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DONTAE SPIVEY, \* IN THE  
Petitioner \* CIRCUIT COURT  
v. \* FOR BALTIMORE CITY  
STATE OF MARYLAND \* POST-CONVICTION NO. :  
\* 9759  
\* ORIGINAL CASE NOS. :  
\* 198300048  
\* 199029053  
\* 199029055

\* \* \* \* \*

TRANSCRIPT OF PROCEEDINGS

POST-CONVICTION HEARING

BALTIMORE CITY, MARYLAND

NOVEMBER 30, 2011

BEFORE: THE HONORABLE LYNN KELLENE STEWART

Transcriptionist: Robin C. Comotto, Notary Public

Proceedings recorded by digital CD recording.

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A P P E A R A N C E S

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T A B L E O F C O N T E N T S

WITNESSES:	EXAMINED BY:	PAGE
Produced by the Petitioner:		
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Michael Middleton	DIRECT Ms. Kamins	25
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1 P R O C E E D I N G S

2 (On the record, video recording begins.)

3 THE COURT: All right, State?

4 MR. GIBLIN: Good afternoon.

5 THE COURT: Good afternoon.

6 MR. GIBLIN: Donald Giblin, for the  
7 State, calling the matter of the Post-Conviction  
8 Petition of one Dontae Spivey. This is Post-  
9 Conviction Number 9759, arising out of Cases  
10 199029053, and 055.

11 THE COURT: Okay, I have all of the wrong  
12 numbers.

13 MR. GIBLIN: Really?

14 THE COURT: Yeah.

15 MR. GIBLIN: I read them from  
16 Petitioner's --

17 THE COURT: Right, I'm sure you -- no,  
18 you probably have the right numbers. I have all  
19 the wrong numbers --

20 MR. GIBLIN: Oh, okay.

21 THE COURT: So, let me try this, once

1 more. What are the -- what is the -- the Post-  
2 Conviction Number is what?

3 MR. GIBLIN: I have it as 9759, Your  
4 Honor.

5 THE COURT: And the actual case number?

6 MR. GIBLIN: Is 199029053, and 055.

7 THE COURT: Is that right, Madam Clerk?

8 MADAM CLERK: (No audible response.)

9 THE COURT: What do you all do when I'm -  
10 - give me the Court file, please.

11 What do you all do when I'm doing this?  
12 Can you follow along?

13 No, that's not what this has. This has  
14 198300048.

15 MR. GIBLIN: That's correct, Judge. I  
16 will read the numbers from the transcript rather  
17 than from the Petition.

18 MS. KAMINS: Your Honor, if I may, the  
19 numbers on the transcript are going to reflect the  
20 co-Defendant's case, as well. So, --

21 THE COURT: Okay, what --

1 MS. KAMINS: -- there are three case  
2 numbers.

3 THE COURT: Okay, let's do it this way.  
4 You know, generally, you file the post-conviction  
5 in your own case. And that case number, according  
6 to Dontae Spivey's file, is 198300048. Is that Mr.  
7 Spivey's case number?

8 MS. KAMINS: That is one of Mr. Spivey's  
9 case numbers, Your Honor.

10 THE COURT: Okay.

11 MS. KAMINS: There are two additional  
12 case numbers that are also Mr. Spivey's case.

13 THE COURT: Do you have the other files,  
14 Madam Clerk?

15 MADAM CLERK: No, that's all.

16 THE COURT: You know what? I'm really  
17 very sick of this --

18 MADAM CLERK: (Inaudible).

19 THE COURT: Yeah, well, no. This is  
20 ridiculous.

21 Okay. Supplement post-conviction. Let

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1 me tell you what we have, here. A motion to  
2 continue, let's start all the way at the beginning.  
3 Who knows what that might bring us.

4 Stand up, Counsel, this is your fault,  
5 whoever filed this.

6 MS. KAMINS: Your Honor, I filed the  
7 substantive pleading, but I filed --

8 THE COURT: Well, you should have made  
9 sure all the right case numbers are on here.

10 MS. KAMINS: Yes, Your Honor. I believe  
11 it does have the --

12 THE COURT: The case numbers that we  
13 have --

14 MS. KAMINS: -- right case numbers on it.

15 THE COURT: Okay, but when I start, you  
16 have to stop. Even if I'm wrong, you have to stop  
17 because I sit here and you stand, there, okay?

18 MS. KAMINS: I was simply trying to  
19 assist the Court.

20 THE COURT: Yeah. Don't.

21 199029053 and 55? Is that the case

1 number you have?

2 MS. KAMINS: Those are two out of the  
3 three, Your Honor.

4 THE COURT: And the other one is  
5 198300048?

6 MS. KAMINS: Yes, Your Honor.

7 THE COURT: That's the first one we have.  
8 But it doesn't seem like anybody took the time to  
9 write all the numbers on the rest of the filings.

10 MS. KAMINS: What filings are you  
11 referring to, respectfully, Your Honor?

12 THE COURT: Gordon Tayback (phonetic)  
13 filed something. Something from the Court.  
14 Prevas. Another something from Dontae Spivey only  
15 indicates 48. Then we have a 49, from Dontae  
16 Spivey, case ending in 49 from Dontae Spivey, which  
17 I don't think he was even convicted on. Then we  
18 have another 49.

19 MS. KAMINS: Those are co-defendant's  
20 case numbers, Your Honor, that --

21 THE COURT: I'm just telling you what's in

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1 his file, and these are letters signed by him, and  
2 those are the case numbers he's put on the files,  
3 okay?

4 MS. KAMINS: I understand, Your Honor.

5 THE COURT: Supplement, only in the case  
6 ending in 48. 48. Case ending in 48, only. 48,  
7 53, and 55. Good Lord, and then the transcript has  
8 41 and 7003.

9 MS. KAMINS: Because the cases tried with  
10 the co-Defendant, Your Honor, together, so all the  
11 case numbers will be reflected on the front of the  
12 transcript; whereas, the post-conviction is, of  
13 course, in Dontae Spivey's name, only, --

14 THE COURT: Okay, but this transcript,  
15 official transcript of proceedings, in State versus  
16 Tyrone Jones?

17 MS. KAMINS: That's an Exhibit, Your  
18 Honor, to this.

19 THE COURT: Okay. I'm just going  
20 through, very quickly, looking at this. We have  
21 the -- okay. And the transcript to this matter is

1 where? Is there a transcript for this matter?

2 MS. KAMINS: There is a very large trial  
3 transcript, Your Honor.

4 THE COURT: Okay. And do we have that,  
5 Ms. Walker?

6 MADAM CLERK: (No audible response.)

7 THE COURT: So, just so -- I don't know  
8 what you're going to do, Madam Clerk, because you  
9 only have one file. It's 198300048, and 199029053  
10 and 55.

11 MS. KAMINS: That's correct.

12 THE COURT: Is that all one incident --

13 MS. KAMINS: Yes, --

14 THE COURT: -- or one set of incidents?

15 And how many co-defendants?

16 MR. GIBLIN: There were two, Your Honor.

17 THE COURT: So, it was two co-Defendants,  
18 and that's why the numbers go from 29-052 to 30-  
19 048?

20 MR. GIBLIN: Yeah, I believe Counsel was  
21 absolutely correct with the numbering of her

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1 supplement to this.

2 THE COURT: Okay, so the Supplement's 53,  
3 55 and 048?

4 MR. GIBLIN: 048 being of 98, is that  
5 correct?

6 MS. KAMINS: Correct.

7 MR. GIBLIN: Okay. And if I didn't call  
8 98, that's my fault.

9 THE COURT: Okay. But you see why it's a  
10 little weird?

11 MR. GIBLIN: Oh, I expect weird, Judge.

12 THE COURT: Uh-huh. You know what? I  
13 should by now, too, but...

14 And I apologize, Counsel, but you don't  
15 know -- today has been a day when they don't have  
16 Court files, they have the wrong Court file, the  
17 computer stops working, no, we don't have a  
18 transcript; oh, are those seven cases on the  
19 docket, too? So it's been one of those days so I  
20 have to apologize, ma'am.

21 MS. KAMINS: No problem.

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1 THE COURT: And, for the record, your  
2 name is?

3 MS. KAMINS: Rachel Kamins.

4 THE COURT: Spell your last name, please.

5 MS. KAMINS: K-A-M-I-N-S.

6 THE COURT: All right, so, (inaudible).  
7 Counsel?

8 MS. KAMINS: Thank you, Your Honor.  
9 We're here on the post-conviction case of Mr.  
10 Spivey. Mr. Spivey was convicted in May of 1999 of  
11 murder, handgun violation, robbery with a deadly  
12 weapon, and possession with intent to distribute.

13 THE COURT: Was that the use of a handgun  
14 to commit a crime of violence?

15 MS. KAMINS: That's correct.

16 THE COURT: Okay.

17 MS. KAMINS: He's serving a sentence of  
18 life plus forty years.

19 THE COURT: All right.

20 MS. KAMINS: Now, talk about complicated,  
21 we're not going to get bogged down by this, I hope,

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1 but just to clarify -- and probably explain why you  
2 have such a large stack of stuff -- he filed a pro  
3 se petition -- or, actually, no -- he filed a  
4 petition for post-conviction relief, by counsel,  
5 through counsel, I should say --

6 THE COURT: Mm-hmm.

7 MS. KAMINS: -- back in '06.

8 THE COURT: Have a seat, Mr. Spivey.  
9 Mm-hmm.

10 MS. KAMINS: Back in 2006.

11 THE COURT: Right.

12 MS. KAMINS: Okay, so, this case has been  
13 a post-conviction case for approximately five  
14 years.

15 THE COURT: Yeah.

16 MS. KAMINS: Over the course of which  
17 multiple supplements were filed, pro se, by Mr.  
18 Spivey.

19 THE COURT: Mm-hmm.

20 MS. KAMINS: I was retained. What I  
21 tried to do, for everybody's benefit, was to sort

1 of distill everything into one pleading so that  
2 Your Honor does to have to, and the State's  
3 Attorney does not have to thumb through the various  
4 pro se filings. And that --

5 THE COURT: And that was a supplement --  
6 which I don't have --

7 MS. KAMINS: You don't have a copy of the  
8 supplement?

9 THE COURT: It's in the Court file but I  
10 don't have a copy.

11 Let me have it from the Court file,  
12 please?

13 Go right ahead.

14 MS. KAMINS: Okay, so that's obviously  
15 where everything that we are raising in this post-  
16 conviction is contained in that single pleading  
17 that was filed, at the beginning of this month,  
18 entitled Supplement to Petition for Post-Conviction  
19 Relief.

20 In that Petition, we allege ten instances  
21 of ineffective assistance of counsel, one

1 cumulative error argument, and an independent,  
2 standalone (inaudible) claim.

3 THE COURT: Mm-hmm.

4 MS. KAMINS: And I would like to go  
5 through each and every one of those issues, today.  
6 One of my concerns is whether or not I have the  
7 presence of the trial attorney in the case, who I  
8 subpoenaed but who gave me an ambivalent answer.

9 THE COURT: Who is the trial attorney?

10 MS. KAMINS: Michael Middleton.

11 THE COURT: He's here.

12 MS. KAMINS: Is he? Okay. I didn't see  
13 him.

14 Hello, Mr. Middleton.

15 Mr. Middleton will be my primary witness.  
16 And, for his convenience, I'd like to call him  
17 first, but I want to give a very brief statement,  
18 if I may, just to kind of put the case -- unless  
19 Your Honor prefers that I go straight to the  
20 witness and --

21 THE COURT: Let's just go to the

1 witnesses.

2 MR. GIBLIN: Your Honor?

3 THE COURT: And before we start, just so  
4 you all know, Judge Stewart doesn't stay late.  
5 We're not going to be here until seven or eight  
6 o'clock. That's just not going to happen. We  
7 might be here at eight o'clock tomorrow morning but  
8 we don't do -- I don't do seven or eight o'clock at  
9 night, okay?

10 MR. GIBLIN: Your Honor, I don't believe  
11 we will even approach that.

12 THE COURT: Okay.

13 MR. GIBLIN: And, quite honestly, the  
14 State has absolutely no objection for Counsel  
15 giving a short introduction to her presentation.

16 THE COURT: All right.

17 MS. KAMINS: No, no, no, wouldn't -- I'm  
18 not going to do that, Your Honor, I'm going to go  
19 straight to the witness, both out of respect to the  
20 Court and out of respect to the witness so that he  
21 can be on his way. I will, however, reserve my

1 remarks more to be kind of a conclusory statement,  
2 and then address some other miscellaneous, what I  
3 would consider necessary housekeeping issues,  
4 perhaps after the witnesses testify. And my only  
5 other witness will be Mr. Spivey and that will just  
6 be on a single issue.

7 THE COURT: Okay.

8 MS. KAMINS: I would call Mr. Middleton  
9 to the stand, please.

10 MR. GIBLIN: Your Honor? Here's my  
11 problem.

12 THE COURT: Come up to the bench.

13 MR. GIBLIN: Okay.

14 THE COURT: Have a seat, Mr. Middleton.

15 MR. MIDDLETON: Good afternoon.

16 THE COURT: Good afternoon.

17 (Counsel approached the bench and the  
18 following occurred.)

19 MR. GIBLIN: My only concern is that the  
20 single issue that Mr. Spivey is going to testify  
21 may be an issue that Mr. Middleton would need to

1       respond to. So, by doing him first and by  
2       convenience and letting him go then we've got a  
3       problem.

4               MS. KAMINS: That's true.

5               THE COURT: Okay, well, for whatever the  
6       issue is with Mr. Middleton, put him on the stand  
7       for that limited purpose, if you want, or do  
8       whatever you want to do with Mr. Spivey.

9               MS. KAMINS: I can just put Spivey on  
10       first and then --

11              MR. GIBLIN: Yeah, that's what I --

12              MS. KAMINS: Yeah.

13              MR. GIBLIN: -- that's all I was saying.

14              THE COURT: Okay.

15              MS. KAMINS: I'll just reverse.

16              THE COURT: That will work.

17              MS. KAMINS: Okay, thank you.

18              THE COURT: Thank you.

19                       (Counsel returned to trial tables and the  
20       following occurred in open court:)

21              THE COURT: Mr. Middleton, it looks like

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1       you're going to be second, sir, not first.

2                   MR. MIDDLETON:   Yes, Your Honor.

3                   MS. KAMINS:   I'll get to you quick, Mr.  
4       Middleton.

5                   Yes, Your Honor, I'm going to change  
6       course and call Mr. Dontae Spivey to the witness  
7       stand, please.

8                   THE COURT:   All right.

9                   (The witness was sworn.)

10                                   DONTAE SPIVEY,  
11       the Petitioner herein, produced on call of the  
12       Petitioner, first having been duly sworn according  
13       to law, was examined and testified as follows:

14                   MADAM CLERK:   Thank you, you may be  
15       seated.   And can you please state your name and  
16       your DOC number, for the record?

17                   THE WITNESS:   Dontae Spivey, 2-8-5-6-3-1.

18                   THE COURT:   2-8-5-6-3-1?

19                   THE WITNESS:   Yes.

20                   THE COURT:   Thank you.

21                                   DIRECT EXAMINATION

1 BY MS. KAMINS:

2 Q. Mr. Spivey, you're currently  
3 incarcerated?

4 A. Yes.

5 Q. And you've been incarcerated since when?

6 A. September 27, 1988.

7 Q. And you're serving what sentence?

8 A. A life plus forty sentence.

9 Q. And who was your trial attorney?

10 A. Michael Middleton.

11 Q. Was Mr. Middleton present with you, in  
12 court, throughout your trial?

13 A. Yes.

14 Q. Was he present on the day of sentencing?

15 A. Yes.

16 Q. On the day of sentencing do you recall  
17 the Judge giving you post-trial rights?

18 A. I can't remember exactly what it was but  
19 I remember she said something.

20 Q. Okay, do you recall whether or not you  
21 were told at the time that you had the right to

1 file a motion for modification of sentence within  
2 ninety days of your sentence?

3 A. Can't remember (inaudible).

4 Q. Okay. After you were sentenced, did you  
5 have any communications with Mr. Middleton?

6 A. No, ma'am.

7 Q. Does that include written communications,  
8 telephonic communications, in-person  
9 communications?

10 A. No.

11 Q. No contact, whatsoever?

12 A. No.

13 Q. Did Mr. Middleton ever discuss with you  
14 the post-trial rights that you had in light of the  
15 Judge's advisement?

16 A. No.

17 Q. Did you know that you, in fact, had the  
18 right to file a motion for modification of  
19 sentence?

20 A. After I got to the Maryland House of  
21 Correction (inaudible).

1 Q. And approximately when was that relative  
2 to when you were sentenced?

3 A. It was some time in -- I think it was '99  
4 or 2000.

5 Q. So, approximately how long after your  
6 sentence would you say it was?

7 A. I'm not sure exactly when but --

8 Q. Was it after the ninety-day period had  
9 expired?

10 A. It possibly was.

11 Q. What did you do in light of your  
12 revelation? What did you then do once you learned  
13 you had the right to file a modification  
14 (inaudible)?

15 A. I wrote a letter to the Judge.

16 Q. And what did you say in that letter?

17 A. Can I get my time reduced?

18 Q. And what was the response to your letter,  
19 if any?

20 A. It is not in the public interest.

21 Q. The answer was it was not in the public

1 interest to reduce your sentence?

2 A. Yes.

3 Q. Did you, at any point, alert Mr.  
4 Middleton to the fact that you received that  
5 response from the Court?

6 A. I didn't know how to get in touch with  
7 Mr. Middleton.

8 Q. After your trial and all the years that  
9 have passed since then, have you had any contact,  
10 whatsoever, with Mr. Middleton?

11 A. No.

12 Q. Did you ever tell Mr. Middleton, before,  
13 during, or after your trial, that you wanted to  
14 have a motion for modification of sentence filed?

15 A. At that time I really didn't know like  
16 the laws or whatever so I didn't have that  
17 conversation with him.

18 Q. Did you ever tell him -- I'm sorry if I'm  
19 being redundant -- did you ever tell him not to  
20 file it?

21 A. No.

1 Q. Would you have wanted him to file a  
2 motion for modification of sentence on your behalf?

3 A. Yes.

4 MS. KAMINS: I have no further questions.

5 MR. GIBLIN: No questions.

6 Thank you, Mr. Spivey.

7 THE COURT: Thank you, sir. You may step  
8 down.

9 MS. KAMINS: Thank you, Your Honor.

10 I would like to recall Mr. Middleton,  
11 please.

12 THE COURT: All right.

13 (The witness was sworn.)

14 MICHAEL MIDDLETON,  
15 a witness, produced on call of the Petitioner,  
16 first having been duly sworn according to law, was  
17 examined and testified as follows:

18 MADAM CLERK: Thank you, you may be  
19 seated. And can you please state your name and  
20 your business address, for the record, please?

21 THE WITNESS: My name is Michael

1 Middleton. My business address is 634 Cherry Hill  
2 Road, Baltimore, Maryland, 21225.

3 MADAM CLERK: Thank you.

4 DIRECT EXAMINATION

5 BY MS. KAMINS:

6 Q. Thank you, Mr. Middleton.

7 Mr. Middleton, do you know the fellow  
8 sitting next me, here?

9 A. Yes, I do.

10 Q. And can you tell the Court how you know  
11 him?

12 A. I represented Mr. Spivey in his case. I  
13 also know Mr. Spivey as a result of knowing his  
14 family. His Aunt Ruth and I were close friends.  
15 And I've also known his mother and his grandmother,  
16 when she was alive.

17 Q. And you said you represented him in his  
18 case. Can you tell the Court what case and what  
19 you were -- and how you were involved in  
20 representing him.

21 A. Yeah. First, let me just say I don't

1 have a transcript so, (inaudible) I have not been  
2 privy to the transcript. Approximately thirteen  
3 years ago I represented Dontae as his defense  
4 attorney in a case brought before the Circuit Court  
5 for Baltimore City, in which he was charged with  
6 first degree murder, theft case, possession of  
7 narcotics, and a relationship to a co-defendant in  
8 the case, Mr. Harris. That case was before Judge  
9 Heller.

10 And a jury trial ensued, in which I  
11 represented Mr. Spivey during that jury trial. As  
12 a result of the jury trial, Mr. Spivey was found  
13 guilty of the handgun violation, as well as the  
14 murder charge, and I believe the theft case, I'm  
15 not sure. But -- and he received the sentence of  
16 life plus forty years as a result of it.

17 Q. So, Mr. Middleton, after Mr. Spivey  
18 received the sentence of life plus forty years, do  
19 you recall communicating with Mr. Spivey -- after  
20 the trial was over and he was sentenced, did you  
21 talk to him?

1           A.    Well, not to be presumptuous, but if  
2           you're relating to whether or not he was informed  
3           as to whether or not he had the right to ask for  
4           modification of sentence, I have no specific  
5           recollection of what specifically of what I told  
6           him but, as a matter of course, I would have given  
7           Mr. Spivey, and any defendant, the right to appeal,  
8           as well as the right for modification.

9           Q.    So you do or you do not have independent  
10          recollection of having that conversation with Mr.  
11          Spivey?

12          A.    I feel quite strongly that I gave him  
13          those. I cannot imagine the Court allowing me to  
14          walk away at the sentencing without giving him his  
15          rights of post-conviction and of appeal. And I  
16          feel strongly that I did. But to sit here and say  
17          I have a specific recollection that I did it  
18          (inaudible), I do not.

19          Q.    Okay, so separate and apart from what  
20          might have been said on the record, in the court  
21          room, by either you or by the Judge, did you go

1 back to the bullpen and talk to Mr. Spivey?

2 A. No, I did not.

3 Q. Did you arrange a meeting at the prison  
4 once he was transported back to --

5 A. I did not have any further communications  
6 with Mr. Spivey after the trial.

7 Q. So, is your ordinary course of  
8 practice -- was your ordinary course of practice at  
9 the time to simply allow the defendant to be told  
10 of his rights and then wait for the defendant to  
11 tell you whether he wanted to exercise those  
12 rights?

13 A. I very rarely represented an individual  
14 in which they were incarcerated. So the time  
15 period to exercise such judgment didn't come often.  
16 On those time periods that it would have occurred,  
17 it would depend upon the relationship with me and  
18 the defendant.

19 In Mr. Spivey's case, as I indicated to  
20 you, I feel surely I let him know of what his post-  
21 conviction -- what his rights were post-judgment,

1 and if he wanted to exercise any of those rights,  
2 to contact me. Since Mr. Spivey did not contact me  
3 it was my -- it would have been my opinion that he  
4 did not want to go any further in relationship with  
5 this case. And the nature of his case would have  
6 been one that involves solely the trying of the  
7 case before the jury.

8 Q. And was that your understanding that that  
9 was your -- your role in the case ended at  
10 sentencing?

11 A. Unless Mr. Spivey wanted me to do  
12 something further and communicated such with me.

13 Q. Okay.

14 A. Which he did not.

15 Q. So, would there have been any down side  
16 to filing a motion for modification of sentence on  
17 Mr. Spivey's part?

18 MR. GIBLIN: Excuse me, Your Honor, just  
19 for purposes of expediency, the State is not going  
20 to object to the Court granting the post --

21 (Stands up.) Oh, I'm sorry, Judge. --

1 granting a belated modification.

2 THE COURT: All right, thank you.

3 Move to the next matter.

4 MS. KAMINS: Thank you, Your Honor. Had  
5 I know that earlier, I certainly would not have  
6 belabored this point.

7 BY MS. KAMINS:

8 Q. Mr. Middleton, have you been afforded the  
9 -- or have you had the opportunity to review the  
10 pleading that was filed in this case entitled  
11 Supplement to Post-Conviction Petition?

12 A. I received a copy of the supplement  
13 petition, from you, after discussing my appearance  
14 here.

15 Q. Okay. And, sir, have you been able to  
16 read through the allegations that we set forth in  
17 that?

18 A. Briefly.

19 Q. Okay. I'd like to -- you don't have your  
20 copy with you, do you?

21 A. I do.

1           Q.    Okay.  May I ask that you have it with  
2           you just for your own reference so I can go through  
3           it, allegation by allegation?

4           THE COURT:  And, so the record is clear,  
5           you want to give it a number, for identification,  
6           or something, so when you talk about --

7           MS. KAMINS:  The numbers within the  
8           petition or the petition, itself?

9           THE COURT:  To what document are you  
10          referring, in general, so we can, you know, --

11          MS. KAMINS:  Yes.

12          THE COURT:  -- so the record is clear.

13          MS. KAMINS:  Okay.  For the record, the  
14          single document that I'm going to be referring to  
15          in my questioning of Mr. Middleton and otherwise  
16          throughout this proceeding, is the document that  
17          was filed on November 2, 2011, entitled Supplement  
18          to Petition for Post-Conviction Relief.

19          THE COURT:  All right.

20          MS. KAMINS:  And it has two exhibits.

21          THE COURT:  Okay.

1 MS. KAMINS: And that is it, in its  
2 entirety.

3 THE COURT: Okay.

4 THE WITNESS: Can I just say that within  
5 the Petition it relates to appendices. My copy  
6 does not include those appendices, which would I  
7 have included, I believe, cases which I been  
8 involved in, either post or after my representation  
9 of Mr. Spivey.

10 MS. KAMINS: So, you're saying that the  
11 copy of the pleading that you received does not  
12 have either Attachment A or Attachment B?

13 THE WITNESS: No appendices, whatsoever.

14 MS. KAMINS: Okay.

15 THE WITNESS: And if they were so  
16 labeled, I do not have those.

17 MS. KAMINS: Okay.

18 THE WITNESS: It ends with your relief  
19 requested.

20 MS. KAMINS: Okay. Well, thank you for  
21 pointing that out, and that's fine because the

1 questions that I have for you do not pertain to the  
2 attachments.

3 THE WITNESS: No problem.

4 MS. KAMINS: Okay. Thank you.

5 BY MS. KAMINS:

6 Q. Mr. Middleton, are you currently  
7 practicing law?

8 A. No, I am not.

9 Q. And when did you stop the practice of  
10 law?

11 A. When the Court of Appeals suspended my  
12 license to practice.

13 Q. And, sir, what year -- what month and  
14 what year, if you recall, did that take place?

15 A. I don't have a specific recollection of  
16 the specific date and time.

17 Q. It was, I assume, after Mr. Spivey's  
18 trial.

19 A. Yes, it was.

20 Q. Any sense of how much time had elapsed  
21 from Mr. Spivey's trial and (inaudible)?

1           A.    I think it would have been 2001, but I'm  
2           not sure. I didn't follow it closely. So, it  
3           would have been a couple years after Mr. Spivey's  
4           case.

5           Q.    Okay. And at the time that the Court of  
6           Appeals issued its decision, had you been  
7           previously reprimanded by (inaudible) counsel?

8           MR. GIBLIN:  Objection.

9           THE COURT:  Sustained.

10          Move on.

11          MS. KAMINS:  Does Your Honor wish me to  
12          not go into that topic whatsoever, or just that  
13          specific question?

14          THE COURT:  I just said move on. You've  
15          already -- I have the Supplement with all the  
16          attachments, here. That I'm assuming -- well, the  
17          Court, of course, takes judicial notice of it and  
18          will have to read it and go through it, for the  
19          purposes of preparing its decision and its order.  
20          So, it will be here.

21          MS. KAMINS:  Okay, thank you, Your Honor.

1 THE COURT: That's why it's evidence in  
2 the Court file so we don't have to go through,  
3 right?

4 MS. KAMINS: I, I --

5 THE COURT: I mean now that I have it.

6 MS. KAMINS: I can't argue with your  
7 point, Your Honor

8 THE COURT: Okay.

9 MS. KAMINS: Thank you.

10 BY MS. KAMINS:

11 Q. Moving to the allegations that are set  
12 forth, starting with number one, the first  
13 allegation of ineffective assistance of counsel --  
14 do you recall the voir dire process in Mr. Spivey's  
15 case?

16 A. Yes, I do.

17 Q. And you'll see that in our petition,  
18 we're alleging your failure to seek questions  
19 specifically designed to find whether there were  
20 jurors in the pool who had strong feelings about  
21 narcotics, the crime of murder, in particular, and

1 violent crime, in general. And the transcript  
2 reflects that you did not seek such questions of --

3 THE COURT: Where is the transcript?  
4 Where is that? I mean --

5 MS. KAMINS: Well, Your Honor, I assume  
6 is in the Court file, which was in your possession.  
7 I have my copy. Mr. Giblin has his copy. I  
8 couldn't speak to where the Court's copy of the  
9 transcript is.

10 THE COURT: No transcript.

11 MS. KAMINS: Do Your Honor wish me to  
12 provide this Court, after this hearing, with a copy  
13 of the transcript?

14 THE COURT: Well, um, okay.

15 MR. GIBLIN: The State would not object  
16 to Counsel introducing the transcript into the  
17 record. The State --

18 THE COURT: All right, are you  
19 introducing the transcript as an exhibit?

20 MS. KAMINS: Well, I was not planning on  
21 doing that, Your Honor, because I -- it's too big

1 for me to have brought into the courthouse, so I  
2 did not bring my copy.

3 THE COURT: This is just one of those  
4 days I think I'm like on Mars. Isn't it just like  
5 -- doesn't that always happen.

6 MR. GIBLIN: Well, Your Honor, the  
7 State's only comment is, if there's no introduction  
8 of the transcript, the State would be arguing, down  
9 the line, that everything is a bald allegation  
10 because there's no record.

11 MS. KAMINS: Your Honor, I simply meant  
12 that I am not intro -- I did not bring a copy, a  
13 physical copy, to introduce into evidence. Of  
14 course, the transcript --

15 THE COURT: Okay, let's do this. Come up  
16 for a minute.

17 (Counsel approached the bench and the  
18 following occurred:)

19 THE COURT: Okay, here's the situation.  
20 You're asking the witness questions. He's already  
21 said he has no attachments, he's not seen the

1 transcript, it's thirteen -- well, I don't know  
2 many years ago. Fine.

3 MS. KAMINS: He did say he has  
4 recollection, though.

5 THE COURT: Okay, fine. The Court has no  
6 transcript. The Court doesn't automatically just -  
7 - a transcript doesn't appear. If there's anything  
8 in the transcript to support your case, then you're  
9 supposed to provide that to the Court. The Court  
10 has nothing, which is par for the course except  
11 when you prepare your case, if the State wanted to  
12 introduce stuff about the transcript, they would.

13 MS. KAMINS: May I inquire how the State  
14 obtained its copy of the transcript?

15 THE COURT: I don't know.

16 MS. KAMINS: May I inquire?

17 THE COURT: Sure.

18 MR. GIBLIN: Sure. We probably got it  
19 from the Attorney General's Office.

20 THE COURT: Yeah.

21 MR. GIBLIN: Look --

1 THE COURT: I understand.

2 MR. GIBLIN: My problem is I've got a  
3 post-conviction for the co-Defendant next week so I  
4 can't offer my transcript to the Court for  
5 convenience.

6 THE COURT: Oh, I understand. I  
7 understand.

8 MR. GIBLIN: Because I need it for the  
9 next week.

10 THE COURT: Of course.

11 MS. KAMINS: And, of course, I've never  
12 reencountered this situation before, where the  
13 Court did not have the transcript in the Court  
14 file, considering this post-conviction has been  
15 pending for five years --

16 THE COURT: I know but it doesn't just  
17 magically appear.

18 MS. KAMINS: -- I didn't know.

19 THE COURT: We don't even have all the  
20 files. See, that's the problem. Half the stuff is  
21 filed with some things, not the other. We're going

1 to move on. I'll tell you what. Have a transcript  
2 for me -- what's today?

3 MS. KAMINS: Wednesday. The 30th.

4 THE COURT: Have a transcript for me, by  
5 Monday, and we'll do with it.

6 MS. KAMINS: Mm-hmm.

7 THE COURT: But, as far as the witness  
8 goes, you're going to have to, you know --

9 MS. KAMINS: Well, may I just say this --  
10 I mean maybe it's unorthodox, the transcript, which  
11 you don't have, I understand, kind of speaks for  
12 itself, so a lot of the questions that I have to  
13 ask him are with my awareness that he probably  
14 doesn't remember --

15 THE COURT: Okay.

16 MS. KAMINS: -- independent of being able  
17 to look at the transcript; although, there are  
18 transcript referenced, you know, there are  
19 citations --

20 THE COURT: Okay, but if there is no  
21 transcript then these are just allegations.

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1 MS. KAMINS: Well, there is a transcript.  
2 It's just that the Court's copy or the Court's file  
3 is --

4 THE COURT: No.

5 MS. KAMINS: -- has been purged,  
6 somewhat.

7 THE COURT: Okay, this is how it works.  
8 It does not just appear in the Court file --

9 MS. KAMINS: The key -- okay --

10 THE COURT: It's provided by the  
11 attorneys.

12 MS. KAMINS: Never, in eight years, have  
13 I been asked to provide it because it's a case went  
14 up on appeal, once the case was remanded back to  
15 the Circuit Court where --

16 THE COURT: Was it appealed?

17 MS. KAMINS: It was.

18 THE COURT: Okay, I'll have it.

19 MS. KAMINS: And the transcript was  
20 prepared and should have been --

21 THE COURT: Maybe it's because --

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1 MS. KAMINS: -- rejoined with the Court  
2 file.

3 THE COURT: Maybe because --

4 MR. GIBLIN: Judge, I'll give you my copy  
5 of the transcript, for today's hearing.

6 THE COURT: Maybe --

7 MR. GIBLIN: Does that -- would you like  
8 that?

9 THE COURT: I don't care.

10 MS. KAMINS: And I'll give you my copy.  
11 It's in my car. It's just too heavy.

12 THE COURT: I don't care.

13 MR. GIBLIN: I know you're not going to  
14 read it, now.

15 THE COURT: I just need a copy, okay?

16 MR. GIBLIN: I'll give it to you, right  
17 now.

18 THE COURT: And if the witness -- if any  
19 witness will need the transcript, it's just going  
20 to need --

21 MR. GIBLIN: Sure.

1 THE COURT: -- something to show them,  
2 something that needs to be marked. I don't want  
3 all that crap, now. Just give it to me by Monday.

4 MR. GIBLIN: Okay.

5 THE COURT: But when you talk about it,  
6 you have to be very specific.

7 MS. KAMINS: Well, am I permitted to talk  
8 about it, without it being here? Because I can be  
9 very specific because I have page numbers  
10 referenced in the pleading. But if I can't show --

11 MR. GIBLIN: I'm not going to object.

12 THE COURT: Okay.

13 MS. KAMINS: -- the witness, physically -  
14 -

15 THE COURT: Do that.

16 MR. GIBLIN: I'm not going to object.

17 THE COURT: Do that, you know, and -- how  
18 can you have page numbers referenced and you don't  
19 have it with you?

20 MS. KAMINS: Your Honor, because, again,  
21 every time I've done a post-conviction --

1 THE COURT: Okay.

2 MS. KAMINS: -- the Court has it.

3 THE COURT: Okay.

4 MS. KAMINS: And I know what it says, and

5 --

6 THE COURT: And I've done --

7 MS. KAMINS: I've never not had a Court

8 have a post -- on a case that went on appeal

9 THE COURT: I know I've done at least a  
10 hundred of these. Anyway, just do it. Let's move  
11 on. But you have to be very specific because we  
12 don't have it.

13 MS. KAMINS: About page numbers?

14 THE COURT: Yes. And the dates of the  
15 transcript, and all that kind of stuff.

16 MS. KAMINS: Yes, ma'am.

17 THE COURT: All right.

18 (Counsel returned to trial tables and the  
19 following occurred in open court.)

20 THE COURT: So, the Court doesn't have a  
21 transcript, either, Mr. Middleton. So, we are both

1 in the same boat. But we're going to work it out  
2 and it's going to be fine.

3 So, we're talking about voir dire.

4 BY MS. KAMINS:

5 Q. Do you recall asking the Court to  
6 propound a voir dire question trying to determine  
7 whether any of the prospective jurors had strong  
8 feeling towards narcotics, murder, or violent  
9 (inaudible)?

10 A. Let me say I don't have a specific  
11 recollection as to whether or not I independently  
12 asked each of those questions to be proposed to the  
13 jurors independently. What I am sure of is usually  
14 that defense counsel has the opportunity to  
15 propound questions for voir dire, along with the  
16 State. The Judge usually has an opportunity to  
17 reconcile those and delivers the voir dire,  
18 herself.

19 We also had the opportunity in this case,  
20 the Court giving the general introduction to the  
21 nature of the offense, and particularly mentioning

1 that of the most heinous offense, and that being  
2 murder. The opportunity to voir dire any witnesses  
3 who had any dealings with past criminal cases, as  
4 well as the Judge making a concluding remark to the  
5 jury to see whether or not there if there anything  
6 else that would preclude them from being impartial  
7 in that case to so state.

8 With that, I felt rather confident with  
9 co-counsel that it was sufficient to insure us that  
10 there were not individual witnesses who were  
11 possible witnesses that would be impartial to the  
12 Defendant.

13 Q. That would be partial to the Defendant?

14 A. Impartial to the Defendant.

15 Q. Okay. So, what, if I may just make sure  
16 I understand your response, in a nutshell, you  
17 recall being of the belief that the questions  
18 actually asked by the Court covered this area of  
19 inquiry and --

20 A. I believe the voir dire process covered,  
21 in its entirety.

1 Q. In its entirety?

2 A. Yes.

3 Q. Yes, sir. Were you aware, at the time,  
4 of case law mandating that those questions be asked  
5 by a trial court if requested to be asked by  
6 defense counsel?

7 A. I can't say if I was or was not, at that  
8 time.

9 Q. Are you aware --

10 A. Or give the nature of that.

11 Q. Are you aware of those cases, now?

12 A. I have no reason to be aware of it. I no  
13 longer practice.

14 Q. Yes, sir. Okay, thank you.

15 Allegation two in our Supplement to  
16 Petition for Post-conviction Relief regards your  
17 failure to object to the trial court's reasonable  
18 doubt instruction. Do you have an independent  
19 recollection, since we don't have a transcript to  
20 show, as to whether or not there were any flaws in  
21 the instruction that you failed to object to on a

1 strategic or inadvertent basis?

2 A. Counsel, I just have no independent  
3 recollection in relationship to this (inaudible).

4 Q. Allegation three in our Supplement to  
5 Petition for Post-conviction Relief is your failure  
6 to challenge the reliability of the State's gunshot  
7 residue evidence and to present your own expert as  
8 to GSR, in rebuttal. Now, do you recall what the  
9 physical evidence in this case was against Mr.  
10 Spivey?

11 A. In relationship to the specific question,  
12 I'm aware of what you're asking. And because of  
13 the circumstance of this case, one, I did not think  
14 it was in the best interest of Mr. Spivey, if I can  
15 start from the end, to have their own separate  
16 expert. Secondly, I don't think we could have  
17 afforded it, to bring in our own expert, as well as  
18 that, at the time period that we asked for his  
19 testimony, I thought we did a thorough enough job  
20 in relationship to cross-examination. And I didn't  
21 believe that that was sufficient enough, or the

1 nature of the residue was sufficient enough, in and  
2 of itself, to have that aggrieve a factor on Mr.  
3 Spivey of his innocence or guilt in relationship to  
4 this case.

5 Q. Did you ever have any conversations with  
6 Mr. Spivey about the pros and cons of obtaining  
7 your own expert?

8 A. I did not.

9 Q. So, was it your own independent judgment  
10 that hiring a defense expert to rebut the State's  
11 expert was financially untenable?

12 A. There were a couple of reasons in  
13 relationship to this. Because of statements made  
14 by Mr. Spivey to me regarding the gunpowder  
15 residue, I felt it was not in his best interest to  
16 have, even if we could afford an expert to testify  
17 in relationship to the matter.

18 Q. Okay. All right. Moving on to  
19 allegation four in the Supplement to Petition for  
20 Post-Conviction Relief, dealing with your failure  
21 to object to various portions of the State's

1 closing argument, any independent recollection of  
2 the State's closing argument and anything that you  
3 might consider objectionable at the time but failed  
4 to object, for one reason or another --

5 A. Besides that it was a good closing  
6 argument, -- you know, there are reasons -- and I  
7 don't have an independent recollection as to  
8 whether or not I did no objections, whatsoever. I  
9 do know that during closing arguments, from my own  
10 perspective, as trial counsel, there are sometimes  
11 you don't raise objections. Given the nature of  
12 your case, the circumstances at that point, where  
13 the jury is, and the nature of what you would  
14 object to, whether it's important enough, whether  
15 or not the nature of you raising the objection  
16 brings or focuses more on that piece of evidence  
17 coming in, or not.

18 So, I believe that I'm aware of the  
19 nature of the State's closing argument, what was  
20 argued. And I believe that whatever the reason for  
21 not objecting, it was in the best interest of Mr.

1 Spivey that I not do so, and it would have been a  
2 tactical basis for not doing so, in Mr. Spivey's  
3 interests.

4 Q. Those specific allegations set forth in  
5 our pleading you say were not objected to for  
6 tactical reasons, or you're speaking in general?

7 A. I'm speaking in general as to that. If  
8 you want to go through on each specific (inaudible)  
9 or items mentioned for which I can respond, I'll do  
10 so.

11 Q. All right, I'm going to go through them,  
12 with the Court's permission, and get as far as I  
13 can.

14 THE COURT: Well, I thought you were  
15 talking about just in closing argument, but now  
16 you're going on to --

17 MS. KAMINS: No, I'm still in closing  
18 argument.

19 THE COURT: Okay.

20 MS. KAMINS: I was going to talk about  
21 the specific --

1 THE COURT: Okay.

2 MS. KAMINS: -- improprieties, if you  
3 will, in the closing argument, because -- I'm  
4 sorry, I'm talking to you sitting down -- because  
5 Mr. Middleton is speaking in general and I want to  
6 know whether or not he failed to object to these  
7 particular statements for tactical reasons or  
8 because --

9 THE COURT: Okay.

10 MS. KAMINS: -- he just missed them.

11 THE COURT: Okay.

12 THE WITNESS: And what I'm saying to you  
13 is that I did not have an independent recollection,  
14 at this time, as to each time that maybe an  
15 objection could have been raised as to why I may  
16 not have raised the objection. But I believe,  
17 under any circumstance, either I felt it wasn't  
18 objectionable, I felt that it was permissible  
19 relationship to -- given that berth to counsel or  
20 that it would have hurt me and my client if I had  
21 raised an objection at that particular time.

1 BY MS. KAMINS:

2 Q. And, so, let me ask you this -- if the  
3 State's Attorney made statements in closing  
4 argument that are arguably mischaracterizations of  
5 evidence or statements that assert facts that are  
6 not in evidence, what would you typically do in  
7 those instances?

8 A. It depended on the nature of what was  
9 done. Um --

10 Q. And would you -- and why would you feel  
11 it would harm your client to object, in those two  
12 instances, if you do feel that way?

13 A. I mean it would be speculative on my part  
14 but it would be dependent on the nature of what it  
15 was --

16 MR. GIBLIN: Objection, as to anything  
17 that's speculative.

18 THE COURT: Sustained.

19 Don't speculate, witness.

20 THE WITNESS: Yes, Your Honor.

21 THE COURT: Don't ask the witness to

1 speculate.

2 MS. KAMINS: Thank you, Your Honor.

3 The Court's indulgence, for one minute,  
4 please?

5 (Pause.)

6 BY MS. KAMINS:

7 Q. Mr. Middleton, moving on to allegation  
8 five in our petition, do you have any specific  
9 recollection of the fingerprint expert in this  
10 case, Mr. John French, testifying on behalf of the  
11 State?

12 A. Um, I don't believe at this time we had  
13 any objections in relationship to the fingerprint  
14 expert testifying, no.

15 Q. That's correct, sir. I guess, I'm sorry,  
16 to be clear, I'm specifically talking about  
17 statements made by the prosecution during the  
18 course of its closing argument, in which Mr. Spivey  
19 is now alleging, on post-conviction, constituted  
20 witness vouching. Do you recall there being -- you  
21 being aware of anything that you would have

1 characterized as witness vouching being done by Mr.  
2 Giblin during the trial?

3 A. Counsel, in relationship to what you  
4 think -- as to what you suggest for item number  
5 five, I am not under the impression that I consider  
6 this as witness vouching, at the time period.

7 Q. So, therefore, if you didn't --

8 A. (Inaudible).

9 Q. -- object, it was because you didn't  
10 believe it was objectionable? May I put words in  
11 your mouth?

12 THE COURT: No, you may not.

13 THE WITNESS: No. Right.

14 MS. KAMINS: I sort of realized I was  
15 doing that and I'm sorry for doing that.

16 THE WITNESS: It would have either been  
17 that I did not feel that it was --

18 MR. GIBLIN: Objection, he's -- I don't  
19 know if he's requested (inaudible) --

20 THE COURT: Are you speculating, witness?

21 THE WITNESS: I'm responding to whether

1 or not I would have raised an objection at the time  
2 period, Your Honor.

3 THE COURT: Okay.

4 THE WITNESS: And my answer to that would  
5 be it would either be that I did not find it  
6 objectionable or I would have felt, from a tactical  
7 perspective, to raise such an objection would only  
8 hurt my client's case.

9 BY MS. KAMINS:

10 Q. Okay, sir, so I misunderstood. So, if I  
11 can just determine, is your response that you, in  
12 fact, did not believe it was objectionable?

13 A. It would have been one or the other.

14 Q. It would have been one or the other?

15 A. Yes.

16 Q. Okay. Okay, thank you.

17 A. And I can't tell you, specifically, at  
18 this moment --

19 Q. Which.

20 A. -- what it would have been predicated  
21 upon.

1           Q.   Fair enough. Thank you. Allegation six  
2 concerns your failure to cross-examine Dr. Moog  
3 (phonetic), who was the -- well, came close to an  
4 eyewitness, I suppose you could say, in this case -  
5 - failure to cross-examine him about the clothing  
6 worn by two individuals that he saw close to the  
7 crime scene, alleging Mr. Spivey and his co-  
8 defendant. Do you recall whether or not you made a  
9 tactical decision not to cross-examine him and ask  
10 him to compare his recollection to the items of  
11 evidence, items of clothing that were introduced,  
12 at trial, by the State?

13           A.   Counsel, in all honesty, I don't really  
14 even have a recollection of this witness, at this  
15 time.

16           Q.   Okay.

17           A.   That's why I really would have liked to  
18 have had the transcript. But I just don't recall  
19 this witness.

20           Q.   This witness. Okay. Thank you.

21                   Allegation seven concerns your failure to

1 seek a missing witness instruction and to argue the  
2 missing witness inference to the jury with respect  
3 to two witnesses who were referred to by State's  
4 witnesses during the course of its presentation of  
5 evidence. Any recollection regarding those  
6 witnesses?

7 A. I really don't. I have no recollection  
8 this aspect of the case.

9 Q. Did reading the pleading that we filed  
10 and that I supplied you with, did that refresh your  
11 recollection, at all?

12 A. It did not. I was trying to determine  
13 what witness that wasn't there I would have wanted  
14 there. And without looking at the specificity --  
15 what, specifically, you were talking about, I was  
16 not able to recall.

17 Q. Okay. Allegation eight is failure to  
18 challenge jury instructions given by the trial  
19 court on murder and robbery with a deadly weapon.  
20 And do recall, sir, discussions held with the trial  
21 court and with the prosecutor regarding how to

1       instruct the jury in this case? Do you recall  
2       having discussions about jury instructions?

3           A.     Yeah, I remember having -- and, excuse  
4       me, Your Honor, I don't mean to smile because I  
5       recognize the seriousness of the nature. It was  
6       just that I do recall that we had, certainly,  
7       discussions in relationship to jury instructions.  
8       In relationship to the specific matter, here, as to  
9       whether or not it would have grounds to object to  
10      it, I do not have a recollection of that.

11           Q.     If I may ask you, in the ordinary --  
12      well, you did say -- how many homicides have you  
13      tried in your career, would you say?

14           A.     (Inaudible) maybe four or five.

15           Q.     And where did Mr. Spivey's case fall?  
16      Was he the first?

17           A.     At the end.

18           Q.     He was the last homicide that you had  
19      tried?

20           A.     Probably would have been the end, yes.

21           Q.     Okay.

1 THE COURT: How many did you say you  
2 tried?

3 THE WITNESS: I think four or five, Your  
4 Honor.

5 BY MS. KAMINS:

6 Q. What was the -- what did -- what type of  
7 law did you practice most of the time? Was it  
8 criminal law?

9 A. Mostly it was general practice. I spent,  
10 I'm sure you probably know my history, I spent a  
11 criminal law practice started with six years with  
12 the United States Attorney's Office as a federal  
13 prosecutor. And then, from that, five years in a  
14 private law firm, three -- two years with William  
15 H. Murphy's law firm, and then a couple years of  
16 practice on my own.

17 Q. Mm-hmm. Okay.

18 A. During that time period, I've tried civil  
19 and criminal cases, but I find, by far, the most  
20 representations was in criminal cases.

21 Q. Okay, now, do you recall that Mr. Spivey

1 was charged with, as you said in your testimony  
2 originally, first degree murder --

3 A. Right.

4 Q. Do you recall that he was charged with  
5 both first degree premeditated murder, as well as  
6 felony murder?

7 A. Probably.

8 Q. And in such instance, based on your  
9 experience trying homicide cases, would you -- you  
10 don't have independent recollection -- or do you  
11 have independent recollection, in this instance, as  
12 to how to resolve the jury instruction issue when  
13 there are the charges of premeditated murder, as  
14 well as felony murder?

15 A. I don't have an independent recollection  
16 in relationship to this case and (inaudible).

17 Q. Okay. And in the other homicide cases  
18 that you tried, in the general course of your  
19 practice, do you do anything, do make any  
20 particular requests of the trial court when it  
21 comes to such instruction so it's able to be

1 determined upon what basis the jury reached its  
2 verdict?

3 A. Well --

4 MR. GIBLIN: Objection.

5 THE COURT: Sustained.

6 BY MS. KAMINS:

7 Q. Mr. Middleton, I'll move off of that.

8 Mr. Middleton, I'm going to ask you if  
9 you happen to recall the drug that -- the specific  
10 controlled dangerous substance that Mr. Spivey was  
11 charged with possessing in this case.

12 A. I knew it was cocaine.

13 Q. It was cocaine?

14 A. Right.

15 Q. Do you remember there being  
16 inconsistencies during the course of the trial --  
17 oh, okay, I'm sorry, I'm referring to allegation  
18 nine --

19 A. Yes.

20 Q. -- currently, in the Supplement to  
21 Petition for Post-Conviction Relief.

1           A.    I understood.

2           Q.    Okay, thank you.  And for the Court's  
3 awareness, as well.

4                    Do you have any recollection of there  
5 being inconstancies between -- during the course of  
6 the evidence presentation about what the weight of  
7 the cocaine was?

8           A.    I have no present recollection of that,  
9 no, I don't.

10          Q.    So, not asking if you remember how much  
11 cocaine it was but whether or not you recall that  
12 there were inconsistencies during the course of the  
13 trial?

14          A.    The answer would be that I don't have a  
15 recollection of either.

16          Q.    Okay.

17          A.    Whether you had asked either one.

18          Q.    Okay.

19          A.    I just don't remember that, and that  
20 being of relevance and relationship to -- that is  
21 the inconsistency of it in relationship to the

1 prime charge.

2 Q. Okay. Thank you.

3 MS. KAMINS: Your Honor, may I have the  
4 Court's indulgence just to confer with my client,  
5 for thirty seconds?

6 THE COURT: Yes.

7 MS. KAMINS: Thank you.

8 (Pause.)

9 MS. KAMINS: Thank you, Your Honor.

10 THE COURT: All right, do you wish to  
11 cross-examine the witness?

12 MS. KAMINS: Uh, actually, Your Honor?

13 THE COURT: I'm sorry.

14 MS. KAMINS: I'm sorry, thank you for the  
15 indulgence, and two more real quick questions.

16 THE COURT: Oh, okay, I'm sorry. I  
17 thought you meant thank you, you were done. Okay.

18 MS. KAMINS: I know, I was --

19 THE COURT: Go right ahead.

20 BY MS. KAMINS:

21 Q. Okay, do recall who the trial judge was

1 in this case?

2 A. Yes.

3 Q. And who was it?

4 A. Judge Heller.

5 Q. And did you know, prior to trial, where  
6 Judge Heller resided?

7 A. No.

8 Q. Did it ever come to your attention before  
9 --

10 THE COURT: Hold it. What do you mean  
11 resided?

12 MS. KAMINS: Resided? Lived? Where she  
13 lived?

14 THE COURT: Of her home?

15 MR. GIBLIN: Your Honor, I'm going to  
16 object, based on --

17 THE COURT: And I'm going to sustain.

18 MR. GIBLIN: -- relevancy as to the  
19 allegations in the Petition.

20 THE COURT: I'm going to sustain that  
21 objection.

1 MS. KAMINS: Your Honor, we were seeking  
2 to --

3 THE COURT: Come up to the bench.

4 MS. KAMINS: Okay.

5 (Counsel approached the bench and the  
6 following occurred.)

7 MS. KAMINS: I was not going to ask him  
8 to say where she lived --

9 THE COURT: Uh-huh. Uh-huh.

10 MS. KAMINS: -- or was I going to even  
11 come close to suggesting her address, but there is  
12 potentially, depending on his response, potentially  
13 an oral supplementation to the Petition we were  
14 going to make regarding a failure to ask for  
15 recusal. So, I'm trying to explore that --

16 THE COURT: Did he ask Judge Heller?

17 MS. KAMINS: -- to recuse herself.

18 THE COURT: What's your proffer?

19 MS. KAMINS: The proffer is that she  
20 lived in the neighborhood where this crime  
21 occurred, and we were --

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1 THE COURT: Where did the crime occur?

2 MS. KAMINS: Roland Park. A specific  
3 portion of Roland Park.

4 THE COURT: Where in Roland Park? What,  
5 what --

6 MS. KAMINS: St. Mary's Lane.

7 THE COURT: What homicide is this?

8 MR. GIBLIN: Your Honor, this was a  
9 homicide that happened in 1998, on a Sunday  
10 afternoon. There was a car found with a body in  
11 it, in an alley, St. Mary's Lane, 9 Hawthorn Road -  
12 -

13 THE COURT: I know --

14 MR. GIBLIN: -- in Roland Park.

15 THE COURT: She doesn't live around --  
16 that's not right near her. She lives in Roland  
17 Park but that's not right near her, at all.

18 MS. KAMINS: Well, do you know that's  
19 where she was living in 1998?

20 THE COURT: Yes. I know where she lived  
21 in 1998.

1 MS. KAMINS: Okay.

2 THE COURT: And we all -- Judges live in  
3 Baltimore City.

4 MS. KAMINS: I know.

5 THE COURT: So, every crime that occurs  
6 in this City is within our City. And I think that  
7 if we start going down that road, that every judge  
8 would have be -- if you started asking judges to  
9 recuse themselves when they live near any crime,  
10 then we would all have to recuse ourselves. The  
11 City is only so big. Twenty minutes one way or the  
12 other you're all the way across town.

13 MS. KAMINS: May I make one more proffer?

14 THE COURT: Yes.

15 MS. KAMINS: I'm doing that at the  
16 request of my client, solely, so I'm not -- I mean  
17 I'm just being brutally honest with you so you know  
18 that I would not think of that as a wise issue --

19 THE COURT: All right, well, let me ask a  
20 question of the witness, okay?

21 MS. KAMINS: Sure.

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1                   (Counsel returned to trial tables and the  
2 following occurred in open court.)

3                   THE COURT: Mr. Middleton?

4                   THE WITNESS: Yes.

5                   THE COURT: If you know, do you know --  
6 well, do you know whether or not this offense  
7 occurred anywhere near the home of any judges on  
8 the bench?

9                   THE WITNESS: I'm not aware of that, Your  
10 Honor.

11                  THE COURT: Thank you. Were you aware of  
12 that at the time?

13                  THE WITNESS: No, I wasn't.

14                  THE COURT: Thank you.

15                  THE WITNESS: And I'm not aware of it, to  
16 this day.

17                  THE COURT: Thank you.

18                  THE WITNESS: I don't know where the  
19 judges live.

20                  THE COURT: Thank you.

21                  Are you satisfied, Mr. Spivey?

1 THE PETITIONER: (Inaudible).

2 THE COURT: Thank you.

3 Put your hand down!

4 THE PETITIONER: Well, can I get it on  
5 the record, at the end?

6 THE COURT: Put your hand down and talk  
7 to your lawyer! I tell you to do these things for  
8 our benefit, sir.

9 MS. KAMINS: Your Honor, may I heard what  
10 he has to ask?

11 THE COURT: Yes, he can ask you but don't  
12 -- he doesn't want to say that out loud.

13 (Pause.)

14 MS. KAMINS: Your Honor?

15 THE COURT: Yes.

16 MS. KAMINS: I'm going to pursue the  
17 issue with one more question.

18 THE COURT: All right.

19 BY MS. KAMINS:

20 Q. Mr. Middleton, if you knew --

21 THE COURT: Whoa! Come up here!

1 MS. KAMINS: Oh, okay.

2 THE COURT: And ask me the question,  
3 first, before we do that.

4 MS. KAMINS: Okay.

5 (Counsel approached the bench and the  
6 following occurred.)

7 MS. KAMINS: I (inaudible).

8 THE COURT: You're the lawyer --

9 MS. KAMINS: Yeah, no, I know --

10 THE COURT: -- and you're supposed to  
11 know better than your client --

12 MS. KAMINS: I know.

13 THE COURT: -- what's appropriate and  
14 what's not.

15 MS. KAMINS: I, under the circumstances,  
16 I'm not saying that it's -- I don't think it's  
17 legally inappropriate --

18 THE COURT: What is the question?

19 MS. KAMINS: -- but I know that it is --

20 THE COURT: What is the question?

21 MS. KAMINS: -- enraging you and I don't

1 want to --

2 THE COURT: I'm not enraged.

3 MS. KAMINS: -- do that.

4 THE COURT: You just don't know me.

5 MS. KAMINS: No, I don't know you.

6 THE COURT: I'm not enraged. This is how

7 I am all the time.

8 MS. KAMINS: Oh, okay.

9 THE COURT: What is the question?

10 MS. KAMINS: The question is there is a  
11 newspaper article that indicates that she lives,  
12 and lived at the time, in north Roland Park. And  
13 what he wants me to ask is if he knew that she  
14 resided in north Roland Park -- and I understand, I  
15 know Roland Park --

16 THE COURT: He's already said he doesn't  
17 know where any of the judges --

18 MS. KAMINS: No, it's a hypothetical --  
19 it's a hypothetical.

20 THE COURT: And he already said he didn't  
21 know where any of the judges lived at the time, he

1 still doesn't know to this day.

2 MS. KAMINS: But if he had known would he  
3 have thought to recuse her?

4 THE COURT: That's speculation, isn't it?

5 MS. KAMINS: Well, that's pretty much  
6 goes on when he doesn't have independent  
7 recollection of anything, and the Petitioner can't  
8 sustain his burden of proof without engaging in  
9 some kind of pattern and practice. I, you know,  
10 I'm trying to do my job, here, and if he doesn't  
11 remember twelve years ago, I need to ask him, well,  
12 if you knew this, would you have done that?

13 THE COURT: Mr. Middleton, can you come  
14 up to the bench, please?

15 THE WITNESS: Yes, Judge.

16 (The witness approached the bench, joined  
17 Counsel, and the following occurred.)

18 THE COURT: Ask the question.

19 MS. KAMINS: If you had known at the time  
20 that Judge Heller lived in northern Roland Park,  
21 would you have filed a recusal motion?

1 THE COURT: Would you what?

2 MS. KAMINS: Would you have filed a  
3 motion to have the judge recuse herself?

4 THE WITNESS: I don't know.

5 THE COURT: Okay.

6 THE WITNESS: I don't know. I would  
7 think -- I respect the nature of judges on this  
8 bench that had Judge Heller thought that her living  
9 in that area would have any effect on her trying  
10 that case, first she would have made known,  
11 herself. And then, secondly, since she did not, I  
12 would be able to believe that this would have paid  
13 no attention -- no part in relationship to her  
14 trying the case. And I don't believe that it  
15 played any part in trying the case.

16 THE COURT: Thank you.

17 You all right?

18 MS. KAMINS: Satisfied.

19 THE COURT: Tell your client.

20 MS. KAMINS: Yes, ma'am.

21 THE COURT: Okay.

1 MS. KAMINS: Thank you.

2 (Counsel and witness returned to trial  
3 tables/witness stand, and the following occurred in  
4 open court.)

5 (Pause.)

6 MS. KAMINS: Okay, Your Honor, my final  
7 question for Mr. Middleton concerns --

8 BY MS. KAMINS:

9 Q. Mr. Middleton, were you aware that there  
10 were certain items of clothing that were seized  
11 from the alleged perpetrators, in this case?

12 A. Yes.

13 Q. And do you recall those pieces of  
14 evidence --

15 THE COURT: I thought that was one  
16 question.

17 MS. KAMINS: Okay. Your Honor, --

18 THE COURT: Just thought I'd say that.

19 MS. KAMINS: -- one final area of --

20 THE COURT: Go ahead, but I just like to  
21 point that out to folks.

1 MS. KAMINS: -- inquiry.

2 THE COURT: I just like to point that  
3 out.

4 MS. KAMINS: That was an excellent,  
5 excellent point but I --

6 THE COURT: Yeah.

7 MS. KAMINS: -- misspoke. One final area  
8 of inquiry. It is brief but it has multiple  
9 subparts.

10 THE COURT: Go ahead. Go ahead.

11 MS. KAMINS: Thank you.

12 BY MS. KAMINS:

13 Q. And were you aware, or do you recall that  
14 those particular items of clothing were introduced  
15 by the State as evidence, at trial?

16 A. Through pictures.

17 Q. Through pictures?

18 A. Through photographs, yes.

19 Q. Do you not recall that the actual items  
20 of evidence were introduced at trial?

21 A. I have not a specific recollection in

1 relationship to the items of clothing, whether --  
2 or how they were presented. I know they were  
3 presented. And I know they were at issue. I know  
4 that Mr. Spivey was promptly identified in  
5 relationship to the articles of clothing that he  
6 had, in particular, by a particular witness, which  
7 I think was grave for this case.

8 Q. Did you ever seek to have any scientific  
9 testing done on any of the items of evidence that  
10 were allegedly worn by my client?

11 A. I don't think it would have been to the  
12 Defendant's benefit to have that done.

13 Q. Can you explain your answer?

14 A. Should I? I mean, can I? I believe it  
15 would be divulging certain information the  
16 Defendant related to me. Would you like me to do  
17 that?

18 MR. GIBLIN: Your Honor, it's the State's  
19 position that counsel asked about conversations  
20 between her client and Mr. Middleton. He is  
21 challenging Mr. Middleton's effectiveness as

1 counsel. I think any attorney/client privilege has  
2 been waived.

3 THE COURT: Go for it, Counsel. Witness.  
4 Answer the question, please, witness?

5 THE WITNESS: Your Honor, in preparation  
6 of the case, Mr. Spivey had indicated to me, and  
7 said specifically, is whether or not urinating on  
8 your hands would remove gun residue, or in the  
9 case. Given that, my belief would have been that  
10 the possibility was here that gun residue may be  
11 permitted, would have been on the clothes, and  
12 therefore I would not have asked for such.

13 BY MS. KAMINS:

14 Q. But you were aware that his hands were  
15 tested for gunshot residue?

16 A. Yes.

17 Q. But, yet, you felt that any benefits of  
18 testing the clothing for DNA or other scientific  
19 products would have been inadvisable?

20 A. Yes.

21 Q. In light of the statement that Mr. Spivey

1 made to you?

2 A. Yes.

3 Q. And you recall that the key issue in the  
4 case was criminal agency? That, well, what was  
5 your defense, at the trial?

6 A. Well, Mr. Spivey indicated that he was  
7 not there, he wasn't present, he did not commit the  
8 act.

9 Q. Okay. So, that was -- so, his defense is  
10 one of criminal agency, meaning it wasn't me.

11 A. That's correct.

12 Q. And if he was alleged by witnesses to  
13 have been wearing certain clothing, you did not  
14 believe it was in his interest to have that  
15 clothing tested to determine whether or not it had  
16 been worn by him?

17 A. Well, not if I thought that given  
18 (inaudible) that possibly it would have shown  
19 something to the contrary of his position.

20 Q. So, would you say you made a strategic  
21 decision not to have the shirt and hat that was

1 supposedly worn by Mr. Spivey tested?

2 A. That's correct. Had I -- had the issue  
3 arisen, that is in relationship to having it done  
4 independently, and, again, whether or not we had  
5 the resources to do it.

6 Q. Resources, meaning finance --

7 A. The money, yes, ma'am.

8 MS. KAMINS: No further questions, Your  
9 Honor.

10 THE COURT: All right, do you wish to  
11 cross-examine the witness?

12 MR. GIBLIN: Just very, very briefly,  
13 Judge.

14 CROSS-EXAMINATION

15 BY MR. GIBLIN:

16 Q. Mr. Middleton, is it -- so what you are  
17 saying is when Dontae Spivey asked you whether  
18 urinating on his hands would remove gunshot  
19 residue, that gave you pause in terms of hiring an  
20 expert about gunshot residue, is that correct?

21 A. That's correct.

1           Q.    And when he told you about, asking you  
2           that question about what he may or may not have  
3           done, did that give you pause in terms of trying to  
4           do any type of testing on either his hands or items  
5           of clothing that may have come in contact with the  
6           hands that he was asking you about peeing on?

7           A.    That's correct.  Mr. Spivey, um, wasn't  
8           really helpful in providing a defense for his case.  
9           Um, we couldn't come up with witnesses to support  
10          that he was someplace else.  He relied primarily in  
11          his constitutional right, is he had to have the  
12          State to prove that he did it.  So, --

13          Q.    And would it be fair to say that the  
14          State had a pretty good case against -- I mean, in  
15          your analysis, the State had a pretty good case  
16          against Mr. Spivey, didn't they?

17          A.    I could say we could have used some help.

18          Q.    Okay.  And, in fact, the jury didn't need  
19          much help because they only deliberated an hour and  
20          eighteen minutes before they returned guilty  
21          verdicts, isn't that correct?

1           A.     That's correct.

2           MR. GIBLIN:   That's all I have.

3           THE COURT:   Anything based on those  
4     questions?

5           MS. KAMINS:   Yes.

6                         REDIRECT EXAMINATION

7     BY MS. KAMINS:

8           Q.     Mr. Middleton, you remember how long the  
9     jury deliberated in the case?

10          A.     I know it wasn't long.   It wasn't long.  
11     AS I recall.   It was under two hours, I believe.  
12     Under two hours.

13          Q.     And you remember specifically this  
14     conversation with Mr. Spivey about what happens if  
15     I pee on my hands, vis-à-vis the gunshot residue,  
16     but you don't remember most of the rest of the  
17     trial?

18          A.     First of all, Counsel, let me say this.  
19     The statement made about the residue was not made  
20     at trial.   It was a statement that was made as a  
21     question to me, by Mr. Spivey.   The matters that I

1 do remember, as I said, that I have general  
2 recollection. The specific matters that you have  
3 or you dealt with, I do not have specific  
4 recollection. And for me to say something  
5 otherwise would -- it wouldn't be based on anything  
6 factual that I know of, at the moment.

7 MS. KAMINS: Okay. And is it fair to  
8 say, though, that you recall more vividly  
9 conversations that you had with Mr. Spivey, before  
10 the trial, than what actually happened at the  
11 trial?

12 MR. DRAPER: No, that's not what I'm  
13 saying. What I'm saying is that I recall that  
14 particular statement by Mr. Spivey in relationship  
15 to questions asked by you, in relationship to me,  
16 as to how far I would have gone in production  
17 (inaudible) seeking of the evidence in relationship  
18 to the materials that were suggested, whether they  
19 were objected to or not objected to. That was  
20 significant. It was very little said by Mr. Spivey  
21 relationship to the facts in relationship to the

1 case. That was something that happened to be  
2 something that I had recollection of.

3 Q. Have you ever sought pre-trial scientific  
4 testing of any articles of clothing or other  
5 objects?

6 A. When? Are you saying in relationship to  
7 this case?

8 Q. No, no. I mean in your practice, in  
9 general.

10 A. Well, as a federal prosecutor, on several  
11 occasions we used -- that was done. And, so, I'm  
12 saying this.

13 Q. And a final question, for real this time,  
14 the statement that you attribute to Mr. Spivey --  
15 the question that you attribute to Mr. Spivey, that  
16 he asked you about what happens if I urinate on my  
17 hands --

18 A. Urination (inaudible) gun powder residue.

19 Q. Right. When did that take place?

20 A. Prior to trial.

21 Q. And was that -- where did that take

1 place?

2 A. Uh, during a conversation I had with Mr.  
3 Spivey.

4 Q. Was that on the telephone?

5 A. No, it wouldn't have been on the  
6 telephone. As a matter of fact, I believe,  
7 speaking with Mr. Spivey on three or four  
8 occasions, either at the -- before he was taken to  
9 Jessup, on a couple of occasions, and the time  
10 period that I went to visit him at Jessup, and we  
11 talked about this case.

12 Q. And approximately how many times was  
13 that?

14 A. Like I said, three or four times.

15 Q. Three or four times?

16 A. Three or four visits, yes.

17 Q. Total, prior to trial?

18 A. Yes.

19 Q. Okay. And none after trial?

20 A. None.

21 MS. KAMINS: Okay. Nothing further.

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1 THE COURT: Any recross?

2 MR. GIBLIN: No, ma'am.

3 THE COURT: All right. May this witness  
4 be excused?

5 MR. GIBLIN: The State has no need for  
6 him.

7 MS. KAMINS: Yes, Your Honor.

8 THE COURT: All right, thank you, sir.

9 THE WITNESS: Thank you, Your Honor.

10 THE COURT: All right, next witness?

11 MS. KAMINS: No additional witnesses,  
12 Your Honor.

13 THE COURT: No additional witnesses?

14 MS. KAMINS: I have no additional  
15 witnesses, no.

16 THE COURT: All right, State, do you have  
17 any witnesses?

18 MR. GIBLIN: No, Your Honor, but as

19 Counsel has referred to, there were plenty of pro  
20 se petitions filed and are contained in the file.

21 I just want to make absolutely clear that any other

1       allegations that may have been raised in this  
2       myriad of pro se petitions are being abandoned at  
3       this point in time, is that correct, Counsel?

4               THE COURT: Counsel? It's the Court's  
5       understanding that the statement made by Counsel  
6       before we got started is that she has put  
7       everything in one big motion, and entitled it  
8       Supplement to Petition for Post-Conviction Relief.  
9       Now, Counsel, your client is waving his hand and  
10      jumping around. Why don't you see what he has to  
11      say to make sure we have everything straight.

12             MS. KAMINS: Thank you, Your Honor.

13             (Pause.)

14             MS. KAMINS: Okay, to clarify. Yes, in  
15      answer to your question. And, yes, in answer to  
16      the State's question. The pleading that we filed  
17      encompasses all of the claims, except that niggling  
18      little housekeeping matter that's actually not a  
19      small matter, that I have to address with this  
20      Court because it's a pending issue. The question  
21      is whether it's properly --

1 MR. GIBLIN: The DNA?

2 MS. KAMINS: The DNA issue, whether it's  
3 properly part of this proceeding, or properly part  
4 of a separate proceeding. And I just want to make  
5 sure that while we're all in the courtroom together  
6 and we're on the record we determine what we're  
7 going to do with that. Because Mr. Spivey does  
8 have an additional issue that we would have raised  
9 in this Petition had we had the DNA results back.

10 THE COURT: Okay.

11 Madam Clerk, first, why don't you get the  
12 exhibit, Madam Clerk, from the witness stand.

13 Second, understand that we're dealing  
14 with one-third of a Court file, no transcript. So  
15 why don't you fill me in about the little DNA issue  
16 you were talking about?

17 MS. KAMINS: I will. I was trying to  
18 move slowly so as to not alarm you that this is --

19 THE COURT: No, I'm not alarmed --

20 MS. KAMINS: No, no, no, I mean --

21 THE COURT: You just don't understand.

1 This is how I am. I'm not alarmed. This doesn't  
2 upset me. You'd be surprised --

3 MS. KAMINS: I'm glad, I'm glad to know  
4 that.

5 THE COURT: -- by the things that I deal  
6 with each and every day. If you're talking about --  
7 -- is there some pending motion where the clothing  
8 is supposed to be DNA tested?

9 MS. KAMINS: There is --

10 THE COURT: Is that what -- is that  
11 what's going on?

12 MS. KAMINS: There is a motion that's  
13 been granted already.

14 THE COURT: It has been granted?

15 MS. KAMINS: By Judge Rasin.

16 THE COURT: Okay.

17 MS. KAMINS: I had originally directed --

18 THE COURT: To test clothing from 1999,  
19 huh, that's probably in a plastic bag?

20 MS. KAMINS: Yes.

21 THE COURT: Okay.

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1 MS. KAMINS: But at least it exists.

2 That was step one, do we still have it. The State  
3 informs me we do still have it and it has been made  
4 available to me. The laboratory indicates that it  
5 is not inconceivable that it will still have  
6 relevant --

7 THE COURT: Okay.

8 MS. KAMINS: -- materials --

9 THE COURT: No, I'm just --

10 MS. KAMINS: -- biological material --

11 THE COURT: That's fine.

12 MS. KAMINS: -- on it. Of course, I  
13 can't speak to how -- in what shape it's in.

14 THE COURT: So, you want to know --

15 MS. KAMINS: So, here's the pickle. Mr.  
16 Spivey, back many, many years ago, filed what could  
17 properly be considered a motion for new trial based  
18 on the DNA, like under 8201. I don't know  
19 (inaudible) --

20 THE COURT: Without knowing the results?

21 MS. KAMINS: Seeking the testing.

1 THE COURT: Okay.

2 MS. KAMINS: Seeking the testing.

3 THE COURT: All right.

4 MS. KAMINS: Trying to get the ball  
5 rolling. His request was absolutely ignored by the  
6 State and he never heard anybody -- anything back  
7 from anybody, whatsoever, about it. It was filed.  
8 It just sat there. It became resurrected when I  
9 entered my appearance in the case. And it became  
10 resurrected in, basically, the form of me filing,  
11 also, a motion, that has since been granted so we  
12 can kind of skip over that part -- a motion seeking  
13 an order directing that I have the right to have  
14 the evidence tested. Judge Rasin ruled on the  
15 motion even though I thought, because we had an  
16 ongoing post-conviction case, that it would be --

17 THE COURT: How did she -- how did that  
18 motion come to be ruled on?

19 MS. KAMINS: Well --

20 THE COURT: How did that come to be --

21 MS. KAMINS: Do you want to speak to that

1 since it's your colleague who spearheaded that?

2 MR. GIBLIN: Well, it's my understanding,  
3 and this was a motion filed under the -- and I  
4 don't speak with any authority, at all -- the DNA  
5 part of the post-conviction statute, which allows,  
6 under certain circumstances.

7 THE COURT: Right. Mm-hmm.

8 MR. GIBLIN: And that is handled by our  
9 forensic --

10 THE COURT: Mm-hmm.

11 MR. GIBLIN: I think Mr. Michael Leedy is  
12 handling it.

13 THE COURT: Okay.

14 As: I conferred with Mr. Leedy and he  
15 basically says, you know, normally, we don't object  
16 to the testing, we just try to maintain some --  
17 have some say in terms of who's doing it --

18 THE COURT: Mm-hmm.

19 MR. GIBLIN: -- the conditions under which  
20 the testing is done. And it's also my  
21 understanding that that is the province of only one

1 judge on this bench, and that's Judge Gail Rasin.

2 If we're talking about a motion for new trial,

3 um --

4 THE COURT: Is that what that was filed  
5 under?

6 MR. GIBLIN: I don't know. I think it  
7 was under a post-conviction petition. A motion for  
8 new trial, theoretically, should be heard by the  
9 judge --

10 THE COURT: Sure.

11 MR. GIBLIN: -- who had the trial, or --

12 THE COURT: Right.

13 MR. GIBLIN: -- in this case, --

14 THE COURT: His or her replacement.

15 MR. GIBLIN: -- Judge Heller's successor.

16 THE COURT: Pierson.

17 MR. GIBLIN: So, that's not an issue that  
18 would be in front of this Court under either  
19 scenario.

20 THE COURT: Right.

21 MR. GIBLIN: So, I understand there's not

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1 a waiver of that issue in terms of the DNA aspect  
2 of it, and I agree with Counsel that that is not  
3 being abandoned.

4 THE COURT: Okay.

5 MS. KAMINS: Okay, so, --

6 THE COURT: So, are you satisfied with  
7 that?

8 MS. KAMINS: -- the new trial, simply, --

9 THE COURT: This Court is hearing the  
10 post-conviction.

11 MS. KAMINS: Right.

12 THE COURT: The Court is not addressing  
13 the motion for a new trial, which may or may not be  
14 filed based upon what may or may not result from  
15 the testing of the clothing.

16 MS. KAMINS: Okay. Now, what is pending,  
17 now, is Mr. Spivey's DNA post-conviction. I'm not  
18 sure what you even call these things, but the  
19 statute that governs this proceeding --

20 THE COURT: Well, isn't that really a  
21 motion for a new trial?

1 MS. KAMINS: Well, that -- okay, thank  
2 you, that's why I actually said motion for new  
3 trial.

4 THE COURT: Isn't that really what it is  
5 -- is that really what it is, Mr. Giblin?

6 MR. GIBLIN: I think it's a hybrid.

7 THE COURT: Okay.

8 MS. KAMINS: I think it's a hybrid, too.

9 THE COURT: Okay. Okay.

10 MS. KAMINS: And I think no one really  
11 knows where does that go and who --

12 THE COURT: Okay.

13 MS. KAMINS: -- handles it when there's  
14 an ongoing post-conviction case. Usually, it's one  
15 or the other. In this case, that was filed many,  
16 many years ago, he is --

17 THE COURT: Okay, this would be -- let me  
18 tell you what this Court's --

19 MS. KAMINS: Yes.

20 THE COURT: -- is, just hearing it for  
21 the first time, it would be this Court's opinion

1 that, under the circumstances, this would be --  
2 would fall under the motion for a new trial, only  
3 because all the other stuff has been done. And  
4 this has been hanging around for five, or six,  
5 twenty years, or whatever. This would be a -- that  
6 would fall under the motion for a new trial, which  
7 would go to the trial judge. In this case, it  
8 would be Judge Pierson.

9 The post --

10 MS. KAMINS: But if that's --

11 THE COURT: Hold on.

12 MS. KAMINS: Okay, sorry.

13 THE COURT: The post-conviction relief  
14 sought with regards to these ten to twelve or how  
15 many allegations we've addressed here, today,  
16 should have no effect on that motion.

17 MS. KAMINS: And I do agree with Your  
18 Honor. And then here's this other thing. It is  
19 both because of we're now embarking on -- and I'm  
20 not going to bog you down with that, that's between  
21 us --

1 THE COURT: Mm-hmm.

2 MS. KAMINS: We're embarking on getting  
3 the stuff tested. And then, one day, we'll have  
4 the results. And then we'll have to take those  
5 results and embody them in some pleading that is  
6 properly directed to the trial judge. Whether it's  
7 going to be redirected to Judge Rasin, I don't  
8 know, because I'm not quite sure what -- because  
9 she's the DNA judge so she seems to handle -- am I  
10 correct that she's to handle all of these?

11 THE COURT: Why don't I know this?

12 Okay.

13 MS. KAMINS: Well, I didn't know it,  
14 either. And they, their office told me that she's  
15 a DNA judge and anything -- any 8201 motion --

16 THE COURT: Okay.

17 MS. KAMINS: -- which is involving --

18 THE COURT: This is what I would suggest.

19 MS. KAMINS: Well, can --

20 THE COURT: I suggest you all figure this  
21 out, procedurally, yourselves. Don't bother me

1 with that.

2 MS. KAMINS: I, I -- yes, but here's why  
3 I have to bother you, Your Honor, because  
4 there's --

5 THE COURT: No, you don't.

6 MS. KAMINS: -- an allegation of  
7 ineffective assistances of counsel --

8 THE COURT: No, you don't.

9 MS. KAMINS: -- that has to be raised --

10 THE COURT: No, you don't! You don't! I  
11 just said that that's not going to be waived as  
12 part of this decision. That this decision will  
13 have no effect on what this Court would term, and  
14 to use Mr. Giblin's term, a hybrid of new trial,  
15 post-conviction. That's the Court's ruling or  
16 decision. It's on the record if you want to have  
17 that done.

18 If it's a mistake, it's the Court's  
19 mistake and that would give the people in Annapolis  
20 something to do, but that part of the Defendant's  
21 request for relief should not be affected by this

1 post-conviction relief. I know you only get one  
2 post-conviction hearing and you're only entitled to  
3 one. If that comes up, by anyone on the bench,  
4 they'll say, "fine, Judge Stewart said that, let  
5 her hear it." Fine. I'll hear it.

6 But what I'm trying to say to you is  
7 because of the status of that statute, which is  
8 kind of a hybrid, and there's obviously no set  
9 procedure, judicially or by the attorneys that I'm  
10 aware of -- are you?

11 MR. GIBLIN: No, ma'am.

12 THE COURT: Then I don't think -- I mean  
13 out of fundamental fairness, I don't believe any  
14 court would throw that out because of that. And I  
15 would urge you in any motion or petition you draft  
16 you'd indicate that this Court indicated that this  
17 post-conviction would have nothing to do with that  
18 because of the state of the lack of a set procedure  
19 or policy legislatively or procedurally. There's  
20 just none that's been developed at this time  
21 because of the scientific evidence and the way that

1 it's been presented.

2 Do you understand what I'm saying?

3 MS. KAMINS: Yes, Your Honor, but --

4 THE COURT: Okay.

5 MS. KAMINS: -- may I be heard further?

6 MR. GIBLIN: Your Honor, may --

7 MS. KAMINS: Well, may I heard be

8 further?

9 MR. GIBLIN: This may keep you from  
10 talking. I'm not saying, trying to be flippant.  
11 The State would agree that there should be no  
12 collateral estoppel effect -- if the Court finds --  
13 if the Court finds that Mr. Middleton wasn't  
14 incompetent for failure to ask for DNA testing --

15 MS. KAMINS: (Inaudible).

16 MR. GIBLIN: -- that that cannot be used  
17 by Mr. Leedy, or any member of the State's team in  
18 the litigation with regard to DNA testing.

19 THE COURT: Right.

20 MS. KAMINS: Okay, that's part of my  
21 concern but that's not the whole concern, so I have

1 to talk, sorry. With the Court's permission I need  
2 to push this a little further.

3 THE COURT: Sure, go ahead.

4 MS. KAMINS: I may -- my intention was to  
5 have all this DNA testing done so that I had  
6 results, one way or the other. And assuming I had  
7 exculpatory results, I would be standing before  
8 Your Honor with the petition that alleged  
9 ineffective assistance of counsel for failure to  
10 test those items of clothing pretrial, and the  
11 prejudice is that, in fact, had they been tested,  
12 it would have been exculpatory.

13 THE COURT: It doesn't work that way.  
14 Doesn't work that way.

15 MS. KAMINS: How does it not work that  
16 way?

17 THE COURT: I can't see it working that  
18 way. It has to be two separate things.

19 MS. KAMINS: No, there are two separate  
20 things. One is an ineffective assistance of  
21 counsel --

1 THE COURT: Am I just sitting up here or  
2 just what, talking to myself?

3 MS. KAMINS: Well, I'm not trying to be  
4 rude, Your Honor, or correct Your Honor. I'm not  
5 saying you're wrong, but what I'm saying is I'm  
6 trying to make a record for --

7 THE COURT: But you're not getting it.  
8 What I'm trying to tell you is that there is no  
9 procedure for it. The State --

10 MS. KAMINS: There is a procedure for it.  
11 There's a --

12 THE COURT: What is it?

13 MS. KAMINS: -- statute that governs a  
14 motion for new trial --

15 THE COURT: Mm-hmm.

16 MS. KAMINS: -- based on DNA evidence.

17 THE COURT: Okay.

18 MS. KAMINS: And Mr. Spivey has the right  
19 to file that --

20 THE COURT: And how does that affect  
21 post-conviction?

1 MS. KAMINS: They're completely  
2 independent proceedings.

3 THE COURT: Well, what the heck you think  
4 we've been sitting here saying for the last ten  
5 minutes!

6 MS. KAMINS: But if we leave this  
7 courtroom, Your Honor, with DNA testing pending and  
8 no results, and then in three months we have  
9 results, and this proceeding is closed, the only  
10 way Mr. Spivey can seek relief based on ineffective  
11 assistance of counsel with respect to the DNA is by  
12 filing a motion to reopen post-conviction, which he  
13 is not entitled to a hearing, which is entirely  
14 discretionary with the Court to hear or to not  
15 hear.

16 So, for my client's safety, I need to  
17 insure either that this post-conviction proceeding  
18 not be closed, pending arrival of those DNA  
19 results, so that he has the right to allege  
20 ineffective assistance of trial counsel, under the  
21 Sixth Amendment, for failing to do that which we

1 have now done that proved to be helpful to him.  
2 Separate and apart from the fact that the DNA  
3 results may entitle him to a new trial based on a  
4 201. The problem is that there is now, since he  
5 filed his 8201, there has come to be a post-  
6 conviction case. And Your Honor wouldn't give any  
7 additional postponements so we're here, today,  
8 without DNA results.

9 My concern is if we leave the courtroom  
10 and you issue your opinion this post-conviction  
11 proceeding is closed. And he has a potential post-  
12 conviction claim that may be need to be raised.

13 THE COURT: You know, I know I should  
14 have paid more attention when I was in French class  
15 but I can only speak one language, and it's  
16 English. I will say it one more time. This post-  
17 conviction issue, the post-conviction issues before  
18 the Court, today, will have no effect on that.

19 MS. KAMINS: That's not my concern, Your  
20 Honor. I'm not concerned about that. I'm  
21 concerned about the mechanism by which I can allege

1       ineffective assistance of counsel -- not a new  
2       trial under 8201, but under the post-conviction  
3       statute, how do I get back into Court? I'm sorry,  
4       Your Honor, for being so persistent but I simply  
5       don't understand --

6                   THE COURT: You're not being persistent.  
7       What you don't understand --

8                   MS. KAMINS: I don't understand the  
9       mechanism.

10                   THE COURT: Okay, be quiet. Be quiet.

11                   MS. KAMINS: Sorry.

12                   THE COURT: Let me explain something to  
13       you. Sit down. Listen. I will say it to you,  
14       again, because I think everybody else in this  
15       courtroom heard it. Mr. Giblin said it. He will  
16       not be estopped from filing for the new trial. And  
17       this Court indicated, yes, I know he only has a  
18       right to have one post-conviction hearing, but if  
19       it's because of that one DNA situation, that this  
20       Court -- I thought I said it would be fundamentally  
21       unfair for anyone to deny that issue. And if no

1 one wanted to hear it then I said, even this Court  
2 would hear it, but since this Court is not in the  
3 position to give out legal advice, that I suggest,  
4 Counsel, that you do what you're supposed to do.

5 Is there anything else left to hear, in  
6 this matter?

7 MR. GIBLIN: The State has nothing to  
8 present.

9 THE COURT: All right, Counsel?

10 MS. KAMINS: Yes, Your Honor. I need to  
11 understand that Your Honor is stating for the  
12 record, so when I have a transcript and have to  
13 file a motion to reopen post-conviction, that you  
14 are -- well, that's what it has to be, Your Honor.

15 THE COURT: I didn't say anything.

16 MS. KAMINS: It has to be a motion to  
17 reopen.

18 THE COURT: I didn't say a word. It  
19 doesn't have to be a motion to open post-  
20 conviction. It can be a petition for post-  
21 conviction relief, subsequent to DNA testing and

1 its results. The Court indicated in its initial  
2 post-conviction whatever whatever -- this, this,  
3 this, this, this, this -- oh, I'm doing it, I'm  
4 giving legal advice, aren't I?

5 MS. KAMINS: Your Honor, I'm not asking  
6 for legal advice. I know that this Post-Conviction  
7 Article allows a single post-conviction, whether  
8 you allow him to file a second one, or not. It's  
9 precluded by law. It has to be in the form of a  
10 motion to reopen post-conviction.

11 If you are stating for the record that  
12 you'll entertain it as a second post-conviction or  
13 a continuation of this one, I'm fine. That's  
14 assuming you're still on the bench when this comes  
15 to pass. So that's why the record has to be  
16 indubitably clear that this is not going to need to  
17 be a motion to reopen, which, in every other  
18 instance, once a post-conviction case is done, you  
19 can't file another, for any reason, whatsoever.  
20 So, if that's what Your Honor's ruling is, then I'm  
21 satisfied.

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1 THE COURT: Ms. Kamins, didn't you say in  
2 every other instance we always -- you always -- the  
3 transcript of the hearing is always there? Didn't  
4 you say that when we came in here?

5 MS. KAMINS: Absolutely, I did.

6 THE COURT: We don't have it here, do we?

7 MS. KAMINS: No.

8 THE COURT: Did we have a hearing?

9 MS. KAMINS: Your Honor, --

10 THE COURT: Did we have a hearing?

11 MS. KAMINS: Yes, we did.

12 THE COURT: Okay. And didn't you want to  
13 call Mr. Middleton first? Right?

14 MS. KAMINS: Yes.

15 THE COURT: But it was decided the way it  
16 might happen, and it may or might be better in this  
17 case would be to call the Defendant first and then  
18 call Mr. Middleton, didn't we do it that way?  
19 Didn't we do that?

20 MS. KAMINS: Yes.

21 THE COURT: Okay. And witness didn't

1 have any of the exhibits or the appendages to the  
2 supplemental motion, did he?

3 MS. KAMINS: He didn't need them.

4 THE COURT: Did he?

5 MS. KAMINS: No.

6 THE COURT: It was yes or no?

7 MS. KAMINS: No.

8 THE COURT: Witness didn't have  
9 opportunity to look at the transcript, did he?

10 MS. KAMINS: He did. He declined.

11 THE COURT: But usually, in most cases  
12 that happens, they look at it, right?

13 MS. KAMINS: Sometimes they decline.

14 THE COURT: Okay. But the hearing went  
15 on, right?

16 MS. KAMINS: Yes.

17 THE COURT: And we moved right along,  
18 right?

19 MS. KAMINS: (No audible response.)

20 THE COURT: Now, we have a record. We  
21 have a video. It can be audio'd. It can be CD'd.

1 It can be DVD, whatever you want to do. But I just  
2 don't know how many different ways to tell you.

3 MR. GIBLIN: I'm just a little miffed  
4 that this wasn't the first thing that we talked  
5 about today --

6 THE COURT: Thank you!

7 MR. GIBLIN: -- rather than the last  
8 thing.

9 MS. KAMINS: I --

10 THE COURT: Thank you!

11 MR. GIBLIN: Because Mr. Middleton --

12 THE COURT: Thank you!

13 MR. GIBLIN: -- has left the building.

14 MS. KAMINS: We asked Mr. Middleton the  
15 questions that were relevant to the --

16 MR. GIBLIN: Absolutely, not.

17 MS. KAMINS: -- ineffective assistance of  
18 counsel.

19 MR. GIBLIN: We --

20 THE COURT: No, you didn't.

21 MR. GIBLIN: You asked them in terms of a

1 minor, a run by DNA sentence, in a forty-two page  
2 petition, not in the context of I don't know how  
3 many pages your DNA stuff was, but to say that he  
4 was asked those questions and the State responded  
5 in its questioning of Mr. Middleton, in an  
6 appropriate fashion, is just wrong.

7 THE COURT: Well, this is what we'll do!  
8 Oh, boy, I'm telling you, this is just fun stuff.

9 MR. GIBLIN: I think we ought to continue  
10 the case.

11 THE COURT: I -- you know what, Mr.  
12 Giblin, you are reading my mind. We're going to  
13 continue this matter. Where is the DNA? Where is  
14 the evidence?

15 MS. KAMINS: That's the only thing I was  
16 trying to say, Your Honor, was that we should keep  
17 the case open --

18 THE COURT: You know what, Ms. Kamins?  
19 You are really, really, really, really not  
20 listening! I make questions real simple. Yes or  
21 no. I was in the process of asking you a question

1 and then you want to tell me what you want to tell  
2 me. I want you to tell me what I want to know.

3 Where is the evidence?

4 MS. KAMINS: The Evidence Control.

5 THE COURT: It's not at a DNA lab?

6 MS. KAMINS: No, they won't let it go.

7 That's what we're -- that's what -- that's the  
8 thing that you're referring to that we have to work  
9 out between us. They won't relinquish it.

10 THE COURT: So it hasn't even been  
11 tested?

12 MS. KAMINS: No, Your Honor.

13 THE COURT: Hasn't even been sent to be  
14 tested?

15 MS. KAMINS: No, Your Honor.

16 THE COURT: Well, guess what? I'll be  
17 here, for sure, until 2017. At least November  
18 2018. Mr. Giblin might.

19 Now, where you going?

20 MR. GIBLIN: Well, maybe, give me three,  
21 three and a half years, Judge. Don't put me in for

1 five.

2 THE COURT: All right. Get that stuff  
3 tested.

4 MR. GIBLIN: I will speak with --

5 THE COURT: So whatever needs to be done.

6 MR. GIBLIN: -- Mr. Leedy with all  
7 dispatch.

8 THE COURT: Okay. Get that stuff tested.  
9 I'm going to give you a post-conviction date, right  
10 now. Tell Mr. Leedy he doesn't want to come in  
11 here in front of me with this mess.

12 MR. GIBLIN: Oh, I want to be in front --  
13 I want to do this case.

14 THE COURT: And when I say mess, just  
15 because it's been going on so long. And this is  
16 something we should have addressed, first thing,  
17 Counsel. First thing. First thing. And this is  
18 kind of like a Fourth Amendment issue. It doesn't  
19 make the search okay because you get a gun. And  
20 that's the same thing with doing DNA. You know, it  
21 doesn't make you ineffective because now you test

1       it and you get DNA or you don't. You know what I'm  
2       saying?

3                   MS. KAMINS: (Inaudible).

4                   THE COURT: That's what I was kind of  
5       thinking about but don't answer -- that was  
6       rhetorical. That was rhetorical!

7                   MS. KAMINS: May I --

8                   THE COURT: That was rhetorical!

9                   MS. KAMINS: (Inaudible) responding to  
10       that, Your Honor, may I put something on the  
11       record? I asked for a postponement of this case  
12       based on --

13                   THE COURT: No, you asked for a  
14       postponement because you were moving offices.

15                   MS. KAMINS: That's one of -- that, that  
16       is one paragraph --

17                   THE COURT: And that is --

18                   MS. KAMINS: -- in the postponement.

19                   THE COURT: That --

20                   MS. KAMINS: The second paragraph in the  
21       postponement --

1 THE COURT: Sheriff?

2 MS. KAMINS: -- was because the DNA  
3 wasn't finished, yet.

4 THE COURT: She is this close to spending  
5 the night in Central Booking because I have put up  
6 with about as much of your insolence and disrespect  
7 and contemptuous behavior as I can, today, Counsel.

8 MS. KAMINS: I apologize to the Court.

9 THE COURT: I have no problem with you  
10 adamantly representing your client. I hope you do,  
11 and I want you to. But you cannot continuously  
12 argue with the Court! Because you're going to  
13 lose! I don't care if I'm right, wrong,  
14 indifferent -- I could be speaking Swahili, you're  
15 going to lose. You know why? One, I'm the Judge.  
16 Two, I'm the Judge. Three, I'm the Judge. Four,  
17 I'm the Judge. Remember that, please!

18 You talking about getting me riled up.  
19 Now, I'm a little riled up because I just will not  
20 tolerate the blatant disrespect that you've shown  
21 this bench, when I've bent over backwards with this

1 haphazard piecemeal presentation by the State and  
2 by you. Okay? So, let's not -- let's do a little  
3 better.

4 Now, do whatever you need to do to get  
5 this matter in order. The Court did not grant a  
6 postponement in this matter because it's been five  
7 years! And Mr. Spivey deserves to have his day in  
8 court! People die! People leave! Mr. Giblin, he  
9 might decide he's going to leave, next week. All  
10 right?

11 But moving to another office is not a  
12 good reason for a postponement. That being said,  
13 the next post-conviction hearing will be on August  
14 17th. No changes. I don't want to hear about  
15 births, deaths, funerals, weddings, christenings,  
16 bar mitzvahs, nothing. Vacations -- none of that  
17 crap.

18 MR. GIBLIN: What year, Judge?

19 THE COURT: You know what? You just --

20 (Laughter.)

21 THE COURT: What did I say? August 17th?

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1 MR. GIBLIN: Yes, ma'am.

2 THE COURT: Well, you know what? Let's  
3 make it September 20th, only because I'm conscious  
4 of peoples' families and people making vacation  
5 plans and you know, however that goes. So, this is  
6 going to be September 20th. Get that stuff tested.  
7 Now, if it's not tested and it's not going to be  
8 ready by then, somebody better tell me.

9 MR. GIBLIN: Yes, ma'am. And I assume by  
10 then Counsel will get you a copy of the transcript  
11 so you can have it --

12 THE COURT: Somebody -- you will have  
13 that transcript to me by Monday morning?

14 MS. KAMINS: Earlier than that.

15 THE COURT: All right.

16 You had your hand up, sir. Did she  
17 answer your question?

18 MS. KAMINS: I just told him to shut up.

19 THE COURT: Well, did she answer your  
20 question? Because that's why we're here. We need  
21 to make sure he gets his (inaudible).

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1 MS. KAMINS: Well, I was trying to make a  
2 record, Your Honor, and you got angry at me so I  
3 didn't think there was anything more that could be  
4 put on the record, today.

5 THE PETITIONER: Well, I got a question.

6 THE COURT: Why don't you ask your  
7 lawyer, first. And then she'll let you know  
8 whether or not you should ask me.

9 And you can always put things on the  
10 record but it has to be in a respectful way!

11 (Pause.)

12 MS. KAMINS: Your Honor, I think it's a  
13 worthwhile point to make for a complete record. Do  
14 you want to hear from my client directly or from  
15 me?

16 THE COURT: What is it, Counsel? What is  
17 it? Just go ahead.

18 MS. KAMINS: Well, he filed -- he tried  
19 to set this in motion a year ago.

20 THE COURT: Set what in motion? The DNA?

21 MS. KAMINS: Yes.

1 THE COURT: Okay.

2 MS. KAMINS: Okay, so he wants you to  
3 know, so that this delay is not being held against  
4 him because he tried --

5 THE COURT: It's not being held against  
6 him.

7 MS. KAMINS: -- to do this.

8 THE COURT: No, no --

9 MS. KAMINS: By himself. A year ago.

10 THE COURT: Mr. Spivey, this is not being  
11 held against you. Not at all. Don't think that.  
12 And, look -- you need to understand. I know how  
13 the evidence, and the State wants the evidence, the  
14 police don't want to give the evidence up. It's  
15 not being held against you. Because even if they  
16 started, it might be sitting there waiting for  
17 someone to pick it up for three years. It's not  
18 being held against you, okay?

19 THE PETITIONER: No, but this is the  
20 point. They -- the Petition, when I filed it, it  
21 was on December 20th of last year.

1 THE COURT: Mm-hmm.

2 THE PETITIONER: It came to you. It  
3 didn't go to Judge Rasin. And you never did  
4 nothing with it, so.

5 THE COURT: Because it probably had to be  
6 sent to Judge Rasin. And, also, because when we  
7 get -- let me tell you, Mr. Spivey, just so you  
8 know, we get letters and petitions from so many  
9 people, every day. The best thing for you to do is  
10 have it sent through your lawyer. And when you  
11 have a post-conviction pending, you really don't  
12 want to send stuff to the Judge. You kind of want  
13 to make sure you send it to your lawyer, because  
14 sometimes you include in those papers and in those  
15 statements things that may not be in your best  
16 interest, okay?

17 THE PETITIONER: I didn't have no lawyer.  
18 I was going through issues with my other lawyer.

19 THE COURT: Okay.

20 THE PETITIONER: I didn't have no lawyer.  
21 And I wanted to make sure it was filed timely so it

1 didn't go against me.

2 THE COURT: Okay, well, with the DNA  
3 thing, I'm not sure what the time, what the time  
4 limit is, but, okay.

5 THE PETITIONER: The way I was saying it,  
6 the --

7 THE COURT: The DNA statute?

8 THE PETITIONER: The DNA statute, it say  
9 as long as you file it within, um, (inaudible) file  
10 it with your first post-conviction, it's supposed  
11 to go with you --

12 THE COURT: Okay, and your first post-  
13 conviction. Okay.

14 THE PETITIONER: Yes.

15 THE COURT: Okay.

16 THE PETITIONER: And not after it.

17 THE COURT: Okay. That's fine. And  
18 that's -- that's fine. But, either way, that issue  
19 will be addressed. And what I'm saying to you,  
20 that issue will be addressed either with this first  
21 post-conviction or separately, by this Court, okay?

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1 THE PETITIONER: Okay.

2 THE COURT: And because I'm continuing  
3 this, it will be addressed altogether, it appears,  
4 okay? So, it will be addressed. And you will not  
5 be hampered or panelized because of any time factor  
6 with regard to the DNA. All right?

7 THE PETITIONER: Okay.

8 THE COURT: See, the process with the  
9 whole DNA situation is so new that everybody is  
10 kind of trying to feel their way around, how to  
11 handle it and how to process it through the courts,  
12 okay?

13 THE PETITIONER: Right. Like I say, I  
14 was going through an issue with my old lawyer.

15 THE COURT: Mm-hmm.

16 THE PETITIONER: I tried to file it when  
17 I first initially filed this Petition, back in  
18 2006.

19 THE COURT: Mm-hmm.

20 THE PETITIONER: But my other attorney, I  
21 was going through issues with him, so.

THE COURT: Okay. But that's okay. Now we know. Now we have it. And I will ask your attorney to send me a copy of that, the petition with regards to the DNA, okay? Just as a courtesy. And you can just attach that, along with the transcript. All right?

Anything else?

MR. GIBLIN: No, ma'am.

MS. KAMINS: No, Your Honor.

THE COURT: Alrighty, have a good evening, folks.

MR. GIBLIN: Thank you, Your Honor.

THE COURT: You're welcome.

(Off the record, video recording ends, proceedings continued to September 20, 2012.)

CERTIFICATE OF TRANSCRIPTION

State of Maryland;

County of Baltimore, to wit:

I, Robin Claire Comotto, a Notary Public  
in and for the State of Maryland, County of  
Baltimore, do hereby certify that the within  
proceedings were transcribed by me accurately to  
the best of my ability, knowledge, and belief.

As witness my Hand and Notarial Seal,  
this 13th day of May, 2013.

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ROBIN CLAIRE COMOTTO

My Commission Expires:

September 15, 2014