


CLERK OF THE COURT

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3 DISTRICT COURT
4 CLARK COUNTY, NEVADA

5 THE STATE OF NEVADA,

6 Plaintiff,

7 vs.

8 DONTE JOHNSON,

9 Defendant.

CASE NO. C153154

DEPT. NO. VI

10
11 BEFORE THE HONORABLE ELISSA CADISH, DISTRICT COURT JUDGE

12 THURSDAY, APRIL 4, 2013

13 **RECORDER'S TRANSCRIPT OF EVIDENTIARY HEARING**

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19 APPEARANCES:

20 For the State:

STEVEN S. OWENS
Chief Deputy District Attorney

21
22 For the Defendant:

CHRISTOPHER R. ORAM, ESQ.

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24 RECORDED BY: JESSICA KIRKPATRICK, COURT RECORDER

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Defense Exhibit 201

12

1 LAS VEGAS, NEVADA, THURSDAY, APRIL 4, 2013, 10:05 A.M.

2 * * * * *

3 THE MARSHAL: Please rise, District Court, Department 6 is now in
4 session. Please be seated, come to order.

5 MR. ORAM: Your Honor.

6 THE COURT: Yep.

7 MR. ORAM: I think Mr. Scheick needs to make a record of one of our
8 witnesses, Alzora Jackson.

9 THE COURT: Why don't you state your appearances first?

10 MR. ORAM: Yes, Your Honor, Christopher Oram on behalf of
11 Mr. Johnson, Donte Johnson. He is present in custody.

12 MR. OWENS: Steve Owens for the State.

13 THE COURT: And just for the record we were scheduled at 8:30 this
14 morning but due to some confusion on Mr. Oram's part, the witnesses weren't
15 scheduled until 10:00, so we have agreed to start at 10:00.

16 MR. ORAM: Actually my fault, my fault, and I apologize, Your Honor.

17 THE COURT: Okay. That's fine.

18 Mr. Scheick.

19 MR. SCHEICK: If I might, Your Honor, I just have some representations
20 on behalf of Ms. Jackson. I can inform the Court that about 7:50 this morning --

21 THE RECORDER: Mr. Scheick, can you come up to the podium so I have
22 you on a microphone?

23 MR. SCHEICK: Okay.

24 THE RECORDER: Thank you.

25 MR. SCHEICK: At about 7:50 this morning Ms. Jackson called into the

1 office indicating that she was ill, that she was aware she had this appearance,
2 and that she was going to do everything she could to make this appearance.
3 And then about quarter to 10:00, she called my direct line at the office and
4 indicated to me that she believes that she has food poisoning from some fish
5 that she had last night, that's what she attributes it to. She's done everything
6 she can conceivably to be able to come to court, but for some obvious reasons
7 can't be too far away from -- from her facilities.

8 THE COURT: Uh-huh.

9 MR. SCHEICK: And so I told her I would come over and make those
10 representations. She sounded, in my opinion, she sounded sick.

11 THE COURT: Right.

12 MR. SCHEICK: And was in distress.

13 THE COURT: Uh-huh.

14 MR. SCHEICK: And she, I know she apologizes and she feels badly
15 because she says it's been rescheduled a number of times at her convenience
16 because of her trial schedule, and that now -- now she comes up sick this
17 morning.

18 THE COURT: Right. Okay. So obviously that's something beyond her
19 control. I guess we'll have to work again with her schedule to reschedule when
20 she can come back, hopefully without too much delay.

21 MR. SCHEICK: I am somewhat familiar, actually quite familiar with her
22 trial schedule, I don't believe she has any trials until July, and so there may be
23 some time in the not too distant future, if the Court has time, she can reschedule
24 without having to interfere with trial schedules.

25 THE COURT: Okay. Okay.

1 MR. SCHEICK: Thank you, Your Honor.

2 THE COURT: Thank you. So given those representations, I'll excuse her
3 for today understanding that we'll need to reschedule with her.

4 MR. SCHEICK: Thank you, Your Honor.

5 THE COURT: Okay. All right. Do we have another witness ready to go?

6 MR. ORAM: We do. We have, it appears we have all three, the rest of
7 the three.

8 THE COURT: Okay.

9 MR. ORAM: And, Your Honor, before we get started, I could tell the
10 Court, having gone through all these briefs, one of the biggest witnesses that
11 would have testified was Lee McMahon, we make allegations of ineffective
12 assistance appellate counsel. Obviously, for the record, Lee McMahon has
13 passed away. And so --

14 THE COURT: Right.

15 MR. ORAM: -- obviously she won't be testifying.

16 THE COURT: Not available, yes.

17 MR. ORAM: So at this time, Your Honor, the defense would call
18 Mr. Figler.

19 THE COURT: Okay.

20 THE MARSHAL: Is the exclusionary rule in effect, Judge?

21 THE COURT: Is anybody invoking the exclusionary rule? It's not really
22 an issue because none of the other attorneys are in the room. But --

23 THE MARSHAL: Please raise your right hand, remain standing, face that
24 gentleman right there.

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DAYVID FIGLER,

[having been called as a witness and being first duly sworn, testified as follows:]

THE CLERK: Thank you. Please be seated. Please state your complete name, spelling both your first and last name for the record.

THE WITNESS: Dayvid Figler, first name is spelled D-A-Y-V-I-D. Last name is F, like in Frank, -I-G-L-E-R.

THE CLERK: Thank you.

MR. ORAM: May I proceed?

THE COURT: Yes, go ahead.

DIRECT EXAMINATION OF DAYVID FIGLER

BY MR. ORAM:

Q Mr. Figler, how are you employed?

A I'm an attorney.

Q And how long have you been an attorney licensed in the State of Nevada?

A I was barred in Nevada in 1991.

Q And you are a criminal attorney?

A Yes.

Q How long have you been doing exclusively or mostly criminal law?

A The transition to almost exclusive criminal law came in 1997 with the opening of the Special Public Defender's Office. I was in its inaugural group of recruits under now Justice Mike Cherry. He hired me to do that job as a Attorney One. And so that's when I really started embarking upon full-time criminal. Prior to that I had worked for an attorney named Dominic Gentile. And

1 he had a vibrant criminal practice. So I was doing criminal work with him as
2 well.

3 Q And you are 250 qualified; is that fair?

4 A I am 250 qualified.

5 Q Now do you know Donte Johnson?

6 A I do.

7 Q I realize you're not a regular witness, you represented Mr. Johnson
8 at his first trial?

9 A That is correct. I was assigned to him through the Special Public
10 Defender's Office in my capacity as a special public defender with
11 Joe Sciscento, he was lead counsel. I was not 250 qualified at the time. This
12 was my 250 case.

13 Q Have you been provided an opportunity to review the briefs that
14 have been filed by Mr. Johnson prior to your testimony today?

15 A Yes.

16 Q And do you have a reasonable recollection of the facts and
17 circumstances surrounding this case?

18 A I believe I do. Reading those briefs did obviously refresh some
19 aspects of it. But Mr. Johnson's case was a very large case at the time. It was a
20 high, I won't say necessarily high profile, but it certainly was the biggest case of
21 my career at that point and one which I do recall with great amount of detail,
22 though the briefs did help fill in some of the gaps, yes.

23 Q When you tried the case initially in front of the first jury, what was
24 the result of the trial?

25 A During the trial phase Mr. Johnson was found guilty, during the

1 penalty phase the jury wasn't able to reach a verdict.

2 Q It was a hung jury?

3 A It was a hung jury. And we were able to speak to them afterwards.

4 But with regard to the deliberative process, Judge Sobel, who was the presiding
5 judge at that proceeding, declared it to be a mistrial based on the jury
6 representation as a hung.

7 MR. ORAM: Your Honor, may I approach your clerk to have an exhibit
8 marked, please?

9 THE COURT: Yes.

10 MR. ORAM: And the exhibit I'm having marked, Mr. Owens, is the special
11 verdict form from that particular proceedings.

12 BY MR. ORAM:

13 Q So in the very first trial the jury was unable to reach a verdict as to
14 penalty, correct?

15 A That's correct.

16 Q And then there was -- thank you -- there was a three-judge panel; is
17 that right?

18 A That's correct. Based on the law at the time when a jury was
19 unable to reach a verdict one of the options was for it to be referred to a
20 three-judge panel consisting of the trial judge and two judges from different
21 districts.

22 Q Same trial attorneys?

23 A It was the same trial attorneys, it was myself and Mr. Sciscento.

24 Q And the three-judge panel sentenced Mr. Johnson to death?

25 A They did.

1 Q And there was an appeal done; is that right?

2 A That's correct.

3 Q And do you know who wrote that appeal?

4 A I wrote that appeal on the three-judge panel.

5 Q And did do you that with Lee McMahon?

6 A I did. Lee McMahon was our lead appellate counsel, that was my
7 only issue was the three-judge panel. Ms. McMahon did the other issues in that
8 particular case. Mine was the three-judge panel. Based on developing law at
9 the time, it was a little burdensome for Ms. McMahon, she was dealing with a lot
10 of different things at the time, but she had -- the way the office was structured at
11 the time, Ms. McMahon had complete responsibility for the appellate but to lend
12 her a hand because *Apprendi* had come out and *Ring* out and all these things
13 were happening at the time, that I took it upon myself because we felt that the
14 three-judge panel was unconstitutional; and ultimately I did brief and argue that
15 issue to the Supreme Court.

16 Q But that was the only brief, in other words you were not responsible
17 for the rest of the issues from the direct appeal connected to the jury trial itself?

18 A No. Ms. McMahon was -- that was her -- her deal. Ours was just
19 on that three-judge panel, mine specifically, Justice Cherry asked me to take
20 care of the three-judge-panel issue because he thought it was very important
21 and that we were going to get relief on that.

22 Q Mr. Figler, you did not try the third penalty phase?

23 A I did not.

24 Q And that was Ms. Jackson and Mr. Whipple?

25 A That is correct, I was no longer with the Special Public Defender's

1 Office at that time.

2 Q Do you remember that there was a special verdict form placed into
3 evidence as a result of the first hung jury with regard to the penalty?

4 A I recall very distinctly trying to make that, at least request that or
5 make that part of the record because when we saw, it was fascinating to us what
6 had occurred with that first jury. So I do recall there being the special verdict
7 form at our request. And I do recall it was being -- I do recall it being filled out by
8 the jury foreperson, signed by the jury foreperson, I do recall that.

9 MR. ORAM: May I approach, Your Honor?

10 THE COURT: Yes.

11 MR. ORAM: Showing him the special verdict form.

12 BY MR. ORAM:

13 Q Mr. Figler, I'd ask you to look at that particular document and see if
14 you recognize it.

15 A That is exactly the document.

16 Q It appears to be a copy of the special verdict form?

17 A That's what I meant, yeah, I mean, it is a fair and accurate
18 representation of the verdict form that I recall from so many years ago. I have
19 not seen one like this since just because it's so unique.

20 MR. ORAM: Move for its admission, Your Honor?

21 THE COURT: Sorry, was it marked as an exhibit?

22 MR. ORAM: It was, 102, is that what it says, Mr. Figler?

23 THE WITNESS: 201.

24 MR. ORAM: 201, I'm sorry.

25 MR. OWENS: This is the one that has all the handwritten mitigators?

1 MR. ORAM: Yes.

2 MR. OWENS: Yeah, no objection.

3 THE COURT: It's admitted.

4 **[DEFENSE EXHIBIT 201 ADMITTED]**

5 BY MR. ORAM:

6 Q Mr. Figler, before we hand that back to the clerk, I want to see if you
7 can tally up the amount of mitigators that were listed by that first jury who did not
8 sentence Mr. Johnson to death.

9 A Sure. I mean, some of these have -- are compound. I think that
10 you could safely say that there were at least 22 mitigating factors found.

11 Q Okay. And Mr. Figler, if you could look on the second page about
12 two-thirds of the way down, do you see a handwritten note saying, no
13 eyewitnesses to identity of shooter?

14 A Yeah, yeah, that from the onset that was one that caused great
15 discussion with the jury after the fact. But, yes, I do recall that one being there
16 at the time and it is here again with regard to the identity of the shooter in this
17 case.

18 Q Mr. Figler, prior to your testimony in the last few years, did you ever
19 have an opportunity to inform me about the special verdict form?

20 A Yeah, I remember when you had -- you had called me up and asked
21 me about certain aspects of the case, and then I remember either you brought it
22 up or I alerted you that there was the existence of a special verdict form with
23 handwritten mitigation found by the jury, and I recall that there were quite a few
24 on there. I thought it might have even have been up to 30 different mitigators
25 that the jury had found. But we did have that conversation. I told you that I

1 remember its existence. And this was after I had already left the Special Public
2 Defender's Office.

3 Q Did you ever have a discussion with counsel from the third penalty
4 phase about the special verdict form, in other words, alerting them to, hey, you
5 know, the first jury found 22 or so mitigating circumstances?

6 A Absolutely, I distinctly remember talking to both Mr. Whipple and
7 Ms. Jackson. There was a transition period, there was actually a time when
8 there was a concept that I would be able, as outside counsel, do the third
9 penalty phase, but that -- that didn't stay. So there was a great deal of
10 discussion between myself and Ms. Jackson and ultimately Mr. Whipple too
11 when he came on to the case.

12 I can't remember which one was there first, Mr. Whipple or
13 Ms. Jackson, but I remember talking about it because to me this was the most
14 important thing that the jury in the penalty phase, because knowing that there
15 aren't a lot of rules and procedures with how a jury receives information
16 sometimes at a re-tried penalty phase, that they get this information to that jury
17 or at least that they argue these things or that they make it part of the record,
18 again for Judge Gates to understand as well because Judge Gates was not the
19 original trial judge.

20 So we had actually made a motion at one point to ask for a directed
21 verdict of life without the possibility of parole which I believe was denied, but
22 once I was out of the case, that -- that was probably, if nothing else, the most
23 important fact or piece of information that I conveyed to Ms. Jackson and
24 Mr. Whipple was this list of handwritten mitigators that were found in the
25 previous penalty hearing.

1 Q Now, you indicated you had a chance to talk to that first jury?

2 A Yes.

3 Q It wasn't as though just one juror had made that finding?

4 A Well, you know, and I'm going to be straight, Your Honor, this is the
5 way I think that Mr. Daskas was present at the same time and Mr. Sciscento was
6 present at the same time.

7 THE COURT: Uh-huh.

8 THE WITNESS: We were all talking to the jury afterwards as is the
9 commonalty.

10 THE COURT: Right.

11 THE WITNESS: After we all had spoke to the jury, Mr. Daskas and I were
12 having a dispute as to what the jury just told us, okay, but it was pretty clear that
13 there was one -- one person who was the primary holdout for a death penalty. It
14 was my understanding from the discussion with the entire --

15 THE COURT: Sorry, clarify, one primary holdout to not give the death
16 penalty or --

17 THE WITNESS: To not give the death penalty.

18 THE COURT: Okay.

19 THE WITNESS: Well, who was saying let's hold off on giving the death
20 penalty. When speaking with the jurors, multiple jurors, and I think it was at
21 least four or five jurors, were saying we were okay with the position of not giving
22 him the death penalty too. We had voted for the death penalty in the straw poll,
23 but if it came down to giving him life without, we were comfortable with that as
24 well. That's what they told us. But when it comes down to how many, quote,
25 unquote, holdouts there were, I think Mr. Daskas and I would agree that there

1 was one specific holdout. But when, in talking to the jury, there were at least
2 four other jurors who said we were comfortable with life without as well for Mr. --
3 for Mr. Johnson. And then it got a little -- I don't know if this is relevant or not --
4 but Mr. Daskas did get into it a little bit with that particular holdout juror and then
5 we had to kind of dissipate.

6 BY MR. ORAM:

7 Q Mr. Figler, maybe my question wasn't clear, what I'm asking is did it
8 seem that several jurors had thought that these were mitigators?

9 A Oh, I'm sorry, yes, absolutely. They were -- they were talking to us
10 that that was kind of the more interesting part of jury process when they were
11 talking about it in finding the mitigation that everybody was participating and
12 agreeing to the things. We instructed the jury that anyone can -- could
13 participate with regard to the mitigation, that was our pitch to the jury to try to get
14 the jury really talking about these mitigating factors. But it was my impression
15 from the jury that they had all participated and agreed to these being the
16 mitigators to write down to present to the Court.

17 Q Mr. Figler, did you try to make these arguments or these mitigators
18 when you argued again to the three-judge panel?

19 A Yes. We were, you know, this is -- this is where I'm a little cloudy
20 on it, it was -- it was a very contentious hearing, if you can imagine me being
21 contentious with judges. There was all sorts of interesting tensions going on
22 with Judge Sobel at the time that I thought had some bearing on what was
23 happening. The other two judges who come in, we were beseeching them to
24 read the entirety of the record, we wanted to get this information in front of them,
25 but we were being really shut down at every -- at every turn to try to get more

1 information to the three-judge panel.

2 It was Mr. Sciscento and I's, we had the concern that the two other
3 judges were not fully informed about the record and we were trying to make a
4 record about their lack of familiarity with the record and Judge Sobel was not
5 allowing us to do that. So that -- that became really a tense moment at the
6 three-judge panel because we had felt that there was no possible time where the
7 other judges would have had the ability to read the transcripts or the record or
8 the information we were giving them. It just was -- it was a physical impossibility
9 and we weren't allowed to make that record.

10 Q I want to move forward, Mr. Figler, to jury selection. Do you recall
11 jury selection in your -- the very first, well, I guess it would be your only jury
12 selection you conducted?

13 A Right.

14 Q Do you remember making some *Batson* challenges?

15 A I do recall there were *Batson* challenges during the course.

16 Q Do you remember objecting to the lack of minorities in the jury
17 venire?

18 A I do recall that as well.

19 Q If you remember or if the briefs refreshed your memory, do you
20 remember complaining that there were only three minority jurors out of a total of
21 80?

22 A I do recall that.

23 Q I understand you did not draft the direct appeal with the exception of
24 the three-judge panel, *Ring*, and a *Apprendi* issue. With regard to the jury being
25 underrepresented by African-Americans or by minorities, that was not your

1 responsibility?

2 A No. Now, Ms. McMahon, just to be very clear, *Apprendi* was my
3 issue.

4 Q Okay.

5 A The *Apprendi* issue was exclusively what I was contributing
6 because they had not worked us into doing appellate at that point yet. It was a
7 shift in our office, and then eventually we started taking on more responsibilities.
8 But it was really Ms. McMahon's responsibility.

9 Q Mr. Figler, I presume by the fact that you objected to the
10 underrepresentation of minorities that this would have been an issue you would
11 have raised had you been the appellate writer on that issue, on all the other
12 issues?

13 A I think being minority representation, *Batson*, is a key issue and it
14 would have been something important to raise, yes.

15 Q And that's why you objected?

16 A Absolutely. It wasn't a frivolous objection.

17 Q Okay. And are you aware subsequently that these similar-type
18 issues have been raised in the Nevada Supreme Court?

19 A That's correct.

20 Q I would like to ask you about to a few of the jurors. Do you
21 remember the "Logan's Run" juror? A juror who basically said that he thought
22 that car -- anyone from car thieves --

23 A Oh, yeah.

24 Q -- to murderers --

25 A Absolutely. Yeah, yeah, yeah, I do recall that comment.

1 Q Okay. And do you recall that there were at least three peremptories
2 or you had to use peremptory, excuse me, you had to use three peremptory
3 challenges to get rid of jurors that you had objected to cause for?

4 A That's correct.

5 Q Do you also remember making a *Batson* challenge regarding a juror
6 and the State argued that the juror had a stepson who had been arrested?

7 A That's correct.

8 Q Why did you -- why would you make a *Batson* challenge with regard
9 to a situation like that?

10 A Well, we just felt that that was a pretext reason for the -- it was the,
11 if I recall, it was the State had tried to remove that person for cause and then we
12 had, or was it a peremptory challenge, I don't recall which, but I remember the
13 State had tried to remove that minority juror and that we thought that was a
14 pretext because of the -- the statistics about people who do get arrested. If I'm
15 recalling this correctly, it was statistics of people who get arrested who live in
16 certain neighborhoods in Las Vegas or in -- in communities where there is a high
17 minority population that wouldn't be a valid disqualifier for someone to serve on
18 the jury.

19 Q And so you objected under *Batson*?

20 A Correct.

21 Q Claiming it was pretextual?

22 A Right.

23 Q Okay. It was not raised on appeal. If you had been the appellate
24 writer for those issues, would you have raised that?

25 A I'm of the mindset, and I still do this, that if I have a viable issue at

1 trial that I try to not only raise it, but put in as much as possible with regard to
2 that particular issue, so that would have been included I feel. If -- if the *Batson*
3 issue was raised, that certainly would have been part of the *Batson* issue and
4 the *Batson* issue should have been raised in my opinion.

5 Q Mr. Figler, do you recall that of the three minority jurors one did not
6 even make it to questioning?

7 A Correct.

8 Q And one you were claiming was pretextually perempted by the
9 State?

10 A That is correct.

11 Q Mr. Figler, approximately how many jury trials have you conducted?

12 A Since then?

13 Q All together in your career, criminal.

14 A Criminal jury trials, I'd say somewhere in the neighborhood of 30,
15 40.

16 Q And have you ever, other than this case, complained about the
17 State using peremptory challenges to get rid of, let's say, a minority jury based
18 upon their knowledge of somebody that has been to jail or has been convicted?

19 A On a regular basis.

20 Q Is that something that you -- has frustrated you as a trial attorney?

21 A I'm going to say that Mr. Johnson's case was not the first time that
22 we had seen that happen, so we were prepared for the pretext argument on that
23 at least. And I have seen it a number of times since. And it is frustrating
24 because we do feel that it is a pattern of pretext.

25 Q Well, what about the fact that the State, with regard to the juror in

1 this particular case, said the juror had crossed her arms, she crossed her arms
2 when she was being questioned?

3 A Okay.

4 Q Does that seem to you like a pretext for getting rid of the juror
5 because the juror was African American?

6 A Yeah. And I have seen that in other trials as well where body --
7 body language is used as the reason that something that was not made part of
8 the record, *per se*, at the time contemporaneous is being raised later as a
9 reason for exercising peremptory challenge, and we always challenge that as
10 pretext. It just doesn't seem to be right.

11 Q So if I understand it correctly, from the jury panel that was brought
12 in, there were three minority jurors?

13 A To my recollection.

14 Q Is that right? Approximately, from what you recall?

15 A Uh-huh. That we were able to identify, yeah.

16 Q One never made it to questioning?

17 A That is correct.

18 Q Another one you claimed was pretextually perempted?

19 A Correct.

20 Q And you felt that this was an unfair jury selection based upon race?

21 A That is correct, and that challenge was made. I recall consulting
22 with Mr. Sciscento as we were going through this because he was first chair
23 and, you know, we were doing what we felt was appropriate to protect
24 Mr. Johnson and that the jury empanelling itself was not a fair process.

25 Q Can you think of any reason why that would not have been raised

1 on appeal?

2 A No.

3 Q It wouldn't be a tactical reason, would it?

4 A I can't think of tactical reason to not raise a viable issue.

5 Q Especially considering there was a sentence of death involved
6 here?

7 A Obviously, yes.

8 Q Do you also remember Judge Sobel granting the State's challenges
9 to life jurors? In other words, jurors who had stated that they were concerned
10 about the death penalty, do you remember that and objecting to it?

11 A I do recall objecting. I'm going to say that we were really surprised
12 that Judge Sobel was -- was sort of, at every turn, ruling in ways that didn't seem
13 to be consistent with some earlier discussions that we had when we did pretrial
14 motions, et cetera, but we did object to that as well.

15 Q And the fact that you used three of your peremptory challenges to
16 challenge jurors that you felt were not life-qualified?

17 A Correct.

18 Q In other words, they were saying they were going to give death if
19 they found first-degree murder; do you remember that?

20 A Yeah, I remember the frustration, I'll tell that. I don't remember the
21 specific circumstances of those particular jurors, I'm going to be straight, that
22 was a very long time ago. But what does stick with me was the discussions with
23 Mr. Sciscento and the great frustration that we were having that we -- because
24 there were a lot of peremptories that we wanted to issue, and our frustration of
25 having to use, or as we call it, waste them on people who should have been

1 taken off for cause.

2 Q What was your overall feeling, if I could be so vague, Mr. Figler,
3 about that jury selection? Did you feel it had been fair?

4 A I felt that Judge Sobel, for whatever reason, was intentionally
5 causing distress to the defense side on that particular case and that we were not
6 getting a fair jury selection.

7 Q Now, with regard to kidnapping case, there were multiple counts of
8 kidnapping?

9 A Correct.

10 Q And are you aware of case law that supports that a kidnapping can
11 be incidental to a murder or to a robbery?

12 A That if a kidnapping is incidental to the robbery that it wouldn't be
13 viable as a conviction?

14 Q Correct.

15 A Yes.

16 Q Okay. Would you have raised that issue in this particular case on
17 appeal if you had been the appellate writer?

18 A With regard to those charges, yes, because of the way that the facts
19 came out at the trial that would have been a viable issue to bring up.

20 THE COURT: Did you raise it at trial?

21 THE WITNESS: That I don't recall. I do remember that there was an
22 objection and we did talk about it during jury instruction settlement.

23 THE COURT: Okay.

24 THE WITNESS: But I don't recall the manner, Your Honor, of how that
25 was preserved. But I'm pretty confident that either through the jury instruction

1 settlement or some other pretrial, that that issue was resolved against us and
2 that we had attempted to resolve it in an -- or attempted to preserve that issue.

3 BY MR. ORAM:

4 Q Mr. Figler, there was an incident, and I recognize that the facts --
5 this happened a long time ago, and so the facts may be somewhat vague, but
6 there was an incident that occurred on August 17, 1998, where allegedly
7 Mr. Johnson was pulled over with Terrell Young in a vehicle by a state trooper
8 and then the people in that vehicle fled; do you recall that?

9 A I do recall that.

10 Q Do you recall there was an introduction of a weapon that was found
11 in the vehicle that was not the murder weapon?

12 A That is correct.

13 Q Did you think that that -- do you think that that is an appropriate bad
14 act?

15 A I think it's prejudicial to bring in guns from a separate incident that
16 were not related to the incident in question and that would be something that
17 would require there to be a ruling by a judge to admit it. Or if it was admitted, it
18 should have been done over only objection.

19 Q And, Mr. Figler, if, even if there is an objection and the judge admits
20 evidence like that, is that something that in your opinion should be appealed?

21 A I believe it's prejudicial and as anything that's prejudicial to
22 someone getting a fair trial especially in a death penalty case should be
23 appealed. I do -- just to expound upon that, the weapons themselves that were
24 presented to the jury were -- were -- the one with the banana clip, et cetera, it
25 was a very scary looking weapon.

1 Q Okay. So you felt it was prejudicial?

2 A Yes.

3 Q At the time you tried the first jury trial, had Sikia Smith and
4 Terrell Young already proceeded to trial?

5 A You know, just as you were phrasing that question I'm trying to
6 recall. I do remember sitting through those proceedings, but I cannot remember
7 if they had been tried yet. It was in a different court. They were in front of
8 Judge Pavlikowski, that I don't have a clear recollection of whether it was before
9 or after.

10 Q Okay.

11 A If I was guessing, I would say that they went after us. But I don't
12 recall.

13 THE COURT: Sorry, the codefendants in this case?

14 THE WITNESS: The codefendants in this case, Terrell Young and
15 Sikia Smith.

16 THE COURT: And they were before a different judge?

17 THE WITNESS: They were not in the front of Judge Sobel.

18 THE COURT: Okay.

19 BY MR. ORAM:

20 Q Eventually in their trials --

21 A I know one of them at least was in front of Judge Pavlikowski
22 because it was actually a very notorious situation where one of the defendants
23 acted up and there was a whole situation that occurred because of that.

24 THE COURT: Okay.

25 BY MR. ORAM:

1 Q So obviously this case was severed, Mr. Johnson was severed from
2 the other two?

3 A It was absolutely severed.

4 Q And you're aware that neither Mr. Sikia Smith nor Terrell Young
5 were sentenced to death?

6 A I do know that, yes.

7 Q If you had been involved in the third penalty phase, obviously by
8 that point, their cases had already gone to trial.

9 A That's correct.

10 Q You're aware of that?

11 A That's correct.

12 Q Would you have argued to the jury that they did not receive death?

13 A I would believe that that would be something to be considered in
14 other mitigation with regard to relative culpability, et cetera, especially given the
15 facts of the case. I would have certainly attempted to explain to the jury that
16 others who are charged similarly to Mr. Johnson were not given the death
17 penalty.

18 Q Now, I'm not sure if you know, but in cases of *Flannigan* and *Moore*,
19 which was a capital case, the State did exactly that, they tried to argue the
20 sentences of codefendants to obtain a death sentence against Flannigan and
21 Moore, were you aware of that?

22 A Yeah, I know those cases. It would be something, and it's kind of
23 an intriguing question, counsel, on how to get that information in front of the jury.
24 It is something to discuss with strategy because I could see it going both ways.
25 But I could see that there could be a prejudice to it, but if handled correctly they

1 might be able to do it in the proper way. But it has to be handled very carefully.
2 But I am familiar with those cases.

3 Q Well, if you're familiar with those cases, that was the State saying,
4 hey, look at what those guys received, let's give it to Mr. Moore and
5 Mr. Flannigan.

6 A That's correct.

7 Q Wouldn't it have been used by someone like you in the opposite
8 effect saying, hey, they didn't sentence those guys to die, why are you
9 sentencing Mr. Johnson to death?

10 A That would be an appropriate mitigation factor, I believe, yes, and
11 so that should be presented to a jury determining death or not death.

12 Q And since the work you had done with the first jury and at least
13 some of the jurors, I guess, had said there was no eyewitness to the identity of
14 the shooter, would you have made that type of an argument that you don't know
15 who shot and therefore --

16 A Absolutely.

17 Q Okay.

18 A I mean, you know, if I had the ability to bring in some of those jurors
19 that we talked to afterwards, I would have done that. But in lieu of not being
20 able to do that, then certainly what you're suggesting would have been
21 appropriate.

22 Q And you could have called the attorneys for Mr. --

23 A That's correct.

24 Q Okay. You could have even maybe introduced, since hearsay is
25 admissible, the judgments of conviction?

1 A That's correct.

2 Q But you would have done something in the -- your case in chief to
3 demonstrate the other two defendants' sentence?

4 A I think that would be appropriate given the facts and circumstances
5 of this case.

6 Q Now, the capital cases that you have conducted, Mr. Figler, are you
7 familiar that some judges will order you to hand over information from mitigation
8 experts or specialists to the State of Nevada?

9 A That does happen on occasion. There is a split of authority I think
10 within the Eighth Judicial District as to when that is appropriate and when it isn't.

11 Q Have you ever had to hand over information from an expert you
12 weren't going to use to the State of Nevada?

13 A No.

14 Q Do you think it would be an error to do so?

15 A I would fight it.

16 Q Obviously, you've --

17 A I don't think it would be appropriate. It has come up in certain
18 cases. It's not been ordered, that was the question you asked, to present -- for
19 an expert I was not intending to use, no.

20 Q If the Court ordered you to do so, obviously, you would comply with
21 the Court?

22 A Absolutely.

23 Q But if you weren't going to use an expert, you may not even notice
24 the expert, right?

25 A That's a possibility, absolutely. In fact often times we will engage

1 experts, we'll evaluate what they have, if they have anything good to offer, then
2 we do notice. If they have something that we don't think will benefit the client or
3 which might be contrary to the client, then we never notice that witness at all.

4 Q Mr. Figler, do you remember either you or Mr. Sciscento,
5 Judge Sciscento, filing a motion to preclude the prosecutor from referring to the
6 victims as kids, or do you remember anything like that?

7 A Yeah, absolutely. I had come from a -- I remember that specific
8 motion because we had just come from a training at Monterey for death penalty
9 and that was one of the things to -- that was placed in our minds, that we want to
10 make sure that we get those kinds of motions in there.

11 Q Okay. And were you aware that Ms. McMahon in fact appealed that
12 issue claiming the prosecutors violated the pretrial order? Are you not aware?

13 A I was not aware of that, but --

14 Q Okay.

15 MR. ORAM: Court's indulgence.

16 THE COURT: Uh-huh.

17 MR. ORAM: Your Honor, that concludes direct examination.

18 THE COURT: Cross.

19 **CROSS-EXAMINATION OF DAYVID FIGLER**

20 BY MR. OWENS:

21 Q Mr. Figler, you're -- the trial in 2000, you said was in front of
22 Judge Sobel?

23 A That's correct.

24 Q And you felt that he didn't give you a fair shake on at least the jury
25 selection process; is that correct?

1 A Well, yes.

2 Q Would you agree with me that Judge Sobel was considered a fairly
3 liberal judge and usually would be a good draw for the defense bar?

4 A I will say this in answer to your question, initially we were quite
5 pleased that Judge Sobel was the judge appointed because of that reputation.
6 Judge Sobel, both during bench conferences and calls that were being made to
7 counsel, was acting in ways that were unusual and reflected in his rulings.
8 Something was going on with Judge Sobel at that time. It was very, very curious
9 and certainly it turned out to not be a very good thing to be in front of
10 Judge Sobel.

11 THE COURT: Hold on, sorry.

12 Mr. Whipple, I need you to wait outside.

13 MR. ORAM: Can I talk to him just for scheduling?

14 THE COURT: Yes.

15 MR. ORAM: Your Honor, I'm sorry --

16 THE COURT: Okay. Just take a quick second and go talk to him.

17 MR. OWENS: I should only be 15, 20 minutes on cross.

18 MR. ORAM: And I'll check for Judge Sciscento.

19 THE COURT: Okay.

20 MR. ORAM: Sorry.

21 THE RECORDER: Mr. Oram, just a reminder to use your -- turn the mic
22 off when you're talking to your client.

23 MR. ORAM: Okay.

24 THE COURT: Okay. Sorry. Continue.

25 BY MR. OWENS:

1 Q Now, Mr. Figler, and the jury selection process you said it was not
2 fair, typically -- well, the point of jury selection is to empanel and seat a juror -- a
3 jury that is unbiased; is that correct?

4 A Sure. I'd say that's one of many aspects of seating a jury, but you
5 want people who are free of biases for either side, of course.

6 Q As long as they're free of bias, then that's a constitutionally fair jury,
7 under the Constitution, correct?

8 A It's one of the components, absolutely.

9 Q And you've read the briefs in this case filed by Mr. Oram; is that
10 right?

11 A That's correct.

12 Q Is there any allegation in there about any jurors who were actually
13 seated on the jury who were biased and unfair?

14 A I don't recall that.

15 Q And so without any allegation of a biased jury, you still believe the
16 process was somehow unfair?

17 A Well, there are a number of considerations in selecting an
18 appropriate jury, the jury who can handle a death penalty case and who could
19 receive the evidence in an appropriate fashion. We just felt that wasting
20 peremptories on people who should not have been on the jury because they
21 weren't otherwise qualified or because they did indicate some inclinations that
22 would not make them fully considerate of the options, et cetera, that they
23 shouldn't have been on the jury; and therefore, people who were not favorable to
24 the defense with regard to the proper exercise of our peremptory right shouldn't
25 have been on that jury.

1 Q Sure, each side's trying to get jurors who are inclined to their point
2 of view, their perspective, that may be a goal of the attorneys, but the
3 Constitution only requires that they be unbiased in terms of being able to render
4 a fair verdict. And we had no jurors seated in this case who would meet that
5 constitutional -- who did not meet that constitutional standard; is that correct?

6 A I mean, we could agree to disagree to the extent that for the
7 broad-stroke lack of bias that they were seated without there being that issue,
8 but with regard to the ability for them to consider all the options fairly, et cetera,
9 there was some problems with a lot of those jurors. We just had a problem with
10 that jury selection process. And Judge Sobel was really riding us hard during
11 that entire process.

12 Q And this was a jury that ruled in your favor, at least hung as to the
13 penalty; isn't that correct?

14 A Ultimately, yes.

15 Q You wouldn't consider that a favorable outcome?

16 A To not give somebody the death penalty is always a favorable
17 outcome.

18 Q And you didn't waste your peremptories if you were removing what
19 would have been biased jurors from the panel; isn't that correct?

20 A That's what I said, yes.

21 Q You said that on appeal that were you responsible for the *Apprendi*
22 three-judge-panel issue. I've got a copy of the appellate brief here. I only see
23 Lee McMahon's name on it. Is it possible that -- that you did not sign and even
24 though you did write half of the brief?

25 A I did those issues, and I think that I signed the supplement that

1 came up because *Apprendi* was decided during the pendency of the -- of the
2 direct appeal. So I would assume that my signature, because I remember going
3 through the process of getting that supplement up to the Supreme Court to
4 inform them, pursuant to the rule of the new ruling that had bearing on the case.
5 But I wouldn't have -- I wouldn't have signed the document, that wasn't the
6 standard course. It was Lee's appeal. I was just doing some research for her
7 and helping her on that *Apprendi* issue. And then when the *Apprendi* issue got
8 hotter, I did almost all of the drafting, if not all of the drafting.

9 Q And the *Apprendi* issue was arguably your best issue on appeal;
10 isn't that right?

11 A With regard to the penalty, it was a lock-dead winner, I mean, there
12 was no way we were going to lose that issue.

13 Q And a substantial part of the brief was taken up with the *Apprendi*
14 issue; isn't that right?

15 A At that point, yeah.

16 Q In fact the appellate brief was 74 pages long, are you -- were you
17 aware of that?

18 A I remember it was a long brief because I had -- I had done a lot of
19 research for Lee on that issue because we knew that that three-judge panel was
20 not going to hold.

21 Q Now, you were somewhat critical of Lee McMahon in not -- in her
22 not including other issues in the appellate brief and that you couldn't think of any
23 tactical reason for not doing, so, well, wouldn't focusing on this *Apprendi* issue
24 and the limitations on the size of briefs, wouldn't those be some valid reasons
25 why she might exclude certain issues that she felt were not meritorious?

1 A And not to, you know, disparage the departed, but, you know, Lee
2 was in charge of that division. I know that when it comes to death penalty cases
3 especially, that page limitation is not something of any concern that much,
4 especially at that time in the late 1990s and the early 2000s, that much longer
5 briefs were being filed. I know that the Supreme Court has indicated in *dicta* that
6 they don't like doing that even in death penalty cases, but certainly the effort
7 could have been made and told to pare it down. But I don't recall that occurring
8 here. But I don't know because I wasn't involved in the appellate. In a death
9 penalty case obviously --

10 Q The page limit on a capital case at that time was 40 pages, wasn't
11 it?

12 A That's correct. But you had the ability, and you still have the ability
13 to ask for excess page filing.

14 Q And she obviously did to get up to 74, but you still think that she
15 could have gone more than that; is that right?

16 A I think that she should have put every single issue in a capital case
17 not just the penalty which we were very confident about the penalty that the tides
18 were going in our favor. And then once *Apprendi* came out, we were so solid
19 that it was going to happen. But really, it was the trial-phase issues that were
20 important. I know that she focused on the suppression issue and a couple
21 others, but that the other stuff just didn't show up and I don't know why.

22 Q When you say that you feel she should have put every appellate
23 issue in there, you're aware the courts disagree with you and say that effective
24 appellate counsel needs to scrutinize the issues and go forward with their
25 strongest arguments so as to not lose the focus of the Supreme Court and

1 undermine some of their stronger issues; isn't that right?

2 A I'm absolutely aware of that *dicta*.

3 Q Now, on the *Batson* challenge, I think Mr. Oram said that the juror
4 had said her son had been arrested, but if you saw in the briefs you recall that
5 the actual quote from her was that her son was in jail, not that he had just been
6 arrested?

7 A Right.

8 Q But that he was actually in jail.

9 A I do recall that.

10 Q And you said you recognized that immediately as a pretext
11 argument; is that right?

12 A I said that based on the circumstances and seeing this repeatedly in
13 other cases and given the context of minorities who have family members who
14 are arrested or who were placed in custody, et cetera, that it was in line with the
15 pretext, a pretext approach to peremptory challenges and minorities on juries.

16 Q But on its face it's race neutral; is that correct?

17 THE COURT: On its face what?

18 MR. OWENS: On its face it's race neutral.

19 THE WITNESS: I think it's a tenuous connection. So I don't know that it's
20 race neutral, *per se*, yes, because you don't --

21 BY MR. OWENS:

22 Q You distrust but it's --

23 A Yeah.

24 Q -- it's legally --

25 A On its face.

1 Q -- a race-neutral reason?

2 A On its face it's race neutral without getting into any of the attendant
3 circumstances, you're absolutely.

4 Q And it's been 13 years since the trial and even though you don't like
5 this reason that the prosecutors come up with, the Nevada Supreme Court has
6 never said that it was not race neutral, not a valid reason to exclude a juror?

7 A I'm not aware of a case in the Nevada Supreme Court that has
8 reversed on that issue, on that aspect of that issue.

9 Q That wasn't the only reason that the prosecutor gave as his
10 race-neutral reason for excusing her, he also gave the reason that when she
11 was asked about how she felt about holding people accountable she had no
12 comment and that on a question -- on the question -- written questionnaire about
13 imposing the death penalty she left it blank. So there was more than just the
14 one son having been in jail reason that was given; is that correct?

15 A I do recall that those were raised as well. But I think we suggested
16 that other jurors had similar things and weren't being singled out by the
17 prosecution.

18 Q Similar in terms of being arrested but not similar in terms of having
19 sons in jail?

20 A No.

21 Q And your part of the appellate brief was effective in winning a new
22 penalty hearing for Mr. Johnson, correct?

23 A Temporarily effective for Mr. Johnson, yes.

24 Q Now, the special verdict form that Mr. Oram directed your attention
25 to --

1 A I still have that in front of me.

2 Q -- do you still have that in front of you? Now, it doesn't bear a file
3 stamp, does it?

4 A No, it does not.

5 Q And to the best of your recollection it wasn't announced in open
6 court, it was simply handed in and made a Court's exhibit, does that sound right?

7 A That's correct. And we were scrambling for figuring out exactly how
8 to make this part of the record because this was such a unique thing. But, I
9 mean, I could tell you that this came out from the jury room when the rest of the
10 verdicts came out, et cetera.

11 Q I have no doubt, it's in the record as a Court's exhibit and so that
12 was handed in by the jury. But my point is it's not necessarily a, well, it's not a
13 final, legal verdict in the sense that it's recorded and constitutes a binding ruling
14 there in the case forever after?

15 A Well, I mean, I do recall, there were a lot of off-record discussions
16 about this particular verdict form. Judge Sobel was riding us on a lot of different
17 things and I do recall --

18 THE COURT: You're talking about before they were submitted to the jury
19 or after?

20 THE WITNESS: After, before, all over the place. Not about the verdict,
21 obviously because the judge wouldn't have known the verdict. But once the
22 verdict form came out and the jury was hung, there was still off-record
23 discussions about different things. We wanted to make this part of the record
24 record and it just wasn't happening. And we weren't really sure what was going
25 on with Judge Sobel. Judge Sobel was acting extraordinarily erratic during this

1 time.

2 THE COURT: It was made a Court exhibit though?

3 THE WITNESS: I believe that we were -- that was the compromise, is that
4 we could at least make it a Court exhibit.

5 THE COURT: Okay.

6 MR. OWENS: And I would agree it is a court exhibit, it's part of the record
7 in this case that the jury handed this in.

8 THE COURT: Okay.

9 BY MR. OWENS:

10 Q My point being is simply it wasn't announced as a formal verdict and
11 the jurors were asked if this was their verdict as read?

12 A You're correct.

13 THE COURT: Right.

14 BY MR. OWENS:

15 Q Okay.

16 THE COURT: Okay.

17 BY MR. OWENS:

18 Q But you thought that that would be helpful nonetheless, in the same
19 way that we go back and talk to jurors to get some insight for use in a redo of the
20 penalty hearing, correct?

21 A Yeah, a little bit more than just talking to jurors. I mean, this was
22 something that was signed by the foreperson and presented to the Court and
23 then through the Court to defense and the State and that it really was a vital part
24 of the record. Whereas discussions with juries aren't typically parts of the record
25 and it's hard to preserve that.

1 Q Right.

2 A But this is something that was in writing and it came from the jury
3 and it was signed by the jury foreperson, boxes were checked, words were
4 written down, dates were stamped on it, or not stamped, but they had written in
5 the date of the deliberation, June 15, 2000. So this was, for all intents and
6 purposes, an important part of the proceeding and should be memorialized.
7 That was our concern at the time.

8 Q Okay.

9 THE COURT: Sorry. I know I questioned a little about this at our hearing
10 in December, but I just want to be clear about, in that first trial and that first jury
11 deliberating in a penalty phase, had the jury made a bifurcated finding that these
12 mitigating factors did not outweigh the aggravating before they went to decide
13 penalty or no?

14 MR. OWENS: It was a single penalty hearing.

15 THE WITNESS: It was not bifurcated.

16 THE COURT: Okay. Go ahead.

17 BY MR. OWENS:

18 Q Am, Mr. Figler, you asked to bifurcate and that was --

19 A Denied.

20 Q -- denied?

21 THE COURT: Right.

22 BY MR. OWENS:

23 Q Sobel had just one hearing?

24 A Correct.

25 Q Okay. That verdict form has, while as helpful as it might be, it has

1 limitations because every jury is a little bit different, wouldn't you agree?

2 A I could agree with that statement.

3 Q What this jury found as mitigating may not be what the next jury
4 would find mitigating?

5 A Well, you would hope there would be some consistency, but you're
6 absolutely correct.

7 Q The evidence that your jury heard may not be the same evidence
8 that the next jury hears; is that correct?

9 A Well, that would be unfortunate if a jury heard evidence that
10 supported finding of mitigation and a second jury was not presented with that
11 evidence, that would be unfortunate. I think that would be ineffective, frankly.

12 Q Well, there would also be some intervening events such as the
13 allegation of Mr. Johnson threw somebody over a balcony at the CCDC in
14 between the two penalty hearings that would foreclose some mitigators that the
15 first jury had found. Specifically, I think they found something about no pattern
16 of criminal history or something?

17 A I'm aware of that allegation. I think ultimately Mr. Johnson wasn't
18 charged with that. And I think it would have been difficult to get that in over
19 proper objection.

20 Q Okay. Evidence changes though between hearings, this is six years
21 apart, the evidence changes, the witnesses may appear differently, some
22 testimony may get read in the second time where it was a live witness the next
23 time, and so there is limitations on how far you can take that mitigation form in
24 terms of predicting what the next jury is going to do with the evidence?

25 A Everything you say is true; however, there are some fundamental

1 components when you're dealing with a death penalty case. And a prime
2 directive with regard to getting in all of the mitigation which is viable and
3 obviously all the mitigation that was presented in that first jury trial was viable
4 and should have been presented in the second irrespective of changed
5 circumstance, in my opinion.

6 Q And we're talking about presenting evidence such as that there was
7 no eyewitness to the ID of the shooter, that's one of the mitigating
8 circumstances. Have you read the second penalty hearing or the third penalty
9 hearing that Alzora Jackson did?

10 A I actually -- not recently, but I have read in the interim.

11 Q Do you remember her arguing to the jury that it was not
12 Donte Johnson who was shooter but that it was Sikia Smith?

13 A I do recall that. And also I recall that the presentation by the
14 homicide detective was very one-sided and biased and that they didn't appear to
15 do proper objection or try to get cross-examination to get that in. So it was more
16 like an unsubstantiated argument.

17 Q When you talked to the jury you said you and Mr. Daskas
18 afterwards did not agree exactly about your interpretation about what the jurors
19 said. What was Mr. Daskas's interpretation?

20 A Mr. Daskas was very clear that in his opinion there was one holdout
21 and one holdout which screwed up him being able to accomplish the death
22 penalty verdict against Mr. Johnson. And my, and the disagreement was while
23 there was clearly one person who was driving the deliberations to not come to a
24 conclusion that there were other jurors there who had indicated to both of us and
25 Judge Sciscento, now Judge Sciscento, that they were perfectly okay with giving

1 him a death, sorry, to giving him something other than death, i.e., life without the
2 possibility of parole as an appropriate punishment.

3 And that's where the discussion got heated because the instruction
4 was if you believe that death is the only appropriate verdict then you can find
5 death; but if you find that anything else would be appropriate, you have to go
6 with the other one and that was the argument that we had made and we were
7 asking the jurors, you know, if that's what you were saying and they were like,
8 yeah, we were cool with the other one. Essentially they were amenable to -- not
9 all of them, a minority of them, I would say no more than four, were amenable to
10 a life without the possibility of parole like the one holdout that we both agreed
11 was the one person who was driving the hung jury.

12 Q So it sounds like you were effective in your representation to this
13 jury that you did not feel was a very good jury for you at least through the *voir*
14 *dire* process, jury selection process, but in terms of the outcome and getting at
15 least four jurors to find, be willing to vote for something other than death, that's
16 sounds like it's effective on your part?

17 A I think so too to the extent that we thought that that should have
18 driven more discussions towards not a hung jury, but a life without the possibility
19 of parole, that these weren't really particularly strong jurors, that they seemed to
20 not be following the instruction that we gave them, that only in talking to them
21 afterwards would be able to explain to them that that's exactly what the jury
22 instruction told you to do, that you should have been voting for life with the
23 possibility of parole at the time, but they weren't doing that during the straw
24 polling. They just told us their opinion afterwards that they were comfortable
25 with giving Mr. Johnson life without the possibility of parole based on the

1 evidence that they received.

2 And then that was our -- that's how the discussion started heating
3 up, we were saying, well, if that was the case, didn't you understand the jury
4 instruction that said that you should vote for life then instead of the death
5 penalty, and it was just lost on them and we just didn't have a great jury. But
6 they were amenable to, definitely amenable to a verdict other than death, but
7 they weren't the ones that were voting in that straw poll, it was just that one guy.

8 Q Okay. Let me move to the kidnapping charges. You say that that is
9 an issue that should have been raised on appeal. Why do you think that should
10 have been raised on appeal?

11 A I don't think that the kidnapping was anything other than incidental
12 to all the other facts and circumstances that resulted in the homicide. The boys
13 were essentially tied up and shot in the -- in the one room. Any movement that
14 would have been required for the kidnapping was incidental to the robbery or the
15 homicide. In other words, this was -- the theory of prosecution was that this was
16 a rip-off of people who were selling drugs and they would have drugs and money
17 at their home, so the robbery occurred, the individuals were tied and then
18 ultimately shot. To me, to parse out that there was a separate movement that
19 would support kidnapping is not viable as a legal theory of culpability for the
20 kidnapping charge.

21 Q Now, what you've been talking about, the law in regards to
22 incidental kidnappings, and you mentioned movement, that hasn't always been
23 the law here in Nevada, has it?

24 A No. There has been some evolution of that law.

25 Q In fact it changed in 2006, that's the law that you were quoting to us.

1 Your trial was in the year 2000; is that correct?

2 A Right. But we still felt that that was an issue, when you're talking
3 about the elements that the asportation was an element. So what I'm talking
4 about, the incidental language that did come from case law that I think that
5 you're referring to, but the actual movement was always supposed to be an
6 element of the -- of the offense that was --

7 Q But what the law should have been is something else, the law that
8 was in the year 2000 was based on the *Hutchins* case which did not require that
9 there be any movement a separate and apart from the murder in order to sustain
10 a separate kidnapping. *Hutchins* said that restraint alone could support, would
11 support a separate kidnapping that was not incidental to a homicide; are you
12 familiar with that?

13 A Right. And we were trying to, I recall that we were offering
14 instructions that were more akin to federal law with regard to certain parts of the
15 issue, et cetera, that it was our directive, and this was something that
16 Justice Cherry had told us to do, was to raise the issue to the best of our ability,
17 that -- that this was an important component, et cetera, and so we did.

18 Q So you fault Alzora for not raising an issue that was contrary to
19 Nevada law and you fault her because she should have seen --

20 A Ms. McMahon.

21 Q -- that in 2000 -- I'm sorry, Ms. McMahon, should have foreseen that
22 in 2006 the Supreme Court would adopt some of that federal reasoning, but you
23 think that she could have prevailed on that in the year 2000 in the appeal?

24 A Well, I mean, that's how we make the changes. We had another
25 case in our office which was Byford and Chris Williams, I think Mr. Oram

1 represented Mr. Byford and we represented Mr. Williams, and that signified a
2 huge seat change in the law, but it had to be raised. And by Mr. Oram raising it
3 in Byford and we raised it in Williams as well, it did result in a complete change
4 of the law.

5 Q Sure, and that happens. But if the law at the time did not support
6 that this was an incidental kidnapping, the law in Nevada, she would have been
7 arguing against Nevada precedent?

8 A I'm not going to disagree with you, with your interpretation of
9 *Hutchins* as it stood at that time, but it was still prone to objection and it still was
10 a ripe issue for appellate review.

11 Q And I believe you said on direct that you had preserved that or you
12 thought that you had preserved it. Do you remember reading that anywhere in
13 the briefs?

14 A No. I do recall that we -- we were trying to figure out how best to do
15 that. And I think that and I suggested that there was some discourse during the
16 settlement of the jury instructions when we were trying to figure out a better way
17 to parse that out. But I don't remember there being a specific objection, *per se*.
18 I think that --

19 Q So if it was not preserved, as I argue in my brief, then it would have
20 been reviewed under plain error on appeal and even more so would have been
21 denied because it was contrary to existing precedent?

22 A It would have been a difficult path.

23 Q All right. Let's turn to the other bad act, these other firearms. A few
24 days after the murder, the vehicle stop, you said that that wasn't fair to put those
25 guns in with the banana clip, that was prejudicial to the jury; is that right?

1 A Correct.

2 Q All right. You did raise that in a motion in front of Judge Sobel and
3 lost?

4 A Correct.

5 Q And it was raised on appeal. And the Nevada Supreme Court
6 disagreed with you. And they said those guns were relevant even though they
7 were not the murder weapons, they were the weapons, and argument could be
8 made they were the weapons used to commit the kidnapping and robbery; do
9 you remember reading that in the Supreme Court's --

10 A I remember that in the Supreme Court decision; is that what you're
11 referring to?

12 Q Yes.

13 A Yes.

14 Q So you just -- you disagree with the Supreme Court?

15 A I do in that interpretation because I was there and, you know, that
16 was the -- that was the shot that wound up in the newspaper with Mr. Guymon
17 holding that weapon. I mean, it was --

18 Q Sure.

19 A -- it was a blockbuster shot, and it was not the murder weapon.

20 Q Right. But it was the kidnapping weapon and the robbery weapon
21 held by the codefendants?

22 A Arguably, sure.

23 Q Now, the codefendants' sentences, you think that they should have
24 been admitted in this case; is that right?

25 A I don't recall that those sentences were available to us at the time.

1 But upon a retrial, I would think that that would be a relevant factor for the
2 defense counsel to consider.

3 Q Isn't it true that that could have been very harmful to you for the jury
4 to hear that the two nonshooters, I understand that you think an argument
5 should be made that Donte Johnson was not the shooter, but there was
6 evidence to suggest that these were the two nonshooters, and if they got life
7 without then the prosecutor could use that and say, well, what are you going to
8 give the actual shooter then; what are you going to give the gunman; there is
9 only one place to go from there and that's -- and that's death.

10 A That -- and I think I stated it on direct, it is a very, it has to be a
11 carefully considered decision to do that. I would think that it would have to be
12 part of the deliberative process that you would have to make a strategic decision
13 that there would be no pathway to it. I think in a case like this that there would
14 be a pathway to it. I think that in -- in good hands for defense counsel, that the
15 fact neither Mr. Young nor Mr. Smith received the death penalty, given the facts
16 and circumstances of the case, would be valid mitigating evidence with regard to
17 a parody argument. I appreciate that there is a potential pitfall of that as well as
18 you stated. I'm not going to deny that that is something that needs to be
19 considered by counsel. But I don't know that that happened in this case
20 because I didn't consult with them on that aspect of it. Mr. Oram asked me --

21 Q Reasonable attorneys might want to keep those codefendants'
22 sentences out; isn't that true?

23 A I won't disagree with you on that.

24 Q In fact, you filed a motion in this case to exclude the codefendants'
25 sentences; did you not?

1 A At the time we felt that that was something that was going to be
2 difficult for us.

3 Q So the very strategy I'm talking about is something you employed in
4 the year 2000, you felt that those codefendant sentences were not something
5 strategically you wanted this jury to hear. Even if the law were to allow it, you
6 didn't want it want in?

7 A At that particular time not knowing what the impact of mitigation,
8 et cetera, would be, we were kind of in the blind, and I remember making --
9 Mr. Sciscento making that call, yeah. I disagreed with Mr. Sciscento on it, but he
10 made the call and I deferred to him. But I understood where he was coming
11 from, of course I did.

12 Q Reasonable attorneys can disagree on this point, correct?

13 A I'm not going to disagree with you on that, yes, you are correct.

14 Q Discovery of the experts' reports, this was Dr. -- oh, who was it, was
15 it Mortillaro? The psych -- Kinsora, the neuropsychologist, he was your last
16 witness as I recall.

17 A Okay.

18 Q He had reviewed some documents. And specifically it was some
19 mitigation experts' report that he had reviewed. And I think that's the issue that
20 Mr. Oram has is that you were ordered to turn that mitigation report over to the
21 State; is that correct?

22 A Right.

23 Q Now, the timing of that, that was not pretrial, that was actually in trial
24 that you were ordered to disclose that to the prosecutor; is that correct?

25 A Right. And that was the thing is that we didn't want to do that, but

1 we had to comply to --

2 Q In fact, I remember reading Mr. Daskas in the cross-examination of
3 Dr. Kinsora talked about just having gotten that mitigation report that day.

4 A Right.

5 Q The day that the witness testified, so there's been a lot of trial that
6 has gone on, a lot of testimony, when you put your neuropsychologist on only
7 then did the judge require you to disclose that report, correct?

8 A That's my recollection of the sequence of events, yes.

9 Q And there is a statute that says that experts can be cross-examined
10 on anything that helped them form the basis of their opinion. This was certainly
11 something that he formed, helped him form his opinion?

12 A I don't know about that. See, that's the thing, that was what we
13 were having, if you recall the record about what Mr. -- or Dr. Kinsora had relied
14 upon, et cetera, and whether or not that was discoverable or not, I mean, what's
15 our -- our objection was if you recall.

16 Q So you think you can put an expert on the stand and withhold some
17 things that he reviewed in forming his opinion and withhold that from the State?
18 What law says that?

19 A As phrased? No. As you phrase that, no. But what we were
20 disputing --

21 Q How is that different than what we've got right here?

22 A Well, that's what I'm saying is that we weren't confident that
23 Dr. Kinsora had actually relied upon in any way these other documents that were
24 out there. I'm trying to recall that aspect of it.

25 Q Well, he said he did.

1 A Yeah.

2 Q He said he referred on this report.

3 A Yeah. And we should have taken that out of -- we should have
4 done a separate hearing to talk about that in greater detail.

5 Q But under the law in existence at the time up until today, if a doctor
6 relies upon it you have turn it over to the State if you're going to use that witness.

7 A As phrased, yes. We were disputing the fact. But you're right,
8 Mr. Owens, that's correct.

9 Q So you may not like that you have to turn it over, but that is what the
10 law is?

11 A We felt that the circumstances brought it out of the law. But you are
12 correct. You have an absolute correct statement of the law.

13 MR. OWENS: That's all I have.

14 THE COURT: Redirect?

15 **REDIRECT EXAMINATION OF DAYVID FIGLER**

16 BY MR. ORAM:

17 Q Mr. Figler, you were asked questions about whether a robbery and
18 kidnapping could be incidental to one another, do you remember that?

19 A Correct.

20 Q I actually cited in my brief *Wright versus State of Nevada* from 1978
21 where the Nevada Supreme Court talks about the movement of a victim being
22 incidental to a robbery.

23 A Yeah.

24 Q So in fact in the state of Nevada we have had robbery being or
25 kidnapping being incidental to robbery since at least 1978?

1 A Yeah. And that's what we were talking about, you know, there were
2 some hurdles with some other cases. But it was important for it to be discussed
3 and that's why we talking about that during the jury selection and we were
4 talking about Ninth Circuit law and there was a bunch of stuff going on at that
5 time.

6 Q So, and you also said on cross-examination there was evolution of
7 this issue?

8 A That's correct.

9 Q You keep up to date on the law?

10 A I do. I try to.

11 Q You seem like a person who's pretty much a student of the law?

12 A I like looking at the decisions when they come out.

13 Q Okay. And so although you're not required or you probably, as sit
14 right here now, don't the know the name of all cases, you do remember that
15 there was that type of issue pending in the state of Nevada?

16 A Oh, obviously, I mean, that's always going to be an issue because
17 you've got the common law, you've got the developments, and you've got also
18 common sense that certain elements need to be proven above and beyond so
19 that there is not the duplicity of -- or -- of charges that's, you know, it's a double
20 jeopardy, almost -- almost a double jeopardy issue that you can't be charged
21 twice for the same one thing.

22 Q Now, with regard to Dr. Kinsora and having to turn over information
23 on Tina Francis's report, she did not testify?

24 A She did not.

25 Q And do you remember what the State utilized against Dr. Kinsora

1 from Tina Francis's report?

2 A I don't have exact recollection of that.

3 Q If I asked you or I told you certain things maybe that would refresh
4 your memory, and for the record, since it is in the record, they asked Dr. Kinsora
5 about Tina Francis's report including that Mr. Johnson's mother did not use
6 alcohol or drugs in pregnancy?

7 A Right. That's right.

8 Q The defendant took a gun, gave a gun to another because he was
9 angry with a cheerleader?

10 A I remember that.

11 Q Defendant's grandmother said he should have been treated as an
12 adult in California? Defendant came to Las Vegas because of selling crack and
13 marijuana, he would make more money doing that here in Las Vegas?

14 A I recall that. I don't recall the grandma comment, but I do recall the
15 last one.

16 Q Now, you're putting on Dr. Kinsora for psychological purposes?

17 A That's correct.

18 Q Not factual purposes of a background or what a grandmother thinks;
19 is that fair?

20 A That's correct.

21 Q And so not using Tina Francis's report or not using utilizing her as a
22 witness, you wouldn't want harmful things that she may have discovered to be
23 raised through Dr. Kinsora?

24 A Absolutely.

25 Q And that is what you disagree with, is that right, that that --

1 A That was what our fight was over. I mean, we just felt it wasn't
2 material things that would necessitate there to be the full disclosure of the
3 document, quite frankly, we didn't think any of that information should come in to
4 the jury.

5 Q Mr. Figler, you know as a experienced capital litigator that you are
6 required to use mitigation specialists now?

7 A That's correct.

8 Q And your mitigation specialists go out and find information on your
9 client?

10 A Correct.

11 Q They come back and tell you what they found?

12 A They do.

13 Q Mr. Figler, you've represented some unusual characters in your life,
14 haven't you?

15 A Yes, I have.

16 Q And those unusual characters that are facing death, you're
17 reasonably confident that if you look under every nook and cranny about who
18 that person is that you may find information that is damaging?

19 A Absolutely.

20 Q Somebody may say, yeah, he skinned the family cat?

21 A That might have actually been a specific example, yes.

22 Q And so now your mitigation specialist who you're required to have
23 comes back and tells you, Mr. Figler, he skinned the family cat or the grandma
24 says he skinned the family cat?

25 A Sure.

1 Q Okay. And if your psychologist just happens to be sitting in in a
2 mitigation meeting because you -- you do have mitigation meetings where you
3 all sit there, the attorneys, your specialist, psychologist just --

4 A That happens on occasion, absolutely.

5 Q Maybe in preparation for trial?

6 A Sometimes that happens, yes.

7 Q So couldn't an argument be made, well, now the psychologist
8 knows that, so therefore, the psychologist has relied upon that for his views?

9 A I would take issue with the word "relied upon." Absolutely, I think it
10 is incidental. It's not material. It's not discoverable. That's our position.

11 Q And the fact that Dr. Kinsora may have known Tina Francis's report
12 that the grandmother said that Donte Johnson should be treated as an adult was
13 not something that really Dr. Kinsora was relying upon for his opinion?

14 A In no sense can I imagine that that was relied upon by Dr. Kinsora
15 in any material way.

16 Q And you were objecting all through that part of the case?

17 A If we did our job right, yes, and I recall objecting a lot. I remember
18 that being one of the contentious issues.

19 Q And eventually the trial judge stops the prosecution from continuing
20 on to question Dr. Kinsora about everything that Tina Francis's report reflected?

21 A Eventually.

22 Q And just so this record is clear, really, the very fact that the
23 Supreme Court has instructed us that we really should use mitigation specialists,
24 sort of puts you in this trick box each and every time, doesn't it?

25 A I think so. It -- it's never an easy conversation with whatever

1 mitigation specialist you're using as to what their ultimate goal is because, you
2 know, you're trying to find reasons to not have someone executed. And it is a
3 mixed bag. So it's treacherous, but it's required.

4 Q And in fact, really you start to become the investigator for or your
5 specialist becomes an investigator for the State?

6 A It -- I could see how you could argue that. We try to limit that to the
7 degree that we can.

8 Q Well, Mr. Figler, let me pose it to you this way, your mitigation
9 specialist finds out about the family cat.

10 A Sure.

11 Q Okay, now your mitigation specialist also finds out that some
12 grandmother really liked your client, had good things to say about your client.

13 A Right.

14 Q Grandmother dies. So now hearsay is admissible. You want to put
15 on the mitigation specialist, right?

16 A We do.

17 Q Okay. So as a prosecutor I want to know all the reports and all the
18 statements that your mitigation specialist has conducted, all the interviews,
19 right?

20 A If I was the State, absolutely, that would be my goal.

21 Q So the very fact that all you're trying to do is put on information
22 about a grandmother who liked the defendant, had good things to say about the
23 defendant, now you've opened the door based on the rules to very negative
24 information about your client?

25 A I feel that interpretation is unfair, but I've seen it utilized, yes.

1 Q You were asked about the jury and Mr. Owens said the jurors that
2 participated in the first jury trial, none of them had a particular bias; do you
3 remember that line of questioning?

4 A Yes.

5 Q Well, Mr. Figler, didn't you have to use three of your peremptories to
6 remove people who clearly had biases?

7 A Absolutely.

8 Q Including "Logan's Run" --

9 A Yes.

10 Q -- man? And you asked that those be dismissed for cause?

11 A Yes.

12 Q Right?

13 A Yes.

14 Q And so you were forced to remove a quarter of essentially a jury
15 with peremptories because you thought that they were inherently biased?

16 A Correct.

17 Q You didn't have any biased jurors, but you were complaining from
18 the beginning that your jury was unrepresented from minorities?

19 A That's true.

20 Q And this was a case where a African-American was on trial and
21 some of the victims were Caucasian?

22 A Three of the four.

23 Q And the other one was Hispanic?

24 A Hispanic.

25 Q This obviously caused you concern?

1 A Great concern.

2 Q And you were asked whether or not somebody being in jail, with the
3 *Batson* challenge juror, and whether that juror had left something blank on a
4 questionnaire was race neutral, right?

5 A Correct.

6 Q Have you, in your experience picking a jury, ever -- strike that.
7 Mr. Figler, if I wanted you to excuse any one of these jurors,
8 imaginary jurors, and you really wanted to do it because a juror was white, could
9 you figure out a reason to say to a Court for why to get -- why you want to get rid
10 of that juror?

11 A I like to think that my skill set would allow me to do that.

12 Q Including saying, well, she crossed her arms when I questioned
13 her?

14 A She looked at me crossways; she was chewing gum; she wasn't
15 paying attention; she appears to not like me.

16 Q She laughed when the prosecutor made jokes?

17 A Something like that.

18 Q Her stepson was in jail, right?

19 A Yes.

20 Q And you're aware, at least I understood you to say, that
21 approximately 50 percent, 50 percent of nonwhite males will be arrested some
22 time in their life?

23 A I know that that's a statistic I've heard, and I have -- believe in its
24 validity.

25 Q So if you're a black female potential juror, you'd have a father,

1 biological father, biological grandfather?

2 A Correct.

3 Q Two biological grandfathers, right?

4 A Yes.

5 Q Okay. That's three males, right, in the potential juror's life?

6 A Certainly.

7 Q Statistically, one of them's going to end up being arrested? The
8 probability?

9 A That's a fair probability. In certain parts of the country it's probably
10 higher.

11 Q In Las Vegas?

12 A In Las Vegas it's significant.

13 Q So you're going to be able to, if you're a prosecutor, skilled
14 prosecutor, Mr. Figler, you'd be able to look over at a juror and say, you know,
15 anybody who's been arrested that's close to you and statistically, the
16 African-American juror's going to say, yeah, my grandfather, my uncle, my
17 brother, my son, something along those lines, right?

18 A In all likelihood, we hear that a lot.

19 Q And when you're looking at questionnaires, you've looked at
20 hundreds, if not thousands?

21 A Thousands of questionnaires -- in this case?

22 Q In all your case you've studied --

23 A Thousands of questionnaires.

24 Q And --

25 THE COURT: Mr. Oram, sorry to interpret, apparently Judge Sciscento is

1 waiting back of the house.

2 MR. ORAM: Do you want me to go see --

3 THE COURT: Are you intending to call him next or --

4 MR. ORAM: Do you want me to see what his schedule is?

5 THE COURT: He's back there.

6 MR. ORAM: Yes, I can, yes, I can call him next. I just don't know how
7 long --

8 THE COURT: I just need to know what to have my assistant tell him.

9 MR. ORAM: Your Honor, what time were you planning to take a lunch?

10 THE COURT: Probably about noon.

11 MR. ORAM: About noon? I think I'm almost done with Mr. Figler. So
12 perhaps we could get -- go with the judge right after.

13 THE COURT: Okay. Okay.

14 BY MR. ORAM:

15 Q Mr. Figler, you notice that a lot of potential jurors who fill in these
16 lengthy questionnaires often rush through them?

17 A That's correct.

18 Q And when sometimes when they come in to actually be questioned,
19 they start seeing the majesty of the capital case?

20 A Yes, that's correct.

21 Q And they say things like, well, I didn't realize, you know, now that I'm
22 looking at the situation I rushed through it or I left things blank. It's very --

23 A Not uncommon at all.

24 Q Okay. So the fact that Juror Number 7 left something blank but said
25 that they could follow the law and consider the death penalty, was that part of

1 your complaint in the *Batson* argument?

2 A Part of our complaint that that was --

3 Q Or part of your belief that this was a pretextual reason?

4 A Yes.

5 MR. ORAM: Court's indulgence.

6 THE WITNESS: Judge Sciscento just poked his head in.

7 THE COURT: I just saw, yeah.

8 MR. ORAM: That concludes redirect examination.

9 THE COURT: All right. Any recross?

10 MR. OWENS: No.

11 THE COURT: Okay. Thank you, Mr. Figler.

12 THE WITNESS: My pleasure.

13 THE COURT: Oh, the exhibit, thank you.

14 MR. ORAM: Your Honor, at this time we call Judge Sciscento.

15 Just go out and see if Mr. Whipple's --

16 THE MARSHAL: Sir, step right into the box, remain standing, raise your
17 right hand, face that gentleman right other there.

18 THE COURT: Sorry, let's wait for Mr. Oram to get back in the room. He
19 was just touching base with Mr. Whipple, I think.

20 THE CLERK: Didn't even notice he was gone.

21 THE COURT: All right. Go ahead and swear him in.

22 **JOSEPH SCISCENTO,**

23 [having been called as a witness and being first duly sworn, testified as follows:]

24 THE CLERK: Thank you. Please be seated. Please state your complete
25 name, spelling both your first and last name for the record.

1 THE WITNESS: Joseph Sciscento, S-C-I-S-C-E-N-T-O.

2 THE COURT: Your first name, please?

3 THE WITNESS: Joseph, J-O-S-E-P-H.

4 THE CLERK: Thank you.

5 **DIRECT EXAMINATION OF JOSEPH SCISCENTO**

6 BY MR. ORAM:

7 Q Sir, how are you employed?

8 A I'm a currently a Justice Court Judge with the Las Vegas Justice
9 Court.

10 Q Judge, how long have you been an attorney?

11 A Twenty-two years, I think 21, 22 years.

12 Q And you represented Donte Johnson in this particular case?

13 A Yes.

14 Q What was your capacity? In other words, did you -- you
15 represented him in the first trial and in the second penalty phase?

16 A No. I represented him in the first trial and the first penalty phase
17 which was a hung jury for the first penalty phase, went to a three-judge panel,
18 that went up to the Supreme Court. The second penalty phase I was not
19 attorney of record on that.

20 Q Okay. Maybe I'm confusing you. Did you conduct a three-judge
21 panel?

22 A Yes.

23 Q So what I'm calling that, just for purposes of clarity, I'm calling it the
24 first penalty phase where the jury couldn't reach a verdict.

25 A Yeah.

1 Q The second penalty phase, which was a three-judge panel, and
2 then there was a third one which you were not involved in.

3 A Okay.

4 Q Fair enough, just for clarity?

5 A Yeah.

6 Q Judge, you represented Mr. Johnson as the lead attorney?

7 A Yes.

8 Q And do you remember jury selection in the first trial?

9 A Somewhat.

10 Q Okay. Now Mr. Figler, had a very sharp memory of the first -- the
11 first jury trial. So I'll ask you and if you know, you know; if you don't, you don't.

12 A Yeah.

13 Q Do you remember objecting, Judge, to the underrepresentation of
14 minority jurors in your jury panel?

15 A Yes.

16 Q Okay. And when you object to something like that is that because
17 you think it's a legitimate issue?

18 A I think that we filed a motion prior to that. We thought that there
19 was unrepresentation, I think it was ten percent of the population of Nevada was
20 African American which was underrepresented as to the jury pool in general.
21 And then I think, if I recall correctly, there was probably only two African
22 American people in the entire pool.

23 Q It was actually, there were three minorities out of 80; does that
24 refresh your memory?

25 A Well, I'm talking about the entire pool. But, yeah, I know there was

1 one lady there, it was a black lady that was excused.

2 Q Okay. So, what you're saying is that you only remember two black
3 members of the jury venire?

4 A Yes.

5 Q And so you objected to that?

6 A Yes.

7 Q And you would have raised that on appeal had you been the
8 appellate writer?

9 A Assuming, I mean, it's been so long ago, I mean, I know that we did
10 object, you know, and unfortunately I'm trying to remember, there is a bunch of
11 cases that we've done, murder trials. But I do believe that it was one black lady
12 that was on the jury that was removed for cause.

13 Q By the State?

14 A Well, I think they -- I don't know if they removed her for cause. I
15 think they just removed her. It was removed by the State. And we objected and
16 their position was, we raised a *Batson* issue and our argument was that, you
17 know, it's trying to get minorities off the jury and their response was, well, her
18 response to us was not proper and she folded her hands to show that she's
19 objecting to the State.

20 Q What did you think of that?

21 A Well, I think Mr. Figler raised the issue, you know, that body
22 language is not enough to have her removed for that.

23 Q Well, also the State argued that had her stepson was in jail; do you
24 recall that?

25 A I don't recall that, no.

1 Q How many murder trials Mr. -- or Judge Sciscento, did you try?
2 A Murder trials tried?
3 Q Yeah.
4 A Fifteen, twenty. I don't recall over my -- over my career 15 or 20.
5 Q Here's what I'm getting at --
6 A Maybe more.
7 Q -- Judge, a lot of African-American jurors, if asked, would have
8 loved ones or family members, friends that would have been arrested in their
9 lives; is that fair?
10 A Well, not to paint a broad picture of any race, I mean, anybody
11 would have people who went to jail or prison. So, I mean, I don't know if it's
12 specifically geared towards, you know, a minority. It depends the number of --
13 Q Judge --
14 A -- kids that they have or the number of -- the size of their family.
15 Q We have placed statistics in these moving papers showing that
16 approximately 50 percent of nonwhite males are arrested some time in their life.
17 Do you have any reason to dispute that?
18 A No, I have no reason to dispute that.
19 Q So statistically then, that means that a lot of minority jurors are
20 going to have a father, a grandfather, an uncle, son, brother?
21 A I'll accept that premise, yes.
22 Q Okay. Doesn't seem out of the range of --
23 A No.
24 Q -- common sense, does it? So then, Judge, wouldn't it be easy to
25 simply take any African-American juror, ask them that question, haven't you -- do

1 you know anybody who's been arrested or convicted, and there's likelihood from
2 that statistic, that they are going to say yes?

3 A Given that statistic, yes.

4 Q Combined with the fact that every potential juror that sits here for a
5 week or a day would have crossed their hands, looked up at the ceiling, maybe
6 yawned, right?

7 A Yes.

8 Q So you can take those two facts and easily argue that's my
9 race-neutral reason why I'm getting rid of the juror?

10 A Yeah. Well, we object, I think we objected to that. I believe we did,
11 I recall that very issue.

12 Q And that would have been an issue had you written the appeal you
13 would have raised?

14 A Obviously, any time the *Batson* issue was out there, yes.

15 Q Do you remember having to remove jurors that you felt were
16 automatically inclined to impose a sentence of death if there had been a finding
17 of first degree murder?

18 A I think we weeded them out. Yeah, we had a jury questionnaire and
19 then we probed into whether or not they would be inclined to give death if they
20 found him found guilty.

21 Q Judge, do you remember a juror, Shink, who talked about being a
22 "Logan's Run" individual? In other words, he said that if, he believed in
23 "Logan's Run" theory that if you are a car thief all the way to murder that they
24 should take a barrel and when your number gets picked out you should be shot
25 or executed?

1 A Yeah, to tell you the truth, I do not remember that. I mean, I think I
2 would have remembered the "Logan Run" reference. I don't recall that.

3 Q You don't remember that?

4 A No.

5 Q Okay. You don't independently remember, other than the *Batson*
6 challenge, you don't remember individual jurors; is that fair?

7 A Yes.

8 Q Okay.

9 A Even --

10 Q You've tried a lot of case since then?

11 A Yes. I'm not saying that didn't happen, I just don't recall.

12 Q You don't recall?

13 A No.

14 Q Okay. Do you remember the jury filling out a special verdict form
15 which was a Court's exhibit?

16 A Yes.

17 MR. ORAM: Can I approach your clerk a minute, Judge?

18 THE COURT: Yeah, yeah, he's got it.

19 BY MR. ORAM:

20 Q Judge, I am going to show you what's marked as or been admitted
21 as Defendant's Exhibit 201. Do you see that document?

22 A Yes.

23 Q Do you recognize that document?

24 A It appears to be the same special verdict form. I recall that there
25 was a lot of writing as to mitigators.

1 Q Now, this was with a jury that was unable to reach a verdict?

2 A Correct. As to death, yes.

3 Q And I won't have you do it because Mr. Figler has counted and we
4 have it in the record, that there are about 22 listed mitigators. Okay?

5 A I would agree with that, yeah.

6 Q And do you see one on the second page about five lines up from
7 the bottom that says, no eyewitness to the identity of shooter?

8 A Yes.

9 Q With regard to the special verdict form, you realized that one or
10 more of the jurors were -- had found these mitigators?

11 A Yes.

12 Q And the result was a hung jury?

13 A Yes.

14 Q Judge, given that you had a jury fill that out and a foreperson sign it,
15 if you were arguing in a third penalty phase would you have argued those
16 mitigators to a jury?

17 A For penalty phase? Yes.

18 Q Yes.

19 A Yes.

20 Q Would you see any reason why you wouldn't?

21 A I haven't reviewed all of them. I mean, it's, you know, obviously you
22 argue anything you can as a mitigators. I don't see, you know, you focus on the
23 no eyewitness to identify the shooter, I might be concerned with that one
24 because the State might then try to bring in additional evidence that they may
25 have had to bolster that. So that might be something that I'd want to stay away

1 from.

2 Q You would stay away from whether -- that your jury had found, at
3 least one juror had found that there was confusion as to the identity of the
4 shooter? You would stay away from that, Judge?

5 A I wouldn't probably put too much emphasis on it.

6 Q Would you try to admit this document? Since hearsay is admissible
7 at a penalty phase, would you have asked that this document be admitted?

8 A I don't recall if they did. On the second trial, I think what they did is
9 they just read the transcript and, if you will, the second penalty -- third penalty
10 phase as you call it, they read the transcript, they did not have live testimony.
11 They did not go through the entire testimony as we did. So I would, obviously,
12 would like the jury to know that the jury that actually sat through the entire trial
13 and heard all of the evidence, ruled a certain way instead of just having a, I think
14 it was a detective who read the transcript.

15 So, yes, I would want this in there to show that, listen, a person who
16 sat in there for the number of weeks and listened to this jury, listened to the
17 evidence, came up with these mitigators and they are more informed than the, if
18 you will, the second jury.

19 Q Okay. Mr. Figler indicated that he talked to the jury after. Were you
20 present during that meeting?

21 A I may have been. I'm not sure.

22 Q Do you not recall?

23 A I don't. I mean, you know, there was a lot of things going on. And I
24 sometimes don't talk to juries. We may have got some indication from them, I
25 don't know. I don't recall.

1 Q You don't have independent memory of it?

2 A No, I don't.

3 Q Is that right?

4 A Yeah, I said I don't recall if we did or not.

5 MR. ORAM: Court's indulgence.

6 BY MR. ORAM:

7 Q You worked with Mr. Figler for a lengthy period of time on this case?

8 A Yes.

9 Q And you know that Mr. Figler had some involvement in drafting the
10 appeal regarding *Ring* and *Apprendi*; are you unfamiliar?

11 A Yeah. No, no, no. Okay. I thought you meant the appeal for this.
12 Yes, under the *Apprendi* case and the *Ring* case, yes.

13 Q And your involvement stopped after -- after the three-judge panel
14 and you didn't have any more involvement in the case?

15 A Yeah, after the three-judge panel, pretty much that ended. I know
16 prior to -- I don't know if -- when it was filed on that whether it was filed prior to
17 the three-judge panel coming in or not, when, if you will, the *Apprendi* motion
18 was filed.

19 Q Is it fair to say, Judge, that you have had a lot of significant cases
20 since that time?

21 A Yes.

22 Q Okay. You have no reason to dispute Mr. Figler's statements or
23 opinions about the case, did you?

24 A No. No.

25 Q In other words, you didn't have any strong disagreements with him

1 about -- about matters?

2 A No. I don't think so. I think, you know, we worked pretty good
3 together as team, I think.

4 MR. ORAM: Okay. That concludes direct examination, Your Honor.

5 THE COURT: Cross.

6 **CROSS-EXAMINATION BY MR. OWENS:**

7 BY MR. OWENS:

8 Q Good morning, Judge.

9 A Good morning.

10 Q On the fair cross-section argument that there was
11 underrepresentation of minorities, we've heard figures that maybe there was
12 three out of 80 who were minorities, you recall just two African-Americans, and
13 you recall objecting to that?

14 A Yes.

15 Q And you said that would have been an issue to be raised on appeal.
16 And if I were to tell you it was not raised on appeal, that's what it sounded like
17 that you were faulting appellate counsel for not having raised that on appeal?

18 A Well, I mean, obviously, that was something that we thought was
19 significant. I think prior motions, even pretrial motions, we did address the death
20 penalties, whether it was properly applied towards minorities given that -- that
21 the -- minorities are given the death penalty too great of a time compared to
22 non-minorities, if you will.

23 Q Okay. Specifically, on the fair cross-section argument, the
24 Sixth Amendment right to a fair jury trial requires more than just showing
25 disparate representation of minorities in a single venire, isn't that correct?

1 A Well, I think it's going, as to the panel itself has got to be a cross
2 section of society. So if ten percent were minority, then ten percent of them
3 should have been at least, at least in the pool itself should have been minorities.

4 Q On average, but the Nevada Supreme Court has said that the
5 Sixth Amendment does not guarantee a jury or even a venire that is a perfect
6 cross section of the community. Instead you have to show systematic exclusion
7 over a period of time that consistently throughout all venires in Clark County,
8 that they're all underrepresented, did you have that factually here to raise on
9 appeal?

10 A As to that there was --

11 Q A successful fair cross-section argument, could you have shown
12 that systematically juries -- minorities are underrepresented across all venires
13 here in Clark County; could you have shown that at this time in the year 2000?

14 A I don't know if we could have shown that statistically, but I think, you
15 know, we showed that there was only -- I just recall two. I do recall the one lady
16 that we did talk about and there was an objection to that. And I don't think that
17 represented the average number of minorities that was in Nevada.

18 Q Okay. Let's go to the *Batson* challenge, there was actually three
19 reasons the State struck the juror or when asked to give a race-neutral reason,
20 the State came up with three race-neutral ones. One was that she had a son
21 who was in jail, not arrested. Mr. Oram threw out some statistics about African
22 Americans, the percentage they're arrested over their lifetime. This juror actually
23 said that her son was currently in jail. Do you see that as being a difference
24 between arrested and currently in jail? The second meaning that he's been
25 prosecuted and convicted, doing time?

1 A Well, obviously, there is a difference, I mean, she didn't see the
2 process, the entire trial process.

3 Q You could understand why a prosecutor would be a little concerned
4 about having a mother on a jury whose son has been recently prosecuted and is
5 doing time in jail?

6 A Well, yes, I mean, there is obviously a reason why.

7 Q So that doesn't strike you on its face as being a discriminatory
8 motive on the part of the State?

9 A I guess there is an issue that the State could bring up and say that
10 they would -- they have some concern regarding that.

11 Q And after the State gives a race-neutral reason the third prong of
12 *Batson* requires the judge, who's there in the courtroom and can judge the
13 demeanor of the prosecutor and judge the demeanor of the juror and listen to
14 the tone and the inflection, they're the final arbiters of whether or not a
15 prosecutor has a discriminatory intent in his heart and mind in striking that juror?

16 A Yes.

17 Q So that would be a safeguard on the prosecutor just routinely
18 striking all African-Americans in coming up with a fairly innocuous reason about
19 that most of them have some family member who's been arrested at some point
20 and that will be my way of kicking off all African-Americans, so the law has a
21 safeguard built in?

22 A Well, the judge is supposed to make that determination and we
23 present it to the judge, yes.

24 Q And here the judge found no discriminatory intent on the part of the
25 prosecutor, correct?

1 A Obviously, because the --

2 Q The *Batson* challenge was denied?

3 A -- the lady was allowed to -- yes.

4 Q Okay. One of the mitigators in that mitigation form was that there
5 was no indication of any violence while in jail. Do you know that to be true?
6 Donte Johnson have no indication of violence while in jail?

7 A Prior to this I'm assuming there was not.

8 Q By the time of the third penalty hearing we had information that was
9 contested, but we had -- were able to make the allegation that he had helped
10 throw an inmate off of a second balcony over at the CCDC.

11 A Yeah, but he was found not guilty of that.

12 Q But we were able to put on evidence, it was a contested factual
13 issue --

14 THE WITNESS: Judge, if I can, I represented Mr. Donte on that matter
15 and he was found not guilty on that. Now my concern is this, obviously, I'm here
16 on a P.C.R. as to the murder charge, the other case I represented Mr. Johnson
17 on that too.

18 THE COURT: Okay.

19 THE WITNESS: So if we start getting into that there becomes a --

20 THE COURT: A privilege issue?

21 THE WITNESS: -- attorney-client privilege.

22 THE COURT: All right. Okay.

23 THE WITNESS: If you will.

24 BY MR. OWENS:

25 Q Well, let me clear that --

1 A You can understand my concern is I represented him on that case.

2 Q Yeah, were you with Gloria Navarro?

3 A What's that?

4 Q Gloria Navarro?

5 A No.

6 Q Didn't she represent --

7 MR. ORAM: Codefendant.

8 THE WITNESS: She represented I think --

9 BY MR. OWENS:

10 Q Oh, Reginald Johnson?

11 A Yes, the codefendant.

12 Q Okay.

13 A Now, I represented Mr. Johnson on that matter.

14 Q Okay.

15 A And I think it was dismissed, if I'm correct.

16 THE COURT: Okay. Okay.

17 THE WITNESS: As to that, I'm not sure if it was attempted murder or
18 what it was.

19 BY MR. OWENS:

20 Q Well, I'm not going to ask you any questions about that. The jury in
21 the third penalty hearing heard about that incident and there was disputed facts
22 as to whether or not he did participate or not. It was hotly contested in that third
23 penalty hearing. But that wouldn't really be an argument, a mitigator that you
24 could throw out to the jury if in fact he did have a history of violence in jail,
25 correct?

1 A So you're saying that the third penalty phase --

2 Q If the State had evidence of incidents in jail besides just throwing
3 somebody off the balcony, but smashing in somebody's face, getting in fights,
4 calling prison guards names, then you would not put forward to the jury and say
5 he has no indication of any violence while in jail; that wouldn't be something you
6 could with a straight face ask the jury to return, correct?

7 A That would be difficult to argue I think.

8 Q Okay. So that the jury came up with this on their own in the first trial
9 doesn't necessarily mean counsel was remiss for not including it as a mitigator in
10 the second penalty hearing, correct?

11 A You know, that's up to the attorney at that time to decide whether or
12 not how he wants to present it to the jury, whether or not it means that he's
13 violent to save himself in prison or in jail, to protect himself he's got to become
14 that way, and there is the argument that we turn them into these animals when
15 they're in prison.

16 Q So there is --

17 A And that was one argument they could have made so --

18 Q -- so there is strategy involved and legal reasoning that may differ
19 between one attorney to the next as to exactly what mitigators you're going to
20 put in front of the jury; is that correct?

21 A Yes, yes. Just like I say with the no eyewitness to identity of the
22 shooter, I would be cautious going to that. Other than alleging there is other
23 people there, we can't say that he's the one that actually did it without getting too
24 much into it.

25 Q Right, because it opens up where the State might be able to come

1 in with additional evidence pointing him out as the shooter, perhaps the jury will
2 not be sympathetic because it looks like you're relitigating guilt or backtracking
3 on the issue in question of his guilt, that may not go over well with the jury,
4 correct?

5 A Well, it would allow too much other information to come in, I would
6 assume, that maybe the second jury wouldn't have heard. But that's, again,
7 that's a determination that I would have to make independently of, you know,
8 another attorney would think a different way.

9 MR. OWENS: Right. That's all I have.

10 THE COURT: Redirect.

11 MR. ORAM: Yeah, very brief.

12 **REDIRECT EXAMINATION OF JOSEPH SCISCENTO**

13 BY MR. ORAM:

14 Q Judge, attorneys handle cases differently, right?

15 A Yes, yes.

16 Q But when you see all this list of mitigators coming out from your first
17 jury, obviously a lot of these of you would want to try to argue to any further jury
18 that they exist?

19 A Yes. I mean, there was a lot there and I think, you know, I thought
20 there was more to tell you the truth. I know -- because we also focus on the fact
21 that the victims came into Mr. Johnson's world, they came from rich, white
22 neighborhoods and they came into his world which was a violent world. And
23 there was some concern that they came into that world and they didn't have to.
24 That Mr. Johnson didn't have choice, that he was born into that world.

25 Q Would you think it was ineffective not to make these arguments to a

1 jury in the third penalty phase?

2 A Okay. There is a lot of things here, I mean, you know, his living
3 conditions, the fact that, you know, we interviewed his probation officer in L.A.
4 who said the only way that they're going to survive on the streets is to join a
5 gang, it's either, you know, join or be killed. His conditions there --

6 THE COURT: Do you think that the attorneys in the final, the later penalty
7 phase should have presented information about those listed there?

8 THE WITNESS: Yes. Yes.

9 BY MR. ORAM:

10 Q Okay. And the two that the State questioned you about one was
11 the violence in jail, okay, and the second one was whether -- the identity of the
12 shooter; and those are the two that you were, at least you had some further
13 consideration about?

14 A As I sit here today I have further consideration, I mean, I have a
15 concern because after doing a few trials, you realize when you bring up this
16 argument they bring in a different, "they" being the State, bring in a different
17 argument to argue against it. I mean, I can argue that, you know, there is never
18 escape in Nevada State Prison, and while I was doing that during a murder case
19 they had an escape out of Texas, which then came in front of the jury. So they
20 start talking.

21 You know, with that, with hindsight that I have, I would tread very
22 lightly on something like that. My concern is no eyewitness to an identity of
23 shooter, yes, but there was other information that could have been brought out
24 that the second jury might have been -- didn't really know about, maybe didn't
25 listen to at the time and then they would have relitigated that issue and

1 presented it in a stronger light. So there is a couple things that I might have
2 avoided. But obviously, his living conditions, the way he grew up, the lifestyle
3 that he had, definitely would have focused on that, definitely.

4 Q Now, with regard to the jury questions, the underrepresentation of a
5 jury panel, of minorities in that panel, there's no way you're going to be able to
6 show a systematic pattern unless attorneys begin to object; is that fair?

7 A Yes.

8 Q In other words, you walk into your first jury trial, they bring in 100
9 jurors and there is not a single minority, you can't say to yourself, well, it's my
10 first one I've never seen a systematic exclusion so I can't object; that would be
11 sort of silly, wouldn't it?

12 A Yes.

13 Q You do it because, you object so there is a record of it?

14 A So that you can show a pattern after a while, yes.

15 Q And so we would -- somebody like myself may take this case and
16 combine it with other murder cases and start to try to show the pattern?

17 A Yes, yeah.

18 Q And that's why you, one of the reasons why you objected?

19 A Well, yes. And, you know, I do recall, I mean, one of the issues was
20 that she had crossed her hands in the manner that I'm showing and I think it was
21 Mr. Guymon who said, Judge, she shows that she is different to the State, that
22 wasn't his exact words, but it was something to the effect that when she crossed
23 her hands we saw that -- or crossed her arms we see that she wasn't going to be
24 a friend to the State.

25 Q Judge --

1 A And I want to say, that wasn't the exact word he said, I mean, that
2 she was not -- she was angry with the State or something to that effect.

3 MR. ORAM: Court's indulgence.

4 BY MR. ORAM:

5 Q Judge, I argued a murder case in the Nevada Supreme Court
6 making the argument there was pretext going on about African-Americans being
7 perempted by the State based upon knowledge of a family member or a loved
8 one being either arrested or involved in the criminal justice system. And the
9 Supreme Court during oral argument asked me where my statistics were. Okay.
10 And essentially the State argued the same thing that there is no proof of this
11 systematic exclusion. So I'm asking you now, that case was Cobb versus State
12 of Nevada, have you been involved in any other murder cases where you
13 remember the State excluding or perempting a juror because the juror, the
14 minority juror, knew somebody who was involved in the criminal justice system?

15 A Well, you're saying involved in the criminal justice system, you
16 mean, like as a defendant?

17 Q Yes, my son was arrested, my uncle's in the penitentiary.

18 A I mean, I recall that there are some times that it would be brought
19 up. I don't recall if they were exempted or not. I don't -- you know, I can't really
20 say.

21 Q Okay.

22 A -- if they were or if they weren't, I don't remember.

23 Q Judge, you do remember that Mr. Guymon used the argument that
24 the juror's body language --

25 A Yes.

1 Q -- was race neutral?

2 A Yes.

3 Q You independently remember this?

4 A Yes. Yes.

5 Q Is that because you independently thought that it was pretextual?

6 A We thought it was kind of ridiculous. I mean, we thought it wasn't a
7 legitimate reason that you don't know the person, to assume that crossing the
8 arms was a show that they are not -- are against the State, we think it was not
9 right. I mean, you don't know what the person's thinking. And so that body
10 language, we didn't think was proper without asking further questions.

11 Q And you felt the juror was excluded because the juror was black?

12 A Well, that's what we objected to, yes.

13 MR. ORAM: Court's indulgence. That concludes redirect examination.

14 THE COURT: Any recross?

15 **RECROSS-EXAMINATION OF JOSEPH SCISCENTO**

16 BY MR. OWENS:

17 Q There is lot of focus on this juror with the hands crossing, that was
18 just one minor part of the State's rationale for excluding her as you recall? She
19 may have sat with her hands crossed, but during the questioning the juror stated
20 it would be difficult to pass judgment on the defendant, she didn't want to judge
21 someone; do you remember that?

22 A I don't recall that exact question, I know that those questions are
23 usually asked in general.

24 Q The juror was asked what her thought was about holding people
25 responsible for their action or choices and she said, No comment. And then she

1 was asked about anyone in jail and she said she had a stepson in jail. And we
2 previously talked about and you agreed that that would cause a prosecutor
3 concern if there was a family member who had had a son prosecuted and in jail?

4 A I mean, I can see a prosecutor being concerned about that, yes.

5 Q And then on question 33 of the questionnaire she was asked her
6 opinion of the death penalty and she left it blank. So not singling any one factor
7 out but looking at all of those you can see how that would be a very, very difficult
8 issue to prevail on in front of the judge, which you did not prevail on, and then to
9 take that up on appeal, there is tons of race-neutral reasons here and very little
10 in the record to show purposeful discriminatory intent on the part of the
11 prosecutor; isn't that true?

12 A You know, I mean, we felt that it was -- I recall, I mean, from other
13 trials I've had I recall that, I can even see where she was sitting front, right
14 second from the right because I recall that that was so odd that that was stated.
15 There is very few juries -- jurors that I remember, but, I mean, I remember that
16 one. So obviously to me it was important and to me it was an issue and to
17 Mr. Figler it was an issue.

18 Now, if you're asking me if on appeal I would have brought that up, I
19 definitely would have brought it up. I thought it was important at the time and to
20 recall that this time, you know, at this date, it obviously was important to me. So
21 would I have brought it up? Yes, I think I would have brought that up. I think I
22 would have brought up the entire thing, anything you can use on appeal you use
23 with a legitimate basis. And I think that there was an argument we had.

24 Q All right. Now, I went through this with Mr. Figler, are you aware the
25 size of the appellate brief that they filed in this case?

1 A No, I'm not.

2 Q If I told you it was 74 pages does that sound like a fairly long
3 opening brief?

4 A I think you have to get permission to exceed 30 pages, I think it is.

5 Q At that time it was probably 40 for a capital case. So they exceeded
6 the pages and obviously the main issue was this *Apprendi-Ring*, three-judge
7 panel ruling that was the main part of appellate brief, correct?

8 A Well, yeah, I think we knew going in that we were going to win on
9 the *Apprendi*. I mean, Mr. Figler and I, when we went to the three-judge panel,
10 we already saw the writing on the wall after *Apprendi* and the case coming out of
11 Arizona, we knew what was going to happen.

12 Q Now, appellate counsel has to be selective in what issue she puts in
13 a capital. There may be all kinds of issues that are out there, and they're going
14 to have to pick and choose which to include in an appellate brief and you don't
15 fault appellate counsel for excluding some and going with what they felt in their
16 judgment was their best chances at prevailing?

17 A I come from two schools of thought, one is you put everything on
18 the wall and see what sticks; and the other one is only put in front of the judge
19 what you think is the strongest. I mean, there is two different thoughts on that
20 and it's up to the attorney to make the decision.

21 MR. OWENS: Thank you. Nothing further.

22 MR. ORAM: Very briefly.

23 THE COURT: Go ahead.

24 **FURTHER REDIRECT EXAMINATION OF JOSEPH SCISCENTO**

25 BY MR. ORAM:

1 Q Do you remember that Juror Number 7 indicated she could consider
2 the death penalty?

3 A I think in order to even survive they had to all say that so, otherwise
4 they would have been kicked before we even got there.

5 Q Okay. So --

6 A They would have been kicked for cause.

7 Q -- so the juror passed for cause?

8 A I'm assuming so because if it, either way, like we give death to
9 everybody who commits any kind of crime or I would never give the death
10 penalty in any time or could never consider it, they would not have gone that far,
11 we would have been kicked. So I'm assuming that.

12 Q If the prosecutor asked Juror Number 7, Ms. Fuller, can you
13 promise me this, that the verdict you will pick will be a just and fair verdict no
14 matter how difficult a choice? Definitely fair, yes; you don't remember her saying
15 that?

16 A I don't remember, I'm just, you know, I know that if she said I could
17 never give him death penalty or the death, I think she would have never got that
18 far.

19 Q Judge, if you don't raise a constitutional issue like *Batson* or a
20 discriminatory jury, that issue is not preserved and it goes to a different
21 standard, plain error, are you aware of that?

22 A Yes.

23 Q You saw this is a significant issue not something that was just minor
24 that's just one of the many that should be winnowed out?

25 THE COURT: Which issue?

1 MR. ORAM: The jury --

2 THE COURT: *Batson*?

3 MR. ORAM: -- the *Batson* and the underrepresentation of the jury.

4 THE COURT: Thank you. Go ahead.

5 THE WITNESS: Well, I mean, that was obviously something that we
6 brought up.

7 MR. ORAM: Okay. Nothing further.

8 MR. OWENS: Nothing further.

9 THE COURT: Thank you.

10 THE WITNESS: Thank you, may I exit through the back?

11 THE COURT: Yes, you can go out the back. Thanks.

12 All right. So, is Mr. Whipple able to be here after lunch then?

13 MR. ORAM: He says he is. I told him 1:30. But I can call him and say
14 earlier. I just didn't know how long the Court was going to --

15 THE COURT: That's fine. As long as we're done by 3:00, I'm fine.

16 MR. ORAM: I think it will be -- it will go quicker.

17 THE COURT: So we'll go ahead and take a break until 1:30 and then
18 we'll resume.

19 MR. ORAM: Thank you very much.

20 [Lunch recess at 11:57 a.m.; matter resumed at 1:53 p.m.]

21 THE MARSHAL: Please be seated. Come to order.

22 THE COURT: All right. Yes, go ahead, you can call your next witness.

23 MR. ORAM: Your Honor, at this time Mr. Johnson would call
24 Bret Whipple.

25 THE MARSHAL: Sir, step into the box, remain standing, raise your right

1 hand, face that gentleman right there for me. Remain standing, raise your right
2 hand, remain standing.

3 THE COURT: You've got to stand up.

4 THE WITNESS: Oh, I'm sorry, of course.

5 **BRET WHIPPLE,**

6 [having been called as a witness and being first duly sworn, testified as follows:]

7 THE CLERK: Thank you. Please be seated. Please state your complete
8 name, spelling both your first and last name for the record.

9 THE WITNESS: My name is Bret Whipple, B-R-E-T, W-H-I-P-P-L-E.

10 THE CLERK: Thank you.

11 THE COURT: Go ahead.

12 MR. ORAM: Thank you, Your Honor.

13 **DIRECT EXAMINATION OF BRET WHIPPLE**

14 BY MR. ORAM:

15 Q Mr. Whipple, how are you employed?

16 A I am self-employed.

17 Q As an attorney?

18 A Yes.

19 Q How long have you been an attorney?

20 A 1996.

21 Q Do you remember representing Donte Johnson?

22 A I do.

23 Q And just for clarity, I've referred to there being three penalty phases,
24 first was a hung jury where the jury was unable to reach a verdict as to penalty.
25 The second was a three-judge panel that sentenced Mr. Johnson to death. And

1 the one, the third one being the one that you did with Ms. Jackson. Do you
2 recall that third penalty phase?

3 A I do.

4 Q Okay. I want to start with something unrelated to the third penalty
5 phase and that is, Mr. Whipple, you have in the past -- you've done quite a few
6 murder cases; is that right?

7 A I have. I think approximately 25, in fact.

8 Q And do you remember representing a man named Delbert Cobb?

9 A I do.

10 Q And was that a murder case?

11 A It was.

12 Q And do you recall in that murder case objecting to the
13 underrepresentation of minorities in a jury venire?

14 A I do. Yes.

15 Q Do you remember, in fact, that you were permitted an opportunity to
16 question the Jury Commissioner over how jurors were selected, how potential
17 jurors were brought into the court?

18 A I do. Mr. Oram, could I ask you a quick question?

19 Q Yes.

20 A Can you remind me what judge that was because I have so many of
21 them, I'm trying to, if I could remember what judge it was, because I specifically
22 remember going to the Jury Commissioner, subpoenaing her, bringing her
23 before the court. I'm just trying to remember the Court so that it kind of -- so that
24 I can kind of bring it all together.

25 MR. ORAM: Court's indulgence.

1 THE WITNESS: Was that in front of Judge Jennifer Togliatti? I think it
2 was.

3 BY MR. ORAM:

4 Q Judge Togliatti, yes.

5 A Yes. Okay, now I remember it, yes.

6 Q You remember the case?

7 A Yes.

8 Q And do you also remember claiming that the State had excluded a
9 potential African American juror pretextually?

10 A Yes.

11 Q Do you remember complaining or that the State used the juror --
12 that the juror had had somebody closely associated with the juror arrested or
13 convicted of crime and you objected saying you thought that this was pretextual?

14 A Yes.

15 Q Had you had seen in the past or since Donte Johnson's trial, the
16 State use a peremptory challenge to excuse an African-American juror based on
17 the fact that that juror had known somebody or had a family member who was
18 convicted of crime or arrested for crime?

19 A The answer is yes. But it's twofold. I've made that objection with
20 regard to any minority, Hispanic or African-American. But in my memory this
21 has only happened a couple times. That's why I was asking you which judge it
22 was. It's always worked when there was an African-American defendant.

23 Q Okay. So you've seen that happen on at least --

24 THE COURT: What do you mean "it's worked"?

25 THE WITNESS: In other words, the person has been precluded because

1 some alleged insight of the judicial system.

2 BY MR. ORAM:

3 Q Okay. And so you actually objected during Delbert Cobb's trial on
4 the issue of underrepresentation of the jury panel as a whole?

5 A Yes.

6 Q And that the State was excusing one of the very few minority jurors
7 on the basis of what you thought were pretextual reasons?

8 A Yes.

9 THE COURT: I'm sorry, for my information, what year was the Cobb trial?
10 Or can you give me some --

11 MR. ORAM: The Cobb trial, Your Honor, was --

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

13 MR. ORAM: Oh, I do, I do.

14 THE COURT: Okay.

15 MR. ORAM: If I can find it. Mr. Cobb was -- the trial began April 16, 2007,
16 trial concluded May 1, 2007.

17 THE COURT: Okay. Thank you.

18 BY MR. ORAM:

19 Q I recognize, Mr. Whipple, that there were certain mitigating factors
20 at least checked by the first jury in the first trial?

21 A Donte Johnson trial, yes.

22 Q And did you ever or do you recall any discussions with
23 Judge Sciscento or Mr. Dayvid Figler about the mitigators that had been listed
24 by the first jury?

25 A Yes. Could I respond a little bit more than that? I was a member of

1 the Special Public Defender's Office. It was a very small office, but a lot of great
2 camaraderie, and we worked -- we worked Donte Johnson's case up together. I
3 remember going to California to visit his family and where a number of, we
4 believed, mitigating witnesses were located with a number of different members
5 from the Special Public Defender's Office. So even though the first trial I did not
6 participate as the trying attorney, I was nevertheless involved with because there
7 were only five or six attorneys in the Special Public Defender's Office and we
8 were all working to help the client at the time. This was a very big trial for our
9 office because it was three homicides and -- and because it was capital.

10 So we often sat down together as a group and just threw out ideas
11 and talked about ideas in general. And so I was even involved with it at the first
12 trial to a certain degree, I believe; and certainly the second one when it went
13 before the judge, the three-judge panel and then. So from the time I joined the
14 Special Public Defender's Office we often at met at lunch and different times and
15 we would talk about different issues. And so I was involved with
16 Donte Johnson's trial, his case, even before I tried it.

17 Q Were you lead counsel in the third penalty phase?

18 A No, I was not.

19 Q Alzora Jackson?

20 A Yes.

21 Q Can you think of any reason why there was no attempt to introduce
22 the special verdict form that was an exhibit in the first trial into the penalty phase
23 that you were involved in?

24 A That's a great question and I'm going to probably guess a little bit. I
25 kind of vaguely remember discussing it in one of those sit-downs. I'm not sure if

1 it was -- if we felt it was -- I think we discussed it. And I'm not sure if we didn't
2 believe it was admissible perhaps. I honestly don't remember what the
3 conclusion was. I kind of believe -- I kind of remember talking about it. I
4 remember, obviously, passing it around and discussing some of the mitigating
5 factors and some of the different ideas of trying to assist our client.

6 Actually introducing that document into evidence, I think was
7 something that was discussed at some point and I'm not -- I don't know if we
8 ever, you know, came to a conclusion. And I'm not sure if there ever was a
9 reason why we chose not to introduce it, other than perhaps it might have not
10 been inadmissible to begin with. But I do think there was a discussion regarding
11 it.

12 Q Did you ever consider listing all of the mitigators that had been
13 found by the first jury and requesting that the jury that you were in front of find
14 these as mitigators?

15 A I can't remember if we did that or not. I don't, if you're telling me we
16 didn't, I don't know a reason we did not.

17 Q There would be no tactical reason for it?

18 A Not that I'm aware of.

19 Q Mr. Whipple, you argued, and I'll refresh your memory, you argued
20 to the jury in closing argument that Mr. Johnson would not have access in the
21 prison to narcotics in an effort to inform the jury that Mr. Johnson had been
22 under the influence of narcotics when the crime he allegedly committed took
23 place and since he couldn't get a hold of narcotics in prison, this was a mitigator;
24 do you recall that?

25 A You know, I haven't thought about this case, how long ago was it, if

1 I can ask, what year?

2 Q I believe the trial you did was 2006.

3 A 2006, I can tell you what I do remember very strongly and that was I
4 tried a different --

5 MR. OWENS: Five.

6 THE WITNESS: -- approach for Mr. Johnson because we were both,
7 Ms. Jackson and myself, I went first and she went second, the thing I remember
8 is I really wanted to -- I wanted to do something a little more novel, I thought
9 extreme measures or extreme challenges would give rise to extreme challenges
10 and I remember trying to convince the jury that the death penalty was old
11 fashioned, that it was outdated, that it was really not necessary in this day and
12 age; and as part of that I think what I argued as well is that he could be kept in
13 custody in a safe manner and I think what you're reminding me -- what you're
14 telling me now is kind of part of that argument.

15 BY MR. ORAM:

16 Q Ms. Jackson argued, after you did that there were no drugs in
17 prison, that she disagreed with you and she thought there would be drugs in
18 prison.

19 A I don't remember that.

20 Q You don't remember that?

21 A No.

22 Q Okay. Then I'll move on from that. Do you remember that the
23 codefendant, Sikia Smith and Terrell Young, received life sentences, life
24 without?

25 A I remember that as a fact, I was not present when that happened.

1 But I remember it as a fact.

2 Q Now Ms. Jackson attempted to argue in closing argument those
3 facts, but it was sustained by objection. Had you and Ms. Jackson ever
4 contemplated calling the defense attorneys who represented Mr. Young and
5 Mr. Smith to bring out what their sentence was?

6 A I don't recall ever discussing that with Ms. Jackson or even that
7 being part of roundtable that we discussed when we discussed Mr. Johnson's
8 case.

9 Q Fair to say you have no independent memory of why that wasn't
10 done or even if it was done?

11 A I don't think it was done. But I don't know why it would not have
12 been done.

13 Q Did you --

14 MR. ORAM: Court's indulgence.

15 BY MR. ORAM:

16 Q How much more involved in the workload would you say
17 Ms. Jackson was as opposed to you?

18 A Substantially. I actually, the one thing I recall about this case, and I
19 don't -- I had just finished a murder trial the week before I started this trial. And I
20 actually had a jury out when I was in trial in Donte's case, and I actually stopped
21 his trial, probably in the transcript somewhere, for me to go take the verdict in
22 the other murder case, and I got an acquittal, that was my first acquittal in a
23 murder case. So that's why I remember that. So because -- and so I had been
24 in trial for the two weeks leading up to Donte's case just the way the trials got
25 stacked.

1 And so my -- I remember my murder trial in the case State of
2 Nevada versus Markette Tillman, the jury deliberated for three days in front of
3 Judge McGroarty and they came back on the end of the third day with an
4 acquittal, all charges. And I remember I was in either the second day, I think, of
5 Donte's penalty phase when that came in, either the first or the second day.

6 Q So the heavy lifting was mostly done by Ms. Jackson?

7 A Oh, absolutely.

8 Q She is the one most familiar with the case?

9 A Yes. I would hope her memory's better than mine, I mean, it's been
10 a while.

11 Q She was the one that did a lot of the investigation on mitigation?

12 A She did. Although we all did a lot. And the reason I mentioned
13 earlier is I think I was part of the group that went to California even earlier when
14 in his first or second phase to try -- we all went down together to try to pitch in
15 and work the case up together. And I remember personally speaking to, I think
16 it's the family members, and I went and talked to his old coach, went to the high
17 school. I think we went as a group.

18 I remember going with not just myself and Ms. Jackson, I thought --
19 I know there was some, our investigators, but I thought we also went with some
20 other attorneys as well. And I think, I don't know if it was for the third phase or it
21 could even have been for the second phase. I know we were all pitching in
22 together.

23 Q Do you ever --

24 THE COURT: Sorry, sorry. I apologize.

25 When did you join the Special Public Defender's Office?

1 THE WITNESS: I don't know. I started -- I was there for four years. And I
2 was in -- I started practicing law in 1996. And I was with the regular Public
3 Defender's Office, like, three and a half years. So I kind of have to move
4 backwards. So I don't think I was in the S.P.D.'s Office when the first case came
5 down. But I was in there when the second case happened and that was, you
6 know, part of when I was traveling.

7 I remember watching it, I think, as a public defender when the
8 Special Public Defenders tried it. And then I think I joined the Special Public
9 Defender's Office. And when I say they tried it, the first one.

10 THE COURT: Right. So, I mean, the first trial was in 2000, right?

11 MR. ORAM: Yeah. No, 1998.

12 MR. OWENS: No, the first trial was June 5th of 2000.

13 THE COURT: Okay. And the trial that Mr. Whipple conducted, which is
14 shown by the records and it shouldn't be disputed, was when?

15 MR. OWENS: That was April of 2005.

16 THE COURT: Five, okay, that's what I thought, okay. So in 2000 you
17 think you were not at the Special P.D. yet?

18 THE WITNESS: I was not.

19 THE COURT: Okay.

20 MR. ORAM: I'm sorry, the crime was 1998.

21 THE COURT: Right. Okay. No, it's fine. Go ahead.

22 BY MR. ORAM:

23 Q When you went to California did you ever speak with Mr. Johnson's
24 father?

25 A I don't think so.

1 Q Do you have any independent recollection, Mr. Whipple, of why
2 Mr. Johnson's father would not have been called as a witness?

3 A I'm going to have to guess a little bit. Or I'm not -- I can't speak 100
4 percent because it's been the passage of time and -- but I think there were
5 family dynamics, if I recall, I think there were some family dynamics that were an
6 obstacle and a bit of a hurdle. And that's -- that's as much as I can recall. I'm
7 sorry I don't know more than that.

8 Q Okay. That's fine.

9 A And I could be wrong, but I think that's --

10 Q That's fine, Mr. Whipple.

11 A -- part of the issues.

12 Q Do you have any involvement with having psychological testing
13 conducted on Mr. Johnson?

14 A I wasn't. Although, can I ask you what judge we tried this in front of
15 on the third case?

16 MR. OWENS: It was Gates.

17 THE WITNESS: Gates, yeah. I think that was pretty much done by
18 Ms. Jackson ahead of time. I did not have my hand in it directly.

19 BY MR. ORAM:

20 Q And you were not obviously appellate counsel from the third penalty
21 phase, the result?

22 A No.

23 Q Do you know who did that?

24 A I don't.

25 Q Was it Lee McMahon?

1 A It could have -- it would have been, probably, yes.

2 MR. ORAM: Okay. Court's indulgence.

3 That concludes direct examination.

4 **CROSS-EXAMINATION OF BRET WHIPPLE**

5 BY MR. OWENS:

6 Q Mr. Whipple, why do you think it was probably Lee McMahon?

7 A Lee did all the appellate work in the Special Public Defender's
8 Office for the most part when I was there, especially towards the end.

9 Q It was kind of her expertise?

10 A That was her assignment.

11 Q Okay. She did a lot of appeal though within the S.P.D.'s Office?

12 A She did. I did the Richard Powell death penalty case with her and
13 then after that point she stopped doing active trials and went more to the
14 appellate side.

15 Q Okay. In preparation for today, I know you didn't read the
16 transcripts from 2005, what about the post-conviction pleadings to familiarize
17 yourself with any of the issues at all?

18 A Mr. Oram advised me to do that. But I did not. I didn't have the
19 time.

20 Q Okay. I understand. He mentioned this Delbert Cobb case where
21 you had raised a fair cross-section argument and a *Batson* argument, and I'm
22 not sure exactly why, but you lost those arguments in Delbert Cobb, right?

23 A I did. Although, I think if I can it expand on it, I won't if you won't,
24 but I think when I had the Jury Commissioner in there, the issue was they were
25 taking the jury panel from the voting blocks, from the voting lists. And I think

1 following my cross-examination or my evidentiary hearing, I think they opened it
2 up to include other lists like --

3 THE COURT: D.M.V.

4 THE WITNESS: Dog permits and D.M.V. and things like that. So I felt
5 that there was some positive gain from that.

6 BY MR. OWENS:

7 Q Okay. So they made some changes as a result of your
8 questioning?

9 A I can't say it was directly as a result of my of my questioning
10 because I don't know that for a fact, but I think that that did occur.

11 Q And as this fair cross-section argument that's been made quite a bit,
12 right, in a lot of cases?

13 A I don't know. I always am aware of it because I think it's part of our
14 duty of being a defense attorney. And so I'm always raising it if I think there is a
15 basis for it.

16 Q Okay. But it's always been denied, right?

17 A I've had *Batson* challenges upheld. Here and in federal court.

18 Q Specifically, the fair cross-section argument, no one's been able to
19 prove that there has been systematic exclusion of minorities in jury venires here
20 in Clark County?

21 A That is correct.

22 Q And the Delbert Cobb order, that just came down here in 2012, I
23 believe, June 6th, no, June 6, 2010?

24 A Okay.

25 Q Sound roughly right? It's a couple years old?

1 THE COURT: Are you talking about the Supreme Court decision?

2 MR. OWENS: Yeah, the order of affirmance.

3 THE WITNESS: I don't know anything, honestly, further.

4 BY MR. OWENS:

5 Q Okay.

6 A I think I actually had a post-conviction hearing on it. He had two
7 murder charges that I represented him on and I think they, I'm getting them
8 confused, no, that's another case. I'm sorry.

9 Q Okay. So you were aware of the mitigator form, verdict form, from
10 the first jury; you had looked over it; you had seen the handwritten-in mitigation
11 that the first jury found; and you considered that in preparing for and presenting
12 mitigation evidence to the new jury, correct?

13 A Can I respond to, the answer's yes, but it was brought up in the
14 group meetings and it was discussed kind of in roundtable, as I recall, and we
15 had different ideas about different aspects of it and something was just
16 discussed, I don't know if there were, you know, it's just like meeting at lunch, we
17 talk about things. We didn't take a vote and come to conclusion.

18 Q Sure.

19 A But we had -- I do remember having it being passed around and
20 something we discussed.

21 Q Sure. But it's not like the -- your defense team was oblivious that
22 there had been this special verdict form, you knew there was one, it was batted
23 around, lots of different ideas, you can considered in preparing for the new
24 penalty hearing?

25 A That's my memory.

1 Q Okay. Any reason to think that that form would have been
2 admissible in the new penalty hearing? Do you have any case authority that
3 where you think -- you said you thought it would not be, do you know of any
4 authority that would allow you to admit a verdict form like that to the new jury?

5 A I have not researched it.

6 Q Do you have the verdict form there in front of you?

7 A I do, apparently, yes.

8 Q You see that it's not file-stamped?

9 A I do. I'm going to take your word that this is the first verdict form,
10 the special verdict form from the first trial.

11 Q Yes.

12 A I do have it before me, yes.

13 Q And you're aware that that wasn't returned as an official verdict in
14 open court, it was collected from the jury when a mistrial was declared and it
15 was made court exhibit ?

16 A I honestly don't remember that part of it. But --

17 Q But if that's true --

18 A -- I'll it take for a fact.

19 Q -- any reason to think that that would somehow now be admissible
20 in res judicata as to the findings of mitigation as to a new penalty hearing and a
21 new jury, would they be bound by that somehow.

22 A No.

23 MR. OWENS: Okay. That's all I have.

24 THE COURT: Any redirect?

25 MR. ORAM: Very briefly.

REDIRECT EXAMINATION OF BRET WHIPPLE

BY MR. ORAM:

Q You did not do Mr. Cobb's direct appeal? You were not appellate counsel?

A I don't -- no, I was not. As of my -- I believe that I did not.

Q I was his appellate counsel.

A Okay. Okay.

Q Mr. Whipple, with regard to the special verdict forms, there would be no reason why the list of mitigators, in other words the things that are listed here, could not have been said to the jury, in other words --

A No, absolutely not.

Q In fact, you could have -- as part of jury instructions in a penalty phase, the defense can offer an instruction listing any mitigators they like?

A Absolutely.

Q And so there would be nothing stopping you and Ms. Jackson from just looking at this list, writing up a jury instruction with everything on there, and saying, ladies and gentlemen, please find these mitigators?

A Absolutely not.

MR. ORAM: Nothing further.

RECROSS-EXAMINATION OF BRET WHIPPLE

BY MR. OWENS:

Q Mr. Whipple, are you aware of leaving something out that was on that mitigation form that you did not present to the jury?

A I honestly don't remember the mitigation or the special verdict form at all in the penalty phase that I did with Donte.

1 Q You don't remember what mitigation evidence you put in?

2 A I don't. I remember my big deal was I was going to try something
3 new, and I was trying to suggest that the death penalty was old fashioned and
4 outdated and really not applicable in today's world, that was my big -- that was
5 my big position at the time.

6 MR. OWENS: Okay. Nothing further.

7 MR. ORAM: Nothing.

8 THE COURT: All right. Thank you.

9 THE WITNESS: Thanks, Judge, I appreciate it.

10 THE COURT: Okay. Okay.

11 MR. ORAM: Thank you, Bret.

12 THE COURT: So we've got to figure out a time to come back for
13 Ms. Jackson's testimony.

14 MR. ORAM: I just don't know when it's convenient to the Court or to --

15 THE COURT: Right.

16 MR. OWENS: My preference would be as soon as possible while it's
17 fresh in everyone's mind.

18 THE COURT: Right. Yeah, so we don't have to spend another few days
19 getting him back.

20 MR. OWENS: And so, yeah, you know, we come back to this in a year,
21 it's going to be like starting from scratch and so --

22 THE COURT: Right.

23 MR. OWENS: -- as soon as possible is my preference.

24 THE COURT: Give me just a second. That's you too. So next Thursday
25 morning, Mr. Oram, you have a hearing before me on a Mr. Holden.

1 MR. ORAM: With Mr. Whipple. I don't think that would take long,
2 Your Honor.

3 THE COURT: Right. So that's on at 8:30 in the morning. I guess I'm
4 wondering if perhaps we could do it this Thursday afternoon maybe, or even
5 10:00 or 10:30.

6 MR. ORAM: Yes.

7 THE COURT: Is that -- Mr. Scheick has represented to us she's not in
8 trial, so.

9 MR. ORAM: Yeah, I -- maybe we --

10 THE COURT: I mean, I don't know what -- I don't remember the Holden
11 case, I don't remember what you're presenting, if it's just Mr. Whipple, it
12 shouldn't take more than an hour or so.

13 MR. ORAM: No. It can't take more than an hour and it was just the one
14 limited issue, Your Honor, about plea negotiations, so.

15 THE COURT: Okay. Oh, okay, I remember that one then, okay.

16 MR. ORAM: But if the Court wants to place it on for, let's say, 10:30 or
17 11:00, whatever, if that's --

18 THE COURT: 10:30 on the 11th.

19 MR. OWENS: Okay.

20 MR. ORAM: 10:30.

21 THE COURT: Because I know I'm not in trial that day. I've got a bench
22 trial the day before and another hearing the day after. But I know the 11th, I don't
23 have anything expect for your hearing.

24 MR. ORAM: So would it be 11:00, so I don't make --

25 THE COURT: 10:30.

1 MR. ORAM: 10:30.
2 THE COURT: Sorry, April 11th at 10:30.
3 MR. ORAM: And the other one is at 8:30, is that right, Holden?
4 THE COURT: Yes.
5 MR. OWENS: Who is doing Holden from my office; do you know?
6 MR. ORAM: Marc DiGiacomo.
7 MR. OWENS: Okay.
8 THE CLERK: Evidentiary hearing continuance, April 11th at 10:30.
9 MR. ORAM: And Mr. Johnson will obviously be brought back here?
10 THE COURT: Right. So we need Mr. Johnson transported that day, if
11 you can make sure of that?
12 MR. OWENS: They are just going to hold him down here then for a
13 week?
14 THE COURT: I don't know.
15 MR. OWENS: Rather than send him back?
16 THE COURT: I have no idea what they will do.
17 MR. OWENS: I think the bus goes back only once every two weeks, so.
18 MR. ORAM: I think he's going to High Desert.
19 MR. OWENS: Okay.
20 MR. ORAM: I think they take him to High Desert.
21 THE COURT: Okay. But he obviously should be here for the hearing on
22 the 11th.
23 MR. OWENS: And Mr. Oram will make sure that Jeannette --
24 THE COURT: Ms. Jackson.
25 MR. OWENS: -- Alzora is available on Thursday?

1 MR. ORAM: If she is not --

2 THE COURT: Let us know.

3 MR. ORAM: -- I'll find out, and I will notify Mr. Owens right away so we
4 can notify the Court.

5 THE COURT: And then we can work on an alternative day. But I
6 hopefully --

7 MR. ORAM: Yes.

8 THE COURT: -- that at least with her not being in trial, that that would be
9 a convenient time for her to appear.

10 MR. ORAM: Yes. And does the Court want to hear argument at the end
11 of next Thursday?

12 THE COURT: That's a good question. I just read again, yesterday, the
13 fairly lengthy arguments we had December 1, 2011. So I'm familiar with that. I
14 mean, I suppose I would listen if you want to kind of briefly summarize what you
15 think the evidence has added to show, but I don't think I need a lengthy
16 argument again because I've read, I mean, I think you covered it pretty well in
17 the argument you had.

18 MR. ORAM: And I can submit it based upon, you know, what we hear, I
19 know the Court reads and I was just concerned if we go out again, the amount of
20 preparation --

21 THE COURT: Right.

22 MR. ORAM: -- to get ready for these is extensive.

23 THE COURT: Right. So I don't think I need to hear the full arguments
24 again. What I would ask you to do though is if you can get me courtesy copies
25 of, sorry, the appeal briefing from the first appeal because given the issues

1 being raised about what was argued or not in the appeal and to be able to look
2 at that, I mean, obviously I can pull down the decision that came down from the
3 Supreme Court and I probably could find the briefs somewhere, but it would be
4 helpful to have --

5 MR. OWENS: Sure.

6 THE COURT: -- a courtesy copy of the briefing that was done on that
7 appeal.

8 MR. OWENS: Yeah, I can do that.

9 MR. ORAM: Okay.

10 THE COURT: Okay.

11 MR. ORAM: I can do it but I think he's going to do it.

12 THE COURT: And, you know, that's fine, obviously sometime in the next
13 week would be good.

14 MR. ORAM: That's fine, Your Honor. And so we'll be back here at 8:30
15 on --

16 THE COURT: 10:30.

17 MR. ORAM: 8:30 and then 10:30.

18 THE COURT: Right, 8:30 on Holden, 10:30 on this case. Okay. We'll
19 see you next week.

20 MR. OWENS: Thanks.

21 PROCEEDING CONCLUDED AT 2:23 P.M.

22 ATTEST: I do hereby certify that I have truly and correctly transcribed the audio-
23 video recording of this proceeding in the above-entitled case.

24

25


SARA RICHARDSON
Court Recorder/Transcriber

CHRISTOPHER R. ORAM, LTD.
520 SOUTH 4TH STREET | SECOND FLOOR
LAS VEGAS, NEVADA 89101
TEL. 702.384-5563 | FAX. 702.974-0623

IN THE SUPREME COURT OF THE STATE OF NEVADA

* * * * *

DONTE JOHNSON,

S.C. CASE NO. 65168

Appellant,

Electronically Filed
Jan 09 2015 02:42 p.m.
Tracie K. Lindeman
Clerk of Supreme Court

vs.

THE STATE OF NEVADA,

Respondent.

APPEAL FROM DENIAL OF PETITION FOR WRIT OF HABEAS CORPUS
(POST-CONVICTION)
EIGHTH JUDICIAL DISTRICT COURT
THE HONORABLE JUDGE ELISSA CADISH, PRESIDING

~~~~~  
APPELLANT'S APPENDIX TO THE OPENING BRIEF  
VOLUME XL  
~~~~~

ATTORNEY FOR APPELLANT

CHRISTOPHER R. ORAM, ESQ.

Attorney at Law

Nevada Bar No. 004349

520 S. Fourth Street, 2nd Floor

Las Vegas, Nevada 89101

Telephone: (702) 384-5563

ATTORNEY FOR RESPONDENT

CLARK COUNTY DISTRICT ATTORNEY

200 Lewis Avenue

3rd Floor

Las Vegas, Nevada 89101

(702) 671-2500

CATHERINE CORTEZ MASTO

Nevada Attorney General

Nevada Bar No. 0003926

100 North Carson Street

Carson City, Nevada 89701-4717

IN THE SUPREME COURT OF NEVADA

DONTE JOHNSON,

CASE NO. 65168

Appellant,

vs.

THE STATE OF NEVADA

Respondent.

OPENING BRIEF APPENDIX

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10	5	DEFENDANT'S MOTION FOR CHANGE OF VENUE (FILED 11-29-1999)	1186-1310
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17	5	DEFENDANT'S MOTION TO EXCLUDE AUTOPSY PHOTOGRAPHS (FILED 11/29/1999)	1098-1101
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19	5	DEFENDANT'S MOTION TO PRECLUDE EVIDENCE OF ALLEGED CO-CONSPIRATORS STATEMENTS (FILED 11/29/1999)	1091-1097
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21	5	DEFENDANT'S MOTION TO PROHIBIT THE USE OF PEREMPTORY CHALLENGES TO EXCLUDE JURORS WHO EXPRESS CONCERNS ABOUT CAPITAL PUNISHMENT (FILED 11/29/1999)	1084-1090
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21	3	MOTION TO COMPEL DISCLOSURE OF EXISTENCE AND SUBSTANCE OF EXPECTATIONS, OR ACTUAL RECEIPT OF BENEFITS OR PREFERENTIAL TREATMENT FOR COOPERATION WITH PROSECUTION (10/19/1999)	738-742
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24	2	MOTION TO COMPEL THE PRODUCTION OF ANY AND ALL STATEMENTS OF THE DEFENDANT (FILED 06/29/1999)	516-520
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1	3	NOTICE OF MOTION AND MOTION TO VIDEOTAPE THE DEPOSITION OF CHARLA SEVERS (FILED 09/29/1999)	622-644
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3	3	NOTICE OF MOTION AND MOTION TO VIDEOTAPE THE DEPOSITION OF MYSELF CHARLA SEVERS (10/11/1999)	682-685
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18	6	OPPOSITION TO DEFENDANT'S MOTION FOR DISCLOSURE OF EXCULPATORY EVIDENCE PERTAINING TO THE IMPACT OF THE DEFENDANT'S EXECUTION UPON VICTIM'S FAMILY MEMBERS (FILED 12/06/1999)	1409-1411
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24	6	OPPOSITION TO DEFENDANT'S MOTION FOR DISQUALIFICATION FROM THE JURY VENIRE OF ALL POTENTIAL JURORS WHO WOULD AUTOMATICALLY VOTE FOR THE DEATH PENALTY IF THEY FOUND MR. JOHNSON GUILTY OF CAPITAL MURDER (FILED 12/06/1999)	1380-1382
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16	6	OPPOSITION TO DEFENDANT’S MOTION TO AUTHENTICATE AND FEDERALIZE ALL MOTIONS OBJECTIONS REQUESTS AND OTHER APPLICATIONS AND ISSUES RAISED IN THE PROCEEDINGS IN THE ABOVE ENTITLED CASE (FILED 12/06/1999)	1394-1396
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4	6	OPPOSITION TO DEFENDANT’S MOTION TO REQUIRE PROSECUTOR TO STATE REASONS FOR EXERCISING PEREMPTORY CHALLENGES (FILED 12/06/1999)	1415-1417
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12	17	REPLY TO RESPONSE TO MOTION FOR NEW TRIAL (FILED 07/10/2000)	4096-4100
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17	21	REPORTER'S TRANSCRIPT OF APRIL 20, 2005 TRIAL BY JURY- VOLUME I-A.M. (FILED 04/21/2005)	4838-4862
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1	23	REPORTER'S TRANSCRIPT OF APRIL 25, 2005 TRIAL BY JURY- VOLUME V- P.M. (FILED 04/26/2005)	5484-5606
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28	6	STATE'S OPPOSITION TO DEFENDANT'S MOTION FOR CHANGE OF VENUE (FILED 12/07/1999)	1421-1424
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21	3	STATE'S RESPONSE TO DEFENDANT'S OPPOSITION TO STATE'S MOTION TO VIDEOTAPE THE DEPOSITION OF CHARLA SEVERS	762-768
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1	35	TRANSCRIPT OF PROCEEDINGS DEFENDANT'S MOTION TO PLACE ON CALENDAR TO EXTEND THE TIME TO FILE REPLY BRIEF IN SUPPORT OF DEFENDANT'S WRIT OF HABEAS CORPUS/HEARING AND ARGUMENT: DEFENDANT'S PETITION FOR WRIT OF HABEAS CORPUS (FILED 07/06/2011)	7537-7574
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CERTIFICATE OF SERVICE

I hereby certify and affirm that this document was filed electronically with the Nevada Supreme Court on the 9th day of January, 2015. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

CATHERINE CORTEZ-MASTO
Nevada Attorney General

STEVE OWENS
Chief Deputy District Attorney

CHRISTOPHER R. ORAM, ESQ.

BY:

/s/ Jessie Vargas
An Employee of Christopher R. Oram, Esq.

CHRISTOPHER R. ORAM, LTD.
520 SOUTH 4TH STREET | SECOND FLOOR
LAS VEGAS, NEVADA 89101
TEL. 702.384-5563 | FAX. 702.974-0623