

1 response)"

2 MR. PASTOR:

3 Thank you.

4 THE COURT:

5 Okay, the next one.

6 MR. KENNEDY:

7 Your Honor, as far as the State can
8 tell, the only references that are in any
9 four of the statements regarding any
10 prior incarceration, and I asked
11 Mr. Pastor to look through all four of
12 the statements and again to check for
13 his, so he's satisfied that there are no
14 other passages, and I haven't been
15 informed of any.

16 MR. PASTOR:

17 I haven't seen any, but if I see
18 anything else, I will report it
19 immediately. Prior to the trial
20 starting, I expressed my concern or
21 desire to bring in Dr. Salcedo to testify
22 to the jury, not as a defense of
23 individual capacity, but as an
24 explanation of who Travis Hayes was, who
25 the young man was giving the statement;

26 That being who he was as far as IQ
27 wise and schooling wise goes, to show
28 that he had limited intelligence, et
29 cetera. And the Court issue at that
30 time, told me that you would think about
31 it some more, and my understanding now
32 after talking to you in chambers, that

1 you were not inclined to put Dr. Salcedo
2 on.

3 THE COURT:

4 For the record, I will allow the
5 State to put on their response to your
6 motion.

7 MR. KENNEDY:

8 Judge, the State opposes that motion.
9 I think what Mr. Pastor is trying to do
10 is offer evidence of diminished capacity
11 and, as the Court is well aware,
12 diminished capacity is only limited for
13 specific intent. In addition to that,
14 the Defense has offered no plea of not
15 guilty by reason of insanity;

16 Therefore, no psychological testing,
17 no psychological tests, no expert
18 testimony in those areas would be allowed
19 or should be allowed by the Court. And,
20 in addition to that, I think it's 70.4,
21 which states that if the Defense wishes
22 to offer any type of diminished capacity
23 or mental disease or defect, they must do
24 so, give the State notice in writing ten
25 days prior to trial. That was not done.

26 So, for all of those reasons, there
27 is no basis of law to allow any such
28 testimony; and the Defense is merely
29 offering that to garner sympathy for the
30 Defendant, and it's not permissible
31 evidence. It's not relevant to these
32 proceedings.

1 THE COURT:

2 All right, your response, Mr. Pastor?

3 MR. PASTOR:

4 You're talking about 726.

5 MR. KENNEDY:

6 I said I believe it was 7.4. I don't
7 have it in front of me.

8 MR. PASTOR:

9 726 says: "If a defendant intends to
10 introduce testimony relating to a mental
11 disease, defect or other condition
12 bearing upon the issue of whether he had
13 the mental state required for the offense
14 charged, he shall not later than ten days
15 prior to trial or such reasonable time as
16 the Court may permit, notify the District
17 Attorney in writing of such intention and
18 file --"

19 We are not introducing this in
20 regards to whether or not he had the
21 mental state required for the offense
22 charged. That is not what I was offering
23 the testimony for at all. I'll read on:
24 "The court may for cause shown allow late
25 filing of the notice or grant additional
26 time to the parties to prepare for trial
27 or make such other orders as may be
28 appropriate. If there is a failure to
29 give notice as required by Subsection A,
30 the court may exclude the testimony of
31 any witness offered by the defendant on
32 the issue of mental condition."

1 726 goes to whether or not I'm
2 offering the mental condition on the
3 issue of whether or not he had the mental
4 state required for the offense charged.
5 That is not what I'm asking Dr. Salcedo
6 to address. I'm not saying that he was
7 insane. I'm not saying that he had the
8 diminished capacity as far as his intent
9 to commit the crime. I'm saying he had
10 the diminished capacity, and he had the
11 mental condition that would make him more
12 susceptible to extensive interrogation,
13 to being able to say things that were
14 suggested to him, instead of things that
15 were true. That is the only issue I
16 wanted Dr. Salcedo to testify as to.

17 MR. KENNEDY:

18 Judge, if the Defense is not offering
19 it under 726, then that's even more
20 reason for the Court to exclude it,
21 because there is no other legal basis in
22 which to offer that. The basis for which
23 Mr. Pastor wishes to offer that is not a
24 legally accepted way of getting any type
25 of that evidence in. It's not proper.

26 MR. PASTOR:

27 Let's say, for instance, the
28 defendant has a broken hand, and he said,
29 "The reason I gave this statement was
30 because when I was in interrogation, they
31 had my hand, they knew it was broken, and
32 they kept pressing down on the broken

1 part of my thumb."

2 I have to give a notice ahead of time
3 to bring a doctor in to verify that he
4 had a broken hand?

5 MR. KENNEDY:

6 Your Honor, at this point, he's
7 talking about physical coercion.

8 THE COURT:

9 I understand your position,
10 Mr. Pastor. I've heard your argument and
11 the argument of the State.

12 The Defense motion is denied. Your
13 objection is noted for the record.

14 MR. PASTOR:

15 I appreciate that, Your Honor.

16 THE COURT:

17 Thank you.

18 MR. KENNEDY:

19 Judge, just one other issue that I
20 did discuss with Mr. Pastor, that in
21 Mr. Pastor's opening statement, he made
22 reference to the amount of time that the
23 Defendant was in custody, in regards to
24 when he was apprehended, and to the point
25 where he was actually taken to lockup.
26 So the record is clear, that Detective
27 Buras, of course, cannot testify to this
28 due to the polygraph;

29 However, we would state for the
30 record that if Mr. Pastor makes any
31 reference to the extended amount of time
32 the Defendant was in custody, there is no