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IN THE UNITED STATES DISTRICT COURT

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FOR THE NORTHERN DISTRICT OF TEXAS

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DALLAS DIVISION

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BOBBY LEE HINES (3: 06-CV-320-BD

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Peti ti oner,

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VERSUS (DALLAS, TEXAS

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NATHANIEL QUARTERMAN,
Director, Texas Department
of Criminal Justice,
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Respondent. (August 26, 2009

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VOLUME 1

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TRANSCRIPT OF EVIDENTIARY HEARING

14

BEFORE THE HONORABLE JEFF KAPLAN

15

UNITED STATES DISTRICT MAGISTRATE JUDGE

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A P P E A R A N C E S:

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P R O C E E D I N G S

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Volume 1 - Evidentiary Hearing

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THE SECURITY OFFICER: All rise and come to order.

4

THE COURT: Be seated, please.

5

Good morning.

6

This is cause number 3:06-CV-320, Bobby Lee Hines versus Nathaniel Quarterman.

8

We're here on an evidentiary hearing on the Atkins claim in the context of a successive 2255 petition.

10

Mr. Parks and Ms. Brandt, you're here for the petitioner?

11

12

MR. PARKS: Yes, Your Honor.

13

THE COURT: And Ms. Callaghan and Mr. Corcoran for the respondent?

14

09: 06: 30 15

MS. CALLAGHAN: Yes, Your Honor.

16

THE COURT: Is the petitioner ready to proceed?

17

MR. PARKS: We are, Your Honor.

18

THE COURT: Respondent?

19

MS. CALLAGHAN: Yes, Your Honor.

20

THE COURT: First order of business is the respondent's motion to compel the production of an expert report, and I have reviewed the motion and the response filed by the petitioner.

21

22

23

24

Ms. Callaghan, the petitioner is representing that there is no new expert report, that the only expert report that

25

09:07:00 1 exists is the one previously prepared by Dr. Kessner and I
2 assume that's the May 13th, 2004 report that was attached as
3 an exhibit to the habeas petition.

4 MR. PARKS: It is, Your Honor.

5 THE COURT: All right. In view of that
6 representation, what's the respondent's position on their
7 motion?

8 MS. CALLAGHAN: First, Your Honor, the respondent's
9 position is that that expert report does not comply with the
10 Federal Rules of Civil Procedure, Rule 26(b) or (a)(2)(B) and
11 it doesn't list any of her expert qualifications. It doesn't
12 give the underlying data which is required by the rule.

13 So while I have no issues with her not going outside the
14 four corners of that report with regard to what her expert
09:07:38 15 opinion is, my position is that that report is not sufficient
16 to comply with the rule.

17 THE COURT: You don't think you waited maybe a
18 little too long to raise that issue?

19 MS. CALLAGHAN: Well, Your Honor, I was under the
20 impression that I was getting an expert report. And I have
21 copies of e-mails that were exchanged between Mr. Parks and
22 myself that demonstrate that.

23 THE COURT: Okay. I would be happy to see those.

24 So you were led to believe that Dr. Kessner was going to
25 provide another expert report?

09:08:01 1

MS. CALLAGHAN: Yes, Your Honor.

2

THE COURT: Let's go ahead and mark this as Respondent's Exhibit 1 to the hearing on the motion to compel.

3

Just give me a minute to review this.

4

MS. CALLAGHAN: And, Your Honor, I can direct you to the -- the date, so you don't have to read through all of it.

5

This is all the e-mail exchanges that I have with Mr. Parks.

6

7

THE COURT: I'm just interested in the relevant ones.

8

9

MS. CALLAGHAN: On an e-mail dated August 11th, which should be about halfway through, I apologize for these not being Bates stamped.

09:08:34 10

11

THE COURT: Are they in chronological order?

12

MS. CALLAGHAN: They are in chronological order, Your Honor.

13

THE COURT: Okay. August 11th, 09?

14

MS. CALLAGHAN: Yes, Your Honor.

15

There's actually three that are dated that. It's the last one. The time is 5:58 p.m.

16

THE COURT: Okay. Any other e-mails?

17

MS. CALLAGHAN: There is one other e-mail, it's dated August 18th, 2009, and the time on that is 5:33 p.m.

18

09: 09: 26

1

It's about five pages back.

2

THE COURT: Okay. Hold on.

3

I'm sorry, the time on that is what?

4

MS. CALLAGHAN: 5:33 p.m.

5

THE COURT: Okay. Anything else?

6

MS. CALLAGHAN: I'm prepared to argue whether or not Rule 26 applies in this case.

8

THE COURT: Let me hear Mr. Parks' response to the argument that the respondent was led to believe there would be another expert report and specifically have him respond to the contents of these e-mails.

10

11

12

MR. PARKS: Thank you, Your Honor.

13

I guess my initial take is that -- is that it's kind of an example of no attempted did good -- good deed going unpunished.

09: 10: 33

15

16

The context of all of these is that we were getting near to the time of the hearing. I was in a death penalty trial that began August 10, Broadnax case that just finished up on Friday. Dr. Kessner was involved in that trial. The State's witness, Dr. Price, was involved in that trial. And the reason these e-mails are all afterhours is because I was trying to do what Ms. Callaghan wanted done in the context of the time and the -- and the ability to do that.

17

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I did intend -- I did tell her that Dr. Kessner did not have another report, had not intended to do another report,

25

09: 11: 21 1 she had not done any additional testing and would only
2 basically be defending what she had said to begin with in
3 2004 and responding to the new testing of Dr. Price.

4 And, quite frankly, because of the press of time, Dr.
5 Price -- I'm not saying he was late getting his report to us.

6 THE COURT: When did Dr. Price give you his --

7 MR. PARKS: I'm thinking we got Dr. Price's report
8 sometime the week of August 10.

9 MS. CALLAGHAN: If I may, Your Honor, he -- it was
10 August 12th.

11 THE COURT: Okay.

12 MR. PARKS: And that left us very little time in
13 the context of what we were involved with to -- to do what I
14 didn't believe we were required to do but in a spirit of
09: 12: 08 15 cooperation was -- was trying to do. And we just weren't
16 able with the --

17 THE COURT: All I want to know, whether you're
18 required to or not, did you --

19 MR. PARKS: Yeah.

20 THE COURT: -- because if you agree to do it
21 whether you're required to is kind of a moot point.

22 MR. PARKS: In my mind my intention was we will do
23 it if we can.

24 THE COURT: Okay. What -- what's Dr. Kessner going
25 to tell me today?

09: 12: 33

1 Is she going to tell me anything that's not in her
2 report?

3 MR. PARKS: Nothing that is not in her report, I
4 believe is fair to say, with the exception of responding to
5 Dr. Price's testing, which is no more than to address the
6 issues in his report.

7 THE COURT: Which the respondent does not have the
8 benefit of a report on?

9 MR. PARKS: That's true.

10 THE COURT: Okay. All right.

11 Ms. Callaghan, do you have any objection to Dr. Kessner
12 testifying to the first aspect of what Mr. Parks says she's
13 going to testify to, which is nothing more than what she said
14 in her report?

09: 13: 07

15 MS. CALLAGHAN: No, Your Honor, I do not.

16 THE COURT: Okay. So the issue is whether or not
17 she can respond to Dr. Price's report.

18 MS. CALLAGHAN: Correct.

19 THE COURT: You know what, I'll continue the
20 hearing, if you want a written report.

21 MS. CALLAGHAN: I would --

22 THE COURT: That's your option.

23 MS. CALLAGHAN: Right. And I understand that.

24 THE COURT: I'm not going to exclude the testimony.
25 I've got to tell that you in -- you know, in the context

09: 13: 26 1 of a death penalty case, your roles are now kind of reversed
2 because it's the respondent that's usually in a hurry to get
3 these resolved and the petitioner who benefits from any
4 delay. But, you know, look, we've waited this long, and in
5 the interest of fairness if you want me to continue the
6 hearing and -- I don't know for how long, that kind of
7 depends on how long it's going to take Dr. Kessner to review
8 the report, and quite frankly what the court's docket looks
9 like, which I can't tell you off the top of my head, or we
10 can proceed here today.

11 So I'll leave it up to you.

12 MS. CALLAGHAN: Your Honor, if I may suggest --
13 suggest another option.

14 THE COURT: Okay.

09: 14: 07 15 MS. CALLAGHAN: To allow us to proceed today and do
16 post-hearing depositions of Dr. Kessner based on the
17 information that she -- that -- discusses with regard to Dr.
18 Price's report, if we feel that that's necessary after the
19 hearing.

20 THE COURT: Well, that's fine. We'll proceed
21 today. We'll hear what Dr. Kessner has to say, based upon
22 what she says then we can revisit the issue. Is that what
23 you're suggesting?

24 MS. CALLAGHAN: Yes, Your Honor.

25 THE COURT: Very well.

09: 14: 33

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MS. CALLAGHAN: Thank you, Your Honor.

2

THE COURT: Any other preliminary housekeeping matters?

3

4

MS. CALLAGHAN: Your Honor, a couple of other things.

5

6

One is we would like to invoke the rule.

7

THE COURT: Rule -- rule's invoked.

8

Any witnesses who will be testifying in connection with this evidentiary hearing are to adjourn to the hallway before the testimony begins.

9

10

You're not to discuss your testimony or the other witnesses' testimony with each other. And the attorneys will instruct their witnesses on the effects and consequences of violating the rule.

11

12

MS. CALLAGHAN: We would like our experts and, of course, the petitioner's experts to be exempt from the rule.

09: 15: 10

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14

THE COURT: Any objection?

15

MR. PARKS: No, Your Honor.

16

THE COURT: They will be exempt.

17

For record purposes your expert is Dr. Kessner and any other expert?

18

19

MR. PARKS: Just Dr. Kessner.

20

THE COURT: And Ms. Callaghan your expert is?

21

MS. CALLAGHAN: Our experts are Dr. Price and Dr.

22

Hughes. We also are prepared to submit expert testimony with

09: 15: 31 1 regard to one of the exhibits, the letters, but Mr. Parks has
2 agreed to the admissibility of those and that it is Mr.
3 Hines' handwriting, so we -- I don't anticipate calling him.

4 THE COURT: Okay. So Dr. Hughes and Dr. Price will
5 be exempt from the rule.

6 MS. CALLAGHAN: Thank you, Your Honor.

7 And the other issue that I wanted to bring before the
8 court is that we anticipated that this hearing was going to
9 take a full two days.

10 THE COURT: I hope that's not right.

11 MS. CALLAGHAN: And that's what I heard.

12 I heard that you had something tomorrow afternoon and so
13 I wanted clarification --

14 THE COURT: Well, I have something tomorrow
09: 15: 59 15 morning. If we don't conclude today, and I'm prepared
16 to go late today if that's what it takes, then we'll
17 reconvene probably at 1:00 o'clock tomorrow afternoon.

18 MS. CALLAGHAN: Okay. Okay.

19 THE COURT: Okay?

20 MS. CALLAGHAN: Thank you, Your Honor.

21 THE COURT: I've got the respondent's exhibits, Mr.
22 Parks.

23 Do you have a bunch of exhibits that you intend to
24 introduce?

25 MR. PARKS: No, Your Honor.

09: 16: 23

1

THE COURT: No exhibits.

2

MR. PARKS: No.

3

THE COURT: All right. Have you reviewed the respondent's exhibits?

5

MR. PARKS: I have.

6

THE COURT: Do you have any objection to any of the respondent's exhibits?

8

MR. PARKS: Not with the understanding with Ms. Callaghan that there is listed some telephone interview conversations that I believe they're not offering, and that would be the only thing --

09: 16: 53

15

THE COURT: Well, what I would like to do to try and save some time is to preadmit those exhibits that are not objected to. And I've got the respondent's exhibit list, 1 through 36.

16

Mr. Parks, if you can just identify for me by number what exhibits you object to, we can preadmit all the other ones.

17

18

19

MS. CALLAGHAN: They aren't on there. They are ones we had sent him because we had given them to our expert. They aren't on there.

20

21

22

MR. PARKS: With that understanding I have no objection to any of the other exhibits.

23

24

THE COURT: All right. So 1 through 36 of respondent's exhibits are admitted at this time.

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MS. CALLAGHAN: Your Honor, one other thing.
Mr. Parks and I had discussed stipulating to the experts being experts, and we both agree that that will be --
THE COURT: Very well.
MR. PARKS: Yes, sir.
THE COURT: All right. Mr. Parks, you may proceed.
If you wish to give a brief opening you may do that as well.
MR. PARKS: We will waive opening, Your Honor.
THE COURT: All right.
MR. PARKS: And Ms. Brandt will call our first witnesses.
THE COURT: Ms. Brandt.
MS. BRANDT: The first witness is Glenn Hines.
THE COURT: Okay. Mr. Hines.
MR. PARKS: May I be excused --
MS. BRANDT: I'm sorry. It's Rita Drennan. Excuse me.
MR. PARKS: Let me --
THE COURT: So everybody did what I told them to do.
You may.
MR. PARKS: And I'll explain the rule to them.
THE COURT: Very well. Thank you.
Ms. Drennan, if you would come up here.

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You're going to be seated right up here.
Raise your right hand to be sworn.
(Witness sworn.)
THE COURT: Be seated, please.
Be sure and speak into the microphone so we can hear you.
Ms. Brandt, you may proceed.
MS. BRANDT: Thank you, Your Honor.
DIRECT EXAMINATION
BY MS. BRANDT:
Q. Could you state your name for the record, please.
A. Rita Drennan.
Q. And could you tell us how you know Bobby Hines?
A. Bobby is my son.
Q. And do you have other children besides Bobby?
A. Yes, I do. I have four others.
Q. Could you tell us the order of birth of those children?
A. The first one is Glenn.
Q. And how much older than Bobby is he, please?
A. Glenn was born in '68 and Bobby was born in '72. About four.
Q. And the next child?
A. Tina.
Q. And what's the age difference?
A. Two -- two years.

09: 19: 42 1

Q. Two years.

2

And then who was the next in the birth order?

3

A. Bobby.

4

Q. And do you have any other children?

5

A. Yes.

6

Q. And could you please tell us the name and the age

7

difference?

8

A. Willie is 18 months younger than Bobby.

9

And my youngest son Lee is more like 11 years younger.

10

Q. 11 years, not months?

11

A. Um-hum.

12

Q. You have had experience with all of your children in

13

terms of toilet -- toileting them, speaking, when they could

14

walk; is that true?

09: 20: 30 15

A. Yes.

16

Q. And did you see any difference between Bobby's abilities

17

and those of, say, for example, Glenn and Tina?

18

A. Yes.

19

Q. And how would you characterize Bobby overall in his

20

development?

21

A. He was much slower.

22

Q. Okay. And if you would explain to the court what we

23

mean by slower.

24

Could you tell us, Glenn was four years older than

25

Bobby, what did you see as Glenn's -- when did Glenn begin to

09: 21: 08

1

Speak?

2

A. When he was about 18 months old.

3

Q. And how about Tina?

4

A. Around the same age.

5

Q. And how about Bobby?

6

A. He was around two and a half.

7

Q. So he was two and a half years before he was able to

8

Speak?

9

A. Um-hum.

10

Q. And by that, are you talking about saying momma and dada

11

or --

12

A. No. He could say -- say one word sentence, like momma,

13

daddy --

14

Q. When he -- before two and a half --

09: 21: 48

15

A. Yes.

16

Q. -- years.

17

A. He was two and a half before he could say a whole

18

sentence.

19

Q. So subject/verb/object, a very simple sentence, he was

20

two and a half years as opposed to the 18 months for your

21

other children?

22

A. Yes.

23

Q. How about as far as Willie and Lee in terms of their

24

abilities to speak?

25

Were they slow also?

09: 22: 11 1

A. No.

2

Q. Okay. How about walking?

3

How old was Glenn and Tina when they were able to walk?

4

A. All of my children, except for Bobby, were walking and

5

potty trained by the time they were one year old.

6

Q. And how old was Bobby when he was first able to walk?

7

A. He was about 15 months old.

8

Q. And potty training?

9

A. About three.

10

Q. Three years?

11

A. Three years old.

12

Q. Three years old.

13

Okay. Children learn to tie their shoes and button

14

their shirts and do things like that -- let me back up one

09: 23: 04 15

second.

16

Did Bobby live with you from the time he was born until

17

the time he was 18?

18

A. No, he did not.

19

Q. Okay. What time period did he live with you?

20

A. From the time he was born until he was 4 or 5.

21

Q. So all of these events with respect to talking, walking,

22

toilet training, you have personal knowledge of those and you

23

saw those events?

24

A. Yes, I did.

25

Q. Okay. Let me go back to the question I had asked you

09: 23: 36 1 before about buttoning his shirt, tying his shoes.
2 Did you teach him to do that?
3 A. I tried, but it was actually Willie that taught him how
4 to tie his shoe.
5 Q. All right. Let's stop a second there.
6 Willie you said is 18 months younger than Bobby.
7 A. Right.
8 Q. And how old was Willie when Willie taught Bobby to tie
9 his shoes?
10 A. He was about 2.
11 Q. Or three?
12 A. Two and a half.
13 Q. Two or three?
14 A. Between 2 and 3.
09: 24: 18 15 Q. Okay. And so Bobby was about four and a half years,
16 thereabouts, 4, and was Bobby able to tie his shoes when
17 Willie taught him?
18 A. When Willie taught him.
19 Q. How long did it take him?
20 A. It took some doing, because when I wasn't trying to
21 teach him Willie was.
22 Q. So it took him --
23 A. It took --
24 Q. Days, months, weeks?
25 A. Months. Months.

09: 24: 45 1 Q. Months for Bobby to -- to learn how to tie his shoes?
2 A. Yes.
3 Q. And how long did it take Willie to learn to tie his
4 shoes?
5 A. He picked it up real quick.
6 Q. Within a matter of weeks?
7 A. Yes.
8 Q. Okay. Did you have any other occasion at -- at the age
9 of 4 or 5 you were no longer -- or -- or Bobby was no longer
10 present or in the same household that you were in; is that
11 correct?
12 A. Yes.
13 Q. So you lost contact with him on a day-to-day basis.
14 A. Yes.
09: 25: 19 15 Q. And when was the next time that you had some daily
16 contact with him?
17 A. When he was a teenager.
18 Q. About what age?
19 A. About 15, 16 years old.
20 Q. 15 or 16.
21 And how long were you around him at that point in time?
22 A. About three months.
23 Q. Okay. And could you tell us what your observations of
24 Bobby was at that time.
25 Was he still slow?

09: 25: 38 1 A. He was still slow. He was very quiet. Didn't have any
2 friends. Even after he started school, he still did not make
3 friends, and he would stay in his room when he came home from
4 school.

5 Q. Okay. Did you ever hear other kids talk about Bobby?

6 A. Yes.

7 Q. Or call him names or --

8 MR. CORCORAN: Objection, Your Honor, to the extent
9 it's hearsay.

10 MS. BRANDT: It's what she heard.

11 THE COURT: Well, I don't need a response --

12 MS. BRANDT: Excuse me.

13 THE COURT: -- unless I ask for one.

14 She can testify to that question without going into the
09: 26: 20 15 substance of what she heard.

16 Objection is overruled.

17 Proceed.

18 BY MS. BRANDT:

19 Q. Did you hear other children make fun of Bobby?

20 A. One time, yes.

21 Q. And did the reason they make fun of him was because he
22 was slow?

23 MR. CORCORAN: Objection, Your Honor. Same
24 objection.

25 THE COURT: That's sustained.

09: 26: 38 1

BY MS. BRANDT:

2

Q. Okay. Do you know whether or not Bobby had any head injuries?

3

4

A. No. I know that when I was pregnant with him his dad would beat me in the stomach.

5

6

Q. His dad would beat you in the stomach?

7

A. Yes.

8

Q. And after Bobby was born did you ever observe his dad interact with Bobby?

9

10

A. Yes.

11

Q. And what did you see?

12

A. Him trying to hit him, in the head.

13

Q. Did he in fact hit him in the head?

14

A. Yes.

09: 27: 23 15

Q. And could you describe that, please, for us?

16

A. His father would come home drunk, angry. He would go ask him a simple question like do you love your mom. If Bobby said yes, he'd back hand him across the head.

17

18

19

Q. And how old was Bobby at the time?

20

A. About a year old.

21

Q. And did this continue over a period of years?

22

A. Yes. It was constant.

23

Q. It was constant.

24

Okay.

25

MS. BRANDT: I have no further questions.

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THE COURT: Cross-examination?

MR. CORCORAN: Thank you, Your Honor.

CROSS EXAMINATION

BY MR. CORCORAN:

Q. Ms. Drennan, my name is Joe Corcoran. I represent the State of Texas and I just want to ask you a few questions.

Do you -- do you remember in 1984 approximately where Bobby and his sister Tina came to live with you-all and your -- and your new husband?

A. Yes.

Q. Can you explain the -- what caused that to happen in 1984?

A. It's when his -- when my daughter was -- was raped.

Q. And do you remember, there was a home study done by a social worker when they were attempting I think to place Tina in your home?

Do you remember talking to somebody named Cynthia Alexander about that time?

A. No. I talked to a lot of people I don't -- don't remember their names.

Q. Well, do you remember -- let me ask you this.

Do you remember telling the social worker that there was no history of abuse between their father and Bobby Hines and Tina Hines?

A. No, I don't remember that.

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MR. CORCORAN: Okay. Your Honor, this document is part of the State's habeas application. It's a document attached to the state habeas. We didn't make it an exhibit but I have courtesy copies that I would like to ask the witness about where this particular narrative came from.

THE COURT: Well, identify the document.

MR. CORCORAN: It is State's Exhibit 9.

THE COURT: No. What is it?

MR. CORCORAN: It's a home study of Rita Drennan produced by a social worker by CPS related to placing Tina in their home.

THE COURT: Are you seeking to use it for impeachment purposes?

MR. CORCORAN: Possibly, depending on what she says. I'm not trying to introduce it for impeachment purposes, it's already before the court --

THE COURT: Well, ask your question.

MR. CORCORAN: Okay. The question is can I --

BY MR. CORCORAN:

Q. You didn't -- did you not say that or you don't remember saying that?

A. I don't remember saying that.

Q. Is it possible that you said that?

A. Could be.

Q. Would looking at a document that reflects what your --

09: 30: 17 1 the interview help refresh your recollection?

2 A. It might.

3 MR. CORCORAN: Could I approach the witness?

4 THE COURT: You may.

5 BY MS. CALLAGHAN:

6 Q. This is Petitioner's Exhibit Number 9 to the original
7 state habeas corpus.

8 On the second page can you read the second full
9 paragraph on the second page?

10 A. Where I dropped out of high school?

11 Q. I think -- well, the -- hold on a second.

12 I think I gave all my copies away.

13 "After the --" do you see where it says the ages 14 --
14 the sentence after the age 14, age 12, can you read the
09: 31: 29 15 sentences after that sentence?

16 A. "Although Ms. Drennan reports that her husband was an
17 alcoholic --"

18 MR. PARKS: The question I believe is to read it to
19 herself to see if it refreshes.

20 THE COURT: I've got it right here. It's part of
21 the record. Go ahead and read it aloud.

22 MR. CORCORAN: Sure. Thank you, Your Honor.

23 Can you begin reading that.

24 THE WITNESS: Ms. Drennan reports that her husband
25 was an alcoholic and abusive towards her. She states that he

09: 32: 08 1 was never abusive toward the children. She was unaware of
2 any problems with possible sex abuse in the family.

3 BY MR. CORCORAN:

4 Q. Does that help to refresh your recollection about what
5 you might have told the social worker?

6 A. I may have told the social worker that.

7 Q. Let me ask you this.

8 Is it -- is it possible that you -- you told the social
9 worker that in order to get Tina out of that situation, to
10 make it more likely that she would be placed in your home?

11 A. I would -- I did -- I wanted Tina in the home with me,
12 yes.

13 Q. I'm sorry, so yes that may have been a motivation?

14 A. It could have been a motivation.

09: 32: 50 15 I really don't remember making the statement, but
16 obviously I did.

17 Q. Okay. Let me ask you one other question.

18 Do you -- did you ever tell any state worker that
19 Bobby -- Mr. Bobby Hines could walk -- could talk at 12 and a
20 half months and walk at 10 months?

21 A. No.

22 Q. Okay.

23 MR. CORCORAN: One minute, Your Honor.

24 That's all we have, Your Honor.

25 THE COURT: Any redirect?

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25

MS. BRANDT: We're --

THE COURT: All right. You may step down.
Are we through with this witness?

MS. BRANDT: We are, Your Honor.

THE COURT: The respondent through with this
witness?

MS. CALLAGHAN: Yes, Your Honor.

THE COURT: Okay. You can remain in the courtroom
if you want.
Call your next witness.

MS. BRANDT: Glenn Hines.

THE COURT: Mr. Hines, if you would come right up
here, sir.
Right up here.
Raise your right hand to be sworn.
(Witness sworn.)

THE COURT: You may be seated up here.
Be sure and speak into the microphone so we can hear
you.
You may proceed.

DIRECT EXAMINATION

BY MS. BRANDT:

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

A. Glenn Thomas Hines.

Q. Mr. Hines, what is your relationship to Bobby Hines?

09: 34: 35 1 A. He' s my brother.
2 Q. And i s he younger or older?
3 A. He' s younger.
4 Q. And do you have any other sibl ings?
5 A. I do.
6 Q. Coul d you --
7 A. I have a sister that' s younger to me and then a --
8 Q. Hang on one second. One question at a time.
9 What is the name of your sister?
10 A. Tina Hines.
11 Q. And is she younger than you?
12 A. Yes, she is.
13 Q. By how many years?
14 A. Two years.
09: 34: 57 15 Q. And next in line is Bobby?
16 A. Yes.
17 Q. And what other sibl ings do you have?
18 A. A younger brother.
19 Q. Hi s name?
20 A. Willie Hines.
21 Q. And how much younger is he than you?
22 A. Eight years.
23 Q. And do you have any other younger sibl ings?
24 A. I have a hal f-brother.
25 Q. A hal f-brother.

09: 35: 23

1 Could you tell the court, please, were you in the same
2 household or raised in the same household as Bobby was from
3 the -- from the time he was born?

4 A. Yes, I was.

5 Q. And until what time -- or was there any interruption
6 where you were not present?

7 A. There was interruptions. I went to the state school and
8 Bobby also went to the state school.

9 Q. When -- okay. So from the time that Bobby was born
10 until what period of time were you both in the same household
11 as youngsters?

12 A. I was 12.

13 Q. And Bobby was?

14 A. 8.

09: 36: 20

15 Q. So you had an opportunity to interact with him on a
16 daily basis; is that true?

17 A. Yes.

18 Q. Okay. Could you tell us, please, what you thought about
19 Bobby's abilities?

20 Was he slow? Was he quick to pick things up?

21 A. He was very slow.

22 MR. CORCORAN: Object, Your Honor. Rule 602.
23 She's not laying a predicate so we can determine how he knows
24 the information he's communicating. It could be based on
25 hearsay.

09: 37: 04

1 THE COURT: Sustained. Just go ahead and lay your
2 predicate. All we know is that they lived in the same
3 household until he was 8 years old. Go ahead and flesh that
4 out.

5 BY MS. BRANDT:

6 Q. Did you -- did you interact with him on a daily basis?

7 A. Yes, I did.

8 Q. And were you able to see him when he engaged in
9 different activities?

10 A. Yes.

11 Q. And what kind of activities did you see him engaged in?

12 A. Like the four of us kids would play games, like I
13 remember we would play like softball in the backyard, and
14 like Bobby was different than Willie.

09: 37: 32

15 Q. Okay. Let's hang on a second.

16 How old was Bobby at the time, when you played softball?

17 A. 6.

18 Q. And how old was --

19 A. All through our life.

20 Q. Well, but let's take this one particular instance.

21 A. Okay.

22 Q. He was six years old and you were playing baseball. How
23 old was Willie?

24 A. 4.

25 Q. Okay. And what was your observation about the game

09: 37: 55

1 playing and -- and --

2 A. I was trying to show him --

3 Q. -- Bobby's ability?

4 A. -- how to play, all of my siblings, you know, explain
5 the game and stuff. And Bobby --

6 Q. Did you -- did you explain the game to Willie?

7 A. I did.

8 Q. And did Willie understand?

9 A. He did.

10 Q. Even though he was 4 years old?

11 MR. CORCORAN: Objection, Your Honor. I apologize.

12 I didn't have a chance to stand.

13 Again, it's not clear what the basis of Mr. Hines'
14 understanding of Mr. Bobby Hines' deficiency here.

09: 38: 28

15 THE COURT: It's pretty clear to me it's based on
16 personal observation. Your objection is overruled.

17 Proceed.

18 BY MS. BRANDT:

19 Q. Could you -- let me back up a second.

20 You said that Willie was able to understand your
21 instructions on how to play baseball --

22 A. Yes. But I want --

23 Q. -- and he was four years old?

24 A. -- it wasn't a big baseball game. It was like we had a
25 little bag of plastic balls, because they were small kids.

09: 38: 49 1 Q. And did you show -- what were you showing Willie how to
2 do?

3 A. How -- how to hit -- well, I was rolling the ball to him
4 and he would hit it on the ground and I had to roll it to
5 Bobby because Bobby couldn't hit it in the air either. So we
6 rolled it on the ground and they would hit it, more like
7 golf, you know.

8 Q. And was Bobby able to follow your instructions about
9 hitting the ball?

10 A. No. No. If you tried to tell him once you hit the ball
11 run over here, he might go this way (indicating).

12 Q. Well you're pointing. You need to --

13 A. If I said run to first base, you know, I sat down and
14 told him, you know, when you hit the ball go to first base,
09: 39: 20 15 and he might run to first base the first time but the next
16 time he would run to third base or he might run to the
17 pitcher. You didn't know where he was going to go.

18 Q. And did you re-instruct him?

19 A. I did.

20 Q. And what happened on the re-instruction, was he able to
21 follow your directions?

22 A. No.

23 Q. But Willie was able to?

24 A. Yes.

25 Q. And were there any other children there?

09: 39: 42

1

A. Tina.

2

Q. Was Tina able to follow the instructions on baseball?

3

A. No.

4

Q. How old was Tina?

5

A. She was about 8.

6

Q. Okay. How about other games that Bobby played?

7

A. I remember trying to teach him over and over and over how to ride a bicycle.

9

Q. At what age?

10

A. He was about 7.

11

Q. And explain what you had taught to Bobby in terms of riding the bike.

13

A. Well, you know, the first he could do the training

14

wheels but when we took the training wheels off, he was big

09: 40: 27

15

enough to take the training wheels off, and I would hold the

16

back of the seat and get him going. And when I would let him

17

go he would fall over and he wouldn't want to try again. And

18

I would show -- you know, try to teach him how to keep his

19

balance, just like I taught Willie and Tina both how to ride

20

a bicycle.

21

Q. And they were successful in being able to ride a bike?

22

A. Correct.

23

Q. Correct, yes?

24

A. Correct, yes.

25

Q. And did Bobby ever learn how to ride a bicycle?

09: 40: 51 1 A. He didn't -- he didn't from the time he was like 7 to
2 12. And I went away to the state school at one time and then
3 when I come back, you know, he was like 12 and I seen that he
4 rode a bicycle, but I know from like 7 to 12 he didn't.
5 Q. Okay. And about how -- do you know about how long it
6 took him to learn that? Or you were not around, so you --
7 A. Yeah. When I was gone to the state school I was only
8 gone for six months and then come right back.
9 Q. Okay. Did you ever help him with his homework?
10 A. I did.
11 Q. And about what age was he when you helped him with his
12 homework?
13 A. 6, 7, 8, 9, 10.
14 Q. So throughout the years every year you would help him
09: 41: 35 15 with his homework?
16 A. Um-hum.
17 Q. And was he -- was he given homework?
18 A. Yes.
19 Q. And was he able to do the homework?
20 A. No.
21 Q. Could you explain one or more incidents about the
22 homework? Math or spelling?
23 A. Reading he -- he was not a very good reader or speller
24 at all.
25 Q. Did you give him a page to read?

09: 42: 04 1 A. Yeah. Out of the book, yes.

2 Q. And it was appropriate for his age level?

3 A. Yeah.

4 Q. And was he able to read an entire sentence?

5 A. Not without missing a word. He would come to a word

6 that he didn't know and then you would have to tell him the

7 word and then he might remember it the next second, but then

8 another paragraph the same word he couldn't pronounce it

9 again.

10 Q. And that was true every time he tried to read something?

11 A. Um-hum.

12 Q. You would give him what the word was and then he could

13 not remember it a couple of paragraphs down?

14 A. Right.

09: 42: 34 15 Q. How about as far as spelling?

16 A. Oh, he was -- he still can't spell today worth a -- I

17 mean, he can't spell at all, really.

18 I have letters where he's written me from prison when he

19 first got there and you can't -- it's difficult to make out

20 what he's trying to say, you have to -- I mean, because the

21 words are so misspelled.

22 Q. Okay. So you were having a hard time understanding what

23 he was trying to communicate with you?

24 A. Yeah. They have gotten better, because I know that he

25 has somebody that writes letters for him now.

09: 43: 07 1

Q. How do you know that?

2

A. He told me.

3

MR. CORCORAN: Objection, Your Honor, that is hearsay.

5

THE COURT: Sustained.

6

BY MS. BRANDT:

7

Q. How about as far as your experiences at the lake?

8

Did the children go to the lake to swim?

9

A. Yeah, we went to Lake Austin.

10

Q. And did you teach your younger siblings to swim?

11

A. I did.

12

Q. You taught Tina?

13

A. Um-hum.

14

Q. And she was able to follow your instructions?

09: 43: 38 15

A. Yes.

16

Q. And Willie also was able to follow your instructions?

17

A. Yes.

18

Q. And he learned how to swim?

19

A. Yes.

20

Q. Even though he was younger than Bobby?

21

A. Yes.

22

Q. Was Bobby able to follow your instructions to swim?

23

A. No.

24

Q. Did he ever learn to swim?

25

A. Not to my knowledge. I don't think he has.

09: 43: 55 1 Q. And how long did you spend with him trying to teach him
2 how to swim?

3 A. We went to the lake like every weekend.

4 Q. During what -- how old was he or what years?

5 A. From -- I say from the time he was 6 to -- let's see,
6 15 -- until he was 12.

7 Q. I -- I know you were embarrassed to tell me this, but
8 can you talk about cheating Bobby out of items?

9 A. It's because of his -- because he was the way he is, I
10 mean, you could cheat him out of anything.

11 I cheated him out of a guitar one time. I cheated him
12 out of cassette tapes before, just several things all through
13 our life.

14 Q. At what ages?

09: 44: 54 15 A. His whole life. Even up until before he was arrested.

16 Q. Okay. But let's -- let's see if we can pinpoint those.
17 With the guitar, about how old was he?

18 A. 13.

19 Q. Did he know the value of the guitar?

20 A. No. He didn't even know how to play the guitar.

21 Q. I'm sorry, I didn't hear you.

22 A. He just had the guitar but he didn't know how to play it
23 or know the value.

24 Q. And what did you essentially cheat him out of? He gave
25 you the guitar --

09: 45: 26 1 A. It was about a \$200 guitar and amplifier and I traded
2 him a pair of \$30 skates.

3 Q. What else did -- was he able to skate?

4 A. I don't remember seeing him skate. I remember seeing
5 him put on the skates and falling down and not skating like I
6 could skating.

7 Q. So he wasn't coordinated enough to skate.

8 MR. CORCORAN: Objection.

9 THE COURT: State the grounds for your objection.

10 MR. CORCORAN: 602. There's no basis --

11 THE COURT: Overruled. Proceed.

12 BY MS. BRANDT:

13 Q. What other items did you cheat him out of?

14 A. I remember cheating him out of some cassette tapes.

09: 46: 08 15 Q. And could you explain that to us, please?

16 What was the value of the cassette tape?

17 A. Back then \$6, \$7.

18 Q. And what were the cassette tapes of?

19 A. He -- he had like an AC/DC cassette tape. I'm not
20 sure --

21 Q. For the court would you explain what AC/DC is?

22 A. It was a rock band.

23 Q. And it was a popular band at the time?

24 A. Yes. I had some kind of off-the-wall -- I can't even
25 tell you who it was because it was an off-the-wall

09:46:43

1 cassette --

2 Q. Of music?

3 A. -- that no one had heard of, and it wasn't our kind of
4 music, but I convinced Bobby that this was a good band and he
5 would like them better if he would trade me.

6 Q. And so he in fact traded with you?

7 A. Yes, he did.

8 Q. And about how old was he?

9 A. 13.

10 Q. And would you say based on these observations and this
11 trading that went on that he was gullible?

12 A. I mean, I knew he was gullible.

13 Q. Okay. Did y'all ever go purchase ice cream?

14 A. Yes, we did.

09:47:20

15 Q. And could you -- and at what age did you purchase ice
16 cream?

17 A. I was about 12.

18 Q. And how old was Bobby?

19 A. About 8.

20 Q. And was there anybody else there besides you --

21 A. Tina and Willie both.

22 Q. Tina and Willie.

23 And could you explain how the ice cream was purchased?

24 A. Okay. Our uncle had given us some money. I think it
25 was like a dollar a piece and change --

09: 47: 51

1 Q. So in what kind of change?

2 A. Quarters and nickels and dimes.

3 Q. Okay.

4 A. And most of us had four quarters. I think Tina had
5 dimes instead of quarters. Our uncle gave it to us, he had
6 come to visit. And I took them across the street to the
7 Sirloin Stockade and they had an ice cream machine in there
8 and there was like a box and it was an honors system. On the
9 box it says ten cents you put a dime in there and you get a
10 little ice cream cone. I put my dime in there and I fixed
11 some ice cream, and I was helping Willie, because Willie was
12 smaller, and then Tina did it, and then Bobby, he put all of
13 his money in the box.

14 Q. He put the full one dollar?

09: 48: 31

15 A. Yes, he did.

16 Q. Did he know that the ice cream only cost 10 cents?

17 MR. CORCORAN: Objection, Your Honor. He would
18 have no idea -- how he would know what Mr. Bobby Hines
19 thought?

20 THE COURT: Sustained.

21 BY MS. BRANDT:

22 Q. Did -- did the box say 10 cents for ice cream?

23 A. Yes, it did.

24 Q. And there was a sign there?

25 A. Yes.

09: 48: 49

1 Q. And you were able to read that sign?

2 A. Yes.

3 Q. And so was Willie -- Willie could read the sign?

4 A. No, not Willie. Willie was probably too young to read.

5 Q. Okay. Was Bobby too young to read the sign?

6 A. No.

7 Q. So he was old enough to have read 10 cents for ice
8 cream?

9 A. He should have been.

10 Q. Okay. But you said he was unable to read?

11 A. Right.

12 Q. Was he able to make change?

13 A. No.

14 Q. Have you ever seen him try to make change?

09: 49: 15

15 A. I seen him get cheated out of change.

16 Q. At what age?

17 A. Like 16.

18 Q. He still couldn't make change for a dollar at 16?

19 A. Well, I -- I -- I'm thinking of an incident where he
20 went to the store with \$20 and was supposed to buy something
21 and come back and didn't have the right amount of change.

22 Q. So he got cheated -- he paid more for the item than what
23 the item cost because he didn't know the difference?

24 MR. CORCORAN: Objection, Your Honor, Leading.

25 THE COURT: Overruled. I'll allow it.

09: 50: 03

1

BY MS. BRANDT:

2

Q. Was he able to -- was Bobby able to drive a car?

3

A. No.

4

Q. Did he apply for a license?

5

A. He did.

6

Q. And did he pass?

7

A. No, he did not.

8

Q. How did he get around town?

9

A. My stepmom would take him around.

10

Q. In what city?

11

A. Paris.

12

Q. At what age?

13

A. All the way until he was like 17, and that's when he

14

come to Dallas to live with me and then my wife would take

09: 50: 31

15

him around.

16

Q. And why would your wife take him around?

17

Could he not use the bus?

18

A. No. That's why she took him around, because there was

19

an incident where he got on the bus and he was supposed to go

20

from Marsh Lane to Josey Lane but he wound up in Pleasant

21

Grove and we had to go get him.

22

Q. So he wasn't able to follow the maps on the bus routes?

23

A. No.

24

Q. Did he ever hold down a job?

25

A. One job for a short period of time.

09: 50: 59 1 Q. And could you tell us what that job was and at what age?

2 A. He was 16. It was Grandy's in Paris, Texas. And he
3 had -- he had one job, like they tried him on a cashier and
4 he couldn't comprehend that and so they moved him to the
5 fryers and then she let him go --

6 MR. CORCORAN: Objection, Your Honor. Again, no
7 basis. I don't know how he knows this.

8 THE COURT: Lay your predicate.

9 BY MS. BRANDT:

10 Q. Were you there at Grandy's?

11 A. I had been in there. I didn't work there, but I went
12 there to eat.

13 Q. Were you there when Bobby was working there?

14 A. Yes.

09: 51: 39 15 Q. And did you observe Bobby unable to make change at
16 Grandy's when he was working the cash register?

17 A. When I went he was on the fryers, working on the fryers
18 and they were trying to show him how to do it.

19 Q. And what was your observation about him working the
20 fryers?

21 A. He didn't know how to do it.

22 Q. Well, he didn't know, but was he -- had he been
23 instructed?

24 A. Yeah. That's what they were doing, was training him.

25 MR. CORCORAN: Objection, Your Honor. Again, same

09: 52: 05

1 objection.

2 THE COURT: Overruled.

3 BY MS. BRANDT:

4 Q. So you saw them instruct him in using the fryers?

5 A. Um-hum.

6 Q. And even after the instruction he wasn't able to follow
7 the instructions?

8 A. So they let him go.

9 Q. Okay. How about filling out the application for
10 Grandy's?

11 A. I don't know who filled the application out at Grandy's.

12 Q. Okay.

13 A. I know when he come to Dallas my wife helped him fill
14 out some applications.

09: 52: 29

15 Q. And why did your wife need to help him fill out the
16 applications?

17 A. Because he didn't know how to do it.

18 MR. CORCORAN: Objection, Your Honor.

19 THE COURT: What's the ground for your objection?

20 MR. CORCORAN: 602. I have no idea to know why he
21 knows how people have done this.

22 THE COURT: I think that's specifically what the
23 question is, why did his wife help him fill out the
24 application. So you can let the witness answer, we'll find
25 out.

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You may answer the question.

THE WITNESS: Because he didn't know how to fill it out.

MR. CORCORAN: Objection, Your Honor, same objection. How do we know how he knew --

THE COURT: Overruled.

BY MS. BRANDT:

Q. Why didn't he -- why wasn't he able to fill out the applications?

A. He can't read. He didn't -- he just didn't understand what they wanted for like, you know, job history. He didn't understand how to write his job on Grandy's, and she -- she had to show him how to do it.

Q. And this was like at the age of 16 or 17?

A. 17.

Q. 17. Okay.

MS. BRANDT: I have no further questions.

THE COURT: Cross-examination?

CROSS EXAMINATION

BY MR. CORCORAN:

Q. My name is Joe Corcoran. I'm an attorney for the state. I want to ask you a couple of quick questions.

First of all, I want to get the time frame in terms of when you were at the house with Bobby and when you weren't.

So you are four years older than he is, roughly, is that

09: 53: 55 1

what -- what you said?

2

A. Roughly.

3

Q. When did you first leave the home?

4

I guess you were with the state school.

5

What state school did you go to?

6

A. Brownwood state school.

7

Q. Brownwood state school.

8

How would were you when you left the home and went to

9

Brownwood state school?

10

A. 13.

11

Q. 13.

12

And how long were you there?

13

A. Six months.

14

Q. Six months.

09: 54: 15 15

And what did you do after that? Did you go straight

16

back to --

17

A. Straight back home.

18

Q. Were you at some point sent again to a state school?

19

A. Yes.

20

Q. And how old were you then?

21

A. 14.

22

Q. 14.

23

And how long did you spend in the state school that

24

time?

25

A. Six months.

09: 54: 29 1

Q. Six months.

2

And after you left the state school where did you go?

3

A. Back home.

4

Q. Back home.

5

And was Mr. Bobby Hines there --

6

A. Yes.

7

Q. -- every time, living there?

8

What -- explain to me, was there a third time you went

9

to a state school?

10

A. Yes. But on the second time when I come back from the

11

state school, when I first came back, let me clarify that, he

12

wasn't there, because the state had removed Bobby and Tina

13

and Willie from the home.

14

Q. Okay. So that was in that time frame.

09: 54: 58 15

And what about the third time you say you went, what was

16

the timing of that, what year, or how old were you?

17

A. 16.

18

Q. And how long was that?

19

A. I went to the state school, I was there for six months,

20

and then this time they wouldn't let me come back to the

21

home.

22

Q. Okay.

23

A. So they sent me to my mother's to live. And I stayed

24

there for two months and I ran away and went back to Paris,

25

back home.

09: 55: 23 1 Q. Okay. And so you were about 17 when you went back to
2 Paris?

3 A. I was 16 when I went, 17 when I come back.

4 Q. Was there a point at which you were arrested and
5 actually sent to prison in that time frame?

6 A. As of right about -- a little after I turned 18.

7 Q. Okay. And the time frame between when you left your --
8 your mom and went back to Paris and when you were arrested at
9 the -- how -- what -- what time are we talking about there?

10 How long were you in Paris before?

11 A. Which -- I'm confused. Which time?

12 Q. When you -- after -- so I think you said you went to
13 live with your mom?

14 A. Um-hum.

09: 56: 03 15 Q. And then you ran away from there and went back to
16 Paris?

17 A. Correct.

18 Q. About 17? Was that around?

19 A. Correct.

20 Q. When you went back to Paris, what was the time from when
21 you got back to Paris and when you were arrested again?

22 A. I'm going to -- I'm guessing it was over a year.

23 Q. Okay. And you were arrested -- when you were arrested
24 did you stay in jail?

25 A. Actually, I did not. They had -- they had let my dad

09:56:31 1 take me back to the state school and he physically drove me
2 back to the state school. And then they -- I -- they put me
3 back in the state school. I didn't have a hearing or nothing
4 that time. I guess they had -- when I had left Dallas they
5 had had a hearing without my presence.

6 Q. Right.

7 A. And that revoked my parole, and when they caught me I
8 went straight to the state school. And I stayed there
9 just -- I'm guessing three or four months, and then I -- I
10 basically broke out and went back to Paris.

11 Q. And what then happened with respect to the -- did you
12 commit a burglary?

13 A. That's correct.

14 MS. BRANDT: Objection, Your Honor, this is
09:57:08 15 irrelevant.

16 THE COURT: Well, it -- I think the question he
17 asked is irrelevant. If you're seeking to impeach him with a
18 prior conviction you can proceed in that regard.

19 So I'm sustaining the objection.

20 MR. CORCORAN: Okay, Your Honor.

21 BY MR. CORCORAN:

22 Q. When was the last -- at what point did you go to prison?
23 How old were you?

24 A. 19.

25 Q. 19 years old.

09: 57: 29 1 And how long were you in prison before you came out?

2 A. About six months.

3 Q. Okay.

4 A. They were overcrowded and kicking us out. As quick as
5 you went in you went right back out.

6 Q. Okay. Now, I want to take a step back and talk about
7 each time you went back to Paris, so you went three times I
8 think to state schools, were arrested, went back, a fourth
9 time your dad took you to a state school again and eventually
10 you went to TCJ. In each of the periods you were in Paris,
11 Texas, was Bobby there every time, Mr. Bobby Hines?

12 A. One time when the state removed Bobby and Willie and
13 Tina from my dad's house, from him beating on 'em, they were
14 gone for I'd say six months.

09: 58: 23 15 And -- and then they came -- Bobby and Willie came back.
16 Tina went to live with our mom in Dallas, and Bobby and
17 Willie came back and I lived with them a couple of months and
18 I got in trouble again.

19 Q. Isn't it fair to say that most of your recollections,
20 you went through several, were when you were younger, before
21 you started to go to the state schools, that most of your
22 interaction --

23 A. It's just been, you know, off and on, off and on, off
24 and on, or -- all the way up until he -- he got arrested.

25 Q. The baseball -- you were talking about the baseball,

09: 58: 57 1 trying to teach your siblings baseball. When -- when was
2 that roughly, what time?

3 How old were you, how old were they?

4 A. It was about -- we're all two years apart.

5 Q. Okay.

6 A. So I was like 10, Tina was like 8, Willie was like -- I
7 mean, Bobby was like 6, Willie was like 4.

8 Q. Okay. And the bike riding, you were talking about the
9 bike riding again, what was the time -- how old were you?

10 A. Which -- I mean trying to teach them --

11 Q. You testified -- well, there were many incidents?

12 A. At the time he was six or 12, he never did learn.

13 Q. Okay. So you testified when he was 6 you were 10, in
14 that time frame you tried to teach him to ride a bike, at
09: 59: 41 15 that point?

16 A. Um-hum.

17 Q. And were you in -- were you in the home with him from 6
18 to 10, when he went from 6 to 10 years old?

19 At some point you weren't there; isn't that correct?

20 A. When I was -- up until I was 12 I was there. So I was
21 there then.

22 Q. Okay. So it's when you were 12, not when -- when he was
23 12?

24 A. Right.

25 Q. Okay.

09: 59: 59 1 A. Well, when he was 12 I was there because I would be
2 16 -- I mean, I'm -- I'm in and out.

3 Q. But I just wanted to clarify because I -- it wasn't --
4 it wasn't clear to me when you said 6 to 12 you were talking
5 about Mr. Bobby Hines or yourself when you were discussing
6 the -- the -- excuse me -- the bike riding that you're
7 referring to -- to yourself, 6 to 12.

8 A. You're confusing me now.

9 Q. Okay. Let me -- let me ask you a different question.
10 What about the swimming?
11 Again, was that done over time?

12 A. Yes. Every -- every weekend our dad would go to the
13 lake. That's where he liked to drink.

14 Q. Okay. And what was the time frame?
10: 00: 34 15 How old were you when -- when the incidents you
16 testified to about the swimming, how old were you when that
17 happened, your observations?

18 A. Which time?

19 Q. All the time -- what's the range?

20 A. I can remember going to the lake -- I was 8, so Bobby
21 would have been 4, and from -- from the time he was 4 to the
22 time he was 17, 16, 17, somewhere in there.

23 Q. And what about with respect to the spelling?
24 You testified a little bit about the spelling. Again,
25 those observations happened when exactly, in terms of your

10:01:16 1 age, the range of your observations about his spelling? When
2 was that?

3 A. It's his whole life. I mean, I have letters right now
4 at home where he's written and you can't make -- you have to
5 really study to understand what he's trying to say because
6 the words are misspelled.

7 Q. In the -- did you ever purchase alcohol or -- or drugs
8 for your brother?

9 A. For my brother?

10 Q. Yeah.

11 A. I have. Not drugs. Alcohol.

12 Q. Okay. And what was the time frame for that?
13 Obviously -- when -- when did that happen?

14 A. I would be 20 and he was about 16.

10:02:03 15 Q. Isn't it fair to say that you would do what you could,
16 because you're his brother, to help him?

17 A. That's fair to say.

18 But when I -- when you -- you just -- let me clarify.
19 You said did I purchase it for him. I didn't really -- I
20 didn't go purchase it for him, but I purchased the alcohol
21 for me and allowed him to drink it.

22 Q. Understood. Okay.

23 MR. CORCORAN: That's it, Your Honor.

24 THE COURT: Any redirect?

25 REDI RECT EXAMI NATION

10:02:32 1

BY MS. BRANDT:

2 Q. Mr. Hines, even though Bobby is your brother, everything
3 that you've told us here is the truth to the best of your
4 recollection; --

5 A. Yes.

6 Q. -- is that true?

7 A. Yes, it is.

8 Q. And that's the reason why you're testifying?

9 A. Yes.

10 MS. BRANDT: Thank you.

11 THE COURT: You may step down. Thank you.

12 Are we through with Mr. Hines?

13 MS. BRANDT: Yes, Your Honor.

14 MS. CALLAGHAN: Yes, Your Honor.

10:02:58 15

16 THE COURT: All right. Mr. Hines, you may remain
17 in the courtroom, if you want.

18 Call your next witness.

19 MR. PARKS: Call Dr. Gilda Kessner.

20 THE COURT: Dr. Kessner, if you would come up here,
21 please.

22 I'll let you get situated.

23 Raise your right hand and be sworn.

24 (Witness sworn.)

25 THE COURT: You may be seated.

Be sure and speak into the microphone, so we can hear

10: 03: 32 1

you.

2

MR. PARKS: May I proceed, Your Honor?

3

THE COURT: You may.

4

DIRECT EXAMINATION

5

BY MR. PARKS:

6

Q. State your name for the record, please.

7

A. Gilda Kessner.

8

Q. Dr. Kessner, you have been employed by petitioner as an expert in this case; is that true?

9

A. That's correct.

10

Q. And you have been so employed for some time now, have you not?

11

A. Initially in 2004, I believe.

12

THE COURT: Dr. Kessner, you need to speak up.

10: 03: 55 15

BY MR. PARKS:

16

Q. Since 2004?

17

A. Yes.

18

Q. All right. Dr. Kessner, if you would, just tell the judge briefly your educational background.

19

Well, first, let me ask you, what is your profession?

20

A. I'm a psychologist licensed in Texas since 1997.

21

Q. Okay. If you would give the judge some idea of your educational ground that leads you to that profession?

22

A. My doctoral degree is from Baylor University in clinical psychology, which was an APA approved program. That included

23

24

25

10:04:22 1 three years of practicum work, 20 hours per week, and then a
2 one year full-time internship which was APA approved. I
3 graduated in 1996.

4 My undergraduate is in social work from Abilene
5 Christian. And I have a master's in human relations and
6 business from a small school here in Dallas called Amberton
7 University.

8 And after leaving my internship and returning to Texas I
9 got a job with the Texas Youth Commission, worked in two of
10 their facilities.

11 Do you want me to go any further?

12 Q. Well, I was going to ask you about your work background
13 also.

14 You went to work for TYC?

10:05:00 15 A. Yes.

16 Q. And how long -- and in what capacity?

17 What were you doing for them?

18 A. Well, I was identified as a psychologist. I think it
19 was like level 2 or something like that based on the pay
20 scale that I was at. I worked at two of their facilities,
21 both of which contained only males ages 10 to approximately
22 17. One was in San Saba, which I believe has reverted back
23 to maybe an adult facility now, and then one was in Bryan
24 College Station, which I was there on the day that it opened
25 when we took the first -- they call them students, took the

10:05:35 1

first student.

2

And I left there around October of '97. So I was there about eight months, nine months, while they were bringing kids in. I was the only psychologist on the ground not doing administrative work up until the point that they had 300 plus students, and they eventually had over 700. So it wasn't until they had 300 or so that they eventually got another person in on the ground

9

Q. And you worked for TYC about how long?

10

A. A little over a year, about a year or so. Then I was eligible to take the licensing exam, be licensed. I moved back to Dallas and went to work for the Dallas County juvenile department.

14

Q. How long did you work for Dallas County Juvenile, roughly?

10:06:14 15

16

A. Approximately a year, maybe a little bit less. And I was a detention center psychologist.

18

They had several psychologists on staff, different ones had primary duties. Mine was the detention center.

20

Responsible for making sure that kids, you know, got a --

21

psychological attention if they needed it. It also included doing psychological assessment and supervising doctoral level students mostly from UT Southwestern Medical School, running group and developing a special program for them.

25

Q. Are you now in private practice?

10:06:48

1 A. Yes.

2 Q. How long have you been in private practice?

3 A. I started my part-time private practice in 1998 and
4 probably went full-time -- I'd have to look and see, sometime
5 in 1999.

6 Q. Dr. Kessner, have you performed evaluations of persons
7 to determine whether or not they were mentally retarded in
8 your practice?

9 A. Yes. Both juveniles and adults.

10 Q. And so you have experience doing that for some years
11 now, would that be fair to say?

12 A. Yes.

13 Q. And when you evaluate a person to determine whether or
14 not they are mentally retarded, are there tests that are
15 administered to help you do that?

10:07:28

16 A. Yes.

17 Q. And what tests do you prefer to use when you're doing
18 that?

19 A. I use the Wechsler, the current version is the WAIS IV.
20 On Mr. Hines I used the WAIS III, which was the current
21 version at the time.

22 Q. And let's get right to that.

23 You did administer a test on Bobby Hines; is that
24 correct?

25 A. Yes.

10:07:54

1 Q. And when would that have been, please?

2 A. I have the date written at 4/26/04.

3 Q. And I know the judge knows this, but let me ask it for
4 the record.

5 The WAIS III is intended to measure a person's full
6 scale IQ according to the way they answer certain tests or
7 subtests on that instrument; is that basically correct?

8 A. Well, yes. I mean, it's not additive or anything like
9 that. It's empirically driven, and so someone may get seven
10 correct answers on a subtest but that doesn't tell you
11 anything, you have to do the calculations, but your ultimate
12 school is called a full scale IQ score.

13 Q. And what was Bobby Hines' full scale IQ according to the
14 WAIS III that you administered in 2004?

10:08:58

15 A. A 69.

16 Q. Now, what does that tell you with respect to making an
17 evaluation of a person whether or not they're mentally
18 retarded?

19 A. Well, that score is consistent with the DSM schedule and
20 AMR.

21 Q. What does the DSM tell us?

22 A. Diagnostic and Statistical Manual of Mental Disorders.
23 Right now there's version IV-TR.

24 Q. And how does it define mental retardation?

25 A. Subaverage intellectual functioning, generally two

10:09:35 1 standard deviations below the mean which would be -- the mean
2 would be a hundred so a standard deviation is 15 points, so
3 two standard deviations would be 70, and approximately 70
4 plus or minus approximately five points, because of error
5 that may occur in the testing.

6 Q. So --

7 A. And so between 65 and 75, generally.

8 Q. If I understand what you're saying, Dr. Kessner, when
9 you gave Bobby Hines the WAIS III in 2004, assuming that that
10 test was properly given, good effort was made by Mr. Hines,
11 and it was properly scored, that -- given the -- the plus or
12 minus error factor, that would have placed his IQ somewhere
13 between, what, 64 and 74?

14 A. Well, if you do the plus or minus 5, they -- they do a
10:10:29 15 different calculation.

16 66 to 74 according to the confidence interval that's
17 calculated statistically.

18 Q. Okay. So that would be two standard deviations below
19 norm; is that right?

20 A. Right.

21 Q. And it would meet the first prong of Atkins and would
22 meet the definitions of mental retardation at least for that
23 part of the -- of the definition, both for the DSM IV
24 and AARM; is that right?

25 A. AAMR, which is now called AAIDD, they have changed their

10: 11: 03 1 name, but -- it was the American Association on Mental
2 Retardation at the time.

3 Q. Now, after you did that testing you wrote a report and
4 furnished that report to the State of Texas with respect to
5 the state habeas matter that was going on at that time?

6 A. Yes.

7 Q. And was your test and its underlying data also furnished
8 to Dr. Randall Price at or about that time?

9 A. Yes.

10 Q. Have you had an opportunity to revisit that test at all
11 to make sure that it was properly scored?

12 A. Sometime ago. Not recently, but sometime ago.

13 Q. In your opinion, Dr. Kessner, did you properly score
14 that test?

10: 11: 52 15 A. Yes.

16 Q. And did you also give Mr. Hines some additional tests
17 that were intended to give you at least some idea of the --
18 of his effort in taking the tests?

19 A. I gave him some screening tests for academic subjects,
20 and I also gave him a neurocognitive screening test,
21 minimal status examination, and a 15 item test.

22 Q. Now, at the end of the day, taking into consideration
23 your testing and other factors that you considered, did you
24 reach a conclusion back in 2004 that Bobby Lee Hines was in
25 fact mentally retarded?

10: 12: 44

1 A. Yes.

2 Q. And you stated that conclusion in your report; is that
3 correct?

4 A. Yes.

5 Q. Now, that was based on more than just the WAIS III that
6 you gave him; --

7 A. Yes.

8 Q. -- that would be fair to say?

9 Did you review a lot of other records, other things that
10 were set out in your report upon which you based your opinion
11 in addition to the results of the WAIS III?

12 A. Yes.

10: 13: 20

13 Q. Now, were you aware at that time that Mr. Hines had been
14 tested previously on -- on various instruments during the
15 course of his life?

16 A. That was included in his records. Yes.

17 Q. And were you aware that he was tested back when he was 6
18 years old and again when he was 7 years old with the
19 Otis-Lennon mental ability test while he was in school?

20 A. Yes.

21 Q. Were the results that you saw from age 6 and 7 from
22 those tests consistent with --

23 MS. CALLAGHAN: Your Honor, I need to object at
24 this time, because this is going outside of her expert report
25 from state habeas.

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THE COURT: Well, let him finish the question.
Go ahead.
BY MR. PARKS:
Q. -- Consistent with a diagnosis of mental retardation.
MS. CALLAGHAN: I object because this is going outside of her expert report from state habeas. She did not mention it at all.
THE COURT: We established the procedure for this. If you're objecting to protect the record I'll carry your object. And the agreed upon procedure would be that at the conclusion of her testimony if you desire the continuance of the hearing to take her deposition I'll allow you to do that.
MS. CALLAGHAN: Okay. I was under the assumption that that was just with regard to her re-examination -- or her examination of Dr. Price's evidence, but if the court wishes we can come back on everything.
THE COURT: Then that's agreeable with the respondent?
MS. CALLAGHAN: Your Honor.
Your Honor, if I may have a running objection to anything that's outside of her report then.
THE COURT: Well, ordinarily I would be happy to do that, but I can't guess for you what's outside the report, so if -- if you think you need to object, feel free.
MS. CALLAGHAN: Okay. Thank you, Your Honor.

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BY MR. PARKS:
Q. Dr. Kessner, you reviewed the school records from the Paris Independent School District in making your report, did you not, in 2004?
A. Yes. Among other records from his adolescents and childhood.
Q. And you state that here in your report that you reviewed those?
A. Yes.
Q. And are those records, the Otis-Lennon records, records contained in the Paris Independent School District records that you reviewed?
A. Yes. That's why in my conclusion I said his function is not a decline from a previously higher level of functioning. That's why I put that statement there.
Q. All right. So, I mean, these were not tests that were just recently discovered, they have been in the record now for some years, since at least 2004; is that correct?
A. I have the binder -- or the envelope with the records that you gave me at the time included, back on the bench.
Q. Okay. Would it be fair to say that his recorded IQ at 6 years old according to the Otis-Lennon was 68?
A. Yes.
Q. And a year later at the age of 7, same test, IQ was tested at 73?

10: 16: 17 1

A. Yes.

2

Q. And would both of those scores be consistent with a diagnosis of mental retardation?

3

4

A. They're consistent. They're just screening instruments but those scores are consistent.

5

6

Q. Let's talk about those instruments a little bit.

7

They were group administered; is that correct?

8

A. That's correct.

9

Q. And would it be fair to say that generally in your line of work group administered tests are not given the same kind of credibility as individually administered tests, like the WAIS III or the other Wechsler tests or even some of the others; is that fair?

10

11

12

13

14

A. Correct. Because they're not -- generally they're not comprehensive, they're not comprehensive assessments of someone's intellectual functioning, and given in a group is it monitored properly and that sort of thing, so you have to, you know, be concerned about how it was administered.

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Q. In your experience, Dr. Kessner, would a child generally in the -- in the age range of 1st grade, 2nd grade, 6, 7 years old, are children inclined to give a good effort at that age?

22

23

A. My experience is, yes, they are inclined in kindergarten and first grade. You know, school is a happy place and generally they like their teachers and they want to -- they

24

25

10: 17: 35

1 want to participate in everything that's going on.

2 Q. Have you seen anything in the records that you have
3 reviewed that would cause you to question whether or not
4 Bobby gave a good effort on those tests when he was 6, 7
5 years old?

6 A. Well, there's no background information on those tests,
7 as far as the -- you know, other -- what was going on or
8 anything like that, no specific information about his test
9 taking behavior, but you wouldn't necessarily get that in a
10 group test.

11 So -- but there is nothing there that would indicate
12 that those scores, you know, should be questioned.

13 Q. All right. Now, in fairness, the record also reflected,
14 did it not, that Mr. Hines was administered a WISC-R when he
10: 18: 23 15 was 13 years old?

16 A. Yes.

17 Q. Do you recall where that test was conducted?

18 A. That test was conducted at the Texas Youth Commission at
19 the reception center, I believe, which would have been in
20 Brownwood at the time.

21 Q. And do you recall what that test reflected his full
22 scale IQ to be at that time?

23 A. The score that is given is a 96.

24 Q. Now, with respect to that particular test, have you seen
25 the test scores?

10: 18: 57 1

Are they among the records that you have reviewed?

2

A. Well, these scores are in there, but the -- there's no

3

test data to examine. So this is an individually

4

administered test, there's no test data to examine to see if

5

it was -- you know, how it was administered, what his answers

6

were, or anything like that.

7

Q. So that essentially what -- so the record will be clear

8

about this, we refer to that as raw data; is that correct?

9

A. Correct.

10

Q. So that's everything that you can have there to look at

11

to make sure that it was correctly given, that it was

12

correctly scored, and the kinds of things that would cause

13

you to form an opinion that this was a valid score, you don't

14

have that; is that true?

10: 19: 42 15

A. Correct. Like Dr. Price and I exchanged our raw data

16

out of the testing that we did.

17

Q. Right. So that each of you could essentially grade each

18

other's papers?

19

A. Yeah.

20

Q. There were no papers to grade for the WISC-R; is that

21

correct?

22

A. Not contained in the record.

23

I did some individual exploration.

24

Q. What did you find?

25

A. I contacted Doug Humeniuk, who was I believe the

10: 20: 12 1 superintendent there, because there was a narrative report
2 that identified a -- a Ms. Nell Bishop, who was identified as
3 a psychometrist for the administration of that WISC-R.

4 Q. Okay.

5 A. And so I wanted to -- so that indicated that she was the
6 one who administered the test, and not Mr. Clark, whose
7 signature was at the bottom, because he had identified her as
8 the psychometrist and made reference to her comments about
9 him.

10 Because the score was to different from the earlier
11 Otis-Lennon I wanted to find out what the circumstances were.

12 I talked to Mr. Humeniuk and he was able to help me
13 locate or give me some information about how to locate Ms.
14 Bishop and also a Mr. Joe Lee, L-e-e, who was also a
10: 21: 07 15 psychologist. And these individuals, Mr. Lee and Mr. Clark,
16 I think are Bachelors level is what their degree designation
17 was at the time.

18 MS. CALLAGHAN: Your Honor, I need to object to
19 this to preserve the record because none of the underlying
20 notes from these conversations were ever turned over to the
21 respondent.

22 THE COURT: Objection noted.

23 BY MR. PARKS:

24 Q. Did you ever -- just so the record is clear, did you
25 ever locate any underlying raw data for this test?

10: 21: 33

1 A. No.

2 Q. Okay. You were essentially trying to determine who gave
3 the test, where that raw data might be, and -- so that it --
4 it could be located if it were available; is that fair to
5 say?

6 A. And/or what circumstances were and if they remembered
7 Bobby Hines.

8 Q. Okay. All right. And so go ahead.

9 A. Well, I spoke with Mr. Humeniuk. He helped me, you
10 know, geographically sort of locate where these people might
11 be.

12 I was able to talk to Mr. Joe Lee, who was one of the
13 staff psychologists. Let's see, so I'm accurate. I note
14 here that I spoke to him on May 13th, 2004. He was retired
10: 22: 37 15 sometime in 2000/2001. At one point he and Mr. Clark were
16 doing all the testing. This is what he told me. They were
17 the only psychologists doing the testing, and other times I
18 think he said they did have people that they would bring in
19 to help. Sometimes they wouldn't do a Wechsler test, they
20 would do others, because they were pretty overloaded.

21 THE COURT: Doctor, let me stop you there for a
22 second. Are these the notes you're talking about that you
23 never got?

24 MS. CALLAGHAN: Yes, Your Honor.

25 THE COURT: We're going to go ahead and take a 15

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minute break.
Here's what I want you to do.
We're going to -- how many other witnesses do you have?
MR. PARKS: This is our last witness.
THE COURT: Oh, this is your last witness?
We'll continue with this witness and see where we are
when this witness finishes. We may recess and you take her
deposition and we reconvene, but since this is their last
witness we'll hear what she has to say.
Let's take a 15 minute break.
THE SECURITY OFFICER: All rise.
(Recess taken at 10:28.)
(Proceedings resumed at 10:45.)
THE SECURITY OFFICER: All rise.
Come to order, please.
THE COURT: All right. Be seated, please.
Mr. Parks, you may continue.
MR. PARKS: Thank you, Your Honor.
DIRECT EXAMINATION
BY MR. PARKS:
Q. Dr. Kessner, let me back up just a minute, so it makes a
little bit more sense what you're testifying about in respect
to investigating the results behind the can WISC-R that was
given.
The 99 on the WISC was very inconsistent from what you

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had seen on the Otis-Lennon test; is that fair to say?
A. Yes.
Q. Because we went from 69, 73, all the way up to 96 on the WISC-R is that -- would it be fair to say that it's not unusual to see some changes, some differences in tests, but that 30 points was -- or thereabout, was enough to raise your curiosity as to why that might have been; is that fair to say?
A. Yes. And the fact that was a comprehensive test and individually administered.
Q. So that was the cause of your beginning to try to investigate the circumstances under which it was given?
A. Correct.
Q. And who gave it, and things of that kind?
A. Right.
Q. And trying to find the raw data?
A. Right.
Q. All right. Now, there were other concerns that you had with respect to the validity of that test?
Let me -- well, let's -- let me back up just a little bit.
As an experienced person in this field what were your concerns about the test and whether or not it was valid?
What could have gone wrong if this is not a valid test?
A. Well, I mean, there's a variety of things that can

10: 43: 45 1 happen and so that's why I wanted to talk to individuals who
2 were named in records to try to determine what the situation
3 was at the time, so that I might possibly be able to
4 determine why there's such a discrepancy.

5 Anything from scoring errors to inappropriate
6 administration -- administration of a test, to transposing
7 numbers. There's all different kinds of things that can
8 happen even to experienced examiners, and so I wanted to find
9 out, you know, what their credentials were, what the
10 situation was at the state school, and -- to satisfy my
11 curiosity and concerns.

12 Q. Okay. Now, Mr. Hines was also given another test there
13 at the same time, TYC, the TONI; is that correct?

14 A. That was given three years later, approximately. 1989.
10: 44: 42 15 The WISC was in 1986. The TONI was in 1989.

16 Q. Oh, you're correct. So some three years later.

17 Now, did -- on that test, on the TONI, that test
18 indicated an IQ of 87; is that correct?

19 A. Yes.

20 Q. And in fairness an IQ of 87 or an IQ of 96 as the WISC
21 showed, would not be consistent -- if those were good and
22 correct tests would not be consistent with mental
23 retardation; is that fair to say?

24 A. That's correct. In other words, if those were two valid
25 administrations that would be inconsistent with a diagnosis

10:45:20 1 of mental retardation.

2 Q. So at this point what we have -- if -- if I'm -- in
3 fact, let me just go ahead on and address one other test at
4 the same time.

5 A year later, in 1990, TDC also administered a Beta or a
6 Culture Fair test, one or the other, and the results of that
7 test was a 97; is that correct?

8 A. Yes. That's what the records indicated.

9 Q. And so there again, we would have now the third test
10 that would show an IQ score that would be inconsistent with
11 retardation; is that fair to say?

12 A. Yes. Except the Culture Fair the Beta and the TONI are
13 not comprehensive tests.

14 Q. I understand. We're going to go into that.

10:46:10 15 I'm just saying we have three tests there that appear to
16 be reasonably consistent, we've got a 96, an 87 and a 97 and
17 all of those tests would be inconsistent -- would be
18 consistent -- I'm sorry, would be inconsistent with mental
19 retardation; right?

20 A. Correct.

21 Q. However, we have tests from when Mr. Hines was 6 and 7
22 showing a 68 and a 73, that would be consistent with mental
23 retardation and very inconsistent with those other three
24 scores that we see?

25 A. Yes.

10:46:44 1 Q. Okay. So with -- with the WISC that is an individually
2 administered test, was a test that was current at the time it
3 was given, I take it?

4 A. I'd have to look at the date. But, yes, it would have
5 been the current version.

6 Q. Is the test specifically intended and designed to
7 determine a person's IQ?

8 A. It's the Wechsler test for children and adolescents.

9 Q. Okay. Now, how is that test different from the TONI
10 with respect to administration?

11 A. Well, it's individually administered. It consists of a
12 variety of subtests covering different areas. And the TONI
13 and the Culture Fair, the Beta, are group administered, can
14 be individually administered, but typically in a large
10:47:35 15 institution they would be group administered.

16 Q. What -- what -- I'm sorry.

17 What is the significance of group administration?

18 What is it that causes persons in your field to be more
19 suspicious, if that's the proper word, of group administered
20 test than those that are individually administered?

21 A. Well, there's a couple -- generally they're not
22 comprehensive tests and so it's only giving you a little bit
23 of information, it's not giving you more complete
24 information, and then if it's a group administered test,
25 depending on the situation, then the score may have been

10: 48: 13 1 i nfluenced by, you know, working off somebody else's paper or
2 providing answers and that sort of thing, so that's the
3 question there. But on the WISC, generally that would not be
4 the case if it's administered properly.

5 Q. Okay. So the TONI is not a comprehensive test; is that
6 correct?

7 A. Correct.

8 Q. It's basically a snapshot rather than a full picture of
9 a person's intellectual functioning?

10 A. Yes.

11 Q. What about the -- the -- were you able to determine from
12 the records whether Mr. Hines was given a Beta or a Culture
13 Fair?

14 A. Well, there was something in the most recent records
10: 48: 51 15 that I received from the AG's office on August 15th --

16 Q. Yes.

17 A. -- that I reviewed, and there was a notation in there by
18 an individual with the TDCJ system who talked about the Beta
19 and the Culture Fair, estimating, you know, it could have
20 been one or the other, so other than that I don't know.

21 Q. Okay. So now then, the next step that was given after
22 the Beta or the Culture Fair, whichever was given by -- that
23 was given by TDC, Texas Department of Criminal Justice, is
24 that correct?

25 A. Correct.

10: 49: 22 1 Q. And Mr. Hines was 17 at that time?

2 A. Yes.

3 Q. And that would have been part of his screening at
4 diagnostic going into the penitentiary; is that right?

5 A. Yes. They use it as a screening instrument to determine
6 whether they're going to do further testing on somebody.

7 Q. So then the next time he was tested was with your WAIS
8 III?

9 A. Yes.

10 Q. And on that WAIS III he got a full scale IQ of 69 and
11 that would have been I take it inconsistent with these --
12 with the WISC, with the TONI and with the Beta or Culture
13 Fair that we see when he was 13, 16, and 17?

14 A. Correct.

10: 50: 00 15 Q. And in -- in your opinion, I believe you've told us,
16 that Mr. Hines gave a good effort in that test, that you gave
17 it correctly, and you scored it correctly.

18 A. Correct.

19 Q. Do you believe that the 69 that the WAIS III showed you
20 was an accurate, so far as accuracy can be determined,
21 measurement of his full scale IQ at that time?

22 A. Yes. I gave a 95 percent probability that it would call
23 between 66 and 74 based on that administration.

24 Q. Okay. So that was consistent really with the early
25 tests that we have when he was 6 or 7 years old and

10: 50: 38 1 consistent with a diagnosis of mental retardation?

2 A. Yes.

3 Q. Okay. Now, just on -- I want to touch on one little
4 thing before we go on with respect to the TONI and the WISC.

5 In reviewing those tests did it appear to you that there
6 was at least some transposition of scores from one of those
7 tests to another?

8 A. Well, that occurs it looks like later in a face sheet
9 that is in one of the binders where they included the
10 performance IQ and the verbal IQ of the WISC and the IQ of
11 the TONI is put in place of the full scale IQ, so that's in
12 one of the binders that came from the AG's office.

13 MS. CALLAGHAN: May I have citation to the record,
14 so I can --

10: 51: 33 15 MR. PARKS: Yeah.

16 THE WITNESS: Sure.

17 I don't know which one it is.

18 Okay. It says Respondent's Exhibit 3, previous criminal
19 charges, tab 3.

20 Okay. On the first page after the affidavit, where they
21 give IQ testing, they don't identify the test, but you can
22 see they give scores from the WISC and from the TONI, and the
23 full scale, if someone were just reading this they would make
24 an assumption --

25 THE COURT: What's the Bates stamped number on the

10: 53: 11 1

bottom of the page?

2

THE WITNESS: Hines TYC 0001.

3

THE COURT: What exhibit is this?

4

MS. CALLAGHAN: Your Honor, it's Exhibit 3. It's in its own notebook.

6

Respondent's Exhibit 3, previous criminal charges.

7

THE COURT: Right. What's the title of this sheet?

8

MS. CALLAGHAN: Correctional care system.

9

THE COURT: I've got the document, but I'm looking for the score.

10

11

MS. CALLAGHAN: It's about two-thirds of the way down the page, on the left-hand column it starts --

12

13

THE WITNESS: It's in the bottom --

14

THE COURT: I see it. Okay. Thank you.

10: 53: 55 15

BY MR. PARKS:

16

Q. So tell me again.

17

A. The verbal IQ scores for the one listed for the WISC-R or 96 done at TYC. These are TYC records. The performance

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IQ score was the one listed with the WISC-R from 1996, and

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the full scale IQ is listed from the TONI, which is a

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different test given in 1989. So instead of putting the full

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scale IQ from the WISC-R of '96 they have mixed the records

23

here.

24

So, I mean, this is a typo or a clerical error or

25

something like that, but those kinds of things turn up in the

10: 54: 33 1 records and then they get written over and over and over
2 again. So that's also a concern of looking and making sure
3 that the face sheets are correct, because if they transfer
4 information from the face sheet, they may not save the actual
5 test data. So you want to make sure that the -- it's
6 consistent. So this is just an example coming from TYC that
7 shows that that occurs.

8 Q. Let me see if I understand by way of summary.

9 With respect to the WISC your concern is that since it
10 is so inconsistent with the scores that were received earlier
11 on the Otis-Lennon that we have no way of knowing from what
12 we actually have in our possession whether or not this is his
13 score or somebody else's score.

14 A. There was such a discrepancy I wanted to investigate
10: 55: 23 15 further, yes.

16 Q. And that was a concern to you; is that fair to say?

17 A. Correct. And also I don't believe I had this sheet,
18 this correctional care system at the time in 2004. I only
19 just got it recently.

20 Q. I understand, Dr. Kessner.

21 A. Okay.

22 Q. I'm just saying that as a general rule that what you're
23 talking about there is an example of what can happen and --
24 and make it appear that a person's score is one thing when in
25 fact it might not have even been his score, it might have

10: 55: 51 1 been a transposition, it might have been a clerical error, we
2 don't have the underlying data in which -- with which we
3 could check all of those things; is that fair to say?

4 A. Correct.

5 Q. Okay. And your concerns with the TONI and the Beta and
6 the Culture Fair are that they are snapshots, they are not
7 comprehensive scores, and I'm assuming from your testimony
8 that it is not something that you as a professional would put
9 a great deal of emphasis on in determining a person's IQ; is
10 that fair?

11 A. Correct. You cannot use those scores stand alone to
12 diagnose mental retardation.

13 Q. Okay. Now, I want to go forward a little bit, Dr.
14 Kessner, to the last testing that was done by a doctor.

10: 56: 34 15 Well, before I do that, aside from the -- from the WAIS
16 III, you also gave some other tests to check on the effort
17 that was given by Mr. Hines when you gave the WAIS III; is
18 that correct?

19 A. Yes.

20 Q. All right. Now then, let's move forward to the -- the
21 WAIS IV testing that Dr. Price did a few months ago.

22 A. Okay.

23 Q. You were furnished with both the results of that testing
24 and the underlying raw data; is that correct?

25 A. Correct.

10:57:08 1 Q. And have you had an opportunity to review that to make a
2 determination for yourself whether or not that test was
3 properly given?

4 A. Yes.

5 Q. And what is your opinion about that?

6 A. It's very consistent with the test that I gave in 2004.

7 Q. Did you also look at -- at the underlying data and was
8 it properly scored?

9 A. Yes. I -- I received the information I think July 10th
10 and reviewed it then. There were a couple minor,
11 insignificant errors, like one -- because you can have some
12 differences in scoring and not change the ultimate outcome,
13 but there's -- so essentially these scores are accurate. I
14 don't have any complaint with them.

10:57:57 15 Q. All right. And so his four -- the WAIS IV showed a full
16 scale IQ of 69; is that correct?

17 Am I right about that?

18 No. Hold it. The WAIS IV had -- well, just tell the
19 court what the results of that was.

20 A. Well, the WAIS IV that Dr. Price administered on
21 4/29/09, full scale IQ of 70.

22 Q. 70.

23 Assuming that was an accurate test, accurately scored,
24 good effort given, was the result of 70 also consistent with
25 a person being diagnosed with mental retardation?

10: 58: 33

1 A. Yes.

2 Q. And it was consistent with your 69 that you got in 2004?

3 A. Yes.

4 Q. And did Dr. Price also give tests that would indicate
5 the effort by Mr. Hines in taking that test?

6 A. Yes. He gave several tests.

7 Q. And have you had an opportunity to review the results of
8 his tests when he gave the WAIS IV, some of the same tests
9 that you gave back in 2004 when you gave the WAIS III, to see
10 whether or not they were consistent?

11 A. You're talking about the academic screening
12 instruments --

13 Q. Yes.

14 A. -- at that time?

10: 59: 10

15 Q. Yes.

16 A. Yes. They were consistent. There's always some shift
17 in scores. You're not going to necessarily get the exact
18 same score, but they're basically equivalent.

19 Q. Okay. So just so that we're clear, his most recent
20 testing, which you believe was accurately done and accurately
21 reflects his full scale IQ, is consistent with the same that
22 you got in 2004; is that correct?

23 A. Yes.

24 Q. In your opinion, Dr. Kessner, what is the likelihood if
25 a person was attempting to test lower than their true

10:59:42 1 abilities, if they were not giving good effort, if they were
2 malingering, whatever you want to call it, what are the --
3 what is the likelihood that a person could get a 69 on a WAIS
4 III in 2004 and a 70 on a WAIS IV in 2009?

5 A. I would say zero is the probability. Of course, You
6 haven't mentioned the other test that was given which is also
7 consistent, and it's kind of -- my idea is somebody would
8 have to be extensively coached, given the answers, and then
9 would have to have a lot of luck, equivalent to winning the
10 Lotto, to get these kind of scores.

11 Q. Now -- and that's just with the two.

12 Now we've got three, the Reynolds Intellectual
13 Assessment system that was also administered by Dr. Price,
14 was it not?

11:00:32 15 A. Yes.

16 Q. And is that an instrument intended to measure a person's
17 full scale IQ?

18 A. Yes It's a little bit different from the Wechsler, newly
19 published probably in 2003, maybe as early as 1999, and
20 Dr. Reynolds was at Texas A & M., and it was also given on
21 April 23rd, 2009, by Dr. Price.

22 Q. Do you believe there would have been any practice affect
23 or test/retest affect by -- just from the fact that Dr. Price
24 gave the WAIS IV and the Reynolds on the same day?

25 A. There -- potentially there could be. There might be

11:01:08 1 some similarities on some of the tests, maybe some of the
2 verbal, as far as the processes that somebody might use to
3 come up with an answer.

4 But the full scale IQ is similar.

5 Q. It wouldn't be something you would expect would make
6 enough of a difference for us to really place any
7 significance on it; is that fair to say?

8 A. Right. Because I don't know -- it doesn't look like
9 anybody would have even an opportunity to digest it.

10 Q. Okay. And the full scale on the Reynolds was a 71; is
11 that correct?

12 A. It's called a composite index, but it's a 71, yes.

13 Q. So that is consistent, in your opinion, perfectly
14 consistent with the WAIS IV that he gave?

11:01:53 15 A. Yes.

16 Q. And consistent with the WAIS III that you gave?

17 A. Yes.

18 Q. And all of those are consistent with a diagnosis of
19 mental retardation -- diagnosis of mental retardation; is
20 that fair to say?

21 A. Yes.

22 Q. And so what we have here is a person being tested three
23 times over time, with three different instruments, by two
24 different qualified examiners, and all of the results are
25 consistent with each other; is that fair to say?

11:02:22 1

A. Correct.

2

Q. And do I understand you to say that in your opinion the odds of that happening are about the same as winning the lottery?

3

4

A. Or less.

5

Q. Or less.

6

All right. So because of that, are you confident, Dr. Kessner, that through the use of these three instruments, by both you and Dr. Price, we have arrived at -- obtained IQ scores that are as accurate as the science will allow us to obtain?

7

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A. Yes.

9

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Q. And would you, just for the judge, tell us the difference between a true IQ score and obtained IQ score?

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11:03:04 12

A. A true IQ score is basically a theoretical IQ score. It's kind of like a dart board, you could give the test repetitively and you're going to get a little different score. You know, there are some calculations to try to determine what a true score would be.

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But essentially when you give a test administration you come up with what's called an obtained score that you have achieved on that particular day under those circumstances.

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Q. And so --

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A. If it's valid they're all going to kind of circle around what would be the true score and one of them may be the true

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score.
Q. All right. And you have reviewed -- you have reviewed Dr. Price's report, have you not, Dr. Kessner, where he is relying on the fact that a person can never test higher than their ability but they can test lower than their ability?
You understand the argument there, do you not?
A. Yes, I -- I read that in his report. I understand that argument.
Q. So that that position basically is if -- if he scored a 96 on the WISC-R, then he could not have done that if he had a true IQ in -- in the '60s or low '70s, but that he could do the '60s or low '70s if he were malingering or had a lack of effort. You understand that argument.
MS. CALLAGHAN: I object to him testifying as to what Dr. Price would say.
THE WITNESS: Correct.
THE COURT: Well, I'll hear Dr. Price's testimony.
Overruled.
BY MR. PARKS:
Q. However, it's your testimony that the test scores that have recently been obtained is in your opinion a fair assessment of his intellectual ability; is that correct?
A. Yes. And they call into greater question the Wechsler that was given in 1996.
Q. Now, I want to shift gears a little bit right quick, Dr.

11:04:50 1 Kessner, so that we can move this along.

2 There's -- there's two prongs to the Atkins
3 determination, both the first prong which we've been talking
4 about and then the adaptive deficit prong; is that correct?

5 A. Yes.

6 Q. And did we ask you to also -- in fact, you would be
7 required to look at his functioning abilities to make a
8 complete diagnosis of mental retardation, and did you do
9 that?

10 A. Yes.

11 Q. And just briefly tell us what -- how you went about
12 trying to make a determination about his adaptive ability.

13 A. I reviewed the CPS records, the school records, and the
14 TYC records. I essentially reviewed almost all these. I did
11:05:34 15 not read all of his letters because that would have taken a
16 lot of time. I did not view the video that was given with
17 this, or if it's an audio. But essentially I reviewed all
18 the records.

19 The -- Dr. Price mentions in his report that there is no
20 standardized instrument that is recognized to be valid on
21 this type of prison population, and so, you know, there's a
22 different methodology that you would use. So using the
23 records and looking at his history as a child and adolescent,
24 comments that people made about him, and his functioning at
25 that time, led me to decide that there was evidence of

11:06:18 1 adaptive deficits in his childhood, beginning early on, and
2 evidence through his teenage years, that would indicate that
3 his adaptive functioning was low, at least in one area, which
4 is what the AAMR 2002 book qualifies that there must be one
5 year of deficit either in social, conceptual, or practical.
6 And so, you know, he covered that also, based on his history
7 and the records, the documented records.

8 Q. Okay. So what you're saying is based upon -- you -- and
9 you interviewed some people; is that correct?

10 A. I interviewed Patricia Seat.

11 Q. Okay. You reviewed the affidavits, right?

12 A. I reviewed affidavits, yes.

13 Q. You reviewed CPS records?

14 A. Yes.

11:07:10 15 Q. You reviewed school records?

16 A. Yes.

17 Q. And based upon all of the things that -- that you
18 reviewed and what you've told us about, would you tell us
19 finally what your opinion is with respect to Mr. Hines'
20 mental capacity.

21 A. That -- I believe that he had adaptive deficits evident
22 in early childhood that are consistent with a diagnosis of
23 mental retardation.

24 I did not have information from age -- before he started
25 school, essentially. It was from school age which is where

11:07:42 1 the documentation begins and there's individuals outside the
2 family that are making notations about him.

3 Q. He was placed in special education; is that correct?

4 A. Correct.

5 Q. Now, was there ever a determination in the school
6 records that school officials identified him as being
7 mentally retarded?

8 A. No, there was not.

9 Q. But he was placed in special education?

10 A. Yes.

11 Q. They made notations that he was learning -- had learning
12 disabilities?

13 A. Yes. And I believe also emotional disabilities.

14 Q. Emotional disabilities.

11:08:15 15 Based upon your experience, Dr. Kessner, in reading
16 records and doing this kind of work, would it have been
17 unusual in your opinion for them not to have made a
18 designation of mental retardation at that time?

19 A. No.

20 Q. Why is that?

21 A. Well, because he was getting services as an LD
22 identified child.

23 MS. CALLAGHAN: Your Honor, for the record I need
24 to object here because this is going outside the scope of her
25 report.

11:08:49 1

THE COURT: Objection noted.

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THE WITNESS: One of the affidavits I believe indicates that if they -- in order to make this final determination they would give an individually administered test, such as the WISC-R or the Stanford-Binet, which is another comprehensive intelligence test. There's no indication in his school records that that was given.

So it appears they didn't take another -- once they got the Otis-Lennon scores it appears by the absence of a comprehensive test that they didn't take the next step to try to identify him further.

BY MR. PARKS:

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11:09:32 15

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Q. So rather than go ahead and do the two tests that would have -- one of the two tests that would have been indicated, they just put him in special education and that would have been where they would have put him if he had been given an individual test and identified as MR; is that essentially what happened? It appears?

A. Yes.

Q. Okay. One other thing, and I'm going to pass you for cross-examination.

I want to go back just real quickly to the test that was given, I believe it was when Mr. Hines entered TDCJ at 17, the Beta or Culture Fair. And it may have been the TONI. I believe it was the TONI at the Texas Youth Commission.

11: 10: 16

1 Did you have an opportunity to review the average test
2 scores of persons admitted at the same time, the same year
3 that -- that Mr. Hines was admitted?

4 MS. CALLAGHAN: Again, I'm going to object because
5 this is --

6 MR. PARKS: I'll -- I'll withdraw it, judge.
7 That's fine. That's fine.

8 I'll pass the witness, Your Honor.

9 THE COURT: All right. Ms. Callaghan, how do you
10 want to proceed?

11 MS. CALLAGHAN: Your Honor, I -- I think that
12 probably the best course of action would be -- they have
13 agreed that they're going to get me all of the notes that she
14 has right now. And I've got a feeling that my
15 cross-examination of her is going to take most of this
16 afternoon.

11: 10: 50

17 THE COURT: Well, I'm not going to let you
18 cross-examine the witness, then recess the hearing and then
19 come back and cross-examine the witness.

20 Ostensibly the reason that you need all this information
21 is so you can formulate an effective cross-examination.

22 MS. CALLAGHAN: Correct.

23 I would like the opportunity to be able to re-call her
24 tomorrow, after I have looked at these notes --

25 THE COURT: Right.

11: 11: 14 1 MS. CALLAGHAN: -- so that I can cross-examine her
2 on things that are included in these notes that were'nt
3 included elsewhere.

4 THE COURT: That's fine. I'm happy to recess the
5 hearing, give you the afternoon to --

6 MS. CALLAGHAN: I would actually like to proceed.
7 I've got a substantial cross-examination prepared based on
8 her state habeas, and then if I can just, you know, have her
9 subject to re-call tomorrow if I need to after I have seen
10 her other notes.

11 THE COURT: And then you're happy?

12 MS. CALLAGHAN: I think that, yes, that will make
13 me happy.

14 THE COURT: And that will moot the motion to strike
11: 11: 41 15 her testimony?

16 MS. CALLAGHAN: Yes. The one -- the one caveat to
17 that is that after I've read her notes it may be that I want
18 to contact the person that she's spoken to with regard to
19 the -- the Wechsler that he took, and perhaps depose that
20 person.

21 THE COURT: Well, that doesn't affect your
22 examination of this witness.

23 MS. CALLAGHAN: No.

24 THE COURT: That would affect the presentation of
25 your case in chief.

11: 12: 04 1

MS. CALLAGHAN: Correct.

2

THE COURT: All right. Very well. You can proceed along those lines.

3

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You can review her notes over the noon hour or this evening?

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MS. CALLAGHAN: Since Your Honor said we wouldn't be having court tomorrow morning I would have that time.

7

8

THE COURT: Correct. That's fine.

9

All right. Proceed.

10

MS. CALLAGHAN: Your Honor, may I approach the witness?

11

12

THE COURT: You may.

13

CROSS EXAMINATION

14

BY MS. CALLAGHAN:

11: 13: 03 15

Q. I just gave you a copy of a CV that I believe is a CV for you. I think this is your CV that I have obtained from outside sources. Because I didn't have your CV. I just want to make sure that this is accurate?

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A. There are changes and additions in the one that I gave Mr. Parks today.

20

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MS. CALLAGHAN: Okay. If you could give me a copy of the new one.

22

23

BY MS. CALLAGHAN:

24

Q. Okay. All right.

25

Dr. Kessner, I'm sorry, my name is Carole Callaghan and

11: 13: 33 1 I'm an attorney for the Attorney General's office, and I
2 don't believe we've ever met before.

3 A. That's correct.

4 Q. Have you ever testified for the state on an MR case?

5 A. No, I have not.

6 Q. So you've exclusively been a defense expert?

7 A. Correct.

8 Q. Are you exclusively a defense expert on other cases or
9 do you ever testify for the state?

10 A. I've never been called to testify by the state. Well,
11 in -- let's see. Not in adult cases.

12 Juvenile cases sometimes it's a little blurry who is
13 calling you, but not in adult cases.

14 Q. Okay. And those juvenile cases would be more like court
11: 14: 08 15 appointments or agreed --

16 A. Correct.

17 Q. -- testimony?

18 Okay.

19 A. In other words, I might have done an evaluation and the
20 prosecutor wants me to come in and testify or calls me and
21 asks me questions or sometimes it's the defense attorney,
22 sometimes the judge wants you to come in.

23 Q. Okay. In your expert report, which is an -- it's
24 Exhibit Number 15, which is in the binder that says Exhibits
25 4 through 15.

11: 14: 51

1 A. 4 through 35?

2 Q. I'm sorry. 4 through 35, yes.

3 A. Which one?

4 Q. 15.

5 A. 15. Yes.

6 Q. You list several items that you reviewed when you were
7 preparing for this. And one of them says Texas Youth
8 Commission. Is that the Texas Youth Commission records that
9 are in our exhibits now?

10 A. Yes. I think it's pretty similar, or pretty complete.

11 Q. Okay.

12 A. Because I reviewed them again. I looked at them last
13 night to see if there was any additional and I don't think
14 there was really any additional information.

11: 15: 30

15 Q. Okay.

16 A. There might be a few extra sheets or something but --

17 Q. And in the notes that you have agreed to hand over
18 today, do those notes contain all of the interview notes for
19 the people that you interviewed personally?

20 A. Well, I've interviewed -- I've -- I've talked to two
21 additional people for this hearing, just maybe yesterday.

22 Q. And who were they?

23 A. A Dr. Carole Wickstrom at University of North Texas.

24 And a Ms. Susan Nash at Syracuse University. I believe
25 she's maybe a department secretary.

11: 16: 18

1 Q. And do you have notes for those?

2 A. Just brief notes, yes, but I will include them in the
3 information.

4 Q. Okay. And then all of the notes that you have for the
5 other ones will be included in that information?

6 A. Right. Except I don't really have any notes for
7 Dr. Jeffords. I obtained some information after I talked
8 with him, so I'll give you that information.

9 Q. Okay. What -- what --

10 A. He was in research and planning, so I think the idea
11 there is he told me where to look for it on the web site.

12 Q. Okay. So he just gave you information about where to
13 find other information?

14 And he didn't give you any substantive information about
11: 16: 51 15 Mr. Hines, correct?

16 A. Correct.

17 Q. And there's also a list of interview summaries that you
18 reviewed?

19 Do you have those also?

20 A. That would have been provided to me by the attorney as a
21 work product, so -- that's some interviews that their
22 investigator did.

23 Q. Okay. I believe under the rules you are required to
24 turn over all of the underlying data that you relied on.

25 A. Okay.

11:17:13 1 Q. So if you have that then I will need that as well.

2 And if you don't have that, I need to know that you
3 don't have it.

4 A. I think I've got all those. There may be one -- no, I
5 think I have all of those.

6 Q. Okay. There's also a note, you have Lamar County
7 juvenile probation. Again, is that substantially the same as
8 the exhibits that we've submitted to you?

9 A. Yes.

10 Q. And is the Child Protective Services note the same?

11 A. Yes.

12 Q. Okay.

13 A. Yours were much better organized, so it's hard for me to
14 tell if they're exact.

11:18:07 15 Q. Right. I tried to go through and remove duplicates as
16 much as I could.

17 Thank you, by the way.

18 Okay. I want to start with talking about IQ scores.

19 A. Oh, one more person, Sharon Hawkins. And I have like a
20 brief note on her, too. She's with the Texas Education
21 Agency. I interviewed her in 2004, regarding the GED.

22 Q. Okay. Thank you.

23 So you've -- you've testified regarding the 96 that
24 Hines received on the WISC-R when he was 13 years old,
25 correct?

11: 18: 49 1

A. Yes.

2

Q. And likewise you're aware of the 87 and the 97 scores that he received on short-form tests?

3

4

A. Yes.

5

Q. The 87 was on the TONI and the 97 was probably on the Beta, possibly the Culture Fair.

6

7

A. Yes. Correct.

8

Q. Are any of these reported in your expert report?

9

A. I don't think I reported them specifically.

10

Let's see. I reported his GED scores.

11

No, I did not report those.

12

Let's see. I just made a reference to them but I didn't report the scores.

14

Q. You made a reference to the WISC-R, correct?

11: 19: 48 15

A. I made a reference to the WRAT W-R-A-T, but I'm not seeing that I made a reference specifically to the WISC-R.

16

17

Q. I believe if you look -- you don't list the score, but I believe -- oh, here it is. Under -- on page 4, under summary of other collateral contacts.

18

19

20

A. Okay. I made a reference to an IQ score, but I didn't cite it.

21

22

Q. Okay. And you didn't reference the TONI or the -- the Beta or Culture Fair at all, correct?

23

24

Is there a reason that you didn't reference those scores?

25

11: 20: 56

1 A. No.

2 Q. Did you feel that they were important?

3 A. Yeah. That's why I did the investigation, but I guess
4 it was a lapse that I didn't list them, but there was no --
5 there was no conscious decision to not list them.

6 Q. Let's talk a little bit about the Otis-Lennon tests that
7 were administered when he was in elementary school. One of
8 those was administered the first time that he was in first
9 grade and then the second one was administered when he
10 repeated the first grade, correct?

11 A. Correct.

12 Q. And those are both, as you stated earlier, grouply --
13 group administered tests?

14 A. Correct.

11: 21: 32

15 Q. And does that make them more or less reliable?

16 A. They're less reliable than a Wechsler or a full --
17 full -- full battery of tests.

18 Q. And did you consider those when you were considering
19 whether or not Hines' IQ score of 96 was an accurate
20 reflection?

21 A. I considered the discrepant information.

22 Q. Did you consider the fact that the TONI and the Beta
23 were consistent with the IQ of 96?

24 A. The Beta, yeah, the TONI is a little bit lower. But, I
25 mean, again, they're -- they're other information, so that's

11:22:13

1 why I wanted to investigate the WISC.

2 Q. Did you consider them as important information with
3 regard to what his actual IQ is?

4 A. As -- as important as the Otis-Lennon.

5 Q. Okay.

6 A. They were all important pieces of information.

7 Q. So if he had -- in pre18 he has two scores on
8 Otis-Lennon, which are group administered tests, that are
9 right around 70, 67 and 73 -- or 68 and 73. And then he has
10 two short-form tests that may or may not be group
11 administered, I think you would agree with me there's some
12 evidence that they were not because they were given at the
13 same time as he was given other standardized tests.

14 He was given -- he was given educational type
11:22:58 15 standardized tests at that time, correct?

16 A. You're talking about the Culture Fair or the Beta?

17 Q. I'm talking about -- I believe it was with the TONI,
18 when he was given -- administered the TONI, he was also
19 administered other standardized tests.

20 A. Well, if it's -- let's see, I know he was given the
21 Woodcock-Johnson at that time.

22 Q. Correct. And that's an individually administered test,
23 correct?

24 A. Yes, but that doesn't necessarily mean that the TONI was
25 administered by the same person individually.

11: 23: 26 1 Q. Does it make it more likely or less likely, in your
2 opinion, that it was administered individually?

3 A. I don't know that I can say.

4 I suppose it could be more likely if -- if there was --
5 but there was no indication of whether it was or not.

6 Q. Well, when you were at TYC did you administer a group of
7 tests to an individual all at one time?

8 A. Well, I think in this case it was not a psychologist who
9 administered it, and so there are different -- I didn't work
10 at the reception center. I worked at one of the units. So
11 my testing would have been for kids who came in that we
12 questioned the diagnostic work that was done on them at the
13 reception center and so then a psychologist would
14 administer.

11: 24: 08 15 Q. Would you administer them all at one time?

16 A. And a diagnostician would generally administer academic
17 testing because they were separate from the education
18 department.

19 Q. Were they administered all at the same time?

20 A. They might not administer the TONI. It might be the
21 psychologist who administers the TONI and they would do
22 the education, so there's no way to tell.

23 Q. Okay. So going back to the question. You've got two
24 tests that are around 70. You have two tests that are upper
25 80s to mid '90s. Do you consider all of those tests have

11: 24: 49 1 equal weight when you're considering IQ?

2 A. Well, once I administered my test --

3 Q. I'm talking before you administered your test. Just
4 looking at that. If you were in the hypothetical world and
5 you got a WISC-R score on a student and then you got two
6 Otis-Lennon tests that were inconsistent with the WISC-R and
7 you had two other short forms that were consistent with the
8 WISC-R, would it be -- is it your testimony that you would
9 discount the WISC-R because of the two short -- the two
10 Otis-Lennon tests?

11 A. No. I would further investigate what the discrepancy
12 was about, but I wouldn't discount it out of hand.

13 Q. Would the fact that there are two short-form tests that
14 are consistent with the full-scale test make it more or less
11: 25: 33 15 likely that he was mentally retarded?

16 A. Well, the circumstances of the administration would be
17 vastly different from when the Otis-Lennon was
18 administered.

19 Q. That's true. The Otis-Lennon we know was administered
20 as a group test.

21 A. And also when he was a first grader.

22 Q. That's true also.

23 And at the same time it was when he was being violently
24 abused by his father, correct?

25 A. According to the records, correct.

11: 25: 52 1 Q. Okay. So --

2 A. And the other one was administered upon -- upon

3 admission to a juvenile justice center.

4 Q. Correct. Where he wasn't being subject to any abuse.

5 A. Well, no but it's a startled kind -- I mean, there are a

6 lot of issues for kids who go there for the first time.

7 Q. Okay. Looking at it in a bubble, he has five pre18 IQ

8 scores, two of them are in the -- around 70, three of them

9 are in the upper '80s to '90s. Is it your expert opinion

10 that the three upper '80s to '90s are the more accurate -- or

11 the less accurate IQ scores?

12 A. Not upon initial examination. That's why I looked

13 further.

14 Q. And when you looked further what did you find?

11: 26: 42 15 A. Well, that's why I interviewed some individuals who were

16 named in the testing material -- in the report, to find out

17 what the circumstances were.

18 Q. And based on the information that you found, are you

19 discounting the 96 that he scored on the WISC-R?

20 A. I call it into question, yes.

21 Q. And what -- what -- what specific reasons do you have

22 for doing that?

23 A. I talked to Mr. Humeniuk who I mentioned earlier, and he

24 helped me -- he gave me some information that allowed me to

25 locate Mr. Lee and Ms. Bishop.

11:27:11 1 And Ms. Bishop is listed as the psychometrist in the
2 report of the WISC, so I wanted to talk to her to see if she
3 remembered giving the test, what the circumstances were. So
4 I did speak with her. And she told me that she had done
5 testing there on a volunteer basis and then later was
6 employed. So she did a lot of testing as a nonemployee on a
7 volunteer basis, not a contract basis

8 Q. Does the fact that she was a voluntary make the test
9 less likely to be accurate?

10 A. Well, she told me additional information. She said that
11 Sometimes she worked 12 hours days.

12 Q. Let's stop there for a second.

13 You worked at TYC, correct?

14 A. I didn't work at that facility, at the reception
11:27:57 15 center.

16 Q. But you worked at TYC?

17 A. Yes.

18 Q. And you testified previously -- let me get the exact
19 statement that you made -- that you were the only
20 psychologist on the grounds at one of the centers that you
21 worked at; is that correct?

22 A. I was the only psychologist -- doctor level psychologist
23 interacting with the kids, other than the director who was
24 administrator and she was new to the agency so she was in
25 training. And I was -- my office was on a unit where kids

11: 28: 20 1 were housed. And as they were bringing them in, almost by
2 the truckloads, it got to be approximately 300, 300 plus kids
3 before they brought anyone else in that was doctoral level.
4 Q. So you were seeing a lot of kids?
5 A. But I wasn't testing those kids.
6 Q. You were making assessments of those kids, correct?
7 A. I was reviewing their records. I was sitting in on
8 intake. As a treatment team we were interviewing them. We
9 might do ten a day, looking at their records, they're coming
10 in, and then they would go out into the dorm.
11 Q. So is your work product not accurate based on the fact
12 that you were working long hours and seeing a lot of
13 children?
14 A. I wasn't working long hours. I was working a standard
11: 29: 02 15 day.
16 Q. Okay. So is it your opinion then that a person who has
17 worked long hours, possibly worked long hours -- she doesn't
18 remember giving this test, correct?
19 A. She doesn't remember this specific test.
20 Q. The best -- from what I can read in your report the best
21 she could say was I recollect I was working long hours at
22 that time?
23 A. She said 12 hour days, and she said that testing records
24 and reports would be stacked very high on the psychologists'
25 desks.

11:29:30 1 Q. Did you put that in your expert report?

2 A. I'm not sure if I put that, but I did say -- it's in my
3 notes. And I just said that she would work 12 hours a day to
4 keep up with the workload. She was --

5 Q. Okay. Can you just try to limit your --

6 MR. PARKS: Judge, can she be allowed to answer?

7 THE COURT: Let her answer the question.

8 THE WITNESS: I was going to tell you what else she
9 told me.

10 BY MS. CALLAGHAN:

11 Q. Okay. Go on.

12 A. She did volunteer there because she enjoyed the work,
13 about five years or so. Then she came on as an employee.

14 She did some testing as an employee, maybe as much as 18

11:30:03 15 months worth of testing. She also worked as a youth
16 rights -- she told me -- let's see. She told me she worked
17 as a youth rights specialist, a case worker, and a dorm
18 director. So that after she got into these other positions
19 she didn't do any testing.

20 Let's see. She mentioned that she was the psychometrist
21 under contract, which Mr. Lee disputed.

22 She estimated that she did thousands of WISC-Rs and
23 WAISs during the time that she was there. And she said she
24 had a Bachelors in psychology from Howard Payne, and a
25 Bachelors degree in psychology typically does not include a

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course in testing.

Started volunteering in 1970, started as an employee in early 1980s. Not sure what happened to the forms after she was finished.

THE COURT: Let me stop you just for a second. I'm trying to follow -- you're reading from your notes?

THE WITNESS: Yes, sir.

THE COURT: Is any of this in your report?

THE WITNESS: Just the 12 hour days. That's what I was going to say.

THE COURT: When did this interview occur?

THE WITNESS: This interview occurred on 5/15/04, after I did the testing.

THE COURT: So right before you prepared your report?

THE WITNESS: Right.

THE COURT: And direct me in the report to where we're talking about 12 hour days.

THE WITNESS: In the paragraph referencing her, she has no recollection --

THE COURT: What page?

THE WITNESS: Page 4, about the middle of the page, under summary of other collateral contacts.

THE COURT: Wait a second.

Okay.

11:31:44 1

THE WITNESS: So summarized that she was listed as a psychometrist in the report, that's how she was identified. That she had a BA degree in psychology, a volunteer, contract worker, and worked 12 hour days.

THE COURT: All right. Go ahead and ask either the question again or your next question. I apologize for the interruption.

MS. CALLAGHAN: I'm not sure what my question was.

BY MS. CALLAGHAN:

10 Q. So you stated that she was a volunteer and that she then
11 went to work there for them on a -- on a contract basis,
12 correct?

13 A. Correct.

11:32:21 15

14 Q. Do you know whether she was a volunteer or contract at
15 the time that she tested Hines?

16 A. She just told me -- I can't be sure. She said that she
17 started as an employee in the early 1980s and so she referred
18 to herself as a psychometrist.

19 Mr. Lee, who I interviewed who was there at the time
20 said she was not a psychometrist.

21 So Mr. Clark said she was a psychometrist in the record.
22 I couldn't locate Mr. Clark.

23 Q. Okay. If you could try to limit your answers to the
24 questions that I'm asking.

25 A. Okay.

11: 32: 51 1 Q. Does it matter if she was a volunteer or whether she was
2 being paid?

3 Does that affect the score?

4 A. Well, it would be unusual to have volunteers -- you
5 know, was she supervised properly, because she wasn't
6 qualified.

7 Q. Do you know that she wasn't supervised properly?

8 A. Well, there's no indication that she was supervised on
9 her testing because she's doing so many tests a day.

10 Q. Do you start with the assumption that the test is
11 erroneous and then try to work towards the test being
12 accurate or should you start with the assumption that the
13 test is accurate until you are sure that there's other
14 evidence making it be erroneous?

11: 33: 32 15 A. I wouldn't say I was questioning the accuracy of the
16 test. I was trying to determine the circumstance so I could
17 decide my opinion on the accuracy of the test.

18 Q. I don't know whether that was a yes or a no.

19 When you start looking at a test what's your premise?

20 Do you start with the premise that the test is accurate
21 or do you start with the premise that the test is inaccurate?

22 A. Neither one.

23 Q. Do you have any -- so you start with no opinion at all
24 whatsoever?

25 A. I look at the data.

11: 33: 56 1 Q. Okay. So is the Otis-Lennon accurate?

2 A. It's consistent with the testing that's been done

3 recently.

4 Q. Is it accurate?

5 A. In my opinion it would be more accurate of the -- of the

6 testing from his childhood.

7 Q. Simply because it's consistent with the information that

8 you've gained recently?

9 A. And based on what I was told about the circumstances

10 under which the testing was done at TYC.

11 Q. Did you investigate the circumstances around the testing

12 on the Otis-Lennon tests?

13 A. No, I didn't call the school and ask them.

14 Q. Why not?

11: 34: 26 15 A. Well, I assumed that they had qualified people doing it,

16 because it was a school district. It wasn't any indication

17 that they had unqualified people.

18 Q. Is Windham not a school district or the schools that --

19 the TYC schools, are they not considered a school district?

20 A. Well, they are, but I also know based on my experience

21 that the classrooms are -- there's a lot of group work that's

22 done, so scores may not reflect an individual's separate

23 abilities.

24 Q. Well, this test was done individually, correct?

25 A. This one was, but I wanted to determine that these were

11: 35: 04 1 actually his scores that I -- as clearly as I could based on
2 the circumstances surrounding the administration.

3 Q. But you didn't want to do that with the Otis-Lennons?

4 A. No. And I didn't do that on the Beta either.

5 Q. Okay. So, Mr. Hines was performing generally poorly in
6 school, correct?

7 A. Consistently poorly, yes.

8 Q. Not consistently poorly, actually.

9 What -- did he not receive decent grades when he was in
10 TYC?

11 A. I believe he's also in special education when he was in
12 TYC. They had him listed that way.

13 Q. He's been in special education since the 1st grade,
14 correct?

11: 36: 01 15 A. Correct.

16 Q. But he wasn't in all special education classes in TYC,
17 was he?

18 A. Sometimes they put him in resource classes that had been
19 mainstreamed but they're not necessarily doing the work of
20 the other students.

21 Q. Was that a yes or no?

22 A. Well, he would not have been in all special ed classes
23 all the time, that's correct.

24 Q. So some of his grades in TYC, which are average grades,
25 were in actual regular classrooms?

11: 36: 28 1 A. The classroom structure there is very different from a
2 regular school room.

3 Q. Were they special ed classes or were they average
4 student classes?

5 A. You have kids in one classroom who range from one
6 classroom up to senior high or college level in the same room
7 with one teacher.

8 Q. Were they special education classes or were they regular
9 student classes?

10 MR. PARKS: We're going to object to arguing.

11 MS. CALLAGHAN: Your Honor, she's not answering.

12 THE COURT: Here are the rules. You make an
13 objection. You state the grounds for your objection. I
14 don't want a response to the objection unless I ask for it.

11: 37: 00 15 She's not arguing, Mr. Parks, she's trying to get an
16 answer to the question that she asks.

17 MR. PARKS: Yes, sir.

18 THE COURT: Dr. Kessner, listen to the question,
19 answer the question, without elaboration.

20 THE WITNESS: Thank you.

21 THE COURT: Proceed.

22 BY MS. CALLAGHAN:

23 Q. So were some of the classes that he took in TYC regular
24 education classes?

25 A. I think that they were not listed as special education,

11: 37: 20 1 so they may have -- I can't remember exactly if the record
2 says they were mainstream classes.

3 Q. So then your answer is that you do not know?

4 A. I know in part of his regular education in the community
5 he was listed as being in some regular classes, but I don't
6 recall if it specifically -- specifically said that at TYC.

7 Q. Okay. So in his -- when he was living at home we both
8 agree that he was getting poor grades, generally speaking.

9 A. Yes.

10 Q. Especially when he was younger.

11 And he got an IQ score on a full-scale individually
12 administered IQ test of 96. Is that not consistent with a
13 learning disability?

14 A. If it's an accurate test, a valid test administration,
11: 38: 11 15 it would be -- it could be consistent with a learning
16 disability if there's enough discrepancy between that and the
17 academics.

18 Q. And he was diagnosed as having a learning disability,
19 correct?

20 A. In the school district that's what they did, yes.

21 Q. Is it your testimony that you can score higher on an IQ
22 test than your actual IQ?

23 A. No, that's not my testimony.

24 Q. So do you believe that you cannot?

25 A. I believe there can be variations in how a child can do.

11: 38: 49 1 And Jerome Sattler, who is a recognized expert on testing of
2 children, indicates that variously kids can score a range of
3 20 points and still fall in the mental retardation range
4 because based on their environment or circumstances. So
5 there can be variations in testing.

6 Q. And with those variations in testing is there a
7 situation where a person's environment can make them score
8 higher than their actual IQ?

9 A. Well, the environment would be such that on that
10 particular day the obtained score would be a better score.

11 Q. So you're saying that a person's environment can
12 positively affect their IQ but as much as 20 points, that's
13 your expert testimony?

14 A. There are a lot of factors that can affect the -- the
11: 39: 38 15 obtained score, the assessment that's done, and I have
16 referenced a noted authority.

17 So I agree, yes, it's possible for scores to fluctuate

18 Q. And you're saying it's possible for a score to be 20
19 points higher than a person's actual IQ score based on
20 testing conditions?

21 A. I have -- I have the book with me if you would like to
22 see the book.

23 Q. Okay. I'm just making sure that that's what you're
24 saying.

25 A. Yes.

11: 40: 05 1

Q. Okay. Are you aware of any pre18 diagnosis of mental retardation?

2

3

A. No.

4

Q. And so far as you know the first time that Mr. Hines was ever diagnosed as being mentally retarded was in relation to this Atkins claim that he's raised?

5

6

A. Yes.

7

Q. Should you consider Hines' poor motivation in school to be a contributing factor to his low IQ?

8

9

A. Yes, I think you should.

10

11

Q. And is an IQ score likely to be subject to somebody's poor environment?

12

13

A. Environment is a contributing factor to intellectual development and motivation is -- is also consistent with low

11: 41: 03 15

functioning, so children who are low functioning have a failure concept of themselves and very often then they do more poorly and they get further behind, so --

16

17

18

Q. Okay. I'm really going to have to ask you to answer the question that I asked.

19

20

A. Okay.

21

Q. If a person has a poor -- comes from a poor environment are they more likely to get a low score on an IQ test because of that environment?

22

23

24

A. That's one of the risk factors.

25

Q. So if you're at home and you're being beaten on a

11:41:30 1 regular basis and you go to school and you take an IQ test,
2 is it more likely or less likely that you're going to score
3 lower than your actual IQ on that test?

4 A. I can't say that it's more or less likely. All I can
5 say is that it's a noted risk factor for low intellectual
6 functioning.

7 Some children in abusive environments excel as a coping
8 mechanism.

9 Q. You can't say whether it's more likely or less likely?

10 As an expert can you not say whether you think that
11 generally speaking people that come from horrible abuse are
12 less likely to score well on an IQ test?

13 A. All I can say is it's a risk factor for low intellectual
14 functioning.

11:42:15 15 Q. You can't make a determination as an expert whether it's
16 more or less likely?

17 A. No.

18 Q. You stated in your direct testimony that one of your
19 concerns was that a Dr. Clark had signed the sheet that had
20 Hines' scores on it, correct, as opposed to the actual
21 administrator of the test?

22 A. Can you repeat that, please?

23 Q. In your direct testimony you discussed the fact that you
24 were expressing concern over the fact that Dr. Clark had
25 signed the -- the sheet which lists his raw data for the --

11: 43: 01 1

for the WISC-R?

2

A. I wouldn't say it's a concern. I would say that that alerted me to the fact that somebody else administered the test.

3

4

Q. Okay. And you contacted Dr. Clark?

5

A. I was not able to locate him.

6

Q. Okay.

7

A. And it was Mr. Clark.

8

Q. It's Mr. Clark?

9

Is he not a doctor?

10

A. No.

11

Q. How do you know that?

12

A. He doesn't have a Ph.D. or Psy next to his name, and ordinarily people put that. And I think he identified

13

11: 43: 31 14

himself as a master psychologist.

15

Q. Do you know if he was board certified?

16

A. Master level psychologists are not allowed to work independently in private practice, so I don't think that he would be board -- he might have been licensed, but that's not indicated either.

17

18

19

20

With a Bachelors level degree, unlikely that he would be licensed. Master's level psychologist may have been a title that they had.

21

22

Q. Let's move on to adaptive skill areas.

23

In your expert report you don't list any adaptive skill

24

11: 44: 11 1 areas at all. Do you use the older version of the definition
2 for adaptive skills, which lists the 10 or 11 subsets, or do
3 you use the newer version which lists the three?

4 A. I think they're related. I mean, the 10 sort of fall
5 under and the American Association on Mental Retardation kind
6 of looks at supports and programming and things like that,
7 whereas the DSM is more of a deficit model. So, I mean, you
8 know, they're kind of related anyway.

9 Q. Okay. So which did you use in this case?

10 A. As I said, I didn't use a formal instrument, so just
11 based on the data that was available and the documents.

12 Q. Well, to diagnose somebody as mentally retarded don't
13 you have to determine whether or not they have deficits in
14 adaptive areas?

11: 45: 01 15 Isn't that the second prong of the mental retardation
16 definition?

17 A. You do, but there's no test that you can administer for
18 someone like Mr. Hines to come to that. There's no
19 standardized tests with a mean and a standard deviation that
20 you can administer to him, so you have to use the information
21 in the history and the records to come to that conclusion.

22 Q. Okay. But you have to reach that conclusion, right?

23 You have to reach a conclusion --

24 A. Right.

25 Q. -- that he has deficits and at least, depending on which

11: 45: 29 1 one you look, 2 of the 10 or 1 of the 3 skill areas?

2 A. I feel like he meets both qualifications.

3 Q. Okay. Did you list that in your report?

4 A. No, I didn't list the specifics on that.

5 Q. Is there a reason why you didn't?

6 A. No.

7 Q. Okay. I'm going to step through them and I'm going to

8 use the definition in the DSM-IV-TR --

9 A. Okay.

10 Q. -- which lists the ten skill areas.

11 And those areas are: Communication; self-care; home

12 living; social interpersonal skills; use of community

13 resources; self direction; functional academic; work;

14 leisure; health and safety, correct?

11: 46: 17 15 A. Correct.

16 Q. And when the courts talk about the related limitations

17 in adaptive functioning they're generally talking about these

18 areas, correct?

19 A. Correct.

20 Q. Okay. Let's go through each of the areas.

21 I'm going to start with communication and social and

22 interpersonal skills. I'm clumping those together because

23 frequently the evidence tends to overlap; would you agree?

24 A. Yes.

25 Q. Okay. Communication would cover both conversational

11:46:47 1 communication as well as written communication, correct?
2 A. Not verbal -- all kinds of communication.
3 Q. Right. Do you think that Hines has a deficit in the
4 area of communication?
5 A. I think that it's reflected in his records. Certainly
6 academically, his writing on his testing, he was scoring low.
7 As he matured his --
8 Q. Can you just answer yes or no?
9 A. Yes.
10 Q. Okay. And social interpersonal skills would include
11 one's ability to interact with others in an appropriate
12 fashion, correct?
13 A. Correct.
14 Q. Do you believe Hines has a deficit in this area?
11:47:33 15 A. Yes.
16 Q. I'm going to direct you to tab 6 of Exhibit 2.
17 A. Tab 6 of Exhibit 2?
18 Q. Yes. Page 31. I'm sorry.
19 A. 31.
20 Q. This is a page titled The Memories of Freddie Webb.
21 Are you on that page?
22 A. Yes.
23 Q. Okay. Have you read this previously?
24 A. Yes. I read this.
25 Q. Okay. In this statement Hines appears to have a deep

11: 48: 47 1 appreciation for Mr. Webb's outlook on life, correct?

2 A. That's what it says here, yes.

3 Q. And it's articulated quite well, isn't it?

4 A. Yes.

5 Q. Does this example of Hines' writing make it more or less
6 likely that Hines is deficient in the areas of communication
7 and social interpersonal skills?

8 A. Well, it's a nicely written piece, but as far as more or
9 less likely, it's just one piece of information.

10 Q. Would it be a piece of information to consider?

11 A. Yes.

12 Q. In considering it which way does it weigh?

13 Does it weigh more likely or less likely that he has
14 deficits in this area?

11: 49: 36 15 A. You have to put it in context. It's like a piece of raw
16 data, you have to put in it context.

17 Q. So put it in context.

18 And In context is it more or less likely?

19 A. Well, did someone help him, was he copying someone.

20 Q. Let's take it out of the Bobby Hines' world and look at
21 it in a hypothetical.

22 Let's assume that the court has determined that Mr.
23 Hines wrote this without help. Would this make it more or
24 less likely that he has a deficit in the areas of
25 communication and social interpersonal skills?

11: 50: 12 1 A. In social interpersonal skills?
2 Q. Yes.
3 A. It's a writing sample, so it's hard to say. I mean, it
4 could be fantasy.
5 Q. Do you believe it to be a fantasy?
6 It's written about a person that was executed.
7 A. Okay. Well, then this is his -- apparently these are
8 his thoughts.
9 Q. So does it make it more or less likely that he has
10 deficits in those areas?
11 A. Well, I don't -- I can't determine either way with this.
12 I mean, that --
13 Q. You're an expert.
14 A. Well, as I said --
11: 51: 08 15 THE COURT: Don't argue with the witness. If she
16 can't make a determination, she can't make a determination.
17 BY MS. CALLAGHAN:
18 Q. As an expert is it not your job -- as a forensics expert
19 is it not your job to look at data such as this and to help
20 it -- help you make a decision with regard to the adaptive
21 deficits?
22 A. This is a nicely written piece and I think it's within
23 the range of somebody who has mild mental retardation to be
24 able to compose something.
25 Q. You do?

11:51:35 1 A. Because they do have strengths and weaknesses within the
2 definition of mental retardation. Just because someone
3 appears to do well -- relatively well in an area does not
4 negate mental retardation.

5 Q. Okay. So -- you still haven't answered by question as
6 to whether it makes it more or less likely that he has
7 deficits in these areas.

8 A. I would say neither at this point.

9 Q. So you have absolutely no opinion?

10 A. It's just a piece of information. It's a piece of raw
11 data.

12 Q. As a forensics expert, isn't it your job to take all of
13 the pieces of raw data and to make a determination as to how
14 they fit into making a mental retardation determination?

11:52:10 15 A. Well, I might want to interview -- yes. I might want to
16 interview him about this piece, discuss these kinds of
17 thoughts with him, and that's something which I haven't done.
18 So just looking at this it's a piece of information.

19 Q. And it wouldn't affect your opinion at all,
20 whatsoever?

21 A. I can imagine that a 6th grader could compose something
22 like this.

23 Q. Okay. Are you familiar with the mail that's in
24 Respondent's Exhibit 1?

25 A. I have read some of it, yes. I couldn't read it all.

11:52:50 1 Q. It's a lot of mail, isn't it?

2 A. It's a lot of mail.

3 Q. It's a lot of writing for a person to do, isn't it?

4 A. Yeah.

5 Q. Yes.

6 Does anything in his mail or does his mail taken as a
7 whole have any impact on your determination as to whether or
8 not he has a deficit in the areas of communication?

9 A. I only read -- I read some letters from people to him
10 and letters from him to others.

11 There was one piece that was kind of course that I have
12 had other individuals I have evaluated that have written
13 similar pieces.

14 Q. Dr. Kessner, again, can you please answer the question?

11:53:56 15 A. I wouldn't say it was high quality stuff.

16 Q. I'm going to ask -- ask the question again.

17 Does anything in his mail or does his mail taken as a
18 whole impact your determination as to whether he has a
19 deficit in the areas of communication or social interpersonal
20 skills?

21 I'm just asking whether there's anything in there or
22 whether the whole of it has any impact at all on your
23 determination.

24 A. As I said, there's one piece in here that did sort of
25 strike me as being rather course and not exceptional.

11: 54: 37 1

Q. Okay.

2

A. The rest of it is just information.

3

Q. So out of these I don't know how many pages, it's your testimony that there is one letter that had any impact at all?

5

6

A. Out of the ones I read.

7

There's so much detail in here, I would have had to have spent all my time reading this, I never have would have gotten to the rest of it. So I had to say enough is enough. So I didn't read all of it.

10

11

Q. And there's one letter out of what you read that had any impact on you at all? On your determination at all.

12

13

A. There was one that I took note of especially.

14

Q. And none of the others did?

11: 55: 19 15

A. They seemed kind of generic.

16

Q. So they didn't have any impact?

17

A. Not one way or the other.

18

Q. You noted a minute ago that there was a large volume of this mail.

19

20

Does the fact that there's a large volume of mail that he sends and receives have any impact on you, on your determination?

22

23

A. No. I understand that's his favorite pastime, is to write letters.

24

25

Q. Does that not indicate that he does not have a deficit

11:55:49 1 in the area of communication?

2 A. It indicates that he's communicating. It doesn't say
3 what level, but he is --

4 Q. Have you read the expert report of Dr. Richard Hughes?

5 A. Yes.

6 Q. And have you seen the portion where he does an analysis
7 of two of Hines' letters?

8 A. Yes.

9 Q. And he finds them to be an at 8th grade level?

10 A. Yes.

11 Q. Do you find that to be accurate?

12 A. I don't find that to be correct, no.

13 Q. You don't think that that's accurate?

14 A. I haven't analyzed the material myself, but I don't find
11:56:26 15 that credible, based on his analysis.

16 Q. Why is it that you don't find that to be credible?

17 A. I mentioned I contacted a Dr. Carol Winstrom at the
18 University of North Texas. She has a Ph.D. in reading. I
19 queried her about this method he used. Reading and reading
20 assessment is her specialty. She said she was not familiar
21 with it, it was not widely used and she would not recommend
22 it as a methodology for assessing someone's reading level or
23 communication level.

24 Q. Have you conducted any assessments yourself of any of
25 these?

11: 57: 01 1 A. No.

2 Q. And so it's your opinion that the sheer volume of mail
3 that Hines sends and receives doesn't have any affect on your
4 determination regarding his communication?

5 A. No.

6 Q. Okay. Okay. Let's talk about specific pieces of mail.
7 Looking through there, did it -- did you notice that he
8 receives the USA Today?

9 A. I think that was listed, maybe a couple of other
10 magazines that he gets. I can't remember exactly. There
11 were some listed.

12 Q. So it's your understanding that he does receive the USA
13 Today?

14 A. Can you point me to the letter that references that?

11: 57: 49 15 Q. There's actually the covers of the newspapers.

16 A. Okay. I got about --

17 Q. For example, on page 195.

18 A. I don't think I got that far.

19 Q. You didn't get to page 195 in reading these?

20 A. No.

21 Q. Okay. Where -- how far did you get into it?

22 A. Page 128.

23 Q. I'm sorry, page 128?

24 MR. PARKS: It's behind what tab?

25 MS. CALLAGHAN: 2.

11: 58: 51 1

MR. PARKS: Got you.

2

BY MS. CALLAGHAN:

3

Q. Flip over to page 79, if you could.

4

A. That's a USA Today.

5

Q. So you have seen this?

6

A. Something -- yes. I saw some of these in here.

7

Q. Okay. So you're aware that he gets the USA Today?

8

A. Um-hum.

9

Q. Are you aware that he's been subscribing to the USA

10

Today for years?

11

A. I don't know that I know that.

12

Q. Okay.

13

A. I mean, it might have been referenced in here in one of the letters, but --

11: 59: 23 15

Q. Do you want to accept that as fact or do you want me to show you? It's in the --

16

17

A. No, I'll accept that.

18

Q. Okay. Okay. Does the fact that Hines subscribes to a newspaper affect your determination that he has a deficit in the area of communication?

19

20

A. No.

21

Q. It has no impact at all?

22

A. I mean, he subscribes to a newspaper. I mean, he's --

23

you know, is he reading all of it. As I said, it's a piece

24

of data that's not attached contextually so you can't assess

25

11:59:56

1 it beyond that.

2 Q. Are you aware that Hines frequently discusses his case
3 in his letters?

4 A. I saw some of that, yes.

5 Q. Does the fact that he discusses his case affect your
6 determination that he had a deficit in the area of
7 communication?

8 A. Knowing that he does that and everything is copied, it
9 doesn't seem very bright, so in that regard, yes. But as far
10 as -- I mean, people sometimes just run off at the mouth
11 regardless of their intelligence.

12 You know, he's obviously reaching out to somebody and
13 sharing his limited life experience with that person and he's
14 preoccupied with his case so he's writing about it.

12:00:49

15 Q. Is it appropriate for him to be preoccupied with his
16 case?

17 A. Makes sense to me.

18 Q. During your interview with Hines that you conducted I
19 think in 2004, he told you that he had pen pals, correct?

20 A. Yes.

21 Q. Did you explore that area with him at all?

22 A. I'd have to go back and look at my notes. I don't
23 recall everything about it.

24 Q. Okay. Your notes are behind tab 16 of the binder that
25 says Exhibits 3 through 35.

12:01:53 1 A. In a different --
2 Q. Yes, they're in a different binder.
3 A. 16?
4 Q. Yes. I can -- I can point you to the exact page, if it
5 helps. It's page 13.
6 A. Okay.
7 MR. PARKS: What page did you say?
8 MS. CALLAGHAN: 13.
9 BY MS. CALLAGHAN:
10 Q. So reading that does it refresh your recollection?
11 A. Yes.
12 Q. So did you discuss this topic with him further?
13 A. I don't know if I went into any great detail, other than
14 just to note that he had pen pals that he was writing to.
12:03:13 15 Q. Did you not find that to be important?
16 A. It's pretty common there.
17 Q. Was that a yes or a no?
18 A. It's -- not necessarily.
19 Q. Okay. Are all of the inmates on death row mentally
20 retarded?
21 A. No.
22 Q. So the fact that it's pretty common would indicate what?
23 A. It's just common for them to have pen pals, especially
24 from Europe.
25 Q. Okay. Are you familiar with the guidelines for forensic

12: 03: 37 1

psychol ogi sts?

2

A. Yes. I mean, I don't have them memorized, but I'm

3

fami liar with them. I read them.

4

Q. And do you attempt to follow those guidelines?

5

A. Yes.

6

Q. Are you aware of the portion of the guidelines which

7

covers the methods and procedures used by forensic

8

psychol ogi sts?

9

A. Not off the top of my head.

10

MS. CALLAGHAN: Your Honor, may I approach the

11

wi tness.

12

THE COURT: This really isn't a very effective way

13

to proceed. If you're referring to a speci fic guideline or

14

practice ask her about it and she may be fami liar with it.

12: 04: 15 15

My guess is there are a whole bunch of guidelines and

16

practices that govern forensic psychol ogi sts.

17

BY MS. CALLAGHAN:

18

Q. Okay. The speci fic guideline I'm referring to indicates

19

states, and this is a quote, that forensic psychol ogi sts,

20

quote, maintain professional integri ty by examining the

21

issues at hand from all reasonable perspectives, actively

22

seeking information that will differenti ally test plausible

23

rival hypotheses; is that correct?

24

A. Yes.

25

Q. Okay. Woul dn' t seeki ng information about Hines' level

12:04:43 1 of communication with a wealth of pen pals conform to the
2 guidelines, especially considering the fact that you were at
3 least aware of the fact that he had pen pals?

4 A. Well, I think I did that, because I covered his reading
5 and I had his school records that indicated his reading level
6 was low, and writing letters to someone is not necessarily --
7 he had -- had a writing sample from him myself, so it wasn't,
8 you know, elegant writing.

9 Q. So you didn't find that it would be informative for you
10 even to explore the fact that he had other pen pals?

11 A. I don't think that it indicates or contradicts mental
12 retardation either way. I mean, I don't think it -- it has a
13 strong bearing on whether or not he's mentally regarded.

14 Q. Is there any hypothetical situation where you could say
12:05:34 15 that having pen pals had a bearing?

16 What if he had 60 pen pals that he wrote to every day,
17 would that have a bearing on whether or not he had a deficit
18 in the area of communication?

19 A. Well, as I said, the communication, it's basically
20 dialogue and so it can be very rudimentary. I mean, he could
21 can be writing brief letters to someone, long letters to
22 someone else.

23 Q. Okay. Let's assume he wrote prolific letters on a
24 regular basis, would that have any bearing on your opinion?

25 A. Would it prove whether or not he was mentally retarded,

12:06:10 1

no.

2 Q. Would it prove whether or not he had a deficit in the
3 area of communication?

4 A. It would indicate that --

5 THE COURT: Doctor, just answer the question.

6 THE WITNESS: Well, it would indicate that it might
7 be a strength, a relative strength for him.

8 BY MS. CALLAGHAN:

9 Q. Okay. So is this not some information that you might
10 want to enter into in a discussion with him?

11 A. As I said, I just made this note. I don't recall. It's
12 been five years since I saw him. I don't recall everything.
13 I can't take notes on everything the person says, so --

12:06:45 15

14 Q. So is it your testimony that you did discuss it further
15 with him?

16 A. I don't -- I don't recall. I don't know that I
17 discussed it further or not. I was looking at his -- what he
18 did with his time, trying to see what kind of activities he
19 was involved in.

20 Q. Okay.

21 A. But I didn't go into detail about how many letters he
22 wrote or anything like that.

23 Q. Okay. Okay. Let me direct you to page 32 of his mail,
24 which is found behind tab 1 of notebook 1.

25 A. Oh, over here?

12:07:33 1 Q. At the top of that page it says Dear Vero, hello there.
2 Are you on that page?
3 Are you familiar with who Vero is?
4 A. Is she from Norway or Suriname or --
5 Q. I think she's French.
6 A. Okay.
7 Q. But would you agree with me that she's a pen pal of his?
8 A. It looks like it.
9 Q. And based on the context of this letter it appears that
10 she's a new pen pal, correct?
11 A. I read this. I don't recall the details of her letter.
12 Q. Okay. Can you look over it really quickly, just to --
13 A. How far do you want me to read?
14 I have the first page.
12:08:43 15 Q. Do you get the impression that it's a new pen pal?
16 A. Well, looks -- yeah, he's discussing what she wants to
17 be called and what he can be called.
18 Q. Right.
19 A. So it indicates this is an early communication.
20 Q. Okay. And at the bottom of page 32, going into the top
21 of page 33, it appears that he's answering some questions
22 that she had written him in a previous letter, correct?
23 A. Well, he's making some statements about his case, so she
24 may have asked him. You asked me a few questions. Okay. I
25 see that. Yes.

12:09:17 1 Q. Okay. So the first question is he -- quote, he says,
2 Number 1: Do I have a chance to ever be released?

3 Vero, I'd like to believe I do. I did not do this
4 crime. I live with faith in my heart that I will. My case
5 is on appeal.

6 Now there's a line that's missing there and I apologize
7 for that but TDCJ cut it off. If we go to the next page it
8 continues: If I'll be granted a hearing. I'll keep you
9 posted.

10 Number 2: What will happen to me?

11 Girl, I really don't know. I always look for the worse
12 and I hope for the best. I'm on death row, so the very
13 worst -- I'm sorry -- so the worse speaks for itself. If I
14 don't win something somewhere in the courts I'll sooner or
12:10:02 15 later be dragged to a table and strapped down and murdered
16 like some kind of animal. Sorry to be so frank with that but
17 it's the truth and the everyday fears of reality in which I
18 live my everyday life in.

19 Did I read that correctly?

20 A. Yes. Yes.

21 Q. Doesn't this indicate that Hines has at least a minimal
22 understanding of his case?

23 A. Yes.

24 Q. Doesn't it also indicate that he has the ability to
25 communicate his fear to Vero?

12: 10: 38 1

A. Yes.

2

Q. Isn't this evidence of both communication and social interpersonal skills?

3

4

A. It's a piece of information that would indicate communication and some social interpersonal skills.

5

6

Q. Doesn't it also indicate that Hines understands the magnitude of his conviction?

7

8

A. It -- it indicates he understands death, yes.

9

Q. And it indicates that he understands the shock value of frankly discussing his eventual execution, correct?

10

11

A. I don't know that this text indicates that, but. . .

12

13

Q. Specifically where he talks about being dragged to a table and strapped down and murdered like some kind of animal and then he states Sorry to be so frank with that but it's

14

12: 11: 24 15

the truth of everyday fears of reality in which I live my everyday life in, doesn't that indicate that he understands the shock value of what he's saying?

16

17

18

A. I don't know if I'd characterize it as shock.

19

20

Q. Okay. Hines goes on to tell Vero that he's including two articles that will, quote, break a lot of things down for her. The articles are attached. Those are on the subsequent pages. Starting on page 36.

21

22

23

Did you find that these articles were relevant to the topic of the letter?

24

25

A. I mean, they were -- yes, they were referring to the

12: 12: 09 1 same issue that he's discussing.

2 Q. And does the fact that he can attach relevant
3 information to assist somebody in learning about his everyday
4 life make it more or less likely that he has deficits in the
5 area of communication and social interpersonal skills?

6 A. Well, it could. Or, again, I'd have to say context.

7 Q. Okay. Can you please flip to page 40.

8 This is a letter that is written to Moni.

9 A. Yes.

10 Q. Are you familiar with who Moni is?

11 A. I believe they're married now by proxy or however they
12 can accomplish that with an inmate.

13 Q. And are you aware that this is a actually a recognized
14 legitimate marriage that is recognized by the State of Texas?

12: 13: 23 15 A. I believe it's this year.

16 Q. Correct. Would April 3rd sound correct to you?

17 A. Yeah.

18 Q. Okay. About three-fourths of the page, way down that
19 page, on page 40, he states Glenn's birthday was on 10th of
20 this month and I forgot it. I'm getting real bad about that
21 these days. I'll forget my own next. Watch.

22 And then he has lol written in parenthesis. Do you know
23 what lol --

24 A. Laugh out loud?

25 Q. Correct. I assume that's the typical meaning for it,

12: 13: 58 1 correct?

2 In addition to showing that he can communicate birthdays
3 and dates to other people, doesn't this also indicate that he
4 has an understanding of the concept of times and calendars
5 and personal holidays?

6 A. Yes.

7 Q. Does it indicate that he understands the importance of
8 celebrating those holidays with his loved ones?

9 A. Or being aware of them. He's not able to directly.

10 Q. Right. Obviously he can't be --

11 A. Yes, it does.

12 Q. Would that make it more or less likely that he has
13 deficits in the skill areas of communication and social
14 interpersonal skills?

12: 14: 41 15 A. At the level -- well, I don't think it's out of the
16 question that someone at the level that he is at could
17 exhibit these and still have adaptive deficits. This doesn't
18 indicate to me -- I mean --

19 Q. Does it more or less likely?

20 A. Neither one. Mentally retarded people can be loving,
21 caring towards their family members. It doesn't mean they
22 aren't or they are. It's a human emotion that they can
23 share.

24 Q. But understanding birthdays and understanding the
25 importance of birthdays and remembering birthdays and the

12: 15: 25 1 fact that he does remember birthdays, do all of those things
2 make it more or less likely?
3 A. I would say at his level of functioning it's -- it's not
4 either way.
5 Q. Okay. Can you flip to page 496, which is behind tab 7?
6 Now, I know you haven't read this far back so I'm going
7 to give you background and I hope that you will accept what
8 I'm saying is accurate. It's all in here.
9 This letter was written to a Ms. Walden, which is
10 apparent on page 495. In a previous letter Ms. Walden had
11 written him requesting information because she was writing a
12 report for school on death row inmates and people -- you
13 know, their interactions with families and things like.
14 A. That occurred earlier in the book?
12: 16: 29 15 Q. No. It's under tab 7, still. It could be something
16 that you had earlier, because these were old records.
17 A. Okay. I remember seeing that so --
18 Q. Okay. So you're familiar with that?
19 A. I remember seeing her request.
20 Q. Okay. Well, there's actually two requests. There's one
21 earlier in the book from someone else and then there's this
22 one.
23 A. Okay. Okay. So I'm not --
24 Q. But it's the same kind of thing.
25 A. Okay.

12: 16: 49 1 Q. So he wrote back to her and this is the letter that he
2 wrote back to her. And at the bottom of the page, again,
3 about three-fourths of the way down there's a sentence that
4 starts, then for him to have -- he's talking about Glenn
5 here. So when it says "him" he's referring to his brother
6 Glenn.

7 A. I'm sorry, I'm not --

8 Q. It's one, two, three, four, five, six lines up from the
9 top -- bottom. About halfway through.

10 A. Six lines up from the bottom?

11 Q. Yes. It starts, Then for him to have a father in prison
12 as well?

13 A. Page 449?

14 Q. Page 496.

12: 17: 38 15 A. Okay.

16 Q. Okay. He's talking about Glenn. He states, Then for
17 him to have a father in prison as well I know he is hurting.
18 How do you think he must feel when Thanksgiving comes around
19 and his wife's family is the only family around,
20 Christmastime, times when the family should be family and
21 together. And he can't do that. I have had 11 years to
22 think about what you are writing about. I know what I am
23 talking about.

24 Does this indicate that Hines has strong insight into
25 the human need for family and companionship?

12: 18: 12 1

A. Yes.

2

Q. Does it affect your determination that he has a deficit in the area of communication?

3

4

A. Well, I would say in this -- this -- this is a strength that he has. This is relative strength that he's exhibiting, his relationship with his family members.

5

6

7

Q. Okay. So are you saying that he has a strength in the area of communication?

8

9

A. His relationship with his -- well, his social personal relationship with his family members and his ability to talk about that.

10

11

12

Q. Okay. So earlier you said -- earlier you said that he has deficits in the areas of communication and social interpersonal skills.

13

14

12: 18: 45 15

A. Yes.

16

Q. Are you still saying that or are you saying that he actually has strengths in those areas?

17

18

A. I'm saying this is an indication of a relative strength in this piece of data --

19

20

Q. Okay.

21

A. -- that with his family he has -- he's able to share his feelings.

22

23

Q. Does that affect your overall opinion? With regard to these -- these adaptive deficit areas.

24

25

A. Well, he also did that as a young person, but sometimes

12: 19: 09 1 i nappropriately, so this is with his family, so this is
2 different.

3 Q. So does it affect your opinion?

4 A. About whether or not he has adaptive deficits?

5 Q. In these areas.

6 A. He has some deficits and he has some relative strengths.
7 This would be like a relative strength.

8 Q. So is it your testimony that if you show some evidence
9 of deficits and some evidence of strengths it still is a
10 deficit?

11 A. It may be, depending on the context.

12 Q. Okay. So then the way this would affect you is you
13 think this is a strength -- this shows a strength but you
14 still think that overall he has a deficit?

12: 19: 52 15 THE COURT: Let's specify. A deficit in what?

16 MS. CALLAGHAN: I apologize, Your Honor.

17 BY MS. CALLAGHAN:

18 Q. In the area of communication and in the area of social
19 interpersonal skills.

20 A. I would say that this letter indicates that as an adult
21 he is exhibiting a relative strength with regard to how he
22 feels about his family members, but other parts of his life
23 indicate that he had -- did not have this kind of strength in
24 his interpersonal social communication skills in a broad
25 variety of contexts.

12: 20: 23 1 Q. So then it's your testimony that he has deficits in
2 these areas, still?

3 A. I think there's evidence that there are deficits and
4 that this is a relative strength.

5 THE COURT: Let's go ahead and break here for
6 lunch.

7 We'll resume at 1:30.

8 THE SECURITY OFFICER: All rise.

9 (Recess taken at 12:25.)

10 (Proceedings resumed at 1:30.)

11 THE SECURITY OFFICER: All rise, come to order.

12 THE COURT: Be seated, please.

13 Ms. Callaghan, you may resume your cross-examination.

14 MS. CALLAGHAN: Thank you, Your Honor.

12: 20: 48 15 CROSS EXAMINATION

16 BY MS. CALLAGHAN:

17 Q. The next thing that I want to look at is on page 399 of
18 the TDCJ mail, which is binder one.

19 And, Dr. Kessner, I'm going to ask some questions about
20 this one as well as page 422, and page 426, and the last one
21 is page 428.

22 THE COURT: Go ahead and ask your question.

23 BY MS. CALLAGHAN:

24 Q. Okay. All of these appear to be cards that Hines sent
25 to various people for Mother's Day; is that correct?

12: 20: 48 1

A. Yes.

2

Q. And these were sent to his actual mother, Rita Drennan, Paula Bozeman, Geneva Slease, and Mona Jean Hines, correct?

3

4

A. Yes.

5

Q. Does the fact that Hines thought to send all of these women Mother's Day cards affect your determination that he's deficit in the area of communication?

6

7

8

A. No.

9

Q. Does it weigh one way or the other in your opinion?

10

A. That he's deficit in communication?

11

Q. Yes.

12

If you could please turn to page 55.

13

Are you at that page?

14

A. 55, yes.

12: 20: 48 15

Q. This appears to be later written to a woman by the name of Tone or Toney Skage, who appears to be one of his pen pals. I'm going to read you a section from this.

16

17

18

The paragraph that starts about halfway down on page 55.

19

It starts with Sis. And it says, Sis, this place is driving people crazy. People are cutting off themselves, popping

20

21

their eye balls out and eating them, for real. His name

22

was -- and then it says in parenthesis -- or is Amere Thomas.

23

He popped his first eye out a few years back, now he done the other one and eat it. Look it up. I don't see how we can be

24

25

treated like this, caged for the rest of our lives, locked in

12: 20: 48 1 one little room. They are turning us into animals slowly, if
2 anything.

3 What it is -- what is it really going to take for these
4 people to see this. There are people trying to even kill
5 themselves back -- themselves back here. One did not long
6 ago, and no one even talked about it hardly. Does this not
7 show insight into the human condition? I'm sorry, that was
8 the end it, hardly. And my question is: Does this show
9 insight into the human condition?

10 A. Yes.

11 Q. Do you think this passage makes it more or less likely
12 that Hines has a deficit in the area of communication?

13 A. Well, it's a nicely written passage, but he -- I would
14 say no based on information contained in the report and
12: 20: 48 15 another letter that he wrote that he has help writing his
16 letters.

17 Q. So do you think it makes it more or less likely?

18 A. Neither.

19 Q. So it doesn't affect your opinion one way or the other?

20 A. Well, not at this point, no.

21 Q. Okay. Could you turn to page 58, please?

22 Now, this is a letter that was written to his wife,
23 Moni, and about a fourth of the way down, right after the
24 smiley face that he draws, he states, I just finished that
25 book that you sent me and it had me all worked up.

12: 20: 48 1 Does this indicate to you that he read a book?

2 A. Well, yes, he says he read a book.

3 Q. And does this make it more or less likely that he has a
4 deficit in the areas of communication?

5 A. Neither.

6 Q. It doesn't have any affect on your opinion at all,
7 whatsoever?

8 A. Well, I don't know what book it was and what he means by
9 reading it or --

10 Q. Okay. The next sentence says, I'm going to spend so --
11 which I assume was meant to be -- some love making time with
12 you baby, girl, tonight -- today, just not in the day room.

13 Based on those two sentences taken in context together,
14 what kind of book do you think it was that he read?

12: 20: 48 15 A. Well, it likely had some sexual content or romantic
16 content.

17 Q. Okay. Knowing that, does it make it more or less likely
18 that he has a deficit in the area of communication?

19 A. For someone with his intellectual functioning level it
20 doesn't weigh either way, I don't think.

21 Q. So in your expert opinion it has no bearing?

22 A. It's consistent with somebody who has mild mental
23 retardation close to the cutoff score of 70.

24 Q. But it doesn't make it more or less likely that he has
25 an adaptive deficit?

12: 20: 48 1

A. No.

2

Q. Okay. On pages 60 through 62 of this same letter -- did you read these letters?

3

4

A. I read this one.

5

Q. Okay. You looked at me and smiled, indicating that you know what this letter contains. And what does it contain?

6

7

A. It's a sexual fantasy.

8

Q. Okay. And this was written by Mr. Hines?

9

A. Yes.

10

Q. To Moni, correct?

11

A. Yes.

12

Q. Does the fact that he wrote this erotic story to his

13

wife make it more or less likely that he has a def -- def --

14

sorry -- deficit in the area of communication?

12: 20: 48 15

A. No.

16

Q. I'm sorry. I don't -- does it make it more or less

17

likely?

18

A. Neither.

19

Q. It doesn't have any affect at all whatsoever?

20

A. Mentally regarded people can marry, they can fall in

21

love. And when I made a reference to a crudely written

22

letter this is one I was referring to, and not because of the

23

subject matter.

24

Q. So in your opinion this letter is a crudely written

25

letter?

12: 20: 48 1 A. Compared to other letters like it that I have read by
2 inmates that have a lot more creativity and fantasy, this one
3 is more crudely written, yes.

4 Q. And it's more crudely written because his fantasy
5 isn't --

6 A. Not as well-developed, not as much creativity.

7 Q. So then you would be saying in your opinion this makes
8 it less -- makes it more likely that he has a deficit in the
9 area of communication?

10 A. Well, it's not inconsistent with somebody who is at the
11 level of intellectual functioning that I believe he is.

12 Q. Can I get you to answer the question?

13 Does it make it more or less likely that he has a
14 deficit in the area of communication?

12: 20: 48 15 A. Neither.

16 Q. Does it indicate to you that he wants to have a romantic
17 relationship with his wife?

18 A. Yes.

19 Q. And does that desire to have a romantic relationship
20 make it more or less likely that he has a deficit in the area
21 of social interpersonal skills?

22 A. Well, I would say it's a relative strength.

23 Q. So more likely then?

24 A. More likely that he has a deficit, no.

25 Q. I mean, I'm sorry, less likely.

12: 20: 48 1 A. Well, I wouldn't say it's less likely.
2 As I said, the mentally retarded can fall in love and
3 marry and have children. This doesn't say that he's not, and
4 it doesn't prove that he is.
5 Q. It shows a relative strength, correct?
6 A. Relative strength.
7 What I mean by that in his relation to his level of
8 intellectual functioning.
9 Q. With regard to the adaptive deficits, is it your
10 understanding that you have to have a substantial deficit in
11 an adaptive area in order to be considered mentally retarded
12 based on the adaptive deficits?
13 A. Yes. If you're using one of the standardized tests you
14 can show a numerical figure that -- a statistical figure that
12: 20: 48 15 tells you exactly how far from the mean. But there is no
16 test available for him.
17 Q. There's no -- right.
18 So you have to show somehow though that he has a
19 significant deficit in an adaptive behavior, correct?
20 A. Yes.
21 Q. Okay. In your opinion does he have a significant
22 deficit in the area of communication?
23 A. With these letters that have been written I don't think
24 that it demonstrates a significant deficit.
25 Q. So do you think he has a significant deficit?

12: 20: 48 1 A. I think it's demonstrated in his other documented
2 records.

3 Q. So then your answer is yes?

4 A. That he has a -- I think his records from childhood
5 indicate significant deficits in communication and
6 interpersonal relations.

7 Q. And which records are those?

8 A. The CPS records, the school records, affidavits by the
9 teacher, comments by the case worker, the TYC records,
10 comments by the staff, the child care staff there.

11 Q. And which specific comments were these?

12 A. His immaturity level, his fixation on a peer when he was
13 in TYC that seemed kind of unnatural to them, sort of a
14 longing to be close to this peer because of his affection for
15 this person that was not sexual, wanting to be transferred
16 from his dorm back to this other dorm.

17 Q. Okay. Let me -- Let me stop you with regard to that
18 particular issue.

19 Is it your testimony that to have a best friend that is
20 in your age group that's a peer of yours that's living in a
21 dormitory environment with you is evidence that he's mentally
22 retarded?

23 A. In the context of the environment that he was in it was
24 unusual enough that they made a note of it.

25 Q. But were they making a note of it in the diagnosis of

12: 20: 48

1 mental retardation?

2 A. No. As far as his functioning they were making a note
3 of it, as a concern that they had.

4 Q. So in your expert opinion he's developed a strong
5 friendship with this person, he's got a bond with this
6 person, is that evidence of mental retardation?

7 A. Having a bond with a person by itself is not evidence of
8 mental retardation.

9 Q. Do you consider that in this case for his friendship
10 with another person that's a peer to be evidence of mental
11 retardation?

12 A. The way they described it, he was obsessive about it.
13 There were concerns about it. It seemed age inappropriate,
14 maybe more for a younger person.

12: 20: 48

15 Q. Okay. I'm going to -- we're going to go to those
16 records for a minute.

17 Did you say they were in the TYC or in the CPS records?

18 A. That was in the TYC records.

19 Q. Okay. So those would have been in exhibit -- the TYC
20 records are in Exhibit 3, behind tab 3.

21 Okay. Do you remember where in here it is?

22 A. Page 166.

23 Q. And which part?

24 I'm having a hard time reading this.

25 A. In the bottom part of the section, Bobby continues to

12: 20: 48 1 have peer problems and will not let go of his deep friendship
2 he has for a peer on -- and they reference a different dorm.
3 He continually looks at that peer as the most important part
4 of his life. His attitude toward the peer is unrealistic.
5 We discussed this.

6 And I think there might have been some other references
7 elsewhere to that. So it was enough of a problem for them to
8 make a note it was unusual, out of the ordinary kind of
9 behavior.

10 Q. Okay. And in the context of Bobby's life growing up,
11 was he capable of having any peers before he entered into
12 TYC?

13 A. Positive peer relationships in foster care, I think
14 there were problems with that.

12: 20: 48 15 Q. So he was bounced around a lot, right?

16 He went from school to school, he transferred schools
17 several times during that time. He went to foster care. He
18 came out of foster care. And so when he got to TYC is it
19 unrealistic for him to embrace the opportunity to actually
20 have a strong relationship with a peer?

21 A. Well, in this environment it would be highly unusual,
22 maybe a cause for concern.

23 Q. And how is it a cause for concern?

24 A. Well, they're concerned about sexual interaction between
25 students. They're concerned about --

12: 20: 48 1 Q. Is there any evidence of sexual interaction here?

2 A. They're not saying that. That's not what I'm saying.
3 They have made a note of it and those are the issues they
4 would be considering whether or not one peer --

5 Q. Did you attempt to contact this person?

6 MR. PARKS: Your Honor,

7 THE COURT: Sustained. Let the witness finish her
8 answer.

9 Are you through, doctor?

10 THE WITNESS: Well, I was just going to say, I mean
11 it indicates that they are concerned --

12 MS. CALLAGHAN: Objection, hearsay. It's calling
13 for speculation with regard to --

14 THE COURT: You asked the question.

12: 20: 48 15 I mean, let's see if we can agree on some rules. You
16 need to ask the witness a direct question.

17 And, Dr. Kessner, you just need to answer the question.

18 THE WITNESS: Okay.

19 THE COURT: All right?

20 Ask your next question.

21 BY MS. CALLAGHAN:

22 Q. Based on the record is there any evidence of any
23 improper sexual relationship between Bobby Hines and his
24 peers?

25 A. They don't document that there's any sexual impropriety,

12: 20: 48

1 no.

2 Q. Thank you.

3 If you could please turn to page 62 of the TDCJ mail.

4 About two-thirds to three-quarters of the way down that
5 page.

6 A. Page 62?

7 Q. Yes. There's a paragraph that starts, Well, now, did I
8 catch you off guard with this or what?

9 Do you see that paragraph?

10 A. Yes.

11 Q. Okay. He goes on to say, what do you think of it?

12 Yeah, it's your attorney now. Okay. Okay. I know it's hard
13 for -- for yeah. So you're off the hook. I don't write
14 these all the time because I want you to totally enjoy them
15 when I do.

12: 20: 48

16 And he's referring to the previous pages, which is this
17 erotic story that he -- that he wrote, right?

18 A. Right.

19 Q. Doesn't this indicate that he understands the pleasures
20 derived from having a rare or a unique experience?

21 A. Rare or unique?

22 I'm not sure I --

23 Q. Well, he states that he doesn't want to write it
24 every -- he doesn't want to write this kind of letter all the
25 time because he wants her to get more pleasure out of it when

12: 20: 48 1 he does. Therefore he's saying I'm making this a rare thing
2 so that you really enjoy it when I do it. Doesn't that mean
3 he understands the pleasure that can be derived from getting
4 something that you don't always get?

5 A. It could indicate that, yes.

6 Q. Does that make it more or less likely that he has a
7 deficit in the area of social and interpersonal skills?

8 A. I think it could go either way. I mean, neutral -- I'm
9 neutral on this also. I mean, it depends on the perspective.

10 THE COURT: You've answered the question.

11 THE WITNESS: Okay.

12 THE COURT: You're neutral.

13 THE WITNESS: I'm neutral.

14 THE COURT: Ask your next question.

12: 20: 48 15 BY MS. CALLAGHAN:

16 Q. Hines has friends in prison, correct?

17 A. Yes. From what I understand.

18 Q. If you would please turn to page 58. Just a little over
19 halfway down that page he states, Hold on, got to go pass a
20 kite. Okay. Back.

21 Are you familiar with what a kite is?

22 A. I believe it's a request. A request for medical or
23 dental or something else.

24 Q. Okay. If I was to tell you -- and there will be
25 testimony to this later, if I was to tell you that a kite is

12: 20: 48 1 when one inmate passes something to another inmate, generally
2 through the third inmate that is in the rec area, would you
3 believe that?

4 A. I've never heard it referred to that. I've always heard
5 it as a request.

6 Q. If one inmate is illegally passing a note for some other
7 item to an inmate, you have heard that as being a called a
8 request?

9 A. No. I've heard that the word "kite" means making a
10 request.

11 Q. Okay. Well, we'll have testimony about this later, but
12 let's take -- let's accept as fact that a kite is when one
13 inmates asks a third party to help him try and pass something
14 from him to another inmate.

12: 20: 48 15 A. Okay.

16 Q. Would this show that he has interaction skills with
17 other inmates?

18 A. Yes.

19 Q. And that he has some kind of reciprocal relationship
20 where he's helping them in -- in things such as this?

21 A. Yes.

22 Q. And it's a casual, familiar type of relationship?

23 A. Well, I don't know the hierarchy involved in this, so I
24 can't say about that.

25 Q. Does it seem like that it's a casual thing that he does

12: 20: 48 1 when he discusses it in his letter?

2 A. It doesn't seem that important to him.

3 Q. Right. It seems like just something he did in passing,
4 correct?

5 A. Right.

6 Q. So knowing he does this type of thing, does that make it
7 more or less likely that he's got a deficit in the area of
8 social interpersonal skills?

9 A. Again, I'm neutral.

10 Q. If you could turn to page 276, please.

11 About two-thirds of the way down -- this is a letter
12 from Moni to Hines. And about two-thirds of the way down she
13 says, Thursday I went to see Lee -- and Lee is another person
14 that's in prison -- I'm sure you heard, and he told me you
12: 20: 48 15 told everybody I was glowing and radiant and beautiful.

16 Bobby Lee Hines you are an idiot, you're meant to tell me
17 that.

18 Does this indicate that Hines is having conversations --
19 casual conversations with several inmates regarding his wife,
20 in this case it was -- she was talking about when they got
21 married.

22 A. Yes.

23 Q. And do these kinds of casual friendships and social
24 interactions make it more or less likely that he has deficits
25 in the area of communications and social interpersonal

12: 20: 48 1

skills?

2 A. Not more likely. But it's not inconsistent with MR.

3 Q. So again you're neutral on this then?

4 A. I think I'm neutral on this, too.

5 Q. Okay. If you could turn to page 54, please.

6 The first full paragraph on that page starts "So."

7 It says, So how is life treating you without the shop?

8 I know you loved it and hated to let it go. Hope you are
9 into something, and not just sitting at home doing nothing.

10 Get a hobby, Sis.

11 In your opinion does this show that he has an
12 understanding of the human nature to want to have something
13 to do and to get bored at the point where retirement occurs?

14 A. That he appreciates leisure? Is that what you're
15 saying?

12: 20: 48

16 Q. Well, that he appreciates the difficulty that can happen
17 when you go from being employed to being unemployed?

18 A. I'm not getting that out of this text, so --

19 Q. He says I know you loved it and hated to let it go, hope
20 you are into something and not just staying at home doing
21 nothing.

22 A. Okay. The shop refers to her work?

23 Q. Yes.

24 A. Well, he understands boredom.

25 Q. And he understands how much different it can be to go

12: 20: 48 1 from having something that's keeping you completely occupied
2 to not having anything, correct?

3 A. Yes. I think he probably understands that acutely.

4 Q. Does this make it more or less likely that he has a
5 deficit in the area of social and interpersonal skills?

6 A. Again I'm neutral.

7 Q. Can you turn to page 389, please.

8 This is written by Hines to a man, I don't know how to
9 pronounce his last name, it's T-h-i-b-a-u-d.

10 A. Thi baud.

11 Q. This is one of his pen pals that lives in France. He's
12 been a pen pal of Hines for many years. Are you aware of
13 Hines' inmate trust accounts?

14 A. That he has money put on his account for commissary and
12: 20: 48 15 things like that?

16 Q. Yes.

17 Are you aware that Mr. Thi baud has given Hines almost
18 \$12,000, since they started their interactions in 1993?

19 A. I didn't know the amount, but I knew that he had
20 given -- according to the letters he had given him money.

21 Q. Does this indicate to you that -- that Mr. Hines has the
22 ability to have a reciprocal relationship where he's gaining
23 something from another person in the relationship?

24 A. That he can benefit from a relationship?

25 Yes, he can benefit from a relationship.

12: 20: 48 1 Q. On page 389 he's talking with Bernard about getting a
2 friend, one of Bernard's friends, to write to one of his
3 friends that's on death row.

4 Hines states, Listen, it's okay, don't worry, okay, I
5 know it must -- and he says me, I think he means be -- hard
6 to find someone willing to take on all that come with writing
7 one of us back here. I do totally understand, brother. I
8 didn't mean to put you on the spot with that.

9 Doesn't that show that Hines does have some sort of
10 social network in place where people rely on him for
11 assistance?

12 A. Well, it shows he has somebody he wants to help.

13 Q. Right. And does it also show that he understands the
14 magnitude of becoming a pen pal with someone who's on death
15 row?

16 A. I think it shows that he understands it's not for
17 everybody.

18 Q. Does this make it more or less likely that he has a
19 deficit in the areas of communication and social
20 interpersonal skills?

21 A. Again, I'm neutral because I don't think it's
22 inconsistent with his IQ level.

23 Q. You note in your report that Hines doesn't read books,
24 have you verified this in any way?

25 A. Just what he told me about reading materials that he had

12: 20: 48 1 been given and he gave them away and someone gave him a bible
2 and he had difficulty reading it. Someone had given him a
3 series of books. One of the ladies, a volunteer visitor,
4 that comes in and sees inmates.

5 Q. So you haven't verified it with any other party or
6 outside source?

7 A. The only other verification is his academic scores
8 indicate that he had a low reading level, but other than that
9 I don't know.

10 Q. We discussed earlier how he had told Moni that he had
11 read the book she gave him. Is that not some indication that
12 his information to you might not be accurate?

13 A. I don't know the level of the book. I don't know if he
14 had help.

12: 20: 48 15 Q. But you know that he read it, or at least he's saying he
16 read it?

17 A. He told her he read it.

18 Q. If he told you he doesn't read books and he tells Moni
19 that he does read books, one of those two must not be
20 accurate, correct?

21 A. Either that or he reads some books but not many.

22 Q. And that would indicate that if he told you he didn't
23 read books that was incorrect?

24 A. Yes. But I think he told me he got magazines, so -- I
25 can't remember for sure.

12: 20: 48

1

Q. You stated in your report books, correct?

2

A. That he doesn't read books, because he said books.

3

That's what he told me.

4

Q. Okay. Are you familiar with his death watch logs in

5

Exhibit 9?

6

A. Where staff was observing him and notating what he was

7

doing?

8

Q. Yes.

9

A. Yes.

10

Q. Okay. If you could please turn to that exhibit.

11

A. Say again where it is.

12

Q. Exhibit 9. It's in the binder that's Exhibits 4 through

13

35.

14

Oh, I'm sorry. That's not -- is that right?

12: 20: 48

15

Oh, that is right. Sorry.

16

No, that's not right.

17

It's in the TDCJ -- it's Exhibit 2. I'm sorry. I

18

apologize. It's tab 9 of Exhibit 2. I'm not as organized as

19

I thought.

20

On the first page of that exhibit, page 1.

21

There's an indication starting at 12/4/03 at 11:28 that

22

says sitting on bunk reading a book.

23

The next notation also says the same thing.

24

And then there's a series of them. One, two -- four of

25

them, after one notation that he's eating. Do you see those?

12: 20: 48 1 A. There's several -- eating. Yes.

2 Q. There's six total that say sitting on bunk reading book.

3 A. Um-hum.

4 Q. Some of them say sitting in doorway reading book.

5 Does this indicate to you that Hines reads books?

6 A. This would indicate that he's reading a book or that

7 someone believes he's reading a book.

8 Q. Okay. So does that make it more or less likely that

9 what Hines told you, that he didn't read books, is

10 inaccurate?

11 A. Well, it's not consistent.

12 Q. So the fact that you've got Hines telling Moni I read

13 the book you sent me, and then you've got TDCJ prison guards

14 indicating that he was sitting in his cell reading books,

12: 20: 48 15 does that make it more or less likely that Hines does read

16 books?

17 A. It makes it likely that he reads certain books. The

18 books he told me about he said he didn't read, he gave them

19 away.

20 Q. Okay. So that means that the statement that he doesn't

21 read books is not accurate?

22 A. Not entirely accurate then, yes.

23 Q. If you turn to tab 10 of this notebook, page 181.

24 Are you familiar with this form?

25 It's referred to as an I-60.

12: 20: 48 1 A. Okay.

2 Q. Are you familiar with the I-60 form?

3 A. Not off the top of my head, no. I may have seen it in

4 other records, but I don't --

5 Q. Okay. This is a form that inmates use when they need to

6 request something from prison staff.

7 A. Okay.

8 Q. And in this one he's requesting to change his visitation

9 logs out of time. Are you familiar with how the visitation

10 logs get altered?

11 A. I know they have to give advance notice with all the

12 identifying information of the person and they can only have

13 so many people.

14 Q. Right. And they can only change their lists at certain

12: 20: 48 15 times. They can't just change their lists whenever they

16 like. So in this I-60 Hines is asking to change his --

17 his visitation log out of turn. And the reason that he's

18 doing that is because he had altered it the last time he was

19 allowed because he had an execution date set and he wanted to

20 put the people that he wanted to be attending his execution

21 on that visitation log and then he -- his execution was

22 stayed and so then he wanted to put people that he would want

23 to come visit him on a regular basis back on that I-60. And

24 that was -- if you read under disposition, it says, Send me

25 the changes, warden's office, which indicates that the

12: 20: 48 1 warden's office said, Okay, fine, send me the changes and
2 we'll let you do that.

3 Does that make it more or less likely that Hines has a
4 deficit in this skill area of communication?

5 A. I mean, this looks like he knows the rules, so he's able
6 to follow the rules in this regard. So, I mean, that's a
7 relative strength but, again, it's not inconsistent with his
8 level of mental retardation.

9 Q. So you think it's a strength but it doesn't affect your
10 opinion at all?

11 A. Right.

12 Q. I'm going to move into a different adaptive area now.
13 The area of self-care.

14 Do you think -- self-care would include things such as
12: 20: 48 15 hygiene, providing for one's self, keeping one's self
16 healthy, things like that?

17 A. Yes.

18 Q. Okay. And do you think that Hines has a deficit in the
19 area of self-care?

20 A. I think there was indications of that when he was
21 younger. I don't know that there's any specific
22 documentation in the record now that he's an adult, other
23 than during his free world time he had some difficulties.

24 Q. When he was a youth?

25 A. Well, in between the time -- well, relative youth. I

12: 20: 48 1 mean, he was like 17 before he went to TDCJ, I think.

2 Q. What things would -- what examples would you give of
3 that?

4 A. I know there was some discussions of clothing, somebody
5 helping him buy his clothing.

6 Q. Well, let's talk about that for a minute.

7 Is it your -- is it your testimony that an expert -- I
8 mean, your expert testimony that a youth getting assistance
9 with purchasing clothing would be evidence of mental
10 retardation?

11 A. Not by itself, but maybe the circumstances as far as
12 correct sizes or appropriate season or, you know, that sort
13 of thing or going some place where he had a good selection
14 with the money he had.

12: 20: 48 15 I'd have to look in my note to see. I think he makes
16 references to somebody going with him or --

17 Q. I'm trying to find it. Somewhere in the CPS records do
18 you recall seeing something that -- here it is. It's on page
19 7 of Exhibit 17, which is in the book that's 4 through 35.

20 A. Exhibit 7 you said?

21 Q. Exhibit 17, page 7. At the top of that page, under the
22 entry dated 9/11/84, it states, Took the children shopping
23 since Mrs. Hines only brought two changes of poor quality
24 clothing. The children had a great time selecting new
25 clothing.

12: 20: 48

1 Doesn't this indicate that the issue with Bobby's
2 clothing was related to his parents not providing clothing
3 for him?

4 A. Not completely. I mean, they're excited about shopping,
5 so . . .

6 Q. And his parents brought -- upon request from CPS his
7 parents brought him two changes of clothing that were not
8 appropriate.

9 A. Well, parental guidance is a factor in mental
10 retardation for parents who are not training their children,
11 so --

12 Q. And -- and when you rely on your parents to get your
13 clothes then -- are you -- are you testifying that you -- if
14 you're relying on your parents to get your clothing that that
15 means that it's indicative of mental retardation?

12: 20: 48

16 A. No. But I don't think being excited about shopping
17 means that he's not mentally retarded.

18 Q. Right. But I'm saying -- I didn't say that.

19 I'm saying do you think that the feedback that his
20 parents are buying his clothing somehow relates to whether or
21 not he's mentally retarded?

22 A. I'm saying if his skills are lacking and his parents are
23 inappropriate in their selections, they're not training him
24 on what types of things he needs to buy, I mean, children
25 need basic training in everything.

12: 20: 48 1 Q. Right. But basic training doesn't make you mentally
2 retarded, does it?

3 A. No. But it provides you with skills is what I'm saying.
4 So parental influence is a factor in -- it's a risk factor,
5 either enhancing or a risk.

6 Q. But the adaptive deficit areas have to be -- you have a
7 substantial deficit in an area that is related to your low
8 IQ, so if he has bad clothing that is the result of his
9 parents purchasing him bad clothing, that can't be considered
10 a deficit, can it? Or evidence of a deficit, can it?

11 A. I'm saying environment contributes to deficits.

12 Q. But the definition of mental retardation says the
13 significant deficits must be related to your intellectual
14 functioning, correct?

12: 20: 48 15 A. Consistent with your intellectual functioning, yes.

16 Q. Related to, correct?

17 A. Well, it -- related to, consistent with, if the parents
18 are low functioning then they're going to have more
19 difficulty helping him achieve a certain level. So here he's
20 excited about going shopping.

21 Q. So are you saying if you have unintelligent or retarded
22 parents that that's going to make you more likely to be
23 retarded from a -- from an environment standpoint?

24 From a genetic standpoint I would agree with you one
25 hundred percent.

12: 20: 48 1 But are you saying from the environment standpoint that
2 that is going to make you more likely to be mentally
3 retarded?

4 A. If you're low functioning yourself and you have parents
5 who are low functioning and don't have the opportunity to
6 provide you with the kind of enhancing environment that might
7 elevate you to a higher level, yes, it could contribute to
8 lower adaptive functioning.

9 Q. But wouldn't that just be indicative that the
10 environment is causing you to function at a lower level than
11 your IQ would allow it?

12 A. No. Environment is a contributing factor.

13 Q. Okay. I'm going to discuss health along with self-care.
14 And health would be -- include things such as going to the
12: 20: 48 15 doctor, maintaining your exercise, you know, that kind of
16 thing, correct?

17 A. Yes.

18 Q. Do you think that Hines has a deficit in the area of
19 health?

20 A. The -- it's unclear.

21 Q. When it's unclear or you have a lack of evidence,
22 what -- as a forensic psychologist what should you do?

23 A. Well, you will look in the data. I think the data is
24 unclear. There's one instance of them -- he's supposed to be
25 going to the doctor for an examination, it's in the CPS

12: 20: 48 1 records, and apparently other boys have teased him so much
2 he's scared and they have to call I think the foster father
3 to come to get him, to calm him down. And he doesn't want to
4 go to the doctor. He refuses to go.

5 Q. Right. And he actually states in that -- and let me
6 pull the record up for the court.

7 That's in Exhibit 17. On page 6. At the bottom of page
8 6. And the entry here, the first entry that discusses it as
9 on 9/7/84, and it states, Karl Brewer said Bobby is afraid of
10 getting a physical. The other boys have ghoulishly terrified
11 him with their version of a physical exam. Bobby got upset
12 and called his dad from school. The school called Karl and
13 he went to the school and tried to calm Bobby down.

14 So it was actually Karl Brewer and not his father that
12: 20: 48 15 went there, correct?

16 A. Yeah. I think I said foster father.

17 Q. And if you keep reading under 9/10/84, it says, Picked
18 the three children up for the physicals. Bobby said he
19 didn't want to take a physical. I told him he was letting
20 the other children play a big joke on him, a physical just is
21 no big deal and told him what it was, again, described
22 Dr. Gilmore, and Bobby just kept shaking his head. At the
23 office, Bobby continued to worry. Only moments after he went
24 into the doctor's office, he rushed out followed by a
25 steely-eyed indigent -- indignant, sorry, Dr. Gilmore. When

12:20:48 1 we got to the car I said, well, Bobby, you did exactly what
2 the other kids wanted you to, you got scared. He mouthed
3 some and finally said, I was a fool. To save face, he said
4 he'd get a physical from a young man but not an old man.

5 Now, let's look at this in context.

6 He had just -- he was actually taken out of his home
7 from CPS because of the -- the physical and sexual abuse that
8 was occurring, correct?

9 A. Yes.

10 Q. And he's actually the one that contacted CPS and got the
11 ball rolling, correct?

12 A. I believe the records indicate he and his sister went to
13 a school counselor.

14 Q. But the record specifically indicates that he convinced
12:20:48 15 his sister to go to the counselor to seek out this
16 assistance?

17 A. I don't recall that.

18 Q. Would you like me to point it out to you?

19 Okay. At home he was being definitely physically abused
20 and potentially sexually abused by the father figure in his
21 household, correct?

22 A. There was definite physical abuse by -- there was
23 witnesses to that, neighbors, speculation about sexual, but
24 not ever --

25 Q. Right.

12: 20: 48 1

A. -- proven.

2

Q. And so then Bobby goes into a group home, he's new in the group home, he has to get a physical by an old man, a man in authority, that clearly makes him think about his father, based on the fact that he's saying I don't want an older man to examine me, I want someone younger, is this not a natural reaction to the kind of abuse that he was having to suffer?

3

A. Well, it could be that.

4

Q. Under tab 7 on Exhibit 2, this is the TDCJ commissary lists. And if you look on page 19 -- are you familiar with these -- these commissary slips?

5

A. Yes.

6

Q. You will see that Hines requested and purchased soap and T-shirts and boxers, correct?

7

12: 20: 48 15

A. Yes.

8

Q. On page 37 it indicates he purchased shampoo, soap, and deodorant.

9

And on page 38 he purchased soap, shampoo, and toothpaste.

10

And on 41 he purchased soap, shampoo, toothpaste, and toilet paper.

11

Does Hines' regular purchase of such toiletries make it more or less likely that he has a deficit in the skill area of self-care?

12

13

14

15

A. I think in this environment it's more difficult to tell

12: 20: 48 1 because it's a controlled environment similar to a group
2 home, where they're supervised all the time and they're very
3 structured.

4 Q. Are they forced to buy soap?

5 A. Well, I know they have hygiene requirements.

6 Q. But are they forced to make these kind of purchases?

7 Are they forced to buy new boxers?

8 A. I don't know that they're forced to buy new boxers, but
9 they do have hygiene requirements.

10 Q. And so is it your opinion that this doesn't make any
11 difference one way or the other?

12 A. Correct.

13 Q. And Hines' TDCJ medical records, which are in tab 13 of
14 this same notebook -- tab 3, I'm sorry. Tab 3.

12: 20: 48 15 In here there's -- there's -- have you looked at these
16 records?

17 A. I looked at these, yes.

18 Q. Okay. Did you see that there is numerous times when
19 Hines requested medical attention for various ailments?

20 A. Yes.

21 Q. Such as his knee was sore from playing basketball. He
22 was having a problem with his eye at one point. Things such
23 as that?

24 A. Yes.

25 Q. Does that make it more or less likely that he has a

12: 20: 48 1 deficit in the area of health and -- areas of health and
2 self-care?

3 A. Well, certainly this -- he knows how to ask for medical
4 attention when he's not feeling well, so this doesn't look
5 like a deficit in that regard.

6 Q. Okay. Is it still your opinion that he has a deficit in
7 the area of health?

8 A. Well, we don't know what he's going to do -- what he
9 would do in the free world if he had been in the free world
10 at this time.

11 Q. So was that a --

12 A. It's difficult to make that kind of assessment based on
13 behaviors like this in a controlled setting. That's why
14 there's no accepted standardized adapted behavior
15 measurement.

12: 20: 48 16 Q. So then do you just dismiss this information entirely?

17 A. Well, I mean he's able to follow the rules at a certain
18 level and function in a controlled, structured environment
19 and that's --

20 Q. So you don't -- do you dismiss it or do you not dismiss
21 it?

22 A. It shows that he can function in a controlled,
23 structured environment, consistent with his --

24 Q. But does that mean you dismiss this information or do
25 you not dismiss it?

12:20:48 1 A. I don't dismiss it. I don't dismiss any of it.

2 Q. So you consider all of this and then make the
3 determination that it doesn't affect your opinion?

4 THE COURT: Let me stop you for a second, because
5 I'm unclear as to what her opinion is on these adaptive
6 skills. Because it's not in the report as you pointed out.

7 Have you formed an opinion as to that prong of the
8 mental retardation analysis?

9 THE WITNESS: Yes, I have.

10 THE COURT: Just -- maybe we can shortcut this.

11 Identify from the laundry list of skills that the
12 court needs to look to, which ones are there significant
13 limitations in adaptive functioning?

14 THE WITNESS: Well, I'm looking from the ones in
12:20:48 15 the earlier records when he was a child and adolescent --

16 THE COURT: Here's the deal. Just answer the
17 question. If you don't understand the question I'm happy to
18 rephrase it.

19 There's a list of various skills that Ms. Callaghan
20 listed for you, communication, self-care, home living,
21 social, interpersonal skills, work, leisure, health and
22 safety. That's the list. And that I guess that comes from
23 the -- the DSM manual?

24 THE WITNESS: Right.

25 THE COURT: Okay. Of the skills that I just listed

12: 20: 48 1 for you, which ones does Mr. Hines have significant
2 limitations in?

3 THE WITNESS: Well, in the free world he had
4 problems with work, functioning on the job.

5 THE COURT: The words here are important. I don't
6 care what he had problems with.

7 THE WITNESS: Okay.

8 THE COURT: I don't care what he had difficulties
9 with. I want to know what he has significant limitations in.
10 Those are terms of art.

11 THE WITNESS: In the area of work.

12 THE COURT: The area of work.

13 Okay. What else?

14 THE WITNESS: Academic functioning.

12: 20: 48 15 THE COURT: I don't see --

16 THE WITNESS: I think it is one of them.

17 MS. CALLAGHAN: It is.

18 THE COURT: It is?

19 THE WITNESS: Yes, it is.

20 THE COURT: Did I miss that one?

21 All right. I think we're looking at two different --
22 that's from the 1992 AAMR definition.

23 THE WITNESS: No, that's from the DSM IV.

24 THE COURT: That's from the DSM?

25 I'm not saying you're wrong but I don't have it on my

12: 20: 48

1 list.

2 MS. CALLAGHAN: It's listed as functional academic
3 skills.

4 THE COURT: I don't have that on my list.

5 I don't have that in the list. I'm not reading from the
6 manual itself. I'm reading from a court opinion that is
7 ostensibly quoting the manual. But I'll refer to you.

8 Academic skills?

9 THE WITNESS: Functional academic skills.

10 THE COURT: Functional academic skills.

11 Okay. What else?

12 THE WITNESS: Read the list again, please.

13 BY MS. CALLAGHAN:

14 Q. Okay. Communication.

12: 20: 48

15 A. I'm going to write these down when you're talking.

16 THE COURT: Actually, maybe it's most productive
17 just to go through the list, have her identify what he's got
18 significant limitations in and then limit your questions to
19 that.

20 MS. CALLAGHAN: Okay.

21 THE COURT: I don't think you need to be
22 questioning her about -- like, for example, she said it --
23 early on, when you asked her about health, I think your words
24 were it's unclear.

25 THE WITNESS: Correct.

12: 20: 48 1

THE COURT: So, I think she's not testifying he's got significant limitations in that area.

2

MS. CALLAGHAN: Okay.

3

THE COURT: All right. So just go through the list one by one. Let's identify what her opinion is with regard to each of the relevant factors and then we can question her about those factors, to the extent you haven't already done some.

4

THE WITNESS: Could she read the list to me?

5

THE COURT: She's going to read them one by one. She's going to read an element and you're going to say yea or nay.

6

BY MS. CALLAGHAN:

7

Q. Okay. Communication.

12: 20: 48 15

A. Not clear.

8

THE COURT: Okay.

9

MS. CALLAGHAN: Can I clarify one thing with regard to the ones where she's saying not clear?

10

BY MS. CALLAGHAN:

11

Q. In your expert opinion when you say it's not clear does that mean there is no evidence of a significant deficit?

12

A. Not necessarily.

13

THE COURT: That's not what she's saying.

14

And if she's not prepared to testify that he's got a significant limitation in that area, I don't know what we're

15

12: 20: 48 1

wasting our time doing.

2

Am I miss something here?

3

MS. CALLAGHAN: No. I just want to make sure I preserve the record, Your Honor.

5

THE COURT: You're asking her two different questions.

7

One question is relevant, the other is irrelevant. Whether there's evidence of it absent expert testimony that it's a significant limitation is irrelevant.

10

MS. CALLAGHAN: Okay.

11

THE COURT: Okay?

12

It's the petitioner's burden to establish that they have got significant limitations in two of these areas. And I'm just trying to figure out -- we've been here now for almost three hours on this witness and I still don't know what her opinion is.

12: 20: 48 15

16

17

MS. CALLAGHAN: Okay.

18

THE COURT: So I think it's most helpful for the court to establish what her opinion is with regard to these areas so we can see where we are. I'll allow you to fully cross-examine on those areas that she has an expert opinion that there are significant limitations in.

23

MS. CALLAGHAN: Yes, Your Honor.

24

THE COURT: All right.

25

THE WITNESS: On the communication, let me just say

12: 20: 48 1 that he told Dr. Price that he had help with his letters. He
2 told his father in a letter that --

3 MS. CALLAGHAN: Your Honor --

4 THE WITNESS: -- so that is an issue of
5 communication, that's why I say it's unclear.

6 THE COURT: Do you not understand my question?

7 Really, I'm trying not to be short or rude here, but all
8 I want to know is based on -- do you have an expert opinion
9 that in the area of communications that the petitioner has a
10 significant limitation in adaptive functioning, and what I
11 thought I just heard you say is that you don't because it's
12 unclear.

13 I'm not trying to put words in your mouth. I'm just
14 trying to understand what your testimony is.

12: 20: 48 15 Do you understand where I'm coming from?

16 THE WITNESS: Yes.

17 THE COURT: Okay. So what is it with regard to the
18 issue of communication?

19 THE WITNESS: Communication in letter writing and
20 things like that, which is what she's been focusing on, one
21 of the items she's been focusing on --

22 THE COURT: Do you understand what the - because I
23 hope you do, because you're responsible for explaining it to
24 me, you're the professional - as listed in the DSM IV what
25 this adaptive functioning requirement of communication is?

12: 20: 48 1

THE WITNESS: Yes.

2

THE COURT: Okay. Based on that understanding, does the -- can you testify based on your expert opinion that he has a significant limitation in communication?

3

THE WITNESS: I'll say no. I'll put that in another category.

4

THE COURT: Okay.

5

THE WITNESS: I'll say no that he does not have a significant deficit in communication.

6

THE COURT: Next.

7

BY MS. CALLAGHAN:

8

Q. The next area is self-care.

9

A. Not presently in the environment he's in, but before that there was evidence of that, but -- by the fact that he climbed on a roof when he was in danger --

12: 20: 48 15

10

THE COURT: I'm not asking you to explain your opinion.

11

THE WITNESS: Okay. I won't explain.

12

THE COURT: I'm just asking you to tell me whether there's a significant deficit in the area of self-care.

13

THE WITNESS: Prior to 18 there was evidence of that. It's less clear now.

14

THE COURT: I'm not asking you if there was evidence of it.

15

I'm asking you based on the evidence can you testify

12: 20: 48 1 that he had a significant limitation in that area? Not was
2 there some evidence of it and some evidence that there
3 wasn't. You take the evidence -- I assume you've studied the
4 evidence, and based on the evidence you come up with an
5 opinion.

6 Is your opinion that he had a significant limitation in
7 that area or not or you don't know?

8 THE WITNESS: Yes.

9 THE COURT: Okay. Next.

10 BY MS. CALLAGHAN:

11 Q. Home living.

12 A. Yes.

13 Q. Social and interpersonal skills.

14 A. Yes.

12: 20: 48 15 Q. Use of community resources.

16 THE COURT: I'm sorry, what was that?

17 BY MS. CALLAGHAN:

18 Q. Use of community resources.

19 A. Yes.

20 Q. Self-direction.

21 A. Yes.

22 Q. Functional academic skills.

23 A. Yes.

24 Q. Work?

25 A. Yes.

12: 20: 48

1 Q. Lei sure?

2 A. Not enough information.

3 Q. Heal th.

4 A. Uncl ear.

5 Q. Safety.

6 A. Not enough information.

7 THE COURT: Okay. So go ahead and limit your
8 cross-examination to those areas that Dr. Kessner testified
9 that there were significant limitations in.

10 MS. CALLAGHAN: Yes, Your Honor.

11 BY MS. CALLAGHAN:

12 Q. Okay. The next category would be home living. This
13 would encompass things such as maintaining your own
14 household, taking care of yourself, et cetera. Correct?

12: 20: 48

15 A. Correct.

16 Q. You stated in your report that Mr. Hines had never lived
17 independently. Do you consider a teenager who never lived on
18 his own to be exhibiting a deficit in this adaptive behavior?

19 A. Generally no, because they don't live away from home,
20 but he lived away from home and had a job.

21 Q. And so in your -- and so generally no but in this
22 specific case yes?

23 A. Well, he had -- he didn't have a checking account. He
24 didn't have a -- his own place. He didn't pay bills.

25 Q. I'm asking --

12: 20: 48 1 A. He would have others for his support, even though --
2 even when he left his home. So there's no evidence that he
3 had reached a level where he could do that on his own.

4 Q. And where was he living when he left his home?

5 A. I know he stayed with a girlfriend for a while, or her
6 family, or a friend and her family. He relied on his boss to
7 get him to work.

8 Q. Okay. If I could stop you there. I just want to focus
9 on living, where he was living.

10 So it's your testimony that generally speaking a
11 teenager living -- not living on his own is not evidence of
12 an adaptive deficit but specifically in this case the fact
13 that Bobby Hines never lived alone is evidence of an adaptive
14 deficit?

12: 20: 48 15 A. I said he didn't live independently. He relied on
16 others even once he left the home, and at 17 he was
17 considered an adult.

18 Q. So another 17 year old that wouldn't be considered a
19 deficit, but for Bobby Hines it is?

20 A. Could you phrase your question again?

21 The way you're stating that I'm not sure what you're
22 asking.

23 Q. I'm just trying to figure out why it is that you're
24 differentiating him from other teenagers that live at home or
25 that don't live on their own.

12:20:48 1 A. They have a job or they are able to follow
2 instructions --

3 Q. Again, --

4 A. -- they have their own money.

5 Q. -- I'm not asking about all of those things.
6 I'm -- living arrangements, if a teenager is living at
7 home, how is it that that's not evidence of an adaptive
8 behavior -- adaptive deficit but in the case of Bobby Hines
9 it is evidence of an adaptive deficit?

10 A. Because he didn't have the skill set to demonstrate that
11 he could live independently, even though he was living with
12 other people.

13 Q. Do you think that -- I'm sorry.
14 Do you think that it's more -- it was in his best
12:20:48 15 interest to get out of the house where he was being abused?

16 A. By the time he was 17 that's not clear that that was
17 happening any more. He went to live with a girlfriend.

18 Q. And so the fact that he got free rent is what makes it
19 different?

20 A. No. The indications that he -- he didn't handle his own
21 money, he didn't fill out job applications, he didn't have
22 utilities that he helped pay, he didn't help support the
23 family, he had difficulty on the job. And so as far as
24 living independently without significant support he didn't --
25 wasn't demonstrating that he could do that.

12: 20: 48

1 Q. He wasn't living independently, was he?

2 He was living with his girlfriend and her family,
3 correct?

4 A. Well, when he left home that's what he was attempting to
5 do, but he couldn't do it by himself so he had to go stay
6 with someone else.

7 Q. Is there evidence that he attempted to live on his own
8 and failed?

9 A. No. He never rented an apartment.

10 Q. Okay. So there is no evidence in the record that he
11 tried to live on his own and failed but there's evidence he
12 went from his home to the home of his girlfriend's family?

13 A. Yes.

12: 20: 48

14 Q. Do you know that the girlfriend was paying rent or
15 utilities?

16 A. Her family was. She was still living in her family
17 home.

18 Q. So she wasn't paying rent or utilities but you expected
19 him to pay the rent and utilities?

20 A. Well, he's staying there. He's not a member of their
21 family.

22 Q. Are you aware of the relationship there?

23 Are you aware of whether or not they asked him to pay
24 rent?

25 A. No, I don't recall what the record said about that.

12: 20: 48 1 Q. Okay. You also state in your expert report that he
2 didn't make major household purchases such as furniture,
3 would there have been a reason for him to buy furniture for a
4 house?

5 A. Well, again it's the same situation. He had left home
6 as though he were trying to emancipate himself but he did not
7 do it. He went into another situation where he had to depend
8 on people.

9 Q. Do you know that he was attempting to live on his own?
10 Again, is there evidence in the record that he was
11 attempting to live on his own?

12 A. Live independently from his parents.

13 Q. But there's no evidence that he was attempting to live
14 by himself?

12: 20: 48 15 A. Well, it was clear that he didn't have the capacity to
16 do that.

17 Q. That's not what I asked you.

18 Is there evidence in the record that he was attempting
19 to live by himself?

20 A. There is no evidence that he searched for an apartment
21 or did any of those things that some people might do when
22 they would leave their parents' home.

23 Q. So there's no evidence that he was attempting to live by
24 himself.

25 A. There's no evidence that he demonstrated the skill set

12: 20: 48 1

to do that.

2

Q. That's not what I asked.

3

Please -- is there evidence that he was attempting to

4

live by himself?

5

A. There's no evidence that he was looking for a place to

6

live on his own.

7

Q. So he was living with his girlfriend's family.

8

Presumably they had a furnished home.

9

A. Right.

10

Q. Is there reason that he would need to buy furniture?

11

A. If there was sparse furniture, the room he was in. That

12

was a question I asked him, if he had ever accomplished that

13

kind of a task, making large purchases, would he know how to

14

do that.

12: 20: 48 15

Q. And you thought it was important enough to note in your

16

expert report that he had never made major purchases such as

17

large furniture, correct?

18

A. That would be the type of item that you would question

19

somebody who was entering young adulthood to determine their

20

adaptive functioning.

21

Q. But if a person has never had the opportunity or need to

22

buy large -- to buy furniture, then it wouldn't be expected

23

that they would buy large furniture.

24

Let me ask you this.

25

If he had gone out and bought an entire new living room

12: 20: 48

1 set and a new bedroom set while he was living at another
2 person's house, would that have shown that he had a skill
3 area -- or a skill in this area of home living?

4 A. Well, I would have asked him how he paid for it, did he
5 shop for it on his own. You know, if he says I used my
6 paycheck and I had a check, I wrote a check, that sort of
7 thing, that demonstrates the ability to set up a household.

8 Q. So if he had done all of those things and bought
9 furniture for a house that was already full of furniture then
10 you would have found that that was a -- evidence of a skill?

11 A. Furniture is just an example.

12 Q. But it's an example that you found important enough to
13 note in your report.

14 A. Is it's just an example like buying underwear is an
15 example.

12: 20: 48

16 Q. He buys underwear.

17 A. He buys underwear.

18 Q. And I think -- I'm not going to testify.

19 Is it common for people to live with other people?

20 A. It's certainly more common these days I think, yes.

21 Q. Are you aware that in prison Hines is responsible for
22 ensuring that he has proper attire and for things like
23 keeping his clothing clean?

24 A. Yes.

25 Q. In tab 2 of Exhibit 2 we have Hines' psych records.

12: 20: 48 1 Are you familiar with these records?

2 A. Yes.

3 Q. I'm not going to go through them all but I'll point out
4 on a couple of them, or at least one, so that you can see it.
5 If you look at page 6, this is a 90 day assessment.

6 Are you familiar with these assessments?

7 A. Yes.

8 Q. And you're familiar with the fact that this is somebody
9 from psych at TDCJ that comes around to all of the death row
10 inmates and does a real quick brief interaction with them,
11 looking at their cell, looking at them, just to make sure
12 that everything seems to be okay. Correct?

13 A. Yes.

14 Q. And on this -- on this version of the form under
12: 20: 48 15 observations there's a list of different observations and
16 then different things that they can check. And on this page
17 for personal hygiene he's got neat clean checked. For cell
18 hygiene he's got neat orderly checked. Correct?

19 A. Yes.

20 Q. If I were to tell you that there is not a single
21 indication in this entire exhibit indicating that he was ever
22 anything other than neat or clean or normal or his cell was
23 orderly, would that be an indication that he has strength in
24 the area of -- of self-care and -- areas of self-care and
25 home living?

12: 20: 48 1 A. Did you say that he had shrunk?

2 Q. I'm sorry, what?

3 A. You said something I didn't understand what you said.
4 It sounded like shrink.

5 THE COURT: Ask your question again.

6 BY MS. CALLAGHAN:

7 Q. If he has -- throughout this entire record there's no
8 evidence that he ever had anything other than neat and
9 orderly appearance and neat and orderly cell, would you
10 consider that to be evidence that he has a skill in the areas
11 of self-care and home living?

12 A. In this environment he's able to manage in a structured,
13 supervised environment, where the rules are clear.

14 Q. The next area is use of community resources. This would
12: 20: 48 15 include things such as using public libraries or public
16 transportation, things like that, correct?

17 A. Yes.

18 Q. Looking at Hines' prison records it's clear that he knew
19 how to ask for assistance, correct?

20 A. Yes.

21 Q. He did it with his I-60s, he did it when he needed
22 medical assistance, all of those things?

23 A. Yes.

24 Q. Is there any indication that you have that he didn't
25 know how to ask for help with any particular thing while he

12: 20: 48 1 was in prison?

2 A. Not while he was in prison.

3 Q. And he also knew to go to his school counselors to ask
4 for assistance when his father was beating him, correct?

5 A. Yes. I don't recall him initiating that though.

6 Q. Okay. Well, let me show that to you so you can refresh
7 your recollection.

8 This is Exhibit 17, the binder that's 4 through 35.

9 A. Okay.

10 Q. Okay. On the very top, the entry that's 9/4/84, the
11 person's name is blacked out, but then it states, Contacted
12 me regarding two children in her office. Bobby had gone to
13 her and asked her to call welfare because he just couldn't
14 take any more of home. The children told a long story of a
12: 20: 48 15 drunken holiday which included neighbors calling the police,
16 the father knocking the boys down, kicking Bobby, threatening
17 to kill Bobby, he hid on top of the roof until dark, cursing
18 the children and their mother and TERRORIZING all three
19 children, a repeat of many past performances.

20 According to this it's saying that Bobby went and sought
21 out help, correct?

22 A. Yes.

23 Q. Okay. And if you read further it states, When Bobby
24 finally crept off the roof he hunted Tina and they got some
25 possessions together. They tried to call the child abuse hot

12: 20: 48 1 line. They finally decided to wait until morning. When
2 Bobby awoke -- it says awake, I'm assuming it meant awoke --
3 he could not find Tina. He saw a foot and found her under
4 the bed clutching a hammer.

5 Correct?

6 A. Yes.

7 Q. So this is indicating that not only did Bobby actually
8 seek help out but he was trying to protect her, correct?

9 A. Yes. It looks like he was trying to protect her, but it
10 looks to me like they sought help together, because it talks
11 about them being there together, the children.

12 But the issue of him hiding on the roof from 2:00 p.m.
13 until 7 p.m. does not seem very adaptive.

14 Q. Okay. I'm going to get to that in a second.

12: 20: 48 15 But it states Bobby had gone to her, correct?

16 A. Yes.

17 Q. And then later it states the children told the story,
18 correct?

19 A. Yes.

20 Q. Let's talk about him hiding on the roof.

21 Do you know -- have you ever spoken with Bobby's
22 neighbors at that time?

23 A. No.

24 Q. Do you know what they were like?

25 A. No.

12:20:48 1 Q. Do you know if they were friends with his father?
2 A. No.
3 Q. Do you know if he tried to go to his neighbors first?
4 A. It didn't -- doesn't indicate that he did. It indicates
5 that he went to the roof.
6 Q. But you don't know that he doesn't?
7 A. No. And I think there's something else in the record
8 where one of the other children was on the roof one time.
9 Q. So is hiding on the roof -- does that mean that that
10 child also displays behaviors consistent with a mentally
11 retarded person?
12 A. I think it indicates the danger and indicates that that
13 was sort of a modeling to him that he decided even in a very
14 dangerous situation that that was an adaptive thing to do,
12:20:48 15 which five hours on the roof didn't make much sense.
16 Q. Would it make much sense for a 13 year old boy who is
17 trying to hide from his father when he doesn't have anywhere
18 else to go to hide on the roof?
19 Did it work?
20 A. I think until the police came.
21 Q. So he wasn't injured and he stopped his father from
22 hurting him, correct?
23 A. Right. But his sister Tina was down some place on the
24 property, not up with him.
25 Q. So if -- if he had brought Tina to the roof would it

12: 20: 48 1 then be indication that it wasn't evidence of a deficit?

2 A. Well, it would have indicated that -- how he was trying
3 to protect her in extraordinary circumstances.

4 Q. But it would still be a deficit?

5 A. Well, it would show more forethought on his part, but
6 going to the roof doesn't make any sense.

7 Q. You don't think it makes any sense even when he has no
8 other choice?

9 A. Running to the nearest fire department, running to the
10 police department.

11 Q. Do you know where the nearest fire department was?

12 A. I know Paris is a small town, relatively small town.

13 Q. Do you know where the nearest fire department was?

14 A. No.

12: 20: 48 15 Q. Do you know where the police department was?

16 A. No.

17 Q. Okay. I need you to turn to the mail again, which is in
18 tab -- Exhibit 1.

19 On page 41.

20 A. On the first tab?

21 Q. Yes. First tab.

22 About halfway through the top paragraph there Bobby
23 states, so, can you get that for me -- I'm sorry, I need to
24 read more of that.

25 Kevin was telling me about a clipping to get. He said

12: 20: 48 1 you would find it at the place called mansonspeaks.com.
2 Yeah, it's one guy they call Charles Manson, said there was a
3 photo and everything, so can you get that for me. Okay.
4 Next is a comic book subscription. It's \$20 a year for 12
5 issues. Here it is. Okay. And then it states USP Ultimate
6 Spiderman found at www.marvel.com/subscribe.

7 Are you aware this is a reference to an Internet site?

8 A. Yes.

9 Q. Does Bobby have Internet access in prison?

10 A. I don't think so.

11 Q. So for Bobby to know this he had to have utilized some
12 resource to get this information?

13 A. It sounds like somebody gave him the information.

14 Q. I think that was -- clearly somebody gave him the
15 information, right.

16 He couldn't have gotten it on his own.

17 And it shows that he understands the concept of the
18 Internet, correct?

19 A. Well, he -- yes, he understands that you can get stuff
20 there and you have to put an address.

21 Q. Yes. And that you have to buy -- you can purchase
22 things there?

23 A. Yes.

24 Q. And this looks like a casual conversation that anyone
25 would have with regard to, hey, go to this web site on the

12: 20: 48 1 Internet and you can buy this, correct?

2 A. Sure.

3 Q. Is that -- does that make it more or less likely that he
4 has a deficit in the area of use of community resources.

5 A. Well, this does not look like a deficit. This looks
6 like less likely.

7 Q. Okay. The fact that he's interested in reading these
8 articles and these Spiderman comics also indicates that he's
9 got -- well, does it indicate that he has a skill in the area
10 of communication?

11 THE COURT: I thought communication was off the
12 table.

13 MS. CALLAGHAN: Oh, I apologize, Your Honor. It
14 is.

12: 20: 48 15 THE COURT: Let's move on.

16 How much more time do you anticipate with this witness?

17 MS. CALLAGHAN: An hour.

18 THE COURT: Okay. Keep going.

19 BY MS. CALLAGHAN:

20 Q. Okay. Further down on that page Hines talks about how
21 he told his friends about L-mail. Are you familiar with
22 L-mail?

23 A. No.

24 Q. Okay. L-mail -- I'll give an example of L-mail. If you
25 turn to tab 3, page 241. This is a letter sent from Moni to

12: 20: 48 1 Bobby and if you look on page 240 it shows L-mail,
2 www.L-mail.com.

3 And this is a service, an Internet service, which
4 permits a person to send in an e-mail with a letter to this
5 service and they will print it out, put it in an envelope
6 with the address that you request, stamp it, and mail it.
7 And the concept behind this is to get mail faster, for
8 instance overseas?

9 A. With the military I'm familiar with that.

10 Q. So the fact that Bobby knows about this and tells his
11 peers about it, does that make it more or less likely that he
12 has a deficit in the area of use of community resources?

13 A. Well, this makes it look like he has less of a deficit,
14 in other words, somebody gave him the information and he was
12: 20: 48 15 able to use it.

16 Q. Okay. Would you consider the prison commissary to be a
17 community resource?

18 A. In that environment, yes.

19 Q. And do you believe that Hines has the ability to use
20 prison commissary?

21 A. Yes.

22 Q. And he understands the concept of getting money put into
23 his trust account so he can then spend it through commissary?

24 A. Yes.

25 Q. Do you think this makes it more or less likely that he

12: 20: 48 1

has a deficit in the area of use of community resources?

2

A. I think in that environment it's more neutral.

3

Q. Okay. If you could turn to page 102.

4

A. 102?

5

Q. I say that, but it doesn't look right.

6

I'm sorry, it's 106. I apologize.

7

That's not right here. Okay. I'm going to move on. I

8

don't know what page I'm on.

9

Okay. I'm going to refer you to his trust account,

10

which is in the TDCJ records.

11

It's tab 5. Now, these are somewhat difficult to read

12

and I've got a witness that can explain them, but there's

13

things that are implicit with it with regard to if you look

14

at the transaction column it will state things -- let me give

12: 20: 48 15

you an example. Just a little ways up from the bottom

16

there's an entry that says clocks and things?

17

A. Yes.

18

Q. Okay. So the way to read this is the column over that

19

says amount, 20.33, that would be the amount of money that

20

was spent. The next thing which says OP stands for outside

21

purchase.

22

And then this clocks and things would be where that

23

money went.

24

A. So OP is --

25

Q. Outside purchase.

12: 20: 48 1 A. Not the commissary --

2 Q. No.

3 A. -- BUT from within prison. He bought it, somebody
4 didn't send it to him.

5 Q. That's correct. So that is when he sends money anywhere
6 outside. It can be to a person or in this case clocks and
7 things, that's how it's denoted in here.

8 A. Okay.

9 Q. There's several entries, and I'm not going to go through
10 them all, to different businesses here, showing outside
11 purchases. Several of them are art supply companies, office
12 products companies, tattoo magazine, National Geographic,
13 Books and More, USA Today. There's several entries for USA
14 Today, which shows that he gets the subscription. A place
12: 20: 48 15 called Blender, Penthouse, Pro Football Weekly, and then more
16 USA Today is --

17 Does the fact that he knows how to order these things,
18 these outside purchases, make it more or less likely that he
19 has a deficit in the area of use of community resources?

20 A. In this case if he's doing it on his own without
21 assistance I would say less likely.

22 Q. Okay. The next area that I'm going to talk about is
23 self-direction.

24 Does the fact that Hines has obtained his GED make it
25 more or less likely that he has a deficit in the area of

12: 20: 48 1

self-direction?

2

A. That he obtained his GED?

3

Q. Yes.

4

A. The information I have is that he was able to retake -- the instructor told him which ones he had wrong and go back and do it again, so --

7

Q. And we're going to get to that in a minute, but just with regard to the fact that he sought out and obtained his GED, does that make it more or less likely that he has a deficit in the area of self-direction?

10

11

A. In this case I would say it's not -- I know in TYC they require it, that they do it, so it's part of their programming, so it's not something he would do independently.

14

12: 20: 48 15

Q. If he was not required would that make it more or less likely?

16

17

A. Well, that's difficult to say.

18

As far as him just to know to go to get a GED on his own, without anybody suggesting it or anything like that, then it would be less likely, I guess.

20

21

Q. Even if someone suggests don't -- do you think that it would be more or less likely?

22

23

A. Well, then that's not self-direction. If someone says you need to do this to be able to help you get a job.

24

25

Q. Does he not still have to learn the information on his

12:20:48 1 own and to take the test on his own, with your testing issue
2 set aside for a moment?

3 Someone can't get a GED for him, correct?

4 A. No. You can't have somebody else stand in and take the
5 test for you.

6 Q. So he had to go and learn the information that's
7 required to obtain a GED and then go and take the test
8 himself, correct?

9 A. Yes. If it's valid.

10 Q. Okay. If you could turn to page 59 of the mail volume.

11 A. Page 59.

12 Q. This is a letter to Moni that is where he is discussing
13 the wedding plans for them to get married.

14 Does the fact that he is planning a wedding make it more
12:20:48 15 or less likely that he has a deficit in the area of
16 self-direction?

17 A. Neither. As I said, mentally retarded people can get
18 married, so it's not inconsistent with mental retardation.

19 Q. But does it make it more or less likely that there's a
20 deficit in this area?

21 A. And we're still talking about self-direction?

22 Q. Correct. Self-direction.

23 A. To plan a wedding and that sort of thing, I mean, that
24 would be less likely, depending on how much help he had.

25 Q. Okay.

12: 20: 48 1 A. But I don't know how much he was able to do based on his
2 situation, if somebody else was doing a lot of the work.

3 Q. Well, in this he -- he states -- let's talking about
4 Lee, I haven't been able to see Lee, I haven't heard from him
5 at all, so, baby, I may need you to keep in touch with him,
6 okay?

7 Which is indicating that he's doing what he can, which
8 is obviously limited, correct?

9 A. Yes.

10 Q. And he says, He will show up, I feel it in my heart that
11 he will come through for us on this, but you keep that backup
12 plan ready just in case. Okay? I'll write him a letter as
13 well, and I have the forms ready to be filled out. You just
14 say where and when and I'm on top of it. Okay?

12: 20: 48 15 So that's indicating that he's filling out the forms
16 that are necessary and attempting to get things set up for
17 the wedding, correct?

18 A. Sounds like he's actively involved, yes.

19 Q. Okay. I'm going to move on to the area of functional
20 academics. And I want to talk to you about the GED.

21 In your report you state that he reported he had
22 problems with the test and that he had -- or that the test
23 administrator basically cheated, right, basically was helping
24 him out with his test, correct?

25 A. Yes.

12: 20: 48 1 Q. In your expert opinion is it more likely that a person
2 who is fighting for his life on death row would exaggerate
3 information or that a test administrator of a standardized
4 test in a school district would cheat on the administration
5 of that test?

6 A. I'm not sure I get -- I mean, I understand the question.
7 Would an administrator -- more likely that an
8 administrator would cheat or that he would lie?

9 Q. Yes. Who's more credible, --

10 A. Well, --

11 Q. -- is the person who's got an obvious reason to lie,
12 that is fighting for his life, be more credible than the
13 person who has absolutely no reason to risk his potential
14 license and certainly job by cheating on this GED?

12: 20: 48 15 A. In my employment at TYC I saw the exact same thing.

16 Q. So you think that Bobby Hines is more credible than the
17 TY -- than the administrator of his GED test?

18 A. It's not outside the realm of possibility that that
19 could have happened. As I say, I saw that type of thing
20 happen.

21 Q. Okay. But which one is more likely?

22 A. I don't know. I saw it happen with employee -- new
23 employees giving answers to the test by the person teaching
24 the class.

25 Q. Did you attempt to contact the administrator of the

12: 20: 48 1

test?

2

A. I just contacted the Texas Education Agency, asked them questions about what it took to pass, what score you had to have, that sort of thing. He has the minimum scores.

3

Q. And you didn't contact the administrator to ask him questions about that?

4

A. No, I didn't ask questions about that.

5

The TYC records also indicate that they expect that he was going to have problems because of his reading level and he might have to retake the test.

6

7

Q. But retaking the test doesn't mean you're going to cheat on the test for him, correct?

8

9

A. Well, that's just the person who is speculating about the kind of problems they think he might have.

10

12: 20: 48 15

Q. So you discount Hines' GED completely because of the story that he told?

11

12

A. I think it's suspect. Not just based on his story but also the notes by the staff.

13

14

Q. Going back to Hines' commissary, and you don't need to go find it, does the fact that Hines correctly calculated his commissary purchases make it more or less likely that he's deficient in functional academics?

15

16

17

A. Well, if he correctly did it without assistance, then that shows a skill but the assessments of him show that he doesn't have that kind of skill.

18

19

20

12: 20: 48 1 Q. Okay. If you will turn to Exhibit 2. Tab 11.

2 MS. CALLAGHAN: Do you have a tab 11?

3 I apologize, Your Honor, a couple of tabs, 11 and 12,
4 didn't get in. And they got reversed.

5 THE COURT: I don't have a tab 11.

6 Are the documents in here?

7 MS. CALLAGHAN: The documents are in here but the
8 tabs are not. I believe in the copies that don't have them
9 11 and 12 are flipped. But there's an affidavit at the
10 beginning of each one of them.

11 THE COURT: All right. That's fine. Just identify
12 it.

13 BY MS. CALLAGHAN:

14 Q. Okay. So I'm looking at page 16 of tab 11.

12: 20: 48 15 And tab 11 should be -- the Bates stamps said TDCJ
16 underscore IMNT underscore legal visit.

17 And, Dr. Kessner, yours might be the same. I apologize.

18 A. These go LG mail staff --

19 Q. Keeping going.

20 THE COURT: It's all the way at the end.

21 BY MS. CALLAGHAN:

22 Q. Right. It's at the very end.

23 A. What page?

24 Q. Page 16.

25 This is an offender-to-offender legal visit.

12: 20: 48 1 Are you familiar with the concept of
2 offender-to-offender visits?

3 A. Yes.

4 Q. And the requesting inmate is listed on the left-hand
5 column and the inmate that is visiting is listed on the
6 right-hand column.

7 And according to this, Mark Robinson requested Bobby
8 Hines to visit him. And under the requesting offender's
9 statement it says he is helping me on Atkins issue to federal
10 court. Correct?

11 A. That's what it says.

12 Q. And on the next page -- I'm sorry, on page 18. This is
13 another example of this. And this one is offender Troy Clark
14 requesting the assistance of Hines, and under the requesting
15 offender statement it says he is helping me on the Atkins
16 issue. Correct?

17 A. That's what it says, yes.

18 Q. Okay. The fact that Hines is assisting other inmates in
19 developing their Atkins claims, does that make it more or
20 less likely that he has a deficit in the area of functional
21 academics?

22 A. Well, if he's doing it with skill it would make it less
23 likely.

24 Q. And we talked earlier about the fact that Hines' grades
25 improved when he went into TYC and was in a safe and more

12: 20: 48 1 structured environment. Does that make it more or less
2 likely that he does not have a deficit in the area of
3 functional academics?

4 A. I believe his Woodcock-Johnson was similar, so --

5 Q. But his grades improved.

6 Does the fact that his grades improved make it more or
7 less likely that he has a deficit in functional academics?

8 A. I wouldn't say in that environment that that translates
9 that way.

10 Q. Okay. I'm going to move on to the area of work, which
11 I'm sure we are all happy is the last area that I will be
12 speaking about.

13 In your report you rely heavily on the statements of
14 Patricia Seat in describing Hines' abilities at work,
15 correct?

16 A. Yes.

17 Q. Are you familiar with her trial testimony?

18 A. I read the transcript I believe that she had indicated.

19 Q. Okay. And that's located in the binder that has tabs 4
20 through 35.

21 A. Which -- which one is that?

22 Okay. And it is Exhibit 33. On page 5 of that
23 testimony there is a question asked of Mrs. Seat.

24 It says:

25 "Q. Can you tell the court and jury what type of

12: 20: 48 1

employee he was?"

2

And she responds:

3

"A. I felt that he was a very good employee.

4

"Anything I asked of him he usually did it. Had no problems with him doing what he was asked to do, getting his job done and getting out on time."

7

This is directly opposed to the information she gave you, correct?

8

9

A. Correct.

10

Q. Does the fact that she has clearly lied in one of these statements make it more or less likely that she had believable information to give you?

12

13

A. I think it goes to her credibility.

14

Q. And it diminishes her credibility, correct?

12: 20: 48 15

A. Yes.

16

Q. If you look on page 4 of her testimony the question is asked:

17

18

"Q. Did he ever have an occasion to take care of your kids?"

19

20

And she responds:

21

"A. Yes, sir."

22

Does this also diminish her credibility with regard to the statements that she made to you?

23

24

A. Where does --

25

Q. It's on lines -- I'm sorry, it starts on lines -- 21.

12: 20: 48 1

A. I don't see how that applies to credibility.

2

Q. The fact that she was willing to trust him with caring for her three sons and then states that he couldn't even wash dishes and put them away?

3

A. That's inconsistent, yes.

4

Q. Does that go to her credibility?

5

A. Yes.

6

Q. Do you still rely on the statements that she made to you?

7

8 A. Well, some of the statements she made were consistent
9 with the statements that his brother Glenn made today,
10 so . . .

11 Q. Do you think that it's credible that his brother Glenn
12 was observing him on any kind of regular basis while he was
13 working at Grandy's?

12: 20: 48 15

14 A. Not necessarily on a regular basis.

15 Q. You also make note that Ms. Seat did not recall Hines
16 ever having any form of ID. But you know that Hines has
17 obtained a driver's license, correct?

18 A. Yes. I think subsequent to his relationship with her.

19 Q. Do you know when his -- when his relationship with her
20 ended?

21 A. I'm not exactly sure, but I know that he moved back to
22 Dallas and I think that that's when he got his license.

23 Q. Okay. With regard to the driver's license, you note in
24
25

12: 20: 48 1 your report that he made, quote, several failed attempts
2 before obtaining his license. Where did you obtain that
3 information?

4 A. From him.

5 Q. Did you attempt to corroborate it?

6 A. No.

7 Q. When you obtain information like that, that's
8 unverified, is it appropriate and in fact encouraged in a
9 forensic setting to try to corroborate it?

10 A. Well, it was consistent with the reading scores and
11 things like that that he had in his record, so it wasn't --
12 it wasn't inconsistent in that regard, that he would have
13 difficulty taking the test.

14 MS. CALLAGHAN: Your Honor, if I can go get
12: 20: 48 15 something I put over here?

16 BY MS. CALLAGHAN:

17 Q. I'm reading from the guidelines for forensic
18 psychologists. It states, while many forms of data used by
19 forensic psychologists are hearsay, forensic psychologists
20 attempt to corroborate critical data that form the basis for
21 their professional product. When using hearsay data that
22 have not been corroborated but are nevertheless utilized,
23 forensic psychologists have an affirmative responsibility to
24 acknowledge the uncorroborated status of that -- those data
25 and the reason for relying upon such data. Correct?

12: 20: 48 1

A. Correct.

2

Q. And did you -- did you do that in this case?

3

A. I feel that the TYC records and the school records indicated that he had such low reading ability that it would call into credibility his ability to take a GED and pass it on his own or a driver's license and pass it on his own.

7

Q. I take it that was an area you did not attempt to corroborate?

8

9

A. I attempted to corroborate it by using his records.

10

Q. Did you attempt to contact the Department of Transportation to get the records of his driving test?

11

12

A. No, I did not.

13

Q. If you could turn to Exhibit 6.

14

I'm sorry, tab 6 of Exhibit 2, page 15.

12: 20: 48 15

Okay. On page 15, the last portion of the section 6, titled employment history.

16

17

A. Which book are we in, 4 through 35?

18

Q. No. I'm sorry. We're in Exhibit 2, tab 6.

19

This is his TDCJ classifications.

20

A. And what page?

21

Q. 15.

22

A. Okay.

23

Q. The last paragraph under section 6, employment history, he says, The inmate stated that he did like to work and got along well with former employers and coworkers. The inmate

24

25

12: 20: 48 1 stated that he would like to participate in the Capable
2 Program.

3 Is the fact that he wishes to work in the Work Capable
4 program and did work in that program until he was caught
5 smoking marijuana indicate -- does it make it more or less
6 likely that he had a deficit in the area of work?

7 A. On that one I would say neutral, because of the
8 environment.

9 This was a sheltered environment that exists.

10 Q. Do you know if all inmates are permitted to work?

11 A. No, they're not.

12 Q. But you know that Mr. Hines was permitted to work?

13 A. According to his records he was for a time.

14 Q. You noted that Hines smoked marijuana, and -- and
12: 20: 48 15 self-reported that he smoked marijuana and did other drugs.

16 A. Correct.

17 Q. At age 11?

18 A. Yes.

19 Q. Did you ask him how he got the marijuana and other drugs
20 that he did?

21 A. I don't recall if I asked him. I know there was
22 information in his records that he spent some time hanging
23 around older kids, I think. That would be consistent with
24 that.

25 Q. Is your opinion hanging around with older kids in an

12: 20: 48 1 effort to get things like this evidence of mental
2 retardation?

3 A. It's not evidence of anything other than -- I mean, it's
4 not evidence for or against mental retardation.

5 Q. Is -- is his ability to get drugs and alcohol whenever
6 he wants it evidence that he knows how to use the system and
7 get things out of people?

8 A. Well, it could be that. It could also be that they
9 liked having someone around that they could manipulate.

10 Q. Is there evidence that they manipulated him, other than
11 Glenn testifying?

12 A. Well, there's evidence of his immaturity in the record,
13 and so that's a possibility.

14 Q. Are you familiar with the disciplinaries that Hines has
12: 20: 48 15 received?

16 A. Yes.

17 Q. Are you familiar with the fact that he was written up
18 for having contraband, including having a XXX magazine, Allen
19 wrench and glue, which are all things that are not permitted
20 and not sold at commissary?

21 A. Yes.

22 Q. Does the fact that he could smuggle these items onto
23 death row make it more or less likely that he's mentally
24 retarded?

25 A. That he smuggled or that somebody smuggled to him?

12: 20: 48

1 Q. Well, he obviously had something to do with it.

2 Correct?

3 A. Right. He received them.

4 Q. Correct.

5 A. It's just maladaptive behavior. It's not evidence for
6 or against mental retardation.

7 Q. In your opinion is maladaptive behavior never evidence
8 for or against mental retardation?

9 A. It depends on the level of sophistication.

10 Q. You considered him climbing on the roof to be
11 maladaptive behavior, correct?

12 A. I thought that was a maladaptive response to the danger,
13 especially for a boy who was, what, 12 years old.

12: 20: 48

14 Q. And you used that as evidence of mental retardation,
15 correct?

16 A. Well, that was evidence of adaptive deficits.

17 Q. So then maladaptive behavior can be used as evidence, in
18 your opinion?

19 A. I'm thinking more of sort of maladaptive behavior in
20 another vein, such as illegal activity and that sort of
21 thing. It's not necessarily evidence for or against mental
22 retardation.

23 Q. Is it because of the legality of it?

24 A. No. It's just illegal behavior.

25 Q. I'm sorry, I'm confused.

12: 20: 48 1 You're saying that this illegal behavior is maladaptive
2 behavior and that it doesn't -- it presents no evidence what
3 so all with regard to his mental retardation, correct?

4 A. Correct.

5 Q. So even though it's showing an ability, such as he can
6 then get these things that he wants for whatever reason, and
7 he has the ability to work the system to do that, that
8 doesn't show any evidence one way or the other of mental
9 retardation?

10 A. There's a mentally retarded defender program at TDCJ so
11 there are people who commit crimes that are mentally
12 retarded.

13 So having a criminal background does not prove or
14 disapprove mental retardation.

12: 20: 48 15 Q. Right. But are you familiar with the Briseno factors?

16 A. Yes. I haven't looked at them in a while.

17 Q. Okay. Well, would you trust me to say that the level of
18 sophistication of one's crime is one of those factors?

19 A. Yeah. I would trust you to say that.

20 Q. Okay. So in Texas the Texas law indicates that -- that
21 a crime can be evidence of mental retardation or of a person
22 not having mental retardation. The fact that it's a crime
23 doesn't have anything to do with it. If it's showing some
24 sort of skill then it should be evidence of mental
25 retardation or evidence against mental retardation, correct?

12: 20: 48 1 A. That's why I said the level of sophistication would make
2 a difference.

3 Q. Okay. So is the fact that Bobby Hines was able to
4 smuggle things into TDCJ evidence that he is not mentally
5 retarded?

6 A. If he was doing the smuggling in, but he is receiving
7 smuggled.

8 Q. Do you think that he has no part in it?

9 A. By receiving it he's having a part, but he's not having
10 to negotiate getting it in there. He's just receiving it.

11 Q. Do you think that he -- do you think that he just asked
12 the guards, hey, can you get me some glue?

13 A. I have no idea.

14 Q. Does that make logical sense?

12: 20: 48 15 A. Well, I mean, I'm sure that there's a system and people
16 learn what the system is when they're in there.

17 Q. And the fact that Bobby Hines learned that system
18 doesn't serve as evidence?

19 A. Well, learning a system can be evidence of adaptive
20 behavior. Even though it can be damaging.

21 Q. Okay. And he did that.

22 Are you aware of the fact that he also smuggled in, or
23 had smuggled in a cell phone?

24 A. I'm aware that he was found with a cell phone, yes.

25 Q. And you don't find that to be evidence of his ability to

12: 20: 48 1 use the system and manipulate people to get what he wants?

2 A. I'm not sure if it was clear that it was his or his
3 cellmates or somebody else's phone.

4 Q. Okay. Well, in the abstract, taken out of -- assuming
5 the court said that we think that he was able to smuggle it
6 in, would that be evidence that he is not mentally retarded?

7 A. It would be -- if he had participated --

8 THE COURT: I think we're getting kind of far
9 afield on speculating as to what happened.

10 Move on.

11 BY MS. CALLAGHAN:

12 Q. Have you had an opportunity to listen to the
13 disciplinary hearing tape that I provided to you?

14 A. No. I indicated when I came in that I did not listen to
15 that.

12: 20: 48

16 Q. Did you read the transcript?

17 A. I read the transcripts of some disciplinary information.
18 I'm not sure if that was on it. I didn't -- I didn't get the
19 records until August 15th.

20 THE COURT: We're going to take a 15 minute break.
21 How close are we to finishing?

22 MS. CALLAGHAN: Very close. Two pages.

23 THE COURT: Well, let's go.

24 BY MS. CALLAGHAN:

25 Q. This is a transcript of that -- that disciplinary

12: 20: 48 1 hearing that I made myself. And if you listen to it I think
2 it's amazing I was able to do this. It took a day.

3 In this disciplinary hearing Mr. Hines was written up
4 for failure to shave. And in his mail he indicates that what
5 happened was that one of the disciplinary hearing officers
6 went through and wrote up everybody she could for failure to
7 shave. And his indication is that he thinks that that's
8 because they needed to keep people on level so that there
9 would be people that that --

10 A. I remember seeing something about that.

11 Q. Okay. Okay. So this is that disciplinary hearing. And
12 in it he argues with the disciplinary hearing officer -- he
13 argues his case in front of the disciplinary hearing officer.
14 If you listen to it, it's him arguing, which is all evident
12: 20: 48 15 on this.

16 And I apologize this is not numbered.

17 On page 3, the third page in, Hines says -- about
18 halfway down, he says, I was asleep and I hadn't -- I hadn't
19 had no razors in my cell whatsoever. They hadn't pass them
20 out yet. They were in the picket getting ready to assign
21 them.

22 Are you familiar with the picket?

23 A. Yes.

24 Q. Okay. And it was about -- to me it was about 7:15,
25 7:20, and I know it was count time because I rolled over and

12: 20: 48 1 I looked at Ms. Williams -- and Ms. Williams is the person that
2 gave him the write-up -- had just walked by and put something
3 down on a piece of paper and continued to go on as if it was
4 count time. I didn't think nothing about it.

5 But a guy in the day room kept calling my name -- and
6 there's an inaudible portion -- and he said man they're
7 writing you a case about something.

8 And I said, what? I tried to call Ms. Williams back to
9 talk to me. She just kept going. She didn't say nothing, I
10 mean nothing. So she leaves and I call the police to come
11 over and talk to me.

12 Well, he comes over a few minutes later and I showed
13 him, I said, I didn't need to shave.

14 And he's like, no, okay.

12: 20: 48 15 Well, I said, well, I want to talk to the sergeant. And
16 I said, you know, I want to speak to the warden because I
17 need a razor. And he sees me before, not after, before I
18 shaved. And he went and got me a razor.

19 And ten minutes later I called him back to show him that
20 I shaved. And I told him, I said, I don't mind shaving, you
21 know, whatever you think is fair, it ain't going to bother my
22 none.

23 And he said, yeah, you didn't even have not -- not even
24 a day's worth of growth on you, and that was before you
25 shaved.

12: 20: 48 1 And I said that's exactly my point. That's why I wanted
2 to talk to the sergeant.

3 And he said, you know, if I can get him down here I
4 will. And I said I'd like to use you for a witness in the
5 case, if you don't mind -- inaudible portion -- so you can
6 say what I had on my face before.

7 And he said, Yeah.

8 And I asked him what his name was, and he told me and I
9 wrote it down. And that's it.

10 Does this level of being able to argue one's case seem
11 consistent with a determination that he's mentally retarded?

12 A. At his level of mental retardation it's not
13 inconsistent. 6th graders, young teenagers, argue with
14 authority figures all the time and plead their case, and so
12: 20: 48 15 it's not inconsistent.

16 Q. In the TYC records an evaluator observes, quote, He
17 convincingly denies all manner of delinquent implications
18 cited against him in the chart. Nonetheless a pattern has
19 been established that it is difficult to explain through
20 chance or coincidence. Therefore, he has to be considered at
21 least a questionable informant concerning his own behavior.

22 Did you read that in reviewing the records?

23 A. Yes.

24 Q. And did you find that to be accurate?

25 A. I would think it would be accurate. In that setting.

12: 20: 48 1 Q. Based on that do you not think that it's proper to
2 question his self-reported statements to you?

3 A. Yes. I think it's appropriate to do so.

4 Q. Did you read the affidavit written by Gary Marlowe, his
5 probation officer?

6 A. Yes.

7 Q. In this report Mr. Marlowe notes that Hines was devious,
8 manipulative and violent, correct?

9 A. Yes. Where is it in the --

10 Q. It's Exhibit 20.

11 A. In the same book?

12 Q. It's in the -- no. It's in the book that's 4 through
13 35?

14 A. And it's which one in there?

12: 20: 48 15 Q. Exhibit 20.

16 A. It's just one page?

17 Q. Yes.

18 A. Just one page.

19 Okay. And where were you reading again?

20 Q. It's the three -- fourth paragraph down. It starts, In
21 my opinion.

22 A. Right.

23 Q. About halfway through it says, He was a true juvenile
24 sociopath, devious, manipulative, and violent.

25 Does the fact that -- that Mr. Marlowe, who had a long

12: 20: 48 1 standing relationship with -- with Hines, found him to be
2 manipulative, make it more or less likely that he's mentally
3 retarded?

4 A. It's -- I don't think it's related to that.

5 Q. So no opinion on that?

6 A. Right. I don't think Mr. Marlowe is qualified to say --
7 to diagnose that he is or isn't.

8 Q. He didn't.

9 Isn't he just stating that he thinks that -- that Mr.
10 Hines is --

11 A. Well, he said he was not mentally retarded either, so
12 he's making a statement -- he's giving his opinion there.

13 MS. CALLAGHAN: Your Honor, I pass the witness.

14 THE COURT: Before I determine how we're going to
12: 20: 48 15 proceed from this point forward, give me an idea -- well, I
16 don't need to know how long your redirect is.

17 I'm concerned on the number of witnesses on the
18 respondent's list.

19 Tell me who you're going to call to testify and what
20 they're going to testify to.

21 MS. CALLAGHAN: Your Honor, we have some witnesses
22 that we would be willing to cut off of the list.

23 Mark Smith is on that list.

24 THE COURT: Just tell me who's going to testify and
25 what they're going to testify to.

12: 20: 48 1 MS. CALLAGHAN: Dr. Price is also going to testify.
2 Dr. Hughes is going to testify.

3 THE COURT: Are they going to testify to the same
4 thing?

5 MS. CALLAGHAN: I'm sorry, what?

6 THE COURT: Are they going to testify to the same
7 thing?

8 MS. CALLAGHAN: No, they're not going to testify to
9 the same thing.

10 THE COURT: Tell me what Dr. Price is going to
11 testify and Dr. Hughes is going to testify.

12 MS. CALLAGHAN: Dr. Price is going to testify based
13 on his experience going through the entire record and looking
14 at all of his past history as well as all of the present
15 testing that has been done.

16 And Dr. Hughes is going to -- to focus specifically on
17 the school records and inform the court on the school
18 records.

19 THE COURT: Okay.

20 MS. CALLAGHAN: Karol Asay is going to testify, and
21 she's a former school teacher of Mr. Hines. She's going to
22 testify what she remembers of him being in class.

23 Gary Marlowe who is his former probation officer is
24 going to testify. He's going to testify about his
25 recollections of Hines when he was his probation officer.

12: 20: 48 1 We have -- we have a few witnesses -- we have John
2 Gordon, who is a sergeant on death row, that is going to
3 testify with regard to his recollections of Hines on death
4 row and his interactions with Hines on death row.

5 And there's two other death row correctional officers,
6 Steven Hillman is -- we called him to testify about the
7 commissary and about how to read the trust account records.
8 If Your Honor believes that there's no issue with, you know,
9 figuring out how to read those, we can certainly cut him.

10 THE COURT: Okay.

11 MS. CALLAGHAN: And Steven White is another guard
12 that was going to testify about his experiences.

13 THE COURT: How long is Dr. Price's testimony going
14 to be?

12: 20: 48 15 MS. CALLAGHAN: I'm guessing 45 minutes.

16 THE COURT: About the same for cross-examination?

17 MR. PARKS: Probably so, Your Honor.

18 THE COURT: And Dr. Hughes?

19 MR. CORCORAN: 30 minutes, Your Honor.

20 THE COURT: About the same for cross?

21 MR. PARKS: About the same. Maybe less.

22 THE COURT: And I assume all of these fact
23 witnesses we're talking in the 10 to 15 minute range?

24 MS. CALLAGHAN: Correct, Your Honor.

25 THE COURT: Okay. All right.

12: 20: 48

1 MR. PARKS: Judge, my only concern with Marlowe and
2 Asay -- is that how you say it?

3 MS. CALLAGHAN: Asay.

4 MR. PARKS: Is that they may be going to be called
5 upon to express opinions that they're not qualified to
6 express.

7 THE COURT: Well, I'm sure you know how to make an
8 appropriate objection at that time.

9 All right. Let's go ahead and do this.

10 Are all these witnesses here?

11 MS. CALLAGHAN: Your Honor, the TDCJ guards are and
12 both of my experts are.

13 Ms. Asay and Mr. Marlowe are going to be here tomorrow.

14 THE COURT: All right. Let's do this.

12: 20: 48

15 We're going to go ahead -- Let's recess for 15 minutes.
16 Let's get all the TDCJ people done today, --

17 MS. CALLAGHAN: Your Honor.

18 THE COURT: -- Leaving only your experts and who
19 for tomorrow?

20 MS. CALLAGHAN: Gary Marlowe and Karol Asay.

21 THE COURT: In the morning Ms. Callaghan is going
22 to get an opportunity to inspect Dr. Kessner's notes. We're
23 going to start with you finishing up any cross-examination
24 you have based on those notes and then you can redirect.

25 And, again, we're going to start tomorrow promptly at

12: 20: 48 1

1: 00.

2

All right. We'll reconvene at 4:00 o'clock.

3

THE SECURITY OFFICER: All rise.

4

(Recess taken at 3:45.)

5

(Proceedings resumed at 4:05.)

6

THE SECURITY OFFICER: All rise and come to order.

7

THE COURT: Be seated, please.

8

Ms. Callaghan, call your next witness.

9

MR. CORCORAN: All right, Your Honor, we're calling

10

John Horton, H-o-r-t-o-n, I believe.

11

THE COURT: Sir, if you would come up here, please.

12

Raise your right hand and be sworn.

13

(Witness sworn.)

14

THE COURT: Be seated, please.

12: 20: 48 15

Be sure and speak into the microphone so we can hear

16

you.

17

May he proceed?

18

DIRECT EXAMINATION

19

BY MR. CORCORAN:

20

Q. Is it Sergeant Horton?

21

A. Yes, sir.

22

Q. Can you state your name for the record?

23

A. John Horton.

24

Q. Where do you work?

25

A. At the Polunsky unit.

12: 20: 48 1 Q. Death row is housed there. Do you work on death row?
2 A. Yes, sir.
3 Q. How long have you worked on death row?
4 A. Off and on approximately nine years.
5 Q. Did you work on it when it was in Ellis or did you start
6 working on death row after it was at Polunsky?
7 A. After it was at Polunsky.
8 Q. Okay. Have you had -- first of all, do you recognize
9 Bobby Hines in the courtroom?
10 A. Yes, sir.
11 Q. Have you had regular contact as a guard with him?
12 A. Yes, sir.
13 Q. I guess off and on?
14 A. Yes, sir.
12: 20: 48 15 Q. When was the last time you had contact with him?
16 A. Specifically I can't remember as far as a date or
17 anything.
18 Q. Sure. Is it -- do you always have contact?
19 Are you ever assigned on different pods?
20 Are you always in his area, your area?
21 A. As a sergeant I'm assigned to the whole building.
22 Q. Okay. Okay. And so what do your duties include then as
23 a sergeant?
24 A. Just making security rounds, ensuring that staff is
25 conducting their self properly. Checking maintenance issues

12: 20: 48 1 on the building, making sure there's no hazards to hurt
2 someone.

3 Q. In your duties you do have face-to-face conversations
4 and interactions with inmates on death row?

5 A. Yes, sir.

6 Q. With respect to Bobby Hines do you have a -- what's your
7 general -- what's your general impression of him as an
8 inmate?

9 A. He's a typical inmate. He's a -- he's not a -- a --

10 MR. PARKS: Judge, we're going to object at this
11 point. He's answered the question.

12 MR. CORCORAN: Okay.

13 BY MR. CORCORAN:

14 Q. Let me ask you this. Is he articulate?

12: 20: 48 15 A. Yes, sir.

16 Q. So, for instance, if he has something he wants to bring
17 up with the guards he -- is he able to communicate that?

18 A. Yes, sir.

19 Q. Do you have a sense that he can follow directions or
20 rules?

21 A. Yes, sir.

22 Q. And in terms of his interaction and the way he
23 describes; himself or what he needs with guards, does he do a
24 good job of that?

25 A. Yes, sir.

12: 20: 48

1 Q. Do you think he understands the rules?

2 A. Yes, sir.

3 Q. Do you think that in your interactions with him that he
4 knows how to use the rules or maybe manipulate the rules?

5 A. Yes, sir.

6 Q. Does he keep himself clean or his cell clean?

7 A. Not typically, sir.

8 Q. Okay. Let me ask you this.

9 Does he have any books in his cell?

10 Do you remember?

11 A. Yes, sir.

12 Q. Do you remember what kinds of books that you may have
13 seen?

12: 20: 48

14 A. I've seen a dictionary and a bible, other assorted
15 books, reading, novel type books.

16 Q. Have -- have you had the opportunity -- have you ever
17 come in contact with him when he's been in trouble?

18 A. Yes, sir.

19 Q. And is he argumentative?

20 How does he typically come across?

21 A. He -- initially he'll come across as I would say
22 talkative, hey, you know, this is what happened, I -- you
23 know, this -- it's not really my fault or what I refer to as
24 being manipulative, trying to take the focus off of the --
25 the actual incident at the moment.

12: 20: 48 1 Q. Okay. So when you say manipulate, he -- he changes the
2 point or -- he complains about something else?

3 Is that what you mean?

4 A. Yes, sir.

5 Q. He -- he -- does he -- in -- in -- in terms of your
6 interactions with -- with him in these instances, where you
7 do investigations, you try to figure out what happened, does
8 he ever in your opinion lie about maybe the bases or the --
9 the reasons for whatever he's in trouble about?

10 A. I feel that he leaves parts of the stories out.

11 Q. He does?

12 And do you think that's done to improve his chances?

13 A. Yes.

14 Q. It's not accidental?

12: 20: 48 15 A. Correct.

16 Q. Do you ever fill out I-60 forms for him?

17 A. No.

18 Q. Is that -- do guards typically do that at TDCJ on behalf
19 of the prisoners?

20 A. If needed it's -- it's part of the policy that we can,
21 if they need help -- if they can't read or write we are
22 allowed to do that.

23 Q. Okay. And is it -- again, you have no information --
24 you don't believe you've ever done it for him?

25 A. No. I've never filled one out for any inmate.

12: 20: 48 1 Q. Again, overall your interactions with him, how would you
2 place him on a scale of inmates on death row?

3 And I'm talking in terms of functioning, whether they
4 can obey commands, they can -- they understand the system,
5 where does he fit?

6 A. Normal.

7 Q. Normal?

8 A. Yes.

9 Q. Are there inmates that do have trouble --

10 A. Yes.

11 Q. -- understanding and -- can you give me an example of
12 what an inmate that doesn't understand or has trouble
13 comprehending or following the rules would -- would do, for
14 instance?

12: 20: 48 15 A. We have inmates that will play in their own feces all
16 day long.

17 Q. Okay. So he's normal, at least in terms of your
18 interaction with him?

19 A. Yes.

20 MR. CORCORAN: I think that's -- we pass the
21 witness, Your Honor.

22 THE COURT: Cross-examination?

23 MR. PARKS: Thank you, Your Honor.

24 CROSS EXAMINATION

25 BY MR. PARKS:

12: 20: 48 1 Q. Sergeant Horton, what you're saying is that some of the
2 people down on death row are crazy at bugs, aren't they?
3 A. Yes.
4 Q. Okay. We're not talking about that, we're talking about
5 Mr. Hines, aren't we?
6 A. Yes.
7 Q. Okay. You've been on death row about nine years now?
8 A. Yes.
9 Q. You indicated to us that Mr. Hines is articulate. Do
10 you mean by that that he can express what he wants and you
11 can understand what he says?
12 A. Yes.
13 Q. Okay. You're not saying he's some sort of orator or
14 great public speaker or anything like that?
12: 20: 48 15 A. No, sir.
16 Q. Okay. He can communicate with you?
17 A. Yes, sir.
18 Q. He can tell you what he wants or needs.
19 A. Yes, sir.
20 Q. You can understand that?
21 A. Yes, sir.
22 Q. Okay. You indicate that he can follow the rules.
23 Would I -- would it be fair to say, sergeant, that the
24 rules on death row are pretty simple, aren't they?
25 A. Yes, sir.

12: 20: 48 1 Q. Doesn't -- doesn't take a genius to figure out what
2 they're supposed to do and not supposed to do?
3 A. No, sir.
4 Q. And y'all explain that to them as best you can?
5 A. Yes, sir.
6 Q. Some inmates are more inclined to follow the rules than
7 others?
8 A. Yes, sir.
9 Q. You indicate that he has some books, dictionary and a
10 bible, would that be pretty common to find those two
11 particular items in a lot of the inmates' cells?
12 A. The bible, yes; the dictionary, no.
13 Q. Dictionary indicate to you a person that might need a
14 little help understanding words, with spelling words?
12: 20: 48 15 A. Yes, sir. That's what you use a dictionary for, sir.
16 Q. Do you have any specific recollection of books that he
17 had in his cell that you could give us the title of?
18 A. No, sir.
19 Q. I just tried a case where the state had gone in and
20 actually photographed all of the books in my client's cell.
21 Y'all didn't do anything like that in preparation for this
22 hearing?
23 A. Not to my knowledge.
24 Q. Okay. You indicate that he does -- feel like he does
25 try to deflect from himself --

12: 20: 48 1 A. Yes, sir.

2 Q. -- and manipulate a little bit?

3 A. Yes, sir.

4 Q. Do you have children?

5 A. Yes, sir.

6 Q. How old are they?

7 A. 6 and 9.

8 Q. Okay. Do they do that, too?

9 A. Yes, sir.

10 Q. Now, you've indicated to us that you have personally not

11 filled out any I-60s, do you know whether or not any of the

12 other people -- the guards, are allowed to do that if they

13 wish to?

14 A. Yes, sir.

12: 20: 48 15 Q. Okay. Do you -- do you know whether or not that's been

16 done in this case?

17 A. Not to my knowledge.

18 MR. PARKS: Thank you, sergeant.

19 That's all I have.

20 THE COURT: Any redirect?

21 MR. CORCORAN: Just real quick, Your Honor.

22 REDIRECT EXAMINATION

23 BY MR. CORCORAN:

24 Q. Putting to the side for the moment whether somebody is

25 crazy, when you interact with Mr. Hines, and we're talking

12: 20: 48 1 about manipulation, where does he fall -- are there inmates
2 that are bad at manipulating because they're -- not the crazy
3 inmates but are just not very good at it?

4 A. Yes, sir.

5 Q. And is he one of those inmates?

6 A. No.

7 Q. Okay. So he's better at manipulating than some of
8 the -- we're not talking about the crazy ones, but some of
9 the other inmates?

10 A. Yes, sir.

11 Q. Is that correct?

12 MR. CORCORAN: All right. That's it.

13 MR. PARKS: Nothing further.

14 THE COURT: You may step down.

12: 20: 48 15 Who's your next witness?

16 MR. CORCORAN: We're calling Stephen White, S-t
17 with a p-h, I believe.

18 THE COURT: Sir, if you would come forward, please.
19 Right up here.

20 Raise your right hand to be sworn.

21 (Witness sworn.)

22 THE COURT: You may be seated up here.

23 Be sure and speak into the microphone so we can hear
24 you.

25 You may proceed.

12: 20: 48 1

DIRECT EXAMINATION

2 BY MR. CORCORAN:

3 Q. Okay. Can you state your full name and spell it?

4 A. Steven White, S-t-e-v-e-n, W-h-i-t-e.

5 Q. And, Mr. White, are you a guard at TDCJ?

6 A. Yes, sir.

7 Q. And where do you work?

8 A. Polunsky.

9 Q. On death row?

10 A. Yes, sir.

11 Q. How long have you worked there?

12 A. 24 months, two years.

13 Q. And in that time frame have you had the opportunity to
14 interact with Mr. Hines?

12: 20: 48 15

A. Yes, sir.

16 Q. What is your customary -- how do you normally interact
17 with him when you do?

18 A. Normally I just do my job. I take him to the shower.
19 He don't talk a whole lot.

20 Q. Okay. So you take him to the shower?

21 A. Yes.

22 Q. So there's a fixed scheduling timing to do that, that
23 kind of thing?

24 A. Yes, sir.

25 Q. In general is he pretty neat, clean?

12: 20: 48 1 A. Yes, sir.

2 Q. Are there inmates that -- that are not on death row?

3 A. Yes, sir. Yes, sir.

4 Q. How does that come out?

5 So inmates that have poor hygiene, what -- do they

6 smell? How -- how do you see that?

7 A. They smell. You can smell 'em, easily.

8 Q. What about their cells, are their cells dirty?

9 A. Sometimes. I mean, not always. Sometimes they can be

10 clean, pretty clean, but their just hygiene is just real

11 poor.

12 Q. Have you ever seen Mr. Hines reading magazines?

13 A. Yes, sir.

14 Q. Newspapers?

12: 20: 48 15 A. Yes, sir.

16 Q. How -- what's your sense of his interaction with -- with

17 other inmates?

18 Is he well liked? Is he --

19 A. As far as I know. I don't know of him having -- having

20 any enemies.

21 Q. Any enemies. Okay.

22 Do you know anything about Bobby Hines?

23 Were you involved at all with the gambling

24 disciplinaries?

25 A. I wasn't involved, but I was around.

12:20:48

1 Q. You were around at that time.

2 And what was your sense -- what was your understanding
3 of that?

4 A. My understanding he just got caught with some gambling
5 paraphernalia, got disciplinaries for it.

6 Q. How does that work if an inmate is caught with gambling
7 paraphernalia?

8 What does that mean about the inmate?

9 A. It just means that he has I guess a gambling problem.

10 Q. Okay. So does he have a reputation at all for gambling
11 or sports or anything like that?

12 A. I'm really not aware if he has a reputation for it, but
13 I mean they all do it.

14 Q. Let me ask you one more question.

12:20:48

15 What -- does he often move around in your experience
16 between units or pods?

17 A. Between pods, yes, sir.

18 Q. He does.

19 So he's not in one fixed area for necessarily -- or he
20 hasn't been in one area for a long time --

21 A. No, sir.

22 Q. -- in your experience?

23 MR. CORCORAN: I'd pass the witness.

24 THE COURT: Cross-examination?

25 CROSS EXAMINATION

12: 20: 48 1

BY MR. PARKS:

2 Q. Just a couple of things.

3 Mr. White, you say that you see him reading magazines
4 and newspapers, would that be when you pass by and glance
5 into his cell?

6 A. Yes, sir.

7 Q. So when he's got a magazine in his hand, can you -- can
8 you tell that he's reading or could he just be looking at
9 pictures?

10 A. I'm not really sure on that one, sir.

11 Q. Okay. And you certainly can't speak to his
12 comprehension level of the items that he's looking at,
13 whether he's understanding what he's reading or to what level
14 he's understanding?

12: 20: 48 15

A. No, sir.

16 MR. PARKS: Nothing further.

17 THE COURT: Any redirect?

18 MR. CORCORAN: Just one question, Your Honor.

19 REDI RECT EXAMI NATION

20 BY MR. CORCORAN:

21 Q. In terms of -- let me take a step back.

22 In terms of the inmates that weren't let's say crazy,
23 we're talking just general smarts, your interaction with
24 inmates, where does he stand among those inmates?

25 A. About average.

12: 20: 48

1 Q. About average?

2 A. Yes, sir.

3 Q. So he's neither the smartest or the not smartest?

4 A. No, sir.

5 MR. CORCORAN: Okay. Thank you.

6 THE COURT: You may step down.

7 Who's next?

8 MS. CALLAGHAN: Your Honor, we call Steven Hillman.

9 THE COURT: Sir, if you would come forward,
10 please, right up here.

11 Raise your right hand to be sworn.

12 (Witness sworn.)

13 THE COURT: Be seated up here, please.

14 You may proceed.

12: 20: 48

15 DIRECT EXAMINATION

16 BY MS. CALLAGHAN:

17 Q. Good afternoon, Mr. Hillman. Could you please spell
18 your name for the record?

19 A. Last name is Hillman, H-i-l-l-m-a-n. First name is
20 Steven, S-t-e-v-e-n.

21 Q. Thank you. And are you an employee of TDCJ?

22 A. Yes, I am.

23 Q. And what's your position there?

24 A. Commissary manager, Polunsky unit.

25 Q. Okay. And how long have you worked there?

12: 20: 48 1 A. 15 -- or 16 years.

2 Q. So as the commissary manager are you familiar with the
3 commissary process, how inmates go about ordering commissary?

4 A. Yes, I am.

5 Q. I'm going to ask you -- there's a bunch of books up
6 there and one of them is labeled Respondent's Exhibit 2, TDCJ
7 records.

8 If you could please flip to tab 7. And then turn to
9 page 4. There's Bates numbers at the bottom of the pages.

10 A. Okay.

11 Q. And can you tell me what this is?

12 A. A commissary order slip.

13 Is that what you're referring to?

14 Q. Yes, sir.

12: 20: 48 15 A. An S0 7, it's where the party fills this out and gives
16 it to the correctional officer who in turn leaves it in the
17 lieutenant's officer for it to be filled later that day.

18 Q. Is this something the inmates fill out themselves?

19 A. Yes, ma'am.

20 Q. Are they responsible for putting down the prices and the
21 total amounts?

22 A. Yes, ma'am.

23 Q. Do they have some kind of sheet that lists everything
24 that's available?

25 A. They have access to a price list from the commissary.

12: 20: 48 1 Q. But they can't keep a copy of that in their cells?

2 A. Yes, they can.

3 Q. Oh, they can.

4 And when do they get the commissary slips in relation to
5 when they have to hand them in?

6 A. Normally the night before they make commissary the next
7 day they will be issued one of these, unless they already
8 have them in their cells.

9 Q. So about half a day then?

10 A. Yes, ma'am. Anywhere from 6 to 12 hours.

11 Q. Looking at this, this looks like a two page order,
12 correct?

13 A. Well, that one -- yes, ma'am. That one is, yes, ma'am.
14 You have to fill out a duplicate.

12: 20: 48 15 Q. So each one of these would be filled out twice then?

16 A. Yes, ma'am.

17 Q. Okay. And is there a limit to how much they can
18 purchase at any given time?

19 A. \$85 every two weeks.

20 Q. Okay. If you look on this -- if you go on the page 1
21 commissary order slip, the left-hand side, if you go a few
22 lines down, about five lines down, there's a star and it says
23 sub 15 pastries. What does that mean?

24 A. That one there it would be if we don't have the instant
25 potatoes that's above it, then in lieu of the instant

12: 20: 48 1 potatoes that he's subbing 15 pastries.

2 Q. And then he has sub 9 salsa verda?

3 A. That's a potato chip.

4 Q. Okay. So basically he's saying I want the instant

5 potatoes, if I can't get that give me the pastries, and if I

6 can't get that give me the chips?

7 A. Right.

8 Q. Is it pretty common for inmates to do that?

9 A. Well, they best do it, because you never know what we're

10 going to be out of at the time.

11 Q. So they do that to ensure that they get something?

12 A. Yes, ma'am.

13 Q. Now, he has on here -- a few lines up from the bottom

14 on that first side of it he has one 2XX boxers. Are those

12: 20: 48 15 boxer shorts?

16 A. Correct.

17 Q. And are those not given to the inmates?

18 A. They're issued clothing every day, standard boxers, but

19 these are boxers they can buy to have their own, a more

20 precise fit or to that nature.

21 Q. Okay. So are they maybe a higher quality or something

22 like that?

23 A. They're a little bit better than what they're furnished,

24 yes, ma'am.

25 Q. Okay. And so he would have to go through and write down

12: 20: 48 1 the amounts of each of these and then total up those, like
2 for say the number 2 coffee, 240 is the amount -- the price
3 of the coffee and because he has two of those then the total
4 is 480?

5 A. Correct.

6 Q. And he has to do that and he has to come up with the
7 grand total, correct?

8 A. Correct.

9 Q. Okay. And there's places in here where it says request
10 a receipt or request a printout. Is that him saying I want
11 you to copy what you end up giving me, make a copy of that?

12 A. Requesting a printout would mean he wanted to know what
13 his account balance is.

14 Q. Okay. So he's asking for his account balance and that's
12: 20: 48 15 with regard to his trust account, correct?

16 A. Yes, ma'am.

17 Q. Okay. Do inmates have any way of knowing commissary
18 prices in other places?

19 For example, if an inmate is going to get transferred to
20 the Dallas County Jail is there a way through formal channels
21 that he can find out how much commissary costs?

22 A. Only through word of mouth, that's the only way I would
23 know.

24 Q. Okay. Okay. And they're tasked with knowing how much
25 money they have in their commissary accounts?

12:20:48 1

A. It's their -- they get a statement from inmate trust fund monthly.

2

3

Q. Okay. If I could get you to turn to, which tab is it?

4

5. Tab 5.

5

If you could just flip in there and tell me what this

6

is?

7

A. Are you referring to this right here (indicating)?

8

Q. Yes, sir.

9

A. That's -- that's a printout of the party's trust

10

account, transaction history of what he's -- what he's

11

purchased or received or whatever period of time that covers

12

right there.

13

Q. Okay. And is this what he gets when he gets his

14

commissary information?

12:20:48 15

A. No, ma'am. He gets -- I think he gets a basic statement

16

just showing what transpired that month.

17

Q. Okay.

18

A. I don't know that they ever receive this particular

19

statement here.

20

Q. Okay. So this is something --

21

A. Although this information will be on that monthly

22

statement condensed one month at a time.

23

Q. Gotcha. So this is just kind of a comprehensive look at

24

all of it --

25

A. All inclusive type deal.

12: 20: 48 1 Q. Okay. I'm going to flip to a page -- okay. If you
2 could turn to page 21. Actually page 20, I'm sorry.

3 A. Okay.

4 Q. On page 20, about a third of the way down on the date of
5 4/21/03 there's an entry, it says 300, and that column
6 indicates the amount of money that's coming in or out,
7 correct?

8 A. That appears to be -- MO means a money order.

9 Q. Okay.

10 A. Received is the amount of 300 from the individual over
11 there on the right, where it says sendee.

12 Q. So from this B. Thi baud?

13 A. Correct.

14 Q. So that indicates on that day he sent a money order to
12: 20: 48 15 the prison in the amount of \$300 for Mr. Hines?

16 A. Correct.

17 Q. If you go a little bit further down, two more down,
18 they're on 4/22/03, there's a \$50 transaction. Could you
19 describe that one?

20 A. Not having the keys to all these -- what are -- these
21 little indications over here, like TR, that appears -- but it
22 appears to be that he transacted something for the benefit of
23 himself there, like he bought an outside purchase or
24 whatever --

25 Q. Could that be a transfer, either to or from --

12:20:48 1 A. Well, yeah. TR. I'm sorry. That is a transfer. I'm
2 sorry.

3 Q. And then it would be --

4 A. Going to this other person here, G-e-o-g-e, I believe.

5 Q. Okay. And if I was to tell you that his father was an
6 inmate named George Hines would that make sense?

7 A. Well, it could be, yes.

8 Q. Okay.

9 A. I don't know who that particular party is.

10 Q. Okay. So that's either a transfer to or from --

11 A. Well, it's a transfer -- it's a transfer out.

12 Q. Okay. And how do you know that?

13 A. Looks like it's -- well, it appears to be a transfer
14 out. Well, it could be coming in. I couldn't tell you
12:20:48 15 unless I saw the cumulative balances of the thing.

16 Q. Right. So they don't differentiate?

17 A. Ma'am?

18 Q. They don't differentiate on this whether it's a transfer
19 in or out?

20 A. Not on this particular one, but on the balance when you
21 look at the computer screen it will give you a balance to
22 or -- you know, so you could tell if it was a debit or credit
23 that way.

24 Q. Okay. And then a few -- a little ways further down
25 there is a line for 6/4/03, a \$300 transaction.

12:20:48 1

A. Yes, ma'am.

2

Q. And that's OP. Do you know what OP stands for?

3

A. I don't have the key with me, so --

4

Q. Would outside purchase be correct?

5

A. That -- that -- that's probably correct. OP, outside purchase.

7

Q. And this is going --

8

A. I'm not sure who this particular individual is or what he bought, or -- or he could be sending out money --

10

THE COURT: Just answer the question.

11

Ask your next question.

12

BY MS. CALLAGHAN:

13

Q. Okay. So this was money that was sent to Tina Church then?

14

12:20:48 15

A. Yes, ma'am. I assume. Yes, ma'am.

16

Q. Okay. And then if you flip back one page, to page 19.

17

About a third of the way down, on October 4th, 2002, there's a \$38 transaction and it's OP to Penthouse. Is that an outside purchase to Penthouse magazine?

18

19

20

A. Yes, ma'am.

21

Q. Okay.

22

MS. CALLAGHAN: Your Honor, we pass the witness.

23

THE COURT: Cross-examination?

24

MR. PARKS: Thank you, Your Honor.

25

CROSS EXAMINATION

12: 20: 48 1

BY MR. PARKS:

2

Q. Did you ever see a Penthouse magazine, Mr. Hillman?

3

A. Not recently, but I have yes.

4

Q. They got pictures in them, don't they?

5

A. Correct.

6

Q. Just a couple of things, Mr. Hillman.

7

I believe I understood that commissary was \$85 every two weeks; is that right?

8

A. Right.

9

Q. And on this -- here at tab 7, page 4, you were referred to earlier, that appears to be a transaction of \$106.95.

10

A. Page 4?

11

Q. Yes, sir. Tab 7, page 4.

12

A. Oh, this particular, yes. Yes, sir.

12: 20: 48 13

Q. And how does that happen? I'm just curious.

14

A. There are certain things that you can purchase on that commissary slip that do not count against your spending limit of \$85, which would be medicine, the boxers, et cetera like that, don't count against your spend.

15

Q. Gotcha.

16

A. So you could spend more than that.

17

Q. I believe I understood you to say either these

18

commissary order slips are passed out or kept in a person's

19

cell. Would they be able to have a store of these commissary

20

orders?

12: 20: 48 1 A. Well, they could have several of them. When they issue
2 them to them they can take in several so they have some for
3 the future.

4 Q. So they could have a good deal of time filling these
5 things out --

6 A. Yes, sir.

7 Q. -- if they needed it.

8 And have you ever known of situations where some inmates
9 help other inmates fill out their commissary slips?

10 A. Well, I'm not there to observe that, but I assume they
11 could, yes.

12 MR. PARKS: Okay. Thank you, Mr. Hillman. I
13 appreciate it.

14 THE COURT: Any redirect?

12: 20: 48 15 MS. CALLAGHAN: No, Your Honor.

16 THE COURT: You may step down.

17 So we are left with your two experts, Mr. Marlowe and
18 Ms. Asay, who are going to be here tomorrow?

19 MS. CALLAGHAN: Yes, Your Honor.

20 THE COURT: All right. We'll go ahead and recess
21 for the day, reconvene tomorrow at 1:00 p.m.

22 MS. CALLAGHAN: May we leave the exhibits in here?

23 THE COURT: The courtroom is not going to be used
24 for anything else and it will be locked up, but that said,
25 you can leave them here at your own risk.

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MS. CALLAGHAN: Okay. Thank you, sir.

THE SECURITY OFFICER: All rise.

(End of proceedings.)

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C E R T I F I C A T I O N

I, PAMELA J. WILSON, CSR, certify that the foregoing is a transcript from the record of the proceedings in the foregoing entitled matter.

I further certify that the transcript fees format comply with those prescribed by the Court and the Judicial Conference of the United States.

This the 1st day of September, 2009.

s/Pamela J. Wilson
PAMELA J. WILSON, RMR, CRR
Official Court Reporter
The Northern District of Texas
Dallas Division