death penalty training and education, correct?

25 A I know that Nat was very much involved in the

1 organization.

2 Q And involved in capital defense.

3 A I have no reason to dispute that.

4 Q And you have no recollection of the conversation
5 you had with him in Macon, Georgia in 1995 about what the
6 core essentials are of a capital defense team, is that
7 right?

8 A Yes, that's correct.

9 Q Now as early as 1989, and I'm referring to Exhibit
10 172, The Champion outlined the proper procedure for
11 obtaining funds for experts in defending indigent defendants
12 when it was denied administratively off the record.
13 Correct?

14 A I have no reason to dispute that.

15 Q Okay. I show you what's marked as Exhibit 172
16 with The Champion of August of 1989. Could you read the
17 title of that article out loud?

18 A Yes. Obtaining Funds for Experts in Indigent
19 Cases.

20 Q Okay. But you knew how to do that prior to Sharp,
21 correct?

22 A I have not -- as I recall, I have not read any of
23 these articles. And again, as far as membership goes, I may
24 have been a member at some point in time. I don't remember
25 when. Um, in '86, '87 and '89 I was not involved in any

1 capital litigation because the state of Kansas had no
2 capital punishment at the time. And I know that you had to
3 be a member to receive the publication. You had to be a
4 member. But I have over the years had occasion to read the
5 publication from time to time. I know it's, it's an
6 excellent resource.

7 Q The question was do you know, did you at the time
8 you defended Kyle Sharp know how to obtain funds, reasonable
9 and necessary to his defense, if the county administratively
10 off the record denied your request for funds? Did you know
11 how to go to court and do it?

12 A Um, well, looks like there's a record of a
13 conversation in court with Judge Borowiec about how that
14 could be done.

15 Q Okay. And did you know how to do it? Did you
16 understand it? You said "I understand" on May 17th of '96.
17 Right?

18 A Yes, that's what I said.

19 Q Okay. Did you understand on May 17th of '96 how
20 to get funds and make a record if you were denied by the
21 county?

22 A Yes.

23 Q And you never did that to get funds. You never
24 applied to the court to get funds to interview Sharp's
25 stepfather in Indiana. Correct?

1 A Not specifically, no.

2 Q You filed a motion on the record for funds?

3 A No. I went, as I recall --

4 Q The question is --

5 A -- to the Board of Supervisors.

6 Q The question is, the question is did you file a
7 motion on the record requesting a court order for funds that
8 were reasonable and necessary for the defense?

9 A I didn't because I didn't believe it was
10 necessary.

11 Q Okay. You're certified as a capital litigator?

12 A No.

13 Q Okay. But it's on your resume?

14 A At the time that I tried the Sharp case I
15 qualified under the rules to sit first chair.

16 Q At the time of the Sharp case?

17 A Yes.

18 Q At the time of the Sharp case -- let's start with
19 the date of your appointment, your office's appointment.
20 You had never attended a capital seminar, correct?

21 A Not that I recall.

22 Q Do you have any proof or any way we could
23 reconstruct to help your memory of whether you attended a
24 capital seminar or not?

25 A There would be --

1 MS. LAM: Objection, your Honor. It's
2 argumentative.

3 THE COURT: Sustained.

4 BY MR. GORMAN:

5 Q Is there anything we could present to you or you
6 could obtain to refresh your recollection, so we could
7 refresh your recollection, so we could have certainty on
8 whether you attended a capital seminar or not prior to
9 representing Sharp?

10 A I would say perhaps the records of the Supreme
11 Court of Kansas is the, is in charge of attorney admission
12 and CLE and that. And the state bar of Arizona would
13 also -- obviously is the sanctioning organization here. And
14 as I recall, when we reported CLE we write down the seminars
15 that we attended and when we attended them. And so there
16 might be a record either in Kansas -- because I would have
17 sent that information at the time. I was still actively --
18 I was still licensed to practice actively in Kansas. I'm
19 now, and have been for a number of years, inactive.

20 Q Do you have any evidence that you attended a
21 capital seminar prior to your appointment to defend Kyle
22 Sharp?

23 A No.

24 Q You never participated in any form as a law clerk,
25 as a paralegal, as a lawyer, as an investigator, as

1 anything, as part of a capital defense team prior to your
2 appointment to defend Kyle Sharp; correct?

3 A Correct.

4 Q So you had zero experience on capital cases before
5 you were appointed to defend Kyle Sharp?

6 A Yes.

7 Q Now did you have an ethical, ethical obligation to
8 research all aspects of a capital defense at the time you
9 were appointed?

10 A Yes.

11 Q So you knew -- well, let me ask you this. Did you
12 satisfy your ethical obligation and research all aspects of
13 a capital sentencing?

14 A Could you ask me that question again? I'm sorry.

15 MR. GORMAN: Judge, could I have the court
16 reporter read back the question?

17 THE COURT: Yes. Please read it back.

18 (Whereupon, the court reporter reads aloud the
19 requested material.)

20 THE WITNESS: I believed at the time that I had.

21 BY MR. GORMAN:

22 Q So you knew, pursuant to Arizona Supreme Court
23 precedent that if you failed to call a fact witness and you
24 failed to introduce an exhibit, that as a matter of law the
25 sentencing judge would have no choice but to deny any

1 mitigation you offered as having substantial weight. Isn't
2 that right?

3 A Yes.

4 Q So you knew going into the capital sentencing
5 proceeding that the way you were going to conduct the
6 hearing would assure that the trial judge would not find
7 substantial weight regarding the mitigators calling for
8 leniency, correct?

9 MS. LAM: Objection, speculation.

10 THE COURT: Overruled. You may answer.

11 THE WITNESS: I'm sorry. Could you read that back
12 again?

13 THE COURT: Madam court reporter, please read the
14 question back.

15 (Whereupon, the court reporter reads aloud the
16 requested material.)

17 THE WITNESS: No.

18 BY MR. GORMAN:

19 Q Well, how do you reconcile your answers to the
20 last two questions?

21 A I would say, Mr., Mr. Gordon --

22 MR. GORMAN: Gorman. I'm sorry.

23 THE WITNESS: I'm sorry. And I called you the
24 right name all day.

25 That was not the design or purpose. That would

1 be, obviously, to purposefully not present evidence at
2 mitigation on behalf of Mr. Sharp, would be tantamount to a
3 crime.

4 BY MR. GORMAN:

5 Q So it was a mistake on your part?

6 A It was, as I said earlier, it was a mistake.

7 Q It was a mistake for you at the time to fail to
8 introduce documents and fail to call a single fact witness
9 because the Arizona Supreme Court put you on notice that
10 self-reporting as a matter of law was insufficient for
11 leniency, correct?

12 MS. LAM: Objection, your Honor, asked and
13 answered.

14 THE COURT: Not exactly. We've had a number of
15 similar questions, but I don't think that one. Overruled.

16 You may answer.

17 MR. GORMAN: Could we have the question read back
18 please?

19 THE COURT: Please.

20 (Whereupon, the court reporter reads aloud the
21 requested material.)

22 THE WITNESS: I have a two-part answer. Yes and
23 no. Yes, it was the, it was the law that uncorroborated
24 statements by the defendant in this case were not
25 sufficient. However, we did have statements from witnesses,

1 a transcript of interviews and such that would support, we
2 believe, I believe, we believe, I think the defense team
3 believed, corroborated his statements that he had been
4 abused and he had other issues.

5 BY MR. GORMAN:

6 Q What difference does that make if they're not made
7 part of the record?

8 A Well, again --

9 Q So you're saying you didn't make a mistake --

10 A Mr. Gorman, I have admitted on more than one
11 occasion that the mistake was made.

12 Q -- to document --. I'm talking about witnesses.
13 Was your failure to call a single fact witness -- you
14 already acknowledge that the failure to introduce a single
15 document into evidence was a mistake and was not a tactical
16 decision.

17 A Yes.

18 Q Does the same answer apply to failing to call a
19 single fact witness?

20 A No.

21 Q Now you knew if you didn't call a single fact
22 witness you were not going to make your burden of proof,
23 correct?

24 A No.

25 Q Do you disagree with the finding of the trial

1 court and the Arizona Supreme Court that the only thing you
2 offered was self-reporting?

3 A Again, we had statements from other people.

4 Q I want to know if you disagree with the Arizona
5 Supreme Court's statement that the only evidence you offered
6 was self-reported evidence of Kyle Sharp. Do you agree or
7 disagree with that?

8 A I disagree with that.

9 Q Okay. If something --

10 A Well, wait a minute. Excuse me. Let me back up
11 because --

12 Q It's just do you agree.

13 A Because the evidence is not --

14 THE COURT: Wait, wait, wait. One at a time. One
15 at a time.

16 MR. GORMAN: If you want to change your answer,
17 you just stated whether you agree or disagree with the
18 Arizona Supreme Court's conclusion that you only offered
19 self-reported evidence.

20 A I disagree.

21 Q What item of evidence was admitted, did you move
22 for admission into evidence to be considered -- well, let's
23 back up. What piece of evidence did you mark as an exhibit
24 to be admitted into evidence?

25 A I don't recall any.

1 Q What exhibit did you move into evidence that was
2 denied that would have supported or corroborated Sharp's
3 self-reporting?

4 MS. LAM: Objection, your Honor, asked and
5 answered.

6 THE COURT: Overruled. You may answer.

7 THE WITNESS: As we discussed, Mr. Gorman,
8 apparently no items, whether documents or whatever, were
9 offered or admitted at the sentencing hearing.

10 BY MR. GORMAN:

11 Q Okay. And we've already discussed you subpoenaed
12 no witness for the hearing who was a fact witness as to the
13 mitigation you alleged in your memorandum.

14 A If fact witness means eyewitness, we had, we
15 subpoenaed no eyewitnesses.

16 Q Or witnesses who could corroborate indirectly
17 Mr. Sharp's statements that were self-reported who knew
18 about his family upbringing, who lived in Indiana?

19 A Correct.

20 Q So what fact did you prove at the capital
21 sentencing aggravation/mitigation hearing, what fact that
22 corroborated Mr. Sharp's statement that he was sexually
23 abused?

24 A The only thing that, that I would offer is that
25 when the, when Dr. Geffen and -- was it Dr. Streed?

1 Q I just want to know what fact.

2 A -- testified --

3 Q I'm not asking you who testified yet. What date
4 did you prove as the date that Kyle Sharp was sexually
5 assaulted?

6 A We didn't offer any live witness to a date.

7 Q You proved no date?

8 A No date.

9 Q Did you prove the county that it occurred in?

10 A Independent of the testimony, no.

11 Q No. Did you prove the county that the crime was
12 committed in?

13 A Which crime, Mr. Gorman?

14 Q The sexual abuse.

15 A No.

16 Q Did you prove the state it was committed in?

17 A Offered no evidence as to the state that it was
18 committed in.

19 Q Did you prove the name of the person who sodomized
20 Mr. Sharp when he was four years old?

21 A I would have to say only through experts.

22 Q Did you prove through experts the name Barry David
23 Phelps?

24 A I cannot say.

25 Q And the experts, Dr. Streed, well, he was only

1 relaying self-reported evidence, right?

2 A Well, I can't say yes to that because I really
3 don't recall what information we provided to Dr. Streed.

4 Q Well, Dr. Streed never went to Indiana on this
5 case, right?

6 A I don't believe he did.

7 Q And Dr. Streed, the only live person who witnessed
8 the horrific child abuse was Kyle Sharp, correct?

9 A Again, Mr. Gorman, I do not recall what other
10 information we provided to Dr. Streed.

11 Q You never proved anything through Dr. Streed
12 because Dr. Streed simply relied on the self-reported claims
13 of Mr. Sharp, isn't that right?

14 A I cannot agree with that.

15 Q Well, what did he rely on that was part of the
16 record?

17 A Mr. Gorman, it's been a long time ago. I cannot
18 tell you what he relied on. If you have documents or you
19 have something that you could show me to refresh my memory,
20 I would be happy to look at them. But I do not have any
21 independent recollection of what information was provided to
22 Dr. Streed, what Dr. Streed did, whether he contacted
23 people. I have no -- I don't remember. I don't remember.

24 Q You have no recollection, yet you can assert that
25 you were effective. That's what you're saying, right? You

1 have no recollection?

2 A I agreed.

3 Q You have no recollection, but you can assert: Oh,
4 there was something on the record. I corroborated it.

5 You're just dead certain on that?

6 THE COURT: One question at a time.

7 MR. GORMAN: Right?

8 THE COURT: So go ahead, back up and ask one
9 question at a time.

10 BY MR. GORMAN:

11 Q Your recollection is perfect regarding the issue
12 of whether you corroborated Dr. Streed's testimony with
13 evidence independent of Mr. Sharp's self-reporting, correct?
14 You have no doubt you did that?

15 A What my testimony was, I do not recall what
16 information that we provided to Dr. Streed. That is my
17 testimony.

18 Q So you do not disagree that you perhaps failed to
19 corroborate Mr. Sharp's self-reported claims of abuse?

20 MS. LAM: Objection, your Honor, argumentative.

21 THE COURT: It is. Sustained.

22 BY MR. GORMAN:

23 Q Now, now Dr. Streed told you -- strike that.

24 Dr. Geffen told you before he testified that he
25 didn't have enough information to make a diagnosis, correct?

1 A I don't recall that.

2 Q And Dr. Geffen told you before he testified that
3 he had only a limited amount of time with the patient,
4 meaning Mr. Sharp, correct?

5 A I don't recall that.

6 Q And Dr. Geffen told you that the records he
7 obtained from your office were not very thorough, correct?

8 A I don't recall that.

9 Q In fact, on March 11th at the aggravation/
10 mitigation hearing Dr. Geffen stated under oath in your
11 presence that he didn't want to call what he was testifying
12 to a diagnosis. He characterized it as an impression.
13 Right?

14 A I don't recall that, but I'm sure it's in the
15 record.

16 Q And he stated under oath at page 157 of the
17 March 11th aggravation/mitigation hearing that he didn't
18 want to call what he was testifying to a diagnosis. He just
19 wanted to call it an impression because of the lack of
20 information provided to him. Correct?

21 A I don't recall that.

22 Q Now I'm going to ask that you read page 157,
23 what's underlined in red, silently to yourself of the
24 March 11th aggravation/mitigation hearing. Could you read
25 that, please?

1 A (Witness complies.)

2 Q Okay. You can just --

3 THE WITNESS: I'm going to read Dr. Geffen's
4 testimony, and you tell me if I read it correctly.

5 If you don't mind --

6 THE COURT: And I'm sorry. Page, please?

7 MR. GORMAN: 157.

8 THE COURT: Thank you.

9 MR. GORMAN: Of 3/11/97.

10 "If you don't mind, I know this sounds like a
11 trivial point, but I would want to call that an impression
12 rather than a diagnosis because I, as a clinician, I think
13 it would be more responsible for me to withhold the
14 diagnosis until I had much more data and it's usually, I
15 think, a physician or a psychologist who treats a patient
16 that would be most responsible for making a diagnosis.

17 "And since my diagnosis, my diagnostic impression
18 is based on a limited amount of time with the patient and on
19 records which were not very thorough, I would rather say it
20 was an impression."

21 Did I read that correctly?

22 A Yes.

23 Q Now did you prepare Dr. Geffen before you called
24 him as a witness?

25 A I do not recall that specifically.

1 Q Would that have been your practice, to meet with
2 an expert on a capital case and review his testimony?

3 A It would be -- any time I would use an expert I
4 would want to talk to them before they testified.

5 Q Okay. And would you want to make sure you gave
6 the expert all the information they needed to render an
7 opinion?

8 A Yes.

9 Q And were you shocked when Dr. Geffen said this, or
10 did you know he was going to say this?

11 A Well, first, I don't recall. But in reading this,
12 it sounds to me -- and again I can't recall at the time --
13 but it sounds to me he, he didn't feel comfortable making a
14 diagnosis because he was not a treating physician or
15 psychologist.

16 Q So why would you call him as a witness?

17 A He was not called to treat Mr., Mr. Sharp. He
18 was, he was employed to try to give us some psychological
19 assessment of Mr. Sharp.

20 Q So he was testifying to give the judge a
21 psychological assessment?

22 A Yeah.

23 Q Without a diagnosis?

24 A Well, it's not my place to tell him whether he has
25 to make a diagnosis or not.

1 Q Well, isn't it your decision whether to call him
2 as a witness or not?

3 A Yes.

4 Q Why would you call him if he can't make a
5 diagnosis, if you're offering him on an issue of Sharp's
6 mental health?

7 A Well, he was a qualified expert. He rendered the
8 best opinion he could render.

9 Q Well, he didn't give an opinion, did he?

10 A Only impression. He did not make a diagnosis.

11 Q Right. And he could not testify to a reasonable
12 degree of certainty within his field that Mr. Sharp was
13 suffering from agitated delirium, correct?

14 A I don't know about that, Mr. Gorman.

15 Q Well, the record will, will -- the transcripts are
16 self-evident?

17 A The transcripts are self-evident.

18 Q And you called him as a witness when he could
19 offer no opinion that would assist the defense; isn't that
20 right?

21 A Well, that wasn't my belief.

22 Q Now Mr -- or Dr. Geffen, aside from not having
23 enough data and aside from having records that were not
24 thorough, Dr. Geffen made mistakes in his factual recitation
25 of Mr. Sharp's history; isn't that right?

1 A I don't know. I do not know.

2 Q Did you personally conduct an investigation of
3 Toni Phelps' background?

4 A No.

5 Q Do you know who Toni Phelps is?

6 A Yes.

7 Q Who is Toni Phelps?

8 A Mr. Sharp's mother.

9 Q Okay. Did you generate any memorandum requesting
10 that her mental health, her parenting skills, her -- whether
11 she had a history of alcoholism or anything like that be
12 investigated?

13 A No.

14 Q And Dr. Geffen testified on page 116 and 117 of
15 the March 11, '87 aggravation/mitigation hearing that Kyle
16 Sharp's mother, referring to Toni Phelps, made a valiant
17 effort as a single mother. Isn't that what he testified
18 too?

19 A I do not know.

20 Q Well, assume that he did testify -- Dr. Geffen,
21 your witness -- that Toni Phelps made a valiant attempt as a
22 single mother to raise Mr. Sharp. Assume that's true.
23 Okay?

24 A Yes.

25 Q Well, that's a positive, complimentary statement

1 about her parenting skills and her effort as a mother,
2 wouldn't you agree?

3 A Yes.

4 Q Did you know Toni Phelps used to physically
5 assault Kyle Sharp?

6 A I don't recall.

7 Q Do you know that Toni Phelps attacked her step --
8 her husband, her second husband with a knife?

9 A I don't recall.

10 Q Do you know that Toni Phelps beat her unconscious
11 step husband -- or second husband with a Coke bottle over 30
12 times in the head?

13 A I do not know that.

14 Q Were you aware that these violent acts that I
15 referenced were committed in the Sharp household in front of
16 Kyle and his brothers, and at least Kyle was aware of them
17 even if he wasn't there?

18 A No.

19 Q Were you aware that Toni Phelps knew that Kyle was
20 being sodomized by his stepbrother Barry Phelps?

21 MS. LAM: Objection, your Honor. That misstates
22 the evidence.

23 THE COURT: I'm sorry. Madam court reporter,
24 would you read the question back?

25 (Whereupon, the court reporter reads aloud the

1 requested material.)

2 THE COURT: Overruled. You may answer.

3 THE WITNESS: I think through Mr. Sharp.

4 BY MR. GORMAN:

5 Q Which would have no weight if offered into
6 evidence at a capital sentencing proceeding, correct?

7 A Without any corroboration in and of itself,
8 Mr. Sharp's statement, that's correct.

9 Q Okay. Did, did, did Dr. Streed witness any of
10 these acts of abuse to Mr. Sharp?

11 A No.

12 Q Now if Dr. Geffen testified that Sharp's mother
13 made a valiant effort as a single mother, assuming what I
14 just recited is true, that would be inconsistent with the
15 truth; wouldn't it?

16 A Well, it depends on -- I guess she felt -- may
17 have felt that she did. Others may have felt differently.
18 I don't know where that came from.

19 Q He didn't testify that she felt she made a valiant
20 effort. He characterized her effort as valiant.

21 A Mr. Sharp did? Or who? Or excuse me. Dr. Geffen
22 did?

23 Q When you called him as a witness -- you remember
24 calling Dr. Geffen as a witness on March 11th of '97?

25 A I remember calling him as a witness, yes.

1 Q And he testified about what Mr. Sharp told him.
2 Right?

3 A And other things that were provided to him and
4 that he -- other information that he gathered himself.

5 Q Okay. Is Dr. Geffen an investigator?

6 A He is a forensic psychologist.

7 Q And does he have an office in Tucson?

8 A He did at the time, yes.

9 Q And post-conviction, up through November of '96,
10 you had no intention of calling Dr. Geffen as a witness;
11 isn't that right?

12 A I'm confused about your time frame, Mr. Gorman.
13 Could you put that in perspective for me? November of 1996
14 means nothing to me.

15 Q Okay. Well, do you recall that Sharp was
16 convicted in July of '96 of first degree murder?

17 A I do not recall the date.

18 Q Okay. But you recall him being convicted of first
19 degree murder?

20 A And felony murder, yes.

21 Q All right. And there were a period of months that
22 went by where you, your office, filed motions to continue
23 the capital sentencing proceeding. Do you recall that?

24 A Not specifically. But I don't have any reason to
25 dispute it.

1 Q On October 28th of 1996 there was a proceeding
2 before Judge Borowiec on the Sharp matter that was attended
3 by yourself and Ms. Macartney, correct?

4 A I don't recall.

5 Q And your office had filed a motion to continue the
6 aggravation/mitigation hearing, correct?

7 A I don't recall.

8 Q And Ms. Macartney stated expressly in your
9 presence, "We are not going to call Dr. Geffen. We decided
10 not to use Dr. Geffen."

11 Do you remember her saying that?

12 A I do not.

13 Q Do you remember her stating again on page 5, "If
14 we were going to call Dr. Geffen, I would have no problem.
15 But we are not calling him."

16 Remember her saying that three times at that
17 proceeding, that you and she were not calling Dr. Geffen?

18 A No.

19 Q Let's see if a transcript will refresh your
20 recollection. Can you look at the October 28th, 1996
21 transcript in this case?

22 A Yes.

23 Q Can you read silently to yourself what I've
24 underlined in red?

25 A (Witness complies.) Would you like me to continue

1 to read through the whole transcript?

2 THE COURT: I guess the question is how far do you
3 want him to read?

4 MR. GORMAN: There's only one more page, Judge.
5 And I asked him to just read the underlined-in-red portions,
6 which I think he's reading the whole thing. But if he just
7 reads those --

8 THE WITNESS: It helps me put things in
9 perspective.

10 Okay. I'm done. Oh. Okay. I've read them.

11 BY MR. GORMAN:

12 Q Okay. Do you agree that you were present on
13 October 26 -- or 28th, rather, of 1996?

14 A Yes.

15 Q And do you agree that Ms. Macartney announced
16 three times in your presence that you were not calling
17 Dr. Geffen --

18 A Yes.

19 Q -- as a witness at the aggravation/mitigation
20 hearing?

21 A Yes.

22 Q Then there was another appearance on November 12th
23 of 1996 where once again there was a motion to continue.
24 Correct?

25 A I don't recall.

1 Q And at that proceeding Ms. Macartney responded to
2 the court, and the court stated, "You don't plan to use
3 Dr. Geffen?" And Ms. Macartney said, "I'm not using
4 Dr. Geffen at the sentencing."

5 Do you recall her saying that?

6 A I do not.

7 Q Do you have any recollection of intending to use
8 Dr. Geffen in November of 1996 at the capital sentencing
9 proceeding?

10 A I have no recollection of that.

11 Q So you don't know who you were going to use as
12 witness at the capital sentencing proceeding as of November
13 of '96?

14 A I don't have any independent recollection of that.

15 Q You don't know?

16 A I don't recall.

17 Q And you agree -- tell me if I read this correctly,
18 the transcript of November 12th of '96 -- that you were
19 present?

20 A Yes.

21 Q And Ms. Macartney, in response to the court, and
22 the court stated, "You don't plan to use Dr. Geffen?",
23 Ms. Macartney said, "I'm not using Dr. Geffen at the
24 sentencing." That's what she said, right?

25 A Yes.

1 Q So it appears from the transcript that there was
2 no plan as of November '96 to use Dr. Geffen at the capital
3 sentencing proceeding.

4 A That's what it appears like.

5 Q Okay. What was the plan in November of '96 that
6 you authored to introduce substantial evidence of mitigation
7 calling for leniency?

8 A I don't recall.

9 Q Your first and the only capital defense trial, and
10 you have no recollection of what you planned to do at the
11 capital sentencing proceeding?

12 A Due to the amount of time that has passed,
13 Mr. Gorman, I do not have any specific recollection.

14 Q Now --

15 (Discussion off the record between counsel.)

16 BY MR. GORMAN:

17 Q Okay, Mr. White, I'm going -- it's marked as an
18 exhibit; the police negligence memorandum is marked as an
19 exhibit number.

20 And perhaps, Stephanie, could you tell me what the
21 exhibit number is for the record?

22 Oh, you found it? All right. Strike that. We
23 found it. It's Exhibit 136.

24 Can you take a look at that?

25 THE COURT: And is Exhibit 136 in evidence?

1 THE CLERK: Yes, it is.

2 THE COURT: Thank you.

3 (Witness reviewing document.)

4 MR. GORMAN: Can I?

5 THE WITNESS: Yes.

6 BY MR. GORMAN:

7 Q Now you signed that document?

8 A Yes.

9 Q And this was your theory of mitigation that you
10 were going to use at the capital sentencing proceeding?

11 A It was one novel approach.

12 Q Okay. And when you say "novel", are you implying
13 it was meritless?

14 A First of its kind that I knew of.

15 Q Well, no. The question is was it meritless, or do
16 you think it had merit?

17 A I think it had merit.

18 Q Under the law?

19 A Yes.

20 Q Okay. And we previously discussed that any
21 mitigation you offered at the aggravation/mitigation
22 hearing, that you had the burden to prove by a preponderance
23 of the evidence; right?

24 A Yes.

25 Q Now was there a factual basis -- I'm not asking

1 you what it was. I just want to know was it a factual basis
2 for you to prove that but for the police failing to enter
3 the room on the first occasion they were there that she
4 died?

5 A Nobody knew the exact time of death, so that
6 was -- the point of it, of course, was that there would have
7 possibly been the -- the, the, the whole thing was that if
8 the police had lawfully entered the apartment -- the hotel
9 room, when they first showed up, there was probably a better
10 chance that she would have been found alive than dead.

11 Q Is a better chance proof by a preponderance of the
12 evidence?

13 A No.

14 Q And once again, I'll ask the question. You made a
15 very long kind of narrative answer. Did you have any
16 evidence that the victim was alive and in room 204 at the
17 time the first officer responded?

18 A Not that I recall.

19 Q So are you saying that there's a possibility there
20 was evidence and you just don't remember it?

21 A I don't remember exactly if there was a -- if the
22 coroner, the pathologist, whatever, came up with an
23 approximate time of death. I do not recall that
24 specifically.

25 Q All right. Assume these facts are true: That

1 Dr. Flores testified in the guilt phase of Sharp's trial.

2 All right. Do you recall the pathologist
3 testified in the guilt phase?

4 A I believe he did, yes.

5 Q Okay. Do you have any doubt that he did? I mean,
6 don't you remember the pathologist named Dr. Flores?

7 A Oh, wait a minute now. I remember the
8 pathologist. The question was do I remember that he
9 testified at the trial. And I don't have any independent
10 recollection of that. I assume that he probably did.

11 Q Okay. And do you recall that he testified at the
12 aggravation/mitigation hearing?

13 A When I looked at the transcript I do note that he
14 was one of the witnesses.

15 Q Okay. And do you remember that he testified it
16 would take three to five minutes to strangle someone?

17 A I don't remember that precisely.

18 Q All right. Assume that fact is true, that it's
19 part of the record. All right?

20 A Yes.

21 Q Do you remember that Dr. Flores testified that he
22 could not give a time of death?

23 A I do not recall that.

24 Q Will you assume that fact is true?

25 A Yes.

1 Q And do you recall that Dr. Flores testified that
2 she died as a result of strangulation because a bone was
3 broke in her throat?

4 A I recall that at some point in time. I don't
5 remember if that was at trial or prior to trial. But I do
6 remember that, yes. A hyoidal bone.

7 Q H-Y-O-I-D?

8 A I believe that's the spelling, yes.

9 Q And would you assume that he would testify to that
10 at the aggravation and mitigation sentencing?

11 A Yes.

12 Q And we'll assume this fact is true, and it is
13 borne out by the record, that there is no -- that there is
14 no testimony from anyone as to the time that she died?

15 A All right.

16 Q And would you agree that Mr. Sharp was found in a
17 locked room with the body and that she had been beaten and
18 sodomized and strangled?

19 A Yes.

20 Q And would you agree that there was no evidence
21 from any source on the record or off the record that she had
22 died as the result of any other reason other than by the
23 hands of Mr. Sharp?

24 A As I recall, that's the case, yes.

25 Q Okay. And you agree you had the burden of proof

1 at a capital sentencing, right?

2 A Yes.

3 Q And you agree that was by a preponderance of the
4 evidence, right?

5 A Yes.

6 Q And you agree that if you failed to meet your
7 burden of proof the mitigator you were offering would not be
8 considered?

9 A Yes.

10 Q And you had no evidence that she was alive when
11 the first officer responded at the Sands Motel?

12 A There was no evidence she was alive.

13 Q So your negligence theory was assured to fail
14 because she died at the result of Mr. Sharp's actions and
15 you couldn't prove that the police could have prevented it,
16 because you couldn't prove that she was alive the first time
17 they came to the room. Right?

18 A I couldn't prove it, nor could it be disproven.

19 Q Well, what's your burden? Does the state have a
20 burden to disprove mitigation that you have not proven?

21 A No.

22 Q Did you have a burden to prove your mitigation?

23 A Yes.

24 Q So what does that mean, it couldn't be proven or
25 disproven? It means nothing to Mr. Sharp. It just means

1 that you offered a theory that couldn't be supported with
2 any evidence that you had. Isn't that what that means?

3 A Perhaps.

4 Q So this had no merit factually, your police
5 negligence theory, because you had no evidence she was alive
6 when the police first responded; right?

7 A I believe that's your assessment, Mr. Gorman.

8 Q What evidence did you have that she was alive --
9 let me finish my question. What evidence did you have that
10 she was alive at the time of the first officer responding?

11 A None.

12 MS. LAM: Asked and answered, your Honor.

13 THE COURT: Sustained.

14 BY MR. GORMAN:

15 Q So how could the judge as a matter of law ever
16 find that the police were negligent as a mitigating factor
17 if you didn't prove that she was alive when they first
18 responded?

19 MS. LAM: Objection, your Honor. It's
20 speculation.

21 THE COURT: Overruled. You may answer if you can.

22 THE WITNESS: We believed when that motion was
23 filed that it was -- that the motion had merit.

24 BY MR. GORMAN:

25 Q I didn't ask you that. Could you read -- Judge,

1 could I have the question I asked him read back?

2 THE COURT: Yes, please read it back.

3 (Whereupon, the court reporter reads aloud the
4 requested material.)

5 THE WITNESS: I'm not sure that could be proven as
6 a mitigating factor.

7 BY MR. GORMAN:

8 Q And you knew before the sentencing --

9 A No. Again, that was a theory of our case that,
10 that we offered at the sentencing hearing, as a theory of
11 mitigation.

12 Q Okay. Well, the police conduct in this case was
13 not and is not relevant to any aspect of Mr. Sharp's
14 background, correct?

15 A Correct.

16 Q And the Arizona Supreme Court states: The victim
17 died because appellant strangled her, not because police
18 delayed their entry into appellant's motel room.

19 Do you disagree with that statement?

20 A I don't disagree with it.

21 Q Now do you agree or disagree that preparation for
22 a capital sentencing proceeding begins immediately upon
23 counsel's appointment?

24 A I would say yes, that it is one of the first
25 things that should be considered is the possibility of

1 conviction.

2 Q No, I didn't ask you what should be considered
3 regarding a possibility of conviction. I asked you isn't
4 one of the single most important things for a capital
5 defense lawyer to do immediately upon appointment is to
6 begin to prepare for a capital sentencing proceeding?

7 A I don't entirely agree with that.

8 Q So you disagree that a capital defense attorney
9 should not begin preparing for a capital sentencing
10 proceeding immediately upon appointment? That's your
11 position?

12 A No, that's not my position. That's not how I
13 answered. I said I didn't entirely agree with that. There
14 are priorities.

15 Q Okay. When did you start preparing for proving
16 that Kyle David Sharp was sodomized by his stepbrother?

17 A There was no proof of that, Mr. Gorman. We
18 covered that.

19 Q No. I asked you when you started preparing to
20 prove that.

21 A I don't recall specifically when that process was
22 started. I think it would have begun sometime after the
23 first interview with Mr. Sharp.

24 Q And what did you do personally to investigate,
25 develop, to use in presentation at a capital sentencing, the

1 mitigator that he was sexually sodomized by his stepbrother?
2 What did you do and when did you start?

3 MS. LAM: Objection, your Honor, asked and
4 answered as well.

5 THE COURT: Overruled. You may answer.

6 THE WITNESS: I don't recall exactly. But the
7 process would be to try to gather information.

8 BY MR. GORMAN:

9 Q I simply asked you what you did personally. If
10 you don't remember, then that's the answer; you don't
11 remember. You can tell me what you did personally.

12 A Personally I do not recall.

13 Q And what did you do personally to investigate and
14 develop and present the allegation that Sharp was physically
15 abused by his stepfather?

16 A I don't recall.

17 Q And what did you do personally to investigate and
18 develop for possible presentation in a capital sentencing
19 proceeding that Sharp's parents were alcoholics?

20 A I don't recall.

21 Q And what did you do personally to investigate and
22 develop for possible presentation in a capital sentencing
23 proceeding that Sharp had a long history of alcohol and drug
24 abuse?

25 A I don't recall.

1 Q Now did you secure the services of a pathologist
2 to consult with to review the medical examiner's findings,
3 to explore the possibility of establishing a time of death
4 of the victim?

5 A I don't recall.

6 Q Well, would a ledger of expenses spent by your
7 offer -- office on Sharp refresh your recollection as to
8 what you did and did not spend?

9 MS. LAM: Objection, your Honor. I haven't seen
10 this.

11 MR. GORMAN: It's not a basis for an objection.

12 THE COURT: Well, I haven't seen it either, but
13 he's not being shown it. It's not been offered. Overruled.

14 The question is whether a ledger or ledgers would
15 refresh your recollection.

16 THE WITNESS: Perhaps it would, yes.

17 BY MR. GORMAN:

18 Q Well, the fact is you never spent any money on a
19 pathologist, correct?

20 A I don't recall.

21 Q That won't be something you would remember?

22 A It's not something I remember.

23 Q And although Judge Borowiec told you how to apply
24 for funds, you never applied with Judge Borowiec for a
25 pathologist, correct?

1 A I don't recall applying to Judge Borowiec for any
2 money.

3 Q Well, let's limit it to a pathologist. You don't
4 recall asking him for a pathologist?

5 A I don't recall.

6 Q And a pathologist would have been useful to act as
7 a consultant to rebut the only aggravator alleged of
8 heinous, cruel, and depraved, which was based on the state's
9 pathologist. Isn't that right?

10 A It was based -- it would be based on the pathology
11 report, yes.

12 Q Are you familiar with Ake versus Oklahoma?

13 A Yes. I recall the case name.

14 Q And that's A-K-E versus Oklahoma, 470 U.S. 68?

15 A I don't know the citation.

16 Q And that was an opinion authored by The Honorable
17 Thurgood Marshal in 1985. Correct?

18 A I do not know.

19 Q And that stands for the proposition that an
20 indigent defendant is entitled to reasonable and necessary
21 services under the due process clause to marshal his
22 defenses. Isn't that what that case stands for?

23 A I don't recall that. But I don't disagree with
24 that.

25 Q And there's a codification of that constitutional

1 principle in A.R.S. 13-4013, sub B, correct?

2 A I do not know.

3 Q You weren't aware that there's a statute, and
4 there was statute prior to 1995, to allow court orders for
5 funds for indigent defendants? You didn't know that?

6 A I don't recall that, Mr. Gorman.

7 Q And your career in criminal defense was
8 representing indigent defendants?

9 A Primarily, yes.

10 Q And you didn't know there's a statute that
11 permitted you to go to the court and get funds?

12 A That's not what I answered, Mr. Gorman. I
13 answered I do not recall that statute.

14 Q Now you're not trained in pathology, correct?

15 A That's correct.

16 Q And you didn't have any experts review the
17 testimony of Dr. Flores or his medical reports who had
18 expertise in pathology, correct?

19 A I don't recall.

20 Q And, and you offered no evidence at the capital
21 sentencing proceeding or in the guilt phase to rebut
22 Dr. Flores' testimony, correct?

23 A I don't recall.

24 Q The sentencing, aggravation/mitigation hearing, of
25 March 11, '97 was a one-day hearing, correct?

1 A As I recall, yes.

2 Q And the state called one witness, Dr. Flores, the
3 pathologist, correct?

4 A Yes.

5 Q You called two witnesses, Dr. Streed and
6 Dr. Geffen, correct?

7 A Yes.

8 Q There were no other witnesses called other than
9 the victim's husband, correct?

10 A I don't even recall that.

11 Q You didn't call any witnesses -- well, Dr. Streed
12 wasn't called to rebut Dr. Flores' testimony on the facts
13 that lended themselves to finding them an aggravator, was
14 he?

15 A No.

16 Q And Dr. Geffen certainly wasn't. He was a
17 psychologist. Right?

18 A Correct.

19 Q So you called no witnesses to rebut the state's
20 evidence offered in aggravation?

21 A I don't recall what the state's evidence was in
22 aggravation.

23 Q Well, their evidence was that she suffered extreme
24 pain and -- in the process of being strangled to death,
25 wasn't it? Do you have trouble remembering that?

1 A I don't remember that precisely, Mr. Gorman. But
2 I would not contest that.

3 Q Okay. But you called no witness to challenge
4 Dr. Flores' testimony as to the pain and suffering she
5 experienced. Correct?

6 A I don't recall his testimony. And as I've said, I
7 don't recall hiring any expert to rebut his findings.

8 Q So with no rebuttal, the aggravator was going to
9 be proven, right?

10 A If that was the only evidence, then it would be
11 proven.

12 Q Okay. And with an aggravator that was proven,
13 then Mr. Sharp would be eligible for the death penalty,
14 correct?

15 A That would be one of the aggravating factors, yes.

16 Q That made him eligible for the death penalty,
17 correct?

18 A That's correct.

19 Q And if counsel for the defense, for Mr. Sharp,
20 failed to introduce evidence that was sufficiently
21 substantial to call for leniency, there would be no evidence
22 outweighing the aggravator. Correct?

23 A You want to --

24 MS. LAM: Your Honor, objection. That misstates
25 the law. It could be found also from the trial evidence.

1 THE COURT: Well, could you read back the
2 question, please?

3 THE WITNESS: Yes, please.

4 (Whereupon, the court reporter reads aloud the
5 requested material.)

6 THE COURT: I'll sustain the objection.

7 MR. GORMAN: Judge, I didn't limit it to the
8 sentencing hearing.

9 THE COURT: Well --

10 MR. GORMAN: And I'll expressly state that it
11 applies to both the guilt and sentencing phase.

12 THE COURT: But wasn't your question directed at
13 what defense counsel had to do? I took the objection to
14 state that the court could have found evidence to outweigh
15 from other things presented.

16 MR. GORMAN: Okay, Judge. I can start -- I'll
17 withdraw the question and start over.

18 THE COURT: Very well. Go ahead.

19 BY MR. GORMAN:

20 Q Let's back up a little bit. Now as lead counsel
21 what was your theory at the guilt phase as to defending
22 Mr. Sharp at the capital sentencing phase that was to
23 follow?

24 A The only thing that I can recall that might apply
25 to both --

1 Q What did you put at issue with the jury at the
2 guilt phase in your mini opening statement to the jury?

3 A One, I don't recall giving a mini opening
4 statement. The theory of the case?

5 Q The theory of your defense.

6 A The theory of your defense. Our defense.

7 Q Are you disputing --

8 A It was, you know -- obviously, the guilt phase
9 was, was an extremely tough mountain to climb because of the
10 evidence.

11 Q I didn't ask you if it was a tough mountain to
12 climb. What was your theory articulated at the guilt phase
13 that provided some defense at the capital sentencing
14 proceeding?

15 A I don't recall.

16 Q As a certified death penalty lawyer can you
17 explain to the court the concept of front-loading
18 mitigation?

19 A I don't -- I'm not familiar with the term.

20 Q Never heard of it?

21 A No.

22 Q At the guilt phase in your opening statement did
23 you dispute that Ms. Coughlin died in Cochise County?

24 A No.

25 Q In the, in your guilt phase opening statement did

1 you dispute that it happened, her death, in room 401 of the
2 Sands Motel?

3 A I don't recall.

4 Q Did you dispute that Mr. Sharp was in the hotel
5 room with her when she died?

6 A I don't recall.

7 Q Do you remember voir dire?

8 A I do not.

9 Q Were you familiar with the concept that you begin
10 fashioning your capital defense at voir dire?

11 A This was a, um -- at the time, of course, there
12 was no sentencing jury, only sentencing judge.

13 Q I understand that. Is the judge listening to the
14 voir dire?

15 A Yes.

16 Q And two jurors came forward after Ms. Macartney
17 gave her opening statement and complained about the quality
18 of her defense counsel, correct?

19 A Yes, I recall that.

20 Q In fact, it was Juror Rudolfo Bernal, B-E-R-N-A-L,
21 was one of the jurors, right?

22 A I don't recall.

23 MS. LAM: Objection, your Honor. I fail to see
24 the relevance.

25 THE COURT: I was wondering about that myself.

1 How, how is this or that last question relevant to the
2 issues here?

3 MR. GORMAN: Did anything occur. And I was going
4 to address it in a question, if I may.

5 THE COURT: I'll let ask you the next question.
6 Go ahead.

7 BY MR. GORMAN:

8 Q Did anything on or off the record that you or
9 Ms. Macartney did that you can offer any explanation as to
10 why these jurors would come forward and complain about the
11 quality of a capital defendant's lawyers at voir dire?

12 MS. LAM: Same objection, your Honor.

13 THE COURT: I'll allow the question as far as it
14 goes. The question asks did anything occur off the record
15 that would explain it. You may answer yes or no.
16 Overruled.

17 THE WITNESS: I don't recall.

18 BY MR. GORMAN:

19 Q If anything happened off the record, that's what
20 you don't recall?

21 A That's correct.

22 Q Now, so any investigation you personally did in
23 Indiana -- which you don't remember what it was --

24 MS. LAM: Objection, your Honor, we've already
25 established --

1 MR. GORMAN: I haven't finished my question.

2 THE COURT: Let him finish the question, and then
3 I'll rule on any objection.

4 BY MR. GORMAN:

5 Q -- was done telephonically, correct?

6 THE COURT: I want to make sure I heard the whole
7 question. Any investigation he did was done telephonically;
8 that is, investigation in Indiana?

9 MR. GORMAN: Right.

10 THE COURT: Is there an objection?

11 MS. LAM: No objection.

12 THE COURT: Okay. You may answer.

13 THE WITNESS: I don't have any specific
14 recollection of doing any investigation myself in Indiana.

15 BY MR. GORMAN:

16 Q Okay.

17 A But I did not go to Indiana.

18 Q So you have no recollection talking to anyone even
19 on the phone who was in Indiana?

20 A Not specifically, no.

21 Q Do you have a general recollection of speaking to
22 people in Indiana on the phone?

23 MS. LAM: Objection, your Honor. He's already
24 testified that he has no recollection.

25 THE COURT: Sustained.

1 BY MR. GORMAN:

2 Q And your total long distance bill on this entire
3 case was \$21.16, correct?

4 A I do not recall that.

5 MS. LAM: Objection, your Honor. Is that
6 information in evidence?

7 THE COURT: Well, it would have been if he had
8 agreed to it. But it isn't because he doesn't remember. I
9 mean is -- has the telephone bill been marked, or do you
10 intend to offer it?

11 MR. GORMAN: We have a rebuttal witness, Judge.

12 THE COURT: Well, we'll take that up at the time.
13 But right now all we have is he doesn't remember about the
14 phone bill. Any objection is overruled. The answer may
15 stand.

16 Why don't we take the afternoon recess at this
17 time. It will be about 15 minutes. Recess.

18 (A recess is taken. Thereafter, proceedings
19 continue as follows.)

20 THE COURT: Please be seated. Good afternoon. We
21 are continuing again with Kyle David Sharp, CR95000271.
22 Counsel are present. Mr. Rohman is present. Mr. White is
23 on the witness stand.

24 Mr. Gorman, you may proceed with
25 cross-examination.

1

2

EXAMINATION CONTINUES

3

BY MR. GORMAN:

4

Q Mr. White, on March 11, 1997 at the aggravation/
5 mitigation hearing you were the only counsel present for
6 Mr. Sharp, correct?

7

A I don't recall.

8

Q At the March 11th of '97 aggravation/mitigation
9 hearing, Ms. Macartney did not attend, correct?

10

A I don't recall.

11

Q Would you look at the first page there of the
12 March 11, 1997 transcript that's in front of you?

13

A Yes.

14

Q And there's a section that says appearances?

15

A Yes.

16

Q And who's the only attorney it says appearing for
17 the defendant?

18

A Myself.

19

Q Does it mention anyone else?

20

A No.

21

Q And do you doubt that Ms. Macartney was not
22 present?

23

A I have no reason to believe that she was there, at
24 least not in a capacity as representing Mr. Sharp.

25

Q Well, she wasn't present, was she?

1 A I don't see her in the appearances, that's
2 correct.

3 Q And after the hearing concluded on March 11th of
4 1997, transcripts were not prepared until April 28th of
5 1997, correct?

6 A I don't recall.

7 Q Could you look at the last page of that official
8 court document that is in front of you?

9 A Yes, I will.

10 Q And what is the date indicated that that
11 transcript was prepared?

12 A 28th of April, 1997.

13 Q And the capital sentencing proceeding occurred
14 April 7th of 1997, correct?

15 Mr. White?

16 A I'm trying to determine. That date is not
17 familiar to me. I see the transcript of March 11th, 1997.

18 Q Okay. Well, Mr. Sharp wasn't sentenced to death
19 on the date of the aggravation/mitigation hearing.

20 A No, that's correct.

21 Q And would it refresh your recollection if you saw
22 the date of the transcript?

23 A Yes.

24 Q Could you take a look at the transcript that's
25 marked April 7th of '97?

1 A Yes.

2 Q And does that refresh your recollection of when
3 the sentencing occurred in front of Judge Borowiec?

4 A One second, please.

5 Yes, it does say in the interior: This is the
6 time for sentencing.

7 Q Okay. So on March 11th Ms. Macartney was not
8 present, you did the aggravation/mitigation hearing, and on
9 April 7th she was present; correct?

10 A She was present on April 7th in the appearances,
11 yes.

12 Q And on April 7th, that was a fairly significant
13 day because that was the day the judge was going to decide
14 whether to sentence Mr. Sharp to life or death, correct?

15 A That's correct.

16 Q You made no statements at that proceeding,
17 correct?

18 A I don't recall.

19 Q And Ms. Macartney argued the case for life,
20 correct?

21 A I don't recall.

22 Q The court stated: Mr. White. And your response
23 was: I would turn this over to my co-counsel,
24 Ms. Macartney, to address the court at this time.

25 Do you recall that?

1 A I do not.

2 Q Did I read that correctly, that the court said
3 Mr. White, and you deferred it to Ms. Macartney?

4 A Yes.

5 Q And could you leaf through the pages where
6 Ms. Macartney speaks and see if that refreshes your
7 recollection that she's the one who made the argument for
8 life?

9 A Yes. (Witness reviews document.)

10 Q Okay. Could you turn to page 7?

11 A Yes.

12 Q And see where Ms. Macartney ends her statement:
13 Thank you, sir.

14 And then the court turns to Mr. Sharp for a
15 statement?

16 A Yes.

17 Q Does it appear that Ms. Macartney made the
18 argument for Mr. Sharp on that date and you did not?

19 A Yes.

20 Q And nowhere in the transcript you read or in
21 anywhere in the argument that Ms. Macartney made does she
22 identify any evidence that was introduced and argued that
23 was proven by a preponderance of the evidence, correct?

24 A No.

25 Q And nowhere in that transcript does Ms. Macartney

1 argue that because evidence that you presented at the
2 aggravation/mitigation hearing was proven by a preponderance
3 of the evidence that the court should consider it
4 substantial and grant leniency when weighing the mitigation
5 against the aggravator; correct?

6 A That's a long sentence, Mr. Gorman. Could you --

7 Q Well, let's do it this way. And take your time.
8 Is there any -- did you tell Ms. Macartney before that
9 sentencing to argue that the mitigator of sexual abuse had
10 been proven by a preponderance of the evidence?

11 A I don't recall that.

12 Q Did you argue on March 11th to Judge Borowiec that
13 the mitigator of sexual abuse had been proven by a
14 preponderance of the evidence?

15 A I don't recall that.

16 Q Did you argue on March 11th and point to a
17 specific fact that you had made part of the record that
18 called for approval finding that Mr. Sharp was sexually
19 abused?

20 A I don't recall that.

21 Q And the same answer would apply in any and all of
22 these other mitigators?

23 A Yes.

24 Q History; the answer is yes, right?

25 A Yes.

1 Q Okay. Now not only did Ms. Macartney fail to
2 argue the preponderance of the evidence, but at page 5, line
3 20, and 21, and 22, she argued that police negligence should
4 be considered because there was a possibility that
5 Ms. Coughlin was alive. Isn't that what she argues, a
6 possibility?

7 A Yes.

8 Q And a possibility is not proof by a preponderance
9 of the evidence, correct?

10 A It does say strong possibility, but I would say
11 that that does not equate to a proof.

12 Q So in your presence, as Mr. Sharp's -- at
13 Mr. Sharp's sentencing proceeding when the judge was going
14 to decide whether to sentence him to life or death, your
15 co-counsel made an argument that under the law she was
16 conceding you had not proven as mitigator?

17 A I don't see any concession there.

18 Q Well, she argued there was only a strong
19 possibility. That's not preponderance of the evidence, is
20 it?

21 A That's not any proof.

22 MS. LAM: Objection, speculation.

23 THE COURT: Well --

24 MS. LAM: Legal conclusion.

25 THE COURT: Well, actually the problem isn't

1 speculation. It's that it wasn't a question. It was a
2 statement.

3 The objection made is overruled. But do ask
4 questions. You may proceed.

5 BY MR. GORMAN:

6 Q You agree that a strong possibility is -- does not
7 equate to proof by a preponderance of the evidence?

8 A More likely than not.

9 Q More likely or not what?

10 A Preponderance of the evidence, more likely than
11 not.

12 Q Could you read back my question?

13 (Whereupon, the court reporter reads aloud the
14 requested material.)

15 THE WITNESS: Semantics. But it's not the same as
16 what I just stated as far as burden preponderance of the
17 evidence.

18 BY MR. GORMAN:

19 Q So Ms. Macartney arguing a strong possibility of
20 police negligence was not arguing proof by a preponderance
21 of the evidence, correct?

22 A She did not argue that, that's correct.

23 Q So in your presence Ms. Macartney and counsel for
24 Sharp made an argument that as a matter of law could not be
25 considered by the sentencing judge, correct?

1 A The standard as we've talked about is
2 preponderance of the evidence. Strong possibility is not
3 more likely than not.

4 Q If you could answer my question directly. An
5 argument was made by legal counsel for Mr. Sharp at the
6 capital sentencing proceeding. Correct?

7 A Yes.

8 Q And legal counsel for Mr. Sharp argued the court
9 should consider police negligence, correct?

10 A Yes.

11 Q And the reason legal counsel said that the court
12 should consider police negligence was because there was a
13 strong possibility that Ms. Coughlin was alive, right?

14 A Yes.

15 Q And that argument is not a legal reason for the
16 judge to find police negligence as a mitigator, correct?

17 MS. LAM: Objection, your Honor. It is for the
18 trier of fact to determine whether or not that burden has
19 been met.

20 THE COURT: I'll sustain that.

21 BY MR. GORMAN:

22 Q Did you have any conversations with Ms. Macartney
23 on how she was going to present her argument to the court on
24 the theory of police negligence?

25 A I don't recall.

1 Q Do you think that would have been important?

2 A I believe it would have been important to discuss
3 the aspects of her argument, yes.

4 Q Okay. But you don't have any recollection of the
5 discussion you had with her prior to April 7th --

6 MS. LAM: Asked and answered, your Honor.

7 MR. GORMAN: Could I finish my question?

8 THE COURT: Yes, go ahead and finish your
9 question.

10 BY MR. GORMAN:

11 Q You don't have any recollection of any
12 conversation you had with Ms. Macartney prior to April 7th,
13 1997 regarding what she was going to argue at the capital
14 sentencing, correct?

15 THE COURT: The objection is overruled. Go ahead.

16 THE WITNESS: I have no recollection.

17 BY MR. GORMAN:

18 Q Would it surprise you to know that she said just
19 before the sentencing she asked you what you were going to
20 argue, and you said you weren't going to argue anything?

21 A Yes, it would surprise me.

22 Q But you don't have any recollection, so you can't
23 dispute that, can you?

24 A Well, again, yes, that's right, I don't recall
25 that because that would be an absurd statement.

1 Q But that's just speculation? You don't have any
2 recollection of that?

3 A That I would say something like that? I can't
4 imagine I would say anything like that.

5 MS. LAM: Objection, your Honor, this is
6 argumentative.

7 THE COURT: Well, the last one was, but he did
8 answer. So I'll let the answer stand. You may proceed to
9 the next question.

10 BY MR. GORMAN:

11 Q And would it surprise you to know of the
12 conversation that you testified under oath that you have no
13 recollection that Ms. Macartney felt that she just had to
14 wing it because she was surprised that you weren't going to
15 argue anything and she offered to do it?

16 A I am surprised, yes.

17 Q Did you prepare a legal memorandum for her to
18 review after the March 11th aggravation/mitigation hearing?

19 A After the hearing?

20 Q Yes.

21 A Let's see, I -- a memorandum? I don't recall. I
22 don't recall.

23 Q Well, would it surprise you that Ms. Macartney
24 testified that she was given nothing to review in regards of
25 a memorandum of what occurred at the March 11th, '97 hearing

1 that you conducted and she was absent?

2 A I have no recollection of any conversation in that
3 regard.

4 Q Do you think that it's high quality and zealous
5 legal representation for one attorney to do the
6 aggravation/mitigation hearing and the second attorney to do
7 a sentencing hearing?

8 A I have no opinion on that, Mr. Gorman.

9 Q And I should have added to the question, when the
10 attorney who does the sentencing is not present at the
11 aggravation/mitigation hearing. You don't have any opinion
12 on that?

13 A I would think that would be best practice.

14 Q To have both attorneys present at both hearings?

15 A Yes.

16 Q Now I'm going to show you what's marked as Exhibit
17 138. And it's previously admitted into evidence. And at
18 the top is written "Death Penalty"?

19 A Yes.

20 Q Is that your handwriting?

21 A Yes.

22 Q And under that it is, is the words, two words:
23 "Another" -- A-N-O-T-H-E-R -- "Pathologist."

24 A Yes.

25 Q And that's your handwriting?

1 A Yes.

2 Q And underneath "Another Pathologist" is written
3 "Natman Schaye"?

4 A Yes.

5 Q And then below in a circle is California -- I
6 can't read the handwriting -- manual, volume two, mitigation
7 workbook?

8 A California death, yes, something, manual,
9 mitigation workbook.

10 Q Okay. And is that your handwriting?

11 A Yes.

12 Q And on the second page in the same file is:
13 Volume 2, Mitigation Workbook, California Death Penalty,
14 Mitigation Manual. Do you see that?

15 A Yes.

16 Q And that's Ms. Macartney's handwriting, correct?

17 A I don't know.

18 Q Now why did you write down California manual,
19 mitigation workbook, in the file labeled Capital
20 Representation Project?

21 A I don't recall.

22 Q And the California mitigation manual outlines
23 what's required in a mitigation investigation, correct?

24 A I would assume so, but I don't, I don't recall.

25 Q Did you get a copy of it?

1 A I don't recall.

2 Q Have you ever read the manual?

3 A I don't recall.

4 Q Other than the Sharp case, what permitted you to
5 represent in your resume as recently as this year that you
6 were certified as a first chair in a death penalty case?

7 MS. LAM: Objection, your Honor. Asked and
8 answered.

9 THE COURT: Sustained.

10 BY MR. GORMAN:

11 Q Have you ever authored a direct appeal?

12 A Yes. Authored as far as?

13 Q Wrote.

14 A Wrote. Written an appeal?

15 Q Uh-huh.

16 A As a judge or as a, as a litigant?

17 Q In Arizona as a licensed Arizona attorney.

18 A I recall one case.

19 Q And when was that?

20 A I think it was while I was the legal defender
21 here.

22 Q And what year?

23 A I don't exactly recall which year.

24 Q What was the court -- court of Appeals or the
25 Arizona Supreme Court -- you filed a brief in?

1 A Court of Appeals.

2 MS. LAM: Objection, your Honor. This is not
3 relevant.

4 THE COURT: What is the relevance, Counsel?

5 MR. GORMAN: Goes to whether he's competent to
6 defend Mr. Sharp.

7 THE COURT: I'll sustain the objection.

8 BY MR. GORMAN:

9 Q How who is Denise Young?

10 A I don't recall.

11 Q And who is the Capital Representation Project?

12 A Who, who was the Capital Representation Project?

13 Q In 1995.

14 A As I recall, it was an organization. I'm not sure
15 how it was funded. But it was to assist attorneys who had
16 death penalty cases.

17 Q Okay. And you called them up, correct?

18 A As I recall, I did.

19 Q Okay. And what did you ask them?

20 A What help they could offer generally.

21 Q Well, did you expect they were going to send
22 attorneys down and work on the case with you?

23 A No. I was looking for resources, I believe.

24 Q Okay. Did you ask them anything about what you
25 should do?

1 A I don't recall the exact conversation.

2 Q But resources was the subject of the conversation?

3 A I don't recall that as well.

4 Q I thought that's what you said, why you called
5 them, to see what resources they could provide.

6 A Yeah, that's why I called them. But what
7 resources, I couldn't tell you, Mr. Gorman.

8 Q Did they offer which resources you could request?

9 A I don't recall.

10 Q Wouldn't that be important to ask?

11 A I don't recall, Mr. Gorman.

12 Q No. I asked you if it would be important for you,
13 as the lead counsel of a death penalty, when you called
14 experts to ask what resources you should request. Would
15 that be something that would be important to you as capital
16 defense lawyer?

17 A Well, that was the reason I would have contacted
18 them, so, yes, it would be important.

19 Q So it was your presumption that you asked them
20 what resources you would have needed?

21 A Again, I don't recall the exact conversations,
22 so --.

23 Q Well, at the time you were appointed to defend
24 Mr. Sharp you had no training or experience in defending a
25 capital defendant, correct?

1 A Training? I don't recall. Experience, no.

2 Q Okay. You were, you were a rookie, you would
3 agree with that, wouldn't you, on capital defense?

4 A Yes.

5 Q And, but you also knew, and as a lawyer, that you
6 had one of the greatest obligations that an attorney can
7 have, and that's defending someone against a possible death
8 sentence; correct?

9 A Absolutely.

10 Q And you know yourself. Now would you have been
11 motivated and would you have made an attempt to consult with
12 experts in the field of capital defense?

13 A Yes.

14 Q And would you have requested what you needed as
15 core resources to properly defend your capital defendant?

16 MS. LAM: Objection, your Honor. This too is
17 asked and answered.

18 THE COURT: Overruled. You may answer.

19 THE WITNESS: Yes.

20 BY MR. GORMAN:

21 Q So the presumption, based on how you viewed you
22 would have practiced in this case, that you would have asked
23 the Arizona Capital Representation Project what resources
24 you needed to defend Mr. Sharp?

25 A Now that, again, that was the purpose for the

1 call.

2 Q Now did you write down the information about the
3 California Capital Death Penalty Mitigation Manual when you
4 had your conversation with the Arizona Capital
5 Representation Project?

6 A I don't recall.

7 Q Do you dispute that the, in 1995, the Arizona
8 Capital Representation Project told all lawyers who
9 contacted them, who asked, that they should get a mitigation
10 specialist?

11 MS. LAM: Objection, foundation, your Honor.

12 THE COURT: Sustained.

13 MR. GORMAN: Foundation? It's already part of the
14 record.

15 THE COURT: Well, I'm not sure if it is.

16 MR. GORMAN: Ms. Duran testified to that and also
17 Natman Schaye.

18 THE COURT: Ms. Lam, did they not testify along
19 those lines?

20 MS. LAM: Your Honor, I don't recall any testimony
21 that they were available in 1995 to provide any assistance.
22 I recall, in fact --

23 THE COURT: I think they did testify they were
24 available.

25 MR. GORMAN: The question didn't have to do with

1 assistance. It had to do with consultation.

2 THE COURT: I understand that. But I believe that
3 they did testify that they informed all inquiring attorneys
4 the need for a mitigation specialist.

5 I'll reverse my ruling. The objection is
6 overruled.

7 And you may answer if you remember what the
8 question was.

9 THE WITNESS: I don't. I'm sorry.

10 THE COURT: You want it read back, or you want to
11 ask it again?

12 MR. GORMAN: I ask that it be read back, your
13 Honor.

14 THE COURT: Please read back the question.

15 (Whereupon, the court reporter reads aloud the
16 requested material.)

17 THE WITNESS: I have no recollection of, um, any
18 mention of it, of a capital mitigation specialist.

19 BY MR. GORMAN:

20 Q Now are you familiar or were you familiar in 1995
21 with the United States Supreme Court decision in Bullington
22 versus Missouri?

23 A I don't recall.

24 Q Did you know in 1995 that the rules of evidence
25 that pertain at a guilt phase apply to the state in a

1 capital sentencing proceeding in proving their aggravator?

2 A I don't recall that specifically.

3 Q You don't recall whether you knew that or not?

4 A I don't recall that information, no.

5 Q So your answer is you don't recall in 1995 whether
6 you knew or not that the state was restricted by the rules
7 of evidence that applied to the guilt phase in proving their
8 aggravator at the sentencing phase?

9 A I don't recall that specifically, no.

10 Q Did you know that in 1996?

11 A I don't recall.

12 Q Did you know that in 1997?

13 A I don't recall.

14 Q Are you familiar with State versus Terrazas?

15 A The, the caption sounds familiar to me.

16 Q Are you familiar with 404(b) of the Rules of
17 Evidence?

18 A Yes.

19 Q Now if you proved with live testimony -- let's
20 assume you had subpoenaed Barry Phelps and he had testified,
21 as he did in front of this court, that he had sodomized
22 Mr. Sharp from the age of 14 to whatever year he said.

23 THE COURT: Not from the age of 14.

24 MR. GORMAN: From the age of four. Excuse me.

25 Thank you, your Honor.

1 BY MR. GORMAN:

2 Q From the age of four to whatever age, whether it
3 was 12 or 11 or later that he stopped.

4 If you had subpoenaed him and he had testified to
5 those acts that he testified he committed on a weekly basis,
6 what would be relevant in terms of rebuttal that the state
7 could offer to rebut that fact that he was sodomized?

8 A I have no idea, Mr. Gorman. I would think they
9 would have -- I have no idea.

10 Q Well, what would be -- how would it be relevant to
11 prove -- well, put it this way. The only factor that would
12 be at issue would be whether or not he had actually been
13 sodomized. Correct?

14 A I'm not sure I'm following your line of
15 questioning.

16 Q Well, you offered as a mitigating factor in your
17 pleading, and in arguments, that the court should consider
18 the fact that he was sodomized from the age of four to 12 or
19 13 by his stepbrother; right?

20 A I don't remember that specifically, but I think we
21 did offer the fact that he had been sexually abused from an
22 early age.

23 Q I'm going to read you a statement from the Arizona
24 Supreme Court. "Appellant reported to psychologists that he
25 was sodomized by an older stepbrother from the age of five

1 through 13." Okay?

2 A Uh-huh.

3 Q And that's at paragraph 29 of the court's
4 decision.

5 Below that in paragraph 41 the court goes on to
6 say --

7 THE COURT: I'm sorry. For the record, that was
8 paragraph 40, not 29. It was headnote 29, paragraph 40.

9 MR. GORMAN: Thank you, your Honor.

10 BY MR. GORMAN:

11 Q Headnote 41, the Arizona Supreme Court goes on to
12 say, "Appellant offered only self-reported evidence, which
13 the trial court could not corroborate."

14 So they didn't give that any weight, the
15 allegation that he had been sodomized, because it was only
16 self-reported.

17 A The Supreme Court?

18 Q And the trial court.

19 A Well, apparently the Supreme Court didn't know. I
20 don't know whether the trial court did or not.

21 Q I'm not asking you if the trial court did.

22 A You just asked me, Mr. Gorman. You said "and the
23 trial court." I can't speak for the trial court.

24 Q That's not a question. How would Mr. Sharp have
25 been prejudiced -- he obviously was prejudiced, would you

1 agree, because it wasn't corroborated, the fact he had been
2 sodomized; correct?

3 A We did not have, again, we did not have a live
4 witness. This is true.

5 Q I didn't ask you that. Was Mr. Sharp or was he
6 not prejudiced because your allegation that he was sodomized
7 was not corroborated?

8 MS. LAM: Objection. That's a legal conclusion.

9 THE WITNESS: I can't answer that.

10 THE COURT: The objection is?

11 MS. LAM: It's a legal conclusion for the trier of
12 fact.

13 THE COURT: In other words, for me. Sustained.

14 BY MR. GORMAN:

15 Q The fact that you alleged that Mr. Sharp was
16 sodomized was found not corroborated. Right?

17 MS. LAM: Objection, your Honor. This too has
18 been repeatedly asked and answered. The state will
19 stipulate to that.

20 MR. GORMAN: It's preliminary.

21 THE COURT: All right. As a preliminary matter
22 leading to something else, overruled.

23 BY MR. GORMAN:

24 Q Right? It wasn't proven?

25 A It's the opinion of the Supreme Court, was that it

1 wasn't corroborated.

2 Q Which means it wasn't proven, right?

3 A Probably equates to wasn't proven.

4 Q So that's the law of the case, right?

5 A Yes.

6 Q If the Supreme Court says so, that's law of the
7 case, right?

8 A Yeah, that's the law of the case.

9 Q Now if you had proven it -- let's have a
10 hypothetical. Let's say you called in Barry Phelps as a
11 witness. Let's say you introduced institutional records
12 that proved that fact, that corroborated. How would
13 Mr. Sharp be negatively impacted by you introducing proof of
14 what you say was true?

15 A On the sodomizing? Nothing. He would not have
16 been prejudiced by that.

17 Q So if you had called live witnesses and called
18 custodians of record through subpoena, then it would have
19 been in his interest to prove that he was sodomized?

20 A I believe, Mr. Gorman, that the strategy was to
21 present that information through witness statements and
22 through the testimony of experts.

23 Q I didn't ask you that. Would it or would it not
24 have been in Mr. Sharp's interest to call live witnesses and
25 introduce institutional documents and prove by a

1 preponderance of the evidence through those witnesses and
2 through those documents that he had been sodomized from five
3 to 13?

4 MS. LAM: Objection, your Honor. This too has
5 been asked and answered.

6 THE WITNESS: I can't answer that, Mr. Gorman.

7 THE COURT: Overruled. You may answer.

8 THE WITNESS: I can't answer that question.

9 BY MR. GORMAN:

10 Q Why not?

11 A I don't make those kind of decisions, Mr. Gorman.

12 Q I'm not asking you to make a decision.

13 A You're asking me to render a decision.

14 THE COURT: Wait. Let him ask the question. Go
15 ahead.

16 BY MR. GORMAN:

17 Q I'm asking you for your opinion. You were his
18 lawyer and devised a plan prior to the sentencing, correct?

19 A Yes.

20 Q And in your plan you didn't subpoena any live
21 witnesses?

22 A That's correct.

23 Q And the state, you understand, their allegation is
24 that your failure to do that is fine. Do you understand
25 that?

1 A Fine?

2 MS. LAM: I don't understand that. Objection to
3 what the state claims. The state has several arguments.

4 THE COURT: Well, I'm not sure they're saying it's
5 fine. But I'll sustain the objection.

6 BY MR. GORMAN:

7 Q Do you understand it's the state's position that
8 you had a legal, tactical, informed reason to refrain from
9 calling live witnesses and introducing documents into
10 evidence? Do you understand that's their position?

11 MS. LAM: Objection to mischaracterizing the
12 state's position.

13 THE WITNESS: I don't understand.

14 THE COURT: Well, I'll sustain the objection. Go
15 ahead and ask your next question.

16 BY MR. GORMAN:

17 Q Do you have any -- did you have any informed
18 tactical reason to fail to call a live witness to prove
19 Mr. Sharp was sodomized?

20 A Yes.

21 Q And what was -- how many reasons did you have?

22 A Probably one.

23 Q And what was that one reason?

24 A That the information was available through other
25 sources and in other ways, through interviews,

1 investigation.

2 Q But if -- but that's not on the record.

3 A We've covered that, Mr. Gorman. I understand
4 that.

5 Q So that was a mistake for you to fail to call
6 them?

7 A No. It was a mistake not to introduce the
8 documents at sentencing. The reason they were not called as
9 live witnesses is that was a tactical decision.

10 Q Well, would it -- you understand the concept of
11 the burden of persuasion?

12 A Yes, I do.

13 Q And what is the burden of persuasion?

14 A The burden of persuasion is that it's on the party
15 that has the burden of proof.

16 Q And you had the burden of proof and the burden of
17 persuasion?

18 A I had the burden of proof. I could persuade
19 somebody but not have any proof.

20 Q And this was a horrendous crime, wasn't it?

21 A Yes, it was.

22 Q And the state called live witnesses to prove their
23 case, correct?

24 A At which stage of the proceeding?

25 Q The entire guilt phase. They called eyewitnesses.

1 Didn't the state call eyewitnesses to prove the sodomy?

2 A At the sentencing stage?

3 Q At the guilt phase.

4 A Whose -- Mr. Sharp's sodomy or the victim? I'm
5 not, I am not following your questioning.

6 Q At the guilt phase did the state call live
7 witnesses to prove that the victim was sodomized by
8 Mr. Sharp?

9 A Yes.

10 Q Why do you think the state called live witnesses
11 at the guilt phase to prove that Mr. Sharp sodomized the
12 victim?

13 MS. LAM: Objection, your Honor. That's
14 speculation.

15 THE COURT: Sustained.

16 BY MR. GORMAN:

17 Q Did the state call live witnesses at the guilt
18 phase to prove Mr. Sharp had assaulted and strangled the
19 victim?

20 A Yes.

21 Q Was that powerful evidence?

22 A Yes.

23 Q And was the evidence that they presented regarding
24 him sodomizing the victim, was that powerful evidence?

25 A Yes.

1 Q And were the witnesses emotional?

2 A On that issue I don't recall anybody being
3 particularly outwardly emotional.

4 Q But that's very heavy, powerful stuff to hear from
5 live witnesses, the fact that she was sodomized, beaten,
6 strangled. Isn't that powerful, persuasive evidence?

7 A Yes.

8 Q And at a capital sentencing proceeding there's a
9 weighing of the proven aggravator against the proven
10 mitigators, correct?

11 MS. LAM: Objection, your Honor. That is legally
12 incorrect.

13 THE COURT: Well, sustained. Rephrase your
14 question.

15 BY MR. GORMAN:

16 Q How does a judge decide, once an aggravator is
17 proven, whether or not he's going to sentence a capital
18 defendant to death?

19 A I believe the standard at the time was that the
20 sentencing judge would, would weigh the aggravating factors
21 against the mitigating factors, or vice versa.

22 Q Okay. And Judge Borowiec had to make a decision
23 based on the evidence he heard, correct?

24 A Evidence he heard and what other information he
25 had available to him, which I don't really recall.

1 Q Well, the evidence he heard is evidence that is
2 submitted on the record, correct?

3 A Yes, what's in the, what's in the live testimony,
4 documents, so on and so forth, whatever is in the court
5 file, that's correct.

6 Q Well, not the court file. What's in the
7 transcripts and what's admitted into evidence, correct?

8 A I don't recall, Mr. Gorman, what, if any,
9 documents we submitted in or that we attached to motions. I
10 don't recall.

11 Q I didn't ask you that. I originally asked you
12 that the judge has to decide, when deciding to impose a
13 death sentence, based on the evidence that has been
14 presented to him that's on the record, correct?

15 A Yes.

16 Q Okay. And you, and then you answered and you
17 added, "and any other information he might have." Well,
18 that would be illegal, wouldn't it, for a judge to have
19 record -- a nonrecord information that he considered?

20 A Mr. Gorman, if you recall my answer, my answer was
21 I do not recall any other documents that may have been
22 attached to motions. I don't recall what documents, if any,
23 were attached to the presentence report. I don't recall.
24 But that would be all information that would be also
25 available to the court to consider.

1 Q Well, the court did not consider the presentence
2 report prior to sentencing or hearing the aggravation/
3 mitigation testimony, correct?

4 A I don't know that that would be possible.

5 Q Well, did you not move to have the court not
6 review the presentence report until after the capital
7 sentencing?

8 A I don't recall that specifically.

9 Q Okay. But, in any event, when the judge decides
10 whether he's going to sentence Mr. Sharp to life or death,
11 he considers the evidence that he heard in the guilt phase,
12 right?

13 A Yes.

14 Q And you agree that it was very powerful, and it
15 was a horrific crime, and he heard live testimony from the
16 state; correct?

17 A Yes.

18 Q And what was described by the Supreme Court as
19 horrific abuse that was alleged, that Mr. Sharp had
20 experienced, you felt it was high quality, zealous advocacy
21 to call no witnesses to that horrific childhood; is that
22 right?

23 A No.

24 Q So you think you failed to provide high quality,
25 zealous advocacy by failing to call live witnesses to prove

1 his horrific childhood?

2 A I don't agree with that. Again, the tactic was
3 to --

4 Q There's no question in front of you.

5 THE COURT: You've answered the question.

6 Go on with your next question.

7 BY MR. GORMAN:

8 Q Now Joyce Green was the woman who died in Indiana,
9 right?

10 A Yes.

11 Q There was no cause of death ever determined by
12 anyone, correct?

13 A Yes.

14 Q And there was no finding that she died as a result
15 of a homicide, correct?

16 A Correct.

17 Q Mr. Sharp was never arrested, correct?

18 A Correct.

19 Q Mr. Sharp was never questioned about it, correct?

20 A I don't know about that. I think he was
21 questioned about it.

22 Q Can you point to any --

23 MS. LAM: Objection, your Honor. That was a
24 misstatement by the -- about the evidence.

25 THE COURT: Well, by the witness. And the witness

1 answered that that that may be the case. The objection is
2 overruled. The answer will stand.

3 You may proceed.

4 BY MR. GORMAN:

5 Q And there was no evidence that it was going to be
6 permitted in court, regarding Joyce Green, either in the
7 state's case in chief or in rebutter -- rebuttal at the
8 guilt phase; correct?

9 A We made an effort to make sure that that was not,
10 that that stayed out of the case.

11 Q And there was never any evidence under the rules
12 of evidence that was present that would allow them to do
13 that, right?

14 A Well, that would have been very risky not to do
15 anything.

16 Q I'm not asking you if it was risky or not risky to
17 do something. I'm asking you if you can point to any
18 evidence that existed at any time that would allow the state
19 under rules of evidence to bring up Joyce Green in court in
20 front of a jury or at a capital sentencing proceeding?

21 A Well, Rule 404(b) does not involve merely -- it
22 doesn't involve arrests or --

23 Q I didn't ask you about 404(b). I asked you
24 about --

25 A Mr. Gorman.

1 Q -- any evidence.

2 A Excuse me.

3 THE COURT: One at a time. One at a time.

4 BY MR. GORMAN:

5 Q I asked you if you can point to any evidence that
6 ever existed that suggested the state was going to be able
7 to present that to a jury or in rebuttal at a capital
8 sentencing proceeding. Any evidence? Can you point to any?

9 A I, I -- Mr. Gorman, I have no idea. I can't speak
10 for the prosecution.

11 Q Did the prosecution share discovery on Joyce
12 Green with you?

13 A Yes, they did.

14 Q And did the prosecution admit in open court that
15 there was no autopsy finding as to the cause of death?

16 A I don't recall in open court, no.

17 Q Well, you certainly would have done discovery on
18 whatever evidence the state possessed regarding Joyce Green,
19 didn't you?

20 A We had reports. And there was no cause of death
21 determined.

22 Q Okay. And if there's no cause of death, you can't
23 prove it's a homicide; right?

24 A That's correct.

25 Q And they had no witness to prove that Mr. Sharp

1 did anything to her, correct?

2 A Circumstantial, at best.

3 Q Who's the witness who was going to testify
4 regarding Joyce Green?

5 A I have no idea, Mr. Gorman.

6 MS. LAM: Objection. That's speculation.

7 THE COURT: Yes. Sustained.

8 BY MR. GORMAN:

9 Q Now in order to be admissible in a criminal case,
10 there's a prime facia offer of proof that proponent has to
11 make, right?

12 A Yes.

13 Q And what is that?

14 A Probable cause.

15 Q Are you sure it's probable cause?

16 A What? Could you ask me the question again,
17 Mr. Gorman?

18 Q In order for a proponent -- well, this Joyce
19 Green. This is a prior bad act, isn't it? It's uncharged
20 conduct, right?

21 A Well, it could possibly fall into that category,
22 yes.

23 Q It could fall into what category?

24 A 404(b), prior acts.

25 Q Okay. Well, it wasn't a subsequent act by

1 Mr. Sharp, right?

2 A That's correct.

3 Q And in order for the state to come into court and
4 claim that Mr. Sharp killed Joyce Green they had to meet a
5 certain threshold of proof, correct?

6 MS. LAM: Objection, your Honor, to the
7 characterization that state was going to prove that he
8 killed Joyce Green.

9 THE COURT: Well, I think the question asks if the
10 state was going to offer this, they would have to meet some
11 threshold of proof prior to attempting to present it. I
12 don't think the question is suggesting that the state wanted
13 to do that in this case. Overruled.

14 BY MR. GORMAN:

15 Q So was that standard of proof the proponent of the
16 Joyce Green evidence would have to satisfy in order to bring
17 it up to a sentencing judge or --

18 A It would be relevancy and probative value.

19 Q No. What is the standard of proof?

20 A Standard of proof?

21 Q Well, there's -- you stated it was probable cause.
22 There's --

23 A Well, probable cause, that was not, that was not a
24 proper response to your question because I was confused
25 about what your question was.

1 Q Well, what's the standard of proof?

2 A Depends on what you are trying to prove.

3 Q 404(b).

4 A If you're trying to prove guilt or innocence, it's
5 beyond a reasonable doubt. If you're trying to prove 404(b)
6 evidence, then it would be preponderance of the evidence.

7 Q Is that what you teach in your trial practice?

8 A I don't teach, I don't teach that particular
9 thing, no.

10 Q Don't you teach the rules of evidence?

11 A Rules of evidence.

12 Q Isn't 404(b) a rule of evidence?

13 A Well, it is.

14 Q Doesn't 404(b) require that to be admissible in a
15 criminal case the relevant prior bad act must have been
16 shown to be committed by the defendant by clear and
17 convincing evidence?

18 A Is that the Arizona rule?

19 Q You're testifying about Arizona, and I'm asking
20 you about the Arizona rule, yes.

21 A Well, I don't just teach Arizona law anymore.

22 Q I'm not asking what you teach. I'm asking you
23 about Rule 404(b), the Arizona Rules of Criminal Law that
24 existed in 1997.

25 A I have no, I have no independent recollection of

1 404(b) in 1997, Mr. Gorman.

2 Q Okay. So you didn't consider the standard of
3 proof in deciding what to present or not to present at the
4 capital sentencing proceeding?

5 A In regarding what issue?

6 Q Well, the -- let's assume that the state is
7 arguing that you did not present certain evidence in
8 mitigation because you were afraid that Joyce Green was
9 going to be brought up. Did you file, do anything at the
10 capital sentencing proceeding because you were afraid that
11 the state was going to bring up Joyce Green?

12 A I don't recall.

13 Q Well, as you sit here now can you think of any
14 theoretical acceptable reason that would permit the state to
15 go into Joyce Green in rebuttal to any mitigation you could
16 have presented but did not?

17 MS. LAM: Objection to what he thinks now, your
18 Honor.

19 THE COURT: Overruled. You may answer.

20 THE WITNESS: I think that, that it was probably
21 considered too risky.

22 BY MR. GORMAN:

23 Q What was considered too risky?

24 A The Joyce Green matter.

25 Q I don't know what that means. If, what, what --

1 A Mr. Gorman, let me explain to you.

2 Q Let me ask you a question.

3 A Okay.

4 Q You -- tell me what mitigator you were afraid to
5 offer evidence on because you feared that the state would
6 then want to introduce the subject of Joyce Green.

7 A None.

8 Q So your failure to call a live fact witness as to
9 Mr. Sharp's abuse and your failure to introduce a single
10 institutional record in support of Mr. Sharp's allegation of
11 horrific abuse had nothing to do with Joyce Green?

12 A That's correct.

13 (Discussion off the record between counsel.)

14 BY MR. GORMAN:

15 Q Now, Mr. White, in July of 1995 and throughout
16 your representation of Kyle David Sharp, you were unaware of
17 the headings in State versus Lara, L-A-R-A, 183 Ariz. 233,
18 State versus Christiansen, 129 Ariz. 32, 1981 decision, and
19 Ricketts versus Vickers, 798 Fed.2d 369, published in 1986;
20 correct?

21 A I don't recall.

22 Q Okay. Now do you recall that you signed an
23 affidavit I submitted for your review and signature?

24 A Yes.

25 MS. LAM: Objection, your Honor.

1 THE COURT: What is the objection?

2 MS. LAM: This is hearsay. I'm sorry. I
3 completely lost my train of thought. I'm getting tired.
4 Actually, the state could go on the record, this does seem
5 to be somewhat badgering, and there's very little probative
6 value. And I just want to make a record.

7 THE COURT: Well, the record may establish your
8 position. I don't believe that the questions are badgering.
9 A few have been argumentative. And I have sustained some
10 objections. But I don't believe it's badgering. And the
11 current question asks whether he recalls signing an
12 affidavit. If I remember, that affidavit, I think that
13 there may be some information about those three cases cited.
14 So objection is overruled.

15 You may proceed.

16 (Discussion off the record between counsel.)

17 BY MR. GORMAN:

18 Q Mr. White, I'm going to show you what's at tab 8
19 of Volume of Exhibits in this matter. It was filed with the
20 original petition. And could you please take a look at it
21 and review the entire document.

22 A (Witness complies.)

23 Q When I say review the entire document, I don't
24 mean read it word-for-word. If you could just look at page
25 to page and look at the signature line.

1 A Oh, certainly. (Witness complies.)

2 Q Have you seen the signature line?

3 A Yes.

4 Q All right. And did you sign an affidavit for me
5 in October of 2000?

6 A Yes.

7 Q And is that a fair and accurate copy of the
8 affidavit you signed?

9 A Yes.

10 Q And you read that affidavit carefully and reviewed
11 it before you signed it --

12 A Yes.

13 Q -- and at paragraph 6 of that affidavit?

14 A Yes.

15 Q Which you swore to under oath in front of a
16 notary. Tell me if I read this correctly: "In July of 1995
17 and throughout my representation of Kyle David Sharp I was
18 not aware of the holdings in State versus Lara, 183 Ariz.
19 233, 902 P.2d, 1337 (1995), State versus Christiansen, 129
20 Ariz. 32 (1981), and Ricketts versus Vickers, 798 Fed.2d
21 369, Ninth Circuit (1986)." Did I read that correctly?

22 A Yes.

23 Q Was that true then in October 20th of 2000 when
24 you signed that affidavit?

25 A I stand by whatever is in this affidavit,

1 Mr. Gorman. I stand by it.

2 Q So your answer is that paragraph 6 is true?

3 A Yes.

4 THE COURT: Counsel, may I see it? I recall
5 reading it. Is it, is that affidavit in evidence at this
6 point?

7 MR. GORMAN: Not that I'm aware of, your Honor.

8 THE COURT: Well, perhaps I shouldn't read it
9 then. But I did read it in connection with the initial
10 review.

11 MR. GORMAN: In pleadings. Well, I'm going to
12 move for admission of Exhibit 8.

13 THE COURT: Any objection?

14 MS. LAM: Is this the affidavit that he's
15 referring to?

16 THE COURT: It is.

17 MS. LAM: It is actually already an exhibit to the
18 PCR, so the state has no objection.

19 THE COURT: It shall be marked and received.

20 Now I can look at it. Thank you.

21 (Discussion off the record between counsel.)

22 BY MR. GORMAN:

23 Q Mr. White, on March 12, 1997 Judge Borowiec
24 indicated that he would not read the presentence report or
25 any of the transcripts -- or excuse me, any of the

1 attachments to the presentence report until after the
2 capital sentencing proceeding. Correct?

3 A I don't recall that. But I don't dispute it.

4 Q Okay. I would refer the court to the April 12th,
5 1997 transcript of the proceeding the day after the
6 aggravation/mitigation hearing at pages 15, 23, 24, 26, and
7 27.

8 So you don't dispute if the transcript indicates
9 that the judge never saw the presentence report or any of
10 the attachments to it until after he sentenced Mr. Sharp to
11 death? You don't dispute that, do you?

12 A After he sentenced Mr. Sharp to death?

13 Q Yeah. Then he looked at the presentence report,
14 and he sentenced him to the kidnapping and assault. Isn't
15 that what happened?

16 A I don't have any recollection.

17 Q So if that's true, he wouldn't have been able to
18 review any of those exhibits that the state showed you, like
19 the letter of Shannon Cassons and things like that, because
20 that was attached to the presentence report; is that right?

21 A I don't recall that but --.

22 Q Do you remember the state showing you State's
23 Exhibit C?

24 A Yeah.

25 Q And the state showing you State's Exhibit D?

1 A Yes.

2 Q And the judge never saw those prior to sentencing
3 Mr. Sharp to death, correct?

4 A I don't have any independent recollection of that,
5 Mr. Gorman.

6 Q Well, you never admitted these documents as
7 exhibits and moved them into evidence because we know you
8 didn't do any documents, right?

9 A At the sentencing?

10 Q At the aggravation/mitigation hearing.

11 A That's correct.

12 Q Now, the state showed you Exhibit 154, a
13 transcript of Detective Rogers' interview with Ms. Cassons.
14 Do you remember seeing that?

15 A Yeah.

16 Q Okay. Ms. Cassons didn't witness Mr. Sharp commit
17 any violent act, correct?

18 A I don't recall the entire contents of the, of the
19 interview.

20 Q But if it's not there, you didn't have any
21 knowledge of it, correct?

22 A I don't have any independent recollection.

23 Q All right. And Ms. Cassons is representing what
24 someone else told her that Mr. Sharp did. That's what she's
25 telling Detective Rogers in Exhibit 154, correct?

1 A The portions I read, yes.

2 Q Okay. And did -- you never permitted
3 Ms. Macartney to go up to Indiana and interview Ms. Cassons
4 in Indiana, correct?

5 A Permitted her to go?

6 Q Who's in charge of the office? You or
7 Ms. Macartney?

8 A I was at the time.

9 Q Who was lead counsel on the case?

10 A I was.

11 Q Did you tell her to go on to Indiana and interview
12 Shannon Cassons?

13 A No.

14 Q Did you tell Ms. Macartney or anyone else to go to
15 Indiana and interview the woman who Ms. Cassons attributes
16 as the declarant of the hearsay she gave to Detective
17 Rogers?

18 A Are you talking about -- oh, who are you referring
19 to, Mr. Gorman? Who was the declarant?

20 Q Well, this transcript, 154, you saw that in the
21 discovery, correct?

22 A I would have, yes, I would have seen that.

23 Q All right. And there were, there were other
24 rumors and allegations that you came across in the discovery
25 that -- regarding Mr. Sharp's, let's for lack of a better

1 term, prior bad acts?

2 A Rumors and allegations?

3 Q Well, like Joyce Green, that was just suspicion.

4 There was no evidence that he harmed Joyce Green. Right?

5 A There was no evidence that he harmed Joyce Green.

6 Q Right. Okay. And were there other things that

7 were implied that he did that you were concerned about

8 being-

9 A Other acts that he supposedly committed?

10 Q Yeah, that you were concerned about the state

11 presenting.

12 A Yes.

13 Q And start with --

14 A At what, at what stage?

15 Q At the sentencing phase.

16 A Well, I knew that they were going to present

17 certain things at the sentencing stage. It was the guilt

18 stage, obviously, we didn't want them admitted, a lot of

19 that stuff.

20 Q I'm not talking about the guilt phase. What prior

21 act of Mr. Sharp in Indiana, if any -- maybe there wasn't

22 any -- were you concerned, if you were, about the state

23 presenting at the capital sentencing proceeding?

24 A Oh, well, all of -- well, not all. But a lot of

25 information.

1 Q Just identify one to start with.

2 A One?

3 Q We'll start with one. So just identify
4 specifically what act Mr. Sharp committed in Indiana, if
5 any, that you were concerned about the state presenting at
6 the capital sentencing proceeding.

7 A One concern would have been the, his activity with
8 dolls.

9 Q All right. Let's start with that. What evidence
10 did the state have that Mr. Sharp had activity with dolls?

11 A I don't recall.

12 Q Did they have a witness?

13 A They called only the pathologist, so I don't think
14 they had a witness.

15 Q I didn't ask you who they called. I asked you in
16 the discovery you reviewed. You said you were concerned.
17 We went over Rule 404(b). That requires clear and
18 convincing evidence before someone can present an act to a
19 trier of fact, correct?

20 A Yes.

21 Q Okay. And then before you even get to Rule 404(b)
22 there has to be relevance, correct?

23 A Correct.

24 Q Now how would the fact that Mr. Sharp tore the
25 crotch out of a doll and ejaculated into it, how would that

1 go to proving the aggravator of heinous, cruel, and
2 depraved?

3 A Two separate things. It wouldn't.

4 Q It would not.

5 A No.

6 Q And could that be used to rebut the fact that he
7 was sodomized from the age of 5 to 13?

8 A No.

9 Q Could it be used to rebut the fact that he was the
10 victim of violence at the hand of both his mother and
11 father?

12 A No.

13 Q Correct that. Stepfather.

14 A No.

15 Q Could that be used to rebut the fact that he had a
16 long history of substance abuse himself?

17 A No.

18 Q Could that be used to rebut the fact that he comes
19 to three -- from three generations of persons that he's
20 related to by blood where incest, violence, drug abuse,
21 mental illness are all within his family tree?

22 A No.

23 Q So it won't rebut anything?

24 MS. LAM: Objection to relevance.

25 THE COURT: Overruled. Answer may stand.

1 BY MR. GORMAN:

2 Q So that evidence won't rebut anything?

3 A No.

4 Q Specifically identify any, if there was, second
5 piece of evidence that was alleged as a prior act of
6 Mr. Sharp in Indiana.

7 A I can't think of one now.

8 Q Okay. Did the state notice that they were going
9 to introduce or were considering to introduce that Mr. Sharp
10 had possessed pornographic materials?

11 A Yes.

12 Q And did the fact that the state implied they had
13 evidence of this in any way cause you to refrain from
14 calling live witnesses to prove that he was sodomized at the
15 capital sentencing proceeding?

16 A No.

17 Q Did the fact that the state possessed this
18 pornography information cause you to refrain from calling
19 live witnesses or introducing documents to prove that he
20 came from a family where there was interfamily violence,
21 alcoholism, that he had three generations of -- any of the
22 mitigation? Did it, did it cause you not to introduce
23 evidence in mitigation of any mitigator?

24 A No.

25 Q Now has the state disclosed to you the evidence

1 that's been admitted in this court and the evidence that was
2 present and available in 1997 that could have been admitted
3 at his capital sentencing? Have they disclosed that to you?

4 A I really don't know.

5 Q Well, you had discussions with Ms. Lam or her
6 co-counsel?

7 A I've received some documents. I don't know, you
8 know, what pertains to what.

9 Q What documents have you received and who sent them
10 to you?

11 A I don't -- can I go out in my car and get them?
12 Would you like me to go get them?

13 Q Do you remember?

14 A Every single document? No, I don't.

15 Q Well, what were the nature of the documents?

16 A Prior interviews during the investigation stage,
17 pleadings filed during the case.

18 Q And they were sent to you?

19 A This, like that.

20 Q And they were sent to you by who?

21 A Um, I can't remember. I know I got some from,
22 from Ms. Lam. Now whether I got -- I don't know if I
23 received anything from, from you guys or not. I don't
24 remember.

25 Q Do you have all those documents in your car?

1 A Yeah.

2 MR. GORMAN: Judge, could I request the witness be
3 permitted to retrieve them?

4 THE COURT: You want him to go to his car?

5 MR. GORMAN: Yes.

6 THE COURT: Your car is out in the parking lot, I
7 take it?

8 THE WITNESS: It's right down below the
9 courthouse, your Honor.

10 THE COURT: All right. I don't know what's in
11 there. But, I mean, he has the right to find out.

12 MS. LAM: Objection, your Honor. This is, this is
13 irrelevant. Seems to be a fishing expedition.

14 THE COURT: I have no way of knowing whether it is
15 or it isn't. I will allow five minutes so that the witness
16 can go to the car. Is it one box? Is it one file?

17 THE WITNESS: One accordion file, your Honor.

18 THE COURT: One accordion file? All right. We'll
19 be at recess for five minutes.

20 (A recess is taken. Thereafter, proceedings
21 continue as follows.)

22 THE COURT: Good afternoon again. Continuing with
23 State against Kyle David Sharp, CR2005-271. Counsel are
24 present. Mr. White is on the witness stand. Mr. Rohman is
25 present. Still cross-examination. Looks like there's a

1 stack of records.

2 I assume those are the things you retrieved from
3 your car?

4 THE WITNESS: Yes, sir.

5 THE COURT: You may proceed, Mr. Gorman.

6 MR. GORMAN: All right. Thank you, your Honor.

7 Could I have this marked as an exhibit?

8 THE COURT: You may. What is it?

9 THE CLERK: 177.

10

11

EXAMINATION

12 BY MR. GORMAN:

13 Q Mr. White?

14 A Yes.

15 Q I'm going to show you what's marked Exhibit 177.

16 Do you see that?

17 A Yes.

18 Q And you see the Post-it on it that says "White"?

19 A Yes.

20 Q And was that sent to you by the Attorney General's
21 Office?

22 A Yes.

23 Q Okay. And that's a transcript prepared for Donna
24 Lam. It states, "Capital Litigation Section, Office of the
25 Attorney General"?

1 A "Prepared for Donna Lam, Carla Ryan, Capital
2 Litigation Section, Office of the Attorney General," yes.

3 Q And did you have a chance to read this before you
4 came and testified today?

5 A I did not.

6 Q Do you have any reason to doubt its accuracy?

7 A I have no reason to doubt its accuracy.

8 MR. GORMAN: Okay. Judge, I move for the
9 admission of Attorney General's transcript of Mr. White's
10 interview of 2008, Exhibit 177.

11 THE COURT: Any objection?

12 MS. LAM: Objection to relevance, but no
13 objection.

14 THE COURT: Exhibit 177 shall be marked and
15 received.

16 MR. GORMAN: Judge, this will just take me a
17 moment. I'm looking through this stuff of Mr. White's.

18 BY MR. GORMAN:

19 Q Now did the Attorney General send you the
20 published opinion in State versus Sharp?

21 A You know, I don't recall. It's a Westlaw. I
22 don't have Westlaw. So I don't know where I got that.

23 Q Did you read it before coming to testify today?

24 A I did not.

25 Q So you've never read the decision?

1 A I have read it, but I didn't read it before I
2 testified today. Not in preparation for my testimony, I
3 should say.

4 Q And the Attorney General sent you a transcript of
5 the March 11th of 1997 sentencing, aggravation/mitigation
6 hearing?

7 A I believe so, yes.

8 Q Did you read this before you came here?

9 A No.

10 Q And there's a Post-it on a transcript that was
11 marked March 12th, 1997, the day after the
12 aggravation/mitigation hearing. Is that Post-it yours?

13 A That's not my writing, no.

14 Q Okay. So did that Post-it come with the
15 transcript that was sent to you by the Attorney General's
16 Office?

17 A I can't say for certain.

18 Q Well, did anybody else have access to this
19 transcript other than you?

20 A I don't know that anybody would be interested in
21 it. So I would have to say no.

22 Q And the Post-it says, "Preclude Presentence
23 Report," correct?

24 A Yes.

25 Q And the presentence report was precluded.

1 THE COURT: Is that a question that you want an
2 answer for?

3 MR. GORMAN: Yes.

4 THE WITNESS: I don't recall.

5 BY MR. GORMAN:

6 Q Did you read the deposition of Betty Hankey that
7 was sent to you by the Attorney General's Office?

8 A I don't specifically recall reading it. I think
9 I've read all this, through all this stuff at some point in
10 time.

11 Q Since you received this?

12 A Since I received it. That's not -- I was provided
13 this. I didn't have this myself.

14 Q And were you provided this by the Attorney
15 General?

16 A I don't know for sure, but I assume, yes.

17 Q Do you have any correspondence or letter from
18 Ms. Ryan or myself that indicates that we sent you any of
19 these items?

20 A No.

21 MS. LAM: Objection. How is this relevant, your
22 Honor?

23 THE COURT: Well, I was wondering about that. But
24 the answer is in. The objection comes too late. Overruled.

25

1 BY MR. GORMAN:

2 Q Okay. So all of these items that you received
3 from the Attorney General, you say you reviewed all of them
4 prior to coming to testify today?

5 A I believe from -- at one point in time. At points
6 in time I have looked at all of them.

7 Q Okay. Is there --

8 MR. GORMAN: And, your Honor, can I get this
9 entire accordion file marked?

10 THE COURT: You can have it marked.

11 Mr. White, are you in need of the file folder or
12 any of its contents?

13 THE WITNESS: No, your Honor. I think -- no.

14 THE COURT: All right. Let's get it marked. 178?

15 THE CLERK: Yes.

16 BY MR. GORMAN:

17 Q Okay. And all of Exhibit 178 which was sent to
18 you by the Attorney General's Office. Is there any act
19 described in that materials that caused you to refrain from
20 introducing any evidence of mitigation at the capital
21 sentencing proceeding?

22 A No.

23 Q And --

24 MR. GORMAN: And, your Honor, I'm going to go
25 through some of these items. Could we have them listed as

1 178-A, B; is that possible?

2 THE COURT: Well, it is. As you choose to ask
3 about them, take them over to the clerk, and you can have
4 them marked separately, 178-A, B, and so forth.

5 MR. GORMAN: Thank you, your Honor.

6 (Discussion off the record between Mr. Gorman and
7 the clerk.)

8 THE COURT: Mr. Gorman, what is your best estimate
9 as to how much more you have? I mean in terms of time.

10 MR. GORMAN: Sure. I just -- I'm looking at what
11 I have. I can finish by 5:00, or five-to-five if you would
12 like.

13 THE COURT: Well, of course state is entitled to
14 redirect.

15 Ms. Lam, what is your best estimate based on what
16 you've heard to this point of how much time you need for
17 redirect?

18 MS. LAM: You know, your Honor, I'm really not
19 sure. I didn't expect quite as much cross-examination. At
20 least -- probably at least an hour.

21 THE COURT: Well, one way or the other, Mr. White,
22 we will see you tomorrow. My thought is perhaps now is the
23 time to stop for the evening. Counsel is still looking
24 through those documents.

25 Yes, Ms. Lam?

1 MS. LAM: If you were contemplating trying to wrap
2 up this evening, it may not be an hour, if you wanted to
3 give it a try.

4 THE COURT: Well, I've, I've learned to take
5 counsel's estimates of time and multiply it by a factor of
6 at least two, sometimes three. I think in this case
7 probably two. I just don't see it. I don't want counsel to
8 rush. And I want you both to have a full opportunity to ask
9 what you think you need to ask. So --

10 MS. LAM: Okay.

11 THE COURT: -- we'll stop here. We'll start up
12 again at 9 a.m. tomorrow morning. At recess.

13 (Proceeding adjourns.)

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I, Penny Heins, Arizona Certified Reporter No. 50219, do hereby certify that the foregoing pages constitute a full, accurate typewritten record of my stenographic notes taken at said time and place, all done to the best of my skill and ability.

DATED this 15th day of April, 2009.

Penny Heins
Certified Court Reporter
Arizona CCR No. 50219

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