

IN THE SUPREME COURT OF THE STATE OF NEVADA

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| JEMAR MATTHEWS, vs. THE STATE OF NEVADA, | Appellant, Respondent, | Supreme Court No. 62241 APPELLANT'S APPENDIX VOLUME IV | Electronically Filed Aug 14 2013 01:51 p.m. Tracie K. Lindeman Clerk of Supreme Court |
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APPELLANT'S INDEX VOLUME IV

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CERTIFICATE OF SERVICE

I hereby certify that on the 12th day of August, 2013, a true and copy of above and foregoing APPELANTS APPENDIX VOL. IV was served on all counsel via the Court's electronic filing system to all counsel of record listed below:

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1 Anything further from the State?

2 MR. BATEMAN: If someone knows what a SCOPE
3 is, they know that it can have criminal history and they
4 know that it can't.

5 Your Honor has a SCOPE. I have a SCOPE.
6 Ms. Lewis has a SCOPE. Perhaps, you know, the
7 individuals -- the attorneys have SCOPEs. I'm sure
8 there's nothing necessarily that's on -- I don't think
9 there's anything prejudicial about the word "SCOPE".

10 THE COURT: Frankly, it's late, and I have a
11 calendar to prepare. I'm going to take it under
12 submission. I'm going to rule on this -- on your motion
13 for mistrial in the morning.

14 MR. BUNIN: Thank you.

15 MR. FIGLER: I appreciate it, Judge.

16 One other fact I needed to present to you
17 was that Mr. Bateman in intending to limit it said
18 there's a lot of other stuff on there. I'm not going to
19 into that. That was on the record as well. That was
20 said and that --

21 MR. BATEMAN: Tattoos?

22 MR. FIGLER: Yeah, probably. Thank you.

23 THE COURT: See you in the morning.

24 MR. SINGER: Thank you. 10:30 in what
25 department again? 6?

1 THE COURT: 22.

2 MR. SINGER: I mean, Department 22.

3 MR. COURT: Yeah.

4 (Off-record colloquy)

5 (Court recessed at 5:16 p.m. until Wednesday,

6 May 9, 2007, at 10:30 a.m.)

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CERTIFICATION

I CERTIFY THAT THE FOREGOING IS A CORRECT TRANSCRIPT FROM THE AUDIO-VISUAL RECORDING OF THE PROCEEDINGS IN THE ABOVE-ENTITLED MATTER.

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CLARK COUNTY, NEVADA

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CLERK OF THE COURT

THE STATE OF NEVADA,

Plaintiff

vs.

PIERRE JOSHLIN
JEMAR D. MATTHEWS,

Defendants
.....

CASE NO. C-228460

DEPT. NO. XVIII

Transcript of
Proceedings

BEFORE THE HONORABLE DAVID BARKER, DISTRICT COURT JUDGE

JURY TRIAL - DAY 3

WEDNESDAY, MAY 9, 2007

APPEARANCES:

FOR THE PLAINTIFF:

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SAMUEL G. BATEMAN
Deputy District Attorneys

FOR DEFENDANT JOSHLIN:

PHILLIP SINGER, ESQ.

FOR DEFENDANT MATTHEWS:

DANIEL M. BUNIN, ESQ.
DAYVID J. FIGLER, ESQ.

COURT RECORDER:

TRANSCRIPTION BY:

RICHARD KANGAS
District Court

VERBATIM DIGITAL REPORTING, LLC
Littleton, CO 80120
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Proceedings recorded by audio-visual recording, transcript
produced by transcription service.

AA000726

1 LAS VEGAS, NEVADA, WEDNESDAY, MAY 9, 2007, 10:49 A.M.

2 (Jury not present)

3 THE COURT: Okay. We're --

4 MR. FIGLER: They don't have your name
5 plaque up there.

6 THE COURT: C -- what was that?

7 MR. FIGLER: They don't have your name
8 plaque up, Judge. I don't know if it matters to you,
9 but it doesn't say Judge David Barker like it did in the
10 other one.

11 THE COURT: I don't care.

12 C228460, State of Nevada, plaintiff, versus
13 Pierre Joshlin and Jamar Matthews.

14 Record should reflect presence of all
15 counsel and with their clients.

16 As we broke yesterday evening there was a
17 motion by Mr. Figler for a mistrial based upon a -- the
18 allegation that the prosecutor had used a SCOPE document
19 inappropriately.

20 Is that correct, Mr. Figler?

21 MR. FIGLER: That's its essence, Your Honor.

22 THE COURT: In my research on this issue
23 I've determined that the burden is a manifest necessity
24 that the mistrial be granted based upon the facts.

25 I find that Mr. Bateman did, in fact, pull

1 the SCOPE sheet and did refer to it, but referred to it
2 in content-neutral terms which should be supported by
3 the record that many people can have SCOPes including
4 individuals who have work cards.

5 Based upon the minimum impact of that
6 information and the understanding that the defense does
7 not wish to have a curative or cautionary instruction,
8 I'm inclined to deny the motion for mistrial at this
9 time.

10 Are there any other motions to come before
11 the Court before we bring the jury in?

12 MR. FIGLER: Yes, Your Honor. The State has
13 filed a motion just regarding -- basically, it's more or
14 less an opposition regarding the gunshot residue.

15 We have some more information that we did
16 yesterday on that, and I've been able to do some
17 research and talk to some experts in the field with
18 regard to both gunshot residue and some attorneys to
19 talk about admissibility of gunshot residue, and I do
20 have a couple things to put on the record, Your Honor.

21 THE COURT: Okay.

22 MR. FIGLER: First and foremost, the --
23 well, I guess we'll leave that one for last about the
24 scientific admissibility in the cases cited by the
25 state.

1 We received last evening after Court the
2 evidence impound report of Officer McPhail, CSA McPhail.
3 This was alleged to have been created on September 30th
4 of '06. That was the date that was stamped up there.

5 The State ostensibly had sent out the
6 gunshot residue to this laboratory in Texas in January
7 of '07, and, apparently, a report was created in
8 February of '07.

9 While we did receive notice of the expert in
10 very broad terms as I stated before that it would be --
11 that this gentleman would be testifying as to firearms
12 examinations, we received no notice of the fact that
13 this was even a gunshot-residue test in existence until,
14 essentially, calendar call.

15 We didn't get the name of the witness who
16 took the gunshot residue until day one of trial, and we
17 didn't receive the report that was available, readily
18 available, apparently, for six months until the
19 afternoon after day two of trial.

20 Within that document, the gunshot-residue
21 impound sheet which was purportedly created back in
22 September by Mr. McPhail, it lists three people that
23 were tested.

24 A was Pierre Joshlin, B was Jamar Matthews,
25 and there was a C person, and the C person is an

1 individual named Trevon Jones (phonetic).

2 Now what's most interesting about all that,
3 Judge, is that there was a result ultimately from the
4 Bexar County Criminal Investigations. Spell B-e-x-a-r
5 County Criminal Investigation Laboratory.

6 And they concluded that my client,
7 Jamar Matthews, and Mr. Singer's client, Pierre Joshlin,
8 and this Trevon Jones all had microscopic particles
9 found on their hands.

10 And based on the quote, "morphology and
11 elemental composition of these particles," all three may
12 have discharged a firearm, handled a discharged firearm
13 or were in close proximity to a discharged firearm.

14 We would renew our objection as to the
15 notice requirements and the timeliness, but I think now
16 there is an admixture of a Brady violation that if there
17 is a third individual who had gunshot residue on his
18 hands as well, that person's presumptive test if you
19 will of gunshot residue is no more or less probative
20 than any of the codefendants.

21 And if the prosecution is taking the stance
22 that this third individual isn't to be charged and
23 Mr. Matthews here is to be charged and somehow this is
24 more probative than not, then certainly there is an
25 implication of exculpatory evidence in the name of this

1 third individual not coming to us until literally after
2 day two of trial.

3 And that the State should not be able to
4 benefit on these gunshot-residue tests for failure to
5 provide us either with the information or as they are
6 responsible for having that information through Kyles
7 and Whitley (phonetic) without the crime scene analyst
8 McPhail. So from the onset, there is a Brady type
9 violation.

10 Secondarily, Judge, my research has found
11 that with regard to these gunshot-residue tests which
12 are falling in disfavor in the country right now -- in
13 fact, the FBI has stopped using them. That with regard
14 to the admissibility under in a post-Daubert (phonetic)
15 world if you will, that the science of it relates only
16 with regard to trustworthiness and reliability to the
17 admixture of the three components with regard to its
18 admissibility, not its weight.

19 So in the event that the three microscopic
20 particles are present, being lead, barium and antimony,
21 that that has been admitted in other courts, and it is
22 an issue of weight versus admissibility.

23 But when there's only a mixture of two or
24 one of the particles, that courts around the country
25 have uniformly denied the admissibility because there is

1 no reliability in the scientific community with regard
2 to that evidence being presumptive of even this very
3 basic statement that they may have discharged a firearm,
4 handle a firearm, or in close proximity to a degree of
5 reasonable scientific certainty. That you need all
6 three elements.

7 With regard to Mr. Matthews, they indicated
8 that there were six particles found, three on each hand,
9 essentially. But out of that only one particle on each
10 hand contained the lead, the barium and the antimony in
11 an admixture that would even make it admissible.

12 Forget the issues of weight. We're going to
13 challenge the techniques and the protocols and all that
14 stuff. And we'd ask to do that outside the presence of
15 the jury, first with McPhail and then, secondarily, with
16 whoever their designee who we still haven't received
17 that person's CV.

18 But if you get beyond the Brady violation,
19 we're asking for them to be penalized for not providing
20 that information, not asking for a dismissal. We're
21 just asking that that evidence doesn't come in.

22 That if they make it past that burden that,
23 secondarily, and the notice stuff, if they make it past
24 that secondarily that even the cases that they cite I
25 would be -- I would venture to say that any case decided

1 after Daubert of the citations that they have, so
2 anything post 1993, does not have microscopic particle
3 evidence allowed into evidence that doesn't contain all
4 three components of the microscopic particles.

5 So we would renew our objection to the
6 admissibility of at least those particles and testimony
7 relating to those particles, but first we need to get
8 through the Brady.

9 THE COURT: Let's talk about Brady. State.

10 MR. SINGER: Judge, can I --

11 THE COURT: Yes.

12 MR. SINGER: Thank you. I won't be
13 duplicative.

14 Also regarding my interpretation of what's
15 going on and the fact that we received this notice at
16 1700 hours yesterday, we -- I know from my client's
17 perspective we employed an investigator, and now we have
18 someone's name and we have no -- it's like being
19 sandbagged.

20 How do we know that person's involvement?
21 What if Trevon Jones could exculpate my client? What if
22 Trevon Jones could say, hey, I did it and Pierre didn't
23 do it? What if Trevon Jones could say, well, Pierre did
24 do it, but he had other involvement if it?

25 We didn't even have an opportunity to see

1 the name Trevon Jones until yesterday at 17 -- whatever,
2 1748 hours, and now there's a whole aspect of the case
3 that wasn't investigated. It's totally infective
4 assistance to investigate Trevon Jones because if Trevon
5 Jones got a GSR and it came positive, you would think he
6 would have at least some impact that my investigator
7 could have asked him questions and it could have put my
8 client in a different light in this case for sure.

9 So in addition to joining in Mr. Figler's
10 application, I would say that how do we have a fair
11 trial now without being able to know what Trevon Jones
12 is going to say about my client. I don't know if
13 Mr. Figler joins in that.

14 THE COURT: State. Brady.

15 MS. LEWIS: Well, Judge, as to the Brady
16 violations, you know, there's nothing in Brady that says
17 we have to turn over reports of witnesses that expect to
18 testify. We have to notice those witnesses, and we did.

19 We provided ample notice of the
20 gunshot-residue expert witness back in January.
21 Clearly, that would have prompted the necessary
22 investigation that they're now alluding to that they
23 wish they would have done or could have done.

24 And, furthermore, I would point out that
25 during this preliminary hearing which happened back in

1 November of last year, Mr. Figler specifically asked
2 questions of one of State's witnesses about gunshot
3 residue, so that would show the Court that the defense
4 was already aware that there was a possibility that
5 gunshot residue might even be an issue in this case.
6 But aside from that, the State provided the notice back
7 in January.

8 As far as any reports that were generated as
9 a result of those experts, the State's not required to
10 provide. In fact, we did provide it in this particular
11 case.

12 The issue as to the gunshot residue and
13 whether or not --

14 THE COURT: I want to talk about Brady. Why
15 this third individual -- is this third individual
16 potentially an exculpatory witness in your opinion?

17 MS. LEWIS: No, Judge, he's not.

18 THE COURT: Why?

19 MS. LEWIS: Well, Judge, we have alleged
20 there was a conspiracy involved in this particular case,
21 and we've heard testimony already from all of the
22 witnesses that there were least three males involved,
23 possibly four, possibly five.

24 And so whether or not there's a third or a
25 fourth or even a fifth individual out there doesn't

1 negate the State's case against these two individuals.
2 All it does is add or show that there was the potential
3 or that officers investigated the potential for a third,
4 fourth, or even fifth suspect as the witnesses all said
5 that there were at least three males, possibly as many
6 as five.

7 So I don't see where the Brady violation
8 lies there. Whether or not there's another individual
9 out there that may be -- possibly was investigated or
10 not, and I submit to the Court from the State's
11 information I don't know of any investigation that was
12 done into any other subjects aside from a GSR test was
13 taken of that individual because he appeared at the
14 scene during the investigation. That's the only thing
15 that the officers did relating to that individual far as
16 I know.

17 And I didn't even know of his existence
18 until I saw his name on the evidence envelope that came
19 from the vault when the evidence arrived here yesterday.
20 On that --

21 THE COURT: At the same the defense did?

22 MS. LEWIS: Yes. On that evidence envelope
23 for the gunshot-residue kit, it describes the names of
24 the people whose gunshot-residue information was taken,
25 these two defendants and that third person. That's the

1 first time that I learned of that individual as well.

2 THE COURT: I can't see how the third member
3 who's positive for GSR is exculpatory. I mean, if
4 anything, it's inculpatory.

5 MR. BUNIN: It could be exculpatory. That's
6 the issue. You know, the question's not whether --

7 THE COURT: It is --

8 MR. BUNIN: -- she believes it's
9 exculpatory. It's whether it could lead to exculpatory
10 evidence, and we have no idea because we didn't know
11 until last night at about 6:00 o'clock, so we couldn't
12 have investigated him if we wanted to.

13 And the issue isn't -- remember the other
14 day Ms. Lewis said we found out about this expert in
15 January, so we could have done our own investigation and
16 we could have gotten the report then? Well, it turns
17 out we couldn't have because the person that produced
18 this report we didn't hear of until day one of trial
19 because that's when the first time he was noticed as a
20 witness says he lost the report for six months, and the
21 prosecution didn't have it, and we didn't have it until
22 yesterday at 6:00 o'clock.

23 And the issue isn't whether they
24 purposefully withheld it or whether they accidentally
25 withheld it. The issue is whether or not we received

1 it. We could not have gotten it if we tried.

2 To that extent, this is a Brady violation.
3 It could lead to exculpatory evidence. It was never
4 given to us until last night.

5 MR. FIGLER: And they're deemed responsible
6 for what it says.

7 MS. LEWIS: Judge, we're talking --

8 MR. BUNIN: And they're deemed responsible
9 for it.

10 MS. LEWIS: -- about two different reports.

11 MR. BUNIN: So long as it exists --

12 THE COURT RECORDER: One at a time.

13 MR. BUNIN: I'm sorry.

14 THE COURT: Hang on. One at a time.

15 MR. BUNIN: So long as the report exists the
16 prosecution is deemed responsible for it even if the
17 officer is the one that lost it. It's still a Brady
18 violation so long as the State had the report and didn't
19 turn it over to us.

20 MS. LEWIS: Judge, we're talking about two
21 would different reports, first of all. One report comes
22 from Bexar County, the laboratory that actually
23 conducted the gunshot-residue testing.

24 The second report that they're referencing
25 that they keep saying they received last night that is

1 Randall McPhail who's a crime scene analyst with Metro.
2 That's his report, and we received it yesterday. As
3 soon as I received it, I contacted counsel. I sent
4 faxes and E-mails, and we made sure that they got copies
5 of that report.

6 That report of Randall McPhail, the crime
7 scene analyst, contains nothing exculpatory in it
8 whatsoever. There is no information in that report that
9 would be favorable to these defendants.

10 In fact, the only thing that report
11 indicates is that Randall McPhail was on scene, what
12 time, what date, what location and that he came into
13 contact with these individuals and did gunshot-residue
14 testing. Nothing more. Nothing less.

15 So there's nothing in that report that's
16 exculpatory. And in order for this Court to deem that
17 the State has committed a Brady violation, the Court has
18 to find that the information withheld contains some
19 exculpatory information.

20 MR. BUNIN: Or could lead --

21 MS. LEWIS: There was nothing exculpatory --

22 MR. BUNIN: -- to exculpatory.

23 MS. LEWIS: -- in that report.

24 MR. SINGER: But, Judge, what happens if you
25 just go down the road a little bit and there's a

1 verdict, and then we obviously are going to do due
2 diligence and go talk to Trevon Jones with our
3 investigators and he says something that could -- he
4 could say something that could tend to exculpate our
5 clients.

6 THE COURT: Or you're speculating. Yeah.

7 MR. FIGLER: Judge --

8 MR. SINGER: Well, no (indiscernible).

9 MR. FIGLER: -- I don't think it's
10 speculation. It's not mere speculation, Judge, because
11 here's the thing.

12 Trevon Jones is not some innocent bystander
13 apparently who walks by. He's got the same degree of
14 evidence that -- if they're saying it's reliable for
15 Jamar, then it's reliable for this other guy.

16 If this other guy is somehow involved, et
17 cetera, then we have a right to find out who he is and
18 what he knows, and if he says these guys weren't here or
19 whatever.

20 But be that as it may, that report that came
21 to us last evening gives us lots of information with
22 regard to this investigation, not enough that we
23 absolutely need, but now it tells us because -- you
24 know, frankly, Judge, before last week we didn't know
25 gun residue was done.

1 When I asked Krylo was gun residue done, he
2 goes I don't have any evidence of that. So, I mean,
3 weren't -- he says I don't know, and --

4 THE COURT: I thought you were noticed about
5 gunshot residue months ago.

6 MS. LEWIS: January.

7 MR. FIGLER: No.

8 MR. BUNIN: No.

9 THE COURT: January.

10 MR. FIGLER: That existed in this case,
11 absolutely not.

12 THE COURT: Yes.

13 MR. BUNIN: No.

14 MR. FIGLER: Absolutely not. I could say
15 that unequivocally that we had no knowledge that my
16 client had gun residue taken from him.

17 He had a lot of stuff done to him that
18 night. He was searched, he was cuffed, a lot of people
19 different came up.

20 He didn't know because he's never had
21 gun-residue tests done and before that he had a
22 gun-residue test done. We went over with him. I asked
23 him. He didn't think that he had a gun-residue test
24 because he doesn't know what a gun-residue test is.

25 So until we actually received a report that

1 said he had gun residue on him which came last week, we
2 had into idea that gun residue was even done. When they
3 notice a witness that is qualified for a hundred
4 different things, and when they have that line that's
5 required by statute to say what is the substance of the
6 testimony, it doesn't say he's going to testify as to
7 the gun residue or potential gun residue on
8 Jamar Matthews.

9 It says he's going to testify as to firearms
10 examination. If you could discern firearms examination
11 from the litany of things that this guy knows -- he
12 knows gunshot residue, that was listed. He knows
13 ballistics comparisons, that was listed. There's a lot
14 of stuff that was listed there.

15 We know there was ballistics comparison in
16 this particular case because Krylo testified to it as
17 well. We were not on notice that he was going to
18 testify about gunshot because, again, Judge, we had no
19 knowledge at that time that gunshot-residue testing was
20 even done.

21 We only get first alert to it last week, and
22 then in a sequence of nontimely filings we find out that
23 there was a guy who did it, and he was listed as a
24 supplemental notice of witness during the course of the
25 trial and that he, in fact, did a report.

1 And in that report it gives us lots of
2 information, none of which I'm going to reveal right now
3 with regard to cross-examination, but it gives us good
4 cross-examination about the reliability of this
5 particular examination that was done which is why I want
6 to even do a further examination of him outside the
7 presence of the jury.

8 But there's absolutely just on the face of
9 that report exculpatory evidence, straight up, not even
10 the other part of standard which is may possibly lead to
11 exculpatory evidence.

12 But what Mr. Singer says, what Mr. Bunin
13 says about interviewing witnesses, et cetera, that is
14 correct, and that's a correct statement of the law, and
15 the fact of the matter is that the State can't come in
16 at the last minute.

17 Granted they noticed a witness who's not
18 even going to be testifying, Judge, by the way. That
19 witness is not testifying. It's some designee who we
20 haven't gotten their resume yet. Come in at the last
21 minute and say oh, you know what, there's this
22 marginally relevant evidence of gunshot residue that
23 does not definitively make him a shooter of any weapon
24 that exists on another individual that's out there, too,
25 who isn't charged of anything. It makes for a very

1 cloudy record. It's very inappropriate.

2 And I think that any reviewing body looking
3 at the timeliness of their filings is going to have
4 certain concerns, and I would hope Your Honor would have
5 those same concerns.

6 MS. LEWIS: Judge --

7 THE COURT: In terms of the -- yes.

8 MS. LEWIS: -- we noticed the gunshot
9 residue expert witness on January 26th. Along with that
10 notice, we also noticed a couple other witnesses, one of
11 which was James Krylo who had testified at the
12 preliminary hearing.

13 As to James Krylo, the notice states that
14 he's going to testify regarding firearms and tool mark
15 examinations. Nothing more. Nothing less.

16 As to the gunshot-residue expert witness
17 notice, it indicates he's going to testify regarding
18 firearms examination and gunshot-residue testing --

19 MR. FIGLER: And --

20 MS. LEWIS: -- done in this case.

21 MR. FIGLER: And tool-mark examinations and
22 comparisons.

23 MS. LEWIS: And gunshot-residue testing
24 performed in this case.

25 THE COURT: All right. All right. All

1 right.

2 MS. LEWIS: That's the notice that they had
3 back in January.

4 THE COURT: I'm going to find at this time
5 -- I don't find that there's a willful violation of
6 Brady as a consequence of the State's action, although,
7 we're going to take up the admissibility of this outside
8 the presence of the jury as you've requested,
9 Mr. Figler.

10 We're not going to just put them up there as
11 we normally would. I want a full examination of his
12 abilities and the science before we admit this to the
13 jury.

14 Is there anything else to come before this
15 Court --

16 MR. FIGLER: Not at this time.

17 THE COURT: -- before I bring the jury in?

18 MR. BATEMAN: I'm sorry. Was that with
19 regard to McPhail and the expert witness,
20 Crystina Vachon? Do you want to hear --

21 THE COURT: I think --

22 MR. BATEMAN: -- outside the presence --

23 THE COURT: -- you want the expert, don't
24 you, Mr. --

25 MR. FIGLER: And I think McPhail as well. I

1 mean, if McPhail didn't do certain things, I --

2 THE COURT: Then we do McPhail, too.

3 MR. FIGLER: Thank you, Judge.

4 THE COURT: Anything else?

5 MS. LEWIS: What time are we going to do
6 that so we can have them available?

7 THE COURT: I'd like to do them at lunch.
8 I'd like to do -- I'd like to do them as soon as we can.
9 Are they here? When do you plan on admitting them? Are
10 you --

11 MS. LEWIS: Maybe this afternoon or before
12 the end of the day.

13 THE COURT: Well, it's -- then we put them
14 up --

15 MS. LEWIS: So lunchtime is fine.

16 THE COURT: -- before. I mean, if we have
17 to work through lunch, then that's what we do.

18 (Off-record colloquy)

19 MR. BATEMAN: Well, I think we can have
20 McPhail here at 12:30.

21 THE COURT: That's fine. So let's work 'til
22 12:30 and then put McPhail up and go from there.

23 Are you ready to bring the jury in?

24 MS. LEWIS: Yes. State's ready.

25 MR. FIGLER: And the State's first -- who's

1 your first witness?

2 MS. LEWIS: (Indiscernible).

3 (Off-record colloquy)

4 THE COURT: Is that a yes, you're ready for
5 the jury?

6 MR. FIGLER: Yes, Your Honor.

7 MR. SINGER: Yes, Judge.

8 THE COURT: Let's bring them in.

9 (Off-record colloquy)

10 THE BAILIFF: The jury's present, please.

11 Your Honor, the panel's present, please.

12 THE COURT: All right. May the record
13 reflect presence -- excuse me. This is C228460, State
14 of Nevada, plaintiff, versus Pierre Joshlin and
15 Jamar Matthews.

16 May the record reflect presence of all
17 counsel and parties.

18 Do the parties stipulate to the presence of
19 the jury?

20 MS. LEWIS: State so stipulates.

21 MR. BUNIN: Yes, Judge.

22 MR. SINGER: Yes, Judge.

23 THE COURT: Is the State prepared to call
24 the next witness?

25 MS. LEWIS: Yes, Your Honor.

1 THE COURT: Call your next witness.

2 MS. LEWIS: The State calls Bradley Cupp.

3 BRADLEY CUPP, PLAINTIFF'S WITNESS, SWORN

4 THE WITNESS: Yes, I do.

5 THE CLERK: Thank you. You may be seated.

6 Please state your full name for us spelling the first
7 and last name.

8 THE WITNESS: It's Bradley, B-r-a-d-l-e-y.
9 My last name is Cupp, C-u-p-p.

10 THE CLERK: Thank you.

11 MS. LEWIS: May I proceed?

12 THE COURT: You may.

13 DIRECT EXAMINATION

14 BY MS. LEWIS:

15 Q. Sir, how are you employed?

16 A. I am currently employed as a police officer with
17 the Las Vegas Metropolitan Police Department.

18 Q. How long have you been employed as a police
19 officer with Metro?

20 A. Approximately, three-and-a-half years.

21 Q. All right. I want to direct your attention to
22 September 30th of 2006, in the evening hours almost
23 10:00 o'clock. Were you on duty that date and time?

24 A. Yes, I was.

25 Q. And what were your job duties on that date?

1 A. At that date and time I was currently or assigned
2 to the Bolden Area Command Problem Solving Unit, and we
3 were on routine patrol in the area of Las Vegas Heights
4 which is MLK and Lake Mead area.

5 Q. Okay. And you say we. Were you with another
6 officer that evening?

7 A. Yes, I was. My partner was Officer Brian Walter.

8 Q. Okay. And were you working in conjunction with
9 any other officers that evening?

10 A. Yes, ma'am. There is our entire PSU squad which
11 was approximately six officers and our sergeant and
12 there was also, approximately, four other patrol
13 officers that were assisting us that night.

14 Q. Okay. And when you say PSU, is that short for
15 Problem Solving Unit?

16 A. Yes, ma'am.

17 Q. Okay. Did there come a point in time when you
18 were patrolling in that area as you've described that
19 you heard something unusual that caught your attention?

20 A. Yes, ma'am. My partner and I were in the area of
21 Bartlett and Concord (phonetic) when we heard,
22 approximately, five or six shots southwest from our
23 location. It sounded relatively close.

24 Q. Okay. And what did you do as a result of hearing
25 that?

1 A. My partner and I got back into our vehicle, and
2 we drove towards the direction that we believed the
3 gunshots were coming from. We drove southbound on
4 Concord around Circle Park and then went eastbound on --
5 or, correction, westbound on Balzar.

6 Q. And did you see anything?

7 A. We -- we initially didn't see anything. We
8 didn't hear anything. There was nobody out on the
9 street, so I turned southbound on Lexington from Balzar
10 and --

11 Q. Were you driving?

12 A. Yes, ma'am.

13 Q. What kind of vehicle were you driving?

14 A. I was driving a maroon Chrysler Seabring. It's
15 an unmarked vehicle.

16 Q. Okay. And is that vehicle equipped in such a way
17 like police vehicles might be equipped with sirens and
18 things like that?

19 A. Yes, ma'am. It's equipped with lights and
20 sirens. The red-and-blue lights are on the visor that
21 we flip down when we activate the emergency equipment,
22 and there are also strobe lights both front and rear of
23 the vehicle.

24 Q. Okay. And so you said that you didn't see
25 anything at the Balzar location. Where did you go from

1 there?

2 A. We turned southbound on Lexington from Balzar,
3 and I came to a stop at the stop sign at Lawry
4 (phonetic) and Lexington.

5 Q. Okay. What happened when you came to the stop --
6 at that stop sign?

7 A. I noticed a commotion off to the left side of my
8 vehicle at the -- it was on the northeast corner of
9 Lawry and Lexington. I saw a male and a female in a
10 yard, and they appeared to be in an argument with three
11 -- three other males that were getting into a light-blue
12 or gray -- I described it as a Cadillac or a Lincoln.

13 Q. And why did that catch your attention?

14 A. It seemed unusual to me based on the number of
15 gunshots we heard and in such close proximity to the
16 gunshots that there was anybody out on the street. It
17 seemed like everybody else was inside or taking cover.

18 And it appeared that, you know, these people were
19 in an argument for a reason, and it didn't fit the rest
20 of the situation that was going on in the area.

21 Q. Okay. So what did you do as a result of seeing
22 that commotion?

23 A. We kind of sat there and observed for a little
24 bit. At this time, I started getting updates over the
25 radio. The other members of my squad were arriving at

1 1271 Balzar. They were reporting that they possibly had
2 multiple victims. I knew at least one person had been
3 shot, and they were in the process of getting met units
4 to respond to that address.

5 Q. Okay. So now you had confirmation that there
6 was, in fact, a shooting?

7 A. Yes, ma'am.

8 Q. And did you know specifically what address the
9 shooting was at?

10 A. Yes, ma'am. I -- I was familiar with the area
11 due to the fact that I was a patrol officer there. And
12 I knew --

13 Q. Had you heard over the radio which address the
14 other officers were responding to to that shooting?

15 A. Yes, ma'am. They broadcasted the address was
16 1271 Balzar.

17 Q. Okay. Where was that in relation to the stop
18 sign where you were observing the commotion that you
19 said you saw at the corner?

20 A. The residence that I observed the male and female
21 arguing in, 1271 Balzar, is one residence to the north.

22 Q. Okay. And as a result of all of the information
23 you had heard over the radio and what you were
24 watching --

25 A. Um-h'm.

1 Q. -- at that residence where the commotion was
2 going on, what did you do or what did you see next?

3 A. The next thing I saw was I observed three of the
4 males get into the -- get into the vehicle, and they
5 took off at a high rate of speed at which time my
6 partner and I pulled our vehicle behind them.

7 I observed them blow or run through the stop sign
8 at Lawry and Martin Luther King, and they went across
9 three lanes of northbound traffic after they ran the
10 stop sign and headed southbound on Martin Luther King,
11 at which time my partner and I activated our emergency
12 equipment and gave chase to the vehicle.

13 Q. Okay. When you observed the three that you saw
14 get into the vehicle, could you describe anything more
15 about what they looked like?

16 A. The only thing I could really describe at that
17 point because of the lighting was that they were three
18 African-American males.

19 It was -- I would have -- I was guessing at the
20 time that they were in the early 20s or late teens, and
21 those are the three people that I saw get into the
22 vehicle. The other male kind of walked back to the yard
23 away from the vehicle after it took off.

24 Q. Okay. And then you also saw a female, you said.

25 A. Yes, ma'am.

1 Q. Okay. And when this -- when the car left that
2 address, how would you describe the way the car left the
3 address?

4 A. I would describe it as it was in a big hurry to
5 leave. It screeched the tires as it left, and it
6 accelerated very rapidly. I would have guessed it was
7 probably going 30 or 40 miles an hour down that
8 residential street and when it ran through the stop
9 sign.

10 Q. Okay. And so at some point, then, you gave chase
11 and activated the lights and sirens on the car you were
12 driving as well; is that right?

13 A. Yes, ma'am.

14 Q. Okay. And so tell us about that. What happened?
15 You said the car went through the next intersection.

16 A. Yes. It ran the stop sign at Lawry and Martin
17 Luther King. My partner and I had to wait a second
18 because we had to clear the oncoming traffic. We
19 couldn't immediately follow the vehicle because traffic
20 is pretty heavy on Martin Luther King.

21 I had line of sight on the vehicle the whole
22 time. As I turned southbound on Martin Luther King, I
23 was able to catch up to the vehicle just south of Lake
24 Mead at which point the vehicle turned eastbound onto
25 Jimmy Street.

1 As it made that eastbound turn, it appeared to me
2 the driver lost control of the vehicle briefly, and the
3 vehicle ran up on the sidewalk. The driver corrected
4 and righted the car still going eastbound on Jimmy.

5 At that point in time my partner and I -- it was
6 the first instance that we had the opportunity to get on
7 the radio due to all the radio traffic that was going on
8 at 127 is Balzar.

9 And the driver who was wearing a black shirt and
10 red gloves opened the door and was looking back at my
11 partner and I, hanging out, hanging out the vehicle
12 while it was still in motion.

13 Q. Okay. And so when you got on the radio at that
14 point, did you relay that information on the radio?

15 A. Yes. My -- Officer Walter was using the -- or
16 was on the radio because I was driving, and he was
17 telling dispatch our location and that it looked like
18 the occupants of the vehicle were getting ready to
19 bailout of the car.

20 We were going based on the fact that the driver
21 already had his door open and was looking -- looking out
22 at us that, you know, he was getting ready to get out of
23 the car.

24 Q. When the driver had the door open and was looking
25 back at you, how -- what distance would you estimate you

1 were in your car?

2 A. We were approximately one car length or a car
3 length and a half behind him. Speeds at this time
4 slowed down to about I would estimate 20 to 25 miles an
5 hour. He wasn't driving nearly as fast after he had to
6 correct the vehicle and bring it back off the sidewalk.

7 Q. Okay. So did the driver ever -- well, what did
8 you see after that?

9 A. It appeared to me that the driver's attention was
10 solely on us. I became concerned because the driver was
11 holding the door open with his left hand, and it
12 appeared to me that he was holding something else in his
13 right hand and that he wasn't really in control of the
14 vehicle.

15 The door closed briefly and they turned
16 southbound back onto Lexington from Jimmy at which point
17 the door swung open again, and, again, I saw the same
18 male, the driver with the red gloves, black shirt,
19 leaning out the car, and it appeared he was holding
20 something in his hand.

21 Q. Okay. And then did you ever see that person get
22 out of the vehicle?

23 A. Yes, ma'am. He exited the vehicle. And when he
24 got out of the car, I saw that he had a firearm in his
25 hand. It appeared to me that it was bigger than a

1 pistol but not quite as long as a rifle.

2 He exited the car. I couldn't tell whether he
3 jumped out intentionally or if he was thrown out of the
4 vehicle, but he exited the vehicle with the firearm in
5 his hand, at which point my partner and I were pretty
6 much defenseless.

7 We were seat belted in our vehicle. We were
8 unable to draw our holster or draw our firearm in case
9 there was a firefight that was going to occur, so I made
10 the decision to swerve my vehicle into the suspect that
11 had the firearm.

12 Q. Okay. And as a result of you swerving your
13 vehicle into this person, what happened?

14 A. I struck the suspect on the right side of the
15 hood. The suspect fell over the hood and fell down on
16 the passenger side of the vehicle right outside of
17 Officer Walter's door. The suspect vehicle continued to
18 roll at this point, and I was trying to get my vehicle
19 to stop.

20 Officer Walter exited the vehicle and it looked
21 like he had some trouble getting the door open because
22 the suspect was laying right outside his door, and I saw
23 him try to grab the suspect as the suspect ran
24 northbound back away from our vehicle.

25 Q. Okay. And did you see anything else with regards

1 to Officer Walter and that person at that time?

2 A. I briefly looked. When the suspect got up, he no
3 longer appeared to have that firearm in his hand. I
4 didn't know what happened to it, but I was pretty sure
5 that he didn't have the gun with him anymore.

6 So Officer Walter took off running northbound
7 after the suspect. My attention was still on the two
8 other suspects that I knew were in the vehicle, and I
9 thought that they were still possibly armed, so that's
10 where I was watching.

11 Q. Okay. So as you focus your attention on the
12 vehicle, what, if anything, did you observe?

13 A. Being that the vehicle no longer had a driver,
14 the vehicle drove up on the sidewalk again, and it
15 looked to me that it struck something, at which point
16 two passengers were ejected from the passenger side of
17 the vehicle. They landed face first in the grass next
18 to the church just north of the intersection of
19 Doolittle and Lexington.

20 One of the males I could see. I saw his hands,
21 and it didn't appear that he had anything in it, and he
22 took off running westbound through the church.

23 The thing that caught my attention was on the
24 other male he was wearing a black long-sleeved shirt,
25 blue jeans, black gloves, and I noticed that he had a

1 black semiautomatic handgun that I thought was a Glock
2 in his right hand when he got up and started running.

3 Q. Why did that cause you concern?

4 A. We were in a pretty heavy residential area.
5 There was a lot of houses around. Due to the
6 seriousness of the crime that I believed that the
7 occupants of the vehicle were involved in, I wasn't sure
8 what they would do while they were running away.

9 Also, my partner was in foot pursuit, and if I
10 let that suspect go, there's a chance that he could have
11 doubled around and, you know, got my partner when he
12 wasn't aware of it, so I decided to pursue the suspect
13 that had the firearm in his hand.

14 Q. And where did that suspect go or where did that
15 pursuit lead you to?

16 A. That suspect took off running in a southeasterly
17 direction from where the vehicle -- from where the
18 vehicle came to a stop. He was running eastbound on
19 Doolittle at which point I announced myself as a police
20 officer. I said police, stop or I'll shoot, police,
21 stop or I'll shoot at which point the suspect took the
22 gun in his right hand and pointed it over his left
23 shoulder at me.

24 I fired three rounds from my duty weapon and took
25 cover at the first parked car that I could see. When I

1 looked up, the suspect was still running southbound
2 through the church parking lot right at the intersection
3 of J Street and Doolittle at which point I decided to
4 not shoot anymore because my backdrop was going to be
5 back towards the residential area, instead of the empty
6 parking lot where I initially fired my shots.

7 Q. Why is it -- why would it have been a problem for
8 you to shoot with that type of backdrop as opposed to
9 the empty parking lot?

10 A. I was concerned about the residences or the
11 people that may have been in the residences at the time.
12 It was 8:00 o'clock -- or it was, you know, about 9:00
13 or 10:00 o'clock at night at this time, and, you know,
14 people are asleep in their residence. I didn't want to
15 risk one of my errand shots going through the wall of
16 the house and striking somebody inside.

17 Q. Okay. So what did you do after that?

18 A. At that point I updated the suspect's description
19 on the radio, I gave direction of travel, and I told
20 dispatch that I lost sight of him going over the south
21 wall at the church at J and Doolittle. That was the
22 last time I saw him.

23 Q. Okay. And do you know what is on the other side
24 of that south wall where you lost sight of that person?

25 A. Yes, ma'am. There is a single row of residences

1 and then further south of that is a strip mall type
2 business area.

3 Q. Okay. What did you do after you updated that
4 information on the radio?

5 A. I started running back westbound on Doolittle
6 trying to locate Officer Walter at which point I
7 observed the maroon Seabring that I had been driving was
8 coming toward me.

9 Officer Patrucci who is a field training officer,
10 so he was riding with a trainee that night, he had made
11 the decision to get out of his trainee's car and get
12 into the vehicle that I was in and come toward my
13 direction after he heard that I had been involved in a
14 shooting.

15 Q. Were you able to hear that information over the
16 radio as well? Aside from the fact that you saw
17 Officer Patrucci driving your car, did you hear any
18 radio calls from Officer Patrucci as far as that he was
19 getting in your car and coming towards you or anything
20 like that?

21 A. No. He didn't say that he was getting on the
22 radio. The radio traffic that I was hearing was the
23 other units that were in area, and I -- there was a lot
24 of them, and I could hear them calling to set up a
25 perimeter.

1 They were trying to take the major intersections
2 away so that we could try to contain whatever suspects
3 were loose inside one specific geographical area.

4 Q. Okay. And so when Officer Patrucci came towards
5 you in the maroon Chrysler that you were driving, what
6 did you do? Did you get in that vehicle?

7 A. Yes. I looked in and I recognized
8 Officer Patrucci, and I got in the car, and he said
9 where to, and I said let's go the apartments, so we ran
10 lights and sirens eastbound on Doolittle and then turned
11 southbound on J Street and went right into the
12 apartments located at 1701 J Street.

13 Q. Okay. Do those apartments have another address
14 as well as 1701 J Street?

15 A. Yes, ma'am. There are two main apartment
16 buildings in that complex. The southern apartment is
17 1701 J Street and the northern apartment is 1801 J
18 Street.

19 Q. And where is the entrance located to those
20 apartments?

21 A. The main entrance is located on the west side of
22 the complex. It's right on J Street just south of
23 Doolittle.

24 Q. Okay. And is that the only entrance to that
25 apartment complex off of J Street?

1 A. It's the only entrance that you can get a vehicle
2 in. There's security bars all over the complex.
3 However, a lot of the kids that live there know that
4 there's -- some of the security bars have been removed,
5 so foot traffic can get in in other places, but the main
6 entrance where vehicles can get in is off of J Street
7 there.

8 Q. Okay. And when you directed Officer Patrucci to
9 those apartments, did you go in through that main gated
10 entrance that you've just described?

11 A. Yes, ma'am.

12 Q. And were the gates open or did you have to open
13 them?

14 A. The gates -- the gates were open, and we actually
15 followed another black-and-white patrol unit into the
16 apartment complex.

17 Q. Do you know which officers were in the
18 black-and-white patrol unit you followed in?

19 A. No, ma'am. I don't know for sure who --

20 Q. At that time you didn't know?

21 A. No.

22 Q. Okay. So once you got into that particular
23 apartment complex on J Street there, what did you do?

24 A. Officer Patrucci and I got out of our vehicle,
25 and we believed -- I believed that based on the

1 suspect's last path of travel that he was going to run
2 into the apartment complex, so we got out of our vehicle
3 and began a systematic search looking for the suspect.

4 What drew my attention next was Officer Calarco
5 and Officer Conn starting yelling verbal commands at a
6 dumpster that was just off to the right, and they
7 started saying, you know, let me see your hands, show me
8 your hands.

9 MR. FIGLER: Objection. Hearsay.

10 BY MS. LEWIS:

11 Q. Without --

12 THE COURT: Sustained.

13 BY MS. LEWIS:

14 Q. Without telling us what any other officers might
15 have said, as a result of hearing information coming
16 from a certain area, did you go to a certain area?

17 A. Yes, ma'am. I went to the dumpster where Officer
18 Calarco and Conn were.

19 Q. And when you got to that dumpster, what did you
20 see? Don't tell us what anybody said. Just tell us
21 what you saw.

22 A. Okay. The male suspect that I had been chasing
23 wearing the black shirt, he wasn't -- he was no longer
24 wearing the gloves -- raised his hand and stood up in
25 the dumpster, at which point the officers there and

1 myself grabbed him and took him out of the dumpster and
2 placed him into custody.

3 Q. Okay. And aside from not wearing the black
4 gloves when you saw him in the dumpster, did he appear
5 to be the same -- were his clothes the same in every
6 other fashion?

7 A. Yes, ma'am. He was still wearing the black
8 long-sleeved shirt, blue jeans, and he was breathing
9 really heavily when we took him into custody.

10 Q. Did you notice anything else in the dumpster at
11 that time or did you even look?

12 A. I didn't -- I didn't even look. At that time the
13 other officers on scene kind of pulled me aside to get
14 out of the -- get out of the investigation and wait for
15 the homicide detectives to show up.

16 Q. Okay. And why were you pulled away from the
17 investigation at that point?

18 A. It's -- it's kind of our department procedure
19 wherever an officer's involved in a shooting that as
20 soon as it's safe to do so, that they remove themselves
21 from the investigation and wait to be interviewed by
22 homicide. So at that point -- from that point on my
23 other team mates were dealing with everything at the
24 scene.

25 Q. Okay. So were you treated as a witness from that

1 point on?

2 A. Yes, ma'am.

3 Q. Okay. The person who you were chasing that
4 evening who you then saw in the dumpster, do you see
5 that person here in the courtroom today?

6 A. Yes, ma'am.

7 Q. Can you please identify that person and tell us
8 something that they're wearing today so we know who
9 you're talking about.

10 A. Okay. He's seated second person from my right.
11 He's wearing a white shirt and it looks like a purple
12 tie.

13 MS. LEWIS: Judge, may the record reflect
14 the witness has identified defendant Pierre Joshlin?

15 THE COURT: It shall.

16 MS. LEWIS: Thank you.

17 BY MS. LEWIS:

18 Q. Officer Cupp, you said that you lost sight of the
19 defendant over that wall, and then you got back into
20 your car with Officer Patrucci and came back around to
21 the apartments.

22 A. Um-h'm.

23 Q. How much time would you estimate had elapsed from
24 when you lost sight of the defendant going over the wall
25 and when you saw him come out of the dumpster?

1 A. Probably a minute or two at the most.

2 MS. LEWIS: May I approach?

3 THE COURT: You may.

4 BY MS. LEWIS:

5 Q. I'm going to show you a map that's already been
6 admitted into evidence. Let me have you look at it here
7 up close. Examine it for a moment, and then I'm going
8 to put on the overhead.

9 A. Okay.

10 Q. Okay.

11 MS. LEWIS: And for the record, this is
12 State's Exhibit 154.

13 BY MS. LEWIS:

14 Q. Do you recognize some of the streets and areas
15 depicted on this map?

16 A. Yes, ma'am.

17 Q. Okay. If you wouldn't mind, could you tell us --
18 you can use that -- is that working? That screen in
19 front of you, if you use your finger, you can tap on it
20 and draw lines and things like that. If you can show us
21 where you were when you first observed that vehicle with
22 the three males getting.

23 A. I was parked right here. I was just north of
24 that intersection right there at Lawry and Lexington.

25 Q. Okay. And there's a stop sign there?

1 A. Yes, ma'am.

2 Q. Okay. And the -- where you were, were you facing
3 southbound?

4 A. I was facing southbound; that's correct.

5 Q. Okay. And in relation to that particular
6 intersection, where is the residence where that vehicle
7 was located?

8 A. The residence is right here.

9 Q. Which corner would it be on?

10 A. It's on the northeast corner.

11 Q. Okay. And in which way was it that the car
12 traveled when you said that it screeched away and then
13 you gave pursuit?

14 A. The car was facing westbound.

15 Q. Okay. And can you show us which way the car
16 went?

17 A. Yeah. The car went westbound on Lawry and then
18 southbound on Martin Luther King.

19 Q. Okay. And after that you said that the car
20 continued on, and I think you said it turned at some
21 point on another street.

22 A. Yes, ma'am. It continued southbound on Martin
23 Luther King and then headed back eastbound on Jimmy.

24 Q. Okay. And at what point was it that you got that
25 first look? You said that the car at some point lost

1 control of the vehicle and then the driver was looking
2 back at you.

3 A. As a mentioned earlier, the vehicle drove up on
4 the curb right here at the northeast -- or, correction,
5 southeast corner of Jimmy and Martin Luther King, so it
6 was right here, and it was shortly after that that I
7 observed the driver's door open.

8 Q. Okay. And where did the car finally come to a
9 rest or where was it that the driver got out of the car?

10 A. The car went southbound on Lexington, and it came
11 to a stop right in that area near that church there.

12 Q. Okay. And that area on the map there appears to
13 be a building there's kind of standing by itself on that
14 area. Is that the church?

15 A. Yes, ma'am.

16 Q. Okay. And then when you went on the foot pursuit
17 after the individual, can you now show us which
18 direction you went.

19 A. I ran in a southeasterly direction back here to
20 Doolittle Street and continued running eastbound. It
21 was around that area that I fired my shots, and the
22 suspect continued running southbound this way and jumped
23 this wall on the south side of that church there.

24 Q. Okay. And those apartments, 1701 and 1801 J
25 Street, do you see those on the map as well?

1 A. Yes, ma'am. They're located right here.

2 Q. Okay. And I forgot what you said. Which one is
3 the north and which one is the south address?

4 A. 1801 J Street is the north building and 1701 J is
5 the south.

6 Q. Okay. So can you actually see 1701 on that map
7 or is it cut off? Maybe I have to move it up a little.

8 A. It's kind of covered by the label there.

9 BY MS. LEWIS:

10 Q. Yeah. Can you pull that up? Can you see the
11 (indiscernible) on that (indiscernible) or not?

12 A. I can see part of 1801. Yes.

13 Q. Okay.

14 A. It's --

15 Q. And where's the entrance to that complex?

16 A. The entrance to the complex is, approximately,
17 right there.

18 Q. Okay. Is there a street that is close to that
19 entrance that has a name that we can use for reference?

20 A. The closest street to that is -- well, it's --
21 the entrance is right off J Street. I'm not real sure
22 what the name of that next street south is.

23 Q. Okay. But there is a street that's just south of
24 there?

25 A. Yes, ma'am.

1 Q. Would that be Wyatt (phonetic) Avenue by chance?

2 A. That sounds correct.

3 Q. Okay.

4 MS. LEWIS: This is marked as 162. It's a
5 close-up.

6 BY MS. LEWIS:

7 Q. Showing you State's Proposed Exhibit 162 which is
8 close-up of this same map, do you recognize what's
9 depicted there?

10 A. Yes, ma'am.

11 Q. Okay. And do you see the entrance to that
12 apartment complex represented in this map?

13 A. Yes, ma'am. This is the entrance right here.

14 Q. Is this a fair and accurate depiction of an
15 overhead view of that entrance?

16 A. Yes, and of 1701 J.

17 Q. Okay.

18 MS. LEWIS: Judge, permission -- or I move
19 for the admission of State's Proposed 162.

20 THE COURT: Any objection?

21 MR. FIGLER: None. Submit it, Your Honor.

22 MR. SINGER: No objection, Judge.

23 THE COURT: It's admitted.

24 (Plaintiff's Exhibit No. 162 admitted)

25 MS. LEWIS: Permission to publish.

1 THE COURT: Yes.

2 BY MS. LEWIS:

3 Q. Okay. So can you (indiscernible). You see
4 J Street here? Is that, in fact, J Street going along?

5 A. Yes, ma'am.

6 Q. Okay. Can you show us where the entrance is that
7 you're talking about on this map.

8 A. This is the entrance that Officer Patrucci and I
9 came through right here.

10 Q. And J Street runs (indiscernible)? Is that
11 right? J Street runs north/south?

12 A. Yes.

13 Q. Okay.

14 A. So it would be --

15 Q. Sorry about that. Can you mark that entrance
16 again?

17 A. -- this entrance right here.

18 Q. Okay. Great. And it's gated you said?

19 A. Yes, ma'am.

20 Q. Are there bars there that you described -- you
21 said there were bars all around this complex. Were
22 there missing bars and you can kind of slip through
23 them. Are there bars at that entrance where you can
24 kind of slip through like that?

25 A. Yes, ma'am. If you're small enough you can get

1 through some of the bars there.

2 Q. And when you come in that entrance, where are
3 those trash dumpsters that you testified about?

4 A. You can actually see it on the overhead here.
5 It's -- they're located right in that area.

6 Q. Okay. So those dark spots in that area represent
7 the trash dumpsters?

8 A. Yes, ma'am.

9 Q. Were there more than one?

10 A. I believe there was two there that night.

11 Q. Okay.

12 (Off-record colloquy)

13 MS. LEWIS: Permission to approach?

14 THE COURT: You may.

15 BY MS. LEWIS:

16 Q. I'm showing you what has been marked as State's
17 Proposed Exhibit -- what I've just shown to defense
18 counsel. Take a look at State's Proposed 133 through
19 137. Tell me if you recognize those.

20 A. Yes, ma'am.

21 Q. Okay. And are they -- do they fairly and
22 accurately depict what you saw that evening of September
23 30th, 2006?

24 A. Yes, they do.

25 MS. LEWIS: Judge, I'd move for the

1 admission of State's Proposed 133, '34, '35, '36, '37.

2 THE COURT: Mr. Singer.

3 MR. SINGER: I don't -- the only objections
4 I have is there's some pictures in there -- I don't know
5 -- can I just have the numbers because there's only a
6 few that I really have an objection to.

7 (Off-record colloquy)

8 MR. SINGER: I object to 133, 134, 135, 136.
9 137 I have no objection to.

10 THE COURT: So 137's in.

11 (Plaintiff's Exhibit No. 137 admitted)

12 THE COURT: Let's show me the other ones.
13 What's the basis for your objection?

14 MR. SINGER: Relevance.

15 THE COURT: Its relevance.

16 MS. LEWIS: Judge, it depicts the witness as
17 he appeared that evening (indiscernible) as well as his
18 service revolver that he indicated he fired
19 (indiscernible).

20 MR. SINGER: Judge, we don't have pictures
21 of all the other police officers. There's no relevance
22 to this police officer.

23 We're not here on a coroner's inquest.

24 We're not here on any kind of internal affairs
25 investigation. We're not -- what he looked like that

1 night is not relevant at all to the charges
2 (indiscernible).

3 THE COURT: They're admitted.

4 (Plaintiff's Exhibit Nos. 133-136 admitted)

5 BY MS. LEWIS:

6 Q. Showing you now State's Exhibit 143 through 147,
7 take a look at those and tell me if you recognize them.

8 A. Yes, ma'am.

9 Q. Do they fairly and accurately depict what you saw
10 at that evening of September 30th, 2006?

11 A. Yes, it does.

12 MS. LEWIS: Judge, I'd move for the
13 admission of 143, 144, 145, 146 and 147.

14 MR. BUNIN: No objection.

15 THE COURT: (Indiscernible). Was that a no
16 objection?

17 MR. SINGER: No objection from --

18 THE COURT: Admitted.

19 MR. SINGER: -- my client.

20 MR. FIGLER: We'll submit it, Your Honor.

21 THE COURT: It's admitted.

22 (Plaintiff's Exhibit Nos. 143-147 admitted)

23 BY MS. LEWIS:

24 Q. Finally, showing you State's Proposed Exhibits
25 106 through 112, take a look at those.

1 A. Yes, ma'am.

2 Q. Do those fairly and accurately depict some of the
3 things you saw the evening of September 30th, 2006?

4 A. Yes, they do.

5 MS. LEWIS: Then I'd move for the admission
6 of 106 through 112, inclusive.

7 MR. SINGER: No objection.

8 THE COURT: They're admitted.

9 (Plaintiff's Exhibit Nos. 106-112 admitted)

10 MS. LEWIS: Permission to publish?

11 THE COURT: You may.

12 BY MS. LEWIS:

13 Q. Officer Cupp, what happened to your firearm that
14 evening?

15 MR. SINGER: Objection. Relevance.

16 THE COURT: What is the relevance?

17 MS. LEWIS: Well, Judge, we don't have his
18 firearm here. There was testing that was done. There's
19 going to be a firearms examiner who's going to be
20 testifying regarding some of the testing that he's done,
21 and we need to be able to clarify which firearms were
22 tested against which casings so --

23 THE COURT: Okay.

24 MR. SINGER: Judge, I still -- it doesn't
25 meet the relevance. The --

1 THE COURT: It's --

2 MR. SINGER: The officer is not charged with
3 anything. We're not questioning whether his firearm
4 was --

5 THE COURT: I don't, frankly, understand the
6 relevance.

7 MS. LEWIS: That's not the question. The
8 problem is when this other witness testifies about the
9 different testing that he performed, I just don't want
10 there to be any confusion as to whose firearm this extra
11 firearm belonged to. It came from Officer Cupp. That's
12 why I'm having him clarify some of these --

13 THE COURT: As opposed --

14 MS. LEWIS: -- (indiscernible).

15 THE COURT: -- to the other firearms --

16 MS. LEWIS: Correct.

17 THE COURT: -- that you -- overruled.

18 MS. LEWIS: Thank you.

19 BY MS. LEWIS:

20 Q. Officer Cupp, what happened with your firearm
21 that evening?

22 A. When homicide came out to take over the
23 investigation, I handed my firearm to Stephanie Smith
24 who is a crime scene analyst, and she packages it up as
25 evidence, and they hold it pending the outcome of the

1 use-of-force investigation.

2 Q. And State's Exhibit 135, is that an accurate
3 photograph of your firearm (indiscernible)?

4 A. Yes, ma'am, it is.

5 Q. What kind of firearm was that?

6 A. It is a Kimber Ultra Carrier 1911. It's a .45
7 pistol.

8 Q. Okay. And then State's Exhibit 136 appears to
9 show a magazine and some cartridge cases. Would that
10 have been the magazine for that firearm?

11 A. Yes, ma'am.

12 Q. Did you take the magazine casings out or did you
13 just hand it all over the way it was to Stephanie Smith?

14 A. I handed it over as it was.

15 Q. Okay. Showing you State's 143 which shows the
16 intersection of Lexington and Doolittle at the top of
17 that map, where in relation to that -- well, tell us --
18 describe for us what's in the photograph of value, where
19 you were that evening.

20 A. In this photograph, this is the vehicle that I
21 was chasing. It's kind of off to the side here in the
22 picture.

23 The vehicle pursuit came down this street. This
24 is Lexington, and my subsequent foot pursuit came this
25 way back eastbound on Doolittle.

1 Q. Okay. So north would be at the top of the
2 picture?

3 A. Correct.

4 Q. Okay. State's Exhibit 144, is that the same
5 picture? And maybe now we can see that car a little
6 better. Is that the car you were pointing to?

7 A. Yes, ma'am. The car I was chasing is now in the
8 center there.

9 Q. Okay. And in this picture, the driver's side
10 door appears to be open. Is that how it was left after
11 you got out of your car and the pursuit on foot began?

12 A. That is correct.

13 Q. And moving on to State's Exhibit 106, what is
14 that a photograph of or who is that a photograph of?

15 A. That is the photo of the suspect I was chasing
16 that night shortly after being taken into custody.

17 Q. Okay. And those are the clothes that he was
18 wearing minus the gloves?

19 A. Yes, ma'am.

20 Q. I'm showing you State's Exhibit 111. What are we
21 looking at in that picture?

22 A. This is a picture of the dumpster that we found
23 the suspect hiding in.

24 Q. Okay. And is that a close-up, State's 112, of
25 that same dumpster or dumpsters?

1 A. Yes, ma'am. It's this dumpster right here.

2 Q. Okay. So the one that's in front is the one that
3 you saw him come out of?

4 A. Correct.

5 Q. Okay. Do you see in that picture a car at that
6 looks maroon? Do you recognize that car that's in that
7 picture?

8 A. Yes, ma'am. That is the car that I was the
9 passenger in while Officer Patrucci was driving at
10 this --

11 Q. Okay. So is that --

12 A. -- at this point.

13 Q. -- the Chrysler you were driving, initially?

14 A. Yes, ma'am.

15 Q. Okay. And where in relation to this photograph
16 is the entrance or those gates that you were talking
17 about?

18 A. The entrance is -- if you're looking at the
19 picture, it's going to be off here to the right of where
20 the vehicle is.

21 Q. Okay. So the angle of this picture is facing
22 which direction?

23 A. The vehicle in that picture is facing westbound.

24 Q. Are you able to -- when you said that you saw the
25 driver who looked back at you, do you see that person

1 present in the courtroom today?

2 A. Yes, ma'am.

3 Q. Can you point to that person and tell us
4 something that that person's wearing so we know who
5 you're talking about.

6 A. Yes, ma'am. He's seated second from the left.
7 He's wearing a white shirt and a black tie.

8 MS. LEWIS: Judge, for the record, the
9 witness has identified defendant Jamar Matthews.

10 THE COURT: The record will reflect.

11 MS. LEWIS: Thank you.

12 MR. FIGLER: And the record will also
13 reflect that he's sitting at the table that says the
14 word "defendant," that he's sitting between his lawyers,
15 and that he already identified Pierre Joshlin as the
16 person he took out of the dumpster. I guess will the
17 record reflect that the word "defendant" is written on
18 the table in front of us as well?

19 THE COURT: Sure.

20 MR. FIGLER: Thank you, Your Honor.

21 BY MS. LEWIS:

22 Q. Officer Cupp, have you testified in an earlier
23 preceding?

24 A. Yes, ma'am.

25 Q. Regarding this matter?

1 A. Yes, ma'am.

2 Q. And at that earlier proceeding were you asked to
3 identify any individuals?

4 A. Yes, I was.

5 Q. And is it the same individuals that are here
6 today that you identified earlier?

7 A. Yes, ma'am. That is correct.

8 MR. SINGER: Objection.

9 MS. LEWIS: I'll pass the witness.

10 MR. SINGER: Move to strike. Improper
11 bolstering.

12 MR. FIGLER: I believe that is bolstering,
13 Your Honor, and I'd move to strike as well.

14 THE COURT: All right. At this point the
15 motion to strike is granted.

16 Is your direct complete?

17 MS. LEWIS: Yes, Judge.

18 THE COURT: Cross-examination.

19 MR. FIGLER: Thank you, Your Honor.

20 CROSS-EXAMINATION

21 BY MR. FIGLER:

22 Q. Officer Cupp, I appreciate that the bulk of your
23 testimony was about the person you got out of the
24 dumpster, but I do have some questions for you as well.
25 Is that all right?

1 A. Yes, sir.

2 Q. Thanks. Now, first I want to just do a little
3 bit of background, and then we'll actually get into the
4 incidents of the day that you're reporting here.

5 First of all, you're not assigned to that
6 division or patrol that you testified to any longer; is
7 that correct?

8 A. That is correct.

9 Q. Okay. And prior to the night that we are talking
10 about, you had only been on that command for six months;
11 is that about right?

12 A. I been at that area command for about two years,
13 but that squad for approximately six months.

14 Q. Six months on that particular squad.

15 A. Yes, sir.

16 Q. Okay. And you would normally patrol those areas,
17 so you had a familiarity with those streets like Balzar
18 and Lexington and Lawry and those type of streets?

19 A. Yes, sir. I worked uniform patrol there.

20 Q. Okay. On this day in question you weren't in
21 uniform. You were in that black that said police. It
22 wasn't the same uniform you're wearing here today.

23 A. That is correct.

24 Q. Okay. Just skipping ahead. You were transferred
25 to a different division; is that correct?

1 A. Yes, sir.

2 Q. And you were transferred to robbery; isn't that
3 right?

4 A. Yes, sir.

5 Q. Okay. And do you wear that uniform at robbery?

6 A. No, I don't.

7 MS. LEWIS: Judge, I'd object as to
8 relevance.

9 THE COURT: What's the relevance?

10 MR. FIGLER: That he's somehow trying to
11 present himself in a way that he doesn't normally dress
12 to curry some sort of sympathy.

13 THE COURT: Overruled. You can ask the
14 question.

15 MR. FIGLER: Thanks.

16 BY MR. FIGLER:

17 Q. Is that your day-to-day dress on robbery?

18 A. No, it's not.

19 Q. Okay. Are you on duty right now?

20 A. No, sir.

21 Q. Okay. What's your day-to-day dress in robbery?

22 A. My day-to-day dress in robbery depends on what
23 we're doing at that day. They give us flexibility
24 depending on what we're doing.

25 Q. Okay. Sometimes you have to wear a suit?

1 A. Sometimes, yes, sir.

2 Q. You do own a suit?

3 A. Yes, I do.

4 Q. Okay. Just want to check. And you have your
5 service revolver with you today?

6 A. It's semiauto, but, yes.

7 Q. Okay. Thank you. Didn't mean to misspeak. All
8 right.

9 Now would you agree with me, Officer, that that
10 area that we're talking about, pretty much the whole
11 scene as you described, is frequented by a large portion
12 of African-American individuals?

13 A. Yes, sir.

14 Q. Okay. You see a lot of young African-American
15 people in that neighborhood?

16 A. Yes.

17 Q. On a day-to-day basis hanging out in front of
18 their houses different hours of night socializing. Not
19 necessarily doing anything wrong, but that would be a
20 common occurrence; is that correct?

21 A. Yes, sir.

22 Q. Okay. And sometimes the police have interactions
23 with these individuals, sometimes you just drive by; is
24 that correct?

25 A. Yes, sir. That is correct.

1 Q. Okay. Would you also agree that some people in
2 that neighborhood like the police and some people in the
3 neighborhood probably don't like the police?

4 A. That's fair, sir.

5 Q. Okay. And that's probably been communicated to
6 you from those individuals. Is that a fair statement as
7 well?

8 A. Yes, sir.

9 Q. Okay. And this day in question was not the first
10 day that you've made arrests in that neighborhood,
11 correct? This wasn't your first arrest?

12 A. That is correct.

13 Q. Okay. And you arrest people for all sorts of
14 violation; isn't that correct?

15 A. Yes.

16 Q. And your duty as an officer is to arrest people
17 if you -- if it comes to your attention that they're
18 violating the law, correct?

19 A. That is correct.

20 Q. For all offenses, big and small, correct?

21 A. That is correct.

22 Q. Okay. So a big offense like a robbery or
23 something like that, you'd arrest that person, correct?

24 A. Yes, sir.

25 Q. For a drug offense, you would arrest the person,

1 correct, if you witnessed it or you had knowledge that
2 they were committing a drug violation under the law,
3 correct?

4 A. That's not entirely true.

5 Q. Okay. But there's a possibility that you would
6 decide to make the arrest if someone had drugs on them;
7 isn't that correct?

8 A. Yes, sir.

9 Q. Okay. Even down to someone violating a
10 restraining order. If you had knowledge of that, you
11 would arrest them, correct?

12 A. Yes, sir.

13 Q. Oak. Now, going through that, sometimes people
14 in the neighborhood don't necessarily want to cooperate
15 or trust the police; isn't that correct?

16 A. That's correct.

17 Q. Okay. Thanks. All right. Now let's get to the
18 day in question. Your -- oh, the other thing, sometimes
19 there's gunfire in that neighborhood; is that correct?

20 A. Yes, sir.

21 Q. Okay. That's something you're aware of?

22 A. Yes, sir.

23 Q. So this wasn't an anomalous event. You had heard
24 gunfire or had responded to gunfire throughout your six
25 months or two years, really, in that area, correct?

1 A. Yes, sir.

2 Q. Okay. Now on the day in question you're in the
3 vicinity and you hear gunshots, so you decide that
4 you're going to investigate with your partner,
5 Officer Walter, correct?

6 A. That is correct.

7 Q. Okay. So in pursuing the sound of the gunfire,
8 you come upon this what turned out to be a Lincoln Town
9 Car, grayish or silver in color, that was taking off at
10 a fairly fast rate of speed, correct?

11 A. Yes, sir.

12 Q. And at that time you saw, approximately, three to
13 four individuals attempting to get into the car; is that
14 about right?

15 A. There was four individuals around the car.

16 Q. Okay.

17 A. That is correct.

18 Q. And you saw three get into the vehicle?

19 A. Yes, sir.

20 Q. Okay. And you decided to focus on your main
21 target, not the fourth individual who may not have
22 gotten into the car, correct?

23 A. That is correct.

24 Q. Okay. Because when there's something important,
25 you focus on what's important. That's a fair statement?

1 A. That's a fair statement.

2 Q. Sometimes you're placed in the position to choose
3 what's more important for your focus, and here you had a
4 speeding-away car, gunshots recently. You made the
5 determination that the better focus would be on the
6 vehicle; is that accurate?

7 A. That's correct.

8 Q. Okay. So now you pursued that vehicle down
9 Lawry, and then you -- I think I got the map here.

10 MR. FIGLER: This has not been marked, but
11 I'd like to mark it as a defense exhibit. It's the same
12 map, and I'm going to publish (indiscernible) unless
13 there's a stipulation to admit it.

14 THE CLERK: Okay.

15 MS. LEWIS: Can I see it?

16 MR. FIGLER: Yeah --

17 MS. LEWIS: I haven't seen it.

18 MR. FIGLER: -- I just got it from

19 Mr. Bateman.

20 (Off-record colloquy)

21 MR. FIGLER: I think there's a
22 stipulation --

23 MS. LEWIS: No objection, Judge.

24 THE CLERK: That will be A.

25 THE COURT: Hearing not objections, it will

1 be --

2 MS. LEWIS: It appears to be a
3 black-and-white photo copy of the same map that we've
4 been using throughout.

5 THE COURT: It'd be admitted as A.

6 (Defendant's Exhibit A admitted)

7 MR. FIGLER: Just for the record, I did just
8 receive it from Mr. Bateman, so -- (indiscernible)
9 pretty good.

10 THE COURT: Pretty good.

11 MR. FIGLER: I'm kind of old school. I like
12 people writing on exhibits, and we don't do that so much
13 anymore because of all the fancy technology.

14 BY MR. FIGLER:

15 Q. But you would agree with me, Officer, that if
16 this is Lawry Street right here where my pen is
17 pointing, that you pursued westbound on Lawry Street
18 until you got to Martin Luther King, assuming that's
19 Martin Luther King. Does that look accurate according
20 to the map?

21 A. Yes, it does.

22 Q. Okay. And it is kind of a tinier map, but I
23 don't want to mislead you. So if I say something wrong,
24 let me know.

25 So your pursuit goes down Lawry, and then you

1 turn left on Lexington -- I'm sorry, Martin Luther King,
2 Martin Luther King, and you indicated that the car that
3 you were pursuing sort of blew through the stop sign
4 over on Lawry and started heading at a rapid,
5 accelerated way down Martin Luther King which would be
6 southbound. That's southbound, correct?

7 A. That is correct.

8 Q. Okay. And you were in pursuit at that time,
9 correct?

10 A. Yes, sir.

11 Q. And then shortly thereafter, you initiated the
12 sirens and the lights on your vehicle so that they knew
13 this were being pursued, correct?

14 A. That is correct.

15 Q. Okay. And you had previously testified or given
16 information that that speed, that high speed, turned
17 into a high speed chase, rather, at 65 miles an hour,
18 correct?

19 A. That was the speed of my vehicle. That is
20 correct.

21 Q. Okay. And they were faster than you, so they
22 were going even faster than 65?

23 A. At that point in the pursuit I couldn't estimate
24 how fast they were going.

25 Q. Okay. (Indiscernible) a police gave me a ticket

1 (indiscernible), but okay. But you'd assume that they
2 were going at a high rate of speed as well?

3 A. Yes, sir.

4 Q. Probably in that neighborhood of 60 or more,
5 correct? Is that fair?

6 A. That's how fast I was going. I can't say for
7 sure what they were -- how fast they were driving.

8 Q. And you were staying with them, correct?

9 A. Actually, sir, I was gaining on them.

10 Q. Okay. And then at some point they took a
11 right-hand turn with -- I'm sorry. That would be a
12 left-hand turn, so that would be eastbound on Jimmy
13 Road, correct?

14 A. It's the next one south from there.

15 Q. Right here. Jimmy?

16 A. Yes. That's correct.

17 Q. Okay. So now we're going eastbound on Jimmy
18 Road, correct?

19 A. That is correct.

20 Q. Okay. And they took that so fast at some point
21 that they popped up on the sidewalk you testified to; is
22 that correct?

23 A. That is correct.

24 Q. Okay. And you saw that, so you're right behind
25 them on Jimmy Street, correct?

1 A. Yes. That is correct.

2 Q. Okay. So now you're pursuing eastbound on Jimmy,
3 right? Now on your monitor there -- and then I'm going
4 to approach you with the exhibit -- you testified twice
5 with regard to the prosecution as to where the driver
6 opened up, but I'm just trying to verify where that was.
7 Where did the driver open up the vehicle door and lean
8 out where you could get a look at him?

9 A. The first time the driver opened the door was
10 right here in this area.

11 Q. Okay. Right there in that area, so that's kind
12 of the halfway point on Jimmy between Martin Luther King
13 and looks like Lexington. Is that about right?

14 A. Yes. That's Lexington.

15 Q. Okay. And I want it to be real accurate for the
16 jury so --

17 MR. FIGLER: If I may approach the witness,
18 Your Honor?

19 THE COURT: Yes.

20 MR. FIGLER: Okay.

21 BY MR. FIGLER:

22 Q. If you could -- and let me see if we have
23 something better than just a pen.

24 MR. FIGLER: Do we have a highlighter?

25 MS. LEWIS: Here you go. I've got one.

1 MR. FIGLER: Great. Green highlighter.

2 Thank you.

3 BY MR. FIGLER:

4 Q. If you could put a green mark on this exhibit as
5 to where the first time that you saw the driver open up
6 the door.

7 A. Right in this area here.

8 Q. Okay. That's great.

9 MR. FIGLER: So the record should reflect
10 that the witness had marked a green mark on Defense
11 Exhibit A.

12 BY MR. FIGLER:

13 Q. And why don't you put your initials right above
14 that. Thank you. All right. So then, Officer, that
15 vehicle turned right which would be southbound on
16 Lexington; is that correct?

17 A. That is correct.

18 Q. And shortly thereafter, that car crashed into a
19 fire hydrant on -- in front of that church there,
20 correct?

21 A. The vehicle crashed. I didn't see what it hit.

22 Q. Okay. So you just saw that it was rolling
23 towards a crash?

24 A. Yes, sir.

25 Q. Okay. And you had also agreed that it's not a

1 great distance between the corner of Jimmy and Lexington
2 and the final place of impact, if you will, or stopping
3 point of where the car came to its conclusion; is that
4 correct?

5 A. Yes, sir.

6 Q. That's a very short area. That's about a block,
7 if even that, correct?

8 A. It's a fairly large block, but that's correct.

9 Q. Okay. And cars going down that street would hit
10 that in just a matter of seconds, correct, that
11 distance?

12 A. The speeds of the pursuit at that time had slowed
13 down quite a bit --

14 Q. Okay.

15 A. -- to about 20 or 25.

16 Q. Well, about 20, 25?

17 A. Yeah.

18 Q. So even going 20, 25 miles an hour down that very
19 short block, it would just be a matter of seconds to get
20 to that final place in front of the church; is that
21 correct?

22 A. That's correct.

23 Q. Okay. Now you testified at some point the driver
24 of that vehicle got out of the car, jumped out of the
25 car while it was still moving; is that correct?

1 A. That is correct.

2 Q. So the driver of the car got out even sooner than
3 the conclusion, so that would be a shorter distance to
4 the Jimmy/Lexington corner; is that correct?

5 A. That is correct, but the vehicle had slowed down
6 even further --

7 Q. Okay.

8 A. -- by then.

9 Q. And when that person came out, you indicated you
10 saw that person had a shotgun; isn't that correct?

11 A. No, sir.

12 Q. Okay. That he had some sort of weapon in his
13 hand?

14 A. Yes, sir.

15 Q. Okay. Whatever that weapon might be.

16 A. Yes, sir.

17 Q. Okay. And that was the driver of the vehicle,
18 correct?

19 A. That is correct.

20 Q. Okay. And you had a fear of that weapon in the
21 driver's hands because you testified that you were
22 vulnerable as well as your partner; isn't that correct?

23 A. Yes, sir.

24 Q. Okay. And that's because your weapon was
25 holstered and you were in your seat belt, correct?

1 A. That is correct.

2 Q. So in your opinion, you were a sitting duck at
3 that point?

4 A. Yes, sir.

5 Q. And you had a good look at that gun seeing where
6 it was pointed; isn't that correct?

7 A. Yes, sir.

8 Q. Okay. And that gun was pointed from the person's
9 chest level; isn't that correct?

10 A. No, sir. I don't remember him ever pointing the
11 gun at me.

12 Q. You just saw the gun?

13 A. Yes, sir.

14 Q. And you were focused on the gun, correct?

15 A. Yes, sir.

16 Q. Okay. And as a result of being focused on the
17 gun, you made a decision -- because oftentimes officers
18 are in tight situations you made the decision to swerve
19 towards that individual to essentially, defensively,
20 take him out, preemptive strike, correct?

21 A. Yes, sir.

22 Q. Okay. And you, in fact, were successful and
23 accomplished the goal of hitting that individual and
24 knocking that individual down, correct?

25 A. Correct.

1 Q. And that individual hit the hood of your car and
2 then hit the ground hard at that point, correct?

3 A. I can't testify to how hard he hit the ground,
4 but --

5 Q. But he hit the ground?

6 A. -- he went to the ground. Correct.

7 Q. So your goal of hitting him was successful,
8 correct?

9 A. That is correct.

10 Q. Okay. And the threat was gone, correct?

11 A. Yes, sir.

12 Q. Okay. And you hit him going you previously
13 testified up to 15 miles an hour; is that correct?

14 A. It was 10 to 15, correct.

15 Q. Okay. So it could have been 15, it could have
16 been a little less, right?

17 A. Yes.

18 Q. Okay. So if you hit him going this fast, either
19 way, he then got up and ran behind your vehicle; isn't
20 that correct?

21 A. That is correct.

22 Q. And you don't know what happened to the weapon
23 after that, but Officer Walter got out of the car and
24 pursued him in a northerly direction; is that correct?

25 A. That is correct.

1 Q. Okay. So you only would see the -- if you were
2 even looking -- the back of that person's head, correct,
3 as they were running northbound?

4 A. Correct.

5 Q. Okay. And then your attention focused to what
6 the new concern which was is there anybody or what
7 happened to those other two people in the vehicle,
8 correct?

9 A. That is correct.

10 Q. And we're talking about this fairly slowly and
11 rationally, but at the time everything's happening very
12 fast; isn't that correct?

13 A. Yes.

14 Q. Okay. And, in fact, you previously testified
15 that things were happening instantaneously; isn't that
16 correct?

17 A. I don't recall that.

18 Q. Okay. I'm going to specifically ask you if you
19 remember being asked a question about how fast the
20 driver was in front of your vehicle and your responding
21 that it was instantaneous. Do you remember that or you
22 don't remember that?

23 A. I don't remember that.

24 Q. If I showed you a transcript of that prior
25 testimony, do you think it might refresh your

1 recollection?

2 A. Yes, sir.

3 Q. Okay.

4 MR. FIGLER: May approach, Your Honor?

5 THE COURT: Yes.

6 MR. FIGLER: And I'm going to be looking at
7 page 83 of the prior transcript.

8 THE WITNESS: Okay.

9 BY MR. FIGLER:

10 Q. All right. I brought your whole transcript, but
11 I just want to focus your attention on page 83. If you
12 could just kind of look over that to make sure that this
13 is your testimony from last time. If you to go back a
14 little bit to see your name or something like that that
15 might help. Maybe this line here will give you a cue
16 that this was your testimony.

17 A. Okay. Okay.

18 Q. All right. If you could review page 83. I put a
19 little mark there. That's just for you, the question
20 that I wanted to ask. If you could just read that to
21 yourself, and then I'll ask you questions.

22 A. Okay.

23 Q. Okay. So now you recall that you agreed to the
24 terminology "instantaneously" in a prior proceeding?

25 A. Yes, but that was your word, not mine.

1 Q. Okay. But you agreed with me at that time.

2 A. Yes.

3 Q. Okay. And you don't have any reason to disagree
4 with me today, do you?

5 A. No.

6 Q. Okay. All right. So as this is happening
7 instantaneously, Walter is gone, you're now focused on
8 something completely different, and then you go off that
9 way, correct?

10 A. That is correct.

11 Q. Okay. And in the pursuit of the individual, not
12 the driver, you felt that it would be important to
13 discharge your firearm. In other words, you made,
14 again, a police-officer decision to discharge your
15 firearm three times; is that correct?

16 A. That is correct.

17 Q. Okay. Shortly thereafter, homicide detectives
18 have come on the scene, and at that point you're being
19 interviewed; is that correct?

20 A. That is correct.

21 Q. Okay. Now at one point you said that this was a
22 standard thing in a homicide investigation, but you also
23 indicated that there was something else going on at this
24 time; is that correct?

25 A. Such as?

1 Q. Something called a use-of-force investigation?

2 A. Yes, sir.

3 Q. Okay. So that doesn't happen in every homicide
4 case. That's something different, correct?

5 A. That is correct.

6 Q. Okay. And that's sort of an administrative
7 investigation on an officer who fired a weapon or used
8 potential deadly force; is that accurate?

9 A. Yes, sir. That's correct.

10 Q. Okay. And you're familiar with the use-of-force
11 investigation?

12 A. Yes, I am.

13 Q. Okay. Now had you been in one before or was this
14 your first one?

15 A. This was my first one.

16 Q. Okay. But you had heard about it before? You
17 knew that this was standard procedure to do these type
18 of things when there's use of force?

19 A. Yes, sir.

20 Q. Okay. And as an administrative investigation
21 you're aware that the results of that don't necessarily
22 impact the case, but impact you as an officer; isn't
23 that correct?

24 A. That is correct.

25 Q. Okay. So if administratively they believe that

1 your use of force was not justified in the particular
2 situation, you could be penalized in any number of ways;
3 isn't that correct?

4 A. That is correct.

5 Q. Okay. And not to say that you wouldn't have
6 right of appeal and, you know, due process and all that,
7 but I'm just saying that some of the consequences of
8 nonjustified use of force could even be the termination
9 of your position if they found that you were not acting
10 correctly, correct?

11 A. That is correct.

12 Q. Okay. And to this end, you sat down with the
13 detective to essentially go over what had happened, nuts
14 and bolts, from the beginning of the call to the
15 discharge of the firearm and even a little bit beyond
16 that; isn't that correct?

17 A. Yes, sir. That's correct.

18 Q. Okay. That statement was recorded; is that
19 correct, Officer?

20 A. Yes, it was.

21 Q. Okay. And you recall that Detective Wilson and
22 Detective Hardy were present doing that with you?

23 A. I believe that's correct.

24 Q. Okay. And there was a Sergeant Gary Dale there
25 as well?

1 A. Yes, sir.

2 Q. And there's a Cathy Warner (phonetic) was there
3 as well?

4 A. Yes, sir.

5 Q. And who's Cathy Warner?

6 A. Cathy Warner --

7 MS. LEWIS: Judge, I'm going to object as to
8 the relevance.

9 THE COURT: What's the relevance?

10 MR. FIGLER: Well, there's some statements I
11 want to get in there and who was present as to the
12 environment and, also, why he had answered questions or
13 how thorough he was supposed to be, and so I'm just
14 trying to find out who the individuals were who were
15 present.

16 MS. LEWIS: And, Judge, I mean, he's --

17 MR. FIGLER: This is not an ordinary
18 investigation. This is something special, so I'm trying
19 to establish --

20 MS. LEWIS: Okay. Judge, he's getting into
21 elements that pertain to the use-of-force investigation
22 that are not relevant to this particular proceeding and
23 that's my -- the basis for my objection is as to
24 relevance as it pertains to anything relating to the use
25 of force.

1 I mean, he's asked lots of questions, and I
2 haven't objected, but it's really not relevant to these
3 proceedings, and I don't want this jury to be confused
4 since they are not here to determine use of force or
5 anything relating to that.

6 THE COURT: Overruled.

7 MS. LEWIS: Thank you.

8 BY MR. FIGLER:

9 Q. Cathy Warner, who's that?

10 A. Cathy Warner is the Police Protective Association
11 attorney.

12 Q. Okay. And what's the Police Protective
13 Association?

14 A. It's basically the police union that represents
15 us on contractual matters and they represent us in
16 use-of-force hearings.

17 Q. Okay. So that was your union rep who was
18 basically there as your advocate or, at least, to watch
19 out for you, correct?

20 A. That is correct.

21 Q. Okay. So it was explained to you that it was
22 important to be as thorough and complete and precise as
23 possible, correct?

24 A. Yes, it is.

25 Q. Okay. Because you got a lot more riding than

1 just a case on this. Is that fair to say?

2 A. Yes, sir.

3 Q. Okay. And this statement was given much closer
4 in time to the event, obviously, than today. In fact,
5 if was given at 2:00 in the morning that night, correct?

6 A. Yes, sir.

7 Q. Okay. And would you agree that one of the
8 factors in determining reliability is the amount of time
9 that the incident's being reported?

10 MS. LEWIS: Objection. Speculation.

11 THE COURT: Sustained. Rephrase.

12 BY MR. FIGLER:

13 Q. Do you think your memory has gotten better over
14 time or it was best at the time when the events were
15 contemporaneously happening?

16 A. I think my memory's about the same.

17 Q. Okay. So you have certain confidence and things
18 that you stated today?

19 A. Yes, sir.

20 Q. Okay. And I'm going to show you this map again,
21 Exhibit A, and you had placed a green dot there as the
22 time when you saw the driver open up his door for the
23 first time and looked back at you, correct?

24 A. That is correct.

25 Q. And you're confident about that, correct?

1 A. Yes, sir.

2 Q. Okay. Do you remember telling the administrative
3 hearing at 2:00 in the morning, the night of this thing
4 happening, that you were headed eastbound on Jimmy?
5 That you continued eastbound on Jimmy for a while when
6 the suspect's vehicle slowed down and then turned
7 southbound on Lexington --

8 A. Um-h'm.

9 Q. -- and that it was at that time that I saw the
10 driver open the door with his left hand, and it appeared
11 today me that he was holding something near his chest
12 and was leaning out the door, if he could see us. The
13 vehicle was slowing down. He wasn't paying attention.
14 His attention was on us.

15 Do you remember telling the administrative
16 officers at that hearing, Officer, that the door opened
17 not in the middle of Jimmy but already as the
18 defendant/suspect vehicle was heading southbound on
19 Lexington? Do you remember telling them that?

20 A. I don't recall.

21 Q. If I showed you your statement, do you think it
22 might refresh your recollection?

23 A. Yes, sir.

24 MR. FIGLER: I'm sorry. I didn't ask to
25 approach.

1 THE COURT: You may approach.

2 MR. FIGLER: Thank you. And this is the
3 voluntary statement of Officer Cupp. I'm going to
4 direct his attention to page 7.

5 BY MR. FIGLER:

6 Q. If you could look at this document to make sure
7 that that's yours. Page 7 is where I want to focus your
8 attention, but you can look anywhere before that or
9 after that. Okay.

10 A. Okay.

11 Q. All right. Why don't you do that for second and
12 then I'll ask you.

13 A. Okay.

14 Q. Okay. Now does it refresh your recollection that
15 you told the officers on that night that it was already
16 when the defendant/suspect vehicle had turned southbound
17 on Lexington when you saw the door open and the person
18 do the behavior described to you today as happening on
19 Jimmy?

20 A. Yes.

21 Q. Okay. So let me just make this point. You said
22 that your memory today is just as good as it was then,
23 but you did just need to review that to refresh your
24 memory because your memory wasn't good, right?

25 A. Correct. I didn't recall what I said at that

1 time.

2 Q. Okay. So at that time you did say something
3 different; is that correct?

4 A. Yes.

5 Q. And additionally, in that statement, you were
6 asked to describe the driver as you saw him; isn't that
7 correct?

8 A. That is correct.

9 Q. Okay. And the best you could come up with with
10 regard to the driver was that he was a black male
11 juvenile, late teens, probably early teens. He was
12 wearing either black or dark -- or, I'm sorry. That he
13 was wearing red gloves; is that correct?

14 A. Yes, sir.

15 Q. Okay. You didn't give any hair style of that
16 individual to the officers at that time; is that
17 correct?

18 A. I didn't. No, sir.

19 Q. Okay. You didn't give any facial features of
20 that individual at that time; is that correct?

21 A. No, sir.

22 Q. Okay. Now when you hit this individual, you hit
23 this individual in the legs; is that correct?

24 A. That is correct.

25 Q. All right. And it was your prior testimony that

1 when you were pursuing this vehicle, when you saw the
2 driver lean out, you could not make out his face at that
3 time; isn't that correct?

4 A. That is correct.

5 Q. Okay. So the first and only time that you could
6 make out the face of this individual is when he's out of
7 the car with the gun in his hand pointed at you and your
8 vulnerable partner; is that correct?

9 A. That is correct.

10 Q. And that happened instantaneously by my question
11 last time and you agreed with that, correct?

12 A. Yes, sir.

13 Q. And then you immediately went and swerved into
14 him and knocked him to the ground; is that correct?

15 A. Yes, sir.

16 Q. And then he ran off in another direction being
17 chased by Officer Walter; is that correct?

18 A. Yes, sir.

19 Q. Okay. Now, have you ever conducted a -- or have
20 you ever had a need to do an identification of a
21 potential suspect with witnesses that you have?

22 A. Yes, I have.

23 Q. Okay. And so you're familiar with a live lineup
24 concept?

25 A. A live lineup?

1 Q. Yes.

2 A. We don't usually do those out in the field.

3 Q. Okay. But you are familiar with this concept?

4 A. Yes.

5 Q. It is available to you as an investigatory tool,
6 correct?

7 A. Not until all the suspects are in custody.

8 Q. Okay.

9 A. Yeah.

10 Q. And you know about a photo lineup. You've heard
11 about those?

12 A. Yes, sir.

13 Q. Sometimes they're called six packs -- I've heard
14 them refer to that -- or eight packs?

15 A. Yes, sir.

16 Q. And by that six or eight, that means you get six
17 or eight photos, one of the suspect, the other of people
18 who may share some similar characteristics of that
19 suspect, and you look at that. That way the witness
20 would look at it that way and see if they could pick out
21 the individual; is that correct?

22 A. Yes, sir.

23 Q. And that's done basically for reliability
24 purposes; is that correct?

25 A. Not necessarily.

1 Q. Accuracy, is that one of the factors?

2 A. Yes, sir.

3 Q. And certainly if they can pick someone out of a
4 group of eight versus someone who is clearly identified
5 or suggested as being the person, that would increase
6 the reliability, would you agree?

7 A. I would agree with that.

8 Q. Okay. And when you have a photo lineup of
9 individuals, usually you have people of the same race in
10 that photo. You wouldn't have one African-American
11 person surrounded by white people because that would be
12 highly suggestive, right?

13 A. Yes, sir.

14 Q. Okay. And you would agree with me that there's a
15 lot of factors that indicate reliability with regard to
16 identification; isn't that correct?

17 A. Yes.

18 Q. Okay. I'm just going to see list some of them,
19 and you tell me in your course of conduct as an officer
20 if you think that these are useful factors when you're
21 bringing suspects into an area where witnesses would be
22 able to identify them. Do you recall that question?

23 MS. LEWIS: Judge, I'm going to object as to
24 relevance as to this line of questioning regarding this
25 officer's -- what he's done in other cases. I mean,

1 he's asking him to comment about other cases where he
2 might have investigated things --

3 MR. FIGLER: I'm asking --

4 MS. LEWIS: -- and it's not relevant to --

5 MR. FIGLER: -- him about the reliability
6 of --

7 MS. LEWIS: -- this case.

8 MR. FIGLER: -- identification techniques
9 that exist.

10 THE COURT: Overruled.

11 MR. FIGLER: Thank you.

12 BY MR. FIGLER:

13 Q. Would you say that one of the things that you
14 would investigate is how much of an opportunity a
15 witness had to view the suspect as bearing on
16 reliability?

17 A. Yes.

18 Q. Okay. Would you say that proximity or the
19 distance that the individual had from that person would
20 increase reliability?

21 A. Yes.

22 Q. Okay. Would you agree that if person had fear or
23 not could impact the reliability when they have the
24 opportunity to initially observe the individual?

25 A. Yes.

1 Q. Okay. Have you ever heard of the expression
2 "cross-racial identification"?

3 A. No, sir.

4 Q. Okay. So you're not familiar with the concept
5 that sometimes people of different races are asked to
6 identify people of other races and that there's some
7 sometimes difference between the races that causes the
8 reliability to go up or down?

9 A. I'm not aware of that study.

10 Q. Okay. So you've had no training whatsoever in
11 cross-racial identification issues?

12 A. That's correct.

13 Q. Okay. How about whether or not a weapon was
14 involved? Would you agree that that could impact the
15 reliability of the identification?

16 A. Yes.

17 Q. Okay. In other words, if somebody -- some
18 suspect was holding a weapon on somebody, their
19 attention might be focused more on the weapon than on
20 the person. You would agree with that as a general
21 statement, correct?

22 A. Correct.

23 Q. Okay.

24 MR. FIGLER: Court's indulgence.

25 (Off-record colloquy)

1 BY MR. FIGLER:

2 Q. All right, Officer. Just one last bit of
3 question. When -- and I don't want to imply anything
4 that you were clear to -- you were justified in the use
5 of force over there. I don't want leave any impression
6 with the jurors that you weren't.

7 You were able to maintain your job and there was
8 no penalty imposed on you whatsoever because they found
9 this was justified use of force, correct?

10 A. Yes, sir. That's correct.

11 Q. Okay. I just want to -- I don't want to leave a
12 wrong impression with the jury or in any way attack that
13 with regard to that aspect of this case, but you were
14 transferred to a division at the end of this shortly,
15 thereafter?

16 A. Shortly thereafter. That's correct.

17 Q. Like less than a month, probably?

18 A. Yes, sir. And I've actually been transferred
19 since then as well.

20 Q. Okay. And what division are you in now?

21 A. I'm currently assigned as a detective in the
22 financial crime section.

23 Q. Obviously, I've been calling you an officer the
24 whole time. I didn't know that you were a detective.
25 Okay.

1 As far as though as the investigation that night
2 goes, once you got contacted by homicide detectives,
3 your version or your -- sorry, your role in this
4 investigation was complete; is that correct?

5 A. Yes, sir. That's correct.

6 Q. Okay. Homicide takes over from there to do the
7 complete and thorough investigation; is that correct?

8 A. Yes, sir. That's correct.

9 Q. Okay. You just sort of -- you gave a statement.
10 You told them what you knew. You told them everything
11 that you knew, and that was the end of your involvement.

12 Everything then turned over to homicide. They
13 have the responsibility to do everything from that point
14 forward, correct?

15 A. Yes, sir. That is correct.

16 Q. Okay. So any additional investigation for that
17 night or any nights after it, that's out of your
18 personal hands, correct?

19 A. Yes.

20 Q. Okay. And your partner that night was Walter,
21 Brian Walter?

22 A. Yes, it was.

23 Q. Okay. And his responsibilities would have ended
24 at that point as well, correct, to your knowledge?

25 A. That is correct.

1 Q. Okay. You guys pretty much shared the same rank
2 or responsibility I guess at that point.

3 A. Yes.

4 Q. Okay. And when was the last time you talked to
5 Officer Walter?

6 A. It's been a couple days.

7 Q. Couple days?

8 A. Yes, sir.

9 Q. Okay. But you guys don't -- you don't physically
10 work in the same unit anymore. He's still over on the
11 Bolden command and you're now in financial crimes,
12 correct?

13 A. That is correct.

14 Q. Okay. Detective, now, thank you very much for
15 your testimony.

16 THE COURT: Cross.

17 CROSS-EXAMINATION

18 BY MR. SINGER:

19 Q. Being in financial crimes, does that take you off
20 the streets a little bit more than problem solving?

21 A. Yes. It does a little bit.

22 Q. Showing you what's in evidence as Exhibit 106.
23 You told prosecutor you recognized that picture, right?

24 A. Yes, sir.

25 Q. And when you came to the scene where the

1 dumpsters were on J Street, this is how Pierre looked,
2 right?

3 A. That is how he was addressed when I took him out
4 of the dumpster, correct.

5 Q. And in the dumpster he had that orange chain on
6 him?

7 A. No, minus the orange chain. That was after he
8 was in custody.

9 Q. Uh-huh. So when you came to see him, he looked
10 just like that except he didn't -- did you look at him
11 and say that was the guy when he had the orange chain on
12 him?

13 A. No, sir. It was when I placed -- when I was
14 there while he was being placed in handcuffs that I
15 identified him.

16 Q. Um-h'm. Now I'm going to ask you -- some of my
17 questions -- I think actually most of my questions are
18 going to be yes-or-no questions.

19 So if you could do the best you can just to
20 answer the question yes or no. I mean, if you have to
21 explain I understand, but if not, can you just try to do
22 that for me.

23 A. Sure.

24 Q. The picture -- you have a view of this picture --

25 A. Yes.

1 Q. -- in front of you? Yes or no, the pants that
2 Pierre's wearing are dark in color?

3 A. Yes.

4 Q. Showing you what's been shown to you as
5 Prosecution Exhibit -- Plaintiff's Exhibit 107 in
6 evidence, yes or no, the individual pictured in this
7 picture has an Afro?

8 A. No.

9 Q. Now, when you had this little interview on the
10 night or going into the next morning, can you describe
11 the room you were in or was it a room? Where were you?

12 A. I was at -- in the homicide office at the
13 Investigative Services Division.

14 Q. Is that on Oakey?

15 A. Yes, it is.

16 Q. Okay. And how much time had elapsed from the
17 time you discharged your weapon to the time that that
18 interview took place, approximately?

19 A. Probably three or four hours.

20 Q. Enough time to like stop breathing heavy and kind
21 of gather yourself to some extent?

22 A. Yes.

23 Q. Now before you made that statement, did any of
24 the homicide detectives do anything similar to Miranda?
25 I know not exactly Miranda, but did they tell you to

1 tell the truth? What -- did they tell you anything like
2 that?

3 A. It's actually Garrity?

4 Q. I'm sorry.

5 A. It's actually Garrity.

6 Q. That's the name of the admonishments?

7 A. For an administrative investigation involving a
8 police officer, that's correct.

9 Q. And do you know Garrity admonishments?

10 A. Not verbatim, no, I don't.

11 Q. Can you give me your best estimate?

12 A. Basically what it says is that the information
13 that you disclose is for administrative purposes only.
14 It can't be used in a criminal complaint.

15 Q. And what about the truthfulness or veracity? Do
16 the admonishments talk about that at all?

17 A. Yes, it does.

18 Q. What does it say about that?

19 A. I'm sure it's in there. Like I said, I don't
20 know verbatim what the verbiage is.

21 Q. But you knew in sum that you were supposed to
22 tell the truth.

23 A. Yes.

24 Q. And tell -- and to the best of your ability give
25 every detail that you thought was important.

1 A. Yes.

2 Q. And it's such an important procedure, you even
3 had counsel next to you.

4 A. Not by choice, but, yes.

5 Q. Well, somebody thought it was important enough to
6 have counsel by your side, right?

7 A. It's just standard procedure.

8 Q. Okay. And in the proceeding, were you sitting
9 around the table?

10 A. We were actually in an office.

11 Q. Okay. There was no table in the office?

12 A. There was a desk.

13 Q. And was your lawyer sitting next to you?

14 A. The lawyer was actually sitting next to the
15 homicide detectives.

16 Q. Not next to you at all?

17 A. Correct.

18 Q. Did you talk to her at all?

19 A. Not during the proceeding, no.

20 Q. Before the proceeding?

21 A. Yes. She just introduced herself.

22 Q. At the end of this statement -- you knew it was
23 being recorded, right?

24 A. Yes.

25 Q. And at the end of the statement did -- yes or no,

1 did the detective questioning give you an opportunity to
2 add or delete or change anything you wanted? Did he say
3 do you have anything else relevant to say or words to
4 that effect?

5 A. Yes.

6 Q. And do you remember whether you chose to add,
7 delete or change anything?

8 A. That's -- I don't believe I did.

9 Q. So you were satisfied with your statement at the
10 time?

11 A. Yes.

12 Q. In your statement you said that the two males on
13 the passenger side got ejected from the vehicle, right?

14 A. Yes.

15 Q. And you even said that on direct today.

16 A. Yes.

17 Q. You used the same word.

18 A. Correct.

19 Q. And in your statement you said that after you
20 decided not to fire any more shots, you called -- did
21 you -- well, strike that. In your statement you put out
22 or you told the homicide that you put out a description
23 of the suspects, right?

24 A. Yes.

25 Q. That description didn't include anything

1 facially, did it?

2 A. I don't believe it did. No.

3 Q. And during the entire chase, foot pursuit action,
4 you didn't see any facial characteristics, did you?

5 A. No, sir, I didn't.

6 Q. And it didn't put a height, did it, or weight?

7 A. Sir, I'd have to check my radio transmission on
8 that. I don't recall.

9 Q. Okay. How about in your statement to the
10 homicide detectives? Did you tell them the height or
11 weight of the person that you were chasing?

12 A. I don't believe I did.

13 Q. Did you tell the homicide detectives how long it
14 had been since -- from the time you lost sight of the
15 suspect to the time somebody was apprehended in the
16 dumpster?

17 A. No, sir. I don't believe I was asked.

18 Q. Was that an important detail in your -- as you
19 look back on it now?

20 A. In the use-of-force decision or use-of-force
21 board, no, it wasn't.

22 Q. Now, what's the -- to the best of your knowledge
23 at the time on September 30th, what was the Metropolitan
24 Police Department's policy as far as shooting at a
25 fleeing suspect?

1 A. What the policy is?

2 Q. Yeah. What did you know? What are you trained
3 to do?

4 A. The policy is is that you're allowed to shoot at
5 a fleeing suspect provided that you can articulate that
6 his escape causes an imminent risk to members of the
7 society.

8 Q. And if it does, you can shoot him in the back?

9 A. That is correct. You're -- you can shoot a
10 fleeing felon if you can articulate that criteria.

11 Q. But the -- a fleeing felon. So you had to
12 observe a felony, right?

13 A. Yes, sir.

14 Q. What felony did you observe the suspect to
15 commit?

16 A. Sir, I observed the vehicle being taken, the
17 vehicle pursuit, the fact that the suspect was armed
18 with a firearm and wouldn't stop when I gave him orders
19 to, and that he was fleeing in a residential area, and
20 he was immediately leaving the area of a homicide that
21 occurred.

22 Q. So if I walked -- I'm walking on the street and a
23 homicide occurs, I can't walk away, me, as a lawyer?
24 I'm not allowed to walk away from a homicide? That's a
25 felony?

1 A. Sir, if that's all you were doing, yes, you could
2 walk away.

3 Q. But at the time you were pursuing that car, you
4 didn't know whether or not the people in the car had
5 permission to take that car or not because you hadn't
6 interviewed the actual owners, right?

7 A. That is correct.

8 Q. And some people have the little yellow cards that
9 says concealed weapon permit on them, right? So if you
10 have a concealed weapon permit, you can carry a gun,
11 right?

12 A. Correct.

13 Q. When you and Officer Walter pulled up to the
14 location of I believe it was a commotion when you were
15 at the location of Lawry and Lexington, is that when you
16 first noticed the commotion?

17 A. Yes, sir.

18 Q. And how far away from you was the commotion? How
19 far away from your location was the commotion going on?

20 A. Probably about from where I'm sitting to the back
21 wall of the courtroom there.

22 MR. SINGER: Judge, I already asked your
23 staff if there was a chart in the courtroom, but there
24 isn't, so can you estimate that for me.

25 THE COURT: 40 feet. 35, 40 feet.

1 BY MR. SINGER:

2 Q. Is that fair, Officer?

3 A. Yes.

4 Q. 35, 40 feet is from where you're in your vehicle
5 to where the commotion was taking place, right?

6 A. That's correct.

7 Q. And the -- you rolled your windows down?

8 A. Yes.

9 Q. And when you were looking at that commotion,
10 wasn't it really dark up there?

11 A. Yes, it was.

12 Q. But even though it was dark, you were able to
13 identify four people around the car, four black youthful
14 -- four teenagers possibly in their early 20s,
15 African-Americans?

16 A. Yes, sir.

17 Q. From 40 feet in a dark -- it was dark, right?

18 A. Yes.

19 Q. And also you saw or you say you were able to see
20 a female arguing with them, right?

21 A. Yes.

22 Q. Did you have a better vantage or a worse vantage
23 point than Officer Walter at that moment?

24 MS. LEWIS: Objection. Speculation.

25 THE COURT: If he knows.

1 THE WITNESS: I was closer to them than
2 Officer Walter was.

3 BY MR. SINGER:

4 Q. By how much? Just by --

5 A. The distance between the passenger and driver's
6 seat, correct.

7 Q. Couple feet? Did you see the woman yelling at
8 the people to bring her car back or to stop, anything
9 like that?

10 A. I heard her yelling at the vehicle. I couldn't
11 make out what she was saying.

12 Q. As it was pulling away?

13 A. No, not as it was pulling it away, before it
14 pulled away.

15 Q. Okay. As the occupants got into it after, were
16 in it and she was out of it, did you see her yelling at
17 the car?

18 A. I just heard her yelling.

19 Q. Okay. What about when the car was speeding away?
20 What did you see her doing?

21 A. I had changed my attention from her to the
22 vehicle that was leaving the area.

23 Q. So you don't know where she was? Was she still
24 there on the street?

25 A. She was there on the street and the fourth male

1 that I didn't see get in the car was walking back toward
2 her.

3 Q. And that male was thought to be a suspect, but
4 then later it was realized he wasn't. Is that true?

5 A. I didn't label him as a suspect.

6 Q. Okay. Now, even in your initial interview and
7 today you said that you lost sight of the person you
8 were chasing, the suspect, in 15 to 20 seconds. What
9 are you basing that time estimation on?

10 A. I don't believe that's what I testified to. I
11 believe it was a minute or two.

12 Q. Okay. I apologize.

13 A. Yeah.

14 Q. What are you basing that time estimation on?

15 A. The amount of time it took me to get into
16 Officer Patrucci's car and to drive over to 1701 J
17 Street at which time I reacquired the suspect in the
18 dumpster.

19 Q. Okay. So from the time you got into
20 Officer Patrucci's car to the time you got to the
21 dumpster, that was a minute or two?

22 A. Yes, sir.

23 Q. Okay. But isn't it true that after you shot in
24 the street, you retreated because you were in the middle
25 of the street with no cover --

1 A. Um-h'm.

2 Q. -- and then you hid behind the parked vehicle?

3 A. Yes, sir.

4 Q. And when you were retreating, were you retreating
5 -- were you back pedaling or did you turn around?

6 A. I was moving forward and to the side. The
7 vehicle was off to my left.

8 Q. So you weren't retreating. You were just moving
9 side ways or forward and to the side?

10 A. Forward and to the side.

11 Q. And then did you get down behind the vehicle for
12 cover?

13 A. I took a knee in front of the vehicle; that's
14 correct.

15 Q. Took a knee in front of the vehicle?

16 A. Yes, sir.

17 Q. But in a position where you were being covered.

18 A. Yes, sir.

19 Q. And then at that point in time the suspect kept
20 running full speed?

21 A. Yes, sir.

22 Q. And at that point in time how long were you there
23 taking cover in front of that parked vehicle?

24 A. I stayed there until I lost sight of the suspect.
25 I still had visual on the suspect at that time.

1 Q. And then you stayed at that position on one knee
2 until you lost sight of the suspect.

3 A. Um-h'm.

4 Q. And then you went back to where you had left your
5 car because you wanted to know if anything had happened
6 today Officer Walter because there was another suspect,
7 but you wanted to make sure he was okay.

8 A. Yes, sir. I moved approximately 15 or 20 feet
9 before Officer Patrucci arrived and picked me up.

10 Q. Okay. Maybe I'm not being clear. From the time
11 you were kneeling in the car and lost sight -- behind
12 the car or in front of the car, you lost sight of the
13 suspect, you went back to your Seabring.

14 A. No, sir.

15 Q. No? Did you ever tell anybody you went back to
16 the Seabring?

17 A. I -- I told them that I got back into the
18 Seabring; that's correct.

19 Q. But didn't you also have a concern that there was
20 a third suspect and you wanted to see what Walter's
21 status or health --

22 A. Yes --

23 Q. -- and well being was?

24 A. -- that is correct.

25 Q. Okay. So after you lost sight of the suspect,

1 you actually had a -- you focused your concern on the
2 well being of your partner for a time.

3 A. Yes, sir.

4 Q. And then after you didn't see Officer Walter,
5 that's when Patrucci -- Officer Patrucci picked you up
6 in the Seabring or in the van, excuse me.

7 A. That's not correct. I started back toward
8 Officer Walter. But before I got very far like I said I
9 moved maybe 15 to 20 feet, and Officer Patrucci arrived
10 in the car I was driving, and I got into the car. He
11 then informed me that his trainee was out looking for
12 Officer Walter, so he had another officer with him.

13 Q. In your statement to the homicide detectives, you
14 described at some point that the suspect tried to put
15 the gun back in his sweatshirt.

16 A. Yes, sir.

17 Q. You also described to the homicide detectives
18 that the gloves that the suspect was wearing were black
19 or charcoal. Remember that?

20 A. Yes, sir.

21 Q. When that Lincoln with the suspects in it kept
22 rolling, how fast would you -- and it had no driver at
23 the time. This is the time I'm talking about.

24 A. Um-h'm.

25 Q. It was just going on its own accord, on it's own

1 volition, right?

2 A. Correct.

3 Q. And that it was going five miles an hour?

4 A. If that, yes, sir.

5 Q. Okay. And then the doors didn't really open.

6 Like nobody just opened the door and got out. You say
7 they were ejected face first.

8 A. Yes, sir. That was my observation.

9 Q. And then after they were ejected, was your --
10 what was your car's status? Was it in drive or -- as
11 they were being ejected?

12 A. My car was actually in park at that time.

13 Q. Okay. And then you were in the driver's seat,
14 right?

15 A. Yes.

16 Q. And did you go around the front of your car or
17 behind your car to get to the --

18 A. I actually stayed right outside of the driver's
19 door.

20 Q. Your driver's door.

21 A. Yes, sir.

22 Q. And then did you -- how far away was your
23 driver's door from where they were ejected first?

24 A. Maybe 20, 25 feet.

25 Q. Okay. And then the suspects that were ejected

1 got up and started a full sprint, right?

2 A. One of them did, and then the suspect that I
3 ended up chasing was the second one to start running.

4 Q. And when he started running, the one you started
5 chasing, he wasn't sprinting?

6 A. He was sprinting. That is correct.

7 Q. Right. And he was initially 60 or 70 feet -- or,
8 initially, you were 60 or 70 feet behind him, right?

9 A. Yes, sir.

10 Q. So if that door is 35 feet, we're talking about
11 twice the length from where you are to the door.

12 A. That is correct.

13 Q. Were you at a full sprint?

14 A. Yes.

15 Q. And it's your testimony that the person who was
16 -- you were chasing, as they were sprinting they turned
17 back to you and stopped?

18 A. No, sir.

19 Q. Their body, their shoulders never turned towards
20 you. Yes?

21 A. It -- he was positioned like this.

22 Q. And your right hand's over your left shoulder.

23 A. Yes, sir.

24 Q. But never turning around, never turning around
25 more than that.

1 A. Yes, sir.

2 Q. So kind of like it would be fair to say shooting
3 over the shoulder or in a position to?

4 A. Yes, sir.

5 Q. Now, does that statement that the suspect was
6 turned and pointing a gun at you affect the excess --
7 the use-of-force hearing?

8 A. Yes.

9 Q. When you were at Lexington and Lawry and you saw
10 the commotion, you said earlier that the male,
11 African-American teenager, older teen, 20s, were all
12 wearing dark clothing.

13 A. Yes. That's correct.

14 Q. When you were in the car and following the
15 Lincoln, you were -- and Officer Walter was in the car
16 with you, did you guys have a preset -- like before
17 September 30th, like before that fight, a preset plan or
18 design as to who got out first or who followed the
19 driver or anything like that?

20 A. Yes.

21 Q. And what was the plan?

22 A. The plan was whoever was in the passenger seat
23 was the -- going to be the primary officer in the foot
24 pursuit, and the person that's driving would be the
25 backup officer.

1 Q. And that's always --

2 A. That's with Officer Walter and I.

3 Q. Okay. And so it didn't matter who the driver
4 necessarily was, but whoever bailed first or whoever got
5 out of the car first, Officer Walter's -- that would be
6 Officer Walter's responsibility?

7 A. That's correct.

8 Q. When you were running full speed, were you -- was
9 your adrenaline pumping or were you able to control it?

10 A. I felt I was pretty calm.

11 Q. Was that the first time somebody had pointed a
12 gun at you with the intent to use it that you believed?

13 A. Yes, sir.

14 Q. But you still maintained your composure?

15 A. Yes, sir.

16 Q. Now, the person that -- when the person came out
17 of the dumpster -- when Pierre came out of the dumpster,
18 that was the first time and really the only -- well, the
19 first time that you had seen his face.

20 A. That is correct.

21 Q. So they got ejected face first and you didn't see
22 their -- his face at all?

23 A. Correct.

24 Q. And then you're doing -- and then you're
25 sprinting after a suspect to whose face you didn't see

1 at all.

2 A. That is correct.

3 Q. Then you lose sight of that suspect. Yes?

4 A. Yes.

5 Q. And then a time later you see Pierre's face for
6 the first time coming out of the dumpster.

7 A. Yes.

8 Q. The suspect that was running away, do you know
9 with whether or not any of your three bullets hit them
10 or struck them?

11 A. Not that I know of, no.

12 MR. SINGER: I'll pass the witness. Thank
13 you, Judge.

14 THE COURT: Redirect.

15 MS. LEWIS: Yes, Judge.

16 REDIRECT EXAMINATION

17 BY MS. LEWIS:

18 Q. Officer Cupp, I want to go back to the area where
19 the car turned when you said that the driver looked like
20 he lost control of the vehicle. Where was that located
21 at during the car pursuit?

22 A. Where the vehicle initially ran up on the curb?

23 Q. Yes.

24 A. It was right at Martin Luther King and Jimmy.

25 Q. Okay. At the corner there or before Jimmy or --

1 A. It was right on the corner as he made that
2 eastbound turn onto Jimmy.

3 Q. Okay. And on this map that Mr. Figler gave you
4 where you made a little mark, you made this mark and
5 indicated that that's where the driver turned his head
6 to look back at you or was leaning out of the car?

7 A. Yes, ma'am.

8 Q. Okay. So in relation to that mark that you made
9 on the map, where was it where the car went up on the
10 curb?

11 A. It was just prior to that.

12 Q. Okay. And do you know what the driver was doing
13 when the car went up on the curb?

14 A. I have no idea.

15 Q. Okay. You were asked by Mr. Figler whether you
16 told the homicide detectives when you gave your
17 statement about the location of where it was that the
18 driver had looked out and looked back at you, right? Do
19 you remember that?

20 A. Yes.

21 Q. Okay. And you were shown, in fact, a page, one
22 page out of that statement --

23 A. That's correct.

24 Q. -- and you were describing those events to the
25 homicide detective; is that right?

1 A. Yes, ma'am.

2 Q. Okay. Did you tell the homicide detective that
3 the car had lost control at that location right before
4 Jimmy?

5 A. Yes, I did.

6 Q. Okay. And you also told the homicide detective
7 in that statement that that's the same time when the
8 driver looked back --

9 MR. FIGLER: Object --

10 BY MS. LEWIS:

11 Q. -- at you, is that right?

12 MR. FIGLER: -- Your Honor. That's leading.

13 THE COURT: It's leading.

14 BY MS. LEWIS:

15 Q. Well, what --

16 THE COURT: Rephrase.

17 BY MS. LEWIS:

18 Q. What did you tell the homicide detective in that
19 statement about the timing of when the driver looked
20 back at you?

21 MR. FIGLER: And, Your Honor, for the
22 record, I think he's just reading the page right now.
23 So if there needs to be --

24 THE COURT: Lay a proper foundation.

25 MR. FIGLER: Thank you, Your Honor.

1 MS. LEWIS: Sure.

2 BY MS. LEWIS:

3 Q. You were asked by Mr. Figler about the timing of
4 when it was that the driver looked back at you, and you
5 said you didn't remember and he used this page to
6 refresh your recollection. Do you remember that a few
7 moments ago, Officer Cupp?

8 A. Yes.

9 Q. Okay. What did you tell the homicide detectives
10 about when it was that the driver looked back at you?

11 A. I believe it was in the homicide one. It was
12 when he was southbound on Lexington --

13 Q. Okay.

14 A. -- is when the door came out --

15 Q. Okay.

16 A. -- came open.

17 Q. And in relation to when the car ran up on the
18 curb, when was that?

19 A. That was prior to that.

20 Q. Okay. And you told the homicide detective about
21 the car running up on the curb because of the driver
22 losing control of the vehicle; is that right?

23 A. Yes, I did.

24 Q. You were asked some questions about lineups and
25 what type of training that you have with regards to

1 lineups. You do receive training regarding doing
2 lineups and preparing them and putting them together,
3 correct?

4 A. Yes, ma'am.

5 Q. And there's different kinds of lineups; is that
6 right?

7 A. Yes, ma'am.

8 Q. You talked about photo lineups, right? That's
9 using photographs?

10 A. Yes.

11 Q. And you were asked by Mr. Figler whether or not
12 you had done a live lineup in this particular instance.
13 Do you remember that?

14 A. Yes.

15 Q. And I believe your answer was you were not out in
16 the field or something to that effect.

17 A. Yes, ma'am.

18 Q. Why is that?

19 A. Live lineups are usually conducted by detectives
20 after the fact. And as the name indicates, you're
21 actually using people that are in CCDC that match the
22 suspect's description and the live lineup is actually
23 conducted in the detention center facility. It's not
24 done out in the field.

25 Q. Okay. So a live lineup is something that's

1 conducted somewhere else and CCDC refers to the
2 detention center facility?

3 A. Yes, ma'am.

4 Q. Okay. And you said that in this particular case,
5 the lineup that you did was the one-on-one
6 identification, essentially, correct?

7 A. Correct.

8 Q. And what is referred to -- what is a one-on-one
9 identification?

10 A. A one-on-one identification's used when it's out
11 in the field. It's immediately following the incident
12 in question, and the witness is present on scene as well
13 as the suspect.

14 Q. Okay. So this type of identification is
15 something that you received training on?

16 A. Yes, ma'am.

17 Q. It's not an unusual thing?

18 A. No, ma'am.

19 Q. Okay. You received training on many different
20 areas involving law enforcement and doing your job; is
21 that right?

22 A. Yes, ma'am.

23 Q. And you've never received training on
24 cross-racial identification. Is that what you said?

25 A. Yes, ma'am. I'm not familiar with that study.

1 Q. Okay. And you're a detective now, so is that
2 considered a promotion from being an officer and going
3 to a detective?

4 A. Yes, it is.

5 Q. You said that you talked to Officer Walter a few
6 days ago. Did you talk to him about this case and your
7 testimony here today?

8 MR. FIGLER: I'm going to object,
9 Your Honor, as leading or suggesting an answer. Just
10 what they talked about would be a better question that
11 doesn't suggest an answer.

12 THE COURT: Overruled.

13 BY MS. LEWIS:

14 Q. Did you talk to him about your testimony here
15 today in this case?

16 A. No, I didn't.

17 Q. Have you ever talked to anybody about your
18 testimony and what you should testify to here today
19 other than homicide detectives or myself and
20 Mr. Bateman?

21 A. No, I haven't.

22 Q. Did anybody ever talk to you about what you
23 should say regarding the events that happened that
24 night?

25 A. No.

1 Q. When you gave that interview and you said there
2 was a lawyer in the room and you met with her briefly
3 where she identified herself to you, did she ever tell
4 you what you should say if you were asked questioned
5 about that night?

6 A. No.

7 Q. You said that you're no longer in the Problem
8 Solving Unit. Was that as a result of the promotion
9 that you received?

10 A. Yes, ma'am.

11 Q. Okay. So it has nothing to do because of this
12 case or anything like that?

13 A. No, ma'am.

14 MR. FIGLER: I'll object, Your Honor, as
15 leading. It was.

16 THE COURT: It was.

17 BY MS. LEWIS:

18 Q. You testified that Officer Patrucci came to pick
19 you up, and can you tell us -- I know you said it was
20 about 15 to 20 feet that you had moved from where you
21 lost sight of the person you were chasing, but can you
22 tell us where location wise you would have been at?

23 A. I would have been in the middle of Doolittle
24 probably just north of the church's parking lot.

25 Q. Okay. So you had began the chase, and it took

1 you into a church parking lot, correct?

2 A. Correct. I actually took cover next to a car
3 that was parked north of the church's parking lot. The
4 suspect continued to run south through the parking lot.

5 Q. Okay. And where is that wall in relation to the
6 church parking lot?

7 A. It's on the far south end of the lot.

8 Q. Had you exited that parking lot before
9 Officer Patrucci picked you up?

10 A. I had never actually entered the parking lot.

11 Q. Okay. So --

12 A. I was still out on the street.

13 Q. Okay. And would that have been in front of that
14 church parking lot?

15 A. Yes, ma'am.

16 Q. Okay. And that's a different church than the
17 church where the crash took place and where you left
18 your vehicle?

19 A. That is correct.

20 Q. Were there any other people, individuals, running
21 in this neighborhood at that time?

22 A. No, there wasn't.

23 Q. You testified that there are -- it's not uncommon
24 for there to be people in this area who don't want to
25 speak with police and, in fact, you've had that

1 experience yourself; is that right?

2 A. Yes, ma'am.

3 Q. Were there any other people in this area that
4 appear to be running away from you besides the one
5 person that you indicated that you were chasing after?

6 A. No, ma'am, not in that immediate area.

7 Q. Do you know -- you said that you were
8 broadcasting over the radio descriptions and your
9 locations. Do you know the exact times of those
10 different broadcasts?

11 A. I don't know off the top of my head.

12 Q. Do you know the exact time that the shooting
13 happened back at 1271 Balzar?

14 A. No, ma'am, not off the top of my head.

15 Q. Would it refresh your recollection to look at the
16 computer-aided dispatch log or otherwise known as the
17 CAD log?

18 A. Yes, it would.

19 MS. LEWIS: May I approach, Judge?

20 THE COURT: You may.

21 BY MS. LEWIS:

22 Q. Were you operating under a particular call sign
23 that evening, Officer Cupp, that would identify you as
24 the one relaying information on that log?

25 A. Yes, ma'am.

1 Q. And what was your call sign that evening?

2 A. I was working under the call sign 8 Williams 73.

3 Q. Okay. So 8W73?

4 A. Yes, ma'am.

5 Q. Okay. So take a look at that log, and I want to
6 ask you about what time the shooting happened and what
7 time you broadcasted the different information you
8 relayed.

9 A. Okay.

10 Q. Does looking at that refresh your recollection as
11 to those times?

12 A. Yes, it does.

13 Q. Okay. So without reading off of the document,
14 because you can't read to us what's on there, but what
15 time was it that the shooting was broadcast at the 1271
16 Balzar?

17 A. The initial time was 2152 hours.

18 Q. And Metro uses military time?

19 A. Yes, ma'am.

20 Q. So that would be 9:52?

21 A. Yes.

22 Q. Okay. And what time was it that you broadcasted
23 information?

24 MR. FIGLER: And, Your Honor, for the
25 record, the officer is in response to each question from

1 the prosecutor looking down and reading it off the log
2 which is understandable because I think he said his
3 memory's not good so I just wanted --

4 THE COURT: Lay the proper foundation.

5 MR. FIGLER: -- to note that for the record.

6 MS. LEWIS: And, Judge, let me do something.
7 Judge, I'd move for the admission of State's Proposed
8 Exhibit 163 which is a certified document, and attached
9 to it is a certification from the custodian of record
10 showing that this is a certified document of the
11 computer-aided dispatch log under the event number in
12 question. I'd move for its admission at this time.

13 THE COURT: Any objection?

14 MR. FIGLER: They're calling that a public
15 record that the public would have access to?

16 MS. LEWIS: Yes, Judge.

17 THE COURT: They're certifying it.

18 MR. FIGLER: Okay. Your Honor, I think that
19 an incidental recall, I don't have a problem with it
20 being marked to refer to it with this witness, but I
21 don't think that this particular document is accessible
22 to the public, so it doesn't fall under public record
23 exception, and it's filled with hearsay.

24 There's a lot of statements in there that
25 come from other people and none of them fall under the

1 particular reliability because we don't know some of
2 them where they are. They might be reporting
3 information that we wouldn't have an opportunity to
4 cross-examine on. That's the only reason.

5 THE COURT: You can use the document to
6 refer and refresh the officer's recollection, but it
7 does contain information that would be normally
8 considered hearsay even though it is a certified
9 document. It's not a public record, so you can refer to
10 the officer with it, but it's in the admitted.

11 MS. LEWIS: So it's not being admitted?

12 THE COURT: It's not being admitted at this
13 time.

14 BY MS. LEWIS:

15 Q. Officer, if you could tell us, what time was it
16 that you broadcasted over the radio any descriptions
17 about the suspect or your location?

18 A. Can I refer to this document?

19 Q. Yes.

20 A. The first time Officer Walter got on the air was
21 2154 hours.

22 Q. Okay. And what about yourself when you were on
23 the air, when was that?

24 A. 2155 hours.

25 Q. Okay. And at that time what was the purpose for

1 you broadcasting information?

2 A. I was just advising the other units that I had
3 been involved in a shooting, where my present location
4 was, and what the suspect description was.

5 Q. And are you aware of what time it was that the
6 suspect was taken into custody out of the dumpster?

7 A. Not off the top of my head.

8 Q. Okay. Would looking at that log refresh -- would
9 that information be contained in that log?

10 A. Yes, ma'am.

11 Q. Would looking at that log refresh your
12 recollection?

13 A. Yes, it would.

14 Q. Please look at that and let me know if that
15 refreshes your recollection.

16 A. 2157 hours.

17 Q. Okay. And, again, 2157 is 9:57 p.m.?

18 A. Yes, ma'am.

19 Q. Okay. So how much time had lapsed from the time
20 that you had broadcast the shooting and the description
21 of the suspect and the time that the broadcast was
22 relayed that he was taken out of the dumpster?

23 A. Approximately, five minutes.

24 Q. Around the area of the apartments when you came
25 around to the apartment and eventually when you entered

1 the dumpster, were there any people walking around there
2 on foot or running or anything like that?

3 A. No, ma'am.

4 MS. LEWIS: I'll pass the witness.

5 THE COURT: Cross.

6 MR. FIGLER: Thank you, Your Honor.

7 Briefly.

8 RECROSS-EXAMINATION

9 BY MR. FIGLER:

10 Q. Officer, would it be a fair statement to say that
11 the -- you did testify that these streets normally have
12 young people hanging out socializing, and that's not an
13 uncommon sight during your patrols in the past; that's
14 correct?

15 A. That's correct.

16 Q. Okay. It would also be a fair statement to say
17 that when there are gunshots or police sirens or a lot
18 of -- or big a police presence in the neighborhood that
19 the kids who would otherwise be hanging out become
20 somewhat scarce, that they kind of get out of the way?

21 A. Yes, sir.

22 Q. Okay. So the streets are a little bit more
23 deserted when there's a big police presence than when
24 it's just your car driving by alone and there's nothing
25 else going on, right?

1 A. That's correct.

2 Q. Okay. Now, the prosecutor had asked you, again,
3 about --

4 (Off-record colloquy)

5 BY MR. FIGLER:

6 Q. And we talked about this map where you put that
7 green dot, correct?

8 A. Yes.

9 Q. Okay. Upon reflecting, reading the statement
10 that you gave closer in time, you have some doubt now as
11 to whether or not that dot is accurate as you sit here
12 today, correct?

13 A. No. To best of my recollection that's accurate.

14 Q. Okay. So the statement you gave earlier in time
15 you have doubt as to the accuracy of that statement?
16 You agree they contradict?

17 A. Yes, they contradict.

18 Q. So one of them is probably more accurate than the
19 other, correct?

20 A. They're just --

21 Q. You said they contradict.

22 A. -- just different scenario, yes.

23 Q. Okay. So you have doubt as to at least one of
24 those scenarios, correct?

25 A. No, sir. Actually, both scenarios are true.

1 Q. So the first time you opened the door being in
2 the middle of Jimmy is also true with the first time you
3 opened the door being southbound on Lexington?

4 A. What I recall is the door was open --

5 Q. Is that yes or no?

6 A. It's a two-part question.

7 Q. Did you open the door -- is it possible he opened
8 the door for the first time twice?

9 A. No.

10 Q. Okay. And you would agree that when you told the
11 police that night when it was freshest in your mind
12 where he opened up the door where you could see him, you
13 told him when he was going southbound on Lexington. You
14 agree with that?

15 A. Yes.

16 Q. Okay. Let me ask you, also. According to that
17 dispatch log --

18 (Off-record colloquy)

19 BY MR. FIGLER:

20 Q. I'm showing you Proposed State's Exhibit 163.
21 According to that log, can you pretty much tell me what
22 time you were present on Doolittle and Lexington, right,
23 if you looked at that to refresh your recollection, if I
24 were to refresh your recollection as to a very close
25 time as to when you were on Lexington and Doolittle,

1 right?

2 A. Actually, all this log document is the radio
3 traffic.

4 Q. Okay. So do you think looking at that might
5 refresh your recollection as to when you were at that
6 location first when the car chase had ended?

7 A. It would give an approximate time.

8 Q. Okay. If you looked at that to refresh your
9 recollection, then you can give me an approximate time
10 as to when the car crash ended or the car chase ended,
11 rather. I misspoke.

12 A. It doesn't have the termination of the pursuit on
13 there.

14 Q. Okay. Can you guess, then, or give me a good
15 estimate based on your recollection plus looking at the
16 log?

17 A. Probably 2153 hours.

18 Q. Sure about that? What time did this start, your
19 calling?

20 A. 2152 hours is the first time it --

21 Q. Okay. So it --

22 A. -- the shots were fired.

23 Q. -- didn't end one minute later.

24 A. The radio traffic says that the suspects are
25 bailing. That was Officer Walter's traffic and that was

1 at 2154 hours.

2 Q. So you're saying it was two minutes after this
3 whole thing started?

4 A. Yes, sir.

5 Q. Okay. Finally, you talked to the prosecutor just
6 now about one-on-one identification. That's something
7 that's supposed to happen immediately following; is that
8 correct?

9 A. That is correct.

10 Q. Okay. But you always have the ability if you
11 want to increase accuracy to take them to whatever
12 facility has the ability to do lineup and do a lineup.
13 That's always an option, right?

14 A. It is an option.

15 Q. It's not against police policy to do a more
16 accurate lineup, is it?

17 A. No, it's not.

18 Q. Okay.

19 MR. FIGLER: Pass the witness.

20 THE COURT: Cross.

21 MR. SINGER: No recross, thank you.

22 THE COURT: Any redirect?

23 MS. LEWIS: No, Judge.

24 THE COURT: This witness is excused, then.

25 Thank you very much.

1 THE WITNESS: Thank you, sir.

2 THE COURT: Ladies and gentlemen, we're
3 going to take our afternoon recess. During this recess
4 you're admonished not to talk or converse among
5 yourselves or with anyone else on any subject connected
6 with this trial or read or watch or listen to any report
7 of or commentary on this trial or talk with any person
8 connected with this trial by any medium of information
9 including, without limitation, newspaper, television or
10 radio or form or express any opinion on the subject
11 connected with this trial until the case is finally
12 submitted to you.

13 Follow the bailiff, and he'll direct you
14 accordingly. We're in recess until 2:00 o'clock.

15 (Off-record colloquy)

16 (Jury not present)

17 THE COURT: Record should reflect we're
18 outside the presence of the jury. I want to use this
19 time -- why don't we take a ten-minute break so
20 everybody can stretch their legs and do whatever they
21 need to do, and then we'll move on to the further
22 proceedings.

23 MR. FIGLER: Specific to gunshot residue,
24 Judge.

25 THE COURT: Specifically to gunshot. Do you

1 have an estimation on how long you're going to be in
2 terms of the rest of your case in chief?

3 MR. FIGLER: How many more witnesses he
4 wants to know.

5 MR. BATEMAN: I'm thinking somewhere around
6 two more officers, to more CSAs with (indiscernible)
7 Randy McPhail.

8 THE COURT: Yeah.

9 MR. FIGLER: The coroner.

10 MR. BATEMAN: The coroner should be short
11 I'm thinking.

12 MR. FIGLER: Short.

13 MR. BATEMAN: But we have Krylo and the
14 expert, Crystina Vachon.

15 THE COURT: Do you believe based upon the
16 pace of our current --

17 MS. LEWIS: Tomorrow morning.

18 THE COURT: Tomorrow morning? Is that when
19 you're estimating?

20 MR. BATEMAN: I'd say we'd be done by
21 tomorrow.

22 THE COURT: I'd like you -- I need jury
23 instructions worked on.

24 MR. FIGLER: We started already.

25 THE COURT: Good.

1 MR. FIGLER: I've exchanged my specials,
2 he's given me the packet, we're conversating about it.

3 THE COURT: Conversating is good. Ten
4 minutes. Court's in recess.

5 (Court recessed at 1:15 p.m. until 1:29 p.m.)

6 (Jury not present)

7 THE COURT: State of Nevada, plaintiff,
8 versus Pierre Joshlin and Jamar Matthews. Record should
9 reflect all parties present with clients outside the
10 presence of the jury.

11 With regard to the previous record that had
12 been marked and that you had offered, I'd initially
13 denied admission of that document. There is a specific
14 statute on point, and there's a specific on point that
15 permits the admission of that document. At this point,
16 I'll going to admit that document based upon --

17 MR. BATEMAN: I should know it since I'm on
18 DV.

19 THE COURT: I think --

20 MS. LEWIS: I'll find it.

21 THE COURT: It's 51.155 --

22 MR. BATEMAN: Right.

23 MS. LEWIS: Is that what it is? Okay.

24 THE COURT: -- subsection 3.

25 MS. LEWIS: Your Honor --

1 THE COURT: Yes.

2 MS. LEWIS: -- would you have --

3 THE COURT: Counsel, actually, do you want
4 to -- you're actually grabbing your log, so --

5 MS. LEWIS: He's welcome.

6 THE COURT: I also reviewed the document and
7 it is just a classic dispatch log. I thought it would
8 have long narratives in it --

9 MR. BATEMAN: No.

10 THE COURT: -- which sometimes are printed
11 out, but I didn't see any of those long narratives.

12 MR. BATEMAN: There's no way the -- I think
13 the jury would even be --

14 THE COURT: But I want Mr. Figler to have
15 his opportunity.

16 MR. FIGLER: I just object for the record,
17 Your Honor. I just think that there's a lot of
18 statements in there of some parties that we won't be
19 able to cross-examine as to their -- the accuracy of it,
20 and I'd just submit it to Your Honor at that.

21 THE COURT: I understand, and your objection
22 is noted for the record. Now --

23 MS. LEWIS: What's that exhibit number for
24 the record.

25 THE CLERK: Was that Exhibit No. 163?

1 THE COURT: Yes.

2 MS. LEWIS: Judge, will I be able to remove
3 for its admission in front of the jury so that they
4 understand that it's been admitted or --

5 THE COURT: That makes sense.

6 MS. LEWIS: Okay. I'll do that after the
7 break.

8 THE COURT: So --

9 MR. FIGLER: So if we get some certified
10 copies of public records we'll get the same ruling?

11 THE COURT: You're going to get the same
12 ruling as long as it falls under that section.

13 MR. FIGLER: Okay.

14 THE COURT: What are you referring --

15 MR. BATEMAN: That specific ruling -- that
16 specific section is with regard to dispatch calls.

17 THE COURT: And I am limiting this rule --

18 MR. BATEMAN: Right.

19 THE COURT: Because it's dispatched calls.

20 MR. FIGLER: All right. I thought it was
21 your basically going on the general that there was
22 nothing in there that wasn't a public record or
23 certified public document.

24 THE COURT: No. It talks about civil cases
25 against -- let's see. In civil cases and against the

1 State of Nevada. "In criminal cases, factual findings
2 resulting from investigations pursuant to this authority
3 unless the source of information or other method or
4 circumstances of the investigation lack and indicate
5 lack of trustworthiness."

6 The documents are certified on the back, and
7 they are records maintained. I've gone through the
8 documents. Show me in there a hearsay statement --

9 MR. FIGLER: Where are we at? What --

10 THE COURT: 51.155. That's a public record
11 exception.

12 MR. FIGLER: Yeah. Okay.

13 MR. BATEMAN: But --

14 THE COURT: And it's also under
15 subsection 1, activity of an official agency.

16 MR. FIGLER: Yeah. Okay.

17 MR. BATEMAN: Is that -- are you looking,
18 Your Honor, at the actual -- there's one that actually
19 talks about --

20 THE COURT: And --

21 MR. BATEMAN: -- calls for service to 911.

22 THE COURT: -- there is one that calls for
23 actual service and --

24 MR. BATEMAN: That's not 911, per se.

25 THE COURT: -- no, that is not the one.

1 MR. FIGLER: This is the 911 log. That's a
2 different thing.

3 THE COURT: Yeah.

4 MR. FIGLER: That's contemporaneous
5 reporting, not testamentary in nature. That's a whole
6 different thing. This is what you're imposing upon, and
7 that's fine as long as we just get the same treatment on
8 both sides.

9 MR. BATEMAN: I'm sorry. I thought you were
10 talking about that particular statute.

11 THE COURT: No, I'm not.

12 MR. BATEMAN: The 911 calls or --

13 MR. FIGLER: 51.155, that's where we're at,
14 then that goes for both sides. We're good.

15 MR. BATEMAN: I thought that's what you were
16 talking about, Judge, but --

17 THE COURT: Well, if there's a different
18 section -- okay.

19 MR. BATEMAN: I'll find it. I'll find it.

20 THE COURT: Okay. We're going to hold off
21 on that --

22 MR. BATEMAN: Okay.

23 THE COURT: -- because I want to make sure
24 the ruling is clear and correct, so we haven't done it
25 in front of the jury. No harm done. Let's move onto

1 why we're here.

2 MR. BATEMAN: Okay.

3 MR. FIGLER: Okay.

4 THE COURT: I have a bench memo, bench
5 brief, that's been filed by Mr. Figler that outlines
6 fully the issue involved in the gunshot residue. I have
7 points and authorities, and I've got this days ago, and
8 I received points and authorities from the State in
9 opposition to a motion in limine that addresses this
10 issue as well.

11 It's the State's burden to prove that this
12 evidence is admissible. So call your first witness.

13 MR. SINGER: Judge, the defendant
14 Pierre Joshlin joins in that motion in limine.

15 MR. BATEMAN: Well, then the question is I
16 guess, first, is I don't care who we call. I can call
17 (indiscernible) or I can call Randy McPhail. I don't --

18 MR. FIGLER: I'd rather have McPhail first
19 then go to the expert.

20 THE COURT: Let's do McPhail first.

21 MR. BATEMAN: Okay. We'll call
22 Randy McPhail.

23 MR. FIGLER: Makes sense.

24 THE CLERK: Please remain standing and raise
25 your right hand.

1 RANDALL MCPHAIL, PLAINTIFF'S WITNESS SWORN

2 THE WITNESS: Yes.

3 THE CLERK: Thank you. You may be seated.
4 Please state and spell your name for the record.

5 THE WITNESS: My name is Randall and the
6 last name is McPhail, M-c capital P-h-a-i-l.

7 DIRECT EXAMINATION

8 BY MS. LEWIS:

9 Q. Sir, how are you employed?

10 A. I'm a senior crime scene analyst with the
11 Las Vegas Metro Police Department.

12 Q. How long have you been so employed?

13 A. Just over ten years, almost eleven years now.

14 Q. Okay. And going back to the evening of September
15 30th, 2006, were you dispatched to a scene at 1701 North
16 J Street in reference to a homicide follow-up
17 investigation?

18 A. Yes.

19 Q. And when you were dispatched to that location,
20 did you have a specific duty that you were involved with
21 at that location?

22 A. Yes.

23 Q. And what was that duty?

24 A. I was asked to photograph two individuals at that
25 location and get GSR, gunshot-residue samples, from

1 those two individuals.

2 Q. Were those your only duties that night at that
3 location?

4 A. At that location, yes.

5 Q. As a crime scene analyst you have numerous duties
6 involving crime scene investigation, correct?

7 A. Yes.

8 Q. Collecting evidence and documenting crime scenes
9 and things of that nature.

10 A. Correct.

11 Q. Okay. In this particular case, you were limited
12 in scope as to what you were required to do at that
13 location?

14 A. Yes. I was just kind of helping out. It was a
15 graveyard call, basically, and I was swing shift just
16 clearing, and I was just helping out.

17 Q. Showing you what's been marked as State's Exhibit
18 106 and 160. Do you recognize those two exhibits?

19 A. Yes.

20 Q. And how do you recognize these two exhibits?

21 A. Those are photos I took, and I just recall the
22 photos.

23 Q. Okay. And these were the photos you took at 1701
24 J Street?

25 A. Yes.

1 (Off-record colloquy)

2 BY MS. LEWIS:

3 Q. And showing you State's Proposed Exhibit 164, do
4 you recognize that?

5 A. I do.

6 Q. And the two photographs in 106 and 160 and for
7 the record, 106 and 160, are those the two that were
8 asked to photograph?

9 A. Yes.

10 Q. Okay. Did you know these two individuals?

11 A. Not prior to that point, no.

12 Q. And are these the two -- same two individuals
13 that are -- appear in the courtroom here in front of
14 you?

15 A. I believe so, yes.

16 Q. What else did you have to do besides take the
17 photographs? You said --

18 A. I --

19 Q. -- the gunshot-residue kit?

20 A. That was basically it, gunshot-residue kits from
21 the scene. Yes.

22 Q. What is a gunshot-residue kit?

23 A. A gunshot-residue kit is a kit that contains four
24 different plastic discs with adhesive tape on one end of
25 the disc for a collection of the sample.

1 We dab an area around the hand, particularly the
2 webs of both hands, looking for small particles that are
3 associated with firing a gun, and we then protect the
4 end of it and turn it in as evidence so it can be
5 analyzed later on.

6 Q. Okay. Now, did you know before arriving at the
7 screen that you were going to be doing this
8 gunshot-residue kit testing that you've described?

9 A. I'm not sure. I don't recall.

10 Q. Okay.

11 A. That's something that we carry with it us and
12 it's pretty standard.

13 Q. Okay. The kits you carry with you --

14 A. Yes.

15 Q. -- and they're standard? Is anything done in
16 order to contain the kit or keep it from being exposed
17 to anything else before you use it?

18 A. They're sealed and the sample discs themselves
19 are sealed. We have to tear -- take them apart prior to
20 using them.

21 Additionally, there is a pair of specialized
22 plastic gloves inside the kit that we put on our gloved
23 hand even if we have gloved hands to protect the discs
24 while we're using it.

25 Q. Okay. And did you do all of those things on the

1 night of September 30th, 2006, with relation to these
2 two defendants after you photographed them?

3 A. It would be my standard procedure to follow those
4 procedures. Yes.

5 Q. Okay. And so just to we're clear, you put
6 plastic gloves on.

7 A. Yes.

8 Q. And the kit itself, it's a little container and
9 the testing --

10 A. The kit has four --

11 Q. -- mechanism --

12 A. -- small containers in it --

13 Q. Okay.

14 A. -- and the plastic gloves and some paperwork as
15 well.

16 Q. So everything you need is inside this kit?

17 A. Yes.

18 Q. The gloves included?

19 A. Yes.

20 Q. Okay. Got you. And the containers that are used
21 as the mechanism for the actual test or the dabbing that
22 you do, those are sealed as well?

23 A. Yes.

24 Q. Are those the four containers you referenced?

25 A. Yes.

1 Q. Why are there four containers?

2 A. We have sections on the hands that we're looking
3 specifically for on the hand. You might do this area
4 around the base of the fingers and you do the palm side
5 of that, as well as the posterior side of the webbing
6 area.

7 So there's actually two samples for each hand,
8 one for the palm, one for the posterior side, so that
9 would make four -- four samples.

10 Q. Okay. So two for each hand?

11 A. Yes.

12 Q. And then one for each side?

13 A. Yes.

14 Q. Okay. Besides putting the gloves on and removing
15 the dab from the container that it contains in, is there
16 anything else that you do with regards to the
17 gunshot-residue kit?

18 A. Well, we would protect the sampled area again,
19 reseal the plastic cap so that it would be protected in
20 the evidence bag. Then we put it in the evidence bag,
21 seal it up.

22 And in this case, I have three of them, so I
23 resealed it in a different bag. There would be three
24 inside this single bag.

25 Q. Okay. And the third kit, was that taken from a

1 different individual?

2 A. Yes.

3 Q. And what location was that at?

4 A. It was at 911 Silverman. It was down the street
5 a little northeast of where I was at 1701, the Capris
6 Villas Apartments.

7 Q. Okay. And when you obtained those samples and
8 placed them into the envelope, did you seal those items?

9 A. Yes.

10 Q. Did you seal them such that they're distinguished
11 from each individual person whose samples you took?

12 A. Yes.

13 Q. Okay. And did you also further label those as
14 well?

15 A. Yes. They're all individual -- they could have
16 been turned in individually and protected just as the
17 way they were, but they did get put in one package, one
18 outer package, so they'd be together.

19 Q. Okay. And State's Exhibit 160 -- what's that?

20 A. 164.

21 Q. 165? 164. Is that the ultimate outer package
22 that you're referring to?

23 A. Yes.

24 Q. Okay. How do you know that that package in front
25 of you, State's Exhibit 164, contains the same kits that

1 you've described from the evening of September 30th?

2 A. It's got my markings on it. It's got my seals on
3 it. This is something I turned in, recognize, and
4 that's how I would know.

5 Q. Okay. Have your seals been disturbed in any way
6 since you placed them on there?

7 A. The seal hasn't, but the package has been opened
8 by somebody else.

9 Q. Okay. Can you tell who opened it?

10 A. It's somebody from the Bexar County Crime
11 Laboratory.

12 Q. And so if you open those packages or that package
13 you'd expect to find those three individual packages
14 contained inside?

15 A. Yes.

16 Q. Do you need gloves to open that?

17 A. No. I don't think so.

18 Q. I'm going to hand you a pair of scissors and ask
19 if you can open that (indiscernible).

20 MS. LEWIS: Judge, I'd move for the
21 admission of State's Proposed 164 which is the actual
22 package.

23 THE COURT: I'm going to hold off on that
24 decision until after cross-examination.

25 THE WITNESS: Sorry. It's a double bag.

1 I'm having trouble getting to the inner pack. Sorry.

2 THE COURT: You did show that to counsel
3 prior to --

4 MS. LEWIS: Yes.

5 BY MS. LEWIS:

6 Q. And you just now removed three white envelopes,
7 correct?

8 A. Yes.

9 Q. And what are the white envelopes?

10 A. The white envelopes are the envelopes I filled
11 out at the scene, and they were sealed by me
12 individually at the scene, and they contain
13 gunshot-residue kits from three subjects.

14 Q. Okay. And are they labelled individually as
15 well?

16 A. Yes, they are.

17 BY MS. LEWIS:

18 Q. And, for the record --

19 THE COURT: Let's have them marked.

20 BY MS. LEWIS:

21 Q. -- Mr. McPhail, is there anything else inside
22 the outer envelope that you just removed these three
23 white envelopes from?

24 A. No. I didn't see anything inside. There
25 shouldn't have been.

1 THE COURT: Let's go ahead and mark the
2 subexhibits, please.

3 MS. LEWIS: So 164A, B, and C.

4 (Off-record colloquy)

5 BY MS. LEWIS:

6 Q. Okay. Now handing you what's been marked by the
7 clerk as State's Proposed 164A, B, and C. For the
8 record, can you tell us what's what.

9 A. I'm sorry. Can I tell you what?

10 Q. Tell us what State's 164A, B, and C --

11 A. Oh, sure. State's 164A would be a
12 gunshot-residue kit that I collected from
13 Pierre Joshlin, State's 164B would be a gunshot-residue
14 kit that I collected from Jamar Matthews, and State's
15 Exhibit C would be a gunshot-residue kit that I
16 collected from Trevon Jones.

17 Q. Okay. And inside each of those envelopes that
18 have now been marked 164A , B, and C, are the four
19 containers that you've discussed?

20 A. Yes, the sampling containers. Yes.

21 Q. Each envelope has four containers?

22 A. Yes.

23 Q. Okay. Did you do anything else with regards to
24 this particular investigation?

25 A. I photographed some injuries on the subject

1 Matthews, Jamar Matthews. He had an apparent dog bite
2 on the back -- on his back, the right shoulder, and he
3 also had some injuries on his hand, one of which may
4 have been a dog bite, and that was pretty much it.

5 Q. Was that the extent of your involvement at this
6 particular scene?

7 A. Yes.

8 BY MS. LEWIS:

9 Q. I'll pass the witness.

10 THE COURT: Cross.

11 MR. FIGLER: Thank.

12 CROSS-EXAMINATION

13 BY MR. FIGLER:

14 Q. All right. Mr. McPhail, I've got a bunch of
15 questions for you. First one is from your direct
16 testimony it becomes very clear to me that there's a
17 very precise protocol or checklist if you will with
18 regard to administering a GSR test; is that correct?

19 A. Yeah. Yes. That's correct.

20 Q. Okay. And as we sit here today, you have no
21 independent recollection of following every part of that
22 protocol or that checklist, do you?

23 A. I would just say that the checklist is not very
24 heavy workload wise. It's very, very simple to follow.
25 It involves putting on plastic gloves --

1 Q. And I'll get to that one --

2 A. Okay.

3 Q. -- by one, but right now my question was you
4 have no independent recollection of following the
5 protocol for a checklist for that particular evening, do
6 you?

7 A. I recall putting on plastic gloves.

8 Q. Okay.

9 A. And that's one of the main issues --

10 Q. Okay.

11 A. -- of the checklist. But there is no checklist,
12 and I'd like to clarify that.

13 Q. Okay. But there's a protocol?

14 A. There are a set of instructions on -- inside the
15 bag, and the instructions, you know, are very simple.
16 Yes. There would be a protocol in that, but it's very
17 small steps.

18 Q. Okay. But you don't follow a form that says I
19 did A, B, and even if there was just A and B, you didn't
20 follow a form that said that.

21 A. No.

22 Q. Okay. And again, your only independent
23 recollection from that evening is you remember putting
24 on the plastic gloves.

25 A. Yes.

1 Q. Okay. That's it.

2 A. Um-h'm.

3 Q. As far as independent recollection; is that
4 correct?

5 A. Yes.

6 Q. Okay. Now, what can you tell me about the order
7 that you did the test in? Can I presume that the order
8 is the same as the number of the kits? You did one
9 first, two second, three third? Is that your
10 recollection or do you know?

11 A. Are you referring to the persons that I took the
12 samples from --

13 Q. Yes.

14 A. -- where it was? Yes. And that would be
15 correct. I started with Pierre, and then I went to
16 Mr. Matthews, and I ended up with Mr. Jones.

17 Q. Okay. Now, how many set of plastic -- these
18 special plastic gloves were there, just the one set?

19 A. There's one pair in each kit.

20 Q. Okay. Do you have any recollection of taking off
21 the special plastic gloves and putting on new plastic
22 gloves?

23 A. They are so uncomfortable you cannot wait to get
24 them off, so yes, I'm sure I took them off.

25 Q. On and off, on and off, on and off --

1 A. Yes.

2 Q. -- three times?

3 A. Yes.

4 Q. Okay. But you have no recollection of that?

5 That's just your habit?

6 A. I drove to my third location, and I -- the second
7 test was done much later than the first test, so I'm
8 positive I took them off.

9 Q. Okay. But the first test and the second test
10 were done at the same location; isn't that correct?

11 A. Well, one was done in the parking area of the
12 Villa Capris Apartment complex, and one was done in the
13 street, I guess it would be J Street, in front of the
14 Villa Capris Apartment complex.

15 Q. Okay. But both were at 1701 North J Street,
16 correct?

17 A. Yes.

18 Q. And you didn't note anywhere the exact times when
19 those tests were taken, did you?

20 A. I'm not positive. They might be on the --

21 Q. Sir, that's yes or no. I'm sorry to cut you off.
22 Did you note the times?

23 A. I'll -- if I say yes, I could be incorrect, but
24 there is an instruction sheet inside here, and it's
25 quite possible the instruction sheet inside -- not

1 instruction sheet, an information sheet. It's quite
2 possible that I did note the time on the information
3 sheet inside.

4 Q. Okay. And on the outside there's only one time
5 noted; isn't that correct?

6 A. That's correct.

7 Q. 2358; is that correct?

8 A. That would have been the time of my arrival at
9 the scene, yes.

10 Q. So the test was done after that?

11 A. Yes.

12 Q. Okay. Now, were you ever dispatched to a
13 location at 1116 Jimmy Street?

14 A. No.

15 Q. Okay. What do you recall about how the
16 defendant, Jamar Matthews, was presented to you? Was
17 there anything unusual about it? Was he in custody, not
18 custody? What do you recall?

19 A. He was in custody.

20 Q. Okay. So he had handcuffs on or no handcuffs on?

21 A. He did have handcuffs on.

22 Q. Okay. Do you know how he was transported to that
23 location or if he was there from the start? Do you have
24 any knowledge?

25 A. I believe that he had gone to the hospital first,

1 but I'm not positive on this. He had like I say a dog
2 bite, and I believe he was seen, too, at the hospital,
3 and they brought him to the scene for me to do my work
4 so I wouldn't have to go to the hospital -- so I
5 wouldn't have to go to the detention center afterwards.

6 Q. Oh, okay. And he was transported there in a
7 police vehicle; is that correct?

8 A. I believe so. Yes.

9 Q. Okay. And you were immediately able to see his
10 hands in those cuffs, correct?

11 A. Yes.

12 Q. Okay. And then did they take his hands out of
13 the cuffs before you did the test or were his hands
14 still in the cuffs?

15 A. No. They would have been out of the cuffs.

16 Q. Okay. So some officer would have opened up his
17 cuffs and taken his hands out -- well, freed his hands
18 by opening the cuffs before you did your examination,
19 correct?

20 A. Yes.

21 Q. Okay. And that officer who opened up the cuffs
22 did not have on the speciality plastic gloves, correct?

23 A. I don't -- he wouldn't have had on these plastic
24 gloves. I don't know if he had gloves on.

25 Q. My question was did he have on the speciality

1 plastic gloves.

2 A. He did not have the speciality plastic gloves
3 because there's only one pair in the kit.

4 Q. Okay. So it would have been impossible for him
5 to have those gloves on --

6 A. Yes.

7 Q. -- correct? Thank you. Now, did you notice
8 anything else unique about Mr. Jamar Matthews' hands
9 before you did the gun-residue test?

10 A. Yes.

11 Q. And what was that?

12 A. He had an apparent dog bite on his left hand and
13 some kind of laceration on his right hand.

14 Q. Okay. So his left and right hands had
15 lacerations on it; is that correct?

16 A. Yes.

17 Q. And you recall blood?

18 A. Yes.

19 Q. Okay. And isn't it true that one of the
20 protocols of taking gun-residue tests is to do it from
21 an area that is not contaminated with blood?

22 A. If it's possible.

23 Q. Okay. And, again, you have no independent
24 recollection of any protocol except for the plastic
25 gloves, correct?

1 A. Yes.

2 Q. Okay. So the first time you saw his hands they
3 were free to the air, out of the cuffs or in the cuffs?

4 A. I believe they were in the cuffs.

5 Q. Okay. So you saw his hands in the cuffs open,
6 then out of the cuffs open, then you did your test,
7 correct?

8 A. We're talking about somebody who is possibly a
9 homicide suspect --

10 Q. Correct.

11 A. -- so they're not going to be letting both hands
12 out freely. The officer would probably have one hand
13 still in the cuff, maybe holding the cuff, while the
14 other hand is being photographed, because I did document
15 the damage -- the injuries on the subject as well.

16 Q. Okay. And that officer is holding or is in close
17 proximity to the subject when he's opening and closing
18 the cuffs for your protection, correct?

19 A. Yes. Yes.

20 Q. Okay. Now, there's another CSA who came in here
21 today, and she had a firearm on, and she said that
22 oftentimes CSAs will have firearms with them. Did you
23 have a firearm with you that evening?

24 A. No, sir.

25 Q. Okay. The police offer who was holding

1 Mr. Matthews or controlling Mr. Matthews, did he have a
2 firearm on him?

3 A. I'm sure he did.

4 Q. Okay. So it's your testimony that Mr. Matthews'
5 hands were not boxed in any way before you did the test;
6 is that correct?

7 A. Yes.

8 Q. Okay. And you know what that expression "boxed
9 hands" mean?

10 A. I would imagine you're referring to putting them
11 in paper bags I'm assuming. Is that what -- is that
12 correct?

13 Q. Right. And one of the purposes of that following
14 a protocol is if that -- if there's a lapsed time to
15 reduce the chances of contamination of particles in
16 different locations, that you want to keep the hands
17 which you're about to test free from any potential
18 contamination. Isn't that one of the purposes of boxing
19 hands?

20 A. I would think the primary purpose would be to
21 protect what is already on the hands --

22 Q. Correct.

23 A. -- so it doesn't get wiped or sweat off or
24 whatever. That's the main reason we do it.

25 Q. Okay. So it's to preserve?

1 A. Yes.

2 Q. And if it's not, then anything can happen,
3 particles can leave, particles can come off. You would
4 agree with that?

5 A. It's possible.

6 Q. Thank you. And approximately how many police
7 officers do you recall being around Jamar Matthews at
8 that time of the test?

9 A. I'm sorry. I don't have any recollection of
10 that.

11 Q. Okay. All right. So you do recall, however,
12 doing Pierre Joshlin first; is that correct?

13 A. Yes.

14 Q. Okay. Now what does your protocol tell you about
15 the transference of molecules and how to avoid that?

16 A. You would simply change your gloves. I'm
17 handling them only with my hands. I'm not putting their
18 hands all over my body or anything.

19 I'm going to be very careful with their hands.
20 I'm going to put on a new pair of gloves with every
21 subject I test, and that's pretty much the protocol.

22 Q. Okay. So you're not worried about contamination
23 of your subject prior to your test?

24 A. I'm very worried about it, but there's not much I
25 can do prior to my test because I don't have any control

1 over that.

2 Q. So you followed -- you have no personal
3 responsibility, and you cannot testify that any
4 safeguards were taken to protect him from contamination
5 of particles in the air or in surfaces; is that correct?

6 A. In the air would be -- to me, it's not a valid
7 question. But if he came into contact with something
8 that had particles on it, a physical something, a gun,
9 for instance, that had particles on it, yes, it could
10 transfer over, but --

11 Q. How about people who have handled guns recently?

12 A. It's possible.

13 Q. And people who have been around an environment
14 where guns were fired?

15 A. It --

16 Q. It's possible too, isn't it?

17 A. It just depends on the time.

18 Q. Okay. And when you --

19 A. But --

20 Q. -- said you were looking for small particles
21 that were indicative of a gun being fired, that's not
22 altogether accurate. It could just be in an environment
23 where a gun was fired too; isn't that correct?

24 A. Yes.

25 Q. And it could also be in an environment where

1 someone who was in an environment where a gun was fired
2 recently was or had contact.

3 A. Would you rephrase that?

4 Q. Sure. It's the environment is really the issue.
5 So if someone is in an environment that has been
6 contaminated with someone who has particles on it, there
7 could be transference, correct?

8 A. Within a reserved amount of space. Yes.

9 Q. Okay. And again, as you testify today you can't
10 verify that there was no contamination because that was
11 a protocol outside of your control, correct?

12 A. He was in custody at the time I did my test, and,
13 certainly, I wouldn't have had anything to say about
14 what happened prior to that point.

15 Q. So the answer is yes. You have no idea if
16 protocols were followed for preservation of evidence
17 prior to your involvement.

18 MS. LEWIS: Judge, I'm going to object as to
19 foundation. He keeps referring to protocols being
20 followed, and I have -- I don't think there's any
21 protocol that this witness testified to that --

22 MR. FIGLER: We talked about safeguards from
23 contamination.

24 THE COURT: He can characterize it any way
25 he wants, yes. (Indiscernible) talk about cross

1 contamination.

2 BY MR. FIGLER:

3 Q. Okay. So you have no personal knowledge of any
4 safeguards or protocols of preservation of evidence that
5 were conducted or not conducted prior to your
6 involvement, correct?

7 A. My personal knowledge would be that there wasn't
8 any. I didn't see a bag on the hands, and that's really
9 all they could have done at the time, and there wasn't a
10 bag on the hands.

11 Q. Or they could have taken you to the scene of
12 where he was found; isn't that correct?

13 A. I was at the scene where he was found I think. I
14 believe that was it.

15 Q. Okay.

16 A. At least as far as Pierre goes.

17 Q. I'm talking about Mr. Matthews.

18 A. Sorry. I was getting a little confused because
19 we've spoke of both of them. I don't know that that
20 would have helped at all.

21 Q. So the answer is no. You have no idea about any
22 safeguards or protocols that were made prior to your
23 involvement, correct?

24 A. I did have an idea, and I didn't that they had
25 done any safeguards. There was no plastic or no paper

1 bags put on the hands.

2 Q. Okay. Thank you. Finally, I want to talk to you
3 about a police report or an evidence impound report that
4 was generated by you. I don't think it's a big surprise
5 to you since there was a mad dash to get this report --

6 A. Correct.

7 Q. -- that this report was not present in what we
8 like to call the discovery or discovery that came to the
9 defense. You know about that, correct?

10 A. Yes.

11 Q. Okay. Do you have -- and I hate to ask
12 open-ended questions of any witness, but I'm going to do
13 an exception for you, Mr. McPhail, because I know you
14 like answering that way. Do you know why this doesn't
15 make it into the discovery in this particular case?

16 A. I'm sorry. I wish I had a great answer for you.
17 I went in yesterday to try to find out what happened,
18 and because of time constraints I wasn't able to find
19 out exactly what happened.

20 All I can say for sure is that it was not in the
21 major case file, and, therefore, wouldn't have been
22 distributed to homicide, district attorney's office as
23 normal.

24 I don't know exactly what happened. It may have
25 been put in our normal files, nonhomicide files, and I

1 just didn't get a chance to check that far.

2 Q. So you just don't know.

3 A. I don't know.

4 Q. Okay. And can you tell me with certainty when
5 this document was created?

6 A. Can I reference my document and see?

7 Q. Sure.

8 A. I'm not going to be able to tell you that. It's
9 possible I could look at WordPerfect where I saved the
10 document and was able to retrieve it because that's
11 where I got it from, my normal files, and, perhaps, that
12 would have an initial save on it, but that would be the
13 only chance I would have of giving you a time period on
14 that, and I can't even say that right now.

15 Q. So as we sit here today you have no idea when
16 this document was actually generated?

17 A. Shortly after the event, that's all I can say.

18 Q. And is there any way to know whether or not this
19 document has been changed or altered in any way?

20 A. I'm sorry. There is -- there -- can I back up
21 for a minute? There is a way of knowing approximately,
22 especially if reference to the evidence -- the evidence
23 report.

24 We have to have an evidence report to accommodate
25 the evidence when we turn it in. The evidence vault

1 requires that, and the evidence vault I can probably
2 determine when this was picked up --

3 Q. Let me stop you before you go there. The
4 document that you gave to Ms. Lewis is not an original
5 document, correct?

6 A. It's my original document --

7 Q. I'm just saying --

8 A. -- that has not been signed.

9 Q. -- it's not the original document that was
10 generated, correct? Let me ask it this way. Did you
11 generate a document initially that you signed --

12 A. Yes.

13 Q. -- and went somewhere, but you don't know where
14 that is?

15 A. Right.

16 Q. Let's call that the original for a moment.

17 A. Okay.

18 Q. Okay. That still has not been retrieved; is that
19 correct?

20 A. I didn't --

21 Q. That original document?

22 A. Yeah. I didn't even look for it. I'm not sure
23 where it is.

24 Q. Okay. So what we have here is something you
25 printed out on, when, yesterday --

1 A. Yes.

2 Q. -- from your computer and now that is being
3 suggested to be the document, correct?

4 A. Yes.

5 (Off-record colloquy)

6 MR. FIGLER: I'd pass the witness.

7 THE COURT: Mr. Singer.

8 MR. SINGER: Thank you.

9 CROSS-EXAMINATION

10 BY MR. SINGER:

11 Q. When you saw Mr. Joshlin, Pierre, he was also
12 handcuffed and shackled, right?

13 A. Yes.

14 Q. And you took a picture of him with a belt, a
15 metal belt around his waist?

16 A. Yes.

17 Q. And that was right -- was that near the dumpster?
18 Do you remember?

19 A. I don't know where the dumpster was. I think it
20 was near it. I believe that somebody pointed a dumpster
21 out to me, but I don't know the involvement of the
22 dumpster or --

23 Q. And in that area there were officers?

24 A. Yes.

25 Q. Were they holing Mr. Matthews -- Mr. Joshlin's

1 arms, shoulders?

2 A. I believe that Mr. Joshlin was in a police
3 vehicle when I arrived, and I believe he was taken out
4 of the vehicle for me to photograph, if my memory serves
5 me correctly.

6 Q. You think he was taken out by an officer?

7 A. Yes.

8 Q. Plain clothes?

9 A. I don't recall.

10 Q. Now, let's just say hypothetically the officer
11 had shot his weapon within the last five minutes from
12 the incident and then he had his hands without gloves,
13 and the hands shot the weapon and then he touched
14 Pierre's hands when he handcuffed him. That's possible
15 to transfer particles from one hand to another.

16 A. Yeah. It would probably be possible.

17 Q. And Pierre's hands had blood on them, right?

18 A. Yes, one of them did.

19 Q. One had blood?

20 A. Um-h'm.

21 Q. And did you do any kind of a swabbing or do you
22 know -- well, let me rephrase. Prior to getting there,
23 you don't know whether or not they cleaned it at all
24 with any kind of antiseptic, do you?

25 A. I don't believe he had been seen, but that's just

1 based on the -- the blood was dry, and I don't believe
2 that he had been cleaned up at all.

3 Q. And you're basing that on speculation because you
4 weren't there.

5 A. True. Just the --

6 Q. There could have been blood all over his hand,
7 down his arm, and they just cleaned it up a little bit.

8 A. Yeah, except the blood was dry. That's all I can
9 really say.

10 Q. The blood that you saw was dry.

11 A. Yes. So that would put some kind of time on it.

12 Q. On that part of the blood?

13 A. Yes.

14 Q. Now, when you were talking about generating this
15 report off the computer, it's held in some type of a
16 word processing program?

17 A. Yes. It's -- it's a WordPerfect document that
18 would be on one of our drives at the police department,
19 one of our main usage drives.

20 Q. Like would it be like a C drive or like an
21 external drive like an A drive?

22 A. It's an external drive.

23 Q. So you could actually -- and that document, it's
24 not a read-only document, is it?

25 A. Not for me.

1 MR. SINGER: I'll pass the witness.

2 THE COURT: Redirect.

3 MS. LEWIS: No questions, Judge.

4 THE COURT: You may step down.

5 Call your next witness.

6 MR. BATEMAN: Crystina Vachon.

7 (Off-record colloquy)

8 THE CLERK: Please remain standing and raise
9 your right hand.

10 CRYSTINA VACHON, PLAINTIFF'S WITNESS, SWORN

11 THE WITNESS: Yes, I do.

12 THE CLERK: Thank you. You may be seated.
13 Please state and spell your name for the record.

14 THE WITNESS: My name is Crystina Vachon.
15 The first name is spelled C-r-y-s-t i-n-a, and the last
16 name is V-a-c-h-o-n.

17 DIRECT EXAMINATION

18 BY MR. BATEMAN:

19 Q. Ma'am, you work in Bexar County; is that right?

20 A. Yes, I do.

21 Q. Is that Texas?

22 A. Yes.

23 Q. It's actually spelled e-x-a-r, correct?

24 A. Yes.

25 Q. What do you do there?

1 A. I am a forensic scientist in the trace evidence
2 section.

3 Q. Okay. And part of your job duties, do you do
4 gunshot residue -- or residue testing?

5 A. Yes.

6 Q. Okay. What goes in -- well, what kind of
7 training and experience have you received specific to
8 gunshot-residue testing?

9 A. I attended the Lehigh University School of
10 Microscopy for training in the scanning electron
11 microscope with --

12 MR. FIGLER: I'm sorry. I hate to interrupt
13 you. The State indicates that yesterday while we were
14 in court this witness's CV was faxed over to us. Both
15 Mr. Bunin and I went to the office afterwards. We
16 received a lot of faxes from a lot of different people,
17 but we never got a CV.

18 I was wondering to follow along if the State
19 can make a copy of that and give it to us because that
20 was not received.

21 MR. SINGER: Judge, I also went back to my
22 office and received a lot of faxes and received the fax
23 about the McPhail document, no problem, but I never got
24 a fax of the CV either.

25 MR. BUNIN: Just for the record, that's

1 exactly what I received yesterday is the two-page
2 McPhail document. I went back to my office after court
3 yesterday. That's the only one my office left me.
4 They're instructed to contact --

5 THE COURT: Are copies of the CV's here? We
6 can get you a copy of those.

7 MR. BATEMAN: Do you have one with you?

8 THE WITNESS: I have one.

9 MR. BATEMAN: She has one.

10 THE COURT: Great.

11 MR. BUNIN: And just for the record, we
12 never received a CV in this case.

13 THE COURT: All right, I understand. That's
14 state of the record.

15 MR. BUNIN: Thank you.

16 (Off-record colloquy)

17 MR. BATEMAN: Does counsel want copies
18 before we continue with questioning or --

19 MR. FIGLER: No, go ahead. It's Court's
20 pleasure. We'll get that and we'll catch up.

21 THE COURT: There you go.

22 MR. FIGLER: Don't want to keep the jury
23 waiting up necessarily.

24 BY MR. BATEMAN:

25 Q. Okay. I think you were, ma'am, telling us about

1 your qualifications to do gunshot-residue testing.

2 A. I attended the Lehigh University School of
3 microscopy in Pennsylvania for training in the scanning
4 electron microscope with the energy disperse of x-ray
5 detector which is what we use to analyze gunshot
6 residue.

7 And I also received training from the maker of
8 the software which is used with our instrument and in
9 addition to training in-house where I conducted
10 supervised casework, and I also had to complete oral and
11 written examinations before I was released to do the
12 primer gunshot-residue analysis on my own.

13 Q. Do you do any other forensic testing in the
14 course of your job duties at Bexar County?

15 A. Yes, I do.

16 Q. Okay. Are you essentially like a crime scene
17 type -- or a forensic scientist?

18 A. Yes.

19 Q. Okay. And what additional training and education
20 did you have to get that was generally -- well,
21 generalized to a forensic scientist?

22 A. I have a bachelors degree in biochemistry.

23 Q. Where did you get that from?

24 A. From Louisiana State University in Shreveport.

25 Q. How long have you been working in your present

1 capacity?

2 A. For three years.

3 Q. What were you doing before that?

4 A. I worked in various pharmaceutical and
5 pharmaceutical science companies, and I also worked in
6 chemical companies and things like that.

7 Q. Okay. The test that you used for the
8 gunshot-residue test, first tell me are there a
9 multitude of tests? Is there one specific test that can
10 be used? Do you know whether there is one specific or
11 multiple?

12 A. There have been many tests used over the years,
13 but the one that we use in our laboratory is the
14 generally-accepted test which is the most accurate.

15 Q. And what makes you say it's the most accurate?

16 A. Because with our tests we cannot only look at the
17 chemical composition of the particles that we find, but
18 we can also look at the morphology which is the shape
19 and size of the particle because gunshot residue has a
20 specific morphology.

21 Q. And these chemicals and what you're looking for,
22 where exactly do they come from?

23 A. They come from the primer cap area of the round
24 of ammunition and it's lead, barium and antimony.

25 Q. Okay. How is the test that you're using

1 different from any of the other tests that you're saying
2 now are less reliable?

3 A. Because with those tests you are not able to look
4 at the morphology of the particle, the shape and size of
5 the particle.

6 Q. Morphology means shape and size?

7 A. Yes.

8 Q. What does the shape and size of the particle tell
9 you that makes it is more reliable than something where
10 you can't look at the shape and size?

11 A. Studies that have been done in the past showed
12 that the elements lead, barium and antimony can be found
13 separately in the environment, but that there's no other
14 source that you can find lead, barium and antimony other
15 than primer gunshot residue where it has the morphology
16 where it's spherical, generally molten-metal appearance
17 and up to ten microns in size.

18 Q. Okay. Now, you did a report and some testing
19 with regard to this particular case at the request of
20 the Las Vegas Metropolitan Police Department; is that
21 correct?

22 A. Yes, I did.

23 Q. Okay. And when you're doing these tests, what do
24 you consider a positive result? What are you looking
25 for request you get a positive result?

1 A. I am looking for lead, barium and antimony and
2 the combination of three of those elements or any two of
3 those elements with the correct morphology, the shape
4 and size.

5 Q. So there are some that -- there's incorrect
6 morphology?

7 A. Yes.

8 Q. What is that?

9 A. Anything that has a crystalline structure or that
10 is larger than ten microns in size, generally.

11 Q. And that would tell you that it came from
12 someplace else?

13 A. It is a possibility.

14 Q. Okay. It's just not as reliable?

15 A. Right.

16 Q. Now, you said it could be the case that you would
17 determine a positive result from finding two of these
18 particular contents of a particle, either lead, barium
19 or antimony, any two of those three?

20 A. Correct.

21 Q. Okay. Is finding two out of the three less
22 reliable or tell me why the cutoff is two and maybe not
23 one or --

24 A. Because these elements separately can be found in
25 the environment, and they would not be in this

1 morphology, so we look for any combination of two of
2 those with the correct morphology.

3 Q. So you're saying you wouldn't find two of these
4 in a correct morphology anywhere else other than from
5 gunshot primer residue --

6 MR. FIGLER: And I'm going to object to it
7 as being leading, Judge. That's not what she said
8 and --

9 MR. BATEMAN: Judge, we're in front of you.
10 We're not in front of a jury.

11 THE COURT: Right. We're not in front of
12 the jury.

13 MR. FIGLER: Right. And I don't want him
14 suggesting answers to his witness whoever's here.

15 THE COURT: Make them not leading.

16 MR. BATEMAN: Okay.

17 BY MR. BATEMAN:

18 Q. Can you find the two out of the three particles
19 or contents of the particle in the morphology that
20 you're referring to anywhere else other than gunshot
21 residue primer?

22 A. No, you cannot.

23 Q. Now, in this particular case, you did testing I
24 think on essentially what is referred to as three items;
25 is that correct?

1 A. Yes.

2 Q. Okay. And what were those three items?

3 A. Item one was a tape sealed brown paper bag that
4 contained two gunshot-residue collection kits. One of
5 them was for Pierre Dante Joshlin, and the other was for
6 Jamar Demon Matthews. I'm sorry. It contained three
7 gunshot-residue collection kits.

8 MR. BUNIN: Can I see the report she's
9 reading off of, Your Honor? I just don't know what
10 she's reading off of.

11 THE COURT: Yes.

12 MR. BUNIN: May I approach quickly?

13 (Off-record colloquy)

14 MR. BUNIN: Is this all -- this is all for
15 this case, this report?

16 THE WITNESS: Yes, it is. It's the report
17 and also my bench notes.

18 MR. FIGLER: For the record, Your Honor
19 we've not received any of this. It appears to have some
20 micrographs in there, some other testing that was done,
21 et cetera. None of this has been presented to the
22 defense before Mr. Bunin grabbing it right now.

23 MR. BUNIN: My guess is this is -- it says
24 it's 186 pages, just for the record, and I can tell you
25 we've received the top three pages. We received them

1 yesterday.

2 MR. FIGLER: No. Those came last week.

3 MR. BUNIN: No, Thursday. I'm sorry. The
4 top three pages. We've never received the other 186
5 pages at least in my quick flip that I'm doing right
6 now. I don't recognize any of it.

7 MR. FIGLER: And especially in light, Judge,
8 of -- and I can just --

9 THE COURT: State, do you have any of that
10 information?

11 MR. BATEMAN: Of course not I don't have any
12 of that information. She brought it here today. That's
13 all of the notes and probably her data when she was
14 doing the testing.

15 Everybody knows exactly what it is as if we
16 should stop feigning this idea that this is just coming
17 out of nowhere, nobody has any idea that this exists.
18 It exists in every expert that ever is brought into
19 court.

20 THE COURT: Continue your direct
21 examination. You've made your record --

22 MR. FIGLER: Thank you, Judge.

23 THE COURT: -- in terms of the documents.

24 MR. BUNIN: Just for the record, I just
25 don't want him saying everybody knows what this is. I

1 don't know what the last 183 pages are. I have no idea
2 what that is for the record.

3 THE COURT: And you'll have an opportunity
4 to ask her.

5 MR. BUNIN: Thank you.

6 MR. FIGLER: Thank you.

7 BY MR. BATEMAN:

8 Q. You took gunshot residue from three items; is
9 that correct?

10 A. Yes. Items -- what I listed as 1A, 1B, and 1C
11 were gunshot-residue collection kits, and item 2 was a
12 red knit glove, and item 3 was a manila envelope which
13 contained two block gloves.

14 Q. So A, B, and C are actual kits or tests that are
15 done?

16 A. Yes, they are.

17 Q. Okay. And then 2 and 3 are actual items of
18 evidence?

19 A. Yes.

20 Q. Okay. Does a kit -- referring to a kit, can you
21 tell me just briefly what a kit is?

22 A. A kit contains two or four sampling devices. In
23 this case, it was four sampling devices.

24 Q. Is a sampling device necessary to -- what is in
25 the sampling device necessarily used for?

1 A. It is used to sample the hands or any area that
2 it's labelled as of a person or an area or surface.

3 Q. Okay. Now you don't necessarily -- didn't need
4 to do the sampling device for an item of evidence; is
5 that correct?

6 A. No. We -- the gloves were sent to us, and I
7 sampled the gloves with sampling devices from the
8 laboratory.

9 Q. And these were all eventually sent to you? When
10 did you receive all of these items you're talking about?

11 A. I received these on January 11th of 2007.

12 Q. Okay. And do you know when it is you actually
13 did the testing on these items?

14 A. I took samples from the gloves on January 29th of
15 2007, and the samples were on the scanning electron
16 microscope from January 29th of 2007 to January 31st of
17 2007.

18 Q. Okay. I'm going to show you what's been marked
19 -- and I don't know if it's been admitted yet -- State's
20 Proposed Exhibit 164.

21 MS. LEWIS: It hasn't been admitted.

22 MR. BATEMAN: It hasn't been admitted,
23 right.

24 BY MR. BATEMAN:

25 Q. Do you recognize that evidence bag?

1 A. Yes, I do.

2 Q. How do you recognize it?

3 A. Because it has our criminal investigation
4 laboratory number on it as well as my initials.

5 Q. Okay. And do you recognize the contents of that
6 bag (indiscernible) marked as items 1 --

7 MS. LEWIS: A, B, and C.

8 BY MR. BATEMAN:

9 Q. I'm sorry. A, B, and C, so 164. Are these the
10 item that came from that bag?

11 A. Yes.

12 Q. So would these be the kits that you did your
13 testing on?

14 A. Yes, they would.

15 Q. Okay. Showing you State's Proposed Exhibit 7,
16 do you recognize that evidence bag?

17 A. Yes, I do.

18 Q. And is what -- do you remember what it is or how
19 it is you recognize this bag?

20 A. From the criminal investigation laboratory number
21 and my initials.

22 Q. Okay. And did you do some testing on the
23 contents of this bag?

24 A. Yes, I did.

25 Q. Do you know what the contents were based upon

1 your report?

2 A. Yes. Item 2, it is one red knit glove.

3 Q. Okay. And you can do your testing without any
4 sort of sampling, right? You can do it directly on the
5 glove?

6 A. Right.

7 Q. Okay. And then State's Proposed Exhibit No. 12,
8 do you recognize this evidence bag?

9 A. Yes, I do.

10 Q. Okay. And how do you recognize it?

11 A. By the criminal investigation laboratory number
12 and my initials.

13 Q. All right. And can you reference this particular
14 contents of this bag back to your report and what would
15 have been in that bag?

16 A. There was one black right-hand glove and one
17 black left-hand glove.

18 Q. Okay. And, ultimately, you used the device you
19 talked about previously to determine whether they were
20 positive for gunshot residue; is that correct?

21 A. Yes. I used the collection devices to stub the
22 samples, and I tested them the same way that I tested
23 the kits.

24 Q. What were your results?

25 A. On which part?

1 Q. Well, let's start with item 2 and its contents.

2 A. Okay. Six microscopic particles containing lead,
3 barium and antimony and one microscopic particle
4 containing barium and antimony were detected on the GSR
5 sampling device collected from the front and back area
6 of item 2.

7 Q. That was from A, B, and C in item 1?

8 A. No. That was item 2.

9 Q. Okay. You were referring to item 2?

10 A. Yes. I'm sorry.

11 Q. Okay. And then what were your results as to item
12 3?

13 A. Item 3 --

14 MR. FIGLER: And for the record, Your Honor,
15 I just want to make it clear that the witness is reading
16 off of the report. She has no independent recollection
17 of them I'm sure.

18 THE COURT: Understood. Record should so
19 reflect. (Indiscernible).

20 THE WITNESS: Ten microscopic particles
21 containing lead, barium and antimony were detected on
22 the GSR sampling device collected from the right back
23 area of item 3A which is the right-hand -- black
24 right-hand glove.

25 Ten microscopic particles containing lead,

1 barium and antimony were detected on the GSR sampling
2 device collected from the right palm area of item 3A.

3 BY MR. BATEMAN:

4 Q. And then -- I'm sorry -- did already testify as
5 to the gunshot kits and samples?

6 A. No.

7 Q. Okay. Reference the item 1A on your report, what
8 was the result of that test?

9 A. Three microscopic particles containing lead,
10 barium and antimony and one microscopic particle
11 containing lead and barium were detected on the palm of
12 the right hand of Pierre Dante Joshlin.

13 Q. Okay. And then item 1B.

14 A. There's more to item 1A.

15 Q. Oh, I'm sorry. Didn't mean to cut you off.

16 A. Two microscopic particles containing lead, barium
17 and antimony and one microscopic particle containing
18 lead and barium were detected on the back of the
19 left-hand of Pierre Dante Joshlin.

20 No microscopic particles containing any
21 combination of lead, barium or antimony were detected on
22 the back of the right hand or the palm of the left hand
23 of Pierre Dante Joshlin.

24 Q. Is that the entirety of the sample with regard to
25 item 1A and Pierre Joshlin?

1 A. Yes, it is.

2 Q. Okay. And did you detect any results or what
3 were your results as to 1A reference Jamar Matthews?

4 A. 1B ?

5 Q. I'm sorry, 1B.

6 A. One microscopic particle containing lead, barium
7 and antimony and two microscopic particles containing
8 lead and antimony were detected on the palm of the right
9 hand of Jamar Demon Matthews.

10 One microscopic particle containing lead, barium
11 and antimony and one microscopic particle containing
12 barium and antimony were detected on the back of the
13 left hand of Jamar Demon Matthews.

14 One microscopic particle containing lead and
15 antimony was detected on the palm of the left hand of
16 Jamar Demon Matthews.

17 No microscopic particles containing any
18 combination of lead, barium or antimony were detected on
19 the back of the right hand of Jamar Demon Matthews.

20 Q. And then you finally did -- tested a sample as it
21 relates to a Trevon Jones which is in 1C; is that
22 correct?

23 A. Yes, I did.

24 Q. Did you get a positive result as to that as well?

25 A. I found one microscopic particle.

1 Q. Okay. And that contained all three?

2 A. Lead -- yes, lead, barium and antimony.

3 Q. Okay. And just, generally, when you receive
4 results, what is your opinion that these results
5 signify?

6 I mean, I think in your report you put what your
7 ultimate conclusion when someone has these particular
8 particles either on their person or they're on an item
9 of evidence. What does that mean?

10 A. I determined that based on the morphology and
11 elemental composition of the particle, that the person
12 or the surface sampled may have discharged a firearm,
13 handled a discharged firearm or was in close proximity
14 to a discharged firearm.

15 Q. Thank you.

16 MR. BATEMAN: I'll pass the witness, Judge.

17 THE COURT: I'm interested in the test. I
18 know you know where we need to go so cross-examination.

19 MR. FIGLER: I understand that. I just need
20 to get into her qualifications really quick before she
21 can even be certified as an expert if I might briefly
22 because obviously just got the CV, so I just want to go
23 over a quick couple things, and then we'll get right
24 into the composition, morphology, the accuracy --

25 THE COURT: Right.

1 MR. FIGLER: -- of the test.

2 CROSS-EXAMINATION

3 BY MR. FIGLER:

4 Q. All right, Ms. Vachon, is that --

5 A. Vachon.

6 Q. Vachon. Okay. Looks like you got your BS in
7 biochemistry in 1999, and then you went to work for some
8 pharmaceutical company; is that correct?

9 A. Yes, I --

10 Q. Dupont?

11 A. I'm sorry.

12 Q. Dupont?

13 A. Yes.

14 Q. Okay.

15 A. As well as other places.

16 Q. Okay. Great. And you worked for Pepsi Cola at
17 one point?

18 A. Yes.

19 Q. All right. So that was back in 2000, you were --
20 what were you doing for Pepsi?

21 A. They had started a pilot program to test the
22 syrups that were being used in all of the area of
23 restaurants, so what I was doing was testing the syrups
24 to make sure that the quality was up to par.

25 Q. Okay. So that was just 2000. When did you start

1 working for Bexar County Criminal Investigation
2 Laboratory?

3 A. I believe it was in 2004.

4 Q. It was, and I'm sorry. I could probably make
5 this a lot quicker. So you started working there in
6 2004, so you've worked there for less than three years
7 at present, correct?

8 A. Yes, about a month away.

9 Q. Okay. And so you'd say that your exposure to
10 SEM/EDS is less than three years, correct?

11 A. Yes.

12 Q. Okay. Because you never touched any SEM device
13 at all prior to that time in a professional capacity; is
14 that correct?

15 A. That's correct.

16 Q. Okay. And I noted here that you're getting a
17 masters in pharmacy right now, but that's in progress.
18 You haven't completed that yet, correct?

19 A. It's in pharmacy and pharmaceutical sciences, but
20 it has a concentration in forensic science.

21 Q. Okay. And that's --

22 A. And yes, that is still in progress.

23 Q. -- incomplete? That's in progress?

24 A. Yes.

25 Q. Okay. So as you sit here right now, your only

1 accredited degree is a bachelors of science in
2 biochemistry, correct?

3 A. Yes.

4 Q. Okay. Now you also note some training, and I
5 want to focus specifically on your SEM/EDS training or
6 also known as EDS; is that correct? Have you ever heard
7 of it referred to as EDS?

8 A. Yes.

9 Q. Okay. And it says here that you have a
10 certificate of completion from June of '05 in the
11 SEM/EDS, but that's not specifically about gun residue.
12 That's about using the equipment, correct?

13 A. Correct.

14 Q. And that equipment's used for a whole lot of
15 things, fiber analysis, the presence of all sorts of
16 chemicals that have nothing to do with gunshot residue;
17 isn't that correct?

18 A. Correct.

19 Q. Okay. So going specifically to gunshot residue
20 it appears as though from your resume the only specific
21 training that you listed for gunshot residue is a
22 24-hour course offered by the manufacturer of the
23 software for the SEM; is that correct?

24 A. That is not the only training that I've had.

25 Q. Okay. You had some other training in

1 specifically in gunshot residue? I'm looking here. I'm
2 sorry. I'm just handed this so I'm trying to go
3 through. Where else on your resume does it talk about
4 gunshot residue specific training?

5 A. I had training within my laboratory.

6 Q. Okay. So that's in-house sort of thing?

7 A. Yes.

8 Q. And do you know what kind of course materials or
9 what textbook you used or do you have any of that
10 information for me?

11 A. No. I don't have specific textbooks. I read
12 several textbooks, many articles. I -- it was over a
13 six-month period. I did 50 to 100 cases of supervised
14 casework. I --

15 Q. And that's specifically --

16 A. -- went oral (indiscernible) --

17 Q. -- on gun residue?

18 A. Yes.

19 Q. Okay. And none of that shows up in here, so
20 that's just something that we're taking your word for or
21 not to say anything else, but you're just telling us
22 that right now, and that doesn't show up here anywhere,
23 right?

24 A. Right.

25 Q. You don't have any special certifications that

1 you received through that in-house training, correct?

2 A. I have a certificate, but no, there isn't any
3 specialized certification for gunshot-residue analysis.

4 Q. Okay. And so in addition to getting some
5 training on the software and some general training on
6 the SEM, you would say that in the last three years --
7 less than three years, actually -- that what we've just
8 talked about is your full experience in gunshot residue,
9 correct?

10 A. Yes.

11 Q. Okay. Now you've not published any scholarly
12 papers on gunshot residue, have you?

13 A. No, I haven't.

14 Q. Okay. And as a habit, do you go out and read
15 some of the current literature on gunshot residue?

16 A. Yes, I do.

17 Q. What's the most recent publication you read about
18 gunshot residue?

19 A. There are often papers that come down through the
20 SEM users group --

21 Q. Um-h'm.

22 A. -- on -- it's a Yahoo users group, and we often
23 get papers that maybe not even have been published. So
24 most recently that's what I've read is papers that have
25 come from that Web site.

1 Q. Okay. So that's off the Internet?

2 A. Yes.

3 Q. Okay. So besides Yahoo, can you cite me any
4 specific published articles that have (indiscernible) by
5 a scientific journal that you've read recently that will
6 update you?

7 A. That's not just Yahoo. That is an
8 invitation-only users group for scanning electron
9 microscope analysts.

10 Q. Okay. Would you agree with me that there are a
11 number of publications that exist in the world that have
12 editorial boards that vet the absolute conclusions of
13 the scientists who have made them and send them out to
14 other scientists to look at to challenge them, what they
15 write as a counter, and then all that process goes
16 through an editorial board before they're published and
17 put into the scientific community? Would you agree with
18 that process existing in the world?

19 A. Yes.

20 Q. Okay. So now can you tell me which of those
21 journals you've recently looked at?

22 A. Probably the most recent journal that I read was
23 put out by the International Association of Micro
24 Analysis, and there were articles in there on specific
25 primers that are used in ammunition and --

1 Q. Okay.

2 A. -- the elements that are found in them.

3 Q. And can you tell me the date of publication of
4 that document?

5 A. No. I cannot give you a specific date.

6 Q. Can you give me a year of publication?

7 A. It was 2006.

8 Q. 2006?

9 A. Um-h'm.

10 Q. Okay. Are you familiar with the FBI's Laboratory
11 Gunshot Residue Symposium that occurred May 31st through
12 June 3rd of 2005?

13 A. Yes, I am.

14 Q. Okay. And you know as a result of that symposium
15 the FBI stopped using gunshot residue as a form of
16 examination, correct? You'd agree with me that the FBI
17 doesn't do gunshot-residue testing anymore?

18 A. They don't do gunshot-residue testing anymore;
19 that is correct.

20 Q. Okay. And you'd also agree with me that the FBI
21 with their standards of presumptive testing and
22 admissibility in proceedings that are involved with FBI
23 cases requires that all three particles that you
24 mention, antimony, barium and lead -- am I saying that
25 correctly? Antimony?

1 A. Antimony.

2 Q. Antimony. Thank you. Barium and lead. That all
3 three of those need to be present before they'll present
4 that -- that's their standard that they have. The FBI
5 has a three-element standard for presumptiveness for
6 gunshot residue before it could be called gunshot
7 residue?

8 A. I am not aware of that.

9 Q. You don't know that?

10 A. No. I was not aware of that.

11 Q. Okay. And you do understand, though, that there
12 is some discussion and controversy if you will in the
13 scientific community as to whether two or three elements
14 present in a micro particle is acceptable to declare
15 whether or not something is gunshot residue or not? Do
16 you disagree with my statement?

17 A. I disagree.

18 Q. Okay. So it's absolutely a scientific certainty
19 that if two elements as opposed to the three elements
20 are present, that you could say throughout the entire
21 scientific community that all scientists agree that two
22 elements is gunshot residue.

23 A. I would say two elements with the correct
24 morphology is generally accepted by a majority of the
25 scientists.

1 Q. Okay.

2 A. You can never say all.

3 Q. Okay. Without the morphology, you would agree
4 that the difference between two and three is
5 significant, correct?

6 A. Without the morphology, you cannot confirm
7 gunshot residue particles as gunshot residue.

8 Q. Fair enough. Let's talk about the morphology for
9 a second. Did you know that there is considerable
10 controversy within the scientist community as to what
11 the exact particle morphology of gunshot residue is?

12 A. I don't agree with that.

13 Q. You don't agree with that statement? So if in
14 the FBI laboratory gunshot residue symposium report if
15 it say that almost all participants indicated that
16 particle morphology, elemental composition and if
17 necessary -- strike that. That there is disagreement
18 between how to even define which the particles are or
19 how they are shaped.

20 So let me ask you this question. Based on that,
21 what would you say the shape of a GSR particle is?

22 A. Can you tell me what page you're on?

23 Q. Oh, you have that symposium report with you?

24 A. Yes, I do.

25 Q. Awesome. Page 3.

1 A. And what paragraph?

2 Q. Under composition morphology. Why don't you
3 review that for a little bit, and we'll talk about the
4 importance of morphology and elemental composition and
5 the disagreement between the leading scientists.

6 A. I do see that it says all participants indicated
7 that they might consider a noncrystalline,
8 nonsymmetrical particle containing lead, barium and
9 antimony to be a GSR particle.

10 Q. Right. Containing those three elements, correct?

11 A. Correct.

12 Q. And then in describing the shapes, different
13 words are used. "Noncrystalline, condensed, rounded,
14 fused together, irregular;" isn't that correct?

15 A. Yes.

16 Q. And that they did a study to illustrate the
17 importance of morphology and elemental composition
18 because a lot of these elements can be produced from
19 nongunshot residue; isn't that correct?

20 A. Yes. These elements are in the environment, so,
21 yes, they can be found.

22 Q. Including brake dust in cars and things like
23 that.

24 A. I've seen many studies that have been done on
25 brake dust particles, and I have never seen a particle

1 that I would identify as gunshot residue.

2 Q. You personally in your less than three years of
3 experience with --

4 MR. BATEMAN: Objection, Judge.

5 BY MR. FIGLER:

6 Q. -- gunshot residue?

7 THE COURT: What's the objection?

8 MR. BATEMAN: Well, that's just a snide
9 comment.

10 MR. FIGLER: She said she has never seen --

11 THE COURT: Rephrase the question.

12 MR. FIGLER: Okay.

13 BY MR. FIGLER:

14 Q. And so in never you mean since your introduction
15 to this world in June of 2004, correct?

16 A. Yes. In the articles that I have read from the
17 history of gunshot-residue analysis by scanning electron
18 microscope and energy disperse of x-ray analysis I have
19 not seen a particle that I would identify as gunshot
20 residue in any of those articles.

21 Q. Okay. But you would understand that there is
22 discussion and testing done with regarding to
23 composition and morphology because there's certainly no
24 consensus within the scientific community; isn't that
25 correct?

1 A. There is a consensus in the scientific community
2 that gunshot residue needs to contain the three elements
3 that I've discussed with the correct morphology.

4 Q. Thank you. The three elements. Now, let's talk
5 about for a second hand sampling and contamination,
6 okay?

7 A. Um-h'm.

8 Q. These are important factors with regard to the
9 accuracy of your testing; isn't that correct?

10 A. I'm sorry. Could you ask the question again?

11 Q. Absolutely. If there's a contaminated sample,
12 then your results don't necessarily amount to any degree
13 of accuracy; isn't that correct?

14 A. I wouldn't agree with that.

15 Q. So if you had a contaminated sample, you can get
16 in front of a court of law and tell people that there's
17 an accuracy to that sample that you analyzed?

18 A. I can't determine if there has been any sort of
19 contamination --

20 Q. Okay.

21 A. -- so I would only be able to testify to what I
22 found in the laboratory.

23 Q. If you were to later find out that a sample given
24 to you was contaminated, then you wouldn't be able to
25 testify; is that correct?

1 A. That's correct.

2 Q. Okay. So in the scientific community, are there
3 protocols to make sure that contamination does not
4 occur?

5 A. Yes, there are.

6 Q. Okay. And within that there are a number of
7 factors that need to be in place to make sure that you
8 don't have a contaminated sample.

9 Would you agree that sampling and transfer
10 concerns require that it is best to sample a subject's
11 hands at the scene of where they are first encountering
12 law enforcement? Would you agree with that?

13 A. Yes.

14 Q. Okay. So if they're transported in vehicles or
15 touched by law enforcements who handle weapons, et
16 cetera, that's a potential -- and I'm just emphasizing
17 the word "potential" -- source of contamination,
18 correct?

19 A. Yes. It is possible.

20 Q. Okay. And one of the ways by scientific protocol
21 to reduce or even eliminate that type of contamination
22 is if you're going to transport a subject you would want
23 to bag the hands so that they cannot get these outside
24 contaminants on the hand. Is that also accurate?

25 A. There are arguments for and against bagging the

1 hands.

2 Q. But with regard to what I just stated, bagging
3 the hands could be a sort -- a way to prevent
4 contaminated sources from coming onto the person's
5 hands. You would agree with that general proposition.

6 A. Yes.

7 Q. Okay. Also, it's important to make sure that the
8 individual is not touched by individuals who have been
9 around firearms; is that correct?

10 A. That could be a source of contamination.

11 Q. Okay. Now let me ask you this, and it's a trick
12 question, so answer carefully. I've warned you. How
13 many particles are dispersed from the firing of a
14 weapon? Told you it was a trick question.

15 A. It depends on the type of ammunition, the type of
16 weapon and how many shots have been fired, if the weapon
17 is clean. There are many different factors that go into
18 the number of particles that are expelled.

19 Q. Many different factors, correct?

20 A. Yes.

21 Q. Okay. And you would agree that some firearms
22 could distribute thousands of particles, others less,
23 depending on those various factors, correct?

24 A. Correct.

25 Q. And so if there's a scenario where weapons were

1 shot 40 times, you would expect that there would be a
2 large number of particles in that area, correct?

3 A. Correct.

4 Q. Okay. Now, isn't it also true that within the
5 scientific community one of the safeguards is to
6 actually do testing on the ammunition, if available, to
7 determine the morphology of the particles that come from
8 that specific ammunition; isn't that true?

9 A. In our laboratory the only reason that we would
10 need to examine the ammunition is to determine if it is
11 a primer that contains lead, barium and antimony. There
12 are some primers that are lead-free primers that don't
13 contain those three elements.

14 Q. Okay. But with regard to the morphology and the
15 composition, would you agree that the, especially at the
16 result of the FBI lab gunshot residue symposium, that if
17 possible, it was suggested that testing be done on the
18 ammunition, understanding that's not always possible,
19 that ammunition isn't always available, those weapons
20 reasonable always retrieved. I understand that.

21 But if it's all possible, would you not agree
22 that in the scientific community it should be done if it
23 can be done? Increases the accuracy, would you agree
24 with that?

25 A. I guess if you have some -- if you have trace

1 elements within your sample that you would like to
2 compare maybe to the bullet, to the weapon, it would be
3 a good idea. But because gunshot residue has a certain
4 elemental composition and morphology already attached to
5 it, then I wouldn't see the need unless there's
6 something out of the ordinary.

7 Q. Okay. And you haven't written any papers on that
8 subject.

9 A. No, I haven't.

10 Q. Okay. And to your knowledge, no independent
11 testing or results were presented to your laboratory
12 with regard to the composition and morphology of the
13 ammunition and/or the weapons used in this particular
14 case, correct?

15 A. Correct.

16 Q. Okay. Finally, let's talk about transference.
17 With regard to transference, would you agree with me
18 that there are a multitude of ways that gunshot residue
19 particles can be transferred from one person to another,
20 from one area to another?

21 A. Yes. That's a possibility.

22 Q. Okay. And if somebody was in an environment
23 where there were tens of thousands, maybe even 100,000
24 particles in close proximity, you would expect to find
25 more than one or two particles of the three elements on

1 their person; isn't that correct?

2 A. It depends on many factors.

3 Q. Okay. But generally speaking, and I just ask you
4 generally, someone who has just recently in the vicinity
5 of 40 gunshots would be expected to have more than one
6 or two particles that contain all three elements that
7 we've been talking about, generally speaking. I
8 understand there's factors, but generally speaking.

9 A. Well, you wouldn't expect to find gunshot residue
10 on their hands if they were wearing gloves, if they had
11 washed their hands, if they had rubbed their hands on
12 their pants. I mean, there are many things that could
13 cause there not to be gunshot residue on hands.

14 Q. Okay. But how about their clothing?

15 A. Their clothing could possibly pick up particles.

16 Q. Okay.

17 A. But they would all be subject to the same factors
18 that I just discussed. If someone was wearing a coat
19 over a shirt, you wouldn't expect to find many particles
20 on the shirt.

21 Q. Okay. But otherwise, if they weren't, you'd
22 expect to find a lot, correct?

23 A. I don't know. "A lot" is such a relative term.

24 Q. Fair enough. How about their arms? Would you
25 expect to find some on their arms?

1 A. It's possible.

2 Q. Okay. And do you know if any clothing was tested
3 in this particular case or was any presented to you?

4 A. I tested three gloves. That's the only thing
5 that I tested besides the kits.

6 Q. Okay. And I guess, then, finally, is it a good
7 practice to take gunshot-residue swabbing from a hand
8 that is cut open or bleeding?

9 A. Yeah. It's fine to do that. We just -- we have
10 notes that are included within the kit so that they can
11 write things like that down, so that if we find like
12 large amounts of iron in a sample could possibly point
13 back to blood because there are large amounts of iron in
14 blood.

15 Q. Okay.

16 A. Or if there haven't been any particles found,
17 blood could have washed away the particles.

18 Q. Okay. Let me ask you this, then. You've got
19 about a 180 pages of documents. That's not privileged
20 or confidential in any way, is it?

21 A. No, it's not.

22 Q. You're not giving up any lab secrets if it's
23 presented to the defense, right?

24 A. Right.

25 Q. And you're saying within it are micrographs. Let

1 me ask you also. You were trained in the computer
2 generation of the results. Did you rely solely, then,
3 on the computer generation or did you do a manual
4 backup?

5 A. I did a manual backup.

6 Q. And is that contained within there as well?

7 A. Yes, it is.

8 Q. Okay.

9 MR. FIGLER: And at this time, Your Honor,
10 I'd ask that the witness's -- I don't know what your
11 ruling is as far as admissibility.

12 BY MR. FIGLER:

13 Q. Oh, finally, finally, finally, you said in your
14 resume you testified in Nevada before. How many times
15 have you testified in Nevada before?

16 A. Let me look at my notes on my testimony. Four or
17 five times I believe.

18 Q. Four or five? And how recently?

19 A. I think the most recent was in March.

20 Q. Of this year?

21 A. Yes.

22 Q. Do you remember the name of that case?

23 MR. BATEMAN: (Indiscernible) Chapman
24 (phonetic). I'll answer for her.

25 MR. FIGLER: That was Mr. Bateman's case?

1 MR. BATEMAN: Yes.

2 MR. FIGLER: Okay.

3 BY MR. FIGLER:

4 Q. Did defense counsel put you through any of this?

5 A. No.

6 Q. Okay. Do you remember the judge there?

7 MR. BATEMAN: Judge Lohrer.

8 MR. FIGLER: Okay.

9 BY MR. FIGLER:

10 Q. You're not a ventriloquist, correct?

11 MR. FIGLER: I'm going to pass the witness,
12 Judge.

13 THE COURT: Cross.

14 MR. SINGER: Yeah.

15 CROSS-EXAMINATION

16 BY MR. SINGER:

17 Q. When you generated this -- the trace evidence
18 report and the format that you use, is that standard in
19 all cases or are you dictated by the Las Vegas
20 Metropolitan Police Department what format to use?

21 A. This is our standard Bexar County Crime Lab
22 format.

23 Q. Okay. So for whatever other agencies you provide
24 services to, it's the same format?

25 A. Yes.

1 Q. And the numbers on top, like the CIL number and
2 the LVMPD number, those are all numbers that you
3 received from one of the detectives or somebody
4 submitting it to you?

5 A. Yes. A submission form is completed by the
6 submitting agency that comes in with the evidence, and
7 that's where we get the information that we put on our
8 report.

9 Q. A submitting form comes in -- so like in this
10 case, the Metropolitan Police Department gives you a
11 submitting form?

12 A. It is a submission form that is for our evidence
13 that is coming into our laboratory. And in this case, I
14 received it from Torry Johnson (phonetic).

15 Q. And on that submitting form --

16 MR. BUNIN: Can we ask what page she's
17 reading off of? I'm sorry, just so I know.

18 MR. SINGER: It doesn't matter. We don't
19 have it (indiscernible).

20 MR. BUNIN: I know, but we're going to have
21 it.

22 Can I just have a page you're reading on?

23 THE WITNESS: It's the last page on the
24 report.

25 MR. BUNIN: Thank you.

1 BY MR. SINGER:

2 Q. And on that report that -- just look at it since
3 I don't have it -- can you tell me. It says suspects on
4 there, Pierre Joshlin, Jamar Matthews, Trevon Jones.

5 A. Yes.

6 Q. In that order?

7 A. Yes.

8 Q. Suspects it says. Suspects?

9 A. Yes.

10 Q. And what date did you have that? What date did
11 that submitting report come to you or what was it dated?

12 A. The submission form came into our laboratory on
13 January 11th of 2007.

14 Q. Okay. And when you did that packet of 180 pages,
15 when was that finished?

16 A. I completed it -- the report is dated February
17 6th, 2007.

18 Q. And the State of Nevada would have had access to
19 it on February 6th, 2007? Did they ask you for it?

20 A. For the report?

21 Q. For the package there, 180 pages.

22 A. I guess I would assume they could. As soon as
23 the report was sent to them what I do is I write my
24 report.

25 And then it goes over to the administrative area

1 of our lab. And once over there, it may take one or two
2 days before it is actually sent to the submitting
3 agency. But after that, I guess they could have asked
4 for my bench notes at any time.

5 MR. SINGER: I'll pass the witness.

6 MR. BATEMAN: Judge, I'm not inclined to ask
7 anymore questions.

8 THE COURT: I have a couple of questions.
9 How many times have you been testified in a court of law
10 as an expert in this area?

11 THE WITNESS: Gunshot residue? I believe
12 15. I think this is 16 times.

13 THE COURT: And in what states? Federal or
14 state?

15 THE WITNESS: I have testified in federal
16 here in Nevada and also in Texas, Minnesota and here in
17 Nevada for state.

18 THE COURT: All right. And the exhibits
19 that you examined, when you received them were they were
20 intact condition? Did they appear to be appropriately
21 sealed and packaged?

22 THE WITNESS: Yes, they did.

23 THE COURT: Prepared correctly based upon
24 your expertise?

25 THE WITNESS: Yes. The only note that I

1 made in my notes was that the two black gloves were
2 packaged together. If they were packaged separately,
3 then it could have prevented any transfer from one glove
4 to the other.

5 THE COURT: Okay. Any other irregularities
6 about the samples you tested at all?

7 THE WITNESS: No.

8 MR. SINGER: Judge, can I follow up on your
9 question?

10 THE COURT: Yes?

11 BY MR. SINGER:

12 Q. The black gloves, did you note any tears on them
13 either?

14 A. No, I did not. The only tear that I noted was on
15 the red glove. There was a large hole.

16 Q. So the black gloves, what about any blood on the
17 black gloves?

18 A. I am not a serologist, so I wouldn't have written
19 down that I found blood.

20 Q. How about a red stain saying that it could have
21 maybe been blood?

22 A. I didn't note anything, any soiled areas.

23 Q. Thank you.

24 MR. FIGLER: I have one follow-up based on
25 your question, Judge.

1 THE COURT: Yes.

2 RECROSS-EXAMINATION

3 BY MR. FIGLER:

4 Q. The judge asked you if you received everything
5 intact. Did you receive any protocol or checklist
6 verifying that the samples were free from contamination
7 before coming to you?

8 A. No, I did not.

9 Q. Thank you.

10 THE COURT: Any other questions as a result
11 of my questions?

12 MR. BATEMAN: No, Your Honor.

13 THE COURT: Thank you for your testimony.
14 Please step down.

15 I want to get to the evidence. And based
16 upon that fact, I'm inclined just to rule.

17 It's clear for me that both Mr. Figler,
18 especially, is quite prepared to cross-examine in this
19 area. I am concerned about the method and manner of
20 which the information has been transferred, but I see at
21 least from this hearing that counsel's prepared to
22 address this issue.

23 Under Nevada law, Daubert is not the
24 appropriate test. I see that courts here under Bolin
25 (phonetic) talk about the admissibility of scientific

1 evidence in terms of trustworthiness and reliability.
2 It's ultimately an issue that should be decided by the
3 trier of fact.

4 MR. FIGLER: None of those cases have two
5 elements, Judge. None of that is supposed to be called
6 GSR. This is the first that anyone has ever said it.

7 She cited no authority. She has produced no
8 scholarly works on it. Her entire reliability is based
9 on Yahoo.

10 Now, I understand that I have fertile
11 sources of cross-examination, but I am not very
12 comfortable, Your Honor, with being penalized for doing
13 as much research, talking to different experts, because
14 I'm not an expert.

15 THE COURT: I'm not penalizing you.

16 MR. FIGLER: And, certainly, we would have
17 the ability to bring in an entire string of experts,
18 people who have actually done the science, who have
19 worked more than as a lab assistant, essentially, who
20 have degrees, masters degrees, Ph.D. degrees, who have
21 written scholarly works in scholarly journals that have
22 been vetted.

23 This is not an expert who's coming in. This
24 is a glorified lab assistant who knows how to run the
25 software.

1 I haven't looked at her documents yet. They
2 still haven't been provided to us, and I hate to belabor
3 the point, but all this came to us yesterday, the day
4 before yesterday and about five days ago.

5 I appreciate that this guy Michael somebody
6 was noticed in the general sense in January, but at that
7 time we had no knowledge that gunshot residue was even
8 an issue in this particular case.

9 Mr. McPhail came in here. He can provide no
10 guarantees as to the trustworthiness or reliability of
11 the sample that was presented to this individual.

12 If it's contaminated or not I have done no
13 investigation on that because I didn't know it was an
14 issue until we're ready to start trial or start a trial,
15 so I've not been able to investigate.

16 I don't have an expert that I can bring in
17 to counter this lab assistant to say that she knows that
18 this is gun residue and that somehow Jamar Matthews was
19 over at Balzar which is going to be the implication
20 because one three element was found on one hand and one
21 three element was found on another after he had been
22 handled by I don't know how many police officers.

23 I don't know how many police cars he was in.
24 I don't know if the dog Lasco (phonetic) who was over at
25 the vehicle, the Town Car, when he attacked him

1 transferred those when he bit him on his hands, okay? I
2 don't have the ability to investigate any of that,
3 Judge.

4 And to have this evident with its marginal
5 probability coming in against the major prejudicial
6 impact to do that 48035 (phonetic) analysis and say that
7 there's no prejudicial impact from this kind of junk
8 science that's being presented by this particular
9 individual who apparently has never been challenged
10 before, well, guess what, she came into a challenge
11 today.

12 And, Your Honor, we would absolutely either
13 ask for the dismissal of the case based on this improper
14 late notice of this type of evidence.

15 Secondly, we would ask for a continuance
16 to be able to get our experts and do the investigation
17 that we need to do on this gunshot-residue evidence
18 or --

19 THE COURT: How long would you need?

20 MR. FIGLER: I would need at least two
21 weeks, Judge. I talked to the experts and --

22 THE COURT: Is this a motion for mistrial?

23 MR. FIGLER: With prejudice.

24 THE COURT: Well, I'm not going to grant a
25 motion for mistrial.

1 MR. FIGLER: Well, then it's a motion for a
2 continuance, Judge, for two weeks so I can get my
3 experts in here and I can do any investigation. I can
4 go through that list of 69 witnesses that they gave us
5 two days before the trial was about to begin and
6 basically go through all of them to find out how many of
7 them touched Mr. Matthews, how many of them had fired a
8 gun within the 24-hour period that the scientific
9 literature says is the exposure period for gun
10 transference.

11 He was in by the State's theory an
12 environment where there were 40 gunshots. There could
13 have been 100,000 particles there, and the only testing
14 that's done are his hands in a contaminated --
15 potentially contaminated environment. They find two of
16 these things on there, and that jury's going to think
17 that that's because he was over there on Balzar, and
18 there's no way for me to get around that.

19 So unless I get a continuance, Your Honor,
20 I'm absolutely ineffective because I did none of this
21 research because I didn't know gun residue until three,
22 four days ago was even done in this particular case.

23 THE COURT: State.

24 MR. BATEMAN: I'm not suggesting for one
25 moment -- I don't mean this in the wrong way, but the

1 reason that all this wasn't done is because -- I have a
2 sneaking suspicion. It's because certain people didn't
3 think this was going to trial this week because a
4 preliminary hearing transcript wasn't done until two
5 weeks ago, so that's what I believe is probably the case
6 here.

7 They didn't notice any experts. We're all
8 scrambling here, Judge, to get this taken care of. If
9 you want to do a two-week continuance for all this,
10 that's fine, but they had notice back when the expert
11 notice was filed.

12 And as of May 3rd they had the test results.
13 As of May 3rd they had the test results. That's a week
14 after --

15 MR. FIGLER: It was four days ago, Judge.

16 MR. BATEMAN: We get experts, Judge, all the
17 time that -- you know in rebuttal the State gets experts
18 all the time at the last second to do these types of
19 things.

20 I also would note that the CV -- I've got
21 the transmission for the faxes. The CV was sent on
22 May 8th at 2:00 o'clock. I don't know why none of them
23 have --

24 MR. FIGLER: One day ago.

25 MR. BATEMAN: -- these particular things.

1 Well, they've come in and said that they don't have
2 them.

3 MR. FIGLER: We don't.

4 MR. BUNIN: We don't.

5 MR. FIGLER: I mean, this whole thing is --
6 I've got transmittal facsimile proof sheets that that
7 went over.

8 If Your Honor wants to go for a continuance
9 for two weeks -- what's their position as to the gloves?
10 Are they only talking about the hands of the defendants?
11 How about the gloves?

12 MR. BUNIN: Where was the fax made at
13 2:00 o'clock? Was that yesterday at 2:00 o'clock
14 because I recall being right here.

15 MR. BATEMAN: May 8th.

16 MS. LEWIS: Yes.

17 MR. BUNIN: So there was a faxing to --
18 where was it? It was faxed to my office at 2:00
19 o'clock?

20 MR. BATEMAN: Yes.

21 MR. BUNIN: I just want to make sure. Well,
22 I didn't get it in my office.

23 MS. LEWIS: Yes.

24 MR. BUNIN: I was here at 2:00 o'clock
25 yesterday. That's just point number one, Your Honor.

1 Number two, I don't know what he's trying to
2 imply on the record. I understand Counsel's argument,
3 but he's trying to imply somebody thought this wasn't
4 going to go. It certainly wasn't the defense. We've
5 prepared for this case. What we didn't prepare for were
6 things that weren't given to us.

7 The argument that Ms. Lewis and now
8 counsel's making, the one that they've continually made,
9 is that they noticed in January somebody or they
10 mentioned he was also an expert in residue, therefore,
11 we could have gotten all of these things -- excuse me --
12 and I understand that argument. But as the information
13 became available to us, that argument turned out to be
14 absolutely incorrect.

15 How do we know? Because Officer McPhail got
16 on the stand and specifically said I don't even know
17 what happen to my report. I've never found the original
18 report. I couldn't find it anywhere. I printed it out
19 yesterday.

20 We couldn't have gotten the report, anyway.
21 We don't even know where the original report is, and we
22 have a separate objection, by the way, for the
23 best-evidence rule because there was no original report
24 for Officer McPhail.

25 MR. BATEMAN: Not offered into evidence.

1 MR. BUNIN: And McPhail never was noticed to
2 us. I know he said this, but he was never noticed to us
3 until the first day of trial so they violated discovery
4 rules, and that person shouldn't be able to testify if
5 we never received his report, not an original of the
6 report, but we'd never be able to expect to see an
7 original. We've got a printout from what was on his
8 computer yesterday, so that's the situation we're in.

9 The CV, certainly we haven't examined this
10 because it was just thrown on my chair a couple minutes
11 ago by counsel. If she faxed it to me yesterday at 2:00
12 I still wouldn't have -- that's still absolutely
13 inappropriate within the rules.

14 THE COURT: You indicate you want two weeks
15 or you want a mistrial?

16 MR. FIGLER: Two weeks, Judge.

17 MR. BUNIN: Well, can we discuss this one
18 moment, Your Honor?

19 THE COURT: Yes.

20 MR. BATEMAN: And I have the law,
21 Your Honor --

22 MR. BUNIN: Is something funny, just the
23 record?

24 MR. BATEMAN: -- with regard to whether it
25 should be without prejudice or with prejudice. The law

1 is clearly that it should be without.

2 (Off-record colloquy)

3 MR. FIGLER: Okay. We're asking for a
4 two-week continuance to be able to investigate this
5 gunshot residue and get our own expert and that's
6 cutting it close.

7 MR. BUNIN: We're in a capital murder trial
8 starting a week from Monday (indiscernible) --

9 MR. FIGLER: And so this puts us in a tough
10 position, but I'm in trial right now and that's my
11 number one priority and everything else has to move
12 because of it, and not because of anything that we did
13 as insinuated.

14 But you know what, if they knew about
15 gunshot residue and because they're sending stuff out,
16 the State's sending stuff out, and they're not telling
17 us about it until we start trial, there has to be some
18 penalty for that, Judge. And when the evidence is so
19 weak, but so prejudicial --

20 THE COURT: Well, they noticed -- they did
21 put you on notice.

22 MR. FIGLER: Of what? Did you see --

23 THE COURT: As to --

24 MR. FIGLER: -- the notice?

25 THE COURT: As to gunshot residue.

1 MR. FIGLER: Can I show you that notice,
2 Judge?

3 THE COURT: Yes.

4 MR. FIGLER: I just had it. May I approach?

5 THE COURT: Yes.

6 MR. FIGLER: This is the notice that they're
7 talking about that comes over to us in January. I'm
8 sorry, Judge.

9 MR. BUNIN: Does that notice take away their
10 duty to give us all the reports when they have them? Do
11 they still have the duty to follow the discover rules
12 and notice witnesses timely? I guess those are the
13 questions that I just would want to ask for the record,
14 Your Honor.

15 MR. FIGLER: And that notice --

16 MR. BUNIN: They're still obligated.

17 MR. FIGLER: -- is before anyone has ever
18 indicated that there was gunshot residue taken in this
19 case. That's not notice. Firearms analysis? How does
20 that tell me that he's going to testify? What's the
21 substance of the testimony? The last line of the --

22 THE COURT: Gunshot residue --

23 MR. FIGLER: -- (indiscernible).

24 THE COURT: -- and tool-mark examination.

25 MR. FIGLER: No. That's not -- Judge, I

1 hate to --

2 THE COURT: I'm just reading line 7.

3 MR. FIGLER: Okay.

4 THE COURT: It just says gunshot residue and
5 tool-mark examinations comparisons. We'll be --

6 MR. FIGLER: That's his expertise.

7 THE COURT: -- giving scientific opinion
8 related thereto.

9 MR. FIGLER: And then the substance of his
10 testimony will be what?

11 MR. BUNIN: The last sentence.

12 THE COURT: Related to -- regarding the
13 firearms analysis performed in this case.

14 MR. FIGLER: Firearms analysis.

15 MR. SINGER: Firearms analysis, yeah.

16 MR. FIGLER: I'm not on notice that gunshot
17 residue is going to be the subject of this gentleman who
18 has a lot of qualifications in a lot of areas.

19 MR. BATEMAN: Even --

20 MR. FIGLER: Firearms analysis does not tell
21 me --

22 THE COURT: What about two weeks --

23 MR. FIGLER: -- gunshot residue.

24 THE COURT: -- for you, Phil?

25 MR. SINGER: Scheduling wise I'm fine, but I

1 just want to let you know that how -- yeah, we got a
2 notice that resembled something that looked maybe that
3 we should have --

4 THE COURT: I want to give you an
5 opportunity to explore this. I'm concerned about the
6 degree of which --

7 MR. SINGER: We (indiscernible) --

8 THE COURT: -- the information you've
9 been --

10 MR. SINGER: And now they have 180 pages
11 that they had access to since February that we -- how do
12 you cross-examination a scientist without the 180 pages?

13 THE COURT: Well, you're going to get it.

14 MR. FIGLER: We are going to get it.

15 MR. BUNIN: Nevada rule -- I just think the
16 appropriate thing seems to be exclude --

17 MR. FIGLER: Right.

18 MR. BUNIN: -- it since we're here at trial
19 now and we --

20 THE COURT: Well --

21 MR. BUNIN: -- would like it finish this
22 trial.

23 THE COURT: -- I'm trying to balance the --

24 MR. BUNIN: -- and my clients want to finish
25 the trial.

1 THE COURT: -- interest of the State with
2 the interest of the defense. I believe a two-week
3 continuance is appropriate based upon the request.

4 MR. BUNIN: They don't want to waive their
5 right to a speedy trial.

6 (Indiscernible colloquy)

7 THE COURT: I understand. The record should
8 reflect the defendants have not waived their right to
9 a --

10 MR. BUNIN: Thank you.

11 THE COURT: -- speedy trial.

12 DEFENDANT MATTHEWS: It should have already
13 been waived.

14 MR. BUNIN: It's not waived. We're not
15 waiving.

16 (Off-record colloquy)

17 THE DEFENDANT: I know, but --

18 MR. BATEMAN: Judge, can we have one
19 moment --

20 THE COURT: Yes.

21 MR. BATEMAN: -- to see if we can't resolve
22 this?

23 MR. BUNIN: We may be able to resolve.

24 (Off-record colloquy)

25 MR. BATEMAN: If you guys want to talk about

1 it (indiscernible) --

2 MR. BUNIN: (Indiscernible).

3 MR. FIGLER: No, we're not.

4 MR. BATEMAN: That's my offer.

5 MR. BUNIN: Oh, let's.

6 MR. FIGLER: All right. We'll talk for a
7 minute.

8 UNIDENTIFIED SPEAKER: I didn't hear what
9 you said.

10 MS. LEWIS: Go talk (indiscernible).

11 UNIDENTIFIED SPEAKER: Okay.

12 (Off-record colloquy)

13 THE COURT: Record should reflect defense
14 counsel are cornering.

15 (Off-record colloquy)

16 THE COURT: So resolved?

17 MS. LEWIS: Okay. So, Judge, I think the
18 stipulation or the agreement that we've come to is that
19 we will proceed today, and with reference to any
20 gunshot-residue testing that was done Ms. Vachon would
21 testify that she examined the gloves, the black gloves
22 and the red gloves, and discussed whatever testing she
23 did with regards to those gloves and no mention would be
24 made of the hands that were examined, and so then that
25 would get rid of Randy McPhail, and he wouldn't need to

1 testify as to those kits.

2 We'll leave them marked as an exhibit. We
3 won't even introduce them in front of the jury. We'll
4 leave them marked and not introduced at this point, but
5 we won't mention --

6 THE COURT: Do we need a stipulation in
7 front of the jury to that factors (indiscernible) --

8 MR. FIGLER: No.

9 MR. BATEMAN: No.

10 (Indiscernible colloquy.)

11 THE COURT: It sounds like we can just
12 simply proceed.

13 MR. FIGLER: That's between --

14 MS. LEWIS: Right.

15 MR. FIGLER: -- the parties that we're
16 withdrawing our motion to continue based upon the
17 State's representations that they're going to be
18 offering no evidence with regard to the testing of the
19 results of gunshot residue on Mr. Jamar Matthews or,
20 apparently, Mr. Pierre Joshlin.

21 THE COURT: And you're just going with the
22 gloves?

23 MR. FIGLER: And we're just going with
24 gloves. Now we'll have the right to full
25 cross-examination --

1 THE COURT: Oh, of course.

2 MR. FIGLER: -- on her test, et cetera, but
3 they'll be no reference, and that's why we're
4 withdrawing our motion to continue.

5 MR. BATEMAN: Well, and I would hope that
6 after what we've gone through here out of the presence
7 that counsel would try to limit their cross --

8 MR. FIGLER: There would be an expedited
9 version --

10 MR. BATEMAN: Right.

11 MR. FIGLER: -- because I've got some
12 answers and how it's going to go.

13 MS. LEWIS: And, Judge, I would just --

14 THE COURT: Let's go.

15 MS. LEWIS: I would just ask for the
16 record -- I would like Mr. Figler to state that he is
17 ready to cross-examine this witness because earlier he
18 said wasn't ready because he just received all this
19 documentation --

20 MR. FIGLER: With regard to my client's
21 hands and the two different kinds, there was two and
22 three. On the gloves there's only three.

23 THE COURT: So you are ready to
24 cross-examine this witness.

25 MR. FIGLER: I believe I'll do the best that

1 I can and --

2 THE COURT: Right.

3 MS. LEWIS: No.

4 MR. FIGLER: -- that's all I can say.

5 MS. LEWIS: Judge --

6 MR. FIGLER: Your Honor made an evaluation
7 of my cross-examination. I think you made a
8 determination, so that's the trial court making that
9 record.

10 MS. LEWIS: Judge, that's not the issue.
11 The issue is is Mr. Figler ready to proceed with this
12 witness despite what he said earlier?

13 THE COURT: Because that's the issue on
14 the --

15 MR. FIGLER: I don't know if I can make a
16 strict (indiscernible) representation. Yes, I'm a great
17 lawyer. I like to think that I am.

18 MS. LEWIS: We're not asking him whether --

19 MR. FIGLER: I'll going to do the best that
20 I can, Judge.

21 MS. LEWIS: -- he's (indiscernible).

22 THE COURT: It's just at this point are you
23 prepared to cross-examine this witness based upon the
24 agreement you've made with the State at this time?

25 MR. FIGLER: Based on (indiscernible), but I

1 would like to have the access to the 183 pages.

2 THE COURT: All right. I don't see a
3 problem with that.

4 MS. LEWIS: Are you getting those copied? I
5 don't have them.

6 MR. SINGER: So the record's going to be
7 devoid of the fact that they got those today in the
8 middle of trial?

9 MR. FIGLER: That I don't care about.

10 THE COURT: No. The record reflects that.

11 MR. BUNIN: We've already made that record.

12 MR. FIGLER: Yeah.

13 THE COURT: Yeah. Absolutely. The
14 record's --

15 MS. LEWIS: And --

16 THE COURT: -- not changing.

17 MS. LEWIS: And the record should show the
18 State doesn't have those 180 pages. I never saw them
19 until Ms. Vachon came --

20 THE COURT: Walked in with --

21 MR. FIGLER: -- here to testify.

22 THE COURT: -- them.

23 MR. SINGER: Well, that's not a good
24 argument. That's like saying the cop had it -- that --
25 you -- she's part of you.

1 MS. LEWIS: No, she's not.

2 THE COURT: That is on -- that is part of
3 the record, ladies and gentlemen, that she walked in
4 here with a stack of information.

5 MR. SINGER: But it's not a --

6 MR. BUNIN: The record is that the DA didn't
7 have the documents, but we're not saying the State
8 didn't. We're saying the DA didn't, but the person that
9 came in brought in a set of records.

10 THE COURT: It is my understanding that when
11 the State got what they got, they gave it to you as
12 quick as they got it, but they did not have that
13 information.

14 MR. BUNIN: Thank you.

15 (Off-record colloquy)

16 MR. SINGER: Is it off limits for
17 cross-examination?

18 THE COURT: The 180 pages? Tell me why it
19 shouldn't --

20 (Indiscernible colloquy)

21 MS. LEWIS: But I don't have it to give them
22 a copy. That's what I'm saying. She has it. If they
23 want an a copy, they need to get that from her. I don't
24 have it to give to them. That's what I'm saying.

25 THE COURT: Record reflect the defendants

1 are leaving the courtroom.

2 MR. FIGLER: Yeah. He has to -- they were
3 going to burst, Judge --

4 THE COURT: I understand.

5 MR. FIGLER: -- because they went through
6 the whole --

7 THE COURT: I understand. I understand. I
8 just need to make a record.

9 UNIDENTIFIED SPEAKER: (Indiscernible) make
10 a record. Okay. There you go.

11 (Off-record colloquy)

12 THE COURT: All right. Yes. Let's take a
13 ten-minute break, or, actually, five-minute. Do it
14 quick so --

15 MS. LEWIS: One other, Judge, for the
16 record. I sent on April 25th which was the exact date
17 that I received the prelim transcript copy -- I did send
18 notification to both counsel that I had received that
19 had prelim transcript today, and I was going to try to
20 get ready for trial.

21 However, I had put them on notice that
22 because testing was still outstanding and I didn't have
23 those items, I didn't know that I would be ready for
24 sure.

25 MR. FIGLER: That's correct.

1 MS. LEWIS: I just want to make that record.
2 I made those representations on April 25th. In fact,
3 the State did ask for a continuance of this case and the
4 Court denied it, so I just want to make --

5 THE COURT: All right. Based upon the 60
6 days that had been invoked, that was the decision. But
7 again, we're outside the presence. The defendants are
8 not here.

9 (Off-record colloquy)

10 THE COURT: I'm ready.

11 (Court recessed at 3:07 p.m. until 3:13 p.m.)

12 (Jury not present)

13 THE COURT: Okay. We're back on the record
14 in C228460, State of Nevada, plaintiff, versus
15 Pierre Joshlin and Jamar Matthews.

16 Record should reflect we're outside the
17 presence of the jury.

18 State.

19 MR. BATEMAN: I just wanted to make sure
20 that we put the stipulation on the record, and I wasn't
21 sure if we had actually done that.

22 THE COURT: Let's do that.

23 MR. BATEMAN: After our conversation and
24 examination of --

25 THE COURT: State the stipulation for the

1 record.

2 MR. BATEMAN: Stipulation is that the State
3 will not introduce any gunshot-residue evidence that was
4 found on the hands of either of the codefendants. The
5 State intends only to address the evidence that was
6 located on the gloves of -- the red glove and then the
7 two black gloves that were recovered from the scene.

8 So we won't make any reference to the hands
9 of the defendants, and, therefore, we wouldn't need
10 Randy McPhail to come in and testify.

11 THE COURT: All right. Is that the
12 understanding of defense?

13 MR. FIGLER: That's correct, Your Honor, and
14 we are withdrawing our motion to continue based on that.

15 THE COURT: That is --

16 MR. SINGER: And --

17 THE COURT: Then that is the state of the
18 record. Mr. --

19 MR. SINGER: And we're not limited in any
20 way by the stipulation as to where we can go
21 cross-examination wise.

22 THE COURT: I don't see why you would be,
23 no.

24 MR. BATEMAN: And then, finally, Judge, I
25 just want to make sure that the brief that I had

1 presented to you, was that actually filed in open court
2 just so we make it part of the record? I did provide
3 copies to counsel.

4 THE COURT: The copy I have of both
5 Mr. Figler's bench brief and your opposition are all
6 marked up because I've been chewing them up, so I don't
7 show original.

8 MR. BATEMAN: Can I? I want to just file
9 one copy.

10 THE CLERK: When did you file -- yes. It
11 didn't come through me I don't believe.

12 MR. BATEMAN: I know. I kind of did it
13 informally with the judge and provided copies to
14 Your Honor.

15 THE CLERK: Okay. So you wanted this
16 treated as the original?

17 THE COURT: We need to mark that -- yes.

18 MR. BATEMAN: Yes.

19 THE COURT: That would be the original.

20 THE CLERK: This is the original? Sure.

21 You want to sign this, Mr. Bateman?

22 MR. BATEMAN: Yes. Sorry.

23 THE COURT: All right, let's bring them in.

24 MR. FIGLER: Thank you, Judge. Thanks for
25 your patience through that.

1 THE COURT: I just want it done right.

2 MR. FIGLER: I appreciate the State, always
3 do. Mr. Bateman wanted an attboy, so I just gave him
4 one. He asked for it. He said what about me?

5 THE COURT: I'm going to thank them for
6 their patience, by the way. Anybody have a problem with
7 that?

8 UNIDENTIFIED SPEAKER: Um-h'm.

9 MR. SINGER: No.

10 MR. BATEMAN: No.

11 MR. FIGLER: No.

12 MR. SINGER: Judge, I forgot to tell you
13 something. I had a little ride on the elevator with one
14 of the jurors again.

15 MS. LEWIS: Again?

16 MR. SINGER: Yeah. Just me and the --

17 MS. LEWIS: You got to be kidding me.

18 MR. SINGER: Hey, I didn't pick him up.

19 THE COURT: We're still on the record.

20 MR. SINGER: I walked down there. He was
21 one two -- four, Mr. P. I don't know his last name.
22 And he said hi, and I couldn't say anything again.

23 I think I hurt his feelings. Patulski, and
24 I didn't say a word like I've always done. But he did
25 say hi and smiled and everything.

1 (Off-record colloquy)

2 MR. SINGER: So can we do that admonishment
3 again?

4 THE COURT: How many times -- okay. I'll do
5 it before they leave tonight.

6 MR. SINGER: Thank you.

7 THE COURT: If I don't, remind me.

8 MR. SINGER: Okay.

9 (Jury present)

10 THE BAILIFF: Jury's present, please.

11 THE COURT: Thank you.

12 THE BAILIFF: Panel's present, Your Honor.

13 THE COURT: Back on the record in C228460,
14 State of Nevada, plaintiff, versus Jamar Matthews and
15 Pierre Joshlin.

16 Ladies and gentlemen of the jury, appreciate
17 your patience. We have been in here working. We
18 haven't been ignoring you.

19 State, call your next witness.

20 MR. BATEMAN: State calls Stephanie Smith.

21 THE BAILIFF: (Indiscernible)?

22 MR. BATEMAN: Stephanie Smith.

23 (Off-record colloquy)

24 THE CLERK: (Indiscernible) and remain
25 standing.

1 STEPHANIE SMITH, PLAINTIFF'S WITNESS, SWORN

2 THE WITNESS: I do.

3 THE CLERK: Thank you. You may be seated.
4 Please state your name for the record and spelling both
5 first and last.

6 THE WITNESS: Stephanie Smith,
7 s-t-e-p-h-a-n-i-e S-m-i-t-h.

8 THE CLERK: Thank you.

9 DIRECT EXAMINATION

10 BY MS. LEWIS:

11 Q. Good afternoon, Ms. Smith. How are you employed?

12 A. I am currently employed as a senior crime scene
13 analyst with the Las Vegas Metropolitan Police
14 Department.

15 Q. How long have you been so employed?

16 A. Approximately six-and-a-half years.

17 Q. Okay. I want to direct your attention to
18 September 30th of 2006 in the evening hours. Were you
19 on duty on that date and time?

20 A. Yes.

21 Q. And were you dispatched or called out to a
22 homicide crime scene that had occurred at 1271 Balzar
23 and then a subsequent crime scene at -- on J Street?

24 A. Yes.

25 Q. When you were called out, were you working with