

NO. WR-75,804-01
WR-75,804-02

IN THE COURT OF CRIMINAL APPEALS OF TEXAS

EX PARTE)	((CAUSE NO. 06-CR-3624-F
HANNAH RUTH OVERTON)	(IN THE 214TH JUDICIAL
TDCJ-ID #1478117)	(DISTRICT COURT
)	(NUECES COUNTY,
)	(CORPUS CHRISTI, TEXAS

ORAL ARGUMENTS,

heard before the Honorable Court of Criminal Appeals
of Texas on Wednesday, April 2, 2014.

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A P P E A R A N C E S

COURT OF CRIMINAL APPEALS JUSTICES:

Hon.
Hon.
Hon.
Hon.
Hon.
Hon.
Hon.

FOR THE STATE OF TEXAS:

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Nueces County Courthouse
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By Mr. Dougs Norman
Mr. Bill Ainsworth

FOR THE DEFENDANT:

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By Ms. Cynthia E. Orr
Mr. Jerry Goldstein

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1 MS. ORR: Good morning. A young mother of five is

2 ---

3 JUSTICE _____: (Inaudible).

4 JUSTICE _____: State your name for the record,
5 please.

6 (Inaudible)

7 MS. ORR: Oh, my name is Cynthia Orr and I'm
8 appearing on behalf of Hannah Overton.

9 A young mother of five is serving a life
10 sentence without possibility of parole on discredited
11 science, concealed favorable evidence, and
12 misdirection has plagued this case from the outset.

13 Brady claims that we've raised here and
14 ineffective assistance of counsel are not mutually
15 exclusive, Your Honors, in this case where they
16 occurred together or they coexist and are interwoven,
17 a terrible injustice is done.

18 Here, Ms. Overton brought her four year old
19 child, Andy, to the Driscoll Urgent Care Clinic three
20 miles from her home for treatment. They suctioned
21 vomit from his mouth to clear an airway as she
22 performed CPR on her own child, wondering why they
23 could not respond to him more quickly and more
24 competently at the Urgent Care Clinic.

25 He was rushed then to two other hospitals,

1 Spohn Hospital and Driscoll Children's Hospital,
2 different from the clinic where he started, where this
3 journey began at about 5:17 p.m. It wasn't until 7:35
4 p.m. that the doctors, with all their medical
5 knowledge, with lab test results and their training
6 were able to determine Andy had hypernatremia or
7 sodium intoxication.

8 His vomit, collected at Driscoll Urgent Care,
9 was the only unadulterated fluid retained from Andy
10 before medical personnel gave him sodium as part of
11 their routine treatment course, sodium products like
12 an IV drip, Epinephrine, Sodium Bicarbonate and other
13 measures.

14 This child with hypernatremia underwent
15 aggressive lifesaving measures. CPRs, nasal gastric
16 tubes, breathing bags and the like, intraosseous lines
17 into his bone marrow to deliver these sodium
18 containing medicines.

19 This first unadulterated evidence was
20 collected by an evidence technician from -- at
21 Driscoll Urgent Care Clinic and stored away, but his
22 report was never provided to any of the defense
23 lawyers, not the civil ---

24 JUSTICE _____: And why do you say that's so
25 important? What -- what is so important about that?

1 MS. ORR: Because that's where the misdirection
2 began, Your Honor.

3 JUSTICE _____: And in what -- in what way?

4 MS. ORR: Because this collected evidence was
5 called something else. It was called ---

6 JUSTICE _____: Gastric ---

7 MS. ORR: --- gastric contents obtained from a
8 hospital. Well, Spohn and Driscoll Children's
9 Hospital didn't collect it, it was at this Urgent Care
10 Clinic, and it was the first vomit, ---

11 JUSTICE _____: Why is that so important?

12 MS. ORR: --- the unadulterated evidence.

13 Because it showed, Your Honor, what this
14 child ingested right before he showed these signs of
15 illness, and it showed that what Hannah Overton told
16 the doctors and the police and testified to at trial
17 was the truth, that she had given her child soup with
18 some Zatarain's sprinkled in it and then some water
19 with a very little Zatarain's sprinkled in it because
20 he wanted to continue to eat.

21 JUSTICE _____: So are you saying that this
22 vomit had a very small concentration of salt in it?

23 MS. ORR: Yes, ma'am, it did.

24 JUSTICE _____: And the significance of that is
25 what?

1 MS. ORR: The significance of that is two; one,
2 that the sodium that this child took in that was
3 killing him had already migrated to the -- through his
4 body, ---

5 JUSTICE _____: And (Inaudible) -- is your
6 position?

7 MS. ORR: --- it left his stomach ---

8 JUSTICE _____: --- (Inaudible) -- it's your
9 position?

10 MS. ORR: --- it left his stomach and so we know
11 two things, he couldn't have been saved and that he
12 ingested it earlier on his own. That was the State's
13 theory, that Hannah Overton forced a slurry of spices
14 down his throat was not true. That's not what the ---

15 JUSTICE _____: When you say we know that, but
16 the Court found that -- made several findings that
17 they're contrary to what was said and done. And one
18 is the Court finds that the attorney Brad Condit, one
19 of the defense attorneys, testified that the bag
20 containing the vomitus was made available to him, but
21 he chose not to open it to inspect the contents. Is
22 that ---

23 MS. ORR: And that's where I think, ---

24 JUSTICE _____: --- (Inaudible).

25 MS. ORR: --- Your Honor, where I say that

1 ineffective assistance of counsel and Brady intersect.

2 One, Brad Condit went to ---

3 JUSTICE _____: Well, but -- but the Court also
4 finds that the low 48 sodium test result actually
5 mentioned in Applicant's application for writ is
6 clearly known to the defense at the time of file, and
7 Applicant failed to prove by -- (Inaudible) -- the
8 prosecutor or any agent of the State failed to
9 disclose this evidence.

10 MS. ORR: That's not correct, Your Honor.

11 JUSTICE _____: That's the ---

12 MS. ORR: (Inaudible).

13 JUSTICE _____: That's not part of the packet?

14 MS. ORR: That's -- that's not the correct Finding
15 of Fact.

16 JUSTICE _____: Okay.

17 MS. ORR: It is true that a test result of 48 was
18 revealed to the civil lawyer at the child custody
19 case. It was identified as lavage, that is irrigated
20 stomach contents in a hospital later on in treatment,
21 not -- not this unadulterated first vomit that tells
22 us what really happened. So, and -- and the lawyers
23 react, "Where's this first vomit?" We're told "It
24 doesn't exist". And every lawyer, Your Honor -- the
25 second chair prosecutor said "My first chair told me

1 and all the defense lawyers the vomit didn't exist
2 from the Driscoll Urgent Care and that this was
3 lavage".

4 JUSTICE _____: Now, I find this packet --
5 (Inaudible) --.

6 MS. ORR: That's right.

7 JUSTICE _____: Yes, okay.

8 MS. ORR: Yes, ma'am.

9 JUSTICE _____: And you filed objections to the
10 Finding of Fact -- (Inaudible).

11 MS. ORR: Yes, ma'am. Yes, ma'am. I did -- with
12 record references, the Clerk can click on to see where
13 I'm correct about these issues in the electronic copy
14 and then the hard copy with the actual transcript
15 attached to the Objections.

16 What's more important, Your Honor, is when
17 Brad Condit walked into -- he's the only lawyer -- I
18 asked all of them -- that went to the physical
19 evidence that represented Hannah, he went in, he
20 looked at the bag and it has not Driscoll Urgent
21 Care's address on it, but the Overtons' home address
22 on Parkview Drive. And just like all the other
23 condiments in the pantry of the Overtons' was labeled,
24 this bag containing the vomit said "reddish brown
25 liquid" -- it said "Bemis", B-E-M-I-S, "container",

1 which I didn't know was a medical receptacle. That
2 might be a brand name, I'm not sure. And -- and he
3 had no interest in that. By this time he had taken
4 the deposition of Dr. Fernandez, the Medical Examiner,
5 who told the lawyer who took that depo "This is
6 something collected in the hospital down the line".
7 The lawyers had been told this was lavage. The
8 lawyers had been told the vomit didn't exist anymore
9 and he's looking at a bag containing something from
10 the Overtons' home address. He's not interested in
11 that. And, the chain of custody documents, at State's
12 Exhibit 1 in the writ hearing has a notation
13 "Container not opened, Brad Condit present". So,
14 should he have opened the bag? Yes. That would be
15 ineffective assistance of counsel not to overturn and
16 look at everything.

17 Should the State -- (Inaudible).

18 JUSTICE _____: You state as a fact that the
19 State hid this evidence?

20 MS. ORR: Yes.

21 JUSTICE _____: The Court finds that that is
22 not so, is that correct?

23 MS. ORR: The trial Court does, and that's an
24 incorrect finding.

25 JUSTICE _____: Okay. I just -- the reason I

1 ask is because throughout your Brief there are
2 statements that sound like they are statements of fact
3 and I can't tell if it's from one of your witnesses
4 testified to that, the Court found it as Finding of
5 Fact, this is your theory or this is undisputed. And
6 you state as a fact that the State hid -- hid Brady
7 evidence, but that is not undisputed and is contrary
8 to the claim -- (Inaudible) ---.

9 MS. ORR: I think there is undisputed to this
10 extent, the second chair prosecutor and every defense
11 lawyer said "We were told this didn't exist". Well,
12 it does exist, Your Honor.

13 JUSTICE _____: And so that is your argument,
14 that the State hid it? (Inaudible).

15 MS. ORR: I believe it's sustained by the facts
16 presented at the -- at the writ hearing and at the
17 trial, and I think that the only evidence ---

18 JUSTICE _____: Before we ---

19 MS. ORR: I'm sorry.

20 JUSTICE _____: --- that's what I mean, that's
21 your theory?

22 MS. ORR: The only argument to the contrary is the
23 prosecutor and she says "I don't recall".

24 JUSTICE _____: And the Judge found that to be
25 true?

1 MS. ORR: The Judge found she didn't recall, but
2 there was no evidence upon which he could base the
3 finding.

4 JUSTICE _____: Well, yeah, -- she also -- she
5 also said that she would have turned over Brady
6 evidence -- (Inaudible). That was true, is that right
7 -- correct?

8 MS. ORR: She believes she would have, but she had
9 no recollection of doing so.

10 JUSTICE _____: Okay.

11 JUSTICE _____: Please continue.

12 MS. ORR: All right.

13 JUSTICE _____: Ms. Orr, on a fairly different
14 topic, I believe it's your position -- or your theory
15 at trial was that this was a horrible accident, that
16 it was Andy himself who ate the salt. Is that your
17 theory at trial?

18 MS. ORR: That is our theory.

19 JUSTICE _____: Okay. The Supreme Court said
20 in Herington vs. Specter that there are some cases in
21 which the defense absolutely requires expert witnesses
22 and an expert investigation. And I'm wondering to
23 what extent, if any, the -- the failure to call Dr.
24 Moritz and Dr. Cortes works into your ineffective
25 assistance claim?

1 MS. ORR: It is really the -- the heart of it, the
2 heart of the matter because here, both Dr. Fernandez
3 -- who in the writ hearing said he would defer to Dr.
4 Moritz, and Dr. Rotta who said he doesn't know about
5 how much time is needed to get quick treatment for
6 salt poisoning, he only knows about cardiac arrest out
7 of the hospital.

8 Dr. Moritz's testimony was crucial. He, in
9 his deposition and if he was called to testify live as
10 the lawyers said they planned, would be able to
11 testify about how quickly sodium would be absorbed,
12 and in this case how it would have shut down all the
13 organ processes so what we have preserved in the
14 stomach is what this child last ate because the
15 earlier high salt had migrated; otherwise, the stomach
16 sodium would have been at 1,600 or 2,000 milliliters
17 per liter, that you would die at this level even if
18 this happened in the hospital, and that -- even with
19 immediate care, and that these scratches and bruises
20 and all this that were mistaken for abuse were caused
21 by coagulopathy which means this child couldn't clot.
22 Any touch would cause this under-skin bleeding and
23 every scratch he had would -- would ooze blood.

24 JUSTICE _____: Let me -- let me interrupt you
25 there for a moment. So there was testimony -- I can't

1 remember which doctor, I think it was Dr. Rotta
2 testified that there was not one continuous area of
3 skin that did not have a mark, a scratch or a bruise
4 on this -- on this four year old child.

5 MS. ORR: Very -- very ---

6 JUSTICE _____: (Inaudible).

7 MS. ORR: --- clear indication of "copulopathy" --
8 coagulopathy, Your Honor. That's what happened.

9 JUSTICE _____: Okay. So the scratches on the
10 neck, the bruise on the nose, that was all because of
11 the coag -- what you just said?

12 MS. ORR: And lifesaving measures, yes, Your
13 Honor. And I can't say it well, either.

14 JUSTICE _____: I can't either.

15 Thank you.

16 MR. NORMAN: May it please the Court, Doug Norman
17 for the State. With the Court's permission, I will be
18 splitting my time with Mr. Ainsworth.

19 I would like to address issues concerning the
20 scope of review in the amendment of this application
21 as well as the Brady claims. Mr. Ainsworth will take
22 the ineffective assistance of counsel claims. There
23 will be some overlap, understandably.

24 May it please the Court, in our response, the
25 State's Brief, one of the things we have argued in

1 this case is that we were basically given one
2 application at the time it was filed and in theory was
3 radically changed by the time we went to a hearing
4 after this Court had designated the issues.

5 In particular, the initial application
6 claimed that there was a low 48 indication on the
7 readings of the stomach contents that was not
8 disclosed to them. It later became apparent in our
9 research that we had disclosed that to them.

10 On the eve of the hearing that this Court had
11 ordered, the theory changed to a 250 reading and an
12 experiment that we had basically no notice of. That
13 raises the question to what extent can a habeas
14 Applicant change their theory after the application
15 has been filed, after this Court has designated issues
16 and sent it back for a hearing. On the eve of that
17 hearing the State basically had no notice of it and we
18 did preserve all along our objection to the fact they
19 had changed their theory.

20 Now, in my Brief I have underlined those
21 portions of their claims that have changed. They
22 changed a number of claims, but the lower 48 to the
23 250 was the main claim that they changed. They
24 changed a number of them there. We make the arguments
25 in our Brief that I will stand on, that an application

1 for Habeas Corpus in the 1107 Statute is mentioned as
2 an application, it shouldn't be multiple applications.
3 We'd urge this Court to read it as a single
4 application.

5 JUSTICE _____: Mr. Norman, we normally allow
6 all kinds of amendments and supplementation and so
7 forth so long as those amendments and supplements go
8 through the trial Court and is made before we come to
9 some decision. Are you saying that we've been wrong
10 in doing that?

11 MR. NORMAN: I would certainly like for you to
12 find that, Your Honor, because it's unfair to the
13 State, I would argue, to allow the Defense to lay
14 behind the law and change their theory on us ---

15 JUSTICE _____: But if we get only one, and I
16 don't recall the statute that in 1995 was enacted, it
17 was said that it was to be one full opportunity and
18 the Defense, and I think it was Senator Pete --
19 (Inaudible) -- who said "Bring the kitchen sink and
20 put it in". We need everything that claims that you
21 learn about because you only get one opportunity and
22 so you want to make sure that every possible issue has
23 been addressed. And so we sort of use that as, you
24 know, a rationale for "Yes, we'll" -- "we'll allow
25 supplementation of the evidence". Are you saying that

1 we should not have been doing that?

2 MR. NORMAN: I'm urging the Court not to. I think
3 that certainly bring everything, including the kitchen
4 sink, but bring it when you file the application,
5 don't throw the kitchen sink at the -- straight at the
6 State at the last minute, which is what happened in
7 this case.

8 There is clear testimony as well in the writ
9 hearing that the attorneys examined our files -- and
10 we gave them free access to our files in 2010. They
11 had all the information that they would need to have
12 made the claims they did, the additional claim, way
13 before they filed their application in 2011. And we
14 would certainly urge this Court to look carefully at
15 that. I understand that common practices evolved into
16 amending these things, and generally there's no
17 provision -- specific provision in the 1107 for
18 amendment, but it seems that more and more habeas
19 applicants, especially those represented by counsel,
20 are amending their claims after the issues have been
21 designated, after this Court has sent -- sent the case
22 back for its own designation issues, it happens at the
23 last minute, the State gets no notice of it. I would
24 urge you even to read the statute conservatively not
25 to allow such amendment, at least not without some

1 sort of leave of Court to amend it at that late date
2 or to find, based on this Court's general application
3 of laches that it is simply unfair to the State to
4 allow amendment at that late date. There is prejudice
5 to the State because once they have made their initial
6 claim and we have expended, you know, numerous
7 manhours responding to the claims that they've made in
8 that, to allow them then to amend it and add or change
9 their theories, in fact it wastes the State's time on
10 having responded and thoroughly looked at the claims
11 before made.

12 JUSTICE _____: So that would be a very hard
13 and fast rule?

14 MR. NORMAN: Well, Your Honor, I think there is
15 plenty of room for such -- (Inaudible) -- discovered
16 things if in the Court's -- as I said, I think the
17 Court could allow amendments, you know, on a case-by-
18 case basis when it's asked for and when leave of Court
19 is granted. Understand in this case, the Court had
20 already designated the issues and it is later amended
21 ---

22 JUSTICE _____: Which Court?

23 MR. NORMAN: This Court, Your Honor.

24 The procedural history was the trial Court
25 initially simply signed an Order saying he didn't find

1 that there were issues in the case and sent it on.
2 This Court found there were issues and sent it back
3 with specific instructions to have a hearing on
4 designated issues. And it was after that the claims
5 were changed.

6 We would urge the Court to limit this. If,
7 on the other hand, there are claims that legitimately
8 could not have been discovered at the time that the
9 initial application was filed, then they have the
10 subsequent application process that they can file.
11 They can claim "We were not able to, factually unable
12 to raise these claims before", and that would excuse
13 them to raise them in the initial hearing.

14 JUSTICE _____: On a practical basis, I
15 understand you feel you have been sandbagged here, but
16 which would you prefer, bottom line, litigate it once
17 or litigate it twice?

18 MR. NORMAN: I'd like a fair opportunity to
19 litigate it twice as opposed to being sandbagged once.
20 And please understand me, Your Honor, I'm not claiming
21 that counsel did anything unethical, I think they were
22 doing what they felt was in the best interest of their
23 client. I -- I assume they didn't realize -- they
24 hadn't looked at the things carefully enough to
25 realize their -- you know, the claims they eventually

1 made. So I'm not accusing them of doing anything
2 wrong, I'm saying allowing this sort of thing, in
3 general, sets a very bad precedent for the State and
4 it allows us to be sandbagged in case after case in
5 these 1107 proceedings.

6 JUSTICE _____: Mr. Norman, I -- I -- when I --
7 honestly, when I read your Brief, I read it exactly
8 the way you're arguing it right now, which is that
9 your argument is procedural default argument. The
10 problem is when I read your Brief, I then also thought
11 he must lose on the merits. So I wonder if you could
12 address the merits?

13 MR. NORMAN: Yeah, and I mean, I don't think we
14 lose on the merits.

15 JUSTICE _____: Well, that's what I'd be
16 interested in -- (Inaudible).

17 MR. NORMAN: And on the merits, I'm going to
18 cover, if I may, I think, the most, you know,
19 important thing here, the one thing that's been argued
20 is this smoking gun of the 48 or 250, whichever you
21 want to look at it as.

22 And you know, initially I would just like to
23 mention there was claim here that there was a
24 misrepresentation that this was lavage. In fact,
25 there's no credible evidence that there was such a

1 misrepresentation. The testimony that's pointed to is
2 the testimony of one of the trial lawyers, Mr. David
3 Jones. He represented -- he did testify that the --
4 he was starting to testify that one of the other
5 defense lawyers from the defense team had learned that
6 it was lavage, supposedly from the prosecution. We
7 said "Hearsay", and the trial Court agreed with us.
8 He didn't hear it himself, this was something he
9 supposedly heard from the defense team.

10 JUSTICE _____: What did the bag say?

11 MR. NORMAN: The bag said "Bemis", "gastric
12 content", I believe, and it was labeled with the home
13 address, but everything was. The standard police
14 procedure was to list the name of the defendant and
15 the home address. If they'd looked at it carefully,
16 they'd see that everything was listed to that home
17 address.

18 JUSTICE _____: Even the stuff that was taken
19 at the hospital?

20 MR. NORMAN: Yes, Your Honor, yes. I believe so.

21 JUSTICE _____: Perhaps you should speak to the
22 police department about that.

23 MR. NORMAN: Well, yes, Your Honor, but I mean, it
24 -- it's clear under their procedure.

25 JUSTICE _____: So how -- however it wasn't

1 known, do you -- do you agree with the Defense that
2 this was really important evidence and sort of, you
3 know, the -- the smoking gun type evidence that
4 supports the Defense?

5 MR. NORMAN: No, I really don't. I mean, ---

6 JUSTICE _____: Okay. Why -- why doesn't it?
7 Why isn't it important?

8 MR. NORMAN: Well, if I may construct what I think
9 their defense is, I think their defense is with this
10 250 level in the stomach, that somehow proved that the
11 Decedent, that Andrew was salt poisoned long before we
12 supposedly claim that he was, that he somehow got into
13 the stuff himself rather than being force-fed. That
14 would assume that our theory was that Hannah Overton
15 force-fed the child this stuff right before she took
16 him to the hospital, and that was never our theory.

17 Our theory was that he was force-fed several
18 hours before. We don't know exactly when. Our main
19 theory was that she did nothing. She stood there and
20 watched him deteriorate for a significant enough
21 period of time that he wouldn't survive and then
22 anyone should have known that he was dying. This is
23 actually consistent with our theory.

24 If we can show that some two or three hours
25 beforehand was the day and the time that he actually

1 ingested the sodium, that really dovetails with the
2 State's theory and not the Defense's. That shows the
3 theory we primarily argued at trial, which is one of
4 omission, that she just sat there, she watched her
5 child die from sodium poisoning.

6 JUSTICE _____: Are you saying that she didn't
7 feed him the salt?

8 MR. NORMAN: Well, no, I'm saying -- the gastric
9 contents don't tell you who fed him the salt.

10 JUSTICE _____: Right. But -- but, are you
11 saying in effect that either she fed him the salt --
12 the Defendant did, she fed him the salt and so she's
13 doubling -- (Inaudible) -- she not only tries to kill
14 him, but she sits there for another two hours and
15 watches him die or are you saying that she watched him
16 eat the salt himself and did nothing or ---

17 MR. NORMAN: I'm saying under the second theory,
18 Your Honor, that she -- however he ingested the
19 sodium, whether she gave it to him or whether she
20 didn't see him take it ---

21 JUSTICE _____: But what -- I mean, but her
22 position was she was taking a nap and he was out -- he
23 was supposed to be in his room, but he wasn't. So are
24 you saying that it doesn't matter if he ate the salt
25 all by himself with nobody watching, that any

1 reasonable person would have picked up on this?

2 MR. NORMAN: According to her admissions, there
3 was a significant period of time, approximately two
4 hours, that she was aware that he was sick and before
5 she took him in to the hospital, one and a half to two
6 hours. That's the critical portion.

7 JUSTICE _____: The question was are you saying
8 that doesn't matter? And you charged her with two
9 theories that -- two theories, right?

10 MR. NORMAN: Yes, Your Honor, omission and
11 co-mission.

12 JUSTICE _____: One was dealing with the salt
13 and the other one was not taking him to the hospital,
14 right, ---

15 MR. NORMAN: Yes, Your Honor.

16 JUSTICE _____: --- essentially?

17 MR. NORMAN: And I mean -- in a nutshell, yes. I
18 don't think it matters. And the theory that the Jury
19 bought, because we know from the polling, was
20 omission. That was what they all agreed. They
21 convicted her on omission rather than co-mission.

22 JUSTICE _____: Mr. Norman, was there any
23 testimony about the symptoms of -- what do you call
24 it?

25 MR. NORMAN: Hypernatremia.

1 JUSTICE _____: Hypernatremia? And we did a
2 case just a few months ago where a child died and the
3 testimony at that trial was he could not get him to
4 the hospital and yet there was testimony that they
5 were symptoms that an untrained -- a medically trained
6 person could not recognize as being critical. And so
7 was there any testimony about whether a parent with no
8 medical training would even know that there was such a
9 thing and know what the symptoms were and therefore
10 react?

11 MR. NORMAN: Well, a couple of things, Your Honor.
12 One, she was a trained EMT. She had been trained in
13 shock and had at least some knowledge of sodium levels
14 in the body. The second ---

15 JUSTICE _____: Was she an LVN?

16 MR. NORMAN: I beg your pardon, Your Honor?

17 JUSTICE _____: Was she an LVN as well?

18 MR. NORMAN: I believe she was, yes, as well.

19 The second, and what I find the most critical
20 portion in examining that, is her initial admissions
21 to the personnel at the Urgent Care Center, that at
22 some point -- which I think we can -- you know, from
23 other testimony, we can narrow down to the point when
24 she first noticed Andrew was in trouble.

25 She first noticed something was wrong with

1 him, which would be an hour and a half to two hours
2 before. She admitted to the personnel that she
3 noticed he was not breathing. Throw out all the
4 medical training. Throw out everything else. If a
5 parent notices their child is not breathing, they get
6 them to the hospital.

7 JUSTICE _____: But the child was not dead on
8 arrival?

9 MR. NORMAN: Well, no, and ---

10 JUSTICE _____: When you stop breathing you've
11 got three to five minutes, that's a known.

12 MR. NORMAN: Exactly, Your Honor. I understand
13 that, but I mean, if we're talking about her knowledge
14 and what she thought at the time, at the time she
15 noticed he was in trouble, she thought he wasn't
16 breathing. Obviously he was still breathing, perhaps.
17 We don't know. Perhaps, you know, slowly, perhaps
18 imperceptibly, but the key question there is her
19 knowledge that something was wrong, her getting him to
20 the hospital. And I would assert that when a parent
21 thinks -- correctly or incorrectly -- that their child
22 is not breathing, they get them to the hospital.

23 JUSTICE _____: Was there testimony ---

24 JUSTICE _____: Well, one quick question, just
25 to clarify, so you're saying the child was not

1 breathing and that she delayed an hour and a half
2 before she took the child to the hospital; is that
3 what you're saying?

4 MR. NORMAN: If you take her admissions to the
5 Urgent Care Center personnel and if you take the rest
6 of the testimony, yes, I think that's the consistent,
7 you know, that -- that's consistent -- (Inaudible).

8 JUSTICE _____: So -- (Inaudible) -- breathing
9 for an hour and a half and yet he was still alive?

10 MR. NORMAN: So she believed, Your Honor, at one
11 point that he was not breathing and did nothing. And
12 as I say, he must have been shallowly breathing, you
13 know, but ---

14 JUSTICE _____: Is that the -- (Inaudible).

15 JUSTICE _____: The question I was going to
16 ask, wasn't there testimony -- and I can't remember
17 who from -- that to all intents and purposes, he was
18 dead when he came -- he was kept alive, brain dead, he
19 was dead when he got to the Urgent Care Center, his
20 pupils were blown, he was blue, cold and had no pulse
21 and was not breathing?

22 MR. NORMAN: Yes. He ---

23 JUSTICE _____: Okay.

24 MR. NORMAN: --- he went into cardiac arrest
25 before he came to the center, while he was being

1 transported. He was resuscitated. He lived for -- I
2 don't know, I don't want to represent to the Court how
3 long; a few hours, maybe a day, I'm not sure, but a
4 short period of time.

5 JUSTICE _____: And never did regain
6 consciousness?

7 MR. NORMAN: Unconscious, yes.

8 JUSTICE _____: Just to follow-up on that, this
9 is what I found so bizarre, among other things, but
10 that -- that there's evidence that she was doing CPR
11 while they were at a clinic or a hospital and I
12 thought what parent does CPR when there's doctors and
13 nurses around the hospital. So I wonder if you could
14 clarify that.

15 MR. NORMAN: Well, it was an urgent care center
16 which is attached to Spohn -- Driscoll Hospital.

17 JUSTICE _____: Well, wouldn't -- wouldn't you
18 immediate -- wouldn't the child immediately be taken
19 at that point? I mean, parents don't do CPR in a
20 hospital or an urgent care, that's what the nurses and
21 the doctors do.

22 MR. NORMAN: Yeah, I think the testimony was there
23 wasn't a crash kit there. And this was -- apparently
24 for whatever reason, they were not set-up to do CPR.

25 Your Honor, if -- if I may, I would like for

1 my co-counsel to get an opportunity to argue. May I
2 turn it over to him at this point, Your Honor?

3 JUSTICE _____: Thank you.

4 JUSTICE _____: Did you say that they weren't
5 -- they weren't trained to do CPR?

6 MR. NORMAN: It's my understanding that that was
7 not a common practice at the Urgent Care Center. I
8 don't know if they had -- somebody there may have had
9 basic training, but she was on the spot and Ms.
10 Overton apparently did it.

11 JUSTICE _____: This was at Driscoll which is a
12 small town, isn't it, outside of Corpus?

13 MR. NORMAN: Oh, no, I'm sorry, Your Honor,
14 Driscoll Children's Hospital ---

15 JUSTICE _____: Oh, okay.

16 MR. NORMAN: --- is a major children's hospital.
17 The Urgent Care Center is a, sort of an adjunct of
18 Driscoll ---

19 JUSTICE _____: I see.

20 MR. NORMAN: --- Children's Hospital.

21 JUSTICE _____: I just wanted to make sure.
22 Okay.

23 MR. NORMAN: You take your child if you don't want
24 to get stuck in the emergency room all day.
25 Supposedly it streamlines the process.

1 JUSTICE _____: So "Urgent Care" doesn't really
2 mean urgent care, it just means -- what to the lay
3 person?

4 MR. NORMAN: It's somewhere between, you know, a
5 regular clinic and an emergency room, Your Honor, as
6 best I can tell.

7 JUSTICE _____: You don't go to the Urgent Care
8 facility to get urgent care?

9 MR. NORMAN: Your guess is as good as mine, Your
10 Honor.

11 JUSTICE _____: Thanks (Inaudible) that point.

12 Thank you, counsel.

13 MR. NORMAN: Thank you, Your Honor.

14 MR. AINSWORTH: Bill Ainsworth, Nueces County
15 District Attorney's Office. With the limited time
16 remaining, I want to talk briefly, Mr. Norman said
17 that the ineffective assistance claims dovetail, and
18 in some way I think Ms. Orr said that, too, with the
19 -- the issues involving the Brady claims and to the
20 extent that they do, I'm not trying to harp on that
21 over again.

22 This Court, y'all remanded the case back and
23 there were really three issues to look at that y'all
24 said on these ineffective claims. I think two of them
25 were already addressed by Defense counsel and so I

1 won't spend -- or Petitioner's counsel, I won't spend
2 time on that to any great extent. This
3 miscommunication issue, I don't think that the
4 testimony was developed at this writ hearing showing
5 any miscommunication. They were -- they might not all
6 have been on one page every single step of the way,
7 but that there were seven or eight lawyers of which at
8 least three or four were expert criminal lawyers. And
9 -- and John Gilmore is an attorney, practiced for
10 many, many years in criminal law of all kinds,
11 including murder cases.

12 The lesser included offense issue, again, I
13 don't think is something to take a lot of time with
14 because I don't think that's something that was ---

15 JUSTICE _____: Mr. Ainsworth, could you
16 address the ---

17 MR. AINSWORTH: Yes, ma'am.

18 JUSTICE _____: --- failure to call expert
19 witnesses concerning pica and the treating physician
20 who was aware that Andy had all these problems before
21 this event.

22 MR. AINSWORTH: I think that ---

23 JUSTICE _____: And I think the Defense counsel
24 may all be individually great, but this sounds like a
25 classic example of too many cooks in the kitchen in --

1 (Inaudible) -- to what was going on.

2 MR. AINSWORTH: This is the issue of Dr. Moritz
3 and his testimony. And -- and they did call an
4 expert, by the way. Dr. Melinek is a medical examiner
5 from San Francisco who did testify and talks about,
6 you know, issues involving forced ingestion and that
7 sort of thing. So they did have an expert testify.

8 But as to Dr. Moritz and his testimony, Dr.
9 Moritz went back and they did this deposition, which
10 is unusual during a criminal trial -- take a
11 deposition in the middle of trial, but they did this
12 deposition. And all you heard was -- David Jones
13 testified and -- and Mr. Jones said "I wasn't there
14 the whole" -- you know, "when they made a decision
15 about whether or not to use that video", but Chris
16 Pinedo testified "I was there and I decided that it
17 wasn't a good idea to use that and that's why we
18 advised Mr. Gilmore, who was present during the trial
19 and so he wasn't there for the deposition, that that
20 wouldn't be useful". And the reason why it's not
21 useful is the same reason why on the Brady issue is --
22 this issue with Dr. Moritz, the things that he could
23 testify to, they don't really contradict what the
24 State's claim was. Again, there are these two issues;
25 it could have been forced ingestion or it could have

1 been an issue involving, you know, neglect. This lady
2 was an LVN and EMT certified, that she didn't take the
3 child to the hospital, but neither one of those is
4 contradicted in any way by what Dr. Moritz said which
5 is that salt ingestion caused the -- the death of Mr.
6 Byrd or -- the death of Andy Byrd. I think that
7 that's clear from all the testimony from everyone who
8 spoke. And Dr. Moritz, even in the writ hearing when
9 he did testify, didn't contraindicate that in any way.
10 In fact, had he testified during the trial, there's
11 all sorts of things that that might have opened the
12 door to and I think that's why they chose not to put
13 him on in the first place.

14 JUSTICE _____: Did the Judge of the convicting
15 court make fact findings?

16 MR. AINSWORTH: He -- he did make factual
17 findings.

18 JUSTICE _____: All right. Are -- are you --
19 are you going to ask us -- and I'll have the same
20 question for you -- are you going to ask us to
21 "un-find" or disagree with any of those findings?

22 MR. AINSWORTH: No, Your Honor, we are not. The
23 factual findings of the trial court I think speak for
24 themselves and the -- and the trial court made factual
25 findings saying that the testimony of Dr. Moritz was

1 unpersuasive given the testimony of Dr. Fernandez, the
2 Medical Examiner. What Dr. Fernandez says is that
3 this issue -- again, this dove-tails, but this issue
4 of Dr. Moritz and him saying oh, well, this -- this
5 issue with the lavage and the Bemis canister and why
6 that would have been important, Dr. Fernandez said
7 that what is in your stomach doesn't tell you anything
8 about what kills you. That's the stuff that didn't
9 kill you, right? That that's the stuff that they got
10 out of him. It was the stuff that was in his body,
11 and none of that tells you about who put that in
12 there. Nothing Dr. Moritz could have said would tell
13 you whether it was Andrew himself or it was Hannah
14 Overton that administered that salt.

15 JUSTICE _____: Did -- did the Jury know about
16 Andrew's whole history of eating behavior, eating
17 strange things and hoarding food and the testimony
18 from his treating pediatrician about his peculiar
19 behavior and the whole concept of -- of pica, the
20 disease ---

21 MR. AINSWORTH: They were given ---

22 JUSTICE _____: --- and was that familiar to
23 the jurors?

24 MR. AINSWORTH: They were given that testimony
25 through -- through the Defendant herself who indicated

1 that this was his history, these were the things that
2 he was doing. This is -- this is what was going on
3 with Andrew is that he was eating all these things.
4 And that was contraindicated by testimony the State
5 put on saying that his previous foster parent hadn't
6 seen any of those things, that there was nothing about
7 that that was indicated to her about pica or anything
8 else, that he seemed like he was a -- a normal child
9 and he was eating normally and he behaved normally
10 that -- you know, there might have been some certain
11 develop -- developmental, he was, you know, slow for
12 his age or whatever, but -- but in terms of this
13 eating behavior, that was an uncontradicted testimony.
14 There was testimony on both sides ---

15 JUSTICE _____: Counsel, I didn't remember that
16 this treating physician said that he had these kinds
17 of issues. Was it his treating physician?

18 MR. AINSWORTH: No, that -- that's not what his
19 treating physician said at all.

20 JUSTICE _____: All right.

21 MR. AINSWORTH: His treating physician, Dr. Rotta,
22 who -- who testified said that -- that that wasn't his
23 opinion at all.

24 JUSTICE _____: And what about his physician --
25 is Dr. Fernandez his pediatrician?

1 MR. AINSWORTH: His -- his pediatrician, Dr.
2 Cortes ---

3 JUSTICE _____: Dr. Cortes.

4 MR. AINSWORTH: --- who -- who did not testify,
5 but was made available to the Defense, Dr. Cortes --
6 nobody was going to say, to my knowledge, that -- that
7 they knew as a -- as a physician that he had these
8 issues. The -- the only thing that they were given
9 showing that -- that he had these issues or pica or
10 anything else was information coming from the
11 Defendant herself which ---

12 JUSTICE _____: Okay. Which physician --
13 something in this -- the Defense Brief that talked
14 about Andrew being mentally retarded. Was there
15 evidence that he was -- was he mentally retarded?

16 MR. AINSWORTH: I -- I don't have that evidence,
17 but I don't think that that's true. I think that
18 there was some evidence given that he had -- that he
19 was -- I believe there was some sort of Hawaii test
20 that indicated that he is, you know, eight months
21 delayed or he was slower than some of his peers, but
22 that didn't mean the same thing.

23 JUSTICE _____: How -- how -- I don't want to
24 take up too much of your time. How long did the
25 Overtons have him?

1 MR. AINSWORTH: How long did they have him?

2 JUSTICE _____: Was it four months?

3 MR. AINSWORTH: It was a short period of time,
4 Your Honor.

5 JUSTICE _____: How long did the -- Sharon --
6 Sharon Hamil, his foster mother, have him before that?

7 MR. AINSWORTH: I -- I believe that she had him
8 for a similar period of time. I think it was a little
9 longer than the Overtons had had him.

10 JUSTICE _____: All right. It wasn't 18
11 months?

12 MR. AINSWORTH: I -- I don't ---

13 Do you have any evidence of that?

14 JUSTICE _____: Okay.

15 MR. AINSWORTH: I -- I don't know, Your Honor.

16 JUSTICE _____: Okay.

17 MR. AINSWORTH: I believe it was longer than the
18 Overtons had him, but I don't -- I don't know exactly.

19 JUSTICE _____: When you say "treating
20 physician", are you talking about the one who treated
21 him during the last medical procedure?

22 MR. AINSWORTH: The one who treated him was,
23 during those procedures, was Dr. Rotta who did
24 testify.

25 JUSTICE _____: Okay. And ---

1 MR. AINSWORTH: And Dr. Rotta ---

2 JUSTICE _____: (Inaudible).

3 MR. AINSWORTH: --- had testified that he didn't
4 --- I'm sorry, Your Honor.

5 JUSTICE _____: I mean, as the treating
6 physician and you're trying to save a life, and how
7 much history do you go into?

8 JUSTICE _____: And I think ---

9 JUSTICE _____: I -- I may have misled
10 accidentally. I meant Dr. Cortes who did not testify
11 who was his regular pediatrician when he wasn't having
12 an emergency ---

13 MR. AINSWORTH: That's correct.

14 JUSTICE _____: --- who had -- who had his
15 history, medical history. So that would have been the
16 person that I was concerned about.

17 JUSTICE _____: I doubt that he would be asking
18 about pica and all those other ---

19 JUSTICE _____: Exactly.

20 JUSTICE _____: --- (Inaudible) -- as he was
21 trying to stabilize him.

22 JUSTICE _____: What did Dr. Cortes say about
23 his medical history? Did he -- did he have any
24 indication that the child had salt pica, or did he
25 testify to any of that?

1 MR. AINSWORTH: No, that there was no -- well, Dr.
2 Cortes didn't testify at all.

3 JUSTICE _____: He didn't testify, but did --
4 (Inaudible)?

5 MR. AINSWORTH: He was available at the time.

6 JUSTICE _____: Okay.

7 MR. AINSWORTH: He -- he -- he testified, and what
8 his testimony was in the Motion for New Trial -- he
9 didn't testify in this writ hearing that I know of.
10 In the Motion for New Trial he was talking about his
11 -- his opinions about whether or not she committed the
12 act purposefully or not which wasn't really based on
13 medical expertise -- (Inaudible).

14 JUSTICE _____: Actually, that's my one
15 question that I have was co-counsel had said that the
16 Jury convicted her of omission rather than co-mission,
17 and I wanted to know is there a -- is it a special
18 verdict form that it was omission? Why do you make
19 that statement?

20 MR. AINSWORTH: It -- it was -- the process was
21 improper, Your Honor. What happened was the -- the
22 Jury was given both theories and they came back with a
23 "Guilty" verdict. And after that, the defense
24 counsel, Mr. Gilmore, asked the trial Judge to poll
25 the Jury to ask them whether or not it -- they

1 believed it to be by co-mission or omission, so in
2 open court each Juror said "omission". But -- but
3 again, that's not something that I don't think has a
4 way to -- that's not credible testimony, in other
5 words, that it ---

6 JUSTICE _____: But this happened at the trial;
7 the Jury rendered verdict ---

8 MR. AINSWORTH: Yes.

9 JUSTICE _____: --- and then the Jury's polled
10 and then the Jury answered?

11 MR. AINSWORTH: Right.

12 JUSTICE _____: That's what I'm trying to ---

13 MR. AINSWORTH: Right.

14 JUSTICE _____: Okay.

15 MR. AINSWORTH: Thank you, Your Honors.

16 JUSTICE _____: Thank you, counsel.

17 MS. ORR: Dr. Cortes did testify at the writ
18 hearing. He was Andrew's treating physician, the only
19 one who treated him while he was alive, and he
20 testified that Andrew was not a normal child, that he
21 was delayed. And when he was made aware of all the
22 records of Sharon Hamil taking him to MH-MR and early
23 childhood intervention, when he became aware of those,
24 that he came to the conclusion that he was mentally
25 retarded or had an autism spectrum disorder. And he

1 said that because "I wasn't aware of all these medical
2 records when I treated him, we had a medical records
3 change-over in my office where my son saw him briefly,
4 but then when I provided all those records to him
5 having discovered this" -- "these initials, early
6 childhood intervention and the subpoena and those
7 records, Sharon Hamil was bringing Andrew in because
8 he was slow, he was (tantruming), he's slower than
9 other children, I don't understand him. He doesn't
10 know the difference between boy and girl". And so
11 there's a clear indication that this was a special
12 needs child ---

13 JUSTICE _____: (Inaudible) ---

14 MS. ORR: --- as Dr. Cortes ---

15 JUSTICE _____: --- foster children had Sharon
16 Hamil fostered?

17 MS. ORR: Depending on when -- which testimony,
18 200 to 300 foster children. So she was no ---

19 JUSTICE _____: (Inaudible) -- so it would
20 seem, in dealing with a wide spectrum of children.

21 Let me just go back to something that's been
22 -- I find very strange. What is it that Ms. Overton
23 said that she fed Andrew the afternoon that he died --
24 or the afternoon he went to the hospital?

25 MS. ORR: That she fed him some soup.

1 JUSTICE _____: And what was that soup?

2 MS. ORR: It was, as I understand it, just an out-
3 of-the-can soup diluted and with a little sprinkling
4 of Zatarain's in it. And he ate the entire serving
5 left over from dinner the night before.

6 JUSTICE _____: Okay. And then what did she
7 feed him after that?

8 MS. ORR: Then she poured a large tumbler of water
9 and sprinkled some Zatarain's and thought "That's too
10 much water for his tummy, I'll cut that in half, put
11 it in a little sippy cup", which we all know doesn't
12 pour, you have to suck on it to get it to pour so --
13 you know, that's the purpose of a sippy cup. She put
14 it in a little sippy cup, this mostly water mixture,
15 and he drank that, a couple of sips and threw it down.

16 JUSTICE _____: Okay. The State referred to
17 that as a slurry of Zatarain's and water.

18 MS. ORR: Yes, ma'am. And that's what the stomach
19 contents tells us she did not feed him. They're right
20 when they say that what killed him had left his
21 stomach. That's right. He had eaten it earlier
22 himself. And what he had in his stomach was that
23 soup. That vomit, you hear the testimony of Ms.
24 Gonzalez and Nurse "Eracon" at Driscoll Urgent Care,
25 it's the soup that's coming up that she just fed him

1 and that's low in sodium content. It's proof that she
2 did -- proof that she gave him what she said she gave
3 him.

4 JUSTICE _____: Are there any fact findings or
5 statements of fact with which you disagree in -- in
6 the record?

7 MS. ORR: The Court -- trial Court's Advisory
8 Statements of Fact and Conclusions of Law, the Court
9 recommended I don't get relief and find against me on
10 things where I don't think there was any support for
11 the facts the Court recommends. And that's why I
12 filed extensive objections to every one of the Court's
13 Findings of Fact and Conclusions of Law. I don't
14 think the record supports it.

15 In addition, Your Honor, with regard to
16 amendment -- I'll remind the Court we're talking about
17 Brady claims here and Banks vs. Dretle allows us to
18 raise these as we discovered them, and of course
19 that's what we did. To note that samples from photos
20 are -- are switched, and that's why I put the photos
21 in the Brief here and you can see when you match it up
22 with the ME's legends that these samples are not as
23 represented, that the Zatarain's with a little water,
24 that that low 48 is Sample "D" and it's actually "E",
25 the 250 is that what -- is the child's stomach

1 content, as I said, showing that Hannah did feed him
2 what she said.

3 JUSTICE _____: Ms. Orr, if I'm understanding
4 the State's argument, they're saying the Jury
5 convicted her of omission which means that he stopped
6 breathing and then she waits an hour and a half to
7 take him to get care. And so all of this business
8 about the salt and the stomach contents and what she
9 fed him and when she fed him really is immaterial to
10 the question of was she guilty of omission, meaning
11 that he stopped breathing and she didn't take him to
12 the hospital, it was ---

13 MS. ORR: It was the State's ---

14 JUSTICE _____: --- timely responding --
15 (Inaudible).

16 MS. ORR: --- theory, it argued and questioned
17 Hannah and closed on force feeding. But if we take
18 the poll of the Jury and examine omission, Andrew did
19 not stop breathing until moments away from Driscoll
20 Urgent Care. How do we know? We know because of
21 first of all, she testified he was breathing. Kathryn
22 Haller, the nextdoor neighbor, came by, saw him, heard
23 him throwing a fit on the phone when she was calling
24 Hannah saying "I need to pick-up a diaper for
25 Sebastian". We know because when the Overtons are in

1 the car taking him to the Urgent Care Center, Hannah's
2 on the phone with Anna Balleu saying "I'm going to
3 need those CPS records that allow me to get medical
4 treatment for him", which she wouldn't need if it was
5 an emergent situation. We know that because Dr.
6 Moritz stated that the symptoms of sodium intoxication
7 are going to be mild and not lead a parent to provide
8 emergent care. This is the testimony from Moritz that
9 was not put on, Judge O'Connell, but it's clearly
10 that's the signs. And additionally we know because
11 Larry called his mother and said "Oh, I'm on the way
12 to Driscoll Urgent Care" -- it's not Driscoll
13 Children's Hospital -- and all these phone calls are
14 being made. Hannah could not have been giving CPR and
15 mouth-to-mouth resuscitation to a non-breathing child
16 if she's made (Inaudible) phone calls and asking for
17 records needed to admit to a child under non-emergent
18 conditions.

19 JUSTICE _____: How is that ---

20 MS. ORR: And we know most importantly from the
21 science, Spohn Hospital, the second hospital that got
22 him, records he had a temperature of 96.2, too high a
23 temperature for a child to have been not breathing for
24 an hour or two hours as the State suggests.

25 JUSTICE _____: How is that consistent with the

1 fact that his pupils were blown, his skin was blue, he
2 was -- he was not -- he was limp and he was cold to
3 the touch?

4 MS. ORR: Because the extremities were not
5 circulating blood. Everything was going to the core
6 functions as Dr. Moritz had testified -- not again in
7 front of a Jury -- but the reason is because the body
8 is trying to preserve itself and keep the brain
9 functioning and the heart functioning and so these
10 extremities were not getting as much circulation. As
11 Dr. Moritz said, the body functions, all the organs
12 are shutting down, even the stomach that preserves
13 this life being -- (Inaudible) .

14 JUSTICE _____: So that's why he was cold. Why
15 are his pupils dilated? And there -- wasn't there
16 testimony that he would have had to be -- had been --
17 had this cardiac arrest symptom earlier for his pupils
18 to be the size -- (Inaudible)?

19 MS. ORR: No, ma'am. There's no evidence that
20 cardio arrest happened earlier. The evidence was that
21 he was -- that Dr. Rotta testified about was "I got
22 news that he's being transferred from Spohn Hospital,
23 the second place, in cardiac arrest". That's the
24 cardiac arrest testimony. And I -- I'm sorry, Your
25 Honor, I forgot the second part of your question.

1 JUSTICE _____: That's okay. Go ahead and
2 finish your argument.

3 MS. ORR: And so this -- this information was --
4 you know, sorting it out would have been important.

5 As to communication, these lawyers -- there
6 were seven of them -- but it's clear they didn't
7 communicate. Mr. Gilmore said "Well, I presumed it
8 was assumed that Jones and Pinedo were going to take
9 care of the medical evidence". And Pinedo and Jones
10 said "We were advising Gilmore about the medical
11 issues". And then Jones says "Well, things changed
12 about discovery and Brad Condit was taking care of
13 discovery". And Brad Condit said "Well, you know,
14 Jones was going to take care of these complex medical
15 issues". And when it came down to it, every single
16 lawyer said "I didn't attend the deposition". Pinedo
17 couldn't have, he was cross-examining Dr. Fernandez
18 who was being put on the Stand at the very time that
19 Dr. Moritz was being deposed. Stith was saying "I'm
20 bouncing back and forth taking care of these
21 objections because I don't like what Sandra Eastwood
22 is asking". The only one in that room was Brad
23 Condit, and no one asked him, no one watches the
24 deposition, no one reviews it until right before the
25 writ hearing and then Jones, who was the expert, said

1 "This was a mistake and I was ineffective". And lead
2 counsel agreed.

3 JUSTICE _____: I'm going to ask you to forgive
4 me for not reading -- remembering what your objections
5 say, but there is a finding -- on Findings of Fact,
6 one is that Dr. Moritz's testimony might have
7 (inaudible) evidence and testimony harmful to the
8 Defense that was otherwise excluded at trial, could
9 not be said to be ineffective in choosing to exclude
10 Dr. Moritz's testimony, especially when the excluded
11 evidence concerned (Inaudible). And there's another
12 finding that it became clear that Dr. Moritz during
13 the State's Cross did not review all the evidence in
14 the case, including, but not limited to Hannah
15 Overton's children's testimony or Mr. Overton's
16 interview regarding Hannah's discipline (Inaudible).
17 Did any evidence of what the children said or the
18 discipline, the disciplinary facts (Inaudible) ever
19 get into evidence?

20 MS. ORR: No, Your Honor, but I believe that Dr.
21 Moritz did review the interviews of the children. The
22 problem with Sandra Eastwood's questions and are
23 encapsulated in that Finding of Fact is that they have
24 no basis in fact. There was no testimony and no
25 evidence and no recording of any person saying that

1 Hannah Overton used salt to discipline her children.
2 None. And that's why the lawyers were concerned. It
3 could have been edited. It could have been put on, as
4 David Jones testified.

5 JUSTICE _____: (Inaudible). One last
6 question, ---

7 JUSTICE _____: The State has said that all the
8 bags of vomit or cans or whatever, all the medical
9 evidence were labeled with the home address. Do you
10 agree with them?

11 MS. ORR: I do not because I went and saw medical
12 evidence. I saw from the Medical Examiner's office
13 how that was labeled. And, keep in mind, the way I
14 found this was Diego Rivera. He gave me a tag number
15 and that's what I tracked down and that's why I knew
16 when it said the Overtons' home address, huh-uh, that
17 was my target. That's where the vomit was and that's
18 why I grabbed the scissors and opened that bag.

19 So no, I don't agree with that. And I think
20 that if we look at the chain of custody documents
21 we'll see that that's not the case.

22 JUSTICE _____: Okay.

23 MS. ORR: Thank you very much.

24 JUSTICE _____: Thank you, counsel.

25 MS. ORR: May I be excused?

1 JUSTICE _____: Please.

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