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**APPELLANT'S APPENDIX VOLUME XI PAGES 2270-2519**

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**Case No. 74468**

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1 Q And in particular, were all of the robberies that you're investigating up  
2 until that time, did they involve the use of a firearm?

3 A Yes. It was a small-frame black firearm.

4 MS. MACHNICH: I'm going to object as to misstating evidence.

5 THE COURT: Well, she asked an open-ended question as to whether  
6 all of the robberies involved a gun.

7 MS. MACHNICH: No objection to that.

8 THE COURT: Okay. What's part of your -- what are you objecting  
9 to?

10 MS. MACHNICH: The part where he said they all involved a  
11 small-frame black firearm.

12 THE COURT: That's just recollection in his testimony. If there's  
13 evidence to contradict that, you can bring it out.

14 MS. MACHNICH: Okay. Okay.

15 THE COURT: Okay. Overruled.

16 MS. LEXIS: Thank you.

17 BY MS. LEXIS:

18 Q And why did you ask or why did you specifically direct a crime scene  
19 analyst to process the vehicle for prints?

20 A Originally, Mr. Valentine said he -- that wasn't his vehicle, and we're  
21 basically trying to substantiate a story.

22 Q Okay.

23 A If that was actually a vehicle used in the crime, we'd like to know who  
24 else was in it, if it wasn't him.

25 Q Okay. But to your knowledge, there was one interior fingerprint



1 located, correct?

2 A Yes.

3 Q And that was Mr. Valentine's?

4 A That was Mr. Valentine.

5 Q Are you aware of latent prints being recovered from a Nissan Altima  
6 located at the Faulkners' residence?

7 A No.

8 Q Okay.

9 A We attempted to get prints, but Mr. Faulkner wasn't sure if the suspect  
10 actually touched the Nissan.

11 Q Okay. So let me ask you a different way. Did you submit anything  
12 concerning the Nissan Altima at the Faulkner's residence for comparison?

13 A No, ma'am.

14 Q Okay. Why not?

15 A As far as the prints on the outside of the vehicle?

16 Q Yes.

17 A Okay. The public has access to it. Anybody can walk by, put their  
18 hands on it. When you have prints on the inside of a vehicle, people, especially  
19 the owner, has more control, because it's going to be locked.

20 Q Okay. Detective, the jurors have been able to view some body cam  
21 footage from various patrol officers.

22 A Okay.

23 Q Do detectives wear body-worn cameras?

24 A We do not.

25 Q Back in May of 2016, did all officers with the Las Vegas Metropolitan

1 Police Department have body cameras?

2 A To the best of my knowledge, yes.

3 Q Okay. Did you, after the showups and after the scene was processed,  
4 was -- did you conduct an interview with the defendant, Keandre Valentine?

5 A We did.

6 Q During this interview, were you able to ascertain whether he was left-  
7 or right-handed?

8 A He was left-handed.

9 MS. MACHNICH: Objection, foundation.

10 THE COURT: Sustained. Can you lay more foundation for that  
11 answer?

12 MS. LEXIS: Sure.

13 BY MS. LEXIS:

14 Q During this interview with the defendant, did you ask him whether he  
15 was left- or right-handed?

16 A I did.

17 Q What did he say?

18 A He was left-handed.

19 Q Thank you. Did you have an occasion to discuss the ownership of  
20 guns with Mr. Valentine during this interview?

21 A I did.

22 Q And what, if anything, did he say about guns, in particular, guns  
23 located in Apartment 218?

24 A Said, to his knowledge, there were no guns.

25 Q Did he -- did you ask him about the vehicle, the 2016 Mazda 3, located

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1 in the parking lot of 1701 J Street?

2 A I did.

3 Q Did -- what did he tell you concerning his contact, involvement,  
4 ownership of that particular vehicle?

5 MS. MACHNICH: Your Honor, at this point we're going to object and  
6 ask to approach.

7 THE COURT: Okay.

8 [Bench conference transcribed as follows.]

9 THE COURT: Just standard --

10 MS. MACHNICH: Yeah.

11 THE COURT: -- defendant admissions, right?

12 MS. MACHNICH: But here's the issue, Your Honor. This was all  
13 taken a recorded interview and under the Doctrine of Completeness, the interview  
14 is one and whole. They're not -- they're poking out little, tiny little sections of it --

15 THE COURT: They're allowed to do that.

16 MS. MACHNICH: -- without getting any context to the rest of it.

17 MS. LEXIS: I have case law. I'm allowed to do that.

18 THE COURT: No, I've seen the case law. I -- you raised the Doctrine  
19 of Completeness in one of your prior trials and I researched it. I did find case law  
20 that defendant admissions can be selectively used by the State, even if he has a,  
21 you know, an hour recording or an hour transcript, they can take out just selected  
22 admissions. It is the law. So.

23 MS. MACHNICH: Okay.

24 THE COURT: All right?

25 MS. MACHNICH: All right.

1 THE COURT: So go ahead.

2 [End of bench conference.]

3 BY MS. LEXIS:

4 Q Did you have an occasion to ask the defendant, Keandre Valentine,  
5 about guns, and specifically -- or I'm sorry, moved on from that.

6 Did you have the occasion to ask the defendant, Keandre Valentine,  
7 regarding his involvement, contact, ownership of the 2016 Mazda 3, the white one  
8 parked at 1701 J Street?

9 A Yes, ma'am.

10 Q What, if anything, did he tell you concerning this car?

11 A He first said that the vehicle was not his. He then said it was his  
12 girlfriend's. And he said he had no ownership with it. He then later recanted that  
13 he might have been in the front driver's seat, but he has never driven the car  
14 before.

15 Q Detective, as a detective with the Las Vegas Metropolitan Police  
16 Department, do you have access to the jail call recording system at the Clark  
17 County Detention Center?

18 A I do.

19 Q And to your knowledge are these jail calls made in the ordinary course  
20 of running the Clark County Detention Center?

21 A They are.

22 Q Okay. And these recordings, they're time-stamped and date-stamped;  
23 is that correct?

24 A Yes, they are.

25 Q So they're made at or near the time that the calls were actually placed?

1 A Yes.

2 Q Okay. And you have access to them?

3 A We do.

4 Q There's a particular system that you can log into and you have access  
5 to it?

6 A Yes. ICS Solutions.

7 Q Okay. And that's through your employment with Metro?

8 A That is.

9 Q During the course of your investigation of the robberies that occurred  
10 on May 26th, 2016, and May 28th of 2016, did you have an occasion to listen to  
11 some jail calls made by the defendant, Keandre Valentine?

12 A I did.

13 Q When you first pull up the jail call, is it fair to say that you can do a  
14 search by name, by identification number and certain other search terms?

15 A Yes.

16 Q Okay. And is it fair to say also that the jail call system has an  
17 identification procedure kind of built in?

18 A Yes.

19 Q Such as voice recognition?

20 A Voice recognition, like -- well, they do have voices you can recognize,  
21 but I don't know if the exact system that says this definitely belongs to this.

22 Q Okay.

23 A We do have people that will try to call under other people's ID  
24 numbers. We understand that. But I have listened to his jail calls so much I  
25 recognize his voice. I've dealt with him. I've talked to him in person.

1 Q Okay.

2 MS. MACHNICH: Objection, Your Honor. He's not an expert in voice  
3 recognition and he can't develop this expertise during the course of listening to  
4 calls that are purported to be an individual.

5 MS. LEXIS: Well, are they even disputing that that's him?

6 THE COURT: Well, I don't think you need to be an expert to provide  
7 testimony on voice identification. So I'm going to allow him to testify as a lay  
8 witness regarding his recognition of Valentine's voice.

9 MS. MACHNICH: Just to respond to the State, no, we are not  
10 contesting the authenticity of the calls.

11 THE COURT: Okay. All right.

12 MS. MACHNICH: Because just his statements of, I listened to so  
13 many and --

14 THE COURT: Right. Okay. Well, I'll go ahead and allow it. All right.  
15 Thank you.

16 BY MS. LEXIS:

17 Q Did you, in fact, pull, meaning download, certain jail calls and provided  
18 it to the State?

19 A Yes, ma'am.

20 Q Okay. And you've had the opportunity to review these recordings in  
21 preparation for court?

22 A I have.

23 Q All right.

24 MS. LEXIS: Your Honor, at this point I am going to mark for our --  
25 excuse me, approach the witness with what's been previously marked for

1 identification as State's 189, 190 and 191.

2 THE COURT: Okay. Those -- you may -- you may approach.

3 MS. LEXIS: Thank you.

4 BY MS. LEXIS:

5 Q Detective, prior to testimony today, did you have an opportunity to  
6 listen to three individual jail calls?

7 A I did.

8 Q Okay. And these CDs, do they fairly and accurately represent the jail  
9 calls that were played for you prior to court?

10 A Yes.

11 Q Thank you.

12 MS. LEXIS: Your Honor, subject to the court's ruling, permission to  
13 admit and publish State's Exhibit 189, 190 and 191?

14 THE COURT: Yeah. Those are all admitted, subject to the court's  
15 rulings on the record and the prior discussions with objections that everybody has  
16 made. All right.

17 [State's Exhibit Nos. 189, 190 and 191 admitted.]

18 MS. LEXIS: Thank you. So first, it will be Exhibit No. 189. And this is  
19 concerning Call No. 52215429. And the reason I say that out loud is because the  
20 court has also allowed the State to prepare transcripts for the jurors to following  
21 along. May I pass them out?

22 THE COURT: Yes, you may. And by the way, I said they're admitted  
23 subject to the objection. What I mean is they're admitted without waiving the  
24 objections. All right. All right. And you may hand out the transcripts to the jurors.

25 MS. LEXIS: And we will now be publishing the audio portion.

256

1 THE COURT: One second. I want the jurors to know that the jail  
2 calls have been redacted. There have been certain portions that the court has  
3 determined you do not need to hear or should not hear for whatever reason. Do  
4 not concern yourself with that. If you want to give them --

5 MS. LEXIS: Yes, please, Your Honor.

6 UNIDENTIFIED JUROR: I can look off him, that's fine.

7 THE COURT: You can? All right.

8 MS. LEXIS: Sharing.

9 THE COURT: Whatever you wish.

10 MS. LEXIS: Maybe if they can share, that would be great. That way  
11 Your Honor also has --

12 THE COURT: So do the jurors all hear me? I said the jail calls have  
13 been redacted, meaning that the audio has been condensed because certain  
14 portions have been excised. And then the written transcript has also been  
15 condensed, certain portions have been excised. All right. So and you'll get --  
16 maybe get further instruction on that later on in the case. All right. So this isn't  
17 exactly how the call would appear if you were listening to it from start to end, but  
18 this is the portions that the court is allowing you to hear. All right.

19 MS. LEXIS: State's Exhibit 189 being published.

20 [Audio played.]

21 MS. LEXIS: That concludes the publishing of State's Exhibit No. 189,  
22 Your Honor. Permission to retrieve the transcript?

23 THE COURT: You may.

24 MS. LEXIS: Thank you. While I'm waiting for the jury to get the  
25 transcripts of that call together, the State will now be publishing State's



1 Exhibit No. 190, which is Call No. 52229515. But I would just ask Mr. Dickerson  
2 to hold on, not publish until I've given the transcripts. We'll retrieve the extras.

3 We are now publishing 190.

4 THE COURT: You may proceed.

5 MS. LEXIS: Thank you.

6 [Audio played.]

7 MS. LEXIS: That concludes State's 190. Permission to retrieve the  
8 transcripts?

9 THE COURT: You may. Yes.

10 UNIDENTIFIED JUROR: We have a problem. Some of the  
11 transcripts were actually from the first recording.

12 THE COURT: Which jurors didn't have the correct transcript? One?  
13 One juror.

14 MS. LEXIS: May we --

15 THE COURT: Why don't you -- let's do this. Rather than replay it,  
16 because -- let's just hand the transcript to that juror, the correct transcript, and  
17 allow him to read it, give him, you know, the equal amount of time that everyone  
18 else had to read it to yourself. All right.

19 [Pause in proceedings.]

20 THE COURT: Thank you, sir. Pass it on down.

21 MS. LEXIS: All right. Your Honor, I've retrieved all of the transcripts.

22 And with that, the State would like to publish State's Exhibit No. 191,  
23 which is Call No. 5231998. Permission to disseminate the transcripts.

24 THE COURT: You may.

25 MS. LEXIS: And we are going to publish.

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[Audio played.]

MS. LEXIS: That concludes the audio portion of State's Exhibit No. 191. May I retrieve the transcripts from the jurors?

THE COURT: Yes, you may.

MS. LEXIS: And while they're getting that together, Your Honor, pursuant with the court's order concerning the admission of the transcripts as approved by the court, I would like to admit State's Proposed Exhibit 193, 194 and 195, which are the redacted transcripts just given to the jury.

MS. MACHNICH: No further objection beyond --

THE COURT: Yeah. It's admitted without waiving the prior discussion and objections of the parties.

[State's Exhibit Nos. 193, 194, and 195 admitted.]

MS. LEXIS: Thank you. So permission to approach the detective with what's been previously marked --

THE COURT: You may.

MS. LEXIS: -- and now admitted 193, 194, and 195.

BY MS. LEXIS:

Q Detective, the jurors have already heard it, but there's just a detail that we need to put on the record. Okay?

A Yes.

Q Concerning State's Exhibit No. 193, the Call No. 52215429, what was the date and time of that call?

A It says 5-28-2016, time 1816 hours.

Q Okay. This was the first call that we listened to?

A It was.

1 Q State's Exhibit No. 194, the call labeled 52229515, the second call  
2 listened to by the ladies and gentlemen of the jury, what was the date and time of  
3 that call?

4 A Again, 05 -- excuse me 05-29-16, the time is 1202 hours.

5 Q Thank you. And State's Exhibit No. 195, as it relates to  
6 Call No. 52231998, the third call listened to by the jury, what was the date and  
7 time of that call?

8 A 05-29-16, 0827.

9 Q Okay. So 5-29-2016 at 8:27 a.m.?

10 A Yes.

11 Q Detective, in that particular call, in the one -- the third one that the  
12 ladies and gentlemen of the jury heard, the defendant makes reference to an  
13 individual by the name of Dame?

14 A Yes.

15 Q Do you recall that?

16 A I do.

17 Q Okay. At some point as this case has progressed, were you able to  
18 identify the person shown in State's Exhibit No. 186 --

19 MS. LEXIS: Oops, excuse me, may we please have the ELMO?  
20 Thank you, Mr. Dickerson. Thank you, Madam Court Reporter.

21 BY MS. LEXIS:

22 Q State's Exhibit No. 186, were you able to identify the other individual,  
23 the one in the white top, as Damian Traylor?

24 A Yes.

25 Q And is that who you believed the defendant to be referring to when he

1 makes reference on the jail calls?

2 A Yes.

3 Q The defendant talks about pieces to a 27; what is he referring to?

4 A A Glock 27.

5 Q Which was recovered in Apartment 218?

6 A Yes, ma'am.

7 Q Detective, I forgot to ask you this, but we indicated -- or you've already  
8 testified that you had the opportunity to interview Mr. Valentine; was that on  
9 May 28th, 2017, at approximately 10:45 a.m.?

10 A Yes, ma'am.

11 Q Did that happen at the station?

12 A Yes, he was.

13 Q Okay. So I asked you about the hand that he uses, guns, and the car.  
14 I did forget to ask you one thing.

15 During that interview, did the defendant indicate to you when it was  
16 that he became aware of police presence?

17 A He told me he was sleeping, he originally said.

18 Q So when did he become aware, when you all knocked -- when you  
19 woke him up?

20 A When we walked in and announced ourselves, yes.

21 Q When you announced yourselves, did the defendant get up from the --  
22 from the bedroom and meet you?

23 A No, he did not. He stayed where he was at.

24 Q Okay. So you first made contact with him in the room?

25 A Yes.

1 Q Okay. And he indicated to you during his statement that that was  
2 when he first became aware of the police?

3 A Yes.

4 Q When you made contact with him in the bedroom?

5 A In the bedroom.

6 MS. LEXIS: Court's brief indulgence.

7 I have no more questions for Detective Majors. Thank you.

8 THE COURT: Do you need any water or are you good there?

9 THE WITNESS: No, sir.

10 THE COURT: Okay. Cross-examine.

11 MS. MACHNICH: Thank you.

12 **CROSS-EXAMINATION**

13 BY MS. MACHNICH:

14 Q Okay. Place to start -- okay. Detective, hi.

15 A Hi. Good morning. Afternoon, actually.

16 Q Yeah, definitely afternoon.

17 A It's all blended in together.

18 Q I had to check, too, Monday. All right.

19 So you testified on direct that you been working for the Las Vegas  
20 Metropolitan Police Department for 16 years?

21 A 16 years, yes.

22 Q So 10 years as a detective?

23 A Yes.

24 Q And would you say that you've handled, as a detective, thousands of  
25 cases, hundreds?

1           A     I've handled a lot of cases. I hate to give a number out there, because  
2 I wouldn't want it to be used against me. So I've handled a lot of cases involving  
3 different types of crimes.

4           Q     Okay. And so you've completed a lot of reports in your time?

5           A     Yes.

6           Q     So you know the importance of keeping a thorough report in the case?

7           A     100 percent agree with you.

8           Q     All right. So in this case, would you say that you completed a thorough  
9 report?

10          A     In this case?

11          Q     Yes.

12          A     Yes.

13          Q     Okay. Now, when we're referring back to -- and this is sort of the  
14 beginning of your direct, so would it surprise you to learn that you don't mention  
15 the fact that a showup ID form with the statement was ever done in this case with  
16 Mr. Darrell Faulkner?

17          A     For which -- you mean in my actual -- my arrest report?

18          Q     Yeah.

19          A     I may have not put that in my report, but --

20          Q     Okay. Do you recall if you put that in your report?

21          A     I don't recall.

22          Q     Okay. Would it refresh your recollection to review your report with  
23 regard to mentioning whether showup ID forms were completed for the various  
24 witnesses?

25          A     Yes.

1 Q All right.

2 MS. LEXIS: No objection.

3 BY MS. MACHNICH:

4 Q I'll direct your attention to this section right here.

5 A Okay.

6 Q Just let me know when you're done.

7 A You want me to go straight to Darrell Faulkner's statement?

8 Q Well, just take a look at that whole section --

9 A Okay.

10 Q -- so I can ask you questions.

11 A Okay. Yes. I stated 0917 hours I conducted a showup with Darrell

12 Faulkner, which I updated in CAD.

13 Q Okay. Thank you, sir.

14 A Okay.

15 Q I understand that's what you stated. But it would be a true statement

16 that nowhere on this report did you state that you completed or he had completed

17 an LVMPD showup witness instruction and statement?

18 A That's true.

19 Q All right. But it would be true to state that it is specifically stated on

20 here that one was completed, the showup witness instructions and statement,

21 with Jordan Alexander?

22 A Yes.

23 Q And with Lazaro Bravo-Torres?

24 A Okay, yes.

25 Q Yes. And with Rosa Vazkuez?

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1 A Yes.

2 Q Okay. And with Santiago Garcia?

3 A Yes.

4 Q Okay. And it's specifically states showup form was completed?

5 A Yes.

6 Q Okay. But for Mr. Faulkner, a showup form was completed?

7 A Yes.

8 Q But it was not memorialized on your report in that manner?

9 A That's true.

10 Q And is that because it had already gone missing by this time?

11 A No. It's a -- you have a dynamic scene. You have -- well, excuse me,

12 I did. We had about seven different scenes, different witnesses, and trying to put

13 everything together, it is possible I made a mistake. I didn't put it in there.

14 That's -- that literally took us the whole day. That was my entire shift. So it is

15 possible that I made a mistake.

16 Q Okay. And then it did not end up written in your report and it did not

17 end up booked into evidence or scanned in OnBase?

18 A All the stuff that -- yes. But all the stuff that I received, I put into

19 OnBase. So why it didn't get put into OnBase, I don't have an answer for you. I

20 did do it, though. And I specifically updated in CAD because of that reason.

21 Q All right. Also, would it -- well, again, going to the thoroughness of

22 your report, would it -- did you include the name of the second landscaper at the

23 Santiago Garcia?

24 A I wasn't aware of a second landscaper. It wasn't brought to my

25 attention until much later.



1 Q So his name doesn't appear in your report --

2 A No.

3 Q -- because you didn't know?

4 A He left -- he wasn't at the scene when I was there.

5 Q All right. And also, would it surprise you to learn -- well, I guess it  
6 probably wouldn't, so I'll rephrase that.

7 You also didn't include the name of Damian Traylor anywhere in your  
8 report, correct?

9 A No. Again, it wasn't until later I found out who he was.

10 Q Okay. He was just -- but he was another man associated with the  
11 apartment?

12 A He was associated with the apartment, yes.

13 Q Okay. But he wasn't written down as being involved or associated with  
14 this case at all?

15 A Every time a call came out -- and these calls were, as you heard, they  
16 were spread out 10 minutes apart from each other. My job, I was going to each  
17 scene, contacting witnesses, victims and just going right down the line. So the  
18 officers that were at the scene who actually made contact with him would have  
19 better information. By the time I got there, I wasn't able to get that information  
20 from them. So we were taking a dynamic scene and trying to make it static.

21 Q Okay. But I mean, you are aware, and I'm showing you what has been  
22 previously marked an admitted as State's Exhibit 186 that --

23 A Yes.

24 Q -- Damian Traylor, the man in the white shirt, was part of this showup  
25 process for --

1 A Yes.

2 Q -- at least an hour?

3 A Yes.

4 Q Okay.

5 A And again, I wasn't -- I was only there for one showup --

6 Q Okay.

7 A -- when he was there. I wasn't there for the rest of them.

8 Q So you didn't have to memorialize his name?

9 A No.

10 Q Okay. And also, it's fair to say you didn't tape or cause to be taken any

11 photos of him that weren't a still from a body cam?

12 A No, ma'am.

13 Q Okay. All right. Let's move on from there. Let's go back to Mr. Bass.

14 You spoke with Mr. Bass on the day of his robbery?

15 A Yes, ma'am.

16 Q All right. He told you his wallet and his gold chains were taken?

17 A Yes, ma'am.

18 Q You would characterize gold chains as something that can be easily

19 pawned or sold?

20 A Yes.

21 Q All right. Did you check any of the local pawn shops for the --

22 A I didn't. No, I did not.

23 Q Okay. Did you cause any patrol officers or detectives to look for

24 those?

25 A Well, the problem with gold chains, they have to be really identifiable to

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1 find them in pawn. I've dealt with pawn, and his chains were pretty generic. So I  
2 didn't --

3 Q Okay. So you didn't look?

4 A I did not look, because they were -- the description was very generic.

5 Q Okay. Now, when you first interviewed Mr. Bass, you actually did a full  
6 recorded statement with him, correct?

7 A Yes, ma'am.

8 Q Okay. And you didn't have a tape recorder or -- and you didn't go  
9 down to the station?

10 A No. I tape recorded him right there in the car.

11 Q You used a phone, right?

12 A No. I use a tape recorder.

13 Q Oh, it was a tape recorder?

14 A Yeah. That was transcript -- transcribed later.

15 Q Absolutely. So you had -- that's something you carry with you at all  
16 times?

17 A Yes, ma'am.

18 Q All right. Now, you later returned to speak to Mr. Bass again, correct?

19 A I did.

20 Q Okay. And this time, you were going through a lineup with him?

21 A I did.

22 Q All right. And you did not record that interaction with him at all?

23 A It's not required that we record that, the photo lineup, yeah.

24 Q But you had a whole conversation and interaction with him?

25 A I did.

1 Q Okay. And it's not recorded?  
2 A No.  
3 Q Okay. Now --  
4 MS. MACHNICH: Court's indulgence. We'll find that later, I guess.  
5 Sorry about this.  
6 MS. LEXIS: What is it that you're looking for? Maybe I can help you.  
7 MS. MACHNICH: The lineup. I don't know where you put them.  
8 MR. GASTON: Tegan.  
9 MS. MACHNICH: That will work. So I'd like to have this marked.  
10 BY MS. MACHNICH:  
11 Q I am going to show you now what has been marked for identification  
12 as --  
13 MS. LEXIS: May I see what she is bringing to the witness?  
14 MS. MACHNICH: I thought you already saw it.  
15 MS. LEXIS: Okay.  
16 BY MS. MACHNICH:  
17 Q All right. You recognize Defense Exhibit J as a copy of the lineup that  
18 was showed to Mr. Bass?  
19 A Yes, ma'am.  
20 Q And this is the copy of a lineup where -- well, it's a photocopy of a  
21 lineup --  
22 A It is.  
23 Q -- where there's a circle around one of the individuals?  
24 A That's correct.  
25 Q Okay. Now, this greenish sort of light tinge to it --

1 A Yes.

2 Q -- this is the way that it looked when you gave it to him?

3 A I specifically made it that way.

4 Q Okay. And the greenish tinge?

5 A It's supposed to come off as grey, but yeah, I specifically made it that

6 way.

7 Q Okay. All right. So this is a fair and accurate representation of the

8 lineup that you gave to Mr. Bass?

9 A Yes, ma'am.

10 Q Okay. And -- all right.

11 MS. MACHNICH: Your Honor, I would, at this time, move into

12 evidence Defense Proposed Exhibit J.

13 MS. LEXIS: Other than it's a duplicate of what's already been

14 admitted.

15 THE COURT: We'll allow them to have it.

16 MS. LEXIS: I have no objection.

17 THE COURT: All right. Exhibit J is admitted.

18 [Defendant's Exhibit No. J is admitted.]

19 MS. MACHNICH: Thank you.

20 BY MS. MACHNICH:

21 Q All right. So fair to say, with different colors of photocopying, different

22 features are emphasized or not emphasized?

23 A Okay.

24 Q Is that fair to say?

25 A Yeah. Yes.

1 Q Okay. Different things show up on different type of photocopy?

2 A Yes.

3 Q You commented that you just -- you had it --

4 A I specifically made it that way.

5 Q Yes.

6 A Would you like to know why?

7 Q Sure. Why?

8 A Okay. So Mr. Valentine, all we had was his driver's license picture and  
9 it had the blue background. Everybody else had a regular background. And I  
10 didn't want Mr. Bass to specifically pick Mr. Valentine and single him out. So I  
11 made it gray so everybody looked the same.

12 Q Great. All right. So the information that you had from Mr. Bass was  
13 that it was a 20-something black male adult?

14 A Yes.

15 Q Okay. With an afro?

16 A Yes.

17 Q Okay. And he didn't mention any visible neck or face tattoos or  
18 anything like that?

19 A No. Mr. Bass?

20 Q Right.

21 A He was sitting in a car when it happened.

22 Q Right. But he didn't mention --

23 A No.

24 Q Okay. So let's take a look at this lineup. You presented this lineup  
25 here to Mr. Bass?

1           A     Yes, ma'am.

2           Q     Now, the color scale, is it fair to say, on ELMO is a little bit off from the

3 actual color that I showed you? This is showing up as a different color on the

4 screen?

5           A     Looks the same to me.

6           Q     Okay. We'll show it in a minute. You can see in this picture that there

7 are six individuals, and you believe these individuals look like Mr. Valentine?

8           A     Yes.

9           Q     Okay. Including the man with the neck tattoo in Position No. 5?

10          A     Those are the best pictures I could pick that wouldn't pick toward

11 anybody. Mr. Valentine had a tattoos, as well.

12          Q     I understand that. But he does not -- and my question was neck and

13 face tattoos.

14          A     Okay.

15          Q     So --

16          A     So.

17          Q     I'll move on from there. And you also had the information from

18 Defense Exhibit I and J, the information you had from Mr. Bass was that the

19 person involved had a short afro?

20          A     Whatever it says on CAD and my interview, I'd have to repeat it. I had

21 several victims give me different descriptions. I believe he said it was short. It

22 was short hair. I'd have to look at it.

23          Q     A short afro?

24          A     Can I -- can I look at it before I give you a definite yes, so I don't --

25          Q     Well, this was a question from direct, so --

1 A Okay.

2 Q Let me see here. Yep. Here we go. Refresh your recollection to see

3 a clean copy of the first page of the CAD?

4 A Absolutely.

5 Q All right.

6 A So --

7 Q I'm not asking for the whole description, I'm just asking, the person that

8 you were looking for, to your knowledge, was a man with a short afro?

9 A Yes. Excuse me, do you want me to read what it says?

10 Q I don't.

11 A Okay.

12 Q I just want you to answer the question.

13 A Yeah, back male adult, short afro.

14 Q Thank you. Appreciate it. There's the lineup. You also learn in the

15 course of your investigation that Mr. Bass noticed a car involved in this robbery?

16 A Yes.

17 Q And it was initially reported as a two-door Kia?

18 A White -- white vehicle.

19 Q White Kia-type vehicle?

20 A Yes.

21 Q Okay. And then he later clarified, Kia, Fiat, right?

22 A Correct.

23 Q All right. And he also reported to you that it was a red-and-white

24 dealer plates on it, right?

25 A I don't recall. I'm not sure. I know they were temporary plates.

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1 Exactly the color --

2 Q Okay. Anyway, would it surprise you to learn that his position was they  
3 were red-and-white dealer plates?

4 A Yes. Because I don't remember.

5 Q That's fine. Did you go and try to find any video in the area?

6 A Of Mr. Bass's incident?

7 Q Yeah.

8 A No.

9 Q You didn't?

10 A No. I didn't, no.

11 Q So you didn't go to an EZ Pawn?

12 A I had officers go there.

13 Q Okay. So you didn't personally go and try to find video?

14 A I -- I had -- I directed officers to look for different videos in different  
15 areas and stuff, so I don't remember.

16 Q Okay.

17 A This was from a year ago, so I do apologize. Mind's not -- remember  
18 every detail.

19 MS. LEXIS: Your Honor, may we approach on this issue?

20 THE COURT: Uh-huh.

21 [Bench conference transcribed as follows.]

22 THE COURT: Is that [indiscernible] on whether he went to a pawn?

23 MS. LEXIS: There was an agreement -- there was an agreement by  
24 the parties that the officers would not testify, whoever -- whichever officer it was,  
25 he went to the EZ Pawn and located a video.

1 THE COURT: Okay.

2 MS. LEXIS: Would not testify to that. I'm just -- I'm wondering -- may  
3 I finish? I'm wondering as to where Ms. Machnich is going with this, because I  
4 just don't want there to be a false impression left on the jury, like he did not look  
5 for video when we know video existed, it's just that it -- it was not located.

6 THE COURT: I wasn't aware of the stipulation.

7 MS. MACHNICH: Well, it was that there would be --

8 THE COURT: Not too loud.

9 MS. MACHNICH: There would be no best evidence violation if we did  
10 not talk about the contents of the video. And it's already been crossed and I do  
11 not intend to go into the content of the video, other than the fact that it was  
12 impounded. And at this point, other than the fact that he says he personally did it.  
13 He personally impounded a video that he believed was relevant to the case and  
14 it's not here. And it becomes more relevant given the fact that now we have a  
15 missing showup, as well.

16 MR. GASTON: So it supplements [indiscernible] video of the car and  
17 this guy impounded it, and now we lost that, too.

18 MS. LEXIS: Okay. But you can't --

19 MS. MACHNICH: Am I going --

20 MS. LEXIS: There's testimony, also there's various people who've  
21 seen this video who can testify to what's contained therein, and I don't think they  
22 get to pick and choose. They can't say it's a violation and -- and we're not going  
23 to use it, but for -- I mean, it's a white car. I mean, all of the -- the EZ Pawn  
24 person who saw it, the police officers who saw it say it's a white car matching the  
25 description of the suspect. They can't leave a false impression on the jury that

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1 that didn't exist if they're going to go down this road.

2 MS. MACHNICH: Actually, I'm not trying to get into what's on the  
3 video. Because that's a best evidence violation. It's the handling of evidence in  
4 this case that I want --

5 THE COURT: You just want -- what -- what are you trying to get in?

6 MS. MACHNICH: That in his report he said that he went down and  
7 spoke with the person, impounded a video [indiscernible] the case --

8 THE COURT: And there wasn't a video that existed?

9 MS. MACHNICH: -- and it was no longer available to produce to the  
10 defense.

11 MR. GASTON: He says he impounded it [indiscernible].

12 THE COURT: Seems relevant.

13 MS. MACHNICH: I'm not getting into the content, which was --

14 THE COURT: Just don't violate -- yeah. Don't get into -- I mean, if  
15 you --

16 MS. MACHNICH: I won't get into content.

17 THE COURT: -- if someone wants to get into content, you can  
18 introduce the video.

19 MR. GASTON: But the video doesn't exist anymore.

20 MS. LEXIS: They can't lead --

21 THE COURT: Well, that's -- okay. That's not -- nothing -- what do  
22 you want me to do about that?

23 MS. MACHNICH: Right now, that's no problem.

24 MR. GASTON: That's the point we're trying to make, is he impounded  
25 this video.

1 THE COURT: Well, then make your point.  
2 MS. MACHNICH: That's my point.  
3 THE COURT: Okay.  
4 MR. GASTON: Thank you.  
5 MS. LEXIS: I just don't want them to be able to leave a false  
6 impression on the jury, either, with that in mind. So.  
7 THE COURT: False impression of what? That the video disappeared  
8 and that's the truth.  
9 MS. LEXIS: Right. Or that he didn't look at it, he didn't know anything  
10 about it, I mean, it does -- it does match the description of the suspect --  
11 THE COURT: Oh, you can't -- you can't give a false impression that  
12 the video wouldn't corroborate something that he would say.  
13 MR. GASTON: We're not talking about the content at all.  
14 MS. MACHNICH: Correct. No, we're not talking about the content.  
15 THE COURT: Okay. Don't give a false impression.  
16 MS. MACHNICH: That's it. Okay.  
17 THE COURT: All right.  
18 [End of bench conference.]  
19 THE COURT: Re-raise the point if it happens.  
20 MS. LEXIS: Of course.  
21 MS. MACHNICH: Thank you, Your Honor.  
22 BY MS. MACHNICH:  
23 Q Okay. So you just stated that you did not ever go to an EZ Pawn to  
24 get a video?  
25 A Ma'am, I don't remember. It was a year -- over a year ago, so I don't

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1 remember.

2 Q Okay. I am going to -- would it refresh your recollection to show you a  
3 copy of your report in this case?

4 A Please.

5 Q Okay. Now, I'm showing you page 4 of 7 of the report.

6 THE COURT: You can show him.

7 BY MS. MACHNICH:

8 Q All right. Sir, I'm specifically asking that you review this and then hand  
9 it back to me and then we can have discussion. Okay?

10 A Okay.

11 Q I'm not asking you to read it.

12 A Okay.

13 Q Thank you. Out loud.

14 A Okay. I see. Okay. All right.

15 Q So let's discuss that paragraph briefly. So did you, in fact, go to an EZ  
16 Pawn?

17 A According to my report, yes, I did.

18 Q Okay. And you spoke with someone at the EZ Pawn?

19 A Yes.

20 Q About a video that might pertain to the case?

21 A Yes.

22 Q All right. And you actually impounded a copy of this video?

23 A It looks as if so.

24 Q Yep. And then it went missing, much like the showup?

25 A It went missing when, after impounded?

1 Q That's what I'm suggesting, yes, sir.  
2 A It was impounded and was missing?  
3 Q Well, you obtained a copy of the video, correct?  
4 A Okay.  
5 Q Yes?  
6 A Yes.  
7 Q Okay. And then the video no longer exists?  
8 A I -- like I said, it was a year ago, and I don't remember.  
9 Q Okay.  
10 A I don't know what happened to it. I did go there, obviously. I wrote it in  
11 my report, but I don't know where it's at.  
12 Q Okay. Would it surprise you to learn that it appears to have gone  
13 missing just like the showup ID form and is --  
14 MS. LEXIS: Your Honor, I would object. I would ask to approach and  
15 revisit my previous objection.  
16 THE COURT: Well, the statement, you're making an argumentative  
17 statement, right. You're comparing one piece of evidence to another piece of  
18 evidence and trying to convince the jury of something. So the jury will disregard  
19 the argumentative question. Rephrase the question. Okay. I mean, the question  
20 is did it go missing? I think that's already asked and answered. All right.  
21 BY MS. MACHNICH:  
22 Q So the video went missing?  
23 A Yes.  
24 Q Okay.  
25 THE COURT: All right.

1 BY MS. MACHNICH:

2 Q Let's talk about some of the other victims in this case. You interviewed  
3 Darrell Faulkner?

4 A Yes.

5 Q You discussed that with the State on direct?

6 A Yes.

7 Q Okay. And he gave you a description -- he gave a description of the  
8 man who robbed him?

9 A Yes.

10 Q And you went over a lot of that on direct, as well?

11 A Yes.

12 Q Specifically, he described a man wearing light blue jeans and blue  
13 tennis shoes?

14 A I think I also said black shorts, too, was in that. I believe that's what I  
15 said.

16 Q Of the --

17 A In addition to -- or was it black shirt? Because I know I corrected  
18 myself. I said black shirt and blue jeans, my bad, sorry.

19 Q Okay. So you recall him reporting --

20 A Yes.

21 Q -- black shirt or dark-colored t-shirt?

22 A Yes.

23 Q Light blue jeans?

24 A Yes.

25 Q Blue tennis shoes?

1 A Yes.

2 Q And he actually -- because this was also addressed on direct, he

3 actually described the gun as a large-frame firearm?

4 A Yeah. Do you have a question? I mean, what are you asking me?

5 Q That was a question.

6 A Yeah.

7 Q He also described the --

8 A Yes.

9 Q -- firearm as a large-frame firearm, didn't he?

10 A Okay.

11 Q Did he?

12 A I --

13 Q I mean, I can't have you answering okay.

14 A No. I understand what you're saying. I -- all I remember was a black

15 gun.

16 Q Okay. Would it refresh your recollection -- well, actually, we'll just do

17 this this way.

18 Where's the statement?

19 Do you recall interviewing Mr. Faulkner on the 28th at 722 hours?

20 A Okay. Yes.

21 Q Okay. And you asked him questions about identification information in

22 this case?

23 A Okay.

24 Q Okay. Yes?

25 A Yes.



1 Q Okay.

2 THE COURT: You have to answer yes or no, because okay doesn't --  
3 just signifies --

4 THE WITNESS: Okay.

5 THE COURT: -- you understand the question.

6 THE WITNESS: Yes.

7 THE COURT: Okay.

8 THE WITNESS: Yes.

9 BY MS. MACHNICH:

10 Q And you specifically asked Mr. Faulkner, Can you describe the gun,  
11 yes?

12 A Yes.

13 Q Okay. And he responded:

14 It was a Glock with night sites on it.

15 Yes?

16 A Yes.

17 Q Comport with your memory still?

18 A Yes.

19 Q Okay. And then you asked:

20 Small frame? Big frame?

21 Yes?

22 A Yes.

23 Q Okay. And Mr. Faulkner responded:

24 It was a big frame, I would say it was .40-caliber.

25 Yes?

1 A Yes. And the gun was a .40-caliber.

2 Q Okay.

3 A Okay. Yes.

4 Q So it's fair to say that Mr. Faulkner reported the firearm very  
5 specifically as a large-frame handgun?

6 A That's what you're saying, but he also described it as a .40-caliber, too.  
7 And people under duress sometimes see things under stress bigger or smaller,  
8 you know. It depends.

9 Q So memory is not perfect under stress, is it?

10 A No, ma'am.

11 Q Now, you also spoke -- well, you encountered Ms. Faulkner that same  
12 day?

13 A I did.

14 Q You did not interview her because she was on the narcotic  
15 Lorazepam?

16 A She was on a narcotic, yes.

17 Q Did you ever learn which narcotic?

18 A I did, but I don't remember now.

19 Q You were concerned that the narcotic would influence her ability to  
20 remember, communicate, and et cetera?

21 A Yes.

22 Q All right. Now, you stated in your report that you had planned to go  
23 back and speak with her later?

24 A I did. I did state that.

25 Q But you never went back to speak with her later?

1           A     I did not.

2           Q     And your testimony here today was because you thought she was too  
3 scared for her to go -- to go back?

4           A     Yes.

5           Q     Would it surprise you to learn that she was sort of waiting for you to  
6 come back to interview her?

7           A     Yeah. Actually that would surprise me.

8           Q     All right. Let me see here, now, let's turn our attention to the  
9 apartment in question.

10          A     Okay.

11          Q     Okay. Now, as discussed on direct, you caused everything within the  
12 apartment that you believed to be material to the investigation to be impounded?

13          A     Yes.

14          Q     And that included some cards, like credit, debit cards and ID cards?

15          A     Victim cards, victim identification, yes.

16          Q     And victim cell phone?

17          A     Yes.

18          Q     Okay. And you briefly discussed that black iPhone; do you recall that  
19 line of questioning?

20          A     Yes.

21          Q     Okay. And you did not cause that to be impounded?

22          A     No.

23          Q     And you stated you would not have impounded that if it did not  
24 match -- if it wasn't described by one of the victims?

25          A     Yes.

1 Q Okay. Let me see here, to your knowledge, that black iPhone doesn't  
2 match the description of any given by the victims in this case?

3 A From the description that I was given at the scene, we recovered  
4 iPhones that were missing that described that. I don't recall a black iPhone that  
5 was missing.

6 Q Okay. All right. Now, let's talk about what was not impounded at the  
7 scene. You did not impound a large quantity of cash, did you?

8 A No.

9 Q Not like \$600-plus of cash?

10 A Would you like to provide me a property report? Because, I mean,  
11 you're asking me direct questions from over a year ago. I don't remember,  
12 ma'am.

13 Q So you just don't know if you impounded any cash?

14 A I don't recall cash, no.

15 Q Okay.

16 A The most important thing was the gun and the victim identification  
17 cards and the IDs.

18 Q All right.

19 A I mean, credit cards.

20 Q So fair to say that you did not impound any clothing in this case?

21 A No.

22 Q Okay. So that would include the dark-colored pants or the light blue  
23 jeans?

24 A Which are we talking about, that were at the scene?

25 Q No. That the robber was allegedly wearing.

1 A No, no. Not at the scene, no.

2 Q And no blue tennis shoes?

3 A No.

4 Q And no dark-colored shirt?

5 A No.

6 Q Okay. Now, let me see what else. You also did not impound any gold

7 chains from Mr. Bass's robbery?

8 A No.

9 Q Fair to say, in fact, you didn't recover anything from Mr. Bass's

10 robbery?

11 A No.

12 Q All right. And you didn't impound Rosa Vazkuez's purse?

13 A I don't believe we found it.

14 Q All right. It was not there. And you did not impound or locate

15 Ms. Alexander's wallet?

16 A Not that I remember.

17 Q Okay. And just as the State covered on direct, you were the one who

18 was in charge of what got fingerprinted and what did not get fingerprinted?

19 A Yes, ma'am.

20 Q And you were in charge of what got ran for DNA and did not get run for

21 DNA?

22 A Yes.

23 Q So the only items you had processed for fingerprints were -- well, the

24 only item, large item, the car?

25 A Okay.

1 Q Yes?

2 A The car was processed for fingerprints, yes.

3 Q Yes. And then the only item that you had processed for DNA was the

4 gun?

5 A Yes.

6 Q Okay. So none of the other items that were impounded as part of this

7 case were tested for DNA?

8 A Which items are those? Which ones are you talking about, just any

9 of?

10 Q The cards, the phones or the cartridges?

11 A No. No, ma'am.

12 Q None of them?

13 A No.

14 Q Okay. And that was your decision?

15 A Yes, it was.

16 Q An you stated on direct because it just wasn't a priority?

17 A It's the department's priorities. They're not going to -- it's backlogged

18 six months, and we've got to stick to the most important things.

19 Q So it was not a priority for you?

20 A Yes. That's correct.

21 Q Okay. Let me see here. When you did submit for fingerprints on the

22 white car, fingerprints did return to Mr. Valentine?

23 A Yes.

24 Q Okay. So that --

25 A On the inside.

1 Q -- means in some say he was associated with that car?

2 A Yes.

3 Q You also had fingerprints returned to a Bobby McCoy?

4 A Yes.

5 Q All right. And Bobby McCoy, did you ever pull a photograph of Bobby  
6 McCoy to see what he looked like?

7 A No, I did not. And there was a reason for that.

8 Q All right. And did you ever pull Bobby McCoy's -- or having anything  
9 tested to compare with Bobby McCoy's DNA?

10 A I did not follow up with Bobby McCoy because his fingerprints were  
11 found on the outside, not the inside. And that evidence doesn't carry weight in  
12 court, as far as anybody has access to the outside, and that is why.

13 Q Okay. All right. So would it surprise you to learn that Bobby McCoy is  
14 also younger, 20-something black male adult?

15 A Yes.

16 Q It would surprise you?

17 A No. I mean, yes, I understand he's a black male adult. I understand  
18 he's in his 20.

19 Q And that he's 5-10?

20 A Yes.

21 Q All right. You had also discussed on direct that a woman named  
22 Omara was detained?

23 A She was.

24 Q All right. And she was placed into handcuffs?

25 A Because she tried to leave.

1 Q All right. So she was not allowed to leave?  
2 A Yes. We weren't sure how much she was involved.  
3 Q Okay. And you did a pat-down or caused a pat-down to be done of  
4 Omara McBride?  
5 A For weapons.  
6 Q Right. And you stated on direct that she was wearing very tight  
7 clothing?  
8 A Yes.  
9 Q But it was important to do the pat-down anyway, because you wanted  
10 to make sure that there were no weapons, because your life depends on that?  
11 A Knives, guns, yes, ma'am.  
12 Q Yeah, okay. So nothing was located on her?  
13 A No.  
14 Q Now --  
15 MS. MACHNICH: Court's indulgence.  
16 Q The car in this case was not ultimately towed, was it?  
17 A Say that again?  
18 Q The car, the white car?  
19 A Yes.  
20 Q Was not ultimately towed?  
21 A I don't recall.  
22 Q Okay.  
23 A I don't think it was. I think it was processed and left at the scene.  
24 Q Because the owner was at the scene to be left with the car?  
25 A The vehicle was just bought, but we weren't able to get any of that



1 information to show who was ownership, but it was legally parked so we could  
2 leave it and process it the way it was.

3 Q Okay. Did you ultimately find out that the car was sold to Omara  
4 McBride?

5 A I did not.

6 Q Okay. You did not?

7 A She told me verbatim that she bought it, but wasn't able to get any  
8 additional paperwork to support that. It was brand new.

9 Q Okay. Did she have the car keys?

10 A I don't remember.

11 Q Did you locate the car keys?

12 A Going back to yes, I'm the case agent. Yes, I'm responsible for  
13 everything. We also had different scenes, and I wasn't there for that portion.

14 Q So you don't know who had the car keys?

15 A I do not.

16 Q That's fair.

17 MS. MACHNICH: Court's indulgence.

18 Nothing further. Pass the witness.

19 THE COURT: Redirect, Ms. Lexis?

20 MS. LEXIS: Yes, Your Honor.

21 **REDIRECT EXAMINATION**

22 BY MS. LEXIS:

23 Q Detective, do you remember some questioning by Ms. Machnich  
24 concerning the EZ Pawn and video from that particular location?

25 A I do.

1 Q Okay. And initially do you recall telling her you don't have an  
2 independent recollection of that particular video?

3 A I said that.

4 Q Okay. I want you to think back on this case; do you recall a video file  
5 being corrupted in this case?

6 MS. MACHNICH: Objection --

7 MR. GASTON: Leading.

8 MS. MACHNICH: -- and also may we approach?

9 THE COURT: Well, how else is she supposed to introduce the issue?

10 MS. MACHNICH: Right. No, I don't have an issue with that, Your  
11 Honor. There's just -- that was never provided, the idea that there was a  
12 corrupted file was never provided to us. So this is all new.

13 THE COURT: Well, all right. Let's see where it goes. Let's find out  
14 what there is about this.

15 MS. MACHNICH: Okay.

16 THE COURT: You're entitled to know if there was a corrupted file and  
17 what happened to it.

18 MS. MACHNICH: Yes, absolutely.

19 BY MS. LEXIS:

20 Q Do you recall whether or not a video file from this particular case had  
21 come up corrupted?

22 A I don't remember, I apologize. I do not remember. I know I said in my  
23 report I went there and I impounded it, but I don't remember if the video worked  
24 or -- yeah.

25 Q Okay. Ms. Machnich asked you some questions concerning Bobby

1 McCoy.

2 A Yes.

3 Q Do you remember that?

4 A Yes.

5 Q Her first question was whether or not you looked or pulled a photo of  
6 Bobby McCoy; you indicated no, correct?

7 A No. Yes?

8 Q And she kind of, through her questioning, got out the fact or got you to  
9 agree that Bobby McCoy was a black male adult; do you remember that?

10 A I remember that, yes.

11 Q Now, you hadn't pulled a picture of Bobby McCoy, right?

12 A I have not.

13 Q Okay. So do you know for a fact that he's a black male adult?

14 A No.

15 Q Okay.

16 A I'm taking it on her word, that's what she said.

17 Q Okay. So when she was testifying?

18 A Yes.

19 MS. MACHNICH: Oh, hey, objection. That completely misconstrues  
20 what cross-examination is, and the witness did testify to that.

21 THE COURT: Yeah. Attorneys don't testify. Attorneys can -- they  
22 ask questions, and questions by the attorneys is not evidence. It's just to be used  
23 by you to provide context to the witness's answers. Right. So anything  
24 Ms. Machnich says is not testimony, it's merely introducing information to try to  
25 get assent from the witness. Okay?

1 MS. MACHNICH: And move to strike Ms. Lexis's statement that there  
2 was testimony --

3 THE COURT: I think I just clarified it's not testimony. I just clarified  
4 it's not testimony.

5 MS. MACHNICH: Thank you, Your Honor.

6 THE COURT: It's just proper cross-examination technique. All right.  
7 Let's continue.

8 MS. LEXIS: Thank you.

9 BY MS. LEXIS:

10 Q Do you recall Ms. Machnich asking you about the age of Bobby  
11 McCoy?

12 A Yes.

13 Q And she kind of got you to agree that it was, like, 20s?

14 A Yes.

15 Q You don't know that, do you?

16 A I don't, because I didn't pull a picture.

17 Q Ms. Machnich asked you about his height being 5-10.

18 A Again --

19 Q Do you recall that?

20 A No.

21 Q Okay. Do you know that his height is 5-10?

22 A I do not. Again, I did not pull the picture.

23 Q Okay.

24 MS. LEXIS: I have no more questions for this detective. Thank you.

25 THE COURT: Okay. Recross?

1 **RECROSS-EXAMINATION**

2 BY MS. MACHNICH:

3 Q So to this day, Detective, you've never seen a picture of Bobby  
4 McCoy?

5 A I have not.

6 Q So you have no idea what he looks like?

7 A I did not follow up with Bobby McCoy of his print on the outside of the  
8 vehicle.

9 Q Okay. So you have no idea what he looks like?

10 A I do not.

11 Q You have no idea what his descriptors are?

12 A No, ma'am.

13 Q Okay. And when you say you did, you were just --

14 A I was agreeing with you.

15 Q Okay.

16 MS. MACHNICH: I'm done.

17 MS. LEXIS: Briefly.

18 THE COURT: All right. Pardon me? Well, you've -- well, let's see,  
19 who started? Direct, cross, redirect, recross. We're done. It's the jury's turn. All  
20 right.

21 Jurors, any questions? Nothing. All right.

22 MR. GASTON: Looks like we have one. May we approach for the  
23 question?

24 [Bench conference transcribed as follows.]

25 THE COURT: Thank you. Let's take a look. Okay. All right. Here

1 you go.

2 MS. MACHNICH: That's fine.

3 THE COURT: You guys okay with those?

4 MS. LEXIS: Yes.

5 MS. MACHNICH: Yes.

6 [End of bench conference.]

7 THE COURT: All right. All right. Detective, these are questions from  
8 one of the jurors.

9 THE WITNESS: Okay.

10 THE COURT: And direct your answers to the jurors, if you can  
11 answer them.

12 THE WITNESS: Okay. Absolutely.

13 THE COURT: All right. Question: Was -- was the magazine ever  
14 recovered? If only -- if only two bullets? And then who did -- who did the gun  
15 belong to? (Serial numbers).

16 I think you understand the questions.

17 THE WITNESS: I do. I do. Ultimately I -- I apologize, I do not  
18 remember all the specific details of who the gun belonged to. The magazine, I  
19 believe, was not recovered.

20 Am I missing anything.

21 THE COURT: Something about he said, if only two bullets?

22 THE WITNESS: I -- the -- like, there's only two bullets?

23 THE COURT: Well, I guess they were -- they were -- wanted to know  
24 if the magazine was recovered, just two bullets, no magazine, right?

25 THE WITNESS: Right.

1 THE COURT: Is kind of the -- the question.

2 THE WITNESS: Yeah. The gun was --

3 THE COURT: And, you know, you [indiscernible].

4 THE WITNESS: -- in pieces. The gun was put in different places to  
5 conceal it from us.

6 THE COURT: All right. Next question: Where was Damian Taylor  
7 located?

8 THE WITNESS: Damian Taylor? Which -- I'm sorry, which one are  
9 we talking about? Damian Taylor, is that -- the one that was at the scene?

10 THE COURT: I can only -- I can only read the question as provided to  
11 me. If you can't answer it, I'll ask the parties if they want to, on these narrow  
12 issues, if you want to follow up.

13 MS. LEXIS: I do.

14 **FURTHER REDIRECT EXAMINATION**

15 BY MS. LEXIS:

16 Q The pieces of the firearm which were recovered was impounded,  
17 correct?

18 A Yes, ma'am.

19 MS. LEXIS: May I approach with 41 and 41A?

20 THE COURT: Yes, you may.

21 BY MS. LEXIS:

22 Q Sir.

23 A Yes.

24 Q Showing you State's 41 and 41A.

25 A Yes.

1 Q Are these the two pieces of the firearm located at Apartment 218?

2 A Yes, it was.

3 Q As it exists right now and as it's been impounded, is the magazine  
4 located therein?

5 A It's not in there.

6 Q Okay. So fair to stay, had the magazine been located, it would have  
7 also been impounded?

8 A That's correct.

9 Q As it pertains to the firearm?

10 A Yes.

11 Q Okay.

12 THE COURT: Anything else?

13 MS. LEXIS: Briefly.

14 BY MS. LEXIS:

15 Q There was a question about two bullets found. The two bullets  
16 located, okay, State's Exhibit No. 36, okay, two bullets contained therein; these  
17 are the two bullets found in the apartment, correct?

18 A Yes.

19 Q But the actual magazine wherein these bullets would have been  
20 placed [indiscernible] --

21 A It's not there.

22 Q Okay.

23 THE COURT: Anything else?

24 MS. LEXIS: Briefly.

25 THE COURT: Okay.



1 BY MS. LEXIS:

2 Q Detective, is it your testimony that you were never able to ascertain the  
3 owner of the firearm?

4 A That's true. We used to have a system to pull up these things and  
5 they've taken that system away.

6 Q People no longer have to register their guns?

7 A That's correct.

8 Q Their blue cards are not -- no longer required?

9 A That is correct.

10 MS. LEXIS: Nothing further. Thank you.

11 THE COURT: Yes, you may.

12 MS. MACHNICH: Just briefly.

13 **FURTHER RECROSS-EXAMINATION**

14 BY MS. MACHNICH:

15 Q The juror -- the juror question specifically addressed Damian Traylor.

16 A Okay.

17 Q So I'm referring you back to State's Exhibit 186. So Damian Traylor is  
18 standing next to --

19 A Yes.

20 Q -- Keandre Valentine in the showup?

21 A Yes.

22 Q Okay. Do you know where -- or did you locate Damian?

23 A I did not, but I've gotten word that -- what happened to him.

24 Q So through the course of the investigation, you learned that he was  
25 associated with the apartment, as well?

1 A Yes.

2 Q And was he located in the apartment?

3 A I wasn't there for that.

4 Q Okay. So you don't know?

5 A I don't know.

6 Q Okay.

7 MS. LEXIS: I do have some follow-up.

8 MS. MACHNICH: Whoa, I'm not passing the witness yet.

9 THE COURT: Okay. All right.

10 MS. MACHNICH: All right. Now we're done. Thank you. Pass the

11 witness.

12 THE COURT: Okay. Very good. I will allow the State, and then

13 defense gets the last word. This is, you know, an important topic, so I --

14 MS. MACHNICH: Of course.

15 THE COURT: And the juror question needs to be fully addressed.

16 MS. MACHNICH: Of course.

17 THE COURT: Go ahead.

18 **ADDITIONAL REDIRECT EXAMINATION**

19 BY MS. LEXIS:

20 Q Detective.

21 A Yes, ma'am.

22 Q Keandre Valentine.

23 A Yes.

24 Q You've testified that you were present when you and other detectives

25 made initial contact or entry into Apartment 218, correct?

1 A That is correct.

2 Q And you've indicated --

3 THE COURT: Let's just focus on Damian now.

4 MS. MACHNICH: Yeah.

5 MS. LEXIS: Correct.

6 THE COURT: Okay.

7 BY MS. LEXIS:

8 Q Keandre Valentine was the only individual located in the apartment  
9 upon first entry, correct?

10 A I was there. There was no one else inside the apartment.

11 Q Damian Traylor was not located in the apartment?

12 A No, he was not.

13 MS. LEXIS: Nothing further.

14 THE COURT: Okay. You want to follow up with that?

15 MS. MACHNICH: Yeah.

16 **ADDITIONAL RECROSS-EXAMINATION**

17 BY MS. MACHNICH:

18 Q Would it surprise you if another officer stated that Damian was actually  
19 inside the apartment?

20 A It would surprise me, but once again, I wasn't there for that when they  
21 made contact with him.

22 Q Okay.

23 THE COURT: All right. I think we got it. I mean, I think we  
24 addressed the juror's question.

25 MS. MACHNICH: We've addressed the issue.

300

1 THE COURT: All right. I didn't see any other hands, so Detective,  
2 you may step down. Thank you very much for your time, sir.

3 THE WITNESS: Thank you.

4 THE COURT: Have a good day. Grab all your paperwork and there's  
5 a step there. All right.

6 We've got 15 minutes. State may call its next witness.

7 MS. LEXIS: Your Honor, with the court's permission, we would like to  
8 have an opportunity to make sure our exhibits have all been admitted. We do  
9 expect to rest upon verification of the admission of the evidence.

10 THE COURT: All right. So if all your exhibits that you've sought to  
11 admit have been admitted, then you're going to rest?

12 MS. LEXIS: That's what we anticipate.

13 THE COURT: All right. Well then, what we can do is excuse the  
14 jurors. Let's find out what time we're going to start tomorrow. I can start tomorrow  
15 at 11:15. Is there anybody who has -- any juror that has a strong objection  
16 to 11:15 start? All right. I think we're planning to go until -- unfortunately, I don't  
17 think we're going to finish tomorrow. Give you the bad news. But I think we are  
18 going to finish Wednesday. Tomorrow we'll go until 4:00 is my plan. And then  
19 attorneys, I plan to then discuss jury instructions with you --

20 MS. MACHNICH: Yes.

21 THE COURT: Tomorrow at 4:00.

22 MS. MACHNICH: Okay. Yes.

23 THE COURT: So plan is to go 11:15 to 4:00. We'll have a lunch  
24 break in there.

25 MS. MACHNICH: Sounds good.

301

1 THE COURT: And then Wednesday, I can start at 10:00.  
2 MS. MACHNICH: Okay.  
3 THE COURT: All right. So we're going to go 10:00 until we're done.  
4 MS. MACHNICH: Okay.  
5 THE COURT: All right. So hopefully we'll get to -- I don't know if  
6 we're going to get to, you know, reading the jury instructions, closing argument,  
7 and then they start to deliberate. I hope we do that. You know, and then if they  
8 need to stay a little bit late, it's going to be up to them.  
9 MS. LEXIS: Of course, Your Honor.  
10 MS. MACHNICH: Sound good. We'll make sure to have our  
11 witnesses here.  
12 THE COURT: And if they-- if the jurors start to deliberate and it gets  
13 to 5:00 and they want to go home and come back Thursday, that will be their  
14 choice.  
15 MS. LEXIS: Of course.  
16 THE COURT: All right. They can come back Thursday at 9:00  
17 or 8:30, whatever they decide. All right, leave it up to them. We'll see how this  
18 goes. All right.  
19 Ladies and gentlemen of the jury, tomorrow at 11:15. All right. Let  
20 me read the admonishment. Ladies and gentlemen, you're not to communicate  
21 among yourselves or with anybody else about this trial or the subject matter of  
22 this trial; do not communicate at all with any of the parties, attorneys or witnesses  
23 involved in this trial; do not seek or obtain any information or comments about this  
24 case from any source including newspapers, television, radio, Internet, e-mail, cell  
25 phones or any other electronic device. Do not read, watch or listen to any report

1 of or commentary about the case; do not perform any research or investigation;  
2 do not form or express any opinion on any subject connected with this trial until  
3 the case is finally submitted to you for deliberations. Please return to the hallway  
4 outside this courtroom for further proceedings tomorrow at 11:15.

5 All right. Very well. Have a good evening. Thank you.  
6 Thank you for your time and attention. Feel free to bring coffee tomorrow if you  
7 want to drink coffee, or soda or juice or water.

8 [Jury recessed at 4:46 p.m.]

9 THE COURT: All right. Anything to put on the record, any additional  
10 records you guys need to make?

11 MR. GASTON: Two issues.

12 THE COURT: Yes, sir.

13 MR. GASTON: First, do you want to address the *Sanborn* thing now  
14 that he's done testifying?

15 THE COURT: *Sanborn* thing now that who's done?

16 MR. GASTON: Or do you just want to address it in jury instructions?  
17 The *Sanborn* issue about the missing witness form.

18 THE COURT: Oh, let's -- let's -- can we do that with jury instructions?  
19 Why don't you propose something and then you guys can address your positions.

20 MR. GASTON: And then if the court will give us one second.

21 THE COURT: Okay.

22 MS. MACHNICH: Okay. Yes. So let me see if I -- I just -- I want to  
23 make a correct representation to the court, so I want to see if something's come in  
24 via e-mail yet.

25 THE COURT: Okay.

1 MS. MACHNICH: So we've been trying, Your Honor, to get custodian  
2 of record affidavit from -- from the dealership in California where the car was --  
3 where the car was purchased. We've turned over what we received from them,  
4 pursuant to a subpoena, previously to the State. And I believe that it is  
5 self-authenticating as both a public record and as a business record. But I'm  
6 getting a custodian of record affidavit that specifically states that.

7 THE COURT: Okay. Just when you get that, cite me the rule so I can  
8 make sure it comports.

9 MS. MACHNICH: Yes.

10 MS. LEXIS: We have not been given the proper notice. That's the  
11 problem. One, of this piece of evidence, it wasn't disclosed to us in a timely. And  
12 number two, we were not -- they are supposed to give us 15 days notice when  
13 they're using an affidavit as opposed to a live person and we were not provided  
14 that information.

15 THE COURT: Well, that's why -- I want to know the rule, because I  
16 want to check the rule.

17 MS. MACHNICH: I do. I will absolutely do that. But I want to state  
18 that I believe the rule says 10 days.

19 THE COURT: Okay.

20 MS. MACHNICH: Additionally, they disclosed this witness or  
21 disclosed custodian of records Mazda on their alibi -- their rebuttal alibi witness  
22 list. So it's actually their disclosed witness. And I don't know what they've done, if  
23 anything, to contact them. But we did. And so we've actually only known this was  
24 a potential piece of evidence for the defense since Monday of last week. Like,  
25 we've just known this. So as soon as we got that, I had my investigator work on

1 what was going on --

2 THE COURT: You've just known that someone other than your client  
3 might own the car?

4 MS. MACHNICH: No --

5 MR. GASTON: Omara McBride owns the car. We're talking about  
6 the date of purchase. That's what relevant.

7 THE COURT: The date of purchase?

8 MR. GASTON: Yeah.

9 MS. LEXIS: They've always known that.

10 THE COURT: You've just known that the date of purchase is an issue  
11 because of what?

12 MR. GASTON: We have --

13 THE COURT: What triggered --

14 MR. GASTON: We have issue -- the real question here is simply do  
15 we have to fly the custodian of records out from California and have her testify in  
16 person or can we use the affidavit? That's what we're arguing about.

17 THE COURT: I don't know. What does the rule say? I don't know.

18 MR. GASTON: The rule --

19 MS. LEXIS: We're objecting.

20 MR. GASTON: -- the rule probably says unless -- unless the court  
21 determines good cause, we have to have her here. And so we're arguing that it's  
22 good cause, they're arguing it's not.

23 THE COURT: Look, give me the citation of the rule? I'll -- let me  
24 look --

25 MS. MACHNICH: I don't -- I don't have it memorized. I will get it. I



1 believe it's 53-something, but I will get it. I just -- the reason why I want to do this  
2 is it sounds like we're going to get through all the testimony. I can't fly in a witness  
3 from California same day.

4 THE COURT: Yeah.

5 MS. MACHNICH: So -- and we just -- I've been waiting to get it back.  
6 I haven't gotten it back yet. I assume that I will have it by tomorrow. It's --

7 MR. GASTON: Maybe we can do --

8 THE COURT: I mean, there's ways to -- you know, you either reach a  
9 stipulation or you do an affidavit, and I don't know what the notice is, or you have  
10 to have a live witness. Those are --

11 MR. GASTON: Maybe this is a -- maybe this is a perfect example as  
12 to what we talked about earlier with the audio visual. I mean, just the fact is if  
13 there's no prejudice, you can't keep -- we are the public defender's office. We  
14 don't have an unlimited budget. Eventually we're going to get told no.

15 THE COURT: True.

16 MR. GASTON: I mean, this is an important part of the case,  
17 establishing this car wasn't in existence for a long time. If there's no prejudice to  
18 the State by doing it -- they -- if they don't like the affidavit and the court finds  
19 that's not sufficient, we've got a visual.

20 THE COURT: So you're trying to establish the purchase date of the  
21 car being when?

22 MR. GASTON: It's the -- it's the 25th of May. And we have a --

23 THE COURT: May 25th?

24 MR. GASTON: Yeah. We have a receipt that shows that and then  
25 she -- we use her to establish that this is business records expectation, that's

1 it's --

2 MS. MACHNICH: It's actually a registration form and it dates back --  
3 it specifically states on the registration form, we have -- we provided this to the  
4 State --

5 THE COURT: Form 2?

6 MS. MACHNICH: -- immediately upon receipt. We received it that  
7 morning, we walked to court, we handed it to them. But this was -- wait, no. I  
8 texted a photo.

9 THE COURT: Wait. So you got the -- you got the document?

10 MS. MACHNICH: There's a -- there's a document. It is --

11 THE COURT: It's not self-authenticating under the rule?

12 MS. MACHNICH: I believe it would be --

13 MS. LEXIS: No.

14 MS. MACHNICH: -- actually self-authenticating under the public  
15 records exception, because it was -- while it was able to be pulled by a --

16 THE COURT: Well, let's look.

17 MS. MACHNICH: -- by a car dealership, it is actually the registration  
18 and it dates back to the date of purchase on the registration. It was not registered  
19 until June 2nd, but it dates back to the 25th, which is the date of purchase on  
20 there.

21 THE COURT: Says:

22 Rule 52.265, Public Records, except as otherwise provided in 52.247,  
23 the contents of an official record or of a document authorized to be recorded  
24 or filed and actually recorded or filed, including data compilations in any  
25 form, if otherwise admissible, may be proved by copy, certified as correct by

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1 the custodian or other person authorized to make the certification or testify  
2 to be correct.

3 So you can -- so you don't need to have a live person if you get the  
4 affidavit, according to subpart 1. I don't what other requirements might apply, but  
5 that's -- that's subpart 1, right?

6 MS. MACHNICH: Right. And --

7 THE COURT: Is that -- is that right?

8 MS. LEXIS: That's my understanding, but they needed to have given  
9 us notice.

10 THE COURT: So you don't -- and you're saying you need to fly  
11 someone here, you can get a affidavit.

12 MR. GASTON: They're arguing the affidavit is insufficient.

13 MS. MACHNICH: My understanding is actually the public records  
14 exception does not have the -- to my knowledge, does not have the notice  
15 requirement of a general custodian of records, where the State would be  
16 contesting the authenticity. I mean, is the State even contesting the authenticity --

17 MS. LEXIS: Yes.

18 MS. MACHNICH: -- of this item?

19 MS. LEXIS: Yes.

20 MR. GASTON: They thing we made it up on Microsoft Word.

21 MS. LEXIS: You know what the problem is, and maybe I should lodge  
22 my multiple objection to -- multiple layers as one, it was late disclosure. This that  
23 was disclosed to us -- they took -- they had information concerning who owned  
24 this particular car, where it was purchased, how it was purchased, because they  
25 had access to the defendant, who claims to have ownership of this car.

1 Number two, they had records in -- in the car --  
2 THE COURT: Wait, can we -- can we just --  
3 MS. MACHNICH: That's actually not true.  
4 THE COURT: Hold on guys.  
5 MS. MACHNICH: Sorry.  
6 THE COURT: Come on. Can we deal with these objections in  
7 piecemeal. So you say it's late disclosure.  
8 MS. LEXIS: It is.  
9 THE COURT: Is it -- what's the rule on disclosure? Five days? 10  
10 days? 20 days?  
11 MS. LEXIS: 30 days prior -- 30 days prior to trial.  
12 THE COURT: Doesn't -- the State produce its exhibits, like, five days  
13 before, right?  
14 MS. LEXIS: No, Your Honor. That's a Notice of Witness.  
15 THE COURT: Oh, that's witnesses. Right.  
16 MS. LEXIS: I requested reciprocal discovery --  
17 THE COURT: This wasn't -- you're -- so you're not complaining that  
18 the custodian was designated late, you're saying that the document itself --  
19 MS. LEXIS: Correct. Correct.  
20 THE COURT: So --  
21 MS. LEXIS: I requested -- I made a specific request for reciprocal  
22 discovery 30 days ago.  
23 THE COURT: So can I --  
24 MS. LEXIS: So.  
25 THE COURT: This is --

1 MR. GASTON: Pursuant to Judge Herndon's order, they had to  
2 notice rebuttal witnesses. We received a list of their rebuttal witnesses --

3 THE COURT: We're not talking about rebuttal.

4 MR. GASTON: This is how we got here.

5 THE COURT: We're talking about your case in chief.

6 MS. LEXIS: Right.

7 MR. GASTON: This is when we got the evidence. Their rebuttal  
8 witness was a custodian of records --

9 MS. LEXIS: Uh-uh.

10 MR. GASTON: -- from Mazda.

11 MS. LEXIS: Uh-uh.

12 MR. GASTON: We began investigating --

13 MS. LEXIS: Uh-uh.

14 MR. GASTON: -- their rebuttal witnesses --

15 MS. LEXIS: Uh-uh.

16 MR. GASTON: -- and then we discovered this.

17 MS. LEXIS: Uh-uh.

18 MR. GASTON: I get that she's saying no every time I talk, but if I can  
19 finish, I don't interrupt anybody.

20 THE COURT: All right.

21 MR. GASTON: They noticed --

22 THE COURT: You keep -- their disclosure of rebuttal is completely  
23 irrelevant. They were talking about, are you going to have this piece of document  
24 to show -- this supports your case in chief.

25 MR. GASTON: Yes.

1 THE COURT: Nothing to do with rebuttal.

2 MR. GASTON: But we got -- well, the time is timing.

3 THE COURT: What they designate rebuttal shouldn't -- their  
4 designation of rebuttal witness should not trigger your due diligence in preparing  
5 your case in chief.

6 MR. GASTON: We're talking about timing of disclosures and I'm  
7 telling you we received this when we began --

8 THE COURT: You received what?

9 MR. GASTON: The Mazda registration thing.

10 THE COURT: You received it when?

11 MR. GASTON: We when began investigating the rebuttal notice  
12 witnesses. And the trial had already begun. We received custodian of records  
13 from Mazda.

14 THE COURT: Okay.

15 MR. GASTON: We investigated it. We received this. It's exculpatory.  
16 We want to present it.

17 THE COURT: All right. So they didn't receive it until just recently; do  
18 you take issue with that?

19 MS. LEXIS: I do, Your Honor.

20 THE COURT: What proof -- tell me what proof. I don't want  
21 argument. I what proof.

22 MS. LEXIS: I have photos here where it says Mazda, it was  
23 purchased from Mazda. There's a ticket number, there's a temporary registration  
24 number. So they obviously knew of the existence of this evidence. To say that  
25 they only came to it or became -- it became known to them --

1 THE COURT: Show me.

2 MS. LEXIS: -- when I filed my Notice of Expert --

3 THE COURT: Show me what evidence you have.

4 MS. LEXIS: -- is completely belied by the record.

5 THE COURT: So State's position is they have evidence that you

6 knew already when the car was purchased?

7 MR. GASTON: Let's have a -- let's have a contempt hearing. If I'm

8 lying, hold me in contempt.

9 THE COURT: Well, it's not -- it's a matter of --

10 MR. GASTON: I'm either lying or I'm not.

11 THE COURT: Well --

12 MR. GASTON: I mean, it is what it is. She's saying I'm lying. I -- my

13 understanding is our investigator began investigating the same thing and same --

14 we're going to have the same argument with the valet ticket, although the valet

15 from Downtown Grand exists here, so we can just have him come in. But it's

16 going to be the same premise. We received a copy of this valet ticket. My

17 understanding is we got this from -- if I'm not mistaken, Tegan, correct me here --

18 my understanding is we got all this once we began investigating their case, their

19 rebuttal.

20 MS. MACHNICH: I'm still trying to figure out, because we had looked

21 into several things. We hadn't gotten them back.

22 THE COURT: So let me --

23 MS. MACHNICH: I know that the day I received it, I turned it over to

24 the State. But the person was not -- was not noticed as a witness before.

25 THE COURT: Wait, so this -- this just shows that the car doesn't have

1 a license plate.

2 MS. LEXIS: And it was purchased from Mazda Vacaville. And also,  
3 Your Honor, State's Exhibit No. 51, they've been on notice from the beginning, it  
4 shows a temporary registration of the vehicle. So they've had ample opportunity.  
5 They've had a year to look through this, get their information. I made a specific  
6 request for reciprocal discovery. This was not turned over to me until the  
7 beginning of trial, maybe last week, Wednesday, if I -- if I would venture to guess.

8 THE COURT: So hold on. So Subpart 2 the public records rule says  
9 that if a copy which complies with the foregoing can't be obtained by reasonable  
10 diligence, then other evidence and contents may be given.

11 So I guess the question I need to pose to you, Mr. Gaston, is why  
12 couldn't, through reasonable diligence, the public defender's office obtain proof of  
13 the purchase date of the car before trial started? Why couldn't you get -- why  
14 couldn't you, like, 30 days before trial started, why couldn't you, like, in reasonable  
15 diligence, if you were saying, hey, you know, boy, an issue in this case might be,  
16 you know, my guy didn't have access to this car, so he probably wasn't the one  
17 driving it during the robberies, you know, I mean, that's kind of been an issue for,  
18 like, over a year. Why couldn't you have found that out, like reasonable diligence  
19 order.

20 MR. GASTON: First, that's not an argument we're going to make.  
21 We're just making the argument, the car's been in existence for three days. So  
22 the fact that Bobby's print's on the car is more relevant than if the car had been in  
23 existence for three years. That's the entirety of this whole thing we're arguing  
24 about.

25 And with respect to the argument right there --

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1 THE COURT: But why couldn't you have found it sooner?

2 MS. MACHNICH: They weren't -- we didn't realize that it was going to  
3 be an issue until they noticed their -- we had outstanding subs. We didn't think  
4 there were any issues --

5 THE COURT: I'm having trouble --

6 MS. MACHNICH: -- they noticed their witness --

7 THE COURT: I'm having trouble getting that -- just putting  
8 someone -- why does putting someone on a witness list trigger some kind of  
9 notice that there's an issue in your case? I don't --

10 MS. MACHNICH: No, there's something --

11 THE COURT: I don't get that.

12 MS. MACHNICH: -- that they might bring up that -- I mean, I can tell  
13 you, as soon as --

14 THE COURT: But they didn't bring it up.

15 MS. MACHNICH: -- we saw their --

16 THE COURT: Right?

17 MS. MACHNICH: They have not brought it up. It's our -- I would think  
18 that they meant to bring it up in their alibi, but we can call anyone on their witness  
19 list.

20 THE COURT: So if they don't bring it up, why do you -- why do you  
21 get to bring it up?

22 MR. GASTON: In our case in chief?

23 THE COURT: Yeah.

24 MR. GASTON: Because --

25 THE COURT: You're saying --

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1 MR. GASTON: -- it's exculpatory evidence.

2 THE COURT: -- because of their rebuttal case, you need to now  
3 being something up, but they're not bringing it up in their rebuttal case.

4 MR. GASTON: I guess, here's the point. First, is the State -- is the  
5 State moving that we committed -- clarify.

6 MS. LEXIS: Yes.

7 MR. GASTON: We committed -- yes. I'll finish anyways. That we  
8 committed a discovery violation --

9 MS. LEXIS: Yes.

10 MR. GASTON: -- by this late disclosure and therefore the sanction  
11 should be suppression of this?

12 MS. LEXIS: Yes.

13 MR. GASTON: Okay. Then, first, let's ignore the --

14 THE COURT: Well, I'm not ruling -- I'm not -- I'm not -- that's not my  
15 ruling.

16 MR. GASTON: Right. That's what I'm saying.

17 THE COURT: You guys can rule on your own on that.

18 MR. GASTON: Well, no, I'm saying that's the request.

19 MS. LEXIS: That was my argument.

20 MR. GASTON: That's their request. My point is, let's move past the  
21 discovery violation just for a second.

22 THE COURT: Okay.

23 MR. GASTON: Even if the court finds that there was a violation of  
24 discovery, that yes, ideally, the public defender would have done this investigation  
25 a year ago. Okay. Even if that is what the court finds, that still doesn't grounds

1 for suppression of otherwise exculpatory evidence. What possible prejudice is  
2 there to the State?

3 THE COURT: Yeah. I'm not suppressing anything. I'm just applying  
4 Rule 52.265.

5 MR. GASTON: Yeah. And my question was is the affidavit sufficient  
6 or we have to have the person testify by audio/visual, or does Darren have to  
7 pony up another couple thousand dollars to get the lady out here? We'll do  
8 whatever we've got to do to get this evidence in.

9 THE COURT: I -- I think -- I don't think you've proved to me  
10 reasonable diligence in getting this, you know --

11 MR. GASTON: Getting the affidavit?

12 THE COURT: Yeah. You can't wait until trial starts to try to get an  
13 affidavit.

14 MR. GASTON: Okay. Then no affidavit. We've got to have the lady  
15 testify. That -- fine. I mean, it's no skin off my back whether we do it through  
16 affidavit or whether it's through personal testifying.

17 THE COURT: Yeah.

18 MR. GASTON: My next request would be, could we do it through  
19 audio/visual? I'm just trying -- the fact is we don't have an unlimited budget and  
20 you can't just keep objecting to stuff that you don't really have any prejudice to  
21 object to in order to hope that Darren closes the purse strings.

22 MS. LEXIS: This has not been disclosed to the State.

23 MR. GASTON: It has been disclosed.

24 MS. LEXIS: I made a specific request for reciprocal discovery. They  
25 are doing everything at the last minute, not exercising their due diligence, Your

1 Honor, day in and day out in this particular trial. This has not been disclosed to  
2 the State in a timely manner. I made a specific request for reciprocal discovery. I  
3 have an e-mail requesting as such. I even went so far as to file a motion with the  
4 court for reciprocal discovery. They indicated to me on the 24th, July 24th, that  
5 there was no discovery to give me. They have not done their due diligence. They  
6 should not be allowed to use this.

7 THE COURT: So when -- when did you first provide -- when did you  
8 first provide -- what's this document called? This one in front of me?

9 MR. GASTON: Registration, just the car's registration.

10 MS. MACHNICH: Just the car registration.

11 THE COURT: When did you first provide it to the State?

12 MR. GASTON: My understanding is we did it as soon as we got it.

13 MS. MACHNICH: The day we got it, yes.

14 THE COURT: I'd like to know the date.

15 MS. MACHNICH: I -- I lost it again, but I will find it.

16 MR. GASTON: She's finding it.

17 MS. MACHNICH: If you'll give me one second.

18 MR. GASTON: My understanding it was after the reciprocal discovery  
19 stuff. It was recent. And I think -- I think it was right before opening or in the  
20 middle of voir dire. We received it --

21 MS. MACHNICH: Well, hold on.

22 MR. GASTON: -- we gave it to them. And then I opened on it. I  
23 mean, are we going to sandbag this issue? Let me open --

24 MS. LEXIS: It was Wednesday at 4:10 p.m., Wednesday the 26th.

25 THE COURT: Last Wednesday?

1 MS. LEXIS: Yes, Your Honor.  
2 MR. GASTON: Done. That's when we did it.  
3 THE COURT: I mean, it's a public record. You've had it for a week. I  
4 don't see any prejudice here.  
5 MS. LEXIS: Your Honor, it's not self-authenticating.  
6 THE COURT: No, but I'm going to allow the -- if you need -- look, you  
7 need to either have a certificate of a custodian --  
8 MR. GASTON: Yes, sir.  
9 THE COURT: -- or you can do it by audio/visual.  
10 MR. GASTON: Okay.  
11 THE COURT: You've got to have a live witness.  
12 MR. GASTON: We will have --  
13 THE COURT: You have to do one or the other.  
14 MR. GASTON: We'll have an affidavit proposed. We have it. We're  
15 just getting it the signed. If that's not --  
16 THE COURT: But I'm not just going to let the record come. You need  
17 to have authentication.  
18 MR. GASTON: We will have -- we have the affidavit. We're just  
19 getting it signed.  
20 THE COURT: All right.  
21 MR. GASTON: If that's insufficient --  
22 MS. LEXIS: Your Honor --  
23 MR. GASTON: -- then we'll arrange for audio/visual testimony.  
24 MS. LEXIS: -- how many more times will the defense be allowed to  
25 provide items late to the State, to a point until it becomes unfair prejudice to the

1 State of Nevada? At what point?

2 THE COURT: It's a public record. You're making a --

3 MS. LEXIS: Your Honor, there's no -- they have not produced this --

4 THE COURT: They authenticated --

5 MS. LEXIS: -- to me.

6 THE COURT: No, I told them, they have to authenticate it.

7 MS. LEXIS: 30 days before trial. That's the rule.

8 MR. GASTON: Because the State always complies with that in every  
9 other trial.

10 MS. LEXIS: Okay. 30 days before trial. They have not complied with  
11 it. They haven't even substantially complied with it. They haven't exercised their  
12 due diligence.

13 THE COURT: What's the prejudice to the State on a -- on a public  
14 record that you could have easily found out the date it was purchased, too?

15 MS. LEXIS: Your Honor, but that's not -- we're not proffering this  
16 particular piece of evidence. It's not on us to exercise due diligence to --

17 THE COURT: Okay.

18 MS. LEXIS: -- to get in what they're wanting in.

19 THE COURT: I made my ruling. Court is adjourned. I'll see you guys  
20 tomorrow. Thank you.

21 MR. GASTON: Thank you, Your Honor.

22 MS. MACHNICH: Thank you, Your Honor.

23 [Court recessed at 5:01 p.m., until August 1, 2017, at 11:30 a.m.]  
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ATTEST: I do hereby certify that I have truly and correctly transcribed the audio/video proceedings in the above-entitled case to the best of my ability.



Shawna Ortega, CET\*562



RTRAN

DISTRICT COURT  
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,  
Plaintiff,  
vs.  
KEANDRE VALENTINE,  
Defendant.

CASE NO. C-16-316081-1  
DEPT. NO. II

BEFORE THE HONORABLE RICHARD SCOTTI, DISTRICT COURT JUDGE

**TUESDAY, AUGUST 1, 2017**

**TRANSCRIPT OF PROCEEDINGS RE:  
JURY TRIAL - DAY 7**

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**APPEARANCES:**

For the Plaintiff:

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MICHAEL DICKERSON, ESQ.  
Deputy District Attorney

For the Defendant:

TEGAN C. MACHNICH, ESQ.  
Deputy Public Defender  
TYLER GASTON, ESQ.  
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RECORDED BY: DALYNE EASLEY, COURT RECORDER



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EXHIBITS

DESCRIPTION

ADMITTED

State's Exhibit No. 192

5

Defendant's Exhibit No. M

17

1 **LAS VEGAS, NEVADA, TUESDAY AUGUST 1, 2017**

2 [Proceedings commenced at 11:31 a.m.]

3 [Outside the presence of the jury.]

4 MR. DICKERSON: Good morning, Your Honor.

5 THE COURT: Still morning. Good morning. Please be seated. All  
6 right. So, we're done with the State's --

7 MS. LEXIS: We have one quick witness.

8 THE COURT: Okay. No problem. All right. Did you notify  
9 Ms. Machnich?

10 MS. LEXIS: I just told her.

11 THE COURT: All right. And so do your witness -- did you confirm your  
12 exhibits are in?

13 MS. LEXIS: Yes. For the most part.

14 THE COURT: All right. And then we'll -- then we'll have to canvass  
15 the defendant as to his rights. Right?

16 MS. MACHNICH: Okay. And we have our expert witness waiting in  
17 the hall.

18 THE COURT: All right. Let's bring in the jury, marshal, and the State's  
19 witness.

20 [Jury reconvened at 11:32 a.m.]

21 THE COURT: All right. Please be seated everybody.

22 This is the *State vs. Valentine*. We're ready to proceed. The court is  
23 going to allow the State to put on one more witness.

24 Go ahead.

25 MS. LEXIS: The State recalls Dean Ludwig.

1 THE MARSHAL: What's the last name, counsel?

2 MS. LEXIS: Ludwig.

3 THE COURT: Please remain standing, the court clerk will administer  
4 your oath.

5 **DEAN LUDWIG**

6 [having been recalled as a witness and first duly sworn, was examined and  
7 testified as follows:]

8 THE CLERK: Please be seated, and please state your first and last  
9 name for the record.

10 THE WITNESS: First name is Dean, D-E-A-N, last name is Ludwig,  
11 L-U-D-W-I-G.

12 **DIRECT EXAMINATION**

13 BY MS. LEXIS:

14 Q Detective Ludwig, are you familiar with an individual by the name of  
15 Keandre Valentine?

16 A Yes, I am.

17 Q Do you see him here in court?

18 A Yes, I do.

19 Q Can you please point to him and identify something he's wearing?

20 A He's sitting over there and he has a gray button-down shirt.

21 MS. LEXIS: Your Honor, please let the record reflect identification of  
22 the defendant.

23 THE COURT: It does.

24 MS. LEXIS: Thank you. May I approach with what's been marked as  
25 Proposed Exhibit 192?

1 THE COURT: You may.

2 MS. LEXIS: Thank you.

3 BY MS. LEXIS:

4 Q Sir, I am showing you what's been previously marked as State's  
5 Proposed Exhibit 192; do you recognize what's depicted here?

6 A Yes, I do.

7 Q What is it?

8 A It's a photo of Keandre Valentine.

9 Q Thank you.

10 MS. LEXIS: Your Honor, I move to admit State's Exhibit 192 into  
11 evidence.

12 MS. MACHNICH: No objection.

13 THE COURT: Admitted.

14 [State's Exhibit No. 192 admitted.]

15 BY MS. LEXIS:

16 Q Detective, on May 28, 2016, did you have the opportunity to sit in  
17 during an interview with the defendant, Keandre Valentine?

18 A Yes, I did.

19 Q Was the interview conducted by one of your squad detectives,  
20 Detective William Majors?

21 A Yes.

22 Q Okay. This interview occurred approximately 10:45 a.m.?

23 A That's correct.

24 Q Okay. During the course of the interview with Mr. Valentine, did Mr.  
25 Valentine indicate knowing an individual by the name of Omara McBride

1 [phonetic]?

2 A Yes, he did.

3 Q Okay. What did he tell you about Omara McBride?

4 A Eventually, he confirmed that he had arrived in town with her, and that  
5 she was his girlfriend.

6 Q Okay. Did he indicate anything about Omara and the 2016 Mazda 3,  
7 which was identified as the suspect vehicle? Did he indicate whether he and  
8 Omara may have purchased or gotten that car together?

9 A Yes, he did.

10 Q What did he say?

11 A He said that he helped her get the car and that he went with her to go  
12 purchase the vehicle.

13 Q Okay. Did he indicate to you that while he didn't have access to the  
14 car, he did give his girl money to by the car?

15 A That's correct.

16 Q So he -- he provided some money for it?

17 A Yes.

18 Q Did this particular defendant, Keandre Valentine, talk about a Chanise  
19 Williams?

20 A Yes.

21 Q Did he indicate his relationship with Chanise?

22 A He -- he did, eventually, yes.

23 Q Okay. What did he say?

24 A He said that they were cousins.

25 Q Okay. And Chanise Williams is the lessee pursuant to your

1 investigation in your prior testimony of Apartment No. 218; is that correct?

2 A That's correct.

3 Q After the defendant was interviewed with you or by you and Detective  
4 Majors, was he subsequently arrested and transported to the Clark County  
5 Detention Center?

6 A Yes, he was.

7 MS. LEXIS: Court's brief indulgence.

8 Q The interview I indicated started at about 10:45 a.m., but it concluded  
9 at approximately 11:14 a.m.; is that right?

10 A That's correct.

11 Q Okay. And shortly thereafter he was booked into the Clark County  
12 Detention Center?

13 A That's correct.

14 MS. LEXIS: Anything else, Mr. Dickerson?

15 I have no more questions for this witness. Thank you.

16 THE COURT: Thank you.

17 Defense, you may proceed.

18 MR. GASTON: No questions.

19 THE COURT: All right. No questions by the defense.

20 Anything by the jurors? All right. Very good.

21 Then, sir, you are excused. Thank you, very much for your time.

22 THE WITNESS: Thank you.

23 THE COURT: Watch your step.

24 The State may call its next witness.

25 MS. LEXIS: Your Honor, at this point the State would rest.

1 THE COURT: All right. Now the State rests. Very good.

2 Then now the defense's case. The defense may call its first witness.

3 MR. GASTON: Your Honor, we would call Dr. Steven Smith.

4 THE COURT: Dr. Steven Smith.

5 Yeah, may counsel approach, please.

6 [Bench conference transcribed as follows.]

7 MR. GASTON: I indicated to the State that I was given a CV marked  
8 as a proposed exhibit to be introduced into evidence for the jury to provide an  
9 example of qualifications. The State indicated that they would object, so I figured  
10 we would just tiptoe around him for at least at the time, before the jury  
11 [indiscernible]. I don't know, I guess -- that's my position.

12 MS. LEXIS: I think it constitutes an improper witness function. If he  
13 wants to get out -- if it puts undo emphasis on the expert testimony. If he wants to  
14 get out his qualifications, he can certainly testify about it. I believe the admission  
15 of the CV is improper.

16 MR. GASTON: I am going to have a problem, sir.

17 THE COURT: No, go ahead.

18 MR. GASTON: I am going to have him testify about some of his  
19 qualifications here, but I don't think it puts undo emphasis on his expertise. I think  
20 it puts exactly the emphasis required of him. It is his CV, it's his -- it's his  
21 qualifications that should go back to the jury when they want to evaluate whether  
22 this guy knows what he's talking about or not. It seems relevant. And if he just  
23 lists his requirements, it's not -- the conferences are not the same thing. There's  
24 hundreds of conferences and papers and stuff in his CV.

25 THE COURT: I generally let CVs in. It's pretty rare that I ever get an

1 objection. Is there some particular language in the CV you're concerned about?

2 MS. LEXIS: I just think it constitutes improper witness function. For  
3 instance, one of their objections in a prior writing was that the admission of both  
4 the audio and the transcript would place undo emphasis on particular witnesses'  
5 credibility.

6 THE COURT: Which is vouching -- that argument usually comes up  
7 when you have a third person that's vouching for credibility --

8 MR. DICKERSON: I think this particular --

9 THE COURT: -- credibility of the witness. It's his own vouching, right?

10 MS. MACHNICH: I think his CV though, I mean, it can get out on direct  
11 examination his qualifications, but I think the admission of this multiple-page  
12 document does vouch.

13 MR. DICKERSON: Included in the issue is some of the titles of the --  
14 the pieces that he'd authored part of, I mean, those are very questionable.  
15 Especially from the standpoint of the State. They lead the jury to the conclusion  
16 that all these things should be believed. And so, I mean [indiscernible] when is  
17 there no proof to it.

18 MR. GASTON: Or it shows that he knows what he's talking about,  
19 because he's done a lot of research on this area.

20 THE COURT: You know what, I -- I can't -- I can't even think of an  
21 instance where I've ever excluded a CV.

22 MS. LEXIS: So, how about if I pose it this way: If I had -- they propose  
23 to admit the [indiscernible] the CV of a crime scene analyst, or the DNA analyst, or  
24 the fingerprint examiner --

25 MR. GASTON: We wouldn't have objected.



1 THE COURT: Yeah.

2 MS. MACHNICH: Nor did we contest their qualifications.

3 THE COURT: I've had lots -- I've done lots of -- many, many criminal  
4 trials, and I've had the State on many occasions introduce CVs.

5 MS. LEXIS: Yeah, I've lodged my objection.

6 THE COURT: No, I appreciate the objection. Now, a different point of  
7 view on expert reports -- expert reports showing excluded as hearsay.

8 MR. GASTON: He didn't prepare any in this case.

9 THE COURT: And but there are some times where the parties  
10 stipulate to let the reports come in. In this case I will allow the CVs to come in  
11 and -- and you can cross-examine as to any -- any statements that you think would  
12 put undo emphasis on his credibility or put him in a false light or something.

13 MR. GASTON: Thank you.

14 THE COURT: What else?

15 MS. MACHNICH: Also one more thing -- I just want to bring to Your  
16 Honor.

17 THE COURT: Just one -- we got to get going on this.

18 MS. MACHNICH: I know. We had lengthy conversations about things  
19 he reviewed in preparation. I spoke with him --

20 THE COURT: What? What?

21 MS. MACHNICH: Things that he reviewed in preparation for his  
22 testimony.

23 THE COURT: Yeah.

24 MS. MACHNICH: And he looked at the Innocence Project Website to  
25 get the updated number of DNA exonerations. So.

1 THE COURT: Innocent Project Website to get updated number of?

2 MS. MACHNICH: DNA exonerations.

3 MR. GASTON: He thought it was over 300, he just checked the  
4 website before he came to testify to make sure exactly what the number was. We  
5 told the State about that.

6 MS. MACHNICH: And I told the State. I mean, if you want to exclude  
7 that, then that's fine --

8 THE COURT: What's the State --

9 MS. MACHNICH: -- the number.

10 THE COURT: Well, let's see what the State's position is.

11 MS. LEXIS: I think it's improper.

12 MR. GASTON: He knew the answer prior to coming in was above 300.

13 MR. DICKERSON: But he isn't -- he wasn't noticed as an expert in  
14 DNA exonerations. Moreover, [indiscernible] he's looking up this morning as we've  
15 indicated [indiscernible] --

16 THE COURT: It's late -- I don't need to hear anything. You're right.

17 MS. MACHNICH: It's fine.

18 THE COURT: It's late forming of an opinion. It's something that we  
19 should have disclosed, you know, and he would have testified at it. And -- and if  
20 he had disclosed and then to comply with -- to try his order, he would have had to  
21 disclose the website that he looked at.

22 MR. GASTON: So I don't --

23 MS. MACHNICH: Okay.

24 MR. GASTON: -- have a -- when I go through --

25 THE COURT: So I'm -- I'm granting the Motion to Exclude that.

1 MS. MACHNICH: Okay.

2 MR. GASTON: So do not mention anything about the number of DNA  
3 exonerations?

4 THE COURT: Yeah, don't mention the number.

5 MS. MACHNICH: Or anything he learned from today. So we'll just  
6 lead him through it. Lead him through that to what he -- because he has  
7 referenced.

8 MR. GASTON: He will testify about, like, exonerations being due to  
9 eyewitness identifications and then accuracy in the lab. That's not something he  
10 reviewed and published in testimony.

11 THE COURT: All right. But if he mentions anything, opinion that he  
12 held before he looked at the website, then --

13 MS. MACHNICH: That's not the number.

14 THE COURT: -- then he can't state with certainty that --

15 MR. GASTON: Sure.

16 THE COURT: -- that he would have now after looking at the website.

17 MS. MACHNICH: His -- his prior -- and I will make an offer of proof.  
18 His prior knowledge was that it was over 300. And then when he checked, it  
19 was 351. So, over 300.

20 THE COURT: All right. But if he -- if he tries to put a certainty to it that  
21 he didn't otherwise have, that could be a problem and I'd strike.

22 MS. MACHNICH: Okay. That's fine.

23 MR. DICKERSON: [Indiscernible.]

24 MS. MACHNICH: Oh, come on. Are you serious?

25 MR. GASTON: Okay. I've -- that's --

1 MS. MACHNICH: He's an expert witness.  
2 MR. GASTON: I don't even think that's an appropriate objection.  
3 MR. DICKERSON: Yeah, but, I mean --  
4 THE COURT: Well --  
5 MR. DICKERSON: [Indiscernible.]  
6 THE COURT: They're allowed -- no. Experts are allowed to rely on  
7 hearsay in forming their opinions.  
8 MR. DICKERSON: Absolutely.  
9 THE COURT: And if this is hearsay he relied upon forming his opinion,  
10 what's the -- I don't understand what the issue is.  
11 MR. DICKERSON: There's got to be a conduit for that hearsay and --  
12 THE COURT: He's not being a conduit.  
13 MR. DICKERSON: Well, that's, basically, they have him work it out so  
14 he could --  
15 MS. MACHNICH: I didn't.  
16 MR. DICKERSON: [Indiscernible.]  
17 MS. MACHNICH: We did not ask him to look it up.  
18 THE COURT: Wait, I don't -- now I'm --  
19 MR. GASTON: I don't think they understand how -- can I just ask  
20 them -- I get the court's ruling.  
21 THE COURT: Do we need to do this outside the presence of the jury?  
22 Because this is way -- getting way too confusing. I thought it was simple.  
23 MR. GASTON: I think they're objecting to hypothetical things.  
24 MS. LEXIS: I thought it was, too.  
25 MR. GASTON: If I can just get started and you object to my question if

1 I get there and you don't like it, and then you have a specific question to make a  
2 decision on, is that okay?

3 THE COURT: Why would I make a decision no. Hold on. You're  
4 saying you want him to testify on something that he learned by a website?

5 MR. GASTON: No. I'm saying that I want him to testify on stuff that he  
6 knew.

7 THE COURT: That he knew?

8 MR. GASTON: Yes.

9 THE COURT: All right. And you're saying what he knew is hearsay.  
10 How do you know it's hearsay?

11 MR. DICKERSON: Well [indiscernible] --

12 THE COURT: How do you know it's not something that he learned --  
13 how do you know it's not something that he learned during his education?

14 MR. DICKERSON: Well, they just said that that's what he was looking  
15 at today to refresh his memory as to what the number was.

16 THE COURT: That's today. I already excluded that. You guys are  
17 making a big thing out of something nothing. It's coming in --

18 MR. GASTON: Thank you.

19 THE COURT: -- but not the -- not the newer stuff. All right. That's it.  
20 Go back.

21 MR. DICKERSON: Thank you.

22 THE COURT: No more bench conferences. Let's go.

23 **STEVEN SMITH,**

24 [having been first duly sworn, was examined and testified as follows:]

25 THE CLERK: Please be seated and state and spell your first and last

1 name for the record.

2 THE WITNESS: My name is Steven Smith, S-T-E-V-E-N S-M-I-T-H.

3 **DIRECT EXAMINATION**

4 BY MR. GASTON:

5 Q Good morning, Doctor. What do you do for a living?

6 A I'm a professor.

7 Q Where are you a professor?

8 A At Texas A&M University, Department of Psychology.

9 Q Can you tell the jury where you received your education at?

10 A How far back should I start? College?

11 Q Start with college -- bachelor degree?

12 A I went to college at the University of Michigan where I got my  
13 bachelor's degree in psychology. I got -- I then went to the University of Wisconsin  
14 and received my master's degree and then my Ph.D. in experimental psychology.  
15 The Ph.D. was in 1979.

16 Q And as part of gaining your Ph.D., were you required to do a  
17 dissertation?

18 A Yes.

19 Q And what was the dissertation on?

20 A My dissertation looked at how human memory is affected by the  
21 surroundings that people are in when they first experience something and when  
22 they remember it.

23 Q And as far as your expertise, where -- what would you say you are an  
24 expert in?

25 A My expertise is in cognitive psychology. Cognitive means the mind.

1 And my specialties in cognitive psychology are human memory, the study of  
2 human memory, the study of creative thinking; and in memory, also, eyewitness  
3 memory.

4 Q And have you written anything on the subject?

5 A Yes, I have.

6 Q Have you written or have you ever published any novels -- any books  
7 on the subject?

8 A I have published four books.

9 Q Any articles?

10 A Yes, many articles.

11 Q If you had to guess on a number, what would you say?

12 A It would be over a hundred. 105. I don't remember, something like  
13 that.

14 Q And how long have you been in this field -- how long have you been  
15 working in this field? How many years?

16 A I've been working in the field of cognitive psychology since 1974,  
17 that's -- I'm not that good at math, but it's -- it's been more than 40 years.

18 Q And to stay up to date on new science, et cetera, do you attend  
19 conferences? Do you --

20 A Yes, I attend conferences every year to keep up with the newest  
21 findings in the field, and I read a lot of journal articles and textbooks.

22 Q And did --

23 MR. GASTON: May I approach the witness, Your Honor.

24 THE COURT: Yeah.

25 BY MR. GASTON:

1 Q I'm showing you what I have marked as Defense Proposed Exhibit M;  
2 is this a copy of your CV? And you can feel free to thumb through it make sure it's  
3 all right.

4 A I don't have time to proof the whole thing, but that looks like it, yes.

5 Q Okay. And did you prepare a copy of your CV to send me?

6 A Yes.

7 Q And does this look like an accurate copy of that?

8 A That looks like an accurate copy, yes.

9 Q And on here it lists your current employment, your prior education,  
10 research areas, and all the -- kind of the information we just went over, correct?

11 A Yes.

12 Q In essence it's an example of your qualifications?

13 A It is sort of an archival listing of my qualifications and  
14 accomplishments.

15 MR. GASTON: Your Honor, I move to admit Proposed Defense  
16 Exhibit M as evidence.

17 THE COURT: What's the letter?

18 MR. GASTON: It's the copy of this -- M.

19 THE COURT: M. Is in --

20 MR. GASTON: As in mom.

21 THE COURT: Mom. All right. M is admitted subject to the bench  
22 conference.

23 [Defendant's Exhibit M admitted]

24 MR. GASTON: Thank you.

25 THE COURT: All right.



1 BY MR. GASTON:

2 Q Now, sir -- or Doctor, have you testified in the past as an expert  
3 witness?

4 A Yes, I have.

5 Q And on subject of eyewitness identifications?

6 A Yes.

7 Q So -- all right. Let's get started. Start with the basics.

8 Well, a lot of talk about human memory; would it be your testimony that  
9 human memory kind of works --

10 MS. LEXIS: Objection. Leading.

11 BY MR. GASTON:

12 Q How would you describe how --

13 THE COURT: Yeah. That's sustained.

14 BY MR. GASTON:

15 Q How would you describe how human memory works?

16 A To fully and accurately describe how human memory works, you would  
17 have to take my class and it would go for at least six months. So I'll be  
18 abbreviated in my answer. And I will tell you that many people think that human  
19 memory works something like a videotape; you record things when you experience  
20 them and when you remember them, you just play back the videotape. And that is  
21 quite wrong. It doesn't work at all like that.

22 It's much more complex and it is subject to a lot of inferences. So a lot  
23 of our memories work based on things that we infer and we accurately remember  
24 bits and pieces of things and we fit those together with inferences based on our  
25 understandings.

1 Q Can -- and in human memory are there types of errors that can occur?

2 A Yes, there are.

3 Q And can you tell the jury about some of those or what those types are?

4 A Sure. The -- the two major errors in human memory, one, everyone is  
5 extremely familiar with; you forget something, you forget someone's name, you forget  
6 the answer to a question on a test that you're taking, that we're familiar with.

7 The one that people don't acknowledge quite as much are called false  
8 memories. False memories are not anything magical. False memories refer to  
9 remembering things differently from the way they actually happened. And a  
10 simple way to explain that is anyone who is married or who has a spouse or  
11 someone that they do a lot of things with, you go to a lot of events together, you  
12 experience the same things. But later you may remember it differently, and at  
13 least one of you is wrong, and that's an example of a false memory.

14 Q Do these type of errors ever matter in, like, legal cases, for example?

15 A Yes. These -- the kinds of errors, for example, false memories,  
16 remembering things differently than they happened, they are -- that's the basis of  
17 most of what I testify about in cases and they can be the causes of remembering  
18 events differently than the way that they happened. They can refer to  
19 misidentifications of people that were witnessed.

20 Q Now without mentioning any specific numbers at this point, are you  
21 familiar with some of the recent cases of DNA exonerations?

22 A Yes.

23 Q Okay. Now, can you tell the jury what -- of those DNA exonerations,  
24 what percentage of those cases had an eyewitness identification?

25 THE COURT: So hold on a sec. This implicates kind of what we

1 discussed at the bench. Right?

2 MR. GASTON: This is the stuff that he knew before ever being  
3 retained on this case.

4 THE COURT: Well, you mentioned that he's aware of recent cases on  
5 DNA exonerations. Right?

6 MR. GASTON: I guess I meant --

7 THE COURT: So how -- okay. So, you know, if he's going to form an  
8 opinion -- if he is going to form an opinion based on documents he relied upon  
9 then, then remember we discussed yesterday, this has to be documents he  
10 produced. Right.

11 MR. GASTON: Right.

12 THE COURT: So we need more foundation on what documents he's  
13 relying upon when he -- when he reviewed those documents.

14 MR. GASTON: Yes, sir.

15 THE COURT: How he knows of those documents.

16 MR. GASTON: Yes, sir.

17 BY MR. GASTON:

18 Q Prior -- prior to being retained on this case -- because I didn't --  
19 ultimately our office retained you for this case, correct?

20 A Yes.

21 Q Prior to ever being retained on this case, were you familiar with the  
22 statistics on what percentage of cases that were ultimately exonerated through  
23 DNA had eyewitness identifications in them?

24 A Yes, I have been familiar with the statistics for at least the past 15  
25 years.

1 Q Okay.

2 MR. GASTON: May I continue, Your Honor?

3 THE COURT: Well, so now I -- now, we were establishing that these  
4 are documents that he relied upon before his engagement of this case, which  
5 satisfies one of the concerns I had yesterday and at the bench.

6 MR. GASTON: Yes, sir.

7 THE COURT: But then now it -- now, where I see where you are  
8 going, it implicates the other concern that Mr. Dickerson had that this is  
9 out-of-court statement being offered for the truth of the matter asserted that he  
10 relied upon. Experts, of course, can rely upon hearsay, but they rely upon hearsay  
11 in forming their opinions in a case. They can't just be a conduit of the hearsay, so  
12 this would be admissible, provided it's something that he considered in forming his  
13 opinions, right? The hearsay itself doesn't come in, so you can -- you can say is  
14 he familiar with the -- the cases, familiar the -- the statistics. And here's how he  
15 relied upon it in forming his opinions. But you can't just use it as a mere conduit  
16 just to come out through the jury.

17 I didn't understand that's what you were planning to do when we had  
18 the sidebar. Now I -- now I see the context in which this is coming up. So his -- he  
19 can't just merely be a conduit by which he tells us what's in the cases for the  
20 conclusion from the cases. All right. So --

21 MR. GASTON: And I'm sorry if I gave the wrong impression, that the's  
22 not what I was trying to do. I was just --

23 THE COURT: Okay.

24 MR. GASTON: -- trying to ask if in preparing his opinion today, he  
25 relied on --

1 THE COURT: Yeah, but don't give -- don't tell us what his perception  
2 is -- what his opinion is on what all these cases demonstrate.

3 MR. GASTON: Right. Yes, sir. And again to clarify --

4 THE COURT: Sorry that was long-winded, but I want to make sure  
5 that we are all on the precise path here.

6 MR. GASTON: Yes, sir.

7 BY MR. GASTON:

8 Q And to clarify, if I didn't already mention it, don't -- don't use any  
9 specific numbers at this point.

10 A That's fine.

11 THE COURT: All right.

12 BY MR. GASTON:

13 Q But, you are aware of those DNA exoneration cases, that some of  
14 them had eyewitness identifications, some had multiple eyewitness identifications?

15 MS. LEXIS: Objection. Leading.

16 MR. GASTON: I'm trying to lead past the part where he can't talk  
17 about.

18 THE COURT: I think he's trying lead, though, to avoid drawing out the  
19 information I'm telling him not to come out. So I'll allow it in this instance.

20 BY MR. GASTON:

21 Q So I'll repeat my question. Again, without mentioning any specific  
22 numbers, you are aware that in of these cases which ultimately were a result of  
23 DNA exoneration, they had eyewitness identifications and some had multiple  
24 eyewitness identifications?

25 A Yes.

1 Q Okay. Now, so that begs me just to start with a general question. In  
2 an ideal case -- an ideal case, all the factors that we are going to talk about a little  
3 bit that affect human memory, in an ideal case, how accurate are eyewitness  
4 identifications?

5 A In an ideal case, which I -- to define an ideal case, someone gets a  
6 very good look at the person that -- the witness gets a good look at the person  
7 they're identifying. They are in full light, they are interviewed by the police a very  
8 short time later, there is no cross-racial identification, there are no other special  
9 factors, nothing that would compromise their memory. And those -- which is -- we  
10 call that the control condition in the experiments that we conduct on this.

11 In those cases we expect at a baseline, people will be somewhere  
12 between 70 and 80 percent accurate in identifying someone that they've seen for  
13 the first time, and that if they're looking at a lineup that doesn't contain the  
14 perpetrator, they'll make false identifications, in the ideal case, somewhere  
15 between 10 and 15 percent of the time.

16 Q So even in the ideal case, there's substantial inaccuracies?

17 A Yes.

18 MS. LEXIS: Objection. Leading.

19 THE COURT: Yeah, please watch the leading.

20 MR. GASTON: Sorry.

21 THE COURT: We want to hear from the witness, not comments from  
22 the lawyers. Thanks.

23 MR. GASTON: Sure.

24 BY MR. GASTON:

25 Q Now, that was talking about an ideal case, and so talk about real life --

1 talk about this case. When I retained you, did I send you some documents to  
2 review?

3 A Yes.

4 Q And after reviewing those documents, have you formed any opinions  
5 about this case specifically, any factors that might have made this case deviate  
6 from the ideal case?

7 A Yes, definitely.

8 MS. LEXIS: Objection, Your Honor. Lack of foundation. He talks  
9 about documents, but he hasn't elicited what documents this expert is relying  
10 upon.

11 THE COURT: Well, that's a foundation which you can bring out in  
12 cross examination.

13 MR. GASTON: I mean, I can do it real quick if you want, Judge.

14 THE COURT: Experts are allowed to -- I mean, you are allowed to  
15 actually jump right into the opinion without stating what all the -- the documents are  
16 he relied upon. So, I'll let you do that.

17 MR. GASTON: I'll do it real quick, if it's helpful to the jury. I got ahead  
18 of myself a little bit.

19 THE COURT: All right.

20 BY MR. GASTON:

21 Q What documents did I send you about this case that you reviewed?

22 A The documents I saw included several police reports; reports of what  
23 the witnesses saw, some of them were transcribed from Spanish; I saw a  
24 photocopy of a photo spread that was used, admonishments that were used in  
25 showups; that's -- that's what I recall.

1 Q And did I also send you a photo of Keandre Valentine?

2 A Yes.

3 Q Did I also send you a photo of Bobby McCoy?

4 A Yes.

5 Q Okay. And you reviewed all of that in coming to your conclusion  
6 today?

7 A Yes, I did.

8 Q Okay. So to restate my earlier question, after reviewing all that  
9 information, did you form any conclusions about what happened in this case that  
10 might have caused this case to deviate from how you described the ideal case?

11 A Yes, there are several factors that had been studied in many scientific  
12 studies, not just one or two, that show each of these factors reliably makes  
13 memory worse and sometimes worse in systematic ways. There are a number of  
14 those factors that are that are present in this case and that would involve all of the  
15 witnesses.

16 Q Can you -- for the jury can you list some of the factors that either  
17 involved all the witnesses or specific witnesses and -- and just let the jury know  
18 what factors you think were present in this case?

19 A Yes. Focusing on the most important factors, not on everything, every  
20 witness was held up at gunpoint. This can cause two sort of related problem. One  
21 problem is a very high level of stress and anxiety. When people are moderately  
22 excited, they form very accurate memories. But when they are under a level of  
23 stress where they think they die or be injured, those levels of stress and anxiety  
24 make memory reliably worse, less reliable, less accurate, so that would be one  
25 factor.



1           Related to that is that when people have a gun or a weapon held to  
2 them or held in their face, they tend to remember the weapon very vividly and they  
3 tend to believe that the rest of their memories are as vivid as their memory of the --  
4 of the weapon, but in fact, it's called the Weapon Focus Effect, and people don't  
5 remember peripheral details like what the person looked like who was holding the  
6 weapon, or other things that were in the background. So those are two factors that  
7 I believe affected all the witnesses who were held at gunpoint, so those would be  
8 two.

9           The -- the others that would affect all of the witnesses would include  
10 the suggestibility of certain eyewitness memory identification methods, like a  
11 showup or a photo spread. Those could involve suggestibility of various sorts, and  
12 I think that there was such suggestibility in these cases.

13           Related to that is that I believe that a biased photo spread was used in  
14 the photo spread identification and I can explain that.

15           And, finally, the -- any kind of identification would be compromised if  
16 the suspect looked similar to the actual perpetrator. And so those would be the --  
17 the major factors that I would worry about.

18           Q     So let's -- let's break those down. Let's start talking about -- start with  
19 suggestivity.

20           You mentioned earlier to me a prior demonstration you sometimes do  
21 in classes?

22           A     Yes.

23           Q     Can you tell the jury about that?

24           A     Sure. As part of my classes since the 1970s, I regularly do an  
25 eyewitness memory demonstration. Without describing the whole thing, I'll be

1 standing in front of a class -- the class might have 250 or 300 people in the class.  
2 The person who is staging the event runs in from the back of the class, he's  
3 shouting a loud speech, he has tucked into his belt a piece of plumbing about this  
4 long, he pulls the plumbing out, aims it at me like it's a gun. Ten feet away in the  
5 front row is a teaching assistant who has a starter's pistol they get from athletic  
6 department, and he or she fires off some shots, the lights go out, the guy who  
7 staged the event runs out, and then I test everyone's memory of the event.

8 Q And how many years have you been doing this?

9 A I've been doing this for almost 40 years.

10 Q Has any student ever, ever gotten it correct?

11 A Well, first I should say that there are thousands, not hundreds --  
12 thousands of students -- I don't memorize all their names, but there are thousands  
13 of students that have been in my classes. Out of those thousands, one student  
14 one time knew it was the teaching assistant, because her leg got a little bit singed  
15 from the starter's pistol. But the person sitting the other side of the teaching -- no  
16 one else ever has known that it was the teaching assistant.

17 Q And so I'm to assume that that illustrates suggestivity?

18 MS. LEXIS: Objection. Leading.

19 MR. GASTON: I didn't mean to lead. I'll restart the question.

20 BY MR. GASTON:

21 Q What -- what principles -- what --

22 THE COURT: All right. Sustained.

23 Go ahead.

24 BY MR. GASTON:

25 Q What factors that can affect unreliability would that demonstration

1 demonstrate?

2 A What that demonstrates is that -- at least two things. One is that  
3 memory is not a photographic record or a videotape record of what the -- of what  
4 accurately happened. It involves inferences of what people assume happened.  
5 And so inferences are affected very strongly can be affected very strongly by  
6 suggestion.

7 And the other thing that it demonstrates is the near unanimity, almost  
8 every single person remembers this event wrong. And which is why we videotape  
9 it and I run it back and I show people what it -- what actually happened, and every  
10 once is always is surprised.

11 Q Now are you familiar with what a showup is?

12 A Yes.

13 Q Can you describe that for the jury?

14 A A showup is an eye witnessed memory identification procedure where  
15 generally the -- the witness is shown either a photograph of a single person or  
16 sometimes a live showup, they see just a single person. And they are asked, to  
17 say, Was this the person that you saw that did the crime or not? And it's just a  
18 yes/no answer, that's a -- that's the classic showup.

19 Q Now one of the factors you listed when you talk about ideal cases is  
20 time lapse from the thing you see to when you make an identification?

21 A Yes.

22 Q For showups, isn't it true that those happen quickly after?

23 A Yes.

24 Q So does that mean that showups are a more --

25 MS. LEXIS: Objection. Leading.

1 MR. GASTON: I'm sorry. What's my question that's leading?

2 THE COURT: So, you know, combined with the last one, isn't it true --  
3 and then with this one, it sounds like you are leading, so let's ask open-ended  
4 questions to the witness. I don't think we're to, like, a scientifically technical area  
5 such that, you know, leading is more appropriate. So let's just watch it right now.

6 MR. GASTON: I didn't mean that. I'm sorry.

7 BY MR. GASTON:

8 Q Do showups tend to happen faster -- or do showups tend to happen  
9 very quickly after the crime?

10 MS. LEXIS: Objection. Still leading. Suggests the answer.

11 THE COURT: I'll -- I'll --

12 MR. GASTON: I give up. I don't know what you want me to say.

13 THE COURT: I'll allow it.

14 BY MR. GASTON:

15 Q Okay. Do showups tend to happen very quickly after the crime?

16 A Yes. That's the reason that showups are used instead of photo  
17 spreads, so that it can be done quickly.

18 Q So does that tend to mean that showups are more reliable?

19 THE COURT: So leading still. So --

20 MR. GASTON: Does that tend to mean showups are more reliable?

21 THE COURT: Because -- yeah, because you are suggesting the  
22 answer, you know.

23 MR. GASTON: That showups are more reliable?

24 MS. LEXIS: Yes.

25 MR. GASTON: Okay.

1 MS. LEXIS: That's what he's -- that's what he's asserting.

2 THE COURT: Well --

3 MR. GASTON: It's kind of the opposite of what I am asserting,  
4 actually. It's the exact opposite of what I'm asserting.

5 THE COURT: Well, that's argumentive. So why -- why don't you say,  
6 you know, I mean, the proper way of phrasing that question is, you know, given the  
7 proximity to showup to the alleged underlying event, what if anything, does that  
8 tend to show regarding the reliability of the showups? That's the non-leading way  
9 of asking the question.

10 MR. GASTON: Okay.

11 BY MR. GASTON:

12 Q I repeat the same question -- the question the judge just suggested  
13 strongly.

14 A I've got it.

15 Q Okay.

16 A I've got it. The underlying principle at work here is time. The more  
17 time that goes by, the more fuzzy a person's memory gets. So if a showup is done  
18 more quickly, we usually expect that it would be more accurate. That is, that it  
19 would fit what the witness actually saw or it would fit their original description of the  
20 perpetrator better than if you waited a long time.

21 Q So does that -- does that fix the -- well, what are some potential issues  
22 of a showup?

23 A The issue is in spite of the fact that they are -- they tend to be done  
24 very quickly, which is why they're done, they are by nature highly suggestible.  
25 When a police officer does a showup and says, is this the person that robbed you

1 or that you saw do a shooting or whatever crime they witnessed, there's a very  
2 strong implication, even when witnesses are admonished, that this might not be  
3 the person. There's a strong implication that the police think that they have the  
4 right person.

5 Q You mentioned admonishments. That was my next question, are you  
6 familiar some admonishments that are --

7 A Yes.

8 Q -- read to a victim before a showup identification?

9 A Yes, I am.

10 Q Does that cure the issue of suggestivity?

11 A The admonishments that are given to be affective -- so they are  
12 admonished this might not be the right person, they're admonished we are still  
13 looking for other leads in the crime, that's what the admonishments refer to. And  
14 the goal of the admonishments is for the witness to completely understand what  
15 the admonishments are to get over their anxiety of making an identification and  
16 being worried that the -- that the perpetrator will enact some sort of revenge.

17 And so the goal is if they really do understand and take to heart the  
18 admonishments, then they are -- they are more affective.

19 Q You said, If they really understand and take to heart the  
20 admonishments; has your research or do you find that admonishments tend to  
21 significantly affect reliability one way or the other?

22 MS. LEXIS: Objection. Leading.

23 MR. GASTON: I literally am saying one way or the other.

24 MS. LEXIS: What does your research show? Why does he have to  
25 say what the research shows?

1 MR. GASTON: I don't even know what the answer's going to be,  
2 Judge.

3 THE COURT: He -- he got -- you were actually objecting before he  
4 finished his sentence. And when he got to the end he said one way or another.  
5 And so I think it made it nonleading. So overruled.

6 Go ahead.

7 BY MR. GASTON:

8 Q One way or the other -- I'll put that in the front -- one way or the other  
9 does your research or the research that you are familiar with tend to show how the  
10 admonitions being read affect the reliability of a showup identification?

11 A There is to my knowledge no systematic research on this question, but  
12 it's well known that people don't always read the fine print carefully.

13 Q Now, you mentioned, high -- high level of stress in terms of another  
14 factor that can deviate from ideal situation.

15 A Yes.

16 Q Same -- same general question; does your research, one way or the  
17 other, show whether victims tend to experience a high level of stress during a  
18 showup identification?

19 A During the showup?

20 Q During the showup.

21 A No. The high level of stress is during the crime itself.

22 Q The crime itself?

23 A Yes.

24 Q So the initial perception of the event?

25 A Correct.

1 Q Okay. And then are you familiar with how the showups were  
2 conducted in this case, specifically?

3 A Yes.

4 Q Are there anything about how the showups were conducted in this  
5 case specifically that could affect the reliability of the memory?

6 A Yes, I am -- there are two fundamental problems that are very  
7 worrisome about the way these showups were done. And there may be other  
8 factors, but I don't know enough about them. But I do know a couple things about  
9 them.

10 One is that the -- the showups were done at a distance that was great  
11 enough to compromise the witness being able get a good look at the suspect that  
12 they were trying to identify and be able to compare that with their memory. So the  
13 distance was -- was quite difficult. And in particular, when I looked at -- not every  
14 witness gave a height estimate, but some witnesses did. And the height estimates  
15 on the descriptions the witnesses gave ranged from -- in one case even shorter  
16 than 5-10, but let's say most of them were 5-10 to 6-feet tall. And so if you think  
17 that the person is around 5-11 or something like that, they didn't get close -- the  
18 witnesses were not close enough in these showups to be able to really understand  
19 how tall the suspect was that they were identifying.

20 Q Now, if the witnesses did happen to get close enough to be able to tell  
21 that height -- had that frame of reference, would you expect more reliable  
22 identifications, or the other way around?

23 A Yes. I would expect a more reliable identification. If the witness could  
24 get close enough to the suspect that they were trying to identify, to understand if  
25 the person was much taller than them, slightly taller than them, shorter than them,



1 that sort of thing, it gives you a frame of reference to judge a factor like that.

2 Q Now you mentioned earlier showups tend to be of one person?

3 A Yes.

4 Q But you -- you read -- you read through these, in this case was the  
5 showup with just one person to be identified?

6 A My understanding is that there was another, I guess, bystander who  
7 stood next to the suspect during these showups.

8 Q So would that -- because there is now two options -- would that  
9 increase the reliability of the showup?

10 A Well that depends on if the other person standing in matched or sort of  
11 matched this description of the original perpetrator. So if that person reasonably  
12 matches the original descriptions of the perpetrator, then that would be a fine thing  
13 to have. Because then you would have to rely -- you as a witness would have to  
14 rely on the specifics of remembering what the people looked like so that you would  
15 remember what the correct person looked like.

16 If the other person standing next to the suspect didn't really look much  
17 like the description, or in this case, if they are very, very different height than the  
18 original description, it would be easy to reject the short guy and then that would  
19 end up making it more suggestible, kind of like a biased lineup or a photo spread.

20 Q I'm going to publish State's Exhibit 186 here. Okay. Do you have a  
21 good view that?

22 A Yes, I do.

23 Q The person here standing next to Keandre Valentine, from your review  
24 of the descriptions given of the perpetrator, does he seem to match the description  
25 at all?

1 MS. LEXIS: Objection. He's giving an opinion.  
2 THE COURT: Who's giving the opinion?  
3 MS. LEXIS: It's an improper opinion.  
4 THE COURT: Who is, the expert?  
5 MS. LEXIS: Correct. Concerning the height of whether he fits the  
6 description; that within the province of the jury.  
7 THE COURT: Well --  
8 MR. GASTON: I'm not trying to make a big deal out of it.  
9 THE COURT: Well, I think it --  
10 MR. GASTON: That was pretty --  
11 THE COURT: I'm going to allow it, provided you have foundation. Did  
12 you look at the descriptions, identifications from each of the victims in the case?  
13 BY MR. GASTON:  
14 Q Did you do that?  
15 A Yes, I did.  
16 THE COURT: All right. And did you do that as part of the  
17 methodology that you employed in forming your opinions in this case?  
18 THE WITNESS: Yes, I did.  
19 THE COURT: All right. And is looking at the -- the physical  
20 characteristics of individuals in a showup part of the methodology that you typically  
21 employ in forming opinions regarding the reliability of eyewitness identifications?  
22 THE WITNESS: Yes, it is.  
23 THE COURT: And that's something you did in this case?  
24 THE WITNESS: Yes.  
25 THE COURT: All right. I'll allow him to express his opinion.

1 MR. GASTON: Thank you, Your Honor.

2 BY MR. GASTON:

3 Q So in this case, the -- the man standing next to Keandre Valentine  
4 during the showup, does he seem to match the description that was given of the  
5 robber at all?

6 A He does not match the description in at least two, to me, very obvious  
7 ways.

8 Q I mean, he's, obviously, a black male; but what are the obvious ways in  
9 which he does not match the description?

10 A The obvious ways -- well actually, now that I think -- there are three.  
11 First, the perpetrator was described as being thin, the bystander does -- I would  
12 not call thin. The perpetrator was said to have an afro; this person standing next to  
13 him does not appear to have an afro that I can tell. And the height of the -- of this  
14 bystander is not close to what the -- actually it's closer to the descriptions,  
15 probably, than the -- than the defendant, but they're very different heights and not  
16 easily confused in -- in the showup.

17 Q Thank you. Now you mentioned distance as being part of the issue.  
18 The distance from -- and the showup and the distance from the witness actually  
19 making an identification. And you mentioned one way that distance could affect  
20 the reliability of the identification is that it's hard to tell height compared to yourself,  
21 for example.

22 A Yes.

23 Q Is there any other ways that distance from the identification of the  
24 showup might affect the reliability of the identification?

25 A Yes. Distance, the farther away we are from anything we're looking at,

1 the -- the more difficult it is to see, the more difficult it is to identify as something  
2 you've ever seen before. You lose details. It's just -- I think you don't need  
3 research for that one.

4 Q I show Defense Exhibit A; this distance from the image that you're  
5 viewing right now to where the -- I don't even know if you can tell, I'll even zoom in  
6 here.

7 A I -- I can't -- is this the showup?

8 Q Yes.

9 A Are these the -- I had cataract surgery, so my eyes are pretty good, but  
10 are these the two men in the showup in the center?

11 Q You can touch the screen. But, yes.

12 A Okay. Yeah, I -- so what is the question?

13 Q The question is is this kind of distance -- would this be the kind of  
14 distance --

15 MS. LEXIS: Objection. Leading.

16 MR. GASTON: I don't even know how to ask a question anymore.  
17 Like, would this be a kind of distance that causes issues, yes or no? Answer it  
18 however you want, I'm not trying to lead the witness, I literally don't even know how  
19 she wants me to ask the question.

20 THE COURT: Ms. Lexis, how would you propose that he frame the  
21 question so that it's not leading?

22 MS. LEXIS: I don't -- honestly don't even remember the question. But  
23 he's leading the witness.

24 MR. GASTON: I think I said the words, Would.

25 THE COURT: All right. So how would you propose framing the

1 question Mr. Gaston?

2 MR. GASTON: Would this distance in the showup be something one  
3 way or the other to -- or would this distance in the showup from this photo to where  
4 the defendants are to be identified?

5 THE COURT: Hold on, I'll do it.

6 Does this distance cause for problems or not?

7 THE WITNESS: Yes. This distance would cause major problems. If I  
8 were --

9 THE COURT: Explain why.

10 THE WITNESS: -- if I were doing an experiment and I wanted to test  
11 the question, does being far away make you less able to identify someone? I  
12 would use this for the very-far-away condition --

13 BY MR. GASTON:

14 Q Okay.

15 A -- in which I would assume everyone would do worse.

16 Q Thank you. Now, you mentioned another factor that could affect  
17 reliability; to deviate from that ideal case that we are talking about would be  
18 whether the person identified or whether the person in the showup actually closely  
19 resembles the perpetrator?

20 A Yes, that's correct.

21 Q And this -- in your reviewing your material today, I -- did I send you a  
22 copy of Keandre Valentine?

23 A Yes.

24 Q And did I send you a copy of Bobby McCoy?

25 A Yes.

1 Q And did you review both of those?

2 A Yes I did.

3 Q And in your opinion, are those two individuals -- do they appear to be --  
4 to look similar?

5 A Yes, they look similar. I would use them -- I would not call them  
6 lookalikes if they were standing next to each other, and the height differential was  
7 erased, I probably still could tell one from the other. But in terms of similarity and  
8 memory, yes, I'd say they would fit -- would fit that description of being very similar  
9 faces.

10 Q Thank you. Now you mentioned another thing in here earlier about a --  
11 this biased photo spread. First, backing up a step, just photo spread, can you tell  
12 the jury what a photo spread is?

13 A Yes. Photo spread is like a lineup, you see several faces. The -- the  
14 standard way it's done is you find six faces, one of whom is the suspect, the other  
15 five faces usually are people that you know could not have been the perpetrators,  
16 either they have alibis or they were in prison, or they're dead, or something like  
17 that. So you know who the suspect is. You -- you put the photo spread together  
18 and in addition to the suspect, you try to have other faces in the photo spread that  
19 fit the description of the perpetrator. And then the witness goes to the photo  
20 spread and sees if they can make a positive identification.

21 Q Now you described a biased photo spread. You used that word. Can  
22 you define what a biased photo spread would be for the jury?

23 A Yes. A biased photo spread is one in which one of the photos, and in  
24 particular, it's usually the defendant or the suspect, in which one of the photos  
25 stands out from the others either in an absolute sense, for example, it's a color

1 photo and the others are black and white, they're wearing totally different kinds of  
2 clothing. But most importantly the question is whether the suspect and the other  
3 photos all matched the original descriptions of the perpetrator.

4 And so this would be the kind of photo spread that I would use if I were  
5 trying to create a biased photo spread, because only the defendant --

6 Q I'm going to ask you about that -- I'm actually going to put it up here --

7 A Okay.

8 Q I'm going to cut you off a little bit. I'm going to put this up here for  
9 you --

10 A Sure.

11 Q -- to actually use. But one question before I do.

12 When we say biased photo spread, does that mean that somebody  
13 intentionally created a biased photo spread?

14 A No, that does not mean that someone intentionally created it. What it  
15 means is that for whatever reason, the photo spread was created in a way that if  
16 someone had never even witnessed the event, they could tell which of these  
17 look -- doesn't look like the others, and they would say, Okay, that's the one.  
18 That's what it means, and that's the problem with biased photo spread.

19 Q Now I'm going to put up the photo spread here. Does this -- is this the  
20 photo spread that -- or a copy of the photo spread that I sent you to review for this  
21 case?

22 A Yes.

23 Q And this is the photo spread that you referring to when you said biased  
24 photo spread?

25 A Yes.

1 Q Why would you say that this is a biased photo spread?

2 A The descriptions that I saw about -- description of the perpetrator, all of  
3 the descriptions that describe the perpetrator's hair said that the perpetrator had  
4 an afro, a small afro, or one of them said Jheri curls. I only see one picture in this  
5 photo spread that matches that description and none of the others do.

6 Q Well, if I had sent -- if I had just -- if I had never told -- if I -- if this circle  
7 here of the identification wasn't made and I just sent you the unmarked photo  
8 spread along with the witness's description, you, obviously, having never actually  
9 seen the defendant or the robber or anything like that, is this -- by biased photo  
10 spread, you mean that this is the individual that would have been selected?

11 A Yes, that's what I mean. If you had to guess, and you didn't even  
12 know, hadn't even seen it, for example, and you had to just guess. In this case,  
13 No. 3 fits the descriptions much better than any of the other five.

14 THE COURT: So help explain to me, isn't that the whole point of a --  
15 of a photo spread identification procedure is to find the person that most clearly fits  
16 the descriptions? So I don't understand why -- can you explain to us why -- what --  
17 I mean, what's wrong with that procedure?

18 THE WITNESS: Yes, I can explain that. What's wrong with that  
19 procedure is that verbal descriptions of people are -- they are not very, generally  
20 speaking, if you say, well, the person had a 'fro, they were a certain height, they  
21 had this kind of complexion, those are not very detailed, nowhere near -- they don't  
22 have nearly as much information as a photograph itself. So a photograph itself the  
23 eyes are going to be a certain size and a certain distance, the configuration of the  
24 eyes, nose, and mouth, there's -- there's a lot more information in that. So you  
25 could easily have six faces in there that match the general description, but that are



1 easily distinguished from each other and the question is if you have other people  
2 that fit the general description do you, the witness, know which one of these it was.

3 BY MR. GASTON:

4 Q So would you --

5 A If any --

6 Q I didn't meant to interrupt you, I'm sorry.

7 A If any.

8 THE COURT: That was all I needed. Thank you.

9 BY MR. GASTON:

10 Q So if you were trying to create -- so to follow up there, if you were  
11 trying create a non biased photo spread --

12 A Yes.

13 Q -- and you had the description of the -- the person who did this --

14 A Yes.

15 Q -- what would be your goal in selecting the other five photos to go  
16 along with this?

17 A Your goal would be to create a photo spread where a witness would,  
18 on the one hand, be able to identify a person that they had seen who was the  
19 perpetrator, but not confuse that person with one of the other people in the photo  
20 spread. So if they had knowledge, that is their memory of having seen this person,  
21 you want them to be able to demonstrate that knowledge by choosing the right  
22 person rather than other people who fit the general description.

23 If you had, for example, everyone else was a different race, this would  
24 be pretty easy, for example. And so you -- that the -- they are called the foils, the  
25 other people in the photo spread who we know are not the guilty person, they need

1 to at least match the general description.

2 Q And in this case the general description -- you're -- are you talking  
3 specifically about the afro?

4 A In -- in this case, yes.

5 Q Okay. And so one of the reasons -- so again, the biased photo spread,  
6 not to lead -- are you -- in what way do the other photos not match the general  
7 description?

8 A The most noticeable way is the hair.

9 Q Okay. Now, we did talk about some of the specific issues that deviate  
10 from the ideal case but in your review of the materials for this case, are you --  
11 where -- did you become aware of how many identifications there were in this  
12 case?

13 A Yes.

14 Q Okay. The factors that you are mentioning, would those be more  
15 specific factors for an individual or a systemic factor that could affect everybody  
16 that was exposed to that procedure? What -- how would you describe those?

17 A Well, I've described two kinds of factors that I think were in play in this  
18 case, some of those would affect anyone. But there are certain factors that are  
19 systemic here where you would expect them to affect all of the witnesses the same  
20 way.

21 Q Okay. Now, one of the other things I wanted to talk to you about is  
22 degree of confidence. In your -- in your review of materials are you aware that  
23 when they were initialing the showup form, witnesses would indicate how  
24 confident they were in their identification?

25 A Yes.

1 Q Yes. And your research, studies, experiments, et cetera, have you  
2 found that there is a high correlation between degree of confidence, how confident  
3 they are, and degree of accuracy?

4 A This has been the subject of many, many dozens, maybe a hundred  
5 experiments. People look at the level of confidence that a witness expresses,  
6 I'm 100 percent sure, I'm only 50/50, for example. And how does that relate to  
7 how accurate they really are? Because usually we feel more confident in our  
8 accurate memories.

9 In the studies, however, there -- in -- in most cases there is no relation  
10 between confidence and accuracy, and in a few experiments there's a very small  
11 relationship between confidence and accuracy. So there is a little bit of a  
12 relationship. What this means is someone can say, I am highly confident, and they  
13 can be correct when they make an identification. They can say, I'm not really sure  
14 about this, and they still might be correct. They might be highly confident and they  
15 could be wrong, or they may not be very sure at all and they could be wrong.

16 So the relationship between how sure a person feels and how likely it  
17 is that they are accurate, those are either not related at all or not strongly related.

18 Q Now over time -- like in this court case for example, over time, do  
19 witnesses tend to be more confident in their identification or less confident?

20 A Yes. When people first make an identification in this sort of a case,  
21 when they first make an identification and they express some level of confidences  
22 if they choose someone and they say that's the person and they give a level of  
23 confidences, then later on they are asked to look at the photo spread again or a  
24 lineup or the person themselves, each time they make that identification again,  
25 their confidences will increase.

1           This is true if they have chosen the correct person who really is the  
2 perpetrator, and then with multiple identifications, their confidence goes up. But  
3 it's also true if they choose the wrong person and make a misidentification, their  
4 confidence that their misidentification is correct also goes up the more times they  
5 make that identification.

6           Q     Thank you.

7           Courts indulgence.

8           THE COURT: All right.

9                         [Pause in proceedings.]

10          BY MR. GASTON:

11          Q     Couple -- couple more points. Oh, sorry, I'll wait a second.

12          Oh, you spill it?

13          A     You should see me eat.

14          Q     Now, sir --

15          THE COURT: All right. Test, what -- what hand was the water in when  
16 you spilled it?

17          THE WITNESS: It was in my right hand.

18          THE COURT: All right.

19          THE WITNESS: But I had a 50/50 chance.

20          THE COURT: All right. I'm sorry. Go ahead.

21          BY MR. GASTON:

22          Q     Now, I do want to ask, you are employed currently, you said, as a  
23 professor?

24          A     I'm a full professor of psychology, yes.

25          Q     Okay. Did you agree to come testify on our behalf for free?

1 A I didn't.

2 Q Okay. What rate are we paying you?

3 A The rate that I charge is \$300 per hour; although, in this case I'm going  
4 to give a discounted rate.

5 Q And is that because we're the public defender's office?

6 A That is because it --

7 MS. LEXIS: Objection. Leading, but --

8 THE WITNESS: -- it's --

9 THE COURT: Well, that's leading. What -- what's the reason why?

10 BY MR. GASTON:

11 Q Why are you giving us -- why are you giving us a discount?

12 A I'm giving you a discount because the number of hours --

13 MS. LEXIS: And the relevance for the discount? How is that even  
14 relevant?

15 MR. GASTON: If they want to get up and try to imply that he's this  
16 hired gun and he's giving us a discount to testify on behalf -- that's relevant.

17 THE COURT: That goes to bias or prejudice.

18 So go ahead.

19 BY MR. GASTON:

20 Q I'm sorry. Why are you giving us a discount?

21 A I --

22 THE COURT: You're not express -- you're not going to express any  
23 opinion as to guilt or innocence of the defendant, correct?

24 THE WITNESS: That's correct.

25 THE COURT: All right. Go ahead and answer.

1 THE WITNESS: The number of hours that I put in on the case  
2 because of the extensive travel is more than I would want my public defender's  
3 office to spend. Because I pay taxes and my goal is to bring the science to the  
4 courtroom, not to -- not to make my living. I have a full-time job already.

5 BY MR. GASTON:

6 Q I do want to kind of -- kind of end on talking about this. The -- you  
7 reviewed the material of how law enforcement conducted their procedures in this  
8 case, so to speak?

9 A Yes.

10 Q Are there ways in which -- are there other ways in which law  
11 enforcement could have done some of the things that were done in this case that  
12 would have increased the reliability of the identifications?

13 A Yes. Two things in particular. As I mentioned before, showups are  
14 used and they are useful because they can be done fairly quickly before the  
15 witness's memory gets worse. When there are multiple witnesses, sometimes a  
16 showup is all you can do and there is a number of reasons. If there is a positive  
17 identification on a showup, then investigators have been advised to seek another  
18 way to get identifications from additional witnesses, like live lineups or photo  
19 spreads, and especially non-biased photo spreads. So those -- that would have  
20 been a better way.

21 Q And when you said advised, what do you mean, advised? Advised by  
22 whom?

23 A Well, in the literature that where people write about photo spreads and  
24 lineups and photo arrays, that's what's generally accepted, is one positive  
25 identification from a showup. If there is more than one witness, it would be better

1 to use photo spreads on all the other witnesses or -- or live lineups.

2 Q Okay. And you mentioned there are two things; I believe that was one  
3 thing. You said there were two different way -- there is another in which law  
4 enforcement could --

5 A Well, the two I put together. One was to use photo arrays or live  
6 lineups and the other is to use ones that are not biased, where there isn't one  
7 person, particularly the suspect, who matches the description better than that foils  
8 match the description.

9 Q Now, are there ways to construct a photo lineup that are doubled blind  
10 or blind?

11 A Yes.

12 Q Can you describe to the jury what blind, double blind, et cetera,  
13 means?

14 A Yes. What double blind means, it's a -- it's a funny term. What it  
15 means is that the person who is administering the showup or who is administering  
16 the photo spread -- when I say administering, I mean this is the police officer or the  
17 investigator who is showing this to the witness. If that person knows the suspect is  
18 Person No. 3 or something like that, even if they don't say anything, they may use  
19 body language or facial expressions or things that they don't even realize that  
20 they're doing that will confirm when a witness picks the suspect. And they'll, you  
21 know, even if they don't jump for joy and start giving them high-five, something  
22 much more subtle could confirm that, yes, they picked the right person or the  
23 person that the investigator thinks it is.

24 If the person who is giving the photo spread doesn't even know who  
25 the suspect is, then they can't -- they can't do that. There could not even -- there

1 couldn't even be unintentional suggestion if it's done in a double-blind --  
2 double-blind fashion.

3 MR. GASTON: Court's indulgence one second.

4 THE COURT: Uh-huh.

5 MR. GASTON: No more questions, thank you.

6 THE COURT: Thank you.

7 So, Ms. Lexis, it's 12:40. Do you want to begin your cross-examination  
8 now or start after lunch?

9 MS. LEXIS: I think we should start after lunch. It will be rather lengthy,  
10 and I don't want it broken up.

11 THE COURT: It's going to be lengthy. Okay. All right. Then I'll have  
12 the jury go to lunch now.

13 And Doctor, perhaps defense counsel can let you know some places  
14 around here where you can take a break and eat.

15 THE WITNESS: Okay.

16 THE COURT: All right. Go ahead and sit here for a second and let me  
17 admonish the jury.

18 Ladies and gentlemen of the jury, we're going to take our lunch recess.  
19 During this recess you're admonished do not talk or converse among yourselves or  
20 with anyone else on any subject connected with this trial; do not read, watch or  
21 listen to any report of or commentary on the trial or any person connected with this  
22 trial; do not seek or obtain information or comments about the case from any  
23 source including without limitation newspapers, television, Internet, cell phones, or  
24 any other electronic device; do not form or -- do not perform any research or  
25 investigation; do not form or express any opinion on any subject connected with



1 the trial until the case is finally submitted to you for deliberations.

2 See you back here, let's see, it's 12:42. Let's say 1:50. Okay. 1:50,  
3 everybody. All right. Thank you.

4 [Jury recessed at 12:39 p.m.]

5 THE COURT: Okay we're outside the presence of the jury.

6 Doctor, you may be excused, please do not discuss your testimony  
7 with anybody while you are off the stand.

8 MS. LEXIS: And, Your Honor, I would ask that during -- since he is still  
9 actively on the stand, I would ask that he not confer with defense counsel  
10 concerning his testimony.

11 MS. MACHNICH: Absolutely not, yeah. That's fine.

12 THE COURT: Yeah, that -- that'll be the order of the court. All right.  
13 Don't confer with the defense counsel regarding your testimony.

14 THE WITNESS: Regarding my testimony. Okay.

15 THE COURT: Yes, sir.

16 THE WITNESS: But I can confer with them about lunch?

17 THE COURT: Of course you can. You can even have lunch with  
18 them.

19 THE WITNESS: Okay.

20 THE COURT: All right. Just don't talk about testimony you've given  
21 here on the stand.

22 THE WITNESS: Okay.

23 THE COURT: All right?

24 THE WITNESS: Yes.

25 THE COURT: You may be excused, then.

1 THE WITNESS: Thank you.

2 THE COURT: All right. Anything else? All right. See you guys back  
3 here at 1:50.

4 [Court recessed at 12:41 p.m., until 2:04 p.m.]

5 [Outside the presence of the jury.]

6 THE COURT: All right. Should I canvass the defendant now as to his  
7 waiver of his rights, or are we going to have another break to do that? What do  
8 you think?

9 MS. MACHNICH: We could do it at the end of the day today. I -- we  
10 won't be done today. So.

11 THE COURT: Okay. This --

12 MS. MACHNICH: What -- we -- we'll still have witnesses tomorrow  
13 morning.

14 THE COURT: Let go, then. Let's bring the jury in.

15 MS. MACHNICH: Okay.

16 [Jury reconvened at 2:06 p.m.]

17 THE COURT: All right. Please be seated everybody.

18 Let's call the -- Dr. Smith back to the stand.

19 MS. MACHNICH: Okay. Thank you, Your Honor.

20 THE COURT: Dr. Steven Smith -- actually, is he -- is he a doctor?

21 MS. MACHNICH: Doctor. Yes.

22 MS. LEXIS: Your Honor, and if they haven't done so already, we  
23 would like to invoke the exclusionary rule, if that hasn't already been placed on the  
24 record.

25 MR. GASTON: Are you talking -- are you talking about --

1 THE COURT: Yeah, I'm not sure -- what?

2 MS. LEXIS: Just -- we're invoking it. Is he is witness?

3 MS. MACHNICH: No.

4 MR. GASTON: No.

5 MS. LEXIS: Okay.

6 THE COURT: All right. If there is anybody in the courtroom that is a  
7 anticipated witness in this case, you are required to stay out of the courtroom. I'll  
8 remind my marshal of that.

9 MR. GASTON: And I believe I addressed that, or I had stopped  
10 [indiscernible]. Just State's [indiscernible].

11 THE COURT: Okay. You're still under oath, Doctor, still required to  
12 testify truthfully. Do you understand?

13 THE WITNESS: Yes.

14 THE COURT: All right. You may take the seat and I'll be with you one  
15 moment.

16 THE WITNESS: Okay.

17 THE COURT: Marshal, while you were out we invoked the  
18 exclusionary rule, so if there is anybody -- is there anybody present in the  
19 courtroom, which I don't think there is at this moment, that is anticipated to be a  
20 witness, then they must wait outside and they are excluded from observing the  
21 proceedings.

22 THE MARSHAL: Absolutely.

23 THE COURT: All right.

24 THE MARSHAL: Okay.

25 THE COURT: All right.

1 THE MARSHAL: No problem, Judge.

2 THE COURT: Thank you.

3 MS. LEXIS: May I, Your Honor?

4 THE COURT: Uh-huh. You may continue.

5 **CROSS-EXAMINATION**

6 BY MS. LEXIS:

7 Q Good afternoon --

8 A Good afternoon.

9 Q -- Dr. Smith.

10 A Thank you.

11 Q You and I haven't had the pleasure of speaking before this afternoon;  
12 is that right?

13 A That's right.

14 Q You were hired, what, to testify for the defense about --

15 A I'm sorry, I couldn't --

16 Q You were hired to testify on behalf of the defense, what, last week?

17 A I think it was last week.

18 Q Okay. You are -- correct me if I am wrong -- currently a psychology  
19 professor at Texas A&M?

20 A That's correct.

21 Q And you testified on direct examination that you were able to draw  
22 salary from that particular employment?

23 A Fees -- oh, from my -- from that employment? Yes, that's right.

24 Q Okay. And you indicated on direct examination that you previously  
25 testified as an -- as an expert in the area of eyewitness identification; is that right?

1           A     That is right.

2           Q     Okay. And, in fact, in your CV, which was admitted into evidence by  
3 the defense, the second to the last page, all the way through to the second page  
4 kind of indicates your brief listing of recent cases; is that right?

5           A     They may not be as recent as when I started, but yes.

6           Q     Okay. So to your recollection -- I mean, you prepared this CV in  
7 preparation for trial, correct?

8           A     No, I didn't prepare it for trial. I keep an updated CV at all times, and I  
9 just sent the one I had on file.

10          Q     Okay. So is it your testimony that the cases listed on Page 28 and 29  
11 are not necessarily the most recent cases?

12          A     That, I think, is correct.

13          Q     Okay. So what years would these prior testimonies have been from? I  
14 counted 11.

15          A     Okay. I have to ask about your question.

16          Q     Okay.

17          A     When you refer to them as prior testimonies, in many of the cases I did  
18 provide testimony, and in other cases they never quite made it to court, but I had  
19 worked with lawyers on a case.

20          Q     Okay.

21          A     Okay. And so they are not all from testimony in court.

22          Q     Okay. So what years were they from, though?

23          A     I can tell you that the first that I recall was in 1996, and the most recent  
24 was -- oh, let's see, maybe two years ago.

25          Q     Okay. And these are the -- at least a listing of when you've testified as

1 an expert witness on eyewitness memory cases; is that right?

2 A That is not entirely right.

3 Q Okay.

4 A As I said before, the cases that are listed there did not all involve  
5 testimony.

6 Q Okay.

7 A And so these are cases that I've worked with lawyers on. Some of  
8 them included testimony and several did not.

9 Q Okay. So let me just restate the question.

10 A Sure.

11 Q You were retained as an expert --

12 A Yes.

13 Q -- to work in these 11 cases that you've listed?

14 A Yes, and -- and others. Yes.

15 Q Okay. And there are no dates or years, right? After the listing of each  
16 of these cases?

17 A I assume that's right.

18 Q Okay. Would you like to take a look?

19 A I -- I'll trust you on that.

20 Q Okay. All right. But your testimony is it's not an inclusive list, correct?

21 A That's correct.

22 Q All right. And the most recent time that you've testified would have  
23 been two years ago; is that right?

24 A I'm -- that would be approximate. My memory is not the greatest.

25 Q Okay.

1 A But I can also tell you --

2 Q That's ironic.

3 A -- that --

4 Q That's just a little ironic. But okay.

5 A I study forgetting and I'm really good.

6 Q You study and then you forget?

7 A I'm really good.

8 Q I gotcha.

9 A There are many cases -- I stopped cases at some point.

10 Q Okay. All right. So you might have to approximate this, because I --

11 I -- you might not have this information; how many times have you testified on

12 behalf of the defense?

13 A I don't know the correct number, but I can give you an approximate

14 number.

15 Q Okay. What's the approximate?

16 A The approximate number would be two dozen times.

17 Q Okay. Have you ever testified on behalf of the prosecution?

18 A No.

19 Q Okay. In this particular case, you have been retained by the defense;

20 is that right?

21 A That is right.

22 Q And we kind of left off on direct examination, where you were talking

23 about this discounted rate. I'm a taxpayer, as well, and I don't think we got this out

24 on direct; what was the discounted rate you charged the public defender's office?

25 A The discounted rate was decided to put a cap on the number of hours

1 that I'll charge at 20 hours.

2 Q Okay. And how many -- how much an hour?

3 A \$300.

4 Q So 300 times 20 hours is a cap?

5 A Pardon me?

6 Q So it's \$300 an hour?

7 A Yes.

8 Q With a 20-hour cap?

9 A Yes.

10 Q Okay. As you sit here today, how much -- how much would they owe  
11 you? What's the bill for?

12 A Well, I'm not a math expert, but that sounds like \$6,000.

13 Q Okay. Have you previously testified as an expert in the area  
14 specifically concerning showups?

15 A No.

16 Q How many hours did you spend reviewing materials in this particular  
17 case?

18 A I spent about 14 hours.

19 Q And as indicated during direct examination, you looked over and  
20 reviewed items provided to you by the defense attorney, correct?

21 A Yes.

22 Q Okay. So you got -- let me go through it here, I know I wrote it down.  
23 You got reports? Police reports?

24 A Yes.

25 Q Reports of what witnesses saw -- what did that contain or what was



1 that about?

2 A I'm not sure what you are asking.

3 Q Okay. On direct examination you said you received -- you reviewed  
4 documents provided by the defense attorney in this case, right?

5 A Yes.

6 Q Okay. I noted all the items that you reviewed, and you stated you  
7 received and reviewed police reports, right?

8 A Yes. I think they were police reports, yes.

9 Q And then specifically you indicated that you reviewed reports of what  
10 witnesses saw. Okay?

11 A Yes.

12 Q What -- what fell within that gamut or that category?

13 A Those were the police reports where they interviewed witnesses and  
14 took notes.

15 Q Okay. So are we talking transcripts of interviews, or --

16 A Yes.

17 Q Okay. And you also reviewed the photo lineup showup forms, correct?

18 A Yes.

19 Q And two photos?

20 A Yes.

21 Q Okay. Were you provided 911 calls?

22 A I was not.

23 Q Okay. How about body camera footage?

24 A I have not seen any.

25 Q Okay. We'll get back to that in a minute.

1                   So you reviewed, for approximately 14 hours, all of these items that we  
2 just kind of outlined; is that right?

3           A       Not entirely, no.

4           Q       Okay.

5           A       What is accurate is that part of the 14 hours I spent reviewing and  
6 reading over those materials and looking over them. The rest of the time I spent  
7 doing library research to -- to study up on the factors that were apparently involved  
8 in this case.

9           Q       Okay. And when did you do that research?

10          A       The library research?

11          Q       Yes.

12          A       I can't tell you which days or hours, but it was since the time that I was  
13 contacted by the public defender's office.

14          Q       Okay. So after you were hired?

15          A       Correct.

16          Q       Okay. And this particular research, can you be a little more specific  
17 about what items it was that you actually looked at? Are we looking at papers?  
18 Articles? Books? What -- what are we looking at that you -- that you researched  
19 in preparation for your testimony today?

20          A       Papers, that is to say published papers, articles, book chapters, and --  
21 and some websites.

22          Q       Okay.

23                   MS. LEXIS: Your Honor.

24                   THE COURT: What?

25                   MS. LEXIS: May we approach?

1 THE COURT: No. Continue with your foundation. I don't want  
2 anybody approaching yet.

3 MS. LEXIS: Okay.

4 BY MS. LEXIS:

5 Q Did you -- after doing this library research to study up, was that to  
6 study up for the subject of your testimony today?

7 A When you say study up, can you explain what you mean?

8 Q Will you said you -- I wrote down library research to study up. That's  
9 what you said?

10 A Yes.

11 Q Okay. So you conducted library research to study up?

12 A Yes.

13 Q On the subject matter upon which you're testifying today?

14 A Yes.

15 Q Okay. And so can you kind of give us an indication of the names and  
16 articles, also the authors of the papers and published papers and research that  
17 you conducted to study up?

18 A Well, as I mentioned before, I don't have a photographic memory so I  
19 don't think I can give you a complete listing of them. And when I say study up, this  
20 is to refresh my memory about facts. I -- my reading has gone back over many  
21 decades. And so whenever I have a case, I refresh my memory by looking at  
22 sources. And the sources I got were through our database called PsycINFO,  
23 which has a compendium of psychology articles. And in those articles I saw --  
24 would you like me to name some of the authors of some of those articles?

25 Q Sure.

1           A     There was one whose first author was Jeffrey Neuschatz or something  
2 like that. I don't know how to pronounce his last name. Let's see. There was a --  
3 an article by a person whose last name is Stebley, S-T-E-B-L-E-Y, it was a  
4 meta-analysis. There -- let's see, there were articles -- I can't remember the  
5 authors' names -- names of the other articles, let me think a moment.

6           Q     While you are contemplating that, these particular articles with the  
7 authors that you named --

8           A     Uh-huh.

9           Q     -- did they contain research and data?

10          A     Many of them did, yes.

11          Q     Okay. And you refreshed your memory and looked at these and pulled  
12 these articles in anticipation of testimony today?

13          A     Yes.

14          Q     So it was fresher in your mind, right?

15          A     Yes.

16          Q     And this information you're relying upon as partly the basis for your  
17 testimony today, your -- at least your opinion testimony, correct?

18          A     Let me -- let me think about your question for a moment.

19          Q     This data, the research --

20          A     No, I understand the question.

21          Q     -- contained in the articles, are you relying on it in forming your  
22 opinions as you stated here today?

23          A     What I'm trying to do -- I want to answer your question correctly, and  
24 so I'm trying to think which parts of my testimony relied on things that I've read in  
25 the time period that you're identifying versus which ones did I read some other

1 time or did I talk to people about some other time.

2 I believe that although I found some articles that I thought would be  
3 relevant, I don't believe that I have mentioned any of those articles in my testimony  
4 today.

5 Q Right, but that's not the question. It's not whether you mentioned it.  
6 Okay. It's whether or not you took that knowledge, the data, the research, that you  
7 refreshed your memory with, whether that formed a basis for your testimony, your  
8 opinion testimony here today?

9 A Whether it formed the basis of it?

10 Q Yes.

11 A Do you mean --

12 Q Whether you relied on that information to give the opinions you  
13 rendered during direct examination?

14 A If I relied on -- when you say did I -- that I relied on it --

15 Q Did you use that information --

16 A -- do you mean, for example, that I mentioned things that I read in  
17 those articles? Did I --

18 Q Did you use that information? Did you rely on it? Did you refresh your  
19 memory and say, Hey, actually, this study was good, and the information in this  
20 particular study, as I'm researching it in the library, that's going to help form the  
21 basis for some of your testimony today?

22 A Okay. I see. I understand what you are saying. The answer is no.

23 Q Okay. So you studied up?

24 A Yes.

25 Q Okay. After you were hired?

1 A Yes.

2 Q But it's your testimony here that that -- that did not form a basis for your  
3 opinion?

4 A It did in the sense that what I learned was that what I already knew  
5 was the relevant information and there was nothing more recent that I needed to --  
6 to see.

7 MS. LEXIS: Your Honor, I renew my objection.

8 THE COURT: Your objection is noted. You can make a record at a  
9 break, but I want you to continue.

10 MS. LEXIS: Okay.

11 BY MS. LEXIS:

12 Q Your prior testimonies, as we were previously discussing -- or actually,  
13 let me ask you this.

14 How many times have you testified as an expert witness? Like, what's  
15 the average in a year?

16 A The average in a year? In the last I would say 10 or 15 years, the  
17 average would be once or twice a year.

18 Q Okay. Let's see. Your prior testimony, has it always been in a district  
19 court in Texas?

20 A No.

21 Q What other jurisdictions?

22 A Well, they've all been in Texas, but they have not all been in district  
23 courts in Texas.

24 Q Okay.

25 A I've testified in two federal cases that were in Texas, and I think the

1 rest were -- most were in Harris County, one or two have been elsewhere in  
2 Texas.

3 Q Okay.

4 A Oh, I -- I just remembered, there were -- there were two in Dallas-Fort  
5 Worth.

6 Q Okay. So you -- you're an expert in this case, right? You have been  
7 noticed as an expert, as an eyewitness identification expert, right?

8 A Yes.

9 Q Okay. But, Dr. Smith, isn't it true that you can't actually render an  
10 opinion as to the reliability of the actual identifications made in this case?

11 A If I understand your question, you are asking me do I know whether or  
12 not the witnesses' memories were accurate or not?

13 Q No.

14 A Okay.

15 Q You can't comments on the reliability of the actual identifications made  
16 in this case, correct?

17 A That is correct.

18 Q Okay. Because that's for the jury, the ladies and gentlemen of the jury  
19 to decide in this case, correct?

20 A Absolutely. That's --

21 Q Okay.

22 A That's right.

23 Q Okay. You indicated that, on direct examination, that you do this as  
24 a -- for the science, right? Do you remember saying that?

25 A That is my --

1 Q You testified for the science?

2 A That is my goal, yes.

3 Q Okay. So eyewitness identification, you consider that a science, right?

4 A Yes.

5 Q Okay. Is it similar in scientific methodology as DNA analysis or like

6 fingerprint analysis?

7 A Yes.

8 Q How so?

9 A It is similar in the sense that it relies upon theories, it relies on

10 empirical or experimental tests of those theories where we do experiments to test

11 our hypotheses. It requires statistical generalization, as other science does. It

12 requires write-ups for peer-reviewed articles in journals that consider themselves

13 to be scientific publications.

14 Q Okay. Would you agree with me that DNA evidence is an unbiased

15 type of evidence?

16 A No.

17 Q Okay. Why not?

18 A Because DNA can be contaminated. It can be faked, it can be --

19 Q DNA can --

20 A Things can be done with the evidence.

21 Q Okay. DNA can be faked? Is that what you just said?

22 A Yeah. You -- if someone switches the DNA sample.

23 Q Okay. How about just -- absent all of those factors, right --

24 A Without it being contaminated.

25 Q Correct. Would you consider it an unbiased? I mean, it just basically



1 tells you the presence of an individual's DNA on any particular item, would you --  
2 would you agree?

3 A I think that if you -- that if you take some of the things like  
4 contamination out, that you can get a lot of the bias out. I think every science has  
5 some bias.

6 Q Right, okay.

7 A That would include DNA.

8 Q What about fingerprints? Without any kind of contamination,  
9 fingerprints will just tell you whether or not someone touched something, correct?

10 A Not really. It isn't quite exact as -- as many people think. There are  
11 some cases from things I have read where not all fingerprints are unique, I don't  
12 know of cases in which that's ever been a problem.

13 Q Are you an expert in this field?

14 A I am not.

15 Q Okay. So that comment that you just made about it not being unique,  
16 you have no -- would it surprise you to learn that the actual expert from the latent  
17 print division of Las Vegas Metropolitan Police Department just testified -- the  
18 expert in this case testified for the ladies and gentlemen of the jury that fingerprints  
19 are indeed unique; would that surprise you?

20 A I wouldn't be surprised. No.

21 Q Okay.

22 MR. GASTON: All right. At this point --

23 MS. LEXIS: That's it.

24 MR. GASTON: Your Honor, at this point I'm going to object to outside  
25 the scope. We've called him in as eyewitness identification expert and talking

1 about human memory. Not talking about DNA, not talking about fingerprints.

2 MS. LEXIS: We're talking about the science.

3 MR. GASTON: Seems like she's baiting him a little bit.

4 MS. LEXIS: And comparison.

5 MR. GASTON: She's asked him about question about fingerprints --

6 THE COURT: Well, what --

7 MR. GASTON: -- and then he answers and then she's like, Well, you  
8 are not an expert in that so we don't care what your opinion is.

9 THE COURT: Yeah. What she's trying to do is -- is test whether this  
10 is --

11 MS. LEXIS: A science.

12 THE COURT: -- a field of technical or scientific knowledge such that  
13 it's capable of expert analysis. And I'll allow her to do that, because it goes -- she's  
14 pointing out some things that she believes goes to the weight of the testimony that  
15 the jury should give. And I think that's a proper area of examination.

16 MR. GASTON: Yes, sir.

17 THE COURT: All right.

18 MS. LEXIS: Thank you.

19 BY MS. LEXIS:

20 Q You mentioned that there were -- that eyewitness identification and --  
21 and the research, you know, you all as scientists, doctors in this field, conduct  
22 experiments; is that right?

23 A Many of us do, yes.

24 Q Okay. And in particular, during direct examination, you testified about  
25 kind of a test that you perform on all of your -- all of your students?

1 A It's more of a demonstration.

2 Q Okay. So are you familiar, based on your training and experience and  
3 your expertise, with how it is that actual eyewitness identification experiments are  
4 conducted?

5 A Could you repeat your question, please?

6 Q Yeah. Let me phrase it a different way. These experiments that you  
7 talk about in the area of eyewitness identification, they are actually, like, mock  
8 crimes, correct?

9 A In -- in many of them, but certainly not all of them.

10 Q Okay. But in the ones that you read, typically, they are mocked  
11 crimes, correct?

12 A That is a common method.

13 Q Okay. Because you -- it's unethical for eyewitness experts or  
14 psychologists, psychiatrists like yourself to actually subject people to victimization,  
15 correct?

16 A That's correct.

17 Q All right. So what you all do as scientists in this field, you do mock  
18 crimes, correct?

19 A That is one of the things that we do --

20 Q Okay.

21 A -- yes.

22 Q So that's one of the things.

23 A It is.

24 Q All right. With mock crimes, how does that work? How does that  
25 research work?

1           A     Well, they vary. In some cases, for example, the mock crime is a  
2 live-staged event in front of people. In other cases it's done with a video that  
3 people watch. Those are the -- the two most common ones of -- of the staged  
4 events that I know of.

5           Q     Okay. And they involve the use of paid participants, correct?

6           A     Usually, no. Not -- my experiments certainly don't.

7           Q     Okay. So you don't use college students who volunteer or somehow  
8 get paid?

9           A     We do use college students who volunteer. Many, if not most of those  
10 college students don't get paid. It may be that in some laboratories they do pay.

11          Q     Okay.

12          A     But that -- that's not very common.

13          Q     Okay. But to some extent, the individuals who are being subjected to  
14 this mock crime, they know what they're there for, correct? Taking part in a  
15 research experiment, correct?

16          A     They know they're there to take place in a research experiment.

17          Q     Okay.

18          A     Yes.

19          Q     Now the -- the whole purpose of this mock crime is to replicate the  
20 performance and the -- the factors and situations that would be present in a violent  
21 crime, let's say, correct? Like the robberies in this case, right? They are trying to  
22 replicate an environment wherein, let's say, a crime's been committed against a  
23 victim, correct?

24          A     No.

25          Q     What are they for, then?

1           A       Excuse me. It isn't necessary to have a -- although there are studies of  
2 real crimes, it isn't necessary to have all of the elements of a real crime to study,  
3 for example, one dimension of -- of a subject's behavior --

4           Q       Okay.

5           A       -- for example --

6           Q       But let me -- let me say --

7           THE COURT: Hold on.

8           THE WITNESS: Okay.

9           THE COURT: You got to let him finish.

10          MS. LEXIS: Okay.

11          THE COURT: You asked an open-ended question, you got to let him  
12 finish --

13          MS. LEXIS: Okay.

14          THE COURT: -- his answer, unless you want to withdraw your  
15 question.

16          MS. LEXIS: I'll withdraw that question. Let me make it a little more  
17 pointed.

18          THE COURT: All right.

19          MR. GASTON: Okay --

20          THE COURT: What.

21          MS. LEXIS: He can redirect.

22          THE COURT: What now? They -- you can't withdraw a question?

23          MR. GASTON: No, I misunderstood what she was doing. I think we  
24 are all on the same page.

25          THE COURT: All right. She's completely withdrawing the question.

1 MR. GASTON: Okay.

2 THE COURT: All right. And not letting the witness answer. That's her  
3 prerogative under these circumstances.

4 Go ahead.

5 MS. LEXIS: Thank you.

6 BY MS. LEXIS:

7 Q Sir, these research and experiments, right, they are designed to  
8 measure the reliability and efficiency or accuracy of eyewitness identifications,  
9 correct?

10 A Many of them are.

11 Q And criminal settings, typically, correct? Like you're -- you're an  
12 identification expert in a criminal case giving expert testimony in that field, correct?

13 A I -- I am an expert giving testimony. But I missed the first part of your  
14 question.

15 Q Let me ask you this.

16 A Okay.

17 Q Are these experiments meant to replicate conditions which would be  
18 present in a real crime scene?

19 A That -- that does occur, but it's very rare.

20 Q Okay. So how is it, then, that this jury can rely upon this research that  
21 you relied upon when the conditions don't even replicate the event upon which  
22 your testifying about?

23 A That's a great question.

24 Q How can they rely on that?

25 A That is a great question. It is the same way that, for example, a

1 chemist who is trying to understand something, for example, the petroleum  
2 industry might go into their laboratory, do studies with their test tubes and Bunsen  
3 burners and so on, and make a conclusion about what happens in this highly  
4 controlled laboratory situation before they would want to generalize it to, for  
5 example, tell the petroleum industry how to refine their materials.

6 Q Okay.

7 A It's the same sort of thing where we extract dimensions of interest and  
8 we test those.

9 Q Okay.

10 A That's -- that's the more common type of research.

11 Q Right. You said two things that kind of piqued my interest. You  
12 indicated that they are highly controlled?

13 A That's correct.

14 Q All right. So this -- research experiments are highly controlled, right?

15 A That's the idea, yes.

16 Q Now, crime scenes necessarily aren't quite as controlled. I mean,  
17 maybe one person, you know, the perpetrator has control of the scene, right? So  
18 they're not considered actual crime scenes. All right. Would you -- would you --

19 A Crime scenes --

20 Q -- consider those controlled?

21 A -- are not controlled --

22 Q Okay.

23 A -- conditions in the scientific sense.

24 Q Okay. So that's how they kind of differ, the experiment versus real life,  
25 right?

1 A Experiments differ, yes.

2 Q Okay.

3 A From real life.

4 Q Okay. Whew. All right. You also indicated that, particularly with your

5 experiments, you're dealing typically with a single variable, correct?

6 A No.

7 Q Okay.

8 A I -- I hope I didn't give that impression. That often happens but there

9 are many cases where people look at more than one variable at the same time,

10 because they want to know the affects of not just of those variables, but how they

11 interact.

12 Q Okay. So I guess kind of like real life, lots of different things, lots of

13 different variables come into play, correct?

14 A In real life.

15 Q In real life, yes.

16 A Yes.

17 Q However, an experiment in more controlled environments or highly

18 controlled environments, how many variables can you affectively test at the same

19 time?

20 A Not very many.

21 Q Okay. How limited? I mean how many could you as a -- as a scientist

22 in this field, how many variables can you test at any given point in time?

23 A Well, I -- I don't know an answer to that question, but I can give you an

24 estimate.

25 Q Okay.



1           A     I would have a hard time imagining someone trying to do more than 10  
2 variables, it would be very complex.

3           Q     Okay. We will talk about that in a minute.

4                     Have you ever performed your own research in the area of eyewitness  
5 identification?

6           A     Yes.

7           Q     Okay. When?

8           A     In the 1990s I did -- I did some of that research. And then I've done  
9 other research since that time that is roughly under the purview of eyewitness  
10 memory, but it applies to other areas of memory, as well.

11          Q     Okay. So 1990s, maybe something closer in time to today, but not  
12 as -- not as special to eyewitness identification?

13          A     Not only to eyewitness identification, that's correct.

14          Q     And so you've primarily reviewed research conducted by other  
15 individuals in your field?

16          A     Yes, I have to do that.

17          Q     So you're relying, basically, on other peoples' research?

18          A     I'm relying on a community of scientists. I can't do it all myself.

19          Q     Right. So other scientists' research?

20          A     That's the rest of the community, if you don't count me.

21          Q     Okay. So you rely on that?

22          A     Yes.

23          Q     Okay. And you read books and articles on these topics, right?

24          A     Yes, I do.

25          Q     Okay. Try to keep up to date with trends and things like that, right?

1 A Yes, I do.

2 Q Changes in the scientific field, right?

3 A Yes.

4 Q Okay. However, these particular studies or these research articles or  
5 things like that; fair to say that they're kind of a summary of what that particular  
6 research was about and how it was carried out? It's more of a summary, correct?

7 A What is more of a summary?

8 Q These particular research articles and books that you've read, studies.  
9 Do you actually -- let me ask you this way. Do you actually look at the raw data --

10 A Yes.

11 Q -- from these -- from these researchers?

12 A Yes, I do.

13 Q Okay.

14 A And the methods.

15 Q And the methods.

16 A Yes.

17 Q Okay. Which ones have you done recently -- have you looked at  
18 recently?

19 A Recently I looked at some articles looking at the reliability of showups  
20 in comparison to photo spreads.

21 Q Okay. Was that provided to the defense attorneys in preparation for  
22 trial?

23 A It was in preparation for the trial but once I reviewed the material, it  
24 seemed to me that it was unnecessary.

25 Q Okay. The review?

1           A     The -- what I learned from that article, or from the one that I am  
2 referring to right now, was that it was not relevant enough to matter -- so I was  
3 asked, for example, about important factors that might compromise memory, didn't  
4 seem like an important factor.

5           Q     Okay.

6           A     But I was --

7           Q     What didn't --

8           A     -- reading it to see --

9           Q     What didn't --

10          A     -- if it did.

11          Q     -- seem like an important factor?

12          A     The difference in reliability or accuracy between a showup method and  
13 a photo spread method.

14          Q     Okay. So you provided three articles to the defense attorneys,  
15 correct?

16          A     I did.

17          Q     Okay. One is called the *Effective Retention Interval on Showup and*  
18 *Lineup Performance*, right?

19          A     Yes. Uh-huh.

20          Q     There is one labelled two, *Showups*, right?

21          A     Ah, Scott Groement [phonetic]. There we go. Now I remember.

22          Q     Okay. And there is one called *Eyewitness Accuracy Rates in Police*  
23 *Showup and Lineup Presentations*, correct?

24          A     Could you say that again, please?

25          Q     *Eyewitness Accuracy Rates in Police Showup and Lineup*

1     *Presentations*, that's the --

2           A     Yes.

3           Q     -- third article?

4           A     Yes.

5           Q     Okay. And you reviewed these in preparation for trial?

6           A     That was my intention, was to -- to see if it was relevant for this trial,  
7     yes.

8           Q     Okay. So you are familiar with the -- at least the contents therein?

9           A     Yes.

10          Q     We are going to talk about that in a little bit. Okay.

11                 You talked about an ideal case during direct examination?

12          A     Yes.

13          Q     Do you remember that?

14          A     I do.

15          Q     Okay. And you talked about certain factors, one of which is whether  
16     the victim got a good look at the perpetrator; that's a factor, correct?

17          A     That is.

18          Q     Okay. Whether it was full light, you know, versus dark conditions,  
19     correct?

20          A     That would make a difference, yes.

21          Q     How soon after they were interviewed or they were able to give a  
22     description of the perpetrator; do you remember that as being the third item?

23          A     Yes. That is an important factor.

24          Q     Okay. The existence of cross-racial identification; that was another  
25     factor, correct?

1           A     Yes, it is can be.

2           Q     And you noted so long has there aren't any special circumstances, that

3 to you is considered an ideal case, correct?

4           A     No.

5           Q     Okay.

6           A     No. You swept a lot under the rug with when -- a special

7 circumstances --

8           Q     Let me ask you this --

9           A     It is often --

10          Q     No, no --

11          A     Okay.

12          Q     During cross -- during direct examination, did you elaborate on these

13 special circumstances?

14          A     Yes.

15          Q     Did I miss something?

16          A     Yes.

17          Q     Okay.

18          A     I did elaborate on them.

19          Q     Okay.

20          A     But you didn't mention them in your question.

21          Q     Okay. Good look at the defendant, full light, interviewed quickly, zero

22 cross-racial identification issues, and no special circumstances; that's considered

23 an ideal case to you?

24          A     Those -- those were examples of factors that could make a case less

25 than ideal. But that was --

1 Q Okay. No, no, no, no.

2 A -- not exhaustive --

3 Q Doctor, that's not --

4 A -- list of examples.

5 Q That's -- I'm not asking you if it's an exhaustive list. Okay. I'm just  
6 asking you, did you testify on direct examination that if the victim got a good look at  
7 the defendant, if there was full light, if they were interviewed quickly, if there was  
8 no cross-racial identification issues, and no special circumstances, that is  
9 considered an ideal case? I wrote it down; that's considered an ideal case. Did  
10 you say that on direct?

11 A No.

12 Q Okay.

13 A You wrote that down incorrectly.

14 Q Okay. 70 to 80 percent accurate, an ID of someone seen for the first  
15 time; you remember saying that?

16 A Yes.

17 Q Okay. The items that you reviewed in this particular case, were you  
18 told each of the victims in this particular case concerning the factor of getting a  
19 good look at the defendant, okay, or getting good look at the perpetrator, did you  
20 know when you were rendering your opinion that each of the victims in this  
21 particular case, Marvin Bass, Deborah Faulkner, Darrell Faulkner, Santiago  
22 Garcia, Jordan Alexander, Lazaro Bravo-Torres, and Rosa Vazkuez all reported  
23 getting a good look at the perpetrator; were you aware of that?

24 A Yes.

25 Q Okay. You are aware that each of these particular robberies, all five

1 separate incidents, occurred during the light hours, correct?

2 A Yes.

3 Q Okay. Were you aware of how quickly or how soon after this violent  
4 robbery each of these victims were interviewed by police?

5 A Yes.

6 Q Okay. And were you aware of how soon after the incident each of  
7 these victims called 911?

8 A No.

9 Q Okay. Were you aware of how soon after this violent incident each of  
10 these victims was taken to either conduct a showup or photo lineup; were you  
11 aware of the timing?

12 A Yes.

13 Q Okay. So there's a -- there's such a thing as duration interval; am I  
14 saying that right?

15 A Yes.

16 Q Okay. And duration interval, is that also called as retention interval?

17 A It's called retention interval.

18 Q Okay. And, basically, that stands for the general proposition that when  
19 an identification is made, the sooner the better, correct?

20 A That's right.

21 Q Okay. Because memory declines, right?

22 A That's right.

23 Q Okay. So the sooner the better?

24 A Correct.

25 Q Okay. How would you define soon?

1           A     I -- I wouldn't define soon other than in a relative sense. I believe that  
2 within hours, anybody would consider that soon. I think waiting more than two  
3 days, most people would consider that not to be soon.

4           Q     Okay. So, Marvin Bass, the victim in the March 26, 2016, incident, you  
5 weren't aware of this, but his 911 call was placed at 12:58; do you recall that?

6           A     I do not recall when his --

7           Q     Okay.

8           A     -- 911 call was.

9           Q     Okay. And then he gave a taped voluntary statement at 1:24; that's  
10 pretty soon, right?

11          A     Pretty soon --

12          Q     Compared to -- from 12:58 to 1:24?

13          A     That would be considered a short time.

14          Q     Okay. So terms of retention interval, that's short?

15          A     Yes.

16          Q     Okay. And that goes towards the -- it falls more on the favor of a  
17 reliable identification, correct?

18          A     A -- a brief time you can count on memory to be better than after a  
19 longer time.

20          Q     Okay.

21          A     Yes.

22          Q     All right. You reviewed items or documentation concerning Darrell and  
23 Deborah Faulkner, correct?

24          A     That's right.

25          Q     911 call placed at 6:53 a.m.; do you have reason dispute that? You



1 didn't know the 911 calls, right, whether they even made one?

2 A I didn't know when the 911 call was.

3 Q Okay. Were you aware that during that 911 call placed at 6:53 a.m.,  
4 Darrell and Deborah Faulkner gave a description; black male adult, 18 to 19 years  
5 old, small build, black shirt, blue jeans, blue tennis shoes, correct? Were you  
6 aware that they gave that identification?

7 A I read a description that they gave, but I didn't know it was part of  
8 a 911 call.

9 Q Okay. Okay. So that could have been a different description.

10 A Could have been.

11 Q Probably the -- the transcripts of the taped interviews maybe?

12 A I don't know if they were taped or not, but I did read a transcript.

13 Q Okay. And so 911 call made immediately after the incident, so 6:53  
14 seems accurate, right?

15 A Yes.

16 Q And they gave this description, correct?

17 A Yes.

18 Q All right. Were you aware that then a showup was conducted with Mr.  
19 Faulkner at approximately 9:23 a.m.?

20 A I didn't know the time, but I did know that a showup was done.

21 Q Okay. So you didn't know the time?

22 A I knew it was a short time.

23 Q Okay. But you didn't know exactly?

24 A I don't remember looking at the exact times. I knew it was less than a  
25 day.

1 Q Okay. So you would -- you would agree with me, then, an hour, two  
2 hours, three hours differ significantly from just a day -- from a day, correct?

3 A Yes.

4 Q Okay. 24 hours in a day, right?

5 A [No audible response.]

6 Q Okay. Is that a yes?

7 A That's my understanding.

8 Q And so concerning the Faulkners, the -- the actual -- were you aware  
9 that Mr. Faulkner gave a recorded statement at 7:22 a.m.?

10 A I did not know that he gave a recorded statement nor what time it was.

11 Q Okay. But 6:53 to 7:22, that's, like, half an hour, right?

12 A That the sounds right.

13 Q After the incident? Okay. Were you aware that he gave a description  
14 in that recorded statement?

15 A In which recorded statement is this?

16 Q Mr. Faulkner's recorded statement at 7:22.

17 A You mean the one that I didn't see?

18 Q I thought you said you saw one?

19 A Oh, okay. I saw a written-down statement. When you said recorded, I  
20 thought you meant video recorded or tape recorded.

21 Q We're talking tape recorded.

22 A Okay. So I didn't hear a tape recording, and didn't see that what I read  
23 had come from a tape recording. I may might have skipped over that. But I do  
24 know that he gave a description of the incident and the perpetrator after a short  
25 time.

1 Q Okay, I am going to approach you with Bate stamp Discovery 293, and  
2 ask you if you looked at this particular piece of evidence? This was one of the  
3 items provided to you by defense counsel.

4 A Yes.

5 Q Okay. There's a date and time, right?

6 A It wasn't highlighted on my copy.

7 Q All right. But it was there?

8 A But I see it here.

9 Q Okay.

10 A Uh-huh.

11 Q Okay. But it was present in your copy? I mean this isn't doctored;  
12 you're not saying that it's doctored?

13 A If it were, I wouldn't know.

14 Q All right. And so the time says 5/28/2016 at 7:22 hours, right?

15 A You just took it away. If I can read it off of there, I can read the number  
16 to you. Where -- where is that?

17 Q The highlighted portion.

18 A It says 5/28/2016.

19 Q Uh-huh.

20 A And do you want me to tell you the hours also?

21 Q Yes?

22 A 7:22.

23 Q Okay. And so you received this information, but you didn't pay  
24 particular close attention to the exact time that it was given, correct?

25 A I paid attention only to the extent that I knew it was what I would

1 consider a brief time.

2 Q Okay.

3 A But I didn't make a note of the hour or minute of the day.

4 Q Okay. But retention interval, as we just discussed, is a -- is a factor,  
5 correct?

6 A Certainly, it is.

7 Q When you are assessing the reliability of a particular identification,  
8 correct?

9 A Definitely.

10 Q All right. So Jordan Alexander -- you received information concerning  
11 the event with Jordan Alexander, correct?

12 A Yes.

13 Q All right. Were you aware of a 911 call or contact with law enforcement  
14 made at 7:01 a.m.?

15 A I don't know if I was made aware of that or not, because I don't know if  
16 what I read was the result of a 911 call. And if it was, I don't know what time  
17 the 911 call was.

18 Q Okay.

19 A My memory is not that good.

20 Q I know, you keep saying. 911. Okay. You have no reason to  
21 dispute 911. The jury has already heard the 911 call at 7:01 a.m.; do you  
22 remember that or -- yes, do you agree?

23 A Are you asking do I have a reason to dispute that it was made?

24 Q Yeah. Do you have reason --

25 A I have no reason to dispute that.

1 Q Okay. And then, were you given a written statement by Jordan  
2 Alexander to look at?

3 A I think I was.

4 MS. LEXIS: Permission to approach.

5 THE COURT: Yes.

6 BY MS. LEXIS:

7 Q Bates stamp 185; did you review this document?

8 A This looks familiar.

9 Q Okay. And did you note the time that this was -- that this was written?

10 A Did I -- I did not note the time --

11 Q Okay. You --

12 A -- other than to note that it was a brief time.

13 Q Okay. Would you just indulge me. What's the time --

14 A It says --

15 Q -- on the information?

16 A -- 0750.

17 Q Okay. Were you aware that Mr. Alexander then gave a taped  
18 statement, which was transcribed, to the police; were you aware of that? Would  
19 you like to look at it?

20 A I wouldn't mind looking at it, but I saw a typewritten statement. I didn't  
21 know if it was recorded or how it got written.

22 Q Okay. So a typed -- typed statement?

23 A I did see that, yeah.

24 Q Okay. Or an interview?

25 A I saw a transcript of what looked like an interview, yes.

1 Q Okay. And you didn't note the time or date of the particular interview,  
2 correct?

3 A Well, sort of. When I looked at all of the interviews in the statements  
4 given by the witnesses who were given showups, I did note that all of them were  
5 done within a day, in -- within hours.

6 Q Okay. But in --

7 A That I noted, and the exact time didn't seem interesting to me, so I  
8 didn't note that.

9 Q It didn't seem interesting?

10 A The exact time.

11 Q Okay.

12 A The fact that it was a short time was interesting.

13 Q Would you agree with me that hours can -- can have a determination  
14 and reliability of eyewitness identification?

15 A I don't -- I -- could you --

16 Q Okay.

17 A When you say hours can have -- I don't understand your question.

18 Q The difference between one hour, two hours, three hours, four hours,  
19 five hours, 10 hours, that -- that comes into play, correct?

20 A Not particularly.

21 Q What do you --

22 A It does -- with certain types of memory --

23 Q Uh-huh.

24 A -- in eyewitness memory, it -- any of those would be considered about  
25 the same.

1 Q What do you consider --

2 A An extra day would be noticeably longer.

3 Q Let me -- let me get a gauge. What's considered short?

4 A A day or less.

5 Q Okay. So this statement, though -- I forgot why I came here -- Jordan

6 Alexander, 6/28/16 at 809 hours; reason to dispute that?

7 A I have no reason to dispute that.

8 Q And were you aware, based on your review of materials in this

9 particular case, that at approximately 9:04 a.m. Jordan Alexander positively

10 identified the defendant by way of showup; were you aware of that?

11 A I was not aware of the time that was stamped on that, but I was aware

12 that there was a positive identification from a showup from that witness.

13 Q 100 percent positive, correct?

14 A That's what I recall.

15 Q Okay. I want to circle back to Darrell Faulkner. As we've already

16 established, the showup was conducted at 9:24 a.m. I forgot to note, were you

17 aware that he gave with a 100 percent positive identification of the defendant at

18 that time?

19 A I am aware, yes.

20 Q Santiago Garcia. Did you review documentation from Mr. Garcia?

21 A I think I did, yes.

22 Q Okay. Were you aware of a 911 call being placed at 7:08 a.m.?

23 A I was not aware that there was a 911 call placed at 7:08.

24 Q Okay. And that he gave a description of a black male adult, 20

25 to 25 years old, medium build, black clothing; do you remember that? Do you

1 remember reading a description like that?

2 A Yes.

3 Q Okay. Do you recall whether or not you were aware -- were you aware  
4 that Santiago Garcia positively 100 percent ID'd the defendant at 9:43 a.m. by way  
5 of a showup?

6 A I don't recall that one being a hundred percent.

7 Q Okay.

8 A So I do remember that he positively ID'd the defendant, yes.

9 Q Okay. Lazaro Bravo-Torres and Rosa Vazkuez Ramirez, 911 call  
10 at 7:15 a.m.; any reason to dispute that?

11 A No.

12 Q Okay. Description: Black male adult, short curly hair, thin build,  
13 small-frame firearm, short-sleeved shirt, saggy pants; do you remember that  
14 description?

15 A That sounds familiar.

16 Q Okay. Do you recall Mr. Lazaro Bravo-Torres identifying the  
17 defendant, 90 percent certainty, at approximately 9:13 a.m.?

18 A I don't remember the time.

19 Q Okay.

20 A I do remember that he made positive identification. And when you  
21 said 90 percent, that sounds familiar, also.

22 Q Okay. How about concerning Rosa Vazkuez Ramirez; were you aware  
23 that she was taken for a showup at 9:25 a.m.?

24 A I was not aware that she was taken for a showup at 9:25 a.m.

25 Q Okay. Were you aware that she positively identified the defendant with



1 a 95 percent certainty as being the individual who robbed her and her husband;  
2 were you aware of that?

3 A Yes.

4 Q Now you were given the actual showups conducted in this particular  
5 case, correct? Like, the showup forms; do you remember that?

6 A Yes.

7 Q Okay. Those have the times listed of -- concerning the showups, as  
8 well, correct?

9 A I -- I'll take your word for it. I didn't note the times once I had noted that  
10 they were all within the day.

11 Q Okay. Short duration?

12 A Correct.

13 Q Okay. Now there were some cross-racial -- so now we got good look  
14 at the defendant or the perpetrator, full light, interviewed quickly, right? We're  
15 going through the list that you testified about on -- on direct. Not exhaustive, but  
16 list that you gave on direct, right?

17 A That's right.

18 Q So now that brings us to no cross-racial identification issues. There  
19 were some cross-racial identification -- identifications present in this case, correct?

20 A Yes.

21 Q Okay. Were you aware, in particular, that Deborah and Darrell  
22 Faulkner were Caucasian?

23 A No.

24 Q Okay. Cross-racial identification does play a role, correct?

25 A It can. It -- it reliably does.

1 Q Okay. I mean at least that's your opinion?

2 A What I knew was that there were multiple races of witnesses --

3 Q Right.

4 A -- some of which were the same as the defendant, some of which

5 differed.

6 Q Okay.

7 A There was no reason to say across the board they were all not a

8 problem versus they were all problematic, because they varied.

9 Q Okay. So you were not aware -- the answer to my question would

10 have been, you were not aware that Darrell and Deborah Faulkner were

11 Caucasian?

12 A Someone may have told me that, but I was not -- I didn't remember

13 that.

14 Q Okay. And were you aware of the fact that Santiago Garcia is

15 Hispanic?

16 A Yes.

17 Q Okay. Lazaro Bravo-Torres and Rosa Vazquez Ramirez, Hispanic?

18 A Yes.

19 Q Marvin Bass, African-American?

20 A That's what I was told.

21 Q Okay. And Jordan Alexander, African-American?

22 A Uh-huh. Yes.

23 Q Now were you aware of the fact that Marvin Bass, who is of a similar

24 race to the defendant, Keandre Valentine, did, in fact, positively identify him by

25 way of photo lineup as the individual who put a gun to his face and robbed him of

1 his chains; do you recall that?

2 A I do.

3 Q Okay. So that was considered same-race identification?

4 A That's correct.

5 Q Okay. And it's your testimony that such identifications are inherently  
6 more reliable than the identifications of individuals or victims who are not the same  
7 race; is that right?

8 A In general, that's true, yes.

9 Q Okay. So all right. Marvin Bass, reliable same-race ID, right?

10 A No.

11 Q Okay. But at least as to that factor?

12 A Pardon me?

13 Q His -- at least to that factor, Mr. Bass --

14 A Yes, that's --

15 Q -- is an African American?

16 A That's certainly not a negative factor.

17 Q Okay. So --

18 A But that -- that's different than saying reliable.

19 Q Okay. It increases the reliability?

20 A No. You can't say it increases reliability; it's just something that was  
21 not a problem.

22 Q Okay. So really what you do is you identify problems, but at no time do  
23 you -- can you say, as an expert in this field, that a certain factor or a lack of a  
24 particular factor can make an identification more reliable; is that what you're  
25 saying?

1 A That is exactly what I'm saying.

2 Q Okay. So always looking for problems, but you are not ever able to  
3 say that a particular identification, even identifications which contain the ideal  
4 conditions that you've already talked about, you can't say that that's reliable,  
5 correct?

6 A I cannot say that it's 100 percent reliable.

7 Q That wasn't my question. Did that increase reliability? Did the  
8 absence or the presence of a victim who is the same race identifying this  
9 defendant as 100 percent positive being the robber who shoved a gun in his car,  
10 took his chains, did that increase -- did the fact that the victim was  
11 African-American increase the reliability of his identification?

12 A When you say increase --

13 Q Uh-huh.

14 A -- increase has to come from somewhere to be increased.

15 Q Right.

16 A What am I comparing it with?

17 Q Well you testified that there was a problem with this -- with this  
18 particular identification with Mr. Bass, correct?

19 A Yes.

20 Q Okay. So the -- the fact that this is same-race identification, that from  
21 the problem area, let's say this is the threshold --

22 A Uh-huh.

23 Q Okay? The same-race identification, according to your science and  
24 research, bumps it up towards the more reliable, correct?

25 A No. It --

1 Q Okay.

2 A I'm sorry, but --

3 Q Okay.

4 A -- the factors --

5 Q Nothing --

6 A -- don't just add up that way in science.

7 Q Okay. So nothing -- what -- let me ask you this. What would actually

8 or what factor would have to be present for you to say, okay, that that factor either

9 increased -- that that factor would increase reliability?

10 A Corroborating evidence.

11 Q And we will talk about that.

12 All right. Before I get too far ahead here. Jordan Alexander, okay --

13 now, wait a minute, Marvin Bass is, by the way, a photo lineup correct?

14 A That's my understanding, yes.

15 Q Okay. Jordan Alexander, however, was by way of showup, correct?

16 A Yes.

17 Q Jordan Alexander, African-American, correct?

18 A Yes.

19 Q Okay. Positively identified the defendant, an African-American,

20 to 1,000 percent certainty. Okay. Same-race identification more reliable, right?

21 Than, say, an identification by a white victim or, say, a Hispanic victim, according

22 to your research, right?

23 A According -- yes.

24 Q You talked about weapons focus during your direct examination; do

25 you recall that, sir?

1 A Yes.

2 Q Earlier you talked or told me about some authors that you relied upon  
3 or whose research you reviewed, you know, to refresh your memory. You named  
4 some of them, I can't -- I can't remember the names.

5 A I'm not surprised.

6 Q They were rather difficult. I just know they were hard to pronounce.

7 Gary Wells, are you familiar with him?

8 A Yes.

9 Q Okay. Is he somewhat renowned or at least well known in your field?

10 A Yes.

11 Q Have you had the occasion to review his research or articles written by  
12 Mr. Wells?

13 A Many of his articles, yes.

14 Q Okay. Show you -- have you read one called *Eyewitness Evidence:  
15 Improving Its Probative Value*; do you recall that?

16 A If you can tell me the names of the authors, that might help.

17 Q Yes.

18 A And the -- and the date.

19 Q Yes, sir. Gary L. Wells, Amina Memon, and Steven D. Penrod?

20 A Yes, I am aware of this one. Uh-huh.

21 Q Okay. All right. This particular article is, basically, a review of  
22 research done by other people; would you agree with that?

23 A That's my memory of it. Although it's been a while.

24 Q Okay. So it's basically these authors looking at various types of  
25 research that had been conducted in different areas concerning eyewitness

1 evidence, and then drawing a conclusion or drawing some kind of conclusion  
2 concerning that topic; is that your memory?

3 A Yes.

4 Q Okay. So concerning weapons focus, you indicated on direct  
5 examination that weapons focus is essentially when victims of crime are  
6 confronted unexpectedly, right, by an individual who brandishes a weapon, say,  
7 shoves it in their face, shoves it in their chest, in the car, okay, that they are so  
8 afraid of that particular weapon that all they can focus on is the weapon, and not  
9 necessarily the identity of the individual; is that what you said on direct?

10 A Roughly speaking, yes.

11 Q Okay. And you indicated that that affects -- that affected all of the  
12 witnesses in this particular case, correct?

13 A It could have.

14 Q Okay. My understanding was during direct examination you indicated  
15 that that was a factor that was -- that affected all witnesses in this case?

16 A That's a factor. I didn't measure that with each individual. That --that's  
17 the only way to know if it actually did have an effect. But one would infer from  
18 scientific studies that, given that everyone of these victims had a weapon held right  
19 up to them, that they had a possibility of being affected by weapon focus.

20 Q Okay. Let me know if you have -- if you're aware of this particular  
21 study, Valentine, et al., and I am taking this from this article that you're familiar  
22 with, *Eyewitness Evidence: Improving Its Probative Value*, the research is done by  
23 Valentine, et al., 2013 -- or 2003; are you aware of that research?

24 A No.

25 Q Okay.

1 MS. MACHNICH: Your Honor, before she approaches the witness with  
2 something, could we possibly be shown what it is? We have no idea what she's  
3 looking at.

4 THE COURT: Is this --

5 MS. LEXIS: He just acknowledged that it was a page in --

6 THE COURT: Is this something from his CV?

7 MS. MACHNICH: Okay. No, no. That's fine. I just --

8 THE COURT: Well.

9 MS. MACHNICH: I personally had not seen what she was referring to.

10 BY MS. LEXIS:

11 Q I obtained this article, you didn't provide this to me, correct?

12 A I didn't. It's not one of my articles.

13 MS. LEXIS: I'm on --

14 MS. MACHNICH: I understand. I've never seen this before. I'm  
15 looking at it.

16 MS. LEXIS: Well, this is cross, and impeachment, so.

17 MS. MACHNICH: I understand. I still get to look at it. Okay. Now I'm  
18 going to show my co-counsel.

19 MR. GASTON: I'm good, thank you.

20 MS. MACHNICH: You're good? I'm still reading.

21 BY MS. LEXIS:

22 Q So you didn't provide this to your defense attorneys?

23 A That's correct, I didn't.

24 Q Okay.

25 MS. MACHNICH: Now I've read.



1 MS. LEXIS: Thank you.

2 MS. MACHNICH: Thank you.

3 BY MS. LEXIS:

4 Q That's page 53; I'm just going to direct you to the highlighted portion.

5 THE COURT: Are you asking him to read it to himself?

6 MS. LEXIS: Yes.

7 BY MS. LEXIS:

8 Q Please read to yourself. Just the highlighted -- just the highlighted  
9 portion, Doctor.

10 A I understand. I am a slow reader.

11 Q I see that.

12 A The darker part I'm having a hard time seeing.

13 Q Okay. Let me just -- I could take that back. All right.

14 Would you have any reason to believe or disbelieve the holding or the  
15 actual conclusion of this study or research by Valentine, et al., concerning  
16 weapon -- for a weapon focus to stand for the proposition that Valentine and his  
17 associates, et al., in this study did not find a weapon focus affect in their study  
18 of 640 attempts by eyewitnesses to identify the alleged target in 314 lineups; do  
19 you have any reason to dispute that particular study?

20 A No, I don't. In fact, I suspect that it's a reliable study.

21 Q Okay. So at least this one study indicates that there are times when,  
22 really, weapon focus -- there's no weapon focus effect in certain -- certain victims  
23 in certain situations?

24 A When -- when a scientific study like that is done, if it is a sensitive  
25 study, if it's sensitive to the effect it's looking for, even then it may not find it in

1 every single individual that is seen. These are stochastic findings, meaning that  
2 probabilistically, if you take a certain number of people in one condition and the  
3 other condition you'll see differences. So it doesn't say that every person  
4 influenced.

5 It also doesn't say how good the experiment was for eliciting this effect.  
6 For example, you were mentioning the sort of naturalness of situations, perhaps it  
7 doesn't include that, perhaps it did. So I have no reason to dispute that they had a  
8 negative finding, it looks like they published it --

9 Q Okay.

10 A -- as it should be.

11 Q Okay. So the negative finding being the study said they did not find a  
12 weapon focus effect in their study of 640 attempts by eyewitnesses to identify the  
13 alleged target in 314 lineups. No reason to dispute that?

14 A I have no reason to dispute that.

15 Q During direct examination you also talked about suggestibility of  
16 showups and lineups, correct?

17 A I did. Yes.

18 Q Okay. Just in general. And you talked about how the suggestibility of  
19 showups and lineups can be alleviated by an admonishment, correct?

20 A Yes.

21 Q Particularly an admonishment that says something to the effect of  
22 this -- this may or may not be the individual who committed this crime against you;  
23 something to that effect, correct?

24 A Yes, and it -- I think it has more information. But, yes, it does say that.

25 Q Okay. But certainly alleviated by an admonishment, right?

1 A That's why the admonishments are given, yes.

2 Q Okay. Going to publish State's Exhibit No. 9. Okay. And this is the  
3 showup form for Jordan Alexander, okay? And you indicated that showups and  
4 lineups are inherently suggestive and alleviated by admonishments. So this  
5 particular showup instruction does have an admonishment, correct?

6 A These instructions look great.

7 Q Okay.

8 \*\*\*In a moment, I'm going to show you a person who is being detained.  
9 This person may or may not be a person who committed the crime now being  
10 investigated. The fact that this person is detained should not cause you to believe  
11 or guess that he or she is guilty. You do not have to identify anyone. It is just as  
12 important to free innocent persons from suspicion as it is to identify those who are  
13 guilty. Please keep in mind that clothing can be easily changed. Please do not  
14 talk to anyone other than police officers while viewing this person. You must make  
15 up your own mind and not be influenced by other witnesses, if any. When you  
16 have viewed the person, please tell me whether or not you can make identification.  
17 If you can, tell me in your own words how sure you are of the identification. Please  
18 do not indicate in any way to other witnesses that you have or have not made an  
19 identification. Thank you.

20 Great way?

21 A Those look good.

22 Q So certainly any suggestibility that you talked about certainly alleviated  
23 by the great set of instructions contained in each of these showups, right?

24 A Not completely alleviated.

25 Q Okay.

1           A     But it seems like it would mitigate it.

2           Q     Did you not just say that that was alleviated by admonishment during  
3 direct examination?

4           A     Yes, and I --

5           Q     Okay.

6           A     -- when I say alleviated --

7           Q     That's it. Nope, that's it.

8                 MR. GASTON: Can he -- objection.

9                 MS. LEXIS: Yes or no.

10                MR. GASTON: She keeps asking --

11                MS. LEXIS: It was a yes-or-no question.

12                MR. GASTON: She keeps asking questions and then not letting him  
13 answer.

14                THE COURT: You got to let him answer the question. All right. You  
15 can't ask, you know --

16                MS. LEXIS: Okay.

17                THE COURT: Because what you are doing, you ask, like, these big  
18 complex, compound, fully packed questions and then -- and then not let him fully  
19 answer. I mean, the human mind is not -- is not capable of allowing him to testify  
20 is just little snidbits of information. You've got to give him a chance to answer  
21 these questions. All right.

22                MS. LEXIS: Okay.

23                THE COURT: Go ahead and answer her question. Take -- take -- or  
24 answer the question and take as long as you want, sir.

25                THE WITNESS: Thank you.

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1           When I say alleviated or when you say alleviated, that means eased. It  
2 doesn't necessarily mean it's wiped out or -- or gotten rid of.

3 BY MS. LEXIS:

4           Q     Okay. So maybe we should use the word eased instead, since we all  
5 seem to know what that means.

6           A     Use the word -- I couldn't hear.

7           Q     Eased. As you would prefer. This part -- the instructions -- the great  
8 instructions that you just said -- I read out loud, they ease the suggestibility; that's  
9 what you are saying?

10          A     That's what they are supposed to do.

11          Q     Okay.

12          A     Whether they did or not, I couldn't say.

13          Q     Right. Okay. The photo lineup witness instructions, did you see this  
14 concerning Marvin Bass?

15          A     Yes.

16          Q     Okay. Photo lineups you indicated are kind of -- are also suggestible,  
17 correct?

18          A     They can be.

19          Q     Certain ones anyway?

20          A     They can be.

21          Q     Certain ones? Okay. They can also be eased by the admonishment,  
22 correct?

23          A     Yes.

24          Q     Page 1 of State's admitted Exhibit 13, I'm going to read it:

25                In a moment I'm going to show you a group of photographs. This

1 group of photographs may or may not contain a picture of the person who  
2 committed the crime now being investigated. The fact that the photos are  
3 being shown to you should not cause you to believe or guess that the guilty  
4 person has been caught. You do not have to identify anyone. It is just as  
5 important to free innocent persons from suspicion as it is to identify those  
6 who are guilty. Please keep in mind that hairstyles, beards, and mustaches  
7 are easily changed. Also, photographs do not always depict the true  
8 complexion of a person. It may be lighter or darker than shown in the photo.  
9 You should pay no attention to any markings or numbers that may appear on  
10 the photos. Also pay no attention to whether the photos are in color or black  
11 and white or any other difference in the type or style of the photographs. You  
12 should study only the person shown in each photograph. Please do not talk  
13 to anyone other than police officers while viewing the photos. You must  
14 make up your own mind and not be influenced by other witnesses, if any.  
15 When you have completed viewing all the photos, please tell me whether or  
16 not you can make an identification. If you can, tell me in your own words how  
17 sure you are of your identification. Please do not indicate in any way to other  
18 witnesses that you have or have not made an identification. Thank you.

19 That's what it says, right?

20 A Yes.

21 Q Okay. So these instructions, at least according to your testimony, will  
22 ease some suggestibility?

23 A That's the intention of these.

24 Q Okay. Towards the bottom, after being read that instruction and after  
25 being shown the second part of this exhibit, all right, Mr. Bass picked out person

1 in No. 3, the defendant, right?

2 A Yes.

3 Q And then he wrote a statement:

4 I'm very sure the suspect I identified in the photo is him, 100 percent.

5 He was very close to me when he robbed me at gunpoint.

6 That's what he wrote, right?

7 A Yes.

8 Q Going back to State's Exhibit 13; you also talked about what's called a  
9 biased photo spread?

10 A Yes.

11 Q Okay. And it was your testimony during direct examination that this  
12 was a biased focus of -- biased photo spread?

13 A This photo spread would fit my definition of a biased photo spread,  
14 yes.

15 Q Okay. All right. And you indicated that part of the reason that you said  
16 that or that lead you to believe that is the dissimilarity in hairstyles?

17 A Yes.

18 Q Okay.

19 A No, no, no, no. I -- no. Not the dissimilarity of hairstyles. It's the  
20 similarity of the third person in the photo spread. His hairstyle to the original  
21 descriptions of people who gave an original description, and that that is not similar  
22 in the other five. So I wasn't just saying similarity and hairstyles, I was saying it's  
23 the similarity of this person's hairstyle to the hairstyle described by witnesses and  
24 that the other witnesses don't have that hairstyle.

25 Q Okay. This is not -- at least according to your understanding, this is

1 not a hair lineup, is it?

2 A I don't --

3 Q It's a full photo lineup, correct? That means there's a photo, including  
4 a face and not just hair, right?

5 A There is -- in these photos?

6 Q Yes.

7 A I see faces and hair --

8 Q Okay.

9 A -- I don't see bodies.

10 Q All right.

11 A So I don't know if it's a full photo.

12 Q Okay. Well, it's a full photo of the face?

13 A Yes.

14 Q Okay. And people were asked to identify faces as opposed to  
15 hairstyles, correct?

16 A Could you ask that question again? I don't think I understood it.

17 Q Well, page 1, the photo lineup witness instructions, do you recall me  
18 reading:

19 Please keep in mind that hairstyles, beards, and mustaches are easily  
20 changed?

21 A Oh, yeah.

22 Q Okay. All right. So this person, whoever it was, Mr. Bass in this  
23 particular case, who completed this particular photo lineup, he was admonished  
24 not to pay particularly close attention to hairstyle, correct?

25 A Yes.



1 Q But rather to see if he could identify the person who robbed him,  
2 correct?

3 A That's my understanding, yes.

4 Q All right. And he picked out No. 3, the defendant, Keandre Valentine?

5 A Yeah.

6 Q You indicated that a showup is -- usually relates to one person being  
7 shown or one being -- one person being presented to any one particular victim,  
8 correct?

9 A I testified that that was my former understanding of what was done in  
10 police showup procedures.

11 Q Okay. And so just in general, typically a showup involves police  
12 presenting an individual to victims, correct?

13 A It can also be a photograph.

14 Q Okay.

15 A In fact, that's how it started.

16 Q All right. But I'm talking about showups.

17 A Showups started where a police officer would say, is this the person?  
18 On a -- in a photograph.

19 Q Okay. As it stands now, showups are actually live, correct?

20 A These were.

21 Q Okay. All right. In this particular article that you provided, *Eyewitness*  
22 *Accuracy Rates and Police Showup and Lineup Presentations*, page 531, are you  
23 aware of a finding which indicates showups produce a significantly higher level of  
24 correct rejections compared to lineups; do you remember that?

25 A Yes.

1 Q Okay. What are correct rejections?

2 A Correct rejection is a case where you are asked is this the person that

3 you witnessed? And it wasn't, and you say it wasn't.

4 Q Okay.

5 A That's why it's correct.

6 Q Were you aware, in this particular case, that Santiago Garcia, one of

7 the victims, was presented a showup prior to him identifying the defendant in a

8 second showup; were you aware of that?

9 A No.

10 Q Okay. So you were not given the body cam footage or this information,

11 correct?

12 A Correct.

13 Q Okay. Does that change your opinion, at least concerning Santiago

14 Garcia's identification, with the reliability therein? With the existence of a correct

15 rejection?

16 A There were several things in your question. Could you ask it again so I

17 could answer it accurately?

18 Q Sure. Does the fact that Santiago Garcia, okay, one of the victims in

19 this case, the fact that he did -- or, I don't know how to say it -- did a correct

20 rejection prior to identifying the defendant in a second showup; does that change

21 your opinion concerning the reliability of his identification?

22 A Because I have no opinion of the reliability of his identification,

23 because I have no opinion, this doesn't change that.

24 Q Let me just talk in generalities.

25 A Okay.

1 Q Typically, the existence of a correct rejection does affect the reliability  
2 of an identification, correct?

3 A I can't parse your question. Could you ask it again, please?

4 Q Yes. Uh-huh.

5 A Okay.

6 Q Would the existence of a correct rejection, meaning a victim being  
7 shown someone and the victim saying, Nope not the person, okay --

8 A Yes.

9 Q -- does that tend to affect reliability, generally; the reliability of the  
10 subsequent identification?

11 A I don't know of any science or any data that could answer that  
12 question.

13 Q So you're not aware of it?

14 A Not that I know of.

15 Q Okay. But you're saying it would have no affect --

16 A I'm not --

17 Q -- at least as you sit here today?

18 A I'm saying that there is no science that I'm aware of, there is no  
19 consensus about science that would support your suggestion.

20 Q Okay. Your training and experience?

21 A It doesn't support that suggestion. People can be right and then turn  
22 around and be wrong and not know the difference.

23 Q So your saying the existence of a correct rejection doesn't affect  
24 anything at all?

25 A Doesn't affect anything?

1 Q Does it affect --  
2 A No, it does affect something.  
3 Q Okay. What?  
4 A It affects the person who was correctly rejected going free, I assume.  
5 Q That's it, that's the only effect you can think of?  
6 A Phycologically speaking, that wouldn't have any effect on a -- on a  
7 subsequent identification or misidentification, that I'm aware of.  
8 Q Okay. All right. So your testimony is being presented a prior showup,  
9 saying that's not the person, being presented a different showup where he  
10 positively identifies someone, that has no bearing?  
11 A If it does, I'm not aware of that science.  
12 Q Okay. You talked about the difference between showups and lineups,  
13 correct?  
14 A I did.  
15 Q Okay. And you said you preferred photo -- unbiased photo lineups as  
16 opposed to showups, correct?  
17 A Yes.  
18 Q The same article, *Eyewitness Accuracy Rates and Police Showup and*  
19 *Lineup Presentations, A Meta Analytic Comparison*, Nancy Stebley, Jennifer  
20 Dysart, Solomon Fulero, and R.C.I. Lindsay, page 533, would it surprise you that  
21 this article states:  
22 In the current study showups and lineups are approximately equal in  
23 true positive identifications.  
24 Would it surprise you?  
25 A I read that and that's why it doesn't surprise me.

1 Q Okay. So they are equal --

2 A No.

3 Q -- at least according to this research?

4 A No, they are not equal.

5 Q Okay.

6 A You have oversimplified a lot. If you read the next couple of pages,  
7 you'll see why.

8 Q Okay. They can get into that into redirect. But does it in fact state, on  
9 page 533:

10 In the current study showups and lineups are approximately equal in  
11 true positive identifications.

12 Does it say that?

13 A If you think that I've memorized that quote and that page number, I  
14 really haven't.

15 Q Page 533, the highlighted portion; does it, in fact, say that?

16 A It says that they are approximately equal in true positive identification.

17 Q Correct. I mean that's -- I think that's what I said.

18 A It does say that.

19 Q Okay.

20 THE COURT: Is it good time for a break?

21 MS. LEXIS: Sure.

22 THE COURT: All right. We have been going for about an hour and a  
23 half, right? I think. You guys ready for a break? Stretch? Yeah? All right.

24 All right. Ladies and gentlemen, I'm going to admonish you do not  
25 communicate among yourselves or with anybody else about this trial or the subject

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1 matter of the trial; do not communicate at all with any of the parties, attorneys,  
2 witnesses involved in the trial; do not seek, obtain any information or comments  
3 about the case from any source including newspapers, television, radio, Internet,  
4 e-mail, cell phones, or any other electronic devices or read, watch, or listen to any  
5 report of or commentary about the case; do not perform any research or  
6 investigation; do not form or express any opinion on any subject connected with  
7 the trial till the case is finally submitted to you for deliberations.

8 All right. It is now about 3:35. We'll come -- I want you back in 15  
9 minutes, so that would make it 3:50. Okay. 3:50. See you back here then.

10 Dr. Smith, just go ahead and stand and wait right there for a moment.

11 [Jury recessed at 3:32 p.m.]

12 THE COURT: All right. Dr. Smith, you are now excused. Please --  
13 you're directed, again, not to discuss your testimony with any of the attorneys. All  
14 right. You may step down.

15 THE WITNESS: Okay.

16 THE COURT: And we'll need you back here in 15 minutes.

17 We're outside the presence of the jury. Ms. Lexis, I said you could  
18 make a record outside the presence of the jury if there is still some foundational  
19 issue on you wanted to put on the record.

20 MS. LEXIS: There is.

21 THE COURT: Okay.

22 MS. LEXIS: Excuse me, Your Honor, may I find my notes?

23 THE COURT: Yes, you may.

24 MS. LEXIS: All right. He indicated -- this particular witness indicated  
25 that he did some kind of library research to study up on in this particular case after

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1 he had been retained by defense counsel. He indicated that he looked at this  
2 particular research to refresh his memory, and then included the factors -- the  
3 factors being discussed in this case, papers, published papers, data, a database  
4 on psychological -- PsycINFO, articles; he looked at the reading to refresh the  
5 sources; he found articles, he read them. And my understanding is he read them,  
6 but with the understanding of to see whether or not it's -- well, he read them.

7 And while he testified on the stand that he did not rely upon this  
8 refreshing of his memory in testifying before this court, I wholeheartedly disagree  
9 with that. My -- I understand the court may disagree with me, but I do --

10 THE COURT: On what point?

11 MS. LEXIS: As to -- you didn't allow me to stop my questioning, so I  
12 guess I got the -- the idea that the court disagreed with me.

13 But I believe this was in direct violation of Judge Herndon's order. I  
14 also believe that he relied on this information to form -- or at least to refresh his  
15 memory concerning the opinions.

16 THE COURT: Well, this is on the issue of whether he relied upon a  
17 document that he didn't produce?

18 MS. LEXIS: Correct.

19 THE COURT: Okay.

20 MS. LEXIS: I think this was in direct -- I mean, we can read back the  
21 record or whatever it is, but I believe he absolutely relied on this refreshing of his  
22 recollection, these articles, this database, these books, this research, and this  
23 data. The websites, he also said he looked at websites, book chapters which  
24 talked about experiments; I believe he relied on that. I believe that formed the  
25 basis of his opinion as he's rendered it during direct examination. I believe that is

1 in direct contradiction to Judge Herndon's ruling, to Your Honor's ruling concerning  
2 the ability for this witness to testify to items or data or research which was not  
3 disclosed to the State.

4 THE COURT: Thank you.

5 Does somebody from the defense side want to respond to that?

6 MR. GASTON: I do. So, two issues, but first --

7 THE COURT: Now wait, so -- so that's your position. So are you  
8 asking the court for any relief or to do anything about that?

9 MS. LEXIS: I would ask to strike all of the portions of his testimony  
10 which pertain to items or opinions upon which he based the opinions on items  
11 which have not been released to me or disclosed.

12 THE COURT: Did he -- I don't think he identified any opinions that  
13 were based upon his library research.

14 MS. LEXIS: Well, he --

15 THE COURT: He -- in fact, he said that he -- he thought that he didn't  
16 provide any testimony that was derived on his library research, so how could --

17 MS. LEXIS: I -- I --

18 THE COURT: -- how would I know how to -- what portions do you  
19 want me to strike?

20 MS. LEXIS: I actually -- well, then I guess --

21 THE COURT: I don't understand how -- how would I determine that?

22 MS. LEXIS: -- in that case I would ask -- I would ask to strike his entire  
23 testimony at that point. Because, Your Honor, here's basically what -- we can play  
24 it back, because he did kind of quantify in the beginning. He said, Oh, I did read  
25 up on it, I did this library research, I pulled all these articles. And as he saw where



1 I was going with this, he started to draw back a little bit. I think that can be shown  
2 in transcripts or a playback.

3 What is also perfectly clear is that he provided three articles. Okay.  
4 And he said on cross-examination that he did not rely on any of the three articles  
5 provided. So what did he rely on? What -- what did he rely on? Obviously, the  
6 articles, the books, the chapters, the research which he used to refresh his  
7 memory in the library, some of the 14 hours that he is charging the public  
8 defender's office in this particular case was spent brushing up on articles,  
9 research, data, which was not provided to the State.

10 In direct contradiction, and I would ask for a read back or a playback of  
11 his entire -- that line of questioning.

12 THE COURT: Okay. Are you done?

13 MS. LEXIS: Yes.

14 THE COURT: Was that -- okay.

15 So does someone from the defense side want to respond?

16 MR. GASTON: So two issues. But first just head category to frame  
17 the issue. We agree with the State's position that if he relied on materials that -- in  
18 preparation of his testimony that was not provided to the State, then that is a  
19 violation of Judge Herndon's order. We agree with that basic premise. We don't  
20 think that happened.

21 Step one, what items did he review and were they provided? Before  
22 we get to reliance, just which items did he review and which items have been  
23 provided. He mentioned library research, he mentioned a book chapter, he  
24 mentioned articles, he mentioned the website, which we had already talked about,  
25 is my understanding.

1           The State then asked for specifics about what he relied on and he  
2 mentioned some authors' names. Those are the authors of the stuff that we  
3 provided. One of the things we provided was a book chapter; one of the things we  
4 provided was a study; and I think the other was an article. The authors' names  
5 that he mentioned who -- the lead authors on these -- one wasn't actually a lead  
6 author, but it was an author, the authors' names he mentioned corresponded to the  
7 articles that he sent us that we provided the State.

8           There is nothing specific that he mentioned that he read in preparation  
9 of this testimony that has not been provided to the State. He talked in generalities  
10 about research, he mentioned about a book chapter online in an article, then he  
11 mentioned the authors of the stuff that he read. That is all the stuff we provided to  
12 the State.

13           So, if the State wants to go further with this inquiry, then voir dire him  
14 outside the presence of the jury. Just ask him straightforward, look, what -- what  
15 did you read? And see if he mentions that he read anything in preparation of his  
16 testimony that wasn't provided to the State. Because right now I don't think they  
17 got that.

18           Second, with the issue of reliance, specifically, he was talking about  
19 the stuff that he's read in preparation of this case, which was the stuff that we had  
20 provided. And then when they started discussing whether it was reliance or not,  
21 my understanding of his testimony is that he read this as a way to kind of double  
22 check and make sure that his understanding that he has accumulated as a  
23 40-plus-year expert in this field wasn't out of date or anything, and that he was just  
24 brushing up. Upon reading it he realized his knowledge was still in line with  
25 current research, et cetera, and that was it. And so that's kind of where the

1 discussion of research -- of reliance or whatever.

2 But my point is we don't even have to parse the definition of reliance,  
3 because everything that he said he read in preparation of this, we provided to the  
4 State.

5 MS. LEXIS: That's not true. He said there was a database from a  
6 psychological information -- he didn't just say a website, he said websites, multiple,  
7 plural, books, chapters, websites, papers, published papers; he was in the library  
8 doing research to study up on these factors.

9 MR. GASTON: The database -- the database is how he found the  
10 articles to read in the first place, that is -- that -- the database of literature is not  
11 itself an independent source that he read. And doing that, that's how he finds  
12 things to read, similarly, like I go check the index catalog of a library to --

13 THE COURT: All right. Look, I -- I heard enough.

14 MR. GASTON: Okay.

15 THE COURT: I don't need to hear anymore. We -- look, I am denying  
16 the State's motion. State wants me to sanction -- to impose a sanction of striking  
17 the expert witness. The State's theory is the expert relied upon documents not  
18 produced that the -- that the expert relied upon. That the expert relied documents  
19 not produced. We have documents that the expert produced.

20 The State has failed to convince this court that the expert relied upon  
21 any documents in forming his opinions, besides beyond those that were produced.

22 And plus the expert has testified on the stand here that when he went  
23 to the library and did this research after he was engaged, it was only to confirm  
24 that literature and data -- only to confirm the literature and data that he already  
25 knew, and that there was nothing new in the field, so -- so that -- that belies -- that

1       believes any substantive reliance. And also if he reviews some documents that  
2       weren't produced and didn't learn anything new from those documents, there's no  
3       prejudice to the State.

4               So State hasn't met its burden sufficient for this court to impose any  
5       sanctions. All right.

6               MS. LEXIS: Okay.

7               THE COURT: I respectfully disagree with State's position, and we can  
8       move forward.

9               It looks like we are not going to be able to do jury instructions at 4:00,  
10       because we've got to finish this witness. But I want to get this witness done today.  
11       All right.

12              MS. MACHNICH: Are we still doing jury instructions today or are we  
13       doing them tomorrow morning?

14              THE COURT: I -- that's -- isn't that -- didn't I just say it looks like we're  
15       not going to get to them by 4:00?

16              MS. MACHNICH: Right. I'm wondering if we were doing them after we  
17       were done with the witness.

18              THE COURT: It depends on whether we have time, right?

19              MS. MACHNICH: Okay. I have --

20              THE COURT: Because I'm not going to --

21              MS. MACHNICH: -- I am going to have a printed copy brought over.

22              THE COURT: I'm not going to keep my staff here for overtime if I don't  
23       have to.

24              MS. MACHNICH: Okay. So we're still breaking at 5:00 -- well, when  
25       we're done with the witness.

1 THE COURT: 5:00 or so, but we might have to go longer to -- to  
2 keep -- get this witness done. All right.

3 MS. MACHNICH: And we appreciate that, your Honor.

4 THE COURT: All right. Thank you.

5 All right. Court's in adjournment.

6 [Court recessed at 3:42 p.m., until 3:59 p.m.]

7 [In the presence of the jury.]

8 THE COURT: All right. Let's bring the witness in, marshal.

9 THE MARSHAL: Yes, sir.

10 THE COURT: All right. Please be seated. You're still under oath.

11 All right. Ms. Lexis, you may continue with cross-exam.

12 MS. LEXIS: Thank you.

13 **CROSS-EXAMINATION (CONT.)**

14 BY MS. LEXIS:

15 Q Doctor, during direct examination you indicated that your attention was  
16 drawn to the distance in terms of where a particular victim was staged and where  
17 the perpetrators -- in this instance, two individuals were presented in front of that  
18 victim; do you remember that testimony?

19 A Yes.

20 Q Okay. Were you aware in this particular case that in each of the  
21 showups conducted, the witnesses or the victims who were placed in the -- in the  
22 patrol car, okay, were given the opportunity to tell the officer giving the showup  
23 whether they needed to be moved closer to better -- to better identify or to better  
24 view the individuals; were you aware that they were given that choice?

25 A No.

1 Q And in particular, since you didn't know that, you also didn't know that,  
2 in particular, Lazaro Bravo-Torres actually was able to tell the officer who was  
3 conducting the showup to radio another officer to tell the defendant to stop moving  
4 so he could get a better view and thus a better view of the suspect -- the suspects  
5 prior to identification; you didn't know that?

6 A I didn't.

7 Q And the same with another witness, I believe it was Rosa Vazquez  
8 Ramirez, indicated that she needed to be brought closer so she could better view  
9 the suspects; you didn't know that?

10 A No, I didn't.

11 Q You indicated on direct examination that you were shown pictures of  
12 Keandre Valentine and Bobby McCoy; do you remember that?

13 A Yes.

14 Q And you indicated that they looked similar, correct?

15 A I thought they did.

16 Q Okay. They were not lookalikes, correct?

17 A That's -- that was my personal reaction, yes.

18 Q You indicated that you could still tell them apart, correct?

19 A I -- I -- from the photographs, yes.

20 Q Doctor, concerning showups, there's such a thing as clothing bias; is  
21 that right?

22 A I don't know that specific term, but I think I know what it means.

23 Q Okay. Would perhaps looking at the article you provided to the  
24 defense counsel, who then provided it to us, which was labelled 2, showups,  
25 page 55, perhaps refresh your memory as to whether you are familiar with this

1 particular factor?

2 A I'm familiar with the factor, but I'm not familiar with the phrase, the  
3 name that you gave it.

4 MS. LEXIS: Okay. Approach with State's 55.

5 Q You can see that, Doctor?

6 A Yes.

7 Q Okay. Sorry. I realized earlier and I apologize, because some of the  
8 print was rather small on the articles --

9 A I noticed.

10 Q -- and I wasn't giving you an opportunity to -- to read it. I apologize for  
11 that. Is this, in fact, labelled clothing bias?

12 A Yes.

13 Q Okay. So maybe it's -- that's not the exact term used, but it is a factor?

14 A Yes, it is.

15 Q Okay. At least --

16 A It can be.

17 Q Okay. Concerning -- or at least in the showup article that you gave us.  
18 Okay. So this article, do you have reason to dispute this:

19 \*\*\*Innocent people dressed in clothing similar to the perpetrator are at  
20 risk of being apprehended and falsely identified.

21 Do you have reason to dispute that?

22 A No.

23 Q Okay. How about this statement:

24 Clothing can bias a witness into making a false identification of an  
25 innocent suspect.

1 Any reason to doubt that?

2 A I have no reason to doubt that.

3 Q a study found -- or Dysart, Lindsay, and Dupuis on 2006 found a  
4 clothing bias effect only when the suspect wore distinctive clothing.

5 Any reason to dispute that?

6 A Not really.

7 Q Okay. And that:

8 There was no clothing bias when the suspects were dressed in typical  
9 clothing.

10 Do you have reason to dispute that statement?

11 A If the statement is about a specific instance, I have no reason to  
12 dispute it. But if you are talking about it as a general rule, I think that as a general  
13 rule, even ordinary clothing, if it's the same clothing that was just seen on a  
14 perpetrator, could cause bias.

15 Q Okay. But how about this -- let me read it in its entirety.

16 Dysart, Lindsay and Dupuis found a clothing bias effect only when the  
17 suspect wore distinctive clothing. For example, Harley Davidson T-shirt.  
18 There was no clothing bias when suspects were dressed in typical clothing;  
19 for example, blue button-down dress shirt.

20 Do you have any reason to dispute that?

21 A No.

22 Q Okay. And I'm sorry, maybe it was because I parsed it out.

23 All-black clothing description or dark clothing description given by the  
24 majority of our victims in this case, you're aware of that, right?

25 A Well, I remember it being a little more complicated than that. I thought

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1 that some witnesses said that they thought that the perpetrator had two shirts on, a  
2 lighter shirt underneath --

3 Q Uh-huh. Okay.

4 A -- which is not dark.

5 Q Okay. And I think there was testimony of, like, blue jeans for  
6 something like that, right?

7 A I think so.

8 Q Okay. But pretty typical clothing, at least; jeans and a top, right?

9 A I guess.

10 Q Okay. In this particular case, speaking of, you know, the descriptions,  
11 most of the individuals did describe a black male adult, taller, thin build, with either  
12 short afro, medium afro-type hair, but wearing at least dark clothing or blue jeans,  
13 right?

14 A There was one part of what you said that I think wasn't right, but I think  
15 the rest was right.

16 Q Okay.

17 A The part that I thought that I don't remember is people saying taller; I  
18 remember people giving feet and inches, like 5-foot-10, for example.

19 Q 6?

20 A 6-foot, yes.

21 Q 6-foot-1.

22 A I didn't see 6-foot-1.

23 Q In this particular case, I am going to publish State's Exhibit 186. Okay.  
24 The suspect -- or the defendant, Keandre Valentine, did not appear to  
25 be dressed, would you agree with me that he's not dressed in the same clothing as

1 at least described by the -- by the victims, correct? I mean, he was clothed, at  
2 least he had a T-shirt or something covering his chest when the victims identified  
3 him or gave a description of his clothing, correct?

4 A I think so.

5 Q Okay. And he was wearing pants in all of the descriptions, correct?

6 A I remember that one victim said, I didn't see that. But most everyone  
7 did, yes.

8 Q Okay.

9 A They thought he was wearing pants.

10 Q Okay. But in this particular still photo of the showup, he is shirtless,  
11 correct?

12 A Looks that way to me.

13 Q And he's wearing shorts, correct?

14 A That's the way I see it.

15 Q Okay. So in the particular showup, he was not dressed in the same  
16 clothing described by we'll say majority of the victims, correct?

17 A Yes. That's right.

18 Q You talked about what's called a double blind; is it a showup or a photo  
19 lineup?

20 A Double blind applies to many situations and it can be applied to both a  
21 showup and a photo spread or a lineup.

22 Q Okay. And double blind means the person who was presenting the  
23 showup is not aware of the identity of the person or the perpetrator, correct?

24 A That's right.

25 Q In this particular case, just drawing your attention to the showups, were

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1 you aware that the officer who showed or conducted the showup with Bravo -- or  
2 Lazaro Bravo-Torres was unaware of the identity of the perpetrator; were you  
3 aware of that fact?

4 A No.

5 Q Concerning the officer who conducted the showup with victim Rosa  
6 Vazkuez, were you aware that that officer was not -- did not know the identity of  
7 the perpetrator?

8 MR. GASTON: I'm going to object to this point to vague and  
9 misleading questions. My understanding is she's asking the officers doing the  
10 showup didn't know that there was a suspect? Or -- I guess I'm objecting to the  
11 extent --

12 THE COURT: Didn't know who the suspect -- didn't know who was the  
13 alleged perpetrator, is the question.

14 MR. GASTON: Well, how does the person doing the showup not know  
15 who is there in handcuffs?

16 THE COURT: Well, I don't know. I guess you got to figure that out on  
17 cross-examination. That's what she suggested --

18 MR. GASTON: All right. Well, I guess my objection is to the extent  
19 that the question is vague and misleading. I'm objecting.

20 THE COURT: Yeah.

21 MS. LEXIS: He's been able to answer it.

22 THE COURT: Yeah. Are you referring to there are some showups  
23 where there is the officer in the car with the victims --

24 MS. LEXIS: Uh-huh.

25 THE COURT: -- and then -- and then the other officer is standing by

1 the two showup people --

2 MS. LEXIS: Right.

3 THE COURT: -- are you -- when you say -- when you were talking  
4 about the officer who doesn't know, are you -- which -- your question is vague and  
5 ambiguous --

6 MS. LEXIS: Okay. It's the --

7 THE COURT: -- as to which -- as to who you're referring to.

8 MS. LEXIS: It's the officer who transported the victims and had contact  
9 with the victims.

10 THE COURT: So the one in the car who is with the victims --

11 MS. LEXIS: Correct.

12 THE COURT: -- not the one who is over there by the -- by the -- the  
13 suspects?

14 MS. LEXIS: Correct.

15 THE COURT: Okay.

16 MR. GASTON: And -- and, Your Honor --

17 MS. LEXIS: By the officers who filled out the showup witness charts.

18 THE COURT: They -- yeah.

19 MR. GASTON: And Your Honor, also, the vague part. I -- I -- she's  
20 saying --

21 THE COURT: So I think she clarified it.

22 MR. GASTON: Also the other end of the question, she's saying  
23 identity of the perpetrator. So she's saying --

24 THE COURT: I can't hear you, what you're saying.

25 MR. GASTON: She's saying that the person doing the showup --

1 we've clarified who she is referring to -- didn't know the identity of the perpetrator.  
2 By identity of the perpetrator, is she referring to who in truth committed the  
3 robberies or who the suspect was that was being presented for a showup?

4 THE COURT: She means the suspect, obviously.

5 MS. LEXIS: Yeah.

6 MR. GASTON: Okay. That's what I thought. Okay.

7 THE COURT: All right. Thank you.

8 MS. LEXIS: Thank you.

9 THE COURT: Yeah, but we've clarified it now. So thanks.

10 BY MS. LEXIS:

11 Q Doctor, were you aware that the officer who was in the vehicle  
12 conducting the showup with Santiago Garcia did not know the identity of the  
13 suspect in this case?

14 A No.

15 Q Doctor, were you aware that the officer who conducted the showup,  
16 meaning in the vehicle --

17 THE COURT: So your question is still kind of vague and ambiguous.  
18 Because is the one -- is the officer who is in the car conducting the showup -- isn't  
19 the one conducting showup the one who is, like, say, Hey, you two guys stand  
20 right here, look that way, you know, he's the one conducting the showup, isn't he?  
21 What do you mean by that term, conducting the showup?

22 MS. LEXIS: Well, maybe I can clarify, Your Honor.

23 THE COURT: Okay.

24 MS. LEXIS: Okay.

25 BY MS. LEXIS:

1 Q Were you aware that the officer who accompanied the victim Jordan  
2 Alexander, who read him and advised him of the showup witness instructions and  
3 who then subsequently transported him to the area of the showup containing the  
4 defendant, are you aware this that particular officer was not aware of the identity of  
5 the suspect?

6 A No.

7 Q Doctor, I know you indicated on direct examination that you didn't -- I  
8 mean you reviewed the articles that you presented to defense counsel and -- and  
9 to myself and Mr. Dickerson, but you didn't really -- you really didn't need to; is that  
10 what you said?

11 A In retrospect after having read them, it seemed to me that there was no  
12 need to cite them or -- or things that they had in them.

13 Q Okay. I'd like to draw your attention to the one labelled *Eyewitness*  
14 *Accuracy Rates in Police Showup and Lineup Presentations, a Meta-Analytic*  
15 *Comparison*, fair to say that page 526 -- do you have reason to disagree that this  
16 would be in here -- states:

17 There is very little available research that explicitly compares showup  
18 to lineup performance. Only eight articles with 12 tests have been located  
19 after extensive investigation. Second, the available research on showup  
20 identification has yielded inconsistent results.

21 A Yes, I recall that part.

22 Q In that same article, are you aware of a statement where it indicated,  
23 page 529:

24 A showup presentation produced a mean of 69 percent correct  
25 decisions, lineups generated 51 percent correct decisions, a significant

1 difference favoring the showup?

2 A I did not recall the numbers, but I recall that result, yes.

3 Q Let's see, on page 530, are you aware of the statement which says:

4 The data demonstrate that correct identification is slightly more likely in  
5 the target present showup presentation than in the lineup format.

6 Do you recall that statement being there?

7 A Yes.

8 Q Do you remember, page 531, a statement that says:

9 Overall, in target -- in target presentations it can showup and lineup will  
10 produce approximately the same results.

11 Do you recall that?

12 A I do.

13 Q Does it -- same page -- does it also indicate that:

14 Showups produced a significantly higher level of correct rejections  
15 compared to lineups.

16 Do you remember that?

17 A I remember that in the context of making that comparison in two  
18 different ways, one with foils and one with target-absent faces.

19 Q Okay. Do you recall that same article indicating:

20 As reported above, this meta-analysis has identified approximately  
21 equal false identification rates from showups versus lineups.

22 Do you remember it saying that?

23 A Yes.

24 Q Do you remember overall are in terms of a conclusion, the last

25 sentence on the -- or, actually -- yeah, the last sentence on page 538, before the

1 theoretical and future research considerations, this article saying:

2 We are left with an incomplete picture of showup vulnerability to bias,  
3 but reason to speculate that several known lineup biases may influence  
4 showups -- showups, as well.

5 Do you remember that?

6 A Yes.

7 Q So the research is incomplete, correct?

8 A Yes.

9 Q It's an incomplete picture?

10 A It is an incomplete picture, yes.

11 Q The article, page 2 -- or the chapter labeled showups that you provided  
12 to defense counsel who then provided it to us, do you have any reason to dispute  
13 a statement that says:

14 A good unbiased instruction explicitly states that the perpetrator may or  
15 may not be in the lineup.

16 Do you have reason dispute that?

17 A No.

18 Q Okay.

19 A I agree with that.

20 Q Do you also recall on page 51, in a section labelled Showup Versus  
21 Lineup, this particular article or chapter saying:

22 The scientific research regarding showups versus lineups is difficult to  
23 interpret.

24 Do you remember that?

25 A I do remember that.



1 Q And:

2 Studies have recorded more correct identifications in showups when  
3 the perpetrator is present and higher correct rejection rates when the  
4 perpetrator is absent.

5 Do you remember that -- do you remember that being said?

6 A Not explicitly, but something like that, yes.

7 Q Okay. Page 52 it says:

8 Showup choices were more accurate.

9 Do you remember that?

10 The laboratory data indicated that showup choices were more  
11 accurate.

12 Do you recall that page or that statement being made?

13 A Not specifically, but I recall that point being made.

14 Q Okay.

15 Correct decisions were significantly higher in showups than in lineups.

16 Do you recall that statements, as well?

17 A I don't know which correct identifications and showups that sentence  
18 refers to. It could -- could have been many --

19 Q Let me read the whole --

20 A -- many different studies. It could have been a summary, it could have  
21 been a meta-analytic result.

22 Q Okay. Maybe I'll read the whole thing.

23 Court decisions -- correct decisions were specific -- were significantly  
24 higher in -- in showups than in lineups. Witnesses in showups did not  
25 choose more often, and contrary to expert opinion, when witnesses did

1 choose from showups, they made more correct decisions.

2 A Yes.

3 Q In addition, the number of incorrect identifications were significantly  
4 lower in showups than in lineups.

5 Yes?

6 A Yes, I recall that.

7 Q Showups appear to be superior.

8 Do you remember that?

9 A I remember the focus on the word appear, yes.

10 Q That same article, I believe page 4, do you remember this article  
11 saying:

12 We believe that the evidence on this point not definitive given the  
13 limited number of tests comparing showups and lineups and the issues  
14 regarding performance measures, like conditional probability. This point  
15 underscores the need for more research on this topic.

16 Do you agree with that?

17 A Yes.

18 Q On page 156 in a paragraph labelled Photograph Versus Live, do you  
19 recall this article indicating:

20 It is reasonable to assume that a live identification task, like a showup,  
21 would provide more cues to a memory compared with a static image.

22 Do you remember that?

23 A I don't remember that. But given the literature, that's a reasonable  
24 inference.

25 Q Okay.

1 In addition, Lineup photos often can be dated and may not necessarily  
2 match how a perpetrator looked at the time of a crime.

3 Do you remember it saying that?

4 A I don't, but that's a concern that any researcher would have.

5 Q Okay. And again:

6 More research is needed to understand how the mode of presentation  
7 may affect showup and lineup performance giving -- given the confounding  
8 and the literature.

9 Do you remember it saying that?

10 A I don't need to remember that. That is a conclusion of almost every  
11 scientific paper ever written.

12 Q More research --

13 A More research --

14 Q -- right?

15 A -- is needed.

16 Q That -- yes, more research. And then in this particular article, it lists  
17 some guidelines, as well, page 57; are you familiar with those guidelines?

18 A Which guidelines is it referring to?

19 Q It says, Best Practice Guidelines --

20 A Yes.

21 Q -- it's in the one that's --

22 A Yes, I am familiar with that.

23 Q Okay. And in this particular guidelines, the first one is:

24 The investigator should document the witness's description of the  
25 perpetrator prior to the identification procedure.

1 Right?

2 A Yes.

3 Q Okay. Second:

4 If multiple witnesses are involved, the person conducting the  
5 identification should keep the witnesses separate so that they do not  
6 influence one another's identification or description.

7 Right?

8 A I -- I know that's a good practice.

9 Q Do you dispute that it's under this Best Practice Guideline?

10 A I don't.

11 Q Okay.

12 Furthermore, in the case of -- in the case of multiple witnesses, if one  
13 witness makes a positive identification from a showup, then the investigator  
14 should consider a different identification for the remaining witnesses.

15 Do you recall that?

16 A I do.

17 Q Okay. But there's literature, at least even in just the articles that you  
18 provided, which tend to favor showups, correct?

19 A When you say favor, I think you mean compared to, say, a photo  
20 spread.

21 Q Right.

22 A And the discussion goes back and forth, depending on which measure  
23 is being considered in that paragraph.

24 Q Okay. But --

25 A In the end --

1 Q -- do you dispute that it says that?

2 A -- if you had to summarize what it meant, you'd have to come to two  
3 conclusions; one is that showups are not clearly better or worse than photo  
4 spreads.

5 Q Okay.

6 A And that more research would be needed to answer the question of  
7 which is better.

8 Q Okay. But didn't we just go through somewhere it indicated that  
9 showups are more accurate, things like that?

10 A Because you cherry-picked the sentences -- accuracy is measured in a  
11 lot of different ways.

12 Q Uh-huh.

13 A And then the authors of this article and of other articles go on to  
14 discuss the different ways that accuracy is measured.

15 Q Uh-huh.

16 A So it may be accurate according to one kind of measure, but not  
17 another kind of measure.

18 Q Conflicting results all the way around.

19 A No. These are not different results, these are the same results, but  
20 assessed in different ways.

21 Q Okay. All right. But everything that I have asked you has been  
22 contained in the articles that you provided us, correct?

23 A Just now? Yes.

24 Q Okay. We are going through the articles, right?

25 Third, inform witnesses that the suspect they are about to view may or

1 may not be -- may or may not be the perpetrator.

2 Right? That's a third guideline listed in this article, correct?

3 A Yes, it is.

4 Q Okay. And fourth:

5 After an identification has been made the investigator should record  
6 the witness's confidence assessment before it can be influenced by other  
7 events to preserve a record for trial.

8 Correct?

9 A That's right.

10 Q Meaning write down, like, the percentage of sureness?

11 A Typically.

12 Q For the record, that article also says:

13 More research is necessary.

14 A That surprises me.

15 Q This particular article, *Journal of Applied Research and Memory and*  
16 *Cognition*, page 9, are you familiar with this? You provided this to the defense and  
17 also to the State; is that right?

18 A Yes.

19 Q Page 9 indicates that:

20 The rationale behind showups is that they provide a quick means for  
21 detaining the guilty or exonerating the innocent.

22 Do you recall that being in this article?

23 A I don't recall that being in that article, but that is the intention of  
24 showups.

25 Q Okay.

1 Showups are the most common identification technique used in the  
2 United States.

3 Correct?

4 A I read that.

5 Q Do you have reason to dispute that?

6 A No.

7 Q However, the limited research comparing lineups and showups has  
8 produced some conflicting results.

9 The second -- the first full paragraph on the first page; do you have any  
10 reason to dispute that?

11 A No.

12 Q More research, right? This is also asking for more research; do you  
13 recall that?

14 A I -- I don't, but I think that's a pretty good standard finish.

15 Q You testified on direct examination that stress can be a factor which  
16 can affect the reliability of an identification?

17 A I testified that very high levels of stress, not all stress --

18 Q Okay.

19 A -- but very high levels stress as defined by the victim fearing for life or  
20 limb.

21 Q Okay. So the level of stress is important, right?

22 A Very.

23 Q Okay. In the Gary Wells article, which you indicated previously that  
24 you were familiar with, the one labeled *Eyewitness Evidence: Improving Its*  
25 *Probative Value*, do you have any reason to dispute a finding by Yuille and

1 Cutshall, which indicated -- which studied multiple witnesses to an actual shooting,  
2 okay, finding that:

3 Those who reported higher stress had better memories for details than  
4 did those who reported lower stress.

5 Are you aware of that study?

6 A I am not aware of that study.

7 Q Okay. Do you have any more reason to dispute that study being listed  
8 this article?

9 A Do you mean the study that says higher and lower, in -- but it doesn't  
10 talk about extremely high or any kind of -- it doesn't describe stress in absolute  
11 terms, just higher or lower.

12 Q Okay. Now, I guess the key part to that particular statement is that  
13 these are witnesses to an actual shooting, correct?

14 A Yes.

15 Q Okay. So fair to say witnesses to an actual shooting probably, more  
16 likely than not, would probably be more towards the higher end of stress, would  
17 you agree?

18 A As compared to the person getting shot, I would think it would be much  
19 lower.

20 Q Okay.

21 A Or --

22 Q Well we don't know --

23 A -- even if you're --

24 Q -- what was --

25 A -- not actually shot --



1 Q Okay.

2 A -- if the gun was pointed at you --

3 Q Uh-huh.

4 A -- you might be -- you might have a lot more stress than someone who

5 was watching a person with a gun pointed toward them.

6 Q Right.

7 A So the one with the gun pointed toward them fits the definition, fear of

8 life and limb. The witness maybe not necessarily. They might, but not as obvious.

9 Q And in this particular case each of these victims had guns pointed at

10 them; you know that, right?

11 A In the -- in the Yuille article?

12 Q No. In this actual case. Each of the victims in this case had guns --

13 A Oh, yes.

14 Q -- pointed at them, correct?

15 A Yes, yes. Yes.

16 Q So would they be more on the higher level of stress?

17 A The highest.

18 Q Highest.

19 A Yes.

20 Q Okay. All right. So that's actually congruent with this finding, right?

21 Those who reported higher stress had better memories for details than

22 did those who reported lower stress.

23 Do you disagree with that?

24 A What are you asking do I disagree with?

25 Q Do you disagree with this finding:

1 Studying multiple witnesses to an actual shooting, finding that those  
2 who reported higher stress had better memories for details than those who  
3 reported lower stress.

4 Do you have reason to dispute that?

5 A I -- I would have to know what the higher and lower levels meant.

6 Q Okay. Unfortunately, the article didn't -- didn't list that out. All right.  
7 Well, on that same Gary Wells article, are you familiar with postdiction variables?

8 A Yes.

9 Q Okay. In that particular -- in that particular section, confidence was  
10 kind of a subset; do you recall that?

11 A No.

12 Q Okay. Considering postdiction variables, is confidence usually one of  
13 those variables?

14 A It can be.

15 Q Okay. Are you familiar with a study by Juslin [phonetic] et al., 1996,  
16 which found that confidence scores were roughly comparable to accuracy scores,  
17 in particular, in a 95-percent confidence group, judgments were 85 to 90 percent  
18 accurate; are you familiar with that study?

19 A I'm not familiar with that study.

20 Q Okay.

21 A But I have heard references to a study that showed something like  
22 that.

23 Q Okay. So the more sure a witness, the more certain a witness is,  
24 typically, their accuracy is also a little higher, correct?

25 A No. That's not right.

1 Q Okay. So let me just read it.

2 Confidence scores were roughly comparable to accuracy scores, in  
3 particular, in a 95-percent confidence groups, judgments were 85 to  
4 90 percent accurate.

5 A In -- in that one experiment, they were.

6 Q Okay. That's the only one I was asking about.

7 Would you consider, of course, the opportunity of the witness to view a  
8 criminal at the time of the crime, a factor that can be used to assess the reliability  
9 of an identification?

10 A I would have to ask you to please repeat that question or --

11 Q Sure.

12 A -- help me with it.

13 Q The opportunity of the witness to view the criminal at the time of the  
14 crime; is that a factor that can be used?

15 A I think this is what you asked before. When you said if it was daylight  
16 and they were standing right there; is this is same question or a different question?

17 Q It's a little -- it's a little more vague. The opportunity of the witness to  
18 view the criminal at the time of the crime?

19 A Yes.

20 Q Okay. The witness's degree of attention?

21 A Yes.

22 Q Okay. The accuracy of a witness's prior description of the criminal?

23 A What is the question?

24 Q Is that -- are you -- is that a factor that can affect the reliability of an  
25 eyewitness identification?

1 A And can you tell me again, what is this factor?

2 Q The accuracy of the witness's prior description of the criminal.

3 A I'm -- I'm unaware of that.

4 Q The level of certainty demonstrated by the witness of the confrontation;

5 we already talked about that, right?

6 A About the one experiment.

7 Q Yes. Right. The length of time between the crime and the

8 confrontation; and we've talked about that, as well?

9 A Definitely.

10 Q Okay.

11 MS. LEXIS: Court's brief indulgence.

12 Q In the example that you gave us earlier about the demonstration you

13 do for your class --

14 A Yes.

15 Q -- do you remember that?

16 A I do.

17 Q Okay. Correct me if I am wrong -- let me get to that part, excuse me --

18 but you indicated that the only person who could identify was the person who got --

19 I'm sorry, can you explain that -- was the person who was hit with or burned by the

20 starter pistol?

21 A I can explain that.

22 Q Okay.

23 A In this demonstration, the -- there are two people involved. One

24 person has a piece of plumbing that is not a gun. The other person is an assistant

25 sitting in the front row of the auditorium with a starter's pistol. And the person with

1 the starter's pistol fires several shots from that pistol. And then almost immediately  
2 the class is -- is given some tests on their memory.

3 Q Okay.

4 A And in this demonstration, in the many dozens of times, the many  
5 thousands of people who didn't -- who never could tell who the real shooter was  
6 and all agree that it was the wrong person, one person had been singed or felt the  
7 heat from the blank that was fired in the starter's pistol. And because -- and then  
8 she wondered, why is my leg feel hot? She turned to the assistant and realized it.  
9 So the one person out of several thousand --

10 Q So --

11 A -- noticed that.

12 Q So the one person who could identify was the person who was actually  
13 the victim of the singeing?

14 A I wouldn't call her a victim. I think that if you feel heat, that doesn't  
15 necessarily make you a victim.

16 Q Uh-huh.

17 A She didn't need first aid.

18 Q Okay. But she was the one effected, let's just say --

19 A She --

20 Q -- effected by --

21 A She felt the heat from the gun.

22 Q Okay. All right. It was also a sound, correct?

23 A Yes, very loud.

24 Q Okay. Or shouting, correct? You said there was shouting?

25 A Well, before -- before the gunshots, yes.

1 Q Right. So there was something that perhaps would have diverted the  
2 attention of -- of these audience members or your class members away from other  
3 parts? There were diversions?

4 A Yes, the -- the demonstration relies on attention.

5 Q Okay. And so in particular, though, with that -- with that study, the  
6 audience is basically your sample, right?

7 A Yes.

8 Q Okay. Again those conditions of being in an auditorium in a -- in a  
9 psychology class, being subjected to a demonstration; you would agree with me  
10 that that varies differently -- that varies and differs from the experiences of victims  
11 with guns shoved in their faces during the course of a robbery?

12 A I sincerely hope it differs, and I think it does.

13 Q One final thing, Doctor. Earlier you talked about -- I guess I asked you,  
14 pretty much point blank, what if anything in your opinion would have increased the  
15 reliability -- would increase the reliability of a witness's identification; do you  
16 remember me asking?

17 A Yes, I remember that discussion.

18 Q And you said corroborating evidence, correct?

19 A I did.

20 MS. LEXIS: Okay. I have nothing further.

21 Thank you.

22 THE COURT: All right. Thank you, Ms. Lexis.

23 Mr. Gaston, redirect.

24 **REDIRECT EXAMINATION**

25 BY MR. GASTON:

1 Q Good afternoon, Doctor.

2 A Good afternoon.

3 Q The State brought up your past record of testifying, et cetera, or  
4 working in criminal cases. And you said you never testified for the prosecution.  
5 Why?

6 A Why have I never testified for the prosecution? No prosecutors have  
7 ever asked me to testify.

8 Q Answers that question. Another point that the State was making. In  
9 your 40-plus -- close to 40 years of experience in this field, I believe you testified  
10 that you rely on the work done by others, as well.

11 A Yes.

12 Q Are you familiar with the quote from Isaac Newton, if we can see  
13 further than our ancestors it's because we are sitting on the shoulders of giants?

14 A Yes.

15 Q Can you describe to the jury how you interpret that statement?

16 MS. LEXIS: Objection. Relevance. His interpretation of a quote?

17 MR. GASTON: She's literally implying --

18 MS. LEXIS: Considering expert opinion?

19 THE COURT: Overruled. I'll allow it.

20 Go ahead.

21 MR. GASTON: Thank you.

22 BY MR. GASTON:

23 Q Can you explain to the jury what you think that quote means?

24 THE COURT: I don't want to waste time.

25 THE WITNESS: There -- there's no one scientist that does all the

1 work. It's -- it's too much work. There's a community of scientists in every  
2 science.

3 BY MR. GASTON:

4 Q So someone who is working in DNA, for example, in order to do DNA  
5 work, do you feel like they have to independently discover all the stuff that's been  
6 come before about DNA?

7 A Clearly not.

8 Q Okay. So in your field, you -- do you feel that you have to  
9 independently do every experiment that's ever been done to take that into  
10 consideration?

11 A I don't. That's not how science works.

12 Q Now -- well, we'll talk about how science works. Do you just -- do you  
13 blindly accept the results of other experiments?

14 A No, I don't.

15 Q So in evaluating a good or bad experiment, what kind of things do you  
16 look at?

17 A I look at many things. First, we -- we trust to some degree the  
18 opinions and expertise of peer reviewers. So any article ever written for a journal  
19 goes through a peer review, usually at least three peer reviewers. I serve as a  
20 peer reviewer for many journals. And then once it's cleared that bar and made  
21 publication, I can still look at it critically and say, Oh, they didn't test this, or they  
22 didn't try something else. And so we continue to be critical.

23 That's the nature of science is to challenge previous findings, to see if  
24 they can be disproven or not disproven.

25 Q So when you read an article, do you just read the conclusion or do you



1 also check out the methodology?

2 A It depends on how closely I am interested. If it's an area of research  
3 that I am very interested in, the things I focus on the most are the specific methods  
4 that they used and the -- and the results.

5 Q And does focusing on the methodology help you evaluate the likely  
6 validity of the results?

7 A Yes, it's essential.

8 Q And do experiments -- do they serve different purposes?

9 A Yes, experiments serve different purposes. And -- and there is more  
10 research methods than only experiments.

11 Q Yes. Okay.

12 A So when you say experiments, I assume that you mean various  
13 research methods. And yes, they serve very different purposes.

14 Q Earlier Ms. Lexis asked you, is this science or pseudoscience,  
15 essentially. And you said this is science. Do you and your colleagues use the  
16 scientific method?

17 A Yes, we do.

18 Q Very briefly, second-grade science recap; can you describe to the jury  
19 what the scientific method is?

20 A Well, I would call it eighth grade. But the scientific method is a method  
21 that consists of the following steps, and they don't have to start with one step, but it  
22 works like this: You begin with an explanation, and the word for explanation is a  
23 theory. A theory just means an explanation. And then the scientist says, is that  
24 theory right or is it wrong? If it was right, it would make the specific prediction, that  
25 if we do X, Y should happen. That's called a hypothesis. So they draw the

1 hypothesis from the theory and they say, Well, if the theory is right, X should be  
2 greater than Y. If the theory is wrong, it will work the other way around.

3 Now you do the empirical test. The empirical test can be an  
4 experiment, it could be a survey, it could be a naturalistic experiment. There is a  
5 number of different research methods.

6 How you do the experiment. Now you have to observe. You have to  
7 see what happened; that's what empirical evidence means. You look at the  
8 results, you compare the results with the original hypothesis. Is this consistent  
9 with what was predicted or does it show that they were completely wrong? And  
10 now you make an inference to that. You have to do statistics, you have to do --  
11 there's some -- there's some quantitative methods you have to use with the data to  
12 be able to assess the hypotheses. And then you make a generalization. And then  
13 the process starts over again.

14 Q Let's assume I were to use the scientific method to design an  
15 experiment, and in one experiment my hypothesis is something along the lines of  
16 testing whether high levels of stress or low levels of stress affect memory. And the  
17 other experiment, I'm trying to test whether confidence correlates to accuracy, for  
18 example. Could I theoretically design a very similar experiment in both of those  
19 things, even though I'm testing different hypothesis?

20 A Yes, you could.

21 Q So if you took a conclusion from one study that was designed to test a  
22 hypothesis focusing on the stress levels affecting memory, and you took a  
23 statement that I mentioned regarding some other aspect, and you used that as if it  
24 were a conclusion, would that be misleading?

25 A It -- it could be misleading. For that matter, any one result from any

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1 one experiment can be misleading. So in science we don't just look at one  
2 experiment; we look at many experiments being replicated and showing the same  
3 thing again and again and again.

4 Q You mentioned that some of the statements being read to you were  
5 being cherry picked, et cetera. We are going to talk about that in a second. But  
6 first --

7 MR. GASTON: May I approach the witness Your Honor?

8 Q I am showing you what I have marked as Defense Exhibit -- Proposed  
9 Exhibit O. Is this the same Chapter 2 showup article that you sent to us?

10 A Yes.

11 Q And that the State was referencing?

12 A Yes.

13 Q And that the State read through?

14 A Yes, it is.

15 Q Is this a chapter from a book?

16 A Yes, it is.

17 Q And is this the -- are these the authors that are listed from that book?

18 A Yes.

19 Q Is this a book that would generally be relied on by others in your field?

20 A Yes.

21 MR. GASTON: Your Honor, I move to admit Defense Proposed  
22 Exhibit O into evidence.

23 MS. LEXIS: I would object only because he indicated during  
24 cross-examination that he didn't rely on any of these articles that he provided;  
25 there was no need to.

1 MR. GASTON: Your Honor, I would point to court's attention  
2 NRS 51.255, which states the learned treatise exceptions. And if subject to  
3 cross-examination on statements, which would be within learned treatise of  
4 science or math, it would be admissible.

5 MS. LEXIS: I don't think it's been determined that it is, in fact, a  
6 learned treatise.

7 MR. GASTON: I think I just established that by asking him.

8 THE COURT: Well, it has been established through direct and cross  
9 it's a learned treatise. I'm just trying to determine if the whole thing comes in or  
10 only the statements that were read. Give me a moment.

11 MS. LEXIS: The problem, too, is he has to rely on it.

12 THE COURT: Can you -- I'm sorry, can you speak up just a little bit?

13 MS. LEXIS: The problem is, Your Honor, the analysis is that whether  
14 he relied on it. And his testimony was he didn't.

15 THE COURT: Well, no because 51.255 says to the extent called to the  
16 attention of an expert upon cross-examination or relied upon by the expert witness  
17 in direct examination. And it goes on to say:

18 A statement contained in the treatise is not inadmissible under the  
19 hearsay rule if it's established as reliable authority.

20 So -- so I think if there's a -- if a statement has been called upon to the  
21 attention of the witness during cross -- you did the cross, right, Ms. Lexis?

22 MS. LEXIS: Yes, I did.

23 THE COURT: So the statements that you've read into the record on  
24 cross are properly admissible as not hearsay.

25 If you want to use it, because it's your witness, Mr. Gaston, on direct

1 examination, you would have to show that he relied upon it. All right.

2 MR. GASTON: Yes, sir.

3 THE COURT: So the only -- so the whole thing doesn't come in. All  
4 right. What comes in are the parts that Ms. Lexis introduced on cross to the extent  
5 he acknowledged that it's, basically, a reliable authority. And I think she did, to the  
6 extent she read certain statements. The rest of it only comes in to the extent that  
7 he's -- he -- he indicates he's relied upon it in forming some opinions in his  
8 testimony. All right.

9 MR. GASTON: Yes.

10 THE COURT: So the whole thing doesn't come in.

11 MR. GASTON: Yes, sir. I can --

12 THE COURT: That's 51.255.

13 MR. GASTON: I can lay more foundation real quick.

14 THE COURT: All right.

15 BY MR. GASTON:

16 Q Sir, for this Chapter 2, she -- Ms. Lexis -- read several statements to  
17 you, correct?

18 A Yes.

19 Q And I believe at a certain point in your testimony you said, and I think  
20 you might have said this several times, that she was cherry picking which  
21 statements to read?

22 A Yes.

23 Q Am I correct in understanding that other parts of this article you would  
24 rely on in order to explain what you wanted to testify to in response?

25 A Yes.

1 MR. GASTON: Your Honor, I would move to admit again. I think --

2 THE COURT: Which parts?

3 MR. GASTON: Well, okay. But then is it going to make -- I guess my  
4 position is the article going to -- I mean, this is book chapter; is it going to make  
5 sense if I submit 63 percent of it out of context? She quoted extensively through  
6 these articles, he needs to rely on others aspects of the article to explain it. It's not  
7 going to make sense to the jury if I only introduce 63 percent of the chapter and,  
8 like, and cutting off sentences.

9 MS. LEXIS: It's not the standard, but --

10 THE COURT: Well.

11 MR. GASTON: And there's nothing prejudicial in these articles, I  
12 mean, to the State's position.

13 THE COURT: Says:

14 If rely upon a direct, a statement contained in published treatise,  
15 periodical, or pamphlet is not inadmissible.

16 So, I mean, you could have a section. You can't -- can't introduce the  
17 whole book or the whole chapter unless you have the witness identify particular  
18 sections within that chapter in those sections that he relied upon, you know, it can't  
19 come in. I mean, I don't think you need to parse it down to, like, you know,  
20 each 25 words from each page that he relied upon. But generally a section, he did  
21 say he relied upon it. But you can't be as broad as the entire published treatise,  
22 because that's not what the statute contemplates. The statute contemplates  
23 statements within the treatise.

24 You got to narrow it down to --

25 MR. GASTON: I'll go by topic.

1 THE COURT: -- particular statements or -- or, you know, a group of  
2 statements that are covering a particular topic.

3 MR. GASTON: I'll go by topic.

4 THE COURT: That's how I read the rule and that's how I've used the  
5 rule in the past.

6 MR. GASTON: I'll go by topic. All right.

7 THE COURT: I think the goal here is we don't -- we don't want just  
8 random stuff going back to the jury and then they are going to read it and not know  
9 what to do with it.

10 MR. GASTON: Right. But they -- they --

11 THE COURT: All right. All right. So go ahead, connect it if you can.

12 BY MR. GASTON:

13 Q All right. Well let's back up before we get into some of these factors,  
14 because I'm going to talk about the factors on what she's read. But let's back up,  
15 then. I'll go topically, but let's back up.

16 State asked you, specifically, here are some of the factors you said on  
17 direct that affect identification; do you remember that?

18 A Yes.

19 Q And she listed them out.

20 Do you remember that?

21 A Yes.

22 Q Okay. And then she kind of went through and showed -- so, I guess,  
23 theoretically starting, we have an ideal situation.

24 A Yes.

25 Q And there are factors that cause deviations from the ideal situation; is

1 that correct?

2 A Negative deviations, yes.

3 Q If -- just hypothetically, if -- of all the factors that could negatively affect  
4 perception or memory, et cetera, are all of those factors present in this case,  
5 specifically? I guess I can rephrase the question, if it's a little confusion.

6 A Okay.

7 Q You mentioned opportunity to observe.

8 A Yes.

9 Q Clothing bias she talked about, cross-racial identifications, and said all  
10 the factors that were listed; are every single one of those factors present in this  
11 case that would cause a negative deviation from the ideal situation?

12 MS. LEXIS: Your Honor, I would object as to the question being  
13 vague. Are all of those factors? I ask that the factors for clarity be listed out, so  
14 that we know which factors are specifically being considered.

15 THE COURT: Point's well taken, because Ms. Lexis identified various  
16 factors and the witness himself said that it's a nonexclusive list and we discussed  
17 various factors. Can you -- can you identify for us which factors we're -- we're  
18 going to focus on now?

19 MR. GASTON: Sure.

20 THE COURT: Thank you.

21 BY MR. GASTON:

22 Q Daylight was one of them. Daylight or night light, et cetera. Is that a  
23 factor that was present here that would negatively deviate from the ideal situation?

24 A No.

25 Q Cross-racial -- cross-racial bias; is that a factor here with each specific



1 identification that would cause a deviation from the ideal situation?

2 A Not for the group of witnesses. Maybe for some of the witnesses, but  
3 certainly not for the group.

4 Q Because some of them are African-American?

5 A Yes.

6 Q Okay. So safe to say that not every factor that could deviate from the  
7 ideal situation actually occurred here?

8 A That's correct.

9 Q When you're kind of trying to figure out was an identification reliable,  
10 not reliable, et cetera, is it -- is it that -- is it that simple, I suppose, where you just  
11 count up how many factors?

12 A No. You can't -- you can -- you cannot add factor after factor and  
13 variable after variable that makes something better and say therefore it's good and  
14 strong and accurate. It doesn't work that way. It only works the opposite way. If  
15 you have things that -- you can't make memory better.

16 Q Can you explain to the jury kind of maybe a real-life example of what  
17 you mean by this you can't make it better; it's not simply, like, measuring factor, et  
18 cetera?

19 A Well, you can't make better, it's a simple analogy. If you have a  
20 procedure and you do every single thing right in the procedure, except you got one  
21 thing wrong. You put the wrong ingredient in the cake, you used salt instead of  
22 sugar. Well, you did so many things right, but I wouldn't eat that cake.

23 Q So is that what you meant earlier when she was saying, does this  
24 increase the reliability? And you were saying no; is that -- it that kind of what you  
25 were talking about earlier?

1           A       It is exactly what I was talking about. By saying, well, I measured the  
2 -- the amount of flour exactly, didn't that make it a better cake? Well, once you've  
3 ruined it, it doesn't matter how many good things you've done.

4           Q       And the State specifically talked about a few factors and why they  
5 didn't apply in this case; do you remember that? Like -- like, cross-racial bias  
6 doesn't apply for every witness?

7           A       Yes. Yes.

8           Q       Daytime, nighttime?

9           A       Correct.

10          Q       I think we talked about it in direct, but that was several -- several hours  
11 ago.

12          A       Uh-huh.

13          Q       We'll talk about it again. There were factors which was grouped into  
14 the word special circumstances, and your opinion, there were those factors which  
15 did deviate from the ideal situation, right?

16          A       Yes.

17          Q       And can you remind us again what those were?

18          A       Those included the suggestiveness of any showup, because it's known  
19 by people doing showups that it's a suggestive situation, however that results.  
20 Next, if there is another person who could be the perpetrator, who looks very  
21 similar to the -- to the suspect or the defendant, that would be probably the biggest  
22 problem of all.

23                 Then there would be the bias inherent in the biased photo spread, in  
24 which the defendant's photograph matched the description given by witnesses  
25 earlier, better in terms of the hair of the person that they identified, and the other

1 people in the photo spread didn't match that. And we use hair to identify faces.

2 Q State at one point asked you a question, if I remember right, this isn't a  
3 hair lineup, it's a face lineup. And she's correct, right? I mean it's face, it's not  
4 hair, right? Does that --

5 A That's right.

6 Q Does that ease your concern in terms of the suggestivity or -- or biased  
7 nature of the photo lineup?

8 A No. It's not an ear lineup, it's not a chin lineup, it's not -- it's a  
9 whole-face lineup. And the face is what we call a configural thing. It has all the  
10 elements together. But for many people, hair is a big part of their identification.

11 Q In the case of Marvin Bass, if I remember right, did he use hair as an  
12 identification?

13 A He used that in his original description in saying that the perpetrator  
14 had a short or small afro.

15 Q So even though the faces were there, would the hair have jumped out  
16 at him, perhaps?

17 A Well, that was one of the few things that he gave in his description, so  
18 you would have to think that he noticed that.

19 Q Now you mentioned double blind, blind, double blind, et cetera, in one  
20 of the reasons, if I remember right, is because the person -- if the person kind of  
21 conducting the photo array knows which is which, there are possible things that he  
22 could do consciously or unconsciously to indicate which answer he wants, correct?

23 MS. LEXIS: Your Honor, the same way I would ask for clarification.  
24 Person conducting?

25 THE COURT: Yeah. Can you -- can you identify who you were

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1 referring to a the person conducting?

2 BY MR. GASTON:

3 Q The officer actually showing the photo lineup to the witness.

4 A Yes. And the question was?

5 Q The reason you mentioned, if I remember correctly, just as clarification,  
6 the reason a double blind might be important is because if the person doing that  
7 test, administering that test, et cetera, to the witness, knows who this actual  
8 suspect is, he could either consciously or unconsciously indicate and therefore  
9 kind of corrupt the results?

10 A Yes.

11 Q Okay. Are you aware that some officers or some police departments  
12 either have it mandatory, or just do as a matter of course, record those  
13 identifications?

14 A I know that some do, I -- I've -- because I've seen some of those  
15 recordings, yes.

16 Q If they -- if those interactions were not recorded, could that make it  
17 hard to come back later and second guess where those things occurred or not in  
18 terms of suggestivity?

19 A Yes. It would make it impossible.

20 Q Because there is no recording?

21 A Yes.

22 THE COURT: We'll have to break pretty soon, so try to find a breaking  
23 point.

24 MR. GASTON: Okay. For the day? Or --

25 THE COURT: Yeah. It's almost 5:00.

1 MR. GASTON: Are we able to push, like, another 15 minutes? I might  
2 be able to finish. I only have a couple more points to make.

3 THE COURT: Guys? All right, my staff says fine.

4 MR. GASTON: Okay.

5 THE COURT: But I don't know what the State's going to have on  
6 redirect.

7 MR. GASTON: Okay.

8 BY MR. GASTON:

9 Q All right. So State mentioned the admonitions with respect to the photo  
10 array. And you testified that these admonitions would be -- would fit in line with  
11 what you think admonition should be?

12 A Yes.

13 Q Does that cure the suggestivity of photo array?

14 A It -- it does not, and for two reasons. One is when somebody reads  
15 you something, you might or might not comprehend it completely. But even if you  
16 do comprehend it completely, that doesn't erase the possibility of bias. So it -- it  
17 helps. And that's why they are in there.

18 Q That's why the admonitions are there?

19 A That's correct.

20 Q Because a photo array with an admonition is probably more likely to  
21 lead to correct results than without?

22 A Well, I don't know about that, but we know that if you don't admonish  
23 people, then there's the -- there is more of a possibility that they'll be influenced by  
24 suggestion.

25 Q But same thing, admonitions of a showup in the photo array, it's not

1 like a cure-all that you just put the badge of a prudent line?

2 A Well, no. It is not a cure-all.

3 Q And if I remember correctly, you said even under ideal circumstances,  
4 what -- it was about a 70 to 80 percent accuracy?

5 A In terms of identifying correctly a perpetrator who we know is in the  
6 lineup.

7 Q Okay. And --

8 A Yes.

9 Q -- and I -- what was the other stat? It was about 10 or 15 percent of  
10 what happens?

11 A It was the false identification rates.

12 Q So identifying someone who wasn't actually the person who was  
13 there?

14 A Yes. And those rates in -- in I would call it an ideal circumstance would  
15 be 10 to 15 percent false identifications, under good circumstances.

16 Q And do all of the factors -- are all the factors that we are talking about,  
17 we say deviate from the ideal, that means they lower the -- or they lower the  
18 percentage of accuracy?

19 A Yes.

20 Q Okay. Now the State mentioned a result from an experiment which on  
21 the surface seemed to contradict some of the things we are talking about here?

22 A Yes.

23 Q With confidence equating to accuracy?

24 A Yes.

25 Q You said that's just one experiment, though. And it seemed like you

1 want to say something in response to that. Hearing that conclusion, have you now  
2 changed your entire mind on confidence not equating to accuracy?

3 A No. My understanding is for many years, we -- after having read 35  
4 studies and finding there was zero correlation in forming that opinion, a few  
5 studies, and this would be one of them, came out and said, well, there is the small  
6 correlation under these circumstances.

7 Q So fair to say that you haven't changed your mind in that sense?

8 A I have changed in the sense that I don't say -- I no longer say there is  
9 zero relationship; there's a small relationship.

10 Q In terms of expressing degree of confidence correlating to degree of  
11 accuracy?

12 A Yes.

13 Q Okay. With respect to the high-stress event and low-stress event, you  
14 were talking about something about absolute value of stress?

15 A Yes.

16 Q And you mentioned something which might not have been clear in  
17 terms of a shooting event. We can agree a shooting event is stressful; witnessing  
18 a shooting event?

19 A Especially if you think you are in danger.

20 Q And that --

21 A If you are watching it on TV, probably not.

22 Q And that's the correlation I'm going to. Would you -- is there a  
23 difference between being the one who is personally being threatened because the  
24 gun is pointed at you, and being the person who's a block and a half away behind  
25 a tree, who is in no real danger?

1 A Almost certainly.

2 Q So both are stressful, but in terms of absolute degrees, actually being  
3 the one being threatened is far more stressful?

4 A Yes.

5 Q Okay. And that study did say, though, the higher the stress tended to  
6 correlate with better recall of details. I don't remember the conclusion actually said  
7 anything about accuracy, so it could have just been talking about they recall more  
8 details.

9 MS. LEXIS: Objection. Leading.

10 THE COURT: Yeah, sustained. Please rephrase.

11 BY MR. GASTON:

12 Q Does that conclusion change your mind in terms of the relationship  
13 between stress events and accuracy?

14 A No, it doesn't, because of other studies I know.

15 Q Okay. So is there -- there are -- are there other studies which kind of  
16 support the idea that you expressed originally?

17 A Yes. They don't just kind of support it, they show for sure that that is --  
18 that that relationship is there.

19 Q High-stress event equals less accuracy?

20 A Yes.

21 Q Okay.

22 THE COURT: Did you study any of those studies and rely upon that in  
23 preparing for your testimony today?

24 THE WITNESS: No, I didn't. I -- this these are -- I -- these are studies  
25 that I've cited for at least a decade, maybe more.



1 THE COURT: Okay. Just checking.

2 Go ahead.

3 BY MR. GASTON:

4 Q Ms. Lexis quoted something about another study, picked one specific  
5 study, saying that they -- in that study they found no -- no weapons focus bias?

6 A Yes.

7 Q Are you now going to tell the jury -- you didn't dispute that, correct?

8 A Correct.

9 Q Are you now going to tell the jury that weapons focus bias doesn't  
10 exist?

11 A I would not say, based on even one good experiment, that the  
12 phenomenon doesn't exist. I would say that it's not a 100-percent,  
13 it-always-occurs-phenomenon, it's something that is likely to occur and then it's  
14 going to depend on -- so weapon focus depends on where the person is looking,  
15 depends on their level of emotion, and then there is many individual differences,  
16 too.

17 Q Now, me asking you to come testify today, have I at any point asked  
18 you specifically to say whether a witness here experienced one of these biases or  
19 didn't experience one of these biases, et cetera?

20 A Not that I recall.

21 Q And could you actually even say that?

22 A No. I have no idea.

23 Q Okay. So fair to say that what I'm talking to you more are general  
24 things that could have happened?

25 A Yes.

1 Q Okay. So weapons focus bias, if you had to describe that in common  
2 sense words to the jury, how would you describe that?

3 A Weapons focus bias? You have a certain amount of attention to pay,  
4 it's like money. You can only pay out a certain amount. If you're paying it all to the  
5 weapon, you are not paying it to the person's face or to other surrounding details.

6 Q And so that doesn't always happen?

7 A It doesn't always happen, no.

8 Q It can happen?

9 A It can happen and it -- and it's been commonly measured and seen in a  
10 number of studies.

11 Q And that led to the description, the descriptor, weapons focus bias?

12 A Yes. There wouldn't even be a term for it if it wasn't so common.

13 Q Another point she mentioned, correct rejections. And she wanted to try  
14 to see whether you know one way or the other whether a correct rejection makes a  
15 subsequent identification more or less reliable; do you remember those questions?

16 A I do.

17 Q And do you remember what your answers were?

18 A My answer were that -- was that I didn't know that that really helped. In  
19 fact, I know of one study that showed the opposite of that. That -- that one correct  
20 rejection or correct identification was unrelated to the next one. And this -- and the  
21 one that I am referring to, they asked the person what was the weather like that  
22 day, what were you wearing that day, and what happened in the event? And they  
23 found that the memory of three different things had nothing to do with each other.  
24 You could be accurate on one and not on others.

25 Q And correct rejection, when we're saying that, what -- what we're

1 talking about is a person presented as a possible suspect in this case. A person is  
2 presented as a possible suspect. The witness said, No, that's not him. And it was  
3 correct. Is that an accurate way of kind of describing of what we mean in this case  
4 about correct rejection?

5 A In a -- correct rejection means two different things, and that's why  
6 there's ambiguity in this article. In the way that we study eyewitness memory, we  
7 know -- because we arrange the events, we know who the perpetrator is and we  
8 know if they are in the lineup or not. When they're in the lineup, we call that a  
9 target-present lineup, and if the -- the witness picks one of the foils, one of the  
10 other five faces, in some studies, including the one that was referred to earlier, that  
11 counts as a correct rejection, if they don't pick one of those foils.

12 But in -- in a real case, if somebody picks one of the foils, we know  
13 that's not the guilty person because they are in prison or dead or something else  
14 like that, so we know the other five people could not have done it. So a foil correct  
15 rejection is different than rejecting the -- the suspect when they are innocent.

16 Q Okay. Fair enough. And so -- so, basically, in some experiments they  
17 term a correct rejection what we may call a misidentification?

18 A Yes.

19 Q Okay. Also, if the person who's originally --

20 A Wait a second. I -- I think --

21 Q Did I say something wrong?

22 A I may have answered that wrong. What we call a correct rejection is  
23 not a misidentification, it's a rejection of an misidentification.

24 Q That's what I meant. That's what I meant.

25 A Yes.

1           Q     The -- again, staying on the topics of correct rejections, real quick, if  
2 the first suspect presented as a possible suspect doesn't look anything at all like  
3 the actual person who was described, as a hypothesis and your experience as an  
4 expert, would it make sense at all for that to have an effect on a later identification?

5           A     No.

6           Q     So if the first person is presented as a tall white guy and I give you a  
7 short black guy, and you say that's not him, that probably doesn't have anything do  
8 with the second?

9           A     I don't see how it could.

10          Q     Now, talking about the actual showup that was done in this case. She  
11 asked some questions, I objected for clarification, she got clarification, you  
12 answered, about whether the officer conducting the showup, and that was defined  
13 as the officer who was actually driving to the scene, presumptively the officer --  
14 actually, I think only three of the identifications -- who read the showup, whether  
15 that person knew the identity of the suspect. And you said you're not aware one  
16 way or the other.

17          A     Yes.

18          Q     The officer who is on the scene driving the witnesses there, fair to say  
19 that person does know there is a suspect going to be presented?

20          A     Yes.

21          Q     And so the person --

22          A     There could be no reason, no rationale otherwise.

23          Q     He's not taking them to get ice cream?

24          A     Right.

25          Q     Okay. Another thing Ms. Lexis asked you was whether it changed --

1 well, actually, she didn't ask if it changed your mind, she just asked were you  
2 aware that the witnesses had the opportunity, if they wanted, to get closer to the  
3 people they were identifying?

4 A Yes.

5 Q And you said you were not aware that they had that option?

6 A I did say that.

7 Q Okay. Well, now you're aware; does that change your analysis in any  
8 way about the suggestivity of the showup?

9 A Not unless they actually did get closer and stand next to the person.

10 Q And so your hypothesis would be that they would be more likely to get  
11 a correct identification the closer they were to the defendant?

12 A Yes.

13 Q At one point you were talking about accuracy and you talked about  
14 different measures of accuracy; what do you mean when you say different  
15 measures of accuracy?

16 A One measure of accuracy is if the bad guy is in lineup and you're able  
17 to pick them out, that's one measure. What's the proportion of times you can pick  
18 out the bad guy when they're there.

19 Another one, the bad guy isn't in it, what's the proportion of times you  
20 reject the suspect that's supposed to look like the bad guy -- it's a correct rejection,  
21 it's a different measure of accuracy.

22 Third measure of accuracy, you pick one of the foils or you reject the  
23 foils, that's a different measure of accuracy.

24 So, accuracy in correct identification is different than accuracy at  
25 misidentification.

1 Q Depends -- does it depend a little bit on what the kind of goal of the  
2 experiment is? The goal of the research method is?

3 A It -- it depends on the goal, but it depends on what you are measuring.  
4 Are you measuring how often they identify the guy we know as the right guy? Or  
5 many times they reject the guy we know is the wrong guy?

6 Q So it depends on what the research method is trying to measure?

7 A Yes.

8 Q The State did mention kind of showups and photo arrays being  
9 compared, et cetera.

10 A Yes.

11 Q Quoted some studies saying one thing.

12 A Yes.

13 Q Are there studies saying the other thing -- the other aspect of it? So  
14 she quoted some studies saying showups are more accurate or more reliable than  
15 photo arrays for certain aspects; does that mean that police should use showups  
16 over photo arrays as an identification method?

17 A It doesn't mean that. In fact, another one of the articles that was  
18 referred to states clearly more than once they found no situation in which the  
19 showup was better than the photo array.

20 Q And is that -- is that paragraph that wasn't mentioned during the State's  
21 cross-examination what you mentioned when you said cherry picking the  
22 paragraph?

23 A Yes.

24 Q And just to clarify over all, are you saying that the showup was  
25 suggestive in this case simply because it was a showup?

1 A Yes.

2 Q Okay. And are there other factors present in addition to it being a  
3 showup that led you to say this might deviate from the ideal situation?

4 A The -- yes. One other factor, and -- and that is only a possible  
5 hypothetical factor that I don't know exists, and that would be if the -- let's say if the  
6 defendant is not the perpetrator, if the defendant looks similar to the perpetrator,  
7 those are shown to be more in error in showups. Those are especially problematic  
8 in showups. So whereas showups over all may not be so bad in terms of  
9 accuracy, it's when the actual perpetrator and the innocent suspect look similar  
10 that the most mistakes are made with showups.

11 Q So if they had the same hairstyle, is that what you mean partly by  
12 similarity?

13 A That could do it.

14 Q And in this case you did review, as part of your preparation for trial, a  
15 photo of Bobby McCoy and Keandre Valentine?

16 A Yes.

17 Q And you told the State that they did not look identical, they are not  
18 identical twins, you could tell them apart, correct?

19 A Yes, sir.

20 Q Does that mean that they are not similar, so this effect you are  
21 describing wouldn't apply?

22 A No. Similarity doesn't mean -- well, I mean that would be perfect  
23 similarity, if you couldn't tell them apart, if it was two pictures of the same person,  
24 for example, or identical twins. No, similarity just means what it sounds like. It's  
25 not a special term.

1 Q And several times the State mentioned this person is 100 percent  
2 accurate that -- and then listed the crime in dramatic fashion, et cetera --

3 MS. LEXIS: Objection. I object to that. His editorializing.

4 MR. GASTON: I can leave it off, I have my question, I'm trying to --  
5 sorry.

6 THE COURT: Sustained. The jury will disregard the comment, the  
7 editorializing about the supposed drama used by State.

8 BY MR. GASTON:

9 Q The confidence -- bring back to this with one more time.

10 A Yes.

11 Q If a witness is 90 percent confident in an identification, is there  
12 anything that you can infer about that identification?

13 A Not really.

14 Q If a witness is 100 --

15 A Well, no. You can infer that they're pretty confident.

16 Q But that they are not sure?

17 A Well, 90 percent sure. I mean, it's kind of a -- it's not a really good  
18 scientific measure. It's kind of just what people mean. I'm pretty much sure, but  
19 not 100 percent sure is what that means.

20 Q And if they say they're 100 percent sure, can you infer anything about  
21 that, the reliability of that identification?

22 A Well, no. In many, many studies, being 100 percent sure was no  
23 guarantee at all that the person was right, and so that occurs in studies, that  
24 occurs in demonstrations, that's -- that's commonly observed that people who were  
25 100 percent sure can be wrong.



1 Q They can also be right?

2 A And they can be right.

3 Q But, in essence, am I -- am I understanding it correctly that those  
4 studies essentially say that people are kind of bad at estimating their own  
5 accuracy?

6 A There are many studies that make that inference, yes.

7 MR. GASTON: Court's indulgence on sec.

8 No more questions, Your Honor.

9 THE COURT: All right. Ms. Lexis.

10 **RECROSS-EXAMINATION**

11 BY MS. LEXIS:

12 Q Sir, you testified on cross examination that showups would be best if  
13 the victims were actually placed next to the alleged perpetrator; do you remember  
14 testifying about that?

15 A I didn't mean that as a general rule, but I thought that in this particular  
16 case -- I didn't realize that showups would be made at such a great distance that  
17 you couldn't really see detail. So in this case it seemed that that would help  
18 people --

19 Q Okay. So did you say --

20 A -- see details and --

21 Q Did you say that on cross-examination or not?

22 A I think I did.

23 Q Okay. Are you aware that the reason showups don't have victims, or  
24 the procedure doesn't involve victims getting directly next to a suspect, is because  
25 they have just been through a traumatic event --

1 A Yes.

2 Q -- and they're potentially in fear, correct?

3 A I am aware of it, yes.

4 Q Okay. So that's --

5 A I understand the reason.

6 Q Okay. So are you retracting from your statement of it's best if the

7 victims are actually placed next to this person that they are presumably may

8 identify as the person who just traumatized and victimized them; are you taking

9 that --

10 A It may not be best --

11 Q -- taking that back?

12 A -- for their -- for the witness's emotional health. When I said best, I

13 mean best in terms of accuracy of identification or better informed identification.

14 But, yeah, if it's traumatic, you wouldn't want to do that, I don't think.

15 Q Of course not. You can't -- just so this is perfectly clear -- comment on

16 the reliability of any of the witnesses' identifications in this case, correct?

17 A That is correct.

18 Q Okay. Mr. Gaston has talked about various factors that could play a

19 role, right?

20 A Yes.

21 Q I've talked about various factors that could play a role?

22 A Yes.

23 Q Okay. We've discussed these factors, quoted studies, articles, ad

24 nauseam; would you agree? I feel like that's what happened.

25 A Well, I wouldn't say I'm nauseous, but we did it a lot.

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1 Q Okay. But the one thing that you were pretty definitive about during  
2 cross-examination is that the presence of corroborating evidence does increase  
3 the reliability of eyewitness identification.

4 A That if you have corroborating evidence, that can help you believe an  
5 eyewitness identification, yes.

6 MS. LEXIS: Thank you. Nothing further.

7 THE COURT: All right. Let's see. We have direct, cross, redirect,  
8 recross?

9 MR. GASTON: I already did --

10 THE COURT: Oh, wait. Direct, cross, redirect, recross.

11 MS. MACHNICH: We're good.

12 THE COURT: Jurors -- anything from there? We've got a hand,  
13 marshal.

14 MR. GASTON: May we approach, Your Honor, for the questions? For  
15 the questions, not for anything else.

16 THE COURT: Yeah, sure.

17 [Bench conference transcribed as follows.]

18 THE COURT: Anybody want a mint?

19 MR. GASTON: I'm okay, thank you.

20 MS. MACHNICH: Thank you.

21 THE COURT: Not that you need one, I'm just --

22 MS. MACHNICH: I'm very close to stealing some jelly beans.

23 THE COURT: I love the jelly beans. I eat way too many.

24 Oh, my gosh. All right. That's okay.

25 MS. MACHNICH: I don't think this is proper.

1 THE COURT: Similar. Blank.  
2 MS. MACHNICH: Again [indiscernible].  
3 MR. GASTON: We haven't been able to introduce a couple of  
4 [indiscernible] yet. So I don't think it's proper to -- proper to --  
5 THE COURT: There's no [indiscernible]?  
6 MS. MACHNICH: In evidence.  
7 MR. GASTON: We're -- we're going to lay a -- actually, they've already  
8 stipulated.  
9 MS. MACHNICH: Not for that version.  
10 MR. GASTON: Not yet?  
11 MS. LEXIS: No. Depending on the --  
12 MR. GASTON: We haven't done it yet.  
13 MS. LEXIS: No. And it's not through this witness. He can't  
14 authenticate that.  
15 MR. GASTON: [Indiscernible.] This witness wouldn't know that.  
16 MS. MACHNICH: This witness wouldn't know this.  
17 MR. GASTON: Can't do it yet.  
18 MS. MACHNICH: Can't do it yet.  
19 THE COURT: Can't do it yet.  
20 MR. GASTON: I don't think any of these are proper yet. He's not the  
21 right witness.  
22 THE COURT: Are any of those being asked yet?  
23 MS. LEXIS: I think this one from No. 20.  
24 MR. GASTON: Well, how would he know?  
25 MS. MACHNICH: It's not for this witness.

1 MR. GASTON: How would he know that answer?  
2 MS. LEXIS: Is it possible?  
3 MS. MACHNICH: It's -- it's beyond --  
4 MR. GASTON: But it didn't happen, A. And B, he doesn't know it.  
5 MS. MACHNICH: No, I believe these are all for different witnesses.  
6 MR. GASTON: I don't think any of these are --  
7 THE COURT: So I'm not asking any of these. Number 7, 20, 20, 20.  
8 Okay. Hold on. I've got to do this one at a time. Here's Juror No. 7.  
9 MR. GASTON: I still don't think it's the right witness.  
10 MS. MACHNICH: [Indiscernible.]  
11 THE COURT: Should I ask it? State wants me to ask it.  
12 MR. GASTON: No.  
13 THE COURT: No?  
14 MR. GASTON: I think --  
15 MS. MACHNICH: No, not for this --  
16 THE COURT: Not to ask is No. 7. All right. Here's No. 11.  
17 MR. GASTON: I think that's proper.  
18 THE COURT: Okay. I'll ask it. So I'm going to ask the question from  
19 Juror No. 11.  
20 MS. LEXIS: Actually --  
21 THE COURT: No? Will you just come closer?  
22 MS. LEXIS: I'm sorry, Your Honor. In this particular instance, I don't  
23 believe he can testify to why all of the witnesses picked the defendant. He doesn't  
24 have that knowledge.  
25 THE COURT: Okay.

1 MR. GASTON: He can talk about factors that might have led to it.

2 MS. LEXIS: It's saying why do these witnesses pick the defendant? If  
3 this was present. So I don't think that's proper for this witness.

4 THE COURT: Oh, that's subjective. Yeah. He did -- and he already  
5 talked about the factors. So I can't ask this.

6 MS. LEXIS: Right.

7 MR. GASTON: That's fine.

8 MS. MACHNICH: Okay.

9 THE COURT: I'm not going to ask the question from No. 11. All right.  
10 From the last one. Okay. I'll take that one. Does he know the answer to that?

11 MR. GASTON: I think that's a proper question.

12 THE COURT: You do?

13 MR. GASTON: It's just asking his guess, his estimate, his opinion.

14 THE COURT: Yeah.

15 MS. LEXIS: I think this is actually -- we've given him an opportunity to  
16 give his opinion about how these two look similar. But, really, that's a question for  
17 the jury to determine whether or not, one, there was a false ID --

18 THE COURT: He expressed an opinion to some extent already on one  
19 question.

20 MR. GASTON: Yeah.

21 MS. MACHNICH: Yes, he did.

22 MS. LEXIS: He did.

23 MR. GASTON: It's just asking for a number on a scale of 1 to 10.

24 MS. LEXIS: And we let it go, but now to quote a certain degree of  
25 certainty as to his opinion? His opinion doesn't matter about how low --

1 THE COURT: I think it prevents the province of the jury. I'm not going  
2 to ask it.

3 MR. GASTON: So no -- no questions?

4 THE COURT: Yeah. All right.

5 [End of bench conference.]

6 THE COURT: So thank you for all these questions. I appreciate the  
7 questions. However, I am not going to ask any of these questions. These  
8 questions -- they do help the attorneys in understanding what's on your mind, the  
9 jurors, it may be that some of these questions are answered with other witnesses;  
10 it may be that this witness is not the right person to ask these questions; it may be  
11 that some of these questions invade the province of you, the jury; and it may be  
12 that some of these points that -- or points that you're suggesting by these  
13 questions are going to be covered by closing arguments. So there's various  
14 reasons I can't answer these -- can't ask these questions. I am going to mark  
15 them not given. And they are all not given after a sidebar with the attorneys with  
16 no -- no express objection to the court not giving these. And I'm going to give  
17 these to the clerk.

18 And I will excuse the witness.

19 Doctor Smith --

20 THE WITNESS: Yes.

21 THE COURT: --you are excused, sir. Thank you, very much.

22 THE WITNESS: Thank you.

23 THE COURT: You may step down.

24 These are all marked not given and will become court exhibits. All  
25 right.

1 Ladies and gentlemen, I'm going to excuse you for the evening. But  
2 first let's talk about tomorrow. My -- I've had some things settle for tomorrow, folks,  
3 tomorrow is my civil stack. I think it's only going to take about half hour, 45  
4 minutes. I could be ready to be actually tomorrow at 10:00. All right. Is there  
5 anybody who can't do it at 10:00 tomorrow? Raise your hand if you can't.

6 What about the lawyers?

7 MR. DICKERSON: No, well -- we'll --

8 MS. LEXIS: We'll make it work, thank you.

9 MS. MACHNICH: That's fine.

10 THE COURT: All right. We still need to do jury instructions sometime  
11 tomorrow. We'll start right at -- right at 10:00 if we can with -- with evidence, and  
12 then kind of go from there. Maybe we can -- sometime around lunch, I guess, we  
13 can do jury instructions; take a longer lunch. Does that work for the parties?

14 MS. LEXIS: Yes, Your Honor.

15 MR. DICKERSON: Sounds great, Your Honor.

16 THE COURT: Okay. All right. So folks, I need you here tomorrow  
17 at 10:00.

18 Are we -- are we on track to have any closing arguments tomorrow?

19 MR. GASTON: The defense anticipates resting tomorrow.

20 THE COURT: Okay. But then we got to read jury instructions.

21 MR. GASTON: It depends --

22 THE COURT: Then we got --

23 MR. GASTON: It depends on --

24 THE COURT: -- closing arguments. Is it a possibility?

25 MR. GASTON: I think it is. It just depends on if the State has a

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1 rebuttal case or not.

2 THE COURT: Okay. We'll find out --

3 MS. LEXIS: We very well --

4 THE COURT: -- tomorrow.

5 MS. LEXIS: We very well may.

6 THE COURT: Okay. So -- so looks like there's -- I'm glad we still have  
7 one alternate. Looks like we might end up going into -- tomorrow's Wednesday.  
8 Might end up going into Thursday. So I'm glad we still have an alternate.  
9 Hopefully, nobody is going to have a hardship and forced to leave us.

10 Let me go ahead and read the standard admonishment. Ladies and  
11 gentlemen, I'm directing you all to return outside the hallway of this courtroom  
12 tomorrow at -- by 10:00.

13 And during this overnight recess, do not communicate among  
14 yourselves or with anybody else about this trial or the subject matter of this trial; do  
15 not communicate at all with any of the parties, attorneys, or witnesses involved in  
16 this case; do not seek or obtain any information or comments about the case from  
17 any source, including newspapers, television, radio, Internet, e-mail, cell phones,  
18 or any other electronic device; do not read, watch, or listen to any report or  
19 commentary about the case; do not perform any research or investigation; do not  
20 form or express any opinion on any subject connected with this trial until the case  
21 is finally submitted to you for deliberations.

22 All right. See you tomorrow at 10:00 a.m. 10:00 a.m. Thank you,  
23 folks. Appreciate your attention and diligence.

24 [Jury recessed at 5:25 p.m.]

25 THE COURT: All right. See you guys tomorrow at 10:00. Thank you.

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KEANDRE VALENTINE, ) No. 74468  
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)  
Appellant, )  
)  
vi. )  
)  
THE STATE OF NEVADA, )  
)  
)  
Respondent. )  
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I hereby certify that this document was filed electronically with the Nevada Supreme Court on the 2 day of August, 2018. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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