

1 specific dates and occurrences and plea bargaining?

2 A Yes.

3 Q All right.

4 A Let me clarify that, Russ. I did not -- as far as I
5 remember, I did not make notations in the file when I
6 talked to Ramon, Truman and Dennis concerning the lake
7 murders. But, now, as far as plea negotiations, witness
8 interviews, and things of that nature, yes, I would have
9 made notations in the file.

10 MR. BUTLER: That would have been concerning --

11 THE WITNESS: The Aggravated Sexual Abuse case.

12 BY MR. HUNT:

13 Q That would have contained reasons for the continuances;
14 is that correct?

15 A I would think so.

16 MR. HUNT: That's all I've got, Your Honor.

17 THE COURT: Any questions?

18 MR. BUTLER: No, Your Honor.

19 THE COURT: I grant the Motion to Quash the
20 Subpoena. You'll be excused, Mrs. Kendrick. Thank you.

21 THE WITNESS: Thank you.

22 (Whereupon the witness was excused.)

23 THE COURT: Now, it's my understanding that
24 ya'll are not insisting -- that the Defense is not
25 insisting upon their subpoena of Mr. Crawford Long,

1 Assistant District Attorney; is that correct?

2 MR. HUNT: That's correct, Your Honor.

3 THE COURT: All right. I'm going to grant the
4 Motion to Quash on him.

5 (Whereupon a short recess was had, after
6 (which the hearing continued as follows,
(to-wit:

7 THE COURT: All right. We're back on the
8 record now. Again we are outside -- in the Judge's
9 Chambers. This is in reference, Mr. Johnston, to a
10 Motion to Dismiss filed by David Wayne Spence and a
11 Motion to Quash in reference to a subpoena that's been
12 issued for you. All of the parties are present,
13 including the Defendant.

14 If you will raise your right hand.

15 (Whereupon the witness was sworn.

16 WILLIAM W. JOHNSTON

17 called as a witness on behalf of the Defendant, and having
18 been first duly sworn, testified as follows, to-wit:

19 DIRECT EXAMINATION

20 BY MR. FULLER:

21 Q State your name for the record, please, sir.

22 A My name is William W. Johnston.

23 Q Mr. Johnston, my name is Hayes Fuller. I'm one of the
24 attorneys representing David Wayne Spence in this cause
25 in which you have been subpoenaed. You have received a

1 subpoena in this cause?

2 A Yes, I have.

3 Q I believe that was a subpoena duces tecum instructing
4 you to bring with you today all documents, including
5 papers, books, accounts, drawings, graphs, charts,
6 photographs, electronic or videotape recordings, and
7 any other data compilation from which information could
8 be obtained and translated if necessary by you in a
9 reasonably useable form, and tangible things pertaining
10 to David Wayne Spence and/or the above entitled and
11 numbered causes which you have in your actual or
12 constructive possession, custody or control, or to which
13 you have right of access.

14 Did you receive that subpoena?

15 A Yes, I did, sir.

16 Q Are you aware of such documents and tangible things
17 pertaining to David Wayne Spence or these indictments?

18 A No.

19 Q Are you saying there are no such records in the District
20 Attorney's Office?

21 A There may be. But under my direct control or construc-
22 tive in that my authority, I have no such papers.

23 Q Can you not walk in and look at any file in the office?

24 A No, I really can't.

25 Q Did you act as one of the attorneys or counsel for the

1 State in the Aggravated Sexual Abuse case?

2 A Yes, sir.

3 Q By acting as one of the attorneys in that case, would
4 you have the right to go back and look at that file?

5 A I can look at the file if I chose to, I imagine.

6 Q Did you choose to in this instance?

7 MR. BUTLER: May it please the Court, at this
8 time I will state for the record that I instructed Mr.
9 Johnston not to bring any of those items because in my
10 opinion they are not discoverable by subpoena.

11 THE COURT: All right, sir.

12 BY MR. FULLER:

13 Q Am I to understand that you have been instructed not to
14 bring any of the documents requested in the subpoena?

15 A Yes.

16 Q By whom?

17 A Mr. Butler.

18 Q Anyone else?

19 A No, sir.

20 Q And, in fact, you have brought none of the items
21 requested in the subpoena; is that correct?

22 A Right.

23 MR. BUTLER: Further for the record, we'll
24 state that those materials are in the District Attorney's
25 Office. They are in my possession under my care, custody

1 and control, and that without a specific court order
2 instructing me to furnish that particular material to
3 the Defense, that I intend for them to remain right
4 there.

5 THE COURT: All right, sir. You're talking
6 about whatever items -- not that you have every item,
7 but whatever items you have, that they are under your
8 care, custody and control?

9 MR. BUTLER: That is correct, Your Honor. Both
10 the documents pertaining to the case at bar, which was
11 the number on the subpoena -- I believe it was 555, as
12 well as the retired or dead files pertaining to the
13 Darvin Pack case.

14 THE COURT: All right, sir.

15 MR. FULLER: Your Honor, at this time --
16 Your Honor, at this time we would request on the record
17 that Mr. Johnston go get those records to which at one
18 time had custody, possession, control over pertaining
19 to David Wayne Spence, or these cause numbers, and
20 bring them to us, to these chambers, to the Court, so
21 you can examine those with questions to their relevancy
22 as to the Motion to Dismiss under the Speedy Trial, and
23 so he will have those available with which to refresh
24 his memory, and so he can testify from those with further
25 questions before I proceed with Mr. Johnston.

1 THE COURT: All right. I'm not going to order
2 that he produce those files here in court at this time.

3 MR. FULLER: I would object to the Court's
4 ruling in that regard.

5 THE COURT: All right, sir.

6 MR. HUNT: Further. We would make a further
7 qualification; that is, we are not asking that those
8 files be disclosed to the Defense. We're solely asking
9 that he have those files available to him so that he
10 will be able to look at a file and see what he has done
11 so, if necessary, the Court can determine whether or
12 not those files are relevant. We're not asking for
13 discovery of those files, Your Honor.

14 THE COURT: All right, sir.

15 MR. BUTLER: Nobody is asking him questions
16 that he can't answer, Your Honor.

17 THE COURT: I understand. I overrule the
18 request of the Defense. Go ahead. Do you have any
19 other questions of this witness?

20 MR. FULLER: Yes, Your Honor.

21 THE COURT: All right, sir.

22 BY MR. FULLER:

23 Q Mr. Johnston, did you assist in the Aggravated Sexual
24 Abuse case involving David Wayne Spence?

25 A Yes, sir. I did.

1 Q When did you first become involved in that particular
2 case?

3 A I believe it was January of 1983. Some point during
4 that month.

5 Q Do you recall when it actually went to trial?

6 A Specific date? No, sir.

7 Q Would March of 1983 sound about right?

8 A Yes, sir.

9 Q So from January 1983 until March of 1983, you were
10 involved on that particular case?

11 A Yes.

12 Q Okay. In order to furnish us with an exact date, would
13 you have to refer to your file?

14 A For an exact day, numeral date, yes, I would.

15 MR. FULLER: Your Honor, again we would urge
16 that Mr. Johnston be allowed to go get his file so that
17 he can furnish us with the exact date.

18 THE COURT: The exact date of the trial is a
19 matter of public record.

20 MR. FULLER: No, sir. The exact date that he
21 took over that particular case -- became involved in
22 that case.

23 MR. BUTLER: Object on the grounds that's
24 irrelevant, Your Honor.

25 THE COURT: I sustain the objection. I think

1 he's testified since January of '83. And you didn't
2 work in the District Attorney's Office before January,
3 did you?

4 THE WITNESS: No, sir.

5 BY MR. FULLER:

6 Q What were your particular responsibilities in regard to
7 that case, Mr. Johnston? Were you lead counsel, or
8 were you --

9 A No, sir. I was not. I was more or less second chair,
10 and more in charge of legal research on the case.

11 Q Legal research. What legal research did you do on the
12 case?

13 MR. BUTLER: Objection, Your Honor. That's
14 immaterial.

15 THE COURT: Sustained.

16 MR. FULLER: Your Honor, I would object to the
17 Court's ruling. If you will allow me to pursue this
18 line of questioning for just a little while, I think the
19 relevancy will become apparent.

20 THE COURT: I can't see any relevancy of what
21 legal research he did in regard to that.

22 MR. FULLER: Your Honor, I would object on the
23 basis of 40.09 of the Code of Criminal Procedure to the
24 Court's refusal to allow us to perfect our record.

25 THE COURT: All right, sir.

1 MR. FULLER: Will we be allowed to continue to
2 perfect our record?

3 THE COURT: Not on what legal research he did.

4 MR. FULLER: Are you overruling my objection?

5 THE COURT: I overrule your objection.

6 BY MR. FULLER:

7 Q Mr. Johnston, was this case set for trial prior to
8 March 1983?

9 A I am unaware -- I'm unsure if it was set prior. It may
10 have been set and possibly was number two or three on
11 the Court's docket and was passed by the Court. But
12 I'm not sure.

13 O Do you recall the Aggravated Sexual Abuse case having
14 been continued?

15 A I really don't.

16 THE COURT: I can tell you it was continued.

17 BY MR. FULLER:

18 O Do you recall the State filing a formal motion of
19 continuance?

20 A Yes. I now recollect that on account of Mrs. Pack's
21 illness that it was continued.

22 O And that was in February -- around February 14th or so
23 of 1983; would that be about right?

24 A That sounds about right.

25 Q Okay. That weekend before it was set for trial, did you

1 all discover a problem with the indictment in that case?
2 A There was a question on the indictment that we needed
3 to research.
4 Q I believe the exact question was a factual problem in
5 the indictment in the sense that the indictment said
6 that David Wayne Spence had done something that actually
7 Gilbert Melendez had done. Would that be a brief
8 rendition?
9 MR. BUTLER: We object. It is totally irrele-
10 vant to the motion before the Court.
11 THE COURT: Sustained.
12 MR. FULLER: I would object to the Court's
13 ruling and ask the Court for us to be allowed to
14 perfect our record in accordance with Article 40.09 of
15 the Code of Criminal Procedure.
16 THE COURT: I can't see any materiality. I'm
17 not going to allow that.
18 MR. FULLER: Are you overruling my objection?
19 THE COURT: Yes, sir.
20 BY MR. FULLER:
21 Q Did you do some research with regard to the indictment?
22 A Yes, I did.
23 Q I believe the case was later re-indicted; was that
24 correct?
25 A Yes, sir.

1 O And I believe it was re-indicted after the continuance
2 was granted; is that correct?

3 A I believe that's right.

4 Q Would that have been one of the reasons also for the
5 continuance?

6 MR. BUTLER: Objection, Your Honor. He's tes-
7 tified that was the reason for the continuance.

8 THE COURT: Sustained.

9 BY MR. FULLER:

10 O Were there any other reasons for the continuance?

11 MR. BUTLER: Objection, Your Honor. The
12 Court's already made Defense counsel aware --

13 THE COURT: I think he said was there any
14 other reason. I'll let him answer.

15 THE WITNESS: Well, I feel like to the best of
16 my memory, Mrs. Pack, she had a cyst or something that
17 she just could not attend. As far as any other reasons,
18 they could exist. I just know that was the reason for
19 the continuance.

20 BY MR. FULLER:

21 O But the weekend before, you had been researching the
22 indictment; is that correct?

23 A I did do some research on the indictment on a weekend.

24 Q You are an attorney in the District Attorney's Office?

25 A Yes, sir.

1 Q And you have had experience trying criminal cases; is
2 that correct?

3 A Yes, sir.

4 Q What happens when you go to trial, in your expert
5 opinion, on a faulty indictment?

6 A When you go to trial on a faulty indictment? Do you
7 mean actually to the jury?

8 Q Yeah.

9 A Well --

10 Q It's not a good thing to do, is it?

11 A By faulty, it depends on if it's raised by -- if it's
12 fundamentally defective; if it's something minor --

13 Q Well, let's assume in this case pertaining to David
14 Wayne Spence that it had alleged factual allegations
15 that there was no way in God's green earth the State
16 could prove. Would that cause you some problems, in
17 your expert opinion as a trial attorney, with the jury?

18 A If you couldn't fit it under, say, the law of parties
19 and prove it, which was possible I think in this case,
20 but --

21 Q It would cause you some problems?

22 A If it was something that was factually off that you
23 couldn't prove, I guess it would be a problem.

24 Q Now, you were actually in attendance at the Aggravated
25 Sexual Abuse case involving Spence?

1 A Yes, sir.

2 Q You took part in that trial?

3 A Yes, sir. I did.

4 Q Were you aware of the presence of Richard Franks at
5 that trial?

6 A Who is that?

7 Q Do you know who Richard Franks is?

8 A Let me see. I think Franks is one of the last names of
9 the boy that was killed.

10 Q Richard Franks would be his father.

11 A Okay. I'm going to say there was someone that -- he
12 may have been there. But I didn't really know -- the
13 name is familiar now. It may have been involved then.
14 But like I say, I didn't have enough knowledge at that
15 time of who he was or who the boy was to know the
16 significance at the time, if he was there.

17 Q Did you later learn that Mr. Franks, the father of one
18 of the victims of the lake murders, had been at the
19 trial?

20 A The name is familiar to me now. It's possible that
21 that's why it's familiar. But I can't say for sure.

22 Q Do you have any idea why he would have been at that
23 trial?

24 A I mean, that's something I guess he would have to
25 answer.

1 MR. FULLER: I believe that's all the questions
2 we have, Your Honor. Pass the witness.

3 THE COURT: Any other questions of this witness?

4 MR. BUTLER: No.

5 THE COURT: I'm going to grant the Motion to
6 Quash the Subpoena.

7 MR. HUNT: Your Honor, we will object to the
8 granting of the Motion to Quash the Subpoena, and urge
9 unto the Court a further ground that we have already
10 urged. That has to do with the subpoenas that were
11 issued for Darvin Pack, Cindy Ann Pack, Donald Lynn
12 Pack, Lenora Pack, Richard Franks, Lynnan Kendrick and
13 now William Johnston, and that is that the State filed
14 no Motion to Quash the Subpoenas that were issued under
15 Cause No. 559 and 563. They have purely filed Motions
16 to Quash under 555. So there is no Motion to Quash on
17 those basis, Your Honor. And we would urge that there
18 be no Motion to Quash, the Court has no grounds to
19 quash a motion.

20 MR. DEACONSON: If I might say something, Your
21 Honor. We talked to the District Clerk's Office in
22 regard to these. We were informed by the District
23 Clerk's Office that these subpoenas were issued only in
24 the instant case 555, which we did file under. That is
25 why we were not aware there were any subpoenas issued to

1 these people in the other two causes against Mr. Spence.

2 MR. BUTLER: On the one copy I saw, Your
3 Honor, of the subpoena that was issued, it bore only
4 Cause No. 555. However, at this time if they were issued
5 in all three cause numbers, which I don't think they
6 were, we would request that our Motion to Quash extend
7 to all three cause numbers.

8 THE COURT: All right, sir.

9 MR. FULLER: Your Honor, for the Court, I have
10 copies of the requests which were filed with the
11 District Clerk's Office. I would bring to the Court's
12 attention that they are requests in all three cause
13 numbers.

14 THE COURT: All right, sir.

15 MR. FULLER: I do not know how they were issued.

16 THE COURT: All right, sir. I see an applica-
17 tion for subpoena, and it does -- there was one applica-
18 tion I assumed filed, and it has all three numbers on
19 the application.

20 MR. BUTLER: What numbers were on the subpoena
21 that were actually served on the people, Your Honor?

22 THE COURT: Well, I'm looking at one, and it's
23 in Cause No. 83-555-C. And that is on Darwin Pack's.
24 Lenora Pack is the same. And I don't have the other
25 files right in front of me. I would have to look to see

1 if there is a subpoena.

2 MR. BUTLER: We are unaware of any other
3 subpoenas being served with any other numbers.

4 THE COURT: All right, sir.

5 MR. BUTLER: We would request if they were
6 issued since they were requested, we would request that
7 our Motion to Quash be amended to include all three
8 cause numbers.

9 THE COURT: All right, sir. I'm going to
10 allow that.

11 MR. HUNT: We would object to that ruling of
12 the Court and urge the Court that the only way to
13 rectify this is that if the State wants to file another
14 Motion to Quash, they should be entitled to do that.
15 Otherwise, we object to the Court's ruling.

16 THE COURT: All right, sir. I overrule that.

17 Now, it's my understanding ya'll have other
18 witnesses that you want to call in reference to the
19 motion.

20 MR. HUNT: Yes, sir.

21 THE COURT: All right. Let's retire back to
22 the courtroom then.

23 (Whereupon the above referred to parties
24 (returned to their respective places in
25 (the courtroom, where the hearing continued
(as follows, to-wit:

1 THE COURT: All right. Now, back in the court-
2 room. All the parties are present. It's my understand-
3 ing, Mr. Hunt, that ya'll have a number of other
4 witnesses subpoenaed. And if those witnesses will all
5 stand and raise their right hand.

6 MAN IN AUDIENCE: They're not all here right
7 now, Your Honor.

8 THE COURT: Are there some in the hallway?
9 If you will ask them to come in.

10 MR. FULLER: Your Honor, I have a list, if the
11 Court would like, to know who has been subpoenaed.

12 THE COURT: Is Jimmy Guitilla here? He's not
13 here.

14 Is Robert Coleman here? Not here.

15 Now, there are a number of witnesses subpoenaed
16 from the District Attorney's Office. Included is Mr.
17 Feazell, Mr. Butler, who is here in the courtroom,
18 Mrs. Kendrick, whom we have just heard, Crawford Long,
19 and William Johnston, who we just heard. Dennis Baier
20 is here in the courtroom. Dennis Kidwell is here in
21 the courtroom. Holly Holstein is here in the courtroom.
22 No. He's not here. Marvin Horton is here in the court-
23 room. Patrick Murphy is not here in the courtroom. Yes.
24 There he is. Willie Tompkins is an Assistant -- I mean
25 an Investigator in the District Attorney's Office. He

1 is not here yet. John Ben Sutter is not here. Truman
2 Simons is here. Fortune is here. R. C. Anderson is
3 in the jail. Jack Harwell is the Sheriff. He's not
4 here. I have called the names of those who are here
5 for the purpose of the record.

6 MR. BUTLER: Salinas is here too, Judge.

7 THE COURT: I didn't see his name on here.
8 There it is. I missed it.

9 Each of you raise your right hand.

10 MR. HUNT: Your Honor, if I could, Mr. Butler
11 is also going to be a witness.

12 (Whereupon the witnesses were sworn.)

13 THE COURT: With the exception of Mr. Butler,
14 who is the prosecutor in the case, all of the witnesses
15 are placed under the rule. That means it will be neces-
16 sary that you remain in the hallway until such time as
17 you are called into the courtroom. You're not to
18 discuss the testimony among yourselves or with anybody
19 else. From the rule I excuse -- you may discuss your
20 testimony with the attorneys.

21 Now, we're not going to hear any more testi-
22 mony. I'm going to recess you people until 1:30.

23 MR. HUNT: Your Honor, if it please the Court,
24 we have no objection to the police officer witnesses
25 being released to go back to the police department, with

1 the understanding that we will call over there about a
2 half hour's notice when it is time to come over here.

3 THE COURT: I assume that when we start after
4 lunch --

5 MR. FULLER: We have some other witnesses that
6 will be lengthy.

7 MR. HUNT: Yes, sir.

8 THE COURT: Can we do that? Can I safely
9 assume that the other witnesses we won't get through
10 this afternoon?

11 MR. HUNT: That's my suspicion, Your Honor.

12 THE COURT: All right. Do you think we just
13 need to have these witnesses instructed to be back over
14 here in the morning at 9:00? Do you think we'll be
15 ready?

16 Can we do this: Can we have somebody late this
17 afternoon call down to the City Hall and leave a message
18 if they need you back in the morning at 9:00?

19 MR. BAIER: Do you have an order of which you
20 want?

21 MR. FULLER: Yes, we do, as a matter of fact.

22 MR. HUNT: Your Honor, if we could have
23 Dennis Baier and Ramon Salinas back here at 3:30, I
24 think that's going to take care of the rest of the day.

25 THE COURT: The rest of you will be excused

1 until 9:00 o'clock in the morning.

2 (Whereupon the witnesses were excused
3 from the courtroom.)

4 All right. Now, before we break for lunch
5 there is one other matter that I think I need to take
6 up at this time. On the Court's own motion I'm going
7 to instruct the attorneys for the State, the District
8 Attorney, the attorney prosecuting this case, then, to
9 instruct each of their agents, servants and employees --
10 I'm also going to instruct the attorneys who represent
11 the Defendant who are here in the courtroom, Mr. Hunt
12 and ya'll, Mr. Fuller, to not -- and also the Defendant
13 -- that they are not to discuss nor have any news
14 conference, press conference with any radio, TV or
15 any news agency concerning the facts in this cause and
16 concerning their opinions in reference to this case or
17 in reference to any of the lake cases.

18 MR. FULLER: Your Honor, the Defense has no
19 objection to not talking with the press.

20 THE COURT: I just want everybody -- I want
21 both sides. And I think that's best for all the parties.

22 All right. Any other matters before we break
23 for lunch?

24 MR. FULLER: Your Honor, we have some matters
25 which will not require any testimony or witnesses. If

1 the attorneys for the State can stick around we can get
2 some things taken care of.

3 THE COURT: Does this need to be on the record?

4 MR. FULLER: Yes, sir.

5 THE COURT: Go ahead.

6 MR. FULLER: Your Honor, we would like to make
7 a part of the record with regard to the Motion to Dismiss
8 under Speedy Trial, perfecting our record in accordance
9 with 40.09 of the Code of Criminal Procedure, we would
10 like to have included in the record true and correct
11 copies of all the instruments or records on file in
12 Cause No. 82-394-C, styled State of Texas vs. David
13 Wayne Spence, in the 54th District Court, McLennan
14 County, Texas. Those would be the records, Your Honor,
15 with regard to the Aggravated Sexual Abuse case under
16 the first indicted case which was later consolidated in
17 the second indicted case.

18 THE COURT: All right, sir.

19 MR. FULLER: Secondly, we would like to have
20 made part of the record with regard to the Motion to
21 Dismiss under the Speedy Trial the statement of facts
22 and transcript, complete statement of facts and transcript
23 in Cause No. 82-394-C, State of Texas vs. David Wayne
24 Spence in the 54th District Court; that being the
25 Aggravated Sexual Abuse case pertaining to David Wayne

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1 Spence. We would like to have those two items, or the
2 records with reference to those two cause numbers made
3 a part of this record to be considered in regard to the
4 Motion to Dismiss under Speedy Trial, Your Honor.

5 THE COURT: All right, sir. I take it since
6 you made the motion that you will see that those records
7 are filed with the Court Reporter.

8 MR. FULLER: We will do so, Your Honor.

9 THE COURT: All right. Any other matters?

10 MR. HUNT: Your Honor, I don't believe we have
11 anything right now with the understanding that we are
12 going to call witnesses at 1:30.

13 THE COURT: Yes, sir. All right. That's all.

14 (Whereupon a noon recess was had,
15 (after which the hearing continued as
16 (as follows, to-wit:

17 THE COURT: All right. All the parties are
18 present, and we're ready to proceed on the Motion to
19 Dismiss. Call your first witness.

20 MR. FULLER: Your Honor, at this time we would
21 call Mr. Vic Feazell to the stand.

22 THE COURT: All right. I think he's downstairs.
23 How long do ya'll anticipate?

24 MR. FULLER: It could take an hour just with
25 Vic.

THE COURT: Do ya'll have another witness you