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

[Petitioner brought into courtroom.]

THE COURT: Okay. We're ready.

MS. SHEIN: Good morning, Your Honor.

THE COURT: Good morning.

MS. SHEIN: My name is Marcia Shein. With me is Attorney Jay Abt, and Andy Cohen, and, of course, Mr. Davis.

This morning what I'd like to start with is just a brief scenario of our position in the case, it will be about ten minutes, and then immediately move into some of the witnesses.

Andy Cohen will be doing the first set of witnesses; I'll be doing the second set somewhere between Tuesday and Wednesday; and then, hopefully, Thursday and Friday Jay Abt will do the final witnesses. And we appreciate your allowing us the three lawyers, it helps.

This case is about a murder of David Coffin in 1996. Obviously, because of the seriousness of this offense, the State wanted someone to pay for the crime. However, no one should pay for a crime at the expense of due process.

This habeas is about serious misconduct in the handling of evidence in this case, false testimony, and the failure of the trial and appellate attorneys to

1 investigate the case thoroughly and to call experts to  
2 refute the State's case.

3 The attorneys also failed to prove there was false  
4 testimony given regarding a taped interview with Scott  
5 Davis the night of the murder of David Coffin. Now I  
6 understand and respect the fact that the lawyers that  
7 represented this case are very well respected lawyers,  
8 but they did make serious errors in this case that were  
9 reflected in the way the case was handled, and that  
10 creates a lack of confidence in the jury verdict.

11 As I stated, the death of David Coffin occurred in  
12 1996. The State investigated the case and gathered a  
13 large amount of evidence, both from the victim's  
14 residence and from a burned-out Porsche that belonged to  
15 him in another location. Scott was interviewed on the  
16 day of the murder and the interview was tape recorded by  
17 the officers investigating the case, a Mr. Chambers and  
18 Mr. Walker, Detective Chambers and Walker.

19 After the case was initially investigated, the case  
20 went cold. Several years later a cold case squad  
21 reinvestigated the case and charged Scott Davis with the  
22 murder of David Coffin.

23 In the interim between the original investigation  
24 and the time of the trial, over 70 pieces of evidence  
25 were lost. They were gathered between -- in 1996 and

1           preserved, but were lost during the process of the case  
2           and just conveniently before the trial began. Some of it  
3           was not lost until just at the moment in which the trial  
4           was expected to start, and much of it was evidence that  
5           the government would end up using but was not available  
6           to the Defense. It had never been turned over to the  
7           Defense for testing or review. A large amount of this  
8           evidence is crucial to the Defense but could not be  
9           tested or even reviewed by the defendant's attorneys.

10           Nonetheless, the State was allowed to discuss the  
11           lost evidence at trial, testify about the tests they  
12           alleged were conducted, even though none of the evidence  
13           was admitted at trial or released to the Defense. For  
14           example, important items that went missing were  
15           fingerprint cards, and not only were they missing but  
16           they were never submitted to the national database AFIS  
17           to determine whose prints they were -- all against  
18           standard operating procedures.

19           This conduct occurred repeatedly with all the lost  
20           evidence, including something that was significant, which  
21           was the gas can found in the burned-out Porsche. We will  
22           show the gas can was traceable. The State was allowed to  
23           talk about the gas can as if it belonged to Scott Davis.  
24           He had no way of confronting that evidence, and the  
25           attorneys representing him failed to object to the

1 admission of the evidence, prove bad faith conduct, or  
2 call an expert to show the can could be traced and was  
3 apparently exculpatory. Davis had no way of confronting  
4 the inculpatory testimony that this can belonged to him  
5 or looked like the one he had at home. A particular  
6 witness, Megan Bruton, was able to testify that that can,  
7 even though no one had the can physically, looked like  
8 the one in Scott Davis' residence. This testimony is  
9 repeated concerning an Olympic bag that was also found in  
10 the Porsche.

11 You will hear today, and during the course of this  
12 week, many more examples of this conduct and the loss of  
13 apparent exculpatory evidence. The testimony you will  
14 hear will address numerous pieces of lost evidence and  
15 the failure of police and fire agencies to follow  
16 standard operating procedures in the preservation of this  
17 evidence. This includes items that could have had  
18 fingerprints or DNA evidence on them.

19 You will hear how the police and fire departments  
20 deliberately, and with indifference, created  
21 circumstances that they knew or should have known could  
22 result in evidence being lost. The conduct, the  
23 disregarded policy and procedure was so pervasive that  
24 these agencies were allowed to cherry pick and get rid of  
25 evidence they did not want the Defense to have by merely

1 claiming it was lost. Their conduct is so egregious that  
2 it is an indictment of the system allowing officers of  
3 the law with impunity to get rid of evidence they deem  
4 dangerous to the State's case or not preserving that  
5 evidence by following standard operating procedures, and  
6 then not caring because they know there are no  
7 consequences to those actions.

8 You will hear testimony that witnesses lied about an  
9 interview tape with Scott Davis, and that the State  
10 failed to disclose misconduct by one of their own  
11 firearms expert witnesses. Ms. Davy, the State's firearm  
12 expert, was fired for falsifying firearms reports in  
13 2009. She had a reputation of dangerous conduct,  
14 insubordination through her employment with GBI; and past  
15 cases were discovered where she did not do the proper  
16 test or filed false information on firearms testing  
17 procedures she was required to perform. Her character  
18 information was never disclosed to trial counsel, even to  
19 this day. We had to locate this information through the  
20 Open Records Act. However, the GBI thought it was  
21 serious enough to disclose it to the various county  
22 district attorneys offices.

23 You will hear evidence from two tape experts that  
24 the taped interview of Scott Davis was tampered with in  
25 contravention to the testimony of Detective Chambers who

1           said the tape was never stopped and started and that  
2           there was only one tape. This matter alone, and  
3           Chambers' false testimony under oath, should be enough to  
4           grant a new trial as this evidence played a major role in  
5           the conviction of Scott Davis. No attorney until now has  
6           had this tape analyzed even though Mr. Davis continuously  
7           asked his lawyers to have that tape checked out by  
8           forensic analysts.

9           Finally, you will hear a great deal of testimony and  
10          evidence of the handling of the missing evidence in this  
11          case. And as I said, it was so widespread and  
12          intentional that to allow this conviction to stand would  
13          send the message to law enforcement agencies that losing  
14          evidence, especially evidence that could help the  
15          Defense, is allowed without consequence. This gives the  
16          police free rein to convict those who might actually be  
17          innocent by simply being able to say: Oops, I'm sorry.  
18          We lost all the evidence we tested in this case, and even  
19          though we did not follow procedure, no harm, no foul.

20          All of the witnesses we will be presenting should  
21          have been called by the Defense at some point in the  
22          trial or the motion for new trial proceedings. Most, if  
23          not all of them, were never called or even spoken to.  
24          There was no trial strategy for not doing so. These  
25          witnesses would have shown bad faith in the conduct of

1 law enforcement agencies and fire department personnel.  
2 Experts would have clarified false information being  
3 presented to the jury, and experts would have discredited  
4 the State's experts on misleading information.

5 Failing to call experts and investigating a case  
6 properly are serious grounds for ineffective assistance  
7 of counsel claims. This case screams for a new trial  
8 where the State cannot use lost or missing evidence in  
9 the trial proceedings. The Supreme Court stated that the  
10 lawyers representing Mr. Davis did not properly address  
11 these matters at trial or prove bad faith. The  
12 information you will hear this week will correct this  
13 injustice.

14 The habeas is based on a number of due process  
15 violations under the Fifth and Sixth Amendments of the  
16 United States Constitution and ineffective assistance of  
17 counsel for some of the following:

18 Failing to properly investigate the lost evidence.

19 Failing to object properly to any admission of  
20 information without the actual evidence.

21 Failing to object to hearsay testimony on non-  
22 existing evidence.

23 Failing to call experts to refute the government's  
24 case regarding witnesses who testified about  
25 evidence that was lost and to prove witnesses lied

1                   under oath.

2                   The attorneys also failed to take precautions on the  
3                   defendant's behalf regarding recusing the Fulton  
4                   County D.A.'s Office from prosecuting this case due  
5                   to the many instances of misconduct, not only about  
6                   losing evidence but their own underlying conduct in  
7                   the investigation of this case.

8                   And failing to turn over evidence in a timely  
9                   manner, including Brady violations on witnesses'  
10                  backgrounds.

11                  When you hear all the testimony and review the  
12                  evidence, it is impossible to believe Scott Davis had a  
13                  fair trial, and this is the habeas that we hope will  
14                  allow you to grant him a new trial where he can have a  
15                  fair trial.

16                  Thank you, Your Honor. And I turn this over to Mr.  
17                  Cohen, Attorney Cohen.

18                  THE COURT: Well, let me just ask, any opening  
19                  remarks from the Defense?

20                  MS. GALLOW: Yes, Your Honor, just briefly if I may.

21                  THE COURT: That's fine.

22                  MS. GALLOW: Good morning, Judge.

23                  THE COURT: Give me one second.

24                  [Off the record in re: another matter.]

25                  MS. GALLOW: Yes, Judge. Good morning, my name



1           Sheila Gallow. I'm here on behalf of Tony Howerton, the  
2           warden in this case, along with Paula Smith and Clint  
3           Malcolm.

4           Your Honor, I'm going to keep this very brief,  
5           primarily because the record in this case speaks for  
6           itself. The issues as to the missing evidence have been  
7           extensively litigated, Your Honor, both pretrial at the  
8           hearings motion. It was again litigated throughout  
9           trial, and the missing evidence issue was brought out  
10          before the jury.

11          Again, at the motion for new trial hearing we are  
12          again litigating this issue of the missing evidence. So  
13          we would submit that the record will show that this issue  
14          was been litigated over and over and over and over again.

15          With regards to the evidence being brought out at  
16          trial that the Petitioner is contending that he had no  
17          option or ability to test that evidence and that he was,  
18          moreover, prejudiced by certain witnesses by the State  
19          being able to testify to that, we would submit, and as  
20          was brought out at trial, that that was exculpatory to  
21          Petitioner and that was preserved through witness  
22          testimony in this case.

23          Moreover, Petitioner's counsel strenuously argued  
24          this missing evidence from the onset of this trial all  
25          the way to the direct appeal in this case. Petitioner's

1 counsel strenuously objected to any evidence that was  
2 brought out by the State should be referred to during  
3 witness testimony. I expect witness testimony to  
4 substantiate that claim. They specifically asked: We  
5 don't want the State to refer to any of the evidence that  
6 was not provided to them that had been destroyed prior to  
7 trial. The trial court denied their motion.

8 Again, when the motion for new trial hearing goes  
9 forward, we have Don Samuel, another very competent  
10 attorney, who brings in more witnesses to testify as to  
11 what happens to this lost evidence. It was either lost  
12 or destroyed. Sometime in around September of 2001  
13 apparently DeKalb destroyed evidence for reasons we do  
14 not know. This again was brought out during trial and at  
15 the motion for new trial hearing.

16 So, Your Honor, we would just submit to this Court  
17 that this issue has been extensively litigated from the  
18 pretrial hearing, during trial, and again at the motion  
19 for new trial hearing. It is again raised as error on  
20 appeal, and it is again decided adversely to Petitioner.

21 I would expect witness testimony, too, to show that  
22 counsel in this case did everything that they could  
23 possibly do to litigate the issue of bad faith. And no  
24 matter what they could do or could not do, they could not  
25 prove the issue of bad faith regardless of various

1 agencies' failure to comply with either their standard  
2 operating procedures or their failure to establish a  
3 chain of custody. It was undisputed in this case that  
4 various agencies submitted the wrong evidence to the  
5 wrong submitting agency. That's an undisputed issue, and  
6 it was litigated extensively.

7 So our position would be, Your Honor, that we've  
8 decided this issue and we're again here relitigating the  
9 same issue. Again, this has been couched in the  
10 ineffective assistance of counsel claim. Petitioner is  
11 alleging that counsel failed to properly develop the  
12 exculpatory nature of the evidence in this case. For  
13 properly developing it as to the individual items of  
14 evidence in this case, we would stipulate or submit to  
15 the Court that they did. They were hampered by their  
16 ability to individually test those missing pieces of  
17 evidence simply because they didn't have access to that  
18 evidence.

19 So to come in and say that they couldn't properly  
20 develop that exculpatory nature, they couldn't. And they  
21 submitted this both in their motions to dismiss this  
22 case, based on the State's destruction of evidence, again  
23 in their brief in support, and again in their arguments  
24 to the Court prior to trial. Again, they objected prior  
25 to the testimony of Megan Lee Davis at the time, now

1 Megan Bruton. They objected to her testimony as to the  
2 gas can that was found in the Porsche as well as the  
3 Olympic bag that was found in the Porsche. They  
4 specifically requested the Court not to allow her to  
5 testify as to that evidence simply because they had not  
6 that the opportunity to test that.

7 Therefore, Your Honor, we would submit, based on the  
8 record in this case, based on the extensive litigation of  
9 the missing evidence, we would submit that Petitioner  
10 will be unable to satisfy his burden under Strickland v.  
11 Washington to show that his attorneys somehow were  
12 improper or ineffective in litigating this missing  
13 evidence issue, Your Honor. Thank you.

14 MR. COHEN: Good morning, Your Honor.

15 THE COURT: Good morning.

16 MR. COHEN: Before calling the first witness that I  
17 would like to begin questioning this morning, we'd just  
18 like to briefly state that Mr. Davis' trial and appellate  
19 counsel did in fact object, but did not actually  
20 litigate, the issue of lost evidence. They objected  
21 without putting on any evidence. They objected without  
22 bringing any witnesses. They objected without bringing  
23 any documentation of why the loss of evidence was  
24 improper or how specifically the harm was done, and that  
25 the lack of specificity on the specific items that were

1 missing as well as the failure to put up any evidence  
2 regarding any argument supporting why this was damaging  
3 to Mr. Davis, more than less invalidates any effort that  
4 was made to litigate these issues in the past.

5 So before calling our first witness, I would just  
6 like to state on the record that these issues have not  
7 been litigated and have not been properly addressed by  
8 counsel to this point.

9 We'd like to begin with Melvin Denson, Atlanta  
10 Police Department.

11 MS. SHEIN: Your Honor, just for the record, we're  
12 going to obviously invoke the Rule of Sequestration, but  
13 I don't see anybody in here that's a witness.

14 THE COURT: All right.

15 MS. SHEIN: Just in case anybody tries to come in.

16 MS. GALLOW: Your Honor, do you have a courtesy copy  
17 of the opinion in this case?

18 THE COURT: I don't think I do.

19 MS. GALLOW: All right. If I may approach, Your  
20 Honor?

21 THE COURT: That would be great. Thank you.

22 MS. GALLOW: I do have a courtesy copy of the direct  
23 appeal in this case as well as the interlocutory appeal.

24 THE COURT: Great. Thank you very much.

25 MS. GALLOW: You're welcome, Judge.

1 THE COURT: Good morning.

2 THE WITNESS: Morning.

3 MR. COHEN: Good morning, Mr. Denson.

4 THE WITNESS: Good morning.

5 MR. COHEN: Your Honor, should I swear in the  
6 witness?

7 THE COURT: Please.

8 Whereupon,

9 **MELVIN M. DENSON, SR.,**

10 having been duly sworn under oath, was examined and testified  
11 as follows:

12 **DIRECT EXAMINATION**

13 **BY MR. COHEN:**

14 Q. Can you tell us -- first of all, just state your  
15 name for the record.

16 A. Melvin M. Denson, Sr.

17 Q. And where are you employed?

18 A. I'm retired.

19 Q. Okay. And before you retired, where were you  
20 employed?

21 A. Want me to start at my last job or are you just  
22 specifically interested in Atlanta Police Department?

23 Q. Specifically interested in Atlanta Police, yes, sir.

24 A. The Atlanta Police Department.

25 Q. Okay. In what capacities have you been in law

1 enforcement officer?

2 A. Basically a patrol officer, worked my way up through  
3 the ranks and attained the rank all the way up to deputy  
4 chief.

5 Q. All right. And how long total were you in law  
6 enforcement?

7 A. Over 30 years.

8 Q. And when did you start working for Atlanta Police?

9 A. That was November 21<sup>st</sup>, 1979.

10 Q. Specifically, did you work in the Evidence Room?

11 A. Twice, yes.

12 Q. When the first time did you begin working in  
13 Evidence?

14 A. I went to the Property Control Unit, which is what  
15 it's called, my first tour of duty started April 22<sup>nd</sup>, 1997. My  
16 rank was sergeant at that time.

17 Q. And how long did you stay in that job?

18 A. I transferred out September of '98 because I went to  
19 the Police Academy, that was my next assignment.

20 Q. And you said that there was a second time?

21 A. Right. I went to Property as the commander in April  
22 of 2003.

23 Q. Can you tell us exactly what the Evidence Room is?

24 A. Basically, per state law, we're responsible for  
25 anything that officers of the Department come into possession

1 of, whether it's evidence, property found, things of that  
2 nature.

3 Q. And how is it organized as a whole, the Evidence  
4 Room?

5 A. It's basically organized into about three, four  
6 different areas. The two primary areas is we always have to  
7 keep, per state law and CALEA Standards, which is what we  
8 operate by, we keep property separated from evidence.

9 Q. Okay. Could you tell us what CALEA Standards are?

10 A. The International Association of Chiefs of Police,  
11 that's on the national level, and the Georgia Association of  
12 Chiefs of Police at the State level have standards that they  
13 accredit various law enforcement agencies. It's performance  
14 standards to show that you are complying with whatever it is  
15 your policy states that you're supposed to do. We were going  
16 for national accreditation, which we did attain in December of  
17 2004, which was our first accreditation.

18 Q. Back up just a moment. Could you tell us -- you  
19 stated a difference between property and evidence just a  
20 moment ago. Could you clarify that?

21 A. Well, property is like an officer would be on  
22 patrol, he could find an item of value in the street, he could  
23 receive a call where people find money, owners unknown. He  
24 would have to turn that property in to the unit before the end  
25 of the tour of duty for that particular officer.



1 Evidence is when a crime has been committed and either  
2 our identification section or officers assigned to the, you  
3 know, department that's investigating any type of crime,  
4 whether it's a hit-and-run, homicide, rape. They would take  
5 the evidence, collect it, package it, and then turn it in to  
6 the Property Control Unit.

7 Q. And you had stated when you were explaining about  
8 CALEA standards, this is all very, very heavily regulated by  
9 procedure?

10 A. Yes. I believe under the National Accreditation,  
11 which is a CALEA standard from IACP, International Association  
12 of Chief of Police, you have two chapters. Chapter 83 from  
13 their manual calls for the collection of evidence, and that's  
14 mainly geared towards officers in the identification section  
15 that collect it. Chapter 84 is primarily what controls the  
16 Property Unit, if I have those two chapters correct.

17 Q. And you were referring to National Accreditation.  
18 Let's go back to a little more local and inside the department  
19 basis. During the time that you were employed in the Evidence  
20 Room, was there a written standard operating procedure for the  
21 handling of evidence?

22 A. Yes, it was. I guess you could call me the initial  
23 change commander that went to the Property Unit. When I got  
24 there, it was April 2003, we had a very old policy in place.  
25 It was B.P.S. which stands for Bureau of Public Safety;

1 S.O.P., Standard Operating Procedure. If I remember that  
2 policy number it would have been 5.1. It was signed sometime  
3 in 1989 and we had changed locations from our Decatur Street  
4 location to the 640 North Avenue, which is the City Hall lease  
5 location. And that policy had not been updated from 1989, and  
6 I took over in 2003, and it still hadn't been updated, so I  
7 took it upon myself to start that to happen.

8 Q. And before we talk about what you updated to, I  
9 believe I've got right here that you're referring to EPS SOP I  
10 believe 5.01 that you were referring to, Standard Operating  
11 Procedure for the Evidence Room which you said had been  
12 replaced from '89 to '03?

13 A. I can look at what you have, but I can't attest to  
14 if that's the one that was in place. But I'm more than happy  
15 to look at it.

16 Q. I'll show it to you in just a moment once we walk  
17 through some of the contents of it then.

18 A. Okay.

19 Q. Let me clarify, you did state that when you came in  
20 there was Standard Operating Procedure that had been in place  
21 from 1989 to 2003, and that you yourself initiated changes in  
22 the procedure at that time.

23 A. If I make no mistake, that policy was initiated  
24 August of 1989, if I make no mistake.

25 Q. Now for the time that it was in place, as well as

1 any changes you made after that, did Standard Operating  
2 Procedure specifically address the storage of evidence?

3 A. Yes, it did.

4 Q. Okay. And when you started the job -- you sound  
5 very familiar with it today, but I'm going to ask you anyway  
6 -- when you started that job, were you very aware of that  
7 Standard Operating Procedure and what was required to handle  
8 evidence?

9 A. It was a learning process, yes.

10 Q. Did you have a paper copy of it?

11 A. Yes, I did.

12 Q. Was there an electronic version that you or anybody  
13 else could access if you had questions?

14 A. Our Management Services Section, which they have  
15 renamed several times -- I believe the current name is the  
16 Planning and Research Unit. That was the repository for all  
17 policy, even if you were to go to APD looking for a policy  
18 today, they are responsible for not only obtaining the chief's  
19 signature for policy, but in the case as we are discussing  
20 today, they must maintain every old policy so if we have a  
21 problem that comes up down the road, that's where you go to  
22 retrieve it.

23 Q. And the overarching -- there are much more specific  
24 things that we're going to get into -- but the overarching  
25 purpose, is it not, of having Standard Operating Procedure for

1       how you handle evidence is in order to maintain a chain of  
2       custody; right?

3           A.   Chain of custody is critical for all cases.

4           Q.   Critical, all cases. Were you required to be  
5       familiar with that Standard Operating Procedure before  
6       starting your job?

7           A.   As a commander of anything, the same as we have a  
8       Commander in Chief of the United States, you have overall  
9       responsibility. However, you do have those day-to-day  
10      responsibilities that are commonly dedicated or delegated for  
11      people to handle. But overall knowledge, yes, you're correct.

12          Q.   Now you've stated that you made changes to the  
13      policy. In fact, was the Standard Operating Procedure  
14      completely rewritten during your tenure?

15          A.   It was rewritten, it was issued, and it was updated  
16      at least 13 times under my tenure.

17          Q.   And was there a specific reason or set of reasons  
18      why that was necessary to change the policy?

19          A.   Some things, like we have DNA evidence now, back  
20      when the policy was written DNA I think may have been in its  
21      infancy stages, with how we store that material, we have to  
22      have refrigeration now, we have to have better organization.  
23      So there were several reasons. Plus, we wanted to be in  
24      compliance with the CALEA standard in keeping a complete  
25      separation of property and evidence and make sure everything

1 was housed in accordance with one, the CALEA standard, which  
2 our policy was supposed to model.

3 THE COURT: Can I just ask, I'm sorry, for the  
4 record, how do you spell CALEA, do you know?

5 THE WITNESS: It's an acronym, Your Honor.

6 THE COURT: Okay. But what --

7 THE WITNESS: C-A-L-A [sic]. And it's the  
8 Commission of Accreditation for Law Enforcement Agencies,  
9 I believe that's what that stands for.

10 THE COURT: Thank you.

11 THE WITNESS: You're welcome.

12 THE COURT: I just wanted the court reporter to have  
13 it.

14 THE WITNESS: Yes, I'm sorry for not --

15 THE COURT: No problem. No problem.

16 MR. COHEN: May I continue?

17 THE COURT: Yes, sir. Sorry, I just wanted that.

18 MR. COHEN: Thank you.

19 **BY MR. COHEN: [Resuming]**

20 Q. You had stated that one of the reasons why there had  
21 to be changes in the policy was that the technology change,  
22 there's more -- there are more numerous kinds of things that  
23 could come into evidence that require specialized storage, and  
24 you specifically mentioned DNA. But could I ask you --

25 MS. GALLOW: Your Honor, if I may interject as to

1           counsel testifying at this point. I'm not sure I'm  
2           hearing a question right now.

3           MR. COHEN: I'm not testifying, Your Honor, I'm  
4           referring to what he said for the purpose of setting up  
5           my next question.

6           THE COURT: All right. Go ahead, counsel.

7           MR. COHEN: Thank you.

8           **BY MR. COHEN: [Resuming]**

9           Q. You stated that because you had new kinds of storage  
10          issues, that was one issue. But an overarching theme, as we  
11          just discussed before, maintaining chain of custody still  
12          remained the most vital part of Standard Operating Procedure,  
13          didn't it?

14          A. Well, I would say it was one of many vital  
15          components. As I stated earlier, we moved the Property Room  
16          from 165 Decatur Street to 640 North Avenue, which is the City  
17          Hall lease location. Since such time the property room has  
18          moved again. The geographical location of the building and  
19          the logistics inside created problems. So everything that I  
20          initiated was based on those facts.

21          Q. What kinds of problems or issues did the Department  
22          have with handling and storing evidence before you made the  
23          changes that you did?

24          A. No agency is perfect. I think that we all strive  
25          for perfection. There have been times when things have been

1 hard to locate, due to the size of the Atlanta Police  
2 Department we are -- I think the Department is shooting now  
3 for a total of 2,000 officers on the street. Collection of  
4 money, jewelry, valuables, firearms, we had a very enormous  
5 Property Room. We did our best to track and keep up with  
6 everything. Items got lost, misplaced, misfiled. Sometimes  
7 they say you don't have to throw away something, you just  
8 misfile it. If you put it somewhere in the particular storage  
9 location and it's not the location that's indicated in the  
10 computer, you'll go to the computer location looking for it  
11 but it's not there and, therefore, you have to physically  
12 search everything.

13 Q. Did you yourself rewrite Standard Operating  
14 Procedure?

15 A. Yes, I did. In conjunction with Dr. Richard Clark,  
16 he was the commander of the Planning and Research Unit, so  
17 everything that -- or suggestion I would come up with, he was  
18 our CALEA representative, and everything I wrote it was  
19 written in draft form, was sent to him for review. We used to  
20 send it out for what we call a command review where other  
21 commanders would look at it to get as many eyes on the policy  
22 as possible. We would make revisions. When all those  
23 revisions were incorporated or changed, then we issued it as a  
24 policy.

25 Q. So at that point, did you personally have the

1 responsibility of training anybody else in the Standard  
2 Operating Procedure for handling and storing evidence?

3 MS. GALLOW: Your Honor, I'm going to object on  
4 relevance grounds at this point. There's been no dispute  
5 at trial and pretrial that evidence in this case was lost  
6 by various agencies. I'm not sure where we're getting at  
7 right now as to the Standard Operating Procedures and  
8 where that fits in with this case at this point.

9 MR. COHEN: Your Honor, where we're going with that  
10 is that this gentleman was the supervisor and author of  
11 the policy. The witness to follow is going to be shown  
12 to have violated specific Standard Operating Procedure as  
13 regards very critical pieces of evidence in this case.  
14 And the level that it has to reach is bad faith, the  
15 standard that we have to show is bad faith, by showing a  
16 consistent and deliberate indifference towards following  
17 Standard Operating Procedure which then results in the  
18 loss of critical evidence. I'm just trying to establish  
19 what should have happened before we introduce what did  
20 happen.

21 MS. GALLOW: And, Your Honor, I would just submit  
22 that that was undisputed at trial and pretrial and post  
23 trial that these agencies didn't follow their chain of  
24 custodies due to the lost evidence, they didn't follow  
25 protocol. So, again, I'm just wondering where this line



1 of inquiry is going to because it is undisputed.

2 MR. ABT: Judge, I'll interject. The argument that  
3 Standard Operating Procedures are important is relevant  
4 because no one up until this date, none of the trial  
5 lawyers, none of the pretrial motions on appeal, on the  
6 motion for new trial -- not in the trial -- ever bothered  
7 to argue that the Standard Operating Procedures were  
8 violated. All they did at trial and all these motions  
9 that the State is arguing now is they objected that the  
10 evidence was lost. And that's true. It was litigated  
11 that way. They checked and said that they lost the  
12 evidence that should be introduced.

13 What they didn't do was show why there was bad  
14 faith. There was bad faith because the police violated  
15 those Standard Operating Procedures.

16 MS. GALLOW: Your Honor, again, I would say, just  
17 based on the record, that's a misstatement of the  
18 evidence in this case. That was actually brought out at  
19 a pretrial hearing where we had certain witnesses to come  
20 in and testify as to the Standard Operating Procedures,  
21 protocol, chain of custody. And that was specifically  
22 the witness was Joe Burford, in the motion -- or the  
23 pretrial hearings, he testified to that.

24 Again, at the motion for new trial hearing, Don  
25 Samuel brings in three more witnesses to testify as to

1           why the GBI, APD, and DeKalb Fire Department, among  
2           others, failed to comply with their chain of custodies,  
3           why they failed to comply with their protocols in  
4           maintaining that evidence. So we had this issue brought  
5           out at the pretrial hearing, we've had this issue brought  
6           out at the motion for new trial hearing, so my objection  
7           was as to where we're going with this today because it  
8           was undisputed that these agencies did not comply with  
9           their protocols and Standard Operating Procedures, Judge.

10           THE COURT: So there's no way, counsel, that we can  
11           just stipulate for purposes of this hearing?

12           MS. GALLOW: It was undisputed that they --

13           THE COURT: Okay.

14           MR. COHEN: Your Honor -- go ahead.

15           MS. SHEIN: I'm sorry, Your Honor, if I may. She's  
16           right about the fact that there was some witnesses  
17           presented. What was wrong here is that there were not  
18           enough witnesses to represent what actually went wrong.  
19           They say, yeah, we didn't -- we didn't follow these  
20           procedures, but there are only a couple of witnesses  
21           saying this, not to the extent of a big picture of all  
22           the evidence.

23           We're now getting down to what happened to specific  
24           evidence, and that's a really critical issue here because  
25           not just a general overview of losing 70 pieces is in

1 question. What's at question here is the number of  
2 pieces but the specific type of pieces.

3 THE COURT: Well, counsel, I'm not -- this witness,  
4 though, can't testify to any of that. I think he's just  
5 here to talk about what the Standard Operating Procedure  
6 was; correct?

7 MR. COHEN: Yes, Your Honor --

8 THE COURT: So --

9 MR. COHEN: -- and to address whether or not the  
10 behavior and the actions of employees was in comportment  
11 with that.

12 MS. GALLOW: And again, Your Honor, this was  
13 undisputed. It was brought out at trial. This evidence  
14 was missing. Witnesses testified to that.

15 THE COURT: Counsel, I'm going to let you go into it  
16 very briefly. I just -- and I don't mean to harp on this  
17 point, but with 30 witnesses, even we had 30-plus, as I'm  
18 understanding now, even with a full week, I don't know if  
19 we're going to finish. So I just ask you to go through  
20 it briefly and get everything that you need on the  
21 record.

22 MR. COHEN: Yes, Your Honor.

23 THE COURT: Go ahead.

24 **BY MR. COHEN: [Resuming]**

25 Q. Okay. So to cut to the chase here, everything that

1 came in was immediately identified as property or evidence;  
2 right?

3 A. It was the responsibility of the officer or the  
4 personnel turning it in to classify it as either property or  
5 evidence, yes.

6 Q. Okay. And what's the first thing that would happen  
7 to items when they came into evidence?

8 A. At what point in time are you asking?

9 Q. As soon as they were recovered in an investigation.

10 A. It was the personnel's responsibility that was  
11 collecting it to tag it, properly identify it, properly  
12 package it, fill out the necessary form. It may have been  
13 Form APD, Form 600 which was a Property Evidence Control  
14 Sheet. You transport it, you get to the back door in the  
15 Property Control Unit, the clerk that was assigned there.  
16 When you turn it in, it was the officer's responsibility to  
17 sign off on it. The clerk would check it and make sure it was  
18 properly packaged. I believe the computer system software  
19 package was Evidence 2000. Both my tenures in Property as a  
20 sergeant and commander, they would issue it -- not issue it  
21 but input into the database, and they would assign a storage  
22 location, and then they would put it there and it would be  
23 housed, depending on the type of property and type of  
24 evidence.

25 Q. Specifically in a homicide investigation, would

1 homicide investigators get a paper copy of a form for evidence  
2 they submitted?

3 A. It could be either the homicide lead investigator  
4 assigned to handle the case or it could have been an  
5 identification unit employee if they took photographic  
6 evidence or things of that nature. If we did investigations  
7 with a joint agency, like we would have a fire sometimes,  
8 arson investigators would collect evidence, but they -- I  
9 don't believe arson investigators used our Property Room.

10 Q. Under your Standard Operating Procedure, how long  
11 was evidence to be kept?

12 A. Evidence is kept until it's no longer needed for  
13 court purposes. And it would take -- we used to run a report,  
14 we used to call it a blue sheet. We would print out those  
15 reports, we would send it to the officer asking if this  
16 evidence needed to be continued held or released. They would  
17 have to check off on it, sign it, and send it back to the  
18 unit.

19 Q. So for anything to be released or destroyed, that  
20 lead investigator had to sign off on it?

21 A. Either that officer that turned it in; in the event  
22 the officer resigned, was terminated, that officer's  
23 supervisor could do it, or the courts could do it by virtue of  
24 a court order.

25 Q. So that was basically a process for signing off on

1 an item of evidence?

2 A. We had a lot of instances where we would be holding  
3 evidence. It would be bound over for a particular court,  
4 either State or Superior. Most of the times when it was bound  
5 over for Superior Court, the investigators that worked with  
6 the D.A.'s Office, they would come over, they would sign out  
7 that evidence and we would have to input that in the database  
8 to show who took it out and where it went.

9 Sometimes for particular evidence -- and this is one of  
10 the things that I had to write into the policy change that I  
11 foresaw as a problem -- sometimes we would have those homicide  
12 investigators or those identification unit technicians, they  
13 would collect evidence and they would take it straight to the  
14 GBI Crime Lab. The APD Property Control Unit would have no  
15 idea that that evidence existed. So, therefore, it was a  
16 change put in the policy that they could still do that, but  
17 they had to come to Property, they had to check that item into  
18 Property, then they would have to check it back out and we  
19 would show it going to the GBI.

20 Q. Let me ask you a question very similar to that but  
21 kind of in reverse. What about when something had gone to GBI  
22 and came back to Atlanta Police? What should happen then?

23 A. There was a procedure in place that I didn't like.

24 Q. What didn't you like about it?

25 A. The GBI would sometimes call APD, they would tell us

1 to come and pick up our evidence. The people that went out  
2 there, which were clerks who would normally drive a step van,  
3 they would get a manifest with a lot of evidentiary items  
4 listed. My instructions to the people that went to the GBI  
5 Crime Lab under my tenure is if you go out there and they give  
6 you this big manifest, and they give you these humongous  
7 plastic bags with millions of pieces of evidence, you might  
8 want to take the time to stay out there all day, two days,  
9 three days, whatever it takes to make sure whatever they're  
10 saying is on that manifest, that you locate it and that you  
11 have it in your possession. Because once you sign it that you  
12 received it, it's yours.

13 Q. Now specifically to that, that's why items were  
14 labeled in a manner that would make it very clear what they  
15 were?

16 A. We had two systems. Everything we did in APD we  
17 issued a barcode number and it was affixed to that item. The  
18 GBI had their own numbering system. So here's the problem as  
19 I stated earlier: when I saw where homicide investigators or  
20 particular identification unit technicians would take  
21 something straight to the GBI, it had a GBI barcode number on  
22 it, but not an APD barcode. Therefore, when that item came  
23 back to us we had not a clue which case it was assigned to.

24 Q. So another way that something could be confused,  
25 besides being labeled differently, would be -- and I'm asking

1 your opinion -- another way something could be unclear about  
2 what it contained is that whatever manner of marking of GBI  
3 code, APD code -- if the name of the item wasn't specific as  
4 to what it was, say for example three bags of evidence, is  
5 there anyway to be sure what's inside something that's labeled  
6 in that manner?

7 A. I'm -- I hear your question, but I really don't  
8 understand what you're trying to tell me.

9 Q. Well, specifically, you were referring to how  
10 something could be confused because it was labeled differently  
11 or it was acquired en masse but, generally, whatever was on  
12 those lists could be specifically identified. Would it have  
13 been proper under any circumstance to simply label three  
14 containers as three bags of evidence?

15 A. I can only attest to APD policy. If an officer came  
16 to APD and he had several pieces of evidence -- that's what  
17 that APD Form 600 was for -- everything had to be listed. If  
18 they had three bags, as you stated, most times the officer  
19 would say Bag 1 and they would list the inventory for that  
20 bag. If we had a suitcase, you just couldn't turn in a  
21 suitcase. As we all know 9/11 2000 [sic], if an officer  
22 turned in a suitcase that the contents had not been checked,  
23 we could have very well taken something in that could have  
24 harmed employees in the Property Control Unit. You had to  
25 inventory everything in the suitcase. You had to check it.



1 Q. Okay.

2 A. That was the way that policy for APD was written. I  
3 cannot attest for the GBI.

4 Q. Now specifically, you had talked about things that  
5 were bound over at State or Superior Court. Specifically, in  
6 terms of something that's going to be used by the State at  
7 trial as part of an investigation, can you tell us what's  
8 different about the chain of custody for an items that the  
9 police department knows is going to be used as trial evidence?

10 A. I can only cite one thing for example, and it's  
11 directly related to me as the property commander. Property  
12 should not be released from our Evidence Room unless we know  
13 where it's going. And usually, it is my understanding when  
14 things are used at trial by the Court, they do not come back  
15 to our Property Room. An example of that would be the federal  
16 courts in this particular example, and I cannot call any  
17 names, prosecuted a APD employee. What they utilized and what  
18 they wanted, they came to the Property Room where we used to  
19 keep things manually in a book, and they wanted a particular  
20 book, which housed all the information that was part of my  
21 backup system. I had to relinquish that book to the federal  
22 courts. The federal courts still have that book. I still  
23 maintain in my possession, even in retirement, a receipt that  
24 those two investigators signed, and every property commander  
25 behind me, especially the one that replaced me, I gave them

1 the original sheet and everyone in the chain of command knew  
2 that that book is still being held by the federal government.

3 Q. So no item of evidence should ever had left without  
4 having been completely accounted for?

5 A. That is the way policy is written.

6 Q. Okay.

7 MS. GALLOW: Again, Your Honor, I'm going to object  
8 to this line of inquiry. We had a witness that testified  
9 at the motion for new trial hearing in this case,  
10 specifically James Wood, who oversaw the Atlanta Property  
11 Section, specifically the Property Control Unit. Don  
12 Samuel brought him in to testify as to this exact same  
13 issue, so I'd just to note for the record that I object  
14 to this line of inquiry, Your Honor.

15 MR. COHEN: If I could just ask him a couple more  
16 questions, I'm done with this witness.

17 THE COURT: Thank you.

18 **BY MR. COHEN: [Resuming]**

19 Q. Did you work with Sandra Padgett during your time in  
20 the Evidence Room?

21 A. When I went to Property first as a sergeant in April  
22 of 1997, she was the property commander, I was her  
23 administrative sergeant until such time I went to cover the  
24 evening watch, which was 3:00 p.m. until 11:00 p.m. That  
25 happened March 31<sup>st</sup> of '98 until such time I transferred in

1 September '98.

2 Q. And -- I'm sorry, go ahead.

3 A. So that's the first time that I worked with her,  
4 yes.

5 Q. Okay. But were you aware of the fact that she  
6 signed for items in the Scott Davis investigation and then  
7 could not later account for their whereabouts, that they  
8 simply disappeared?

9 A. I'm not aware of the commander's actions in the  
10 incident you're speaking of, no.

11 Q. If that had happened, that would be a clear  
12 violation of procedure?

13 A. I cannot testify to that.

14 Q. Okay. And finally, I just want to ask you, are you  
15 aware that the State has a duty under law, under statute, to  
16 preserve evidence in a criminal case?

17 A. I'm familiar with the State statute. I believe it  
18 might fall in Annotated Code under 17 --

19 Q. 17-5-55 and 17-5-56?

20 A. 17-5-fifty --

21 Q. Preservation of Evidence.

22 A. -- et al. It's a lot of sections. It makes  
23 departments responsible for collecting, storage, notifying  
24 it's -- and there are different items that are treated  
25 differently in that code section. We're not mandated in

1 certain items to return -- such as certain cases involving  
2 firearms or edged weapons, knives.

3 Q. Okay. But during the time of this investigation you  
4 were in fact -- and everyone in your agency is a state actor  
5 for the purposes of that code section relating to Scott Davis?

6 A. Which investigation are you referring to? I'm not  
7 sure of the time frame.

8 Q. The homicide took place in 1996 and was prosecuted  
9 in 2006.

10 A. 1996 there should have been a policy in place, like  
11 I stated. There's two times I went through Property, the  
12 first time in 1997 through the period of September of '98.  
13 The old policy would have been in force at that time, that's  
14 that BPS-SOP 5.1. And my second tenure down there was April  
15 of 2003.

16 MR. COHEN: If I can have just a brief moment, I  
17 think we're about done here.

18 [Counsel confer.]

19 MR. COHEN: Could I approach the witness briefly?

20 THE COURT: Sure.

21 **BY MR. COHEN: [Resuming]**

22 Q. Mr. Denson, you're referring to two different  
23 Standard Operating Procedures, BPS 5.01 and then the Evidence  
24 Manual that came later. Are these the SOPs that you referred  
25 to?

1           A.     These appear to be the SOPs.

2           MR. COHEN: Your Honor, at this time we'd move to  
3     admit these Standard Operating Procedures into evidence.

4           THE WITNESS: Could I see the second one?

5           THE COURT: Do they have numbers?

6           MR. COHEN: Yes, Your Honor.

7           THE WITNESS: This one.

8           MR. COHEN: Petitioner's Exhibits 1 and 2.

9           THE COURT: And can you specify which is which?

10   **BY MR. COHEN: [Resuming]**

11           Q.     Exhibit 1 is the Standard Operating Procedure BPS  
12     5.01, and Exhibit 2 is the revised Standard Operating  
13     Procedure.

14           A.     May I see that, sir? I have a problem with this  
15     one, BPS SOP 5.01. You asked me a question earlier if there  
16     was a way for persons to retrieve SOPs electronically. This  
17     one where this is kind of covered up, the electronic signature  
18     as it appears to be R.J. -- I would say that's R.J. Pennington  
19     for -- our last chief. But BPS SOP 5.01, this should have an  
20     original signature page on similar to this one here, and it  
21     should have been signed by Morris G. Redding. At the time  
22     that was the chief in place. And at the time that this  
23     version was written, you could have not obtained an electronic  
24     copy. So the reason I have a problem with this, unless I see  
25     the cover page with the electronic signature, I cannot attest

1       that this is even an exact replica of what was in force at the  
2       time.

3             And one of the things, if I'm not speaking out of turn, I  
4       tried to ascertain from the attorney that I talked to upon  
5       receiving the subpoena is that in my own records I have  
6       probably the original -- one of the original copies issued to  
7       me of this SOP, which I would have been more than happy to  
8       bring before testifying to it today, but I was not so  
9       informed.

10            Q.    The sections that you see here, are they accurate,  
11       to your recollection?

12            A.    I cannot -- I cannot attest to that.

13            Q.    Okay, thank you.

14            A.    Okay.

15            MR. COHEN:  Your Honor --

16            THE COURT:  Go ahead.

17            MR. COHEN:  We still move to introduce these items  
18       into evidence.

19            MS. GALLOW:  Based on Mr. Denson's inability to  
20       actually identify those documents, Respondent would  
21       object to the admission of those.

22            THE COURT:  Well, I think he only can't identify  
23       P-1; correct?

24            THE WITNESS:  That's the one that's labeled as --

25            THE COURT:  5.01?

1 THE WITNESS: -- 5.01.

2 THE COURT: Yes.

3 MS. GALLOW: Well, in that case, Judge, we withdraw  
4 our objection to Petitioner's 2, but we would still  
5 object to Petitioner's 1.

6 MR. COHEN: Your Honor, we would just ask that the  
7 witness bring the original copy of this.

8 THE COURT: Well, is he coming back?

9 MR. COHEN: He is now.

10 MS. SHEIN: He is now. Your Honor, these were --  
11 let me just share for just a minute, this might be  
12 resolvable. These were what we obtained through the  
13 request of Open Records. This is exactly what they sent  
14 us. I appreciate that he could not testify this is  
15 exactly what it was, but because it's a business record  
16 and because it was obtained through Open Records, he'll  
17 have to come back to show us there might be a difference  
18 in it, and I'll be happy to have him come back with that  
19 information.

20 THE COURT: Well, I'm going to let y'all deal with  
21 him. I mean, this is something certainly that could have  
22 been worked out before he got here today. Maybe he can  
23 fax you a copy of what he's got at home and you can agree  
24 on that.

25 I'm going to admit 2, I'm not going to admit 1, and

1 y'all will have to deal with your witness.

2 **[WHEREUPON, Petitioner's Exhibit Number 2 was admitted**  
3 **into evidence without objection.]**

4 MS. GALLOW: Thank you, Your Honor.

5 MR. COHEN: Thank you, Your Honor. Nothing further.

6 THE COURT: Anything on cross?

7 MS. GALLOW: Just briefly, Your Honor.

8 **CROSS-EXAMINATION**

9 **BY MS. GALLOW:**

10 Q. Good morning, Mr. Denson.

11 A. Good morning.

12 Q. I believe you testified that you worked with the  
13 Property Control Unit between 1997 and 1998; is that correct?

14 A. That's correct.

15 Q. And then you came back in, in about April of 2003 to  
16 implement various new procedures and policies and evidence  
17 maintenance; is that correct?

18 A. The first time I was a supervisor, the second time I  
19 was the commander.

20 Q. And you left in about 2003; is that what you had  
21 testified to?

22 A. I was assigned there April of 2003.

23 THE COURT: How long were you there --

24 THE WITNESS: In the Property --

25 THE COURT: -- the second time?



1 THE WITNESS: The second time?

2 THE COURT: Uh-huh.

3 THE WITNESS: From April 2003, I believe, until  
4 March 2005. They transferred me to run the budget for  
5 the Department at that time.

6 **BY MS. GALLOW: [Resuming]**

7 Q. And do you recall who your successor was once you  
8 left APD?

9 A. Well, I had two. The person -- the commander that  
10 immediately came after me was Lieutenant Cecil Mann; and upon  
11 Lieutenant Cecil Mann's retirement, that was Lieutenant Hobbs;  
12 Hobbs transferred and there was Lieutenant Shaw; and Shaw left  
13 and then it was Lieutenant Webb; and as of last Thursday, they  
14 have a new commander, and that's Lieutenant Sheffield.

15 Q. And when you -- were you aware that when Mr. Mann  
16 took over your role or various roles within your unit, he  
17 again implemented new procedures with regard to evidence  
18 maintenance?

19 A. Yes, he did.

20 MS. GALLOW: Thank you, Your Honor. I have no  
21 further questions.

22 THE COURT: Any redirect?

23 MR. COHEN: No, Your Honor.

24 THE COURT: Okay. Can Mr. Denson be excused or do  
25 you need to talk to him a minute to see if you can get

1 the paperwork?

2 MS. SHEIN: If we could chat with him for just a  
3 moment, Your Honor, it would be appreciated.

4 THE COURT: Sure.

5 THE WITNESS: Okay.

6 THE COURT: You can step down, Mr. Denson.

7 THE WITNESS: Thank you, Your Honor.

8 [Witness steps down.]

9 THE COURT: Ready to call your next witness?

10 MR. COHEN: Yes. Sandra Padgett.

11 [Brief pause.]

12 MR. COHEN: Good morning, Ms. Padgett.

13 THE WITNESS: Good morning.

14 Whereupon,

15 **SANDRA PADGETT,**

16 having been duly sworn under oath, was examined and testified  
17 as follows:

18 **DIRECT EXAMINATION**

19 **BY MR. COHEN:**

20 Q. Will you state your name for the record.

21 A. Sandra Padgett.

22 Q. And where are you employed?

23 A. I am currently retired from the Atlanta Police  
24 Department.

25 Q. Okay. And how long did you work for Atlanta Police?

1           A.    Almost 28 years.

2           Q.    Okay.  And while you were there, did you work in  
3 Property or Evidence?

4           A.    Yes, I did.

5           Q.    Okay.  Did you have any formal training when you  
6 started?

7           A.    In Property?

8           Q.    Yes, ma'am.

9           A.    No, sir.

10          Q.    And as part of your job there, did you handle  
11 evidence that the State was planning to use for trials?

12          A.    Yes, sir.

13          Q.    Did you have to sign for the receipt of evidence?

14          A.    To -- yes, sir.

15          Q.    Okay.  And do you recall or are you familiar with  
16 the Scott Davis investigation?

17          A.    Not until this came up, no, I wasn't.  I mean --

18          Q.    But you were employed with the Evidence Room during  
19 the time of that investigation?

20          A.    I was employed from 1998 to August of 2000.

21          Q.    Okay.  And before you started there, did you have  
22 any relevant experience with handling evidence?

23          A.    No.  I mean, other than the normal maintaining the  
24 chain of custody as an officer turning the property in.

25          Q.    Okay.  And can you tell us what you mean by chain of

1 custody?

2 A. Well, if I found some evidence and I would turn it  
3 in to Property, of course I would fill out an Evidence Sheet  
4 and turn it in to Property in evidence where they would sign  
5 the sheet and enter it into their computer system. And if  
6 someone else came and needed that evidence, when they signed  
7 it out -- or when they took it they would have to sign it out,  
8 and then if they brought it back they'd have to sign it back  
9 in.

10 Q. Okay. And so you would have to be compliant with  
11 Standard Operating Procedures for handling evidence and  
12 showing where it went?

13 A. Yes.

14 Q. And did anyone ever check your work records for  
15 purposes of showing compliance?

16 A. We would have audits. I think we had one while I  
17 was there, but I'm not sure, I can't really remember. But  
18 they would do audits. But they would just take selected  
19 pieces of evidence and make sure that they were in the proper  
20 place in the Evidence Room or the Property Section.

21 Q. Okay. And how about the movements of evidence from  
22 Atlanta Police to GBI and back, would you play a role in that?

23 A. Occasionally, I think maybe once or twice the GBI  
24 would call us and they would say we have so much of your stuff  
25 out here we don't have room to keep anymore; would you please

1       come down and get it. So -- usually the property sergeant  
2       would take the van, we had a huge bread-truck-like van, and  
3       take it out there and pick up the evidence and bring it back.  
4       And a couple of times the sergeant was busy and I didn't have  
5       any -- too much to do, and I had said, okay, I'll go out there  
6       and get it for you. So, yes, I have done that.

7           Q.   And as far as any routine for picking evidence up  
8       from the Crime Lab, how were you to account for what you had  
9       picked up and match it with what you recorded when you got  
10      back?

11          A.   When you -- when we got back? When I got back I  
12      would just turn the sheets and the evidence over to the  
13      property evidence sergeant.

14          Q.   Did you have to do anything like verify the contents  
15      of any bags or boxes that you picked up?

16          A.   No, not verify the contents of anything.

17          Q.   You just signed for it?

18          A.   You would -- you would -- they would give you a  
19      sheet and you would have the bags, and you would match the  
20      sheet up with the numbers on the bags.

21           THE COURT: I'm sorry, they had -- you got your --  
22      you had a sheet from the GBI --

23           THE WITNESS: Yes, ma'am.

24           THE COURT: -- and they had numbers on the outside  
25      of the bag?

1 THE WITNESS: Yes, ma'am. They -- or names on the  
2 outside of the bags.

3 THE COURT: I don't -- names of the defendant --

4 THE WITNESS: Yes.

5 THE COURT: -- to whom the evidence belonged --

6 THE WITNESS: Yes, ma'am.

7 THE COURT: -- to the case?

8 THE WITNESS: Yes, ma'am.

9 THE COURT: But you didn't -- so all of that was  
10 just on the outside of the bag.

11 THE WITNESS: Yes. Never opened the bags --

12 THE WITNESS: To look inside.

13 THE COURT: You didn't open the bag. So it's  
14 possible, I guess, that there were things that they had  
15 on the outside of the bag that weren't on the inside of  
16 the bag, but you didn't know it?

17 THE WITNESS: I didn't know it.

18 THE COURT: Okay.

19 **BY MR. COHEN: [Resuming]**

20 Q. Okay. What about very similar to that, if something  
21 was returned to the Department from GBI and you simply signed  
22 to take receipt of it, did you ever do that?

23 A. Yes.

24 Q. And when you did that, was there any process to be  
25 sure that what you signed for was actually what was present?

1           A.    In the bag?

2           Q.    Uh-huh.

3           A.    No.

4           Q.    Okay.

5           A.    We did not open any sealed bags or containers; we  
6 just made sure that the names or the numbers were matched up.

7           Q.    Now if something went to the Crime Lab then came  
8 back, there should be very specific documentation to getting  
9 it back?

10          A.    Yes.

11          Q.    Okay.  And furthermore, there would be documentation  
12 of what happened to it once it did come back?

13          A.    Yes.

14          Q.    Okay.

15               MR. COHEN:  May I approach the witness?

16               THE COURT:  Sure.

17          Q.    Showing you what's been marked as Petitioner's  
18 Exhibit 3.  First of all, does that look like your signature?

19          A.    It is my signature.

20          Q.    Okay.  And how about here?

21          A.    Yes.

22          Q.    Okay.  And do you recognize this numbering system  
23 that's in place here?

24          A.    Yes.

25          Q.    Does this make sense to you?  Can you explain for us

1        what that is?

2            A.    Okay.  These are complaint numbers, case numbers.

3            Q.    Yes, ma'am.

4            A.    Okay.  This is the year, the first two digits of the  
5        year.  And then the rest of it, I believe, is what's called  
6        the CAD's number or a complaint number.

7            Q.    Okay.

8            A.    And it would match up with the particular case and  
9        the paperwork, and on the evidence would have the same number  
10       on it.

11          Q.    And then what about these numbers over here next to  
12       it?  What do the numbers signify where you've taken receipt of  
13       these items?  For example, it's 9 and 21.  Do you know what  
14       those are?

15          A.    I don't remember.

16          Q.    Okay.  I show you something else.

17          A.    Okay.  It's been 14 years.

18          Q.    I do understand.  I'm showing you what's been marked  
19       as Petitioner's Exhibit 4, do you recognize this kind of a  
20       document?

21          A.    No.  But there's my name, so --

22          Q.    Okay.  And it indicates that this is the chain of  
23       custody identifying items in particular cases the way that you  
24       had shown --

25          A.    Yes.



1 Q. -- the numbers corresponded to cases?

2 A. What I would -- what I picked up at the Crime Lab  
3 would be that handwritten piece of -- piece of paper that you  
4 showed me --

5 Q. Okay.

6 A. -- and the bags of evidence.

7 Q. And here where they're showing your name as having  
8 taken receipt, they're identifying things. Specifically here  
9 are items 9 and 21 --

10 A. Uh-huh.

11 Q. -- that were signed for in April of 1999.

12 A. Uh-huh.

13 Q. Actually, the signature date here is March 22<sup>nd</sup> of  
14 '99.

15 A. Uh-huh.

16 Q. And if that is identifying particular items that you  
17 signed and took receipt for.

18 A. Okay. It may have been that there were several bags  
19 that belonged to one case, and this was Bag No. 9 or Bag No.  
20 21 of a set of bags that belonged to a case.

21 Q. And I think I can clarify it --

22 A. Okay.

23 Q. -- just a little further for you now with what has  
24 been marked as Petitioner's Exhibit Number 5. And do you see  
25 where this is identifying by the numbers -- here's the

1 identifier for the case that you had shown on the first page  
2 that you signed for. And these numbers identifying specific  
3 items where it showed that you had signed for Items 9 and 21,  
4 can you tell us what Items 9 and 21 are?

5 A. No. 9 is athletic shoe -- shoes returned to me.

6 Q. And how about 21?

7 A. Twenty-one is a gasoline can returned to me.

8 Q. Okay. And how about 43?

9 A. Questioned material returned to me.

10 Q. Okay. And how about 44?

11 A. Burned debris returned to the Atlanta Fire  
12 Department.

13 Q. Okay. Thank you.

14 THE COURT: Ma'am, just -- how long were you in the  
15 Evidence Room? From what years, do you remember?

16 THE WITNESS: 1998, and I don't remember what month.

17 THE COURT: Uh-huh.

18 THE WITNESS: And then I was transferred to the  
19 airport in August of 2000.

20 THE COURT: Okay. So a couple of years, tops.

21 THE WITNESS: Yeah.

22 THE COURT: Yeah?

23 THE WITNESS: Yeah.

24 THE COURT: Okay. Maybe two and a half?

25 THE WITNESS: I don't think it was that long but --

1       **BY MR. COHEN: [Resuming]**

2           Q.     So we have confirmed that that was your signature  
3     and you took receipt for, among other items, a gas can.

4           A.     [No audible response.]

5           MR. COHEN: Your Honor, at this time we'd ask to  
6     move Exhibits 3, 4, and 5 into evidence.

7           MS. GALLOW: Your Honor, I would object to  
8     Petitioner's 5. This purports to be an email from Sheila  
9     Ross, the prosecuting attorney in this case, to Glenn  
10    O'Loughlin who worked at the GBI. I have no idea how  
11    they're going to authenticate this document, so I would  
12    object on that basis, Your Honor.

13          MR. COHEN: Your Honor, it's actually from Mr.  
14    O'Loughlin to Ms. Ross.

15          THE COURT: Well, hold on just a second. None of  
16    them were actually identified on the record, counsel.  
17    You asked her if, you know, if this was her signature and  
18    you've talked about them. Could I get you just on each  
19    one to please identify what they are on the record, and  
20    then we can talk whether they're coming in or not.

21          MR. COHEN: Yes, Your Honor.

22          THE COURT: P-3, I'm assuming was a Property Sheet,  
23    but I don't know that.

24          MR. COHEN: Yes, Your Honor.

25          THE COURT: Okay.

1           MR. COHEN: It's from Atlanta Police Department and  
2           it shows the witness' signature taking receipt for items  
3           from Case 96-52726.

4           THE COURT: And when you say taking possession of  
5           items -- and I guess I'm jumping here -- is this when she  
6           went to the Crime Lab and brought it back? Is that what  
7           -- because I'm not clear. I understand that's a Property  
8           Sheet, but I'm just not clear what was going on. Is that  
9           a sheet that she got from the Crime Lab or is that an APD  
10          sheet?

11          MR. COHEN: It's an APD sheet --

12          THE COURT: Okay.

13          MR. COHEN: -- and I believe it shows taking receipt  
14          of something that was delivered back.

15          THE COURT: From the?

16          MR. COHEN: From the Crime Lab.

17          THE COURT: From the Crime Lab, okay.

18          MR. COHEN: Yes, Your Honor.

19          THE COURT: Okay. Any objection to P-3?

20          MS. GALLOW: Yes, Your Honor. I would object to  
21          P-3. Like I said, I'm not sure where this comes from, I  
22          have no idea where -- what document we're dealing with  
23          here. We simply have various items that have been signed  
24          for. I have no idea where this document has come from.  
25          I would just object on that basis, Your Honor.

1 THE COURT: Okay. Counsel, then you'll need to voir  
2 dire your witness a little further to see if we can get  
3 that information for the State.

4 MR. COHEN: Just a moment.

5 [Brief pause.]

6 **BY MR. COHEN: [Resuming]**

7 Q. Would this be consistent with an outgoing Crime Lab  
8 log book from the Georgia Bureau of Investigation?

9 A. Yes.

10 Q. Okay. And this is your signature?

11 A. It is.

12 Q. And you've identified this is the case number?

13 A. Uh-huh.

14 Q. And specifically, if we have chain of custody  
15 indicating which items you signed for?

16 A. Yes.

17 THE COURT: Are you on P-3?

18 MR. COHEN: Yes, Your Honor.

19 THE COURT: Okay.

20 MR. COHEN: It shows Exhibits 9 and 21.

21 **BY MR. COHEN: [Resuming]**

22 Q. And you do recognize this document as a log sheet?

23 A. Yes.

24 Q. And that you would have had to sign for it in order  
25 to receive any evidence?

1           A.     Right.

2           MR. COHEN: Your Honor, the document shows she took  
3 receipt of these items.

4           MS. GALLOW: Your Honor, Ms. Padgett can identify  
5 this document. I guess I have no objection to this --  
6 the admission of Petitioner's 3.

7           THE COURT: All right. I'll admit 3 then without  
8 objection.

9           **[WHEREUPON, Petitioner's Exhibit Number 3 was admitted  
10 into evidence without objection.]**

11          THE COURT: And ma'am, when you're answering try not  
12 to say uh-huh or uh-uh.

13          THE WITNESS: Okay.

14          THE COURT: The court reporter can't take it down.

15          THE WITNESS: Yes, ma'am.

16          **BY MR. COHEN: [Resuming]**

17          Q.     So according to these documents, you would have  
18 taken receipt of a gas can that had been sent to GBI and was  
19 then returned to the Atlanta Police?

20          A.     According to that paperwork, yes, sir.

21          Q.     Okay. And there was a Standard Operating Procedure  
22 for what to do with items that came back from the Crime Lab?

23          A.     There was a Standard Operating Procedure in place at  
24 that time, yes, there was.

25          Q.     And what should have happened with that item once it

1       came back?

2           A.    Once the items came back from the Crime Lab, they  
3       are -- they were taken to the 7<sup>th</sup> floor of City Hall East where  
4       there was a large area fenced off with a very high fence and a  
5       locked gate to it, and those items are -- were kept there on  
6       the floor of the 7<sup>th</sup> floor.

7           Q.    And there would have been records of all of it?

8           A.    Yes, sir, there should have been.

9           Q.    But in fact there are no records of anything that  
10       further happened with that gas can.

11           MS. GALLOW:  Objection, Your Honor, counsel is  
12       leading his witness again.

13           THE COURT:  Rephrase, counsel.

14       **BY MR. COHEN:  [Resuming]**

15           Q.    Are there any records, that you are aware of,  
16       showing what happened to that gas can after you signed for it?

17           A.    No, sir.

18           Q.    And are you aware of any reason why those records  
19       would not be available to anybody looking for them?

20           A.    No, sir.

21           Q.    So, in other words, there should have been a clear  
22       trail of where the gas can went?

23           A.    Yes, sir.

24           Q.    All right.  You didn't personally create any records  
25       for the gas can?

1           A.    No, sir.

2           Q.    Did you realize the significance of that gas can to  
3 Scott Davis' case?

4           A.    No, sir.

5           Q.    Did you realize it was significant for the State and  
6 154

7

8           A.    No, sir.

9           Q.    All right. So you have described Standard Operating  
10 Procedure for what should have happened. The things that  
11 you've just described following taking receipt of that gas  
12 can, are these violations of Standard Operating Procedure?

13          A.    I do not specifically remember that the Standard  
14 Operating Procedure that was in place at that time stated  
15 exactly what we did -- stated what we should have done  
16 specifically with items that came back from the Crime Lab. I  
17 do not remember that.

18          Q.    So the only thing you can account for is signing for  
19 the gas can?

20          A.    Signing for the item, putting it in the van, and  
21 bringing it back to Property Management.

22          Q.    And no further record would have been created from  
23 that point?

24          A.    It should have been logged back in as being in  
25 Property Management, and taken up to the 7<sup>th</sup> floor.



1           Q.   And if that had happened, it would have remained  
2 available?

3           A.   Yes.

4           Q.   And are you aware that there is a statutory duty on  
5 State agencies to preserve evidence in a criminal case?

6           A.   Yes.

7           Q.   And you are employed by the State of Georgia at this  
8 time?

9           A.   No.

10          Q.   You're -- I'm sorry, by Atlanta Police as an agency  
11 assisting in law enforcement?

12          A.   At that time I was.

13          Q.   So you were a State actor for purposes of the law?

14          A.   Yes, sir.

15          MR. COHEN:  Nothing further.

16          THE COURT:  Give me just one second.

17          Ma'am, I just want to understand.  You went to the  
18 Crime Lab --

19          THE WITNESS:  Uh-huh.

20          THE COURT:  -- in reference to, I think, P-3.  You  
21 went to the Crime Lab, they gave you some -- a bag with  
22 some evidence in it?

23          THE WITNESS:  They gave me many bags.

24          THE COURT:  Okay, many bags.

25          THE WITNESS:  With evidence.

1 THE COURT: Now let me -- I have a couple of  
2 questions. Did the bags have more than one thing in  
3 them?

4 THE WITNESS: Some of them did.

5 THE COURT: Okay. You had -- on the outside of the  
6 bag it referenced the case --

7 THE WITNESS: Uh-huh.

8 THE COURT: -- and you got a Property Sheet from  
9 them.

10 THE WITNESS: Uh-huh.

11 THE COURT: Which -- did you check to confirm that  
12 those things matched?

13 THE WITNESS: I believe I did.

14 THE COURT: Okay. Then -- but you didn't open any  
15 of the bags.

16 THE WITNESS: No.

17 THE COURT: Put them in the van, took them back to  
18 APD.

19 THE WITNESS: Yes.

20 THE COURT: And then what did you do?

21 THE WITNESS: I advised the property evidence  
22 sergeant --

23 THE COURT: Okay.

24 THE WITNESS: -- there was a particular sergeant who  
25 was in charge of property and evidence, that the items

1           were now in Property and he needed to log them back in or  
2           have his personnel log them back in and put them in the  
3           proper place.

4           THE COURT: And that was all you did?

5           THE WITNESS: Yes.

6           THE COURT: So you didn't log them back in.

7           THE WITNESS: No.

8           THE COURT: Do you know when you got back to the  
9           police department, did you leave them in the van, did you  
10          bring all the bags in, do you recall what you did?

11          THE WITNESS: I would have locked the van --

12          THE COURT: And gone to --

13          THE WITNESS: -- and gone in and told him that those  
14          items were out there.

15          THE COURT: Okay.

16          THE WITNESS: And he was on other cases that I  
17          remember. He would -- he and someone else would go out  
18          there and unload the van and bring them in to Property  
19          Management.

20          THE COURT: Okay. And what did you do with the keys  
21          when you locked the van, did you --

22          THE WITNESS: Gave them to him.

23          THE COURT: Gave them to him. So you locked the  
24          van, left everything in the van, gave them the keys, said  
25          I got stuff out in the van, and you're done?

1 THE WITNESS: Right.  
2 THE COURT: Okay.  
3 MR. COHEN: Nothing further.  
4 THE COURT: Sorry.  
5 MS. GALLOW: No questions, Your Honor.  
6 THE COURT: Okay. Can this witness be excused?  
7 MS. SHEIN: Yes.  
8 MR. COHEN: Yes.  
9 MS. GALLOW: No objection.  
10 THE COURT: You are free to leave. Thank you,  
11 ma'am.

12 THE WITNESS: Thank you.  
13 [Witness excused.]  
14 [Brief pause.]

15 MR. COHEN: Good morning, Mr. Mann.

16 THE WITNESS: Good morning.

17 Whereupon,

18 **CECIL MANN,**  
19 having been duly sworn under oath, was examined and testified  
20 as follows:

21 **DIRECT EXAMINATION**

22 **BY MR. COHEN:**

23 Q. State your name for the record.

24 A. It's Cecil Mann.

25 Q. And can you tell us where you're employed?

1           A.    I'm currently employed with the Georgia Secretary of  
2 State's Office.

3           Q.    Have you worked at the Atlanta Police Department?

4           A.    Yes, sir, I have.

5           Q.    And in what capacity did you work for APD?

6           A.    Several different capacities, you know: officer,  
7 investigator, sergeant, and then finally as a lieutenant.

8           Q.    Okay. And you still active at all in law  
9 enforcement?

10          A.    Well, the Secretary of State's Office.

11          Q.    And when you worked with Atlanta Police, did you  
12 work in Evidence?

13          A.    Yes, sir, that was my last tour from sometime around  
14 2005 till December 2007 when I retired.

15          Q.    Okay. And you were a supervisor?

16          A.    Yes, sir, I was the commander of the unit.

17          Q.    Okay. So you would have been very familiar with  
18 Standard Operating Procedure for handling evidence?

19          A.    Yes, sir.

20          Q.    Okay. What kind of training did you have to  
21 complete to be a supervisor?

22          A.    Several different trainings. Initially when you  
23 make sergeant they put you through a frontline supervisor  
24 school. And then when you make lieutenant they put you  
25 through an advanced level of supervision. And then I had a

1 couple of supervisors courses that I took with the State  
2 Police Academy.

3 Q. Were you ever aware of any irregularities in the  
4 handling of property or evidence?

5 A. Irregularities such as?

6 Q. Such as not following Standard Operating Procedures  
7 or losing items.

8 A. I mean there were occasions that, yeah, some items  
9 were probably lost, you know, over the course of time.

10 Q. Was it part of your job to be aware of where items  
11 went if they went to other agencies?

12 A. Yes, yes, yes.

13 Q. Like say if something was sent to GBI.

14 A. Yes.

15 Q. And did you personally send evidence from Atlanta  
16 Police to GBI?

17 A. Yes, I personally did. I mean, there were several  
18 different changes. When I first went to Homicide, there was a  
19 time when detectives would actually get the evidence from the  
20 crime scene and take it directly to the GBI Evidence Room, the  
21 lab there. And then over the course of time things changed  
22 and you had to bring it down to the Property Room, you had to  
23 check it in and then kind of turn around and check it back out  
24 to take it to the Property Room so that it could continue to  
25 be tracked.

1 Q. And what about when things came back?

2 A. Yeah, when things came back what you were supposed  
3 to do is enter the evidence into the database system if it had  
4 never been entered in before.

5 Q. And if it had been, what should the process have  
6 been for receiving something back into evidence that had been  
7 to the GBI Crime Lab?

8 A. You would enter it in the database and you'd just  
9 note who picked it up, what the evidence was, case number, if  
10 it did not have an APD barcode on it then we would put an APD  
11 barcode, tracking barcode, that we would put on it, and you  
12 would note in the Remarks section the GBI number and things  
13 like that, which case it was associated with.

14 Q. Was there any way of checking for compliance with  
15 that procedure as far as items coming back from GBI?

16 A. There were several audits set up, audit trails that  
17 we initially set up that we tried to track the best that we  
18 could with the equipment that we actually had to track and see  
19 that they were followed.

20 Q. And now --

21 MS. GALLOW: Your Honor, I'm sorry to interject, but  
22 before we go on with regard to Mr. Mann, it has not been  
23 established when Mr. Mann actually worked with the  
24 Atlanta Property Control Unit, so I'd like for counsel to  
25 establish when in fact he did work there to determine

1           whether or not he's competent to testify as to the  
2           matters between '96 and about 2001, Your Honor.

3           THE COURT: Yes, ma'am. Thank you.

4           **BY MR. COHEN: [Resuming]**

5           Q. Can you tell us exactly when you did work at Atlanta  
6           Police?

7           A. Yeah, it was 2005 mid July, until December of 2007.

8           Q. And in the time that you did work there, I'm just  
9           asking you about what you saw with the flow of items in  
10          evidence back and forth.

11          A. Right. That's the only thing I was talking about,  
12          what we were doing when I was there.

13          Q. During your time.

14          A. Yes.

15          Q. Did you have personal knowledge of items that should  
16          have been sent back to Atlanta Police that went somewhere  
17          else?

18          A. I didn't have any personal knowledge of anything  
19          that should have been sent back. I know during my stay there  
20          we would periodically be contacted about evidence that was  
21          being returned to us. There was one example, when Fulton  
22          County Police Department had some badges or something that was  
23          recovered, gosh, years ago, and they contacted us and we had  
24          to go pick that up. Periodically we would receive things in  
25          the mail. A couple of times we received firearms in the mail



1       that were sent back to us.

2           Q.    And I want to ask you about the database that was  
3       used to track property in evidence.

4           A.    Sure.

5           Q.    Are you familiar with Evidence 2000?

6           A.    Yes.

7           Q.    Okay.  How long had that program been in use by  
8       Atlanta Police when you started working?

9           A.    I'm not exactly sure of the exact date, but it seems  
10      to me like it was, I don't know, late '90s sometime when it  
11      was actually installed.

12          Q.    So Evidence 2000 when you came into the police  
13      department had been in use for some time.

14          A.    It had been in use for some time.

15          Q.    And did you have to use that database on any regular  
16      basis?

17          A.    I didn't use it on a day-to-day basis.  My people  
18      generally used it on a day-to-day basis, but it was one of the  
19      things that I strived to replace when I was there.

20          Q.    And why did you wish to replace Evidence 2000?

21          A.    New technology.  I mean, like today if something  
22      comes out today, six months down the road you're going to want  
23      to get that new and improved version of it.  We wanted to get  
24      a new and improved version of an evidence tracking system that  
25      would be more user friendly.  This one was -- I mean, we had

1 to generate our own barcode numbers by buying barcode numbers,  
2 and then we had to enter the barcode number into it. That led  
3 to keystroke errors. And so what we wanted to do was get a  
4 system that would generate its own barcode number. It was  
5 just more technology, more user friendly. We were able to  
6 capture electronically the signature of somebody that was  
7 signing out for evidence. We would also be able to take their  
8 I.D. card, scan it in, we'd have a copy of the I.D. card right  
9 there with the record itself. So, you know, just trying to  
10 improve business processes.

11 Q. Was it a reliable program?

12 A. Evidence 2000?

13 Q. Uh-huh.

14 A. Well, it was the best we had at the time.

15 Q. Could a user have altered data within the program  
16 without authorization?

17 A. Absolutely.

18 Q. And without detection?

19 A. Absolutely.

20 Q. So if I'm understanding you right, this had been in  
21 use from the '90s forward --

22 A. Right.

23 Q. -- and somebody could alter or even delete an item  
24 and nobody would be able to determine that later?

25 A. There was no historic trail.

1 Q. And anybody could access that program?

2 A. I'm not sure about that. Seems to me like you had  
3 to have a password to get into it. Like I say, I wasn't an  
4 everyday user so --

5 Q. So in light of what you just told us, would you  
6 consider Evidence 2000 a good fit for complying with Standard  
7 Operating Procedure?

8 MS. GALLOW: Your Honor, I object to this line of  
9 inquiry. It's been established that Mr. Mann only worked  
10 in Atlanta Property beginning in July 2005 towards  
11 December of 2007, so I'm not sure where he's getting his  
12 personal knowledge to testify as to events that occurred  
13 prior to July 2005.

14 MR. COHEN: Your Honor, this program was still in  
15 use right up through the time that Mr. Davis was  
16 prosecuted. His trial wasn't until 2006. There are  
17 numerous items of evidence that pass through this agency  
18 and they were tracked with Evidence 2000.

19 MS. GALLOW: And again, Your Honor, Respondent would  
20 submit that Mr. Mann only came into this case -- or to  
21 Atlanta Property in July 2005, so whether or not he has  
22 personal knowledge to testify as to the events that  
23 occurred prior to that, we would want to know where this  
24 line of inquiry is going.

25 MS. SHEIN: Your Honor, just to let you know that

1           our complaint is a continuous breach of the policies and  
2           procedures all the way up through the trial, because some  
3           of the evidence wasn't lost until just before the trial.

4           THE COURT: Well then, counsel, as long as you  
5           either confirm with this witness how he may have personal  
6           knowledge of what went on before '05 or limit your  
7           questions to things that were happening in '05 through  
8           '07 when he was there.

9           MR. COHEN: Okay.

10       **BY MR. COHEN: [Resuming]**

11           Q.    Specific to the time that you worked with Evidence  
12           2000, was there a searchable database for this program?

13           A.    You could search it, yes.

14           Q.    Okay. And could you look for something by date?

15           A.    I'm not sure about the date part of it. Typically  
16           when I would do any searches, I would search by barcode number  
17           or complaint number. But, there again, I was not an everyday  
18           user. If I needed to find something, I typically had somebody  
19           that I would go to and do the searching for me.

20           Q.    And as this relates to chain of custody, Evidence  
21           2000 with the database program, were there paper forms during  
22           your time in the Department to document collection and  
23           transportation of evidence, or is that all done  
24           electronically?

25           A.    I'm not sure I understand exactly the point that

1       you're trying to get at.

2           Q.    Well, the database program would create an  
3       electronic record --

4           A.    Yes.

5           Q.    -- theoretically where something was.

6           A.    Yes.

7           Q.    But as we talked about items moving between say APD  
8       and GBI and back, would there have been a physical paper trail  
9       of those items?

10          A.    Yes.  What would happen is if somebody brought  
11       something in, they would enter it into the database, of  
12       course, and they would have their Property Sheet that we would  
13       actually sign off on.  Now if we signed something out, say  
14       whether it was going to the Crime Lab or out to court or  
15       something like that, it would make a notation in the database,  
16       they would print that off, have the individual sign for it,  
17       and then that copy would be kept.

18          Q.    So there should have been a way to document the  
19       return of items and the departure of items, no matter what  
20       agency they went to?

21          A.    Yes.  Yes.

22          Q.    Was there an effort made to ensure there was  
23       compliance with that requirement for documentation?

24          A.    Yes, as best as possible.

25          Q.    And what was the most common method of returning

1 items from other agencies?

2 A. Typically they would bring it in and check it back  
3 in if it was a local agency or a local court. Like I say, we  
4 did actually receive some items in the mail that that would be  
5 mailed to us. I remember one time, again, that we had to go  
6 up to Fulton County on the north precinct and pick up some  
7 evidence there and bring it back.

8 Q. And wasn't it your experience that items were  
9 frequently lost when they were shipped back to you from GBI?

10 A. The GBI didn't typically -- or during my stay there,  
11 they didn't ship that many items back to us. It would be  
12 other agencies, other law enforcement agencies that mailed the  
13 guns back. I can't recall getting anything from the GBI  
14 because typically we had an officer that went out to the GBI  
15 once every two weeks, once a month or something, and would  
16 pick things up and bring them back.

17 Q. So is it fair to say that because of the use of  
18 Evidence 2000 and what you've acknowledged is a little loss of  
19 items between agencies, that items that were going to be used  
20 for evidence in criminal trials were sometimes lost or  
21 misplaced?

22 A. There were a few items lost, but the biggest problem  
23 that I saw in my experience was items being misplaced because  
24 of the system that we used to store things on on our shelving  
25 locations. That's not to say that we didn't lose a couple of

1 items, because I do remember that we lost one violin. But  
2 typically, it wasn't that it was lost, it was that we couldn't  
3 find it just because of the methodology that was used to place  
4 things on shelves. That was the biggest issue for my tenure.

5 Q. Did you ever hold anybody personally accountable for  
6 losing or misplacing items?

7 A. No.

8 Q. So nobody would ever specifically have been  
9 disciplined in any manner for failing to maintain a chain of  
10 custody?

11 A. No, under my tenure.

12 Q. Did you work with Jennifer Denise Johnson when you  
13 were in the Evidence Room?

14 A. Yes, as a matter of fact, I did.

15 Q. And are you aware of any items that she may have  
16 signed for at any time that then were not documented upon  
17 receipt?

18 A. I'm not aware of any, no.

19 Q. Now, the last few questions I've got for you, the  
20 incidents that led to the investigation of Scott Davis  
21 occurred in 1996.

22 A. Uh-huh.

23 Q. Years later we have something called three bags of  
24 evidence that appears in the chain of custody. Is it common  
25 for something to appear in an investigation so far in time

1 from the incident date?

2 A. I'm not sure I understand. What do you mean  
3 "appear"?

4 THE COURT: Can you rephrase, counsel. I'm --

5 MR. COHEN: Yes, Your Honor.

6 Q. If something occurred that was under investigation,  
7 would it be normal for evidence to come in on that case years  
8 later with no prior chain of custody attached?

9 A. It's possible. What I discovered when I started in  
10 the Evidence Room was that in the late '90s the GBI returned a  
11 lot of evidence back, not to just the Atlanta Police  
12 Department but to the agencies where that they were actually  
13 housing the evidence for them. GBI ran out of storage space  
14 and let the agencies know that they would have to actually  
15 come back and get the evidence and take it back to their own  
16 agency and start housing it.

17 So I know in the late '90s the Atlanta Police Department  
18 started picking up evidence from the GBI. They would bring it  
19 back, and they essentially stored it on the 7<sup>th</sup> floor that City  
20 Hall leased. Some of that evidence -- some of that evidence  
21 got put into Evidence 2000 then, some of that evidence got put  
22 into Evidence 2000 at a later date, perhaps when it was signed  
23 out for court. So, unfortunately, that was not an anomaly, I  
24 mean, it did occur.

25 That was one of the things that I wanted to change when I



1 got down there. I wanted to start putting everything into the  
2 database so that we could start tracking it, and pretty much,  
3 that's what we did during my tenure.

4 But so, yeah, I mean, it's possible that something like  
5 that could show up at a later date, either stuff from the GBI  
6 or stuff from the M.E.'s office.

7 Q. Okay. Just a moment.

8 [Counsel confer.]

9 Q. Specifically, if something appeared in the  
10 Department in 2003 with no chain of custody, and it is  
11 supposed to be tied to something that happened in 1996, is  
12 that normal?

13 MS. GALLOW: Objection, Your Honor, this is  
14 asserting facts not in evidence at this time.

15 MR. COHEN: I'm asking hypothetically for purposes  
16 of this witness' familiarity with how you -- the property  
17 in evidence was supposed to be handled.

18 MR. ABT: Also, I don't think, Your Honor, that Ms.  
19 Gallow can have it both ways. On one hand she's arguing  
20 this has already been litigated and that it's already --  
21 all these issues have already been established and they  
22 lost the evidence. But now she wants to argue that the  
23 facts aren't in evidence.

24 MS. GALLOW: Well, Your Honor, at this point we  
25 don't have anything before the Court to show that this is

1 or is not true. My -- in my opening, I submit the Court,  
2 based on the record in this case I expect to show that  
3 all these issues have been litigated. The question right  
4 now that has been propounded to this witness is assuming  
5 facts that are not in evidence before the Court at this  
6 time.

7 THE COURT: I'll sustain. You can rephrase,  
8 counsel.

9 MR. COHEN: May I approach the witness?

10 THE COURT: Yes, sir.

11 **BY MR. COHEN: [Resuming]**

12 Q. Can you identify this document?

13 A. It says Chain of Custody, the Atlanta Police  
14 Department.

15 Q. Okay. And does it identify anything?

16 A. It identifies a barcode number, APD 000 154604.  
17 It's related to Case No. 96-3460736.

18 MS. GALLOW: Your Honor, I'd object to him going  
19 into these documents at this time. They're not in  
20 evidence, and I'm not sure what documents they're even  
21 referring to at this time.

22 THE COURT: Yes. He's going to need to identify it.  
23 I don't know what it is.

24 **BY MR. COHEN: [Resuming]**

25 Q. Can you tell us for the record what it is?

1           A.    It says Chain of Custody, Atlanta Police Department.  
2   I -- to be honest with you, I've never seen this before but --

3           MS. GALLOW:  Then, Your Honor, I'd object to this  
4   witness testifying as to any of the contents in that  
5   document.

6           THE COURT:  Yes, if he doesn't -- if he doesn't know  
7   what it is and can't identify it, then he can't testify  
8   about what it tells.

9           THE WITNESS:  Yeah.

10   **BY MR. COHEN:  [Resuming]**

11          Q.    How about this one?

12          A.    This one I know.

13          THE COURT:  Okay.  And what -- does that was have --  
14   that he knows, does that have a number?

15          MR. COHEN:  It does, Your Honor.  It identifies the  
16   case --

17          THE WITNESS:  Yeah, it is -- this is --

18          MR. COHEN:  -- that particular item.

19          THE COURT:  No, sorry, I wasn't very clear.  An  
20   exhibit number?

21          MR. COHEN:  No, Your Honor, it's not labeled yet.

22          THE COURT:  Okay.  Well, it's going to need -- if  
23   you're -- if he's going to testify about it and/or you  
24   want to try to get it in, it needs to be numbered and  
25   identified.

1                   And I think it would be 6, is that what you've got,  
2                   Beth?

3                   COURT REPORTER: Yes, ma'am.

4                   THE COURT: Okay. This would be 6.

5                   **BY MR. COHEN: [Resuming]**

6                   Q. Would you tell us what the description of the item  
7                   is?

8                   A. Description, it says three bags of Crime Lab  
9                   evidence, Reference No. 96-52726.

10                  Q. And what's the date?

11                  A. The date -- let's see, I've got a date-in 6/9 of  
12                  2003.

13                  Q. Thank you. So if this came in in 2003 and there had  
14                  been no prior documentation of where these items had been, is  
15                  that normal? This is based on something that happened in  
16                  1996.

17                  A. Right.

18                  Q. The first document we see placing this in evidence  
19                  is 2003; is that normal?

20                  A. It could be.

21                  Q. And finally, as far as you know, in the Property  
22                  Room or in the Evidence Room, do any detectives working  
23                  investigations have their own storage --

24                  A. No.

25                  Q. -- specific to whatever they're doing?

A.      No.

Q. So this couldn't have been kept in somebody else's individual storage area?

A. It shouldn't have been.

MR. COHEN: Your Honor, at this time we move into evidence Petitioner's Exhibit 6.

MS. GALLOW: No objection, Your Honor, since the witness has identified that document.

THE COURT: All right. Admitted without objection.

[WHEREUPON, Petitioner's Exhibit Number 6 was admitted into evidence without objection.]

MR. COHEN: Nothing further.

THE COURT: Anything for this witness on cross?

MS. GALLOW: Just briefly, Your Honor.

**CROSS-EXAMINATION**

BY MS. GALLOW:

Q. Good morning, Mr. Mann.

A. Good morning.

Q. I believe you had testified that you worked with Atlanta Property Records between July 2005 and approximately the end of December of 2007?

A. Yes.

Q. Did you have any personal involvement with any evidence regarding the Scott Davis case?

A. No, ma'am.

1           Q.    Did you have any knowledge of the procedures that  
2           had been implemented between 1996 and when you became involved  
3           in this -- in the Atlanta Property in about July of 2005?

4           A.    Not in the Property Room.  Just -- the only  
5           procedures I would be aware of is just general, you know,  
6           throughout for the whole department.

7           Q.    So would it be fair to say that you can only testify  
8           based on your personal knowledge between the procedures that  
9           were in effect between July 2005 and December of 2007?

10          A.    Yes.

11               MS. GALLOW:  No further questions, Judge.

12               THE COURT:  Any redirect?

13               MR. COHEN:  Very briefly.

14                               **REDIRECT EXAMINATION**

15               **BY MR. COHEN:**

16           Q.    But you did, sir, work with Evidence 2000?

17           A.    Yes.

18           Q.    And you are very familiar with how it functioned.

19           A.    I'm not going to say I'm very familiar.  I knew how  
20           it functioned because I had the people telling me how it  
21           functioned.  I could not actually set down and do a lot of the  
22           searches.  As the commander I would have a sergeant or  
23           somebody do that for me.  But, yes, I knew the overall how it  
24           worked, yes.

25           Q.    Okay.

1 MR. COHEN: Nothing further.  
2 THE COURT: Any recross?  
3 MS. GALLOW: No, Judge.  
4 THE COURT: Can this witness be excused?  
5 MS. SHEIN: Yes, Your Honor.  
6 MS. GALLOW: No objection.  
7 THE COURT: You're free to go, sir. Thank you.  
8 THE WITNESS: Thank you.

9 [Witness excused.]

10 MR. COHEN: Good morning, Ms. Johnson.

11 THE WITNESS: Good morning.

12 Whereupon,

13 **JENNIFER DENISE JOHNSON,**  
14 having been duly sworn under oath, was examined and testified  
15 as follows:

16 **DIRECT EXAMINATION**

17 **BY MR. COHEN:**

18 Q. Would you please state your name for the record.

19 A. Jennifer Denise Johnson.

20 THE COURT: Ma'am, can you slide up, speak a little  
21 louder and into those microphones, please. The court  
22 reporter is taking down everything you say.

23 THE WITNESS: Okay.

24 [Off the record.]

25 **BY MR. COHEN: [Resuming]**

1 Q. Where are you employed, Ms. Johnson?

2 A. Atlanta Police Department Property Unit --

3 Q. And how long --

4 A. -- Logistical Support.

5 Q. -- have you been there?

6 A. Ten years.

7 Q. I'm sorry, I didn't mean to cut you off. I didn't  
8 realize you weren't finished.

9 A. Logistical Support Section.

10 THE COURT: Ma'am, again, I'm sorry. I need you to  
11 slide up. I need you to speak as loudly as you can.  
12 Maybe take those mics and sort of point them together and  
13 try to speak into them --

14 THE WITNESS: Okay.

15 THE COURT: -- as best you can.

16 THE WITNESS: Okay.

17 **BY MR. COHEN: [Resuming]**

18 Q. And you work in the Evidence Room or have worked in  
19 the Evidence Room?

20 A. I have, uh-huh.

21 Q. Okay. And did you have a specific numerical I.D. as  
22 an employee in the Evidence Room?

23 A. Yes, 3283, that's a unique I.D. number.

24 Q. Okay. Three-two-eight-three?

25 A. Uh-huh.



1 Q. Okay. And exactly when and for how long did you  
2 work in Evidence?

3 A. About four and a half years.

4 Q. Can you tell us when you started?

5 A. 2001, January.

6 Q. And how long were you there?

7 A. For about four and a half years. I'm now in the  
8 Supply Inventory Section of the Property Unit.

9 Q. Can you tell us exactly what you did during the time  
10 that you were logistical support in Evidence?

11 A. Release property, enter property, release cars,  
12 enter cars on the system.

13 Q. And did you ever have to show compliance with any  
14 rules regarding handling evidence?

15 A. Yes.

16 Q. Was there a formal Standard Operating Procedure that  
17 you had to adhere to in handling evidence?

18 A. Yes.

19 Q. Could you just very briefly explain that process  
20 when you -- say when you signed and took receipt of something?

21 A. Usually an officer or an investigator or one of our  
22 sworn personnel would bring something in from the Crime Lab.  
23 The -- the officer would bring it from, you know, from  
24 arresting someone, and we would have -- he would give us a  
25 form, we would sign it, and put it on the system.

1 Q. Okay.

2 A. And we would give it a location and someone would  
3 put it in the location that was on the evidence or property.

4 Q. So anything that was ever taken in and signed for,  
5 there should have been a very clear paper trail, electronic  
6 trail of where it went?

7 A. At least an electronic trail.

8 Q. Were you employed with the Evidence Room during the  
9 time of the Scott Davis investigation?

10 A. To my knowledge, it was in '86; right?

11 Q. It actually happened in '96.

12 A. In '96?

13 Q. And went to trial in 2006.

14 A. Okay. According to the computer paperwork that I  
15 got from one of my sergeants, I put some evidence on in 2003.

16 Q. Okay. And you would have had responsibility to  
17 preserve that evidence, at least document it?

18 A. Document it.

19 MR. COHEN: May I approach the witness?

20 THE COURT: Yes, sir.

21 Q. Can you tell me if you recognize this document?

22 A. Yes, I do.

23 THE COURT: Is it marked?

24 MR. COHEN: Yes, Your Honor, this is marked

25 Petitioner's Exhibit 7.

1 THE COURT: Thank you.

2 A. Yes. And I also have a -- go ahead.

3 Q. Go ahead. No, after you.

4 A. Go ahead.

5 Q. Can you tell us what it is, what kind of document  
6 this is?

7 A. This is the item detailed by a barcode. This is  
8 just a --

9 THE COURT: I can't hear you.

10 A. This is the item detail by barcode. It's a record  
11 of what was put on a computer and it has a disposition date  
12 and if it's in or if it's out of Property.

13 Q. Okay. And can you tell us what's the -- what the  
14 date is on it?

15 A. The date here is -- the date in?

16 Q. Yes, ma'am.

17 A. Okay, the date in is 6/9 2003.

18 Q. Okay. And right here where it says "clerk" can you  
19 read for us that number?

20 A. 003283.

21 Q. And you have identified the 3283 was your  
22 identification?

23 A. That was my identification.

24 Q. So this document does show that you took receipt of  
25 this barcoded evidence?

1           A.    I took it in to Property, yes.

2           Q.    Okay.  And can you tell us what this description is  
3 of the evidence?

4           A.    Three bags of Crime Lab evidence with the reference  
5 number.

6           Q.    Okay.  And this is an accurate depiction of the way  
7 that evidence coming in would have been logged by barcode?

8           A.    Yes.

9           MR. COHEN:  Your Honor, at this time we'd move to  
10 admit into evidence Petitioner's Exhibit 7.

11          MS. GALLOW:  Your Honor, no objections given our  
12 witness has authenticated and she knows this document.

13          THE COURT:  Admitted then without objection.

14          MR. COHEN:  Thank you.

15               **[WHEREUPON, Petitioner's Exhibit Number 7 was admitted**  
16               **into evidence without objection.]**

17 **BY MR. COHEN:  [Resuming]**

18          Q.    Now regarding the item that you just took receipt  
19 of, if you had to, would you be able to at any time go back  
20 and locate anything that you had signed for?

21          A.    No.  I would have to talk to one of my sergeants if  
22 an investigator came down to check it out.

23          Q.    Okay.  And if something that you had signed for had  
24 been destroyed, would there be written documentation of it  
25 being destroyed?

1           A.    It should be, yes.

2           Q.    Okay.  Now in either the case of something being  
3 released or destroyed, I ask you to just clarify, that there  
4 would be records to show what had happened.

5           A.    Yes.

6           Q.    Okay.  Now about the three bags of Crime Lab  
7 evidence that you have identified taking receipt for, did you  
8 then have any idea what could have been in those three bags?

9           A.    No.

10          Q.    And, therefore, would you now?

11          A.    No.

12          Q.    When a detective brought these items in -- and I'm  
13 sorry, I need to ask you one more question about this  
14 document.

15               MR. COHEN:  Can I approach the witness, Your Honor?

16               THE COURT:  Sure.

17          Q.    Where it says here "located by," does this identify  
18 who brought this into evidence?

19          A.    Not really.

20          Q.    Right here?  What does it say?

21          A.    It could have been the officer that -- or the  
22 investigator that collected it or put it in a bag for the  
23 Crime Lab or for Property.

24          Q.    Okay.  And whose name do we have here?

25          A.    That says M. Walker.

1 Q. Okay. So that's who you got this from?

2 A. No. I'm believing, to my knowledge back then, I'm  
3 believing that this came from the Crime Lab.

4 Q. Okay, thank you. So labeled as "three bags of crime  
5 lab evidence," there was really no way to look at the label  
6 and determine what was in any of those three bags?

7 A. No. We're not allowed to open evidence.

8 Q. What does it mean, in terms of identifying  
9 something, for an item to have sub-items?

10 A. I didn't understand the question.

11 Q. An item that comes in with a barcoded detail --

12 A. Uh-huh.

13 Q. -- were there items that had sub-items?

14 A. If there were other items under that case number, is  
15 that what you're saying?

16 Q. Yes, ma'am.

17 A. You can also go into the computer and check to see  
18 if there were other items.

19 Q. And nothing that you signed for or took receipt for  
20 should have simply disappeared; right?

21 A. No.

22 Q. Okay. And under Standard Operating Procedures you  
23 described, there were safeguards to be sure that nothing that  
24 came in could just disappear?

25 A. No, not to my knowledge.

1           Q.    So there should have been further documentation of  
2 what happened to these three bags of Crime Lab evidence?

3           MS. GALLOW: Your Honor, I'm going to object to  
4 counsel leading his witness.

5           THE COURT: Try not to lead your witnesses, counsel,  
6 please.

7           MR. COHEN: Yes, Your Honor. I would suggest that  
8 for purposes of this hearing, the majority of the  
9 witnesses that I'm questioning are in fact State actors  
10 that are going to be adverse to what I'm trying to  
11 establish. I would ask for a little bit of latitude.

12          THE COURT: Okay.

13 **BY MR. COHEN: [Resuming]**

14          Q.    Just a few more questions for you. The particular  
15 labeling of this "three bags of evidence," is that specific  
16 enough to give you personally, the person signing for it, any  
17 idea of what you just took receipt of?

18          A.    I don't really know how to answer that question  
19 because there was really no way for me to know what was in the  
20 bags of evidence.

21          Q.    And if you didn't know what was in the bags, would  
22 there have been any way for you to know if anything was  
23 missing from the bags?

24          A.    No.

25          THE COURT: I'm sorry, I didn't hear you.

1 THE WITNESS: No.

2 Q. And are you aware that after this point there is no  
3 further record of these three bags of evidence?

4 A. No --

5 MS. GALLOW: Again, Your Honor, counsel is leading  
6 his witness and injecting facts into evidence.

7 THE COURT: All right.

8 MR. COHEN: I'm just asking her if she knows what  
9 happened to the three bags.

10 THE COURT: Well, rephrase your question.

11 **BY MR. COHEN: [Resuming]**

12 Q. Are you aware of what happened to those three bags?

13 A. I received some forms from my sergeant, computer  
14 form, the same form you have, but it's a further chain of  
15 custody that went on that -- the form that you have is when it  
16 first came on, but it's not saying what eventually happened to  
17 it. But I have another chain of custody with the evidence.

18 Q. You have another chain of custody?

19 A. Uh-huh.

20 Q. What would that be?

21 A. It was released to the D.A.'s Office, Fulton County  
22 D.A.'s Office.

23 Q. And who did you give it to or who was it released  
24 to?

25 A. I didn't give it to anybody. Someone from Property



1 released it to the Fulton County D.A.'s Office.

2 Q. Do you know why Detective Walker's name would have  
3 been on the barcode detail that you identified?

4 A. The only thing I can tell you is what I think, that  
5 Detective Walker was the detective that sent it to the Crime  
6 Lab or that put it in a bag and brought it to Property.

7 Q. And as far as the chain of custody that you referred  
8 to of it being released, can you produce that?

9 A. Yes.

10 MR. COHEN: Your Honor, we would ask that this  
11 witness in fact produce it for the chain of custody.  
12 We're not aware of any such open records requests  
13 indicated that the items went missing from Atlanta Police  
14 custody, so if there are documents available to show that  
15 these three bags of Crime Lab evidence were released to  
16 another agency, we just ask that we keep the record open  
17 and allow this witness to bring us such documentation.

18 THE COURT: Any objection if they recall this  
19 witness at a later time?

20 MS. GALLOW: Your Honor, you know, if they want to  
21 bring in somebody to show where this evidence  
22 subsequently went, we have -- Respondent intends to  
23 submit some evidence, and I believe one of their  
24 witnesses that they have under subpoena, specifically  
25 Chris Harvey, who was the lead investigator for the

1 District Attorney's Office, I believe he was the one that  
2 signed for those bags of evidence, so we may not need to  
3 recall her, given the fact that Chris Harvey is under  
4 subpoena, Your Honor.

5 THE COURT: Okay.

6 THE COURT: Thank you.

7 **BY MR. COHEN: [Resuming]**

8 Q. And finally, is there any reason why there would  
9 have been listed sub-items 4 through 8 underneath the general  
10 heading of "three bags of evidence"?

11 A. I don't know. I don't have the answer to that  
12 question.

13 MS. GALLOW: I can't hear her.

14 THE COURT: I'm sorry, yeah.

15 THE WITNESS: I don't have the answer to that  
16 question. I don't know.

17 MR. COHEN: May I approach the witness?

18 THE COURT: Yes, sir.

19 **BY MR. COHEN: [Resuming]**

20 Q. Down here on this page it says, describing some of  
21 the items starting here with three and ending with nine --

22 A. Uh-huh. Well, I didn't -- I didn't handle that.  
23 See, that's another property clerk that handled that  
24 particular entry. But I can tell you about the --

25 THE COURT: Ma'am, I really -- I'm sorry, there are

1           just too many people in the courtroom --

2           THE WITNESS: Oh, I'm sorry.

3           THE COURT: -- that have to be able to hear.

4           THE WITNESS: Okay.

5           THE COURT: Counsel, are you looking at P-7? What  
6           are you -- I don't know what you're showing her so I -- I  
7           don't --

8   **BY MR. COHEN: [Resuming]**

9           Q. Did you at any time -- and this is the document that  
10          is in evidence, a copy of Petitioner's 7 showing the intake of  
11          these three bags of Crime Lab evidence --

12          A. Yes.

13          Q. -- did you at any time inventory those three bags?

14          A. No. No.

15          Q. And do you yourself have any documents showing that  
16          Chris Harvey took receipt of those items?

17          A. Yes.

18          MR. COHEN: We would just ask that the witness  
19          produce that document, Your Honor.

20          THE COURT: Well, you'll have to recall her,  
21          counsel. I mean, do you have it with you, ma'am?

22          THE WITNESS: Yes.

23          THE COURT: Oh, okay. She said she's got it with  
24          her so --

25          MR. COHEN: Okay.

1 MS. SHEIN: Let me ask one of the questions since  
2 she's identified she has documents with her. Do you have  
3 any other documents related to this -- evidence in this  
4 case in your possession at this time?

5 THE WITNESS: Yes.

6 MS. SHEIN: Okay. Your Honor, could we take a  
7 recess?

8 THE COURT: Sure.

9 MS. SHEIN: Because we're going to have to look at  
10 that. We asked for these documents in Open Records  
11 Request --

12 THE COURT: Okay. I said sure. I said sure. How  
13 long do you want?

14 MS. SHEIN: Just give me ten minutes or less.

15 THE COURT: Okay. We'll take about ten minutes.

16 MS. SHEIN: Thank you, Judge.

17 **[A brief recess was taken.]**

18 \* \* \*

19 [Jennifer Denise Johnson retakes the stand.]

20 MR. COHEN: Thank you, Your Honor. If I could  
21 approach the witness one more time.

22 THE COURT: Yes, sir.

23 **BY MR. COHEN: [Resuming]**

24 Q. On the document that you provided showing the  
25 release to Mr. Harvey right here under "Description" where it

1 shows, "Clear bag, Sub. No. 3" and then "Brown bag, Sub. No.  
2 9" --

3 THE COURT: Counsel, I'm sorry. Is that a new  
4 document or are you looking at P-7?

5 MR. COHEN: I'm sorry, Your Honor, it's a new  
6 document that she just introduced for us.

7 THE COURT: Okay. Well then, it needs to have a  
8 number, it needs to be identified.

9 MR. COHEN: Yes.

10 MS. GALLOW: And, Your Honor, what has that been  
11 marked as? Is that Petitioner's 8 at this point?

12 THE COURT: Eight.

13 MR. COHEN: That's Petitioner's 8.

14 MS. GALLOW: All right. Thank you.

15 THE COURT: And have y'all had a chance to see it,  
16 counsel?

17 MS. GALLOW: Your Honor, we have copies.

18 THE COURT: Okay.

19 **BY MR. COHEN: [Resuming]**

20 Q. I'm showing you here on Petitioner's 8 a description  
21 of --

22 THE COURT: Well, can she identify what P-8 is  
23 before she goes into it?

24 MR. COHEN: Yes, Your Honor.

25 THE WITNESS: No, I don't -- I didn't put that one

1           on. I don't understand what they wrote down.

2           Q. But do you recognize this kind of a document?

3           A. Yes, I do.

4           Q. Can you tell us what this document is?

5           A. That's an Item Detail by Barcode.

6           Q. Okay. And this is the document that you brought to  
7 Court showing --

8           A. Yes.

9           Q. -- the release of the three bags?

10          A. No, that's not the three bags.

11          Q. Okay. Well, this is showing a release to Mr.  
12 Harvey. Do you see here where we've got a sub-item No. 3 and  
13 a second sub-item No. 9?

14          A. I see that, but I didn't put it on, and I don't  
15 really know what they meant by that.

16          Q. So you --

17          A. I don't know if it was on the bag or anything. I  
18 don't know why they put that on there.

19          Q. You can't tell us what happened to 4 through 8?

20          A. I cannot.

21          Q. Okay. And finally, the only other thing I need to  
22 know is this document shows receipt by Mr. Harvey. Does this  
23 document show any inventory being performed by Mr. Harvey?

24          A. Only thing I know is the end of that document it  
25 says that it was released to Mr. Harvey from the D.A.'s

1 Office.

2 Q. And would you personally be aware of whether or not  
3 the inventory was bags?

4 A. No.

5 MR. COHEN: Your Honor, we seek to introduce  
6 Petitioner's Exhibit 8 into evidence.

7 MS. GALLOW: Your Honor, if I may just briefly  
8 examine what their document is purporting to show?

9 [Counsel confer.]

10 **BY MR. COHEN: [Resuming]**

11 Q. I'm showing you what has been marked as Petitioner's  
12 Exhibit Number 9. Can you identify this document?

13 A. Okay. This would be the three bags --

14 MS. SHEIN: Speak into the mic.

15 A. This would be the three bags of Crime Lab evidence  
16 that I put on the computer.

17 Q. Okay. And --

18 THE COURT: I'm sorry. It's actually not the three  
19 bags, it's the document referencing the three bags?

20 THE WITNESS: The -- yeah, the document --

21 THE COURT: Okay.

22 THE WITNESS: -- representing the three bags.

23 THE COURT: Yeah, it's just a piece of paper, P-9.

24 THE WITNESS: Okay.

25 THE COURT: Well, is that -- correct me. We're only

1 going to have a record, so I just need to know is P-9  
2 actually three bags or is it a document referencing them?

3 THE WITNESS: It's the document referencing.

4 THE COURT: Do you know what kind of document it is?  
5 Is it --

6 THE WITNESS: Yeah, it's an Item Detail by Barcode  
7 document.

8 **BY MR. COHEN: [Resuming]**

9 Q. And very similar, showing you what's been marked as  
10 Petitioner's Exhibit 10, do you recognize this document? Can  
11 you identify this document?

12 A. Yes, an Item Detail by Barcode.

13 Q. Okay. And what does this one state was handled or  
14 released?

15 THE COURT: Which one?

16 MR. COHEN: Exhibit 10.

17 THE COURT: Ten.

18 A. It says it's a .12 gauge Steven's shotgun.

19 MR. COHEN: Your Honor, we move to admit Exhibits 8,  
20 9, and 10 into evidence at this time.

21 MS. GALLOW: No objection, Your Honor.

22 THE COURT: All right. They're all admitted then  
23 without objection.

24 **[WHEREUPON, Petitioner's Exhibits Numbers 8, 9 and 10**  
25 **were admitted into evidence without objection.]**



1 **BY MR. COHEN: [Resuming]**

2 Q. And the final question regarding Petitioner's 9  
3 stating "three bags of Crime Lab evidence," do you know if Mr.  
4 Harvey ever inventoried the contents of those three bags?

5 A. No, I don't know.

6 MS. GALLOW: Objection, Your Honor. I'd object to  
7 what Ms. Johnson can or cannot speculate as to what Chris  
8 Harvey did in this case.

9 THE COURT: I'll sustain.

10 **BY MR. COHEN: [Resuming]**

11 Q. Did you yourself ever inventory those three bags?

12 A. No.

13 MR. COHEN: Nothing further, Your Honor.

14 MS. GALLOW: Just briefly, Your Honor, if I may.

15 **CROSS-EXAMINATION**

16 **BY MS. GALLOW:**

17 Q. Good morning, Ms. Johnson.

18 A. Good morning.

19 Q. As I understand it, your testimony was that you were  
20 a clerk with the Atlanta Property Unit which monitored  
21 evidence that was coming in or going out; is that correct?

22 A. Yes.

23 Q. And the only thing that you did in this case with  
24 regards to the Scott Davis case was that you signed for the  
25 three bags of evidence?

1           A.    No.  I believe those bags of evidence came from the  
2   Crime Lab, and I believe that maybe one of our sworn  
3   personnel signed for it.  When they brought it back, I just  
4   put it on the system.

5           Q.    So all you did in this case was enter those three  
6   bags of evidence into the system at that time?

7           A.    Entered it into the system.

8           Q.    And that's all you did with regard to those pieces  
9   of evidence?

10          A.    To my knowledge.  I think I put a location number on  
11   it and the sergeant would put it on the --

12          Q.    And you had --

13          A.    -- in that location on the 7<sup>th</sup> floor.

14          Q.    I'm sorry to interrupt you.  Were you finished?

15          A.    Yes.

16          Q.    I'm sorry.  And you have no knowledge what was in  
17   those bags?

18          A.    No knowledge, no.

19          Q.    So you just entered the evidence in the system --

20          A.    Yes.

21          Q.    -- as per your standard procedure --

22          A.    Yes.

23          Q.    -- and that was all you did in this case?

24          A.    Yes.

25          Q.    And you really have no idea what happened to the

1 evidence subsequent to entering it into that system?

2 A. Only thing I can go by is what's on the item by  
3 detail sheet.

4 Q. With regards to Chris Harvey picking that evidence  
5 up?

6 A. Yes.

7 Q. Do you have personal knowledge whether in fact he  
8 did or did not pick those evidence bags up --

9 A. I have no --

10 Q. -- from your unit?

11 A. I have no personal knowledge.

12 MS. GALLOW: I have no further questions, Your  
13 Honor.

14 THE COURT: Ma'am, I'm sorry, I just want to ask --  
15 I'm trying to understand. You think this is evidence in  
16 P-7 that came back from the Crime Lab; correct?

17 THE WITNESS: Which?

18 THE COURT: P-7. You said that was an Item Detail  
19 by Barcode, it referenced three bags of Crime Lab  
20 evidence that was taken into the Property Room.

21 THE WITNESS: Yes.

22 THE COURT: So am I correct this is evidence that  
23 you believe had been at the Crime Lab and then was  
24 transported back to Atlanta P.D.?

25 THE WITNESS: I believe so.

1           THE COURT: Okay. You never -- did you ever see the  
2 evidence?

3           THE WITNESS: No. No. They come in a white bag,  
4 white evidence bag that's sealed --

5           THE COURT: No, I'm sorry. Did you see the bags  
6 that it was in?

7           THE WITNESS: The bags, yeah. The bags.

8           THE COURT: Okay. So when you actually -- can you  
9 tell me the procedure? I mean, how is it that you came  
10 to be logging it into the system? Where was it? How did  
11 it get there?

12          THE WITNESS: I don't -- from '03 I don't exactly  
13 remember. The only reference I have is that item by  
14 detail sheet.

15          THE COURT: Uh-huh.

16          THE WITNESS: The only thing that is what I think  
17 that it came from the Crime Lab by my --

18          THE COURT: I understand that. But I'm just trying  
19 to understand. Did you go to the Crime Lab and pick it  
20 up?

21          THE WITNESS: No. No.

22          THE COURT: Someone else did that?

23          THE WITNESS: One of our sergeants usually will go  
24 to the Crime Lab and pick it up --

25          THE COURT: Okay.

1 THE WITNESS: -- and come -- bring it back.

2 THE COURT: And is that reflected on P-7, who  
3 brought it from the Crime Lab?

4 THE WITNESS: No, uh-uh.

5 THE COURT: Okay. So when you would have been  
6 logging it into the system, where was it? Was it -- how  
7 did it get to you to be logged in, do you know? I mean,  
8 did it -- just came in one morning, then it appeared?

9 THE WITNESS: The sergeant would -- no. The  
10 sergeant would bring it to us and tell us this came from  
11 the Crime Lab, log it in. The reference numbers on there  
12 is what leads me to believe that it came from the Crime  
13 Lab.

14 THE COURT: Okay. So some -- but someone -- during  
15 the course of your day, someone actually --

16 THE WITNESS: Yes.

17 THE COURT: -- a sergeant or someone --

18 THE WITNESS: Yes.

19 THE COURT: -- brought it to you and said log this  
20 in?

21 THE WITNESS: Yes, I believe so, but I don't  
22 remember.

23 THE COURT: Okay. And there's nothing on P-7 that  
24 shows that?

25 THE WITNESS: No.

1 THE COURT: You didn't just get to work -- or did  
2 you, I'm just asking, I just want to understand. Were  
3 there days when you just got to work and there were bags  
4 sitting there that you logged in?

5 THE WITNESS: No, uh-uh.

6 THE COURT: Okay. So during the course of your day  
7 someone --

8 THE WITNESS: Yeah.

9 THE COURT: -- brought you some bags. And do you  
10 just leave those sitting there?

11 THE WITNESS: No, uh-uh.

12 THE COURT: Okay. Do you log them in immediately?

13 THE WITNESS: We log them in, yes.

14 THE COURT: And then what do you do with them?

15 THE WITNESS: We put them in the cage at the end of  
16 our work shift.

17 THE COURT: Okay. So --

18 THE WITNESS: We put them in our cage, and then our  
19 sergeant that was in charge of disposal, he put it in the  
20 -- on the 7<sup>th</sup> floor or whatever location that it should  
21 have been in.

22 THE COURT: Okay. So before you put it in your cage  
23 at the end of your work shift, where is it?

24 THE WITNESS: In Property. Property is a secure  
25 area.

1           THE COURT: Okay. So you log it in?

2           THE WITNESS: Yes.

3           THE COURT: Then immediately after you log it in,  
4 what do you do with it?

5           THE WITNESS: We had our evidence and our property.  
6 We put it in a location where we worked, and at the end  
7 of our shift we put up our property and our evidence.

8           THE COURT: Okay. I'm still clueless, so you're  
9 going to have to be a little more specific. Somebody  
10 brings you these bags.

11          THE WITNESS: Yeah.

12          THE COURT: You log them in.

13          THE WITNESS: Yes.

14          THE COURT: Very specific. What do you do with  
15 them? Do they sit next to you all day?

16          THE WITNESS: Yes, we kept them until the end of our  
17 shift.

18          THE COURT: Okay. The area that they're sitting in,  
19 you say you kept them, is that like would I be sitting  
20 here doing my work, and I'm sitting here and these bags  
21 are sitting next to me?

22          THE WITNESS: Yes.

23          THE COURT: Okay. So are you locked in?

24          THE WITNESS: Yes.

25          THE COURT: Nobody can get in to you?

1 THE WITNESS: It was a secure area.

2 THE COURT: Okay.

3 THE WITNESS: We let officers in, but they couldn't  
4 come in our secure area.

5 THE COURT: Okay. So it might be like my bench --

6 THE WITNESS: Yeah.

7 THE COURT: -- and the officers can come in the  
8 courtroom but they couldn't get over here.

9 THE WITNESS: It was a secure -- yeah.

10 THE COURT: Okay. So I've got these bags of  
11 evidence just sitting here. Yes?

12 THE WITNESS: Yes.

13 THE COURT: And then at the end of the day, what do  
14 you do?

15 THE WITNESS: We took them to the cage and our  
16 sergeant would put it up for us --

17 THE COURT: Okay. And --

18 THE WITNESS: -- on the 7<sup>th</sup> floor or --

19 THE COURT: Explain to me, what is the cage? Do you  
20 have your own cage?

21 THE WITNESS: We had an evidence cage where we put  
22 all of our evidence in.

23 THE COURT: But what is that?

24 THE WITNESS: An area where we put the evidence in,  
25 we kept it locked at all times, and our sergeant would



1 put all our evidence in -- he would take it up to the 7<sup>th</sup>  
2 floor or he would put it in the bins that we had for  
3 evidence.

4 THE COURT: Okay. Anybody have any other questions?

5 MR. COHEN: Very briefly, Your Honor.

6 THE COURT: Sure.

7 **REDIRECT EXAMINATION**

8 **BY MR. COHEN:**

9 Q. When the sergeant picked it up and took it to the 7<sup>th</sup>  
10 floor --

11 A. Yes.

12 Q. -- any idea what happened to it after that?

13 A. No idea.

14 Q. And finally, when you entered these items into a  
15 database, did you do that with Evidence 2000?

16 A. I think it was Evidence 2000. They changed the  
17 system since then.

18 MR. COHEN: Nothing further.

19 THE COURT: Anything else?

20 MS. GALLOW: No further questions, Judge.

21 THE COURT: Okay. Can this witness be excused?

22 MS. SHEIN: Yes, ma'am.

23 MR. COHEN: Yes, Judge.

24 MS. GALLOW: No objection.

25 THE COURT: You are free to leave, ma'am. Thank

1           you.

2                               [Witness excused.]

3           MR. COHEN: Good morning, sir.

4           THE WITNESS: Good morning.

5   Whereupon,

6                               **JOHN MCNEAL,**

7   having been duly sworn under oath, was examined and testified  
8   as follows:

9                               **DIRECT EXAMINATION**

10   **BY MR. COHEN:**

11           Q. State your name for the record.

12           A. John McNeal.

13           Q. And where are you employed, sir?

14           A. City of Covington Fire Department.

15           Q. Okay. And before that, where were you employed?

16           A. Rockdale Fire Department. And prior to that, the  
17   City of Atlanta Fire Department.

18           Q. Okay. When did you start working at Atlanta Fire?

19           A. 1980.

20           Q. How long were you there?

21           A. Twenty-seven years.

22           Q. And were you working at Atlanta Fire during the time  
23   of the Scott Davis investigation?

24           A. Yes.

25           Q. And do you remember that investigation? Do you

1 remember Scott Davis?

2 A. Not -- not really. I -- my only involvement was I  
3 was the Deputy Chief of Technical Services, which one of the  
4 sections were Fire Investigations.

5 Q. Okay. And --

6 A. And that was in 2005.

7 Q. So what then would you have done relating to this  
8 investigation?

9 A. I was directed by the fire chief to try to see if  
10 there was any evidence still around in the Fire Investigation  
11 evidence vault or supply rooms or storage areas.

12 Q. Okay. And who told you specifically to look for  
13 missing evidence?

14 A. Dennis Rubin, the fire chief.

15 Q. Okay. And if you found anything missing, how were  
16 you supposed to document finding it?

17 A. Well, if we found anything missing, I was going to  
18 report back to him that we had found some evidence.

19 Q. Did he tell you what you were looking for?

20 A. A gun.

21 Q. Anything else?

22 A. There was a long list of items.

23 Q. Okay. Do you recall any of those other items?

24 A. Not particularly, no. Primarily a gun is what I  
25 remember, but --

1           Q.    So you were told to look for a gun that was part of  
2           this case.  Would there have been just a description or a  
3           numbering or a marking system for things that you were told to  
4           look for?

5           A.    None of that.

6           Q.    All right.  And you said Dennis Rubin was the fire  
7           chief.  Was that the top of the chain of command?

8           A.    Yes, sir.

9           Q.    And at the time that you were asked to look for  
10          missing evidence here, specifically the gun, were you in  
11          charge of the Evidence Room?

12          A.    No.

13          Q.    Who was?

14          A.    The Chief of Fire Investigations.

15          Q.    All right.  And that's Mr. Rubin?

16          A.    No.

17          Q.    Who would that be?

18          A.    I'm trying to remember who it was in 2005.  I think  
19          it was --

20          Q.    Would it have been James Phillips?

21          A.    Yes.

22          Q.    So if that's who was in charge of the Evidence Room,  
23          did you talk to him about what you were looking for?

24          A.    Yes.  We all looked high and low to try to see if we  
25          could find anything.

1           Q.    Okay.  And while you were doing all this looking, do  
2 you know if you were ever present when any of these items were  
3 initially returned to Atlanta Fire?

4           A.    I don't know when they were returned.

5           Q.    When you searched for these missing items, when or  
6 where and how exactly did you look for these things?

7           A.    We looked in files, we looked in the evidence vault,  
8 we looked in supply rooms, anywhere where it could possibly  
9 have been left or put or placed, storage areas in City Hall  
10 East.

11          Q.    Okay.  City Hall East.  Where was the fire  
12 department located at that time?

13          A.    At City Hall East.

14          Q.    Did you look for missing items anywhere other than  
15 that?

16               MS. GALLOW:  Your Honor, I object against this line  
17 of questioning.  Not only did Mr. McNeal testify at  
18 trial, but the issues that we are now requesting on  
19 have all been discussed and brought out at trial.  So I'm  
20 trying to determine where counsel is going with this,  
21 because as I've mentioned, as to the evidence, the lack  
22 thereof, Mr. McNeal's extensive searching of this  
23 evidence, this was testified to, brought out before a  
24 jury so I'm just wondering where he's going with this  
25 questioning.

1 MR. COHEN: Where I'm going with it, Your Honor, is  
2 to show that under Standard Operating Procedure these  
3 items shouldn't have been lost, to begin with. And we  
4 can follow up with that by indicating how these items  
5 came back to the possession of the fire department in the  
6 first place.

7 MS. GALLOW: And, Your Honor, again I would just  
8 submit that this was brought out before trial, and Mr.  
9 McNeal testified to exactly these points at trial.

10 THE COURT: Counsel, was it all brought out at  
11 trial?

12 MR. COHEN: I don't believe that he was questioned  
13 as to Standard Operating Procedure for taking receipt of  
14 items, specifically a gun.

15 THE COURT: Okay. Then I'll let you ask in  
16 reference to Standard Operating Procedure, but everything  
17 that he did, if it's already been covered at trial, then  
18 we're not going to recover it.

19 MR. COHEN: Yes, Your Honor.

20 **BY MR. COHEN: [Resuming]**

21 Q. You were required to know as part of your job what  
22 the Standard Operating Procedures were that governed handling  
23 of evidence?

24 A. Yes.

25 Q. Okay. And is it fair to say that if everyone who

1 handled evidence had followed that Standard Operating  
2 Procedure, there would have been a clear trail of where things  
3 were?

4 A. Typically, the evidence that you are referring to  
5 would normally have been returned to the agency that submitted  
6 it to the GBI.

7 Q. So under Standard Operating Procedure, the gun you  
8 were looking for should never have come back to Atlanta Fire  
9 in the first place.

10 A. Correct.

11 MS. GALLOW: Your Honor, counsel is leading his  
12 witness again.

13 THE COURT: Try not to lead your witness, counsel.

14 MR. COHEN: Yes, Your Honor.

15 **BY MR. COHEN: [Resuming]**

16 Q. What should have happened instead, if it was a gun  
17 in evidence?

18 A. Evidence collected by an agency is returned to that  
19 agency.

20 Q. Okay.

21 A. And this evidence was collected by Atlanta Police,  
22 and it should have been returned by the GBI to Atlanta Police.

23 Q. So would there be any circumstance under which you  
24 should have taken receipt of that gun?

25 A. No.

1           Q.    And are you aware that there is a paper trail  
2           showing receipt of items coming back, packages -- I'm just  
3           trying to establish why you would be looking for these items  
4           if you didn't think you should have taken receipt of them.

5           A.    To make sure that we didn't have them anywhere, even  
6           though we should not have had them.

7           Q.    And even if you shouldn't have had them, under  
8           Standard Operating Procedure, once the department did take  
9           receipt of something, the department was responsible for it;  
10          right?

11          A.    Correct.

12          Q.    Okay.  Why exactly does Atlanta Fire have an  
13          evidence vault?

14          A.    For evidence related to arson as opposed to murder.

15          Q.    Okay.

16          A.    You would have samples of, you know, flammable  
17          liquids or so forth.

18          Q.    So just things that were related --

19          A.    To arson.

20          Q.    -- to the cause of a fire.

21          A.    Correct.

22          Q.    If you submitted those items to GBI, would the  
23          department get those things back?

24          A.    Yes.

25          Q.    Okay.  And they would be documented and the chain of



1 custody established?

2 A. Yes.

3 Q. Okay. Was taking receipt of that gun in Scott  
4 Davis' case proper under Atlanta Fire Department Standard  
5 Operating Procedure?

6 A. It came -- from what I understand, it came as a  
7 package through either UPS or mail or something, so it wasn't  
8 really identified as to what it was.

9 Q. All right. And you identified that there was a list  
10 of items? I'm about to get into that, but there was more than  
11 just a gun?

12 A. Correct.

13 Q. Okay. And, therefore, if Atlanta Fire retained  
14 possession of a lot of these items that should have gone to  
15 Atlanta Police, the fire department still had a duty to know  
16 where these items were?

17 A. Yes.

18 Q. Okay. And you were never able to locate any of  
19 these items; right?

20 A. No.

21 Q. You couldn't find a Beretta handgun?

22 A. No.

23 Q. Shotgun?

24 A. No.

25 Q. Nine millimeter magazine?

1           A.    No.

2           Q.    Shell casings?

3           A.    No.

4           Q.    Biological evidence?

5           A.    No.

6           Q.    Swabbings?

7           A.    No.

8           Q.    Bullets?

9           A.    No.

10          Q.    Okay.  What kind of tracking software does the fire  
11 department use to make records of evidence that's held or  
12 received?

13          A.    At that time they weren't using a tracking software  
14 that I'm aware of.

15          Q.    So how was chain of custody established?

16          A.    Just logged in a logbook.

17          Q.    So the items that I just asked you about that you  
18 were looking for, where would chain of custody documents for  
19 those items be?

20          A.    In the evidence vault.

21          Q.    Wouldn't those items having a chain of custody,  
22 documented in the evidence vault, had meant that you'd be able  
23 to find them?

24          A.    Correct.

25          Q.    All right.  And the physical size of some of these

1 items, I'm just asking, we're talking about a shotgun, a  
2 handgun -- kind of big enough they'd be hard to miss; don't  
3 you think?

4 A. Yes.

5 Q. Okay. And can you tell us who would have signed for  
6 receipt of any of those kinds of items?

7 A. From what I understand, Linda Tolbert signed for  
8 that.

9 Q. Did you try to locate her or anybody else when you  
10 were looking for these items?

11 A. No, I don't believe I did.

12 Q. Did you review any incoming logs in the Evidence  
13 Room?

14 A. Yes.

15 Q. Okay. And that didn't help?

16 A. No.

17 Q. Did you review records of things going out?

18 A. Yeah, it would be the same log in a chain of  
19 custody.

20 Q. And do you know if those records are available now?

21 A. No, I don't.

22 Q. Are you personally certain that those documents were  
23 ever created?

24 A. The log?

25 Q. Yes, sir.

1           A.    Yes.

2           Q.    And the items that we just listed, has there ever  
3           been a formal investigation in the Department about those  
4           items being lost?

5           A.    No, not to my knowledge.

6           Q.    And has anyone ever been held accountable for those  
7           items being lost?

8           A.    Not to my knowledge.

9           Q.    No one faced any consequences at all?

10          A.    I don't know who would be responsible.

11          Q.    Did the Office of Professional Standards, for  
12          example, ever conduct an investigation on where these things  
13          went?

14          A.    No.

15          Q.    So in regards to preserving evidence or documenting  
16          evidence, this is a complete breakdown of Standard Operating  
17          Procedure?

18          A.    As I said earlier, it's not typical of how you would  
19          receive evidence back --

20          Q.    What -- I'm sorry, go ahead.

21          A.    -- back from -- I mean, it normally would have been  
22          returned to the agency that collected it and sent it to the  
23          GBI.

24          Q.    And besides Standard Operating Procedure or handling  
25          evidence, was there a Standard Operating Procedure specific to

1 the handling of firearms?

2 A. No.

3 Q. All right. Were there changes made to the handling  
4 of evidence, the Standard Operating Procedure, after this  
5 case?

6 A. No.

7 Q. So it's the same now as it was then?

8 A. Well, today they probably have a tracking system,  
9 software or something.

10 Q. So while these items were lost and you were looking  
11 for them, did anybody within the fire department think at all  
12 about the implications for the State if evidence is lost?

13 A. Yes.

14 Q. Did anybody think about the implications for a  
15 defendant if evidence is lost?

16 A. Yes.

17 Q. Okay. And did you know then or do you know now that  
18 as a State actor handling these items, there is a statutory  
19 duty to preserve evidence in a criminal case?

20 A. Yes.

21 MR. COHEN: I don't believe I have anything else.

22 MS. GALLOW: Briefly, Your Honor.

23 **CROSS-EXAMINATION**

24 **BY MS. GALLOW:**

25 Q. Good morning, Mr. McNeal.

1           A.    Good morning.

2           Q.    You testified in this trial; is that correct?

3           A.    Yes.

4           Q.    And you testified that you were asked by your chief,  
5 I believe at the time, was Dennis Rubin; is that correct?

6           A.    That's right.

7           Q.    To search for any of the evidence that you could  
8 possibly locate at that time?

9           A.    That's right.

10          Q.    And you were unable to locate any of the evidence in  
11 this case?

12          A.    Yes.

13          Q.    You were also at trial testifying that the GBI had  
14 sent various items of evidence to your fire -- Atlanta Fire as  
15 opposed to the submitting agency; right?

16          A.    Correct.

17          Q.    And you testified to this at trial?

18          A.    Right.

19          Q.    You also testified that you received the shell  
20 casings, the projectile, and I believe the Beretta, which was  
21 the alleged murder weapon in this case; is that correct?

22          A.    Yes.

23          Q.    And that you also testified at trial that you were  
24 unable to locate those weapons --

25          A.    Correct.

1 Q. -- despite an extensive search.

2 A. Right.

3 Q. You also testified that in contravention of the  
4 GBI's and as well as your agency, in contravention of their  
5 Standard Operating Procedure, they incorrectly sent that  
6 evidence to Atlanta Fire when in fact they should have been  
7 sent to Atlanta Police; is that correct?

8 A. Yes.

9 Q. Sir, you testified before the jury that this  
10 evidence was improperly sent to the wrong agency?

11 A. Yes.

12 Q. And not only was it sent to the incorrect agency,  
13 you conducted an extensive search to determine whether or not  
14 you could find the evidence at Atlanta Fire; is that correct?

15 A. That's correct.

16 Q. And this was all brought out at trial; is that  
17 correct, Mr. McNeal?

18 A. Yes, it was.

19 MS. GALLOW: I have no further questions, Judge.

20 THE COURT: Any redirect for this witness?

21 MR. COHEN: Briefly.

22 **REDIRECT EXAMINATION**

23 **BY MR. COHEN:**

24 Q. When you testified at trial, did you testify as to  
25 Standard Operating Procedure for maintaining evidence?

1           A.    I don't recall if we discussed Standard Operating  
2 Procedures or not.

3           MR. COHEN:  Nothing further.

4           THE COURT:  Anything else, counsel?

5           MS. GALLOW:  No, nothing further, Judge.

6           THE COURT:  Can this witness be excused?

7           MS. SHEIN:  Yes, Your Honor.

8           THE COURT:  You're free to go.  Thank you, sir.

9           THE WITNESS:  Thank you.

10                       [Witness excused.]

11           THE COURT:  Okay.  Unless you've got a super short  
12 witness we're going to call it a day.  Okay, I'll see  
13 y'all tomorrow morning at 8:30.

14                       [Off the record in re: scheduling.]

15                       **[Proceedings adjourned for the evening.]**



C E R T I F I C A T E

STATE OF GEORGIA

COUNTY OF GWINNETT

I hereby certify that the above and foregoing Pages 1 through 120 are a true and correct transcription of Volume I of VII of the habeas corpus proceedings taken down by me in **Scott Winfield Davis vs. Tony Howerton, Warden, Phillips State Prison, Civil Action Number 10-A-0741-2.**

I further certify that I am neither related nor counsel to any of the parties and am not financially interested in the matter.

**This certification is expressly withdrawn and denied upon the disassembly and/or photocopying of the foregoing transcript or any part thereof unless disassembly and photocopying is done by the undersigned Certified Court Reporter and original signature and official seal attached thereto.**

WITNESS my hand and official seal in Gwinnett County, Georgia, this 19th day of December, 2011.

---

Beth O. Capell, CCR, CVR  
Certificate Number A-1290  
Official Court Reporter

Gwinnett Superior Ct./Div. II

1 **TUESDAY - JULY 26, 2011**

2 [Petitioner brought into courtroom.]

3 MR. COHEN: We'll briefly be recalling Cecil Mann.

4 THE COURT: Okay.

5 Whereupon,

6 **CECIL MANN,**

7 having been duly sworn under oath, was further examined and  
8 testified as follows:

9 **FURTHER REDIRECT EXAMINATION**

10 **BY MR. COHEN:**

11 Q. Thank you, sir. Put your hand down. Just a few  
12 brief questions for you this morning. And again, I appreciate  
13 you coming back today.

14 MR. COHEN: Your Honor, may I briefly approach the  
15 witness?

16 THE COURT: Yes, sir.

17 Q. I'm holding in my hand what is labeled as  
18 Petitioner's Exhibit Number 11. I'm showing it to you at this  
19 time. Do you recognize that photograph?

20 A. I do.

21 Q. And can you tell us whether or not you provided that  
22 photograph to us?

23 A. I did.

24 Q. Okay. And can you tell us what's in the picture?

25 A. It is a picture of the 7<sup>th</sup> floor at City Hall, 8675

1 Ponce de Leon Avenue, and it was the are where that, I guess,  
2 overflow evidence was being stored.

3 Q. And is that photograph a true and accurate depiction  
4 of the Evidence Room on the 7<sup>th</sup> floor as it was at that time?

5 A. At that time, yes, sir.

6 Q. Okay. And --

7 MS. GALLOW: Objection, Your Honor. He's testifying  
8 as to the fair and accurate depiction of this picture at  
9 that time. Can we establish what time frame we're  
10 talking about at this point?

11 Q. Sir, could you tell us exactly when these photos  
12 were taken?

13 A. This photograph was taken in 2006, the early part of  
14 2006.

15 Q. Okay. And just briefly, could you describe for us  
16 what you see in that picture?

17 A. The main focus is on a bunch of looks like black  
18 plastic garbage bags. Just to the left of that are some  
19 wooden pallets. Behind that is some shopping carts, metal  
20 shopping carts. And then in the background you see like these  
21 little plastic containers where magazines are housed. And to  
22 keep going into the background, it's just some other pictures  
23 of boxes and items like that that's evidence.

24 Q. And would you characterize that as being an  
25 organized array of evidence or something that you could easily

1 work with?

2 A. I wouldn't characterize that it's organized, no,  
3 sir.

4 Q. And as far as those items being in the condition  
5 that they are, was that deliberate?

6 A. Deliberate in -- I mean --

7 Q. In how the items were placed on the 7<sup>th</sup> floor in that  
8 manner. Were they deliberately placed there that way?

9 A. They were placed, yes, sir. They were placed that  
10 way.

11 Q. And when you took over the Evidence Room, was this  
12 emblematic of the way that evidence was typically stored on  
13 the 7<sup>th</sup> floor?

14 A. Not just the 7<sup>th</sup> floor but the way the evidence was  
15 housed.

16 Q. And as part of that -- as a consequence of that, did  
17 you have any conditions that you gave the Department before  
18 you took over the Evidence Room? Things that --

19 A. I don't know -- I don't know that there were  
20 conditions. I mean, you're given an assignment and you have  
21 to go. But I requested support from my chain of command in  
22 improving the business practices of the Evidence Room, and I  
23 was given support in that nature as far as being able to  
24 attend training, being able to purchase the necessary  
25 equipment to improve the organization and overall organization

1 of the Property Room.

2 Q. And did you take this picture yourself?

3 A. No. No, sir, I did not, one of employees did.

4 Q. Okay. And finally, can you tell us roughly how long  
5 that --

6 THE COURT: Can I get -- is that the same one he's  
7 been looking at?

8 MR. COHEN: Yes, Your Honor. At this time we'd move  
9 to admit Petitioner's Exhibit 11 into evidence.

10 MS. GALLOW: No objection, Your Honor.

11 MR. COHEN: Admitted without objection.

12 **[WHEREUPON, Petitioner's Exhibit Number 11 was admitted**  
13 **into evidence without objection.]**

14 **BY MR. COHEN: [Resuming]**

15 Q. Can you tell us, if you know, how long the Evidence  
16 Room was organized or disorganized in that manner that's  
17 characterized by the photograph?

18 A. The only thing I can tell you is when I walked in in  
19 2005, that's pretty much the way the Property Room -- that was  
20 the state of the Property Room. How long it had been there, I  
21 have no idea.

22 MR. COHEN: Okay. May I approach once again, Your  
23 Honor?

24 THE COURT: Yes, sir.

25 Q. Do you recognize what I've labeled Petitioner's

1 Exhibit 12?

2 A. Yes.

3 Q. And can you tell us what that is?

4 A. Yeah, it's another photograph. This would have been  
5 of the property storage area downstairs.

6 Q. Okay. And --

7 A. The main floor of the Property Room.

8 Q. Did you provide us with that picture?

9 A. I did, yes, sir.

10 Q. And do you know about when the picture would have  
11 been taken?

12 A. The same time frame. It would have been taken the  
13 early part of 2006.

14 Q. So that again is a true and accurate depiction of  
15 how things were in that part of the Evidence Room at that  
16 time?

17 A. That is correct, sir.

18 Q. Okay. At this time, Your Honor, we would move to  
19 admit Petitioner's Exhibit 12 into evidence.

20 THE COURT: Any objection?

21 MS. GALLOW: No objection, Your Honor.

22 THE COURT: Admitted without objection.

23 **[WHEREUPON, Petitioner's Exhibit Number 12 was admitted**  
24 **into evidence without objection.]**

25 THE COURT: Now are there any of these photos that

1           we can just stipulate in?

2           MS. GALLOW: Your Honor, subject to the witness'  
3 authentication and within the time frame that he worked,  
4 I would have no objection. But until that foundation is  
5 laid --

6           THE COURT: Okay.

7           MS. GALLOW: -- I would have to just determine at  
8 that point.

9           THE COURT: Okay, that's fine.

10          MS. GALLOW: I'm sorry, Your Honor, I'd like to make  
11 this easy --

12          THE COURT: That's fine. That's fine.

13          MR. COHEN: We can move through the remainder of the  
14 photos very quickly, your Honor. Approach one more time?

15          THE COURT: Yes, sir.

16 **BY MR. COHEN: [Resuming]**

17          Q. Showing you what's labeled Petitioner's Exhibit 13,  
18 and I would just ask you the same thing. Do you recognize  
19 that, sir?

20          A. Yes, sir. Again, this is a photograph of the  
21 evidence storage area on the main floor of the Property Room.  
22 Again, it was taken in the same time period, early part of  
23 2006.

24          Q. All right. And can you just tell us roughly what  
25 we're looking at?



1           A.    Yes, sir. The main focus is on a -- I guess a  
2   series of shelves, four shelves, and it has paper bags,  
3   plastic bags, other items just piled on it. In the aisle area  
4   again you see -- you see tires, suitcases, cardboard boxes.  
5   In the background you see a bunch of bicycles. They're all  
6   evidence in the storage area.

7           Q.    And once again, is the placement of these items  
8   deliberate? Is that how -- they were put there on purpose?

9           A.    Apparently, yes, sir.

10          Q.    And that is in fact a true and accurate depiction of  
11   what is represented?

12          A.    It is.

13          MR. COHEN: Your Honor, at this time we'd move to  
14   place Petitioner's Exhibit 13 into evidence.

15          MS. GALLOW: No objection, Your Honor.

16          THE COURT: Admitted without objection.

17               **[WHEREUPON, Petitioner's Exhibit Number 13 was admitted**  
18               **into evidence without objection.]**

19          MS. GALLOW: Your Honor, first of all, I would  
20   object to his characterization that he deliberately put  
21   all the evidence items there. I think that's a  
22   mischaracterization and I don't think he had special  
23   knowledge to say that he did in fact or did not put them  
24   there.

25          THE COURT: I'll sustain that objection. It's come

1 in twice. I don't -- I think, counsel, your question  
2 was, "Is this where people put things?" or something, and  
3 that's fine. I don't understand exactly what you mean by  
4 "deliberate," so I'll ask you to rephrase in the future.

5 MR. COHEN: Thank you, Your Honor.

6 **BY MR. COHEN: [Resuming]**

7 Q. What I would ask is, is that part of the normal and  
8 customary manner in which evidence was handled at the time?

9 A. Yes, once I arrived. I mean the only thing I can  
10 tell you is it was there, it was placed there in that  
11 condition when I arrived. I don't know who placed it there, I  
12 don't know the time frame that it was placed there, but when I  
13 arrived there, that was kind of the methodology that was used  
14 to place it inside the main storage area.

15 Q. Yes, sir. So it was normal and customary.

16 A. Yes.

17 MR. COHEN: May I approach one more time, Your  
18 Honor?

19 THE COURT: Yes, sir.

20 Q. I'm now showing you Petitioner's Exhibits 14, 15,  
21 16, and 17, and again would ask you if you recognize these  
22 photos.

23 A. Yes. Again, these are photographs of the main  
24 storage area --

25 THE COURT: The one downstairs.

1           A.    -- the one downstairs, the main one downstairs.  
2           Again, the time frame was the early part of 2006.

3           Q.    And that is a true and accurate depiction of the  
4           conditions as they existed at that time?

5           A.    Yes, sir.

6           Q.    And did you provide us with this photograph?

7           A.    Yes, sir, I did.

8           Q.    Okay. And if you could just go through each of them  
9           and confirm for me the same thing that you have just  
10          described.

11          A.    Yeah. Numbers 14, 15, 16, and 17, they depict  
12          cardboard boxes, brown paper bags, shelves, slicing golf  
13          clubs, maybe a TV, some electronic equipment, plastic bags.  
14          They're all labeled with a red tag that was used as evidence.

15          Q.    And at the time the photos were taken, would you  
16          have been able to locate any particular item of evidence that  
17          you needed to find?

18          A.    We could. I mean, it was a difficult task. There  
19          were days that going through some of the shelves looking for  
20          evidence that we could potentially overlook it. I mean -- I  
21          mean, sometimes it took a very long time to find something,  
22          but we did find stuff, yes, sir.

23          Q.    Okay. And once again, that was normal, customary?  
24          That was the normal state of the Evidence Room at that time?

25          A.    Yes, sir, it was.

1 Q. Okay.

2 MR. COHEN: If I can approach, Your Honor. At this  
3 time we seek to move into evidence Defense Exhibits 14,  
4 15, 16, and 17.

5 THE COURT: Any objection?

6 MS. GALLOW: No objection, Your Honor.

7 THE COURT: Admitted without objection.

8 **[WHEREUPON, Petitioner's Exhibit Numbers 14, 15, 16, and**  
9 **17 were admitted into evidence without objection.]**

10 **BY MR. COHEN: [Resuming]**

11 Q. And finally, just two more for you, Mr. Mann. I'm  
12 showing you what are -- I'm sorry, three more -- what are  
13 labeled as Petitioner's Exhibits 18, 19, and 20. And again,  
14 can you tell me if you recognize these?

15 A. Yes, sir, I do.

16 Q. And can you tell us what we're looking at now?

17 A. Yes, sir. I believe it looks like Photograph 18 is  
18 of the 7<sup>th</sup> floor area that was used to -- let me study this  
19 just a minute to make sure. Actually, all of these are going  
20 to be of the downstairs area, the main floor downstairs, where  
21 we have implemented a reorganization of the Property Room.  
22 Photograph 18 depicts banker boxes on the shelves that are  
23 labeled -- I can't exactly see what the labeling is, but it's  
24 where that we started storing evidence in banker boxes to sort  
25 of organize it.

1            Photograph 18 -- or Photograph 19 is some additional  
2            banker boxes. It's also some new plastic containers that look  
3            customized for the Atlanta Police Department's size of  
4            envelope where that we would store small evidence.

5            And again, Photograph 20 is some more banker boxes and  
6            the blue plastic I guess containers that we had customized for  
7            the size of envelope that we were using for the small  
8            evidence.

9            These pictures would have been taken mid to late 2007.

10           Q.    So can you tell us roughly how long it took for you  
11           to transform the Evidence Room from what the first sets of  
12           pictures I showed you were like to what you have in front of  
13           you now?

14           A.    It took me a good 15 months, 12 or 15 months to  
15           start seeing some notable changes. Like I say, these were  
16           taken mid to late 2007, so 15, 18 months to kind of reach this  
17           point here.

18           Q.    And once you did reach a point where things were  
19           organized where you had things labeled, you have things in  
20           boxes, would there have been any way to determine the  
21           whereabouts of something that had been missing when all of the  
22           evidence was just scattered around the way it was in the first  
23           pictures?

24           A.    Not unless it was entered into Evidence 2000. If --  
25           if it was never entered into Evidence 2000, then we would have

1 no way of knowing if it was even turned in to us or was not  
2 turned into us. So, no, I mean, if we didn't have a record of  
3 it, I couldn't determine if we had it or not, so --

4 Q. So it's accurate to say that the after photos show  
5 organization that could have located something much more  
6 easily?

7 A. Oh, much more easily, absolutely.

8 Q. And that the before photos, you wouldn't really have  
9 any way of going back and determining where anything had been  
10 before the 18-month process to transform it?

11 A. Not -- not easily. I mean, you've seen the  
12 photographs. I mean, it would sometimes take weeks and months  
13 just to go through an area to try to find something, and we  
14 may or may not find it.

15 MR. COHEN: One moment, Your Honor.

16 Q. Did you ever provide these photographs to any  
17 defense attorney in this case?

18 A. No. Nobody's ever asked me for them.

19 Q. And did you testify at trial in this case?

20 A. No.

21 MR. COHEN: Nothing further.

22 MS. GALLOW: Judge, no further questions.

23 THE COURT: Okay. Can Mr. Mann be excused?

24 MR. COHEN: Yes, Your Honor.

25 THE COURT: Okay. You can be excused again, sir.

1 Thank you.

2 THE WITNESS: Thank you, Judge.

3 [Witness excused.]

4 THE COURT: Counsel, did you intend to offer in 18,  
5 19, and 20?

6 MR. COHEN: Yes, Your Honor. I apologize.

7 THE COURT: Any objection?

8 MS. GALLOW: No objection.

9 MR. COHEN: I offer into evidence Photographs 18,  
10 19, and 20.

11 THE COURT: Very good. They're in.

12 **[WHEREUPON, Petitioner's Exhibit Numbers 18, 19, and 20**  
13 **were admitted into evidence without objection.]**

14 MR. COHEN: Good morning, Mr. O'Loughlin.

15 THE WITNESS: Good morning.

16 Whereupon,

17 **GLENN O'LOUGHLIN,**

18 having been duly sworn under oath, was examined and testified  
19 as follows:

20 MR. COHEN: Your Honor, may I approach the witness?

21 THE COURT: Sure.

22 **DIRECT EXAMINATION**

23 **BY MR. COHEN:**

24 Q. Mr. O'Loughlin, I'm showing you what's been labeled  
25 as Petitioner's --

1 MS. GALLOW: Your Honor, before we start, can we get  
2 the witness to be sworn in?

3 THE COURT: I think he swore him in.

4 MS. GALLOW: Did he swear him in?

5 THE COURT: Uh-huh. But I would like --

6 COURT REPORTER: I need his name.

7 THE COURT: Didn't he swear him in, Beth?

8 COURT REPORTER: He did swear him in, but I don't  
9 have a name.

10 THE COURT: But we need his name.

11 **BY MR. COHEN: [Resuming]**

12 Q. Would you state your name for the record, please.

13 A. Glenn O'Loughlin.

14 COURT REPORTER: Would you spell the last name,  
15 please?

16 THE WITNESS: Sure. It's O'-L-O-U-G-H-L-I-N.

17 Q. And Mr. O'Loughlin, could you just briefly tell us  
18 where you're employed?

19 A. I'm employed with the Georgia Bureau of  
20 Investigation Crime Lab.

21 Q. And how long have you been there?

22 A. For just short of seven years.

23 Q. Okay. And what kind of work do you do?

24 A. I'm the Evidence Receiving Manager/Laboratory  
25 Support Manager, it's kind of multi-named.



1           Q.    Okay.  And what kind of training have you received  
2 related to handling evidence?

3           A.    On-the-job training and going through our policies.

4           Q.    Okay.  And is there formal Standard Operating  
5 Procedure for documenting chain of custody for evidence that  
6 the State intends to use at trial?

7           A.    Yes, there is.

8           Q.    Okay.  And could you tell us just a little bit about  
9 how that works?

10          A.    The way it works presently is when evidence comes in  
11 to our Crime Lab it goes in what's called the lockbox, which  
12 is a box that when evidence is put it in, it closes and then  
13 it's locked and has to be removed from the other side, which  
14 is our side where my staff is working.  It's also -- there's a  
15 submission form on that evidence that is filled out by the  
16 submitting agency.  It is date and time stamped, and it is  
17 then dropped in the lockbox.  We also have someone available  
18 for questions as far as packaging and any questions the  
19 officer or agent may have.

20          Q.    All right.  And this is all towards maintaining  
21 chain of custody; right?

22          A.    That's correct.

23          Q.    Can you tell us why that's important?

24          A.    Well, particularly we have to show that there's no  
25 gaps in time from the time the evidence is dropped off to the

1 time that it's returned to the agency. So each person that  
2 touches the evidence removes it from the lockbox, enters it  
3 in, and even then when it's transferred to the associate  
4 scientific disciplines, that's all logged in, presently.

5 Q. Okay.

6 MR. COHEN: If I could approach, Your Honor?

7 THE COURT: Yes, sir.

8 Q. I'm showing you what's been marked as Petitioner's  
9 Exhibit Number 21. Can you tell me, do you recognize that  
10 document, that kind of document?

11 A. Yes.

12 Q. Can you tell us what it is?

13 A. It is a listing of the evidence on a case.

14 Q. And what's the identifying number up at the top  
15 right corner?

16 A. Case 96-52726.

17 Q. Okay. And what exactly is the list that comes  
18 underneath it with the numbers corresponding. Can you just  
19 explain for us what kind of program would generate a document  
20 like this?

21 A. This is our Laboratory Information Management System  
22 commonly known as LIMS. It's a listing of when the evidence  
23 is in, it assigns evidence numbers to each piece of evidence.

24 Q. Okay. And along those lines, briefly, were there  
25 not two different systems of numbering during your tenure,

1 your ongoing tenure, with Georgia Bureau of Investigation?

2 A. No. Actually, I came in after the new system, LIMS  
3 Information Management System and JusticeTrax was implemented.  
4 Prior to that, there was a different system called the HP-3000  
5 System.

6 Q. Okay. And would you have had the occasion to work  
7 with evidence that was cataloged in both systems, even though  
8 after you started it was all on this LIMS System?

9 A. Yes.

10 Q. Okay. I just want to go through a few items on this  
11 list with you to confirm that these are items that were  
12 acknowledged as being in evidence in the case that you have  
13 identified by the number at the upper right-hand corner.

14 MS. GALLOW: Your Honor, I would object to the  
15 witness going into the contents of this document at this  
16 time.

17 MR. COHEN: Your Honor, there are only four items  
18 that are -- five items that I'd like to verify were in  
19 GBI custody at this time because these are items that  
20 were specifically lost during this case and never made it  
21 to trial. I'm just establishing chain of custody.

22 MS. GALLOW: And, Your Honor, these are no -- this  
23 is not in evidence at this time, so again, I would renew  
24 my objection as to going into the contents of this  
25 document.

1 THE COURT: You're going to have to get the document  
2 admitted.

3 MR. COHEN: Your Honor, at this time we would move  
4 to admit Petitioner's Exhibit 21 into evidence.

5 THE COURT: Is there an objection to the admission  
6 of the document?

7 MS. GALLOW: Your Honor, if the witness has personal  
8 knowledge of this document, then I would have no  
9 objection.

10 THE COURT: Well, counsel, do you want to voir dire  
11 the witness? Are you objecting because you don't think  
12 he has personal knowledge?

13 MS. GALLOW: Your Honor, basically I'm just trying  
14 to object to him getting into the actual contents of this  
15 document since it's not in evidence at this time. If he  
16 can recognize this document, then I have no objection.

17 THE COURT: I think he's identified it.

18 MR. COHEN: Your Honor, he has identified the  
19 document.

20 THE COURT: So counsel, I'm happy to let you voir  
21 dire him if you want.

22 MS. GALLOW: If I may, Your Honor.

23 THE COURT: Yes, ma'am.

24 **VOIR DIRE EXAMINATION**

25 **BY MS. GALLOW:**

1           Q.   Mr. O'Loughlin, did you prepare this Open Records  
2 Request?

3           A.   The --

4           Q.   Did you prepare this document?

5           A.   I did not.

6           Q.   Do you have any personal knowledge as to any of the  
7 evidence that is contained in this record?

8           A.   I was not here during the time that evidence was  
9 submitted.

10           MS. GALLOW: Your Honor, based on the fact that he  
11 has no personal knowledge of any of the evidence in this  
12 and he was not here at the time, I would object to him  
13 getting into the contents of this document.

14           THE COURT: Counsel, can you give me a little more  
15 information about where the list came from --

16           MR. COHEN: Your Honor, we --

17           THE COURT: -- how this witness got it?

18           MR. COHEN: We obtained this through an Open Records  
19 Request.

20           THE COURT: Well, you can't testify, counsel.

21           MR. COHEN: Yes, Your Honor.

22           THE COURT: But he needs to be able to identify the  
23 document and how the document -- not -- I'm sorry, I  
24 wasn't very clear -- not how you happen to get the  
25 document, but how was the document created, how was it

1 generated, is it something that a third party sat down  
2 and typed up, is it on the computer -- so I need to know  
3 where the document came from.

4 THE COURT: Yes, Your Honor.

5 **BY MR. COHEN:**

6 Q. In your experience, Mr. O'Loughlin, could somebody  
7 with a password and authorization to use this program have  
8 generated this document simply by putting in the case number?

9 A. It would lead them to the case, which includes that  
10 document, yes.

11 Q. And this being an authorized copy provided under  
12 Open Records would be an accurate description of the items  
13 that were placed in evidence under this case number?

14 A. Not the evidence numbers.

15 Q. And how would the evidence numbers be different?

16 A. Because the -- and this is -- I was not here during  
17 the time, but we had two different systems. The information  
18 from one system, in order to be moved over to the other  
19 system, had to be converted.

20 Q. Aside from the numbering system, would the named  
21 items on the report, as generated by LIMS, be accurate if an  
22 authorized user input this case number?

23 A. That's what this system would print out, yes.

24 THE COURT: I'm just trying to understand is -- the  
25 document was just -- was generated by your -- I know you

1           didn't do it, but is that the document that if you put in  
2           the case number, that's what your records now, your  
3           computers, would now generate?

4           THE WITNESS: Including a number of other  
5           information, including like final reports, things like  
6           that that also has a numbering -- actual numbering system  
7           of the evidence itself. It's kind of confusing.

8           THE COURT: Yeah, and you've successfully confused  
9           the Judge.

10          MR. COHEN: Your Honor, I think I can clear it up  
11          with one question.

12          THE COURT: Okay.

13 **BY MR. COHEN: [Resuming]**

14          Q. Is this a document that the GBI keeps and maintains  
15          in the ordinary course of business?

16          A. Yes.

17          THE COURT: Further objection?

18          MS. GALLOW: Just one brief question, Your Honor.

19 **BY MS. GALLOW:**

20          Q. Mr. O'Loughlin, when exactly was this report  
21          generated, to your knowledge?

22          A. I'm not -- there is a print date on it as 9/22/2008.

23 **BY MR. COHEN: [Resuming]**

24          Q. But that date would actually indicate the date that  
25          it was reprinted; correct?

1 A. That was --

2 Q. Because of an Open Records Request.

3 A. Yes, this is when this was printed from the system.

4 THE COURT: Are there dates on there, I'm just  
5 curious, when the evidence was actually logged in?

6 THE WITNESS: Not -- no, not on this document.

7 THE COURT: Not on that document, okay.

8 MR. COHEN: Your Honor, we would still seek to admit  
9 it as a business record.

10 THE COURT: Counsel?

11 MS. GALLOW: No objection.

12 THE COURT: Okay. Admitted without objection.

13 MR. COHEN: Thank you.

14 **[WHEREUPON, Petitioner's Exhibit Number 21 was admitted**  
15 **into evidence without objection.]**

16 **BY MR. COHEN: [Resuming]**

17 Q. Just a few quick questions for you about this and  
18 I'll move on and ask you about a few other things.  
19 Specifically, I'll let you look on this copy right here, can  
20 you tell me what Items 30 and 31 are?

21 THE COURT: And we're still looking at P-21?

22 MR. COHEN: Yes, Your Honor.

23 THE COURT: Okay. Just making sure.

24 A. Item 30 says "secured package containing one  
25 Browning .20 gauge over and under shotgun, Serial No. Number



1 35951V5."

2 Item 31 on this sheet says "secured bag containing one Beretta  
3 .9mm pistol, Serial No. Number L43964Z."

4 Q. And then on the next page, flipping it over, if you  
5 could tell me what these three items are.

6 A. A sealed envelope containing .9mm cartridge case,  
7 that was Item 39. Item 40 is a sealed envelope containing a  
8 .9mm cartridge. Item 41 is a sealed bag containing one  
9 magazine.

10 Q. Thank you, sir. Now --

11 MR. COHEN: If I may approach, Your Honor?

12 THE COURT: Yes, sir.

13 Q. Mr. O'Loughlin, now I'm showing you what has been  
14 labeled Petitioner's Exhibit 22. Can you tell me if you  
15 recognize that?

16 A. Yes, I do.

17 Q. Can you tell us what it is?

18 A. It was a typed listing of the item numbers according  
19 to the final report.

20 Q. Okay. And by that you mean the final report similar  
21 to the one that I just showed you, referring to the same  
22 evidence?

23 A. That was not a final report.

24 Q. Okay. So that wasn't a final report. And this is a  
25 communication from you -- it's a typed report, but is this

1 being communicated to another party?

2 A. Yes.

3 Q. And can you tell us who this is being sent to?

4 A. I believe it was Sheila Ross.

5 Q. And up at the top where it says "from" and it's got  
6 your name, is that your name and email address?

7 A. That's correct.

8 Q. And below that there is a date and time stamp?

9 A. Yes.

10 Q. Sent -- and could you tell us when it was sent?

11 A. It was sent -- actually was initiated, well, email,  
12 yes -- it was sent August 8<sup>th</sup>, 2006, 3:16 p.m.

13 Q. Okay. And can you tell us roughly what are the  
14 contents of this communication?

15 A. This was sent -- this is a listing of the evidence  
16 item numbers, a very brief description, and the result of the  
17 disposition of that evidence.

18 Q. And how do you mean disposition?

19 A. Where it was sent to or who it was sent to.

20 Q. And this is a true and accurate depiction of where  
21 these items went?

22 A. As accurate as was possible, due to the conversion  
23 and the difference in change of numbers. And I was not here  
24 during the time the evidence came in, so it was as accurate as  
25 I could determine at the time.

1           Q.    But besides the numbering system, there is also a  
2 language description of each item; right?

3           A.    Yes.

4           Q.    Okay.

5           MR. COHEN:  Now at this time we'd ask to move  
6 Petitioner's Number 22 into evidence.

7           MS. GALLOW:  No objection, Your Honor.

8           MR. COHEN:  And if I can --

9           THE COURT:  I just have a question about it before I  
10 admit it.  Where did -- where did the information on the  
11 list come from?  From the other list?  From your  
12 computers?  I'm not --

13          THE WITNESS:  During the conversion -- and I'm  
14 speaking kind of not being there because I wasn't there  
15 during the conversion, but during the conversion item  
16 numbers on the listing that LIMS produced, the Laboratory  
17 Information System, versus what was in the HP-3000, when  
18 it converted it, it numbered evidence items down on the  
19 evidence list.  The Laboratory Information System did  
20 that in its numbering scheme.  That did not match 100  
21 percent the final report or what actually was the actual  
22 evidence number.  This was the Laboratory Information  
23 Systems number, not the actual evidence number.

24          THE COURT:  I guess I didn't ask a very good  
25 question.  You said that this list contains disposition

1 of property.

2 THE WITNESS: Yes, that's right.

3 THE COURT: What I want to know is where did that  
4 information come from? From the computer? From your --

5 THE WITNESS: No. This actually came from manual  
6 log books.

7 THE COURT: Okay.

8 THE WITNESS: At the time that's what was used in  
9 order to -- when evidence was transferred or disposed of.  
10 There was no barcode system at that time and --

11 THE COURT: And so you created this list?

12 THE WITNESS: This list I created using log book  
13 information.

14 THE COURT: Okay, P-22. So tell me exactly what you  
15 did to create the list, please.

16 THE WITNESS: Sure. I took the final report, which  
17 is the evidence items and evidence that was listed, and  
18 that's produced by all the different scientists that  
19 worked on the evidence. I took that list and I took the  
20 log books for the disposition to see where the log books  
21 said evidence was sent to.

22 THE COURT: So now at the Crime Lab would all that  
23 information be in the LIM System, the disposition?

24 THE WITNESS: The log books themselves?

25 THE COURT: Well, no -- are you still using manual

1 log books or does all of that --

2 THE WITNESS: No.

3 THE COURT: Okay.

4 THE WITNESS: No.

5 THE COURT: So now today -- I'm just asking you --  
6 today, when a piece of property comes in and it gets  
7 tested and it goes back out for trial or something, where  
8 is that information, the disposition as you referred to  
9 it, where is that listed?

10 THE WITNESS: That's all in a chain of custody now  
11 that's developed. Each time that evidence is scanned, it  
12 puts an entry in the chain of custody showing who had it  
13 and where it went to. Even the last one would be, for  
14 instance, it would say -- not in this case, but "Cobb  
15 P.D. evidence returned."

16 THE COURT: Okay. But that goes where? That goes  
17 in the computer somewhere? I mean, it's --

18 THE WITNESS: Yes.

19 THE COURT: -- not a handwritten log anywhere.

20 THE WITNESS: No, that's scanned.

21 THE COURT: Okay.

22 THE WITNESS: It's scanned to them. And then we  
23 print out a evidence receipt that's signed by the agency.

24 THE COURT: And -- but to generate this list, at the  
25 time that this evidence was in, there was just this

1 handwritten log book --

2 THE WITNESS: That's the manual system.

3 THE COURT: -- and so you withdrew that and took  
4 down the information from that handwritten document and,  
5 I guess, either hand typed or compiled it in the  
6 computer.

7 THE WITNESS: Yes.

8 THE COURT: And then ran it.

9 THE WITNESS: That's correct.

10 THE COURT: Okay. I'm sorry.

11 THE WITNESS: No, no, that's --

12 THE COURT: I'll admit it without objection. I was  
13 just trying to understand it.

14 THE WITNESS: All right.

15 MR. COHEN: Thank you, Your Honor.

16 **[WHEREUPON, Petitioner's Exhibit Number 22 was admitted**  
17 **into evidence without objection.]**

18 **BY MR. COHEN: [Resuming]**

19 Q. So on this communication determining disposition of  
20 items, you're fairly specific about where a number of things  
21 went. And before I ask you about where some of them went, I  
22 just want to ask you a little bit about Standard Operating  
23 Procedure for returning items that have been submitted to the  
24 GBI for testing.

25 What should have happened with anything that was sent to

1 you from the Atlanta Police Department after testing was  
2 completed?

3 A. Now or back then?

4 Q. At the time.

5 A. I can't say that, I wasn't here, I'm not sure what  
6 the criteria, what the process was at that time. It was years  
7 and years before I got there. So I'm not sure exactly what  
8 the procedure or process was at that time.

9 Q. And what would be the appropriate procedure at this  
10 time?

11 A. At this time, if evidence is received, usually a  
12 primary agency is established, also a submitting agency.  
13 Evidence is generally scanned back to the submitting agency.

14 Q. Okay. And that's typical?

15 A. Well, yes. I say generally because that's not in  
16 every case.

17 Q. Okay, sent back to the submitting agency. But the  
18 items that you received from Atlanta Police or that GBI  
19 received from Atlanta Police, would there have been any reason  
20 after testing to then send those items to the Atlanta Fire  
21 Department?

22 A. I can't speak directly on that. I know evidence was  
23 sent back to primary agencies sometimes, which Atlanta Fire  
24 Department was the first agency, according to Records, that  
25 submitted evidence in that case.

1           Q.    Now on the disposition of evidence, if you look at  
2 Item No. 4, can you tell me what No. 4 is?

3           A.    Item 4 is the .9mm Beretta pistol.

4           Q.    Okay. And what was the disposition?

5           A.    Returned to Atlanta Fire Department on 3/15/99 via  
6 UPS.

7           Q.    Okay. How about Items 12 through 15?

8           A.    Twelve through 15 is 9 -- I guess that's millimeter  
9 -- I can't read this thing -- 9mm. cartridges and magazine  
10 returned to Atlanta Fire Department on 3/15/99 via UPS.

11           MS. GALLOW: Your Honor, I'd like to object to this  
12 line of inquiry. This was already established at trial  
13 that the GBI incorrectly sent various items back to  
14 Atlanta Fire in contravention of their Standard Operating  
15 Procedures.

16           MR. COHEN: Your Honor, I first of all thank the  
17 State for pointing out this is a direct violation of  
18 Standard Operating Procedure but --

19           MS. GALLOW: And it was established at trial, Your  
20 Honor.

21           MR. COHEN: -- but this is not something that was  
22 properly litigated at trial. For one thing, bad faith,  
23 which is the standard we have to reach now, was  
24 established by the Supreme Court. Bad faith is not a  
25 jury question, it's not something that was put to the



1 jury, it was never presented in terms of if you find the  
2 agencies involved mishandled and lost evidence with  
3 deliberate indifference to violations of Standard  
4 Operating Procedure that you should acquit. This has not  
5 been litigated. And at the conclusion of our case we're  
6 going to show that at no time has defense counsel at the  
7 trial or appellate level categorically gone through and  
8 shown the complete indifference which does reach the  
9 level of bad faith. This has not been litigated, Your  
10 Honor.

11 THE COURT: Counsel, I guess I'm just a little  
12 confused. I understand what you're telling me your  
13 burden is in this hearing. What I don't quite understand  
14 is how this gentleman, reading the list to you of what  
15 happened to the property, establishes bad faith.

16 MR. COHEN: We're just itemizing the -- specifically  
17 the items that we had just gone through, establishing  
18 that were in evidence, which were crucial to this case: a  
19 cartridge, a shell casing, a pistol --

20 THE COURT: I'm sorry. But was all of that gone  
21 into at trial? Was it clear at trial that all of this  
22 evidence went to the Atlanta Fire Department?

23 MR. COHEN: No, Your Honor, I don't believe it was  
24 specifically categorically stated. I believe there was a  
25 general statement of a huge volume of evidence was lost

1           and sent back to the wrong place --

2           THE COURT: Let me rephrase. Does it matter what  
3           the specifics are with regard to which pieces of evidence  
4           went back to Atlanta Fire to show bad faith?

5           MR. COHEN: Yes, Your Honor, it does because these  
6           are crucial items that Mr. Davis had absolutely no  
7           opportunity to cross-examine or to refute or to conduct  
8           any kind of independent -- independent testing.

9           THE COURT: Go ahead and finish. Just -- I'm going  
10          to overrule.

11          MS. SHEIN: Your Honor, I just wanted to mention one  
12          thing. That one of the problems in this case is the SOPs  
13          that were never admitted. There were a few, and here and  
14          there they did a bit of this and that. But we have a  
15          problem with the way the Supreme Court has decided the  
16          case; we have to go back and articulate what was missing.  
17          And that's what's happened with it.

18          THE COURT: Okay.

19          MR. COHEN: Thank you, Judge.

20          THE COURT: Can I ask, I'm just curious, was a trial  
21          transcript filed? My staff got the habeas file and  
22          there's clearly not -- I'm assuming that the little bit  
23          that I have is not the complete trial transcript. So I'm  
24          just --

25          MS. SHEIN: It hasn't been filed yet, Your Honor. I

1           presume that the AG was going -- their usual course of  
2           procedure as to file the entire record.

3           MS. SMITH: That's something ordinarily we do at the  
4           hearing itself, Your Honor, not ahead of time.

5           THE COURT: Okay.

6           MS. SMITH: But we have it here. That's the boxes.

7           THE COURT: Okay.

8           MS. SMITH: And if it would facilitate matters to go  
9           ahead -- we've been talking about it but we didn't --

10          THE COURT: Okay, I was just asking. I was just  
11          asking, not --

12          MS. SMITH: We didn't think you had time to read it  
13          before the hearing, so it's a lot -- it's twenty-some  
14          volumes.

15          THE COURT: Gotcha. Okay.

16          MR. COHEN: If I could approach with just one more  
17          exhibit, Your Honor.

18       **BY MR. COHEN: [Resuming]**

19           Q.    Sir, I'm showing you what's marked Petitioner's  
20           Exhibit Number 23. Can you tell us if you recognize what kind  
21           of a document this is?

22           A.    This is, at the time that I -- as far as I know.  
23           Again, I wasn't here during this time. But what I've been  
24           told is that this kind of was a disposition sheet of the  
25           evidence at the time through these -- the D.I. is a

1 disposition code that was issued to that evidence, again, a  
2 manual system.

3 Q. And is this a document that GBI keeps and maintains  
4 in the ordinary course of business?

5 A. Not currently, but back then I heard it was.

6 Q. But at the time. And again, this is just showing,  
7 very briefly, disposition, if you will, of certain items  
8 because it's got a column marked for "return to"; right?

9 A. Yes.

10 Q. And again, showing numerous items were sent back to  
11 the Atlanta Fire Department?

12 A. That is correct.

13 MS. GALLOW: Again, Your Honor, I would object to  
14 counsel going into the contents of this document at this  
15 time.

16 MR. COHEN: Your Honor, we would seek to admit  
17 Petitioner's 23 into evidence.

18 THE COURT: I'm not prepared to admit it at this  
19 point. I don't know what this is, I don't know where it  
20 came from. This gentleman has just heard about it, so  
21 I'm not prepared to admit it at this time.

22 MR. COHEN: Just one more question.

23 **BY MR. COHEN: [Resuming]**

24 Q. Are you aware that of all the items that were sent  
25 back to Atlanta Fire Department which should not have been,

1       that all of those items were lost prior to trial?

2           A.    I was not aware all the items were lost.

3           MR. COHEN:  Nothing further.

4           MS. GALLOW:  Your Honor, I have no questions of this  
5       witness.

6           THE COURT:  Can he be excused?

7           MS. SHEIN:  Your Honor, on that exhibit, we did ask  
8       him if this was a document kept in the ordinary course of  
9       business.  He recognized it as one that was, Your Honor.  
10      So I would like to put on the record that we believe that  
11      it should be admitted.

12          MS. GALLOW:  And, Your Honor, I further point out  
13      that this is not a complete document.  This says Page 3  
14      of 3.  I'm not sure what the remainder of this document  
15      is.

16          THE COURT:  Beth, go back.  I'm sorry, I may have  
17      missed -- I just want to know what the answer was to the  
18      question -- did you say -- was your understanding back  
19      then that was -- that this was a document that was kept  
20      in the ordinary course of business?

21          THE WITNESS:  Yes, but I'm not sure of that.

22          THE COURT:  Okay.

23          THE WITNESS:  Because I wasn't there at the time.

24          THE COURT:  Gotcha, okay.

25          MR. COHEN:  Nothing further.

1 THE COURT: Okay. Can he be excused?

2 MS. GALLOW: No objection.

3 MS. SHEIN: Sorry, Your Honor, one more question.

4 [Off the record.]

5 MS. SHEIN: Sorry, Your Honor, I apologize.

6 [Off the record.]

7 MR. COHEN: Nothing further.

8 THE COURT: I think you're free to go.

9 THE WITNESS: Thank you.

10 [Witness excused.]

11 MS. SHEIN: Your Honor, could we take a ten minute

12 break?

13 THE COURT: Sure.

14 MS. SHEIN: Thank you, Your Honor.

15 THE COURT: Ten minutes.

16 **[A brief break was taken.]**

17 \* \* \*

18 MR. COHEN: Good morning, Ms. Lang.

19 THE WITNESS: Good morning.

20 Whereupon,

21 **GAIL LANG,**

22 having been duly sworn under oath, was examined and testified

23 as follows:

24 **DIRECT EXAMINATION**

25 **BY MR. COHEN:**

1 Q. Will you state your name for the record, please.

2 A. Gail, G-A-I-L, Lang, L-A-N-G.

3 Q. Thank you. And where are you employed?

4 A. I am employed with the Georgia Bureau of  
5 Investigation, the Crime Lab.

6 Q. And what specifically do you do there?

7 A. Well, I retired the 1<sup>st</sup> of May. I was the Lab  
8 Support Manager for 20 years, or Assistant Manager for 20  
9 years of the Lab Support Section.

10 Q. And for 20 years beginning when?

11 A. '99, I believe.

12 Q. And what kind of training did you receive relating  
13 to handling evidence?

14 A. Well, when I first went, when I first was employed,  
15 I did -- I added evidence into the system, and it was, you  
16 know, hands-on training from an employee that had been there.  
17 And three years, you know, as I got into management, I've had  
18 management training.

19 Q. Okay. And is there a requirement for then -- it  
20 sounds like ongoing certification, recertification?

21 A. No, no.

22 Q. No?

23 A. Uh-uh.

24 Q. And what kind of formal Standard Operating Procedure  
25 was in place during your tenure with GBI for documenting chain

1 of custody for evidence?

2 A. In --

3 Q. Evidence intended to be used in criminal  
4 prosecutions?

5 A. What, now or --

6 Q. Well, going back to let's say around the time of the  
7 events in question here, say between 1996 and '99, to begin  
8 with.

9 A. We had a log book. We signed evidence out in log  
10 books and people's -- used people's signatures.

11 Q. Okay. And you used a signature to show someone took  
12 receipt?

13 A. Yes.

14 Q. And that was the purpose of an outgoing log book?

15 A. Yes.

16 Q. And what about if something was sent to an agency by  
17 mail or courier, how would you document that?

18 A. It was also in a log book, but it was shipped  
19 usually UPS.

20 Q. All right. And as far as anything that was  
21 considered forensic evidence, was there a particular division  
22 of GBI that handled that kind of evidence or was it all  
23 generally handled by the same department?

24 A. I'm not sure I understand what you mean.

25 Q. Was there a Division of Forensic Sciences?



1           A.    Yes.

2           Q.    Okay.  So things that were considered to be of  
3 forensic value for prosecution would be handled by that  
4 particular division?

5           A.    Yes.

6           Q.    And along those lines, did the agency require any  
7 kind of worksheet for documenting evidence that was  
8 specifically related to the Department of Forensic Sciences?

9           A.    Yes, we had a worksheet on the computer where we had  
10 to add the evidence into the system.

11           MR. COHEN:  Okay.  Your Honor, may I approach?

12           THE COURT:  Yes, sir.

13           Q.    Showing you what's been marked as Petitioner's  
14 Exhibit Number 24, can you tell me what kind of document that  
15 is?

16           A.    That's the DOFS worksheet.

17           Q.    And can you tell us what that is, DOFS worksheet?

18           A.    Yes.  This was a copy of the evidence that -- the  
19 information on the evidence that was inputted into the system.

20           Q.    Okay.  And this would be an accurate representation  
21 then of items that were placed into evidence and documented?

22           A.    Should be, yes.

23           Q.    Okay.  And who would have access to either enter  
24 items into this system or create a printout?  Would it take a  
25 password, authorization?

1           A.    Yes, it would have taken, you know, lab support  
2 personnel or scientific personnel would have been able.

3           Q.    Okay. And anything, therefore, that is documented  
4 in one of these DOFS worksheets would then be an accurate  
5 representation of items that were in possession of GBI  
6 Division of Forensic Sciences?

7           A.    Yes, in 1996.

8           Q.    Okay. And is that the date at the upper left of  
9 this document? Can you tell us what that is?

10          A.    Yes.

11          Q.    Okay. Could you just tell us what that date is?

12          A.    12/11/96.

13          MR. COHEN: Your Honor, at this time we'd seek to  
14 admit Petitioner's Exhibit 24 into evidence.

15          MS. GALLOW: Your Honor, if I may briefly question  
16 the witness.

17          THE COURT: Yes, ma'am.

18 **BY MS. GALLOW:**

19          Q.    Ms. Lang, did you prepare this document?

20          A.    No.

21          Q.    Do you have any personal knowledge of what's  
22 contained in this document?

23          A.    No.

24          MS. GALLOW: Your Honor, I would object on that  
25 basis.

1 MR. COHEN: Your Honor, one additional question.

2 **BY MR. COHEN: [Resuming]**

3 Q. Is this document something that the GBI maintains as  
4 part of the ordinary course of business?

5 A. Yes.

6 THE COURT: Any other questions, counsel?

7 MS. GALLOW: No objection.

8 THE COURT: All right. Admitted without objection.

9 MR. COHEN: Thank you, Your Honor.

10 **[WHEREUPON, Petitioner's Exhibit Number 24 was admitted**  
11 **into evidence without objection.]**

12 **BY MR. COHEN: [Resuming]**

13 Q. Now as far as this particular DOFS worksheet is  
14 concerned, I just want you to identify a few items that are  
15 named here. Could you tell me what Item 3 is and read the  
16 description for us?

17 A. Item 3 is fingerprint card bearing prints of Scott  
18 Davis.

19 Q. And how about Item 4?

20 A. Sealed bag containing six latent lift cards.

21 Q. Okay. Now under what circumstances would those  
22 items have left GBI custody?

23 A. They were returned to the agency.

24 Q. Okay. Which agency?

25 A. On this sheet in '96 it would have been the agency

1 at the top of the sheet, which says it was the County Fire  
2 Department.

3 Q. So in doing so, if that's where you returned these  
4 items, would you have maintained any records of how those  
5 items were sent?

6 A. Yes.

7 Q. And would you have maintained records of who  
8 specifically took receipt of them?

9 A. Maintain records of what?

10 Q. If you sent these items to other agencies, would you  
11 maintain records of who took receipt of them and where they  
12 went?

13 A. Yes.

14 Q. Okay. And how would you do that?

15 A. Through the log book.

16 Q. Okay. And did you also rely on documents such as  
17 delivery notification --

18 A. Yes.

19 Q. -- as provided by?

20 A. UPS or -- yes.

21 Q. I'm showing you two documents. One is marked  
22 Petitioner's 25 and the other is 26. Starting first with 26,  
23 can you tell me what that is?

24 A. It's a UPS delivery notification.

25 Q. Okay. And is there a tracking number?

1           A.    Yes, there is.

2           Q.    Okay.  I won't ask you to read it, it's a very long  
3 number, but on Petitioner's 25 I would ask you to look at not  
4 far down from the top where there are two circled numbers.  Do  
5 you see what I'm talking about?

6           A.    I do, yes.

7           MS. GALLOW:  Your Honor, I object to the witness  
8 reading any of Petitioner's 25 into evidence.  This has  
9 not been introduced at this time.

10          THE COURT:  It's not been identified or introduced,  
11 I don't believe.

12          MR. COHEN:  Okay.

13 **BY MR. COHEN:  [Resuming]**

14          Q.    Can you tell us what Petitioner's 25 is?

15          A.    It's a -- looks like a copy of the log book.

16          Q.    Okay.  And as a copy of it, was that the document  
17 that was maintained as part of the normal course of business?

18          A.    Yes.

19          Q.    Okay.  And would the -- well, what would the purpose  
20 of that document be?

21          A.    So we could see where the evidence was returned to.

22          Q.    Okay.

23          MR. COHEN:  Your Honor, at this time I would ask to  
24 admit both Petitioner's 25 and 26 into evidence.

25          MS. GALLOW:  Your Honor, one brief question.

1 THE COURT: Yes, ma'am.

2 MS. GALLOW: Ms. Lang, did you prepare this document  
3 that's been marked Petitioner's 25?

4 THE WITNESS: Not that I'm aware of, no.

5 **BY MR. COHEN: [Resuming]**

6 Q. Could I ask you, besides the fact that this is a  
7 document maintained in the normal course of business, can you  
8 look up at the upper left part of the page for me --

9 A. Yes.

10 Q. -- and could you read for me the top line from left  
11 to right.

12 A. Case 96-52726 by Lang, Gail 4/13 2006.

13 Q. Would this refresh your recollection to having  
14 perhaps prepared this document?

15 A. I suppose I did print it out then, yes.

16 Q. Thank you.

17 MS. GALLOW: No objection, Your Honor.

18 THE COURT: To either one of them?

19 MS. GALLOW: Just the Petitioner's 25, Your Honor.

20 THE COURT: Okay. We you asking for both to come in  
21 or just 25?

22 MR. COHEN: Yes, Your Honor, I'm asking to admit  
23 both of them.

24 THE COURT: So objection to 26?

25 MS. GALLOW: Your Honor, I'm not sure where this

1 document is purported to come from, so unless we can  
2 establish a foundation of where this has come from, I  
3 would like to know where it came from at this time.

4 MR. COHEN: Your Honor, once again -- I'm sorry.

5 **BY MR. COHEN: [Resuming]**

6 Q. Ms. Lang, on the UPS delivery notification, would  
7 you look at the upper left-hand part of the page, and it's a  
8 little bit cut off but it's still there, can you read the top  
9 left of that for me? It might be hard to read the number.  
10 Let me show you.

11 MR. COHEN: May I approach?

12 THE COURT: Yes.

13 Q. Right here. Is that your name?

14 A. No.

15 Q. Right here? Lang, Gail?

16 A. No, that's Diana Wallace.

17 Q. Okay. But right here above Diana Wallace.

18 A. Oh, okay, yes. I do see, yes, sir.

19 Q. Okay. So that is your name?

20 A. Yes.

21 Q. And this is a record, therefore, that would have  
22 been a normal -- a record normally maintained in the course of  
23 business --

24 A. Yes.

25 Q. -- showing receipt. And, in fact, it shows that you

1 had some responsibility in maintaining this document?

2 A. Right.

3 Q. Okay.

4 MS. GALLOW: No objection, Your Honor.

5 THE COURT: Admitted then without objection.

6 **[WHEREUPON, Petitioner's Exhibit Numbers 25 and 26 were**  
7 **admitted into evidence without objection.]**

8 **BY MR. COHEN: [Resuming]**

9 Q. So between the two, 25 and 26, the only other thing  
10 I want you to do for me is acknowledge whether or not this  
11 tracking number matches the one on the UPS delivery  
12 notification. That's a lot of digits, take your time.

13 A. No, it does not.

14 Q. I'm sorry.

15 MR. COHEN: The last one was 26?

16 THE COURT: Yes, sir.

17 MR. COHEN: If I can approach one more time.

18 Q. Showing you what's marked Petitioner's 27, this  
19 one's a little bit grainier, but can you tell me what this is?

20 A. It's a UPS delivery notification.

21 Q. And can you tell me if the tracking number on this  
22 document matches the tracking number on your log book?

23 A. Yes, it does.

24 MR. COHEN: Your Honor, at this time we'd seek to  
25 admit Petitioner's Exhibit 27 into evidence.



1 MS. GALLOW: Again, Your Honor, the witness has not  
2 identified Petitioner's 27.

3 MR. COHEN: The witness has identified 27.

4 THE COURT: Counsel, do you --

5 MS. GALLOW: Your Honor, if she knows the contents  
6 of this document, we have not established where this  
7 document came from or whether or not she in fact prepared  
8 this or has any knowledge of this document.

9 THE COURT: Do you want to --

10 MR. COHEN: It's a UPS delivery notification with a  
11 tracking number that matches the document prepared in the  
12 log book.

13 THE COURT: Do you want to voir dire the witness?

14 MS. GALLOW: Your Honor, I guess I have no objection  
15 to this.

16 THE COURT: I'll admit it then without objection.

17 **[WHEREUPON, Petitioner's Exhibit Number 27 was admitted**  
18 **into evidence without objection.]**

19 **BY MR. COHEN: [Resuming]**

20 Q. Now having confirmed that these items were received  
21 at the fire department, can you just very briefly tell us  
22 where any items that you had gotten from Atlanta Police should  
23 have been sent back to once the GBI was finished with them?

24 A. They were received from the Atlanta Police  
25 Department. They should have been returned to -- returned

1 back to Atlanta Police.

2 Q. And are you aware that many, many items that were  
3 received from Atlanta Police were, like these documents, sent  
4 back to --

5 MS. GALLOW: Objection, Your Honor. Counsel is  
6 again testifying and leading his witness at the same  
7 time.

8 MR. COHEN: Your Honor, I'm simply asking her if she  
9 knows where the items went.

10 THE COURT: Well, no, that's not exactly what you  
11 asked, counsel, so rephrase.

12 **BY MR. COHEN: [Resuming]**

13 Q. Are you aware that these items went to --

14 THE COURT: No, no, no. I think the question would  
15 be "Where did the items go?"

16 Q. Where did the items go?

17 A. Well, according to this, it went to the Atlanta Fire  
18 Department.

19 Q. And you just stated that they should have gone to --

20 A. If they were submitted by the Atlanta Police  
21 Department, yes.

22 MR. COHEN: If I could have just a moment.

23 [Brief pause.]

24 Q. When the GBI shipped items to other agencies, was  
25 there a requirement to send in a written communication to

1       those agencies about the items you were sending?

2           A.    I'm not sure.  I was -- you know, I'm not -- I did  
3       not work in that section, so I'm not really sure.

4           MR. COHEN:  Nothing further for this witness.

5           MS. GALLOW:  I have no questions of this witness,  
6       Your Honor.

7           THE COURT:  Can this witness be excused?

8           MR. COHEN:  Yes, Your Honor.

9           THE COURT:  You are free to go, ma'am.  Thank you.

10          THE WITNESS:  Thank you.

11                       [Witness excused.]

12          MR. COHEN:  Good morning, Mr. McCravy.

13          THE WITNESS:  Good morning.

14       Whereupon,

15                       **ADRIAN D. MCCRAVY,**

16       having been duly sworn under oath, was examined and testified  
17       as follows:

18                       **DIRECT EXAMINATION**

19       **BY MR. COHEN:**

20           Q.    Would you please state your name for the record.

21           A.    Adrian D. McCravy.

22           Q.    Thank you, sir.  And would you tell us, Mr. McCravy,  
23       where you're employed?

24           A.    I'm presently retired, special agent principal, the  
25       Georgia Bureau of Investigation.

1 Q. Okay. And how long did you work with GBI?

2 A. Twenty-five years.

3 Q. Okay.

4 A. Almost 25 years.

5 Q. What year did you start?

6 A. 1973.

7 Q. Okay. And what exactly in your tenure there did you  
8 do?

9 A. A little bit of everything. I started out as a  
10 field agent in Region 3 in Americus, Georgia. I've worked  
11 Organized Crime, I've worked as a training officer with the  
12 Georgia Bureau of Investigation, as an instructor in Criminal  
13 Law, Constitutional Law. I've been the Organized Crime Squad,  
14 the Auto Theft Squad, Major Crime Scene Investigator and  
15 Special Investigator with the State Medical Examiner's Office.  
16 Possibly some others, but it's been 13 years and it's --

17 Q. Okay. Now are you familiar with the case that we're  
18 here talking about, the Scott Davis investigation?

19 A. No, sir, I'm not.

20 Q. Okay. Are you familiar with when it took place?

21 A. No, sir. Well, I believe it was in 1996.

22 Q. Yes, sir. And the case went to trial in 2006.

23 Were you at the agency during those years?

24 A. No, sir, I retired in 1998.

25 Q. Okay. But at the beginning of the case, you were

1       there.

2           A.    Yes, sir.

3           Q.    And evidence that came to GBI would have been  
4       subject to procedure and rules that you're familiar with at  
5       the top?

6           A.    Yes, sir.

7           Q.    Okay.  And before we get to specific rules and  
8       operating procedure, just let me ask you generally about  
9       Standard Operating Procedures.  Evidence handling and  
10      maintaining evidence properly, this was all governed by very  
11      specific agency rules?

12          A.    Yes, sir.

13          Q.    And those were referred to as Standard Operating  
14      Procedures?

15          A.    Yes, sir.

16          Q.    And they were updated from time to time?

17          A.    Yes, sir.

18          Q.    Okay.  And were these kinds of documents made  
19      available to or provided to anybody who worked in the agency  
20      and was found to follow them?

21          A.    Standard Operating Procedures?

22          Q.    Yes, sir.

23          A.    Yes, sir.

24          Q.    Okay.  I'll just ask you a few questions and show  
25      you a few in particular of the items that I'm referring to.

1 MR. COHEN: If I can approach, Your Honor?

2 THE COURT: Yes, sir.

3 Q. Showing you what is marked Petitioner's 28, do you  
4 recognize that? Or can you tell us what kind of document that  
5 is?

6 A. It appears to be part of the Operations Manual,  
7 Georgia Bureau of Investigation. It's a Crime Lab document.

8 Q. Okay. And this is a little bit more current,  
9 realizing the date on this, but this is the kind of document  
10 that governs what?

11 A. Return of evidence to the agency and evidence return  
12 receipts.

13 Q. Okay. And during the time that you were with GBI,  
14 what would have been the policy for returning items that had  
15 been submitted to GBI, say for testing?

16 A. Returning them to whom?

17 Q. That's my question to you, sir.

18 A. Anytime evidence is transferred to one custody to --  
19 from the custody of one person to another, it's done against a  
20 hand receipt.

21 Q. Okay. And items that are submitted from, say,  
22 Atlanta Police, would be returned after testing was completed  
23 to whom?

24 A. To the Atlanta Police.

25 Q. And this is a document that would have been kept and

1 maintained as an ordinary course of business?

2 A. The evidence receipt?

3 Q. On this or any other Standard Operating Procedure.

4 A. I'm not sure I'm clear on your question. Every  
5 agent that worked in the major crime scene squad had a copy of  
6 GBI evidence procedures, policy and procedures, that --

7 Q. And in keeping -- I'm sorry, go ahead.

8 A. -- that covered the location, collection, packaging,  
9 marking, transportation, and processing of evidence.

10 MR. COHEN: Your Honor, at this time we'd seek to  
11 move Petitioner's Exhibit 28 into evidence.

12 MS. GALLOW: Your Honor, if I may ask the witness a  
13 few questions.

14 THE COURT: Yes, ma'am.

15 **BY MS. GALLOW:**

16 Q. Mr. McCravy, when exactly did you retire from the  
17 GBI?

18 A. March 1<sup>st</sup>, 1998.

19 Q. And if you look at the document that is before you,  
20 the date, I believe, is March of 2009; is that correct?

21 A. There are several documents here. This one is dated  
22 1999.

23 MR. COHEN: It should be just a single page. I  
24 apologize. I'm on the wrong -- I'm sorry, these are --  
25 these are items that had already been admitted.

1                   This is the document in question.

2       **BY MS. GALLOW:**

3           Q.    All right. Referring then to Petitioner's 28, Mr.  
4   McCravy, you said that you retired back in 1999; is that  
5   correct?

6           A.    '98.

7           Q.    '98, I apologize. And the date on this document  
8   that you're looking at now, I believe, is May of 2009; is that  
9   correct?

10          A.    That's correct.

11          Q.    So would this have been the protocol from the  
12   disposition of release and/or transferred evidence at the time  
13   you worked with GBI?

14          A.    I don't know that. I don't recall exactly what the  
15   Standard Operation Procedures were in 1998. I could probably  
16   give you some specifics, but I've been retired for 13 years,  
17   and the hazy memory is one of the few concessions I've had to  
18   make to advancing years. And this does look familiar. I  
19   don't see anything radically different than the procedures  
20   that we followed. If you could give me a specific question, I  
21   could --

22               MS. GALLOW: Well, Your Honor, based on the fact  
23               that this witness has been retired for 13 years, he can't  
24               necessarily personally attest that this is how their  
25               standard protocol was followed at the time of the case,



1 we would object based on this document.

2 MR. COHEN: Your Honor, the witness has already  
3 stated that the policy at the time was to return it to  
4 the submitting agency. This is a continuation of -- if I  
5 could ask one additional question.

6 **BY MR. COHEN: [Resuming]**

7 Q. The process described, returning it to the  
8 submitting agency, is that what would have been required in  
9 1998?

10 A. As I recall, it would, yes, sir, once the evidence  
11 has been processed by the Crime Lab.

12 THE COURT: Well, his testimony to the procedure is  
13 one thing, but I'm not sure that he's properly identified  
14 the disposition sheet in P-28. He says he doesn't really  
15 know. So I'm not going to admit P-28.

16 MS. SHEIN: Your Honor, just briefly, just to put on  
17 the record that he did -- he did say, I think I remember  
18 his testimony saying, that this is the same or similar to  
19 what they did before. It was the same procedure. I know  
20 he didn't make up this document or knows where this  
21 document came from but, Your Honor, we asked for the  
22 document leading back to 1996. The GBI advised us that  
23 these are not archived and there's no documents back that  
24 far, but that this would be what was in place at the same  
25 time.

1           And I'm not testifying, I'm just putting on the  
2           record that I think that's what he's saying as well.

3           THE COURT: Counsel, I'll admit your P-28 for the  
4           record only.

5           MS. SHEIN: Thank you.

6           **[WHEREUPON, Petitioner's Exhibit Number P-28 was admitted**  
7           **into evidence for the record only.]**

8           MR. COHEN: Thank you. And if I could approach once  
9           again, Your Honor.

10          **BY MR. COHEN: [Resuming]**

11           Q. I'm showing you what's marked as Petitioner's 29.  
12           Do you recognize this document? Can you tell us what kind of  
13           document this is?

14           A. The Latent Prints Operational Manual, Case Files.

15           Q. And this actually was Standard Operating Procedure  
16           during the time that you were with the GBI?

17           A. Yes, sir.

18           Q. Okay. And this is -- it says right across the front  
19           of the archived version, this would have been the rule that  
20           governed what was to be done with what?

21           A. Latent prints, I see.

22           Q. And what specifically -- is this a fair and accurate  
23           depiction of the Standard Operating Procedure as you knew it  
24           at that time?

25           A. Yes, sir, I believe it is.

1 Q. And is this a document that was kept and maintained  
2 as part of the normal course of business?

3 A. Yes, sir.

4 MR. COHEN: Your Honor, at this time we'd seek to  
5 admit Petitioner's 29.

6 MS. GALLOW: No objection, Your Honor.

7 THE COURT: All right. Admitted without objection.

8 **[WHEREUPON, Petitioner's Exhibit Number 29 was admitted**  
9 **into evidence without objection.]**

10 **BY MR. COHEN: [Resuming]**

11 Q. And just one more and then we can talk about what  
12 these documents actually say.

13 MR. COHEN: May I approach the witness?

14 THE COURT: Yes, sir.

15 Q. Showing you what is marked as Petitioner's Exhibit  
16 30, can you tell us what that is?

17 A. Evidence Purge Procedure.

18 Q. And is this a document that would have been kept and  
19 maintained as part of the ordinary course of business at GBI?

20 A. Yes, sir.

21 Q. And this is the Standard Operating Procedure that  
22 would have been available to anybody who was an employee of  
23 GBI at that time?

24 A. An employee of the Division of Forensic Sciences.

25 Q. Yes.

1           A.    The Crime Lab.

2           Q.    Okay.  So this is a document which fairly and  
3 accurately depicts the procedure for handling evidence in the  
4 Division of Forensic Sciences?

5           A.    Yes, sir.

6           Q.    In 1998.

7           A.    Uh-huh, that's correct.

8           MR. COHEN:  Your Honor, we'd seek at this time to  
9 admit Petitioner's 30 into evidence.

10          MS. GALLOW:  No objection.

11          THE COURT:  Admitted without objection.

12               **[WHEREUPON, Petitioner's Exhibit Number 30 was admitted**  
13 **into evidence without objection.]**

14 **BY MR. COHEN:  [Resuming]**

15          Q.    Okay.  Now referring to these documents as you need  
16 to, or if you're able to recall any of this from memory, I  
17 just want to ask you a few questions about Standard Operating  
18 Procedure as it relates to fingerprint evidence.  Did you work  
19 in fingerprints?

20          A.    Yes, sir.

21          Q.    And you had extensive training, didn't you?

22          A.    Yes, sir.

23          Q.    Okay.  Could you tell us just a little bit about the  
24 training you did have in fingerprints?

25          A.    Well, in a basic agent school that we went through

1 in 1973, we were taught how to locate and collect, that is,  
2 lift latent prints; how to mark, identify them; how to locate  
3 them on the crime scene by measurement and triangulation; and,  
4 of course, as in all evidence, we were taught how to package  
5 it and secure it and maintain a valid chain of evidence.

6 Q. Thank you. So there was certification required in  
7 processing as well as preservation of fingerprints?

8 A. Yes, sir.

9 Q. And what about testing, things that were supposed to  
10 happen before and after testing fingerprints?

11 A. We did not do that. That was in the fingerprint  
12 section, latent print identification section of the Crime Lab.

13 Q. Okay. What was the Standard Operating Procedure for  
14 the retrieval of fingerprints?

15 A. From the Crime Lab?

16 Q. Yes, sir.

17 A. It would be done by the -- by the police agency, I  
18 would suppose, as I recall. And any that would be turned over  
19 to the police department would be done against the hand  
20 receipt.

21 Q. Okay. And what should have happened to any  
22 fingerprints that the agency created or analyzed at that time?

23 A. What should have happened to them?

24 Q. Yes, sir. Besides processing. Was there any kind  
25 of a database that they should have been submitted to or

1 through or --

2 A. The Georgia Crime Information Center, yes, sir.

3 Q. Okay. Could you tell us, what is AFIS?

4 A. The Automatic Fingerprint Identification System.

5 Q. All right. Can you tell us a little bit about what  
6 that is?

7 A. That is a system whereby a fingerprint can be  
8 electronically and digitally classified and submitted into a  
9 state or federal database.

10 Q. And if it's state or federal, can you give us just a  
11 ballpark figure of roughly how many profiles would have been  
12 in AFIS?

13 A. That would be a big figure. I would be afraid to  
14 give you a figure. I can just say a lot.

15 Q. Who's likely to be in such a database?

16 A. Repeat criminals.

17 Q. What about unidentified perpetrators, unsolved  
18 cases?

19 A. They're stored for future possible comparison.

20 Q. And was that automatic? The fingerprints would be  
21 submitted to AFIS?

22 A. Yes, sir.

23 Q. Why would the fingerprints automatically go to AFIS?

24 A. Well, that is the procedure that law enforcement  
25 uses to submit digital information into a national database in

1 order to see if this person has been arrested before, or if  
2 this person is wanted. Even an unidentified person with an  
3 AFIS fingerprint stored could be identified if his  
4 fingerprints later turn up on a crime scene.

5 Q. Let's go back for just a moment to Latent Prints  
6 Operation Manual case files, that's one of the two exhibits in  
7 front of you. Could you tell us what are the items near the  
8 top of the page above where it says "NOTE" in bold? What are  
9 the items that are being identified that are mandatory to  
10 create in reviewing fingerprints?

11 A. Worksheet for Evidence, Submission Form (when  
12 applicable), Incident Report (if separate from the Submission  
13 Form), and case notes from supplemental requests.

14 Q. Okay. So if I'm understanding this procedure  
15 properly, there's an entire case file that should be created  
16 in support of any fingerprints that are processed and  
17 preserved.

18 A. I can't answer that question with any degree of  
19 certainty. I'm sorry.

20 Q. Okay. But according to this document, which was  
21 Standard Operating Procedure at the time, there should have  
22 been a file created with the worksheet, a submission form,  
23 case notes, that sort of thing?

24 A. According to this document, yes. Yes.

25 Q. Okay. And all of that should have happened with

1 anything that went through AFIS, for example?

2 A. Yes, sir.

3 Q. And if anything was sent to AFIS or was of AFIS  
4 quality and should have been sent to AFIS, according to this  
5 procedure, these documents should have been created in support  
6 of them?

7 A. They should have been, yes, sir.

8 Q. Okay. And what exactly -- we're referring to a  
9 process of sending prints through AFIS. How exactly does that  
10 work?

11 A. I'm sorry, I'm the wrong person to ask that  
12 question. That would have to be someone from the Latent Print  
13 Section of the Georgia Division of Forensic Sciences. I'm  
14 just not that familiar with the process.

15 Q. Okay. But you do know that it was Standard  
16 Operating Procedure for fingerprints to be submitted to AFIS.

17 A. Yes, sir.

18 Q. Okay. What -- what should have happened generally  
19 -- let's back out and get just a little more general here.  
20 With any crime scene evidence that was obtained, tell us how  
21 it should have been identified or labeled. What should have  
22 been the process when something was taken in?

23 A. By the crime scene specialists on the scene?

24 Q. Yes, uh-huh.

25 A. That would depend on the type of evidence. Latent



1 print evidence, at the time I was working crime scenes, the  
2 latent print was lifted, it was identified as to its location,  
3 and of course it was placed on a latent print card with all  
4 the identification information on it, and it was kept with  
5 other latent print cards. Other types of evidence, the  
6 gathering and packaging and processing depends on the type of  
7 evidence it is. If it was fluid or tissue, it would have to  
8 be collected in such a way that is not to provide for cross-  
9 contamination, and preservation, and it would have to be  
10 marked accordingly. Documentary evidence would be placed in  
11 the envelope and marked and identified as to location. All of  
12 the photographs of the crime scene would have to be numbered  
13 and stated specifically as to what the photograph was supposed  
14 to show.

15 Q. Let's go back to the AFIS database. Was there a  
16 particular quality required of fingerprints to be sent to  
17 AFIS?

18 A. Yes, sir.

19 Q. What does it mean for a print to be AFIS quality?

20 A. I'm sorry, again, I'm just not -- I don't have that  
21 information at hand.

22 Q. No problem. You have identified latent print cards.  
23 Once they were created and sent to GBI, latent prints, do you  
24 know what should happen to them at that point?

25 A. They were classified and marked and entered into a

1 database.

2 Q. Now turning to the document exhibit in front of you  
3 marked I believe was it 30 or 31? Evidence Purge Procedure.

4 A. Yes.

5 Q. Is that 30 or 31?

6 A. Thirty is Evidence Purge Procedure.

7 Q. Okay. On the first paragraph marked 1) a little way  
8 down, do you see where it says "Each laboratory shall  
9 distribute the portion of the printout containing their  
10 cases"?

11 A. What paragraph is that, sir?

12 MR. COHEN: May I approach, Your Honor?

13 THE COURT: Yes, sir.

14 A. "Each laboratory shall distribute..."

15 Q. Yes, sir.

16 A. Uh-huh.

17 Q. According to this Standard Operating Procedure which  
18 we've already identified as being the applicable one at the  
19 time, can you tell us what it says about correspondence? If  
20 you would just read for us from "Copies are sent to the  
21 agencies..." just the next couple of lines.

22 A. "Copies are sent to the agencies and to the  
23 appropriate prosecuting attorney by via certified mail or UPS  
24 along with a letter (OPS FORM 80 -- I'm sorry, FORM 8) from  
25 the Deputy Director of appropriate Lab -- or appropriate Lab

1 Manager concerning disposition of the evidence. One copy is  
2 held in the laboratory. After the appropriate time has lapsed  
3 and/or the return of the inventory list stating the  
4 dispositions of each case has been received, an inventory list  
5 of all evidence containing case number, date of destruction or  
6 date of return, and ERT/scientist initials shall be prepared."

7 Q. So if I understand that correctly, when things were  
8 sent back, prints or for that matter anything else, there  
9 should be a communication, this OPS FORM 8, there should be  
10 communication sent along with it to update the status of the  
11 case, the nature of the evidence. And isn't that what it's  
12 asking for here?

13 A. Yes, sir.

14 Q. Okay. And what exactly -- do you know what an OPS  
15 FORM is?

16 A. No, sir.

17 Q. Okay. But according to this procedure, it's a  
18 communication that should accompany the return of any items?

19 A. It should.

20 MS. GALLOW: Objection, Your Honor. He's leading  
21 his witness. The witness just testified he did not know  
22 what it was. I'd object to the question.

23 THE COURT: I'll sustain.

24 MR. COHEN: I'll move on.

25 **BY MR. COHEN: [Resuming]**

1           Q.    At the bottom of the page -- there's just a couple  
2 more things about this procedure here, and we'll wrap it up.  
3 Starting at the bottom, and again, this being the operating  
4 procedure that was in place at the time, according to this  
5 document, is it the responsibility of the section manager to  
6 contact agencies with previously marked open homicide cases?

7           A.    Where are we reading?

8           Q.    Number 5 at the bottom of the page.

9           A.    Page?

10          Q.    Page 1.  Actually, just look at the beginning of  
11 five.

12          A.    Yes, it is, uh-huh.

13          Q.    Okay.  And what exactly does it say there?

14          A.    "It is each Section/Lab Manager's responsible [sic]  
15 to contact each agency with previously marked Open Homicide  
16 cases to determine the status of these cases."

17          Q.    And then on the next page, starting with "reviewed,"  
18 if you could just finish that sentence that began on the prior  
19 page.

20          A.    "These cases are opened and reviewed to determine  
21 which items might later be used by the Division of Forensic  
22 Sciences to solve the case, such as identifiable latent lifts,  
23 cartridge cases, bullets, et cetera.  These are compiled into  
24 a laboratory container and stored."

25          Q.    Okay.  And finally, how about Number 6.

1           A.    "An administrative review of fingerprint cases is  
2 performed, and all unsolved cases with AFIS quality prints are  
3 added to the laboratory Hold list."

4           Q.    Along the same lines as holding the items, if you're  
5 holding the latent print cards, would there have been an  
6 obligation to make backup copies of those cards?

7           A.    Not to my knowledge, no, sir.

8           Q.    Okay.

9           MS. SHEIN: Your Honor, can we take a two-minute  
10 break just to consult with the document that I have back  
11 here.

12          THE COURT: Still relating to this witness?

13          MS. SHEIN: Yes. Yeah, I just want to just check  
14 something to be sure.

15                   [Brief pause.]

16          MS. SHEIN: You know, we may need a few more  
17 minutes, Your Honor. Can we take a five-minute break.

18          THE COURT: Sure.

19          MS. SHEIN: But I don't want to dismiss the witness  
20 yet.

21          THE COURT: Okay.

22          MS. SHEIN: Okay, great. Thank you.

23          THE COURT: We'll take about five minutes or so.

24                   [A short break was taken.]

25                   \*   \*   \*

1 THE COURT: Any more questions for this witness?

2 MS. GALLOW: No questions, Judge.

3 THE COURT: Sir, you're good to go.

4 THE WITNESS: Thank you, Your Honor.

5 [Witness excused.]

6 THE COURT: Are y'all ready for me to bring the  
7 defendant out?

8 MS. SHEIN: Not yet. We need to see what witness  
9 will come up.

10 THE COURT: Okay, just let me know. How much more  
11 time, do you think?

12 MS. SHEIN: Probably another five minutes.

13 THE COURT: Okay.

14 [Short break continued.]

15 \* \* \*

16 [Defendant brought into courtroom.]

17 MR. COHEN: Good morning, Mr. Pryor.

18 THE WITNESS: Good morning.

19 Whereupon,

20 **ALFREDDIE PRYOR,**

21 having been duly sworn under oath, was examined and testified  
22 as follows:

23 **DIRECT EXAMINATION**

24 **BY MR. COHEN:**

25 Q. Thank you, sir. Will you state your name for the

1 record.

2 A. Alfreddie Pryor.

3 Q. Thank you, sir. And if you could tell us, where are  
4 you employed, Mr. Pryor?

5 A. I'm working part time back at the Georgia Bureau of  
6 Investigation Division of Forensic Sciences.

7 Q. How long have you worked for Georgia Bureau of  
8 Investigation?

9 A. Well, I'm retired with 35 years of service in 2005.

10 Q. Okay. So do the math for us. When does that mean  
11 that you started?

12 A. 1972.

13 Q. All right. And were you working at the GBI during  
14 the time of the Scott Davis investigation?

15 A. Yes, that's correct.

16 Q. And by answering the question the way you did, is it  
17 fair to say that you recall the case?

18 A. Yes, sir. I was assigned the case.

19 Q. Okay. So you in fact did play an active role in  
20 Scott Davis' case?

21 A. That's correct.

22 Q. Did you work in fingerprints?

23 A. Yes, sir.

24 Q. Okay. And what kind of training did you have  
25 working with fingerprints?

1           A.    I first received my training at the FBI, which  
2           consisted of one day of classroom and a year on-the-job  
3           training. I was employed with Georgia -- the FBI for a period  
4           of two years.

5           I left the FBI and received a job with the Georgia Crime  
6           Information Center. My duties there at the Georgia Crime  
7           Information Center was also to complete comparison and  
8           identification of ink finger impressions.

9           I transferred from the Georgia Crime Information Center  
10          to the State Crime Lab, Division of Forensic Sciences. My  
11          duties there at the Crime Lab was to process forensic evidence  
12          that are submitted to us from our local police agencies, aid  
13          in identifying an unknown deceased and, of course, testify to  
14          the findings.

15          I attended the Administration of Advanced Latent  
16          Fingerprints School at the FBI Academy, the Scientific School  
17          at the Georgia Police Academy in Louisville, Kentucky. I am a  
18          certified latent prints examiner and also teach the science.

19          Q.    And can you tell us what that means to be a  
20          certified latent prints examiner?

21          A.    What that mean is that I'm recognized by following  
22          all the bylaws in the organization that governs anyone working  
23          in the field.

24          Q.    And, therefore, while you are not yet partially  
25          retired, working at GBI, and during the Scott Davis



1 investigation, you would have been familiar with Standard  
2 Operating Procedures that governed not only processing but the  
3 preservation of fingerprint evidence?

4 MS. GALLOW: Objection, Your Honor. Counsel is  
5 leading his witness. I believe the correct question  
6 would be "Were you familiar with the Standard Operating  
7 Procedures?" and not "You were familiar with Standard  
8 Operating Procedures."

9 MR. COHEN: Your Honor, generally I'm questioning  
10 law enforcement and potentially adverse witnesses. I  
11 would ask to be allowed to lead a little bit.

12 THE COURT: Well, counsel, at least at this point,  
13 until you establish that this witness is an adverse  
14 witness, I'm going to ask you to ask an appropriate  
15 question that doesn't lead the witness.

16 MR. COHEN: Thank you, Your Honor.

17 **BY MR. COHEN: [Resuming]**

18 Q. Were you familiar with Standard Operating Procedure  
19 as regards the handling and preservation of fingerprints?

20 A. Yes.

21 Q. Okay. And there was -- or was there in place at the  
22 time a published known Standard Operating Procedure?

23 A. Yes, sir.

24 Q. Under Standard Operating Procedure, and before we  
25 introduce any of those, what would have been required of

1 anybody at the agency who took receipt of fingerprint  
2 evidence?

3 A. Well, the procedure is that the cases first come  
4 into the Crime Lab, it is assigned a Crime Lab case number, at  
5 that time a submissions form is submitted with the evidence.  
6 The request is also as to what is needed to be done on that  
7 particular case. Then the evidence is then assigned to a  
8 fingerprint examiner, and his role is to examine the evidence,  
9 process evidence, generate a report, and when he's finished it  
10 will be placed in the Evidence Room or given back to the  
11 agency.

12 Q. Can you tell us what is AFIS?

13 A. AFIS is Automated Fingerprint Identification System.

14 Q. Okay. What kind of profiles were maintained in  
15 AFIS?

16 A. A profile consisted of fingerprint cards with prior  
17 arrest records.

18 Q. So backing up just a moment, you did work on Scott  
19 Davis' investigation?

20 A. That's correct.

21 Q. Do you recall handling fingerprint evidence in Scott  
22 Davis' case?

23 A. Yes, sir.

24 MR. COHEN: May I approach?

25 THE COURT: Yes, sir.

1           Q.    Showing you what are marked Petitioner's Exhibits  
2   31, 32, and 33, could you please tell us if you recognize  
3   those documents.

4           A.    State's Exhibit Number 31 is an official Crime Lab  
5   report which was generated as to my examination of the  
6   evidence that was submitted on this case.

7           Q.    Okay. And is this a record that would have been  
8   kept and maintained during the ordinary course of business?

9           A.    Yes, sir.

10          Q.    And on the second page, is that your signature?

11          A.    Yes, sir.

12          MR. COHEN: Your Honor, at this time we would seek  
13   to introduce Petitioner's 31 into evidence.

14          MS. GALLOW: No objection.

15          THE COURT: Admitted without objection.

16               **[WHEREUPON, Petitioner's Exhibit Number 31 was admitted**  
17               **into evidence without objection.]**

18   **BY MR. COHEN: [Resuming]**

19          Q.    And likewise, on Petitioner's 32, could you tell us  
20   what that one is, do you recognize that one?

21          A.    State's Exhibit Number 32 is also an official report  
22   that was -- as far as the findings on this case that were  
23   generated by me as to my findings of it on this evidence.

24          Q.    And how about 33?

25          A.    State's Exhibit Number 33 is also an official report

1       that is generated by me for my findings.

2           Q.   And these two, just like the prior, were documents  
3       that were kept and maintained as part of the ordinary course  
4       of business?

5           A.   That's correct.

6           Q.   And verified that your signature appears on both  
7       documents?

8           A.   Yes, sir.

9           MR. COHEN:  Your Honor, we'd seek to admit  
10       Petitioner's 32 and 33.

11          MS. GALLOW:  No objection, Judge.

12          THE COURT:  Admitted without objection.

13       **[WHEREUPON, Petitioner's Exhibit Numbers 32 and 33 were**  
14       **admitted into evidence without objection.]**

15       **BY MR. COHEN:  [Resuming]**

16           Q.   On 33 [sic], I believe it is, the Official Report,  
17       the one with the shorter top page, underneath "results" can  
18       you tell us what the two lines underneath the second printed  
19       word "results" say?

20           A.   Sir?

21           MR. COHEN:  May I approach, Your Honor?

22           THE COURT:  Yes, sir.

23           Q.   This one perhaps is 33 [sic], I apologize.  Right  
24       here on the Official Report that's dated December 17, 1996.  
25       That's the one, thank you.

1           A.    Read my results?

2           Q.    The second set of results, please.

3           A.    Okay.  "The latent lifts submitted have been  
4 visually examined and were found to be of value for comparison  
5 purposes."

6           Q.    What does it mean for prints to be of value for  
7 comparison purposes?

8           A.    In making outlines in latent fingerprints, the print  
9 helps you include sufficient characteristic points to render  
10 whether the latent print is of value or not, whether they  
11 could be identified.  And so that would make it of value.  If  
12 it lacks sufficient ridge detail necessary, then it's  
13 considered there's no value.  And in this case, it was of  
14 value for comparison purposes.

15          Q.    Now when you say ridge detail, is there a particular  
16 number of ridge details required or what -- what specifically  
17 would be the cutoff between something that was of value for  
18 comparison and something that was not?

19          A.    Well, fingerprints are -- they're unique to each  
20 individual, so there is no set number of points.  It depends  
21 on the examiner who made the comparison to satisfy himself,  
22 that it, that the latent print is a value -- of value.

23          Q.    There's not a particular number of say ridge  
24 characteristics required, or does it vary with the prints that  
25 you've collected?

1           A.    There's no set number of points, it depend on the  
2 individual.

3           Q.    Okay.  And is there a difference between something  
4 having comparison value and being of AFIS quality?

5           A.    Yes, sir.

6           Q.    Could you tell us what the difference is?

7           A.    Well, again, a print can be of value for comparison  
8 purposes by an individual and have a sufficient amount of  
9 ridge detail for that comparison, but it may lack sufficient  
10 ridge detail necessary to run it against the AFIS system  
11 because the AFIS system require the print has to be unique or  
12 it likes to have the more examination or the -- more  
13 characteristic points that a print has when it was entered  
14 into the AFIS System, the better a response as to the search  
15 of that particular print.

16          Q.    So I was just a little confused by it.  Could you  
17 tell me specifically what determines if a print is of AFIS  
18 quality.

19          A.    Well, it have to maintain at least eight or nine  
20 sufficient ridge detail necessary to be searched against the  
21 AFIS system in order to get an accurate result as to the  
22 search of the database.

23                               [Brief pause.]

24           MR. COHEN:  Your Honor, may I approach the witness?

25           THE COURT:  Yes, sir.

1           Q.    Showing you what's been marked as Petitioner's 28,  
2 do you recognize that document? Can you identify that  
3 document?

4           A.    This is a operation policy, State's Exhibit Number  
5 P-28.

6           Q.    Petitioner's 28?

7           A.    Petitioner's 28.

8           Q.    And is this a Standard Operating Procedure that  
9 would have been in effect during any of the time that you  
10 worked full time or part time at the GBI? It's dated 5/27/09.

11          A.    Well, this policy is dated in '09, 5/27, yes, sir,  
12 it was in place.

13          Q.    And you were employed with the GBI at that time, at  
14 least part time?

15          A.    In 5/27/09? No, sir.

16          Q.    Well, sir, didn't you say that you're working part  
17 time with GBI?

18          A.    Yes.

19          Q.    Okay. Thank you, sir. Going back to AFIS, could  
20 you tell us what the process is -- it is referred to as  
21 sending prints through AFIS, but what exactly does that mean?  
22 How does that work?

23          A.    Well, the prints that have been sent through AFIS is  
24 a print which have not been identified or there's no knowledge  
25 of the print. The print is then scanned into the AFIS system

1 with the proper marked minutia points. And when those points  
2 are marked properly as to the position of the latent print,  
3 the relationship or the identification of ridge formation is  
4 marked. When the individual is doing that, the print is then  
5 searched or sent to be scanned against a database of the  
6 prints that have been stored on that particular computer.

7 If the database matches or have a sufficient ridge detail  
8 necessary that is in sequence or close to those characteristic  
9 points which have been entered, what a computer does, the  
10 computer then kicks back a response, a candidate. And at that  
11 point, an individual have to look at that candidate to see if  
12 in fact that it was from the same source.

13 Q. So as a certified latent prints expert, what would  
14 be the purpose of sending prints through AFIS?

15 A. The purpose of sending prints to AFIS is if a case  
16 comes into the Crime Lab and there is no known suspect at the  
17 time and the print is of AFIS quality, it fits the process of  
18 sending it through the AFIS system. Also, it could well be  
19 sent through the AFIS system if a victim prints are submitted  
20 or suspect prints are submitted. Once you make those  
21 comparisons and your results are negative, and if it fits the  
22 criteria to be searched against the AFIS system, then that  
23 print or those prints can be sent through the AFIS system.

24 Q. So would it be -- I'm sorry, go ahead.

25 A. Also, inked finger impressions of an individual who



1 has not been identified, their prints is also sent through the  
2 AFIS system to see if in fact it's possible another name or et  
3 cetera.

4 Q. So was it necessary then for technicians who worked  
5 a crime scene and retrieve fingerprints, would it be necessary  
6 for them to ask the prints be sent through AFIS or would that  
7 have happened because it was procedure?

8 A. Well, now it's procedure. But at that time it was  
9 up to the individual or the examiner who made the comparison  
10 or working his case to decide whether a print should be sent  
11 to the AFIS system. However, if you do have a suspect and you  
12 also have a victim, and sometimes it's not ran.

13 THE COURT REPORTER: Sometimes it's not ran, you  
14 said?

15 THE WITNESS: Or sent through the AFIS system.

16 Q. And you've identified the documents that showed that  
17 you took possession of latent print cards in Scott Davis'  
18 case, which I believe are in front of you?

19 A. That's correct.

20 Q. All right. Are you aware that these prints were not  
21 sent through AFIS?

22 A. Yeah, it's not indicated in my results that they  
23 were.

24 Q. Are you aware that the fingerprints instead went to  
25 the DeKalb Fire Department?

1           A.    Yes.

2           Q.    Okay.  Who would have made the decision to send the  
3 prints to DeKalb Fire?

4           A.    The decision was done by the investigators and/or  
5 whoever is involved in that case.  Once the evidence is  
6 completed and placed in the Evidence Room, and if an  
7 individual comes to the Crime Lab who is from that particular  
8 agency, then it could be returned to that particular officer.

9           Q.    Do you know if DeKalb Fire would have had any means  
10 of running those prints through AFIS?

11           MS. GALLOW:  Objection, Your Honor, this calls for  
12 speculation.  Mr. Pryor works with the GBI.  I don't  
13 think he's qualified to speculate as to what DeKalb Fire  
14 would or would not do.

15           MR. COHEN:  Your Honor --

16           THE COURT:  Well, I'm going to allow the question.  
17 If he knows, he can tell us.

18 **BY MR. COHEN:  [Resuming]**

19           Q.    Do you know, sir, if DeKalb Fire could have run  
20 prints through AFIS?

21           A.    DeKalb Fire Department itself?

22           Q.    Yes, sir.

23           A.    They may have -- they could have requested, but  
24 DeKalb County Fire Department does not.

25           Q.    Okay.  So is that because only your agency has the

1 capacity to run the prints through AFIS?

2 A. DeKalb County does have the capability of searching  
3 against the AFIS database, I should say. And if it was done,  
4 I'm not sure if it was or not.

5 MR. COHEN: May I approach?

6 THE COURT: Yes, sir.

7 Q. Showing you Petitioner's Exhibit 34, and tell me if  
8 you recognize that document.

9 A. State's Exhibit Number 34 is a copy of a policy,  
10 Operation Manual Policy, that is in place dated 2/1/99.

11 Q. Okay. And is this a record that would have been  
12 kept and maintained as part of the ordinary course of GBI  
13 doing business?

14 A. Now it is, yes, sir.

15 Q. Okay. So this is Standard Operating Procedure?

16 A. That's correct.

17 MR. COHEN: Your Honor, we would seek to admit  
18 Petitioner's 34.

19 MS. GALLOW: No objection, Judge.

20 THE COURT: Admitted without objection.

21 **[WHEREUPON, Petitioner's Exhibit Number 34 was admitted**  
22 **into evidence without objection.]**

23 **BY MR. COHEN: [Resuming]**

24 Q. Let me ask you just a few questions about this  
25 particular Standard Operating Procedure. What is case review?

1           A.    Case review is when another qualified examiner  
2 examines the results of an examiner that has worked the case  
3 and it is given to another examiner who is qualified to do a  
4 case review to make sure everything is done in order.

5           Q.    So according to this procedure, it says 100 percent  
6 of latent print case files, there always should have been  
7 documentation of somebody doing follow-up examination?

8           A.    That's correct, under peer review.

9           Q.    Okay. And then underneath that, what are the two  
10 things that are mentioned next, supplemental reports and  
11 reprints?

12          A.    "Supplemental reports produced as a result of  
13 additional analysis from the latent print section will be peer  
14 reviewed in the normal fashion, generating a new copy of the  
15 case review documentation."

16          "Reprint of a report or when supplemental reports are  
17 issued from other services with no change or additional data  
18 from latent print services, the case review documentation will  
19 be updated by examiner to indicate that no changes have been  
20 introduced into the new report when compared to the prior  
21 version."

22          Q.    Thank you.

23               MR. COHEN: May I approach?

24               THE COURT: Yes, sir.

25          Q.    Showing you what's marked Petitioner's Exhibit 35,

1 will you identify that for us?

2 A. State's Exhibit Number 35 is dated 11/15/04, is a  
3 Quality Assurance Policy for Case Peer Review.

4 Q. Okay. And this is a document that would have been  
5 kept and maintained in the ordinary course of GBI business?

6 A. Yes, sir.

7 Q. And a Standard Operating Procedure that anybody  
8 working in this Division of Forensic Sciences would have been  
9 made aware of at the time?

10 A. That's correct.

11 MR. COHEN: Your Honor, we'd seek to introduce  
12 Petitioner's 35.

13 MS. GALLOW: No objection, Judge.

14 THE COURT: Admitted without objection.

15 **[WHEREUPON, Petitioner's Exhibit Number 35 was admitted**  
16 **into evidence without objection.]**

17 **BY MR. COHEN: [Resuming]**

18 Q. And looking at the contents of this document, it  
19 appears to just be an updated version or an ongoing  
20 requirement for case review; is that correct?

21 A. Case review, technical review, yes, sir.

22 Q. Okay. And then along those same lines --

23 MR. COHEN: If I may approach one more time.

24 Q. -- showing you Petitioner's 36, can you identify  
25 that document?

1           A.     State's Exhibit Number 36 is also dated -- well,  
2     it's dated March 21, 2005, and it's also Quality Assurance  
3     Manual Case Peer Review.

4           Q.     And that was a document that was kept and maintained  
5     in the ordinary course of GBI business?

6           A.     That's correct.

7           Q.     And a Standard Operating Procedure that would have  
8     been available and known to anybody working in the Division of  
9     Forensic Sciences?

10          A.     That's correct.

11          MR. COHEN: Your Honor, we'd seek to admit  
12     Petitioner's 36 into evidence.

13          MS. GALLOW: No objection.

14          THE COURT: Admitted without objection.

15                 **[WHEREUPON, Petitioner's Exhibit Number 36 was admitted**  
16                 **into evidence without objection.]**

17          MR. COHEN: May I approach?

18          THE COURT: Yes, sir.

19     **BY MR. COHEN: [Resuming]**

20          Q.     Showing you now what is labeled as Petitioner's  
21     Exhibit 37, do you recognize this document?

22          A.     State's Exhibit Number 37 dated March 8, '04, AFIS  
23     Procedure. And also has a quality and a manual about the  
24     procedures that's being rendered.

25          Q.     Okay. And is this a document that would have been

1 kept and maintained in the ordinary course of GBI business?

2 A. Yes, sir.

3 Q. And made available to anybody working in the  
4 Division of Forensic Sciences?

5 A. That's correct.

6 Q. And it would have been the applicable rule to  
7 follow?

8 A. Yes.

9 MR. COHEN: Your Honor, we seek to admit  
10 Petitioner's 37.

11 MS. GALLOW: No objection.

12 THE COURT: Admitted without objection.

13 **[WHEREUPON, Petitioner's Exhibit Number 37 was admitted**  
14 **into evidence without objection.]**

15 **BY MR. COHEN: [Resuming]**

16 Q. And one more. I'm showing you now what is marked  
17 Petitioner's 38. Do you recognize this document?

18 A. State's Exhibit Number 38 is a Procedures Manual  
19 Instruction dated 11/14/06 as to the Digital Capturing of a  
20 Fingerprint.

21 Q. Okay. And is that a document that would have been  
22 kept and maintained in the ordinary course of GBI business?

23 A. Yes, sir.

24 Q. And that would have been the Standard Operating  
25 Procedure hopefully known and definitely available to anyone

1 working in that Division?

2 A. Today, yes, sir.

3 MR. COHEN: Your Honor, I'd seek to introduce  
4 Petitioner's 38 into evidence.

5 MS. GALLOW: Your Honor, I object. This document  
6 purports to be dated on 11/2006. Mr. Pryor has testified  
7 that he retired in 2005.

8 THE COURT: Do you want to clear that up, counsel?

9 MR. COHEN: Just a moment.

10 [Brief pause.]

11 **BY MR. COHEN: [Resuming]**

12 Q. Mr. Pryor, you still work, at least part time, at  
13 GBI, don't you?

14 A. That's correct.

15 Q. So you would be familiar with the Standard Operating  
16 Procedure regarding this digital capturing of fingerprints?

17 A. Yes. I started back with the GBI, and I kind of  
18 reviewed the policies and the new updated policies on new  
19 equipment that is inside the laboratory.

20 MR. COHEN: Your Honor, taking the witness' answer  
21 into account, we would again ask to admit Petitioner's 38  
22 into evidence.

23 MS. GALLOW: Well, Mr. Pryor, when did you start  
24 back with the GBI once you retired?

25 THE WITNESS: In March of this year.



1 MS. GALLOW: Based on that, we'd have no objection,  
2 Your Honor.

3 MR. COHEN: Thank you.

4 THE COURT: All right. Admitted without objection.

5 **[WHEREUPON, Petitioner's Exhibit Number 38 was admitted**  
6 **into evidence without objection.]**

7 **BY MR. COHEN: [Resuming]**

8 Q. Now, let's go back to what some of these Standard  
9 Operating Procedures ask of you and talk about some of the  
10 things that happened in Scott Davis' case. Once the latent  
11 print cards were sent to the GBI Latent Prints Unit, under  
12 Standard Operating Procedure, what should have happened next?

13 A. Well, the latent prints or the fingerprints are  
14 compared against the known exemplars of individuals that  
15 submitted along in that case for examination of all the  
16 evidence to determine if the latent print or unknown print and  
17 the known prints are from the same origin, meaning were they  
18 made by the same person.

19 Q. Okay. Now backing up just a little bit before we  
20 even go too far with what's going to happen, if we could come  
21 back to Exhibit 38, Digital Capturing, can you tell us a  
22 little bit about what is involved in digital capturing?

23 A. Well, this procedure is for impressions that may  
24 have been very light in color due to the process of developing  
25 latent prints. The digital capturing will allow you to darken

1       that particular image to get a better quality of it and it  
2       could be used. Or if an image is too dark, a digital  
3       capturing image can lighten it up a little bit so it can be  
4       more visual, I should say, to be analyzed.

5           Q.    And wouldn't another advantage of a digital capture  
6       be the creation of a backup?

7           A.    Yes, you could store that image.

8           Q.    So if you follow the Standard Operating Procedure  
9       there would be a backup of latent print cards?

10          A.    Yes, you --

11          Q.    Because there would be more than one.

12          A.    Yes, it was a copy of it, yes.

13          Q.    So, therefore, under a scenario where latent print  
14       cards were lost, if the Standard Operating Procedure had been  
15       followed, there would be backup; right?

16          A.    Well, you do have a -- and you can store those  
17       particular images and it's maintained on the DCS-3 Digital  
18       Capturing image.

19          Q.    So whoever handled those cards should have  
20       photographed or scanned or otherwise backed them up; right?

21          A.    Well, we --

22          Q.    Under Standard Operating Procedure?

23          A.    We're comparing dates now. This particular Digital  
24       Capturing procedure was implemented in '06.

25          Q.    In 1996 through 1999 you were working latent prints

1 at that time?

2 A. I retired in 2005.

3 Q. Okay. Was there a requirement to photograph or  
4 otherwise back up latent prints?

5 A. No, sir.

6 Q. None whatsoever?

7 A. Well, it depends on the examiner. It wasn't in  
8 place to actually photograph all the latents because the  
9 latent prints are visually examined. If the latent prints are  
10 of value and an examiner needed to make copies of it, they  
11 would have did that. If not, the evidence is then secured and  
12 maintained in the container that it originated in, and it  
13 would be placed in the Evidence Room.

14 Q. But that's not what happened in this case.

15 A. Well, as far as the digital capturing or the  
16 placement of the evidence?

17 Q. Either.

18 A. The evidence was placed back into the original  
19 submitted container, placed into the Evidence Room, and it  
20 stays there until the agency picks it up.

21 Q. Okay. But there was no backup created?

22 A. No, sir.

23 Q. Now, how about this requirement for case review and  
24 for peer review? Between the different revisions of it,  
25 they're referred to as three different things. Case review --

1 or two different things: case review vs. peer review. What's  
2 the difference between case review and peer review?

3 A. Well, case review is make sure that the  
4 documentation, the notations, the work, the file is in order.  
5 Peer review is also somewhat the same, but it looks for  
6 identification. If the peer review examiner reviews the  
7 results from the examiner, then it would come under -- he  
8 would -- he looks -- actually, he almost reworks the case by  
9 looking at the results, physical results, of the original case  
10 examiner.

11 MR. COHEN: If I could approach, Your Honor.

12 THE COURT: Yes, sir.

13 Q. Showing you what's marked as Petitioner's Exhibit  
14 39, can you tell us what that is?

15 A. State's Exhibit Number 39 is Visual Examination  
16 Procedure dated in '98.

17 Q. And were you employed with GBI at that time?

18 A. Yes, sir.

19 MS. SHEIN: Just a moment, Your Honor. May I have  
20 that?

21 [Brief pause.]

22 MS. SHEIN: Your Honor, may I take just a moment?

23 THE COURT: Sure.

24 MS. SHEIN: I need to see which one she's got to  
25 make sure I've got the comparison.

1 [Counsel confer.]

2 MS. SHEIN: Your Honor, we need to take just a break  
3 and get a copy of this made. Your Honor, if we can just  
4 take a moment.

5 THE COURT: Sure.

6 MS. SHEIN: We may need a five minute break because  
7 there's been a document that needs to be reproduced.

8 THE COURT: Okay.

9 MS. SHEIN: Because he testified about something  
10 that we need to clarify.

11 THE COURT: That's fine. I was just going to ask if  
12 you've got -- if you want me to take it back and just  
13 make a copy of it.

14 MS. SHEIN: That would be awesome. Two copies, this  
15 would be great.

16 THE COURT: Sure.

17 [Off the record.]

18 \* \* \*

19 **BY MR. COHEN: [Resuming]**

20 Q. So Mr. Pryor, could you tell us what this document  
21 is?

22 A. State's Exhibit 39 is a procedure for visual  
23 examination.

24 Q. Okay. And is this the document that would have been  
25 kept and maintained in the ordinary course of GBI business?

1           A.    Yes.

2           Q.    And it would have been Standard Operating Procedure  
3 for anybody who worked in the Division of Forensic Sciences?

4           A.    In Latent Prints, yes.

5           Q.    Okay.  And partway down the page -- first let me  
6 back up.  You had stated that it wasn't -- in your earlier  
7 testimony you said it was not necessary to make a photograph  
8 of latent prints?

9           A.    Well, if the examiner needed to enhance the prints  
10 somewhat, then there is a -- there is a policy for making a  
11 copy of that particular print.

12          Q.    So is it required then to photograph and back up  
13 latent print cards like the ones you handled?

14          A.    Yes.

15          Q.    Okay.

16               MR. COHEN:  Your Honor, we would seek to admit  
17 Petitioner's 39 into evidence.

18               MS. GALLOW:  No objection.

19               THE COURT:  Admitted without objection.

20               **[WHEREUPON, Petitioner's Exhibit Number 39 was admitted**  
21 **into evidence without objection.]**

22 **BY MR. COHEN:  [Resuming]**

23          Q.    Going back to some of the other things that we have  
24 identified as procedure, there should have been a latent print  
25 case file as required by Case Review and Peer Review; right?

1           A.    Yes.

2           Q.    Where is the latent print case file in this case?

3           A.    My notes --

4           Q.    Just notes?

5           A.    -- the case file is back at the lab.  I didn't get a  
6 chance to find it.

7           Q.    So it's your testimony today that there was a latent  
8 print case file?

9           A.    Yes, sir, there's a case file.

10           MR. COHEN:  Your Honor, we have subpoenaed that  
11 particular document, that's why I was asking this witness  
12 if there was a latent print case file.  As far as a  
13 remedy at this point would be, we have not been able to  
14 obtain any kind of a latent print case file, which is why  
15 we're going down this road with these Standard Operating  
16 Procedures for latent print cards.  I'm not sure what  
17 remedy is available if the agency says they don't have  
18 these to give to us.

19           MS. SHEIN:  Judge, apparently Mr. Pryor has a copy  
20 of this file.

21           Is that correct, Mr. Pryor?

22           THE WITNESS:  I have a copy of my results in my  
23 personal file, yes.

24           MS. SHEIN:  You did not bring that with you today?

25           THE WITNESS:  No, I did not.

1 MS. SHEIN: Your Honor, I would ask that after  
2 today's testimony, we're not going to excuse the witness  
3 and ask him because he's under subpoena to return with  
4 the file.

5 THE COURT: Okay.

6 **BY MR. COHEN: [Resuming]**

7 Q. Going back to the case file, how many prints were  
8 there?

9 A. There were six latent lift cards.

10 Q. Okay. And the worksheet would include results on  
11 all of those prints?

12 A. That's correct.

13 Q. And coming back again to Standard Operating  
14 Procedure, the section manager would have been responsible for  
15 contacting the agencies with open homicide files?

16 A. Would you repeat that question, please?

17 Q. Would the section manager have been responsible for  
18 contacting agencies with open homicide files?

19 A. Contacting them in what regard?

20 Q. Regard to -- this is already in evidence -- this  
21 document, State's -- or Petitioner's 30, which is already  
22 admitted into evidence. The document is marked Evidence Purge  
23 Procedure, Revision 2.

24 A. Yes, sir.

25 Q. Do you see the one I mean?



1           A.    I have it.

2           Q.    At the bottom of the first page where it says 5)  
3 could you read that for us?

4           A.    "It is each Section/Lab Manager's responsibility to  
5 contact any agency with previous marked open homicide cases to  
6 determine the status of these cases. These cases are opened  
7 and reviewed to determine which items might later be used by  
8 Division of Forensic Science to solve this case -- the case  
9 such as identifiable latent prints [sic], cartridge cases,  
10 bullets -- bullets, et cetera. There are complied [sic] into  
11 a laboratory container and stored."

12          Q.    And then just right underneath that, 6).

13          A.    "An administrative review of fingerprint cases is  
14 performed and all unsolved cases with AFIS quality prints are  
15 added to the laboratory hold list."

16          Q.    What is the laboratory hold list?

17          A.    The hold list is cases which the district attorney  
18 or the court of that particular county -- once information is  
19 called and to render the status of that case as this policy  
20 mentioned, then the evidence could be sent back or destroyed  
21 or whichever. But in this case, we have the agency or the  
22 D.A.'s Office will say hold the evidence or send it back or  
23 whatever, but that's a hold case.

24          Q.    And when they say "hold" is there any definite  
25 period of time or --

1           A.    It's held on -- it's held for a period of time, I'm  
2 not sure how long.

3           Q.    Okay.  So essentially, according to Standard  
4 Operating Procedure, we've already identified and you read for  
5 us, the section manager should have contacted any agency with  
6 an open homicide file.

7           A.    Yes, that's what's printed.

8           Q.    And what's the purpose of that?

9           A.    The hold cases?  It's to see if the case need to be  
10 reworked or the status of the investigation of that case.

11          Q.    So possibly there would be an identification of  
12 items that could later be used to solve any of these open  
13 cases?

14          A.    You're referring to being reworked?

15          Q.    Uh-huh.

16                [Court reporter requests clarification.]

17          A.    Or the agency may have developed an additional  
18 suspect or additional piece of evidence that that they need  
19 checked out.

20          Q.    Okay.  And items such as latent prints?

21          A.    If they -- if they discovered that they have  
22 developed some additional evidence which falls into the  
23 category of latent prints, yes, it is up for case review.

24          Q.    Okay.  And that would apply to things like  
25 cartridges and shell casings?

1           A.    Yes.

2           Q.    And bullets?

3           A.    Uh-huh.

4           Q.    And as you read for us, supposed to be compiled in a  
5 laboratory container and stored.

6           A.    That's correct.

7           Q.    Okay. And then administrative review under  
8 Operating Procedures should have been performed. Can you  
9 clarify for us what that is?

10          A.    Administrative review is basically the final review  
11 of cases which have been completed, peer reviewed, and worked  
12 by an examiner.

13          Q.    So prints that are of comparison quality can be used  
14 to solve cases, not just the case they came in?

15          A.    I'm not following you.

16          Q.    Well, going back to the AFIS database and the  
17 ability to run prints, if you determine that they're not  
18 relevant to a suspect or a victim in a case, and we're talking  
19 about putting things on this laboratory hold list, wouldn't  
20 the reason for keeping prints of comparison quality be to  
21 solve other cases?

22          A.    The purpose that you're referring to, going back to  
23 latent prints, the prints are held in a place in the hold file  
24 for a period of time. During the course of investigation, the  
25 outside agency can develop additional suspects or that they

1 need compared to those latent prints that have been submitted.  
2 At certain times, sometimes prints are re-examined again to  
3 see if they fit or be checked against the AFIS database.

4 Q. So if prints don't belong to a victim or a suspect,  
5 there could be another suspect identified by putting those  
6 fingerprints through AFIS?

7 MS. GALLOW: Objection, Your Honor. Counsel is  
8 still leading his witness. I don't hear a question.

9 Q. Could fingerprints that are submitted through AFIS  
10 identify another suspect?

11 A. If -- if -- if a suspect have been compared and you  
12 have negative results, and if they're a particular print, it  
13 is sent to the AFIS system or if it's run against an AFIS  
14 database, if it fits the criteria, it could be identified to  
15 someone else.

16 Q. To someone else.

17 A. It's possible.

18 Q. And, at the very least, they should have been put in  
19 a hold, the prints in this case --

20 A. Well, they were maintained --

21 Q. -- according to procedures.

22 A. They were maintained for a period of time.

23 Q. Okay. But they shouldn't have, under the procedures  
24 that you just walked us through, should those prints, the  
25 latent print cards, have remained with GBI or should they have

1       gone to DeKalb Fire?

2           A.     Well, it depends.  If the case has been -- a report  
3       has been generated, and the agency comes in and they want the  
4       evidence, it's given to them.

5           Q.     But you've already stated, have you not, that DeKalb  
6       Fire wouldn't have had any way to run those prints through  
7       AFIS or any other database?

8           A.     DeKalb Fire Department does not have an AFIS  
9       database but the --

10          Q.     Now if these prints had been run through AFIS --

11               THE COURT:  Well, counsel, I'm sorry.  I think he  
12       was finishing his answer.

13               MR. COHEN:  I'm sorry, Your Honor.

14          Q.     Please finish.

15          A.     But the DeKalb Police Department does have an AFIS  
16       database.

17          Q.     But the prints were sent to DeKalb Fire; right?

18          A.     Yes, the evidence was returned to them, yes.

19          Q.     Okay.  Now if the prints had been run through AFIS,  
20       would it have been possible that they could have provided  
21       another suspect in this case?

22               MS. GALLOW:  Objection, Your Honor.  That calls for  
23       speculation.

24               MR. COHEN:  It does not.  It's exactly on point with  
25       what this witness is testifying about, the purpose of

1 AFIS and the quality of prints required to compare.

2 THE COURT: Let me hear the question one more time.

3 Q. If the prints in this case, the latent print cards,  
4 had been run through AFIS, would it have been possible to  
5 develop another suspect?

6 A. Well, sir, any --

7 THE COURT: Yeah, I --

8 MR. COHEN: I'll put it another way.

9 Q. Could the prints have been identified as belonging  
10 to someone who is not a named suspect or victim in this case?

11 A. If -- if a print is compared to a known individual,  
12 or the known fingerprint cards, and the comparison is negative  
13 or hasn't been identified, and it meets the criteria for an  
14 AFIS search, the AFIS -- the print is then searched against  
15 the AFIS database. The results I can't explain until we get  
16 the results back.

17 Q. And you can't get those results if you don't  
18 maintain custody of the cards; is that correct?

19 A. Well, the cards are -- the custody of the cards  
20 becomes a product of Georgia Crime Information Center, the  
21 fingerprint cards.

22 Q. They should have; right?

23 A. I'm not following you.

24 Q. Well, what you're describing didn't happen. So are  
25 you saying that there should have been a record kept of these

1 latent prints?

2 A. I'm saying that the latent prints were not searched  
3 against AFIS database. They are returned to DeKalb Fire  
4 Department.

5 Q. And having been lost at that point, was it then  
6 possible to ever run those prints through AFIS?

7 A. Well, at the time of my initial investigation -- I  
8 don't have my notes in front of me -- the prints may not have  
9 been AFIS quality.

10 Q. Now did the State ever ask you about running those  
11 prints through AFIS?

12 A. I don't recall, sir.

13 Q. And one of the documents that you identified and  
14 it's been admitted into evidence stated that the prints were  
15 of comparison quality.

16 A. That's correct.

17 Q. Okay. Just considering the prints along with all  
18 the other lost evidence, if the State had not lost the gun,  
19 gas can, shell casing, Olympic bag; would it have been  
20 possible to get prints off of those items as well that could  
21 have been compared to the latent print cards?

22 A. Sir, are you asking me a question about evidence  
23 being lost?

24 Q. If there were other evidence in the case that had  
25 been maintained through a chain of custody, could you have

1       gotten latent prints from other items and then compared them  
2       to the latent print card?

3               MS. GALLOW:  Objection, Your Honor.  I'm not sure  
4       this witness is qualified to answer that question based  
5       on the other evidence that we're speaking of at this  
6       point, so I'd object to that question.

7               THE COURT:  Yes --

8               MR. COHEN:  I'm only asking if there's other  
9       evidence.

10              THE COURT:  I'm going to -- I'm going to sustain.

11              MR. COHEN:  Thank you.

12              THE COURT:  If you want to try to rephrase, counsel,  
13       that's fine, but I'm just not clear what you're doing.

14       **BY MR. COHEN:  [Resuming]**

15              Q.    Could other items that were part of this  
16       investigation have been tested for fingerprints?

17              A.    Sir, I'd need to look at which items you're  
18       referring to.

19              MS. GALLOW:  Again, same objection, Your Honor.

20              THE COURT:  He's -- okay.

21              MS. GALLOW:  We don't know what items --

22              THE COURT:  And he's responded consistent, so you'll  
23       have to move on, counsel.

24       **BY MR. COHEN:  [Resuming]**

25              Q.    Could anything that had a latent print also have



1       been used to obtain touch DNA?

2           A.     Could items been touched obtain DNA?  You're asking  
3       that?

4           Q.     Something that bears a fingerprint, could a  
5       fingerprinted item also contain touch DNA?

6           MS. GALLOW:  I'd object to this question, too, Your  
7       Honor.  I don't believe that this witness is qualified to  
8       testify as to any DNA evidence in this case.

9           MR. COHEN:  He's a certified latent print examiner.  
10      He would know what science corresponds.

11          THE COURT:  Well, I think, counsel, you'll have to  
12      establish that he understands how DNA is collected and  
13      what has DNA and what doesn't.  So you'll have to  
14      establish that.

15      **BY MR. COHEN:  [Resuming]**

16          Q.     Are you aware that DNA can now be lifted simply from  
17      an item that has been touched?

18          A.     If the pressure had a certain amount of  
19      perspiration, that's possible, yes.

20          Q.     Okay.  And that is, to go a little farther into the  
21      science of fingerprint, that's based on transfer from one  
22      surface to another; right?

23          A.     As far as from the finger to the surface itself?

24          Q.     Yes.

25          A.     That's transfer.

1           Q.    Right.  And that goes back to the theory of  
2           exchange.  When you touch something, you leave something;  
3           right?

4           A.    It's possible, yes.

5           Q.    And is it now possible to obtain DNA through  
6           something that has simply been touched?

7           A.    I'm not sure about that, sir.

8           Q.    Does it make sense to you, as an expert, certified  
9           latent prints expert, that in an open case GBI should have  
10          held those latent print cards?

11          A.    No, sir, they don't necessarily have to hold it.

12          Q.    Couldn't they have been run through AFIS over a  
13          period of time?

14          A.    I'd have to see if they were AFIS quality.

15          Q.    And you have identified that they were comparison  
16          quality.

17          A.    That's correct.

18          Q.    And as technology improves, again it was an open  
19          case for ten years, could there have been more applications of  
20          keeping those latent prints?

21          A.    Once the -- once a particular piece of evidence as  
22          far as your latent prints have been compared with negative  
23          results, and if they were sent to the AFIS system, at that  
24          point it could be returned to the agency.

25          Q.    How many total latent prints were there?

1           A.    Sir, I don't have my notes to tell you.

2           Q.    Did you ever report that you didn't know if the  
3 prints were of AFIS quality?

4           A.    I don't have a report specifying that.

5           Q.    So there's no indication that you ever reported that  
6 the prints weren't of AFIS quality?

7           A.    No, I don't have any notes on my report that -- on  
8 my notes that will allow me to answer that question correctly.

9           THE COURT:  If we're calling him back tomorrow to  
10 bring this report --

11          THE PETITIONER:  Yeah.

12          THE COURT:  -- can we just let him go now?  Mr.  
13 Davis, I'm really not talking to you, I'm sorry, I'm  
14 talking to counsel.

15          THE PETITIONER:  I'm just talking to myself, Your  
16 Honor, that's all.

17          THE COURT:  Okay.  Can we just bring him back  
18 tomorrow for the rest of these questions that have to do  
19 with his report?

20          MR. COHEN:  That would be fine.

21          MS. SHEIN:  I think that works, Your Honor.

22          MR. ABT:  That's fine.

23          MS. SHEIN:  Yeah, that would work great.

24          THE COURT:  Any objection?

25          MS. GALLOW:  No objection, Your Honor.

1 THE COURT: Okay. Sir, I'm going to let you go  
2 today and -- do you have that report at home or access to  
3 it either there at the Crime -- I mean at the GBI?

4 THE WITNESS: I would have to look for it, ma'am.

5 THE COURT: Okay. So you haven't looked?

6 THE WITNESS: No, ma'am, I have not.

7 THE COURT: Okay. Well, hopefully you'll find it.  
8 We'll see you tomorrow.

9 THE WITNESS: Okay.

10 MS. SHEIN: Your Honor, I'm sorry, I didn't mean to  
11 interrupt you. But he did say he has his own personal  
12 file. I want that to come with him.

13 THE COURT: Okay. But I'm not sure what's in that  
14 personal file --

15 MS. SHEIN: Right.

16 THE COURT: -- and I'm not sure -- do you know where  
17 that personal file is?

18 THE WITNESS: No, ma'am. I will have to look for  
19 it.

20 THE COURT: Okay. But I'm -- I guess I'm just  
21 trying to find out, do you -- well, you look for it and  
22 bring back what you find tomorrow morning.

23 Do you want him here at 9:00? Eight-thirty? What  
24 time?

25 MS. SHEIN: Nine is fine, Your Honor.

1 MR. ABT: Mr. Samuel is going on at 9:00.

2 MS. SHEIN: Oh, yeah. If he could come back maybe  
3 around 11:00. It may help with traffic.

4 THE COURT: Well, who are we having at 8:30?

5 MR. ABT: I can call Don and see if he could come  
6 earlier. Don will --

7 MS. SHEIN: He'll probably be here.

8 MR. ABT: Don was -- Don Samuels was supposed to  
9 come at 9:00. That was when we originally called him.  
10 And I can see if he can be here at 8:30. Otherwise, you  
11 know, our first witness will be at 9:00 tomorrow.

12 THE COURT: Well, I mean, I don't mind starting at  
13 9:00, don't misunderstand. But I didn't know --

14 [Off-the-record comments.]

15 MS. SHEIN: Okay. Then he can come around 10:00, if  
16 that will help with the traffic.

17 THE COURT: Okay. Ten o'clock, does that work?

18 THE WITNESS: Yes, ma'am.

19 THE COURT: Okay.

20 MR. ABT: I'm going to try and confer with Mr.  
21 Samuel and see if he'll be available at 8:30, and I'll  
22 let the Court know by the end of the day.

23 THE WITNESS: May I be excused?

24 THE COURT: Yes, sir. See you tomorrow.

25 THE WITNESS: Yes, ma'am.

1 THE COURT: And bring whatever you find, okay?

2 THE WITNESS: Yes, ma'am.

3 THE COURT: Thanks.

4 [Witness steps down.]

5 MS. SHEIN: Do you want to start another witness,  
6 Your Honor? We're ready to go forward.

7 THE COURT: Okay.

8 MS. SHEIN: I'll just go get him.

9 THE COURT: Okay.

10 MR. COHEN: Good morning, Mr. McKinnon. Would you  
11 raise your right hand, please.

12 Whereupon,

13 **JOE MCKINNON,**

14 having been duly sworn under oath, was examined and testified  
15 as follows:

16 **DIRECT EXAMINATION**

17 **BY MR. COHEN:**

18 Q. Would you please state your name.

19 A. Joe McKinnon.

20 Q. Thank you, sir. And where are you employed?

21 A. I am not, I'm retired.

22 Q. And before you were retired, where were you  
23 employed?

24 A. DeKalb County Fire Department.

25 Q. How long did you work there?

1           A.   Twenty-seven years.

2           Q.   When did you start?

3           A.   My hire date was May 16<sup>th</sup>, 1983.

4           Q.   All right. And what did you do at the fire  
5 department?

6           A.   I'd started out as a line level fire fighter, made a  
7 couple of promotions, driver, engineer; and in 1997 I was  
8 promoted to lieutenant, captain, battalion chief, and  
9 eventually deputy chief.

10          Q.   All right. And could you tell us just a little bit  
11 about your training?

12          A.   Trained by the State of Georgia in firefighting, the  
13 regional academy there. Also received training from P.O.S.T.  
14 whenever I did go in -- I was assigned to the Arson Unit, went  
15 in there and was trained by -- as a police officer through the  
16 Clayton Regional Law Enforcement Academy. I also have a two-  
17 year degree from DeKalb College in Applied Science.

18          Q.   So was handling evidence a significant part of your  
19 job?

20          A.   It was a part of my job. When you say significant,  
21 I'm not sure what you mean by that. It was a part of the job  
22 I would have as an investigator.

23          Q.   What about preserving evidence?

24          A.   Yeah, absolutely.

25          Q.   Documenting the chain of custody?

1           A.    Yes, sir.

2           Q.    So as part of your job did you handle or preserve  
3 evidence that the State intended to use at criminal trials?

4           A.    Yes, sir.

5           Q.    While you were there, did the fire department handle  
6 and preserve evidence for offenses other than arson?

7           A.    Typically no. I won't say that carte blanche that  
8 that was with every case, but for the most part no, we didn't  
9 go outside of our world. If we did, if we had another type of  
10 case, typically we'd have another investigator from that  
11 discipline that would help us.

12          Q.    So it was not common -- or was it uncommon for  
13 DeKalb Fire to handle and preserve evidence that wasn't  
14 directly related to fires?

15          A.    It would be unusual, yes.

16          Q.    How much storage space when you were there did the  
17 fire department have for evidence that was intended to be used  
18 at trial?

19          A.    We didn't have any storage space for that.

20          Q.    What about property room?

21          A.    No, sir, not the fire department did not -- now of  
22 course we were under the police department also, so we had  
23 access, and that's where our property would go, would be to  
24 the Property Room for DeKalb Police Department.

25          Q.    Okay. So that -- that is -- what's the relationship



1 between DeKalb Fire and DeKalb Police in terms of the public  
2 safety for public records. Was that a database that refers to  
3 both agencies?

4 A. Public safety? I'm not sure we have a database, I  
5 mean, I'm not sure what you're asking for. The fire  
6 department would maintain their records, the police department  
7 would also maintain police reports, and oftentimes we would  
8 have a report in both, both avenues, for the same case.

9 Q. All right. What kind of documentation did you have  
10 to keep regarding chain of custody for any evidence that the  
11 department did retain?

12 A. Well, typically we would identify where that was --  
13 obviously, we would photograph where the evidence was taken  
14 from. We would create a Property Sheet, and from that  
15 Property Sheet we would -- that would help us route whatever  
16 evidence we had.

17 Q. All right. And who makes decisions regarding  
18 whether or not to keep an item of evidence?

19 A. Typically, it would fall back to the officer if he  
20 were available to do that. That would be who the evidence  
21 would go back to from a disposition, from the evidence, if  
22 there was something to be done with that evidence.

23 Q. All right. Now if for any reason something was not  
24 going to be kept, what options were there for disposing of it?

25 A. From the Property Room they typically would send out

1 a disposition sheet. That would ask whether to either keep  
2 it, sell it, destroy it, one of those options would be  
3 available -- or return to the owner, that was also an option.

4 Q. Okay. So there would be a decision and it would be  
5 documented.

6 A. Yes, sir.

7 Q. What options -- and I'm sorry, this is similar to  
8 what I just asked you -- but you said release or destroy. Any  
9 other options for disposing of something?

10 A. Not that I'm aware of.

11 Q. What about sale? Were items ever sold?

12 A. I think I said that, that they could be sold.

13 Q. Okay, I apologize.

14 A. If there was a sale, they could be destroyed, or  
15 they could be returned to the owner if they could be  
16 identified.

17 Q. So sale -- could you tell us what's an Old Hoss  
18 Sale?

19 A. You're getting out of my area. That was really in  
20 the police department, but I think that's typically where they  
21 would sell items that had been released. And I can't really  
22 comment too much on it, I never went to one. I know that they  
23 did have them, and typically they were over -- they were items  
24 that were for sale.

25 Q. Okay. So the main ways that something could be

1 disposed of then would have been for sale or destruction or  
2 releasing back to an original owner.

3 A. Yes, sir.

4 Q. And did the department keep records of what was sold  
5 when you did sell stuff?

6 A. I cannot speak to that.

7 Q. Would there have been documentation of what happened  
8 to anything that's released, destroyed, sold, anything the  
9 department didn't choose to keep?

10 A. That would be back in the Property Room. They would  
11 have to -- I know that they would probably keep a disposition  
12 sheet on that, what happened to that, yes, sir.

13 Q. Were you working at DeKalb Fire during the time of  
14 the Scott Davis investigation?

15 A. Yes, sir.

16 Q. And did you handle any evidence relating to Scott  
17 Davis' investigation?

18 A. No, sir, not that I was aware of.

19 MR. COHEN: May I approach the witness, Your Honor?

20 THE COURT: Yes, sir.

21 Q. Showing you what I've labeled Petitioner's Exhibits  
22 40, 41, and 42.

23 A. Uh-huh.

24 Q. Starting with Exhibit 40.

25 A. Okay.

1 Q. Do you recognize this document?

2 A. I do.

3 Q. Can you identify it for us?

4 A. That's the disposition sheet that was presented to  
5 me in the Arson Unit for the disposition of these items.

6 Q. And is this a document that would have been kept and  
7 maintained in the ordinary course of business at DeKalb Fire?

8 A. No, sir. This actually would have come from the  
9 Property Room itself.

10 Q. Okay. Is it a document that would have been kept  
11 and maintained as part of the ordinary course of business in  
12 the Property Room?

13 A. Yes, sir.

14 Q. And is that your signature where it says "sign"?

15 A. Yes, sir, it is.

16 Q. Okay.

17 MR. COHEN: And at this point we would seek to move  
18 into evidence Petitioner's 40.

19 MS. GALLOW: No objection, Your Honor.

20 THE COURT: Admitted without objection.

21 **[WHEREUPON, Petitioner's Exhibit Number 40 was admitted**  
22 **into evidence without objection.]**

23 **BY MR. COHEN: [Resuming]**

24 Q. So looking at this document --

25 A. Uh-huh.

1           Q.    -- we've got on the left-hand side a column that  
2 shows various items here.

3           A.    Yes, sir.

4           Q.    And then it's continued with a little more specific  
5 -- specificity, pardon me -- in the middle there. Could you  
6 just identify for us what are the items that are named in this  
7 disposition sheet?

8           A.    It's -- Item No. 1 looks like it was a Browning  
9 Shotgun; there was also a gas can recovered; some type of  
10 knife; a key/flashlight for No. 4; an AT&T caller I.D., I  
11 think that was a little box; and then that last item is not --  
12 I don't see that as any item there.

13          Q.    Okay. And underneath where it says "check  
14 disposition," can you tell us which box is checked?

15          A.    It is the "sale."

16          Q.    Sale. So this would indicate that those items were  
17 in fact sold.

18          A.    Yes, sir.

19          Q.    Okay. And --

20          A.    Well, no. This would indicate that I've -- I've --  
21 from my point that it would be allowed to be sold.

22          Q.    Okay.

23          A.    I don't know what the actual disposition, final  
24 disposition, of these were.

25          Q.    And with your signature indicating they're allowed

1 to be sold.

2 A. Yes, sir.

3 Q. Now on -- regarding Petitioner's 41 --

4 A. Yes, sir.

5 Q. -- can you identify that document?

6 A. It looks like the same disposition -- a similar  
7 disposition sheet.

8 Q. Okay. But does it have an earlier date be the only  
9 difference?

10 A. I'm looking for the date but I don't see it.

11 Q. It's (indicating).

12 A. Okay. It looks like the same date from the other  
13 disposition sheet.

14 Q. Okay, so it's the same date. And is this a document  
15 that would have been kept and maintained in the ordinary  
16 course of business in the Property Room?

17 A. Yes, sir.

18 Q. Okay. And then finally the other one that you have  
19 there, 42. Can you identify that for us?

20 A. That looks -- I'm not familiar with this particular  
21 -- it looks like a printout from the actual computer program  
22 that belongs to the Property Room.

23 Q. Okay. And would this be a document that was kept  
24 and maintained in the ordinary course of business in the  
25 Property Room?

1           A.    Yes, sir.

2           MR. COHEN:  At this time we'd seek to introduce  
3           Petitioner's 41 and 42 into evidence.

4           MS. GALLOW:  No objection, Your Honor.

5           THE COURT:  Both admitted without objection.

6           MR. COHEN:  Thank you, Your Honor.

7           **[WHEREUPON, Petitioner's Exhibit Numbers 41 and 42 were**  
8           **admitted into evidence without objection.]**

9           **BY MR. COHEN:  [Resuming]**

10          Q.    And as regards the items that are listed on the  
11          second two documents, are they the same documents that are  
12          listed on Petitioner's 40?

13          A.    Yes, sir, they are.

14          Q.    Okay.  And those are the gas can, a knife, caller  
15          I.D., shotgun, key/flashlight.  On Petitioner's 41, which is a  
16          slightly darker and grainier one, can you tell us down here  
17          where it shows "Check Disposition" which disposition is  
18          indicated?

19          A.    It says it's to be placed on hold.

20          Q.    Okay.  And then on Petitioner's 43, up at the top of  
21          the page do you see where the question is, "Can it be  
22          released?"

23          A.    I don't see a Petitioner's 43.

24          THE COURT:  I don't either.

25          MR. COHEN:  I'm sorry, I mean 42.  My mistake.

1 THE COURT: Okay.

2 MR. COHEN: Mea culpa.

3 A. Yes, sir. It says "Can it be released?" and it says  
4 "No."

5 Q. Okay. So we've got two documents here, one stating  
6 to hold and the other one saying no, it cannot be released.

7 A. Uh-huh.

8 Q. Yet on Petitioner's 40 we have your signature  
9 indicating it can be released for sale.

10 A. Okay.

11 Q. Just wanted to clarify. Did anybody contact you  
12 after the Scott Davis case regarding items of evidence that  
13 had been in DeKalb Fire Department custody?

14 A. At the time that this was -- at the time that this  
15 was presented to me, I had no knowledge of the Scott Davis  
16 case whatsoever.

17 Q. Okay.

18 A. So I'm not sure what you're asking me. At what  
19 point was I aware of the Scott Davis -- I think the first time  
20 I even knew about it was later when it -- I proceeded towards  
21 trial.

22 Q. Okay. What I'm asking is, and I apologize for being  
23 unclear, did anybody ever approach you and ask what happened  
24 to these items?

25 A. Later on, yes, sir.



1 Q. Okay. Who approached you?

2 A. I think it was really through a subpoena that I  
3 first became aware of it, asking for those items.

4 Q. And these particular items, would you know where  
5 they were recovered from?

6 A. Yes, sir.

7 Q. Where were they recovered?

8 A. It's showing it on here, Fernwood Circle.

9 Q. Okay.

10 A. Actually 1330 Fernwood Circle.

11 Q. Was it your decision, as indicated by your  
12 signature, to release these items?

13 A. Yes, sir.

14 Q. What reason did you have for making that decision?

15 A. The decision was it was presented to me as a  
16 disposition sheet for this on Fernwood Circle. That was my  
17 decision to make.

18 Q. Even though we have two other documents, both saying  
19 "hold" and "can't be released"?

20 A. These were not presented to me. And I recognize  
21 that it says that on there. That does not alleviate my  
22 responsibility to give a disposition. The Property Room would  
23 typically give us periodically these sheets to look at. This  
24 was one of many that I looked at that day. So based upon  
25 that, my responsibility is to check to see if we had any open

1 case on this, whether any of the judicial system had any open  
2 case on this, and I did not find that.

3 Q. And all three of these documents bear the same  
4 dates?

5 A. They do, yes, sir, as far as when they were -- yeah,  
6 they do. Yes, sir.

7 Q. And two of them indicate not to release the items.

8 A. Correct.

9 Q. Okay. Now did you check with Atlanta Police before  
10 you made that decision?

11 A. I had no reason to check with Atlanta Police.

12 Q. How about the Fulton County D.A.'s Office?

13 A. No reason to.

14 Q. So were you under the impression that no  
15 investigation would be reopened about these items, wherever  
16 they came from?

17 A. The investigation I had was in DeKalb County. There  
18 was no other outside agency involved in any kind of  
19 investigation that I was aware of.

20 Q. Did you have to get anybody else's approval before  
21 deciding to dispose of these items?

22 A. No, sir, I did not.

23 [Counsel confer.]

24 MR. COHEN: Your Honor, we're going to need to copy  
25 some documents before we can complete this witness.

1 Perhaps this would be a good time to take a break.

2 THE COURT: Okay. Then we'll break until about  
3 1:00?

4 MS. SHEIN: Your Honor, just to be sure on a couple  
5 of witnesses, can we go till 1:30?

6 THE COURT: Sure.

7 MS. SHEIN: Break till 1:30?

8 THE COURT: Okay.

9 MS. SHEIN: We have a few things to talk about, and  
10 then I think we have another couple of witnesses.

11 THE COURT: That's fine. That's fine. Let me -- I  
12 just wanted to ask. I think this is -- Mr. McKinnon is  
13 the 10<sup>th</sup> witness. How are we progressing? Any -- I mean,  
14 do you think we're going to finish this week?

15 MR. ABT: Oh, yeah.

16 MS. SHEIN: Yeah. Actually -- we're actually moving  
17 faster on these than we anticipated.

18 THE COURT: Okay.

19 MS. SHEIN: So that's working out well.

20 THE COURT: Okay.

21 MS. SHEIN: My -- one of my experts is supposed to  
22 be here this afternoon. If he is, we might be able to  
23 even get him started.

24 THE COURT: Great.

25 MS. SHEIN: If not, we can pick up tomorrow pretty

1           quick.

2           THE COURT:   Okay.

3           MS. SHEIN:   And Don Samuels is coming tomorrow.

4           THE COURT:   Okay.   And I never heard -- do y'all  
5           have witnesses, the State?

6           MS. GALLOW:   Your Honor, just contingent on what  
7           they bring out, we may or may not bring people back in to  
8           --

9           THE COURT:   Okay.

10          MS. GALLOW:   -- rebut anything they have presented.  
11          Like I said, we'll know further on, you know, towards the  
12          end of the week whether or not we intend to bring anybody  
13          else in.

14          THE COURT:   Okay, that's fine.   No problem.   All  
15          right.   Then we'll -- we'll break now and we'll see  
16          everybody back at 1:30.

17          MS. SHEIN:   Thank you, Your Honor.

18          MR. COHEN:   Thank you.

19                       **[Luncheon recess to 1:30 p.m.]**

20                       \*   \*   \*

21          MR. COHEN:   Good afternoon, Mr. Berry.

22          THE WITNESS:   Good afternoon.

23          MR. COHEN:   If you'll raise your right hand, please.

24          Whereupon,

25                       **DETECTIVE ANTHONY BERRY,**

1 having been duly sworn under oath, was examined and testified  
2 as follows:

3 **DIRECT EXAMINATION**

4 **BY MR. COHEN:**

5 Q. Please state your name for the record.

6 A. Detective Anthony Berry.

7 Q. And could you tell us where you're employed?

8 A. DeKalb Fire & Rescue Investigations Unit.

9 Q. And were you subpoenaed here to court today?

10 A. The department was. I'm here to represent the  
11 department.

12 Q. And are you aware of what the department was  
13 subpoenaed for?

14 A. I am.

15 Q. Could you tell us what the subpoena was for?

16 A. Records in reference to the Scott Davis case, 96-  
17 501913, it's a 1996 case. Arson was the issue with our  
18 department.

19 Q. And among the other things that the department was  
20 asked for, was there a request for Standard Operating  
21 Procedures?

22 A. There was.

23 MR. COHEN: May I approach the witness?

24 THE COURT: Yes, sir.

25 Q. Do you recognize -- I'm showing you what's been

1 labeled as Petitioner's 43. Do you recognize this document?

2 A. I do.

3 Q. And can you tell us what it is?

4 A. It's the DeKalb Police Service Bureau S.O.G.s in  
5 reference to Property and Evidence Unit.

6 Q. And did you bring us a copy of this document here  
7 today?

8 A. I did.

9 MR. COHEN: And, Your Honor, we basically just need  
10 it put on the record that we have a chain of custody as  
11 to where this document came from.

12 MS. GALLOW: If they're tendering 43 at this time,  
13 Your Honor, we have no objection on authentication  
14 grounds. We reserve any others as to if and when it's  
15 tendered for other purposes.

16 MR. COHEN: And, Your Honor, we would be seeking to  
17 introduce Petitioner's 43 into evidence.

18 THE COURT: I'm just a little unclear about whether  
19 there's an objection or not an objection to the document  
20 being admitted.

21 MS. SMITH: My understanding was, Your Honor, that  
22 his role was solely the person who brought the documents  
23 in. If that is his role, we are not objecting to the  
24 documents on grounds they're not authenticated or what --  
25 or who they purport to be from.

1 THE COURT: Okay.

2 MS. SMITH: But anything else in terms of hearsay or  
3 any other objections we might have to the documents,  
4 because he did bring several, we would reserve those --

5 THE COURT: Okay. Then as far -- as far as this  
6 witness goes, I'm just -- do you have other questions for  
7 him?

8 MR. COHEN: No, Your Honor.

9 THE COURT: Okay.

10 MR. COHEN: Our sole purpose was to get the Standard  
11 Operating Procedures into evidence.

12 THE COURT: Okay. Then I think I understand. I'm  
13 going to go ahead and excuse him and we'll deal with any  
14 other objections. I'm not necessarily admitting the  
15 documents, I'm just accepting the foundation that these  
16 were business records and that DeKalb County has sent  
17 someone over to bring the record. I don't exactly know  
18 what they are, so --

19 MS. SHEIN: Well, let me -- we need to clarify that  
20 because I -- I'm getting confused about what you're  
21 saying and what he's saying. But he was subpoenaed to --  
22 well, the department was subpoenaed to bring over their  
23 Standard Operating Procedures. He was the guy elected to  
24 bring them to us. These were the -- it is the -- I  
25 presumed -- I'm going to ask some questions just to be

1           sure I get it clarified.

2           THE COURT:   Okay.

3   **BY MS. SHEIN:**

4           Q.   Is this the manual that contains the Standard  
5   Operating Procedures?

6           A.   It's my report that contains the Standard Operating  
7   Procedures, yes.

8           Q.   Did you put this together?

9           A.   I did.

10          Q.   Okay.  And is that based on an instruction you  
11   received from one of your superiors?

12          A.   The subpoena that came, I was the responsible party  
13   for putting that together.

14          Q.   Okay.  So are these documents kept in the ordinary  
15   course of business at your agency, the DeKalb County Fire and  
16   Rescue?

17          A.   They are.

18          Q.   Okay.  And they came from that location?

19          A.   They did.

20          MS. SHEIN:  Thank you, Your Honor.  Any objection to  
21   the admission of the one document from the total that we  
22   referred to specifically?

23          MS. SMITH:  And that's Tab I for -- actually, you've  
24   already marked it as Petitioner's 43; is that correct?

25          THE WITNESS:  Yes, it is.



1 MS. SHEIN: Yes.

2 MS. SMITH: No objection. Thank you.

3 THE COURT: All right. It's admitted then without  
4 objection.

5 **[WHEREUPON, Petitioner's Exhibit Number 43 was admitted**  
6 **into evidence without objection.]**

7 MS. GALLOW: Thank you, Your Honor.

8 THE COURT: Now can this witness be excused?

9 MS. GALLOW: He can now.

10 MR. COHEN: Yes, Your Honor. Thank you.

11 MS. SHEIN: Thank you.

12 [Witness excused.]

13 THE COURT: Now are we going back to Mr. --

14 MR. COHEN: McKinnon.

15 THE COURT: -- McKinnon?

16 MR. COHEN: Yes, Your Honor.

17 [Brief pause.]

18 **[Joe McKinnon retakes the stand.]**

19 MR. COHEN: Your Honor, this witness has already  
20 been sworn in.

21 THE COURT: Yes, sir.

22 **BY MR. COHEN: [Resuming]**

23 Q. Mr. McKinnon, we had been discussing the disposition  
24 of items, specifically I believe they were Petitioner's 40,  
25 41, and 42. And did you already confirm for us that all three

1 of these documents have the same date?

2 A. The same date as whenever they -- whenever this was  
3 originally put in here. No, there was different dates as to  
4 whenever I saw it. My actual disposition date that I signed  
5 it was in 2001.

6 Q. 2001?

7 A. Yes, sir.

8 Q. Now on Petitioner's 40, which I'm not sure it's the  
9 same --

10 A. No, sir, it's not.

11 MR. COHEN: May I approach, Your Honor?

12 Q. What's the significance of that date?

13 A. I think it's still going to be the original date  
14 that it was placed into evidence to begin with.

15 Q. Okay.

16 A. When it was placed in the Property Room to begin  
17 with.

18 Q. Okay.

19 A. That's your base date. And so that would be  
20 throughout -- and that's why it's on that database.

21 Q. And we had been discussing your decision to release  
22 these items; correct?

23 A. Yes, sir.

24 Q. And had confirmed that in fact that was solely your  
25 decision to release those documents?

1           A.    Yes, sir.

2           Q.    And I had asked you if there was anybody that you  
3 needed to check with before releasing those documents; right?

4           A.    I remember that was your question, yes, sir.

5           Q.    Okay. And wasn't your answer that you didn't need  
6 to check with anybody about releasing those documents?

7           A.    That's correct.

8           Q.    If I could draw your attention to the exhibit which  
9 is currently on the podium in front of you, Petitioner's 43.

10          A.    Uh-huh.

11          Q.    It's already in evidence, but do you recognize that  
12 document?

13          A.    Yes, sir.

14          Q.    And could you tell us what it is?

15          A.    It looks like the -- a copy of the Police Service  
16 Bureau's Property and Evidence SOG.

17          Q.    Okay.

18          A.    Their Standard Operating Guideline.

19          Q.    And this would have been applicable to items that  
20 would have been subject to being released or destroyed or  
21 kept?

22          A.    Yes, sir.

23          Q.    Okay. I would draw your attention to -- going a  
24 little ways, Page 9, Subsection H, Disposition of Property and  
25 Evidence.

1           A.    Okay.

2           Q.    And the large paragraph about halfway down the page  
3 starts with: "For evidence or property marked must be approved  
4 for release..."

5           A.    Uh-huh.

6           Q.    Just before the bold print, "The decision must be  
7 based --" right about the middle of that paragraph, the line  
8 before the bold print, do you see: "This decision must be  
9 based"?

10          A.    Uh-huh.

11          Q.    Okay.

12                THE COURT:  Sir, I'm sorry, I need you to answer yes  
13 or no.  The court reporter can't take down an uh-huh.

14                THE WITNESS:  Yes, ma'am.

15          Q.    If you could, read that paragraph briefly, and then  
16 if you could explain for us what this Standard Operating  
17 Procedure asks you to do before releasing any evidence.

18          A.    Starting with "This decision..."?

19          Q.    Just read to yourself from "For evidence or  
20 property..." look over that paragraph for me, and then if you  
21 can, tell us what this -- what this guideline is suggesting  
22 should happen before anything is released.

23          A.    [Reading document.]  Basically -- my understanding  
24 is basically that the officer would be sure that there's no  
25 open case anywhere before releasing this.

1 Q. Okay. And how might you go about determining if  
2 there was an open case?

3 A. Files that we would have on there in the arson unit  
4 and/or any databases that the court systems would have,  
5 checking that, against that.

6 Q. Okay. And you had indicated that you didn't need to  
7 check with anybody before you made the decision to release the  
8 items that were listed on those Property Room disposition  
9 sheets?

10 A. That's correct.

11 Q. So wouldn't that be in direct violation of Standard  
12 Operating Procedure?

13 A. Based upon what?

14 Q. The statement that it's the officer's responsibility  
15 to look up the case on departmental computers or contact the  
16 courts to ascertain disposition, and then dispose of said  
17 property and evidence accordingly. And you said you disposed  
18 of these items in 2001?

19 A. That's correct.

20 Q. And Mr. Davis' case didn't go to trial until 2006?

21 A. Uh-huh, yes.

22 Q. And then if you move ahead to about two pages away  
23 from there, Subsection M, still under Property and Evidence.

24 A. Okay.

25 Q. And this subsection states, does it not, that

1 "[When] officers and detectives receive disposition forms from  
2 Property Room personnel, it is that officer's responsibility  
3 to contact the appropriate court of jurisdiction and verify  
4 the status of that case"?

5 A. Yes.

6 Q. And "If the case has been disposed of, the officer  
7 must mark the sheet, Sale, Destroy, County Use, or Revenue  
8 Collection." Right?

9 A. Yes.

10 Q. And it's not the responsibility of property room  
11 personnel, it's the responsibility of the officer to determine  
12 case status?

13 A. That's correct.

14 Q. And you told us that you didn't check with any other  
15 agency or any other court before releasing the gas can, the  
16 knife, the key/flashlight, caller I.D., and the Browning  
17 shotgun?

18 A. No, I in fact did check with other courts through  
19 their database systems. The courts in DeKalb County have  
20 databases that would tell me whether there's any open case on  
21 that case number and/or that address.

22 Q. But didn't you say that you didn't check with  
23 anybody earlier? That you didn't check with APD or Fulton  
24 County D.A.'s Office before acting on the decision to release  
25 these items?

1           A.    I did not.

2           Q.    Okay.  And why not?

3           A.    Because I was unaware of any open case with any of  
4 these.  I would not typically go outside of DeKalb County to  
5 look for a case that was not there.  All I had in front of me  
6 was a disposition sheet for this -- for this address.

7           Q.    So under the Standard Operating Procedure we just  
8 went through, what should have been processed before releasing  
9 or destroying the evidence in this case?

10          A.    Exactly what was done.

11          Q.    Check with courts of jurisdiction.

12          A.    Check with the court of the jurisdiction that I'm  
13 in.  That's where our case would have been at had we had an  
14 open case.  And then I was the officer to release those.  
15 Captain Raines was no longer employed by DeKalb County as the  
16 unit commander.  It then befelled [sic] me to make that  
17 decision one way or the other, and that's what was done.

18          Q.    And just to be sure, you didn't check with Atlanta  
19 Police or the Fulton County D.A.'s Office?

20          A.    No, sir.  I was not aware of any -- any case  
21 whatsoever.

22                THE COURT:  The property involved here was in  
23 DeKalb?

24                THE WITNESS:  Yes, ma'am, it was.

25          Q.    Do you know exactly when you made the decision to

1 destroy those items?

2 A. No, sir, I do not. It was in 2001.

3 Q. And was your decision based on the date on that  
4 Property Sheet?

5 A. Could you repeat the question again?

6 Q. Was there anything on the Property Disposition Sheet  
7 that led you to make that decision?

8 A. No, sir. It was my responsibility to check with --  
9 to see if we had any open -- any open cases, and check the  
10 corresponding databases of the courts that might have  
11 something open in those, and that's exactly what I did.

12 Q. Were you aware of what kind of a case it was in  
13 DeKalb or in Fulton?

14 A. I was unaware of any case in Fulton County.

15 Q. You didn't have any information that this was part  
16 of another homicide case in Fulton County?

17 A. No, sir, I did not.

18 Q. Did you ever see or handle any latent print --  
19 latent fingerprint cards relating to this investigation?

20 A. No, sir, I did not.

21 Q. Are you aware of any shipments that were received by  
22 anybody in your department?

23 A. No, sir, I am not.

24 Q. What kind of a case was this in DeKalb that you had  
25 authorization to release this information?



1           A.    Release the information?

2           Q.    Release the items, I'm sorry.

3           A.    It was a car fire on Fernwood Circle.  Is that what  
4 you're asking?

5           Q.    Yes.

6           A.    Okay.

7           Q.    Did you ever talk to Bobby Smith about any of the  
8 evidence in this case?

9           A.    No, sir, I did not.

10          Q.    You said this was from a car fire at Fernwood  
11 Circle?

12          A.    Yes, sir.

13          Q.    Are you aware of any of the items that were alleged  
14 to have been or proven to have been in that vehicle?

15          A.    Just what I was given in the disposition sheet,  
16 that's all I had.

17          Q.    There was, among the items that were in the Porsche,  
18 besides the ones that we've identified, there was also what's  
19 been referred to as a 1996 Atlanta Olympics bag.  Are you  
20 aware of any documentation showing that that was ever taken  
21 into evidence?

22          A.    Not from what I've seen, it was not part of that  
23 disposition sheet.  I did not see that, no, sir.

24          Q.    Okay.  So there wouldn't have been any documentation  
25 that was checked for any prints?

1           A.    I have no knowledge of that.

2           Q.    If it was in the car, shouldn't it have been  
3 collected and tested?

4           MS. GALLOW:  Objection, Your Honor.  He's just  
5 testified that he has no idea what was in the car, so,  
6 therefore, I would object to his asking this question of  
7 the witness when he has no personal knowledge of anything  
8 that was recovered from that Porsche.

9           Q.    Whatever was in the car, shouldn't that have been  
10 tested?

11          A.    Yes, sir.

12          Q.    Thank you.  This bag in fact was identified in the  
13 testimony of one of the State's witnesses --

14          MS. GALLOW:  Objection, Your Honor.  Counsel is  
15 testifying and injecting facts into evidence not at this  
16 time --

17          THE COURT:  Counsel, I need you not to lead your  
18 witness.

19 **BY MR. COHEN:  [Resuming]**

20          Q.    Do you know if anybody at DeKalb Fire allowed anyone  
21 to view any of the items that were in the car?

22          A.    No, sir, I do not.

23          Q.    Okay.  If anybody had been allowed to view what was  
24 in the car, would there have been any record of that?

25          A.    When you say view, are you saying just look at it in

1 the Property Room, or are you saying sign -- or take custody  
2 of it?

3  
4 Q. Just looking at it in the Property Room or even  
5 still in the car.

6 A. Still in the car?

7 Q. Uh-huh.

8 A. That should not -- I mean, that would not have  
9 happened, per se.

10 Q. Okay. Let me ask you just a few questions about  
11 some of the things we have identified on the disposition  
12 sheet.

13 A. Yes, sir.

14 Q. One of which was a caller I.D. box.

15 A. Yes, sir.

16 Q. And it's on the disposition sheets that we've gone  
17 over together. Would you be aware of any photos that were  
18 taken of it?

19 A. I would not be, but the investigating officer very  
20 well may have, Captain Raines.

21 Q. Would it have been checked for fingerprints?

22 A. Yes, sir. Probably so, yes, sir.

23 Q. Would the call log have been checked? There's a  
24 caller I.D. box.

25 A. Again, I don't -- I can't testify to -- you're

1 asking me supposition? What I would do?

2 Q. If it would have made sense to --

3 THE COURT: Uh-uh. I'm sorry, you can ask him if he  
4 knows or he doesn't know.

5 MR. COHEN: Okay.

6 THE COURT: But we're not going to have what he  
7 might have done or what he assumed somebody else had  
8 done.

9 **BY MR. COHEN: [Resuming]**

10 Q. Do you know if anybody checked the call logs for the  
11 caller I.D. box that was later disposed of at sale.

12 A. I do not have any -- no knowledge of that, no, sir.

13 Q. And on that same disposition sheet, the gas can, do  
14 you know if it was tested for fingerprints?

15 A. From looking at the case file later, yes, I do know  
16 that it was.

17 Q. Okay. Do you know if anybody recorded any serial  
18 numbers from that gas can?

19 A. No, sir, I do not know that.

20 Q. What about any kind of unique labels on it, anything  
21 at all tested --

22 A. No, sir, I --

23 Q. -- on the gas can. Did you know that that was a  
24 stolen car from Fulton County?

25 A. No, sir, I did not.

1 MR. COHEN: Nothing further.

2 THE COURT: Any questions for this witness?

3 MS. GALLOW: Could we have a brief moment, Your  
4 Honor?

5 THE COURT: Sure.

6 [Counsel confer.]

7 **CROSS-EXAMINATION**

8 **BY MS. GALLOW:**

9 Q. Mr. McKinnon --

10 MS. GALLOW: If I may approach the witness, Your  
11 Honor. And for the record, I'm referring the witness to  
12 Petitioner's 40 and Petitioner's 41.

13 Q. Mr. McKinnon, there's the signature that is yours  
14 that you've previously identified on Petitioner's 40; is that  
15 correct?

16 A. Yes, ma'am, it is.

17 Q. Now why would it -- explain the difference between  
18 your signature that's on Petitioner's 40 versus there no  
19 signature on Petitioner's 41?

20 A. I'm not sure -- again, if you go back to the  
21 Standard Operating Guideline, the Property Room custody  
22 manager periodically will send out sheets or generate sheets.  
23 Now why this does not have a signature, I do not know. That  
24 would be internal to the Property Room. I mean, this here was  
25 what I received in 2001 and what -- and where I moved forward

1 with the disposition of this evidence.

2 MS. GALLOW: And, Your Honor, if I may approach the  
3 witness again. And for the record, I'm showing him  
4 what's been marked as Petitioner's 42.

5 Q. And now Mr. McKinnon, there is no signature or  
6 anything on that; is that correct?

7 A. That's correct.

8 Q. And you said you had no idea where that particular  
9 document came from?

10 A. I can make -- just looking at the top of it, it does  
11 say it's the Property Room Online System, so this has to be a  
12 screened print of that, of what their computer base is showing  
13 there. That's what this is.

14 Q. And before you sign off on a document such as the  
15 one that you did in Petitioner's 40, did you have to seek  
16 approval from anyone prior to signing off on a document such  
17 as that?

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

19 Q. And that was just your pure signing without the  
20 authorization of anybody else?

21 A. That's correct.

22 MS. GALLOW: Your Honor, I don't believe I have any  
23 further questions at this time. If I could have one  
24 brief minute.

25 THE COURT: Sure.

1 MS. GALLOW: Thank you, Judge.

2 [Counsel confer.]

3 **BY MS. GALLOW: [Resuming]**

4 Q. One more question, Mr. McKinnon. When you signed  
5 that off, those were the Standard Operating Procedures for  
6 DeKalb only; is that correct?

7 A. Yes, ma'am, that's correct.

8 Q. And to your knowledge, the Porsche that was  
9 recovered in this case, there was no indictment that resulted  
10 with any of the evidence in this case; is that correct?

11 A. That's correct.

12 MS. GALLOW: I have no further questions, Your  
13 Honor.

14 THE COURT: Can this witness be excused? Or any  
15 redirect?

16 MS. GALLOW: If I may approach the witness to get  
17 the documents.

18 THE COURT: Sure.

19 MS. GALLOW: Thank you, Judge.

20 [Brief pause.]

21 MR. COHEN: Nothing further.

22 THE COURT: He can be excused?

23 MR. COHEN: Yes, Your Honor.

24 THE COURT: Go ahead.

25 THE WITNESS: Thank you, Your Honor.

1 [Witness excused.]

2 MR. COHEN: Good afternoon, Ms. Tolbert.

3 THE WITNESS: Hi.

4 Whereupon,

5 **LINDA TOLBERT,**

6 having been duly sworn under oath, was examined and testified  
7 as follows:

8 **DIRECT EXAMINATION**

9 **BY MR. COHEN:**

10 Q. Please state your name for the Court.

11 A. Linda Tolbert.

12 Q. Thank you. And where are you employed?

13 A. I'm retired now. I retired from the Atlanta Fire  
14 Department.

15 Q. Okay. And how long did you work with the fire  
16 department?

17 A. Twenty years.

18 Q. Twenty years. And what capacities did you work in  
19 while you were at the fire department?

20 A. 911 dispatch, fire safety specialist, and  
21 switchboard operator.

22 Q. Did you ever work in the Evidence Room?

23 A. No.

24 Q. Did you ever sign for anything that was accepted as  
25 evidence?



1           A.    [No response.]

2           Q.    Or let me rephrase that. Did you ever take receipt  
3 for anything that would have been evidence?

4           A.    If something came in from outside to the front desk  
5 where I worked, yes.

6           Q.    And how might something come in from the outside to  
7 the front desk?

8           A.    UPS, FedEx, and from the mail room.

9           Q.    Okay. Now I'm going to show you a document that is  
10 already in evidence.

11           MR. COHEN: May I approach the witness?

12           THE COURT: Yes, sir.

13           Q.    This is a document showing receipt being taken for  
14 an item in 1999?

15           A.    Uh-huh.

16           THE COURT: Counsel, what's that document number  
17 that you're showing her?

18           MR. COHEN: That is 26, Your Honor, Petitioner's 26.

19           Q.    Do you recognize that document?

20           A.    The document? No.

21           Q.    But do you recognize your --

22           A.    I recognize my signature, yes.

23           Q.    Okay.

24           MR. COHEN: And, Your Honor, if we could just state  
25 for the record that earlier today we had Gail Lang

1           testify at the time that this was placed into evidence  
2           that in fact this UPS delivery notice had a tracking  
3           number that matched the delivery tracking number of the  
4           originating shipment. That in fact this was a package  
5           sent from the GBI that was received and signed for by Ms.  
6           Tolbert, and these documents were already placed into  
7           evidence.

8           Q.   And what should have happened at the point that you  
9           took receipt of something specifically?

10          A.   Well, from where I worked, I worked at a desk, and  
11          behind where I sit was a credenza [sic], if you would call  
12          it, with -- a large credenza, and it had different little  
13          spaces in it for different like -- our divisions that we  
14          worked, like fire chief, fire safety, technical services, OPS,  
15          arson, field operations -- so if something came in to one of  
16          those divisions, then I would just place it in their credenza.

17          Q.   And, therefore, whenever something came in to the  
18          department, there was a specific place that it needed to go.

19          A.   Right, uh-huh.

20          Q.   And was there a chain of custody to be maintained?

21          A.   No.

22          Q.   You didn't have to maintain a chain of custody?

23          A.   No.

24               MR. COHEN: Your Honor, may I approach the witness?

25               THE COURT: Yes, sir.

1           Q.    I'm showing you what has been marked as Petitioner's  
2 Exhibit 44.

3           A.    Let me put my glasses on.

4           Q.    Yes, ma'am.

5           MS. GALLOW: Your Honor, if I may request, is this a  
6 new exhibit that we have -- is this the one that he was  
7 just showing me?

8           MR. COHEN: That's the one that we just brought.

9           MS. GALLOW: Okay.

10          A.    Uh-huh.

11          Q.    And can you tell us what that is?

12          A.    It says Atlanta Fire Department.

13          Q.    Okay. And --

14          A.    And it has a Table of Contents.

15          Q.    Okay. And is this a document that would be kept and  
16 maintained in the normal course of the fire department doing  
17 business?

18          THE COURT: I'm sorry, I don't know if she knows  
19 what it is or not. What she said is it says Atlanta Fire  
20 Department and it has a Table of Contents.

21          THE WITNESS: Right.

22          THE COURT: So I need her to identify it.

23          MR. COHEN: Okay. Yes, Your Honor.

24          MS. GALLOW: And, Your Honor, if I may, we haven't  
25 established whether Ms. Tolbert actually worked with

1 Atlanta Fire, so if we could just get that on the record  
2 as to the dates that she was employed with Atlanta Fire,  
3 that might be helpful too.

4 THE COURT: Okay.

5 **BY MR. COHEN: [Resuming]**

6 Q. Can you tell us exactly when you were employed with  
7 Atlanta Fire?

8 A. In '85, 1985.

9 Q. And through -- and when did you leave Atlanta Fire?

10 A. 2/06.

11 Q. Okay. So at the top of the page here, it says  
12 Number AFDSOP.03.18?

13 A. Uh-huh.

14 Q. And then next to it Fire Investigation Section  
15 Operating Procedures.

16 A. Uh-huh.

17 Q. Is this in fact a manual of Standard Operating  
18 Procedures for the Atlanta Fire Department?

19 A. I would have no idea because I didn't deal in  
20 procedures.

21 Q. But you received evidence; correct?

22 A. I received packages. I'm not sure if they were  
23 evidence or just what, so --

24 Q. You received packages.

25 A. Uh-huh.

1           Q.    That's what we're getting into.  So you were not  
2 specifically trained in specific operating -- Standard  
3 Operating Procedures then?

4           A.    No.

5           Q.    Okay.  Tell us what you were supposed to do  
6 specifically when evidence arrived from UPS.  When you signed  
7 for a box, whatever it was.

8           MS. GALLOW:  First of all, objection, Your Honor.  
9 That assumes facts not in evidence.  And, second of all,  
10 this witness has specifically testified that she did not  
11 work in the Evidence Room.

12          MR. COHEN:  But she has stated that she took receipt  
13 of packages.

14          THE COURT:  Well, you'll need to rephrase then  
15 consistent with her testimony.  You can ask her what she  
16 did when packages came.

17 **BY MR. COHEN:  [Resuming]**

18          Q.    You -- did you take receipt of packages, such as the  
19 one that your signature is on?

20          A.    Yes.

21          Q.    What did you do with packages such as that one when  
22 they arrived?

23          A.    Then I place it in the credenza into whichever  
24 division that -- maybe I can answer better and you would  
25 better understand my position.  My position was to receive the

1 mail from the mail room, or receive packages mailed, whatever  
2 came in from UPS or FedEx. But I did not open packages, I  
3 just placed them in their division, so maybe that's a better  
4 understanding.

5 Q. Thank you, that is. That is.

6 A. Uh-huh.

7 Q. Did you ever release any of the things that you  
8 signed for to anyone outside of your agency?

9 A. No.

10 Q. All right. Did you ever destroy anything that came  
11 in to --

12 A. No.

13 Q. Was there any way that you could have located  
14 something after you had received it?

15 A. Locate?

16 Q. After -- after you signed for it, like you did on  
17 that UPS notification, could you then have gone back and found  
18 where that item was?

19 A. If it had not been picked up, yes.

20 Q. Okay. And did you ever open -- I know you just made  
21 a statement --

22 A. Uh-huh.

23 Q. Did you ever open anything that came to you when you  
24 were receiving packages at Atlanta Fire?

25 A. Yes.

1 Q. You did?

2 A. Uh-huh.

3 Q. Okay. Did you ever sign --

4 THE COURT: Ma'am, I'm sorry. I need you to answer  
5 yes or no. The court reporter cannot take down an uh-huh  
6 or uh-uh.

7 THE WITNESS: Oh, I'm sorry. I'm sorry, okay.

8 Q. Did you ever sign for anything that was already  
9 open?

10 A. No.

11 Q. So generally, if you didn't open boxes, all you did  
12 was sign for things and pass them along?

13 A. Yes.

14 Q. And you never yourself destroyed anything?

15 A. No.

16 Q. Lost anything?

17 A. No.

18 Q. Anybody ever come looking for something you'd signed  
19 for?

20 A. No.

21 Q. All right. And did you ever know what was in any of  
22 the boxes that you signed for?

23 A. No. The only packages, if I can explain, that I  
24 opened -- if something came in that was in a flat package like  
25 UPS or FedEx and it just had City of Atlanta Fire Department

1 and it did not have a division on where it was to go, then I  
2 opened that package. Most of the time that package was for  
3 fire safety for a permit.

4 Q. Were there ever packing lists on any of the boxes?

5 A. Yes.

6 Q. So could you ever verify that contents of any boxes  
7 you signed for?

8 A. [No response.]

9 Q. If it had a packaging list on the outside, could you  
10 -- did you have any way of verifying what was inside?

11 A. No.

12 Q. Were you personally responsible for the contents of  
13 any of the boxes that you signed for?

14 A. No.

15 Q. And you stated that you didn't work in the Evidence  
16 Room?

17 A. No.

18 Q. But you did sign for packages coming in?

19 A. Yes.

20 Q. Did anybody in law enforcement contact you about UPS  
21 boxes that related to Scott Davis?

22 A. No. I talked to someone from the police department  
23 about a package that had come in.

24 Q. Okay. And what was that package, do you know?

25 A. He said a gun. I don't know. I'm just -- can only



1 repeat what I was told.

2 Q. Did Chris Harvey contact you?

3 A. No.

4 Q. Did anybody ask you to say anything about the gun  
5 that they alleged that you took receipt of?

6 A. No.

7 Q. And of any of the boxes that you signed for, would  
8 you ever remember a particular one because of its contents?

9 A. No.

10 Q. And that's because you didn't open them?

11 A. Right.

12 Q. So you're sure that you didn't see what was in the  
13 boxes that you received?

14 A. No, I did not, because I didn't open the boxes.

15 Q. Did you ever say that if you'd seen a gun you would  
16 have remembered it?

17 A. Oh, yes. Because --

18 Q. But how -- go ahead.

19 A. I was going to say because that would have been a  
20 big deal to me, so --

21 Q. But without opening the boxes, you couldn't know if  
22 you had signed or received a gun.

23 A. Right.

24 Q. Some of the boxes in this case would have been very  
25 large and heavy. Would that have been out of the ordinary?

1           A.    No.

2           Q.    And --

3           A.    If the -- if I can take it a little further.  If the  
4 box was too big to go into the credenza because they were only  
5 -- the spaces are only so big -- I would put them on the top  
6 of the credenza and call someone from that office and let them  
7 know that they had a package.

8           Q.    During the time of your employ, was Lieutenant James  
9 Phillips in charge of the Evidence Room?

10          A.    Yes.

11          Q.    Did he ever question you about evidence in this  
12 case?

13          A.    No.

14          Q.    Specific to this case, did he ever hold you  
15 accountable for a chain of custody for anything you signed  
16 for?

17          A.    No.

18                MS. SHEIN:  Your Honor, we need to take just a  
19 couple of minute break to make a couple of copies of  
20 these two documents.

21                THE COURT:  Okay.

22                               **[Brief break.]**

23                               \*   \*   \*

24                MS. SHEIN:  Ms. Tolbert?

25                THE WITNESS:  Uh-huh.

1 MS. SHEIN: Your Honor, may I approach?

2 THE COURT: Yes, ma'am.

3 **BY MS. SHEIN:**

4 Q. I'm showing you a document we marked as P --  
5 Plaintiff's [sic] 45. Do you recognize this document?

6 A. Yes.

7 Q. And is this an affidavit that you personally  
8 prepared?

9 A. Yes.

10 Q. And can you give me the date at the top, please?

11 A. May 17<sup>th</sup>, 2006.

12 Q. And is that your signature on the bottom?

13 A. Yes.

14 Q. And was this notarized on May looks like 17<sup>th</sup> --

15 A. Yes.

16 Q. -- 2006?

17 A. Yes.

18 Q. And did you prepare this document for a particular  
19 reason?

20 A. Yes. I was called in -- concerning the -- the  
21 evidence that we are discussing today, and it was just like I  
22 wanted to send something to say I don't have any other  
23 information no more than just receiving packages but don't  
24 open them, so that's why I did this, yes.

25 Q. That's the reason you prepared this document?

1 MS. SHEIN: Your Honor, I'd like to admit this into  
2 evidence unless there's an objection.

3 MS. GALLOW: No objection.

4 THE COURT: All right. It admitted without  
5 objection.

6 **[WHEREUPON, Petitioner's Exhibit Number 45 was admitted**  
7 **into evidence without objection.]**

8 [Direct examination continued by Ms. Shein.]

9 **BY MS. SHEIN: [Resuming]**

10 Q. Well, actually I'm going to ask you one more  
11 question. Could you read the last paragraph for me? I know  
12 it's small.

13 A. Yes. It says, "I was shown the document in which my  
14 forged signature was obtained and I cannot identify who signed  
15 it. Even though this was my position for the past several  
16 years, like in any receptionist position, I was relieved for  
17 lunch by others who highly suggest that a more thorough  
18 investigation is done to see who was at the front desk on that  
19 -- on that day in question to determine which person may have  
20 signed my name."

21 Q. Okay, thank you. And was this affidavit prepared  
22 based on a piece of evidence that was received by your desk --  
23 at your front desk?

24 A. Could you rephrase that question?

25 Q. Was this affidavit prepared because of something

1       that was received by your -- at your desk?

2           A.     This was when I went to speak to the office --  
3     police officer, how you sign the little -- when packages come  
4     in and they have the little scanner thing that you sign. And  
5     the one that he showed me was not clear, and I was telling him  
6     that it looks like my signature, but it might not be my  
7     signature because other people sat at my desk. So I think  
8     that's where that came from.

9           Q.     So you think somebody received a package that was  
10    signed in your name, but that it was forged?

11          A.     That's just what I was saying, but not really.  
12    That's just the way that it was -- it looked on the little  
13    sign, I don't know what you call that little machine but --

14          Q.     Well, I just want to refresh your recollection. "I  
15    was shown the document in which my forged signature was  
16    obtained."

17          A.     Uh-huh.

18          Q.     "I cannot identify who signed it." Is that a  
19    correct statement?

20          A.     No.

21          Q.     So your affidavit is incorrect?

22          A.     Yes, that part of it is because, like I said, when I  
23    was speaking to him it was just so unclear, and so that's why  
24    I made that statement.

25          Q.     So you misrepresented yourself?

1           A.    Yes.

2           MS. SHEIN:  Thank you very much.

3           I'm going to admit that into evidence, Your Honor.

4           THE COURT:  It's already admitted.

5           MS. SHEIN:  Yes, ma'am.

6           THE COURT:  Anything for this witness?

7           MS. GALLOW:  Briefly, Your Honor, if I may.

8                                   **CROSS-EXAMINATION**

9           **BY MS. GALLOW:**

10          Q.    Good afternoon, Ms. Tolbert.  How are you?

11          A.    Hi.

12          Q.    My understanding is that you were essentially a  
13 switchboard operator with the 911 department at the time; is  
14 that correct?

15          A.    At the time of this?

16          Q.    Yes.

17          A.    No.  I was not 911.  I started out in 911, this was  
18 just switchboard operator working under the Fire Chief's  
19 office.

20          Q.    And then prior -- and then subsequent to that, you  
21 moved into essentially working with the mail room, so to  
22 speak, where you would receive and sign for evidence; is that  
23 correct?

24          A.    Not the mail room, but the mail came to the front  
25 desk.

1 Q. And that's where you had signed for that.

2 A. Right.

3 Q. And you would have no idea what was in any of those  
4 packages; is that correct?

5 A. No.

6 Q. Your job was simply to just sign for whatever came  
7 in to your office at that time?

8 A. Right, uh-huh.

9 Q. And you would have no knowledge of what it was?

10 A. No.

11 Q. You wouldn't know if it was evidence or not?

12 A. No.

13 Q. You wouldn't know what was in the bags or not?

14 A. No.

15 MS. GALLOW: And if I may approach the witness, Your  
16 Honor.

17 THE COURT: Yes, ma'am.

18 MS. GALLOW: And for the record, I am showing her  
19 Petitioner's Exhibit 27.

20 Q. And I believe you've already addressed that, Ms.  
21 Tolbert, but you said that that -- it looked like it but it  
22 also may not have been your signature; is that correct?

23 A. Yes.

24 Q. And is that possibly because it was one of those  
25 electronic signing documents?

1           A.    Yes, yes.

2           Q.    So it possibly could have skewed your signature to  
3 the point where it may have looked like it, but it also just  
4 slightly distorted it?

5           A.    Yes.

6           Q.    Is that why you now possibly say that that was in  
7 fact your signature but it just looks slightly distorted?

8           A.    Right.

9           MS. GALLOW: Your Honor, I have no further  
10 questions. If I may approach the witness?

11          THE COURT: To get the document?

12          MS. GALLOW: Yes, Your Honor.

13          THE COURT: That's fine.

14          Any redirect on this witness?

15          MS. SHEIN: Just a moment, Your Honor.

16                               [Brief pause.]

17          MS. SHEIN: Yeah, I do have some follow-up, Your  
18 Honor, if I may.

19                               **REDIRECT EXAMINATION**

20       **BY MS. SHEIN:**

21           Q.    Ms. Tolbert?

22           A.    Yes.

23           Q.    You signed an affidavit under oath that you thought  
24 the signature was forged; correct?

25           A.    Yes.



1           Q.    You're now saying you can't tell if it was forged or  
2 not; correct?

3           A.    That is the only reason I said that, because of the  
4 scanner. That's the only reason I said that.

5           Q.    Okay. So is it your testimony today that you did  
6 receive this item? That you personally received it?

7           A.    [No response.]

8           Q.    The item that you referred to in this affidavit, did  
9 you personally receive that item?

10          A.    Yes. That's my signature, yes.

11          Q.    Okay. I'm not talking about your signature on the  
12 affidavit, I'm talking about your signature on the actual item  
13 itself, that was received that you said was forged. Are you  
14 now testifying that the item that you said was forged was  
15 actually your signature?

16          A.    I have no -- to better explain this, I have no  
17 knowledge of which packages came in. That's the only reason I  
18 said -- the reason why I said that also, too, because one of  
19 my -- if I -- if I can explain it.

20          Q.    Well, the question is, did you -- you wrote an  
21 affidavit that said the signature was forged; correct?

22          A.    Yes.

23          Q.    Okay. You're now saying that it wasn't forged. Is  
24 it your signature?

25          A.    Yes.

1 Q. And you received this item?

2 A. Yes.

3 Q. Okay. So there was no forgery?

4 A. Right.

5 Q. You must -- why did you make the affidavit? What  
6 were you afraid of?

7 A. No, I wasn't afraid of anything. The reason why I  
8 said that, because one of my coworkers said when I had gone to  
9 lunch, she says, "Linda, a package came in and I just signed  
10 your name." So that's why I said that.

11 Q. So you didn't sign for it?

12 MS. GALLOW: Objection, Your Honor. She said she  
13 did sign for it.

14 MS. SHEIN: No, no, no -- she said --

15 THE COURT: I just -- I'm sorry.

16 MS. SHEIN: Go ahead, Your Honor.

17 THE COURT: I'm not -- I'm sorry, I'm not sure what  
18 the objection was, so let me just hear that first.

19 MS. GALLOW: Your Honor, the witness has said on at  
20 least two separate occasions now that she did in fact  
21 sign the document. And counsel is now arguing with her  
22 and said that she said no, she didn't sign it, when she  
23 said on two occasions that she did sign it.

24 THE COURT: Okay. Counsel, one more time you can go  
25 through your questions. Ma'am -- are you talking about

1 P-27? Is that the signature you're talking about?

2 MS. SHEIN: Yes, Your Honor.

3 THE COURT: Perhaps you could show her P-27 one more  
4 time. But ma'am, you need to listen carefully to the  
5 questions. I think there are two signatures. There's  
6 one on the affidavit and there's one on P-27. So if  
7 you'd just --

8 MS. SHEIN: Right. I'm not disputing the signature  
9 on the affidavit.

10 THE COURT: I know.

11 MS. SHEIN: Okay.

12 THE COURT: But I just want to be sure that the  
13 questions are clear as to which signature you're  
14 referring to. And ma'am, you need to -- you just need to  
15 listen carefully to the question, answer it, and you can  
16 explain your answer. Okay?

17 THE WITNESS: Thank you.

18 THE COURT: All right.

19 MS. SHEIN: May I approach, Your Honor?

20 THE COURT: Yes.

21 **BY MS. SHEIN: [Resuming]**

22 Q. I am now showing you what's been marked as P-27.  
23 Would you take a look at that one more time? Well, you have  
24 that in front of you.

25 A. Yes.

1 Q. Is that signature on the bottom your signature?

2 A. Yes.

3 Q. Okay. You are now testifying that this is your  
4 signature?

5 A. Yes.

6 Q. Okay. Your Honor, this -- you said -- and I need  
7 clarification from the witness. You said, if I recall  
8 correctly, that someone was at your desk and signed for you.

9 A. Yes.

10 Q. Is that person's -- is that what this is, the person  
11 signing for you?

12 A. No, that's my signature.

13 Q. Okay. That's your signature?

14 A. Yes.

15 Q. I'm going to show you once again what's been marked  
16 as I think it's P-45. And I think you might have it still up  
17 here. Do those signatures match?

18 A. Yes.

19 Q. They do, okay. I'll give you back 27 and make sure.  
20 Did I give you the affidavit?

21 [Brief pause.]

22 Q. Okay. Did there come a time when someone came to  
23 you to discuss the receipt of a firearm in the Davis case?

24 A. When someone came to me? No.

25 Q. Yeah, to discuss that?

1           A.    No.

2           Q.    No one ever discussed with you anything about a  
3 missing firearm?

4           A.    A police officer did.

5           Q.    Okay. Do you remember that officer's name?

6           A.    No.

7           Q.    And what did he ask you?

8           A.    He was asking me about a package that had come in  
9 and that was supposed to have a firearm. And I was explaining  
10 to him the same thing, that I did not open packages, I just  
11 signed for them.

12          Q.    Did they accuse you of losing that firearm?

13          A.    No.

14          MS. SHEIN: One moment, please, Your Honor.

15                               [Brief pause.]

16          Q.    Was -- did Mr. Chris Harvey ask you to prepare this  
17 affidavit that we talked about?

18          A.    No.

19          MS. SHEIN: May I approach again, Your Honor?

20          THE COURT: Yes, ma'am.

21          Q.    Would you look at the top left here and note that  
22 information about Chris Harvey?

23          A.    Uh-huh.

24          Q.    Do you know what that means, why that's on the  
25 affidavit?

1 A. Okay, yes.

2 Q. Yes, what?

3 A. Yes, now I know why that's on the affidavit.

4 Q. Okay. Can you --

5 A. Right.

6 Q. Did Mr. Harvey ask you to prepare it?

7 A. Yes, uh-huh.

8 MS. SHEIN: That's all, Your Honor. Thank you.

9 THE COURT: Any recross?

10 MS. GALLOW: Brief recross, Your Honor.

11 **RECROSS-EXAMINATION**

12 **BY MS. GALLOW:**

13 Q. Ms. Tolbert, you signed for this package back in May  
14 of 1999; is that correct?

15 A. Yes.

16 Q. And then you subsequently prepared this affidavit  
17 back in May of 2006?

18 A. Yes.

19 Q. Almost seven years later; correct?

20 A. Yes.

21 Q. And is it your testimony today that you were  
22 mistaken, it was a simple mistake in the affidavit whether you  
23 thought that this signature was forged?

24 A. Yes.

25 MS. GALLOW: One moment, Your Honor.

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[Brief pause.]

MS. GALLOW: No further questions, Your Honor.

THE COURT: Can this witness be excused?

MS. GALLOW: Yes.

MR. COHEN: Just one moment. Just one moment.

THE COURT: Okay, sorry.

[Brief pause.]

MS. SHEIN: No, nothing further, Your Honor.

THE COURT: Ma'am, you're free to go.

THE WITNESS: Thank you.

[Witness excused.]

MS. SHEIN: Just a moment, Your Honor. Just to help the Court a little bit and the AG's Office, we have I think one more witness, and then I believe putting on our -- an evidence expert. And that, hopefully, will take us through the day.

THE COURT: Okay. What time were you thinking -- can we finish that expert tonight? And what time do you think we'll end up, if we can?

MS. SHEIN: Realistically, we could get out at a reasonable hour, five or six o'clock at the latest.

THE COURT: Okay.

MS. SHEIN: I mean it could be earlier, it just -- it depends on how things go along.

MR. ABT: And Judge, my office spoke to Mr. Samuel

1           and he will be here at 8:30.

2           THE COURT: Great. Okay.

3           MS. SHEIN: You know what, Your Honor, it would  
4           probably be in our best interest to take a little break  
5           at this moment.

6           THE COURT: That's fine.

7           MS. SHEIN: We need to show one of our witnesses  
8           some of the exhibits that have already been introduced  
9           into evidence.

10          THE COURT: Okay. How long you want?

11          MS. SHEIN: Till 3:00.

12          THE COURT: Okay. All right, we'll take about a 20  
13          minute break.

14          MS. SHEIN: And we should be able to finish with  
15          this witness today.

16          THE COURT: The expert?

17          MS. SHEIN: Yes.

18          THE COURT: Okay. Very good.

19                           **[Afternoon recess was taken.]**

20   \*   \*   \*

21          Whereupon,

22   **ROBERT A. DORAN,**

23          having been duly sworn under oath, was examined and testified  
24          as follows:

25   **DIRECT EXAMINATION**



1 **BY MS. SHEIN:**

2 Q. Could you state your full name, please, and  
3 occupation.

4 A. Yes. My name is Robert A. Doran D-O-R-A-N. I am a  
5 Police Management and Training Consultant.

6 Q. Can you explain what that is?

7 A. Yes. Basically, it involves three things: I do  
8 consulting for law enforcement agencies, property and evidence  
9 management systems; that also includes auditing, the physical  
10 audits and procedural audits of property and evidence room  
11 systems. I also teach training classes on property and  
12 evidence management, advanced techniques in evidence  
13 management, and management of homicide evidence.

14 Q. And how long have you been doing this?

15 A. Approximately 29 years.

16 Q. And is this your employment, is that a private  
17 consulting firm?

18 A. Yes, it is.

19 Q. Okay. And --

20 A. Private.

21 Q. I'm sorry.

22 A. Self-employed.

23 Q. Okay. And that's for the past 29 years?

24 A. Correct.

25 Q. Can you go a little bit over your education and

1 professional training and experience related to the management  
2 of evidence and recovered property?

3 A. Yes. I received my bachelor's degree in  
4 Administration of Criminal Justice from the University of  
5 Illinois. I attended John Marshall Law School for one year.  
6 After leaving law school I enrolled in graduate school and  
7 received a master's degree -- master's degree in Public  
8 Administration.

9 In terms of training, I have annually for probably the  
10 past 15 years attended a multi-day training session somewhere  
11 in the United States on property and evidence management  
12 issues.

13 Q. And have you authored any text or professional  
14 articles or papers regarding the subject?

15 A. Yes. I authored the first textbook on police  
16 evidence management, evidence and recovered property, The  
17 Police Property Control Function, now in second edition. I  
18 have also authored numerous articles on property and evidence  
19 management.

20 Q. Did you provide a copy of your professional vitae  
21 regarding the area of expertise and experience you've had?

22 A. Yes, I did.

23 Q. When did you publish that text that you just  
24 described?

25 A. That was in, if my memory is correct, 1994.

1           Q.   And it's been republished how many times or  
2   reprinted?

3           A.   It's in its second edition now.

4           Q.   I'm sorry, go ahead.

5           A.   I'm sorry?

6           Q.   Is that the -- I didn't know if that was the end of  
7   your answer.

8           A.   Yes.

9           Q.   Okay. Is this -- the text I'm about to show you, is  
10   this the text you're referring to?

11          A.   Yes, it is.

12           MS. SHEIN: Your Honor, I don't want to put this in  
13   to an exhibit, but just so you know, this is the text  
14   that he's referring to that he wrote.

15          Q.   How do you stay current on your professional  
16   activities?

17          A.   As I mentioned, for the past many years I have  
18   attended the multi-day training sessions. This past May, for  
19   example, I attended a three-day -- three-day training  
20   conference that was hosted by the Illinois Association of  
21   Evidence and Property Managers. I not only made a  
22   presentation at that workshop, but I also attended the three  
23   days of the workshop and attended the workshop. Just a way of  
24   maintaining my currency in the field.

25          Q.   Do you have a licensing procedure that you have to

1 go through, like lawyers have legal education they have to  
2 continue, do you have some of that requirement in what you do?

3 A. Not for the consulting or the auditing for the  
4 training. I am state certified in a number of states,  
5 including Michigan, Illinois, Wisconsin, Oregon, Washington,  
6 New Mexico, and several more that --

7 Q. So you're the one who does training classes on  
8 evidentiary --

9 A. I have been doing -- presenting training classes on  
10 evidence management since -- for the past 29 years also, yes.

11 Q. Can you describe some of those training classes that  
12 you've given? Just give a brief list of maybe --

13 A. Yes. The one class, the introductory class, is  
14 Management of Evidence and Recovered Property. That's a  
15 two-day class that involves a review of the applicable state  
16 statutes. I teach that course in many different states. But  
17 a review of the applicable evidence and property management  
18 statutes. It deals with the -- the initial intake of  
19 property, inventory and proper packaging, proper sealing of  
20 evidence, how to and the process of maintaining the chain of  
21 custody, the proper management preservation of evidence, which  
22 includes shelving units, the storage of sensitive or valuable  
23 items, firearms, currency, jewelry, narcotics -- all employ  
24 different storage methods -- and the disposal of evidence, the  
25 proper means or methods of disposing of evidence.

1           Q.    Have you also taught classes in this regard in any  
2 universities or colleges?

3           A.    Yes, I have. For approximately 15 years I taught a  
4 course in -- a three-day course, it's called Advanced  
5 Techniques and Evidence from Management. I taught that at  
6 Northwestern University Center for Public Safety in Evanston,  
7 Illinois.

8           Q.    Okay. Have you ever in the past testified at  
9 judicial proceedings or been retained as an expert in the area  
10 of law enforcement evidence management?

11          A.    Yes, I have.

12          Q.    Have you testified for the state or federal  
13 government?

14          A.    I have to stop and think there for a moment. Two  
15 were civil -- as I'm recalling, two were civil cases, I  
16 testified for the plaintiff. I believe they were all  
17 plaintiff representation cases, yes.

18          Q.    Okay. And have you testified in criminal cases  
19 before?

20          A.    Yes, I have.

21          Q.    Before you got into the consulting business, what  
22 was your profession?

23          A.    Before that I was a deputy chief of police for  
24 several years for a suburban law enforcement agency in  
25 suburban Chicago. I was an administrative deputy chief, which

1 was responsible for planning, training, research, the records  
2 section, and directly responsible for the supervision of the  
3 police department's evidence room. Ah --

4 Q. And -- I'm sorry, go ahead.

5 A. Prior to that I spent five years, I was executive  
6 director of a criminal justice planning council that  
7 incorporated Lake, Will, McHenry, and DuPage Counties, the  
8 collar counties around the state.

9 Prior to that for several years, I was a police  
10 specialist with the Illinois Law Enforcement Commission  
11 responsible for planning and developing police operations and  
12 management programs.

13 Prior to that, while I was in college --

14 Q. That's okay.

15 A. I'm sorry?

16 Q. That's all right. I don't want to age you too much.

17 A. I know, it just drags on.

18 Q. That's all right.

19 A. I can't hold a job.

20 Q. As a police officer and in law enforcement, did you  
21 testify in cases?

22 A. Yes. I've testified in I'd estimate over 500 civil  
23 -- or excuse me, traffic, misdemeanor, felony, and coroner's  
24 inquest cases.

25 Q. Was a lot of what you testified to over the years of

1 your employment as an officer and now regarding evidence  
2 matters?

3 A. Yes.

4 MS. SHEIN: Your Honor, can I approach?

5 THE COURT: Yes, ma'am.

6 Q. I have provided and marked as Exhibit P-46. Would  
7 you take a look at that document for me, Mr. Doran.

8 A. Yes, I recognize this document.

9 Q. Can you tell me what that is?

10 A. That is my curriculum vitae.

11 Q. And is that something you provided to my office upon  
12 my request?

13 A. Yes, it is.

14 Q. Did that accompany an affidavit that you prepared  
15 for me?

16 A. Yes. Yes, it does.

17 Q. Okay.

18 A. That's Exhibit P -- yes.

19 MS. SHEIN: Your Honor, I'd like to tender the  
20 exhibit as -- his professional vitae in recognition of  
21 his status as an expert on evidence matters.

22 MR. MALCOLM: I don't have any objection to that,  
23 Your Honor.

24 THE COURT: All right. Admitted without objection.

25 **[WHEREUPON, Petitioner's Exhibit Number 46 was admitted**

1           **into evidence without objection.]**

2           **BY MS. SHEIN: [Resuming]**

3           Q.   Are there commonly accepted professional standards  
4           for the operation management of law enforcement and fire --  
5           well, law enforcement evidence rooms?

6           A.   Yes, there are.

7           Q.   And what are those standards, and can you identify  
8           them for me?

9           A.   Probably the most commonly recognized standards are  
10          the CALEA Standards, Chapter 84. CALEA is the Commission for  
11          the Accreditation of Law Enforcement Agencies.

12          MS. SHEIN: Let me make some correction to the  
13          record, too. There was an individual who testified to  
14          the spelling of that, and I think he misspelled it. So I  
15          just wanted to clarify that.

16          THE COURT: Can we just get it spelled, CALEA?

17          THE WITNESS: C-A-L-E-A.

18          THE COURT: Okay.

19          Q.   Go ahead. Sorry. Did you finish your answer in  
20          terms of what this particular item is?

21          A.   That specific standard, number one, yes.

22          Q.   Okay. What is this standard used for?

23          A.   The standard is recognized and has been adopted  
24          nationwide. Chapter 84 of the CALEA Standards governs the  
25          policies and procedures for the maintenance of a police



1 Evidence Room, law enforcement Evidence Room. CALEA is a  
2 voluntary certification program that police agencies can  
3 pursue. And they -- in order to acquire the CALEA  
4 certification, they must meet a certain percentage of the  
5 standards, and it gets a little more technical from there.

6 Q. Is it important for individual states to recognize  
7 these standards?

8 A. Yes. Many of the states -- many of the individual  
9 states have recognized CALEA. Georgia, as a state, has  
10 recognized the CALEA Standards through a Georgia GPAC, Georgia  
11 Professional Accreditation Coalition, excuse me.

12 Q. Is it Georgia Police or Professional?

13 A. I'm sorry, Georgia Police, thank you. Yeah, GPAC,  
14 yeah. Georgia Police Accreditation Coalition.

15 Q. Is there a -- well, the Georgia Law Enforcement  
16 Certification Program, what is that compared to the Georgia  
17 Police Accreditation Coalition?

18 A. I'm sorry, would you repeat the --

19 Q. Well, there's two things I'm interested in knowing  
20 the difference between: Georgia Law Enforcement Certification  
21 Program and then Georgia Police Accreditation Coalition. What  
22 is Georgia Law Enforcement Certification Program?

23 A. That -- to my understanding, that would be a  
24 certification by GPAC.

25 Q. Okay. So GPAC is the "person" that accredits --

1       what does GPAC do?

2           A.   GPAC is -- GPAC, in the State of Georgia, would be  
3       the accrediting body. The Law Enforcement Standards you're  
4       relating to would be the standards that would have to be  
5       proven to be adhered to in order to get the accreditation from  
6       GPAC.

7           Q.   And CALEA would be what they refer to for their  
8       standards; correct?

9           A.   In part, yes.

10          Q.   In part. So they can also develop their own  
11       standards?

12          A.   And they have, yes.

13          Q.   Okay.

14          A.   Yes.

15          Q.   When did CALEA start to become the national  
16       standard?

17          A.   CALEA came into existence and the standard in 1979.

18          Q.   Okay. And is it still in existence today?

19          A.   Yes, it is.

20          Q.   Okay. What -- when did GPAC, the one for Georgia,  
21       come into existence?

22          A.   1980 it was incorporated in the State of Georgia.

23          Q.   And is it still intact today?

24          A.   To my knowledge, it is.

25          Q.   Have you audited -- or have you been retained to

1       audit law enforcement agencies evidence rooms?

2           A.    Yes, I have.

3           Q.    Okay.  And on how many occasions?

4           A.    Approximately 40 to 44 occasions.

5           Q.    Is that throughout the United States?

6           A.    Throughout the United States.

7           MS. SHEIN:  Your Honor, I did indicate earlier that  
8       I tendered the witness as an expert in this field.  If  
9       there wasn't any objection, I'd like to proceed.

10          THE COURT:  You hadn't.

11          MS. GALLOW:  Your Honor, there was no tender.

12          THE COURT:  Right.

13          MR. MALCOLM:  Your Honor, there's no objection to  
14       the resume of this witness; however, I would like to ask  
15       a few voir dire questions --

16          MS. SHEIN:  Please.

17          MR. MALCOLM:  -- of the witness in regards to his  
18       expert status.

19          THE COURT:  That's fine.

20          MS. SHEIN:  Absolutely.

21          MR. MALCOLM:  Thank you.

22                               **VOIR DIRE EXAMINATION**

23       **BY MR. MALCOLM:**

24           Q.    Mr. Doran, how you doing?

25           A.    Good morning -- afternoon.

1           Q.    I'm Clint Malcolm with the Attorney General's  
2           Office. I just have a few questions for you. In regards to  
3           your testimony on prior occasions in criminal matters, as an  
4           expert, not as your involvement as a prior police officer,  
5           about how many times have you testified similarly in the  
6           capacity you're testifying today?

7           A.    I have been deposed.

8           Q.    Deposed?

9           A.    Yeah.

10          Q.    But never testimony in actual open court?

11          A.    No.

12          Q.    Okay. How many times have you been deposed in  
13          similar matters?

14          A.    I believe it's three.

15          Q.    Okay. And those were all criminal cases?

16          A.    Let me think back. No, one was a Section 1983 Civil  
17          Rights Action. The other -- the second one was a criminal  
18          case. It was on a Terry stop.

19          Q.    Okay. And in that case, where you gave a  
20          deposition, were you called in to analyze evidence similar to  
21          you being asked to do today, or analyze protocol or SOPs?

22          A.    Yes. Yes, uh-huh.

23          Q.    Okay. And is that the only time you've given  
24          testimony in any capacity in regards to SOPs or maintenance of  
25          evidence, property, things of that nature?

1           A.    The only time I've given testimony?

2           Q.    Yes, sir.

3           A.    Yes, I think that would be accurate, yeah.

4                   MR. MALCOLM:   That's all I have, Your Honor.   The  
5           witness has laid a proper foundation as an expert.  
6           Although he's only testified on one prior occasion, I  
7           don't think there's anything to limit him as an expert  
8           here today, based on the qualifications that have been  
9           laid.

10                   THE COURT:   All right.   Then I'll qualify him as an  
11           expert.

12                   MS. SHEIN:   Thank you.   Thank you, Your Honor.

13                                   **DIRECT EXAMINATION**

14           **BY MS. SHEIN:   [Resuming]**

15                   Q.    Did there come a time when I contacted your office  
16           regarding the Scott Davis case?

17                   A.    That's correct, yes.

18                   Q.    And do you recall when that was?

19                   A.    As I recall, that was on June 9<sup>th</sup>.

20                   Q.    And what did I ask you to do?

21                   A.    You mentioned that you were involved in a habeas  
22           cause of action that had to do in part with the Property and  
23           Evidence Management.   You had found my name and had inquired  
24           two things: number one, would I feel -- would I take the  
25           retainer, and second, was I available, and at that time it was

1 for the last week of July.

2 You then sent me some materials, I reviewed those  
3 materials, got back to you, said I would be interested in  
4 being retained in the case, yes.

5 Q. And did I actually retain you?

6 A. Yes, you did.

7 Q. Or my office, the Law Office of Shein & Brandenburg.

8 A. Yes. Yes, you did.

9 Q. In doing so, were you paid for your services?

10 A. Yes, I am.

11 Q. And will you be paid for your services today?

12 A. Yes, I will.

13 Q. Are the fees you're receiving any different than the  
14 fees you would charge in any other case?

15 A. No, they're not.

16 Q. Did anybody promise you any excessive fees for a  
17 particular type of testimony today?

18 A. No.

19 Q. Can you describe for me what documents you reviewed  
20 in this case?

21 A. The Petition for Habeas, the amendment for the  
22 Petition for Habeas, the Atlanta Police Department's SOP,  
23 Standard Operating Procedure for Evidence of Property  
24 Management, multiple SOPs from the Georgia Bureau of  
25 Investigation Crime Lab on the processing of various types of

1 physical evidence, SOPs of the DeKalb County Department of  
2 Public Safety on Evidence Management. And if I may, I have --

3 Q. Sure.

4 A. That should be Exhibit A to my report. The Motion  
5 and Memorandum in Support for the Writ for Habeas, as I  
6 mentioned the supplement. The amendment -- there was an  
7 amendment to the petitioner's supplement. The CALEA  
8 Standards, I reviewed those. The IAPE, International  
9 Association of Property Evidence Management Standards, I  
10 reviewed those. The GPAC that we talked about. Also, the  
11 National Fire Protection Association has three different  
12 standards that would apply to the evidence in this particular  
13 case, I reviewed those. Basically, that's it.

14 Q. Okay. Since you arrived here today, did I also ask  
15 you to review Plaintiff's Exhibits 2, 39, 38, 43, 34, 35, 36,  
16 and 37?

17 A. If those are the Atlanta P.D. SOPs and the GBI?

18 Q. Yes.

19 A. Is that -- am I correct?

20 Q. Correct.

21 A. Yes, you asked me to review those, and I did.

22 Q. Did I also ask you today to review some pictures  
23 noted as Plaintiff's Exhibits 11, 12, 13, 14, 15, 16, and 17?  
24 If I need to, I can refresh your recollection. These are the  
25 pictures you looked at earlier today.

1           A.    Yes, I recall reviewing those photographs, yes.

2           Q.    Okay.  And you also reviewed Standard Operating  
3 Procedures, items that were attached to the habeas petition;  
4 is that correct?

5           A.    That is correct.

6           Q.    You mentioned something and I just want to clarify.  
7 What is IAPE again?

8           A.    IAPE is the International Association for Property  
9 and Evidence Management -- or excuse me, I'm sorry --  
10 International Association for Property and Evidence.  Strike  
11 the management portion.

12          Q.    Okay.  What is that organization?

13          A.    IAPE is a voluntary organization that individual  
14 property and evidence officers may join.  Over the years they  
15 have promulgated an extensive set of standards for property  
16 and evidence management and property and evidence rooms.  
17 These have been peer reviewed and they are -- have been  
18 published.

19          Q.    In the review of all these documents, did you  
20 prepare an affidavit statement on your findings --

21          A.    Yes, I did.

22          Q.    -- of the documents and everything you've just  
23 described?

24          A.    Yes, I did.

25          Q.    Okay.



1 MS. SHEIN: May I approach, Your Honor?

2 THE COURT: Yes, ma'am.

3 Q. This would be --

4 MS. SHEIN: May I approach, Your Honor?

5 THE COURT: Yes, ma'am.

6 Q. I'm showing you what's been marked P-47. Do you  
7 recognize this document?

8 A. Yes, I recognize this as my preliminary expert  
9 report on this matter.

10 Q. Okay. And is this the report you prepared as a  
11 result of your review of the information you described here  
12 today?

13 A. It is.

14 Q. And is that your signature on the last page?

15 A. On Page 11, yes, it is.

16 Q. Okay. And what is the date of that document?

17 A. The date of this document is July 19, 2011.

18 Q. Thank you. Do you have a copy of that document to  
19 refer to while I'm questioning you?

20 A. I have a copy in front of me, yes.

21 Q. In the process of your evaluation you identified in  
22 your affidavit five questions that you reviewed these  
23 documents to answer. Would you identify those five questions  
24 for me?

25 A. Yes. Those five questions were:

1           1. Was the physical evidence associated with this  
2 matter documented sufficiently to allow a thorough chain  
3 of custody to be initiated and maintained?

4           2. Was the physical evidence associated with this  
5 matter maintained in a manner consistent with commonly  
6 accepted professional law enforcement standards?

7           3. Was the physical evidence associated with this  
8 matter disposed of in a manner consistent with commonly  
9 accepted professional law enforcement standards?

10          4. Was there adequate supervision of physical  
11 evidence handling, retention, and disposal, consistent  
12 with commonly accepted professional law enforcement  
13 standards?

14          5. Was there a pattern and practice of police  
15 agency, fire department, GBI Laboratory and prosecutor's  
16 office of failing to respond timely to deficiencies in  
17 the chain of custody, handling, retention, and disposal  
18 of physical evidence associated with this matter?

19          Q. And before we get into the specific results of those  
20 questions, I want to ask you a few preliminary questions.

21          A. Uh-huh.

22          Q. What is an SOP?

23          A. SOP is a Standard Operating Procedure. It is --

24          Q. And what -- I'm sorry. What are Standard Operating  
25 Procedures for? What's the purpose?

1           A.    Standard Operating Procedures serve several  
2           purposes. One is to ensure uniformity in the way procedures  
3           are engaged in within a particular law enforcement agency, for  
4           example. They're also used for training purposes, to  
5           communicate management's policies and procedures. They can  
6           also be used as a set of standards for disciplinary purposes.  
7           Should they not be followed, adhered to, then there is a  
8           definitive standard that has not been attained, and it could  
9           result in some type of disciplinary action.

10          Q.    What can happen if SOPS are not followed in  
11          relationship to the evidence?

12          A.    Oh, a lot could happen. Everything from the initial  
13          collection of the evidence, the packaging, the inventory, the  
14          chain of custody, the retention, the disposal, everything --  
15          every one of those elements of the property and evidence  
16          system could go awry. If proper procedures are not adhered  
17          to, and particularly the procedures up front, the initial  
18          procedures for the initial processing of that evidence, it has  
19          a ripple effect all the way through the evidence system.

20          Q.    In this case, you did review Standard Operating  
21          Procedures from various departments in Georgia?

22          A.    That is correct.

23          Q.    Do you want to just recall them again, just in case.

24          A.    The Atlanta Police Department, the GBI, Georgia  
25          Bureau of Investigation Crime Laboratory, the DeKalb County

1 Police Department and the DeKalb County Fire Department,  
2 although they are a safety department, yes.

3 Q. What -- let's talk about a piece of evidence. What  
4 should happen when a piece of evidence is collected?

5 A. Well, the very first thing is that evidence should  
6 be documented, and there are a number of ways of documenting  
7 it, but I think what we're getting to here is that it should  
8 be adequately and completely described, documented on a  
9 Property Inventory Report or Evidence Inventory Report. And  
10 that initial documentation is what initiates the chain of  
11 custody.

12 Q. And what is chain of custody?

13 A. The chain of custody records variously the hand-to-  
14 hand transfer of a piece of evidence from one person to  
15 another or one organization to another from a law enforcement  
16 agency, the Crime Lab for example. The reason or the purpose  
17 for that transfer of custody, the date of that transfer, who  
18 the transfer was between, either individuals or between  
19 organizations, and I believe -- I don't know if I mentioned  
20 the purpose or the reason for that transfer.

21 Q. And what after -- what is necessary once the  
22 evidence is collected and placed in custody for the  
23 preservation of that evidence?

24 A. For the preservation of evidence it must be properly  
25 packaged. Certain container types are more adequate than

1 others for certain types of evidence, for example, paper,  
2 plastic boxes, tins, metal -- depending on the evidence. So  
3 the packaging itself is vital to the preservation of the  
4 evidence.

5 The next would be proper storage. Something we're very  
6 concerned with today is something that's called storage  
7 contamination, and that is one piece of evidence can possibly  
8 contaminate another piece of evidence because of improper  
9 storage methods.

10 We also have to be concerned with temperature, humidity  
11 control, depending on the evidence.

12 So packaging and storage as well as preservation of the  
13 chain of custody, talking about the physical preservation of  
14 it, do we know where it is at any given time or what the  
15 disposal or disposition of it was.

16 Q. Is this particularly important in homicide cases?

17 A. It's vital in homicide cases.

18 Q. And why is that?

19 A. Homicide cases are very sensitive, obviously.

20 Generally, in homicide cases a significant amount of physical  
21 evidence is collected, so, therefore, as I mentioned,  
22 therefore, the documentation of what is collected, because of  
23 just the great volume of evidence that is collected, has to be  
24 documented so that the present and possibly the future  
25 forensic value of that evidence can be known from the

1 documentation. Homicides -- homicide evidence is probably the  
2 most sensitive, with the exception or possible exception of  
3 sexual assaults and child abductions, the three most sensitive  
4 types of offenses in evidence collection.

5 Q. What's needed to ensure proper documentation related  
6 to homicide cases?

7 A. From the very beginning, it would be photographing  
8 the evidence in situ before it's touched, before it's removed.  
9 Then the proper collection of it, the proper marking of that  
10 evidence, which would also include the complete identity  
11 description of that item. Again, depending on the item would  
12 depend on the nature of the description, obviously. Tagging,  
13 bagging, sealing that package, transportation to the evidence  
14 room, entry into the evidence system, and then proper  
15 maintenance within the evidence room itself.

16 Q. If that's not done, what are the consequences?

17 A. The consequences are many. We could have  
18 contaminated evidence, we could have lost evidence, it could  
19 be that the chain of custody is broken, which would affect, if  
20 nothing else, the probative value of the evidence. It could  
21 affect what a crime laboratory is able or unable to do with  
22 that evidence, given the way it was handled or possibly  
23 mishandled, all the way through up in to prosecution,  
24 misjustice.

25 Q. In your professional opinion, is following Standard

1 Operating Procedures a part of what makes this work?

2 A. Absolutely.

3 Q. Pardon me?

4 A. Absolutely, yes.

5 Q. I mentioned earlier that you had reviewed these  
6 photographs that I've already identified as Exhibits -- I  
7 think it's 11 through 17. Do you recall looking at these?

8 A. Yes, I do.

9 Q. Previous testimony today identified those documents  
10 are part of an Evidence Room, the Atlanta Police Department  
11 Evidence Room. Does that look to you to be an organized  
12 Evidence Room?

13 A. In my experience, having been in 80, 90 Evidence  
14 Rooms throughout the United States, I can say this is one of  
15 the worst messes I have seen.

16 Q. Is that evidence retained according to Standard  
17 Operating Procedures?

18 A. Far from it. Far from it.

19 Q. The larger picture --

20 A. Yes.

21 Q. -- the one with the plastic bags --

22 A. Uh-huh.

23 Q. -- is that proper procedure in the storage of  
24 evidence?

25 A. Absolutely not. Absolutely not. No.

1           Q.    In reviewing the documents in this case that we  
2           provided you, did you note whether Standard Operating  
3           Procedures had been followed?

4           MR. MALCOLM:   Your Honor, at this time I would like  
5           maybe to clarify what documents we're specifying he's  
6           reviewed. Were those the previous exhibits that you had  
7           mentioned?

8           MS. SHEIN:   The exhibits and the ones he identified  
9           earlier when I asked him what documents he reviewed. He  
10          did articulate earlier.

11          THE COURT:   Okay?

12          MR. MALCOLM:   Yes, ma'am.

13          THE WITNESS:   I'm sorry, would you repeat the  
14          question?

15   **BY MS. SHEIN:   [Resuming]**

16          Q.    In reviewing the documents that you identified  
17          earlier, there was quite a long list, plus the ones I provided  
18          to you today --

19          A.    Yes.

20          Q.    -- does it appear that Standard Operating Procedures  
21          in the State of Georgia were followed in the collection and  
22          preservation of evidence?

23          A.    In this case, no.

24          Q.    I am going to refer now -- well, let me ask you  
25          this. Did you look at the kind of evidence lost in this case?



1           A.    Yes, I did.

2           Q.    Okay.  What was lost?

3           A.    From what I've been able to determine in toto, there  
4 were approximately --

5                   MR. MALCOLM:  Your Honor, I hate to interject, but I  
6 have to object at this point.  It's my understanding the  
7 documents and the previously admitted evidence that he  
8 has referred to, from my notes that I've taken, are the  
9 Standard Operating Procedures and the Petition in the  
10 Amended Petition.  If I'm missing something, then I just  
11 want to be clear that he's looked at the Standard  
12 Operating Procedures, the multiple ones that have been  
13 previously admitted, and that's how he's formulating this  
14 opinion.  If that's the case, I'm not sure how we're  
15 getting to this so-called expert opinion at this point,  
16 Your Honor.  That's my problem.

17                   MS. SHEIN:  Your Honor, in the trial transcript and  
18 the transcript there -- and in the motion for new trial  
19 and in the appeal there are multiple statements of  
20 evidence that was lost, particular pieces.  No one has  
21 contested that they were not lost.  He reviewed those  
22 documents in contemplation of discussing that lost  
23 evidence that has been identified already as lost  
24 evidence.

25                   MR. MALCOLM:  Your Honor, I don't recall the record

1 of Mr. Doran reviewing the trial transcript.

2 THE COURT: I don't either. So, counsel, perhaps  
3 you can lay a foundation before you ask the question.

4 **BY MS. SHEIN: [Resuming]**

5 Q. Mr. Doran, did you review in this case portions of  
6 the trial transcript that I forwarded to you?

7 A. Yes, I did.

8 Q. If you did not -- did you -- you didn't review the  
9 entire trial transcript.

10 A. No, I did not.

11 Q. Did I forward to you particular portions of the  
12 transcript discussing lost pieces of evidence?

13 A. Yes, you did.

14 MR. MALCOLM: The witness like -- correct as to what  
15 portions of the transcript? I'm not trying to be  
16 difficult, but I just want to know what we're talking  
17 about to make sure we're not taking things out of  
18 context, Your Honor.

19 THE COURT: Yes, sir.

20 MR. ABT: And Judge, I just want to add for the  
21 record that it was stipulated by the State at trial that  
22 over 70 items of evidence were lost. They stipulated to  
23 that.

24 MS. GALLOW: I didn't, Judge.

25 MR. MALCOLM: I don't dispute that, Your Honor, and

1 I'm just, as I said, not trying to be difficult. I just  
2 want to know what Mr. Doran actually looked at to  
3 formulate this opinion that I believe he's fixing to  
4 testify to.

5 MS. SHEIN: Well, Mr. Doran, then stick around for a  
6 while.

7 **BY MS. SHEIN: [Resuming]**

8 Q. Did I forward you a copy of the summary of the trial  
9 transcripts?

10 A. Yes, I believe you did.

11 Q. All right. Starting with --

12 THE COURT: I'm sorry, counsel. Did you forward him  
13 a copy of the trial transcript or summary that you or  
14 somebody with you made of the trial transcript?

15 MS. SHEIN: The trial transcript is 25 volumes. We  
16 sent him the summaries which identifies the pages that  
17 the information is taken from. So it is actual pages,  
18 and those pages can be admitted into evidence. When you  
19 see the whole trial transcript, that will be identified.

20 MR. MALCOLM: And, Your Honor, that's certainly our  
21 intention to admit the trial transcript into evidence.  
22 And, as I said, I'm not trying to be difficult, I just  
23 want to know what portions, if any, of the actual trial  
24 transcript Mr. Doran looked at and reviewed in  
25 preparation for testifying here today. If he looked at

1 portions of it, I'd just like to know which portions. Or  
2 if he just looked at a summary prepared by petitioner's  
3 counsel, I'd like to know that as well.

4 **BY MS. SHEIN: [Resuming]**

5 Q. Did you receive the summary of the trial transcripts  
6 that we provided you?

7 A. Yes, I did.

8 Q. Okay. In the contents of the summary were various  
9 pages of the trial transcript referenced when a particular  
10 item was discussed or a witness was discussed?

11 A. Yes, as I recall it was.

12 Q. Is there anything that -- for you to believe that  
13 the information you read is false or misleading in any way?

14 A. No.

15 MS. SHEIN: And, Your Honor, I can submit our  
16 summaries. I would be happy to do a clean copy of that.  
17 It will follow the trial transcripts and actually may  
18 help you in the end. And I can get us a clean copy of  
19 that if you'd like that admitted into evidence.

20 MR. MALCOLM: I would like to see it, Your Honor.  
21 And certainly, if it reflects accurately the transcript,  
22 which I'm sure that it does, you know, but we haven't  
23 seen that up until this point, Your Honor.

24 MS. SHEIN: I apologize. I should have given you a  
25 copy. We worked really hard to make it. Now don't look

1 at my notes.

2 MR. MALCOLM: I won't do that, you have my word.  
3 Can we have just a moment?

4 THE COURT: Sure.

5 MR. MALCOLM: Thank you.

6 [Respondent counsel reviewing summary.]

7 MR. MALCOLM: Your Honor, I have reviewed it, and at  
8 least on the first page, it does appear to be a summary  
9 of the transcript, not the transcript itself. There are  
10 certain quotations and excerpts from the transcript, but  
11 it does appear to be bits and portions of the transcript.  
12 And, obviously, the Petitioner has an interest in this  
13 case to submit certain parts to the -- their expert  
14 witness in this case, Your Honor. If he's going to base  
15 his expert opinion based on solely this case summary as  
16 well as his SOPS previously admitted into evidence, and  
17 the petition and amended petition prepared by  
18 Petitioner's counsel, I would object to any opinion being  
19 offered by this witness, Your Honor.

20 THE COURT: Well, the only question that has been  
21 asked thus far was what items were lost. So Mr. Abt, I  
22 think you said that there was a stipulation in the record  
23 that the items were lost. Is it a list of the items or  
24 just a stipulation, in general, that items were lost?

25 MR. ABT: I don't know the exact answer to that,

1 Your Honor, offhand. But --

2 MS. SHEIN: I do. It's a list of items that were  
3 lost, and there are things that were identified that they  
4 don't know what was lost, but it was lost, such as the  
5 three bags of evidence.

6 THE COURT: Okay. Well, what page is that list on?  
7 And can we get --

8 MR. ABT: But, Judge, in addition to that, what he  
9 has reviewed is our habeas brief. And our habeas brief  
10 outlines individually each piece of evidence that was  
11 lost, which he has reviewed.

12 MR. MALCOLM: And, Your Honor, that's not in  
13 evidence here today.

14 THE COURT: Right.

15 MR. MALCOLM: That's prepared by Petitioner's  
16 counsel, and would have some things in that brief,  
17 obviously, the Respondent would disagree with.

18 THE COURT: Okay. I'm just looking -- I'm just  
19 looking for a reference in the transcript that lists the  
20 items that were lost. Do we have a page number?

21 MS. GALLOW: Your Honor, if I may, Judge, I can give  
22 you a page number that does list several items of  
23 evidence that the State did concede and we did stipulate  
24 that evidence was missing. That was specifically at  
25 trial transcript 790. And I would refer the Court to --

1           it was an Olympic bag, a hat tassel, a gas can that was  
2           recovered from the Porsche, and I believe that was the  
3           three items that were specifically litigated, and that's  
4           at transcript again 690 [sic] and you will find that in  
5           the transcript. I believe there was also -- oh, I'm  
6           sorry, 790.

7           THE COURT: Yes, you gave me 790.

8           MS. GALLOW: Yeah, I'm sorry, 790. And you'll  
9           actually find references to the lost evidence that were  
10          agreed by the State that were lost between 789 and 790.

11          MS. SHEIN: Does that include the Beretta?

12          MS. GALLOW: That -- the Beretta, the transcript  
13          that refers to the Beretta that was lost would be at  
14          trial transcript 2725 through 2726.

15          THE COURT: Counsel, can we hear from this witness  
16          as to the items that he believes -- I'm just asking, just  
17          to see if we can't move on -- that he understood were  
18          lost. And then I'll let y'all respond if in fact they  
19          weren't lost. I mean, or is there some --

20          MR. MALCOLM: No, Your Honor, I think that would --

21          THE COURT: I'm just not sure why we're fighting  
22          about this.

23          MR. MALCOLM: I just want to make sure nothing is  
24          being misrepresented.

25          THE COURT: Okay.

1                   MR. MALCOLM: I'm not saying that it is, I just want  
2                   to make sure that Mr. Doran --

3                   THE COURT: Okay.

4                   MR. MALCOLM: -- was presented the entire factual --

5                   THE COURT: Okay. Then let's just hear from the  
6                   witness the answer to the question what items he  
7                   understood were lost, and then, counsel, I'll hear from  
8                   you if any are in fact not lost. Okay?

9                   MR. MALCOLM: Thank you, Your Honor.

10                  **BY MS. SHEIN: [Resuming]**

11                  Q. All right. Let's see if we can get to that. What  
12                  items -- first of all, you reviewed the summaries of trial  
13                  transcript?

14                  A. Yes, I did.

15                  Q. All right. And in the contents of that, what did  
16                  you find was lost, identify that was lost?

17                  A. My understanding is that approximately 70 items of  
18                  physical evidence were lost in this case.

19                  Q. Okay. Did you also determine from reading this that  
20                  there were specific items identified?

21                  A. Yes, I did.

22                  Q. What were those items?

23                  A. Some of the specific items were three bags of  
24                  evidence; a fingerprint -- latent fingerprint cards and what  
25                  are called ten print cards, inked fingerprints; a Beretta



1 pistol; a shotgun; two gasoline cans; a pom-pom; and an  
2 Olympics bag of some sort or description, when the Olympics  
3 was here in Atlanta. I'm --

4 Q. Did you -- I'm sorry, go ahead.

5 A. I'm searching my mind for -- okay. Those are the  
6 ones that I immediately recall.

7 MS. SHEIN: Okay. Based on the State's AG statement  
8 that that is consistent with the trial transcript, Your  
9 Honor.

10 THE COURT: Any questions concerning that at this  
11 point?

12 MR. MALCOLM: No, Your Honor.

13 THE COURT: Okay. We can proceed then.

14 **BY MS. SHEIN: [Resuming]**

15 Q. Did you also look at exhibits such as actual chain  
16 of custody documents?

17 A. Yes, I did.

18 Q. Were all these things that you looked at and  
19 considered a basis for some of your conclusions?

20 A. Yes, they were.

21 Q. Okay. I want to talk about what evidence audits are  
22 for just a minute.

23 A. Uh-huh.

24 Q. What is an evidence audit?

25 A. An evidence audit -- there are basically two

1 components to an evidence audit: one is called a physical  
2 audit, the other is a procedural audit.

3 A physical audit is to insure that all of the property  
4 evidence that should be in the Evidence Room is in fact in the  
5 Evidence Room, it can be located, it is properly sealed, and  
6 it has not experienced any deterioration, contamination, or  
7 spoilation while in the Evidence Room.

8 A procedural audit is a review of the police agency's  
9 SOPs. Are they legally compliant, in other words, do they  
10 comply with the state statutes? Do they incorporate best  
11 practices? And what are the proofs of practice that would  
12 indicate that that police agency is in fact following it's own  
13 SOPs?

14 The proofs of practice are very often indicated during  
15 the course of the physical audit.

16 Q. And how many audits have you done?

17 A. Approximately 44.

18 Q. And in those audits, have you ever seen a case where  
19 over 70 pieces of evidence have been lost?

20 A. Never. Never.

21 Q. All right. Let's go to your specific findings.

22 A. Uh-huh.

23 Q. Okay. In reviewing your affidavit, please guide me  
24 through what you reviewed for the findings you made in  
25 Question No. 1. And if you'd repeat the question, it would

1 help the Court, I'm sure, understand what you're about to  
2 testify to.

3 A. Question No. 1 is my findings. It is based upon my  
4 review of the materials provided me to date. It is this  
5 expert's finding that insufficient documentation was initiated  
6 and maintained to allow a thorough chain of custody to be  
7 initiated and maintained and did not comport with commonly  
8 accepted law enforcement standards.

9 Q. Can you guide us then through what it is you  
10 reviewed, analyzed, and considered in making that  
11 determination?

12 A. Yes. Of the multiple items of missing, mislocated,  
13 and destroyed evidence, I identified certain pieces of  
14 evidence for, if no other reason, judicial economy, to draw my  
15 attention to.

16 The first was three plastic bags of unknown physical  
17 evidence. This was taken into the custody of the Atlanta  
18 Police Department. The department, upon taking custody of  
19 that evidence, the department or the officer or the  
20 investigator involved did not document an inventory of the  
21 specific items that were placed into those three bags of  
22 evidence.

23 Those three bags of evidence were admitted into the  
24 Evidence Room, contrary to department procedure, and based  
25 upon that there could be -- there could be no future chain of

1 custody of those items. Unknown items being placed in bags,  
2 there is no -- there's no current -- there would be no current  
3 and there would be no future indication as to what was in the  
4 bags, nor the forensic value of the evidence in those bags at  
5 any future date.

6 Again, this was in violation of the Atlanta Police  
7 Department's SOP 8.2.1(a) which states that the receiving  
8 clerk, meaning the receiving evidence clerk, will accept only  
9 those items that have been properly recorded on the Property  
10 evidence Inventory Form. Given that three bags of  
11 uninventoried physical evidence were allowed or entered into  
12 the Property and Evidence Room means that the Property and  
13 Evidence officer did not follow SOP in that case.

14 Q. Did --

15 A. It's a clear violation.

16 Q. I'm sorry. Did you review a number of SOPs that  
17 were a string of SOPs for a series of years when you reviewed  
18 these documents?

19 A. Yes, I did.

20 Q. And do you remember when those years started?

21 A. These years started -- let me go back to my memory  
22 here -- I believe it was about 1996-97, if I'm not mistaken.

23 Q. And carried on through what year did you think that  
24 you stopped?

25 A. The last SOP that I reviewed, I believe it was dated

1 2005.

2 Q. Now in coming to your conclusions that you just  
3 described in the first question that you've answered, what  
4 professional standards did you review to make your -- to give  
5 your opinion in this regard?

6 A. I looked at the CALEA Standard, the Commission for  
7 the Accreditation of Law Enforcement Standard 84.1.1 which  
8 states that all employees, meaning law enforcement officers,  
9 "shall complete a descriptive inventory of every item of  
10 property coming into their possession as a result of their  
11 official duties and responsibilities." And as I stated,  
12 testified, this was not done in this case with the three bags  
13 of evidence.

14 Q. Was this done in regards to the Beretta pistol and  
15 cartridges?

16 A. The Beretta pistol was a failure to maintain a  
17 documented chain of custody, the GBI Laboratory erroneously  
18 returning the Beretta pistol, the magazine, and the cartridge  
19 cases to the Atlanta Fire Department when, in fact, I believe  
20 it was the Atlanta Police Department that submitted them,  
21 submitted the evidence to the GBI.

22 Q. Why is this wrong?

23 A. The GBI SOP mandates that evidence will be returned  
24 to the submitting department.

25 Q. And that was not the submitting department?

1           A.    And that was -- the fire department was not the  
2 submitting department.

3           Q.    What about the gas can?

4           A.    The gas can, there's a -- there's a situation of  
5 conflicting records. I believe that one -- excuse me -- the  
6 Atlanta Police Department -- or excuse me -- it's even getting  
7 me confused right now. There was confliction on the gas can.  
8 The gas can was recovered by the DeKalb County Fire Department  
9 from the burned Porsche. The gas can was submitted to the  
10 DeKalb County Public Safety Evidence Room, their joint Public  
11 Safety Department.

12           DeKalb records indicate that in March of '99 that the gas  
13 can had been released to the Atlanta Police Department.  
14 However, the DeKalb County evidence records, the original  
15 holding agency, DeKalb County, their records indicated that  
16 the gas can, according to their records, was destroyed in  
17 2001.

18           So we have a contradiction between a statement by Atlanta  
19 P.D. that they received the gas can in 1999, and a completely  
20 contradictory record by DeKalb that they had destroyed the gas  
21 can in 2001.

22           Q.    Was this in contravention to the SOPS you read?

23           A.    Yes, it was.

24           Q.    All right. Let's take a --

25           MS. SHEIN: Just a moment, Your Honor.

1 [Brief pause.]

2 **BY MS. SHEIN: [Resuming]**

3 Q. Let's move to your Question No. 2. Would you read  
4 the question, then identify for us how you came to that  
5 conclusion?

6 A. Yes. Question No. 2 is based upon my review of the  
7 materials provided me to date, it is this expert's finding  
8 that the physical evidence was maintained in a manner that did  
9 not comport with commonly accepted professional law  
10 enforcement officer standards.

11 What I analyzed in that regard was between the time of  
12 the commission of the Coffin homicide in December of 1996 and  
13 2002 when the case was declared to be a cold case, in other  
14 words, a lack of viable leads -- excuse me -- and 2002 when  
15 the cold case was reopened, it had been earlier closed as what  
16 was commonly called a cold case, a lack of viable leads. It  
17 was reopened in 2002. At that time it was learned that  
18 approximately 70 items of case-related physical evidence had  
19 been lost, destroyed, or otherwise unlocatable.

20 In respect to those lost items, CALEA, referencing CALEA,  
21 CALEA Standard 84, the Property and Evidence Control, says a  
22 directive requires that a police agency have a directive that  
23 ensures the accountability for an uninterrupted chain of  
24 custody until final disposition of the evidence.

25 And then it goes into a CALEA Standard 84.1.1: A written

1 directive establishes procedures for receiving all evidentiary  
2 property, including establishing security measures for  
3 handling evidence of an exceptional value or sensitive nature.

4 My analysis at that point was that a homicide is a  
5 sensitive case. As I mentioned before, the commonly accepted,  
6 the three most type -- three most sensitive type cases, one of  
7 them being homicide. So the standard, the CALEA Standard is  
8 saying that sensitive types -- sensitive items of evidence  
9 should be given -- afforded extra security measures.

10 Q. Is -- go ahead.

11 A. No.

12 Q. Is this also part of the Georgia Standards you  
13 mentioned earlier?

14 A. I'm sorry, the --

15 Q. Is this also a part of the Georgia Standards?

16 A. Yes, it is. Yes.

17 Q. And you -- I note in your affidavit you reflect on a  
18 state statute, O.C.G.A. 17-3-1.

19 A. The statute of --

20 Q. Go ahead.

21 A. The Statute of Limitations.

22 Q. Yeah. Did you review this statute --

23 A. Yes, I did.

24 Q. -- in forming your opinion?

25 A. Yes, I did.



1 Q. And what does the statute reflect?

2 A. The Georgia Statute of Limitations for a homicide is  
3 that there is no statutory limit.

4 Q. And why is that important?

5 A. Because the evidence -- on a cold case homicide, the  
6 evidence per law would have to be kept forever.

7 Q. There is also fingerprint cards that was also  
8 testified at trial was lost.

9 A. Uh-huh.

10 Q. What should be done with those when they're  
11 collected in a homicide case?

12 A. The latents or the inked prints?

13 Q. Well, let's go through both.

14 A. Okay. The latent prints, those which we cannot see  
15 that are present at a crime scene, once they are located and  
16 -- it's called raising the print to make it visible -- they  
17 should be recovered, and there's various methods of recovering  
18 the latent prints through powders and other forensic  
19 techniques. But the raised prints need to be secured,  
20 maintained. And very often, the way it is in securing them  
21 where powders have been used, fingerprint powders have been  
22 used, is to use what is called a lift tape to lift the powder,  
23 the latent impression and the powder off of the item, and then  
24 to adhere it to a white -- typically a 3x5 card. So we now  
25 have the -- a visible latent print on that card.

1           Those cards should be, number one, inventoried --  
2           identified, number one, as to where the latents were found,  
3           where they were lifted from, who lifted them. And after that,  
4           they should be inventoried on a property -- an Evidence  
5           Inventory Sheet. They should then be put into an appropriate  
6           size envelope, which is sealed. That envelope should be  
7           placed in the Evidence Room.

8           Q.    What's the other type of evidence for fingerprints?

9           A.    The other is what is called inked prints or a ten  
10          print card, and that is where an individual -- their fingers  
11          are inked and then the finger -- their fingers are rolled  
12          individually on the card to provide the ten inked impressions.  
13          Those cards should similarly be inventoried, placed into an  
14          appropriate size envelope, and generally they are also put  
15          into the Evidence Room.

16          Q.    What is AFIS?

17          A.    AFIS is the Automatic Fingerprint Identification  
18          System. It's a national system run by the FBI.

19          Q.    And what is that used for?

20          A.    There's two sides of the AFIS system. One is that  
21          everyone that has been arrested in the United States, their  
22          fingerprints are submitted to the FBI and they go into the  
23          AFIS system.

24                On the other side -- so we now have the print, the ten  
25          prints of the known or identified arrestee. Where latent

1 prints are recovered, those latent prints can also be entered  
2 into the AFIS system. The AFIS computer system, through  
3 various computer -- through its computer program, will begin  
4 to match the unknown latent print to the known ten prints for  
5 identification purposes.

6 Q. In your experience and your audits, if there is a  
7 latent print, a viable latent print, is it usually -- if it's  
8 unknown who they belong to, do they normally put it through  
9 AFIS?

10 A. Yes, they do.

11 Q. Would that be a Standard Operating Procedure?

12 A. Yes, it would be.

13 Q. And that's based on what standards?

14 A. Well, that would be -- in the State of Georgia that  
15 would be based upon GBI procedures, but it is just good, sound  
16 criminal investigative procedure, et al.

17 Q. What about procedures in the collection and  
18 preservation of firearms? Is there a different standard for  
19 them?

20 A. Yes, there is.

21 Q. Can you explain that to us, please?

22 A. Firearms -- a collected firearm, the inventory of a  
23 firearm, to be complete, to be acceptable, should be the make,  
24 model, color, serial number, and caliber of the weapon.  
25 Firearms need -- obviously need to be stored in a safe mode,

1 but all of the standards, the IAPE Standards, CALEA Standards,  
2 and just best practices states that firearms shall be stored  
3 separately from all other classes of evidence. And generally,  
4 it's called double-secure storage.

5 Q. In this case, was that done?

6 A. No, apparently not, no.

7 Q. When you say apparently, what do you mean?

8 A. Well, it was not done. In reviewing, if I may -- in  
9 reviewing a Property Inventory Form, what I found was that the  
10 firearm and several other -- if I may?

11 Q. Take your time.

12 A. The shotgun -- the shotgun, according to the DeKalb  
13 County Public Safety Property Room disposition sheet, which I  
14 reviewed, that document reflects that the shotgun was stored  
15 in the same location as the gas can, the recovered gas can, a  
16 knife, and a flashlight. I found that by looking at the  
17 storage -- the storage address or the bin location, and each  
18 of those items had a -- had the same identical storage  
19 location, Bin A94. This immediately drew my attention because  
20 we have several violations of SOP. In fact, there's a  
21 violation of OSHA Safety Standards that was present here.

22 Q. Explain that to me.

23 A. Well, number one -- number one is that the shotgun  
24 should have been stored separately and stored only with other  
25 firearms, and stored under what is called double-secure

1 storage, and that is a secure storage area within the secure  
2 Evidence Room. Storing the other matter was the gas can.  
3 OSHA regulations and NFPA, National Fire Protection  
4 Association, Standards state that flammables shall be stored  
5 in an OSHA NFPA approved three hour fire rated storage  
6 cabinet. Further, that cabinet must be placed in a fire  
7 resistant area. Generally, that is not with -- a fire  
8 resistant area is generally not within the confines of a  
9 building, it must be in a sally port.

10 Q. What's a sally port?

11 A. A sally port would be a drive-thru area, generally  
12 open at both ends, such that a police car could drive through  
13 from one end to the other. For security purposes they  
14 typically have doors. But sally ports, because you have motor  
15 vehicles going in and out of them, generally have to buy --  
16 generally have to be of fireproof materials. The point being  
17 that this is -- sally ports are generally where law  
18 enforcement agencies place these OSHA NFPA approved fire rated  
19 storage cabinets. The bottom line is that a gas can should  
20 not have been in the Evidence Room.

21 Q. So based on your review of the materials that you've  
22 looked at, including the ones that have been identified in  
23 exhibits that I showed you earlier today, was this a violation  
24 of Standard Operating Procedures?

25 A. Yes, it was.

1 Q. Of those Standard Operating Procedures?

2 A. Yeah, of the SOPs as well as OSHA and NFPA  
3 Standards.

4 Q. All right. Take a look at your Finding No. 3.  
5 Would you refresh the Court's recollection to the question and  
6 how you came to that conclusion?

7 A. No. 3 is based upon my review of materials provided  
8 me to date. It is this expert's finding that the disposal of  
9 numerous items of physical evidence did not comport with  
10 commonly accepted professional law enforcement standards.

11 The basis of my finding was again going back to the fact  
12 that from 19 --

13 Q. Wouldn't that be -- is that a scrivener's error?

14 A. That is a scrivener's error, yes. It should be --

15 Q. I thought so too.

16 MS. SHEIN: Your Honor, on Page 9 --

17 THE WITNESS: Yes.

18 MS. SHEIN: -- it says from 1966 to 2002, it's a  
19 scrivener's error. It should be 1996; is that correct?

20 THE WITNESS: 1996, yes.

21 MS. SHEIN: Which was the -- any objection to him  
22 initialing that at this time as 1996?

23 MR. MALCOLM: No, not at all.

24 MS. SHEIN: Do you have the original exhibit up  
25 there or do I have it?

1 THE WITNESS: No. No, I believe I gave it back to  
2 you. I'm reading off my copy.

3 MS. SHEIN: Yes, here it is. Your Honor, may I  
4 approach?

5 THE COURT: That's fine.

6 MS. SHEIN: Would you just on Page 9 --

7 THE WITNESS: Sure.

8 MS. SHEIN: -- make the correction and then just  
9 initial it.

10 THE WITNESS: Initial it, uh-huh, sure.

11 [Witness initialed document.]

12 MS. SHEIN: Thank you.

13 **BY MS. SHEIN: [Resuming]**

14 Q. All right. Back to Question No. 3.

15 A. Yes.

16 Q. That's from 1996 to 2002.

17 A. Correct. And we were addressing the disposal of the  
18 numerous items, the physical evidence. Again, from 1996 until  
19 2002, a period of six years, this was a cold case, an unsolved  
20 homicide with no investigative leads. However, from reviewing  
21 the records, it seems that evidence during that time period  
22 hadn't been disposed of. So the evidence -- there was no  
23 justification for the disposal of the evidence during that  
24 time period because it was a cold case, an unsolved homicide,  
25 and we talked about the Statute of Limitations.

1           Quite the contrary, because it was a cold case, for those  
2 years the physical evidence should have been retained in a  
3 more exact and more secure manner until the case was solved,  
4 prosecution was completed, or any appeals issues had been --  
5 had been settled.

6           IAPE, the International Association of Property and  
7 Evidence, has a standard that states that a law enforcement  
8 agency should have a systematic review process assuring that  
9 each item of evidence is evaluated for possible purging on an  
10 annual basis. Well, had they -- had they adhered to this  
11 standard of an annual review, they would have quickly realized  
12 that this is evidence associated with an unsolved homicide and  
13 would have left it -- left it be.

14           I think but even more important, though, the best  
15 practice for the long-term or the unknown storage term for  
16 unsolved homicides is to box the evidence up, generally in  
17 uniform size boxes, inventory the contents of the box, the  
18 individual packages for each -- within the box have been  
19 inventoried, but to inventory the individual packages that  
20 they're put into the box, seal the box, and clearly indicate  
21 on the face of the box the case number, very often the  
22 homicide victim's name, the investigating investigator, and  
23 the date of the case. And then taking those boxes of cold  
24 case evidence collectively and storing them in a section of  
25 the Evidence Room that is dedicated for cold case storage.



1           That does several things. Number one is it brings all of  
2           the homicide evidence, the unsolved homicide evidence,  
3           together boxed singularly, and it's in an area that should not  
4           be disturbed. In other words, there should not be, under  
5           those circumstances, any inadvertent destruction or disposal  
6           of the evidence because the cold case evidence is known to be  
7           there and basically to leave it alone.

8           Q.    Based on the pictures you saw earlier, the  
9           description of what you just gave us regarding a cold case,  
10          does it look like that was -- those pictures reflect that type  
11          of organization?

12          A.    There was -- there was absolutely no organization in  
13          that Evidence Room as I was able to discern from those  
14          pictures. So I seriously doubt, based upon viewing those  
15          pictures, that they had any cold case storage, dedicated  
16          storage. I don't think they had any rhyme or reason as to how  
17          they were storing their evidence. It was on the floors. That  
18          is totally unacceptable.

19          Q.    And that's a violation of SOPs?

20          A.    It definitely is.

21          Q.    Is that also a violation of the standards that  
22          Georgia applied at that time?

23          A.    Yes, it is.

24          Q.    Based on the -- let's go to your Finding No. 4. If  
25          you'd repeat the finding and then tell us how you got there.

1           A.    Based upon my review of materials provided me to  
2           date, it is this expert's finding that the supervision of the  
3           physical evidence handling, retention, and the disposal did  
4           not comport with commonly accepted professional law  
5           enforcement experiences.

6           The basis for that foundation was the Atlanta Fire  
7           Department, having taken delivery and receipt of a box of  
8           evidence that was erroneously sent to it by the GBI Lab,  
9           apparently the clerk that receipted for the box had no idea  
10          what was in the box or what to do with the box. And it's my  
11          understanding that from that point on that the box became  
12          lost. The point here is I think it would only be reasonable  
13          for someone receiving a box, not knowing what is in it and  
14          having some indicia that it came from the GBI Lab would be  
15          either to open the box to determine its contents and make a  
16          decision based on that, or otherwise inquire of her supervisor  
17          as to the proper action to take. I don't know that either  
18          were done, but it became clear that the box was later missing  
19          with the physical evidence in it.

20          Q.    So someone received a box and just signed for it and  
21          then placed it in a bin. What should happen with that?

22          A.    If -- if someone other than a designated property  
23          and evidence officer received a box with indicia that it was  
24          from the GBI Laboratory, what they should have done was to  
25          contact the evidence officer immediately, then stating, "I

1 have received -- I have a box here that I've received from the  
2 GBI Lab; I have reason to believe it belongs to you; come and  
3 take custody of it," to ensure that it would be retained  
4 securely.

5 Q. You discussed the Evidence Room clerk's lack of  
6 supervision. Why is supervision important?

7 A. Everyone needs to be supervised. And particularly  
8 in the Evidence Room because, just again, referring back to  
9 those photos there, obviously, whoever was operating and  
10 managing that Evidence Room at that time didn't care. And I  
11 have to believe that either that room was never inspected by a  
12 supervisor or the supervisor didn't care. But the point of it  
13 is it goes right up the chain of command to the top of the  
14 organization. That is why one of the CALEA and the GPAC  
15 Standards is that every Evidence Room will be audited on an  
16 annual basis, and that audit shall be at the direction of the  
17 chief law enforcement officer, either the chief or the  
18 sheriff, to ensure that procedures, policies, storage --  
19 proper storage is being taken into account, as did not happen  
20 with those depicted in the photos.

21 Q. Those -- the testimony earlier, if that was -- if  
22 that is pictures taken in 2005, does that indicate to you that  
23 there's an ongoing violation of Standard Operating Procedures?

24 MR. MALCOLM: Your Honor, I'm going to object to  
25 that question . I don't believe this witness would have

1           personal knowledge to testify to that. He's looked at  
2           some pictures and some other documents. I don't think he  
3           even has personal involvement with that organization to  
4           say it was an ongoing thing or that was something that  
5           took place in the matter of a couple of weeks.

6           MS. SHEIN: That's not what I asked him. I asked if  
7           those pictures were taken in 2005, which is what was  
8           testified to earlier today, would that be evidence kept  
9           in Standard Operating Procedures that he reviewed in this  
10          case and that are in evidence in this case.

11          MR. MALCOLM: My problem with her initial question  
12          was I believe she asked if that was -- would be  
13          symptomatic of an ongoing issue with that Evidence Room,  
14          and I have an objection to that portion of her question.  
15          I don't have an objection to -- as she just restated it.

16          MS. SHEIN: All right. That's why I said I  
17          apologize. I didn't hear myself. Thank you.

18          THE COURT: Okay. I'd like y'all to rephrase.

19          MS. SHEIN: All right.

20       **BY MS. SHEIN: [Resuming]**

21           Q.    If that -- if those pictures were taken in 2005,  
22           would that indicate to you, based on your review of the  
23           Standard Operating Procedures in 2005, that the Evidence Room  
24           is not in compliance with Standard Operating Procedure?

25           A.    Yes, that would.

1           Q.    Was it also not in compliance with 2005 CALEA  
2 Standards or GPAC Standards?

3           A.    It would be, yes.

4           Q.    Now going to your Finding No. 5.

5           A.    Yes.

6           Q.    If you would identify that for us.

7           A.    Finding No. 5 is based upon my review of the  
8 materials provided to me to date. It is this expert's finding  
9 that there was a pattern and practice of police agency, fire  
10 department, GBI Laboratory, and prosecutor's office of failing  
11 to respond timely to deficiencies in the chain of custody,  
12 handling, retention, and disposal of physical evidence  
13 associated with this matter, and that pattern and practice did  
14 not comport with commonly accepted professional law  
15 enforcement standards.

16          Q.    And is that based on review of information that I  
17 provided as well as information you reviewed here today?

18          A.    Yes, it is.

19          Q.    Is your conclusion here consistent with the same  
20 thing after reviewing evidence that -- documents that have  
21 been put into evidence?

22          A.    Yes, it is.

23               MS. SHEIN: Your Honor, may I have a moment?

24               THE COURT: Yes.

25               MS. SHEIN: Your Honor, could we take a 15 minute

1 break?

2 THE COURT: Sure.

3 MS. SHEIN: Appreciate that. And I should be done  
4 very shortly.

5 THE COURT: Okay.

6 **[Brief break was taken.]**

7 \* \* \*

8 MS. SHEIN: I tender the witness at this time.

9 MR. MALCOLM: Just a few questions, Your Honor.

10 **CROSS-EXAMINATION**

11 **BY MR. MALCOLM:**

12 Q. Mr. Doran, just so I have a complete understanding  
13 of where you got all of your information from in coming up  
14 with your conclusions in this case, you said that you reviewed  
15 the petition and the amended petition provided to you by  
16 Petitioner's counsel; is that correct?

17 A. I -- going back to my Exhibit A, the Motion and  
18 Memorandum Support of Application for the Writ, the Supplement  
19 to Habeas Petition, and the Amendment to Petitioner's  
20 Supplement to the Habeas Petition.

21 Q. Okay. And you also reviewed multiple Standard  
22 Operating Procedures that had previously been tendered at this  
23 hearing, those from the GBI as well as, I believe, DeKalb Fire  
24 as well as CALEA Standards; is that correct as well?

25 A. Among others, yes.

1 Q. Among others.

2 A. Yes.

3 Q. Okay. You've also examined the photographs we heard  
4 mentioned to have been -- you've seen those?

5 A. I have seen those photographs, yes.

6 Q. All right. And those were the photographs, I  
7 believe, we were talking about.

8 MR. MALCOLM: May I approach the witness, Your  
9 Honor?

10 THE COURT: Yes, sir.

11 Q. These are photographs, I believe, as previously been  
12 testified, the Evidence Room there at the Atlanta Police  
13 Department?

14 A. Yes.

15 Q. And you reviewed those as well as the SOPs and the  
16 petition and amended petition in formulating your opinion;  
17 correct?

18 A. Among others, yes.

19 Q. What others, specifically?

20 A. Well, the CALEA Standards.

21 Q. I said CALEA -- I'm sorry, and CALEA Standards.  
22 Other than those, what else did you take a look at?

23 A. At the moment I'm at a loss. I would have to say  
24 that's the substance of it, yes.

25 Q. Okay. And I believe there's also, through your

1 direct examination, you looked at a summation of parts of the  
2 trial transcript provided to you by Petitioner's counsel --

3 A. That's correct.

4 Q. -- is that correct as well?

5 A. That's correct.

6 Q. But you didn't actually look at parts of the trial  
7 transcript themselves; is that correct?

8 A. Excerpts or certain pages?

9 Q. Right.

10 A. No, of the trial? No, I didn't, no.

11 Q. After you'd seen like the transcript --

12 A. Yes, I have.

13 Q. -- of the court hearing before?

14 A. Yes.

15 Q. It's your testimony that you did not look at any  
16 actual trial transcript from Mr. Davis' criminal trial;  
17 correct?

18 A. That's correct.

19 Q. Everything you looked at in regards to the  
20 transcript was the summary provided by Petitioner's counsel?

21 A. I would say that's a fair approximation.

22 Q. All right. So it's fair to say that you didn't  
23 review -- excuse me -- or talk to any of the witnesses who may  
24 have testified at trial in this criminal case of Mr. Davis.

25 A. No.



1           Q.    Okay.  Didn't speak to any of the investigators who  
2 worked the case.

3           A.    No.

4           Q.    Didn't review any of their case files or  
5 investigative files.

6           A.    No.

7           Q.    And certainly didn't review their actual transcribed  
8 testimony from the trial itself.

9           A.    No.

10          Q.    All right.  In regards to -- there was mention of a  
11 double-secured storage facility where firearms should be  
12 maintained and stored.  What -- which one of the SOPs does  
13 that fall under, or did you see that in one of the SOPs that  
14 you examined in regards to preparation for testimony here  
15 today?

16          A.    No, I believe my testimony was that they did not  
17 have, but that is the proper way to store firearms.

18          Q.    Okay.  So they were -- they weren't specifically --  
19 that provision wasn't specifically in any of the SOPs of the  
20 GBI, Atlanta Police, or DeKalb Fire that you reviewed?

21          A.    I did not observe any mention of double-secured  
22 storage in any of the SOPs.

23          Q.    All right.  And you don't have any firsthand  
24 knowledge of any of the evidence that was obtained from DeKalb  
25 County at any point during the criminal investigation against

1 Mr. Davis, do you?

2 A. I don't understand the question. When you say  
3 firsthand knowledge, did I --

4 Q. Firsthand knowledge, personal knowledge of any  
5 evidence that was ever obtained, observed, or documented at  
6 any point by any of the agencies in DeKalb County.

7 A. Other than what I have read in these documents?

8 Q. Right.

9 A. No, I have no personal knowledge.

10 Q. Okay. And what specifically have you read in those  
11 documents about the DeKalb County case?

12 A. In terms of pieces of evidence?

13 Q. Yes.

14 A. Well, there was the gas cans, there was the --  
15 everything that came out of the Porsche --

16 Q. Okay.

17 A. -- as I recall.

18 Q. And your information is coming from where,  
19 specifically?

20 A. From the documents that I testified that I had  
21 examined in the result of my Exhibit A.

22 Q. Right. But where specifically in those documents?

23 MS. SHEIN: Your Honor, I object on the premise that  
24 these -- these items have already been admitted to as  
25 being lost. There's no sense in him trying to -- he

1           didn't touch the items, they're lost. But they -- it's  
2           already in the transcript and the AG has admitted that  
3           these are items that were identified in the transcripts.  
4           I don't know where -- you know, what the point of this is  
5           and what relevance this is.

6           MR. MALCOLM: I'm simply trying to establish where  
7           he got his information from, Your Honor, in formulating  
8           his expert opinion.

9           THE COURT: I'll allow it. He's got him on cross.  
10          Try to answer the question, sir. Do you need him to  
11          repeat it?

12          THE WITNESS: Yes, would you repeat it, please?

13          MR. MALCOLM: Sure.

14       **BY MR. MALCOLM: [Resuming]**

15          Q.    What specific pieces of information that you looked  
16          at in regards to preparing for court today did you observe or  
17          review anything about any of the evidence from the DeKalb  
18          County case?

19          A.    I have in front of me Exhibit N. I don't know what  
20          the original document it -- but it's a DeKalb County Public  
21          Safety Property Room Disposition Sheet that lists, among other  
22          things, is a Browning shotgun, gas can and knife that I  
23          testified to.

24          Q.    Other than the information on that sheet you're  
25          holding, that's really your limited knowledge of that agenda?

1           A.    No, that's not my testimony. I'm saying that this  
2 is one of the documents.

3           Q.    What is?

4           A.    I would have to go through all the paperwork here or  
5 scour my expert witness report to try to determine where and  
6 in any page or paragraph that I referred to an exhibit.

7           Q.    That would be fine.

8           A.    Okay.

9                       [Witness reviewing document.]

10          A.    I believe my Expert Witness Report, Page 4, about  
11 the third paragraph from the bottom. In Exhibit Z Motion and  
12 Memorandum Support of Application for the Habeas is one  
13 possible.

14          Q.    Okay. Now you're referencing in your report, and I  
15 think I'm following you here, third paragraph from the bottom  
16 on Page 4 of your affidavit. It says, "Motion and Memorandum  
17 in Support of Application for Writ of Habeas Corpus, Exhibit  
18 Z."

19          A.    "Z." And --

20          Q.    What is Exhibit Z? Is that the Motion and  
21 Memorandum in Support of Application for Writ of Habeas  
22 Corpus?

23          A.    No.

24          Q.    Okay.

25          A.    I would -- again, I would -- that's a reference.

1           Q.    Okay.  But is Exhibit Z attached to your expert  
2 affidavit?

3           A.    No, it's not.

4           Q.    Okay.  Are any of the exhibits attached to your  
5 expert affidavit, Mr. Doran?

6           A.    Are any of the exhibits attached?  No, they're not.

7           Q.    All right.  And when did you say you became involved  
8 in this case?

9           A.    June 9<sup>th</sup>, as I recall.

10          Q.    Of this year?

11          A.    Of this year, correct.

12          Q.    Okay.  And when did you reach your conclusions as  
13 shown in your affidavit?

14          A.    On the date of signing on the dated page, which I  
15 believe is --

16          Q.    July 19<sup>th</sup>, 2001?

17          A.    July 19<sup>th</sup>, 2011.

18          Q.    Right, okay.  And did you perform any audits of any  
19 of the agencies involved in this investigation, criminal  
20 investigation?

21          A.    Have I personally audited their Evidence Rooms?  Is  
22 that --

23          Q.    Yes.

24          A.    No.

25          Q.    Okay.  Have you seen -- personally seen the Evidence

1 Rooms --

2 A. No.

3 Q. -- at any point in your involvement in this case?

4 A. No.

5 Q. Okay. Haven't seen any photographs of DeKalb Fire  
6 Department or Atlanta -- well, you've seen Atlanta Police  
7 Department -- DeKalb Fire Department or any of the other  
8 agencies, GBI, anything along those lines?

9 A. None that I recall, no.

10 Q. Okay. How they store evidence?

11 A. No.

12 Q. And I believe you said this is the first time you've  
13 testified in actual open court in regards to formulating an  
14 expert opinion in regards to the preservation of evidence in a  
15 criminal matter?

16 A. That was my testimony, but if I may add to it, it's  
17 the first time I've had to testify.

18 Q. Okay.

19 A. Because in all the other cases, respondents pled.

20 Q. Okay. All right. I don't think that's an option in  
21 this matter.

22 A. There was no trial. There was no trial after my  
23 expert witness report was submitted, that's the point I'm  
24 making.

25 Q. Okay. All right.

1 MR. MALCOLM: One moment, Your Honor.

2 [Off the record.]

3 MR. MALCOLM: That's all I have, Your Honor. Thank  
4 you.

5 THE COURT: Anything else?

6 MS. SHEIN: Just briefly, Your Honor.

7 **REDIRECT EXAMINATION**

8 **BY MS. SHEIN:**

9 Q. You had testified on cross that you looked at the  
10 CALEA Standards in your analysis of the case. But I believe  
11 you testified throughout our discussion and questions I asked  
12 you that you also looked at other things, such as GPAC State  
13 Statutes and -- I'm not sure -- OSHA and something else, I  
14 forget what the initials were; is that correct?

15 A. That's correct, IAPE.

16 Q. So there were more than just GPAC that you looked at  
17 in terms of coming to your conclusion?

18 A. Oh, absolutely. Yes.

19 Q. The exhibits you reviewed were also exhibits that  
20 had actually been provided to you today; is that correct?

21 A. I'm sorry?

22 Q. Your testimony is also based, and your conclusions  
23 are based on information you also reviewed today --

24 A. Yes, that's correct.

25 Q. -- that I handed you that had been admitted in to

1 exhibits [sic]?

2 A. That's correct.

3 Q. Did you -- you received a copy of the habeas and the  
4 supplement to the habeas; is that correct?

5 A. That's correct.

6 Q. And there were exhibits attached to that; correct?

7 A. Yes, there are.

8 Q. If I can, Exhibit Z, does it sound more like it  
9 comes from the supplement than the original habeas?

10 A. I'm at a loss, counsel. I --

11 MS. SHEIN: The record will reflect that, Your  
12 Honor. That's why the Exhibit Z was not in the original  
13 habeas petition, it's actually part of the supplement.  
14 And also for the record, just to clarify, Exhibits J and  
15 H in the habeas have been admitted into evidence today.  
16 So they're the same. And they're the same in the habeas  
17 as Exhibits J and H. I just wanted to clarify that. We  
18 checked that with the exhibits that have been admitted,  
19 and those are the two from the habeas that are in there  
20 as J and H.

21 **BY MS. SHEIN: [Resuming]**

22 Q. I recall reading something in your material that  
23 suggested that you had also testified in a case -- or you  
24 testified about the Terry case, about a Terry search?

25 A. Yes.



1 Q. Did you testify or is that a deposition?

2 A. No, that was expert witness. Again --

3 Q. I'm sorry, that was what?

4 A. It was -- it was a Terry case. It was a Terry stop  
5 by a municipal and federal officer that involved questions of  
6 search and seizure and the later seizure of a firearm.

7 Q. What was the name of that case; do you recall?

8 A. Ooh --

9 Q. Okay, that's all right, I won't put you through  
10 that. But was this a criminal case?

11 A. Yes, it was.

12 Q. And you testified for the Defense or did you testify  
13 for the government?

14 A. It was for -- for the government.

15 Q. Thank you.

16 MS. SHEIN: Your Honor, at this time I would tender  
17 Exhibit P-47 as an accurate description of the testimony  
18 that he's provided here today and the affidavit that he  
19 has verified with his signature and date.

20 MR. MALCOLM: Your Honor, that does seem to be an  
21 accurate representation of what he's testified to here  
22 today, and we don't have any objection to it.

23 THE COURT: All right. I'll admit it without  
24 objection.

25 **[WHEREUPON, Petitioner's Exhibit Number 47 was admitted**

1           **into evidence without objection.]**

2           MS. SHEIN: Thank you. I have no further questions  
3 of the witness, Your Honor.

4           THE COURT: Anything else on recross?

5           MR. MALCOLM: No, Your Honor.

6           THE COURT: Can this witness be excused?

7           MS. SHEIN: He sure can. Thank you very much.

8           THE WITNESS: Thank you, Your Honor.

9                       [Witness excused.]

10          MS. SHEIN: Your Honor, I believe there's no other  
11 witnesses here today, so it probably would be an  
12 opportunity for us to quit kind of earlier --

13          THE COURT: Okay.

14          MS. SHEIN: -- than anticipated and start again  
15 tomorrow.

16          THE COURT: Okay.

17                       [Off the record in re: scheduling.]

18          MR. ABT: Are we back on?

19          THE COURT: Wait a minute. I'm not sure why we're  
20 back on, but we're back on the record.

21          MR. ABT: Sorry. There was one other issue.  
22 Regarding -- since we are starting with Mr. Samuel in the  
23 morning, Your Honor, and there's going to be three other  
24 attorneys who will testify following him, these are  
25 lawyers, Judge, that have previously represented Mr.

1           Davis. We are arguing -- we have argued in our habeas  
2           brief and we'll continue to argue that these attorneys  
3           were ineffective in their counsel and representation of  
4           Mr. Davis.

5           I would like permission, as a result of that, and I  
6           think these lawyers know why they're being called, to  
7           treat them as adverse witnesses and cross-examine them as  
8           such, given the fact that, you know, they are lawyers and  
9           they understand that I'm trying to prove that they did a  
10          bad job.

11          MS. GALLOW: Your Honor, I would strenuously object  
12          to counsel being able to treat them as adverse witnesses.  
13          Just because they've alleged ineffective assistance of  
14          counsel claim does by no mean show that they are hostile,  
15          unless otherwise proven. But I would object to them  
16          being able to treat them as a hostile witness, Your  
17          Honor.

18          THE COURT: Well, I think we'll just have to wait  
19          and see how -- I don't know how they're going to respond.  
20          I've had lawyers on the stand that say: Yeah, I was  
21          ineffective. So we'll just have to wait and see.

22          MR. ABT: Okay. Very good.

23          THE COURT: Okay.

24          MR. ABT: Thank you, Judge.

25          [Proceedings adjourned for the evening.]

C E R T I F I C A T E

STATE OF GEORGIA

COUNTY OF GWINNETT

I hereby certify that the above and foregoing Pages 122 through 354 are a true and correct transcription of Volume II of VII of the habeas corpus proceedings taken down by me in **Scott Winfield Davis vs. Tony Howerton, Warden, Phillips State Prison, Civil Action Number 10-A-0741-2.**

I further certify that I am neither related nor counsel to any of the parties and am not financially interested in the matter.

**This certification is expressly withdrawn and denied upon the disassembly and/or photocopying of the foregoing transcript or any part thereof unless disassembly and photocopying is done by the undersigned Certified Court Reporter and original signature and official seal attached thereto.**

WITNESS my hand and official seal in Gwinnett County, Georgia, this 19th day of December, 2011.

---

Beth O. Capell, CCR, CVR  
Certificate Number A-1290  
Official Court Reporter

Gwinnett Superior Ct./Div. II

1                                   **WEDNESDAY - JULY 27, 2011**

2                                   [Petitioner brought into courtroom.]

3                                   THE COURT:   Okay.

4                                   MR. ABT:    Good morning.

5                                   THE WITNESS:   Good morning.

6   Whereupon,

7                                   **DONALD FRANKLIN SAMUEL,**

8   having been duly sworn under oath, was examined and testified  
9   as follows:

10                                   **DIRECT EXAMINATION**

11   **BY MR. ABT:**

12                   Q.    Please state your name for the record.

13                   A.    Donald Franklin Samuel S-A-M-U-E-L.

14                   Q.    Mr. Samuel, you're an attorney?

15                   A.    I am.

16                   Q.    You're a member of the State Bar of Georgia?

17                   A.    Yes.

18                   Q.    How long have you been practicing law?

19                   A.    I graduated in May of 1980.

20                   Q.    Okay.  Where did you go to law school?

21                   A.    UGA.

22                   Q.    And how many jurisdictions do you think you've  
23   practiced in other than Georgia?

24                   A.    I've been in State Court in Florida, and Federal  
25   Court in probably 20 different states.

1 Q. Do you remember what year your first jury trial was?

2 A. Well, I clerked for a judge for two years, so I  
3 didn't actually start practicing until 1982, and I was --  
4 either '83 or '84, within a year or two.

5 Q. And would it be fair to say you do solely criminal  
6 defense?

7 A. With extraordinarily few exceptions. I've tried one  
8 civil personal injury case, a lot of forfeiture cases, which  
9 were technically civil, but other than that, exclusively  
10 criminal.

11 Q. When was your most recent trial?

12 A. I tried a case in Montgomery, Alabama about a month  
13 ago, the first week in May.

14 Q. And can you give me an estimate of how many trials  
15 you have had in your career, jury trials?

16 A. You know, I have a partner who for many, many years I  
17 was carrying the briefcase for, so if you include those, the  
18 number would be over a hundred-fifty. If you look at trials  
19 where I feel like I had kind of primary responsibility or, you  
20 know, at least did the opening or the closing or something more  
21 substantial than carrying a briefcase, still over a hundred  
22 felonies.

23 Q. And of those --

24 A. Don't ask me how many acquittals. That's not going  
25 to be the next question, is it? Don't do that. Don't go

1       there.

2           Q.     No, I'm not -- I'm not going to do that. You're not  
3 going to get that asked. But I would ask you how many murder  
4 cases -- and it can be cases that not necessarily went to  
5 trial, but total, how many murder cases you've been involved in  
6 as the lead counsel?

7           A.     You know, it would be such a guess, but 20, 25 maybe.  
8 But I could be off by quite a bit.

9           Q.     Have you been lead counsel in arson cases?

10          A.     Well, Wayne Carr's case, but that was an appeal, new  
11 trial motion and appeal. Wayne Carr was a famous case  
12 involving Nancy Grace's last trial, the Hastings arson case.  
13 My firm has had other arson cases in which I've participated.

14          Q.     And you've also handled, been lead counsel, on a fair  
15 number of appeals, I take it?

16          A.     I'm --

17          Q.     Both State and Federal?

18          A.     At least 50 or 60, I'd say.

19          Q.     How do you generally prepare a case for appeal?

20          A.     Well, I tell you, there's a big fork in the road  
21 right in the beginning with regard to State cases, and that is  
22 whether trial counsel is going to remain in the case or not  
23 remain in the case. If trial counsel's going to remain in the  
24 case, then the issue of ineffective assistance of counsel is  
25 not something that I need to be concerned about or couldn't --



1 would not be allowed to be concerned about at that point. So  
2 that's a big fork in the road. If trial counsel is out of the  
3 case, then you basically, you know, to the extent that  
4 resources allow, you have to start from the beginning. Because  
5 at the new trial stage, of course, in Georgia, if trial counsel  
6 is out of the case, you have to, if you're ever going to, raise  
7 an ineffective claim. So you really have to start as if you're  
8 the trial lawyer. What did the lawyer miss? What did he do  
9 wrong, he or she? And so that's one fork in the road.

10 If you go the other fork in the road and the trial counsel  
11 is still in the case, then it's primarily, with some  
12 exceptions, just looking at the record and trying to figure out  
13 what appellate issues exist in the case based on the record.

14 Q. Okay. Well, then let's talk about the second fork --

15 A. Right.

16 Q. -- in the road that you just spoke of.

17 A. Right.

18 Q. Would you normally read the trial transcript as part  
19 of your preparation?

20 A. Well, to the extent that "normally" suggests that  
21 there's ever any exceptions, the answer is always. I mean,  
22 obviously, you can't do an appeal without reading the record.  
23 It would be absolutely impossible.

24 Q. Would you review the evidence provided in discovery  
25 by the State?

1           A.     Absolutely. When you say read the -- you mean the  
2 documentary discovery?

3           Q.     Absolutely.

4           A.     Pretrial hearings, if jury selection was taken down,  
5 I mean, to the extent that there's anything in the file that's  
6 available, I can't imagine a lawyer who didn't read everything  
7 being competent.

8           Q.     What else -- sorry.

9           A.     That's all right.

10          Q.     What else would you do to go about narrowing or  
11 identifying the legal issues to raise on appeal, other than  
12 reviewing the trial transcript and documentary evidence?

13          A.     Well, again, if we're talking about a non IEC case  
14 where the lawyer is still -- the trial counsel's in the case.  
15 I mean, obviously interviewing the trial lawyer, trying to  
16 figure out if something that went on that's not in the record.  
17 You know, I mean obviously that happens sometimes. There's  
18 sidebar conferences that aren't recorded. There's -- turns out  
19 that the judge went back in the jury room and was talking to  
20 the jury during deliberations. I mean, those kinds of things  
21 are not going to be in the record. So you've got to find out  
22 if something went on that you could develop, you know, in a new  
23 trial hearing. You know, interviewing the client, interviewing  
24 other people who might have some idea of something that went on  
25 outside the record that you could raise.

1 Q. Would you talk to your client?

2 A. That's what I just said: interviewing the client,  
3 client's family if they might know something, and the trial  
4 lawyer.

5 Q. I'm going to jump --

6 A. Sure.

7 Q. -- a little bit for a second. In -- I assume you've  
8 also handled a number of motions for new trial?

9 A. Absolutely.

10 Q. Could you give me an estimate as to how many of those  
11 you've had?

12 A. I've just never even tried to count, and I'm afraid  
13 I'd be inaccurate. But I'd say that most of the appeals I've  
14 handled I've also done a new trial motion. I'm really  
15 uncertain about it, but I'd say 40, 50, 60, you know, but the  
16 -- a lot of times there's not much to the new trial motion.  
17 Sometimes I in fact am hired after the Notice of Appeal has  
18 been filed so -- but a lot, all right?

19 Q. A lot more, maybe, than anyone that's in this room?

20 A. Well, not Paula, but most of the other people.

21 Q. What -- well, maybe I should jump back for a minute.  
22 Are you a member of any -- besides handling, obviously, a great  
23 number of criminal cases in your career, are you a member of  
24 any professional organizations or associations?

25 A. I am a member of the Georgia Association of Criminal

1 Defense Lawyers.

2 Q. Let me stop you there. What type of member? What  
3 level of membership do you have there?

4 A. Dues paying.

5 Q. Are you a life member?

6 A. I am not a life member, no. I'm a past president,  
7 former chairman of the AMICUS Committee, former chairman of the  
8 Legislative Affairs Committee. I am a member of the American  
9 College of Trial Lawyers, I'm a member of the American Board of  
10 Criminal Lawyers, NACBL, which is just a dues paying  
11 organization, Atlanta Bar Association.

12 Q. Do you know when your most recent appeal was?

13 A. Well, I remember the most recent decision was that  
14 Chua case C-H-U-A from the Georgia Supreme Court that came out  
15 about -- well, it came out while I was in Montgomery on trial  
16 there, so it came out about six weeks ago.

17 Q. Okay. How much time do you typically spend when you  
18 prepare a case for a motion for new trial on appeal?

19 A. You know, it varies. I mean, I imagine a death  
20 penalty case I might spend a year, you know, with associates  
21 working on it, you know. Or I've done appeals of DUIs, where  
22 it does not take a year to prepare, so the range is so huge  
23 it's almost pointless to answer the question.

24 Q. Let me ask you about a murder case where there's no  
25 death penalty.

1           A.     There's no death penalty. You know, again, I just  
2 wouldn't know where to begin to give an estimate because it  
3 varies so much.

4           Q.     Well, do you think it would be more than a hundred  
5 hours or less than a hundred hours?

6           A.     You know, if you're including reading the record,  
7 going to the prison, meeting with the client and everything,  
8 it's obviously more than 100 hours.

9           Q.     Now do you recall how you prepared for the motion  
10 for new trial and appeal in the Scott Davis case?

11          A.     Well, not every single detail, but I was originally  
12 -- the first -- well, the first knowledge I even had about the  
13 case was Brian Steel, with whom I am very close friends, called  
14 me during the trial. He would -- really almost every day  
15 during the trial, as I recall. And he was telling me about  
16 issues that were going on, raised, and kind of the facts of the  
17 case, which I just did not know from the newspaper or from any  
18 other source. So I knew about the case just as the trial was  
19 going on.

20          And then after the verdict, some time passed and -- and I  
21 don't remember how much time, I mean, not even within a month  
22 or two, I couldn't give you an estimate -- Brian Steel called  
23 me and asked if I would join him in the appeal, and we talked  
24 money and I agreed to work with him on the appeal. And I  
25 should emphasize right from the outset, it was agreed he would

1 stay on the case, as would Bruce.

2 Q. And I'm not going to ask you how much you were paid,  
3 but you were compensated in the case?

4 A. Yes, I was paid in full by the family or someone, I  
5 can't remember who, I think Mom or Dad.

6 Q. And so once you were retained, what did you do to  
7 begin preparation for the motion for new trial and then  
8 ultimately the appeal?

9 A. Well, I can't give you necessarily in chronological  
10 order. I remember meeting with Dr. Davis and his wife in  
11 Brian's office one evening. Kind of went through issues with  
12 them. I spent a lot of time on the phone with Brian and -- I'm  
13 sorry for using first names -- Brian Steel and Bruce Morris,  
14 talking about the issues. It was a fairly large record. I  
15 went and saw the client at the prison who -- as I remember, he  
16 was in Gwinnett County, I guess he's in the same place now --  
17 met with Scott a couple times at the prison. I remember  
18 reading the -- some of the transcripts, which now that -- I  
19 will remember Mark Kadesh was involved in, who I know -- knew a  
20 lot better in the past. Don't see him that often now. There  
21 were a lot of issues raised. Obviously, the lost evidence  
22 issue was a central focus of what everybody was dealing with.

23 We spent time on the issue dealing with the A.D.A. in  
24 Fulton County -- Abramson, is that her name?

25 Q. Gail Abramson.

1           A.     Gail Abramson. There were issues with her and her  
2     role in the wiretaps and all. I remember reading all those  
3     transcripts. Mr. Steel and I agreed we would divvy up certain  
4     issues for purposes of the appeal. This is kind of going to  
5     the back end before the new trial motion, that I would handle  
6     certain issues, the Miranda issue, the lost evidence issue, the  
7     actual briefing. I think he did the Statement of Facts. But  
8     -- and that kind of translated back until how the new trial  
9     motion was handled.

10           Mr. Davis -- Scott if I can use his first name to  
11     distinguish him from his father -- would call frequently. I  
12     would talk to him on the phone. We would talk about different  
13     issues, different ways to pursue -- I'm sorry.

14           Q.     No, you're fine.

15           A.     Okay. Different ways to pursue the lost evidence  
16     issue. Scott is extraordinarily thorough and meticulous, and  
17     it was like having a fabulous assistant working on the case.  
18     Sometimes I felt like I was carrying his briefcase, so to  
19     speak.

20           Q.     How much time do you think you spent -- well, let me  
21     -- before I ask you that, in terms of the motion for new trial  
22     you also divvied up responsibilities with Mr. Steel?

23           A.     Well, certainly the briefing issues. I mean, the  
24     transcript, I guess, would speak for itself. I don't remember  
25     Mr. Steel actually handling any witnesses, but I may be wrong

1 about that. I don't remember Mr. Morris handling any  
2 witnesses. But, I mean, obviously the transcript is going to  
3 show who was doing it, but I seem to remember doing the  
4 witnesses but I -- I just -- I'd hate to just guess when the  
5 transcript would obviously show which lawyers were doing which  
6 issues.

7 MR. ABT: Sorry, Your Honor. Just a moment.

8 [Brief pause.]

9 **BY MR. ABT: [Resuming]**

10 Q. I'm going to show you what --

11 MR. ABT: Judge, can I approach the witness?

12 THE COURT: Yes, sir.

13 Q. Mr. Samuel, I'm going to show you what's been marked  
14 as Exhibit P-48, and ask if you are familiar with that  
15 document.

16 A. Well, it says it's the transcript of the proceedings  
17 and hearing on motion for new trial, and I'm -- I'm familiar  
18 with it.

19 Q. Okay. And you were present and conducted that  
20 hearing in front of Judge Campbell in Fulton County?

21 A. There was more than one, but yes.

22 Q. There was more than one what?

23 A. There was certainly more than one day we were there.  
24 I -- it seems to me we -- well, whatever the transcript says,  
25 it says. It seems to me there were three times. One of them



1 got aborted because there was issue about -- there was a  
2 controversy, internals of the defense that -- not necessarily  
3 relevant, that we aborted the hearing altogether. And I would  
4 -- I seem to remember having two completely separate hearings  
5 or sessions in court, but if I'm wrong, I'm wrong. You'd think  
6 that I could remember something from three years ago, but I may  
7 be wrong about that.

8 Q. Okay. Well, let me ask you this. If you'll turn to  
9 -- and there is in fact a certification page on the back of the  
10 transcript; is that correct?

11 A. Yes, Page 71.

12 Q. If you'll turn to the first page where I guess -- I'm  
13 sorry, Page 2.

14 A. Okay.

15 Q. Where on the Court begins proceedings on January 11<sup>th</sup>  
16 of 2008.

17 A. Right.

18 Q. Does that refresh your recollection as to being in  
19 court at that time and arguing before the Court?

20 A. I have no reason to question that it was January  
21 11<sup>th</sup>.

22 MR. ABT: Judge, if I could just have a minute.

23 [Brief pause.]

24 MR. ABT: Your Honor, just -- I think -- I've  
25 conferred with the State, and they're going to admit the

1 original certified version of the motion for new trial, so  
2 I'm not going to seek to admit that at this time. I'm  
3 just going to use it to refresh Mr. Samuel's recollection.

4 THE COURT: That's fine with me unless there is some  
5 objection.

6 MR. ABT: I've conferred with the State and they  
7 intend to admit the original.

8 THE COURT: Right, but --

9 MS. SMITH: Well, to be accurate, Your Honor, we  
10 don't have the original motion for new trial transcript.  
11 That would be on file in the Supreme Court of Georgia.  
12 And I was just -- counsel and I at a break will discuss  
13 possibly stipulating that the record on file in the  
14 Georgia Supreme Court would be part of the record in this  
15 case, and we could loan the Court a copy. That's  
16 something we have done in the past to avoid having to  
17 introduce all these pages, but that's something we have  
18 not yet discussed. But it will be before Your Honor  
19 either as part of the record or per stipulation.

20 THE COURT: Okay. That's fine. So y'all, I'm  
21 assuming, will work it out.

22 MS. SMITH: Yes.

23 MS. SHEIN: Yes, Your Honor. We don't want the extra  
24 paper in the courtroom.

25 **BY MR. ABT: [Resuming]**

1 Q. I'm sorry.

2 A. I'm sorry, is there a question?

3 Q. Yeah. I'm getting like -- how much time do you think  
4 you took in preparing for the motion for new trial as opposed  
5 to the appeal in this case?

6 A. I just couldn't even begin to give you a number. I  
7 mean, if you include trips to Gwinnett County Jail and -- I  
8 just --

9 Q. Let me just try and use a hundred hours as a frame of  
10 reference. Do you think it was more than a hundred hours of  
11 time or less than a hundred?

12 A. A hundred hours.

13 Q. Okay.

14 A. But give or take a large number, I just can't tell  
15 you. It was a lot of time. A lot of transcripts to read, a  
16 lot of phone calls, a lot of meetings.

17 Q. Same question with respect to the appeal. If you  
18 have any idea how much time you spent on this particular  
19 appeal, if you have any idea whether it was more or less than  
20 say a hundred hours?

21 A. Well, I'd say less because most of the briefing was  
22 done for the new trial motion, and I mean at that point you're  
23 just putting together a brief. And Mr. Steel did a good deal  
24 of the brief, the document itself, so I'd probably say less  
25 than 100 hours if you're just -- say from the date the new

1 trial was absolutely over. That doesn't include the oral  
2 argument and so forth.

3 Q. Did you utilize any -- from your firm any associate  
4 attorneys or non-lawyers to assist you in the preparation for  
5 the motion for new trial?

6 A. I do not believe so, other than my secretary,  
7 obviously, but there were no paralegals or associates in my  
8 firm working on this case that I recall at all.

9 Q. And for the record, who else -- who were the other  
10 attorneys of record with you in the motion for new trial and  
11 the appeal?

12 A. Bruce Morris, Brian Steel, Alan Manheim, I see him on  
13 the -- Exhibit P-48 here.

14 Q. Was he still involved at that point?

15 A. Well, his name is on the transcript, so I assume he  
16 was there that day. He had a very, very minor role. And I  
17 can't remember -- I can't remember him actually doing anything,  
18 but I hate to denigrate what he did. If he did do something,  
19 it's just not in my memory right now if he did anything.

20 Q. You mentioned earlier that you were the primary  
21 attorney responsible for the missing evidence issues and a few  
22 of the other issues. Did you do a fair amount of legal  
23 research and --

24 A. Yes.

25 Q. -- and I guess reading case law with respect to the

1 missing evidence issue?

2 A. Yes.

3 Q. What were the other legal issues in the -- actually,  
4 let me --

5 A. Well, what I recall is, in addition to lost evidence  
6 and the Trombetta and Youngblood analysis, I also in the appeal  
7 wrote the Miranda/Seibert portion of the brief.

8 MR. ABT: Judge, if I could approach the witness  
9 again.

10 THE COURT: Sure.

11 A. [Continuing] And Mr. Steel also worked on the lost  
12 evidence issue. He did some state -- other state's law  
13 research. There was some -- Connecticut or something like that  
14 had some interesting issues but --

15 Q. I'm sorry, let me get again. You did the missing  
16 evidence. Seibert --

17 A. Right. Seibert/Miranda -- Seibert/Miranda.

18 Q. Right.

19 A. And -- I have to look at the brief to look at the --

20 Q. I'm going to -- do you have the brief there?

21 A. You gave me one before we came in, but it doesn't  
22 have a Table of Contents in all the issues --

23 Q. The one that I'm marking is P-49.

24 A. Okay.

25 MS. SMITH: Actually, that would be -- Your Honor, I

1 think that would be P-48 since the other exhibit would not  
2 be entered.

3 MR. ABT: Oh, all right.

4 MS. SMITH: Since it's part of the record. We're  
5 going to make that part of the record so just --

6 THE COURT: Well, then it's got to keep its number.

7 MS. SMITH: Okay. All right.

8 THE COURT: Yes, so this will be P-49.

9 MS. SMITH: Okay. Thank you, Your Honor. Just  
10 wanted to be sure we've got that right.

11 THE COURT: Are we going to go head and admit 48?

12 MR. ABT: I'm not.

13 THE COURT: Well, for the record only? And then can  
14 we substitute in a 48 that y'all agree on?

15 MR. ABT: Let's --

16 MS. SMITH: Yeah, let's take a quick second so we can  
17 resolve this and there won't be a problem with it.

18 THE COURT: Okay.

19 [Counsel confer.]

20 MS. SMITH: As a matter of economy, Your Honor, we  
21 will stipulate that the record on file in the Georgia  
22 Supreme Court from the direct appeal in this case, which  
23 the Court keeps, will be considered part of the record in  
24 this case.

25 THE COURT: Okay.

1 MS. SMITH: So that if and when this case goes up to  
2 the Supreme Court of Georgia, they would have that record.  
3 We propose to loan Your Honor a copy of everything else  
4 for your use in deciding this case. We will substitute a  
5 clean copy of the motion for new trial transcript that  
6 will be introduced as part of today's hearing.

7 THE COURT: Okay.

8 MS. SMITH: And it will be pinned to the transcript  
9 for ease of review. We will also introduce a copy of the  
10 appellant's brief so it will be part of the transcript.  
11 And, otherwise, everything else we have for Your Honor.  
12 And counsel now will go through everything when we don't  
13 have witnesses on the stand, and then further put on the  
14 record what we talked about.

15 THE COURT: So I guess I'm being hypertechnical. Are  
16 we getting rid of then P-48 as far as the number? Or is  
17 it within --

18 MR. ABT: No. P-48 will become a clean copy of the  
19 motion for new trial --

20 THE COURT: Okay. Okay, fine.

21 MR. ABT: -- that will be provided by the State.

22 THE COURT: So then it's going to be admitted.

23 MR. ABT: It's going to be --

24 THE COURT: A clean copy.

25 MR. ABT: Yeah, a clean copy of the motion for new

1 trial will be admitted as P-48.

2 THE COURT: Okay.

3 **[WHEREUPON, Petitioner's Exhibit Number 48 was admitted**  
4 **into evidence without objection.]**

5 MR. ABT: I am going to --

6 THE COURT: You're going to work with an unclean  
7 copy.

8 MR. ABT: Well, I'm not going to work with it  
9 anymore. I'm going to move on to P-49.

10 THE COURT: Okay.

11 MR. ABT: And I'm going to move on to P-49, which is  
12 -- I'm going to ask the State to stipulate is a copy of  
13 the appellant's brief to the Georgia Supreme Court.

14 MS. GALLOW: Your Honor, I will stipulate that this  
15 is the brief that was filed on behalf of Mr. Davis.

16 THE COURT: Okay.

17 MS. GALLOW: That's a copy of.

18 **BY MR. ABT: [Resuming]**

19 Q. Mr. Samuel, does that appear to be a true and correct  
20 copy of the brief that you and Mr. Steel submitted to the  
21 Georgia Supreme Court?

22 A. Well, without being too difficult, P-49 has pages 1  
23 through 127, and then for some reason it starts over again. So  
24 it's a little too much. We didn't submit the same brief twice.  
25 But it's Page 1 through 127 is the brief, and then for some



1 reason in the exhibit you've given me it starts over again,  
2 Page 1 through Page 30.

3 MS. SMITH: Let's just remove that portion of it.

4 THE COURT: So it's 127 pages.

5 THE WITNESS: That's exactly right.

6 MS. SMITH: And that's what I believe the Court --  
7 the copy we have will be submitted will have.

8 THE WITNESS: All right. One-twenty-seven is a  
9 certificate of service, and then for some reason it starts  
10 over again.

11 MR. ABT: And I'm going to ask the Court to admit P-  
12 49 at this time.

13 THE COURT: Then I take it there's no objection. Do  
14 you want --

15 THE WITNESS: No, it's all done. Thank you.

16 THE COURT: Okay. So, Beth, it's admitted without  
17 objection.

18 **[WHEREUPON, Petitioner's Exhibit Number 49 was admitted**  
19 **into evidence without objection.]**

20 **BY MR. ABT: [Resuming]**

21 Q. All right. So referring to P-49 then, your portions  
22 were the missing evidence and the Miranda -- the Miranda  
23 argument?

24 A. Yeah. I was -- during the break just now I was  
25 looking through it. There were portions of each of the

1 arguments where Mr. Steel and I at least talked about, you  
2 know, adding cases and, you know, we collaborated on almost all  
3 -- and there's some issues that I thought, you know, he just  
4 did them by himself because I didn't think much of them,  
5 frankly. And there are other issues where I clearly took the  
6 lead, did the major drafting.

7 And then the only other one I would add is I remember this  
8 -- in looking through the brief just now, the issue involving  
9 Daws, D-A-W-S. I remember having quite a bit to do with that  
10 one as well.

11 But the short answer to your question is if you were to  
12 divide up primary responsibility, understanding that nothing  
13 was exclusive, I took the lead in the lost evidence issue, the  
14 Miranda/Seibert issue, and I think the investigator testimony  
15 issue --

16 Q. You meant the Daws issue.

17 A. The Daws issue, right; the investigator, correct. I  
18 think I had a pretty major role in the drafting of that portion  
19 of the brief as well.

20 Q. Lucky for us, they're numerically identified in the  
21 brief summary.

22 A. Right.

23 Q. So I'm going to go quickly through each one.

24 A. Yeah.

25 Q. So Argument Roman Numeral I is that the -- there's an

1 issue about calling for a moment of silence in front of the  
2 jury.

3 A. Right.

4 Q. Was that Brian's -- was Brian the primary --

5 A. Yes.

6 Q. -- primary role in that issue?

7 A. He did.

8 Q. Okay. No. II is listed as an erroneous jury charge.  
9 Was that Brian's primary issue?

10 A. Mr. Steel's.

11 Q. And No. III is objecting to testimony by Greg Gatley  
12 and Detective Rick Chambers. Again, was that primarily your  
13 responsibility or Mr. Steel's? And I understand, you know,  
14 with these line of questions that you may have had some input -  
15 -

16 A. Yeah.

17 Q. -- of course, corroborating with another attorney,  
18 but I just wanted to --

19 A. I think if I would have designated primarily, I'd say  
20 it was probably his. But I remember working on this issue and  
21 I remember kind of going back and re-reading the transcript and  
22 portions of it because I remember it was a difficult issue, and  
23 I remember working on that as well.

24 Q. The fourth, Roman Numeral IV is the Daws issue,  
25 investigator Daws, and that was primarily you?

1           A.    Yeah. I just remember this issue because I remember  
2 talking to Bruce Morris about this a lot, who otherwise was not  
3 very involved in the appeal itself at all, I don't think -- I  
4 may be wrong about that -- I don't think Bruce Morris wrote any  
5 of the brief. And again, if he did, I apologize to him and to  
6 you, but I don't remember him being involved in the actual  
7 brief writing. But I do remember this issue, doing a lot of  
8 work on it, so I'm going to take some credit for it.

9           Q.    Okay. And Roman Numeral V is the argument that -- a  
10 Sixth and Fourteenth Amendment issue --

11          A.    Yes.

12          Q.    -- arguing that there was an invasion of the --

13          A.    That was not unrelated to the Daws issue.

14          Q.    So you also had primary responsibility or a  
15 significant amount of responsibility for preparing that section  
16 of the brief?

17          A.    I think so.

18          Q.    Issue No. VI is --

19          A.    That was the one I remembered I mentioned before I  
20 thought this had -- didn't deserve to be in the brief, and I  
21 didn't work on this at all. I thought it was not worthy of  
22 being in the brief but --

23          Q.    You're talking about Section V?

24          A.    VI.

25          Q.    Oh, Section VI. The documents going back to the

1 jury, you thought it was a worthless argument?

2 A. I did.

3 Q. And whose -- I take it you were not the primary  
4 attorney for preparing that.

5 A. I -- I spent a limited amount of time trying to  
6 convince the other lawyers that there was no merit to this  
7 issue and it shouldn't be raised. That would be my primary  
8 responsibility with regard to that argument.

9 Q. Issue VII was the --

10 A. Yes, lost evidence.

11 Q. -- lost evidence. And so you had a fair amount of  
12 work --

13 A. Yes.

14 Q. -- put into that. And then the final issue --

15 A. With the understanding that Mr. Steel -- you'll see  
16 at one point in the brief we kind of move over to some State  
17 cases -- I don't see it right now but -- and that we ought to  
18 change the standard in Georgia, maybe on Page 115 you see some  
19 of that. Yeah, the Connecticut case, I remember that very  
20 well, Page 114. Mr. Steel added those cases and that whole  
21 portion of the brief, which I thought was a good idea.

22 Q. All right. So looking at the -- and then the last  
23 issue is the Miranda issue --

24 A. Yeah.

25 Q. -- and you prepared that as well?

1           A.     I did.

2           Q.     Looking at the lost evidence issue, how did you couch  
3 that to the Georgia Supreme Court? How did you prepare or  
4 present that issue?

5           A.     I guess the brief speaks for itself, how it was  
6 written, but it was primarily -- I mean, I guess -- listen, I  
7 didn't re-read it before I got up here so you're testing memory  
8 a little bit. But basically we took the approach that we  
9 satisfied the Trombetta/Youngblood standard, and if we didn't,  
10 then the standard ought to be different. Fair enough?

11          Q.     And to just be clear on the record, we're referring  
12 to two cases that are U.S. Supreme Court cases known as  
13 Youngblood and Trombetta.

14          A.     Correct.

15          Q.     And those cases stand for what proposition?

16          A.     Well, they stand generally for the proposition that  
17 if -- if exculpatory or apparently exculpatory evidence -- I  
18 don't want to overstate it, but it's -- if exculpatory or  
19 apparently exculpatory evidence is lost or destroyed in bad  
20 faith, the defendant can seek relief.

21          Q.     Would it be fair to say that those courts have sort  
22 of given a guideline that if the evidence has apparent  
23 exculpatory value and that the evidence can't be tested  
24 otherwise or replaced, that if those two burdens are met, then  
25 there is a showing of bad faith and a new trial would be

1 warranted?

2 A. I didn't understand the word -- I didn't see how you  
3 got to the bad faith. It has to be "and" a showing of bad  
4 faith, yes. If it's -- my understanding of the cases -- and  
5 again, you have a lot of states that are interpreting those  
6 cases and, you know, other federal decisions --

7 Q. Sure.

8 A. -- but the basic rule, as I understand it, is a)  
9 there's evidence that's lost or missing, b) the evidence is  
10 either known to be exculpatory or is, you know, apparently  
11 exculpatory, and c) it is lost or destroyed in bad faith. So,  
12 you know, if it's a breath sample in a DUI case, it's not known  
13 to be, you know, exculpatory in theory, and so losing it --

14 Q. Apparently exculpatory?

15 A. It's not apparently or known to be exculpatory,  
16 that's what the Supreme Court says, you know, assuming it's not  
17 known to be exculpatory. I mean, in fact, it's known to be  
18 inculpatory. The fact that it can't be tested independently by  
19 the Defense doesn't give you the right to a new trial, because  
20 why would the State intentionally destroy evidence that they  
21 believed was inculpatory, is the theory. Inculpatory.

22 But if it's known to be exculpatory -- I mean, listen, the  
23 classic situation where even the Supreme Court would agree with  
24 us is, you know, there is a piece of evidence that clearly  
25 shows the defendant is not the perpetrator. It shows he's not

1 the perpetrator; let's throw it in the river. I mean, you're  
2 going to win that case; all right? That's one extreme.

3 The other extreme is here's a piece of evidence that  
4 unequivocally shows the defendant is guilty; right? I mean,  
5 it's his fingerprint and a videotape of him committing the  
6 crime, and darn, we lost it. You're not going to win that  
7 issue. There may be limitations on what can be used at trial,  
8 but you're not going to win that issue because the Supreme  
9 Court says the fact that you can't independently test it  
10 doesn't give you the right to a free pass.

11 Q. And so the argument is then all that -- all -- but  
12 what's in between those two issues?

13 A. The problem is when you have all the evidence that  
14 either hasn't been tested yet, so you don't know whether it's  
15 exculpatory or not, and they've lost it, which is a lot of what  
16 was going on in this case.

17 Q. So in the brief you discuss the fact that the State  
18 lost approximately how many items of evidence? Do you recall  
19 how much evidence was --

20 A. Well, I know the brief lists it, so --

21 Q. It's on Page 116 and 117.

22 A. Right. I mean, there's 55 items --

23 Q. Fifty-five that you list.

24 A. -- that we list in the brief.

25 Q. And did you -- as opposed to just -- you listed them



1 and said this evidence is lost, it violates the Sixth and  
2 Fourteenth, and you make arguments to that effect; correct?

3 A. That's a little simplistic, but yes. Yes.

4 Q. I'm trying to move it along.

5 A. Fine.

6 Q. Well, and so --

7 A. I mean, there's different categories within here.  
8 Some of it, you know, a lost bag. I mean, nobody knew what was  
9 in the bag. All we knew is that there was a bag on a chain of  
10 custody document or an evidence log, and it's lost, so nobody  
11 knew what it was. There's not a whole lot you could argue  
12 there.

13 Other evidence we knew what it was, right, and I don't  
14 want to make things up here, but the gun or the gas can or the  
15 -- what was it, the duffel bag, whatever it was -- we knew what  
16 it was, and it was lost. So there's kind of different  
17 categories there.

18 Q. Well, could it -- could you have spent more paper,  
19 more time, instead of just listing the items and then making  
20 the legal arguments -- could you have individualized each item  
21 and shown how each item had apparent exculpatory value? Could  
22 that have been done?

23 MS. GALLOW: Your Honor, I object. This question is  
24 based on hindsight, and I would object to this question  
25 based on Strickland, we can't decide what should have been

1           done at the time.

2           Q.    Did you consider it?

3           A.    Well, let me put it this way, there's no page limit  
4 in the Supreme Court, so could I have? Obviously. There's no  
5 page limit. So --

6           Q.    I'm sorry, you needed to wait for the Court's ruling.

7           A.    I'm sorry.

8           THE COURT: Go ahead, you're fine.

9           MR. ABT: I wanted to rephrase the question and say  
10 -- you know, but I apologize to the Court.

11          Q.    Did you consider doing that?

12          A.    I can't remember sitting down and methodically  
13 thinking, let's not do it, let's do it. But I just can't  
14 answer that, I don't remember if we considered it.

15          Q.    I'm going to refer you to Page --

16          A.    I mean, just looking at the brief, obviously we  
17 talked about the fingerprint card on Page 113 --

18          Q.    Hang on, hang on.

19          A.    Okay, I'm not answering a question now.

20          THE COURT: I'll sustain that objection.

21          THE WITNESS: I objected to -- I objected to my own  
22 answer.

23          THE COURT: Ms. Gallow was up but --

24 **BY MR. ABT: [Resuming]**

25          Q.    If you would refer to Page 107.

1           A.    I'm there.

2           Q.    There's a new paragraph midway down through the page,  
3 and you begin discussing fingerprints.

4           A.    Right.

5           Q.    And so that discussion of fingerprints goes on for  
6 approximately two or three pages.

7           A.    Exactly.

8           Q.    And so there is a pretty lengthy discussion about  
9 fingerprints.

10          A.    I do remember that.

11          Q.    Could you have -- did you consider making arguments  
12 to the Supreme Court on evidence -- on individualized pieces of  
13 evidence other than the fingerprints? There are 55 missing  
14 items, you chose this one. What I'm asking is did you consider  
15 proving an apparent exculpatory value on any of the other 54  
16 items that you knew about?

17          A.    I don't -- I don't remember going through the thought  
18 process of should we go through 54 other items of evidence, so  
19 I just -- I can't answer that one way or the other. I mean, we  
20 didn't.

21          Q.    Okay. Fair enough. That section of the brief  
22 focuses on Sixth and Fourteenth Amendment violations. Did you  
23 ever consider appealing on grounds that the missing evidence  
24 violated O.C.G.A. § 16-10-94?

25          A.    I don't remember going through that thought process

1 at all.

2 Q. Did you ever consider appealing that the missing  
3 evidence violated O.C.G.A. § 17-16-4?

4 A. No.

5 Q. Did you ever consider appealing on the grounds that  
6 the missing evidence violated O.C.G.A. § 17-5-55 or 56?

7 A. I don't remember going through that thought process  
8 at all.

9 Q. And if you need me to refresh your memory as to what  
10 those statutes are, I'd be happy to do so, but I think you  
11 know.

12 A. It wouldn't -- it wouldn't make a difference if you  
13 refreshed me or not. We didn't do it. And I don't remember  
14 thinking of those statutes or eliminating them through any  
15 thought process.

16 Q. With respect to the motion for new trial and appeal,  
17 did you at some point think about obtaining Standard Operating  
18 Procedures from various state agencies in order to show that  
19 those Standard Operating Procedures were violated in -- in  
20 handling the evidence, retaining it, and preserving it --

21 A. Yes.

22 Q. -- for trial?

23 A. Yes.

24 Q. What did you do to try and obtain those Standard  
25 Operating Procedures?

1           A.     Well, we -- and I say "we," issued a Open Records Act  
2 Request on a number of agencies, and I don't remember all of  
3 them now -- some of which responded, some of which didn't, some  
4 -- and I cannot remember which agencies responded and which  
5 didn't. I seem to remember DeKalb County Fire and Police may  
6 have responded, but someone else didn't. I think we also  
7 issued subpoenas for the hearing to bring them. The answer to  
8 -- short answer to your question is absolutely we thought about  
9 it and acted upon that thought.

10          Q.     Okay. And I'm going to point you to the -- I guess  
11 again we're going to -- we're going to -- with respect to P-48,  
12 we're going to substitute with the original, but I'm going to  
13 ask you to look at that document in front of you and refer to  
14 the exhibits at the back of the document.

15          A.     Okay. There are many.

16          Q.     There is a single Standard Operating Procedure for  
17 DeKalb County Police and Fire that is included as an exhibit to  
18 the motion for new trial; is that correct? I believe it's  
19 labeled as Exhibit Number 9 -- well, let's find the exhibit  
20 stickers on this. I believe it's labeled as Exhibit 9. It's  
21 part of Exhibit 9. There are some other documents that are  
22 included in Exhibit 9, but I'll bring your attention to this  
23 page, if I could, which is a letter addressed to you from Jim  
24 [inaudible], the Deputy Chief Fire Marshal of DeKalb County.

25          A.     Got it. Got it.

1 Q. Okay.

2 A. I'm sorry, I found it.

3 Q. And in Exhibit -- within Exhibit 9 there are two --  
4 there's a Standard Operating Procedure for DeKalb Fire and  
5 DeKalb Police; is that correct?

6 A. Within Exhibit 9?

7 Q. Within Exhibit 9. If you flip through Exhibit 9,  
8 you'll get to that.

9 A. Well, it starts with Property and Evidence, it looks  
10 like, in this case.

11 Q. Keep going.

12 A. And then there is -- looks like an SOP fire scene  
13 investigation. Yeah, got it.

14 Q. Okay. Do you know whether or not you submitted any  
15 other Standard Operating Procedures to the Court, in either the  
16 motion for new trial or the appeal?

17 A. Well, I didn't offer any evidence in the appeal, but  
18 it looks like in the new trial motion, and it looks like part  
19 of Exhibit 9 is Police Services, so maybe that's a different  
20 one. If you go back a couple of pages from Fire it goes to  
21 Police. But I guess my short answer is whatever the record  
22 shows I did, I did. I don't think there's anything that  
23 happened that wouldn't be in the record, so --

24 Q. There -- it's one policy, it's one SOP, DeKalb Fire  
25 and Police. But --

1           A.    I mean, it just looks like two different documents  
2 here, but listen, I --

3           Q.    You submitted that as part of the record.

4           A.    Whatever is in the record I'm sure is the record, and  
5 whatever is not in the record I didn't submit, so --

6           Q.    Do you remember submitting that?

7           A.    I -- do I remember standing up and saying, "Your  
8 Honor, I now tender Exhibit 9"? No.

9           Q.    Okay. Do you recall whether or not at the motion for  
10 new trial -- and you testified it happened on various dates --  
11 do you recall whether or not you asked the Court to leave the  
12 record open so that you could submit additional documents in  
13 evidence?

14          A.    I have a fairly -- fairly good memory of that, but  
15 again, I -- if it's in the record I absolutely remember it, if  
16 it's not -- and if it's not in the record I still think it  
17 happened, and it may have happened after the court reporter  
18 left. But I do remember, just because we were struggling with  
19 different agencies producing stuff, that we asked the record to  
20 be kept open.

21          Q.    Okay. So you did ask for the record to be --

22          A.    I -- I --

23          Q.    It's in --

24          A.    I mean, if it's in the record, then absolutely.

25          Q.    I'm looking for it now so I can refresh your

1 recollection.

2 A. Okay. But I think that absolutely happened so I --

3 Q. Okay. I'm good with that.

4 A. Okay. I am, too.

5 Q. Did you ultimately supplement the record with any  
6 additional materials?

7 A. I -- I'd just ask you to look at the record. If we  
8 didn't, the answer is no. If -- you know, either we did or we  
9 didn't. I don't remember.

10 Q. You don't remember whether or not you did.

11 A. I do not.

12 Q. Does there appear to be in that exhibit anything that  
13 was supplemented by brief -- well --

14 A. Well, we definitely did a brief.

15 Q. Did you -- do you know whether or not you submitted a  
16 supplemental brief to the Court in a motion for new trial?

17 A. We absolutely submitted a supplemental brief, but --

18 Q. Did it contain any exhibits?

19 A. I don't remember. I kind of doubt it, frankly. I  
20 would doubt that the Judge would allow us to just start adding  
21 attachments to a brief, but it's possible. But I don't  
22 remember doing that.

23 Q. But you did ask the Court to keep the record open for  
24 that?

25 A. Correct.



1           Q.    Let's talk about the, again, apparent exculpatory  
2 value on the individual piece of evidence with respect to the  
3 appeal. Did you ever consider retaining an expert or multiple  
4 experts to provide affidavits or other testimony to show that  
5 an individual piece of evidence had an apparent exculpatory  
6 value?

7           A.    I don't remember --

8           Q.    Well, let me give you an example.

9           A.    Yeah. I don't remember doing that.

10          Q.    Do you recall that one of the pieces of evidence that  
11 was missing in this case was a gas can?

12          A.    Yes.

13          Q.    Okay. The gas can was originally found in the burnt  
14 out Porsche in DeKalb County; correct?

15          A.    That's my memory.

16          Q.    Okay. And are you aware that gas cans, as evidence  
17 in cases, generally are traceable in the sense that an expert  
18 can look at the gas can and determine who manufactured it,  
19 where it was bought, on what day it was bought, and then  
20 ultimately by finding that store, who made the purchase?

21          A.    That wouldn't surprise me, but I'm not going to swear  
22 that I know that to be the case. But, I mean, that seems  
23 likely but --

24          Q.    Okay.

25          A.    I mean, I guess they have serial numbers, and if

1 someone bought it with a credit card, or a surveillance camera,  
2 but you're asking me for sure that that can be done in every  
3 case? I don't think I knew that then.

4 Q. Well, did it cross your mind in this case?

5 A. I don't remember.

6 Q. Did you consider hiring an expert -- and going back  
7 to my previous question -- did you consider hiring an expert on  
8 any of the individual pieces of evidence to show that they had  
9 an apparent exculpatory value?

10 A. I don't remember doing that. But I'm not sure we  
11 have the agreement on what the term "apparent exculpatory  
12 value" means, so --

13 Q. Okay.

14 A. -- I'm not sure the premise of your question is  
15 necessarily --

16 Q. Well, let's talk about that then.

17 A. Yeah. I mean apparent exculpatory value would be you  
18 could look at it and say not "it might be exculpatory" but "it  
19 is apparent that it's exculpatory." So I don't know how -- and  
20 maybe I'm wrong about this, but I don't know how you could look  
21 at a gas can, or is it a backpack or a duffel bag, whatever it  
22 was --

23 Q. Whatever the individual piece of evidence was.

24 A. -- and say that is apparently exculpatory. I mean,  
25 you can't tell by looking at it that it's exculpatory.

1 Q. No, but it --

2 A. The fingerprint card you knew was exculpatory so that  
3 was a whole separate issue.

4 Q. Well, that's my point. Could an expert make that  
5 determination?

6 A. Yes, but it's not apparent, that's the problem, is  
7 it's clearly important evidence --

8 Q. So hiring an expert could make --

9 MS. GALLOW: Your Honor, I'd object to counsel  
10 cutting his witness off. Can he finish his answer,  
11 please?

12 A. Well, I feel like I'm having a legal argument that's  
13 not my role. But I guess I'm just, because of the way you  
14 framed the question, I'm nervous that my answer is not exactly  
15 accurate, which is -- I don't know how an expert can testify --  
16 you know, I'm looking at a briefcase here under counsel's table  
17 -- that that has apparent exculpatory value. You can't look at  
18 it and say. Yes, it's possible it has exculpatory value. Any  
19 item of evidence might be exculpatory once tested, that's  
20 absolutely true. But that's not what the word "apparent"  
21 means. The word "apparent" means that, in theory at least, the  
22 cops knew it when they saw it and destroyed it.

23 Q. Okay. Well, then let's use -- talk about the term  
24 "bad faith" instead.

25 A. Okay.

1           Q.    Did you consider hiring an expert on any individual  
2 piece of evidence to show that there was in fact bad faith by  
3 the State in destroying evidence?

4           A.    I don't remember. I don't remember going through  
5 that thought process.

6           Q.    Okay. And do you recall whether or not you  
7 ultimately obtained Standard Operating Procedures from -- let's  
8 going through a variety of agencies. Do you recall the  
9 agencies that were involved in handling evidence in this case?  
10 Let me ask you that.

11          A.    Well, DeKalb Fire, DeKalb Police, Atlanta Fire,  
12 Atlanta Police, GBI/Crime Lab, D.A.'s Office.

13          Q.    You got them. Do you know whether or not you  
14 ultimately obtained the Standard Operating Procedures from any  
15 of the agencies, other than DeKalb Fire and DeKalb Police?

16          A.    Well, I'd be surprised if we didn't get something  
17 from the GBI Crime Lab. But other than that, I don't recall.  
18 And if I'm wrong, I'm wrong. But whatever we got, I assume we  
19 put in evidence.

20          Q.    Do you know what you got from the GBI?

21          A.    I don't remember off the top of my head. And we may  
22 not have, I just -- somehow that sounds familiar, but I may be  
23 wrong about that.

24          Q.    Okay. So again, I use the gas can as an example.  
25 But you never consulted with an expert on the issue of --

1           A.     No.

2           Q.     -- determining whether the gas can was traceable?

3           A.     We did not. Well, I did not.

4           Q.     And let's talk about the murder weapon, which was a  
5 9mm Beretta; is that correct?

6           A.     I'll take your word for it.

7           Q.     There was a -- did you ever consult with an expert to  
8 determine if that piece of evidence could have been tested or  
9 should have been tested?

10          A.     I consulted with no experts on that issue, and nor do  
11 I remember considering doing that.

12          Q.     You mentioned earlier an Olympic gym bag. We didn't  
13 know what was in the bag. Do you know whether or not any tests  
14 were ever done on the bag by the State or by anyone?

15          A.     I just don't remember.

16          Q.     Okay. And did -- you didn't retain anyone --

17          A.     No.

18          Q.     -- to consult with or investigate the bag?

19          A.     Correct.

20          Q.     You said you read the trial transcript. Do you have  
21 any recollection of a witness named Megan Bruton --

22          A.     Yes.

23          Q.     Or Detective -- you remember who Megan Bruton is?

24          A.     I remember because one of the issues in the new trial  
25 motion was the blogging that was going on. But I know who she

1 was.

2 Q. Okay. She was the victim's girlfriend at the time  
3 and the estranged wife of the defendant.

4 A. I recall.

5 Q. And there was a lead detective in the case named Rick  
6 Chambers. Do you remember who he is?

7 A. I know him personally and I knew him during the  
8 hearing.

9 Q. Okay. And do you recall that both those individuals  
10 at trial gave testimony that they thought the Olympic bag and  
11 gas can looked like Mr. Davis'? Do you remember that  
12 testimony?

13 A. Well, I'd be surprised if Rick Chambers said he knew  
14 it belonged to -- but I -- listen --

15 Q. Mischaracterizing.

16 A. Yeah.

17 Q. But what Mr. Chambers -- I'm asking if you remember  
18 Mr. Chambers would have testified to is that --

19 A. Megan said.

20 Q. -- Megan told him the gas can and Olympic bag looked  
21 like Scott Davis'?

22 A. I don't have a specific recollection of it, but if  
23 it's in the transcript, you know, I've certainly read it.

24 Q. If that were in the transcript, do you think that  
25 raises an issue with respect to the Sixth Amendment and

1 Fourteenth Amendments that he could have raised on appeal,  
2 arguing that that violated Mr. Davis' right to confront those  
3 witnesses because they're testifying about an item that looks  
4 like his and he has no ability to look it or test the items.

5 A. I understand the issue, and I'm not sure I  
6 necessarily agree that you would win that issue. We didn't  
7 raise it. I think that is inherent in all lost evidence cases  
8 is that the evidence is lost, so the prosecution shouldn't be  
9 able to testify about it. So it -- you know, we call it Sixth  
10 and Fourteenth Amendment or, you know, due process.

11 I'm not sure the confrontation clause has been  
12 specifically held by, you know, the Supreme Court or Georgia  
13 Court to say that someone can't talk about physical evidence if  
14 the physical evidence isn't present. I mean, it seems to me  
15 that happens a lot in trials. So I'm not sure it's a  
16 confrontation clause problem. It's certainly not -- I mean,  
17 you know, there are confrontation clauses all over the place  
18 these days, as we know from Crawford and Melendez [phonetic]  
19 and so forth. But it's -- it's just another way of saying it's  
20 a due process violation.

21 The answer to your question is -- and I apologize for  
22 talking too much, I should know better -- we didn't raise it.  
23 Excuse me, we didn't raise it as a confrontation issue.  
24 Obviously the issue was raised about the lost evidence.

25 Q. Right. But there's a difference between losing

1 evidence and then -- I mean, you said it's inherent -- earlier  
2 you said it's inherent in the process that when evidence is  
3 lost and then the State talks about it. But it is possible --

4 A. You're right.

5 Q. -- well, hang on, let me finish the question.

6 A. I know where you're going. You're right.

7 Q. Let me finish the question --

8 A. Okay.

9 Q. -- so we can get it on the record.

10 [Off the record comments.]

11 Q. And I've interrupted you too. But there is a  
12 difference between losing evidence and having that violate  
13 someone's Sixth and Fourteenth Amendments's rights, if it's in  
14 bad faith, and losing evidence and then having the State talk  
15 about it at trial.

16 A. You're right. You're absolutely right. There's two  
17 different parts. One -- you've stated it exactly right, there  
18 are two different aspects to it.

19 Q. And if -- well, Megan Bruton and then Detective  
20 Chambers describing Megan Bruton or saying, "That's is Scott's  
21 bag, that is Scott's gas can" at trial. Then in our mind,  
22 would that raise the Sixth and Fourteenth Amendment issue?

23 A. I still think it's due process, but, yes, it is  
24 clearly a separate way of looking at the problem. Not only is  
25 the evidence lost so I can't use it, but now you're using it



1 and I can't even -- I don't have the right to test it, I don't  
2 have the right to deal with it. And just -- I have a little  
3 problem calling that a confrontation issue, but it's just  
4 words. It's still a constitutional violation. I would call it  
5 due process as opposed to confrontation but --

6 Q. It's a constitutional issue.

7 A. It is.

8 Q. And it's not raised by you on appeal; is that  
9 correct?

10 A. Well, we raised a lost issue. I can't remember if we  
11 divided it, as you just did, appropriately between --

12 Q. You have your appeal brief in front of you. I mean,  
13 if you -- we can -- I'm happy to take a break so you can  
14 refresh your memory.

15 A. It is what it is.

16 Q. But you don't remember raising that particular issue?

17 A. I'm troubled by your point at that issue, but  
18 whatever we raised, we raised. I don't know how it would help  
19 for me to reread it and say it.

20 Q. I know you said you hired -- you hired no experts on  
21 the appeal; is that correct? You consulted with no experts for  
22 the appeal?

23 A. I do not remember hiring any experts for the appeal  
24 or the new trial motion.

25 Q. And we've established that -- well, let me move on to

1 something now that I think is pretty critical, very important.  
2 Do you recall any conversations with Scott Davis about his  
3 audiotaped statement at trial?

4 A. Many conversations.

5 Q. And do you recall Mr. Davis stressing to you that the  
6 audiotape was altered, edited, and tampered with by the police?

7 A. I'm not sure I remember those exact words. There was  
8 a lot of -- well, first of all, there was a lot of controversy  
9 just about the legal Miranda vs. Seibert issue. It was -- just  
10 from a legal point of view. And there were discussions about  
11 whether Mr. Morris had raised it properly and whether that was  
12 an ineffective claim and that whole business, which is not your  
13 question.

14 Q. I'm not concerned about that.

15 A. Right. But he did also -- he meaning Mr. Davis,  
16 raised the issue of that tape being turned off and on.

17 Q. Okay.

18 A. Yes.

19 Q. That's what I'm talking about.

20 A. Yes.

21 Q. Mr. David brought to your attention that the  
22 audiotaped statement --

23 MS. GALLOW: Your Honor, I'd object. At this point  
24 he's -- first of all, he is testifying, he's leading his  
25 witness, and he's also injecting facts into evidence that

1           are not before the Court at this time.

2           THE COURT: Rephrase.

3       **BY MR. ABT: [Resuming]**

4           Q.    What did Mr. Davis tell you about the -- what you  
5       have already mentioned as a stopping and starting of the  
6       audiotape?

7           A.    I cannot remember details other than that subject  
8       matter was discussed with some -- I don't want -- I don't want  
9       to say with some frequency, but he was adamant that the tape  
10      was started and stopped, and perhaps that the transcript did  
11      not accurately reflect what was actually said. And I don't  
12      mean that the transcript and tape aren't identical, but there  
13      were issues, I guess is the best way I can describe it. But I  
14      cannot, whatever it is, three or four years later, tell you  
15      what our conversations were with any specificity.

16          Q.    Did you go then and listen to the tape?

17          A.    I don't think I ever listened to the tape.

18          Q.    You did read the trial transcript?

19          A.    I did.

20          Q.    And in the trial transcript do you recall Detective  
21      Chambers testifying that the tape was not started and stopped,  
22      that it was continuous and complete?

23          A.    I do not remember that, but if that's what it says,  
24      then obviously it's what it says. But I do not remember that  
25      specifically.

1           Q.    Did you further investigate or retain any expert or  
2 have anyone analyze the tape?

3           A.    No.

4           Q.    Now the decision wasn't out at the time you did the  
5 appeal, but I do want to talk to you briefly about The State  
6 vs. Mussman. Are you aware of that decision?

7           A.    I'm aware of both the Court of Appeals and the  
8 Supreme Court decisions.

9           Q.    Are you aware that this Court was the trial court in  
10 that case?

11          A.    I knew it was Gwinnett County. I can't tell you I  
12 remember the Judge, but I -- you did remind me of that this  
13 morning, so --

14          Q.    Do you think there's a significant difference between  
15 the evidence that was loss and Mussman, that being a -- well,  
16 before I call an objection -- what is your understanding of  
17 what the evidence that was lost in the Mussman case?

18          A.    Well, eventually a car, because I remember it was a  
19 car, and the issue was -- there's a statute that requires the  
20 preservation of -- I can't remember what the statute says,  
21 bodily fluids or something like that.

22          Q.    O.C.G.A. 17 -- one of the statutes I mentioned  
23 earlier.

24          A.    Right.

25          Q.    17- --

1           A.     Right. And the issue was whether a car is a  
2 container and whether the -- you know, the decision is what it  
3 is, but it -- I mean, it just came out a couple of weeks ago  
4 and I read it.

5           Q.     So you must have read it recently.

6           A.     I read it about a week and a half ago, as I remember.

7           Q.     And you recall that the reason the Supreme Court  
8 decided not to find bad faith was because --

9           A.     It was in compliance with -- no, I forget. I don't  
10 want to answer --

11          Q.     Let me ask this.

12          A.     You ask it.

13          Q.     Was it because storing an entire car in an Evidence  
14 Room is impractical.

15          A.     Well, not just --

16                 MS. SMITH: Your Honor, I object. I object to this  
17 whole line of inquiry. It was not in existence, not  
18 available for Mr. Samuel to have used at the time, so I  
19 think all this is irrelevant.

20                 MR. ABT: Judge, I'm going to ask him about his  
21 understanding of the law, current state of the law, and  
22 compare his opinion, his legal opinion, as to what --  
23 whether he thinks that the facts in this case comport to  
24 bad faith in that.

25                 THE COURT: But it wasn't the law at the time that he

1           was writing all these appeals, so I'm going to sustain the  
2           objection. But happy to know my cases are making it to  
3           your --

4           MR. ABT: Consciousness?

5           THE COURT: -- consciousness, yes. Thank you.

6       **BY MR. ABT: [Resuming]**

7           Q. Well, do you think it's bad faith to have -- have you  
8           ever been involved in a case where the State has lost 55, or  
9           now it appears to be 70, but let's stick with the number that's  
10          in your appeal brief. Have you ever been involved before in a  
11          case where the case lost 55 items of evidence?

12          A. Not that I recall.

13          Q. Anywhere near that?

14          A. I've only had one significant lost evidence case, and  
15          now I'm drawing a blank on the name. We won it in the Court of  
16          Appeals and it was much, much more limited. The Supreme Court  
17          granted cert and then dismissed as improvidently granted but --

18          Q. Have you ever been involved in another case where the  
19          State lost the murder weapon?

20          A. Not that I recall.

21          Q. Have you ever been involved in a case where the State  
22          tested a variety of different items of evidence -- the murder  
23          weapon, bullets, shell casings, fingerprints, gas can -- and  
24          then after losing that evidence --

25          A. After testing it?

1           Q.    After testing it, then lost it?

2           A.    I mean, this case is obviously unique, so nothing  
3 would compare with this.

4           Q.    Do you think there was -- well, let me ask you this.  
5 Do you think it is bad faith for -- you earlier mentioned that  
6 there are extremes -- there's evidence that's clearly bad faith  
7 because it's entirely exculpatory and the police lose it?

8           A.    And -- well, what makes it bad faith is not that they  
9 lose it, but they intentionally -- my extreme was they throw it  
10 in the river.

11          Q.    Right. What about tampering with evidence? Do you  
12 think it's bad faith for the police to tamper with evidence?

13          A.    Bad faith doesn't begin to capture what I think about  
14 tampering with evidence.

15               MS. SMITH: Your Honor, with all due respect, this is  
16 -- again, I object to this whole line of inquiry. They  
17 are on the one hand alleging Mr. Samuel is ineffective; on  
18 the other hand, they're asking for his legal opinion as if  
19 this is an expert. It ultimately invades your providence  
20 to decide what the law is, so we'd object to these  
21 questions.

22               THE COURT: I'm going to sustain. Not that I don't  
23 value your opinion, Mr. Samuel.

24               THE WITNESS: I'm not insulted, Your Honor.

25               **BY MR. ABT: [Resuming]**

1           Q.    There was no argument in the appellate brief as to  
2 the editing or altering of the audiotaped statement at trial;  
3 correct?

4           A.    I think that's correct.

5           Q.    Nor did you argue on appeal that the police tampered  
6 with the evidence in this case; correct?

7           A.    Tampered with the evidence?

8           Q.    Tampered. Not lost, tampered.

9           A.    I think that's correct as well.

10          MR. ABT: One moment, please, Your Honor.

11                   [Counsel confer.]

12          MR. ABT: I have a question I've been meaning to take  
13 up. A short five minute break, Judge, and I'll have one  
14 or two more after the break for Mr. Samuel, and we'll be  
15 done.

16          Q.    Mr. Samuel --

17          A.    Yes, sir.

18          Q.    -- do you recall whether Mr. Davis asked you to have  
19 the tape analyzed, the audiotaped statement?

20          A.    I cannot tell you that I have a specific  
21 recollection, but I want to be very clear that doesn't mean it  
22 didn't happen because we talked a lot, we had a lot of phone  
23 calls, I got a lot of correspondence, and the fact that I don't  
24 remember doesn't mean it didn't happen, but I can't recall that  
25 specific conversation.



1 Q. He may?

2 A. Absolutely he may have.

3 MR. ABT: Judge, could we take a five minute break,  
4 and I'll just have -- maybe have one or two more for him.

5 THE COURT: Sure. Do y'all want to take maybe a 10  
6 minute break --

7 MR. ABT: That's fine.

8 THE COURT: -- if anybody wants a water break, a  
9 restroom break. Okay. Take about 10 minutes.

10 MR. ABT: Thank you, Your Honor.

11 MS. SHEIN: We need to probably take a little longer  
12 break.

13 THE COURT: Okay.

14 MS. SHEIN: We have a document that we need Mr.  
15 Samuel to look at, but we believe it needs to be redacted  
16 because it only has the portion we need -- the rest of it  
17 could be -- would not be part of the record -- should not  
18 be part of the record.

19 THE COURT: Okay.

20 MS. SHEIN: It's a letter from Mr. Davis. So we just  
21 want to talk to the AG about it and make sure it's okay  
22 and go forward from there.

23 THE COURT: Okay.

24 MS. SHEIN: We just need to get a really heavy black  
25 Magic Marker as well to do the redaction.

1 MR. ABT: I have it.

2 THE COURT: Well, let me just ask a question. Would  
3 it be possible for y'all -- I'll give you whatever you  
4 need, but would it be possible to chat, then finish with  
5 Mr. Samuel, and then just redact it afterwards?

6 MS. SHEIN: Yes. If -- that's why I just want to  
7 make sure it's okay with them.

8 THE COURT: Okay.

9 MS. SHEIN: If we do that, that would be awesome, and  
10 we can let him go.

11 THE COURT: Yeah.

12 MS. SHEIN: Yeah. Thank you so much, Judge.

13 **[A brief break was taken.]**

14 \* \* \*

15 THE COURT: Okay.

16 **BY MR. ABT: [Resuming]**

17 Q. Mr. Samuel, I have just a couple more questions for  
18 you.

19 A. Okay.

20 Q. First, have you ever in other cases hired other  
21 experts to analyze audiotapes?

22 A. Yes.

23 Q. And you know what's involved in that process?

24 A. Basically. I mean, I've actually watched them do it  
25 on their machine, so I guess I have some, but I have no idea

1       how the technology actually works, but yes.

2           Q.     Okay. I'm going to show you what's going to be  
3       marked as P-50, and ask if you ever received any copy of -- if  
4       that document is familiar to you.

5           A.     You know, to look at it, it's not necessarily  
6       familiar, but --

7           Q.     What's the date on the letter?

8           A.     September 6<sup>th</sup>, 2008.

9           Q.     And who is it addressed to?

10          A.     Brian and Don. Well, up on top it says Brian Steel,  
11       Don Samuel, then it says Brian and Don, and then it starts the  
12       letter. And across the top it says attorney -- client/attorney  
13       work product. I'm not saying that I didn't get it, I just --  
14       you ask me to remember three years later do I specifically  
15       remember this letter, no. But it is certainly characteristic  
16       of the letters that I would receive, so --

17               MR. ABT: If I could approach, Judge.

18               THE WITNESS: Sure.

19               THE COURT: Yes.

20               THE WITNESS: I said sure [laughter].

21          Q.     If I can draw your attention to Paragraph 9.

22          A.     Right.

23          Q.     Could you just read that and see if that refreshes  
24       your recollection at all.

25          A.     [Reviewing document.] I'll say the same thing. I

1 don't remember, you know, physically looking at this, but it is  
2 absolutely characteristic of our conversations. So it's  
3 consistent, I think, with what we had talked about, very much  
4 consistent with what we talked about, so I'm sure this letter  
5 in fact was received.

6 Q. All right. So it's consistent with what you  
7 discussed with Scott Davis.

8 A. Exactly.

9 Q. And in Paragraph 9 he asked you to have the tape  
10 analyzed; is that correct?

11 A. I'll read it, but that's exactly what it says.

12 Q. And you would say that's consistent with your  
13 conversations with him.

14 A. Absolutely. I mean, it's --

15 MR. ABT: Well, Your Honor, I'm going to ask that --

16 THE WITNESS: Do you want me to read it?

17 MR. ABT: No.

18 THE WITNESS: Okay.

19 MR. ABT: Your Honor, I'm going to ask that it be  
20 admitted for the record. I understand that Mr. Samuel  
21 cannot authenticate it, but I'm going to ask it be  
22 admitted as part of the record.

23 THE COURT: Any objection for the record only?

24 MS. GALLOW: No objection to it being made part of  
25 the record, Judge.

1 THE COURT: Okay. It's admitted then for the record  
2 only. And that's going to be a redacted copy?

3 MR. ABT: We are going to redact the letter, for the  
4 record, because there are portions other than Paragraph 9  
5 that are not relevant to this hearing, and that I think  
6 still remain privileged communication and we will redact  
7 those portions.

8 THE COURT: Okay.

9 **[WHEREUPON, Petitioner's Exhibit Number 50 was admitted**  
10 **into evidence for the record only.]**

11 MR. ABT: Thank you, Mr. Samuel, for your time.

12 THE WITNESS: You're welcome.

13 THE COURT: Any cross for Mr. Samuel?

14 MS. GALLOW: Yes, Your Honor.

15 **CROSS-EXAMINATION**

16 **BY MS. GALLOW:**

17 Q. Good morning, Mr. Samuel.

18 A. Good morning.

19 Q. I'd like to briefly go back and touch on your  
20 background and experience. You have tried, I believe you had  
21 said, approximately a hundred cases alone as lead counsel.

22 A. I think more than a hundred felonies at this point,  
23 yes.

24 Q. In both state and federal courts?

25 A. That is correct.

1           Q.    You've also tried several death penalty cases; is  
2 that right?

3           A.    To verdict and sentencing, two. I've had many death  
4 penalty cases that either settled before trial or the Judge  
5 said: Why don't we do the penalty phrase without a jury. But  
6 actually doing a closing argument on death penalty, twice.

7           Q.    And in all those cases that you represented where  
8 your client was subject to the death penalty, none of them were  
9 actually sentenced to death; is that correct?

10          A.    Thankfully.

11          Q.    You've also been ranked among some of the top Georgia  
12 lawyers in the state; is that correct?

13          A.    There are magazines that are completely unreliable  
14 that have those kinds of surveys in them that are completely  
15 useless unless I'm talking to a prospective client.

16          Q.    Well, along those lines, you've also been listed as  
17 among the best lawyers since 1991; is that correct?

18          A.    Same answer.

19          Q.    And you've also been recognized in Georgia's Trend  
20 Magazine for the legal elite, specifically for your work in  
21 criminal defense; is that correct?

22          A.    Yes.

23          Q.    You were also -- or you were a president for the  
24 Georgia Association of Criminal Defense Lawyers; is that  
25 correct?

1           A.     Yes.

2           Q.     In 1999 is it correct that you were elected to the  
3 American Board of Criminal Lawyers?

4           A.     American Board of Criminal Lawyers 1999? That sounds  
5 right.

6           Q.     And further, you were also inducted into the American  
7 College of Trial Lawyers in about 2000; is that correct?

8           A.     That's correct.

9           Q.     You also authored various books on criminal law; is  
10 that correct?

11          A.     That is correct.

12          Q.     Could you tell us what they are.

13          A.     I have written a book called The Georgia Criminal Law  
14 Case Finder which is a two-volume book on Georgia criminal law.  
15 I have written what's titled The Eleventh Circuit Criminal Law  
16 Handbook which is a one-volume encyclopedia, I guess, of  
17 Eleventh Circuit criminal law. I just finished another book on  
18 Georgia evidence for Lexis that has -- I'm the general editor,  
19 there are three or four authors who wrote different chapters.  
20 And I am just about finished, with Brian Steel, we have written  
21 a new form book for Georgia criminal defense. And I wrote a  
22 book for James Publishing Company, which is also on federal  
23 criminal law.

24          Q.     Thank you, Mr. Samuel. You've also spoken at various  
25 seminars and conferences in continuing legal education; is that

1 correct?

2 A. Yes.

3 Q. Including before the Eleventh Circuit Judicial  
4 Conference?

5 A. Correct.

6 Q. Further, I believe you're also a frequent guest on  
7 CNN discussing various criminal defense issues.

8 A. I stopped doing that, but I was at one point.

9 Q. But you have in the past been a guest on CNN; is that  
10 correct?

11 A. I have.

12 Q. Do you recall the case of Ray Lewis?

13 A. Of course.

14 Q. Now he was charged with a double homicide; is that  
15 correct?

16 A. Double murder.

17 Q. And in your representation of Mr. Lewis, you in fact  
18 got that double homicide reduced to a misdemeanor with 12  
19 months probation; is that correct?

20 A. That is correct.

21 Q. Now turning to some of the issues in this case, Mr.  
22 Samuel, I believe you said that lost evidence in this case was  
23 probably one of the essential issues that you focused on post  
24 trial?

25 A. That is correct.



1           Q.    And in preparing the motion for new trial, you  
2 divided some of the work up with Mr. Steel; is that correct?

3           A.    Yes.  And in the new trial I think Bruce Morris was  
4 somewhat involved then, too.  For the appeal it was just me and  
5 Brian Steel, for the most part.

6           Q.    And in preparing for the motion for new trial, you  
7 had testified that you met with both Dr. Davis and his wife.

8           A.    Correct.

9           Q.    Discussed various issues with them.

10          A.    Yes.

11          Q.    And in addition, you obviously met with Bruce Morris,  
12 you said, and discussed various issues that occurred at trial.

13          A.    Absolutely.

14          Q.    As well as Brian Steel?

15          A.    Frequently.

16          Q.    You also said that you read the entire trial  
17 transcript in this case.

18          A.    I did.

19          Q.    You reviewed the --

20          A.    I might not have read all the jury selection, but  
21 certainly the trial.

22          Q.    Did you get a chance to review the entire record of  
23 the case, including all the motions that were filed --

24          A.    Yes.

25          Q.    -- on behalf of Mr. Davis?

1           A.     Absolutely.

2           Q.     I believe you said that you had spent approximately,  
3 give or take, a hundred hours in preparing for the motion for  
4 new trial hearing; is that correct?

5           A.     More. More than a hundred hours for the new trial  
6 motion. Probably less for the actual brief in the Georgia  
7 Supreme Court.

8           Q.     You said less time for the brief?

9           A.     Less time for the brief, because we briefed it in the  
10 new trial motion, so then it was just a question of, you know,  
11 to some extent, reformatting. Mr. Steel did the Statement of  
12 Facts, which obviously is very detailed. So I think it was  
13 less than a hundred hours to actually write the appellate  
14 brief. But the new trial motion and the research and the  
15 investigation and the hearings and the visits to the prison, I  
16 think far exceeded a hundred hours.

17          Q.     So would it be fair to say that in preparing for both  
18 the motion for new trial hearing and preparing for the actual  
19 appeal itself, would it be fair to say that you spent  
20 approximately, give or take, 200 hours in preparing this case?

21          A.     You know, I don't know. I'm sure.

22          Q.     Regarding the lost evidence in this case, you  
23 obviously said you discussed this issue specifically with Bruce  
24 Morris, who was lead counsel?

25          A.     Yes.

1 Q. How did you decide --

2 A. Lead counsel at the trial.

3 Q. At trial.

4 A. Yes.

5 Q. In discussing the case with Bruce Morris, how did you  
6 decide to pursue the missing evidence issue on appeal?

7 A. Well, first we had to address it in the new trial  
8 motion, then the appeal. I probably spent more time talking  
9 with Brian Steel about it, though that's not necessarily  
10 responsive to your question. It -- I mean, we decided to --  
11 and this is with Mr. Davis, too, talking with him, Scott Davis  
12 -- you know, to issue Open Records Act request, subpoenas for  
13 the SOPs.

14 There was some effort, although I don't think it was --  
15 that we had much chance of actually finding the lost evidence,  
16 that perhaps it would actually be found if we continued to  
17 pursue it and make demands and subpoena it. It wasn't, of  
18 course.

19 We subpoenaed witnesses who testified at the new trial  
20 motion about the lost evidence -- and I am -- there was  
21 something about the fingerprint card. There was a witness with  
22 the fingerprint card, and I can't remember the details, at  
23 least one witness who testified about the missing fingerprint  
24 card, which was quite significant to us.

25 And then there were the whole legal issues of how do we

1 deal with Trombetta and Youngblood and the Georgia precedence  
2 with trying to convince, you know, the trial judge, Judge  
3 Campbell, and then ultimate the Supreme Court had to undo the  
4 verdict.

5 Q. Would it be fair to say at the motion for new trial  
6 hearing that you subpoenaed three witnesses to testify as to  
7 the missing evidence issue?

8 A. I don't remember the number. I --

9 MR. ABT: I'm going to object to it as a  
10 characterization as to what the witnesses were -- the  
11 purpose for what the witnesses were subpoenaed for. I  
12 mean, I think the record, a) speaks for itself and it's a  
13 mischaracterization as to what their testimony meant.

14 THE COURT: Rephrase.

15 MS. GALLOW: I'll rephrase the question.

16 **BY MS. GALLOW: [Resuming]**

17 Q. Mr. Samuel, do you recall James Wood?

18 A. No, sorry.

19 Q. Do you recall Carter Jackson?

20 A. I'm sorry, I did not reread the new trial motion, but  
21 that strikes me as maybe being the fingerprint guy I was just  
22 talking about. But I know that name. I know him. But I don't  
23 remember any connection here exactly what he did but --

24 Q. But you did say you subpoenaed witnesses to testify  
25 at the motion for new trial?

1           A.    Oh, we certainly did.

2           Q.    You also said that you attempted to subpoena records  
3 from various agencies regarding the chain of custody issue with  
4 regard to the evidence in this case?

5           A.    That absolutely sounds familiar.

6           Q.    And some of those agencies you would have subpoenaed  
7 were the GBI --

8           A.    Yeah. And when you say subpoenas, both subpoenas and  
9 Open Records Act requests --

10          Q.    Yes.

11          A.    -- so there were two different methods we were using,  
12 as I recall, yes.

13          Q.    And in fact you had attempted to use the chain of  
14 custody records from those agencies to explain where the  
15 evidence was before it was lost?

16          A.    That sounds certainly reasonable.

17                MS. GALLOW: Your Honor, if I may have a minute?

18                THE COURT: Yes, ma'am.

19                MS. GALLOW: And for the record, I'm about to show  
20 counsel the motion for new trial transcript, specifically  
21 pages 9 through 10.

22                If I may approach the witness, Judge.

23                THE COURT: Mr. Abt, if you want to go take a look at  
24 it, that's fine.

25                MR. ABT: No, I have my own copy.

1 THE COURT: Okay.

2

3 [Brief pause.]

4 MR. ABT: Sorry, what page did you reference?

5 MS. GALLOW: Nine through 10.

6 MR. ABT: Okay.

7 **BY MS. GALLOW: [Resuming]**

8 Q. Now again, with regards to James Wood, who was  
9 referenced on Page 10, why did you subpoena James Wood to  
10 testify at the motion for new trial?

11 A. Is there a clue on Page 10?

12 Q. Yes.

13 A. I'll keep looking then. Well, it looks like he was  
14 the sergeant with the Property Section of Atlanta Police. I'm  
15 -- all I can do is read this transcript. And it is what it is,  
16 and I can just repeat what's in there, and I'm absolutely  
17 positive the court reporter got it right, but other than that,  
18 I have no specific recollection of individual witnesses. I'm  
19 sorry.

20 Q. Well, in going back to the evidence issue, obviously  
21 this was, again, the central issue in the case at trial.

22 A. Well, it was for new trial motion. At trial was it  
23 the central issue? I'm not going to -- I don't know if that's  
24 fair or not.

25 Q. And again, when you said you were preparing a motion

1 for new trial to litigate that issue of missing evidence,  
2 again, part of your strategy was to subpoena the chain of  
3 custody records from the various agencies?

4 A. Absolutely.

5 Q. And would that have been to show that the chain of  
6 custody was in fact not maintained by those various agencies?

7 A. Right.

8 Q. And that was to show bad faith on the part of those  
9 agencies?

10 A. I think that's -- I think that's correct. And not  
11 only the chain of custody but the SOPs. Both of them showed  
12 bad faith, I think is the theory.

13 Q. Now with the gas can that was recovered from the  
14 burned out Porsche, you had testified that you didn't think  
15 that an expert would be helpful in finding the exculpatory  
16 nature of that gas can because you said it wasn't directly  
17 apparent; is that correct?

18 A. No, that's not --

19 MR. ABT: That's not what Mr. Samuel testified to.

20 THE COURT: Rephrase the question.

21 Q. I believe you testified, Mr. Samuel, that you wanted  
22 to find out whether or not the evidence in this case was  
23 apparent, the exculpatory nature of the evidence was apparent.

24 A. Well --

25 MR. ABT: Objection, Your Honor. I don't think he's

1 testified to that.

2 MS. GALLOW: I believe, Your Honor, what he said was,  
3 when we were getting into the lost evidence, he was trying  
4 to determine whether or not the evidence, when we had the  
5 reference to the bag, whether or not the evidence was  
6 apparent, whether the exculpatory nature was apparent on  
7 its face.

8 MR. ABT: I don't think he testified to that, either.  
9 In fact, Judge, I think it's the opposite.

10 THE COURT: Okay. I remember his -- some extensive  
11 testimony about what his understanding of the law was, and  
12 your -- it may even be that we need to go back. If you  
13 can just direct the court reporter, she'll look back and  
14 try to find exactly where you're referencing.

15 MS. GALLOW: Well, I will move on at this point, Your  
16 Honor.

17 THE COURT: Okay.

18 **BY MS. GALLOW: [Resuming]**

19 Q. Let me just -- let me back up for just a minute, Mr.  
20 Samuel. You said that you had subpoenaed the records from the  
21 various agencies to show bad faith in the loss or destruction  
22 of the evidence.

23 A. We subpoenaed all the records from the agencies. We  
24 wanted to show -- well, a) we wanted to see if we could find  
25 the evidence.



1 Q. Yes.

2 A. Not likely, but that's always possible, and b) we  
3 wanted to show that they didn't comply with their own either  
4 operating procedures or chain of custody obligations, if you  
5 will. And then at least our theory was, having not complied  
6 with the SOPs, having not complied with the chain of custody  
7 requirements, that equates to bad faith. That was the theory.

8 Q. That was your theory for motion for new trial?

9 A. Correct.

10 Q. Did you in fact argue that on appeal?

11 A. Whatever the brief says is what the brief says.

12 Q. I'd like to move on again to the taped interview that  
13 we had discussed earlier. There was an allegation that Mr.  
14 Davis had brought it to your attention that the tape had been  
15 stopped and started.

16 A. That is correct.

17 Q. Did you ever think a tape expert was necessary to  
18 evaluate whether or not that tape had been stopped or started?

19 A. I'm sorry, for some reason -- it sounded like a  
20 simple question but I -- I want to be careful with the answer.

21 Q. All right. Well, let me get -- it had come to our  
22 attention or your attention that Mr. Davis had said to you that  
23 the tape had been stopped and started?

24 A. Correct.

25 Q. And that he had requested in that letter that he

1 would like a tape analyst to check out the tape or analyze to  
2 see whether or not it had been stopped and started. Do you  
3 recall that?

4 A. There's two different questions there. The letter  
5 that I was just shown, that paragraph, Paragraph 9, focuses  
6 initially on the Seibert issue, which was clearly what we were  
7 all dealing with. And whether it was started and stopped which  
8 -- and my memory may be wrong here, but I didn't think there  
9 was much dispute that the tape was started and stopped because  
10 I think that Chambers -- Detective Chambers at one point, you  
11 know, left the room, came back, left the room, came back so --

12 THE COURT: Is -- okay.

13 MS. SHEIN: No objection, Judge.

14 A. [Continuing] But what Paragraph 9 of that last  
15 exhibit I saw was that Mr. Davis also suggested or stated that  
16 the tape was altered, which is different than stopped and  
17 started, in my opinion, and he wanted the tape analyzed for  
18 that, which is a little -- not particularly subtle difference  
19 between started and stopped and altered.

20 Q. Well, based on that allegation by Mr. Davis, did you  
21 see a need to secure an independent tape expert to analyze that  
22 tape?

23 A. I think the only answer I could give you is that we  
24 didn't do it. We didn't hire a tape analyst. I don't know  
25 what else to say. Did I see the need? I don't recall the

1 thought process. I don't even specifically recall the letter,  
2 but clearly it is addressed to me, so I don't question that I  
3 received it. I just don't recall the thought process one way  
4 or the other of should we hire one. I don't remember talking  
5 to Mr. Steel about it. I don't remember talking to Mr. Morris  
6 about it. So I just can't really fairly answer that question  
7 with any degree of certainty.

8 Q. But you did say it was undisputed that the tape was  
9 in fact stopped and started?

10 A. I thought it was.

11 MS. GALLOW: Your Honor, I have no further questions  
12 at this time.

13 THE COURT: Any redirect?

14 MR. ABT: Yes, Your Honor. One moment, Your Honor.

15 [Brief pause.]

16 MR. ABT: Judge, we may need to take another break at  
17 some point, but I'm going to have a few on redirect  
18 because we're going to have to get a portion of the trial  
19 transcript to refresh Mr. Samuel's recollection.

20 MS. GALLOW: Your Honor, I have the copy of the trial  
21 transcript if it would facilitate matters.

22 MR. ABT: Yeah.

23 MS. GALLOW: And I know exactly where it is.

24 MR. ABT: It will. I'm going to let -- I'm going to  
25 let Ms. Shein get the portion of the trial transcript from

1 the State while I'm redirecting Mr. Samuel.

2 **REDIRECT EXAMINATION**

3 **BY MR. ABT:**

4 Q. Ms. Gallow indicated you had called several witnesses  
5 at the motion for new trial; correct?

6 A. Is it correct that she said that? Yes.

7 Q. And were any of those witnesses experts?

8 A. No. I mean, there were police officers, sometimes  
9 I'm sure they get qualified as experts, but not on the issues  
10 that we are dealing with.

11 Q. They weren't experts retained by you?

12 A. No.

13 Q. And she also talked about how you went and, either  
14 through Open Records Request or subpoenas, set up to try and  
15 obtain Standard Operating Procedures and chain of custody  
16 documents. Ultimately did -- which Standard Operating  
17 Procedures were you able to obtain?

18 A. I don't remember the specific ones, I just -- I think  
19 we talked before about I got DeKalb Police, I may have gotten  
20 DeKalb Fire or they may be the same thing, and I don't remember  
21 -- I know we didn't get all of them. I know there was  
22 frustration that we didn't get all of them, but we did get  
23 some.

24 Q. Do you remember following up to go and get them so  
25 that they could then be supplemented in court?

1           A.    I remember efforts being made.  I remember being  
2 unsuccessful in my efforts.

3           Q.    Okay.

4           A.    That's the best I can tell you.

5           Q.    Okay.

6           A.    And I don't remember supplementing the record.

7           Q.    Do you know as to how many -- do you know how many  
8 violations of Standard Operating Procedure you were able to  
9 establish in the motion for new trial or appeal?

10          A.    I do not.

11          Q.    Scott Davis complained to you that the tape was --  
12 needed to be analyzed.

13          A.    Correct.

14          Q.    It needed to be analyzed because it was being stopped  
15 and started?

16          A.    And/or altered, correct.

17          Q.    Then I'm only going to have really one remaining  
18 question, but I need to refresh your recollection with the  
19 trial transcript, and if we could just take a moment.

20                               [Off the record.]

21               MR. ABT:  Your Honor, if I could approach Mr. Samuel.

22       **BY MR. ABT:  [Resuming]**

23          Q.    I'm going to show you what is a portion of the trial  
24 transcript in this case dated October 23<sup>rd</sup> through December 4<sup>th</sup>  
25 of 2006.  And this is Volume XII of -- well, no, I think that's

1 XXI.

2 A. That's XII.

3 Q. Oh, I'm sorry, thank you. I hate Roman Numerals.  
4 Volume XII of XXI of the trial transcript. And referring to  
5 Page 2,673.

6 A. Okay.

7 Q. This is a portion of the testimony of Mr. Chambers  
8 where he -- and I'll ask you if this refreshes your  
9 recollection as to whether or not there was repeated starting  
10 and stopping.

11 A. Okay, I read it.

12 Q. Okay. And does that refresh your recollection as to  
13 Detective Chambers' testimony with regard to that issue?

14 A. Certainly on that page, yes, absolutely.

15 Q. And so his testimony was that it was stopped once to  
16 turn the tape over; correct?

17 A. That's what he says on that page, yes.

18 Q. And that other than that, it was not -- that it was  
19 continuous and not started and stopped?

20 A. That's what it says, absolutely.

21 Q. Okay.

22 A. And I seem to remember some discussion about him  
23 leaving the room at some point, but I can't link that with  
24 starting and stopping the tape, necessarily.

25 Q. All right. So that's what I want to differentiate

1 here.

2 A. Right.

3 Q. Is that Mr. Davis, Scott Davis, was asking you to  
4 have the tape analyzed because he felt that --

5 MS. GALLOW: Objection, Your Honor. Counsel is  
6 testifying and leading.

7 THE COURT: Rephrase.

8 A. In the letter he is -- he --

9 Q. What was it clear to you the reason -- why was the  
10 reason that Scott Davis wanted you to have the tape analyzed?

11 A. Because it was either altered or repeatedly started  
12 and stopped -- stopped and started.

13 Q. Did Mr. Davis ever have any conversations with you  
14 about what happened during the starting and stopping? In other  
15 words, if the tape was stopped, what happened during those  
16 portions that were not recorded? Did he ever discuss that with  
17 you?

18 A. I just can't -- I'm certain that would have been the  
19 nature. Why else bring up the topic? But I can't recall the  
20 specifics.

21 Q. Did he ever make any allegation about that Detective  
22 Chambers threatened him?

23 A. I think that was the gist of it, yes.

24 Q. Threatened to kill him?

25 A. I do not remember that.

1           Q.    If an expert testified the gas can was purchased by  
2 someone other than Scott Davis, that would have apparent  
3 exculpatory value; correct?

4           A.    That would no longer be apparent, that would be  
5 exculpatory.

6           MR. ABT:   Okay.   Thank you.

7           THE COURT:   Any recross?

8           MS. GALLOW:   Brief recross, Your Honor.

9                           **RECROSS EXAMINATION**

10          **BY MS. GALLOW:**

11           Q.    Mr. Samuel, it was apparent that you did attempt to  
12 secure the Standard Operating Procedures from the various  
13 agencies at the motion for new trial; is that correct?

14           A.    Absolutely.

15           Q.    Was there a reason why you didn't follow up in  
16 securing those documents?

17           A.    I don't remember.   Was there a reason?   I'm certain  
18 there was.   And it may have been different reasons for  
19 different agencies.   There may have been some that said -- I'm  
20 speculating a little bit here, so I should be careful to say  
21 that -- it may have been they --

22           MR. ABT:   Objection.   I'm going to object.

23           THE WITNESS:   Okay.

24           MR. ABT:   He's speculating, Your Honor.

25           THE COURT:   I'll sustain it.



1           A.     [Continuing] I don't remember what the reasons were.

2     **BY MS. GALLOW:   [Resuming]**

3           Q.     Would it be fair to say, Mr. Samuel, that you had  
4 attempted to secure these documents?

5           A.     Absolutely.

6           Q.     And after attempting to secure the documents, you  
7 felt that maybe they weren't helpful to your case?

8           A.     I did not think that's what happened. I do not  
9 remember ever looking at an SOP and thinking, boy, this really  
10 hurts us. That -- it's inconceivable to me that an SOP would  
11 have said it's perfectly okay to lose a bunch of evidence,  
12 which would have been the only thing -- it would have made me  
13 think I don't want this SOP.

14          Q.     So had you seen at the time that these SOPs were  
15 critical to your case, would you have in fact made all efforts  
16 to secure them to prove bad faith on the part of the State?

17                 MR. ABT: Objection, Judge. Calls for speculation.

18                 MS. GALLOW: Your Honor, I said at the time had he  
19 seen these SOPs as being critical to his case, would he  
20 have subpoenaed them at the time.

21                 MR. ABT: Objection. They were never introduced into  
22 evidence, so she's asking him to speculate about what  
23 could have happened.

24                 THE COURT: Yes, rephrase, counsel.

25                 MS. GALLOW: Your Honor, I'll move on.

1 **BY MS. GALLOW: [Resuming]**

2 Q. Mr. Samuel, regarding the taped interview, it was  
3 obviously brought to your attention by Mr. Davis that there was  
4 allegations that the interview was stopped and started?

5 A. That's correct.

6 Q. So it was brought to your attention that there was  
7 some allegation that there may be some impropriety that  
8 occurred during that taped interview; is that correct?

9 A. That's what I don't really remember. I mean, my  
10 memory is just kind of focused on the whole Miranda/Seibert  
11 issue. He's not being Mirandized. There's some indication  
12 maybe -- Detective Chambers said at some point I did orally do  
13 it. And the timing wasn't right. We had a very detailed  
14 timeline of when the oral Miranda occurred, when the written  
15 Miranda occurred. So that was kind of my -- that's what my  
16 memory is -- that's what my memory is, that that's what we were  
17 dealing with, was just this whole timeline of when does Miranda  
18 occur, when are the statements introduced, when is he actually  
19 in custody. And the threat, if there is a threat, it was more  
20 of at what point do you feel you're in custody, that's the  
21 problem we're having. It's at what point is the witness in  
22 custody, therefore, Miranda kicks in. And anything said  
23 thereafter, without having been Mirandized, is inadmissible.  
24 Am I making sense?

25 So that's what -- where my memory is now, is that it was

1 all focused on Miranda as opposed to, you know, did he threaten  
2 to kill him or something. I certainly don't remember Detective  
3 Chambers threatening to kill anybody, but --

4 Q. Well, then based on your testimony that you just said  
5 that --

6 A. Yes.

7 Q. -- the Miranda issue was a prior -- it was a priority  
8 in terms of attacking that statement, would it be fair to say  
9 that that was what you focused on as the most important issue  
10 as to that taped interview?

11 A. Not only most important, probably only.

12 Q. So given that you focused on the Miranda issue or the  
13 fact that Davis was un-Mirandized at the time he was in  
14 custody, you chose not to secure a tape expert because that was  
15 the more important issue that you wanted to pursue on appeal?

16 A. I can't --

17 MR. ABT: Again I'm going to object as to -- she's --  
18 she's asking him to speculate about what was legally more  
19 important and --

20 MS. GALLOW: Your Honor --

21 MR. ABT: -- that's asking for a legal conclusion.

22 MS. GALLOW: Your Honor, I'm getting into what he was  
23 deciding at the time when he filed --

24 THE COURT: I'm going to overrule the objection. Go  
25 ahead.

1 MS. GALLOW: Thank you, Your Honor.

2 **BY MS. GALLOW: [Resuming]**

3 Q. So again, Mr. Samuel, at the time you filed the  
4 appeal as to the taped interview, you said the Miranda issue  
5 was of utmost importance?

6 A. Correct.

7 Q. So again, is it fair to say that based on the fact  
8 that that Miranda issue was of utmost importance, whether or  
9 not the taped interview itself may have been altered or stopped  
10 was of a secondary nature?

11 A. I mean today, looking back, if it's altered or  
12 something, that would affect the Miranda issue; right? I mean,  
13 if during the course of an unrecorded portion of the interview  
14 -- you know, and I'm hypothesizing -- if Detective Chambers  
15 says you're not going anywhere, you're staying right here;  
16 well, then he's in custody. So if that's what's happening  
17 during an unrecorded portion of the tape, or he does something  
18 that's coercive that would kick in the in-custodial aspect of  
19 the interrogation, I don't see how you would divide the two.

20 Q. But again, this conclusion is now based on hindsight;  
21 is that correct?

22 A. I don't know what happened -- if there was an  
23 unrecorded portion, I don't know what happened, so it's all  
24 hypothetical to me today.

25 Q. Mr. Samuel, at the time you filed the appeal in this

1 case, including the issue as to the taped interview, did you  
2 feel that you found the most viable and meritorious issues that  
3 had the most success on appeal?

4 A. At the time I thought so.

5 MS. GALLOW: Your Honor, I have no further questions.

6 THE COURT: Can Mr. Samuel be excused?

7 MR. ABT: Judge, just a very brief redirect.

8 THE COURT: It's actually not a redirect, it's a re-  
9 redirect.

10 MR. ABT: Re-redirect.

11 THE COURT: But who's counting. Go ahead, Mr. Abt.

12 MR. ABT: Sorry, Your Honor.

13 **FURTHER REDIRECT EXAMINATION**

14 **BY MR. ABT:**

15 Q. Again, just to clarify.

16 A. Sure.

17 Q. Scott asked you to have the tape analyzed?

18 A. Correct.

19 Q. He thought it had been tampered with or altered or  
20 started and stopped?

21 A. Correct.

22 Q. You never got an expert to analyze it?

23 A. Correct.

24 Q. You knew how to do that because you had hired experts  
25 in other cases?

1           A.     Correct.

2           MR. ABT:  No other questions.

3           MS. GALLOW:  Your Honor, one more question.

4           THE COURT:  Yes.

5                           **FURTHER RECROSS EXAMINATION**

6   **BY MS. GALLOW:**

7           Q.     Mr. Samuel, if that was the case, based on what we  
8           just heard, why didn't you do it?

9           A.     I just don't know the answer to that.  I just -- I  
10          cannot remember the thought process, I can't remember  
11          discussing it with co-counsel, I don't remember doing a --  
12          putting a line down the middle of a page and saying here are  
13          the good reasons to do it, here are the reasons not to do it.  
14          I just don't have any -- I can't tell you the answer to that  
15          question because I don't remember.

16          Q.     And again, just to reiterate, you did say that the  
17          Miranda issue was your most important issue that you wanted to  
18          pursue at the time you filed an appeal?

19          MR. ABT:  Objection.  Asked and answered.

20          THE COURT:  Go ahead.

21          MS. GALLOW:  No further questions, Your Honor.

22                           [Witness excused.]

23          THE COURT:  Okay.  What's next?

24          MS. SHEIN:  Good question.  Can we take just a two  
25          minute break and figure that out?

1 THE COURT: Okay.

2 MS. SHEIN: We've got a lot of witnesses here, we  
3 just have to decide what order we should try to call them.

4 **[Brief recess.]**

5 \* \* \*

6 THE COURT: You can just have a seat, sir.

7 MR. COHEN: Good morning, Mr. Pryor.

8 THE WITNESS: Good morning.

9 Whereupon,

10 **ALFREDDIE PRYOR - Recalled**

11 having been duly sworn under oath, was examined and testified  
12 as follows:

13 **DIRECT EXAMINATION**

14 **BY MR. COHEN:**

15 Q. And could you once again state your name for the  
16 record.

17 A. Alfreddie Pryor.

18 Q. And we established this yesterday, but your  
19 occupation?

20 A. That's correct.

21 Q. Is? If you could clarify for us your occupation.

22 A. Right now I'm a Crime Laboratory worker.

23 Q. Okay. And we established this yesterday that you had  
24 been involved with the Crime Lab handling of particular  
25 evidence in the Scott Davis investigation; correct?

1           A.     That's correct.

2           Q.     And yesterday I had been asking you questions about  
3 some latent print cards, and we had been through some  
4 questioning about matters such as AFIS and backing up print  
5 cards; do you recall all that?

6           A.     Yes, sir.

7           Q.     And I had asked you about a Standard Operating  
8 Procedure that dealt with creating a case file on any latent  
9 fingerprints; correct?

10          A.     That's correct.

11          Q.     Okay. And the reason that we had asked you to come  
12 back today was that you were going to bring us back the final  
13 notes that you had on this case.

14          A.     I was going to try to find if I had any.

15          Q.     Okay. But as of this time you have not been able to  
16 produce anything for the Court?

17          A.     That's correct.

18          Q.     Okay. And correct me if I'm wrong, you had stated  
19 that you hadn't created an actual case file, you had personal  
20 notes; right?

21          A.     Analytical notes.

22          Q.     Okay. And we had discussed yesterday if there were  
23 Standard Operating Procedures that actually stated that there  
24 should be an actual case file created for any case involving  
25 latent prints --



1 MR. MALCOLM: Your Honor, I'm going to object. This  
2 has all been gone over yesterday; it's asked and answered.

3 MR. COHEN: Your Honor, I'll move on. I just wanted  
4 to make sure I picked up where I left off.

5 THE COURT: Okay.

6 MR. COHEN: I didn't want to take the train of  
7 thought up out of the blue.

8 **BY MR. COHEN: [Resuming]**

9 Q. All I'm trying to establish today is you weren't able  
10 to bring us anything; right?

11 A. That's correct.

12 Q. Okay. And we had talked about Standard Operating  
13 Procedures. Do you recall my asking you whether or not there  
14 was a requirement that any prints that were not determined to  
15 be of AFIS quality would have to be acknowledged as such in an  
16 official report?

17 A. Well, now the procedures have changed. Yes, it is  
18 required now.

19 Q. Required now.

20 THE COURT: But it was not required at the time this  
21 case was pending, or you don't know?

22 THE WITNESS: I can't remember back in 1996.

23 MR. COHEN: Your Honor, if I may approach the  
24 witness.

25 THE COURT: Yes, sir.

1           Q.    I'm showing you what is marked as Petitioner's 51.  
2 Can you tell us if you recognize that document?

3           A.    Yes.

4           Q.    And can you identify it for us?

5           A.    This is a Latent Print Operation Manual for AFIS  
6 Searches dated in 1999.

7           Q.    Okay. And I'm going to clarify that some of these --  
8 or actually, they're all two-sided documents, this one I'm not  
9 asking you to review anything on the back side, we're just  
10 dealing with the front page of this. Is this a document that  
11 you would have been familiar with in your role at the GBI?

12          A.    Well, just, like I say, this is dated 1999. The case  
13 was submitted in 1996, I believe it is.

14          Q.    Okay. But is this document that in your time with  
15 the GBI you would have been familiar with?

16          A.    As far as AFIS searches, yes.

17          Q.    And is this a document that would have been kept and  
18 maintained in the ordinary course of GBI business?

19          A.    In 1999, yes.

20               MR. COHEN: At this time we'd seek to admit  
21 Petitioner's 51 into evidence.

22               MR. MALCOLM: No objection, Your Honor.

23               THE COURT: Admitted without objection.

24               **[WHEREUPON, Petitioner's Exhibit Number 51 was admitted**  
25               **into evidence without objection.]**

1 **BY MR. COHEN: [Resuming]**

2 Q. Okay. I just want to ask you a few questions --  
3 we've gone back as far as we can with these, but this is, as  
4 you have identified, Standard Operating Procedure for AFIS  
5 searches; correct?

6 A. In 1999, yes, sir.

7 Q. Okay. And the fingerprints would have still been  
8 with the agency at that time?

9 MR. MALCOLM: Objection, Your Honor. Leading.

10 Q. Would the fingerprints still have been with the  
11 agency at that time?

12 A. Would they have been?

13 Q. Yes, sir.

14 A. Well, when evidence is submitted to a laboratory,  
15 once, all right, the analysis is done, once the agency receives  
16 an official Crime Lab report, at that time they can come pick  
17 the evidence up.

18 Q. Didn't we establish -- did we establish yesterday  
19 that fingerprints of comparison quality which were not a match  
20 were to be placed in a laboratory hold container?

21 A. If evidence is requested by the agency to be hold or  
22 held, then it is held for a period of time.

23 Q. Okay. And what exactly is the procedure here that is  
24 described for items that are determined to not be of AFIS  
25 quality?

1           A.     Number 3 says: Items that are not AFIS quality will  
2 be reported as such in an official report.

3           Q.     So is this consistent with other requirements for  
4 keeping records on latent prints that essentially ask to  
5 document every step of the process?

6           A.     From 1999 forward, yes, sir.

7           Q.     Okay. So clearly this does state, we're in  
8 agreement, if the prints were not of AFIS quality that should  
9 have been stated in an official report.

10           MR. MALCOLM: Objection, Your Honor. He's still  
11 leading the witness.

12           THE COURT: Try not to lead your witness, counsel.

13           MR. COHEN: Yes, Your Honor.

14 **BY MR. COHEN: [Resuming]**

15           Q.     If the prints were not of AFIS quality, would this  
16 procedure have required submitting a written report to that  
17 effect?

18           A.     From 1999 forward, that's correct. To the day, we  
19 have to indicate a report.

20           Q.     And again, I would ask, there is no case file  
21 available, there are no notes that you've got for us?

22           MR. MALCOLM: Objection, Your Honor, asked and  
23 answered.

24           THE COURT: Yes.

25           MR. COHEN: Fine. May I approach?

1 THE COURT: Yes, sir.

2 **BY MR. COHEN: [Resuming]**

3 Q. I'm showing you now what's marked Petitioner's 52.  
4 Can you identify that document?

5 A. Exhibit Number -- is that an 8 or P-52?

6 Q. P-52.

7 A. P-52 is a Latent Prints Operations Manual Notes and  
8 Worksheets that's dated 8/20/99.

9 Q. And is this a document that you would have been  
10 familiar with as an employee of the Division of Forensic  
11 Sciences at the top?

12 A. In 1999, yes.

13 Q. And is this a document that would have been kept and  
14 maintained in the ordinary course of GBI business?

15 A. That's correct.

16 Q. Okay.

17 MR. COHEN: And at this time I would seek to  
18 introduce Petitioner's 52 into evidence.

19 THE COURT: Admitted without objection.

20 COURT REPORTER: Tell me, please, the name of that  
21 document.

22 MR. COHEN: This is Notes and Worksheets, Revision 1.

23 **[WHEREUPON, Petitioner's Exhibit Number 52 was admitted**  
24 **into evidence without objection.]**

25 **BY MR. COHEN: [Resuming]**

1 Q. Can you tell us what the instruction is at the top of  
2 this page regarding notes and worksheets?

3 A. As I mentioned, this is Notes and Worksheet Manual  
4 dated 8/20/99. It says, "All worksheets, notes, and any  
5 document generated will be completed in ink."

6 Q. Okay. And below that, what further requirements are  
7 there?

8 A. "Worksheets will be provided for the examination of  
9 evidence. All administrative data will be completed on the  
10 worksheet. All notes made will be neat, clean [sic], and  
11 concise."

12 Q. So this was a document which further details the  
13 document requests or the document requirements that would go  
14 with any latent print analysis.

15 A. During the time 1999, yes.

16 MR. COHEN: If I can approach the witness, Your  
17 Honor.

18 Q. Showing you now what is marked Petitioner's 53, will  
19 you tell me if you recognize that document.

20 A. This is -- P-53, Latent Prints Operations Manual  
21 Services dated 1/20/98.

22 Q. And is this a document that would have been available  
23 to you in your time at the GBI?

24 A. 1/20/98, yes.

25 Q. All right. And is this a document that would be kept

1 and maintained in the ordinary course of GBI business?

2 A. Well, when you say kept in GBI ordinary business,  
3 policies are changed in and on what is needed in the near  
4 future, so I'm not going to say this is a policy that is in  
5 force now, but during 1/20/98 it was in place.

6 MR. COHEN: At this time we would seek to introduce  
7 Petitioner's 53 into evidence.

8 MR. MALCOLM: Just for clarification purposes, what  
9 I've received is -- Petitioner's 53 has a back.

10 MR. COHEN: And both sides we want to be part of  
11 Exhibit 53.

12 MR. MALCOLM: Okay.

13 MR. COHEN: That was not the case with the prior two,  
14 which is why I'd mentioned the first one --

15 MR. MALCOLM: Then I would have an objection, Your  
16 Honor. He's not identified anything on the back of the  
17 exhibit.

18 MR. COHEN: I'll identify the back page.

19 **BY MR. COHEN: [Resuming]**

20 Q. On the other side of the page, sir, do you recognize  
21 this document?

22 A. This is also a Latent Prints Operations Manual,  
23 Receiving, Transfer, and Storage of Evidence Manual dated  
24 1/20/98.

25 Q. And is this also something that you would have been

1 familiar with and that would have been available to you in your  
2 tenure at the GBI?

3 A. From -- during the time 1/20/98, yes.

4 Q. And again, this would have been kept and maintained  
5 during the ordinary course of GBI business?

6 A. On that date, yes, sir.

7 MR. COHEN: We would seek to introduce Petitioner's  
8 53 into evidence at this time.

9 MR. MALCOLM: No objection, your Honor.

10 THE COURT: All right. It's admitted without  
11 objection.

12 **[WHEREUPON, Petitioner's Exhibit Number 53 was admitted**  
13 **into evidence without objection.]**

14 THE COURT: On 51 and 52, if the backs are not being  
15 considered, could you X them out?

16 MR. COHEN: They are X'd out, Your Honor.

17 THE COURT: Okay. Thank you.

18 **BY MR. COHEN: [Resuming]**

19 Q. Turning back to the front of P-53, can you tell us  
20 what specifically this Standard Operating Procedure deals with?

21 A. This particular P-53 deals with Services.

22 Q. And if you could, just read the first two sentences.  
23 I think that will clarify exactly what the point of this  
24 exhibit is.

25 A. Latent fingerprints are the most dynamic physical



1 evidence available to law enforcement agencies. The  
2 preservation, analysis, and documentation of latent  
3 fingerprints provides invaluable support to criminal  
4 investigations.

5 Q. And then looking at the headings that are underneath  
6 that paragraph, what is the second line referring to?

7 A. Development and Preservation of Latent Prints.

8 Q. And turning it over to the other side, can you tell  
9 us what the Standard Operating Procedure on the other side of  
10 P-53 deals with?

11 A. This is titled Receiving, Transfer, Storage of  
12 Evidence; and it's dated 1/20/98 again.

13 Q. And you can take a moment to read the document and  
14 refresh your recollection if you need to, but can you tell us  
15 what the gist of this Standard Operating Procedure is?

16 A. The first line says that the Latent Print evidence  
17 will be entered into the laboratory following these guidelines  
18 set forth in the DOFS Operations Manual.

19 Q. And in the second paragraph, there are some very  
20 specific requirements dealing with the preservation of latent  
21 prints. Can you tell us what kind of things are required under  
22 this Standard Operating Procedure?

23 A. May I read it?

24 Q. Sure.

25 A. "The receiving Latent Print Examiner or Technician

1 will clearly and prominently mark all containers with the  
2 unique DOFS case number, items number, initials, and keep the  
3 evidence sealed until transfer or time of analysis. At times  
4 of analysis the examiner will initial the evidence container,"  
5 I'm sorry, I left my glasses -- "When evidence is removed from  
6 any container, the evidence will be marked with the unique DOFS  
7 case number, item number, and initials of the examiner  
8 performing the analysis."

9 Q. And as of today, you have been unable to locate any  
10 documentation that relates to preservation, much less the  
11 analysis, of these prints?

12 A. That's correct.

13 Q. Okay. And finally, let's skip down to Evidence Room  
14 Transfer. If you can just read us what it says under Evidence  
15 Room Transfer.

16 A. "Items transferred to the Evidence Room will be  
17 sealed by the examiner. The appropriate documentation required  
18 by DOFS Policy will be attached to each item to be transferred.  
19 The evidence will be controlled -- collected maybe -- by a  
20 Latent Print technician on assigned days for transport to the  
21 Evidence Room."

22 Q. And again, is there any such documentation available  
23 on these prints?

24 A. Of transfer to the Evidence Room? I believe we have  
25 a copy of all the policies and everything.

1           Q.    We admitted into evidence yesterday a chain of  
2 custody document showing receipt and possession of these items,  
3 but we established, in asking about it, there was a case file.  
4 Is there documentation showing these items being transferred?

5           A.    I believe you have a copy of all of the policies and  
6 information from the Crime Lab referencing transfer of  
7 evidence.

8           Q.    Referencing transfer of evidence. But the only  
9 documents we saw yesterday acknowledged receipt and possession  
10 as opposed to transfer?

11          A.    I'm not sure, but yes.

12                               [Off the record.]

13          MR. COHEN: May I approach, Your Honor?

14          THE COURT: Yes, sir.

15          Q.    I'm showing you now what is marked Petitioner's 54.  
16 Can you tell me if you recognize this document?

17          A.    This document is a Latent Print Procedures Manual,  
18 AFIS Procedure, dated 7/30/01.

19          Q.    And is this a document that would have been available  
20 for your viewing while you were at GBI?

21          A.    In '01, yes, sir.

22          Q.    And is this a document that would have been kept and  
23 maintained in the ordinary course of GBI business?

24          A.    That's correct.

25          Q.    And if you turn the page over, you can see -- or tell

1 us, is it a separate SOP or is it the continuation of what  
2 begins on the front page?

3 A. This is a continuation.

4 MR. COHEN: At this time we'd seek to admit  
5 Petitioner's 54 into evidence.

6 MR. MALCOLM: No objection, Your Honor.

7 THE COURT: Admitted without objection.

8 **[WHEREUPON, Petitioner's Exhibit Number 54 was admitted**  
9 **into evidence without objection.]**

10 **BY MR. COHEN: [Resuming]**

11 Q. Is this a procedure that you would have been familiar  
12 with personally?

13 A. In '01, yes.

14 Q. Okay. Coming down to where it says Procedures --  
15 well, actually, let's start with Purpose up at the top. You  
16 can read it if you want to or you can scan it and just give us  
17 a summary. What is the purpose of this procedure?

18 A. The front part of this P-54 says, "To provide  
19 Georgia's law enforcement agencies with access to the statewide  
20 Automated Fingerprint Identification System. Latent  
21 fingerprint scientists can search latent prints against a known  
22 criminal file and an unsolved latent file. Scientists can also  
23 search questioned inked prints against the same files."

24 Q. Now coming down to Procedures and the first numbered  
25 paragraph below that, yesterday do you recall my asking you if

1       there was a standard for what determined whether or not prints  
2       were of AFIS quality?

3           A.     Well, that is up to the examiner.

4           Q.     Could you read for us, starting with just Item 1 of  
5       Procedures.

6           A.     "Visual examine -- visually examine the latent  
7       print/questioned inked fingerprint with a professional  
8       fingerprint magnifier to determine if they are AFIS quality. A  
9       latent print/questioned inked print will be determined to be  
10      AFIS quality if the latent print/questioned inked print can be  
11      digitally enhanced to clearly define at least eight ridge  
12      characteristics. A latent print/questioned inked prints will  
13      be determined not to be AFIS quality if the latent  
14      print/questioned inked print cannot be digitally enhanced to  
15      clearly define eight ridge characteristics. Some latent  
16      print/questioned inked prints with less than eight ridge  
17      characteristics can be considered AFIS quality provided that  
18      these latent print/questioned inked prints have a unique/rare  
19      characteristic, i.e. smiley face, letter, or number."

20          Q.     And turning the document over, I would draw your  
21      attention to the numbered Item 7. Can you tell us what seven  
22      directs?

23          A.     Number 7 says, "If the search results in a 'NO HIT,'  
24      the latent print is registered to the unsolved latent file so  
25      that incoming known criminal fingerprint cards can be compared

1 to that and other latents from unsolved cases. After  
2 registration, the AFIS procedure is complete."

3 Q. So in summary, we do have a standard for what  
4 determines AFIS quality?

5 A. Yes.

6 Q. And anything that is of AFIS quality should be run  
7 through the database?

8 A. No -- yes.

9 Q. And anything that doesn't have a match in the  
10 database is then maintained in an unsolved latent print case  
11 file?

12 A. If it's registered, yes, sir.

13 MR. COHEN: May I approach the witness?

14 THE COURT: Yes, sir.

15 Q. Showing you what's been marked Petitioner's 55, can  
16 you tell us if you recognize this document?

17 A. State 55 is a Quality Assurance Manual for Case Peer  
18 Review, and it's dated 1/23/98.

19 Q. And if you turn it over -- I'm sorry, we're just  
20 looking at the front of this one -- and on the page behind it  
21 can you tell us what the page behind that identifies?

22 A. This is Case Peer Review from the Quality Assurance  
23 Manual also dated 1/23/98.

24 Q. And they have the same date. Do you also see how  
25 only the front page says LP9-1 of 2?

1           A.     That's correct.

2           Q.     And only the front of the second page is LP9-2 of 2?

3           A.     Yes, that's correct.

4           MR. COHEN: I clarify, Your Honor, because it is a  
5 two page document; however, the back of the first page is  
6 not part of the procedure that is continued on the front  
7 of the second page.

8           THE COURT: And you've marked out the back of the  
9 first page?

10          MR. COHEN: If I may approach the witness, on this  
11 one I haven't yet.

12          THE COURT: Sure.

13          MR. COHEN: Thank you, Your Honor. Thank you.

14          Q.     And do you recognize -- I'm sorry, we've been through  
15 this -- is this a document that would have been kept and  
16 maintained in the ordinary course of GBI business?

17          A.     In 1998, yes.

18          MR. COHEN: And at this point we would seek to  
19 introduce Petitioner's 55 into evidence.

20          MR. MALCOLM: Just for clarification purposes, Your  
21 Honor, we're only introducing the front pages entitled  
22 Case Peer Review for both?

23          MR. COHEN: Yes.

24          MR. MALCOLM: Striking the back on both pages.

25          MR. COHEN: Case Peer Review only.

1 MR. MALCOLM: I have no objection, Your Honor.

2 THE COURT: Admitted without objection.

3 **[WHEREUPON, Petitioner's Exhibit Number 55 was admitted**  
4 **into evidence without objection.]**

5 **BY MR. COHEN: [Resuming]**

6 Q. I believe we looked at other versions of this with  
7 different dates on it. The red version might have a different  
8 date, but did we discuss Peer Review yesterday?

9 A. Yes.

10 Q. And can you tell us what it is that this Standard  
11 Operating Procedure is requiring in terms of latent prints  
12 examination?

13 A. May I read it?

14 Q. By all means?

15 THE COURT: I'm sorry, I don't -- sir, you can just  
16 read it silently and then answer the question.

17 THE WITNESS: Okay.

18 THE COURT: The document is going into evidence. I  
19 really don't think we need to read it into the record.

20 MR. COHEN: Yes, Your Honor.

21 Q. Take a moment and refresh your recollection.

22 [Off the record in re: scheduling.]

23 THE COURT: Back with Mr. Pryor.

24 MR. COHEN: Thank you.

25 Q. Have you had an opportunity to refresh your



1 recollection as to the Case Review Standard Operating  
2 Procedure?

3 A. Yes. The Case Review goes under a Technical Review  
4 and a Administrative Review, which the case files, the  
5 notations, the notes are in the case file. The administrative  
6 scope deals with -- they look for errors, make sure that  
7 initials, names, procedures follow into this Case Review.

8 Q. Okay. And how about Administrative Review?

9 A. Well, the Administrative Review also, this has been  
10 done on 100 percent of all cases. It looks for reviewing the  
11 information that's present in the case file, the dates,  
12 photographs, initials. It's looked at to make sure that all  
13 the documentations are there with initials and case number and  
14 et cetera. It looks for typographical errors. This is all  
15 done under Administrative Review.

16 Q. And finally on the second page of it, how about the  
17 second paragraph referring to "if an issue remains  
18 unresolved..."?

19 A. If the issue is unresolved between the scientist and  
20 reviewer, the case will be presented to the section manager,  
21 who will assume the role as a peer review. And if the manager  
22 questions the data of the scientist, and the resolution is  
23 still not possible, then the case will be reported  
24 inconclusive. Of course, this is done with a print and maybe  
25 there's a difference as far as whether it can be individualized

1 or not.

2 Q. Thank you. So again, there were requirements for a  
3 considerable amount of documentation?

4 A. That's correct.

5 MR. COHEN: May I approach?

6 THE COURT: Yes, sir.

7 Q. I'm showing you now what is marked Petitioner's 56.  
8 Sir, do you recognize this document?

9 A. State's Exhibit P-56 is a Evaluation of Evidence,  
10 copy of an Operation Manual dated 1/20/98.

11 Q. And is this something that would have been available  
12 to you during your time with the GBI?

13 A. In 1998, yes.

14 Q. And this is a document that would have been kept and  
15 maintained in the ordinary course of GBI business?

16 A. That's correct.

17 Q. And the back page is -- the back of the page has an X  
18 through it indicating you're only concerned with the contents  
19 on the front of the page?

20 A. That's correct.

21 MR. COHEN: At this time we would seek to move  
22 Petitioner's 56 into evidence.

23 MR. MALCOLM: No objection.

24 THE COURT: Admitted without objection.

25 **[WHEREUPON, Petitioner's Exhibit Number 56 was admitted**

1           **into evidence without objection.]**

2       **BY MR. COHEN: [Resuming]**

3           Q.    Can you tell us a little bit about what this  
4 particular Standard Operating Procedure deals with?

5           A.    Well, the examiner must review the investigative  
6 information, written documentation, conversation, directly with  
7 the officer --

8           Q.    Okay.

9           A.    -- to --

10          Q.    Go ahead.

11          A.    -- to establish what evidence needed to be worked.

12          Q.    All right. And the point of this is to determine the  
13 potential value of the latent prints evidence?

14          A.    Well, this is to evaluate evidence to determine the  
15 potential of our useful investigation or information.

16          Q.    And it requires, as we established, either written  
17 documentation or --

18               MR. MALCOLM: Your Honor, objection. I don't mean to  
19 belabor the point, but he sort of is going over the  
20 document and leading the witness.

21               MR. COHEN: I'll rephrase.

22               THE COURT: I'll sustain.

23          Q.    Does this Standard Operating Procedure require any  
24 communication with an investigating officer on the case?

25          A.    Yes, it does.

1 Q. Thank you.

2 MR. COHEN: May I approach the witness?

3 THE COURT: Yes, sir.

4 Q. I'm showing you now what is marked Petitioner's 57.  
5 Do you recognize this document?

6 A. State's Exhibit 57 is also a Case Peer Review  
7 document dated 3/8/99.

8 Q. And is this something that would have been kept and  
9 maintained in the ordinary course of GBI records for business?

10 A. In 1999, yes.

11 Q. And on the backside you'll notice there's an X  
12 through it indicating we are only concerned with the front of  
13 this page.

14 A. That's correct.

15 MR. COHEN: At this time we would seek to introduce  
16 Petitioner's 57 into evidence.

17 MR. MALCOLM: Your Honor, my only objection to this  
18 document, it does say Page 1 of 2 at the bottom, but if  
19 it's going specific to this portion, I would like to have  
20 the full document --

21 THE COURT: Is the full document not the back --

22 MR. COHEN: No.

23 THE COURT: -- that we're not --

24 MR. MALCOLM: No, Your Honor, it does not appear to  
25 be.

1 MS. SHEIN: Hang on a second, we'll find it, Your  
2 Honor.

3 [Brief pause.]

4 MR. COHEN: Your Honor, this is actually not a  
5 document that needs to go into evidence.

6 MS. SHEIN: We already have something that, Your  
7 Honor -- that reflects the same thing.

8 MR. COHEN: To that effect. May I approach the  
9 witness?

10 THE COURT: Yes, sir.

11 **BY MR. COHEN: [Resuming]**

12 Q. Showing you now what is marked as Petitioner's 58, do  
13 you recognize this document?

14 MR. MALCOLM: Your Honor, just for numbering  
15 purposes, if we're going to supplement this one for 57, I  
16 have no problem with that. But, if not, then I guess 57  
17 needs to --

18 MS. SHEIN: Fifty-seven wasn't admitted.

19 THE COURT: Yes.

20 MR. MALCOLM: It wasn't admitted, but it was  
21 identified.

22 MS. SHEIN: Fifty-seven is not admitted; therefore,  
23 this will be 57.

24 THE COURT: Okay. Yes, I thought y'all withdrew 57.

25 MS. SHEIN: We did. We did, Your Honor.

1 THE COURT: So can we make this 57 just for numbering  
2 purposes, if that's okay?

3 MS. SHEIN: Yes.

4 MR. COHEN: Yes, Your Honor.

5 THE COURT: So the record is clear.

6 **BY MR. COHEN: [Resuming]**

7 Q. And do you recognize this document?

8 A. Exhibit P-57 is the Evidence Disposition dated  
9 1/4/99.

10 Q. And is this a document that would have been kept and  
11 maintained in the ordinary course of GBI business?

12 A. In 1999, yes.

13 MR. COHEN: At this time we would seek to admit  
14 Petitioner's 58 into evidence.

15 MS. SHEIN: Fifty-seven.

16 MR. COHEN: Fifty-seven, I'm sorry.

17 MR. MALCOLM: Only issue, Your Honor, there's a front  
18 and back on what I've been provided. It looks like  
19 they're both Evidence Disposition, labeled as such, but  
20 they have different dates on them. One is a revised SOP  
21 and one-- I would like the witness to clarify that.

22 MR. COHEN: They are, and I apologize for not  
23 clarifying.

24 Q. If you could tell us what's on the back of the page.

25 A. On the back of the page is Evidence Disposition

1 Revision 2, and this is dated 11/25/98.

2 THE COURT: So it's both the front and the back that  
3 you're wanting to admit?

4 MR. COHEN: Yes, Your Honor.

5 THE COURT: Okay. And -- I'm sorry?

6 MR. MALCOLM: I just would like the witness to be  
7 able to identify the back portion which he just mentioned.

8 Q. Can you identify that back of the page for us?

9 A. Yes. On the back of the page of the Evidence  
10 Disposition, Revised 2, dated 11/25/98.

11 MR. COHEN: At this time we would seek to introduce  
12 Petitioner's 57 into evidence.

13 MR. MALCOLM: I don't have an objection.

14 THE COURT: Admitted without objection.

15 **[WHEREUPON, Petitioner's Exhibit Number 57 was admitted**  
16 **into evidence without objection.]**

17 **BY MR. COHEN: [Resuming]**

18 Q. And Mr. Pryor, can you tell us what the Standard  
19 Operating Procedure indicated on the front of the page  
20 addresses?

21 A. The disposition of evidence, including returning the  
22 evidence to the appropriate parties.

23 Q. And I believe just the first paragraph is what's  
24 important to us here. Can you tell us what it states is  
25 supposed to happen to evidence which is not going to be

1 retained by GBI?

2 A. "The disposition of evidence includes returning  
3 evidence to the appropriate parties, retention of evidence, and  
4 destruction. Evidence that is stored beyond a certain time  
5 will be subjected to purging by returning the evidence to the  
6 submitting agency or by destruction."

7 Q. A submitting agency. And these items were submitted  
8 to GBI by Atlanta Police; right?

9 A. I need to see a report.

10 MR. COHEN: It was in evidence yesterday, Your Honor.

11 I didn't need to ask the question.

12 THE COURT: Okay.

13 Q. And on the back of the page, obviously it's a  
14 different revision of the same Standard Operating Procedure,  
15 but could you tell us what is clarified as to what should be  
16 the disposition of something that is not going to be  
17 maintained?

18 A. "...by returning the evidence to the submitting  
19 agency or by destruction," if that's what you're referring to.

20 Q. That's exactly what I'm referring to, thank you.

21 MR. COHEN: May I approach the witness?

22 THE COURT: Yes, sir.

23 Q. I'm showing you now what is marked Petitioner's 58.  
24 Tell me if you recognize this document.

25 A. [No response.]



1 Q. Do you recognize this document?

2 A. P-58, AFIS Searches dated 1/10/98. I think we went  
3 over part of this process.

4 Q. I believe it's a different revision is all, and the  
5 back of the page is X'd out, so we're referring only to the  
6 front page. Is this a document that would have been kept and  
7 maintained in the ordinary course of GBI business?

8 A. 1/20/98, yes.

9 MR. COHEN: We would seek to introduce Petitioner's  
10 58 into evidence at this time.

11 MR. MALCOLM: No objection, Your Honor.

12 THE COURT: Admitted without objection.

13 **[WHEREUPON, Petitioner's Exhibit Number 58 was admitted**  
14 **into evidence without objection.]**

15 MR. COHEN: If I may approach.

16 THE COURT: Yes, sir.

17 **BY MR. COHEN: [Resuming]**

18 Q. Showing you now what is marked Petitioner's 59. Can  
19 you tell me if you recognize that document.

20 A. Fifty-nine -- P-59 is a Instruction Manual Case Files  
21 dated 1/20/98.

22 Q. And if you turn it over, you'll see that the back of  
23 this one is also crossed out, so I'm asking you only to refer  
24 to the front of the document. Is this something that would  
25 have been kept and maintained in the ordinary course of GBI

1 business?

2 A. In 1998, yes.

3 MR. COHEN: I would seek to admit Petitioner's 59.

4 MR. MALCOLM: No objection.

5 THE COURT: Admitted without objection.

6 **[WHEREUPON, Petitioner's Exhibit Number 59 was admitted**  
7 **into evidence without objection.]**

8 MR. COHEN: Approach the witness?

9 THE COURT: Yes, sir.

10 **BY MR. COHEN: [Resuming]**

11 Q. I'm showing you what is marked Petitioner's 60. Can  
12 you tell me if you recognize this document?

13 A. Exhibit P-60 is Comparison of Latent Prints to Known  
14 Inked Fingerprints dated 3/26/99. It's also stamped Archived  
15 Version.

16 Q. And you'll notice that the back of the page on this  
17 one is also crossed out, so we're only asking you to refer to  
18 the front page -- front of the page.

19 A. Okay. Yes, sir.

20 Q. And is this a document that also would have been kept  
21 and maintained in the ordinary course of GBI business?

22 A. 3/26 of '99, yes, sir.

23 MR. COHEN: At this time we would seek to admit  
24 Petitioner's 60 into evidence.

25 MR. MALCOLM: No objection.

1 THE COURT: Admitted without objection.

2 **[WHEREUPON, Petitioner's Exhibit Number 60 was admitted**  
3 **into evidence without objection.]**

4 MR. COHEN: And finally, just one more. May I  
5 approach one last time?

6 THE COURT: Yes, sir.

7 **BY MR. COHEN: [Resuming]**

8 Q. Showing you what is marked Petitioner's 61 at this  
9 time, can you tell me if you recognize this document?

10 A. P-61 is a Comparison of Evidence, Operation Manual  
11 dated 3/8/99.

12 Q. And if you turn it over can you tell us what's on the  
13 other side?

14 A. It's a Chain of Custody, Revision 1, dated 3/5/01.

15 Q. And is this a document that would have been kept and  
16 maintained in the ordinary course of GBI business?

17 A. During the dates, yes.

18 MR. COHEN: I would seek to introduce Petitioner's 61  
19 into evidence at this time.

20 MR. MALCOLM: No objection.

21 THE COURT: Admitted without objection.

22 **[WHEREUPON, Petitioner's Exhibit Number P-61 was admitted**  
23 **into evidence without objection.]**

24 MR. COHEN: Just a very few questions.

25 **BY MR. COHEN: [Resuming]**

1           Q.    Do we know how many prints were on those six latent  
2 print cards?

3           A.    No, sir.

4           Q.    Okay. Do we have any worksheets regarding the  
5 results of any analysis of those latent prints?

6           A.    No, sir.

7           Q.    Do we have any notation that the prints were not of  
8 AFIS quality?

9           A.    I need to see those reports. I don't think so.

10          MR. COHEN: I would need to look at the exhibits in  
11 evidence to be certain which number this is. I don't  
12 remember what part of yesterday this was.

13          COURT REPORTER: What is that?

14          MR. COHEN: GBI official report of latent prints.

15                [Off the record to look for exhibit.]

16          MR. COHEN: So this document is already in evidence.  
17 May I refresh the --

18          THE COURT: I have no idea what that document is. Do  
19 you want to tell me what number it is?

20          MR. MALCOLM: Your Honor, if I can facilitate things.  
21 I believe he's looking for Exhibits 31 through 33.

22          THE COURT: Right.

23          MR. MALCOLM: Specifically in regards to those  
24 fingerprint reports, if we could just clarify what  
25 specific -- I have those fingerprints he's referring to in

1 asking the questions.

2 THE COURT: Well, can you -- I mean, if you don't --  
3 can you just -- Beth, do you have 31, 32, and 33 to just  
4 compare?

5 COURT REPORTER: It should be --

6 THE COURT: I just want to know what that is.

7 [Off the record comments.]

8 MS. SHEIN: All right. It's the Official Report of  
9 the State of Georgia Exhibit Number 32, analysis.

10 THE COURT: Okay, that's all I wanted to know.

11 MR. COHEN: Thank you. May I approach?

12 THE COURT: Yes.

13 **BY MR. COHEN: [Resuming]**

14 Q. Here you are, sir. So the question was do we have  
15 any notation that the prints were not of AFIS quality?

16 A. No, sir, we do not.

17 Q. And referring to this same document, in your results  
18 -- do your results show that the prints aren't a match for  
19 Scott Davis?

20 A. That's correct.

21 Q. And after having made that determination, you didn't  
22 choose to hold the prints at GBI?

23 A. Would you repeat the question?

24 Q. You did not determine that it was necessary to keep  
25 these prints at GBI?

1           A.    As my examination was complete, they were placed in  
2 the Evidence Room.

3           Q.    And you didn't back up the prints?

4           A.    I don't have my notes.  If you asked did I make  
5 copies of them, I don't have my notes, I can't say.

6           Q.    Where would latent print case files be stored?

7           A.    Well, the -- back in 1996 we would have a copy of the  
8 results and also a copy of our notes, and it would be  
9 maintained by the examiner.

10          Q.    And would that be in a secure location?

11          A.    Yes, sir, that's correct.

12          Q.    Would you have personally stored those files  
13 yourself?

14          A.    Yes.  For my personal copies, yes.

15          Q.    But we don't have any case file whatsoever on these  
16 prints?

17          A.    That's correct.

18               MR. COHEN:  Nothing further.

19                               [Brief pause.]

20               MR. COHEN:  One more question.

21          Q.    Where is the secure location where the case files  
22 should have been stored?

23          A.    My personal copies is in my office.

24          Q.    But you don't have them?

25          A.    That's correct.

1 THE COURT: I'm sorry, I'm a little unclear. Did you  
2 go to your office to get them?

3 THE WITNESS: Yes, ma'am. I looked for personal  
4 copies of any notes that I think that I may have had on  
5 this case.

6 THE COURT: Uh-huh.

7 THE WITNESS: I don't have any.

8 THE COURT: Okay. So -- so you -- was it your  
9 practice to store a personal copy in your office?

10 THE WITNESS: Referring to my notes, I would have  
11 kept my notes myself.

12 THE COURT: In your office?

13 THE WITNESS: Yes.

14 THE COURT: Okay. And when you left the GBI, because  
15 I think you're there part time now; correct?

16 THE WITNESS: That's correct.

17 THE COURT: Okay. So when you left, did you -- and  
18 you came back, I guess you changed offices?

19 THE WITNESS: I'm in a different location.

20 THE COURT: Huh?

21 THE WITNESS: I'm in a different location.

22 THE COURT: Okay. So what did you do with all of the  
23 personal notes and records that you kept secured in your  
24 office?

25 THE WITNESS: Well, a lot of those notes were

1 destroyed for age.

2 THE COURT: Okay. So your -- was there an official  
3 report that you made and then you kept your notes as well?

4 THE WITNESS: The official report was put on the GBI  
5 computer system.

6 THE COURT: Okay.

7 THE WITNESS: And then I just kept a copy of my  
8 notes.

9 THE COURT: Okay. And so your notes were just  
10 destroyed because they were old?

11 THE WITNESS: That's correct.

12 THE COURT: Okay. I'm sorry.

13 MR. COHEN: Thank you. Briefly, just a couple more  
14 things.

15 **BY MR. COHEN: [Resuming]**

16 Q. Where is the secure location that you referred to?

17 A. In my office at the GBI Headquarters.

18 Q. That was the secure location?

19 A. That's correct.

20 Q. And you referred to there being a copy. Where is the  
21 copy?

22 A. It's destroyed.

23 Q. So you didn't keep a copy of anything?

24 A. I don't have a copy of it.

25 Q. Within the Division of Forensic Sciences, does the



1 Latent Print section maintain a copy of a latent print case  
2 file?

3 A. Now you're asking?

4 Q. Now, yeah.

5 A. No, those are all scanned into the computer on to the  
6 LIMS system.

7 Q. What about then?

8 A. No.

9 Q. So there was no backup whatsoever?

10 A. All the backup I had was what I generated.

11 Q. Which you don't have?

12 A. I don't have.

13 MR. COHEN: Nothing further.

14 THE COURT: Any recross?

15 MR. MALCOLM: Well, just -- I think it's our first  
16 cross. Have we crossed yet?

17 MS. GALLOW: First cross.

18 MR. MALCOLM: First cross, Your Honor.

19 THE COURT: Oh, sorry. My mistake, I apologize.

20 MR. MALCOLM: That's okay. That's all right.

21 THE COURT: I apologize.

22 MR. MALCOLM: Just a few questions, Your Honor.

23 **CROSS-EXAMINATION**

24 **BY MR. MALCOLM:**

25 Q. Mr. Pryor, I believe you have what's already been

1 admitted as Petitioner's 32 there in front of you? That's your  
2 report. Do you have that in front of you?

3 A. Yes, sir.

4 Q. Okay. And I believe that report indicates that the  
5 prints were found to be of value for comparison purposes;  
6 that's correct?

7 A. Yes, sir.

8 Q. Okay. Does it say anything on that report about AFIS  
9 quality prints?

10 A. No, sir.

11 Q. Okay.

12 MR. MALCOLM: May I approach, Your Honor?

13 THE COURT: Yes, sir.

14 Q. I just want to see what you've got up here in front  
15 of you while you're searching for it.

16 Mr. Pryor, I'm going to show you what's previously been  
17 admitted as Petitioner's 33. Would you take a look at that for  
18 me? You've already identified that and authenticated it.  
19 Would you turn to the second page of that report. And isn't it  
20 correct that latent prints in this case were also compared to  
21 other individuals with negative results?

22 A. Yes, sir.

23 Q. Okay. I'm showing you now what's been previously  
24 admitted as Petitioner's 37. And this is, for the record, the  
25 AFIS procedure SOP I believe you testified about previously;

1 correct?

2 A. Yes.

3 Q. Okay. And these are actually a collection of a  
4 couple of revisions to that procedure, the first being marked  
5 looks like March the 8<sup>th</sup>, 2004; is that correct?

6 A. That's correct.

7 Q. And that's the first two pages. And for the record,  
8 would that date right there, does that indicate that date these  
9 procedures would have been implemented?

10 A. Yes, sir.

11 Q. Okay. And then the third page here is dated May the  
12 30<sup>th</sup>, 2006; correct?

13 A. That's correct.

14 Q. So that would have been an updated AFIS procedure?

15 A. Yes, sir.

16 Q. All right. And then finally we have a 12/4 2006,  
17 that's Page 4; correct?

18 A. That's correct.

19 Q. And actually, that's Page 4 and 5, that updated  
20 procedure. What I'm getting at, Mr. Pryor, is these dates  
21 indicate when those Operating Procedures become effective?

22 A. That's correct.

23 Q. All right. So are you aware -- or you don't have --  
24 do you have any knowledge of what the SOP, the specifics of the  
25 SOP would have been prior to Exhibit 37 as well as, I believe,

1       there's another exhibit today also mentioned, an AFIS  
2       procedure. What I'm getting at, Mr. Pryor, would it have been  
3       protocol back in December of 1996 for each examiner,  
4       fingerprint examiner, to submit prints through AFIS?

5           A.     In 1996, I'm not sure.

6           Q.     Okay. What about 1997?

7           A.     I'm not sure.

8           Q.     Okay. And didn't you testify, I believe at some  
9       point yesterday, that it was a discretionary call of the  
10      examiner to submit prints through AFIS?

11          A.     That's correct.

12          Q.     I'll show you what's previously been admitted as  
13      Plaintiff's -- Petitioner's 38. That is the digital capturing  
14      protocol dated November 14<sup>th</sup>, 2006; is that correct?

15          A.     That's correct.

16          Q.     All right. And that is in regards to the procedure  
17      for photographing latent fingerprints; correct?

18          A.     That's correct.

19          Q.     All right. And isn't it correct at the time that  
20      procedure was in place it was a discretionary call by the  
21      examiner of whether or not to digitally capture fingerprints?

22          A.     This procedure, it depends on whether the prints need  
23      enhancing or et cetera, this policy states that it would be  
24      used to produce examination-quality digital images of friction  
25      ridge impressions.

1           Q.    Okay.  So is it safe to say they would only be  
2           digitally captured if it was needed to enhance them for some  
3           reason, subject to the discretion of the examiner?

4           A.    That's correct.

5           Q.    And that's for 2006; correct?

6           A.    11/14/06, yes, sir.

7           Q.    And one final issue.  Petitioner's 39 you've  
8           previously identified and it's been admitted.  It's entitled  
9           Visual Examination Procedure dated January 20<sup>th</sup>, 1998.  That's  
10          the protocol for visual examination of prints at that time, Mr.  
11          Pryor?

12          A.    Yes, sir.

13          Q.    Okay.  And that protocol in regards to examination of  
14          those prints, what specifically does it say about when that's  
15          required?

16          A.    To examine any visible latent fingerprints.

17          Q.    Okay.  So generally, this is a fairly basic procedure  
18          required of each fingerprint analyst when they're examining a  
19          set of prints?

20          A.    That's basic, yes, sir.

21          Q.    Okay.

22               MR. MALCOLM:  Your Honor, I believe that's all I  
23          have.  Just one moment.

24                               [Brief pause.]

25               MR. MALCOLM:  That's all I have, Your Honor.  I'll

1 collect the exhibits and try to keep them in order. Thank  
2 you, Mr. Pryor.

3 MS. SHEIN: One moment, Your Honor.

4 [Brief pause.]

5 **REDIRECT EXAMINATION**

6 **BY MR. COHEN:**

7 Q. What was the procedure -- rather I'll ask it another  
8 way. Would the procedures we have discussed today be  
9 consistent with procedures in 1996 or 1997?

10 A. Probably not. I'm not sure.

11 Q. Not sure. If you recovered prints from a crime scene  
12 that were not those of the person arrested, would you have run  
13 them through AFIS?

14 A. It depends on the print, it depends on whether there  
15 was an individual or a suspect developed. It would be at my  
16 discretion.

17 Q. In an open homicide case, would it be normal to run  
18 prints through AFIS if there were no matches?

19 A. If -- that particular -- you're referring to back in  
20 1997, 1996? If there was no defendant or victim or elimination  
21 fingerprints and the print fit the criteria of being quality to  
22 be searched against the AFIS database, I probably would have  
23 ran it.

24 Q. Are you suggesting that in 1997, in an open homicide  
25 case with no matches, you would not have run prints through

1 AFIS?

2 A. Sir, but I would have to see those prints.

3 Q. And in this situation, without running the prints  
4 through AFIS, your only focus was on, at that point, Mr. Davis  
5 or the mechanic who had worked on the car or Megan Bruton who  
6 had been in the car?

7 A. My focus would be on the evidence that's submitted to  
8 me.

9 Q. So based on the answers that you've just given, would  
10 the decision not to run those prints through AFIS be logical?

11 A. I would have to see those prints because I don't have  
12 them in front of me.

13 Q. And we don't have them and they're lost forever?

14 A. The evidence was returned. I don't know where they  
15 are.

16 MR. COHEN: Nothing further.

17 THE COURT: Anything else?

18 MR. MALCOLM: No, Your Honor.

19 THE COURT: Okay. Can Mr. Pryor be excused?

20 MS. SHEIN: Yes, Your Honor, we're done with Mr.  
21 Pryor.

22 Thank you, Mr. Pryor, sir.

23 THE COURT: You're free to go, sir. Thank you very  
24 much.

25 THE WITNESS: Thank you.

1 THE COURT: Okay. Do y'all want to take 30 minutes  
2 for lunch now and get started back again around 12:30?

3 MS. SHEIN: Absolutely.

4 MR. MALCOLM: Thank you, Your Honor.

5 **[Luncheon Recess.]**

6 \* \* \*

7 THE COURT: Okay.

8 Whereupon,

9 **HENRY B. HOWARD,**

10 having been duly sworn under oath, was examined and testified  
11 as follows:

12 **DIRECT EXAMINATION**

13 **BY MS. SHEIN:**

14 Q. Would you state your name, please.

15 A. Henry Bolin Howard.

16 Q. And what is your occupation?

17 A. I'm basically an audio producer working in recording  
18 spoken word training materials, corporate training.

19 Q. Okay. And how long have you been in this employment?

20 A. I started working in the AV field in about 1975,  
21 worked for two different companies. Then in 1979 I started my  
22 own company.

23 Q. Have you been your own company since then?

24 A. With the exception of about two years when I worked  
25 for another studio in town.



1 Q. And what's the name of your company?

2 A. When I originally started I was doing business as  
3 Audio Craft. In the latter years I've just been operating as  
4 an individual.

5 Q. Just as a -- under your own name?

6 A. Yes.

7 Q. Okay. And can you describe a little bit about the  
8 type of work that you do?

9 A. Over the years I have done, primarily, as I said,  
10 spoken word recording, training materials, voiceovers for film,  
11 radio. I've also done, primarily for my own pleasure, created  
12 a lot of audio entertainment, primarily in the form of audio  
13 theater.

14 Q. And did you graduate from any college?

15 A. Graduated from Georgia State with the bachelor's in  
16 Accounting.

17 Q. And did you continue doing training in the area that  
18 you now are employed, or your individual employment?

19 A. Most of my training has been self-study, reading  
20 literature, magazines of the trade. I did one week-long  
21 seminar with NPR on Recording, but most of it has been through  
22 self-study, participating in organization discussions, groups,  
23 et cetera.

24 Q. Are you a member of any organizations?

25 A. Not at this time.

1 Q. Have you ever been?

2 A. I have been.

3 Q. And what are those organizations?

4 A. I was a member of NARIS --

5 Q. What is that?

6 A. That's the music industry, the folks that vote for  
7 the Grammys.

8 Q. Uh-huh.

9 A. Only because my boss put me in there. I was a member  
10 of AMI, the Atlanta Multimedia group, which has since become  
11 defunct. I was a member of the AES, Audio Engineering Society  
12 Chapter in Atlanta. There may have been something else, but I  
13 don't --

14 Q. What is the Audio --

15 A. Audio Engineering Society.

16 Q. -- Engineering Society? What is that?

17 A. That's a national organization of audio engineers.

18 The local society presented programs, gave us access to  
19 equipment manufacturers, and other material that as an  
20 individual it would have been very difficult to have exposure  
21 to.

22 Q. And what type of equipment is used in audio analysis?

23 A. There may be some sophisticated tools. What I end up  
24 using is basically high grade studio recording equipment,  
25 computers, which give you visual displays of the wave form, in

1 addition to recording material, and allowing you to edit,  
2 process, et cetera.

3 Q. Is this equipment, equipment that has been gradually  
4 improved as the years have gone by?

5 A. Yes. When I first started working in audio we cut  
6 and spliced quarter-inch tape. These days everything is in the  
7 computer.

8 Q. Okay. In the 1990s would you say -- what type of  
9 equipment could be used for forensic analysis of, let's say,  
10 audiotapes?

11 A. In the '90s I really -- I wouldn't be that familiar.  
12 There were some processes for being able to look at wave forms.  
13 And I really wasn't -- I wasn't involved in the forensic side  
14 at all in that time period, it's only recently that I have  
15 become involved in matters such as brings me here today.

16 Q. From the forensic side, but let's -- you were doing  
17 audio work in --

18 A. Yes. Yes, very --

19 Q. I didn't ask the question very well. What was the  
20 equipment you used in just doing audio work at that time? Just  
21 explain some of the equipment.

22 A. Well, you had, obviously, high-end microphones. In  
23 the '90s -- early '90s it was all quarter-inch tape recording,  
24 in addition to, obviously, there were cassettes then, and I  
25 don't remember when the micros first came out. We had mixers,

1 amplifiers, sometimes you used oscilloscopes, you had VU  
2 meters.

3 Q. What is an audio mixer?

4 A. An audio mixer allows you to combine the inputs of  
5 different sources to create a final product.

6 Q. During this time period, let's say from late '90s to  
7 early 2000s, was there equipment that you're familiar that  
8 could analyze audiotape productions -- or could listen to  
9 audiotape productions and determine how they were made?

10 A. Not that I'm aware of. I would imagine in that time  
11 period if there were, they were only held by large government  
12 agencies.

13 Q. Could you -- if you listen to a tape that was made  
14 from a mixing board, is that multiple layers of information on  
15 that tape that's put on it?

16 A. It could be, yes.

17 Q. Okay. So you could tell that, if you heard a tape,  
18 whether it was mixed or not mixed?

19 A. Generally speaking you could, but it would just be by  
20 listening to the content of what's there.

21 Q. Okay. Did there come a time when we contacted your  
22 office to assist us in analyzing a tape in the Scott Davis  
23 case?

24 A. Actually, your first contact was to go to the  
25 courthouse and make a copy of that tape, since it was evidence

1 and could not be released.

2 Q. But we contacted you --

3 A. Yes.

4 Q. -- to ask for your assistance in that regard; is that  
5 correct?

6 A. Yes, ma'am.

7 Q. And do you recall approximately when that was?

8 A. February 15<sup>th</sup>, I believe, is the day we actually went  
9 to court -- went down to the Fulton County Court.

10 Q. So that would be about the same time we contacted  
11 you?

12 A. Yes, very shortly after the first contact.

13 Q. Right. And were you paid for your services that you  
14 provided to our firm?

15 A. Yes, I was.

16 Q. And is this fee that you received consistent with  
17 fees you would have charged for a similar act to another  
18 person?

19 A. Yes.

20 Q. Have you received any bonuses or expectation of a  
21 bonus for testimony here today?

22 A. Not at all.

23 THE COURT: February 15<sup>th</sup> of this year, 2011?

24 THE WITNESS: 2010.

25 THE COURT: Okay.

1 MS. SHEIN: May I approach?

2 THE COURT: Yes.

3 [Off the record comments.]

4 Q. I am now showing you what has been marked as  
5 Plaintiff's Exhibit P-62. Could you identify this document for  
6 me?

7 A. This is a court order allowing myself and Debra  
8 Mulder access to go in and make that recording, and specifying  
9 the equipment that I could bring past security.

10 MS. SHEIN: Your Honor, this was an order we  
11 requested, and unless there's an objection, it's a court  
12 record, about the admission of it.

13 MR. MALCOLM: No objection.

14 MS. SHEIN: Okay.

15 THE COURT: It's admitted then without objection.

16 **[WHEREUPON, Petitioner's Exhibit Number 62 was admitted**  
17 **into evidence without objection.]**

18 **BY MS. SHEIN: [Resuming]**

19 Q. On the document, the order is identified Item No.  
20 251. Did you go to the courthouse to review Trial Exhibit in  
21 Scott Davis' case 251?

22 A. Went to the courthouse to actually make a complete  
23 copy of that Exhibit 251, which was a microcassette.

24 Q. Okay. And you entered the courthouse and did that  
25 with the exhibit you were handed by the Court?

1           A.     Yes.

2           Q.     Tell me -- or tell me how you -- what room you went  
3 to and what you did.

4           A.     We went to the Judge's office or office suite. We  
5 were escorted into -- I don't know whether it was his actual  
6 office or a conference room. I believe either his assistant or  
7 a court reporter brought us the evidence. At that point, I put  
8 the microcassette in a player which was connected to a digital  
9 recorder. We -- I played the tape from the very beginning to  
10 the end, recording everything that was there, then turned it  
11 over and played the second side of the tape, recording what was  
12 there.

13          Q.     And I need to go back just a little bit. I want to  
14 get him as an expert and want to make sure they don't -- if  
15 they have some voir dire for them -- I should have done this.

16          In your area of expertise, which appears to be forensics  
17 -- I'm sorry, audio analysis -- not forensics but audio  
18 analysis, have you testified in cases before?

19          A.     I have not.

20          Q.     Okay. Have you provided affidavits before to other  
21 people who have requested it for audio analysis?

22          A.     I have not for audio analysis. I have created a  
23 number of affidavits for making true and exact copies, or for  
24 processing to enhance the audio to try to pull out the words  
25 over background noises or other problems that might have been

1 -- might have occurred when the recordings were made.

2 Q. So that's actually analysis of the tape itself?

3 A. At that point you're analyzing what's the noise  
4 problem, what's the best way to get rid of it.

5 Q. And how long have you been doing that?

6 A. I actually started a little bit, primarily in the  
7 form of telephone recordings from individuals --

8 Q. I'm talking about years.

9 A. I was going to say, in the late -- mid to late '80s.  
10 I have done more of this particular type of business over the  
11 last five to eight years.

12 Q. Okay.

13 MS. SHEIN: I'd like to tender him as an expert in  
14 terms of audio analysis.

15 MR. MALCOLM: I do need to voir dire the witness, if  
16 that's all right, Your Honor.

17 THE COURT: Yes, sir.

18 **BY MR. MALCOLM:**

19 Q. Just a few questions for you, Mr. Howard.

20 MR. MALCOLM: And just so we're clear, I believe  
21 you're trying to tell me that he's an expert in audio  
22 analysis only, not in any sort of forensic analysis of  
23 tape recordings?

24 MS. SHEIN: Correct. Correct.

25 MR. MALCOLM: Okay.



1           Q.    Your current position, Mr. Howard, you said you're  
2 self-employed; is that correct?

3           A.    That's correct.

4           Q.    And what is -- what is the general business that  
5 you're self-employed in? What do your day-to-day operations  
6 consist of?

7           A.    I have two sides of that. One is I'm a legal  
8 videographer, videotaping depositions.

9           Q.    Okay. And what does that entail, just briefly?

10          A.    Going to the site of the deposition, setting up a  
11 camera, microphones, and ensuring that the entire event is  
12 properly captured for the Court.

13          Q.    All right. And what else?

14          A.    And the other is continuing in my same line of  
15 recording material, usually voice material, sometimes mixing  
16 music. I still continue to produce some audio entertainment.  
17 And from time to time I do receive from individuals, from  
18 attorneys or clients, audio that is -- that was not recorded in  
19 a pristine manner, and the attempt to enhance that and make it  
20 as listenable as possible.

21          Q.    So your expertise would be in videotaping the  
22 deposition as well as enhancing the sound quality of a  
23 audiotape?

24          A.    Yes.

25          Q.    You don't have any expertise in analyzing a tape to

1 determine if portions of it were deleted or if portions of it  
2 were altered in any way?

3 A. Not specific training there. However, in terms of  
4 editing and as we create material, we're constantly listening  
5 for any nuances, noises, anything else, we obviously -- from  
6 the other side, we're obviously trying to create something that  
7 runs real time very believable. In the radio drama I have  
8 done, it's a matter of piecing together elements such that the  
9 scene sounds very real and believable, which means very minute  
10 detail of which sounds go where. Obviously, you don't want a  
11 character walking through a door that hasn't been opened yet.  
12 So it makes you aware of all the little nuances that occur in  
13 audio.

14 Q. Okay. And you've never testified before in regards  
15 to analyzing a tape to determine if parts of it had been  
16 altered or omitted or deleted, anything like that, as an expert  
17 before, have you?

18 A. I have not.

19 MR. MALCOLM: Your Honor, I do object to this witness  
20 being tendered as an expert.

21 MS. SHEIN: I'm not -- Your Honor, I'm not asking him  
22 about whether he has expertise in determining deletions.  
23 I'm asking -- he'll be being asked questions related to  
24 the tape and what he has been able to detect on the tape  
25 concerning the stops and starts of the tape, which is the

1 issue in question.

2 MR. MALCOLM: Your Honor, in response to that, we've  
3 been provided with an affidavit from Mr. Howard as well as  
4 citations to what Mr. Howard testified to in the petition  
5 and brief in support of, which directly says that Mr.  
6 Howard would offer testimony if the tape was altered,  
7 portions were taped over or omitted or deleted, which is  
8 essentially what Petitioner's trying to argue. If they're  
9 going to try to elicit testimony regarding that, he  
10 clearly does not have expertise to testify to that, and  
11 that's what I'm objecting to.

12 THE COURT: Any response? Because I'm -- I'm not --  
13 I mean, at this point I'm not prepared to qualify him as  
14 an expert in that area.

15 MS. SHEIN: Just a moment, Your Honor.

16 [Counsel confer.]

17 MS. SHEIN: Let me ask a few more questions, Your  
18 Honor.

19 **BY MS. SHEIN: [Resuming]**

20 Q. Mr. Howard, have you analyzed tapes in terms of the  
21 sound quality of the tape and the contents of the tape?

22 A. In terms of listening to what can be done to enhance  
23 it, improve it, yes.

24 Q. Have you evaluated tapes before on what the context  
25 is?

1           A.     Yes.

2           Q.     How many -- how many years have you done that?

3           A.     Pretty much through my entire career.

4           MS. SHEIN: Your Honor, I don't know why he wouldn't  
5 be qualified to tell us what is on, you know, the  
6 structure of the tape and the contents of the tape in  
7 terms of what happened during the course of the recording.  
8 He's totally qualified to do that.

9           MR. MALCOLM: No, he's not, Your Honor. There's been  
10 no foundation laid whatsoever that he's qualified to do  
11 that. He has testified that he is an expert, I guess, in  
12 videotaping depositions and determining quality of  
13 audiotapes in regards to sound quality, and that he has an  
14 expertise or experience in enhancing that quality. He  
15 produces those types of things. But he has not testified  
16 and laid a foundation that he has an expertise in what  
17 they're trying to get at.

18          MS. SHEIN: No, he has, Your Honor. He's actually  
19 said that that's what he does, is he identifies what is on  
20 the -- the sound quality --

21          THE COURT: Well, I can identify what's on the tape.  
22 I can hear it. I mean, he hasn't said -- he said he's  
23 done enhancement of tapes that are hard to hear, and he's  
24 made tapes. I'm -- you can ask him. I'm not aware that  
25 he's ever taken a tape -- and if this is what he does, I'm

1 happy for him to tell me that, but I'm not aware that he's  
2 taken a tape and listened, does this as part of his work  
3 and is able to tell whether tapes have been stopped and  
4 started and added to and deleted. So I'm unclear.

5 **BY MS. SHEIN: [Resuming]**

6 Q. Can you clarify that? Have you done that before?

7 A. In terms of the issues we've just discussed, whether  
8 tapes have been started, stopped, I do that, not specifically,  
9 but in terms of listening to and production.

10 As I was making a copy of this tape originally, just as it  
11 was run --

12 Q. No, no. Mr. Howard, the question to you is --

13 THE COURT: I just need you to be careful.

14 MS. SHEIN: Yeah.

15 Q. We'll get to all that later. But the question to you  
16 is have you done in other tapes or other situations listened to  
17 tapes and determined the stops and starts of those tapes?

18 A. Yes.

19 Q. How many times have you done that over the years?

20 A. Probably five to ten years or more.

21 Q. And could you make like a number of occasions in  
22 which you've done that over the five to ten years, like one  
23 tape? twenty tapes? a hundred?

24 A. Since I'm usually not being asked to identify them,  
25 I'm being asked to clean up, to edit, whatnot. I have to

1 identify those places to make those edits to take out problems.  
2 Probably hundreds of recordings.

3 MR. MALCOLM: Based on his answer to that question,  
4 that just corroborates what I'm saying. And also, Your  
5 Honor -- and I'm specifically citing to the Petitioner's  
6 brief, citing what Mr. Howard -- his anticipated testimony  
7 would be, that he was going to testify to the portions of  
8 the recording that had been altered or deleted or taped  
9 over. He has not laid any foundation to qualify him as an  
10 expert to testify to those things, Your Honor.

11 And, furthermore, his affidavit that was provided us  
12 lists none of his qualifications that would show that as  
13 well. So we object to that, Your Honor.

14 THE COURT: Counsel, I'm going to need -- I  
15 understand what he's said, but I'd like some more specific  
16 information about instances where he has -- where he's  
17 determined that a tape had been altered or something had  
18 been deleted, and that's what he was being asked to do.  
19 Not that he just enhances tapes or corrects and deletes  
20 something that shouldn't be there is a formal recording.  
21 So at this point, I'm just not prepared to qualify him as  
22 an expert for what I think you're trying to put him up as  
23 an expert for.

24 MS. SHEIN: Let me take just a moment because I think  
25 we can clarify that.

1 THE COURT: Okay.

2 [Counsel confer.]

3 **BY MS. SHEIN: [Resuming]**

4 Q. Mr. Howard, can you isolate or give me an example of  
5 a situation in which you have listened to an audiotape and  
6 analyzed the tape itself for stops, starts, or gaps, deletions,  
7 or alterations?

8 A. In a lot of the recordings I may receive that someone  
9 else has made, in the process of editing, you're listening for  
10 the subtleties of the recording, in particular -- in some  
11 cases, they may have recorded a segment, then followed by  
12 another, but there's an unusual timing gap in there, there may  
13 be indications that a portion of that tape was not actually  
14 recorded on.

15 Q. Can you detect that?

16 A. Yes, you can hear that.

17 Q. Have you done that?

18 A. Yes, I have.

19 Q. How many times?

20 A. Probably thousands of times in making edit decisions  
21 and working with products.

22 Q. So you can detect, when you review a tape and analyze  
23 it, if there are stops and starts?

24 A. You can analyze -- you can detect in many cases. I  
25 won't say you can always detect --

1 Q. Right. But you've analyzed --

2 A. -- but there are certain -- there are subtle signs  
3 and sounds that say this was not a continuous recording.

4 Q. And you've analyzed that type of tape?

5 A. Yes.

6 Q. Okay. Have you also analyzed tapes where there are  
7 gaps?

8 A. I've had those kind of tapes come through -- I think  
9 -- I think the word we're hanging on is "analyze." I'm not  
10 normally hired to analyze but to go through and fix those kind  
11 of problems. In the process, I have to identify them and then  
12 take whatever --

13 Q. But you can identify them.

14 A. Yes.

15 Q. My question is can you identify gaps in tapes or  
16 stops and starts or alterations?

17 A. Not all, but many.

18 Q. How many have you done this with?

19 A. Hundreds to thousands.

20 MR. MALCOLM: It's the same objection, Your Honor.

21 MS. SHEIN: I don't -- Your Honor, he's telling --

22 MR. MALCOLM: I believe, Your Honor, if I may, he can  
23 say that he listened to the tape and -- as anybody could,  
24 or even with his limited expertise that it was stopped and  
25 started. But in regards to going further into some sort



1 of expert analysis of the tape being altered or what I've  
2 been saying, he's not -- no foundation has been laid that  
3 he be an expert in that field, Your Honor.

4 MS. SHEIN: I totally disagree. Actually, he said  
5 thousands of tapes. He's listened to it and determined --  
6 was able to detect if they were altered or if there are  
7 gaps in those taps.

8 MR. MALCOLM: He didn't say that, Your Honor.

9 MS. SHEIN: That is what an expert is. That is what  
10 he said. That is what an expert is. And under the code  
11 24-9-67 the admissibility of an expert is qualified by  
12 this information.

13 THE COURT: Okay. Here's what I'm going to do. I'm  
14 going to qualify him on a limited basis as an expert, and  
15 sir, before you answer any question, counsel, I'll let you  
16 ask the question and then if there's an objection to the  
17 question we'll deal with it like that.

18 MS. SHEIN: Very well. Thank you, Your Honor.

19 [Off the record.]

20 MS. SHEIN: Your Honor, may I approach?

21 THE COURT: Yes, ma'am.

22 **BY MS. SHEIN: [Resuming]**

23 Q. Mr. Howard, would you -- this has been marked as P-  
24 63. Would you please identify this item?

25 A. This item contains a CD-R, that is a burnable CD,

1 which has a true and exact complete and unaltered copy of the  
2 original microcassette identified as Exhibit 251.

3 Q. And where did you get this -- is this something you  
4 handled?

5 A. Yes, it is.

6 Q. And is that your seal on the back?

7 A. Yes, it is.

8 Q. And that's got a copy of the affidavit that you  
9 signed that inside the sealed item?

10 A. I don't think the affidavit per se is. There's a  
11 signed and notarized copy of this inside the envelope.

12 Q. Okay. Is this the envelope you used to -- well, did  
13 you go and copy the tape as per the Order of Court that allowed  
14 you to do that?

15 A. Yes, I did.

16 Q. Okay. What equipment did you copy it on?

17 A. I copied it using a Sound Devices 702 Digital  
18 Recorder.

19 Q. And was the original provided for you by the Court?

20 A. Yes, it was.

21 Q. And was that copy -- is that the copy you got from  
22 the Court in that sealed document?

23 A. Yes, this is a copy of that tape, yes.

24 Q. Okay. And did you seal that?

25 A. Yes, I did.

1           Q.    And then you -- and you also listened to it; is that  
2 correct?

3           A.    Yes, I did.

4           Q.    And you did your affidavit evaluation based on that  
5 copy; is that correct?

6           A.    That's correct.

7           Q.    Okay. And this is the sealed one after you completed  
8 your evaluation?

9           A.    Yes.

10          Q.    Okay.

11                MS. SHEIN: Any questions?

12                MR. MALCOLM: May I, Your Honor?

13                THE COURT: Yes.

14 **BY MR. MALCOLM:**

15           Q.    Mr. Howard, did you ever listen to the original  
16 recording in its entirety?

17           A.    Yes, I did.

18           Q.    Did you record the -- both sides? It's my  
19 understanding it's a two-sided tape?

20           A.    Yes.

21           Q.    Of that recording?

22           A.    I recorded from the beginning of Side 1 to the end of  
23 Side 1, then turned the tape over and recorded the beginning of  
24 Side 2 all the way through the end of Side 2, including the 20  
25 or 30 minutes of blank tape at the end to be sure that we

1 didn't miss anything.

2 Q. And did you report -- make your copy after you  
3 listened to the original?

4 A. Yes.

5 Q. So you listened to the original in its entirety and  
6 then you listened to the copy that you made in its entirety?

7 A. I probably have not listened to all of the copy in  
8 its entirety. The portions that did not have any bearing on  
9 this case I wrote and listened to.

10 Q. So can you say for certain that the copy that you  
11 made is a complete fair and accurate representation of the  
12 original that is in evidence?

13 A. Yes, I can.

14 Q. Okay. How can you say that for certain if you didn't  
15 listen to the entire copy?

16 A. I made the copy through the process. The recorder  
17 indicated no errors. You know, even if I had listened to it, I  
18 wouldn't have enough memory of the original to know that  
19 everything was there, but I have no reason whatsoever to  
20 believe that it was not a complete copy.

21 MR. MALCOLM: Your Honor, I do object to the  
22 admission of this evidence.

23 THE COURT: So I just want to ask, when you were  
24 doing your evaluation of the tape, you didn't do it from  
25 the tape, you did it from the copy?

1           THE WITNESS: That's correct, because I -- we were  
2           only allowed access to the tape for the purpose of making  
3           a complete copy.

4           MS. SHEIN: But you listened to the original.

5           THE WITNESS: I listened to the original as we made  
6           the copy, and even at that point is when I started  
7           noticing things that came to my attention as interesting  
8           or unusual.

9           THE COURT: And when you were listening and you were  
10          -- while you were making the copy, I'm just curious, you  
11          say now that while you were making the copy you were  
12          noticing things that were interesting or unusual. Were  
13          you taking notes at that point of the interesting and  
14          unusual things or were you just -- you just said to  
15          yourself, well, I'll just hear it again on my copy?

16          THE WITNESS: If I took a note, couple of notes, it  
17          may have been very minimal. The main thing that I  
18          mentioned to Debra Mulder as we were listening, the first  
19          thing that came to my attention was this was --

20          THE COURT: Well, I just --

21          THE WITNESS: Oh, okay.

22          THE COURT: -- I'm just trying to understand the  
23          procedure. Who's this person with you?

24          MS. SHEIN: A private investigator, Your Honor.

25          THE WITNESS: Private Investigator Debra Mulder.

1           THE COURT: Okay. And so was she taking notes when  
2           you were saying, oh, that's sort of interesting?

3           THE WITNESS: I believe she was.

4           THE COURT: So -- and then you went back and referred  
5           to those notes of all those interesting things?

6           THE WITNESS: Those notes. But at that point I went  
7           back and did a very serious listening where I could --

8           THE COURT: Of your copy.

9           THE WITNESS: Yeah. For the purpose of making the  
10          copy, it had to run continuously. Once the copy was made,  
11          then I could go back and listen over and over to  
12          particular parts.

13          THE COURT: Okay. But I'm -- I just am trying to  
14          make sure I understand. You said you were, of course,  
15          listening at the same time you were making the copy;  
16          right?

17          THE WITNESS: Yes.

18          THE COURT: And when you were doing that, you said  
19          you noticed -- I can't remember -- one of them was  
20          "interesting." I don't remember the other term you used.

21          THE WITNESS: "Unusual," I believe.

22          THE COURT: Unusual, okay. You may or may not have  
23          made a couple of notes. Did you actually speak to Ms. --  
24          is it Mulder?

25          THE WITNESS: Mulder.

1 MS. SHEIN: Yes.

2 THE COURT: While the tape was being copied?

3 THE WITNESS: Yes, I did.

4 THE COURT: Okay. So that doesn't affect the copy of  
5 the tape.

6 THE WITNESS: No. The copy was made with a cable  
7 between a microcassette player and the recorder.

8 THE COURT: Okay. And so -- and you think she made  
9 notes of what you were saying?

10 THE WITNESS: I believe she did.

11 THE COURT: So my question is then when you went back  
12 and listened to your copy, did you -- did you get Ms.  
13 Mulder's notes and your notes and go through your notes as  
14 you were listening?

15 THE WITNESS: I referred to those notes, and at the  
16 same time made lots of additional notes as we went  
17 through.

18 THE COURT: Okay. And do you know where her notes  
19 are and your notes are?

20 THE WITNESS: My notes I have here.

21 THE COURT: And her notes?

22 THE WITNESS: I don't know. I would assume she has  
23 those.

24 THE COURT: Okay.

25 MS. SHEIN: Your Honor, this is a true recording. It

1           was done by order of the court and it's a true recording  
2           of the document.

3           MR. MALCOLM: I don't believe a foundation has been  
4           laid for that, Your Honor. I object to that -- to this  
5           witness being able to authenticate that copy of the  
6           original interview of Mr. Davis by the detectives back  
7           during the investigation of his criminal case. He has not  
8           said for certain that he can -- he can absolutely say that  
9           it was a fair and accurate representation of the entire  
10          recording. And if I may ask him a few additional  
11          questions.

12          THE COURT: Sure.

13          **BY MR. MALCOLM: [Resuming]**

14          Q. Mr. Howard -- and I've looked at your affidavit. Did  
15          you not say that you focused on the interview with Mr. Davis,  
16          that portion of the tape; is that correct?

17          A. Yes, I did.

18          Q. All right. And you did things to -- how did you know  
19          what portion of the tape to focus on?

20          A. One of the initial notes I took as we were making the  
21          copy was all the extraneous material. The original tape  
22          consisted of a lot of different interviews as well as some  
23          audio notes that the officer had made on that recorder. I only  
24          put specific information -- or specific attention into the  
25          interview in question that I was hired to copy.



1 MR. MALCOLM: Your Honor, I just had that -- I had a  
2 problem with the way this has been presented and the way  
3 the foundation has attempted to be laid, to get this  
4 evidence in and to have this witness qualified as an  
5 expert.

6 **BY MS. SHEIN: [Resuming]**

7 Q. Well, let me ask you this, Mr. Howard. Did you  
8 listen to the entire portion and copy of the tape dealing with  
9 the Scott Davis interview?

10 A. Yes, I did.

11 Q. Is it a true copy of what you heard in the Judge's  
12 chambers when you copied the tape in the first place?

13 A. Yes, it is.

14 THE COURT: It's a fair and accurate --

15 THE WITNESS: Yes, ma'am.

16 THE COURT: -- representation of the original?

17 THE WITNESS: Yes, Your Honor.

18 THE COURT: So you've listened to both of them.  
19 You've listened -- but you never listened to them --

20 THE WITNESS: Simultaneously.

21 THE COURT: Right. And you -- it was some time after  
22 the first one that you listened to the second one;  
23 correct?

24 THE WITNESS: If it wasn't the same day, it was the  
25 next day.

1 MR. MALCOLM: And, Your Honor, I'd like to point out  
2 to Mr. Howard I believe he's contradicted himself. He did  
3 earlier say that he didn't listen to it all. I mean, he  
4 said that in his earlier --

5 THE COURT: Didn't listen to all of the second one.

6 THE WITNESS: No, I did not listen to all --

7 MR. MALCOLM: The copy, correct, the second one.

8 THE WITNESS: I did not listen to the portions that  
9 were not relevant to this case.

10 THE COURT: What do you mean by that? I didn't -- I  
11 don't know what else was --

12 THE WITNESS: The original cassette, the original  
13 micro cassette contained numerous interviews as well as  
14 some audio notes made by the owner of the recording that  
15 had nothing to do with this case. Apparently every time  
16 he talked to somebody, he thought it might be useful to  
17 have a copy. He would put the recorder in the record  
18 mode. I have no idea who these people were, what they  
19 were, why he was interviewing them.

20 **BY MS. SHEIN: [Resuming]**

21 Q. But that -- that particular -- those items, which  
22 they don't relate to Scott Davis --

23 A. Right.

24 Q. -- are on that copy as well; is that correct?

25 A. Yes, they are.

1 Q. And you listened to that portion, but did you pass  
2 them up to get to Scott Davis but you knew they were there?

3 A. No.

4 MR. MALCOLM: Your Honor, please, she can't --

5 MS. SHEIN: No, no. No, you can't sit there and tell  
6 me that --

7 THE COURT: Well, I'm just --

8 MS. SHEIN: -- while I'm cross-examining my -- direct  
9 examining my witness.

10 THE COURT: Okay. Well, I don't want you to lead  
11 your witness.

12 MS. SHEIN: Well, I think he's trying to confuse the  
13 witness and I'm going to clarify.

14 THE COURT: Okay. Well, if you could clarify with a  
15 question that wasn't leading, counsel.

16 **BY MS. SHEIN: [Resuming]**

17 Q. When you got the copy of the tape from the Judge's  
18 order in the Judge's chambers, did you listen to the portion of  
19 the tape before the Scott Davis interview?

20 A. Yes.

21 Q. And did you just pass it up to get to Scott Davis?

22 A. No.

23 Q. What did you do?

24 A. When I physically received the original microcassette  
25 I put it in a microcassette player that was connected by a wire

1 to the digital recorder, ensured that it was rewound to the  
2 beginning, put the -- activated the recorder, started the  
3 playback, and we listened to the entire thing go by, the entire  
4 tape play through, both sides.

5 Q. Okay. That's to get the copy.

6 A. To make the copy.

7 Q. When you got the copy and you took it with you --

8 A. Yes.

9 Q. -- when you went to analyze the portions of the copy  
10 that dealt with Scott Davis, was there information in front of  
11 that before the Scott Davis information on that copy?

12 A. Yes.

13 Q. Did you know that because you heard it?

14 A. Yes.

15 Q. Did you pass it up so it could get to Scott Davis?

16 A. Yes.

17 Q. But you knew it was on there.

18 A. I knew it was on there.

19 Q. Because you heard it.

20 A. Because I heard it.

21 MR. MALCOLM: Did you listen to the entire tape, even  
22 the portions that did not contain Scott Davis' interview?

23 THE WITNESS: The original tape? Yes.

24 MR. MALCOLM: The copy.

25 THE WITNESS: I did not listen to the non-relevant

1 portions completely. I listened to parts of them, in  
2 terms of checking to be sure everything ran through.

3 MR. MALCOLM: And, Your Honor, that's a problem  
4 because one of the allegations is that portions of Mr.  
5 Davis' testimony was taped over, his interview was taped  
6 over. If these other portions that are so-called  
7 irrelevant, may have been irrelevant in Scott Davis'  
8 criminal case but they're certainly relevant to the  
9 integrity of this tape. And if he didn't listen to all of  
10 those on the copy, he cannot properly authenticate that  
11 copy of that tape, Your Honor.

12 MS. SHEIN: Yes, he can, Your Honor, and he did. And  
13 that's because -- we can listen to the tape in court today  
14 if you'd like, and you'll see what he knew was on the tape  
15 that didn't belong to Scott Davis, wasn't part of what was  
16 being analyzed. It was the part that Mr. Chambers used  
17 for Scott Davis' interview, and it talks about it, and  
18 when it started and when it stopped. It's exactly  
19 identified by timing. You can hear it on the tape  
20 yourself. I'd be happy to get the audio, we have it here,  
21 we can play the tape live.

22 THE WITNESS: If I could --

23 THE COURT: Which tape? His tape or --

24 MS. SHEIN: The original copy of the tape that was  
25 made in the Judge's chambers.

1 THE COURT: Well, that seems to be the issue.

2 MS. SHEIN: Well, he can testify to what's on that  
3 tape if that's what he heard in the Judge's chambers,  
4 because he heard what was in the Judge's chambers.

5 THE WITNESS: If I -- if I could add an additional  
6 clarification. I didn't listen to proceeding material  
7 completely because I assumed it may contain confidential  
8 and private information that I had no need to hear. I  
9 mean, these were -- I have no idea what all was --

10 MS. SHEIN: Other cases; is that correct?

11 THE WITNESS: -- other cases, yes.

12 MS. SHEIN: And you knew that from listening to the  
13 tape?

14 THE WITNESS: Yes. When Mr. Davis --

15 MS. SHEIN: That's all, Mr. Howard.

16 THE COURT: Okay. Again, I'm going to allow you to  
17 go ahead. I still haven't exactly heard the question, so  
18 go ahead, and on a question-by-question basis, counsel, if  
19 you've got an objection, I'm happy to hear it.

20 MR. MALCOLM: Okay. And is this Petitioner's 63  
21 admitted, Your Honor, or not?

22 THE COURT: I'll admit it over objection.

23 MS. SHEIN: Thank you, Your Honor.

24 **[WHEREUPON, Petitioner's Exhibit Number 63 was admitted**  
25 **into evidence over objection.]**

1 **BY MS. SHEIN: [Resuming]**

2 Q. Now Mr. Howard, when you got to the portion of that  
3 tape that dealt with just the Scott Davis case, can you discuss  
4 with us and explain to us what analysis you did and how you did  
5 it?

6 A. I went through listening very carefully -- well, when  
7 we made the original copy, I heard things, as I said, that  
8 caught my ear. In my production side we're always listening  
9 very carefully for anything on the recording, any little  
10 background noise or anything else so -- when I'm hearing things  
11 go through that do not make sense. The first thing I noticed  
12 was this represented to be the official recording of the  
13 interview. We very clearly heard where the official recording  
14 was stopped, and this recording continued.

15 THE COURT: I don't under -- I'm sorry, I do not  
16 understand what you're saying.

17 THE WITNESS: The interview would be going along,  
18 they would say, "I'm going to stop the tape now," either  
19 to take a break, or at one point they stopped the tape to  
20 turn it over, and you actually hear the button pushed to  
21 stop the other recording, you heard the tape removed,  
22 turned over, inserted, and then that recorder put back  
23 into the record mode.

24 Q. What did you conclude from that particular segment?

25 A. I assumed -- well, I concluded that there was more

1       than one tape made --

2               MR. MALCOLM:  Objection.  Same objection as prior.

3               THE COURT:  Okay.  I think -- go ahead.

4               MR. MALCOLM:  My objection is he's not qualified as  
5       an expert to make that conclusion or state his opinion in  
6       regards to that.

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

8       **BY MS. SHEIN:  [Resuming]**

9               Q.     Mr. Howard --

10              MS. SHEIN:  Your Honor, I'm going to present my  
11       record because I think this has gotten to the point where  
12       they're trying to misrepresent what's really going on  
13       here.  He heard the tape and he can tell what was on the  
14       tape based on his experience.

15              THE COURT:  Okay.  What he just said in this one  
16       instance was he heard them on the record -- first he said  
17       something about the beginning of the interview, and then I  
18       don't know what he said, and that's when I asked him, I  
19       said, "I don't understand what you're saying."  And he  
20       said, "Well, for example, they said they were going to  
21       turn the tape over, and I heard them stop the tape, turn  
22       it over, and start it again."  So I'm not sure -- I'm  
23       unclear what that -- where you're headed.  If it's on the  
24       record, if that's -- that's inconsistent with what he  
25       originally said, which was -- and Beth -- I can have her



1 go back and read it when I said I didn't understand what  
2 he was saying because he made it sound like they said they  
3 were starting the interview, and then somehow it was a  
4 different interview or it was something different. And I  
5 said, "I don't understand." And then he gives the example  
6 of they say they're turning over -- that they're stopping  
7 the tape, they're turning it over, and starting it again.  
8 Those are -- I don't understand.

9 MS. SHEIN: I'll clarify that. I can clarify that.

10 THE COURT: Okay.

11 MS. SHEIN: I can clarify.

12 MR. ABT: Go ahead.

13 THE COURT: I just --

14 MS. SHEIN: I can clarify.

15 THE COURT: -- or Beth, read it back. Read it back  
16 and --

17 MS. SHEIN: No, no, that's fine, Your Honor. I'm  
18 fine. Go ahead.

19 MR. ABT: Your Honor, and what I think he's trying to  
20 elaborate, Judge, and may I can help clear this up very  
21 quickly, is that even without expertise, when you listen  
22 to the tape, you can hear Detective Chambers telling  
23 Detective Walker to turn the tape over, and you can hear  
24 them turning the tape over. Which means, by definition --  
25 it doesn't require an expert to figure this out -- that

1           there is a second tape. There would have to be.

2           MR. MALCOLM: And, Your Honor, counsel is essentially  
3           testifying at this point --

4           THE COURT: Yes, sir.

5           MR. MALCOLM: -- that's not in evidence.

6           MR. ABT: I know, but I'm trying to clarify for the  
7           Court.

8           MR. MALCOLM: I understand that.

9           THE COURT: Well, I --

10          MR. ABT: I'm not trying to put something in  
11          evidence.

12          THE COURT: -- I understand they turned it over.  
13          He's -- Mr. Abt, he's already said he listened to both  
14          sides of the tape. I have to make an assumption here, and  
15          I'm not an expert in this area, but if there are two sides  
16          of the tape, I have to assume that they turned it over.

17          MS. SHEIN: Well, let me ask -- let me ask a  
18          question. I think that might -- we might get some  
19          clarification.

20       **BY MS. SHEIN: [Resuming]**

21          Q. Mr. Howard, when you were listening to the tape, did  
22          you identify that certain pauses in the tape were stops and  
23          starts?

24          A. Yes.

25          Q. Okay. Do you remember how many of them?

1           A.    Quickly scanning this list, which may not be totally  
2   -- totally complete, there were probably four to five times  
3   when the recording was stopped. Now this particular  
4   microcassette was recorded in what's known as a box mode.

5           Q.    What is box mode?

6           A.    Box is a system on some recorders that when the  
7   recorder is hearing sound above a certain level, the tape runs  
8   and it's recorded. When there is no sound above that level, it  
9   will stop running the tape until it hears sound again. The  
10   particular application is to be able to save tape when there's  
11   nothing going on where it's recording. There are numerous box  
12   stops and starts. This has been common in -- particularly in  
13   dictation type recording equipment for years.

14          Q.    So that's how you determine stops and starts?

15          A.    That's how you determine the box starts and stops.  
16   There are when --

17          Q.    I didn't ask any question. Wait just a second. I  
18   notice in your affidavit you broke this down by time.

19          A.    Yes.

20          Q.    Can you explain how you break it down by time, what  
21   these times are that are identified?

22          A.    The times are referenced to just the portion that was  
23   the interview. I took the original long recording, and from  
24   that made a copy of just the interview with Scott Davis. The  
25   times referenced begin, to that copy, when you play this file

1 in a computer it continuously shows you where you are on the  
2 timeline, and those are the times that I noted with particular  
3 events.

4 Q. So this came from you inserting the disk of --

5 MR. MALCOLM: Your Honor, objection, that's a leading  
6 question. And also, he just mentioned something else  
7 about another copy that I'm not sure what he's talking  
8 about. I would object to him going into that unless he  
9 can explain what he's talking about. He's not laid a  
10 foundation, and I continue to object that he's not an  
11 expert in this field, Your Honor.

12 THE COURT: I'm sorry, I'm not clear what he just  
13 said.

14 MS. SHEIN: Okay.

15 THE COURT: I don't know if he's talking about  
16 another copy. I don't know --

17 **BY MS. SHEIN: [Resuming]**

18 Q. Mr. Howard -- I'll clarify. Mr. Howard, the original  
19 copy of the tape that you got from the Court, is that what you  
20 analyzed?

21 A. I did and --

22 Q. Yes or no?

23 A. Yes.

24 Q. Okay. Now did you, with that, identify stops and  
25 starts on that copy?

1           A.    Not on that copy.

2           Q.    Okay.

3           MR. MALCOLM:  Your Honor, at this point I would  
4           object to him going into anything further about an  
5           analysis of that tape.  We have no evidence about any  
6           other kind of copy.  That would be the second copy at this  
7           point.  I'd object, Your Honor.

8           MS. SHEIN:  Your Honor, may I take a break just a  
9           minute?  I think we can get that copy.

10          MR. MALCOLM:  But whether they produce it or not,  
11          Your Honor, I still would object.

12          THE COURT:  How many copies do you have?

13          MS. SHEIN:  Well, Your Honor, I still need to take a  
14          five minute break so I can figure out what it is he has or  
15          doesn't have.

16          THE COURT:  Okay.

17                               [Brief pause.]

18          MS. SHEIN:  No, if we can just take a five minute  
19          break.

20          THE COURT:  That's fine.

21                               [Off the record.]

22          MR. MALCOLM:  I would make a notation on the record  
23          that the witness is still involved in direct examination  
24          and I would object to --

25          THE COURT:  Do you want him back in?

1 MS. SHEIN: Yeah.

2 MR. MALCOLM: Yes, Your Honor.

3 MS. GALLOW: We would both strenuously object to them  
4 talking to their witness right now while we're still on  
5 direct examination.

6 THE COURT: I understand.

7 [Off the record.]

8 MS. SHEIN: Your Honor, at this time we're not going  
9 to ask Mr. Howard any further questions about the contents  
10 of the tape he analyzed and how he analyzed it. What we  
11 -- what we -- I'm sorry. Oh, I'm sorry, I apologize.

12 [Off the record.]

13 THE COURT: Okay.

14 MS. SHEIN: We're not going to ask any questions of  
15 this witness on the contents or his analysis of the  
16 contents of the tape. We would ask the Court for the  
17 opportunity to have -- we have a second expert -- but we'd  
18 like to have some clarification of the problem that's  
19 occurred in this case by having an expert go to the court  
20 chambers and take his analytical equipment with him to the  
21 chambers and actually analyze the tape there at the  
22 Judge's chambers, but we will need an order to do that  
23 from Judge Campbell.

24 We'd like a postponement of our -- I would like to  
25 ask for an opportunity to come back with -- at a later

1           time -- we'll finish the rest of the case today, but a  
2           later time to have our expert testify. I want to be sure  
3           that we are covering the proper procedures in terms of the  
4           Judge's copy. I believe we got the correct and proper  
5           procedure in this case and that he testified properly  
6           about how he got the copy and how the copy was sealed of  
7           the original. I agree that he may not be able to testify  
8           today about any of the analysis of that original that he  
9           copied, because he said he copied the second one and used  
10          that portion as his analysis.

11                 But in order for us to have our second expert  
12          testify, he would have to go to the Judge's chambers to  
13          review that tape at that time. It's just a matter of  
14          allowing us to resolve this in the next couple of days.  
15          Hopefully, we may be able to get it resolved on Friday.

16                 MR. MALCOLM: Your Honor, they've had ample  
17          opportunity to do that. Mr. Howard attempted to do that,  
18          but he didn't do it properly. As he's testified, he made  
19          a copy of what's in evidence -- what was in -- is in  
20          evidence in the criminal trial, and he made a further  
21          copy, a second copy, of just the portion of Mr. Davis'  
22          interview. That is completely inappropriate and that's  
23          why we've objected. We'd object to any further  
24          continuance or delay in this case, Your Honor. Ms. Gallow  
25          may --

1 MS. GALLOW: And if I may add to that objection, Your  
2 Honor, it is undisputed in this case that the tape was in  
3 fact stopped. And if I may cite to the record and I'll  
4 cite for all counsel, it's on Page 2673 where Detective  
5 Chambers is specifically asked, "Was the tape stopped?"  
6 He said, "Yes, it was stopped to be flipped over." So  
7 it's undisputed, from the record in this case that the  
8 tape was stopped and it was flipped over. So that is --

9 MS. SHEIN: That is a --

10 THE COURT: Hey, counsel, one at a time. Finish, Ms.  
11 Gallow, I'm sorry.

12 MS. GALLOW: I would just renew my objection based on  
13 my counsel's objection that it's undisputed in the case  
14 that the tape was in fact stopped and turned over.

15 MS. SHEIN: That's not the issue, Your Honor. We  
16 didn't -- we are not disputing the trial transcript that  
17 Mr. Chambers testified that it was stopped. We disputing  
18 the fact that he lied on the stand that it was only  
19 stopped one time to turn the tape over. In fact, the tape  
20 was stopped and started, and our experts will testify to  
21 that. Because it's very obvious even if a person like  
22 myself listened to the tape you can hear it. And that  
23 there was a second tape, which you can hear on the tape  
24 recording another tape.

25 MS. GALLOW: And Your Honor, if I may briefly



1           respond. Counsel is mischaracterizing what happened.  
2           Detective Chambers said, "Yes, I stopped the tape. It was  
3           flipped over." He never said it was never stopped again.  
4           And I'll again cite to the record that's again at 2673, he  
5           says he never recalled if it was never stopped again. He  
6           never undeniably says it was never stopped again. So I  
7           would again just say that that was a mischaracterization  
8           of the record, Your Honor.

9           MS. SHEIN: The trial transcript and the motion for  
10          new trial he testified again and the same thing came up.  
11          And he did testify that it wasn't stopped and started.

12          THE COURT: Okay. Counsel, let me just -- I want to  
13          put -- just make sure that a couple of things are clear.  
14          I understand the State's position, you don't want to -- we  
15          were scheduled for today, I expected y'all to be ready for  
16          today. What my concern is, is regardless how I rule, this  
17          is going back up, we all know that. Then somebody's going  
18          to say this should have been done, it's going to come  
19          back, and we're going to start all over.

20          So I'm going to allow you the opportunity, but to do  
21          your -- have your experts listen to the tape, copy them  
22          again, and come back for that, let me make it clear  
23          "limited" purposes. We're not bringing in anybody else,  
24          we're not questioning them about anything about anything  
25          else.

1           But what I want you to understand is we set aside a  
2 week for y'all. I can't guarantee when this limited issue  
3 is coming up. I don't know when I have time, and I'm  
4 going to make sure that since, counsel, it's y'all's  
5 request, I'm going to make sure that I schedule it when it  
6 is convenient for the State.

7           MS. SMITH: We appreciate that, Your Honor, and just  
8 for the record we realize they're still in their portion  
9 of the case. And we would also ask that if we need to  
10 present any rebuttal at that time --

11          THE COURT: Absolutely.

12          MS. SMITH: -- anything so that we're not precluded  
13 from --

14          THE COURT: Absolutely.

15          MS. SMITH: -- challenging them.

16          MS. SHEIN: And we have no problem with that.

17          THE COURT: Okay.

18          MS. SHEIN: And I appreciate it. And, Your Honor,  
19 just so you know, we intend to continue to complete the  
20 case this week.

21          THE COURT: Yes, ma'am.

22          MS. SHEIN: Okay.

23          THE COURT: I understand. But it isn't complete  
24 because we're going to have one or maybe two witnesses  
25 coming back, and I just want you to know that I suspect

1 I'm booking in to September and October so --

2 MS. SHEIN: I understand.

3 THE COURT: -- I just want you to be aware. And I'm  
4 also going to want a little bit more accurate time  
5 estimate of how long those witnesses are going to take.  
6 And I want to know now, how many witnesses are coming? Is  
7 it this gentlemen and one other, or are there going to be  
8 five more witnesses?

9 MS. SHEIN: Two at the most.

10 THE COURT: Two, okay.

11 MS. SHEIN: And it may be down to one at the end of  
12 the day.

13 THE COURT: Okay, I've got you, but -- okay. Okay.

14 MS. SHEIN: Yeah, yeah. Nothing more, Your Honor.  
15 Truly nothing more.

16 THE COURT: Gotcha, okay. So --

17 MS. SHEIN: And I apologize for that delay. I didn't  
18 want to take the delay either.

19 THE COURT: It's fine. Can Mr. Howard be excused  
20 now, and we're going to do him and/or someone else at  
21 another day?

22 MR. ABT: Just to make sure the record is crystal  
23 clear, if and when we come back to have the very limited  
24 purpose of having experts on the stand, at most we may  
25 have two, that may not include Mr. Howard. It may be two

1 experts.

2 THE COURT: Okay.

3 MS. SHEIN: Well, that's --

4 THE COURT: If I understand it, if it's -- the issue  
5 is the recording. So it's not going to be two experts on  
6 some other topic.

7 MR. ABT: Oh, no, it's on two audiotape experts.

8 THE COURT: Okay. On the audiotape --

9 MS. SHEIN: Correct.

10 THE COURT: -- that was made --

11 MS. SHEIN: -- just the tape.

12 THE COURT: -- of Mr. Davis.

13 MR. ABT: Just the tape.

14 MS. SHEIN: Just the tape.

15 THE COURT: Very good, okay.

16 MS. SHEIN: We're all very clear about that.

17 THE COURT: Okay. So Mr. Howard is free to go?

18 MS. SHEIN: Yes, he is.

19 THE COURT: Thank you, sir.

20 [Witness excused.]

21 MS. SHEIN: Your Honor, could we go ahead now, before  
22 I call the next witness, have ten minutes?

23 THE COURT: Yes, but I just want to do one other real  
24 quick thing. We've got P-62 and P-63, and now we've sort  
25 of undone our witness. Can we -- what do you want to do

1           with P-62 and P-63? Can we --

2           MS. SHEIN: I don't think there's a question about  
3           how he got the tape or the Judge, that he went to the  
4           Judge's chambers and recorded it and that he sealed that  
5           copy.

6           THE COURT: But you're going to get another order.

7           MS. SHEIN: I'm hoping to, yes. I mean, at this  
8           moment, I'm not sure I can actually withdraw those  
9           exhibits since you've admitted them over objection. I  
10          don't want to withdraw them because I have to work that  
11          out. I have to get another order from Judge Campbell to  
12          have the expert go into the chambers.

13          THE COURT: Okay. But then we've also got P-63 which  
14          was at least one of the copies of the original tape. I  
15          mean, I'm happy to leave them in, I just am concerned the  
16          record's going to be very unclear when -- especially if  
17          you bring in somebody other than Mr. Howard.

18          MS. SHEIN: Well, at that point -- I think it's  
19          appropriate at that point to resolve it, but I can't  
20          resolve it today.

21          THE COURT: Okay. I'll leave them in.

22          MS. SHEIN: And then we'll resolve it through the  
23          expert.

24          THE COURT: Okay, that's fine. Okay. Let's take ten  
25          minutes then.

1 [Brief break.]

2 \* \* \*

3 Whereupon,

4 JOSEPH M. TOLBERT,

5 having been duly sworn under oath, was examined and testified  
6 as follows:

7 DIRECT EXAMINATION

8 BY MS. SHEIN:

9 Q. Would you state your name, please.

10 A. Yes. Joseph M. Tolbert.

11 Q. And what is your present occupation?

12 A. I'm a Public Safety Consultant.

13 Q. Can you describe what that is?

14 A. I basically go to different municipalities and fire  
15 departments and I teach Fire Behavior Strategy and Tactics,  
16 Fire Department Management, Scopes and Methods.

17 Q. Okay. And how long have you been doing this type of  
18 work?

19 A. This has been my sideline occupation since 1982.

20 Q. When you say sideline --

21 A. Yes.

22 Q. -- explain what you were doing also, in addition to  
23 that.

24 A. Yes. Since 1972 I was employed by the Atlanta Fire  
25 Department from 1972 until 2005. And then in 2006 I went to

1 work for the East Point Fire Department as their deputy chief  
2 of operations, and worked there for a year.

3 Q. And what was -- what was your responsibility as a  
4 fire chief in these jurisdictions?

5 A. With the City of Atlanta I was the assistant fire  
6 chief over one of the shifts, I was a shift commander, which  
7 meant I was the highest ranking officer that worked in a fire  
8 station. I did personnel administration, management, budget,  
9 but also responded to fires in emergency incidents.

10 Q. And tell me a little bit about the business you're in  
11 now. What you do now. And you said this is full time now?

12 A. Yes. It's as full time as retired folks get, but,  
13 yes.

14 Q. How long -- I may have asked you this, but how long  
15 have you been doing private consulting?

16 A. I started in 1982.

17 Q. Okay. And what is the name of your company?

18 A. I just go by my name, Joe Tolbert, Public Safety  
19 Consultant.

20 Q. And then tell me what your duties are as a public  
21 safety consultant.

22 A. As a public safety consultant, I generally go to fire  
23 departments as a teacher, and sometimes as a -- as an assistant  
24 to helping them plan. As a teacher, I generally teach, because  
25 of my years of experience, Fire Behavior Strategy and Tactics

1 to the fire -- basically, I teach fire fighting to officers and  
2 personnel.

3 Q. And did you do that also as -- working for the cities  
4 that you described?

5 A. Yes.

6 Q. Okay. And that was part of your job?

7 A. Yes, it was.

8 Q. Is to train and teach --

9 A. Yes.

10 Q. -- recruits?

11 A. Yes. And I also, as most firefighters, have numerous  
12 part-time jobs. I also worked as an adjunct instructor for the  
13 Georgia State Fire Academy for about 12 years.

14 Q. And what kind of courses did you teach?

15 A. The same thing that I'm teaching now: Fire Behavior,  
16 Strategy and Tactics, Firefighting Levels 1, 2, 3, 4, and 5,  
17 which goes from introductory firefighting to advanced fire  
18 fighting.

19 Q. Can you describe a little bit more about what those  
20 types of activities are? Fire behavior, for example, what's  
21 fire behavior?

22 A. Well, there's a -- there's a science to how fire  
23 behaves. And before we ever put someone in a situation where  
24 they have a hose line in their hand and they fight a fire,  
25 first is classroom portion where you give them some idea of the



1 chemistry and behavior of fire and, you know, what fire is,  
2 what causes it, what sustains it.

3 And then you take them from the classroom setting into the  
4 -- generally into either what we call a burn building or into a  
5 structure that we're going to -- had been donated to burn down,  
6 and you begin to show them the various phases and stages that a  
7 fire goes through as it grows from the beginning or incipient  
8 stage all the way to the stage where it literally is dying out.  
9 There's four predictable stages in every fire: the beginning or  
10 incipient stage, then there's a free-burning stage where the  
11 fire's in the growth phase, then there's a flash-over phase to  
12 a fire where literally everything in the room erupts almost  
13 simultaneously, and right after that the fire goes into a  
14 decline or a diminished phase. And we teach students and we  
15 show them the various and sundry phases of the fire so they  
16 understand how to apply water to the fire and how to combat the  
17 fire, and where the fire's likely to extend or go based on the  
18 phase or stage that it's in. So it's a training component to  
19 the firefighting. You have to understand how a fire behaves  
20 and understand how a building will behave in a classroom  
21 setting and in a controlled environment before you let someone  
22 loose with a hose line in an uncontrolled environment to fight  
23 a fire.

24 Q. Do you -- does this include identifying a fire  
25 timeline? Is that what that is when you describe these stages

1 or is that something different?

2 A. Well, a fire timeline is some degree difference  
3 because the phases and stages of a fire are dependent on a  
4 plethora of factors. And how the fire develops from one phase  
5 to the other is really dependent -- the timeline is dependent  
6 on how the fire -- dependent on the size and structure of the  
7 building, the -- what's inside the building, construction of  
8 the building, the components inside the building, the fuel load  
9 and the fire load, the ventilation, how much air is -- how much  
10 air is available in the building, and the changes that occurred  
11 during the fire. So timelines are taught somewhat differently  
12 because all of those five factors will affect the timeline.

13 Q. But -- so you've taught classes on fire behavior and  
14 fire timeline information?

15 A. Well, I taught -- I've taught primarily on fire  
16 behavior. I have taught some timelines based on, you know, we  
17 would look at certain scenarios and say, well, you know, based  
18 on, you know, what we have to burn here and this is -- not  
19 timelines from building, a scenario or something that has  
20 happened, but something that probably would happen. Because  
21 once a fire reaches a certain stage, it begins to grow  
22 exponentially, and we show that.

23 Q. Then -- I'm sorry.

24 A. I'm finished.

25 Q. This is all a part of the training process for you --

1           A.    Yes.

2           Q.    -- for your recruits, but this is something you also  
3 went through personally?

4           A.    Oh, yes.  Yes.

5           Q.    And in your capacity as a fire -- I'll call you  
6 chief; is that right?

7           A.    Chief, yes.  Yes, assistant chief.

8           Q.    -- were you responsible for a lot of individuals, a  
9 lot of people under your command?

10          A.    Yes, I was a shift commander, and the City of Atlanta  
11 had 248 people that worked for me, and I supervised every -- I  
12 oversaw the work of every fire station in the city, which at  
13 that time there were 34 fire stations and 248 people on each  
14 shift.

15          Q.    Would you describe your education for us?

16          A.    Yes.  I have an associates degree in Fire Science; I  
17 have a bachelor's degree in Business Administration.  I'm a  
18 state certified fire instructor, state certified safety  
19 officer, hazardous material technician, explosive ordinance  
20 technician.  And in the course of my 33 years in the City of  
21 Atlanta, I had almost 4,000 hours of additional training.

22          Q.    And are you a member of any organizations that relate  
23 to that particular fire activity or --

24          A.    Since my retirement, I'm still an active member of  
25 the Georgia Association of Fire Chiefs; I'm a member of the

1 Incident Safety Officers Association -- are the two that I have  
2 left -- also, a member of the International Association of Fire  
3 Chiefs.

4 Q. Are there accreditation programs or training programs  
5 you participate in or teach for this type of -- for you to  
6 maintain your information about fires?

7 A. Actually, with my years of service and the  
8 credentials that I have established, there is no renewal date  
9 required for most of them, with the exception of Incident  
10 Safety Officer, and that certification will expire next year.

11 Q. And do you intend to recertify?

12 A. No.

13 Q. You're giving it up?

14 A. Well, with 40 years, I'm about to retire from all of  
15 it.

16 Q. Okay. Have you testified in court before?

17 A. Yes, I have.

18 Q. In criminal and civil cases?

19 A. Yes, criminal and civil cases.

20 Q. Do you know about how many?

21 A. I would say probably a dozen.

22 Q. And has this been as a fire chief as well as a  
23 private citizen?

24 A. Yes.

25 Q. You've done both?

1           A.    Yes, I have.

2           Q.    Have you been paid for your services in the past to  
3 testify on behalf of the defense or the prosecution in criminal  
4 cases?

5           A.    Yes.

6           Q.    Have you been paid by both to testify on their behalf  
7 or just criminal defense?

8           A.    Just criminal defense.

9           Q.    And do you charge a fee for your services?

10          A.    Yes.

11               MS. SHEIN: Your Honor, I'm going to tender him as an  
12 expert in fire incident recreation modeling, which is what  
13 he is known to --

14               MS. GALLOW: Your Honor, I have no objection to him  
15 testifying as to that. I'd have an objection as to him  
16 testifying as to the actual fire timeline. He hasn't  
17 testified that he has any foundation as to that. He said  
18 that he specializes primarily in fire behavior, and then  
19 he said he had had some experience as to fire timelines,  
20 but not -- I don't -- we need to get more into that, if we  
21 could.

22               MS. SHEIN: Sure, be happy to.

23           Q.    Could you explain a little more about what training  
24 you have and/or -- training you have or you have given  
25 concerning the fire timelines versus just fire behavior?

1           A.    From an emergency response standpoint, we generally  
2   look at fire timelines from the time of our arrival, from that  
3   point until the -- what we call the termination phase of the  
4   incident. In our training, we're all trained -- as chief  
5   officers and first arrivers on the scene of an emergency  
6   incident, we're all trained to understand that there is a  
7   logical progression as far as the time goes. We're also  
8   trained that there are benchmarks based on what we see in the  
9   building that gives us an indication of where we are as far as  
10  the time the fire has been burning.

11          Q.    Are you also trained in areas dealing with making  
12  determinations of -- I'm trying to remember what the right word  
13  is because it's -- the structure and contents of a house or a  
14  property that -- and the status of the air and these elements  
15  -- the word I'm looking for is elements -- that make up a fire  
16  timeline?

17          A.    Yes. In order to -- in order to teach strategy and  
18  tactics, you have to be -- you have to be aware of the impact  
19  that the five factors that I gave previously, you know, the  
20  design of the structure, the building construction, the  
21  contents and fire load within the building, the changes that  
22  occur during the fire, and also the ventilation of the fire,  
23  which are progressions of the fire that -- you know, when you  
24  say timeline, we -- most of the timeline work done in fires is  
25  done in controlled environments.

1           When you say do you have experience or expertise in  
2 understanding that at this moment this occurs and so forth,  
3 that -- timelines are generally established in controlled  
4 environments, because in the chaotic environment of a fire  
5 scene, we understand that there are timelines, we understand  
6 what we call benchmarks, which is a benchmarking, which is a  
7 part of a timeline. We understand that those are, you know,  
8 necessary events that occur in a fire.

9           Q.    When you go to a fire that's extinguished, and you  
10 want to look at that fire afterwards, do you evaluate the  
11 various elements that are around the fire to determine how or  
12 how fast the fire went?

13          A.    [No response.]

14          Q.    I may not be asking the exact question that I need to  
15 ask. This could be my fault, I'm not the technician.

16          A.    Sure.

17          Q.    But, for example, in your -- well, let me put it this  
18 way. Are there -- can you do recreation of fires to get  
19 information about the fire that you might have extinguished  
20 previously? Is there a test that you do?

21          A.    We generally don't do recreations because in order to  
22 recreate a fire those five factors have to be recreated  
23 identical to the event. And when you break it down into the  
24 components of all of that, it's practically impossible to do.

25          Q.    So, in other words, your testimony is that it's not

1 -- it's very unlikely to be able to recreate a timeline on a  
2 fire; is that correct?

3 A. I would say that it's -- I would say that it's not  
4 impossible, but I would say that in order to do that,  
5 everything would have to be identical to the day of the fire.  
6 When I say identical, I mean you would have to have a building  
7 of the same age with each structural component being the same  
8 age, because the natural decay of wood will affect the  
9 temperature at which it ignites and burns. There's a  
10 difference of brand-new wood versus wood that's 20 years old.  
11 There's a difference of 100 degrees in how a two-by-four burns,  
12 depending on its age. Older materials are less flame retardant  
13 when it comes to cushions and sofas and everything else versus  
14 brand-new. Natural fibers are more -- produce less BTU's than  
15 synthetic fibers, and foam produces less BTU's than say you had  
16 an old antique sofa that was stuffed with horse hair. And so  
17 in order to recreate with, in my opinion, any accuracy, each  
18 one of those factors, just in the construction, would have to  
19 be identical.

20 Q. And is this information you gained from your  
21 education and experience?

22 A. Well, we're -- yes, from my experience because I  
23 worked in the -- I worked in the same area of the City of  
24 Atlanta for 16 years. I was a firefighter there, a captain  
25 there, and a battalion chief there. So I had the opportunity



1 to fight fire in many of the same structures on more than one  
2 occasion.

3 Q. Is part of your education understanding the fire, but  
4 also understanding the difficulty in recreating the fire?

5 A. Well, it's -- at the end of the fire it's always nice  
6 to determine -- there's things that we want to determine for  
7 investigative purposes. We want to determine the point of  
8 origin and the cause of the fire. Generally, by the  
9 destruction in the fire, we can see, you know, how fast the  
10 fire burned and how -- and to some idea of how long the fire  
11 burned based on how much was consumed. But we couple all of  
12 that with eyewitness testimonies and what we call conditions  
13 upon arrival, what we saw when we first got there.

14 Q. Okay. Your testimony is that it's not -- but I'm  
15 talking about like in timelines of recreating, you've described  
16 that you have to have absolutely almost all the same  
17 circumstances of that event in order to recreate it?

18 A. I would say that any event that -- any portion of the  
19 scene, whether it be the temperature or the humidity, whether  
20 the furnace was on in a house, whether it was off in a house --  
21 and that's what I talk about when I say ventilation -- whether  
22 a window was open, whether a window was shut, at what point,  
23 even in a closed window, did that window fail. All of that  
24 will have an effect on the fire, because as the fresh air comes  
25 in at the moment the window fails, fresh air is introduced into

1 the scene. So it could take a fire that was literally  
2 smoldering, and once the window fails, then the fire could go  
3 to a flash-over stage in 30 or 40 seconds.

4 Q. So from your experience and training, you've learned  
5 how to define a fire and its behavior?

6 A. Yes.

7 Q. Okay. And to analyze whether -- have you ever tried  
8 to recreate a fire scene? In other words, what you were  
9 describing, have you ever tried to recreate the exact set of  
10 circumstances, or is that difficult, too difficult?

11 A. We never -- we never thought it was fundamentally  
12 feasible to attempt that, so in my career I never requested  
13 that or we never tried it. We would piece together from an  
14 investigative standpoint as much information as we could  
15 because we felt like it was just not practical to try to  
16 recreate that incident because of the complexities.

17 It's complex to the point that if that table or that  
18 podium that you're standing in front of was two feet one way or  
19 another, it would have a minor impact on how this room, if it  
20 was on fire, would behave. And if you couple even that minor  
21 factor with a factor of whether that door that just came open  
22 stayed open or not, each one of those doesn't have a monumental  
23 effect on the fire, but when you add up the small variances  
24 that they would have, it could -- it would just be practically  
25 impossible to try to say with any -- with any accuracy at all

1 of a timeline based on that, because there's so many unknowns  
2 because there's so much evidence that was destroyed between the  
3 fire itself, the firefighting operations itself.

4 Because when the firefighters get there, they're -- you  
5 know, their objective is to save lives and property, not to  
6 preserve crime scenes or to preserve the evidence in any way,  
7 shape, or form. Their object is to save lives and property.  
8 And in doing that, obviously, everything gets wet, windows are  
9 taken out, the exact position of everything in a room, when you  
10 put hoses capable of delivering 250 gallons a minute, they will  
11 literally -- that hose line would move every piece of furniture  
12 in this room if it was directed at it.

13 Q. So in reality, based on your description of what it  
14 would take or not take, you have some knowledge and  
15 understanding of how it is done or not done; is that correct?

16 A. Oh, yes.

17 THE COURT: How -- the timeline?

18 MS. SHEIN: I'm sorry. How a fire timeline could or  
19 could not be created. It apparently is impossible or  
20 almost impossible, based on his testimony, but he  
21 understands how it would be done, and knows that from his  
22 experience and knowledge.

23 MS. GALLOW: No objection, Your Honor, then.

24 THE COURT: He's admitted then as an expert without  
25 objection.

1 MS. SHEIN: Thank you.

2 **BY MS. SHEIN: [Resuming]**

3 Q. All right. Did there come a time when we contacted  
4 you regarding the Scott Davis -- the case of Scott Davis?

5 A. Yes.

6 Q. Okay. And did we ask you to evaluate some  
7 information in his case?

8 A. Yes.

9 Q. Okay. And were you paid for that service?

10 A. Yes.

11 Q. Did the fees you receive comport to fees you would  
12 charge in any other case for the same service?

13 A. Yes.

14 Q. Have you received any bonuses or any expectations of  
15 bonuses for your testimony here today?

16 A. Absolutely not.

17 Q. Can you describe for us what you did in analyzing --  
18 what you received from us, what materials you looked at, and  
19 what we asked you to do?

20 A. I was asked to evaluate the relevance of four fires,  
21 four test fires, that occurred in North Carolina, and whether  
22 their -- the timeline that was established in these four fires  
23 in North Carolina, in my opinion, was valid to the fire that  
24 occurred at the house at 951 Conway Drive, I believe is the  
25 address, or if that model could be used to the timelines

1 established, based on those four houses that were burned in  
2 North Carolina, if that was valid, in my opinion, to be used in  
3 any comparison to another fire.

4 Q. And did you -- what did you go through to evaluate  
5 that information?

6 A. I read the -- I read the report that the ATF agent  
7 had given regarding what had transpired in the fires in  
8 Kinston, North Carolina and what they were -- I read initially  
9 what they were -- the reason that they set the fires and how  
10 they set the -- you know, what they used as far as combustibles  
11 and what they were trying to accomplish with those fires.

12 Q. And what did you find after -- well, let me ask you.  
13 You already testified about this sort of in your description so  
14 I don't want to reiterate it, but there were a lot of factors  
15 to consider before you could determine if you can recreate any  
16 fire at all; is that correct?

17 A. Yes, right.

18 Q. Okay. And some of those factors were -- if you could  
19 just list a couple more. I think you said siding was one,  
20 furniture was another --

21 A. Yes, right. Well, the structural dimensions --

22 Q. Right.

23 A. -- the interior finishes, the fire load, and the  
24 combustibles changes during the fire, and ventilation are the  
25 five that are -- that are the most critical.

1           Q.    Do floor coverings have an impact?

2           A.    Yes, that's part of the interior. When I say the  
3 interior, I'm talking about the floor coverings, the wall  
4 coverings, the ceiling, everything in the room, the composition  
5 of the doors, whether they're hollow core, solid core doors,  
6 whether the walls are insulated. When I say the structural --  
7 the interior finishes in the structure, whether the walls are  
8 insulated. Whether heat will pass through it or whether the  
9 heat stays in the room is key and critical to how the fire  
10 behaves.

11          Q.    Is the type of method of construction of the house a  
12 factor as well?

13          A.    It absolutely is. There are different kinds -- even  
14 within residential structures, there's different kinds of  
15 different constructions. Older houses are what we call balloon  
16 frame construction where there's a void that goes from the  
17 crawlspace all the way up through each exterior wall into the  
18 attic. More modern construction is considered -- is called  
19 what they call platform construction where -- which is what  
20 most of us live in today where they build floor joists and a  
21 floor system and they lay a covering or laminate of plywood or  
22 particle board on top of that, a subflooring if you will, and  
23 then that's covered with carpet. But then the walls are  
24 resting on the subfloor versus the walls resting against the  
25 floor joist, which has an effect on how fire travels.

1 Q. The same with like closet storage areas, basements?

2 A. Everything. And the contents, not just the fact that  
3 there are those rooms, but the fact of what is inside, the  
4 combustible -- what we call the fire load. It's critical to  
5 all of that.

6 Q. Did you read the testimony from the trial of Scott  
7 Davis of Mr. Grove?

8 A. Yes.

9 Q. Okay. And that's the person you're describing that  
10 had described these different fire examples that he tried in  
11 North Carolina?

12 A. Yes.

13 Q. To develop the timeline?

14 A. Well, the fire -- the fires in North Carolina were  
15 not -- were not set to develop a timeline. The fires -- the  
16 four fires in North Carolina were set for the purpose of  
17 training fire investigators to see if they could know the  
18 different between fires where accelerants were used and non --  
19 what they call accelerated and non-accelerated fires. The  
20 North Carolina fires were not set or staged to develop  
21 timelines.

22 Q. Do you recall Mr. Grove's testimony concerning his  
23 use of those fire examples in his testimony? I'm going to pull  
24 that testimony out, if I may.

25 [Retrieving transcript of testimony.]

1 [Off the record.]

2 MS. SHEIN: I'm trying to find the page where the  
3 witness, Your Honor, actually testified about those  
4 particular reconstructed fires, and that's why I'm just  
5 trying --

6 MS. GALLOW: Marsha, that would be 3068 through 69.

7 MS. SHEIN: Thank you so much.

8 MS. GALLOW: You're welcome.

9 MS. SHEIN: That's just what I need. I knew it was  
10 in here somewhere.

11 Q. You said you --

12 MS. SHEIN: I'm sorry, may I approach, Your Honor?

13 THE COURT: Yes, ma'am.

14 **BY MS. SHEIN: [Resuming]**

15 Q. You testified that you read Mr. Grove's testimony; is  
16 that correct?

17 A. Yes.

18 Q. I'm showing you what's been marked Respondent's  
19 Exhibit 3-M. It is Volume 13 of 21 in the trial of Scott  
20 Davis, December -- I'm not sure what date this one is, but  
21 that's the number. And do you recall reading the testimony on  
22 Page 3068 to 3069? And I'll just let you take a moment to read  
23 it.

24 A. Yes, I recall reading this.

25 Q. And is it accurate to say that this is -- he was



1 describing those fires you just described in North Carolina  
2 that he was -- had recreated?

3 A. Yes.

4 Q. Okay. And do you recall his testimony that that --  
5 that those fires assisted him in creating a timeline in the  
6 Scott Davis case fire?

7 A. Yes. He assimilated, from my reading of the  
8 testimony, he assimilated the data from those four fires and  
9 then used that to render his opinion about the timeline for the  
10 fire off of Conway Drive.

11 Q. And when you evaluated that, what was your response  
12 to that in terms of evaluating what -- if that could actually  
13 be done?

14 A. As I had stated previously, I think that to me, when  
15 I read it, it was an apples to oranges comparison. The houses  
16 in North Carolina were smaller, which would have an effect on  
17 how the fire burned. When he was talking about how they set  
18 the fires and looking at the times and everything that they  
19 established for the fires, from his testimony I could not  
20 determine, and it was really not necessary for me to determine,  
21 where they had placed their combustibles, even though they were  
22 limited within those houses that they set afire. Unless --  
23 unless he had compared -- I did not see anything he mentioned  
24 in comparison to a similar construction or a similar size.  
25 They were -- I saw more variances than I did similarities.

1           Q.    Describe what you mean when you saw more variances  
2           than similarities.

3           A.    They were smaller houses, they set -- the Conway fire  
4           was supposedly set in the dinette area.  These fires were set  
5           in the living room using stuffed furniture and using pallets  
6           stuffed with foam.  And on two of the houses they had used  
7           eight gallons of gasoline.  So it was not -- it was not an --  
8           those houses in North Carolina were not occupied dwellings.  
9           Those were housings that were staged to set afire.  And, as I  
10          said earlier, he had said earlier in the testimony, if my  
11          recollection is correct, that the purpose of those fires in  
12          North Carolina was to set two of them using an accelerant,  
13          which was eight gallons of gasoline, and two that were just set  
14          without accelerant to see if fire investigators could determine  
15          or see the difference between accelerated fires and non-  
16          accelerated fires.

17          The variables, the houses in North Carolina, I don't --  
18          you know, when he says through the roof, did the fire impinge  
19          on a window and come out through a window and go into the eave  
20          of the house and then convey to the roof?  Did the fire go  
21          straight up through the middle of the house and convey to the  
22          roof?  All of those would have factors on when you have  
23          technically "through the roof," if that's what they were  
24          looking for.  And I know on the cases he was mentioning where  
25          the fire, you know, ventilated itself through the roof at

1 certain times. But the point is I've seen fires ventilate  
2 through the roof in two minutes, and I've seen fires not  
3 ventilate through the roof after three and a half hours of  
4 burning, so --

5 Q. So, in your opinion, did you review other information  
6 related to the fire in Scott Davis' case in comparison to that  
7 information of Mr. Grove?

8 A. No, I did not. I was looking strictly at Mr. Grove's  
9 testimony.

10 Q. And in that regard, was Mr. Grove's testimony  
11 accurate in relationship to being able to reproduce a fire --  
12 reproduce a fire, any fire, basically?

13 A. No.

14 MS. SHEIN: Your Honor -- well, let me do this first.

15 Q. Did anybody from the Criminal Defense portion of this  
16 case ever contact you to get an expert opinion from you? Did  
17 you ever hear from a Donald Samuel or a Mark Kadesh or a Bruce  
18 Morris?

19 A. No.

20 Q. You've never been contacted by anyone in this case  
21 until now --

22 A. Right.

23 Q. -- to testify --

24 A. That's correct.

25 Q. -- in regards to this information?

1           A.     That's correct.

2           Q.     Okay. I'd like to show you what's been marked --

3           THE COURT: Sixty-four?

4           MS. SHEIN: Sixty-four, thank you.

5           THE COURT: Isn't that what you've got, Beth?

6           COURT REPORTER: Yes, ma'am.

7           MS. SHEIN: That's right. Thank you, Your Honor.

8       **BY MS. SHEIN: [Resuming]**

9           Q.     Is this a copy of the report that you prepared in  
10       response to request for evaluation of this case?

11          A.     Yes, it is.

12          Q.     And is that your signature on the back?

13          A.     This particular one is not signed.

14          Q.     Did you bring a copy of the signed -- your signed  
15       copy?

16          A.     I brought a copy. Not one that I signed, but I  
17       brought my copies with me.

18                       [Looking for signed copies.]

19          MS. SHEIN: I admitted copies from the habeas, Your  
20       Honor, to the habeas. My apologies for the delay. Hang  
21       on one second.

22               Let me exchange that one for this one. It's also  
23       been marked as Exhibit N, but I will also put P-64 on the  
24       bottom. This is N in the habeas itself, but it will be P-  
25       64 for the purposes of today.

1 Q. Do you recognize this document?

2 A. Yes, that's the document that I wrote.

3 Q. Okay. And you wrote that after you did the analysis  
4 we requested?

5 A. Yes.

6 Q. And your signature is on the back of that?

7 A. Yes, it is.

8 Q. Okay.

9 MS. SHEIN: Your Honor, I'd like to now introduce  
10 Exhibit P-64.

11 Q. Is that reflective of your testimony that you've  
12 given here today?

13 A. Yes, it is.

14 MS. GALLOW: No objection, Your Honor.

15 THE COURT: Admitted without objection.

16 **[WHEREUPON, Petitioner's Exhibit Number 64 was admitted**  
17 **into evidence without objection.]**

18 MS. SHEIN: I have no further questions for the  
19 witness, Your Honor.

20 **CROSS-EXAMINATION**

21 **BY MS. GALLOW:**

22 Q. Good afternoon, Mr. Tolbert.

23 A. Good afternoon.

24 Q. You have testified that it is your opinion that there  
25 is no possible way that you could create an accurate timeline

1 in a case based on, in this case, four test fires that were in  
2 North Carolina; is that correct?

3 A. Yes.

4 Q. And in doing so, you primarily relied on Agent Brian  
5 Grove, who was the expert that testified at trial in this case;  
6 is that correct?

7 A. Yes. I based my opinion on his description of the  
8 fires that occurred in North Carolina.

9 Q. And there was nothing else that you reviewed?

10 A. No.

11 Q. You didn't review pictures of the scene in this case,  
12 did you?

13 A. No, I did not.

14 Q. You didn't review the structural engineering report  
15 in this case, did you?

16 A. No, I did not.

17 Q. Did you, by any chance, review a private fire  
18 investigation report that was prepared in this case?

19 A. No.

20 Q. Did you review the City of Atlanta fire report that  
21 was prepared in this case?

22 A. No.

23 Q. Did you review the State Farm Insurance report that  
24 was prepared in this case?

25 A. No.

1           Q.    Did you review any pictures that were taken from  
2 inside the burned house in this case?

3           A.    No, I did not.

4           Q.    Now with regard to Brian Grove, who was the agent  
5 that testified in this case, you reviewed his testimony;  
6 correct?

7           A.    Yes.

8           Q.    And you said that the four test fires that were in  
9 North Carolina that he based his opinion on were completely  
10 inaccurate because they were not of comparable nature to the  
11 victim's burned house in this case?

12          A.    Yes, I said there was no comparison.

13          Q.    And in reviewing Agent Grove's testimony, did you  
14 note the timeline that he had provided for the State?

15          A.    Yes.

16          Q.    Do you recall the timeline that he had provided for  
17 the State?

18          A.    Yes. The earliest time one of the accelerated fires  
19 was 12 minutes, and one of the non-accelerated fires was  
20 25-plus minutes, if I recall.

21          Q.    And since you've testified that you did review Agent  
22 Grove's testimony, do you recall him saying that the fire could  
23 have been from anywhere between 12 minutes to 25 minutes to 30  
24 minutes to 40 minutes, all the way up an hour in this case?

25          A.    Yes, I did.

1           Q.    Do you also recall him testifying at trial that there  
2 was absolutely no way that he could pinpoint the time of the  
3 fire timeline, that he could only speak in likelihoods?

4           A.    Yes.

5           Q.    But it is your testimony here today that it's  
6 impossible to create an accurate timeline?

7           A.    Well, to me accuracy and the likelihood, when you're  
8 looking at a difference between 12 minutes up to 45 minutes, I  
9 would not call that an accurate timeline.

10          Q.    So you're saying that between 12 minutes and an hour,  
11 that's not an accurate timeline?

12          A.    Not if you're trying to pinpoint the events in the  
13 occurrence of a fire, no.

14          Q.    Did you also recall Agent Grove testifying that there  
15 was absolutely no way of knowing exactly how long it took the  
16 fire to vent the house at the victim's residence?

17          A.    Yes.

18          Q.    Do you also recall him saying that the four test  
19 fires were only used to compare the burn victim's house?

20          A.    Yes.

21          Q.    And it was just purely for comparison purposes only?

22          A.    In his comparison, yes.

23          Q.    And in his testimony, he also took into consideration  
24 that --

25               MS. SHEIN: Your Honor, object to her leading the



1 witness, number one, telling what the witness said in the  
2 trial. This witness is not here to refute the testimony  
3 at trial for purposes of a jury determination. He's here  
4 because he's an expert witness that was not called to give  
5 testimony on behalf of Scott Davis on the timeline of when  
6 he was supposed to have committed the murder. So our  
7 position is that this is a witness about the -- about the  
8 ability to determine the timeline for him to have  
9 committed the murder, and he would have been an expert  
10 called by the defense attorneys to refute Mr. Grove's  
11 testimony.

12 MS. GALLOW: And, Your Honor, I would just say that  
13 she opened that on direct by saying that he specifically  
14 relied on Agent Grove's testimony at trial, which I'm  
15 getting into, which he based solely his expert opinion on,  
16 Your Honor.

17 THE COURT: I'll allow it. Go ahead, counsel.

18 **BY MR. GALLOW: [Resuming]**

19 Q. Again, Mr. Tolbert, Agent Grove used those four test  
20 fires only in comparison to the -- to the house that we're  
21 talking about in question now; is that correct?

22 A. He used them as a comparison, yes.

23 Q. And he also testified that they weren't going to be  
24 the same, based on the fact that they were of different size.

25 A. He did -- yes, he did say that.

1           Q.    He also said that the fuel load for each house could  
2 affect the time -- the timeline of the fire for each house and  
3 test fire in question?

4           A.    Yes, fuel load affects every fire.

5           Q.    As well as the accelerant that may or may not have  
6 been used in the house?

7           A.    That's correct.

8           Q.    As well as any ventilation in the house at the time?

9           A.    Yes.

10          Q.    So it was brought out at trial, based on your review  
11 of Agent Grove's testimony, that he could not, without a doubt  
12 and in any certain way, say I can give you an exact timeline of  
13 the fire in this case?

14          A.    He -- he rendered an opinion of an estimation of  
15 between as little as 12 minutes and up to 45 minutes, is what I  
16 read, that he did render an estimation. And rather than -- and  
17 this is just me talking now -- if you asked me my opinion, if I  
18 can render an estimation of, you know, when a fire started and  
19 when it vented through the roof, I would say beyond a shadow of  
20 a doubt in any case I could not do that -- whether it's 12  
21 minutes or 45 minutes or 5 minutes to 10 minutes.

22          Q.    But again, did you recall Agent Grove testifying that  
23 he can only speak in likelihoods as to the timeline in this  
24 case?

25          A.    He spoke in likelihoods, yes.

1 MS. GALLOW: No further questions at this time, Your  
2 Honor.

3 MS. SHEIN: Just briefly.

4 **REDIRECT EXAMINATION**

5 **BY MS. SHEIN:**

6 Q. At no time were you ever called to testify in the  
7 trial of Scott Davis, were you?

8 A. No.

9 Q. You never appeared before that jury, did you?

10 A. No.

11 Q. You never were able to testify about anything in this  
12 case that you testified to today; is that correct?

13 A. That's correct.

14 MS. SHEIN: Nothing further, Your Honor.

15 THE COURT: Anything else, Ms. Gallow?

16 MS. GALLOW: Just one brief question, Your Honor.

17 **RECROSS-EXAMINATION**

18 **BY MS. GALLOW:**

19 Q. Mr. Tolbert, were you ever directly involved in this  
20 case in terms of preparing any report or any testimony in this  
21 case, in the Scott Davis criminal case?

22 A. No.

23 MS. GALLOW: No further questions, Your Honor.

24 **FURTHER REDIRECT EXAMINATION**

25 **BY MS. SHEIN:**

1 Q. Not until now, right?

2 A. Not until now, I mean, to the document that I just  
3 admitted to signing, yes.

4 MS. SHEIN: Okay. Thank you.

5 THE COURT: Can Mr. Tolbert be excused?

6 MS. SHEIN: No, thank you very much. He can be  
7 excused, yes.

8 [Witness excused.]

9 MS. SHEIN: I need a five minute break just to get my  
10 next witness ready, and I just need to find one document,  
11 Your Honor.

12 THE COURT: Okay.

13 MS. SHEIN: So I can try to be a little bit more  
14 efficient, Your Honor.

15 [Brief break.]

16 \* \* \*

17 Whereupon,

18 **WILLIAM GRADY DODD,**

19 having been duly sworn under oath, was examined and testified  
20 as follows:

21 **DIRECT EXAMINATION**

22 **BY MS. SHEIN:**

23 Q. Mr. Dodd, could you tell us how you're employed?

24 A. Currently self-employed as a private investigator.

25 Q. Can you describe a little bit about your employment

1 history for us?

2 A. Sure. Prior to becoming a private investigator, I  
3 worked the City of Atlanta and Fulton County Fire Departments.  
4 I'm retired as the assistant fire chief of Fulton County.

5 Prior to going to Fulton County I worked for the City of  
6 Atlanta, and the last job that I had with the City of Atlanta  
7 was as an arson investigator. And --

8 Q. How long did you do that? I'm sorry.

9 A. Well, total involved as an arson investigator,  
10 between City of Atlanta and Fulton County was 21 years as an  
11 investigator with both departments. I was also a bomb squad  
12 commander with Fulton County and City of Atlanta.

13 Q. And how long were you there?

14 A. I was with City of Atlanta for 11 years, and the rest  
15 of my career was with Fulton County for a total of 32 years.

16 Q. So what are some of the duties that you performed  
17 while employed as a fire deputy or chief?

18 A. Well, as the deputy chief, I was responsible for all  
19 the departments -- or all the divisions within the fire  
20 department with the exception of the Extinguishment Division.  
21 I took care of the Fire Prevention Division, the Maintenance  
22 Division, the Training Division, and Administrative Divisions.

23 Q. Did you actually do training?

24 A. Yes, I did.

25 Q. Are you still doing that now?

1           A.    On a limited basis, but I do still do training, yes.

2           Q.    They call upon you to do that?

3           A.    Yes.

4           Q.    How many fires have you analyzed in your career with  
5 the Atlanta Fire Department?

6           A.    Between the City of Atlanta, Fulton County, and  
7 private business, all told, ought to be several thousand.

8           Q.    And when you analyze a fire, do you analyze -- what  
9 do you analyze when you go to look at a fire?

10          A.    Well, first of all, my job function is to determine  
11 the origin and cause of the fire, so you're analyzing a lot of  
12 things. First of all, you're analyzing the structural  
13 components of the building, you're looking at the damage to the  
14 building, and looking at anything that may contribute to fire  
15 spread, you know, within the building, and you're looking for  
16 any heat producing devices that can cause the fire, and, more  
17 importantly, you're looking for anything that's unusual or out  
18 of the ordinary, and you're looking for -- the ultimate  
19 question is why did the fire happen today and not yesterday?  
20 What's different today than yesterday?

21          So you're looking at sometimes what event was going on  
22 immediately prior to the fire that may have contributed to the  
23 cause of the fire, you're looking at weather conditions, you're  
24 also taking witness statements and information that you're  
25 gathering from any witnesses that may have input, or knowledge

1 of the building. Because, first of all, you need to know  
2 what's in the building itself, what's there to burn, what's  
3 there to cause a fire, and what brought the heat source and the  
4 fuel source together.

5 Q. Did you also examine evidence -- in your experience,  
6 over a period of time, did you also examine evidence that was  
7 retrieved from a fire?

8 A. Oh, yes, ma'am, because anytime that you're dealing  
9 with the cause of the fire, of course you're recovering  
10 evidence all through the process and moving debris and so  
11 forth, so you're analyzing debris and evidence as you go, and  
12 also, you're collecting evidence for further examination by  
13 laboratories in the process.

14 Q. And what kind of evidence would you classify as items  
15 that you might find in a fire besides the structure itself?

16 A. Okay. And evidence is -- and that's a question that  
17 firefighters used to ask me all the time when I was doing my  
18 job, is what are you looking for? And my answer to that is I  
19 don't know what I'm looking for until I find it, so what I'm  
20 looking for is something sort of out of the ordinary, out of  
21 place, unusual, anything that's capable of producing heat that  
22 can cause a fire, or anything that can contribute to fire  
23 spread. So I'm also looking for accidental fire causes and,  
24 you know, what's there that can cause an accident, so I'm  
25 looking for mechanical, electrical, chemical items, and, like I

1 say, looking for anything that's out of the ordinary or unusual  
2 and out of place. Also, a lot of times I'm looking for  
3 evidence of an explosion. So anything there that could, you  
4 know, contribute to or cause an explosion.

5 Q. Would you also examine items such as firearms or gas  
6 cans that might be located in a fire?

7 A. Yes. And it's not unusual to find either/or in a  
8 fire scene, both accidental and intentional. You know, a lot  
9 of times during the course as buildings burn, a lot of people  
10 have firearms in their house, so you do find firearms in the  
11 house. So you do look at those, collect them, and, you know,  
12 you do preserve them from that standpoint. Also, you do find  
13 gasoline containers. And one thing about gasoline containers  
14 that you particularly look for is when you find them that are  
15 out of place. You know, I've found them on some very unusual  
16 places, like on the front burner of a stove, the middle of the  
17 bed in the master bedroom, and those are places that people  
18 don't commonly store their gasoline containers. So those are  
19 things that you're looking for that are out of place and out of  
20 the ordinary.

21 Q. If you are in a situation where you actually retrieve  
22 pieces of evidence, do you personally analyze that piece of  
23 evidence for tar damage and what condition it's in? Have you  
24 personally done that?

25 A. Well, I've -- yes, ma'am. I've collected it,



1 photographed it, documented it and, you know, preserved it to  
2 send to the laboratory for further examination.

3 Q. And are you a member of any associations?

4 A. Yes, I am. I'm a member of the International  
5 Association of Arson Investigators, the Georgia Fire  
6 Investigators Association, Metro Fire Investigators  
7 Association. I'm also a member of the Georgia Private  
8 Investigators Association, I'm a member of the FBI National  
9 Academy Associates, a member of Georgia Peace Officers  
10 Association, and a member of the International Association of  
11 Bomb Technicians and Investigators.

12 Q. Have you also taught courses?

13 A. Yes, I have.

14 Q. Or classes?

15 A. Yes, I have.

16 Q. Can you just give me a quick description of some of  
17 the classes?

18 A. I've taught classes in Fire Scene Investigation, both  
19 basic and advanced classes at the state and national level;  
20 I've taught classes on Crime Scene Processing, both a mandate  
21 class and also an -- advanced classes; and I've taught classes  
22 on Bomb Scene Processing.

23 Q. I'm going to -- may I approach, Your Honor?

24 A. Yes.

25 Q. I'm going to show you what's been marked Exhibit P-

1 65. Is this an accurate reflection of your resume and  
2 experience that you described here today?

3 A. Exhibit A, yes, is a list of courses that I've  
4 attended and has my training and education, and classes that  
5 I've taught on there as well, yes, and current license and  
6 memberships.

7 Q. How far did you go in school? What education did you  
8 receive?

9 A. I received a high school diploma, and I also have  
10 some college education, but I do not have a degree.

11 Q. Have you continued keeping your certification up in  
12 different areas of expertise?

13 A. Yes.

14 MS. SHEIN: And I'm going to tender him at this time  
15 for an expert in the area of Fire Analysis.

16 MS. GALLOW: Your Honor, I have no objection to him  
17 testifying as an expert in Fire Analysis. I do have a  
18 concern, based on the affidavit that he has provided for  
19 the Court, that he may or may not provide testimony  
20 regarding any firearms. He also may or may not provide  
21 testimony regarding a gas container that was recovered  
22 from the scene. I would object to any testimony going  
23 into any line of questioning as to the firearm or the gas  
24 can, because I don't believe there's been a foundation  
25 laid as to him being an expert to testify either in

1 ballistics or in gas cans and markings therefrom.

2 MS. SHEIN: I'll ask some more questions, Your Honor,  
3 if I may.

4 THE COURT: Okay. If you want to qualify him in  
5 something other than Fire Analysis.

6 MS. SHEIN: Right.

7 **BY MS. SHEIN: [Resuming]**

8 Q. Having you heard the attorney general's comments,  
9 have you had the opportunity in your career to analyze items  
10 that you had seized or found at a fire, including firearms and  
11 gas cans?

12 A. Yes, ma'am. I've had cases where I've had firearms  
13 recovered, and one of the things that I teach in the classes of  
14 crime scene processing is how to properly collect and preserve  
15 firearms from a fire scene so that you can get the best  
16 evidentiary value out of those items.

17 Q. Now let me just finish with that particular part.

18 A. Sure.

19 Q. When you do that, are you able to make determinations  
20 from your experience and knowledge concerning the damage caused  
21 by the fire to that item and what else could be done with that  
22 item?

23 A. Well, when I'm picking the evidence up, one of the  
24 things that I look for while I'm submitting evidence to the  
25 Crime Lab is things that I want them to particularly test for.

1 So, yes, I evaluate the evidence and I will talk with the  
2 examiner about things that I would expect the examiner to be  
3 able to do for me. And, of course, the examiners themselves  
4 are going to tell me whether or not they physically think that  
5 it's capable of that happening, but I try to preserve it in the  
6 best condition that I can preserve it in so that that evidence  
7 is available for that type of testing.

8 Q. And what about a gas can? Have you ever retrieved a  
9 gas can from a fire scene?

10 A. Yes. Gasoline containers, whether it be a gas can or  
11 just any other container that is bought, several times in  
12 recovering those I've been able to get useful information  
13 directly from the can that has led me to a location, one, where  
14 it was purchased at, up to and including identifying the store  
15 that it came from, the recover video of the person that  
16 purchased the container. So a lot of times there's useful  
17 information that's clearly visible on burned containers that's  
18 used to help track down potential suspects in a case.

19 Q. Do you also have experience in identifying items  
20 necessary to determine a fire timeline, like when it started  
21 and how it was -- progressed?

22 A. Well, in a fire timeline and progression of fires,  
23 one of the things that we teach in the fire investigation  
24 fields course is fire spread and fire growth. The problem with  
25 any calculations when you're dealing with fire spread and fire

1 growth is there are so many variables that's involved, you have  
2 to be very careful in the data that you're collecting. Now I  
3 have personally burned over 100 houses in conducting classes  
4 and testing and experiments. So not only have I, you know,  
5 tested different methods of fire spread and fire burning and  
6 fire behavior, but I've personally witnessed it as it burned.

7 MS. GALLOW: Your Honor, I have no objection to Mr.  
8 Dodd testifying as to the gas can in this case. I would  
9 still renew my objection to him testifying as to anything  
10 regarding the firearm that he discovered in this case or  
11 reviewed based on the pictures. I don't think he's -- I  
12 don't think he's been qualified as an expert in ballistics  
13 or firearms, and I would renew that objection.

14 MS. SHEIN: I don't think those are the questions  
15 we'll be asking, it's more about the preservation of that  
16 particular item.

17 THE COURT: Okay.

18 MS. SHEIN: Yeah, I think we're on the same page.

19 MS. GALLOW: As long as it's as to the preservation,  
20 I have no objection.

21 THE COURT: Okay. Then we'll qualify him as an  
22 expert in the preservation of the evidence located, and  
23 also in the analysis of the fire.

24 MS. SHEIN: Thank you, Your Honor.

25 **BY MS. SHEIN: [Resuming]**

1           Q.    Let's discuss a little bit about what procedures  
2 should have been -- should be used to protect a fire scene.

3           A.    Well, first of all, you know, after the fire is  
4 extinguished and the fire is brought under control, then the  
5 next thing that you do is you remove any unnecessary personnel  
6 from the fire scene until the fire scene is photographed and  
7 documented. So that's the first thing that you do in  
8 preservation is, you know, after the fire is extinguished is  
9 you remove the fire fighters from the fire scene. Because, you  
10 know, as you've got people moving through a fire scene, to  
11 start with, it's a fragile environment in a fire to start with  
12 because, first of all, it's been damaged and burned by the  
13 fire. So to limit the amount of that damage, then you, like I  
14 say, you remove the people from the scene once the emergency is  
15 over with. So that's the first step in preservation.

16           And the next thing you do from a preservation standpoint,  
17 of course, is you photograph and document it as you find it,  
18 which is the next step of the preservation before you start  
19 removing any of the debris from the scene.

20           After that, then, of course, as you're removing the  
21 debris, you systematically go through the debris in layers.  
22 Because, you know, things that are on top of the fire, you  
23 know, were last to get there -- or on top of the debris,  
24 they're the last to get there. So what you're ultimately doing  
25 is going through the layers of debris systematically looking

1 for any evidence of heat-producing devices, anything out of the  
2 ordinary, or anything unusual.

3 As you're going through the debris you're making  
4 photographs and documenting what you're finding. And sometimes  
5 it includes, ultimately, you know, going through the debris  
6 literally with a sifter, depending on what you're looking for.  
7 For instance, if you're looking for small items such as jewelry  
8 or things of that nature in an area, you want to go through it  
9 very carefully and you would use something that is literally as  
10 small as a sifting screen to go through to look for those type  
11 of items.

12 Q. Could that include things like gun shell casings?

13 A. Yes, in cases where you have firearms used and you  
14 have projectiles. And I have worked fire scene cases to where  
15 I had a -- had victims that were shot or wounded during the  
16 course of the events and had a fire occurring. And yes, that's  
17 one of the things that you do is you look for the shell casing  
18 and projectiles because, again, you want to document and  
19 preserve as much evidence as you can.

20 Q. If a fire scene -- should the fire scene be processed  
21 immediately after the fire is extinguished?

22 A. That's a yes and a no.

23 Q. Okay.

24 A. Okay? You know, the sooner that you process it, the  
25 less deterioration that there is to the fire scene. But, more

1       importantly, you want to make sure that you have proper  
2       equipment and people in place to process the scene before you  
3       start.

4           Q.     I'm sorry to interrupt you, but I just want to know,  
5       at that point how do you protect the scene so that it can be  
6       processed if it's not processed immediately?

7           A.     Well, when we're talking about not processing  
8       immediately, I'm not talking about days, weeks, or months. I'm  
9       only talking a matter of minutes and hours at the most so that  
10      the amount of deterioration at that point in time, you know,  
11      you're not going to have that much effort to it. Now if it is  
12      going to be days, weeks, or months -- and sometimes it is -- in  
13      that particular case then you try to board up and secure the  
14      scene the best that you can, and you put a guard on the  
15      property. For instance, I've had large commercial buildings  
16      when I worked with the government that I literally surrounded  
17      and posted with guards until we were able to get all the work  
18      crews in there to start processing the scene. And sometimes it  
19      may include covering it up with either plastic or tarpaulins to  
20      protect it from the environment if you're having heavy rains or  
21      something of that nature.

22          Q.     If there's a person involved, perhaps, let's say,  
23      someone who's suspected of starting the fire, are there certain  
24      things you would do if that particular person was arrested at  
25      the scene of the fire?



1           A.    Yes.  If the person is arrested at the scene of the  
2 fire, I would want to secure the person's clothing, I would  
3 also want to check the person over closely for singed eyebrows,  
4 singed nose hair, singed hair around their hands and arms and  
5 ankles.

6           Q.    Would this be a procedure that you would teach in the  
7 ordinary course of activities for investigating a fire?

8           A.    Well, that's one thing that we do teach is when  
9 you're looking -- you know, one of the things that you're doing  
10 when you're at a fire scene is examine the people that are in  
11 the area there watching the fire.  And if you do notice anybody  
12 unusual or whatever, to interview that person and, you know, if  
13 you identify a suspect, then yes, you want to preserve any  
14 evidence that may be on the suspect as well.

15          Q.    There came a time when you were contacted by my  
16 office?

17          A.    Yes, I was.

18          Q.    And what were you asked to do?

19          A.    Well, Ms. Mulder contacted me and she -- first of  
20 all, she brought some photographs and documents and asked me to  
21 review those documents and, you know, tell her what I saw or  
22 render an opinion from those documents and photographs.

23          Q.    Were you paid for your services?

24          A.    Not for those services, no.

25          Q.    Have you been paid -- will you be paid for coming

1 here today?

2 A. Yes.

3 Q. And the fee that you charge, is that a standard fee  
4 you would charge for anyone else in this kind of a case?

5 A. Yes.

6 Q. And is there -- has anyone promised you any bonuses  
7 or additional fees for any type of testimony you provide here  
8 today?

9 A. No.

10 Q. Tell me, if you would, please, what you reviewed from  
11 the information provided?

12 A. She had some court transcripts, she had some  
13 photographs, and originally she had some black and white  
14 photographs that I asked her to see if she could get the  
15 original colors or get copies of the color photographs so that  
16 I could -- you know, when you have copies of copies of copies  
17 that are black and white on a Xerox machine, because you're  
18 dealing with burned debris to start with, you lose a lot of the  
19 detail in there, so ultimately she did get me some better  
20 copies of the photographs to review.

21 Q. You were able to look at both black and white and  
22 color photos; is that correct?

23 A. That's correct.

24 Q. I am now showing you what has been marked as Exhibit  
25 66. Do you recognize these photographs?

1           A.    Yes, ma'am.  These were about as bad a quality as the  
2 first ones that I looked at.

3           Q.    But do they look like the copies of the photographs  
4 that you did look at?

5           A.    Yes, ma'am, they are.

6           Q.    And did you have color photographs of those same  
7 items?

8           A.    Yes, I did.

9           Q.    Okay.  And in those pictures, will you describe what  
10 you see, sir?

11          A.    They're collectively marked as P-66.

12          Q.    Yes.

13          A.    Okay.  There's two photographs that show a Beretta  
14 Model 92 that was found at the fire scene in the debris.  And  
15 then there's two photographs of a gasoline container that was  
16 recovered from a burnt automobile.

17          Q.    Thank you.

18                MS. SHEIN:  Your Honor, these were photographs that  
19 were actually admitted into trial, and I've just -- I've  
20 spoken to the AG about it, and that the record will come  
21 up with the color copies of these, but we're going to  
22 submit -- they've agreed to allow me to admit them into  
23 evidence for purposes of this testimony.

24                THE COURT:  All right.

25                MS. SHEIN:  Any problem with that?

1 MS. GALLOW: No objections.

2 MS. SHEIN: Okay. Thank you.

3 **[WHEREUPON, Petitioner's Exhibit Number 66 was admitted**  
4 **into evidence without objection.]**

5 [Off-the-record comments.]

6 **BY MS. SHEIN: [Resuming]**

7 Q. You did not personally see the crime scene in this  
8 case; is that correct?

9 A. That is correct.

10 Q. But you did examine a number of documents. Can you  
11 describe again what those documents are? I'm not sure you  
12 actually mentioned them in detail, so I have to --

13 A. No, the documents that I read, again, were copies of  
14 the court transcripts of witnesses that had testified in this  
15 case previously.

16 Q. Do you recall which ones those were?

17 A. Not by name, I sure don't. One was an ATF agent, and  
18 I don't recall his name, that had testified about the fire  
19 spread issue. I had read some court testimony about the  
20 firearms examination that took place.

21 Q. Does the name Mr. Grove and -- I don't remember the  
22 ATF agent's name either, but --

23 A. Randy Grove, I think is one of the --

24 Q. Is one of the people?

25 A. -- one of the people that I've read testimony from is

1 one, yes.

2 Q. Is it safe to say that the testimony from the trial  
3 that you read was excerpts from the trial related to the fire  
4 itself?

5 A. That's correct.

6 Q. You were also asked to look at photos of a Porsche;  
7 is that correct?

8 A. That's correct.

9 Q. And in the contents of that Porsche you saw a gas  
10 can; do you recall that?

11 A. Yes, I do. It was setting there on the front seat --  
12 well, the Porsche doesn't have a back seat -- so it was setting  
13 there is the passenger compartment of the Porsche, yes, ma'am.

14 Q. As you reviewed this information, let me see what --  
15 let me talk to you about some of your findings.

16 One of your findings in your affidavit and statement was  
17 that the fire scene was contaminated. Can you explain how you  
18 made that determination?

19 A. Well, in this particular case the original  
20 investigators that were there at the fire scene left prior to  
21 processing the fire scene.

22 MS. GALLOW: Objection, Your Honor. I would like to  
23 know where this witness got that information. He's  
24 testified that he only interviewed four pictures,  
25 documents, and witness testimony from, I believe, an Agent

1           Grove and the firearms examination, which I believe would  
2           be Bernadette Davy. So I want to know where this witness  
3           got this information before we get into this line of  
4           questioning.

5           MS. SHEIN: I think he also said the ATF agent; is  
6           that correct?

7           THE WITNESS: That is correct. But where --

8           MS. GALLOW: My understanding, Your Honor, is the ATF  
9           agent was Brian Grove that we're speaking of, so I'm not  
10          sure where this witness is getting the information of --  
11          as to the original investigators in this case.

12          THE COURT: Ms. Shein, can you --

13 **BY MS. SHEIN: [Resuming]**

14          Q. Can you clarify that?

15          A. Yes, ma'am, I certainly can.

16          Q. Please go right ahead.

17          A. The boy that works with me is Johnny Buck that was  
18          one of the investigators that worked with the City of Atlanta,  
19          and the information come from Lieutenant Buck, and he still  
20          works with me today.

21          MS. GALLOW: And, Your Honor, I believe what he's  
22          referring to is the -- Lieutenant Buck was the one that  
23          provided the report to Brian Grove who testified at the  
24          trial based on that report.

25          THE WITNESS: No, ma'am.

1           Q.    So you reviewed the report and the testimony and, go  
2 ahead, what else?

3           A.    To clarify a little bit, Lieutenant Buck does not  
4 show up anywhere in the paperwork.

5           Q.    Right.

6           A.    He was a member of the Atlanta Arson Investigators.  
7 Where Grove got his information was from Buck Kennedy, which is  
8 a different Buck. From that same -- that's where Grove got his  
9 information from. Lieutenant Buck was, up until October of two  
10 years ago, was a full-time investigator with the City of  
11 Atlanta as an arson investigator and he worked in that  
12 division. And when this fire happened -- and he's worked with  
13 me part time since about 1998. He currently works with me full  
14 time after his retirement. And, yes, he and I talked about  
15 this case extensively.

16          Q.    So from all the information reviewed, including the  
17 discussions you had, were you able to make findings concerning  
18 the fire scene and whether it was contaminated or not?

19          A.    Yes, ma'am, I did.

20          Q.    Will you explain that you found?

21          A.    Well, again, the original two investigators that  
22 responded to the fire scene left before they actually processed  
23 the fire scene --

24                THE COURT: I'm sorry, I just want to ask a question.

25                Lieutenant Buck, who now works with you full time, was he

1 at the scene?

2 THE WITNESS: He was on duty that day. He did not go  
3 to the fire scene.

4 THE COURT: Okay.

5 THE WITNESS: Okay?

6 THE COURT: And so -- I'm just trying to understand.  
7 I understand what you're telling me, I just -- he didn't  
8 testify at trial; correct?

9 THE WITNESS: No, ma'am, that's correct.

10 THE COURT: And somewhere along the way he became  
11 aware that the original investigators left the scene;  
12 correct?

13 THE WITNESS: That is correct.

14 THE COURT: And then now ten years later, he's giving  
15 you that information?

16 THE WITNESS: No, ma'am. I got this information --  
17 bear in mind, I did not retire until the end of '97 is  
18 when I retired.

19 THE COURT: Okay. Were you -- but you weren't  
20 involved in this case.

21 THE WITNESS: Not directly.

22 MS. SHEIN: He has personal knowledge, Your Honor.

23 THE WITNESS: I had -- because it's in the field that  
24 I work in --

25 THE COURT: Yes, sir.



1           THE WITNESS:  -- and in our business, we discuss  
2           those types of cases with our investigators that we work  
3           -- share common work with.

4           THE COURT:  I'm just trying to make sure I  
5           understand.  There's nothing in the record about this;  
6           correct?  Or is there?

7           MS. SHEIN:  Not about his -- the information he got  
8           from Lieutenant Buck, because that was not known that he  
9           got -- he told us about that, so he's a witness of that  
10          information that he used to analyze what happened that  
11          came from people that were involved with the fire, this  
12          fire.

13          THE COURT:  Okay.  So he got it from Lieutenant Buck,  
14          and Lieutenant Buck got it from I don't know where?

15          MS. SHEIN:  Well, he's involved with the  
16          investigation with his --

17          THE WITNESS:  He was on duty that day.

18          MS. SHEIN:  That's right.

19          THE COURT:  But being on duty, does that mean you're  
20          at the -- I'm just trying to understand where you came  
21          from.

22          THE WITNESS:  And what I was getting at is all the  
23          investigators that were in the office that next morning  
24          went back to the fire scene, with the exception of  
25          Lieutenant Buck.

1           THE COURT: So he was never at the fire scene. But  
2 he --

3           THE WITNESS: He never went to the fire scene.

4           THE COURT: Okay.

5           THE WITNESS: He did transport some evidence in the  
6 case.

7           THE COURT: Okay. But he heard people talking about  
8 it.

9           THE WITNESS: Right.

10          THE COURT: And that's where he got the information,  
11 and then he relayed that information to you.

12          THE WITNESS: That is correct, yes.

13          MS. GALLOW: Your Honor, I'd object to him testifying  
14 based solely on the discussions of other people that  
15 weren't directly involved in this case.

16          MS. SHEIN: He's not basing his whole analysis on  
17 that, it's just additional information he used in forming  
18 some opinions.

19          THE COURT: Well, I'm going to sustain an objection  
20 to him -- his statements that the officers left the scene  
21 unsecured -- I just don't know where that came from. I  
22 mean, I understand what he's telling me, but I don't think  
23 that's reliable information.

24 **BY MS. SHEIN: [Resuming]**

25 Q. You do you have personal knowledge that the persons

1 investigating the fire the day of the Coffin murder left the  
2 scene?

3 A. No, I do not have direct personal knowledge.

4 Q. Did you get that from a report?

5 A. No.

6 Q. And you got that from someone who was not at the fire  
7 scene?

8 A. That is correct.

9 Q. But who supervised people that were at the fire  
10 scene?

11 A. Well, he was of equal rank. The supervisor at that  
12 time was Chief Joe Haney was the supervisor.

13 Q. Okay.

14 A. And I can't remember the other one. He's back in  
15 Hawaii now, but he was the other supervisor at the time.

16 Q. Were you able -- from the materials you did review,  
17 excluding that information that someone left the fire scene,  
18 were you able to identify whether the fire scene itself was  
19 contaminated or processed properly?

20 A. Well, from the evidence that I reviewed with the  
21 photographs on there and the debris -- the two photographs that  
22 you showed me just of the weapon doesn't show all of  
23 photographs that I was shown of that area and the way they  
24 processed the scene.

25 MS. SHEIN: May I approach, Your Honor?

1 THE COURT: Yes, ma'am.

2 MS. SHEIN: I think I'm going to use these. I'm  
3 using the two color photos that are directed as State  
4 exhibits instead of the two black and whites that have  
5 been admitted.

6 Q. Are these the same pictures you had an opportunity to  
7 evaluate?

8 A. Yes, ma'am.

9 Q. In color and in black and white?

10 A. Yes, ma'am.

11 Q. From those pictures, how can you tell that the fire  
12 scene might not have been processed properly? I'm talking  
13 about the gun first, not the Porsche.

14 A. Okay. Dealing with just the gun itself, there's also  
15 some additional photographs that shows where they shoveled out  
16 the debris from the garage area. But --

17 Q. Okay, go ahead.

18 Q. -- and that's basically what they did is they  
19 shoveled the debris. And in there they found one or two of the  
20 shell casings. Well, first of all, they found a clip for the  
21 Beretta --

22 MS. GALLOW: Objection, Your Honor. He's reviewing  
23 two pictures based on the gun, and now he's testifying as  
24 to shoveling debris based on something else. I'm not sure  
25 where he's getting this information. Can we get into

1           where he's getting this information, please?

2           MS. SHEIN: Sure.

3           THE COURT: Please.

4           MS. SHEIN: Yeah. These are all from the fire  
5 exhibits at the trial.

6           THE COURT: Okay. Well, the only two pictures that  
7 I've heard anything about are two of the gun and two of  
8 the gas can in the car. So, Ms. Shein, you're going to  
9 have to be more specific. I'm not sure where all his  
10 information is coming from.

11          MS. SHEIN: No problem, Your Honor. He received a  
12 lot of pictures.

13          THE COURT: Okay. Well, he's going to need to tell  
14 me exactly what he looked at and what conclusion he drew.  
15 And I don't want to hear from people that he talked to.

16          MS. SHEIN: No problem.

17          THE COURT: Okay.

18 **BY MS. SHEIN: [Resuming]**

19          Q. I'm showing you another set of pictures. Did you  
20 also see these pictures previously?

21          THE COURT: Are you going to mark those?

22          MS. SHEIN: Well, that's the question at this point.  
23 We were trying to do it so that it would be efficient with  
24 the whole record coming up, but I guess at this point I'll  
25 go ahead and mark them because it's probably easier for

1 the Court as well.

2 Let's call the two color photos of the firearm  
3 defense -- Petitioner's Exhibit 67, I think.

4 COURT REPORTER: That's correct.

5 MS. SHEIN: And even though these are already part of  
6 the trial record, I'll identify them that way. That might  
7 make it a little easier.

8 And the I will identify the two casings as 68.

9 THE COURT: And 67, can you specifically tell me what  
10 that's a picture of or --

11 MS. SHEIN: Through him or through me, Your Honor?

12 THE COURT: Well, I --

13 MS. SHEIN: Yeah.

14 THE COURT: -- you started out doing it --

15 MS. SHEIN: Well, I was going to go through each one  
16 once I put it in --

17 THE COURT: Okay. I'm just not clear.

18 MS. SHEIN: I apologize, Your Honor. I'm trying --  
19 I'm trying to clear that.

20 All right. This is, I'm sorry, P-68. I'm going to  
21 ask you to describe each one of them, then I'm going to do  
22 P-69, Your Honor.

23 And then I have one more, Your Honor, that at the  
24 moment is -- we'll make that P-70.

25 **BY MS. SHEIN: [Resuming]**

1           Q.    If you will take each one of these exhibits and go  
2 through them and tell me what they are, tell the Court what  
3 they are individually, and if those are things that you have  
4 had the opportunity to look at previously.

5           A.    P-67, there's two color photographs of Beretta Model  
6 92 that was found at the fire scene. The one has the  
7 defendant's -- or excuse me -- the Plaintiff's sticker 67 on it  
8 as it's first uncovered in the debris, and it's leaning up on  
9 -- been lifted up on its side, or as it's found in the debris  
10 it's laying on its side. And the other photograph is after an  
11 investigator has picked up the Beretta, and showing the size of  
12 the weapon in there.

13           P-68 is a clip for the weapon that is not in the weapon at  
14 the time. And also with this photograph, the way the  
15 photographs are you can't tell the relationship of distance  
16 from the weapon from in there, but P-68 is two photographs of  
17 the clip that is the same type of clip used by that weapon.

18           P-69 is a color photograph, just one, but it's a color  
19 photograph of the gasoline container in the front seat of the  
20 Porsche. It's the red and white container that's marked  
21 "gasoline."

22           P-70 is a photograph of the clip that was shown in P-68 in  
23 an investigator's hand.

24           Q.    Okay.

25           MS. SHEIN: Now, Your Honor, now I admit those

1 exhibits.

2 THE COURT: Okay.

3 MS. GALLOW: No objection, Your Honor.

4 THE COURT: Okay, they're admitted without objection.

5 **[WHEREUPON, Petitioner's Exhibits Numbers 67, 68, 69, and**  
6 **70 were admitted into evidence without objection.]**

7 Q. You can hold them for just a minute in case you need  
8 to refer to them. From your analysis of these items, what can  
9 you tell?

10 A. Well, in P-69 [sic] you can tell that you have a  
11 Model 92 Beretta. It's a 9mm weapon. The plastic grips of the  
12 weapon are melted. It appears that the magazine is out of the  
13 weapon. And you can tell that there's not a lot of heat damage  
14 to the metal of the weapon itself. But, more importantly, you  
15 can tell that it's in a wet environment, and being in a wet  
16 environment, it should be packaged to protect it in that  
17 condition, because as that weapon dries out, then the weapon  
18 starts to deteriorate from rust.

19 Q. So to preserve that particular piece of evidence, the  
20 proper procedure would be to do what?

21 A. To package it in the debris that it's found in, to  
22 put it in an airtight container so that it doesn't air out till  
23 it can be taken to a laboratory to where it could be recovered  
24 using electrolysis to bring the weapon back to a normal  
25 atmosphere.



1           Q.    Okay.  What about the next item?

2           A.    In P-69, which is the red and white gasoline  
3 container, it has very little damage to it.  First of all, it's  
4 a unique design of that container.  And in that container that  
5 would -- by the design of the container, it would kind of help  
6 narrow down to at least a few dozen locations locally to where  
7 that container could be purchased at, which would be a  
8 possibility.  But one of the things that would help it is the  
9 barcode on that container is undamaged, so with a barcode, you  
10 could get information from the manufacturer of that container  
11 as to who all distributes that container.  And --

12          Q.    And -- go ahead.

13          A.    And by finding out who all distributes or sells that  
14 container, it would give you some potential sources to go to  
15 find out when that container was sold and who may have even  
16 purchased that container.

17          Q.    When you process a fire scene that you've been  
18 involved in with a car, if you find a gas can, what should --  
19 what is the procedure that should be done to handle that?

20          A.    Well, first of all, I'm going to handle it and  
21 process it very carefully so that I can even potentially have  
22 it processed for latent fingerprints.

23          Q.    Who do you send that to once you collect it?

24          A.    Well, when I work with the government, I send it to  
25 the GBI Lab.  Or I use my own lab in Fulton County.  We had our

1 own fingerprint examiners in Fulton County, so if it was  
2 something that they could do, they would process it. If not, I  
3 would send it to the GBI Lab. Generally, I got a lot quicker  
4 turnaround from my own lab than GBI because they didn't have as  
5 much backload. So from fingerprint analysis, I would take it  
6 to my own lab to have it processed for latent prints.

7 I would also want to preserve any liquid that's in that  
8 container to test the liquid to see what was in the container.  
9 Because just because it's marked gasoline doesn't mean it has  
10 gasoline in it. So again, that's something that would have to  
11 be confirmed by laboratory analysis as to what the contents of  
12 that container was.

13 The other thing that I'd want to look at on that container  
14 is to see if there's any sale sticker, such as ACE Hardware or  
15 something of that nature. And it --

16 Q. Have you done that in the past?

17 A. Yes, ma'am, I have. I've been --

18 Q. Have you been able to find out where a particular gas  
19 can may have come from?

20 A. Yes, ma'am, I have. I've been able to successfully  
21 track down not only where the container was purchased at, but  
22 witnesses that would identify the person that bought the  
23 container -- on more than one occasion.

24 Q. You never testified in the trial of Scott Davis, did  
25 you?

1           A.    No, I did not.

2           Q.    Were you ever contacted to be an expert witness in  
3 this case by any of the defense lawyers?

4           A.    No, I was not.

5           Q.    I'm now showing you what's going to be marked as  
6 Exhibit P-70 --

7           THE COURT:   Seventy-one.

8           MS. SHEIN:   Seventy-one.

9           Q.    I'm going to show you what is being marked P-71 --

10          MS. SHEIN:   May I approach, Your Honor?

11          THE COURT:   Yes.

12          Q.    I'm now showing you what's been marked as P-71.  Do  
13 you recognize this photograph, this black and white?

14          A.    Yes, ma'am, I do.

15          Q.    And what is that of?

16          A.    P-71 is a photograph of the burned debris, and also  
17 shows a -- what was identified to me as being a 9mm shell  
18 casing.

19          Q.    And what were you able to determine from looking at  
20 this photograph?

21          A.    Well, in conjunction with P-70 and P-71, I have shell  
22 casings that are not in the magazine itself, because P-71 is  
23 obviously not in the magazine that was shown in P-70.  That  
24 magazine -- and I'm not so sure whether that's a 10 round  
25 magazine or a 14 round magazine -- but they would be at least,

1 you know, a capacity of 10 to 14 rounds. So if I have one  
2 shell casing, I have one magazine, I would want to, you know,  
3 check the fire scene and the debris to account for all the  
4 shell casings. Now there may have only been one or two shells  
5 in there, but I'd want to process that scene to make sure that  
6 I had gone through the debris to -- in every effort to locate  
7 as many of the shell casings as possible. Because the shell  
8 casings themselves, if they've been fired from the weapon, hold  
9 evidentiary value. They can help be linked sometimes back to a  
10 weapon.

11 Q. Now I'm going to show you what has been marked as  
12 Exhibit 72.

13 MS. SHEIN: May I approach, Your Honor?

14 THE COURT: Yes.

15 Q. This had been marked P-72. Is this the affidavit you  
16 prepared from the analysis requested of you?

17 A. Yes, ma'am, it is.

18 Q. I'd like to go through your affidavit with you just a  
19 little bit. Obviously, it identifies your personal background  
20 at the beginning of that, but on Page -- end of Page 2, top of  
21 Page --

22 MS. GALLOW: Your Honor, I object. Ms. Shein has not  
23 yet tendered this before the Court.

24 MS. SHEIN: Well, I'm not tendering it till I go  
25 through it.

1 MS. GALLOW: She's going into the contents of --

2 MS. SHEIN: I understand. I will --

3 THE COURT: And did you move to tender 71?

4 MS. SHEIN: I haven't tendered any of them in yet,  
5 but I can tender them all in, all the pictures in now. I  
6 don't think there's any objection to these pictures.

7 MS. GALLOW: No objection to the pictures.

8 MS. SHEIN: So let's go ahead and get those out of  
9 the way, and we'll tender all the pictures.

10 THE COURT: Okay. Is that -- I've already admitted,  
11 I think, 66 through 70.

12 MS. SHEIN: That would be right.

13 THE COURT: Exhibit 71 --

14 MS. SHEIN: That's his affidavit, yes, Your Honor.

15 THE COURT: Seventy-two is the affidavit.

16 MS. SHEIN: Right. Let's see, seventy -- yes, that's  
17 correct, Your Honor.

18 THE WITNESS: Seventy-one is the last photo.

19 MS. SHEIN: And 71 is -- yes, all the way through 71,  
20 yeah, thank you.

21 **[WHEREUPON, Petitioner's Exhibit Number 71 was admitted**  
22 **into evidence without objection.]**

23 **BY MS. SHEIN: [Resuming]**

24 Q. All right. Is this your affidavit that you prepared  
25 as a result of your -- our request to analyze the information

1 you testified to today?

2 A. Yes, ma'am, it is.

3 Q. And did you sign this affidavit?

4 A. Yes, I did.

5 Q. Is that your signature in the back?

6 A. Yes, ma'am, it is.

7 Q. And what is the date of that signature?

8 A. 5<sup>th</sup> of June of 2010.

9 Q. Does this information accurately reflect the  
10 information presented in your testimony today as well as  
11 additional information?

12 A. Yes, it did.

13 MS. SHEIN: I tender this as Exhibit 71 -- 72.

14 MS. GALLOW: No objection, Your Honor.

15 THE COURT: Admitted without objection.

16 MS. SHEIN: Thank you.

17 **[WHEREUPON, Petitioner's Exhibit Number 72 was admitted**  
18 **into evidence without objection.]**

19 **BY MS. SHEIN: [Resuming]**

20 Q. Now getting back to the contents, on the bottom of  
21 Page 2, top of Page 3, would you take a look at that for just a  
22 moment, that paragraph on the top of Page 3?

23 A. Yes.

24 Q. So you've testified to the sifting -- this discusses  
25 the sifting of the fire scene and also discusses the recovery

1 of the weapon and how it should be contained in a wet  
2 environment; correct?

3 A. That's correct.

4 Q. At the bottom of that, would you read the last two  
5 sentences for me?

6 MS. SMITH: Your Honor, I'm sorry, I'm going to  
7 object to this. This procedure is somewhat irregular. We  
8 have the witness on the stand to testify alive as to what  
9 he has found. He's now being asked to go through his own  
10 sworn affidavit and read portions of that affidavit. And  
11 I -- I -- we object to this procedure. If he's here  
12 today, then he can testify as to it. He's bolstering his  
13 own testimony.

14 MS. SHEIN: Well, it wasn't my intention to bolster,  
15 I'm simply trying to get him to talk about a particular  
16 item. But that's fine, I can ask a question about the  
17 item.

18 THE COURT: Thank you.

19 **BY MS. SHEIN: [Resuming]**

20 Q. In your affidavit you stated that there was damage to  
21 the fire by the weapon, and it was -- the question is when you  
22 described the firearm, can you describe what it is you  
23 discovered about the firearm? And from looking at the  
24 pictures.

25 A. Well, first of all, there's not a lot of heat damage

1 to the metal of the weapon because you only have the plastic  
2 itself. One of the photographs -- and they've been moved now  
3 -- but it shows the weapon where it's laying on its side, you  
4 can still see the bluing of the weapon, so it did not get hot  
5 enough to even discolor the weapon. So structurally the weapon  
6 is still sound enough that it can be test fired.

7 MS. GALLOW: Your Honor, I'd object to his  
8 characterization of that.

9 THE COURT: Yes, I'm going to sustain that.

10 MS. SHEIN: Well, I think he's entitled to say how he  
11 knows this.

12 THE COURT: Well --

13 MS. SHEIN: He has experience in obtaining evidence  
14 from a fire scene and knowing what to do with it in terms  
15 of sending it to be tested.

16 THE COURT: Right. We talked about his being  
17 qualified in regard to preservation of the evidence, but I  
18 think Ms. Gallow specifically objected to him testifying  
19 to the weapon itself, to whether it could be used or  
20 couldn't be used, or what it might or might not show.  
21 That's not where his expertise is. So I don't -- I'm not  
22 sure that he's qualified to look at a picture, and based  
23 on his analysis of the picture, testify that the weapon is  
24 able to be fired, which is what I think he was saying. So  
25 I'm sustaining the objection. I'll note your exception.



1 MS. SHEIN: Exception. Thank you.

2 **BY MS. SHEIN: [Resuming]**

3 Q. Do you have training in evaluating firearms found in  
4 fire debris?

5 A. Not training as such, but I've had firearms that I  
6 found in debris that I've sent to the lab, and I've been there  
7 when the firearms examiners have tested those weapons.

8 Q. Have you been able to assess from your experience  
9 what type of test should be done?

10 A. Yes. From a crime scene processing standpoint, when  
11 you have an automatic weapon -- and this is one of the things  
12 that I teach in processing a weapon, the things that you'd want  
13 to test for is you'd want -- you can check for firing pin marks  
14 on shell casings, you can check for ejection marks on shell  
15 casings, and you can -- if you have the projectile itself, you  
16 can check for the ballistics markings that are left by the  
17 lands and grooves of the weapon.

18 First of all, you'd want to make sure that the cartridges  
19 and ammunition that you have there is the same type that's used  
20 by that particular weapon and, in fact, that they did -- you  
21 know, may have came from that weapon.

22 Q. You also had the opportunity to review information  
23 from Mr. Grove's testimony regarding a timeline, a fire  
24 timeline?

25 A. Yes, I did.

1           Q.    Could you give me your analysis of that information  
2 that you reviewed?

3           A.    Well, again, it was in the transcript of his  
4 testimony and where he described four test houses that they had  
5 burned, two that were accelerated and two that were  
6 unaccelerated in there. And he talks about the timeline of how  
7 quick that the fire, you know, went through the roof, and  
8 accelerated versus the non-accelerated fires. And I want to  
9 say that it was somewhere between 12 and 20 minutes, based on  
10 his testimony.

11          Q.    And what did you determine from that testimony?

12          A.    Well, again, when you're dealing with fire scenes,  
13 you have to compare apples to apples and oranges to oranges.  
14 In this particular case, you have a fire in a garage and a  
15 kitchen area. And there's so many variables that come into  
16 play because you have to deal with not just whether it's  
17 accelerated or non-accelerated. And I'll give you an example.

18                In another homicide case that I testified in where a  
19 mattress was supposedly soaked in gasoline and set on fire with  
20 the victim in the bed, I burned two identical mattresses, one  
21 with gasoline and one without gasoline. The mattress without  
22 the gasoline burned quicker than the mattress with the gasoline  
23 because, very simply, it -- you know, the gasoline actually had  
24 a cooling effect on it, which is one of the ways we extinguish  
25 fire is by cooling. And besides, it's liquid, and you have to

1       evaporate the liquid off, whereas when you have the dry  
2       materials in there, it burns a lot quicker.

3             But any material before it burns has to be converted to a  
4       vapor, regardless of what material, whether it's paper, wood,  
5       cloth, or whatever, it has to be converted to a vapor before it  
6       will burn. So it's the ability of that material to convert  
7       from its original state to a vapor, and how fast that can  
8       transpire has the total effect on how fast any fire grows or  
9       progresses.

10            Now under ideal conditions where you have sufficient heat,  
11       sufficient air or oxygen for the fire to burn, and no other  
12       outside factors, a fire will double in size every 17 seconds.  
13       But once you change or alter that, as the fuel decreases, the  
14       growth of the fire decreases. As the oxygen flow decreases,  
15       the growth of the fire decreases. So anything that you do that  
16       changes and alters the chain of the fire tetrahedron which is  
17       fuel, oxygen, and self-sustained burning, anything that you do  
18       that inhibits that is going to change and alter how fast the  
19       fire does or does not progress. If you increase the airflow,  
20       you increase how fast the fire burns. If you increase the fuel  
21       load, you increase. But again, on the reverse of that, if you  
22       decrease it, then you also reverse it.

23            Q.     So, in your opinion and from your experience, unless  
24       you can recreate the exact set of circumstances that started a  
25       fire, it would be virtually impossible or difficult or possible

1 to recreate a fire scene timeline?

2 A. Well, they have a modeling system that you use, but  
3 you have to have -- you have to have all the fuels that are  
4 available, and you use the BTUs of those fuel, and you also  
5 have to know the measurements and the dimension so that you  
6 know what the cubic feet of airflow that you have, you also --

7 Q. Are these -- I don't mean to interrupt you, but I  
8 just want to make sure I understand. Are these things you have  
9 to have from the original fire itself?

10 A. That's correct.

11 Q. That's what I'm trying to get at.

12 A. Yeah, you know, you -- you know, this courtroom, for  
13 instance, is not going to burn the same as your residential  
14 house is going to burn because the fuel load is totally  
15 different, and there's a lot of other factors that come -- so  
16 you have to compare same and similar conditions when you're  
17 making those projections.

18 Q. Did anyone in this case ever contact you to testify  
19 at the trial of Scott Davis?

20 A. No.

21 Q. Any other attorneys?

22 A. No.

23 Q. Is this the first time you've been contacted as an  
24 expert in this case?

25 A. That is correct.

1 MS. SHEIN: Just a moment, Your Honor.

2 [Counsel confer.]

3 MS. SHEIN: Yeah, I'm done, Your Honor. I believe --  
4 I think we've -- let me make sure we put in this exhibit.  
5 I think this has already been admitted. This is 65 and  
6 72, Your Honor, that he was holding. It's his resume and  
7 his affidavit.

8 THE COURT: Sixty-five we never moved, as best I can  
9 tell.

10 MS. SHEIN: I'm moving now. I apologize.

11 THE COURT: Any objection? That's Mr. Dodd's resume?

12 MS. GALLOW: No objection.

13 THE COURT: Okay. It's admitted.

14 **[WHEREUPON, Petitioner's Exhibit Number 65 was admitted**  
15 **into evidence without objection.]**

16 MS. SHEIN: Thank you, Your Honor. And 72.

17 THE COURT: Yes, they're all in.

18 MS. SHEIN: Thank you.

19 **CROSS-EXAMINATION**

20 **BY MS. GALLOW:**

21 Q. Good afternoon, Mr. Dodd.

22 A. Good afternoon.

23 Q. Just for clarification purposes, you had no role or  
24 prior role in the criminal case of Scott Davis; is that  
25 correct?

1           A.     That is correct.

2           Q.     You've never investigated the fire relating to the  
3 Scott Davis case; is that correct?

4           A.     That is correct.

5           Q.     And furthermore, in basing the opinions that you have  
6 provided today, you didn't interview any witnesses from the  
7 criminal case from Scott Davis; is that correct?

8           A.     That is correct.

9           Q.     You didn't review any of the structural engineering  
10 reports that were prepared in this case, did you?

11          A.     I don't know that there were any structural  
12 engineering reports prepared. There was a fire investigative  
13 report prepared by Kennedy & Kennedy, but I'm not aware of any  
14 engineering reports that were prepared.

15          Q.     So would it then be fair to say that you did not  
16 review any engineering reports in the case?

17          A.     Yes, ma'am, that would be correct.

18          MS. GALLOW: Your Honor, I have no further questions  
19 of this witness.

20          THE COURT: Anything else for Mr. Dodd?

21          MS. SHEIN: No, Your Honor. Thank you.

22          THE COURT: Can he be excused?

23          MS. SHEIN: Yes, ma'am. Yes.

24          THE COURT: You're free to go. Thank you very much.

25          THE WITNESS: Thank you, Your Honor.

1 [Witness excused.]

2 MR. ABT: Can we take two and a half minutes, Judge?

3 THE COURT: Yes.

4 [Off the record in re: scheduling]

5 THE COURT: Okay. We can take about five minutes if  
6 anybody needs a break.

7 [Brief break.]

8 \* \* \*

9 Whereupon,

10 **GEORGE HERRIN, JR.,**

11 having been duly sworn under oath, was examined and testified  
12 as follows:

13 **DIRECT EXAMINATION**

14 **BY MS. SHEIN:**

15 Q. Would you state your full name, please.

16 A. George Herrin, Jr.

17 Q. And what is your occupation?

18 A. I'm the deputy director of the GBI in charge of the  
19 Crime Lab.

20 Q. And how long have you been in that position?

21 A. Just a little bit over four years.

22 Q. And what were you doing before that?

23 A. I was an assistant deputy director in the Crime Lab.

24 Q. And what is your duties as Assistant Director and  
25 then now -- in the position you're in now?

1           A.    As assistant deputy director I had responsibility for  
2 several of the sections within the laboratory, but not the  
3 whole laboratory system. Now I have responsibility for the  
4 operations of the whole system.

5           Q.    Can you give me a little more details to what that  
6 includes?

7           A.    It includes doing all the budgetary, you know,  
8 strategic -- budgetary issues, strategic planning, making  
9 decisions on personnel actions that then are reviewed, you  
10 know, by other people within the GBI as well. You know,  
11 helping to gain funding for the laboratory through, you know,  
12 meeting with legislators and granting agencies, that type of  
13 thing.

14          Q.    And I know you might have said this, how long you've  
15 been in the positions that you've been in with GBI. When did  
16 you start?

17          A.    I've been with the GBI just a little over 21 years,  
18 about 21-1/2 years.

19          Q.    All right, so do the math for me. When did you  
20 start?

21          A.    In 1989, late 1989.

22          Q.    And you're still employed with them now.

23          A.    I am.

24          Q.    Okay. Did you have an occasion to supervise an  
25 employee by the name of Bernadette Davy?



1           A.    Indirectly, yes.  She was within one of the units  
2 that we supervised, yes.

3           Q.    What unit was that?

4           A.    Firearms.

5           Q.    And what was her position?

6           A.    She was a firearms examiner and then a technical  
7 leader within the Firearms Section within the laboratory.

8           Q.    And do you know the time frame of that particular --

9           A.    She started -- I'm not exactly sure exactly when she  
10 started, but she started in 1991 or 1992.  And she became a  
11 technical leader in 2003 or 4, I'm not exactly sure of the  
12 exact date on that.

13          Q.    And had you been involved with her as an employee all  
14 during this time frame?

15          A.    Not all during that time frame, because for the first  
16 several years of my career I didn't have anything to do with  
17 the Firearms Section at all.

18          Q.    So when would you say you started contact with her?  
19 What year?

20          A.    Well, I became an assistant deputy director in 1998,  
21 and I don't think I was over Firearms beginning -- at the  
22 beginning of that period, so I would say probably not till 2003  
23 or 2004.

24          Q.    But you knew about her and you knew about another  
25 employee with her in --

1           A.    Yes.

2           Q.    -- before that time?

3           A.    I knew -- I knew Bernie, yes, Bernadette Davy.

4           Q.    Is that what you called her?

5           A.    We called her Bernie, yes.

6           Q.    In your experience with her and knowing her and  
7 supervising her, did you have occasion to learn of accusations  
8 of misconduct while -- by this employee at the GBI?

9           A.    There were -- there were instances where Ms. Davy or  
10 Bernie had some lack of following policy would be a good way to  
11 put it.

12          Q.    Could you explain that?

13          A.    Well, in some cases she was found -- in one case she  
14 gave her password to our case management system to a contract  
15 employee, and there was a disciplinary action involving that.

16          Q.    What happens when someone does that? What are the  
17 consequences?

18          A.    Well, it means that that contract employee was able  
19 to go in and change information without -- you know, without  
20 anybody's knowledge or permission, so that was a serious issue  
21 because we consider that information to be, you know, very  
22 privileged information.

23          Q.    What were the consequences to her for her actions?

24          A.    You know, I don't have any direct -- I don't remember  
25 directly, but Mr. Mays, who's our director of legal -- or

1 director of internal affairs or professional standards,  
2 reminded me this morning that she was given a week-long  
3 suspension for that.

4 Q. Okay. Were there other occasions that she also came  
5 to your attention?

6 A. She was the subject of an investigation for a threat  
7 to her direct supervisor at the time, although I was not  
8 directly involved in it, I had peripheral knowledge of that  
9 particular situation. She was also involved --

10 Q. Well, let me ask you about that a little bit.

11 A. Okay.

12 Q. What do you know about the threat?

13 A. Only that she threatened physical harm to the  
14 supervisor. And then basically I did not get involved in that  
15 particular investigation because I was not over the Firearms  
16 Unit at that time.

17 Q. Okay. And were there -- another incident?

18 A. And then the last incident that I can remember is the  
19 one in 2009.

20 Q. Before we get to that one --

21 A. Okay.

22 Q. -- I'm sorry, I was going from your timeline, sorry.

23 A. Okay, I'm sorry.

24 Q. Was there another one after that for insubordination  
25 or is that related to the threat?

1           A.    I don't really remember, I'll be honest with you.

2           Q.    Today did you bring documents with you concerning any  
3 of these investigations?

4           A.    The document that I have with me is from a 2009  
5 investigation.

6           Q.    Did you bring any from the other investigations?

7           A.    No.

8           Q.    But your testimony is that you're aware of them  
9 sufficiently to be able to describe what happened?

10          A.    For -- for those two that I've described, yes.

11          Q.    Are you familiar with a Mr. Ernest -- Ernst?

12          A.    Yes, I do know Richard Ernst, yes.

13          Q.    Okay. Is he the person who reported the threat?

14          A.    I believe so, but I'm not 100 percent sure of that.

15          Q.    Did, at any time during the course of these first few  
16 events that you described, anyone notify any district attorneys  
17 of Ms. Bernadette Davy's problems in the lab, that she might  
18 have compromised the lab by giving her card away?

19               MS. SMITH: Your Honor, I object. That calls for a  
20 conclusion that this witness hasn't drawn, and it's a  
21 leading question.

22               MS. SHEIN: Well, I'm just asking -- I'm just asking  
23 if he knows, if he's provided information about that  
24 incident.

25               MS. SMITH: That wasn't her question.

1 THE COURT: Right.

2 MS. SMITH: She said had he provided anyone that she  
3 had compromised, and that was --

4 THE COURT: Rephrase.

5 MS. SHEIN: I'll rephrase, no question.

6 **BY MS. SHEIN: [Resuming]**

7 Q. Did you notify any district attorneys or defense  
8 lawyers regarding Ms. Davy's conduct problems at the GBI prior  
9 to 2009?

10 A. Not to my knowledge.

11 Q. Okay. You personally did not?

12 A. No, I did not.

13 Q. Did there come an occasion that Ms. Davy came to your  
14 attention again in 2009?

15 A. Yes.

16 Q. Concerning misconduct?

17 A. Yes.

18 Q. Can you describe what that misconduct was?

19 A. It was discovered on peer review of one of her case  
20 files that the information recorded on her notes did not  
21 accurately reflect what should have been done in the case. And  
22 when questioned about that, she changed the notes, but further  
23 investigation determined that she did not actually do the  
24 testing that was involved -- should have been involved.

25 Q. What is the standard testing that was required?

1           A.     In that particular case -- and you know, I'm speaking  
2 as a non-firearms expert, so please excuse -- excuse that.  
3 That's not my area of expertise. But they were required to  
4 perform two trigger pull determinations per chamber of a  
5 revolver, and Mr. Davy did not do that on her original testing  
6 but indicated that she had. And so -- but it was discovered  
7 that she didn't, and that she did not actually take custody of  
8 the evidence when it was brought to her attention to redo that  
9 test.

10          Q.     Did she also lie about fixing the test?

11          A.     Well, what she lied about was the fact that when she  
12 fixed the note, she said that yes, she redid it, and we  
13 determined that she couldn't have redone it because she didn't  
14 take -- retake possession of the evidence into her custody.

15          Q.     Was this a serious infraction of GBI policy --

16          A.     Absolutely.

17          Q.     -- and procedure?

18          A.     Absolutely.

19          Q.     What were the consequences of those actions?

20          A.     We asked Ms. Bernie -- or Ms. Davy to resign her  
21 position.

22          Q.     And did she do so?

23          A.     She did.

24          Q.     And I'm going to show you now what's been marked as  
25 Exhibit 73?

1 THE COURT: Yes.

2 MS. SHEIN: Thank you. May I approach, Your Honor?

3 THE COURT: Yes.

4 Q. Do you recognize this document?

5 A. Yes, ma'am. This is a draft of the letter that was  
6 sent to the prosecutors around the State informing them of the  
7 situation where Ms. Davy was leaving our employment.

8 Q. Regarding -- regarding?

9 A. Basically asking them that if they needed a case to  
10 be worked, they need to offer -- you know, to inform our office  
11 so that we could do it as quickly as we could.

12 Q. And did you notify the district attorneys throughout  
13 the five county area of this --

14 A. No, throughout the entire state.

15 Q. Oh, throughout the entire state.

16 A. Yes.

17 Q. Is this something you prepared and sent out?

18 A. I prepared the letter. I did not send it out. It  
19 was actually sent out by one of the administrative assistants  
20 to the director of the GBI.

21 Q. Does this accurately reflect the letter that you gave  
22 to them to send out?

23 A. It is, yes. I've actually --

24 Q. Did you create this letter or do you have --

25 A. I've actually got a copy of the signed letter.

1           Q.    Even better.  Let me just adjust the exhibit, if you  
2 don't have any objection to using a signed copy.

3           A.    It's actually just a one-page letter.  We shrank the  
4 font a little bit to get it on one page.

5           MS. SHEIN:  Well, we'll label this one then P-73  
6 because it is a signed copy.  Thank you for bringing it, I  
7 did ask you to.

8           And Your Honor, I tender this exhibit at this time as  
9 being an depiction of the letter he sent to the district  
10 attorneys throughout the State of Georgia.

11          MS. GALLOW:  May I just --

12          MS. SHEIN:  Sure.

13          MS. GALLOW:  No objection, Your Honor.

14          THE COURT:  Admitted without objection.

15               **[WHEREUPON, Petitioner's Exhibit Number 73 was admitted**  
16               **into evidence without objection.]**

17 **BY MS. SHEIN:  [Resuming]**

18          Q.    Did you send a similar letter to any criminal defense  
19 lawyers?

20          A.    No, we did not.

21          Q.    Did you send that letter or any similar letter to the  
22 Georgia Association of Criminal Defense Lawyers?

23          A.    No, we did not.

24          Q.    Did you send that letter to any -- to the Georgia Bar  
25 Association?



1           A.     No.

2           Q.     Did there come a time that any of Ms. Davy's cases  
3 were -- that she had done before 2009 had been looked at?

4           A.     Yes. We did reexamine some of her case work.

5           Q.     And what did you find?

6           A.     Well, we reexamined about 170 -- 170 to 175 of her  
7 cases at the request of prosecutors around the state to prepare  
8 for court or to reexamine evidence, and I don't know in which  
9 cases it was which. And about 20 to 25 of those cases we found  
10 some deviations in the re-analysis from what she had originally  
11 reported.

12          Q.     So she had -- there was a developed -- was there a  
13 pattern being developed that some of her -- you said 20 percent  
14 or 20 cases?

15          A.     About 20 cases.

16          Q.     Okay, I'm sorry. That had problems?

17          A.     That -- and the problems ranged from the notes did  
18 not completely reflect the evidence that was looked at, to, in  
19 some cases, the conclusions were not wrong in that they  
20 implicated anyone that shouldn't have been implicated, but they  
21 weren't as completely accurate as they should have been.

22          Q.     Did any -- how far back did you go or have you gone  
23 so far?

24          A.     Well, we're not doing this actively unless asked to  
25 just because of resource issues. But the oldest case that my

1 -- the manager that runs my computer system, the oldest case  
2 that he saw this morning when I asked him to run this query was  
3 2000/2001.

4 Q. Okay. And did -- have you ever reevaluated the  
5 information or evidence reviewed by Ms. Davy in the Scott Davis  
6 case?

7 A. Not to my knowledge.

8 Q. No one's ever asked you to do that?

9 A. Not to my knowledge.

10 Q. So the only people that know about requesting this  
11 would be prosecutors?

12 A. That's correct.

13 Q. So you never notified --

14 MS. SMITH: Your Honor, I can't -- he can't speak to  
15 that, obviously. They were able to obtain a copy of the  
16 letter. The information has been disseminated and it's  
17 beyond his personal knowledge.

18 THE COURT: Just rephrase the question. I mean, I  
19 think what he's testified to is they only notified  
20 prosecutors, but I don't think he knows --

21 Q. Have you been contacted by any criminal defense  
22 attorneys other than us regarding Bernadette Davy's mishandling  
23 of firearms testing?

24 A. Not that I remember, no, ma'am.

25 Q. Have you provided any information on any cases to any

1 defense lawyers in the cases you reviewed concerning the  
2 misconduct?

3 A. If we found a result that was needed to be clarified  
4 or expanded upon, upon the re-analysis, we always issue a new  
5 report upon that re-analysis. So in every case, all of the 170  
6 to 75 cases that we've redone, a new report would have been  
7 issued.

8 Q. Did you send those reports to the criminal defense  
9 lawyers who were involved in those cases?

10 A. No, ma'am. We don't know who the criminal defense  
11 lawyers are.

12 Q. Did you attempt to find out?

13 A. No, ma'am.

14 MS. SHEIN: Just one moment, Your Honor.

15 [Counsel confer.]

16 Q. One follow-up question to that. Would that letter,  
17 based on your testimony, have been sent to District Attorney  
18 Paul Howard?

19 A. It should have been because he's part of the mailing  
20 list. Generally what we do to distribute this type of  
21 information is we send it to the prosecuting attorney's counsel  
22 and let them distribute it for us.

23 MS. SHEIN: That's all I have Your Honor --

24 [Counsel confer.]

25 Q. You have -- do you have any knowledge of where the

1 case file is in regards to the Scott Davis case?

2 A. The report?

3 Q. Yeah, the report or any firearms information at all.

4 A. The report, we've got a copy within our computer  
5 system. The notes, I don't have any knowledge of where those  
6 are.

7 MS. SHEIN: Thank you. Nothing further.

8 **CROSS-EXAMINATION**

9 **BY MS. SMITH:**

10 Q. Good afternoon, Dr. Herrin. Just to make clear for  
11 the record, this peer review in which this problem was  
12 discovered was not the Scott Davis case?

13 A. It was not.

14 Q. But it was in 2009?

15 A. It was found in 2009. It was actually a 2006 case  
16 that was being worked.

17 MS. SMITH: I have no further questions.

18 THE COURT: Anything else?

19 MS. SHEIN: No, Your Honor, that will be all of this  
20 witness. Thank you very much.

21 THE COURT: Can he be excused?

22 MS. SHEIN: Yes, he can. And thank you for staying  
23 all day.

24 THE WITNESS: Thank you.

25 [Witness excused.]

1 MS. SHEIN: The next witness will be Amanda Lokar.

2 MR. ABT: Hold on one second.

3 [Brief pause.]

4 MS. SHEIN: Good afternoon.

5 THE WITNESS: Good afternoon.

6 Whereupon,

7 **AMANDA LOKAR,**

8 having been duly sworn under oath, was examined and testified  
9 as follows:

10 **DIRECT EXAMINATION**

11 **BY MS. SHEIN:**

12 Q. Would you please state your name for the record.

13 A. My name is Amanda Lokar, L-O-K-A-R.

14 Q. And what is your occupation?

15 A. I am the technical leader for the firearms discipline  
16 for the Georgia Bureau of Investigation.

17 Q. Can you explain what that means?

18 A. I am responsible for all of the training of new  
19 employees as well as working an individual case load as well as  
20 overseeing all the policies and procedures for our laboratory.

21 Q. And how long have you been in this position?

22 A. Since -- I was promoted in August of 2010, so a  
23 little over -- almost a year.

24 Q. And what were you doing before then?

25 A. I was a crime lab scientist.

1 Q. And what does that mean?

2 A. I was responsible for working firearms case work.

3 Q. Okay. And when did you begin your employment with  
4 GBI?

5 A. I was hired in July of 2005.

6 Q. Did you have an occasion to work with an employee  
7 named Bernadette Davy?

8 A. Yes, I did.

9 Q. Do you recall when that was?

10 A. I started working with her the day that I was hired  
11 in July of 2005.

12 Q. And in what capacity did you work with her?

13 A. She was my trainer when I was hired by the GBI. And  
14 then after I finished training, I went on to work with her as a  
15 colleague and peer review her cases.

16 Q. What -- describe for me what peer review is. I think  
17 it's a --

18 A. What we do in our laboratory is all of the cases that  
19 we do official reports on are submitted for a peer review  
20 process. It has to pass that peer review process by another  
21 qualified scientist in the discipline in order for the official  
22 report to be released.

23 Q. And -- I'm sorry, go ahead.

24 A. During the peer review, what we do is we look at all  
25 the technical data to make sure that all of the policies and

1 procedures have been followed, the technical data supports  
2 findings that they're issuing on the case, and if it doesn't,  
3 then it doesn't pass the peer review process and it gets what  
4 we call "rejected" during the peer review process in order for  
5 them to go back and correct any mistakes that they have done in  
6 the case before it's completely finished.

7 Q. Did there -- an occasion when you ran into some  
8 difficulties with Bernadette Davy regarding this peer review  
9 process?

10 A. Yes, there was.

11 Q. Can you describe what happened?

12 A. In one case in particular, there was a case that I  
13 was assigned peer review in which I noticed that she had not  
14 followed our procedure for conducting trigger pull testing.  
15 She had a revolver in the case, and our policy stated that you  
16 have to do trigger pulls twice around the cylinder. It was a  
17 six-shot revolver, which means that she would have had to do 12  
18 trigger pulls. She only performed 10 trigger pulls, which does  
19 not follow our policy, so it got rejected in peer review. And  
20 she was told that she needed to go back and do the additional  
21 testing in order for it to pass the peer review process and the  
22 report be released.

23 Q. And what did she do?

24 A. I rejected the case and told her to fix the error. I  
25 then got the case back in peer review, and the two trigger

1 pulls were on her worksheet and they matched the average in the  
2 case. Earlier in the peer review process I had noticed that  
3 the firearm had been returned to our Evidence Room, and I  
4 wasn't expecting her to get back to me so quickly with the  
5 additional testing. And when she got back to me with the  
6 additional testing, I looked at the additional information she  
7 put on her worksheet, and I then went back and looked at the  
8 chain of custody and saw that the gun had not moved from our  
9 Evidence and Property Room.

10 Q. So you had asked her -- in the peer review you asked  
11 her to fix the problem you discovered.

12 A. Yes, by doing additional testing.

13 Q. And sent it back.

14 A. Yes.

15 Q. And she still did not fix it and then lied about  
16 that?

17 A. Well, she had fixed the numbers, but what I  
18 discovered, because I happened to notice the chain of custody  
19 of the firearm, was that she never took possession again of the  
20 firearm to do the additional testing. So my natural assumption  
21 was that the information was fabricated.

22 Q. After this incident, was additional investigation  
23 done on other cases?

24 A. There was --

25 Q. I'm sorry, of hers.



1           A.     Of hers? We did rework several of her cases.

2           Q.     Did you personally do some of those?

3           A.     I can think of one off the top of my head that I know  
4 was a rework of hers, but I can't recall if I did anymore than  
5 that particular one.

6           MS. SHEIN: I am now introducing Exhibit P-74?

7           THE COURT: That's what I show.

8           MS. SHEIN: Okay.

9           THE COURT: Beth, is that --

10          COURT REPORTER: Yes, ma'am.

11          Q.     And this is also identified in the habeas as L-3. And  
12 I will give it to you in just a second. Do you recognize --

13          MS. SHEIN: I'm sorry, may I approach, Your Honor?

14          THE COURT: Yes.

15          Q.     Do you recognize this document?

16          A.     Yes, I do recognize it.

17          Q.     Is this an email you received on April 14<sup>th</sup> of 2009  
18 at 3:58 p.m.?

19          A.     Yes, it is.

20          Q.     You received it, among other people, at the GBI; is  
21 that correct?

22          A.     That's correct.

23          Q.     Were those folks that this was sent to at that time  
24 all work for GBI?

25          A.     Yes.

1 Q. And did this -- does this depict some of the concerns  
2 on cases that had been presented by Bernadette Davy?

3 A. Yes, it does.

4 MS. SMITH: Your Honor, I think she's premature in  
5 going into the contents of the email, and I do have just  
6 one question before she seeks to tender it, if I may.

7 MS. SHEIN: Sure, go ahead.

8 MS. SMITH: Not to interrupt. I didn't know if you  
9 were returning to it.

10 **BY MS. SMITH:**

11 Q. At the top of the email above the line "From:" it  
12 says George. Do you know where that language came from? It  
13 doesn't -- there does not appear to be a name behind it.

14 A. No, I do not.

15 Q. But you otherwise received this is the regular course  
16 of business from your work there at the Crime Lab?

17 A. The actual excerpt from the email, yes. The top  
18 portion of it, I don't know who that was addressed to or by.

19 Q. So this does not exactly and fairly reflect what you  
20 received?

21 A. What I --

22 Q. You received it from the "From:" down?

23 A. Yes.

24 Q. But was this an email generated within the GBI as  
25 best you can tell?

1           A.    As far as I can tell, yes.

2                               [Off the record.]

3   **BY MS. SHEIN: [Resuming]**

4           Q.    If you turn that document over, can you identify  
5 what's on the back of it? Does this look familiar to you?

6           A.    Yes, it does. On the reverse side there is the email  
7 that I had sent to George Stanley, who was the manager at the  
8 time of the Firearms Headquarters Section, and Mark Maycock who  
9 was the assistant deputy director assigned to the Firearm  
10 Section.

11          Q.    And are these some of the discrepancies that you  
12 personally evaluated for Bernadette Davy?

13          A.    Yes. This references the discrepancies that I had on  
14 that particular case that I had mentioned that I do remember  
15 working -- reworking that she had worked.

16          Q.    So in the course of business, this does accurately  
17 reflect at least the bottom portion.

18                MS. SHEIN: And we can actually cross that out, if  
19 you'd like, at the top.

20                MS. SMITH: At the top, yes.

21                MS. SHEIN: That's fine.

22                MS. SMITH: It doesn't seem to be responsive to  
23 anything.

24                MS. SHEIN: Yeah, and it's not necessary, so we'll  
25 just cross that out and I'll do that on the original

1 exhibit, Your Honor.

2 **BY MS. SHEIN: [Resuming]**

3 Q. But the remainder of that email and the one on the  
4 back are in fact an email that you sent and also received?

5 A. Yes, it is.

6 Q. Describing the discrepancies of Ms. Davy's firearms  
7 testing in other cases besides the one you uncovered?

8 A. That is correct.

9 MS. SHEIN: May I approach, Judge, to get the  
10 document?

11 THE COURT: Yes, ma'am.

12 MS. SHEIN: Any objection to admission?

13 MS. GALLOW: None, Your Honor.

14 THE COURT: Admitted then without objection.

15 **[WHEREUPON, Petitioner's Exhibit Number 74 was admitted  
16 into evidence without objection.]**

17 **BY MS. SHEIN: [Resuming]**

18 Q. Have you been asked to review any other cases since  
19 this event, going back before 2009?

20 A. Before 2009? No.

21 Q. You weren't there in 2000; right?

22 A. No. I was hired in 2000.

23 Q. Right.

24 MS. SHEIN: Nothing further.

25 MS. GALLOW: No questions, Your Honor.

1 THE COURT: Can this witness be excused?

2 MS. GALLOW: Yes.

3 THE COURT: You're free to go. Thank you.

4 [Witness excused.]

5 MS. SHEIN: The next gentleman is Fred Mays.

6 [Brief pause.]

7 Whereupon,

8 **FRED MAYS,**

9 having been duly sworn under oath, was examined and testified  
10 as follows:

11 **DIRECT EXAMINATION**

12 **BY MS. SHEIN:**

13 Q. Be seated, please, and state your name.

14 A. My name is Fred Mays M-A-Y-S.

15 Q. And your occupation?

16 A. I am the director of the Office of Professional  
17 Standards for the Georgia Bureau of Investigation.

18 Q. And how long have you been in that position?

19 A. That position, since 2001.

20 Q. When did you start with GBI?

21 A. July 1, 1982.

22 Q. And can you describe the positions that you held from  
23 1982 up to the present?

24 A. From 1982 till 1993 I worked the Drug Enforcement  
25 Section of the GBI. From 1993 till 2000 I worked General

1 Investigations in the Atlanta Field Office. And in 2001 I was  
2 promoted to Assistant Special Agent in Charge while I was  
3 working at the State Health Fraud -- State Health Care Fraud  
4 Control Unit. And in 2001 I came over to the Internal Affairs  
5 Office of Professional Standards Unit.

6 Q. And that's what you're in now?

7 A. Yes, ma'am.

8 Q. Okay. And what does that job require?

9 A. I handle all the external and internal complaints. I  
10 work strictly for the director of the GBI, handle all the  
11 complaints, the employee misconduct.

12 Q. Are you familiar with an employee by the name of  
13 Bernadette Davy?

14 A. Yes, I am.

15 Q. And how do you know her?

16 A. I conducted an internal investigators on Ms. Davy  
17 back in March of 2009.

18 Q. Had you been involved with investigating her for  
19 other matters prior to that?

20 A. No, ma'am.

21 Q. Are you familiar with any other matters that she was  
22 investigated for?

23 A. Through hearsay, yes, ma'am. There was several cases  
24 located in my office that was involving her.

25 Q. When you say located in your office, what do you

1 mean?

2 A. Case files.

3 Q. Case files?

4 A. Uh-huh.

5 Q. Can you explain what you mean about case files?

6 A. Okay. Whenever there's an investigation on an  
7 employee, we conduct a -- produce a case file, and this here is  
8 a case file of an investigation on her that I did, but there's  
9 other case files that was done by other internal affairs  
10 investigators.

11 Q. Have you ever reviewed those other case files?

12 A. I think I might have looked over them when I did the  
13 investigation on her.

14 Q. And what did you find?

15 A. There was one there that I think she was -- the  
16 allegation was sustained where she had allowed someone to use  
17 her password; one where she was carrying an unauthorized  
18 firearm; and I think there was one -- I don't know, there was  
19 three or four there that was in the case file on her that was  
20 prior to me getting there that was investigated on her.

21 Q. Okay. And in 2009, what happened then?

22 A. Okay. I received information from Dr. Herrin, who  
23 just testified. We met with Assistant Deputy Director --  
24 Assistant Director Dan Kirk, that Ms. Davy had allegedly  
25 falsified some documents in reference to some firearm tested.

1 And at that point there, Assistant Director Kirk advised Dr.  
2 Herrin to talk with her and see exactly what did she do. And I  
3 think she admitted to him there is a policy that they have when  
4 you test a firearm, a revolver, there's a certain number of  
5 trigger pulls that you're supposed to conduct, and I think she  
6 only conducted I think 10 and there's supposed to have been 12.  
7 And when Ms. Amanda Lokar peer reviewed that case, she saw that  
8 she'd only conducted 10 instead of 12. And when she asked her  
9 about it and told her about it, Ms. Davy said she had corrected  
10 it when in fact she did not go and conduct the 12 trigger  
11 pulls.

12 Q. So in this one instance she had misrepresented  
13 herself twice?

14 A. Yes.

15 Q. Okay.

16 A. Yes.

17 MS. SHEIN: May I approach, Your Honor?

18 THE COURT: Yes.

19 Q. Marked Exhibit P-75, do you recognize this document?

20 A. Yes, ma'am.

21 Q. What is the number up on the left-hand side?

22 A. That would be my internal affairs case number.

23 Q. That's your internal affairs case number?

24 A. Yes.

25 Q. You recognize the number?



1           A.    Yes, ma'am.

2           Q.    Is this document initialed by you? Those are your  
3 initials at the bottom?

4           A.    Yes, ma'am.

5           Q.    And what is the date on that?

6           A.    March the 13<sup>th</sup>, 2009.

7           Q.    That's the date on the paragraph, but at the bottom  
8 where your initials are.

9           A.    March the 20<sup>th</sup>, 2009.

10          Q.    Can you describe what this document is?

11          A.    Yes. This is a document that I placed in my case of  
12 the initial information that I received in reference to  
13 Bernadette Davy's allegedly falsifying the information in  
14 reference to the firing test.

15               MS. SHEIN: Any objection to this?

16               MS. SMITH: No objection, Your Honor.

17               THE COURT: Admitted then without objection.

18               **[WHEREUPON, Petitioner's Exhibit Number 75 was admitted**  
19 **into evidence without objection.]**

20          Q.    Is the file you brought with you your investigative  
21 file in this incident?

22          A.    [No audible response.]

23          Q.    And do you have copies of these documents I'm showing  
24 you or the one I showed you in that file?

25          A.    Yes, ma'am.

1 MS. SHEIN: May I approach, Your Honor?

2 THE COURT: Yes, ma'am.

3 Q. This is a document, Exhibit Number P-76. Do you  
4 recognize this document?

5 A. Yes, ma'am.

6 Q. Can you describe the number on the top left side?

7 A. Yes, ma'am. It's my case number for this case.

8 Q. And at the very end of it, can you identify whether  
9 this is a document prepared by you?

10 A. Yes, ma'am, it was.

11 Q. And is it signed or initialed by you?

12 A. Yes, ma'am, it is.

13 Q. And what is the date?

14 A. March the 13<sup>th</sup>, 2009.

15 Q. And can you describe what the document is?

16 A. Yes. This is a summary of a transcript when I  
17 interviewed Amanda Lokar on March the 18<sup>th</sup>, 2009.

18 Q. And what does this document describe in terms of that  
19 -- your investigation into the matter concerning Bernadette  
20 Davy's misrepresentation of a firearm?

21 A. Ms. Lokar was the one that did the peer review on Ms.  
22 Davy's analysis of a gun, and discovered that Ms. Davy only  
23 conducted 10 trigger pulls instead of 12, and that's when I  
24 interviewed her and it was recorded and transcribed.

25 Q. Was that one of the witnesses as to the events? Is

1 that wy you interviewed her?

2 A. Yes, ma'am.

3 Q. Is that a part of your file?

4 A. Yes, ma'am, it is.

5 MS. SHEIN: Any objection to its admission, subject  
6 to getting a copy?

7 MS. SMITH: No objection, Your Honor.

8 THE COURT: Admitted then without objection.

9 **[WHEREUPON, Petitioner's Exhibit Number 76 was admitted**  
10 **into evidence without objection.]**

11 MS. SHEIN: I'm going to get them a copy real quick,  
12 Your Honor.

13 [Brief pause.]

14 MS. SHEIN: May I approach, Your Honor?

15 THE COURT: Yes, ma'am.

16 **BY MS. SHEIN: [Resuming]**

17 Q. I am presenting to you what's been marked as  
18 Plaintiff's Exhibit 77. Can you identify this document?

19 [Off the record.]

20 MS. SHEIN: One second, Your Honor. There's just one  
21 difference in these documents, so I'm just trying to make  
22 sure I'm not repeating myself.

23 Q. This is still going to be P-77. Do you recognize  
24 this document?

25 A. Yes, ma'am, I do.

1 Q. Now can you describe the numbers on the top left?

2 A. That's my OPS case number in this investigation.

3 Q. And is that your initials at the bottom --

4 A. Yes, ma'am.

5 Q. -- where your name appears. What's the date on that?

6 A. March the 20<sup>th</sup>, 2009.

7 Q. I showed you a similar document that almost looks  
8 just like it. I just want to clarify the distinction between  
9 the two. And this is Exhibit P-75. It looks like there's two  
10 people that are contacted regarding the investigation. Can you  
11 explain that?

12 A. Yes, ma'am. This P-75, this is initial information  
13 that I got on Bernadette Davy. We met with Assistant Director  
14 Dan Kirk and Dr. Herrin in reference to the fabrication of the  
15 firearm analysis. And at that time A.D.A. Kirk advised Dr.  
16 Herrin to talk with Ms. Davy and see what happened in this  
17 incident.

18 And the other one dated March the 17<sup>th</sup>, 2009, is Director  
19 Vernon Keenan authorizing me to conduct an internal  
20 investigation on Bernadette Davy. And the director is the one  
21 that authorized all investigations in the GBI.

22 Q. Are both of those documents in your personnel -- the  
23 personnel file, investigative file, that you have with you  
24 today?

25 A. In my investigative file, yes, ma'am.

1 MS. SHEIN: Any objection?

2 MS. SMITH: If I may see that document.

3 MS. SHEIN: Yeah.

4 MS. SMITH: I think we've been handed two copies of  
5 what appeared to be the same thing. I don't think we have  
6 the copy of what he has.

7 MS. SHEIN: Okay. Let me make sure. I'm going to  
8 have to get you one.

9 [Off the record.]

10 MS. SHEIN: I'm just substituting copies unless they  
11 have an objection to it.

12 THE COURT: It is 77 and 78?

13 MS. SHEIN: No, it's 75 and 78.

14 THE COURT: Okay. Okay.

15 MS. SHEIN: One is an earlier document.

16 THE COURT: We brought it -- yeah.

17 MS. SHEIN: Yeah, we kind of passed it, but they look  
18 so similar except for one thing.

19 THE COURT: Okay.

20 MS. SHEIN: Yeah.

21 [Off the record comments.]

22 MS. SMITH: And we have no objection to 77, Your  
23 Honor.

24 THE COURT: Okay. I'm showing 75, 76, and 77  
25 admitted without objection; correct?

1 MS. SHEIN: Yes, Your Honor.

2 MS. SMITH: Yes, I think 75 is the initial report, 76  
3 is the summary of the transcript, 77 is the one we're  
4 copying now, but it references Vernon Keenan.

5 **[WHEREUPON, Petitioner's Exhibit Number 77 was admitted**  
6 **into evidence without objection.]**

7 [Off the record comments.]

8 **BY MS. SHEIN: [Resuming]**

9 Q. I'm showing you now what's been marked Plaintiff's  
10 Exhibit 79. Do you recognize this document?

11 MS. SMITH: I'm sorry, did we skip 78?

12 MS. SHEIN: I'm sorry, my bad. So it's 78, sorry.

13 Q. Plaintiff's Exhibit 78. Do you recognize this  
14 document?

15 A. Yes, ma'am, I do.

16 Q. And is this your name at the top --

17 A. Yes.

18 Q. -- Fred Mays, Office of Professional Standards  
19 Director?

20 A. Yes, ma'am.

21 Q. Was this sent to you?

22 A. Yes, ma'am.

23 Q. Do you recall who sent it to you?

24 A. Yes. Assistant Deputy Director Mark Maycock.

25 Q. And can you tell when you got this?

1           A.     It was around March the 17<sup>th</sup> -- 18<sup>th</sup> I received this  
2 document from Mark Maycock.

3           Q.     Is this one of the documents you have in your file in  
4 investigation of this case?

5           A.     Yes, ma'am. This document asks Mark Maycock to  
6 conduct -- produce a memorandum to me in reference to his  
7 meeting with Bernadette Davy and Dr. Herrin and George Stanley.

8           Q.     And what does this document identify to you?

9           A.     It's a meeting that they had with Bernie, Bernadette  
10 Davy --

11          Q.     Is -- I'm sorry, go ahead.

12          A.     -- and what -- and the meeting they had with her and  
13 asked her about the firearms analysis.

14          Q.     In this memorandum that's in your file, it identifies  
15 that Ms. Davy admitted to the fabrication of the results; is  
16 that correct?

17               MS. SMITH: Your Honor, it hasn't been tendered and  
18 admitted yet.

19               MS. SHEIN: I'm sorry, I'll do that now. I'd like to  
20 tender this document into evidence, Your Honor, as a  
21 document that's in his personnel file and that he  
22 received.

23               MS. SMITH: I would just briefly like to voir dire  
24 him.

25               THE COURT: Sure.

1 **BY MS. SMITH:**

2 Q. This was part of the information you received as part  
3 of your investigation that you acted upon?

4 A. Yes, ma'am.

5 MS. SMITH: No objection, Your Honor.

6 THE COURT: All right. Seventy-eight is admitted  
7 without objection.

8 **[WHEREUPON, Petitioner's Exhibit Number 78 was admitted  
9 into evidence without objection.]**

10 **BY MS. SHEIN: [Resuming]**

11 Q. Do you recall my question or do I need to repeat it?

12 A. Yeah. She admitted that she had only conducted 10  
13 trigger pulls instead of 12, and that reading further, she said  
14 she took a -- I don't know what they call it -- but an average  
15 of the trigger pulls instead of going back and doing the 12  
16 trigger pulls, she just took an average of the one that she'd  
17 already completed.

18 Q. Did she also admit that she didn't -- when she was  
19 asked to go back, after the peer review, that she did not pull  
20 the item out of evidence in order to do the retesting?

21 A. That's correct, she admitted to that.

22 MS. SHEIN: May I admit that as evidence, Your Honor?

23 THE COURT: What, 78 is already in.

24 MS. SMITH: Yes, I'm sorry.

25 MS. SHEIN: I've got the other copy, she just showed



1 me.

2 THE COURT: Okay.

3 MS. SHEIN: I'm going to get all those for them --  
4 here's -- let me do one at a time. Hold that for just a  
5 second because I'm going to get confused myself. All  
6 right, this is 76 -- and this is 77.

7 All right. Just a moment, Your Honor.

8 [Counsel confer.]

9 **BY MS. SHEIN: [Resuming]**

10 Q. Are you involved with any investigations in this case  
11 regarding other cases Ms. Davy may have been involved in?

12 A. No, ma'am.

13 Q. Have you ever evaluated any other -- any of her cases  
14 previous to this time?

15 A. No, ma'am, that's not part of my job duties. I only  
16 do employee misconduct that come to my office when I was there.  
17 And as far as her analyzing firearms, unless there was a  
18 complaint that came up, no, I would not have been involved in  
19 that.

20 Q. Have you been made aware of other cases that she has  
21 errors on?

22 A. No, ma'am.

23 Q. Done any other investigations concerning her firearms  
24 testing --

25 A. No, ma'am.

1 Q. -- procedures?

2 A. No, ma'am.

3 MS. SHEIN: I think that's all I have, Your Honor.

4 MS. GALLOW: No questions, Your Honor.

5 THE COURT: Can Mr. Mays be excused?

6 MS. SHEIN: One second.

7 [Counsel confer.]

8 MS. SHEIN: No, no further questions for this witness  
9 and he can be excused?

10 THE COURT: Thank you, Mr. Mays.

11 [Witness excused.]

12 [Off the record in re: scheduling]

13 THE COURT: Okay. I think we're done. And I can't  
14 remember who was here and who wasn't, but I think  
15 everybody wants to come at 9:00 tomorrow instead of 8:30?

16 MR. MALCOLM: That's right.

17 THE COURT: Is there an objection to coming at 9:00?

18 MS. SHEIN: Not at all.

19 MR. ABT: No.

20 THE COURT: Because I'll be here at 8:00 if you want  
21 to come. Happy to have you.

22 MS. SHEIN: Okay.

23 THE COURT: And the courtroom will be open. But  
24 we'll officially start at 9:00, okay?

25 **[Proceedings adjourned for the evening.]**

C E R T I F I C A T E

STATE OF GEORGIA

COUNTY OF GWINNETT

I hereby certify that the above and foregoing Pages 356 through 632 are a true and correct transcription of Volume III of VII of the habeas corpus proceedings taken down by me in **Scott Winfield Davis vs. Tony Howerton, Warden, Phillips State Prison, Civil Action Number 10-A-0741-2.**

I further certify that I am neither related nor counsel to any of the parties and am not financially interested in the matter.

**This certification is expressly withdrawn and denied upon the disassembly and/or photocopying of the foregoing transcript or any part thereof unless disassembly and photocopying is done by the undersigned Certified Court Reporter and original signature and official seal attached thereto.**

WITNESS my hand and official seal in Gwinnett County, Georgia, this 19th day of December, 2011.

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Beth O. Capell, CCR, CVR  
Certificate Number A-1290  
Official Court Reporter

Gwinnett Superior Ct./Div. II

1                                   **THURSDAY - JULY 28, 2011**

2                   [Petitioner brought into courtroom.]

3                   MR. ABT: Good morning.

4                   THE WITNESS: Morning.

5                   MR. ABT: If you would please raise your right hand.

6   Whereupon,

7                                   **BRUCE HOWARD MORRIS,**

8   having been duly sworn under oath, was examined and testified  
9   as follows:

10                                   **DIRECT EXAMINATION**

11   **BY MR. ABT:**

12               Q. And can you please state your name for the record.

13               A. Bruce Howard Morris.

14               Q. Good morning, Mr. Morris. My name is Jay Abt. I'm  
15   one of Scott Davis's attorneys on this habeas petition.  
16   You were the lead trial counsel for Mr. Davis in his jury  
17   trial; correct?

18               A. Yes.

19               Q. And you also represented him -- continued to  
20   represent him in the motion for new trial and his appeal?

21               A. Correct.

22               Q. How long have you been practicing law?

23               A. Just over 37 years.

24               Q. And do you have an either exact number or an estimate  
25   as to how many jurisdictions you've practiced in, both state

1 and federal?

2 A. Most of my work is in Georgia, but I've tried cases  
3 in -- or handled cases in about 14 states.

4 Q. How many jury trials do you think you've had?

5 A. I don't know, dozens.

6 Q. And have you tried a number of murder cases other  
7 than Mr. Davis's?

8 A. Yes.

9 Q. Do you have any estimate as to how many?

10 A. Handled more than a dozen, tried four or five, and  
11 that's an -- I just can't remember.

12 Q. Have you ever tried an arson case?

13 A. Tried an arson case?

14 Q. Other than Mr. Davis. A case -- or a case that  
15 involved arson, other than Mr. Davis'?

16 A. I don't think I've tried one, no.

17 Q. When was your most recent jury trial?

18 A. Last summer.

19 Q. I want to talk a little bit about your other  
20 professional experience. Have you ever published any papers or  
21 books on criminal defense?

22 A. No books, a number of papers, presentations to bar  
23 associations and the like.

24 Q. You've posted or taught at seminars?

25 A. Yes.

1 Q. Are you a member of any professional organizations?

2 A. Atlanta Bar Association, the State Bar of Georgia,  
3 Georgia Trial Lawyers, American Board of Criminal Defense  
4 Lawyers, American College of Trial Lawyers, National  
5 Association of Criminal Defense Lawyers -- if I didn't say it,  
6 Georgia Association of Criminal Defense Lawyers.

7 Q. And as a percentage of your practice in Law, what --  
8 or do you do entirely criminal defense?

9 A. Probably 99 percent. The other one percent is  
10 complex civil litigation that involves fraud-type overtones.

11 Q. The vast majority of your career has been in the area  
12 of criminal law?

13 A. Yes, sir.

14 Q. Walk me through how you would typically prepare a  
15 case for trial.

16 A. I beg your pardon?

17 Q. Walk me through how you would typically prepare a  
18 murder case for trial.

19 A. How would I typically do it?

20 Q. What are some of the things you would do to prepare a  
21 murder case for trial?

22 A. Are you talking about from the beginning of the  
23 representation --

24 Q. Yes.

25 A. -- or in anticipation of trial?

1 Q. Starting with beginning of representation.

2 A. Interview the client; interview the witnesses; visit  
3 the scene; review the discovery; talk with the prosecutor;  
4 research legal issues; prepare motions; prepare witnesses to  
5 testify; subpoena witnesses that were necessary; analyze any  
6 issues that need expert assistance; probably talk with other  
7 lawyers, associates, members of my staff for their thoughts,  
8 ideas; sometimes have a mock jury trial; depending upon the  
9 case, probably hire a consultant to work with ideas on ideal  
10 jurors, voir dire questions; research the Request to Charge;  
11 draft -- well, I start backwards -- draft closing statement;  
12 figure out which witnesses I need to call to get the evidence  
13 to make the argument; draft cross-examination questions for the  
14 same purpose; draft direct examination questions for the same  
15 purpose; write an opening statement; show up for trial; prepare  
16 my client for the possibility of testifying.

17 Q. And let's talk a little bit about appeals. Do you  
18 have an estimate as to how many cases you have represented  
19 clients on appeal?

20 A. More than a dozen is the best I can tell you.

21 Q. Are those generally state appeals or federal appeals  
22 or both?

23 A. Both.

24 Q. Specifically with respect to Scott Davis' case, what  
25 year were you initially retained in?



1           A.    I believe it was 1995.

2           Q.    Well, according to the record, if I could refresh  
3 your memory --

4           A.    Please do. I haven't looked at my file in a long  
5 time. It's been in Ms. Shein's office. It's either '95 or '96  
6 if recollection serves.

7           Q.    Allegedly the murder happened in '96. If I told you  
8 that, would that --

9           A.    Absolutely correct.

10          Q.    Okay.

11          A.    Within hours of the Atlanta Police Department's  
12 investigation.

13          Q.    And from -- in just the first year or two, until the  
14 case became a cold case, how much time do you think you spent  
15 preparing or working on Mr. Davis' legal --

16          A.    Hundreds of hours.

17          Q.    And then a great deal of time went by before the  
18 Fulton County D.A.'s Office renewed their efforts; is that  
19 correct?

20          A.    Correct.

21          Q.    For approximately ten years?

22          A.    Yes.

23          Q.    And when the case was renewed, how much time do you  
24 think you spent then preparing for trial?

25          A.    More than hundreds of hours.

1 Q. Can you give me --

2 A. I couldn't possibly.

3 Q. More than a thousand hours?

4 A. I have no idea. I just -- I couldn't tell you.

5 Q. A lot of time.

6 A. It consumed a tremendous amount of time.

7 Q. There were other lawyers on the team with you; is  
8 that correct?

9 A. Yes.

10 Q. And give me sort of a chronology of the -- who else  
11 represented Mr. Davis and what their roles were.

12 A. In 1996, Mark Kadesh worked with me side by side. We  
13 shared responsibility for a number of activities and then  
14 divided up certain other responsibilities. Doug Peters  
15 consulted with us from the start of that until the case was  
16 dismissed by the District Attorney's Office. When the case  
17 picked back up in 2006 or so, Mark Kadesh, I believe in the  
18 pretrial stages of that, also worked with me. And then before  
19 trial, Brian Steel joined the team, and he and I were co-  
20 counsel in the trial itself.

21 Q. Was there another attorney named Alan Manheim that  
22 also worked on the case?

23 A. I don't think Mr. Manheim got involved until after  
24 the trial, I think. I think that was to review the record. I  
25 couldn't -- I don't know because I didn't hire him, and he was,

1 for lack of a better term, less involved than Mr. Steel and I.

2 Q. Okay. And then -- correct me if I'm wrong, but what  
3 you're saying is Mr. Steel ultimately replaced Mr. Kadesh?

4 A. Yes.

5 Q. And then in the motion for new trial and appeal, were  
6 there other lawyers involved?

7 A. Don Samuel took the lead in the motion for new trial  
8 and appeal, although the three of us, that's -- well, I guess  
9 it would be four if you consider Mr. Manheim having reviewed  
10 the record and made suggestions -- but Mr. Samuel was probably  
11 the lead, supported by Mr. Steel and myself.

12 Q. Were there also non-lawyer staff involved in the  
13 case, either back in '96 or in '06?

14 A. Yes. I had an associate in '96 who worked on it, and  
15 then I had an associate in preparation for the trial and  
16 through the trial and during the appeal, and I had two non-  
17 lawyer staff members who worked on it a great deal.

18 Q. Were there also any private investigators involved?

19 A. Yes. Initially, in '96 I believe it was Tim Huhn &  
20 Associates, and he assigned Dennis Miller as the lead  
21 investigator. Thereafter, I believe Dennis did more work, I  
22 think Tim Huhn did work, I believe Oliver Halle did some work.

23 Q. Focusing back on the lawyers, initially it was you  
24 and Mr. Kadesh --

25 A. And Mr. Peters.

1 Q. -- and Mr. Peters. Tell us -- tell me how you  
2 divided up the work, or who was responsible for which  
3 activities?

4 A. I believe back in '96 both Mark Kadesh and I jointly  
5 handled the case. We strategized together, we met and talked  
6 with Mr. Davis together. I think the division of  
7 responsibility was more in the investigative part, and we  
8 worked on motions together, and we worked on theory together,  
9 but I think we divided up some of the investigation. I think  
10 Mr. Kadesh worked more closely with Dennis Miller, the  
11 investigator, in coordinating and interviewing potential  
12 witnesses and gathering evidence.

13 Q. In terms of the, I guess now focusing more on 2006,  
14 there were a great deal of pretrial motions; is that correct?

15 A. Yes.

16 Q. In terms of focusing on those pretrial motions, was  
17 there any delegation of work between you and Mr. Kadesh?

18 A. We discussed which motions we should prepare and  
19 file. I believe we divided up some responsibility for the  
20 initial research and drafting. Classically, Mr. Kadesh and I  
21 worked together a great deal, and our usual pattern is that he  
22 will do the first draft and I'll edit and finalize.

23 Q. Did -- in that pretrial motion phase, did either you  
24 -- did you delegate any work to either interns or law students?

25 A. I think Mr. Kadesh at that time had one or more law

1 student clerks who did some research for us, yes. I couldn't  
2 tell you their names.

3 Q. Was Mr. Kadesh also teaching law at that point in  
4 time?

5 A. Yes, he was a professor at Georgia State.

6 Q. Do you have any idea how many people either you or  
7 Mr. Kadesh or your investigators interviewed prior to trial?

8 A. I don't. I mean, my file would reflect that. We'll  
9 have notes on every witness who was contacted. Lots is all I  
10 can tell you.

11 Q. Okay. Did -- I assume you had extensive  
12 conversations with Mr. Davis?

13 A. Yes. Yes.

14 Q. Did he ever have any concerns or express any concerns  
15 to you about the quality of Mr. Kadesh's work?

16 A. No.

17 Q. He never was concerned about any issues involving Mr.  
18 Kadesh?

19 A. I think after the fact, but not during the  
20 representation.

21 Q. So after Mr. Kadesh left representation?

22 A. Yes.

23 Q. Why did Mr. Kadesh not represent Scott all the way  
24 through trial?

25 A. He had a health problem, heart condition that flared

1 up.

2 Q. Were you aware of Mr. Kadesh's health problems prior  
3 to his coming on to the Scott Davis legal team?

4 A. When you say health problems, I mean, I knew he had  
5 had a heart attack years before.

6 Q. Okay. Was that prior to 1996?

7 A. I think so but I'm not positive -- yes, yes, it was.

8 Q. Did you review all of the work that Mr. Kadesh did on  
9 the case?

10 A. Yes. I kept the master file, for lack of a better  
11 description. I reviewed every interview that he would have had  
12 primary responsibility for with him.

13 Q. All right. At some point you became aware that the  
14 State had lost evidence in the case; is that correct?

15 A. That was not in '96 but as the case came back, yes.

16 Q. So when is the first time that you became aware there  
17 was a significant amount of evidence missing?

18 A. I don't think it was until Mr. Davis was indicted.

19 Q. That would have been in 2006?

20 A. I think that's right.

21 Q. Did you discuss issues that -- legal issues with Mr.  
22 Kadesh at that time about what legal issues that would raise?

23 A. Yes.

24 Q. What in particular were your conversations about?

25 A. Well, we felt that we should move to dismiss the

1 indictment and to try and exclude from evidence any reference  
2 to evidence that had been destroyed or lost.

3 Q. Was there a discussion about the legal standard that  
4 would be argued for that purpose?

5 A. Yes.

6 Q. And what legal standard did you pursue at that time?

7 A. Well, we pursued every legal standard we could think  
8 of, which basically included the Trombetta issue of -- first of  
9 all, aside from the good faith and bad faith of the  
10 prosecution, whether it was prejudicial to Mr. Davis. And our  
11 position was it was, and he could not get a fair trial.

12 Q. Well, was there a decision made to argue a standard  
13 of gross negligence --

14 A. Yes.

15 Q. -- at that time?

16 A. Yes.

17 Q. Okay. Rather than arguing bad faith?

18 A. I wouldn't say rather than bad faith. We raised all  
19 issues, including gross negligence. I believe, if my  
20 recollection serves, that we argued that there was evidence of  
21 bad faith and, alternatively, that the gross negligence should  
22 equate to bad faith.

23 Q. And you are aware of the -- both the Trombetta and  
24 the Youngblood decisions in arguing those issues?

25 A. I believe we cited both of them.

1           Q.    I apologize for -- in advance for possibly invading  
2 any personal discussions -- but at some point during the  
3 investigation, I guess the early part in the 1996 time frame,  
4 did you have some personal issues in terms of your spouse's  
5 health that were -- that came up during the Davis case?

6           MS. GALLOW: Your Honor, I object on the relevance of  
7 this question. I'm not sure what Mr. Morris' spouse's  
8 health conditions have to do with his personal work in  
9 this case.

10          MR. ABT: Judge, I think it could reflect on the --  
11 Mr. Morris' ability to spend time on the case, and what  
12 efforts he was able to make, given the fact that his  
13 spouse might have had a serious personal health issue.

14          THE COURT: Well --

15          MR. ABT: And I'll be brief.

16          THE COURT: Well, I don't want to go into whatever  
17 those issues might have been. If you want to ask him if  
18 those issues may have affected his ability to spend time  
19 with this case, that's fine.

20          MR. ABT: That's all I want.

21          THE COURT: Okay.

22          MR. ABT: That's all I want.

23          THE WITNESS: No.

24 **BY MR. ABT: [Resuming]**

25          Q.    Any issues that your family was having did not impair



1 your ability to work on Mr. Davis' case?

2 A. Correct.

3 Q. Did you take any large chunks of time off of work as  
4 a result of any of those issues?

5 A. No, sir. I don't think I've ever taken any large  
6 chunks of time off of work.

7 Q. Going back to the legal research and pretrial  
8 motions, do you recall what evidentiary issues, other  
9 evidentiary issues, you raised in pretrial?

10 A. I know that we raised the issue of the testimony of  
11 Mr. Daws. That I definitely recall.

12 Q. And you extensively litigated the items of missing  
13 evidence?

14 A. We did.

15 Q. You mentioned earlier you argued bad faith, and in  
16 the alternative, gross negligence --

17 A. Yes.

18 Q. -- in pretrial with respect to that missing evidence.  
19 Were there other arguments that you raised?

20 A. I'm sure there were, I just -- I can't tell you  
21 specifically.

22 MR. ABT: Just a moment, Your Honor.

23 [Brief pause.]

24 [Off the record regarding other matters.]

25 MR. ABT: Judge, if I can approach the witness.

1           Q.    I'm going to show you what's been marked as  
2 Respondent's Exhibit 2 and ask if you're familiar with that  
3 document.

4           A.    It appears to be a transcript of a proceeding in  
5 pretrial motions.

6           Q.    Okay. And do you recall being present throughout the  
7 pretrial motion proceeding?

8           A.    Yes.

9           Q.    And I'm just going to refer you to the index page  
10 that lists the witnesses, and ask if you know who each of those  
11 individuals are who were called.

12          A.    I know who Mr. Rick Chambers is, I know who Paul  
13 Howard is, I know who Joe Burford is. If I could look a  
14 moment, I'd probably be able to tell you who Mr. O'Connor is.  
15 I don't remember off the top of my head.

16          Q.    Sure.

17          A.    I think he's the Atlanta Police officer who responded  
18 to Mr. Davis' home. Is that who that is? I believe so.

19          Q.    Okay. And in the pretrial motions, did you call any  
20 other witnesses other than those four?

21          A.    I don't recall.

22          Q.    You don't recall? Those are the only four that are  
23 listed.

24          A.    Well, that's apparently --

25          Q.    If you could use your -- if you could review that.

1           A.     Well, I trust that the Index is correct, that  
2     apparently during this particular hearing, April 12/13, 2006,  
3     that these were the only witnesses who were called.

4           Q.     Did you call any expert witnesses at the pretrial  
5     motions?

6           A.     I don't think so.

7           Q.     And in arguing, specifically with respect to the  
8     missing evidence, did you present any witnesses in pretrial  
9     motions to testify about the apparent exculpatory value of the  
10    missing evidence?

11          A.     Any expert witnesses?

12          Q.     Correct.

13          A.     I don't think so.

14          Q.     In the pretrial motions, did you present to the Court  
15    any Standard Operating Procedures that had been violated in  
16    missing evidence?

17          A.     I'm sorry, I don't remember.

18          Q.     Do you know whether -- you argued that the evidence  
19    was missing based on Sixth and Fourteenth Amendment grounds; is  
20    that correct?

21          A.     As best I recall.

22          Q.     Do you know whether you argued that the --

23          A.     Although due process is under the Fifth, isn't it?

24          Q.     Well, under the Fourteenth for purposes of the Sixth.

25          A.     I think I may have argued both.

1 Q. Do you know whether you made any objections or  
2 arguments to the Court regarding the missing evidence on  
3 various Georgia statutes?

4 MS. GALLOW: Your Honor, objection. I think at this  
5 point the record speaks for itself.

6 THE COURT: Counsel, is there some reason that we  
7 need to go into this? I mean, we've got the record.

8 MR. ABT: Let me rephrase, Your Honor.

9 THE COURT: Okay.

10 **BY MR. ABT: [Resuming]**

11 Q. Did you consider making arguments that the evidence  
12 -- that the evidence should be excluded, not just on  
13 constitutional grounds, but on the grounds that it violated a  
14 variety of Georgia statutes?

15 A. All I can tell you is I raised everything I could  
16 think of, and I know I cited Georgia cases in support of our  
17 position.

18 Q. Are you aware of O.C.G.A. §16-10-94(a) that --

19 A. I'm going to presume it exists.

20 Q. -- that creates an affirmative duty to law  
21 enforcement to preserve evidence?

22 A. Okay.

23 Q. So did you consider raising any arguments on those  
24 grounds?

25 A. I thought I incorporated all of the ideas that I

1 could think of that were supported by federal and state law,  
2 whether by statute or case law. If you're asking me if I cited  
3 that particular statute, I don't remember.

4 Q. Do you remember whether you cited any of -- there's  
5 also some statutes in Title 17 on the preservation of evidence.

6 A. I'm sorry, I just don't remember.

7 MR. ABT: Just a moment, Your Honor.

8 [Brief pause.]

9 Q. I'm going to again refer you to Respondent's Exhibit  
10 2, if I may, Your Honor.

11 THE COURT: Fine.

12 Q. Do you recall again -- I'll ask you to refer to that  
13 document. Do you recall whether or not you attached or  
14 submitted any exhibits --

15 A. I don't remember.

16 Q. Okay. If you could look through that briefly and  
17 refresh your recollection.

18 A. Well, this says Testimony Only, so it wouldn't  
19 refresh my recollection of anything.

20 Q. Do you recall whether or not you submitted any -- you  
21 don't recall whether or not you submitted any exhibits at  
22 pretrial motions?

23 A. I don't.

24 Q. Okay.

25 A. I know that at some point lists of the lost,

1 misplaced, or destroyed evidence were provided, they're in the  
2 record, of evidence straight from the GBI evidence lists or the  
3 State list of items as well as our own statement of which items  
4 were significant and no long available.

5 Q. All right. Referring to the trial itself, when  
6 ultimately evidence -- a lot of these items of evidence came up  
7 at trial; is that correct?

8 A. Yes.

9 Q. Did you make objections then during the trial to each  
10 item of evidence?

11 A. My recollection is that the Judge permitted us at the  
12 beginning of the trial to have a continuing objection. So the  
13 answer is yes.

14 Q. And on what grounds was that continuing objection?

15 A. I beg your pardon?

16 Q. On what grounds?

17 A. On the grounds previously raised, which included our  
18 motions to dismiss the indictment and/or exclude any reference  
19 to these items during the trial.

20 Q. Did you at trial argue that the evidence should be  
21 excluded based on bad faith?

22 A. Yes. That was adopted, if you will, in the  
23 continuing motion.

24 Q. Did you submit at trial any Standard Operating  
25 Procedures of the various agencies to demonstrate that those

1 agencies had violated their own procedures?

2 A. I don't believe so.

3 Q. And at trial, did you bring to court any experts on  
4 any individual pieces of evidence to show that there was bad  
5 faith in the State losing or destroying that evidence?

6 A. I don't think we put on any defense witness for that  
7 purpose, no.

8 Q. If I told you that in the pretrial motions you  
9 objected to six pieces of evidence, would that sound --

10 A. I'm sorry, I just don't remember.

11 Q. Do you remember how many total items of evidence were  
12 lost by the State?

13 A. I don't, but there were a bunch.

14 Q. More than ten?

15 A. Oh, yes.

16 Q. More than 20?

17 A. I can't remember. It depends on whether you  
18 consider, you know, a bag of debris to be evidence. There were  
19 some generic references to things that no longer existed.

20 Q. But you're aware that, for example, the State said  
21 that they lost the alleged murder weapon.

22 A. Oh, absolutely.

23 Q. The 9mm Beretta.

24 A. Yes.

25 Q. And you're aware that the State said that they lost

1 the two shell casings that were found at the Coffin residence?

2 A. And the gas can.

3 Q. We'll get to that in a minute.

4 A. Yes.

5 Q. You're aware that they lost the bullet --

6 A. Yes.

7 Q. -- that was recovered from Mr. Coffin's head?

8 A. Yes.

9 Q. You're aware that they lost a shotgun from the burned  
10 out Porsche?

11 A. Yes.

12 MS. GALLOW: Your Honor, I object at this point. I'm  
13 trying to give him a little bit of leniency, but he's  
14 leading his witness and he's also testifying at the same  
15 time.

16 THE COURT: Counsel, rephrase.

17 MR. ABT: He's saying he can't remember and I'm  
18 trying to --

19 THE COURT: Well, you can show him something to  
20 refresh his recollection, but I don't think you can lead  
21 him or --

22 MR. ABT: Okay.

23 THE COURT: -- testify for him.

24 **BY MR. ABT: [Resuming]**

25 Q. Do you recall Megan Bruton testified at trial?



1           A.    Oh, yes, I do.

2           Q.    Did you interview her prior to trial?

3           A.    We interviewed her in person once at least, yes.

4           Q.    And you recall her testimony at trial?

5           A.    Oh, yes.

6           Q.    What, if anything, did she testify to regarding the  
7 gas can?

8           A.    My recollection is that she testified something to  
9 the effect of they had a gas can that was like that.

10          Q.    So when she testified that the gas can looked like  
11 Scott Davis', did you object at that point?

12          A.    Again, I believe we had the continuing objection to  
13 any reference, so the answer would be yes.

14          Q.    Did you make an objection on the grounds that she was  
15 testifying about a piece of evidence and making a conclusion  
16 about who it belonged to without you having the ability to  
17 look, touch, feel, or examine that evidence?

18          A.    Yes.

19          Q.    I'm going to ask you sort of the same set of  
20 questions with regard to an Olympic gym bag. Do you recall --

21          A.    She did testify about an Olympic gym bag, a plastic  
22 gym bag from the '96 Olympics that I believe was supposedly  
23 around holding the gas can.

24          Q.    What was her testimony with respect to that?

25          A.    That it looked just like or similar to the ones that

1 she and Scott had at their house.

2 Q. And did you make some sort of objection to the Court  
3 about that piece of evidence?

4 A. Yes.

5 MR. ABT: Just a moment, Your Honor.

6 [Off the record.]

7 Q. You mentioned earlier that you had a continuing  
8 objection.

9 A. Yes.

10 Q. And that you raised in that continuing objection at  
11 trial both the Sixth and Fourteenth Amendment; correct?

12 A. And I believe Fifth.

13 Q. And Fifth. Could it have helped with respect to the  
14 individual pieces of evidence to have made a variety of  
15 different objections and given different legal arguments for  
16 each piece of evidence based upon that piece of evidence of  
17 exculpatory value at trial?

18 A. In retrospect, yes.

19 Q. And you mentioned earlier you did not obtain or  
20 introduce any Standard Operating Procedures at trial to  
21 demonstrate those were violated by the State; is that correct?

22 A. Correct.

23 Q. Could that have assisted you or improved your ability  
24 to have excluded those items --

25 MS. GALLOW: Your Honor, this question is -- well, I

1 object to personal -- based on hindsight. Second of all,  
2 it calls for speculation at this point.

3 THE COURT: I'll sustain it.

4 **BY MR. ABT: [Resuming]**

5 Q. Did you think about or consider introducing these  
6 Standard Operating Procedures at trial from the various  
7 agencies?

8 A. I don't think so.

9 Q. Your experience is vast and certainly more  
10 significant than mine, and I'm pretty respectful, but is it  
11 normal in your experience for -- in the other cases you've had  
12 -- for the State to discuss items of missing evidence to the  
13 jury?

14 A. I think it's highly objectionable. I mean, I still  
15 disagree with the ruling.

16 Q. Have you ever been involved in another case where  
17 that much evidence was lost?

18 A. That much? Never.

19 Q. Specifically after the State had access to it?

20 A. Never.

21 Q. You've handled a fair number of cases in your career  
22 involving firearms; would that be fair to say?

23 A. Yes.

24 Q. Have you ever had other cases where the murder weapon  
25 being a gun was lost by the State?

1           A.    I can't remember one. I can't say it never happened,  
2 but I can't remember one.

3           Q.    Have you had cases where the murder weapon was not in  
4 evidence?

5           A.    Yes.

6           Q.    That's not that necessarily unusual, is it?

7           A.    No.

8           Q.    The same sort of question with regard to the shell  
9 casings. In your experience is it typical for the State to  
10 have tested the shell casings and then lose them?

11          A.    And then lost them? No, it's not usual.

12          Q.    Can shell casings -- have you hired experts in your  
13 career with respect to firearms?

14          A.    Yes.

15          Q.    With respect to bullets and shell casings?

16          A.    Yes.

17          Q.    And is it possible to trace where firearms were  
18 bought?

19          A.    Yes.

20          Q.    Is it possible to trace where shell casings were  
21 purchased?

22          A.    Yes.

23          Q.    Did you ever consider bringing an expert to trial to  
24 testify about the fact that the Defense could have, had they  
25 had the evidence, tested the firearm and shell casings to

1 determine whose fingerprints they were on or where they were  
2 purchased or anything of that nature?

3 A. I honestly can't remember.

4 Q. The -- do you recall whether the magazine from the  
5 9mm Beretta was a piece of evidence in the case?

6 A. I think -- I think it was.

7 Q. Do you recall whether that was one of the items that  
8 was lost?

9 A. I think it was.

10 Q. In your experience as a criminal defense attorney,  
11 can you examine a -- can you have an expert examine a magazine  
12 to determine whether there are fingerprints?

13 A. Yes.

14 Q. Did you consider hiring an expert to come to trial  
15 and testify that that could have been tested had the State not  
16 lost it?

17 A. I just don't remember. I know we made the argument,  
18 but I just don't remember if we considered calling an expert.

19 Q. You did not in fact call any experts to trial to  
20 testify about the lost of missing evidence; that's a fair  
21 statement?

22 A. Correct. Other than my cross-examination, but we  
23 didn't call them.

24 Q. You cross-examined the State's expert?

25 A. Correct, and officers as well.

1 Q. Specific to the gas can, what did you do, if  
2 anything, to investigate the lost gas can?

3 A. I know that we followed the trail through DeKalb  
4 County of once it was seized and later destroyed, that fact  
5 that it was seized, held, and destroyed.

6 Q. Did you consult with any investigators or experts to  
7 determine whether or not the gas can could have been traced  
8 back to where it was purchased?

9 A. I just don't remember.

10 Q. You didn't retain any expert to testify at trial  
11 about the gas can though, is that correct?

12 A. Correct.

13 Q. Do you think that it was crucial to have brought  
14 experts to trial to testify about this missing evidence?

15 A. No.

16 Q. Are you familiar with the decision of -- I don't mean  
17 to quiz you on case law -- but are you familiar with Head vs.  
18 Thomason?

19 A. I'm sorry, I cannot identify it by name, no.

20 Q. It's a Georgia Supreme Court case that indicates it  
21 would be ineffective assistance of counsel for failure to hire  
22 an expert. Are you aware of that -- that line of case law?

23 A. Oh, sure, absolutely.

24 Q. And so --

25 MS. SMITH: Your Honor, I object to that question.

1           That is a total misstatement of the case, and I don't  
2           think we're here to have counsel have a pop quiz on the  
3           law. Ultimately it's for you to determine whether or not  
4           his decision in this case was reasonable.

5           THE COURT: Well, he says that, I think based on what  
6           Mr. Abt asked, he is familiar with the case. What the  
7           holding of the case is is not an issue for the Court, so  
8           we're just going to move on, counsel.

9           Q.    Why do you think it wasn't crucial for you to have  
10          brought experts to testify about the missing and lost evidence?

11          A.    Frankly, because I believe the prejudice that  
12          resulted from it is obvious and didn't take an expert to  
13          explain. I think we did it by cross-examination and by  
14          argument.

15          Q.    Well, you mentioned earlier you didn't obtain or  
16          investigate or introduce any Standard Operating Procedures at  
17          trial; correct?

18          A.    I don't remember saying I didn't investigate. I do  
19          remember saying that we did not introduce any Standard  
20          Operating Procedures at trial.

21          Q.    Well, let me ask you what, prior to the end of the  
22          trial -- I'm not talking about the appeal or motion for new  
23          trial, just the trial and prior to that -- what Standard  
24          Operating Procedures did you investigate?

25          A.    I'm sorry, I just don't remember. Listen, if you're

1 asking me was I cognizant of the fact that the law enforcement  
2 authorities and the District Attorney's Office didn't properly  
3 handle the evidence, the answer is yes.

4 Q. No, but I'm talking about their individual policies  
5 and procedures. Did you actually obtain those?

6 A. I don't remember.

7 Q. You didn't introduce any at trial?

8 A. Correct.

9 Q. Let me ask you about the phone records in the case.  
10 Do you recall there being a variety of factual and  
11 investigative issues with respect to the phone records?

12 A. Yes.

13 Q. Was that an important part of Scott's defense?

14 A. Yes.

15 Q. And did you hire any outside investigators or  
16 otherwise pursue through subpoena or record requests phone  
17 records to determine any timeline of certain phone calls?

18 A. I believe we did.

19 Q. Do you recall conversations with Mr. Davis where he  
20 told you that Megan Bruton is the one who told him that David  
21 Coffin had been shot?

22 A. Absolutely.

23 Q. And not the other way around as Megan suggested at  
24 trial?

25 A. Correct.



1           Q.    And you're aware that Ms. Bruton made several phone  
2 calls on the evening of December 10<sup>th</sup>, 1996 --

3           MS. GALLOW:  Again, objection, Your Honor.  Counsel's  
4 testifying again.  I'd ask him to ask a direct question of  
5 this witness instead of injecting facts into evidence at  
6 this time.

7           MR. ABT:  Judge --

8           THE COURT:  I'll sustain, counsel.  Just rephrase.

9           Q.    What phone calls are you aware of that Ms. Bruton may  
10 have made on December 10<sup>th</sup>, 1996?

11          A.    I think -- you know, I'm doing my best here from  
12 memory.  I think there was a critical phone call made from the  
13 next-door neighbor's house who's name was Limburger, to Jen  
14 Jenacova and her husband's home.  I think that was the critical  
15 phone call.

16          Q.    And do you recall interviewing the Jenacovas?

17          A.    Absolutely.

18          Q.    And what did the Jenacovas tell you with respect to  
19 the phone calls that they had with Ms. Bruton?

20          A.    There were two calls on the machine by the telephone  
21 -- or the answering machine or the television or something --  
22 when Ms. Jenacova answered the phone, it was 12:08 a.m.  She  
23 saw that.  She made note of that.  Her husband was aware of it.  
24 And they communicated that to Mr. Jenacova's mother as well,  
25 and she made note of it.

1           Q.    And at the 12:08 conversation, what did the Jenacovas  
2 tell you Ms. Bruton said?

3           A.    According to Ms. Jenacova, who I believe repeated it  
4 to Mr. Jenacova at the time, Ms. Bruton said that David Coffin  
5 had been shot and was dead. May have said shot in the head, I  
6 can't remember, but it was definitely shot.

7           Q.    Now let's talk about what phone conversations are you  
8 aware of between Ms. Bruton and Mr. Davis that same evening?

9           A.    I'm aware that there were phone calls.

10          Q.    When did those phone calls allegedly take place?

11          A.    I believe they took place after the 12:08.

12          Q.    So --

13          A.    It is my belief that the information Ms. Bruton told  
14 the Jenacovas preceded her conversations with Scott.

15          Q.    So it was important to show that timeline at trial;  
16 correct?

17          A.    Correct.

18          Q.    Because that would have demonstrated what?

19          A.    The timeline. That she had the information before  
20 she conveyed it to Scott.

21          Q.    And that Scott --

22          A.    Scott did not tell her that, as the police alleged.

23          Q.    Okay. So in preparation for trial and trying to  
24 establish that timeline was part of his defense, what did you  
25 do to obtain those phone records?

1           A.    I can't remember if that was in '96 or 2006 when we  
2 got that information. I can't remember.

3           Q.    Do you know what, if anything, you did to try and  
4 obtain the phone records?

5           A.    I know we got the -- I think we got Ms. Limburger's  
6 phone records to establish the exact time of that call -- I  
7 think. I can't remember.

8           Q.    Do you know whether or not you subpoenaed the  
9 Jenacovas' phone records?

10          A.    I'm sorry, I can't remember.

11          Q.    Do you know whether or not you subpoenaed Megan  
12 Bruton's parents' phone numbers?

13          A.    I don't think we did that.

14          Q.    What if any calls did Megan have with -- Megan have  
15 with -- and I apologize if I'm mispronouncing her name -- Megan  
16 Bruton have with her parents that evening?

17          A.    I'm sorry, I don't remember.

18          Q.    But you spoke extensively to Mr. Davis about that --  
19 the importance of that timeline prior to trial?

20          A.    Yes.

21          Q.    So it's your testimony that you think you subpoenaed  
22 the Limburger's phone records?

23          A.    For some reason I picture in my mind something that  
24 said Limburger. So it must have been some kind of phone  
25 record, I just don't remember what it was. But it said

1 Limburger.

2 Q. In the normal course of your 37 years practicing law,  
3 if the phone records can determine a basic issue of guilt or  
4 innocence, then would it be important to make sure you get  
5 those phone records?

6 A. Yes, if they existed.

7 Q. That's not just trial strategy, the failure to get  
8 those in a case where it can establish innocence; correct?

9 A. If it's there, we should have gotten it.

10 Q. What about Mr. Davis' incoming calls? Did you  
11 attempt to obtain those?

12 A. I can't remember. There were -- there were lots of  
13 phone records we had, and some phone records we didn't, and I  
14 can't remember which we might have obtained in '96 and which  
15 were still in existence in 2006. I just don't remember. I --  
16 let me say --

17 Q. But the value in obtaining those phone records is  
18 clear; correct?

19 A. Oh, sure.

20 Q. Would there have been any possibility of the phone  
21 records being harmful to Scott's defense?

22 A. Yes.

23 Q. Well, how?

24 A. It is possible that it would have interfered with or  
25 been inconsistent with our timeline.

1           Q.    Well, if, for the sake of argument, you found  
2 something harmful to the timeline, would you have been required  
3 to reveal that information?

4           A.    No.

5           Q.    So then how could it be harmful?

6           A.    You didn't ask me if I would have to use it or give  
7 it away, you asked me if it could be harmful and the answer is  
8 yes, it could.

9           Q.    Would it be harmful actually at trial?

10          A.    If the State had it, yes.

11          Q.    If you were to subpoena the phone records and obtain  
12 them on your own, without regard to whether or not the State  
13 gets them, you would have no duty to disclose them; is that  
14 correct?

15          A.    Not unless I intended to use a part of them.

16          Q.    So there would be no reason to not to try and obtain  
17 the phone records.

18          A.    Fair statement.

19               MR. ABT: Just one moment, your Honor.

20                       [Counsel confer.]

21          Q.    Do you recall, Mr. Morris, whether you submitted at  
22 trial as evidence any phone records?

23          A.    I think we did.

24          Q.    Do you know what phone records?

25          A.    I do not.

1           Q.    Do you believe you submitted Mr. Davis' phone  
2 records?

3           A.    I think he had some hard line phone records and some  
4 cell phone records, and I don't remember which went into  
5 evidence.

6           Q.    Did you introduce the Limburger's phone records?

7           A.    I can't remember.

8           Q.    And whether you introduced the Jenacovas' phone  
9 records?

10          A.    I can't remember.

11          Q.    But you acknowledge it would have been important to  
12 get those phone records into evidence?

13          A.    I think if they had been helpful, yes. You know --  
14 never mind, sorry.

15          Q.    That's okay.

16          A.    That's okay. Go ahead.

17          Q.    I want to jump back to the pretrial for a minute, the  
18 pretrial motions. Sorry about jumping around. But did you  
19 call any witnesses in pretrial motions that handled any of the  
20 lost evidence?

21          A.    I think so.

22          Q.    Who would those be?

23          A.    I know Mr. Chambers handled some of it.

24          Q.    Anyone else?

25          A.    I'm sorry, I can't -- Mr. Burford, maybe. I can't

1 remember. I think the District Attorney's Office lost  
2 something, but I'm not positive.

3 Q. Do you recall either witnesses or potential witnesses  
4 named Craig Foster?

5 A. Yes.

6 Q. What about Patricia Flavin?

7 A. Yes.

8 Q. What was -- what was their testimony for?

9 A. I can't remember.

10 Q. All right. Do you know what, if anything, they would  
11 have said about in Megan discussing whether she knew David  
12 Coffin had been shot?

13 A. Just don't remember.

14 MR. ABT: Judge, if we could take about a ten minute  
15 break, if that would be okay.

16 THE COURT: Sure. Okay, we'll take about ten  
17 minutes.

18 MR. ABT: Thank you.

19 **[A short recess was taken.]**

20 \* \* \*

21 MR. ABT: Okay, Mr. Morris, I'm going to -- if I  
22 could approach, Your Honor.

23 THE COURT: Sure.

24 **BY MR. ABT: [Resuming]**

25 Q. I'm going to show you what's been marked as

1 Respondent's Exhibit 3-F. It's a portion of the trial  
2 transcript in Scott Davis' jury trial. And refer you to Page  
3 1257 --

4 A. Yes, sir.

5 Q. -- through about 1260. If you'll take a look at that  
6 testimony.

7 A. Yes, sir. [Examining testimony.] Yes, sir.

8 Q. Do you recall the State attempting to have Ms. Bruton  
9 testify about the gas can and the Olympic bag?

10 A. Yes.

11 Q. What -- and does that testimony refresh your  
12 recollection that she said the gas can and Olympic bag looked  
13 just like the ones that she and Scott owned?

14 A. Yes.

15 Q. What objections did you make at that point in the  
16 trial?

17 A. Nothing at that point in the trial, other than the  
18 continuing objection that we had.

19 Q. Okay. And I'll bring up that continuing objection  
20 and we'll go through it in a moment. But I did want to  
21 establish that --

22 A. There is no objection when she said that. I've got  
23 her on cross-examination here. I haven't read the direct, but  
24 I'm going to assume the direct is no better.

25 Q. I'm going to shift gears for a moment. Did you at



1 some point learn that the State had lost the latent fingerprint  
2 cards?

3 A. Yes.

4 Q. Do you know when you became aware of that?

5 A. Not until after Mr. Davis was indicted, I believe.

6 Q. So sometime in 2006?

7 A. Correct.

8 Q. Do you know whose fingerprints those were?

9 A. No. I know they weren't Scott Davis'.

10 Q. When did you become aware that fingerprints were  
11 taken from the Porsche or other items?

12 A. I'm sorry, I don't know.

13 Q. Were you aware of that back in '96 when you did your  
14 initial investigation?

15 A. I don't remember.

16 Q. Did you attempt to hire any expert or have those  
17 fingerprints run through AFIS prior to them being lost?

18 A. I don't know that I knew about them. Did I hire --  
19 attempt to hire an expert? No. But I don't remember when I  
20 learned about them, and if they still existed when I learned  
21 about them. I just don't remember.

22 Q. I'm going to ask you some questions about the various  
23 law enforcement agencies involved in this case. You've  
24 mentioned that you became aware that many items of evidence  
25 were lost. What agencies, to the best of your recollection,

1 were the agencies involved in handling those items of evidence?

2 A. The City of Atlanta Police Department, Georgia Bureau  
3 of Investigation, DeKalb County Police, and DeKalb County Fire.

4 Q. What about the Atlanta Fire Department?

5 A. Oh, and the Atlanta Fire Department, yes.

6 Q. What about the Fulton County District Attorney's  
7 Office?

8 A. Yes, they would be an agency, yes.

9 Q. Tell me sort of what the process was that you went  
10 through to try and investigate who the individuals were at each  
11 agency that would have played a role in handling or losing that  
12 evidence.

13 A. I can't remember, I'm sorry.

14 Q. You don't remember anything you did?

15 A. Well, I know we had the investigator look into it. I  
16 believe Mr. Kadesh looked into it. I know that I spoke to Mr.  
17 Burford, Ms. Sheila Ross, Detective Chambers, Detective Walker  
18 -- I just can't remember beyond that. But I know we had an  
19 investigator look into it, and then I believe we also consulted  
20 with the gentleman who at one time was in charge of the  
21 Property Room in the City of Atlanta Police Department.

22 Q. Okay. Do you know who that was?

23 A. I can't remember his name. If you mentioned it, I  
24 would recognize it.

25 Q. Well, did you call any of those people that you just

1 mentioned to trial to examine them about having lost the  
2 evidence?

3 A. Did I call them? No. Did I examine some of them?  
4 Yes.

5 Q. Did you call any other individuals to trial who had  
6 handled any of the lost or missing evidence as a result of your  
7 investigation?

8 A. I don't think so.

9 Q. Do you recall an individual named Linda Tolbert?

10 A. No.

11 MR. ABT: If I could, Judge.

12 [Brief pause.]

13 MR. ABT: Your Honor, if I could approach the  
14 witness.

15 THE COURT: Yes, sir.

16 **BY MR. ABT: [Resuming]**

17 Q. Mr. Morris, I'm going to show you what's been marked  
18 as Exhibit P-45 and ask if you'd carefully review that  
19 document.

20 A. [Witness complied.] Yes, sir.

21 Q. Are you familiar with the document? Have you ever  
22 seen it -- let me rephrase the question. Have you ever seen  
23 this document before today?

24 A. I think I have.

25 Q. Do you know whether it was produced in discovery?

1           A.    I just don't remember.

2           Q.    Does reviewing that document refresh your  
3 recollection as to who Ms. Tolbert is?

4           A.    Yes.

5           Q.    Did you ever consider -- think about calling her as a  
6 witness at trial?

7           A.    I don't think so.

8           Q.    Did you interview her or investigate her?

9           A.    I cannot remember. That's the best I can tell you.

10          Q.    Do you know whether or not you sent -- we talked  
11 about all the agencies a moment ago that had handled and lost  
12 evidence prior to trial. Do you recall which of those agencies  
13 you sent subpoenas to, to try and obtain their Standard  
14 Operating Procedures?

15          A.    I don't know.

16          Q.    Do you know whether or not you sent a records request  
17 to try and obtain any of those Standard Operating Procedures?

18          A.    I don't know.

19          Q.    Do you know how many different Standard Operating  
20 Procedures were violated as a result of losing the items of  
21 evidence?

22          A.    I don't.

23          Q.    Did you consider retaining or consulting with an  
24 expert, not on the individual pieces of items, but someone who  
25 could testify about what the Standard Operating Procedures

1       should look like, what the chain of custody should look like,  
2       how the Evidence Room should be handled, and how evidence  
3       should properly be maintained, to come and testify at trial?

4           A.    I do not recall considering that.

5           Q.    Do you know whether or not you consulted with Mr.  
6       Kadesh about pursuing or investigating or subpoenaing these  
7       Standard Operating Procedures? Do you recall any conversations  
8       with him about --

9           A.    I --

10          Q.    -- about going through the process of doing that?

11          A.    I don't. I don't.

12          Q.    Do you know if you had any conversations with Mr.  
13       Steel about going and obtaining those Standard Operating  
14       Procedures?

15          A.    I don't recall doing that.

16          Q.    When you say you don't recall, you're not sure if --  
17       you don't remember either way or you don't think you did?

18          A.    I don't remember either way, and I don't think I did.

19          Q.    Okay, that's a good answer. I'd like to ask you a  
20       few questions about the fire that took place at 951 West Conway  
21       Drive. What did you do to investigate the fire that took  
22       place?

23          A.    Personally, I believe I went to the scene, and I  
24       believe we hired an expert to go to the scene and evaluate it.

25          Q.    Who was that expert?

1           A.     John Lentini.

2           Q.     Okay.  And what -- did you call him at trial?

3           A.     No.

4           Q.     Why not?

5           A.     My recollection is, is that his investigation and his  
6 review of the State's witnesses' report was not helpful to us.

7           Q.     Did you consider challenging the State's timeline  
8 regarding the fire?

9           A.     I believe we did by cross-examination.

10          Q.     Did you consider hiring an expert to challenge the  
11 State's timeline regarding the fire?

12          A.     That's what -- part of what Mr. Lentini did.

13          Q.     And his conclusions were not helpful to you?

14          A.     No.  He gave us some suggestions for cross-  
15 examination to show the weakness in it, but he could not -- his  
16 report and his comments didn't make him a helpful witness on  
17 the topic.

18          Q.     Let's talk about -- did that -- I'm sorry, his name  
19 is Mr. Lantini?

20          A.     Lentini, I believe it's L-E-N-T-I-N-I.

21          Q.     Did Mr. Lentini provide opinions regarding the cause  
22 of the fire?

23          A.     I'm sorry, I can't remember.

24          Q.     Did he provide opinions regarding the duration of the  
25 fire?

1           A.    He may have.

2           Q.    The intensity of the fire?

3           A.    Yes.

4           Q.    Did you consult with Mr. Lentini or anyone else  
5 regarding impeaching or attacking the State's, what I'll call  
6 their comparable models --

7           A.    Yes.

8           Q.    -- of the fire?

9           A.    Yes.

10          Q.    Was that Mr. Lentini who you hired to do that?

11          A.    It was Mr. Lentini, and there was another gentleman  
12 that Mr. Steel found -- I apologize, I can't remember his name  
13 -- we were attempting to raise the issue of Mr. Coffin's watch  
14 and the time that the watch had stopped, and trying to  
15 extrapolate the timeline from that, and he did some  
16 experimenting for us.

17          Q.    Okay.

18          A.    That did not turn out to be helpful.

19          Q.    But with respect to the models, I guess to comparable  
20 fires, that the State presented at trial, they had a witness  
21 named Mr. Grove. Do you recall Brian Grove?

22          A.    I do.

23          Q.    With respect to attacking his testimony, did you  
24 consult an expert to -- to potentially testify that Mr. Grove's  
25 models would either be inaccurate or irrelevant?

1           A.    I -- I believe we consulted with Mr. Lentini about  
2 Mr. Grove's anticipated testimony. I believe so.

3           Q.    And you also found that to be not helpful?

4           A.    Correct, except for the suggestions that he made  
5 about cross-examining Mr. Grove. And we may have gotten input  
6 from the gentleman I just referred to that Mr. Steel hired. I  
7 can't remember.

8           Q.    Did you speak with Mr. Grove or any other of the  
9 State's fire experts prior to trial?

10          A.    I don't remember.

11               MR. ABT: One moment, Your Honor.

12                       [Brief pause.]

13          Q.    Did Mr. Lentini provide you a report?

14          A.    I think he did, a short report.

15          Q.    Do you know what you did with that?

16          A.    What I did with it?

17          Q.    Would it have been part of your file?

18          A.    Should be.

19          Q.    Did you have conversations with Mr. Davis regarding  
20 Mr. Lentini's filing -- findings?

21          A.    I'm sorry, I can't remember. I'm sure we did.

22          Q.    Did you consider speaking with another expert that  
23 could have been more helpful?

24          A.    I don't remember.

25          Q.    Did you in fact consult with another expert after Mr.



1       Lentini that could have provided more assistance or more help?

2           A.     Other than the gentleman I referred to that Mr. Steel  
3       consulted with, I don't think so.

4           Q.     Did you do anything to investigate whether the police  
5       checked Mr. Davis' clothes or skin for the presence of  
6       accelerants?

7           A.     Did I do anything --

8           Q.     Did you hire any experts or investigators to  
9       determine whether the police checked Mr. Davis' clothes for the  
10      presence of accelerants?

11          A.     I don't think so. I think -- I think Detective  
12      Chambers said they didn't, but I can't swear to that.

13          Q.     Well, you understand that Mr. Davis was accused of  
14      burning down Mr. Coffin's house; right?

15          A.     Yeah, I'm aware of that.

16          Q.     And are you aware that an arson investigator could  
17      tell you things like handling gas or other accelerants is  
18      detectable after the fact?

19          A.     Conceivably, yes.

20          Q.     Through odor or other means?

21          A.     Sure.

22          Q.     What about through contact transfer, are you aware of  
23      that?

24          A.     Sure.

25          Q.     So it would have been important and necessary to

1 attack the State for not determining whether Scott had handled  
2 gasoline right after the fire?

3 A. Could have been.

4 Q. Well, when you say it could have been, how could it  
5 not have been?

6 A. You want my opinion?

7 Q. Sure.

8 A. The problem is that he was the victim of an arson as  
9 well and came into contact with accelerants and fire and smoke.  
10 So whether it would have been determinative of anything or not,  
11 didn't strike me as it would.

12 Q. Well, you brought up an interesting point that it may  
13 not have been -- since Scott was alleging that someone came and  
14 lit a fire at his house, that was part of your defense;  
15 correct?

16 A. Yes, and I believed him.

17 Q. And so if you had gotten someone to make that  
18 determination that Scott did not evoke gasoline or accelerants,  
19 then that could help explain that someone else had set the fire  
20 at Scott's house; correct?

21 A. Theoretically, yes.

22 Q. Let me ask you about -- do you remember there being  
23 torn clothing from Mr. Davis' house?

24 A. I remember there being a swath maybe of clothing on  
25 the back fence. Is that what you're referring to?

1 Q. That's what I'm referring to.

2 A. Yes.

3 Q. And tell us what, so that the Court understands, what  
4 was the importance of that clothing?

5 A. We -- it was part of our defense based on what Mr.  
6 Davis told us, that the person who set the fire at his house  
7 shot at him and ran out of his backyard and had to go over or  
8 by a fence in the back of the property, and there was a little  
9 torn piece of clothing on the back fence.

10 Q. Was that one of the items that the State lost?

11 A. Yes. Or didn't process, I can't remember which it  
12 was, but we thought it was significant.

13 Q. And are you aware that items of clothing are  
14 traceable?

15 A. Yes.

16 Q. You can test them for fibers?

17 A. Yes.

18 Q. You can test them for DNA?

19 A. Yes.

20 Q. Did you consider retaining an expert prior to the  
21 evidence being lost -- did you consider retaining an expert to  
22 test that piece of clothing?

23 A. Yes. But we never got the chance because they didn't  
24 have it. We discussed the possibility of getting an expert,  
25 yes.

1           Q.    So by the time you thought about getting an expert,  
2 the State already lost the clothing; is that your testimony?

3           A.    Yes.

4           Q.    Do you recall a witness at trial named Bernadette  
5 Davy?

6           A.    I do.

7           Q.    Who is she?

8           A.    She worked for the Crime Lab and I think she was the  
9 firearms expert.

10          Q.    At the GBI?

11          A.    Yes.

12          Q.    Do you remember her testimony or portions of it?

13          A.    Vaguely, yes. I think Mr. Steel cross-examined her,  
14 prepared for her cross-examination, but I think she basically  
15 testified that the picture of the gun and the picture of the  
16 bullet and the magazine, or whatever it was, was consistent  
17 with the cause of death.

18          Q.    And did you ever consider attacking her  
19 qualifications as an expert or her credibility?

20          A.    No. Did we consider it? For a split second, because  
21 at that point in time we believed her to be unassailable.

22          Q.    Did you ever think about subpoenaing her personnel  
23 file --

24          A.    No.

25          Q.    -- to see if there was anything in it?

1           A.     No.

2           Q.     Well, I'm going to jump forward for a minute. I've  
3 asked you that question with respect to trial. Let's -- I'm  
4 going to ask you the same question with respect to the motion  
5 for new trial and the appeal. Did you ever consider  
6 investigating her personnel file at that point?

7           A.     No, sir.

8           Q.     Did you ever receive any documentation, even after  
9 the trial, even after the appeal, did you ever at any time ever  
10 receive any documentation from the Fulton County D.A.'s Office  
11 disclosing to you anything regarding Ms. Davy's personnel file  
12 or disciplinary history?

13          A.     I don't think so. I know about it, but I don't think  
14 it was provided by the State.

15          Q.     How do you know about it?

16          A.     I think I read it in the newspaper.

17          Q.     Okay. So the Fulton County D.A.'s Office to this day  
18 has never produced to you any documentation regarding her  
19 discipline?

20          A.     Not to me.

21          Q.     Still talking about the trial, were there significant  
22 issues regarding the audiotaped statement that Mr. Davis gave  
23 to the police?

24          A.     When you say significant issues, I raised -- I tried  
25 to keep it out of evidence.

1           Q.    What else were the factual or legal issues that you  
2 encountered with respect to that audiotaped statement?

3           A.    That's sort of a broad question. We tried to keep it  
4 out because it wasn't helpful.

5           Q.    Did you become aware at some point that Mr. Davis  
6 believed there were two tapes of his statement, not just one?

7           A.    Not until after the trial.

8           Q.    So at trial Mr. Davis didn't communicate to you or  
9 tell you that he thought there was more than one tape?

10          A.    I don't think so.

11          Q.    Did you listen to the audiotape?

12          A.    Many times.

13          Q.    Do you recall during the tape hearing Detective  
14 Chambers tell Detective Walker to turn the tape over?

15                MS. GALLOW: Objection, Your Honor. Again, counsel  
16 is leading his witness. The question would be, "What did  
17 you hear on the tape?" rather than telling him what was on  
18 the tape, Your Honor.

19                THE COURT: Try not to lead your witness, counsel.

20          Q.    What did you hear with respect to the tape when you  
21 turned it over?

22          A.    It's my recollection that the tape was stopped and  
23 turned over. And Mr. Davis was emphatic that the tape was  
24 stopped.

25          Q.    When you listened to the tape, as you said you

1       listened to it many times --

2           A.     I did.

3           Q.     -- could you hear the tape being turned over?

4           A.     I don't remember, I'm sorry. I don't remember.

5           Q.     Could you hear multiple, not just the tape being  
6       turned over, I'm not talking about that stop, I'm talking about  
7       during other portions of the tape, did you hear any other  
8       anomalies, starts and stops? I realize you're not an audio  
9       expert and I'm not asking you to give an expert opinion. I'm  
10      asking just as a lay person, did you hear other strange things  
11      that raised your attention?

12          A.     I heard sounds. As to what they were, I don't know.

13          Q.     At what point -- let me rephrase that. Did Mr. Davis  
14      also bring to your attention, not moving off the issue of there  
15      being two tapes, did Mr. Davis bring to your attention that  
16      there were multiple times, five or half a dozen times, where  
17      Detective Chambers would stop the tape during the interview and  
18      then go off the record, so to speak, and say things to Mr.  
19      Davis?

20          A.     Mr. Davis was emphatic, I don't remember how many  
21      times, Mr. Davis was emphatic that Detective Chambers stopped  
22      the tape and threatened him while the tape was not on.

23          Q.     And Mr. Davis told you that prior to the trial?

24          A.     Absolutely.

25          Q.     He told you that back in 1996; correct?

1           A.    Yes.

2           Q.    So if Mr. Davis was correct, that would have been a  
3 pretty crucial thing to prove; correct?  Is that right?

4           A.    Yes.  I think we did prove it.

5           Q.    Well, did you have the audiotape analyzed or examined  
6 by an expert witness?

7           A.    No.

8           Q.    Did you -- what did Detective Chambers testify to, if  
9 anything, regarding this stopping and starting of the tape?

10          A.    He admitted he stopped the tape.

11          Q.    How many times?

12          A.    Oh, I don't remember, but I know he admitted stopping  
13 the tape.

14          Q.    Did he admit stopping the tape just to turn it over?

15          A.    That may well have been his testimony.  And I  
16 remember cross-examining him and alleging that he threatened  
17 Mr. Davis while the tape was stopped, as Mr. Davis told me he  
18 did, and he denied that.

19          Q.    He denied threatening him?

20          A.    Yes.

21          Q.    He didn't admit to threatening him?

22          A.    He did not admit to threatening him.  He admitted  
23 only to stopping the tape.

24               MR. ABT:  Just a moment, Your Honor.

25                               [Counsel confer.]



1           Q.    Was there also testimony at trial about whether or  
2 not there was more than one tape?

3           A.    I don't remember. We were never told there was a  
4 second tape, if there was one.

5                       [Counsel confer.]

6           MR. ABT: Sorry, Your Honor. Just a moment.

7                       [Brief pause.]

8           MR. ABT: Judge, if we could take like a two minute  
9 break, I'm sorry.

10          THE COURT: Okay.

11          MR. ABT: I just need to -- oh, we've got it.

12                       [Brief pause.]

13          MR. ABT: If I could approach, Your Honor.

14          THE COURT: Yes, sir.

15          Q.    Mr. Morris, I refer you to a portion of the trial  
16 transcript, specifically Page 2749.

17          A.    Yes, sir.

18          Q.    If you'll read starting on Line 16.

19          A.    Sixteen. Yes, sir, I see that.

20          Q.    Does that refresh your recollection with respect to  
21 Detective Chambers' testimony?

22          A.    Yes. I mean, he -- he denied that anything occurred  
23 that wasn't on tape.

24          Q.    So he indicated that everything was on tape?

25          A.    Yes.

1 Q. That the tape was continuous?

2 A. No. My recollection is he admitted on cross-  
3 examination at some point, maybe during the motions hearing, I  
4 think -- my recollection is he admitted stopping the tape. If  
5 I'm wrong, I'm wrong, but --

6 Q. We're trying to --

7 MS. SHEIN: I'm sorry, may I approach just to see  
8 what pages he has?

9 THE COURT: Yes, ma'am.

10 [Counsel confer.]

11 Q. I'm going to ask you to look again at what is Page  
12 2673 of the trial transcript. Just read that top portion there  
13 at the page.

14 A. [Witness complied.] Yes, sir.

15 Q. Does that refresh your recollection sufficiently  
16 regarding Detective Chambers testimony about when and how the  
17 tape was stopped?

18 A. Well, I see what he says here, and that's consistent,  
19 I think, with what I've testified.

20 Q. Well, does he indicate stopped -- the tape was  
21 stopped one time to turn it over?

22 A. Yes.

23 Q. He indicates otherwise the tape was not stopped, it  
24 was continuous?

25 A. He says he doesn't -- "There's another reference to

1 the tape stopping as well, do you recall that?" "No, sir."

2 Q. He says he doesn't recall stopping the tape  
3 otherwise?

4 A. Correct.

5 Q. Okay. So he stopped it in order to turn it over?

6 A. That's what he says here, yes.

7 Q. Okay. And so -- and you mentioned that after trial  
8 an issue came up regarding there being a second tape; is that  
9 what you said earlier?

10 A. No.

11 Q. When did -- did that issue ever come up in your --

12 A. No.

13 Q. Did you, after trial, consider having an expert, an  
14 audio engineer, analyze the tape?

15 A. No.

16 Q. And you did not, in fact, ever have anyone analyze  
17 the tape?

18 A. I don't think so.

19 [Counsel confer.]

20 Q. Have you ever been involved in another case where the  
21 -- where an audiotape has been tampered with or altered?

22 A. I think we've investigated that in another case, yes.

23 Q. Have you ever hired an expert in another case to  
24 analyze an audiotape?

25 A. Yes.

1 Q. So you're familiar with that process?

2 A. I know it can be done, yes.

3 Q. I want to move on now to the motion for new trial and  
4 appeal. In the motion for new trial were you present at that  
5 hearing or those hearings?

6 A. Yes.

7 Q. And you were also, I think you've already testified,  
8 you remained on as an attorney for the appeal?

9 A. I did, yes.

10 Q. How did you present that issue to the Georgia Supreme  
11 Court in the appeal, the issue of the missing or lost evidence?

12 A. How did we present it?

13 Q. Do you know what legal arguments were raised?

14 A. Whatever's in the brief.

15 Q. Do you have any recollection of that?

16 A. Yeah, I mean, I think it was primarily --

17 Q. I'll show you the brief.

18 A. -- the prejudice that we had argued previously on the  
19 grounds we had argued previously. The brief was a  
20 collaboration of Mr. Samuel, Mr. Steel, and Mr. Morris.

21 MR. ABT: Judge, if I can approach him again?

22 THE COURT: Sure.

23 Q. Mr. Morris, I'm going to show you what's been marked  
24 as P-49 in this case.

25 A. Yes, sir.

1 Q. And ask if you're familiar with that document.

2 A. I believe that's our brief to the Supreme Court.

3 Q. Okay. And if you turn to Page 37, please.

4 A. Excuse me, sorry.

5 Q. You're fine.

6 A. Thirty-seven, yes, sir.

7 Q. Okay. Do you recall which -- did you author certain  
8 portions of the brief?

9 A. I contributed to it, yes.

10 Q. Which of the -- on Page 37 the brief is broken down  
11 using Roman Numerals. Which portions did you have a  
12 significant role in?

13 A. I think --

14 Q. Or let me rephrase. Was the work on the brief  
15 between you and Mr. Samuel and Mr. Steel, how was it divided  
16 up? If you could tell us how --

17 A. I think each of us took primary responsibility for  
18 the initial draft of one or more items, and then they were  
19 circulated among the group. And I could be wrong, but I think  
20 Mr. Samuel finalized everything. I know I took part in  
21 discussing, researching all of the issues. I think I probably  
22 did at least the initial drafting on IV and V.

23 Q. Did you have a significant role in the missing  
24 evidence?

25 A. I believe I did.

1 Q. Okay. I want to draw your attention to that.

2 A. Well, that would be VII as well.

3 Q. That's right, Portion VII. So now I'm going to ask  
4 you to take a look at Page 1 of 3 for Portion VII.

5 A. Okay.

6 Q. Did you do the initial draft of this portion or did  
7 Mr. Samuel or did Mr. Steel; do you know?

8 A. I can't be positive, but I think it was Mr. Samuel.

9 Q. But you had input and you had a role -- you played a  
10 role.

11 A. Yes, absolutely.

12 Q. A significant role.

13 A. Yes, sir.

14 Q. The -- on Page -- on Pages 116 and 117, there is a  
15 list of items of evidence that are alleged that the State lost.

16 A. Yes.

17 Q. Does that refresh your recollection as to how many  
18 items you are alleging the State -- how many items of evidence  
19 the State lost?

20 A. Yes.

21 Q. And how many items are there?

22 A. A minimum of 55.

23 Q. There are also some sub-items; correct?

24 A. Yes.

25 Q. So it actually ends up being a lot more than 55

1 because, for example, Item 6 has six items with it.

2 A. Correct.

3 Q. Did you ever consider, rather than just listing the  
4 items and making arguments, did you ever consider going and  
5 obtaining, subpoenaing or sending an open records request to  
6 obtain the actual Standard Operating Procedures to show the  
7 Supreme Court that those procedures were violated habitually  
8 and regularly in losing the evidence?

9 A. I don't remember having that thought, no.

10 Q. Did you ever consider retaining an expert on appeal  
11 to provide affidavit or other testimony to support the  
12 proposition that certain items of evidence would have an  
13 apparent exculpatory value?

14 A. I just don't remember doing that, no.

15 Q. Let me talk about the gas can again. The gas can is  
16 one of the items that was lost; correct?

17 A. Yes.

18 Q. And there are actually two gas cans in the case, but  
19 I want to focus on the one from the Porsche.

20 A. There may have been three, but go ahead.

21 Q. The one that's found -- there's a gas can that was  
22 found in the burnt out Porsche?

23 A. Yes.

24 Q. What is your knowledge with respect to whether that  
25 piece of evidence could have been traced?

1           A.     Traced?

2           Q.     Traced.  Let me further specify what I mean by traced  
3 before you answer.  In examining the gas can from either a  
4 serial number or other clues or evidence on the gas can,  
5 determining where it was bought, on what date it was bought,  
6 and bought by whom.

7           A.     That's theoretically possible, I believe.

8           Q.     Did you consider consulting with an expert on that  
9 issue?

10          A.     No.  I felt that the prejudice from it not being  
11 there was obvious and didn't need expert testimony to support  
12 it.  I think we made that argument.

13          Q.     You've also testified that Ms. Bruton at trial  
14 testifies that the gym bag looks like Scott's.  And there's no  
15 objection made at that point.  We're going to get to the  
16 continuing objection in a moment.  But did you consider  
17 investigating how many different companies manufactured gym  
18 bags during the Olympics?

19          A.     No.

20          Q.     Did you consider introducing into evidence at trial  
21 or on appeal that research could have -- or investigation could  
22 have shown how many bags like that one were produced during the  
23 Olympic period?

24          A.     No.

25          Q.     When I say the Olympic period, I mean the Olympics



1       happening in Atlanta in 1996, and the years prior to that  
2       building up, getting ready for the Olympics.

3           A.     The answer is still no.

4           Q.     Do you know what tests, if any, the State did on the  
5       Olympic bag prior to it being lost?

6           A.     I don't recall. I don't recall getting any results  
7       on any tests of the bag.

8           Q.     Okay. Are you aware of a technology called Touch  
9       DNA?

10          A.     Aware, yes. Can I define it for you and explain it?  
11       No.

12          Q.     Let me see if I can --

13          A.     Go right ahead.

14          Q.     -- figure out what your understanding of it is. That  
15       when someone touches something, not only would it be of a  
16       fingerprint, but then you actually leave some DNA material  
17       behind. And then that piece of material can be tested to  
18       determine whose DNA it is.

19          A.     Agreed, yes.

20          Q.     You're aware of that?

21          A.     I am.

22          Q.     Were you aware of that back in 2006 when the trial  
23       took place?

24          A.     Yes. Maybe not that particular -- I don't know if I  
25       would have called it that. Did I understand there was a

1 possibility of taking something to determine if there was a  
2 fingerprint or DNA on it? Yes.

3 Q. So was there ever a consideration of prior to the  
4 evidence being -- prior to items of evidence being lost, having  
5 them tested for that purpose?

6 A. No, because the case was dismissed.

7 Q. When it was reopened, did you consider hiring an  
8 expert to testify that those items of evidence could have been  
9 tested for that had the State not lost them?

10 A. No.

11 Q. In arguing the -- in the motion for new trial on  
12 appeal that the missing evidence, lost evidence, destroyed  
13 evidence, that it prejudiced Scott's trial -- Mr. Davis' trial  
14 -- and I'll ask you to refresh your memory with the brief.

15 A. Sure.

16 Q. Did you make any arguments other than the Fifth, the  
17 Sixth, and the Fourteenth Amendment arguments?

18 A. There's more than that -- there are cases cited in  
19 addition to those statutes, if that's your question.

20 Q. Those cases rely on those constitutional arguments;  
21 correct?

22 A. If you say so. I mean --

23 Q. Are you familiar with the Youngblood decision?

24 A. Yes.

25 Q. Are you familiar with the Trombetta decision?

1           A.    I am.

2           Q.    And so those -- those cases that you're talking about  
3 are based upon violations of Sixth Amendment rights and  
4 Fourteenth Amendment rights?

5           A.    You know, I keep insisting the Fifth is in there  
6 somewhere.

7           Q.    Let's just focus on the Sixth because the Sixth  
8 Amendment contains the Confrontation Clause; correct?

9           A.    Yes.

10          Q.    Okay. Did you ever consider on appeal making any  
11 arguments that losing or destroying this evidence also violated  
12 Mr. Davis' legal rights with respect to a variety of Georgia  
13 statutes that were not constitutional issues?

14          A.    I don't know.

15          Q.    Do you know whether you included it in the brief?

16          A.    If they're not here, they're not here, but I don't  
17 know.

18          Q.    And with respect to --

19          A.    I mean, the key issue as we saw it was due process.

20          Q.    And in arguing due process, did you consider showing  
21 the Supreme Court, not in front of a jury anymore, showing the  
22 Supreme Court that the State violated a particular -- going  
23 through a process where you would show not just that the  
24 evidence was lost and that that violated due process, did you  
25 ever consider going through and showing the Supreme Court there

1 were procedures that the government agency, for example, the  
2 GBI, had in place, Standard Operating Procedures, that they  
3 violated those Standard Operating Procedures by losing or  
4 missing the evidence, and then hiring an expert to present what  
5 apparent exculpatory value that evidence could have had to  
6 demonstrate and ultimately come to the conclusion of bad faith?

7 A. I'm confident that it was argued. Did we ever  
8 discuss or did I consider hiring an expert to assist in that?  
9 No.

10 Q. And you didn't consider or submit those procedures as  
11 well; is that --

12 A. I don't remember. They may well have been in the  
13 motion for new trial and then as a part of the record to the  
14 Supreme Court. I just don't remember.

15 Q. Did you ever send any subpoenas or open record  
16 requests for Standard Operating Procedures to the GBI?

17 A. You'll have to ask Mr. Samuel. I know he handled  
18 that issue on the appellate side.

19 THE COURT: Mr. Abt, can I just get a general idea of  
20 how much longer you're going to be on direct?

21 MR. ABT: It's not going to be much longer. I'm  
22 getting to the end.

23 THE COURT: Okay.

24 MR. ABT: I've skipped through a lot based on -- so I  
25 think maybe we've got -- actually, Judge, if we could take

1 a ten minute break I think we'll probably have about  
2 another fifteen minutes after that. Would that be okay?

3 THE COURT: Sure. And you're -- you've got one more  
4 witness today? What time -- is that witness here now?

5 MR. ABT: Mr. Steel should be here at 1:00, Judge.

6 THE COURT: Okay.

7 MR. ABT: We tried to estimate that Mr. Morris would  
8 take most of the morning and that Mr. Steel would take  
9 most of the afternoon, so --

10 THE COURT: That's fine. So if you actually -- if we  
11 finish the cross before 1:00, then we get lunch.

12 MR. ABT: That's right.

13 THE COURT: Okay.

14 **[Brief break.]**

15 \* \* \*

16 MS. SHEIN: Your Honor, at this time we would admit  
17 Exhibit -- without objection, I believe -- Exhibit P-1,  
18 which is the facts that Mr. Denson, Melvin Denson,  
19 testified earlier -- I think it was on Monday -- relating  
20 to the Standard Operating Procedure BPSSOP5.1, and that he  
21 provided that to us with a cover letter pursuant to the  
22 request of both parties --

23 THE COURT: Okay.

24 MS. SHEIN: -- or agreement of both parties, I should  
25 say. So if I may admit it now? Any objection?

1 MS. GALLOW: No objection.

2 THE COURT: Okay. Then it is now -- it's P-1 and it  
3 is admitted.

4 MS. SHEIN: Okay. And yeah, here's the little note,  
5 too, so should I put this on top of that?

6 COURT REPORTER: That would be great.

7 MS. SHEIN: Okay.

8 [Off the record comments.]

9 **[WHEREUPON, Petitioner's Exhibit Number 1 was tendered and**  
10 **admitted into evidence without objection.]**

11 MS. SHEIN: I appreciate it. Thank you, Your Honor.

12 THE COURT: And Mr. Abt, we're back with you whenever  
13 you're ready.

14 MR. ABT: Okay. Thank you, Your Honor.

15 **BY MR. ABT: [Resuming]**

16 Q. Mr. Morris --

17 A. Yes, sir.

18 Q. -- I need to follow up on a few things we've already  
19 discussed. You mentioned earlier a Mr. Lentini who you  
20 consulted regarding some of the fire evidence in the case.  
21 Would you have kept his report or other documentation regarding  
22 his services on any computers that you own?

23 A. That's very possible, yes.

24 Q. Okay. Would there be any problem for you looking for  
25 that and reproducing that for us?

1           A.    Yeah.

2           Q.    There would be a problem?

3           A.    Yes.

4           Q.    Okay. Tell me what that is.

5           A.    During the course of my representation of Mr. Davis,  
6 he personally and with our -- one of our secretaries, encrypted  
7 or protected certain of his files with passwords. I don't know  
8 how to get in them.

9           MS. SHEIN: Just a moment, Your Honor.

10          MR. ABT: I'm going to need a break again. Sorry,  
11 Judge.

12                               [Counsel confer.]

13          Q.    Was that, those encryptions, was that done for the  
14 entirety of all of the Davis files on your computer?

15          A.    No.

16          Q.    So it's some certain files but not others?

17          A.    Correct.

18          Q.    Could you search -- well, I guess it's two questions  
19 then. Can you search the ones that are non-crypted to  
20 determine if you can find Mr. Lentini's materials?

21          A.    Well, sure, I'll be glad to.

22          Q.    Okay. And then with respect to the ones that are  
23 encrypted, if we can assist you, could we assist you in  
24 unencrypting them so that we can then try and --

25          A.    Absolutely.

1 Q. -- retrieve those?

2 A. Certainly.

3 Q. Thank you.

4 A. I'm going to assume -- I don't know this to be a fact  
5 -- but I'm assuming there is a subfile in my handwritten hard  
6 files with a John Lentini name on it.

7 Q. You're talking about not a computer file, but an  
8 actual paper file?

9 A. Correct.

10 Q. Are you certain of that?

11 A. Oh, no. No.

12 [Brief pause.]

13 MR. ABT: Your Honor, if I could approach Mr. Morris,  
14 please.

15 THE COURT: Yes, sir.

16 Q. Mr. Morris, I'm going to direct your attention to  
17 what has been marked as P-79 and ask you to review that  
18 document for a moment.

19 A. [Witness complied.] Yes, sir.

20 Q. Are you familiar with this document?

21 A. I think so. I think this is the tape-recorded  
22 interview of Mr. Davis by the police.

23 Q. It is a transcript of that.

24 A. Yes, sir. It's not a -- or a partial transcript.

25 Q. Well, what makes you think it's partial?



1           A.    Well, there's some blanks in it, so I think we  
2           probably have a copy where we tried to fill in the blank with  
3           what we thought we heard.

4           Q.    In other words, when you say "blanks," there are  
5           places where it's unclear what is being said, and so there's  
6           just a long --

7           A.    Yes. The typist puts a line where I'm assuming the  
8           typist couldn't make out what was being said.

9           Q.    You're not contending that there are missing pages?

10          A.    I don't think so.

11          Q.    You're not -- you're not saying that then?

12          A.    I don't think so, no. I haven't read this entire  
13          transcript, I don't know. But I believe that's what the blanks  
14          represent.

15          Q.    Okay. You've never read the entire transcript or you  
16          haven't read it recently?

17          A.    Just recently.

18          Q.    But you're familiar with the document?

19          A.    Yes.

20          Q.    Was this a document that was produced to you at some  
21          point in discovery?

22          A.    I believe it was. I can't swear to that, but I think  
23          so.

24          Q.    Would it have been a document that you kept and  
25          maintained in the ordinary course of business in conducting

1 your law practice and keeping your files on Mr. Davis' case?

2 A. Absolutely.

3 MR. ABT: Judge, I'm going to ask that the document  
4 be admitted as P-79.

5 MS. GALLOW: Your Honor, the Respondent has no  
6 objection to the document coming in to evidence, but we  
7 would rather -- it doesn't speak to the contents as  
8 provided in this document. We don't have an objection to  
9 it coming in to the record.

10 THE COURT: I'm sorry, I don't quite understand.

11 MS. SMITH: If I may, Your Honor, we don't have an  
12 objection to the document coming in as information  
13 provided to Mr. Morris and something that's available to  
14 him to utilize, but I think we would object to the  
15 document being offered for the truth and the contents  
16 itself.

17 MR. ABT: I'm going to ask him questions about the  
18 document, but I'm seeking to admit it as an exception to  
19 the Hearsay Rule based upon the fact that he keeps -- he  
20 said he absolutely keeps and maintains it as a business  
21 record.

22 THE COURT: Okay. Well, that's what he received.  
23 Did that -- I'm just curious, did it come in at trial.  
24 Was the tape heard at trial?

25 MR. ABT: The tape -- interesting, Judge, a copy of

1 the tape was played at trial on a disk, not the original.

2 THE COURT: Okay. And did the jury have a  
3 transcript?

4 MR. ABT: No.

5 THE COURT: No, okay. All right.

6 **[WHEREUPON, Petitioner's Exhibit Number 79 was tendered**  
7 **and admitted into evidence for the record only without**  
8 **objection.]**

9 THE COURT: And I'm not sure -- Ms. Gallow, are you  
10 going to be cross-examining while we -- we flip-flipped  
11 around, anybody's been making objections --

12 MS. SMITH: Right.

13 THE COURT: -- so as the questions come out, if  
14 there's an objection, feel free, okay?

15 MS. GALLOW: Thank you, Your Honor.

16 **BY MR. ABT: [Resuming]**

17 Q. I'm going to draw your attention to -- there's a page  
18 that's actually paper clipped.

19 A. Okay. And let me correct one thing?

20 Q. Sure.

21 A. If this is the transcript we were provided, there  
22 would be a copy in my file somewhere.

23 Q. I understand.

24 A. Can I swear this is the one they gave us? I don't  
25 know. I mean, I know we made our own. Whether they gave us

1 one, I just can't remember.

2 Q. I'm going to direct your attention to --

3 MR. ABT: Actually, hold on one second, Your Honor.

4 [Counsel confer.]

5 MS. SHEIN: Your Honor, we need to take a moment.

6 Sorry.

7 [Off the record.]

8 **BY MR. ABT: [Resuming]**

9 Q. Mr. Morris, we established that this would be -- had  
10 been received in discovery and kept as a business record. I  
11 want to refer you to I guess what is marked in the exhibit as  
12 -- there are really not page numbers on here, but there is a  
13 page that's tabbed off.

14 A. I see, yes.

15 Q. Okay. Do you see where it says "End of Side A, Tape  
16 #2," "Beginning of Side B, Tape #2"?

17 MS. SMITH: Hang on one second while I find it  
18 quickly.

19 A. I do see that. This leads me to believe I've never  
20 seen this before.

21 Q. Let me ask you again. Was this transcript produced  
22 to you -- excuse me -- was this transcript produced to you as  
23 part of discovery in the case?

24 A. I can't remember. I think it looks familiar, but I  
25 don't -- you've pointed me to this particular page where it

1 says Tape #2. I don't ever think I -- I don't recall a  
2 recollection of believing there was more than one tape.

3 Q. Okay. Is it possible that page wasn't there when you  
4 got it in discovery?

5 A. It's possible.

6 Q. Well --

7 A. It's either in my file or it's not. I can't tell  
8 you.

9 Q. If you received this --

10 A. Yes.

11 Q. -- in discovery, and it said Tape 2, would -- did you  
12 ever ask for a second tape from the State?

13 A. I can only tell you that I asked for the tape  
14 recordings of any interview or statement made by Scott Davis.

15 Q. And how many tape recordings did you receive from  
16 this tape?

17 A. To my recollection, it was one and only one.

18 Q. So the fact that this says Tape 2, you did not go  
19 back and request any other tapes?

20 A. I don't think so.

21 Q. And you did not investigate whether or not there was  
22 a second tape?

23 A. I can't tell you I did or didn't. All I know is what  
24 I asked for. But as I look at this and it says Tape #2, that  
25 seems surprising to me today.

1           Q.    Okay.  You mentioned earlier you remembered that  
2 there was an interview of Megan Bruton, you interviewed her.

3           A.    Yes, sir.

4           Q.    And in interviewing her, not what she said at trial,  
5 but in interviewing her, did she give you an order of the phone  
6 calls that took place that evening on December 10<sup>th</sup> that she  
7 made?

8           A.    I don't know.

9           MS. GALLOW:  Your Honor, if I may interject one brief  
10 moment.  Based on the fact that counsel has testified that  
11 he has not actually seen this, and he furthermore said at  
12 the beginning of his testimony that this probably was in  
13 his file and that he did recognize it and he subsequently  
14 changed his testimony to say that I don't recognize this,  
15 it may not have been in my file; we would object to this  
16 portion of this document at this time.

17          THE COURT:  Yes.  He also said something in between.  
18 I think he originally said he recognized it, then I -- I'm  
19 not sure, Ms. Gallow, I think you then had an objection --  
20 then he said something else that -- but there wasn't  
21 another objection.  I can get Beth to repeat that.  But  
22 I'm now a little uncomfortable with this and -- because  
23 I'm not sure that Mr. Morris actually can identify it.

24          MS. GALLOW:  And, furthermore, Your Honor, we don't  
25 know where this came from --

1 THE COURT: Right.

2 MS. GALLOW: -- if he can't identify this document.

3 THE COURT: Right. Now is there an objection to this  
4 being admitted just for the record only?

5 MS. GALLOW: It can be for the record only, Your  
6 Honor --

7 THE COURT: Okay.

8 MS. GALLOW: -- but we would object to this document  
9 based on the fact that Mr. Morris cannot identify it, and  
10 we, furthermore, do not know where this document came  
11 from.

12 THE COURT: Okay. Then I'm going to admit it for the  
13 record only.

14 MR. ABT: Judge, can I further voir dire Mr. Morris  
15 about --

16 THE COURT: Sure. And Ms. Gallow, I'll be happy to  
17 let you question him as well.

18 MS. GALLOW: Thank you, Your Honor.

19 **BY MR. ABT: [Voir dire.]**

20 Q. Referring to P-79 --

21 A. Yes, sir.

22 Q. -- you are familiar with the document as a whole?

23 A. Do me a favor?

24 Q. Yes.

25 A. In all fairness, you have my files, and whatever I

1 was given in the way of a typed transcript of the recorded  
2 interview of Scott Davis would be in my file.

3 Q. Okay.

4 A. And if I can see what that is and compare it to this,  
5 I can tell you if I've ever seen this before or not.  
6 Otherwise, I can't tell you.

7 Q. Okay, we can do that. We're going to need -- I'm  
8 going to do it but --

9 MR. ABT: Judge, I would just ask then, maybe after  
10 I'm done with other examination, we'll compare the -- to  
11 hold off on ruling whether or not the exhibit is admitted,  
12 only for the record or for purposes of evidence until we  
13 can have him look at his own files.

14 THE COURT: Okay. Well, are the files here?

15 MR. ABT: Ms. Shein just went to get them, his entire  
16 case file.

17 THE COURT: Okay. I don't --

18 MR. ABT: I mean, it's where it's from.

19 THE WITNESS: Well, if you tell me that, I'll accept  
20 it then.

21 MR. ABT: Yeah, but I can't testify.

22 THE COURT: Okay. Well, then, we'll just move on. I  
23 just -- I don't know how voluminous the case file is, how  
24 well organized it is. Nothing against you and your  
25 organizational skills, Mr. Morris, but I'm concerned --



1           you know, I don't want to keep Mr. Morris here for the  
2           next couple of days while we go through the case file --

3           MR. ABT: I won't.

4           THE COURT: -- so --

5           MR. ABT: I won't.

6   **BY MR. ABT: [Resuming]**

7           Q. Did you try to ever subpoena or obtain the firearm  
8           case file from the GBI?

9           A. I don't recall.

10          Q. What about the latent print case file from the GBI?  
11          Did you ever try to subpoena that?

12          A. I'm not sure it existed. I don't -- I don't think --  
13          the answer is, I don't know, I can't remember.

14          Q. And you didn't retain -- do you know who Alfreddie  
15          Pryor is?

16          A. Yes.

17          Q. Did you -- you didn't retain an expert to review his  
18          work?

19          A. No. We may have spoken with Alfreddie, I can't  
20          recall.

21          Q. At some point, Sheila Ross, who was the assistant  
22          district attorney on the case, informed you that the latent  
23          fingerprint cards had been destroyed; is that correct?

24          A. Someone informed us.

25          Q. If I could approach, Your Honor.

1 A. Yes, sir.

2 Q. I'm going to show you what's been marked as P-80.

3 A. Sure.

4 Q. If you could review that document.

5 A. [Witness complied.]

6 Q. Are you familiar with that document?

7 A. Yes.

8 Q. What is it?

9 A. These are a series of emails between Sheila Ross and  
10 me.

11 Q. And those emails would have been kept and maintained  
12 either in your computer or as a paper file in the ordinary  
13 course of business in your conducting and working on the Scott  
14 Davis case?

15 A. Correct.

16 MR. ABT: Judge, I would seek to admit the email as  
17 Petitioner's Exhibit 80.

18 MS. GALLOW: No objection, Your Honor.

19 THE COURT: Admitted without objection.

20 **[WHEREUPON, Petitioner's Exhibit Number 80 was tendered**  
21 **and admitted into evidence without objection.]**

22 **BY MR. ABT: [Resuming]**

23 Q. And in this email Ms. Ross lets you know -- on what  
24 date is this email?

25 A. The emails are on February 28<sup>th</sup>, 2006.

1 Q. And what does she tell you?

2 A. I ask her what evidence, what physical evidence, is  
3 there still in existence, I want to examine it. She tells me  
4 she gave me a list in a letter and I can call Chris to get more  
5 information. I ask does this mean that the latent fingerprint  
6 cards and the Elias note are gone. And she tells me, "We have  
7 the note. The prints from the Porsche have been destroyed by  
8 DeKalb after your client was eliminated." And she says she'll  
9 check with the lab to see if they have copies of the prints.

10 Q. And that happened in February of '06?

11 A. Correct.

12 MS. GALLOW: Your Honor, I apologize. I just  
13 realized at the top of this email there is a -- it looks  
14 like this has been slightly redacted. At the top of the  
15 email it says, "Not true. APD had the prints in 2005."  
16 I'm not sure if that was in the original document or if  
17 that has been subsequently put on there by counsel, and  
18 I'd object to that portion being introduced into this  
19 exhibit.

20 MR. ABT: We'll redact that. We will redact it.

21 THE COURT: Okay.

22 MS. GALLOW: Thank you, Your Honor.

23 MR. ABT: We'll redact that, for the record.

24 MS. GALLOW: Thank you.

25 MR. ABT: If the State will stipulate otherwise that

1 the document is authentic and admitted.

2 MS. GALLOW: Yeah, I have no objection to the  
3 document --

4 THE COURT: Yeah, it's already -- she's already --

5 MS. GALLOW: She's redacting that portion of it, Your  
6 Honor.

7 MR. ABT: Absolutely.

8 THE COURT: So we'll just make sure it gets redacted.  
9 Thank you.

10 [Counsel confer.]

11 **BY MR. ABT: [Resuming]**

12 Q. Mr. Morris, did you -- you were one of the attorneys  
13 on the appeal?

14 A. On the what?

15 Q. On appeal.

16 A. Yes, sir.

17 Q. Did you raise any issues of ineffective assistance of  
18 counsel?

19 A. No, I didn't.

20 Q. Did you discuss the possibility of raising  
21 ineffective assistance of counsel with Mr. Davis?

22 A. No, I don't think so.

23 Q. Did you consider recusing yourself from the appeal in  
24 order for Mr. Davis to raise ineffective assistance of counsel?

25 A. No.

1 MR. ABT: Judge, I have no other questions for Mr.  
2 Morris but for this issue regarding Plaintiff's -- or  
3 Petitioner's 79. Ms. Shein has indicated to me that we  
4 can get those records and examine Mr. Morris briefly after  
5 lunch, and then get him out of here. Because that's --  
6 there's no other -- I have no other issues to question him  
7 about.

8 THE COURT: Well, I'm a little unclear. Where are  
9 the records now?

10 MS. SHEIN: Your Honor, they're in my office. Mr.  
11 Morris provided me with, I think, twenty-plus boxes of  
12 documents, and I just called my office to have my  
13 associate bring the box with the discovery documents.  
14 There's like five or six of those.

15 THE COURT: Okay. Is there not a way -- because I'm  
16 really not prepared to keep Mr. Morris here all day. So  
17 is there not a way that you can locate whatever was in  
18 your file that's supposed to be this document, let Mr.  
19 Morris see it. If it's the same, then perhaps he can just  
20 submit an affidavit saying it's the same. And if it's not  
21 the same, then --

22 MS. SHEIN: Okay.

23 THE COURT: -- if you feel like you need to question  
24 him, then we'll bring him back on the same day.

25 MS. SHEIN: Right.

1           THE COURT: I mean, do -- I don't know how -- I'm not  
2 exactly sure, or I've got to look here, I don't know where  
3 everybody's office is, but I don't see this as -- y'all  
4 are in Decatur --

5           MS. SHEIN: We're fine. We're close enough to Mr.  
6 Morris we can take care of this.

7           THE COURT: I mean, but I'm talking about bringing  
8 all that paperwork out here, having Mr. Morris stay --

9           MS. SHEIN: Right.

10          THE COURT: -- then to review it here. So you tell  
11 me, Mr. Morris, what you prefer.

12          THE WITNESS: Okay. Judge, I'm fine with what you  
13 just suggested.

14          THE COURT: Okay.

15          THE WITNESS: And what's in my file, if it matches  
16 this, then I've seen it and --

17          THE COURT: Okay.

18          THE WITNESS: -- and if it doesn't match this, then  
19 I've seen something like this.

20          THE COURT: Okay.

21          MS. SHEIN: Great. And there's no objection with  
22 Andy's office about that. And I agree with you, I don't  
23 want to keep him unnecessarily.

24          THE COURT: Okay.

25          MS. SHEIN: And for this item, I'll get back with you

1           and you can --

2           THE WITNESS: Thank you.

3           MS. SHEIN: -- and we'll make it work. Okay. Thank  
4           you, Judge. That's a nice suggestion.

5           THE COURT: Okay. Any cross?

6           MS. GALLOW: Yes, Your Honor.

7                               [Off the record comments.]

8                               **CROSS-EXAMINATION**

9           **BY MS. GALLOW:**

10           Q. Good morning, Mr. Morris.

11           A. Good morning.

12           Q. Now I believe we had touched on your background  
13           experience, so I'm not going to rehash that, but essentially,  
14           you've been practicing for at least 37 years?

15           A. Correct.

16           Q. Primarily handling criminal defense matters?

17           A. Yes.

18           Q. You've handled at least a dozen jury trials?

19           A. More.

20           Q. More than that. Felony -- both felony -- any death  
21           penalty type cases?

22           A. Yes, ma'am.

23           Q. I know we had gone over your standard practices in  
24           such as the case of Scott Davis. I don't think we specifically  
25           touched on exactly what you did in this case, so I'd like to

1 just briefly touch on that at this time.

2 You said that your standard practice was you generally go  
3 over discovery, you said you usually discuss the case with the  
4 State, interview various witnesses. With regard to this case,  
5 you were retained to represent Mr. Davis; is that correct?

6 A. Correct.

7 Q. And at the time you were retained to represent him, I  
8 believe you said it was pretty much right after he was arrested  
9 at the time?

10 A. Before he was arrested.

11 Q. Before he was arrested. And this was the second  
12 arrest?

13 A. I'm sorry, I was retained in 1996, before his arrest  
14 -- is -- no? I'm sorry, I take that back. In '96 I think was  
15 after his arrest. In 2006 it was before he was taken into  
16 custody.

17 Q. And you began representing him back in '96?

18 A. Yes.

19 Q. Okay. And once you began representing him, you  
20 subsequently got the initial charges against him dismissed in  
21 the latter part of '97; is that correct?

22 A. Yes, ma'am.

23 Q. When you were again retained to represent him again  
24 in about 2004, 2005, what did you specifically do to prepare  
25 and investigate this case?



1           A.    I retrieved my old file. I began discussing strategy  
2 with co-counsel Mark Kadesh. We thought through what needed to  
3 be done and divided up responsibility for doing it, hired an  
4 investigator, met with Scott Davis after getting him released  
5 on bond, and worked very hard preparing for trial.

6           Q.    And during your preparations for trial, did you have  
7 any contact with Scott Davis?

8           A.    Yes, constantly.

9           Q.    Could you approximate the amount of times that you  
10 actually had time to discuss the case with him?

11          A.    He was an active client.

12          Q.    Is there any way you could approximate the number of  
13 times you discussed anything with him?

14          A.    Too numerous to count.

15          Q.    Did you have any opportunity to discuss the case with  
16 anybody else aside from Scott Davis?

17          A.    Yes.

18          Q.    And who would those people be?

19          A.    Mark Kadesh, Brian Steel, my associate at the time,  
20 my paralegal at the time, my secretary at the time, my law  
21 partner, my wife, anybody who I happened to come into contact  
22 with and thought might be able to shed some insight to either  
23 the Judge we were in front of or the prosecutor we had or any  
24 of the police officers who were witnesses in the case.

25          Q.    And you said that you had received the State's file,

1 entire discovery file, in this case?

2 A. I don't know if I received the entire file, but I  
3 received discovery from the State.

4 Q. And you reviewed that discovery?

5 A. Sorry?

6 Q. And you reviewed that discovery?

7 A. Every page.

8 Q. Did you have a chance to review that discovery with  
9 Mr. Davis?

10 A. Yes.

11 Q. Did he have any input as to any theories of defense  
12 in the case?

13 A. Yes, he was active.

14 Q. And what was your theory of defense in this case?

15 A. He didn't do it.

16 Q. And so essentially it would be alibi; is that what  
17 you're saying?

18 A. That's part of it.

19 Q. And again, I believe you said it was either alibi and  
20 sufficiency of the evidence in this case?

21 A. Or insufficiency of the evidence, if you will.

22 Q. You said that you conducted legal research in  
23 preparing for the case?

24 A. Yes.

25 Q. You said that you had your investigator locate

1 various witnesses?

2 A. Yes.

3 Q. Your investigator interviewed various witnesses?

4 A. Yes.

5 Q. And you yourself interviewed various witnesses?

6 A. Yes.

7 Q. I believe you said that there were too many witnesses  
8 for you to give an approximate number of how many witnesses you  
9 interviewed in this case?

10 A. We interviewed scores of witnesses. We interviewed  
11 every witness Scott Davis wanted interviewed.

12 Q. Now in discussing the case with Mr. Davis, had he  
13 indicated that he wanted to proceed to trial in this case?

14 A. Yes.

15 Q. Were there any plea offers that came about prior to  
16 trial?

17 A. I know there was an unofficial plea offer that I  
18 specifically remember from Detective Chambers, and there  
19 probably was from Sheila Ross; I just can't remember the  
20 specifics.

21 Q. However, he was adamant about proceeding to trial?

22 A. Yes.

23 Q. And I apologize for jumping around, but I'm just  
24 trying to track Mr. Abt's questioning, so I'd like to touch on  
25 the lost evidence issue that you had litigated at pretrial.

1 You said that you had prepared extensively, along with Mark  
2 Kadesh, to dismiss this case based on the State's destruction  
3 of the evidence?

4 A. Destruction and loss.

5 Q. And you said that you didn't recall whether or not  
6 you in fact subpoenaed Standard Operating Procedures from  
7 various agencies to litigate that issue?

8 A. Correct. I just don't remember.

9 Q. And why would you not have done something like that?

10 A. To me it was self-evident. They obviously didn't  
11 handle the evidence properly. I didn't think that required  
12 proof.

13 Q. So based on your testimony, is it fair to say that  
14 the SOPs would not necessarily have been helpful in litigating  
15 the issue of the missing evidence?

16 A. I -- you know, in retrospect, I would say it would  
17 have been helpful because we weren't successful and it might  
18 have helped us.

19 Q. Regarding the missing evidence issue as to the gas  
20 can and the Olympic bag that was retained or discovered in the  
21 burned Porsche, counsel had essentially questioned you on  
22 whether or not you had objected to the State referring to that  
23 missing evidence.

24 A. Yes.

25 Q. And you testified that you, in fact, had requested

1 the State to exclude any testimony regarding the missing  
2 evidence?

3 A. I'd asked the Court to exclude it, yes.

4 Q. Specifically the gas can?

5 A. Everything that was no longer in existence and  
6 available for us to test.

7 Q. And then you again also had a continuing objection to  
8 the State referring to any of the lost evidence --

9 A. I think that's --

10 Q. -- through witness testimony at trial.

11 A. That's my recollection, yes.

12 Q. And again, I apologize for jumping around but I'm  
13 just following the previous line of questioning.

14 Regarding the phone records and Megan's testimony at  
15 trial, you said that you recall some phone records that had  
16 been subpoenaed?

17 A. Yes.

18 Q. But you couldn't recall specifically which ones?

19 A. Yes.

20 Q. Now with regards to Megan's testimony that she had  
21 told Mr. Davis that David Coffin had been shot first, how would  
22 those phone records have been helpful to prove that she did or  
23 did not say that to Mr. Davis?

24 A. Well, it wouldn't have proved the substance, but it  
25 would have proved the timing of the call.

1 Q. So essentially, the only thing the phone records  
2 would have done was to say that the call had in fact been made?

3 A. Yes. But she didn't deny making the phone call.

4 Q. Is it also true at the trial that Megan adamantly  
5 denied ever telling Mr. Davis that David Coffin had been shot?

6 A. Yes.

7 Q. Regarding the fire investigation in your decision not  
8 to retain an expert, you said that --

9 A. We did retain an expert.

10 Q. You said that you had hired an expert to review the  
11 case, and his name is John Lentini; is that correct?

12 A. Correct.

13 Q. And you decided not to use him at trial because you  
14 believed his testimony was in fact unhelpful?

15 A. Correct.

16 Q. And, furthermore, the State's arson expert, which  
17 would have been Brian Grove, pretty much said exactly what you  
18 would have wanted him to say anyway; is that correct?

19 A. I think it's fair to say that the cross-examination  
20 of Mr. Grove, which may well have relied in part on what Mr.  
21 Lentini gave me as information, brought out the information  
22 that I needed to bring out to make the argument I wanted to  
23 make in closing.

24 Q. And I believe you had said that Mr. Lentini had  
25 provided you a report substantiating his conclusions as to the

1 fire timeline?

2 A. He gave me some kind of report and I don't remember  
3 the substance of it, but I know we have something in writing  
4 from Mr. Lentini.

5 MS. GALLOW: Your Honor, if I may approach the  
6 witness.

7 THE COURT: Yes, ma'am.

8 MS. GALLOW: For the record, I am showing counsel  
9 what we have marked as Respondent's Exhibit A.

10 THE COURT: Respondent's what?

11 MS. GALLOW: Respondent's Exhibits A.

12 THE COURT: A?

13 Q. Mr. Morris, do you recognize that document?

14 A. I recognize Mr. Lentini's name, yes.

15 Q. Do you recognize whether or not that was sent to you?

16 A. I believe it was, yes.

17 Q. Now would you have kept that record and that letter  
18 in the ordinary course of your business, specifically in your  
19 file related to Scott Davis?

20 A. Yes, that's what I was referring to, I thought.

21 Q. And that's the report that you were referring to?

22 A. I think so, as best I can recall. I can't swear to  
23 that, but it looks like it.

24 MS. GALLOW: Your Honor, at this time I would tender  
25 Respondent's Exhibit A into evidence.

1 MR. ABT: I'm going to object on the same grounds  
2 that he's not sure whether or not that's from his file or  
3 not. I mean, he says he can't swear to it.

4 Q. Mr. Morris, I would direct your attention to the top  
5 of that letter. Who is that directed to?

6 A. It's directed to me at my address.

7 Q. And was that your address at the time?

8 A. Yes.

9 Q. Is that still your address?

10 A. Yes.

11 Q. So that would have been sent to you as well as your  
12 office?

13 A. Yes.

14 Q. And you said that you would have usually kept  
15 something like that in the ordinary course of your business,  
16 specifically in the Scott Davis file?

17 A. Yes.

18 MS. GALLOW: Again, Your Honor, I would tender  
19 Respondent's Exhibit A.

20 THE COURT: Do you want to voir dire?

21 MR. ABT: I do, Your Honor.

22 **BY MR. ABT: [Voir dire]**

23 Q. Are you certain this is the document that you kept in  
24 the ordinary course of business, that this is an exact and  
25 accurate, full and complete replica?



1           A.    I have no reason to believe it is not. But without  
2 looking at the one in my file, I can't tell you five and a half  
3 years later that this is the same document. I can't say that.

4           MR. ABT: Judge, what's good for the goose is good  
5 for the gander. If he --

6           THE COURT: Well, okay. I'll admit it at this point  
7 for the record only, and we'll do that same thing, so  
8 y'all will have to find both documents.

9           MS. SHEIN: No worries.

10          THE COURT: Okay.

11          MS. GALLOW: Thank you, Your Honor.

12          **[WHEREUPON, Respondent's Exhibit Number A was tendered and**  
13 **admitted into evidence over objection, for the record**  
14 **only.]**

15                               [Off the record comments.]

16 **BY MS. GALLOW: [Resuming]**

17          Q.    Mr. Morris, though, it is fair to say that you had  
18 secured an independent expert, John Lentini, to review the fire  
19 scene?

20          A.    Yes.

21          Q.    And you found him to be unhelpful?

22          A.    I found -- I made the decision that to put him on as  
23 a witness would not advance our defense.

24          Q.    I would like to move on to the taped statements that  
25 counsel was discussing earlier regarding the stopping and

1 starting of the tape. You said it was undisputed that  
2 Detective Chambers stopped and started the tape, at trial?

3 A. That's correct.

4 Q. And this was brought out at trial?

5 A. Yes.

6 Q. If it was undisputed that the tape was stopped and  
7 started at trial, did you see the necessity to secure an  
8 independent tape expert --

9 MR. ABT: I'm going to object. That mischaracterizes  
10 Mr. Morris' previous testimony about how and when and  
11 under what circumstances the tape was stopped and started.

12 MS. SHEIN: The testimony speaks for itself.

13 MR. ABT: Judge, there's a difference between a tape  
14 being turned over and a tape being stopped and started.

15 THE COURT: Well, Mr. Abt, you can certainly go into  
16 this on recross to clear it up -- or redirect, sorry.

17 Go ahead, counsel.

18 A. If I understand your question, I don't think there  
19 was a dispute that there was a time during the interview that  
20 the tape was off. The question Scott Davis raised and was  
21 emphatic about -- when I say emphatic I can't be any more --  
22 there's no better word than emphatic -- was that he had been  
23 threatened during the time the tape was not running. And that  
24 was the issue.

25 Q. And do you -- I believe you brought that out at the

1 pretrial hearings motion when you had the Jackson-Denno hearing  
2 on the voluntariness of his statements; is that correct?

3 A. Correct.

4 MS. GALLOW: Your Honor, at this time I have no  
5 further questions.

6 MR. ABT: Very briefly.

7 **REDIRECT EXAMINATION**

8 **BY MR. ABT:**

9 Q. Mr. Morris, the -- you've testified previously about  
10 the phone calls and that the order of when the phone calls were  
11 made is what's important, not the content, with respect to the  
12 phone calls that Ms. Bruton makes the evening of December 7<sup>th</sup>  
13 -- December 10<sup>th</sup>, 1006?

14 A. Well, both the content and the order are important.

15 Q. Okay. Well, let's talk about that then for a minute.

16 A. Okay.

17 Q. Tell the Court why it's important. Explain the  
18 timeline and why not only the order but what is said in those  
19 calls is important.

20 A. The State believed that the most critical evidence  
21 against Scott Davis was that he made the statement during his  
22 interview by Detective Chambers and Walker that David Coffin  
23 had been shot in the head. And the question was how could he  
24 know that if he were not the murderer? That was the issue. We  
25 established from Mr. Davis that he got that information from

1 Megan Bruton in a phone call. So we had to establish, 1) that  
2 Megan Bruton made the phone call, and 2) that that's what she  
3 said. Megan Bruton admitted she made the phone call. Megan  
4 Bruton denied saying "David's been shot in the head." We  
5 called as witnesses the Jenacovas to establish that's what she  
6 said and the time of the call.

7 Q. So you determined that the order of the calls is  
8 important because you were able to show that -- or you tried to  
9 show that the Jenacovas' conversation with Ms. Bruton happened  
10 before Ms. Bruton called Scott Davis?

11 A. Correct.

12 Q. And that when she spoke with the Jenacovas, the  
13 Jenacovas heard her say David Coffin's been shot in the head?

14 A. Correct. And at first she never suggested that she  
15 got that information from Scott, she just said I never made the  
16 phone call; I never said that.

17 Q. Proving the order of those phone calls is crucial to  
18 his defense?

19 A. It became crucial; it wasn't initially.

20 Q. Getting the phone records to show that is part of  
21 that evidence?

22 A. You know, I think we could establish -- I thought we  
23 had the phone record of the Limburger call.

24 Q. Okay. Now --

25 A. If we had the -- if we had the record -- if I'm

1 wrong, tell me I'm wrong. But if we could establish what time  
2 Megan Bruton made the call from the Limburger home to Scott  
3 Davis, we also knew the time of her call to the Jenacovas as  
4 12:08. So if we had the phone record from the Limburgers and  
5 compared that to the 12:08, we had our timeline established.

6 Q. If you had it.

7 A. If we had it. If we didn't have it, then I wish we  
8 had.

9 Q. Okay. Regarding Mr. Lentini, do you recall an issue  
10 at trial where the -- the timeline of the fire being crucial  
11 because that would help establish Scott couldn't have started  
12 the fire?

13 A. Yes.

14 Q. Explain to the Court a little bit about what that  
15 theory of the defense is.

16 A. I don't remember, to be honest with you. I think it  
17 was a question of whether he had time to start the fire and  
18 then get back home or something like that, but I can't  
19 remember.

20 Q. That's exactly right.

21 A. Okay.

22 Q. Okay. So what -- on the front page of Mr. Lentini's  
23 report, what does it say in terms of the time, in his estimate,  
24 to testify about what time --

25 THE COURT: Wait, just -- I'm sorry. But what's good

1           for the goose is good for the gander.

2           MR. ABT: Okay.

3           THE COURT: So, I mean, if you want to admit it, I'm  
4 happy to let you talk about it, and if you don't want to  
5 admit it, then we'll do it some other time. So you say.

6           MR. ABT: I don't want to have to call Mr. Morris  
7 back. You want to stipulate to it?

8           MS. GALLOW: If you do.

9           MR. ABT: We'll stipulate to it.

10          THE COURT: Okay, then it's in. Okay. So  
11 Respondent's A is in. And certainly, Ms. Gallow, I'll give  
12 you an opportunity to question him about it on your  
13 recross.

14          MR. ABT: We're not all bad, for the record.

15          **[WHEREUPON, Respondent's Exhibit Number A was admitted**  
16          **into evidence without objection by stipulation.]**

17          **BY MR. ABT: [Resuming]**

18          Q. What are Mr. Lentini's conclusions about the timeline  
19 for the fire to break through the roof?

20          A. He said the fire in question probably burned for a  
21 period of 10 to 25 minutes before it broke through the roof.  
22 It's likely that, given the presence of gasoline, the fire  
23 broke through the roof in a period of closer to 10 minutes than  
24 to 25. And then he talks about various things that can affect  
25 that.

1           Q.    Do you recall what Mr. Grove's testimony at trial was  
2 about the length of time for the fire to break through the  
3 roof?

4           A.    No.

5           Q.    Do you think it was longer than 10 minutes?

6           A.    I don't remember. It may have been, I don't  
7 remember.

8           Q.    Do you think it was longer than 25 minutes?

9           A.    I don't remember.

10          Q.    Okay. In terms of the tape, you said Scott  
11 emphatically discussed this issue. In his emphatic  
12 discussions, did he bring up not just that he was threatened  
13 and -- we don't have to get into the substance of those threats  
14 -- but not just that he was threatened while the tape was  
15 stopped, but that there were multiple times when the tape had  
16 been started and stopped during the course of the interview,  
17 where they would turn the tape off, threaten him, turn it back  
18 on, turn the tape off, threaten him, turn the tape back off?  
19 Do you recall him telling you that?

20          A.    I don't know.

21          Q.    Do you recall him asking you to have the tape  
22 analyzed?

23          A.    No, because there was never a question of whether  
24 there was something that was erased from the tape or covered  
25 up, it was what occurred when the tape was off was the issue.

1 MR. ABT: Thank you. No other questions.

2 MS. GALLOW: No questions, Your Honor.

3 THE COURT: Okay. Can Mr. Morris be excused?

4 MS. SHEIN: Yes. And we'll get back together with  
5 him regarding the affidavit later on.

6 THE COURT: Very good.

7 MS. SHEIN: Thank you, Mr. Morris.

8 THE COURT: Thanks, appreciate it.

9 THE WITNESS: Thank you.

10 MR. ABT: Thank you, Mr. Morris, appreciate your  
11 time.

12 [Witness excused.]

13 [Off the record in re: scheduling]

14 [Luncheon recess.]

15 \* \* \*

16 THE COURT: Do you want Mr. Steel to take the stand?

17 MR. ABT: Please, Your Honor.

18 Whereupon,

19 **BRIAN STEEL,**

20 having been duly sworn under oath, was examined and testified  
21 as follows:

22 **DIRECT EXAMINATION**

23 **BY MR. ABT:**

24 Q. If you could please state your name for the record.

25 A. I am Brian, B-R-I-A-N, Steel, S-T-E-E-L.



1 Q. Mr. Steel, you are an attorney?

2 A. Yes, sir.

3 Q. How long have you been practicing law?

4 A. Since 1991.

5 Q. And what type of law do you practice?

6 A. One hundred percent criminal defense.

7 Q. And can you give me an estimate as to, other than  
8 Georgia, how many other jurisdictions you've practiced in?

9 A. I've practiced throughout the United States of  
10 America. If you want a number, I would say about half the  
11 states.

12 Q. In both Federal and State Court or in other states,  
13 predominantly in Federal Court?

14 A. Both. I don't know if that's right, I mean, I'd have  
15 to count the states, but that's approximately.

16 Q. And could you give me an estimate as to how many jury  
17 trials you've had?

18 A. I really don't know, 50, 75, 100. I really don't  
19 know.

20 Q. More than ten?

21 A. Yes, more than ten.

22 Q. I mean, certainly more than ten. You think somewhere  
23 between 50 and 100?

24 A. I really never counted. I've tried a lot of cases.

25 Q. Okay.

1           A.    They've all been very serious cases.  Usually they  
2   take multiple weeks to try.

3           Q.    And of those 50 or 100 cases, do you know what  
4   percentage would have been murder trials?

5           A.    I really don't -- I wish -- I'm sure I could figure  
6   this out some way, but, no, I don't.  But I've tried a lot of  
7   murder cases, but I don't --

8           Q.    Tried.

9           A.    I have no idea, between 20 and 35, 40 percent, I  
10  really don't know.

11          Q.    You've tried more than ten murder trials to verdict?

12          A.    I would agree that's true.

13          Q.    When was your most recent trial?

14          A.    January 2011, February 2011.

15          Q.    And have you also done a fair number of motions for  
16  new trial or appeal?

17          A.    Yes, sir.  Well, I believe -- I believe the number is  
18  probably high.

19          Q.    Do you know approximately how many appeals you've  
20  handled?

21          A.    In the State of Georgia alone, I think I have 160 or  
22  155 reported opinions.

23          Q.    Have you published any papers in the area of criminal  
24  defense law?

25          A.    I'm writing a book right now that Lexis is printing

1 with Don Samuel. I wrote another book recently with Don  
2 Samuel, but I just wrote a chapter in it on evidence in  
3 Georgia. And then I've written papers for the National  
4 Association of Criminal Defense Lawyers and the Georgia  
5 Association of Criminal Defense Lawyers, and maybe some other  
6 bars. I think I've spoken and written papers to the bar for  
7 divorce or whatever they call them.

8 Q. You've also spoken at seminars to teach other  
9 lawyers?

10 A. I don't know if I'm teaching, but I've been honored  
11 to speak at many seminars.

12 Q. You've spoken at a seminar I hosted; isn't that  
13 right?

14 A. Yes, sir.

15 Q. Are you a member of any professional organizations?

16 A. The National Associations of Criminal Defense  
17 Lawyers, the Georgia Association of Criminal Defense Lawyers. I  
18 may be a member of other ones, but I really don't -- I really  
19 don't follow, I try to just practice law.

20 Q. Can you run through how you typically, once you're  
21 retained by a client, how you typically prepare a case for  
22 trial?

23 A. Yes. But this was not typical of this. Mr. Davis'  
24 case was not the typical way I prepare for trial. But if I'm  
25 the lawyer, the lead lawyer, which I tend to be the lead lawyer

1 on the case, I would -- I read all the cases from the United  
2 States Supreme Court, the 11th Circuit, the Georgia Supreme  
3 Court, the Georgia Court of Appeals. I have them all indexed  
4 into files so I keep abreast of the law.

5 I would then, if I have my client, God forbid, who's  
6 arrested and charged with a crime, I would try to get as much  
7 information from all relevant sources. So from discovery, if  
8 the case is indicted, I'm entitled to discovery. From doing  
9 our own investigation we always speak with all the experts that  
10 could possibly be involved in a case. I have great  
11 communication with my clients. Everything I do I put in  
12 writing and I send it to the client because they're my boss.  
13 Sometimes the client's family members, the client gives  
14 permission to have them involved so that they know what's going  
15 on with their loved one.

16 I would then take all the facts that I could gather, I  
17 would apply all the law I could gather, I would generate  
18 motions in the case, and I would develop, which is fluid, but a  
19 theory of defense. You know, like in Mr. Davis' case, clearly  
20 he didn't commit the crime, so it would be a misidentification  
21 case/lack of evidence case. In another case it may be an  
22 alibi, another case it may be self-defense, in another case it  
23 may be coercion defense, whatever the defense is, and we would  
24 head towards that road.

25 After reviewing all of the facts in the case that I could

1 get a handle on, after reviewing and speaking with all of the  
2 experts, and after generating all the law that's applicable, we  
3 would then find ourselves in court arguing motions, whether  
4 it's to challenge the indictment, the arrest, suppression of  
5 evidence, introduce evidence, bring in evidence that the  
6 prosecution doesn't want, whatever the individual case would  
7 be.

8 When the Honorable Court rules, we would then determine  
9 whether to have a pretrial appeal of the case if it's  
10 appropriate, and if it's not appropriate we would be prepared  
11 for a trial. Judges typically -- Judges are great, they  
12 typically specially set the cases so we know when we're on  
13 trial, and we are prepared and we go to trial.

14 If we win, I go on to the next case. If we lose, I live  
15 with it for the rest of my life.

16 Q. And how did your -- in your description of that  
17 preparation, how did your representation of Mr. Davis differ  
18 from what you've described as what you would typically do?

19 A. It was nothing typical of how I do a case. Mr. Davis  
20 was falsely charged with maybe an eight -- I really don't  
21 remember and I have reviewed no documents to prepare for today.  
22 I don't think I have my file anymore. I think it was either  
23 given to you or Don Samuel took it. I don't remember. But he  
24 was charged with an indictment. It was maybe a decade after  
25 the deceased was tragically killed. So right away you have a

1 Manley issue in there and a Jackson issue because of the delay  
2 of time, and a Speedy Trial issue for Mr. Davis.

3 But all of that was gone because my memory is -- and if  
4 you want to show me I could tell you exactly -- but my memory  
5 is I got into Mr. Davis' case maybe four to five weeks prior to  
6 his actual trial date, and he had already done substantial  
7 motion on -- an attorney/client privilege was breached, they  
8 appealed to the wrong court -- it should have gone to the  
9 Supreme Court of Georgia and it was sent to the Court of  
10 Appeals of Georgia, and that's in re: Fulton County S.D. or in  
11 re: S.D., I can't remember -- In the Matter of the Grand Jury  
12 of S.D. -- I think, investigating S.D.

13 But anyway, the witnesses were interviewed, the theory of  
14 the case was already decided upon, and unfortunately a very  
15 fine lawyer, Mr. Mark Kadesh, got sick and told the Davis  
16 family that he could not participate. Bruce Morris wanted a  
17 second chair. I believe Bruce Morris -- I don't know this --  
18 recommended me to Mrs. Davis and Dr. Davis and Scott Davis.  
19 And Scott was out, I think, on a very restricted ankle monitor  
20 on bond. And they may have interviewed other lawyers, I was  
21 never privy to that. I met one evening with the Davis family.  
22 They were leaving like the next day to go to Paris, I believe,  
23 and I got a call saying that they would hire me. And when that  
24 happened, I was way behind the 8-ball because the trial was  
25 going forward.

1           Q.     So how much time, how many hours would you estimate  
2     that you spent working on Mr. Davis' case prior to trial as a  
3     result?

4           A.     I don't know, but I can tell you this. Whenever I  
5     got the case, I put everything else aside because I understood  
6     the commitment and I worked on Mr. Davis' case. So -- and I  
7     work all the time, so I put in tremendous hours. But it wasn't  
8     the same because I was basically being told here's what we're  
9     doing, here's what this witness is saying, here's who these  
10    witnesses are. You don't need to interview these witnesses,  
11    we've done these interviews, you just tell me what I missed on  
12    the law and then help me as we go along.

13          Q.     So would it be fair to say you did not have the  
14    ultimate decision-making authority in the case?

15          A.     I mean, Bruce Morris is a great lawyer, and he was  
16    the lead lawyer in the case. We disagreed a great deal on how  
17    to present Scott's case. Scott's aware of that. And -- but,  
18    yeah, but Mr. Morris had the case for, I think, a decade. I  
19    think he was Scott's lawyer -- that's not fair because a  
20    substantial amount of time the case was dormant -- so, you  
21    know, for years before I got involved.

22          Q.     And I'm going to ask you later about some of the  
23    disagreements you had with Mr. Morris. But before we get to  
24    that, were there, other than you and Mr. Morris, were there  
25    other at the trial phase, other individuals who were assisting

1 you in the defense who are not attorneys? For example, were  
2 there paralegals? Were there staff? Was there private  
3 investigators? Do you know --

4 A. Yeah.

5 Q. -- who any of those people are?

6 A. Oliver Halle H-A-L-L-E is a wonderful person, he's a  
7 private investigator. He was in the case before I was in the  
8 case, but I really don't know how much before I was in the case  
9 he was in the case. But he had interviewed a whole bunch of  
10 witnesses, and I wanted to interview witnesses so I went with  
11 him alone and I went with him with Mr. Morris to interview some  
12 people, because it wasn't tightly woven yet.

13 There was another investigator there who's a former IRS  
14 agent and his last name is -- his name is Ted Robertson, he was  
15 involved. I had no relationship with him, though. I really  
16 don't know what he was doing in the case. And I'm not saying  
17 that to be insulting, I'm saying that I didn't do anything with  
18 him, but he was clearly there for some meetings.

19 Tricia Renard was used. I asked her to be used. She's  
20 great at taking all the documents, putting them on a computer,  
21 and weaving out, you know, what we need for trial and defining  
22 a theory of the case, but that was already done to a large  
23 extent, although I think she disagreed with me too. She  
24 thought that -- she agreed with Bruce Morris, I think, on how  
25 to try the case.



1           Q.    Were there -- were there also any associate  
2 attorneys, either of yours or Mr. Morris, that worked on the  
3 case with you?

4           A.    Not that I remember. And if there were, I -- if you  
5 show me something -- but I don't remember.

6           Q.    Were there any associates that you employed that you  
7 put to work on the case? Forget about Mr. Morris.

8           A.    Well, I employed -- they weren't associates. Experts  
9 looked at all the evidence in the case for Mr. Davis that I  
10 brought in that wasn't done previously. I don't remember  
11 whether -- I don't think -- you know, I do everything my -- I  
12 mean, I look at every paper -- but we do have law students and  
13 lawyers at our office. But I don't remember anybody else doing  
14 it for my side.

15           Now on Mr. Morris' side, he also has one or two lawyers  
16 working in his office. I have no idea what they did. And he  
17 had a paralegal -- well, I don't know if she's a paralegal, but  
18 his assistant, and she was integral clearly to him. I didn't  
19 work with her. But to do his organization, she was very on top  
20 of the case.

21           Q.    Is it fair to say you were not then involved in --  
22 either directly or indirectly, involved in arguing or preparing  
23 any of those pretrial motions you discussed earlier that you  
24 would normally do, in this case?

25           A.    I came very late. But I do remember looking at -- I

1 think I met with Mr. Davis before I even met with his parents.  
2 And I -- he brought the indictment, and my memory is the  
3 indictment was obviously fatally flawed on two or three or four  
4 counts. I remember filing that motion and arguing it, and the  
5 Honorable Judge Campbell granted certain of those motions.

6 Q. Okay, so there were some?

7 A. And I think I filed a plethora of motions in limine,  
8 but I'm not -- I mean, I'd have to see the file. But I  
9 remember going through it thinking this is not -- this is not  
10 the way, you know, this should be done. And Mr. Morris was  
11 great, he said thank you, just -- you do it.

12 Q. Okay. So you had some corrections to the file that  
13 you made or changes --

14 A. Yeah, addition type --

15 Q. -- and you brought additional motions that you had to  
16 argue before trial?

17 A. I think I'd say the word "addition." I don't want to  
18 say corrections. But, yes, before I got involved in the case,  
19 I believed there was -- there were motions argued by Mr. Kadesh  
20 and/or Mr. Morris.

21 Q. From the moment you were brought in on the case, did  
22 you have an understanding that the State intended to introduce  
23 items of evidence that had been lost or destroyed?

24 A. Well, if they were lost or destroyed, I don't follow  
25 how they would introduce them.

1           Q.    That the State planned on having witnesses testify  
2 about evidence that was lost or destroyed.

3           A.    That happened. I'm not so sure I was up on that  
4 issue right away. I don't remember -- that was a big issue in  
5 Mr. Davis' case because there was a lot of evidence that was  
6 missing. But I believe, unless you can show me something, I  
7 believe -- I mean, maybe I'm wrong, I thought there was a  
8 motion to dismiss for the lost evidence, and I was not a party  
9 to that. But if I'm wrong, I apologize.

10          Q.    But you were aware that that was a significant issue  
11 with respect to his case?

12          A.    I became aware of it.

13          Q.    Do you know when you became aware of it?

14          A.    No.

15          Q.    Prior to trial?

16          A.    I don't -- I could assume. I mean, I'll -- I mean, I  
17 got on top of Mr. Davis' case, so I won't -- I hope I was aware  
18 of it, but I don't know.

19          Q.    So you indicated earlier that you had some pretty  
20 significant disagreements with Mr. Morris about how the case  
21 should be handled. Could you tell me -- tell us a little bit  
22 about what the framework of those disagreements were.

23          A.    Mr. Morris is a great lawyer, so I respect what he  
24 says, but we were diametrically opposed. His whole theory was,  
25 and he said it to the jury, Scott Davis may have done this, and

1       --

2           Q.    He said Scott Davis may have done this?

3           A.    Yeah.

4           Q.    Okay.

5           A.    He said it in closing argument.  I think he may have  
6 said it in opening argument -- opening statement.  And I know  
7 he discussed that with me, that we have to be honest with the  
8 jurors.  And I said, you know, if you're going to be honest  
9 with the jurors, tell them the truth, Scott Davis didn't do  
10 this.  And we were -- he told me no, because there's too much  
11 evidence here and we're going to lose credibility by arguing  
12 that he's not involved.

13           And I looked at the other side.  I said they don't have  
14 that much evidence, and we've got a defense, and if you give  
15 that sign that -- you know, because at that point Scott was not  
16 going to testify.  And from trying cases, I thought this is  
17 going to look pretty horrific if the lawyer stands up and says  
18 that.  So we spent time talking about that.  And, you know, if  
19 you know Mr. Morris, he's a gentleman all the time and he said  
20 "I respect you and I respect we're going to disagree.  And  
21 that's the way the trial went.

22           In addition, I would have asked for a voluntary  
23 manslaughter instruction.  Mr. Morris said, no, that would just  
24 give the opportunity to convict.  That's not my experience.  
25 And I would have had Scott testify.  But that's Scott's

1 decision, he didn't want to, so there was nothing -- Mr. Morris  
2 didn't want him to testify, but that was Scott's decision.

3 Q. I apologize, let me interrupt you. You said Scott  
4 wanted to testify but Mr. Morris didn't want him to?

5 A. No. I wanted Mr. Davis to testify. I could tell how  
6 the trial's -- I don't know why, but in trial everything moves  
7 slowly to me. It all makes sense. It's the best place to be.  
8 It works. And I was watching a man go to prison. It was bad.  
9 And I told Scott that during the trial, and he needed to  
10 testify, in my opinion, and he needed to take a voluntary  
11 manslaughter charge. But I explained to Scott his  
12 constitutional rights, Mr. Morris agreed that's his  
13 constitutional right. Mr. Morris was -- as pro I was for Scott  
14 testifying, Mr. Morris was on the opposite side, he can't do  
15 it, and Scott said he's not going to testify. So I'm not  
16 blaming anyone for that, it's just how it is. And if he would  
17 have testified, we may have lost anyway, so I'm not -- not  
18 saying that it would have mattered.

19 Q. Do you know, were there any other disagreements you  
20 had with Mr. Morris about things that you either considered --

21 A. Those were the big ones but --

22 Q. -- crucial or important in the case?

23 A. Those were the big ones, but, yeah, I mean, we -- you  
24 know, we -- we got along great. He let me do all the  
25 objections. I think all the objections at trial, even if it's

1 his mouth, were from me. I would say to him, "This is the  
2 issue," and he was great with it. And he's smart. But those  
3 were the big issues that I wouldn't concede a thing if I were  
4 going to redo it, and --

5 Q. Okay. Well --

6 A. -- should have asked for a voluntary manslaughter  
7 charge.

8 Q. Let me ask you about a lot of the objections at  
9 trial. During the course of the trial, do you recall whether  
10 the State's witnesses were allowed to testify about items of  
11 missing evidence?

12 A. Yes. I think so. Yeah, I think that was part of the  
13 theory of defense that Bruce argued that they lost all the --  
14 excuse me -- Mr. Morris argued that they lost all this evidence  
15 and how could Scott -- excuse me -- Mr. Davis therefore bring  
16 his experts to test it, and without -- if state law said it  
17 should be a reason to doubt, that was, I think, part of the  
18 theory. But you'd have to look at the transcript. But, yes, I  
19 remember Bruce Morris cross-examining on that.

20 Q. And did you object each time a witness testified  
21 about -- a State's witness testified about each one of those  
22 pieces of evidence?

23 A. Well, I didn't probably cross-examine any of those  
24 witnesses. And if I did, you know, just show me the record.  
25 But Mr. Morris, I think, did all the -- the gas can, the police

1 officers, the ballistic, I believe, so I wasn't really the  
2 lawyer. But he wanted to cross-examine on the fact -- he  
3 wanted the jury to know that Scott couldn't have a fair trial.

4 Q. So Mr. Morris -- at trial, it was Mr. Morris'  
5 responsibility to handle the cross-examination of the State's  
6 witnesses with respect to those missing evidence issues?

7 A. I believe so. You know, if I'm wrong, please show me  
8 the transcript, but that's my memory.

9 Q. And this may -- this next question may refer more to  
10 the motion and new trial and appeal, but I guess at trial as  
11 well, do you know what grounds you were objecting on with  
12 respect to the -- when I say you, I mean you collectively with  
13 Mr. Morris -- do you know what grounds the defense team was  
14 objecting on with regard to the lost, destroyed, or missing  
15 evidence?

16 A. I assume it was a due process violation.

17 Q. Referring to the 14<sup>th</sup> Amendment, and then ultimately  
18 the 6<sup>th</sup> Amendment, his right to confrontation.

19 A. The Miller case and the State of Georgia.

20 Q. Okay. And did you ever consider objecting on any  
21 other grounds?

22 A. If I didn't, then no, I -- if there's not an  
23 objection on another ground, then it was not strategy not to  
24 object, and I didn't consider it.

25 Q. And specifically, are you aware of a variety of

1 statutes in the Georgia Code which required the police and  
2 other law enforcement agencies to preserve and maintain  
3 evidence?

4 A. Yes.

5 Q. For example, are you aware of in Title 17 §17-5-55  
6 and 56, those statutes?

7 A. I think they're all in the Miller case and it was  
8 just reversed by the Supreme Court of Georgia is what you're  
9 referring to. And, yes, I'm aware of it, that the Georgia  
10 Legislature has said that the police have to preserve evidence,  
11 certain types of evidence.

12 Q. Do you remember Megan Bruton's testimony at trial?

13 A. I remember it, but if you want to refresh my memory,  
14 that would not be insulting.

15 Q. And I'll refresh, if necessary, but do you remember  
16 what she testified to with respect to a gas can and an Olympic  
17 bag that was stuck to it?

18 A. Yes.

19 Q. What is your recollection of that testimony?

20 A. My recollection is that she testified that she was  
21 shown either a photograph of or the actual Olympic -- alleged  
22 -- I've never seen, even a photograph I've never seen a  
23 supposed Olympic bag, that was in the Porsche that belonged to  
24 Mr. Coffin in DeKalb County. The Porsche was put on fire.  
25 There's a gas can sitting allegedly in the front -- front



1 driver's seat, is my memory. I believe it was a convertible.  
2 And Ms. Bruton was allowed to testify that similar bags were at  
3 her home in 1996 because the Olympics were here that summer and  
4 Scott went out after the Olympics, and everything was on sale,  
5 and bought a whole bunch of items and memorabilia from the  
6 Olympics, and brought them home in these types of bags, and  
7 that a gas can similar to that was in her home. And that was  
8 very devastating because the police said that Scott said that a  
9 gas can was stolen from his house.

10 So when you link that together, that was awful testimony,  
11 if believed. And we didn't have any way of defending that  
12 because my memory is it may have been a picture, and I really  
13 don't know, Mr. Abt, but I think there was a picture. But even  
14 in the picture you couldn't see the supposed Olympic bag.

15 Q. And did you bring to trial an expert who could have  
16 testified that there would have been tests you could have done  
17 on the bag or the gas can to have shown it was traceable to a  
18 particular place, time of purchase, or even the person who  
19 purchased it?

20 A. With regards to the bag, definitely not, because we  
21 were handcuffed because there was nothing we could go off of.  
22 And with regards to the gas can, you know, Bruce Morris, my  
23 memory is, cross-examined witnesses on the fact they lost the  
24 evidence and you couldn't do certain things. But we did not  
25 put up an expert to say: If I would have had that bag, it would

1 have been purchased at this store on this date. And then Scott  
2 could have had an alibi for that day.

3 Q. Well, I'm not saying whether or not you brought an  
4 expert to actually do the test, but an expert who could have  
5 testified that if they'd not lost the evidence you could have  
6 done the test.

7 A. We did not call an expert to testify that way at  
8 trial.

9 Q. And do you know whether or not you objected to Ms.  
10 Bruton's testimony at the time she made it at trial on any  
11 grounds?

12 A. On what?

13 Q. On any grounds. Did you object to her testimony --

14 A. Yeah, the --

15 Q. -- that the bag and the gas can looked like --

16 A. I'm pretty sure. And the trial transcript is here,  
17 and I could probably go through it fast. I'm pretty sure that  
18 we have a continuing objection to the entire mention of any of  
19 the lost evidence -- and the Judge gave it.

20 [Off the record.]

21 Q. So it's your recollection that there was some type of  
22 continuing objection?

23 A. You know, Mr. Abt, I'm very focused on accuracy, so  
24 if you show me it -- yes, my memory tells me that the Court  
25 granted us a continuing objection because he was allowing the

1 State to discuss evidence that we never had an opportunity to  
2 test or look at, and we thought that was prejudicial. And the  
3 Judge gave us a continuing objection.

4 MS. GALLOW: I'm sorry, I'll try to help your memory.  
5 It's at 12 2609.

6 MR. ABT: Is that the continuing or --

7 MS. GALLOW: That's the continuing objection.

8 THE COURT: And haven't we covered this? I mean, I  
9 guess it's important to have every lawyer that was  
10 involved say there was a continuing objection, but I think  
11 Mr. Morris was pretty clear.

12 MR. ABT: I agree, Your Honor, but unfortunately --  
13 unfortunately, Judge, if we fail to examine --

14 THE COURT: Okay, go ahead.

15 MR. ABT: -- all the lawyers, then we have --

16 THE COURT: Go ahead.

17 MR. ABT: -- a substantive issue later on. Okay.  
18 If I could approach the witness, Your Honor.

19 THE COURT: Yes, sir.

20 **BY MR. ABT: [Resuming]**

21 Q. Mr. Steel, I'm going to show you a portion of the  
22 trial transcript.

23 MR. ABT: For the record, I'm referring to Page 2609,  
24 which is Volume VII of XXI.

25 THE WITNESS: XII of XXI.

1           Q.    XII of XXI, thank you, Page 2609. If you'll review  
2 that for a moment.

3           A.    [Reviewing document.] Okay.

4           Q.    Does that refresh your recollection with respect to  
5 the general objection that is made earlier on with respect to  
6 those items?

7           A.    It is a specific objection where we argued that the  
8 State shouldn't be allowed to discuss these items that are  
9 missing, and the Judge denied it. We asked for a continuing  
10 objection. So I'm assuming that's what Mr. Morris at Line 14  
11 on 2609 is referring to. This does not necessarily refresh my  
12 recollection anymore than it was my memory before this page.

13          Q.    Okay. Well, let me show you another volume of the  
14 trial transcript, which is Page 1257, and I ask you to take a  
15 look at that, 1257 through roughly 1260. And I'll give you a  
16 moment to review that.

17          A.    [Reviewing document.] Okay, through 1260?

18          Q.    Yeah.

19          A.    I read that.

20          Q.    Okay. So does that refresh your recollection about  
21 when Ms. Bruton testified about those items of evidence?

22          A.    This is the -- yeah, this is the cross-examination of  
23 Mr. Morris, and he -- she -- Ms. Bruton's already been allowed,  
24 is my memory, over objection to get into the fact of what she'd  
25 seen. And the Court allowed a continuing objection. My memory

1 is before this. And then Mr. Morris had no choice, so he  
2 confronted Ms. Bruton.

3 Q. So that continuing objection only referred to the gas  
4 can and the Olympic bag --

5 A. That's not --

6 Q. -- but earlier --

7 A. That's not my memory.

8 Q. Let me again refresh your memory on Page 2609 of the  
9 trial transcript. Is there a continuing objection for the gas  
10 can and the Olympic bag?

11 A. Well, my memory -- if you let me see the transcript,  
12 I bet you I could find it -- but my memory is it was to all  
13 evidence that is not able to be seen by Mr. Davis. Then on  
14 2609 Mr. Morris is objecting where he says, "Judge, just note  
15 my continuing objection," this time targeting what was the  
16 topic, which was the Olympic bag -- allegedly. I have no  
17 evidence there was an Olympic bag, you know, physical evidence.  
18 But the alleged Olympic bag and the supposed gas can. But the  
19 objection included much more than that.

20 Q. Have you -- do you know how many items -- I'm going  
21 to move on. Do you know how many items of evidence were  
22 missing or destroyed in this case?

23 A. You know, if you really got into minutia, I think --  
24 I think there was 60. But, you know, you could show me  
25 something to refresh my memory.

1 Q. I'm going to show you what's been marked as P-49 and  
2 ask if you're familiar with that.

3 A. This is our brief to the Honorable Supreme Court of  
4 Georgia.

5 Q. And in that brief if you will turn to Page No. 116.

6 A. Okay.

7 Q. Does that refresh your recollection as to how many  
8 items of evidence you are alleging was lost by the State?

9 A. I don't -- you know, to be frank with you, Mr. Samuel  
10 focused on this issue in the case.

11 Q. Okay, I understand that.

12 A. So, but --

13 Q. I'm asking if this --

14 A. But I've worked --

15 Q. -- refreshes your recollection.

16 A. No, it doesn't refresh my recollection. But, you  
17 know, he's listed 55. My memory was that there were more than  
18 60, but --

19 Q. Okay. Well, then in addition to him listing 55,  
20 there are sub-items; correct?

21 A. Oh, okay. That may be the difference, I don't know.

22 Q. Well, have you ever been involved in a case where  
23 that much evidence was lost? Any other case?

24 A. I'm not -- I don't know. Not that I -- I can't think  
25 of a case where I've been involved that law enforcement

1 officers from different agencies just happened to lose all this  
2 evidence.

3 Q. Okay. Have you ever been involved in another case  
4 where the State lost the murder weapon?

5 A. I think so.

6 Q. Have you been involved in a case where the State had  
7 the murder weapon, tested it, and then lost it before you had a  
8 chance to test it?

9 A. I don't -- I mean, I think so, but I don't know.

10 Q. Well, I want you to think hard for a minute, because  
11 my next question is if that's happened in another case where  
12 you've been involved, did the trial court exclude then the  
13 piece of evidence?

14 A. The Court let in, in a case -- I mean, you -- the  
15 Court let in a critical piece of evidence even though the State  
16 lost it and let me cross-examine on it. I'm not, though,  
17 saying that that's appropriate. I respect courts. But I think  
18 when you try to take someone's liberty, law enforcement should  
19 do it perfect and should not be allowed to lose evidence that  
20 may be critical in a case.

21 Q. Did you bring to trial an expert to -- do you  
22 remember the testimony of Bernadette Davy at the trial?

23 A. I don't remember her testimony but --

24 Q. Do you know who she is?

25 A. Yes.

1           Q.    Do you know whether you brought an expert to trial to  
2 testify about tests, other tests that could have been done to  
3 the murder weapon, the 9mm Beretta, again, someone to testify  
4 about tests that could have been done had the weapon not have  
5 been lost?

6           A.    No.

7           Q.    Did you bring to trial an expert to testify about  
8 tests that could have been done to the shell casings, had they  
9 not been lost?

10          A.    No, but we never took responsibility for that gun or  
11 shell casings?

12          Q.    What do you mean by "we never took responsibility"?

13          A.    I mean, Scott Davis didn't commit this crime. So the  
14 fact that the law enforcement lost the weapon, and then the  
15 weapon -- my memory is the weapon was burned next to Mr.  
16 Coffin's body --

17          Q.    I understand that you say Mr. Davis didn't commit the  
18 crime, but a moment ago you told me that Bruce Morris told the  
19 jury he probably had something to do with it. So in having to  
20 respectfully follow Mr. Morris' lead, what I'm asking you is  
21 did you bring to trial experts to show that tests could have  
22 been done on the shell casings had they not been lost?

23          A.    Like what type of test? The answer to your question  
24 is no, we didn't -- obviously -- I mean, the transcript speaks  
25 for itself. We didn't bring an expert.



1           Q.    Let's go into it a little. Are you aware that shell  
2 casings could have fingerprints on them?

3           A.    Potentially, yeah.

4           Q.    And could you test those fingerprints to see who they  
5 were -- who the fingerprints belonged to? In any case.

6           A.    If you get -- if the shell casing happens to have a  
7 latent print on it after being burned up in that house, and a  
8 person grabbed that fingerprint, an expert, yes, it could be  
9 tested and run through AFIS.

10          Q.    What about the traceability of shell casings? Can  
11 you -- in your experience, which is vast and for which I have  
12 great respect, in your experience in representing the defense,  
13 can you take a shell casing and trace from the shell casing  
14 where it was bought, on what day it was bought, by who it was  
15 bought, and what store?

16          A.    That I don't know. You would have to ask an expert.

17          Q.    But you did not bring to trial any expert to testify  
18 about any test that could have been done to the shell casings?

19          A.    No, sir.

20          Q.    Same question with respect to the bullets, the slug  
21 that was removed from Mr. Coffin's head. Did you bring any  
22 expert to trial to testify about what tests could have been  
23 done about that piece of evidence, had it not been lost by the  
24 State?

25          A.    When you're saying tests, fingerprint tests is what

1       you're --

2               Q.     Well, no, you're not going to fingerprint a slug  
3       that's in someone's head, but other tests.

4               A.     Well, I don't know what tests you're referring to,  
5       but the answer to your question is we didn't bring an expert to  
6       testify before the petit jury as to any scientific or ballistic  
7       or trace evidence involving the bullet, unfortunately and  
8       tragically, inside Mr. Coffin's head.

9               And Mr. Morris didn't tell the jury that Scott did do it,  
10      he said, "You may think Scott did do it," but I took that to be  
11      offensive.

12              THE COURT:   I'm sorry, but I want you to clear that  
13      up, Mr. Steel, because that's not what you said earlier.  
14      I believe what you said earlier was that Mr. Morris told  
15      the jury that he may have done it. Now you're saying he  
16      told the jury you may think he did it, so --

17              THE WITNESS:  That's right. I think it's the second,  
18      whatever the record says, but I'm pretty sure it's the  
19      second one. The jury may --

20              THE COURT:  That "you may think he did it."

21              THE WITNESS:  Right. Whatever the record is, that's  
22      pretty much what my memory says that he said.

23              THE COURT:  Okay. But you've given two very  
24      different recollections of what he said.

25              MS. SHEIN:  We're going to get the transcript, Your

1 Honor, to make sure what was said.

2 THE COURT: Okay.

3 **BY MR. ABT: [Resuming]**

4 Q. Were those comments made in opening argument or  
5 closing argument?

6 A. Definitely closing, possibly opening.

7 MR. ABT: Just a moment.

8 [Brief pause.]

9 Q. I want to ask you some questions about the  
10 fingerprint evidence. Were you aware that the State also lost  
11 some latent fingerprint cards that they had lifted latent  
12 fingerprints from the Porsche?

13 A. Yes.

14 Q. And did you present at trial a witness to -- an  
15 expert witness to testify about -- and those fingerprints were  
16 tested to determine that they were not Mr. Davis'; is that  
17 correct?

18 A. That's my memory.

19 Q. Did you bring an expert to trial to testify that  
20 those fingerprints could have been run through AFIS? Do you  
21 know what AFIS is?

22 A. Yes, I know what AFIS is.

23 Q. Did you bring an expert to trial to testify that  
24 those fingerprints could have been run through AFIS to have  
25 brought to light that the prints were someone else's?

1           A.    No, but that was cross-examined and admitted to, if  
2 my memory serves me right.

3           Q.    Do you know whether or not the phone records in this  
4 case played an important part of the defense?

5           A.    The phone records I think were critical concerning  
6 Mr. Davis' alibi for the fire night. That's my memory.

7           Q.    Okay. Do you have -- do you recall that Ms. Bruton,  
8 on the evening of December 10<sup>th</sup>, made a series of phone calls  
9 from someone's house?

10          A.    Is December 10<sup>th</sup> the night that the fire happened?

11          Q.    You know, I can't testify. I can refresh your  
12 recollection.

13          A.    Well, I have the brief right here. May I look at the  
14 brief?

15          Q.    Sure.

16          A.    I'm looking at P-49.

17          Q.    Were you directly involved with the investigation  
18 into the phone records? Was that your -- was that your  
19 responsibility at trial?

20          A.    I mean, Scott -- Scott Davis is my responsibility.  
21 But to answer your question, no.

22          Q.    I'm talking about as opposed to Mr. Morris.

23          A.    All of that work was done before I ever was involved  
24 in the case.

25          Q.    Okay, thanks. So you discussed before that there

1 were multiple agencies that lost evidence in this case.

2 A. That's my memory.

3 Q. Do you know which agencies were the agencies  
4 responsible for handling and preserving the evidence, which  
5 governing agencies?

6 A. I could look to refresh my memory.

7 Q. The appellate brief is in front of you, if you want  
8 to use that.

9 A. [Reviewing document.]

10 Q. Maybe a better question would be do you remember  
11 which governing agencies were responsible for investigating and  
12 ultimately prosecuting the case?

13 A. Who prosecuted Mr. Davis?

14 Q. Sure, let's start with that.

15 A. Fulton County District Attorney's Office.

16 Q. Did they have any of the responsibility in losing any  
17 of the evidence?

18 A. I don't specifically remember, but it's -- they're  
19 part of the prosecution team.

20 Q. Do you know what other agencies were involved?

21 A. The Atlanta -- City of Atlanta Police Department, the  
22 GBI, the DeKalb County Fire Department, DeKalb -- City of  
23 Atlanta Fire Department. Those are the ones I remember.

24 Q. How about the DeKalb Police?

25 A. I don't remember, but I'm not saying they weren't

1 involved.

2 Q. Okay. Well, did you ever attempt to obtain from any  
3 of those agencies -- did you ever attempt to obtain Standard  
4 Operating Procedures so that at trial you could show the jury  
5 what procedures they violated in losing all the evidence?

6 A. I think they admitted to that, but I don't know. I  
7 don't have a specific --

8 Q. I'm not talking about whether they admitted to losing  
9 evidence, I'm talking about whether or not you introduced as  
10 your own evidence what the rules were, the Standard Operating  
11 Procedures, so you could show them how and under what rules  
12 that they actually broke.

13 A. I don't remember that happening at trial.

14 Q. I understand you came into the process quite late,  
15 but did -- and you mentioned you went and tried to speak with,  
16 interview every witness you could, given the limited time you  
17 had. Do you recall whether or not you interviewed or spoke  
18 with anyone who was responsible for handling any of the missing  
19 items of evidence?

20 A. I do not. Not to my knowledge.

21 Q. Did you -- do you recall the issue at trial about  
22 what I'll refer to as the fire timeline being part of Scott's  
23 defense?

24 A. Yes.

25 Q. Tell us what your recollection of that is.

1           A.     Scott Davis' neighbor originally told Mr. Kadesh  
2     and/or Mr. Morris and I believe one of their investigators that  
3     he saw Scott at a certain time -- excuse me, Mr. Davis at a  
4     certain time coming back from buying mace or attempting to get  
5     mace, to purchase mace from a nearby store, but the store was  
6     closed. And if that neighbor, whose name is Mr. Gatley, I  
7     believe it's G-A-T-L-E-Y, was accurate in that time, then  
8     according to the prosecution's expert and Mr. Morris' expert,  
9     the fire had to be started at Mr. Coffin's home within the --  
10    with not enough time for Mr. Davis to be with his neighbor at  
11    his home. So, therefore, it was a perfect evidence trail that  
12    Scott Davis did not burn down Mr. Coffin's home because Scott  
13    Davis is at his home with his neighbor. And to get from Scott  
14    Davis' home to Mr. Coffin's home would not give you enough time  
15    to put that house on fire. That's my memory.

16           Q.     Okay. And you mentioned both the State's expert and  
17    Mr. Morris' expert?

18           A.     Right. Before I was in the case, Mr. Morris and/or  
19    Mr. Kadesh hired an expert, who I think -- my memory is --  
20    concurred with the prosecution's expert.

21           Q.     Do you remember the name John Lentini?

22           A.     That's who was Mr. Morris' expert.

23           Q.     I'm going to show you what's been marked as  
24    Respondent's Exhibit A and ask if you're familiar with that  
25    document.

1           A.    [Reviewing document.] I definitely looked at these  
2 documents.

3           Q.    Okay. And was it Mr. Lentini's conclusion that the  
4 fire, in all likelihood, would take 10 minutes to reach the  
5 roof from the time it was set, to reach the roof and be  
6 apparent to people outside of the home at the 951 West Conway  
7 address?

8           MS. GALLOW: Your Honor, I'd object to the  
9 mischaracterization. It was between 10 and 25 minutes  
10 stated in that letter.

11          MR. ABT: It actually says closer to 10, but I'll ask  
12 him for --

13          MS. GALLOW: But it also says 25, Judge --

14          MR. ABT: But I'll withdraw --

15          MS. GALLOW: -- not just 10 minutes.

16          MR. ABT: I'll withdraw the question.

17          THE COURT: Thank you, counsel.

18 **BY MR. ABT: [Resuming]**

19          Q.    What is your understanding of what Mr. Lentini's  
20 conclusions were with respect to how long it would take for the  
21 fire to reach the roof?

22          A.    From reading this, because Mr. Morris was really in  
23 control of this part, 10 to 25 minutes.

24          Q.    Okay. Does it get more specific than just 10 to 25  
25 minutes?



1           A.    It says -- I'm just reading from the document,  
2   Respondent's A as in apple, that "It is likely that, given the  
3   presence of gasoline in the room of origin, the fire broke  
4   through the roof in a period closer to 10 minutes than to 25."  
5   That's what -- I'm just reading from --

6           Q.    Am I correct in stating that the shorter the length  
7   of time that the fire reaches the roof, the more that helps Mr.  
8   Davis' defense because then he couldn't have set the fire and  
9   gotten home; is that correct, as opposed to a longer period of  
10  time that it takes to reach hurts Mr. Davis?

11          A.    I don't know. I mean, something happened, I  
12  remember, with Mr. Gatley that was terrible at trial where he  
13  went against his previous statements to Mr. Morris and/or his  
14  investigators, so I'd have to look at the phone -- I don't  
15  remember how much time there was --

16          Q.    I'm not asking you to make an estimation of time.  
17  What I'm asking you is if you understand that with respect to  
18  establishing a fire timeline, was it your understanding that --  
19  what was your understanding with respect to whether a shorter  
20  time was helpful or harmful in Mr. Davis' defense?

21          A.    I don't know. I mean, I just don't have a clear  
22  memory.

23          Q.    Do you know whether Mr. Lentini was called at trial?

24          A.    He -- my memory is he was not called to testify.

25          Q.    Did you or Mr. Morris bring any fire or arson expert

1 to testify at trial to refute the State's theory of how the  
2 fire happened and under what conditions?

3 A. We didn't -- we did not call a witness to testify at  
4 trial.

5 Q. And did you or Mr. Morris call an expert witness at  
6 trial to testify about what caused the fire or how it started  
7 to refute the State's theory?

8 A. No, sir.

9 Q. Did you -- one of the State's experts, do you recall  
10 his name as being Brian Grove?

11 A. Vaguely.

12 Q. Do you know whether or not you spoke to him prior to  
13 trial?

14 A. I don't believe I did.

15 MR. ABT: If I can approach again, Your Honor.

16 THE COURT: Yes, sir.

17 Q. Mr. Steel, I'm going to show you what has been marked  
18 Petitioner's Exhibit 45 and ask if you are familiar with that  
19 document.

20 A. [Reviewing document.] I don't remember this at all.

21 Q. Do you know who Linda Tolbert is?

22 A. No, sir.

23 Q. I take that it would be fair to say that you never  
24 questioned her or met her?

25 A. To my knowledge I've never known the existence of

1 this document and I never spoke with Ms. Tolbert, to my  
2 knowledge.

3 Q. Well, let me ask you this. Prior to trial in the  
4 Davis case, did you review all the discovery materials that the  
5 State provided?

6 A. I received everything that Mr. Morris had.

7 Q. I understand it was a very atypical situation for you  
8 to come in sort of late, but did you review everything Mr.  
9 Morris sent you?

10 A. Yeah, everything Mr. Morris gave to me I looked at.  
11 Whether -- whether I got everything that he had or whether the  
12 prosecution gave me everything, I did not go through the  
13 prosecution's file.

14 Q. You did not go through the prosecution's file?

15 A. They wouldn't -- they didn't have an open file  
16 policy, to my knowledge.

17 Q. But it was your belief that what Mr. Morris sent you  
18 was all the discovery in the case?

19 A. No, because he didn't give me some of the items that  
20 were not relevant -- or what he deemed not relevant for trial.

21 Q. So you were limited in what evidence you reviewed,  
22 based upon Mr. Morris' analysis about what was important?

23 MS. GALLOW: Objection, Your Honor. Again counsel is  
24 testifying and I'd ask he direct questions --

25 THE COURT: Yes. Don't lead the witness. Rephrase.

1 Q. What --

2 A. I mean, Mr. Morris would have let me see anything --

3 THE COURT: Mr. Steel, the question's been withdrawn.  
4 He's going to rephrase.

5 Q. Do you know whether or not you reviewed -- can you  
6 tell the Court what your knowledge is with respect to reviewing  
7 the totality of the discovery?

8 A. I reviewed every piece of discovery that I could. If  
9 I wasn't given something, I was unaware of it and I didn't  
10 review it.

11 Q. You understood that Mr. Davis was accused of burning  
12 down David Coffin's house as part of the prosecution's case,  
13 fair? Is that -- that was -- or what was your understanding of  
14 -- let me withdraw that. What was your understanding of the  
15 prosecution's theory, just basically, with respect to the fire  
16 at 951 West Conway Drive?

17 A. That Scott Davis was upset that his wife was having  
18 extramarital affairs with Mr. Coffin, that Scott Davis hired a  
19 -- or excuse me -- his -- Scott Davis' divorce lawyer hired an  
20 investigator to --

21 Q. I'm sorry to interrupt you, Mr. Steel, but what I  
22 want to ask is not their entire theory of the case, just with  
23 respect to the fire. What was your understanding as to who set  
24 the fire? What was the prosecution's theory as to who set the  
25 fire?

1           A.    I don't -- I mean, the transcript would speak for  
2           itself. My memory is that their theory wavered, that somehow  
3           they got a party to the crime charge over my objection, and  
4           they said that Scott Davis either did this by himself or had an  
5           accomplice, but I don't -- whatever the transcript shows.

6           MR. ABT: Judge, could I take a few minutes break?

7           THE COURT: How many is a few?

8           MR. ABT: Five.

9           THE COURT: Okay. We'll take a five minute break.

10          Make it seven, that gets you to quarter-till.

11          MR. ABT: Thank you, Your Honor.

12                   **[Brief break.]**

13                   \*   \*   \*

14          **BY MR. ABT: [Resuming]**

15          Q.    Mr. Steel, were you trying to -- was one of your  
16          theories of defense you trying to show that Mr. Davis had  
17          nothing to do with the fire at 951 Conway?

18          A.    Yes, sir.

19          Q.    And are you knowledgeable or aware that an arson  
20          expert, an arson investigator, can determine whether someone  
21          has handled accelerants? In other words, you know, when I  
22          touch something it leaves a fingerprint after the fact. Are  
23          you aware of the science involved with gasoline and other  
24          accelerants that if you touch them there can be tests done to  
25          determine whether or not you've touched those type of

1 chemicals?

2 A. Not personally. I'm sure that I don't disagree with  
3 that statement.

4 Q. Okay. But you did not have any arson experts or  
5 experts in accelerants testify as a part of your theory of the  
6 defense at trial; is that fair to say?

7 A. [No response.]

8 Q. Or what -- let me rephrase the question. What  
9 experts did you present at trial to refute the State's theory  
10 that Mr. Davis had set the fire?

11 A. Like many cases, we cross -- I say "we" -- in this  
12 case it was the Honorable Bruce Morris cross-examined the  
13 State's witnesses.

14 Q. There were no experts?

15 A. Whatever the transcript shows. My memory is that in  
16 Scott Davis' case in chief we did not call an arson expert.  
17 That's my memory.

18 MR. ABT: Judge, if I could approach Mr. Steel.

19 THE COURT: Sure.

20 Q. Mr. Steel, I'm going to try to refresh your  
21 recollection on an earlier issue so you can clarify for the  
22 Court, and I'm showing you what is the trial transcript of Page  
23 4265 -- actually, let's start at the bottom of Page 4264 and go  
24 through 4265. I'm going to ask you to read that to see if it  
25 can refresh your memory of the closing argument.

1           A.    [Reviewing document.] Okay.

2           Q.    I understand the record speaks for itself, but what  
3 is your recollection of what Mr. Morris told the jury?

4           A.    Well, this and the Court was telling me that I said  
5 two different things, so you're about to say I said three  
6 things, because the record's the best evidence. And Mr. Morris  
7 basically -- it's actually a very eloquent argument -- he said  
8 that, "I'm not telling you," meaning the petit jury "that the  
9 circumstances of this case aren't suspicious. I'm not telling  
10 you that it's possible to construe the circumstances and point  
11 to Scott Davis. I don't disagree with that. But that's not  
12 the question. The question is has the State proven guilt  
13 beyond a reasonable doubt." That's what I was referring to  
14 earlier, and that's the quote, Your Honor.

15           THE COURT: Thank you.

16           Q.    I'm glad we cleared that up. Redirecting your  
17 attention elsewhere, do you -- we discussed briefly Ms. Davy,  
18 Bernadette Davy, who was the GBI's firearm expert at trial. Is  
19 that your --

20           A.    I don't -- I definitely don't disagree with that. I  
21 don't have a clear recollection of Ms. Davy, but I'm sure that  
22 that's true.

23           Q.    When -- and I want to ask you what you normally --  
24 what your thought process is in trials, in general, when the  
25 State identifies an expert that they're going to bring to

1 trial. What do you -- what are some of the things you consider  
2 doing in either attacking or refuting that expert's opinion?

3 A. Or embracing it. It depends on the case, every case  
4 is different.

5 Q. Sure. Have you ever, in other cases, considered the  
6 credibility of an expert?

7 A. I've done that.

8 Q. And in so doing, have you ever done research and  
9 investigation into that expert's background to determine things  
10 in their history, in their professional career, so that you can  
11 impeach them -- either impeach their credibility or their  
12 qualifications or even their ability to testify as an expert  
13 under federal court or the Georgia statute in state cases to  
14 attack their either qualifications or credibility?

15 A. I've done that.

16 Q. Okay. Do you ever, for example, an expert who is  
17 employed by a state agency like the GBI, would you subpoena  
18 their personnel file to look at it and see if there's anything  
19 in there to question them about?

20 A. I've done that before.

21 Q. Did you subpoena Ms. Davy's personnel file?

22 A. No.

23 Q. I want to ask you some questions about the -- and  
24 this pertains to throughout your representation of Mr. Davis,  
25 both to the trial and then ultimately a motion for new trial



1 and then -- a trial, then the motion for new trial, and  
2 ultimately the appeal, was it your understanding that there was  
3 some issue or issues regarding the taped -- audiotaped  
4 interview of Mr. Davis?

5 A. Yes.

6 Q. And did it come to your -- what came to your  
7 attention that was legally important to his defense at trial  
8 about that audiotaped interview?

9 A. It was very damaging. Scott Davis, according to the  
10 prosecution and the tape, was being interviewed by Detective  
11 Chambers. Allegedly it was a non-custodial interrogation at  
12 first because Scott -- excuse me -- Mr. Davis was a victim of a  
13 fire at his house, an arson, and a shooting, and eventually it  
14 became custodial. And law enforcement officers at that time  
15 supposedly did not know that Mr. Coffin was shot in the head.  
16 They had no idea what his cause of death was. And Mr. Davis,  
17 my memory is, on the tape said something to the effect of, I  
18 did not burn down that man's home and I did not shoot him in  
19 the head. And law enforcement officers did not know that Mr.  
20 Coffin was shot in the head.

21 Q. And again, that refers back to the -- that refers  
22 back to the issue about the phone records, the phone calls and  
23 what -- what phone calls may or may not have been of -- Scott  
24 Davis may not have received that evening from Ms. Bruton.

25 A. I don't remember it being phone calls as much as

1 phone records, but it may be. It was testimony. I think Mr.  
2 Davis, on the tape, said that he learned that information from  
3 his wife.

4 Q. Did it come to your attention that -- from Mr. Davis  
5 that he was concerned that there were times in the tape,  
6 multiple times in the tape, where the tape was stopped and  
7 started, and that during those stops the police were  
8 threatening Mr. Davis?

9 A. I don't -- I don't know if I remember multiple, but  
10 it definitely was said. My memory is that Mr. Davis told Mr.  
11 Morris and myself that Detective Chambers, I believe Detective  
12 Walker, and I believe a third detective or officer was in a  
13 room with Mr. Davis. I think Mr. Davis told me that Detective  
14 Chambers shut the tape off in Mr. Davis' presence -- Detective  
15 Chambers shut off the tape in Mr. Davis' presence, put a finger  
16 in Mr. Davis' face, and told him that he would die in the  
17 Georgia electric chair, he would see to it that he would die,  
18 he would get the death penalty, and then Mr. Chambers calmed  
19 down and turned back on the tape. That's my memory.

20 Q. Okay. So this was not -- was not your understanding  
21 that this was an issue about turning the tape over, that Mr.  
22 Chambers stopped the tape to then threaten Mr. Davis.

23 A. I feel very comfortable testifying that's what Mr.  
24 Davis had told me.

25 Q. I'm going to --

1                   MR. ABT: If I could approach the witness again, Your  
2 Honor.

3                   THE COURT: Yes, sir.

4                   Q. Mr. Steel, I'm going to ask you to take a look at  
5 what has been marked as Petitioner's Exhibit 50 and review that  
6 document, specifically if you can view Paragraph 9.

7                   A. Just reviewing Paragraph 9 of P-50?

8                   Q. Preliminary question. First, who is the letter --  
9 who is that document addressed to?

10                  A. The Honorable Donald Samuel and myself.

11                  Q. Do you remember receiving that letter?

12                  A. I can't say I received it, but I recognize the  
13 handwriting.

14                  Q. Do you know what date is on the letter?

15                  A. I'm reading from the document 9/6/08.

16                  Q. Do you know whether Mr. Samuel shared with you all of  
17 the letters he received from Scott Davis?

18                  A. You'd have to ask Mr. Samuel. I don't know -- I know  
19 I was in very good communication with Mr. Davis.

20                  Q. If you could reread Paragraph 9.

21                  A. Okay.

22                  Q. I really just want to use it to refresh your  
23 recollection as to whether or not you remember Mr. Davis asked  
24 you to have the audiotape analyzed, whether he asked you in  
25 writing or in verbal conversations, did he stress to you that

1 he wanted someone to examine the audiotape?

2 A. I don't know.

3 Q. I'm sorry?

4 A. I don't -- I don't remember.

5 Q. You're not sure? You don't remember either way?

6 A. I'm fairly sure that before I got -- I was involved  
7 in the case, this issue on the Jackson-Denno was already  
8 argued. If I'm wrong, I apologize, but that's my memory.

9 Q. Well --

10 A. This is --

11 Q. -- but you were still involved for the motion for new  
12 trial and appeal?

13 A. Right, that's what I'm about to say.

14 Q. Sorry, go ahead.

15 A. That's okay. On P-50 I always explain to Mr. Davis  
16 that I could step aside from the case, Mr. Morris can step  
17 aside from the case.

18 Q. That's not really my question. My question is about  
19 whether he asked you to have the tape analyzed.

20 A. Well, I'm trying to answer. This goes to Mr. Davis  
21 -- I'm just reading from Division 9 on Page 5. I've not  
22 reviewed the whole letter of P-50, but it says, "If we do an  
23 ineffective on this issue, I want to testify about it," meaning  
24 Detective Chambers stopping the tape, "and I want the original  
25 interview tape analyzed." But it was decided by Mr. Davis not

1 to have me and Mr. Morris step away from the appeal, so we  
2 didn't do an ineffective claim.

3 Q. Did you, at some point during the representation of  
4 Mr. Davis, actually sit down and listen to the entire taped  
5 interview, audiotaped interview?

6 A. I can't -- I mean, I can't remember doing that, but I  
7 would be shocked if I didn't do that.

8 Q. You don't specifically remember?

9 A. I can't sit here and tell you where I was when I  
10 listened to that tape.

11 Q. And you don't specifically remember the contents of  
12 the tape or what it sounded like or --

13 A. Not as I sit here today. I think it may have been  
14 played at trial. I mean, I'm assuming it was.

15 Q. Have you hired audiotape experts in other cases?

16 A. Yes. Well, I mean, it depends on what you define by  
17 that. But we've enhanced tapes -- yeah, we've challenged  
18 tapes.

19 Q. Challenged the authenticity of the tape?

20 A. Like who the speakers are?

21 Q. Let's start there, sure.

22 A. I don't know. I mean, I've done a lot of cases, Mr.  
23 Abt. I mean, if you want me to answer that question, I will  
24 answer it. But I have done this as hard as I can for 20 years,  
25 so, yes, I have -- I've been down to record studios and had

1 tape recordings enhanced, and I've worn earphones and blown my  
2 eardrums out trying to listen to things, so I'm trying -- yeah,  
3 I mean, I don't know if I'm answering your question, but, yeah,  
4 I'm familiar that there's technology that can be used to  
5 analyze recording devices.

6 Q. Thanks.

7 [Brief pause.]

8 MR. ABT: Just a moment, Your Honor, if I could.

9 [Counsel confer.]

10 MR. ABT: Judge, Your Honor, that is all the  
11 questions I have for now of the Honorable Mr. Steel.

12 MS. GALLOW: Your Honor, we will be glad to know that  
13 I have no questions for this witness.

14 THE COURT: Okay. Wow.

15 [Off the record comments.]

16 THE COURT: Can Mr. Steel be excused?

17 MR. ABT: Your Honor, he can be excused and you can  
18 go play a round of golf --

19 THE COURT: I wish I did.

20 MR. ABT: Thanks, Mr. Steel, appreciate it.

21 THE WITNESS: Bye, Your Honor. Good to see you.

22 [Off the record in re: making copies of documents.]

23 **[Proceedings adjourned for the evening.]**

C E R T I F I C A T E

STATE OF GEORGIA

COUNTY OF GWINNETT

I hereby certify that the above and foregoing Pages 634 through 779 are a true and correct transcription of Volume IV of VII of the habeas corpus proceedings taken down by me in **Scott Winfield Davis vs. Tony Howerton, Warden, Phillips State Prison, Civil Action Number 10-A-0741-2.**

I further certify that I am neither related nor counsel to any of the parties and am not financially interested in the matter.

**This certification is expressly withdrawn and denied upon the disassembly and/or photocopying of the foregoing transcript or any part thereof unless disassembly and photocopying is done by the undersigned Certified Court Reporter and original signature and official seal attached thereto.**

WITNESS my hand and official seal in Gwinnett County, Georgia, this 19th day of December, 2011.

---

Beth O. Capell, CCR, CVR  
Certificate Number A-1290  
Official Court Reporter

Gwinnett Superior Ct./Div. II



1 **FRIDAY - JULY 29, 2011**

2 [Petitioner brought into courtroom.]

3 MR. MALCOLM: Your Honor, before they call their next  
4 witness, I would just like to make an objection on the  
5 record. And I don't know what specifically they're going  
6 to get into with this witness, but she has been in the  
7 courtroom, so that is a technical violation of the rule,  
8 and I would like to note that for the record.

9 MS. SHEIN: And I would like to put on the record in  
10 response that Ms. Mulder was not here yesterday at all,  
11 and yesterday was the only day that was involved with  
12 testimony relating to the transcript of the tape. And she  
13 is our private investigator, worked on this case, she's no  
14 different than a police officer or a detective that would  
15 be sitting at the counsel's table for the government and  
16 assisting in the representation of their case.

17 So I don't believe that in this case she was here  
18 during any of the testimony relevant to what she's about  
19 to testify to, and so she would have been sequestered  
20 yesterday anyway.

21 THE COURT: All right. Well, I note the exception.  
22 I do -- counsel, I will note -- I have seen her in the  
23 courtroom the entire week, and I understand --

24 MS. SHEIN: She was not here yesterday.

25 THE COURT: Yes, ma'am. But we'll -- I go ahead and

1           hear it, okay?

2           MS. SHEIN: Okay, thank you.

3   Whereupon,

4                               **DEBRA MULDER,**

5   having been duly sworn under oath, was examined and testified  
6   as follows:

7                               **DIRECT EXAMINATION**

8   **BY MS. SHEIN:**

9           Q.    Would you state your name, please.

10          A.    Debra Mulder.

11          Q.    And what is your occupation?

12          A.    I'm a private investigator.

13          Q.    And did you work for my law office, Marcia Shein,  
14   Elizabeth Brandenburg, on the Scott Davis case?

15          A.    Yes, I did.

16          Q.    And did you file some open records requests on our  
17   behalf?

18          A.    Yes, I did.

19          Q.    On behalf of Scott Davis?

20          A.    Yes.

21          Q.    And was one of those with the Atlanta Homicide  
22   Division; is that --

23          A.    Yes.

24          Q.    -- is that what it's called?

25          A.    Yes. It was the Atlanta Homicide Division requesting

1 the homicide file of this case against Scott Davis.

2 Q. And after you filed that, did you receive a phone  
3 call from them?

4 A. They gave me three days and then they called me and  
5 said I could come down and view the file.

6 Q. Okay. And did you do that?

7 A. I did.

8 Q. And did you obtain a copy of the file?

9 A. I obtained a copy of the file as well as the  
10 interview that I've got, the transcription that I've got here.

11 Q. And when you went to Homicide, did they tell you they  
12 could give you the original file?

13 A. No. That the original file never leaves their  
14 custody.

15 Q. And did -- how did they give you a copy?

16 A. They made the copy for me. I was in a room, allowed  
17 to view the file. After I viewed the file, I gave it back to  
18 them, they made the copy for me, and --

19 Q. You retained possession of that file?

20 A. Yes, I did.

21 Q. Did you retain possession of that file in the  
22 ordinary course of your private investigative business?

23 A. Yes, I did.

24 Q. Do you still have that original copy?

25 A. Yes, I do.

1 MS. SHEIN: Your Honor, may I get that from her?

2 I've not even received it.

3 THE COURT: Oh, yeah, that's fine.

4 Q. And did you provide a copy of the original to me at  
5 my request?

6 A. Yes, I did.

7 Q. But you still have the one you originally got from  
8 Homicide?

9 A. Yes, I do.

10 MS. SHEIN: Okay. If I may approach, Your Honor?

11 THE COURT: Yes, ma'am.

12 MS. SHEIN: This would be marked as the next exhibit.

13 Q. Is this one copy or --

14 A. It's one copy.

15 Q. This whole thing?

16 A. Yes. You have a copy that's copied on both sides.

17 Q. So this is the original you received from --

18 A. Yes, it is.

19 MS. SHEIN: Marking as the next exhibit.

20 THE COURT: Eighty-one. Eighty-one?

21 MS. SHEIN: Exhibit 81. I ask that the document be  
22 admitted as having come from the City of Atlanta Homicide  
23 Division.

24 MR. MALCOLM: Your Honor, I haven't seen the  
25 document.

1 MS. SHEIN: Just a second and I'll give it to you.

2 MR. MALCOLM: Your Honor, may I voir dire the  
3 witness?

4 THE COURT: Sure.

5 **BY MR. MALCOLM: [Voir dire]**

6 Q. Ms. Mulder, do you work for the City of Atlanta?

7 A. No, I do not.

8 Q. And do you have any personal knowledge of what looks  
9 like contained in Petitioner's 81 is a transcript of an  
10 interview with Detective Walker and Scott Davis? You weren't  
11 present during that interview, were you?

12 A. No, I was not.

13 MR. MALCOLM: Your Honor, I do have an objection to  
14 this document coming into evidence. I don't believe that  
15 this witness can authenticate it properly.

16 MS. SHEIN: Your Honor, she can. That's the only way  
17 you can get these documents. And I have -- I'll bring in  
18 another witness if we have to, but this is how they  
19 release documents to people if you ask for it under the  
20 Open Records Request. This is the only way that we could  
21 get this document. And she's the person that did the ORR,  
22 when down to Homicide, got the document, and brought it  
23 here to court. There's no other way to get it, not one  
24 single way. They won't bring the file, they won't bring a  
25 copy to you, and they won't come here. And I think Ms.

1 Gallow knows this herself from having experienced that.

2 THE COURT: Mr. Malcolm, what is it that you're -- I  
3 understand the objection, but what is it that -- do you  
4 want to hear from somebody?

5 MR. MALCOLM: I just want to know that it's a -- I  
6 believe what Ms. Mulder is saying, I just want to make  
7 sure that it is an accurate representation, a full  
8 representation of what it says it is, which appears to be  
9 a transcript of an interview with Mr. Davis. Obviously,  
10 Ms. Mulder wasn't present during any of those interviews  
11 and I believe that she did go down there and obtain, I'm  
12 sure, a copy of it. However, I don't believe she's the  
13 appropriate witness to authenticate that document to get  
14 it tendered into evidence.

15 THE COURT: Is that all that's in that file is the  
16 transcript?

17 MR. MALCOLM: That's what it looks like.

18 MS. SHEIN: Yes, that's correct.

19 THE COURT: Well, then -- and is that the entire  
20 purpose of her being here?

21 MS. SHEIN: Yes.

22 THE COURT: Okay. Then for the moment I'm not going  
23 to admit it, and perhaps when we're back, you can bring in  
24 a witness that can compare the two.

25 MS. SHEIN: I might be able to do that right now,

1 Your Honor.

2 THE COURT: Okay. Can Ms. Mulder step down?

3 MS. SHEIN: Yes. Thank you, Your Honor.

4 [Witness steps down.]

5 THE COURT: I'm not sure where we are now. Got  
6 another witness?

7 MS. SHEIN: There's another witness, Your Honor.

8 THE COURT: Okay.

9 Whereupon,

10 **DETECTIVE M. WALKER,**

11 having been duly sworn under oath, was examined and testified  
12 as follows:

13 **DIRECT EXAMINATION**

14 **BY MS. SHEIN:**

15 Q. Please state your name.

16 A. I'm Detective M. Walker.

17 Q. And where do you work?

18 A. I'm a retired Atlanta Police Officer.

19 Q. And how long did you work at Atlanta Police  
20 Department?

21 A. Thirty years.

22 Q. Can you tell me when you started and when you  
23 finished?

24 A. Started October the 25<sup>th</sup> of 1976, retired June the  
25 26<sup>th</sup> of '06.

1 Q. And were you a part of the police personnel who was  
2 involved with the Scott Davis case?

3 A. Yes.

4 Q. And did you work for the Homicide Division?

5 A. Yes.

6 Q. And are you familiar with the homicide file in the  
7 Scott Davis case?

8 A. Yes.

9 MS. SHEIN: May I approach, Your Honor?

10 THE COURT: Yes, ma'am.

11 Q. I'm showing you now what's marked P-81, Plaintiff's  
12 Exhibit 81. Do you recognize this document?

13 A. Yes, I do.

14 Q. What is it, please?

15 A. This is the transcript of an interview with Scott  
16 Davis.

17 Q. Was that kept in the ordinary course of business in  
18 the files of the Atlanta Homicide Division?

19 A. Yes.

20 Q. Are you personally familiar with the document?

21 A. Yes.

22 MS. SHEIN: I'd like to enter that document as  
23 Exhibit 81, Your Honor.

24 MR. MALCOLM: One question, Your Honor.

25 **BY MR. MALCOLM: [Voir dire]**



1 Q. Detective Walker, does that appear to be the complete  
2 transcript of the entire interview as you recall?

3 A. Yes. I didn't go through all of it, but it seemed to  
4 be there, yes.

5 MR. MALCOLM: And for the purposes of this hearing,  
6 Your Honor, I have no objection to that. I would just  
7 like to note that it is a transcript, it's not the actual  
8 recording. But for this hearing, I have no objection.

9 THE COURT: All right. Then I'll admit 81 without  
10 objection.

11 **[WHEREUPON, Petitioner's Exhibit Number 81 was tendered**  
12 **and admitted into evidence without objection for purposes**  
13 **of hearing only.]**

14 MS. SHEIN: Thank you very much, Mr. Walker. You're  
15 free to go. Thank you, Your Honor.

16 [Witness excused.]

17 MS. SHEIN: They've agreed to consider that as an  
18 option. So it looks like Mr. Kadesh is not going to be  
19 here. We haven't seen him in court nor have we heard from  
20 him. So in light of the offer, I think that might be the  
21 most expeditious thing to do.

22 THE COURT: Just a deposition?

23 MS. GALLOW: Yeah. Your Honor, what we usually do,  
24 and you know, Marcia, is just get the deposition and then  
25 we could leave the record open, and we'll submit that

1 deposition upon completion. And if that's amenable to  
2 this Court, that's what we'll plan on.

3 THE COURT: That's fine. And perhaps, you know,  
4 y'all can do the deposition between now and the time that  
5 we actually have the hearing with the other witness --

6 MS. SHEIN: Yes.

7 THE COURT: -- and you can submit all of that at  
8 once.

9 MS. SHEIN: Oh, we will, Your Honor. We'll try to  
10 get it all --

11 MR. ABT: Along with the affidavit from Mr. Morris.

12 THE COURT: Okay.

13 MS. SHEIN: Yes. Yeah, there's two things that we  
14 have -- three things: deposition, affidavit of Mr. Morris,  
15 and the expert.

16 THE COURT: Okay.

17 MS. SHEIN: And I'm going to make sure I remember all  
18 that.

19 THE COURT: Do you all have any -- so I'm -- well,  
20 let me back up. Is that it then for today?

21 MR. ABT: We have several witnesses that have not  
22 shown up, Judge, so we're going to try and track these  
23 folks down.

24 THE COURT: Okay.

25 MR. ABT: I mean, I can't --

1 MS. SHEIN: We do -- I mean, Mr. Phillips was served  
2 and had agreed to come, and of course he wanting money,  
3 but we told him, of course, he can't have that. And he  
4 called Ms. Mulder a couple of times trying to skate out of  
5 it, but he did not indicate he wasn't planning to come.  
6 We have an affidavit of the service of the subpoena, so we  
7 may have to force him to come in some fashion.

8 COURT REPORTER: What was that name, please? I  
9 didn't get it.

10 MS. SHEIN: The name of the witness?

11 COURT REPORTER: Yes.

12 MS. SHEIN: James Phillips, P-H -- I'm sorry?

13 MR. ABT: Just to make the record very clear, he  
14 asked for money besides --

15 MS. SHEIN: Yes, besides the fee.

16 MR. ABT: -- the subpoena fee that he's entitled to.

17 MS. SHEIN: Yes, right.

18 THE COURT: Well, I guess what I was trying to get to  
19 is how long do you estimate needing to finish up, and do  
20 you want to go now and try to get a date?

21 MS. SHEIN: Well, I want to make sure it's convenient  
22 to the AG's office and to the Court, because I know you've  
23 got -- we've all got backed up work now.

24 THE COURT: Right.

25 MS. SHEIN: So you mentioned something in late

1           September or October, which probably is a good idea, more  
2           like October.

3                         [Off the record comments.]

4           MS. SHEIN:   Sometime in October might be the best.  
5           It would give us enough time to possibly get the  
6           deposition done and all the experts.

7           THE COURT:   Let me see counsel, please.

8                         [Off the record in re: scheduling]

9           THE COURT:   You just tell me what you want.

10          MR. ABT:    One long day.

11          MS. SHEIN:   Yeah, one long day.

12          THE COURT:   And I want to tell you one other thing.  
13          You've probably figured this out, but if you haven't, I'm  
14          going to want proposed orders. So I'm just giving you a  
15          heads up. I'm certainly not going to expect them on that  
16          day, but just be thinking that I will want that.

17          MS. SHEIN:   Well, if I may ask, when I've normally  
18          done proposed ordered, and I think they do the same thing,  
19          is waiting for the transcripts and then we have like a 60  
20          day window --

21          THE COURT:   Okay, that's fine.

22          MS. SHEIN:   -- after that. And then they have --

23          THE COURT:   That's fine.

24          MS. SHEIN:   -- the same 60 days window. We both  
25          submit what we think is worth saying and --

1 THE COURT: Okay. Okay.

2 MS. GALLOW: And, Your Honor, along those lines, we  
3 should just clear up the record of what we've done as to  
4 the record in this case, what we've stipulated to, what  
5 we've loaned to the Court for purposes of the hearing.

6 THE COURT: Okay.

7 MS. GALLOW: And I'm sure if you want to put that on  
8 the record just to make --

9 THE COURT: That's fine.

10 MS. GALLOW: -- sure that we're all on the same page.

11 THE COURT: That's fine, yeah.

12 MR. ABT: Lieutenant Phillips is on the way from  
13 Winder.

14 THE COURT: He just left?

15 MS. SHEIN: I don't think he's gotten in his car yet.

16 THE COURT: Well, I don't --

17 MS. SHEIN: No, I think -- well, I don't want to have  
18 the Court sitting here for a couple of hours because the  
19 traffic is so bad.

20 THE COURT: What -- where's the traffic -- I mean --

21 MS. GALLOW: Well, 85 is shut down.

22 MS. SHEIN: Eighty-five is shut down with a seven-car  
23 wreck.

24 THE COURT: Okay.

25 [Off the record comments.]

1 MS. SHEIN: Well, if we can make it -- if you don't  
2 mind waiting, I'd like to make him come in and finish it  
3 up.

4 THE COURT: Okay. I'm -- unless there's some  
5 objection somewhere, I'm here, this is all I have  
6 scheduled today --

7 MS. SHEIN: Okay.

8 THE COURT: -- so I'm happy to wait.

9 MS. SHEIN: Let's wait for him.

10 MS. GALLOW: I just wanted to just put on the record  
11 what we had -- that we had stipulated, that we were going  
12 to use the certified copy of Supreme Court record in the  
13 case.

14 MS. SHEIN: Oh, yeah. Yeah, go ahead, please.

15 MS. GALLOW: And then what we've loaned to the Court,  
16 what's already been submitted.

17 MS. SHEIN: Yeah, yeah, please go ahead.

18 MS. GALLOW: We're on the record.

19 Judge, as we all previously stipulated, should this  
20 case go up on appeal, the record of it in the Scott Davis  
21 case is in the Supreme Court. What we had proposed to do  
22 is loan the Court our copy of the case, and if there are  
23 any references to the transcript in this case, they were  
24 Respondent's 3 -- they were Respondent's 3 through 18, and  
25 those were 21 volumes. We are loaning the Court the trial

1 court record, which is the trial court's file in this  
2 case, the trial transcript. I believe Petitioner had  
3 already introduced the motion for new trial transcript as  
4 well as the appellant's brief. And we are also loaning  
5 the Court the preliminary hearing transcript and the  
6 appellant's supplemental brief in this case.

7 So I just want to make sure that we're clear on all  
8 the records. Is that your understanding, counsel?

9 THE COURT: How many -- I'm sorry. Go ahead.

10 MR. ABT: Yes, all those things are either stipulated  
11 or already admitted.

12 MS. GALLOW: Yes.

13 THE COURT: You've got those -- what you're loaning  
14 me is here?

15 MS. GALLOW: Yes, Your Honor.

16 THE COURT: How many boxes is it?

17 MS. GALLOW: Three.

18 THE COURT: Okay. I'm going to get --

19 MS. GALLOW: And I will also loan you the dolly, if  
20 that would be --

21 THE COURT: Well, I've got a little cart. I'll get  
22 my staff to come up with a cart --

23 MS. GALLOW: Okay.

24 THE COURT: -- in just a couple of minutes while  
25 we're waiting for Lt. Phillips.

1 MR. ABT: A couple -- one thing I want to make sure  
2 we're also including in the documents you're loaning to  
3 the Court, are we including the transcript from the  
4 pretrial motions?

5 MS. GALLOW: Yes, that's -- because we have not  
6 admitted that, we're loaning that to the Court. And that  
7 would be -- and just for the record, that was Marcia's  
8 Respondent Exhibit 2, if it was referring to during  
9 testimony.

10 MR. ABT: For the record.

11 MS. SHEIN: Let me just check.

12 MR. ABT: Yes.

13 MS. SHEIN: Let's be sure.

14 MR. ABT: I don't think it was admitted, but I think  
15 it was --

16 MS. GALLOW: Yeah, we didn't admit the pretrial  
17 hearings transcript.

18 MR. ABT: That's the motion for new trial transcript.

19 MS. SHEIN: Yeah.

20 MR. ABT: That was the --

21 MS. SHEIN: Pretrial transcript, yeah.

22 MR. ABT: The pretrial motions transcript --

23 MS. GALLOW: You said that was what you were -- the  
24 preliminary hearing transcript was Respondent's 2. We did  
25 not admit that. I'm not sure if you guys did, but I don't



1 think you did. The only ones that we --

2 MR. ABT: Can we stipulate?

3 MS. GALLOW: Yeah.

4 MR. ABT: Can we stipulate to admit it?

5 MS. GALLOW: Yeah.

6 MS. SHEIN: Yeah, we need the transcript from the  
7 pretrial hearing because that's part of the court record  
8 anyway.

9 MS. GALLOW: I thought we did that, or was it the  
10 motion for new trial?

11 MS. SHEIN: I think it was the motion for new trial.

12 MS. GALLOW: Okay.

13 MS. SHEIN: So once --

14 MR. ABT: The motion --

15 MS. SHEIN: I'm sorry.

16 MR. ABT: I'm sorry, go ahead.

17 MS. SHEIN: We have a motion to stipulate -- we're  
18 going to stipulate to the pretrial motion transcript. And  
19 that should be in there.

20 MS. GALLOW: Yeah, that's fine. We can do that.  
21 We've got that.

22 THE COURT: Okay.

23 MS. SHEIN: Are the motions here as well or just the  
24 transcripts?

25 MS. GALLOW: It's just the transcript.

1 MS. SHEIN: Well, that would come in through Mr.  
2 Kadesh's deposition, the actual motion itself. We might  
3 as well reserve that for when he's doing the deposition.

4 MS. GALLOW: This is just the --

5 MR. ABT: Yes, that's it.

6 MS. SHEIN: Yes, that is it. Thank you.

7 MS. GALLOW: So, Your Honor, we're just going to  
8 stipulate to which has been marked as Respondent's Exhibit  
9 2, but this is just the pretrial motions hearing  
10 transcript.

11 THE COURT: Okay.

12 MS. GALLOW: If I may approach.

13 THE COURT: And that's being admitted; correct?

14 MS. GALLOW: Yes, Your Honor.

15 THE COURT: Okay.

16 **[WHEREUPON, Respondent's Exhibit Number 2 was admitted**  
17 **into evidence by stipulation.]**

18 [Off the record.]

19 THE COURT: And Ms. Gallow, are y'all done with the  
20 transcript that you're loaning me for purposes of the  
21 hearing?

22 MS. GALLOW: Yes, Your Honor.

23 THE COURT: Okay. Then I'm going to get somebody to  
24 bring up --

25 MS. GALLOW: Okay. And I'll just put them in order

1           for you and give you -- and I believe I gave your court  
2           reporter the index of the transcript so --

3           THE COURT:   Okay.

4           MS. GALLOW:  -- how they're marked and what they  
5           included.

6           THE COURT:   Okay.

7           MS. GALLOW:  And I believe I gave you guys a copy  
8           too.

9           MS. SHEIN:   Somewhere.  If not, I'll probably call  
10          you for another one.

11          MS. GALLOW:  I'll get you one, that's all right.

12          MS. SHEIN:   There's a lot of paper on my desk that  
13          was shuffled around.

14                        [Off the record.]

15          MR. MALCOLM:  Your Honor, essentially I've just  
16          spoken to Ms. Shein about this.  Petitioner's Exhibits 79  
17          and 81 have already been admitted into evidence.  They  
18          appear to be exact duplicates.  They are the transcripts  
19          of Mr. Davis' interview during the criminal investigation.  
20          I believe we have stipulated and agreed to, just so we  
21          don't have to pay for all those extra pages, there would  
22          be no reason to keep Petitioner's 81 as part of the  
23          record.

24          THE COURT:   Okay.

25          MR. MALCOLM:  But I'll let Ms. Shein clarify

1 anything, should she need to.

2 MS. SHEIN: Well, because this one's the one that was  
3 testified to in terms of directly from the officer, I'm  
4 going to just use 81 and change it to 79. Does that work?

5 MR. MALCOLM: Okay.

6 MS. SHEIN: Because of the issue we had with that, I  
7 want to make sure this is the one --

8 MR. MALCOLM: Okay.

9 MS. SHEIN: -- everybody agrees is properly before  
10 the Court, based on the chain of custody.

11 MR. MALCOLM: Sure. That's no problem.

12 MS. SHEIN: Okay.

13 MR. MALCOLM: So the actual -- the one that was  
14 tendered as 81 will become 79.

15 MS. SHEIN: Seventy-nine, correct.

16 MS. GALLOW: Seventy-nine.

17 THE COURT: Okay.

18 MS. SHEIN: Everybody's good with that? Okay. And  
19 I'll re-label this, Your Honor.

20 THE COURT: Okay, that's fine.

21 COURT REPORTER: Didn't we admit 79 for the record  
22 only?

23 MR. MALCOLM: I believe.

24 MS. SHEIN: But now we've actually admitted it as an  
25 exhibit related to testimony and the custody --

1 THE COURT: Okay. So, yeah, all right.  
2 MS. SHEIN: Okay.  
3 THE COURT: All right. So 81 is now 79.  
4 MS. SHEIN: Correct.  
5 THE COURT: And it's in.  
6 MS. SHEIN: Correct.  
7 THE COURT: And 79, which was record only, is gone.  
8 MS. SHEIN: Correct.  
9 THE COURT: Okay.  
10 [Off the record.]  
11 \* \* \*  
12 MR. COHEN: Good morning, Mr. Phillips.  
13 THE WITNESS: Good morning.  
14 MR. COHEN: Would you raise your right hand.  
15 Whereupon,  
16 **JAMES D. PHILLIPS,**  
17 having been duly sworn under oath, was examined and testified  
18 as follows:  
19 **DIRECT EXAMINATION**  
20 **BY MR. COHEN:**  
21 Q. State your name for the record, please.  
22 A. James D. Phillips.  
23 Q. And, Mr. Phillips, were you ever employed with the  
24 Atlanta Fire Department?  
25 A. Yes, sir.

1 Q. And when were you employed with the fire department?

2 A. From 1982 until 2010.

3 Q. And can you tell us a little bit about what you did  
4 there?

5 A. My last assignment was for the previous 18 years --  
6 17, 18 years, was an arson investigator, a lieutenant arson  
7 investigator.

8 MR. COHEN: Your Honor, may I approach the witness?

9 THE COURT: Yes, sir.

10 Q. Mr. Phillips, I'm showing you what's been marked as  
11 Petitioner's 82. Can you tell me if you recognize this  
12 document?

13 MS. GALLOW: Your Honor, if I may interject, I think  
14 we have withdrawn Petitioner's 81, so we be --

15 MS. SHEIN: I'm sorry. He wasn't in the room. He  
16 wasn't in the room.

17 MS. GALLOW: Oh, okay, I apologize.

18 MS. SHEIN: Sorry. Sorry.

19 MR. COHEN: I'm sorry.

20 THE COURT: So it's going to be 81.

21 MR. COHEN: Should I put a sticker over this one  
22 rather than --

23 THE COURT: Sure, whatever you want to do is fine.  
24 I'm easy.

25 [Off the record comments.]

1 **BY MR. COHEN: [Resuming]**

2 Q. I'm actually showing you what's marked Petitioner's  
3 81 now, sir, and I'll ask you if this is a document that you  
4 recognize.

5 A. Yes, I recognize it.

6 Q. And can you tell us what it is?

7 A. It's an SOP, a Standard Operating Procedure, 03.18,  
8 and it's operating procedures for the Fire Investigations Unit.

9 Q. And is this a document that would have been kept and  
10 maintained in the ordinary course of Atlanta Fire Department  
11 business?

12 A. Yes, sir.

13 MR. COHEN: Your Honor, at this time I'd seek to  
14 admit Petitioner's 81 into evidence.

15 THE COURT: Any objection?

16 MS. GALLOW: No, Your Honor, no objection.

17 THE COURT: Admitted without objection.

18 **[WHEREUPON, Petitioner's Exhibit Number 81 was tendered**  
19 **and admitted into evidence without objection.]**

20 MR. COHEN: Thank you.

21 Q. And just very, very briefly, if I could, sir, I just  
22 want to draw your attention to Page 8, and under Section 8.3  
23 Security of Evidence and Personal Property, does this section  
24 deal with the responsibilities of the Department for evidence  
25 coming into its custody?

1           A.    Yes, sir, it does.

2           Q.    Okay.  And just very briefly, if you will describe  
3 for us what that requires the Department to do with items that  
4 come into the custody of the Fire Department.

5           A.    Well, it's -- in a nutshell it's the procedures that  
6 are in place for maintaining the chain of custody of evidence.

7           Q.    Okay.  So the Standard Operating Procedure does  
8 require that the chain of custody be maintained?

9           A.    Yes, sir.

10          Q.    Would you happen to know anybody who was in charge of  
11 the Evidence Room from 1999 to 2006?

12          A.    There were -- that would be the chief officer, chief  
13 of investigations, there would have been probably three, I  
14 believe.

15          Q.    Do you know who any of those individuals would have  
16 been?

17          A.    What were the years again, please?

18          Q.    Between 1999 and 2006.

19          A.    Well, I believe the -- in chronological order it  
20 would have been Lieutenant Roy Awana A-W-A-N-A, he was acting  
21 OIC.  And when he left, I took upon the duties of acting chief  
22 officer for about -- less than a year, just less than a year.  
23 And then the next person would be Chief Dennis Ware.

24          Q.    So there was a brief period of time during which you  
25 were in charge of incoming evidence and property?



1           A.    I was in charge of the unit, so yes.

2           Q.    Okay. And as such, is the Department responsible for  
3 anything that it receives?

4           A.    In what regard? I mean --

5           Q.    If something is submitted to the Fire Department and  
6 taken into custody, does the Fire Department remain responsible  
7 for the custody of that item?

8           A.    While it's in our possession, yes.

9           Q.    And that would apply -- would that apply even to  
10 items that shouldn't have been sent to the Department?

11          A.    I -- I would have to say yes.

12          Q.    If the Fire Department took receipt of something that  
13 was sent to it that shouldn't have been sent to the Department,  
14 couldn't those items have been returned to the agency that  
15 wrongly sent them to the Fire Department?

16          A.    Since it's -- I've never known of an incident where  
17 that's happened. I would say yes, we could send them back.

18               MR. COHEN: No further questions.

19               MS. GALLOW: No questions, Judge.

20               THE COURT: Okay. Sir, you are free to go. I  
21 apologize for your issues this morning and --

22               THE WITNESS: I apologize for the delay.

23               THE COURT: Well, no problem. And I'm just sorry  
24 that we brought you all this way for such a short period  
25 of time, but thank you very much.

1 THE WITNESS: Yes, ma'am.

2 [Witness excused.]

3 [Off the record.]

4 MS. SHEIN: We were told that Mr. Phillips was the  
5 person who was responsible for the Evidence Room during  
6 the time frame in which we had been concerned about  
7 questioning him, that was the reason he was subpoenaed.  
8 He, of course, the first time, just like a few other  
9 things, has told us that he is not.

10 So in talking to the AD about it, then we're either  
11 going to do a deposition of the other gentleman and/or --  
12 that might be brief enough we can bring him in that day in  
13 October.

14 THE COURT: That's fine.

15 MS. SHEIN: Any objections on the record?

16 MS. GALLOW: No objection.

17 MS. SHEIN: Thank you.

18 THE COURT: Okay. So I just want to be clear on the  
19 record, we are down until something in the neighborhood of  
20 8:30 in the morning on October 27<sup>th</sup>.

21 MS. SHEIN: We're all good.

22 THE COURT: Okay? And we'll get notices out.

23 MS. SHEIN: Great.

24 THE COURT: Okay? Very good.

25 MR. ABT: Thank you very much, Your Honor, for your

1  
2  
3  
4  
5

time.

MR. MALCOLM: Thank you.

THE COURT: Y'all take it easy, have a great weekend,  
and I'll see you in a couple of months.

**[Proceedings adjourned; to reconvene October 27, 2011.]**

OCTOBER 27, 2011

[Continued from 7/29/11]

THE COURT: Are we ready?

MS. SHEIN: Yes. There's nothing other than the Bruce Morris affidavit. We all have stipulated that we'd get one from him to submit, and I have the original.

THE COURT: Okay.

MS. SHEIN: Just to add that as the next numerical exhibit which, again, I'm not 100 percent sure about.

MR. MALCOLM: I think we --

THE COURT REPORTER: Eighty-two.

MS. SHEIN: Pardon?

THE COURT REPORTER: Eighty-two.

MS. SHEIN: Eighty-two. Exhibit 82.

MR. MALCOLM: Your Honor, I do have an objection to this affidavit in regards to its timeliness. We were served a copy of it this morning. Looks like Mr. Morris signed it on September the 16<sup>th</sup>, 2011. We're supposed to get this affidavit ten days prior to this hearing, pursuant with the statute O.C.G.A. §9-14-48.

MS. SHEIN: Your Honor, that's not what the agreement was. It was that we would bring the affidavit here. We all agreed to that and waived any kind of statutory limitations. The discussion we had here was that we could bring the affidavit to the hearing. I would have provided

1           it for him in advance, but everybody agreed that he could  
2           provide an affidavit regardless of its contents.

3           THE COURT: Well, they're not objecting with regard  
4           to the contents. Was that agreement -- was that on the  
5           record? I can get Beth to go back. Or Mr. Malcolm, what  
6           -- do you want a few minutes to look at it?

7           MR. MALCOLM: Well, Your Honor, the only thing -- and  
8           just from looking at it in the few minutes we received it,  
9           parts of it I do have a problem with because,  
10          specifically, No. 6 here where it's referenced that Mr.  
11          Morris has personal knowledge that a certain exhibit was  
12          admitted into the record and represented as the transcript  
13          of the taped interview of Mr. Davis. Mr. Morris wasn't  
14          here during that portion of the proceedings. I don't know  
15          how he would have any personal knowledge of that to swear  
16          to that, but there are things in the affidavit, Your  
17          Honor, that we certainly would have liked to have looked  
18          at and had the opportunity to talk to Mr. Morris about it,  
19          if that was appropriate. So the 10 days notice is  
20          something we have a serious problem with.

21          MS. SHEIN: Well, Your Honor, this is sort of a  
22          change in perspective now. When Mr. Morris was here, we  
23          had a discussion, I don't know recall the exact details,  
24          but the discussion was we could recall him based on this  
25          exhibit or we could get an affidavit from him. And I

1 believe that we all, including the Court, suggested that  
2 this would be the means to do that. If we need to, I'd  
3 just as soon recall Mr. -- Mr. Morris.

4 THE COURT: Well, that's what I was going to say. I  
5 mean --

6 MS. SHEIN: That's what we first suggested the first  
7 time, but then everybody -- and I think you even brought  
8 it up, can we do this by affidavit --

9 THE COURT: Well --

10 MS. SHEIN: -- and it was very specific to this  
11 question about the transcript in Exhibit 79. I provided  
12 the exhibit. I'm not sure if he saw the exhibit while he  
13 was here, I can't recall that, either, but he was provided  
14 an exhibit that was admitted in this court to make his  
15 affidavit, which was the whole basis for it.

16 MS. SMITH: Your Honor, my recollection is there was  
17 no discussion about -- and I admittedly was not here the  
18 last day, but I was here when Mr. Morris was here -- and I  
19 was not party to nor heard any discussion about waiving  
20 timeliness. My recollection was he was to go to their  
21 office or they were to make arrangements for him to review  
22 the file to refresh his recollection, and he could testify  
23 by affidavit, but we said nothing -- I have no personal  
24 knowledge about waiving any ten day notice.

25 THE COURT: Okay. Well, then let me just ask,

1           because perhaps the simplest thing to do will be to do  
2           what we can do today, set another date, get Mr. Morris  
3           back here. Does that work for everybody?

4           MS. SHEIN: Fine with me, Your Honor. We had tried  
5           to do that the first time around.

6           THE COURT: Well, okay, but we're here. So, Mr.  
7           Malcolm, okay if we just come back again and hear from Mr.  
8           Morris once again, then you can review his affidavit, I  
9           won't look at it, and then you can cross-examine and --

10          MR. MALCOLM: That will be fine.

11          THE COURT: Okay, very good. Then we'll do that.  
12          And y'all need to, before the end of the day, need to  
13          decide how long we're going to need for Mr. Morris so that  
14          I'll know how long to schedule and get you another date.

15          MS. SHEIN: Are you going to make the same objection  
16          to the expert?

17          MR. MALCOLM: Same objection in regards to --

18          MS. SHEIN: Yes, that's correct. Because there's no  
19          affidavit and the expert will just --

20          MR. MALCOLM: No, I don't have any objection to the  
21          -- what the expert is going to say from the witness stand  
22          in regards to -- I'm assuming he's going to --

23          MS. SHEIN: Right, talk about --

24          MR. MALCOLM: -- testify as to what's in the report.

25          MS. SHEIN: Right, right.

1           MR. MALCOLM: And the findings he made. Obviously,  
2 he can do that. But essentially, I would have an  
3 objection if you seek to tender the report into evidence.  
4 I would object on the grounds that it would be cumulative  
5 and bolstering of the live witness's testimony. It  
6 essentially is the same thing as an affidavit, and I don't  
7 believe there's any reason to tender an affidavit as  
8 cumulative evidence after a live witness has testified as  
9 to his findings.

10           MS. SHEIN: Well, it's not an affidavit, it's his  
11 report, and that's the report he's testifying about. But  
12 I think the report is very accurate for purposes of  
13 admission into the record because he's going to be  
14 testifying about it, and that's the basis for his  
15 testimony. So if -- and it's a business record, and it's  
16 what we asked for and what we all talked about. But we  
17 can also do this another day if this is going to become an  
18 issue.

19           So I don't know if he's -- if you're objecting to the  
20 timeliness of it or you're objecting to his report being  
21 admitted. That's something the Judge decides.

22           THE COURT: I'm -- you've lost me. Is the witness  
23 not going to be here with regard to the report?

24           MS. SHEIN: No, no, he's here, yes.

25           THE COURT: Okay.



1 MS. SHEIN: No, he's here to testify.

2 THE COURT: Well, then --

3 MS. SHEIN: But the report is what he's testifying  
4 about, so the report becomes the exhibit to his testimony,  
5 which I think is very relevant, because that's what we  
6 received from him that made his testimony relevant for  
7 today's hearing.

8 THE COURT: Well, I guess he can refresh his  
9 recollection with the report, and I'm happy to admit the  
10 report for the record only. But I don't -- I don't -- if  
11 the witness is here, I don't see the need for the Court to  
12 review the report; you can question him.

13 MS. SHEIN: That's fine. I mean, I don't have any  
14 agenda one way or another, it's just the report is a  
15 summary of what he's going to be testifying to.

16 So if that's all you're objecting to, let me make  
17 sure that is what you're objecting to.

18 MR. MALCOLM: That's essentially correct, Your Honor.  
19 We would have an objection to tendering the report as  
20 evidence at the hearing today. If the witness is going to  
21 testify -- if they need to use his report to refresh his  
22 recollection, then I'll have no objection to that,  
23 obviously. But that's our only issue with the report.  
24 It's not proper for a live witness to testify, just like a  
25 police officer would testify and then tender his report,

1           somehow it would go along with his testimony. That's not  
2           appropriate.

3           MS. SHEIN: That's it. Go ahead.

4           MR. ABT: Judge, I --

5           THE COURT: Let me just say, I'm just noticing the  
6           defendant's not in here and we're having all of these  
7           discussions, so can I get him out, please.

8           [Petitioner brought into courtroom.]

9           MR. ABT: Well, Your Honor, there is specific case  
10          law on why the portions and contents of these reports are  
11          inadmissible, the narrative portions, and that's because  
12          it's reporting another event that occurred in the past  
13          that has res quest value to it, and there's the specifics  
14          of case law with respect to that.

15          Generally, there is a set of case law that says  
16          expert reports are admissible, not only as a business  
17          record, but also in order to summarize and determine any  
18          science behind what the experts testify to. So, I mean --

19          THE COURT: Well --

20          MR. ABT: -- we can brief this issue, but I'm fairly  
21          confident that in, you know, criminal trials the reports  
22          of experts are generally admissible. I've never heard an  
23          objection before or read a case that says the report is  
24          inadmissible because it's a duplicative summary of their  
25          testimony.

1 THE COURT: Well --

2 MR. ABT: I'm not aware of any law that's opposed to  
3 that.

4 MS. SHEIN: Me, either.

5 THE COURT: Well, you know, I could be totally wrong.  
6 I've been wrong before. Again, your witness is going to  
7 be here and I'm prepared to let you put the report into  
8 the record, but I'm not going to review it. So it's going  
9 in for the record only --

10 MR. ABT: Well, we can't tell Your Honor what  
11 evidence to look at.

12 THE COURT: Well, I'm -- well, I'm just telling you.  
13 And then if, depending on how this plays out, and somebody  
14 wants to take it up on appeal, you've got that issue and  
15 you can provide all of those cases then.

16 MR. ABT: As long as it's admissible then.

17 THE COURT: Happy to have it in for the record only,  
18 and anybody that wants to look at it can, okay? And I'll  
19 let him testify all he wants to about it.

20 MR. ABT: That's all we need.

21 THE COURT: Okay?

22 MR. ABT: Thank you.

23 THE COURT: Let me just ask, what's our time -- other  
24 than Mr. Morris, are we going to finish today or do we  
25 have --

1 MR. ABT: Well, I guess not, because if Mr. Morris is  
2 going to come back, then I'm going to reserve closing  
3 argument until the evidence is closed. And so, you know,  
4 there will be a brief closing --

5 THE COURT: Okay. Well, I'm sorry, I didn't ask a  
6 very good question. How long are we going to need today?

7 MS. SHEIN: I don't expect more than half the day, I  
8 mean, till probably noon. I don't anticipate anything --

9 MR. MALCOLM: We have one possible witness to call,  
10 Your Honor, depending on what this eyewitness testifies  
11 to.

12 THE COURT: Okay. Then we'll -- we definitely, other  
13 than Mr. Morris and closing, we don't need anything else  
14 after today; correct?

15 MS. SHEIN: Correct.

16 MR. ABT: That's correct.

17 THE COURT: And does anybody just have a ball park of  
18 how long we would need for Mr. Morris and closing? Is  
19 that another day or is that a couple of hours --

20 MS. SHEIN: No --

21 MR. ABT: I'd say half a day.

22 MS. SHEIN: I -- I mean, I don't know how many  
23 questions they want, since this was based on a pretty  
24 focused issue. So, I mean, basically it's going to be  
25 following the affidavit. I don't think --

1 THE COURT: So --

2 MS. SHEIN: An hour? Hour and a half maybe, at most?  
3 Unless they've got a litany of questions they want to ask.

4 THE COURT: So if I do -- if I give you a half a day,  
5 is that going to get us Mr. Morris and closings?

6 MS. SHEIN: Yes, I think so. Yes.

7 MR. ABT: Yes.

8 THE COURT: Okay.

9 MS. SHEIN: Unless you have some other --

10 THE COURT: Okay.

11 MR. ABT: I mean, I would estimate my closing would  
12 take 30 minutes.

13 THE COURT: Okay.

14 MS. SHEIN: Okay.

15 THE COURT: All right. Then before -- I've got a  
16 note, and before we leave I'll get you a half a day.  
17 Okay, then I'm ready.

18 MS. SHEIN: I invoke the rule. I don't think  
19 anybody's in here that's going to testify. And I need Mr.  
20 Griffin. Can we get him? There he is.

21 [Off the record briefly.]

22 MS. SHEIN: Good morning. Would you raise your right  
23 hand, please.

24 Whereupon,

25 JAMES A. GRIFFIN,

1 having been duly sworn under oath, was examined and testified  
2 as follows:

3 **DIRECT EXAMINATION**

4 **BY MS. SHEIN:**

5 Q. And would you please state your full name.

6 A. James A. Griffin, G-R-I-F-F-I-N.

7 Q. And how old are you?

8 A. Fifty-five.

9 Q. And what is your present occupation?

10 A. I am the owner of Forensic AVI.

11 Q. Can you explain what that business does?

12 A. I provide assistance to attorneys, law enforcement,  
13 private investigators, and corporate clients with respect to  
14 the analysis, enhancement, and authentication of audio and  
15 video evidence.

16 Q. And how long have you been doing this?

17 A. Since 1992, approximately 19 years.

18 Q. And what is the education you received in order to be  
19 able to do this?

20 A. I have attended numerous seminars around the country,  
21 including a course at the New York Institute for Forensic  
22 Audio, seminars put on by the Audio Engineering Society, the  
23 International Association for Identification, seminars by  
24 Digital Audio Corporation, and seminars both as an attendee and  
25 as a presenter at the American College of Forensic Evidence.

1           Q.    Is this an education that is traditionally known to  
2 be a part of the type of work that you do?

3           A.    Yes, it is.

4           Q.    Is this vocational training?

5           A.    You can call it that, yes.

6           Q.    Educational/vocational?

7           A.    Correct.

8           Q.    Do you -- have you also -- have you ever written any  
9 articles or taught any courses about this?

10          A.    I've published articles in a magazine called The  
11 Champion, which is for the National Association of Criminal  
12 Defense Lawyers, and I've published an article in the magazine  
13 for the National District Attorneys Association.

14          Q.    And what is that -- what do those articles basically  
15 deal with?

16          A.    Both of those articles dealt with assisting attorneys  
17 when they're preparing cases with audio or video evidence, and  
18 tips on how they might proceed.

19          Q.    And have you ever taught any courses?

20          A.    Yes, I have.

21          Q.    And where is that?

22          A.    At the International Association for Identification I  
23 have presented papers as well as at the American -- excuse me  
24 -- the Audio Engineering Society.

25          Q.    And what about at universities?

1           A.    I taught for a semester at Jackson State University  
2 in their -- as a recording engineer, yes.

3           Q.    And what does that entail?

4           A.    That course was geared to people who were considering  
5 careers in the music business as in working in recording  
6 studios. And I taught a one-semester course on recording  
7 engineering.

8           Q.    And have you used these experiences and education  
9 that you've received in the -- in representing -- in appearing  
10 in court?

11          A.    Yes.

12          Q.    And testifying on behalf of individuals?

13          A.    That's correct.

14          Q.    Have you testified on behalf of the government?

15          A.    Yes, I have.

16          Q.    Have you done so in federal and state cases or just  
17 -- both or --

18          A.    I've been retained in both cases. I'm trying to  
19 remember where I would have testified. I believe I've  
20 testified on behalf of the government in state cases but not in  
21 federal.

22          Q.    But you've been retained by the federal government?

23          A.    That's correct.

24          Q.    And what have they paid you to do?

25          A.    Both enhance recordings and authenticate recordings.



1 Q. And have -- they paid you to do this?

2 A. Yes.

3 Q. And you said you testified in cases for the State.  
4 What states have you testified in?

5 A. I'd have to look at my C.V. to know for sure, but  
6 I've testified in North Carolina, Georgia, Washington,  
7 Mississippi, Louisiana, Texas -- I can't remember them all, I'm  
8 sorry.

9 Q. Well, let me --

10 MS. SHEIN: May I approach, Your Honor, just to give  
11 him a copy of his resume, just so he can refresh his  
12 recollection?

13 THE COURT: Yes.

14 A. Is the question jurisdictions where I've testified?

15 Q. Yes, if you can recall as many as possible.

16 A. Sure. Again, Texas, Louisiana, Mississippi, Alabama,  
17 Singapore, Puerto Rico --

18 Q. Is this -- I appreciate -- can you give me a full --  
19 a number of places that you've testified, how many cases?

20 A. I have testified in 30 cases.

21 Q. Okay. And --

22 A. And some of those testified twice, both at a pretrial  
23 hearing and at the trial itself.

24 Q. And have you testified on behalf of the government  
25 and defense attorneys in criminal cases?

1           A.    Yes.

2           Q.    Also civil or just criminal?

3           A.    Also civil, plaintiff and defense.

4           Q.    And during those -- during the course of your  
5 testimony in these cases, has the Court determined that you  
6 were an expert in audio forensic --

7           A.    Yes, each time so tendered.

8           Q.    Each time you testified?

9           A.    Yes.

10          Q.    Do you have a recollection of some of the attorneys  
11 you've worked for?

12          A.    I suppose I could if I refer to the notes again. In  
13 Texas, Mark Cover, Stuart Johnston, Anne Winter -- there's a  
14 very long list of attorneys I've testified for.

15          Q.    So it's on your resume?

16          A.    Yes, many of them are.

17          MS. SHEIN: Would you object to tendering his resume  
18 just for the record?

19          MR. MALCOLM: Yes.

20          MS. SHEIN: I'm not tendering it as an exhibit, just  
21 for the record.

22          MR. MALCOLM: That's fine.

23          MS. SHEIN: So that I don't have to have him go  
24 through each and every item.

25          MR. MALCOLM: That's fine. I have no objection to

1           that, Your Honor.

2           MS. SHEIN: Excuse me, Your Honor.

3           THE COURT: What number are we giving it?

4           MS. SHEIN: Eighty-two, Your Honor.

5           **[WHEREUPON, Petitioner's Exhibit Number 82 was tendered**  
6           **and admitted for the record only without objection.]**

7           **BY MS. SHEIN: [Resuming]**

8           Q. What is the general procedures that you incorporate  
9           once someone asks you to look at a tape?

10          A. Well --

11          Q. The tape that was made in the course of law  
12          enforcement activity.

13          A. Sure. Well, procedure is going to be determined by  
14          the analysis I'm asked to do. Sometimes I'm asked to determine  
15          what certain sounds might be in the sequence and the timing of  
16          certain events. I might be asked to enhance the tape to  
17          improve its intelligibility, or I might be asked to do an  
18          authenticity examination. So the scope of the work determines  
19          what I'm going to do with it --

20          Q. And have you -- I'm sorry.

21          A. -- what I'm asked to do with it, yes.

22          Q. And have you done all of these types of things in  
23          your work for both the government and for defense or civil?

24          A. Yes.

25          Q. How do you normally start an analysis process?

1           A.     Well, again, it depends on what I'm asked to do, but  
2     in the case of an authenticity examination I will ask for the  
3     original recording where it's available, or if not, the  
4     original -- the recording which is to be offered into evidence.  
5     That's the -- obviously the recording that's at issue. And if  
6     it's authenticity, the first thing I do is to make a digital  
7     copy of it onto a computer using an audio software editing  
8     program. And depending on what I find there, I'm going to  
9     listen to the tape several times and perhaps identify any areas  
10    that need further study. Those areas will be looked at on the  
11    computer wave form as well as magnetically developed and viewed  
12    through the microscope where necessary to identify those areas.

13           Q.     And have you done this in other tape analysis work  
14    that you've done for various people you've described?

15           A.     Yes.

16           Q.     And has your training, since you have been in this  
17    business, allowed you to do that type of analysis or taught you  
18    how to do that?

19           A.     That's correct.

20           MS. SHEIN: Your Honor, I'm going to tender him as a  
21    tape expert in the area of forensic analysis. And he's  
22    been determined to be an expert in the past, subject to  
23    further voir dire.

24           MR. MALCOLM: No objection.

25           THE COURT: All right. He's admitted then.

1 MS. SHEIN: Thank you.

2 Q. Did there come a time -- now we've never met;  
3 correct?

4 A. That's true. Until today.

5 Q. The first time you met me was this morning?

6 A. That's correct.

7 Q. Did there come a time when I contacted you to assist  
8 us in doing a tape analysis?

9 A. Yes, you did.

10 Q. Do you recall approximately when that was?

11 A. Over the summer, I believe, late July, possibly  
12 August.

13 Q. And what did I ask you if you could do for us?

14 A. You told me that there was a tape that was presented  
15 at his -- at the trial of Mr. Davis, and you wanted an  
16 authenticity examination of that tape.

17 Q. And did you receive an order from the Court allowing  
18 you to do that authenticity exam?

19 A. Yes, I did.

20 MS. SHEIN: Your Honor, I don't know that I need to  
21 tender this as an exhibit, but just so you know that this  
22 is the order that was drafted.

23 MR. MALCOLM: That's fine.

24 MS. SHEIN: Anybody want to see it? It's in the  
25 record. Obviously, I don't need to -- because it's in the

1 public record. But it was an order of September 13<sup>th</sup>,  
2 2011, authorizing him to -- James Griffin, the Forensic  
3 Audio expert, to listen to and record Exhibit 251 in the  
4 trial in the Scott Winfield Davis case number 05SC37460.  
5 And he was allowed to bring the following equipment:  
6 laptop computer, USB audio interface device, cassette  
7 playback units, digital camera, microscope with camera  
8 attached, and lighting, and/or speaker.

9 Q. Did you take that equipment with you?

10 A. Yes, I did.

11 Q. Was there any additional equipment that you took?

12 A. There were some accessory items, numerous cables,  
13 that sort of thing.

14 Q. Things to help this equipment run?

15 A. That's correct.

16 Q. Now tell me the steps you took when you got the order  
17 to proceed with the exam.

18 A. I arrived at the courthouse in Atlanta, and I was  
19 given -- I was provided the tape by the court reporter. I  
20 believe her name is Beverly Barfield. And the first thing, I  
21 looked at the tape very carefully to see that it was not  
22 damaged, that it appeared to be in playable condition; and it  
23 was. I placed that into a microcassette transcriber and copied  
24 it to my computer using the audio interface device and SONY  
25 sound forge editing software program.

1           Q.    Okay, but before we go further into what that all  
2 means, what kind of a tape was this?

3           A.    It was a microcassette.

4           Q.    Is that considered like an analog tape or is there a  
5 tape for that kind of --

6           A.    It's -- it is an analog tape.

7           Q.    Would you describe for me and the Court what an  
8 analog tape is?

9           A.    An analog tape, the tapes are generally analog or  
10 digital these days -- mostly digital now. But an analog tape  
11 is a physical tape which has iron oxide particles on a long  
12 running stretch of Mylar to which it's attached, and the -- do  
13 you want to know what the recording process is or how that tape  
14 captures recording?

15          Q.    So, just the definition.

16          A.    Okay. Well, it would be a standard cassette, a  
17 microcassette, a reel-to-reel tape that we're all familiar with  
18 from the, you know, days gone by. We don't see those much  
19 anymore, but they're out there.

20          Q.    So it's a physical piece of tape.

21          A.    It's a piece of tape as opposed to a digital format  
22 which may be on some, you know, computer generated type device.

23          Q.    So you actually analyzed the analog tape as well as  
24 downloaded it into digital capacity?

25          A.    That's correct.

1           Q.    Now is downloading -- in the process of analyzing  
2 these kinds of tapes, is the standard procedure to not only  
3 examine the tape, but also to download it into digital format?

4           A.    That's correct. There are things that we gain from  
5 the tape itself. There are things that we can gain from  
6 looking at the digital representation of the tape.

7           Q.    Okay. Did you listen to the entire analog tape?

8           A.    Yes.

9           Q.    And did you download the entire tape?

10          A.    Yes.

11          Q.    Okay. You did not separate any portions of it?

12          A.    That's correct.

13          Q.    And then you were at the point where you're  
14 describing that you downloaded it to a digital machine?

15          A.    That's correct.

16          Q.    Okay. Then what is the steps you took? But before  
17 you did that, you did the analysis of the actual physical tape  
18 because that's what we --

19          A.    Well, before I did that, I physically inspected the  
20 tape to see it was in playable condition.

21          Q.    Okay. And you were listening to it as it was being  
22 recorded on a digital machine?

23          A.    That's correct.

24          Q.    So it was recorded on the digital machine. What is  
25 the next steps you took?



1           A.    The next step, as it's being recorded and I'm  
2    listening to it over headphones, I am hearing things that sound  
3    like things that might be needed to investigate further, things  
4    like stops and starts of the recorder, for instance,  
5    potentially erasure, over-recording, that sort of thing. And  
6    I'm making notes as to where those are located on the tape as  
7    I'm listening in real time.

8           After that, I'm going to look at those places on the wave  
9    form of the computer display and make some sort of  
10   determination as to which of those things that I heard are  
11   actually noteworthy events that need to be investigated  
12   further.

13          Q.    What is wave form analysis?

14          A.    A wave form -- I can demonstrate it here, if you'd  
15   like. I can put it on the computer screen.

16          Q.    That would be fine.

17          MS. SHEIN: Can everybody see it?

18          A.    It's difficult to see because the wall is gray. But  
19   essentially, if you're looking from right to left, that  
20   represents time. And the vertical striations are volume. So  
21   we can focus in on small portions of the tape. This particular  
22   view is the entire one hour and a few minutes of the entire  
23   side. Or I can focus on something as small as a fraction of a  
24   second and see what that looks like.

25          Q.    And this is part of what you did in analyzing this

1 tape, the Scott Davis tape?

2 A. Yes, it is.

3 Q. Okay. And during the course of the analysis, did you  
4 make -- you made this chart -- or is this -- how was this made?

5 A. Well, this is -- this chart is generated by the  
6 computer --

7 Q. Okay.

8 A. -- and I can -- as stated before, I can look at the  
9 entire -- I mean this that we're looking at right now on the  
10 screen, that's the entire one hour of Side A. If I want to, I  
11 can focus on a very small portion of Side A, and this like, for  
12 instance right here, this would be two seconds of Side A.

13 Q. I see.

14 A. So it gives me a great deal of flexibility in  
15 determining what I want to look at, and I can look at it in as  
16 much detail as I want to.

17 Q. I want to provide you with a copy of your report that  
18 you provided to me, to take a look at so we can go over it  
19 specifically. [Petitioner's Exhibit No. 83.]

20 A. Thank you. Okay.

21 Q. You got it?

22 A. Yes. Okay, this is the memo.

23 Q. Did you prepare this report from your analysis?

24 A. I did prepare a report. What you've handed me is the  
25 supplemental memo, [Petitioner's Exhibit No. 84.] Not the

1 report itself.

2 Q. Okay. I meant to hand you this one first.

3 A. Okay. That's okay. Yes, this is the report.

4 Q. Okay. Can you tell me the analysis in the report  
5 dealing with your examination, first of the analog tape?

6 A. I'm sorry, I need some more detail on that question,  
7 clarification.

8 Q. Like when you went to examine the physical tape  
9 itself --

10 A. That's right.

11 Q. -- did you find anything interesting or specific to  
12 that before you downloaded it or --

13 A. No, it appeared to be a normal tape of the  
14 approximate age it was purported to be.

15 Q. Okay.

16 A. And in relatively good condition.

17 Q. Okay. When you downloaded it, what were some of the  
18 specific findings that you were made aware of?

19 A. I was able to determine that at least with respect to  
20 the Scott Davis interview portion, and there was other material  
21 on the tape, some of it -- most of it not relevant to this case  
22 -- but throughout the recording, and specifically during the  
23 interview portion, there were numerous voice activated pauses  
24 of the recorder. There were stops and starts and there were  
25 over-recordings.

1           Q.    Well, let's talk about some of the language you're  
2 going to use in a few minutes.

3           A.    Okay.

4           Q.    What does over-recording mean?

5           A.    An over-recording is when you have an existing tape  
6 that has been recorded on, and at some later point in time, and  
7 it's not possible to determine how later in time that occurred,  
8 but at some point after the initial recording is made, the tape  
9 is in a playback and/or recording device, and the record button  
10 is pushed, erasing some of the underlying original recording.

11          Q.    Okay.

12          A.    That's an over-recording.

13          Q.    When you looked at the whole tape, not just Scott  
14 Davis' portion, were there some of those events?

15          A.    The over-recordings that I found were in the Scott  
16 Davis portion of the tape.

17          Q.    Let me point you out to Page 3, the first couple of  
18 locations.

19          A.    Right. And there were other ones scattered  
20 throughout, that's correct.

21          Q.    Okay. So what I wanted you, just to refresh your  
22 recollection --

23          A.    Right.

24          Q.    -- in the course of the whole tape, did you find  
25 evidence of over-recording?

1           A.    Yes, I did.

2           Q.    Okay. Did you also find that in the contents of the  
3 Scott Davis interview?

4           A.    Yes.

5           Q.    And can you identify on the two occasions which that  
6 occurred?

7           A.    On the Scott Davis interview portion?

8           Q.    Yes. I don't know if you can show it visually or  
9 just verbally.

10          A.    I actually can. At approximately 43.31 seconds into  
11 Side A, there is one over-recording. And I'll see if I can  
12 bring that up. And I'll call your attention to the screen.  
13 You'll see these vertical striations here represent --

14          Q.    Let me make sure I know which ones because they all  
15 look vertical to me.

16          A.    Okay.

17          Q.    Are you talking about the thin lines?

18          A.    I'm talking about the thick lines. All of the  
19 vertical lines, whether they're thick or thin, represent the  
20 volume. And if you'd like, I can play this section of the  
21 recording for just a moment. You'll hear during this first  
22 portion, this thick portion, you'll hear the conversation  
23 taking place, and then when it gets over to here, this section  
24 right here where there is apparently nothing going on, then  
25 that will be the erased portion. And if you'd like, I can play

1       that for just a few seconds.

2           Q.     Go ahead.

3                   [Portion of audio played in open court.]

4           A.     So you heard a brief portion of silence where the  
5 conversation had previously been.

6           Q.     Is there a second place where this also occurs?

7           A.     Yes.   It's on Side B at --

8           Q.     It's on Page 6?

9           A.     Yes, Page 6.  At approximately 17:22, and this is at  
10 a portion where there's very little conversation at all, but  
11 you will see -- you will hear the same sort of thing, you'll  
12 hear a click where the over-recording takes place.

13                   [Portion of audio played in open court.]

14          Q.     And that's -- explain again, just for my edification,  
15 what an erase head touch down means in terms of that analysis.

16          A.     All right.  An erase head touch down is where -- it's  
17 similar to an over-recording, whereas in the over-recording  
18 instance the tape recorder actually is -- the record button is  
19 pushed and the recording proceeds.  Actually, the tape moves to  
20 the housing and a new recording is generated over the old  
21 recording.  In an erase head touch down the record button is  
22 pushed for some period of -- some short period of time, and it  
23 erases a smaller portion of the tape because the recording --  
24 the tape does not move through the housing, but the erase head  
25 touch down, nevertheless, erases a portion of the tape.

1           Q.    So there are, at least in the Scott Davis interview,  
2 two portions of the tape that were erased?

3           A.    That's correct.

4           Q.    Now on the -- what is the stop and start in -- there  
5 are several of those that show up that are not audio activated  
6 but other stops and starts. Can you explain what the  
7 difference is in the stop and start?

8           A.    Sure. With respect to a voice activated recording,  
9 that's set up so that the recorder automatically pauses when  
10 there is no conversation, the idea being to conserve the amount  
11 of tape on the recorder and it pauses when there's nothing  
12 going on. That's going to happen more or less randomly  
13 throughout the tape, and it's generated by the recorder itself.  
14 A stop, on the other hand, is when the actual physical button  
15 is pushed on the tape recorder which activates it and makes it  
16 stop, and then at some point later the recording is resumed  
17 when the record button is again pushed.

18          Q.    In your analysis of this tape were there a number of  
19 those events?

20          A.    There were, yes.

21          Q.    Looking at the portion of the -- well, let me ask you  
22 this. Clearly, it's throughout the whole tape.

23          A.    That's correct.

24          Q.    But just to focus on Scott Davis' portion of that  
25 tape --

1           A.     Okay.

2           Q.     -- can you identify the location for those stops and  
3 starts?

4           A.     Yes.   On Side A there is a stop and start at  
5 approximately 43 minutes 2 seconds.   On Side B the stop is at  
6 approximately 17.21 seconds.

7           Q.     And when the tape is stopped and started, is there  
8 any way to determine how long the tape stopped and started?

9           A.     No, there's not.

10          Q.     And I'm showing you, if I may approach, what has been  
11 marked as a second memo that was requested from you; do you  
12 recall that?    [Petitioner's Exhibit No. 83.]

13          A.     Yes.

14          Q.     And what was the purpose of requesting that memo?

15          A.     You had asked me to somehow determine or somehow  
16 report on where the location was of the stops and starts on the  
17 tape.

18          Q.     And what did you find in that?

19          A.     What I did was to make a portion -- I transcribed a  
20 portion of the tape immediately before and immediately after  
21 the stops and starts.

22          Q.     And when you transcribed it, what did you discover?

23          A.     Please clarify that.

24          Q.     I'm sorry.   During the -- let me get my report copy  
25 out here of this.   Looking at Page -- Page 3.



1           A.     Okay.

2           Q.     What did you discover at 17:21?

3           A.     At 17:21 I discovered a stop, and immediately after  
4 the tape was resumed, the detective in the room said, "Turn the  
5 tape over."

6           Q.     What did that mean to you?

7           A.     It suggested that there was another tape recorder  
8 being used. And I would add that immediately following the  
9 detective's words "Turn the tape over," there was some  
10 fumbling, handling, mechanical noise which was consistent the  
11 operation of the tape recorder.

12          Q.     What does the term "authenticity" mean?

13          A.     A tape is authentic if it is shown to be original,  
14 continuous, and unaltered.

15          Q.     Is this tape authentic?

16          A.     No.

17          Q.     Is it continuous?

18          A.     No.

19          Q.     Has the tape been altered?

20          A.     Yes, it has.

21                MS. SHEIN: A moment, Your Honor?

22                               [Brief pause.]

23          Q.     Can you locate on your analysis information that  
24 portion of the tape in your second memo that says, "Turn the  
25 tape over" and play that?

1 A. Certainly.

2 [Requested portion of tape played in open court.]

3 A. It goes by fairly --

4 MS. SHEIN: Your Honor, I mean I could hear it, so I  
5 just didn't know if --

6 THE COURT: Yes, ma'am.

7 **BY MS. SHEIN: (Resuming)**

8 Q. Would you play that section one more time a little  
9 bit longer?

10 A. Sure.

11 Q. Just to be sure it's clear?

12 A. Certainly.

13 Q. My client didn't hear it.

14 [Requested portion of tape replayed in open court.]

15 Q. Do you hear after that the other sounds?

16 A. Yes.

17 Q. Could you play that, please?

18 A. Certainly. I'll begin with the words "Turn the tape  
19 over," then there's approximately a 9-1/2 second pause in the  
20 conversation where you'll hear the handling noise of what  
21 appears to be another tape recorder.

22 [Requested portion of tape played in open court.]

23 MS. SHEIN: Okay. Nothing further from us, Your  
24 Honor.

25 **CROSS-EXAMINATION**

1 **BY MR. MALCOLM:**

2 Q. Good morning, Mr. Griffin.

3 A. Good morning.

4 Q. I just have a few questions I need to ask you. You  
5 said your first involvement with this case came in late July or  
6 early August of this past summer?

7 A. That's correct.

8 Q. Okay. And you were approached by Mr. Davis'  
9 attorneys -- or not necessarily attorneys, somebody with his  
10 legal team to analyze this audiotape, which you did?

11 A. That's correct.

12 Q. And you actually went to the courthouse and analyzed  
13 -- I'm not trying to belabor the point -- but listened to the  
14 original recording and put it into your computer so you could  
15 do all these things?

16 A. That's correct.

17 Q. All right. Other than actually going to the  
18 courthouse and listening to the tape, did you do anything else  
19 in regards to this case?

20 A. Well, the analysis entailed more than just listening  
21 to tape.

22 Q. All right, everything you did at your -- at the  
23 courthouse and subsequent to that, specific to the analysis of  
24 the tape, did you do anything else in regards to this case?

25 A. No.

1           Q.    Okay. Did you ever examine the actual tape recorder  
2 that was used by the detectives in this case?

3           A.    No. I would like to have, but it was not provided.

4           Q.    Did you have an opportunity to speak to anybody who  
5 was present during the interview of Mr. Davis?

6           A.    No.

7           Q.    All right. And you said there were three things --  
8 just want to be clear because this is all sort of Greek to me  
9 -- voice activated pauses, starts and stops, and over-  
10 recordings, those are all three separate classifications or  
11 things you look for when analyzing a tape?

12          A.    That's correct.

13          Q.    All right. You mentioned, I believe, in your direct  
14 testimony, two instances of over -- what you say are over-  
15 recordings of the tape, I believe one on Side A and one on Side  
16 B; is that correct?

17          A.    That's correct.

18          Q.    All right. And the first one on Side A, I believe  
19 you said was about 1.76 seconds?

20          A.    That's correct.

21          Q.    And the second one on Side B was about 0.52 seconds?

22          A.    That's correct.

23          Q.    All right. In regards to the voice activated pauses,  
24 is this the type of tape where it would have been at the  
25 interview that the detective or whoever was using the recording

1 device, when somebody speaks it comes on and records what's  
2 being said, or if there's noise it comes on and picks that up;  
3 is that correct?

4 A. When there is noise of a certain volume, the recorder  
5 activates. That's correct.

6 Q. All right. It's almost like a dictation type device  
7 where if somebody's talking it comes on and records what's  
8 being said in theory, and then stops when the talking goes  
9 below a certain volume?

10 A. That's correct.

11 Q. All right. And this is a relatively rudimentary or  
12 crude, compared to today's standards, way of recording  
13 somebody's conversation?

14 A. Yes, it is.

15 Q. All right. And when you're using a device like this  
16 it stops and starts based on voices or a certain volume. What  
17 volume does it have to get to play for it to start recording,  
18 or does that depend on the machine?

19 A. It depends on the machine, it depends on how close  
20 the talkers are to the machine.

21 Q. No way you could determine in this case what that  
22 volume level would have been?

23 A. That's correct.

24 Q. Okay. But is it safe to say that when the machine  
25 starts and stops the recording that there could be a slight

1 pause or it could miss maybe a slight portion of what somebody  
2 was saying; isn't that possible?

3 A. That is possible.

4 Q. All right. And you also mentioned about starts and  
5 stops. That's pretty easy to tell if a tape stopped and  
6 started; is that safe to say?

7 A. That's correct.

8 Q. All right. And you said the tape was stopped and  
9 started how many times?

10 A. It was stopped and started once on each side of the  
11 tape.

12 Q. Once on -- so once on Side A and once on Side B.

13 A. And I would add that it was also stopped at -- the  
14 tape ran out at the end of Side A, and we don't know what  
15 amount of time may have transpired before it was resumed on  
16 Side B.

17 Q. Okay. But it --

18 MS. SHEIN: Just for clarification purposes --

19 MR. MALCOLM: Yes, ma'am.

20 MS. SHEIN: -- you're just talking about the Scott  
21 Davis portion; correct?

22 MR. MALCOLM: Yes, just --

23 MS. SHEIN: Because there's other stops and starts on  
24 the whole tape.

25 MR. MALCOLM: Right.

1 MS. SHEIN: Okay. I just wanted --

2 MR. MALCOLM: Because I believe, just to clarify, the  
3 beginning portion of the tape contains some information or  
4 recordings from other cases.

5 MS. SHEIN: Thank you. I just wanted to be sure.

6 MR. MALCOLM: Yes, that's what I'm talking about.

7 **BY MR. MALCOLM: [Resuming]**

8 Q. So are we clear on that, Mr. Griffin?

9 A. Yes.

10 Q. Okay, thank you. Drawing your attention specifically  
11 to the stop and start on Side 2, that occurred at about 17:21;  
12 is that correct?

13 A. That's correct.

14 Q. And isn't it true that right before that stop and  
15 start, according to your report, that there was a question by  
16 the detective, "Do you want some water or something to drink?"  
17 asked of Mr. Davis?

18 A. That's correct.

19 Q. All right.

20 MR. MALCOLM: Just one moment, Your Honor.

21 [Brief pause.]

22 Q. Now were you aware from your examination of this tape  
23 that it had been used potentially on other investigations by  
24 these detectives?

25 A. Well, yes, I did hear material that was unrelated to

1 this case, apparently unrelated to it.

2 Q. Is it possible to, I assume, record over certain  
3 portions of an audiotape like this, like if I had an old case  
4 on a tape and wanted to record it with a new case I was working  
5 on, I could re-record over that old stuff; is that correct?

6 A. That's correct.

7 Q. And could do that with relative ease?

8 A. That's correct.

9 Q. All right. And it is true that the beginning  
10 portions of this tape there were other matters unrelated to the  
11 Scott Davis investigation; correct?

12 A. That's correct.

13 Q. That would make you believe that this tape had been  
14 used on other investigations in the past?

15 A. Yes.

16 Q. And you never examined any tapes other than this  
17 individual tape?

18 A. That's correct.

19 MR. MALCOLM: Just one moment, Your Honor.

20 [Counsel confer.]

21 MR. MALCOLM: I have no further questions, Your  
22 Honor. Thank you.

23 MS. SHEIN: Your Honor, just brief clarification.

24 **REDIRECT EXAMINATION**

25 **BY MS. SHEIN:**



1           Q.    Just to be sure we understand, would you re-explain  
2 the difference between the voice activation portions of this  
3 tape for the Scott Davis interview and the stops and starts?

4           A.    Yes.  A voice activation pause is done randomly by  
5 the machine itself when the volume falls below a certain  
6 threshold.  The stops and starts that I referred to are  
7 manually operated stops and starts by someone pushing the  
8 button.

9           Q.    And what are the erasures that are different from  
10 those two items?

11          A.    The erasures are also manually done when someone  
12 pushes the button.

13          Q.    The attorney general asked you -- assistant attorney  
14 general asked you if tapes that are used can be re-recorded.

15          A.    Yes.

16          Q.    Did you hear any over-recording conversation from  
17 another case on Scott Davis' interview?

18          A.    No, I did not.

19                MS. SHEIN:  One moment, Your Honor.

20                               [Counsel confer.]

21          Q.    So just to be sure we're all clear, there are two  
22 stops and starts on this, and two separate erasures?

23          A.    That's correct.

24                MS. SHEIN:  One more moment.  I'll make sure to get  
25 this right.

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[Counsel confer.]

MS. SHEIN: Your Honor, that's all we have for this witness.

MR. MALCOLM: Nothing further for this witness, Your Honor.

THE COURT: Can this witness be excused?

MS. SHEIN: Yes, he can.

THE COURT: Any objection?

MR. MALCOLM: No, Your Honor.

THE COURT: You are free to go, sir.

THE WITNESS: Thank you. It will take me just a moment to pack this up.

[Witness excused.]

[Brief recess.]

**[WHEREUPON, Petitioner's Exhibits No. 83 and 84 were admitted for the record only.]**

\* \* \*

MR. MALCOLM: Your Honor, the Respondent would call Mr. Rick Chambers to the witness stand. And he's already up there, so I'll swear you in, Mr. Chambers. Would you raise your right hand.

Whereupon,

**RICK CHAMBERS,**

having been duly sworn under oath, was examined and testified as follows:

**DIRECT EXAMINATION**

**BY MR. MALCOLM:**

Q. Go ahead and state and spell your name for the record, please.

A. Rick Chambers, R-I-C-K C-H-A-M-B-E-R-S.

Q. And how are you currently employed, sir?

A. Chambers Consulting & Security. I have an investigating business.

Q. Okay. How were you employed prior to your current employment?

A. City of Atlanta Police Department.

Q. Okay. In what capacity in that City of Atlanta Police Department?

A. When I retired, I was a supervisor in Major Crimes.

Q. All right. Were you a detective involved directly in the Scott Davis case some years ago?

A. Yes, I was.

Q. And were you one of the primary detectives who participated in the interview of Scott Davis in regards to the homicide investigation?

A. I did.

Q. All right. And I believe it was you and Detective Walker?

A. That's correct.

Q. All right. Do you have a recollection of how the

1 interview proceeded with Mr. Davis?

2 A. Yes.

3 Q. And where is that interview at?

4 A. It was, at the time, the City of Atlanta Homicide  
5 Office.

6 Q. All right. And do you recall how that interview --  
7 how you came to interview Scott Davis?

8 A. He became a person of interest in the case when we  
9 were looking -- when we were working the homicide of David  
10 Coffin.

11 Q. Now was this interview with Mr. Davis recorded?

12 A. Yes, it was.

13 Q. And how was it recorded?

14 A. On a tape recorder.

15 Q. All right. And what kind of tape recorder was it?

16 A. Just your basic cassette recorder.

17 Q. One of the old ones?

18 A. Yes.

19 Q. All right. Now were you present in the interview  
20 room with Mr. Davis at all times, or were you in and out of the  
21 room?

22 A. We were in and out of the room.

23 Q. And why was that?

24 A. Because we were going to clarify points that Mr.  
25 Davis was making in his statement to us.

1           Q.    Was the tape recording ever stopped and restarted by  
2 you?

3           A.    Not by me.

4           Q.    The other detectives?

5           A.    Yes, it was by Detective Walker.

6           Q.    Okay. And do you recall how many times?

7           A.    To my knowledge, once --

8           Q.    Okay.

9           A.    -- to turn the tape over.

10          Q.    Is it possible that it was stopped and started again  
11 for some other reason?

12          A.    It's possible.

13          Q.    All right. At any point during the interview did you  
14 or Detective Walker or any other law enforcement official in  
15 the room at the time shut off the recording device and threaten  
16 Mr. Davis in any capacity?

17          A.    No, sir.

18          Q.    Was anybody threatening Mr. Davis in regards to he  
19 was going to get the death penalty?

20          A.    No, sir.

21          Q.    Did you or any of the other detectives, to your  
22 knowledge, alter the actual tape recording of the interview of  
23 Mr. Davis?

24          A.    No, sir.

25          Q.    Was there more than one recording device in the

1 interview room?

2 A. No, sir.

3 Q. Was there anything on the actual tape that you used  
4 or y'all used to record the interview with Mr. Davis before  
5 y'all started recording his interview?

6 A. It was Detective Walker's tape, and I believe he had  
7 another interview on there that we taped over.

8 MR. MALCOLM: That's all, Your Honor. Thank you.

9 **CROSS-EXAMINATION**

10 **BY MR. ABT:**

11 Q. Good morning, Detective Chambers.

12 A. Good morning.

13 Q. How are you?

14 A. Good.

15 Q. My name is Jay Abt. I'm one of the attorneys for Mr.  
16 Davis here today. I'll try to be relatively brief, but you  
17 indicated that to the best of your recollection the only time  
18 the tape was stopped was to turn the tape over?

19 A. That's right. It may have been stopped one time to  
20 get Mr. Davis some water or something to drink one time, but  
21 other than that was it -- other than that.

22 Q. Okay. And do you recall testifying consistently with  
23 that at trial, pretrial, and other hearings in this case?

24 A. Yes.

25 Q. And you're saying here today that it is possible that

1       you stopped the tape another time to get a drink of water?

2           A.     Not for me, for Mr. Davis that's possible.

3           Q.     It's possible but you don't know?

4           A.     I don't recall.

5           Q.     You don't recall today?

6           A.     No, sir.

7           Q.     Do you remember whether you testified at trial about  
8 whether there were other stops other than turning the tape  
9 over?

10          A.     I'm not sure.

11          Q.     Okay. I'm going to ask you to -- I'm going to ask if  
12 you remember giving -- being asked the following questions and  
13 giving the following answers in your trial testimony. And just  
14 for the purposes of identification, I'm on Page 2673 of the  
15 trial transcript.

16                 Were you asked the following questions?

17          "Q.    Now several times on the tape it sounded from your  
18 comments that the tape had been stopped; do you agree with  
19 that?

20          "A.    Okay. One time the tape was stopped to be turned  
21 over.

22          "Q.    There's another reference to the tape stopping as  
23 well; do you recall that?

24          "A.    No, sir."

25                 MR. MALCOLM: Your Honor, if I may, essentially what

1           he just read is essentially what Mr. Chambers just  
2           testified to.

3           MR. ABT: Well, I'm going to ask him if he --

4           MR. MALCOLM: If he doesn't recall it, it's not -- I  
5           don't know what the purpose of this is.

6           MR. ABT: I don't know if he can object to a question  
7           I haven't asked yet.

8           THE COURT: All right. Go ahead and ask the  
9           question, Mr. Abt.

10       **BY MR. ABT: [Resuming]**

11           Q. Do you recall being asked those questions and giving  
12           those answers?

13           A. I do.

14           Q. So your testimony at trial was there were no other  
15           starts and stops other than turning the tape over?

16           A. That's true.

17           Q. And do you have any formal training or expertise with  
18           respect to audio recordings and analyzing audio tapes?

19           A. I do not.

20           Q. Do you have any specific training with respect to the  
21           operation of a tape recorder?

22           A. Other than hitting the button to start it and hitting  
23           the button to stop it, no, sir, I do not.

24           Q. Other than that, you have no other training; correct?

25           A. No, sir.



1 Q. And it's your testimony here today that you did not  
2 alter the tape, you did not --

3 A. As it was five years ago, as it was at every motion  
4 hearing, as it was every time I've testified in this case, it's  
5 -- the answers are still the same.

6 Q. And you never made any erasures?

7 A. Never erased it, never altered it, never had a second  
8 recorder, never stopped it, started it, never threatened Mr.  
9 Davis, never threatened to shoot Mr. Davis, never threatened to  
10 give Mr. Davis the death penalty, never threatened to hit Mr.  
11 Davis --

12 Q. That's not my question.

13 A. We actually took Mr. Davis home that night.

14 Q. That's not my question, sir.

15 A. I'm just telling you. We were getting to it, so --

16 Q. I understand. You're very adamant about that, I  
17 understand. Do you -- do you ever communicate by email?

18 A. I do.

19 Q. Okay. Do you have an email address  
20 deathtodisloyal@yahoo.com?

21 A. I do not.

22 Q. Okay.

23 A. I do not. My email address is  
24 rick5397@windstream.net.

25 Q. Okay. Have you ever had an email address that sounds

1 familiar to that?

2 A. No, I've -- the only email address I've ever had is  
3 the one I just gave you and the one I had when I was with the  
4 City of Atlanta Police Department.

5 Q. Do you have a Blackberry device or a cell phone?

6 A. I do.

7 Q. Okay. Is it a Blackberry?

8 A. No.

9 Q. In -- what type of cellular device do you have?

10 A. I have an iPhone.

11 Q. Okay. Did you have the same iPhone in March of 2010?

12 A. Yes.

13 Q. Okay. And what is -- do you mind if I ask you what  
14 the cell phone number is?

15 A. 770-713-5269.

16 Q. Have you ever -- are you aware that Mr. Davis, Scott  
17 Davis, has a website?

18 A. I am not.

19 Q. Okay. And you've never gone to that web --

20 A. Never gone to it.

21 Q. You've never blogged on it?

22 A. Never blogged on it. I don't blog. I've never  
23 blogged.

24 Q. And it's your testimony here today that you do not go  
25 by the handle deathtodisloyal@yahoo.com?

1           A.     Absolutely.

2           Q.     Very good.

3           MR. ABT:   One moment, Your Honor.

4                       [Counsel confer.]

5           MR. ABT:   No other questions, Your Honor.

6           THE COURT:  Anything else, Mr. Malcolm?

7           MR. MALCOLM:  No, Your Honor.

8           THE COURT:  Can this witness be excused?

9           MR. MALCOLM:  Yes, Your Honor.

10          THE COURT:  Any objection?

11          MS. SHEIN:  No objection, Your Honor.

12          THE COURT:  You may step down.  Thank you.

13          THE WITNESS:  Thank you.

14                       [Witness excused.]

15          THE COURT:  Okay.  As I understand it, other than Mr.  
16          Morris, we are done with witnesses?

17          MS. SHEIN:  That's correct, Your Honor.

18          MR. MALCOLM:  Yes, Your Honor.

19          THE COURT:  And we're going to proceed now with brief  
20          closing arguments?

21          MS. SHEIN:  Yes.

22          MR. ABT:  Judge, can we have maybe a ten minute break  
23          before --

24          THE COURT:  Sure, as much as you want.  Ten?  Will  
25          that do it?

1 MR. ABT: Ten. Ten, 15.

2 THE COURT: Fifteen?

3 MR. ABT: Ten is fine.

4 THE COURT: You said you wanted a whole day, so you  
5 can have 15 if you want.

6 **[Brief recess.]**

7 \* \* \*

8 **CLOSING ARGUMENT BY MR. ABT**

9 Well, the first thing I want to say is to thank the  
10 Court for its patience and allowing us to have the  
11 necessary time to present what is a pretty complicated  
12 habeas.

13 Your Honor, this case is about whether Scott Davis  
14 got a fair trial. Clearly, he did not. We are going to  
15 present to you a summary of the reasons why, and there's  
16 lots of great reasons to support that. And if he didn't  
17 get a fair trial, then he needs one. And that's what  
18 we're here to ask the Court.

19 It was -- despite the fact that there are very  
20 prominent attorneys that have represented Mr. Davis, both  
21 at trial and appeal -- Mr. Morris, Mr. Steel, and Mr.  
22 Samuel; these counsel were ineffective for a variety of  
23 reasons which we have to take notice of. We have  
24 presented a wide variety of explanations as to objections  
25 that should have been made and arguments that should have

1           been raised, both at trial and appeal. It is not simply  
2           enough for his counsel to have objected in summary to the  
3           fact that pieces of evidence were lost or destroyed. And  
4           that's what they did.

5           Instead, what they should have done and what would  
6           have made them effective, would have been to object to the  
7           individualized pieces of evidence in pretrial motions, at  
8           trial, and the motion for new trial, and on appeal. And  
9           they could have individualized those objections in a  
10          number of ways. Instead of just objecting and saying this  
11          violates the Sixth Amendment Confrontation Clause, they  
12          should have gone further. They should have raised issues  
13          regarding Fourteenth Amendment Due Process with respect to  
14          each piece of evidence, and they should have objected on  
15          the grounds of O.C.G.A. §16-10-94(a), O.C.G.A. §17-5-56  
16          which are duties of law enforcement to preserve evidence,  
17          and they should have objected on the grounds of §17-16-4  
18          allowing the Defense to inspect all the evidence prior to  
19          trial. These objections are simply not raised on an  
20          individualized basis on each piece of evidence through  
21          trial, and there's no standing objection for these various  
22          points of law with respect to what is tantamount to almost  
23          70 items of evidence. And these are not unimportant  
24          items, and we'll get to that in a moment.

25          It's just not enough for them to say it's unfair for

1 witnesses to testify about lost evidence, they needed to  
2 have gone further. They needed to have highlighted the  
3 Standard Operating Procedures or SOPs that were violated  
4 and provide experts to show -- when I write IAC,  
5 ineffective assistance of counsel -- they needed to have,  
6 with respect to each piece of evidence, shown a Standard  
7 Operating Procedure that violated in losing or destroying  
8 that evidence, and then bringing to bear an expert at  
9 trial to say this piece of evidence had exculpatory value.  
10 If we could have tested it, here's what we could have  
11 tested it for. But they simply don't do that. They don't  
12 bring one expert to trial. Not one.

13 And so trial counsel didn't particularize these  
14 objections, and appellate counsel didn't investigate all  
15 the SOPs, and they didn't bring these experts. And when  
16 you have such a vast amount of evidence that's lost or  
17 destroyed, the totality of that, when you look at it as a  
18 whole -- and that's what the Court's already done, but we  
19 wanted to point out that these are individualized  
20 objections that should have been made: the Sixth  
21 Amendment, Fourteenth, and the O.C.G.A. statutes. There's  
22 three of them, in particular, that I can think of offhand,  
23 the ones that I've mentioned. These are the objections  
24 that should have been made, and this is what should have  
25 been presented as evidence in trial and appeal to prove

1           that it was not just harmless error to have lost such a  
2           tremendous volume of evidence. And the failure to  
3           investigate these issues, the failure to bring these  
4           experts, the failure to get those Standard Operating  
5           Procedures into evidence, made them ineffective.

6           And I want the Court to keep thinking about  
7           throughout when the Court is deciding this case, keep  
8           thinking about those photos of the Atlanta Police  
9           Department Evidence Room, how it looked like a garbage bin  
10          during the course of the Scott Davis case. And how later  
11          they cleaned it up, and now it looks like a real Evidence  
12          Room, how an Evidence Room should look.

13          Another example of this ineffectiveness is when we  
14          talk about the phone records. So I'm going to make this  
15          kind of Point 1. This is a good example of what could  
16          have been done or should have been done at trial. The  
17          Defense doesn't go out and obtain the phone records, which  
18          are now lost. We can't get them anymore. They've been  
19          purged. Mr. Morris testified about how the phone records  
20          are pursued but never pursued to the extent necessary to  
21          show that his theory of defense was that Ms. Bruton called  
22          the Jenacovas first, and then called Scott Davis. The  
23          Jenacovas at trial are the ones that supported the  
24          testimony that Ms. Bruton is the one that told them Mr.  
25          Coffin had been shot. And so that would have contradicted

1 the State's theory that Scott Davis is the first person to  
2 mention that Coffin has been shot. And it would have  
3 created a defense of showing that he only knew that from  
4 Ms. Bruton, because she speaks to the Jenacovas first,  
5 they testify that she mentions that to them, and then she  
6 calls Scott Davis. But the only way to prove that time  
7 line is through the phone records, and the phone records  
8 are not pursued.

9 It's also worth noting that Mr. Morris and Mr. Steel  
10 remain on for the appeal and the motion for new trial.  
11 And I think that's okay, but in a case with this many  
12 issues and this much going on, there is no mention in the  
13 motion for new trial or in the appeal about ineffective  
14 assistance of counsel. And that can't be just strategy,  
15 not when these tremendous amount of issues exist. It's  
16 ineffective for them to raise ineffective assistance of  
17 counsel, and they needed to have done that.

18 When you look at the totality of evidence in this  
19 case, almost 70 items, you can only come to the conclusion  
20 that bad faith exists because there is a pattern and  
21 practice by the State to have lost evidence. And again,  
22 we've gone through this, but I want to highlight some of  
23 these pieces of evidence:

24 You've got the gun, the 9mm Beretta; you've got the  
25 bullet; you've got the shell casings; you've got a shotgun



1 from the Porsche; a flashlight; a knife; the fingerprint  
2 cards; you've got the gas can that's used allegedly to  
3 cause the fire at the Coffin residence. And that's just  
4 to name a few of those items. Oh, two more of  
5 significance: the mace can that's recovered, the pepper  
6 spray; and the Olympic bag that's never recovered. And  
7 those become all these items of evidence which are not a  
8 automobile, and we'll talk about that comparison in  
9 Georgia Law later, but these are small enough and, you  
10 know, manageable enough to be kept in a box somewhere  
11 labeled "Scott Davis Case." It's bad faith not to have  
12 managed the evidence well in this case. It's the  
13 antithesis of good faith police work.

14 And when you look at it both from an individual item  
15 standpoint, which is what should have been argued at trial  
16 and what should have been argued in appeal, and then you  
17 look at it in the totality of it, the sheer volume of the  
18 evidence; the only conclusion that I think any reasonable  
19 person can come to is this is not acceptable police work.  
20 This is not how we want our trials to look.

21 Prosecution witnesses at trial are repeatedly allowed  
22 to testify about this evidence. And specifically, the  
23 most egregious example is Ms. Bruton and Detective  
24 Chambers who later essentially confirms Ms. Bruton's  
25 testimony. But what she is allowed to do and what Bruton

1 is later allowed to confirm is that the Olympic bag and  
2 the gas can looked like Scott Davis'. Well, that's a  
3 pretty incriminatory statement right there. How does the  
4 Defense get an opportunity to confirm that statement?  
5 They can't. They can't. This item and this item  
6 [indicating items written on board] are not available to  
7 be tested. And so what should the Defense have done at  
8 trial?

9 Well, they should have brought an expert like Mr.  
10 Dodd and Mr. Doran to come and say, you know, these items  
11 are traceable. We can test them for fingerprints to see  
12 who's touched them, if we have them. And we can test, if  
13 we have them, to see where they were purchased, on what  
14 day they were purchased, at what store, with whose credit  
15 card. There's a video tape, possibly, from the store to  
16 show who bought them. These are things that are  
17 exculpatory, but the Defense never gets to do that. And  
18 the prosecution witnesses are allowed to, without any  
19 retribution, violate Mr. Davis' Sixth Amendment rights to  
20 confront that evidence. You can't confront a witness  
21 under the Sixth Amendment if they're allowed to testify  
22 about something that -- poof -- doesn't exist.

23 And this issue about bringing experts in to show the  
24 prejudicial nature of the lost evidence, it's not raised  
25 at trial. It's not raised in the motion for new trial.

1           It's not raised at appeal. It's just not brought up.

2           The gas can is really an excellent example because,  
3           as I believe Mr. Doran testified, you know, you can trace  
4           it back, and that way you can -- it has -- it has  
5           exculpatory value. You can show who bought it. You can  
6           show where it was bought. You can show on what day it was  
7           bought.

8           There is a good case, Head vs. Thomason 276 Ga. 434,  
9           it's a 2003 case, which says, you know, it summarizes a  
10          lot of other cases which says basically, look, failing to  
11          call experts is a guaranteed way to get an ineffective  
12          assistance of counsel claim. You know, when you don't --  
13          the two biggest ways to mess up a criminal trial are not  
14          investigating the facts and not calling experts. And  
15          despite the fact that he's got these great attorneys,  
16          attorneys that are the most well respected in the state,  
17          they don't do the things that are necessary in the face of  
18          knowing that all of these pieces of evidence are tested by  
19          the Prosecution, destroyed, and then the Prosecution is  
20          allowed to talk about them in trial, as if they're right  
21          there.

22          There is no objection at trial to Ms. Bruton's  
23          testimony that the bag and the gas can looked like Scott  
24          Davis'. There is no argument made that this violates his  
25          Sixth Amendment rights, his Fourteenth Amendment rights,

1           and all of these Georgia Code sections about preserving  
2           and maintaining evidence, about sharing evidence with the  
3           defense prior to trial.

4                     [Off the record briefly.]

5           This is what I would call a pattern of misconduct.  
6           When you have 70 pieces of evidence that go missing or are  
7           destroyed. It is not simply an isolated incident anymore.  
8           You cannot say that it is an accident. And I contest that  
9           at what point do we as a judicial system say harmless  
10          error, it's okay to lose one or two pieces of evidence or  
11          a piece of evidence that doesn't matter; at what point,  
12          when you lose this many items of evidence, including the  
13          murder weapon and key pieces of evidence like a can that's  
14          allegedly used to start the fire, fingerprint evidence; at  
15          what point does the totality of circumstances -- where is  
16          the threshold? Because if it's not 70 pieces of evidence  
17          that constitute the murder weapon and all the other key  
18          pieces associated with the conclusion of the Prosecution  
19          that Mr. Davis committed this horrific act; if it's not  
20          there, I don't know where the threshold is that it becomes  
21          harmful error, it becomes reversible error.

22                    When you look at the totality of circumstances in  
23                    this case, and you look at the individualized pieces of  
24                    evidence, and you look at how much is lost and how little  
25                    is done to maintain it; then to me that raises to the

1 level of bad faith. That screams bad faith. It can't be  
2 good faith.

3 You have these agencies: the GBI, the Atlanta Police  
4 Department, the Atlanta Fire Department, and then some  
5 DeKalb agencies as well. And we have counted over 300  
6 violations of Standard Operating Procedure. Three hundred  
7 with respect to these 70 pieces of evidence. How many  
8 does it take? How much disregard for the law and snubbing  
9 or disregarding it does it take to say, hmm, we can't have  
10 a fair judicial system if you're throwing evidence in a  
11 room in garbage bags and hoping that's some sort of  
12 orderly way of maintaining it.

13 Again, I really want to focus on the photos from the  
14 Evidence Room. I want the Court to remember that. Melvin  
15 Denson came in here -- I hope I'm spelling his name right,  
16 I believe it has two n's [sic] -- Melvin Denson came to  
17 court and showed you those photos of what the Evidence  
18 Room looked like. And, by the way, those were never  
19 presented or disclosed at trial. Those were never  
20 investigated by the Defense. That's something new. And  
21 we'll get to new versus old, I want to talk about that  
22 later on. But I want the Court to remember and think  
23 about how the APD Evidence Room was run. It looked like a  
24 trash dump to me, not an Evidence Room. And after the  
25 Davis case they change everything, because they know that

1           it's bad faith. They know there's a pattern and a  
2           practice of losing and abusing and mistreating the way  
3           evidence should be treated at trial. This is per se bad  
4           faith because it is the supervisors who are ignoring and  
5           disregarding any careful attention to what Georgia Law  
6           requires, those Georgia statutes requiring how evidence  
7           needs to be handled.

8           And then you have the photos from Cecil Mann, and  
9           those were great photos, too, because you have the before  
10          and the after photos. You have this trash dump and then  
11          you have these photos of, wow, you know, boxes on shelves,  
12          nicely labeled. Hmm, that looks like an Evidence Room to  
13          me. That's a good faith attempt to keep an Evidence Room.  
14          Well, what's the opposite of good faith? It can't be said  
15          that it's anything other than bad faith to treat evidence  
16          like trash. There's no way that that can be fair. It's  
17          not fair to the Prosecution. It's not fair to the  
18          Defense. And it's certainly not fair to our system of  
19          justice.

20          We brought forth another expert, Mr. Doran, who was  
21          an expert on the issues of chain of custody, evidence  
22          handling, police procedures. And Mr. Doran is a fantastic  
23          type of witness. That's the type of expert that should  
24          have been brought at trial to explain to the Court and  
25          explain to the jury how evidence should be handled, how

1 evidence should be presented, and why it is bad faith on  
2 the part of the police not to statutorily preserve the  
3 evidence under O.C.G.A. §17-5-56, under §16-10-94.

4 Doran tells us that the SOPs were violated, the chain  
5 of custody was violated, the physical evidence was  
6 improperly destroyed in violation of Georgia Law, there  
7 was a lack of supervision of the evidence. And it's the  
8 supervision that is so key because that's what constitutes  
9 a pattern and practice that is tantamount to bad faith.  
10 It's the supervision that becomes so important because  
11 it's no longer just one person at a low level making a  
12 careless error, it is a pattern and practice of bad  
13 conduct. And it is pervasive in these agencies. This is  
14 not an isolated incident. This doesn't happen once or  
15 twice in this case, it happens almost 70 times.

16 By the way, the -- a good example of this is the  
17 fingerprint evidence, another important piece of evidence  
18 that's lost or destroyed. So if the lawyers had run the  
19 fingerprints through AFIS, the national system, then that  
20 could have exculpated Scott Davis, and that's not done.  
21 The fingerprints aren't lost until 2004 had gone. So the  
22 Prosecution has them from '96 to '04. The Defense doesn't  
23 make sure they're run through AFIS, which means they're  
24 ineffective for not doing so, but the bad faith is proven  
25 by the fact that during this time period, from '96 when

1 the murder happens to '04, they do go to great lengths to  
2 test the fingerprints, to determine whether they're Davis'  
3 or Coffin's. And, you know, they figure out they're  
4 neither. Well, if they'd been Davis', boy, they would  
5 have jumped all up and down about that. And the  
6 fingerprints aren't Coffin's, and that could have only, if  
7 they had been, only helped the Prosecution. But so the  
8 Prosecution stops there. They don't run it through the  
9 national database.

10 And by the time we get to 2004, we have Alfreddie  
11 Pryor coming to court and testifying that he thinks maybe  
12 he has the fingerprint cards. So he goes back and comes  
13 back the next day -- he checks at home, "No, no, I don't  
14 have them. They were too old. They were destroyed."  
15 Well, if the man is potentially keeping fingerprint cards  
16 in his house, doesn't that demonstrate again to the Court  
17 this tremendous pattern of mishandling evidence, of lack  
18 of police procedures being followed? This is evidence  
19 that the Prosecution was allowed to test, that the Defense  
20 never got to confront or test on its own, and has that  
21 apparent exculpatory value because who do those  
22 fingerprints belong to? We will never know. They never  
23 get tested, the Defense never gets to run them through  
24 AFIS. And yet the Prosecution goes to great lengths to  
25 prove what they want to prove. They get to prove what



1           they want, but the Defense doesn't get its Sixth Amendment  
2           right. It doesn't get to confront the evidence.

3           Torn clothing, another great example. There is torn  
4           clothing found at Scott Davis' house. And you know Mr.  
5           Doran testified that things like that, fibers, can be  
6           tested for DNA, they can be traced to determine where  
7           they're bought from, where they're purchased, point of  
8           purchase. But they're lost, and never -- there's never a  
9           chance to test them. And it's ineffective assistance of  
10          counsel for them not to have investigated this and tested  
11          it. And then it's ineffective assistance of counsel for  
12          them not to have highlighted at trial, well, since the  
13          Prosecution lost it, here's the procedure that was  
14          violated, members of the jury, and here's an expert to  
15          testify about what we could have done with that evidence  
16          if we had had that.

17          Same thing, fire timeline. Fire experts. And this  
18          is a -- this is sort of really interesting because it's  
19          the same issue, but Bruce Morris retains a man named  
20          Lentini, who is a nationally recognized fire recreation  
21          expert. And in his report Lentini says, well, fire  
22          timelines are too tenuous to establish. And so he doesn't  
23          bring in Lentini to testify at trial. That's exactly the  
24          testimony that should have been brought out in front of  
25          the jury. And that's exactly the testimony that Mr. Dodd

1 and Jim Tolbert, who got up here on the stand, testified  
2 about. That fire timelines and fire recreations are  
3 imperfect to the point where they're not scientifically  
4 acceptable, they shouldn't have been admitted at trial,  
5 they should have been contested at trial, but nobody's  
6 brought to bear on that issue until now. They never bring  
7 in to trial their own expert, or on appeal, to show that  
8 the fire timeline that the State creates and the fire  
9 re-creation that the State creates is hocus-pocus.

10 Also Mr. Dodd testifies about something really  
11 interesting that we'll bring up again later, but he  
12 testifies about the 9mm Beretta. Because one of the  
13 things he says is, you know, you can take -- even Ms. Davy  
14 at the original trial says you can't test the gun; it's  
15 burnt; it's too burnt to perform tests on. Mr. Dodd says  
16 you can take the action bolt off that gun, put it on  
17 another gun, and perform tests on them. And there's a  
18 lack of investigation, there's a lack of bringing experts  
19 to trial to talk about these things. That's something  
20 that could have determined the cause of death in this  
21 case. But because Ms. Davy's allowed to testify without  
22 any controversion of her testimony, without any contrary  
23 expert testimony about what the cause of death is -- and  
24 Dodd says, no, you know, you could have performed other  
25 tests on that gun. We're going to come back talking about

1           both the gun and Ms. Davy, but it's -- I think that's an  
2           important point to note.

3           Dodd testifies that the evidence at the fire scene is  
4           not properly handled, that the evidence was not properly  
5           preserved, that it was contaminated, and that violated all  
6           kinds of Standard Operating Procedures, both for national  
7           and local standards of handling evidence in fire scenes.  
8           The Defense doesn't bring anyone to trial, and the issue  
9           isn't raised on appeal about these fire issues. And  
10          again, that's of great importance in deciding all of this  
11          totality of the 70 items of lost evidence.

12          I think it's important to look at some of the case  
13          law with respect to all this evidence that's not properly  
14          litigated. And there's some big cases I'm sure the Court  
15          is aware of. The first is Trombetta from 1984. And the  
16          Court looks -- the Supreme Court looks at due process and  
17          says when you're unable to -- the first step is if you  
18          can't recreate the evidence or test it in another way --  
19          you know, if you can, then there's no -- there's no  
20          harmful error -- but if you can't recreate it, that's step  
21          one. And then the second step, the most important step,  
22          is it having an apparently exculpatory value? Due process  
23          demands simply that where evidence is collected by the  
24          State, law enforcement agencies must establish and follow  
25          rigorous and systematic procedures to preserve the

1 captured evidence or its equivalent for the use of the  
2 defendant. That's not done here. They violate everything  
3 Trombetta stands for. Can we really say that law  
4 enforcement agencies here handled the evidence using  
5 systematic and rigorous procedures when you see the photos  
6 of that Evidence Room from APD?

7 In Trombetta the Court does not suppress the lost  
8 breath samples from a DUI in their case because law  
9 enforcement was acting in good faith in accordance with,  
10 quote, their normal practice. Well, when normal practice  
11 is to treat an Evidence Room like a garbage dump, then I  
12 don't think those are the procedures, rigorous procedures,  
13 that the Trombetta court was looking for. I don't think  
14 it is normal for an Evidence Room to look like a garbage  
15 dump or of, you know, someone's garage.

16 The next important case I want the Court to be  
17 reminded of is Youngblood, Arizona vs. Youngblood. I  
18 apologize to the Court that I have probably not the  
19 greatest penmanship, but I think you get it. Youngblood  
20 is a 1988 case. And the important thing I want the Court  
21 to recognize about this case is in the decision the  
22 Supreme Court rules that bad faith is irrelevant. You  
23 don't even have to get to the issue of bad faith. When  
24 the State fails to disclose evidence or tampers with  
25 evidence, it automatically violates due process and the

1 confrontation clause of the Sixth and the Fourteenth  
2 Amendment. You don't even have to address all these  
3 issues. When they mess with the evidence or they don't  
4 disclose it, you get in trouble.

5 By the way, what's interesting, I think, about the  
6 Youngblood case is again they rule for the Prosecution.  
7 It's a child molestation case. And it's basically they  
8 allegedly lost forensic evidence. But two years after the  
9 Supreme Court rules for the State, the attorneys for Mr.  
10 Youngblood, despite the fact that the case is ready to be  
11 ruled on by the highest court in the land, they ask for  
12 the DNA evidence to be retested and, lo and behold,  
13 Youngblood wasn't the perpetrator. And two years after  
14 the case is decided, after 1982 -- 2000, they test the DNA  
15 and Youngblood walks free. And that's important because  
16 you don't have to show that they -- you don't have to show  
17 all these procedures were violated, you don't have to show  
18 all these experts, you find that the State didn't disclose  
19 evidence or they altered evidence, tampered with evidence.  
20 That case doesn't even -- it's not even important.

21 And now the most important case, Mussman. We're very  
22 confident that this Court has what I think is some pretty  
23 good insight into the Mussman decision, having litigated  
24 the case. 289 Ga. 586. Mussman is Georgia's law when it  
25 comes to the issue of lost or destroyed evidence. So

1           there's a few things that are important about the Supreme  
2           Court's ruling in Mussman. I'll make a whole new page, if  
3           possible.

4           The first is in Mussman it isn't the State that  
5           destroys the evidence, it's a third party wrecking service  
6           that destroys a car. So can you really distinguish that?  
7           I think you can, when it's not the State's fault that the  
8           evidence gets destroyed, you can't really hold them  
9           responsible. And I think that's an important distinction.  
10          We had 70 items of evidence that are lost or destroyed,  
11          and there is no third party handling it. It's not a  
12          wrecking service, it's not some contractor for the State,  
13          it's the GBI and the APD and the AFD.

14          The second really important distinction, and this is  
15          huge, in Mussman, the defendant consents to the evidence  
16          being destroyed. There's a car, and I think the wrecking  
17          service calls Mussman's parents and says, hey, you know,  
18          do you want this? No. Nah, total it out. Our insurance  
19          will pay for it. Well, you can't consent to the evidence  
20          being destroyed and then later claim that it's prejudicial  
21          to you. And there's nothing like that here. We don't  
22          have a situation where, you know, Sheila Ross or Detective  
23          Chambers called up Bruce Morris and say, hey, you know,  
24          we're thinking about throwing away the gun. Is there  
25          anything you want to test it for? Uh-uh, that doesn't

1           happen here.

2           And the third -- and the thing that the Court really  
3 makes an important issue of -- is the size of the  
4 evidence. You're dealing with a whole car in Mussman.  
5 Okay. That's a pretty big piece of evidence. And the  
6 Court goes to great lengths to explain why you can't store  
7 a car in an Evidence Room. And they even give other  
8 examples. They say that, you know, if there is DNA on a  
9 mattress, you can't expect the State to keep the entire  
10 mattress, maybe they should keep a portion of it. Or a  
11 recliner, you know, if there's some fluid, bodily fluid on  
12 a button of a recliner, you keep the button, not the whole  
13 recliner. And that makes good sense. The Court gets it  
14 right.

15           And this is the opposite of Mussman. We don't have a  
16 car we're asking them to hold on to. We have a gun, a  
17 bullet. How much space does a bullet take up, a shell  
18 casing, magazine for the bullets, a flashlight,  
19 fingerprint card? These are small pieces of evidence that  
20 are easily stored, readily stored. And instead of taking  
21 up too much space, they're destroyed altogether due to the  
22 incompetence and bad faith of the State, not some third  
23 party, not the Defense consenting to it, but the State.

24           And in Mussman the Court concludes, and I'll quote,  
25 "Here the trial court correctly found there is simply no

1 evidence in the record that the police were acting in bad  
2 faith when they followed the standard policy of releasing  
3 evidence of vehicular homicide cases that they considered  
4 to be solved. This is not to say that following a  
5 standard policy may never amount to evidence of bad faith.  
6 However, the question of whether bad faith would exist  
7 under such circumstances would depend on the conduct of  
8 the actors in relation to the policy, not whether the  
9 policy itself constituted evidence of bad faith."

10 In that last sentence of the Mussman court, they  
11 instruct to look at the conduct of the actors. Does their  
12 conduct create an issue of violating procedure and policy?  
13 Does it raise to a level of being -- acting in bad faith?

14 And so now we get to what I consider the most  
15 important issues in this. Because even if the Court wants  
16 to look and interpret Mussman and Youngblood and Trombetta  
17 and say -- because they're going to get up and say these  
18 issues have been litigated. That's what they said in  
19 opening, I'm sure they're going to say it again. All this  
20 stuff's been litigated. And so even if the Court wants to  
21 follow that line of thinking and say, well, you know, 70  
22 items of evidence -- I don't think it's bad faith because  
23 -- for whatever reason. If the Court wants to take that  
24 position, we want the Court to be reminded of Arizona vs.  
25 Youngblood and issues which have not been litigated.



1           And we're going to start with Ms. Davy. Bernadette  
2           Davy. She is the State's firearm expert at trial. And  
3           Ms. Davy testifies about a variety of tests that she  
4           performs and, of course, she performs those tests on  
5           pieces of evidence that are then lost or destroyed. And,  
6           importantly, she is the person who testifies about the  
7           cause of death. She is, of course, terminated from the  
8           GBI for falsifying tests and lying in other trials, which  
9           comes out after the Davis appeal has been denied.

10           George Herrin, Jr., who is the deputy director of the  
11           GBI Crime Lab, you heard his testimony. And he testifies  
12           that him and -- he and Amanda Lokar -- he is the deputy  
13           director, Ms. Lokar's title was the technical leader for  
14           GBI firearms. And they both really testified about prior  
15           disciplinary issues with Ms. Davy. She had given out  
16           passwords she wasn't supposed to, she had threatened a  
17           supervisor, and these are important points because these  
18           prior disciplinary issues are things that the Defense, Mr.  
19           Morris and Mr. Steel, could have investigated. How about  
20           when you know an expert's going to come to trial to  
21           testify, subpoenaing their personnel file and records --  
22           we do it all the time in every DUI case, we go and get the  
23           P.O.S.T. records of every officer who's going to testify.  
24           That's not that hard to do. They could have gone and  
25           found out, hey, she's got a bunch of disciplinary issues.

1           Maybe we should cross-examine her about those. But they  
2           don't do that. That's a failure to investigate and it's  
3           another reason why there's ineffective counsel.

4           But the new issue, the key issue, is that issue they  
5           couldn't have known about. The issue that doesn't rely on  
6           something that's already been litigated, is that it turns  
7           out she is a big, fat liar. She lies in trials, she lies  
8           about tests she performed. And Fred Mays, who also  
9           testified from the GBI, he is from the Office of  
10          Professional Standards, he is the one who says, well, she  
11          ultimately admitted to falsifying tests, lying about it,  
12          and not just falsifying tests from 20 or 25 trials that  
13          actually took place, but when they confronted her about  
14          it, she tried to cover her own tracks and lied about it  
15          then in the audit that was done. This alone could grant  
16          us a new trial. Her conduct is not just reprehensible,  
17          it's prejudicial. There is no way for us to go back now  
18          and determine if Ms. Davy fabricated or falsified or  
19          tampered with the tests in the Davis case. The evidence  
20          is gone. But we don't -- that's not an issue that's been  
21          mitigated because Ms. Davy's misconduct comes forward  
22          after the fact. And it is, on its face, prejudicial to  
23          us.

24          What are the pieces of evidence she handled? The 9mm  
25          Beretta, the magazine, the shell casings, and the bullet

1           that caused Mr. Coffin's death. All this evidence is lost  
2           after she handles it. I don't know if she lost it, I  
3           don't know who lost it. And that's not the issue. The  
4           issue is she is wholly discredited and her testimony is  
5           used to convict Mr. Davis.

6           What's even more complicated and distressing about  
7           Ms. Davy and her situation is when the GBI finds out about  
8           it and does their investigation and forces her to -- or  
9           asks her to resign -- that's a nice way of doing it -- who  
10          do they notify? They send a letter to every D.A. in the  
11          State. Wow, that's great. That's just fantastic. Let's  
12          just notify one side of the coin. We don't need to  
13          actually put on notice any defense lawyers who have been  
14          involved in her trials, we'll just notify every D.A.'s  
15          office. I mean, why not at least send the same letter to  
16          every public defender in the state? At least that way  
17          every county or every circuit is -- both sides are on  
18          notice. No, no, they don't do that.

19          But they do send the same letter to Paul Howard. And  
20          what does he do with that letter? I don't know, I guess  
21          he puts it in a file somewhere. He certainly doesn't  
22          share it with Scott Davis' lawyers, and that's a Brady  
23          violation because there are cases like Penn vs. Richey  
24          with the U.S. Supreme cite in 1987 that says, ah, you  
25          know, Brady doesn't just extend the evidence you have

1 prior to the date of trial. If new things come up, even  
2 after appeal, you have to -- have to -- share them with  
3 the Defense. To this day, as I stand here before Your  
4 Honor, no one from the Fulton County's D.A.'s Office or  
5 anyone from the State has ever notified anyone on his  
6 team, not Bruce Morris, not Brian Steel, not Don Samuel,  
7 not Ms. Shein, Mr. Cohen, or myself, or any of our  
8 investigators. I mean, he's got enough lawyers. All  
9 you'd have to do is notify one of them. They never  
10 mentioned the word Davy and termination. They've never  
11 shared the letter with us.

12 He gets a new trial just on that ground. It violates  
13 his due process that she was allowed to testify about the  
14 cause of death, testify about the firearms, testify about  
15 key pieces of evidence, when she very well may have been  
16 lying through her teeth.

17 All right. Well, that's not an issue that depends on  
18 something that's already been litigated, so that's one.

19 Number two, Linda Tolbert. Linda Tolbert is an  
20 interesting witness. She provided the Fulton County  
21 D.A.'s Office, at their request and at their drafting, she  
22 signs an affidavit. And that affidavit -- and she signs  
23 the affidavit prior to trial, it's already in discovery.  
24 And that affidavit says really two things. One, her  
25 signature on the Evidence Room sheets is forged, and two,

1 she never received the 9mm Beretta. Maybe she thought it  
2 was, at the time, under Ms. Davy's mattress at home. But  
3 she signs this affidavit that says two things. Her  
4 signature on the evidence -- evidence logs is not right,  
5 and she doesn't get the gun.

6 And so after seeing that affidavit, Scott Davis'  
7 defense team says, well, no reason to call her. I mean,  
8 you know, we're going to investigate and look at her in  
9 such a way that, you know, we can't prove that the D.A.'s  
10 Office ever got the gun, that she ever got the gun. Well,  
11 then she comes here and says, you know, they kind of made  
12 me lie in that affidavit. It's false. The affidavit's  
13 false. It is my signature and I probably did get the gun.  
14 So, I mean, I hate to use the word "perjury," but at the  
15 very least she's supplying false testimony. And that  
16 changes the way that a defense attorney operates and  
17 strategizes and deals with a witness. Because you have  
18 this belief that these things are going on when, in fact,  
19 they're not. And Bruce Morris could have called her to  
20 the stand and said, you got the gun, it comes back to you,  
21 and then presto-chango, puff, it disappears.

22 So now we have evidence that a prosecution witness  
23 provided false testimony. Again, I would argue, that  
24 alone would be grounds for a new trial. Remember, this is  
25 no small piece of evidence she's testifying about. It's

1 the 9mm Beretta. It's the murder weapon that she loses.  
2 It's not a flashlight. I can't think of a more important  
3 piece of evidence in this case, physical evidence. And  
4 she got up on the stand here and admitted to providing  
5 false testimony. What's interesting is she's asked to  
6 provide that affidavit by Chris Harvey, who's the  
7 investigator in the D.A.'s Office. I don't want to point  
8 the finger too hard at Paul Howard's Office, but boy, that  
9 to me is reprehensible. It's unacceptable. It is not  
10 worthy of the system of justice and trials that we have in  
11 this country where fairness and truth should prevail.

12 All right. And then we have the crown jewel. The  
13 most important piece of evidence is the tape, the audio  
14 tape of Scott Davis' interview. Scott Davis tells his  
15 lawyers: Please get this analyzed. But they don't. It's  
16 ineffective for them not to. I hope that would be grounds  
17 for a new trial alone, in and of itself. But we go a lot  
18 further than that.

19 Mr. Griffin testified today that you have the tape  
20 being turned over once when you get from Side A to Side B.  
21 Okay. There's no real technical issue with respect to  
22 that. Then you have two starts and stops. And then you  
23 have two deletions or what he calls them "erasures."  
24 They're for small amounts of time, but they're erasures  
25 nevertheless. You know, the interesting issue about the

1 tape is not all this technical stuff he testifies to. The  
2 interesting issue for me, from my perspective, is  
3 something we don't even need an expert for. He just hits  
4 play and you hear -- it's either Chambers or Walker  
5 telling one or the other, hey, turn the tape over. And  
6 then you hear them turning the tape over. Well, how is  
7 that possible? Let's think about that for a minute. If  
8 you hear them turning the tape over, that means there's  
9 another tape. It means there's two tapes. You can hear  
10 the tape being turned over. How does that tape record?  
11 There's a second tape and it's never disclosed. It's not  
12 turned over ever. To this day Detective Chambers gets up  
13 here and says, you know, there's no second tape. There's  
14 no second tape. Okay, really? I don't even think you  
15 need an expert to figure that one out.

16 But Griffin does point out something important.  
17 There are these erasures. I call that tampering or  
18 altering. He says the tapes not altered. Okay. You  
19 know, we've all seen somebody come in and they fail a drug  
20 test for a probation violation: I swear, I didn't use any  
21 drugs. I mean, that's what I felt like when he was  
22 testifying. The uncontroverted expert testimony is that  
23 there are alterations and deletions to the tape. He wants  
24 to swear that the sky is blue, and if the sky's not blue,  
25 that it's purple, fine. He can do that all day long. But

1           the science shows that the tape is altered.

2           So we're no longer dealing with harmless error after  
3 harmless error, and oh, it's okay for the State to kind of  
4 mess things up. It's too much. It gets to a point where  
5 after -- if you don't want to look at the 70 pieces of  
6 evidence and you don't want to look at Davy and you don't  
7 want to look at Tolbert and you don't want to look at the  
8 tape, at what point does it become an unfair trial? I  
9 can't think -- maybe I have a limited imagination, but I  
10 can't think of a more egregious set of examples, which in  
11 their totality point to the fact that this man didn't get  
12 a fair trial.

13           And it's also prejudicial because the tape, by the  
14 way, is used as the key, the crown jewel, in closing  
15 argument at trial by Sheila Ross, who's the ADA. I mean,  
16 she hammers on that issue at trial. Listen to his tape.  
17 That's what's used to convict him, and it's a tampered  
18 with piece of evidence. So I'm not afraid to call  
19 Detective Chambers a liar. I mean, I know there was a  
20 second tape in my heart and I know that somewhere it still  
21 could exist and that we'll never see it.

22           And I want to point back to Don Samuel's testimony  
23 because Don not only is brave enough to get up on the  
24 stand and say, you know, I screwed up. Scott Davis did  
25 ask me to have the tape analyzed and I just didn't do it.



1 But he also says something that is really, really  
2 important, which is -- and I want to quote him -- that if  
3 the tape had been altered, it would be, quote, the very  
4 definition of bad faith. I like that. It is not  
5 acceptable for the police to erase parts of the evidence  
6 and say here's an authentic copy. And, in fact, the case  
7 law supports that as well. There's a lot of cases but the  
8 one I'll point the Court to is Brown vs. State which says  
9 that "In order to authenticate and introduce an audiotape  
10 at trial," Brown vs. State is 274 Ga.App. 302, it's a 2005  
11 case, "the audiotape cannot have any --" oh, what is the  
12 word they use -- "if the recording is authentic and  
13 correct, then there can be no changes, additions, or  
14 deletions." You can't have any deletions. Well, there's  
15 two erasures in this tape. And it's not like the A.G.'s  
16 Office brought an expert and has to analyze the tape and  
17 said, oh, no it's continuous. There's no erasures. This  
18 is uncontroverted.

19 I expect the State's response to all of this is to  
20 say two things: one, all these issues have been litigated,  
21 and two, there's overwhelming evidence of Mr. Davis'  
22 guilt. Well, guess what? That overwhelming evidence of  
23 his guilt is based on things like the tape and Ms. Davy's  
24 testimony and Ms. Tolbert's affidavit, which have been  
25 altered and tampered with and which is what the Court in

1        Youngblood said you don't even need bad faith. When they  
2        do that, when the State starts messing with the evidence  
3        and they don't disclose stuff and Paul Howard doesn't even  
4        tell you about the fact that Davy's been fired, then you  
5        get a new trial.

6                If we ignore this new evidence, things like Tolbert,  
7        Davy, the Evidence Room photos, and the tape issues -- the  
8        two tape issues, because there's one issue with the  
9        erasures, the second issue -- the fact that there's a  
10       second tape out there somewhere. If we ignore that, what  
11       message does it send? We are inviting disaster in our  
12       judicial system because we are telling police it's okay to  
13       lie a little, it's okay to fake it, it's okay to fudge the  
14       evidence, as long as you think you're right. That's not  
15       the legal system that any of us signed up for. And I  
16       simply can't sit here and stand by and think that this is  
17       harmless.

18               What is left with the greatest justice system in the  
19       world if the police are allowed to erase portions of an  
20       interview of a defendant and a suspect? How many times do  
21       we have to say things like this is harmless error? What  
22       is the threshold -- again, I point to the Court -- when  
23       you have -- what is the threshold when you have 70 items  
24       of evidence that are lost, the failure to show Standard  
25       Operating Procedures have been violated, the failure to

1 call the experts to show that the evidence was important,  
2 and then the photos from the Evidence Room? Tolbert  
3 lying, Davy lying, tape deletions, and a second tape out  
4 there somewhere. Because, again, you know, I think a lay  
5 person can figure that out, but we have the expert  
6 testimony that there's a second tape. Uncontroverted.  
7 Unless, of course, you believe Detective Chambers and want  
8 to ignore basic common sense, because you can hear the  
9 tape being turned over.

10 So how many times do we have to say that all of this  
11 is harmless? When we look at the totality of the  
12 circumstances in this case, it raises to a level, to me,  
13 that is obnoxious the way the police and the Fulton County  
14 District Attorney's Office handled the evidence and  
15 handled the witnesses, and conducted this case.

16 Do we want to send a message to police that it's okay  
17 to cherry pick pieces of evidence? Here's the stuff that  
18 helps you out, we'll just admit that at trial. And, you  
19 know, this may not help us at trial, let's toss it. Or  
20 let's test it and see if it helps us use those tests and  
21 then toss it. And it's okay to fake the tests you do, if  
22 you need to. And it's okay to edit the tapes or keep a  
23 second secret tape if you need to.

24 You know, maybe we start swearing in police -- if  
25 this is all acceptable, maybe what we need to do is swear

1 in police witnesses: Do you swear to tell some of the  
2 truth or distort the truth if you think it's necessary to  
3 prove your case? Maybe that's the oath they should take  
4 if all of this becomes acceptable in court. I can't  
5 endorse that. I can't endorse treating an Evidence Room  
6 like a garbage pit or falsifying affidavits or falsifying  
7 firearms tests or deleting portions of tapes or hiding  
8 tapes or hiding the fact that the firearms expert has been  
9 discredited and terminated. I think it's simply  
10 intolerable. It violates every principle we have as a  
11 society that relies on fair and honest police work and a  
12 fair system of justice.

13 So I implore Your Honor, if nothing else persuades  
14 you in this case, Scott Davis must have a new trial on  
15 these issues here.

16 I thank Your Honor for her time and patience in  
17 hearing this case.

18 MR. MALCOLM: Your Honor, our argument will be  
19 reflected in our brief. We don't intend to present an  
20 oral closing argument today.

21 THE COURT: All right. Then I guess we're done for  
22 the day. I will plan to see everybody on December 2<sup>nd</sup>?

23 MS. SHEIN: Yes, ma'am.

24 THE COURT: Okay, at 1:30. And I'm thinking it's  
25 going to be the same courtroom, but we'll get a notice out

1           to everybody to let you know. We change courtrooms so  
2           often, I couldn't really say.

3                       [Off the record comments.]

4           **[Proceedings adjourned; to reconvene on December 2, 2011.]**

C E R T I F I C A T E

STATE OF GEORGIA

COUNTY OF GWINNETT

I hereby certify that the above and foregoing Pages 781 through 889 are a true and correct transcription of Volume V of VII of the habeas corpus proceedings taken down by me in **Scott Winfield Davis vs. Tony Howerton, Warden, Phillips State Prison, Civil Action Number 10-A-0741-2.**

I further certify that I am neither related nor counsel to any of the parties and am not financially interested in the matter.

**This certification is expressly withdrawn and denied upon the disassembly and/or photocopying of the foregoing transcript or any part thereof unless disassembly and photocopying is done by the undersigned Certified Court Reporter and original signature and official seal attached thereto.**

WITNESS my hand and official seal in Gwinnett County, Georgia, this 19th day of December, 2011.

---

Beth O. Capell, CCR, CVR  
Certificate Number A-1290  
Official Court Reporter

Gwinnett Superior Ct./Div. II

C E R T I F I C A T E

STATE OF GEORGIA

COUNTY OF GWINNETT

I hereby certify that the above and foregoing Pages 891 through 1380 are a true and correct transcription of Volume VI of VII of the habeas corpus proceedings taken down by me in **Scott Winfield Davis vs. Tony Howerton, Warden, Phillips State Prison, Civil Action Number 10-A-0741-2.**

I further certify that I am neither related nor counsel to any of the parties and am not financially interested in the matter.

**This certification is expressly withdrawn and denied upon the disassembly and/or photocopying of the foregoing transcript or any part thereof unless disassembly and photocopying is done by the undersigned Certified Court Reporter and original signature and official seal attached thereto.**

WITNESS my hand and official seal in Gwinnett County, Georgia, this 19th day of December, 2011.

---

Beth O. Capell, CCR, CVR  
Certificate Number A-1290  
Official Court Reporter



Gwinnett Superior Ct./Div. II

C E R T I F I C A T E

STATE OF GEORGIA

COUNTY OF GWINNETT

I hereby certify that the above and foregoing Pages 1382 through 1960 are a true and correct transcription of Volume VII of VII of the habeas corpus proceedings taken down by me in **Scott Winfield Davis vs. Tony Howerton, Warden, Phillips State Prison, Civil Action Number 10-A-0741-2.**

I further certify that I am neither related nor counsel to any of the parties and am not financially interested in the matter.

**This certification is expressly withdrawn and denied upon the disassembly and/or photocopying of the foregoing transcript or any part thereof unless disassembly and photocopying is done by the undersigned Certified Court Reporter and original signature and official seal attached thereto.**

WITNESS my hand and official seal in Gwinnett County, Georgia, this 19th day of December, 2011.

---

Beth O. Capell, CCR, CVR  
Certificate Number A-1290  
Official Court Reporter

Gwinnett Superior Ct./Div. II

C E R T I F I C A T E

STATE OF GEORGIA

COUNTY OF GWINNETT

I hereby certify that the above and foregoing Pages 1 through 1961, consisting of Volumes I through VII, are a true, correct, and complete transcription of the habeas corpus proceedings taken down by me in **Scott Winfield Davis vs. Tony Howerton, Warden, Phillips State Prison, Civil Action Number 10-A-0741-2.**

I further certify that I am neither related nor counsel to any of the parties and am not financially interested in the matter.

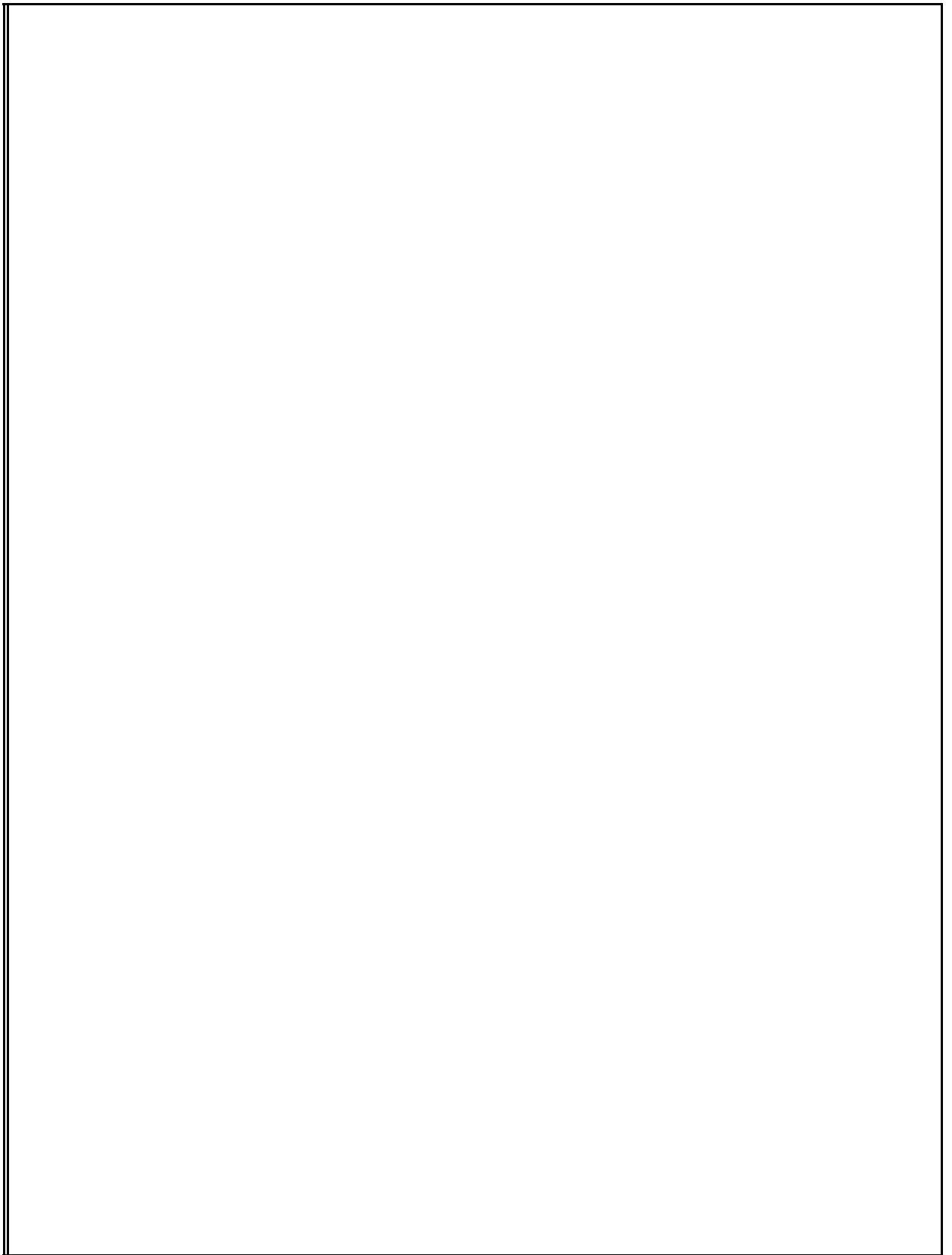
**This certification is expressly withdrawn and denied upon the disassembly and/or photocopying of the foregoing transcript or any part thereof unless disassembly and photocopying is done by the undersigned Certified Court Reporter and original signature and official seal attached thereto.**

WITNESS my hand and official seal in Gwinnett County, Georgia, this 19th day of December, 2011.

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Beth O. Capell, CCR, CVR  
Certificate Number A-1290  
Official Court Reporter

Gwinnett Superior Ct./Div. II



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