

1 getting something so we make sure we have the
2 testimony.

3 THE COURT: But that's not an official transcript.
4 She'll have to give you an official transcript.

5 MR. HENDRIX: And Judge, I'm keeping an eye out
6 for the lay witnesses coming in; I understand there's
7 a little bit of an issue about that yesterday.

8 THE COURT: Well, it's not an issue with me at
9 all, unless somebody objects to it. But I had to
10 point out that the witness had been in the courtroom,
11 so I mean, I don't know who your witnesses are.

12 MR. HENDRIX: Right now I have Jason's mom in here
13 and she wasn't here during the testimony. I just saw
14 her come in afterward.

15 THE COURT: I think I saw her come in. Are we
16 done for the day, then?

17 MR. BURT: I think we are, Your Honor.

18 (WHEREUPON, a recess was taken August 12, 2009; proceedings
19 resumed 9:30 a.m., August 13, 2009 as follows, to-wit:)

20 **AUGUST 13, 2009**

21 THE COURT: All right, call your next witness.

22 MR. PHILLIPSBORN: Thank you, Your Honor. We
23 call Dr. Janis Ophoven. Doctor, would you come
24 forward and take the stand?

25 THE COURT: Raise your right hand and be sworn.

1 (Witness sworn.)

2 MR. PHILLIPSBORN: Your Honor, if I may approach,
3 I'm going to ask for the document, which is Dr.
4 Ophoven's CV, be marked as next in order.

5 THE COURT: All right, it may be received.

6 MR. PHILLIPSBORN: Thank you.

7 (WHEREUPON, Petitioner/Defendant's Exhibit # was admitted and
8 received into evidence and is appended on page .)

9 THEREUPON,

10 JANIS OPHOVEN, MD

11 was called as a witness by and on behalf of the Petitioner/Def-
12 endant and having been duly sworn was examined and testified as
13 follows, to-wit:

14 DIRECT-EXAMINATION

15 BY MR. PHILLIPSBORN:

16 Q] Doctor, I'm placing a document in front of you and I wonder
17 if you would be kind enough just to thumb through it briefly
18 and, and tell the Court whether that is a copy of a recent
19 curriculum vitae of yours?

20 A] (Witness examining same.) Yes, it is, sir.

21 Q] Doctor, what, what is your profession?

22 A] I'm a medical doctor.

23 Q] And do you have a particular area of specialty?

24 A] Yes.

25 Q] And what is that?

1 A] I'm a forensic pathologist with special training and
2 experience in pediatrics and pediatric pathology, and my focus
3 for my professional career has been pediatric forensic
4 pathology.

5 Q] And Doctor, before I ask you more about your own background
6 and qualifications, I wanted to ask you in 1993 and 1994 were
7 there, to your knowledge, physicians who like you, uh, had
8 specialty training and special emphasis in the field of
9 pediatric pathology?

10 A] Yes.

11 Q] To your knowledge, how many training centers or, uh, how
12 many either hospitals or medical schools provided training for
13 persons who are interested in pediatrics and specifically,
14 pediatric pathology in the early '90s?

15 A] I don't have a number but the, there have been board certi-
16 fication, uh, available for training in pediatric pathology for
17 some years by that point. Many of the prestigious children's
18 hospitals around the country had pediatric pathologists in
19 practice and were training or taking pediatric pathology
20 fellows. I know for certain that there were fellowships
21 available in my area, as well as in Boston and Denver and such
22 large children's hospitals. There's about twenty-five centers
23 now that provide official training and I would say many of those
24 centers were available for training in those days.

25 Q] Doctor, can you review, uh, for the Court the course of

1 your own professional training, uh, beginning with, with, uh,
2 where you obtained your bachelor's degree?

3 A] Sure. I went to medical school, or I went to college at
4 the University of Minnesota and then I trained at the medical
5 school, at the university there. And while I was in medical
6 school I realized that I was interested in pediatric pathology;
7 this was in the late '60s. At the time there was no official
8 place to go and get that training; there wasn't a sponsored
9 fellowship environment, so I made the determination to do a
10 pediatric's residency and study the care of children. And then
11 during the course of that training, uh, I decided that I wanted
12 to do pathology and, uh, re-approached the University of Minne-
13 sota to see if there was a way for me to construct a training
14 program in pediatric pathology, because we had some world famous
15 pediatric pathologists there and who could have done that. So
16 at that time, this was in the mid-'70s, it was possible for me
17 to develop a combined program between pediatrics and pathology
18 and I proceeded to continue that journey. That was an addition-
19 al four years and that also included training at the children's
20 hospital for one year where I basically assumed responsibility
21 in the laboratory for running the show, so to speak, with my two
22 mentors as a back-up. While I was studying pediatric pathology,
23 I realized that there was an area of undiscovered, uh, or un-
24 tapped knowledge that had to do with the intersection between
25 children and trauma and things that cause children to get hurt.

1 Many children were hurt, were being hurt and dying, uh, and
2 there didn't seem to be an area of knowledge around that. So I
3 decided that I would do a forensic fellowship with the intention
4 of applying the principles of forensic pathology to what happens
5 to children as a pediatric pathologist and a pediatrician. So I
6 did a fellowship with the Henaphin County Medical Examiner's
7 office in 1980 to complete my training in all of the ways I
8 possibly could, so that I could study injuries in children. In
9 1981 I began my professional career with, uh, the intention of
10 studying injuries in children as my life's work.

11 Q] And, Doctor, just generally, because we have, uh, the Court
12 has received testimony in this particular case from several
13 forensic pathologists, can you describe how the course of train-
14 ing in pediatrics and pediatric pathology, uh, is different, if
15 it is, from the course of study that a physician who enters and
16 then takes either an anatomic or clinical pathology, uh, resi-
17 dency and then goes on to, to further specializing in forensic
18 pathology, uh, how, how is the course of study that you engaged
19 in different?

20 A] Well, I can speak to that because I undertook the training
21 both as a pathologist and as a forensic pathologist as well as
22 training as a pediatrician, with the focus on pediatric path-
23 ology and practiced for nearly ten years in a children's
24 hospital running the laboratory. Pediatric pathologists are
25 expected not only to acquire the skills and knowledge to dissect

PROPERTY OF ARKANSAS SUPREME COURT/COURT OF APPEALS

CR 10 00456

Appellant(s)

Charles Jason Baldwin
Jessie Lloyd Misskelley, Jr.

v. Craighead Circuit, Western District
Hon. Charles David Burnett, JUDGE
CR93-450 (BALDWIN), CR93-47 (MISSKELLEY)

Appellee(s)

State Of Arkansas

25 Volume Supplemental Record Lodged
3 Envelopes Exhibits
1 Small Box Exhibits

Writ Returned
Supplemental Record Filed
June 11, 2010
Leslie W. Steen, Clerk
By Renee Herndon

Volume 9

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IN THE CIRCUIT COURT OF CRAIGHEAD COUNTY, ARKANSAS
CRIMINAL DIVISION

STATE OF ARKANSAS

PLAINTIFF

VS.

CR-93-~~4~~4500

~~JASON CHARLES BALDWIN~~
JASON CHARLES BALDWIN

DEFENDANT

VOLUME VIII of X

FILED

APR 21 2010

Ann Hudson
Circuit Court Clerk

1 and perform autopsies and make the determination of why someone
2 has died, but they also have to understand the nature of taking
3 care of and supporting the diagnostic progress in children who
4 are alive, so it's understanding how to interpret laboratory,
5 how to interpret things that happen to children who don't pass
6 away; sexual abuse being one of those; child abuse that's not
7 fatal is one of those; and more importantly, the diagnosis of,
8 uh, cancer and leukemia where you must be certain of the
9 diagnosis. You don't just say it's consistent with, it could
10 be, it's probably. And when you're making the diagnosis of
11 childhood cancer, you have to be certain. So my definition of
12 certain, I think evolved from a different background than, say,
13 someone who has done pathology and forensic medicine where the
14 definition of certain may be different. And I have seen circum-
15 stances where that definition is different. So if a child comes
16 in with a swollen liver and big glands and bleeding gums, it
17 could be leukemia, but you don't say it is. So the diagnostic
18 process and precision is different; that's number one. Number
19 two, uh, children really are different, uh, substantially
20 different. How you approach their tissue, how you approach
21 their anatomy, how you approach their injuries, how you approach
22 those things happening is not the same as what you do in an
23 adult. And that has proved to be very obvious to me over the
24 years; how you investigate, how you approach, and how you use
25 consultants for a pediatric pathologist in a children's hospital

1 there is an expectation that there be a level of scholarship and
2 academic verification of findings, because these are people that
3 are wanting to contribute to the body of knowledge and advance
4 in knowledge in child care and so the expectation that a
5 practitioner in that environment has to be, uh, bringing a good
6 solid basis of scientific knowledge to the table when you're
7 answering questions. And I think that is also a part of the
8 difference, because you're practicing in a different environment
9 than a forensic pathologist.

10 Q] And, Doctor, I think you've touched on this but, uh, did
11 you sit for the boards administered by the American Board of
12 Pathology?

13 A] Yes, I did.

14 Q] And which boards did you sit for?

15 A] I sat for the forensic boards and the anatomical pathology
16 boards. I didn't sit for the pediatric pathology boards because
17 I had been out of training already for ten years, and I was done
18 with tests.

19 Q] Now, uh, when is it that you consider that you started your
20 professional course as a pediatric pathologist; I think you
21 mentioned in the 1980s?

22 A] Yes. I joined the staff at the children's hospital there,
23 which was a referral hospital, uh, for sick children. It had an
24 active emergency room and in-patient service, cancer service,
25 and then over time I assisted in developing the child abuse pro-

1 gram there, uh, especially as it relates to the emergency room
2 evaluation and consulted with the Mid-West Children's advocacy
3 center at the St. Paul center.

4 Q] And beginning with that particular professional experience,
5 have you continued working in professional positions that allow-
6 ed you to maintain contact with both forensic pathology and
7 pediatric pathology?

8 A] Yes, I have maintained relationships, memberships,
9 continuing education, learning, writing, publishing, teaching in
10 the field of pediatric forensic science and sexual abuse since
11 1981.

12 Q] Can you describe for the Court what contact, professional
13 contact you have had, including positions held with medical
14 examiner's offices?

15 A] On completion of my training at the, uh, Henaphin County
16 medical examiner's office, I continued as a deputy medical exam-
17 iner, mostly to remain on call, uh, for kid fatalities, child-
18 hood fatalities, both as a consultant and as a teacher to the
19 folks in training. I trained residents from the Henaphin County
20 center on issues relating to pediatric pathology and pediatric
21 forensics, and also maintained an academic, uh, clinical
22 academic appointment with University in that arena, and then I
23 also was a deputy medical examiner for a period of time in the
24 late '80s and early '90s, uh, again, as a consultant to the Hen-
25 aphin County medical examiner's office, as well as deputy

1 medical examiner. And that was specifically for children's
2 cases. Since that time I have had informal relationship with a
3 number of the medical examiners in Minnesota, uh, when they
4 request additional information and knowledge and insight and so
5 on, in cases both from the, uh, Ramsey County Medical Examiner's
6 Office and from the, uh, Minnesota or regional coroner's office.

7 Q] Now what, uh, what area is covered by Hennepin County?

8 A] Hennepin County is, uh, the twin cities of St. Paul and
9 Minneapolis is actually a seven county jurisdiction. Hennepin
10 County covers the majority of the Minneapolis and western
11 suburbs, uh, it's the largest county by population and square
12 miles. There are three other medical examiners' offices it
13 covers, uh, its jurisdiction, interestingly enough, uh, Ramsey
14 Washington, which is St. Paul and then the north and the south
15 are covered by two other smaller offices. Hennepin County
16 probably has a population of close to a million, perhaps more
17 than a million individuals.

18 Q] Have you worked in conjunction with the medical examiner's
19 offices that you have been employed with as well as those that
20 you've consulted with and with other governmental agencies to
21 address, uh, issues having to do with the, uh, proper detection
22 of suspected - - of child abuse in children?

23 A] Yes, in a variety of arenas, uh, I have participated with
24 both the offices, the child abuse, uh, center as well as Minne-
25 sota governmental agencies as a consultant and in the area of

1 investigation of child abuse.

2 Q] And does the investigation of child abuse include as you
3 were describing it, uh, for the purposes of describing your own
4 background, uh, suspected sexual abuse of children?

5 A] Yes.

6 Q] Now, uh, again, when it comes to the question of investi-
7 gating potential sexual abuse in children, uh, are there
8 differences, to your knowledge, acknowledged in your profession
9 between the signs of sexual abuse as they're manifested in
10 adults and those that, uh, that you might find in children?

11 A] There are differences, yes, uh, most strikingly discussed
12 in the literature and experience of children who have been sub-
13 jected to sexual assault and sexual injury, uh, and also
14 survived. The, the examination of the decedents is, is some-
15 where within the interpretation. It may be very different in
16 children than in adults, based on tissue, based on variations in
17 their anatomy and so on. And so it isn't the same process, uh,
18 or the exam may be the same process, but the interpretation may
19 not.

20 Q] And when it comes for example to the interpretation of
21 injuries in human tissues, are there differences that, uh, in
22 the characteristics of tissues found in adults versus tissues
23 found in children?

24 A] The basic cellular structures are similar, but the anatomi-
25 cal relationships are different. The way that the tissues are

1 related to each other and the patterns of injuries that one ex-
2 pects to see with adult sexual abuse and childhood sexual abuse
3 may be very different. They can be the same, but may be very
4 different.

5 Q] In your career have you consulted on, on cases that have
6 been investigated by law enforcement agencies?

7 A] Yes.

8 Q] And you've also worked as a consultant to defense counsel
9 in criminal cases?

10 A] Sure.

11 Q] Can you give the Court some idea of, if, if there is a
12 proportion of cases that you associated with law enforcement
13 workers versus defense work, roughly what the proportion is?

14 A] I would say that for the first, uh, fifteen to twenty years
15 the majority of my work was for law enforcement and for agencies
16 prosecuting, uh, childhood injuries or fatalities and then I
17 would say in the last ten years the relationship has gone
18 further towards defense work, uh, more and more cases of fairly
19 high profile nature and cases that are more complicated and
20 challenging, uh, involving the defendants. Education is the
21 predominate work. I get calls and have been asked to review
22 cases for prosecutors in law enforcement, but the vast majority
23 is for defense work.

24 Q] Now, uh, Doctor, you, uh, I'm not going to belabor this,
25 because the Court has copies of your CV, uh, you've indicated

1 that you have written and published in a variety of areas. Does
2 that include in the area of pediatric pathology?

3 A] Specifically the writings that I have done pertinent to the
4 matters at hand here are chapters and, uh, that I have been re-
5 quested to write for textbooks of pediatric pathology. These
6 are chapters, uh, in 1992 was the first chapter, where I was
7 asked to summarize the basically, what is currently known about
8 how to investigate and examine traumatic injuries in children,
9 forensically. So the chapter was *Pediatric Forensic Pathology*.
10 Similarly, another chapter in 1997 and another chapter in 2007.
11 These are expected to be instructive to people who both intro-
12 ducing themselves to the field of, of analysis in forensic in
13 children, but also, uh, is expected to be a summary of what is
14 currently known about how to do this, how to interpret the
15 findings both in accidental and inflicted circumstances and
16 conditions that have hurt and killed children that are outside
17 of the typical natural disease spectrum. I've also been invited
18 to write chapters for the Bender series on head trauma in child-
19 ren and how to go about investigating it, especially in certain
20 circumstances where it might be abuse. And I have been asked to
21 discuss and lecture on, on, uh, similar issues in both sexual
22 homicide in children, as well as abusive trauma.

23 Q] And from the look of entries on your CV over a period of
24 years, you've periodically, uh, lectured to law enforcement and
25 other groups on various aspects of pediatric pathology or the

1 investigation of various matters that are specifically focused
2 on children?

3 A] Yes.

4 MR. PHILLIPSBORN: Your Honor, I'm offering Dr.
5 Ophoven as an expert in forensic pathology with a
6 special emphasis in pediatric pathology.

7 THE COURT: Any objection?

8 MR. HOLT: I have no objection.

9 THE COURT: All right, you may proceed.

10 MR. PHILLIPSBORN: Thank you, Your Honor.

11 DIRECT-EXAMINATION, continuing:

12 Q] Now Doctor, have you ever had an occasion at my request, to
13 review certain materials that, uh, at least according to me, are
14 pertinent to the cases before the Court?

15 A] Yes, I have.

16 Q] And can you describe to the Court what you have reviewed?

17 A] I have reviewed transcripts, uh, testimony, I have reviewed
18 investigative materials and crime scene and analyses and dia-
19 grams, trace evidence materials, uh, voluminous photographs,
20 autopsy reports, uh, materials attendant to the testimony
21 specifically as it relates to the cause and manner of death by
22 Dr. Peretti.

23 Q] Uh, now, Doctor, as I'm approaching questions that are
24 specific to this case, in 1993, in your opinion, were there
25 specific standards or at least specific professional practices

1 that would apply to the postmortem examination of eight-year-old
2 children who, uh, whose deaths were being investigated as, uh,
3 possibly related to some form of sexual abuse in connection with
4 the cause of death?

5 A] There were certainly standards of practice for forensic
6 pathology. There were standards of practice for pediatric path-
7 ology and standards of practice that apply to unique cases such
8 as this, uh, implicit in our training and our ethical standards,
9 uh, as physicians. Those standards are not listed in a book
10 anywhere, nor are they for any specialty in medicine that I am
11 aware of in 1993, but the standards would be very clear to any
12 person who is trained and understands the nature of the practice
13 of medicine.

14 Q] And, and is, is part of what you're explaining whether it's
15 inherent in the training process including the supervised
16 training process of a resident, or is somebody who is a fellow
17 in pathology that are, uh, that you learn about the methods and
18 protocols that are to be applied in the postmortem examination
19 of death?

20 A] Forensic pathology, uh, was, in 1993, a sub-specialty of
21 the field of pathology. In order to be qualified as a forensic
22 pathologist for the board certification, you have to have first
23 completed the residency in pathology and then completed a
24 fellowship in forensic pathology or what would be deemed as
25 equivalent. During that period, one would be exposed to

1 meticulous training in not only the performance of a forensic
2 autopsy, but the adaptation of the forensic autopsy to the
3 special circumstances of whatever cases you are dealing with.
4 They're not a cookbook, so you accommodate the autopsy for the
5 special circumstances. And an obvious expectation that if the
6 case, uh, carries with it unique or unusual conditions that
7 you're not experienced or, or have not been exposed to before,
8 that there are appropriate avenues of consultation and
9 additional consideration for advice, and so on, which was very
10 well established in 1993. I would receive calls from medical
11 examiners on a regular basis in cases having to do with child-
12 ren and if I had a case that had a special brain condition I
13 would know to consult with a neuropathologist or with a cardiac
14 pathologist and so on. That's inherent in the practice of
15 medicine. So the issue is first, in any case is what are you
16 dealing with; do you have the training and experience to conduct
17 the necessary testing and then once you've conducted the
18 necessary testing, do you have the training and experience and
19 scientific knowledge to actually render opinions about the
20 findings in the case. And those two may be very different. A
21 person may be well able to do an autopsy, collect the evidence,
22 but may not be in a position to render opinions based on the
23 unique nature of the case.

24 Q] And, again, was it your understanding that a, uh, that one
25 of the results of, uh, going through a residency and a fellow-

1 ship that would lead to involvement in forensic pathology with
2 the medical examiner's office is that you would gain awareness
3 of the ability to consult on cases like, uh, cases involving
4 childhood death if you felt you needed to reach out and get more
5 specialized training to make the call, whatever it was going be?

6 A] Absolutely. I mean, and that is a standard of practice in
7 medicine in general, but in forensics specifically, the recom-
8 mendation of consulting or working with pediatric pathologists
9 was well established in 1993.

10 Q] Now you, you've indicated that you reviewed a variety of
11 materials. Let me ask you first of all, with respect to the
12 reports prepared by Dr. Peretti in each of the three cases we
13 are dealing with here, uh, ME cases 329, 330 and 331, uh, Mr.
14 Moore, Mr. Branch and Mr. Byers, you've reviewed those reports?

15 A] Yes, I have.

16 Q] And just looking at the reports themselves, uh, as far as
17 you are concerned based on your training and experience, did the
18 reports themselves comply with the standards that were
19 applicable to your profession as of 1993?

20 A] The reports are, uh, in my opinion, uh, not inclusive of
21 those many of the things that would have been expected. It was,
22 it looked like, uh, a pretty basic template and the connection
23 between the conclusions and the actual findings are not evident
24 in all areas, specifically, the sexual abuse questions and some
25 of the other issues having to do with injuries to the body.

1 Q] Now as far as you know, and again, uh, my questions are
2 focused on, on, uh, the years at issue, 1993 and 1994, uh, was
3 there a general consensus in, in your profession about the need,
4 for example, to take, uh, tissue samples associated with the in-
5 vestigation of potential sexual abuse?

6 A] Yes.

7 Q] And, uh, in this case, uh, in your opinion, was the post-
8 mortem examination or were the postmortem examination reports
9 indicative of sufficient tissue sampling?

10 A] Uh, my read of the report is that the tissue sampling was,
11 was rather limited. And there certainly was more tissue samp-
12 ling that could, and in my opinion, should have been done.

13 Q] Now in terms of, of, uh, just staying with the subject of
14 the investigation into the sexual abuse of, uh, these children
15 prior to death, uh, have you had the opportunity to read Dr.
16 Peretti's testimony?

17 A] Yes, I have.

18 Q] And, and generally speaking, and I'm going to ask you, uh,
19 a series of questions about specifics, but generally speaking,
20 uh, did you find, uh, the testimony offered by Dr. Peretti with
21 respect to the findings that he made during the autopsies that
22 were indicative of sexual abuse, uh, either forced fellatio or
23 some kind of anal penetration of the victims. Did you find, uh,
24 that testimony to, uh, fall within a generally accepted arena of
25 linkage between data and opinion?

1 A] No.

2 Q] Why not?

3 A] The forensic pathologist, my training and experience and
4 continued training and experience over the years, uh, has con-
5 firmed that the forensic pathologist is, function, is to
6 identify the medical evidence and testify about the medical
7 evidence, based on science, training and experience. The
8 findings of sexual abuse, sexual penetration, sexual injury are
9 very concrete and are not challenging when present, uh, under-
10 standing the context of the, the, where the body is found and
11 under what condition. I found Dr. Peretti's testimony to be,
12 uh, predominately speculative and not based on the actual
13 scientific evidence. The, uh, testimony regarding fellatio and
14 forced oral sex is unsupported by, uh, the facts, the medical
15 evidence, the photographs and his descriptions, uh, the findings
16 of anal dilatation, uh, the photographs actually show very
17 normal, uh, anal anatomy, purely normal in anal anatomy. Anal
18 dilatation can be seen postmortem in normal adults and children,
19 uh, and is not something that is considered abnormal at all. In
20 this case, the anus looks perfectly normal; it doesn't look
21 dilated at all. There's no apparent abnormality of the, uh,
22 anal skin, uh, and microscopically, there's no evidence whatso-
23 ever that there was trauma to the, uh, anal region. So I have,
24 uh, I have grave, uh, concerns about what was communicated to
25 the jury on the basis of what I'm seeing in the postmortem and

1 find it to be highly speculative.

2 Q] Now let, let me, uh, what I'd like to do is ask you some
3 questions based on the actual testimony in the, uh, in the case
4 that I'm specifically involved with and the record that I'm
5 going to be referring to is the record of State v. Echols and
6 Baldwin. Page 1035 of the record, Dr. Peretti, uh, testifies as
7 follows in answer to this question: "Could you explain to the
8 ladies and gentlemen of the jury the general procedure that you
9 follow in performing an autopsy?"

10 The answer is: "Well, anybody that comes into the office, what
11 we do is, the first thing we do is we take height and weight.
12 Then what we do is the as-is photographs as the body comes into
13 the office. Now depending on the type of case it is, for
14 instance, a gunshot case, you would do a gunshot residue kit.
15 If it is a rape case, you would do a rape kit. We focus our
16 attention on the type of case it is."

17 And I'm not going to read the rest of that particular answer.
18 Let me ask you, uh, whether if, in your experience and based on
19 your training, uh, whether a, a working opinion is actually
20 developed about it a cause of death or a manner of injury, uh,
21 very early in the postmortem examination process?

22 A] The answer to that is yes. I agree with Dr. Peretti when
23 he says that you look at the case type. What kind of case type
24 is it? In any deceased child that comes to you under suspicious
25 circumstances for whatever reason, even if it's a faint

1 suspicion, then the analyst, the examiner, is obligated to treat
2 the case as suspicious and do the case, uh, not necessarily
3 based on just what you're seeing but the also-just-in-case
4 questions. So for childhood fatalities, there's a vast number
5 of things that are done, uh, by routine, uh, especially in a
6 case as unique as this. So a sexual examination, uh, collection
7 of the material would be done, uh, regardless of whether there's
8 any question of sexual assault. It's just done. But to, uh,
9 say that it is a sexual assault or not a sexual assault early in
10 the course of events, uh, in a case such as this could be prob-
11 lematic.

12 Q] Then I'd like to ask you about specific testimony he gave
13 beginning at page 1043 of his transcript. He is talking about
14 injuries regarding Michael Moore, who I believe is ME#329. And
15 I'd like to call your attention to, uh, the following:

16 MR. PHILLIPSBORN: And actually I was going to
17 ask if, Your Honor, we don't have a big screen
18 anymore, unfortunately, but Mr. Burt was kind enough
19 to bring his laptop and I was going to see if it was
20 okay if we, uh, since the Court I know has seen these
21 photographs several times, if we could display some of
22 the photographs just so I can ask some questions about
23 them.

24 THE COURT: Do you not have that projector from
25 the prosecutor's office anymore, Mike?

1 MR. WALDEN:

2 DIRECT-EXAMINATION, continuing:

3 Q] This is in relation to the Moore, uh, autopsy beginning
4 with exhibit 66A, the lower lip and the bridge in the mouth?

5 A] This is a picture that has the lower lip pulled down, uh,
6 exposing the inner surface and it's shiny. There appears to be
7 a little bit area of reddening or hyperemia going on inside.

8 Q] So Doctor, I'd like to ask your opinion of the following
9 that was testified to. Again, this is at page 1046 of the
10 record beginning with line 12.

11 Question: "Doctor, in your experience as a medical examiner have
12 you seen instances or are you familiar with cases in which there
13 are injuries and bruising to the ears and also injuries to the
14 mouth of the victims?"

15 Answer: "Well, those types of injuries we generally see in
16 children who are forced to perform oral sex."

17 Question: "And the injury, the punctate scratches to the nose
18 and to the upper lips, what are the possible, what are the
19 scenarios as far as the causes of those injuries?"

20 Answer: "Well, you can get them by, the lip injuries, by
21 putting an object inside the mouth. You can get those types of
22 injuries also from a punch or a slap or you can get those types
23 of injuries from a hand over the mouth and by pressing the hands
24 very tightly up against the mouth."

25 Those were answers given in relation to the display of exhibit

1 66A. What is your opinion of the nature of the information
2 conveyed when he answered the questions?

3 A] Well, when I read it I was actually, frankly, shocked. Uh,
4 there's a little bit of reddening on the inside of the lip but
5 it doesn't really mean much of anything. The abrasions that are
6 on the underside of the nose, I'm sure has already been
7 discussed as related to postmortem trauma. Uh, there's nothing
8 about this picture that would even, uh, raise me to say in front
9 of a jury, uh, such an inflammatory thing as forced oral sex.
10 I, I consider that a violation of responsibility.

11 Q] No, uh, Doctor, I, I, uh, also wanted to ask you in the
12 next questions again are asked with respect to Mr. Moore, uh,
13 they begin at 1050 and there isn't a particular, uh, there isn't
14 a particular photograph being displayed at this time. The
15 answer that introduces the questions I'm focused on begins at
16 page 1050, line 2.

17 Answer: "Yes, underneath those injuries that I pointed out
18 earlier were skull fractures and the other findings included
19 binding at the wrists and ankles in a hog-tied fashion. There
20 were multiple bruises, scrapes and lacerations of the torso and
21 extremities. We have the defense-type injuries of the hands.
22 There was also anal dilation with hyperemia, or redness of the
23 anal/rectal mucosa."

24 Question: "Doctor, when you say 'anal dilation,' could you
25 describe in layman's terms what that means?"

1 Answer: "Well, that means that the anal orifice was dilated."

2 Question: "And the 'hyperemia of the anal/rectal mucosa,' can
3 you explain what that means in layman's terms?"

4 Answer: "Well, it means reddening or congestion of the mucosa,
5 that is the lining of the, internal lining of the anus and
6 rectum."

7 Question: "Would those two signs, dilation of the anus and the
8 reddening of the rectal mucosa, would those be consistent with
9 some sort of sexual trauma to the anal area?"

10 Answer: "Well, you have dilation of the anus, it could be from
11 putting an object in the anus, but it could also be due to the
12 fact that postmortem relaxation and the fact that the body was
13 in the water, and that could alter things, also."

14 And then it goes on to describe some washer-woman, uh, wrinkling
15 to the hands and feet. Do you, and I realize that was a long
16 passage. Do you have the questions and answers in mind?

17 A] Yes.

18 Q] And specifically, uh, the, uh, the answers including 'well,
19 it means reddening or congestion of the mucosa, that is the
20 lining of the internal lining of the anus and rectum,' and the
21 question of whether those signs would be 'consistent with some
22 sort of sexual trauma' and you're having dilation of the anus
23 being associated with that. What is your opinion of answers
24 given by Dr. Peretti?

25 A] My opinion of the answers given are similar to my previous

1 answer. I'm shocked that the possibility of anal penetration or
2 sexual abuse was raised from the findings, uh, that he first
3 described, which is hyperemia of the mucosa. The mucosa is
4 always reddish, a red color in that area, and postmortem it does
5 get congested. As he subsequently said 'the anus relaxes post-
6 mortem,' uh, the issue here is whether or not there is a shred
7 of evidence that there was damage or trauma to the anus and
8 rectum. Yes, or no. There is not a shred of evidence that
9 there is damage to the anus and rectum. That said, then
10 suggesting that there is evidence of sexual penetration is
11 improper.

12 Q] Now, uh, Doctor, I want to call your attention to something
13 different, and here we do have a photograph, uh, photograph 65B
14 and 64B. And for the record as this is being quod up, Your
15 Honor, I'm going to be making reference to, uh, questions and
16 answers on pages 1057 and 1058 of this transcript and the state
17 is asking questions concerning the autopsy of Steven Branch.
18 Those questions begin at 1053. So Doctor, have you had the
19 opportunity to review those photographs that Mr. Burt is
20 displaying?

21 A] Yes.

22 Q] And so in pertinent part there is an answer that, uh, Dr.
23 Peretti gives, uh, and I'm beginning by reading from page 1057,
24 line 7.

25 Question: "State's Exhibit 65B and 64B is showing a penile

1 injury. Here on state's exhibit 65B all we can see is that we
2 have a photograph of the head of a penis and the mid-shaft of
3 the penis. And you can note here the dark discoloration is
4 bruising and overlying the area of bruising, if you look very
5 closely, you can see a small area of bruising and fine linear
6 scratches. Now state's 64B is showing the undersurface of the
7 penis and here we can see the injury and part of the head and
8 shaft of the penis, but what is important to note in this
9 photograph is that we have a clean clear line of demarcation
10 here, okay, where we have this area which is involved and we
11 have this nice circumferential band going around the penis which
12 you can also see on the front of the penis, the anterior part of
13 the penis, this line of demarcation which is separating the
14 injury from the uninvolved skin."

15 Question: "Doctor, do you have an opinion or have you seen
16 similar injuries? Do you know what the cause of those type
17 injuries could be?"

18 Answer: "Well, you see those type of injuries in two situations.
19 One, if an object is wrapped around like a belt, for example,
20 tightly around the penis or those type of injuries are more
21 characteristic when you see young children who have oral sex
22 performed on them, because the little scratches are the teeth
23 marks."

24 Uh, do you have, do you have that reading in mind, Doctor?

25 A] Yes.

1 Q] Based on the photographic evidence that you have reviewed,
2 uh, do you have an opinion on the reliability and validity of
3 the opinion expressed?

4 A] Yes.

5 Q] What is that opinion?

6 A] I, I, uh, I would just go with my previous statements. The
7 opinion that a ligature has been applied or wrapped around the
8 penis and that the injury appears to be a bruise or that there's
9 teeth marks present or that it's compatible with what you see in
10 children who have been subjected to fellatio is not
11 scientifically valid at all. There is a mark, looks pretty much
12 like a postmortem sort of alteration. Based on the microscopic
13 exam there is clearly no evidence of hemorrhage or bleeding into
14 the tissue, which is what you would see if it is a bruise, uh,
15 what is described microscopically is that the surface tissue is
16 denuded in a part of that area which is clearly what you would
17 see with a postmortem, uh, scuffing or type of abrasion. It
18 does not look like any kind of, uh, sexual injury, uh, and
19 certainly does not comply with what he is describing at all.

20 Q] Uh, now, Doctor, with, with respect to, uh, testimony
21 concerning Christopher Byers, which Your Honor, for the record,
22 begins in State v. Echols/Baldwin at reporter's transcript 1062.
23 There was some, uh, there was some specific testimony I wanted
24 to ask you about and, uh, if we could go to 69C, and Doctor, are
25 you generally familiar from your review of the materials

1 pertinent to this case, uh, with Dr. Peretti's characterization
2 of how the injuries in the area of the body that are now being
3 displayed in that photograph were caused?

4 A] Yes.

5 Q] And with respect to the, uh, to the testimony generally,
6 the specific answer that I wanted to call your attention to
7 begins at the top of page 1066. The answer is given to this
8 question:

9 "Doctor, was that type of injury to the back of the scalp, would
10 that be consistent with a broad blunt object that you described
11 in regard to the other injuries to the other boys?"

12 And the answer is: "Well, it's more consistent with an object
13 that is narrower and sometimes we see this type of injury for
14 example like a piece of wood like this railing here, the sharp
15 edge can give that type of injury, or an injury with an object
16 such as a broomstick can cause that type of injury. State's
17 exhibit 69C is a photograph of the genital region showing
18 genital mutilation. Here it is important to note here that you
19 can see where there is a close-up photograph of that. Here's
20 were the penis and scrotal sac and testes should be."

21 And then, as you know, there are further descriptions of how the
22 scrotal sac, testes and penis were removed. Uh, first of all,
23 in your opinion, was whatever mutilation or removal of the
24 genitalia caused by a human being?

25 A] No.

1 Q] Uh, and in, in your opinion, uh, is it, is that a close
2 call; in other words, uh, based on the photographic evidence
3 that you see, is, is there, uh, a serious scientific question
4 about whether a knife or some kind of tool is used to remove the
5 scrotal sac, testes and penis?

6 A] No question, this is not a close scientific question at
7 all. This is not sharp tool.

8 Q] And, uh, you are aware and the Court has unfortunately been
9 asked to repeatedly see these photographs. So I'll spare us
10 all. There are close-ups of the injury area that, uh, is
11 depicted in the photograph that's currently before you on Mr.
12 Burt's laptop?

13 A] Yes.

14 Q] And you've looked at those recently?

15 A] Yes, I have.

16 Q] Can you explain why, in your opinion, it isn't a close call
17 about, uh, about the nature of, uh, of the removal of the
18 genitalia of Mr. Byers?

19 A] The forensic eye looks at the big picture which is absence
20 of all of the genital material, uh, and then looks at the margin
21 the nature of the removal and whether or not it's dissected by
22 sharp force or whether or not there was clearly pulling and
23 tearing involved. Looking at the absent hole, it's uh, torn,
24 pulled, not sharp removal of the genital material. The next
25 thing you look at is in higher magnification, even with the

1 naked eye and you can see actually little, uh, puncture wounds
2 where there is no blood but you can actually see the skin heaped
3 up in piles next to holes where there has been a little puncture
4 wound and there's also additional marks there that actually
5 verify that this is small animal predation.

6 Q] Uh, and, and, uh, Mr. Burt, there are two photographs I
7 wanted to ask if we could display. One is 70C. And I just
8 wanted to ask you about the following answer which is at page
9 1067 of the record.

10 "State's Exhibit 70C is a close-up of the genital area. Here we
11 can see that all of the skin of the penis has been literally
12 removed or carved off. And what we have here is the shaft of
13 the penis without the skin on it and all around it we have all
14 of these cutting, gouging wounds. The scrotal sac and testes
15 are missing."

16 Uh, in, in your opinion, or what's your opinion about the
17 particular characterization and answer?

18 A] Well, "carved," you know, implies the - - it's not a word
19 that, that forensic conveys much, but carved does suggest a
20 sharp force instrument which has, which had been previously
21 suggested. If you will look at the scalloped edges, not only
22 has this been torn off, not sharply removed and the edges here,
23 you can see there's abrasions around the edge of it. This is
24 pretty basic pathology. You can also see shreds of tissue that
25 have been pulled out by the, by the process. And then even more

1 importantly, this tissue has been eaten out down basically to
2 the pelvic bones. So it isn't just that the tissue has been
3 removed, tissue has been eaten out from underneath, excavated
4 and actually removed, uh, not in a sharp force way, uh, but
5 basically from the same process of, uh, of pulling. And, and
6 you can see that proceeding from the edges of the outside to the
7 inside. Similarly, there are these, uh, these marks, uh, around
8 the outside that are purely, are clearly, uh, torn tissue with-
9 out any blood in them, uh, and even if the water had washed some
10 of the blood out, it would be still leak out after, uh, after
11 this period of time. So it's clearly postmortem.

12 Q] And Doctor, calling your attention to an answer given at
13 page 1076 of the record of the same proceedings, lines 12
14 through 13. The answer was: "There was no evidence of animal
15 activity; insect bites."

16 Uh, in your opinion, is there evidence of animal activity here?

17 A] Of course.

18 MR. PHILLIPSBORN: Mr. Burt, thank you very much
19 for your help.

20 DIRECT-EXAMINATION, continuing:

21 Q] I just have a couple more questions about specific testi-
22 mony that was given. Now in connection with a case like this,
23 uh, in, in your opinion, was it a preferred practice or the
24 pathologist who is going to be doing the postmortem examination
25 be present at the scene before the human remains were actually

1 taken from the scene to either, uh, a funeral home or some other
2 facility?

3 A] That's a basic tenant of forensic pathology. If it's a, if
4 it's an important case where there's serious implications, the,
5 uh, forensic pathologist has to go to the scene.

6 Q] Uh, in, in connection with your review of this record, uh,
7 are you aware of the testimony given by Dr. Peretti at page 1095
8 beginning at line 5.

9 Question: "Since you have been in the state of Arkansas, have
10 you been called upon to go to a crime scene?"

11 Answer: "No one has ever called me to go to a crime scene."

12 A] I'm aware of that.

13 Q] Uh, and, and are you aware that Dr. Peretti, uh, indicated
14 during his testimony that he, uh, did not, he was not present
15 when the remains of the three boys were, uh, removed from the
16 drainage ditch and the area of the drainage ditch to be taken to
17 the funeral home?

18 A] Yes, I'm aware of that.

19 Q] Uh, and, and, in your view, uh, would a, a reasonably
20 competent forensic pathologist who had been to the scene, likely
21 have at least considered the issue of, uh, of animal predation,
22 uh, given the photographs of the scene that you reviewed?

23 A] Of course. And, and as an aside, even if you weren't there
24 when the, when the bodies were removed, which is, uh, obviously
25 problematic, there's nothing to prevent a pathologist from going

1 back later to look at the area where the, uh, the bodies were
2 found. I don't know whether that was done or not. But it is
3 important to, uh, see the bodies in their situation in the
4 actual place that they, uh, were found prior to actually being
5 touched at all, which is pretty common practice around, uh, the
6 country is that before the bodies are touched, the medical
7 examiner is summoned.

8 Q] Now Doctor, uh, I'd like to call your attention to the
9 questions and answers that, uh, are in the record in connection
10 with the cross-examination of Dr. Peretti by Mr. Baldwin's law-
11 yer, uh, Paul Ford. And beginning at page 1100, line 7 of the
12 transcript:

13 Question: "Doctor, based on what you have seen in your
14 examination of these boys and based on your experience and
15 training, based upon a reasonable degree of medical certainty,
16 isn't it your opinion that these boys were not forced to perform
17 oral sex?"

18 Answer: "Well, that's difficult, you know, they have injuries
19 that are consistent with that, you know. They have the ear
20 injuries, they had the mouth injuries; like I said before, it
21 could be another modality how those injuries were sustained, but
22 we see those type of injuries in people who are forced to
23 perform oral sex. But then again, there are no injuries to the
24 back of the mouth and one way you can explain that is that the
25 mouth wasn't totally open. The teeth were clenched."

1 Question: "Are you telling this jury that in your opinion, based
2 upon a reasonable degree of medical certainty those boys were
3 forced to perform oral sex?"

4 Answer: "No, I'm saying they had injuries that we normally see
5 in people who are, especially children, especially the ear
6 injuries, were forced to perform oral sex."

7 Now in your opinion was there a basis in the professional liter-
8 ature where a reasonably competent forensic pathologist to give
9 the answers that I just read to you?

10 A] Absolutely not.

11 Q] And, and can you explain your answer?

12 A] Again, the determination of the presence of sexual injury
13 requires that the injuries even conform to, uh, uh, the pattern
14 seen, which they don't. Number two, the context of the bodies
15 suggest that, that the, uh, postmortem, uh, changes to the face
16 and to the, to other parts of the body are, are confounding
17 variables and there is no evidence whatsoever of, uh, the kinds
18 of injuries that are associated with the patterns seen in forced
19 fellatio: bruises to the pallet, uh, and, uh, bruises to the
20 back of the throat. Uh, the pattern injury here is absolutely
21 nonspecific and has nothing to do with oral sex. So it would be
22 improper to suggest that the pattern is consistent, character-
23 istic suggestive or even, uh, supportive of a diagnosis of
24 sexual penetration of the mouth. And the part that's the
25 hardest for me is because his explanation that there's no trauma

1 to the roof of the mouth is because the teeth are clenched, uh,
2 that's just an amazing statement, uh, it just doesn't make any
3 sense at all.

4 Q] To your knowledge, is there a basis, or was there in 1993
5 and 1994, uh, a basis for saying that, uh, ear injuries are
6 consistent with being forced to perform oral sex?

7 A] Well, not like this at all. I mean, there are certainly
8 scenarios you could create in your head but there's no, uh,
9 pattern in the, uh, that I'm aware of or any publications that
10 I'm aware of that specifically suggest that any injury of the
11 ear, uh, should lead you to think that oral sex is involved. In
12 child abuse cases we see kids whose ears have been pinched or
13 kids who have been yanked on in child abuse you certainly look
14 at injuries to the ear in children who are alive and you worry
15 about whether someone might be manhandling them. But to suggest
16 that any injury to the ear is, uh, leads you to oral sex,
17 especially in a case like this, is absolutely inappropriate.

18 Q] You, you actually have looked at the, uh, postmortem exam-
19 ination photographs of the injuries, uh, to the ears, whatever
20 injuries were there?

21 A] Yes.

22 Q] Well, what was your, generally speaking without going
23 through each one, uh, but generally speaking, did you see any,
24 uh, evidence that to you was consistent with a child having been
25 grabbed by the ear or held by the ear?

1 A] No.

2 Q] Uh, and, uh, Dr. Peretti had also explained as part of the
3 answer that I read to you, this was again for our record at page
4 1100 of the Echols/Baldwin transcript at line 24, uh, but they
5 had mouth injuries which he was explaining were consistent with,
6 uh, with being forced to perform oral sex. Were there any mouth
7 injuries in any of the three boys that were consistent, uh, with
8 being forced to perform oral sex?

9 A] No.

10 Q] Now, Doctor, do you recall seeing in the photographs that
11 were, that you reviewed, uh, injuries that had a pattern to
12 them?

13 A] Well, there are, yes, the pattern injuries of the vermin
14 predation.

15 Q] Uh, did you see just, uh, before I show you some specific
16 photographs, but so you recall seeing any injuries that in your
17 opinion, uh, were attributable to a tool, uh, specifically a
18 tool that had some kind of a pattern on it like a serrated knife
19 or some other tool that had serrations on it?

20 A] No.

21 MR. PHILLIPSBORN: Now if I could retrieve the 48
22 series of photographs?

23 THE COURT: Let's take a ten-minute recess while
24 you retrieve those pictures.

25 MR. PHILLIPSBORN: Thank you.

1 THE COURT: Court will be in recess ten minutes.
2 (WHEREUPON, a recess was taken; proceeding resumed as follows,
3 to-wit:)

4 THE COURT: Court's back in session.

5 MR. PHILLIPSBORN: Thank you, Your Honor.

6 DIRECT-EXAMINATION, continuing:

7 Q] Doctor, I want to call your attention to, uh, further
8 testimony given by Dr. Peretti on re-direct examination by Mr.
9 Davis, page 1127 of the Echols/Baldwin transcript beginning at
10 line 5.

11 Question: "Okay, now, Dr. Peretti, let me, Mr. Ford asked you
12 about these weapons, if you could positively say those weapons
13 caused the injuries, and if I understood your testimony
14 yesterday, there was one weapon used on these three boys that
15 was a sharp object such as a knife; correct?"

16 Answer: "That's correct." The question, after some objections,
17 goes on to, uh, say, again:

18 Question: "There was," - - this is the same page, line 21 - -

19 Question: "There was one weapon that was a sharp object such as
20 a knife?"

21 Answer: "That's right."

22 Uh, in your opinion, uh, are there injuries that you saw on
23 these bodies, uh, as depicted in the photographs that you saw
24 that are consistent with knife injuries?

25 A] No.

1 Q] Uh, in your opinion, Doctor, I'm going to approach you with
2 some photographs that have been marked and just so our record
3 reflects, the Court has had to look at a number of these several
4 times. 48MM is an area of ME331, Mr. Byers, you've testified
5 earlier from a photograph that was displayed on Mr. Burt's lap-
6 top; I want to ask you, first of all, can you generally describe
7 for the record the area of the body that's depicted there?

8 A] (Witness examining same.) This is a close-up, uh, photo-
9 graph of the, uh, anterior, uh, region of the perineum or the
10 area where the genitals, uh, normally are placed in the male.

11 Q] And, uh, you had testified earlier today in your direct-
12 examination that you had seen some areas in which, uh, you saw,
13 uh, marks on the body that to you were postmortem examination
14 injuries that actually to you appeared to be, uh, claw marks of
15 some kind?

16 A] Teeth marks, uh, there's a few that look like teeth marks,
17 uh, puncture lacerations, uh, with heaped up fat and skin and
18 others where the tissue torn, uh, could be claw, could be teeth,
19 but clearly not human.

20 Q] Uh, I want to, uh, show you and I apologize because I
21 didn't put these in a correct order, but what's been marked 48W
22 which is, according to the photograph, refers to ME case 330 and
23 ask you, uh, Mr. Branch. First of all, what area of the body is
24 depicted there?

25 A] (Witness examining same.) This is a, uh, the lower, uh,

1 face, head on, close-up.

2 Q] And, uh, do you see the lips?

3 A] Yes.

4 Q] I know you've testified about this, but just to be clear,
5 since you now have the photograph in hand, uh, do you see any-
6 thing in that photograph that you specifically associate with
7 sexual abuse or trauma caused by some kind of a forced sexual
8 assault?

9 A] (Witness examining same.) No, and this is, uh, the marks
10 actually have some similarities to many of the marks in the area
11 of the genitals. There's a perforation and gouges and
12 lacerations and, uh, uh, a ripping of the tissue, but clearly
13 not, uh, a human. This is identical to the predation in the
14 genitals, so it's the same. Nothing having to do with sexual

15 Q] In, in terms of the appearance of those wounds, uh, do they
16 appear to be, to be injuries sustained while the heart is still
17 beating; do they appear to be postmortem? What do they appear
18 to be?

19 A] They appear to be postmortem, from the photograph. Clearly.

20 Q] Now I wanted to show you, all of these are admitted
21 exhibits. This one is 48I and ask if you could, just so, uh, I
22 think the Court was looking over your shoulder just a moment
23 ago.

24 THE WITNESS: Oh.

25 THE COURT: I've seen them too many times.

1 DIRECT-EXAMINATION, continuing:

2 Q] That, that particular photograph, Doctor, again, just for
3 our record, what does it show and which ME number does it per-
4 tain to?

5 A] (Witness examining same.) It's 329 and it shows the upper
6 torso and head, uh, of the boy and there's a laceration on the
7 forehead and on the left temporal region, temporal partial
8 region and shaved area with some swelling on the right and then
9 scrapes on his chest and nondescript abrasions on his nose and
10 chin and mouth.

11 Q] Now when you answered a question earlier in direct exam-
12 ination about having looked at photographs and considered them
13 when you were providing your opinion whether they were pattern
14 injuries consistent with tool marks, have you that particular
15 photograph in mind?

16 A] Yes.

17 Q] I want to show you another photograph, 48S, uh, pertinent
18 to ME #330, Mr. Branch, and for our record, can you explain what
19 part of the body is, is shown in that photograph?

20 A] (Witness examining same.) This is a photograph of his head,
21 mostly from the right side, slightly tilted towards the right.
22 Uh, it shows, uh, again similar predation marks, punctures, uh,
23 uh, postmortem type abrasions, uh, tears of the lip. It's, it's
24 obviously the, the, uh, the same person as, uh, well, I don't
25 have the number. Oh, 48W, uh, it's just from a slightly

1 different angle.

2 Q] Now I, I have just a couple of more photographs, Doctor,
3 48T admitted as another photograph from ME 330, Mr. Branch, uh,
4 showing the, showing what area of the body, Doctor?

5 A] (Witness examining same.) This is, uh, upper torso and
6 head from the left side, obviously prior to being washed. Norm-
7 ally we take pictures before washing and after washing, and this
8 is a pre-washing photograph, so the blood is still in the hair
9 and in the ear and over the tissues, but you can see the pre-
10 dation, holes along the jaw line and, uh, along the mandible and
11 discoloration of the facial tissues.

12 Q] Now Doctor, again, the Court has seen these photographs,
13 but this one is 48LL that pertains to, uh, ME 331, Mr. Byers.
14 And, and can you describe generally what's shown in that photo-
15 graph?

16 A] (Witness examining same.) Again, this is a pre-wash photo-
17 graph of the buttocks area and upper thigh with a portion of his
18 hand. There appears to be either stool or mud on, uh, the left
19 buttock and obvious dirt over the lower back area and then
20 three, what appear to be claw marks, scrapes, on the, uh, left
21 upper thigh.

22 Q] And, uh, you have looked at other photographs of that area
23 of that particular young man?

24 A] Yes.

25 Q] And, and as far as you're concerned, uh, is there any

1 question that you have about that being an injury inflicted by,
2 uh, wildlife as compared to, say, a tool, like a knife, a
3 serrated knife?

4 A] No, that's not a sharp force and based on not just this
5 picture, but the other pictures after it's cleaned up and dried.
6 It's clearly claw marks.

7 Q] Now I'm showing you what's been marked and admitted as
8 48NN, uh, a picture of a, uh, of a knife. Did you see any
9 injuries on any of those boys that in your opinion is consistent
10 with force being administered by any part of that particular
11 knife, or a knife like it; in other words, a knife that has a
12 blade, uh, also some kind of a serration or a set of teeth?

13 A] (Witness examining same.) There's a de-scaling edge or,
14 uh, what we use in Minnesota to get the fish scales off, uh, and
15 it's not a, it's not a, uh, going to be very effective as a
16 sharp cutting, like a serrated edge would be, but I see nothing
17 that, uh, suggests that this instrument was involved in anything
18 that happened to the boys.

19 Q] Now, Dr. Ophoven, in your practice and in your experience,
20 uh, is it discussed in the framework of your profession that in
21 pediatric cases, specifically in cases involving children, uh,
22 there are risks that a pathologist may misidentify as a knife
23 cut, uh, something that actually turns out to have been
24 inflicted by an animal?

25 A] Sure.

1 Q] Uh, and as far as you know, has, uh, has any attention
2 actually been focused on, on that particular matter as any
3 focused study been done on it as a result of certain errors that
4 were detected and, uh, opinions rendered by medical examiners?

5 A] Well, there's lots of publications about, uh, mistakes that
6 are both common and uncommon because of preconceived notions and
7 experience and so forth, and, uh, those have been discussed in
8 general and then they've also been discussed specifically in
9 children. And it all comes back to the quality of the science
10 that's brought to the diagnostic process, similar to, uh, me not
11 wanting someone, uh, to do, uh, cardiac catheterization on me.
12 That's only done once. Uh, in cases that are highly
13 sophisticated, unique, presenting with challenging and substan-
14 tial implications, it's, it's, uh, it's not that those cases
15 deserve better medicine; it's just you have to be really, really
16 scientific about the analysis. And most mistakes, uh, recur
17 because of failure to have adequate experience in the, the, the
18 kind of case you're dealing with, establishing a proper
19 differential diagnoses, which means have you considered all of
20 the reasonable and legitimate explanations for what you're
21 seeing and have you applied sufficient knowledge and training to
22 those differential diagnoses, uh, or should you consult with
23 someone who may have more training and experience. And I think
24 that that example has to do with the nature of the, of the, of
25 the predation, the details of the predation and needing to have

1 someone who obviously considered that appropriate.

2 Q] Uh, Doctor, the Court has already heard about this from
3 another witness, but are you familiar with the, the Goudge, G-O-
4 U-D-G-E Commission report?

5 A] Unfortunately, I am all too familiar with this report. I,
6 uh, have been involved in cases in Ontario which consulted
7 before the Goudge, uh, group actually was formed and was asked,
8 uh, about the names of people to recommend to participate in the
9 project, and I've been in conversation with individuals along
10 the way as these tragedies unfolded. It has two very important
11 points. One is substantial a substantial and horrifying
12 miscarriage of justice over a period of twenty years, but even
13 more importantly, the failure to question the obvious when faced
14 with, uh, conflicting evidence, uh, why did the system fail to
15 recognize that there was, uh, that there was good science coming
16 in on one side and bad science on the other.

17 Q] And, and generally speaking, uh, again, without getting us
18 into the kind of detail about it that you know, what was the
19 problem that ended up having to be studied by the provincial
20 government of Ontario?

21 A] Well, simply put, there was a theory that was being used
22 and applied to cases without considering alternative diagnoses.
23 And the reason why the Goudge inquiry was so tragic is that that
24 theory was applied not just on one case or two cases, but on
25 multiple cases over time. A fixed interpretation of a pattern

1 of injury, when in fact, that interpretation was incorrect,
2 repeatedly used to convict individuals over a period of twenty
3 years with conflicting evidence being presented repeatedly, that
4 this is a false interpretation, that this is an incorrect inter-
5 pretation of the science and yet because of that belief, uh, not
6 only was that individual pathologist, uh, flawed over at least I
7 think they expect maybe twenty to twenty-five convictions for
8 child abuse murder to be overturned, but the entire system
9 couldn't bring itself to recognize and understand that it had
10 bad science. And it's the issue of bad science that was
11 perpetuated repeatedly, whether it was in one case on multiple
12 occasions, both child custody as well as criminal, but over time
13 if there was a bad system with bad science that was blindly
14 believed because of the competence of that individual that the
15 consequence were awful and the Goudge Inquiry was not to
16 investigate that pathologist, it was to find out how this could
17 have happened in Ontario, I mean, this supposedly civilized
18 wonderful scientific place, how could this have happened in
19 their community. That's what the Goudge Inquiry, and I think
20 ten million dollars was spent on investigating why this
21 happened, how it happened and how to prevent it from happening
22 again.

23 Q] And, and among the cases studied by the, by the Commission,
24 were there cases, pediatric cases involving what were determined
25 to be errors in describing as a knife or scissors wounds?

1 A] Well, the case that finally tipped the balance was a case
2 of a baby where the mother was charged with abuse and convicted
3 of stabbing her child multiple times. The defense presented
4 evidence that this was clearly a dog mauling, pit bull-type dog
5 mauling, claw marks and penetrating wounds, and subsequently was
6 verified that this was actually a child that had been mauled to
7 death by a dog and yet this woman was still, uh, because of how
8 the system works, uh, charged and tried for murdering her baby.
9 And it was, this was a pretty obvious case. Those pictures have
10 been shared in there, you know, pretty similar to the
11 misinterpretation here.

12 Q] Uh, now in your opinion would it be unusual for an
13 experienced forensic pathologist employed by a medical, a
14 statewide medical examiner's office, uh, to, uh, describe as
15 common signs of sexual abuse or assault on a child, the sorts of
16 things that Dr. Peretti described injuries to ears and the
17 injuries to the mouth as he characterized them?

18 A] In a case like this, I, I can't imagine that happening,
19 from a, uh, uh, statewide experienced individual. I can't
20 imagine people having a first reaction that might later prove to
21 be in-correct after thoughtful consideration and differential
22 diagnosis and so on, but uh, I can't imagine these wounds being
23 misinterpreted as sharp force injury or the children having
24 been, uh, uh, suggested to have been sexually assaulted. It is
25 a consideration when you have multiple fatalities to consider

1 the possibility that sex might have been a motive, but the
2 possibility that might have been a motive is a far leap to
3 serious sexual abuse verified.

4 Q] But as, as far as you know, in 1993 and 1994, would it have
5 been generally accepted among forensic pathologists that if you
6 have injuries to the ears and some level of observable injuries
7 to the mouth including and specifically the lip, that that would
8 be, that those were a hallmark of, uh, sexual assault?

9 A] No. No. No.

10 Q] And, and to your knowledge in 1993 and 1994, were there,
11 uh, was there both literature and information that you would
12 expect to have been imparted to a trained forensic pathologist
13 that would have given you some benchmarks or some, some, uh, a
14 checklist, if you will, of, uh, factors that, uh, would identify
15 forced oral sexual assault on a male by a male?

16 A] There's, there's no question that in 1993 the information
17 was available to properly interpret the case, uh, whether or not
18 there's an article that says watch out for over interpretation
19 of the ears and small bruises in a child found under these
20 circumstances, but there clearly was evidence out there about
21 how to approach and appropriately diagnose, uh, sexual injury in
22 children.

23 Q] Uh, in, in, uh, your experience as a, uh, pathologist is
24 relying on, for example, on her or his prior experience has
25 essentially the sole manner of determining that a particular

1 symptom or a particular finding dictates, uh, in the end the
2 definition of "the manner of injury," in other words, injuries
3 to ears equates sexual assault, uh, is it, uh, would it be
4 uncommon for that pathologist to have some documentation
5 available to challenge to at least produce so that people could
6 verify his or her foundation?

7 A] Uh, absolutely. May I expand on that?

8 Q] Yes.

9 A] Uh, it is, uh, it is the expectation of the forensic path-
10 ologist that when you say anything to a reasonable degree of
11 medical certainty, that you are carrying the sole responsibility
12 to actually scientifically verify your conclusions. So if
13 asked, show me the proof. And when I said, and when anyone else
14 said I was trained with and as far as I know, anyone who does
15 that is, is even though I'm not going to ask you to bring in
16 every shred of proof, I am going to assume that you have
17 scientific evidence to document the proof for your certainty.
18 Just like when I say it is leukemia, I have to be able to show
19 the family why I am certain that it's not something less
20 serious. So the expectation in a case where you say I suspect
21 or am diagnosing sexual penetration of the mouth and assault
22 that one of the three elements that is typically seen in sexual
23 abuse is present.

24 Q] What are those three things that are commonly seen in
25 sexual abuse cases; you've made reference to, to, uh, matters

1 that are often seen. What are they?

2 A] The, the first is a pattern of injury accepted as
3 scientifically verifiable, uh, and consistent with sexual abuse.
4 So there's patterns of tissue damage that are evident of sexual
5 abuse. That's number one and we've already discussed that there
6 isn't that. Number two, that you find presence of ejaculate in
7 a child where ejaculate shouldn't be. That's pretty straight
8 forward that there has been sexual contact of some kind. And
9 the third is the presence of some form of sexually transmitted
10 disease that is associated with sexual activity. That's not
11 hard; it's pretty straight forward. You have pattern of
12 injuries that's pretty consistent with what is seen in the
13 literature; you see presence of ejaculate; or you have presence
14 of infectious disease that clearly verifies that sexual activity
15 and sexual contact has occurred. If those aren't there, then
16 the forensic pathologist doesn't have anything to contribute.
17 That's a different question than whether or not there's sexual
18 activity in a living child occurred or not, but in a possible
19 sexual homicide, those things, one or more of those things need
20 to be present.

21 Q] In your experience and especially when you were with the
22 medical examiner's office and, uh, uh, typically be called, uh,
23 by the prosecution in a case, uh, was it unusual for the defense
24 to approach you to interview you about, uh, are you going to be
25 giving testimony in?

1 A] I was trained that my job as a scientist, as a forensic
2 pathologist, is my information is available to whomever needs
3 it. Now I would not discuss the case with the defendant until
4 after charges had been brought while the case was still actively
5 being investigated, out of difference to the work being done by
6 law enforcement. But once charges have been brought and a case
7 was going to trial, I made myself available and still do to
8 whomever wants to talk about the case, see the pictures, discuss
9 the issues and so forth.

10 Q] Is it unusual or has it been unusual in your experience
11 when you expressed an opinion about a case for defense counsel
12 and, and for the prosecutor as well, to ask you whether there is
13 any specific literature that you're making reference to that,
14 uh, would substantiate an opinion you had rendered?

15 A] Of course. In my work I am routinely asked to provide the
16 source of my opinion. Sometimes it's experience and common
17 sense in forensics and sometimes it's specific literature that
18 has been accumulated over time to answer the question of what is
19 the definition of sexual injury, what is, uh, what is known
20 about predation injuries, what is known about known about
21 drowning, and so forth.

22 Q] Uh, where you've said you relied on your experience to, to
23 render an opinion in a courtroom, uh, has it occurred that you,
24 uh, have been asked to provide the, the, uh, basis for that
25 opinion; in other words, to actually state specifically what

1 your experience in that kind of case is, how many cases you've
2 actually considered, what kinds of symptoms you saw in any of
3 those routinely?

4 A] Routinely I'm asked what is the basis for my opinion and
5 the expectation is that I would be able to provide the case,
6 the, the, the general case types and experience, the, whether or
7 not I've had cases of this nature and whether or not there is
8 published information specifically about the issues of drowning
9 and vermin and most importantly, sexual abuse, uh, or sexual
10 injury in, uh, deceased kids.

11 Q] And, and here you've indicated you've actually reviewed the
12 testimony of Dr. Peretti; right?

13 A] Yes.

14 Q] Uh, do you recall seeing any, uh, questions asked, uh, that
15 asked for Dr. Peretti to make any statement about the literature
16 he was depending on to, uh, provide his opinions concerning sex-
17 ual assault?

18 A] No.

19 Q] Do you remember his being asked any questions about what
20 the experience base was that he was making reference to in stat-
21 ing his opinions about the ears and mouth?

22 A] No.

23 Q] And, and as far as you're concerned, uh, as I understand
24 your answers, and please correct me if this is wrong, would it
25 be fair to say that it's your expectation that proper profes-

1 sional practice would have been that he could have either
2 basically put on or not; in other words, he either would be able
3 to, uh, provide specific, uh, information about the number of
4 cases involving injuries to ears in which the call was made of
5 the opinion was rendered, uh, that there was forced sexual
6 assault on a child or not; is that fair?

7 A] That's fair.

8 Q] But do you, uh, uh, and, and for example, uh, would you
9 expect that the same would be true as well insofar as Dr.
10 Peretti purported in his testimony one of his answers will
11 eliminate animal predation or animal caused injury from any
12 aspect of the case, would you expect that again, had he been
13 asked, uh, his professional practice would have been that he
14 would have been able either to refer to cases that he had
15 personally, uh, investigated involving animal predation to
16 eliminate that possibility; is that fair?

17 A] That's fair, although it's so, uh, in my opinion, it's so
18 obvious, it's hard to imagine there would be an article saying
19 something so obvious is obvious. But there's clearly literature
20 out there that would be easy to demonstrate as consistent with
21 these pattern are consistent with classic predation. And I
22 don't know how he'd go about saying "I have evidence of absence
23 of that," but it didn't appear that anyone verified the basis
24 for why he said there was no predation.

25 Q] But let me ask you, last inquiry, I'm going to ask you a

1 hypothetical question. Assuming that you attended a meeting
2 with other fellow professionals, meaning persons who are
3 forensic pathologists, uh, had been medical examiners, were
4 medical examiners, uh, and, uh, you were discussing a case and,
5 uh, during the course of the meeting, uh, you actually offered
6 to search your files to, for example, to report on the past ten
7 years' worth of bodies recovered from water so that some assess-
8 ment could be made about the nature of the predation, if any,
9 that was found in, in those cases; and again, I'm asking you to
10 assume that you have made that offer, uh, would you expect that
11 if, uh, that data could be produced; in other words, if you told
12 me that data could be produced, could I have the expectation
13 that you would produce it?

14 A] Yes, if I said I could produce it, then I would. Then you
15 would expect to get it.

16 MR. PHILLIPSBORN: I have nothing further of this
17 witness, Your Honor. I pass the witness to Mr. Burt.

18 DIRECT-EXAMINATION

19 BY MR. BURT:

20 Q] Good morning, Doctor.

21 A] Good morning.

22 Q] Doctor, as you know there were two trials here and two
23 different testimonies by Dr. Peretti, so I'm going to focus
24 mainly on some of the testimony that was given in Mr.
25 Misskelley's trial.

1 A] Okay.

2 Q] Just for your reference, but before I do that, I have just
3 a few general questions for you based on some of the answers you
4 gave to Mr. Phillipsborn. First of all, in certain professions
5 there are ethical standards that govern how someone testifies,
6 an expert testifies in court; for example, forensic psychology,
7 they have an ethical standard and it says "Forensic psych-
8 ologists make reasonable efforts to ensure that the products of
9 their services as well as their own public statements and pro-
10 fessional testimony are communicated in ways that will promote
11 understanding and avoid deception, given the particular
12 characteristics, roles and abilities in various recipients of
13 the communication." And it goes on to say "forensic
14 psychologists take reasonable steps to correct misuse or misrep-
15 resentation of their professional testimony." Is there any-
16 thing comparable in the field of forensic pathology that
17 governs, uh, standards for what forensic pathologists should,
18 how they should testify in, in minimal ethical standards for how
19 they present their information to juries?

20 A] There's, uh, there is no, uh, organization that, uh,
21 officially represents everybody in forensic science or forensic
22 pathology. But there are multiple organizations that provide
23 basic mission statements and expectations for education and they
24 all speak to conduct of the highest ethical, uh, standards. The
25 job of the forensic pathologist is to educate, based on the

1 science. So the expectation of a pathologist is to provide in-
2 formation, uh, to the best of their ability and if that means
3 there is controversy, then that would be expected to be
4 discussed as well.

5 Q] Is there some standard that, uh, the forensic pathologist
6 is only there to answer the specific questions asked of him or
7 her and has no obligation to really put forth what the truth is,
8 regardless of whether the right question is asked?

9 A] No. The forensic pathologist practices medicine. That's,
10 that's, that's, uh, that sounds like a simple answer to the
11 question, but the practice of medicine carries with it the, the
12 basic tenant of doing no harm and making sure that the ethical
13 principles under which we became physicians are in play, which
14 means you are there to be a scientist and do the work, uh,
15 meeting the standards of your peers.

16 Q] Uh, You reviewed some testimony in this case where Dr.
17 Peretti put together certain injuries and tried to equate those
18 injuries with sexual assault; correct?

19 A] That's correct.

20 Q] For instance, injuries to lips plus injuries to ear and in
21 his experience, he said at the trials, equates to oral sex;
22 correct?

23 A] That's my impression.

24 Q] And he also, uh, as part of his answers, and we'll get to
25 this in a minute, that suggested other possibilities; for

1 instance, he would say, "well, this is in my experience, sexual
2 assault, but it could be other things as well." Uh, is it the
3 role of the forensic pathologist simply to throw out
4 possibilities like that; in other words, framed in terms of what
5 things could possibly be or what they might have been. Is that
6 the standard by which scientifically you should be testifying?
7 A] No. The differential, the, the, the, the key word here is
8 the differential diagnosis. "Differential diagnosis" is a word
9 or a term of art that every doctor uses, whether they're a
10 pathologist or a forensic pathologist or a pediatrician, or
11 whatever. And that term says what are the scientific
12 explanations for the finding you have? You make the list: what
13 are the reasonable scientific explanations for the particular
14 finding you're discussing, and then you apply science, the, uh,
15 process of bringing experience and training to that science to
16 narrow the differential diagnosis, if it is possible. So the
17 only thing this could be is sexual assault. The only thing this
18 could be is a car wreck. The only thing this could be is a
19 drowning. If, however, there is insufficient evidence to narrow
20 it to a specific thing, then to call it that thing is a mis-
21 application of the science. If it could be three things, then
22 the pathologist says it could be one of these three things. The
23 follow-up is, I have insufficient evidence to determine which is
24 correct.
25 Q] And, and the follow-up is essential, is it not, in order

1 not to mislead the jury?

2 A] "I don't know" is an important forensic diagnosis. It is a
3 critical forensic diagnosis. If the science is not there to
4 answer the question, it is the honorable scientific thing to
5 answer "I don't know." If there is no evidence to support your
6 theory then there are alternatives that are substantially more
7 likely. It is improper for you to promote your theory.

8 Q] Let me ask you this: In this case we have some evidence, I
9 believe it's exhibit 35 where Dr. Peretti was interviewed prior
10 to his testimony in one of these cases and the defense lawyer
11 actually made a tape recording of that conversation and during
12 the course of that conversation the lawyer asked Dr. Peretti:
13 "Doctor, do you think the prosecutor in this case can stand in
14 front of the jury and in good faith, tell the jury that the
15 proof would be that these boys were sodomized?"

16 And Dr. Peretti's answer was, and this is on tape, exhibit 35:
17 "I would not say 'in good faith.' That's his decision, not
18 mine."

19 Now unfortunately, the lawyer never brought out that statement
20 during the testimony of Dr. Peretti, but given the fact that he
21 made that statement to a lawyer on tape, didn't he have some
22 obligation during the testimony not to suggest to the jury that
23 there was in fact sodomy in these boys, given his own case?

24 A] He had, he had, uh, uh, an ethical responsibility to make
25 clear whether it - - and those of us that testify a lot, know

1 how to communicate effectively that we're being asked a
2 question, that we are uncomfortable with limiting it with a yes
3 or no answer. Refusing to make a yes or no answer, because it's,
4 uh, you can't do a yes or no answer, is what must be done when
5 you're asked a question that is, uh, that is suggesting some-
6 thing that you don't agree with.

7 Q] Uh, you mentioned during your direct-examination that you
8 have three criteria for diagnosing a sexual trauma: one was, I
9 believe, some trauma is recognized in nature, ejaculation,
10 sexually transmitted disease. I take it you don't need all
11 three of those to...

12 A] ...no, I just need one, uh, under the proper circumstances,
13 uh, you know, in a, uh, it isn't cookbook, but if I have ejac-
14 ulate on a two-year-old, or in a two-year-old, uh, whether there
15 is an injury or not, uh, I'm going to be a problem for the
16 defendant.

17 Q] And, and you said, and I thought this was interesting, that
18 if one of those three criteria are not there, then your role as
19 a forensic pathologist ends and that's a separate question as
20 whether sexual assault actually took place; right?

21 A] Certainly, if there's witness statements, if there's other
22 issues, if there's, you know, there's all kinds of other things
23 for the jury to consider. But the forensic pathologist wields
24 too much, I think, influence. I was taught that the forensic
25 pathologist wields too much influence with the jury to opine

1 things for which there is no scientific basis. So the, the
2 answer to the question is there evidence of sexual assault,
3 that's a yes or a no.

4 Q] And, and by "evidence," you're talking about scientific
5 evidence?

6 A] Scientific evidence. Not my personal opinion as to whether
7 or not this was some kind of sexually caused crime, but do I, as
8 the scientific representative of the physical evidence from the
9 children have any evidence that sexual activity of any kind took
10 place associated with their death. That's a simple question:
11 yes or no.

12 Q] Let me ask you this: Hypothetically, if you have the
13 situation that is ambiguous at best; for instance, you have no
14 ejaculation, you have no evidence of sexually transmitted
15 disease and you're trauma evidence is at best is maybe
16 ambiguous, is it ever appropriate for the forensic pathologist
17 to go outside the four corners of the autopsy report and to take
18 into account things like confessions; for instance, should your
19 interpretation of the traumatic injuries be colored or
20 influenced by taking into account, uh, just for an example, a
21 law enforcement officer coming to you and saying, "well, we have
22 a confession from a guy and he says there was sexual assault,"
23 so you should take that into account in looking at these
24 injuries and judge it accordingly. Is that a proper method of
25 analysis in your field?

1 A] Absolutely not. Now many forensic pathologists have, have
2 fallen into that trap. The enthusiasm that's brought to the
3 table, the desire to, to assist in solving a difficult crime and
4 a desire to be a part of the team that assisted in solving the
5 crime. The problem is when you're testifying. There's no team.
6 You're supposed to be talking about the evidence so if you get
7 to the end of your journey and some one says well, how do you
8 know there was sexual assault and you end up having to say the
9 police told me they thought there was sexual assault, then
10 that's considered a mistake. Uh, uh, so I either have evidence
11 of a sexual assault or not; I present that information to the
12 jury and if I don't have enough information or have absolutely
13 no information to suggest sexual assault, then I say there's no
14 evidence of sexual assault.

15 Q] And, and in your field of pediatric pathology, are there
16 situations where you simply cannot trust the statements of eye-
17 witnesses where it's not borne out by your physical examination?

18 A] Well, you're asking someone who's been practicing forensic
19 pathology for thirty years. And when I ask for the case
20 material, I traditionally, uh, especially in fatalities in
21 children, I request not only medical records from birth on and
22 all of the documentation relating to the child's illnesses and
23 medical findings and autopsy and so on, but I request police
24 statements and witness interviews and DVDs and transcripts. And
25 I take into account everything that's said. I have never based

1 my opinion on what was said. What I do do is take into account
2 what was said and compare it to what I found. If what was said
3 and what I found are in synch, then that's part of my opinion.
4 The witness statements make sense and it matches with everything
5 I found. However, after thirty years, I have seen unbelievable
6 things said by witnesses, uh, in the form of quote
7 "confessions," that had absolutely nothing to do with what
8 actually happened to the child. So from my, from my standpoint,
9 what witnesses say, uh, is, is for the trial court. I just
10 match whether what the witnesses said matches with the, with
11 what I found at the autopsy. That is an opinion I'm prepared to
12 make.

13 Q] All right, I want to ask you some specific questions about
14 the Misskelley case and I'll start with trial exhibit 69A.
15 We've touched on this a little bit already, but I just want to
16 make sure that your testimony relates specifically to this case
17 in the Misskelly trail. Looking at 69A, which is the photograph
18 of the anal area on Mr. Moore and Dr. Peretti testifies at page
19 824 of the Misskelley trial:

20 "69A is a photograph of the anal orifice. Here we can see
21 abrasions and the focal areas of contusion and Lividity. There
22 was anal dilation," and then in reference to the same photograph
23 he says later on, "we had anal dilation and hyperemia of the
24 anal/rectal mucosa."

25 Looking at that photograph, is that testimony borne out by his

1 documentation?

2 A] No, sir. First of all, this is not a dilated rectum - -
3 anus. Uh, there area dilated anuses but this is a normal post-
4 mortem anus. That's how it looks. Actually, that's how it
5 looks in living people. It's, it's not that open. I mean, if
6 you have a living person and spread their cheeks apart, the anus
7 is going to look just like that. So first of all, it's not
8 dilated. Secondly, what he's discussing is hyperemia. There's
9 a, uh, the anus is normally star shaped. It's not a perfect
10 round little, like, hubcap that a lot of people think it is.
11 It's a star shaped and it's star shaped so that the, the tissue
12 can actually expand fairly substantially and at the intersection
13 of these points here, you're actually looking inside to the
14 rectum, which is a pink color, just like the inside of your
15 lips. It's always pink. And postmortem, it's pinker, and the
16 tissue around the anus traditionally gets really purple color.
17 This is remarkably normal, I mean, this actually could be the
18 picture of a living child, that's how normal this anus looks.
19 So, no, there's nothing about this picture that suggests this
20 child has been sodomized.

21 Q] Now I'm going to bring out exhibit 71C and this is the
22 anal, photo of the anal area of Mr. Byers. And the testimony in
23 relation to this photo is at page 843 and Dr. Peretti says:
24 "State's Exhibit 71C is the buttock region in here. There was
25 evidence of genital mutilation. This is the back of the anal

1 orifice, the multiple cutting wounds here on the anal orifice in
2 the perineum area, which is area below the anal orifice."

3 Question: "Doctor, did you also make a finding that the anal and
4 rectal mucosa were hyperemic and injected?"

5 Answer: "Yes."

6 "Can you explain what that means?"

7 "It was red and injected, some capillary dilation there." Is
8 that testimony supported?

9 A] No.

10 Q] And could you walk us through, first of all, in regard to
11 the anal orifice showing "multiple cutting wounds"?

12 A] Well, the anal orifice doesn't show any cutting wounds.
13 The anus looks completely normal, tightly, kind of closed for a
14 deceased person. It looks just like a regular anus. There's
15 these claw marks over on the side which I assume is he's
16 referring to, but there's no cutting wounds in the anus. And
17 then if you look inside the anus there's an area, you can see a,
18 a, a demarcation here, which is the inside where there's the
19 mucosa, uh, and it looks perfectly normal; perfectly normal.
20 There's no contusion, there's no nothing.

21 Q] And when he states here that it was red, injected and some
22 capillary dilation, can you see at all what he's referring to?

23 A] No.

24 Q] It's just not there?

25 A] No.

1 Q] Now let's take a look at 64A, which is Michael Moore,
2 pertaining to the ear. Dr. Peretti's testimony at page 823 was:
3 "State's Exhibit 64A is showing abrasions, contusions, bruising
4 behind the ear and some scattered abrasions that were under the
5 scalp in the left ear. This dark discoloration here is a
6 bruising behind the ear. You can see this little area here,
7 this discoloration. This is an abrasion or a scrape behind the
8 ear and also we can see in the hairline an abrasion or scrape."
9 And then, uh, if we could go to 65A next, page 825, Dr. Peretti
10 says:

11 "The next photograph State's Exhibit 65A and 66A," which I'll
12 show you in a moment, "show the mucosal surface or the inner
13 aspect of the lips. The upper lip and lower lip respectively,
14 and also the nose. Here on the nose we can see some abrasions
15 or scrapes. Here on the upper lips we can see some cuts,
16 contusions and edema or swelling."

17 And then Dr. Peretti is asked: "Doctor, in your experience as a
18 medical examiner when you see injuries to the ears and injury to
19 the inside surface of the mouth, what does that indicate to you
20 in a person that is eight years old and has died this type of
21 death?"

22 He says: "There's a number of possibilities, but commonly when
23 we see the ears are contused on both sides or bruised with
24 overlying fine linear scratches," then there's an objection.

25 And the question is rephrased:

1 "Let me ask you, have you seen in your past experience as a
2 medical examiner, have you seen similar injuries to the ears of
3 children?"

4 Answer: "Yes, I have."

5 Question: "In those cases, were they also frequently accompanied
6 by injuries on the inside of the child's mouth?"

7 Answer: "Yes, they were."

8 Question: "Based on your past experience, expertise and training
9 do those type injuries indicate to you, based on your expertise
10 and training as a potential type trauma that has occurred to
11 cause those type injuries?"

12 Answer: "In my practice those types of injuries I have seen in
13 children that are held by the ears who are forced to perform
14 oral sex. It can also be due to putting a hand over the mouth
15 causing injuries to the mucosa surface to the lips or they can
16 be by someone grabbing someone by the ear and pulling them."

17 Does that testimony support that?

18 A] No. And actually the injury to the, to the, that's shown
19 in the photograph is behind the ear over the mastoid process
20 with some abrasions on it, which means that there was a blunt
21 force impact there; whether he bumped his head or, uh, whatever,
22 but it's a, it's a, it's a direct impact point. There is no
23 trauma to the ear suggesting pulling, holding, yanking the sort
24 you would expect from a forced fellatio. The only injury
25 that's, that's present here that is of any interest at all is a

1 very small bruise in the center of the upper lip in an eight-
2 year-old boy without sampling it and looking at it under the
3 microscope, he might have come in to the day with that injury;
4 it has absolutely nothing to do with fellatio. It has to do
5 with bumping his teeth against his upper lip. It might have
6 happened in a scuffle might have happened during the terminal
7 event, but it has nothing to do with, uh, it has nothing to do
8 with sodomy or fellatio.

9 Q] Now, uh, 64B and the next one will be 65B. Look at these
10 in connection with the testimony regarding Mr. Baldwin, but it's
11 testimony about the two penile photographs. This is as follows
12 in the Misskelley trial, this is at page 837.

13 Question: "Exhibit 64B and 65B are photographs of the penis. 65B
14 shows the mid-shaft of the penis and head of the penis with
15 contusions, bruising and overlying scratches. This injury, as
16 you can see, there is an area of demarcation of the involved
17 area and the uninvolved area all of this discoloration here is
18 bruising. There are fine scratches overlying the head of the
19 penis along with other focal areas of bruising. Also, State's
20 Exhibit 64B is the back of the penis showing similar injuries
21 and lines of demarcation between the involved and uninvolved
22 area."

23 Question: "Do you have an opinion as to what type of instrument
24 or what could have caused the bruising, lacerations and injuries
25 you have indicated to the penis?"

1 Answer: "Well, these injuries could be from oral sex, they could
2 be also a squeeze, a very tight squeeze, but also with a clear
3 band of demarcation between the involved and uninvolved area, an
4 object could have been placed around the penis and tightened
5 very fast."

6 Is there any support from that testimony?

7 A] No, there's no contusion or bruising. Uh, the glans penis,
8 which is the end of the penis is always a blue color because of
9 the vascular supply, so that's not bruised. There's no swelling
10 or damage to the penis or shaft that would suggest that there
11 had been any trauma to the deeper tissues, like what had been
12 seen with the ligature. There's some abrasions very superficial
13 abrasions, uh, that are very clearly demarcated. It has the
14 color of postmortem change, uh, but there's nothing here to
15 support, uh, I have seen unfortunately many squeezed ligatured,
16 bruised, bitten penises, uh, in my experience and none of those
17 things apply to this, uh, to this appearance here. So none of
18 the things, ligature, biting, squeezing, pulling, nothing,
19 pinching, none of those things are consistent with what I'm
20 seeing here. It's a, it is, has the coloration of a postmortem
21 change.

22 Q] Photograph 69C...

23 THE COURT: ...can you kind of avoid repetition?

24 She's already testified on these areas.

25 MR. BURT: I understand, Your Honor, there is a

1 little bit of overlap here and I'm just trying to get
2 her to comment on specific testimony.

3 THE COURT: All right, go ahead.

4 MR. BURT: This is actually the last, oh, second
5 to last.

6 DIRECT-EXAMINATION, continuing:

7 Q] 69C should be a photograph showing the right side of Mr.
8 Byers. Doctor, in the Misskelley trial, uh, Dr. Peretti
9 testified as follows, this is at page 844:

10 "State's exhibit 69C is a photograph showing the legs, the area
11 of the genital mutilation. You can see the binding injuries of
12 the left wrist but also here we can note on the top of the
13 thighs and inner aspect of the thighs the multiple contusions
14 and bruising in the thigh, inside the thighs and you can see
15 that here."

16 Question: "Doctor, what would cause that type of bruising?"

17 Answer: "These types of injuries are normally seen in female
18 rape victims when they are trying to spread the legs for
19 penetration or they may be hit with an object, also. It is also
20 a possibility."

21 Now is that speculation supported by the photos here?

22 A] No.

23 Q] In the image of...

24 A] ...well, these are eight-year-old boys, where they all have
25 little spots on them. There's nothing here that suggests that

1 their legs were forced apart.

2 Q] Is it appropriate, ethically appropriate for a pathologist,
3 based on a photo such as depicted in 69C to suggest, which was
4 done here, that there is, uh, "we see this normally in female
5 rape victims when they're trying to spread their legs for
6 penetration"?

7 A] In my opinion, that has nothing whatsoever to do with what
8 is shown in this picture and I feel like that's very inflam-
9 matory, uh, when you're looking at little bruises in eight-year-
10 old boys, you're looking at kids who are rough and tumble in
11 play and a few bruises on the lower extremities, if they didn't
12 have them, you would wonder.

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

14 THE COURT: All right, let's take the noon recess.

15 Court will be in recess until 1:15.

16 (WHEREUPON, a recess was taken; proceedings resumed as follows,
17 to-wit:)

18 THE COURT: Court will be in session. Go ahead.

19 CROSS-EXAMINATION

20 BY MR. HOLT:

21 Q] Good afternoon, Dr. Ophoven.

22 A] Good afternoon to you.

23 Q] My name is Kent Holt and I'm with the Arkansas Attorney
24 General's office. This isn't really a trial situation, this is
25 more of an evidentiary hearing. But I do have some questions I

1 would like to ask you regarding the work that you have done on
2 this case. And, and a little bit about your background. How
3 many autopsies have you done during the course of your career?

4 A] Uh, hundreds and hundreds and hundreds of autopsies.

5 Q] So is that three hundred?

6 A] No, I don't know, I don't have a, a, uh, a number.

7 Q] Okay. How many have you done in the last five years?

8 A] Probably somewhere between two and three hundred.

9 Q] In the past five years?

10 A] Yeah, around two hundred, plus or minus; yeah.

11 Q] Okay. Well, what about in the past two years?

12 A] I don't know. Probably less than a hundred.

13 Q] Okay. So in the past two years of that number of autopsies
14 how many have been on children, say, under the age of twelve?

15 A] Three or four, maybe.

16 Q] Uh, you mentioned that you had in your training and exper-
17 ience and education that you had an emphasis on pediatric
18 forensic pathology. Uh, are you a member of any organization
19 that subscribes to that specialty?

20 A] Well, that specialty, there's, there's, uh, not very many
21 people that have that kind of training and background, so
22 there's no pediatric pathology, forensic pathology group, but
23 there is a field of pediatric forensic pathology, education,
24 writing, and so on. But there's not enough of us to have a
25 group yet.

1 Q] Okay. Well, isn't there a group called the Society of
2 Pediatric Pathology?

3 A] That's different than pediatric forensic pathology. I am a
4 member of the Society for Pediatric Pathology; as a matter of
5 fact, I'm a life member.

6 Q] Okay?

7 A] Of that organization.

8 Q] Are you also a member of the National Association of
9 Medical Examiners?

10 A] Yes.

11 Q] Okay. Now with regard to that emphasis that you have
12 placed in your own practice on pediatrics, is there any emphasis
13 or education that is not in your practice, uh, education dealing
14 with animal predation?

15 A] Sure.

16 Q] And what - - could you describe that?

17 A] Uh, I've taken a number of courses over the years, uh,
18 usually the teachers are folks that are sponsored by, uh, the
19 FBI and come from the body farm in Tennessee; those are folks
20 where they've actually studied and described different forms of
21 predation. I've also studied predatory marks and so on in cases
22 that I've had. I've, uh, reviewed and kept up to date on the
23 scientific literature; I've worked with the bureau of criminal
24 apprehension on issues having to do with possible predation in
25 cases that we've worked, and then I've had actual cases of, uh,

1 predation in bodies found in, uh, in water.

2 Q] Okay. Is some of that, uh, is one of your concerns as a
3 forensic pathologist a situation when postmortem injuries like
4 animal predation are superimposed on antemortem injuries?

5 A] Of course. That's, that's a question, uh, the distinction
6 between postmortem injury and premortem injury is at the very
7 heart of what a forensic pathologist does, to be able to tell
8 the difference and have the skills, knowledge and experience to
9 do that.

10 Q] You mentioned in preparation for this, uh, in your consul-
11 tation on this particular case that you looked at certain
12 materials. Did you look at any of the forensic reports of other
13 experts retained in this case?

14 A] I have looked at reports that have been prepared, uh, uh,
15 by various experts; yes.

16 Q] Uh, did you happen to peruse a report that was prepared for
17 the defense by a forensic pathologist by the name of Dr. Terri
18 Haddocks?

19 A] I don't - -I don't know. You'll have to show it to me to
20 see whether or not I have, uh, uh, have seen that one.

21 Q] Okay.

22 MR. HOLT: May I approach the witness?

23 THE COURT: You may.

24 MR. HOLT: We'll mark it for identification.

25 MR. BURT: It's already in evidence.

1 CROSS-EXAMINATION, continuing:

2 A] (Witness examining same.) I don't remember the details of
3 it, but I believe I have seen this report. I can't say for
4 certain, though.

5 Q] Okay. Well, let me back up for just a minute. We have
6 had, uh, are you familiar or have you spoken with or consulted
7 with Dr. Michael Baden in reference to this case?

8 A] I haven't talked to Dr. Baden.

9 Q] About this - -you have not?

10 A] No, I have not spoken with any other witnesses in this
11 case.

12 Q] No, I'm talking about before now?

13 A] I haven't spoken with any other witness.

14 Q] Okay. So you don't know, and you didn't have an oppor-
15 tunity to sit in on his testimony?

16 A] No, I did not.

17 Q] Well, if, if he said that he agreed with the cause and
18 manner of death that was listed on the autopsy in this case,
19 would you agree or disagree with him?

20 A] Uh, if he said that, uh, blunt force injury to the head and
21 drowning?

22 Q] Yes?

23 A] Uh, manner of homicide, then I would agree with that.

24 Q] Okay. Now the portion of this particular report that I was
25 going to refer to was an observation by Dr. Haddocks is that

1 "sharp force injuries that are described in Branch's left facial
2 area. I think these are postmortem injuries, possibly
3 attributable to animal depredation, superimposed upon antemortem
4 injuries." Do you believe that any of these injuries in this
5 case are postmortem injuries superimposed on antemortem
6 injuries?

7 MR. PHILLIPSBORN: Objection, Your Honor. Excuse
8 me. Is this to Mr. Branch specifically, or generally
9 in this case?

10 MR. HOLT: Any one specific.

11 THE COURT: All right, I'm going to allow it.
12 You're talking about any one of the three victims?

13 MR. HOLT: Yes, sir.

14 THE COURT: All right, yes, go ahead.

15 CROSS-EXAMINATION, continuing:

16 A] There clearly, in my opinion, is injury to the head, uh,
17 that is most likely premortem, to the skull.

18 Q] To the skull?

19 A] Skull fractures. The remainder of the injuries to the
20 boys' bodies in general, in my opinion, are entirely consistent
21 with postmortem change.

22 Q] Okay. So can you differentiate between someone who has
23 been emasculated and then have suffered postmortem animal pre-
24 dation and someone who has just suffered animal predation?

25 A] I, what I can say is, is there any evidence of premortem

1 injury to the area of the genitals, or any place. Is there
2 evidence of postmortem trauma, if there's evidence of premortem
3 and postmortem, I would entertain that possibility. If there is
4 no evidence of premortem trauma, then I would not entertain that
5 possibility.

6 Q] As in terms of your opinion?

7 A] In terms of my, in terms...

8 Q] ...I'm sorry. In terms of what you observed and then what
9 you would...

10 A] ...in what I would testify to.

11 Q] Okay?

12 A] In other words, anything is possible, but the forensic
13 pathologist also is trained to discuss what is proper and
14 probable. So for instance, if I see a person on the railroad
15 tracks who's been run over by a train and it's clear that he was
16 alive when he was run over by the train but there's parts
17 missing, can I comment about whether or not he was, uh, suffer-
18 ing from some kind of strange problem before he laid down on the
19 tracks? I, all I can say is I have absolutely no evidence that
20 there was premortem trauma besides the train track.

21 Q] Well, you're getting into a whole other case.

22 A] I apologize. I'm just trying to say that there're some
23 rules about what we can speculate about.

24 Q] I see. Uh, is it possible, is it - - well, and in terms of
25 what you saw and your opinion is that you did not see any other

1 evidence of antemortem injury?

2 A] No, I believe that I was specifically asked about the
3 causation of the, of the, uh, genital injuries and the causation
4 of the facial injuries as it relates to, uh, the determination
5 of possible sexual violence or mutilation. There are bruises on
6 the knees and lower legs and there's a little mark on the inside
7 of the lip and there's clearly evidence of, of, uh, inflicted or
8 somehow injurious injuries to the head that I don't think are
9 premortem - - or postmortem. So I was specifically limiting my
10 testimony to those areas that are in question about sexual
11 violence and, uh, mutilation.

12 Q] Okay. Uh, how would you complete this: "When scientific
13 evidence is lacking, experts should..." what? What should an,
14 how should an expert testify when scientific evidence is
15 lacking?

16 A] It depends on what the question is. I mean, it depends on
17 what the question is.

18 Q] Okay?

19 A] If, if it's a question of, uh, significant forensic impli-
20 cation that requires science, then I don't know, or I can't say.

21 Q] Very good.

22 A] Is the answer. If, however, it's not a, if it's not that
23 kind of question, then, uh, I've been known to answer questions
24 like "what are possibilities?" - - like if someone, uh, dies of
25 heat exposure, what are the possible things that could happen?

1 Uh, in the absence of those things I would have to say "I don't
2 have any evidence to support that."

3 Q] If you had, but in terms of being a pathologist or an
4 expert who had an opinion, uh, previously in this case, uh, one
5 of the experts, Dr. Spitz, have you had any consultation with
6 Dr. Spitz?

7 A] Not on this case, no.

8 Q] Okay. Well, for instance, Dr. Spitz made the comment that
9 what he used as part of the basis for his opinion as to the wide
10 abrasions on the face, he said that he referenced his own cat
11 and dog at home, and they were "rough tongued" for example, and
12 Dr. Souviron - - have you had any...

13 A] ...I have not consulted with any of these individuals.

14 Q] Uh, and I wouldn't have a problem if you had.

15 A] No, I just haven't.

16 Q] Okay. You know, part of his opinion and the basis of it
17 was that he was a hunter and a fisherman. So you could have a,
18 you could rely on something other than a scientific evidence to
19 give as part of your opinion and be an expert in that particular
20 area; is that not correct?

21 A] It depends, entirely. Like when I said that looks like a
22 fishscaling knife.

23 Q] Yes.

24 A] That's because I fish. And I think that's a fair conclu-
25 sion. I did not need scientific evidence to draw that

1 conclusion.

2 Q] But when you said those looked like scratches, you had seen
3 a scratch before, so you said that that was a scratch; is that
4 right?

5 A] Well, that's Jan Ophoven, the sixty-two-year Susan of the
6 United States has her own opinion about some things. And then
7 there's my scientific professional opinion and when I answered
8 the question what did those look like; those are claw marks.
9 They just are claw marks. There's plenty.

10 Q] Do you know what kind of claw they're made from, though?

11 A] No, I would turn to, if that was a specific question, then
12 I would ask, uh, uh, and if I were being asked to answer that
13 question, which sometimes I am, I'm in the crime lab and someone
14 says what do you think it could be, Doc? So we can go out and
15 collect evidence to see, uh, you'd be looking for a fairly large
16 clawed animal, so anywhere from turtles to raccoons, to you
17 know, there's all kinds of things that could do that.

18 Q] Right?

19 A] But, uh, if I were going to be more specific then I would
20 narrow my list and then I would go to the people who actually
21 looked in the forest for tracks and, you know, who would know
22 those things better if I'm looking for a, you know, how big of a
23 turtle, or how heavy of a raccoon and then you go to the
24 naturalist for some of those more sophisticated questions. But
25 I don't have to go to a naturalist or a biologist to answer the

1 questions of claw marks.

2 Q] But would it narrow it down for you if you knew, for
3 example, that the bodies were found submerged, would that narrow
4 it down for the possibilities in your mind?

5 A] Not necessarily.

6 Q] It wouldn't?

7 A] No, not necessarily.

8 Q] Wouldn't you want to know the circumstances surrounding how
9 the bodies were found?

10 A] Well, of course, I want to know everything I possibly
11 could, but to answer the question of whether or not it's a claw
12 mark, I don't need to know more than that. Obviously, since the
13 children were drowned, water was involved, so I, my first, my
14 first, uh, uh, request if someone were going to say "identify
15 the likely animal or animal types," I would say, "well, who,
16 what is the local, uh, uh, biology, ecology and who are likely,
17 are there big turtles, are there snappers." We have big
18 snappers in Minnesota and they can really tear apart tissue. So
19 those are the kinds of questions that I would be asking, but
20 before I would come in here and say to a reasonable degree of
21 medical certainty that was a forty pound snapping turtle that
22 produced those marks, then I would, I would have to get
23 additional information and consultation.

24 Q] But you wouldn't say they were claw marks?

25 A] Well, I can say they are claw marks. That's no problem.

1 Q] Uh, you mentioned that you wanted to know everything that
2 you possibly could about a case and I think you also said that
3 you had, you would want to consider whether or not sex might
4 have been a motive in a case?

5 A] No, what I was saying is when I'm working my own cases up
6 and I'm being asked those kinds of situations when I'm drawing
7 conclusions about the nature of the injuries, and then I include
8 that in my analysis. And for this particular case, obviously,
9 that would be a concern to anyone. You have these three child-
10 ren - - it's a very general concern.

11 Q] It would just be a general protocol that you would say?

12 A] Well, naked bodies.

13 Q] That's my next question.

14 A] Sure. It's naked bodies, three decedents.

15 Q] Ligatures?

16 A] Ligatures. That's, that's just common sense.

17 Q] Okay?

18 A] You know, it's like when you find a deceased woman with her
19 skirt up over her head, uh, common sense says you need to work
20 this up as a possible sexual homicide.

21 Q] Okay. Uh, and I think that you mentioned - - what were the
22 three things that you said that you looked for in terms of the
23 possibilities of scientific evidence in sexual assault?

24 A] Uh, the trauma pattern, the evidence of ejaculate, and the
25 presence of sexually transmitted disease of certain kinds.

1 Those are the three, those are the three, uh, solid pieces of
2 evidence, understanding that trauma can occur to a human body in
3 a variety of ways, but if it's a characteristic trauma pattern,
4 then you certainly, uh, raise the possibility.

5 Q] Well, do you distinguish, do you have any distinguish
6 between sexual assault in terms of what you're doing from a
7 medical standpoint and a legal standpoint?

8 A] I don't make a legal determination. So sexual assault is
9 actually a legal term, so my, my language is, is there evidence
10 of sexual trauma, potentially sexual penetration, is there
11 evidence of ejaculate, is there whatever. The assault question
12 obviously comes, uh, from a legal, uh, but when I'm talking
13 about it with my associates, when I'm teaching, when I am
14 lecturing about sexual injuries, I use the term "sexual assault"
15 meaning a criminal act of sexual violence, as Jan Ophoven
16 defines it, not as a, as a legal entity.

17 Q] Okay. What do you go by? Jan or Dr. Jan, either one?

18 A] Well, no, Dr. Jan is the one doing the lecturing and I use
19 that term as an illegal sexual assault either on an, an adult or
20 a child.

21 Q] Well, you would agree with me that there are degrees of
22 sexual assault?

23 A] Uh, legally, I know there are, depending on how far in and
24 that sort.

25 Q] Well, you can have for instance the rape of an individual

1 without, without having evidence of ejaculate?

2 A] Well, of course.

3 Q] That's what I'm saying. You can have - - and also, there
4 is, you can attempt to sexually assault someone and not leave
5 physical evidence of a sexual assault?

6 A] Yes. But then that's not my business. So if there's no
7 evidence, then I'm just here saying there's no evidence.

8 Q] But generally in a circumstantial way, some things do stack
9 up to leading to sexual assault, do they not?

10 A] For the courts. But for the forensic pathologist, it's
11 really very straight forward. There's either an injury or
12 there's not, there's either ejaculate or there's not, there's
13 either sexually transmitted disease or not.

14 Q] And there will be something that is consistent with
15 whatever the crime is that is being charged that may or may not
16 be something consistent with the crime that's charged; correct?

17 A] Well, it depends on what you mean by "consistent with."
18 Consistent with is a term that pathologists use in the
19 differential diagnosis, which means here is a list of all of the
20 possibilities. I wouldn't list it as a possibility unless it
21 was consistent with it.

22 Q] Okay.

23 A] 'Cause that would be silly.

24 Q] Yeah?

25 A] So...

1 Q] ...but is it unusual for a pathologist to list the
2 possibilities?

3 A] No. Possibilities are a part of the thinking process and
4 the expectation is that the listing of those possibilities have
5 taken place and the reasons for excluding or including one of
6 those diagnoses must be provable with scientific evidence.

7 Q] Well, hypothetically, because I think you have mentioned
8 this example, you have said that if ejaculate, for instance, had
9 been found and it had matched one of the defendants in a case
10 where there were children who were assaulted, you would, I think
11 you said they would have a problem with you because you, I guess
12 you...

13 A] ...well, my evidence was not going to be helpful if they
14 were denying sexual contact with the child. No, again, there
15 are circumstances where presence of ejaculate is explainable on
16 a child if there is a family bed and stuff happened during the
17 night; I mean, there is potential explanations for material
18 being on or around a child's body without there having a sexual
19 assault. But one's index of suspicion is very high if sexual
20 ejaculate is found in or on a child.

21 Q] Well, if it's found on a child victim's clothing and it
22 belongs to a certain person does that raise that index of
23 suspicion in your mind?

24 A] Well, that would be separate from my opinion because it's
25 evidence found by law enforcement and they would be testifying

1 as to how they obtained it, whether or not they had proper chain
2 of custody, how they tested it and whether or not it was
3 legitimate. But for me if there is nothing found on the body of
4 the child or in the child, then my testimony will be the same: I
5 have no evidence of sexual injury.

6 Q] You would not consider that as part of the differential
7 diagnosis in what you looked at to determine whether or not
8 there had been a sexual assault?

9 A] Of course I would consider it. Of course, I would consider
10 it. Uh, but when I'm testifying, if there is no evidence of
11 sexual injury, the pathologist has the responsibility of testi-
12 fying truly about what the evidence shows.

13 Q] I see.

14 A] And the evidence doesn't show anything. If you found a
15 stranger ejaculate on a child who has been injured, and it's
16 stranger ejaculate or DNA, then that's one thing. To find dad's
17 DNA on the child's underpants when he changes her pants, doesn't
18 mean anything, unless I find actual evidence of ejaculate.

19 Q] I see. One of the things I need to ask, uh, have you been
20 paid in this case to render an opinion?

21 A] Uh, I believe I have been reimbursed, but to tell you the
22 truth, I didn't check on how much. When I first get involved in
23 cases, I usually get involved without requirement for reimburse-
24 ment. But if there is a preparation of, of report materials and
25 travel, sometimes I do and sometimes I don't. I assume I have

1 been reimbursed, but I don't know how much.

2 Q] You assume you have?

3 A] Well, I could check. I don't know.

4 Q] Have you ever been asked that question before in court?

5 A] Well, I know. Uh, I know that I wasn't initially. Uh, on
6 habeas cases I have a rule that I will review cases for no
7 charge, for habeas cases. And then what I say is if it goes
8 further, to further, uh, uh, work in which I'll have to dedicate
9 substantial time, then I will charge. But I, I quite frankly
10 forgot to find out how much I, if any, I have been paid on this
11 case. I, I am sure that one of the attorneys could tell me the
12 answer to that question but I don't, I don't remember, honestly.

13 MR. HOLT: Could one of you attorneys tell her the
14 answer to that question?

15 MR. PHILLIPSBORN: I, I, my recollection is that
16 Dr. Ophoven has received a retainer for work done on
17 this case, I think, in the neighborhood of three
18 thousand dollars.

19 THE WITNESS: That sounds about right for what I
20 have done.

21 CROSS-EXAMINATION, continuing:

22 A] Because I had to prepare an affidavit.

23 Q] Yes?

24 A] Uh, I worked on the case many years ago and gave my
25 opinions and I didn't charge for any of that. I just said this

1 is an interesting case and this is what I think.

2 THE COURT: How many years ago did you work on
3 it?

4 THE WITNESS: Uh, 2006, maybe. A long time ago;
5 at least, that's a long time for me.

6 CROSS-EXAMINATION, continuing:

7 Q] Was that with Mr. Riordan?

8 A] Oh, gosh. That name rings a bell. So it may be that that
9 was the original attorney. I provided...

10 Q] ...tell me something more contemporaneous; do you expect to
11 charge for your attendance and testimony here today?

12 A] Uh, I'll submit, uh, I'll send a bill and if I get paid,
13 great. And if I don't that's okay, too, on cases like this.

14 Q] Okay?

15 A] My office understands that.

16 Q] That you'll invoice?

17 A] I'll invoice for a day of time on site, uh, and I invoice
18 for an affidavit, which came, uh, at, uh, Mr. Phillipsborn's
19 request and I believe I signed it in 2008 and the preparation of
20 the affidavit, I believe was what I have been reimbursed for.

21 Q] The three thousand?

22 A] Right.

23 Q] Okay?

24 A] And then, uh, I will, uh, my, I know my administrative
25 assistant will submit a, uh, an invoice for today. I don't know

1 whether we're expected to get reimbursed. Sometimes we are and
2 sometimes we are not, but she always submit one and then we talk
3 about it later, based on how the funding works.

4 Q] Okay. And I expect it will be more than what you just - -
5 what, an invoice submitted for an affidavit?

6 A] I charge the same per hour.

7 Q] What would that be?

8 A] Uh, I charge anywhere between three and four hundred
9 dollars an hour. And it sounds like I charged ten hours for the
10 affidavit.

11 Q] What do you anticipate charging for this testimony you've
12 given in court today?

13 A] I believe it's still the same amount, three hundred dollars
14 an hour.

15 Q] Does that include your travel time to and from?

16 A] I do not charge for travel time. I just charge for the day
17 on site, so if I had of been held up in another airport and if
18 my plane gets delayed tomorrow, I don't count door-to-door. I
19 just count the time that I'm actually, uh, on site and it's
20 usually a ten-hour cap, no matter how many days I'm there.

21 Q] I see. Do you recall a case involving an individual named
22 Jeremy Marshall?

23 A] Of course. You guys bring it up every time I testify.

24 Q] Well, I didn't want to disappoint you.

25 A] No, I'm glad you didn't. It tells me you did your home-

1 work.

2 Q] And did you, in that case, did you make a finding or have
3 an opinion that the cause of death was natural?

4 A] Yes, I did.

5 Q] And was that in fact determined to be the cause of death?

6 A] Eighteen years later, uh, the mother came forward and said
7 that she had suffocated her child, which leaves no physical
8 evidence.

9 Q] I see.

10 A] So I autopsied the child; he had been admitted to the
11 hospital with an upper airway infection. He had an upper air-
12 way infection; he had a respiratory arrest at home; they trans-
13 ported him by ambulance; he was in the hospital for a day; he
14 had suffered an irreversible brain injury and he died. And I
15 did the autopsy and he had a swollen larynx and he had
16 infections in the lungs and I called it natural causes.
17 Eighteen years later new information came in that said that she
18 had claimed that she had suffocated the baby. Whether she had
19 or not, I couldn't actually say but the, uh, crime lab people
20 came back and said you called it natural causes; we want to take
21 this for criminal charges, uh, what do you say about the fact
22 that you called it natural eighteen years ago and now it might
23 be a homicide? And I said I had to look at the information and
24 if they had told me he might have been suffocated eighteen years
25 ago, I would have said, uh, uh, undetermined, because I wouldn't

1 have been able to tell from the autopsy. So a lot of people
2 tried to characterize this as a mistake; I don't understand
3 that. If you get additional information then you use your head
4 and fix it.

5 Q] I see. I just bring it up. Uh, what about another case
6 where, uh, I believe that you said that the cause of death was a
7 car crash trauma and a passenger in the vehicle, and the husband
8 admitted to bashing the head?

9 A] May I tell the story of that one?

10 Q] Sure.

11 A] Okay. This was a case that came in from, uh, northern
12 Minnesota...

13 Q] ...does it sort of illustrate the masking of another cause?

14 A] Well, this case was clearly a case of a car crash and a
15 lady who died of blunt force trauma to the head with a basilar
16 skull fracture; a fracture here and a fracture here. And the
17 car, pictures that I got from the scene, from the state
18 Minnesota patrol showed a star pattern on the passenger side
19 where she had clearly hit and lacerated her head and where she
20 had clearly got a skull injury. She had blood in her head and
21 she had a fractured skull. Uh, law enforcement subsequently
22 identified reasons that I considered to be very appropriate to
23 consider this as being a potentially staged car crash. I did
24 not sign the case out yet. I just said the cause of death was
25 blunt force trauma to the head because this was consistent with

1 an accident.

2 Q] What kind of reason did they develop?

3 A] For why they thought it was a homicide?

4 Q] Uh-huh.

5 Q] Uh, this is something I didn't know at the time. There was
6 a stretch of eighteen miles of straight Minnesota prairie, two
7 lane, uh, frozen cold and his car crash occurred, coincidentally
8 with slipping and sliding and crashing into that parked car.
9 Law enforcement thought that that seemed odd since it was a
10 straight road and there didn't seem to be a reason why the car
11 would have gone out of control. And then they investigated
12 further and found out that the gentleman had another, uh, girl
13 friend and that, uh, things hadn't been going well. So there
14 was all of the additional information for them to be suspicious.
15 Okay? So they sat him down and had him go back over his
16 explanations for how things happened and he said he indeed
17 staged the accident, there was a crash and she did impact her
18 head. And what I testified to at the trial was that I couldn't
19 tell whether the injury to the side of her head where he had
20 slammed her against the post before he staged the crash, or the
21 crash with her flying forward and impacting the windshield was
22 the cause or whether the two together, but because he
23 intentionally turned the car into the other car, that changed
24 the dynamics of the event from what would have been an accident,
25 an unforeseen traumatic injury into a homicide, which was an

1 intentional act that could have hurt somebody, so you get the
2 additional information. The case was never signed out as an
3 accident and then a homicide; it was always in the process of
4 investigation. I had people tell me that I got it wrong and
5 then it's, like, well, they did further investigation and we got
6 additional information and then we signed it to make it
7 correctly. I don't understand why that's a mistake, but you
8 know, you guys have got your business.

9 MR. HOLT: Thank you, Dr. Ophoven.

10 THE COURT: Anything else?

11 RE-DIRECT EXAMINATION

12 BY MR. PHILLIPSBORN:

13 Q] Doctor, I gather as part of the - - when you were making
14 the discussion you just had with Mr. Holt, that as a forensic
15 pathologist if you do get additional information about a case
16 you considered some time ago, uh, that you will consider that
17 new information, uh, and uh, if it appears reliable, you may
18 apply it to the analysis in the case?

19 A] That's my job. My job isn't to quote "get it right on the
20 first note," my job is to do good science.

21 Q] And then again, hypothetically, if, uh, a group of
22 colleagues, uh, approached you on a case including people like
23 Werner Spitz and Michael Baden and others, including a chief
24 odontologist from Miami/Dade and asked your opinion about a
25 case, would you be likely at least to consider what, what

1 discussion they had and observations them made to you concerning
2 a case to see whether or not you felt that some of the
3 information they conveyed to you might change your mind about
4 the way you signed out a case some years ago?

5 A] Absolutely. If, if a colleague comes forward and presents
6 me with good alternative supporting evidence for an alternative,
7 uh, diagnosis and it appears that my interpretation of that
8 evidence may have been incorrect, then it is my obligation to go
9 back to square one; whether I would get an independent consul-
10 tation or whether I would honor the experience they're bringing
11 and say, "Man, this is pretty compelling; I probably made a
12 mistake."

13 Q] Now with respect to the question Mr. Holt asked you
14 concerning emasculation, and I, I, we're here to call your
15 attention to your review of ME#331, Mr. Byers, did you see any
16 evidence in the materials you reviewed, including the ones you
17 reviewed here in court today, which showed the injury site, uh,
18 did you see any evidence of, uh, emasculation, meaning the
19 removal of the genitalia being an injury that occurred, uh,
20 antemortem, while, while the child's heart was still beating?

21 A] Absolutely not.

22 Q] Now moving to another area, you were asked about, uh, and
23 here I want to call your attention to the discussion you had
24 with Mr. Holt, a question he asked you about the nature of the
25 crime, uh, the removal of clothing, etc cetera...

1 A] ...yes.

2 Q] Now, uh, I think you explained that those are all matters
3 that you would factor into your consideration of the case, had
4 it been presented to you, had you been essentially, uh, the, the
5 pathologist in the medical examiner's office. This is
6 information you would have considered in assessing the case?

7 A] Certainly. Uh, the location, the site, the presence or
8 absence of clothing, what appears to be postmortem, attachment
9 of ligatures, you know, all of the elements of the case making
10 it a very unique and unusual case, but whenever you have those
11 elements, you have to put a broad, very wide angle on your, uh,
12 taking in of information and then you narrow as you start to
13 see, uh, either miscues, which in this case there appears to be
14 many: the presence of ligatures in someone without a struggle is
15 a very unusual finding and that's something that you just, uh,
16 you take into account. But it's very different than what you
17 would see in a classic case.

18 Q] Now I'd like to zero in on, on some of the information that
19 you conveyed here, because I'm not sure we've discussed it
20 before. And all of my questions are obviously intended, uh, to
21 tap your expertise as a forensic pathologist, but in a case in
22 which ligatures or restraints are applied it sounded as if
23 one of the things that you consider is whether there is evidence
24 that those restraints were applied when a person was alive,
25 mean-ing a) the heart was beating?

1 A] Right.

2 Q] And then second of all, uh, would it be fair to say that
3 one of the things as a forensic pathologist, you may be able to
4 determine is whether there is evidence that an individual may
5 have moved, uh, let's say wrists, in ligatures or tried to pull
6 against the ligatures so that you would see resulting evidence
7 on the body; is that correct?

8 A] True.

9 Q] And, uh, in this particular case you, you mentioned what
10 seemed to be an opinion concerning the ligatures?

11 A] Yes.

12 Q] And the timing of the application of the ligatures?

13 A] Typically, when ligatures are applied, uh, in a fatal case,
14 there is a reason for the ligatures to be present and typically,
15 the reason for the ligatures is to restrain movement of the
16 individual or to capture and to either put a person into a
17 particular position or to keep them from escaping. And in an
18 individual who is alive when that occurs there are changes that
19 occur to the tissue that are different than if and when
20 ligatures or things happen to the body after death. And in a
21 case such as this, the question is obviously were the ligatures
22 present during life or during active attempt to escape, what
23 would be, uh, the explanation for restraining a person who is
24 unable to move and is that an attempt to misdirect, uh, the
25 investigation away from one set of circumstances and towards

1 another, which is something, you know, the FBI speaks to and
2 it's a vast, uh, it's a vast science about the difference
3 between a staging and an actual legitimate crime scene. So the
4 concern would always be that if the ligatures were applied and
5 to a specific position on any of the individuals were not alive
6 at the time that that happened and there may be intentional mis-
7 direction. So that is a question that would be raised in that
8 analysis, uh, in the case and if the body is moved with the
9 restraints or pulled on by the restraints, it certainly can get,
10 you know, pressure on the restraints. But if a person is
11 actually alive when they are applied with, uh, you know, if
12 they're secured at all, then one would expect to see evidence.

13 Q] And, and in this case, uh, I think you've mentioned this
14 earlier, but the, uh, there is evidence that, that, uh, the
15 ligatures are applied to areas that would be evident in one
16 particular victim in which there is at least no evidence of, uh,
17 heart activity?

18 A] No, there is no way to verify scientifically that the
19 ligatures were on a living person.

20 THE COURT: Would it matter whether or not they
21 were conscious at the time that they were applied?

22 THE WITNESS: Uh, unless, if they were applied
23 loosely, which this isn't. This is a hog-tying, so
24 there is pressure. So no, it wouldn't matter whether
25 they were awake or not, although you would expect more

1 injuries if they were awake, obviously.

2 RE-DIRECT EXAMINATION, continuing:

3 Q] Uh, now again, uh, I think you, you, uh, were also asked
4 about a different area and I just want to see if the understand-
5 ing on that statement is accurate. Mr. Holt asked you about,
6 uh, a situation in which you are reviewing a case, the case of
7 these three boys and he asked you to assume that there was some
8 biological material that is found on clothing that is that,
9 uh...

10 MR. HOLT: ...my objection to that is I didn't
11 refer to it as "this case."

12 MR. PHILLIPSBORN: Okay. So I'll withdraw the
13 question in view of the objection.

14 RE-DIRECT EXAMINATION, continuing:

15 Q] Uh, the area, the area of the forensic sciences that, uh,
16 deals with the identification of fluids on, on physical evidence
17 including clothing, would that be, uh, your area or would those
18 be criminalists and persons who deal with biological materials,
19 serologists, DNA experts and the like?

20 A] The only material, uh, for, uh, analysis having to do with,
21 uh, sexual investigation is materials obtained from inside or on
22 the body that I personally collect. I typically turn that over
23 to the criminalists and to the law enforcement laboratory and
24 all of their trace evidence is run by the same people. Years
25 ago when I had, uh, when I got my forensic training, there were

1 a number of individuals who came to the emergency room alive
2 with sexual assault and those tests were actually performed at
3 the hospital where my forensic pathology fellowship was and as a
4 fellow, I had to interpret all of the forensic evidence from
5 sexual assaults from our county emergency room. So we had ten
6 to fifteen of those a day, unfortunately. And so those fluids
7 and materials in the past used to be in a separate location than
8 the crime labs. Now they all go in one package in a kit.

9 Q] Did you see any evidence in your review of this case of,
10 uh, any one of these children being, uh, handled in such a way
11 as to restrain him uh, physically, and by this, to clarify being
12 gripped by the arms or torso, uh, having clothing ripped off
13 during the course of let's say in an aggressive attempt to
14 initiate some kind of a sexual assault?

15 A] No.

16 MR. PHILLIPSBORN: I have nothing further. Thank
17 you very much.

18 MR. BURT: I don't have any questions.

19 MR. HOLT: Just one.

20 RE-CROSS EXAMINATION

21 BY MR. HOLT:

22 Q] Could you provide this Court with a redacted copy of an
23 autopsy that you have done, an autopsy protocol report that you
24 have done in a case involving a child?

25 A] Of course.

1 Q] You could?

2 A] Sure. I have a little boy that died of a ruptured liver
3 from a handle bar accident. Is that okay?

4 Q] Could you provide one that where you determined that the
5 cause, uh, that the manner of death was homicide?

6 A] I, I don't have one. I don't have access anymore because
7 of HIPPA laws.

8 Q] But I asked you to redact it, one that is redacted, it
9 doesn't have names.

10 A] I don't know whether I can or not. I'll have to check
11 because it would be at other institutions than the one I'm
12 currently at, but I can, I will extend every effort to.

13 Q] Well, let me narrow it a little bit more. Could you
14 provide a copy of an autopsy protocol that you have done in a
15 case where the manner of death was listed as homicide through a
16 juvenile and the case was in fact, it did go to trial?

17 A] I don't know. I don't know whether I can or not.

18 Q] Can you provide us with the case notes and you don't have
19 to do it today.

20 A] I don't have records beyond my current caseload. I don't
21 have names, I don't have anything besides what I have at St.
22 Louis County and I have not done an autopsy on a juvenile
23 homicide at St. Louis County. So I don't think I can. I can
24 get you a redacted copy of, of, uh, an autopsy protocol
25 involving a juvenile.

1 Q] Okay. Can you do that?

2 A] I'd be glad to.

3 Q] Okay. And just one other thing. In terms of the places
4 where you have worked and performed autopsies, do you have, is
5 there any set number of tissue slides that you take in
6 connection with a case?

7 A] It depends on the case; it totally depends on the case. If
8 it's a sudden infant death syndrome, there's a certain set and
9 if there's a brain injury, there's another set and if it's a
10 traffic accident, then it's another number. So I don't have a
11 particular number.

12 Q] Okay.

13 MR. HOLT: That's all. Thank you, Doctor.

14 MR. PHILLIPSBORN: I have no further questions.

15 MR. BURT: No further questions.

16 THE COURT: All right, you're free to go. Thank
17 you very much.

18 THE WITNESS: Thank you.

19 THE COURT: Call your next witness.

20 MR. HENDRIX: Judge, we call Gail Grinnel.

21 THE COURT: Raise your right hand and be sworn.

22 (Witness sworn.)

23 THEREUPON,

24 ANGELA GAIL GRINNEL

25 was called as a witness by and on behalf of the Petitioner/