

1           you very much.

2           THE COURT: You may stand down. You're free to  
3 go, unless they want to keep you here for some reason.

4           THE WITNESS: Thank you, Your Honor.

5 (Witness excused.)

6           MR. BURT: Your Honor, we have another witness we  
7 would like to start with, unless the Court has had it  
8 for the day.

9           THE COURT: Well, I'm ready. We'll go on.

10          MR. BURT: Okay.

11          THE COURT: But I'm going to quit at five.

12          MR. PHILLIPSBORN: Your Honor, our next witness  
13 is Dr. Werner Spitz.

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

15 (Witness sworn.)

16          MR. PHILLIPSBORN: Your Honor, as Dr. Spitz is  
17 settling in, I wanted to let the Court know, uh, Dr.  
18 Spitz's testimony is in the area of pathology, and at  
19 some point we have a number of photographs that we're  
20 going to have marked.

21                 Dr. Spitz also put these photographs on a com-  
22 puter disc, so at some point and with Mr. Hendrix's  
23 help, we're going to, uh, I was actually looking at  
24 his computer. We may display some of these  
25 photographs on the laptop.

1 I don't know that we're going to quite get there  
2 this afternoon, though.

3 THE COURT: Well, again, I have to ask if he is  
4 going to testify as a pathologist, what relevance is  
5 it to a Rule 37 petition?

6 MR. PHILLIPSBORN: And that's, uh, Your Honor,  
7 Dr. Spitz was practicing and had been practicing for  
8 quite a while in '93 and '94.

9 He has been the editor and an author of one of  
10 the standard books on forensic pathology, including  
11 one that I think Stidham said that he had pulled some  
12 materials from.

13 And so one of the questions is going to be, as  
14 the Court may recall, as to Mr. Baldwin, the testimony  
15 is that counsel did not consult with a forensic path-  
16 ologist, with a qualified forensic pathologist, or  
17 review the literature or actually seek advice concern-  
18 ing issues that forensic pathologist, so it goes to  
19 effectiveness of counsel, and the omissions in that  
20 particular area.

21 THE COURT: All right, go ahead.

22 MR. PHILLIPSBORN: It's just going to be re-  
23 stricted to that.

24 THE COURT: All right, go ahead.

25 MR. PHILLIPSBORN: Thank you, Your Honor. Your

1 Honor, I'd like to ask that our first three documents  
2 be marked. They have stickers on them.

3 The first in order is Dr. Spitz's CV. And the  
4 next which I have marked for the record but may not be  
5 submitted into evidence, is a letter from Dr. Spitz to  
6 attorney Dan Stidham, marked November 27, 2006, and  
7 the last of this series is a letter to Don Horgan from  
8 Dr. Spitz, dated October 12, 2007.

9 And I will give the Court copies of all of these  
10 documents so the Court can follow along.

11 MR. DAVIS: Your Honor, are they attempting to  
12 introduce the letter from Dr. Spitz?

13 MR. PHILLIPSBORN: I said I was marking them, and  
14 they're actually just going to assist in following  
15 some of the testimony; it's really just for the  
16 convenience of the Court and counsel.

17 THE COURT: 45 was an exhibit, and the other two  
18 were for ID?

19 MR. PHILLIPSBORN: Yes, sir.

20 THE COURT: All right.

21 MR. PHILLIPSBORN: And I'm just leaving these on  
22 the bench so the Court will have a copy.

23 THEREUPON,

24 WERNER SPITZ, M.D.

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

1 having been sworn, was examined and testified as follows, to-  
2 wit:

3 DIRECT-EXAMINATION

4 BY MR. PHILLIPSBORN:

5 Q] Dr. Spitz, thank you very much for your patience, sir.

6 What is your profession, or occupation?

7 A] I am a medical doctor and I am specialized in pathology and  
8 forensic pathology.

9 Q] What is your current employment; what are you currently  
10 doing?

11 A] Currently, I teach; I'm a full professor of pathology at  
12 Wayne State University School of Medicine, and I'm also adjunct  
13 professor of chemistry at University of Windsor in Ontario,  
14 which is across the river from Detroit, in Canada; I teach  
15 toxicology. The main profession that I practice is forensic  
16 pathology. Forensic pathology is a sub-specialty of pathology.  
17 I do private consulting in forensic pathology at the present  
18 time. I am retired from the county of Wayne, which is Detroit  
19 and suburbs where I was a chief medical examiner for almost  
20 seventeen years and then I continued to work, uh, I say  
21 "continued," because I had worked for another county, for the  
22 county of Macomb, M-A-C-O-M-B, uh, before; while I was working  
23 for Wayne County, as well. And I retired from that position as  
24 chief medical examiner in 2004. So at the present time I do, as  
25 I said, consulting in forensic pathology and teaching and

1 writing.

2 Q] Doctor, when did you finish your medical studies?

3 A] I became a physician in 1953.

4 Q] And after that, did you attain any additional or specific  
5 training in pathology and forensic pathology?

6 A] Well, after that I did an internship in what they call a  
7 "straight internship" in pathology, and this was followed by a  
8 residency in pathology. And then I took a side-track and  
9 continued to specialize in forensic pathology. And I've  
10 actually, uh, started to practice exclusively forensic pathology  
11 in 1958, '59. And in 1959 in July, I came to the United States  
12 and worked here at the office of the chief medical examiner for  
13 the state of Maryland. And if you would like me to go through  
14 the, uh, my resume, I will.

15 MR. PHILLIPSBORN: Thank you. Your Honor, may I  
16 approach the witness, just so he has a copy of his CV.

17 THE COURT: Yes.

18 THE WITNESS: Thank you.

19 DIRECT-EXAMINATION, continuing:

20 A] I, uh, as I said, I came to this country in 1959; I came  
21 here as a visitor, to work at the office of the chief medical  
22 examiner in Maryland, to see what it's like. I soon realized  
23 this is what I would like to continue doing, so, in other words,  
24 I decided to stay here. In order to stay, I needed an  
25 immigration visa; at that time you didn't come through Mexico

1 like you do now. So I had to go to the country of my origin,  
2 which is Germany, for two years; that was the law - - and maybe  
3 still is. And I worked at the Department of Legal Medicine,  
4 which is like forensic pathology: doing autopsies and testifying  
5 to the results, at the University of West Berlin in West Berlin,  
6 Germany. And I then came back after two years and three months,  
7 because it took three months to get the visa, and came back to  
8 Baltimore and worked there first as Assistant Medical Examiner  
9 and then as Deputy Chief Medical Examiner until July of  
10 1972. At that time I was offered the position of Chief Medical  
11 Examiner for the county of Wayne, which is Detroit and suburbs,  
12 and I worked there for almost seventeen years. Shortly after I  
13 arrived, the next county asked me if I would help them out with  
14 their autopsies, and I did that and later on, became chief  
15 medical examiner for that county after I retired from the county  
16 of Wayne. My last government employment was until September,  
17 2004, and at that time I retired from official work, except for  
18 the affiliation with the University, uh, with the medical  
19 school. I have published ninety-five scientific articles, most  
20 of them are peer-reviewed articles, which means that other  
21 forensic pathologists review them and decide whether they are  
22 fit to be published. I published a large textbook in forensic  
23 pathology; the textbook has a world-wide circulation. It is  
24 used by pathologists, forensic pathologists, especially. It is  
25 used by police; it is used by lawyers, both on the defense side

1 and on the prosecution side. I am certified by the American  
2 Board of Pathology. I was certified in hospital pathology in - -  
3 you have to have hospital pathology certification to be a  
4 forensic pathologist - - I mean, you can not have it, but then  
5 it's not the same. I was certified by the American Board of  
6 Pathology, which is the body that certifies physicians who want  
7 to be, uh, who want to practice pathology, in Boards, for any  
8 specialty: Board in Surgery; Board in Obstetrics; Board in  
9 Gynecology; Board in Pediatrics; anything. I don't know how  
10 many boards there are; there must be twenty or thirty boards.  
11 In 1961 I was Board certified in Pathology and in 1965, because  
12 of that stint in Germany, they wouldn't let me take the Board  
13 until I became an immigrant, and I took that examination in the  
14 beginning of 1965 and was certified since. I have testified in  
15 all states of the United States in state courts, in federal  
16 courts; I testified before the U.S. Congress, too, in the  
17 assassination of President Kennedy matter, and for the, uh, a  
18 committee that was put together by Nelson Rockefeller, governor  
19 of New York state at that time. I was a committee of four or  
20 five forensic pathologists - - no, there was one who was not a  
21 physician; he was a ballistic expert - - and there were four  
22 physicians, where I wrote a report. That report was later made  
23 public when the House of Representatives established its own  
24 committee, and then this report was made public.

25 Q] Doctor, if you don't mind my interrupting you, to just ask

1 you a few specific questions, and then I wanted to ask you some  
2 more about your background and qualifications. Can you describe  
3 to the Court the process of training that a person who wants to  
4 acquire expertise in pathology undergoes in residency, what does  
5 it mean to go through a residency program in pathology and then  
6 to try to become trained through a residency program in forensic  
7 pathology?

8 A] When we graduate from medical school and we want to  
9 specialize, we can specialize in any type of medicine that is  
10 being practiced, including family practice - - the Board of  
11 Family Practice. If you decide you want to become a path-  
12 logist, you undergo a program, uh, a teaching program in a Board  
13 accredited institution, depending on whether you want to be  
14 certified in anatomic pathology, which deals mainly with  
15 examination of tissues and some body fluids, to determine causes  
16 of diseases. And if a person dies in a hospital, such a person  
17 can have an autopsy performed, if the next-of-kin gives  
18 permission to the hospital to do the autopsy. Such program is,  
19 I think, three or four years; I am not sure. And then after ob-  
20 taining certification, that candidate has complied with the  
21 training period, that person is now admitted to take an exam-  
22 ination; it's a three-day examination. I did that and then I  
23 proceeded, when I came back from Europe, to take the examination  
24 in forensic pathology. I previously, before I left, complied  
25 with the requirement of the Board whereby my work in Baltimore



1 was considered training in forensic pathology, because that  
2 office was one of the two major offices in this country that  
3 offered superb training. And following my work there I was  
4 admitted to the examination. In forensic pathology, this is a,  
5 I think at that that time, it was one and a half-day exam-  
6 ination. And I should tell you that the office in Maryland had  
7 a very active program in training of pathology, if you wanted to  
8 become forensic pathologist. It was accredited and it had lots  
9 of people who worked there and trained there. Dr. Fisher was a  
10 chief medical examiner and he became sick after a while, uh,  
11 that I was there, and asked me if I would assume the position of  
12 being in charge of the training program for those pathologists  
13 who, uh, sought to be forensic pathologists. And there are  
14 other offices like that; at one point I remember there were  
15 twenty. Today, there must be a lot more offices that train  
16 forensic pathologists.

17 Q] Based on your experience in the office in Maryland, as well  
18 as the experiences, you have had since, how long does it nor-  
19 mally take for a person who is advanced enough in their training  
20 that they are trying to seek a specialization training in foren-  
21 sic pathology; how long does it take for that person to be  
22 trained under supervised conditions?

23 A] When the, after completion of medical school, uh, four  
24 years; then four years of - - a minimum four years of training  
25 in hospital-type pathology; and then added to that, one

1 additional year of fellowship in forensic pathology. So if you  
2 add it all together, you have four years for medical school,  
3 four years for anatomic pathology, another year in forensic  
4 pathology, so you've got eleven years.

5 Q] And at what point can a physician who has completed this  
6 specialty training in forensic pathology, apply to take Boards  
7 and actually take the Boards to become certified as a forensic  
8 pathologist?

9 A] I didn't understand that.

10 Q] When is it, in the continuum of your experience, once you  
11 complete your residency and/or specialty training in forensic  
12 pathology, how long is it before you can actually sit as a  
13 candidate for board certification?

14 A] You, they offer the examination, the American Board of  
15 Pathology offers the Anatomic Pathology training certification  
16 twice a year. The Forensic Pathology, as far as I know, is  
17 offered only once a year. And so as soon as you finish your  
18 training, you apply. And then when the date comes when you can  
19 take the examination, you take it. And if you pass, then you  
20 are certified and admitted to this big club of certified  
21 pathologists.

22 Q] Now in the early 1990s, let's say around 1993, 1994, uh,  
23 was the book that you had helped to author, in publication in  
24 fact, in either its second or third edition by 1993?

25 A] Oh, yes. There was not only - - forensic pathology, you

1 should know, in America took off like a rocket with the  
2 assassination of President Kennedy. Until then, until the  
3 assassination of President Kennedy, the attitude was "a path-  
4 ologist is a pathologist is a pathologist"; so if he is a  
5 pathologist, he can do an autopsy, and that's the end of that.  
6 And they soon found out when Kennedy was, President Kennedy was  
7 assassinated, that this was not so simple. The pathologist who  
8 did the autopsy on President Kennedy had done one autopsy on a  
9 gunshot case, and that was the autopsy on the president. And  
10 the people soon realized that there was something missing and as  
11 a result of that, there was lots of research grants offered,  
12 there were positions offered; all of this since 1963, and  
13 suddenly there was programs on television: *Quincy*, *CSI Miami* - -  
14 this, and all kinds of programs. You turn on the television  
15 today and in 1990, when did we have *Quincy*, people asked "why  
16 can't we have" - - they asked me a lot of times - - "why cannot  
17 you determine when this person died? According to *Quincy*, he  
18 died at 12:01." Yes, that is true, because *Quincy* would do the  
19 autopsy, which the show would start at 8:00 in the evening,  
20 finish at 9:00, with four commercials - - well, we don't work  
21 that way.

22 Q] Doctor, let me just display something. I don't know if you  
23 can see it from the witness stand - - this is the third edition  
24 of *MEDICOLEGAL INVESTIGATION OF DEATH - Guidelines for the*  
25 *Application of Pathology to Crime Investigation*, this third

1 edition...

2 A] ...this came out in 1993. There were two editions before  
3 that: one came out in 1972; one came out in 1980. And that blue  
4 book there came out in 2006.

5 Q] Now the third edition of your book, the one that came out  
6 in 1993, covers a number of issues of concern to the forensic  
7 pathologist; correct?

8 A] It is all for forensic pathologists.

9 Q] In addition to your book, Doctor Spitz, were there other  
10 works that would have been considered standard references for  
11 forensic pathologists?

12 A] Oh, yes.

13 Q] And, uh, can you give the Court some idea - - again, with  
14 reference to works, that in your opinion, were considered stand-  
15 ard in the early 90s; in addition to your books, what else was  
16 there?

17 A] There was a book, uh, by Bernard Knight, K-N-I-G-H-T, who  
18 is a professor of forensic pathology and works out of the home  
19 office in Britain and Wales. It's a book about the size of that  
20 gray book and it's a very good book; it's a very thorough book  
21 and he talks about issues that aren't in question here. And  
22 there were other books, too. I don't remember all of the names  
23 of them. It's amazing that there were a lot of English books;  
24 American books just started to come in, in the 70s, and followed  
25 that. I don't remember all of the names, but on the disc that I

1 have, there are pictures and with each picture that is  
2 pertinent, there is the name of the book from where it came.

3 Q] In addition to books, to reference books of the type that  
4 you have written and edited, uh, and of the type that you just  
5 described, are there journals of scientific societies that are  
6 of interest of forensic pathologists?

7 A] Sure. Most of the things that you read in textbooks make  
8 their appearance in journals first. And a textbook, the way I  
9 look upon a textbook, and I think the way most people look upon  
10 a textbook, is it takes two years to make a textbook; by the  
11 time it is printed, by the time it is read and re-read to see  
12 that there are no mistakes, it all takes time. But all of this  
13 originally published in articles, in articles such as, for  
14 instance, here is a journal of forensic; it's called *The*  
15 *American Journal of Forensic Medicine and Pathology*, uh, this is  
16 a forensic journal, and America has two such journals. And they  
17 have been going on continuously for the past fifty years.

18 Q] And again, would there have been such journals in existence  
19 in 1993, whether they were journals published in the United  
20 States, or journals published overseas, that were regularly  
21 consulted by persons in your profession?

22 A] Absolutely. The International journals, uh, didn't even  
23 mention those. It's called the *International Journal of*  
24 *Forensic Science*. There are all kinds of German, French,  
25 British, Australian, Canadian journals that all talk about for-

1 ensic pathology.

2 Q] Now to what degree, Doctor Spitz, and again, based on your  
3 experience, plus doing post-mortem examinations yourself, super-  
4 vising other people who are doing them, or consulting with other  
5 persons, is it customary for forensic pathologists when  
6 necessary to make reference to the literature; if you happen to  
7 see something that is not entirely familiar, is it - - would it  
8 be expected that you would make reference to the literature to  
9 see if you can see anything that might inform you about what you  
10 are looking at?

11 A] Yes. I do that; other people do that, uh, at the end of an  
12 opinion letter, many times I give references. Other people give  
13 references, uh, I think that's routine in pathology to do that,  
14 even in hospital pathology, and maybe there moreso than in  
15 forensic pathology. They list, uh, usually journals because the  
16 journals are much more up-to-date. We will send a paper in and  
17 within six months the paper is published. It doesn't take two  
18 years, and it's up-to-date, and these papers are quoted in  
19 opinions in autopsy reports, and any type of documents that may  
20 become a legal document.

21 Q] Now during the course of your career, is it fair to say  
22 that one of the areas that you did research in and published in,  
23 is the area of death by drowning and certain facets of drowning  
24 issues, generally?

25 A] Yes.

1 Q] And in addition, is it also fair to say that you have  
2 published a number of articles in periodical literature?

3 A] I did.

4 Q] And also, if one is looking at your book, for example, the  
5 third edition that came out in 1993, is it correct that you  
6 personally authored the chapter that has to do with drowning?

7 A] Yes, it came out in 1993 and the two proceeding books also  
8 chapters by me, uh, on the issue of drowning. And in the fourth  
9 edition, my son wrote that chapter.

10 Q] Now, Doctor, just so the record is clear, I put a copy of  
11 your CV in front of you; it's a lengthy CV. Is that an accurate  
12 reflection of your background, uh, including your publications  
13 and lectures, the honors you have been awarded?

14 A] Yes.

15 Q] In the context of your experience, and because of the  
16 nature of these proceedings, I'm going to be restricting my  
17 questions, Doctor Spitz, to your experience, uh, up through the  
18 years '93-'94. And where we depart from that, I'll try to make  
19 it clear, because what we are focused on are things that happen-  
20 ed in those particular years. But would it be standard practice  
21 based on your own experience and your knowledge of the community  
22 of forensic pathologists, for forensic pathologists to consult  
23 with more experienced members of their profession; for example,  
24 for someone from Miami to call you when you were in Maryland; or  
25 for someone from another office to call New York, or any other

1 office, to try to exchange information about some unusual issue  
2 that may have arisen in a case. Is that common?

3 A] Pathologists in general and forensic pathologists, in  
4 particular, do that all of the time.

5 Q] Just in terms, uh, I want to focus for the purpose of the  
6 next few questions, Doctor, on some testimony that was elicited  
7 in the course of this case, bearing on, again, on training  
8 issues, uh, and for the record, I'm making reference to testi-  
9 mony in the Baldwin and Echols trial beginning in the reporter's  
10 transcript, 1088, testimony of Dr. Peretti. I would like you to  
11 assume, Dr. Spitz, that a pathologist testifying in a criminal  
12 proceeding, testified that he graduated from medical school in  
13 1984 and that he then underwent a residency in anatomical path-  
14 ology from 1985 through 1988, and again, anatomical pathology  
15 is, I know you told us, but what general area of study is that?

16 A] Let me give you a couple of examples: Say a woman has a  
17 lump in the breast. She goes to the gynecologist; gynecologist  
18 says "I think the lump needs to come out. I will send you to a  
19 surgeon." Surgeon takes it out, puts it in a solution; sends  
20 it to pathology. The pathologist looks at it with the naked eye  
21 and then makes a cut through it and takes a specimen out of it  
22 and has a technician take a piece of glass - - I'm sure you have  
23 seen it on television - - and it is stained with a certain types  
24 of stain and then he looks at it in the microscope. What's a  
25 "microscope"? It's a number of lenses which enlarge it up to



1 four hundred, and sometimes more, times; I mean, a four-hundred  
2 enlargement, so a little cell that you don't see with the naked  
3 eye becomes "zoom, zoom" and then you can make a determination  
4 whether this is cancer or it isn't cancer. And if it is cancer,  
5 what kind of cancer? And the oncologists, the people who deal  
6 with cancer get this answer, and they determine what kind of  
7 treatment is going to be suitable for this particular type of  
8 disease. You get a lump in the lung; you do the same thing.  
9 Not only for cancer; for what kind of disease or condition this  
10 is, and then the clinicians know how to apply the treatment.

11 Q] Now assume further that the physician who testified, testi-  
12 fied that he, uh, after completing his residency program in  
13 anatomical pathology in the year 1988, he went to the office of  
14 the Maryland, uh, the, the office of the chief medical examiner  
15 for the state of Maryland and then he completed a one year of  
16 training program in forensic pathology. First of all, based on  
17 your own experience, having been the chief medical examiner in  
18 Maryland and having also supervised training there while you  
19 were there for a period of time, is that consistent with your  
20 understanding of the practices of your old office, that a  
21 person, uh, physician might go there after having completed  
22 residency in anatomical pathology for that last year of  
23 specialty training in forensic pathology?

24 A] For training; yes, but the training is not complete until  
25 this person has a certificate for completion of the training

1 where the American Board of Pathology determined that this in-  
2 dividual has taken the supervised training, has documented his  
3 ability by passing the test.

4 Q] You anticipated where I was going. But assume that during  
5 the course of this particular physician's testimony, there is no  
6 reference to his having, uh, actually taken and passed the Board  
7 in forensic pathology. And assume further, Doctor, that a law-  
8 yer, uh, would have consulted with an experienced forensic path-  
9 ologist who is board certified and had gone over this and had  
10 asked, uh, is there a "red flag" here?

11 A] There sure is. There sure is. There is something, well,  
12 the red flag is double, uh, a double red flag. Why is it a red  
13 flag? Because first of all, I would wonder what this  
14 individual, I mean, the Baltimore office was a good office  
15 during Dr. Fisher. I do not know what - - I left that medical  
16 examiner's office in Maryland in 1972, so I really don't know  
17 what happened after that in Baltimore. And then Dr. Fisher died  
18 sometime after that, so that changed that office significantly  
19 and I don't know whether that's better, worse, or where it took,  
20 but the red flag is if you do something, you look at something  
21 that leaves you uncertain, go and ask somebody else. And it's  
22 so easy, because we do it all of the time. I get requests to  
23 look at things; I call back; there is the e-mail - - maybe at  
24 that time there was no e-mail - - but there is today. I'm  
25 talking about today, there is e-mail, or if not, there is the

1 telephone. And I do it; I don't know everything. You cannot  
2 know everything. I know most of things, but I don't know every-  
3 thing. Nobody knows everything.

4 Q] Does the fact that a person who is practicing forensic  
5 pathology is not board certified, is that a red flag?

6 A] That is a red flag.

7 Q] Now also assume this physician, according to his testimony,  
8 uh, left Maryland around '91, came to the state of Arkansas, and  
9 was involved in this case; testifying, in fact, during the year  
10 1994 about autopsies that he did in 1993, uh, so that person is  
11 about three to four years out of his specialty training in the  
12 state of Maryland. From what you were testifying about earlier,  
13 he could have actually taken this board; he was eligible to take  
14 this board; correct?

15 A] Yes, he was eligible to take the boards twice; once for  
16 anatomic pathology, and once for forensic pathology, and the  
17 time was available, because the pathology boards were given  
18 twice for anatomic pathology and the forensic pathology is given  
19 once a year. And their accommodation is, and I used to be in  
20 charge of the training programs, so I would tell the fellows,  
21 "go and take the boards right now while it is fresh in your  
22 minds. Don't procrastinate, because you'll have more difficulty  
23 if you don't take it."

24 Q] In the course of your lengthy career, did you meet a fellow  
25 physician by the name of Dr. William Sturner?

1 A] Yes.

2 Q] And did you know him when he was the chief medical examiner  
3 here in the state of Arkansas?

4 A] Yes, I know him today. I knew him then, that is, and I  
5 know him now.

6 Q] Do you, uh, do you have personal knowledge of a physician  
7 named Dr. Frank Peretti?

8 A] Only that he wrote to me at one time, uh, in the early 90s  
9 I think it was, to ask me to have him come and train with me in  
10 Detroit. And for whatever reason it was, we could not have it.

11 Q] There's nothing pejorative about that; it's just that at  
12 the time you couldn't have him?

13 A] Yes, there is nothing, I mean, I am not suggesting that  
14 there was something ominous about that. We just couldn't have  
15 it. Maybe the office was full; there were a lot of times when  
16 we had only two positions that were funded by the county. But  
17 we sometimes had as many as thirteen visiting people who did not  
18 get paid.

19 Q] Doctor, roughly how many post-mortem examinations would a  
20 forensic pathologist working in your office when you were chief  
21 medical examiner in Maryland, roughly how many autopsies a year  
22 would such a person be expected to do?

23 A] The National Association of Medical Examiners suggests that  
24 we do no more than two hundred and fifty autopsies a year. In  
25 many cases, this is an unrealistic number, because the counties,

1 the government doesn't fund too many positions. So we have to  
2 do more autopsies to comply with the demand. We would do some-  
3 where around three hundred and fifty to four hundred autopsies  
4 per year, per person.

5 Q] By the time you left your position in Detroit, uh, had you  
6 done a number, personally done a number of postmortem examina-  
7 tions in cases involving drowning, in which drowning played a  
8 part in a person's death?

9 A] Oh, sure. I not only did autopsies on drowning, you know  
10 Michigan is surrounded by water. There are lots of lakes and  
11 rivers. I have done autopsies on drowning; I have testified in  
12 regard to drowning. I testified in Wilkes-Barre, Pennsylvania  
13 in the matter of the Mary Jo Kopechne and the Chappaquiddick  
14 bridge with Senator Ted Kennedy. That was a drowning case.

15 Q] Now, again, in your experience, uh, relying on a number of  
16 professional training you have done, professional associations  
17 you have been involved in, uh, as you have become familiar with  
18 the practice of forensic pathology in the United States, would  
19 it be fair to say that certain offices, or perhaps, certain  
20 individual pathologists might become very familiar with drowning  
21 deaths and some of the ancillary issues that occur to human  
22 remains associated with drowning deaths, whereas others might  
23 not have extensive experience with drownings or ancillary  
24 issues?

25 A] Well, you know, in order for me to seek help from another

1 forensic pathologist, what I do and what I think many people,  
2 most people would do, is to go to the library and see who has  
3 written on the subject. Then I know who is the one to consult.  
4 And that's what people do. Still to this day, although I have  
5 not published on drowning specifically of late, but I still get  
6 inquiries about drowning cases. I get inquiries about certain  
7 things that people read in the book and ask me, "well, can you  
8 elaborate on that?"

9 Q] Have you had a chance to look at certain records in con-  
10 nection with the case of *State v. Echols* at all, in the case  
11 that we are in court on?

12 A] Yes.

13 Q] And can you tell the Court what you have had an opportunity  
14 to review?

15 A] I reviewed, Your Honor, uh, a lengthy investigation and I  
16 reviewed three autopsy reports from three, I think eight-year-  
17 old kids, and a lot of pictures, photographs.

18 Q] Did you, and just so we, uh, we cover this for the record,  
19 did you actually prepare a letter after you had reviewed the  
20 materials you reviewed, and sent that letter to an attorney  
21 named Dennis Riordan, law offices in San Francisco?

22 A] Yes, I did.

23 Q] And I'm showing you what's been marked...

24 MR. PHILLIPSBORN: Your Honor, may I approach the  
25 witness?

1                   THE COURT: Yes.

2 DIRECT-EXAMINATION, continuing:

3 Q] I'm showing you what's been marked Exhibit 46, Dr. Spitz.  
4 Is that November 26, 2007 letter the letter that you addressed  
5 to attorney Dennis Riordan?

6 A] (Witness examining same.) Yes.

7 Q] And does that letter, in its first paragraph, accurately  
8 reflect the materials that you actually had occasion to look at?

9 A] Yes, it does.

10 Q] Now was there a time after you prepared that letter when  
11 you obtained some tissue slices and actually reviewed those  
12 tissue slices in relation to this case?

13 A] Yes, in the microscope.

14 Q] And did you then prepare a second letter, uh, this one  
15 covering specifically findings that you have made with respect  
16 to those particular tissue slides?

17 A] I did.

18                   MR. PHILLIPSBORN: Your Honor, if I may approach  
19 Dr. Spitz with what has been marked Number 47?

20                   THE COURT: All right.

21 DIRECT-EXAMINATION, continuing:

22 Q] Dr. Spitz, is that the second letter, the one or the memo-  
23 randum that is dated October 27, 2007?

24 A] (Witness examining same.) Yes, sir.

25 Q] And now Doctor, based on the information that was provided

1 to you, and again, I'm, uh, I am restricting my questions of  
2 you, Dr. Spitz, in terms of what information you would have made  
3 available had someone consulted with you in 1993 or 1994, uh,  
4 first of all, does it happen that criminal defense lawyers or  
5 prosecutors will send you photographs of the case, including  
6 crime scene photographs and autopsy photographs, and ask to  
7 consult with you to obtain the benefit of advice you may have  
8 about their case?

9 A] Absolutely.

10 Q] And is it also customary for you to be asked to review  
11 autopsy reports in that connection; again, so that you can offer  
12 consultation?

13 A] Yes; absolutely.

14 Q] And as far as you know, in 1993 and 1994 and in addition to  
15 yourself, were there other board certified experienced forensic  
16 pathologists in the United States who were available for  
17 consultation?

18 A] Yes; absolutely.

19 Q] And Doctor, is it accepted practice, and again, restricting  
20 these questions to the early 90s, I'm framing them in the terms  
21 of the early 90s, was it accepted practice in your field for you  
22 or another experienced forensic pathologist to review photo-  
23 graphs, for example, and give opinions based on photographic  
24 evidence?

25 A] This has been in the 1990s; this has been before the 90s,



1 and after the 90s. This goes on every day.

2 Q] Now Dr. Spitz, and in this case, uh, maybe the easiest  
3 thing I can do is just ask you to review some photographs. I'll  
4 just begin to introduce this testimony before we adjourn. Dr.  
5 Spitz, I'd like to show you what's going to be marked 48A for  
6 identification. Dr. Spitz, is it your understanding that the  
7 remains of three boys in this case, uh, were initially located  
8 by police officers in a body of water that was running through a  
9 wooded area?

10 A] Yes.

11 Q] And, uh, was it your further understanding that, uh, I'd  
12 like to show you what's been marked Exhibit 48B, that the  
13 remains of the boys were actually located by one or more law en-  
14 forcement officers who, uh, removed the remains, put them on the  
15 bank and then they were later taken away from the area; in other  
16 words, did you have an understanding that it was actually law  
17 enforcement officers who had found the remains?

18 A] Yes.

19 Q] Now were you able to review photographs of the remains of  
20 each of the three young boys who were the victims in this case?

21 A] Yes.

22 Q] And are you aware that each of the cases was actually fur-  
23 nished a specific medical examiner's office number?

24 A] Yes; I know their numbers, actually: 329; 330; and 331.

25 Q] Well, actually, what I'd like to do, beginning this after-

1 noon, and again, realizing that we may do this with a computer  
2 disc in the future, is begin with the case that was 331. I'd  
3 like to show you Exhibit 48C and ask you, Doctor, uh, is first  
4 of all, in terms of the way you identify the, uh, the photo-  
5 graphs and the remains, were the photographs that were presented  
6 to you of the type that I am showing you; in other words, photo-  
7 graphs that had in them at some point some kind of, uh, uh,  
8 medical examiner number as in the one that's in front of you?

9 A] Yes.

10 Q] Now Dr. Spitz, just making reference to the exhibit that is  
11 in front of you, uh, I wanted to ask you a few questions. When  
12 an experienced forensic pathologist is asked to review a case,  
13 and review a set of photographs, is it your habit and custom and  
14 to your knowledge, the habit and custom of other experienced  
15 forensic pathologists, to look at all of the information  
16 available first, and then begin to form opinions; in other  
17 words, uh, do you start - - are you, are you able to form  
18 opinions just based on one photograph, or do you want to see as  
19 much information as possible before you actually start forming  
20 your opinion?

21 A] Well, when I get a call, I will ask what do you have avail-  
22 able. And they will tell me. And I will say can you get me  
23 this or that, in addition. And then they will try and get it,  
24 and usually, they do.

25 Q] Now is it correct to say that based on your review of all

1 of the information that was made available to you in this case,  
2 you formulated certain opinions about the origin of some of - -  
3 or the mechanism that, uh, caused certain injuries to the  
4 remains that are depicted in photographs?

5 A] Yes.

6 Q] What I would like to do is just ask you if you would, to  
7 take a look at 48C, which is the photograph I put in front of  
8 you there, uh, which is a photograph of the face of the young  
9 man involved, uh, can you describe, just so we begin to get  
10 oriented as to some of the vocabulary that's pertinent here.

11 What classes of injuries do you see; are there abrasions; are  
12 there contusions; what sorts of injuries do you see depicted?

13 A] (Witness examining same.) There are abrasions of different  
14 depth; an "abrasion" is a scraping. And sometimes a scraping is  
15 deeper and sometimes it's not as deep. And then there are, in  
16 addition to that, injuries to, uh, in this case, on the upper  
17 lip and on the left cheek, but close to the lip, uh, which are,  
18 uh, at least in part, semi-circular, and they look sharp.

19 Q] I'm showing you Exhibit 48D, Doctor. Is that again the  
20 same medical examiner number, and does it show some of those  
21 semi-circular injuries you were just describing a little bit  
22 closer up?

23 A] Yes, in fact, this is close-up picture, and there are more,  
24 uh, they are almost all semi-circular and some of them show a  
25 scraping around the edge. And then there are scrapes on the

1 left upper eyelid, on the tip of the nose, on the left side of  
2 the bridge of the nose, like here (indicating). That's what  
3 this picture shows.

4 Q] I would like to show you, Doctor, what has been marked as  
5 48E for identification. This shows a different area, uh, of  
6 this little boy's remains. Would you be kind enough to just to  
7 describe for the record what that shot shows?

8 A] (Witness examining same.) This shows mutilation in the  
9 genital area, uh, this shows, uh, uh, tearing off of the, uh,  
10 scrotum, uh, with surrounding scrapping. And when I say  
11 "tearing off," I mean tearing off. This is not cut off; this is  
12 torn off. And, uh, I see what looks either like a superficial  
13 scrapping or a bruise, two bruises, about I would say size of a  
14 quarter or maybe a little bit bigger, or even or less. Other-  
15 wise, I see nothing of significance on the body, uh, the line  
16 across the chest between the nipples, which is from the - - this  
17 is a, uh, uh, because the body was face down at one time on the  
18 autopsy table and they turned it back over - - this is just an  
19 impression that will probably go away after that. And then I  
20 see that the hand, the fingers and the hands are somewhat,  
21 especially the left hand, the right hand shows it less because  
22 you don't see as much of it as you do on the left hand. The  
23 hand shows, uh, uh, like when you put the hand in water, uh,  
24 especially warm water, uh, the skin gets wrinkled and becomes  
25 white and the longer it stays, the more white and the more

1 wrinkled it gets, to a fault; and both hands on the right side  
2 to that, the index and middle finger on the left side.

3 Q] Doctor, I'm showing you what's been marked next in order,  
4 which is 48F...

5 MR. PHILLIPSBORN: ...and Your Honor, I'm going  
6 to hand these photographs up to the Court so the Court  
7 can review them.

8 DIRECT-EXAMINATION, continuing:

9 Q] Which is 48F is a somewhat similar shot. Is there, uh, are  
10 there any other matters that are apparent to you from that shot,  
11 and that is to say, I realize it's relatively distant, uh, but  
12 before getting into closer-up shots, it seems as though there  
13 are different colors and the tissue appears to be different,  
14 slightly different colors in the thigh area, the upper thigh  
15 area?

16 A] When the, uh, when the areas on the body where the upper  
17 layer of the skin is removed by scraping or by rubbing it away,  
18 but if you rub long enough, you're going to rub away that area,  
19 that portion of the skin which is called epidermis, which is  
20 that layer which the snake sheds once a year. We don't shed  
21 those layers; people don't shed that. Mammals don't shed it,  
22 but reptiles do. And there are areas which are like that around  
23 the area, the genital area, and when those areas dry, they be-  
24 come darker. They become so dark that actually they may even  
25 get to being dark brown, or even black.

1 Q] I show you then, Doctor, 48G, and ask you first of all, in  
2 terms of the rubbing away the skin, the epidermis, are there  
3 areas shown in that photograph of the epidermis, uh, fluffed  
4 away?

5 A] Yes, there are a whole array of scrapes, scratches, linear,  
6 that show definitively that there is a tearing off of the  
7 scrotum, with pieces of flesh hanging loose. I'm sorry about  
8 the graphic, being that graphic, but that's what the picture  
9 shows, uh, hanging loose. And then you see three marks, uh,  
10 which are wider, uh, parallel spaced equally between each other  
11 on the inner upper posterior, meaning back surface of the left  
12 thigh. And you see that these areas, wherever they had the  
13 opportunity of drying, they didn't have much opportunity,  
14 because let's not forget, they were taken out of water. They  
15 don't dry in water. But you can see that the skin is  
16 discolored, or discoloring, because it is in the process of  
17 becoming dry in some areas, like on the area on the left side,  
18 you can see already the yellowish tint that's becoming notice-  
19 able which will with time become brown and then maybe more  
20 brown, more brown, more brown.

21 Q] Now Doctor, in just looking at that photograph and also re-  
22 flecting on the fact that you have looked at the number of  
23 photographs in connection with this case, if a lawyer had come  
24 to you in the early 1990s and had given you photographs,  
25 including the many photographs of the specific area of this

1 young boy's body that you're looking at now, uh, would you have,  
2 uh, what, what kind of information would you have supplied the  
3 lawyer who had asked, "Doctor Spitz, in your opinion, how did  
4 the - - what's the cause of this discoloration; how come there  
5 are areas that are - - the skin is sloughed off - - how did that  
6 happen?" What is your opinion?

7 A] Well, if he gave me this picture, I would say to him "can  
8 you give me pictures from other areas of the body, as well? Can  
9 you show me a picture where the body is turned over? Can you  
10 show me a close-up, and distant pictures of those areas?" I  
11 can give him an opinion on this, but it is superior to base an  
12 opinion on more evidence.

13 Q] When you do begin to theorize that the epidermis may have  
14 been removed in the manner that's seen here, what sorts of  
15 mechanisms of injury come to mind in connection with that; I  
16 mean, is that a tool, does a tool do that, uh, did the water do  
17 it, what - - what?

18 A] If, if you look at each and every injury, you can probably,  
19 uh, opine that there are different - - for lack of a better term  
20 - - tools that could have done this. If you take all of the  
21 injuries together, and I'm talking about the close-up of 48G, if  
22 you look at all of these together, I see that which I have seen  
23 before.

24 Q] Which is what?

25 A] Which is that this is, uh, uh, mutilation; post-mortem

1 mutilation, after-death mutilation by animals.

2 Q] Can you explain to the Court how - - what is your opinion  
3 based on - - how is it that post-mortem mutilation by animals -  
4 - what is significant, what are the significant hallmarks that  
5 you are looking at?

6 A] Well, the first, the most impressive thing that you  
7 immediately zero on, you can't escape that, is the fact that the  
8 scrotum is missing. The next thing you look, when you look  
9 again, you see not only is the scrotum missing, but the area  
10 where it is missing is where it is amputated, if you will, is  
11 ragged, jagged, irregular. And the adjacent skin has abrasion,  
12 scrapping of the epidermis. The epidermis, the upper layer of  
13 the skin, is irregularly, without any regularity at all, uh,  
14 moved away. Furthermore, there are gouge marks around on the  
15 inner surface of the thigh and on the front of the upper thigh,  
16 mostly on the inner-surface in the general area of the genitalia  
17 if you imagine the legs being like that (indicating) or like  
18 this (indicating), this part is missing and around here and here  
19 are, and I'm talking about the lower extremities, uh, are these  
20 irregular relatively superficial gouges and linear scrapes.  
21 Large animals, dogs, I think, do this with their paws, with  
22 their mouths, grabbing loose parts of the body: the scrotum is a  
23 loose part of the body that is a, uh, can I call it a  
24 "favorite"? It's a point of attack by large dogs. And on my  
25 disc that I have here, there is a picture from a magazine that I



1 did not - - it's not my case; it's somebody else's publication,  
2 where a scrotum was ripped off, just the same as this, only this  
3 is a child; that was an adult. That's the only difference. The  
4 totality of the injuries here really leaves no doubt that this  
5 the teeth of a dog, of a large animal, and when I say "dog," I  
6 don't mean dog specifically. It could be a coyote; a canine-  
7 type animal. The scraping is by the animal - - we have all seen  
8 dogs try to come closer to the prey and try to grab it, only  
9 they don't have fingers; they have claws. That's what leaves  
10 these, uh, uh, scratches. These scratches are mostly in the  
11 same direction, because they go like that (indicating), they  
12 don't go sideways, and they dig their teeth into the tissue.  
13 They don't pull out deep tissue, as I'm showing with my hand,  
14 chunks of tissue. They grab and shake.

15 THE COURT: I hate to stop in the middle, but I'm  
16 tired.

17 MR. PHILLIPSBORN: I know you are. So I know  
18 that we have talked about when we can conclude this  
19 matter, and I don't know that we can finish or not  
20 today, and I don't know what the Court's thoughts are.

21 THE COURT: Well, we'll recess for now and y'all  
22 can get together here in a minute or two and tell me  
23 what days you can come back, or want to come back.  
24 That's the best I can do.

25 MR. PHILLIPSBORN: I understand, and we'll also

1 have to talk to Dr. Spitz to see when he is available.

2 THE COURT: Well, let's try to do that now, and I  
3 can give you a calendar date so we will know.

4 THE WITNESS: Your Honor, I would like to make a  
5 comment, if I may?

6 THE COURT: Yes, sir.

7 THE WITNESS: For me, it would be very difficult,  
8 because I don't have my calendar. And unfortunately,  
9 my secretary is ill today and she is not in the  
10 office.

11 THE COURT: We're talking about some time in  
12 January, Doctor. We're not going to be able to do it  
13 until then.

14 THE WITNESS: That's a different story.

15 THE COURT: Well, gentlemen, I have the three  
16 days that I told you about that I could give you in  
17 December, but other than that, I don't have the time.

18 MR. DAVIS: What were they? The 17<sup>th</sup>, 18<sup>th</sup>, and  
19 19<sup>th</sup>?

20 THE COURT: Yes, but if we're going to continue  
21 it, I'd just as soon continue the whole thing until  
22 January.

23 MR. PHILLIPSBORN: Well, Your Honor, if you'll  
24 give us just a moment, why don't we come up with some  
25 dates?

1           THE COURT: Okay.

2 (A recess was taken; proceedings resumed as follows, to-wit:)

3           THE COURT: Are we set on the dates of the 28<sup>th</sup> of  
4 January and continue on until it is over?

5           MR. BURT: Right.

6           THE COURT: I am going to want y'all to prepare  
7 me briefs that spell out, I mean, a precedent that  
8 fits your theory of the case.

9 (THEREUPON, the proceedings were concluded November 21, 2008 and  
10 continued until April 2, 2009.)

11                                   **APRIL 2, 2009**

12           THE COURT: All right, let's get started. Where  
13 were we - - I can't remember now.

14           MR. ROSENZWEIG: Your Honor, we were on several  
15 tracks and for the purposes of this hearing, we are  
16 finishing Mr. Stidham and Mr. Crow in this session of  
17 court.

18                   And technically speaking, the record will reflect  
19 that the State had reserved some cross and that Mr.  
20 Burt had started re-direct just to get some done, and  
21 the State had reserved cross and I think we both  
22 agreed the proper thing to do would be for the State  
23 to resume its cross of Mr. Stidham at this time.

24           THE COURT: All right. That's fine. Well, what  
25 are we doing tomorrow? The same thing?