

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