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R E P O R T E R ' S R E C O R D

VOLUME 45 OF 53

Trial Court Cause No. 380-80047-01

THE STATE OF TEXAS * IN THE 380TH DISTRICT COURT

V. *

IVAN ABNER CANTU * OF COLLIN COUNTY, TEXAS

REPORTER'S RECORD

VOLUME 45 - PUNISHMENT PHASE

CAPITAL MURDER JURY TRIAL

COPY

On the 23rd day of October, 2001, from 9:10 a.m. to 6:00 p.m. the Capital Murder - Punishment Phase proceedings came on to be heard in the presence of a jury, in the above-entitled and -numbered cause; and the following proceedings were had before the Honorable Charles F. Sandoval, Judge Presiding, held in McKinney, Collin County, Texas:

Proceedings reported by Computerized Stenotype Machine; Reporter's Record produced by Computer-Assisted Transcription.

LISA M. RENFRO, Texas CSR #4534

Official Court Reporter - 380th Judicial District Court

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380TH JUDICIAL DISTRICT
MCKINNEY, TEXAS
LISA M. RENFRO

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PROCEEDINGS

1
 2 (The jury enters the courtroom at 9:10 a.m.)
 3 THE COURT: Please be seated.
 4 Mr. Goeller.
 5 MR. GOELLER: Thank you, Your Honor. We will
 6 call Penny Leland (Phonetic), Your Honor.
 7 THE COURT: All right.
 8 (Witness enters the courtroom.)
 9 THE COURT: Raise your right hand, please.
 10 (Witness sworn by the Court.)
 11 THE COURT: Put your hand down and be seated.
 12 Mr. Goeller.
 13 MR. GOELLER: Thank you, sir.
 14 Whereby,
 15 PENNY LELAND,
 16 a witness called by the Defense, sworn to testify to the
 17 truth, testified under oath as follows:
 18 DIRECT EXAMINATION
 19 BY MR. GOELLER:
 20 Q. Ma'am, please state your full name.
 21 A. Penny Marino Leland.
 22 Q. Where do you live?
 23 A. 6616 Greenspan, Dallas, Texas, 75232.
 24 Q. Do you know this guy right here?
 25 A. Yes, I do.

- 1 Q. What's his name?
 2 A. **Ivan Cantu.**
 3 Q. What's his relationship to you?
 4 A. **He's my nephew.**
 5 Q. I want to talk to you --
 6 MR. SCHULTZ: Excuse me a moment. Judge, would
 7 you let the record reflect the witness has identified the
 8 Defendant here in open court?
 9 THE COURT: All right. I will do so.
 10 Q. BY MR. GOELLER: I want to talk to you a little
 11 about your relationship and your knowledge of Ivan.
 12 Throughout the course of Ivan's life -- and your Ivan's aunt?
 13 A. **Yes, I am. I'm his aunt.**
 14 Q. You're Sylvia's sister?
 15 A. **Yes, I am.**
 16 Q. What kind of contact have you had with Ivan
 17 throughout his life. If you would just give the jury some
 18 idea when he was born, up to now, the rough periods of his
 19 life, proximity you lived to him, and how much contact you had
 20 to him.
 21 A. **He was like a son to me. I raised him, changed his**
 22 **diapers, gave him advice when he was growing up. Told him to**
 23 **stay away from James, because he was a drug dealer, and Amy**
 24 **Kitchens.**
 25 Q. When was that?

- 1 A. **It was a few years back. I don't know exactly what**
 2 **year.**
 3 Q. Do you have a pretty good knowledge -- working
 4 knowledge of the family dynamics and relationships in that
 5 family, Ivan's family?
 6 A. **Yes. Yes, I do.**
 7 Q. What kind of relationship did Ivan have with his
 8 father, Abner Cantu?
 9 A. **He did not have a relationship with his father.**
 10 Q. And you're not here to say that was all Abner's
 11 fault, are you?
 12 A. **No.**
 13 Q. If you had to cast -- well, are both parents kind of
 14 responsible for that dysfunction?
 15 A. **Yes.**
 16 Q. More so Sylvia?
 17 A. **Yes.**
 18 Q. What about grandparents? What kind of relationship
 19 did Ivan have, if any, with his maternal grandfather?
 20 A. **None.**
 21 Q. Sylvia's father?
 22 A. **None.**
 23 Q. Your father?
 24 A. **Absolutely none.**
 25 Q. Why?

- 1 A. **His grandfather lived in Mexico his entire life, and**
 2 **my father -- his other grandfather, left my family, my mother,**
 3 **when we were very small children, so we didn't know him,**
 4 **either.**
 5 Q. All right. So the maternal grandfather and the
 6 paternal grandfather were not in the picture?
 7 A. **Correct.**
 8 Q. No relationship?
 9 A. **No relationship.**
 10 Q. The maternal grandfather, what was the situation
 11 there? Was that the one in Mexico?
 12 A. **He lived in Mexico.**
 13 Q. Okay. The maternal grandfather, where was he?
 14 A. **Which one?**
 15 Q. Not the grandfather that lived in Mexico, the other
 16 one.
 17 A. **We never knew his about -- whereabouts. We never**
 18 **knew where he was at.**
 19 Q. I want to talk to you about something that's a
 20 little uncomfortable. You had a daughter, correct?
 21 A. **Yes.**
 22 Q. What was her name?
 23 A. **Shona Ester Clark.**
 24 Q. Did there come a point in her life and your life
 25 where she ran away?

- 1 A. **Yes.**
 2 Q. How old was she?
 3 A. **Thirteen.**
 4 Q. Where were y'all living at the time?
 5 A. **In Dallas.**
 6 Q. All right. How long was she gone?
 7 A. **Two years.**
 8 Q. All right. This would have been when, what, Ivan
 9 was in high school?
 10 A. **Junior high.**
 11 Q. Okay. At a certain period of time after those two
 12 years, she appeared and was brought back, correct?
 13 A. **Correct.**
 14 Q. Where was she and who brought her back?
 15 A. **Hobbs, New Mexico, and Ivan's mother brought her**
 16 **back.**
 17 Q. She was prostituting at an interstate truck stop,
 18 right?
 19 A. **Correct.**
 20 Q. Where were you during this two years? What was
 21 going on between you and your -- I mean, not that anything was
 22 going on. She was gone for two years, but tell the jury about
 23 what was happening those two years.
 24 A. **I was living with my husband in Dallas.**
 25 Q. Was that a bad time in your life as well?

- 1 A. Yes.
- 2 Q. When she came back to Dallas -- now, did Sylvia go
3 out to New Mexico and get her?
- 4 A. Yes, she did.
- 5 Q. How was she alerted that the child was even out
6 there?
- 7 A. The police department notified her in Hobbs, New
8 Mexico.
- 9 Q. Did she bring her back to Dallas?
- 10 A. Yes, she did.
- 11 Q. Where did she live when she came back to Dallas?
- 12 A. With Sylvia.
- 13 Q. How long a period of time did she live with Sylvia?
- 14 A. Six months, maybe.
- 15 Q. Did -- where were you during this period of time,
16 the six months that she lived with Sylvia?
- 17 A. In Dallas.
- 18 Q. Who else was living in the house with your daughter?
- 19 A. Ivan and Eric.
- 20 Q. Did you ever reunite with her, your daughter?
- 21 A. Yes, I did.
- 22 Q. How did it end, what happened?
- 23 A. She ended up dying in my arms of pneumonia.
- 24 Q. Pneumonia brought about by AIDS?
- 25 A. Possibly. I don't know.

- 1 Q. During that period of time, did Ivan become close
2 with her?
- 3 A. Yes.
- 4 Q. Did they become like brother and sister?
- 5 A. They were brother and sister.
- 6 Q. How did that affect the family?
- 7 A. Very much so. It affected us all. It tore the
8 family apart.
- 9 Q. Did you ever see what impact that had on Ivan?
- 10 A. Yes.
- 11 Q. What?
- 12 A. Disbelief. That was his sister that we buried.
- 13 Q. Did you have much contact with your daughter during
14 that period of time that she came back -- was brought back and
15 lived with Ivan and Sylvia?
- 16 A. Yes.
- 17 Q. Why was that arrangement taking place; in other
18 words, why was she living with Sylvia and Eric? Why didn't
19 she just come back to you?
- 20 A. You would have to ask her that question. I don't
21 know.
- 22 Q. Up until she left when she was 13, had she lived
23 with you continuously?
- 24 A. Yes.
- 25 Q. How long a period of time -- I don't know if I asked

- 1 this. When she comes back she's living with Ivan and Sylvia
2 and Eric, and then does she end up living with you for a brief
3 period of time?
- 4 A. Yes.
- 5 Q. How long before she passed?
- 6 A. About two months.
- 7 MR. GOELLER: I'll pass the witness, Your
8 Honor.
- 9 CROSS-EXAMINATION
- 10 BY MR. SCHULTZ:
- 11 Q. Ma'am, my name is Bill Schultz. I'm one of the
12 Assistant District Attorneys representing the State of Texas
13 in its capital prosecution of the Defendant, Ivan Cantu. I
14 have a few questions to ask you. First of all, did you make
15 any written statements of any of the things you've been
16 testifying about?
- 17 A. No.
- 18 Q. Could you tell us what your educational background
19 is?
- 20 A. I majored in Government and Politics at the
21 University of Texas at Dallas.
- 22 Q. And how many years -- are you there now as a
23 student?
- 24 A. I'm enrolled now.
- 25 Q. How are you classified?

- 1 A. Senior.
- 2 Q. And what do you propose to do with your degree when
3 you graduate?
- 4 A. Go into law.
- 5 Q. Does that mean, like, law school?
- 6 A. Law school, apply for law school.
- 7 Q. Have you applied already to law school?
- 8 A. No.
- 9 Q. Now, first of all, do you believe the Defendant is
10 guilty of the capital murder of those two people?
- 11 MR. GOELLER: Objection as to relevance at this
12 stage of the trial, Your Honor.
- 13 MR. SCHULTZ: Very relevant to show her bias
14 against the State, Judge.
- 15 THE COURT: Okay. For that purpose, I'll allow
16 you to ask.
- 17 Q. BY MR. SCHULTZ: Do you think he's guilty of capital
18 murder?
- 19 A. No one has shown me any proof to believe that.
- 20 Q. And I assume he hasn't told you that, either; is
21 that correct?
- 22 A. That's correct.
- 23 Q. So then you're up there testifying with the belief
24 or assumption that he's not guilty, or that he's innocent; is
25 that right?

1 A. **Until someone is proven guilty to me, that person is**
2 **considered innocent.**

3 Q. What would you need to prove he's guilty? Do you
4 accept the verdict of the jury to prove he's guilty? Is that
5 all right with you?

6 A. **I would have to see the evidence myself to be part**
7 **of that decision.**

8 Q. You understand the jury has found him guilty. You
9 know that because we're in the punishment stage now?

10 A. **Yes.**

11 Q. Can you not accept the fact that the jury listened
12 to all the evidence, evaluated it fairly and found him guilty
13 of capital murder? Can you do that?

14 A. **Well, I trust --**

15 MR. GOELLER: Objection to the relevance, Your
16 Honor. Pitting her against this jury is of no significance
17 whatsoever at this stage of the trial.

18 THE COURT: Sustained.

19 Q. BY MR. SCHULTZ: Now, let me see if I understand
20 this. Are you saying that Abner was not a good dad; is that
21 what you're saying?

22 A. **I didn't say that.**

23 Q. Was he a good dad?

24 A. **From what I saw with the children, yes.**

25 Q. Well, what makes you say that he was a good dad?

1 A. **I never saw him abuse the children.**

2 Q. Isn't there more to being a good dad than that?

3 A. **He knew how to find his way home. In my family**
4 **that's pretty good. I think in society today, if a husband**
5 **can find his way home, that's pretty good.**

6 Q. Do you think the average married man can't find his
7 way home; is that what you're saying?

8 A. **All situations are different. All family life, and**
9 **husband and wife relationships are different.**

10 Q. But I'll ask my question again. Are you saying the
11 average married man can't find his way home; is that your
12 opinion?

13 A. **No.**

14 Q. Well, let's continue. Were you being sarcastic when
15 you were talking about Abner could find his way home? Was
16 that sarcasm or was that genuine?

17 A. **I've heard that comment from a lot of women, so --**

18 Q. About Abner?

19 A. **No, about their boyfriends or husbands.**

20 Q. Okay. Well, I'll ask it again. Was Abner a good
21 father to the Defendant?

22 A. **No.**

23 Q. Okay. Then what things about him do you say were
24 not good father traits?

25 A. **His alcohol and drug abuse.**

1 Q. Now, you say he was an alcohol and drug abuser. He
2 was also a police officer, wasn't he?

3 A. **At one time.**

4 Q. For how many years?

5 A. **I don't know.**

6 Q. You don't have any idea how many years he was a
7 police officer?

8 A. **He -- I would say the first part of Ivan's life when**
9 **he was born.**

10 Q. Was he -- in your judgment, was he a kind father?

11 A. **A what?**

12 Q. A kind father.

13 A. **Yes.**

14 Q. And you already told us that he didn't abuse the
15 kids, right?

16 A. **That's right.**

17 Q. And let's face it, lots of kids get abused in our
18 society, don't they?

19 A. **Yes, they do.**

20 Q. And for whatever reasons the divorce occurred, it
21 seemed to have broken his heart, don't you agree?

22 A. **Yes.**

23 Q. So much so he never remarried?

24 A. **Yes.**

25 Q. He's in terrible health right now. Have you seen

1 him recently?

2 A. **Yes, I have.**

3 Q. Do you agree with me? He's, obviously, very ill
4 right now?

5 A. **He looks like he's dying, yes.**

6 Q. And he never remarried, even though this divorce
7 occurred many, many years ago?

8 A. **Yes.**

9 Q. Did he pay child support as directed?

10 A. **Yes.**

11 Q. A lot of men don't do that, right?

12 A. **Correct.**

13 Q. But he did?

14 A. **Yes.**

15 Q. Whatever his other deficits you might perceive, he
16 didn't abuse the children, he paid child support, and he must
17 have loved Sylvia because he never remarried; do you agree?

18 A. **No.**

19 Q. You don't think he loved Sylvia?

20 A. **You would have to ask him that question.**

21 Q. Well, I'm confused because you're up here

22 testifying, as I think Mr. Goeller referred to you, as very

23 knowledgeable about family dynamics, and I'm just wondering

24 why you're so selective?

25 A. **Well, I personally think he was in love with her,**

1 **but I can't speak for him.**

2 Q. I didn't ask you to speak for him. I want to know
3 what you think about the situation. You think he loved
4 Sylvia, right?

5 A. Yes.

6 Q. Thank you. Now, do you know about some child
7 support difficulties that arose between Sylvia and Abner?

8 A. Yes.

9 Q. What do you know about that?

10 A. **What specifically?**

11 Q. Well, for whatever reason, is it true that Sylvia
12 was demanding direct payment, rather than going through the
13 local child support office?

14 A. Yes.

15 Q. And at least the reason given for that was because
16 she wanted to get her money faster, and there was a lag. If
17 they went through the child support office, they would have to
18 deposit, let those checks that were deposited clear, and issue
19 another check; is that right?

20 A. Yes.

21 Q. And she wanted the money directly?

22 A. Uh-huh -- yes.

23 Q. And did Abner comply with that?

24 A. Yes, he did.

25 Q. And he didn't have to, but he did it because she

1 asked; is that right?

2 A. Yes.

3 Q. Truth of the matter is, some would say he's even
4 technically violating the Court order that told him to do it a
5 different way, but for the benefit of Sylvia and the kids, he
6 made the money -- paid just like clockwork every month; is
7 that right?

8 A. **I don't think he understood how to put it through
9 the court system.**

10 Q. Okay.

11 A. **I don't think he understood that -- how to do that.**

12 Q. Well, whatever he understood, Sylvia still wanted it
13 coming directly from him?

14 A. Yes, uh-huh.

15 Q. Well, if he's paid every month the amount he's
16 supposed to pay and paying it the way Sylvia wanted it, how
17 could there have been any issue that arose about child support
18 anyway? What went wrong?

19 A. **She wanted more.**

20 Q. She wanted more money?

21 A. **She wanted more money.**

22 Q. Than was ordered by the Court?

23 A. **I can't hear you.**

24 Q. More money than the Court ordered, is that right, is
25 what she wanted?

1 A. Yes.

2 Q. Well, you can go back to court to try to convince
3 the judge to increase child support if you have grounds. You
4 understand that because you're studying that stuff?

5 A. Uh-huh.

6 Q. Right?

7 A. Yes.

8 Q. Was that what she did, or did she try to shake him
9 down some other way?

10 A. **I would use the word "coercion." Tried to coerce
11 money out of him.**

12 Q. You wouldn't call it a shakedown. You'd just say it
13 was coercion.

14 A. **What do you mean "shakedown"?**

15 Q. Okay. How would she try to coerce him then into
16 giving her more money?

17 A. **By taking legal action, by saying that it never
18 arrived since it didn't go through the courts.**

19 Q. Could you be more specific?

20 A. **She wanted him to pay back child support.**

21 Q. Well, did he owe back child support?

22 A. No.

23 Q. Okay. So because she convinced him to not go
24 through the child support office where there would be
25 independent records, it was her belief she had him in a

1 position of claiming that there wasn't child support paid, and
2 then he'd have to pay back child support?

3 A. Correct.

4 Q. That would have involved her lying, though; do you
5 understand that?

6 A. Yes.

7 Q. But she was apparently willing to do that, also; is
8 that right?

9 A. Yes.

10 Q. And so such things as whether you lie in court or
11 not wasn't a big deal to her; is that what you're saying?

12 A. **You'd have to ask her that question, but it doesn't
13 appear.**

14 Q. Fair enough. Do you know Emelba?

15 A. Yes, I do.

16 Q. How are you related to Emelba?

17 A. **She's my sister, my older sister.**

18 Q. So all three of you are sisters?

19 A. Yes.

20 Q. And let's go back to Abner again. Do you think he
21 was a loving father?

22 A. **Would you give me -- what do you consider a loving
23 father? What do you mean?**

24 Q. The mutual understanding of that word.

25 A. **I haven't seen it in our family, so I'm -- I would**

1 say no.

2 Q. Okay. He didn't appear to be a loving father in
3 your mind?

4 A. No.

5 Q. What about your husband, the father of your
6 daughter, how would you characterize him as a father?

7 A. Not -- we don't know where he went. I mean, he
8 disappeared. He was not a loving father. He was not there.

9 Q. How about Emelba's husband, they've had five
10 children; is that right?

11 A. Yes.

12 Q. Is the father of her five children, is he a loving
13 father?

14 A. In his own way, yes.

15 Q. Well, tell me what that means, that qualification.

16 A. He provides his duty, which is supporting the
17 family, the household, the education, the bills, food,
18 clothing.

19 Q. But you don't see that as being a loving father in
20 your mind?

21 A. No.

22 Q. You said you've never seen any loving fathers in
23 your family?

24 A. No.

25 Q. How about your father, was he a loving father?

1 A. No. He almost killed my mother. No, he was not
2 loving.

3 Q. It's interesting because some people would say why,
4 if someone grew up in a family with an unloving father and a
5 father that almost killed the child's mother, the child would
6 turn out bad, a criminal or vicious. And yet, it appears
7 you've turned out fine. You're in college wanting to go to
8 law school. How do you explain that?

9 A. I truly believe if you don't have an education, if
10 these things are not exposed to you, you don't know any
11 different.

12 Q. Well, nobody gave you an education. You have had
13 the courage and the drive to get an education, right?

14 A. Correct.

15 Q. I mean, they didn't just walk in and say, here, we
16 classify you as a junior now, and you're a senior. You have
17 to go to school and work and be patient and carefully sew
18 seeds each season until you graduate, don't you?

19 A. It took a tragedy of my daughter dying in my arms
20 for me to turn my life around and to be where I'm at today.

21 Q. Okay. My point is whatever backgrounds or tragedies
22 people have, people make choices of how they want to respond
23 to that, don't you think? You made a choice. That's why
24 you're doing what you're doing.

25 A. It would depend on your frame of mind and what it is

1 when you make those choices. It's easier for some than
2 others.

3 Q. I understand. But my point is, I'll bet if really
4 listened to what your life was as a little girl growing up,
5 I'll bet it would be the kind of thing that could break our
6 hearts; is that a fair statement?

7 A. Yeah.

8 Q. And I'm not trying -- I'm not insensitive. Quite
9 the contrary. I think I've got a good read on you. I think I
10 understand.

11 But my question to you is, despite all of that
12 misery that you grew up in, you've made choices that are
13 positive, and you're doing something constructive with your
14 life, aren't you?

15 A. Right now I am.

16 Q. And you could just as easily, if you chose to, hide
17 behind or use as an excuse, the unfortunate things in your
18 life growing up, and use that as some kind of justification or
19 explanation or mitigation for doing anything in the world you
20 wanted to do, if that's where your choices led you, couldn't
21 you?

22 A. I believe everybody's life has circumstances to lead
23 up to the events along the path that they -- that they're
24 taking.

25 Q. I understand. But you could have chosen another

1 path if you wanted to. You have free will, don't you?

2 A. I could be sitting where the Defendant is today
3 myself had I not experienced the tragedy that I had to turn my
4 life around. That could be me sitting there being the
5 Defendant and the jury deciding my fate.

6 Q. Right. I understand that.

7 You could have chosen a different path than you
8 have, right?

9 A. Everyone can, but, you know, depends on the
10 situation.

11 Q. Okay. How about your sister -- how about your
12 sister Emelba, is she a lawbreaker?

13 A. No.

14 Q. Is she a criminal?

15 A. No.

16 Q. Violent?

17 A. No.

18 Q. Drug dealer?

19 A. No.

20 Q. All right. She grew up in the same household that
21 you did?

22 A. Yes.

23 Q. That was her father and her mother you're talking
24 about?

25 A. Yes.

1 Q. And she was experiencing the same things that you
2 were?

3 A. Yes.

4 Q. And she could have done the same things. She could
5 have chosen to be a lawbreaker and a thief and a swindler and
6 a cold-blooded capital murderer, and she could have pointed to
7 her past and said, well, I never had a chance and isn't that
8 sad, couldn't she?

9 MR. GOELLER: Excuse me, Mr. Schultz. Judge, I
10 object to the form of the question. It's argumentative and
11 vague.

12 THE COURT: Sustain the objection.

13 MR. SCHULTZ: Did you sustain on argumentative
14 grounds, Judge?

15 THE COURT: Yes.

16 Q. BY MR. SCHULTZ: Well, in other words she turned out
17 to be a person who lives a decent life and tries to do what's
18 right, didn't she?

19 A. **If she were around drug dealers, she would not be
20 the wonderful mom that she is today. She could also be the
21 Defendant today.**

22 Q. Well, maybe; maybe not. She chose a way to live,
23 and the way she's living is good, don't you think?

24 A. **Because of her environment now, yes.**

25 Q. Pardon me?

1 A. **Because of her environment that she placed herself
2 in, yes.**

3 Q. What do you mean "environment she placed herself
4 in"?

5 A. **If she were around -- if she were using drugs --**

6 Q. Yes.

7 A. **-- and around people who -- and her husband sold
8 drugs, then she would be breaking the law, and the
9 circumstances would be different. They're different for each
10 individual.**

11 Q. Sure. But she's obviously not -- she's chosen not
12 to be doing that, just like if she chose to be doing that,
13 then she would be doing that, right?

14 A. **Uh-huh. Yes.**

15 Q. I guess what I'm getting at, you're not up here
16 telling us that getting exposed to drugs and taking drugs,
17 it's not -- it's not like what we've got going on now. You're
18 getting letters and they've got disease in them, and you don't
19 even know the letters are diseased. It's not like that when
20 you get on drugs, is it? You choose to do it.

21 A. **A lot of young people choose to do it. It's a new
22 wave of crime coming through our courts.**

23 Q. I understand. But you make it sound like Emelba
24 isn't doing drugs just because that's -- just how fate led
25 everybody, as opposed to she's choosing not to do that? Don't

1 you think using drugs is a choice?

2 A. **At one point it is, in the beginning.**

3 Q. And it doesn't do any good to tell somebody not to
4 use drugs if they're just dead-set on using them, right?

5 A. **Wrong.**

6 Q. It does do good?

7 A. **If they're addicted, just like if you're an
8 alcoholic or you smoke cigarettes, every year you make a
9 promise you're going to quit smoking. The next day you're
10 smoking. It's easier said than actually done.**

11 Q. When did the Defendant first promise you he was
12 going to quit using drugs then?

13 A. **He never did promise.**

14 Q. What would you say when you would be counseling him
15 against them and warning him don't be using drugs, and stay
16 away from drug dealers, and it's no good for you, and you're
17 talented, and you've got the ability to make something of
18 yourself? What would he tell you when you would be telling
19 him those things?

20 A. **I think being in the courtroom today is enough for
21 him to see what it does --**

22 Q. Excuse me, I didn't ask you that.

23 A. **Ask the question again, please.**

24 Q. When you would have these counseling sessions with
25 him about drugs and drug dealers, what would be his response?

1 If he didn't tell you he'd quit, what would he tell you?

2 A. **I know.**

3 Q. Pardon me?

4 A. **I know.**

5 Q. He'd tell you he knows?

6 A. **Uh-huh.**

7 Q. Okay.

8 A. **I really can't remember the conversations, but I,
9 being an aunt, gave him advice to stay away from James
10 Mosqueda and his wife.**

11 Q. But he's got free will, like all of us, doesn't he?
12 He can make choices, just like you and I can make choices.

13 A. **Yes.**

14 Q. He can chose to quit one job, for example, in favor
15 of another job that he thinks will make him more money? He
16 can do that, can't he?

17 A. **Yes.**

18 Q. He can quit the Navy when he can't manipulate the
19 Navy the way he's used to manipulating people, can't he?

20 A. **I disagree with your question. What exactly are you
21 saying -- asking?**

22 Q. You knew he was serving with distinction in the
23 United States Navy? You know about his military career?

24 A. **Yes.**

25 Q. And apparently that didn't go very well with him

- 1 because he quit that job, like any other job?
- 2 **A. He graduated.**
- 3 Q. Pardon me?
- 4 **A. I believe he graduated from -- he got his -- he**
- 5 **served his -- got his diploma there.**
- 6 Q. In the Navy?
- 7 **A. Or his -- he enrolled and did some time and got a**
- 8 **certificate, I believe.**
- 9 Q. And so in your opinion, he served with honor and
- 10 distinction, then; that's what you believe?
- 11 **A. I don't know about -- I don't know what the**
- 12 **certificate said.**
- 13 Q. Well, is it your belief he did what every other
- 14 Naval recruit was supposed to do; is that what you believe
- 15 occurred?
- 16 **A. His entry and the reasons that he went in to enroll**
- 17 **were -- he enrolled for eight years, I believe, and to --**
- 18 **because he had problems. I don't think he should have gone in**
- 19 **the first place.**
- 20 Q. What kind of problems do you say he was having that
- 21 led him to, I think you called it enroll in the Navy? What
- 22 problems was he having?
- 23 **A. The same as a lot of people have. They lose a**
- 24 **marriage, home, job, everything.**
- 25 Q. They were all his fault, weren't they?

- 1 **A. No.**
- 2 Q. Well, let's first talk about losing a job. What job
- 3 did he lose that you say wasn't his fault?
- 4 **A. Working for a mortgage company.**
- 5 Q. Which one?
- 6 **A. Lloyd was his employer. I believe they did some**
- 7 **work for Holligan Homes.**
- 8 Q. How did he leave that job?
- 9 **A. I believe got fired.**
- 10 Q. For what?
- 11 **A. I believe drug use.**
- 12 Q. Okay. So that wasn't his fault? If you're right
- 13 and you understand the facts, getting fired in the mortgage
- 14 business for drug use, that's not his fault?
- 15 **A. Well, that would be considered his fault, yes.**
- 16 Q. Let's talk about the failed marriage because that's
- 17 another reason. Was the failed marriage, in your opinion, his
- 18 fault?
- 19 **A. I'd have to put blame 50/50 with any marriage, not**
- 20 **just particularly his marriage. But there's always two sides**
- 21 **to any marriage.**
- 22 Q. Okay. Do you think getting your head beat on the
- 23 concrete by somebody that's supposed to love and honor you is
- 24 a 50/50 kind of a situation in your mind?
- 25 **A. If they're both high on drugs and out of their mind,**

- 1 **you would have to ask both of them --**
- 2 Q. Well, you know, he -- I'm sorry. I didn't mean to
- 3 interrupt you.
- 4 **A. I'm finished.**
- 5 Q. Okay. Thank you. Well, you know he was violent to
- 6 Michelle, don't you?
- 7 **A. That's what I heard. I've never seen him violent**
- 8 **towards her.**
- 9 Q. Where did you hear it? Did you hear it from him?
- 10 **A. Sylvia said they had an argument.**
- 11 Q. Okay.
- 12 **A. I've never actually seen Ivan hit anybody, ever.**
- 13 Q. So he went in the Navy; is that right?
- 14 **A. Yes.**
- 15 Q. And how long was he in the Navy; do you know?
- 16 **A. I think he was in about two months.**
- 17 Q. That's a little less than eight years, right?
- 18 **A. Yes.**
- 19 Q. Explain to me how you figure he completed, whatever
- 20 it is you were saying you thought he should be completing, in
- 21 a two-month period?
- 22 **A. I really don't know what it was, if it was Boot**
- 23 **Camp. I don't know. I just know he enlisted.**
- 24 Q. Do you know how he left the Navy?
- 25 **A. He left. He just bolted and decided that was not**

- 1 **for him.**
- 2 Q. I understand.
- 3 **A. He made a big mistake.**
- 4 Q. And going back again, he wasn't able to manipulate
- 5 the Navy the way he can manipulate family members and spouses
- 6 in his own direction. He couldn't do that. The Navy was
- 7 smarter than to go for that, weren't they?
- 8 **A. I don't know about your word "manipulation." He**
- 9 **never tried to manipulate me.**
- 10 Q. And Sylvia, your sister, grew up in that household
- 11 also with your father and your mother, right?
- 12 **A. Yes, she did.**
- 13 Q. And does she work for a living?
- 14 **A. She's unemployed right now.**
- 15 Q. For how long has she been unemployed?
- 16 **A. Going on two months now.**
- 17 Q. Prior to that time, how was she employed?
- 18 **A. She was a sales representative for Vista Real Homes,**
- 19 **a homebuilder.**
- 20 Q. How long did she do that work?
- 21 **A. About a year and a half.**
- 22 Q. Throughout most of her life after the divorce, has
- 23 she been employed?
- 24 **A. Yes. Yes, she has.**
- 25 Q. Has she been able to be successful given her talents

- 1 and her background and education?
- 2 **A. No.**
- 3 Q. Why not?
- 4 **A. You can be ambitious, but you also need the tools to**
5 **understand how to be ambitious.**
- 6 Q. Okay.
- 7 **A. You can be ambitious, but if you don't know how to**
8 **read and write then you've got to do -- you need tools to get**
9 **you where you need to go.**
- 10 Q. Well, she knows how to read and write, though,
11 doesn't she?
- 12 **A. Yes, she does.**
- 13 Q. And as far as I can -- as far as you know, she's
14 always known how to read and write since they taught it to you
15 as school kids, right?
- 16 **A. Yes, but my mother doesn't. We grew up in a home**
17 **where a mother does not know how to read and write.**
- 18 Q. But once again, you're on your way to going to law
19 school, even though you came from a home where your mom
20 couldn't read and write, and your mom almost got killed by
21 your dad?
- 22 **A. Yes.**
- 23 Q. Do you understand what I'm asking you? People can
24 have the ability to rise from any circumstances if they choose
25 to, right?

- 1 **A. And people don't have the abilities to rise, also.**
- 2 Q. Okay. And when we talk about being able to rise
3 above your upbringing or your younger years, certainly the
4 things that happen to people as children -- I'm sorry?
- 5 **A. I'm listening.**
- 6 Q. Certainly the things that happen to us as children
7 can influence how we go about our lives and how things work
8 for us later on; is that true?
- 9 **A. Yes.**
- 10 Q. For example, if we grow up in an unstable home as
11 children, it may be more challenging for us to make a stable
12 home as adults, right?
- 13 **A. Depends on how strong you are.**
- 14 Q. Okay. For example, did -- well, okay. Don't you
15 think it's more of a challenge, though?
- 16 **A. For some people, just taking one day at a time is a**
17 **challenge so it would be different for each person.**
- 18 Q. For example, if someone grows up in a home where the
19 father is not around or not involved or not loving, it may be
20 more difficult as an adult to find that, or be able to receive
21 that. Don't you think that's true?
- 22 **A. Now, repeat the question again.**
- 23 Q. Someone grows up in a household, for example, where
24 the father is not around, or the father is not as loving as
25 maybe we would all wish he would be, it could be more

- 1 difficult for children growing up in that to make a good
2 relationship when they're adults in their own marriage, don't
3 you think?
- 4 **A. They have no background of what a good marriage is,**
5 **or what a father should be --**
- 6 Q. Sure.
- 7 **A. -- so, yes, it would be difficult.**
- 8 Q. Sure.
- 9 **A. They've never seen it.**
- 10 Q. Sure. People can do it, but it may be more of a
11 challenge for them than if they had grown up in something more
12 traditional, at least according to our notions, don't you
13 think?
- 14 **A. Yes.**
- 15 Q. But then on the other hand, haven't you known people
16 in your life that have grown up in what appeared to be an okay
17 family environment? Mom and dad take family vacations, they
18 go shopping for clothes when it's back-to-school time, all the
19 regular things, and those kids don't do well. You've seen
20 that, too, haven't you?
- 21 **A. There's also mental illness in society.**
- 22 Q. Sure, sure. But when we're taking about explaining
23 maybe why someone doesn't do well in a marriage, or maybe why
24 someone doesn't seek to get a good education or work hard at a
25 job, that's one thing to point to the family and say, my dad

- 1 never works and how did I learn how to work? Or my dad wasn't
2 loving, so how can I be loving? Isn't that real different
3 from saying, my mom and dad divorced, and so I had to get on
4 drugs and steal and kill people; isn't that a different
5 proposition?
- 6 **A. I don't think any of us wake up one day and decide**
7 **to do certain things. Every mind is completely created**
8 **separately. None of us here think alike.**
- 9 Q. Right. And we've got free will, don't we?
- 10 **A. Yes. We do have free will if -- and sometimes we**
11 **don't.**
- 12 Q. Okay. And we make choices in exercising that free
13 will, and some of the choices are good and some of them are
14 neutral and some of them are very bad, right?
- 15 **A. Depending on the circumstances when you make the**
16 **decision, yes. You can make bad decisions when you're drunk.**
17 **You can make bad decisions when, you know, you're angry. You**
18 **can make bad decisions when you're on drugs.**
- 19 Q. Sure. But it's still all free will. Even if you're
20 angry, you're still choosing to do what you do, aren't you?
- 21 **A. If your mind isn't coherent, then what is the free**
22 **will?**
- 23 Q. Don't you think people have to receive the
24 consequences from the exercise of their free will?
- 25 **A. Can you explain it a little bit simpler to me? I**

1 mean, what exactly are you saying?

2 Q. What I'm asking you is when people make choices,
3 isn't it perfectly fair that those choices should be
4 evaluated, and they receive what those choices make them
5 deserve?

6 A. Depends on the circumstances.

7 Q. For example, you've chosen to spend a lot of your
8 years studying, and I'm assuming that you're going to get a
9 law degree, get licensed by the State Bar of Texas and be able
10 to practice law some day. That's your goal, isn't it?

11 A. Hopefully, yes.

12 Q. And if you do those things, it's logical that you
13 ought to be able to be a lawyer because you have exercised
14 choices that entitle you to your benefit. The consequences of
15 those choices are you'd be a lawyer one day, right?

16 A. Yes.

17 Q. Other people can choose to be less, and those are
18 choices maybe influenced by upbringing, but they can choose to
19 do something less, but not be harmful to anybody. They can do
20 that, right?

21 A. Yes.

22 Q. Other people can be pretty harmful to people, but
23 not awfully harmful to people, and those are choices, right?

24 A. Yes.

25 Q. And some people can do atrocious, savage crimes, and

1 those are choices, too, right?

2 A. You can't put the same minds on the same level if
3 they're doing different things.

4 Q. Well, I agree. The minds may not be on the same
5 level, but the minds are still operating in a way that we're
6 making choices; don't you agree?

7 A. Well --

8 Q. You don't agree?

9 A. If I'm sober and you're not, are we going to be
10 making the same decisions of free will? I don't see it.

11 Q. I chose to be drunk, and you chose not to be. Isn't
12 that free will?

13 A. Well, yes. But if you don't remember what you do
14 that night, and I have to tell you what you did the night
15 before, and you -- to this day you don't remember, and some --
16 you commit a crime, how are you going to explain that?

17 Q. Are you saying the Defendant doesn't remember what
18 he did?

19 A. I didn't say that.

20 Q. Okay.

21 A. But I'm just comparing, not all of us are going to
22 be exactly alike and our thinking is not going to be alike.
23 We all have different circumstances and different home lives
24 and backgrounds and experiences. You have to take all of
25 that into consideration.

1 Q. What person in this world do you most love?

2 A. That would be hard to say because I love a lot of
3 people.

4 Q. Name somebody that you love a bunch.

5 A. Ivan, my nephew, is like my son. I love him
6 tremendously, and my daughter and my family. My mother
7 doesn't know how to read or write. I can't agree with the way
8 she raised me, but I love her. I have to read for her. I
9 have to explain things to her. I have to educate her. She
10 doesn't know how to do very much.

11 Q. If you came home some night and found out your mom
12 had been murdered, and I apologize for the question, but I
13 want to see how you --

14 MR. GOELLER: I object to that question.

15 That's just -- that's not right. I don't know even know what
16 my objection is, but putting this witness in the place that
17 her mother has been murdered in a hypothetical is not proper.
18 It's a hypothetical not based on facts before this jury.

19 THE COURT: I'll sustain the objection.

20 Q. BY MR. SCHULTZ: Well, if somebody you cared about
21 a lot was murdered --

22 MR. GOELLER: Objection. I'm sorry to

23 interrupt you, Mr. Schultz. Same objection.

24 THE COURT: Overruled.

25 Q. BY MR. SCHULTZ: Somebody you cared a whole lot

1 about and loved had been murdered, and you just found out
2 about it. And the police said, well, it's not so bad after
3 all because the person that murdered your loved one is a drug
4 addict. Would you agree with the officer, well, I was really
5 worried, but I see it's not so bad anymore because he's a drug
6 addict?

7 MR. GOELLER: Objection, Your Honor. It's a
8 hypothetical based to a non-expert witness.

9 MR. SCHULTZ: I just want to know her reaction,
10 Judge. She's already said there's some difference in her mind.

11 MR. GOELLER: Still poses a hypothetical to a
12 nonexpert. It's improper.

13 THE COURT: Well, I tell you what, I'll
14 overrule the objection. But let's figure out where we're going
15 here.

16 A. Repeat the question, please.

17 Q. BY MR. SCHULTZ: Uh-huh. Would you agree with the
18 policeman it wasn't quite so bad because it was just an addict
19 that killed your mom as opposed to somebody sober?

20 MR. GOELLER: Same objection. He's back to
21 killing her mother, and I object to it.

22 MR. SCHULTZ: I apologize for that. I withdraw
23 that.

24 THE COURT: All right.

25 Q. BY MR. SCHULTZ: Your loved one, would you agree

1 with the policeman it's not so bad because an addict did it?
 2 **A. We live in a different society than we did years**
 3 **ago.**
 4 Q. Excuse me, ma'am, I didn't ask you that.
 5 **A. And I accept --**
 6 **MR. SCHULTZ:** Judge, would you instruct her to
 7 be responsive?
 8 **THE WITNESS:** I don't understand exactly --
 9 **A. Make the question clearer to me, please.**
 10 Q. **BY MR. SCHULTZ:** Do you think being an addict in any
 11 way excuses the horrible crimes, even if a person is an
 12 addict?
 13 **A. Yes, I do, because I understand it. I've studied**
 14 **it. I understand these situations, along with opinions from**
 15 **my criminal professors at the university. We seem to all**
 16 **agree on a lot of these issues.**
 17 Q. So that's your opinion, if it's an addict, it's not
 18 the same as if it's somebody that just does it sober?
 19 **A. Every situation is different. I don't believe that**
 20 **people just wake up and go kill people. There's situations --**
 21 **there's mental illness. There's alcohol; there's drug-related**
 22 **incidents. There's numerous reasons why people do the things**
 23 **they do, and I'm open-minded enough to listen to them and**
 24 **study them and evaluate them.**
 25 Q. People murder because of jealousy and greed and

1 envy?
 2 **A. I've seen it done.**
 3 Q. Well, people murder because they want to steal from
 4 somebody who does work when they're not working; do people do
 5 that?
 6 **A. I don't know. I've never seen anyone kill over a**
 7 **job because somebody works and somebody doesn't work. I don't**
 8 **know of anybody like that.**
 9 Q. Well, James Mosqueda was working, right, when he was
 10 murdered? He had a job.
 11 **A. Yes, selling drugs and the mortgage company and --**
 12 **with his girlfriend selling drugs and -- yes.**
 13 Q. And she was going to nursing school, also? Wasn't
 14 she?
 15 **A. Well, she could have lied to the university. Where**
 16 **she was going, you can't take drugs and be a drug dealer and**
 17 **go to school. That's against the law.**
 18 Q. I understand, but she was a nursing student?
 19 **A. She lied to her school then, yes.**
 20 Q. She was a nursing student. That's pretty much a yes
 21 or no.
 22 **A. Yes.**
 23 Q. Where was the Defendant working at the time of the
 24 murders?
 25 **A. For his own company. He was a mortgage broker.**

1 Q. Was he successful at it?
 2 **A. I don't know. I don't know if he was successful**
 3 **because of his drug deals or successful because of his**
 4 **mortgage business.**
 5 Q. Was he making more money dealing drugs or in the
 6 mortgage business?
 7 **A. I would say dealing drugs.**
 8 Q. Do you think the Defendant was making more dealing
 9 drugs than in the mortgage business?
 10 **A. If he were a dealer.**
 11 Q. Now you're saying he wasn't a dealer?
 12 **A. Are you asking me if the Defendant is a drug dealer**
 13 **or drug user?**
 14 Q. I thought you just said you don't know how much was
 15 mortgage and how much was dealing drugs?
 16 **A. I'm talking about James Mosqueda.**
 17 Q. Okay, fair enough. And you don't know if the
 18 Defendant was making any money or not at the time?
 19 **A. The Defendant had a job with Country Wide Mortgage**
 20 **Homes. He was employed.**
 21 Q. At the time of the murder?
 22 **A. As far as I know.**
 23 Q. Was he making money at that job?
 24 **A. Yes.**
 25 Q. Was he making good money at that time?

1 **A. I would consider he was making a decent living.**
 2 Q. Which would be how much? What would you consider a
 3 decent living?
 4 **A. Well, I believe -- well, I don't know exactly how**
 5 **much he made. He didn't show me his paycheck, but I saw a**
 6 **paycheck of his at his mother's house.**
 7 Q. When was that?
 8 **A. And I don't know how many days he worked, but he**
 9 **could survive on his income.**
 10 Q. How big was the paycheck you saw at his mom's house?
 11 **A. Over 600.**
 12 Q. Dollars?
 13 **A. Yes.**
 14 **MR. SCHULTZ:** Moment, please, Judge?
 15 **THE COURT:** Yes.
 16 **MR. SCHULTZ:** Judge, I need a moment to read
 17 something if I might, please.
 18 (Brief pause in proceedings.)
 19 Q. **BY MR. SCHULTZ:** Is it your opinion the Defendant
 20 ought to be given five years probation for what he's done?
 21 **A. Yes.**
 22 Q. So he's murdered a couple of people in cold blood,
 23 and your thinking is he ought to get five years probation so
 24 he can go to law school; is that right?
 25 **A. I think he belongs in a classroom and not a jail, as**

1 well as a lot of other young people like himself. I think as
2 a society we ought to invest our money in our people here on
3 this soil, as well as Afghanistan.

4 Q. I understand. That's interesting, but my concern
5 is you believe that for what he's done he ought to get five
6 years probation. That's how you measure the impact of what
7 he's done?

8 A. I believe there's a law in Texas that allows that.

9 Q. And you think that makes sense? I mean, looking at
10 what he's done, to you and to your value system, it makes
11 sense to give him five years probation?

12 A. This Defendant --

13 Q. Uh-huh.

14 A. -- as well as any other defendant deserves the equal
15 rights that you and I have. We don't fly the flag just for
16 the flag, but there's a Constitution behind it, and we're
17 afforded those liberties.

18 Q. Yeah. But you and I have the same rights he does,
19 because if we went out and slaughtered two people innocently
20 at bedtime, we'd be sitting where he is, too. He's getting
21 the same treatment you and I would have, and everybody else
22 would have if we had done what he had; don't you agree?

23 A. Our country has a problem, I agree.

24 Q. Pardon me?

25 A. Our county has a problem, I agree.

1 Q. Okay. But the five-year probation notion of yours,
2 if you and I did the same thing he did, we'd be sitting where
3 he is being judged by this jury, wouldn't we?

4 A. He doesn't have a past history of killing. He
5 doesn't have a future history of killing. We just know there
6 was a terrible incident that happened that happens daily in
7 the papers.

8 Q. Okay.

9 A. There could be three -- six in one day. What does
10 that tell about our society? We have a problem.

11 Q. So your solution is give all those people that do
12 those things probation? That's what you've been studying in
13 college and in law school, give them all probation?

14 A. And your solution is to kill them all.

15 Q. What's this about you think he belongs in law
16 school? Explain that.

17 A. Why not? Why don't we educate our youth, rather
18 than put them in a prison? Why don't we turn those into
19 educational facilities.

20 Q. Well, you don't think he was educated?

21 A. No.

22 Q. You tried. You told him to stay away from drug
23 dealers, stay away from drugs. You educated him, right?

24 A. Easier said than done.

25 Q. But giving him probation and turning him loose on us

1 some more, that's a solution to you?

2 A. What do you mean "turn him loose on us"?

3 Q. Well, you know what probation is. It means he'd be
4 walking around our streets.

5 A. We have a lot of drug dealers on our streets. We
6 have a lot of alcoholics on our streets. We have a lot of people
7 who have cigarette habits. They're all drugs. They're
8 walking the streets.

9 Q. So your solution is turn him loose on us again?
10 That's what you think is the right thing to do in this case?

11 A. Well, the way you phrase it, "turning him loose on
12 us," that implies something different than giving him a chance
13 to live and have his life turned around and giving him a fair
14 chance to live a decent life.

15 Q. No. Because you're the one that made the statement
16 he ought to get five years probation.

17 A. If it's a Texas law and it applies to this case,
18 yes.

19 MR. GOELLER: Judge, I'm going to object. It's
20 not the law.

21 THE WITNESS: Oh, it's not?

22 MR. GOELLER: This debate between the witness
23 and the prosecutor over crime and punishment -- I'm not
24 backing anything she says. It's just not relevant.

25 MR. SCHULTZ: I object to Mr. Goeller giving

1 answers to his witness when I've got her on cross-examination.

2 MR. GOELLER: I'm not giving answers. We're
3 talking about probation, and everybody in this courtroom knows
4 it's a ridiculous topic because we're not going there.

5 MR. SCHULTZ: She wants it, though, Judge, and
6 that's why I'm trying to demonstrate her bias in this case.

7 THE WITNESS: Your Honor, I guess what I'm
8 trying to say is I believe in rehabilitation. I believe in
9 saving someone rather than killing someone. That's the point
10 I'm trying to make, Your Honor.

11 MR. SCHULTZ: Judge, we'd object --

12 THE WITNESS: I think everyone --

13 MR. SCHULTZ: Excuse me, ma'am. We'd object to
14 that. I understand she's conversing with the Court. We still
15 object to that outburst as nonresponsive.

16 THE COURT: Sustained.

17 Q. BY MR. SCHULTZ: But that's how your mind works in
18 this case, you think he ought to get five years probation?

19 A. I think every human deserves a second chance.

20 Q. And, of course, you don't think he's dangerous?

21 A. No.

22 Q. And you don't think the next time somebody didn't
23 give him what he wanted or got jealous, he wouldn't harm
24 anybody? He's not a violent fellow?

25 A. No.

1 MR. GOELLER: Objection as to speculation,
 2 Judge, and relevance.
 3 THE COURT: Overruled.
 4 Q. BY MR. SCHULTZ: And you don't think the next time
 5 he hooked up with some fragile personality that didn't do
 6 exactly what he wanted, he'd start beating her or knocking her
 7 around? You don't think he'd do that?
 8 A. **You're speculating to the future.**
 9 Q. Well, if you're wanting to turn him loose on us, I
 10 would hope you'd do a little thinking about the future,
 11 wouldn't you?
 12 A. **Now, what? I can't hear you.**
 13 Q. You're wanting to turn him loose on us. Wouldn't
 14 you want to know a little bit about the future?
 15 A. **I know Ivan, and he's not a killer.**
 16 Q. So he's -- what is it, a frame-up? He didn't murder
 17 those people?
 18 A. **I'm saying every situation is separate. I have**
 19 **not -- what the jury has seen, I have not seen the evidence,**
 20 **so I can't make a decision. I can't say my nephew is guilty**
 21 **when -- you know, I haven't seen anything. I'm not allowed to**
 22 **know anything the courtroom knows.**
 23 Q. Well, that's fine. Is he a killer or not?
 24 A. **No.**
 25 Q. You think he's got the personality of a killer?

1 A. **No.**
 2 Q. Do you think he's a dangerous person?
 3 A. **No.**
 4 Q. Do you think he's a law-abiding person?
 5 A. **Yes.**
 6 MR. SCHULTZ: I'll pass the witness.
 7 MR. GOELLER: I don't have anything further,
 8 Judge.
 9 THE COURT: You may step down.
 10 THE WITNESS: Thank you, Your Honor.
 11 (Witness exits the courtroom.)
 12 THE COURT: Call your next witness, please.
 13 MR. GOELLER: Call Dr. Mark Cunningham.
 14 MR. SCHULTZ: Could we keep this witness on
 15 three-hour call, Judge?
 16 THE COURT: Yes.
 17 (Witness enters the courtroom.)
 18 (Discussion off the record.)
 19 THE COURT: Come on up to the bench, please.
 20 (Witness sworn by the Court.)
 21 THE COURT: Have a seat right here, please.
 22 Mr. Goeller.
 23 MR. GOELLER: Thank you, Your Honor.
 24 (No omissions.)
 25

1 Whereby,
 2 MARK CUNNINGHAM,
 3 a witness called by the Defense, sworn to testify to the
 4 truth, testified under oath as follows:
 5 DIRECT EXAMINATION
 6 BY MR. GOELLER:
 7 Q. Sir, would you please tell us your name?
 8 A. **Mark Douglas Cunningham.**
 9 Q. And what is your occupation?
 10 A. **I'm a clinical and forensic psychologist in private**
 11 **practice.**
 12 Q. And how long have you been a psychologist?
 13 A. **I've been licensed as a psychologist since about**
 14 **1979 or 1980. Even before that, I was a staff psychologist**
 15 **with the United States Navy, so just over 20 years.**
 16 Q. What is a clinical or a forensic psychologist? I
 17 guess we'll start off with clinical. What is clinical
 18 psychology, Dr. Cunningham?
 19 A. **Clinical psychology is evaluation and treatment of**
 20 **psychological disorders. It's psychological testing and**
 21 **interviewing and counseling.**
 22 Q. You mention forensic psychology. Can you tell the
 23 folks on the jury a little bit about what is forensic
 24 psychology?
 25 A. **Yes, sir. Forensic psychology is the application of**

1 **psychological research and techniques to legal issues. All**
 2 **the way from evaluating parenting capability in child custody**
 3 **evaluations to competency to stand trial to sentencing**
 4 **determinations, such as are being considered today. So, any**
 5 **of the ways that psychological research and approaches can**
 6 **illuminate some question before the Court.**
 7 Q. Are you licensed -- hold a professional license in
 8 your field?
 9 A. **Yes, I do.**
 10 Q. What is that license?
 11 A. **Well, I'm licensed as a psychologist in a number**
 12 **of jurisdictions.**
 13 Q. Can you -- more than one state?
 14 A. **Yes, sir. I'm licensed in Texas, Louisiana,**
 15 **Arkansas, Tennessee, South Carolina, Indiana, Illinois,**
 16 **Colorado, Idaho, New Mexico, Oregon. I may have left out one**
 17 **or so.**
 18 Q. What's your educational background, and then in
 19 general and specifically, to forensic psychology?
 20 A. **Yes, sir. I got my undergraduate degree from**
 21 **Abilene Christian College with majors in mass communication**
 22 **and psychology and a minor in Bible. And I then went to**
 23 **graduate school at Oklahoma State University in a doctoral**
 24 **program in clinical psychology that's accredited by the**
 25 **American Psychological Association for that training, and**

1 received both my masters and Ph.D. in clinical psychology from
2 Oklahoma State.

3 As part of the requirements for that Ph.D., in
4 addition to the practicums, the kind of practical experience
5 programs there at Oklahoma State, I did a one-year clinical
6 psychology internship at the National Naval Medical Center in
7 Bethesda, Maryland, which is the large Navy hospital there in
8 suburban Washington, D.C. and was an active-duty Naval officer
9 and clinical psychology intern.

10 I was then assigned as a staff clinical psychologist
11 at the Naval Submarine Medical Center in Graton, Connecticut,
12 which is the main Atlantic sub base -- submarine base at that
13 time. While there, I did two years of part-time postdoctoral
14 study at Yale University, and then I've participated
15 extensively in continuing education.

16 Q. You mentioned the -- what I call the APA, the
17 American Psychological Association?

18 A. Yes, sir.

19 Q. Are you accredited by that body?

20 A. The doctoral training program that I attended was
21 accredited by the American Psychological Association, and that
22 requires -- it's a pretty rigorous review that doctoral
23 programs undergo in terms of its faculty and training program
24 and practicums, a library and that sort of thing, and
25 only a very limited number of programs are accredited for that

1 training by the APA. And my internship was also accredited by
2 the American Psychological Association, and it requires a
3 similar kind of review, and again, only a very limited number
4 of programs meet that standard of training.

5 Q. I think you said you did an internship at Bethesda
6 Naval?

7 A. Yes, sir.

8 Q. What was that about, or tell the jury a little about
9 what you did there and why it's -- if it has any significance
10 to your training and your credentials as you sit here today.

11 A. Sure. The -- it was a rotational internship. I did
12 two rotations on inpatient wards where I was involved in
13 assessing and treating individuals who were so disturbed that
14 they had been admitted to the hospital. Many of them
15 psychotic or profoundly depressed.

16 I also did outpatient rotations, both in providing
17 psychological and outpatient clinic and also in medical
18 consultation. That means I accompanied the physicians in the
19 hospital as they evaluated people who had primarily medical
20 disorders for which the psychological problems were kind of an
21 adjacent issue for them.

22 And then I also worked on a research project while I
23 was there on internship, and that was a much more intensive
24 kind of apprenticeship, to supplement the kinds of practical
25 training that I had through graduate school.

1 Q. First comes Bethesda Naval Hospital and then --

2 A. Submarine base.

3 Q. -- sub base in Graton?

4 A. Yes, sir.

5 Q. What were your duties, and what did you do with the
6 Navy after Bethesda, and I guess as a Naval officer then you
7 were out in the field, so to speak?

8 A. Yes, sir. I was assigned at the sub base. My
9 assignment there was kind of an experience. Before that there
10 had been two psychiatrists who had been at the submarine base,
11 which had an active duty population of 15,000, and then about
12 40,000 dependents. And there had been two psychiatrists who
13 had been part of the mental health clinic there.

14 Q. Let me interrupt you. Dependents means spouses and
15 children of --

16 A. I'm sorry. Those are the wives and the children of
17 active duty, which the Navy calls dependents.

18 And so I was -- I was assigned there to see if a
19 clinical psychologist could fulfill the -- largely the role
20 that had been primarily taken care of by a psychiatrist. And
21 so my duties included being on call every other night to the
22 emergency room and having a very heavy patient load of active
23 duty people primarily that we assessed that came into our
24 clinic, providing treatment services, doing medical
25 consultations, admitting and discharging people from the

1 hospital and writing orders for them under the
2 counter-signature of one of the physicians on staff, those
3 kind of things.

4 Q. How did that -- I guess, experiment, how did that
5 turn out, or what was the final result, just out of curiosity?

6 A. Well, it turned out pretty well. Since then they
7 have continued to assign psychologists in that role, and I was
8 decorated for my professional contributions.

9 Q. I was going to ask you, as a Naval officer did you
10 receive any commendations while you were in active duty?

11 A. Yes. I was awarded a Navy commendation medal, which
12 is a relatively unusual recognition for a junior officer in
13 his first assignment.

14 Q. Outside of the things you spoke about at Graton at
15 the sub park, we used to call it, what else did you do there?

16 A. In addition to those duties as a psychologist, I was
17 also attending a two year, part-time postdoctoral program at
18 Yale during the same time, and was also teaching college
19 classes in the evening with the community college system, and
20 also what's called the extension system, which are courses
21 that are offered on base to active duty personnel.

22 Q. Were you recognized or achieve any significance,
23 professionally speaking, while you were at that program at
24 Yale?

25 A. Yes, sir. At the conclusion of that two-year

1 program, I was given an award as the outstanding trainee.

2 Q. What year does this take us up to in Graton?

3 A. I was at Graton for three and a half years, and
4 left the Navy in 1981.

5 Q. What did you do then?

6 A. I took a full-time academic job at a small, private
7 college in Abilene, Texas, Hardin-Simmons University, and
8 taught a variety of undergraduate psychology courses, and one
9 graduate-level course, as I recall.

10 Q. In your field are you published?

11 A. Yes, sir. But I only taught at the university for a
12 couple years, from '81 to '83 and then resigned that
13 position. I was in practice at the same time, and then I have
14 been in practice since that time, since 1983. And, yes, I am
15 published. I have a number of peer-reviewed articles.

16 Q. Are your articles and your publications in the area
17 of forensic psychology?

18 A. Most of them are. My doctoral dissertation I wrote
19 up into a peer-reviewed paper that was published back in about
20 1980 or 1981. Then for many years, I was not involved in
21 doing research and publishing. And then in the last three
22 years, I've been very active in that arena again, and those
23 papers are all in the area of forensic psychology. I've had
24 five or six peer-reviewed papers published in the last three
25 years, two more are in press, which means they passed peer

1 review and are simply waiting to come out in the journal, and
2 then there are three scholarly book chapters there are also in
3 press.

4 Q. I think most of us have an idea of peer review.
5 What's the significance of peer review, at least with your
6 research and the articles you've written? Peer review in your
7 field, what does that really mean?

8 A. Well, peer-reviewed journals are the primary way
9 that scientists exchange information with each other, and the
10 way that works is a piece of research is performed and
11 written up, or analysis of existing research is critiqued and
12 summarized. And that's then submitted to a peer review
13 journal.

14 The editor of the journal is typically a leading
15 authority, or researcher himself in the field. He then sends
16 that paper out to two or three or four reviewers who are
17 identified as having much expertise in that particular area
18 that the paper is written in. They review the paper for its
19 scholarly potential, for whether it adequately accounts for
20 and summarizes research that's been done up to that time, the
21 methodology and design of the study, and if it passes their
22 review, it's said to have passed peer review. It's accepted
23 by the journal, and in leading journals typically only a
24 fraction of the papers presented, maybe 15 percent of the
25 papers presented, pass that peer-review process and are then

1 published in the journal.

2 Q. The people that, I guess, sit in judgment of
3 articles submitted, what kind of folks are they in your
4 fields?

5 A. In this case, they would be forensic psychologists,
6 perhaps forensic psychiatrists. Sometimes these individual
7 may have a law degree, as well as a doctoral degree in
8 psychology. And they're individuals who have published
9 extensively themselves and have a significant scholarly
10 reputation so that they sit on the editorial board of the
11 journal. Or sometimes a person with particular expertise in
12 the area may be brought in as a special reviewer, in addition
13 to folks from their editorial board.

14 Q. How many of these peer reviewed articles have you
15 authored? I know in the medical business -- there's a lot of
16 those articles are either written solo, as I say, or there's
17 two doctors writing them, co-authored, I guess y'all say.

18 A. Yes, sir.

19 Q. How many fall into those categories?

20 A. Well, all of the articles -- the peer reviewed
21 articles that I've written, I've had co-authors on. I'm the
22 first author of all of them but one. I'm the first of two
23 authors. There's another article that I'm the second of
24 three, and then book chapters I've solo authored each of
25 those.

1 Q. What kind of publications, or what are the names --
2 tell the jury a little about the publications that these
3 articles have been published in.

4 A. Yes, sir. The articles have appeared in "Behavioral
5 Sciences in the Law," and also in "Criminal Justice and
6 Behavior," which, by my evaluation, are -- there are three
7 leading, peer reviewed forensic psychiatry journals, and these
8 are two of those three that these articles have appeared in.

9 Q. Is this something local, like Texas, or are these
10 articles -- are these journals subscribed to and read by
11 national, across-the-country kind of folks?

12 A. Yes, sir. These are international journals. The
13 primary readership is North American, and they're written in
14 English, but they are distributed internationally.

15 Q. What is the gist of the articles that you've had
16 published? What do they talk about? What are they written
17 about?

18 A. Well, the -- the original article that I discussed
19 was my doctoral dissertation. It was entitled, "The Effects
20 of Biolateral EEG Biofeedback on Verbal, Visual, Spatial and
21 Creative Skills in Learning Disabled Male Adolescents."
22 That's a mouthful. That had to do with --

23 Q. Say that again.

24 A. That had to do with using EEG information to try to
25 help folks that were learning disabled improve their academic

1 abilities. The papers that I have written in the last several
2 years have all been in the area of forensic psychology, and
3 those have centered around issues of what we call violence
4 risk assessments, or assessments of future dangerousness in
5 capital sentencing. One of the papers have dealt with
6 diagnostic conceptualizations of antisocial personality
7 disorder and psychopathy, as it relates to sentencing
8 considerations.

9 One of my in-press papers is a review article of all
10 the studies that have been done to date on death row
11 populations. Another study involved assessing almost all of
12 the individuals on Mississippi's death row regarding their
13 abilities to represent themselves in the appeal process after
14 their death sentences because there was no provision in
15 Mississippi to provide state funding for an attorney to
16 represent them. So we were evaluating their abilities to
17 represent themselves.

18 THE COURT: Mr. Goeller, before we finish up
19 his qualifications, let's take a 15-minute recess.

20 MR. GOELLER: Yes, sir.

21 THE WITNESS: Thank you, sir.

22 THE BAILIFF: All rise.

23 (Jury exits the courtroom at 10:25 a.m.)

24 (Recess taken.)

25 THE BAILIFF: All rise.

1 a part of a 14-volume set called the Comprehensive Textbook of
2 Psychology that's being published by John Wylie. That's
3 intended to represent the state of the art of psychology at
4 this time. And one of those volumes is on forensic
5 psychology, and one of the chapters within that volume is on
6 capital sentencing evaluations, and I was requested to provide
7 that chapter. And I asked the -- another forensic
8 psychologist, Allan Goldstein, to co-author that with me, so
9 he's the second author of that chapter.

10 Q. Who's he?

11 A. He's a nationally recognized forensic psychologist.
12 He's the director of the continuing education programs that
13 are put on by the American Academy of Psychology, and he is
14 also the editor of that particular volume on forensic
15 practice.

16 Q. That 14-volume set of books, is that kind of a
17 standard set of books that professionals would have in their
18 office, or these days, go on-line and have access to, I guess?

19 A. Yes, sir. It would be in libraries, academic
20 libraries and that kind of thing.

21 Q. The kind of research that you've done and you do,
22 Dr. Cunningham, what kind of time do you have to put into
23 that? Just so the jury understands, research in this field,
24 capital sentencing, forensic psychology, what are the hours
25 like?

1 (Jury enters the courtroom at 10:50 a.m.)

2 THE COURT: Please be seated.

3 Mr. Goeller.

4 MR. GOELLER: Thank you, Judge.

5 Q. BY MR. GOELLER: You're one and the same Mark D.
6 Cunningham that's previously been sworn and testified, right?

7 A. Yes, sir, same one.

8 Q. It's always stupid when we say that, but we have to
9 do it for the record.

10 A. Yes, sir.

11 Q. Dr. Cunningham, when we left off, and we were
12 talking a little about some of the articles that you've
13 published. Have you ever published for a textbook -- what I'd
14 call a textbook in your field?

15 A. Yes, sir. The three articles -- the chapters that
16 are in press are all in textbooks. Two of them are in a
17 textbook that is designed to provide psychologists with
18 examples of what a well-done professional report is supposed
19 to look like, and so two of my reports that have been
20 sanitized -- that means the identifying information has been
21 changed or cases have been combined and that sort of thing --
22 one of those that's being used as an example is a capital
23 sentencing evaluation, and another one is a competency to be
24 executed evaluation.

25 And then the third chapter is one that is -- that's

1 A. It's an extraordinary amount of time. Each one of
2 the articles or chapters might take well over a hundred
3 hours -- couple of hundred hours in some cases to put
4 together. The articles are extensively referenced. There
5 might be 60, 80, 100 references that are cited, so all those
6 papers have been reviewed and analyzed, and potentially it's a
7 review article and that's all been critical integrated.

8 Other times there a piece of research that's been
9 done, so in addition to that background research, then you go
10 into the field and actually gather the data. So it's an
11 extraordinarily time-intensive process.

12 Q. Is the medical field and psychology field, is that
13 kind of like law and engineering, to an extent, that these
14 things you publish, these learned treatises and textbook
15 chapters, do you get paid for that, or is that just part of
16 what you do?

17 A. It's just part of what I do. I will get a volume --
18 I will get the volume that my chapters, for example, are
19 published in. I'm already subscribing to the journals, so I
20 get those, anyway. But there's no income that derives from
21 that.

22 Q. Okay. Why does somebody like yourself do it? If it
23 ain't for coin, why do you do it?

24 A. Well, my wife asks me that sometimes, too. You
25 know, I -- I'm kind of a nerd in that way, if you can like to

1 write research papers. It's stimulating to me. I like it. I
2 like to review the research and learn about it and analyze it
3 and write it up and engage in this, and so in kind of a nerdy
4 sort of way, that's what I -- I enjoy that.

5 I also feel some professional obligation to
6 contribute to my colleges, and so is -- there are research
7 questions to be answered or research to integrate, and I can
8 make that available to my colleges and contribute to elevating
9 the standard of practice of my profession. Then as a
10 scientist, I'm invested in that as well. I guess that's part
11 of what makes somebody want to go to graduate school, is the
12 love of learning and the desire to contribute to that body of
13 knowledge.

14 Q. Kind of along those lines, I know a lot of
15 professors that do a lot of research and publication. You are
16 an actual, practicing clinician; can I say that?

17 A. Yes, sir.

18 Q. You're a bit unusual, I think, in that you're doing
19 research and publishing, plus you have a private practice, and
20 that's pretty unusual, at least in my business. How do you do
21 that? Why do you do that, or how can you do that, or is that
22 unusual?

23 A. Yes, it is. Most of the papers that are published
24 are published by academicians. They're published by people in
25 a university setting, where that's kind of part of their job.

1 They get a reduced teaching load, and much of their time is
2 expected to be devoted toward research and publishing, and so
3 it is unusual for somebody to be in a private setting and be
4 this active in doing research and having papers published.

5 Because its an interest of mine, because of the
6 motivations I described to you before, I just carve out that
7 much time out of what I would otherwise be doing
8 professionally that would be billable. I just don't do those
9 billable hours, and instead do this for some part of my time.

10 MR. GOELLER: May I approach?

11 THE COURT: Yes.

12 Q. BY MR. GOELLER: You better recognize this.
13 Dr. Cunningham, let me hand you what I've marked as 33.

14 A. Yes, sir.

15 Q. Defense Exhibit 33, and ask if you can identify
16 that?

17 A. This is my curriculum vitae, which is kind of a
18 fancy word for resume.

19 Q. And does this contain -- what kind of things does
20 it contain?

21 A. Well, it describes my educational background. It
22 describes my board certification. It identifies the practice
23 I'm engaged in and what I've done before with the Navy. It
24 talks about where I'm licensed and what professional awards
25 I've gotten, and lists the publications that I've had.

1 MR. GOELLER: Judge, I would offer Defendant's
2 33.

3 MR. SCHULTZ: No objection.

4 THE COURT: 33 is admitted.

5 MR. GOELLER: Publish to the jury?

6 THE COURT: All right.

7 Q. BY MR. GOELLER: Dr. Cunningham, we spoke a little
8 bit earlier about forensic psychology. You are board
9 certified in that field, correct?

10 A. Correct.

11 Q. Can you tell the jury what board certification in
12 forensic psychology means and how you get it?

13 A. Yes, sir. Board certification in psychology is a
14 little bit different than medicine where it is -- is a more
15 standard credential that's sought at the end of the residency
16 period of time. And in that way is a demonstration of your
17 expertise as you begin that profession, that specialization.

18 In psychology, board certification is much more
19 infrequent, and it's typically not even attempted until
20 mid-career and is intended to represent the highest standards
21 of practice. In forensic psychology, for example, it's an
22 extraordinarily rigorous process. You have to be at least
23 five years out from your Ph.D., have to have a lot of
24 experience in the forensic area, done a lot of continuing
25 education, or had a fellowship, or that sort of thing.

1 You then submit examples of professional work that
2 you've done, reports that are extensively supplemented or
3 annotated by case law and scientific references in research
4 literature and ethical analysis, and then that's critically
5 reviewed by some board certified psychologists. If they find
6 that demonstrates sufficient sophistication, you're then
7 allowed to sit for an oral exam that's administered by three
8 board certified forensic psychologists, and lasts for several
9 hours. They can ask you anything in the field of forensic
10 psychology.

11 Q. It's kind of like you're in a chair in the middle of
12 the room, and you've got three people blasting you with
13 questions?

14 A. Yes, sir. It's a rigorous thing. The -- I spent
15 the better part of a year, probably 30 hours a week studying,
16 between the work sample, preparing it, and then spent six or
17 seven months studying for the oral exam very intensively.

18 Q. Is it hard to pass that thing?

19 A. The failure rate historically, even after the work
20 sample and all the rest of it, the failure rate is 40 percent.
21 So, it's a very steep hill.

22 Q. How many -- I don't know. How many psychologists are
23 there approximately in the United States?

24 A. About 60 or 70,000.

25 Q. How many are board certified in forensic psychology?

1 A. Fewer than 200.

2 Q. Why is that? Is it because it's such a specialized
3 sub area or most don't attempt it? It's probably a little
4 like law. I mean, there's lots and lots of lawyers, but for
5 one reason or another, there's not a whole lot of board
6 certified lawyers.

7 A. Yes, sir. There are other boards. There are boards
8 in clinical psychology and counseling, industrial. All of
9 them though, represent only a small minority of the
10 psychologists that are out there practicing, and some of that
11 in forensic psychology is because there may be psychologists
12 that only come into the courtroom occasionally, which was more
13 representative of my practice, for example, in the mid-1980s,
14 that on occasion I would come into the courtroom. It wasn't
15 something that I did real regularly, so that may be occurring.

16 Because it is such an extraordinarily steep hill, it
17 is simply not attempted. Even most people who are in the
18 forensic arena primarily, I think don't attempt it because
19 it's simply too daunting a task. And then you have some who
20 have and have failed and don't attempt it again. And you have
21 a small group, I think at this point it's about 160 or 70,
22 who, in fact, hold this credential.

23 Q. Have you ever found yourself to be in the position
24 or have been asked to teach other psychologists?

25 A. Yes, sir. One of the -- the Scholarly Association

1 Q. What's that all about?

2 A. Well, psycho-legal issues are that interface, that
3 junction between the issue that's before the court and what
4 psychology has to say that addresses that. For example, in --
5 at the guilt phase -- the guilt stage of the trial, a
6 psycho-legal issue has to do with insanity, or mental state at
7 the time of defense. And the issue there would be does the
8 person suffer from a severe mental disease or defect so at the
9 time of the offense they did not know their conduct was wrong.

10 Well, that evaluation of whether this person has a
11 severe mental disease or defect, and how that is related to
12 their criminal conduct is something that psychology can
13 contribute to, and so it's important that the psychologist
14 know what it is he's trying to measure. He needs to know what
15 the issue is that's before him, and in that case it's one of
16 criminal responsibility that's defined in a particular way,
17 and different states around the country have different precise
18 definitions for it.

19 At sentencing -- at capital sentencing the
20 psycho-legal issues are two; one of them is a concept of
21 future dangerousness, or what psychologists call violence-risk
22 assessment. What's the likelihood this person is going to
23 commit acts of serious violence in the future? The other is
24 one called mitigation, as psychologists approach it, what we
25 would frame as moral culpability, and that's the idea of what

1 of Board Certified Forensic Psychologists by the American
2 Board of Professional Psychology. That's the board
3 certification arm that's recognized by the APA. The academy
4 is the scholarly association of those folks, and one of the
5 primary goals of the academy is to elevate the standard of
6 practice as it comes into the courtroom. That doesn't mean
7 training psychologists to speak more persuasively. It means
8 equipping them with the best understanding of the psycho-legal
9 issues that are before them, and equipping them with the best
10 research about -- that they can apply to those questions. And
11 I teach on behalf of the academy. I give -- have given
12 full-day workshops around the country regarding capital
13 sentencing evaluations, training psychologists how to do that
14 more expertly and what research to bring to bear.

15 Q. The number one, or at least the first question in
16 our capital sentencing scheme is -- I'm sure you know this --
17 the jury is asked -- or the burden is put on the State to
18 prove beyond a reasonable doubt that the defendant -- there's
19 a probability the defendant would commit criminal acts of
20 violence constituting a continuing threat to society.

21 A. Yes.

22 Q. I guess in this part of the trial we mix law and
23 medicine maybe, or psychology, kind of psycho-legal issues.
24 Have you ever heard that term?

25 A. Yes, sir.

1 forces -- not did you have a choice or did you know right from
2 wrong, but instead what forces shape that choice. The concept
3 being that we don't all get to a level playing ground.

4 MR. SCHULTZ: Excuse me just a moment, Doctor.
5 Judge, we're going to object at this time, number one, on the
6 excessive narrative answer, and, number two, he's invading the
7 province of the Court, which is responsible for giving the law
8 applicable to the jury in the case, and now he's essentially
9 offering them a demonstration of law, and we have both
10 objections.

11 THE COURT: I believe the question has to do
12 with -- in fact, do you remember the question?

13 MR. GOELLER: I was asking him about the
14 psycho-legal issues.

15 THE COURT: What are psycho-legal issues?

16 MR. GOELLER: Yeah. And he was going into the
17 psycho-legal issues of the second phase of trial, which is the
18 primary reason I've called him.

19 THE COURT: I tell you what, I'll overrule the
20 objection.

21 Q. BY MR. GOELLER: Go ahead, Doctor.

22 A. So as a psychologist who's providing a consultation
23 at this phase, he is involved in assessing -- that violence
24 risk assessment, the probability question, and also
25 potentially providing information about this person's

1 development or
 2 background in terms of what sort of damaging experiences were
 3 there, what kind of risk factors are there that increase the
 4 likelihood of this person engaging in acts of violence in
 5 adulthood, kind of what shaping, what formative factors
 6 apply. So if the person had not had a choice, then they would
 7 likely not -- that's a guilt phase issue. They would have
 8 been found not guilty by reason of insanity, or
 9 wouldn't -- no criminal intent if they didn't have a choice.
 10 Sentencing is not addressing that issue of whether
 11 they had a choice. It's talking about the notion that we
 12 don't all get to our choices from a level playing ground, and
 13 the things that happen to us growing up are formative in
 14 shaping the choices that we have.

15 Q. Do you instruct on this area, workshops instruction,
 16 that kind of thing?

17 A. Yes, sir.

18 Q. Tell me about that.

19 A. Well, in the full-day workshops that I give, I
 20 extensively describe the research, both how you go about
 21 making a reliable assessment of serious violence in the
 22 future, and also what statistics you can bring to bear. So
 23 both about what kind of scientific model applies and what
 24 statistics are relevant. And then in the -- in talking about
 25 mitigation or moral culpability, we'll present an extensive

1 body of research about how children are affected and their
 2 outcomes by things that happen to them growing up. A lot of
 3 that being studies that are now being done by the United
 4 States Justice Department, as well as psychologist and
 5 developmental psychologists that are involved in research. So
 6 that they -- in fact, their assessments are informed by the
 7 best research about what we know about what affects
 8 developmental trajectory or substance abuse or all kinds of
 9 things.

10 Q. Out of the -- I don't know -- I think you said there
 11 are a couple of hundred individuals that are board certified
 12 in forensic psychology, how many people out of that 200 -- 160
 13 or 200? I couldn't remember.

14 A. Well, it's below 200, and I think it's around 160 or
 15 70, but it's below 200.

16 Q. How many folks out of that group actually teach this
 17 kind of stuff?

18 A. Yeah, I think it's about 30 folks -- someplace
 19 between 30 and 40, I guess, that are involved in the teaching
 20 faculty for the academy. There are several others that teach
 21 about capital sentencing issues, and other forensic
 22 psychologists provide courses about all kinds of things;
 23 competency to stand trial and malingering and criminal
 24 responsibility and sex offenders and all kinds of things. All
 25 sorts of different areas where psychology has information that

1 could be helpful to a court.

2 Q. Have you ever had the opportunity to teach or
 3 instruct the Government, the prosecutors?

4 A. Only in a print form. One of my papers that's not
 5 peer reviewed is one that was published in the "Prosecutors'
 6 Brief," which is the magazine that goes out to all the
 7 district attorneys in California. And it was a paper about
 8 antisocial personality disorder and psychopathy and how those
 9 relate to criminal proceedings or to assessments of the
 10 likelihood of somebody committing another crime in the future,
 11 those
 12 kinds of things. And so that was written as a continuing
 13 education piece to assist the prosecutors in their knowledge
 14 of these topics.

15 Q. Do you have to keep going to school -- CLE, we call
 16 it, Continuing Education. You've got to get so many hours a
 17 year and all that?

18 A. Yes, sir. It depends on the state. Texas requires
 19 12 hours of CE's each year. Some of the other states that I'm
 20 involved in require a little more. They might require 15 or
 21 18 or 20. But, yeah, there's a requirement for CEs that you
 22 have to get each year.

23 Q. How many hours do you reckon you got?

24 A. You know, the last five years or so, I probably
 25 average between 60 and a hundred hours of CEs, in addition to

1 the papers that I write, which you will typically get some CE
 2 credit for. But in terms of going to formal classes and
 3 schooling, I do 60, 100 hours of that a year.

4 Q. What professional organizations are you a member of
 5 in your field?

6 A. Well, I'm a diplomate, which that means board
 7 certified, by the American Board of Forensic Psychology.
 8 That's a specialty board of the American Board of the American
 9 Board of Professional Psychology. I'm a Fellow of the
 10 American Academy of Forensic Psychology. That's that
 11 scholarly association of folks that are board certified. I'm
 12 listed in the National Register of Health Service Providers,
 13 which is a designation that indicates that in addition to that
 14 internship you've had supervised training in a health care
 15 setting beyond internship, so that you are identified as
 16 somebody who is particularly well-equipped to treat more
 17 serious psychological disorders. And then I'm a member of the
 18 American Psychological Association, Texas Psychological
 19 Association, local psychological association, and maybe a
 20 member of the state psychological associations in some other
 21 states as well by virtue of being licensed there.

22 Q. Have you ever been admitted as an expert in -- well,
 23 we'll start off, I'm sure you know the term, a general court
 24 marshal and special court marshal?

25 A. Yes, sir. When I was in the Navy, that was really

1 my first forensic involvement was testifying in a court
 2 marshal, or captain's mass proceedings.
 3 Q. Okay.
 4 A. And then since then -- since I got out of the Navy,
 5 I've also been called to testify in court marshal
 6 proceedings, both by the Defense as well as by the
 7 prosecution.
 8 Q. Have you ever testified in family courts?
 9 A. Yes, sir, on many occasions.
 10 Q. How about a court like this, criminal court?
 11 A. Yes, sir.
 12 Q. Okay. Have you ever been denied by any court to
 13 have been designated as an expert?
 14 A. No, sir.
 15 Q. How many different states -- how many states have
 16 you testified in where you -- those states, or at least
 17 jurisdiction of the court deemed you an expert?
 18 A. Oh, wow. It's beyond the states I'm licensed in.
 19 Texas, Louisiana, Arkansas, Alabama, South Carolina, North
 20 Carolina, Virginia, New Jersey, Indiana, Illinois, Kansas,
 21 Colorado, Oregon, Idaho, New Mexico. There are many, many
 22 states I've testified in.
 23 Q. It's always an issue in trial, money?
 24 A. Yes, sir.
 25 Q. You get paid?

1 A. For my time, yes, sir.
 2 Q. Okay. How does that work?
 3 A. Well, my fee is 210 dollars an hour, and that is
 4 regardless of the function I'm engaged in, whether I'm
 5 reviewing records or interviewing or on the stand testifying,
 6 or if the review of the research is very specific to the case,
 7 not something I'm doing on my own to write an article, then
 8 that may be billable as well. So it's not -- it's not
 9 overnight when I'm sleeping or thinking about it in the shower
 10 or that kind of thing. But if I'm directly engaged in
 11 working, then I'm keeping close track of my time.
 12 In criminal cases, the Defendant is almost always
 13 indigent. That means he doesn't -- he can't afford to pay for
 14 that, and so I'm then appointed by the Court. And typically
 15 the Court agrees to the fee and reviews the charges and that
 16 kind of thing.
 17 Q. Do you ever testify for the State?
 18 A. Oh, yes, sir.
 19 Q. Kind of where and what things have you testified to?
 20 A. Most of that has been in the local Abilene area
 21 where I've testified for the State. Many of the cases I've
 22 been involved in, I've been appointed as a neutral evaluator
 23 by the Court to evaluation competency to stand trial, or
 24 mental state at the time of offense, insanity questions. Then
 25 at the trial, I may be called by one side or the other,

1 depending on who found my findings to be most helpful to them.
 2 And on a number of occasions when I have thought, for example,
 3 was someone competent to stand trial, or was not insane at the
 4 time of the offense, I've been called by the State to testify
 5 about that.
 6 In sex offender cases, I've been called by the State
 7 to testify on -- because the data that I had was helpful to
 8 the proposition they were advancing in that case. And in the
 9 military setting, I've testified on behalf of the State as
 10 well.
 11 Q. Okay. In capital murders -- trials at the
 12 punishment phase, State ever call you to testify?
 13 A. No, sir. I've never been -- the State has never
 14 requested my consultation at the sentencing phase of a capital
 15 proceeding.
 16 Q. Why is that?
 17 MR. SCHULTZ: Objection; speculation.
 18 THE COURT: Overruled.
 19 A. My testimony is -- I'm married to the data. It's
 20 highly researched based, and that's what I testify about.
 21 It's my best analysis of the data, and I'm married to that
 22 data. Much of that data is not helpful -- is not typically
 23 helpful to the position of the State. As I testify about the
 24 statistical studies about how capital offenders behave in
 25 prison, that generally indicates that the majority of capital

1 offenders don't go on to serious acts of violence in
 2 prison.
 3 That approach to risk assessment is respected in the
 4 research and that there's an extensive body of data to
 5 support, that data is not helpful to the State in what they're
 6 advancing typically at these proceedings.
 7 Now, if there were a new study that superseded the
 8 ones before --
 9 MR. SCHULTZ: Objection; nonresponsive, Judge.
 10 THE COURT: Sustained.
 11 Q. BY MR. GOELLER: Regarding ongoing research, you
 12 know the research. You've done a lot of it yourself.
 13 Obviously you're pretty familiar with it. If there was new
 14 research out or new data that would make you, I don't know,
 15 more likable by the State, or there was something that was
 16 added to the facts or the data of knowledge, would you be
 17 willing to testify?
 18 A. Absolutely. That's what I would testify about. If
 19 there were a study, for example, that was of very large size
 20 and demonstrated that, in fact, new data, the majority of
 21 capital offenders did commit acts of serious violence in
 22 prison, then I would incorporate that data, and I imagine then
 23 I would be principally be called by the State, and the Defense
 24 would no longer find that data to be helpful to them.
 25 Q. So it's not that you refuse to testify for the

1 Government. They don't call you?

2 **A. That's correct. It's kind of like if there is a --**

3 MR. SCHULTZ: Objection; nonresponsive, Judge.

4 THE COURT: Sustained.

5 MR. GOELLER: That's all right. We'll just
6 move on.

7 Judge, at this time we have kind of an overhead
8 presentation. I'd ask the Court's permission if Dr.
9 Cunningham could stand down. I think we're ready to move into
10 the actual presentation.

11 MR. SCHULTZ: I have a position on that,
12 Judge. I don't mind that, but experience tells me that he
13 just takes over and proceeds in a lecture form. And as long
14 as it's done in question and answer, I don't mind where he
15 stands, but if it isn't I'm going to request he be returned to
16 his seat like any other witness.

17 THE COURT: All right.

18 MR. GOELLER: Well, part of the reason I ask
19 you that is he's got his laptop, and it would be easier if
20 he's down.

21 THE COURT: All right.

22 **Q. BY MR. GOELLER: Dr. Cunningham, one of the**
23 **primary -- I'm sorry. This future dangerousness question, you**
24 **know the beyond a reasonable doubt, probability, commit**
25 **criminal acts of violence, continuing threat to society,**

1 going to object to the continued narrative answer by him in
2 lecture form.

3 MR. GOELLER: I'd ask, in that he's an expert.
4 Judge, and this involves a pretty complex question -- and he's
5 an expert witness, I'd ask for some leeway. There has to be
6 some narrative, I think, in his testimony.

7 MR. SCHULTZ: I don't mind some of that,
8 Judge, but he's just turning to the jury. He's lecturing to
9 them, and he's not being asked questions. It's just a speech
10 that he makes, and he's got a slide presentation, and he just
11 goes on and on. I don't mind a lot of latitude for an expert,
12 but that's not what we're getting here. It's just a lecture.

13 THE COURT: I tell you what, I'll allow him
14 some latitude. For now, I'll overrule the objection, but
15 let's keep it confined to -- I tell you what, let's keep it
16 confined to this, since you're asking questions on the board,
17 I'm assuming that you're going to be testifying with regard
18 to the answers that are to the questions on the board. And if
19 you deviate from that -- well, for one thing we'll take a look
20 at the question and see if the question is objectionable. But
21 if you deviate the answer from the question, I suppose I'll
22 hear an objection. Go ahead.

23 THE WITNESS: Yes, sir.

24 **Q. BY MR. GOELLER: What would be the third one?**
25 **What's significant at --**

1 that's going to be the question the jury will face here soon.
2 To understand that, to get some insight into that, what are
3 some of the essential questions in your opinion we need to ask
4 in that, I guess, risk assessment we call it?

5 **A. The overall question is will there be violence? And**
6 **that overall question has four component questions to it. The**
7 **first one is what's the probability? It's not an either or**
8 **question. It's not "yes, he will," or "no, he won't." That's**
9 **crystal balling, and it's unscientific. Instead it's an**
10 **identification of what's the relative likelihood? What's the**
11 **percentage chance that this person will be violent in the**
12 **future.**

13 **The second question is what form of violence? As**
14 **the severity of violence increases, it's likelihood**
15 **dramatically decreases. For example, if the question is**
16 **what's the likelihood of him shoving another inmate across a**
17 **40-year term in the Texas prison system, I'd say probably 100**
18 **percent. He's going to have to show some willingness to stand**
19 **up for himself, to prevent being victimized or prevent more**
20 **serious escalation of violence. If the question is, what's**
21 **the likelihood of him killing a correctional officer or staff**
22 **member, that's something that's extraordinarily unlikely, has**
23 **happened twice in the Texas prison since 1982. Happens one**
24 **time per million inmates --**

25 MR. SCHULTZ: Excuse me, Judge Sandoval. We're

1 **A. That means at what time in this person's life. The**
2 **likelihood of violence is greater when they're younger than it**
3 **will be ten years from now at 35, 45, 55, 65. The likelihood**
4 **of violence is steadily decreasing as a person ages, so that's**
5 **a part of this equation as well.**

6 **Q. And the fourth subcategory?**

7 **A. The fourth question is in what context are we**
8 **talking about in the general prison population, and then at**
9 **what level of security. Are we talking about an ad seg, where**
10 **he's locked down by himself 23 hours a day and exercises by**
11 **himself, or are we talking about an old-age parole? At age**
12 **67, or whenever it is that he would become eligible for**
13 **parole, at the end of a capital term, then in the community,**
14 **but in that old age. And it's very important to specify what**
15 **context are we talking about.**

16 **Q. This area of risk assessment, that's not unique to**
17 **courtrooms and criminal litigation, is it?**

18 **A. Oh, no, sir. No, sir.**

19 **Q. Do you have a slide that kind of talks about --**
20 **explains that?**

21 **A. Yes, I do. These are the same questions that are**
22 **asked by the automobile insurance industry as they are also**
23 **assessing risk of a casualty. They're asking what's the**
24 **probability of what type of accident, at what age driver, and**
25 **what driving locale. And those are, essentially, the same**

1 questions that are being asked here as well. So, this
2 methodology and this approach is not unique to violence risk
3 assessment. This is -- is the standard methodology of the
4 insurance industry who are assessing risk in as reliable a way
5 as possible for a way of living.

6 Q. Okay. And by the same thought process -- I mean,
7 obviously the insurance company, they're trying to figure out
8 what premium to charge a person?

9 A. Yes, sir.

10 Q. And they base that on data?

11 A. Yes, sir, because they're trying to identify what's
12 the likelihood that this person will have an accident. The
13 data they're looking at are similarly suited drivers;
14 16-year-old male, unmarried drivers, driving in Dallas, Texas,
15 and they look at their experience with that group of drivers,
16 and on the basis of that group experience, they identify the
17 relative likelihood of this particular driver. It's not even
18 unique to the insurance industry. It's also common to
19 medicine as well, and I could give you an example of that.

20 Q. Do, do.

21 A. If I go to the doctor, and he identifies that I have
22 a cancer, one of my first questions is going to be what's my
23 prognosis? Well, prognosis is the five-year survival of
24 people with the same cancer, and I figure the odds on those
25 guys say a lot about what happens to me. It's a similar

1 application of group data to an individual question, and
2 really all of the clinical practice of medicine rests on
3 taking group data that is then individualized to this person.

4 MR. SCHULTZ: Excuse me a moment. Judge, may I
5 take this witness on voir dire briefly?

6 THE COURT: Yes, sure.

7 VOIR DIRE EXAMINATION

8 BY MR. SCHULTZ:

9 Q. When did you first meet the Defendant? We're
10 talking about this person. When did you first meet the
11 Defendant?

12 A. I met the Defendant last night.

13 Q. Where?

14 A. Outside the courtroom in the -- at the chambers back
15 behind the court.

16 Q. So, you've talked to him?

17 A. Only to shake his hands.

18 Q. You didn't ask him about his killing or what he's
19 like or what his ideations are?

20 A. No, sir. I was preparing to meet with the attorneys
21 for few a minutes. The Defendant was there. I shook his hand
22 and excused myself.

23 Q. So you don't have a clue to anything about what
24 he's thinking or what he's about?

25 A. I've not interviewed him personally. I've reviewed

1 records regarding him, heard some of the testimony, but have
2 not interviewed or evaluated him directly.

3 Q. You've just heard, what? Slides about hypothetical
4 people; is that right?

5 A. Well, again, I've reviewed records about him, and
6 I've heard testimony about him, but I have not directly
7 interviewed or evaluated him. So, I'm going to be describing
8 how you go about a scientifically reliable violence risk
9 assessment. I'm going to be talking about what data you plug
10 into that. The individualization to him is going to be
11 cautious and tentative because I've not interviewed him, and
12 so I'm going to do that based on limited information from the
13 records and from testimony or from hypotheticals. But it's
14 not going to be as definitive as it would be had I actually
15 interviewed him.

16 Q. Why didn't you interview him?

17 A. I was not requested to do that.

18 Q. Well, why didn't you say I want to interview him so
19 I can know him the way the jury knows him, for example?

20 A. Well, that's one roll that I could take. I could be
21 an evaluating a witness in proceedings like this --

22 Q. Excuse me, Doctor. I know that's a roll you can
23 take. My question was why didn't you do that?

24 A. Because there are other rolls that are available.

25 It's not my choice which roll I fill. I may also be a

1 teaching witness. I may testify about how you go about doing
2 this.

3 Q. Okay.

4 A. I may particularize it based on limited information.
5 That's not my -- that's not my selection of which one of those
6 rolls I'm going to fulfill.

7 MR. SCHULTZ: That's all I have.

8 THE COURT: All right. Go ahead.

9 Q. BY MR. GOELLER: To follow-up on that, you'd agree
10 with me that on an individual basis -- it's impossible to
11 predict, on an individual basis, human behavior?

12 A. Well, if it's a prediction of absolutely somebody
13 will or absolutely they won't, that prediction is impossible.

14 It is certainly possible to identify the relative likelihood
15 that an individual person will behave in a certain way.
16 That's what the insurance industry is doing as well. They're
17 establishing a relative likelihood --

18 MR. SCHULTZ: Objection; nonresponsive, Judge.

19 THE COURT: Overrule the objection.

20 A. That's what the insurance industry is doing.
21 They're taking the group data and applying it to a particular
22 person and establishing their risk. So as an assessment of
23 probability, I think that it is reasonable and there are
24 methods for assessing the roll of likelihood that a particular
25 person will behave in a certain way. It's not a yes or no.

1 It's a law of likelihood.

2 Q. BY MR. GOELLER: To testify about this risk
3 assessment, you don't have to talk to an individual to do
4 this, do you?

5 A. You don't have to talk to an individual to describe,
6 here's how you do it reliably. You don't have to talk to him
7 to say here are the statistics you plug into the equation.
8 You don't have to talk to him to identify the demographic data
9 that would raise or lower his risk.

10 Now, there may be -- it's certainly possible that
11 there are some factors that would come out of an individual
12 interview that might adjust that equation somewhat. But for
13 the most part, the data that you would get from an interview
14 is not very helpful in identifying the long-term risk of
15 violence in a situation like this. The base rates, the
16 statistical data is much better. The assessment of his
17 personality, for example, is notoriously reliable as a way of
18 identifying potential long-term violence in prison.

19 Q. Let's get into actual, kind of, risk assessment
20 techniques. Can I use that word -- or that phrase?

21 A. Yes, sir.

22 Q. Tell us the differences in these techniques, or the
23 kind of techniques that are out there.

24 A. These are arranged from more scientific to less
25 scientific. The most objective approach, the most scientific

1 approach is the insurance company method, the actuarial method
2 where you take a group of individuals that are like this
3 person, and based on the outcome of that group you then assess
4 the likelihood of this individual person.

5 The next approach is the pattern approach. That's
6 the idea that the best predictor of future behavior is past
7 behavior, okay? And that's right if you have two critical
8 elements. Number one, if you have enough behavior to form a
9 pattern and, number two, if your context of prediction is
10 sufficiently similar. For that reason the way that a kid
11 drives -- 16-year-old drives on Friday night when he's out
12 with his friends may have no correspondence to the way that he
13 drives on Sunday morning with his dad sitting next to him in
14 the seat. Same kid, same car, but fundamentally different
15 context.

16 Or the class may act different with a substitute
17 teacher than they do with the regular teacher. And in this
18 case, one of the things we're going to see is behavior in the
19 community is not predictive of violence in prison. Violence
20 in the community is predictive of violence in the community,
21 and violence in prison is predictive of violence in prison,
22 but the context are sufficiently different that community
23 violence is not predictive of prison violence. Though it's
24 counter to it, you would think it would be, but when you
25 actually look and study it, it turns out not to be.

1 The third approach is intensive clinical evaluation.

2 That's where I would interview someone, do psychological
3 testing on them, identify personality characteristics about
4 them, and on the basis of those characteristics infer their
5 likelihood of long-term violence. That approach is
6 notoriously unreliable in assessing long-range violence risk.

7 And then the fourth approaching, hypothetical
8 inference, would be, Doctor, I want you to assume these facts
9 about the offense and these features about his background, and
10 on the basis of that infer personality characteristics, and on
11 the basis of that infer likelihood of violence. That's like
12 seeing animals in the stars. It's taking a few points of
13 lights and drawing lots of line in between, only you could
14 make the shapes of nearly any animal out of those same points
15 of light.

16 Q. These -- from the more scientific, I guess down to
17 the less scientific, what approaches do you use?

18 A. I would rely on these top two. If there is an
19 established pattern -- let's say the person has a pattern of
20 serious violence in prison. They've gone to prison before,
21 then that pattern approach is likely to be more reliable for
22 that person than this group statistical approach. In the
23 absence of a pattern of conduct in prison, then our most
24 reliable approach is going to be a group statistical approach.

25 Q. These more scientific techniques, the actuarial and

1 the pattern, is that something you just came up with on your
2 own or --

3 A. No, sir. These are not my pet theories. I'm a
4 student of this research, but I didn't think it up. Just to
5 illustrate, historically Monahan is probably the grandfather
6 of violence risk assessment. He talked about using group
7 statistical methods that are then individualized
8 conservatively. We say conservatively because, unless you
9 have very compelling reasons, the farther you stray from those
10 group statistical rates, the more likely you are to be in
11 error.

12 Morrison Miller (phonetic) talked about using the
13 actuarial approaches, and also the patterned approach that
14 they call anamestic (phonetic) approaches, using how this
15 person's behaved in the past, estimate behavior in similar
16 circumstances. Then they identify clinical methods as being
17 quite unreliable and detracting from the reliability of these
18 top two approaches.

19 Then Hall talked about long-range violence being
20 best estimated by the base rate of violence in the group to
21 which a person belongs.

22 And then Serin Amis talked about beginning with the
23 relevant base rate, individualizing it, and then evaluating
24 what risk management things can be brought to bear. In our
25 automobile insurance analogy those are things, like padded

1 dash, seat belts, air bags, stop signs, reflective strips, all
2 kinds of things that reduce the likelihood
3 of being hurt in an automobile accident.

4 In a capital murder setting, as the person is
5 headed into prison, those are things like classification or
6 locking them down in ad seg.

7 Q. When you say "ad seg," we use that all the time.

8 Ad seg, Administrative Segregation?

9 A. Yes, sir. Among the 140,000 or so beds in the
10 Texas prison system, there are about 9,000 ad seg beds,
11 Administrative Segregation beds. Ad seg, there are three
12 levels of it that exist, but broadly what happens is the
13 person is in their cell by themselves 23 hours a day. When
14 they are removed from the cell, they back up to the food slot
15 and are handcuffed behind their back before the cell doors
16 open. They're then escorted to an area where they exercise by
17 themselves for an hour a day. They put them in that, a little
18 bit larger cell, a recreation area, and they back up to the
19 door, get their handcuffs removed and then exercise for an
20 hour. Then that process is repeated when they're taken back
21 to their cell, and they can be maintained at that security
22 level indefinitely if they're identified as being a
23 disproportionate risk of violence to the system. They take
24 their meals in the cell. That's where they live their lives
25 is in that cell 23 -- we call it 23 to 1; 23 hours in the

1 cell, one hour out of the cell a day.

2 Q. Very briefly, these folks up here, who are they?

3 A. These are prominent researchers in the field, and
4 this illustrates their -- the presence of this methodology in
5 the scientific literature for the last 20 years.

6 Q. The things in red, the actuarial, long-range
7 violence, most of that is self-explanatory.

8 Base rate. I know we want to go into base rate.

9 Can you tell the jury a little bit about what base rate is and
10 how it figures into this?

11 A. Yes, sir. The base rate is simply how often
12 something happens. The fancy definition of it is, "It's the
13 statistical prevalence of a particular behavior over a set
14 period of time." For example, if we say there is -- there is
15 one assault on a staff member per 100 inmates per year.
16 That's the base rate. Or if I say, one staff member is killed
17 in the whole United States each year with over a million
18 inmates locked up, that's the base rate. One in a million
19 per year. Now, the --

20 Q. I'm sorry, I don't mean to interrupt. Where do you
21 get the base rates? Are you getting -- where are you getting
22 that data from?

23 A. Well, for example, when I describe the base rate of
24 one correctional officer being killed in the whole United
25 States each year averaging -- or one and a half, that comes

1 from statistics that are accumulated by the United States
2 Justice Department, a branch of that. It's called the Bureau
3 of Justice Statistics, and they are collecting statistical
4 data from federal and state prisons nationwide.

5 You know, I could also say the base rate of homicide
6 or murder in our society, for example, is about six per
7 hundred thousand population per year. Well, that base rate
8 comes from the Justice Department. So many of the rates that
9 I'm going to talk about come either from a Department of
10 Corrections, or from the United States Justice Department. As
11 we begin to look at studies of capital offenders, those are
12 based on records that are provided by the corrections
13 department that researchers then review and tabulate and then
14 publish the results that are based on those official records.

15 Q. Base rates aren't unique to this kind of field of
16 science. I mean, I've got to figure when my insurance company
17 sends that bill, I know they're -- I know -- they don't tell
18 you they are, but I know they're using base rates. Same
19 thing?

20 A. The same thing. My insurance went up a thousand a
21 year when my son turned 16 and started to drive. And I figure
22 that was 600 dollars in the risk they think he represents.
23 That's their average risk, 200 for clerical, and 200 for
24 profit, and it's a thousand bucks to me. So, yeah, they're
25 basing that on base rates. And so is -- the practice of

1 medicine is doing the same thing. The base rate is the single
2 most important piece of information necessary to make an
3 accurate prediction or an accurate assessment of the likely
4 risk.

5 Q. How does base rate -- how does base rate figure
6 into, say, your office practice when you're seeing patients
7 and -- psychiatrists see patients. Do you know what I'm
8 saying?

9 A. Yes, sir. Let's say for example, somebody presents
10 to my office and they are clinically depressed. They have
11 appetite disturbance and sleep disturbance and their mood is
12 sad and blue and they are withdrawn socially and fatigued and
13 those kind of things. First, the reason that I know that
14 represents a symptom of depression is because studies have
15 been done on other people who have the same pattern of
16 symptoms and because we have found that pattern to exist out
17 here with these other people, we identify a diagnosis of
18 depression. That's how I know to attach this guy.

19 Now, also based on that group statistical data, we
20 know that certain medications will relieve those symptoms.
21 They've done a trial. They have had a group of depressed
22 people. They give them the given medication. 90-something
23 percent of them respond to it in a certain way, and that's why
24 I know about what the likelihood is that it will work for this
25 guy, and also about what the likelihood of side effects will

1 be. And so that's an example of the rates being used both in
2 the clinical assessment and also in identifying what treatment
3 to apply.

4 Q. I want to get into a little bit about this violence
5 risk assessment models, and things like that.

6 A. Yes, sir.

7 Q. What can you tell us about that?

8 A. Well, we look at those different models. If we look
9 at how you go about this in terms of actuarial steps.

10 Q. This is the most scientific?

11 A. Yes, sir. This is the insurance company method.
12 These are the steps in how you do that.

13 You begin by identifying the general
14 characteristics. That might be 16-year-old male, unmarried
15 drivers, or an individual convicted of capital murder, or
16 inmates in the Texas prison system. Identify the general
17 characteristic. I then review what our experience is with
18 that group. We track our experience over time, and on the
19 basis of that we establish a base rate or historic percentage
20 of outcome, and we may adjust that base rate for what context
21 they're in, or for individual differences. Very
22 conservatively, we may look at what preventive measures can be
23 brought to bear, and we may want to do some comparison to try
24 to identify how much risk is this person in comparison to the
25 other people they're housed with.

1 Q. What specifically -- when we talk about these base
2 rates and actuarial steps, and then link that to, or try to
3 talk to that -- about that in terms of violence in the joint,
4 what can you tell us about that?

5 A. Here's what we'll do then. We'll identify this in
6 terms of different general characteristics. For example, we
7 could look at capital offenders and murderers in a general
8 prison population. That would be one group to track over
9 time. We could track the frequency of assaults by inmates in
10 Texas prisons. We might look at federal prisons, too, because
11 so much research has been done there.

12 We could look at the frequency of homicide of
13 inmates or staff in state and federal prison. We could look
14 at -- since a capital offender is going to be -- in Texas is
15 going to be in prison a minimum of 40 years, we can compare
16 long-term inmates, which capital offenders would certainly be,
17 with short-term inmates. That's another way of looking at
18 this.

19 We can also look at group data about aging effects
20 on criminality and violence over time, both in prison and also
21 out in the general community.

22 Q. Has the Texas State Penitentiary given base rates or
23 given you data so you can talk about base rates?

24 A. Yes, sir. For example, when we're looking at the
25 rates of assaults by inmates in Texas prisons, the way I

1 obtained that was to request that data, the emergency action
2 reports, from the Texas Department of Criminal Justice, from
3 the prison system. And then followed that up to get the
4 latest data about what percentage of those assaults
5 represented injury that required more than first aid. So I'm
6 basing this data on information that was provided directly to
7 me by the Texas prison system.

8 Q. Do you have access to, or have you had access to
9 base rates -- well, let me strike that. I'm thinking of
10 something. Obviously, the more people that you can include in
11 the base rate --

12 A. Yes, sir.

13 Q. -- would it be fair to say the more accurate?

14 A. The bigger your sample is, the more reliable the
15 data that you get, or maybe the more different samples you've
16 taken. The cumulative size of those -- if you have more
17 samples and more cumulative size, you're increasing the
18 reliability of the outcomes if the data keeps coming back the
19 same.

20 Q. Have you been able to take base rates from other
21 states, too, other than Texas and try and incorporate it in?

22 A. Yes, sir.

23 Q. Why do you do that and is it -- I don't know.

24 Somebody might say, well, what's Oregon or Leavenworth, Kansas
25 Military Correctional, what does that got to do with Texas?

1 Do you know what I'm talking about?

2 A. I sure do. And we're talking about -- some of this
3 data is drawn from samples in Texas, some nationwide; Oregon,
4 Indiana, of different samples that we're looking at, New
5 Jersey. And there are a number of reasons why that's relevant
6 to a capital offender whose headed into the Texas prison
7 system.

8 First, in all those instances, if we're looking at
9 capital offenders, and in this case it's capital offenders who
10 were sentenced to death, and then because of errors in their
11 sentencing phase or retrials or computation, they end up
12 being --

13 MR. SCHULTZ: Excuse me. I'd object to the
14 continuing lecture and nonresponsive answers of the witness.

15 THE COURT: I'll overrule the objection.

16 A. The guys on death row end up being moved to general
17 prison population, and they follow them for a varying number
18 of years to see how they acted, see what level of violence was
19 among that group. All of those guys had (inaudible) history,
20 that death sentences were returned, whatever jurisdiction they
21 came from.

22 Inmate offense distribution is similar from state to
23 state. That means nationwide about 47 percent of inmates in
24 prison are there for serious violent felonies. Now, in some
25 states it might be 48 and some 46 or 45, but that relative

1 distribution of who's in prison is the same in Texas, Oregon,
2 North Carolina, Tennessee. Those numbers stay pretty -- who's
3 in prison isn't different from state to state.

4 As I'm in prisons from country to country, I'm
5 stunned by the similarity that prisons have. Architecturally,
6 particularly ones built in the last 20 years when much of the
7 prison construction has been done, they are remarkably
8 similar. Their staffing procedures are much the same, and it
9 makes sense they are accredited by the same groups. They
10 belong to the same correctional associations. Similar
11 contractors built prisons, and the facilities are quite the
12 same. And then regardless of whether we're looking at studies
13 done in different parts of the country, different periods of
14 time in this century and sentences to death under different
15 capitals and different characteristics, none of these
16 characteristics make any difference. The data is repeatedly
17 the same.

18 There are no out (inaudible) studies here. It's not
19 like three studies say this and one says this, or one is way
20 over here. Instead, the data is remarkably consistent,
21 regardless of these features. And then as there's been -- as
22 peer-reviewed articles have described the application of these
23 findings so broadly to capital offenders, peer review journals
24 have published that as being acceptable methodology. I
25 suppose inmates in that particular -- in other words, it's

1 consistent throughout. There's not a state in a particular
2 part of the country that it its penal applicational laws
3 and how they live it. (Inaudible) prisons and how they
4 operate are the same from state to state.

5 When we follow capital offenders among all these
6 different jurisdictions in these states, we keep finding the
7 same percentage were violent in prison. Didn't make any
8 difference where they were, or whether they were convicted
9 before 1972 or after 1982. We keep getting the same kind of
10 numbers about what kinds of and the percentages that are
11 violent in prison.

12 Q. Do you have some information about those first base
13 rates on capital offenders?

14 A. Yes, I do. Looking at the Furman communities.

15 Q. You better talk about Furman. Was Furman the case
16 in the '70s?

17 A. Yes, sir. In 1972 the Supreme Court ruled on a
18 case called Furman v Georgia, and ruled the death penalty, as
19 it was being practiced in the United States, was
20 unconstitutional. At this time there were about 533 guys on
21 death row nationwide. As a result of Furman, their sentences
22 were commuted. They were moved from death row to the general
23 prison population where they began serving life sentences in
24 prison life as it was described. It was shorter than we have
25 for life now.

1 Q. Was it a good group to study?

2 A. As we're looking at how do capital offenders behave
3 in prison; guys that were eligible for the death penalty or,
4 got the death penalty. If they're not executed, how do they
5 act in prison? That's the first good-sized group to track and
6 follow over time to see how they behave. And they're then
7 tracked over a 15-year period of time after they're removable
8 from death row and go into general prison population in 1972.

9 Q. Why only 15?

10 A. Their study was published in 1989, so they were
11 following data from '72 to '87, and then it takes a while to
12 garner the data, and after the Journal accepts it, it sits
13 there for several months before it comes out. So that's as
14 much follow-up as they have at this time.

15 Q. Okay.

16 A. Here's what they found. 70 percent of them had no
17 serious rule infraction across that whole 15 years; 15 percent
18 had one violation. Now, this is important because if you're a
19 malignant, violent person we'd expect to see more than one
20 incident in 15 years. So, there's some likelihood this has
21 some situational factors that contribute to it. And 27 and a
22 half had two violations and seven and a half had three or
23 more. In fact, this group was responsible for all serious
24 disciplinary infractions that occurred.

25 But as the first base rate, we say that based on

1 Furman that about 70 percent don't have any, and another 15
2 percent are only going to have one, so that's kind of the
3 beginning group experience -- group risk piece of information
4 to have.

5 Q. Was this really kind of the first study?

6 A. Of this size. It's what called a natural
7 experiment. What scientists like to do is pick people at
8 random, and say, okay, we're going to follow what happens with
9 you. Take you off death row, see what happens, take you off
10 death row. You can't do that. This is a natural experiment.
11 It's something that was happening, anyway, and now we're just
12 going to track what happened with it.

13 Q. These folks, could it be argued, or was it argued
14 that, well, they're sitting on death row and they've got
15 another shot. Did that have something to do with
16 this --

17 A. Yeah. Kind of the idea that, is being sentenced to
18 death a life-changing experience, and that's why, when they're
19 in the general prison population they act better, because they
20 just got scared to death of getting sentenced to death. And
21 there's a study -- what scientists do when they want to know
22 the answer to that is they don't speculate about it. They
23 study. They look in the horse's mouth and count the teeth.
24 They don't speculate about how many teeth does a horse need.
25 There's, in fact, a study that looks at this.

1 In this case we're looking at 47 guys that were
 2 commuted under Furman -- this is a Texas study -- and we're
 3 comparing them to 156 inmates who were sentenced to life in
 4 prison, rather than death. And most of them were murderers,
 5 some were rapists, because among this Furman Group, at that
 6 time you could be sentenced to death both for capital murder
 7 and capital rape. So we've matched these two samples.
 8 They're about the same age as we're beginning to track them,
 9 and they're followed for an average of 10 years and an average
 10 of 11 years, so similar periods in duration of follow-up.
 11 Here's what we found:

12 There were no prison homicides in either group.
 13 Neither group killed anybody in prison. When we look at
 14 serious infractions, the guys that came off of death row, 75
 15 percent of them did not have any serious infractions in their
 16 disciplinary records. The guys that were sentenced to life in
 17 the beginning, 70 percent, very close, had no serious
 18 infractions. When we look at more serious infractions;
 19 aggravated assault or fighting with a weapon, then 93 percent
 20 of our guys that were taken off of death row did not have any
 21 aggravated assault or fighting with a weapon, as compared to
 22 90 percent of those who were sentenced to life in the
 23 beginning. But it's a very small difference. Really not a
 24 very significant difference in outcome for the two groups.

25 Notice as well, that as our violence gets more

1 serious, as our infractions get more serious, the percentage
 2 of folks involved gets smaller. It's that same concept I
 3 talked about before.

4 Q. What's that really mean?

5 A. Well, the conclusion is it wasn't being sentenced to
 6 death that accounts for the low rate of serious violence among
 7 these offenders, because our life sentence guys act about the
 8 same as the guys that were sentenced to death.

9 Q. This kind of research, has there been any more
 10 recent research, or has this been confirmed?

11 A. Oh, yeah. These are some of the initial studies.
 12 There's another study that was done just this -- in fact, it's
 13 been published now. It was published this year. This is a
 14 study that I was one of the co-investigators on that just came
 15 out this spring in Criminal Justice and Behavior, and in here
 16 we were looking at inmates. We were tracking their
 17 disciplinary records, some of them as far back as 1972, right
 18 up to March of 1999 in Indiana.

19 Q. Did you say you were doing this research?

20 A. That's right. Dr. Reedy and I were co-investigators
 21 with this, and Dr. Sorenson was involved in data analysis as
 22 well.

23 Q. Did you have to go to Indiana?

24 A. Yes we went to Indiana, and physically reviewed the
 25 disciplinary files of these 39 inmates, and we had some --

1 some assistants who were helping us with that data review.
 2 So, for example, every file was gone through by two different
 3 reviewers to be sure that we caught everything that was in the
 4 file.

5 Q. When you say file, would that be the Indiana joint's
 6 files?

7 A. That's correct. We were in their facilities, and
 8 they set a room aside for us and brought the disciplinary
 9 files in on -- in shopping carts, and then we went through
 10 those. Each file was reviewed by two independent reviewers
 11 and logged for disciplinary infractions that occurred.

12 Q. What were the results?

13 A. Well, very similar to Furman -- what we call the
 14 Furman community. 62 percent of them were never in ad seg.
 15 That was solitary confinement, the punishment for more serious
 16 offenses. Remember that Furman Group? 69.5 percent
 17 had no serious infractions. Our guys, 62 percent never went
 18 to ad seg, and 74 percent had no assault, no fights, no
 19 homicide. Again pretty similar numbers to what we saw out of
 20 that Furman Group and out of the comparison study we just
 21 looked at, too.

22 Q. The prison authorities and the Government, do they
 23 make comparisons between base rates for capital offenders and
 24 base rates for noncapital other felony offenders?

25 A. That comparison data of having capital offenders

1 compared to other inmates, there have been studies of that
 2 based on file review, based on data that was provided by the
 3 correctional system.

4 Q. What can you tell us about that?

5 A. Well, this is a study that was done in Texas that
 6 compares how do capital inmates compare to general and
 7 high-security inmates. And this is based -- remember our
 8 early group were based on the folks commuted under Furman. As
 9 we look at these guys, these are not Furman commutes. This
 10 is a whole new sample of people that were sentenced after --
 11 well, after the Furman decision, the death penalty statute in
 12 Texas was rewritten to include this future dangerousness
 13 special issue, and that was affirmed under a Supreme Court
 14 decision called Jurick v Texas. So these are individuals who
 15 are sentenced under that future dangerousness, the new statute
 16 after Furman.

17 And what we're looking at here are -- the rate that
 18 we're looking at is the number of violations per hundred
 19 inmates per year. That's the rate that we're talking about,
 20 and by violations we mean homicide, assault on an inmate with
 21 a weapon, sex by force, assault on staff. That's what we're
 22 looking at with violations. The homicide being, I think, one
 23 or two of those in the capital group. That's not a primary
 24 part
 25 of these violations.

1 We're looking at 90 inmates, who after a capital
 2 sentencing trial, the jury said would be a future danger and
 3 sentenced them to death. Then because of errors that occurred
 4 more frequently in that era, because the capital statute was
 5 just starting up, they end up having their sentences changed
 6 to capital life, and they're taken off of death row, and now
 7 they're in the general prison population where they're going
 8 to be followed for an average of seven and a half years. And
 9 we're going to compare them to 107 capital inmates, where at
 10 their death penalty trials, the jury said they would not be a
 11 future danger and so sentenced them to life in prison. And
 12 we're comparing them to 38,000 inmates in the Texas prison
 13 system -- the whole Texas prison system in 1986, and then with
 14 1,700 inmates that were on a higher security unit, the
 15 Darrington Unit. They weren't locked down, but it is a
 16 higher security unit. And here's what happened --

17 Q. When you say words like "Darrington," that's the
 18 name --

19 A. Name of the prison.

20 Q. Prisons are named after, usually either somebody on
 21 a gubernatorial staff or somebody that was involved in the
 22 work --

23 A. That's right. The prisons have different names.

24 Q. They're not named for inmates?

25 A. No, sir. No.

1 Q. Okay.

2 A. When we look at outcomes here, our guys who were
 3 released from death row, I think it's 1.61 serious violent
 4 rule infractions per hundred inmates per year, something like
 5 that. I'll see the number in a minute. The life sentence
 6 guys had just over two serious violent rule infractions per
 7 hundred inmates per year. System-wide they're averaging about
 8 11 per hundred inmates per year.

9 Q. Those people in the yellow, they're not capital?

10 A. These are just 38,000 system-wide. The whole Texas
 11 prison system in 1986 had 38,000 guys. They're averaging
 12 about 11 serious violent rule infractions per hundred inmates
 13 per year. They're offending in prison at five times the rate
 14 of the capital offenders.

15 Q. What year is this?

16 A. This is 1986.

17 Q. Okay. So the majority -- so I get this right, the
 18 majority of people in yellow are not capital murderers?

19 A. Oh, no.

20 Q. Or actually the vast majority are not?

21 A. That's correct. There would be -- and I would have
 22 to look back at the study to see if these guys were extracted
 23 from it, but you would have only 200 capital offenders in this
 24 group, and the rest of them -- or at least released from death
 25 row. This is just system-wide. These are guys in the general

1 prison population.

2 Q. The numbers in the parentheses are the actual --

3 A. That's the size of the sample. That's the number of
 4 inmates we're talking about.

5 Q. Okay.

6 A. And in the Darrington Unit, those guys were
 7 averaging over 19 per hundred inmates per year. So the
 8 capital group rather than being disproportionately likely to
 9 commit acts of serious violence in the general prison
 10 population, which is maybe what we would have expected if we
 11 didn't know this research, is instead disproportionately less
 12 likely to be engaged in that activity.

13 Q. Obviously, the bulk of the 38, are not -- they're
 14 not capital offenders?

15 A. That's correct. It's about 45, 47 percent of them
 16 are going to be violent felons. About 10 to 12 percent will
 17 have committed murder, a non-negligent homicide. Of the other
 18 55 percent are going to be property and drug offenders and
 19 that kind of thing.

20 Q. What does that say about the -- making the
 21 connection between the offense convicted for and sent down
 22 versus -- not versus. But the offense you're convicted and
 23 sent down for, how that pans out in whether you're going to do
 24 bad things in the joint? Do you know what I'm saying?

25 A. And what it says is, you cannot identify violence in

1 the prison from the seriousness of the offense that sent you
 2 there, and that's going to be a conclusion of the Justice
 3 Department we're going to see in a minute. That it's not
 4 particularly helpful -- at least you can't infer that the
 5 person is going to be -- is likely to be violent in prison
 6 because the offense that sent them there was terribly serious.

7 Q. Right.

8 A. That connection doesn't hold. That's an
 9 inappropriate classification.

10 Q. My brain doesn't think?

11 A. I'm sorry. I'm not expressing it very plainly.

12 Q. No. That's exactly what I was trying to say. The
 13 severity of the offense you get sent to the joint for has
 14 little or nothing to do with whether or not you're going to be
 15 bad in the joint?

16 A. In fact, it may be related to doing better in the
 17 joint because inmates that are serving long sentences tend to
 18 be more subtle prisoners. It's the idea I'm going to be here
 19 for a long time.

20 Q. I want to talk to you about that. There are people
 21 that have said the "lifers"?

22 A. Yes, sir.

23 Q. Not just lifers in capital cases, but you can get
 24 life for dealing dope. You can get life for -- well, maybe
 25 not dealing dope, but a lot of dope. But lifers that go down

1 with multiple felony convictions, have been in and out of the
2 joint, get paroled, go back to the joint. Eventually
3 non-murdering type of people can end up doing life sentences?

4 A. Yes, sir.

5 Q. Those people that are doing life for noncapital
6 cases and the capital lifers, people in the business have
7 heard that they -- they've got to get along, so to speak. Do
8 you know what I'm saying?

9 A. Yes, sir.

10 Q. What do you know about that?

11 A. Well, there are a couple of reasons why that's true.
12 One of them is that if this is where I'm going to be for a
13 long period of time, and it's not that the lifers suddenly
14 become more altruistic. It's not that they suddenly become
15 all different as people, but instead we've changed the
16 contingencies. We've change the outcome so that I can either
17 spend the next 40 years in a walk-in closet by myself, or I
18 can go along and not cause trouble and have a job that I can
19 go to and be able to buy a package of potato chips from the
20 commissary and have just a little bit of movement within the
21 prison. When you're in lock-down in an institution, and
22 you're eating institutional food, the ability to even get out
23 of your cell for a little while, to have a visit, to get a
24 phone call, to be able to get a package of potato chips, those
25 become incredible powerful privileges that you will work very,

1 very hard to maintain because this is where you're going to
2 live from now on.

3 Now, if I'm only down for a year or two, I can do
4 that standing on my head. What difference does it make if I
5 go a year without -- with just institutional food. It's the
6 same concept that one of correctional staffers here in the
7 county jail was talking about yesterday. The idea that they
8 can use those privileges to very powerfully control the
9 behavior of the inmates that are there. And so you see
10 long-term inmates being much more invested in trying to make
11 that experience in prison as least onerous as possible.

12 Q. Along those lines, I mean, if I go to a cocktail
13 party and people find out what I do, what do you mean they got
14 TV's, what do you mean they got a commissary? What do you
15 mean they can get a book through the mail or -- and people in
16 corrections, the professions in corrections, if they wanted
17 to -- there's no laws -- would you agree with me there's no
18 laws out there that say you have to let inmates buy a bag of
19 potato chips?

20 A. Under *Turner v Safely*, it was a Supreme Court
21 decision, the prisons can do anything that is reasonably
22 related to a legitimate penological interest. And so if it's
23 related to institutional security or that kind of thing, they
24 can do largely what they desire to. The presence of a lot of
25 those things in the prison are because they work to control

1 inmate behavior.

2 Q. That's my point.

3 A. You create small incentives, things that we take for
4 granted on the outside, but become very powerful as a
5 privilege to maintain when you're locked down in this concrete
6 for 40 years.

7 Q. It's not so much -- you mean to tell me they get to,
8 you know, buy a bag of chips or get a visitation, the staff --
9 the professionals that run it, want that kind of thing to be
10 able to use as a tool -- nothing says the Sheriff of Collin
11 County has got to let any inmate buy a Twinkie?

12 A. Not that I know of.

13 Q. But the Sheriff runs that commissary because, as a
14 professional, he knows that's another angle of control?

15 A. That's correct. It let's him run that facility in a
16 more ordered and organized way that's safer for the people who
17 work there, and he spends less money in staffing and in
18 architectural security.

19 Q. The next area I think we'll talk about is the gang
20 stuff.

21 A. As we look more carefully at these guys right here,
22 there were a few bad apples among that group. And the guys
23 who were released from death row, 8 of the 90 were identified
24 as prison gang members, and then locked down indefinitely in
25 administrative segregation, which is what TCD does when they

1 identify that somebody's in a gang, or if they think they are
2 they then lock them down. And 6 of the 107 guys that were
3 sentenced to life in the beginning had the same outcome.
4 Most of them adjusted positively, though.
5 Two-thirds never went to solitary. Very similar to our Furman
6 Group, to the Indiana group. These numbers are very close to
7 the same, and 90 percent of them end up being trustee. That
8 doesn't mean they have a cushy life. That means they are
9 allowed to work and perform -- help earn their keep. Perform
10 some duties in the prison.

11 Q. Do you have any insight as to the kind of jobs
12 trustees might have in a joint?

13 A. It depends on their level of classification within
14 the system. It's a pretty complex system, the classification
15 that Texas has, and it's not just a matter of being a trustee,
16 but also what level of security you're at. But those range
17 all the way from being kind of the unit orderly who's mopping
18 and sweeping the cell area and doing the maintenance to
19 working in the prison industries that are there within the
20 prison, to working out on the hose squad and doing outside
21 farm work under the supervision of an armed staff member, a
22 variety of things.

23 All the inmates in the Texas prison system are
24 expected to work, unless they're held at such a high security
25 that they're locked down. But otherwise they work and help

1 earn their keep.

2 Q. What is -- can you explain a little bit about
3 trustee status and how it fits in the risk assessment?

4 A. Well, essentially this says that 90 percent of these
5 guys were not considered to be such an eminent risk that they
6 needed to be in ad seg; that they needed to have a staff
7 member at their elbow all the time, and they could handle mops
8 and brooms and industrial equipment, whatever the industry
9 they're working in, with interaction with a staff member,
10 without that seeming to represent a eminent hazard by the
11 folks -- by the correctional officers.

12 Q. Some people -- I don't know. The raging debate is,
13 well, if somebody gets life in Texas for cap murder, and
14 they've got to do at least 40 calendar years --

15 A. Yes, sir.

16 Q. -- some people think, well, they got to be --
17 they've got to be a future danger for violence -- criminal
18 acts of violence because they've got nothing to lose. Is
19 there some studies, or can you give the jury a little input
20 about whether that's cocktail party garbage or if that's
21 legit?

22 A. Yes, sir. That's cocktail party garbage. That's
23 the bottom line, and there are two approaches to that. One of
24 them is --

25 Q. You can tell my cocktail parties I go to are pretty

1 come in. So it's not the same anonymous kind of experience
2 that crime in community is. That's a difference as well; that
3 the other people that are there, you're going to end up having
4 to interact with across time.

5 Q. You're in the same house?

6 A. You're in the same house, and maybe in the same
7 house with their family members that you may or may not know
8 in future.

9 Q. Go ahead.

10 A. In terms of study, there have been studies that look
11 at murderers that are sentenced to life in prison. This one
12 out of Missouri looked at 93 inmates that were sentenced to
13 death, and they're on death row, but they have interaction
14 with each other. And we compared them to 323 inmates that
15 were sentenced to life without parole, and 232 that are
16 sentenced to life with parole. Pretty good size; 648 total.
17 Out of the Missouri prison system we're tracking their
18 disciplinary record across a 15-year period of time.

19 And what we find is it didn't matter what your
20 sentence was in terms of your assaultive outcome in prison.
21 The three groups were virtually identical to each other, and
22 here's what it looked like: 78 percent across 15 years had no
23 assaults, of the 21 percent that did have assaults, a third
24 were minor, two-thirds were more serious, and about one
25 percent -- just over one percent of each group killed another

1 boring.

2 A. Yes, sir. First, in prison there's always something
3 to lose. That's the way the prison is designed. You can lose
4 your visitation, you can lose your commissary, you can lose
5 the ability to get out of your cell. You can lose the job
6 that you go to. There's always something to lose, and so
7 that's what creates a positive incentive, and you're going to
8 be there for a long time so those things are very powerful.

9 The other thing that happens with long-term inmates
10 is --

11 MR. SCHULTZ: Excuse me a moment. Judge, the
12 question related to studies, and he's just lecturing the jury
13 again, and we think it's nonresponsive.

14 THE COURT: Sustained.

15 Q. BY MR. GOELLER: I'm sorry, that's my fault.

16 Before we got to the studies, the other factors that
17 go to that "nothing to lose since I'm here for life," what was
18 the next thing you were talking about?

19 A. The next issue is that when you are violent
20 or predatory in the community, typically you never run into
21 your victims again, nor their family or anybody they knew. In
22 prison it's different. If you get physically aggressive with
23 somebody, and you're going to be there for a long time, then
24 you're going to have to deal with them in the future and their
25 friends, and them if they come back, and their family, if they

1 inmate at some time across that 15 years. So it -- rather
2 than saying it doesn't make -- you have nothing to lose if
3 you're serving life without as opposed to life with, in this
4 case it didn't make any difference what your sentence was.
5 The disciplinary outcome, assault outcome was the same.

6 Q. When we say death row, that's obvious. Death row
7 inmates, 323, life without parole. Are those people who --
8 they will die?

9 A. They are sentenced to die in prison.

10 Q. Okay.

11 A. That's right. You will die in prison. You're never
12 going to see the outside, and 232 where life is a possibility.
13 That doesn't mean that they'll all be paroled. They may die
14 before they get there. They may be denied parole, but they
15 are at least eligible for consideration some day.

16 Q. How are these predictive over time, or how reliable
17 are they over time? Do you know what I'm trying to say?

18 A. Yeah. They seem to be very robust over time. They
19 seem to hold well over time, and here's a couple of studies
20 that illustrate that. This is looking at former capital
21 inmates in New Jersey. We're looking at 55 of them that were
22 released from death row between 1907 and 1960, and then
23 they're in the regular prison population. Among that group
24 there were no allegations of unmanageable behavior.

25 Q. What does that mean?

1 A. Well, this is based on when they came up for
2 parole. It doesn't mean none of them had any violence in
3 their history. It means that as they came up for parole, none
4 of them had prison violence in histories that was a
5 consideration for denying them parole. That wasn't what it
6 was about. And so none of them had that kind of violence in
7 their prison records.

8 Q. These types of studies showing these relationships,
9 have they been consistent over -- well, almost a hundred years
10 now?

11 A. This one is looking back at 1907 to 1960. And then
12 there's another that looks at capital offenders in Texas, a
13 hundred of them, who were released before Furman. And again,
14 followed in the general prison population, we see almost
15 exactly the same thing; 80 percent have no violent offenses in
16 their whole time in the general prison population; 20 percent
17 do have at least one violent offense. None of that involved
18 inmate-on-officer violence, though.

19 This is virtually the same thing that we saw 78
20 percent here, 80 percent here. It's essentially the same
21 findings, even though the Missouri data was drawn here across
22 the 1970s and '80s, and this was drawn looking at people back
23 in the '30s, '40s, '50s. So even though you've got a 50-year
24 separation, you're still given the same kind of results.

25 MR. SCHULTZ: Excuse me a moment, Judge. May I

1 Q. Okay. When you've done the research -- your
2 research and you've looked at other research, and you went
3 back and compared all these studies, did it surprise you to
4 find the consistency over, you know, certainly the last
5 hundred years?

6 A. Yes, sir. I was surprised when I began studying
7 this research because I didn't expect to find these outcomes.
8 As I found more studies, and as I've done more research
9 myself, I'm continually surprised at how closely they match.
10 For example, in my Indiana data that I collected myself with
11 Dr. Reed, just over 20 percent of those former death row
12 inmates in Indiana had no disciplinary write-ups whatsoever
13 across 10, 15, 20 years in the general prison population.

14 When we look at data from Texas, from the 1970s and
15 '80s, it was almost exactly the same. They had just over 20
16 percent of their inmates -- former death row inmates who had
17 no disciplinary write-ups whatsoever across their whole prison
18 record in the general prison population. I mean, really very
19 startling correspondence of findings across these studies.

20 Q. Do you have -- I think you have a slide for just
21 Texas. Do you have a Texas slide?

22 A. No. This one is looking at data nationwide and
23 comparing homicide offenders and property offenders. I'm not
24 sure which one you may be asking for. I can go back to it.

25 Q. I'm sorry, we already covered the commuted Texas

1 take the witness on voir dire?

2 THE COURT: Yes.

3 VOIR DIRE EXAMINATION

4 BY MR. SCHULTZ:

5 Q. Doctor, those weren't all capital murderers, were
6 they? Those were a mixture of offenders because we had the
7 death penalty applying to all sorts of cases?

8 A. That's correct. At that time that could have
9 included --

10 MR. SCHULTZ: Thank you. That's all I've got.

11 I object to that slide. It's absolutely -- it's
12 certainly designed to be misleading to the jury, and its
13 danger for prejudice is certainly outweighed by any probative
14 effect, not only because of the age of the study, but even
15 more importantly, we are mixing situations that are
16 inapplicable to this Defendant that he's never met.

17 THE COURT: All right. I tell you what,
18 remember this slide and where it is, and I'll let you
19 cross-examine him at length when the time comes.

20 MR. SCHULTZ: Yes, sir.

21 Q. BY MR. GOELLER: Still people sentenced to death,
22 though, aren't they?

23 A. Oh, yes, sir. Their offenses were sufficiently
24 violent and aggravated that a death sentence was sought and
25 returned.

1 capital offenders. But Texas certainly falls within those
2 statistics?

3 A. Yes. This data out of Texas that we looked at is --
4 this is Texas data, 1924 to 1972, and this is Mississippi
5 data, 1977 to 1992. So it's 50 years more recent potentially,
6 and yet it shows almost exactly the same incidents. The
7 findings are very, very similar.

8 Q. How about to the present?

9 A. Yes, sir. In my Indiana data showed very similar
10 kind of data, even up to the present time.

11 Q. And is Texas --

12 A. Yes. There is a study that I have here that looks
13 at very current data about murders in the Texas prison system,
14 about 6,400 of them that are followed -- this study was
15 published this last year, and that data is also very
16 consistent with these earlier studies.

17 Q. Let's go to your slide where we talked about rule
18 violations per offender -- I mean, what people go to the joint
19 for, that kind of thing.

20 A. Well, these are what the person went to the joint
21 for. These are the violent offenses they went to the joint
22 for here. Property offenders, drug offenders, and these are
23 the average number of disciplinary write-ups per year that
24 they got. These could be write-ups for anything. You know,
25 not obeying an order. It could be anything. Doesn't have to

1 be violent.

2 Q. Before you explain them, what -- what am I trying to
3 say? We've got 1.5, 1.4. Is that per rate? Is that a base
4 rate? Is that based on a --

5 A. Well, that's the average number of write-ups these
6 guys got. So let's say you're a homicide offender, those guys
7 average just one write-up per offender per year. It could be
8 a write-up for anything. That's the average number of
9 write-ups that they got.

10 Q. When you say write-up for anything, that could be --

11 A. Disobeying an order -- all the way from disobeying
12 an order, being out of your area, to an assault. It could be
13 anything. Just a disciplinary write-up.

14 And what's interesting here is that the homicide
15 offenders average just less than one per year. The property
16 offenders average twice as many, and so even though they've
17 gone down for much less serious offenses, they're twice the
18 disciplinary problem that the homicide offenders are.

19 Q. This is '89.

20 A. This comes from -- United States Justice Department,
21 the Bureau of Justice Statistics. It's based on state prisons
22 nationwide. It was published in 1989.

23 Q. Based on '86 data?

24 A. That's correct.

25 Q. Do you have any information that would lead you to

1 A. They're Justice Department sponsored, and that is,
2 for example, the National Council on Crime and Delinquency.
3 That's a quasi-Governmental agency, and this is the National
4 Institute of Corrections, which is also a quasi-Governmental
5 agency. So these are sponsored by the Justice Department.
6 They're Governmental-affiliated organizations, and these are
7 their conclusions as they review the studies that have been
8 done in this area.

9 Q. Again, that connection, that violence in the
10 community is not a good indicator of violence in the joint.
11 What -- has anybody said, besides the raw data, why that is?
12 Does it get back to doing life, lifers, it's your house, that
13 kind of thing?

14 A. It has to do with this notion that these guys are
15 going down for a long time. And when you go down for a long
16 time, the majority of those people take a different
17 perspective to doing time. It also has to do with kind of --
18 what I would call the Algebra of violence that involves a
19 person and an interaction in a context. And when you
20 fundamentally change the context, then that substantially
21 changes your outcomes in terms of violence risk.

22 Q. Okay. Can you go to the -- I think our next slide
23 will be the DOJ model?

24 A. Yes, sir. If we're looking at factors that are
25 predictive of violence in the community, those are different

1 believe that those numbers are somewhat consistent or -- I
2 won't say somewhat consistent, as we sit here, in 2001,
3 approximately?

4 A. Yes, sir.

5 Q. Okay.

6 A. We can look at that in terms of conclusions that
7 have been reached by the Justice Department about the
8 relationship of your offense with how you end up doing in
9 prison. For example, past -- these are the conclusions of
10 these Justice Department sponsored studies. Past violence in
11 the community is not strongly or consistently associated with
12 prison violence. Even though the person has a past pattern of
13 violence in the community, that's associated with community
14 violence. It's not strongly or consistently associated with
15 prison violence. Current offense, prior convictions and
16 escape history are only weakly associated, not very strong,
17 with prison misconduct. The severity of the offense is not a
18 good predictor of prison adjustments.

19 So a number of the things that we might intuitively
20 think are predictive, turn out not to be when we're looking at
21 violence in prison.

22 Q. And these are the findings by the BOJ, which is part
23 of the United States Department of Justice. You have
24 Corrections, FBI, all those kind of things. That's the
25 Federal Government's stuff.

1 than the factors that are predictive of violence in prison.
2 This is something that the Department of Justice is studying
3 as part of a preventative orientation. In other words, the
4 Justice Department is interested in reducing the frequency of
5 serious violence in our society, criminal violence. One way
6 to do that is to lock people up after they do acts of
7 violence. Only then there's a victim that's happened that has
8 been tragically impacted.

9 Much preferable, if you could interrupt this before
10 the violence ever occurred in the first place, and this is
11 what the Justice Department is now studying is what could we
12 do that could keep this from happening in the first place?
13 It's the idea of investigating --

14 MR. SCHULTZ: Excuse me, Doctor. Object to the
15 narrative lecture to the jury.

16 THE COURT: Sustained.

17 Q. BY MR. GOELLER: Under that DOJ, obviously the first
18 one, prevention approaches, explain that.

19 A. Well, as they take this prevention approach, what
20 DOJ describes is that they're identifying the processes that
21 cause the violence. That's their language. These risk
22 factors, these processes cause the violence. In other words,
23 as DOJ is looking at this, they de-emphasize choice. Their
24 risk factors are not primarily bad choices. Instead they're
25 looking at the risk factors that lead people and put them at

1 risk to make bad choices. And since they're looking at
2 research over the past 30 years just to identify risk factors
3 for delinquency and violence on one hand, and then protective
4 factors that would buffer or protect that individual against
5 the risk factors so that as we're studying criminal outcome,
6 as the Justice Department sees this, you're looking at the
7 balance between risk and protective factors, and choice is
8 what you make out of that balance between those factors.

9 Q. Is there a relationship between those and the risk
10 factors out in the free world, how that predicts future
11 violence in the penitentiary? Do you know what I'm trying to
12 say?

13 A. Well, yes. Those factors are so persuasive among
14 inmates in prison. When we look at the risk factors that the
15 DOJ has identified, those factors are so common. That's what
16 they're saying, these are the factors that get you to prison,
17 that lead to criminal acts of violence that get people
18 convicted to prison. So once you're in prison and you've got
19 a population that's saturated with those factors, they no
20 longer predict who's going to be violent in that setting,
21 although they were predicted out in the community.

22 Q. Can you relate any of that to Ivan; do you know what
23 I'm saying?

24 A. Based on testimony that I've heard in the case and
25 the records I've reviewed and factors that you and co-counsel

1 asked me to assume, you can relate some of these things to
2 Ivan. As we look at risk factors for violence and delinquency
3 in the community that, according to the Justice Department,
4 may occur between conception to age six, I've identified all
5 the factors listed by the Justice Department, and then have
6 put red checkmarks next to the ones that have been identified
7 as having some correspondence with Ivan's history. Again,
8 this is without the benefit of having interviewed him or third
9 parties, but instead is based on the records and the testimony
10 and factors that you had asked me to assume.

11 Q. Okay.

12 A. So we've identified that he has four of seven of
13 these risk factors from conception to age six, and if we look
14 at age six through adolescence there are a number of those
15 risk factors that are present as well, and perhaps some that
16 we might have added in. He did fail, not pervasively, but
17 there are failing grades in his background. That one might
18 have been added, so there may even be some additional risk
19 factors besides the ones I've identified.

20 Q. And these are -- the red checkmarks -- all of these
21 things on the checkmarks -- the red checkmarks, those are what
22 the Department of Justice is telling us?

23 A. The list -- the list is all the factors identified
24 by the Justice Department. The red checkmarks are ones that
25 there seem to be evidence of being present in Ivan's history.

1 Q. I'd like to go through the red checkmarks and
2 explain briefly to the jury the significance. Transition
3 mobility. I think it's in evidence, the family moved probably
4 nine times?

5 A. Yes, sir. That's an example of that factor that the
6 child is being moved from place to place, or is going back and
7 forth between parents. Those are examples of transition and
8 mobility.

9 Q. Why is that a factor? I mean, why is that a risk
10 factor? I mean, I know it sounds kind of obvious.

11 A. As this research is being done, they're simply
12 looking at what factors are associated with bad outcome. The
13 explanation of why is one of interpretation. They're simply
14 studying the research that shows the negative outcome.

15 What happens here, though, as we would try to
16 understand that is that children need a good degree of
17 structure and guidance as they're growing up, and the way they
18 learn to control themselves is because there are clear,
19 consistent structures around them. So mom and dad are present
20 and their own lives are well-ordered, and they set limits and
21 there are regular bedtimes --

22 MR. SCHULTZ: Excuse me, Judge. We're going to
23 object. It's a nonresponsive, narrative lecture at this point
24 to the question. Just lecturing to the jury.

25 THE COURT: I'll sustain.

1 Q. BY MR. GOELLER: Regarding that situation --

2 THE COURT: Say, let me ask the attorneys to
3 step over to the side, please.

4 (Discussion off the record outside the hearing of
5 the jury and court reporter.)

6 THE COURT: Dr. Cunningham, let me ask you to
7 have a seat, and Ladies and Gentlemen of the Jury, I think
8 it's time we take a break for lunch, and turn the lights back
9 up, Billy. And remember the admonitions not to discuss the
10 case among yourselves or with anybody else until you're
11 deliberating. So with that, it's about 12:30. Let's come
12 back about 1:45.

13 THE BAILIFF: All rise.

14 (Jury exits the courtroom at 12:30 p.m.)

15 (Lunch recess.)

16 THE COURT: All right. Let's bring the jury
17 back in.

18 THE BAILIFF: All rise.

19 (The jury enters the courtroom at 1:55 p.m.)

20 THE COURT: Please be seated. All right.

21 Mr. Goeller.

22 MR. GOELLER: Thank you, Your Honor.

23 Q. BY MR. GOELLER: For purposes of the record, you're
24 the same Mark Cunningham previously sworn to give testimony in
25 this cause?

1 A. Yes, I am.

2 Q. Dr. Cunningham, finishing up with this slide, the
3 association with peers who engage in delinquency --
4 delinquency and violence as a risk factor determined by the
5 Department of Justice. Why is that significant?

6 A. Adolescents are really influenced by who they're
7 around. Teenage development is kind of a group experience,
8 and so they're trying out roles based substantially on who's
9 around them, so they're very susceptible.

10 Q. You had mentioned protective factors? Can we go
11 into that? Can you talk a little bit about what protective
12 factors the Department of Justice -- first of all, what are
13 protective factors, and tell us what the Justice Department,
14 if you could, has identified those as such?

15 A. Certainly. Protective factors are factors that if
16 they're present they may insulate you, even if you have a lot
17 of risk factors in your background. And again, as the Justice
18 Department attempts to account for criminal outcome, they're
19 looking at a balance of risk factors on one side and
20 protective factors on the other. These are the risk factors
21 that were -- the protective factors, rather, that were
22 identified by the Justice Department as tending to inhibit
23 delinquency and violence in the community in adolescents in
24 young adulthood.

25 There are some individual characteristics. For

1 temperament, meaning that you weather things better. All of
2 those are individual characteristics that may have a
3 protective value.

4 Q. Social bonding to positive role models?

5 A. That means that you have very strong attachments to
6 people who are a positive influence on you and are modeling
7 how you behave appropriately. And so if there are family
8 members or teachers or coaches or youth leaders that you're
9 spending a lot of time with and have a strong bond with, then
10 that may also have a protective element.

11 My understanding is in Ivan's background that a
12 protective factor included the parents of friends of his as he
13 spent time in their homes, and they had some positive
14 influence on him as an adolescent.

15 Then if the standards in the home are -- they're
16 healthy beliefs and clear standards for behavior and
17 abstinence from drugs and if there are effective
18 interventions, all those things contribute to better
19 outcomes.

20 Q. Do you have a slide that kind of shows the balance
21 between all of this?

22 A. Yes, sir. If you have a lot of risk factors and
23 only a few protective factors, it's almost like balancing
24 these on a scale. In fact, the research identifies if you
25 have very many of these risk factors, they may overwhelm the

1 example, if you are female, you are much less likely to go on
2 to criminal violence as an outcome. Now, that doesn't mean
3 that you aren't damaged by the risk factors. It means you
4 have a different sort of negative outcome; things like
5 dropping out of school, marrying badly to abusive men, having
6 an erratic marital history, psychological problems, maybe drug
7 or alcohol abuse yourself, not so much in the criminal
8 violence direction, but other ways that their lives may go
9 awry.

10 For example, in Ivan's own family, the women who
11 have testified, his momma, his aunts, their outcomes have not
12 been criminally violent, but they have showed casualties in
13 their lives of another sort that reflect the problematic
14 origins of their childhood.

15 If you're intelligent, and really we're talking
16 about college-bound kind of intelligence, then you get to
17 school and it's a place of great success for you, and you get
18 a lot of attention from the teachers, and even if things are
19 crazy at home, school works for you.

20 And I've got this one bolded in green because there
21 is some indications of Ivan being intelligent. I didn't have
22 an IQ test to identify just where that was, and some of his
23 grade performance is kind of marginal, but he does seem to
24 have some degree of resourcefulness and intelligence.

25 Having a positive social orientation, a resilient

1 protective factors that are present. Then, the likelihood of
2 violence in the community is becoming increasingly likely,
3 almost inevitable if there are enough of them piled up there.

4 Q. What's the Justice Department done recently?

5 A. Well, this study that I have just been over was in
6 1995. There was a much larger study that was published just
7 this last spring, April of 2000, that's kind of the mother of
8 all analyses in this area. And they brought together 22
9 nationally prominent researchers for a couple of years and had
10 them analyze all the research that exists about risk factors
11 for how development affects likelihood of criminal outcome.
12 They looked at 66 studies and Justice Department research
13 reports and also longitudinal data that takes the same group
14 of kids and tracks them from infancy up through early
15 adulthood to see what happens over time.

16 And this time, instead of breaking out from
17 conception to age six, and age six to adolescence, they
18 identified different groups of risk factors; individual,
19 family, school, peer and community, neighborhood risk factors,
20 and they also identified a cumulative impact. In other words,
21 the more risk factors you're exposed to were steadily
22 increasing the odds of you being criminally violent in the
23 community by early adulthood; that it's A, plus B, plus C,
24 plus D. This is a cumulative sort of thing as these have an
25 additive effect.

1 Q. And if we take that to the next question, why do
2 some of these kids go bad and some not?

3 A. As the Justice Department is looking at this, it's a
4 function of what cumulative risk factors are there, balanced
5 against what protective factors are present. As we look at
6 the risk factors some of them I've got a parenthesis X, 2
7 times 5. That means that the research studies -- some of the
8 research studies describe odds ratios.

9 For example, if you were hyperactive as a child,
10 you were two to five times more likely to end up being
11 chronically delinquent or seriously violent by young adulthood
12 just from that factor alone, regardless of the additive
13 factors that may be present -- also be present.

14 And I've listed here all the factors that are
15 identified in these Justice Department studies. Again, I've
16 put checkmarks next to factors that appear to be present in
17 Ivan's background. Those cluster most heavily around family
18 factors of poor family management practices, low levels of
19 parental involvement, poor family bonding, residential
20 mobility, parents involved in substance abuse, parent-child
21 separation. His risk factors are heavily loaded on those
22 family factors.

23 Q. Again, those are the Justice Department factors?
24 Those aren't yours?

25 A. That's correct. And I've just checked the ones that

1 seem to be present in Ivan's background.

2 This is some follow-up on the parent-child
3 separation. This speaks to risks associated with father
4 absence. This, going to other research besides just the
5 Justice Department studies and looking both at research
6 studies, as well as Justice Department and Health and Human
7 Services information. What's identified in terms of the
8 effect of the father being absent across a child's development
9 is that there's a much lower level of supervision in the home,
10 and that it's not so much the economic impact of dad being
11 gone, as him not being present to supervise, or mom having to
12 be absent working a second job, so she's not there, either.
13 These kids are more likely to commit a school crime. The
14 likelihood that a young male will engage in criminal activity
15 doubles if he's raised without a father, triples if he lives
16 in a neighborhood with --

17 MR. SCHULTZ: Excuse me a moment, Doctor.
18 We're going to object. There's absolutely no evidence this
19 Defendant was raised without a father, and it's absolutely
20 irrelevant. It's misleading and has no connection to this
21 Defendant, this hypothetical situation. The evidence is clear
22 it's quite to the contrary, and to offer an example such as
23 that and knowing that this person was not raised without a
24 father is deliberately misleading.

25 MR. GOELLER: Judge, I don't think it's

1 deliberately misleading. I think the evidence is pretty clear
2 that there was little or no contact, for whatever reason,
3 between Ivan and his father throughout most of his youth. I
4 think that's the testimony. There were visitation problems,
5 and all sorts of games getting played with Sylvia and Abner.
6 I don't think -- maybe I can clarify it if I can ask
7 Dr. Cunningham another question on that.

8 Q. BY MR. GOELLER: Doctor, on --

9 THE COURT: Wait a minute, there's an
10 objection.

11 MR. GOELLER: I know there's an objection.

12 THE COURT: I'll overrule the objection.

13 Q. BY MR. GOELLER: When we say raised without a
14 father, do you have any insight as to what the study meant by
15 that?

16 A. Yes, sir. Father absence doesn't mean that the
17 father is dead or that the child never sees him. It means
18 that he is not functionally engaged in the child's life in
19 terms of providing ongoing relationship supervision,
20 interaction, modeling, that sort of thing. There's a
21 functional basis that he's simply not plugged in.

22 The likelihood that a young male will engage in
23 criminal activity doubles if he's raised without a father,
24 triples if he lives in a neighborhood with a high
25 concentration of single-parent families. You see the mix here

1 of risk factor and choice. It doesn't -- it doesn't mean that
2 every child who's raised without a father goes on to criminal
3 activity. It's not that choice has nothing to do with it, but
4 you have doubled the likelihood of criminal activity. Clearly
5 something is happening here besides simple choice. There are
6 developmental factors that we can identify that are
7 dramatically increasing the risks that have some cumulative
8 affect.

9 Seventy percent of juveniles in state reform
10 institutions grew up in single or no-parent situations.
11 Seventy-two of adolescent murderers grew up without fathers --

12 MR. SCHULTZ: Excuse me, Judge. Again, we
13 object. That's absolutely irrelevant, that study, because he
14 didn't grow up without a father. Certainly the testimony is
15 not in conflict how good his father was. Some witnesses said
16 he was very good; other people said he wasn't. But the point
17 is that's misleading because he had a father. He grew up
18 with an involved father. That's the testimony.

19 THE COURT: I think that's appropriate for
20 cross-examination, so I'll overrule the objection.

21 A. The conclusion of the Department of Health and
22 Human Services is that fatherless children are a dramatically
23 greater risk for drug and alcohol abuse, for mental illness,
24 suicide, poor performance in school, teen pregnancy,
25 criminality; that it's a broad social risk factor.

1 Q. BY MR. GOELLER: School factors, talk a little bit
2 about their -- what kind of school factors?

3 A. That means doing poorly in school. The child is
4 making grades that are lower than would be expected from his
5 intelligence and his ability.

6 Q. Situational factors, what are those?

7 A. Well, among the other factors identified by the
8 Justice Department, a final identifier when they identify
9 situational factors, that's the idea that in many instances of
10 criminal violence there is an inner section of this person,
11 maybe with substance abuse, with a provocative situation, with
12 the influence of somebody else, that often there are a number
13 of vectors that converge and that if you took any one of those
14 elements out, the offense never would have happened. It's
15 that kind of idea, that there are factors -- intersecting
16 factors that may be a part of a criminally violent episode.

17 Q. I want to talk a little bit about dope, drug,
18 alcohol dependence, that kind of thing.

19 A. Yes, sir.

20 Q. How does that factor in?

21 A. Well, these are all developmental risk factors that
22 are here. These are the ones that, for example, we're looking
23 at substance abuse in the family system the child is in. In
24 addition to that, a very significant risk factor for violence
25 in the community is drug or alcohol abuse. That is its own

1 factor out here in adulthood that is related, but separate
2 from the developmental factors.

3 Q. What specialized or -- specialized training do you
4 have in substance abuse, alcoholism in your field?

5 A. Well, drug and alcohol -- issues with drug and
6 alcohol disorders were a part of the clinical training in
7 graduate school. It was certainly an emphasis of the
8 internship in the Navy. When I was at the submarine base I
9 did some very intensive training with the alcohol
10 rehabilitation outpatient program that the Navy has and have
11 made this -- I read extensively in this area, as well as a
12 professional.

13 Q. What's the connect (sic) between substance abuse and
14 violence?

15 A. Well, there's a very strong association between the
16 two, and I'll just survey -- give you a few examples from the
17 research. Murdock & Associates in 1990 reviewed 26 studies
18 from 11 countries involving 9,000 crimes. Sixty-two percent
19 of the violent offenders were drinking at the time of the
20 crime. Swanson did, what's called an epidemiologic
21 Cachment (sic) area survey. That means they intensively
22 interviewed community members in two sites, in Los Angeles and
23 in Durham, and they found that alcohol abuse and dependence
24 was associated with an 11-fold greater incidence of violent
25 behavior. In other words, if you weren't a drug or alcohol

1 abuser, then 2.28, just over 2 percent of those individuals
2 would be violent in the community that year.

3 But if you were a drug and alcohol abuser the rate
4 jumps to 23.6. It's 11 times greater as we look at the
5 incidence of that in the community, and that's essentially the
6 same whether we're looking at alcohol or other substance
7 abuse. The odds are increased if you've got a psychological
8 disorder, along with the drug and alcohol abuse. In other
9 words, if you're depressed or bipolar or schizophrenic and
10 you're drug and alcohol abusive, the two interact somewhat and
11 increase your risk of violence in the community even more.

12 In terms of trying to understand how that works,
13 there's a guy named Gustaffson who reviewed the experiments in
14 the lab where they would dose people with alcohol and then
15 test their level of aggression and reactivity in different
16 ways.

17 And what they found is, with alcohol at least, that
18 intoxication results in increased perception of threat; that
19 it's as if you're sensitized to cues that make you feel like
20 you're under attack in some way, and that you're much more
21 responsive to frustration and threat, and that then leads to
22 aggression, as well as being more responsive to peer pressure.
23 And they're saying that the alcohol seems to affect people by
24 narrowing their focus of attention, kind of putting blinders
25 on so they're kind of zeroed in on the things that would

1 frustrate them and make them angry and cause them to be
2 reactive.

3 Q. Can you speak a little bit about substance abuse
4 and specifically homicide confinees?

5 A. Yeah. When we look at the relationship between
6 drug and alcohol offenses, and who commits homicides? Who's
7 in state prisons for murder or non-negative (sic) homicide?
8 This is data out of the Justice Department. Forty-one percent
9 of homicide offenders were drinking very heavily at the time
10 of the offense.

11 If we increase -- if we add drug abuse to our
12 definition, then we have 52 percent were under the influence
13 of either alcohol and/or drugs, and a good chunk of them, 32
14 percent of them, had a pattern of dependence on alcohol before
15 they -- as part of their background before this. Alcohol and
16 drug abuse appears to be a pretty integral part of what we
17 would call the Algebra of homicide, how we get to a situation
18 where somebody is killed. Very often alcohol intoxication,
19 drug intoxication is part of that.

20 Q. Dr. Cunningham, there's been quite a bit of evidence
21 that Ivan had been abusing, not just alcohol, but cocaine --

22 A. Yes, sir.

23 Q. -- methamphetamine --

24 A. Yes, sir.

25 Q. -- speed, ecstasy. It all kind of runs together for

1 me. What can you tell us about, I guess, the study of people
 2 that are engaged in that kind of frequent substance abuse for
 3 those kind of hard drugs? How does that relate to violence?
 4 A. Let me describe that. It has to do, in part, with
 5 the typical pattern that's observed in cocaine and/or
 6 methamphetamine abuse. And as we talk about this, these two
 7 terms are used jointly in the research because the effects
 8 psychologically and on the body from cocaine or
 9 methamphetamine are very equivalent to each other, with the
 10 exception that meth has a longer half-life. It stays in your
 11 system longer. So where the person is coming down -- the edge
 12 is coming off the cocaine in 15 minutes or 30 minutes, the
 13 meth they're still racing several hours later. But the first
 14 30 minutes, it feels a lot the same, and the patterns of abuse
 15 are much the same.

16 What happens is the person goes on a binge. They
 17 use it persistently across two, three, four, five days or
 18 longer, and typically getting very little, if any, sleep
 19 during that time and not eating very much, and then going
 20 through a period of time of marked irritability called
 21 tweeking and a crash then where they are then recovering,
 22 sleeping, not abusing for a day or two, or three or five, and
 23 then going on another run. And the typical pattern is to see
 24 periods of runs with a crash, another run and a crash. The
 25 effects are weight loss, aggression, violence, belligerence,

1 both during this phase, as well as in this tweeking zone.
 2 The effect, and I'll move forward to talk about some
 3 of these in here, are really very, very powerful and almost
 4 unavoidable among heavy users. Again, typically prolonged
 5 runs of over a week often occur. The behavioral and physical
 6 effects are not just the toxic effects of the drugs and
 7 whatever contaminants they were cut with, but also sleep
 8 deprivation and some degree of malnutrition. So you have a
 9 number of things all operating on the nervous system.

10 Sustained runs frequently result in marked paranoia.
 11 The person is increasingly suspicious and paranoid and
 12 reactive, and that may develop into a frank psychosis; in
 13 other words, the person appears to be a paranoid
 14 schizophrenic. They're having hallucinations and delusions.
 15 They just aren't quite as disorganized (sic) as somebody is
 16 who is actually schizophrenic.

17 Routinely, they are quite impulsive. That means the
 18 brakes aren't working. They go off and react without
 19 thinking. They're restless, irritable, hypervigilant.
 20 There's been testimony that Ivan was very nervous in the days
 21 and weeks before these offenses, and that seems to capture
 22 that kind of reaction.

23 Q. What's hypervigilant?

24 A. Hypervigilance means that you're feeling threatened
 25 and checking things out. You're looking over your shoulder

1 and are just very aware and attuned to things that are going
 2 on around you as if they represent some threat to you. There
 3 are dramatic mood fluctuations that are associated with
 4 chronic abuse so that somebody may go from being warmly
 5 congenial to just incredibly angry and hostile and assaultive
 6 over the most trivial of stimulus, the most trivial
 7 provocation. So it takes very little to set the person off
 8 when they're in the midst of these kind of run/crash,
 9 run/crash.

10 The suspiciousness often combines with irritability
 11 and impulsiveness and hyperactivity to create spontaneous and
 12 unwanted assaultive behavior. It's not like the person sits
 13 around dreaming this up, but it's almost as if they're caught
 14 up in the wave that overtakes themselves.

15 Q. Can you tell us a little bit more -- here we are --
 16 about chronic -- I guess some other chronic -- when we say
 17 chronic abuse of these kind of drugs, what's the medical
 18 community think chronic is?

19 A. We're talking about over a period of months.

20 Q. Okay.

21 A. Longer than six months, that this is a chronic
 22 ongoing. It's not -- I didn't start using this three weeks
 23 ago. It's not a recent sort of thing, but instead it's become
 24 part of an established, longer-standing pattern.

25 Q. Can you explain some of these other side effects? I

1 call them side effects. Don't know if that's the right word.

2 A. There -- these are effects that you're getting
 3 besides that initial rush euphoria that you get. Now,
 4 these -- these are the, Mr. Goeller, essentially what you call
 5 the "side effects." The primary effect is that these are
 6 enormously reinforcing, incredibly addictive substances;
 7 cocaine and methamphetamine.

8 All the animal species that they have experimented
 9 with will chose meth and cocaine over food and water, and will
 10 press the bar until they exhaust themselves and die. They
 11 will choose to get -- they will choose injections of cocaine,
 12 even if it requires them to tolerate an electric shock. These
 13 are incredibly powerful, addictive substances.

14 They often simultaneously consume other drugs,
 15 alcohol and other drugs, and that combination increases the
 16 violence potential. They may hang out -- likely do hang out
 17 with other people that are abusing these drugs and also
 18 reactive and suspicious and paranoid, so there aren't the
 19 social breaks that somebody else would say, wait a minute,
 20 calm down. You're going way off on this. That kind of thing.

21 They may begin to carry weapons out of a sense of
 22 suspiciousness and fearfulness and a desire to protect
 23 themselves. They may also be carrying them for use in an
 24 armed robbery to support the drug addiction. Once they
 25 begin -- if they're abusing methamphetamines or cocaine and

1 they start carrying a handgun as well, the potential for
2 tragic violence at that point is becoming awesome. That is a
3 tragic correspondence to abuse these drugs and begin to carry
4 weapons.

5 Most high-dose abusers describe involvement either
6 as an aggressor or victim in episodes where murder or mayhem
7 were avoided by the slimmest of margins. As they look at the
8 homicides that occur in the presence of methamphetamines and
9 cocaine, it's pretty clear that if you took that out of the
10 equation, that in most instances the homicide would not have
11 occurred. That's kind of an essential part of the Algebra.
12 But when they investigated the homicides in San Diego County
13 in 1987, a third of them involved cocaine or meth or both,
14 and some tendency at the crime scene for there to have been
15 more wounds to the body than were necessary to kill the
16 victim, what we call "overkill."

17 Q. There's been a lot of talk about choices, willpower,
18 drugs, addiction. Can you talk to us a little bit about that?
19 Give us some insight on those kinds of things.

20 A. Yes, sir. There are risk factors for drug and
21 alcohol abuse that vary from one person to another. The first
22 risk factor is genetic predisposition; in other words, are
23 there people in my biological background who are drug or
24 alcohol abusers? Now, if there are then my risk is 4 to 5
25 times the rate of the general population. If drug and alcohol

1 abuse is strictly a matter of choice, we wouldn't expect to
2 see a 4-to-5-fold increase in risk based on biology, based on
3 heredity, and this holds true even when we look at adoption
4 studies.

5 Adoption studies are when a baby is adopted away at
6 birth and then you track the alcoholism outcome of that child,
7 and you find that outcome matches their biological parents,
8 not their adoptive parents. Or you look at twins, and the
9 incidents of alcoholism among two twins, or even twins that
10 are separated at birth. And again, you see very strong
11 evidence of this being a biologically driven phenomena in many
12 ways, and the findings point toward a common biological
13 vulnerability. In other words, if my grandparents or
14 grandfathers or father or uncles were alcoholic, I'm not only
15 much more likely to be an alcoholic, I have a tremendously
16 increased risk to become drug dependent as well.

17 Now, the taking of the first drink, or using of the
18 first drug, that's a pretty open choice. After that, the
19 effect that has on me is dramatically different depending on
20 whether I've got these biological markers. So, for example,
21 if I drink a beer, I stop after a beer because that's all I
22 want. I'd no more drink 12 beers than I would drink 12 Cokes
23 or eat three pies. But for somebody that has a different
24 biology, when they take that first drink they have to drink 6
25 or 12. It has a completely different effect. It's like me

1 and Fritos, I guess. I cannot eat a Frito because I can't eat
2 just one. There's a different sort of thing that sets in
3 motion with them biologically, and if the drug is strong
4 enough, the addictive potential becomes very high.

5 Q. That modeling of substance abuse and dependence,
6 we've heard that term "modeling." Tell the jury what
7 modeling is and speak more specifically about that second risk
8 factor.

9 A. Well, what modeling means that I have observed
10 people around me drinking and drugging -- drinking
11 irresponsibly or drugging, and that's part of my picture of
12 that's how people act. That's how grown-ups act, and maybe
13 that's how you cope with things, and that's how you party and
14 have fun and that becomes part of my program. That's part of
15 my software.

16 It also is the milieu. It's sort of the tribal
17 value that I live. For example, when we think about how
18 family works as an influence, this modeling, and even out to
19 aunts and uncles and cousins and that sort of thing, your
20 belonging to a family can give you a lot of what we call
21 social cohesiveness. It helps support you because there's a
22 group identity, and you share the shame values, and so it's
23 like houses that are built close together. They --

24 MR. SCHULTZ: Judge, we've got to object to the
25 nonstop narrative answers that are essentially just lectures

1 to the jury, and would ask they be in some form of question
2 and answer.

3 THE COURT: Sustained.

4 Q. BY MR. GOELLER: Are we talking about extended
5 families here?

6 A. Okay. That's why you like to get kids with
7 grandparents and aunts and uncles and cousins so they have a
8 sense of the tribe they belong to, and they feel glue between
9 them and these other people, and that glue helps protect them
10 from bad outcomes. It's kind of like rock climbing, and
11 you're belayed. You're roped to other people, so if you slip,
12 their anchoring catches you, and that's part of what a family
13 system does for somebody if it's operating in a healthy
14 fashion. It helps provide mutual protection and increases the
15 likelihood of the kids within it growing up to be functional
16 and healthy.

17 Q. Explain shared status values.

18 A. That means that they have -- the family system has
19 same values about working hard, being honest, not abusing
20 drugs and alcohol, obeying the law, being a responsible
21 father, staying engaged with your kids, all the kind of things
22 that go into building a healthy, constructive citizen. So if
23 all those are operating in a healthy fashion, then you get
24 solid houses that help protect each other.

25 The problem with this is, if you have members of the

1 extended family that are drinking and drugging, or doing
2 things that are criminal or irresponsible, then that same
3 phenomena of close connections to family increases the risk
4 that your house will catch on fire, too, because you are close
5 and you are in contact with each other. It's now creating a
6 hazard if some of them are in harm's way.

7 Q. How does this relate to risk factors, maybe, in
8 Ivan's case?

9 A. Well, as Ivan had members of his family that were
10 drinking and drugging, as his cousins were involved in drug
11 dealing or illegal activity, then his attachment and
12 association with the extended family is now working to his
13 detriment.

14 MR. SCHULTZ: Excuse me, Doctor. Judge, may I
15 have this witness on voir dire?

16 THE COURT: Yes.

17 VOIR DIRE EXAMINATION

18 BY MR. SCHULTZ:

19 Q. You don't know any of this yourself, do you?

20 A. I know some of this from the testimony that I've
21 heard in the courtroom.

22 Q. Well, you don't know if that's true or not. I'm
23 just saying, you were here listening to witnesses. You don't
24 know if any of this is true?

25 A. I was not with him during his adolescence and his

1 childhood. I have no direct observation of his interactions
2 with his family.

3 Q. You haven't even taken the trouble to even talk to
4 him for what his version of all this is, now, have you?

5 A. No. It's not a function of not taking the trouble.
6 That's not the role that I was asked to take in this case.

7 Q. But my point is, all these things you're talking
8 about related to this Defendant you have no personal knowledge
9 of at all?

10 A. These are based on review of the records, based on
11 the testimony that I've heard.

12 MR. SCHULTZ: Objection.

13 Q. BY MR. SCHULTZ: Just answer yes or no. It's a
14 very simple question.

15 THE COURT: Sustained.

16 A. My --

17 Q. BY MR. SCHULTZ: Can you do that, Doctor?
18 Can you tell me --

19 THE COURT: Say, Doctor, just, with regard to
20 the responses, listen to the questions that are asked.

21 THE WITNESS: Yes, sir.

22 THE COURT: And only answer the questions that
23 are asked.

24 A. I have no direct observation of his childhood.

25 Q. BY MR. SCHULTZ: I'll ask it again. Do you have any

1 personal knowledge of any of the things you're attributing to
2 him, any personal knowledge? It's a yes or no.

3 A. I have not observed any of his life directly. I
4 wasn't there to see it, so I guess the answer is no. I
5 don't -- if that's what personal knowledge means, then, no, I
6 don't. I wasn't there to observe his life.

7 Q. Sir, you're a professional witness. You do this for
8 a living, don't you? You know what personal knowledge means.

9 A. No, sir. You seem to be inferring that it may mean
10 that I get it from the defendant; that I talk to third
11 parties; that I review records, so I'm not sure what you mean
12 by "personal knowledge." Sometimes those concepts capture
13 personal knowledge. Sometimes it means, were you actually
14 there to see it happen yourself, so I'm trying -- that's what
15 I'm trying to clarify with you.

16 Q. Not only do you not even know the person you're
17 testifying about, you don't know any of the events you're
18 testifying about?

19 A. Only from what I've read in the records, heard
20 testimony of.

21 MR. SCHULTZ: I'd object to any conclusions
22 relating to this defendant, Judge.

23 THE COURT: Overruled.

24 MR. SCHULTZ: All right.

25 Q. BY MR. GOELLER: Mental illness or psychological

1 disorders, anything like that, do they play into risk factors?

2 A. Yes, sir, they do. Those are risk factors as well.
3 What happens to you growing up may be a part of contributing
4 to a psychological disorder, and then mental illness as well
5 is a risk factor as people may try to medicate themselves as
6 their coping responses aren't very positive, and so they're
7 more at risk to use crutches to help them cope. So, these are
8 additional risk factors that may be present for everyone, not
9 just Ivan, but anybody.

10 Q. Genetics and these risk factors and substance abuse
11 and mental illness and all that, can you tell the jury a
12 little bit about that?

13 A. Well, I earlier spoke about genetics associated with
14 drug and alcohol dependence. There are some genetic
15 predispositions for psychological disorders as well. For
16 example, if you have first-degree relatives who have
17 depression, that's part of your family group. Then you're one
18 and a half to three times more likely to be depressed
19 yourself, as well as being at increased for risk alcohol
20 dependence if you have relatives that have depression in their
21 background. There was testimony that Ivan's family does have
22 this risk factor of depression.

23 Q. There's been evidence before the jury that members
24 of his immediate family have suffered from depression, and he
25 was diagnosed with depression in the Parkland Psychiatric

1 Unit.

2 A. And he's been taking the antidepression medication
3 in jail as well.

4 Q. Yes, sir. Yes, sir.

5 A. Right.

6 Q. How does that figure in? Have there been any
7 studies showing the genetic link to all that? Do you know
8 what I'm saying?

9 A. This describes the increased risk for him to be
10 depressed. He is one and a half to three times more likely to
11 be depressed, to have an aggressive disorder himself, because
12 of that family history. He's also at increased risk for
13 alcohol dependence because of that family history. He is more
14 at risk for alcohol or drug abuse because of the presence of
15 the psychological disorder, the depression, in his own history
16 and background.

17 Q. Dr. Cunningham, did I ask you to prepare kind of a
18 model, or put something together and kind of show how all this
19 relates?

20 A. Yes, sir. This is the person, and here are the bad
21 outcomes; psychological disorder, drug dependency and criminal
22 activity, and the question is, how does this person get over
23 here to these bad outcomes?

24 Well, if when you're growing up, there is no family
25 history of alcohol or drug dependence. There's no family

1 inter-relate with each other and how they're associated as we
2 try to identify, "So what happens over here"? How do people
3 get here?

4 Q. How about when it comes to the penitentiary, you
5 know, the kind of choices? Do you have -- do a model for me
6 on that.

7 A. Yes, sir. You have the same -- the same ramp is
8 there as you had before. I've taken the drugs and alcohol
9 out, the rollers out. While you can get drugs and alcohol in
10 prison, you can't sustain the kind of habit that you could in
11 the community.

12 Q. I was going to ask you about that. We hear from
13 time to time that some pot or some kind of drug can get into
14 the penitentiary, but obviously we -- it's not on the scale in
15 the free world?

16 A. No, sir. There's substantial impediments, as you
17 would imagine, getting that stuff into the prison. It does
18 happen, but the supply is much more limited. The staff is
19 monitoring. They can random drug test you whenever they want.
20 And so while it's present in the prison, not to the degree
21 of -- that you can sustain as a habit out in the free
22 community of just continuing abuse.

23 Q. Can you talk about risk assessment in the
24 penitentiary in relation to these things?

25 A. In addition to taking the drugs and alcohol out --

1 history of psychological disorder, and there's no development
2 of abandon or instability, then typically these are all parts
3 of what you grew up with; an intact family where there was
4 acceptance and affirmation and stability and structure and
5 consistency and modeling positive values and positive peer
6 relationships, and your choices then rest on this foundation.
7 You have choices. This is what it rests on.

8 Now, you can still get to these bad outcomes, but
9 it's quite a leap to get there. It's not easy to get there
10 out of this background. If you have a family history of
11 substance dependence or psychological disorder, it's like
12 we're ramping this thing up. And if you've got model
13 substance abuse, then we're ramping it up some more, and if
14 there's developmental trauma and abandonment and instability,
15 then we're ramping it up some more. If you begin to use and
16 abuse alcohol and drugs yourself, now it's as if you put this
17 thing on rollers.

18 Of course, if this is how you grew up, then
19 typically these are not part of your background, and you'll
20 look more like this. You have choices, but the nature of the
21 choices you get don't look at all like the kind of choices
22 that someone gets who grows up out of this kind of a
23 background.

24 Instead, they're in this situation. So that's a --
25 that's a way of describing how these different factors may

1 it's a substantial factor here -- you've got a number of
2 structural impediments that are part of the context of prison.
3 The staff, the structure, the supervision, work treatment,
4 confinement, a lot of things are there to hold this person in
5 place, to keep them from moving into more problematic
6 outcomes. And that's demonstrated as we look at the
7 overwhelming number of folks in prison. Of 47 percent
8 serious, violent felons in prison, and then as we look at the
9 statistics about how infrequently there's serious violence in
10 prison, clearly even individuals that were abusing lots of
11 drugs and alcohol and had very violent outcomes into the
12 community, you bring them into a prison setting, and your rate
13 of serious violence drops to a very low level, particularly
14 against the population that's there.

15 Q. Did you bring some information about our Texas
16 penitentiary makeup of offenders?

17 A. Yes, sir.

18 Q. Can you tell the jury a little bit about that?

19 A. As of --

20 Q. Just to interrupt you real quick. I think you
21 testified earlier there's about a hundred --

22 A. 140,000, 145,000, something like that in the Texas
23 prison system as a whole.

24 Q. Okay.

25 A. Very large population.

1 These statistics are based on the 2000 statistical
 2 report that was released in March of this year. There are
 3 13,000 folks in Texas prisons that are there for homicide,
 4 almost a thousand for kidnapping, almost 15,000 for sexual
 5 assault. This is what percentage of the population they make
 6 up. 21,000 for robbery; 11,000 for assault. All and all,
 7 there are 62,000 violent offenders, which represent 49.7
 8 percent of the Texas prison population. Just a little bit
 9 above the national average of 47 percent.

10 THE COURT: Let me ask you a question.

11 THE WITNESS: Yes, sir.

12 THE COURT: What are the burglars?

13 THE WITNESS: Those would be property
 14 offenders, sir. Those would be within the 50 percent that are
 15 nonviolent offenders.

16 THE COURT: So those are the violent offenders?

17 THE WITNESS: These are the violent offenders
 18 that represent 49.7 percent. The other 50 percent of those in
 19 prison would be property offenders, burglaries, sex offenders
 20 of a non-assaultive nature, drugs, those kind of things.

21 THE COURT: All right.

22 Q. BY MR. GOELLER: The TDCJ were these statistical
 23 reports. That's the Texas Department of Criminal Justice?

24 A. Yes, sir.

25 Q. When we say TC -- TDCJID --

1 to the hospital. So while any assault happens one per
 2 hundred, a serious or major assault happens closer to one
 3 every 4,500. Much, much less likely to happen.

4 And what you see there in federal prison is that 97
 5 percent -- at least 97 percent don't assault anybody, inmate
 6 or staff, in a given year.

7 When we move up to the high-security prisons, what
 8 we call USP's or U.S. Penitentiaries, there are about 95
 9 percent don't assault anybody in a given year. It may be that
 10 more than 95 percent don't assault anybody. This is acting as
 11 if every assault is done by a different inmate. If the same
 12 inmate is engaging in multiple assaults, then obviously there
 13 are many more inmates who didn't assault anybody.

14 Q. Right. Again, what can you draw from this that
 15 the --

16 A. The critical issue is when we start talking about
 17 serious or major assaults on staff, that is profoundly less
 18 likely to occur than any -- than just your regular -- than any
 19 assault towards a staff member.

20 Q. Can you talk about Texas?

21 A. Yes, sir. This is data out of 2001, and what I'm
 22 describing here is the annual rate. Now, obviously, we're not
 23 done with 2001 yet, so what I did is I took the statistical
 24 data from February to September, and just expanded it for the
 25 whole year, okay? That we'd act like the same frequency is

1 A. Institutional Division.

2 Q. That means the penitentiary?

3 A. Penitentiary, correct.

4 Q. That's where the figures come from?

5 A. Yes, sir. So we have the average sentence length
 6 for male offenders is 20 years. About 21 percent, or 25,000
 7 inmates are serving as -- they're facing a sentence of 30
 8 years plus, up to life, in prison. And 37 percent have been
 9 in the Texas prison system before. That don't count the guys
 10 that have been in other prison systems before. About 37
 11 percent have been in the Texas prison system before. They're
 12 going down for at least a second time.

13 Q. When we talk about -- of what severity in this
 14 context? Can you bring up a slide and explain to the jury
 15 that concept?

16 A. Yes, sir. One of the things I talked about earlier
 17 was that as the seriousness of the violence increases, how
 18 often it happens decreases, and this is illustrated with some
 19 numbers from the federal prison system. There is about one
 20 assault on a staff member in federal prison for -- that
 21 happens just over one time per hundred inmates per year, that
 22 there's any assault on a staff member. But only 1/50th of
 23 those are serious or major. That means one of those for about
 24 every 4,500 inmates per year. Serious or major means a cut
 25 requiring stitches, a broken bone, a concussion or admission

1 going to continue to happen across the rest of the year as
 2 happened in seven months.

3 Now, the TDCJ has just recently begun to change the
 4 way they code assaults on staff. Before they coded all kinds
 5 of things as an assault on staff. If you threw your shirt
 6 at a staff member, that was an assault. If you threw a piece
 7 of paper at him, that was an assault. You threw a cup of
 8 water on him, that was an assault. And now what they're
 9 doing, they're breaking those out into assaults that result in
 10 an injury that requires more than first-aid. If it just
 11 needed some alcohol and a Band-aid, they aren't counting that.
 12 They're counting, did you need stitches? Did it require
 13 medical attention beyond just simple first-aid?

14 Q. Why did they change? Trying to find out what's
 15 serious?

16 A. Yes, sir, because this is what they're really
 17 looking at. What they're really trying to prevent are
 18 assaults on staff that result in injuries. They broke it
 19 out -- earlier they broke it out into, was it an assault on a
 20 staff member with a weapon? And they decided even that was
 21 not quite precise enough, so they broke weapons out into body
 22 fluids or actual weapon or some other object. They're trying
 23 to narrow this down to measure what they're most concerned
 24 with, which is when, where and how often are staff members
 25 actually being injured?

1 Q. Okay.

2 A. So this is relatively new data that's just based --
3 they're collecting this year.

4 Q. And again, this data is not yours. That's the Texas
5 Penitentiary?

6 A. That's correct. They provided me what the numbers
7 are so far this year. They're collecting this new data from
8 February to September, so then I extrapolated it out for the
9 rest of the year based on those months. They just started in
10 February collecting it this way.

11 What we have as an annual rate is that there is an
12 inmate-on-inmate assault that requires more than first-aid.
13 There is a half of one of those for every hundred inmates per
14 year. That's how often it happens. Now, that's a really
15 important number to know because as I'm thinking about --

16 MR. SCHULTZ: Excuse me one moment, Doctor.
17 Judge, object. He's lecturing to the jury again. It's a
18 nonresponsive, narrative answer.

19 THE COURT: Sustained.

20 Q. BY MR. GOELLER: That .45, obviously less than one
21 per 100 inmates, and then it's broken down again, inmate on
22 staff?

23 A. Those are much less likely. That's 3.8 per 10,000
24 inmates.

25 Q. Why the difference in the two, I call them

1 either, until I started looking at the numbers.

2 The rate of inmate-on-inmate homicide in federal
3 prison is seven per hundred thousand inmates per year. In
4 state prisons nationwide, it's 5.6 per hundred thousand
5 inmates per year. In Texas so far, putting this on an annual
6 rate, Texas this year has got a 3.1 per hundred thousand
7 inmates per year.

8 Now, that compares here to the -- if we want to look
9 at the population in the United States as a whole. In the
10 United States, the rate of homicide is 6.3 per hundred
11 thousand residents per year.

12 Q. Now, this bottom comparison, that's not the
13 penitentiary?

14 A. No. This is the open community; men, women,
15 children, little old ladies, everybody. United States as a
16 whole, 6.3 per hundred thousand per year. Texas, as a whole,
17 6.8 per hundred thousand; Dallas, 23.1 per hundred thousand.

18 Q. Dallas County?

19 A. The Justice Department says "Dallas Metropolitan
20 Area," they're looking at.

21 Q. Okay.

22 A. So our rate of homicide in the community is higher
23 than the rate of homicide in state prison, even though prison
24 has 47 percent serious violent felonies and 10 percent
25 murderers and homicide offenders. So the structure, in the

1 baselines?

2 A. Well, because when you look at it as a decimal
3 point, it starts getting hard to interpret. You know, so
4 what does that mean, .038? And what that's talking about is
5 3.8 per 10,000 inmates per year. That's our frequency that
6 we're looking at.

7 What that means is -- you may have the notion that,
8 in fact -- the terrible violence is happening in Texas prisons
9 at a very high frequency. In fact, what we see is that at
10 least 99.5 percent of the inmates don't assault anybody in a
11 given year. This yellow is the percentage that an inmate
12 assaults another inmate requiring more than first-aid. The
13 assaults on staff, that represents such a small portion of the
14 circle that I can't even get the computer to recognize it. I
15 couldn't even change the color of the line, so it's just a
16 very -- it's just a line. It's just a very, very thin number
17 that engage in a serious assault on a staff member.

18 Q. Talk about homicide. That's a frequent topic in
19 these cases.

20 A. Yes, sir.

21 Q. An inmate killing a guard, killing somebody like
22 that?

23 A. The rate of inmate homicide in prison is much lower
24 than is commonly thought in the community. By common -- by
25 those -- laypeople, I didn't think -- didn't know this,

1 context of prison, works to constrain the most serious
2 violence.

3 Q. That's what I was going to follow-up with. It's not
4 that when people go to the penitentiary they become
5 altruistic, or all the sudden they're -- all of them just
6 become wonderful people. It's more to do with the function of
7 why we pay prison systems?

8 A. That's correct. They don't become wonderful people
9 just because they got sentenced to prison. Prison works. The
10 context -- these people weren't able to control themselves
11 happily. Prison controls them, provides external structure.
12 The rate of inmate on staff homicide in federal prison, it's
13 about 1 per 500,000 inmates per year. In State prisons
14 nationally, it's about one per million inmates per year.

15 In Texas, there have been two in the last 20 years,
16 last 19 years; one in 1982 and one, tragically, in 1999. But
17 the homicide of a staff member is an event of extraordinary
18 infrequency.

19 Q. I'm trying to phrase this next one we talk about.
20 Risk factors for violence in the community, and I want you to
21 talk about that as far as inmates and risk for violence in
22 prison as well?

23 A. Yes, sir. Well, we'll look at this. The risk
24 factors that caused them to be violent in the community
25 haven't gone away just because they've gone to prison. What

1 we've done is loaded up the other side of the scale with
2 immediate consequences and confinement and staff and structure
3 and security. So even though those risk factors are still
4 there, the other side of the scale is keeping these people out
5 of serious violence in prison, for the most part.

6 Q. Okay. The next discussion I want to get into is
7 those long-term base rates?

8 A. Yes, sir.

9 Q. I know that's important. I can't remember right now
10 why it is, but go to that and let's talk about --

11 A. Well, this is comparing long-term and short-term
12 inmates. Let me adjust that screen down just slightly.

13 This is relevant because a capital offender will be
14 a long-term inmate. He's going to be in prison a long period
15 of time. There's a study that compares long-term and
16 short-term inmates. And by long-term, we mean he's actually
17 going to have to do more than five years in this study.
18 That's what they're calling a long-term inmate; five years or
19 more to do. A short-term inmate is going to have less than
20 five years.

21 In this study we have over 700 short-term inmates
22 and 768 long-term inmates. And first we're going to look at
23 what it is that got them sent to prison. What was their
24 offense of incarceration? And the long-term inmates are
25 described in the red bars. Forty-seven percent of the

1 long-term inmates in this study are in prison for a homicide,
2 and almost a third of them, or just less than 30 percent are
3 in prison for a robbery. So this is a pretty serious violent
4 group in the community, these long-term offenders are.

5 Now, we're going to look at what disciplinary
6 infraction rate is. The short-term inmates are in the blue
7 line; the long-term inmates are in the red. This is how many
8 disciplinary write-ups a year they get. Could be disciplinary
9 write-ups for anything. This is their age at admission to
10 prison. And so if we're talking about inmates that are in the
11 age range of Ivan Cantu, this 22 to 30, our long-term
12 offenders average just over one disciplinary write-up a year.
13 The short-term offenders -- short-term inmates are having
14 twice the number of disciplinary write-ups. So, the older you
15 are at the time you come into prison, the less likely you are
16 to be written up.

17 And your long-term offenders generally have lower
18 rates of disciplinary infractions than the short-term until we
19 get out here to people that are past 30, and particularly
20 past 40, and then age is so powerful that it doesn't much
21 matter anymore whether you're there for a short time or a long
22 time.

23 Q. When we say disciplinary infraction write-ups, are
24 we talking --

25 A. All the way from being disobeying an order or being

1 out of area through assault. Misconduct -- any kind of
2 misconduct.

3 Q. Doesn't have to be -- those figures don't
4 necessarily reflect assault on a guard?

5 A. That's right, any misconduct.

6 Q. Okay. Is this age factor, I call it the mellowing
7 out as the years go by. Has there been studies done on that?
8 Is that pretty consistent, pretty recognized by everybody in
9 the penitentiary themselves?

10 A. Yes, it is. This is one of the most
11 well-established principles in criminology, and that is that
12 criminal activity and violence are associated with being
13 young, and the likelihood of it falls steadily with age, in
14 prison or out of prison.

15 If we look at disciplinary misconduct in prison, for
16 example. This is data out of New York. The rate of
17 disciplinary misconduct in prison peaks at age 20. By age 30,
18 it's only half as much and continues to fall across the life
19 span. So if you do a violence risk assessment, it's not a
20 status thing. It's not that somebody has the same risk
21 forever. We are gauging them at a current age the likelihood
22 of their being involved in violence, and misconduct is going
23 to fall as they age in the prison system.

24 Q. In my way of thinking of that, I don't want to pay
25 the same rates -- insurance rates I did when I was 18 --

1 A. That's right.

2 Q. -- I don't want to pay them now, not that they're
3 necessarily great, either?

4 A. That's right. They're shifting your risk based on
5 how old you are, and when you're 65 they're not going to
6 evaluate your driving risk based on the tickets that you got
7 when you were in your early 20's.

8 Q. Okay.

9 A. It's a different risk pool.

10 This is more data. This is nationwide data looking
11 at misconduct of any type in prison. Again, the rate of
12 misconduct peaks between the ages of 18 to 24, and then falls
13 steadily as the inmate ages.

14 Q. I was going to ask you; I knew you had a slide. Put
15 it all together, kind of a summary.

16 A. Well, capital inmates have lower rates of violence
17 in a general prison population. Even when they're out with
18 other inmates, the rates of violence are low. The seriousness
19 of the offense does not predict prison violence. Infraction
20 rates are progressively lower as the inmate ages. This is
21 consistent with lots of research in this area. As we look at
22 these anchoring base rates, these are the base rates that you
23 would use as a starting place to then individualize them to a
24 specific capital inmate. These are kind of our anchor
25 points.

1 The likelihood of an assault -- any assault is 20 to
2 30 percent. I call this a lifetime risk. The risk of
3 repetitive assault is about 10 percent. The likelihood
4 of aggravated assault on a staff member is about one percent,
5 lifetime risk. The likelihood of homicide of an inmate is
6 between a fifth of a percent and one percent. The likelihood
7 of killing a staff member is one per million inmates annually.
8 So that's kind of -- those are our anchor points. And as the
9 violence becomes increasingly serious, the rate of it and the
10 likelihood of it decreases very dramatically.

11 Q. Assault -- assault could be pushing another inmate?

12 A. It's probably more than that. Typically as we're
13 looking at assaults it's even more than a fist fight. It's
14 more of a predatory. Some studies have fights. Most of them
15 were talking about an assault that was beyond just two guys
16 got in a fist fight.

17 Q. I think you testified earlier that the chance of an
18 inmate at some point in his penal career shoving or I guess
19 getting in a fight --

20 A. That's almost universal among inmates who have to
21 show a willingness to stand up for themselves in order not to
22 be victimized. And most of the research doesn't treat that
23 sort of thing as a serious act of criminal violence.
24 Certainly the prison is going to discipline those guys and
25 that's appropriate, but as we're tracking violence that we are

1 that increase the risk.

2 There are also some factors that work to decrease
3 the risk. There has not been a pattern of violence in the
4 Collin County Jail; that he has a history of employment in the
5 community from age 14; that he's responded positively to the
6 structure of school and employment, as well as the jail; that
7 he has some degree of education, just short of a high school
8 diploma, or he has a GED, but also seems to have some
9 resourcefulness, intelligence, and then has also undergone a
10 Christian conversion. All those, I think, are factors that
11 would modestly reduce him upon the scale.

12 Q. I want to talk about that Christian conversion. When
13 you come across that phrase, that somebody has gone through
14 that, how do you factor in for whether it's legit, not legit?
15 A lot of people say, well, you know, he's in a capital murder
16 trial. Of course, he's converted. Do you know what I'm
17 saying?

18 A. Yes, sir.

19 Q. Or if it's bona fide or not, how does that factor in
20 to your assessment?

21 A. Well, I factor it in as a missionable, but minor
22 point. I'm always a little skeptical about folks that get
23 religion when they're about to face a serious trial and about
24 the authenticity of that. At the same time, I also recognize
25 that there are people who, when they, in fact, hit rock bottom

1 really concerned about in prison, typically we're not looking
2 at just fights. We're talking about an assault beyond that.

3 Q. How does all this relate to Ivan? Have you got any
4 information on that?

5 A. Yes, sir. And please understand, as I described
6 earlier, as I would individualize this to him, it's
7 necessarily cautious and more tentative because I have not --

8 MR. SCHULTZ: Excuse me, Judge. I'm going to
9 object to him lecturing the jury. It's a nonresponsive answer
10 to the question.

11 THE COURT: Sustained.

12 Q. BY MR. GOELLER: You were going to preface this.
13 Tell the jury your preparatory remarks as you individualize it.

14 A. Yes, sir. It's necessarily more cautious and
15 tentative in its absence of a direct evaluation of him and
16 interview of third parties and all those other things because
17 I have not done all those. As I would individualize it to
18 him, it's more cautious and less certain.

19 Q. Okay.

20 A. And we start with those anchoring base rates that I
21 just described. There are a couple of factors that tend to
22 increase the risk and -- above those base rate numbers that we
23 talked about. The capital offense involved a robbery and two
24 people rather than one were killed. We're going to talk about
25 some data in just a minute that identifies those as factors

1 with their life do look to God, do re-evaluate themselves and
2 where they're going, and that may be the time that, in fact,
3 you'd most feel the need for God.

4 I also -- I'm a Christian, and I believe that as
5 somebody is involved in studying the word of God, whether they
6 went into that for the wrong motives or not, that has the
7 power to change somebody. So he has, in fact, completed some
8 Bible correspondence classes and is actually engaged in
9 reading the word of God, and I believe that can change
10 somebody, even if their motivations were not sound as they
11 started into it. So I can't look into his soul to know. I'm
12 encouraged he is headed in that direction, and I think that
13 can't hurt him and has some promise for where he goes from
14 here.

15 Q. Have you put some of these base rates and decreased
16 risks and come up with kind of a model for Ivan?

17 A. Yes, sir. This is based on simply a statistical
18 study. If we looked at this just by the numbers, not the soft
19 factors like Christian conversion or employment history, if we
20 just did it by the numbers this is based on some data that
21 came out -- I should change this. It came out this last year,
22 2000. It's based on a study of 6,300 murderers in the Texas
23 prison system. A very recent study, people convicted after
24 1989, and they're followed in prison for an average of four
25 and a half years. On the basis of that follow-up, they're

1 extrapolating the risk of violence across a 40-year prison
2 term.

3 And here's what they identify in this sample. As we
4 would extrapolate that, we would expect about a 16.4 percent
5 of these inmates would be involved in an act of serious
6 violence across their 40 years in prison, about 16.4 percent.
7 Because of the extraordinary sample size, for the first time
8 we're able to break out, in the regression analysis, factors
9 that would raise or lower it in a predictive fashion. And so
10 if the capital offense involved a robbery -- or the murder
11 involved a robbery or burglary, that bumps the risk by 7.4
12 percent. If there were multiple murder victims, that bumps
13 the rate by 5.6 percent.

14 There are some other factors that would have bumped
15 the rate that are not present here. There's no prior prison
16 term. There's no prison gang membership. Because he's age 26
17 to 30 we subtract 7.2 percent. If he had been less than 21,
18 we would have added a youth add-on. If he's over 30 or 35, we
19 would have subtracted much more, but he's 26 to 30 so he's
20 getting some break in age. And that leaves an overall risk
21 rate of 22.2 percent for a serious assault, lifetime risk.

22 Q. Explain that, or go into detail about that. What
23 does 22 percent mean?

24 A. Well, that means if we do a strictly statistical
25 analysis, there is 22.2 percent likelihood that he will be

1 pervasive, maladaptive pattern of behavior that's evident in
2 almost every part of the person's life, that they sustain
3 across a long period of time.

4 When we talk about Antisocial Personality Disorder,
5 that describes someone whose long-standing personality
6 pattern, even from early childhood, has been exploitative, has
7 been potentially assaultive, characterized by dishonest and
8 criminal behaviors, impulsivity, irresponsibility, all kinds
9 of things. But the idea being that this person is not
10 attached to other people, doesn't seem to care about other
11 people, and so doesn't have the same kind of moral
12 sensibilities or concern for other people's feelings, and
13 that's evident even in childhood as a very pervasive, deeply
14 ingrained pattern of conduct.

15 There are some -- while that exists as a diagnosis
16 in what we call DSM-4, which is the diagnostic manual that
17 psychologists and psychiatrists use --

18 MR. SCHULTZ: Excuse me, Judge. He's answered
19 that question, and now he's lecturing again. It's
20 nonresponsive to the question, what is Antisocial Personality
21 Disorder?

22 THE COURT: Sustained.

23 Q. BY MR. GOELLER: You talked about the DSM-4. I know
24 this is in that. What book, you said -- that's kind of the
25 Bible of psychiatrists and psychologists, correct?

1 violent -- have at least one act of serious violence in the
2 next 40 years in prison. Conversely there is a 77.8 percent
3 chance that he will not if we strictly -- if we analyze it
4 strictly by the numbers.

5 Q. And that overall risk rate, is that talking about
6 the chance of one serious infraction over that 40 years?

7 A. One serious assault. Now, the likelihood of an
8 aggravated assault on a corrections officer is down about one
9 percent, so it doesn't change that. That likelihood is still
10 right at just over one percent. Likelihood of killing another
11 inmate, that's about a fifth of a percent, if we base it on
12 this study. Likelihood of killing a staff member, we have to
13 go to the national data, one per million inmate per year. So
14 this is principally, while we're grouping any type of serious
15 assault, the largest part of this is assault with a weapon,
16 fight with a weapon, sexual assault, robbery, those kind of
17 things, not a homicide.

18 Q. What if -- are you familiar with the term APD,
19 Antisocial Personality Disorder?

20 A. Yes, sir.

21 Q. If someone were diagnosed with that, how would that
22 figure in?

23 A. Let me describe that. First --

24 Q. I should ask you, what it is, first of all?

25 A. A personality disorder is a deeply ingrained,

1 A. That's correct. That's how we communicate with each
2 other. That way if I talk about I'm seeing somebody who's
3 depressed, and I'm talking to a psychologist in California, he
4 knows what I'm talking about he has got the same book and is
5 basing what depression means on the same set of criteria.

6 Q. Is it so standardized that I think insurance
7 companies use it to bill -- or doctors use it to bill --

8 A. Yeah. DSM-4 or ICD-9. Psychiatrists and
9 psychologists mostly use DSM-4, and then the managed care
10 protocols and how long you're supposed to treat somebody and
11 what happens next are based, in part, on those diagnostic
12 codes that somebody has given.

13 Q. And DSM-4, Diagnostic --

14 A. Statistical Manual --

15 Q. -- Statistical Manual --

16 A. -- Fourth Edition.

17 Q. -- Fourth Edition, what does that say about if
18 somebody is diagnosed -- what are the criteria for being
19 diagnosed Antisocial Personality Disorder?

20 A. Well, it describes you have to have a deeply
21 ingrained, long-standing pattern of maladaptive behavior that
22 is characterized -- and let me see if I can remember. There
23 are seven of them I think -- by repeatedly doing acts that are
24 grounds for arrest, irresponsibility, disregard for safety of
25 others, I think lying, exploitative types, irresponsible

1 behavior may be one of those. They're grouped in that kind of
2 classification.

3 Q. Is it something where the medical professionals
4 agree that part of the criteria has got to be it's something
5 before age 15?

6 A. Yes, sir.

7 Q. In your youth, in your early youth, you've got to be
8 really bad?

9 A. I apologize. One of the necessary prongs that you
10 have to meet to get this diagnosis is that you had to have
11 been diagnosable as a conduct disorder -- childhood conduct
12 disorder before the age of 15. And to be called a childhood
13 conduct disorder, again, you have to have a long-standing
14 pervasive pattern of disregard for the -- for other people and
15 kids and violence and exploitative behaviors. It's as if --
16 similar to the antisocial stuff, except it was pervasive all
17 the way back in early and middle childhood. So you would have
18 to have gotten the diagnosis, but you had to have been able to
19 meet the criteria for that.

20 Q. Right.

21 A. Now, there are a number of reasons why this
22 diagnosis really doesn't meet the scientific rigor that we
23 might expect in a capital sentencing proceeding.

24 Q. Yeah. I was going to ask you, a lot of people --
25 you hear people say, he's antisocial or he's a psychopath.

1 Variations, and here's what that means: Under DSM-3(r), the
2 edition that came just before what we're using now, there were
3 three and a half million different symptom combinations that
4 you could have that could result in a diagnosis of APD, or
5 Antisocial Personal Disorder -- 3.5 million different
6 pathways. We're doing better under DSM-4. Now, we're down to
7 only 400,000 different symptom combinations that could give
8 you this disorder, this diagnosis.

9 Now, anything that you can get to 400,000 different
10 ways, obviously contains many different subdisorders that have
11 different origins that have different outcomes, and instead
12 they're grouped into kind of a waste basket right now of
13 symptoms. There's a lot of concern in the scientific
14 literature that none of these are weighted; that you just have
15 to have three of seven without weighting of particular
16 subtypes that may be present.

17 There's also what's called Temporal Instability.
18 That means that when we send some psychiatrist in to evaluate
19 somebody and they call them an Antisocial Personality
20 Disorder, when they come back six months, a year later and
21 they look at the same guy, they only agree half the time that
22 he was APD. So even over that period of time, it no longer
23 seems to hold up. And more importantly there's evidence of
24 aging out of this; that as we look in the community, there
25 were lower rates of APD for people that are over age 45 than

1 A. Right.

2 Q. How does that factor into the research and the
3 studies that you know about as predicting the future?

4 A. Well, this is what one of my peer review papers is
5 about. It's about the diagnostic category of Antisocial
6 Personality Disorder and psychopathy as those come into
7 sentencing considerations.

8 Q. What is psychopathy?

9 A. Psychopathy is kind of a rarified form of Antisocial
10 Personality Disorder. It's like if you took the worst portion
11 of the Antisocial Personality Disorder, that's where
12 psychopathy would be. It's measured by a structured interview
13 called the Psychopathy Checklist Revised.

14 Q. Okay.

15 A. There are a number of reasons why this doesn't
16 really meet the muster in a setting of this degree of
17 seriousness. First, psychologists and psychiatrists keep
18 changing our mind about exactly what does this concept mean
19 and what are the diagnostic criteria, so we keep changing the
20 criteria from one edition of the DSM to another. Now, they're
21 still talking about broadly the same phenomena, but we keep
22 changing the individual criteria. Those changes are not
23 driven by new research. It's because we keep changing our
24 mind about what we want to call them.

25 Then there's what's called the Enumeracy of Symptom

1 there are for younger than 45, and the DSM talks about aging
2 out by the 4th decade. In other words, by the time the person
3 is in their 30s, very commonly the symptoms are going away;
4 reduced criminal activity, reduced substance abuse; reduced
5 antisocial acts. They are aging out of this disorder.

6 And then very important in a situation like this,
7 where there is a substance abuse history there is a lot of
8 controversy in the field that if you're behaving in an
9 antisocial way because you're drug dependent -- because you're
10 a drug addict that that represents a very different type of
11 person than somebody who is engaging in criminal acts of
12 violence, or repeated criminality who's just stone-cold
13 sober. If you're drug seeking, that's different than just
14 doing it for fun and --

15 Q. How does -- I'm sorry. I didn't mean to interrupt
16 you.

17 A. So when we look at the criteria, things like
18 illegal acts, deceitfulness, impulsivity, aggressiveness,
19 recklessness, irresponsibility, those are all things that may
20 occur in a substance abuse disorder, and take away the drug
21 addiction and that's not who this person would otherwise be at
22 all. So, there's very significant concern in the research,
23 and even DSM approaches this to say, if you've got a history
24 of substance abuse that starts before the antisocial behavior
25 does, and that seems to be the primary driver, you need to be

1 real careful about calling it a personality disorder.

2 Q. For whatever reason, how many folks -- percentage of
3 people in the penitentiary in Texas have this tag, this APD
4 disorder?

5 A. As we look at prison populations, various studies
6 that have been done, I don't have one specifically on Texas,
7 but as we look at ones that apply around the country, about 75
8 percent of the guys in prison can be diagnosed as having APD.
9 That's why it doesn't mean anything when you do a risk
10 assessment because anything that 75 percent of the people --

11 MR. SCHULTZ: Excuse me, Doctor. Judge, we're
12 going to object. Once again, he's answered the question. Now
13 he's lecturing the jury. This is not a classroom.

14 THE COURT: Sustained.

15 MR. GOELLER: That's my fault.

16 Q. BY MR. GOELLER: About 75 percent of all -- is this
17 male and female, or male --

18 A. Principally male.

19 Q. Principally male. Have been diagnosed with having
20 APD. What's the problem with using that as a predictor of
21 future violence in the penitentiary, besides the obvious? You
22 know, 75 percent have it.

23 A. That is the point, that if you have a characteristic
24 that's present in 75 percent of a population, it's not going
25 to identify which particular guy is going to be violent

1 factor. Being impulsive would be a risk factor. Being
2 reactive would be a risk factor. There are personality
3 characteristics that put you at risk, depending on what
4 context you're in.

5 The problem is the research does not identify those
6 things as predicting who's going to be violent in prison.
7 Even when we look at psychopathy, which represents about a
8 third of these antisocial guys, they're like the most extreme
9 antisocial types, even psychopathy doesn't identify who's
10 going to be violent in prison. The studies that have tried to
11 use that as a way of predicting who's going to be violent in
12 prison just doesn't demonstrate the power to do that.

13 Q. Those are the worst?

14 A. Those are the worst of the Antisocial Personality
15 Disorders, and even that is not predictive of violence in
16 prison. It's predictive of violence in the community in young
17 adulthood among males who are white, but not prison.

18 Q. What also affects these risks in this context?

19 A. Well, in addition to -- personality is not the only
20 part of the equation. You've got the person who is in a
21 certain interaction in a given context, and violence is what
22 emerges out of that matrix of all three of those things. It
23 isn't simply a function of personality. Now, if you're in
24 prison, context may be so powerful that it kind of swallows up
25 these others, so even though you're somebody who had a problem

1 because it's so pervasive. As you look at the individual
2 characteristics, that's why being impulsive doesn't work.
3 Impulsivity predicts violence in the community. You get to
4 prison, virtually everybody in prison is impulsive. That's
5 how they got there. So now impulsiveness no longer tells you
6 which inmate is going to be violent in prison. So,
7 essentially it doesn't tell us any more about prison behavior
8 or even parole outcome, except that he's like most other guys
9 in prison.

10 Q. Personality. I roughly -- probably wrongly --
11 associate personality with the DSM-4, like psychopathy and
12 antisocial personality -- Antisocial Personality Disorder.
13 What's the problem with using personality in trying to
14 predict -- I don't mean just APD, but personality in general
15 as far as risk factors go?

16 A. Personality can -- personality features can be a way
17 of identifying risk in the community if, in fact, they've
18 demonstrated by research to be predicted. And there is
19 research that identifies that certain personality
20 characteristics are associated with an increased likelihood of
21 violence in the community. APD increases the likelihood of
22 violence in the community. Now, not always. 53 percent of
23 the people in the community who have APD don't have a
24 significant arrest record, so it's not even invariably
25 associated with arrest, much less violence, but it is a risk

1 with your personality in the community and interacted with
2 folks that aggravated that, gee, you put this same guy in
3 prison and the context becomes so powerful it simply stops
4 this from ever emerging.

5 Q. Let's go there, and let's switch gears and talk
6 about the joint and how they handle people down there?

7 A. Yes, sir. I've been describing somebody just going
8 into the general prison population. As we talk more
9 specifically about the context of prison, in TDCJ, in that
10 classification system, you have people that are in or out;
11 they may be confined largely to in their cell, in the
12 building, inside the fence. They may be in a minimal medium
13 or close custody. There may be a designation that their
14 supervision is unarmed, or that their supervision is armed.
15 So, it's a multi-level matrix that they're looking at in terms
16 of placing
17 somebody. And obviously, as you move somebody into a more
18 closely supervised context, their opportunities and likelihood
19 of serious violence are being further contained.

20 So part of what happens when somebody goes to TDCJ
21 is they go through a classification procedure that establishes
22 these things, and then they're monitoring how it's going,
23 shifting the person, depending on how they do.

24 Alternatively, this is all part of the general
25 prison population, but it's not one big emorphis group. There

1 are all kinds of classification levels within general
2 population. The person may, alternatively, be sent to
3 administrative segregation. That's the 23 and one thing that
4 I described.

5 Q. Ad seg everybody calls it.

6 A. That's it, right.

7 They can send somebody there before they engage in
8 an act of serious violence. If they had been applied, they're
9 a disproportionate risk, if they think they need that. And
10 there are about 9,000 of those beds in TDCJ. If a person had
11 a psychiatric disorder, then they, either temporarily or on an
12 ongoing basis, might be sent to one of those facilities.

13 Q. Are they secure?

14 A. Oh, yes.

15 Q. Psychiatric units?

16 A. Yes.

17 Q. You can't walk out?

18 A. They're contained, they're secure, they're within
19 fences.

20 Q. Okay. I want to talk a little bit with you about
21 preventive intervention. I know we spoke about that, and I
22 asked you to do a slide on that.

23 A. This is similar to what you were describing before
24 about how the prison management is oriented in such a way as
25 to do things to reduce the likelihood of the person being

1 themselves, there is a pretty substantial correctional
2 industry program operated in different prisons that involve
3 all kinds of different activities, all the way from raising
4 crops to manufacturing signs and refurbishing school busses
5 and school furniture and building furniture for the State use,
6 lots of things that are happening to help provide goods and
7 services for the State of Texas and to occupy these inmates in
8 a constructive way.

9 Q. Again, is it more than just they will work? Is
10 there more to it that this is a tool that the Government uses
11 to keep violence down?

12 A. Absolutely. This makes your population more
13 manageable if you constructively engage them. Even your kids
14 are easier to manage during the school year when they've got
15 the constructive activity of school to go to, as opposed to
16 sitting around the house in summertime.

17 Q. Are these privileges, some of these jobs, or are you
18 just -- you go there and you make license plates, or how does
19 that work?

20 A. Some of them would be, and there are promotions
21 within those jobs as well, and some sense of achievement that
22 somebody may have by moving up into a more responsible
23 position. And some are more desirable than others, and some
24 are based -- some on seniority, some on work records, some on
25 which setting you're in.

1 violent. Some of that's classification housing. If they have
2 a psychiatric disorder, then they start them on medication, as
3 has happened with Mr. Cantu in the Collin County Jail.
4 Counseling services, prison work, educational programs,
5 religious programs, mentoring, all kinds of things that are
6 brought to bear to try to propel this person in a more
7 positive direction, or contain the violence.

8 Q. You talked about earlier that our -- I don't know if
9 it's our -- I guess the Texas Department of Criminal Justice,
10 we've gone to an "earn-your-keep"?

11 A. Yes, sir.

12 Q. You're not going to sit. You're either going to be
13 locked down or you're going to work?

14 A. Yes, sir.

15 Q. How does that kind of factor into violence and risk
16 assessment and that kind of thing?

17 A. When there are programs available that engage this
18 person productively, then you don't have idle hands that are
19 the devil's workshop. You engage this person constructively,
20 productively. It's better for the inmate to have something
21 constructive that he's doing. He gets out of his cell. It
22 becomes even a privilege to get to go to work. It has some
23 sense of accomplishment and you're teaching a work ethic, and
24 those kind of things as well.

25 In addition to the maintenance of the prisons

1 Q. Do we have -- are there any other context out there
2 when we look at recidivism or violence amongst capital
3 offenders, maybe outside the prison setting?

4 A. Yes, sir. All we've talked about, what are the --
5 how do you do a risk assessment in the context that he's going
6 to be in prison for the next 40 years? The other context of
7 interest is what about on parole? 40 years from now, I guess
8 he's 67 or so at age of earliest eligibility. He might not be
9 paroled then, but at least 67-years-old. At that point,
10 that's another context, what about in the community?

11 Q. Okay. What can you tell us about that?

12 A. Again, there are number of different base rates that
13 we could look at that will inform this risk assessment. It's
14 the same methodology. We can look at likelihood of arrest by
15 age, likelihood of arrest for violent offense and murder by
16 age, how old people are when they come back into prison. We
17 can look at the parole outcome of capital offenders and also
18 the parole outcome of homicide offenders. All different ways
19 of grouping our data and then following our outcomes.

20 Q. Recidivism obviously means --

21 A. Return to prison.

22 Q. -- return to prison.

23 A. Depending on the study, some of them treat
24 recidivism as a new felony, or a new violent offense. Others
25 define recidivism as just coming back to prison for any reason

1 at all.

2 Q. Can you talk about these base rates just a little
3 bit so we have an idea?

4 A. If we look at this age phenomena, this is looking --
5 this is Justice Department data. The blue line is violent
6 crime; the red line is murder or non-neighborhood
7 manslaughter, and how old the person is at the age they commit
8 this crime. This is looking at data from 1981. The rate of
9 violent offense and murder peaks here in the early 20's, falls
10 steadily across the life span. It shows you the influence of
11 youth as a risk factor in violent offending.

12 This is the same issue, this time, 1995, 14 years
13 later. Again, the rates of violent offending and murder are
14 peaking here in this youthful age range falling steadily. By
15 the time we're out here at age 65, it's only a very small
16 percentage of murders that are committed by somebody who's
17 out there beyond that age.

18 This is that epidemiologic Cacheemnt area study
19 again, where they intensively interviewed members of the
20 community, and if you were between 18 and 29 from the lowest
21 socioeconomic group, then 17 percent of those individuals were
22 violent in the community in any given year. These guys are
23 170 times more likely to be violent in a given year than a
24 male was who over age 65. So again, very dramatic and
25 powerful indication of the effects of aging on the likelihood

1 were over age 60, so again we're seeing this age-related
2 effect in terms of who comes into prison.

3 Q. Is this solely people that go there for the first
4 time, or is this everybody that goes to the penitentiary in
5 the year 2000? Do you know what I'm saying?

6 A. Yes, sir. I'm not sure I can answer that for sure.
7 As I recall, it isn't broken out. It's just talked about age
8 of admission.

9 Q. Okay. This parole -- the next slide here, parole
10 recidivism; in other words, going back by age, is that linked
11 to -- obviously an age to --

12 A. Yes, sir. The younger the person is at the age
13 that they're paroled, they tend to be more likely to come
14 back. This is data from the parole division of TDCJ, and if a
15 person is paroling in this zone, about 25 to almost 30 percent
16 of them come back. If we're talking about somebody who's
17 being paroled who's over 50, then we're talking about maybe 12
18 percent of them come back within the first few years.
19 Typically, as people return to prison, they're coming back
20 very rapidly after they get out. So if they're going to
21 bounce, they tend to do that in the first 2, 3, 4 years of
22 time.

23 Q. Do you have the new Arizona -- the big study on
24 parole?

25 A. Yes, I do. Unfortunately the data that is collected

1 of violence in the community. This is not even arrests. This
2 is based on self-reports and family reports.

3 Q. I was going to say, this age -- I call it the
4 "mellowing-out factor," but age is pretty significant in this
5 risk evaluation. What do these graphs show?

6 A. This notion of the aging effect on the likelihood of
7 criminal activity and violence is one of the most
8 well-established principles in criminology. It's evidenced
9 across 200 years of data collection. In this case, we've got
10 the rate of criminal activity in the community. This is
11 males; this is females. This is England and Wales in the
12 1840s. This is the United States arrest record data in the
13 1970s. Same curve, peaks here at age 20, falls steadily
14 across the life span. It's the same curve that we saw in the
15 prison disciplinary data. It's the same curve you see in the
16 murder rates and violent offense rates.

17 So as we're looking at the likelihood of criminal
18 activity and violence on parole that's out here post-age 65,
19 we're identifying a trend aging-out phenomena that's very
20 powerful.

21 Q. This slide here is about when they actually go to
22 the penitentiary; how old they are when they get there?

23 A. That's right. If we look at the folks that came
24 into the Texas prison system in the year 2000, 60 percent of
25 them were between the ages of 20 and 40. One percent of them

1 in Texas is not as detailed and extensive as we would like for
2 it to be. There is a study, though, that's pretty recent out
3 of Arizona that is a very significant, well-done study. It
4 follows 38 thousand prison releasees out of Arizona and tracks
5 them across a seven-year period of time, and here's what they
6 found.

7 Broadly 40 percent of the inmates, of those 38
8 thousand came back into custody within several years;
9 increased to 52 percent after a seven-year period of time.
10 Almost 90 percent of those who are going to bounce -- who are
11 going to come back to prison did so within the first three
12 years. The new offense return rate, about 43 percent of them
13 came back with a new offense after seven years -- within seven
14 years. Of those who came back, 43 percent did so with a new
15 offense, not just not meeting their conditions of parole or
16 that sort of thing. So the recidivism rate for inmates as a
17 whole -- this is not murderers. This is just all inmates in
18 the Arizona prison system, that recidivism rate is pretty
19 high. Fifty-two percent returning to prison after seven
20 years; 43 percent with a new offense.

21 Here's what predicted that recidivism. And this is
22 in order of power by the degree of influence. If you were
23 younger when you were paroled, a property offender, had been
24 to prison multiple times, narcotic abuser, as differentiated
25 from other forms of drug abuse. New offense, probation

1 violators, where a parolee, they just cut you loose at the end
2 of that time so you had no supervision. If you had acted
3 badly enough in prison that they were releasing you from a
4 high security facility instead of moving you down, that was a
5 risk factor, or if you were from a metropolitan county and
6 went back into a metropolitan zone, those were the factors
7 that were predicted.

8 This is looking at likelihood of return by how old
9 the person was when they were released. If you were 15 to 18
10 when you were paroled, 50 percent of those guys came back to
11 prison.

12 Q. Okay.

13 A. If you were over age 60 when you were released, 7.3
14 percent of those came back to prison. And so the older the
15 person was at the time they were released, the less likely
16 they were to come back to prison, to recidivate.

17 Q. Did you bring -- go to the next one on -- I want to
18 talk about parole, get specific about capital if you could.

19 A. Yes, sir. This is looking at the -- what happened
20 with some of the Furman communities who actually ended up
21 being paroled. There were 533 of them. There's a study that
22 follows: 188 of them, who were paroled, by 1989 when this
23 study was done, and with that group 80 percent of them did not
24 return to prison at all across this follow-up time. Of the 20
25 percent that did, about half of those guys, it was for a

1 know much about it because it's only been in the law maybe 10
2 years.

3 A. Yes, sir.

4 Q. The 40-year minimum has only been with us about 10
5 years, so we don't know anything about the future. So,
6 suffice it to say, you have a lot of -- a lot of material you
7 have regarding incidents of violence juxtaposed against age
8 and paroled down the road, the general theme of that would be
9 what?

10 A. Well, I have 12 to 15 studies from states all around
11 the country that describe the parole follow-up of commuted
12 capital offenders, first-degree murders, willful homicide
13 offenders, different categorizations of murder. Those -- and
14 shows the pie charts and the numbers. The summary of that is
15 the majority of those offenders don't recidivate in any way,
16 and a much narrower portion of them commit a new felony of
17 some kind.

18 Q. One of the last slides I've asked you to go to is
19 that one on aging.

20 A. Yes, sir.

21 Q. In the context of, you know, I was going to say the
22 top and the bottom. That's all I could remember. Explain
23 this --

24 A. Before I do, this is the interaction of -- person
25 interaction and context that is the matrix of violence in

1 misdemeanor or technical violation. Ten percent of them
2 committed a new felony. One of them committed another
3 homicide in the community up to the point this data is
4 reported.

5 THE COURT: Mr. Goeller, I'm going to give the
6 jury a recess at this time. If you've got materials to turn
7 over to the State, now is the time to do it.

8 MR. GOELLER: Yes, sir.

9 THE COURT: Let's take a 15-minute recess.

10 (Jury exits the courtroom at 3:30 p.m.)

11 (Recess taken.)

12 THE BAILIFF: All rise.

13 (Jury enters the courtroom at 3:50 p.m.)

14 THE COURT: Please be seated.

15 All right. Mr. Goeller, go ahead.

16 Q. BY MR. GOELLER: Dr. Cunningham, you're one and the
17 same Mark Cunningham, forensic psychologist that's been sworn,
18 giving testimony in this cause?

19 A. Yes, I am.

20 Q. Dr. Cunningham, part of -- I'm going to jump way,
21 way ahead and get to the end. We have a lot more -- we could
22 talk about a lot more material regarding, I suppose a
23 secondary issue in capital sentencing, and that is the jury
24 has been told, or will be told probably that after 40 years
25 somebody is parole eligible. Part of our problem is we don't

1 youth. What we're talking about on parole is that we have an
2 extraordinary aging process across 40 years, so that on the
3 other side of that we've got an elderly person and personality
4 who's engaged in senior interactions in an old-age context.
5 But that's now the matrix that we're looking at. There is
6 certainly the potential for violence to come out of that. It
7 is much, much reduced from what would have been present at an
8 earlier time, and that's what's described on all those aging
9 graphs, and that we also see in the parole outcome.

10 The murder parolees have lower rates of recidivism
11 than the general offenders do, not because they're better
12 people, but because they've been in prison longer and are
13 older when they're released.

14 Q. They're mellow?

15 A. That's correct.

16 Q. Okay. There are incidents of violence -- serious
17 violence. Two corrections officers have been killed in the
18 last, I guess, 10 years in Texas?

19 A. Twenty years.

20 Q. I'm sorry, 20 years. There have been bad things
21 happen in the joint in Texas?

22 A. Yes, sir.

23 Q. And --

24 A. And bad things on parole --

25 Q. Yes.

1 A. -- on occasion as well.

2 Q. Folks parole out and will kill and will rape and
3 will rob, and all sorts of bad things can happen.

4 A. Nobody who has been in for 40 years. We haven't
5 gone that far yet.

6 Q. Right.

7 A. But parolees, bad things can happen.

8 Q. Does that change how you go about risk assessment
9 for future violence? Does that -- bring that together for me.

10 A. It doesn't change. The risk assessment identifies
11 that there is a certain likelihood of an assault. There is
12 even a smaller likelihood of an aggravated assault on a
13 corrections officer. There is an extraordinarily small
14 likelihood of a homicide. That means those things do happen,
15 and when they happen, they're horrible and they're tragic, and
16 the stories about them are wrenching. But as we get more
17 serious, those are still happening at a very low frequency.
18 So the details don't illuminate, don't change the frequency
19 with which they happen.

20 Q. Okay. Can you go to that slide, some errors --
21 common errors that are made when we go about this business of
22 risk assessment?

23 A. Yes, sir.

24 Q. There it is. Can you go through those one step at a
25 time, and I can assure everyone this is one of the last slides

1 I have, and we'll end this pretty shortly. I know it's
2 getting on. I'm one of those lawyers that's smart enough to
3 know when to start shutting up.

4 A. Yes, sir.

5 Q. It may be a little too late. Can you go through
6 those, though, because this is important and explain those?

7 A. Yes, sir. As we identify, how do you go about
8 doing this wrong? What are common errors that are made in
9 undertaking this? One approach is not to know or rely on the
10 base rates, not to have identified how often capital offenders
11 are violent or what the rate of homicide in prison is. You've
12 got to have those and be anchored to them.

13 Another is to consider that -- to think that the
14 community and prison are the same, or that the community and
15 young adulthood is the same context as the community and
16 old-age parole. That's a common error not to adjust your
17 risks depending on what context you're in.

18 There's also what's called susceptibility to
19 illusory correlation. That means I think something is related
20 to violence in prison, except it's not. I think -- I believe,
21 I have an intuition or an attitude that a serious offense in
22 the community, that must mean that guy is going to commit
23 violence in prison, except it's illusory. Those two are not
24 connected to each other. Maybe I think a certain personality
25 characteristic or disorder is -- results in violence in

1 prison. That doesn't occur, either. So we've got illusory
2 correlations. Things I think are predictive that aren't.

3 A failure to define the severity of the violence, to
4 not differentiate between assaults, assaults on staff,
5 homicides, that kind of thing.

6 Over-reliance on a clinical interview. To identify
7 that somehow the characteristics or read that I'm getting on
8 somebody out of a clinical interview have lots of difference
9 to make on this thing when, in fact, the data from the
10 clinical interview is very, very modest in terms of what
11 effect it's going to have.

12 Q. Let me ask you, while we're on that point. I think
13 this is important. Some people are of the belief that, well,
14 to be a good witness in court in this area, you've got to be
15 one of those 50/50 type folks. I testify for the Defense 50
16 percent of the time, and I can testify for the Government for
17 50 percent of the time, therefore, I'm believable.

18 When it comes to clinical assessment of future
19 dangerousness, why is that not -- well, I'll admit from a
20 lawyer's standpoint, I always thought, well, I need a doctor
21 that's 50/50, makes the jury probably believe him more.
22 What's the problem with that?

23 A. Well, if your method is unreliable -- clinical
24 interview is unreliable as a method for predicting serious
25 violence in prison. If your method is unreliable, it then

1 would allow you to come to any conclusion. So let's say you
2 hire me. I do a clinical interview of Mr. Cantu, and I say,
3 gee, there's a lot that's commendable about him. He has had
4 an employment history in the community. He took care of his
5 little brother. You know, he wanted to work so bad he would
6 even misrepresent his age in order to get a job and helped
7 care about his cousin, who ultimately died. And I could
8 identify some things that say all those characteristics, in
9 fact, represent some humanity in this guy, and, therefore,
10 he's really not very likely -- he's different from other
11 criminals. He's not going to hurt people in prison. And you
12 would say, thank you, Dr. Cunningham. That opinion is very
13 helpful.

14 Now, if I happen to be called by the State in the
15 same case, then I would interview Mr. Cantu, and I'd say, you
16 know, he didn't show remorse about this, or he wouldn't talk
17 about it. And, obviously, if he won't show remorse and he
18 won't talk about it, he hasn't really repented, and the whole
19 religious thing then is bogus. And besides that, anybody who
20 could do this kind of thing must be a terrible person. And
21 the drug abuse, and he changed jobs, and that means he's
22 unstable. And I'd take the same data, and I'd say this guy is
23 far beyond the usual criminal. He's very likely to hurt
24 people in prison wherever he goes. Now, I'm the perfect
25 witness. I can testify 50/50 because my method is so

1 unreliable it allows me to say anything.

2 If the witness is grounded in the research data,
3 about development, about violence in prison, if you're married
4 to the data -- if my data tells me that -- scientific data
5 tells me that the world is round, in every proceeding about
6 whether the world is flat or the world is round, I'm going to
7 keep coming back saying the world is round. A hundred percent
8 of the time that's going to be my testimony. I'm never going
9 to get called by flat-worlders, okay, because this is what the
10 science says. It's not a matter of being biased. It's a
11 function of this is what the research tells me.

12 And so that's the problem with, as your methods
13 become full of error, not only are you going to make
14 well-intentioned mistakes, but it also allows you to be
15 completely biased, even though you work half the time for
16 either side.

17 Q. Okay. Misap of strike testing, I don't know if that
18 has a whole lot in this case, but what is that?

19 A. Well, it means that -- let's say I gave him an MMPI
20 of some psychological tests. I identified personality
21 characteristics. There were a problem. I said, therefore,
22 those predict him being violent in prison except --

23 MR. SCHULTZ: Excuse me, Judge. We're going to
24 object because that's certainly not related to this case. He
25 hadn't met this man, other than a handshake, and what he would

1 identify a single act as a pattern, or maybe just a few acts
2 somehow constituting a pattern. Or that I'm looking at a
3 pattern in the community that's not a pattern in custody.
4 Neglect of preventive measures. That's not
5 attending to things like classification or ad seg that could
6 reduce the violence opportunities. Insufficient data. Not
7 knowing what the percentage of violent felons are in prison.
8 Not knowing who's in prison, or what the rates of violence
9 are, and then describing this as somehow an all or nothing.
10 Either he will absolutely be violent or he won't be, and not
11 giving it a relative percentage or probability. Those are
12 common errors that occur at this phase of a capital sentencing
13 proceeding that introduce error into the determination.

14 Q. Did you do a slide for me for the presentation that
15 kind of sums everything up?

16 A. Yes, sir.

17 Q. Could you go to that?

18 A. There are only two states, Texas and Oregon, that
19 identify future danger as an essential issue in assessing the
20 death penalty. Others may consider it as an aggravator.

21 Past pattern in the same context. An actuarial or
22 insurance approaches are vastly more accurate and reliable
23 than personality-based methods. Ivan's past violence, by the
24 materials I've reviewed and heard, has been in the context of
25 drug or alcohol abuse in the community. He has a past pattern

1 speculatively do has no relevance in this particular case.

2 MR. GOELLER: That's okay, Judge. I'll move on.

3 THE COURT: All right.

4 MR. SCHULTZ: Can I get a ruling on the
5 objection, please?

6 THE COURT: You don't need one. He's not going
7 to answer it.

8 MR. SCHULTZ: Okay.

9 THE COURT: I tell you what, if you want to
10 have one just to have one, I'll overrule the objection, and he
11 may answer.

12 MR. GOELLER: I tell you what, I don't think
13 there's going to be any of that. I'll move on.

14 THE COURT: All right.

15 Q. BY MR. GOELLER: APS or APD --

16 A. APD. By identifying the guy as being APD, or having
17 psychopathy and saying, therefore, he's going to be violent in
18 prison, the research just doesn't support that. So I'm
19 making assumptions about what the risks are that are simply
20 not founded. That's been studied, we've looked at people in
21 prison who have those personality characteristics. They have
22 not been more violent than the other inmates around them.

23 Ignoring the effects of aging, not identifying this
24 aging out of personality problems, or risk of violence.
25 Misuse of patterns of behavior, that means that I maybe

1 of positive response to structure and school, employment and
2 jail. Murderers have low rates of violence in prison. I
3 reviewed the likelihood of different levels of violence; about
4 a 20 percent likelihood of serious assault, and a one percent
5 likelihood cumulatively across a lifetime in prison of a
6 murderer to seriously assault an officer.

7 The likelihood of killing another inmate is a fifth
8 of a percent to one percent lifetime risk. Homicide is one
9 per million per year. This likelihood is further reduced by
10 ad seg or other preventative interventions. Likelihood
11 of violence in prison is going to decrease with age.

12 Murderers have lower rates of recidivism than property
13 offenders, largely as a function, I think, of simply being
14 older at the time they're released.

15 There is a low likelihood of violence in the
16 community with parole after age 65, and that likelihood would
17 continue to decline with advancing age.

18 Q. Okay. Thank you, Doctor. If you could have your
19 seat, and I want to --

20 Dr. Cunningham, let me show you what I've marked as
21 Defendant's Exhibit Number 34, and I know we've put tons and
22 tons of graphs up on the board.

23 A. These are the exhibits that I prepared in this
24 case. There are 12 or 15 of those studies that I identified
25 on the parole outcomes that I did not flash up there that are

1 here as well.

2 Q. Okay. Do they back your finding and are they
3 consistent with your testimony regarding age-out, parole and
4 recidivism?

5 A. Yes, sir.

6 Q. Okay, All right.

7 MR. GOELLER: I'd offer 34, Your Honor.

8 MR. SCHULTZ: No objection.

9 THE COURT: This is Number 34?

10 MR. GOELLER: Yes, Your Honor.

11 THE COURT: All right. It's admitted.

12 Q. BY MR. GOELLER: Dr. Cunningham, throughout your
13 testimony you talked about statistics of findings and research
14 from some of the articles that you've either authored or
15 co-authored. Let me hand you what I've marked as Defendant's
16 Exhibits 35, 36, 37, 38, 39, and ask you if those are those
17 articles?

18 A. Yes, sir, they are.

19 Q. Okay.

20 MR. GOELLER: Judge, I'd offer 35 through 39.

21 THE COURT: 35 through 39?

22 MR. GOELLER: Yes, sir.

23 MR. SCHULTZ: Moment, please, Judge?

24 THE COURT: All right.

25 (Brief pause in proceedings.)

1 Q. In other words, these articles have been selected
2 then for your purposes here?

3 A. These are the ones I made available to Defense
4 counsel that provide a theoretical and research-based
5 background for my testimony. Those other articles were not
6 relevant to that research, theoretical background of my
7 testimony. They are -- I'm always glad for people to read
8 things that I've co-authored, so I'm happy to make them
9 available to you or anybody else, but they weren't specific to
10 my testimony.

11 Q. Or they contain materials that may not advance this
12 particular case, also; is that right?

13 A. Oh, no, sir, not at all. I would expect that you'd
14 do your homework, get my articles. They're on my vitae. They
15 have been, and I'd think that that you'd run those articles
16 and see what's in them, and I'm not concerned about anything
17 I've written.

18 MR. SCHULTZ: We have no objection to these
19 offerings.

20 THE COURT: All right. 35 through 39 for the
21 Defendant are admitted.

22 MR. GOELLER: Thank you, Doctor. I'll pass the
23 witness.

24 THE COURT: All right. Go ahead, Mr. Schultz.

25 CROSS-EXAMINATION

1 MR. SCHULTZ: May I voir dire the witness on
2 this offer?

3 THE COURT: Yes.

4 VOIR DIRE EXAMINATION

5 BY MR. SCHULTZ:

6 Q. Doctor, are these the only articles you've authored?

7 A. No, sir. There are others.

8 Q. What was your theory for selecting only portions of
9 your writings?

10 A. It was not my selection. These are ones that the
11 Defense counsel identified. I have other papers that are not
12 specific to violence risk assessment. I have a paper
13 assessing the Mississippi death row inmates and their
14 competency to act as their own attorneys in capital
15 post-conviction.

16 Q. Let me stop you. I appreciate that. You have other
17 articles that you've also authored?

18 A. Yes, sir, that are not specific to violence risk
19 assessment.

20 Q. And you've got them with you here?

21 A. I may not. I'm not sure. Let me look. I think the
22 only ones that I have with me are the ones that are specific
23 to violence risk assessment. I don't think that I brought the
24 other articles that are not on this -- specifically to this
25 topic.

1 BY MR. SCHULTZ:

2 Q. Let me take a moment and look with you at your
3 curriculum vitae, and you have indicated on that and testified
4 that you are a licensed psychologist in Arkansas, Idaho,
5 Indiana, New Mexico, South Carolina, Texas, Colorado,
6 Illinois, Louisiana, Oregon and Tennessee; is that correct?

7 A. That's correct. I wasn't tracking the list. There
8 may still be a state. I think you mentioned all of them.

9 Q. I'm just -- all right. You maintain offices then
10 for meeting patients in all those different states?

11 A. Oh, no, sir. My office is in Abilene, Texas, and I
12 go into those other State as I'm called upon to do
13 consultations.

14 Q. For example, when's the last -- where is the last
15 state you testified in?

16 A. The last state was in South Carolina.

17 Q. And that was probably sometime last week; is that
18 right?

19 A. Yes, sir, that's correct.

20 Q. Now, South Carolina is one of those states that does
21 not have, in every capital case, a requirement of a
22 determination of future danger; is that correct?

23 A. That's correct.

24 Q. As a matter of fact, Schaffer versus South Carolina
25 deals with the problem of state selection of that as a

1 special aggravating circumstance; is that correct?

2 **A. I'm not familiar with the case law that specifies**
3 **that as a possible aggravater.**

4 Q. It was a death penalty case you testified in?

5 **A. Yes, it was.**

6 Q. And let me guess, you testified on behalf of the
7 Defendant?

8 **A. I was called by the Defendants in that case. I**
9 **don't know if it was on his behalf, but I was called by the**
10 **Defense to testify.**

11 Q. What percentage of those slides that you've
12 presented as here in Texas were presented in South Carolina?

13 **A. Let me think about my testimony there. Most of**
14 **these slides I had prepared to present about risk assessment**
15 **there. There were a number of them that I did not present**
16 **because we were trying to shorten the testimony as much as**
17 **possible.**

18 Q. Okay.

19 **A. So I don't know that I can recall exactly which**
20 **ones were used and which ones weren't. I was prepared to**
21 **testify about most of them, not the parole ones because I**
22 **don't think that was an issue there. But in terms of violence**
23 **in prison those -- I think I just -- I distilled it down. I**
24 **think that I -- let me correct that because I'm -- in**
25 **anticipation of trying to make it brief, I think I distilled**

1 **that down to about seven slides, maybe five that I presented**
2 **in South Carolina.**

3 Q. My point is these are slides that you use on a
4 regular basis when testifying in capital cases; is that true?

5 **A. If I testify about violence risk assessment, yes,**
6 **sir.**

7 Q. And when we talk about them being -- they're not
8 specially prepared, for the most part, for a particular case
9 because you use them in all your capital cases?

10 **A. There are some that I'll prepare specific to a given**
11 **case.**

12 Q. True.

13 **A. Many of them I've used before because it's more**
14 **efficient and is less billings against the county or the state**
15 **if I don't recreate the wheel each time I go in.**

16 Q. And certainly you're familiar with them. You appear
17 to know the sequence of the slides that you've loaded into the
18 Power Point?

19 **A. Yes, sir.**

20 Q. And it seems like you could present all the slides
21 in a narrative form, if given that opportunity; is that a fair
22 statement?

23 **A. Oh, I think it is.**

24 Q. And that tells me this isn't the first time you've
25 done such a thing. Is that a fair inference on my part?

1 **A. Yes, sir. Again, I often, as I get new data, will**
2 **add in an additional slide here or there to reflect that, but**
3 **I'm certainly familiar with these and have used many of them**
4 **before.**

5 Q. What did the guy in South Carolina do? What was his
6 crime?

7 **A. He had gone into -- well, let me --**

8 THE WITNESS: Judge, I don't have a release of
9 information from that case, and so to speak about the details
10 of what I learned in that, I would need for you to order me or
11 instruct me to testify.

12 THE COURT: I'll order you to answer the
13 question.

14 THE WITNESS: Yes, sir.

15 THE COURT: It was a public trial, right?

16 THE WITNESS: Yes, sir.

17 THE COURT: All right. Go ahead.

18 MR. SCHULTZ: Also, let the record reflect he
19 requested the Court to give him that order so I don't want
20 to -- putting him in the position of we just tricked him into
21 doing it. We gave him what he wanted before he testifies. He
22 asked for it, is all I'm saying.

23 MR. GOELLER: I think he's trying to be
24 accommodating.

25 THE WITNESS: I need to clarify. I'm under an

1 ethical obligation not to reveal -- standard of
2 confidentiality applies, so that outside of those proceedings
3 I'm not allowed to discuss and describe the information that I
4 learned in that case, even if I testify about it publicly
5 unless I'm ordered to do so.

6 THE COURT: And I'm not arguing with you.
7 Seems to me like the question he asked was a matter of public
8 record, right?

9 THE WITNESS: Even if it was a public record, I
10 can't address that. My knowledge of that is within a
11 professional relationship, and so I can't respond to that
12 ethically in another setting it unless I'm instructed to do to
13 so, and that's why I was -- I'm not unwilling to, but I am
14 simply advising the Court of my ethical position and that I
15 would need to be instructed to testify about those things that
16 would otherwise be confidential.

17 Q. MR. SCHULTZ: By the way, when did you first meet
18 that fellow in South Carolina?

19 **A. I met him in August of this year.**

20 Q. Did you examine him?

21 **A. Yes, I did.**

22 Q. Now, tell me what he had done since they've got him
23 charged with capital murder and the State is seeking to
24 execute him.

25 **A. He had been employed doing some yard work for an**

1 elderly woman in the community, was also abusing cocaine and
 2 perhaps methamphetamines at the time, and some indication of
 3 drinking as well, is borderline mentally retarded and has a
 4 history of psychotic symptoms himself and in his family as
 5 well. He went into the -- there was some sort of conflict
 6 that apparently occurred with him and the elderly woman. He
 7 raped and killed her, and the neighbor had come over and he
 8 also killed the neighbor lady, drove the car through the
 9 garage door -- closed garage door as he was leaving, drove
 10 kind of aimlessly, but generally back in the direction of his
 11 family home several hours away, was apprehended the next day
 12 still wearing the bloody clothing, and -- in a somewhat
 13 disorganized -- psychologically disorganized state. That's an
 14 overview of that offense.

15 Q. Had he been in the prison system prior to this time?

16 A. Yes, he had.

17 Q. On how many occasions?

18 A. Let me think. As I recall, he had had two prior
 19 prison sentences. I believe twice, and he had some juvenile
 20 record as well.

21 Q. What had he been to prison for? What type offenses?

22 A. I don't know that I -- I don't know that I can
 23 recall the specifics.

24 Q. It's only been a week, hasn't it?

25 A. Yes, sir. I'm reviewing and working on lots of

1 recollection.

2 Q. What did you determine was his risk of future
 3 violence; do you remember that?

4 A. Yes, sir. It depended in part on whether or not he
 5 was maintained on psychiatric medication in the prison
 6 setting. He had been belligerent in the jail and so that was
 7 of some concern. On the other hand, his prison record was
 8 without a pattern of serious violence when he had been
 9 incarcerated before, and, in fact, even though he had been
 10 belligerent and --

11 Q. Excuse me just a second, Doctor. I understand all
 12 that and it's interesting, but my question was, what did you
 13 determine was his risk of violence?

14 A. The risk of serious violence that he had was -- I'm
 15 not sure I can recall my percentages in that case. As I
 16 recall, it was about 34 percent based on the strictly
 17 statistical California mechanism. If you based it on his past
 18 pattern to adaptation to prison before, it might be somewhat
 19 below that. It depended in part on whether or not he was
 20 maintained on psychiatric medications. But on a strictly
 21 statistical basis, as I recall, it was 34 and change.

22 Q. Do you recall testifying recently in a case styled
 23 the State of Texas versus Michael Segalla?

24 A. Yes, I do.

25 Q. And tell me what that man had done; what was his

1 stuff.

2 Q. I understand.

3 A. Typically when I got get done with a case, I don't
 4 hold that stuff in the RAM. I've got limited capacity.

5 Q. We'll get to that in a little bit, but you can't
 6 remember even in a week what somebody you're testifying for in
 7 a capital case had been to prison for?

8 A. I have a general recollection of it involving a
 9 theft, either drug-related issues as well, but I don't have a
 10 specific recollection.

11 Q. What about his juvenile crimes; do you remember
 12 them?

13 A. No, sir. I remember there being some record of him
 14 having some institutional background, but don't recall the
 15 specifics.

16 Q. And you had offered your testimony to the Defense
 17 in South Carolina and you don't recall details that like about
 18 somebody you were doing a risk assessment on?

19 A. First, I was offering my evaluation or my findings
 20 to the Court. The Defense may call me or not, depending upon
 21 how they felt about that. I describe the risk assessment
 22 portion briefly, more testimony and mitigation, and quite
 23 frankly, have not committed that to memory, and typically
 24 begin to -- I guess deep-file data on cases when I leave
 25 them. I don't try to keep all those things in immediate

1 crime?

2 A. Michael Segalla had entered the -- I guess knocked
 3 at the door and gained entrance into the home of Clebur and
 4 Lillian Santos. Mr. Santos was shot in the head in the region
 5 of the door, and Lillian was mistreated and abused, tortured
 6 of sorts, was sexually assaulted, and then was also shot in
 7 the head. Property from the home was removed; a guitar and
 8 jewelry and some other items that were then pawned by -- some
 9 by Mr. Segalla; some by associates of his, friends of his that
 10 were also involved in that stolen property.

11 Q. There's a little more to it than that, wasn't there?
 12 You testified a little bit more about those facts just
 13 recently, haven't you?

14 A. I'm sorry, about Mr. Segalla's case?

15 Q. Uh-huh.

16 A. That was a summary of it, but certainly there's much
 17 more data in that case.

18 Q. Let's get into how he sexually abused corpses. We
 19 talk about that?

20 A. The sexual abuse of a corpse?

21 Q. Uh-huh. What happened to the female victim of
 22 Mr. Segalla? What did he do to her?

23 A. I'm not sure if it's clear that this happened before
 24 or after she was killed, but there was evidence of hot wax
 25 being dripped on her breasts and genital area. That may have

1 occurred -- I wasn't present to know specifically, but my
2 understanding was that happened while she was still alive.
3 After her death, I believe her hands were crossed over her
4 chest and Mr. Santos's body was moved a short distance and his
5 hands were crossed on top of his chest. I'm not aware of
6 other abuse to a corpse that occurred, but then I wasn't there
7 during the guilt phase.

8 Q. Didn't you testify just not more than -- a little
9 bit over a week ago that she was both vaginally and anally
10 penetrated?

11 A. Yes, sir. I thought that was during the sexual
12 assault, not after she was dead.

13 Q. Fair enough. What risk did you consider that
14 creature to be in terms of future violence?

15 A. Mr. Segalla -- I'm pausing because I suppose in
16 reaction to your use of the word "creature." Mr. -- this
17 person, this Defendant, as he would come into the Texas prison
18 system, had risk factors if we use a strictly statistical
19 model of multiple victims, context of a robbery in the course
20 of the homicide.

21 Q. Well, you testified about your risk assessment. Why
22 don't you just tell us what that was?

23 A. I'm trying to recall exactly what that was, and I
24 was describing the statistical analysis of that. In terms of
25 the relative likelihood of his being violent in prison, the

1 murderer do that got you there testifying for him?

2 A. Again, I was not testifying there for him. I was
3 testifying about my best understanding of the research data
4 that's there. I was called by the defense.

5 Q. I understand that. We all understand that. What
6 did he do that got you there testifying?

7 A. Well, his offense was of -- and this is, as I
8 recall, was a retrial of an earlier death sentence that had
9 been set aside, and he had robbed and sexually assaulted an
10 elderly woman in the community there, and then was in prison
11 for, perhaps, seven years or so, and was coming back for a
12 retrial is my recollection. Those dates may be off some.

13 Q. Had he been to prison before?

14 A. He had a juvenile record and had been incarcerated
15 before. I don't know -- I can't recall -- my thought is that
16 he had not been to adult prison, but had had an extended
17 prison term as a juvenile, but that -- again, it's been a
18 number of months.

19 Q. So you can't -- you understand that for society,
20 these cases are really important, and they're important on
21 both sides? You understand that?

22 A. Oh, absolutely.

23 Q. But you can't -- now, you make a very large amount
24 of money offering this testifying (sic) business of yours,
25 don't you?

1 likelihood of his violence in prison was less probable than
2 more likely than not. It was below a 50-percent threshold. I
3 recall in that case it was someplace in the 30 percent range,
4 although I don't recall for sure.

5 Q. 34.7 percent, does that refresh your memory?

6 A. That could be close, yes, because, as I recall, the
7 factors that I identified would boost his rate somewhat.
8 That would be for any assault. His likelihood of the killing
9 of a correctional officer or another inmate would be pretty
10 close to what the base rates are, maybe somewhat above those
11 his given his being above the base rates in his overall risk.

12 Q. Had he been to prison before?

13 A. At this point, I don't recall.

14 Q. Now, other than this case in South Carolina that
15 you've recently testified on, what other work have you done in
16 that state?

17 A. I testified in a case, and I don't recall if it was
18 earlier this year or sometime last year, I testified in a case
19 out there. And then I testified in another case out there two
20 or three years ago.

21 Q. What kind of case was the more recent of those two
22 cases? What was the charge?

23 A. The charge was capital murder. The cases in South
24 Carolina have all been capital murder cases.

25 Q. And what more recent case, what did that capital

1 A. I would not characterize it as "this testifying
2 business of yours." I am blessed by making a good income as a
3 forensic psychologist. The hourly rate that I receive is
4 substantial, and I'm very active as a psychologist, and so I
5 enjoy good income. Very little of that comes directly from
6 court testimony. Much of it from doing evaluations and a
7 review of research and that kind of thing, that may or may not
8 result in me going to testify.

9 Q. How much time did you have in the Segalla case?
10 Let's go at it that way.

11 A. Gee, I don't remember.

12 Q. You testified about it just less than two weeks ago.
13 You don't remember?

14 A. No, sir, I don't. I would have to, again, look at
15 the time sheets. They haven't been added up from that case,
16 to my knowledge.

17 Q. What's your best estimate? It's only two weeks ago
18 you testified about it. What's your best estimate of your
19 time?

20 A. Perhaps 50 hours.

21 Q. Okay. So that's, what, 10,500 dollars, something
22 like that?

23 A. Very closely. It may be some less than that. It's
24 hard for me to recall exactly how long I spent there and what
25 hours were engaged in that.

1 Q. And where had you testified immediately prior to
2 testifying in the Segalla case?

3 A. I had testified about the mental state at the time
4 of the offense in a case where I was appointed by the Court,
5 and that case was in a town north of Abilene, small town. I
6 don't recall the name of it now.

7 Q. Do you have your calendar with you?

8 A. Yes. On a PDA, but it's wiped out. It shows the
9 months, but each time I plug it in back in the office it takes
10 out the data from before today.

11 Q. Okay, fair enough.
12 How much time do you have in this case now, Doctor?

13 A. I apologize. My secretary's daughter was ill so she
14 couldn't calculate that for me before I came out here.

15 Q. I'm not trying to pin you down. Give us some --
16 you know what you've been doing.

17 A. Well, only in a very general sort of way. I think
18 that I perhaps spent 8 or 10 hours reviewing records and
19 working on this before I came out here.

20 Q. Right.

21 A. I came out here on Sunday, worked on it all of
22 Sunday, was here yesterday, and worked on it throughout the
23 day and was here for part of the proceedings, and then have
24 been here all day today.

25 Q. Do you charge for your sleeping time if you're in

1 another jurisdiction?

2 A. Oh, no, sir. It's only for the time I'm actually
3 looking and working on the case. I charge for travel time if
4 I'm not able to work on this file or another file while I'm
5 traveling, but I try to get somebody else to drive for me so
6 that I can be working on this case or another case while I'm
7 going down the road, and certainly do so when I'm on airplanes
8 to reduce that travel expense.

9 Q. Fair enough. I noticed on your curriculum vitae
10 that you did some publications back in 1977, 1978, 1981, and
11 those related to an examination of program text instruction
12 and social learning theory and parenting applications, and
13 that was what you called an unpublished master's thesis?

14 A. That's correct. That was not published in a
15 journal. That was a master's thesis that was a part of
16 fulfilling the requirements for my master's degree.

17 Q. So when it says research and publications, it was
18 more actually of research than publication?

19 A. Yes, sir.

20 Q. And then you did something on something called
21 Nocturnal Anuresis, and I think I know what that means. Is
22 that bedwetting?

23 A. When I was on an internship we ran a bedwetting
24 study for kids. Then we were using a pad and buzzer system to
25 teach kids not to wet the bed, had some success with it, and

1 then wrote that up in an article that was in a nonrefereed
2 journal. It was in "U.S. Navy Medicine," which is a non-peer
3 reviewed journal.

4 Q. And then in 1981 you published in something called
5 "The Journal of Learning Disabilities," an article dealing
6 with the effects of (inaudible) EEG Biofeedback on Verbal,
7 Visual, Spatial, Creative Skills and Learning Disabled Male
8 Adolescents?

9 A. Yes, sir. That was a doctoral dissertation that
10 ended up being published.

11 Q. So actually during that time, the only thing that
12 you published, other than your prescribed coursework, was that
13 one article dealing with bedwetting, is that right, because
14 the other two were master thesis or doctoral dissertations?

15 A. Yes, sir. Very often a doctoral dissertation does
16 not end up being submitted for publication --

17 Q. I understand.

18 A. -- because that takes some additional work, so that
19 wasn't in -- the dissertation was in fulfillment of my degree
20 requirement. Writing that up in a publishable form and having
21 it accepted was outside of the degree requirements.

22 Q. And then from 1981 to 1998, it appears you didn't
23 publish anything?

24 A. That's correct.

25 Q. And then you started publishing in areas involving

1 risk assessment of capital sentencing, problems with the
2 Mississippi death row inmate self-representation competency
3 proceedings.

4 A. The title isn't problems. It's an assessment of
5 their abilities with that function.

6 Q. An article entitled, "Don't Confuse Me With the
7 Facts: Common Errors in Violence Risk Assessment in Capital
8 Sentencing."

9 A. That's correct.

10 Q. "From Death to Life: Prison Behavior of Former
11 Death Row Inmates in Indiana."

12 A. Yes, sir.

13 Q. "Bias in Capital Sentencing Evaluations."

14 A. Yes, sir.

15 Q. "Capital Sentencing," is that the title?

16 A. Are you talking about -- is it a book chapter?

17 Q. Well, it's in presence, Cunningham, M.D. I guess
18 that would be Mark David, right?

19 A. Mark Douglas.

20 Q. Pardon me, I apologize. Because you're not a
21 medical doctor. It's not that kind of M.D.?

22 A. That's correct. I have a Ph.D.

23 Q. I understand. The point I'm making is your gears
24 shifted professionally when you started publishing extensively
25 in the area of capital punishment and this whole risk

1 assessment; is that right?

2 **A. In part. My gears very shifted significantly -- I**
 3 **was doing forensic work across the 1980s, and increasingly in**
 4 **the early 1990s, and made a deliberate shift in my practice**
 5 **towards forensic psychology. Very intensively began to study**
 6 **that arena and got board certified in 1995 and continued**
 7 **that -- that kind of reawakened my scientific and professional**
 8 **interest in the research from reading and preparing for that**
 9 **board certification exam. And at that point as I was**
 10 **assimilating extensive research materials, saw that there was**
 11 **a deficit in the research in terms of an integration of these**
 12 **materials, so began to write in that area and then do**
 13 **research, on this and other projects, and was invited to**
 14 **perform some research as well.**

15 Q. Okay. Now, these other states -- other than the
 16 State of Texas where you maintain licenses, am I correct that
 17 you have never practiced any type of conventional psychology?
 18 That means treating patients for any type of mental disorders
 19 in any of those states?

20 **A. Well, I was licensed in Connecticut, which I haven't**
 21 **kept that license active. That, I was involved in providing**
 22 **treatment, but in the ones that I'm currently licensed in, the**
 23 **only states that I provide clinical services are in Texas.**

24 Q. By the way, which of the states don't have death
 25 penalties that you're licensed in? Can you help me with that?

1 **A. To the best of my knowledge, all of these have the**
 2 **death penalty as a sanction that's available to their courts.**

3 Q. Of course, Connecticut doesn't have a death penalty;
 4 is that correct?

5 **A. I'm not familiar with whether Connecticut does or**
 6 **not.**

7 Q. Fair enough. Is it a fair statement to say that
 8 these licenses that you've obtained are related to your
 9 forensic practice, as opposed to your patient treatment
 10 practice?

11 **A. That's correct.**

12 Q. And perhaps some of the state's might require
 13 licensure -- do they require licensure for you to go up there
 14 and testify in all those states?

15 **A. It varies by state, so if I -- if I am asked to do a**
 16 **consultation from another state, then I have my office call**
 17 **the state board in that state and find out what their policy**
 18 **is about forensic psychologists from out of state going in and**
 19 **delivering services there. Sometimes they allow a temporary**
 20 **license, or even just a notice. They may allow you to provide**
 21 **services 10 days every 90 days, or 30 days a year, or they may**
 22 **say, no, you need to be licensed here in order to do that. So**
 23 **whatever the requirement is, I meet that.**

24 **In many of these states because I was returning**
 25 **there again, I was required, or it seemed most feasible to**

1 **seek licensure there. So, then I went through a full-blown**
 2 **licensing procedure of credentials and exams and that kind of**
 3 **thing in order to secure a license in that state.**

4 Q. When we talk about you having continuing education
 5 units that are required for licensure, you can use the same
 6 courses for all those different states? They'll all accept
 7 the same courses, right?

8 **A. Oh, yes, sir. It's not 60 hours, a hundred hours**
 9 **for each state, but I submit those same CE's to any of the**
 10 **states.**

11 Q. So the same number of hours will probably suffice
 12 for 50 states. You can take the most demanding state and
 13 satisfy that requirement. Every other state in the Union
 14 would also be satisfied?

15 **A. Expect perhaps for California, and there may be**
 16 **others. I know California requires CE's they have**
 17 **specifically certified.**

18 Q. And you're not licensed in California?

19 **A. No, sir.**

20 Q. How many of these states in which you hold licensure
 21 do you ever attend the annual meetings of their local
 22 associations? Any of them?

23 **A. No, sir.**

24 Q. So, despite the fact that you're licensed, you're
 25 not doing it like the psychologists that actually work in

1 those states; that is, going to local meetings or being
 2 members of the local associations, anything like that; is that
 3 a fair statement?

4 **A. Yes, sir. My CE's are almost all in the areas of**
 5 **forensic psychology. The local associations typically don't**
 6 **offer advanced training in that area, so I go to forensic**
 7 **meetings around the country.**

8 Q. And the reason for the licensure is to facilitate
 9 your business of forensic psychology?

10 **A. The reason for the licensure is because the states**
 11 **require that where my consultation has been sought, and so I**
 12 **am very careful to make sure I'm meeting that standard, which**
 13 **is relatively unusual for psychologists. Most of the time**
 14 **they just go in and testify.**

15 Q. All 11 of these states are death penalty states --

16 **A. Yes, sir.**

17 Q. -- that you're licensed in?

18 **A. Yes, sir. They all have provision for the death**
 19 **penalties.**

20 Q. And you're not licensed in any state that doesn't
 21 have a death penalty?

22 **A. No, sir. I've not sought that.**

23 Q. I understand that. Now --

24 **A. Let me pause on that, I am licensed in Illinois, and**
 25 **that state currently has a moratorium on the death penalty.**

1 Q. Why did you get licensed in Illinois?
 2 **A. Again, I was being called upon to provide**
 3 **consultations there, either in state or federal cases, and so**
 4 **I met their licensing requirements.**

5 Q. Did you ever get involved in an Illinois death
 6 penalty case?

7 **A. Yes, sir.**

8 Q. So whether they have one right now or not, that's
 9 not why you have a license. It's because they were doing it
 10 when you were involved?

11 **A. I got a license because I was going into the state**
 12 **to deliver forensic consultation services, and the state**
 13 **requires it.**

14 Q. In death penalty cases?

15 **A. My consultation was in a death penalty case, that's**
 16 **correct.**

17 Q. You know, Doctor, there are certainly all kinds of
 18 areas of expertise in our society. And yet, it's possible for
 19 people not educated in that expertise to be able to handle
 20 decision-making that experts might have some knowledge upon,
 21 also. Do you understand what I'm saying?

22 **A. Yes, sir.**

23 Q. I'm no meteorologist, but if I hear a cold front is
 24 coming in, I would know how to dress appropriately, for
 25 example. I might not know why it's going to drop 40 degrees

1 expert saying you're in a dangerous situation. We all know
 2 those things, don't we?

3 **A. Those kinds of things that have, in fact, permeated**
 4 **our personal experience, we would know.**

5 Q. And we know such things as -- don't you think we do
 6 that all the time? Don't you think we make decisions all the
 7 time that perhaps there are experts that devote their life to
 8 studying or learning, but we're still able to do that just
 9 fine as ordinary people and make regular decisions?

10 **A. Only because in our society ordinary people have a**
 11 **significant degree of education and awareness and**
 12 **sophistication. And so what's happened is, that expert**
 13 **knowledge has moved into the every-day awareness and arena.**
 14 **And so now you don't need an expert to tell you because you**
 15 **went to public schools and you've watched television and that**
 16 **information has become part of your own fund. It's not that**
 17 **ordinary people in some remote area of South America, or in**
 18 **Afghanistan or some place automatically know those things.**
 19 **It's become part of our knowledge based on our exposure.**

20 Q. And my point, Doctor, is that when looking at
 21 special issue number one, which asks whether there is a
 22 probability that the Defendant would constitute a continuing
 23 threat to society, that threat being by the vehicle of acts of
 24 violence, don't you think the average citizen has the ability
 25 to look at the evidence, evaluate the behavior of a particular

1 by sundown, but I would understand what that meant in a
 2 practical sense just by being a human being that lives in this
 3 society. Would you agree with that? We could do that, even
 4 if we're not meteorologists, right?

5 **A. In a sense because meteorological information is**
 6 **permeated all the way down to the average citizen. Now**
 7 **average citizens have what formally, 100, 200 years ago, would**
 8 **have had expert knowledge about fronts and movements and**
 9 **impending cold temperatures and that kind of thing. Now all**
 10 **of us get that by turning on our news and have some**
 11 **sophistication about it. So it doesn't -- we still watch the**
 12 **meteorologist tell us what's happening, but once he does, we**
 13 **have some sense of what to do with that based on our**
 14 **experience.**

15 Q. Maybe, maybe not. Maybe grandpa's sore toe would
 16 tell him about the cold front coming in. There may be other
 17 ways people could have understood that; do you understand?

18 **A. Not as reliably, and often, perhaps with a good deal**
 19 **of superstition and error. But, yeah, grandpa's toe, it might**
 20 **have been an indicator of dropping barometric pressure.**

21 Q. And if I go to the circus, and I'm watching the
 22 animal acts, and I'm watching the tigers perform, I'm no
 23 veterinarian, and I don't know much about animal behavior, but
 24 I, like anybody else in our society, if that tiger gets loose,
 25 we'd know to leave. We would understand that without an

1 defendant, evaluate that defendant's motives for the crime,
 2 the method for which he committed the crime, and the behavior
 3 surrounding that crime, both before and after, and make those
 4 determinations about the probability of future danger?

5 Don't you think -- I guess what I'm getting at is, I
 6 know you don't know this jury any better than you know the
 7 Defendant. I understand that. But don't you think that
 8 ordinary people that have been paying attention have the
 9 ability to answer that question by themselves based on
 10 evidence?

11 **A. Let me break down -- your question involves a number**
 12 **of subclauses.**

13 Q. Fair enough. Go ahead.

14 **A. I don't know the Defendant as well as if I had**
 15 **interviewed him or interviewed his family, but certainly I**
 16 **know much more about his background and history and records**
 17 **than I do about the Members of the Jury, who I know nothing**
 18 **about at all. So let me set that aside as one aspect.**

19 **If part of the evidence that the jury is considering**
 20 **is the evidence that's been made known to them today. Then**
 21 **with that in hand, that's become part of their knowledge base,**
 22 **that's why I think it's important to go through extraordinary**
 23 **detail of study, so that rather than take my word for it, they**
 24 **have the studies themselves to make some use of.**

25 **Now, otherwise what happens in prison and the**

1 behavior of capital offenders in prison and what the offense
2 has to do with behavior in prison, that is completely outside
3 of the knowledge and awareness or background of a juror, and
4 often even of psychologists that are not in this arena. So in
5 that case they would be -- would be sorely deprived and would
6 be making decisions based on intuitions that, in fact, might
7 not at all be supported by research data.

8 Q. So if they didn't have you here testifying, they
9 wouldn't be able to answer that question properly in your
10 mind?

11 A. I'm extraneous to that. They don't have to have me
12 here testifying, if there's not some vehicle for them to learn
13 about this information. If they don't have these base rates
14 and methodology about how you go about an accurate risk
15 assessment, then the likelihood that they will make an
16 assessment that is in substantial error is very great, just as
17 it is if I'm operating outside a knowledge of germs and
18 viruses. Gee, the decisions I make about handling things and
19 disease exposure and things, I can get myself into trouble
20 because it's -- I don't know about some of the information I
21 need to have.

22 Q. Let's talk about that for a second and we'll come
23 back in a minute to whether or not the jury has to have you or
24 somebody equally valuable -- with information that's
25 equally --

1 A. Again, it's not about me. It's about the data.

2 Q. I understand. They've got to have your data in your
3 opinion or they can't do their job properly?

4 A. Not my data. The data that exists. They need to
5 have it. These are all the studies about capital offenders.
6 This is data about the rate of homicide in prison. So it's
7 not my data. It's the data that exists at this point.

8 Q. They've got to have that in some form, or they
9 can't do their job, according to you?

10 A. Yes, sir, just --

11 Q. It's just yes or no.

12 A. Oh, yes, sir. Absolutely.

13 Q. Okay. Let's talk about viruses for a second.
14 Let's assume somebody is possessing a glass vial of active
15 small pox virus, okay?

16 A. Yes, sir.

17 Q. Is that small pox virus dangerous or not, in your
18 opinion?

19 A. Contained in the vial, the small pox is not
20 dangerous in and of itself. It simply is something that sits
21 in a vial.

22 Q. Okay.

23 A. The potential that it has, if released from the vial
24 and then structured and spread in the community, then it has
25 substantial hazard.

1 Q. So if a question is asked of you, Doctor, is this
2 material a dangerous material, what's your answer to that?

3 A. It's a potentially hazardous material. It's one
4 that needs to be handled carefully and with respect.

5 Q. If you're asked, is it a dangerous material, what's
6 your answer to that; yes or no? Is that a hard question?

7 A. Well, it is because the term -- the term
8 dangerousness almost infers that the small pox itself has
9 some will about where it goes. And the small pox simply exist
10 as an organism and so it is a hazardous material, whether
11 it's -- and it becomes dangerous in the hands of a terrorist.
12 It is a hazardous material as it exists by itself.

13 Q. Okay. Is the Defendant dangerous, in your opinion?
14 Is he a dangerous man?

15 A. Depending on what context he's in and under --

16 Q. Stop. Okay. I take that as a perhaps yes; is that
17 fair?

18 A. Yeah. Depending on the context, I suppose that
19 "perhaps yes" captures that.

20 Q. All right. For example, suppose he runs away right
21 out of this courtroom and runs out on our streets. Is he
22 dangerous?

23 A. In the midst of an escape, there is an increased
24 risk, yeah.

25 Q. Okay. Could you just answer it yes or no, is he

1 dangerous if he runs away right now?

2 A. Well, dangerous infers the notion that this is
3 something that belongs to persons all over. That is a
4 dangerous situation. A prisoner under an escape condition is
5 a hazardous and dangerous situation. Doesn't mean that
6 person -- otherwise we have somebody who's going from
7 dangerous to not dangerous, depending on kind of where they
8 are.

9 Q. Do you understand, other people might be able to
10 say, you know, that's -- I'm watching this witness, and that's
11 a pretty simple question. I think I could answer that, like a
12 jury. They could say, you know, I believe I can figure out
13 whether or not Cantu is a dangerous fellow if he takes off
14 running. Why are you having so much trouble with it, if
15 you're so helpful?

16 A. There are some questions that don't lend themselves
17 to easy answers, and so those will make me pause a little bit
18 more. And let me answer the question.

19 Q. What is --

20 A. This is --

21 Q. Excuse me just a minute, Doctor.

22 MR. GOELLER: Let him answer.

23 Q. BY MR. SCHULTZ: No. I'm going to let you answer
24 the questions responsively, but I'm not going to let you just
25 get up and lecture. So, if you can't answer that yes or no

1 tell me that.

2 **A. Let me --**

3 Q. You can't tell me whether he's dangerous or not if
4 he leaves this courtroom, just running away? Just tell me
5 that, and I won't force it any further.

6 **A. If he's running out in the community, there is
7 substantial risk of serious violence.**

8 Q. Okay. And we're not talking about the community on
9 him; we're talking about him on the community, right?

10 **A. That's correct.**

11 Q. And we're not talking about violence to property.
12 We're talking about violence to people?

13 **A. That's the risk, yes. It much increases the risk of
14 violence to people.**

15 Q. Just like -- now, that's a simple concept, isn't
16 it? That's not something that requires an expert to answer a
17 question like that, somebody that viciously murdered two
18 people running away, being dangerous? Couldn't we all figure
19 that out without you?

20 **A. Probably, yes, sir.**

21 Q. That's what I'm getting at. I mean, we know to put
22 on an overcoat when it's 20 degrees. We don't need a
23 scientist to come in and tell us the obvious about something
24 like that, right?

25 **A. Well, yes. In that case, that's pretty obvious, and**

1 **most of us have even read stories about escaped convicts and
2 that sort of thing and violence that might have been done by
3 one. So again, that's become part of our common fund of
4 knowledge, and you don't need me to illuminate that.**

5 Q. So depending upon the context of his activities, he
6 is a person likely, depending upon the context, to commit
7 future acts of violence?

8 **A. In right the context. This age, free community,
9 stoned, yeah, there is substantial risk. In prison,
10 monitored, TDC, the risk goes way down.**

11 Q. Now, in fairness, we're not anywhere near finished
12 talking about some of the cases you've testified in, but do
13 you think it's -- do you think if you and I wanted to do it,
14 we could create a system where nobody would be a danger in
15 prison? Do you think we can just about do that if we want to
16 take the steps and spend the money on that?

17 **A. At a high enough level of security, the likelihood
18 of somebody engaging in serious violence becomes
19 extraordinarily minimal.**

20 Q. For example, we could put a defendant in a
21 cast-iron suit, bolt him in, and put a bunch of guards on this
22 cast-iron suit, and when it's bedtime we just lie the suit
23 over and lie him on his back. When it's wake-up time we wake
24 him up, feed him through a hole in the mask of this cast-iron
25 suit and hose it out every now and then for hygienic reasons,

1 and he's not going anywhere, right?

2 **A. That's correct.**

3 Q. He's not going to hurt anybody, so if our society
4 has to take that extraordinary responsibility, the world's
5 most dangerous person could be handled just fine in a
6 cast-iron suit; don't you agree?

7 **A. Yes, sir. There is -- that would certainly contain
8 anybody.**

9 Q. Or, for example, we could sit them down in a chair
10 and put dynamite on them with a motion sensor, and say, if you
11 move, the dynamite is going to go off and you'll be dead and
12 that person would probably sit there for eight hours a day,
13 don't you agree?

14 **A. Yes.**

15 Q. Pretty extraordinary means, but we can certainly --
16 if the question is can we make somebody safe in prison,
17 probably so. All right?

18 **A. You're describing extraordinary to incredible kinds
19 of settings to do that. There are, in fact, mechanisms of
20 security within a correctional setting that do that before we
21 get to an iron suit and sticks of dynamite.**

22 Q. Put them on a small island out in the middle of the
23 ocean?

24 **A. We don't have to go that far, either. We've got
25 supermaximum custody and places where they're handled -- where**

1 **they can not even have to be handled by other people and get
2 their meals delivered to them and that kind of thing.**

3 Q. Anything else you'd want to volunteer and lecture us
4 about?

5 MR. GOELLER: I'd object to the sidebar. He's
6 engaging him, and he's baiting him, and he's trying to answer
7 the question. Iron suits and -- I didn't hear the blast them
8 off into the moon yet, but this isn't legitimate question and
9 answering. It's baiting. It's rhetorical. The iron suit
10 stuff has no evidentiary value at this phase of this trial,
11 Judge. Object to relevance.

12 THE COURT: I tell you what, I'll overrule the
13 objection. But lets get to the last -- if you got one more,
14 let's hear it.

15 MR. SCHULTZ: I just have a few more.

16 THE COURT: We'll give you two more.

17 Q. BY MR. SCHULTZ: We could make him comatose. We
18 could give him so much drugs that he stays unconscious for 24
19 hours a day. No human being would ever be able to stand,
20 right?

21 **A. No human being would be able to act violently then,
22 that's correct.**

23 Q. So we've got that. We've got the technology to do
24 it?

25 **A. Yes, sir.**

1 Q. And I'm not going to give Mr. Goeller his trip to
2 the moon. Instead, let's talk about construction sites. Have
3 you ever seen what they do with compressors at construction
4 sites at nighttime?
5 A. **Oh, yes, sir.**
6 Q. They hang them from a derrick, right?
7 A. **Oh, from the crane. I see them hanging out there.**
8 Q. We could do that, too. We could have a big crane,
9 and every day we'd lower him down for whatever he needs to be
10 lowered for. He stays suspended there at the penitentiary,
11 and he's not going to be a danger?
12 A. **He can't act out violently because he's suspended up**
13 **in the air.**
14 Q. Exactly. He probably can't climb up; he probably
15 can't climb down. He's just hanging there, right?
16 A. **Yes, sir.**
17 Q. And my point, Doctor, is if we interpret that
18 special issue to mean is there a way that a person could be
19 rendered undangerous in prison, who in the world would you
20 ever -- somebody -- any of us would know, would you ever say
21 is a probability of a future threat? Tell me somebody that
22 you think would ever be a probability of danger.
23 A. **The probability is not of danger. The probability**
24 **is of serious violence.**
25 Q. Okay.

1 A. **Every violent felon in prison is dangerous; that's**
2 **why they're in prison, and why they're going to be in prison**
3 **for a good while. The issue is not do they require**
4 **quarantine, do they require prison, because they're all**
5 **dangerous. The issue is what's the likelihood of him engaging**
6 **in acts of serious violence.**
7 **There is a level of preventive custody that would**
8 **hold anyone at a level where they would simply not be able to**
9 **engage in acts of serious violence, assuming that level of**
10 **custody was brought to bear and it was done -- and they**
11 **followed their protocol. That's achievable. That can be**
12 **done.**
13 Q. Okay. Name me a person that in your judgment would
14 probably be a threat of criminal violence in prison. Name me
15 a single person.
16 A. **Well, everybody who's in prison has some likelihood**
17 **of engaging in criminal violence. This Defendant has some**
18 **likelihood --**
19 Q. Doctor, excuse me.
20 A. **-- which is what I've described today.**
21 Q. My question was, name me a person who would probably
22 be?
23 A. **Someone who is more likely than not to be**
24 **dangerous -- to be violent in prison?**
25 Q. However you want to define probability. If that's

1 your definition, that's fine.
2 A. **Well, if you have somebody who, according to the**
3 **risk factors out of the Texas study who was --**
4 Q. You didn't understand me. Name me somebody,
5 somebody we would know. Make it Manson; make it Hitler, make
6 it Timothy McVeigh. Just name me somebody in your judgment
7 we'd all know that, here's somebody that is probably going to
8 be a threat to society in the future for criminal acts of
9 violence. Just name somebody.
10 A. **The cases are easier to describe than the names.**
11 **If someone has killed a correction --**
12 Q. Excuse me, Doctor. I didn't ask you that. If you
13 can't name somebody that you believe would qualify for a yes
14 answer on Special Issue Number One, just tell us that.
15 MR. GOELLER: Object to the form of the
16 question, Judge. Number one, name me. I think the doctor is
17 trying to answer. He may not have a name, but based on his
18 training and experience he may be thinking of somebody, but I
19 don't think it's a fair question.
20 MR. SCHULTZ: I told him if he couldn't do it,
21 just tell me he couldn't do it.
22 THE COURT: Overruled.
23 A. **Off the top of my head, I don't know that I can come**
24 **up with the name of someone who I think is absolutely going to**
25 **commit acts of serious violence in prison.**

1 Q. I didn't ask you about absolutely. I asked you
2 about probability, didn't I?
3 A. **Yes, sir. And then as I try to identify from you**
4 **exactly what probability you're wanting me to respond to, then**
5 **you tell me I'm being nonresponsive, so I'm feeling a little**
6 **boxed in.**
7 Q. I'm not trying to. I'm just asking -- if you can't
8 name somebody, tell me you can't name anybody. That's all I
9 want to know.
10 A. **There are cases I can identify. I can't tell you**
11 **the guy's name.**
12 Q. What about Hitler? Would Hitler be a low risk
13 factor to you?
14 MR. GOELLER: Again, Judge, relevance. When
15 we get into the specifics about Adolf Hitler, I just don't see
16 the relevance in the context of my client and these special
17 issues and this jury. I don't want to spend the rest of the
18 day talking about Hitler and McVeigh.
19 THE COURT: I'll overrule the objection.
20 MR. GOELLER: Yes, sir.
21 THE COURT: You may answer the question.
22 Q. **BY MR. SCHULTZ: Do you think Hitler is probably**
23 **dangerous if he were still here?**
24 A. **Hitler is obviously dangerous if he were still**
25 **alive. Is there a probability that he would commit acts of**

1 serious criminal violence himself? It depends on what level
2 of custody he's held at. Does he have access to other people
3 to give orders to or to develop an organization with?

4 There are some parameters under which he would
5 likely never, in fact, assault another inmate or a corrections
6 officer. His hazard is not so much his ability to personally
7 injure somebody, that he's going to be trying to stab somebody
8 up. His risk has to do with being a symbol to other people
9 and being able to orchestrate their activities.

10 That was -- he wasn't a criminal menace in the
11 community himself. It was his ability to affect influence and
12 leadership to others that was so horrendously destructive.

13 Q. So if you got licensed in Germany, maybe you'd find
14 yourself going over there to testify he was a low risk; is
15 that right?

16 MR. GOELLER: I'm drawing the line. I object
17 to that. That's just rhetorical. It's baiting. It's abusing
18 Dr. Cunningham. He's really badgering him. That's what it
19 is. Here we go down the Hitler trail again. There's no need
20 for it.

21 THE COURT: I'll sustain it.

22 Q. BY MR. SCHULTZ: Do you recall testifying in a case
23 styled the State of Texas versus Michael Wayne Hall in the
24 District Court in Tarrant County, specifically the 371st
25 Judicial District Court? Do you recall that case?

1 He and a co-defendant picked her up. The co-defendant, I
2 think, was the one who was driving. He was older. And drove
3 her to a remote area where she was shot in the calf, and I
4 think in the chest with a pellet gun and was killed. My
5 recollection is that they left her there. Then came back the
6 next day and may have taken her wallet from her and then fled
7 the area.

8 THE COURT: Let's me interrupt you.

9 Mr. Schultz, it's about five minutes to 5. We can
10 go to 6. If anybody has child-care problems, let me know, and
11 we'll break for the day. If not, I figure we probably ought
12 to get another hour in.

13 JUROR: I don't have a problem, but I would
14 need to make a phone call.

15 THE COURT: All right, sir. Then let's --
16 anybody else got a problem? All right. Let's step down for
17 five minutes and we'll come back and continue.

18 THE BAILIFF: All rise.

19 (Jury exits the courtroom.)

20 (Brief recess taken.)

21 THE BAILIFF: All rise.

22 (Jury enters the courtroom at 5:05 p.m.)

23 THE COURT: Please be seated. Mr. Schultz, go
24 ahead.

25 MR. SCHULTZ: Thank you, Judge.

1 A. Yes, sir.

2 Q. And now the last time I asked you about that, you
3 didn't remember the name Amy Robinson; is that right?

4 A. That's correct.

5 Q. But now you do?

6 A. Yes, sir. You identified she was the victim in the
7 case.

8 Q. She was a little retarded child in Fort Worth that
9 got done by the person you were testifying for; is that right?

10 A. Yes, sir. I described in my testimony that she was
11 developmentally disabled, as was Michael Wayne Hall.

12 THE WITNESS: I assume I'm still under the
13 order to talk about these other cases?

14 THE COURT: I think the question was do you
15 know her? Am I wrong? What was the question?

16 MR. SCHULTZ: I just asked him if he testified
17 in that case. That's as far as I got.

18 THE COURT: All right. You may answer.

19 A. Yes, sir, I testified in the case.

20 Q. BY MR. SCHULTZ: Now, let's talk about Mr. Hall.
21 What had he done to her?

22 A. Mr. Hall and a co-defendant had -- I think she was
23 on her way to work. She was developmentally disabled but was
24 still working. Mr. Hall was also mentally retarded and had
25 been employed at the same place, at a grocery store, I think.

1 Q. BY MR. SCHULTZ: Doctor, we were talking about your
2 testimony in Michael Wayne Hall over in Fort Worth; is that
3 right?

4 A. Yes, sir.

5 Q. That's a fellow, that among other things, used to
6 have violent, demonic bloody dreams, right?

7 A. I don't recall the specifics of his background in
8 detail.

9 Q. Could I refresh your memory when you said yes?

10 A. If you would make the transcript available to me,
11 I'd be glad to review my testimony and talk about it. I'm
12 sure that would refresh my recollection.

13 Q. Fair enough. Do you recall how much you received
14 for your testimony in that case?

15 A. It wouldn't have been for my testimony alone. It
16 would have been for all the work that I did on the case. I
17 don't have a break-out either way, for the time I spent on the
18 witness stand or my total hours in the case.

19 Q. Okay. Now, he was resentful of black people, wasn't
20 he?

21 A. I don't recall the specifics of the case. He was
22 not a White Supremacist candidate. As I said, he was mentally
23 retarded himself, and so was nobody's exhibit of racial
24 superiority.

25 Q. Well, you testified that he used to discuss with

1 his co-defendant shooting black people, and you said, yes, he
2 does discuss that. You don't remember that?

3 **A. No, sir. Again, I would want to review the**
4 **transcript.**

5 Q. Now, you testified that in your judgment there was
6 not a probability that he, Michael Wayne Hall, would have been
7 a continuing threat to society; that is, as in criminal acts
8 of violence. You testified to that. You remember that part,
9 don't you?

10 **A. No, sir, that would not have been my testimony,**
11 **that there was no likelihood at all of his having serious acts**
12 **of violence.**

13 **In this case, I would have described what the**
14 **studies are, and how those could be individualized to him.**
15 **There is always some possibility, and I try to assess that**
16 **possibility as accurately as possible.**

17 Q. Well, now, specifically because I just asked you
18 about this recently, that in some of his younger days he had
19 tried several times to build a fire in the schoolroom and did
20 build one just outside the building; do you remember that?

21 **A. No, sir.**

22 MR. SCHULTZ: Approach the witness, Your
23 Honor?

24 THE COURT: Yes.

25 Q. BY MR. SCHULTZ: I'll show you what's previously

1 (Laughter.)

2 Q. BY MR. SCHULTZ: Well, here we go. Here's 162 and
3 then it continues.

4 **A. This is 162. This is 162 with a number at the top.**
5 **This is 162 with a number at the bottom. These are not the**
6 **same transcript. This page does not go in this sequence.**
7 **These are all numbered at the top. This one is numbered at**
8 **the bottom. This is a transcript from another case.**

9 Q. This is not Michael Wayne Hall?

10 **A. Obviously not.**

11 Q. Then would that be Danny Thomas from Houston?

12 **A. Perhaps. You'd need to give me that transcript and**
13 **let me see those pages in context to give you some**
14 **determination of that.**

15 Q. Do you remember being asked about an individual who
16 jabs students and teachers with a sharp pencil?

17 **A. No, sir, not out of context. You've described that**
18 **as Michael Wayne Hall. It's clearly not him. If it's**
19 **somebody else, then I would need to see that transcript to put**
20 **that description in some context to be able to recall.**

21 Q. Fair enough. You indicated -- tell me then, who was
22 Daniel Dean Thomas?

23 **A. Daniel Thomas was a defendant in a Houston case.**

24 THE WITNESS: Again, Judge, I assume that I'm
25 still being instructed to describe other cases? Am I still

1 marked as State's Exhibit 356. I know I'm out of sequence,
2 but I'd rather not change it, if it's okay with the Court?

3 THE COURT: All right. As long as we don't go
4 back again.

5 MR. SCHULTZ: Yes, sir.

6 **A. This is referring, apparently, to a part of the**
7 **records that existed that were descriptive of him. If I could**
8 **have the several pages prior to this so that I could put this**
9 **in some context, as well as the pages afterwards, it would be**
10 **helpful to me.**

11 Q. Sure.

12 MR. SCHULTZ: Approach the witness?

13 THE COURT: Yes.

14 (Brief pause in proceedings.)

15 **A. I have -- the part of the binder that you've opened**
16 **here, I think, is another case because I've got 162 here, and**
17 **you've opened the binder to 162 here, and these pages don't**
18 **match up with each other. So I think you may have handed me a**
19 **page from one case while you've got the transcript open to**
20 **another case.**

21 Q. BY MR. SCHULTZ: Let's see.

22 MR. SCHULTZ: I'm sorry. May I approach the
23 witness, Judge?

24 THE COURT: Yes. Not so fast, Mr. Schultz.

25 MR. SCHULTZ: Yes, sir.

1 ordered to do that?

2 THE COURT: Well, it depends on the question
3 that's asked. I think the question was, who was Daniel Dean
4 Thomas. I don't see how that's privileged.

5 **A. He's a defendant that was on trial in Houston,**
6 **Texas.**

7 Q. BY MR. SCHULTZ: Okay. And when he was on trial,
8 did you testify?

9 **A. Yes, sir.**

10 Q. What had he done, if you recall?

11 **A. That I would be need to be ordered by the Court to**
12 **respond to.**

13 THE COURT: Okay. Well, I'll order you to
14 answer, if you feel I need to.

15 **A. Daniel Thomas had been convicted of abducting a**
16 **young woman with a co-defendant. They were at the victim's**
17 **residence, as I recall, smoking drugs and drinking. They**
18 **abducted the girl from that scene. She was bludgeoned to**
19 **death, had her body weighted with some rocks and was then**
20 **sunk -- the body was hidden in the river.**

21 **He was -- had been convicted of that and sentenced**
22 **to death. He then came back for another sentencing hearing**
23 **because of errors that had occurred in his trial, and there**
24 **was another sentencing proceeding after he had been on death**
25 **row for, gee, seven, ten years. It had been a good while, and**

1 then I was -- I was called to evaluate him and to testify at
2 that resentencing proceedings.

3 Q. BY MR. SCHULTZ: And did you testify about his
4 probability of future violence?

5 A. Yes, sir.

6 Q. And did you do a risk assessment of him?

7 A. Yes, sir.

8 Q. And what did you decide about him? What did you
9 tell that jury in Harris County?

10 A. Well, I don't recall all of the case. There were
11 several elements of it. At the time of the resentencing, as I
12 recall, he may -- was over 35 years old. He was on the older
13 side. He had been in prison for a total of about 20 years by
14 that point. He had served a prior offense, had no pattern of
15 serious violence in prison. On death row at that time, you
16 could work -- there was a work program, and he worked in a --
17 in a garment or kind of a -- they were making bags, like
18 briefcases, and he had worked there in that garment factory,
19 and -- in a work program and had handled large scissors and
20 had interaction with staff and was identified as one of the
21 better inmates on death row.

22 So his conduct of -- his behavior across his years
23 in prison, even after he had done this terrible offense, in
24 prison he was a well-managed, orderly inmate. As I recall he
25 had some psychiatric disturbance as well that had been treated

1 MR. SCHULTZ: Court give me a moment?

2 THE COURT: Yes.

3 Q. BY MR. SCHULTZ: You don't remember the part about
4 cutting baby bird's wings off and killing them? You don't
5 remember any of the part of that testimony related to that
6 case; is that right?

7 A. If I'm able to refresh myself with the transcript,
8 I'd be glad to take a look at that. Again, I would appreciate
9 it being, in fact, identified as being the transcript of his
10 proceedings.

11 Q. So you can't independently remember that he was the
12 person that did all those things as a juvenile?

13 A. Not independently, no. The details of many of these
14 cases, I no longer recall.

15 Q. Have you testified frequently in Harris County,
16 Doctor?

17 A. No, sir. I recall testifying in that case. I may
18 have testified in one or two others, but I've not been
19 frequently involved in Harris County.

20 Q. Do you remember who the lawyers were?

21 A. In this case?

22 Q. No, in the Daniel Dean Thomas case.

23 A. Yes, sir. That's what I'm -- I know the lawyers in
24 this case. In the Daniel Dean Thomas case, I think there
25 was -- one of the lawyer's name was Cornelius. I don't recall

1 while he was in prison and had some kind of strange ideas
2 about things.

3 Q. Was he a recidivist?

4 A. As I recall, this was not his first trip to prison.
5 I know he had been in prison for a very long time. Some of
6 the details I'd need the file in front of me, not because the
7 case is unimportant, but because my memory is limited, even
8 for very important cases, perhaps not unlike a cardiologist
9 that focuses very much on the surgery that's before him, but
10 may not remember that operation 18 months later.

11 Q. Okay. Well, you were asked the question, "Question:
12 Now we know that the Defendant is a recidivist, do we not?"
13 And you answered, "Yes, we do."

14 A. Again, if you'll show me the transcript and let me
15 see it in context, I'll be glad to try to respond.

16 Q. Okeydoke.

17 A. I apologize because I'm looking for something that
18 identifies this as the transcript in that case to be sure
19 that, as I'm answering questions about him from this
20 transcript, it, in fact, reflects that case. Can you help me
21 identify where in here I can find his name to verify at this
22 point that, in fact, we're talking about Danny Thomas?

23 Q. Sure.

24 A. Then let me look at the transcript and I'll try to
25 refresh myself on the testimony.

1 the other's name.

2 Q. There's a reference here to reviewing the statement
3 of Danny Dean Thomas. I think there's maybe a reference page
4 back to his momma, Rita. Mom, Rita Thomas; is that --

5 A. That doesn't ring a bell

6 Q. What about Danny Dean Thomas; does that --

7 A. Certainly, if it's in here. Can you show me where
8 that is?

9 Q. Sure.

10 A. Yes, sir. Regarding Danny Dean Thomas and his
11 fingerprints. All right, thank you.

12 And what was the portion that you wanted me to
13 review specifically in this?

14 Q. Well, for starters, do you recall testifying in your
15 judgment he was not a probability of future violence?

16 A. No, sir. I never make absolute statements that
17 someone simply is not a probability of acts of criminal
18 violence, unless that's been previously defined as being more
19 than a 50 percent likelihood, and, in fact, his risk
20 assessment is well below that, but never just in isolation
21 would I say somebody is not going to commit an act of serious
22 violence.

23 Q. Well, was he a probability of future violence,
24 Daniel Dean Thomas, at the time you testified?

25 A. If by probability you mean more likely than not to

- 1 **commit any assault whatsoever, his likelihood**
 2 **of committing an assault was less than 50 percent in prison.**
 3 **It was less than more likely than not.**
 4 Q. Do you remember testifying to that?
 5 A. **That's my recollection of my conclusion in that**
 6 **case, given the absence of serious violence in prison, even**
 7 **after this murder and given the period of time that he had**
 8 **been there in the work program that identified a proportional**
 9 **likelihood of assault, as well as likelihood of homicide,**
 10 **just like I've done here.**
 11 Q. Okay. Let me ask you again to review State's
 12 Exhibits 346 and 347 if you would.
 13 A. **(Complies.) I've reviewed this.**
 14 Q. Do you remember testifying to those portions?
 15 A. **Only with this in front of me. I would not**
 16 **otherwise have a clear recollection of it, no.**
 17 Q. Okay. Are you saying then that you don't have any
 18 recollection about the records indicating he tried to burn the
 19 schoolhouse down? You don't have any independent recollection
 20 of that?
 21 A. **Not separate from reading the transcript. There's a**
 22 **description of a number of disturbed behaviors. I think he's**
 23 **5 or 6-years-old. This is happening back in 1968.**
 24 Q. Right.
 25 A. **And he displays a number of behaviors that are**

- 1 **child.**
 2 Q. Threaten teachers' lives, brought bullets to school,
 3 pulled hand, pulled hair from teacher's head, cut teacher's
 4 hair with scissors. Often climbed out window and had to be
 5 physically restrained from doing so. Climbed on roof of
 6 building, jumped from limb of tree. Cut wings and tail of
 7 parakeet which had been brought to his teacher by other
 8 children as a gift from her children and then took the maimed
 9 bird home with him leaving the empty cage and feathers all
 10 over the room. Cheated in every game undertaken in the
 11 classroom. And you said, "That's correct." I think you said
 12 in here, "He was an extraordinarily disturbed little boy."
 13 A. **Yes, sir, he was.**
 14 Q. And then removed from that into the juvenile system,
 15 is that correct, with him?
 16 A. **Yes, sir.**
 17 Q. And he got in violent trouble with that?
 18 A. **Again, I would need to look at the transcript. I**
 19 **don't recall all the historical data of his development. I'm**
 20 **not disputing. I just don't recall.**
 21 Q. I understand. We're fine.
 22 Do you recall, among other things, one time he
 23 impersonated a peace officer?
 24 A. **Again, I'd have to see the transcript. There's a**
 25 **lot of his history that I don't personally recall.**

- 1 **evidence of a pretty profoundly disturbed kid.**
 2 Q. Jabs students and teacher with sharp pencil. You
 3 don't remember testifying that you read those records?
 4 A. **As I read these records, that refreshes me. But in**
 5 **terms of an independent recollection of the file at this**
 6 **point, I don't.**
 7 Q. Brought razor blade and knife to school and resisted
 8 violently when it was taken from him. Put hot matches to
 9 children's arms, put tacks in chairs, also in his own shoes
 10 and then jabbed people with them. Your answer was, "That's
 11 correct."
 12 A. **Yes, sir. That was a review of those Burbank School**
 13 **records at that time.**
 14 Q. Twisted teacher's arms and had to be bodily carried
 15 from the room and down the hall by the principal, kicking and
 16 shouting obscenities?
 17 A. **Yes, sir.**
 18 Q. Brought baby birds to school several times and
 19 killed at least one of them. That's correct?
 20 A. **That's what the transcript says, yes.**
 21 Q. Brought poisonous snake and black widow spider.
 22 Had to be forcibly restrained from turning them loose showing
 23 absolutely no sense of fear or realization of danger. The
 24 answer was, "That's correct."
 25 A. **He was a very disturbed kid, even as a very young**

- 1 MR. SCHULTZ: Approach the witness, Judge?
 2 THE COURT: Yes.
 3 A. **That's correct. It describes my recollection of**
 4 **whether or not he had impersonated a peace officer, and also**
 5 **an offense for theft in Florida.**
 6 Q. Were you asked, did he have weapons with him for
 7 both of those crimes?
 8 A. **Yes, I was, and he did.**
 9 Q. Okay. Now, he had been in and out of the pen. You
 10 testified that's your recollection?
 11 A. **That's my recollection, that he had more years -- my**
 12 **recollection is at the point that I was assessing him he had**
 13 **about 20 years in custody altogether, and all of that wasn't**
 14 **while on death row in the work program. And so my**
 15 **recollection is generally that he had been to prison before.**
 16 Q. Now, how many people are on death row, your best
 17 estimate, right now in Texas?
 18 A. **Around 500.**
 19 Q. Okay. Other than the obvious, do you think they all
 20 share certain things in common in terms of how they got there;
 21 is that correct?
 22 A. **Yes, sir. They've all been convicted of capital**
 23 **murder as that statute has existed since Jurick v Texas.**
 24 Q. And more importantly a trial jury has unanimously
 25 found that they probably were going to be a danger in the

1 future, right? Otherwise, we don't get to death row unless
2 there's a "yes" answer to that question.

3 MR. GOELLER: Objection to the form of the
4 question. That's a misstatement of the special issue. Again,
5 it's not "danger." It's beyond a reasonable doubt, the
6 probability to commit criminal acts of violence, and I just
7 want to make the record clear the jury is answering that
8 question and not some other.

9 THE COURT: Would you state the question more
10 technically?

11 Q. BY MR. SCHULTZ: Every one of those people on death
12 row has had a trial jury unanimously answer Special Issue
13 Number One "yes," is that true?

14 A. That's correct.

15 Q. Otherwise they don't get to death row?

16 A. That's correct.

17 Q. And that's a separate issue with whether or not
18 they've answered the mitigation issue "no," because if that's
19 answered other than no, then also they don't get to death row,
20 correct?

21 A. That's my understanding, yes. But that question
22 wasn't always there in its present form, as at this point in
23 time.

24 Q. I understand. But you testify on that very question
25 from time to time, don't you?

1 violent on death row and about 80 percent of them were not.
2 About the same thing as these other studies have shown,
3 whether they're on death row or in the general prison
4 population. But I don't know there has been a current study
5 of the folks that are on death row.

6 Q. Now, if we adopt your interpretation of Special
7 Issue Number One, which -- and correct me if I'm wrong, I
8 believe your interpretation is that it only relates to the
9 possibility of prison violence?

10 A. No, sir.

11 Q. It doesn't?

12 A. No, sir. There are two contexts that are relevant.

13 One of them is the risk of violence in prison. That's one
14 place he's going to be. The other would be on old-age
15 parole. Conceivably the issue of what if he escapes could be
16 identified, and in that case we would look at data on the
17 frequency with which murderers escape from TDC. That would be
18 a separate risk analysis and discussion about what would
19 happen then.

20 Q. But in your model, you exclude the fact that
21 special -- the possibility of the Special Issue Number Two as
22 for the personality of the individual to be identified in
23 whatever context of society he might present himself. In your
24 view, that's not possible?

25 A. As a method of reliable risk assessment, personality

1 A. Regarding mitigation?

2 Q. Uh-huh.

3 A. Yes, sir, I do.

4 Q. And you're familiar with the question, and you get
5 displayed it often and you will analyze it for a jury; is that
6 correct?

7 A. On occasion, yes.

8 Q. So you know exactly what I'm talking about?

9 A. Yes, sir.

10 What I was describing was, you talked about there
11 are -- also being a mitigation question in those cases, I'm
12 not sure that everybody who's on death row currently has -- in
13 fact, I'm confident they don't have the same mitigation
14 question at their trials that is before this jury because that
15 was modified and a result of Penry, and the series of Penry
16 decisions across the 1990s.

17 Q. Okay. In your opinion, what percentage -- what's
18 your data tell you about the probability of violence by those
19 people on death row in terms of assaults on an inmate, assault
20 on staff?

21 A. I don't think there is a study that tracks the
22 current -- that current sample of who's there on death row now
23 in terms of their frequency of violence against staff. There
24 is data that's been collected on prior death row samples that,
25 I think, demonstrated that about 20 percent of them were

1 does not predict risk of violence in prison, or 40 years from
2 now on old-age parole. And so as a -- as a technique that
3 would be brought to bear, it's simply an unreliable one.

4 Q. It was a bad question, and that's my fault. I
5 apologize to you.

6 My question is you exclude, from a construction of
7 Special Issue Number One, a consideration of whether or not he
8 would be safe in the free world society? You exclude that as
9 part of your framework of thinking?

10 A. The issue is not whether he would be safe in the
11 free world society. The issue is will he commit acts of
12 criminal violence? Now, logically the only context that I can
13 identify of where he's going to be to commit criminal acts of
14 violence for the next 40 years is in prison. So that's the
15 specific context that I investigate. The other context that
16 is a possibility is in the free community after 40 years on
17 parole, and so that's the other context.

18 Q. Can you read that from where you are?

19 A. Yes, sir.

20 Q. Okay. For starters, it doesn't say will he be a
21 danger in prison. It doesn't say that, does it?

22 A. No, sir.

23 Q. Doesn't say even whether there's a probability the
24 Defendant would commit criminal acts of violence in the prison
25 that would constitute a continuing threat to society. Doesn't

1 say that, does it?

2 **A. No, sir.**

3 **Q.** As a matter of fact, it doesn't even say -- it
4 doesn't even ask a jury afterwards to decide whether he will
5 or won't, does it?

6 **A. No, sir.**

7 **Q.** Because what it says is "would." Is there a
8 probability that the Defendant would commit criminal acts of
9 violence? That's what it says?

10 **A. Yes, sir.**

11 **Q.** Now, if we turn him loose right now on us in the
12 free world society, in your judgment is there a probability he
13 would commit criminal acts of violence that would be a
14 continuing threat to our society?

15 **A. Sure. I'd give the same answer about any violent
16 felon who we were just going to cut loose today. I would say
17 the same thing. Yeah, there's a risk of the guy committing
18 acts of criminal violence. That's why he needs to be locked
19 down.**

20 **Q.** I understand. But if what this question is asking
21 us to do is determine what his personality creates as a risk
22 for us, if that's what that question -- I understand you don't
23 like that construction. But what it's asking is would this
24 Defendant be a threat to society, which includes you and me
25 and the free world? If that's what it means, you'd say, yeah,

1 he is a threat, isn't he?

2 **MR. GOELLER:** Well, I object to that. That's a
3 misstatement of the law. All we know is that it includes
4 prison society. No court has ever addressed the free world.
5 And I would further object because if civilians go into the
6 joint to work, that's how the courts have said, in that
7 context, free world. But I object to this free world versus
8 prison society, and Mr. Schultz's interpretation of that
9 question, because that's not the law.

10 **THE COURT:** He's allowed to ask whatever
11 perspective this witness may have.

12 **MR. GOELLER:** Yes, sir.

13 **Q. BY MR. SCHULTZ:** So if he gets loose on us in the
14 free world right now, he is a threat of criminal acts of
15 violence, no doubt about this Defendant? Even though you've
16 never met him, you've got no doubts about that?

17 **A. No. At this point you've asked me three questions
18 that I have not yet answered, and a couple of them embed
19 clauses that I wouldn't necessarily endorse, and now I'm being
20 expected to say yes or no to what is now a pretty compound,
21 multi-question.**

22 **Q.** Okay.

23 **A. I guess I could say, "yes, yes, no, no, yes."**

24 **Q.** Okay. Let me start over.

25 **A. Let me try to address it, and I can talk about the**

1 **pieces. I recall them, I think.**

2 **Q.** All right.

3 **A. First, it's not a function of me not --**

4 **Q.** Hold on. If you can't answer my questions, I'll
5 give you others.

6 **A. Yes, sir. I can answer the questions. Let me
7 answer each part of the question --**

8 **Q.** No.

9 **A. -- because you've asked several of them embedded in
10 each other.**

11 **Q.** No. I'll just reask it.

12 **A. Okay.**

13 **Q.** Let's assume this Defendant is turned loose on
14 society right now today. Will you do that?

15 **A. Yes, sir.**

16 **Q.** All right.

17 **A. Society being the open community.**

18 **Q.** The open community where you and I and other people
19 live. Where there are people who are not incarcerated. Is he
20 a probability -- is his personality one that makes him a
21 probability of future violence?

22 **A. It's not a function of his personality. His drug
23 addiction, and -- his drug addiction, his weapons access, the
24 friends that he has, the lifestyle that he's had at times in
25 the face of that. If, in fact, those same factors come**

1 **together, and he's in the free community, then there is grave
2 risk, and there is a probability of future violence. If he
3 gets out and he maintained his Christian conversion, and he
4 never did a bit of drugs again the rest of his life, then the
5 likelihood of violence would not be over 50 percent. But put
6 it back into the same mix and we add in the same factors,
7 yeah, there's grave risk.**

8 **Q.** And do you think we need a psychologist to tell us
9 that about him?

10 **A. Oh, no, I don't think so. If we're going to cut him
11 loose today, then I think, in fact, that is in the fund of
12 knowledge that a jury would have.**

13 **Q.** Okay. But that's not true of all of us. I mean,
14 we're not all probably going to commit criminal acts of
15 violence in the future. It's not inherent in all mankind or
16 humankind, is it?

17 **A. There is some likelihood that any of us can behave
18 violently. If you add in cocaine and methamphetamine abuse,
19 then the likelihood of any of us exhibiting criminal violence
20 probably becomes more likely than not. So it depends on what
21 factors we add into that mix.**

22 **Q.** Whose responsibility is it when we take cocaine and
23 methamphetamine and get more violent? Whose responsibility is
24 that, in your mind?

25 **A. There is some element of personal responsibility in**

1 that somebody chooses the cocaine or methamphetamine. They
 2 don't choose to have an addictive biology, and so, although
 3 they are making a choice and they have responsibility for that
 4 choice, it's a choice that's made with -- as that then takes
 5 hold of them. It's made with faulty biology, and if you've
 6 grown up without guidance, then the structures that you need
 7 to make good choices have also been deficient.

8 But in terms of the law, you've got the cocaine on
 9 you, or you're taking it, then you're criminally responsible.
 10 If we're talking about moral culpability, how God sorts it out
 11 some day, I don't know. I'm glad that I'm not the guy to do
 12 that because I'm not sure how I'd weigh out biology and
 13 background and choice, and those are issues that I'm glad for
 14 God to look at.

15 Q. Let's talk about the Defendant and his treatment of
 16 women. How does he treat women? You've studied him, you know
 17 about him, you're here testifying about him. How does he
 18 treat women?

19 A. Well, first let me qualify that my knowledge is
 20 limited to what I've heard in these proceedings and reading
 21 some things about his criminal record and that sort of thing.

22 Q. Yes.

23 A. At some time he seems to treat women pretty well,
 24 because he does attract women to him, and they end up living
 25 with him and that kind of thing. Under the influence of drugs

1 and alcohol, he can be profoundly abusive and has abused women
 2 that he's been involved with. My understanding is that's in
 3 the context of drug and alcohol abuse that it occurs. But he
 4 is violent in a domestic relationship with drugs and alcohol
 5 there.

6 Q. Okay. So it's your opinion that approximately 80
 7 percent of the people that are on death row don't have any
 8 significant probability of violence in the prison setting; is
 9 that your opinion?

10 A. No, sir. I said that 80 percent of them had been
 11 violent on death row, even when death row includes some access
 12 to other inmates and work programs and that kind of thing.

13 As we take people off of death row, and we track
 14 them in the general prison population, then we have 20 to 30
 15 percent who are violent in the general prison population. We
 16 have 70 to 80 percent who are not. We have one percent that
 17 kill another inmate. We have just an extraordinarily low
 18 proportion that have killed a staff member. And so it kind of
 19 depends on what violence are we talking about. But the
 20 majority of them, based on our best estimate if you took them
 21 off death row at this point, based on these other studies, 20
 22 to 30 percent of them would be violent; 70 to 80 percent would
 23 not.

24 Q. How violent is death row then?

25 A. About the same as the rest of the prison population.

1 Historically -- now, they're locked down, but historically
 2 they've matched pretty much the same kind of statistics as our
 3 capital offenders in the open prison population. I'm not sure
 4 that we've got good data.

5 Well, Sorenson collected data that he compared for
 6 the 19 -- I'm sorry -- Mark (inaudible) and Sorenson
 7 collected data that they compared for 1986.

8 Q. Okay.

9 A. Otherwise, there's not much research that has
 10 tracked the general prison population across 20 or 30 years
 11 the way we've tracked capital offenders. So that makes
 12 comparability a little difficult. We can compare one-year
 13 rates. It's much harder for us to compare multi-year rates.

14 Q. My question -- when you say it's generally the same
 15 as in the general population, how violent is death row;
 16 violent for criminal acts of violence? How much of it goes
 17 on?

18 A. My recollection is that -- and I would need to maybe
 19 look at some of the research that I've reviewed with this.
 20 It's -- about 20 percent of the guys on death row have behaved
 21 violently on death row; about 80 percent of them have not, and
 22 that's pretty similar to the behavior of capital offenders in
 23 the open population.

24 Q. So if we accept your construction of Special Issue
 25 Number One, about 80 percent of those people probably don't

1 belong on death row. The jury has been wrong 80 percent of
 2 the time; is that right?

3 A. I wouldn't characterize the jury as being wrong. I
 4 can tell you what our best estimate is of what would happen to
 5 them if they were released at this point.

6 Q. Right. But everybody on death row had a yes answer
 7 to Special Issue Number One?

8 A. Yes, sir.

9 Q. And 80 percent of them, according to you, have not
 10 committed acts of violence?

11 A. Yes, sir. It would appear that the jury's estimates
 12 were exaggerated given as we follow-up capital offenders over
 13 time. Some of the time the jury would be right. It looks
 14 like their estimates of that, though, were pretty
 15 substantially exaggerated based on what we see when we
 16 actually follow those people in prison. They saw more risk
 17 than, in fact, was there.

18 Q. Or maybe the juries considered the evidence that you
 19 or someone in your capacity has offered, and said that really
 20 doesn't relate significantly how to answer that question.
 21 That's possible, too, isn't it?

22 A. Sure. It's possible that they discarded the data.
 23 Most of those cases did not have -- as they were presented
 24 didn't have this data as a part of them. This kind of base
 25 rate testimony and these kind of statistical analyses were not

1 a part of the sentencing proceeding of most of those. But the
2 jury might have heard it in some cases and decided to set it
3 aside.

4 Q. Now, we could talk about statistical frequency of
5 acts happening or risks. We do that all the time in our
6 lives. We do it by such things as not wanting to drive on New
7 Year's Eve because we perceive a higher rate of accidents?

8 A. Yes, sir.

9 Q. People understand such things, right?

10 A. Yes, sir. If they have -- they make probability
11 judgments all the time. That's what makes this important, to
12 try to illuminate the probabilities that they're now going to
13 apply in this situation.

14 Q. That's if all we're concerned about is prison
15 society. If that's what we're limiting ourselves to, then --
16 if that were really the issue, then perhaps this discussion
17 would be significant, but maybe it isn't. Maybe we're not
18 limited to prison society. You don't agree with that, though?

19 A. For the issue to make sense as a special issue, it
20 would seem to need to identify where he's actually going to
21 be. If the issue is the free society right now, then all
22 capital offenders are a probability of committing acts of
23 serious violence in the community, unless they're a
24 quadriplegic or something, or made themselves comatose at the
25 time of the offense. So the way the statute is created is --

1 A. Yes, sir.

2 Q. And you understand that they have a view of not only
3 his crime -- his capital murder, but also his general
4 personality. You understand all that?

5 A. I understand they have a lot of data in this case
6 that I haven't had, that may illuminate his general
7 personality or it may not. It's my understanding there hasn't
8 been expert testimony of an analysis of his personality and
9 in-depth interviews and testing and that sort of thing that
10 would illuminate that issue. But I understand they know a lot
11 about the case that I don't know about and have heard about
12 some of his activities that I haven't heard about.

13 Q. They know what he did because they've already ruled
14 on that; he's been found guilty. Do you understand?

15 A. Yes, sir.

16 Q. They know how he did it and what his mental state
17 was because they found him guilty of intentionally causing the
18 death of two people.

19 A. They know enough about his mental state to have
20 found him guilty of the offense; that he wasn't insane at the
21 time.

22 Q. Okay.

23 A. How much -- how his mental state was affected, less
24 than insanity, whether or not he was intoxicated, on cocaine,
25 or what else. I don't know if they've reached a determination

1 after Furman is that it narrowed the class of offenders who
2 were eligible for the death penalty. It narrowed them from
3 everybody who commits a capital eligible offense to those
4 smaller portion that are going to be a substantial risk of
5 violence.

6 Now, if substantial risk of violence or probability
7 of violence means in the community right now, then it doesn't
8 narrow the issue at all. It only has a narrowing function if
9 we look at it in the context they're going to be in.

10 Q. Anything else?

11 A. I was just trying to be responsive to your
12 characterization of my opinion about how this fits in with
13 this special issue.

14 Q. Okay. You still can't tell us whether Hitler would
15 be dangerous down there, by the way? You can't even do that
16 for us?

17 MR. GOELLER: Judge, I think the doctor talked
18 about that. He answered that question; asked and answered,
19 times four.

20 THE COURT: Yeah. I'll sustain the objection.

21 Q. BY MR. SCHULTZ: Are you saying -- you understand
22 that the jury knows this Defendant. They've been watching
23 this trial, hearing people under oath, both on direct and on
24 cross-examination. They've looked at materials that you've
25 not been furnished?

1 of that. But they found there was sufficient mental state to
2 be guilty of the offense.

3 Q. Okay. And having heard all of that and having heard
4 the nature of his crime, you're still of the opinion they
5 can't say a person who would commit a crime, such as this,
6 would or would not probably be a danger to society in the
7 future? You don't think they could do that without you?

8 A. It's not a function of me, number one. Number two,
9 it's not function of him being a danger. It's a function of
10 how likely it is that he's going to commit an act of criminal
11 violence. I think if they don't have this data, if they
12 don't have the base rate data, if they don't know about how
13 capital offenders act in prison, if they don't know the rates
14 of violence in Texas prisons, then they can't -- if they don't
15 know about risk assessment, they can't reliably answer that
16 question based on offense information.

17 Q. Well, they can't reliably answer that question,
18 according to you and according to how you construe that
19 question, because you construe it to only apply to the prison
20 setting?

21 A. Let me answer both of those questions that you've
22 embedded. One of them, it isn't according to me. It's
23 according to the best -- the most scientifically, reliable
24 risk assessment methodology we have. And that methodology
25 says if you base a risk assessment on the offense of

1 conviction and on inferences that you make about his
2 personality, you are going to go in harm's way and you've got
3 grave potential for error.

4 Number two, it's not my construction of the special
5 issue. As a scientist, as I would attempt to address this
6 issue, I have to specify the context. I've identified that
7 context as, number one, prison; number two, the community 40
8 years from now, so I'm now addressing those two. If the
9 context is, he's walking out the door today, then clearly the
10 risk assessment is very high.

11 Q. Okay, okay. Now, there are a lot of things we do
12 that might involve statistical risk. Are you saying it's not
13 important to know the individual to decide whether that risk
14 is enhanced or not?

15 A. Sometimes things you know about the individual allow
16 you to bring different statistics to bear. And so, for
17 example, if what we knew about the individual was he had three
18 acts of serious violence in prison, I'd say now he falls into
19 a whole different group of offenders, and his likelihood of
20 additional violence in prison is pretty high because we've now
21 taken that individual information about him, and we've
22 identified what that means in terms of group data, and now
23 we're bringing that group data to bear.

24 That's all any of us know about human behavior, is
25 how those features have been represented in the group of

1 his mind. It's pretty straightforward.

2 MR. GOELLER: I object to the relevance, if
3 that's the question.

4 THE COURT: I'll overrule the objection.

5 Q. BY MR. SCHULTZ: How many of those 75 or 80 would
6 have qualified for a yes answer, according to you?

7 A. Are you defining probability as more likely than
8 not? See, I never respond with a yes answer or a no answer to
9 anybody. I always describe this in terms of --

10 Q. Please stop.

11 A. -- what's the probability of what level of violence,
12 in what context?

13 MR. SCHULTZ: Judge, would you please instruct
14 him to just quit his oratory. If he can't answer the
15 question, all he has to do is say he can't answer it. He
16 doesn't have to give a speech.

17 THE COURT: Just -- do you recall the
18 question, sir?

19 A. Yes, sir. As you've asked the question, it's
20 impossible for me to answer.

21 THE COURT: All right.

22 Q. BY MR. SCHULTZ: You can't -- there's not a single
23 one of those 75 or 80 capital murderers you've ever evaluated
24 that would not qualify -- that would qualify for a yes answer;
25 is that what you're telling us?

1 people that we have known before or read about, and we take
2 that group and we apply them to this individual.

3 Q. How many capital murderers have you worked with,
4 either testifying for them or in response to their lawyers'
5 questions or consulting? How many total?

6 A. I've not testified for any of them. I've testified
7 in a number of the proceedings about them.

8 Q. Okay.

9 A. In terms of evaluations of capital offenders,
10 perhaps 70 or 80.

11 Q. How many of those have deserved a yes answer,
12 according to you, in Special Issue Number One?

13 A. Well, many of those didn't involve Special Issue
14 Number One. They were in other states that didn't have --

15 Q. I didn't ask you that. How many of those people --

16 MR. GOELLER: Well --

17 Q. BY MR. SCHULTZ: How many people would deserve a yes
18 answer to Special Issue Number One?

19 MR. GOELLER: Objection to the form of the
20 question. It can't be answered, and I think the doctor
21 alluded to it. It's multi-states. It may not involve Special
22 Issue Number One.

23 MR. SCHULTZ: Doesn't matter. I'm just asking
24 him about these people he's examined that are capital
25 murderers. How many of them would qualify for a yes answer in

1 A. I never evaluate someone in terms of whether they
2 require a yes or a no answer to that question.

3 Q. I'm asking you now. Of those people that you've met
4 and dealt with, I'm asking you now, how many of those would
5 qualify, not whether you thought about it at the time? I'm
6 just asking you now. How many would qualify for a yes answer,
7 of all those capital murderers you work with?

8 A. Again, unless we identify the probability of what
9 type of violence, then it's not possible for me to do the math
10 for you.

11 Q. Well, do (sic) me this, Doctor, consider every
12 single one of those 75 or 80, and I'll ask you whether there
13 is a probability that any of those defendants would commit
14 criminal acts of violence that would constitute a continuing
15 threat to society? Is there a single one of those people
16 that, in your judgment, you can answer yes?

17 A. Again, I can't answer it with the way it's phrased
18 without some broader -- without elaborating on that, I can't
19 answer it the way you've asked.

20 Q. That's phrased the same way the jury is going to
21 have it phrased, and you're here to help them, aren't you?

22 A. Yes, sir. I'm not trying to invade their province
23 to do their job for them. I'm trying to illuminate what the
24 probabilities of various severities of acts of violence are.

25 Q. Here's the question. You see that question. You're

1 familiar with it?

2 **A. Yes, sir, I am.**

3 Q. You testify about it all the time in Texas and

4 sometimes other states in very similar (inaudible)?

5 **A. Not all the time, sir, but I've testified about this**
6 **on occasions before.**

7 Q. Do you understand the question? Are you able to
8 understand it?

9 **A. Yes, I am.**

10 Q. Does it, in your mind, make sense to you?

11 **A. Yes, sir.**

12 Q. And you understand that's a yes or no question, and
13 I know you have trouble answering yes or no questions; you
14 told us.

15 MR. GOELLER: Objection to sidebar.

16 Q. BY MR. SCHULTZ: Those are your words. You have
17 trouble with yes or no questions, right?

18 **A. No, sir. If the questions are in kind of, "Do you**
19 **still beat your wife," then I have trouble with yes or no,**
20 **because then embed some other issue that's a part of them.**

21 Q. How about this issue, that's right out of the law.

22 **A. Yes, sir.**

23 Q. You've examined 75 or 80 capital murderers, right?

24 **A. Yes, sir.**

25 Q. How many of those capital murderers would receive a

1 **also don't recall the total number of hours that were involved**
2 **in the evaluation. I was not just paid to appear to testify,**
3 **but also for the evaluation that I did in preparation for it.**

4 Q. By the way, do you make more money if you testify
5 than if you don't?

6 **A. No, sir. I have more -- I have more forensic work**
7 **and consultation than I can get to, so if I weren't here**
8 **today, I'd be doing some other work.**

9 Q. So it doesn't matter to you?

10 **A. No, sir.**

11 Q. Do you recall testifying that you made -- in 1999,
12 you made approximately 200,000 dollars in your forensic work?

13 **A. I don't recall the testimony.**

14 Q. You don't recall that?

15 **A. No, sir, I don't recall the testimony. I don't**
16 **recall how much I made in 1999.**

17 Q. You don't?

18 **A. No, sir. My wife and my office assistant track**
19 **that, but I don't keep up with it very well.**

20 Q. You certainly make a very good living doing that,
21 right?

22 **A. Yes, sir. I'm blessed to make a very good living as**
23 **a psychologist, and as a forensic psychologist.**

24 MR. SCHULTZ: Approach the witness, Judge?

25 THE COURT: Yes.

1 yes answer to that question from you?

2 **A. I don't know that I can answer. If I can describe**
3 **just in a sentence, I will.**

4 Q. No. If you can't answer, just tell me you can't.

5 **A. I can't answer the question.**

6 Q. Do you understand how other people might be able to
7 answer a question like that yes or no? They might have the
8 skills that you don't seem to have; do you understand that?

9 MR. GOELLER: Objection, Judge. That's

10 sidebar, "skills you don't seem to have." This isn't one of
11 his people he puts up on the who -- "Name the Doper." This is
12 a professional man. He doesn't need to be treated like that.

13 It's not Carlos Gonzalez sitting up there.

14 THE COURT: Let's do this, if you've got an
15 objection --

16 MR. GOELLER: Objection to the baiting, and I
17 object further, Your Honor --

18 THE COURT: Please rise.

19 MR. GOELLER: I'm sorry, Judge.

20 -- badgering this witness.

21 THE COURT: All right. I'll sustain the
22 objection.

23 Q. BY MR. SCHULTZ: How much were you paid when you
24 testified in Michael Wayne Hall?

25 **A. I don't recall my hourly rate at that time, and I**

1 Q. BY MR. SCHULTZ: Let me show you State's Exhibit
2 349. I refreshed you with that a few days ago. Do you
3 remember when we talked about that then?

4 **A. I don't remember looking at a transcript at that**
5 **time. Can you tell me which case this is?**

6 Q. Uh-huh. You don't recall me asking you about that?

7 **A. I recall you asking me about some income, but I**
8 **don't recall looking at a transcript. You were more reluctant**
9 **to bring the documents up for me to review at that time.**

10 Q. I didn't because I was --

11 **A. Oh, yes, sir, because I asked you about it. Could**
12 **I look at the whole document? At that time you said, I**
13 **couldn't, I was just supposed to respond to the one page you**
14 **brought me.**

15 Q. Here we are in State of Texas v Michael Wayne Hall.
16 This is the transcript. See the page (inaudible).

17 **A. Okay.**

18 Q. You all right?

19 **A. Yeah.**

20 Q. Now, you're still on that page for me, on 349?

21 **A. Yes, sir.**

22 Q. It talks about the 200,000 dollars. That was your
23 testimony that's how much you made, right?

24 **A. I described that I really didn't know what**
25 **percentage of my practice that capital work involved; that I**

1 would anticipate that the total billings was in excess of
2 200,000 dollars.

3 Q. Isn't that what I just asked you?

4 A. I don't recall what you asked.

5 Q. Okay. And how much were you making on that
6 particular case, that Hall case?

7 A. Again, I don't recall the total number of hours that
8 I had involved in that.

9 MR. GOELLER: Judge, I'm sorry. I've really
10 got to object as to what he made on other cases. I mean, you
11 know, granted, it's not free. So what relevance to this jury
12 does it have what this man's private finances are and what he
13 made on a case? And furthermore a district judge has approved
14 just about every penny of it, I would guess. But anyhow, I
15 object to the relevancy at this point.

16 THE COURT: Well, I tell you what, he can
17 impeach him for bias, so I'll allow him some leeway. You
18 know, let's get to the heart of this one and go on to the next
19 one.

20 Q. BY MR. SCHULTZ: You indicated you didn't
21 remember -- you didn't remember what your hourly rate was
22 then?

23 A. No, sir.

24 Q. Check State's 348, and tell me if that will refresh
25 your memory on what your hourly rate was then.

1 A. Oh, it's the same as now; 210 an hour.

2 Q. You said you didn't remember how much time you had
3 in that case. Does that refresh how much time you had in that
4 case?

5 A. I couldn't give them an exact number even then. I
6 didn't know for sure. I estimated then that it was 75 or 80
7 hours.

8 Q. Let's take the lower number, let's say 75 times 210,
9 so we're over 15,000 for that testimony?

10 A. For my total work on that case, the evaluation -- I
11 spent about 75 hours, assuming that's accurate. And again, I
12 don't have an independent recollection now of just how much
13 time it involved.

14 Q. Well, it's your testimony, isn't it?

15 A. At that time I said, I can't tell you for sure. I
16 don't have a timesheet here. This is my best guess.

17 Q. Okay. Did that have anything to do with you
18 changing and starting to publish in the area of capital
19 punishment in 1998, which is about same time you started
20 testifying in capital cases?

21 A. No, sir. I first began to testify in a capital case
22 in 1995, and that was as a result of becoming board certified,
23 and that coming to the attention of some attorneys who then
24 said, gee, this guy is board certified. Let me call him and
25 ask him to do a risk assessment. So at that point, I began to

1 gather this statistical information together that's necessary
2 to do that in a reliable way.

3 Q. Now, don't you think a lot of what you presented
4 here is just common sense for anybody who lives in this world?

5 A. Oh, no, sir. The common sense is that somebody
6 that does something violent in the community, they're going
7 to be real violent in prison. Common sense is there's all
8 kinds of mayhem committed by almost everybody in prison.
9 Common sense is very different.

10 Q. So the simple answer to my question is no?

11 A. Oh, yes, sir. No, it's not common sense.

12 Q. We'll go to those DOJ risk factors, if you would,
13 please. Get back to Power Point.

14 A. Certainly. Which ones are you looking for?

15 THE COURT: Say, you know what, it's right at
16 about 6:00 I think, and I can go more if you-all can, but we
17 can also quit for the day. So hearing no response, I think we
18 probably better quit. All right. Then -- although I may
19 have drawn the wrong inference.

20 At any rate, I'll admonish you, as I've done
21 repetitively, this being a teaching tool, both for me and for
22 jurors. And so I will tell you that you are instructed that
23 it is your duty not to converse among yourselves or with
24 anyone else on any subject connected with the trial, or to
25 form or express any opinion thereon until the cause is finally

1 submitted to you. And I'll see you at 9:00 tomorrow morning.

2 THE BAILIFF: All rise.

3 (The jury exits the courtroom at 6:00 p.m.)

4 (End of Volume 45.)

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1 REPORTER'S CERTIFICATE
2 THE STATE OF TEXAS *

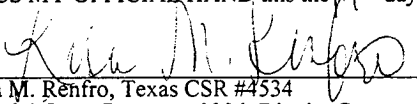
3 COUNTY OF COLLIN *

4
5 I, Lisa M. Renfro, Official Court Reporter in and
6 for the 380th District Court of Collin County, State of Texas,
7 do hereby certify that the above and foregoing contains a true
8 and correct transcription of all portions of evidence and
9 other proceedings requested in writing by counsel for the
10 parties to be included in this volume of the Reporter's
11 Record, in the above-styled and -numbered cause, all of which
12 occurred in open court or in chambers and were reported by me.

13 I further certify that this Reporter's Record of the
14 proceedings truly and correctly reflects the exhibits, if any,
15 offered by the respective parties.

16 I further certify that the total cost for the
17 preparation of this Reporter's Record is contained in
18 Volume 53 and was paid by Collin County.

19 WITNESS MY OFFICIAL HAND this the 4th day of
20 January, 2003.

21 
22 Lisa M. Renfro, Texas CSR #4534
23 Official Court Reporter, 380th District Court
24 Collin County, Texas
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